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“Food of their Own Choosing”: Improving Access to Locally Grown, Sustainable, and Real Food

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“FOOD OF THEIR OWN CHOOSING”: IMPROVING ACCESS TO LOCALLY GROWN, SUSTAINABLE, AND REAL FOOD

Alexia M. Kulwicz & Tom Starck

ABSTRACT

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Alexia M. Kulwicz & Tom Starck*

ABSTRACT

The State of Maine is leading the nation in efforts not only to promote production of locally and sustainably grown food, but the right of consumers to grow, produce, and consume the food of their choosing. This includes creation of a constitutional right to food, a right recognized in the global community but not throughout the United States.¹ Many advocates in the United States emphasize the right to food as a human right, advocating for the same attention and protection as other human rights such as the right to life, liberty, freedom from slavery, and freedom from discrimination.

The right to food provides individuals with greater access to healthy and sustainable food. This meets the global right to food standards of availability, accessibility, adequacy, and sustainability. A constitutional right to food addresses the challenging regulatory environment for food production and prioritizes access of individuals and families to nourishing food. This constitutional right is not only about access to food as a human right, but it also protects the ability of individuals to grow their own food or to obtain their food from small, local producers whom they trust.

This Article approaches the constitutional right to food as a method to mitigate the overwhelming morass of regulations that discourage local food production by smaller independent farms and by consumers themselves. Establishing this right prioritizes the rights of individuals and small producers to produce locally grown, sustainable, and healthy food over regulations that favor larger industrial producers.

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1. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 11 (Dec. 16, 1966) [hereinafter ICESCR]. *But see Status of Ratification Interactive Dashboard*, U.N. OFF. OF THE HIGH COMM’R ON HUM. RTS., <https://indicators.ohchr.org/> [<https://perma.cc/CJ8N-RH9V>] (last visited May 9, 2024); Anya Wahal, *On International Treaties, the United States Refuses to Play Ball*, COUNCIL ON FOREIGN RELS. (Jan. 7, 2022, 5:08 PM), <https://www.cfr.org/blog/international-treaties-united-states-refuses-play-ball> [<https://perma.cc/2SK7-CHY5>] (showing that the International Covenant on Economic, Social and Cultural Rights, which recognizes the right of everyone to adequate food, was not ratified by the United States). While not explicit, the right to food is arguably included in the 1948 Universal Declaration of Human Rights. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25 (Dec. 10, 1948).

Legal obstacles throughout the United States impede the ability of homesteaders, home gardeners, cottage food producers, and others to produce their own healthy, sustainably grown food. Impeding regulations include zoning prohibitions on the raising of chickens, front yard gardens, hoop houses, and other land uses. Small farms, increasingly sought out by consumers, are similarly affected. Regulations that negatively impact them include licensing and zoning restrictions; challenges to meat and poultry processing; complex food safety regulations; and regulation of unlicensed eggs, cottage foods, and dairy products. Continuing problems with and access to the U.S. meat processing industry forces local producers to drive long distances for processing, which is harmful to both the environment and to animals raised in humane conditions.

Passage of a constitutional right to food and food sovereignty legislation provides an effective method of diminishing the impact of a regulatory system that supports centralization of the U.S. food supply controlled by a small number of corporate producers. It appropriately prioritizes the right of individuals to obtain locally and sustainably grown healthy food. The Maine constitutional right to food and the Maine Food Sovereignty Act provide a helpful blueprint for expanding Americans' right to food. Maine courts and its Legislature should protect this new right to food, avoid unnecessary limitations, and prevent state agencies from violating the text, spirit, and intent of this basic right to food.

Pending in the Superior Court of Maine is *Deschaine et al. v. Lambrew and DHHS*. The Deschaines had been preparing food from locally produced ingredients permitted by a town ordinance and the Maine Food Sovereignty Act. The Maine Department of Health and Human Services insisted that the Kitchen obtain a food establishment license, which in turn requires construction of a cost-prohibitive commercial kitchen. Such action violates the Maine constitutional right to food by interfering with consumer choice of local healthy nourishment. The action likewise violated the Maine Food Sovereignty Act, which authorizes local control. By closing Kenduskeag Kitchen, the state shut down the only healthy prepared food option in town. This action demonstrates the need for a constitutional right to food over mere statutory changes.

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The right to food has been defined as “the right to have regular, permanent and unrestricted access . . . to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions” of the consumer.² This does not mean intermittent acts of charity but rather long term solutions based in community, empowering consumers and producers to work together toward

2. *About the Right to Food and Human Rights*, U.N. OFF. OF THE HIGH COMM’R ON HUM. RTS., <https://www.ohchr.org/en/special-procedures/sr-food/about-right-food-and-human-rights> [<https://perma.cc/M2QZ-RTU5>] (last visited May 9, 2024); *accord* UNIV. OF MIA. SCH. OF L. HUM. RTS. CLINIC, FACTSHEETS ON THE RIGHTS TO FOOD, HEALTH, HOUSING, AND WATER 2 (2019).

creation of an appropriate food system.³ The components of the right to food have been described as accessibility, availability, adequacy, and sustainability.⁴ This means that individual consumers must have the ability to access what they view as adequate food, in turn meaning that consumers deserve the choice of food that they consume, and that healthy, sustainable, and locally grown food be available to meet those choices. Indeed, as argued by Professor Olivier De Shutter of the University of Louvain, Belgium, “the right to food is the right of all individuals to secure, through their own means and resources, access to adequate food, either through their own production or by purchase.”⁵ Yet, in the United States, as found in an investigation by both the *Guardian* and Food and Water Watch, “consumer choice is largely an illusion.”⁶ It also cannot be ignored that those most often denied the right to food in the United States are people of color or those in otherwise marginalized communities.⁷

The Author anticipates that other Articles in this special volume on the right to food will discuss in greater depth the global recognition of the right to food and overall inequity. This Article argues that the U.S. statutory and regulatory system severely limits the ability of independent sustainable food producers to provide locally grown sustainable food desired by consumers and their communities. Rather, U.S. federal, state, and even local food policy has supported global corporate control of the U.S. food system, and works to discourage independent farms, homesteading to produce foods for oneself and one’s family, and community food systems. The Maine constitutional right to food amendment paired with Maine’s nearly decade-old Food Sovereignty Act, however, provides a unique legal framework address these issues.

In enacting the Maine Food Sovereignty Act and the constitutional right to food, one goal of the Maine Legislature and Maine’s people was to respect “local foodways,” often defined as the “cultural, social and economic practices related to the production and consumption of food.”⁸ Respect for local foodways also includes the traditional activities, attitudes, beliefs, and behaviors associated with foods, including customs of food production, preservation, preparation, presentation, gathering, marking, and uses of food.⁹ The International Covenant on Economic, Social and Cultural Rights (ICESCR), recognizes the right to adequate

3. See generally Alison Cohen et al., *Food Banks and Charity as a False Response to Hunger in the Wealthy but Unequal Countries*, GLOB. NETWORK FOR THE RIGHT TO FOOD & NUTRITION (Oct. 13, 2021), <https://www.righttofoodandnutrition.org/food-banks-and-charity-false-response-hunger-wealthy-unequal-countries> [https://perma.cc/EEN8-62Q4].

4. UNIV. OF MIA. SCH. OF L. HUM. RTS. CLINIC, *supra* note 2, at 2.

5. Brief for Olivier De Schutter as Amici Curiae Supporting Respondents, ¶ 1, *Lhaka Honhat Assoc. v. Argentina, Merits, Reparations, and Costs* (2020), Inter-Am. Ct. H.R. (ser. C) No. 12.094.

6. Nina Lakhani et al., *Our Unequal Earth Revealed: The True Extent of America’s Food Monopolies, and Who Pays the Price*, *GUARDIAN* (July 14, 2021, 6:00 PM), <https://www.theguardian.com/environment/ng-interactive/2021/jul/14/food-monopoly-meals-profits-data-investigation>.

7. See Angela M. Odoms-Young, *Examining the Impact of Structural Racism on Food Insecurity: Implications for Addressing Racial/Ethnic Disparities*, *FAM. CMTY. HEALTH*, Apr.–June 2018, at 2–3.

8. L.D. 1648 (128th Legis. 2017); see also Julia Darnton, *Foodways, When Food Meets Culture and History*, *MICH. STATE UNIV. EXTENSION* (Dec. 12, 2012), https://www.canr.msu.edu/news/food-ways_when_food_meets_culture_and_history [https://perma.cc/MK6Y-BJ9P].

9. Darnton, *supra* note 8.

food.¹⁰ The Special Rapporteur on the right to food has further found that having adequate food means having access to a wholesome diet of healthy, culturally acceptable food.¹¹ U.N. Human Rights Council Resolution 40/7 further references the goals of improved nutrition and promoting sustainable agriculture.¹² Toward these ends, food sovereignty

is the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agricultural systems. It puts the aspirations and needs of those who produce, distribute and consume food at the heart of food systems and policies rather than the demands of markets and corporations.¹³

Much more needs to be done in the United States to work toward food justice and ensuring access to traditional foodways.¹⁴ This Article argues for a simple first step: changing the federal, state, and local government framework to exempt small-scale food producers from onerous rules. Rather, policy should support families in growing their own food, permit smaller scale production in communities, and allow individuals to access and consume the food of their choice. Further, enshrining the right to food in state constitutions empowers communities to support local, healthy, and sustainably grown food and permits people to define their own food and agricultural systems. Establishing a state constitutional right to food also provides a powerful tool to challenge those regulations, ordinances, or enforcement actions that interfere with the right to food. This Article examines some of the regulatory conditions throughout the United States that challenge local production of food and consumer choice and urges more states to adopt a constitutional right to food as a solution.

Specifically, in Parts II and IV, this Article examines some of the regulatory conditions throughout the United States that challenge local production of food and consumer choice. Part III introduces the concept that a right to food constitutional amendment, together with a state food sovereignty statute, best protects small producers and local homesteaders. Part V addresses any potential objections on alleged food safety grounds. In Part VI, this Article discusses how Maine's right to food and Food Sovereignty Act protects small farms and promotes local food systems. It then examines litigation pending before the Maine courts that demonstrates a need for a constitutional amendment and urges more states to adopt

10. ICESCR, *supra* note 1, ¶ 1.

11. *About the Right to Food and Human Rights*, *supra* note 2.

12. Human Rights Council Res. 40/7, U.N. Doc. A/HRC/RES/40/7 (Mar. 21, 2019); *About the Right to Food and Human Rights*, *supra* note 2; *About the Mandate*, U.N. OFF. OF THE HIGH COMM'R ON HUM. RTS., <https://www.ohchr.org/en/special-procedures/sr-food/about-mandate> [<https://perma.cc/67AF-6JFP>] (last visited May 9, 2024).

13. *Declaration of Nyéléni*, NYELENI (Feb. 27, 2007), <https://nyeleni.org/IMG/pdf/DeclNyeleni-en.pdf>; *Food Sovereignty*, U.S. FOOD SOVEREIGNTY ALL., <https://usfoodsovereigntyalliance.org/what-is-food-sovereignty/> [<https://perma.cc/SN6T-QXZM>] (last visited May 9, 2024).

14. See ROBERT GOTTLIEB & ANUPAMA JOSHI, *FOOD JUSTICE* 13–26, 75–98 (2010) (addressing workers' safety and working conditions, as well as the U.S. politics impacting the U.S. food system); *Food Justice*, FOODPRINT (Feb. 28, 2024), <https://foodprint.org/issues/food-justice/> [<https://perma.cc/P6TE-2A66>].

a constitutional right to food as a solution to local and state regulation that impedes local food production and sales, such as licensing and sales regulations.

I. GLOBAL CORPORATE CONTROL OF THE U.S. FOOD SYSTEM, ITS FAILINGS, AND ITS INABILITY TO PROMOTE COMMUNITY-BASED FOOD SYSTEMS

The U.S. food system, controlled by a remarkably small number of corporations, limits food choices and operates to deny the right to food to individual consumers and their communities. Just four transnational companies control the vast majority of the market share in American grocery stores.¹⁵ This provides profits to shareholders while exploiting farmers and workers as well as deceiving consumers about choice.¹⁶ The U.S. Department of Agriculture (USDA) Economic Research Service has found that the top four beef producers control approximately eighty percent of the U.S. meat supply, and the top four pork producers account for sixty-four percent of the hog market.¹⁷ Poultry is also highly concentrated in a handful of top producers.¹⁸ Accordingly, most farms are necessarily forced to sell livestock to one of the few firms controlling the market and have little opportunity for local processing or sales.¹⁹ Four companies also control eighty-five percent of the corn seed market, ninety percent of grain trading,

15. FOOD & WATER WATCH, *THE ECONOMIC COST OF FOOD MONOPOLIES: THE GROCERY CARTELS 1* (2021), https://www.foodandwaterwatch.org/wp-content/uploads/2021/11/IB_2111_FoodMonoSeries1-SUPERMARKETS-V2FINAL.pdf.

16. Lakhani et al., *supra* note 6.

17. See Jen Skerritt, *Tyson Foods Helped Created the Meat Crisis It Warns Against*, BLOOMBERG (Apr. 29, 2020), <https://www.bloomberg.com/news/articles/2020-04-29/tyson-foods-helped-create-the-meat-crisis-it-now-warns-against>; Harrison M. Pittman, *Market Concentration, Horizontal Consolidation, and Vertical Integration in the Hog and Cattle Industries: Taking Stock of the Road Ahead*, NAT'L AGRIC. L. CTR., Aug. 2005, at 5. See generally JAMES M. MACDONALD ET AL., *CONCENTRATION AND COMPETITION IN U.S. AGRIBUSINESS* 25 (2023); *Explainer: How Four Big Companies Control the U.S. Beef Industry*, REUTERS (June 17, 2021, 1:12 PM), <https://www.reuters.com/business/how-four-big-companies-control-us-beef-industry-2021-06-17/> (beef in the United States controlled by Cargill, Tyson Foods Inc., JBS SA, and National Beef Packing Co.). Top pork producers include WH Group, JBS, Hormel, and Tyson Foods. *Top 4 Pork Processors in the United States*, OPPORTIMES (Mar. 13, 2023), <https://www.opportimes.com/top-4-pork-processors-in-the-united-states/> [<https://perma.cc/77N5-QUAD>]. For poultry, the controlling corporations are Tyson Foods, Pilgrim's Pride, Perdue Farms, and Sanderson Farms, Inc. *Top USA Poultry Producers by Market Share*, ESS-FEED (Jan. 22, 2023), <https://essfeed.com/top-usa-poultry-producers-by-market-share/> [<https://perma.cc/P3DK-4Y8B>].

18. *Top USA Poultry Producers by Market Share*, *supra* note 17.

19. See *Fact Sheet: The Biden-Harris Action Plan for Fairer, More Competitive, and More Resilient Meat and Poultry Supply Chain*, THE WHITE HOUSE (Jan. 3, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/fact-sheet-the-biden-harris-action-plan-for-a-fairer-more-competitive-and-more-resilient-meat-and-poultry-supply-chain/> [<https://perma.cc/L6ZN-K5U8>] (producers forced to sell to large meat processors); Catie Joyce-Bulay, *Small Ranchers, Big Problems*, MOD. FARMER (Jan. 25, 2021), <https://modernfarmer.com/2021/01/small-ranchers-big-problems/> [<https://perma.cc/5PX5-4ACW>] (discussing challenges to small producers); Dan Macon, *Challenges for Direct-Market Meat Production*, RANCHING IN THE SIERRA FOOTHILLS (June 27, 2019), <https://ucanr.edu/blogs/blogcore/postdetail.cfm?postnum=30656> [<https://perma.cc/C24R-RL8E>] (highlighting the loss of meat processors).

and sixty-three percent of food retail.²⁰ "Twenty percent of farms control nearly [seventy] percent of US Farmland."²¹

Control by so few corporations necessarily limits choice. It also interferes with the right to food because it creates cheap and often unhealthy food at the expense of the health and welfare of consumers and the workforce. The system denies access to sustainably grown food to many consumers because smaller local operations struggle to meet regulatory burdens or are prohibited from selling locally produced food, as discussed below. Similarly, zoning restrictions such as those in Old Town, Maine, prohibiting livestock or chickens, ensure that consumers cannot necessarily grow their own food to avoid the U.S. system.²² Many towns throughout the United States ban, for example, front yard vegetable gardens.²³ The U.S. system thus limits access to locally sustainable food, violating the tenets of the globally recognized right to food. It fails to provide an alternative to the industrial agricultural system that has been linked to food insecurity and diet-related disease such as diabetes and heart disease.²⁴ This is in part because the U.S. federal government subsidizes production of high fructose corn syrup and other ingredients used in the production of unhealthy food, thus contributing to associated health risks.²⁵

In the United States, these subsidies are provided for in omnibus legislation known as the Farm Bill. While the vast majority of funding included in the Farm Bill is spent on nutrition assistance such as the Supplemental Nutrition Assistance Program (SNAP), about thirteen percent of the farm bill budget supports Farm, Conservation, and Commodity Programs.²⁶ For example, the 2018 Farm Bill authorized approximately \$6.3 billion in income support to commodity producers in 2022, through either the Agriculture Risk Coverage (ARC) or Price Loss Coverage (PLC) program, and \$9.7 billion towards the Federal Crop Insurance Program.²⁷ The top three commodities receiving the most ARC and PLC support

20. *Ending Corporate Control*, NAT'L FAM. FARM COALITION, <https://nffc.net/what-we-do/ending-corporate-control> [<https://perma.cc/68F4-NXPL>] (last visited May 9, 2024).

21. *Id.*

22. *See, e.g.*, Old Town, Me., Zoning Ordinance § 111(b)(6) (June 1, 2009), <https://old-town.org/vertical/sites/%7BF7FABD96-D29C-4681-A9ED-8F3156759DC9%7D/uploads/Zoning-Ordinance.PDF>.

23. Baylen Linnekin, *Local Laws Ban Front Yard Food Gardens in Cities Across the U.S.*, EARTH ISLAND J. (Nov. 16, 2016), https://www.earthisland.org/journal/index.php/articles/entry/local_laws_ban_front_yard_food_gardens/ [<https://perma.cc/JJV2-T3MF>].

24. Sarah Schindler, *Food Federalism: States, Local Governments, and the Fight for Food Sovereignty*, 79 OHIO ST. L.J. 761, 764, 765 (2018); *see* Karen R. Sigel et al., *Association of Higher Consumption of Foods Derived from Subsidized Commodities with Adverse Cardiometabolic Risk Among US Adults*, 176 JAMA INTERNAL MED. 1124, 1131 (2016).

25. *See* Schindler, *supra* note 24, at 765; Sigel et al., *supra* note 24, at 1125.

26. *Farm Bill Spending*, U.S. DEP'T OF AGRIC. ECON. RSCH. SERV., <https://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/farm-bill-spending/> [<https://perma.cc/X4TF-YW69>] (Feb. 7, 2023).

27. *See* Agricultural Improvement Act of 2018, Pub. L. No. 115-334, §§ 1106–07, 132 Stat. 4490 (2018) (authorizing PLC and ARC programs respectively); *see also* U.S. DEP'T OF AGRIC., FY 2022 USDA BUDGET SUMMARY 6, 42 (2022), <https://www.usda.gov/sites/default/files/documents/2022-budget-summary.pdf> (providing more information on how the ARC and PLC programs work). On

are corn, soybeans, and wheat.²⁸ In addition, the farm bill authorizes loans to be made to processors for domestically grown sugarcane.²⁹ In addition to income support, the USDA subsidizes crop insurance and administers the Marketing Assistance Loan Program (MLAP) for these crops.³⁰

Notably, these commodity crops do not include so called “specialty crops,” such as healthy fruits and vegetables, although the 2018 Farm Bill did include some support for these crops.³¹ Rather, the greatest subsidized crop is corn, used for “animal and livestock feed or . . . high fructose corn syrup, including sugar-sweetened beverages (SSBs), cereals, and alcohol.”³² The consumption of products made with high fructose syrup is associated with obesity, leading to a number of risk factors for cardiometabolic disease such as high blood pressure.³³ Subsidizing animal feed of corn and soy may contribute to factory farms and concentrated animal feeding operations, along with their environmental and animal welfare concerns.³⁴ For instance, farm subsidies permitted factory farms to purchase feed at low prices, potentially increasing the growth of such operations.³⁵ A better policy would be to support pasture-raised livestock. Yet the current system causes environmental harm, subsidizing production and consumption of cheap food

November 17, 2023, President Biden extended the 2018 Farm Bill. Consolidated and Further Continuing Appropriations Act, 2024, Pub. L. No. 118–22, § 102 (2023).

28. Megan Bland, *Of Crops and Credit: Commodities Programs Steady Prices, Support Producers*, NAT’L CONF. OF STATE LEGISLATURES (Mar. 29, 2024), <https://www.ncsl.org/state-legislatures-news/details/of-crops-and-credit-commodities-programs-steady-prices-support-producers> [<https://perma.cc/U6G5-9MC7>].

29. 7 U.S.C. § 7272(a).

30. *Title I: Crop Commodity Program Provisions*, U.S. DEP’T OF AGRIC. ECON. RSCH. SERV., <https://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/title-i-crop-commodity-program-provisions/> [<https://perma.cc/6D8Y-5TUD>] (Feb. 7, 2023); Agricultural Improvement Act of 2018, §§ 1107, 1202, 11101–26.

31. RENEE JOHNSON, CONG. RSCH. SERV., IF11317, 2018 FARM BILL PRIMER: SPECIALTY CROPS AND ORGANIC AGRICULTURE (2019) (explaining that support for specialty crops includes monies for research, marketing, technical assistance, and support for organic production); *see also* Joanne L. Slavin & Beate Lloyd, *Health Benefits of Fruits and Vegetables*, 3 ADVANCES IN NUTRITION 506, 514 (2012); *Vegetables and Fruits*, HARVARD T.H. CHAN SCH. OF PUB. HEALTH, <https://www.hsph.harvard.edu/nutritionsource/what-should-you-eat/vegetables-and-fruits/> [<https://perma.cc/2CNG-3CZD>] (last visited May 9, 2024) (concerning the health of produce).

32. Whitney L. Do et al., *Consumption of Foods Derived from Subsidized Crops Remains Associated with Cardiometabolic Risk: An Update on the Evidence Using the National Health and Nutrition Examination Survey 2009–2014*, 12 NUTRIENTS 3244, 3245 (2020).

33. *Id.*

34. *See* Gene Baur, *Why is Healthy Food So Expensive in America? Blame the Farm Bill That Congress Always Renews to Make Burgers Cheaper Than Salad*, FORTUNE (July 21, 2023), <https://fortune.com/2023/07/21/why-healthy-food-so-expensive-in-america-blame-farm-bill-congress-always-renews-make-burgers-cheaper-salad-gene-baur/> [<https://perma.cc/77F7-K573>]; Jon Devine & Valerie Baron, *CAFOs: What We Don’t Know Is Hurting Us*, NAT’L RES. DEF. COUNCIL (Sept. 23, 2019), <https://www.nrdc.org/resources/cafos-what-we-dont-know-hurting-us> [<https://perma.cc/QA58-CTTA>].

35. *See* ELANOR STARMER & TIMOTHY A. WISE, GLOB. DEV. & ENV’T INST. TUFTS UNIV., FEEDING AT THE TROUGH: INDUSTRIAL LIVESTOCK FIRMS SAVED \$35 BILLION FROM LOW FEED PRICES 1 (2007).

lacking in nutrients and driving small, diversified farms out of business.³⁶ Protecting the right to food requires policy that supports nutritious food over less healthy options.

In addition to supporting cheap, unhealthy food, the food system produces food at the expense of harm and exploitation of the agricultural workforce and the environment. Agricultural workers are among the lowest paid workers in the U.S. farmworkers are subjected to dangerous conditions, long hours without overtime pay, and limited access to health care.³⁷ Farmworkers face injury and disease from pesticide exposure, poor living conditions,³⁸ and lack of access to healthy foods themselves.³⁹ Similarly, food processing workers suffer injuries from conditions and high line speeds in processing plants.⁴⁰ Communities also suffer from environmental harms caused by fertilizer runoff and exposure to chemicals such as pesticides.⁴¹ Monocropping depletes nutrients from the soil, fertilizer runoff threatens freshwater bodies and oceans, and factory farms cause air and water pollution.⁴²

The system of support for transnational corporations also disempowers individuals and their communities from establishing local, healthy food systems. The benefits of homesteading, or growing one's own food, are often limited to residents with higher incomes who have the space and land ownership rights to do so.⁴³ Regulations may allow for the raising of animals and the growing of

36. See J.M. Greene, *Localization: Implementing the Right to Food*, 14 *DRAKE J. AGRIC. L.* 377, 389 (2009).

37. See Sheila Soto et al., *Determining Regional Differences in Barriers to Accessing Health Care Among Farmworkers Using the National Agricultural Workers Survey*, 25 *J. IMMIGR. MINOR HEALTH* 324, 324 (2023).

38. See, e.g., Kennedy Saldanha, *The Invisibility of Farmworkers: Implications and Remedies*, 20 *LATINO STUD.* 28, 30–32 (2022) (analyzing farmers in Michigan); Thomas A. Arcury et al., *Safety, Security, Hygiene and Privacy in Migrant Farmworker Housing*, 22 *NEW SOLS.: J. ENV'T & OCCUPATIONS HEALTH POL'Y* 153, 153–54, 163 (2012) (analyzing farmworkers in North Carolina). See generally GOTTLIEB & JOSHI, *supra* note 14, at 21.

39. *FARMWORKER JUST., POLICIES AND STRATEGIES TO ADDRESS FOOD INSECURITY IN AGRICULTURAL WORKERS COMMUNITIES* 1 (2023); Margot J. Pollans & Emily M. Broad Leib, *The New Food Safety*, 107 *CAL. L. REV.* 1173, 1180 (2019).

40. Pollans & Leib, *supra* note 39, at 1190.

41. *UNION OF CONCERNED SCIENTISTS, SUBSIDIZING WASTE: HOW INEFFICIENT US FARM POLICY COSTS TAXPAYERS, BUSINESSES AND FARMERS BILLIONS* 3 (2016).

42. See Lakhani et al., *supra* note 6 (addressing impact of monocropping and agricultural runoff). Both the labor and the environmental aspects of the industrial food system are a vital concern but are not examined in this Article. See generally GOTTLIEB & JOSHI, *supra* note 14; *FOODPRINT*, *supra* note 14 (discussing health and problems suffered by farmworkers); *NAT'L RSCH. COUNCIL, TOWARD SUSTAINABLE AGRICULTURAL SYSTEMS IN THE 21ST CENTURY* (2010) (suggesting sustainable farming methods to prevent and mitigate the potentially negative impacts on soil erosion and water quality stemming from industrial agriculture); SUSAN A. SCHNEIDER, *FOOD, FARMING, AND SUSTAINABILITY: READINGS IN AGRICULTURAL LAW* 200–12 (2d ed. 2016) (explaining the impact of agriculture on air quality and health concerns with the use of pesticides); Schindler, *supra* note 24; JULIE GUTHMAN, *WEIGHING IN: OBESITY, FOOD JUSTICE, AND THE LIMITS OF CAPITALISM* 152 (2011) (identifying health concerns with the U.S. food system).

43. See Emily Kenny, *Pandemic Gardening and Hunting Stronger Among Higher-Income Families, Cornell Study Finds*, *SPECTRUM NEWS* 1 (Oct. 20. 2023, 1:34 PM), <https://spectrumlocalnews.com/nys/central-ny/news/2023/10/20/a-look-at-accessibility-in-gardening--hunting-and-fishing->; Jean L.

vegetables only on agriculturally zoned land with high minimum acreage, which is not affordable to many individuals and families seeking to grow their own food.⁴⁴ Jurisdictions governing more affordable property often prohibit the raising of meat animals, laying hens, hoop houses, and front yard gardens, or place other restrictions on the individual's ability to grow their own food.⁴⁵ These restrictions disproportionately impact lower income neighborhoods and smaller properties, thus only permitting the right to food, or at least the right to personally grow healthy food, to more wealthy individuals.

Similarly, the already-limited methods by which consumers can in fact obtain locally produced meat, eggs, and vegetables are often unavailable for those with lower incomes or those receiving subsidized access to food. For example, to obtain local meat not processed by a USDA facility, a consumer may purchase a live animal or a share in that animal to be brought to a custom slaughter facility for processing.⁴⁶ Locally grown organic vegetables may be available through Community Supported Agriculture (CSA), requiring a commitment to purchase a year's worth of produce up front.⁴⁷ Of course, these options are difficult for those without the means to make significant up-front investments in their food supply. These options are also not available to institutional organizations providing food, such as food banks.⁴⁸ Only owners of the animal can send it to custom slaughter and processing for personal consumption and cannot then be sold or given away.⁴⁹ This means that a food bank lacks the ability to bring local livestock to custom processing and then distribute the food. Regulations allowing for limited on-farm sale of food directly to consumers often prohibit donation of food.⁵⁰ The system that supports global corporate control of the food system means that lower income or traditionally marginalized communities have less access to or choice of locally grown healthy foods.⁵¹

Coffin-Schmitt et al., *Wild and Backyard Food Use During COVID-19 in Upstate New York, United States*, 10 FRONTIERS NUTRITION, (Sept. 5, 2023), at 2.

44. See Katherine Kornei, *Only Two States Have Passed 'Right to Garden' Laws. Will Others Follow?*, CIV. EATS (Aug. 20, 2022), <https://civileats.com/2022/08/20/two-states-right-to-garden-laws-local-food-community-nutrition-security-illinois-florida/> [<https://perma.cc/BL4C-VGTC>]; see also BAYLEN J. LINNEKEN, BITING THE HANDS THAT FEED US: HOW FEWER, SMARTER LAWS WOULD MAKE OUR FOOD SYSTEM MORE SUSTAINABLE 145–74 (2016) (examples of ordinances limiting vegetable gardening and backyard poultry).

45. LINNEKEN, *supra* note 44.

46. 9 C.F.R. § 303.1(a)(2) (2023) (custom slaughter exemption to the Federal Meat Inspection Act).

47. See Steve McFadden, *The History of Community Supported Agriculture*, RODALE INST. (Jan. 1, 2004), <https://rodaleinstitute.org/blog/the-history-of-community-supported-agriculture/> [<https://perma.cc/NV73-XATT>].

48. See, e.g., USDA FSIS Guideline FSIS-GD-2018-0007, Guideline for Determining Whether a Livestock Slaughter or Processing Firm is Exempt from Inspection Requirements of the Federal Meat Inspection Act (May 2018), <https://www.fsis.usda.gov/guidelines/2018-0007> [<https://perma.cc/F6GT-GT2N>].

49. 9 C.F.R. § 303.1 (2023).

50. See GOTTLIEB & JOSHI, *supra* note 14, at 39–58 (discussing the decreased access of marginalized communities to healthy food).

51. The lack of equity in food access is a serious aspect in the promotion of the right to food, to which this Article cannot do justice.

II. THE MAINE STATE CONSTITUTIONAL RIGHT TO FOOD AMENDMENT AND FOOD SOVEREIGNTY STATUTE BEST PROTECTS HOMESTEADERS AND SMALL FARMS AND PROMOTES LOCAL FOOD SYSTEMS

In contrast to the federal system, which supports corporate control of the food system, the Maine voters enacted a constitutional right to food and the Maine Legislature enacted the Maine Food Sovereignty Act, which in concert establish local control of locally produced food.⁵² Some states have made attempts to assist local producers and consumers by passing cottage food laws or allowing food production to the extent permitted by federal law.⁵³ Such efforts are limited and do not satisfy the need for individuals to exercise personal food choice, prepare food according to their cultural traditions, support their interest in serving the environment and local economies, or indeed to grow and prepare their own food. Likewise, food sovereignty statutes in isolation often support local, sustainable food systems but may not protect an individual's right to grow their own food or a community's right to choose adequate and accessible food from their trusted local farm.⁵⁴

Rather than engage in piecemeal statutory amendments, Maine first passed a Food Sovereignty Act, and then a right to food constitutional amendment.⁵⁵ In an effort to support self-sufficiency, preserve family farms and traditional foodways, and improve the health of citizens by supporting sustainable farming and fishing, in 2017 the State of Maine passed its Food Sovereignty Act.⁵⁶ It then went further, passing by referendum the constitutional right to food amendment, which states:

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.⁵⁷

Enshrining the right to food in a constitutional amendment immediately confers protection on small food producers interested in growing their food.⁵⁸ Critically, U.S. constitutional jurisprudence requires that once a right is enshrined

52. See ME. CONST. art. I, § 25; 7 M.R.S. § 283 (2023).

53. See, e.g., WYO. STAT. ANN. § 11-49-103 (2022).

54. See, e.g., UTAH CODE ANN. §§ 4-5a-101 to -105 (2021); OKLA. STAT. tit. 2, § 5-4.1 (2021); see also Decision and Order on Zinniker Plaintiffs' Clarification Motion at 4, Farm-to-Consumer Legal Def. Fund v. Wis. Dep't of Agric. Trade & Cons. Prot., Case No. 09-CV-6313 (Wis. Cir. Ct. Sept. 9, 2011) (finding that plaintiffs do not have a fundamental right to produce and consumer the foods of their choice).

55. ME. CONST. art. I, § 25.

56. 7 M.R.S. § 283.

57. ME. CONST. art. I, § 25.

58. See *id.* See generally Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 YALE L.J. 191 (2023) (discussing among other topics, that state constitutional amendments have generated most of the state constitutional rights enjoyed). See also Parker v. Dep't Inland Fisheries & Wildlife, 2024 ME 22, ¶ 21, ___ A.3d ___ (finding that hunting is protected by the Maine constitutional amendment but also that a Sunday hunting ban did not violate the state's constitutional right to food).

as a fundamental right in the constitution, the state should only interfere with these rights by demonstrating that the restriction is narrowly tailored to promote a compelling state interest.⁵⁹ Indeed, the state may not interfere with a fundamental right without passing the most exacting standard of review: strict scrutiny.⁶⁰ Following the Supreme Court's lead on the requirement of strict scrutiny, state courts will not uphold laws that infringe on fundamental rights unless narrowly tailored to serve a compelling government interest.⁶¹ Courts have previously held, however, that certain land use or property right questions were not "fundamental rights" deserving of strict scrutiny, and have thus upheld zoning laws that serve only a "legitimate interest."⁶² Enshrining the right to food as a constitutional right establishes it as a fundamental right, prohibiting government interference unless "narrowly tailored" to serve a "compelling government interest," and obviates debate about whether the right to food is an existing fundamental liberty right.⁶³

Requiring interference with local production to be narrowly tailored to serve a compelling government interest should negate many currently challenging and restrictive regulations. For example, there is likely no "compelling government interest" in prohibiting laying hens in a residential community because it is the roosters, not the laying hens, that bring noise to the vicinity. Likewise, under this exacting standard, communities regulating the use and uniformity of front lawns merely for aesthetic principles would not succeed in defending unnecessary restrictions. Because it appears that very few zoning laws that restrict growing food could pass strict scrutiny, a constitutional amendment provides greater protection for food production.

III. THE IMPACTS OF THE CURRENT U.S. STATUTORY AND REGULATORY SYSTEM ON INDEPENDENT PRODUCERS AND HOMESTEADERS ARE A CLARION CALL TO RECOGNIZE THE RIGHT TO FOOD EVERYWHERE

A. Introduction to the Challenges Faced by Independent Producers and Homesteaders

To implement any right to food requires that healthy, sustainably grown food be available and accessible. Yet even as consumer demand for local, sustainable

59. See *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); see also, e.g., *Anderson v. Town of Durham*, 2006 ME 39, ¶ 29, 895 A.2d 944. As of the writing of this Article, the Law Court decided *Parker v. Department of Inland Fisheries and Wildlife* and found that hunting was protected by the constitutional amendment but did not find that the Sunday hunting ban violated the amendment. *Parker*, 2024 ME 22, ¶¶ 24, 25, ___ A.3d ___. The court did not analyze the question under either intermediate or strict scrutiny but rather that the ban fell under the amendment's poaching exception, and thus should have no bearing on the Kenduskeag matter. *Id.* ¶¶ 22–24.

60. See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

61. See *League of Woman Voters of Kan. v. Schwab*, 525 P.3d 803, 829 (Kan. Ct. App. 2023) (voting rights case); *Dotson v. Kander*, 464 S.W.3d 190, 197 (Mo. 2015) (Second Amendment case).

62. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8–9 (1974) (upholding zoning ordinance limiting land use to one-family dwellings).

63. See, e.g., David J. Berg, *Food Choice is a Fundamental Liberty Right*, 9 J. FOOD L. & POL'Y 173, 177–78 (2013).

food in the United States continues to rise,⁶⁴ current federal, state, and local agricultural policies interfere with the ability of independent sustainable producers to grow healthy food.⁶⁵ In Maine, for example, a town may prohibit any livestock or poultry on residential property, or perhaps ban a front yard garden.⁶⁶ As discussed below, the Maine Department of Health and Human Services (DHHS) has denied residents the ability to sell homemade food without a cost prohibitive license. In many states, the ability of individuals to sell homemade food is quite limited.⁶⁷

There has been some national support for community food systems, but few proposals have addressed the existence of restrictive regulations.⁶⁸ Nationally, some funding exists to support research, training, technical assistance, and programs that benefit Native American food sovereignty efforts.⁶⁹ There has been a proposal, not yet passed, to provide funding to upgrade small meat and poultry processors, such as the Requiring Assistance to Meat Processors for Upgrading Plants Act (RAMP-Up).⁷⁰ Yet even with funding assistance, construction of new processing facilities will likely require cost prohibitive outlay by potential plant operators and does not guarantee access to USDA inspectors.⁷¹ Any new plant is required to have USDA inspectors on site for all slaughter and processing; adding

64. Stephen Martinez, *Local Food Sales Continue to Grow Through a Variety of Marketing Channels*, U.S. DEP'T OF AGRIC. ECON. RSCH. SERV. (Oct. 4, 2021), <https://www.ers.usda.gov/amber-waves/2021/october/local-food-sales-continue-to-grow-through-a-variety-of-marketing-channels> [<https://perma.cc/RB3T-NFVX>]; Liz Crampton, *Coronavirus Has More Americans Turning Directly to Farms for Food*, POLITICO (Mar. 31, 2020, 1:45 PM), <https://www.politico.com/news/2020/03/31/coronavirus-demand-for-local-farms-157538>.

65. See, e.g., Federal Meat Inspection Act, 21 U.S.C. §§ 601–626; Poultry and Poultry Products Inspection Act, 21 U.S.C. §§ 451–472; Food Safety Modernization Act, 21 C.F.R. § 112.11 (2024) (produce safety rule); LINNEKIN, *supra* note 44, 145–74 (providing examples of various regulations against vegetable production and backyard poultry).

66. See, e.g., OLD TOWN, ME., CODE § 111(b); LINNEKIN, *supra* note 44.

67. *Cottage Foods Map and Chart*, FARM-TO-CONSUMER LEGAL DEF. FUND, <https://www.farmtoconsumer.org/cottage-foods-map> [<https://perma.cc/NSA9-AJEU>] (last visited May 9, 2024).

68. See *Food Projects Competitive Grant Program*, NAT'L INST. OF FOOD & AGRIC., <https://www.nifa.usda.gov/grants/programs/hunger-food-security-programs/community-food-projects-competitive-grant-program-cfpegp> [<https://perma.cc/A7WE-BNGM>] (last visited May 9, 2024); see also KATE FITZGERALD ET AL., THE NATIONAL SUSTAINABLE AGRICULTURE COALITIONS' GUIDE TO USDA FUNDING FOR LOCAL AND REGIONAL FOOD SYSTEMS (1st ed. 2010), <https://sustainableagri.culture.net/wp-content/uploads/2010/06/6.18-FINAL-Food-System-Funding-Guide2.pdf>.

69. *USDA Announces More than \$32 Million in Grant Awards to Strengthen Local and Regional Food Systems*, AGRIC. MKTG. SERV. (Oct. 30, 2023, 12:00 PM), <https://www.ams.usda.gov/press-releases/usda-announces-more-32-million-grant-awards-strengthen-local-and-regional-food> [<https://perma.cc/47F5-GANU>].

70. *RAMP-UP Act Helps Meat Processors Upgrade Plants*, FEEDSTUFFS (July 6, 2020), <https://www.feedstuffs.com/agribusiness-news/ramp-up-act-helps-meat-processors-upgrade-plants> [<https://perma.cc/2PNX-QTN9>].

71. The cost of building a modest 5,000-square-foot facility has been estimated as approximately \$2,000,000 with annual operating expenses of \$4,442,000. NICHE MEAT PROCESSOR ASSISTANCE NETWORK, LOCAL FOOD SYSTEMS RESPONSE TO COVID: BUILDING BETTER BEYOND 2 (2021), https://lfsccovid.localfoodeconomics.com/wp-content/uploads/2021/08/So-You-Want-To-Start-A-Meat-Plant_081221-1.pdf.

more inspectors will likely also be challenging.⁷² The Processing Revival and Intrastate Meat Exemption Act (PRIME Act) would permit the use of custom slaughter facilities for processing meat and intrastate sale.⁷³

A simple way to provide support to smaller local farms, however, is simply to lessen the regulatory burden that makes it difficult and often cost prohibitive for small independent farms and food producers to produce and sell local food. Small, diversified farms raising beef or dairy cattle, poultry, eggs, and vegetables are subject to a number of federal and state laws, such as the Federal Meat Inspection Act (FMIA), the Poultry Products Inspection Act (PPIA), food labeling regulations, the Clean Water Act, the Federal Egg Safety Rule, Food Safety Modernization Act (FSMA), and state land use and licensing regulations discussed below.⁷⁴ To a small-scale farm, the overwhelming amount of regulations can be more intimidating and burdensome than for larger producers.⁷⁵ And the regulators themselves can be intimidating: federal regulators have been known to be heavily armed when visiting independent producers or to bring law enforcement with them for a conversation regarding inspection requirements.⁷⁶

Lessening the burdens imposed by these myriad regulations that make growing and selling food challenging would thereby follow the matching principle, which proposes appropriate government regulation and responses to concerns at an appropriate scale.⁷⁷ Currently, rather than regulate for different scales of farming and food production, “most of our federal and state food-related regulations were designed to govern and check abuse by large-scale food producers.”⁷⁸ This one-size-fits-all regulatory system places the same requirements on very small operations, such as a sustainable family farm with a few dozen cows growing a mix of vegetables, as on a thousand acre monocropping farm or plant processing tens of thousands of cows a day.⁷⁹ These large corporate food producers spend many millions each year to support policies that continue to benefit them.⁸⁰ Community organizations, small-scale farms, and homesteaders likely do not have the resources or armies of lobbyists to quickly change this panoply of rules imposed on small

72. 21 U.S.C. §§ 602–609 (concerning mandatory inspectors on site for slaughter and processing); *Critics Uneasy as Federal Meat Inspectors Face Overload*, FOOD MFG. (Sept. 30, 2019), <https://www.foodmanufacturing.com/home/news/21101337/critics-uneasy-as-federal-meat-inspectors-face-overload> [<https://perma.cc/2MXN-EDYA>].

73. H.R. 2859, 116th Cong. (2019).

74. Federal Meat Inspection Act, 21 U.S.C. §§ 601–695; Poultry Products Inspection Act, 21 U.S.C. §§ 451–473; Federal Labeling Requirements, 9 C.F.R. § 412.1 (2023); Clean Water Act, 33 U.S.C. §§ 1251–1388; Federal Egg Rule, 21 C.F.R. §§ 118.1 to .12 (2023); Food Safety Modernization Act, 21 U.S.C. §§ 2201–2252; FSMA Produce Safety Rule, 21 C.F.R. §§ 11, 16, 112 (2023); Preventive Controls Rule for Facilities, 21 C.F.R. § 112 (2023).

75. Zach Boyd, *Small Farmers Bear an Extra Burden as California Agricultural Policies Respond to a Changing Climate*, STAN. U.: & THE WEST (Sept. 15, 2022), <https://andthewest.stanford.edu/2022/small-farmers-bear-an-extra-burden-as-california-agricultural-policies-respond-to-a-changing-climate/> [<https://perma.cc/8GN5-E3PY>].

76. Conservation with Farm-to-Consumer Legal Defense Fund members (Feb. 15, 2023).

77. See Schindler, *supra* note 24, at 771.

78. *Id.*

79. See Baylen J. Linnekin, *America’s Slaughterhouse Mess*, THE COUNTER (May 2, 2017, 12:08 PM), <https://thecounter.org/americas-slaughterhouse-mess> [<https://perma.cc/BWT5-8EKF>].

80. See Lakhani et al., *supra* note 6.

producers and consumers. Passing a constitutional right to food, as was done in Maine, requires state and local laws to accommodate for small-scale production, thus increasing availability of food choice sovereignty for local consumers.

B. Specific Laws and Regulations That Challenge the Ability of Local Communities to Grow, Process, and Sell Their Own Food

1. Meat and Poultry Production and Processing

The FMIA prohibits the sale of meat or meat products from an animal that was not slaughtered and processed in a USDA facility or a state inspection facility with state requirements "equal to or greater than the USDA."⁸¹ Yet compared to the nearly ten thousand facilities operating in 1967,⁸² today there are only about eight hundred federally-inspected slaughterhouses and numerous state-inspected facilities.⁸³ Of the limited number of available slaughterhouses, many are located hours away from small farms and ranches.⁸⁴ Small producers are regularly turned away from these facilities, or are given slaughter dates two years out from placing a processing order.⁸⁵ This creates an enormous financial burden on the small producer in the meantime by requiring feed, veterinary, and other care for animals, sometimes for years beyond when the producer intended to get the animals to market.⁸⁶ Meanwhile, large-scale producers are granted a much shorter turnaround time, creating a market imbalance. The lack of facilities also means that a small producer—who has raised animals humanely on pasture with care—must transport those animals longer distances for purposes of slaughter, thereby increasing the environmental cost of meat production as well as creating stress in animals otherwise humanely raised.⁸⁷

The FMIA fails to exempt small, independent farms from the requirements to bring animals for slaughter and processing to a USDA or state facility. It does

81. See 21 U.S.C. § 603(a) (governing slaughter and processing of cattle, sheep, swine, and goat).

82. Monica Nickelsburg, *The Pandemic Has the Potential to Finally Transform Meat Processing in the U.S.*, CIV. EATS (Oct. 19, 2020), <https://civileats.com/2020/10/19/the-pandemic-has-the-potential-to-finally-transform-meat-processing-in-the-u-s/> [<https://perma.cc/96TC-T3UD>].

83. See Deena Shanker, *There Aren't Enough Slaughterhouses to Support the Farm-to-Table Economy*, BLOOMBERG (May 23, 2017, 5:00 AM), <https://www.bloomberg.com/news/articles/2017-05-23/there-aren-t-enough-slaughterhouses-to-support-the-farm-to-table-economy>; Michael Corkery & David Yaffe-Bellany, *The Food Chain's Weakest Link: Slaughterhouses*, N.Y. TIMES (Apr. 18, 2020), <https://www.nytimes.com/2020/04/18/business/coronavirus-meat-slaughterhouses.html>.

84. See Beth Hoffman, *Small-Scale Slaughterhouses Aim to Put The 'Local' Back in Local Meat*, NPR (June 4, 2012, 11:11 AM), <https://www.npr.org/sections/thesalt/2012/06/04/153511889/small-scale-slaughterhouses-aim-to-put-the-local-back-in-local-meat>.

85. Joyce-Bulay, *supra* note 19.

86. See *Tell Congress the PRIME Act Is the Best Shot for Small Livestock Farmers!*, FARM & RANCH FREEDOM ALL. (July 18, 2020), <https://farmandranchfreedom.org/prime-act-for-small-livestock-farmers/> [<https://perma.cc/B6WX-73BX>].

87. See, e.g., MICHAEL R. DIMOCK ET AL., UC DAVIS FOOD SYS. LAB, *A NEW ERA FOR MEAT PROCESSING IN CALIFORNIA? CHALLENGES AND OPPORTUNITIES TO ENHANCE RESILIENCE* (2021); Abbie Fentress Swanson, *Small Meat Producers Take Their Slaughterhouse Gripes to Congress*, NPR (Oct. 15, 2021, 5:30 PM), <https://www.npr.org/sections/thesalt/2015/10/15/448942740/small-meat-producers-take-their-slaughterhouse-gripes-to-congress>.

allow an exemption for the producer to slaughter and process livestock “exclusively for use by him and members of his household and his nonpaying guests and employees,” and for custom slaughter for the owners of an animal.⁸⁸ This failure to exempt small farm sales of locally produced meat directly to local consumers creates an enormous disincentive to smaller producers who otherwise wish to contribute to the local food supply. Instead, the rule drives consumers to purchase food slaughtered and processed by one of four major meat-packing companies and subjects consumers to eating food produced and processed outside their community, potentially utilizing methods with which they may disagree—for example the use of chemicals or irradiation to kill any pathogens. Compelling consumers to consume products processed by methods they object to limits their opportunity to purchase food “of their choosing.”⁸⁹ U.S. consumers lack the right to obtain meat locally raised, slaughtered, and processed by a method that avoids contamination rather than a potentially unhealthy method of killing off pathogens created by factory farming.⁹⁰ Advocates for consumers have been seeking solutions for quite some time, such as allowing for the use of on-farm slaughter and the use of custom processing facilities for meat sales. This latter proposal, the PRIME Act, would permit the use of custom slaughter facilities for processing meat and sales intrastate.⁹¹

Likewise, the PPIA requires inspection at a USDA facility or state facility subject to state regulations that are “equal or greater to the USDA” facilities for the sale of processed poultry and poultry products.⁹² The PPIA, however, includes exemptions that serve the small producer far better than the FMIA. While states may, and often do, have stricter regulation of on-farm poultry slaughter and processing for the sale of poultry meat, the federal regulations exempt operations producing meat from fewer than one thousand birds a year to fewer than twenty thousand birds a year. The two different thresholds for poultry processing are a good example of regulations that are appropriately scaled: farms with fewer than one thousand birds are subject to five basic requirements while those with fewer than twenty thousand birds are subject to additional requirements.⁹³ However, poultry producers are often stymied by state or local regulation, which do not adopt the complete set of federal exemptions, place restrictions on the method of processing, or require a license to do so.⁹⁴ Much more can be done to assist small producers, including broadening available sales venues, such as farmers’ markets

88. 9 C.F.R. § 303.1(a)(1) (2024).

89. ME. CONST. art. I, § 25.

90. *But see* Processing Revival and Intrastate Meat Exemption Act (PRIME Act), S. 907, 118th Cong. (2023) (allowing for intrastate use of custom slaughter and processing facilities for the sales of meat). In addition, advocates continue to push for permitting on farm slaughter. *See On-Farm Slaughter*, RURAL VT., <https://www.ruralvermont.org/onfarm-slaughter> [<https://perma.cc/JQ9N-PAM3>] (last visited May 9, 2024).

91. H.R. 2859, 116th Cong. (2019).

92. *See* 21 U.S.C. §§ 455, 458(a).

93. *See* 9 C.F.R. § 381.10(b)–(c) (2024).

94. *See, e.g.*, OR. REV. STAT. § 603.038 (2024) (Oregon permits 1,000 birds only); 225 ILL. COMP. STAT. ANN. 650/5 (West 2001) (Illinois exemption for five thousand birds, state inspection of facilities); 31 PA. CONS. STAT. § 483.4 (1968) (Pennsylvania prohibits open air processing and requires license).

or retail stores, or increasing the production limits. At a minimum, states can simply adopt the federal exemptions to provide as much flexibility to producers and consumers as possible.

2. Eggs and Dairy

The federal egg rule regulates biosecurity, sanitation requirements, refrigeration, environmental testing, and record keeping of egg production.⁹⁵ This can be daunting for a small producer who simply wishes to keep laying hens and sell eggs directly to local consumers or at the local farmers' market. Small farms may be exempt from federal law if they keep less than three thousand laying hens, but they often must contend with stricter state regulation as well as local regulations and individual farmers' market rules.⁹⁶

Federal regulation prohibits the interstate sale of raw unpasteurized milk and milk products.⁹⁷ The Food and Drug Administration (FDA) established the model Pasteurized Milk Ordinance (PMO), which sets minimum standards and requirements including pasteurization for milk production and processing.⁹⁸ States can adopt some or all of the PMO in regulating the intrastate sales of milk and milk products.⁹⁹ Milk and dairy products sold *intrastate* are a matter of state law and vary significantly from state to state.¹⁰⁰

3. The Food Safety Modernization Act

Vegetable and fruit producers are not immune from the burdens of complex government regulations. The FSMA intended to shift food safety regulation to prevention rather than in reaction to outbreaks of foodborne illness.¹⁰¹ The FSMA Produce Safety Rule places a number of requirements on vegetable and fruit growers to ensure food safety.¹⁰² While there are exemptions for very small farms,¹⁰³ the rule generally requires stringent training of personnel, hygienic practices, specific use of manure fertilization practices, the separation of produce covered by FSMA from those crops not covered, equipment regulation, record keeping requirements, and water testing.¹⁰⁴ Unlike the FMIA, the Produce Safety rule exempts very small farms with less than \$25,000 in produce revenue

95. See 21 C.F.R. § 118.4 (2024).

96. See 21 C.F.R. § 118.1(a)(1) (2024); WIS. STAT. § 97.28 (2022) (may sell eggs from fewer than 150 laying hens without a food production license, but still need transient retail food establishment license to sell at farmers' markets); FLA. STAT. §§ 583.01(4), 583.09 (2005) (can sell fewer than thirty dozen eggs a week; producer needs food establishment permit).

97. 21 C.F.R. § 1240.61(a) (2024).

98. See FOOD & DRUG ADMIN., U.S. DEP'T OF HEALTH & HUM. SERVS., PASTEURIZED MILK ORDINANCE vi (2017).

99. See *id.*

100. See *id.* at iv.

101. See 21 U.S.C. § 2202(b)(2).

102. 21 C.F.R. § 112.11 (2024).

103. *Id.* § 112.4(a).

104. *Id.* §§ 112.4, 112.21(a)–(b), 112.31(a)–(b), 112.41(a).

annually.¹⁰⁵ Yet this limit is exceptionally small for producers intending to make a living and support the local economy.¹⁰⁶ These requirements were intended to keep vegetables safe when produced by large agricultural operations that regularly bundle products with other farms and involve a large number of employees.¹⁰⁷

In addition, the FDA has recently passed a final rule on requirements for additional traceability records for certain foods.¹⁰⁸ While this creates the ability to track food in the global food supply, it is certainly unnecessary for farms selling from the farm direct-to-consumer which do not involve any long chains of distribution. The final rule requires detailed information on where crops have been grown and harvested¹⁰⁹—a requirement that is difficult for small, rural farmers lacking reliable internet service or for those who regularly rotate crops as part of the regenerative agriculture process.

4. State and Local Regulation of Locally Produced Food

State and local laws also include a wide array of regulations that impede the operation of small-scale agricultural operations and homesteading. For example, at issue in the Kenduskeag Kitchen Maine litigation is the state statute requiring eating establishments to obtain a license in order to operate.¹¹⁰ Yet the Maine Food Sovereignty Act later instructed that notwithstanding any provision of law in Title 22 of the Maine Revised Statutes, municipalities are authorized to govern direct produce-to-consumer transactions and the statute shall not enforce contrary state laws.¹¹¹ As discussed *supra*, the Maine DHHS insisted on enforcing the earlier statute. This hesitancy of state agencies to embrace local control and local food systems demonstrates the need for a constitutional amendment over a mere statutory change.

In Maine and throughout the United States, restrictions on the ability to produce one's own food include prohibitions against raising animals unless the residence is on a very large number of acres, chicken coops in residential areas,

105. *Id.* § 112.4. There are also modified exemptions for producers (a) selling the majority of their produce directly to consumers or another qualified end user and (b) that have less than \$500,000 annual gross sales. *Id.* § 112.5.

106. See *Poverty Guidelines*, U.S. DEP'T OF HEALTH & HUM. SERVS.: ASPE (Jan. 7, 2024), <https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines> [<https://perma.cc/UG89-G4DC>] (less than \$25,820 constitutes the federal poverty line for a family of three).

107. See THE NAT'L SUSTAINABLE AGRIC. COAL., UNDERSTANDING FDA'S FSMA RULE FOR FOOD FACILITIES 3 (2016), <https://sustainableagriculture.net/wp-content/uploads/2008/08/FSMA-FACILITIES-FINAL-.pdf>.

108. See *generally* Requirements for Additional Traceability Records for Certain Foods; Technical Amendment, 88 Fed. Reg. 65815 (Sept. 26, 2023) (to be codified at 21 C.F.R. pt. 1).

109. *FSMA Final Rule on Requirements for Additional Traceability Records for Certain Foods*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/food/food-safety-modernization-act-fsma/fsma-final-rule-requirements-additional-traceability-records-certain-foods> [<https://perma.cc/5VMP-PLTW>] (last visited May 9, 2024).

110. See Complaint for Declaratory Judgment & Injunctive Relief ¶ 1, *Deschaine v. Dep't of Health & Hum. Servs.*, No. CV-23-45 (Me. Super. Ct. Mar. 24, 2023) [hereinafter Complaint for Declaratory Judgment]; 22 M.R.S. § 2492 (2024).

111. 7 M.R.S. § 284 (2023).

front yard gardens, or the use of hoop houses to extend the growing season.¹¹² Overly broad ordinances against noise, odor, or the existence of “debris” on a property have been used to limit growing activity on residential land. For instance, the City of Gary, Indiana, issued a notice of violation concerning “debris on the property” against an urban farmer engaged in regeneration of land in Gary.¹¹³

Moreover, homesteaders may be particularly impeded from growing their own livestock and poultry or from using regenerative agricultural methods. Many state right-to-farm laws (initially passed to support factory farming) exempt producers from nuisance liability due to sights, smells, and the noise of farming—but only for producers *engaged in commercial activity*.¹¹⁴ In other words, homesteaders growing animals and diversified crops have no protection from alleged nuisance actions because they are growing for themselves and not for commercial activity. The existence of a right to food would certainly impede this treatment of homesteaders wishing to grow their own healthy and nourishing foods.

For small-scale producers trying to grow and sell food, state and local restrictions include the following: zoning restrictions; state licensing requirements such as for food establishments, warehousing, retail facilities, transportation, and sales licenses; state laws for production; and sale of certain foods such as ungraded eggs.¹¹⁵ The state and local health departments may have specific requirements, and local townships and municipalities add their own ordinances to the mix of regulations that make farming and selling local food on a small scale greatly challenging.¹¹⁶ Even a farm on agriculturally zoned land may be prohibited by local ordinance from engaging in commercial activity on the farm, thus prohibiting on-farm sales and requiring other venues for sales of local goods.¹¹⁷

It is important to note that at the state level, there have been initiatives to lighten the regulatory burden on independent farms, such as the Wyoming Food Freedom Act and the Colorado Ranch to Plate Act.¹¹⁸ These state laws provide for local production of food, including an avenue for meat sales through a meat share

112. OLD TOWN, ME., CODE § 111(b)(6); Graydon Megan, *Elmhurst Mayor Breaks Tie to Continue Hoop House Ban: Smaller Gardening Structures Approved*, CHI. TRIB. (Feb. 5, 2019, 10:20 AM), <https://www.chicagotribune.com/2019/02/05/elmhurst-mayor-breaks-tie-to-continue-hoop-house-ban-smaller-gardening-structures-approved/>; *Woman Sues City of Tulsa for Cutting Down Her Edible Garden*, NEWS ON 6 (June 15, 2012), <https://www.newson6.com/story/5e364c1c2f69d76f6206499f/woman-sues-city-of-tulsa-for-cutting-down-her-edible-garden>.

113. See Katherine Ghantous, *Urban Farming Under Threat in Gary, Indiana*, FARM-TO-CONSUMER LEGAL DEF. FUND (May 15, 2019), <https://www.farmtoconsumer.org/blog/2019/05/15/urban-farming-under-threat-in-gary-indiana/> [https://perma.cc/R92W-RNFU].

114. See, e.g., MICH. COMP. LAWS §§ 286.471–.474 (1981).

115. See, e.g., WIS. STAT. § 97.30(3) (2022) (food establishment license); *Food Licenses*, MINN. DEP'T OF AGRIC., <https://www.mda.state.mn.us/food-feed/food-licenses> [https://perma.cc/TU5T-NTJR] (last visited May 9, 2024).

116. See Alexia Kulwicz, *Viability of Small to Mid-Sized Agriculture*, 27 DRAKE J. AGRIC. L. 85, 86 (2021).

117. See generally LINNEKIN, *supra* note 44 (discussing the impact of regulations on small producers).

118. Wyoming Food Freedom Act, WYO. STAT. ANN. § 11-49-103 (2023); Colorado Ranch to Plate Act, COLO. REV. STAT. § 25-4-1617 (2022); 481 IND. ADMIN. CODE 30.13 (2024).

arrangement.¹¹⁹ Other states have passed cottage food statutes, minimizing regulation of home-produced goods.¹²⁰ These laws typically provide for production of value-added products prepared in the home, typically those deemed “non-potentially hazardous,” meaning products not time or temperature controlled such as baked or pickled goods.¹²¹ Similarly, California and Utah specifically permit the Microenterprise Home Kitchen Operation (MEHKO), allowing individuals to operate a restaurant in their private residences.¹²² Notably, the ability of individual food producers to be able to produce and sell foods from their home kitchens became increasingly necessary during and after the COVID-19 pandemic as consumers sought closer sources of food and otherwise out-of-work employees opened home food businesses.¹²³ While these local supports are welcome, they certainly cannot do enough towards protecting individuals’ right to produce, access, or consume the food of their choice. Indeed, without broader reform, state efforts are severely limited by federal law.

C. Other States Should Follow the Example of Maine and Seek Passage of a State Constitutional Right to Food Amendment

The overwhelming regulatory system discussed above interferes tremendously with the ability of individuals to grow their own food. This can be through the prohibition of growing livestock, keeping laying hens, or prohibiting use of front yard gardens or hoop houses. The system likewise creates a challenging environment for small farms and producers. Reversing all the restrictive regulations would be a welcome change to interfering with consumers’ food choice yet would in fact require a great deal of legislative effort and political capital scattered across the United States. Some states have made attempts to assist local producers and consumers by passing cottage food laws or allowing food production to the extent permitted by federal law, but these are limited.¹²⁴ In addition, such efforts do not respect the need for individuals to exercise personal food choice, prepare food according to their cultural traditions, support their interest in serving the environment and local economies, or indeed to grow and prepare their own food. A better system is for states to follow the example of Maine and pass both a

119. See H.B. 0155, 65th Leg., Budget Sess. (Wyo. 2020); S.B. 21-079, 73rd Gen. Assemb. Reg. Sess. (Colo. 2021).

120. See, e.g., UTAH CODE ANN. § 4-5a-101 (2021); OKLA. STAT. tit. 2, § 5-4.1 to 5-4.6 (2021); IOWA ADMIN. CODE r. 482-34.1.

121. S.B. 199, 67th Leg. (Mont. 2021); S.B. 187 (Conn. 2022); 410 ILL. COMP. STAT. 625/4 (2022).

122. Assemb. B. 626 (Cal. 2019) (giving counties the ability to authorize MEHKOs in their jurisdiction and requiring that operation of a MEHKO needs to be permitted by the local environmental health agency such as a county health department; be limited to only sales directly between the home kitchen operation and the consumer; and adhere to an annual sales limit of \$50,000); H.B. 94, 64th Leg., General Sess. (Utah 2021); Complaint for Declaratory Judgment, *supra* note 110, ¶ 2 (involving the State Department of Health Service’s failure to respect the Maine Food Sovereignty Act and the right to food amendment and permit sales of prepared meals from a home business).

123. See, e.g., Devorah Lev-Tov, *Why Out-of-Work New Yorkers Are Starting Cooking Businesses*, N.Y. TIMES (June 27, 2020), <https://www.nytimes.com/2020/06/27/nyregion/coronavirus-nyc-home-cooking-business.html>.

124. See, e.g., WYO. STAT. ANN. § 11-49-103(k) (2002); OKLA. STAT. tit. 2, § 5-4.1 (2023).

constitutional right to food amendment and a food sovereignty statute. This avoids piecemeal legislation and local amendments. The constitutional right to food provides a much stronger right to individuals and increases the difficulty for state actors wishing to deny this right. Passing a constitutional right to food, as was done in Maine, has the effect of immediately invalidating state and local laws that fail to accommodate small-scale production, thus increasing availability of food choice for local consumers. A constitutional right likewise benefits individuals engaged in non-commercial homesteading. A food sovereignty statute supports small-scale commercial agricultural activity by removing regulatory barriers. An amendment and statute together support independent sustainable producers and empower consumers with the food of their choice.

IV. DECREASING THE REGULATORY BURDEN ON LOCAL FOOD SYSTEMS NEED NOT COMPROMISE FOOD SAFETY

As discussed above, much of the current system is supported by powerful corporate lobbies to ensure their continued control of the food system. In other words, larger producers and processors support the regulatory system that is so costly and inefficient for smaller independent producers. Lobbying efforts to keep expensive requirements and cumbersome regulations are often suggested as needed for food safety.¹²⁵

While certain food safety measures are clearly needed for large interstate and international food production, many of the measures imposed by the federal, state, and local regulatory systems are unnecessary and too expensive for independent, local farms. The same level of protection needed for large multinational producers is not necessary to support a decentralized system of local farm production: local food is inherently traceable and accountable.¹²⁶ Disease outbreaks in local food systems are more isolated and therefore more contained. Consumers purchasing from their neighbors within their community have the opportunity to know how their food is produced and to hold local producers accountable in the rare cases of a problem.

Moreover, these regulatory systems have unintended consequences. For example, meat processing laws allegedly intended to ensure food safety have created an extremely consolidated market of processors that process a high volume of meat, often at line speeds unhealthy for workers. These very large operations also may use chemical processes that many consumers may find unhealthy or undesirable. The regulatory system is intended to ensure meat products are free of pathogens—yet local farms raising livestock on pasture seek, among other things, to prevent production of unhealthy pathogens in the first place. Some of the practices at meat processing plants may protect consumers from pathogens during

125. Baylen Linnekin, *The Sickening Nature of Many Food-Safety Regulations*, REASON (June 30, 2012, 8:00 AM), <https://reason.com/2012/06/30/the-sickening-nature-of-many-food-safety/> [<https://perma.cc/NT9F-W4M9>].

126. Schindler, *supra* note 24, at 772. See generally Mary Christian Wood et al., *Reform of Local Land Use Laws to Allow Microlivestock on Urban Homesteads*, SUSTAINABLE LAND USE PROJECT OF THE ENV'T & NAT. RES. PROGRAM UNIV. OF OR. SCH. OF L. (Mar. 1, 2010), https://law.uoregon.edu/sites/law2.uoregon.edu/files/mary-wood_0/mary-wood/enrmicrolivestock.pdf.

slaughter and processing but create long-term health issues. For example, both meat and poultry processing operations are allowed to utilize chlorine and ammonia,¹²⁷ and the FDA has approved radiation during beef and pork processing.¹²⁸ These processes may limit bacterial contamination. That contamination may be better addressed up front by farming practices such as pasture-raising animals, which is frequently employed by small, sustainable, local farms or ranches. Common sense and scale-appropriate regulation is necessary for local food systems to thrive.

In addition, U.S. food safety policy concerns itself almost exclusively with foodborne illness and risks directly related to food ingestion.¹²⁹ This ignores the impact of long-term health repercussions of a poor diet, such as heart disease, hypertension, diabetes, and cancer,¹³⁰ stemming from a diet encouraged by U.S. food policy.¹³¹ For instance, nitrates are required in cured meat production to prevent botulism, but there is evidence that nitrates can become carcinogenic.¹³² There is an alternative. By allowing local communities to control their own food supply, they can weigh the risks and benefits of processes and choose an appropriate foodway for their community. As discussed, Maine has largely done so.¹³³

V. THE MAINE CONSTITUTIONAL RIGHT TO FOOD AND FOOD SOVEREIGNTY ACT SERVE AS A MODEL TO CONFER THE RIGHT TO FOOD IN THE UNITED STATES

A. Maine's Right to Food Constitutional Amendment and its Food Sovereignty Act

In 2017, the Maine Legislature passed the Maine Food Sovereignty Act (the Act), working with many in the local food sovereignty movement.¹³⁴ The Act expressly authorizes Maine municipalities to adopt ordinances governing “direct producer-to-consumer transaction[s]” and prohibits state agencies from enforcing state laws or implementing rules with respect to such transactions.¹³⁵ In keeping with the underlying purpose of the Act, the Legislature worked with farmers and

127. *Chlorine: Health Hazard Information Sheet*, U.S. DEP'T OF AGRIC. FOOD SAFETY INSPECTION SERV., https://www.fsis.usda.gov/sites/default/files/media_file/2020-08/Chlorine.pdf (last visited May 9, 2024); Michael Moss, *Safety of Beef Processing Method is Questioned*, N.Y. TIMES (Dec. 30, 2009), <https://www.nytimes.com/2009/12/31/us/31meat.html> (regarding the use of ammonia in beef processing).

128. U.S. FOOD & DRUG ADMIN., FOOD IRRADIATION: WHAT YOU NEED TO KNOW 1 (2016). The Author recognizes that some safety measures, such as the Hazard Analysis and Critical Control Points (HACCP) practices, are needed in mid- to large-sized plants which process a high volume of animals. See 9 C.F.R. §§ 304.1–3 (2023) (USDA rule requiring HACCP plans).

129. Pollans & Leib, *supra* note 39, at 1180.

130. *Poor Nutrition*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 8, 2022), <https://www.cdc.gov/chronicdisease/resources/publications/factsheets/nutrition.htm> [<https://perma.cc/EG8T-C2R8>] (covering effects of poor nutrition).

131. See Do et al., *supra* note 32.

132. Pollans & Leib, *supra* note 39, at 1211–12.

133. See *supra* Part III.

134. P.L. 2017, ch. 314, § 1; 7 M.R.S. §§ 281–286 (2023).

135. 7 M.R.S. §§ 282, 284 (2023).

community groups to ensure local food sovereignty.¹³⁶ In passing the statute, the Legislature indicated that it was state policy “to encourage food self-sufficiency for its citizens.”¹³⁷ The state also sought to support the ability of communities to produce, process, sell, purchase, and consume locally produced foods; preserve traditional foodways; improve access to wholesome nutritious foods; and promote self-reliance and personal responsibility.¹³⁸ In sum, the law makes clear that local governments may adopt ordinances regarding traditional foodways and direct producer-to-consumer transactions that must be respected by state agencies. Only where local governments choose not to pass a relevant ordinance may state agencies enforce state food laws.¹³⁹

In the summer of 2021, the Maine Legislature approved a constitutional ballot referendum to adopt a right to food constitutional amendment.¹⁴⁰ On November 3, 2021, Maine voters overwhelmingly approved the amendment, securing the right of individuals to produce and consume the food of their choosing.¹⁴¹ As a constitutional protection, the state may interfere with these rights only by demonstrating that the restriction is narrowly tailored to promote a compelling state interest.¹⁴² Accordingly, passing a constitutional right to food provides far greater protections to communities seeking control over their own food system. Enshrining the right to food in a constitutional amendment immediately confers protections on small food producers and individuals interested in growing their own food.

As discussed further below, the state amended the Food Sovereignty Act in 2023.¹⁴³ The 2023 law strongly protects the ability of local communities to govern transactions between local producers and consumers. The law makes clear that local government entities may adopt ordinances regarding traditional foodways and direct producer-to-consumer transactions that must be respected by the state.¹⁴⁴ Where local governments choose not to pass a relevant ordinance, state agencies may enforce state laws intended to protect the welfare of Maine residents.¹⁴⁵ In other words, the state may not take any enforcement action that interferes with a local ordinance concerning direct producer-to-consumer transactions.¹⁴⁶ Enshrining the right to food in a constitutional amendment and state statute

136. See Julia Bayly, *One Year After Becoming Law, Food Sovereignty in Maine Has Taken Hold*, ME. PUB. (Nov. 26, 2018), <https://www.mainepublic.org/business-and-economy/2018-11-26/one-year-after-becoming-law-food-sovereignty-in-maine-has-taken-hold>.

137. 7 M.R.S. § 282.

138. *Id.* § 283.

139. *Id.* § 284.

140. See Legis. Rec. H-632 to -634 (1st Spec. Sess. 2021); Legis. Rec. S-1227 (1st Spec. Sess. 2021).

141. Taylor Telford, *Maine Just Voted to Become the Nation's First 'Right to Food' State. What Does That Mean?*, WASH. POST (Nov. 3, 2021, 4:52 PM), <https://www.washingtonpost.com/business/2021/11/03/maine-right-to-food/>.

142. See, e.g., *Anderson v. Town of Durham*, 2006 ME 39, ¶ 29, 895 A.2d 944 (involving alleged infringement of freedom of religion).

143. L.D. 1947 (131st Legis. 2023).

144. *Id.*

145. See 7 M.R.S. §§ 282, 284 (2023) (as amended).

146. *Id.* § 284.

immediately confers protection on small food producers and individuals interested in growing their own food.

B. Litigation Pending Before the Maine Courts Demonstrates State Agencies' Reluctance to Embrace Local Food Systems and the Need for a Constitutional Right to Food

Current litigation in Maine serves as an example of the interplay between the right to food constitutional amendment and restrictive regulations. Despite the clear directives of the Maine Legislature, state agencies have continued to enforce state law licensing requirements even when local communities chose to permit sales of local food without such license—precisely what the Maine Food Sovereignty Act authorizes. This pending litigation demonstrates how the State's enforcement of licensing laws contradicts the text and intention of both the Maine Food Sovereignty Act and the constitutional right to food.

Pursuant to the Food Sovereignty Act, the Town of Kenduskeag, Maine, enacted a local ordinance providing that producers or processors of local foods are exempt from licensure and inspection when the transaction is between the producer or processor and the consumer.¹⁴⁷ The ordinance applies to any individual who “grows, produces, processes, or prepares local food or food products,” including in a home kitchen.¹⁴⁸ After the ordinance was enacted, the Kenduskeag Kitchen, a small home-based food producer, began to sell its home-cooked meals made from local ingredients to its neighbors.¹⁴⁹ Despite the protection of local food production and sales in the local ordinance, in late 2022 DHHS issued a letter of enforcement directing Kenduskeag Kitchen to obtain an eating establishment license from DHHS prior to selling their home prepared food from locally sourced products.¹⁵⁰ This directive would have required Kenduskeag Kitchen to convert its home kitchen to a commercial kitchen, a proposition involving cost prohibitive renovations.¹⁵¹ In response, the owners of Kenduskeag Kitchen, along with one of their customers and Farm-to-Consumer Legal Defense Fund, filed a civil suit seeking a declaratory judgement that the DHHS enforcement letter violated both the Food Sovereignty Act and Maine's right to food constitutional amendment.¹⁵² As of the publication of this article, this litigation is pending.

It is important to the discussion of an individual's right to food that Kenduskeag Kitchen has ceased operating during the pendency of the litigation.¹⁵³ While there may be options in the greater community, the Kitchen was the only option in this immediate community where consumers could purchase prepared fresh and local foods. Its closing left the option of a local gas stations for prepared

147. Kenduskeag, Me., Code § 2(E) (2023).

148. *Id.*

149. *See* Complaint for Declaratory Judgment, *supra* note 110, ¶ 15.

150. *Id.* ¶¶ 45–47.

151. *Id.* ¶ 47.

152. *Id.* ¶¶ 3, 50–54 (involving DHHS's failure to respect the Maine Food Sovereignty Act and the right to food amendment). Note that the Author also serves as Executive Director for the non-profit, Farm-to-Consumer Legal Defense Fund.

153. *Id.* ¶ 61.

food, or traveling greater distances outside Kenduskeag.¹⁵⁴ Absent the protections of the Food Sovereignty Act and Maine's right to food, the sale and consumption of gas station food—which potentially sits for long periods of time and likely is not made from locally sourced organic crops or humanely raised livestock—is the only prepared food that can be served in the small community of Kenduskeag. Despite this, the sale of wholesome, nutritious meals prepared by Kenduskeag Kitchen from locally sourced ingredients will be foreclosed.

Such a result demonstrates how restrictive regulations can shut down local food producers, denying individuals in a community the right to choose their food or care for themselves in a healthful manner. The plaintiffs in this case therefore brought an action challenging DHHS interference not only with the Kenduskeag Kitchen's right to exist pursuant to the Food Sovereignty Act, but also their customer's constitutional right to obtain and consume the food of their choosing.¹⁵⁵

Notably, during the pendency of this litigation, the Maine Legislature further amended the Food Sovereignty Act by broadening the definition of direct consumer-to-producer transactions to include the exchange of food off-premises, such as at roadside stands and fundraisers, or through buying clubs, deliveries, or community-supported agricultural programs.¹⁵⁶ The 2023 law thus appears to broaden the reach of producer-to-consumer transactions that can be exempt from state control without altering the mandate of the original law: local government entities may adopt ordinances regarding traditional foodways and direct producer-to-consumer transactions that must be respected by the state. In other words, with this most recent amendment to the Food Sovereignty Act, the Maine Legislature has not deviated from its long-standing position that state agencies may not take any enforcement action against direct producer-to-consumer transactions that are governed by local ordinance.¹⁵⁷ In doing so, the Legislature has continued to empower local communities to govern their local food systems and decide on the most appropriate regulation of that system.

C. Maine Courts and Legislators Should Interpret the Constitutional Right to Food Liberally

The language of both the Maine constitutional right to food and the Food Sovereignty Act suggest that the Maine Legislature intended to provide great deference to the communities and residents of Maine in choosing their own food systems.¹⁵⁸ This would appear to include the ability of communities to produce food without interference by government regulation that is not narrowly tailored to serve a compelling government purpose. Maine State Senator Troy Jackson

154. Conversations with Farm-to-Consumer Legal Defense Fund member (Sept. 2, 2022).

155. See Complaint for Declaratory Judgment, *supra* note 110, ¶¶ 3, 65–67.

156. 7 M.R.S. § 282(1) (2023).

157. See *id.* The Author, however, strongly opines that these statutory amendments were unnecessary. Under the language of the 2021 Maine Food Sovereignty Act, the Legislature authorized municipalities to adopt ordinances regarding direct “producer-to-consumer transactions” and directed the state enforcement agencies to not enforce laws or implement rules with respect to those direct “producer-to-consumer transactions.” *Id.*, amended by P.L. 2023, ch. 420, § 1 (effective Oct. 25, 2023).

158. See 7 M.R.S. § 283 (2023); ME. CONST. art. I, § 25.

described the Maine Food Sovereignty Act as “designed to allow small-scale farmers and food producers to participate in the same kind of local food distribution systems since they have since time immemorial.”¹⁵⁹

The constitutional amendment and state law provide a unique model for changes to food system regulations to support independent sustainable producers and empower consumers with their choice of food. Thus far, despite clear guidance from the Legislature, Maine agencies appear to be ignoring or working to limit the reach of the Maine Food Sovereignty Act and the constitutional right to food.¹⁶⁰ The possibility that state agencies will resist local control over food systems, even when such local control is sanctioned by legislative action, supports the need for the stronger protection of a constitutional amendment.

Other states can also support the ability of individuals to grow their own food, respect traditional foodways, allow small-scale local producers to provide healthy nourishing foods in their communities, and ensure consumers can eat the food of their choice. Protections through statutes and state constitutions, if properly enforced, will go a long way to protect the ability of individuals to achieve some degree of food sovereignty and work towards a true “right to food.” Achieving a true right to food, however, will also require judicial recognition that the right to food cannot be infringed upon without a rule narrowly tailored to serve a compelling government interest. Scale appropriate regulations—local food rules adopted and enforced at the local level—provide a far more narrowly tailored regulation than the one-size fits all approach that prohibits sale of home cooked food from local sources. Whether Maine’s courts will make the necessary recognitions remains to be seen.

D. A Human Right to Food Requires Even Greater Policy Changes than Those Conferred in the Maine Right to Food Constitutional Amendment and the Food Sovereignty Act

Passing a constitutional right to food, as Maine has done, provides a powerful legal mechanism to compel state and local laws to accommodate small-scale production, thus increasing food sovereignty for local consumers. Yet even the Maine right to food and the Food Sovereignty Act are limited by federal law. Specifically, the Maine Food Sovereignty Act requires that the state’s meat and poultry inspection remain “at least equal” to the requirements of the federal law, as required by the Federal Meat Inspection Act and Poultry Products Inspection Act.¹⁶¹

159. *An Act to Amend the Law Recognizing Local Control Regarding Food Systems and Require Compliance with Federal and State Food Safety Regulations Before the J. Standing Comm. on Agric., Conservation & Forestry*, 128th Legis. (2017) (testimony of Senator Troy Jackson, Maine State Legislature).

160. See Complaint for Declaratory Judgment, *supra* note 110, ¶¶ 49–51; see also *Parker v. Dep’t of Inland Fisheries & Wildlife*, 2024 ME 22, ¶ 24, ___ A.3d ___ (finding that hunting is protected by the amendment but also that a Sunday hunting ban did not violate the right to food amendment).

161. Federal Meat Inspection Act, 21 U.S.C. §§ 601–626; Poultry Products Inspection Act, 21 U.S.C. §§ 451–473.

For a consumer to truly exercise a right to food, or any food sovereignty, they must have the ability “to secure, through their own means and resources, access to adequate food, either through their own production or by purchase[,]”—including meat and poultry.¹⁶² This would require modification of federal meat and poultry regulations that depend on the scale of the operations and allow for on-farm slaughter and processing of meat and poultry for sale directly to consumers. Alternatively, the federal and state frameworks could authorize local communities to make decisions about how to support local food production and consumption, including small scale meat processing. States that have indicated interest in greater food sovereignty, such as Maine, Wyoming, and Utah, for example, could then build a regulatory structure that permits direct producer-to-consumer transactions of any foods, including meat and poultry, and honors the consumer’s choice, traditions, and beliefs.

Other states should pass constitutional amendments to protect individuals’ right to food. As in Maine, this could bypass the need to modify every state statute and local law that interferes with the individual’s growing of their own food. As Maine’s constitution now sets forth, “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.”¹⁶³ State regulations and local ordinances that unduly interfere with this right in a way that is not narrowly tailored to address a compelling government concern would thus be unconstitutional.

CONCLUSION

The Maine constitutional right to food and the Maine Food Sovereignty Act together provide the first holistic human right protection of the right to food in the United States. This effort provides a blueprint for creating and respecting a right to food in American society. The vast number of federal, state, and local food production regulations create tremendous challenges to small producers and homesteaders and necessitate scale appropriate legislation. Understanding the intricacies of these regulations and how they impede—or sometimes defeat—consumers’ ability to grow their own food, or obtain locally sourced food of their choosing, is the first step in promoting the right to food. The current regulatory and policy system places consumers at the mercy of the monolithic and consolidated U.S. food system, with a substantial amount of unhealthy food causing a variety of health concerns. The current system also prevents individuals from preparing and consuming culturally appropriate food, determining their own foodways, and otherwise choosing their own food sources. A constitutional right to food, as established in Maine, along with protective legislation should serve to provide greater protections by exerting stronger restrictions on those who choose to limit one’s meaningful right to food.

162. Brief for Olivier De Schutter et al. as Amici Curiae Supporting Respondents, *supra* note 5, ¶ 1.

163. ME. CONST. art. I, § 25 (emphasis added).