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What the Cluck? Backyard Chickens and Maine's Mysterious Right to Food

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Lucy Weaver

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WHAT THE CLUCK? BACKYARD CHICKENS AND MAINE'S MYSTERIOUS RIGHT TO FOOD

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ABSTRACT

When Maine voters approved the nation's first "right to food" constitutional amendment, many were concerned about the amendment's potential to conflict with animal welfare, food safety, and other regulations currently in place at the state and local level. Born from a decade of advocacy, the amendment represents a new era for Maine's food sovereignty movement. However, the boundaries of the amendment remain unclear, and Maine's municipalities lack sufficient guidance as they attempt to navigate how this amendment applies to them.

This Comment explores one example of the many challenges that may arise from the enactment of the right to food amendment. Zoning regulations and local ordinances regulating health and safety, long under municipal control through the right of home rule, may be upended if they unreasonably restrict residents' ability to procure their own food. Specifically, this Comment examines backyard chicken ordinances in light of the new amendment and structures a model ordinance that attempts to appropriately balance individuals' right to food with municipalities' right to regulate public health and safety. This Comment shows that it is possible, with some flexibility on both sides, for these rights to coexist. As Maine and other states look to their constitutions as a mechanism for creating individual rights where the U.S. Constitution has left gaps, it is critical to show that these rights are not just nice in theory, but workable in practice.

INTRODUCTION

Nearly forty million people visited Maine in 2019 and when asked what brought them, many gave the same answer: the food.¹ In Maine, food is king. Shiny, red lobsters adorn postcards and picnic tables; ripe, wild blueberries sit in green cardboard containers; and schools in the far northern areas of the state still observe a "harvest break" for students to assist with the fall potato crop.² It may, therefore, not come as a surprise to learn that in 2021, Mainers voted to amend

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1. See ME. OFF. OF TOURISM, 2019 ANNUAL REPORT 60, 95 (2020), <https://motpartners.com/wp-content/uploads/2020/06/2019-MOT-Annual-Visitors-Research.pdf>. When asked what Maine offers as a destination that similar destinations do not, overnight visitors responded "food" more than any other answer. *Id.* at 76.

2. Morgan Mitchell & David Marino Jr., *Aroostook County's Harvest Break is Indispensable for the Potato Industry, Farmers Say*, BANGOR DAILY NEWS (Aug. 5, 2020), <https://www.bangordailynews.com/2020/08/03/news/aroostook/some-consider-aroostook-countys-long-tradition-of-harvest-break-unnecessary-but-farmers-say-they-need-it/>.

their state constitution to guarantee a “right to food.”³ This amendment, the first of its kind in the nation, granted the following to the people of Maine:

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.⁴

Despite contrasting views on the amendment’s meaning and practical impact, sixty-one percent of Maine voters supported its adoption.⁵ Proponents of the amendment emphasized the need to ensure Mainers’ “opportunity to wrest control of the food supply from large landowners and corporate retailers” and alleviate Maine’s reliance on food grown out of state.⁶ Critics argued that the amendment was too vague and failed to adequately address a real problem—Maine’s widespread food insecurity.⁷ Despite its rich agricultural history, Maine has the highest rate of food insecurity in New England.⁸ Nearly twenty percent of Maine’s children experience food insecurity, and single-parent households, immigrants from the Global South, and other marginalized groups experience food insecurity at up to four times the rate of Maine’s general population.⁹

Representatives from the Maine Municipal Association testified against the amendment at a public hearing before the State Legislature. They argued that town officials often come up with “locally created responses” to address food insecurity, “which are sometimes the only way residents receive food . . . when they are daunted by [the] incredibly low income levels necessary to qualify for programs”¹⁰ such as the Supplemental Nutrition Assistance Program (SNAP), a federal program that provides low-income households with benefits to purchase groceries and other

3. Patrick Whittle, *Maine Voters Pass the Nation’s First ‘Right to Food’ Amendment*, PORTLAND PRESS HERALD (Nov. 2, 2021), <https://www.pressherald.com/2021/11/02/supporters-of-right-to-food-amendment-lead-in-early-returns/>.

4. ME. CONST. art I, § 25.

5. *Tabulations for Elections Held in 2021*, ME. DEP’T OF THE SEC’Y OF STATE, <https://www.maine.gov/sos/cec/elec/results/results21.html> [<https://perma.cc/6HQL-2KP4>]; see also Kelly Bouchard, *Maine’s Passage of ‘Right to Food’ Amendment Stirs Celebration, Worry*, PORTLAND PRESS HERALD (Nov. 4, 2021), <https://www.pressherald.com/2021/11/04/maines-passage-of-right-to-food-amendment-stirs-celebration-worry/>.

6. Bouchard, *supra* note 5.

7. *Id.* Food insecurity “is the limited or uncertain availability of nutritionally adequate and safe foods, or limited or uncertain ability to acquire acceptable foods in socially acceptable ways.” *Food Security in the U.S.*, U.S. DEP’T OF AGRIC. ECON. RSCH. SERV. (Oct. 25, 2023), <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-u-s/measurement/#insecurity> [<https://perma.cc/KMD4-SS64>].

8. ME. DEP’T OF AGRIC., CONSERVATION & FORESTRY, EVERYONE AT THE TABLE: MAINE’S ROADMAP TO END HUNGER BY 2030 13 (2019) [hereinafter EVERYONE AT THE TABLE], <https://www.maine.gov/future/sites/maine.gov/future/files/2023-06/maines-roadmap-to-end-hunger.pdf>.

9. *Id.* at 12.

10. *Proposing an Amendment to the Constitution of Maine to Establish a Right to Food: Hearing on L.D. 95 Before the J. Standing Comm. on Agriculture, Conservation & Forestry*, 130th Legis. 2 (2021) [hereinafter *Hearing on L.D. 95*] (testimony of Rebecca Graham, Maine Municipal Association).

food.¹¹ In addition to experiencing higher rates of food insecurity than much of the country, Mainers also experience food insecurity at higher incomes than in other parts of the nation; forty percent of food-insecure households in Maine do not meet the income requirements to qualify for SNAP benefits.¹²

Opponents of the amendment also feared that recognizing a constitutional right to food could create a system that jeopardizes food safety regulations and animal welfare.¹³ Municipalities and animal welfare organizations were concerned that the amendment's passage would hobble their ability to reasonably regulate the ownership and safety of certain livestock through town zoning ordinances.¹⁴ While no right exists without some limitations, the right to food leaves municipalities wondering which regulations are permissible and which may open them up to constitutional challenges and costly litigation.

One example of this concern, and the focus of this Comment, is whether a “homeowner [could] cite the new constitutional right [to food] to push back against their suburban town’s ordinance prohibiting backyard chickens.”¹⁵ This Comment strives to untangle some of the intricacies and unknowns of Maine’s right to food amendment in the context of backyard chicken zoning regulations and provide some clarity for Maine’s municipalities as they structure their backyard chicken ordinances.

Part I of this Comment evaluates the concept of food sovereignty, its history in Maine, and how Maine became the first state in the nation to recognize the right to food. Part II discusses chicken ordinances and notes the complex array of public health and safety issues that municipalities must attempt to balance when they choose to permit backyard chickens. Part III analyzes backyard chicken ordinances currently in place in two of Maine’s more populous centers, Bangor and Lewiston, and how a court might interpret these restrictions in light of the new constitutional amendment. Finally, Part IV develops and offers a model backyard chicken ordinance to municipalities, which they can draw upon as they attempt to reconcile valid concerns about public health, nuisance control, and the health and welfare of chickens without running afoul of the new constitutional amendment.

11. *Supplemental Nutrition Assistance Program (SNAP)*, ME. DEP’T OF HEALTH & HUM. SERV., <https://www.maine.gov/dhhs/ofi/programs-services/food-supplement> [https://perma.cc/ARC6-VJVL] (last visited May 8, 2024).

12. EVERYONE AT THE TABLE, *supra* note 8, at 13.

13. Editorial Board, *Our View: Question 3 the Wrong Way to Address Problems in Food System*, PORTLAND PRESS HERALD (Oct. 10, 2021), <https://www.pressherald.com/2021/10/10/our-view-question-3-the-wrong-way-to-address-problems-in-food-system/>.

14. Bouchard, *supra* note 5.

15. Kevin Miller & Steve Mistler, *Why Maine Voters are Considering a Constitutional ‘Right to Food’*, ME. PUB. (Oct. 29, 2021, 10:02 AM), <https://www.mainepublic.org/politics/2021-10-29/why-maine-voters-are-considering-a-constitutional-right-to-food>; *see also* Bouchard, *supra* note 5 (“Suburban homeowners who want to raise livestock in their backyard could use [the amendment] to challenge municipal zoning regulations.”).

I. THE RISE OF FOOD SOVEREIGNTY IN MAINE

Though new to the United States, the right to food has been recognized elsewhere.¹⁶ However, international law approaches the right to food from a human rights perspective, emphasizing equitable access to adequate food.¹⁷ In contrast, the concept of a constitutional right to food in the United States, particularly in Maine, originated as part of a growing interest in food sovereignty.¹⁸ At its core, “the food sovereignty movement takes a critical look at the current food system and how policies have disenfranchised citizens’ ability to provide food for themselves and their communities.”¹⁹ While the goal of the food sovereignty movement is to bolster individuals’ ability to grow and produce without the shackles and constraints of the corporate agricultural structure, some laws tend to look less like “food sovereignty . . . and more [like] . . . anti-regulation [movements].”²⁰ In theory, “food sovereignty gives control over the way that food is produced, sold, and eaten within local communities to those local communities,” though the movement often “seems to manifest as a desire to avoid regulations that currently govern food production.”²¹

A. State v. Brown

Beginning in 2009, a handful of towns in Maine began to look for ways to distance themselves from federal and state agricultural requirements, such as inspections and licensing.²² In 2011, this movement gained traction when a group of farmers and food sovereignty advocates drafted the “Local Food and Community Self-Governance Ordinance,” which several towns in Maine adopted.²³ According to the ordinance, its purpose was to give communities “the right to produce, process, sell, purchase and consume local foods thus promoting self-reliance, the preservation of family farms, and local food traditions.”²⁴ Further, the ordinance stated that “[p]roducers and processors of local foods . . . are exempt

16. See, e.g., CONST. OF CUBA Feb. 24, 2019, ch. II, art. 77 (“All people have the right to a healthy and adequate diet.”).

17. See U.N. Off. of the High Comm’r on Hum. Rts., *Fact Sheet No. 34: The Right to Adequate Food*, at 2 (Apr. 1, 2010).

18. The U.N. differentiates the right to food from the idea of food sovereignty, explaining that “[f]ood sovereignty is . . . a concept that promotes an alternative model for agriculture, trade policies and practices that serve people’s rights to food and to safe, healthy and ecologically sustainable food production.” *Id.* at 4. According to the U.N., the right to food is more closely related to food security than food sovereignty. *Id.* at 4–5.

19. Allison Condra, *Food Sovereignty in the United States: Supporting Local and Regional Food Systems*, 8 J. FOOD L. & POL’Y 281, 283 (2012).

20. *Id.* at 296.

21. Sarah Schindler, *Food Federalism: States, Local Governments, and the Fight for Food Sovereignty*, 79 OHIO ST. L.J. 761, 767–68 (2018) [hereinafter *Food Federalism*].

22. Wendy Heipt, *The Right to Food Comes to America*, 17 J. FOOD L. & POL’Y 111, 117–18 (2021).

23. See *id.* at 118; see, e.g., Blue Hill, Me., Local Food and Community Self-Governance Ordinance (Apr. 1, 2011), <https://www.animallaw.info/sites/default/files/lousmebluehillfarmingandfoodproduction.pdf>; Sedgwick, Me., Local Food and Community Self-Governance Ordinance (Mar. 5, 2011), <https://sedgwickmaine.org/2016/wp-content/uploads/2013/03/local-food-ordinance.pdf>.

24. Blue Hill, Me., Local Food and Community Self-Governance Ordinance § 3.

from licensure and inspection provided that the transaction is only between the producer or processor and a patron when the food is sold for home consumption.”²⁵ The ordinance also stated that “[i]t shall be unlawful for any law or regulation adopted by the state or federal government to interfere with the rights recognized by the ordinance.”²⁶

Part of this opposition to state and federal licensing and inspection programs was in response to the Federal Food Safety Modernization Act (FSMA) of 2011, which required, among other things, that producers and growers implement new food safety standards to prevent the spread of foodborne illnesses.²⁷ Maine farmers worried that the FSMA “would negatively impact small farmers by imposing expensive regulations, reducing access to local food, increasing chemical use, decreasing natural fertilizers, and making it harder for farms to diversify.”²⁸ Several towns in Hancock County, Maine, adopted the Local Food and Community Self-Governance Ordinance, including coastal Blue Hill.²⁹ Farmers in these small towns often sold their products directly to consumers, and they used the ordinance to avoid the “overly onerous regulations” imposed by the state and federal governments.³⁰

This agricultural subversion culminated in an action by the State of Maine against dairy farmer Dan Brown from Blue Hill, who refused to properly license and label his raw milk pursuant to Maine’s dairy distribution laws.³¹ Although Maine permits the sale of raw—also called unpasteurized—milk directly to customers, distributors must obtain a milk distributor license and alert consumers through proper labeling that the product has not been pasteurized.³² As part of his defense, Brown argued that the Blue Hill Local Food and Community Self-Governance Ordinance of 2011 exempted him from state licensing and labeling requirements.³³

25. *Id.* § 5.1. The ordinance also exempted producers and processors from licensing and inspection if their food was sold or prepared for a community event. *Id.* § 5.1.a.

26. *Id.* § 6.1.

27. See Heipt, *supra* note 22, at 117; see also *Food Safety Modernization Act (FSMA)*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/food/guidance-regulation-food-and-dietary-supplements/food-safe-ty-modernization-act-fsma> [<https://perma.cc/KWS5-38EV>] (last visited May 8, 2024).

28. Heipt, *supra* note 22, at 117.

29. See *id.* at 117–18.

30. *Id.*

31. *State v. Brown*, 2014 ME 79, ¶ 9, 95 A.3d 82; see also Jess Bidgood, *Maine Court Fight Pits Farmers Against State and One Another*, N.Y. TIMES (June 18, 2014), <https://www.nytimes.com/2014/06/19/us/maine-court-fight-pits-farmers-against-state-and-one-another.html> (noting that Brown had failed to purchase a twenty-five-dollar milk distributor’s license).

32. 7 M.R.S. §§ 2901-C(1), 2902-B(1) (2023); see also *Brown*, 2014 ME 79, ¶ 1, 95 A.3d 82. Pasteurization is a process that heats milk to high temperatures to kill potentially harmful bacteria. U.S. FOOD & DRUG ADMIN., FOOD FACTS, THE DANGERS OF RAW MILK 1 (2020), <https://www.fda.gov/media/119383/download>. According to the U.S. Food and Drug Administration (FDA), consuming raw milk increases the risk of infections like salmonella, E. coli, and listeria. *Id.* Raw milk advocates claim that raw milk has many health benefits and that the pasteurization process, while killing any potentially harmful bacteria, also kills beneficial bacteria and enzymes that make milk easier to digest. See *Learn About Raw Milk*, RAW MILK INST., <https://www.rawmilkinstitute.org/about-raw-milk/nutrition> [<https://perma.cc/9LXU-F765>] (last visited May 8, 2024).

33. *Brown*, 2014 ME 79, ¶ 22, 95 A.3d 82.

Though the Maine Supreme Judicial Court, sitting as the Law Court,³⁴ ultimately decided *State v. Brown* on other grounds, it acknowledged that state laws regulating the licensing and labeling of dairy products likely preempted Blue Hill's ordinance.³⁵ Under the preemption doctrine, any conflicts that arise between laws passed by states and laws passed by Congress must be resolved in favor of the federal law.³⁶ The same doctrine applies when local laws conflict with state laws.³⁷ The Law Court's decision also rested on the Maine Constitution's "home rule" provision, which, coupled with statutory authority, allows municipalities to pass ordinances and regulate freely anything that has not otherwise been "denied either expressly or by clear implication" by state law.³⁸ However, local ordinances "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.'"³⁹ In *Brown*, the Law Court stated that while the ordinance would exempt food producers from Blue Hill's own licensing and labeling laws, it would not exempt local producers from state licensing requirements because the state already had laws specifically regulating milk distributors.⁴⁰ The Law Court stopped short of overturning the ordinance entirely, but the ruling still dealt a blow to Dan Brown and other food sovereignty activists.⁴¹

Brown tested the legality of Maine towns' food sovereignty statutes and illuminated weaknesses in the movement's ability to deregulate local growers and producers. However, towns across Maine have continued to enact similar ordinances, and many viewed the Law Court's decision as an opportunity for the food sovereignty movement to take root at the state level.⁴²

B. Failed 2016 and 2019 Right to Food Amendments

In 2016, two years after *Brown*, the Maine Senate rejected a first attempt to enshrine the right to food in Maine's constitution.⁴³ Any proposed amendment to the Maine Constitution must receive two-thirds of the votes from members of both the Maine House and Senate, and then be submitted to voters in the next general

34. 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).

35. *Brown*, 2014 ME 79, ¶ 25, 95 A.3d 82.

36. *Gibbons v. Ogden*, 22 U.S. 1, 210–11 (1824).

37. See *Int'l Paper Co. v. Town of Jay*, 665 A.2d 998, 1001–02 (Me. 1995).

38. 30-A M.R.S. § 3001 (2023); *Brown*, 2014 ME 79, ¶ 23, 95 A.3d 82; see also discussion *infra* Section III.A.

39. *Brown*, 2014 ME 79, ¶ 23, 95 A.3d 82 (quoting *Perkins v. Town of Ogunquit*, 1998 ME 42, ¶ 7, 709 A.2d 106).

40. *Id.* ¶¶ 24–25.

41. *Brown* has left the dairy industry to cultivate medical marijuana. Heipt, *supra* note 22, at 119 n.33.

42. See Patrick Whittle, *Legal Defeat Only Emboldens 'Food Sovereignty' Soldiers*, PORTLAND PRESS HERALD (Apr. 8, 2018), <https://www.pressherald.com/2016/04/25/legal-defeat-only-emboldens-food-sovereignty-soldiers/>.

43. *Id.*; L.D. 783 (127th Legis. 2015).

election.⁴⁴ This early iteration of the right to food focused on slightly different issues than the successful 2021 version:

Section 25. Right to food freedom and self-sufficiency. All individuals have a natural, inherent and unalienable right to acquire, produce, process, prepare, preserve and consume the food of their own choosing, for their own nourishment and sustenance, by hunting, gathering, foraging, farming, fishing, gardening and saving and exchanging seeds, as long as no individual commits trespassing, theft, poaching or other abuses of private property rights, public lands or natural resources in the acquisition of food. Furthermore, all individuals have a right to barter, trade and purchase food from the sources of their own choosing for their own bodily health and well-being. Every individual is fully responsible for the exercise of these rights, which may not be infringed.⁴⁵

Critics voiced many of the same concerns in 2016 as they did in 2021—that the proposed amendment was “vague, unnecessary, or potentially dangerous.”⁴⁶

The failed amendment’s wording went through several variations before finally reaching the Maine Senate. The original proposal did not include the ability to save and exchange seeds.⁴⁷ This language was added to the final draft of the failed 2016 amendment and later incorporated into the 2021 amendment.⁴⁸ In 2016, some noted that incorporating the ability to save and exchange seeds could prove to be problematic because the seeds of genetically modified organisms (GMOs) are typically patented.⁴⁹ At least one writer posited that this language may have been the reason the bill failed in the Maine Senate.⁵⁰ While the measure ultimately passed the Maine House with the necessary two-thirds majority, the Senate’s rejection tabled the issue.

Representatives attempted to revive an expanded version of the right to food amendment in 2019, which initially included a right to be free from hunger,⁵¹ but

44. ME. CONST. art. X, § 4.

45. Comm. Amend. A to L.D. 783, No. H-526 (127th Legis. 2016).

46. Whittle, *supra* note 42.

47. See L.D. 783 (127th Legis. 2015), which stated the following:

Section 25. Right to food. Every individual has a natural and unalienable right to food and to acquire food for that individual’s own nourishment and sustenance by hunting, gathering, foraging, farming, fishing or gardening or by barter, trade or purchase from sources of that individual’s own choosing, and every individual is fully responsible for the exercise of this right, which may not be infringed.

48. Comm. Amend. A to L.D. 783, No. H-526 (127th Legis. 2016); ME. CONST. art. I, § 25.

49. Baylen Linnekin, *Food Freedom Legislation Slowly Advancing in States*, REASON (Apr. 30, 2016, 8:00 AM), <https://reason.com/2016/04/30/food-freedom-legislation-slowly-advancing/> [<https://perma.cc/3GMD-M45K>].

50. *Id.* Though beyond the scope of this Comment, it will be interesting to see how the right to save and exchange seeds, which is included in the current amendment, will interact with federal patent laws.

51. See L.D. 795 (129th Legis. 2019). L.D. 795’s language was initially very broad:

Section 25. Right to food and food sovereignty and freedom from hunger. All individuals have a natural, inherent and unalienable right to acquire, produce, process, prepare, preserve and consume the food of their own choosing by hunting, gathering, foraging, farming, fishing, gardening and saving and exchanging seeds or by barter, trade or purchase from sources of their own choosing, for their nourishment, sustenance, bodily health and wellbeing, as long as the individual does not commit trespassing, theft, poaching or other abuses of private property rights, public lands, or natural resources in

this bill did not even make it out of the House.⁵² This version of the bill was promptly amended to remove any language that established the right to be free from hunger, presumably because it could create an obligation for the state to feed its residents.⁵³ Still, it would be two years until the final attempt to enshrine the right to food would make it out of the Maine House and Senate with the requisite votes needed to reach the people of Maine.

C. Maine Food Sovereignty Act of 2017

Against the backdrop of repeated attempts to add the right to food to the Maine Constitution, the food sovereignty movement experienced a major win with the passage of the Maine Food Sovereignty Act of 2017 (the MFSA).⁵⁴ Aimed at supporting small-scale farming, improving Mainers' health, and developing rural economies,⁵⁵ the MFSA authorizes municipalities to "adopt ordinances regarding direct producer-to-consumer transactions" and promises that "the State shall recognize such ordinances by not enforcing those laws or implementing rules with respect to those direct producer-to-consumer transactions that are governed by the ordinance."⁵⁶ However, the MFSA does not apply to poultry and meat, which remain under the authority of the state's inspection and labeling laws.⁵⁷ Indeed, Maine could not cede this control to municipalities because the federal government and the states cooperate to maintain minimum health and safety standards for meat and poultry.⁵⁸

Maine was ultimately forced to amend the MFSA after the U.S. Department of Agriculture (USDA) threatened to take over Maine's meat inspection program entirely unless Maine clarified that state meat inspections would continue in towns

the acquisition of food; furthermore, all individuals 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.

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

53. See House Amend. B to L.D. 795, No. H-675 (129th Legis. 2020). The amendment pared L.D. 795 down significantly:

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 nourishment, sustenance, bodily health and well-being, as long as an individual does not commit trespassing, theft, poaching or abuses of private property rights, public lands or natural resources in the harvesting, production or acquisition of food.

See also *Proposing an Amendment to the Constitution of Maine to Establish a Right to Food: Hearing on L.D. 795 Before the J. Standing Comm. on Agriculture, Conservation & Forestry*, 129th Legis. 1 (2019) (testimony of John Harker).

54. See 7 M.R.S. § 283 (2023).

55. *Id.*

56. *Id.* § 284.

57. *Id.* § 285.

58. See 21 U.S.C. §§ 454, 661.

that claimed to be “food sovereigns.”⁵⁹ Initially, the MFSA applied only to “face to face interactions at the site where the food was produced,” which did not include sales at places like grocery stores and farmers’ markets.⁶⁰ However, in 2023, the Legislature expanded the scope of the MFSA to apply to any “direct producer-to-consumer transaction,” which includes purchases made at “roadside stands, fundraisers, farmers’ markets and community social events; or through buying clubs, deliveries or community-supported agriculture programs, herd-share agreements and other private arrangements.”⁶¹

Notwithstanding the MFSA’s narrow application, its passage represented a huge victory for Maine’s food sovereignty movement. Alleviating some requirements (and costs) placed on small farmers and growers was appealing to the MFSA’s supporters, particularly in a state where roadside food stands entice tourists and rural communities are often fiercely proud of their self-reliance. Since the MFSA’s passage, more than ninety municipalities have passed food sovereignty ordinances.⁶² Some towns retained the flowery language from Blue Hill’s ordinance,⁶³ while others adopted more sterile ordinances reminiscent of the Maine Food Sovereignty Act itself,⁶⁴ but all of the food sovereignty ordinances share the same desire: to give local growers control over production and to preserve the local food economy.

59. Mary Pols, *Food Law Leaves Maine Meat Producers Squealing for a Fix*, PORTLAND PRESS HERALD (Oct. 18, 2017), <https://www.pressherald.com/2017/10/18/maines-meat-and-poultry-producers-caught-in-the-middle-of-food-sovereignty-fight/>.

60. P.L. 2017, ch. 314, § 1; *see also Food Federalism*, *supra* note 21, at 778–79.

61. 7 M.R.S. § 282(1) (2023).

62. Bouchard, *supra* note 5.

63. *Compare* Blue Hill, Me., Local Food and Community Self-Governance Ordinance § 3 (“We the People of the Town of Blue Hill, Hancock County, Maine have the right to produce, process, sell, purchase and consume local foods thus promoting self-reliance, the preservation of family farms, and local food traditions.”), *with* Gray, Me., Local Food and Community Self-Governance Ordinance § 602.2 (Oct. 15, 2020), https://www.graymaine.org/sites/g/files/vyhlf631/f/uploads/chapter_602_food_ov_ordinance.pdf (“Gray residents have the right to produce, process, harvest, sell, purchase, and consume local foods, thus promoting self-reliance, the preservation of our local food economy, our family farms, and our food traditions.”).

64. *Compare* 7 M.R.S. § 283(1) (2023) (“Through local control, preserve the ability of communities to produce, process, sell, purchase and consume locally produced foods.”), *with* Norridgewock, Me., Food Sovereignty Ordinance § 2 (Mar. 2, 2020), https://www.norridgewock.gov/sites/g/files/vyhlf6081/f/uploads/food_sovereignty_ordinance.pdf (“The purposes of this ordinance are to ensure that the residents of the Town of Norridgewock are provided unimpeded access to local food or food products and to reduce governmental regulation of direct producer-to-consumer transactions.”), *and* WATERVILLE, ME., CODE § 150-2(a) (June 11, 2019), <https://ecode360.com/WA3904> [<https://perma.cc/F2MN-HSLL>] (“The purposes of this chapter are to ensure that residents of the City of Waterville are provided unimpeded access to local food or food products and to reduce governmental regulation of direct producer-to-consumer transactions.”), *and* AUGUSTA, ME., CODE OF ORDINANCES § 153-1 (Nov. 15, 2018), <https://ecode360.com/AU3534> [<https://perma.cc/GQ6T-Q66U>] (“This chapter is intended to provide Augusta residents unimpeded access to local food and to reduce governmental regulation of local foods to the extent permitted by home rule authority.”).

II. WHY MUNICIPALITIES MIGHT REGULATE BACKYARD CHICKENS IN THE FIRST PLACE

In recent years, public support and acceptance of backyard chickens and other small-scale agriculture has bloomed across the United States. But while cities as large as San Francisco, Austin, and Chicago now permit backyard chickens, many municipalities continue to struggle to enact ordinances that are fair to both chicken-raisers and the chicken-averse.⁶⁵ One of the largest hurdles that municipalities must overcome when they are deciding whether to permit backyard chickens is how to balance the rights of individual property owners against such factors as nuisance considerations (noise and smell), public health, animal welfare, and the protection of property values.⁶⁶

A. Historical Justifications for Backyard Chicken Bans and Regulations

Cities across the United States have been reckoning with increased interest from residents in raising hens, primarily for eggs.⁶⁷ This means that municipalities have had to strike a balance between some residents' desires and the concerns of the greater community.

1. Public Health, Safety, and Nuisance

In 2010, the City Manager of Cambridge, Massachusetts, released a letter discussing the two major areas of concern the city faced when it considered allowing residents to raise hens.⁶⁸ The first was public health—protecting residents from chicken-borne illnesses such as salmonella and other types of bacteria.⁶⁹ All eggs carry some risk of infection, and cities often fear that amateur chicken raisers may not take proper precautions when handling eggs.⁷⁰ Similarly, avian (bird) flu poses a risk to backyard flocks and can occasionally infect people.⁷¹

65. See Catherine Price, *A Chicken on Every Plot, a Coop in Every Backyard*, N.Y. TIMES (Sept. 19, 2007), <https://www.nytimes.com/2007/09/19/dining/19yard.html>.

66. See Patricia Salkin, *Feeding the Locavores, One Chicken at a Time: Regulating Backyard Chickens*, 34 ZONING & PLAN. L. REP. 1, 1 (2011).

67. In 2004, residents of Oakland, California, convinced the city council not to implement a two-hen-per-household limit. Price, *supra* note 65. Also in 2004, a group of residents in Madison, Wisconsin, calling itself the “Mad City Chickens,” “organized into . . . beautiful anarchy . . . and lobbied the City of Madison to get an ordinance passed to allow the keeping of four hens per residential lot.” Mad City Chickens, FACEBOOK (Oct. 31, 2016), <https://www.facebook.com/groups/16484708535/?mibextid=HsNCOg> [<https://perma.cc/V6XL-ZFUM>]. Even New York City allows residents to own hens, though roosters and other poultry are expressly forbidden. N.Y.C., N.Y., HEALTH CODE § 161.19(a) (2024).

68. Letter from Robert W. Healy, City Manager, Cambridge, Ma., to the City Council, Cambridge, Ma., (Aug. 2, 2010), https://www2.cambridgema.gov/cityClerk/cmLetter.cfm?action=search&item_id=17752#:~:text=Hens [<https://perma.cc/5AWZ-NL7N>].

69. *Id.*

70. *Id.*

71. *Id.*; Dana Hedgpeth, *Bird Flu Infects Millions of Chickens in Md., Del. Amid Broader Surge*, WASH. POST (May 9, 2022), <https://www.washingtonpost.com/dc-md-va/2022/05/06/bird-flu-maryland-chickens-vultures-deadly/>. In May 2022, a strain of avian flu had already infected millions of chickens on farms in multiple states. *Id.*

Second, municipalities are acutely aware of the potential for nuisance claims and general complaints arising from all kinds of noisy, smelly, and pest-attracting activities that residents might get involved in.⁷² To limit nuisance claims from backyard chicken flocks, many towns prohibit roosters due to their propensity for early-morning crowing, and many municipalities limit the number of hens per lot to avoid complaints about rats and foxes.⁷³ Critically, “[c]ourts that have considered chicken bans that are founded on harm prevention, noxious use, or nuisance rationales have found those bans to be constitutional because they do not interfere with any fundamental rights.”⁷⁴ This may change in Maine now that there is a constitutional right in play.

2. *Aesthetic and Exclusionary Reasons*

Aesthetics and property values also often play a role in shaping local zoning ordinances. An unruly or messy chicken coop in a yard could, in theory, reduce the value of a neighboring home, as “studies suggest that the appearance of homes in a neighborhood affects property values in that neighborhood.”⁷⁵ This type of “not-in-my-backyard” attitude has fueled those opposed to backyard chickens, as “[m]any communities and residents prefer uniform, neat front yards to . . . chicken coops, and they feel that . . . chickens are out of place in their upper- or upper-middle-class communities.”⁷⁶ Unsightly coops alone cannot be the basis for nuisance lawsuits, as the aesthetic nuisance doctrine protects “the actor . . . if an aesthetically offended observer brings an action for nuisance.”⁷⁷ Nevertheless, many municipalities fear the economic repercussions associated with falling property values and residents’ general disgruntlement.

Further, zoning ordinances have long been used to exclude people who are often associated with certain activities.⁷⁸ Immigrant and low-income families, for example, have historically been associated with urban agriculture, even before it became trendy.⁷⁹ Zoning ordinances that ban chickens may, therefore, be less about the chicken than they are about the people associated with it.⁸⁰

III. ON THE BOOKS: BACKYARD CHICKEN ORDINANCES IN BANGOR AND LEWISTON

Though the U.S. Constitution is known for guaranteeing individual rights, state constitutions play an important role in safeguarding rights that parallel those

72. See Sarah B. Schindler, *Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores*, 87 TUL. L. REV. 231, 254–64 (2012) [hereinafter *Of Backyard Chickens*].

73. See *id.* at 255–56, 258 n.140.

74. *Id.* at 256.

75. *Id.* at 258.

76. *Id.*

77. James Charles Smith, *The Law of Yards*, 33 ECOLOGY L.Q. 203, 215 (2006); see also Whitmore v. Brown, 102 Me. 47, 57, 65 A. 516, 520 (1906) (“A neighbor’s building on his own land, by its ugliness of architecture or by its mere proximity, may lessen one’s enjoyment of his own residence and lessen its market value . . . and yet no legal right be infringed.”).

78. See *Of Backyard Chickens*, *supra* note 72, at 258.

79. *Id.* at 259.

80. *Id.*

enshrined in the U.S. Constitution. The addition of the right to food amendment has created a conflict within the Maine Constitution, pitting municipalities' ability to broadly regulate matters relating to public health and safety against an individual's right to food.⁸¹

A. Home Rule in Maine

Local governments use their police powers to restrict urban agriculture to protect public health and minimize nuisance claims.⁸² Typically, municipalities can exercise authority only when the state has “expressly granted” power to the local government.⁸³ However, the Maine Constitution grants municipalities the right of “home rule.”⁸⁴ Specifically, the constitution instructs that “[t]he inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character. The Legislature shall prescribe the procedure by which the municipality may so act.”⁸⁵ This allows Maine's villages, towns, and cities to “adopt . . . ordinances . . . without specific legislative authorization, and . . . to govern themselves in any area unless it is prohibited, directly or by clear implication, by state or federal law.”⁸⁶ The purpose of home rule “is to give local communities the powers to regulate their municipal affairs.”⁸⁷ This right is supported by legislation that grants ordinances passed by municipalities a presumption of authority, which means that there is a rebuttable presumption that any properly enacted ordinance “is a valid exercise of a municipality's home rule authority.”⁸⁸ Because no state or federal law regulates chicken ownership, municipalities in Maine have thus far been able to regulate backyard chickens and the issues associated with them.

Lewiston and Bangor, two of Maine's most populous cities, have used their right to home rule to regulate backyard chickens through municipal ordinances.⁸⁹ Neither ordinance would likely survive a constitutional challenge under Maine's right to food, at least in its entirety. This is primarily due to the ordinances' aesthetic and exclusionary purposes, which do not align with the purpose of the amendment. The ordinances' public health and safety provisions, on the other hand, would likely remain intact because municipalities have a legitimate interest in protecting their residents' health and safety.

81. Compare ME. CONST. art VIII, pt. 2, § 1, with ME. CONST. art I, § 25.

82. *Of Backyard Chickens*, *supra* note 72, at 253.

83. *Id.* at 254.

84. ME. CONST. art VIII, pt. 2.

85. ME. CONST. art VIII, pt. 2, § 1.

86. ME. MUN. ASS'N, LOCAL GOVERNMENT IN MAINE 10 (2016), https://www.memun.org/DesktopModules/Bring2mind/DMX/API/Entries/Download?Command=Core_Download&EntryId=577&language=en-US&PortalId=0&TabId=38.

87. Steven M. Wise et al., *The Power of Municipalities to Enact Legislation Granting Legal Rights to Nonhumans Pursuant to Home Rule*, 67 SYRACUSE L. REV. 31, 34 (2017).

88. 30-A M.R.S. § 3001(2) (2023).

89. See BANGOR, ME., CODE § 65-10 (Sept. 14, 1998), <https://ecode360.com/BA1684> [<https://perma.cc/EYB3-8JVS>]; LEWISTON, ME., CODE OF ORDINANCES § 14-39 (Oct. 20, 2022), <https://www.lewistonmaine.gov/DocumentCenter/View/192/Chapter-14?bidId=>

1. Bangor, Me., Code § 65-10

*No person shall keep any fowl, goats, sheep, cattle, or swine of any kind within the urban developed area of the City of Bangor.*⁹⁰

Imagine the following hypothetical: A young man buys a house on residential Bowdoin Street, close to downtown Bangor, Maine. His friends, who live in nearby Orono, recently built a chicken coop to house their six newly hatched female chicks. The man decides that he wants to get in on the chicken-raising action and starts to investigate what it would take to get chickens in his backyard. His backyard is quite large, and he thinks it would be perfectly suited to raising hens. Besides loving fresh eggs, he is also an avid gardener, and he thinks that backyard chickens could help provide some much-needed natural fertilizer for his vegetable patch. Much to his dismay, he discovers that a zoning ordinance prohibits keeping “fowl . . . of any kind within the urban developed area of the City of Bangor.”⁹¹ Bowdoin Street is zoned as urban residential.⁹² However, he is civically engaged and remembers recently voting “yes” to add the right to food to the Maine Constitution. Thinking that this outright prohibition on chicken ownership violates his constitutional right to “raise . . . the food of [his] own choosing for [his] own nourishment, sustenance, bodily health and well-being,”⁹³ he sues the City of Bangor.

In 2010, the Bangor City Council voted to indefinitely table an ordinance amendment that would have permitted up to six hens per lot in residential zones.⁹⁴ As it stood then, Bangor residents could keep chickens and other livestock only if they lived in rural and agricultural zones.⁹⁵ In 2019, just two years before Maine enshrined the right to food in its constitution, the Bangor City Council again reconsidered the prohibition on backyard chickens in residential neighborhoods.⁹⁶ Opponents reprised many of the typical worries about backyard chickens in the neighborhood, namely, that “chickens can attract predators, and be loud and unsanitary.”⁹⁷ Supporters “point[ed] to the merits of raising their own food and argu[ed] that ordinances can be written to prevent chickens from disrupting neighbors.”⁹⁸

90. BANGOR, ME., CODE § 65-10.

91. *Id.*

92. *City of Bangor Parcel Viewer*, CITY OF BANGOR, <https://bangor.maps.arcgis.com/apps/webappviewer/index.html?id=542e4d3d42e3454ebd8f35bcbebf8368> [<https://perma.cc/BA47-U4YD>] (last visited Mar. 20, 2024) (add “Zoning” layer option and search “Bowdoin Street” in parcel search bar).

93. ME. CONST. art I, § 25.

94. Eric Russell, *Bangor Balks at Backyard Chickens*, BANGOR DAILY NEWS (Feb. 22, 2010), <https://www.bangordailynews.com/2010/02/22/news/bangor/bangor-balks-at-backyard-chickens/>.

95. Charles Eichachker, *Bangor Won’t Lift Ban on Backyard Chickens*, BANGOR DAILY NEWS (Apr. 23, 2019), <https://www.bangordailynews.com/2019/04/22/news/bangor/bangor-wont-revisit-backyard-chicken-ban/>.

96. *Id.*

97. *Id.*

98. *Id.*; see also ORONO, ME., CODE OF ORDINANCES § 18-149 (Nov. 19, 2018), https://library.municode.com/me/orono/codes/code_of_ordinances?nodeId=12839 [<https://perma.cc/W4WD-ML3J>] (restricting backyard chickens to six hens per lot and requiring action to prevent odors and noise from disturbing neighbors); PORTLAND, ME., CODE OF ORDINANCES §§ 5-402, 5-405 (Mar. 20, 2009),

In a workshop held prior to a regularly scheduled meeting, the Bangor City Council briefly discussed whether backyard chickens merited a full conversation.⁹⁹ Only two councilors spoke in favor of amending Bangor’s ordinance to allow backyard chickens within “city limits.”¹⁰⁰ One councilor who supported moving forward with amending the ordinance said that backyard chickens were a “staple of sustainability” for members of the community and that he had been “told by several people that they have . . . moved out of Bangor because they cannot have chickens.”¹⁰¹ He cautioned the other members of the city council against failing to seriously consider decisions that were causing people to leave Bangor.¹⁰²

The councilors opposed to chickens reasoned that Bangor’s “tiny lots” were unsuitable for chickens, and they fretted about the possibility of chickens attracting rats and other pests.¹⁰³ When asked for an opinion, one councilor simply responded, “no chickens,” and said that people who wanted to raise chickens should move to areas where it was permitted.¹⁰⁴

Ultimately, the Bangor City Council voted five to two in favor of maintaining the status quo without engaging in an in-depth discussion of the policies surrounding backyard chickens.¹⁰⁵

2. Lewiston, Me., Code of Ordinances § 14-39

*[T]he keeping of up to six female chickens [is] permitted . . . on lots of no less than 15,000 square feet developed with single-family detached dwellings.*¹⁰⁶

About one hundred miles southwest of Bangor lies Lewiston, which has taken a different approach to backyard chicken ownership within city limits.

Picture another hypothetical: A young couple, recent college graduates, move to Lewiston and buy one half of a duplex on a quiet, tree-lined street. To reduce their carbon footprint, the couple researches raising chickens on their side of the

<https://content.civicplus.com/api/assets/d6067614-40f0-4dae-9ff0-f927805cbf3b> (same); S. PORTLAND, ME., CODE OF ORDINANCES §§ 3-54, 3-57 (Sept. 20, 2010), <https://www.southportland.org/DocumentCenter/View/1419/CH-03-Animals-and-Fowl> (same).

99. Videotape: City Council Workshop, CITY OF BANGOR (Apr. 21, 2019) [hereinafter City Council Workshop], <https://bangormaine.viebit.com/player.php?hash=oQNDyCKO4fjW> [<https://perma.cc/AGE5-JA45>].

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. Eichachker, *supra* note 95. Bangor recently made headlines when the city permitted one family to have six “emotional support” chickens. Eduardo Medina, *A Mother in Maine Rallied for Her Son’s Emotional Support Chickens*, N.Y. TIMES (Oct. 21, 2023), <https://www.nytimes.com/2023/10/21/us/emotional-support-chickens-maine.html>. However, this applies only to one family’s specific situation and does not grant the ability to keep chickens in Bangor’s urban residential zones. See Lorraine Muir, *Bangor Chickens Are Here to Stay: A Family’s Fight to Keep Emotional Support Animals*, NEWS CTR. ME. (Oct. 6, 2023), <https://www.newscentermaine.com/article/news/bangor-family-wins-fight-to-keep-emotional-support-chickens-in-their-backyard/97-bee0514b-61f7-42b5-b981-2b68b6d303e2> (“Bangor’s city solicitor . . . made it clear that these accommodations would only pertain to this particular applicant and property.”).

106. LEWISTON, ME., CODE OF ORDINANCES § 14-39.

grassy backyard. Their neighbors seemed fine with it, even excited at the prospect of benefitting from any surplus egg production. Unfortunately, the couple discovers an ordinance that limits the lot size and the type of lots that are permitted for chicken-keeping in Lewiston. Like many other municipalities, Lewiston limits residents to six hens, but the hens must be kept on lots of at least “15,000 square feet developed with single-family detached dwellings.”¹⁰⁷ This means that the couple occupying one half of a two-family home with a sizeable yard would not be permitted to own chickens, while the ordinance would permit their neighbors across the street to own chickens because they live in a single-family home.

Significantly, 15,000 square feet is just over a third of an acre—not a trivial amount of land—and Lewiston’s average lot size is only 11,000 square feet.¹⁰⁸ Fewer than half of the lots zoned in the areas listed in the ordinance meet the lot size requirement.¹⁰⁹ The couple, believing that this lot size requirement is an arbitrary obstacle to raising hens, sues the City of Lewiston under the right to food amendment.

B. Analyzing the Law Court’s Decisions on Constitutional Challenges to Ordinances

The Law Court’s jurisprudence on the permissibility of local ordinances reveals a long-favored presumption of constitutionality.¹¹⁰ In general, all legislation is presumed to be valid, and the party challenging the constitutionality of any legislation, including local ordinances, bears the burden of rebutting that presumption.¹¹¹ A party challenging the constitutionality of a piece of legislation must “demonstrate convincingly” that the legislation and the constitution conflict.¹¹² This high standard of proof means that very few who challenge the constitutionality of an ordinance prevail.¹¹³

107. *Id.*

108. Telephone Conversation with Ashley Faucher, Appraiser, City of Lewiston Assessor’s Dep’t (Jan. 4, 2023).

109. Spreadsheet from Bill Healey, Chief Assessor, City of Lewiston Assessor’s Dep’t, to Author (Feb. 22, 2023) (on file with Author).

110. *See State v. Starkey*, 112 Me. 8, 11, 90 A. 431, 432 (1914); *Donahue v. City of Portland*, 137 Me. 83, 85, 15 A.2d 287, 288 (1940); *Buck v. Kilgore*, 298 A.2d 107, 109 (Me. 1972); *Ace Tire Co. v. Mun. Officers of City of Waterville*, 302 A.2d 90, 95 (Me. 1973); *E. Perry Iron & Metal Co. v. City of Portland*, 2008 ME 10, ¶ 26, 941 A.2d 457.

111. *See E. Perry Iron & Metal Co.*, 2008 ME 10, ¶ 26, 941 A.2d 457. For a long time, the Law Court even demanded “clear and irrefragable evidence that [the ordinance] infringes the paramount law” to declare it unconstitutional. *Donahue*, 137 Me. at 86, 15 A.2d at 288 (quoting *Village of St. Johnsbury v. Aron*, 151 A. 650, 652 (Vt. 1930)).

112. *See Irish v. Gimbel*, 1997 ME 50, ¶ 6, 691 A.2d 664; *see also Godbout v. WLB Holding, Inc.*, 2010 ME 46, ¶ 5, 997 A.2d 92; *Bouchard v. Dep’t of Pub. Safety*, 2015 ME 50, ¶ 8, 115 A.3d 92; *Goggin v. State Tax Assessor*, 2018 ME 111, ¶ 20, 191 A.3d 341; *City of Lewiston v. Verrinder*, 2022 ME 29, ¶ 15, 275 A.3d 327.

113. In one rare case, the Law Court held that a Waterville ordinance that exacted a \$500.00 license fee from automobile junkyards operating within 100 feet of a highway while only requiring a \$10.00 fee for junkyards located further away violated the Fourteenth Amendment of the U.S. Constitution. *Ace Tire Co.*, 302 A.2d at 101 (Me. 1973). The Law Court found that the exorbitant fee bore “no actual relation to the purpose of the [ordinance],” which was “the protection of the safety, health and welfare of travelers . . . against accidents of the road by reason of the presence of a junkyard or automobile

For example, in *State v. Rush*, the Law Court held that a Portland ordinance banning overnight parking on public ways was neither unreasonable nor arbitrary.¹¹⁴ The plaintiff had argued that the city's ordinance violated the Fourteenth Amendment's Equal Protection Clause by unfairly discriminating against "low-income people living in high-density areas" of Portland, whose housing arrangements often did not include off-street parking spaces.¹¹⁵ In response, the Law Court laid out a three-part test to assess the constitutionality of the exercise of the state's police power, which includes ordinances enacted by municipalities pursuant to their home rule authority.¹¹⁶

To be constitutional, the parking ordinance must (i) have been enacted to promote public health and safety, (ii) use balanced means to achieve its goals, and (iii) not represent an "arbitrary and capricious" exercise of power.¹¹⁷ This test is a form of rational basis review and affords the legislative acts of the State and municipalities a great level of deference because the "reasonableness of legislative enactment . . . is presumed."¹¹⁸ Under Maine's equivalent Equal Protection Clause, if the asserting party is not part of a suspect class, claims also receive rational basis review.¹¹⁹

The Law Court found that the "ordinance [was] not the product of purposeful discrimination against any group or class . . . impinge[d] upon no substantive constitutional rights or liberties, and [was] not wholly irrelevant to the achievement of legitimate municipal objectives."¹²⁰ The city's objectives included ease of snow removal, access for fire and safety crews, and decreasing the risk of automobile thefts.¹²¹

It is unknown which level of scrutiny will be applied to claims brought under Maine's right to food amendment. However, the Law Court's treatment of Maine's individual right to bear arms, guaranteed in 1987, indicates that such claims may receive a form of rational basis review.

1. Two Peas in a Pod: The Right to Food and the Right to Bear Arms

The Law Court will likely use a similar framework to evaluate claims under the right to food amendment as it did when Maine amended its constitution to guarantee an individual right to bear arms.¹²² There are few rights present in the

graveyard in close proximity to the highway." *Id.* at 100. Further, there was no increased cost to the municipality to justify the difference in fees. *Id.* The Law Court noted that the "presumption of constitutionality is not absolute, but must give way if 'clear and irrefragable' evidence establishes the lack of a rational relationship between the evil sought to be prevented and the method adopted to do so." *Id.* at 101.

114. *State v. Rush*, 324 A.2d 748, 756 (Me. 1974).

115. *Id.* at 750.

116. *Id.* at 753.

117. *See id.*

118. *Nat'l Hearing Aid Ctrs., Inc. v. Smith*, 376 A.2d 456, 460 (Me. 1977).

119. *MacImage of Me., LLC v. Androscoggin Cnty.*, 2012 ME 44, ¶ 33, 40 A.3d 975.

120. *Rush*, 324 A.2d at 757.

121. *See id.* at 753.

122. *See State v. Brown*, 571 A.2d 816, 816 (Me. 1990).

Maine Constitution that do not exist, in some form, in the U.S. Constitution.¹²³ Analyzing claims under the right to food, which is unique to Maine, means that the Law Court cannot turn to any directly analogous case law. Instead, the Law Court will have to find similarities between the right to food and other existing rights in the Maine Constitution. The most obvious analogous right is from a 1987 amendment to Maine's constitution, which created an individual right to bear arms.¹²⁴

When Maine amended its constitution to guarantee an individual right to bear arms, questions arose about the State's ability to reasonably regulate firearm usage.¹²⁵ In another case called *State v. Brown*, the Law Court held that Maine's statute forbidding convicted felons from purchasing firearms was constitutional under the amended right to bear arms.¹²⁶ To establish that the individual right to bear arms did not "vest every citizen with an absolute right to possess firearms,"¹²⁷ the Law Court relied heavily on statements made by legislators and by the Attorney General that "the proposed . . . right, like the existing collective right [in Maine's constitution], would be subject to reasonable limitation by legislation enacted at the state or local level."¹²⁸ Though the reasonableness of legislation enacted pursuant to a state's police power is presumed, due process requires "that the purpose of the enactment be in the interest of the public welfare and that the methods utilized bear a rational relationship to the intended goals."¹²⁹ To illustrate further, "[i]n order to withstand the test of reasonableness the regulatory means must bear a rational relationship to the evil sought to be corrected."¹³⁰ The Law Court found that there was a "rational relationship between statutes forbidding possession of firearms by any and all convicted felons and the legitimate state purpose of protecting the public from misuse of firearms."¹³¹ The court reasoned that "[o]ne who has committed any felony has displayed a degree of lawlessness that makes it entirely reasonable for the legislature, concerned for the safety of the public it represents, to want to keep firearms out of the hands of such a person."¹³²

Legislators who supported the right to food amendment invoked the right to bear arms to show that the right to food was also subject to reasonable regulation.¹³³ State Senator Craig Hickman, who had advocated for the right to

123. See ME. CONST. art. I, § 16 (amended 1987); see also *Brown*, 571 A.2d at 816. When the Law Court first interpreted Maine's individual right to bear arms in *Brown*, there was little Supreme Court precedent to aid its analysis. *Id.* at 820–22.

124. ME. CONST. art. I, § 16 (amended 1987).

125. See June A. Jackson, Note, *State v. Brown: How Limited a Right to Keep and Bear Arms?*, 44 ME. L. REV. 519, 525 (1992).

126. *Brown*, 571 A.2d at 821.

127. *Id.* at 818.

128. *Id.*

129. Nat'l Hearing Aid Ctrs., Inc. v. Smith, 376 A.2d 456, 460 (Me. 1977).

130. *Id.* at 461.

131. *Brown*, 571 A.2d at 820.

132. *Id.* at 821.

133. See Craig Hickman, *Sen. Craig Hickman: Vote 'Yes' on Question 3 to Reaffirm That All Power Is Inherent in the People*, PORTLAND PRESS HERALD (Oct. 17, 2021), <https://www.pressherald.com/2021/10/17/sen-craig-hickman-vote-yes-on-question-3-to-reaffirm-that-all-power-is-inherent-in-the-people-2/>; *Hearing on L.D. 95, supra* note 10 (testimony of Representative Billy Bob Faulkingham).

food as a member of the Maine House, said in an opinion piece published in the *Portland Press Herald* that “constitutional rights are relative to other rights and considerations, including animal welfare, and are always subject to reasonable limitations by law, rule, regulation or ordinance.”¹³⁴ State Representative Billy Bob Faulkingham took the comparison further, telling the *Economist* that the right to food is “the second amendment of food.”¹³⁵

Because of the analogous language used by state legislators comparing the right to food with the right to bear arms, as well as the repeated emphasis that the right to food would be subject to reasonable regulation, the Law Court will likely approach this issue in the same way it approached the 1987 amendment to the right to bear arms.¹³⁶ Therefore, for a backyard chicken ordinance to withstand a constitutional challenge, the ordinance must be in the interest of public welfare, its ends must be appropriate with its means, and it must not be an “arbitrary and capricious” exercise of power.¹³⁷

a. Parker v. Department of Inland Fisheries and Wildlife

The Law Court’s first interpretation of the right to food amendment, *Parker v. Department of Inland Fisheries and Wildlife*, did not touch on the constitutionality of regulations enacted to protect public health and safety. The case did not concern municipal ordinances or backyard chickens, but the ability to hunt on Sundays.¹³⁸ Long prohibited in Maine by what are known as “blue laws,”¹³⁹ Sunday hunting attracted headlines as the subject of the first challenge under the right to food amendment.¹⁴⁰ Joel and Virginia Parker filed suit in Kennebec County Superior Court in April 2022, citing the prohibition on Sunday hunting as a violation of their right to “harvest” their food.¹⁴¹

In a relatively sparse opinion, the Law Court concluded that though the amendment does protect a “limited” right to hunt, the Sunday hunting ban fell within the amendment’s poaching exception.¹⁴² Because the court declined to

134. Hickman, *supra* note 133.

135. *Maine’s New “Right to Food” Could Sprout Legal Challenges*, *ECONOMIST* (Nov. 27, 2021), <https://www.economist.com/united-states/2021/11/27/maines-new-right-to-food-could-sprout-legal-challenges>. Faulkingham was, of course, referencing the right to bear arms contained in the U.S. Constitution, not Maine’s, but the effect is the same.

136. *See State v. Rush*, 324 A.2d 748, 755–56 (Me. 1974).

137. *Id.* at 753; *see also Nat’l Hearing Aid Ctrs., Inc. v. Smith*, 376 A.2d 456, 460 (Me. 1977).

138. *Parker v. Dep’t of Inland Fisheries & Wildlife*, 2024 ME 22, ¶¶ 3, 5, ___ A.3d ___.

139. 12 M.R.S. § 11205 (2023). “New England’s blue laws were put down by early settlers to enforce proper behavior on Sundays. (The origin of the term is unclear. Some have said the laws were printed on blue paper, while others have said the word ‘blue’ was meant to disparage those like the ‘blue noses’ who imposed rigid moral codes on others.)” Katharine Q. Seelye, *Where Pilgrims Landed, Thanksgiving is Kept at Table, not Mall*, *N.Y. TIMES* (Nov. 20, 2012), <https://www.nytimes.com/2012/11/21/us/blue-laws-curb-consumerism-where-pilgrims-gave-thanks.html>.

140. Michael Shepherd, *Sunday Hunting Lawsuit is the 1st Test of Maine’s New Right to Food*, *BANGOR DAILY NEWS* (Apr. 28, 2022), <https://www.bangordailynews.com/2022/04/28/politics/sunday-hunting-lawsuit-wont-be-last-right-to-food-joam40zk0w/>.

141. Complaint at 2, *Parker v. Dep’t of Inland Fisheries & Wildlife*, 2024 ME 22, ___ A.3d ___.

142. *Parker*, 2024 ME 22, ¶ 22, ___ A.3d ___.

engage in an extended analysis of why the Sunday hunting ban is constitutional,¹⁴³ how the right to food amendment will be interpreted with respect to municipal ordinances is still unknown.

C. Applying the Law Court's Analysis to Bangor and Lewiston's Ordinances

As noted earlier, courts that have considered constitutional challenges to backyard chicken prohibitions have generally upheld the ordinances because, until now, bans on backyard chickens did not infringe on the residents' constitutional rights.¹⁴⁴ However, now that Maine voters have chosen to enshrine an "unalienable"¹⁴⁵ right to food, courts will have a much more difficult time deciding how to balance municipalities' legitimate worries about public health against the rights of residents to "grow, raise, harvest, produce, and consume" their own food, which undoubtedly includes eggs from backyard hens.

1. Bangor

In a hypothetical litigation, like the scenario described above, it is unlikely that a court would uphold Bangor's ban on backyard chickens in its urban developed areas, or at least in parts of them. The outright ban almost certainly infringes on the right of individuals to lawfully procure food for their own consumption. The ban on chickens in the residential areas of the urban developed zone, characterized primarily by single- to four-family detached homes with large yards,¹⁴⁶ would be difficult for Bangor to justify, particularly when other cities in Maine and beyond have permitted backyard chickens in similarly dense neighborhoods.¹⁴⁷ Other municipalities have successfully addressed the concerns that opponents raised in public hearings about Bangor's chicken ordinances, including more populous Portland and nearby Orono.¹⁴⁸ In their workshop, Bangor's city councilors echoed the primary concerns about rodents, noise, public health, and property values.¹⁴⁹ Even though addressing these concerns is typically well within municipalities' abilities under the right of home rule,¹⁵⁰ the constitutional right to food narrows the analysis. A blanket prohibition on backyard chickens in all but the rural areas of Bangor is unlikely to be found proportional to the city's goals of protecting public health, preventing rat infestations, and promoting property values.¹⁵¹ An ordinance

143. Indeed, the court's reasoning was rather circular: "[T]he poaching exception in the amendment prevents the ban from conflicting with the amendment because hunting in violation of the ban is illegal, and the right to hunt created by the amendment does not extend to illegal hunting." *Id.* ¶ 24.

144. *Of Backyard Chickens*, *supra* note 72, at 256.

145. *See* ME. CONST. art. I, § 25.

146. BANGOR, ME., CODE §§ 165-88 to -89 (Dec. 27, 2000), <https://ecode360.com/BA1684> [<https://perma.cc/9ADD-FKS6>]; *City of Bangor Parcel Viewer*, *supra* note 92.

147. *See, e.g.*, PORTLAND, ME., CODE OF ORDINANCES § 5-402.

148. *See id.* §§ 5-402, 5-405; ORONO, ME., CODE OF ORDINANCES § 18-149.

149. City Council Workshop, *supra* note 99.

150. *See* discussion *supra* Section III.B.

151. *See* City Council Workshop, *supra* note 99.

can be drafted to sufficiently address these concerns, as municipalities in other parts of Maine and across the country have demonstrated.¹⁵²

Conversely, a ban could be upheld in other portions of Bangor's urban development areas, such as its downtown residential and commercial zones.¹⁵³ These areas are much less suitable for chicken enclosures, and a ban on backyard chickens in these zones is better grounded in policy and would be in the best interest of both human and chicken health.

2. Lewiston

Like many zoning ordinances, Lewiston's chicken ordinance is regressive.¹⁵⁴ It prevents certain people from raising backyard chickens based on their inability to afford larger parcels of land and single-family detached homes.¹⁵⁵ In contrast, the purpose of the new constitutional amendment and the broader food sovereignty movement was, at least according to the legislators who sponsored the bill and its supporters, to help combat food insecurity in Maine and to ensure that every Mainer can grow, harvest, and otherwise procure their own food.¹⁵⁶

Backyard chickens and other forms of urban agriculture have long been associated with immigrant populations.¹⁵⁷ Lewiston has historically been one of Maine's immigrant centers, beginning in the late nineteenth century with the arrival of Franco-Americans who worked in the city's textile mills.¹⁵⁸ In the early 2000s, Somali immigrants began to settle in Lewiston and immigrants now make up over fifteen percent of the city's population.¹⁵⁹ This is especially relevant considering that over fifty percent of African immigrants in Maine experience food insecurity.¹⁶⁰ An ordinance that limits backyard chicken ownership to only those who can afford a 15,000-square-foot lot does not comport with the intent of the right to food amendment, which was to provide a mechanism for Mainers to take control of the food they consume and to help bolster Maine's food supply.¹⁶¹

152. See, e.g., PORTLAND, ME., CODE OF ORDINANCES §§ 5-402, 5-405; S.F., CAL., HEALTH CODE art. 1, § 37 (2001), https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_health/0-0-0-43.

153. See generally BANGOR, ME., CODE §§ 165-90 to -93.

154. See *Of Backyard Chickens*, *supra* note 72, at 258–59.

155. See LEWISTON, ME., CODE OF ORDINANCES §§ 14-36, 14-39.

156. See *Hearing on L.D. 95*, *supra* note 10 (testimonies of Representative Billy Bob Faulkingham, Heather Retberg, and Representative Justin Fecteau).

157. See *Of Backyard Chickens*, *supra* note 72, at 259.

158. See Douglas I. Hodgkin, *History of Lewiston*, LEWISTON ME., <https://www.lewistonmaine.gov/421/History-of-Lewiston> [<https://perma.cc/5T5J-R576>] (last visited May 8, 2024); Susan Sharon, *Reason for Recent French Speaking Resurgence in Lewiston: African Immigrants*, ME. PUB. (Mar. 27, 2017), <https://www.mainepublic.org/maine/2017-03-27/reason-for-recent-french-speaking-resurgence-in-lewiston-african-immigrants>; see also David Vermette, *When an Influx of French-Canadian Immigrants Struck Fear into Americans*, SMITHSONIAN MAG. (Aug. 21, 2019), <https://www.smithsonianmag.com/history/french-canadian-immigrants-struck-fear-into-new-england-communities-180972951/> [<https://perma.cc/7ZNT-NTZQ>].

159. Kathryn Skelton, *Stronger than Barriers: Lewiston-Auburn's Immigrant Community Hustles, Thrives with the Help of Local Groups*, SUN J. (Apr. 25, 2021), <https://www.sunjournal.com/2021/04/25/new-mainers-new-jobs/>.

160. EVERYONE AT THE TABLE, *supra* note 8, at 12.

161. Hickman, *supra* note 133.

Because Lewiston's chicken ordinance already requires that chickens remain in their enclosure at all times and forbids roaming chickens, the 15,000-square-foot requirement begins to look more like it serves an exclusionary purpose and less like a requirement that is necessary for ensuring the health and safety of humans and chickens.

Other parts of the Lewiston ordinance do provide possible guides for municipalities considering how to approach backyard chicken regulations under the right to food amendment. Prohibiting roosters, requiring that chickens remain in their coops, and enforcing reasonable setbacks are likely the types of regulations that could withstand a constitutional challenge.¹⁶²

IV. MODEL BACKYARD CHICKEN ORDINANCE

The passage of the right to food amendment has altered the context of backyard chicken zoning ordinances in Maine. It is unlikely that municipalities will be able to enact backyard chicken restrictions unless those restrictions are necessary for the protection of public health and safety, chicken health, and the prevention of certain types of nuisances. However, city council members and animal rights activists can take comfort in the knowledge that it is also unlikely that the Maine courts will find that constitutionally appropriate chicken habitats include the inside of apartment buildings, as many feared could happen.¹⁶³ Municipalities with ordinances in place now have the option of either waiting to be sued and allowing a court to determine whether their ordinance violates Maine's constitution or reworking their current ordinances so that they meet constitutional requirements. If towns choose the latter, this Comment offers some guidance.

A. The Model Ordinance

Section 1. Purpose. The purpose of this ordinance is to provide reasonable standards for raising chickens in residential areas and to ensure that it is done so in accordance with public health, safety, and welfare. It is intended to provide residents with an opportunity to keep a small number of hens for the production of eggs on a non-commercial basis. This chapter does not authorize the keeping of chickens for slaughter and consumption.

This ordinance is intended to regulate backyard chickens kept solely for egg production. While raising chickens for slaughter and consumption is also likely implicated by the right to food amendment, this Comment does not address that aspect of raising chickens. Municipalities will likely have to manage the slaughter and consumption of livestock in separate ordinances and regulations.

Further, this ordinance is intended to apply to municipalities zoned with fairly dense residential areas. Municipalities should incorporate this ordinance into their zoning plan designations and may choose to expand or add flexibility to these

162. See LEWISTON, ME., CODE OF ORDINANCES §§ 14-33 to -39.

163. See, e.g., Margaret Kilkelly & Wendy Pieh, *Maine Voices: 'Right to Food' Amendment Would Give Too Much Say to the Courts*, PORTLAND PRESS HERALD (Oct. 28, 2021), <https://www.pressherald.com/2021/10/28/maine-voices-right-to-food-amendment-would-give-too-much-say-to-the-courts/>.

regulations for lots in rural zones, such as permitting chickens to roam, increasing flock size, and allowing roosters.

Municipalities should also consider offering educational resources to those interested in raising backyard chickens. Some options for that could include creating a page on the town website with a list of internet links, drawing on community knowledge to share information,¹⁶⁴ working with local universities that have agriculture programs,¹⁶⁵ or forming coalitions with neighboring towns to provide educational resources to residents.

Section 2. Number and type of chickens allowed.

(a) The minimum number of chickens allowed per flock is two (2). The maximum number of chickens allowed per flock is six (6).

(b) Only female chickens are allowed. There is no restriction on chicken species.

In general, Maine municipalities are within their rights to restrict the number of animals allowed on a particular lot through their right of home rule.¹⁶⁶ This is clear through ordinances regulating the number of dogs, cats, and other domesticated animals.¹⁶⁷ Similarly, municipalities should be able to regulate the number of chickens allowed in any particular flock. Chickens are social animals, and they do better in flocks than on their own.¹⁶⁸ To have any real egg production, which is typically why people are interested in chickens in the first place, it is necessary to have more than one chicken.¹⁶⁹ This ordinance forbids having fewer than two chickens in a flock, primarily because of their social needs.¹⁷⁰ Chickens tend to form strong relationships with four to six other chickens, suggesting a preference for larger flocks.¹⁷¹

Across the country, the number of chickens allowed in a flock varies greatly.¹⁷² In Maine, the municipalities that allow chickens are in general agreement that six chickens is an appropriate limit on flock size.¹⁷³ For larger municipalities, six is an

164. See *Backyard Chickens*, CITY OF MINNEAPOLIS, <https://www.minneapolismn.gov/government/programs-initiatives/homegrown-minneapolis/backyard-chickens/> [<https://perma.cc/928M-N3N5>] (last visited Mar. 21, 2024) (linking to a local chicken listserv).

165. See *id.* (linking to an informational page from the University of Minnesota Extension School); *Obtaining a City of Madison Chicken License*, CITY OF MADISON, <https://www.cityofmadison.com/dpced/bi/obtaining-a-city-of-madison-chicken-license/65/> [<https://perma.cc/68AT-P3P4>] (last visited May 8, 2024) (linking to an informational page from the University of Wisconsin-Madison Division of Extension under the header “Resources for Raising Chickens in the City”).

166. See 30-A M.R.S. § 3001 (2023).

167. See, e.g., S. PORTLAND, ME., CODE OF ORDINANCES § 3-24 (making it unlawful to have more than three dogs over the age of six months on premises occupied by any one family).

168. See Jaime Bouvier, *Illegal Fowl: A Survey of Municipal Laws Relating to Backyard Poultry and a Model Ordinance for Regulating City Chickens*, 42 ENV'T L. REP. NEWS & ANALYSIS 10888, 10897 (2012).

169. See *id.* at 10892.

170. See *id.* at 10897.

171. See *id.*

172. See *id.* at 10906–07.

173. See PORTLAND, ME., CODE OF ORDINANCES § 5-402(a); S. PORTLAND, ME., CODE OF ORDINANCES § 3-54(a); WATERVILLE, ME., CODE § 275-4.33(D)(1), <https://ecode360.com/WA3904> [<https://perma.cc/8LJN-ENFK>] (last visited May 8, 2024); BIDDEFORD, ME., CODE OF ORDINANCES § 10-62 (Nov. 20, 2012), <https://ecode360.com/BI3074> [<https://perma.cc/WB8A-F62G>].

appropriate number because it allows chickens to form the necessary social relationships to thrive while also providing plenty of eggs.¹⁷⁴ For four-to-five-person families, “four to six hens can easily provide enough eggs . . . and sometimes enough for the neighbors as well.”¹⁷⁵ Limiting the number of chickens in a flock to six is likely constitutional under the right to food amendment because it does not prevent Mainers from exercising their rights, and it is also an appropriate means for municipalities to ensure that public health is not affected by large flocks of chickens in small spaces.

Towns will also likely be free to limit residents’ flocks to only hens. Roosters are not required for hens to produce eggs; they are necessary only if owners want fertilized eggs.¹⁷⁶ Because roosters are not necessary for egg production, it is unlikely that they are implicated by the right to food amendment, at least concerning ordinances regulating backyard chickens for eggs.¹⁷⁷ Municipalities are, therefore, free to prohibit roosters from backyard flocks.

Section 3. Non-commercial use only. Backyard chickens shall be kept only for personal use and consumption. No person shall use eggs to engage in breeding for a commercial purpose.

The ordinance prohibits backyard chickens from being used for commercial purposes. This is constitutional because the amendment is focused on the right to food for personal consumption and does not implicate commercial uses.¹⁷⁸

Section 4. Enclosure requirements.

(a) During daytime hours, chickens shall be kept in a secure, predator-proof enclosure of at least ten (10) square feet per chicken. The enclosure shall be maintained in a neat and sanitary condition at all times and be secure from rodents, wild birds, and predators. The enclosure shall be maintained in a manner that will not disturb the use or enjoyment of neighboring lots due to noise, odor, or other adverse impacts. Chickens may spend time in a separate fenced-in area of a yard during daylight hours only while under the supervision of an adult. Chicken waste shall be managed appropriately to minimize risks to public health and perceptible odors.

(b) During nighttime hours, chickens shall be kept in a secure, predator-proof coop of at least four (4) square feet per chicken. Chicken coops shall have a solid roof and walls on four sides. Access doors must be kept locked at night. Coop windows must allow for air ventilation and sunlight access and be covered with predator- and bird-proof wire. Any chicken coop shall be at least ten (10) feet from adjacent property lines. Chicken coops may not be kept inside a home.

(c) Chickens shall not be permitted to roam.

174. See Bouvier, *supra* note 168, at 10897.

175. *Id.* at 10892.

176. ANDY G. SCHNEIDER & BRIGID MCCREA, THE CHICKEN WHISPERER’S GUIDE TO KEEPING CHICKENS 21 (2011).

177. Raising chickens for food does present a possible issue with the rooster prohibition because a resident who intends to breed chickens for slaughter needs a rooster for fertilized eggs. However, this Comment and the model ordinance are designed to provide a guide for backyard chickens being kept for egg production.

178. ME. CONST. art. I, § 25 (“All individuals . . . have a right to . . . consume the food of their own choosing for their own nourishment.”).

The internet is full of backyard chicken forums and blogs recommending information about chicken coop designs and construction tips. Because backyard chickens became popular relatively recently, many communities relied on these somewhat “underground” networks to establish illegal flocks.¹⁷⁹ Some backyard chicken enthusiasts build elaborate coops for their flocks, complete with twinkle lights and designed to look like “hobbit houses.”¹⁸⁰ Of course, chickens do not need twinkle lights and weathervanes to be happy, but there are some basic requirements to ensure that flocks are healthy and safe in their coops.

Size recommendations vary, but it is generally understood that a coop should be around four-square feet per chicken, particularly for those living in more urban areas.¹⁸¹ Therefore, for a flock of six chickens, the coop should be at least twenty-four square feet to ensure that the chickens have enough room to move around. Ready-made chicken coops are available to purchase online,¹⁸² though many backyard chicken raisers may appreciate the creativity and flexibility that building their own coop allows.

Chickens also need some outdoor space to peck around. Therefore, chicken coops should include some sort of enclosed run area for the chickens to stretch their legs. It is recommended that runs provide around ten square feet of space per chicken.¹⁸³ Every flock of six chickens should have access to a sixty-square-foot, enclosed, predator-proof run that is attached to the coop. In addition, keeping chickens a certain number of feet from property lines will also help to minimize complaints from neighbors. Therefore, this ordinance recommends that coops and runs be placed at least ten feet from property lines to ensure that perceptible odors do not bother those living nearby. This setback allows residents with relatively smaller yards to keep chickens, which is an important aspect of ensuring the ordinance’s constitutionality.

This ordinance forbids allowing chickens to roam. While chickens should be given opportunities to scratch and forage in their yards, they should do so only in a fenced-in area and under the supervision of an adult. Forbidding free-roaming chickens will help ensure that chickens are kept safe from predators and prevent

179. See *The Chicken Underground*, CHICKENS & YOU, http://chickensandyou.org/chicken_underground.html [<https://perma.cc/Y4HM-F82V>] (last visited May 8, 2024) (describing “[a] strategy for those who want flocks where they are illegal”); see also Bouvier, *supra* note 168, at 10889.

180. See *Chicken Coops*, BACKYARDCHICKENS.COM, <https://www.backyardchickens.com/articles/categories/chicken-coops.12/> [<https://perma.cc/SY4P-QXL6>] (last visited May 8, 2024). One user even posted a photo of a chicken coop shaped like a spaceship. *Id.*

181. Interview with Megan Phillips, Farm & Woodlot Manager, Chewonki Foundation (Jan. 23, 2023); see also *How Much Room do Chickens Need?*, BACKYARDCHICKENS.COM (Dec. 1, 2013), <https://www.backyardchickens.com/articles/how-much-room-do-chickens-need.66180/> [<https://perma.cc/BZB6-5HNX>].

182. See *Kennon 25.7 Square Feet Chicken Coop with Chicken Run*, WAYFAIR, <https://www.wayfair.com/pet/pdp/archie-oscar-kennon-walk-in-chicken-coop-with-chicken-run-for-up-to-10-chickens-w005311958.html> [<https://perma.cc/5F8L-SBEZ>] (last visited May 8, 2024); “*The Bungalow*” *Chicken Coop*, MY PET CHICKEN, <https://www.mypetchicken.com/products/the-bungalow-chicken-coop> [<https://perma.cc/7Y2R-LT5G>] (last visited May 8, 2024); *Cedar Chicken Coop & Run with Planter*, WILLIAMS SONOMA, <https://www.williams-sonoma.com/products/cedar-chicken-coop-with-planter/> [<https://perma.cc/GUH9-94WN>] (last visited May 8, 2024).

183. *How Much Room do Chickens Need?*, *supra* note 181.

potential infections from wild birds.¹⁸⁴ This is within municipalities' abilities to regulate health and safety.

Requiring that coops and runs be a certain size should not affect the ordinance's constitutionality, as these are reasonable regulations designed to ensure that the chickens are happy, healthy, and safe. After all, happy chickens lay more eggs.¹⁸⁵

Section 5. Odor and noise.

(a) Odors from chickens, chicken waste, or other chicken-related items shall not be perceptible by neighbors at the property boundaries.

(b) Noise from chickens shall not be loud enough at the property boundaries to disturb persons of reasonable sensitivity.

Odor can create ample opportunities for nuisance claims to flourish. Like any animal, chickens do produce some smell.¹⁸⁶ However, chickens that are kept in healthy environments are less likely to emit an offensive odor than chickens housed in unhealthy conditions.¹⁸⁷ Odor can be adequately controlled by an effective ordinance that requires that the coops and runs be regularly cleaned and maintained.

Roosters are the root of the misconception that chickens are noisy.¹⁸⁸ In fact, hens cluck at around sixty to seventy decibels, which is similar to the volume of human conversation, whereas a dog's bark can reach over ninety decibels.¹⁸⁹ Further, hens are receptive to the amount of light they receive and tend to sleep during the hours of darkness, which means they are inactive at night.¹⁹⁰ Because of this, even an active flock of hens is unlikely to bother neighbors. Of course, municipalities could add provisions to their chicken ordinance to protect against noisy chickens, similar to provisions forbidding disruptive dogs.¹⁹¹

Section 6. Pests and predators. The chicken owner shall take all necessary precautions to reduce any attraction of rodents and predators to the chicken enclosure and coop.

Many people associate chickens with rats that come to feast on chicken feed and waste. While it is true that rodents and other predators are often attracted to chicken coops, good coop design and maintenance will reduce the risk of

184. See *Backyard Poultry*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/healthypets/pets/farm-animals/backyard-poultry.html> [<https://perma.cc/948K-3ACK>] (last visited May 8, 2024); see also Bouvier, *supra* note 168, at 10897–98.

185. See SCHNEIDER & MCCREA, *supra* note 176, at 23.

186. See *id.* at 48.

187. *Id.*

188. See BARBARA KILARSKI, KEEP CHICKENS! 46 (2003).

189. *Just How Loud are Roosters? 5 Myths Debunked*, THE HAPPY CHICKEN COOP (Dec. 12, 2022), <https://www.thehappychickencoop.com/how-loud-are-roosters/> [<https://perma.cc/VN7X-UAD7>].

190. See GAIL DAMEROW, STOREY'S GUIDE TO RAISING CHICKENS 188 (2017); SCHNEIDER & MCCREA, *supra* note 176, at 48.

191. See PORTLAND, ME., CODE OF ORDINANCES § 5-405(b) (Oct. 5, 2020) (“Perceptible noise from chickens shall not be loud enough at the property boundaries to disturb persons of reasonable sensitivity.”).

predators.¹⁹² In some ways, having a chicken coop is not very different from having a backyard compost, which will attract pests only if not cared for properly.¹⁹³

To minimize risks of predators, chickens should be enclosed in their predator-proof coop or run at all times. If allowed to forage, they should do so only in a small fenced-in area while under the supervision of an adult to ensure that chickens stay safe from predators and do not come into contact with wild birds. This will allow chickens to provide health benefits to gardens and lawns while staying protected from foxes, coyotes, and other predators.

Chickens themselves actually provide good pest control. Chickens will eat “all kinds of insects,” including ticks and cockroaches.¹⁹⁴ Having a flock of chickens to eat nuisance insects could, therefore, be a boon to many homeowners.

Section 7. Food and water. Chickens shall have access to adequate food and water. Food and water shall be inaccessible to rodents, wild birds, and predators.

Because many municipalities have legitimate public health concerns about rats and other pests, this ordinance requires that chicken feed be inaccessible to rodents and other interested parties.¹⁹⁵ Requiring that chicken feed remain inaccessible to rodents does not infringe on residents’ right to food. Keeping rats away from chicken coops and homes is in the public interest, and chicken owners themselves do not want rats threatening their flocks.

Section 8. Disease. Chicken owners shall take all necessary precautions to protect their flocks from disease. This includes keeping flocks separate from wild birds and other flocks of chickens and ensuring that sick chickens are identified and treated promptly.

As discussed earlier, chickens can carry certain diseases that infect humans.¹⁹⁶ Salmonella and E. coli, for example, do pose a risk to humans, but this risk can be managed by maintaining clean living conditions for the chickens and taking basic precautions such as washing hands after handling chickens or eggs.¹⁹⁷

Since early 2022, a particularly pernicious strain of avian influenza, or bird flu, has ravaged flocks of birds across the country.¹⁹⁸ Partially due to the loss of around

192. See DAMEROW, *supra* note 190, at 128.

193. See Julia Bayly, *The Secret to Keeping Bad Odors and Rats Out of Your Compost*, BANGOR DAILY NEWS (May 21, 2022), <https://www.bangordailynews.com/2022/05/21/homestead/the-secret-to-keeping-bad-odors-and-rats-out-of-your-compost/>.

194. SCHNEIDER & MCCREA, *supra* note 176, at 15. The Maine Tracking Network reported over 2,500 cases of Lyme disease in 2023. *Tickborne Diseases*, ME. TRACKING NETWORK, <https://data.ma.inpublichealth.gov/tracking/tickborne> [<https://perma.cc/ELG4-E8EF>] (last visited May 8, 2024). When foraging in a yard, chickens will consume ticks naturally and anecdotal evidence has shown a reduction in ticks on properties with chicken flocks. See Lindsay Tice, *Animal Tales: Durham Family Picks Chickens for a Tick Fix*, SUN J. (July 3, 2018), <https://www.sunjournal.com/2018/07/01/animal-tales-durham-family-picks-chickens-for-tick-fix/>.

195. See DAMEROW, *supra* note 190, at 132.

196. See *supra* Section II.A.1.

197. See SCHNEIDER & MCCREA, *supra* note 176, at 49.

198. 2022-2023 *Confirmations of Highly Pathogenic Avian Influenza in Commercial and Backyard Flocks*, U.S. DEP’T OF AGRIC. ANIMAL & PLANT HEALTH INSPECTION SERV. (Jan. 18, 2023), <https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/animal-disease-information/avian/avian-influenza/hpai->

44 million egg-laying chickens from the disease, egg prices in December 2022 spiked to double what they were just a year prior.¹⁹⁹ Unsurprisingly, the rising cost of eggs has caused interest in backyard chickens to soar throughout the United States.²⁰⁰ Although bird flu does not pose a significant threat to humans at this point,²⁰¹ owners need to take precautions to ensure that their backyard flocks are not infected. Maintaining “biosecurity” and isolating wild birds and other flocks of chickens can help manage the spread of bird flu.²⁰²

Unfortunately, the United States has been slow to adopt a vaccine against bird flu.²⁰³ Bird flu vaccinations for poultry have existed for some time; however, these vaccinations are not widely used in commercial flocks because it is difficult to tell whether a chicken that has antibodies to the flu developed them through vaccination or exposure to the disease.²⁰⁴ Because of the possibility of exporting infected birds, “the U.S. poultry industry and the U.S. Department of Agriculture have resisted adopting vaccines for fear of jeopardizing the \$6 billion in poultry and eggs products the United States exported in 2022.”²⁰⁵ The United States is warming up to the idea of vaccines for poultry because the current strategy of “culling” infected flocks to prevent the spread of the virus has not proved successful.²⁰⁶ Until a vaccine is approved for use in the United States, owners of backyard flocks will have to educate themselves on the signs and symptoms of bird flu, quarantine sick chickens, and keep their flocks separate from wild birds or other backyard chickens.

Requiring sufficient biosecurity measures for backyard flocks is an appropriate means for a municipality to prevent the spread of disease among birds and humans alike.

Section 9. Waste removal and storage. All stored waste shall be covered by a fully enclosed container. In addition, the henhouse, chicken pen, and surrounding area must be kept free from trash and accumulated droppings. Uneaten feed shall

2022/2022-hpai-commercial-backyard-flocks [https://perma.cc/E43B-FWPH]. Even the ravens at the Tower of London have been affected by the disease. See Daniel Victor, *The Newest Captives at the Tower of London: Its Famous Ravens*, N.Y. TIMES (Nov. 14, 2022), https://www.nytimes.com/2022/11/11/world/europe/uk-bird-flu-ravens.html.

199. Ashley Wu, *Why Eggs Cost So Much*, N.Y. TIMES (Feb. 3, 2023), https://www.nytimes.com/2023/02/03/briefing/why-eggs-cost-so-much.html.

200. Jeanna Smialek & Ana Swanson, *Forget Pandemic Puppies. Meet the Inflation Chicken*, N.Y. TIMES (Feb. 2, 2023), https://www.nytimes.com/2023/02/02/business/economy/inflation-chickens-egg-prices.html.

201. Jim Robbins, *A Gull Flaps Its Wings and a Deadly Virus Explodes*, N.Y. TIMES (June 17, 2022), https://www.nytimes.com/2022/06/17/science/avian-flu-birds.html.

202. ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP’T OF AGRIC., PROTECT YOUR POULTRY FROM AVIAN INFLUENZA (Feb. 2022), https://www.aphis.usda.gov/publications/animal_health/bro-protect-poultry-from-ai.pdf.

203. Adam Minter, *Want to Control Bird Flu? Vaccinate the Chickens!*, BLOOMBERG (Feb. 26, 2023, 8:00 AM), https://www.bloomberg.com/opinion/articles/2023-02-26/vaccination-skeptics-are-making-the-bird-flu-epidemic-worse.

204. See On the Media, *Examining the Risks of Bird Flu*, N.Y. PUB. RADIO (Feb. 17, 2023), https://www.wnycstudios.org/podcasts/otm/segments/examining-risks-bird-flu-on-the-media; see also Minter, *supra* note 203.

205. Minter, *supra* note 203.

206. See *id.*

be removed promptly. Waste used as compost and/or fertilizer must be maintained properly.

Requiring that waste be stored properly is unlikely to cause a constitutional issue. People do not consume chicken waste, and its presence can have an impact on public health and safety, which is directly within municipalities' rights to regulate. Further, regularly removing chicken waste can reduce any unpleasant odor related to chickens. If cared for properly, chicken manure can be used as a beneficial compost and fertilizer for yards and gardens,²⁰⁷ which could enable Mainers to exercise other rights pursuant to the amendment. Therefore, municipalities should provide basic pamphlets or have a webpage informing residents about how to safely turn chicken waste into compost and fertilizer.

Section 10. Registration requirements; permits.

- (a) Residents are required to register flocks with the municipality annually.
- (b) Residents who wish to be exempted from certain provisions of this ordinance are required to obtain a permit.

Instead of requiring general permits, this ordinance requires that residents annually register their flocks with the municipality, much as one would register a dog. It is in the public interest for local governments to know where live animals are being kept, and maintaining a registry of backyard flocks allows the city to periodically check in to ensure that residents are adhering to other provisions of the ordinance. Creating as few barriers as possible to register backyard flocks will help to maximize the number of people who register their flocks.

Residents can apply for a variance from the municipality to be exempted from parts of the ordinance, which would come in the form of a permit. An example of this could be a larger family requesting a permit to have more than six chickens, as they need more eggs than smaller families do. Another example could be having a setback of fewer than the prescribed ten feet, which might require a resident to have permission from the neighboring landowner.

Section 11. Notice and the right to cure; removal; appeals.

- (a) The Enforcement Officer shall notify residents of any violation, and residents shall be given thirty (30) days from receipt of such notice to cure the violation.
- (b) The Health Inspector, Health Officer, or Animal Control Officer may order the removal of chicken(s) upon the determination that the chicken(s) poses a risk to public health and safety, or for repeated violations of this ordinance.
- (c) Residents may appeal removal decisions to the Board of Appeals within thirty (30) days of the decision being issued.

This ordinance allows residents written notice and thirty days to cure any violations of the ordinance. Municipalities must have some kind of mechanism for enforcement before they remove chickens entirely, and residents should have an opportunity to fix any violations. It is also important from a due process standpoint that residents have a mechanism to appeal removal decisions.

207. See R. Saliga III & J. Skelly, *Using Chicken Manure Safely in Home Gardens and Landscapes*, U. NEV., RENO EXTENSION (2013), <https://extension.unr.edu/publication.aspx?PubID=3028> [<https://perma.cc/D4MC-TH4M>].

CONCLUSION

The passage of the right to food amendment has fundamentally altered the framework of municipal ordinances regulating food-producing livestock in Maine. The reality is that many of the ordinances currently in place in towns, cities, and villages across the state will have to be changed to allow residents the opportunity to “grow, raise, harvest, produce and consume the food of their own choosing.”²⁰⁸ Now that the right to food is enshrined in the Maine Constitution, ensuring that people have the opportunity and the resources to exercise their right is critical, especially as other states look to Maine as they consider adding similar amendments to their state constitutions.²⁰⁹ Backyard chickens, already popular in parts of the country and in parts of Maine, provide an example of how residents can exercise their right to food without jeopardizing public health and animal safety, two of the main arguments against the amendment. This model backyard chicken ordinance will help give Maine municipalities a starting point as they begin to shift their perspectives on how to regulate other animals and pave the way for those who wish to exercise their right to food by keeping backyard chickens in Maine.

208. ME. CONST. art I, § 25.

209. *See, e.g.*, H.R.J. Res. 12, 86th Leg., 1st Reg. Sess. (W. Va. 2023) (“Proposing an amendment to the Constitution of the State of West Virginia . . . providing for the right to food, food sovereignty and freedom from hunger.”).

APPENDIX

Section 1. Purpose. The purpose of this ordinance is to provide reasonable standards for raising chickens in residential areas and to ensure that it is done so in accordance with public health, safety, and welfare. It is intended to provide residents with an opportunity to keep a small number of hens for the production of eggs on a non-commercial basis. This chapter does not authorize the keeping of chickens for slaughter and consumption.

Section 2. Number and type of chickens allowed.

- (a) The minimum number of chickens allowed per flock is two (2). The maximum number of chickens allowed per flock is six (6).
- (b) Only female chickens are allowed. There is no restriction on chicken species.

Section 3. Non-commercial use only. Backyard chickens shall be kept only for personal use and consumption. No person shall use eggs to engage in breeding for a commercial purpose.

Section 4. Enclosure requirements.

- (a) During daytime hours, chickens shall be kept in a secure, predator-proof enclosure of at least ten (10) square feet per chicken. The enclosure shall be maintained in a neat and sanitary condition at all times and be secure from rodents, wild birds, and predators. The enclosure shall be maintained in a manner that will not disturb the use or enjoyment of neighboring lots due to noise, odor, or other adverse impacts. Chickens may spend time in a separate fenced-in area of a yard during daylight hours only while under the supervision of an adult. Chicken waste shall be managed appropriately to minimize risks to public health and perceptible odors.
- (b) During nighttime hours, chickens shall be kept in a secure, predator-proof coop of at least four (4) square feet per chicken. Chicken coops shall have a solid roof and walls on four sides. Access doors must be kept locked at night. Coop windows must allow for air ventilation and sunlight access and be covered with predator- and bird-proof wire. Any chicken coop shall be at least ten (10) feet from adjacent property lines. Chicken coops may not be kept inside a home.
- (c) Chickens shall not be permitted to roam.

Section 5. Odor and noise.

- (a) Odors from chickens, chicken waste, or other chicken-related items shall not be perceptible by neighbors at the property boundaries.
- (b) Noise from chickens shall not be loud enough at the property boundaries to disturb persons of reasonable sensitivity.

Section 6. Pests and predators. The chicken owner shall take all necessary precautions to reduce any attraction of rodents and predators to the chicken enclosure and coop.

Section 7. Food and water. Chickens shall have access to adequate food and water. Food and water shall be inaccessible to rodents, wild birds, and predators.

Section 8. Disease. Chicken owners shall take all necessary precautions to protect their flocks from disease. This includes keeping flocks separate from wild

birds and other flocks of chickens and ensuring that sick chickens are identified and treated promptly.

Section 9. Waste removal and storage. All stored waste shall be covered by a fully enclosed container. In addition, the henhouse, chicken pen, and surrounding area must be kept free from trash and accumulated droppings. Uneaten feed shall be removed promptly. Waste used as compost and/or fertilizer must be maintained properly.

Section 10. Registration requirements; permits.

- (a) Residents are required to register flocks with the municipality annually.
- (b) Residents who wish to be exempted from certain provisions of this ordinance are required to obtain a permit.

Section 11. Notice and the right to cure; removal; appeals.

- (a) The Enforcement Officer shall notify residents of any violation, and residents shall be given thirty (30) days from receipt of such notice to cure the violation.
- (b) The Health Inspector, Health Officer, or Animal Control Officer may order the removal of chickens upon the determination that the chicken poses a risk to public health and safety, or for repeated violations of this ordinance.
- (c) Residents may appeal removal decisions to the Board of Appeals within thirty (30) days of the decision being issued.

Section 12. Severability. If any section, subsection, sentence, clause, phrase, or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity of the remaining portions thereof.