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Amy J Cohen, Mathilde Cohen

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THE “SECOND AMENDMENT OF FOOD”: SOME REFLECTIONS ON AMERICAN LIBERALISM

Amy J. Cohen* & Mathilde Cohen**

In 2021, the State of Maine became the first in the nation to constitutionalize a right to food via a bipartisan coalition supported by legislators, small-scale food producers, and advocates. In its final iteration, the Amendment was sponsored by a Republican state representative who dubbed it the “Second Amendment of food” to invoke an individual right to care and provide for oneself and one’s family with minimal state oversight and regulation. In 2024, a Republican congressional representative proposed a similar amendment to the federal constitution. This Article explores the tensions in the idea of a right to food elaborated in an international human rights context and then rearticulated as a personal liberty in the United States. What has unfolded in Maine testifies to the persistence of an American version of liberalism that centers “freedom” over redistributive egalitarianism even when it comes to basic material necessities such as food.

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* Robert J. Reinstein Chair in Law, Temple University Beasley School of Law.

** George Williamson Crawford Professor of Law, University of Connecticut School of Law.

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INTRODUCTION

On November 2, 2021, the State of Maine became the first in the nation to codify a right to food through a constitutional Amendment.¹ The Amendment resulted from a bipartisan coalition supported by legislators, small-scale food producers, libertarians, and anti-corporatists, some of whom had worked for the recognition of “food sovereignty” at the municipal level for over a decade.² The Amendment was initially proposed in 2015 by Democratic Representative Craig Hickman and backed by progressive lawmakers and advocates such as Heather Retberg, a livestock farmer and activist organizing for “the right to sufficient, healthy, and culturally appropriate food for all people and the right of people to have control over land, seeds, and water.”³ It was eventually adopted by referendum, with nearly 61% of voters approving, under the sponsorship of Republican Representative Billy Bob Faulkingham, who dubbed it the “Second Amendment of food.”⁴ Faulkingham was motivated by “the dangers our farming, hunting, and fishing rights face” from the government, in particular the Food and Drug Administration (FDA), and from animal rights organizations.⁵

1. ME. CONST. art. I, § 25.

2. On Maine’s efforts to affirm a right to food via local regulations, statutes, and a constitutional amendment, see, for example, Hilda E. Kurtz, *Framing Multiple Food Sovereignities: Comparing the Nyéléni Declaration and the Local Food and Self-Governance Ordinance in Maine*, in FOOD SOVEREIGNTY IN INTERNATIONAL CONTEXT: DISCOURSE, POLITICS AND PRACTICE OF PLACE 163 (Amy Trauger ed., 2015); Ryan Almy, *State v. Brown: A Test for Local Food Ordinances*, 65 ME. L. REV. 789, 796 (2013); Stephen R. Miller, *A Coordinated Approach to Food Safety and Land Use Law at the Urban Fringe*, 41 AM. J.L. & MED. 1, 12 (2015); Sarah Schindler, *Food Federalism: States, Local Governments, and the Fight for Food Sovereignty*, 79 OHIO ST. L.J. 761 (2018); Wendy Heipt, *The Right to Food Comes to America*, 17 J. FOOD L. & POL’Y 111 (2021); R. Denisse Córdova Montes, *Using International Human Rights Law to Address Hunger in the U.S.*, 6 BUS. ENTREPRENEURSHIP & TAX L. REV. 1 (2022) [hereinafter Córdova Montes, *International Human Rights Law*]; Denisse Córdova Montes et al., *Food, Housing, and Racial Justice Symposium*, 31 U. MIA. INT’L & COMPAR. L. REV. 77 (2023) [hereinafter Córdova Montes et al., *Symposium*]; Pierre Desrochers & Pierre Lemieux, *Maine’s Mysterious New ‘Right to Food,’* REGULATION, Spring 2022, at 6–9. For more on Maine’s new constitutional amendment, see generally Volume 76, Issue 2 of the Maine Law Review.

3. R. Denisse Córdova Montes et al., *Constitutionalizing the Human Right to Food in Maine: A People’s Tool to Advance Food Sovereignty in the U.S.*, 76 ME. L. REV. 229, 240–41 (2024); see also *Legal Defeat Only Emboldens ‘Food Sovereignty’ Soldiers*, STATE AG & RURAL LEADERS, <https://www.agandruralleaders.org/legal-defeat-only-emboldens-food-sovereignty-soldiers> [<https://perma.cc/BF84-2RSX>] (last visited Oct. 28, 2024).

4. Patrick Whittle, *Is There a Constitutional Right to Food? Mainers to Decide*, ASSOCIATED PRESS (Oct. 23, 2021, 9:06 AM), <https://apnews.com/article/lifestyle-business-elections-environment-and-nature-health-86d6df657a0594b966d840ab03f89199> [<https://perma.cc/G47W-99C2>].

5. Billy Bob Faulkingham, Opinion, *Rep. Billy Bob Faulkingham: Mainers Can Protect Their Food Freedom by Supporting ‘Right to Food,’* SUN J. (Oct. 17, 2021),

Lawmakers have emphasized the Amendment's bipartisan appeal. Indeed, it could be understood as expressing a form of interest convergence around eating, a practice everyone engages in several times per day regardless of their politics or place in society.⁶ Another interpretation is that Mainers proved able to agree on broad liberty declarations to define the right to food without settling their precise meanings, reaching an "incompletely theorized agreement" in the face of conflict over one of life's most fundamental matters — how we feed ourselves.⁷ In this Article, we recount the legislative history of the Amendment as also a glimpse into something else: how as liberal progressive actors endeavored to craft a broad political consensus, they became vulnerable to right-wing definitions of the right to food as primarily about non-interference. As we shall see, Democratic Senator Craig Hickman, the initial proponent of the Amendment, and his allies relinquished language that would have enshrined the "right to be free from hunger" in the Maine Constitution, deferring questions about the new provision's positive potential to judges who could or could not choose to interpret it according to international human right norms not binding on them.

To tell this story, we recount how people in Maine used the right to food to articulate three popular interpretations of "freedom." The first is freedom from hunger, which is the oldest interpretation of the right to food, beginning in the 1940s in international law.⁸ The second interpretation coalesced in the 1990s and was advanced by global food sovereignty movement actors who argued that a world where everyone has sufficient calories does not go far enough to actualize freedom: people also need the capacity to create their own local, democratic, culturally appropriate food systems.⁹ To that end, food sovereignty actors endeavored to make questions of economic justice

<https://www.sunjournal.com/2021/10/17/rep-billy-bob-faulkingham-mainers-can-protect-their-food-freedom-by-supporting-right-to-food/> [<https://perma.cc/T2Y4-2GGY>].

6. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523–24 (1980) (contending that "the interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites," a theory of "interest convergence" that scholars have applied to other contexts to argue that political or legal action toward a particular goal depends on the interests of the marginalized aligning with those of the powerful).

7. See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–36 (1995); see also Ian Ward, 3 SOC. & LEGAL STUD. 317, 318 (1994) (reviewing JOHN RAWLS, *POLITICAL LIBERALISM* (1993)).

8. See, e.g., Ruth Jachertz & Alexander Nützenadel, *Coping with Hunger? Visions of a Global Food System, 1930–1960*, 6 J. GLOB. HIST. 99, 100 (2011).

9. HANNAH WITTMAN ET AL., *FOOD SOVEREIGNTY: RECONNECTING FOOD, NATURE AND COMMUNITY* (2010); PRISCILLA CLAEYS, *HUMAN RIGHTS AND FOOD SOVEREIGNTY MOVEMENT: RECLAIMING CONTROL* 12–13 (2015); Raj Patel, *Food Sovereignty*, 36 J. PEASANT STUD. 663, 665 (2009).

central to any answer to the conundrums of how to enact individual and collective self-determination. And finally, there is a version of the right to food defined as freedom from being told what to do, a distinctively American interpretation articulated by Maine's right-wing supporters of the Amendment.

Today, a growing number of states are discussing right-to-food campaigns.¹⁰ Most recently, in 2024, a Republican Congressman proposed an Amendment to the U.S. Constitution aimed at scaling back federal food regulation.¹¹ The making of the Maine Amendment, we thus argue, offers one look at how political actors vie to define alternative accounts of the relationship between the state and the individual under liberalism, a struggle endemic to American political life — and political hope — today. This Article first recounts some of the development of the right to food paradigm internationally before pausing to examine the meanings acquired by the right in the Maine context, the compromise that emerged in the process of enacting the Amendment into the state constitution, and the potential consequence of this compromise for American liberalism.

I. ON THE RIGHT TO FOOD

Today, the right to food has at least two kinds of redistributive meanings. Actors have used it to demand that states ensure people do not suffer hunger and more recently to urge states as well as international institutions and corporations to transform the political economy of agriculture and trade to enhance people's capacities, individually and collectively, to feed themselves.¹² Here, we set forth, all too briefly, how these meanings have evolved over time, first internationally and then in the United States.

In 1948, the 58 countries then comprising the United Nations (U.N.) adopted the Universal Declaration of Human Rights, which included the right to food as part of a "right to an adequate standard of living."¹³ In 1966,

10. See Córdova Montes, *International Human Rights Law*, *supra* note 2, at 3 (suggesting that West Virginia, Connecticut, Hawaii, Massachusetts, New Hampshire, Pennsylvania, Rhode Island, Tennessee, and Washington have considered constitutionalizing the right to food).

11. Pete Kennedy, *Right to Food: Massie Proposes Constitutional Amendment*, FOOD FREEDOM FOUND. (Apr. 11, 2024), <https://www.foodfreedomfoundation.org/blog/right-to-food-massie-proposes-constitutional-amendment> [https://perma.cc/GL9R-88EN].

12. Michael Fakhri, *The International Political Economy of the Right to Food*, HUM. RTS. & GLOB. GOVERNANCE (2019), <https://www.academia.edu/40614188/> [https://perma.cc/NH4W-HRKJ].

13. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25 (Dec. 10, 1948) ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . ."). But see CLAEYS, *supra* note 9, at 63 for earlier roots.

when newly independent states could influence the drafting of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the right to food reappeared as two related entitlements: the right to adequate food and the fundamental right to be free from hunger.¹⁴ As Samuel Moyn has argued, these early articulations of positive social and economic rights did not include “any kind of commitment to egalitarian distribution within states” or demand for “cross-border social justice.”¹⁵ But early actors used the right to food to argue for welfarist policies. For example, in 1974, when the U.N. Food and Agriculture Organization called a World Food Summit in response to a food price crisis, it framed the problem of hunger in the language of rights, namely, an “inalienable right to be free from hunger and malnutrition” — prompting proposals for income redistribution to ensure people could access food available via markets as well as for states to secure adequate supplies of commercial food at “reasonable prices.”¹⁶

To be sure, the 1980s and 1990s did not witness the entrenchment of redistributive international and domestic welfare institutions, but rather their erosion, particularly in the West. During this period, policymakers in the United States and Washington Consensus institutions did not promote the “right to food” as much as “food security,” redefined as a question of how individual households could participate in markets and how international markets could increase efficient supplies through free trade, technological innovation, and comparative advantage.¹⁷ For example, a 1989 background paper published by the U.S. Department of Agriculture and the U.S. Trade Representative’s Office made clear that “[f]ood security — the ability to acquire the food you need when you need it — is best provided through a smooth-functioning world market.”¹⁸ At the same time, however, actors

14. G.A. Res. 2200A (XXI), International Covenant on Economic, Social, and Cultural Rights, art. 11 (Dec. 16, 1966).

15. SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD 111 (2019).

16. See Harriet Friedmann, *From Colonialism to Green Capitalism: Social Movements and Emergence of Food Regimes*, in 11 NEW DIRECTIONS IN THE SOCIOLOGY OF GLOBAL DEVELOPMENT 227, 245, 248, 261 n.15 (Frederick H. Buttle & Philip McMichael eds., 2005) (describing the position of the New International Economic Order); G.A. Res. 3348 (XXIX), Universal Declaration on the Eradication of Hunger and Malnutrition, pmbl., ¶¶ 1, 12 (Dec. 17, 1974).

17. In the postwar period, food security was widely understood as to mean that “states had an obligation to avoid the starvation of their populations and those of other nations.” MATIAS E. MARGULIS, SHADOW NEGOTIATORS: HOW UN ORGANIZATIONS SHAPE THE RULES OF WORLD TRADE FOR FOOD SECURITY 49 (2023) (citation omitted); see also Amy J. Cohen, *The Law and Political Economy of Contemporary Food: Some Reflections on the Local and the Small*, 78 L. & CONTEMP. PROBS. 101, 101 (2015).

18. Mark Ritchie, *Breaking the Deadlock: Agriculture and Environmental Protection Policy in the Uruguay Round 28 n.35* (Oct. 1993) (thesis, Inst. for Agric. & Trade Pol’y), https://www.iatp.org/sites/default/files/Breaking_the_Deadlock_Agriculture_and_Environm.htm [https://perma.cc/8ZQG-F29Q].

resisting this neoliberal logic turned to the right to food as a frame. They hoped to use it to rebalance basic obligations to feed oneself and one's family away from an individual's achievement through effective engagement in markets and towards some responsibility upon states. For example, as Mathew Canfield recounts, in 1983, Asbjørn Eide, a member of the U.N. Sub-Commission on the Promotion and Protection of Human Rights, elaborated the "general framework of the right to food . . . adopt[ing] Henry Shue's now well-known 'respect-protect-fulfill' framework . . ."¹⁹ On this reading, states must fulfill the right to food by ensuring that people who are unable to feed themselves have sufficient food through social protection schemes and policies. States must also respect and protect people's capacities to provide food for themselves including by "guard[ing] against powerful economic interests and unfair trade regulations that would undermine people's ability to be self-sufficient."²⁰ Eide's interpretation and this tripartite frame was, in turn, echoed by the U.N. Committee on Economic, Social and Cultural Rights' publication in 1999 of General Comment 12, which sets forth an authoritative elaboration of the right to food in international law.²¹

In the late 1990s and 2000s, agrarian social movements set into motion a debate between the meaning and strategic uses of right to food versus what they newly called the right to food *sovereignty*.²² Actors affiliated with La Vía Campesina and other transnational peasant movements argued that the right to food presupposes a relationship of entitlement and duty between an individual and a state — a relationship, they worried, that was all too easily reducible to the "right to be fed."²³ These activists wanted a more radical, agentic and collective reimagining of the rights and relationships among peoples, nature, economies, and institutions that would involve the redistribution of land, seeds, and other property entitlements as well as of knowledge and decision-making power beyond simply the redistribution of

19. MATTHEW C. CANFIELD, TRANSLATING FOOD SOVEREIGNTY: CULTIVATING JUSTICE IN AN AGE OF TRANSNATIONAL GOVERNANCE 165–66 (2022); *see also* Asbjørn Eide (Special Rapporteur), Study on the Right to Adequate Food as a Human Right, U.N. Doc. E/CN.4/Sub.2/1983/25 (July 25, 1983) [hereinafter Eide, Right to Adequate Food].

20. CANFIELD, *supra* note 19, at 166; *see also* Eide, Right to Adequate Food, *supra* note 19.

21. Comm. on Econ. Soc. & Cultural Rts., General Comment 12: The Right to Adequate Food (Art. 11), U.N. Doc. E/C.12/1999/5 (May 12, 1999). For more detail and elaboration of the international right to food, see Nadia Lambek & Priscilla Claeys, *Institutionalizing a Fully Realized Right to Food: Progress, Limitations, and Lessons Learned from Emerging Alternative Policy Models*, 40 VT. L. REV. 743, 748 (2016).

22. CLAEYS, *supra* note 9, at 89.

23. CLAEYS, *supra* note 9, at 111.

calories and nutrition.²⁴ In 2007, 500 delegates from five continents gathered in Mali to define food sovereignty; the resulting Declaration of Nyéléni described “the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agricultural systems.”²⁵ Food sovereignty actors have since mobilized in diverse ways to advance the economic independence of smallholder farmers, pastoral people, fishers and workers including through reimagining governance institutions — for example, by challenging the inclusion of agriculture in the World Trade Organization’s rules for global trade and helping to restructure the U.N. Committee on World Food Security to include a platform for social movement participation in global governance decisions.²⁶

Today, there is a lot more synergy and slippage between the right to food and the right to food sovereignty. Canfield illustrates how social movement activists now “mobilize the right to food and food sovereignty as complementary and mutually reinforcing claims,”²⁷ just as some elite human rights experts have recently infused the meaning of the right to food with arguments advanced by grassroots food sovereignty activists.²⁸ But when Nadia Lambek and Priscilla Claeys endeavored to take stock of how the right to food was penetrating the legislation and constitutions of several dozen nation states, they found fairly standard readings and efforts at implementation. That is, most states focused on achieving the “obligation to ‘fulfill,’ most often through a combination of programs aimed at both providing food directly and assisting with the means of acquiring food.”²⁹ Largely missing, Lambek and Claeys reported, are more holistic interpretations of how a state could also “respect” and “protect” people’s

24. See CLAEYS, *supra* note 9, at 21–22, 89–90, 109, 111. In this period, social movement actors also used the right to food sovereignty to distinguish their claims to authority and representation from NGOs and elite human rights experts who were then more likely to invoke the right to food. CLAEYS, *supra* note 9, at 111.

25. DECLARATION OF NYÉLÉNI (2007), <https://nyeleni.org/IMG/pdf/DeclNyeleni-en.pdf> [<https://perma.cc/W6MY-DZD5>]. Groups included the Coordination Nationale des Organisations Paysannes (CNOP), La Vía Campesina, the Network of Peasants and Farmers of West Africa (ROPPA), and the International Planning Committee for Food Sovereignty Rome, among many others. See generally NYÉLÉNI 2007: FORUM FOR FOOD SOVEREIGNTY (2007), https://nyeleni.org/DOWNLOADS/Nyeleni_EN.pdf [<https://perma.cc/9L4F-BF8J>] (noting organizations that gathered to adopt the Declaration of Nyéléni).

26. CLAEYS, *supra* note 9, at 22–24; CANFIELD, *supra* note 19, at 165.

27. CANFIELD, *supra* note 19, at 165.

28. Amy J. Cohen & Nadia Lambek, *When Critics Go to the UN: Conversations with Olivier De Schutter, Hilal Elvar, and Michael Fakhri on the Right to Food*, in RESEARCH HANDBOOK ON INTERNATIONAL FOOD LAW (Michael T. Roberts ed., 2023).

29. Lambek & Claeys, *supra* note 23, at 752.

capacities to “meet their own food needs in dignity”³⁰ by making political and economic systems more democratic, egalitarian, and sustainable — a kind of food sovereignty infused reading.³¹

Lawmakers in the United States have likewise experimented, at different times, with food policies that have focused on individual food entitlements and sometimes on policies that could enable more individual and collective self-determination in acts of food production, distribution, and consumption. In 1944, when President Franklin D. Roosevelt presented his “Second Bill of Rights,” he linked food to consumer livelihoods, enumerating “[t]he right to earn enough to provide adequate food and clothing and recreation,” and to producer livelihoods, enumerating “[t]he right of every farmer to raise and sell his products at a return which will give him and his family a decent living”³² His plan did not result in a judicially recognized constitutional right to food, but in the decades that followed, the federal government invested massively — both legally and financially — in food assistance programs for low-income Americans as well as for specific populations such as children and the elderly, provisions that were hollowed out with the welfare reforms of the 1990s.³³

During this period, in the United States, as elsewhere, food security became a set of arguments about how people should participate in labor and consumer markets in order to feed themselves and their families. Likewise, in the United States, as elsewhere, some small-scale farmers would come to repoliticize the question of how food systems should operate and in whose interests.³⁴ To be sure, the United States today is not a country of smallholder farmers. Indeed, by the 1970s, small-scale farming had drastically decreased, a consequence of post-war agricultural subsidies,

30. Lambek & Claeys, *supra* note 21, at 757.

31. Lambek & Claeys, *supra* note 21, at 764.

32. Franklin D. Roosevelt, U.S. President, State of the Union Message to Congress (Jan. 11, 1944), http://www.fdrlibrary.marist.edu/archives/address_text.html [https://perma.cc/Z6A4-R6GB].

33. See MICHAEL T. ROBERTS, FOOD LAW IN THE UNITED STATES 361–368, 443–445 (2016). The 1996 Personal Responsibility and Work Opportunity Reconciliation Act and the state-level reforms that preceded it represented a dramatic shift in how the government provides food assistance. Hope Corman et al., *Effects of Welfare Reform on Household Food Insecurity Across Generations*, 45 ECON. & HUM. BIOLOGY 1, 2 (2022). Before, low-income families were entitled to a package of welfare benefits that includes cash and food stamps; afterwards, work requirements, administrative hurdles, and time limits were placed on the receipt of cash, leading many families to drop out from the benefits to which they are entitled. *Id.* Welfare reform left intergenerational marks on Americans, leading to “decreases in food insecurity of the next generation of households” and potentially “exacerbating socioeconomic and health inequalities.” *Id.* at 12.

34. See, e.g., *Member Organizations*, U.S. FOOD SOVEREIGNTY ALL., <https://usfoodsovereigntyalliance.org/member-organizations/> [https://perma.cc/ZJY6-RLD5] (last visited Oct. 28, 2024).

which benefitted large farmers far more than small ones, combined with the industrialization of agriculture and meat production.³⁵ But this decline has been less pronounced in Maine, where 40% percent of the population continues to live in one or another of its 11 rural counties³⁶ and where the average farm size is 174 acres³⁷ (compared to 445 acres nationwide³⁸).³⁹

Given the state's geography, it is not surprising Maine's small-scale farmers were among the first to write food sovereignty into American law beginning in 2011.⁴⁰ But whereas many global movement actors mobilized in response to what they saw as the ruins caused by international financial institutions and the global economic order, food sovereignty organizers in Maine rallied most visibly against health and safety regulations. Many in particular chafed at the FDA's argument in 2010 that "there is no right to consume or feed children any particular food" — an argument the agency made to defend its ban on the interstate distribution of raw milk for human consumption.⁴¹

35. Friedmann, *supra* note 16, at 227, 242, 246; *see also* John Ikerd, *Farm and Food Policies for a Sustainable Future*, 6 BUS. ENTREPRENEURSHIP & TAX L. REV. 34, 40–41 (2022) (explaining that in 1996, the federal government passed the Agriculture Improvement and Reform Act as an attempt to bring government price subsidies to an end. But this experiment was quickly abandoned, and the federal government returned to its policy of absorbing the market risks of large industrial operations to ensure domestic food security).

36. *Facts*, ME. CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.maine.gov/dhhs/mecdc/public-health-systems/rhpc/rural-health.shtml> [<https://perma.cc/P39K-59GW>] (last visited Oct. 28, 2024).

37. U.S. DEP'T OF AGRIC., 2022 CENSUS OF AGRICULTURE: MAINE STATE AND COUNTY DATA 3 tbl.1 (2024) [hereinafter 2022 CENSUS OF AGRICULTURE], https://www.nass.usda.gov/Publications/AgCensus/2022/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/mev1.pdf [<https://perma.cc/95YY-LTSC>].

38. *See* U.S. DEP'T OF AGRIC., FARMS AND LAND IN FARMS: 2021 SUMMARY 4 (2022), https://www.nass.usda.gov/Publications/Todays_Reports/reports/fnlo0222.pdf [<https://perma.cc/UXC8-ADUP>].

39. Even urban and suburban areas are not fully disconnected from agriculture considering that some dwellers keep chickens at home to eat and/or sell eggs and that small farms may be located in the vicinity of residential neighborhoods. It is also noteworthy that of the 13,416 producers counted by the U.S. Department of Agriculture, 56% identify as male and 43.53% as female. Of these farmers, 97.29% identify as White when White people comprise 90.5% of Maine's population. Of the remaining farmers, 1.01% identify as Black, 0.48% as American Indian or Alaska Native, and 0.37% as Asian. 2022 CENSUS OF AGRICULTURE, *supra* note 37, at 40 tbl.52, 84 tbl.71.

40. *See* Nathan Bellinger & Michael Fakhri, *The Intersection Between Food Sovereignty and Law*, 28 NAT. RES. & ENV'T 45, 46 (2013).

41. Pete Kennedy, *FDA – Interstate Raw Milk Ban*, FARM-TO-CONSUMER LEGAL DEF. FUND (May 6, 2010) (quoting the FDA), <https://www.farmtoconsumer.org/blog/2010/05/06/litigation-fda-status/> [<https://perma.cc/5ZZD-MBU7>]; *see also* *Farm-To-Consumer Legal Def. Fund v. Sebelius*, No. C 10-4018, 2012 WL 219376 (N.D. Iowa Jan. 23, 2012).

In 2011, the small coastal town of Blue Hill was one of the first localities to use its “home rule”⁴² power to enact a “Local Food and Community Self-Governance Ordinance,”⁴³ or what Mainers colloquially call “food sovereignty ordinances.”⁴⁴ Ninety other towns soon followed suit.⁴⁵ Citing the Declaration of Independence, these ordinances use a model text demanding local self-governance: “[O]ur right to a local food system requires us to assert our inherent right to self-government” against illegitimate forms of state and corporate power.⁴⁶ The ordinances thus reject “federal and state regulations . . . [that] constitute a usurpation of our citizens’ right to foods of their choice,” and they make it “unlawful for any corporation to interfere with the rights recognized by this Ordinance.”⁴⁷ But when a superior court judge decided that a Blue Hill dairy farmer needed to comply with the state’s licensing requirements to sell his only cow’s raw milk — despite the newly enacted food sovereignty ordinance⁴⁸ — a growing group of Mainers mobilized at the state level.⁴⁹ This is the movement that eventually culminated in 2021 with the passage of the country’s first constitutionalized right to food.

What has thus emerged in Maine is an articulation of food sovereignty — here thoroughly entangled in popular and constitutional parlance with the right to food — that encodes two kinds of meanings. For some, it trends closer to transnational social movements’ desires for the kinds of solidaristic re-regulations and redistributions that would enable more local control over food system against concentrated private and public power. For others, it

42. As a “home rule” state, municipalities can exercise any constitutionally granted power or function not expressly or implicitly denied by the legislature. ME. REV. STAT. ANN. tit. 30-A, § 3001 (West 2011). This was a scheme Maine enacted by constitutional amendment in 1969, the same year “new federalism” was coined to express a conservative response to progressive federal policies. Yishai Blank & Issi Rosen-Zvi, *Reviving Federal Regions*, 70 STAN. L. REV. 1895, 1932–33 (2018).

43. Blue Hill, Me., Local Food and Community Self-Governance Ordinance of 2011 (Apr. 1, 2011).

44. See Bellinger & Fakhri, *supra* note 36, at 45; Scott Thistle, *Voters Will Decide If Mainers Have a Constitutional Right to Food*, PORTLAND PRESS HERALD (July 18, 2021), <https://www.pressherald.com/2021/07/18/voters-will-decide-if-mainers-have-a-constitutional-right-to-food/> [<https://perma.cc/T4QJ-MBGJ>].

45. Lucy Weaver, *What the Cluck? Backyard Chickens and Maine’s Mysterious Right to Food*, 76 ME. L. REV. 289, 298 (2024).

46. FARMLAND INFO. CTR., LOCAL FOOD AND COMMUNITY SELF-GOVERNANCE ORDINANCE OF 2011 (2011), https://farmlandinfo.org/wp-content/uploads/sites/2/2019/09/Maine_Food_and_Community_Model_Law_1.pdf [<https://perma.cc/SF2E-FRJ6>].

47. *Id.*

48. State v. Brown, 95 A.3d 82, 85 (Me. 2014).

49. See Córdova Montes et al., *supra* note 3, at 237.

inclines more closely toward a larger American cultural and political sensibility that the state simply should not tell people what to do.

II. ON THE RIGHT TO FOOD IN MAINE

“Maine is the first of the United States to enshrine the Right to Food in our Constitution, the original right of all living beings, reaffirming that all power is inherent in the people. Thank the Lord,” Senator Craig Hickman effused.⁵⁰ Over years of advocacy, Hickman advanced a right to food that was grounded in both “individual liberty that promotes responsibility,”⁵¹ and in policy reforms to ensure that “all Maine people have the social and economic opportunity to be free.”⁵² That is, he and his allies expressed a right to food as part of what we would call a progressive-liberal position: one that holds that the kind of individual liberty worth having depends on certain social and economic preconditions. This nuanced position, however, proved difficult to keep explicit.

Hickman is a small organic farmer and the first Black lawmaker to serve in both chambers of Maine’s legislature.⁵³ “A Democrat by enrollment but a “libertarian in spirit,”⁵⁴ he wants everyone to be

[f]ree from hunger and poverty. Free from violence and addiction and abuse. Free from drought and pestilence and disease. Free from oppression and discrimination and institutional bias. Free from financial ruin on account of debt, a serious accident, or a chronic medical condition. Free from tyranny and deception and greed. Free from state interference in personal matters and private decisions.⁵⁵

For Hickman, all such freedoms depend on people’s capacity to feed themselves with dignity — an understanding of the right to food now well-entrenched in international documents.⁵⁶ To that end, Hickman is fond of

50. Córdova Montes et al., *Symposium, supra* note 2, at 111 (quoting Craig Hickman).

51. Córdova Montes et al., *Symposium, supra* note 2, at 112 (quoting Craig Hickman).

52. See *Craig Hickman: Candidate for Maine State Senate District 14*, CRAIG HICKMAN, <https://craighickman.mainecandidate.com/> [<https://perma.cc/A4UZ-7HU3>] (last visited Oct. 28, 2024) [hereinafter *Craig Hickman*].

53. See *id.*; see also Press Release, Me. Democratic Party, What They are Saying: Maine State Representative Craig Hickman “Stole the Show” on Night Two of Democratic National Convention (Aug. 19, 2020), <https://www.mainedems.org/media/what-they-are-saying-maine-state-representative-craig-hickman-stole-show-night-two-democratic> [<https://perma.cc/D5NM-R78L>].

54. Bill Nemitz, *Lawmaker’s Election a Victory for All of Us*, PORTLAND PRESS HERALD (Nov. 16, 2012), https://www.pressherald.com/2012/11/16/lawmakers-election-a-victory-for-all-of-us_2012-11-16/ [<https://perma.cc/VH9L-M77Y>].

55. *Craig Hickman, supra* note 52.

56. See, e.g., UNITED NATIONS OFF. OF THE HIGH COMM’R FOR HUM. RTS., FACT SHEET No. 34: THE RIGHT TO ADEQUATE FOOD (2010),

quoting civil rights activist Fannie Lou Hamer: “When you’ve got 400 quarts of greens and gumbo soup canned for the winter, nobody can push you around or tell you what to say or do.”⁵⁷

Hickman first ran for office by assailing the “food and agricultural policy that made it too difficult [for small farmers in Maine] to earn an honest living off a relatively small parcel of land,”⁵⁸ and recounting his frustration at “regulators coming to my farm and telling me what I could do and could not do”⁵⁹ when he wished to continue to sell cheese and yogurt from his single goat to his neighbors without a state license.⁶⁰ Hickman sees food as one way to recalibrate the relationship between individuals and the state so that people have more autonomy in production, distribution, and consumption. Hickman also uses food to demand a state that is committed to racial equality. He quotes Martin Luther King to explain that when the poor white man’s “wrinkled stomach cried out for the food that his empty pockets could not provide, he ate Jim Crow,” that is, undernourished poor Whites subsisted on their feelings of racial superiority.⁶¹ And Hickman teaches his constituents about Jim Crow’s legacy: “The carceral state irreparably harms black families and communities and exposes the gruesome modes by which our nation’s prison industrial complex profits off black pain.”⁶² And yet

<https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet34en.pdf> [<https://perma.cc/SUQ5-WSPT>].

57. Craig V. Hickman, Me. State Representative, *Fifty Years After Martin: Does the Arc of Our Moral Universe Bend Toward Justice?* (Jan. 15, 2018) [hereinafter Hickman, *Fifty Years After Martin*] (quoting Fannie Lou Hamer), <https://hickmaninthehouse.blogspot.com/> [<https://perma.cc/LXL9-L2MB>].

58. *Id.*

59. Nemitz, *supra* note 54 (quoting Craig Hickman).

60. Interview with Craig Hickman, Me. State Senator (Aug. 2, 2024) (on file with authors). He explained further:

a license was not required so long as I did not advertise my cheese and yogurt, which an inspector interpreted to include listing the items on a farm stand sign at the side of the road. The investment in infrastructure necessary to procure a license was cost prohibitive so before the Maine Food Sovereignty Act passed, the only way I could continue to sell milk and milk products to my neighbors was through word of mouth.

Id. Enacted in 2017, the Food Sovereignty Act “encourage[d] food self-sufficiency” for Mainers, explicitly authorizing municipalities to adopt ordinances governing “direct producer-to-consumer transactions” shielded from state “laws or implementing rules.” ME. STAT. tit. 7, §§ 281–286 (2017). It also represented a steppingstone to the constitutional Amendment. *See infra* note 73.

61. Andy O’Brien, *Senator Hickman’s Remarks on the History of Black Workers’ Struggles in Maine*, ME. AFL-CIO (Dec. 6, 2022) (quoting Martin Luther King, Jr.), <https://maineafclcio.org/news/senator-hickmans-remarks-history-black-workers-struggles-maine> [<https://perma.cc/2D5A-LVJ4>].

62. Hickman, *Fifty Years After Martin*, *supra* note 57.

Hickman combines commitments to individual liberty and criticisms of the carceral state with gratitude for state assistance: “As hard as they both worked,” referring to his parents who were low-wage city laborers, “and they worked *hard*, we needed food stamps in order to survive,” he explains.⁶³ “Access to wholesome food” must therefore be “a right for every citizen.”⁶⁴

Hickman’s advocacy thus combines a complex amalgam of positive entitlements, personal responsibilities, and negative rights for people in their identities as both producers and consumers.⁶⁵ But if Hickman and his allies struggled to infuse this complex and nuanced form of ethical and political liberalism into the plain language of the Amendment, they are in esteemed company. As Samuel Moyn has argued, over the course of the 20th century, the West’s most preeminent liberal thinkers “grew up in the presence of the most egalitarian and emancipatory state liberals ever built, but failed to defend it in theory, leaving it exposed and vulnerable in our time.”⁶⁶ What follows is a story about this vulnerability — a microcosm of lived political theory and history.

In his quest for a constitutional right to food, Hickman worked closely with Heather Retberg, a small-scale diversified farmer who, in 2010, when she began organizing around food sovereignty, was (and today remains) “an independent, officially ‘unenrolled’ in either major political party.”⁶⁷ She worked with other farmers and farm workers to write the earliest “Local Food and Community Self-Governance Ordinance” responding in part to the FDA’s defense of its ban on the interstate transport of raw milk and rule changes around poultry processing, but, more pointedly, she explained, to “the loss of democratic participation of farms and rural community needs” in legislative and regulatory processes.⁶⁸ She described feeling shocked by FDA statements such as “assertions that ‘[t]here is no absolute right to consume or feed children any particular food’ and ‘[t]here is no “deeply rooted” historical tradition of unfettered access to foods of all kinds.’”⁶⁹ For

63. Hickman, *Fifty Years After Martin*, *supra* note 57.

64. Craig Hickman, *Vote Hickman*, HICKMAN IN THE HOUSE (June 8, 2012, 6:29 AM), <http://hickmaninthehouse.blogspot.com/2012/> [<https://perma.cc/M9BV-P823>].

65. Córdova Montes et al., *Symposium*, *supra* note 2, at 107–12 (quoting Craig Hickman).

66. SAMUEL MOYN, *LIBERALISM AGAINST ITSELF: COLD WAR INTELLECTUALS AND THE MAKING OF OUR TIMES* 6 (2023).

67. Interview with Heather Retberg (May 2, 2024) (on file with authors).

68. *Id.* In particular, Retberg described how the Food Safety and Modernization Act of 2010 and the Wholesome Meat Act of 1967 reinforced federal control over food regulation as well as cooperative federalism in the form of partnerships between state and federal agencies. *Id.*

69. *Id.* (referring to *Farm-To-Consumer Legal Def. Fund v. Sebelius*, 734 F. Supp. 2d 668 (N.D. Iowa 2010); *Farm-To-Consumer Legal Def. Fund v. Sebelius*, No. C 10-4018, 2012 WL 219376 (N.D. Iowa Jan. 23, 2012)); see also Kennedy, *supra* note 41 (quoting the FDA).

her the idea that “an agency [can] insert themselves between a person who wants food and a person who grows food” cut at the core of “community relationships, personal health, small-farm survival and individual liberties.”⁷⁰ In 2015, Hickman approached Retberg to mount an “equal and opposite pull in the direction of people being able to choose what foods to eat,” and one that could be constitutionalized.⁷¹

Retberg and Hickman reached out to Joel Salatin to lend his voice to the movement.⁷² Salatin is a self-described “Christian libertarian environmentalist capitalist lunatic farmer.”⁷³ “If I had one thing to say to the USDA and the FDA,” he told viewers in a 2011 documentary criticizing food regulation as enabling the agro-industrial complex:

I guess my question would be why do you hate freedom so much? What is it about freedom, whether it’s the consumer’s freedom to choose the food that they want to drink, whether it’s me as a farmer choosing the customer who wants to buy my product, or how I want to make my product. What is it about freedom that is so horrendous to you that you are willing to take my property, take my life, take my customers, take my animals, take my land, that you are willing to do this in order for me to not have the freedom to even sell a porkchop to my neighbor?⁷⁴

Hickman quoted Salatin in his legislative testimony: “I can’t imagine a more basic human right, a more bipartisan issue, than protecting my right to choose my body’s food.”⁷⁵

Retberg and Hickman coupled freedom to make decisions about consumption with arguments to support small-scale farmers in food production and exchange in a moment when Maine needs more paths to economic prosperity. Many of Maine’s industries no longer exist, Retberg

70. Interview with Heather Retberg, *supra* note 67.

71. Interview with Heather Retberg, *supra* note 67. Hickman and Retberg had previously worked together beginning in 2013 to advocate for the Maine Food Sovereignty Act. *See supra* note 58.

72. Interview with Heather Retberg, *supra* note 67.

73. *About, THE LUNATIC FARMER* (2018), <https://www.thelunaticfarmer.com> [<https://perma.cc/DH5A-KZJF>] (last visited Oct. 28, 2024).

74. Gravitas Documentaries, *Farmageddon: Family Farms Providing Healthy Foods to Their Communities*, YOUTUBE 1:20:28 (Nov. 3, 2022), <https://www.youtube.com/watch?v=J5ZKZshwOtw> [<https://perma.cc/KU9W-NNFC>]. On “food freedom,” see generally JOEL SALATIN, EVERYTHING I WANT TO DO IS ILLEGAL (2007); Samuel R. Wiseman, *Liberty of Palate*, 65 ME. L. REV. 737, 746 (2013); Samuel R. Wiseman, *The Dangerous Right to Food Choice*, SEATTLE U. L. REV. 1299 (2015); David J. Berg, *Food Choice is a Fundamental Liberty Right*, 9 J. FOOD L. & POL’Y 173, 219 (2013); BAYLEN J. LINNEKIN, BITING THE HANDS THAT FEED US: HOW FEWER, SMARTER LAWS WOULD MAKE OUR FOOD SYSTEM MORE SUSTAINABLE (2016).

75. *Protect Food Freedom in Maine’s Constitution Now*, FOOD FOR ME.’S FUTURE (quoting Joel Salatin), <https://savingseeds.wordpress.com/2016/03/09/protect-food-freedom-in-maines-constitution-now/> [<https://perma.cc/8PPS-PTFV>] (last visited Oct. 28, 2024).

stressed, “but farming still does. People here . . . have personal experience with policies squeezing out small-scale local food production, from picking crab to smoking alewives to small dairies.”⁷⁶ She organized with people who saw the constitutional amendment as “a stick in the spokes of the industrial food machine” and as a way to counter “market protectionism” and “empower more local food production.”⁷⁷ And, indeed, some of the Amendment’s most forcible detractors were representatives of Maine’s industrial farming industries, such as the Maine Potato Board concerned that if home gardeners could grow and save potato “seeds” without restriction, they could spread blight and harm the industry.⁷⁸

Such arguments for self-determination easily crossed the aisle. Perhaps one of the greatest ironies of neoliberalism is that even if it insists that markets are now, in theory, free, virtually no ordinary person, and especially no ordinary farmer, gets to experience them that way in reality. Retberg’s testimony struck a chord. “[A]ccess to food,” she argued, “is increasingly legally controlled by corporate food monopolies. And when they sue, the law is often on their side.”⁷⁹ Republican Representative Billy Bob Faulkingham, a White Trump-supporting lobsterman, agreed entirely. When he became the Amendment’s new sponsor in 2021, he admonished Maine lawmakers about how

power is concentrated in the hands of a few rich individuals and corporations. Ever since the New Deal, the U.S.’s agricultural policy encouraged the consolidation of farmland. Today, Bill and Melinda Gates at 242,000 acres, are the U.S.’s largest private farmland owners . . . Will Monsanto own all the seeds and will we have gotten so far from our roots that we won’t even have natural seeds anymore?⁸⁰

The Amendment thus appealed widely for its promise to increase small producer autonomy. Indeed in 2015, Matthew Dana II, a non-voting representative of the Passamaquoddy Tribe in the House of Representatives,

76. Interview with Heather Retberg, *supra* note 67.

77. Interview with Heather Retberg, *supra* note 67. In her conversations with us, Retberg emphasized that in their advocacy work, she and her allies were always holding multiple purposes: enhancing access to nourishing food as an individual and community right rather than as corporate commodity; preserving traditional foodways; and enabling people to exchange food directly with each other. Interview with Heather Retberg, *supra* note 67.

78. *See Alert: MFB Opposes Question 3 on November 2nd*, ME. FARM BUREAU (Oct. 23, 2021), <https://www.mainefarmbureau.us/question3/> [<https://perma.cc/ZG6E-SB53>].

79. *Protect Food Freedom in Maine’s Constitution Now*, *supra* note 75 (quoting Heather Retberg).

80. *Hearing on L.D. 783 Before the H. Comm. on Agric., Conservation & Forestry*, 130th Leg., 1st Sess. H-270 (Me. 2021) [hereinafter Testimony of Rep. Faulkingham] (statement of Rep. Billy Bob Faulkingham), https://www.maine.gov/legis/lawlib/ldl/constitutionalamendments/elegrec_2021-05-19_hd_ph0269-0274.pdf [<https://perma.cc/8GJ8-V3AY>].

testified in favor of the measure precisely because it would shield the “traditional practice[s]” of the Passamaquoddy people “to hunt, fish, gather and grow our food.”⁸¹

Arguments for autonomy and choice in consumption also crossed the aisle. During his floor speech to promote the Amendment in 2021, Faulkingham read the same Salatin language Hickman had quoted years earlier to stress that “protecting my right to choose my body’s food” is a “bipartisan issue.”⁸² Former Democratic State Representative Brian Jones likewise saw the Amendment as a bulwark “against governmental overreach” that, among other things, could protect how “people consume food . . . as a means of communion with friends, family, or the community”⁸³ Other Mainers testified that they believed the Amendment would help proliferate the kind of food they could procure through face-to-face relationships lessening their dependence on government regulations that routinely fail to discipline the industrial food system.⁸⁴ One invoked the Bible on behalf of this form of liberty, trust, safety, and community.⁸⁵

On both sides, moreover, people grounded their arguments for freedom in American law and history. Maine’s food sovereignty activists had circulated Justice Stephen Field’s 1888 dissent in *Powell v. Pennsylvania*, objecting to a decision to uphold a state law that prohibited the use of “oleaginous substances” (i.e., margarine).⁸⁶ Like many other constituents, Mainer Betsy Garrold of the Green party testified in favor of the Amendment using Field’s language: “The right to procure healthy and nutritious food, by which life may be preserved and enjoyed, and to manufacture it, is among those

81. *Hearing on L.D. 783 Before the J. Standing Comm. on Agric., Conservation & Forestry*, 127th Leg., 1st Sess. (Me. 2015) (statement of Rep. Matthew Dana II, Passamaquoddy Tribal Rep.) (on file with authors). House Representative Henry John Bear, a Green Party member and representative of the Maliseet Tribe, also hoped the Amendment would sustain ancestral foodways. *See id.* (statement of Rep. Henry John Bear, Maliseet Tribal Rep.) (on file with authors). In 2019, the Penobscot Nation joined a statement in favor of the Amendment together with several Maine towns.

82. Testimony of Rep. Faulkingham, *supra* note 80, at H-270.

83. *Hearing on L.D. 783 Before the J. Standing Comm. on Agric., Conservation & Forestry*, 127th Leg., 1st Sess. (Me. 2015) (statement of Rep. Brian Jones) (on file with authors); *see also id.* (statement of Betsy Garrold) (on file with authors) (declaring that liberty is not just freedom from bodily restraint, but also includes “rights of self-identity and self-expression,” and stating that “you really are what you eat”).

84. *See, e.g., id.* (statement of Richard King) (on file with authors).

85. *Hearing on L.D. 783 Before the J. Standing Comm. on Agric., Conservation & Forestry*, 129th Leg., 1st Sess. (Me. 2019) (statement of Alan Lowberg) (on file with authors).

86. *Powell v. Pennsylvania*, 127 U.S. 678, 698 (1888) (Field, J., dissenting). The holding of *Powell* was ostensibly justified to protect consumers from injurious and fraudulent goods but was arguably in part motivated by the desire to foster the interests of dairy farmers against cheaper non-dairy butters.

inalienable rights which . . . no state can give, and no state can take away”⁸⁷ Others reached back further in time. For example, Bonnie Preston, a long-time food sovereignty advocate who organized with Retberg, explained, “[o]ur country was founded on the idea that life, liberty and the pursuit of happiness are inalienable rights.”⁸⁸ “Food is life,” she continued to explain — a fact so obvious to an agrarian society that the framers did not think to name it.⁸⁹ Jesse Watson, a permaculture designer who subscribes to progressive, self-described decolonial worldviews,⁹⁰ elaborated this logic: “Two hundred and forty-five years ago, the framers of the U.S. Constitution were all farmers who fed themselves. It never occurred to them to enunciate the right to food because most of society was still agrarian, and the right to grow your own food was assumed.”⁹¹ Faulkingham again agreed entirely: “I wholeheartedly believe that this would be the First Amendment in the United States Bill of Rights if the forefathers could’ve ever foreseen the potential we see today for government infringement of our food rights.”⁹² For good measure, he also grounded his defense in Christian natural law theory: “If you agree with me that our rights come from our Creator, then you should agree with me that we can’t rely on the fallacy of government or mankind to protect this God-given right unless we pass Question 3 this Nov[ember] 2.”⁹³

In sum, the Amendment’s supporters across the aisle argued that it advanced *liberty* of a kind so basic and universal it nearly went without saying. For this very reason, it would appear that at a time when few states

87. *Hearing on L.D. 783 Before the J. Standing Comm. on Agric., Conservation & Forestry*, 127th Leg., 1st Sess. (Me. 2015) (statement of Betsy Garrold) (on file with authors); *Powell*, 127 U.S. at 692 (Field, J., dissenting).

88. *Id.* (statement of Bonnie Preston) (on file with authors)

89. *Id.*

90. *See, e.g.*, Jesse Watson, *Decolonizing Permaculture*, RESILIENCE (Feb. 19, 2016), <https://www.resilience.org/stories/2016-02-19/decolonizing-permaculture/> [<https://perma.cc/KZL3-7GWG>].

91. Jesse Watson, Opinion, *Commentary: Question 3 a Common-Sense Effort to Secure the Right to Grow Our Own Food*, PORTLAND PRESS HERALD (Oct. 20, 2021), <https://www.pressherald.com/2021/10/20/commentary-question-3-a-common-sense-effort-to-enshrine-our-right-to-grow-our-own-food/> [<https://perma.cc/MVR9-FUME>].

92. Billy Bob Faulkingham, *Vote to Protect Your Food Freedom*, ELLSWORTH AM. (Oct. 22, 2021), https://www.ellsworthamerican.com/opinion/commentary/vote-to-protect-your-food-freedom/article_c501a5eb-bf37-5311-9689-5ea9d1c83ec3.html [<https://perma.cc/R58V-T9SX>].

93. *Id.* The right to food amendment was listed as “Question 3” on the ballot. In this statement, Faulkingham was building upon Republican Representative Justin Fecteau’s floor testimony a few months earlier, “Whether it is the theory of Evolution or of Creationism, the Right to Food is the Original Right of all living beings This isn’t a bill, it isn’t a resolution, it’s a manifesto of our Original Right.” *Hearing on L.D. 783 Before the J. Standing Comm. on Agric., Conservation & Forestry*, 130th Leg., 1st Sess. (Me. 2021) (statement of Rep. Justin Fecteau).

seem able to pursue bipartisan lawmaking, food connected people on a common ground: a desire for freedom that spans body and culture, market and home. But this shared embrace of food and freedom also left Hickman and his allies vulnerable to people who would insist upon a different set of boundaries between the state and the individual than the one they wanted.

In his pursuit of liberty, Hickman advocated for a state that would regulate less in the interests of large corporations and industries and more in and through the interests and needs of individuals and communities *and* simultaneously for a state that would ensure a basic minimum floor. Echoing transnational social movements, he explained:

Food sovereignty is the right of peoples to define their own food systems. It's not just "don't regulate me." It's not really about deregulation, [but rather] how our communities can talk to each other and build food systems that we define and that we regulate in ways that are very different from the regulations [designed for an industrial food system].⁹⁴

It is also simply the case, he insisted, that "the social contract requires that we don't let people starve."⁹⁵ Indeed, some of Hickman's prominent advocacy against hunger conjured a "strong and active role by state and federal governments" that could make more people eligible for SNAP (food benefits for low-income households and individuals), allocate resources to address gaps in public food assistance, invest in food systems infrastructure as well as strengthen "wage and workplace protections," raise the minimum wage to a "thriving wage," and invest in public transportation and affordable housing, childcare, and healthcare.⁹⁶

In 2019, when Hickman had re-introduced the Right to Food Amendment with Retberg's support, it included the following language bolstering these commitments: "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."⁹⁷ This expression proposed to make Maine's obligations to "fulfill" entirely explicit, to use international right-to-food language. But a caring state pursuing modest social and material reforms is not what other constituents of people envisioned when they discussed their own understandings of freedom.

94. Interview with Craig Hickman, *supra* note 60.

95. Interview with Craig Hickman, *supra* note 60.

96. ME. DEP'T OF AGRIC., CONSERVATION & FORESTRY, EVERYONE AT THE TABLE: MAINE'S ROADMAP TO END HUNGER BY 2030, at 27, 32, 34, 38 (2019) <https://legislature.maine.gov/doc/8096> [<https://perma.cc/V7EE-W6N9>]. Hickman was one of the main authors of the roadmap. *See id.* at 1.

97. H.B. 795, 129th Leg., 1st Sess. (Me. 2019), https://www.mainelegislature.org/legis/bills/bills_129th/billtexts/HP058301.asp [<https://perma.cc/RSR6-CAQN>].

Several ordinary Mainers testified before the legislature to oppose redistributive interpretations of the right to food. For example, one Maine resident had testified in favor of the Amendment back in 2015 because “[w]e have a right to choose what we eat.” And yet, she clarified, “[t]he phrase ‘right to food’ is, in my view, problematic, because I can foresee someone saying, ‘I have a right to food, and since I don’t have any and you do, you have to give me yours.’”⁹⁸ Another resident likewise expressed concern that the Amendment could be interpreted as obligating the government “to provide the food to us,” which is “antithetical to our constitution!”⁹⁹ He argued the proposed language “may also allow for control of food markets with the potential to set prices. This bill may allow for farm workers to sue farmers to provide livable wages, overtime and health benefits. This bill, in its worst form, could be about land redistribution.”¹⁰⁰ This resident nevertheless hoped that some state support for local business could lift people out of poverty; even on the libertarian right, boundaries between intervention and freedom can get fuzzy.¹⁰¹

During the 2019–2020 legislative session, Hickman relented: he submitted a floor amendment without the offending sentence that would have told people in Maine that they have the right not to suffer hunger. Language obliging the state to assure freedom from hunger, malnutrition and scarcity “always catches people,” he explained, especially given the then-governor’s efforts at “welfare reform,” which Hickman viewed as “just punitive to poor people.”¹⁰² Hickman decided that removing the positive language was politically necessary to secure votes for the Amendment. It was also, he explained, politically acceptable to him and his allies because they reasoned that a positive obligation is already included in the meaning of the right to food as it has developed in international law and jurisprudence.¹⁰³

98. *Hearing on L.D. 783 Before the J. Standing Comm. on Agric., Conservation & Forestry*, 127th Leg., 1st Sess. (Me. 2015) (statement of Joy Metcalf) (on file with authors). Likewise, goat farmer Richard King had worried that students and prisoners would sue the state arguing that their “choice of food” has not been respected. *Id.* (statement of Richard King) (on file with authors).

99. *Hearing on L.D. 783 Before the J. Standing Comm. on Agric., Conservation & Forestry*, 129th Leg., 1st Sess. (Me. 2019) (statement of John Harker) (on file with authors).

100. *Id.*

101. *Id.*

102. Interview with Craig Hickman, *supra* note 60.

103. Interview with Craig Hickman, *supra* note 60; Córdova Montes et al., *supra* note 3, at 249 (“This first clause [of the amendment stating that ‘[a]ll individuals have a natural, inherent and unalienable right to food’] means that food must be adequate, available, accessible, and sustainable according to the normative content of the international right to food.”); cf. Smita Narula, *Realizing the Right to Food in Maine: Insights from International Law*, 76 ME. L. REV. 165, 200 (2024) (“[T]he efficacy of the amendment may ultimately depend on the extent to which Maine chooses to operationalize the positive dimensions of the right.”). We should remind readers: the United States remains one of the few U.N. member

And yet history repeatedly illuminates a gap between what rights “mean” and what rights “do,” and how actors invariably vie to bend this gap towards their desired ends. When Faulkingham became the new sponsor of the Amendment in 2021 he described a right that was negative. He embraced the popular gun-food analogy that had emerged in the mid 2010s when the Amendment had first been introduced:

Just as the right to bear arms is protected by the Constitution, the Constitution does not provide arms to the people The same would be true of the Right to Food. The amendment would protect the right of the people to grow, raise food for their own use, but have no obligation to provide it to them.¹⁰⁴

Faulkingham used this argument as both analogy and literalization. He stressed that the right to food enacts the “right to hunt and fish,” a necessary counterweight to the dangers of animal rights movement: “I could give you a thousand examples of the dangers our farming, hunting and fishing rights face” from organizations such as PETA and the Humane Society.¹⁰⁵ These sorts of arguments motivated a growing constituency of people, such as the Maine Sportsmen’s Alliance¹⁰⁶ and other self-described “conservative law-and-order” types to vocally support the Amendment for hunting rights.¹⁰⁷

In 2021, 61% of Maine voters expressed their support for the Amendment drafted as follows:

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

states that never ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR). See Ann M. Picard, *The United States’ Failure to Ratify the International Covenant on Economic, Social, and Cultural Rights*, 13 ST. MARY’S L. REV. ON RACE & SOC. JUST. 231 (2010).

104. Testimony of Rep. Faulkingham, *supra* note 80, at H-270.

105. Faulkingham, *supra* note 92.

106. The Sportsmen’s Alliance is a nonprofit organization whose “mission is to protect and advance America’s heritage of hunting, fishing and trapping by uniting sportsmen to protect against legal and legislative attacks by the animal-rights movement.” The Alliance has organized against efforts to “establish background checks for private gun purchases.” SPORTSMEN’S ALL., *What We Do*, <https://sportsmensalliance.org/what-we-do/> [<https://perma.cc/9D9M-H9S4>] (last visited July 9, 2024).

107. In practice, in its first case to interpret the Amendment, the Maine Supreme Judicial Court held that the term “harvest” included hunting, but that a Sunday hunting ban nevertheless survived under the Amendment. See *Parker v. Dep’t of Inland Fisheries & Wildlife*, 314 A.3d 208, 216–17 (Me. 2024).

private property rights, public lands or natural resources in the harvesting, production or acquisition of food.¹⁰⁸

Many of the Amendment's detractors articulated different ideas about what the state should provide and restrain and what should be left to private individual decisions. For example, animal rights groups vehemently argued that the Amendment would exempt "food producers and and/or hunters, trappers, and fisherman . . . from animal welfare and cruelty laws" by granting them "a constitutional right to 'raise' and 'harvest' those animals as the food 'of their own choosing.'"¹⁰⁹ Some worried about the future of food safety regulations, and others about the future of regulations designed to protect Maine's large-scale agricultural industries. People who wanted to oblige the state to alleviate hunger found the Amendment especially lacking. For example, Rebecca Graham of the Maine Municipal Association objected to how the Amendment's "language elevates personal choice, not availability, not nutritional adequacy, not accessibility nor sustainability."¹¹⁰ Or for more basic rights critique, as one ordained minister testified: "I do not know how the enactment of this bill will help the many poor people I deal with. What they need is food, and not necessarily a statement that they have a natural and unalienable right to food."¹¹¹ Sociologist and op-ed writer Michael Haedicke argued similarly: "The barriers [Mainers] face are economic ones, not legal ones."¹¹² And the legal barriers some people *do* face, he continued, are anyhow not addressed by the Amendment which explicitly leaves the existing allocation of "private property rights, public lands [and] natural resources" (to quote the Amendment) as fixed and

108. ME. CONST. art. I, § 25.

109. *Hearing on L.D. 783 Before the J. Standing Comm. on Agric., Conservation & Forestry*, 130th Leg., 1st Sess. (Me. 2021) (statement of Katie Hansberry, Me. State Dir., Humane Soc'y) (on file with authors).

110. Sawyer Loftus, *The Battle Over Maine's 'Right to Food' Could Be Waged in Cities and Towns*, BANGOR DAILY NEWS (Nov. 15, 2021), <https://www.bangordailynews.com/2021/11/15/politics/the-battle-over-maines-right-to-food-could-be-waged-in-cities-and-towns-joam40zk0w/> [https://perma.cc/L7RE-3F63]; see also Opinion Contributor, *Question 3 Is Unpalatable Lawmaking*, BANGOR DAILY NEWS (Oct. 26, 2021), <https://www.bangordailynews.com/2021/10/25/opinion/opinion-contributor/question-3-is-unpalatable-lawmaking/> [https://perma.cc/MR8Q-2D5Y]. Rebecca Graham is on the Advocacy & Communications staff of the State and Federal Relations Department at Maine Municipal Association. *Advocacy Staff*, ME. MUN. ASS'N, <https://www.memun.org/Advocacy-Communications/Staff> (last visited Oct. 28, 2024).

111. *Hearing on L.D. 783 Before the J. Standing Comm. on Agric., Conservation & Forestry*, 127th Leg., 1st Sess. (Me. 2015) (statement of Jon Olson, Exec. Sec'y, Me. Farm Bureau) (on file with authors).

112. Opinion Contributor, *Question 3 Sidesteps Important Issues Around Hunger in Maine*, BANGOR DAILY NEWS (Oct. 19, 2021) [hereinafter *Question 3 Sidesteps*] (quoting Michael Haedicke), <https://www.bangordailynews.com/2021/10/19/opinion/opinion-contributor/question-3-sidesteps-important-issues-around-hunger-in-maine/> [https://perma.cc/KNB6-QHGJ].

settled.¹¹³ As such, Haedicke continued, the Amendment “doesn’t consider how the historical loss of Indigenous territorial sovereignty may restrict access to culturally important food sources for the Penobscot Nation and other Indigenous peoples . . . this dimension of the right to food is off the table.”¹¹⁴

There is rich critical literature that asks how the global food sovereignty movement’s demands for rights are both shaped in response to and deradicalized by the liberal democratic political systems that rights must necessarily operate in.¹¹⁵ Members of the global food sovereignty movement working from the political left — with an “ambivalent relationship to rights discourse”¹¹⁶ — often articulate this paradox as a challenge: can “liberal legality . . . open up political spaces through which they could then pursue more radical claims[?]”¹¹⁷ More specifically, could rights be used not simply to extend some new entitlements to producers and consumers within a liberal democracy, but also more radically to question basic assumptions about how liberal political systems should exercise power? Canfield shows ethnographically how “food sovereignty movements selectively draw on the logics of rights to create a political space through which to translate their own prefigurative practices of self-representation and to democratize global governance,” for instance by employing the language of rights, but refusing the principle of formal equality.¹¹⁸

It would seem, however, that progressive food sovereignty activists in the United States face a different challenge as they turn to rights language and endeavor to compromise across the aisle. When compared with its origins in international law — and its subsequent redistributive interpretations — the right to food in an American context stands, rather stunningly, to become a call for non-interference. Indeed, in 2024, Republican Congressman Thomas Massie, who is the Chairman of the Regulatory Reform, Antitrust,

113. *Id.*; H.B. 795, 129th Leg., 1st Sess. (Me. 2019), https://www.mainelegislature.org/legis/bills/bills_129th/billtexts/HP058301.asp [<https://perma.cc/RSR6-CAQN>].

114. *Question 3 Sidesteps*, *supra* note 112 (quoting Michael Haedicke).

115. *See generally* AMY TRAUGER, WE WANT LAND TO LIVE: MAKING POLITICAL SPACE FOR FOOD SOVEREIGNTY (2017); ANNIE SHATTUCK ET AL., THE POLITICS OF FOOD SOVEREIGNTY: CONCEPT, PRACTICE AND SOCIAL MOVEMENTS (2018); Alberto Alonso-Fradejas et al., *Food Sovereignty: Convergence and Contradictions, Conditions and Challenges*, 36 THIRD WORLD Q. 431 (2015); WITTMAN ET AL., *supra* note 9; Rajeev C. Patel, *Food Sovereignty: Power, Gender, and the Right to Food*, PLOS MED., June 2012; Raj Patel, *Food Sovereignty*, 36 J. PEASANT STUD. 663 (2009); Christina M. Schiavoni, *The Contested Terrain of Food Sovereignty Construction: Toward a Historical, Relational and Interactive Approach*, 44 J. PEASANT STUD. 1 (2016).

116. Fakhri, *supra* note 12, at 3.

117. CANFIELD, *supra* note 19, at 195.

118. CANFIELD, *supra* note 19, at 153, 179.

and Administrative Law Subcommittee, proposed a “right to food” amendment to the U.S. Constitution that states: “The right of the people to grow food and to purchase food from the source of their choice shall not be infringed and Congress shall make no law regulating the production and distribution of food products which do not cross state lines.”¹¹⁹ Massie, who is also an organic cattle farmer, has criticized the federal regulation of organic labeling. He reiterates many of the arguments at play in Maine when he advocates for federal constitutional change: that Democrats and Republican alike want to choose what they eat; that the right to food was “so obvious [to the founding fathers] that they didn’t put it in the Constitution”; and that people should “take personal responsibility for [their] own health.”¹²⁰ Massie’s supporters now imagine the end of *Wickard v. Filburn*, a New Deal era Supreme Court case that enhanced federal regulatory power over interstate commerce, which would substantially reduce Congress’s ability to regulate food.¹²¹

To be sure, then, there are more strands to this story in Maine and beyond. There are echoes here of a longer American tradition of agricultural exceptionalism with its longstanding suspicions of federal regulation.¹²² There is also a conflict at play about how people interpret and claim the right to food in their identities as producers versus consumers and as members of rural versus urban spaces. But just as fundamentally it would seem many rights-holders in Maine and beyond envision themselves as subjects only liberated from state power desirous of living according to an ethic of personal and community responsibility. In this sense, Maine’s negotiated compromise around the right to food is typical of American liberalism, which produces mutually acceptable solutions to pluralist dilemmas by evacuating an ethos of redistributive egalitarianism.

119. See, e.g., Kennedy, *supra* note 11 (quoting Thomas Massie).

120. Thomas Massie, *Rep. Thomas Massie on One America New: “We Need a Food Declaration of Independence”* 4/11/2024, YOUTUBE 01:35 (May 3, 2024), <https://www.youtube.com/watch?v=cnveGN3j0vU> [<https://perma.cc/84UR-HM7S>]. Massie argued that “every person should be able to sign a food declaration of independence that says ‘okay, I’m going to take responsibility for my own health, and I don’t need the government to tell me what I can and can’t buy’” See *id.* at 03:55.

121. See 317 U.S. 111 (1942); see also Kennedy, *supra* note 11.

122. See, e.g., Jessica Guarino, *The Injustices of Agricultural Exceptionalism: A History and Policy of Erasure*, 27 DRAKE J. AGRIC. L. 321, 322 (2023); Guadalupe T. Luna, *An Infinite Distance?: Agricultural Exceptionalism and Agricultural Labor*, U. PA. J. LAB. & EMP. 487, 489 (1999).

CONCLUSION

That a right to food has finally been constitutionalized in the United States has inspired widespread celebration among human rights proponents.¹²³ It has also launched a national conversation as several other states contemplate the recognition of a right to food in their jurisdiction proposing constitutional amendments.¹²⁴ Some echo Maine’s adopted language,¹²⁵ while others recall Hickman’s 2019 proposal to include an explicit, positive “right to be free from hunger.”¹²⁶ For many of the Maine Amendment’s progressive supporters, this is accomplishment enough, they have established a wedge in the door to give people the tools to begin to remake food systems in directions that are more equitable and democratic. From this perspective, the materiality and universality of food — that it makes and transforms all bodies and minds, from the physical work of growing and preparing it to its biological ingestion and cultural significance — grounds compromises that can barely be imagined in most other spheres of life.

One must still ask, however, about the logics that ground a compromise. Republican lawmakers in Maine and beyond are endeavoring to turn a basic social and economic right — what in other countries has become at least a formal obligation upon states to minimally ensure that no person suffers hunger — into a rallying call to demand that states and corporations stop ordering the lives of ordinary Americans. Thus far, lawyers’ incipient efforts to use Maine’s newly institutionalized right have done so first to challenge hunting regulations¹²⁷ and then to challenge food safety regulations.¹²⁸

123. See generally Córdova Montes, *International Human Rights Law*, *supra* note 2; Córdova Montes et al., *Symposium*, *supra* note 2; Desrochers & Lemieux, *supra* note 2; Wendy Heipt, *Implementing the RTF in America*, 22 CONN. PUB. INT. L.J. 53 (2022).

124. See *supra* note 10 and accompanying text.

125. See, e.g., S.B. 902, 113th Gen. Assemb., Reg. Sess. (Tenn. 2024) <https://fastdemocracy.com/bill-search/tn/113/bills/TNB00050319/> [<https://perma.cc/XU74-VMPC>] (proposing a state constitutional amendment that copies Maine’s language).

126. See, e.g., S.J. Res. 11, 90th Gen. Assemb., Reg. Sess. (Iowa 2023), <https://www.legis.iowa.gov/docs/publications/LGI/90/SJR11.pdf> [<https://perma.cc/G74V-92HQ>] (proposing a constitutional amendment in Iowa that is very similar to the original Maine amendment introduced by Hickman); S.B. 628, 2023–2024 Leg., Reg. Sess. (Cal. 2023), <https://legiscan.com/CA/bill/SB628/2023> [<https://perma.cc/D5VJ-JZ35>] (proposing to declare that it is an “established policy of the state that every human being has the right to access sufficient affordable and healthy food”).

127. See *Parker v. Dep’t of Inland Fisheries & Wildlife*, 314 A.3d 208, 216–17 (Me. 2024).

128. See Suzanne Sisk, *Fighting for Food Freedom in Maine: FTCLDF Lawsuit Asserts the State of Maine Has Violated the Food Sovereignty Act*, FARM-TO-CONSUMER LEGAL DEF. FUND (Apr. 27, 2023), <https://www.farmtoconsumer.org/blog/2023/04/27/fighting-for-food-freedom-in-maine-ftcldf-lawsuit-asserts-the-state-of-maine-has-violated-the-food-sovereignty-act/> [<https://perma.cc/9U4V-NEMV>] (recounting that the Farm-to-Consumer Legal Defense Fund has sued the Maine Department of Health and Human Services on the

We should stress: the Maine case differs from what legal scholars Rosalind Dixon and David Landau call “abusive constitutional borrowing” and Gráinne De Búrca and Katharine Young, “the misappropriation of human rights.”¹²⁹ By abusive constitutional borrowing, Dixon and Landau “mean the appropriation of liberal democratic constitutional designs, concepts, and doctrines in order to advance authoritarian projects.”¹³⁰ As for de Búrca and Young, they argue that people misappropriate rights when they use them “in the service of ends which are exclusionary, repressive or anti-pluralist in character, highly retrogressive or reversing of previous commitments, and evasive of external monitoring or accountability.”¹³¹ This is not what happened in Maine, where the bipartisan adoption of a right to food instead illustrates the type of pluralistic agreement cherished by a contemporary American liberal tradition, including when (or precisely because) it evades commitments to basic welfare.

But as we witness the rise of the illiberal forms of populism and authoritarianism that Dixon, Landau, de Búrca, Young, and others describe, it is surely also the case that this predominant American liberal tradition is vulnerable as well. Reminding readers of the progressive, even radical, origins of liberal theory, Moyn recently ventured that “the task for liberals in our time is to imagine a form of liberalism that is altogether original.”¹³² Hickman, Retberg, and their allies have sought to use food — with its intimate connections to bodily autonomy as well as to social reproduction and political-economic systems — to try and imagine bits of liberalism anew through ordinary electoral politics. As we have seen, their nuanced vision encountered resistance from people who hold fast to ideas of negative freedom that have shaped American sensibilities from the mid-20th century onwards. And yet their activism also suggests a political hope worth emphasizing in conclusion. It is one that takes seriously just how constrained and controlled many people feel living today, ironically, under conditions of late neoliberalism and hence how desirous people are of *freedom*. It therefore limns a different world in which people can act democratically and meaningfully to shape the food policy that governs their lives and to shape the complex interdependencies of production, consumption, and living without hunger. And in so doing, it is also a political hope that insists that

ground that its threats to fine a home food business and a commercial kitchen for operating without food licenses violated, among others, the newly constitutionalized right to food).

129. See generally ROSALIND DIXON & DAVID LANDAU, *ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY* (2021); Gráinne de Búrca & Katharine G. Young, *The (Mis)Appropriation of Human Rights by the New Global Right: An Introduction to the Symposium*, 21 INT’L J. CONST. L. 205 (2023).

130. DIXON & LANDAU, *supra* note 129, at 3.

131. De Búrca & Young, *supra* note 129, at 205.

132. MOYN, *supra* note 66, at 176.

conserving and reinventing a liberal future require disestablishing deep inequalities of power.