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You Can Grow Your Own Way: Maine's Constitutional "Right to Food" Amendment

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YOU CAN GROW YOUR OWN WAY: MAINE'S CONSTITUTIONAL RIGHT TO FOOD AMENDMENT

Kristin Hebert

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Kristin Hebert*

ABSTRACT

Maine is the first state to constitutionalize a right to food. This is significant not only because no other states have enshrined such a right, but because this is Maine's first foray into constitutionalizing *any* new individual rights. This raises a host of questions for courts to grapple with: What level of scrutiny should apply? What kinds of protections does this right afford? What are its limitations? This Comment offers a framework for courts to use when interpreting the right to food that is grounded in the legislative and voter intent. Given the amendment's broad language, this Comment argues that the scope of the right to food should be construed quite narrowly to avoid unforeseeable and perhaps undesirable outcomes. This Comment also offers some reflections on Maine's constitutional amendment process, and considerations for adding new rights in the future.

INTRODUCTION

Maine voters constitutionalized the "right to food" in November 2021. For some, the amendment was a victory after a decades-long struggle against intrusive government control over food production. For others, the amendment was a threat to public health and animal welfare regulation. And for others still, the amendment was utterly inconsequential; a right to food seemed as innocuous as a right to air. The legal implications of this amendment are far from clear, but this Comment explores the contours of the right to food and offers a framework for Maine courts to interpret it.

Part I discusses the history of Maine people organizing for local control over food production and the events that led to the creation of this amendment. This lays the groundwork for following sections by providing key insights into the drafters' intentions behind the amendment.

Part II argues that when Maine courts are faced with new legal challenges invoking this amendment, they should first address the threshold question of whether the right to food applies at all in a given case. This Section recommends a set of interpretive tools that may be particularly useful in determining the scope of this amendment. In particular, this Comment argues that the scope of the right to food should be construed quite narrowly. Next, this Section argues that once a court has determined that there is a protected constitutional right to food at issue, it should apply strict scrutiny. Together, this narrow scope and strict standard of review create a framework that allows judges to identify and honor the central motivations and

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intentions behind the amendment, while promoting judicial efficiency and preserving the separation of powers between the judicial, executive, and legislative branches.

Part III applies this framework to areas of actual and potential litigation that could yield unintended results if a narrow and strict framework is not utilized. It also demonstrates some areas of litigation that are squarely within the scope of the amendment's protection.

Lastly, in Part IV, this Comment offers some reflections and considerations for the future of rights-based constitutional amendments in Maine.

I. THE EVOLUTION OF THE RIGHT TO FOOD IN MAINE

This Section provides some insight into the events that led to the creation of the constitutional right to food in Maine. Certainly, this history is much richer and more complex than the succinct summary here, and the ideologies and activism around food freedom extend far beyond the boundaries of Maine. But the purpose of this Section is to home in on some of the central motivations behind this new constitutional amendment to shed light on both voter and legislative intent in its interpretation.

A. *The Food Sovereignty Movement Broadly*

Food sovereignty is at the heart of the right to food amendment.¹ In fact, the original title of the amendment read “Right to Food and *Food Sovereignty* and Freedom from Hunger.”² While the term was ultimately dropped from the amendment's language, there is no doubt that the food sovereignty movement played a key role in its creation. But what exactly does “food sovereignty” mean? The answer begins in 1996 when La Via Campesina, a global peasant farmer social movement, first coined the concept at the World Food Summit where international policy-makers gathered to address world hunger.³ In the nearly two decades leading up to the event, rapid globalization and corporatization of agriculture had dramatically impacted small-scale food producers and rural communities worldwide.⁴ La Via Campesina introduced the concept of food sovereignty as a way to center small-scale food producers, cultural wisdom, and the “autonomy and diversity of rural and urban communities” as essential components for crafting global policies around food and agriculture.⁵ Today, food sovereignty is “broadly defined

1. “The proposed amendment was the result of effort by members of the state's food sovereignty movement. The movement includes small farmers, raw milk fans, libertarians, liberals and anti-corporate activists who all feel local communities should have more of a say in the future of the food supply.” Patrick Whittle, *Maine Voters Pass the Nation's First 'Right to Food' Amendment*, PORTLAND PRESS HERALD (Nov. 2, 2021), <https://www.pressherald.com/2021/11/02/supporters-of-right-to-food-amend-ment-lead-in-early-returns/>.

2. See Legis. Rec. H-1340 to -1341 (2d Reg. Sess. 2020); see also STATE OF ME. LEGIS. INFO. OFF., HISTORY AND FINAL DISPOSITION OF LEGISLATIVE DOCUMENTS OF THE 129TH LEGISLATURE 5 (2d Reg. Sess. 2020) (emphasis added).

3. *Food Sovereignty, A Manifesto for the Future of Our Planet*, LA VIA CAMPESINA (Oct. 13, 2021), <https://viacampesina.org/en/food-sovereignty-a-manifesto-for-the-future-of-our-planet-la-via-campesina/> [<https://perma.cc/X7FE-TMUD>].

4. See *id.*

5. *Id.*

as the right of nations and peoples to control their own food systems, including their own markets, production modes, food cultures and environments . . . as a critical alternative to the dominant neoliberal model for agriculture and trade.”⁶

Removing regulations that are overly burdensome for small-scale food producers, including expensive and time-consuming permitting and licensing processes, has often been a central motivation for food sovereignty advocates in the United States.⁷ While some food sovereignty advocates seek an active role for government in food policy,⁸ the concept has “taken on a bit of a libertarian bent” in the United States.⁹ There is certainly a common ground among both conservatives and liberals when it comes to the interplay of food policy, distrust of government regulation, and corporate interference.¹⁰ This bipartisan common ground is reflected in the history of Maine’s own food sovereignty movement, which is discussed further below.

B. Maine’s Food Sovereignty Movement

Maine has been credited as a pioneer in the food sovereignty movement over the last decade.¹¹ But there is a much longer history of Maine people organizing for local control over food production.¹² In the 1970s, back-to-the-landers¹³ settled in Maine. These counterculture newcomers formed an unlikely “symbiotic” relationship with the “old-timer” farmers in Maine.¹⁴ The back-to-the-landers relied on the practical knowledge and skills of traditional farmers, and in turn, they helped

6. Hannah Wittman et al., *The Origins & Potential of Food Sovereignty*, in *FOOD SOVEREIGNTY: RECONNECTING FOOD, NATURE, AND COMMUNITY* 2 (Hannah Wittman et al. eds., 2010).

7. *Id.* at 770.

8. See Allison Condra, *Food Sovereignty in the United States: Supporting Local and Regional Food Systems*, 8 J. FOOD L. & POL’Y 281, 300 (2012) (“[G]overnments play an important role in obtaining and protecting food sovereignty.”).

9. Sarah Schindler, *Food Federalism: States, Local Governments, and the Fight for Food Sovereignty*, 79 OHIO ST. L.J. 761, 768 (2018).

10. See generally Ben Leonard, ‘QAnon Shaman’ Granted Organic Food in Jail After Report of Deteriorating Health, *POLITICO* (Feb. 3, 2021, 6:43 PM), <https://www.politico.com/news/2021/02/03/qanon-shaman-organic-food-465563> (discussing how a man who stormed the U.S. Capitol on January 6th, known as the “QAnon shaman,” requested and was granted access to organic food while incarcerated due to the spiritual and physical effects of “unnatural chemicals”).

11. See Stephen R. Miller, *A Coordinated Approach to Food Safety and Land Use Law at the Urban Fringe*, 41 AM. J.L. & MED. ETHICS 422, 433 (2015) (“No state has invested more in the food sovereignty movement than Maine.”). See generally Wendy Heipt, *The Right to Food Comes to America*, 17 J. FOOD L. & POL’Y 111 (2021).

12. “Maine has been described as a state whose local food systems and values are ‘deeply embedded in long-standing social and political norms.’” Schindler, *supra* note 9, at 775 (quoting Hilda E. Kurtz, *Framing Multiple Food Sovereignities: Comparing the Nyéléni Declaration and the Local Food and Self-Governance Ordinance in Maine*, in *FOOD SOVEREIGNTY IN INTERNATIONAL CONTEXT* 170 (Amy Trauger ed., 2015)).

13. The back-to-the-land movement in Maine is marked by “thousands of young, educated idealists flood[ing] into the state’s rural corners in a complex pursuit of a more satisfying life,” by prioritizing self-sufficiency and proximity to nature. Abigail Curtis, *The Good Life: Seed*, *BANGOR DAILY NEWS*, <https://external.bangordailynews.com/projects/2014/04/goodlife/index.html?chapter=seed> [<https://perma.cc/SPBG-8FDV>] (last visited May 2, 2024).

14. Eileen Hagerman, *Old Roots and New Shoots: How Locals and Back-to-the-Landers Remade Maine’s Local Food Economy*, 49 ME. HIST. 176, 187 (2015).

revitalize Maine's rural communities that had suffered dramatic population declines in the twentieth century.¹⁵ This alliance was further enhanced by the formation and evolution of the Maine Organic Farmers and Gardeners Association (MOFGA), which provided a cooperative model to reduce the operating costs of small-scale farmers to "put small growers on a more equal footing with larger competitors."¹⁶

MOFGA and similarly aligned grassroots groups were vocal opponents of genetically engineered crops, which were introduced in the 1990s, due to the supposedly uncertain health and environmental effects.¹⁷ In 1993, MOFGA proposed state legislation to label genetically modified foods as such,¹⁸ and "the governor appointed a Maine Commission to Study Biotechnology and Genetic Engineering."¹⁹ Simultaneously, grassroots groups including GE Free Maine and the Independent Food Project (which later merged to create Food for Maine's Future (FMF))²⁰ actively campaigned to limit the presence of genetically modified organisms (GMOs) altogether in Maine.²¹ Two decades later, Maine became the first state to pass a law requiring GMO labeling, and at the time, the Portland Press Herald noted that the victory "was a case of seriously unusual bedfellows. A Republican proposed it and the powerful [MOFGA] lobbied for it."²² There was a mutual distrust of big agriculture among perhaps more progressive-leaning, organic farmers and religious conservatives, some of whom "saw [GMOs] as an abomination, the idea of playing God with food."²³

In addition to health and environmental concerns, genetically engineered agriculture presented a new challenge for small-scale farmers: seeds. In a 1980 case, *Diamond v. Chakrabarty*, the Supreme Court "ruled that living organisms—in this case, a bacterium—could be patented."²⁴ The advent of genetically modified seeds that produced herbicide-resistant ("Roundup Ready") crops led to a proliferation of seed patents and other intellectual property mechanisms by GMO agricultural

15. *Id.* (quoting RICHARD W. JUDD & CHRISTOPHER S. BEACH, NATURAL STATES: THE ENVIRONMENTAL IMAGINATION IN MAINE, OREGON, AND THE NATION 240–41 (2003)) ("[N]ewcomers' values and goals were similar to those of their neighbors, including the desire to obtain 'peace of mind, self-reliance, autonomy, harmony with the land, [and] a new foundation for the work ethic.'").

16. Hagerman, *supra* note 14, at 195.

17. See *GMOs*, ME. ORGANIC FARMERS & GARDENERS, <https://www.mofga.org/advocacy/uncategorized/gmos/> [<https://perma.cc/2W9C-88K7>] (last visited May 2, 2024).

18. *Id.* Also note that GMO has become the common term consumers and popular media use to describe foods that have been created through genetic engineering. *Science and History of GMOs and Other Food Modification Processes*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/food/agricultural-biotechnology/science-and-history-gmos-and-other-food-modification-processes/> (last visited May 2, 2024).

19. *GMOs*, *supra* note 17.

20. *About*, FOOD FOR ME'S FUTURE, <https://savingseeds.wordpress.com/about/> [<https://perma.cc/6GBC-JV6J>] (last visited May 2, 2024).

21. See generally *id.*

22. Mary Pols, *Monsanto and Maine: A Look at Maine's Sometimes Fractious Relationship with the GMO Giant*, PORTLAND PRESS HERALD (May 4, 2014), <https://www.pressherald.com/2014/05/04/monsanto-and-maine-a-look-at-maine-s-sometimes-fractious-relationship-with-the-gmo-giant/>.

23. *Id.*

24. DEBBIE BARKER, CTR. FOR FOOD SAFETY, HISTORY OF SEED IN THE U.S. 4 (2012); *Diamond v. Chakrabarty*, 447 U.S. 303, 318 (1980).

companies.²⁵ This drastically concentrated the seed market to a few large corporations, most notably Monsanto (now known as Bayer).²⁶ In 2011, the Maine-based Organic Seed Growers and Trade Association (OSGATA) was joined by a group of seventy-three organic and conventional family farmers, seed businesses, and public advocacy groups in a case challenging Monsanto's patents.²⁷ In particular, the lawsuit sought court protection for farmers whose crops might have inadvertently become contaminated by Monsanto's patented GMO seed and who could thus be accused of patent infringement.²⁸ Ultimately, the court held that Monsanto could not sue farms that had not purchased their product if those farms' crops contained trace amounts (less than one percent) of Monsanto's patented genetic material, a ruling that remains contentious.²⁹

Big agriculture has also been criticized for influencing government regulations. In 1987, the Federal Drug Administration (FDA) banned the interstate sale of raw milk due to potential threats to public health.³⁰ At the time, the ban marked "one of the few times that an entire food category has undergone such a restriction" and caused significant backlash from small-scale producers.³¹ The FDA has issued subsequent regulations to address food-borne illness and disease for other products that have continued to frustrate small-scale producers and food sovereignty activists, such as the Food Safety Modernization Act (FSMA), which added more rigorous and expensive compliance measures for food safety.³² Many small-scale producers and food sovereignty supporters have criticized these regulations as a means for corporations to dominate the market, as they have substantially more resources to comply with regulatory burdens.³³ This tightening of federal food safety regulations prompted Maine farmers and activists to implement state and local laws intended to protect food freedom, as discussed in the following sections.

1. Joint Resolution and Local Food and Self-Governance Ordinances

In 2011, the Maine Legislature passed a joint resolution that provided that the "basis of human sustenance rests on the ability of all people to save seed and grow, process, consume and exchange food and farm products."³⁴ The resolution sought "to oppose any federal statute, law or regulation that attempts to threaten our basic human right to save seed and grow, process, consume and exchange food and farm

25. *Id.*

26. *Id.*

27. Meredith Goad, *Maine Farmers Appeal Monsanto Case to Supreme Court*, PORTLAND PRESS HERALD (Sept. 6, 2013), https://www.pressherald.com/2013/09/06/farmers-appeal-monsanto-case-to-high-court_2013-09-06/.

28. *Id.*

29. *Id.*

30. 21 C.F.R. § 1240.61 (2024).

31. Daniel P. Puzo, *FDA to Ban Interstate Raw Milk Sales*, L.A. TIMES (Aug. 12, 1987), <https://www.latimes.com/archives/la-xpm-1987-08-12-mn-469-story.html>.

32. Ryan Parker, *The Food Safety Modernization Act*, JUST. RISING, Winter 2015, at 4.

33. Jim Tarbel, *Small Farmers Fight Corporate-Driven Regulations*, JUST. RISING, Winter 2015, at 3.

34. J. Res., H.P. 1176 (125th Legis. 2011).

products within the State of Maine.”³⁵ While a joint resolution does not have the force of law as a bill would in the Maine Legislature, it is nonetheless “issued by the Senate and House to express special recognition or opinion.”³⁶

That same year, many towns began adopting local ordinances trying to shift control of food production from the state to the municipal level.³⁷ The local ordinances were supported by farmers and community organizations such as FMF, whose work “is informed and strengthened through relationships with [their] allies in La Via Campesina,”³⁸ and Local Food Rules which drafted the template ordinance language for towns to adopt.³⁹ The town ordinances were intended to ease regulatory burdens, particularly for the smaller farmers and producers who faced greater financial and logistical challenges in order to comply.⁴⁰ For example, farmers who wanted to engage in open-air slaughtering of chickens were concerned about new guidelines requiring indoor poultry processing.⁴¹ Sedgwick was the first town in Maine to adopt a “Local Food and Community Self-Governance Ordinance” which stated:

We, the People of the Town of Sedgwick, Hancock County, Maine, have the right to produce, process, sell, purchase and consume local foods thus promoting self-reliance, the preservation of family farms, and local food traditions. We recognize that family farms, sustainable agricultural practices, and food processing by individuals, families and non-corporate entities offers stability to our rural way of life by enhancing the economic, environmental and social wealth of our community. . . . *We hold that federal and state regulations impede local food production and constitute a usurpation of our citizens’ right to foods of their choice.* We support food that fundamentally respects human dignity and health, nourishes individuals and the community, and sustains producers, processors and the environment.⁴²

Dozens of towns followed in Sedgwick’s footsteps, adopting more or less identical ordinances. But as Professor Sarah Schindler has noted, from a legal perspective “it seemed like a matter of time before the state or federal government would step in to put an end to the ordinances and any actions that resulted from them.”⁴³ However, even if not intended to have full legal effect, these ordinances nonetheless served as a statement or declaration of their interest and commitment to local self-governance in the context of food production.⁴⁴

35. *Id.*

36. Off. of Pol’y & Legal Analysis, *Maine Legislators’ Handbook* § 1-B(2)(a) at 9 (22d ed. Nov. 2022).

37. Schindler, *supra* note 9, at 777.

38. FOOD FOR ME.’S FUTURE, *supra* note 19.

39. *See generally Organizing for Food Sovereignty*, LOC. FOOD RULES (Feb. 17, 2018), <https://www.localfoodrules.org/organizing-for-food-sovereignty/> [<https://perma.cc/4A4U-GHJ2>].

40. *See* Condra, *supra* note 8, at 303.

41. *Id.*

42. Sedgwick, Me., Local Food and Community Self-Governance Ordinance (Mar. 5, 2011) (emphasis added), <https://sedgwickmaine.org/2016/wp-content/uploads/2013/03/local-food-ordinance.pdf>.

43. Schindler, *supra* note 9, at 776.

44. *See id.* (noting the disparity between legal promise and practical perspective regarding the ordinances).

2. Limitations on Local Ordinances: The Law Court Weighs In

It is worth pausing to clarify here the role of preemption in federal, state, and local lawmaking. Maine is a “home rule” state, meaning that counties and municipalities have broad discretion to self-govern absent contrary state action.⁴⁵ But if the local law contradicts state law, then state law governs.⁴⁶ This preemption can be explicit or implicit.⁴⁷ For example, even if the Maine Legislature does not explicitly claim authority over a particular matter, the Law Court⁴⁸ has held that any local ordinance that would frustrate the central purpose of a statutory scheme is invalid.⁴⁹ The Maine Constitution, of course, remains the “supreme law of the State.”⁵⁰ But even state laws and state constitutional amendments may be subject to *federal* preemption. A similar framework applies, in that “[f]ederal law may preempt state law by express preemption or implicit preemption, which encompasses occupation of the field and conflict preemption.”⁵¹ These layers of preemption play out in the following sections, as food sovereignty supporters sought increasingly greater levels of legal protection.

Relying on the home rule authority, a dairy farmer in *State v. Brown* argued that he did not need to comply with state licensing and labeling requirements for the sale of raw milk because his town ordinance exempted such requirements for direct producer-to-consumer sales.⁵² The Law Court held that the relevant provision merely meant that individuals like Brown were exempt from adhering to *municipal regulations*, but not state or federal regulations.⁵³ Thus, Brown was required to abide by the relevant state regulations in order to sell his raw milk.⁵⁴ In response, many food sovereignty advocates recognized the limitations of these local food ordinances—that would likely be preempted by state law—and began targeting their advocacy efforts toward amending the state constitution to make control over local food systems a fundamental right.⁵⁵

45. 30-A M.R.S. § 3001 (2023).

46. *Id.*

47. *Id.*

48. When acting in its appellate capacity, the Maine Supreme Judicial Court is referred to as the “Law Court.” Leadbetter, Seitzinger & Wolff, *Uniform Maine Citations* § III(B)(1) at 37 (2022–2024 ed. 2022).

49. *See, e.g.,* Ullis v. Inhabitants of Boothbay Harbor, 459 A.2d 153, 159 (Me. 1983) (holding that a town could not add restrictions to liquor license applications because doing so would conflict with the purpose of a statewide liquor licensing scheme enacted by the legislature).

50. ME. CONST. art. X, § 6.

51. 81A C.J.S. *States* § 49 (2023).

52. *State v. Brown*, 2014 ME 79, ¶ 22, 95 A.3d 82.

53. *Id.* ¶ 25 (“The Ordinance would be constitutionally invalid and preempted only to the extent that it purports to exempt from state or federal requirements the distribution of milk and operation of food establishments.”).

54. *Id.* ¶ 28.

55. *See* Abigail Curtis, *Food Fight: Why the Debate Over Food Sovereignty Continues*, BANGOR DAILY NEWS (Mar. 28, 2016), <https://www.bangordailynews.com/2016/03/28/news/food-fight-debate-over-food-sovereignty-amendment-continues/>.

3. *The Food Sovereignty Act and the USDA*

In order to amend the Maine Constitution, two-thirds of the State Legislature must approve the proposed amendment and then submit it to the people for a referendum.⁵⁶ If it is then approved by the majority of voters, the amendment becomes part of the state constitution.⁵⁷ The proposal to constitutionalize the right to food was first introduced by Representative Craig Hickman in 2015.⁵⁸ While Hickman's constitutional proposal did not quite have enough support from lawmakers at that time, the Legislature did pass "An Act to Recognize Local Control Regarding Food Systems," more commonly known as the "Food Sovereignty Act" (the Act), in June of 2017.⁵⁹ The Act explicitly permitted municipalities to self-regulate direct-to-consumer sales of food or food products without being preempted by state regulatory laws.⁶⁰ However, the U.S. Department of Agriculture (USDA) quickly swooped in out of fear that the new law would contravene federal food safety requirements.⁶¹ The USDA warned that if the Act was not amended to exclude local control over meat and poultry processing, then all meat and poultry processing in the state would be subject to federal inspection.⁶² The Act was swiftly revised through emergency legislation proposed by the governor to include a clause to exclude meat and poultry products.⁶³ The revision also added stronger language further clarifying that any transactions outside the scope of direct-to-consumer transactions are subject to state and federal food and safety regulations.⁶⁴

C. The Right to Food is Constitutionalized

In 2021, an amendment to the Maine Constitution was again proposed, but this time it had broad bipartisan support within the Legislature.⁶⁵ The COVID-19 pandemic arguably played a role in this shift, as the disruption in supply chains and fear-induced stock-piling behavior left some people feeling uneasy about the state's reliance on large-scale operations to obtain food.⁶⁶ During the legislative hearing on the proposal, supporters on both sides of the aisle expressed anti-corporation and anti-government regulation sentiments. Representative Billy Bob Faulkingham described the amendment as a preventative measure to limit future unreasonable government intrusion, comparing it to the right to bear arms under the Second

56. ME. CONST. art. X, § 4.

57. *Id.*

58. L.D. 783 (127th Legis. 2015).

59. L.D. 725 (128th Legis. 2017).

60. *Id.*

61. See Letter from Alfred V. Almanza, Acting Deputy Under Sec'y, Off. of Food Safety, to Walter Whitcomb, Me. Dep't of Agric. Comm'r (July 6, 2017), <https://perma.cc/US2V-F5V9>.

62. Heipt, *supra* note 11, at 121.

63. *Id.*

64. *Id.*

65. *Id.* at 122.

66. See Scott Thistle, *Voters Will Decide if Mainers Have a Constitutional Right to Food*, PORTLAND PRESS HERALD (July 18, 2021), <https://www.pressherald.com/2021/07/18/voters-will-decide-if-mainers-have-a-constitutional-right-to-food/>.

Amendment to the U.S. Constitution.⁶⁷ Representative Faulkingham also expressed fear that without such a drastic constitutional amendment, Monsanto (big agriculture) would exclusively control the food chain.⁶⁸ Similarly, farmer and vocal food sovereignty advocate Heather Retberg testified that enumerating the right to food “ensures people continue to have the ability to grow and raise their own food and protect against government overreach.”⁶⁹

However, opponents of the amendment argued that its sweeping language would negatively impact the government’s ability to regulate food safety. The Maine Department of Agriculture, Conservation, and Forestry expressed concern that the amendment would conflict with the “department’s statutorily mandated role to uphold food safety standards related to food in commerce,” and requested that the language be adjusted “to remove references to food processing and preparation.”⁷⁰ However, even with this adjustment, other opponents such as the Maine Farm Bureau remained suspicious of the unintended consequences for food safety and the potential spread of diseased crops or invasive species that could occur if agricultural regulations were weakened.⁷¹

Animal rights groups were among the most vocal opponents. The Maine Veterinary Medical Association expressed concern that individuals’ constitutional right to food would trump accepted practice regarding the safe and humane treatment of animals.⁷² For example, they questioned whether the amendment would allow someone to keep a cow in their Portland apartment or laying hens in the basement.⁷³ Animal Rights Maine argued that the amendment could “significantly hinder the ability of the Maine State Legislature, State agencies, and citizens in efforts to protect public safety through improving gun and takings/hunter safety laws or improving wildlife and farmed animal protection and management.”⁷⁴

Opponents also argued that the constitutional amendment was an insufficient means of addressing food insecurity in Maine and could even inhibit current efforts to address the issue. The Maine Municipal Association cautioned that because the scope of constitutional amendments are “generally only established concretely through the creation of case law,” such determinations by the courts “can strip a community, or this legislature, of the flexibility necessary to respond to fundamental human rights issues.”⁷⁵

Supporters of the amendment acknowledged that it could not feasibly guarantee food for all Mainers but argued that even if the amendment alone does not solve food

67. *Proposing an Amendment to the Constitution of Maine to Establish a Right to Food: Hearing on L.D. 95 before the J. Comm. on Agric., Conservation & Forestry*, 130th Legis. (2021) [hereinafter *Hearing on L.D. 95*] (testimony of Representative Billy Bob Faulkingham).

68. *Id.*

69. *Id.* (testimony of Heather Retberg).

70. *Id.* (testimony of Emily Horton, Director of Policy and Community Engagement for the Department of Agriculture, Conservation and Forestry).

71. *See Alert: MFB Opposes Question 3 on November 2nd*, ME. FARM BUREAU (Oct. 23, 2021), <https://www.mainefarmbureau.us/question3> [https://perma.cc/9MYS-RDD4].

72. *Hearing on L.D. 95, supra* note 67 (testimony of the Maine Veterinary Medical Association).

73. *Id.*

74. *Id.* (testimony of Animal Rights Maine).

75. *Id.* (testimony of Maine Municipal Association).

insecurity, it is nonetheless a step in the right direction.⁷⁶ Before the drafted amendment was put to the public for a vote, the language regarding a right to be “free from hunger” was dropped, as was the term “food sovereignty.”⁷⁷ What remained appeared simple: *a right to food*. The final language of the amendment reads as follows:

Right to food. All individuals have a natural, inherent and unalienable right to save and exchange seeds and the right to grow, raise, harvest, produce and consume the food of their own choosing for their own nourishment, sustenance, bodily health and well-being, as long as an individual does not commit trespassing, theft, poaching or other abuses of private property rights, public lands or natural resources in the harvesting, production or acquisition of food.⁷⁸

Ultimately, the referendum was passed by a sixty-one percent majority vote.⁷⁹ In an interview leading up to the election, Representative Hickman stated that the amendment provides standing to challenge a law or regulation “that goes above and beyond its purpose to protect the public’s health and becomes more of an agenda to control the flow of food and who gets what and who doesn’t.”⁸⁰ But it will be up to the courts to decide at what point state and municipal regulations become more about control than about public health.

II. A NARROW AND STRICT FRAMEWORK FOR INTERPRETING THE RIGHT TO FOOD

A. Individual Rights and the Maine Constitution

The addition of the right to food amendment provides Maine courts with a unique opportunity to interpret and define the scope of an individual right within the Maine Constitution. Through the incorporation doctrine, the U.S. Supreme Court gradually applied most of the Bill of Rights to the states through the Due Process Clause of the Fourteenth Amendment and thus, “many provisions of Maine’s [own] Declaration of Rights became irrelevant.”⁸¹ In other words, many state constitutional rights that mirrored federal rights became redundant when analyzed together.⁸² Even though Maine courts have made efforts over the years to draw directly from the state

76. See Joao Fonseca, *Empowering the People to Nourish: Right to Food in the State of Maine*, WHYHUNGER (June 17, 2019), <https://whyhunger.org/empowering-the-people-to-nourish-right-to-food-in-the-state-of-maine/blog> [<https://perma.cc/3DMU-LM2K>]. Representative Craig Hickman explained that “putting this amendment in the constitution isn’t going to move policy forward all by itself . . . but a right defined in the constitution can become a foundation for public policy going forward as well.” *Id.*

77. Compare L.D. 795 (129th Legis. 2019), with ME. CONST. art. I, § 25.

78. ME. CONST. art. I, § 25.

79. *Maine Question 3, Right to Produce, Harvest, and Consume Food Amendment* (2021), BALLOTPEDIA, [https://ballotpedia.org/Maine_Question_3_Right_to_Produce_Harvest_and_Consume_Food_Amendment_\(2021\)](https://ballotpedia.org/Maine_Question_3_Right_to_Produce_Harvest_and_Consume_Food_Amendment_(2021)) [<https://perma.cc/U6JL-4KG7>] (last visited May 2, 2024). It is also worth noting that only thirty-eight percent of eligible Maine voters actually voted in this referendum. Jackie Mundry, *Voter Turnout on Higher Side for Off-Year Elections*, NEWS CTR. ME. (Nov. 22, 2021) <https://www.newscentermaine.com/article/news/politics/maine-politics/voter-turnout-on-the-higher-side-for-off-year-elections-in-maine/97-ff811499-9b34-42e2-87be-bdb889cc85b4>.

80. Fonseca, *supra* note 76.

81. MARSHALL J. TINKLE, THE MAINE STATE CONSTITUTION 20 (2d ed. 2013).

82. *Id.*

constitution when analyzing constitutional rights, the trend remains to largely defer to the U.S. Constitution.⁸³ It should be noted here that Maine has *technically* embraced a “primacy approach,” meaning that state constitutional provisions should be interpreted prior to delving into the mirrored federal constitutional provision, but practically speaking, this has “neither been adopted broadly nor applied consistently.”⁸⁴ Here, of course, there is no federal counterpart to the right to food, and thus there is no similar federal constitutional analysis to fall back on.

Until the right to food, no new individual rights had been added to the Maine Constitution for nearly 200 years.⁸⁵ Additionally, most of Maine’s constitutional amendments have “involved issues of governmental structure and political suffrage . . . [but] have rarely spoken to questions of public policy.”⁸⁶ This means that Maine courts and practitioners do not have a body of case law to draw from in order to discern how *any* new individual right should be interpreted under the Maine Constitution, let alone the right to food. But this is not unique to Maine. Professor James Gardner calls this phenomenon the “poverty of state constitutional discourse.”⁸⁷ Legal scholars have criticized the lack of autonomous authority that many state constitutions are given as a threat to our federalist system.⁸⁸ Justice Connors of the Maine Supreme Judicial Court recently called for the need to independently interpret state constitutions in a “systematic and consistent way” to avoid ad hoc decision making and confusing state constitutional precedent.⁸⁹ Without such a systematic and consistent framework, courts and practitioners alike will be swimming in uncharted waters when the first legal challenges invoking a right to food arise.

B. The Scope of the Right to Food

Although the right to food is vague, it is not broad. Instead, the right to food should be construed narrowly. Of course, any interpretation should be construed

83. See, e.g., *All. for Retired Ams. v. Sec’y of State*, 2020 ME 123, 240 A.3d 45. For example, in 2020 the Law Court considered the constitutionality of two Maine statutes that set absentee ballot deadlines and governed the validation of absentee ballots during the height of the COVID-19 pandemic. *Id.* ¶ 1. While the Federal Constitution does not protect the right to vote, the Maine Constitution not only protects the general right to vote, but the specific right to vote by absentee ballot. *Id.* ¶ 3. Nevertheless, the Law Court still relied on Supreme Court precedent for addressing voting rights broadly rather than analyzing the case under the Maine constitution. *Id.* ¶ 21.

84. Hon. Catherine R. Connors & Connor Finch, *Primacy in Theory and Application: Lessons from a Half-Century of New Judicial Federalism*, 75 ME. L. REV. 1, 2–3 (2023).

85. See *Amendments to the Maine Constitution, 1820 - Present*, ME. STATE LEGIS., <https://www.maine.gov/legis/lawlib/lldl/constitutionalamendments/> [<https://perma.cc/LZB5-XHD3>] (last visited May 2, 2024). Note, however, that there have been a few instances where Maine people have expanded or clarified existing constitutional rights. See ME. CONST. art. I, § 16 (amended 1987).

86. Kenneth Palmer & Jonathan Thomas, *The Maine Constitution: A Tradition of Consensus*, in *THE CONSTITUTIONALISM OF THE AMERICAN STATES* 23–24 (George E. Connor & Christopher W. Hammons eds., 2008).

87. See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 766 (1992).

88. Loretta H. Rush & Marie Forney Miller, *A Constellation of Constitutions: Discovering & Embracing State Constitutions as Guardians of Civil Liberties*, 82 ALB. L. REV. 1353, 1357–58 (2019).

89. Connors & Finch, *supra* note 84, at 24.

broadly enough to reflect the central purpose of the amendment. But whereas some judges interpreting the U.S. Constitution may be inclined to construe provisions quite broadly to be of greater use in our modern society, judges interpreting state constitutions need not take such a living constitutionalist approach because the amendments are not so stagnant.⁹⁰ State constitutions are traditionally much easier to amend than the U.S. Constitution.⁹¹ While Maine has rarely utilized its constitutional amendment process to add new *individual* rights, it has added or changed many other provisions.⁹² As of 2023, the Maine Constitution has been amended 177 times.⁹³ Maine's constitution is not as easy to amend as those of some other states. For example, California permits constitutional amendments by citizen-led initiatives.⁹⁴ But even without a citizen-led process, Maine is still well-positioned to make changes to its constitution as “[s]tate legislatures generate more than 80 percent of constitutional amendments that are considered and approved around the country each year.”⁹⁵ Furthermore, not only is the process for amending state constitutions much easier, such amendments also have a very high likelihood of passing: “[f]rom 2007 through 2023 . . . the average approval rate was 81.47%.”⁹⁶ For these reasons, Maine courts should narrowly interpret the right to food.

While the Law Court has not provided a clearly defined framework for determining the scope of an individual right, it has said that its analysis of constitutional provisions “depends primarily on [the amendment’s] plain language, which is interpreted to mean whatever it would convey to ‘an intelligent, careful voter.’”⁹⁷ The Law Court has also said that “[w]hen a [constitutional] provision is ambiguous . . . [it] must ‘determine the meaning by examining . . . context, historical origins, tradition, and precedent.’”⁹⁸ These factors are not necessarily specific to individual rights under Maine’s constitution, but rather Maine constitutional provisions broadly. Justice Connors has recently argued for a more robust “checklist” approach that would include assessing the following items when analyzing a state constitutional amendment: the text and structure; the history of the amendment; the common law and statutes; expressed values; economic and

90. See Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 NW. U. L. REV. 65, 79 (2019) (“Whereas the Federal Constitution has been amended only twenty-seven times over 230 years, state constitutions average 1.3 amendments per year and there have been 7,586 amendments to current state constitutions.”).

91. See *id.*

92. See *Amendments to the Maine Constitution, 1820 - Present*, *supra* note 85.

93. *Id.*

94. Kenneth P. Miller, *The California Supreme Court and the Popular Will*, 19 CHAP. L. REV. 151, 167–68 (2016).

95. John Dinan, *Constitutional Amendment Processes in the 50 States*, STATE CT. REP. (July 24, 2023), <https://statecourtreport.org/our-work/analysis-opinion/constitutional-amendment-processes-50-states> [https://perma.cc/7RRR-7PF2].

96. *Constitutional Amendments from 2006 Through 2023*, BALLOTPEdia, https://ballotpedia.org/Constitutional_amendments_from_2006_through_2023 [https://perma.cc/PQJ7-2LWU] (last visited May 2, 2024).

97. Opinion of the Justices, 2017 ME 100, ¶ 58, 162 A.3d 188 (quoting Opinion of the Justices, 673 A.2d 1291, 1297 (Me. 1996)); see also *State v. Reeves*, 2022 ME 10, ¶ 43, 268 A.3d 281 (“When interpreting the Maine Constitution, we look primarily to the language used.”).

98. Opinion of the Justices, 2015 ME 107, ¶ 39, 123 A.3d 494.

sociological considerations; precedent; and persuasiveness.⁹⁹ Many other state courts have adopted similar variations of these factors, including the courts of Connecticut and Vermont.¹⁰⁰

Drawing on these approaches, this Section offers some tools for interpretation that could be particularly useful for deciphering the scope of the right to food.

1. Text and Structure

In general, the same principles employed in the construction of statutory language hold true in the construction of constitutional provisions.¹⁰¹ The Law Court has relied on dictionary definitions, statutory definitions, and other traditional canons of construction to decipher the plain meaning of constitutional provisions.¹⁰² The context and structure of the amendment within the broader state constitution is an important consideration to ensure that any interpretation of one clause does not conflict with another. For example, separation of powers considerations may be instructive here.¹⁰³ When the Law Court is considering the societal or policy impacts of interpreting a constitutional provision in a certain way, it may also consider whether such issues are best resolved by the legislature. If an interpretation of the scope of the right to food would require a court to resolve complex policy determinations, this could encroach on the legislature's sphere of authority.

2. Legislative History

As discussed in Part I, Maine constitutional amendments are initially proposed by representatives and, once passed by two-thirds of the state legislature, go to the public as a referendum.¹⁰⁴ Thus, the relevant history encompasses both the intent of the legislators that drafted the amendment and the voters that ultimately approved it. Maine courts should focus on where these two spheres of intent overlap. This approach will ensure a balance between giving effect to the amendment's intended purpose (as determined by the drafters) while also avoiding decisions that the average voter could not have foreseen based on the broad language of the amendment.

The drafters' intent can be gleaned from legislative testimony and revisions to the amendment's language. Deciphering voter intent is a bit more complicated. One

99. Connors & Finch, *supra* note 84, at 25–32.

100. See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 421 (Conn. 2008) (relying on “(1) the text of the operative constitutional provision; (2) holdings and dicta of this court and the Appellate Court; (3) persuasive and relevant federal precedent; (4) persuasive sister state decisions; (5) the history of the operative constitutional provision, including the historical constitutional setting and the debates of the framers; and (6) contemporary economic and sociological considerations, including relevant public policies” to interpret provisions of the Connecticut Constitution); see also *State v. Jewett*, 500 A.2d 233, 236–37 (Vt. 1985) (relying on the text of the provision, the history surrounding its adoption, case law from other states analyzing similar provisions, and economic and sociological materials as tools for interpreting provisions in the Vermont Constitution).

101. See *Payne v. Sec’y of State*, 2020 ME 110, ¶ 17, 237 A.3d 870.

102. See, e.g., *id.* ¶ 18.

103. See ME. CONST. art. III, § 1 (“The powers of this government shall be divided into 3 distinct departments, the legislative, executive and judicial.”).

104. See *supra* Section I.B.3; ME. CONST. art. X, § 4.

source the Law Court has considered to determine voter intent is the Attorney General's explanatory statement prior to the submission of the question to voters.¹⁰⁵ This statement is required by statute to "fairly describe the intent and content . . . for each constitutional resolution or statewide referendum that may be presented to the people."¹⁰⁶ In other words, "[t]he Attorney General's statement must explain what a yes vote favors and what a no vote opposes."¹⁰⁷ Unfortunately, the Attorney General's statement in this instance does not shed much additional light on the scope of this amendment.¹⁰⁸

Some scholars have suggested that courts rely on nontraditional methods of discerning voter intent. For example, "[t]he most comprehensive studies of voter behavior in ballot campaigns demonstrate that media communications and political advertising are the most important sources shaping how voters understand the initiative proposals on which they are asked to vote."¹⁰⁹ There may be no way to *definitively* discern the intent of voters.¹¹⁰ However, media materials could nonetheless prove useful in gauging the overall messaging that voters may have been exposed to prior to voting on the right to food.

3. Other Laws and Context

Lastly, Maine courts should look to the broader context in which the amendment was enumerated. Judges are not historians, but there should be at least a reasonable inquiry into the circumstances that led to an amendment's proposal and ultimate adoption. Other proposed and enacted laws can be incredibly instructive here, such as the Food Sovereignty Act discussed in Part I. Looking to other jurisdictions may also be useful; even though Maine is the only state with a constitutional right to food, other states have similar constitutional provisions such as the "right to farm" that shed light on the national context in which this amendment materialized.

C. Standard of Review

The preceding analysis set forth some tools for interpreting the scope of the right to food. The next question becomes what standard of review courts should use to assess whether a law, regulation, or other government action has infringed on this protected right.

The rights that we value most and afford the utmost protection generally receive strict scrutiny.¹¹¹ Strict scrutiny requires that the regulation or law be narrowly

105. See, e.g., *State v. Brown*, 571 A.2d 816, 817 (Me. 1990).

106. 1 M.R.S. § 353 (2023).

107. *Brown*, 571 A.2d at 817.

108. See OFF. OF THE SEC'Y OF STATE, MAINE CITIZEN'S GUIDE TO THE REFERENDUM ELECTION 19 (Nov. 2, 2021). Contrast this with *State v. Brown* where the ballot statement explicitly indicated that a change to the state constitutional right to bear arms "would be subject to reasonable limitation by legislation enacted at the state or local level." *Brown*, 571 A.2d at 818.

109. Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 131 (1995).

110. See 16 C.J.S. *Constitutional Law* § 86 (2023).

111. *Pitts v. Moore*, 2014 ME 59, ¶ 12, 90 A.3d 1169 (referring to strict scrutiny as the "highest level of scrutiny").

tailored to a compelling government interest.¹¹² Under the more lenient intermediate scrutiny, the law or action “must be narrowly tailored to serve a significant governmental interest.”¹¹³ Last is the most deferential standard of review: rational basis. Under rational basis review, the challenging party must demonstrate that “there exists no fairly conceivable set of facts that could ground a rational relationship between the challenged classification and the government’s legitimate goals.”¹¹⁴

The Law Court applies strict scrutiny to violations of fundamental rights recognized by the U.S. Supreme Court,¹¹⁵ but it is not entirely clear what standard applies to violations of fundamental rights as defined by the Maine Constitution. In his dissenting opinion in *Alliance for Retired Americans v. Secretary of State*, Justice Jabar wrote that “[e]ven though we are interpreting Maine’s Constitution, there is no reason not to adopt the analytical approach used by the federal court in protecting federally protected rights.”¹¹⁶ Justice Jabar seemed to suggest that the Law Court should have treated the right to absentee voting (enshrined in the Maine Constitution) as a fundamental right and thus applied strict scrutiny.

States differ in their approach to when and whether to apply the different levels of scrutiny to rights enumerated in their constitutions. For example, Montana courts categorize fundamental rights based on where the right is located within the state’s constitution.¹¹⁷ If it falls under Article II, the constitution’s “Declaration of Rights,” then it is treated as a fundamental right and strict scrutiny is applied.¹¹⁸ But rights that fall elsewhere in the Montana constitution are not fundamental rights and are instead reviewed under “middle-tier scrutiny,” essentially Montana’s version of intermediate scrutiny.¹¹⁹ If Maine’s right to food is meant to be more expressive than substantive, perhaps a similar approach should be considered.¹²⁰ As Representative Justin Fecteau shared in his legislative testimony supporting the right to food amendment: “[t]his isn’t a bill, it isn’t a resolution, it’s a manifesto of our Original Right. It’s a public health statement, it’s an affirmation of our relationship with Mother Earth, and it speaks to the spirit of Maine.”¹²¹

112. *Id.*

113. *Gray v. Dep’t of Pub. Safety*, 2021 ME 19, ¶ 23, 248 A.3d 212 (quoting *Packingham v. North Carolina*, 582 U.S. 98, 105 (2017)).

114. *Anderson v. Town of Durham*, 2006 ME 39, ¶ 29, 895 A.2d 944.

115. *Sch. Admin. Dist. No. 1 v. Comm’r, Dep’t of Educ.*, 659 A.2d 854, 857 (Me. 1995) (“If a challenged statute infringes a fundamental constitutional right or involves an inherently suspect classification such as race or religion, it is subject to analysis under the strict scrutiny standard. That standard requires that the challenged action be narrowly tailored to achieve a compelling governmental interest.”).

116. *All. for Retired Ams. v. Sec’y of State*, 2020 ME 123, ¶ 40, 240 A.3d 45 (Jabar, J., dissenting).

117. See Ariel Overstreet-Adkins, *Extraordinary Protections for the Industry That Feeds Us: Examining A Potential Constitutional Right to Farm and Ranch in Montana*, 77 MONT. L. REV. 85, 106 (2016).

118. *Id.*

119. *Id.*

120. Note that Maine’s right to food is currently under the “declaration of rights” section of the Maine Constitution. ME. CONST. art. I, §25.

121. *Hearing on L.D. 95, supra* note 67 (testimony of Representative Justin Fecteau).

But if courts narrowly interpret the meaning of the right to food, as this Comment has recommended, then strict scrutiny makes the most sense. Very few cases would pass the initial threshold or “scope” analysis, which considers not only the plain language of the amendment but also legislative and voter intent. Those that remain should reflect the types of cases that the drafters intended the amendment to protect. This promotes judicial efficiency by limiting the number of potential litigants, while still honoring the will of the legislature and the voters who used language signaling that this is a right that deserves serious consideration and protection: in other words, a fundamental right. The legislative history demonstrates that the drafters of the amendment intended it to be a preventative measure in the case of *extreme* government intervention that burdens a right to food. Thus, if this type of intervention presents itself, courts should review it with a skeptical eye as the drafters of the amendment intended.

Though some view strict scrutiny as the “death knell” for challenged laws, that does not need to be the case.¹²² Maine courts have said that the state possesses substantial police power to pass regulatory laws to promote public health and safety.¹²³ The Law Court has stated the following:

Too much significance cannot be given to the word ‘reasonable’ in considering the scope of the police power in a constitutional sense, for the test used to determine the constitutionality of the means employed by the legislature is to inquire whether the restrictions it imposes on rights secured to individuals . . . are unreasonable, and not whether it imposes restrictions on such rights.¹²⁴

Courts can still recognize the state’s police power to pass regulations under strict scrutiny. However, it would require the courts to closely consider the constitutionality of governmental action, and it would shift the burden onto the government to prove constitutionality.

III. APPLICATION OF A NARROW AND STRICT FRAMEWORK TO POTENTIAL LEGAL ISSUES

Just as case law has developed the contours of federally recognized rights over time, the scope of the right to food will only materialize as courts determine what is and is not protected by the amendment. The following subsections demonstrate how a narrow scope and strict standard of review would play out in the context of four different legal issues: (i) hunting and fishing, (ii) buying and selling food, (iii) home gardening, and (iv) animal husbandry.

122. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 807 (2006) (citation omitted).

123. *State v. Brown*, 571 A.2d 816, 820 (Me. 1990) (quoting *Nat’l Hearing Aid Ctr., Inc., v. Smith*, 376 A.2d 456, 460 (Me. 1977)).

124. *Id.*

*A. Legal Issues Outside the Scope of the Right to Food**1. Hunting and Fishing*

The first lawsuit invoking the constitutional right to food was brought in April 2022 by Virginia and Joel Parker against the Maine Department of Inland Fisheries and Wildlife to challenge Maine's Sunday hunting ban.¹²⁵ In their complaint, the Parkers claimed that the ban infringes on their constitutional right to food because their busy work schedules only allow them to hunt on the weekend, leaving them one day per week to hunt to feed their family.¹²⁶ The Parkers argued that meat is a staple food for many households, and the amendment's emphasis on protecting individuals' ability to acquire food for themselves further supports the contention that the right extends to the ability to hunt to feed oneself or one's family.¹²⁷ The ban has been a controversial issue for decades,¹²⁸ and this amendment provided fertile ground to challenge it. The Law Court weighed in on the case in March 2024 and determined that while the amendment does protect a limited right to hunt, that right "does not extend to situations in which hunting is illegal," and thus the Sunday hunting ban is constitutional.¹²⁹ However, this Comment argues that the right to food amendment does not apply to hunting or fishing activities *at all*.

The relevant language in the amendment reads as follows: "[a]ll individuals have a . . . right to . . . harvest, produce and consume the food of their own choosing . . . as long as an individual does not commit trespassing, theft, poaching or other abuses of private property rights, public lands or natural resources."¹³⁰ The critical question: what does "harvest" mean?

The colloquial meaning of the term "harvest" involves things that grow in the ground. As a noun, "harvest" may even refer to the physical fruits and vegetables collected from a farm or garden at the end of the growing season. However, the more technical meaning of the word as a verb—as it is used in the amendment—is more expansive, focusing on the acquisition or accumulation of foods. *Merriam-Webster* reflects both of these definitions, stating that "harvest" means "to gather (a crop)," likening it to "reap," and also "to gather, catch, hunt, or kill (salmon, oysters, deer, etc.) for human use, sport, or population control."¹³¹ The Maine Department of Inland Fisheries and Wildlife utilizes this second definition by routinely using "harvest" when referring to hunting and fishing activities in its own regulations and

125. See Complaint at 1, *Parker v. Dep't of Inland Fisheries & Wildlife*, 2024 ME 22, ___ A.3d ___.

126. *Id.* at 4.

127. *Id.*

128. See Jennifer Rooks, *The Debate Over Whether to Lift the Ban on Sunday Hunting in Maine*, ME. PUB., at 00:17–00:24 (Nov. 17, 2022) [*hereinafter* Maine Public Sunday Hunting Debate], <https://www.mainepublic.org/show/maine-calling/2022-11-17/the-debate-over-whether-to-lift-the-ban-on-sunday-hunting-in-maine> ("[O]ver the past forty years, there have been dozens of attempts to end the ban.").

129. *Parker v. Dep't of Inland Fisheries & Wildlife*, 2024 ME 22, ¶ 24, ___ A.3d ___.

130. ME. CONST. art. I, § 25.

131. *Harvest*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/harvest> [<https://perma.cc/DP8Y-ZRTF>] (last visited May 2, 2024).

communications.¹³² Additionally, the amendment specifically states that an individual's right to food does not permit "poaching." According to *Merriam-Webster*, poaching means "to encroach upon especially for the purpose of taking something; to trespass for the purpose of stealing game [or] to take game or fish illegally."¹³³ One could argue that the drafters would not have needed to spell out this particular limitation if hunting and fishing were not protected *at all* under this amendment. Thus, from a purely textualist perspective, it seems that the term "harvest" itself is not limited to agriculture and does include the acquisition of fish and animals.

However, the legislative context and events surrounding the adoption of this amendment tell a different story. The Law Court did not look into the intent behind the amendment because it determined that the language of the amendment *unambiguously* protects a limited right to hunt.¹³⁴ Because the Law Court only looks to the meaning and purpose if the text is ambiguous, that additional analysis was unnecessary.¹³⁵ But the Law Court should have found that the language *is* ambiguous, because while the term "harvest" appears to encompass hunting based on its use in other Maine statutes, it is highly unlikely that the average voter would have made that association. Not only is the term "harvest" not colloquially used to mean "hunt," but there also does not appear to be any substantial media or campaign messaging around how the right to food would impact hunting. Thus, it's unlikely voters could have foreseen that their support for the right to food amendment might weaken or strike hunting-related laws or regulations. Because the Law Court interprets the plain meaning of an amendment "to mean whatever it would convey to 'an intelligent, careful voter,'"¹³⁶ the court should have found the language to be ambiguous and proceeded to look to the legislative history.

A complete evaluation of the arguments for and against Maine's Sunday hunting ban are beyond the scope of this analysis. It is a fraught issue with compelling arguments on both sides.¹³⁷ But whether or not the Sunday hunting ban is good or bad policy, *Parker* does present additional support for why hunting, in particular, should fall outside the scope of the right to food amendment. First, the Maine Legislature has considered the issue thirty-five times in the past forty years, each time resolving to keep the ban in place.¹³⁸ This suggests that the Legislature did not intend that the right to food overrule the Sunday hunting ban. In light of the pending lawsuit, the Maine Department of Inland Fisheries and Wildlife conducted a survey to gauge the general public, hunters, and landowners' attitudes toward lifting the

132. See, e.g., *Big Game Harvest Data Dashboard*, ME. DEP'T OF INLAND FISHERIES & WILDLIFE, <https://www.maine.gov/ifw/hunting-trapping/hunting/harvest-information.html> [<https://perma.cc/D3SH-N9QV>] (last visited May 2, 2024).

133. *Poach*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/poach> [<https://perma.cc/MZF5-R5RU>] (last visited May 2, 2024).

134. *Parker*, 2024 ME 22, ¶¶ 20–21, ___ A.3d ___.

135. *Id.* ¶ 19.

136. Opinion of the Justices, 2017 ME 100, ¶ 58, 162 A.3d 188 (quoting Opinion of the Justices, 673 A.2d 1291, 1297 (Me. 1996)).

137. See generally Maine Public Sunday Hunting Debate, *supra* note 128.

138. *Id.* at 2:57.

ban.¹³⁹ The survey demonstrated that fifty-four percent of the general public supported the ban at that time.¹⁴⁰ This is a good indication that when a majority of Maine voters passed the right to food amendment, most did not intend or anticipate that these hunting regulations would be called into question.

Additionally, the original draft amendment included the words “hunting” and “fishing.”¹⁴¹ These were struck when the Maine Department of Inland Fisheries and Wildlife and the Department of Agriculture raised concerns that the inclusion of these activities in the amendment may conflict with existing statutes and rules regulating these activities.¹⁴² Reading into the amendment a right to hunt and fish would be a direct contradiction to the Legislature’s intent because the Legislature made the affirmative decision to eliminate that language.

Turning to other jurisdictions, between 1996 and 2020 twenty-three states enshrined the rights to hunt and fish in their respective state constitutions.¹⁴³ Thus, if hunting and fishing enthusiasts in Maine wanted to do the same, there would have been substantial recent precedent from other states to make sure those rights were protected by the right to food. In fact, there have been numerous attempts to constitutionalize the rights to hunt and fish in Maine and all have failed.¹⁴⁴

2. *Buying and Selling Food*

In the spring of 2023, owners of a home-based food business, Kenduskeag Kitchen, in Penobscot County filed a complaint against the Department of Health and Human Services (DHHS) after being shut down for operating without a food establishment license.¹⁴⁵ The owners claim they are exempted from licensing requirements because they are engaging in “direct producer-to-consumer sales” as permitted by the Food Sovereignty Act.¹⁴⁶ DHHS is not persuaded that they meet this definition because plaintiffs are “preparing and selling meals that contain food products and/or ingredients that are purchased from other sites.”¹⁴⁷ But the owners are also joined by co-plaintiff Frank Roma, one of the business’s “loyal customers,” who invoked his right to food to challenge the shutdown.¹⁴⁸ While a complete

139. RESPONSIVE MGMT., MAINE RESIDENTS’, HUNTERS’, AND LANDOWNERS’ ATTITUDES TOWARD SUNDAY HUNTING (2022), https://www.maine.gov/ifw/docs/ME%20Sunday%20Hunting%20Survey%20Rep%202022_Resp%20Mgt.pdf.

140. *Id.* at iii.

141. *See* L.D. 795 at 8 (129th Legis. 2019).

142. *See Proposing an Amendment to the Constitution of Maine to Establish a Right to Food: Hearing on L.D. 795 Before the J. Standing Comm. on Agric., Conservation and Forestry*, 129th Leg. (2019) (testimony of Emily Horton, Director of Policy and Community Engagement for the Maine Department of Agriculture, Conservation, & Forestry).

143. *History of Right to Hunt and Fish Constitutional Amendments*, BALLOTPEdia, https://ballotpedia.org/Right_to_hunt_and_fish_constitutional_amendments [<https://perma.cc/4VZM-XULR>] (last visited May 2, 2024).

144. *See, e.g.*, L.D. 1303 (126th Legis. 2013); L.D. 703 (127th Legis. 2015); L.D. 753 (127th Legis. 2015); L.D. 11 (128th Legis. 2018).

145. Complaint for Declaratory Judgment and Injunctive Relief ¶ 1, *Deschaine v. Dep’t of Health & Hum. Servs.* No. CV-23-45 (Me. Super. Ct. Mar. 24, 2023).

146. *Id.* ¶ 2.

147. *Id.* ¶ 47.

148. *Id.* ¶ 3.

examination of this specific case is beyond the scope of this analysis, this Comment argues that the right to food does not apply to buying and selling food.

The text explicitly states that an individual's right to food is "for their own" bodily health and nourishment, etc.¹⁴⁹ The focus is on *individual* consumption and acquisition of food, not on any right to do business or profit from food products. One could argue that buying food is often a necessary precursor to being able to consume the food of one's choosing, but on its face, the amendment does not make any reference to the economic or financial aspects of our food system.

There is no doubt that the food sovereignty movement in Maine over the past few decades has included organizing efforts around the ability to sell food products, as discussed in the background section of this analysis. But the legislative history of the right to food tells a slightly different story. In her legislative testimony, Representative Jennifer Poirier stated that "[a] Right to Food should extend to allow one neighbor to sell their abundant supply of vegetables and other grown goods to others."¹⁵⁰ While Representative Poirier explicitly advocated for a right to sell food under this amendment, it seems to be in the context of direct-to-consumer sales rather than in any sort of more formal business structure (i.e. fully prepared meals). Another amendment supporter and organizer, Heather Retberg, submitted legislative testimony stating that "the right to food . . . would not restrict the authority of the Department of Agriculture to oversee and regulate food processing and *commercial distribution of food*."¹⁵¹ The original draft language included the right to "barter, trade, or purchase [food] from sources of [individuals'] own choosing" as well as the right to "process, prepare, [and] preserve" food.¹⁵² However, these clauses—which reference both the buyer and seller side of a transaction involving the sale of food—were eliminated in an effort to ease the Maine Department of Agriculture's concerns regarding conflicts with commercial food safety standards.¹⁵³ These changes effectively eliminated any reference to commerce.

As for broader voter intent, a common-sense reading of the amendment suggests that the average voter could not have understood the amendment to protect the right to buy or sell food when there is no language in the amendment addressing any sort of economic rights related to food. The right to food also differs from other states' seemingly similar right to farm amendments in that there is a much more explicit and intentional economic impact in the right to farm amendments.¹⁵⁴ Without more explicit language, it's difficult to assume that voters could have anticipated that a right to food would create standing to challenge any law or regulation that imposes standards for commercialized food products.

149. ME. CONST. art. I, §25.

150. *Hearing on L.D. 95, supra* note 67 (testimony of Representative Jennifer Poirier).

151. *Id.* (testimony of Heather Retberg) (emphasis added).

152. L.D. 795 (129th Legis. 2019).

153. *See* Heipt, *supra* note 11 at 124–25.

154. *See* MO. CONST. art. I, § 35 ("That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri's economy. To protect this vital sector of Missouri's economy, the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri.").

Based on a review of the text, intent, and context, the right to food does not extend to the sale or purchase of commercialized food products. While this Section has addressed a few potential claims that would fall *outside* the right to food's protection, the following examples demonstrate two issues that would fall *within* the scope of the right to food: home gardening and animal husbandry.

B. Legal Issues Within the Scope of the Right to Food

1. Home Gardening

Even simple backyard gardens can raise public health concerns that may come under the purview of regulatory bodies. For example, in Portland, Maine, residents in certain downtown areas are encouraged (though not required) to grow any edible food in raised beds due to the presence of lead and other chemicals in the soil.¹⁵⁵ Similarly, zoning ordinances and land use laws may restrict construction of things like rooftop gardens or greenhouses. This Section argues that the right to food protects these types of home gardening activities.

The text of the amendment itself does not outright address gardening on one's own land. In fact, the word "gardening" was originally included in the first draft of the amendment.¹⁵⁶ While such elimination would typically signal that this is outside the scope of the amendment's protections, as argued in the preceding section regarding hunting and fishing, the removal of this term was for different reasons. Arguably, the word "gardening" was deleted from the amendment out of concern that a broad right to garden could infringe on *other people's* property rights, given that the words "gathering" and "foraging" were simultaneously struck from the list and the Legislature added additional language prohibiting trespass, theft, and other abuses of private and public land.¹⁵⁷

Additionally, the ability to produce food on one's own land is the central tenet of this amendment. To drafters and proponents of the amendment, this is an act of resistance against the industrialization and corporatization of our food systems.¹⁵⁸ A proponent and organizer for the amendment, Betsy Garrold, wrote in an op-ed "[t]his is a common sense amendment, brought to you by hardworking, hard-headed Mainers who see the shape of things to come if we continue down the road of increasing consolidation *in the corporate food system*."¹⁵⁹ Again, this demonstrates that the right to food is at its core about protecting autonomy and preservation of family farms and local food supply chains in response to the highly regulated and

155. Sarah B. Schindler, *Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores*, 87 TUL. L. REV. 231, 257 n.133 (2012); see Cumberland Cnty. Soil & Water Conservation Dist., *Soil Lead Factsheets*, <https://www.cumberlandswcd.org/documents-1/soil-lead> [<https://perma.cc/G3NZ-GUEB>] (last visited May 2, 2024).

156. See L.D. 795 (129th Legis. 2019).

157. See ME. CONST. art. I, § 25.

158. See *Hearing on L.D. 95*, *supra* note 67 (statement of Representative Justin Fecteau) ("Simply put in the words of Joel Salatin, America's most famous farmer, 'the shorter the chain between raw food and fork, the fresher it is and the more transparent the system is.'").

159. Betsy Garrold, Opinion, *A Yes Vote on Question 3 Will Support Our Local Food System*, BANGOR DAILY NEWS (Oct. 21, 2021) (emphasis added), <https://www.bangordailynews.com/2021/10/08/opinion/opinion-contributor/voting-yes-on-question-3>.

industrialized food system in the United States and beyond. The right to grow food in one's home or on one's land is essential for realizing this autonomy.

But note that even if the right to food protects gardening and other food-producing activities on one's own land, it does not mean that such a right is without limitations. Even under strict scrutiny, a court may still determine that certain public health or land use regulations outweigh an individual's right to food. The specific facts of a given case will ultimately inform those decisions, but the right to food should protect home gardening activities.

2. *Animal Husbandry*

As discussed in Part I, animal rights activists were alarmed by the potential implications of this amendment.¹⁶⁰ Many feared that a right to food would render animal safety regulations unconstitutional.¹⁶¹ Constitutional protections for animal husbandry¹⁶² also raise concerns about nuisance complaints and the rights of neighbors. Nonetheless, this section argues that the right to food does apply to animal husbandry.

Like with gardening, the text of the amendment does not address animal husbandry directly. However, one word in the amendment suggests that animal husbandry may be implicit in the right to food: "raise."¹⁶³ A dictionary definition of "raise" analogizes it to "grow" or "cultivate," as in to "raise cotton."¹⁶⁴ However, the word "grow" is already contained in the amendment.¹⁶⁵ If "raise" simply referred to the cultivation of edible plants, it would be duplicative to also include the word "raise" in the amendment. An alternative definition, "to bring to maturity" or "rear" (as in "to breed and bring [an animal] to maturity") seems to be a better interpretation of "raise."¹⁶⁶ Thus, based on the text of the amendment, the right to food protects the ability to raise animals for animal-related food products.

The Maine State Director of The Humane Society of the United States submitted legislative testimony requesting that the word "raise" be removed and suggested additional limitations to make the right to food "subject to reasonable state and local laws to protect animal welfare."¹⁶⁷ Given the vocal concerns of animal rights groups, it seems that the Legislature had ample opportunity to amend the provision to exclude animal husbandry from the right to food—or at least place some limitations on it—but ultimately chose not to.

160. *Supra* Section I.C.

161. *Id.*

162. "Animal husbandry" is defined as "a branch of agriculture concerned with the production and care of domestic animals." *Animal Husbandry*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/animal%20husbandry> [<https://perma.cc/Q47K-DGLH>] (last visited May 2, 2024).

163. *See* ME. CONST. art. I, § 25.

164. *Raise*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/raise> [<https://perma.cc/c4BKQ-4PJ3>] (last visited May 2, 2024).

165. *See* ME. CONST. art. I, § 25.

166. *Raise*, *supra* note 164.

167. *Hearing on L.D. 95*, *supra* note 67, at 2 (testimony of Katie Hansberry, Maine State Director of The Humane Society of the United States).

Additionally, animal husbandry is a prominent part of the food sovereignty movement in Maine.¹⁶⁸ Maintaining on-site poultry processing was one of the primary motivators when towns began passing local food and community self-governance ordinances.¹⁶⁹ The ordinances were specifically designed to exempt local individuals who “produced” or “processed” animals from licensure and inspection requirements.¹⁷⁰

If the right to food protects animal husbandry, clearly one of the most obvious concerns is the preservation of animal cruelty laws. Society has become increasingly concerned about the mistreatment of animals. But acknowledging that the right to food protects animal husbandry does not mean that it cannot simultaneously protect animal rights. Even if a court reviews a challenged animal husbandry regulation under strict scrutiny, it could determine that protecting animal rights is a compelling state interest. Similarly, environmental and other public health concerns could certainly also be compelling state interests. Even though animal husbandry is protected by the right to food, such activities are not utterly exempt from state interference or control.

The preceding examples just barely scratch the surface of actual and potential legal issues that may be brought to court invoking the right to food. Given the amendment’s broad language, any number of lawsuits could be brought. But if courts apply a narrow and strict framework, homing in on the central intentions of the voters and drafters, a wave of unnecessary litigation could be subdued.

IV. THE FUTURE OF INDIVIDUAL RIGHTS IN MAINE

The right to food amendment could be the catalyst for Maine to establish a more robust constitutional identity. Within just the first few months of 2023, Maine lawmakers proposed adding numerous rights to the state’s constitution,¹⁷¹ including a “right to housing,”¹⁷² “a right to a clean and healthy environment,”¹⁷³ and a right to health care.¹⁷⁴ This Section provides some reflections on what this might mean for the future of individual rights in Maine broadly.

First, this amendment may present an opportunity to consider whether the process itself for amending the Maine Constitution should be revised. There are no citizen-initiated constitutional amendments in Maine.¹⁷⁵ This is interesting for a state

168. See *supra* Section I.B.1.

169. *Id.*

170. See, e.g., Sedgwick, Me., Local Food and Community Self-Governance Ordinance § 2.

171. Michael Shepherd, *Maine Politicians Want to Give You New Rights*, BANGOR DAILY NEWS (Feb. 6, 2023), <https://www.bangordailynews.com/2023/02/06/politics/maine-new>.

172. Mal Meyer, *Maine Lawmaker Proposes Adding ‘Right to Housing’ to State Constitution*, WGME (Feb. 28, 2023), <https://wgme.com/news/local/maine-housing-crisis-lawmaker-proposes-adding-right-to-housing-state-constitution-portland-benjamin-collings-equal-justice>.

173. Jackie Mundry, *Right to Clean and Healthy Environment Proposed in Maine*, NEWS CTR. ME. (Mar. 22, 2023), <https://www.newscentermaine.com/article/news/politics/right-to-clean-and-healthy-environment-proposed-in-augusta-maine-politics/97-bd64ce5b-dc95-4b9e-afa7-1384fe1f723c>.

174. Shepherd, *supra* note 171.

175. In order to add amendments to Maine’s constitution, two-thirds of the Legislature must approve the proposed amendment and then submit it to the people for a referendum, ME. CONST. art. X, § 4, or amendments may be added through constitutional convention, ME. CONST. art. IV, § 15.

that has traditionally valued popular lawmaking. In 1909, Maine became the first eastern state to adopt the direct initiative and referendum for statutory laws.¹⁷⁶ But the Republican and Prohibition Parties at the time opposed citizen-initiated amendments out of fear that a then-existing constitutional amendment banning liquor might be removed.¹⁷⁷ This is not inherently a bad thing. Only eighteen states have citizen-initiated constitutional amendments.¹⁷⁸ There are also downsides to citizen-initiated amendments, including the risk of corporate or otherwise powerful private interests interfering. But given that there was little meaningful community debate prior to the vote on the right to food, a citizen-initiated referendum could be a way to engage more voters in the process. This in turn could provide additional information for judges to decipher voter intent.

There is another alternative amendment process already enshrined in the Maine Constitution: amendment by constitutional convention.¹⁷⁹ Maine held its first and last constitutional convention in 1819.¹⁸⁰ But Article IV, Section 15 states that “[t]he Legislature shall, by a 2/3 concurrent vote of both branches, have the power to call constitutional conventions, for the purpose of amending this Constitution.”¹⁸¹ A discussion of the benefits and drawbacks of constitutional conventions are beyond the scope of this analysis, but it is worth noting that other mechanisms already exist that could potentially create new opportunities for public participation in the amendment process.

Second, the addition of the right to food begs an even broader, existential question: what purpose should our state constitutional amendments serve? Given that the current bills in the Legislature proposing to add new amendments are nearly all “positive rights,” it is unclear what legal effect they may have. Even supporters of the right to food were quick to dispel any concern that the right to food meant that the government needed to actively provide food to its citizens.¹⁸² Issues of food, housing, and a clean environment are policy decisions that the courts simply cannot solve. Not only are they ill-equipped in terms of expertise and resources to answer such complex and technical issues, but they are also constitutionally forbidden from legislating.

Lastly, the right to food raises questions concerning the role that administrative agencies should play in the context of constitutional rights. The right to food is unique in that it is designed to weaken regulation. In contrast, for example, so-called constitutional “green amendments” (such as those that grant the right to a clean environment), have been structured as “gap fillers” because they are able to give individuals standing to challenge otherwise unregulated pollutants, given state and

176. Palmer & Thomas, *supra* note 86, at 28.

177. *Id.* at 29.

178. *Amending State Constitutions*, BALLOTEDIA, https://ballotpedia.org/Amending_state_constitutions [<https://perma.cc/MBA8-5M2U>] (last visited May 2, 2024).

179. ME. CONST. art. IV, § 15.

180. Palmer & Thomas, *supra* note 86, at 27.

181. ME. CONST. art. IV, § 15.

182. *Hearing on L.D. 95*, *supra* note 67 (testimony of Representative Billy Bob Faulkingham) (“Some have said that if an amendment called *Right to Food* is passed, that the government must provide food to people. That is not the case, and the language in this amendment is clear.”).

federal governments' widespread failure to adequately address climate change.¹⁸³ Where the right to a clean environment seeks *more* regulation, the right to food seeks *less*. Moving forward, legislators and voters should strongly consider whether hamstringing agencies, rather than increasing their resources and capacity to respond to community needs, will further the goals that these constitutional amendments seek.

CONCLUSION

The right to food seems simple. But constitutionalizing such a broad right raises a multitude of questions and concerns. This Comment argues that courts should narrowly interpret the meaning of the right to food, largely drawing from the text and the intersection between the drafters' and voters' intent. This shrinks the pool of potential legal claims invoking a right to food to those that reflect the central motivations of the drafters and proponents of the amendment, as understood by the citizens that voted for it. Ultimately, the impact of this amendment reaches far beyond protection for growing food. It is the impetus for broader conversations and action around what rights are important to Maine's people and how those rights should be protected.

183. Todd Ommen, *Environmental Rights Amendments: Misconceptions and Applications*, A.B.A. (Oct. 28, 2022), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2022-2023/november-december-2022/environmental-rights-amendments/.