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Green Amendments and Ham: How Green Amendment Jurisprudence Can Inform Maine's Right to Food

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GREEN AMENDMENTS AND HAM: HOW GREEN AMENDMENT JURISPRUDENCE CAN INFORM MAINE’S RIGHT TO FOOD

Sarah Everhart

ABSTRACT

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GREEN AMENDMENTS AND HAM: HOW GREEN AMENDMENT JURISPRUDENCE CAN INFORM MAINE’S RIGHT TO FOOD

Sarah Everhart*

A bill of rights is an ‘ordinance of the people’—a dynamic set of substantive instructions and limitations on government that is adopted and jealously maintained by the people themselves.¹

ABSTRACT

Maine’s constitutional right to food is the first state constitutional right to food and the extent of the rights created by the amendment is largely unknown.

The right to food, as enacted in Article I, Section 25 of the Maine Constitution, provides:

Section 25. Right to food. All individuals have a natural, inherent and unalienable right to food, including the 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.

The right to food is new to the Maine Constitution; however, it is the culmination of over a decade of advocacy for food self-sufficiency. Maine is home to predominately small farms and many of its farmers market their goods directly to consumers and have sought to exempt themselves from complex state and federal food production laws. Supporters of Maine’s right to food hold the view that local governments, rather than state or federal actors, are the appropriate sovereigns to establish and enforce standards for local food. Those opposed to the right to food amendment fear that this broadly phrased constitutional right is vague and has the potential, by reducing governmental oversight of food production, to do more harm than good.

The table has been set for the Maine courts to decide what the right to food will mean and how it will impact the citizens of Maine. The right to food is already being invoked in legal challenges and more litigation is sure to follow, challenging a diverse array of governmental functions that could conflict with the right to food. To determine the meaning of the right to food, Maine courts will first construe the plain language of the amendment and if the language is ambiguous, the courts will also consider the purpose and history of the amendment. Given the unique nature

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of the right, it is possible this analysis will leave the courts without sufficient guidance. This Article suggests it could also be useful for the Maine judiciary to consider the interpretation of state amendments guaranteeing the right to a clean environment, known as green amendments. Although Maine’s right to food amendment and green amendments differ in scope, as explained more fully herein, they are both fundamental state constitutional rights that protect basic human needs and minimally prevent government action that infringes upon the protected rights. How courts have interpreted green amendments and struck a balance between development and the right to a clean environment is translatable to the balance that the Maine judiciary will need to strike between government oversight of food production and the right to food.

INTRODUCTION

Although it is difficult to pinpoint the exact moment the fight for a constitutional right to food began in Maine, many point to 2011 when a farmer, Dan Brown, got into legal trouble for selling milk. Brown sold raw milk directly to consumers at his farm and at the local farmers’ market. Although a glass of farm fresh milk may sound like an inherently pure product, raw milk is unpasteurized and may contain harmful bacteria that can cause potentially serious foodborne illnesses. The Centers for Disease Control and Prevention (CDC) considers raw milk to be one of the riskiest foods, and due to these risks, the Food and Drug Administration (FDA) has outlawed the interstate sale of raw milk. Despite the federal prohibition on interstate sales, states have the authority to allow intrastate sale of raw milk, subject to state food regulations. Maine is one of thirty states that allows the sale of raw milk subject to state licensing and labeling rules.

According to Wendy Heipt, Brown ended up in a “regulatory turf war” when he was caught selling raw milk in Maine without the proper state license. Brown defended his noncompliance by claiming a municipal food sovereignty law exempted him from the need to comply with the state’s raw milk licensing and

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3. Heipt, supra note 2.
5. Id.
9. Heipt, supra note 2, at 119.
As described more fully below, both the district and state supreme court disagreed with Brown and found that selling raw milk without a license frustrated the purpose of the state law, and that the local law did not exempt him from compliance. Despite not invalidating the local food sovereignty ordinance, the Maine Supreme Judicial Court, sitting as the Law Court, did not give Brown and his supporters what they were seeking, namely, freedom from state laws regulating food production and the right to control the food in their communities.

Brown’s predicament provides a necessary backdrop for understanding why the citizens of Maine went on to pass a constitutional right to food. The unique food system and political landscape of Maine are also integral to understanding Maine’s right to food. Maine’s agricultural sector differs from other states in that it is comprised mainly of small farms that sell directly to consumers. According to the U.S. Department of Agriculture (USDA), sales from Maine farms make up a quarter of all direct-to-consumer sales in New England. Farms that sell directly to consumers, whether through community-supported agriculture or at farm stands or farmers’ markets, often create processed or value-added products from their produce, such as pickles and jams. The creation and sale of these products is often done according to cottage food laws and Maine has one of the oldest cottage food laws in the country. Cottage food laws allow certain food producers, such as farmers, to create and market low-risk foods with less burdensome restrictions than those applicable to more industrialized food producers. As described more fully below, the support for local foods in Maine was strong enough to motivate its citizens to demand freedom from even the reduced regulatory burden of cottage food laws.

12. 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).
15. In 2020, ninety percent of Maine’s farmers had sales below $100,000; sixty-three percent made less than $10,000. Moore & Bober, supra note 2.
18. Id.
Despite the presence of locally produced foods, the citizens of Maine are heavily reliant on imported food and this reliance leaves Maine’s citizens vulnerable to food system disruptions. Food security is achieved “when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life.” Maine has a food insecurity rate that is higher than the national average and the highest in New England. Given Maine’s food access and security deficiencies, the original version of the right to food included “a fundamental right to be free from hunger, malnutrition, starvation and the endangerment of life from the scarcity of or lack of access to nourishing food.” However, these rights were removed from the final version of the right to food, and the ratified amendment instead embraces concepts more closely aligned with food sovereignty.

According to Professor Sarah Schindler, the term food sovereignty has international origins and is defined as follows:

“[T]he right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and [farmers’] right to define their own food and agriculture systems.” The central idea is that food sovereignty gives control over the way that food is produced, sold, and eaten within local communities to those local communities.

To be able to produce and market food within a local community, largely free from governmental oversight, is at the heart of what Brown and other supporters of the right to food were seeking. This desire, now enshrined in the Maine Constitution, presents challenging issues for the Maine judiciary related to state and federal preemption and raises the question of the appropriate level of government oversight of food. This Article argues that the emerging case law surrounding state constitutional rights to a clean and healthy environment, known as green amendments, although not binding precedent, may prove to be a valuable comparison for the Maine judiciary.

In Part I, this Article explores how the Maine judiciary interprets constitutional rights and the nature of state constitutional rights. Part II details the journey to
food sovereignty in Maine. Part III describes how the right to food amendment came to pass and the basis for the support and opposition to it. In Part IV, this Article describes the current legal challenges to the right to food and the importance of those legal decisions. The final section, Part V, examines how the judicial interpretations of green amendments can offer insight and inform how the Maine right to food takes shape.

I. STATE CONSTITUTIONAL INTERPRETATION AND THE NATURE OF STATE CONSTITUTIONAL RIGHTS

When interpreting the state constitution, the Maine judiciary first applies principles of statutory construction by looking to the plain language of the constitutional provision at issue. If an examination of constitutional language results in ambiguity, the courts then review the purpose and history of the provision. The purpose and history of the right to food is briefly outlined in Part II of this Article to provide interpretive context. However, the streamlined version of the enacted right to food is not fully reflective of the original purpose and history of the amendment and therefore may leave the Maine judiciary court searching for external guidance.

The Maine judiciary, when interpreting the meaning of the right to food, will not find much value in looking at widely accepted definitions of the right. Although the right to food is a concept recognized under international law and by some foreign governments, the United States has not adopted this right. The U.N. defines the right to food as placing legal obligations on the government to make sure “individuals [have] access to adequate food and to the resources that are necessary for the sustainable enjoyment of food security.” This definition embraces concepts of food access and food security; however, as explained above, these concepts are not embodied in Maine’s right to food. When interpreting constitutional provisions that have federal counterparts, Maine courts have also found it helpful to consider federal interpretative guidance. However, there is no federal right to food. Further, Maine courts have looked “to the interpretation of constitutional provisions undertaken by other courts when the constitutional language at issue is similar or drawn from similar historical passages.” Given that the right to food is the first state constitutional right of its kind, this avenue for comparative constitutional interpretation is also not available. Because of the inherent limitations of available interpretative guidance, it is foreseeable that the Maine judiciary may analyze how other state courts have interpreted similar fundamental constitutional rights, such as green amendments.

27. Id.
29. Id. at 113.
30. Fact Sheet No. 34: The Right to Adequate Food, supra note 21, at 4–5.
Federal constitutional rights are typically viewed as negative liberties that limit the federal government’s power.\textsuperscript{33} State constitutions differ from the federal because they also contain positive rights\textsuperscript{34} which require governmental intervention to ensure the right is preserved.\textsuperscript{35} Positive state constitutional rights tend to be more specific than their federal counterparts, such as the right to an education via public school.\textsuperscript{36} Other examples of state constitutional rights include rights for women, labor protections, the right to hunt, and the right to farm.\textsuperscript{37} There has been a recent surge in interest in enacting state constitutional rights to hunt to prevent animal welfare groups from restricting hunting rights.\textsuperscript{38} Although a constitutional right to hunt may seem like a natural comparison for the right to food, the right to hunt jurisprudence is limited and pertains mostly to challenges to state hunting regulations.\textsuperscript{39} As is explained more fully in Part IV, the Law Court recently decided in \textit{Parker v. Department of Inland Fisheries and Wildlife} that although the right to food contains a right to hunt, it is subject to existing Maine hunting restrictions.\textsuperscript{40}

The right to food, however, also includes “the right to grow, raise, harvest, produce and consume the food of [Mainers’] own choosing.”\textsuperscript{41} These rights are connected with and dependent upon having a healthy and sustainable environment to support food production.\textsuperscript{42} Additionally, the constitutional right to farm, adopted in the last decade by only a few states, is meant to protect a farmer’s right to engage in modern farming and ranching practices and shield them from laws that would restrict farming practices based on animal welfare or environmental concerns.\textsuperscript{43} Just like the constitutional right to hunt, the purpose of the right to farm is focused on protecting industrial farming techniques rather than protecting the right to freely produce and consume food. This difference in purpose combined with the limited amount of case law interpreting this fairly new constitutional right makes the right an unhelpful point of comparison for the right to food. Therefore, this Article suggests that green amendments, self-executing and enforceable constitutional rights to a clean and healthy environment described more fully

\textsuperscript{33} Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983).
\textsuperscript{35} EMILY ZACKIN, \textit{LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS} 41 (2013).
\textsuperscript{36} See Seifter & Bulman-Pozen, supra note 34, at 1867.
\textsuperscript{37} See \textit{id}. at 1866–68 (enumerating positive rights found in state constitutions).
\textsuperscript{39} Wendy Heipt, \textit{Implementing the RTF in America}, 22 CONN. PUB. INT. L.J. 53, 89–90 (2022) [hereinafter \textit{Implementing the RTF in America}].
\textsuperscript{40} See infra Part IV.
\textsuperscript{41} ME. CONST. art. I, § 25.
\textsuperscript{42} See \textit{Implementing the RTF in America}, supra note 39, at 90 (outlining the issue of PFAS contamination currently affecting Maine farmers).
below, are a more helpful comparison than the much narrower rights to hunt or farm.

Proponents of the first green amendments felt that the existing negative constitutional rights were not sufficient to provide for environmental protection.\textsuperscript{44} They sought “a new kind of right, one that would guarantee government’s active intervention to protect them from other sorts of dangers.”\textsuperscript{45} Green amendments are broader in scope than the right to food. However, the right to food is similar to green amendments in that it is in the state’s bill of rights,\textsuperscript{46} making it a fundamental right. Like the right to a healthy environment, the right to food “is a fundamental human right, upon which all other human rights depend.”\textsuperscript{47} It is unclear whether the Maine right to food creates both negative and positive rights. Whether the right to food is a negative or positive right is relevant to determine what legal authority this new right bestows on the citizens of Maine—whether it restrains governmental interference with a right to food or whether it requires active governmental intervention to guarantee a right to food. As is explored more fully in Part V, how state courts have interpreted green amendments has been integral to determining the full extent of the right. These interpretations can provide the Maine judiciary with valuable comparative information.

II. THE FOOD FIGHT FOR LOCAL CONTROL OF FOOD PRODUCTION

The passage of Maine’s right to food is the culmination of years of local and state-level legislative actions meant to provide the people of Maine with relief from the burden of governmental regulation of food. The U.S. Constitution does not endow local governments with specific powers; instead, the Tenth Amendment provides states with the powers not delegated to the federal government.\textsuperscript{48} This results in federal law preempting state law when the U.S. Constitution or federal law conflicts with state law.\textsuperscript{49} In the same way, states grant authority to local governments to pass laws that are not in conflict with the state constitution or existing state laws. Local governments exercise their authority based on whether the state embraces home rule or Dillon’s Rule.\textsuperscript{50} Maine is considered a strong home rule state: pursuant to state law, municipalities in Maine have the authority to pass laws about local matters without state authorization as long as those laws do not conflict either expressly or by implication with existing state law.\textsuperscript{51} In contrast, local governments in Dillon’s Rule states are able to exercise only the powers expressly granted by the state.\textsuperscript{52} According to the Law Court, municipal laws in

\textsuperscript{44} ZACKIN, supra note 35, at 147.
\textsuperscript{45} Id.
\textsuperscript{46} ME. CONST. art. I, § 25.
\textsuperscript{47} Nicholas Robinson, The Dawn of Environmental Human Rights in New York, 43 N.Y Env’t LAW., 2023, at 30, 31.
\textsuperscript{48} U.S. CONST. amend. X.
\textsuperscript{49} See U.S. CONST. art. VI, cl. 2.
\textsuperscript{50} See Condra, supra note 7, at 309.
\textsuperscript{51} 30-A M.R.S. § 3001 (2023); see also Condra, supra note 7, at 309 n.151 (describing the difference between Dillon’s Rule and home rule).
\textsuperscript{52} See TRAVIS MOORE, DILLON RULE AND HOME RULE: PRINCIPLES OF LOCAL GOVERNANCE 1 (2020).
Maine will be invalidated “when the Legislature has expressly prohibited local regulation, or when the Legislature has intended to occupy the field and the municipal legislation would frustrate the purpose of state law.” This limitation on the authority of local governments to regulate fields occupied by state law is relevant to understanding why the proponents of food sovereignty in Maine were not able to use municipal law to successfully assert their desired autonomy over food production.

Food production is an area in which the federal, state, and local governments customarily pass multiple layers of laws covering issues related to health department inspections, licensing, and labeling. At the federal level, there are “at least a dozen federal agencies implementing more than 35 statutes [that] make up the federal part of the food safety system.” The agencies with the greatest influence over food regulation are the FDA and USDA. The FDA regulates the production of all food other than the meat products regulated by the USDA. The passage of the Food, Drug, and Cosmetic Act of 1938 (FDCA) authorized the FDA to “protect the public health by ensuring that foods are safe, wholesome, sanitary, and properly labeled.” The FDCA granted the FDA both police and regulatory powers. The FDA has used this authority to declare certain foods, such as raw milk, dangerous and to ban the sale of the products in all interstate commerce. The passage of the Food Safety Modernization Act (FSMA) in 2011 greatly increased the FDA’s authority over food safety. Due to the FSMA, the FDA now has significant authority over farms growing fruits and vegetables and farms making value-added products through food processing. The farmers subject to the FSMA now have required training, recordkeeping, and a requirement to adopt costly food safety monitoring such as water testing. The FDA also enforces regulations for food labeling, including nutrition labeling and packaging of food products.

The USDA, through the Food Safety and Inspection Service (FSIS), oversees the slaughtering, processing, and labeling of meat, poultry, and egg products. For

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54. See generally Condra, supra note 7, at 288–94 (discussing different levels of jurisdiction and oversight).
55. COMM. TO ENSURE SAFE FOOD FROM PROD. TO CONSUMPTION, ENSURING SAFE FOOD FROM PRODUCTION TO CONSUMPTION 26 (1998).
56. See Condra, supra note 7, at 283.
57. COMM. TO ENSURE SAFE FOOD FROM PROD. TO CONSUMPTION, supra note 55.
59. Emily Semands, Food Choice: Should the Government Be at the Head of the Table?, 67 OKLA. L. REV. 149, 153 (2014).
60. 21 C.F.R. § 1240.61 (2023).
63. Id.
these products to be sold in interstate commerce, an FSIS inspector must ensure compliance with federal food standards.\(^6\) Through cooperative agreements with FSIS, states like Maine can operate their own meat inspection programs as long as the programs are at least as restrictive as the federal standards.\(^7\)

In addition to federal requirements, producers of value-added products in Maine must comply with state food safety regulations.\(^8\) States can regulate the production and sale of food as long as the laws are at least as strict as the federal laws and do not conflict with the federal legal framework.\(^9\) As mentioned above, Maine has state-level food production laws meant to reduce the likelihood of foodborne illness outbreaks, such as cottage food laws which reduce regulatory burdens for small scale food producers, and laws related to the sale of agricultural products, such as those regulating the sale of raw milk.\(^70\)

In Maine, the Department of Agriculture, Conservation and Forestry requires home food producers who sell their products directly to the public to obtain a state license and pass a home inspection.\(^71\) There is also additional required testing for acidified or pickled foods, or if the water used for food production comes from a private well.\(^72\) Further, Maine requires these foods to comply with food labeling requirements.\(^73\) This regulatory scheme created much of the drive within Maine to seek relief through food sovereignty laws and, eventually, the right to food.\(^74\)

The concept of food sovereignty has been embraced as a way to alleviate the regulatory burden for non-industrial food producers.\(^75\) In 2011, the Maine Legislature, through a joint resolution, expressed allegiance to food sovereignty by pledging “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 products within the State of Maine.”\(^76\) Following the adoption of the joint

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\(^{69}\) Schindler, supra note 2, at 769.

\(^{70}\) See 7 M.R.S. §§ 2902-A to -B (2023) (noting that “[a]ny violation that results in a health or safety hazard may lead to suspension of a permit”).


\(^{72}\) See 01-001 C.M.R. ch. 345, § 5; Selling Homemade Food in Maine, supra note 71.

\(^{73}\) 01-001 C.M.R. ch. 345, § 7.


\(^{75}\) Schindler, supra note 2, at 768.

resolution, local governments throughout Maine began adopting food sovereignty ordinances. The ordinances declared local governments to be the controlling sovereigns for purposes of food production: how food is “grown, raised, or produced, and sold for consumption.” The food sovereignty ordinance, used by many of Maine’s local governments, cited both the Maine Constitution and the state’s home rule statute as the source of local government authority to control food production.

Maine is not alone in its embrace of food sovereignty; municipalities in Vermont, Massachusetts, and California have passed similar ordinances, and several Western states have passed food freedom laws. Food freedom laws allow local foods to be sold directly to consumers, not simply in compliance with the reduced regulatory scheme established by cottage food laws, but without burdensome state licensing, inspection, or regulation. Food sovereignty laws, based on more local control and deregulation of the food system are similar to food freedom laws and “represent a general trend toward more localized control of a community’s food supply”; however, the proponents of food freedom laws do not

77. Schindler, supra note 2, at 775–76.
78. Id. at 768.
80. “All power is inherent in the people; all free governments are founded in their authority and instituted for their benefit, they have therefore an unalienable and indefeasible right to institute government and to alter, reform, or totally change the same when their safety and happiness require it.” ME. CONST. art. I, § 2.
81. 30-A M.R.S. § 3001 (2023) (“There is a rebuttable presumption that any ordinance enacted under this section is a valid exercise of a municipality’s home rule authority.”); 7 M.R.S. § 211 (2023) (“It is the policy of the State to encourage the procurement of Maine foods and food products by state institutions to increase the viability of Maine farms and food businesses, thus making a positive contribution to the State’s economy and enhancing food self-sufficiency for the State.”).
82. See Gaulkin, supra note 76; see, e.g., Schindler, supra note 2, at 768.
necessarily have a shared ideology like the proponents of Maine’s food sovereignty laws.\(^8\) The local food sovereignty ordinances in Maine, however, raised issues of state and federal preemption, with some of the ordinances expressly providing that it would be unlawful for a state or federal law to interfere with the local right of food sovereignty.\(^9\) In 2017, Maine solidified its commitment to food sovereignty through the passage of the Maine Food Sovereignty Act (MFSA).\(^9\) The MFSA expressly provides that it is state policy “to encourage food self-sufficiency for its citizens.”\(^9\) The MFSA encouraged food self-sufficiency by permitting municipalities to adopt local food sovereignty ordinances that would supersede state and federal food production regulations.\(^2\) Soon after the passage of the MFSA but before the effective date, the USDA informed Maine that the passage of the MFSA would threaten the state’s ability to self-regulate meat and poultry processing.\(^3\) According to the Federal Meat Inspection Act\(^4\) and the Poultry Products Inspection Act,\(^5\) the USDA allows states to enforce requirements for meat and poultry processing facilities if the states’ programs are at least equal to the standards imposed and enforced under the federal laws.\(^6\) The MFSA, by purporting to grant local governments control over meat processing, endangered the level of compliance that the state would be able to maintain over meat processing, and the USDA threatened to commence federal oversight of the processing facilities if the MFSA was not amended.\(^7\) Before the effective date, the MFSA was amended to make it clear that control over meat processing remained with the state pursuant to federal law.\(^8\) The amended MFSA also specified that the authority of local governments is limited to asserting control over direct producer-to-consumer interactions at the producer’s residence and excluded sales at farmers’ markets or other public venues.\(^9\) The law was enacted at the state level but applies only to local governments that have declared food sovereignty.\(^10\) Despite this weakening of the original MFSA, the revised MFSA further encouraged the

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8. Id.
9. See Gaulkin, supra note 76; see also Schindler, supra note 2, at 769.
10. See L.D. 725 (128th Legis. 2017); Gaulkin, supra note 76.
11. 7 M.R.S. § 283 (2023).
12. L.D. 725, (128th Legis. 2017); see Gaulkin, supra note 76.
13. See Gaulkin, supra note 76.
17. See Gaulkin, supra note 76; see also Schindler, supra note 2, at 778.
18. 7 M.R.S. § 285 (2023); see Schindler, supra note 2, at 778. The Maine Food Sovereignty Act was enacted and became public law effective November 1, 2017, and was amended most recently in 2023. P.L. 2023, ch. 420.
19. 7 M.R.S. § 284; Selling Homemade Food in Maine, supra note 71.
adoption of local food sovereignty ordinances. Currently, 113 municipalities in Maine have adopted a local food sovereignty ordinance.

Despite the proliferation of local food sovereignty ordinances and the passage of the MFSA, the plight of Farmer Dan Brown became illustrative of the need to strengthen the legal support for food self-sufficiency in Maine. In 2011, the State filed a complaint against Brown for noncompliance with raw milk licensing and labeling regulations. The State also found samples of Brown’s milk taken the same year “to be in violation of the Quality Assurance Division’s bacteria-level standards.” In the lower court proceeding, Brown claimed to be exempt from state licensing requirements because of the expense of bringing his facility up to state sanitation standards, based on a conversation about licensing with a state official many years prior. He also claimed the food sovereignty ordinance in his town of Blue Hill exempted him from complying with state licensing requirements for milk distributors and operators of food establishments and exempted him from the labeling and sanitation regulations imposed by those licensing laws. The lower court granted summary judgment to the State and enjoined Brown from selling his raw milk without the required license. In 2014, the Law Court affirmed the lower court’s holding. In reviewing Brown’s claim for exemption based on the Blue Hill food sovereignty ordinance, the court found the State occupied the field of milk regulation for distribution and sale at food establishments and, therefore, a local law could not preempt these state laws. The court further explained the local food sovereignty law exempted food producers only from municipal licensure and inspection requirements for food sold directly at locations such as farmers’ markets and for home consumption. For Brown and his supporters, this decision dealt a blow to the local food sovereignty movement and sent a clear message about the limitations of these local food laws.

101. See Gaulkin, supra note 76.
106. Id. ¶ 4.
107. Id. ¶ 10.
108. Id. ¶ 11.
109. Id. ¶ 33.
110. Id. ¶¶ 23–24.
111. Id. ¶¶ 24–25.
112. Id.
III. MAINE’S RIGHT TO FOOD: A SOLUTION IN SEARCH OF A PROBLEM

In 2021, fueled by Farmer Brown’s plight and the passage of the MFSA, a proposed right to food amendment, L.D. 95,113 was introduced in the Maine House of Representatives by Representative Billy Bob Faulkingham.114 Representative Faulkingham called it the “[second] [a]mendment of food.”115 According to Faulkingham, the proposed amendment “empower[ed] people to fight hunger and regain command over the food supply in an era of corporate domination.”116 Other proponents of the amendment cited hunger and the need to ensure “the protection of food as an unequivocal basic human right” as the reason to support the right to food.117 “Heather Retberg, a farmer who supported the right to food amendment, claims that it is ‘an antidote to corporate control of our food supply’ and believes the amendment is an opportunity for rural communities to develop self-sufficiency in terms of food consumption.”118 Retberg also cited the ability to address the state’s food deserts as a reason she supported the right to food amendment.119

Opposition to the right to food amendment came from a diverse array of long-standing organizations such as the Maine Farm Bureau, the Maine Municipal Association, and the Maine Federation of Humane Societies.120 The Maine Farm Bureau expressed concern that the right to food amendment’s “vague language” provides “fertile ground for unintended consequences.”121 The Farm Bureau was joined by the Maine Veterinary Medical Association and the Maine Federation of Humane Societies, which felt the amendment represented a threat to food safety and animal welfare and could lead to inexperienced citizens attempting to raise livestock in non-farm settings.122 The Farm Bureau also expressed concern that inexperienced food producers could plant diseased crops and fail to control invasive species that could impact other producers.123 The Maine Municipal Association opposed the right to food based on concerns related to vagueness, while critics more broadly characterized the amendment as “a solution in search of

113. L.D. 95 (130th Legis. 2021).
115. Whittle, supra note 114.
117. Id.
118. Whittle, supra note 114.
119. Id.
123. Alert: MFB Opposes Question 3 on November 2nd, supra note 121.
the problem.”

Although positions on the right to food varied, the one perspective that appeared to be consistent from both proponents and opponents was that the true meaning of the right to food would be defined by the courts and the legislative history of the amendment would play a crucial part in that analysis.

As referenced above, an early version of the right to food from 2019, which was not ultimately enacted, included since-discarded language: “all people have a fundamental right to be free from hunger, malnutrition, starvation and the endangerment of life from the scarcity of or lack of access to nourishing food.”

This phrase was struck based on a concern that it would imply the government’s obligation to feed all citizens. Another amendment to the bill involved removing a provision that provided for the right to consume food of your own choosing in various ways including hunting, as described more fully below. This since-removed provision impacts one of the pending legal challenges to the right to food.

By July 2021, the final version of the right to food amendment had passed both the Maine House and Senate, and it was put on the statewide ballot in November of 2021. The ballot question read as follows: “Do you favor amending the Constitution of Maine to declare that all individuals have a natural, inherent and unalienable right to grow, raise, harvest, produce and consume the food of their own choosing for their own nourishment, sustenance, bodily health and well-being?” More than 400,000 ballots were cast in the referendum election, and the right to food measure passed with sixty-one percent of the popular vote.

IV. LEGAL CHALLENGES TO MAINE’S RIGHT TO FOOD

Thus far, the Law Court has decided one case interpreting the right to food, Parker v. Department of Inland Fisheries and Wildlife. Virginia and Joel Parker of Readfield, Maine, filed suit claiming Maine’s ban on Sunday hunting violated their constitutional right to harvest food through hunting. The Parkers supplemented their diet through hunting and the Sunday hunting ban prevented them from being able to use the entire weekend to gather food; therefore, they argued the right to food should be interpreted to allow them to hunt throughout the

125. See Desrochers & Lemieux, supra note 20, at 2; see also Telford, supra note 116; Bishopp, supra note 120.
126. L.D. 795 (129th Legis. 2019); Heipt, supra note 2, at 124–25.
128. Heipt, supra note 2, at 125.
129. See Whittle, supra note 114.
131. See Desrochers & Lemieux, supra note 20.
132. Parker v. Dep’t of Inland Fisheries & Wildlife, 2024 ME 22, ___ A.3d ___.
133. Id. ¶ 5.
weekend. The Parkers contended that the term “harvest” in the right to food included harvesting food via hunting, and therefore the Sunday hunting ban should be found unconstitutional. Their suit, although dismissed by the lower court, was appealed to the Law Court and arguments were heard in October 2023. According to the Parkers’ appellate brief in the case, “[t]he Amendment is a tangible guarantee that the people of Maine can provide for themselves, underscoring the importance of individual autonomy and self-sufficiency in a free society.”

The Law Court disagreed with the Parkers and held that, though the right to food unambiguously creates a limited right to hunt, the Sunday hunting ban does not conflict with the right to food. The court began its interpretation with a finding that the Sunday hunting ban is presumptively constitutional. The court then looked to the plain language of harvest in the right to food and found it includes a right to hunt “for the limited purposes of ‘nourishment, sustenance, bodily health and well-being’ by including the ‘right to . . . harvest’ food.” The court went on to find that the right to food contains exceptions and the right to harvest is qualified by the following language of the amendment: “as long as an individual does not commit . . . poaching . . . in the harvesting . . . of food.” According to the court, the amendment’s poaching exception limits the right to hunt to statutorily permissible hunting. Therefore, the law at issue that makes hunting on Sundays illegal does not conflict with the right to hunt contained within in the right to food.

A pending case involving the interpretation of the right to food and local control of food production began in the spring of 2022. Nathan and Rhiannon Deschaine began sourcing local ingredients within a seventeen-mile radius of their home and, using their home kitchen, prepared meals that they sold directly to consumers. The Deschaines carried on their business (the Kenduskeag Kitchen) without any governmental approvals in reliance on their local food sovereignty.

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135. Id. ¶¶ 5–6.
136. Id. ¶ 6.
138. Brief of Petitioner-Appellants at 14, Parker v. Dep’t of Inland Fisheries & Wildlife, 2024 ME 22, ___ A.3d ___.
139. Parker, 2024 ME 22, ¶ 6, ___ A.3d ___.
140. Id. ¶ 18.
141. Id. (citing ME. CONST. art. I, § 25).
142. ME. CONST. art. I, § 25.
143. Parker, 2024 ME 22, ¶ 24, ___ A.3d ___.
144. Id.
ordinance (the Kenduskeag Food Sovereignty Ordinance). Following an inspection in July 2022 by the Maine Department of Health and Human Services (DHHS), the Kenduskeag Kitchen was told to discontinue its operations. According to the DHHS, the Kenduskeag Kitchen was operating without a required state license and was not protected by the local food sovereignty ordinance, as some of the ingredients used were purchased from other retail stores. The Deschaine family claim they are exempt from the state license requirement under their local food sovereignty ordinance, the MFSA, and the right to food. The Deschaines have sued the DHHS and are seeking an injunction to stop the DHHS from preventing them from operating the Kenduskeag Kitchen. The Deschaines are joined as named plaintiffs in the lawsuit with one of their customers, Frank Roma, and collectively the plaintiffs are also seeking a declaratory judgment that the cessation of the Kenduskeag Kitchen’s operation violates their rights under the right to food amendment and is unconstitutional as applied to their customer, who desires to consume food of his own choosing. The DHHS has filed a motion to dismiss the lawsuit claiming that the state “license does not deprive the businesses or its customers of a constitutional right. If it did, the state argues, restaurants in other communities could claim the same right to operate without licenses or oversight.” The state has also remarked that the right to food does not, as the plaintiffs are seeking, nullify the state’s comprehensive food safety laws. The Deschaine case is centered around the food sovereignty issues that drove the adoption of the right to food, and the court decision of whether the right to food trumps the state food production standards at issue will be critical to charting the course for future legal challenges based upon the right to food.

V. INTERPRETATION OF MAINE’S RIGHT TO FOOD: HOW GREEN AMENDMENTS MAY HELP RESOLVE THE PROBLEM IN SEARCH OF A SOLUTION

Given the challenging judicial interpretation presented by the Deschaine case and cases that will surely follow, this Article argues that green amendment jurisprudence, although not directly binding, may provide valuable insights for the Maine judiciary. Green amendments date back to the environmental movement of the 1960s. According to Maya K. van Rossum, author of The Green Amendment: Securing Our Right to a Healthy Environment, to qualify as a green amendment, the provision must:

146. Id. at 8.
148. Id.; Complaint for Declaratory Judgment, supra note 145, ¶ 47.
149. Graham, supra note 147.
150. Complaint for Declaratory Judgement, supra note 145, at 23.
151. Id.
152. Graham, supra note 147.
153. Id.
1) be placed in the bill of rights or declaration of rights section of a constitution; 2) recognize and protect individual rights of current and future generations; 3) ideally, recognize the fiduciary duty of the state to act as a trustee; 4) be self-executing, explicitly or implicitly, based on how the constitution is interpreted and how the language is applied in a state; and 5) elevate environmental rights to the status of other legally recognized and legally protected fundamental rights.  

Currently, only a small group of states have green amendments; however, numerous states have introduced green amendment proposals in recent years. By elevating the right to a healthy environment to a constitutionally protected right, the government is prevented from taking actions that abridge the right. It also requires courts reviewing legislative challenges in which the right is asserted to apply the heightened strict scrutiny standard and only allow “the infringement of rights if the government action is narrowly tailored to further a compelling state interest.” Maine courts should apply the same level of scrutiny in the case of an infringement of the right to food. For example, if the court finds the state food production standards in Deschaine have infringed upon the plaintiffs’ constitutionally protected right to food, the state will need to prove that the food production standards are narrowly tailored and further a compelling state interest.

Green amendments are passed to protect the environment in the absence of sufficient government regulation, in other words to fill regulatory gaps. For example, the most recent green amendment in New York was passed, in part, out of a concern about an unregulated pollutant contaminating drinking water. For this reason, the language of green amendments is purposefully broad so that it can be asserted to guarantee the right to a healthy environment, as needed, in the future. Although the Maine right to food was criticized for its vagueness, vague language is useful for those seeking to assert this type of broadly defined right. The opposition to the Maine right to food characterized it as a solution in search of a problem due to its inherent vagueness; however, the right to food is more properly characterized as a problem in search of a solution. By passing the right to food amendment, the people of Maine identified the problem: the inability to control their local food supply. Now, the judiciary will resolve the problem through the interpretation of the right to food.

156. See, e.g., PA. CONST. art. 1, § 27; MONT. CONST. art. II, § 3; MONT. CONST. art. IX; N.Y. CONST. art. I, § 19.
159. Id. at 111.
160. See id.
161. Id. (“In Hoosick Falls, New York, where residents were drinking water contaminated with perfluorooctanoic acid (PFOA, a type of per- and polyfluoroalkyl substance, or PFAS) for years because PFOA was unregulated and untested for water providers with under 10,000 users.”).
162. See id.
163. See Ommen, supra note 157.
The judiciary’s interpretative role is no small task and has the potential to either support or impair the ability of the citizens to use the right to food to assert their desired control over the food supply. In the coming subsections, this Article will examine green amendment jurisprudence and highlight the import of careful interpretation and how severely the utility of a constitutional amendment can be impacted by adopting a balancing test that allows courts to find that other governmental concerns outweigh the fundamental right. This Article will also detail recent green amendment caselaw that can be instructive for how courts have recognized the power of the constitutional provision to create a non-discretionary duty to avoid infringing upon the right to a clean and healthy environment. The following is not meant to be a comprehensive summary of all green amendment jurisprudence, but rather an overview of case law in the three states that have green amendments and an explanation of what the Maine judiciary can glean from these cases to guide its interpretation of the right to food.

A. Pennsylvania’s Green Amendment Case Law

A few short years after its enactment, the Pennsylvania judiciary was asked to interpret Pennsylvania’s green amendment in Payne v. Kassab. In Payne, the plaintiffs sought to stop a street-widening project by invoking the green amendment and claiming that the project should be stopped due to the potential harm to the environmental value of the area at issue. The lower court refused to adopt the absolutist approach argued by the plaintiffs and expressed concern that the green amendment “was antidevelopment, threatening to derail otherwise worthy projects based on relatively inconsequential impacts.” To address these concerns, the court opted to allow for controlled development and created a three-part balancing test to evaluate claims invoking the green amendment. The last two factors of the test required the court to consider whether the government had demonstrated a reasonable effort to reduce environmental impacts and whether the environmental harm from the challenged decision outweighed the public benefit. In applying the newly formed test, the court downgraded the constitutional right to a clean and healthy environment to one factor in a stacked balancing test designed

164. P.A. CONST. art. 1, § 27 (“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”).
166. Polk, supra note 154, at 130.
168. The court in Payne articulated the balancing test as follows: “(1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth’s public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?” Kassab, 312 A.2d at 94; see also Polk, supra note 154, at 131.
169. Kassab, 312 A.2d at 94.
to favor governmental action over environmental protection. Further, the lower court, in justifying its decision, explained the function of “judicial review must be ‘realistic’ rather than ‘legalistic.’”

On appeal, the Pennsylvania Supreme Court did not directly address the Payne balancing test, however, it affirmed the lower court’s decision and explained that the green amendment is not absolute and the Commonwealth must balance a duty to conserve natural resources with its other duties, such as the maintenance of an adequate highway system. By affirming the lower court’s decision, the court prevented the green amendment from functioning as an effective negative right: one that can restrain government actions that imperil constitutionally protected rights. For the next forty years, the Pennsylvania courts failed to recognize the green amendment as creating a right more valuable than other fundamental rights; this failure is illustrated in the Payne line of cases, where the Pennsylvania courts rarely vindicated the right. As explained below, the Payne balancing test has since been abandoned by the Pennsylvania courts; however, it is a relevant example for the Maine judiciary of the impact that an imprecise judicial interpretation can have on a fundamental state constitutional right.

Robinson Township v. Commonwealth is a seminal Pennsylvania case from 2013 that revived both the state’s green amendment and the national interest in the adoption of green amendments. The plaintiffs in Robinson Township sought a declaratory judgment that a state law establishing a framework for regulating oil and gas fracking and preempting local governments from regulating fracking through zoning was violative of the Pennsylvania green amendment. The plaintiffs argued that the state law, by preempting local regulation, provided insufficient environmental safeguards for oil and gas extraction.

Although much of the Robinson Township decision pertains to the second part of the Pennsylvania green amendment and therefore incorporates public trust principles that are not a part of the right to food, the case remains relevant to guide courts that are struggling to balance governmental oversight and state constitutional rights.

In ruling for the plaintiffs, a plurality of the Pennsylvania Supreme Court acknowledged the importance of the green amendment’s location in the state’s bill of rights and noted that this placement indicated it is an inherent right on par with all other rights in that section. This right is reserved to the people as a functional limitation on government power. In analyzing the first clause of the green amendment, which is a simply worded fundamental right similar to the right to food, the court determined it imposed “an obligation on all levels of state government [to] refrain from ‘unduly infringing upon or violating the right.’”

171. See Polk, supra note 154, at 130.
172. Id. at 131–32; Dernbach, supra note 167, at 154.
174. See id. at 913; Dernbach, supra note 167, at 155; see also Polk, supra note 154, at 132.
175. Robinson Twp., 83 A.3d at 915.
176. See id. at 919.
177. Id. at 948; see Polk, supra note 154, at 133, 178.
178. Robinson Twp., 83 A.3d at 948.
179. Polk, supra note 154, at 133.
The plurality addressed the absolutist concerns raised in \textit{Payne} and explained that “the right does not call for a ‘stagnant landscape,’ ‘the derailment of economic or social development,’ or ‘for the sacrifice of other fundamental values.’”\textsuperscript{180} Instead, the court emphasized the rights stemming from the green amendment “should be harmonized with property rights.”\textsuperscript{181} According to the plurality, “the General Assembly must exercise its police powers to foster sustainable development in a manner that respects the reserved rights of the people to a clean, healthy, and esthetically pleasing environment.”\textsuperscript{182} Applying this framework, the plurality found the state law to be unconstitutional, in part because it prevented municipal governments from protecting natural resources from the effects of fracking through local zoning regulations.\textsuperscript{183}

In 2017, the Pennsylvania Supreme Court issued another decision in \textit{Pennsylvania Environmental Defense Foundation v. Commonwealth}\textsuperscript{184} that served to further reinvigorate the Pennsylvania green amendment.\textsuperscript{185} In \textit{Pennsylvania Environmental}, the plaintiffs successfully invoked the Pennsylvania green amendment to challenge the use of revenue derived from leasing state land for oil and gas extraction.\textsuperscript{186} The court held that the first clause of the green amendment “places a limitation on the state’s power to act contrary to this right, and while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional.”\textsuperscript{187} In resolving the case in favor of the Pennsylvania Environmental Defense Foundation, the majority explicitly rejected the problematic \textit{Payne} balancing test and adopted the principles elucidated in \textit{Robinson Township}.\textsuperscript{188} The green amendment case law from Pennsylvania is indicative of the importance of respecting and acknowledging the elevated status of fundamental constitutional rights and the need to restrict state actions contrary to those rights.

\textbf{B. Montana’s Green Amendment Case Law}

In 1972, Montana became the second state to pass a green amendment.\textsuperscript{189} The Montana constitution contains the right to a clean and healthful environment as a fundamental right and also contains a separate section in Article IX pertaining to the management of the state’s natural resources; however, Article IX does not bestow fundamental rights.\textsuperscript{190} Much of the Montana green amendment jurisprudence is devoted to reconciling these two constitutional sections, and more recently how these sections interact with the Montana Environmental Policy Act.
The judiciary in Montana has faced a similar challenge to the one facing the Maine judiciary because the Montana green amendment does not invoke the public trust doctrine, which Pennsylvania’s green amendment does, and the court has had to navigate interpreting a simple and broadly written constitutional right.

In Park County Environmental Council v. Montana Department of Environmental Quality, the Montana Supreme Court examined the appropriate remedy for the issuance of a mining exploration license without the proper environmental impact analysis required by MEPA. Specifically, the court considered whether recent amendments to MEPA to prohibit equitable relief violated the Montana green amendment. In finding the amendments to MEPA unconstitutional, the court emphasized the need to be able to award equitable relief to prevent environmental harm as protected by the Montana green amendment.

The court also held that the amendments to MEPA failed the strict scrutiny analysis. According to Professor Amber Polk, “the interesting part of the court’s scrutiny analysis was therefore not in applying strict scrutiny to the challenged statute, but in refusing to balance the constitutional environmental right against the defendant mining company’s alleged property rights, which are also found in the Montana Constitution.”

The court clarified in dicta that, although balancing property rights and the Montana green amendment was not needed in Park County, the balancing of property rights may be appropriate “when a case presents an irreconcilable conflict between the co-equal rights of the parties.”

In Held v. State, decided in 2023, a Montana District Court considered another challenge to MEPA. Given the nature of the alleged injuries and landmark verdict, the case made national headlines and, despite the pending appeal, has been claimed as a victory for both climate change and green amendment advocates.

The plaintiffs in Held are a group of young people who claim that a limitation to MEPA and subsequent amendments prohibiting the consideration of climate impacts from the required environment analysis are a violation of their rights guaranteed by the Montana green amendment. The district court ruled in favor of the plaintiffs and held the MEPA provisions excluding climate impacts to be

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191. MONT. CODE. ANN. §§ 75-1-101 to -110.
192. See Polk, supra note 154, at 147-48.
194. See id. ¶ 51.
195. Id. ¶ 74.
196. Id. ¶ 82.
197. Polk, supra note 154, at 146.
facially unconstitutional because they prevented an “irreversible degradation of the environment.” The court also found the MEPA provisions failed the strict scrutiny analysis. The court characterized Montana’s green amendment as establishing an affirmative governmental duty to protect the right to a clean and healthful environment. The Held case marks the first time a green amendment has been successfully invoked in the context of climate change.

C. New York’s Green Amendment Case Law

In 2021, New York became the third and most recent state to adopt a green amendment. Although it is the newest green amendment, it has already generated some interesting and instructive case law that can serve to guide the Maine judiciary in its interpretation of the right to food. In a pair of cases filed in the New York Supreme Court and currently on appeal (Fresh Air for the Eastside), the plaintiff is attempting to force several governmental and nongovernmental parties to make improvements to a large landfill in Monroe County, New York. The New York Department of Environmental Conservation (DEC), in its motion to dismiss, claimed the management of the landfill is a discretionary regulatory matter that the court cannot compel. Supreme Court Judge John Ark issued an opinion in which he disagreed with the DEC and explained that the New York green amendment presents the agency with a nondiscretionary duty to comply with the state constitution. This is relevant because it entitles citizens to invoke the right to bring an action for mandamus. Judge Ark also found the parties did not need to exhaust administrative remedies within the DEC before bringing a claim invoking the right. According to Judge Ark, the reason that exhaustion of the remedies was not required before the filing of the suit was because the green amendment was placed in the bill of rights section of the New York Constitution instead of in the environmental conservation section of the state code.

203. Id. at 101.
204. Id. at 96.
205. Bookman, supra note 200.
206. “Each person shall have a right to clean air and water, and a healthful environment.” N.Y. CONST. art. I, § 19.
210. Id. at 27.
211. See id.
212. Id.
213. Id.
Judge Ark’s earlier opinion on the same issue also contains an important legal framework for judicial decision-making in the green amendment context. According to Judge Ark, “[i]n adjudicating and applying the green amendment, it may be necessary to have a two-prong test: First, did the government action comply with the applicable statute? Second, did the government action violate a person’s constitutional ‘rights to clean air and water and a healthful environment’?” If failure to adhere to the applicable statutory duty is found, then a court may not need to reach the constitutional claim.

In his later opinion, Judge Ark describes the enactment of the green amendment as a regulatory paradigm shift that requires the State to intervene to prevent further environmental harm from the landfill. Although not explicit, Judge Ark’s opinion indicates that the New York green amendment contains both negative rights that can be invoked to limit government action and positive constitutional rights that can be invoked to force government action to preserve the right to a healthy environment. In her appellate brief, New York Attorney General Letitia James disagrees and argues that the green amendment is not self-executing and “does not impose a concomitant duty on the state to take action against third parties to enforce that right in the absence of language imposing that duty.” Although the case is currently on appeal, Judge Ark’s opinion sends a clear message to government agencies and the public that the invocation of this right can occur before the end of the administrative process and requires the State to ensure that citizens have their inalienable right to a healthy environment.

D. How Green Amendment Jurisprudence Can Inform the Interpretation of Maine’s Right to Food

The interpretation and application of Maine’s right to food will be a complex task for the Maine judiciary. Although the right to a healthy environment and the right to food are distinct in terms of what is being protected, both share an elevated status as fundamental rights. Pennsylvania green amendment jurisprudence includes important examples of the potential pitfalls and successes of this type of judicial interpretation. The Maine judiciary should take note of the damage caused by the improper balancing test adopted in the Payne line of cases. The Payne balancing test, by encouraging that the right to a healthy environment be considered on par with other competing governmental priorities, served to hamper the proper invocation of the state’s green amendment for the next forty years. In Robinson Township and Pennsylvania Environmental Defense Foundation, the Pennsylvania courts corrected course and directed the Legislature to exercise its rights jurisprudence in New York).

214. See Fresh Air for the Eastside, Inc. v. Town of Perinton, No. E2021008617, at 8 (N.Y. Sup. Ct. 2022); see also Robinson, supra note 47, at 41 (discussing Judge Ark’s framework for judicial decision-making in the green amendment and its practical outcome on the current shift in environmental rights jurisprudence in New York).


216. Id. at 10.


218. See supra Section V.A.
police powers to foster sustainable development that respects the right to a healthy environment. These lessons can inform the pending legal challenges in Maine and be used as helpful examples for striking a balance between the state’s right to govern and the full exercise of citizens’ rights.

In Park County, the Montana courts examined the importance of being able to issue equitable relief to enjoin government action that threatens a fundamental right. The Park County court also refrained from balancing the right to a healthy environment against a competing property right, although it reserved the right to balance similar rights in the future. Given the broad nature of the right to food, it is also likely that the Maine judiciary will need to balance the right to food with other constitutional rights. The decision in Park County not to balance the environmental right against the mining right may be viewed as a sidestep, however it is something that may prove useful for the Maine courts. In the Held case, a green amendment enacted in 1972 was successfully used to protect its citizens from the current environmental crisis of climate change that was unforeseen at the time of the adoption of the amendment. The Montana green amendment in Held was not just interpreted to strike down a state law that failed to take climate change impacts into account, but also to impose a positive duty to improve the environment. As the Maine judiciary undertakes to interpret the right to food, Montana jurisprudence can be illustrative of the vital role equitable remedies play in protecting such a right, the ability to apply the right broadly, and the negative and positive duties the right bestows.

Although the New York green amendment case law is still in its infancy, the clear directives from the Fresh Air for the Eastside decisions are informative. The trial court cleared the way for utilizing a fundamental right to challenge state action by interpreting the right as non-discretionary and removing the need to first exhaust administrative remedies. Judge Ark also proposed a simple two-step test for analyzing claims brought pursuant to the New York green amendment; this approach is something that could be replicated in the examination of right to food claims. Lastly, Judge Ark found the New York green amendment embraced both positive and negative liberties in that it requires active governmental intervention to prevent future harm to the fundamental right. The Maine judiciary, like the judiciary in New York, has the difficult task of applying a new constitutional right to established legal frameworks. However, this burden may be eased by adopting Judge Ark’s interpretation of a similar right as creating a regulatory paradigm shift that creates a nondiscretionary duty for the State to recognize, respect, and protect this new fundamental right.

219. See supra Section V.A.
220. See supra Section V.B.
221. See supra Section V.B.
222. See supra Section V.B.
223. See supra Section V.B.
224. See supra Section V.C.
225. See supra Section V.C.
226. See supra Section V.C.
CONCLUSION

It is difficult to think of a more vital human right than the right to food. In 2021, the citizens of Maine voted to acknowledge the fundamental and inherent nature of this right by adding it to the Declaration of Rights in their state constitution. The citizens who supported the right to food did it to regain control of their food system. Although Maine is the only state to pass such an amendment, the right to food is like other state constitutional rights in that it attempts “to guarantee not only individuals’ ability to direct their own lives while attending to the common good but also the people’s collective ability to direct government.”

The question of how government should be directed by this new right is now in the hands of the Maine judiciary. To guide their interpretation, this Article suggests they look to the caselaw of another type of fundamental right—the right to a clean and healthy environment—found in state constitutional green amendments. The historical case law interpreting Pennsylvania’s green amendment is emblematic of the damage that can be done by interpreting the right in a way that simply reinforces the state’s regulatory authority. The Robinson Township line of cases, however, has corrected the interpretation of the amendment and energized not just Pennsylvania’s green amendment, but also the national interest in the use of such amendments to stop governmental actions that endanger a fundamental right. The Montana Supreme Court has created helpful guidance for how to interpret a broadly written inalienable right and specifically how to reconcile state laws and a constitutional amendment. Although the Held v. Montana case garnered national attention for many reasons, for the purposes of this Article its value lies in interpreting a fundamental right broadly to prevent harm caused by state law and creating an affirmative duty to preserve the right at issue. Although New York is the most recent state to adopt a green amendment, the judiciary is wasting no time in wading into the rough waters of judicial interpretation and is already acting to ensure the new right is respected as inherent and inalienable. In conclusion, although not precedential, green amendment jurisprudence may prove valuable for the Maine judiciary in its effort to strike a balance between protecting an inalienable right to food with the public health, safety, and welfare.

227. Seifter & Bulman-Pozon, supra note 34, at 1873.