It’s Getting Hot in Here: Maine’s Right to Food as a Mechanism to Address the Impact of the Warming of the Gulf of Maine on Lobster

Rachel Fischer

University of Maine School of Law

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IT’S GETTING HOT IN HERE: MAINE’S RIGHT TO FOOD AS A MECHANISM TO ADDRESS THE IMPACT OF THE WARMING OF THE GULF OF MAINE ON LOBSTER

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IT’S GETTING HOT IN HERE: MAINE’S RIGHT TO FOOD AS A MECHANISM TO ADDRESS THE IMPACT OF THE WARMING OF THE GULF OF MAINE ON LOBSTER

Rachel Fischer*

ABSTRACT

In United States v. Washington, the Ninth Circuit considered a series of treaties, called the Stevens Treaties, between the Washington state government and a group of twenty-one Native American nations in the pacific northwest. The court held that embedded in a treaty right to take fish was a promise by the Washington state government that fish would still exist in that region. This case ultimately required the state government to protect the region’s fish against environmental degradation. In the age of climate change, this case provides a model for states like Maine to impose a duty on the state government to prevent further environmental degradation. Maine is both particularly well-adapted to enjoy the benefits of the Washington precedent and vulnerable to climate change. The Gulf of Maine is warming faster than almost any other ocean surface on the planet. The accelerated warming along the coast of the state coupled with the state’s reliance on lobster as an economic resource makes the State of Maine particularly susceptible to the impacts of climate change if preventative measures are not taken. This Note analyzes the way Washington can be analogized to Maine’s constitutional right to food and the way that the inclusion of the term “harvest” imposes a duty on the state government to take affirmative steps to slow the warming of the Gulf of Maine.

INTRODUCTION

This discussion will demonstrate how Maine’s new constitutional right to food may be used by Mainers to assert their rights to harvest lobster now and in the future and in doing so might impose a duty on the state government to protect the lobsters’ environment against climate change. Ninth Circuit case law, United States v. Washington,1 provides an example of the way a legal right to access or harvest a natural resource, such as salmon, creates an affirmative duty on the state government to preserve the resource by preventing further environmental degradation of its habitat to the degree necessary for the species to remain

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1. See generally United States v. Washington, 853 F.3d 946 (9th Cir. 2017).
By analogizing the treaty right in Washington to Maine’s passage of a constitutional right to food, this discussion will argue that the amendment’s passage and specific inclusion of the term “harvest” provides a basis for Maine citizens to obligate the government to address the rapid warming of the Gulf of Maine, preserving the lobstersing industry and ultimately protecting Maine citizens’ right to food.

This discussion will trace the origins of the food sovereignty movement in Maine, looking at how it paved the way for the passage of a right to food amendment in the state constitution. Exploring the ways that the passage of the right to food amendment may be used by Maine citizens to protect certain activities and ways of life, this discussion will focus specifically on the threat that climate change poses to lobsters in the Gulf of Maine and the citizens that depend on that industry. This discussion will then explore how the right to food in Maine might be used by individual citizens, fishers, and industries as a legal mechanism to address climate change and the environmental degradation it causes.

I. UNITED STATES v. WASHINGTON

A. Background

The right to food in Maine is an outgrowth of the food sovereignty movement. At its core, this right is about “healthy, homegrown or locally produced food.” It follows that in some instances, food sovereignty and a constitutional right to food will depend on the health of the surrounding natural environment. Case law from the State of Washington that emerged out of treaty agreements between Native American nations in the Pacific Northwest and the U.S. government provides persuasive authority for imposing a duty on the government to prevent environmental degradation.

Often, treaties between Native American nations and governments relinquished title to vast amounts of land to the United States in exchange for things like protection from attack, sovereignty, and sometimes payment. Notably, it was common for these treaties to reserve both land and rights for the nations and

2. See id. at 977.
5. Id. at 954 (referring to the Suquamish Indian Tribe, Jamestown S’Klallam, Lower Elwha Band of Klallams, Port Gamble Clallam, Nisqually Indian Tribe, Nooksack Tribe, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Upper Skagit Tribe, Tulalip Tribes, Lummi Indian Nation, Quinault Indian Nation, Puyallup Tribe, Hoh Tribe, Confederated Tribes and Bands of the Yakama Indian Nation, Quileute Indian Tribe, Makah Indian Tribe, Swinomish Indian Tribal Community, and the Muckleshoot Indian Tribe).
their future generations. Particularly relevant to this discussion, governments commonly promised to protect hunting and fishing rights in return for these relinquishments of land.

The idea that a treaty reserved certain rights for Native American nations and that a treaty holds the same force now as the day it was signed played out in the courtroom in *United States v. Washington*. In the State of Washington, a group of twenty-one Native American nations in the Pacific Northwest entered a series of treaties, known as the Stevens Treaties, with the State to cede land to the United States in order to preserve a right to access natural resources in the area. In 2001, the nations began to seek legal recourse to push the State to meet its environmental obligations under the treaties. The nations filed two matters in court. The first was a Request for Determination which sought to prevent the state from constructing and maintaining culverts under state roads that degrade fish habitats and lead to reduced adult fish production. The second sought a permanent injunction that would require the state to identify and open culverts under state roads when those roads obstruct fish passage, in order to preserve fish runs returning to or passing through the “usual and accustomed grounds and stations of the plaintiff tribes.” The United States joined the tribes’ requests. This case established an affirmative duty on the government to prevent environmental harms to areas and resources to which the nations hold a right.

**B. District Court Decision**

In the U.S. District Court for the Western District of Washington, District Judge George H. Boldt, in what would become known as the “Boldt decision,” divided the case into two phases. Phase one determined whether the fishing clause guarantees the nations a portion of the annually harvestable fish in the area and, if so, how much. Phase two addressed whether the fishing clause extends to hatchery fish and—relevant to this discussion—whether the fishing clause requires The State of Washington to prevent environmental degradation in the specified

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7. *Id.*

8. *Id.*

9. *Id.; Washington*, 853 F.3d at 954 (referring to preserving salmon habitat in order to maintain a treaty-granted right to take fish).

10. *Washington*, 853 F.3d at 953–54. The Stevens Treaties are a series of treaties that Native American nations in the Pacific Northwest entered into in 1854 and 1855 that were negotiated by the Governor of Washington. *Id.* Under these treaties, the nations “relinquished large swaths of land” in exchange for a right to off-reservation fishing. *Id.* at 954.

11. *Id.*

12. *Id.* at 960.

13. *Id.*

14. *Id.*


17. *Id.*
area. The term “fishing clause” was used by the court to refer to the portion of the Stevens Treaties that states “the right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory.”

The court concluded, in part, “that the Tribes’ right to a ‘sufficient quantity of fish to satisfy their moderate living needs’ entailed a ‘right to have the fishery habitat protected from man-made despoliation.’” The district court granted summary judgment in favor of the nations and the United States, holding that “the right of taking fish, secured to the Tribes in the Stevens Treaties, impose[d] a duty upon [Washington] to refrain from [activity that] diminish[ed] the number of fish that would otherwise be available for Tribal harvest.”

C. Ninth Circuit Decision

On appeal, the Ninth Circuit affirmed the district court’s decision, relying on actual language from the Stevens Treaties and the well-established principle that treaties will be interpreted in a manner favorable to the tribes. The court noted several times that Governor Isaac Stevens intended not only for the Stevens Treaties to encompass the right to harvest food, as evidenced by the language of the fishing clause, but also for that harvesting right to provide food security for the nations now and in the future. The treaties’ intention to guarantee a continued harvest is particularly obvious considering that Governor Stevens “assured the Tribes that even after they ceded huge quantities of land, they would still be able to feed themselves and their families forever.” Governor Stevens reinforced this intention several times and explicitly stated, “I want that you shall not have simply food and drink now but that you may have them forever.” Importantly, the court noted that “the Governor’s promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians’ assent.”

Although the explicit promises made by Governor Stevens were not included in the treaty itself, the Ninth Circuit still “infer[ed] . . . a promise to ‘support the purpose’ of the Treaties.” The court relied on statements made by Governor Stevens during negotiations, including assurances “that the number of fish would

18. Id.
19. Id.
21. Id. at 961. After concluding that the State of Washington “currently owns and operates culverts that violate this duty,” the district court required that the state refrain from “building or operating culverts under State-maintained roads that hinder fish passage.” Id.
22. See id. at 963 (quoting Worcester v. Georgia, 31 U.S. 515, 582 (1832)).
23. Id. at 963, 964 (quoting Washington v. Washington State Com. Passenger Fishing Vessel Ass’n, 443 U.S. 658, 667 n.11 (1979)).
24. Id. at 961.
25. Id.
26. Id. at 964 (quoting Fishing Vessel, 443 U.S. at 676–77).
27. Id. at 965. Other courts, including the Supreme Court, have inferred meaning beyond what is explicitly stated in the treaty based on its overall purpose. See Winters v. United States, 207 U.S. 564, 576–77 (1908); United States v. Adair, 723 F.2d 1394, 1409 (9th Cir. 1983).
always be sufficient to provide a ‘moderate living’ to the Tribes,” 28 “that [the Treaty] secures [the Tribes’] fish, and that there would be food ‘forever,’” 29 to infer a promise of fish habitat protection. 29 This reading is further supported by the Supreme Court’s long-standing preference to interpret treaties in favor of tribes. 30

The Ninth Circuit stated in Washington that it would “construe a treaty with the Indians as [they] understood it” 31 and that the “treaty must . . . be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.” 32

In stating that the Stevens Treaties’ promised to provide for the harvest of traditional food included an inference that the traditional food source would exist, the court appropriately concluded that this inference required the State of Washington to take affirmative action to prevent environmental degradation of salmon habitat. By laying out this connection between the grant of a right and the fundamental presumptions upon which that right rests, the Ninth Circuit created a model for future entities to access environmental remedies in a similar way.

II. CASE STUDY: MAINE’S FOCUS ON FOOD SOVEREIGNTY INTERACTING WITH CLIMATE CHANGE

United States v. Washington provides an example of the way a legal right to access or harvest a natural resource might create a duty on the state government to protect that resource for the species to remain harvestable. 33 To understand how the same line of reasoning used in Washington could be applied in different contexts, this discussion will explore a case study centered on the recent adoption of the right to food in Maine’s constitution, the lobster industry in Maine, and climate change in the twenty-first century. Looking at the background of the food sovereignty movement in Maine, the language employed in the right to food amendment and the broad use of the right as a tool to access the courts, this discussion will analyze the way the right to food might be used by the lobster industry to create a duty for the state government to prevent further warming of the Gulf of Maine.

A. Food Sovereignty in Maine

The right to food, though only recently amended into Maine’s constitution, has long been an important aspect of life in Maine. The food sovereignty movement “is about people asserting their right to healthy, homegrown or locally produced food.” 34 The strength of this movement in Maine is likely due in part to the state’s agricultural industry being dominated by small-scale farming operations that sell

29. Id. at 964–65.
30. Worcester v. Georgia, 31 U.S. 515, 582 (1832) (“The language used in treaties with the Indians should never be construed to their prejudice.”).
31. Washington, 853 F.3d at 963 (quoting United States v. Winans, 198 U.S. 371, 380 (1905)).
32. Id. (quoting Jones v. Meehan, 175 U.S. 1, 11 (1899)).
33. See id. at 977.
34. Miller & Mistler, supra note 4.
directly to consumers.\textsuperscript{35} This composition of farmers means that the state’s regulations on the sale of agricultural products often makes it difficult to make a profit.\textsuperscript{36} All of these circumstances contribute to Maine acting as a national leader in food sovereignty efforts by becoming the first state to codify the right to food in its constitution.\textsuperscript{37} The history of the food sovereignty movement in Maine and the buildup to the right to food amendment’s passage provides a framework for understanding the stakeholders involved and the implications the amendment may hold.

\textit{I. Maine Town Ordinances and a Local Dairy Farmer}

In 2011, in response to pressure from farmers and community members, Maine passed a bill “to oppose any federal statute, law, or regulation that attempts to threaten our basic human right to save seed and grow, process, consume and exchange food and farm products.”\textsuperscript{38} That same year, local Food Sovereignty Ordinances (FSOs) began to emerge in municipalities in order to combat the regulatory barriers farmers selling directly to consumers were facing.\textsuperscript{39} These ordinances “declared that it was unlawful for any state or federal government regulation to interfere with community members’ rights to sell and grow food.”\textsuperscript{390} Despite the growth of FSOs to support local farming businesses and reduce regulatory barriers, one Maine farmer still was not satisfied and continued to push the boundaries of his rights, and further defined the contours of how small-scale farming is regulated in the state. Maine farmer Dan Brown regularly sold raw milk, dairy products, and other food items through a farm stand on his property and at local farmers’ markets.\textsuperscript{41} “The State of Maine allows the direct sale of unpasteurized, or ‘raw,’ milk from farmers to consumers.”\textsuperscript{42} However, Brown failed to obtain the proper licensing, failed to label according to state laws, and was sued by the state.\textsuperscript{43} Brown argued (i) that he was “exempt from state licensing requirements because . . . a state official told him that he did not need a license to sell milk,” (ii) that it was too expensive to meet state sanitation standards imposed on farmers selling directly to consumers, and (iii) that his town had “enacted an ordinance exempting him from compliance with state licensing laws.”\textsuperscript{44} The Law Court\textsuperscript{45} ultimately ruled against Brown,\textsuperscript{46} but avoided determining whether, given a

\textsuperscript{35} See Moore & Bober, supra note 3.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{39} Moore & Bober, supra note 3.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} State v. Brown, 2014 ME 79, ¶ 1, 95 A.3d 82.
\textsuperscript{43} Id. ¶¶ 1–2.
\textsuperscript{44} Id. ¶ 1.
\textsuperscript{45} 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).
conflict between the local ordinance and state law, the state law preempted the FSO.\textsuperscript{47}

Although this case did not result in Brown’s favor, it did garner support for small farmers who were bearing the burden of complex state regulation.\textsuperscript{48} In 2017, in response to grassroots pressure, the governor signed into law the Maine Food Sovereignty Act (MFSA).\textsuperscript{49} This act legitimized the FSOs and gave local governments in Maine the authority to pass ordinances that “would supersede state and federal regulations, subject to certain unburdensome requirements.”\textsuperscript{50} The MFSA was created to support local producers’ food sovereignty by providing exemptions as long as transactions are carried out between the producers and the customers directly.\textsuperscript{51}

While the legitimization of local FSOs was certainly a win for local farmers and consumers, it was not without preemption concerns. Although municipalities in Maine may now adopt their own food regulations, thanks to the MFSA, “federal law requires states to ensure that any state and local requirements are at least as strict as the federal requirements.”\textsuperscript{52} The U.S. Department of Agriculture voiced concerns that the state would not be able to ensure that state and local requirements would be at least as strict as federal rules and threatened to “transfer control of meat and poultry from the state to federal inspectors.”\textsuperscript{53} To avoid this outcome, the Maine Legislature amended the MFSA and “substantially eroded municipal power by stipulating that the state would continue requiring state inspection and licensing pursuant to federal law for meat and poultry.”\textsuperscript{54} Despite this clawback to appease federal regulators, ninety-seven towns currently enjoy the benefits of food sovereignty through FSOs.\textsuperscript{55}

2. Right to Food Amendment and Sunday Hunting

In 2021, food sovereignty was once again in the headlines around the state when Maine voters decided whether the right to food should be added to the Maine

\begin{footnote}{46. Brown, 2014 ME 79, ¶ 33, 95 A.3d 82.} \end{footnote}
\begin{footnote}{48. See id.} \end{footnote}
\begin{footnote}{49. Id.} \end{footnote}
\begin{footnote}{50. Id.} \end{footnote}
\begin{footnote}{51. Mike Maharrey, Another Maine Town Passes a Food Sovereignty Ordinance; Foundation to Hinder FDA Control, TENTH AMEND. CTR. (Nov. 2, 2018), https://blog.tenthamendmentcenter.com/2018/11/another-maine-town-passes-food-sovereignty-ordinance-foundation-to-hinder-fda-control [https://perma.cc/S8LP-QF78].} \end{footnote}
\begin{footnote}{52. Gaulkin, supra note 47.} \end{footnote}
\begin{footnote}{53. Id.} \end{footnote}
\begin{footnote}{54. Id.} \end{footnote}
After passage by sixty-one percent of voters in favor of the amendment, Article I, Section 25 of the Maine Constitution now reads:

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.

Arguments in opposition to the right to food amendment attack the breadth of its language. Opponents claim that the amendment will place “challenges in the hands of the courts to interpret intent,” and that its broad nature will quickly pose problems defining the contours of actions permitted under its authority. This concern found footing in the courts almost immediately after the passage of the amendment when Virginia and Joel Parker, a couple from Readfield, Maine, filed a lawsuit against the Department of Inland Fisheries and Wildlife Commissioner, Judy Camuso, claiming that the century-old “Sunday hunting ban” violates the right to food amendment.

In Maine, hunting on Sundays is prohibited across the state to make land accessible for public recreation once a week. The Sunday hunting ban is highly contested, with almost forty failed attempts over the last forty-five years to allow “some form of Sunday hunting in Maine.” However, this is not necessarily indicative of the general population’s view. A survey conducted by the Maine Department of Inland Fisheries and Wildlife shows “that the majority of Mainers don’t support Sunday hunting in any form.” Only thirty-eight percent of the general population are in favor of opening up Sunday hunting and even fewer citizens are in favor of this if it results in landowners restricting access to their land for recreational activity.

58. ME. CONST. art. I, § 25.
60. Id.
63. Id.
64. See id.
65. Id. A majority of the survey responses were from licensed hunters (1,643 responses). RESPONSIVE MGMT. NAT’L OFF., MAINE RESIDENTS’, HUNTERS’, AND LANDOWNERS’ ATTITUDES TOWARD SUNDAY HUNTING 4 (2022). The next largest category at 943 responses came from the general population over 18 years old. Id. The last significant demographic responding to the survey was private landowners (10 or more acres) with 381 responses. Id.
the survey allow hunting on their land, and of that group, about half stated that they would be likely to restrict access to hunting on their land if Sunday hunting were allowed.67

Groups that oppose lifting the Sunday hunting ban point to the fact that Maine is one of the last remaining states where citizens may hunt on private land without landowner permission and argue that if Sunday hunting is allowed, it will change the way people have hunted in Maine for decades.68 Noting that the ban on Sunday hunting is “the tradeoff for not having to get permission the other six days of the week,”69 there is concern that if Sunday hunting is allowed, landowners will require permission every day of the week.70

The Parkers’ claim was dismissed in the Superior Court, but on appeal to the Law Court, the couple argued that “under a straightforward reading of this new constitutional amendment, Maine’s statutory ban on Sunday hunting is unconstitutional as applied to those who hunt for food.”71 Relying on the amendment’s use of the term “harvest,” the Parkers argued that the term is not ambiguous72 and that it specifically protects the right to hunt for food because “harvest” or “harvesting” is used in state regulations and statutes in reference to hunting.73 The State, in response, contended that the term “harvest” is in fact ambiguous, arguing that the term does not specifically refer to hunting.74 Further, the State noted that the term “hunting” was initially included in the amendment but was removed and replaced with “harvest” before being adopted, which demonstrates that the legislative intent was to exclude hunting from the amendment’s authority.75

The Law Court ultimately held that the Sunday hunting ban does not conflict with the amendment because the term “harvest” in its plain language “unambiguously enshrines a limited constitutional right to hunt.”76 The Law Court focused on the amendment’s limitations on the broad right to food and concluded that the Sunday hunting ban is in fact constitutional because it falls within the amendment’s poaching exception.77 While this holding provides limitations to the right to food’s broad grant, it does not speak to the potential for the right’s inclusion of the term harvest to impose a duty to protect the habitat of Maine’s harvestable species.

67. Id.
68. Id.
69. Id.
70. Id.
71. Brief of Petitioner-Appellants at 14, Parker v. Dep’t of Inland Fisheries & Wildlife, 2024 ME 22, ___ A.3d___; see also Edwards, supra note 59.
72. Brief of Petitioner-Appellants at 8–10, Parker v. Dep’t of Inland Fisheries & Wildlife, 2024 ME 22, ___ A.3d___.
73. Id. at 8.
74. Brief of Respondent-Appellee at 21–23, Parker v. Dep’t of Inland Fisheries & Wildlife, 2024 ME 22, ___ A.3d___; see also Edwards, supra note 59.
75. Brief of Respondent-Appellee at 6, Parker v. Dep’t of Inland Fisheries & Wildlife, 2024 ME 22, ___ A.3d___.
76. Parker v. Dep’t of Inland Fisheries & Wildlife, 2024 ME 22, ¶ 20, ___ A.3d___.
77. Id. ¶ 15.
In Maine, food sovereignty is a strongly held value that has generated both support and controversy throughout the state. On the one hand, the ability to exert control over one’s food has grown increasingly strong over the past decade as the MFSA, passed in 2017, enabled local governments to adopt their own food regulations. Though the act was amended to address concerns that local requirements regarding meat and poultry would not be as strict as federal rules, the history behind the MFSA demonstrates the ferocity with which Maine farmers have asserted their right to self-govern matters of food sovereignty. Further, the Maine Constitution was amended to provide citizens with a “natural, inherent and unalienable” right to food. However, while the vague language of the amendment appears to provide a broad grant of power to the people of Maine in regard to harvesting, growing, producing and consuming food, the courts have already begun to define the contours of this right. Despite the Law Court’s ruling in Parker v. Department of Inland Fisheries and Wildlife, the history of the food sovereignty movement in Maine and the reverence of Mainers for independence in their food systems indicate that the right to food will be a topic of continued focus and litigation. Therefore, the limits of a Mainer’s food sovereignty will likely continue to be subject to change.

B. Climate Change and Lobstering in Maine

1. Ocean Acidification

To understand why the right to food would be a powerful tool if it were used as a mechanism to force the state to prioritize work to tackle climate change, it is important to understand the nature and scope of the issue that is the warming of the Gulf of Maine. Climate change is an undeniable threat that impacts all marine species and the industries that rely on them. However, while a worldwide concern, climate change does not impact all regions evenly. Northern latitudes have been shown to experience some of the most accelerated warming on the planet. Maine is no exception to this trend as “most of the world’s oceans experienced unusually warm temperatures in 2022.” Further, the rate of warming in the Gulf of Maine has been 0.86°F per decade for over four decades. While an increase in temperature less than one degree Fahrenheit per decade may not sound

78. See discussion supra Section II.A.1.
79. 7 M.R.S. § 283 (2023).
80. Id.; see also Gaulkin, supra note 47.
81. ME. CONST. art. I, § 25.
82. ME. CONST. art. I, § 25; Miller & Mistler, supra note 4; Thistle, supra note 56.
83. See generally Parker v. Dep’t of Inland Fisheries & Wildlife, 2024 ME 22, ___ A.3d ___.
85. See id. at 1593.
87. Id.
significant, this figure is “more than triple that of the world’s oceans (0.27°F per decade).”

Ocean acidification poses one of the most significant climate-change related challenges for marine environments. Since the Industrial Revolution, humans have burned fossil fuels on an enormous scale. While carbon dioxide (CO2), the primary fossil fuel, is a naturally occurring compound typically absorbed by the world’s oceans, the increased rate of fossil fuel emissions creates a situation where the world’s oceans have begun to “absorb much of the ‘extra’ carbon dioxide.” The reaction that occurs when the ocean absorbs CO2, particularly in the “excess” amount being produced in modern time, is like the “reaction that both gives sodas their fizz and contributes to their ability to dissolve tooth enamel.” This reaction forms acid and in turn lowers the ocean’s pH.

The impact of oceans absorbing “extra” CO2 has serious implications for marine environments because “[a]ll life is sensitive to changes in pH [and] [a]s a result, the ocean is already experiencing a wide range of biological and ecological impacts . . . .” Ocean acidification impacts marine species at all levels by interfering with plankton, which as a food source for many other species, causes a ripple effect of impacts throughout the marine food chain. However, marine species with exoskeletons or shells, like lobsters, are especially vulnerable because ocean acidification “most directly interferes with marine organisms that grow shells—mussels, clams, oysters, crabs, lobsters . . . .”

2. The Maine Lobstering Industry

Annually, the Maine lobster fishery employs over 5,600 independent lobstermen and harvests over 100 million pounds of lobster, contributing over $1 billion to the Maine economy. Data shows that for many tourists, “Maine’s fishing communities . . . draw them to the coast,” whether that be for harbor activities or culinary experiences. In 2021, between September and November, seventy-eight percent of people surveyed by the Maine Office of Tourism stated that “food and culinary experiences were their top activities [and] of those, [fifty-two percent] said eating lobster was their primary aim.” The economic significance of lobster for the State of Maine cannot be understated. In addition, Maine’s lobster fishing industry is uniquely sustainable in the larger scheme of

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88. Id.
89. Dealing with Ocean Acidification, supra note 84.
90. Id.
91. Id. at 1585.
92. Id.
93. Id. at 1590.
94. Id.
95. Id.
98. Id.

commercial fisheries, considering that all Maine lobsters are “hand-harvested from small dayboats, one trap at a time, to protect their quality and the marine habitat.”

Despite the theoretically sustainable makeup of Maine’s lobstering scheme and the economic incentives of maintaining or growing the industry in the state, the industry faces additional challenges beyond ocean acidification. In 2014, the Maine lobstering industry surprised people around the state when over six hundred individual lobstermen unionized. This move, likely prompted by an almost fifty percent decrease in the boat price of lobster, was still surprising. Lobstermen do not fit the “traditional model of a labor union” because in Maine, “each lobsterman is essentially the owner of his small business” and there is a notoriously fierce ethos of competition among Maine lobstermen. That many lobstermen in Maine have found it increasingly challenging to make a living in the last decade stretches beyond the reach of the lobstering industry and concerns any individual, family, or field that relies on not only lobster, but the Gulf of Maine broadly. The warming of the Gulf of Maine, resulting in ocean acidification, and its ripple effects on the broader economy will touch the lives of not just lobstermen, but all Mainers who are tied to the health of their environment and, for example, lobster stocks.

3. The Impact of Climate Change on the Lobstering Industry

Maine is both unique and not unique in the way the state experiences the consequences of climate change. The nature of ocean acidification means that many coastal states, regardless of their industry makeup, are impacted by ocean acidification. However, Maine’s dependence on natural fisheries puts the state in a uniquely vulnerable position to climate change. The state’s reliance on marine resources, coupled with the fact that the Gulf of Maine is “warming faster than 97% of the world’s ocean surface,” creates a scheme where climate variations impact “the resilience of the marine food supply into the future . . . threatening food security” as well as the economic prosperity of some of Maine’s most prominent industries.

The Gulf of Maine, heavily relied on by Maine’s lobstering industry, is “one of the fastest-warming ocean regions on the planet.” This unprecedented warming

99. Maine Lobster Fact Sheet, supra note 96.
101. Id.
102. Id.
103. Id.
104. Though outside the scope of this discussion, it is worth noting that Maine’s lobster industry is heavily regulated, and it is not yet known how the right to food will interact with the industry as it relates to both commercial and personal harvest.
105. Dealing with Ocean Acidification, supra note 84, at 1598.
106. Waterman, supra note 97.
107. Annual Warming Update 2022, supra note 86.
109. Annual Warming Update 2022, supra note 86.
has resulted in significant ocean acidification of the area.\textsuperscript{110} In Casco Bay, ocean acidification has manifested as acidic muds that entirely dissolve clams in surrounding mud flats, causing “increasing concern among wild clam harvesters, oyster aquaculturists, and lobster fishermen.”\textsuperscript{111}

Although “increasing anthropogenic emission of carbon dioxide is the primary cause of ocean acidification in Maine,” two local factors, freshwater runoff and nutrient pollution from land-based sources also contribute to the severity of the issue.\textsuperscript{112} Freshwater runoff is typically more acidic than ocean water and is more frequently finding its way into the Gulf of Maine due to the rising severity in storms and an increase in input from watersheds and melting ice entering from the Scotian shelf.\textsuperscript{113} Nutrient pollution often occurs in the form of phytoplankton blooms due to the addition of excess nutrients into a body of water.\textsuperscript{114} Eventually the blooms decompose, and release CO\textsubscript{2}, which in turn accelerates the warming and acidification of the oceans.\textsuperscript{115}

Despite the grave implications of the warming of the Gulf of Maine, there is a unique, and temporarily advantageous change: a northward shift of lobster.\textsuperscript{116} This shift is due to “the number of juvenile lobsters . . . mak[ing] it to adulthood . . . dropp[ing] in southern New England and ris[ing] sharply in the Gulf of Maine.”\textsuperscript{117} Coincidentally, the demand for seafood in the United States continues to increase despite “dwindling supplies of domestic fish stocks.”\textsuperscript{118} To address this mismatch in supply and demand, at one point in time, as much as ninety-one percent of the seafood consumed in the United States came from imported sources.\textsuperscript{119} This enormous disparity provides an opportunity for coastal states to grow industries to meet demand.

As a result of the industry opportunistically responding to the northward migration and the rising demand for fresh seafood, Maine’s economy has “reaped the benefits of the lobsters’ move,” reporting eighty-one percent of the total lobster industry’s profits in 2014.\textsuperscript{120} However, the future implications of this warming will likely not shine kindly on Mainers considering that “the thing that pushed [the lobsters] north hasn’t gone away: warming ocean temperatures.”\textsuperscript{121}

\textsuperscript{110} See Dealing with Ocean Acidification, supra note 84, at 1615.
\textsuperscript{111} Id. at 1640.
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 1640–41. The Scotian Shelf is a section of the Continental Shelf off the coast of Nova Scotia that produces vertical mixing by strong tidal streams. P.C. Smith & R.J. Conover, Scotian Shelf, \textsc{The Canadian Encyclopedia} (Dec. 16, 2013), https://www.thecanadianencyclopedia.ca/en/article/scotian-shelf [https://perma.cc/M9M2-QESE].
\textsuperscript{114} See Dealing with Ocean Acidification, supra note 84, at 1640–41.
\textsuperscript{115} Id. at 164.
\textsuperscript{116} See Emily Greenhalgh, \textsc{Climate & Lobsters}, NOAA \textsc{Climate.gov} (Oct. 6, 2016), https://www.climate.gov/news-features/climate-and/climate-lobsters [https://perma.cc/A9K2-RGYY].
\textsuperscript{117} Id.
\textsuperscript{118} Kristen L. Johns, \textsc{Farm Fishing Holes: Gaps in Federal Regulation of Offshore Aquaculture}, 86 \textsc{S. Cal. L. Rev.} 681, 687 (2013).
\textsuperscript{119} Id. at 686–87.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
lobster, creates a niche in the seafood industry that only Maine is in a position to fulfill. However, a suitable habitat is necessary in order to realize this potential.

 Maine has a deep-rooted interest in preserving local lobster stocks against warming waters. The industry holds incredible potential to provide long-term economic and employment opportunities in Maine. Under the authority of the state’s constitutional right to food, the relationship between local lobster stocks and the rapid warming of the Gulf of Maine provides a unique opportunity for Mainers to assert their rights to harvest lobster now, but also to argue that the very same right preserves their ability to harvest lobster into the future as well.

 III. HOW UNITED STATES V. WASHINGTON COULD SUPPORT IMPOSING A DUTY ON THE MAINE STATE GOVERNMENT TO PREVENT FURTHER WARMING OF THE GULF OF MAINE.

 Like in Washington—where a treaty providing Native American nations the right to fish traditional lands imposed upon the state government a duty to maintain the habitat of those fisheries\(^{122}\)—the right to food amendment opens the door for Mainers to hold the state accountable. The specific inclusion of the term “harvest” in the amendment, when coupled with the reasoning in Washington, provides strong support that the lobster industry might be able to force the state to work to prevent further warming in the Gulf of Maine. For example, the district court, and subsequently the Ninth Circuit, looked at the context surrounding the Stevens Treaties and relied on statements made by Governor Stevens to demonstrate that the state was not only responsible for allowing the nations to take fish, but for protecting the habitat of the fish so that the ability to take fish remained.\(^{123}\)

 Similarly, the right to food amendment came as an outgrowth of the food sovereignty movement that found “particular resonance” in Maine.\(^{124}\) The statewide focus on “asserting [a] right to healthy, homegrown or locally produced food”\(^{125}\) appears to have created the foundation for the passage of the right to food amendment and provides support for interpreting it in a parallel manner that protects Mainers current and future access to the state’s natural bounty.

 It is important to note that the rights at issue in Washington represent a federal treaty right and the language of Maine’s constitutional amendment represents a state constitutional amendment.\(^{126}\) It is inappropriate to compare these two issues without acknowledging that federal treaty rights, which interact with sovereign Tribal nations, inherently hold different implications and values than the rights given to citizens by state constitutions. Nevertheless, comparing the language in the Maine amendment to the language the Ninth Circuit used in Washington, reveals a common thread between the two cases. For example, the Ninth Circuit affirmed “that ‘the right of taking fish, secured . . . in the Stevens Treaties, imposes a duty upon [the State] to refrain from building or operating culverts under State-

\(^{122}\) See discussion supra Part I.

\(^{123}\) United States v. Washington, 853 F.3d 946, 963 (9th Cir. 2017).

\(^{124}\) Miller & Mistler, supra note 4.

\(^{125}\) Id.

\(^{126}\) See discussion supra Sections I.C, II.A.2.
maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest.”

The district court, affirmed by the Ninth Circuit, concluded the following:

Governor Stevens had assured the Tribes that they would have an adequate supply of salmon forever. During the negotiations leading up to the signing of the treaties, Governor Isaac Stevens and other negotiators assured the Tribes of their continued access to their usual fisheries. Governor Stevens assured the Tribes that even after they ceded huge quantities of land, they would still be able to feed themselves and their families forever. As Governor Stevens stated, “I want that you shall not have simply food and drink now but that you may have them forever.”

The language embedded in the fishing clause of the Stevens Treaties and used by Governor Stevens in negotiating the Treaties with Native American nations demonstrates the importance of examining the underlying intent behind legislative documents, treaty agreements, or even a constitutional amendment. Looking at the specific language of the amendment, Article I, Section 25 of the Maine Constitution reads:

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

The Legislature’s inclusion of the term “harvest” into the amendment implicates an affirmative duty, similar to Washington, that the government must provide, maintain, or protect the habitat of species implicated by the term “harvest” in order for Mainers to be able to fully realize their right to food. While the phrase “to harvest” might hold a different meaning based on the context of where that activity is happening, there is evidence that here, the Legislature intended for it to include the harvest of Maine’s most valued renewable resource: lobster. The term harvest, used in certain contexts, may be intended to convey a broad definition that is not geared towards the harvest of any particular thing. However, that is not the case with the right to food amendment. Here, the term “harvest” is being used to point towards typical and usual harvest activities in the state of Maine, such as harvesting lobster. Further, in other instances, “harvest” implicates a citizens’ ability to not only harvest lobster as a personal food source, but to provide an income for themselves through lobster fishing as evidenced by Maine’s dependence on the industry to create jobs, draw tourists, and bring revenue to the state.

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127. Washington, 853 F.3d at 961.
129. ME. CONST. art. I, § 25.
130. Edwards, supra note 59.
131. See Waterman, supra note 97.
This Note does not advocate that the inclusion of the term “harvest” provides for the right to harvest any species, anywhere, at any time. That would be counterintuitive to the many state laws—such as the Sunday hunting ban—and the laws governing government agencies that are tasked with regulating the taking of fish and wildlife. The inclusion of the phrase “as long as an individual does not commit . . . abuses of . . . public lands or natural resources in the harvesting” serves to clearly convey that there are limits, and severe ones, on the breadth of one’s ability to harvest under the right to food. However, the text, which grants the right to “harvest . . . and consume the food of their own choosing for their own nourishment, sustenance, bodily health and well-being” implies at the most basic level that a food source (e.g., lobster), historically present in an area (e.g., the Gulf of Maine), still exists to a harvestable degree.

CONCLUSION

A. Climate Work that the Maine Government Could Expand On

The Washington case, where the government’s engagement in a treaty provided Native American nations the right to fish traditional lands, imposed a duty to maintain the habitat of those fisheries on the state government. In Maine, the right to food amendment opens the door for Mainers to hold the state accountable in similar ways. By using the amendment as a mechanism to protect Maine’s watersheds and halt the rapid warming in the Gulf of Maine, the right to food may be fully realized by different user groups. In particular the lobstering industry may benefit by preserving the opportunity to capitalize on the economic potential of the growing demand for domestically caught seafood.

The State of Maine has already started down the path of climate mitigation with lobster in mind by prioritizing research and policy addressing the impact of climate change on Maine’s coastal waters. In 2014, the Maine Legislature established the Maine Ocean Acidification Commission in order to, among other things, identify the actual and potential effects of ocean acidification on commercial fishing in Maine. The Commission concluded that “ocean acidification in Maine is an urgent political and economic problem.” The Commission recognized that the “impact of ocean acidification on shell-forming organisms [is] particularly troubling” because in “Maine’s critically important fishing industry, 87% of the value of . . . wild fisheries . . . come from species with shells, like lobsters.” While the Commission represents another step in the right direction to comprehensively address climate change and ocean acidification in the Gulf of Maine, it is not the sole solution. Considering that the Gulf of Maine is

132. See discussion supra Section II.A.2.
133. Id.
134. ME. CONST. art. I, § 25.
135. See discussion supra Section I.B.
136. See Dealing with Ocean Acidification, supra note 84, at 1642.
137. Id.
138. Id.
139. Id.
warming almost three times faster than the rest of the world’s ocean surfaces, the State of Maine will need to be at the forefront of ocean acidification mitigation. The ground-breaking nature of Maine’s constitutional right to food, being the first in the nation, provides hope that the state is open to stepping into the climate mitigation role imposed by the amendment.

**B. Further Considerations**

This Note cannot address all the implications of Maine’s right to food amendment. The next step in this discussion is to explore the bounds of this new affirmative duty. If the State of Maine’s government does in fact have a duty to prevent environmental degradation to provide its citizens with a right to food, how far does that extend? Does the government’s duty to maintain the state’s waters, including measures to mitigate climate change to provide suitable habitat for lobster, require only the prevention of further warming? Or, alternatively, is this duty retroactive, requiring the government to mitigate warming in the Gulf of Maine to temperatures that were considered normal before the right to food was passed? These questions will continue to arise as the right to food is applied across the state and hopefully, as this avenue for climate mitigation is explored, the State of Maine is prepared to take action.

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140. Thistle, supra note 56.