



— S T A N F O R D —

# Journal of Animal Law and Policy

Volume 2

2009

## Hell to the Sound of Trumpets: Why Chicago’s Ban on Foie Gras Was Constitutional and What It Means for the Future of Animal Welfare Laws

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<b>Introduction</b> .....	54
<b>I. Background</b> .....	58
A. The History of Foie Gras.....	58
B. The Production of Foie Gras.....	59
C. Foie Gras and the Economy.....	62
D. The Chicago Ban on Foie Gras.....	65
1. <i>Enactment</i> .....	65
2. <i>Repeal</i> .....	68
<b>II. The Dormant Commerce Clause</b> .....	70
A. Basic Doctrine.....	71
B. Policy Considerations.....	73
<b>III. Illinois Restaurant Ass’n v. City of Chicago</b> .....	75
A. Did the Ordinance Discriminate Against Interstate Commerce?.....	75
B. Pike and Economic Protectionism.....	78
<b>IV. Illinois Restaurant Ass’n Was Correctly Decided</b> .....	81
A. The Correct Focus of Dormant Commerce Clause Analysis is Discrimination.....	82
1. <i>The two-tier framework was created to guard against discrimination</i> .....	82

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The author would like to thank his parents, Claude and Karen Grant, for their never-ending love, support, and wisdom, his siblings and family for their encouragement, Konica Mitra for her inspiration, and Professor Keith Harley of the Chicago-Kent College of Law for his Animal Law course.

- 2. *The Pike test is a tool to detect discrimination*..... 83
- 3. *A focus on discrimination protects the national economy*..... 84
- 4. *A focus on discrimination limits the role of the judiciary*. .... 85
- 5. *The Supreme Court has demonstrated that discrimination is the proper focus of the dormant commerce clause*. .... 86
- B. **Even Under the Pike Test, Illinois Restaurant Ass’n Was Correctly Decided** ..... 87
  - 1. *The unethical treatment of animals*..... 87
  - 2. *The reputation of Chicago’s restaurants*..... 96
  - 3. *The health of humans who consume foie gras*. .... 98
  - 4. *Burden on interstate commerce*..... 99
  - 5. *Balancing the interests*. .... 100
- V. **The Future** ..... 100
  - A. **Lessons Learned** ..... 101
  - B. **Constitutionality of Future Legislation**..... 102
  - C. **Political Viability of Future Legislation**..... 104
  - D. **Pending Foie Gras Legislation**..... 108
- Conclusion** ..... 109

## Introduction

In a swanky New York restaurant on the cable television series *Sex and the City*, Charlotte York is treated to a romantic night out on the town by her husband. Promising to woo Charlotte by showing her real romance and a night of wining and dining, Charlotte's husband, Harry, takes her to an upscale French restaurant in downtown New York. With classical music playing in the background and candles on the table, Harry fluently orders course after course of delicacies, including the plat du fromage and foie gras for the main entree. Carrie Bradshaw, played by actress Sarah Jessica Parker, narrating in the background, tells us that "It was Harry's version of a serenade, and Charlotte ate it right up."<sup>1</sup> Charlotte was fortunate that this fictional scene took place in a New York restaurant. Had this same meal been ordered recently in a Chicago restaurant, there would have been no serenade, no eating up, and most noticeably, no foie gras.<sup>2</sup> In fact, had a Chicago restaurant served Charlotte and Harry foie gras while the product was banned, it could have been slapped with a fine of up to \$500.<sup>3</sup>

Foie gras, which means "fat liver" in French, is the fattened liver of a duck or goose.<sup>4</sup> The delicacy is made through the controversial process of "gavage," or the intentional force-feeding of a duck or goose to fatten and enlarge its liver.<sup>5</sup> While the French are best known for the cultivation and promotion of foie gras, the force-feeding of ducks or geese is a practice that has existed in many countries and cultures throughout human history, dating back as far as ancient Egypt.<sup>6</sup> However, as long as foie gras has existed, the question of whether it should be produced through force-feeding has also been debated.<sup>7</sup> The debate

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<sup>1</sup> *Sex and the City: The Ick Factor* (Home Box Office broadcast Jan. 11, 2004).

<sup>2</sup> The sale of foie gras in a food dispensing establishment in Chicago was banned from April 26, 2006 until May 14, 2008. See CHICAGO, ILL., MUN. CODE § 7-39-001 (2006) (adopted Apr. 26, 2006), *repealed by* Chicago, Ill., Ordinance 2008-2041 (May 14, 2008).

<sup>3</sup> See *id.*; *id.* at § 7-39-005 (requiring that a food dispensing establishment "shall be fined not less than \$250 and no more than \$500" for each day the establishment serves foie gras).

<sup>4</sup> MICHAEL A. GINOR ET AL., FOIE GRAS: A PASSION 320 (1999).

<sup>5</sup> *Id.* The process of force-feeding causes a rapid increase in the size of a bird's liver. A liver may become between six and ten times larger than its original size. See HUMANE SOC'Y OF THE U.S., THE WELFARE OF ANIMALS IN THE FOIE GRAS INDUSTRY 2, <http://www.hsus.org/web-files/PDF/farm/HSUS-Report-on-Foie-Gras-Bird-Welfare.pdf> (last visited June 7, 2009) [hereinafter "HSUS WELFARE REPORT"].

<sup>6</sup> See generally GINOR ET AL., *supra* note 4, at 1-74 (providing extensive information on the historical origins of foie gras).

<sup>7</sup> See generally *id.*; see also Ill. Rest. Ass'n v. City of Chicago, 492 F. Supp. 2d 891, 892 (N.D. Ill. 2007). The court in *Illinois Restaurant Ass'n* noted that historians wrote about the practice of force-feeding as far back as the Roman times. The debate over whether the practice is ethical has continued well into the 19th century "as Jean Anthelme Brillat-Savarin sided with the geese and ducks, writing that '[t]hey have not only been deprived of the means of reproduction, but they have been kept in solitude and darkness, and forced to eat until they were led to an unnatural

over the methods used to force-feed birds in order to produce foie gras has inspired passionate discussions in which there is often no middle ground between the belief that foie gras is an enjoyable delicacy that humans have the right to produce and consume, and on the other hand, that force-feeding is cruel and the consumption of foie gras is unnecessary.<sup>8</sup>

For example, a British clergyman once said that his idea of heaven was “eating pâté de foie gras to the sound of trumpets,”<sup>9</sup> while on the other end of the spectrum, one American politician has referred to the practice as “manifest cruelty to animals.”<sup>10</sup> Even the Pope and the Prince of Wales have weighed in on the foie gras debate, with both opposing the practice of force-feeding ducks or geese.<sup>11</sup> The debate over foie gras has recently come to the forefront of the public and legislative consciousness in the United States.<sup>12</sup> California has banned the sale and production of products produced by force-feeding, Chicago passed and then repealed a ban on the sale of foie gras in its restaurants, and thirteen more states or local governments have considered or are considering similar

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state of fatness.’ On the other hand, his contemporary, Charles Gerard, called the goose ‘an instrument for the output of a marvelous product, a kind of living hothouse in which there grows the supreme fruit of gastronomy.’” *Id.* (citations omitted).

<sup>8</sup> See generally Marshall Sella, *Does a Duck Have a Soul? How Foie Gras Became the New Fur*, N. Y. MAG., June 18, 2005, available at <http://nymag.com/nymetro/food/features/12071/> (discussing the debate over foie gras and stating that “[t]his is the age of . . . absolute divisiveness. Just as there is red and there is blue, there is no middle ground on *gavage*”).

<sup>9</sup> *Fat Geese, Fatter Lawyers; Gastronomy*, ECONOMIST, May 20, 2006, at 37.

<sup>10</sup> HSUS WELFARE REPORT, *supra* note 5, at 6 (quoting Patrick Buchanan).

<sup>11</sup> See MARK CARO, *THE FOIE GRAS WARS: HOW A 5,000-YEAR-OLD DELICACY INSPIRED THE WORLD’S FIERCEST FOOD FIGHT* 86 (2009) (stating that in 2002 “Cardinal Joseph Ratzinger, the future Pope Benedict XVI, says of the industrial fattening of geese: ‘This degrading of living creatures to a commodity seems to me in fact to contradict the relationship of mutuality that comes across in the bible’”); Tim Walker, *Much Ado About Stuffing*, THE INDEPENDENT, Feb. 23, 2008, at News 20 (reporting that the Prince of Wales issued a letter asking his chefs to not buy foie gras).

<sup>12</sup> See *infra* note 18; Parts I.D, V.B, V.D. The controversy over foie gras is also part of an increasingly larger societal discussion over the virtues and ethics of food products and how they are produced. This has become a contentious and routinely debated topic among producers, consumers, moral activists, and political actors. For a sociological perspective on how the foie gras controversy is part of this larger debate over “conscientious production”, a concept that emphasizes moral choices in food production, and how it connects markets, movements, and government, see Michaela DeSoucey, *Gullet Politics: How Markets, Movements, and the State Organize Public Morality: Contentious Foie Gras Politics in the United States and France* (Apr. 23, 2009) (unpublished Ph.D. dissertation, Northwestern University) (on file with author) (“Today’s food world is one of contentious moral and cultural politics. . . . Food is both a personal and public subject since it unites economic, political, and cultural threads of social life.”). DeSoucey details the historical and cultural foundations of foie gras and how its current debate reflects and impacts social movement affiliation, markets, political citizenship, and public debates over morality, laws, and rights. See *id.* (“Foie gras can be seen . . . as an object that breaches the boundaries between cultural tastes and social problems. Something about foie gras sparks attention—whether discomfort or outrage, or resistance and pride. The social world that the ‘problem’ of foie gras inhabits possesses a curious and expanding infatuation with its legal and moral status.”).

legislation.<sup>13</sup> The question of whether this type of regulation by a state or local government is constitutional, however, is an unanswered and controversial issue.<sup>14</sup> The first major step in answering that question was taken in *Illinois Restaurant Ass'n v. City of Chicago* when a federal court held that Chicago's ban on the sale of foie gras in restaurants was constitutional.<sup>15</sup>

Although Chicago later repealed its ban on the sale of foie gras,<sup>16</sup> the holding of *Illinois Restaurant Ass'n*, which addresses the legality and not the wisdom of this type of regulation, remains good law. This Article will not resolve the factual dispute of whether force-feeding to produce foie gras is cruel.<sup>17</sup> Instead, this Article will focus on the legal implications of foie gras legislation, and particularly, whether the court in *Illinois Restaurant Ass'n* correctly upheld Chicago's ban on foie gras as constitutional. The question of whether a ban on foie gras is constitutional is an important new legal question with potentially broad consequences and practical effects on a person's everyday life. If this type of legislation is constitutional, it may set the foundation for the vast expansion of current and future animal welfare laws that regulate the food industry, including the regulation of veal, seafood, chicken, beef, and a seemingly infinite number of other products affecting the daily lives and personal choices of countless citizens.<sup>18</sup> This Article will therefore provide a thorough examination of the

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<sup>13</sup> See *infra* Parts I.D, V.B, V.D.

<sup>14</sup> Compare Alexandra R. Harrington, *Not All It's Quacked Up to Be: Why State and Local Efforts to Ban Foie Gras Violate Constitutional Law*, 12 DRAKE J. AGRIC. L. 303 (2007) (arguing that "the content and effects of foie gras legislation are in direct violation of the Commerce Clause", that state regulation of foie gras threatens to undermine important economic and trade considerations, that the regulation of property through foie gras legislation may constitute a "taking" under the United States Constitution, that legislators have other priorities they should focus their attention on, and that allowing the sale or production of foie gras to be regulated by the government may be the first step down a dangerous slippery slope which could lead to the regulation of many other food products that would be against the public's general will); with Kristen Cook, *The Inhumanity of Foie Gras Production: Perhaps California and Chicago Have the Right Idea*, 2 J. ANIMAL L. & ETHICS 263 (2007) (arguing that the production of foie gras causes pain and suffering to animals and is cruel, that current statutes regulating the use of animals in commerce and animal cruelty in general are not likely to be applied to ducks or geese used to produce foie gras, that the ban on the force-feeding of ducks or geese in California is a reasonable compromise between the interests of the producers of foie gras and the interests of those seeking to guard against unnecessary cruelty to animals, that "[t]he public consensus appears to support the ending of foie gras production and sale," and that other states should enact foie gras laws similar to those passed in California and Chicago).

<sup>15</sup> 492 F. Supp. 2d 891 (N.D. Ill. 2007).

<sup>16</sup> See *infra* Part I.D.2.

<sup>17</sup> For a well-written, balanced, and thorough investigation of the foie gras controversy, see generally CARO, *supra* note 11.

<sup>18</sup> See, e.g., Harrington, *supra* note 14, at 324 ("What makes the foie gras legislation unique and disconcerting is . . . the precedent that it will establish. . . . [F]oie 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. . . . 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

factual and legal controversy surrounding foie gras, the court's holding in *Illinois Restaurant Ass'n*, and the potential impact of *Illinois Restaurant Ass'n* on future foie gras and animal welfare laws or regulations.

Part I of this Article presents the background information necessary to understand the current foie gras debate, including the history of foie gras, the production of foie gras, the effect of foie gras on today's economy, and the context of Chicago's enactment and repeal of its ban on foie gras. Part II examines the relevant doctrinal and policy considerations under the dormant Commerce Clause used to determine whether a state's regulation of foie gras is constitutional. Part III discusses the court's holding in *Illinois Restaurant Ass'n*. Part IV analyzes the court's decision in *Illinois Restaurant Ass'n*, provides additional justifications for the court's decision, and argues that the case was correctly decided. Part V explores the impact of the *Illinois Restaurant Ass'n* decision and repeal of the ordinance on future foie gras legislation. Finally, this Article concludes that foie gras legislation is constitutional, an appropriate

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as 'good' and 'bad' food, and becomes unconstitutional for the additional reason that it starts to interfere with personal choice."); Mariann Sullivan & David J. Wolfson, *What's Good for the Goose . . . The Israeli Supreme Court, Foie Gras, and the Future of Farmed Animals in the United States*, LAW & CONTEMP. PROBS., Winter 2008, at 139, 140-43 (noting that instituting change in animal welfare laws governing the production of food is difficult because "cruelty is embedded in nearly every aspect and stage of animal food production. . . . This consistency seems to encourage people to adopt an 'all or nothing' view of animal agriculture. . . . [I]t is difficult to argue that anything we do to farmed animals is more necessary than anything else, since none of it is actually necessary at all. This conundrum creates a real challenge for anyone who is not 'ready to become a vegan' but who is trying to decide whether a particular farming practice is really justifiable. As a result, it is far easier to think of the issue as an all-or-nothing proposition and justify each cruelty by there being so many others, than to try to make uncomfortable, and often inconsistent, choices separating the acceptable from the unacceptable and to hold industry to those choices"); Marian Burros, *Organizing for an Indelicate Fight*, N.Y. TIMES, May 3, 2006, at F3 (reporting that in response to Chicago's ban on foie gras, the owner of two New York French restaurants said he "believes the government should not tell people what to eat. 'If force-feeding a duck is cruel, then packing chickens in a cage is cruel, and then the veal and the beef. We are all going to be vegetarians soon if they have their way'"); Charles Campion, *Take a Gander at Foie Gras Protests; Food Spy*, EVENING STANDARD, Aug. 15, 2007, at A32 (stating that "if you feel passionately about animal cruelty, campaigning about foie gras is rather like turning a blind eye to the elephant in front of you and worrying about a mouse in next door's attic. . . . By all means choose whether or not you want to eat foie gras and then apply the same logic when you're next buying a chicken"); Kari Lydersen, *Restaurateurs See Faux Pas in Ban on Foie Gras*, WASH. POST, Aug. 23, 2006, at A2 (reporting that Chicago Chef Robert Gadsby, in response to Chicago's ban on the sale of foie gras, asked, "'What's next? . . . They'll outlaw truffles, then lobster, beluga caviar, oysters'", and that a local bartender believes "'[t]hey might as well make a citywide bedtime ordinance[.] . . . It's like banning smoking. . . . We're adults; we're allowed to have bad habits'"); Martha T. Moore, *Foes See Foie Gras as a Fat Target; Animal Welfare Groups Allege Cruelty to Birds*, U.S.A. TODAY, June 2, 2006, at 3A (reporting that Stephen Starr, the owner of a dozen restaurants in the Philadelphia area, doesn't "know where you draw the line"). Justice Asher Grunis of the Israeli Supreme Court, in a case which banned the production of foie gras in Israel, recognized "that imposing a complete ban on a certain agricultural industry may have far-reaching economic and social consequences." HCJ 9232/01 Noah v. Att'y Gen. [2003] IsrSC 215, 231.

exercise of a government's legislative powers, and that it is imperative for such legislation to be encouraged and enacted.

## I. Background

The controversy over foie gras in *Illinois Restaurant Ass'n* has its origins in the longstanding use of the product by many different cultures and the force-feeding process through which foie gras is produced. This Part will provide the context necessary to fully understand the foundations of the modern foie gras debate by examining (A) the history of foie gras; (B) the production of foie gras; (C) foie gras's current effect on the U.S. economy; and (D) the former Chicago ban on the sale of foie gras.

### A. *The History of Foie Gras*

Foie gras may have the image of a modern delicacy crafted exclusively by celebrity chefs in high-priced restaurants, but the food's origins are centuries old.<sup>19</sup> Wild geese were first domesticated and force-fed by ancient Egyptians, despite the fact that the birds were considered sacred.<sup>20</sup> The Greek philosopher Plato set the foundation for future foie gras debates by arguing that "a keen interest in fine food signaled a weak moral character."<sup>21</sup> In France, foie gras quickly became a favorite of the French aristocracy and to this day remains a celebrated part of the country's culinary and cultural tradition. During the eighteenth century, the dissemination of France's cook books and cooking methods throughout Europe was largely responsible for the spread and increase in popularity of foie gras.<sup>22</sup> Foie gras was often viewed as a luxury item and associated with lavish social experiences. The eventual industrialization of the agriculture industry allowed for the more inexpensive mass production of foie gras and its exposure to other world markets.<sup>23</sup>

Foie gras was first introduced to the United States in the 1830s and 1840s by individual retailers who brought limited quantities of livers with them from Europe.<sup>24</sup> An increasing awareness of French culture and cooking by the

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<sup>19</sup> For extensive discussions of the origins of foie gras, see CARO, *supra* note 11, at 23-33; GINOR ET AL., *supra* note 4, at 2-74; DeSoucey, *supra* note 12.

<sup>20</sup> GINOR ET AL., *supra* note 4, at 2-3. Ancient tombs of Egyptian aristocrats built around 2390 B.C. contain images of geese being captured alive and killed by Egyptian hunters. One tomb even depicts servants softening food and then grasping geese by their necks in order to push food down their throats. *Id.*

<sup>21</sup> *Id.* at 4 ("This connection between the food one ate and the state of one's moral health has remained a persistent theme in food writing, one with particular relevance to foie gras. These ancient texts anticipate future debates in which foie gras is singled out as an emblem of moral degeneracy.").

<sup>22</sup> See *id.* at 23.

<sup>23</sup> See *id.* at 76, 79-80.

<sup>24</sup> *Id.* at 54-57.

American public in the 1950s helped to increase the popularity of foie gras in the United States.<sup>25</sup> In the 1970s, French producers of foie gras began exporting semi-cooked, shrink-wrapped foie gras to restaurants and gourmet meat shops.<sup>26</sup> In 1984, spurred by the fact that a new breed of mulard duck “created a new, potentially profitable industry,” several investors from Israel founded a foie gras production facility in New York called Commonwealth Enterprises.<sup>27</sup>

Several years later, another production facility, Sonoma Foie Gras, opened in the Sonoma Valley in California.<sup>28</sup> In the late 1980s, Izzy Yanay, a founder of Commonwealth, parted with the company and partnered with Michael Ginor to found Hudson Valley Foie Gras, also located in New York.<sup>29</sup> Hudson Valley later acquired Commonwealth, increased its production levels over ten times during the 1990s, and has even begun distributing foie gras worldwide.<sup>30</sup> Sonoma Foie Gras and Hudson Valley remain the two primary producers of foie gras in the United States,<sup>31</sup> with two other smaller farms in New York<sup>32</sup> and Minnesota.<sup>33</sup> Thus, the practice of force-feeding ducks and geese to produce foie gras has consistently been both employed and debated throughout the culinary, moral, and agricultural history of the world.

## B. *The Production of Foie Gras*

The methods used to produce foie gras, like the history of the product, have existed for centuries.<sup>34</sup> Still, there has been passionate debate throughout history about whether the production of foie gras is cruel or unethical.<sup>35</sup> In order to provide context for those issues, this Subpart will only introduce the standard production methods of foie gras and not the debate over the propriety of those methods.<sup>36</sup>

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<sup>25</sup> *Id.* at 66-69. Julia Child, in a 1961 cookbook that featured mostly French cuisine, “ignited a revolution in American eating habits” that did much to set the stage for the increase in popularity of French cooking and foie gras in the United States. *Id.*

<sup>26</sup> *Id.* at 54-57.

<sup>27</sup> *Id.* at 71.

<sup>28</sup> *Id.* at 71-73.

<sup>29</sup> *Id.* at 73.

<sup>30</sup> *Id.* at 76.

<sup>31</sup> *See id.* Ginor wrote that “[a]t the end of the twentieth century, chefs in American restaurants ha[d] carved out a permanent place for foie gras on their menus.” *Id.* at 73; *see also* Harrington, *supra* note 14, at 305-07.

<sup>32</sup> LaBelle Farms is a small chicken farm that also produces foie gras and is located less than a mile from Hudson Valley Foie Gras. CARO, *supra* note 11, at 87-88.

<sup>33</sup> Au Bon Canard is a small foie gras farm located in Caledonia, Minnesota. *Id.* at 281-85.

<sup>34</sup> GINOR ET AL., *supra* note 4, at 76. The production of foie gras has “remained virtually unchanged for 4500 years.” *Id.*

<sup>35</sup> *See supra* notes 14, 18; *infra* Part IV.B.1.

<sup>36</sup> *See infra* Part IV.B.1 for a discussion of how the production of foie gras may cause significant pain and suffering to birds. *See also* Amanda Paulson, *A Ban on Foie Gras? Could This Really Be Chicago?*, CHRISTIAN SCI. MONITOR, Dec. 13, 2005, available at <http://www.csmonitor.com/2005/1213/p01s04-ussc.html>.



Foie gras is produced through the force-feeding of ducks and geese. Until the 1960s, the majority of foie gras was produced from geese. However, farmers and scientists discovered that a particular type of mulard duck could be produced from artificial insemination. In comparison to a goose, the new mulard duck has a stronger body and esophagus, is more resistant to disease, and is substantially cheaper to produce.<sup>37</sup> While some countries still produce foie gras from geese, the majority of foie gras today, and particularly in the United States, comes from mulard ducks.<sup>38</sup> The production of foie gras, therefore, begins with the breeding of mulard ducks. Since the mulard is a cross-breed, two different species of sexually incompatible ducks must be bred. Female pekin ducks are artificially inseminated with the sperm of muscovy male ducks.<sup>39</sup> The fertile eggs that the females subsequently lay are collected and brought to a hatchery, where they hatch within twenty-four hours.<sup>40</sup> Eggs are checked during the hatching process, and on average, 50% of the eggs are infertile and discarded.<sup>41</sup> Out of the remaining 50%, only 50% of those eggs (or 25% total) become male mulard ducks.<sup>42</sup> The other 25%, which become female mulards, are not believed to produce a high-enough quality liver for foie gras and are usually sold to farmers who often slaughter them for meat.<sup>43</sup> Both female and male mulard ducks produced through artificial insemination are sterile.<sup>44</sup>

While the ducks are best adapted to living on water, during the growing stage, or pre-gavage, they are either allowed to free-range outdoors or are kept in production facilities on land.<sup>45</sup> During this period, the birds are fed hay for fiber to help expand their esophagi.<sup>46</sup> At between ten to fourteen weeks of age, the ducks are placed in force-feeding pens with dim lighting and fans.<sup>47</sup> Ducks are force-fed two to three times a day for a minimum of twelve and a maximum of thirty-one days.<sup>48</sup> The ducks are force-fed through a standardized mechanism that is attached to each crate or pen containing ducks.<sup>49</sup> Suspended on an elastic cord above the ducks' pen is a plastic funnel with a small electric motor attached. A bird feeder will begin force-feeding by restraining a bird with his legs, holding the bird by its neck, opening the bird's mouth, and inserting a metal feeding pipe

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<sup>37</sup> GINOR ET AL., *supra* note 4, at 76-78.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 77-78.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 78; see also CARO, *supra* note 11, at 18; Sidney H. Storozum, *Why a Duck? California Pokes a Hole in the "Iron Curtain" of Factory Farming*, 1 LIBERTY U. L. REV. 193, 195 (2006) ("The birds are typically housed in very confined and darkened quarters, in order to keep them calm and inactive.").

<sup>46</sup> GINOR ET AL., *supra* note 4, at 77-78.

<sup>47</sup> *Id.* at 78; see also HSUS WELFARE REPORT, *supra* note 5, at 1-2, 5.

<sup>48</sup> See GINOR ET AL., *supra* note 4, at 78; HSUS WELFARE REPORT, *supra* note 5, at 1-2.

<sup>49</sup> See HSUS WELFARE REPORT, *supra* note 5, at 1; Storozum, *supra* note 45, at 193.

approximately ten to twelve inches in length down the bird's esophagus.<sup>50</sup> The feeder then typically switches on an electric motor attached to the funnel above the pen, which pushes food down the duck's esophagus with an auger or pneumatic pump.<sup>51</sup>

The amount of feed given to a duck is gradually increased throughout the process. While amounts vary, a bird is generally fed around 0.4 pounds of food during its first force-feeding and after the first day may be fed as much as one to seven pounds of food per force-feeding.<sup>52</sup> An entire amount of food is injected in as little as two seconds and as much as thirty seconds, and the feed is usually corn based.<sup>53</sup> Immediately after feeding, ducks waddle over to a drinking trough and take long drinks of water. Ducks must have continual access to water during the force-feeding process because their consumption of water steadily increases throughout the process. Each employee may handle around 350 ducks per force-feeding session.<sup>54</sup> Every step of this feeding process must be performed in a calm and gentle manner to ensure that the ducks are not injured.<sup>55</sup>

During the course of force-feeding, a duck will accumulate body fat and its liver will begin to turn white due to the amount of corn it is being fed.<sup>56</sup> Ginor states that "[t]he changes in the liver might be likened to blowing up a brown balloon with a hole in it. As it expands, the color lightens—it becomes beige—but it also loses air due to the hole."<sup>57</sup> In other words, as a bird is force-fed and its liver expands, producers of foie gras regulate the size and color of the liver, which change over time, according to what grade of liver they wish to produce.<sup>58</sup> A liver will expand and grow between six and ten times larger than its original size.<sup>59</sup> After a producer decides that growth is complete, a duck is taken to a slaughterhouse where it is killed, bled, and cleaned. A duck's carcass is then chilled overnight, and the next day the liver is removed.<sup>60</sup>

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<sup>50</sup> See GINOR ET AL., *supra* note 4, at 78; HSUS WELFARE REPORT, *supra* note 5, at 1-2; Storozum, *supra* note 45, at 195.

<sup>51</sup> See GINOR ET AL., *supra* note 4, at 78; HSUS WELFARE REPORT, *supra* note 5, at 1.

<sup>52</sup> See GINOR ET AL., *supra* note 4, at 78; HSUS WELFARE REPORT, *supra* note 5, at 1. The amount of food force-fed to a duck per day is the equivalent of force-feeding approximately sixteen pounds of pasta to a person. Stephanie J. Engelsman, *World Leader – At What Price? A Look at Lagging American Animal Protection Laws*, 22 PACE ENVTL. L. REV. 329, 362-63 n.232 (2005).

<sup>53</sup> See GINOR ET AL., *supra* note 4, at 78; HSUS WELFARE REPORT, *supra* note 5, at 1.

<sup>54</sup> See GINOR ET AL., *supra* note 4, at 78. Ginor notes the importance of handling ducks carefully at this stage of the process and for that reason, "[m]any of the feeders are women, because the farmers have found that they are gentler and more patient with the ducks than are men." *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 78-79.

<sup>57</sup> *Id.* at 79.

<sup>58</sup> See *id.*

<sup>59</sup> Susan Adams, *Legal Rights of Farm Animals*, MD. BAR J., Sept.-Oct. 2007, at 19, 21; HSUS WELFARE REPORT, *supra* note 5, at 2.

<sup>60</sup> GINOR ET AL., *supra* note 4, at 78-80; see also Videotape: The Culinary Institute of America: The Production of Foie Gras (2004) (on file at the Schenectady County Community College

To produce what is often regarded as a lesser quality canned foie gras, many European producers use a more industrialized process that employs a mechanical feeder with a pump and computer calibrated portions of feed delivered through tubes located in each bird's crate.<sup>61</sup> In this system, ducks are placed in individual cages only slightly larger than the ducks themselves and rapidly fed by a feeder, who inserts a feeding tube and pushes a button to push the automatic feed down the duck's esophagus.<sup>62</sup> This process, while not used in the United States, is more efficient because it typically produces foie gras in ten to fourteen days.<sup>63</sup>

Thus, the foie gras industry follows a standard and routine practice of artificial insemination, sex-sorting, and daily force-feeding to produce the product known as foie gras.

### C. *Foie Gras and the Economy*

The production of foie gras involves more than the birds used to create livers; it also involves the United States' economy. California, New York, and Minnesota are the only states with foie gras production facilities in the United States.<sup>64</sup> Between these states, there are a total of four foie gras production facilities in the United States.<sup>65</sup> Of those four facilities, Hudson Valley Foie Gras, located in New York, and Sonoma Foie Gras, located in California, account for the majority of U.S. foie gras production.<sup>66</sup> In comparison to Sonoma, Hudson Valley is the clear leader of foie gras production in the United States.<sup>67</sup> In 2006, the state of New York gave over \$400,000 to Hudson Valley Foie Gras to encourage and subsidize its expansion.<sup>68</sup> California has not appropriated any

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library, Schenectady, New York) (detailing the process of foie gras production, according to Michael Ginor and Izzay Yanay).

<sup>61</sup> GINOR ET AL., *supra* note 4, at 79-80.

<sup>62</sup> *Id.*

<sup>63</sup> *See id.*

<sup>64</sup> *See* Burros, *supra* note 18; *see also supra* notes 31-33 and accompanying text.

<sup>65</sup> *See supra* Part I.A; notes 31-33 and accompanying text.

<sup>66</sup> *See* Burros, *supra* note 18; Moore, *supra* note 18.

<sup>67</sup> *See* Burros, *supra* note 18; Moore, *supra* note 18; About Foie Gras, <http://www.gourmetcruelty.com/about.php> (last visited May 28, 2009) (stating that Sonoma Valley Foie Gras accounts for approximately only 20% of the foie gras produced in the United States and that "Hudson Valley Foie Gras is the largest foie gras producer in the U.S. and one of the largest factory farming corporations in New York State").

<sup>68</sup> *See* HUMANE SOC'Y OF THE U.S., *HSUS Sues to Block Foie Gras Expansion in New York*, Aug. 24, 2006, [http://www.hsus.org/farm/news/pressrel/hsus\\_sues\\_foie\\_gras\\_expansion\\_ny.html](http://www.hsus.org/farm/news/pressrel/hsus_sues_foie_gras_expansion_ny.html) (last visited May 28, 2009). The Humane Society sued Hudson Valley Foie Gras to block the appropriation, arguing that the use of state money to benefit foie gras production violated several state laws. *Id.* A New York Appellate Court held that the Humane Society lacked standing to challenge the appropriation of funds and that the project's classification was exempt from review under New York law. *See* Humane Soc. of U.S. v. Empire State Dev. Corp., 863 N.Y.S.2d 107, 110-11 (App. Div. 2008).

funds to Sonoma Foie Gras and has in fact banned the current production techniques used by Sonoma.<sup>69</sup>

In total, the four foie gras production facilities in the United States slaughter approximately 400,000-500,000 ducks annually.<sup>70</sup> These facilities produce around 800,000 pounds of duck liver per year, which is worth about \$27 million wholesale.<sup>71</sup> According to a study by the United States International Trade Commission, in 1997—the most recent available data—the United States imported “approximately one million dollars in foie gras-related items, while exporting over one million dollars worth of ‘animal livers . . . prepared and preserved.’”<sup>72</sup> While the 1997 figures from the U.S. Trade Commission are the most current figures relating to the import and export of foie gras, some producers and restaurants have claimed that the demand for the product in the United States has been increasing, especially in response to efforts to ban or regulate the product.<sup>73</sup>

The figures, however, indicate that the impact of the production, export, and import of foie gras on the economy of the United States is minimal when compared to the substantial impact and size of the poultry industry.<sup>74</sup> The U.S. Trade Commission’s report states that the sale of ducks, geese, and guinea fowl

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<sup>69</sup> See CAL. HEALTH & SAFETY CODE §§ 25980-25984 (West 2007) (banning the use of force-feeding to produce foie gras in California, effective 2012).

<sup>70</sup> See CARO, *supra* note 11, at 69; HSUS WELFARE REPORT, *supra* note 5, at 1.

<sup>71</sup> See Moore, *supra* note 18.

<sup>72</sup> See Harrington, *supra* note 14, at 305-08 (citing OFFICE OF INDUSTRIES, U.S. INT’L TRADE COMM., INDUSTRY & TRADE SUMMARY: POULTRY (Dec. 1998), available at [http://hotdocs.usitc.gov/docs/pubs/industry\\_trade\\_summaries/pub3148.pdf](http://hotdocs.usitc.gov/docs/pubs/industry_trade_summaries/pub3148.pdf) [hereinafter “OFFICE OF INDUSTRIES”]). Harrington arrived at these figures “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” and “tak[ing] into account many segments of the overall poultry market that do not include or relate to foie gras.” *Id.*

<sup>73</sup> See Burros, *supra* note 18. Michael Ginor, a founder and owner of Hudson Valley Foie Gras, said that “the market has grown at least 20 percent since [activists] began their efforts [to ban foie gras]. At the end of the day they have helped increase the popularity of foie gras.” *Id.*

<sup>74</sup> See generally OFFICE OF INDUSTRIES, *supra* note 72. The term “poultry” means commonly known poultry, which includes broilers, turkeys, spent laying hens, geese, ducks, and guinea fowl. *Id.* at 3; see also Daniel R. Murray, *Foie Gras?: Making Economic Sense of the 1999 U.S. Tariffs on Gourmet European Goods*, 5 J. INT’L LEGAL STUD. 243, 257-58 (1999) (“The United States possesses no burgeoning foie gras . . . production markets to protect. Any United States production markets for [foie gras] can—at best—be described as fledgling. Even assuming that the United States possessed viable production market for [goods like foie gras] that could flourish under protectionist tariffs, it seems that the United States consumer market for these goods is quite small.”) (footnotes omitted); DeSoucey, *supra* note 12 (“Foie gras in the United States is a \$20-25 million annual business. For comparison purposes, two points are salient. First, in France, it is a \$1.9 billion business. Second, a typical, modern chicken plant in the U.S. processes more birds in a single eight-hour shift than Sonoma Foie Gras does in an entire year.”).

is “a relatively minor poultry category in the U.S. market.”<sup>75</sup> The report also repeatedly emphasizes the “minor” nature of this category of poultry in relation to the United States’ overall market.<sup>76</sup> During 1993-1997, the average value of U.S. live poultry meat shipments was about \$15 billion, poultry production exceeded \$17.1 billion in 1997, and U.S. poultry exports reached \$2.5 billion in 1997, which was more than double the amount of exports in 1993.<sup>77</sup>

The \$2.5 billion in poultry exports in 1997 and the overall size of the poultry industry, therefore, when compared to the approximately 1 million,<sup>78</sup> or at most 25 million,<sup>79</sup> dollars of foie gras-related items prepared in the United States, shows that the foie gras industry is an extremely small piece of the American poultry industry and an even smaller piece of the overall American economy.<sup>80</sup> Furthermore, while it is commonly known that a majority of the consumption of foie gras in the United States is the result of foreign imports, often from France, U.S. imports in the entire poultry industry, of which foie gras is only a fraction, are “negligible,” representing “less than 0.5 percent of consumption.”<sup>81</sup> The consumption trends of American consumers also show that while the average consumption of poultry in the United States increased from 1993-1997, the consumption of “other poultry,” which includes foie gras, “declined by 25 percent annually.”<sup>82</sup> Even if foie gras consumption increases, the industry will still remain a negligible part of the overall U.S. poultry industry. Additionally, foie gras is most commonly served at restaurants as an expensive luxury product, and the current economic downturn may further decrease demand for the product and its importance to the economy.<sup>83</sup>

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<sup>75</sup> See OFFICE OF INDUSTRIES, *supra* note 72, at 7-8, 20; CARO, *supra* note 11, at 69 (“U.S. foie gras producers kill about as many ducks a year—500,000—as some factories kill broiler chickens in a day.”) (emphasis in original).

<sup>76</sup> OFFICE OF INDUSTRIES, *supra* note 72, at 7-8, 20 (finding that a “relatively minor share of poultry consumption consists of ducks, geese, and guineas” and that “[t]he consumption of other poultry . . . is relatively minor”).

<sup>77</sup> *Id.* at 1-3.

<sup>78</sup> See *supra* note 72 and accompanying text.

<sup>79</sup> See DeSoucey, *supra* note 12; *supra* note 74.

<sup>80</sup> See OFFICE OF INDUSTRIES, *supra* note 72, at 7-8, 20; *supra* notes 72, 74, and accompanying text; see also CARO, *supra* note 11, at 11 (noting that when the debate over foie gras started in Illinois, “foie gras didn’t constitute a full fledged U.S. industry.”).

<sup>81</sup> OFFICE OF INDUSTRIES, *supra* note 72, at 1, 21. The study also finds that imports of specialty poultry products, which include poultry liver pates, decreased during 1997 and “accounted for a declining share of U.S. poultry.” Further, the number of imported goose livers steadily declined during 1993-1997. *Id.* at 24, A-16.

<sup>82</sup> *Id.* at 20-21. The U.S. consumption of live poultry and poultry meat increased from 11.8 billion dollars in 1993 to 14.6 billion in 1997. The consumption of chicken, which is the principal poultry meat in the United States, grew by almost 3 percent per year. On the other hand, the consumption of “other poultry,” which includes ducks and geese used to produce foie gras, was “relatively minor” and decreased each year. *Id.* at 1, 20, A-12.

<sup>83</sup> With the current economic downturn in the United States, as fine dining restaurants cut back on products like foie gras to make menus more affordable for customers with less money who are dining out less frequently, the product’s demand and importance will likely decrease.

Thus, while the production of foie gras is occurring in the United States in a small number of facilities, the economic impact of foie gras on the overall poultry industry and trade in the United States is minimal.

#### D. *The Chicago Ban on Foie Gras*

The history, production, and sale of foie gras all came to the forefront of a heated public debate when Chicago 1) enacted the most comprehensive ban on the sale of the product in the history of the United States; and 2) repealed the very same ban two years after it was first passed.

##### 1. *Enactment.*

On April 26, 2006, the Chicago City Council passed City Ordinance PO-05-1895, which became effective on August 23, 2006.<sup>84</sup> The ordinance banned the sale of foie gras in all “food dispensing establishments” in Chicago.<sup>85</sup> A food dispensing establishment is broadly defined by the Chicago Municipal Code to cover any business that serves food capable of consumption by the public, with or without charge.<sup>86</sup> Any business that violated the ordinance was subject to a

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*See, e.g.,* CARO, *supra* note 11, at 319 (writing that several restaurants had removed foie gras from their menus and dishes because of the weak economy); Russ Parsons, *High-end Restaurants on a Tightrope of Economic Uncertainty*, L.A. TIMES, Oct. 8, 2008, available at <http://www.latimes.com/news/local/valley/la-fo-economy8-2008oct08,0,3813954,full.story> (last visited Apr. 20, 2009) (writing that “[r]estaurateurs are taking steps to control costs” and that “one tried-and-true method of dealing with economic downturns that’s sure to come back is serving less expensive but still delicious cuts of meat. After the stock market crash of 2001, hangar steak seemed to be everywhere and pork belly became the new foie gras”); Michael S. Rosenwald, *Economy Raises the Heat in the Kitchen*, WASH. POST, June 16, 2008, at D1 (reporting that according to an international market research group “54 percent of people who dine out regularly are eating out less because of the economy” and that restaurants have been reconsidering “the merits of foie gras”). The demand for foie gras, like the fine dining industry in general, is routinely affected by the economy and will likely improve as the economy improves and customers have more money to spend on expensive restaurants and luxury products. However, the fact that foie gras is often one of the first menu items to be reevaluated or cut from menus reveals its marginal importance to the economy, restaurants, and consumers.

<sup>84</sup> *See* CHICAGO, ILL., MUN. CODE §§ 7-39-001–005 (2006) (adopted Apr. 26, 2006), *repealed by* Chicago, Ill., Ordinance 2008-2041 (May 14, 2008); Gretchen Ruethling, *Chicago Prohibits Foie Gras*, N.Y. TIMES, April 27, 2006, at A16 (discussing Chicago’s new ordinance). For a description of the legislative process leading up the passage of Chicago’s ordinance, including the Health Committee hearing on the ordinance, *see* CARO, *supra* note 11, at 123-44.

<sup>85</sup> CHICAGO, ILL., MUN. CODE § 7-39-001 (2006) (adopted Apr. 26, 2006), *repealed by* Chicago, Ill., Ordinance 2008-2041 (May 14, 2008). The Ordinance provided that: “All food dispensing establishments, as defined in Section 4-8-010 of the Municipal Code, shall prohibit the sale of foie gras.” *Id.*

<sup>86</sup> Section 4-8-010 of the Municipal Code of Chicago defines a “food dispensing establishment” as “any fixed location where food or drink is routinely prepared and served or provided for the public for consumption on or off the premises with or without charge. Such establishments include, but are not limited to, restaurants, coffee shops, cafeterias, short order cafes, luncheonettes, grills, tearooms, sandwich shops, soda fountains, taverns, bars, cocktail

fine “not less than \$250 and no more than \$500 for each offense,” and a business was considered to have committed a separate offense on each day that it sold foie gras.<sup>87</sup>

The preamble to the ordinance is instructive as to the City’s motivations for passing the ordinance. The City Council began by stating that under the Illinois Constitution, it “may exercise any power and perform any function relating to its government and affairs including protecting the health, safety and welfare of its citizens.”<sup>88</sup> The City then noted that Chicago is the home of many famous and legendary restaurants and that millions of people visit Chicago each year to attend those restaurants and various cultural events.<sup>89</sup> The City stated that it believed that ducks and geese are “inhumanely force fed” to create foie gras<sup>90</sup> and noted that “[s]imilar legislation requiring the ethical treatment of birds is being introduced throughout the United States”,<sup>91</sup> including Illinois,<sup>92</sup> and that California had already passed legislation governing the production and sale of foie gras.<sup>93</sup> The City next cited a recent Zogby poll stating that 80% of Americans, when educated about foie gras, supported a ban on the force-feeding of birds.<sup>94</sup> Finally, the City stated that it was passing the ordinance to “ensur[e] the ethical treatment of animals” and so that “the City of Chicago is able to continue to offer the best in dining experiences.”<sup>95</sup> The ordinance, included as part of the City’s routine omnibus bill, passed by a vote of 48-1.<sup>96</sup>

Despite the overwhelming vote in favor of the ordinance, the ban on foie gras stirred even more overwhelming controversy and backlash from restaurant owners. Many Chicago restaurants passionately opposed the ban, going so far as to protest the law by creating and openly serving special items featuring foie gras; some restaurants even threw foie gras parties on the day the law took

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lounges, nightclubs, industrial feeding establishments, take-out establishments, private institutions or organizations routinely serving food, catering kitchens, commissaries or any other eating or drinking establishment or operation.” CHICAGO, ILL., MUN. CODE § 4-8-010 (1999).

<sup>87</sup> CHICAGO, ILL., MUN. CODE § 7-39-005 (2006) (adopted Apr. 26, 2006), *repealed by* Chicago, Ill., Ordinance 2008-2041 (May 14, 2008).

<sup>88</sup> See CITY OF CHICAGO, COMM. ON HEALTH, AMENDMENT OF TITLE 7, CHAPTER 39 OF CHI. MUN. CODE BY ADDITION OF NEW SECTIONS 001 AND 005 PROHIBITING SALE OF FOIE GRAS BY FOOD ESTABLISHMENTS, 75180-82 (Oct. 25, 2005), *available at* [http://www.ward49.com/site/files/322/35116/155427/214511/foie\\_gras.pdf](http://www.ward49.com/site/files/322/35116/155427/214511/foie_gras.pdf) [hereinafter “CHICAGO COMM. ON HEALTH REPORT”].

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* This section of the preamble states in full: “Birds, in particular geese and ducks, are inhumanely force fed, via a pipe inserted through their throats several times a day, in order to produce a rare delicacy, foie gras, for restaurant patrons[.]” *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> See H.B. 867, 95th Gen. Assem., Reg. Sess. (Ill. 2007); S.B. 312, 95th Gen. Assem., Reg. Sess. (Ill. 2007); S.B. 413, 94th Gen. Assem., Reg. Sess. (Ill. 2005).

<sup>93</sup> See CAL. HEALTH & SAFETY CODE §§ 25980-82 (2004).

<sup>94</sup> CITY OF CHICAGO COMM. ON HEALTH REPORT, *supra* note 88.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*; see CARO, *supra* note 11, at 139-44.

effect.<sup>97</sup> A spokesperson for the Chicago Public Health Department, which was charged with enforcement of the ordinance, stated that enforcing the law was the department's "lowest priority."<sup>98</sup> Further, despite failing to veto the ordinance and allowing its passage without any political opposition,<sup>99</sup> Chicago's Mayor, Richard Daley, openly criticized the law, calling the ban "the silliest law" the City Council had ever passed.<sup>100</sup> On the other hand, animal rights groups uniformly praised the City for passing the law, saying that Chicago "took a bold position in favor of the humane treatment of animals."<sup>101</sup> Chicago Alderman Joe Moore, who led the campaign to pass the ordinance, publicly defended the law and argued that it did not interfere with personal choices, that the ordinance was

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<sup>97</sup> See, e.g., Catherine Philp, *Chefs' Protest Turns Ban on Foie Gras into a Goose Fair*, THE TIMES, Aug. 26, 2006, at 47. Philp reported that "Harry Caray's, a renowned steakhouse, Connie's Pizza and the soul-food joint BJ's Market were just some of the establishments that cooked foie gras dishes for the first time in a protest against the ordinance" and that "[c]hefs are already plotting to get round the ban by 'giving away' foie gras with a \$16 serving of roast potatoes." See also CARO, *supra* note 11, at 199, 210-12 (writing that one Chicago restaurant began serving a "Joe Moore foie gras sausage" and that a "Turtle Soup" underground club was organized in which special cards could be obtained and shown at select restaurants, redeemable for a special foie gras dish); Lydersen, *supra* note 18 (reporting that one Chicago chef used foie gras as an ingredient in an "Outlaw Dinner" to protest the ban); Josh Noel, *Chicago Restaurateurs Scoff at Law Banning Foie Gras: Even Mayor Calls Law 'Silly'*, NAT'L POST, Dec. 22, 2006, at A22 (reporting that one restaurant "proudly" listed foie gras on its menu and continued to serve the product). The passion that the foie gras debate elicited from chefs was nothing new. Charlie Trotter, a celebrity chef who renounced the serving of foie gras before the Chicago ordinance was ever considered and who was largely responsible for starting the debate in Chicago, had once become so incensed by criticism from another chef that he suggested the chef should eat his own liver. CARO, *supra* note 11, at 1-15.

<sup>98</sup> See Noel, *supra* note 97. Tim Hadac, the spokesperson for the Chicago Public Health Department, said that "[i]n a world of very limited public health resources we're being asked to drop some things so we can enforce a law like this[.] . . . With HIV/AIDS, cancer, West Nile virus and some of the other things we deal with, foie gras is our lowest priority." *Id.*

<sup>99</sup> A Chicago Alderman asked Daley if he would like to oppose the ordinance and Daley told the Alderman to "let it go." Daley's lack of opposition before the passage of the ordinance could be explained by the theory that "he was weakened by scandal and thus didn't want to expend political capital on such a fringe issue." Another theory about the Mayor's actions is that "[t]he alderman had been asking for more rope, so [Daley] gave it to them—and sat back and watched as they dealt with the consequences of going off the reservation." See CARO, *supra* note 11, at 142-43.

<sup>100</sup> *Id.*; see also Moore, *supra* note 18 (reporting that Mayor Daley said "[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").

<sup>101</sup> See, e.g., Humane Soc'y of the U.S., *Chicago's Historic Foie Gras Ordinance in Danger*, May 29, 2007, [http://www.hsus.org/farm/news/ournews/chicago\\_foie\\_gras\\_ban\\_repeal.html](http://www.hsus.org/farm/news/ournews/chicago_foie_gras_ban_repeal.html) (last visited May 28, 2009); Humane Soc'y of the U.S., *Chicago Won't Swallow Foie Gras Cruelty*, Apr. 26, 2006, [http://www.hsus.org/farm/news/ournews/chicago\\_foie\\_gras\\_ban.html](http://www.hsus.org/farm/news/ournews/chicago_foie_gras_ban.html) (last visited May 28, 2009) (stating that the ordinance "has earned the Windy City a place in animal welfare history").



necessary to prevent animal cruelty, and that the “city [was] better for taking a stance against cruelty to animals.”<sup>102</sup>

## 2. *Repeal.*

On May 14, 2008, just over two years after passing the foie gras ordinance, the Chicago City Council attempted to settle or least silence the debate by repealing the ban.<sup>103</sup> The Illinois Restaurant Association<sup>104</sup> and Chicago Chefs for Choice<sup>105</sup> had actively lobbied for the repeal of the ordinance. Alderman Tom Tunney and Mayor Daley also supported the repeal.<sup>106</sup> The repeal ordinance had been introduced a year prior to its passage and was referred to the Rules Committee instead of the Health Committee, which had approved the foie gras ban. The ordinance was then moved for a vote on the City Council floor without a hearing, a rare occurrence at the City Council. Alderman Moore, the sponsor of the original ban, objected to the absence of a hearing and attempted to exercise his right to postpone the vote. Mayor Daley ruled him out of order and when Alderman Moore tried to debate the merits of the bill, Mayor Daley ruled that the issue was not debatable.<sup>107</sup> As Alderman Moore shouted objections and demanded to be given an opportunity to be heard, Mayor Daley ordered the City Council Clerk to call roll and continue with the vote, which ended in the repeal of the ordinance by a vote of 37-6, with six abstentions.<sup>108</sup>

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<sup>102</sup> Lydersen, *supra* note 18 (reporting that Moore said “[t]his isn't telling people what to eat; this is basically a statement against cruelty to animals” and that “[t]his is a product of animal torture, pure and simple. It doesn't need to be on menus in Chicago”); Humane Soc’y of the U.S., *Will Chicago Flip-Flop on Animal Cruelty?*, May 21, 2007, [http://www.hsus.org/farm/news/pressrel/will\\_chicago\\_flip-flop.html](http://www.hsus.org/farm/news/pressrel/will_chicago_flip-flop.html) (last visited May 28, 2009). Moore has also pointed out that Mayor Daley had the opportunity to veto the ordinance but chose not to. See Farmed Animal Watch, *Foie Gras Ban Causes Uproar*, Aug. 25, 2006, <http://www.farmedanimal.net/faw/faw6-31.htm> (last visited May 28, 2009).

<sup>103</sup> See Chicago, Ill., Ordinance 2008-2041 (May 14, 2008) (repealing CHICAGO, ILL., MUN. CODE §§ 7-39-001-005 (2006)).

<sup>104</sup> The Illinois Restaurant Association “is a non-profit organization dedicated to promoting, protecting, educating and improving the restaurant industry in Illinois.” Illinois Restaurant Association, <http://www.illinoisrestaurants.org/> (last visited May 28, 2009). The Association was led by Mayor Daley’s former Chief of Staff Sheila O’Grady. See Fran Spielman, *Animal Stories – Daley Rams Through Repeal of Ban on Foie Gras – Moore Blasts Tactics as Tough to Swallow*, CHI. SUN-TIMES, May 15, 2008, at News 2.

<sup>105</sup> Chicago Chefs for Choice is an ad-hoc organization that aims “to protect the future of our freedom at the dinner table” and worked to overturn Chicago’s ban on the sale of foie gras. ChicagoChefsForChoice.com, About Us, <http://www.chicagochefsforschoice.com/> (last visited May 28, 2009); Phil Vettel, *Hold the Jokes the Rest of Yours: Foie Gras Back on Menus*, CHI. TRIBUNE, May 18, 2008 at Perspective 1.

<sup>106</sup> Spielman, *supra* note 104; Vettel, *supra* note 105. For a description of the political and legislative process leading to the repeal of Chicago’s ordinance, see CARO, *supra* note 11, at 298-312.

<sup>107</sup> Spielman, *supra* note 104.

<sup>108</sup> *Id.* See also CARO, *supra* note 11, at 307-10, 314, for a detailed account of the ordinance’s repeal.

Supporters of the repeal felt that the original ordinance drew undue national attention to Chicago, was an embarrassment to the city, and infringed on freedom of choice.<sup>109</sup> Alderman Tunney argued that the purpose of the ordinance, to make a statement against animal cruelty and raise awareness about the foie gras debate, had been accomplished even if the ordinance had been repealed.<sup>110</sup> Mayor Daley also noted that restaurants had still found ways to serve foie gras and therefore had made a mockery of Chicago and the ordinance's statement against animal cruelty.<sup>111</sup> Alderman Moore, on the other hand, argued that the ordinance still represented an important statement against animal cruelty, did not infringe on personal choice, and should not have been repealed.<sup>112</sup> Moore and supporters of the ordinance argued that by repealing the ban, Chicago had taken a step backwards and effectively endorsed serving products that come from animal cruelty.<sup>113</sup> Supporters of the ordinance also criticized the City Council's motivations for the repeal—politics and

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<sup>109</sup> See AFP.com, *Chicago Lifts Ban on Foie Gras, Ending Era of 'Duckeasies'*, May 14, 2008, [http://afp.google.com/article/ALeqM5h6wrYPdOjs\\_JcMeTcG967RCnCCiw](http://afp.google.com/article/ALeqM5h6wrYPdOjs_JcMeTcG967RCnCCiw) (last visited May 28, 2009) (discussing opposition to the ban and that "[t]he ban became a cause celebre among those who opposed government intervention in culinary decisions"); Nick Fox, *Chicago Overturns Foie Gras Ban*, DINER'S JOURNAL: THE N.Y. TIMES BLOG ON DINING OUT, May 14, 2008, <http://dinersjournal.blogs.nytimes.com/2008/05/14/chicago-overturns-foie-gras-ban/> (last visited May 28, 2009) (reporting that "the ban has been a source of embarrassment for the city and the repeal comes as residents have accused officials of trying to micromanage people's lives"); Vettel, *supra* note 105 ("Ald. Bernard Stone (50th) quickly recanted his support of the ban, saying, 'Anybody who has traveled anywhere in this country knows that people are just laughing their heads off at us.'"). Mayor Daley said that "once you get into every menu item dealing with food, we would be here forever every day debating all types of issues with all types of food. That's not the role of the City Council." Spielman, *supra* note 104. Alderman Stone told a local T.V. station that Mayor Daley's continued criticism contributed to the repeal. CARO, *supra* note 11, at 300-01.

<sup>110</sup> Tunney said that "[s]upporters of this legislation have accomplished their goal by raising awareness of this issue" and that while he "respect[s] their viewpoint, this is clearly a matter the council should stay out of and let the educated consumer and chefs make their own menu choices." Fox News.com, *Chicago City Council Overturns Foie Gras Ban*, May 14, 2008, <http://www.foxnews.com/story/0,2933,355759,00.html> (last visited May 28, 2009).

<sup>111</sup> Chicago restaurants openly defied the ordinance throughout much of the ban's existence. In a play on the word "speakeasy," used to describe a restaurant or bar that served alcohol during Prohibition, many restaurants became "duckeasies," forming secret clubs and using code words to order foie gras. One hot dog restaurant even named a hot dog after Alderman Moore and served foie gras on top of the dish. In addition, Mayor Daley said that the law turned Chicago into "the laughingstock of the nation." See AFP.com, *supra* notes 97, 109. Daley even began to mockingly refer to Alderman Moore as "Joe Foie Gras Moore." Spielman, *supra* note 104.

<sup>112</sup> See Monica Davey, *Ban Lifted, Foie Gras Is Back on the Menu in Chicago*, N.Y. TIMES, May 15, 2008, at A19.

<sup>113</sup> See AFP.com, *supra* note 109 (reporting that Moore said that "I felt and I still feel it is important to speak out against such forms of cruelty. Chicago's ordinance did just that. Unfortunately it was a step back for civilization"); Spielman, *supra* note 104.

embarrassment—and animal rights organizations universally condemned the decision.<sup>114</sup>

Moore and other supporters of the ordinance also protested the manner in which the law was repealed. They argued that the repeal was passed without debate, that the process violated City Council procedure and tradition, and that the ordinance was ultimately repealed by secretive political maneuvering.<sup>115</sup> Alderman Tunney, however, argued that similar political maneuvering was used to pass the ordinance since the ban was part of a larger omnibus package of ordinances and many aldermen may not have realized what they were voting for.<sup>116</sup> Ultimately, many media sources speculated that the repeal of the ordinance had more to do with cutthroat Chicago politics than it did with foie gras.<sup>117</sup>

Thus, by enacting and then repealing an ordinance specifically targeting foie gras and animal cruelty issues, the City of Chicago sparked a passionate debate about whether force-feeding ducks and geese is cruel, and moreover, whether it is appropriate for a local government to regulate this type of activity. Regardless of whether the City of Chicago's enactment and repeal of the foie gras ordinance was wise, the question of whether this type of legislative action is legal remains open. There is, however, well-developed legal doctrine that may give this debate proper context and an answer as to whether the City of Chicago's ordinance was constitutional.

## II. The Dormant Commerce Clause

State laws or ordinances like Chicago's ban on foie gras, when challenged in court, are subject to attack based on state and federal constitutional grounds. In general, states have broad authority under their constitutions to regulate for

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<sup>114</sup> AFP.com, *supra* note 109 (reporting that Julie Janovsky of animal rights group Farm Sanctuary said that “[t]o reverse a compassionate and admirable decision under pressure from political bullies and special interests shows a cowardly brand of cynicism unlike any we have seen in our efforts to give voice to the most vulnerable beings in our society—animals raised for food”); Davey, *supra* note 112; Vettel, *supra* note 105 (“The People for the Ethical Treatment of Animals called it a craven capitulation to special interests.”).

<sup>115</sup> Moore said that “[e]ven in the ugliest days of one-man rule, members of the City Council still had the opportunity to . . . state their case. For the mayor to fail to recognize me to debate the merits of this issue was the height of arrogance.” Spielman, *supra* note 104.

<sup>116</sup> Davey, *supra* note 112.

<sup>117</sup> *Id.* (“The banning—and subsequent un-banning—of foie gras here seemed to say more about classic Chicago politics than it did about dinner.”); Vettel, *supra* note 105 (“I think the ban was repealed because people were laughing at us.”). Vettel noted that Chicago's ban even became a joke on national television, with comedians like Stephen Colbert on Comedy Central mocking the ordinance and that such attention was a source of discomfort for a city making a bid to host the Olympics. *Id.*

the public's health, safety, morals, or welfare.<sup>118</sup> This power, known as a state's police power, is expansive and typically construed as broadly as possible in order to uphold a state or local government's use of its police power in enacting legislation.<sup>119</sup> A state's regulation of a food product is therefore likely to be upheld on state constitutional grounds as a valid exercise of a state's power to protect the public health, safety, morals, or welfare.<sup>120</sup> However, a state or local government's regulation must still past muster under the United States Constitution.<sup>121</sup> Thus, this analysis will focus on whether such state regulations are constitutional under the federal Constitution. A determination of whether a state or local government's regulation is constitutional is made by an analysis of the effect that a regulation may have outside of the state that passed it. This examination is governed by the dormant Commerce Clause of the United States Constitution.

### A. *Basic Doctrine*

The Commerce Clause of the U.S. Constitution provides that Congress shall have the power to "regulate Commerce . . . among the several States."<sup>122</sup> While the Commerce Clause does not contain any express language limiting a state's ability to regulate interstate commerce, and in fact does not bar a state from regulating interstate commerce, the positive grant of authority to Congress to regulate interstate commerce has long been recognized as an implicit or negative limitation on a state's ability to regulate interstate commerce.<sup>123</sup> This

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<sup>118</sup> *E.g.* ILL. CONST. art. VII § 6(a) (granting cities in Illinois "the power to regulate for the protection of the public health, safety, morals and welfare").

<sup>119</sup> *See, e.g.*, Nat'l Paint & Coatings Ass'n v. City of Chicago, 45 F. 3d 1124, 1126-32 (7th Cir. 1995), *cert. denied*, 515 U.S. 1143 (1995) (upholding the City of Chicago's ban on the sale of spray paint and holding that a "law can be both economic folly and constitutional") (quoting CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 96-97 (1987) (Scalia, J., concurring)); ILL. CONST. art. VII § 6(m) (providing that the "[p]owers and functions of home rule units shall be construed liberally"); *see also* Scadron v. City of Des Plaines, 153 Ill.2d 164, 174-75 (Ill. 1992) (holding that the provision of the IL constitution granting police powers "was written with the intention that home rule units be given the broadest powers possible"); Koy v. City of Chicago, 263 Ill. 122, 131 (Ill. 1914) (holding that "[l]egislatures and city councils, in the exercise of the police power, may prohibit all things hurtful to the health and safety of society even though the prohibition invade[s] the right of liberty or property of an individual").

<sup>120</sup> *See supra* note 119; *see also* 3B C.J.S. *Animals* § 194 (2008) (stating that statutes punishing cruelty to animals "are sustainable as a valid exercise of the police power").

<sup>121</sup> The terms "statutes," "laws," "ordinances," and "regulations," whether passed by state legislatures or local governments, are analyzed under the same set of rules by courts. This Article will therefore use the terms interchangeably.

<sup>122</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>123</sup> *See, e.g.*, S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984) ("Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce."); *Gibbons v. Ogden*, 22 U.S. 1 (1824).

negative aspect of the Commerce Clause is referred to as the “dormant Commerce Clause” and is recognized as an independent limit on a state’s authority to regulate interstate commerce.<sup>124</sup> The dormant Commerce Clause prevents a state from enacting laws that discriminate in favor of its own citizens or businesses and place excessive burdens on interstate commerce.<sup>125</sup>

Cases under the dormant Commerce Clause are analyzed under a two-tiered approach.<sup>126</sup> Under the first tier, a court must determine whether a law on its face or in effect discriminates against interstate commerce.<sup>127</sup> Discrimination “means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”<sup>128</sup> Discriminatory laws “motivated by ‘simple economic protectionism’ are subject to a ‘virtually *per se* rule of invalidity . . . .”<sup>129</sup> These statutes are subject to strict scrutiny<sup>130</sup> and will be struck down unless a state “can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.”<sup>131</sup> However, if a law does not discriminate in favor of local interests but instead regulates neutrally and has only incidental effects on interstate commerce, then a case is analyzed under the second tier of case law.<sup>132</sup> Under the famous *Pike* test, a statute that “regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits” and so long as the state interest could not be promoted “with a lesser impact on interstate activities.”<sup>133</sup> The *Pike* balancing standard is generally more favorable to governments seeking to uphold statutes because the laws are not presumed to be invalid and are subject to a balancing test, which is less rigorous than the strict scrutiny standard in tier one.<sup>134</sup>

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<sup>124</sup> *E.g.* *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S.Ct. 1786, 1792-93 (2007).

<sup>125</sup> *Id.*

<sup>126</sup> *E.g.* *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389-90 (1994).

<sup>127</sup> *E.g.* *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578-79 (1986).

<sup>128</sup> *Oregon Waste Systems, Inc. v. Dep’t of Env’tl. Quality of Or.*, 511 U.S. 93, 99 (1994).

<sup>129</sup> *United Haulers*, 127 S.Ct. at 1793 (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

<sup>130</sup> *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992).

<sup>131</sup> *Carbone*, 511 U.S. at 392-93; *Maine v. Taylor*, 477 U.S. 131, 138-39 (1986) (holding that “once a state law is shown to discriminate against interstate commerce ‘either on its face or in practical effect,’ the burden falls on the State to demonstrate both that the statute ‘serves a legitimate local purpose,’ and that this purpose could not be served as well by available nondiscriminatory means”) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

<sup>132</sup> *E.g.* *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>133</sup> *Id.*

<sup>134</sup> *See id.*; *see also Wyoming*, 502 U.S. at 454-55.

## B. Policy Considerations

The existence of the judicially created dormant Commerce Clause jurisprudence and two-tiered approach is justified by several important policy concerns that are also relevant to the foie gras controversy. First, federal courts are wary of state regulation that places a burden on citizens in other states because citizens in other states do not have access to the political processes of the state that is placing a burden upon them.<sup>135</sup> Therefore, a court may justify overturning a state regulation because it may place a burden on other citizens without adequately taking their interests into account.<sup>136</sup> Second, the use of the dormant Commerce Clause to invalidate state legislation has been justified under the theory that it is more efficient for the country's economy to function as a cohesive national unit, instead of being hindered by a patchwork of conflicting state regulations.<sup>137</sup>

Finally, and perhaps most importantly, the Supreme Court has repeatedly recited the fact that the dormant Commerce Clause is designed to protect against economic protectionism by the states.<sup>138</sup> A state engages in economic protectionism when it enacts a regulation that favors a state industry or product to the disadvantage of out-of-staters.<sup>139</sup> The Supreme Court frequently cites substantial evidence that the Framers intended the Commerce Clause to be used

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<sup>135</sup> See, e.g., *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S.Ct. 1786, 1797 (2007) ("Our dormant Commerce Clause cases often find discrimination when a State shifts the costs of regulation to other States, because when 'the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.'") (quoting *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767-68 n.2 (1945)); see also *M'Culloch v. Maryland*, 17 U.S. 316 (1819) (holding that states and citizens should not be harmed by laws in states where they lack representation).

<sup>136</sup> See, e.g., *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199-201, 206-07 (1994) (holding that Massachusetts's milk tax was unconstitutional in part because its purpose and effect was to benefit local dairy producers and the interests of out of state dairy producers were not adequately represented in Massachusetts's political process).

<sup>137</sup> See, e.g., *Am. Trucking Ass'n, Inc. v. Michigan Public Service Comm'n*, 545 U.S. 429, 433 (2005) ("Our Constitution 'was framed upon the theory that the peoples of the several states must sink or swim together.'" (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935))); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 532-39, 544-45 (1949) (holding that a law protecting New York's milk supply by prohibiting export of the product was unconstitutional because it conflicted with the policy goal of cultivating a national economy, which the Framers intended); *Southern Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 767-78 (1945) (holding that Arizona's statute limiting the use of long trains was unconstitutional because "the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority").

<sup>138</sup> See, e.g., *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.").

<sup>139</sup> See *id.*

to prevent this type of state action. At the time of ratification, it was “universally assumed” that the Federal government, and not the states, would have the power to regulate interstate commerce.<sup>140</sup> When faced with a challenge to a state statute, therefore, the Supreme Court will not always strictly adhere to the two-tiered approach discussed above and may recite the approach but then decide a case largely on the question of whether a statute discriminates against interstate commerce.<sup>141</sup> Deciding a case based on the question of whether a statute is discriminatory, or in other words, whether a statute places a significant burden on interstate commerce so as to benefit intrastate commerce, is justified because the primary concern of the Framers was economic protectionism.<sup>142</sup>

While these policy considerations are rooted in the Constitution and history of the United States, the use and existence of the dormant Commerce Clause is not without controversy. Justices Scalia and Thomas have openly stated that they do not believe the dormant Commerce Clause jurisprudence should exist.<sup>143</sup> They argue that use of the Commerce Clause in this way violates separation of powers, that it is an unnecessary judicial intervention, that cases often turn simply on policy choices by judges, and that if Congress wanted to act and preempt a state’s regulation, it could.<sup>144</sup> Due to these arguments, use of the dormant Commerce Clause by the Supreme Court to overturn a state law is often controversial and rigorously debated by the Justices.<sup>145</sup>

Perhaps recognizing this controversy and the difficulty in balancing the different policy considerations while applying the standard two-tiered approach, the Supreme Court has acknowledged that there is no “clear line” separating those cases subject to strict scrutiny in the first tier and those cases subject to *Pike* balancing in the second tier.<sup>146</sup> The Court has also recognized that applying the *Pike* balancing approach is even more difficult and that the Court’s dormant Commerce Clause precedent in this area “becomes (and long has been) a ‘quagmire.’”<sup>147</sup> However, it will become clear that despite the ambiguity in its

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<sup>140</sup> *E.g. id.*; *H.P. Hood & Sons*, 336 U.S. at 531-41.

<sup>141</sup> *See United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S.Ct. 1786 (2007) (applying the *Pike* test but deciding the case based on the question of whether the state regulation discriminated against interstate commerce); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298-99 n.12 (1997) (acknowledging that there is “no clear line between these two [traditional] strands of analysis” and that “several cases that have purported to apply the undue burden test (including *Pike* itself) arguably turned in whole or in part on the discriminatory character of the challenged state regulations”).

<sup>142</sup> *See infra* Parts IV.A.1-5.

<sup>143</sup> *See United Haulers*, 127 S.Ct at 1799-1803.

<sup>144</sup> *Id.*

<sup>145</sup> *See, e.g., id.*

<sup>146</sup> *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578-79 (1986).

<sup>147</sup> *See, e.g., West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (Scalia, J., concurring in the judgment) (“Applying [the standard two-tier] approach—or at least the second part of it—is not always easy, since once one gets beyond facial discrimination our negative-Commerce-Clause jurisprudence becomes (and long has been) a ‘quagmire.’”).

decisions, the Supreme Court consistently and properly decides cases based on the question of discrimination and economic protectionism.<sup>148</sup>

It is with this “quagmire” of dormant Commerce Clause precedent and policy considerations that a federal district court in Chicago turned, for the first time, to the foie gras controversy.

### III. Illinois Restaurant Ass’n v. City of Chicago

Immediately after the City of Chicago passed its ordinance banning the sale of foie gras in restaurants and before the ban was later repealed, the Illinois Restaurant Association and a local Chicago restaurant<sup>149</sup> (“the plaintiffs”) sued the City in state court, claiming that the City’s ordinance violated the Illinois constitution.<sup>150</sup> On December 19, 2006, after the plaintiffs had amended their complaint to include a dormant Commerce Clause challenge under the federal Constitution, the City removed the suit to a federal district court in the Northern District of Illinois.<sup>151</sup> The City soon filed a motion to dismiss the complaint in its entirety.<sup>152</sup> In its opinion, the district court quickly concluded that the ordinance was a valid exercise of the City’s police powers under the Illinois Constitution, and turned to the primary issue in the case, the dormant Commerce Clause and its two-tiered framework.<sup>153</sup>

#### A. *Did the Ordinance Discriminate Against Interstate Commerce?*

Under the first tier of dormant Commerce Clause case law, an ordinance is *per se* invalid if the ordinance on its face or in practical effect discriminates against interstate commerce.<sup>154</sup> A law discriminates against interstate commerce if it directly regulates interstate commerce or if the effect of the law is to favor in-state economic interests over out-of-state economic interests.<sup>155</sup> In other words, if

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<sup>148</sup> See *infra* Parts IV.A.1-5.

<sup>149</sup> The restaurant was Allen’s New American Café. See *Ill. Rest. Ass’n v. City of Chicago*, 492 F. Supp. 2d 891, 892 (N.D. Ill. 2007).

<sup>150</sup> The plaintiffs argued that the ordinance exceeded the City’s police powers under the Illinois Constitution. *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 892-97. While both parties argued and the court ultimately ruled on the issue of whether the City of Chicago’s ordinance exceeded the City’s police power under the Illinois Constitution, the critical issue before the court was the plaintiffs’ dormant Commerce Clause claim. *Id.*

<sup>154</sup> E.g. *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S.Ct. 1786, 1792-93, 1797 (2007); *Brown-Forman Distillers Corp. v. N.Y. Liquor Auth.*, 476 U.S. 573, 578-79 (1986).

<sup>155</sup> E.g. *United Haulers*, 127 S.Ct. at 1795-96; *Brown-Forman*, 476 U.S. at 578-79.



the purpose of the law is simple economic protectionism, it is presumed to be invalid.<sup>156</sup>

The plaintiffs argued that the ordinance was *per se* invalid since the purpose and effect of the ordinance was to regulate and discriminate against interstate commerce.<sup>157</sup> The plaintiffs acknowledged that the ordinance appeared to be facially neutral because it applied to any restaurant selling foie gras in Chicago and did not distinguish between in-staters and out-of-staters.<sup>158</sup> However, the plaintiffs argued that since the law explicitly stated that its purpose was to “ensur[e] the ethical treatment of animals,”<sup>159</sup> and since there were no local producers of foie gras who could treat animals unethically, the ordinance, on its face, intentionally regulated and economically punished out-of-state producers of foie gras.<sup>160</sup> The plaintiffs also argued that even if the ordinance was facially neutral, its economic effect on out-of-state producers amounted to discrimination against interstate commerce.<sup>161</sup>

The City of Chicago, on the other hand, argued that the ordinance did not discriminate against interstate commerce on its face or in effect because it did not control the conduct of out-of-staters.<sup>162</sup> The City contended that the ordinance only controlled the conduct of local restaurants and that out-of-state producers were not subject to any regulation, control, fines, or penalties under the ordinance.<sup>163</sup> The City also pointed out that the ordinance applied to all Chicago

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<sup>156</sup> *United Haulers*, 127 S.Ct. at 1795-96.

<sup>157</sup> Plaintiffs’ Memorandum of Law in Opposition to the City of Chicago’s Motion to Dismiss at III.A.1, Ill. Rest. Ass’n v. City of Chicago, 492 F.Supp. 2d 891 (N.D. Ill. 2007) (No. 06 C 7014), 2007 WL 1348832 [hereinafter “Plaintiffs’ Memorandum”].

<sup>158</sup> *See id.*

<sup>159</sup> *Id.* The plaintiffs also pointed to statements by the City Council made after the ordinance passed in which the Council said that the ordinance was intended to discourage the unethical treatment of animals in the out-of-state production plants that produce foie gras. *Id.* at I.

<sup>160</sup> *Id.* (arguing that the ordinance was passed “to make a political statement and to punish economically the conduct of *out-of-state persons* who engage in a lawful out-of-state practice with which Chicago disagrees”).

<sup>161</sup> *Id.* at III.A.1-2. The plaintiffs argued that the ordinance was an attempt to place economic sanctions on out-of-state producers in order to alter conduct that was lawful in other states. The plaintiffs contended that the case was similar to *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff’d sub nom. on conflict preemption grounds Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000), where the First Circuit Court of Appeals invalidated a Massachusetts law that restricted the ability of citizens to purchase goods from any person or entity that did business with Burma, and *Hunt v. Wash. State Apple Advertising Comm.*, 432 U.S. 333 (1977), where the Supreme Court invalidated an North Carolina law that banned state labeling systems for apples that would have required Washington apple producers to alter their entire labeling system. The plaintiffs reasoned that like the laws in Massachusetts and North Carolina, the intent and effect of the foie gras ban in Chicago was to control out-of-state conduct and impose burdens on lawful conduct in other states. Ill. Rest. Ass’n v. City of Chicago, 492 F. Supp. 2d 891, 899-901 (N.D. Ill. 2007).

<sup>162</sup> Memorandum in Support of the City’s Motion to Dismiss at II.A-B, Ill. Rest. Ass’n v. City of Chicago, 492 F.Supp. 2d 891 (N.D. Ill. 2007) (No. 06 C 7014), 2007 WL 1973283 [hereinafter “City’s Memorandum”].

<sup>163</sup> *Id.*; Ill. Rest., 492 F. Supp. 2d at 898-902.

restaurants without considering the source of foie gras.<sup>164</sup> Therefore, since the ordinance applied neutrally to all producers of foie gras, and there are no local producers of foie gras in Chicago that could benefit from the ordinance,<sup>165</sup> the ordinance did not favor in-state interests at the expense of out-of-state interests.<sup>166</sup>

The district court agreed with the City of Chicago and held that the ordinance did not discriminate against interstate commerce in its purpose or effects.<sup>167</sup> The court held that even though the ordinance had an economic effect on out-of-state foie gras production, that was not the same as regulating or discriminating against interstate commerce.<sup>168</sup> The court reasoned that although the ordinance may have had a negative impact on the profits of out-of-state foie gras producers and distributors, the ordinance only regulated the conduct of restaurants in Chicago.<sup>169</sup> Since the ordinance did not regulate foie gras production or pricing and did “not force out-of-state foie gras producers or distributors to do anything,” it did not regulate or discriminate against interstate commerce.<sup>170</sup>

The court also reviewed relevant case law in which state laws that had economic effects on out-of-staters were held to be unconstitutional.<sup>171</sup> The court held that these cases did not stand for the proposition that any law with an extraterritorial economic effect is *per se* unconstitutional. Instead, the court read these cases to hold that an economic penalty which is tantamount to a “legislatively authorized fine” meant solely to govern out-of-state conduct would violate the dormant Commerce Clause.<sup>172</sup> The court then held that the foie gras ordinance did not violate the dormant Commerce Clause because “an indirect economic effect is not tantamount to a legislative fine.”<sup>173</sup> Thus, the court held that the ordinance did not facially regulate or discriminate against interstate

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<sup>164</sup> City’s Memorandum, *supra* note 162, at II.A-B; *Ill. Rest.*, 492 F. Supp. 2d at 898-902.

<sup>165</sup> City’s Memorandum, *supra* note 162, at II.A-B. In fact, as the City argued, only Chicago restaurants were subject to fines under the ordinance. Therefore, the ordinance, instead of giving an advantage to local interests, actually placed a burden on Chicago restaurants. *Id.*

<sup>166</sup> *Id.* The City also argued that the case was similar to *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), where the Supreme Court upheld a ban on plastic milk containers in part because the law applied equally to in-state and out-of-state milk producers, and *Nat’l Paint & Coatings Ass’n v. City of Chicago*, 45 F.3d 1124 (7th Cir. 1995), *cert. denied*, 515 U.S. 1143 (1995), where the Seventh Circuit upheld Chicago’s ban on the sale of spray paint in part because the ban applied equally to all producers of spray paint. *See id.*

<sup>167</sup> *Ill. Rest.*, 492 F. Supp. 2d at 901-05.

<sup>168</sup> *Id.* at 899.

<sup>169</sup> *Id.* at 899-901.

<sup>170</sup> *Id.*

<sup>171</sup> *See id.* (discussing *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff’d sub nom. on conflict preemption grounds*, *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000); and *BMW of North Am., Inc. v. Gore*, 517 U.S. 559 (1996)).

<sup>172</sup> *Id.* at 900.

<sup>173</sup> *Id.*

commerce and was a valid exercise of legislative power under the first tier of dormant Commerce Clause analysis.

### B. *Pike and Economic Protectionism*

The district court then moved on to the second tier of dormant Commerce Clause analysis, in which courts usually apply the *Pike* balancing test. Under the *Pike* test, a law that regulates neutrally for a legitimate local purpose with only incidental effects on interstate commerce will be upheld unless the burden imposed on commerce is clearly excessive in relation to the putative local benefits and there is no way to promote the local interest that would have a lesser impact on interstate commerce.<sup>174</sup> The City of Chicago, however, argued that *Pike* balancing is not always required when a law does not discriminate against interstate commerce and has only incidental effects on interstate commerce.<sup>175</sup> The City pointed out that under the Seventh Circuit case *National Paint & Coatings Ass'n v. City of Chicago*,<sup>176</sup> the proper focus of a dormant Commerce Clause inquiry is whether a law treats in-state and out-of-state interests in a discriminatory manner, or in other words, engages in economic protectionism.<sup>177</sup> In *National Paint*, the Seventh Circuit reversed a district court that had applied the *Pike* test to a Chicago ordinance that banned the sale of spray paint in order to stop graffiti.<sup>178</sup> The Seventh Circuit held that *Pike* balancing was not necessary because the ordinance “affects interstate shipments, but it does not discriminate against interstate commerce in either terms or effect. No disparate treatment, no disparate impact, no problem under the dormant Commerce Clause.”<sup>179</sup> The City argued that like the spray paint ordinance in *National Paint*, Chicago’s foie gras ordinance merely affected the interstate

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<sup>174</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>175</sup> *Ill. Rest.*, 492 F. Supp. 2d. at 898. The City later retreated from this position, but the court still considered the argument. *Id.*

<sup>176</sup> 45 F.3d 1124 (7th Cir. 1995), *cert. denied*, 515 U.S. 1143 (1995).

<sup>177</sup> *See Ill. Rest.*, 492 F. Supp. 2d. at 901-05; City’s Memorandum, *supra* note 162, at II.A-B, D. In fact, the Seventh Circuit in *National Paint* followed an entirely different method of analyzing cases under the dormant Commerce Clause, which the court believed to be more accurate. *Nat’l Paint*, 45 F.3d at 1131. The district court in *Illinois Restaurant Ass’n*, summarizing *National Paint*, held that “laws fall into three categories: (1) those which explicitly discriminate against interstate commerce (e.g., a law banning the sale of spray paint manufactured outside Illinois); (2) those which are facially neutral but ‘bear more heavily on interstate commerce than local commerce’ (e.g., a law which sets a 55-foot limit for trailers when all nearby states set a 65-foot limit); and (3) those which are facially neutral and ‘do not give local firms any competitive advantage over those located elsewhere.’” 492 F. Supp. 2d. at 902 (quoting *Nat’l Paint*, 45 F.3d at 1131). The City argued that Chicago’s foie gras ordinance fell into the third category, in which *Pike* is not applied and a law is upheld so long as it does not discriminate against interstate commerce. *See* City’s Memorandum, *supra* note 162, at II.A-B.

<sup>178</sup> 45 F.3d at 1126-27.

<sup>179</sup> *Id.* at 1132.

shipment of foie gras but did not discriminate against interstate commerce or give an advantage to local producers.<sup>180</sup>

The plaintiffs disagreed and argued that the Supreme Court has held that local favoritism is not a required element of a dormant Commerce Clause claim and that if a law imposes a burden on interstate commerce, even if it is an incidental or small burden, the law must be subjected to *Pike* balancing.<sup>181</sup> The plaintiffs argued that *National Paint's* refusal to apply the *Pike* test was an anomaly, that other Circuits follow the traditional two-tiered approach that applies *Pike*, and that other Seventh Circuit and Supreme Court cases have applied the traditional two-tiered approach.<sup>182</sup> Further, the plaintiffs contended that *National Paint* was distinguishable because unlike the spray paint ordinance in *National Paint*, which addressed an area of traditional governmental regulation (the upkeep of the City), the foie gras ordinance was directed at the out-of-state production of foie gras, which is not an area of traditional state regulation.<sup>183</sup> The plaintiffs therefore concluded that since the ordinance had an effect on interstate commerce, it must be analyzed under the *Pike* test.

Both parties went on to argue the validity of the ordinance under the *Pike* test. The City argued that the ordinance served the valid goal of improving the City's image and advancing the morals of the community.<sup>184</sup> Further, any burden on interstate commerce, the City argued, was minimal, especially because foie gras could still be eaten in the city or sold in a grocery or specialty store.<sup>185</sup> The City also pointed out that there was no less restrictive way for the City to promote its local interest in the reputation of its restaurants and that the City had a legitimate interest in promoting the morals of the community.<sup>186</sup> The plaintiffs, on the other hand, argued that the City of Chicago's interests in ensuring the ethical treatment of animals and in the reputation of its restaurants were weak and insufficient to uphold the ordinance in comparison to the ordinance's

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<sup>180</sup> City's Memorandum, *supra* note 162, at II.A-B. The City also relied on *Procter & Gamble Co. v. City of Chicago*, in which the Seventh Circuit held that a Chicago ordinance banning the sale of certain detergents containing phosphates was constitutional because the ordinance did "not require that detergents be manufactured in Chicago or Illinois and does not benefit manufacturers who are located there." 509 F.2d 69, 78 (7th Cir. 1975), *cert. denied*, 421 U.S. 978 (1975).

<sup>181</sup> Plaintiffs' Memorandum, *supra* note 157, at III.A.1-2 (arguing that the ordinance must be subjected to *Pike* balancing because "[a]s the absence of [a] local benefit does not eliminate the international implications of the discrimination, it cannot exempt such discrimination from Commerce Clause prohibitions" (quoting *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue and Fin.*, 505 U.S. 71, 79 (1992))).

<sup>182</sup> *Id.* at III.A.1-2.

<sup>183</sup> *Id.*

<sup>184</sup> See City's Memorandum, *supra* note 162, at II.A-B.

<sup>185</sup> *Id.* ("Any effects on the interstate commerce in foie gras is therefore no different than what occurs any time a city bans the sale of a product that travels in interstate commerce—which is virtually every product.").

<sup>186</sup> *Id.*

burdens on interstate commerce.<sup>187</sup> The plaintiffs also argued that the Commerce Clause was designed to promote a uniform national economy that is free from state-imposed discriminatory trade barriers.<sup>188</sup> The plaintiffs claimed that if the ordinance was upheld, any local government would be able to legislate based on a moral or policy judgment and could forbid almost any type of conduct.<sup>189</sup> Cumulatively, this type of widespread local legislation could lead to a serious impairment of the national economy.<sup>190</sup>

The district court, however, did not reach the issue of whether the ordinance was constitutional under *Pike*. Instead, the court held that it was not required to apply the *Pike* test.<sup>191</sup> The court found Chicago's foie gras ordinance and the spray paint ordinance in *National Paint* to be "substantially similar" because both ordinances banned a product produced exclusively outside of Chicago and consumers of the products in Chicago would not turn to a locally produced product because of the ban.<sup>192</sup> The court then noted that the *Pike* test is an "oft-stated maxim" that is not the actual deciding factor in many cases that claim they are decided under the *Pike* test.<sup>193</sup> The court found that the pivotal determination under the dormant Commerce Clause is whether a law is discriminatory and results in economic protectionism. Summarizing its reading of dormant Commerce Clause precedent, the court held that "the dormant Commerce Clause applies to nondiscriminatory laws only where the law has some sort of discriminatory effect or when judicial intervention is necessary to promote national uniformity and thereby prevent discrimination."<sup>194</sup> The court

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<sup>187</sup> Plaintiffs' Surreply Addressing New United States Supreme Court Decision, at B, Ill. Rest. Ass'n v. City of Chicago, 492 F.Supp. 2d 891 (N.D. Ill. 2007) (No. 06 C 7014), 2007 WL 1973283 ("[T]he Ordinance has nothing to do with health, safety, environmental issues or governmental revenue generation. Nor does it fit into traditional areas of state governmental interest in food regulation since there is no tradition in Illinois of banning, on morality and reputational grounds, food that has already been found safe on the federal level for human consumption."); Plaintiffs' Memorandum, *supra* note 157, at III.A.1-2..

<sup>188</sup> Plaintiffs' Memorandum, *supra* note 157, at III.A.1-2.

<sup>189</sup> *Id.* ("If 39,000 local, county or state government units were free to adopt legislation banning the local sale of products because they did not like something about the perceived political, economic, social or moral conditions under which those products were elsewhere lawfully produced . . . and justified those bans on the ground that local sale presented a local moral concern or impaired the locality's 'reputation'[,] . . . the impact on interstate and foreign commerce could be enormous and devastating.").

<sup>190</sup> *Id.* The plaintiffs also argued that the City could accomplish its objectives through less discriminatory means, such as passing a resolution, advertising, or otherwise educating the public. *Id.*

<sup>191</sup> Ill. Rest. Ass'n v. City of Chicago, 492 F. Supp. 2d 891, 901-05 (N.D. Ill. 2007).

<sup>192</sup> *Id.* at 903.

<sup>193</sup> *Id.* at 901-905.

<sup>194</sup> *Id.* The Court also noted that in the recent *United Haulers* case, the Supreme Court held that *Pike* balancing was required when a law does not discriminate against interstate commerce, but proceeded to focus on whether the law had a disparate impact on out-of-staters. Thus, the court concluded that "*United Haulers*, therefore, is yet another case that recites the *Pike* standard in connection with a facially nondiscriminatory law but, in the same breath, looks to whether the

further held that the existence of the *Pike* test is not an excuse for the court to engage in “general-purpose balancing” and that the court must look for “discrimination rather than for baleful effects.”<sup>195</sup> Thus, the court concluded that without discrimination, economic protectionism, or a compelling need to protect the national economy, an ordinance is not required to be subjected to *Pike* balancing.

Applying this standard, the court held that since the ordinance was not facially discriminatory and the *Pike* balancing test did not apply, the ordinance did not violate the dormant Commerce Clause.<sup>196</sup> Finally, the court recognized that its decision was “in tension with other Supreme Court and Seventh Circuit cases which do not delve into the details of the dormant Commerce Clause” and simply apply the *Pike* balancing test.<sup>197</sup> The court, however, reiterated its conclusion that discrimination is the proper focus of the dormant Commerce Clause and that there was no such discrimination by Chicago in favor of a local market or local producers.<sup>198</sup>

In summary, the court concluded that Chicago’s foie gras ordinance did not discriminate against interstate commerce because Chicago did not engage in economic protectionism, and that with only incidental effects on interstate commerce, the *Pike* balancing test was not applicable and the ordinance was therefore constitutional.

#### IV. Illinois Restaurant Ass’n Was Correctly Decided

*Illinois Restaurant Ass’n* was appealed to the Seventh Circuit Court of Appeals. While the case was rendered moot by the City Council’s repeal of the ordinance, the primary issues on appeal were whether the district court used the correct standard of analysis under the dormant Commerce Clause, whether the district court erred by refusing to apply the *Pike* test, and whether Chicago’s ordinance was constitutional under the *Pike* test.<sup>199</sup> Even though the appeal was never heard by the Seventh Circuit, whether the case was correctly decided has broad implications on the ability of state and local governments to regulate food

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law has any discriminatory effects.” *Id.* at 901-905. See *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authr.*, 127 S.Ct. 1786 (2007).

<sup>195</sup> *Ill. Rest.*, 492 F. Supp. 2d at 904 (quoting *Nat’l Paint & Coatings Ass’n v. City of Chicago*, 45 F.3d 1124, 1131 (7th Cir. 1995), *cert. denied*, 515 U.S. 1143 (1995)).

<sup>196</sup> *Id.* at 905.

<sup>197</sup> *Id.* at 904-05.

<sup>198</sup> *Id.* The Court also justified its holding on policy grounds, stating that it declined the “plaintiffs’ invitation to act as a superlegislature and opine as to the wisdom of the Ordinance.” *Id.*

<sup>199</sup> See Appellate Brief of Appellants Illinois Restaurant Association et al., *Ill. Rest. Ass’n v. City of Chicago*, 492 F.Supp. 2d 891 (N.D. Ill. 2007) (No. 06 C 7014) (appeal filed July 10, 2007) (appeal No 07-2605), 2007 WL 4557433; Brief of Defendant-Appellee City of Chicago, *Ill. Rest. Ass’n v. City of Chicago*, 492 F.Supp. 2d 891 (N.D. Ill. 2007) (No. 06 C 7014) (appeal filed Jul. 10, 2007) (appeal No 07-2605), 2007 WL 5031441.

products like foie gras. A thorough examination of the dormant Commerce Clause and Chicago's foie gras ordinance shows that the district court's holding was correct because A) its legal analysis correctly focused on whether a regulation is discriminatory; and B) even under *Pike*, the ordinance was not discriminatory.

A. *The Correct Focus of Dormant Commerce Clause Analysis is Discrimination*

The district court's refusal to apply the *Pike* balancing test in *Illinois Restaurant Ass'n* is surprising given that most dormant Commerce Clause cases cite the test and apply it in some fashion. However, despite the fact that the court itself recognized that its analysis was "in tension" with other precedent, the court's decision to not apply *Pike* was the correct decision.<sup>200</sup> Instead of applying *Pike*, the district court focused on the question of discrimination.<sup>201</sup> The court's decision to focus on discrimination essentially amounts to a policy choice based on the history of the dormant Commerce Clause and the proper role of the judiciary. The court made the correct decision to focus on discrimination because 1) the traditional two-tier framework was created to guard against discrimination; 2) the *Pike* test is a tool for courts to detect discrimination; 3) a focus on discrimination serves the goal of fostering a national economy; 4) a focus on discrimination properly limits the role of the judiciary; and 5) a recent Supreme Court case shows that discrimination is the proper focus of the dormant Commerce Clause.

1. *The two-tier framework was created to guard against discrimination.*

First, the dormant Commerce Clause, a judicial creation, exists because the Framers granted Congress plenary authority over interstate commerce due to their fear that the states may enact laws that would favor their own interests at the expense of other states.<sup>202</sup> The Framers believed that this type of behavior, or economic protectionism, could result in "economic Balkanization" that would impair the ability of the new union to function and develop as a whole.<sup>203</sup> The prohibition against laws specifically designed to favor in-state interests at the expense of out-of-state interests is the "central rationale" for judicial intervention in the name of the dormant Commerce Clause.<sup>204</sup> This rationale is the source of

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<sup>200</sup> *Ill. Rest.*, 492 F. Supp. 2d at 904-05.

<sup>201</sup> *Id.* at 901-05.

<sup>202</sup> *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994); *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988); *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979).

<sup>203</sup> *See, e.g., Carbone*, 511 U.S. at 390; *Hughes*, 441 U.S. at 325-26 (stating that the Framers gave Congress its plenary authority over interstate commerce because of "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation").

<sup>204</sup> *See, e.g., Carbone*, 511 U.S. at 390.

the Supreme Court's two-tiered approach, which was created because it was a clear method that allowed courts to answer the question of whether a state law discriminates against interstate commerce.<sup>205</sup> Therefore, the judicial framework used to decide dormant Commerce Clause cases should, whenever possible, be interpreted in such a way as to serve the reasons for its existence: guarding against economic protectionism. Thus, interpreting the *Pike* test to apply only when it is necessary to guard against economic protectionism is consistent with the Framers' intent.

2. *The Pike test is a tool to detect discrimination.*

Second, the *Pike* test, as part of the judicial framework used to decide dormant Commerce Clause cases, is simply another method used by courts to detect and guard against unnecessary burdens that a state may impose on interstate commerce as the result of discriminatory motives or conduct. Many courts, however, claim to decide cases under the *Pike* balancing requirements regardless of whether a state has engaged in discrimination.<sup>206</sup> This broad reading of how *Pike* is cited by courts misses the point of why the *Pike* test exists and what question it really helps courts answer: the discrimination, or economic protectionism, question.<sup>207</sup> It is true that, on its face, the test balances state interests against interstate interests even when a law does not discriminate against interstate commerce and has only incidental effects.<sup>208</sup> However, the real purpose of the *Pike* test, and the entire two-tier framework, is to smoke out or identify discriminatory laws, or those laws which, in practice or effect, place state interests above those of out-of-staters.<sup>209</sup> The *Pike* test, therefore, is merely

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<sup>205</sup> See, e.g., *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 87 (1987) ("The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce."); *Cavel Intern., Inc. v. Madigan*, 500 F.3d 551, 554 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 2950 (2008) ("The clearest case of a state law that violates the commerce clause is a law that discriminates in favor of local firms.").

<sup>206</sup> E.g. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 76 (1945).

<sup>207</sup> See *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124 (7th Cir. 1995), *cert. denied*, 515 U.S. 1143 (1995); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986) (arguing that "in movement-of-goods cases the [Supreme] Court is doing nothing but preventing state protectionism, where protectionism is defined in terms of *purposeful* favoring of locals over their foreign competitors. Implicit in this thesis [is the claim that] . . . the Court is engaged in the suppression of purposeful protectionism, [and] . . . that the Court is not engaged in balancing"); see also Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571 (1997) (arguing that "the primary concern in evaluating local regulations ought to be the long-recognized prohibition against resident economic protectionism").

<sup>208</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>209</sup> See *Carbone*, 511 U.S. at 390; *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979); Regan, *supra* note 207, at 1095 ("Protectionist effect is significant evidence on the issue of protectionist purpose; but it is just that, evidence and no more."). Regan has even suggested that Justice Stewart, who wrote the famous *Pike* opinion, failed to apply the test and actually decided the case



another tool for courts to guard against laws that impose such substantial burdens on interstate commerce that the laws are in fact discriminatory. Thus, as simply another tool used to guard against economic protectionism, it is appropriate for a court to refuse to use the tool when it has already determined that a state has not engaged in economic protectionism.

3. *A focus on discrimination protects the national economy.*

Third, a focus on discrimination and economic protectionism is consistent with the Framers' intent to protect and foster a national economy. The Framers' desire to foster a national economy is the source of the oft-stated uniformity policy argument, in which courts justify invalidating a state regulation by asking "[w]hat would happen if all States did the same?",<sup>210</sup> and then stating that if every state acted similarly, their actions would undermine the need for a uniform and cohesive national economy.<sup>211</sup> If a state's regulation could have a detrimental effect on a national economic need for uniformity, especially if duplicated, then at its core, that regulation has a discriminatory effect. The policy argument in favor of a uniform national economy is therefore consistent with an inquiry into discrimination because an inquiry into discrimination could also uncover any potential devastating effects on national uniformity.<sup>212</sup> Thus, an inquiry into discrimination would be sufficient to protect the national economy.

Further, it is important to note that the uniformity argument has typically only been applied to limited areas of the national economy that have a compelling need for uniformity, such as highway regulation,<sup>213</sup> tax,<sup>214</sup> and the national railway.<sup>215</sup> Therefore, a court will typically not invalidate a law that is not discriminatory unless it places a substantial burden on an area of commerce that has a compelling need for uniformity. Additionally, the application of the uniformity argument in cases where there is a compelling need for national uniformity explains why the Court has used *Pike* to invalidate some regulations

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based on the question of economic protectionism. *Id.* at 1209-1221 ("Stewart may think he is balancing; but read as a whole, the opinion strongly suggests that Stewart . . . decides the case by reference to a *per se* rule against a standard protectionist technique. This *per se* rule is better justified by anti-protectionist considerations than by balancing.").

<sup>210</sup> *E.g.* *Am. Trucking Ass'n, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 437 (2005).

<sup>211</sup> *E.g.* *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69 (1987); *Bibb*, 359 U.S. 520; *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-538 (1949) ("This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, . . . has as its corollary that the states are not separable economic units."); *S. Pac. Co.*, 325 U.S. 761.

<sup>212</sup> *See supra* notes 207, 209; *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997) (referring to "the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors").

<sup>213</sup> *E.g.* *Bibb*, 359 U.S. at 520 (conflict in state laws governing truck mud flaps).

<sup>214</sup> *E.g.* *Am. Trucking*, 545 U.S. at 429.

<sup>215</sup> *E.g.* *S. Pac. Co.*, 325 U.S. at 761 (regulation limiting long trains undermined need for uniformity).

that are genuinely non-discriminatory.<sup>216</sup> Although courts applying *Pike* discuss interest balancing, those cases that have used *Pike* to invalidate genuinely non-discriminatory laws often employed the *Pike* test because of and rest their conclusion on a compelling need for national uniformity.<sup>217</sup> This further illustrates that *Pike* is not a tool for a court to engage in general purpose balancing, but rather, another method by which courts address the related policy questions of national uniformity and discrimination.

4. *A focus on discrimination limits the role of the judiciary.*

Fourth, the discrimination inquiry, unlike the *Pike* test, properly limits the role of the judiciary. The existence of dormant Commerce Clause jurisprudence itself is controversial.<sup>218</sup> The proper role of a court becomes even more controversial when a judge, under the *Pike* test, weighs competing interests and burdens. By engaging in this process, courts come dangerously close to overstepping their proper roles and violating separation of powers by acting like super-legislatures and re-trying the wisdom of a state legislature's decision.<sup>219</sup> Further, if *Pike* were applicable to any regulation that had an incidental effect on interstate commerce, it would apply to almost every state regulation that exists because almost every local regulation can affect the national economy in some way. This would allow a court to engage in judicial review of almost any state law that it found unwise under the guise of *Pike* and the dormant Commerce Clause.<sup>220</sup> While it is unlikely that *Pike* will lead to another *Lochner* era,<sup>221</sup> it is possible that a court, when faced with a dormant Commerce Clause challenge, may inadvertently overstep its bounds and re-try the wisdom of a legislature while trying to perform its due diligence under *Pike*. A focus on discrimination,

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<sup>216</sup> See *Gen. Motors*, 519 U.S. at 299 (“[A] small number of our cases have invalidated state laws under the dormant Commerce Clause that appear to have been genuinely nondiscriminatory, in the sense that they did not impose disparate treatment on similarly situated in-state and out-of-state interests, where such laws undermined a compelling need for national uniformity in regulation.”).

<sup>217</sup> See *id.* at 299-306, 310-12.

<sup>218</sup> See *id.* at 312; see also *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S.Ct. 1786, 1799-1803 (2007).

<sup>219</sup> *United Haulers*, 127 S.Ct. at 1798 (holding that arguments in favor of invalidating a law under *Pike* because of burdens on interstate commerce “are invitations to rigorously scrutinize economic legislation passed under the auspices of the police power. There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. We should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause” (citation omitted)).

<sup>220</sup> See *id.*; *Nat’l Paint & Coatings Ass’n v. City of Chicago*, 45 F.3d 1124 (7th Cir. 1995), *cert. denied*, 515 U.S. 1143 (1995) (“Because even ‘local’ activities displace the movement of goods, services, funds, and people, almost every state and local law-indeed, almost every private transaction-affects interstate commerce. . . . If the balancing approach of *Pike* supplied the standard applicable to all laws affecting commerce—that is, to all state and local laws addressing a subject that Congress *could* regulate, if it chose—then judicial review of statutory wisdom after the fashion of *Lochner* would be the norm. Not so, because *Pike* is not universally applicable.”).

<sup>221</sup> See *Lochner v. New York*, 198 U.S. 45, 45 (1905).

however, confines a court's role to that of determining whether economic protectionism exists, a role specifically contemplated by the Framers.<sup>222</sup> Therefore, a court can properly limit its role and avoid judicial legislating by focusing on the question of discrimination.

5. *The Supreme Court has demonstrated that discrimination is the proper focus of the dormant commerce clause.*

Finally, the Supreme Court's recent decision in *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*<sup>223</sup> shows that the current Court believes that the proper focus of dormant Commerce Clause analysis is discrimination. In *United Haulers*, a plurality decision, the Court upheld a New York flow control ordinance because it treated in-state and out-of state private business interests the same and therefore did not discriminate against interstate commerce or engage in economic protectionism.<sup>224</sup> Significantly, the case was decided on the portion of the opinion that addressed the issues of discrimination and economic protectionism.<sup>225</sup> The discussion and application of *Pike* in the decision did not garner enough votes to be a part of the Court's opinion.<sup>226</sup> Thus, by deciding a recent dormant Commerce Clause case solely on the issue of discrimination and not the *Pike* test, the Supreme Court has demonstrated that the heart of a dormant Commerce Clause inquiry is discrimination.

In summary, the district court in *Illinois Restaurant Ass'n* made a controversial and nuanced policy decision to focus on discrimination and to not apply the *Pike* balancing test. Based on the aforementioned policy considerations,<sup>227</sup> the court's focus on discrimination was in accord with the underlying principles of the dormant Commerce Clause. Thus, the court's decision to uphold the Chicago foie gras ordinance because it was not discriminatory was correct because its decision was based on long-standing

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<sup>222</sup> See *supra* Part IV.A.1-2.

<sup>223</sup> 127 S.Ct. 1786 (2007).

<sup>224</sup> *Id.* at 1790-98.

<sup>225</sup> See *id.* Chief Justice Roberts and Justices Souter, Ginsburg, and Breyer joined the opinion in full. Justice Scalia filed a concurring opinion and joined the opinion of the court except for the discussion and application of the *Pike* test. Justice Thomas filed an opinion concurring in the judgment only, and Justice Alito filed a dissenting opinion in which Justices Stevens and Kennedy joined. *Id.*

<sup>226</sup> *Id.* Justice Scalia also specifically declined to join the portion of the court's decision that applied *Pike*, and he criticized the test. *Id.* at 1798-99.

<sup>227</sup> See also Brief of Amicus Curiae Animal Legal Defense Fund, Inc. in Support of the Defendant-Appellee City of Chicago and Affirmance of the District Court's Order, *Ill. Rest. Ass'n v. City of Chicago*, 492 F.Supp. 2d 891 (N.D. Ill. 2007) (No. 06 C 7014) (appeal filed Jul. 10, 2007) (appeal No. 07-2605), available at [http://www.aldf.org/downloads/753\\_briefofamicuscuriaealdfto.pdf](http://www.aldf.org/downloads/753_briefofamicuscuriaealdfto.pdf) (arguing that the district court's decision in *Illinois Restaurant Ass'n* should be affirmed because the City of Chicago could properly codify its community's values regarding the humane treatment of animals, that the district court was correct in not applying *Pike*, and that even under *Pike*, the ordinance was a valid exercise of Chicago's police powers).

policy considerations that form the basis of dormant Commerce Clause jurisprudence.

**B. *Even Under the Pike Test, Illinois Restaurant Ass'n Was Correctly Decided***

The district court's decision in *Illinois Restaurant Ass'n* to not apply *Pike* was correct in light of its careful reading of dormant Commerce Clause policy and precedent. As a practical matter, the court might have also wanted to avoid extended hearings that could have been necessary to prove the ordinance was constitutional under *Pike*, or the district court may have been afraid that the City of Chicago's justifications for the ordinance—the ethical treatment of animals and the reputation of its restaurants—would not have survived *Pike* balancing. However, the ordinance was constitutional even under *Pike*, and the court should have strengthened its holding by applying *Pike's* balancing test. Under *Pike*, a regulation will be upheld unless the burdens of the regulation outweigh any putative local benefits and there is not a less discriminatory method to achieve the same local benefits.<sup>228</sup> The ordinance was constitutional under *Pike* because 1) there was a significant local benefit in combating the unethical treatment of animals; 2) there was a significant local benefit in ensuring Chicago's reputation for fine dining; 3) there was a significant local benefit in protecting the health of humans who consume foie gras; 4) the ordinance placed a minimal burden on interstate commerce and there was no less discriminatory method of regulation; and 5) the balance of these interests proves that the ordinance's burden did not outweigh any putative local benefits.

1. *The unethical treatment of animals.*

The City of Chicago passed its foie gras ordinance in part because of the local benefit of “ensuring the ethical treatment of animals, who are the source of the food offered in our restaurants.”<sup>229</sup> Specifically, Chicago was concerned with “the unethical practices of the care and preparation of the livers of birds” and in particular, the force-feeding methods that are used to produce foie gras.<sup>230</sup> In

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<sup>228</sup> 397 U.S. 137, 142 (1970).

<sup>229</sup> CHICAGO, ILL., MUN. CODE § 7-39-001 (2006) (adopted Apr. 26, 2006), *repealed by* Chicago, Ill., Ordinance 2008-2041 (May 14, 2008).

<sup>230</sup> *Id.* Chicago's concern with the unethical treatment of animals was a proper interest under the dormant Commerce Clause. *See, e.g., Cavel Intern., Inc. v. Madigan*, 500 F.3d 551, 557 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 2950 (2008) (holding that “[s]tates have a legitimate interest in prolonging the lives of animals that their population happens to like” and that “a state is permitted, within reason, to express disgust at what people do with the dead”); *DeHart v. Town of Austin, Ind.*, 39 F.3d 718, 722 (7th Cir. 1994) (“The regulation of animals has long been recognized as part of the historic police power of the States.”); Robert J. Delahunty & Antonio F. Perez, *Moral Communities or a Market State: The Supreme Court's Vision of the Police Power in the Age of Globalization*, 42 HOUS. L. REV. 637, 676 (2005) (“The States' authority to pursue specifically

order to access the weight that should be given to Chicago's animal cruelty justification for passing the regulation, it is necessary to detail the nature and extent of the "unethical practices" that Chicago was concerned with. Foie gras producers assert that fat livers must come from healthy ducks and that it is against their interests to harm the animals.<sup>231</sup> There has been extensive documentation, however, of injuries to force-fed ducks. This evidence indicates that the force-feeding of ducks and geese to produce foie gras may be detrimental to the birds' health and welfare.<sup>232</sup>

First, the force-feeding process causes numerous internal injuries to birds.<sup>233</sup> The regular insertion of a metal force-feeding tube "causes cuts and lesions in the birds' throats and ruptures in their digestive tracts."<sup>234</sup> The repeated insertion of a force-feeding tube to a damaged esophagus, which is common, is painful to a bird.<sup>235</sup> The amount that an injured bird suffers is likely to increase each time it is force-fed.<sup>236</sup> Further, in order to insert the force-feeding pipe, workers must suppress a natural gag reflex from the birds.<sup>237</sup> The suppression of this reflex is stressful and may be painful for the birds.<sup>238</sup> The high-temperature corn based feed that is injected into the birds' esophagi and stomachs can also injure their stomachs and "blow out," or rupture, their

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moral objectives is deeply rooted in the American constitutional tradition. Indeed, it is one of the fundamental features of our federalism.").

<sup>231</sup> DeSoucey, *supra* note 12.

<sup>232</sup> The question of whether the practice of force-feeding is unethical and harmful to birds, forms, in large part, the central factual issue of the foie gras controversy. This Subpart will not attempt to resolve the factual controversy about whether the production of foie gras is cruel. Instead, it will present the type of evidence documenting the way force-feeding harms a bird's welfare that the City of Chicago likely relied on or that supports the City's concern, as well as some competing evidence.

<sup>233</sup> There has been little scientific data published in the United States on the effect of force-feeding. However, the European Union's most authoritative scientific body on farm animal welfare has studied and issued an extensive report on the effects of force-feeding to produce foie gras. The report concluded that many of the industry's current practices create numerous injuries and cause force-fed animals significant harm. See SCIENTIFIC COMM. ON ANIMAL HEALTH & ANIMAL WELFARE, WELFARE ASPECTS OF THE PRODUCTION OF FOIE GRAS IN DUCKS AND GESE 60-65 (Dec. 16, 1998), [http://ec.europa.eu/food/fs/sc/scah/out17\\_en.pdf](http://ec.europa.eu/food/fs/sc/scah/out17_en.pdf) [hereinafter "SCIENTIFIC COMM."].

<sup>234</sup> Cook, *supra* note 14, at 263-64. Force-feeding can also cause painful bruising, lacerations, sores, and organ rupture. Adams, *supra* note 59, at 21.

<sup>235</sup> See HSUS WELFARE REPORT, *supra* note 5, at 3 (reporting that Ian Duncan, Emeritus Chair in Animal Welfare at the University of Guelph, stated that "the regular insertion of a feeding tube down the esophagus several times a day will inevitably lead to damage of the esophagus. When the esophagus becomes damaged, then the painfulness of every force-feeding episode will be exacerbated").

<sup>236</sup> See *id.*

<sup>237</sup> *Id.*; SCIENTIFIC COMM., *supra* note 233, at 35 ("The oropharyngeal area is particularly sensitive and is physiologically adapted to perform a gag reflex in order to prevent fluids entering the trachea. Force-feeding will have to overcome this reflex and hence the birds may initially find this distressing and injury may result.").

<sup>238</sup> See HSUS WELFARE REPORT, *supra* note 5; SCIENTIFIC COMM., *supra* note 233, at 35.

esophagi.<sup>239</sup> Autopsies of force-fed birds also often reveal scar tissue that is the result of injuries sustained because of force-feeding.<sup>240</sup>

Second, although it can be difficult to visibly spot injuries on force-fed birds or discomfort by the animals,<sup>241</sup> reports indicate that the process of force-feeding can create external injuries that may cause visible suffering to the birds. As many as 30-70% of birds used to produce foie gras may suffer from broken bones caused by their diet or poor handling by workers.<sup>242</sup> Many force-fed birds also have difficulty standing, walking, or breathing.<sup>243</sup> These physical difficulties are due to the significant and unnatural expansion of the birds' livers.<sup>244</sup> The expansion of the liver also causes birds' legs to go to the side of their bodies and places stress on their joints.<sup>245</sup> The force-feeding and cramming of birds into overcrowded areas can also cause ulcerated calluses on birds' feet, footsores, an infection called "bumblefoot," and bone and skin disorders.<sup>246</sup>

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<sup>239</sup> See HSUS WELFARE REPORT, *supra* note 5, at 2-3, 5; Videotape: Victims of Indulgence: Force-feeding for Foie Gras (People for the Ethical Treatment of Animals) (on file at the Western State College of Colorado Library) [hereinafter "Victims of Indulgence"]. The large amount of feed pumped into a bird's stomach can cause a rupture of the bird's stomach or esophagus, which leads to a slow and painful death. Engelsman, *supra* note 52, at 362.

<sup>240</sup> See HSUS WELFARE REPORT, *supra* note 5, at 3.

<sup>241</sup> See CARO, *supra* note 11, at 87-108, 230-97. Caro observed pre-force-fed ducks at Sonoma Valley foie gras and wrote that "Did [the ducks] look happy about the force-feeding that was about to take place? No. Did they look particularly fearful or agitated? No. They looked like ducks, big ducks." After viewing the entire force-feeding process at Sonoma Valley, Caro wrote that "I'd expected to see something more dramatic and disturbing. The ducks at the end of the process were large but not Orson Welles obese. I didn't feel great about the limping, lame ones, and I wasn't sure what to make of all that panting, but still, most of the birds appeared to be relatively unaffected by those eight-second-long feedings. The word that came to mind was 'mundane.'" *Id.* at 91-93. Similarly, DeSoucey, who has also visited foie gras farms, did not see any obvious signs of pain or discomfort in force-fed ducks. DeSoucey, *supra* note 12 ("Indeed, my own observations of the force-feeding process at the various foie gras farms I visited in the U.S. and France showed that while the birds disliked being grabbed by their human feeders, they [were] not particularly hurt by the tube being inserted into their esophagi. After a feeding, the duck or goose would shake its head, get a drink of water, and look much as it did before.").

<sup>242</sup> See SCIENTIFIC COMM., *supra* note 233, at 45 ("Different lesions can be observed on carcasses. The most frequent are bone fractures. They occur on wing bones, mainly the humerus."); see also HSUS WELFARE REPORT, *supra* note 5, at 3-4 ("Scientists postulate that the problem of broken bones could be due to changes in homeostasis caused by force-feeding of an abnormal diet, which could affect metabolism of calcium and phosphate and subject birds to osteopathy, 'making their bones more fragile or even more painful.'") (quoting SCIENTIFIC COMM., *supra* note 233, at 44).

<sup>243</sup> See Adams, *supra* note 59, at 21 (stating that it is "difficult for the birds to move comfortably or even walk"); Cook, *supra* note 14, at 263-64; SCIENTIFIC COMM., *supra* note 233, at 34 (reporting that birds with "expanded livers had difficulty in standing and their natural gait and ability to walk were severely impaired"); Storozum, *supra* note 45, at 195-96.

<sup>244</sup> The birds' livers can expand up to ten times their normal size. See Adams, *supra* note 59, at 21; HSUS WELFARE REPORT, *supra* note 5, at 2.

<sup>245</sup> See HSUS WELFARE REPORT, *supra* note 5, at 4; SCIENTIFIC COMM., *supra* note 233, at 34, 61.

<sup>246</sup> See HSUS WELFARE REPORT, *supra* note 5, at 4; SCIENTIFIC COMM., *supra* note 233, at 46; Victims of Indulgence, *supra* note 239.

Third, the force-feeding process causes a number of other diseases and injuries to birds that result in considerable pain and suffering. Injuries to force-fed ducks and geese have included “bowel obstruction; indigestion; tympanism; parasitism; amidostomosis; epomidiostomosis; spiruosis; enteritis; intestinal indigestion; fibrosis of the liver; hypoglycemic coma; [and] bronchial obstruction.”<sup>247</sup> Respiratory disorders are also common, as force-fed ducks and geese sometimes pant excessively after being force-fed.<sup>248</sup> The rapid increase in fat in a bird’s liver during force-feeding also impairs liver function and often causes liver diseases such as hepatic lipidosis<sup>249</sup> or leads to the development of hepatic encephalopathy.<sup>250</sup> The entire process is so detrimental to the health of force-fed birds that the birds have a high mortality rate.<sup>251</sup> Workers at Hudson Valley Foie gras are also paid bonuses at the end of the foie gras process depending on the ducks’ health and quality of the livers produced.<sup>252</sup>

Fourth, the force-feeding process causes ducks and geese significant stress because they are prevented from fulfilling biological physical and social needs.<sup>253</sup>

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<sup>247</sup> HSUS WELFARE REPORT, *supra* note 5 (citation omitted); *see also* SCIENTIFIC COMM., *supra* note 233, at 48 (“Other clinical signs that force fed birds exhibit which are not seen in age matched birds fed ad libitum on a ‘natural’ diet include: loose faeces, wet neck, increased time spent sitting and less time carrying out active behaviours, some aversion to the feeding process, increased incidence of bone fractures and liver lesions at the abattoir.”); Storozum, *supra* note 45, at 195-96 (“[The birds] frequently also suffer perforations and other wounds and infections of the esophagus, asphyxiation from improper tube placement, and secondary effects of the overfeeding, such as liver hemorrhages and the inability to walk.”).

<sup>248</sup> *See* HSUS WELFARE REPORT, *supra* note 5, at 5; SCIENTIFIC COMM., *supra* note 233, at 33, 61-62. Whether panting by birds after force-feeding is to try to relieve pain from the amount of food that has been thrust into their stomachs or is a natural method of heat regulation for the birds is a contested issue between pro and anti foie gras activists. The question does not appear to have a clear answer and more scientific research is needed. *See infra* notes 271, 280.

<sup>249</sup> Hepatic lipidosis is a pathological condition of the liver commonly known as fatty liver disease. HSUS WELFARE REPORT, *supra* note 5, at 2; SCIENTIFIC COMM., *supra* note 233, at 42.

<sup>250</sup> Hepatic encephalopathy is damage to the brain that is caused by toxins in the blood that a healthy liver would normally filter out. *See* HSUS WELFARE REPORT, *supra* note 5, at 2; SCIENTIFIC COMM., *supra* note 233, at 39-42; Storozum, *supra* note 45, at 195.

<sup>251</sup> *See* SCIENTIFIC COMM., *supra* note 233, at 46-48 (finding that “[c]ontinued feeding would almost certainly result in an earlier death” and that the mortality rates of force-fed birds “compare most unfavourably with mortality rates for ducks and geese during normal rearing”); Storozum, *supra* note 45, at 195-96 (“Most would soon die of their afflictions if they were not then immediately slaughtered. In fact, many do not survive to be slaughtered.”). *But see* DeSoucey, *supra* note 12 (“Mortality rates for force-fed ducks and geese are also somewhat higher (varying from 2% to 4%) than those reared solely for meat (around 0.2%) but are no higher, and are often lower, than other poultry operations.” (citations omitted)).

<sup>252</sup> CARO, *supra* note 11, at 103. It has also been reported that some workers have even been paid bonuses for killing under fifty birds in a given time period. *See* HSUS WELFARE REPORT, *supra* note 5, at 5-6; Storozum, *supra* note 45, at 196 n.22; Victims of Indulgence, *supra* note 239.

<sup>253</sup> HSUS WELFARE REPORT, *supra* note 5, at 5 (“Ducks and geese are web-footed birds who primarily live in water. In nature, they are social animals and spend much of their time foraging and maintaining their plumage by bathing and preening. In foie gras production, however, the birds are housed at high densities and prevented from engaging in natural behaviors.”);

During the force-feeding process, many birds are kept in cages that do not allow a bird to turn around or stretch its wings.<sup>254</sup> If pens are used, which is the case in the United States, they may be over-crowded to the point that ducks or geese cannot properly socialize and may injure one another.<sup>255</sup> Force-fed birds may also be kept in almost complete darkness for most of their lives except for the feeding period during force-feeding.<sup>256</sup> Ducks have strong biological instincts and need to spend a significant amount of their time in the water and are prevented from doing so for the majority or entirety of their adult lives.<sup>257</sup> Ducks and geese also have elaborate social rituals which they are prevented from engaging in due to their isolation and control during the force-feeding process.<sup>258</sup>

Fifth, birds may fear the process of force-feeding and the pain that it causes them. During force-feeding, a worker will often have to use his legs to restrain a bird's body and his hands to hold the bird's neck and mouth open in order to thrust a long pipe, approximately 20-30 centimeters long, down the throat of the bird.<sup>259</sup> While there is no conclusive scientific evidence, studies show that force-feeding causes fear, birds sometimes avoid the pen in which they are force-fed, and birds may even recognize and avoid the worker who has force-fed them.<sup>260</sup> Additionally, the speed at which corn feed is pumped into many birds' esophagi and stomachs can result in surplus feed coming back up a bird's

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SCIENTIFIC COMM., *supra* note 233, at 27 ("Animals have some needs which can only be fulfilled if they are allowed to perform a particular behaviour").

<sup>254</sup> Adams, *supra* note 59, at 21 ("Factory-farmed birds in foie gras production are often intensively confined in filthy warehouses, crammed in barren pens or cages so small they cannot even turn around or spread their wings."); SCIENTIFIC COMM., *supra* note 233, at 55 ("In the case of force-feeding, the animal cannot turn around in its cage, stand in a normal position, preen normally or spread its wings.").

<sup>255</sup> See Victims of Indulgence, *supra* note 239.

<sup>256</sup> SCIENTIFIC COMM., *supra* note 233, at 21, 35, 64.

<sup>257</sup> *Id.* at 63-64; Victims of Indulgence, *supra* note 239; see also HSUS WELFARE REPORT, *supra* note 5, at 5 ("Birds raised for foie gras are unable to forage for food and are denied water in which to swim and clean their plumage. The absence of opportunities to engage in these instinctual behaviors is likely to cause frustration and stress."). *But see* CARO, *supra* note 11, at 90 (writing that foie gras producers do not allow birds to swim in ponds because ponds are ordinarily not made available in animal agriculture since they are a source of disease and bacteria that could harm the birds).

<sup>258</sup> In a natural setting, geese form family groups, mate for life, protect their young from predators, watch over their young who cannot fly, migrate large distances, have a lifespan of twenty to twenty-five years, have a strong affection for their flock, and will try to help a goose that is sick, injured, or wounded. Engelsman, *supra* note 52, at 363; Victims of Indulgence, *supra* note 239.

<sup>259</sup> See HSUS WELFARE REPORT, *supra* note 5, at 1; Victims of Indulgence, *supra* note 239.

<sup>260</sup> See HSUS WELFARE REPORT, *supra* note 5, at 3 ("Behavioral evidence suggests that force-feeding causes fear."); see also SCIENTIFIC COMM., *supra* note 233, at 33, 63 (finding that "[s]ince the feeding pen was attractive to the birds which were not force-fed, the results indicate that the force-feeding pen was not attractive to the force fed ducks and that the procedure might involve an aversive component" but also noting that there is "no conclusive scientific evidence as to the aversive nature of the force feeding process").



esophagus.<sup>261</sup> A bird will often inhale or choke on the extra feed, which causes the bird stress.<sup>262</sup>

Thus, birds that are force-fed can suffer from routine stress, fear, physical injury, liver disease, a number of other internal or external injuries, and high mortality rates.<sup>263</sup>

On the other hand, Michael Ginor, the founder of Hudson Valley Foie Gras in New York, and other foie gras producers like him, have argued that “[w]aterfowl are not humans, however, and a practice that could cause us grave harm or death has little effect on a goose or duck. The bird’s anatomy is fundamentally different from ours and reflects their natural environment and their twice-annual long-distance migrations.”<sup>264</sup> While a bird will naturally gorge before a migration and somewhat expand its liver on its own, the justification that the production of foie gras merely takes advantage of this natural behavior and causes little harm to birds is not supported by scientific research. Ginor is correct that as a species, birds migrate and gorge on their own before migrations, which results in the expansion of their livers.<sup>265</sup> This means that a bird generally is somewhat naturally adaptable to the process of force-feeding and capable of storing the large amounts of food it is fed during the process.<sup>266</sup> A mulard duck, however, is less likely to be naturally adaptable to storing food before a migration because it is cross-bred with a tropical species of duck that is non-migratory.<sup>267</sup> Further, the quantity of food force-fed to a bird is much larger than a bird would voluntarily consume.<sup>268</sup>

The most credible scientific research also indicates that despite whatever natural tendencies birds have to gorge before migration, the process of force-feeding goes beyond merely taking advantage of birds’ migratory tendencies and causes significant harm to the animals’ welfare. The Scientific Committee on Animal Health and Animal Welfare, which is the European Union’s most authoritative scientific body on farm animal welfare, conducted a study on foie

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<sup>261</sup> Victims of Indulgence, *supra* note 239.

<sup>262</sup> *See id.*

<sup>263</sup> HSUS WELFARE REPORT, *supra* note 5, at 1 (citations omitted); SCIENTIFIC COMM., *supra* note 233, at 62 (finding that the “effects of force-feeding are lethal when the procedures are continued”).

<sup>264</sup> GINOR ET AL., *supra* note 4, at 81.

<sup>265</sup> SCIENTIFIC COMM., *supra* note 233, at 26.

<sup>266</sup> *Id.* at 26, 31.

<sup>267</sup> *Id.* at 26 (“[W]hilst the domestic goose might well be adapted to store food before migration, it is less likely that a cross between the domestic duck and the Muscovy duck, the Mulard, has such a potential for food. These hybrids do accumulate fat in the liver when caused to have a high food intake but the biological origins of this are unclear.”).

<sup>268</sup> *Id.* at 61 (“The amount of food fed during each force feeding is considerably more than normal intake and is the same as that recorded as being voluntarily eaten by ducks after being deprived of food for 24 hours. However, as the procedure is repeated 2-3 times a day, the quantity of energy rich food (maize) which the birds are forced to ingest during the two or three weeks of force feeding is much greater than that which the birds would eat voluntarily. If force feeding is stopped, the birds greatly reduce their food intake for several days.”).

gras production in 1998 that totaled over eighty-five pages.<sup>269</sup> The study concluded that under current production methods, force-feeding “is detrimental to the welfare of the birds.”<sup>270</sup> The Scientific Committee’s conclusion has not ended the factual debate about whether the production of foie gras is unethical. Indeed, there are research gaps left open by the report and differences between the birds studied in the report and current production methods that are worth considering.

The Scientific Committee’s report recognizes that little scientific research has been conducted on foie gras and that while many of its findings were cause for concern, those results were often not conclusive and required further research.<sup>271</sup> For example, the Scientific Committee noted that the evaluation of an animal’s welfare is difficult because of the lack of consensus about how animals feel or experience pain.<sup>272</sup> Also, a bird’s liver condition during force-feeding may be pathological<sup>273</sup> and liver function is impaired to the point that if force-feeding would continue, more significant injury or death could result. However, the Committee recognized that if force-feeding was stopped, the liver’s condition was reversible.<sup>274</sup> Additionally, the birds studied by the Committee were not always raised in the same conditions as birds in the United States. Most of the ducks studied by the report were kept in individual cages during force-feeding,<sup>275</sup> unlike the group pens in which ducks in the United States are kept.<sup>276</sup>

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<sup>269</sup> See generally SCIENTIFIC COMM., *supra* note 233. The exact number of pages was 89. *Id.*

<sup>270</sup> *Id.* at 65; see also Adams, *supra* note 59, at 21 (“Indeed, birds used for foie gras are among the most abused animals in the world of factory farming today.”).

<sup>271</sup> Questions about foie gras production that concerned the panel but could not be conclusively proven to harm the birds’ welfare or required further research included whether birds avoid the person who force-feeds them and the significance of this avoidance, whether the more frequent panting observed by birds who are force-fed causes pain or stress, the frequency of a bird’s inability to stand or of joint damage, and whether the hormone corticosterone can provide indications about a bird’s stress level caused by force-feeding. SCIENTIFIC COMMITTEE, *supra* note 233, at 4, 34-36, 38-44, 58, 63.

<sup>272</sup> *Id.* at 12 (stating that a “problem in the evaluation of animal welfare is the lack of knowledge of how animals experience, for example, the states of disease, conflict or frustration” and that “many agree that welfare particularly concerns what an individual animal feels, but think that the techniques to measure feelings are not very well developed at the present time”).

<sup>273</sup> Pathological means a liver that is diseased, or “a body condition in which there are malfunctioning organs.” *Id.* at 4, 34, 38-44 (“There is a general consensus that such diseases lead to suffering.”).

<sup>274</sup> *Id.* at 38-44.

<sup>275</sup> Approximately 80% of the ducks studied by the Committee were kept in individual cages during force-feeding. *Id.* at 55.

<sup>276</sup> See *supra* Part I.B. The Scientific Committee was particularly concerned with the use of individual cages for the birds, which did not provide them with an opportunity to move or turn around. The Committee recommended eliminating the use of such cages, which are still used in France. SCIENTIFIC COMM., *supra* note 233, at 19-23, 63-64, 68. The difference between the birds in individual cages studied by the Committee and birds in pens in the United States should be taken into account when considering the impact of the Committee’s findings. This difference in housing for the force-feeding pen may indicate that fewer injuries occur to the birds in the United States because they are not kept in small, individual wire cages. While no evidence exists concerning

The Scientific Committee stopped short of recommending a ban on force-feeding, but still concluded that the process is harmful to the birds' welfare.<sup>277</sup>

Since the release of the Scientific Committee's report, French researcher Daniel Guémené, along with several other co-authors, has conducted studies that contradict the Committee's claims and refute arguments that force-feeding causes birds stress.<sup>278</sup> Guémené argues that the debate over foie gras has been characterized by emotion and that "[o]pponents of foie gras refer mainly to personal feelings and observations rather than from experimental approaches."<sup>279</sup> Guémené's research finds that ducks pant as way of controlling heat and not as an expression of stress,<sup>280</sup> ducks' livers are not diseased because the fatty-liver condition is fully reversible if force-feeding is stopped,<sup>281</sup> and that corticosterone hormone levels in birds show no increase in stress due to force-feeding.<sup>282</sup> Guémené's report ultimately concludes that scientific data does not support the Scientific Committee's conclusion that force-feeding is "is detrimental to the welfare of the birds."<sup>283</sup>

Guémené's research, however, has been criticized by animal protection activists because he is employed by the INRA, a research agency of the French

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the impact of this difference, the difference is likely small because the basic process of force-feeding in both countries remains the same. Even if physical injuries such as broken bones and foot problems that are associated with individual cages are significantly lessened, walking problems and internal injuries to the birds' livers associated with force-feeding are likely to remain.

<sup>277</sup> SCIENTIFIC COMM., *supra* note 233, at 65, 67-68.

<sup>278</sup> See Daniel Guémené, Jean-Michel Faure, & Gérard Guy, *Is There Avoidance of the Force Feeding Procedure in Ducks and Geese?*, 50 ANIMAL RES. 157 (2001); Daniel Guémené & Gérard Guy, *The Past, Present and Future of Force Feeding and "Foie Gras" Production*, 60 WORLD'S POULTRY SCI. J. 211 (2004) [hereinafter Guémené et al., *Past and Future*]; Daniel Guémené, Guy Gérard, Servière Jacques, & Jean-Michel Faure, *Force Feeding: An Examination of Available Scientific Evidence* (2006), [http://www.artisanfarmers.org/images/Foie\\_Gras\\_Study\\_by\\_Dr.\\_Guemene.pdf](http://www.artisanfarmers.org/images/Foie_Gras_Study_by_Dr._Guemene.pdf) [hereinafter Guémené et al., 2006 Summary].

<sup>279</sup> Guémené et al., 2006 Summary, *supra* note 278, at 1.

<sup>280</sup> *Id.* at 2-3 ("Panting in ducks, which frequency is increased by the end of force-feeding period . . . strikes many visitors of a force-feeding operation and is often misinterpreted as an indicator of discomfort. Panting originates from a thermo-regulatory reflex. Birds have no sudoriferous glands and their capacity to eliminate extra heat through contact with the air is limited by the insulating properties of their plumage. Thus, they open their beaks and pant to eliminate the latent heat associated with water losses. Panting constitutes an effective way 'to burn' excessive calories.").

<sup>281</sup> *Id.* at 4-5.

<sup>282</sup> *Id.* at 1-2. In Guémené's research, birds force-fed in individual cages showed no increase in corticosterone hormone levels. Birds force-fed in pens showed an increase only during the first feeding, which Guémené attributed to the handling of the ducks, not the force-feeding itself. *Id.*

<sup>283</sup> SCIENTIFIC COMM., *supra* note 233, at 65, 67-68; Guémené et al., 2006 Summary, *supra* note 278, at 6 ("That statement, while clearly taken for granted by opponents of foie gras, was based on the very limited amount of scientific literature available at the time and is not supported by the extensive scientific experimentation done in the intervening years.").

government.<sup>284</sup> France's foie gras industry is responsible for over 80% of the world's production of foie gras.<sup>285</sup> Guémené's research was also partially funded by the Comité Interprofessionnel des Palmipèdes à Foie Gras, which is the French foie gras producers' association.<sup>286</sup> French animal rights activist Antoine Comiti has written a 270 page book detailing the inadequacy of Guémené's studies, analyzing internally conflicting data in the studies, refuting Guémené's conclusions, and stating that Guémené's studies were "commissioned by foie gras producers, with the express goal of 'creating a scientific argument in favor of foie gras production.'"<sup>287</sup> Former members of the INRA and the Scientific Committee have also criticized Guémené's findings as biased and flawed because they focus on hormone levels to measure stress, which are inaccurate indicators of stress or an animal's welfare.<sup>288</sup>

It is unclear whether Guémené's studies or the Scientific Committee's report were considered by the City of Chicago. Both sets of research should be considered by legislators. The Scientific Committee report, however, is more credible because there are clear conflicts of interest in the funding of Guémené's work and his findings may be questionable. While there apparently is no clear-cut scientific conclusion about whether the production of foie gras is cruel, no such clear-cut answer is necessary for a legislature to form public law. Legislatures routinely weigh competing sets of facts when forming public policy,

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<sup>284</sup> Guémené is employed by the French National Institute for Agriculture Research, which is known as the INRA. The INRA is a French research institute that lists "producing and disseminating scientific knowledge" as one of its primary goals. See INRA, [http://www.international.inra.fr/the\\_institute/a\\_brief\\_overview](http://www.international.inra.fr/the_institute/a_brief_overview) (last visited May 28, 2009).

<sup>285</sup> Guémené et al., *Past and Future*, *supra* note 278, at 216.

<sup>286</sup> Known as CFROG, the organization's "sole goal" is to increase the production of foie gras. Yves Miserey, *Foie Gras: Debating the Suffering of Ducks*, LE FIGARO, Dec. 21, 2006, at 12.

<sup>287</sup> See StopGavage.com, French Scientists to the Rescue of Foie Gras: A Bit of Science, a Lot of Bad Faith, <http://www.stopgavage.com/en/docs/fichier.php?nom=INRA-foie-gras-EN.pdf> (last visited May 28, 2009) (citation omitted).

<sup>288</sup> For example, Robert Dantzer, a former member of the INRA and one of the authors of the Scientific Committee report, characterized Guémené's work as "pseudo science and opportunistic research driven by researchers reared in the field of Animal Production." Herve Morin, *INRA Accused of Connivance with the Foie Gras Industry*, LE MONDE, Dec. 30, 2007, at 7. Dantzer has also said that the "methodology and interpretation" in Guémené's work is flawed because it relies on hormone levels to measure stress. Dantzer says that the "hormonal system is very adaptable, and it can show adaptation over time[.] This doesn't mean that there is no stress. It just means that the system is adapting, that's all. It doesn't mean that the animal is not suffering any pain . . . You have to keep in mind that we have no biochemical measure of stress in any animal species, including human beings." Further, American animal rights activist and Farm Sanctuary co-founder Gene Baur, writing about a 2004 study by Guémené, said that the article has "no objective validity because it was commissioned" by CIFO. CARO, *supra* note 11, at 170-71. Guémené, in turn, has defended his findings linking hormone levels to stress and has defended the funding of his work, stating that it is routine for French research to be partially financed by the government. *Id.*

and it is the proper role of a legislature to fashion laws by considering and balancing different sets of facts, social norms, and moral considerations.<sup>289</sup>

In the case of foie gras, the most credible scientific report available, despite its shortcomings, concluded that the production of foie gras “is detrimental to the welfare of the birds.”<sup>290</sup> There is also substantial scientific documentation of how force-feeding can injure birds and harm their welfare. That documentation includes evidence that force-fed birds suffer from stress, fear, and “a number of significant welfare problems, including frustration of natural behaviors, injury, liver disease, lameness, diseases of the respiratory and digestive tracts, and high rates of mortality.”<sup>291</sup> Thus, since credible evidence shows that the production of foie gras may cause extraordinary pain and suffering and is detrimental to the health of animals, the City of Chicago could have received a substantial local benefit from “ensuring the ethical treatment of animals” by banning the sale of a product of force-feeding in Chicago’s restaurants.

## 2. *The reputation of Chicago’s restaurants.*

In addition to Chicago’s interest in ensuring the ethical treatment of animals, the City of Chicago enacted its foie gras ordinance to protect the

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<sup>289</sup> The fact that a legislature ultimately chooses to pass a law to address a concern and the particular method chosen to address a concern does not impact the constitutionality of a legislature’s action. *See Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1148-49 (2009) (“Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action. . . . This limitation ‘is founded in concern about the proper-and properly limited-role of the courts in a democratic society.’”) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)); *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 825 F.2d 367, 370 (11th Cir. 1987) (“[G]overnmental bodies [have] wide latitude in enacting social and economic legislation; the federal courts do not sit as arbiters of the wisdom or utility of these laws.”); *Furman v. Georgia*, 408 U.S. 238, 382-83 (1972) (Burger, J., dissenting) (“[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.”).

<sup>290</sup> SCIENTIFIC COMM., *supra* note 233, at 65, 67-68. Further, in 2008, the Pew Commission on Industrial Farm Animal Production recommended an end to the practice of force-feeding to produce foie gras. PEW COMM. ON INDUSTRIAL FARM ANIMAL PRODUCTION, PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA 85 (Apr. 29, 2008), [http://www.ncifap.org/\\_images/PCIFAPFin.pdf](http://www.ncifap.org/_images/PCIFAPFin.pdf). The Pew report is the result of a two and a half year independent study of agriculture’s impact on public health, the environment, farms, and animal welfare. The report’s researchers “represent diverse backgrounds and perspectives and come from the fields of veterinary medicine, agriculture, public health, business, government, rural advocacy and animal welfare.” *See* Pew Commission on Industrial Farm Animal Production, <http://www.ncifap.org/about/> (last visited May 28, 2009). The American Veterinary Medical Association has declined to take a definitive stance on foie gras production. *See* AM. VETERINARY MEDICAL ASS’N, WELFARE IMPLICATIONS OF FOIE GRAS PRODUCTION (Sept. 24, 2007), [http://www.avma.org/reference/backgrounders/foie\\_gras\\_bgnd.pdf](http://www.avma.org/reference/backgrounders/foie_gras_bgnd.pdf).

<sup>291</sup> HSUS WELFARE REPORT, *supra* note 5, at 1 (citations omitted); SCIENTIFIC COMM., *supra* note 233, at 62 (finding that the “effects of force-feeding are lethal when the procedures are continued”). The Scientific Committee also found that “there is good evidence that liver structure and function that would be classified as normal is severely altered and compromised in force fed ducks and geese.” *Id.* at 48.

reputation of the City's restaurant industry.<sup>292</sup> In the ordinance, the City noted that Chicago is "home to many famous restaurants" and that "[m]illions of people visit Chicago every year."<sup>293</sup> The City stated that the issue of the unethical treatment of animals in the production of foie gras has received considerable attention by the media and that visitors to Chicago "have come to expect, and rightfully deserve, the highest quality in resources, service and fare."<sup>294</sup> The City then concluded that by banning the sale of a product in its restaurants that is produced through animal cruelty, the City would be able to continue to offer the best possible dining experiences.<sup>295</sup> In other words, the City of Chicago determined that the continued sale of foie gras in its restaurants could harm the City's reputation as a destination for fine dining and the overall reputation of Chicago's restaurant industry.

The decision by the City of Chicago to protect a local industry that attracts "[m]illions" is intended to produce a substantial local benefit—the preservation and enhancement of a significant local industry. This type of policy decision by a state or local legislature is entitled to substantial deference.<sup>296</sup> The weight of the City's stated benefit that it was seeking to gain by enacting the ordinance—the protection of the City's reputation—is made more significant by the wealth of information now available about the cruelty involved in the production of foie gras.<sup>297</sup> Further, the City's apparent recognition that the media was disseminating this information, which could have harmed the reputation of Chicago and its restaurants, makes the putative local benefit even more significant. Finally, the legitimacy and weight of Chicago's interest in the reputation of its restaurants is bolstered by the fact that the Supreme Court has recognized that a state may enact legislation to promote the reputation of a local industry.<sup>298</sup>

Thus, the City of Chicago could have received a substantial local benefit from the protection of Chicago and its restaurants from negative information disseminated by the media about the cruel practices used to produce foie gras.

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<sup>292</sup> CHICAGO, ILL., MUN. CODE § 7-39-001 (2006) (adopted Apr. 26, 2006), *repealed by* Chicago, Ill., Ordinance 2008-2041 (May 14, 2008).

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* For proof of the amount of media interest in the sale of foie gras, see *supra* note 18.

<sup>295</sup> CHICAGO, ILL., MUN. CODE § 7-39-001 (2006) (adopted Apr. 26, 2006), *repealed by* Chicago, Ill., Ordinance 2008-2041 (May 14, 2008).

<sup>296</sup> See *Illinois Gamefowl Breeders Ass'n v. Block*, 75 Ill. 2d 443, 453 (Ill. 1979) ("Once the legislature determines that a problem exists and acts to protect and promote the general welfare of its citizens, the legislation is presumed to be a valid exercise of the State's police power.").

<sup>297</sup> See *supra* Part IV.B.1.

<sup>298</sup> See *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 99-100 (1984) (recognizing that a state may enact laws to promote reputational interests so long as the laws do not amount to economic protectionism); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970) (discussing that the State's purpose was "to protect and enhance the reputation of growers within the State" and that this purpose was "surely legitimate").

3. *The health of humans who consume foie gras.*

Another distinct potential benefit of Chicago's ordinance is the protection of the health of Chicago citizens who could consume foie gras in restaurants.<sup>299</sup> Foie gras is a product that some have considered dangerous to the health of those who consume it.<sup>300</sup> Since the purpose of force-feeding is to greatly enhance the fat content of a bird's liver, many birds' livers also become infected or diseased.<sup>301</sup> The force-feeding of birds causes a pathological condition in livers that results in abnormally large quantities of fat, which is what gives foie gras its distinctive taste.<sup>302</sup> Further, the livers of force-fed birds that are used to make foie gras have been diagnosed as having hepatic lipidosis (fatty liver disease), or contributing to the development of hepatic encephalopathy.<sup>303</sup>

Foie gras may also contain harmful pathogenic proteins that could be transferable by oral ingestion.<sup>304</sup> Scientists report that foie gras is "contaminated" with these proteins, and that when the same proteins were fed to mice, the mice developed dangerous clumps of the proteins, which are associated with Alzheimer's, Parkinson's, and rheumatoid arthritis.<sup>305</sup> Similarly, the consumption of foie gras by humans may lead to an increased risk of the same conditions.<sup>306</sup> Also, despite the fact that the United States Department of Agriculture has approved foie gras for consumption, the Humane Society of the United States has petitioned New York to label foie gras as an "adulterated" food product based on research that the product is diseased.<sup>307</sup> Thus, although the risks of

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<sup>299</sup> In evaluating the constitutionality of an ordinance under *Pike*, a court is not limited to a legislature's stated justifications for passing a law. A court may properly consider all *putative*, or all potential benefits that could be attributed to the law. See *Pike*, 397 U.S. at 141-43.

<sup>300</sup> See Erika Gebel, *Is Foie Gras a Health Hazard?*, PHILADELPHIA INQUIRER, June 25, 2007, at F1.

<sup>301</sup> See *supra* Part IV.B.1; *supra* notes 247, 249-50 and accompanying text.

<sup>302</sup> See HSUS WELFARE REPORT, *supra* note 5, at 2.

<sup>303</sup> See *supra* Part IV.B.1; *supra* notes 247, 249-50 and accompanying text.

<sup>304</sup> See Alan Solomon et al., *Amyloidogenic Potential of Foie Gras*, 104 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA 10998 (June 2007) ("[W]e report that commercially available duck- or goose-derived foie gras contains birefringent congophilic fibrillar material composed of serum amyloid A-related protein that acted as a potent AEF in a transgenic murine model of secondary (amyloid A protein) amyloidosis. When such mice were injected with or fed amyloid extracted from foie gras, the animals developed extensive systemic pathological deposits. These experimental data provide evidence that an amyloid-containing food product hastened the development of amyloid protein A amyloidosis in a susceptible population. On this basis, we posit that this and perhaps other forms of amyloidosis may be transmissible, akin to the infectious nature of prion-related illnesses.").

<sup>305</sup> See *id.*; see also Gebel, *supra* note 300.

<sup>306</sup> See Solomon et al., *supra* note 304; Jennifer Warner, *Healthy Reasons to Forgo Foie Gras: Study: Eating Foie Gras May Raise Risk of Alzheimer's, Diabetes, and Other Diseases*, WebMD, June 20, 2007, <http://www.webmd.com/food-recipes/news/20070620/healthy-reason-to-forgo-foie-gras> (last visited May 28, 2009).

<sup>307</sup> An "adulterated" food product in New York is a term usually applied to "food like rotten or mislabeled beef." See Anthony Ramirez, *Citing Treatment of Fowl, Groups Urge State to Ban Foie Gras*, N.Y. TIMES, June 22, 2006, at B1.

eating foie gras are unclear, scientific research shows that it could pose a health risk to humans who consume it. Chicago's ordinance therefore had the large putative benefit of protecting the health of Chicago citizens who could consume foie gras in restaurants.

4. *Burden on interstate commerce.*

In stark contrast to the importance of Chicago's putative local interests, the foie gras industry in the United States is small and relatively unimportant when compared to the overall size of the poultry industry. The production and distribution of foie gras in the United States has a minuscule impact on the industry and trade of poultry in the United States.<sup>308</sup> The Chicago foie gras market represents an even smaller portion of the entire U.S. foie gras industry.<sup>309</sup> The largest probable effect of Chicago's ordinance was that it would chip away at a portion of foie gras producers' profits.<sup>310</sup> The ordinance also did not regulate or increase the price of the production of foie gras in other states.<sup>311</sup> Further, despite some concern that the ordinance would harm Chicago's economy,<sup>312</sup> during the two years of its existence, there was little or no evidence documenting any significant economic effect of the ordinance on the producers of foie gras, the overall poultry industry, Chicago's economy, or the national economy.

The absence of any significant economic effects from the ordinance is due in part to the fact that the ordinance was not strictly enforced and was disregarded by many Chicago restaurants.<sup>313</sup> If the ordinance had been more strictly enforced, it could have created a more tangible effect. However, any successfully enforced ordinance will produce some economic effect. The relevant question is how large of a burden on interstate commerce that economic effect creates.<sup>314</sup> Even if Chicago's ordinance had been strictly enforced, it would have only decreased profits in some restaurants in Chicago and parts of the foie gras industry, itself a small fraction of the country's much larger poultry industry.

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<sup>308</sup> See *supra* Part I.C.

<sup>309</sup> Notably, foie gras was not even considered a full-fledged industry when Chicago began debating the product's merits. See *supra* note 80.

<sup>310</sup> See *Ill. Rest. Ass'n v. City of Chicago*, 492 F. Supp. 2d 891, 899 (N.D. Ill. 2007).

<sup>311</sup> *Id.*

<sup>312</sup> The Artisan Farmers Alliance and Illinois Restaurant Association predicted that Chicago's ordinance would have a large negative impact on Chicago's restaurant industry and economy. This prediction, however, was not credible even when it was released due to the fact that it was produced by the foie gras industry itself and contained somewhat inconsistent, unverifiable estimates of the ordinance's effect. See Press Release, Chris Robling & Andrew Ariens, Artisan Farmers Alliance, City Council Foie Gras Ban Challenged: Unconstitutional Ban Costs City \$18 million in Lost Business and Tax Revenues (Aug. 23, 2006), available at <http://www.artisanfarmers.org/foiegrasinthenews/foiegrasbanchallenged.html> (claiming that the ban would cause Chicago to lose "\$18 million of restaurant business, tax revenues, tips and related sales" but also stating that restaurants would lose approximately "\$6.6 million annually").

<sup>313</sup> See *supra* notes 97-98 and accompanying text.

<sup>314</sup> *Pike v. Bruce Church*, 397 U.S. 137, 140-41 (1970).



Therefore, since the ordinance only detracted from a portion of the profits in an industry that represents an insignificant portion of the country's overall poultry industry, any incidental effects of the ordinance on interstate commerce were extremely minimal. Additionally, the City exercised extreme legislative discretion by only banning the sale of foie gras in restaurants.<sup>315</sup> Foie gras was still available for consumption by the citizens of Chicago through online orders or specialty stores. The City of Chicago therefore employed the least discriminatory means possible to achieve the ordinance's benefits.

5. *Balancing the interests.*

The City of Chicago's putative local benefits from its foie gras ordinance were ensuring the ethical treatment of animals, protecting the reputation of the City and its restaurant industry, and protecting the health of its citizens from a potentially dangerous product. Each individual rationale for enacting the ordinance was supported by scientific research and had strong potential benefits for the citizens of Chicago. Accordingly, each reason should be given significant weight. Cumulatively, the benefits formed compelling justifications for the enactment of the ordinance. In comparison, the foie gras industry in the United States is a minor industry that has little effect on the United States's overall poultry industry or economy. The imposition of a ban on only one point of access to the product in one market in the country had a negligible effect on interstate commerce.<sup>316</sup> Thus, the ordinance's burden on interstate commerce did not clearly outweigh any putative local benefits and the ordinance was constitutional even under the *Pike* test.

## V. The Future

The *Illinois Restaurant Ass'n* case represents the first constitutional challenge to a foie gras regulation in the United States and is the first federal case to uphold the legitimacy of this type of law. The impact of the court's holding extends beyond that of Chicago's foie gras ordinance and A) teaches important lessons about how to enact constitutional foie gras ordinances; B) serves as an indicator for the constitutionality of future foie gras legislation; C) informs the debate about the political viability of future foie gras legislation; and D) sheds light on the potential of foie gras legislation that is currently pending in other cities and states.

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<sup>315</sup> See CHICAGO, ILL., MUN. CODE § 7-39-001 (2006) (adopted Apr. 26, 2006), *repealed by* Chicago, Ill., Ordinance 2008-2041 (May 14, 2008).

<sup>316</sup> See *Cavel Intern., Inc. v. Madigan*, 500 F.3d 551, 557 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 2950 (2008) (holding that a local government "is permitted to balance its interest in [animals'] welfare against the other interests of its (human) population; and it is also permitted to take one step at a time on a road toward the humane treatment of our fellow animals").

### A. *Lessons Learned*

The court's decision in *Illinois Restaurant Ass'n* points towards several key issues that are likely to affect whether other similar foie gras laws are constitutional. First, the court in *Illinois Restaurant Ass'n* approved of the City of Chicago's motivations for banning foie gras, which were ensuring the ethical treatment of animals and protecting the reputation of a local government and a local industry.<sup>317</sup> Noticeably, however, the City of Chicago provided little detail in its ordinance about how it reached its conclusions about foie gras, what the potential benefits of the regulation would be, or what the regulation's effect on intrastate and interstate commerce would be.<sup>318</sup> Perhaps this explains why the court avoided *Pike* and its interest-balancing test. The court may have feared that the lack of legislative findings made the law more susceptible to challenge and less likely to survive under the test. However, those fears would have been unfounded because the *Pike* test measures putative, not actual, benefits.<sup>319</sup> Regardless, the court in *Illinois Restaurant Ass'n* still held that the City of Chicago's rather vague conclusions were sufficient to pass constitutional muster.<sup>320</sup> This indicates that if another foie gras law were challenged in court, almost any stated conclusion about foie gras or the potential benefits of a law by a local legislature may be enough to sustain it against such a challenge.

Second, the court's reluctance to apply *Pike*, despite its conclusion that the City's ordinance was constitutional, suggests that legislators who wish to pass and protect similar laws from challenges should make explicit findings about their reasons for regulating or banning foie gras. Legislative findings should include information and reasons that the legislature relied on in passing the law, anticipated benefits of the law, and the law's effect on intrastate and interstate commerce. If a legislature decides to pass a foie gras law based on animal cruelty concerns, like the City of Chicago did, it should clearly state its reasons for doing so and make specific conclusions about the cruelty involved in the production of foie gras and its effect on the local government or population. The more specific and extensive a legislature's findings are, the more hesitant a court will be to overturn the political will of another co-equal branch of the government.<sup>321</sup>

Third, a court will be more likely to uphold a law regulating or banning foie gras if it is narrowly tailored to address local interests or a local concern. The City of Chicago detailed its concern for the reputation of the City and its restaurant industry as a destination for fine dining that millions of people visit

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<sup>317</sup> See *Ill. Rest. Ass'n v. City of Chicago*, 492 F. Supp. 2d 891, 901-05 (N.D. Ill. 2007).

<sup>318</sup> See CHICAGO, ILL., MUN. CODE § 7-39-001 (2006) (adopted Apr. 26, 2006), *repealed by* Chicago, Ill., Ordinance 2008-2041 (May 14, 2008).

<sup>319</sup> *Pike*, 397 U.S. at 141-43.

<sup>320</sup> *Ill. Rest.*, 492 F. Supp. 2d at 901-05.

<sup>321</sup> See *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S.Ct. 1786 (2007).

each year.<sup>322</sup> The City then enacted a ban on foie gras that was as narrowly tailed as possible to address that concern. Chicago banned the sale of foie gras in “food dispensing establishments,” but conspicuously declined to ban the sale of foie gras over the Internet or in specialty stores.<sup>323</sup> The City Council’s precision and discretion in crafting its ordinance likely impacted the court’s conclusion in *Illinois Restaurant Ass’n* that the ordinance did not discriminate against interstate commerce. The City of Chicago’s discretion certainly would have weighed in the City’s favor had the law been subjected to *Pike* balancing. A legislature seeking to pass foie gras legislation should therefore further insulate its law from constitutional attack by crafting it as narrowly as possible to address a specific local concern.

### B. *Constitutionality of Future Legislation*

The clearest significance of the court’s holding in *Illinois Restaurant Ass’n* is that future attempts by state legislatures to regulate the production of or ban the sale of foie gras are likely to be upheld as constitutional. The court’s decision to hold that a ban on the sale of foie gras in one of the major restaurant locations in the United States was constitutional, without applying the *Pike* test, makes a strong statement about the legality of similar types of regulation. *Illinois Restaurant Ass’n* suggests that despite any controversy over the merits of enacting foie gras legislation, if a legislature decides to enact such a law, courts are likely to uphold its legality in the face of state or federal constitutional challenges.

Indeed, the holding of *Illinois Restaurant Ass’n* will have immediate persuasive precedential impact on the constitutionality of and the debate informing other currently enacted and proposed foie gras legislation in the United States. California has enacted perhaps the most expansive foie gras legislation in the United States.<sup>324</sup> The state, which is only one of three in the United States that produce foie gras, has outlawed the force-feeding of a bird to enlarge its liver and banned the sale of a product that is the result of force-feeding.<sup>325</sup> The law carries a much harsher penalty for a violation than the Chicago ordinance did, as both civil and criminal penalties can be assessed against a violator.<sup>326</sup> The law also seems to anticipate the enforcement problems

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<sup>322</sup> See CHICAGO, ILL., MUN. CODE § 7-39-001 (2006) (adopted Apr. 26, 2006), repealed by Chicago, Ill., Ordinance 2008-2041 (May 14, 2008).

<sup>323</sup> *Id.*

<sup>324</sup> See CAL. HEALTH & SAFETY CODE §§ 25980-82 (2004).

<sup>325</sup> See *id.* (banning a person from force-feeding a bird “for the purpose of enlarging the bird’s liver beyond normal size” or hiring another to do so, outlawing the sale of a product that is the result of force feeding, and defining force-feeding as “a process that causes the bird to consume more food than a typical bird of the same species would consume voluntarily. Force feeding methods include, but are not limited to, delivering feed through a tube or other device inserted into the bird’s esophagus”).

<sup>326</sup> See *id.* § 25983 (2004) (establishing that a violator may be fined up to \$1,000 for each violation and is also subject to prosecution by a district attorney).

experienced by Chicago with its ordinance and allows a qualified humane society or animal control officer to issue citations to violators.<sup>327</sup>

Despite California's more expansive nature of banned activities in comparison to Chicago's former ordinance, *Illinois Restaurant Ass'n* indicates that California's law will likely be upheld against any sort of constitutional attack. Notably, the California legislature made extensive findings and conclusions about the animal cruelty debate surrounding the law.<sup>328</sup> Further, although California's law may have an incidental effect on interstate commerce, the law does not favor a local industry. In fact, the law will have heavy negative consequences for California's local producer of foie gras, Sonoma Foie Gras. Additionally, the California legislature tolled the law's application until July 1, 2012, in order to give its local producer time to create an alternative method of producing foie gras that does not include force-feeding.<sup>329</sup> Since the law clearly outlaws force-feeding yet gives producers time to create a more humane method of producing fatty livers,<sup>330</sup> the law's tolling provision represents a reasonable

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<sup>327</sup> *Id.*

<sup>328</sup> See CAL. SENATE RULES COMM., SENATE BUSINESS & PROFESSIONS COMMITTEE REPORT, S.B. 1520 (May 6, 2004), available at [http://info.sen.ca.gov/pub/03-04/bill/sen/sb\\_1501-1550/sb\\_1520\\_cfa\\_20040506\\_152512\\_sen\\_floor.html](http://info.sen.ca.gov/pub/03-04/bill/sen/sb_1501-1550/sb_1520_cfa_20040506_152512_sen_floor.html).

<sup>329</sup> See CAL. HEALTH & SAFETY CODE § 25984(c) (2004) ("It is the express intention of the Legislature . . . 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 their business practices."). In its previous sections, the statute outlaws the production and sale of a product produced through force-feeding. *Id.* §§ 25981-82. Thus, read in conjunction with the entire statute, the requirement for producers to "modify their business practices" means that producers must modify their practices by eliminating force-feeding to produce foie gras. See *Freeman v. Gonzales*, 444 F.3d 1031, 1046 (9th Cir. 2006) (holding that "we should interpret statutes to be coherent and internally consistent").

<sup>330</sup> To date, there is no accepted alternative to force-feeding to produce foie gras. Potential alternatives to the traditional force-feeding of birds to produce foie gras include a new machine using a soft rubber tube that is more gentle on an animal's throat, a culinary award-winning canned pâté from Spanish company Patería de Sousa, which lets birds roam freely and does not use force-feeding, and various pilot programs and experiments from companies and scientists attempting to create a substitute but not replica of foie gras. See Juliet Glass, *Foie Gras Makers Struggle to Please Critics and Chefs*, N.Y. TIMES, Apr. 25, 2007, at F9. However, since the California statute outlaws force-feeding and states that "[f]orce feeding methods include, but are not limited to, delivering feed through a tube or other device inserted into the bird's esophagus," force-feeding through a soft rubber tube is still force-feeding and would be illegal. See CAL. HEALTH & SAFETY CODE §§ 25980(b), 25981-82. The company that experimented with the soft metal tube in Glass's article has gone out of business, and Hudson Valley dismissed the idea because soft metal tubes would breed infection, unlike a metal pipe which can be sterilized. DeSoucey, *supra* note 12. Further, even if a rubber tube were less painful for a bird, the essential process of force-feeding and its effects on a bird would be largely the same, making such an innovation a helpful but inadequate remedy. See *id.* (reporting that Paul Shapiro, director of the factory farming campaign of the Humane Society of the United States, a group that pushed for the California bill, said, "Is a soft rubber tube better than a hard tube? . . . Maybe, but you are missing the point. You are still forcing them to eat more than they would ever eat voluntarily and inducing a state of disease" (citation omitted)). Additionally, since the traditional method of producing foie gras has existed for centuries and consumers of foie gras are dedicated to a particularly rich, fatty product, both

compromise between the interests of the legislature and the people of California with the interests of local and interstate producers of foie gras. Thus, the decision in *Illinois Restaurant Ass'n* indicates that the only other enacted foie gras ban in the United States is also constitutional.

### C. *Political Viability of Future Legislation*

While a court will likely uphold foie gras legislation in the face of a constitutional or legal challenge, the question of whether such regulation can survive political challenges is less clear. Despite the *Illinois Restaurant Ass'n* court's ruling that Chicago's ordinance was constitutional, the Chicago City Council later repealed the ordinance. Chicago therefore became the first city in the history of the world to ban and then un-ban the sale of foie gras. The City's experience with this process offers important lessons as to whether future foie legislation is politically feasible. First, the City of Chicago's repeal of an ordinance that was upheld by a federal court shows that any similar laws in the future will likely have to survive both a legal and political attack after enactment. This demonstrates that while a federal court ruling in support of the constitutionality of a law will likely affirm some amount of public support, it will not conclusively end the debate about whether such an ordinance is appropriate.

Second, when a foie gras ordinance is subject to political challenge and inevitable public debate, the dissemination of accurate information on both sides of the debate and the education of both the public and legislators is key to a fair resolution. Significantly, public opinion polls at the time of Chicago's enactment of the foie gras ordinance showed that an overwhelming majority of citizens favored banning foie gras when educated about force-feeding.<sup>331</sup> The City of Chicago did not address or contradict these polls when it repealed the ban and did so in large part because it was embarrassed about the ordinance.<sup>332</sup> The contradiction between public support for the ban after education about foie gras and the City's supposed embarrassment about the ban suggests that many Chicago City Council members were not properly informed about foie gras or the ban when they voted to repeal it.<sup>333</sup> A balanced and neutral discussion that educates citizens and legislators about the merits and downfalls of foie gras

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producers in the foie gras industry and animal rights advocates remain skeptical of the viability of other alternatives. See Glass, *supra*; see also CARO, *supra* note 11, at 5 ("The rub with foie gras is that the qualities that people find irresistible are inescapably linked to the way it is produced."). Finally, the approach taken with the canned pâté from Pateria de Sousa is promising, but it has not been demonstrated whether the company's production methods are replicable and industry insiders remain skeptical. See CARO, *supra* note 11, at 286-90; Glass, *supra*.

<sup>331</sup> See CHICAGO COMM. ON HEALTH REPORT, *supra* note 88.

<sup>332</sup> See *supra* Part I.D.2.; *supra* notes 109, 117.

<sup>333</sup> Indeed, as Caro suggests, the Chicago City Council "never took a principled stand on animal cruelty in the first place; otherwise the [vote] tally [by the Alderman] wouldn't have swung so dramatically from 48 to one for the ban to 37 to six (plus abstentions) against." See CARO, *supra* note 11, at 314.

legislation is therefore crucial to the public dialogue and to the ability of a legislature to represent the will of its constituents.

Further, the debate over the merits of foie gras legislation involves more than just legislators and private citizens; it involves powerful lobbyists. Animal rights supporters were influential in supporting Chicago's ban and the restaurant industry actively led the movement to repeal the ban.<sup>334</sup> Legislators must be cognizant of the interests of these two groups in order to enact sustainable legislation and must also form reasonable compromises between them.<sup>335</sup> Chicago's ban, while allowing the sale of foie gras over the Internet or in specialty stores, otherwise neglected to strike any real compromises with the foie gras industry and allowed just under four months before its ban took effect.<sup>336</sup> California's ban, on the other hand, protects Sonoma Foie Gras from liability from lawsuits, and the ban has been tolled until 2012 to give Sonoma time to develop an alternative to force-feeding.<sup>337</sup> While some argue that this was too great of a concession to foie gras producers,<sup>338</sup> the law would probably not have been passed without it.<sup>339</sup> The compromise has also had the effect of insulating California's ban from an intensive political backlash from the foie gras industry.<sup>340</sup> It was just that type of political reaction to Chicago's ban that ultimately doomed the ordinance and led to its repeal. Legislators should therefore protect foie gras laws from continued pressure by animal rights or industry lobbyists by compromising between the two interests at the time of enactment.

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<sup>334</sup> See *supra* Part I.D.

<sup>335</sup> See Storozum, *supra* note 45, at 211 ("Political reality necessarily includes the acceptance of a certain amount of compromise in the process of advancing legislation. Certain circumstances dictate that moral imperatives may justifiably be asked to yield a bit to economic and other considerations.").

<sup>336</sup> See *supra* Part I.D.1.

<sup>337</sup> CAL. HEALTH & SAFETY CODE §§ 25984(b)(1), (c) (2004).

<sup>338</sup> See Gary L. Francione, *Reflections on Animals, Property, and the Law and Rain Without Thunder*, 70 LAW & CONTEMP. PROBS. 9, 24-27 (2007) ("[T]he law is more properly characterized as a victory for California's only foie gras producer, Sonoma Foie Gras. . . . This law requires the dismissal of pending litigation and effectively insulates the industry completely at least until 2012 although the prohibition is unlikely ever to come into effect in any event. In the meantime, researchers will use animals in painful experiments in order to determine whether force feeding is 'humane' or to develop a way to get enlarged liver through 'natural processes.' If by some miracle the law does come into effect in 2012, these birds will still be able to be raised intensively and slaughtered. . . . Moreover, this sort of law deludes people into thinking that animal welfare works, that things are getting significantly better for nonhumans whom we exploit for food, and that we can 'consume with conscience.'"); Storozum, *supra* note 45, at 212-13 (criticizing the concession in California's law that tolls enforcement as lacking a "morally justifiable underpinning"). *But see* CARO, *supra* note 11 at 84-85 (noting that foie gras supporters did not consider the passage of the law a victory and believed that the owner of Sonoma Foie Gras "screwed up" in withdrawing his initial opposition to the ban).

<sup>339</sup> See Storozum, *supra* note 45, at 210-13; CARO, *supra* note 11, at 81-85 (describing the legislative hearings leading up the passage of California's foie gras ban).

<sup>340</sup> See Storozum, *supra* note 45, at 207-17 (characterizing the California law as an effective victory for local producer Sonoma Foie Gras).

Finding the appropriate compromise between the two groups' interests in each state and city will undoubtedly be difficult. Each piece of legislation should be tailored according to the political climate of each locality. It will be unnecessary to toll the implementation of all foie gras legislation as long as California's law did because most states do not house a local foie gras farm, unlike California, New York, or Minnesota.<sup>341</sup> However, whatever the objections to a piece of legislation may be, legislators should take those objections into account and strike a compromise that is apparent in the text of the legislation itself. By doing so, legislators can create laws that compromise both on the face of a statute and in spirit. This type of compromise is more meaningful and more likely to be accepted by the public. Thus, with its tolled enforcement, liability insulation for the local foie gras farm, and ban on the sale of products produced through force-feeding, the California law is the type of reasonable compromise that Chicago did not make and a balance of competing interests that should serve as a model for future foie gras legislation.

Instead of enacting legislation like California or Chicago, several cities have passed resolutions condemning foie gras as cruel, encouraging the enactment of bans by state legislatures, or encouraging local restaurants to not serve the product.<sup>342</sup> The City of Takoma, Maryland, for example, thanked an animal rights group for raising awareness about the issue, praised local restaurants that had stopped serving foie gras, and encouraged its citizens "to avoid supporting this extreme form of animal cruelty."<sup>343</sup> Additionally, in a display of support for California's pending foie gras ban, many California cities have passed resolutions in support of the ban.<sup>344</sup> These resolutions praise

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<sup>341</sup> California is home to Sonoma Foie Gras, New York houses Hudson Valley Foie Gras, and Minnesota houses Au Bon Canard. *See supra* Part I.A.

<sup>342</sup> *E.g.* CITY OF TAKOMA PARK, MD., Res. 2008-49 (June 30, 2008) (opposing the production and sale of foie gras and encouraging local residents "not to buy foie gras in order to avoid supporting this extreme form of animal cruelty"); *see also* NEW YORK, N.Y., Res. 1456 (2008) (pending) (encouraging the New York State legislature to ban force-feeding).

<sup>343</sup> CITY OF TAKOMA PARK, MD., Res. 2008-49 (June 30, 2008).

<sup>344</sup> These cities include San Diego, West Hollywood, San Francisco, Berkeley, and Solana Beach. *See* CITY OF SAN DIEGO, CAL., Res. 2008-421 (Jan. 8, 2008) (commending the Animal Protection and Rescue League for raising awareness about force-feeding, commending local restaurants that have stopped selling foie gras, and encouraging citizens to "avoid supporting this extreme form of animal cruelty"); CITY OF WEST HOLLYWOOD, CAL., Res. 09-3772 (Feb. 17, 2009) (stating that "West Hollywood remains committed to being an animal-cruel free zone indicated by . . . continued support of legislation promoting a better quality of life for animals", supporting the statewide ban, and encouraging restaurants and resident to avoid purchasing foie gras); CITY OF SAN FRANCISCO, CAL., Res. 97-09 (Mar. 24, 2009) (stating that "virtually all animal protection groups recognize foie gras as inherently cruel" and "commend[ing] the many restaurants that have stopped selling *foie gras* before the California statewide ban goes into effect, and encourage[ing] San Franciscans to avoid supporting this extreme form of animal cruelty"); CITY OF BERKELEY, CAL., Res. 64,420 (Apr. 21, 2009) (noting the San Diego and San Francisco resolutions and stating that "by urging local restaurants to voluntarily remove foie gras from their menus, Berkeley can help put an end to [the] inhumane practice [of force-feeding]"); CITY OF

restaurants that have already stopped serving foie gras and encourage residents to not purchase the product. This type of official resolution by a local government has some value because of the expressive function of the law.<sup>345</sup> However, a resolution is likely to have little practical impact because it is merely symbolic and cannot be enforced to prevent force-feeding or the serving of foie gras.<sup>346</sup> Thus, passing a resolution as opposed to actual legislation may represent too much of a compromise to the foie gras industry. Still, if the political will of a community does not support legislation, then a resolution may still serve as an important method of educating the public about the foie gras debate.

Finally, the City of Chicago's ban on the sale of foie gras generated considerable public controversy and the court's decision in *Illinois Restaurant Ass'n* to uphold the ordinance did little to quiet it. The City of Chicago likely wanted to end that controversy when it repealed the law. However, the City Council's repeal has done little to silence the public debate over foie gras. Like the foie gras industry that continued to protest when the ordinance was in effect, animal rights groups have similarly continued to protest the ordinance's repeal and the media have continued to take note of the debate.<sup>347</sup> This shows that once introduced, the foie gras controversy will inspire passionate public debate that is unlikely to subside regardless of the specific legislative action taken.

All of these considerations show that although Chicago's ordinance did not survive its political challenge, other foie gras regulations may succeed where the Chicago ordinance failed. The Chicago City Council folded to political pressure because there was no balanced public debate or dissemination of

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SOLANA BEACH, CAL., Res. 2009-027 (Apr. 22, 2009) (stating that the "City Council supports a voluntary ban on selling and purchasing foie gras").

<sup>345</sup> See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022, 2044 (1996) (writing that "[m]any people support law because of the statements made by law, and disagreements about law are frequently debates over the expressive content of law" and noting that arguments in favor of animal rights are "very much about social norms"); Michael P. Vandenberg, *Order Without Social Norms: How Personal Norm Activation Can Protect the Environment*, 99 Nw. U. L. Rev. 1101, 1122-23 (2005) (noting the "expressive functions of the law" and stating that "the law can change beliefs in at least two ways. First, the enactment of a law can change beliefs about the nature of the underlying social problem addressed . . . . Second, the enactment of a law can change beliefs about the existence of a social consensus regarding the problem (and thus increase the perceived likelihood of social and legal sanctions for certain behaviors)").

<sup>346</sup> The effectiveness of Chicago's ordinance, which carried fines, was questionable because many restaurants still openly or secretly served foie gras. See *supra* note 97 and accompanying text. A resolution, which carries no fines, would be even less effective.

<sup>347</sup> See Daniel Maurer, *Foie Furor: Pâté Police Hit Momofuku*, [http://nymag.com/daily/food/2009/05/foie\\_furor\\_pt\\_police\\_hits\\_momo.html](http://nymag.com/daily/food/2009/05/foie_furor_pt_police_hits_momo.html) (May 18, 2009) (reporting on foie gras protests in New York); Chris Caesar, *Foie Gras Protesters Return to Laguna Beach*, ORANGE COUNTY REG., May 1, 2009, <http://www.ocregister.com/articles/protest-protesters-reyes-2387929-hush-dish> (reporting on a protest in California); Sarah DiGregorio, *Is Foie Gras Torture?*, VILL. VOICE, Feb. 17, 2009, at Features 1 (noting recent protests in Philadelphia and the devotion of activists to protesting foie gras); *supra* Part I.D.2; see also Chicago Animal Rights Demonstration (Foie Gras), May 29, 2008, <http://www.youtube.com/watch?v=3F4MytvMr0A> (last visited May 28, 2009).



information, Chicago's pro-foie gras restaurant industry had a particularly strong lobby, and the City Council aldermen did not compromise with the foie gras industry when the ban was enacted. Enacting and sustaining future foie gras legislation therefore is still feasible for legislators not only because courts are likely to reject legal challenges, but because political challenges can be anticipated and survived by actively engaging in a balanced public debate over the merits of foie gras legislation and by forming reasonable compromises that take into account the interests of both opponents and supporters of foie gras legislation.

#### D. Pending Foie Gras Legislation

*Illinois Restaurant Ass'n* and the lessons Chicago learned about the constitutional and political viability of foie gras legislation will serve to inform the debate surrounding other pending pieces of foie gras legislation. In addition to the City of Chicago and California, Connecticut,<sup>348</sup> Hawaii,<sup>349</sup> Illinois,<sup>350</sup> Maine,<sup>351</sup> Massachusetts,<sup>352</sup> Maryland,<sup>353</sup> Michigan,<sup>354</sup> New York,<sup>355</sup> New Jersey,<sup>356</sup> Oregon,<sup>357</sup> Washington,<sup>358</sup> the City of Philadelphia,<sup>359</sup> and the City of San Diego<sup>360</sup> have all proposed and considered foie gras legislation. The terms of the regulations, bans, penalties, and scopes of the various pieces of legislation differ from state to state, but all are in one way or another concerned with the sale of products produced from the process of force-feeding.<sup>361</sup> Some of the

<sup>348</sup> See H.B. 6866, Gen. Assem., Jan. Sess. (Conn. 2007).

<sup>349</sup> See H.B. 3012, 2005 Leg., 23d Sess. (Haw. 2006); S.B. 2686, 2005 Leg., 23d Sess. (Haw. 2006).

<sup>350</sup> 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).

<sup>351</sup> See LD 9, HP 0004, 124th Leg., Reg. Sess., (Me. 2008). This bill was killed by a committee vote on March 25, 2009. *Id.*

<sup>352</sup> See S.B. 2397, 184th Gen. Court, 2006 Reg. Sess. (Mass. 2006); S.B. 498, 184th Gen. Court, 2005 Reg. Sess. (Mass. 2005).

<sup>353</sup> See S.B. 599, 2008 Gen. Assem. (Md. 2008); H.B. 1137, 2008 Gen. Assem. (Md. 2008). The sponsors of these bills withdrew their support after a public hearing on March 4, 2008. Press Release, Artisan Farmers Alliance, Maryland Legislature Rejects Proposed Foie Gras Ban (Mar. 10, 2008), available at <http://www.reuters.com/article/pressRelease/idUS145063+10-Mar-2008+PRN20080310>.

<sup>354</sup> See H.B. 4871, 94th Leg., 2008 Reg. Sess. (Mich. 2007).

<sup>355</sup> See Assem. B. 6277, 230th Ann. Leg. Sess. (N.Y. 2007); S.B. 1463, 2007 Reg. Sess. (N.Y. 2007).

<sup>356</sup> See Assem. B. 3230, 212th Leg., Reg. Sess. (N.J. 2006).

<sup>357</sup> See S.B. 861, 73d Leg. Assem., 2005 Reg. Sess. (Or. 2005).

<sup>358</sup> See H.B. 2421, 59th Leg., 2006 Reg. Sess. (Wash. 2006).

<sup>359</sup> See PHILA., PA., CODE § 9-600, §629, BILL NO. 060476 (Phil., PA. 2006).

<sup>360</sup> See SAN DIEGO, CAL., ORDINANCE AMENDING CHAPTER 5, ARTICLE 2, OF THE SAN DIEGO MUNICIPAL CODE (2006). The City of San Diego passed a resolution instead of the proposed law. See *supra* note 344 and accompanying text.

<sup>361</sup> See Harrington, *supra* note 14, at 308-14 (collecting and discussing the similarities and differences of various proposed pieces of foie gras legislation).

pieces of legislation have died within various committees or portions of state legislatures, some have been rejected, some are still pending, and all have generated considerable public controversy and debate.<sup>362</sup>

While courts cannot make policy judgments about the merits of whether legislatures should pass foie gras legislation, it is clear that many states and local governments are considering legislation very similar to Chicago's ordinance. It is also clear that if other legislatures choose to enact foie gras legislation, the legislation will face both political and legal challenges. California's and Chicago's experience with foie gras suggests that with a fair debate and reasonable education, legislators can strike a fair balance between opposing interests that will enable a law to survive political challenges. Finally, *Illinois Restaurant Ass'n* shows that a government's decision to enact foie gras legislation is constitutional and will withstand legal challenges from opponents.

## Conclusion

One significant question remains: is this the beginning of state regulation of every intimate personal choice? Will veal, caviar, lobster, chicken, and beef be soon to follow? With the first federal court case upholding the ban of an expensive food delicacy on animal cruelty grounds in a major city in the United States, are we but a few slippery steps away from state-imposed vegetarianism? Chicago's passage of a foie gras ordinance and the *Illinois Restaurant Ass'n* decision that upheld it were landmark moments in the history of animal welfare laws. The reality that a state or local government can legislate and perhaps even criminalize what private citizens choose to eat could have spectacular ramifications for the future of personal privacy and animal welfare laws.

However, beyond a first blush assessment of the impact that these types of laws could have, the road that has been opened by these laws is, in reality, not as open as it appears. The fact that state governments can lawfully pass legislation on foie gras is likely to remain confined to the arena of foie gras itself because unlike other mainstream food products, like chicken or beef, foie gras is an expensive luxury product that by definition requires the imposition of cruelty in order to be created. It is also a niche industry that has little effect on interstate commerce. The parents of the foie gras industry, the poultry and beef industries, could not constitutionally be regulated in such a way by state governments because of their enormous effects on interstate commerce. Further, as a practical matter, state legislators are unlikely to slide too far down the slippery slope that opponents of foie gras legislation are so fearful of. The pattern for regulating the production of foie gras could be applied to other food industries, but the United States is perhaps centuries away from state-imposed vegetarianism; the use of

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<sup>362</sup> See, e.g., *id.*; Michael Klein, *A Bargain for Lovers of Foie Gras: Liver It Up*, PHILADELPHIA INQUIRER, Sept. 26, 2007, at A1 (discussing the debate generated by the proposed foie gras ordinance in Philadelphia).

animals for the consumption of meat is simply a practical reality that most Americans accept. Recognition of this reality is key to forming a proper perspective on the potential future effects of regulating foie gras. Consuming mainstream meat such as chicken and beef is so widely accepted by society that even if similar policy judgments could be made about those industries, Americans would simply never accept a ban on the consumption of all meat products.

This point underscores the fact that state legislators who have banned or will ban foie gras should represent the political will of their constituents. Since there is no danger of the majority of the political will in this country turning against the consumption of meat in general, there is similarly no danger that the regulation of foie gras will serve as a justification for the excessive regulation or ban of mainstream meats. True, the constitutionality of laws addressing animal cruelty issues in the production of foie gras opens the door for regulation of other products that may involve excessive animal cruelty, like the production of veal. While the logic behind laws regulating or banning foie gras can certainly be applied to other industries and particularly specialty food products, it is important to consider that laws addressing the production and sale of foie gras are laws that represent moral judgments formed by a political majority of local citizens.

Foie gras laws are being introduced and considered by legislators because polls and public debates indicate that a majority of citizens are concerned with the practices of the foie gras industry. If a significant number or a majority of local citizens are concerned about a moral issue that affects their society, then these are exactly the types of problems that legislators should address. The argument that legislators have bigger problems that they should spend their time on is not persuasive because legislators exist to address the concerns and needs of their constituents. If society is concerned about foie gras, then legislators should address that concern. The idea that time spent addressing issues like foie gras takes away time that should be spent addressing more important issues like homelessness or cancer, is valid but misplaced. Government exists to address a vast array of social, moral, economic, and health issues, and is properly equipped to simultaneously advance and address the needs of many segments of society. A government can enact foie gras legislation without hurting its important interests in curbing poverty and furthering cancer research.

There is, however, no doubt that a government cannot address every concern of every citizen; nor should it. Legislators must prioritize how they spend their limited time and resources. Foie gras legislation does not require extensive hearings, complicated legislation, or expensive enforcement provisions. It is an issue that can be quickly and effectively addressed. It is also an issue that citizens care about and that public opinion polls are decidedly in favor of addressing. With public interest in favor of addressing foie gras, and the ease with which it can be addressed by legislators, foie gras legislation is a proper use of a legislature's time because it can prevent a substantial amount of animal

suffering without requiring any considerable investment from the public's limited resources.

As citizens of states become more and more concerned with the practice of force-feeding to produce foie gras, it is more and more appropriate for local governments to address the issue. The current tide of political will in the United States, as demonstrated by the number of states and local governments considering foie gras legislation, indicates that many citizens are concerned with and oppose the process of force-feeding to create foie gras. As cities and states across the country begin to respond to those concerns with legislation, their legislative responses appear to be in harmony with the rest of the world, where over fifteen countries have banned the production or sale of foie gras.<sup>363</sup>

So as more countries and states begin to address the production and sale of foie gras, there is a compelling argument that such legislative attention is necessary to address the changing values of their political constituents. The tide of political will against foie gras represents an incremental shift in the values of society in relation to animal cruelty and it is important that current laws reflect those values. If the values of millions of constituents also change to one day include other industries, like veal, in their notions of cruelty, then laws that reflect those changing values would also be proper. But we are not there yet. In fact, some argue that incremental change, such as the regulation of foie gras, is counterproductive and may serve to legitimize other broader but equally cruel uses of animals. Still, incremental change that reflects a population's current cultural values is both a proper and necessary step towards the moral and legal advancement of society.

Chicago's repeal of its foie gras ordinance due to political reasons largely unrelated to the substance of the ordinance reflects poorly on the City and its democracy. But however the foie gras experiment in Chicago ends, the enactment of Chicago's former ordinance, the holding in *Illinois Restaurant Ass'n* that the ordinance was constitutional, and the dialogue created by the legislation is representative of small changes in society's values. As those values shift, they deserve political and legislative expression. If nothing else, the foie gras laws in Chicago and California show that state and local governments have the tools and sensitivity to simultaneously reflect competing values and interests through reasonable compromise and responsive legislation.

The changing notions of cruelty in the United States and world-wide in regard to the force-feeding of ducks and geese to produce foie gras should continue to be codified. New legal precedent shows that foie gras laws are constitutional. Overwhelming independent scientific evidence exists that establishes the excessive cruelty involved in this gratuitous and luxury product. The regulation of this industry by states and local governments is also likely to have a nominal effect on the interstate poultry trade and the United States' economy as a whole. These substantial legal, factual, and moral considerations should encourage state legislators to enact legislation that prohibits the sale of

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<sup>363</sup> See Walker, *supra* note 11; HCJ 9232/01 Noah v. Att'y General [2003] IsrSC 215, 231.

foie gras and discourages or bans the use of force-feeding to produce it. Until the point where all state legislators have taken a stance against this industry of cruelty, Charlotte York will still be able to enjoy her slice of heaven in a fancy French restaurant in New York or Chicago, while hell, louder than the sound of any trumpet, will continue to reign on foie gras farms throughout the United States.