

THE LEGAL IMPLICATIONS OF QUESTION 3: THE “RIGHT TO FOOD”

With the passage of LD 95 in the Maine legislature, Mainers will soon be deciding in the November election whether to amend the state constitution to include a “right to food.” The Amendment, if passed, would state:

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

The proposed Amendment raises significant questions regarding its ultimate effects on the state’s current legal landscape, as well as future local government and state legislative efforts to address animal and public health and welfare concerns, environmental protection, local land use authority and a host of other known and potential impacts of the agricultural, hunting and fishing and food production activities in the state. Unfortunately, given the ambiguity of the Amendment as written and the reliance on future court rulings to establish legal parameters, Question 3 raises many more open questions than it provides firm answers.

Despite the uncertainty of what the precise future impacts of a “Yes” vote on Question 3 might be, this document is an attempt to provide some clarity regarding the possible outcomes of amending the state constitution as proposed.

Does The Amendment Really Provide Hungry Mainers With A Legal “Right To Food”?

No. Labelling the Amendment as a right to food effort is, at best, misleading. The Amendment does nothing to put food on the plates of the over 12 percent of Mainers and the over 44,000 children in the state facing hunger.¹ A “Yes” vote on Question 3 only provides the people of the state with a right that Mainers already enjoy: to grow, produce and consume food of their choosing. Furthermore, there are laws and policies currently in place that, unlike the Amendment, actually do work to ensure that people have a right and access to food. The Maine Food Sovereignty Act, Title 7 M.R.S.A. §§ 281-286, establishes the policy of the state to “[i]mprove the health and well-being of citizens of this State by reducing hunger and increasing food security through improved access to wholesome, nutritious foods by supporting family farms and encouraging sustainable farming and fishing.”²

That policy fosters real options for Mainers who want to support feeding the state’s hungry. Just this year, Maine became only the second state in the country to pass a law that requires schools

¹ <https://www.feedingamerica.org/hunger-in-america/maine>

² Title 7 M.R.S.A. § 283(3)

to provide free meals to all students, regardless of their family's income.³ Another bill introduced last session includes emergency funding for food banks and soup kitchens in the state.⁴

These are the kinds of policies and measures that put food into the stomachs of hungry Mainers, unlike the “right to food” amendment now being considered.

How Would the Amendment Affect Current Laws Regarding Food Production?

This constitutional amendment will shift power away from lawmakers and citizens and empower a small number of judges to determine the future of food policy in the state.

While state and local governments are empowered to exercise their authority to craft and enact laws and policies for the general welfare of people, those powers become much more restricted once a right is constitutionally guaranteed. Under established Supreme Court precedent, courts examine laws enacted by legislators that infringe on constitutional rights using a heightened standard of review. Often that review is conducted under a “strict scrutiny” lens where fundamental constitutional rights can only be limited by laws, regulations and ordinances if there exists a “compelling governmental interest” in limiting the activity and the law is narrowly tailored to achieve that interest.⁵

Though through our separation of powers approach to government, judges are always the final arbiter of the legality of any law enacted by legislators, making the right to food a constitutional right opens up the vast array of laws and regulations that touch on food production to elevated judicial scrutiny, representing a judicial empowerment that could have dire consequences on a number of fronts. While Maine’s legislators are elected to office by citizens to serve two-year terms with eight-year term limits, all judges in Maine at the Supreme, Appellate and District Court levels are appointed by the Governor for repeated seven-years terms. The shift of power in deciding agricultural policy and laws in the state of Maine from accountable, elected officials to largely unaccountable, appointed members of the bench sets a dangerous precedent that could have severe impacts on public health, safety and welfare for Mainers in the future.

What Kind Of Laws Might Be Impacted If We Amend The Constitution?

While doing nothing to sate hunger, adding the Amendment to the state constitution will undoubtedly open the floodgates for legal challenges to a whole host of current animal, public and environmental health and safety laws, local ordinances and regulatory controls that have any - even minor - impacts on food production in the state. It’s impact may be felt across a number of state and local laws that have been enacted over many decades of informed policy-making on everything from animal welfare standards, environmental protections, drinking water protocols, local zoning ordinances and public health safeguards.

³ HP 0130 / LD 167 An Act to Prevent Shaming in Maine’s Pubic Schools
https://legislature.maine.gov/legis/bills/bills_129th/chapters/PUBLIC54.asp

⁴ HP 955 House of Representatives, March 30, 2021
<http://legislature.maine.gov/legis/bills/getPDF.asp?paper=HP0955&item=1&snm=130>

⁵ See *Korematsu v. United States*, 323 U.S. 214 (1944)

Many of the provisions contained in Title 7 of the Maine Revised Statutes, which provides a number of balanced, commonsense laws and policies related to Agriculture and Animals, will suddenly be subject to legal challenges that will cost state taxpayers a considerable amount of money to defend.

For example, Title 7 M.R.S.A. § 4020 currently prohibits confining a sow or a calf in a manner that prevents the animal from lying down, standing up and fully extending its limbs and turning around freely.⁶ Should this Amendment be enacted, those who wish to inhumanely confine these animals may claim that the § 4020 prohibitions are a violation of their constitutional right to raise animals for food in the ways that they prefer.

Similarly, Title 7 M.R.S.A. §§ 4201-4214, the state's Nutrient Management Act, requires certain livestock producers and other agricultural operations to obtain and comply with nutrient management plans that limit the amount and location of manure and other fertilizers placed on croplands to grow food.⁷ These limits are critical to the health and sustainability of local waterways that would be powerless to prevent individuals using unsustainable and dangerous practice to flood communities with waste and other effluent.

Responding to the concerns of the people in their communities, municipalities typically enact zoning and other land use ordinances to protect public health and safety and property values. These local measures often involve the creation of agricultural districts to help mitigate problems between farms and non-farming neighbors while also limiting certain activities in residential zones. As an example, Article IV of the City of Brunswick's municipal code imposes reasonable standards on the keeping of domesticated farm animals, including a 2-acre minimum lot area and a prohibition on outdoor slaughter and processing.⁸ By amending the state constitution as proposed by Question 3, these and other local land use restrictions will come under attack and, potentially overturned, removing many of the public health safety rails now in place at the municipal level.

Not only will current laws be challenged and, in some cases, struck down, but enacting this Amendment will also have a chilling effect on the willingness of legislators to propose and pass new legislation that touches on food production.

Don't Mainers Already Have the Right to Raise Their Own Food?

Yes. Maine is already a very food-friendly state with a number of laws to promote and protect the rights of people to grow and raise their own food and provide the same protections that Amendment proponents claim the Amendment preserves.

The Maine Agricultural Protection Act. Title 7 M.R.S.A. §§ 151-163, shields farming operations, including livestock facilities, from being subject to the state nuisance laws that attach to virtually

⁶ Title 7 M.R.S.A. § 4020(2)(A) and (B)

⁷ Title 7 M.R.S.A. § 4204(1)

⁸ Brunswick Code of Ordinances, Chapter 4, Article III, Sec. 4-63

every other industry in the state. In addition to MAPA, there are many other state laws and policies implemented, as well as local ordinances enacted across the state, to allow agricultural operations and food production activities to take place without interference, including Registration of Farmland laws, the Voluntary Municipal Farm Support Program, the Farm and Open Space Tax Law and the Conservation Easement Law.⁹

There is simply no need to amend the state’s constitution in the manner that Question 3 proposes to provide Mainers with the right to grow food. The Amendment is, at most, an empty gesture and will create substantial regulatory uncertainty around food production in the state as decades of costly lawsuits play out.

Doesn’t the Language Around ‘Trespassing, Theft, Poaching or Other Abuses of Private Property Rights, Public Lands or Natural Resources’ Provide Protections Against Harmful Food Production Activities?

While that language arguably places some limitations on the types of food-raising activities that Mainers can engage in, the terms used are so vague and undefined that no one can predict what practices will be constitutionally protected and what “abuses” will be tolerated. It will be up to the courts to decide, on a case-by-case basis, after many years of nonstop litigation (and the expenses, including taxpayer money, and resources those efforts entail) to determine what constitutes “abuses” and what protective restrictions are left to stand. And this will be an ever-evolving development as new cases are brought and new rulings emerge, creating a landscape of legal uncertainty for both food producers and those who face the impacts of irresponsible food production practices.

Criminal and penal laws enacted by legislative branches of government are regularly struck down by courts under the “vagueness doctrine,” which holds that it is unjust to hold people liable under statutory language that is too vague for the average citizen to reasonably understand what conduct is prohibited under the law. While the Amendment proposed is not a law and not technically subject to the “vagueness doctrine,” the same claim of vagueness can be made here; we should not allow vague amendment language to be added to the constitution when it could not stand as a state law because of vagueness.

Analysis courtesy of:

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⁹ See https://www.maine.gov/dacf/municipalplanning/technical/farmland_ordinances.shtml