

## Implementing the RTF in America

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Implementation of human rights principles are generally within the purview of national governments, who sign on to and ratify international treaties that provide for their obligations and responsibilities. As the United States has adopted few international human rights treaties, increasing numbers of state and local governments have decided not to wait for national action and have adopted human rights principles on their own. Most recently, this has occurred in the Right to Food realm, where the past year has seen several U.S. states seeking to adopt this particular human right through both legislative and constitutional avenues. This essay explains the Right to Food and what it means. It then illustrates how this right has been adopted and litigated internationally and describes the phenomenon of subnational human rights implementation in the United States. The essay then describes the recent push for constitutional adoption of the Right to Food in several U.S. states and suggests examples of how this right can best be implemented and then practically utilized by advocates.

### I. THE RIGHT TO FOOD

The Right to Food (“RTF”) movement holds that hunger is a human rights violation and not an inevitable systematic by-product.<sup>1</sup> Although

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<sup>1</sup> While the term ‘right to food’ most correctly describes the state constitutional push this article focuses on, ‘food sovereignty’ is an aligned movement whose definition often overlaps with RTF principles. The term ‘food sovereignty’ was introduced at the 1996 World Food Summit by Via Campesina, an international movement founded in 1993 working on behalf of peasant agriculture. Although the term is now in wide-spread use with numerous definitions, as forwarded by Via Campesina it includes free access to seeds and the rights of consumers to be able to decide what they consume and by whom it is produced. LA VIA CAMPESINA INT’L PEASANTS’ MOVEMENT, <https://viacampesina.org/en> (last visited Oct. 10, 2021); Tina D. Beuchelt & Detlef Virchow, *Food Sovereignty or the Human Right to Adequate Food: Which Concept Serves Better as International Development Policy for Global Hunger and Poverty Reduction?*, 29 AGRIC. & HUM. VALUES 259, 260–61 (2012); *Declaration of Nyéléni*, NYÉLÉNI: INT’L MOVEMENT FOR FOOD SOVEREIGNTY (Feb. 27, 2007) <https://nyeleni.org/en/declaration-of-nyeleni>; Jessica Clendenning et al., *Food Justice or Food Sovereignty? Understanding the Rise of Urban Food Movements in the USA*, 33 AGRIC. & HUM. VALUES 165, 167–69 (2016). The term ‘food security’ is also distinguishable from the RTF, as it is not a legal concept and does not confer legal obligations.

many people assume the RTF confers an affirmative obligation on the government to provide sufficient food directly to each person, rarely is this the case.<sup>2</sup> The RTF movement looks at food determination as a human right dependent on economic and political inclusion, and seeks to ensure that conditions allow for citizens to access adequate amounts of appropriate and available food themselves.<sup>3</sup> In other words, the RTF is a person's right to feed themselves, through their own efforts, with dignity. This right speaks to more than just the right to an adequate number of calories to sustain life: it is the right to enough of the types of food that ensure good health, dignity and well-being in a sustainable fashion. In order to fulfill this mandate, governments must afford the conditions that allow full realization of the RTF and ensure that this support does not interfere with the realization of other basic human rights.<sup>4</sup>

There is no internationally agreed upon model language for the RTF,<sup>5</sup> and assorted treaties, constitutions and international bodies have used different definitions in explaining the right.<sup>6</sup> I employ what I have termed

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<sup>2</sup> Certain events and subpopulations do confer such an obligation. For example, as the state is the only source of food for people who are incarcerated, prisoners have a right to safely receive nutritionally adequate food that must comport with the Eighth Amendment to the Constitution. U.S. CONST. amend. VIII. Lawsuits over prison food have focused on religious dietary needs, food safety and food discipline, most notoriously over 'nutraloaf,' a composite food made up of rotating ingredients fed to inmates as punishment. Complaint at 14, *Thomas v. Clarke*, No. 2:17-cv-01128 (E.D. Wis. Aug. 14, 2019) (alleging that the nutraloaf served at the Milwaukee County Jail was so dry that the dust from the loaf set off the fire alarm); *Prude v. Clarke*, 675 F.3d 732, 733, 735 (7th Cir. 2012) *reh'g denied* (Apr. 19, 2012); *See also* the Free Exercise Clause to the First Amendment, U.S. CONST. amend. I; Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc-c-5 (2012); Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb-bb-4 (2012); MASS. CONST. art. XLVII ("The maintenance and distribution at reasonable rates, during time of war, public exigency, emergency or distress, of a sufficient supply of food . . . are public functions[.]").

<sup>3</sup> While the RTF gives people the right to meet their own needs as expanded more fully below, the government must provide the context in which food can be grown or procured, such as access to land, seeds, a sustainable environment, clean water, economic stability, transportation and purchasing choices. THE FOOD & AGRIC. ORG. U.N. & U.N. HIGH COMM'R FOR HUM. RTS., THE RIGHT TO ADEQUATE FOOD 3-5, <https://www.ohchr.org/Documents/Publications/FactSheet34en.pdf>.

<sup>4</sup> This expression of the RTF as a human right comports with a particularly well-articulated definition of human rights in general: that they "express deep ethical and moral values, which are similar to principles held by many religions concerning the way that people should treat one another. What distinguishes human rights from ethical and moral principles, however, is that they are entitlements, and as such, they consist of enforceable claims against governments." ROLF KÜNNEMAN & SANDRA EPAL-RATJEN, THE RIGHT TO FOOD: A RESOURCE MANUAL FOR NGOS 23 (2004).

<sup>5</sup> *See* THE FOOD & AGRIC. ORG. U.N., GUIDE TO CONDUCTING A RIGHT TO FOOD ASSESSMENT, RIGHT TO FOOD METHODOLOGICAL TOOLBOX Book 1 (2009) (noting no model can account for each state's context, history, or systems, but discussing key elements).

<sup>6</sup> For example, the U.N. Special Rapporteur on the RTF defines it as the "right to have regular, permanent and unrestricted access — either directly or by means of financial purchases — to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions to which the consumer belongs, and which ensure a physical and mental, individual and collective, fulfilling and dignified life free of fear." U.N. Special Rapporteur on the Right to Food, *About the Right to Food and Human Rights* (2022), <https://www.ohchr.org/en/special-procedures/sr-food/about-right-food-and-human-rights>. "The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its

the ‘4As’ to most clearly define the RTF. The ‘4As’ are: (1) Availability, (2) Accessibility, (3) Adequacy, and (4) Appropriateness.<sup>7</sup> Availability means that individuals are able to produce, procure, and/or purchase the amount and types of food they need and want. Accessibility means that there is sufficient infrastructure, physical and economic, to allow individuals physical proximity to the food both required and desired, and the resources to purchase that food without sacrificing other basic needs. Adequacy means that each person is getting, and will continue to get, enough calories, nutrients, and micronutrients to lead healthy and safe lives. This means that available and accessible food must do more than look good and cost little. Appropriateness means that individuals are able to access food relating to their cultural preferences in a dignified manner and that food systems are environmentally sustainable over time.

The 4As emphasize that the RTF is one part of a human rights framework—an interdependent element whose achievement rests on the realization of other rights.<sup>8</sup> This is because human rights are so integrally intertwined that the full realization of any one of them depends on the progress of others.<sup>9</sup> The RTF asks that the government refrain from actions that stymie realization of the RTF and act in a manner that will facilitate realization of the right. It also means that the government will step in to ensure that third party actors are not permitted to undermine the right.<sup>10</sup> RTF

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procurement.” Comm. on Econ., Soc. & Cultural Rts., CESCR General Comment 12: The Right to Adequate Food, U.N., ¶ 6, Doc. E/C.12/1999/5 (1999) (general comments do not have the same force as the ICESCR itself, but they are an authoritative guide for treaty understanding and implementation).

<sup>7</sup> Much of this section appears in my case study looking at the RTF and Maine’s path to legislative passage of its RTF constitutional amendment. Wendy Heipt, *The Right to Food Comes to America*, 17 J. FOOD, L. & POL’Y 111, 112 (2021).

<sup>8</sup> Many international instruments recognize that using a human rights framework when discussing the RTF implicates multiple other rights. For example, the ART recognizes the RTF is connected to the rights to health, housing, and social security. See generally G.A. Res. 2200A (XXI) at art. 11, International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966). The Association for Cooperation and Development has written on the connections between the RTF and governance of land, fisheries and forests. ASS’N FOR COOP. & DEV. (ACTUAR), INTERCONNECTIONS AND RECIPROCITY BETWEEN THE RIGHT TO FOOD AND LAND TENURE RIGHTS 4–5 (2012). The U.N. 2030 Agenda for Sustainable Development is built around seventeen Sustainable Development Goals (SDGs) which recognize that ending hunger is inextricably linked with ending other deprivations and with strategies promoting economic growth and justice. LIU ZHENMIN, UNDER-SECRETARY-GENERAL FOR ECONOMIC AND SOCIAL AFFAIRS, THE SUSTAINABLE DEVELOPMENT GOALS REPORT 2018, INTERLINKED NATURE OF THE SUSTAINABLE DEVELOPMENT GOALS (2018), <https://unstats.un.org/sdgs/report/2018/interlinkages/>.

<sup>9</sup> To illustrate at its extreme, starvation will essentially nullify the fulfillment of all other rights. Less dramatically, a lack of sufficient food hinders the full realization of other rights. K. Heather Devine, *Vermont Food Access and the “Right to Food”*: Using the Human Right to Food to Address Hunger in Vermont, 41 VT. L. REV. 177, 178–79, 181, 183–84 (2016).

<sup>10</sup> In order to ensure realization of a human right, states must respect, protect, and fulfill it. U.N., *Global Issues: Human Rights, What Are Human Rights*, <https://www.un.org/en/global-issues/human-rights> (last visited Oct. 1, 2021). The ICESCR addresses this specifically in regard to the RTF (“The right to adequate food, like any other human right, imposes three ... levels of obligations on States parties: the obligations to respect, to protect and to fulfil.”). U.N., Econ. & Soc. Council, Comm. on Econ., Soc. &

constitutional amendments including the 4As provide future courts with a structure for interpretation and encourage recognition of the fact that hunger is a human rights and social access issue that affects marginalized communities most acutely.<sup>11</sup> Most fundamentally, using a human rights framework changes a conversation about rights from one about marginalized individuals seeking special handouts to one about empowered communities demanding accountability.

While the RTF is recognized under international law and by governments around the globe, the United States has no such right in its federal constitution and has not signed any documents that would give that right to its citizens.<sup>12</sup> Until the recent movement by American subnational entities to adopt a RTF (discussed more fully below), concerns over food regulations, availability and equity in the United States focused on two areas: the food regulatory system and programs to feed the hungry. Efforts to challenge the food regulatory system have resulted in ‘cottage food’ or ‘food freedom’ laws, both of which provide small scale producers with the ability to sell or donate certain food products. Efforts to address issues of food availability and equity have resulted in anti-hunger efforts such as federal nutrition programs and charitable food banks,<sup>13</sup> both of which

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Cultural Rts., *General Comment 12* (Twentieth Session), 5, U.N. Doc. E/C.12/1999/5 (Mar. 12, 1999). As one example, this is thought to include proactive measures to eliminate harmful pesticides and the adoption of policies addressing climate change. *Rep. of the Special Rapporteur on the Right to Food*, 4, 9, 22, U.N. Doc. A/HRC/34/48 (2017); *Interim Rep. of the Special Rapporteur on the Right to Food*, 3, 11, 20, 23–24, U.N. Doc. A/70/287 (2015).

<sup>11</sup> In accordance with the 4As framework, the RTF should, ideally not contain limiting language, but should contain both an aspirational sentence and enough guidance for implementation while remaining concise. That said, not every nation with an explicit or implicit right to food incorporates the 4As. This is not only because this is an evolving right, but also because incorporating all of the 4As makes it more difficult to pass amendments when there is opposition. This holds true for the experience in Maine, where drafters had to hone their original proposed language to garner the votes necessary for passage.

<sup>12</sup> Food and Agric. Org. of the U.N., *The Right to Food Around the Globe, United States Constitutional Recognitions of the Right to Adequate Food*,

<http://www.fao.org/right-to-food-around-the-globe/constitutional-level-of-recognition/en/> (last visited Oct. 9, 2021). The most comprehensive RTF language is found in the ICESCR. In fact, the RTF was the first right contained in the ICESCR that the U.N. commissioned a study on, a work undertaken by Asbjørn Eide in 1983. Asbjørn Eide (Special Rapporteur, U.N. Econ. & Soc. Council Comm. Of Hum. Rts.) *Report on the Right to Adequate Food as a Human Right*, U.N. Doc. E/CN.4/Sub.2/1987/23 (July 7, 1987). Other relevant international and regional documents include the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women, the UN Convention on the Rights of the Child (UNCRC), the 1996 World Food Summit, the American Convention on Human Rights, and the Convention on the Rights of Persons with Disabilities. See generally Margaret E. McGuinness, *Exploring the Limits of International Human Rights Law*, 34 GA. J. INT’L & COMP. L. 393, 405, 408, 411 (2006) (discussing state behavior and international human rights).

<sup>13</sup> The largest food nutrition entitlement program in the U.S. is the Supplemental Nutrition Assistance Program (SNAP), which actually provides significantly more food than food banks. In order to qualify for SNAP in Maine, a family of four must have a before-tax annual household income below \$49,025. *Maine Supplemental Nutrition Assistance Program (SNAP), Annual Household Income Limits (before taxes)*, BENEFITS.GOV, <https://www.benefits.gov/benefit/1272> (last visited Oct. 10, 2021).

received increased attention during the Covid-19 pandemic.<sup>14</sup> All of these efforts to address problems with the food system actually further entrench the current structure, allow the monetization of food waste, and depend upon the populace embracing temporary charity as a solution to the structural problem of hunger.<sup>15</sup> Unlike the RTF, none of these endeavors use a human rights lens, and none provide whole-scale transformation of a system where hungry people exist while there is sufficient food to feed everyone.<sup>16</sup> But the realization that there are issues with the current system and the efforts to address these problems provided a foundation of food-rights work that the U.S. RTF movement is built on.<sup>17</sup>

This RTF movement, although bubbling about for years, became a bigger issue for people worldwide as the Covid-19 pandemic turned food insecurity into a public issue.<sup>18</sup> As the pandemic exposed the depth of food

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<sup>14</sup> Covid-19 exposed the depths of food insecurity in the country. The term ‘food insecurity,’ as officially monitored by the United States Department of Agriculture (USDA), describes households that do not have sufficient access at all times to enough food for an active, healthy life. *Food Security Overview*, U.S. DEP’T AGRIC. (USDA) ECON. RSCH. SERV. (2021), <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us>. Many others have written about the exposure of food insecurity during the pandemic. Lauren Bauer, *The Covid-19 Crisis has Already Left Too Many Children Hungry in America*, BROOKINGS (May 6, 2020), <https://www.brookings.edu/blog/up-front/2020/05/06/the-covid-19-crisis-has-already-left-too-many-children-hungry-in-america/> (noting an April 2020 survey finding a 6000% increase in hunger rates for mothers with children); John Burnett, *Thousands of Cars Line Up at One Texas Food Bank as Job Losses Hit Hard*, NPR (Apr. 17, 2020), <https://www.npr.org/2020/04/17/837141457/thousands-of-cars-line-up-at-one-texas-food-bank-as-job-losses-hit-hard>. (showing aerial footage of Texans lining up outside a San Antonio food bank); Helena Bottemiller Evich, *‘There’s Only So Much We Can Do’: Food Banks Plead for Help*, POLITICO (June 8, 2020) <https://www.politico.com/news/2020/06/08/food-banks-plead-for-help-306492> (discussing the choice to increase public food dispersal rather than increase benefits).

<sup>15</sup> One way the current system has monetized waste is by reframing it as “charity” and distributing it to marginalized communities via programs such as the government’s pandemic Farmers to Families Food Box Program. Jocelyn Meyer, *Burdening Food Banks with the Charity of Waste*, ME. J. CONSERVATION & SUSTAINABILITY (Apr. 8, 2021), <https://umaine.edu/spire/2021/04/08/meyer/>; Andrew Coe, *Free Produce, with a Side of Shaming*, N.Y. TIMES, June 25, 2020, at A27. Food is even rejected after reaching grocery stores and it is often easier for stores to discard and write-off what they do not want, even if hungry people are geographically close.

<sup>16</sup> Eric Holt-Giménez et al., *We Already Grow Enough Food for 10 Billion People . . . and Still Can’t End Hunger*, 36 J. SUSTAINABLE AGRIC., 595, 595 (2012); AMARTAYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION 1–8 (1981); *See also, How to Feed Ten Billion People*, U.N. ENV’T PROGRAMME (July 13, 2020), <https://www.unep.org/news-and-stories/story/how-feed-10-billion-people>;

Bridget Shirvell, *Should Emergency Food be the Long-Term Solution to Hunger?*, HUNTER COLL. N.Y.C. FOOD POL’Y CTR. (Oct. 29, 2019), <https://www.nycfoodpolicy.org/should-emergency-food-be-the-long-term-solution-to-hunger/>; Olivier de Schutter, *Food Banks Are No Solution to Poverty*, THE GUARDIAN (Mar. 24, 2019), <https://www.guardian.com/society/2019/mar/24/food-banks-are-no-solution-to-poverty>.

<sup>17</sup> While food freedom laws seek independence and food charity seeks to feed the hungry, the RTF seeks to use context-supported independence to curtail hunger in the first place.

<sup>18</sup> For a recent review of efforts globally, see Devon Sampson et al., *Food Sovereignty and Rights-Based Approaches Strengthen Food Security and Nutrition Across the Globe: A Systematic Review*, 5 FRONTIERS SUSTAINABLE FOOD SYS. 1, 2–3 (2021).

insecurity, municipalities across the globe started to advocate for a RTF.<sup>19</sup> In America, states began to investigate and seek to incorporate a RTF at the constitutional and legislative levels. Addressing the RTF at the state level makes sense, for state governments have often proven to be the preferred mechanism for achieving social and economic rights, particularly through constitutional amendments.<sup>20</sup> States provide a flexible forum for evolving standards that go beyond federal constitutional mandates, and this flexibility provides an opportunity to more accurately represent human rights values that reflect community standards particular to a single state.<sup>21</sup> Like international human rights instruments, state constitutions seek to establish rights beyond the reach of changing legislatures or a fickle judiciary and ensconce fundamental truths in language that will last for generations.<sup>22</sup> Additionally, even though the federal system provides the benefit of commonality, individual states are more accustomed to experimentation and can try fifty different avenues of achieving a particular human right. Each state can consider its own issues, such as agricultural land and type, rates of food insecurity, and rural and urban demographics. Importantly, subnational implementation of the RTF also forwards the prospect of eventual national acceptance.<sup>23</sup>

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<sup>19</sup> For example, leaders in both Great Manchester and Newcastle in the U.K. have begun calling for a right to food. Nigel Barlow, *Greater Manchester Becomes First City-Region to Support 'Right to Food' Campaign*, ABOUT MANCHESTER (Feb. 16, 2021), <https://aboutmanchester.co.uk/greater-manchester-becomes-first-city-region-to-support-right-to-food-campaign/>; Josh Sandiford, *Newcastle Backs Right to Food Campaign to 'End the Scandal' of Poverty*, THE BIG ISSUE (Mar. 10, 2021), <https://www.bigissue.com/news/activism/newcastle-backs-right-to-food-campaign-to-end-the-scandal-of-poverty/>.

<sup>20</sup> Of course, states can also seek to incorporate the RTF legislatively. For example, California introduced the State Healthy Food Access Bill in its 2021-22 legislative session. The bill, relying on a 2010 United Nations publication, defines the RTF as encompassing availability, adequacy and accessibility and specifically notes that the “COVID-19 pandemic began as a health crisis and quickly became a hunger crisis as well . . . . Racial and ethnic health disparities became even more apparent, with Latinx, Black, and other households from communities of color facing higher rates of food insecurity than white Californians.” *State Healthy Food Access Policy: Hearing on SB108 Before the Cal. Assemb. Comm. on Hum. Servs.* 3 (Ca. 2021). The bill passed the state House and Senate in June 2021 and was referred to Appropriations. This bill sought two avenues of effect – to recognize the RTF and declare it to be a state policy, and to “protect the agricultural industry of the state.” *Id.* at 2; The law would require reports to the Legislature recommending courses of action on, among other things, barriers to utilizing food assistance programs, evolving water needs for state residents, and the effects of climate change on food availability. *Id.* at 1.

<sup>21</sup> See *State v. Caouette*, 446 A.2d 1120, 1122 (Me. 1982) (citing *State v. Collins*, 297 A.2d 620, 626 (Me. 1972)).

<sup>22</sup> For this reason, human rights based constitutional amendments at the state level address one of the reasons many are reluctant to amend the federal constitution or sign on to international treaties, even when they reflect social and economic rights most Americans want—a fear of involving the judiciary in interpreting or enforcing these rights. See Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 13–14 (2005).

<sup>23</sup> For example, in the case of *Roper v. Simmons*, 543 U.S. 551, 568 (2005), the Court stated that “[a] majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.” The Court also relied on Article 37 of the UNCRC and referenced the ICCPR, the American Convention on Human Rights and the African Charter

Most significantly for purposes of this essay, in 2021 the state of Maine introduced, and passed through both houses of its legislature, a proposal seeking to add a RTF amendment to its state constitution.<sup>24</sup> In November of 2021 a majority of the electorate approved the resolution,<sup>25</sup> and Maine now has the first constitutionally enshrined RTF in this country.<sup>26</sup> Now that the RTF is part of the state constitution in Maine, RTF proponents have the highest state level tool at their disposal. As this right is new to American shores; advocates will have to look abroad for any guidance they may want on adoption, framework laws or implementation.

## II. THE RTF AROUND THE GLOBE

Most countries come to a RTF by becoming a state party to one of the international treaties that seek to guarantee this right, the most significant of which is the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>27</sup> Under the ICESCR, which has been ratified by over 150

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on the Rights and Welfare of the Child. *Id.* at 576–77. There are also other cases where the Supreme Court has tallied state law or constitutional amendments in order to assess evolving contemporary thought. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the death penalty for the mentally impaired constituted cruel and unusual punishment). As discussed *infra* municipal human rights implementation has also been the harbinger of state acceptance.

<sup>24</sup> The only other state to introduce legislation seeking to establish a constitutional RTF is West Virginia. On March 15, 2021, Delegate Danielle Walker introduced House Joint Resolution 30, the “Right to food, food sovereignty and freedom from hunger,” a proposed addition to article three, section twenty-three of the West Virginia Constitution. H.R.J. Res. 30, 2021 Leg., Reg. Sess. (W. Va. 2021). The state of Washington has also begun the process, inaugurating an advisory council in 2021 with the intention of introducing RTF legislation by 2023.

<sup>25</sup> Question 3 on the November 2, 2021, Maine ballot read: Do you favor amending the Constitution of Maine to declare that all individuals have a natural, inherent and unalienable right to “grow, raise, harvest, produce and consume the food of their own choosing” for their own nourishment, sustenance, bodily health and well-being? Taylor Telford, *Maine just voted to become the nation’s first ‘right to food’ state. What does that mean?*, WASH. POST (Nov. 3, 2021), <https://www.washingtonpost.com/business/2021/11/03/maine-right-to-food/>.

<sup>26</sup> While Maine is the first state in the United States to have a constitutional RTF, note that other states have constitutional rights to aspects of the RTF, such as the right to farm, the right to hunt and the right to fish. Later in this Essay I look at some of these amendments and their value in implementation of a RTF.

<sup>27</sup> Article 11 of the ICESCR states:

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

nations, the RTF is expected to be realized progressively,<sup>28</sup> and while no nation has of yet fully realized this right, as a first step many nations have added a RTF to their national constitutions.<sup>29</sup> The language of constitutional guarantees found across the globe, and of other legislative measures, vary significantly as nations attempt to implement diverse strategies in their efforts to account for individual circumstances while pursuing an identical goal.<sup>30</sup> Regardless of individual strategy, the RTF is a goal reached progressively through the three basic steps used in achieving any human right: respect, protect and fulfill, each of which requires significant support.<sup>31</sup>

The first obligation—to respect the RTF—asks the government at issue to not interfere with anyone’s access to adequate food. In other words, the government must respect the RTF by not passing any laws that interfere with the right and by addressing or amending any current laws that do interfere with the right. This tier helps construct a legal framework for individuals to safeguard their rights and for the state to begin meeting its RTF commitment by reviewing statutes, rules, and regulations to ensure their compatibility with this new constitutional amendment.<sup>32</sup> Comprehensive assessments done at this stage ideally consider a wide variety of factors, including any disparities in community resources, issues of supply and

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(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 11, at 4 (Dec. 16, 1966).

<sup>28</sup> Each state must implement steps for the realization of all rights in the ICESCR “to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” *Id.* art. 2 at 1–2.

<sup>29</sup> See discussion *infra* and: KANSTYTUCYJA RESPUBLIKI BIELARUS [CONSTITUTION 2004, § 2, art. 21 (Belr.);

CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [Constitution] Oct. 20, 2008, arts. 3, 13, 32, 66, 281 (Ecuador); DUSTŪR JUMHŪRIYAT MIŠR AL-‘ARABĪYAH [CONSTITUTION] 2019, art. 79 (Egypt); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA [CONSTITUTION] 1993, art. 51 (Guat.); CONSTITUTION OF THE REPUBLIC OF MALDIVES 2008, art. 23; CONSTITUTION OF NEPAL 2016, art. 36; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ [CONSTITUTION] 2004, arts. 110, 118 (Pan.); CONSTITUTION OF SEYCHELLES 2017, (Sey.). While the United States has not ratified the ICESCR, there is an argument to be made that the right to adequate food (and the right to be free from hunger) have become customary international norms to which it is bound. Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 COLUM. J. TRANSNAT’L L. 691, 795–96 (2006).

<sup>30</sup> The ICESCR was adopted by the United Nations General Assembly in 1966 and came into force in 1976. It was followed by a number of other international instruments addressing the rights of specific populations to food and further interpreting and confirming the RTF. THE FOOD & AGRIC. ORG. OF THE U.N., FIFTEEN YEARS IMPLEMENTING THE RIGHT TO FOOD GUIDELINES (2019).

<sup>31</sup> While the terminology has evolved, this three-tiered system originated with Henry Shue, a philosopher active in human rights. See HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY: 40TH ANNIVERSARY EDITION (2020).

<sup>32</sup> As an example, the Maine legislature can supply definitions for any terms in the amendment that need explanatory language.

demand, worker protections, and utility provisions, among others.<sup>33</sup> This can lead to repeals, amendments, clarifications, or additional legal promulgations in order to ensure respect for the RTF.<sup>34</sup> The second obligation—to protect the RTF—calls on state actors to ensure that no third parties are interfering with the RTF. When a third party attempts or continues an action that interferes with a citizen’s RTF, the government must step in to stop that action and to address any harms it has caused. This tier ensures that there is accountability from all relevant parties, so that the right in question is not at risk from the actions of outside actors. The third obligation—to fulfill the RTF—is the final step in full achievement of the RTF and the one that most squarely addresses a situation in which rights holders do not have food. This calls for direct action to ensure a governments own behavior forwards full achievement of the right through actually facilitating and providing. For the RTF, this requires a structure that ensures that the full citizenry has access to food or to sufficient income. This tier safeguards the right in question for every citizen, particularly those most marginalized.

While this essay provides specific examples below, some of the general situations that threaten the RTF and call for government action include: destruction or desecration of food producing natural resources (such as bodies of water for fishing or hunting grounds) or of farms or gardens, denial of indigenous rights (most notably to land), biopiracy (situations in which resources or knowledge are appropriated and patented without agreement or compensation for commercial use), and food chain manipulation (which arguably includes food assistance programs).<sup>35</sup> Each of these general examples call for redress, which relies on the practicable employment of a RTF constitutional amendment. This means that the RTF must have effective implementation in order to ensure that citizens are able

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<sup>33</sup> THE FOOD & AGRIC. ORG. U.N., GUIDE TO CONDUCTING A RIGHT TO FOOD ASSESSMENT 11 (2009) (this guidebook includes a discussion of how and why to incorporate human rights principles in any RTF assessment).

<sup>34</sup> Although no U.S. locality has as of yet conducted a RTF assessment specifically, there are numerous examples of community food assessments. These include one piloted by the University of Virginia, one focusing on Jackson and Union counties in Southern Illinois, one for the city of Portland, Oregon, and one in Denver, Colorado. Jennifer O’Brien & Tanya Denckla Cobb, *The Food Policy Audit: A New Tool for Community Food System Planning*, 2 J. AGRIC. FOOD SYS. & CMTY. DEV. , 177 (2012); FOODWORKS, *Community Food Systems Project: A Report on the State of Local Food in Southern Illinois* (2012); *Food Policy and Zoning in Portland*, PORTLAND.GOV, <https://www.portland.gov/bps/food-policy-and-zoning-portland> (last visited Dec. 23, 2022); DENVER PUB. HEALTH & ENV’T, DENVER FOOD ACTION PLAN (2018), <https://www.denvergov.org/content/dam/denvergov/Portals/771/documents/CH/Food%20Action%20Plan/DenverFoodActionPlan.pdf>; The USDA also provides a number of assessment tools, including an assessment toolkit. BARBARA COHEN, U.S.D.A. ECON. RSCH. SERV., COMMUNITY FOOD SECURITY ASSESSMENT TOOLKIT (2002), <https://www.ers.usda.gov/publications/pub-details/?pubid=43179>.

<sup>35</sup> The RTF has particular import for indigenous peoples, whose claims to land, seeds, and farming have been disproportionately affected. THE FOOD & AGRIC. ORG. U.N., THE RIGHT TO FOOD AND INDIGENOUS PEOPLES: AN OPERATIONAL GUIDE 14 (2008); THE FOOD & AGRIC. ORG. U.N. & U.N. HIGH COMM’R FOR HUM. RTS., *supra* note 3, at 17–18.

to enjoy the right. The United Nations Food and Agricultural Organization (FAO) has provided specific guidance for implementation, beyond the general human rights principles of respect, protect, and fulfill.<sup>36</sup> This is known as the PANTHER framework, an acronym that represents the seven human rights principles to be observed during implementation: Participation,<sup>37</sup> Accountability,<sup>38</sup> Non-discrimination,<sup>39</sup> Transparency,<sup>40</sup> Human Dignity,<sup>41</sup> Empowerment,<sup>42</sup> and Rule of Law.<sup>43</sup> These seven principles originated in human rights treaties and can help guide governments through the progressive tiers of respecting, protecting, and fulfilling the RTF.<sup>44</sup> These guidelines also help provide the societal entrenchment that protects a human right when contextual conditions change. Such changes, whether due to environmental degradation, political changes, or a pandemic, can threaten rights and intensify vulnerabilities, especially among already marginalized populations.<sup>45</sup>

It is also notable that, while other nations are pursuing the benchmarks intrinsic to solidifying an affirmative human right (respect,

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<sup>36</sup> The Food and Agriculture Organization (FAO) is a United Nations agency that works on behalf of member states towards the eradication of hunger and the full realization of the right to food. The PANTHER approach is based on seven principles that should be integrated in RTF work. THE FOOD & AGRIC. ORG. U.N., *THE RIGHT TO FOOD AND THE RESPONSIBLE GOVERNANCE OF TENURE: A DIALOGUE TOWARDS IMPLEMENTATION* 67 (2014).

<sup>37</sup> This calls for both positive action and the limitation of negative actions. Positively, it calls for education and encouragement to voluntarily participate in a meaningful fashion. It also calls for the removal of barriers that would prevent individuals from participating in the process, such as overly onerous bureaucratic requirements, remote locations, and inadequate notice.

<sup>38</sup> This principle calls for governmental actors to be cognizant of their responsibilities and responsible towards those most affected by their decisions. Accountability intersects with transparency and also means preventing corruption and other third-party behavior that undermines the RTF.

<sup>39</sup> This principle forbids actors from acting on or permitting any discriminatory animus for any reason and calls on them to actively work on altering societal conditions that structurally permit discrimination. It calls for a balancing of laws, such as property, business rights and environmental justice.

<sup>40</sup> Transparency calls for actions, decisions, and processes to be available in a timely manner and in a manner that makes them easily accessible.

<sup>41</sup> Human dignity calls for implementation strategies that affirm that all people have equal worth at all times.

<sup>42</sup> Empowerment builds the capacity of people to act for themselves and have equitable opportunities in all sectors of society (including government, agricultural pursuits, non-profits, educational institutions, etc.).

<sup>43</sup> Rule of law calls for laws and consequences that are fair on their face and in implementation. This speaks not only to judicial power but also administrative and quasi-judicial mechanisms.

<sup>44</sup> THE FOOD & AGRIC. ORG. U.N., *RIGHT TO FOOD: MAKING IT HAPPEN PROGRESS AND LESSONS LEARNED THROUGH IMPLEMENTATION* 7 (2013). As one example, the Committee on World Food Security endorsed land tenure guidelines that sought to operationalize the PANTHER principles in their implementation. THE FOOD & AGRIC. ORG. U.N., *supra* note 36, at 7–12. The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (“VGGT”) discusses the ten VGGT principles of implementation, how they relate to the PANTHER principles, and their inclusion of gender equality, sustainability and continuous improvement. THE FOOD & AGRIC. ORG. U.N., *VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY* 4 (2022).

<sup>45</sup> U.N. OFF. HIGH COMM’R ON HUM. RTS. ET.AL., *COVID-19 AND NATIONAL HUMAN RIGHTS INSTITUTIONS* 5 (2021).

protect, and fulfill), they have not discarded any already existing efforts to provide food, whether those are through government programs or from charitable sources. Progressive realization of a human rights goal always takes a complimentary track to current efforts and seeks to ensure that the process is as attentive to the positions of duty bearers as it is to rights holders. This means remaining mindful of issues such as equity and non-discrimination, interdependence with other human rights, and the 4As as detailed above. Similarly, when subnational entities in the U.S., such as Maine, adopt their own RTF amendment, existing efforts to provide food must also not be immediately abandoned.

### III. EXAMPLES OF RTF LITIGATION INTERNATIONALLY

While passage of the ICESCR, incorporation of a constitutional RTF guarantee and the establishment of framework laws should be enough to ensure the RTF for every country's citizenry, in reality the road to realization is generally paved with lawsuits. As it is likely that subnational implementation of the RTF in the United States will also eventually end up in a courtroom, it is instructive to see how RTF lawsuits have played out in other nations.<sup>46</sup> Each lawsuit reflects its' own country's legal structure and implementation path (and whether the 4As and the PANTHER framework noted above were incorporated) and implicates one or more of the three tiers of progressive implementation: respect, protect and fulfill.<sup>47</sup>

On the world RTF stage, India has loomed large. India was one of the first countries in the world to entertain a RTF lawsuit before its Supreme Court; that case became the longest running RTF case on earth, and it garnered attention from human right advocates across the globe.<sup>48</sup> The case began in 2001, when the People's Union for Civil Liberties (PUCL), relying,

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<sup>46</sup> THE FOOD & AGRIC. ORG. U.N., *supra* note 5, at 25–29, 66 (discussing RTF constitutional work, legislation, and lawsuits worldwide).

<sup>47</sup> There have been other RTF-based lawsuits in addition to the cases highlighted herein. In Nepal, two NGOs brought suit seeking to have the Nepalese government recognize a RTF. After four years of litigation the court held that the government was bound by international treaties to recognize the RTF. Four years after that, the RTF was added to the Nepalese Constitution. In Germany, the court found that the right to dignity (and the requirements of a welfare state) included the RTF and compelled the government to provide benefits sufficient enough to meet these needs. In Argentina, the Supreme Court determined a case involving access to food and safe drinking water for indigenous communities under the RTF. A Brazilian court relied on both international and domestic law to find a municipality liable for depriving children and young people of their RTF (and other basic rights). In Canada, the Supreme Court held up the fishing rights of an indigenous community and struck down that part of a criminal case that had been brought based on the lack of a permit. See INT'L DEV. L. ORG. & IRISH AID, REALIZING THE RIGHT TO FOOD: LEGAL STRATEGIES AND APPROACHES 37–38, 40, 44 (2015)

<sup>48</sup> People's Union of Civil Liberties v. Union of India (2003) 2 SCR 1136 (India). The PUCL case was brought under India's Public Interest Litigation (PIL) scheme, which allows individuals to bring constitutional complaints in the public interest even if they themselves have not been affected. P.N. Bhagwati & C.J. Dias, *The Judiciary in India: A Hunger and Thirst for Justice*, 5 N.U.J.S. L. REV. 171, 176 (2012).

in part, on the Indian National Constitution and its right to life article,<sup>49</sup> alleged that the Indian government had abrogated its responsibilities by allowing starvation deaths to occur at the same time that it maintained excess grain stocks and that it was allowing subpar food distribution schemes to persist.<sup>50</sup> Respondents answered by referencing the eight programs they maintained to feed the hungry. The case persisted for sixteen years, over which time the Indian Supreme Court issued dozens of interim opinions and the issues under consideration continued to expand.<sup>51</sup> Most significantly, between the filing of the case and its conclusion in October 2017,<sup>52</sup> the Court held: that the constitutional right to life was, indeed, at risk due to governmental failure to provide food; that the government should be held liable for not fulfilling the mandates of its own food and nutrition related programs; that it was the responsibility of the states to prevent deaths due to starvation and malnutrition; that two Commissioners, aided by assistants and state-appointed Nodal officers, should be appointed and funded by the government to monitor implementation of the interim orders and report their findings to the Court; that starvation deaths would be taken as evidence that the Court's orders were not properly implemented and; that government programs to feed the hungry could not be diluted or ended and many had to be expanded, regardless of cost.<sup>53</sup>

In assessing the impact of the PUCL case, one can find many successes and a number of unanswered issues. Among the many achievements of the case were passage of the 2013 National Food Security Act, redeployment of state expenditures in favor of marginalized

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<sup>49</sup> Article 21 of the Indian Constitution reads: "No person shall be deprived of his life or personal liberty except according to procedure established by law." BHĀRĀTĪYA SAMVIDHĀNA [CONSTITUTION] Jan. 26, 1950, art 21 (India). Prior to the 2001 PUCL case the Indian Supreme Court, in *Shantistar Builders v. Narayan Khimalal Totame*, (1990) 1 SCC 520 (India), had held that the right to life implies sufficient food, stating, "The right to life is guaranteed in any civilized society. That would take within its sweep the right to food[.]" Note that the Constitution of India art. 47 is also relevant to a RTF discussion. Article 47 reads, "The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavor to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health." BHĀRĀTĪYA SAMVIDHĀNA [CONSTITUTION] Jan. 26, 1950, art. 47. (INDIA).

<sup>50</sup> PUCL's petition was initially filed against the Indian Government, the Food Corporation of India, and six State Governments, but was later enlarged to include all the country's state governments.

<sup>51</sup> The case has spawned literally dozens of interim orders over decades. Partial listings of those orders can be found at *Supreme Court Orders*, RIGHT TO FOOD CAMPAIGN INDIA, <http://www.righttofoodcampaign.in/legal-action/supreme-court-orders> (last accessed Oct. 30, 2022); Harsh Mander, *Food from the Courts: The Indian Experience*, 43 INST. OF DEV. STUD. BULL., 15 (2012); *Right to Food Case: PUCL vs. Union of India & Ors.*, SOCIO-LEGAL INFO. CTR. (May 8, 2002), <https://www.slic.org.in/litigation/2002-pucl-vs-union-of-india-and-others-civil-writ-petition-196-of-2001>; *Interim Order of May 2, 2003*, *PUCL vs. UoI and Ors.*, GLOB. HEALTH RTS., <https://www.globalhealthrights.org/wp-content/uploads/2013/10/Peoples-Union-India-2003-Interim-Order.pdf> (last accessed Oct. 30, 2022).

<sup>52</sup> *PUCL vs. Union of India & Ors.* (2017) 53 SCR 196 (India).

<sup>53</sup> For explanations and documents related to this complex case, see Harsh Mander, *Food from the Courts: The Indian Experience*, 43 IDS BULL. 15, 16 (2012); YAMINI JAISHANKAR & JEAN DRÈZE, RIGHT TO FOOD CAMPAIGN, SUPREME COURT ORDERS ON THE RIGHT TO FOOD: A TOOL FOR ACTION (2005).

communities throughout the country, broad expansion of hot school meals and improvement of the food distribution system.<sup>54</sup> The case legitimized the justiciability of the RTF and the grassroots movement it set in motion continues to influence the discourse in India and around the globe.<sup>55</sup> In fact, the PUCL case illustrates how a legal case can spur social action that continues long after litigants have left the courtroom. In terms of a human rights framework, this case illustrates both the first and third tiers of human rights progressive implementation. The case demonstrates respect for the RTF by successfully guaranteeing entitlement schemes already in place and by instructing the government not to interfere in these schemes. The case demonstrates fulfillment of the RTF by codifying an existing benefit so that it became an entitlement and by guaranteeing minimum levels of subsistence and employment. In looking to the PUCL case for the lessons it can impart for work in U.S. subnational implementation, the most critical part of the case is how the court looked at a benefit and made it a right.<sup>56</sup> This transformation came via the court's November 28, 2001 interim order, and while questions remain, this decision essentially transformed beneficiaries into rights holders who no longer had to prove their requests, even if remedies and metrics remained to be worked out.<sup>57</sup>

Other international RTF cases have dealt with third party behavior, as opposed to direct acts (or inaction) by a home government. Most often these cases occur when a company or company subsidiary based in the global North seeks resources or land in the global South, and the results disenfranchise local communities and hinder their RTF. One such case that has garnered much attention began in 2001 when the Ugandan government agreed to lease a parcel of 'unencumbered' land to a wholly owned

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<sup>54</sup> RIGHT TO FOOD CAMPAIGN & CTR. FOR EQUITY STUD., HUNGER WATCH REP. 15–16 (2021).

<sup>55</sup> In 2021, as Covid-19 ravaged the country, RTF issues continued to be revisited throughout India. Press Trust of India, *Right to Food Needs to be Looked into With Human Rights Perspective Too: NHRC*, THE TIMES OF INDIA (Aug. 10, 2021, 11:30 PM), <https://timesofindia.indiatimes.com/india/right-to-food-needs-to-be-looked-into-with-human-rights-perspective-too-nhrc/articleshow/85219142.cms>; Press Trust of India, *Right to Life May be Interpreted to Include Right to Food: Supreme Court*, BUS. STANDARD (June 30, 2021 at 1:38 IST), [https://www.business-standard.com/article/economy-policy/right-to-life-may-be-interpreted-to-include-right-to-food-supreme-court-121062901761\\_1.html](https://www.business-standard.com/article/economy-policy/right-to-life-may-be-interpreted-to-include-right-to-food-supreme-court-121062901761_1.html).

<sup>56</sup> Still other cases across the globe illustrate additional aspects of respecting the RTF. For example, the South African case of *Minister Env't Affs. & Tourism v. George & Others* (437/05, 437/05) [2006] ZASCA 57 (S. Afr.), dealt with a government's obligation to ensure that regulations already in place do not interfere with the RTF of vulnerable communities. In this case, a group of non-commercial fishermen, with international support, brought suit in Equality Court over that country's 1998 Marine Living Resources Act, which established quotas that resulted in the minor fishermen having no access to the sea. As with the PUCL case, the *Kenneth George* case had successes and failures, but the court did instruct the government to advance a new policy that would ensure the RTF for the claimants, contributing to a formal settlement and the 2012 Small-Scale Fisheries Policy. Olivier de Schutter (Special Rapporteur on the Right to Food), *Countries Tackling Hunger with a Right to Food Approach*, Briefing Note 01 (May 2010); Policy for the Small Scale Fisheries Sector in South Africa, GN 474 of GG 35455 (June 20, 2012).

<sup>57</sup> Lauren Birchfield & Jessica Corsi, *Between Starvation and Globalization: Realizing the Right to Food in India*, 31 MICH. J. INT'L L. 691, 699–701 (2010); Priya Shankar, *Hunger in a Land of Plenty: The Benefits of a Rights-Based Approach to India's Mid-Day Meal Scheme*, CUREJ: COLL. UNDERGRADUATE RSCH. ELEC. J. (2009); Jaishankar & Drèze, *supra* note 53, at 10.

subsidiary of Neumann Kaffee Gruppe (NKG), a German company.<sup>58</sup> In order to ‘unencumber’ the land the Ugandan army forcibly evicted several thousand tenants, causing increased poverty and a violation of the RTF. In August 2002 a court case was filed against the NKG’s subsidiary and the Ugandan government.<sup>59</sup> The first part of the case took eleven years to wind its way through the court and in March 2013, the High Court in Kampala, Uganda, ordered compensation of approximately eleven million euros.<sup>60</sup> NKG appealed, in July 2015 the Court of Appeal in Kampala ordered a retrial, and in August 2019 the court ordered the parties to mediate.<sup>61</sup>

As in the PUCL case, the NKG case has spawned additional issues, taken numerous twists, had successes and has continuing unanswered questions.<sup>62</sup> As the case advanced, it drew increasing scrutiny and international human rights oversight bodies began to step in, demonstrating the interconnectedness of human rights and how violations in one area have a cascading effect on other areas. Reports have been filed noting how the actions of NKG (among others) effect international agreements such as the U.N. Convention on the Rights of the Child<sup>63</sup> and the continuing effects on the ICESCR.<sup>64</sup> The idea of having to pursue litigation across borders, be they international or state, is one that will continue until every person lives under

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<sup>58</sup> FIAN INTERNATIONAL, HUMAN RIGHTS VIOLATIONS IN THE CONTEXT OF KAWERI COFFEE PLANTATION IN MUBENDE/UGANDA 3 (1990).

<sup>59</sup> FIAN INTERNATIONAL, EXTRA-TERRITORIAL HUMAN RIGHTS VIOLATIONS IN THE CONTEXT OF SUPPORTING LARGE SCALE AGRARIAN INVESTMENTS: THE CASE OF KAWERI COFFEE PLANTATION LTD. IN MUBENDE/UGANDA 3 (2014).

<sup>60</sup> As the court case plodded forward, in June 2009 a case before the German National Contact Point (NCP) was also initiated. *Complaint Against Neumann Kaffee Group on Violations of the OECD Guidelines for Multinational Enterprises*, WAKE UP & FIGHT FOR YOUR RTS. (June 2009) [https://www.oecdwatch.org/wp-content/uploads/sites/8/dlm\\_uploads/2021/03/FIAN\\_vs\\_NKG\\_20090615\\_complaint.pdf](https://www.oecdwatch.org/wp-content/uploads/sites/8/dlm_uploads/2021/03/FIAN_vs_NKG_20090615_complaint.pdf). The NCP case issued a final declaration in March 2011, finding that the parties should work together more amicably. Final declaration by the National Contact Point for the OECD Guidelines for Multinational Enterprises regarding a complaint by Wake up and Fight for Your Rights Madudu Group and FIAN Deutschland against Neumann Gruppe GmbH, Berlin (March 2011).

<sup>61</sup> See FIAN International, *Human Rights Violations in the Context of Kaweri Coffee Plantation/Neumann Kaffee Gruppe in Mubende/Uganda*, MISEREK (November 2019), [https://www.fian.de/wp-content/uploads/2021/11/Layout\\_Uganda\\_Druckerei.pdf](https://www.fian.de/wp-content/uploads/2021/11/Layout_Uganda_Druckerei.pdf) (last accessed October 31, 2022); NKG, *Chronology of Events, Kaweri Coffee Plantation – 2000 to 2019 –*, <https://www.nkg.net/wp-content/uploads/2019/07/2019-07-19-Chronologie-ENG.pdf> (last accessed October 31, 2022).

<sup>62</sup> For an interesting read, see *Annex to the Study Land Grabbing and Human Rights: The Involvement of European Corporate and Financial Entities in Land Grabbing Outside the European Union - Exchange of Letters Between the Neumann Gruppe and the Authors of the Study*, PARL. EUR. DOCS DGEXPO/B/POLDEP/NOTE/2017-18 (Jan. 2017).

<sup>63</sup> U.N. Comm. on Rts. Child, International Commission of Jurists’ (ICJ) Submission to the UN Committee on the Rights of the Child in Advance of the Examination of Germany’s Third and Fourth State Party Reports in Accordance with Article 44 of the Convention on the Rights of the Child (Jan. 2014).

<sup>64</sup> U.N. Econ. and Soc. Council, Comm. on Econ., Soc. and Cultural Rts., *Concluding Observations on the Initial Report of Uganda*, U.N. Doc E/C.12/UGA/CO/1 (July 8, 2015).

a RTF.<sup>65</sup> Most importantly for U.S. RTF subnational implementation is how the NKG case demonstrates the protection tier of the RTF, and the principle that actions instigated by third parties with state acquiescence or aid remain the responsibility of the home government.

#### IV. SUBNATIONAL ADOPTION OF HUMAN RIGHTS PRINCIPLES ACROSS THE UNITED STATES

While formal adoption of international treaties fall squarely within the scope of the federal government, even before the RTF came to U.S. shores subnational entities across the country were increasingly embracing both the principles contained in many of those treaties and, on occasion, even the treaties themselves.<sup>66</sup> This has proven particularly true in the human rights arena, where the existence of an established right on the world stage provides advocates with conceptual social and legal frameworks for pursuing a particular right, as well as proof of an evolving standard to which they can aspire.<sup>67</sup> Cities and states, who would in fact help provide practical implementation of any international treaties, recognize that a human rights structure offers a dignified narrative and a common language outside of conventional legalese.<sup>68</sup> They also recognize that unlike litigation, which most often looks backwards to address wrongs already committed, human rights principles look forward. For example, the United States Conference

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<sup>65</sup> Both the broad subject matter and the length and complexity of proceedings in the NKG case are commonplace. As another example, grassroots groups in Ghana, working with international support, accused a South African mining company of violating the RTF by displacing villagers. Samuel Awuah-Nyamekye, *Ecological Resistance Movements: A Case Study from Ghana*, 4 OGUAA J. RELIGION & HUM. VALUES, 71 (2018); Rolf Künemann and Sandra Epal-Ratjen, *The Right to Food: A Resource Manual for NGOs*, *supra* note 4, at n.4.

<sup>66</sup> In addition to adoption of a treaty containing a RTF, the U.S. could, like numerous other nations, amend its national constitution to include a RTF. However, our federal constitution is commonly believed to be an exceptional and negative document. Because of this belief, the idea of amending it to include a positive social right is generally dismissed at the outset. Negative rights are constraints on the government to prevent it from intruding on citizens lives and positive rights obligate the government to provide something for its citizens. While not completely accurate, it is true that for the most part, and as compared to other countries, the U.S. Constitution is more a document of negative than positive rights. EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 2* (Princeton Univ. Press 2013). The creation of both negative and positive rights attached to the RTF has been recognized even when those specific terms are not used. THE FOOD & AGRIC. ORG. U.N., *VOLUNTARY GUIDELINES TO SUPPORT THE PROGRESSIVE REALIZATION OF THE RIGHT TO ADEQUATE FOOD IN THE CONTEXT OF NATIONAL FOOD SECURITY 5-7* (2004).

<sup>67</sup> While American courts have a long-standing reluctance to openly rely on international sources, courts often look abroad without express citation. Further, civil rights movements have long looked past U.S. shores for inspiration and scholarship. Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L. J. 1564, 1576 (2006); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 250 (2001).

<sup>68</sup> This builds on a state tradition of considering elements beyond those traditionally relied upon. See The Honorable Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1306, 1322-23 (2017) (noting an era in which state constitutional decisions relied on ideas "that transcended state-specific texts or understandings." (citation omitted)).

of Mayors has passed resolutions promoting human rights<sup>69</sup> and cities and towns have sought to embrace human rights principles on their own as a way to legitimize the changes they seek.<sup>70</sup>

This state level willingness to look abroad holds true within the courtroom as well. In fact, while many federal courts have shown a reluctance to heed international treaties or customary international law, despite the long standing principle that the U.S. should strive never to contradict such instruments,<sup>71</sup> state courts have some history of looking to international human rights standards when making their decisions, especially those standards contained in widely supported treaties and even if the United States is not a signatory to the treaty at issue.<sup>72</sup> This practice relies on a state court level history of using international documents for their value in proclaiming evolving norms and rights and in interpreting the meaning and reach of human rights principles.<sup>73</sup>

In America, the phenomenon of U.S. subnational entities adopting international human rights norms has recently intensified, a state of affairs that provided increased support for the RTF movement.<sup>74</sup> I believe that this trend rests on a number of factors, all of which are as applicable domestically as they are internationally.<sup>75</sup> First, advocates are increasingly seeking to codify rights once thought to be inherent.<sup>76</sup> Second, technology has provided not only a real-time window into human rights movements around the globe,

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<sup>69</sup> U.S. CONF. MAYORS, ADOPTED RESOLUTIONS <https://www.usmayors.org/the-conference/adopted-policies/> (last visited Apr. 19, 2021).

<sup>70</sup> The World Human Rights Cities Forum is an annual meeting that takes place in South Korea and began in 2011. Co-sponsored by the U.N. High Commissioner on Human Rights, the Forum's mission is to discuss and forward the implementation of universal human rights by local governments. See generally, United Cities and Local Governments, *The World Human Rights Cities Forum (WHRCF) of Gwangju* (Feb. 28, 2021), <https://www.uclg-cisd.org/en/activities/human-rights-cities/international-meetings/World-Human-Rights-Cities-Forum-of-Gwangju>.

<sup>71</sup> Justin Hughes, *The Charming Betsy Canon, American Legal Doctrine, and the Global Rule of Law*, 53 VAND. J. TRANSNAT'L L. 1147 (2020); *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804); Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 23 (1992).

<sup>72</sup> In *Moore v. Ganim*, 660 A.2d 742, 782 (Conn. 1995), (Peters, C.J., concurring) (in a case involving subsistence provision to indigents, the concurrence noted that even when the U.S. was not a party to the treaty at issue, broad international agreement was a significant point).

<sup>73</sup> This has been true since the time of the UDHR until now. For example, a mere two years after passage of the UDHR the court in *Wilson v. Hacker*, 101 N.Y.S.2d 461, 473 (N.Y. Sup. Ct. 1950), stated, "Indicative of the spirit of our times are the provisions of the Universal Declaration of Human Rights[.]" In *Diatchenko v. District Att'y for the Suffolk Dist.*, 1 N.E.3d 270, 287 n.16 (2013), the court referenced the UNCRC and John Adams in saying, "we belong to an international community that tinkers toward a more perfect government by learning from the successes and failures of our own structures and those of other nations."

<sup>74</sup> Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9 (2013).

<sup>75</sup> Barbara Oomen & Moritz Baumgärtel, *Frontier Cities: The Rise of Local Authorities as an Opportunity for International Human Rights Law*, 29 EUROPEAN J. INT'L L. 607 (2018).

<sup>76</sup> Margaret H. Marshall, "Wise Parents Do Not Hesitate to Learn from Their Children": *Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. Rev. 1633, 1639 (2004).

it has also provided increased information about the underpinnings of these movements to anyone with a computer.<sup>77</sup> Third, subnational entities are naturally at the vanguard of constitutional interpretation and change, as state governments have always been ultimately responsible for the day-to-day execution of any international treaty, providing them with increasing proficiency in implementing positive human rights tenets.<sup>78</sup> Fourth, state legislators are generally more accessible and more responsible to their constituents than their national counterparts and often have first-hand knowledge of the concerns at hand.<sup>79</sup> Fifth, as information, trade and travel flows have all increased, individuals and institutions at the local level have had the chance to educate themselves about human rights principles and to connect with one another on issues of mutual concern.<sup>80</sup> Sixth, international institutions have increasingly and favorably acknowledged the human rights work of subnational entities, further legitimizing their place.<sup>81</sup> Seventh, the growing awareness of environmental concerns, their interconnectedness with human rights issues and their effect on localities, has given an extra push to adoption of human rights principles.<sup>82</sup> Eighth, the growing consensus on a link between physical and mental health and a strong human rights structure has further pushed public health advocacy of human rights.<sup>83</sup> Finally, the ongoing Covid-19 pandemic has proven how challenging it can be to draw lines between purely provincial concerns and local concerns that have far wider repercussions and provided a substantial incentive for human rights work across the country.

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<sup>77</sup> Lisa Horner, *A Human Rights Approach to the Mobile Internet*, ASS'N FOR PROGRESSIVE COMM'NS (June 2011).

<sup>78</sup> This idea famously goes back to Justice William Brennan who, in a series of articles, argued that the states can, and should, expand protections for citizens. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); see also, William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

<sup>79</sup> State legislators may also be more responsive to constituents because local government functions sometimes need a legislative amendment to change a policy, or because state constitutions have restricted legislative powers and elected officials need popular support.

<sup>80</sup> See e.g., this joint opinion essay on refugees: Bill De Blasio, Anne Hidalgo & Sadiq Khan, *Our Immigrants, Our Strength*, N.Y. TIMES, September 20, 2016.

<sup>81</sup> Michele Acuto, *Cities Are Gaining Power in Global Politics – Can the UN Keep Up?*, THE CONVERSATION (Sept. 14, 2017, 9:17 AM), <https://theconversation.com/cities-are-gaining-power-in-global-politics-can-the-un-keep-up-83668>. Additionally, San Francisco has been recognized by the U.N. Development Fund for Women (now UN Women) and by the Americas Fund for its work implementing CEDAW principles. Karen Knop, *International Law and the Disaggregated Democratic State: Two Case Studies on Women's Human Rights and the United States*, RAPOPORT CTR. FOR HUM. RTS. WORKING PAPER SERIES at 24–25 (2012).

<sup>82</sup> ORG. FOR ECON. CO-OPERATION & DEV. & BLOOMBERG PHILANTHROPIES, *CITIES AND CLIMATE CHANGE* (2014).

<sup>83</sup> W.H.O., *LEADING THE REALIZATION OF HUMAN RIGHTS TO HEALTH AND THROUGH HEALTH: REPORT OF THE HIGH-LEVEL WORKING GROUP ON THE HEALTH AND HUMAN RIGHTS OF WOMEN, CHILDREN AND ADOLESCENTS* 6 (2017); Wendy K. Mariner & George J. Annas, *A Culture of Health and Human Rights*, HEALTH AFFS. 35, no. 11 (2016).

Subnational entities across the United States have embraced human rights principles contained in international treaties and agreements in a wide variety of fields, including the environment, the treatment of prisoners, divestment, indigenous rights, the protection of children and the inherent value and dignity of human life. One particularly strong example of subnational human rights activity in the United States has been in the area of women's rights, with numerous localities embracing the principles and language contained in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>84</sup> The State of California has been particularly active in this area: in 1998, the city of San Francisco was the first municipality to pass an ordinance adopting CEDAW,<sup>85</sup> Los Angeles passed a similar CEDAW ordinance in 2003,<sup>86</sup> Santa Cruz passed a CEDAW resolution in 2005,<sup>87</sup> Berkeley passed a CEDAW ordinance in 2010,<sup>88</sup> and Santa Clara passed a CEDAW resolution in 2017.<sup>89</sup> As human rights adoption can be a trickle up as well as a trickle down proposition, the state of California followed the lead of these more local examples and, in 2018, passed a Resolution to implement CEDAW principles and protect the human rights of women and girls by addressing violence and discrimination.<sup>90</sup> Outside of California, numerous other states, municipalities, cities and counties have also embraced CEDAW, such as Honolulu, Hawai'i,<sup>91</sup> Miami-Dade County,<sup>92</sup> Louisville, Kentucky,<sup>93</sup> and Pittsburgh,<sup>94</sup> and multiple others have CEDAW focused committees. In addition to these CEDAW-specific resolutions, ordinances and laws, other subnational bodies, including

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<sup>84</sup> Interestingly, while the United States has not ratified CEDAW, the world's foremost treaty on women's rights, the nation did actively participate in its drafting. Similarly, while the United States has ratified only three of the nine core international human rights treaties (the International Convention on the Elimination of All forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT), the country has worked on and is in agreement with the content of numerous other international agreements. For a discussion on state behavior and international human rights law, *see generally* Margaret E. McGuinness, *Exploring the Limits of International Human Rights Law*, 34 GA. J. INT'L & COMP. L. 393, 403 (2006).

<sup>85</sup> CITY & CNTY. OF S.F. MUN. CODE, § 33A.1(e) (2018).

<sup>86</sup> L.A., CAL., ORDINANCE 175735, An Ordinance to Provide for the Local Implementation of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (2003).

<sup>87</sup> CNTY. SANTA CRUZ BD. SUPERVISORS, Resolution Supporting Ratification of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (2005).

<sup>88</sup> CITY OF BERKELEY, CAL., ORDINANCE 7,224-N.S., Adding Chapter 13.20 to the Berkeley Municipal Code Adopting the Operative Principles of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (2010).

<sup>89</sup> CNTY. SANTA CLARA, CAL., ORDINANCE NS-300.919 ch. 24, An Ordinance of the Board of Supervisors of the County of Santa Clara Adding Chapter XXIV of Division A6 of the County of Santa Clara Ordinance Code Relating to the Establishment of a Task Force on the Convention on the Elimination of All Forms of Discrimination Against Women, (2017).

<sup>90</sup> S. Con. Res. 78, Ch. 16 (Cal. 2018).

<sup>91</sup> HAW. GEN. PROVISIONS § 1-11.3 (2018). Note that Hawaii was the first state to pass CEDAW legislation in every state county.

<sup>92</sup> Miami-Dade County, Fla., Ordinance 15-87, (amended Sept. 1, 2015).

<sup>93</sup> Louisville Metro Gov't, Res. No. R-193-14 (Ky. 2014).

<sup>94</sup> City of Pittsburgh, Pa., Ordinance § 177C.02 (Dec. 13, 2016).

Seattle,<sup>95</sup> and Eugene, Oregon,<sup>96</sup> have referenced CEDAW while adopting broad human rights principles.

Of course, localized implementation of human rights objectives presents its own obstacles.<sup>97</sup> Even though subnational bodies have often been responsible for the day to day implementation of human rights objectives, national bodies generally provide a framework and macro-level support.<sup>98</sup> Without the structure provided by a national government, subnational entities have to rely on their own resources while not running afoul of national laws.<sup>99</sup> This is as true for the RTF movement as it has been for other human rights principles.

## V. IMPLEMENTING THE RTF IN THE UNITED STATES

Structural RTF implementation in the U.S. is built on both international RTF work and domestic subnational human rights implementation. These foundations, along with the food sovereignty movements in states like Maine, provided the groundwork for the progress of the RTF in the United States. While most states now have cottage food or food freedom laws and a variety of charitable food provisions, it is worth noting that Maine has a particularly strong background in food advocacy work. Maine's work in this area rests on state recognition of food insecurity, a foundation of local food advocacy, and independent local government action that has been particularly strong for the last three decades.<sup>100</sup> In fact,

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<sup>95</sup> See GENDER EQUITY IN PAY TASKFORCE, GENDER EQUITY IN PAY AT THE CITY OF SEATTLE 38 (2014).

<sup>96</sup> The city of Eugene, Oregon, under former three-term mayor Kitty Piercy, unanimously voted to make it a duty of its Human Rights Commission to embrace human rights as enumerated in the UDHR, including aligning the city budget with human rights principles. COLUM. L. SCH., HUM. RTS. INST., BRINGING HUMAN RIGHTS HOME: HOW STATE AND LOCAL GOVERNMENTS CAN USE HUMAN RIGHTS TO ADVANCE LOCAL POLICY 5, 12 (2012).

<sup>97</sup> Gaylynn Burroughs, *More Than an Incidental Effect on Foreign Affairs: Implementation of Human Rights by State and Local Governments*, 30 N.Y.U. REV. L. & SOC. CHANGE 411, 415, 427 (2001).

<sup>98</sup> See THE FOOD & AGRIC. ORG. OF THE U.N., *supra* note 47, at 12 (noting that most of the action needed in order to implement the RTF takes place at the national level).

<sup>99</sup> The federal government has generally taken no action against subnational entities for incorporating human rights social and economic standards, even though those actions communicate a locality's disagreement with national stances to the larger world. However, in certain instances the federal government's position vis à vis an international treaty standard has conflicted with that of a subnational entity. See *Medellin v. Texas*, 128 S. Ct. 1346, 1361 (2008); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 401 (2003) (state attempt to benefit Holocaust survivors preempted by federal authority); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 366 (2000) (state divestment act created conflict supporting preemption). For a good discussion on why subnational entities should be encouraged to promote human rights absent explicit contrary federal legislative or executive action, see Martha F. Davis, *Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era*, 77 FORDHAM L. REV. 411, 416 (2008).

<sup>100</sup> Maine's work in this area can be traced back to the 1960s, when the state added a home rule amendment to its constitution that has been liberally interpreted and provides a presumption of authority to localities. Building on this, many localities in Maine have adopted local food and self-governance

Maine's passage of its RTF amendment took years of consensus building and local advocacy in order to achieve the bipartisan support that made its passage possible.<sup>101</sup>

Now that the RTF is a part of the constitution in Maine, the meaning it holds will be shaped by the way the state adapts this right to fit their local concerns.<sup>102</sup> At a minimum, the people of Maine will be able to rely on this amendment if they believe that an existing or proposed law, regulation, or ordinance infringes on their RTF.<sup>103</sup> As noted above, while litigants around the world have begun to turn towards courts in order to fully realize their RTF, even court cases rely on societal structures and acceptance of a right they are legally evaluating. Thus, before proceeding to examine possible legal challenges in Maine, it is worth discussing how implementation can proceed outside of the courtroom.

Both the human rights principle of respect and the PANTHER principles of education and empowerment stand for the notion that the government and the populace need to be informed about their right for it to be meaningful.<sup>104</sup> And while it might seem self-evident, it is all too true that when new human rights principles are adopted at any level there is an education process necessary for all parties.<sup>105</sup> Governments need guidance on how to make the RTF a reality, and those holding that right, the citizens of the subnational entity at issue, need to understand what the right does and does not entitle them to demand.<sup>106</sup> This is why subnational passage of a RTF should also include a fiscal note geared towards education of the

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ordinances, to exempt local producers from license and inspection regulations. In addition, Maine has a strong history of local food support, the largest number of farms in New England, and a fervent belief in autonomy. For a longer discussion on Maine's history of food advocacy independence, see Heipt, *supra* note 7, at 115.

<sup>101</sup> Douglas Rooks, 'Right to Food': Maine Ballot Question a Rare Example of Bipartisanship, PORTLAND PHOENIX (October 13, 2021), <https://portlandphoenix.me/right-to-food-maine-ballot-question-a-rare-example-of-bipartisanship/>.

<sup>102</sup> The manner in which localities adopt human rights claims to their particular needs is termed 'vernacularization,' Peggy Levitt & Sally Merry, *Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States*, GLOB. NETWORKS 9, 441, 446, 448 (2009).

<sup>103</sup> Naomi Hossain & Dolf te Lintelo, *A Common Sense Approach to the Right to Food*, J. HUM. RTS. PRAC. 367, 367–68 (2019).

<sup>104</sup> This is because a human-rights based approach holds the right at issue as a governmental obligation and those citizens living underneath that government as individual rights holders, with the ability to hold the government accountable for not fulfilling its obligations. This structure seeks to empower all parties, particularly those most marginalized. THE FOOD & AGRIC. ORG. U.N., THE RIGHT TO FOOD IN PRACTICE, IMPLEMENTATION AT THE NATIONAL LEVEL 3 (2006).

<sup>105</sup> Gillian MacNaughton & Mariah McGill, *Economic and Social Rights in the United States: Implementation Without Ratification*, 4 NE. UNIV. L. J. 365, 397 (2012).

<sup>106</sup> Education can not only inform rights holders and duty bearers of their obligations and rights under the RTF: it can also head off uneducated and reactive responses. For example, numerous states have passed so called "anti-Sharia" measures seeking to forbid state courts from considering international or Islamic law when deciding cases. These unconstitutional blanket prohibitions on state courts' deliberative processes misunderstands both the court system and foreign policy, and can be best be countered by an informed electorate. Ross Johnson, *A Monolithic Threat: The Anti-Sharia Movement and America's Counter-Subversive Tradition*, 19 WASH. & LEE J. C.R. & SOC. JUST. 183, 193–94 (2012).

citizenry.<sup>107</sup> Other nations and international organizations have used a variety of methods to educate their citizenry about the RTF, including picture books and activity guides for children,<sup>108</sup> educational modules for older students,<sup>109</sup> posters, badges, songs, street theater,<sup>110</sup> and instruction guides for teachers.<sup>111</sup> The FAO has produced a methodological toolbox to aid in educational development<sup>112</sup> and civil society initiatives have been set up in regions around the world.<sup>113</sup> As an obvious example of an aspect of the RTF requiring education, both rights holders and duty bearers must understand that the RTF does not obligate governments to begin delivering food to every citizen.<sup>114</sup> This misconception has been one of the most common roadblocks whenever the RTF has been introduced.<sup>115</sup> All parties must understand that the RTF is not charity, it is empowerment. Analogizing the RTF to other rights that empower citizens, but do not immediately call on the government to provide the goods and services at issue, has been a helpful tool in explaining the RTF. As one example, RTF advocates in

<sup>107</sup> THE FOOD & AGRIC. ORG. U.N., BUDGET WORK TO ADVANCE THE RIGHT TO FOOD, 'MANY A SLIP . . .' 2, 4 (2009) (discussing budgeting in regard to the policies and programs needed to advance a RTF).

<sup>108</sup> See generally, THE FOOD & AGRIC. ORG. U.N. & WORLD ASS'N GIRL GUIDES & GIRL SCOUTS, THE RIGHT TO FOOD RESOURCE AND ACTIVITY GUIDE (2006). See also, THE FOOD & AGRIC. ORG. U.N. & WORLD ASS'N GIRL GUIDES & GIRL SCOUTS, THE RIGHT TO FOOD: A WINDOW ON THE WORLD ILLUSTRATED BY YOUNG PEOPLE FOR YOUNG PEOPLE (2006).

<sup>109</sup> *Module 12: The Right to Adequate Food*, CIRCLE RTS.: ECON., CULTURAL & SOC. RTS. ACTIVISM: A TRAINING RES.,

<http://hrlibrary.umn.edu/edumat/IHRIP/circle/modules/module12.htm> (last visited Oct. 12, 2021).

<sup>110</sup> In India the RTF campaign produced a variety of materials (including posters, badges, songs, and street theater) to explain the RTF. See, e.g., Indian Right to Food Campaign Poster explaining the National Food Security Act (2013), Secretariat, *Right to Food Campaign Email, What are the National Food Security Act 2013 Entitlements?* (2013) <https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbnoYXFB3ppcm90aXxneDphOWZjMDM2ZjkzNjJkMzU> (last visited Oct. 12, 2021). In Spain the NGO Prosalus utilized puppet shows, posters and university discussion groups. In 2020 Prosalus entered a partnership with the FAO to monitor the Milan Urban Food Policy Pact. THE FOOD & AGRIC. ORG. U.N., *The Urban Food Policy in Spain Undergoes a Review* (Feb. 28, 2020), <http://www.fao.org/right-to-food/news/news-detail/fr/c/1264022/>.

<sup>111</sup> THE FOOD & AGRIC. ORG. U.N., FEEDING MINDS, FIGHTING HUNGER, A WORLD FREE FROM HUNGER 5 (2001).

<sup>112</sup> ROSALES ET AL., RIGHT TO FOOD CURRICULUM OUTLINE, (The Food & Agric. Org. of the U.N., 2009).

<sup>113</sup> As one example, the African Network on the Right to Food (ANORF) was established to promote the RTF across Africa. See, *Benin: Launch of the African Right to Food Network*, HABITAT INT'L COAL. (July 15, 2008), <https://www.hic-net.org/benin-launch-of-the-african-right-to-food-network/> (last visited Oct. 12, 2021).

<sup>114</sup> The Maine RTF campaign has sought to educate state citizens about what the RTF does and does not mean and has employed social, print, and visual media in addition to setting up a website. See *Right to Food for Maine*, FACEBOOK, <https://www.facebook.com/righttofoodforme> (last visited Jan. 10, 2023); Administrator, *Food Freedom at Stake – Help Support Maine Right to Food (Nov. 2nd Referendum)*, WESTON A. PRICE FOUND. (Oct. 29, 2021), <https://www.westonaprice.org/food-freedom-at-stake-help-support-maine-right-to-food-nov-2nd-referendum/#gsc.tab=0>.

<sup>115</sup> As noted in my earlier article about Maine's path to a RTF, other common misconceptions about the RTF include erroneous assumptions about the effect on animal welfare, on private property, on the reach of state constitutional amendments and on the need for the amendment in the first place. Heipt, *supra* note 7, at 126, 129.

Maine have analogized the RTF by explaining that, even though there may be a right to bear arms, the government does not provide weapons to each citizen.<sup>116</sup>

A natural outgrowth of education is advocacy, and both the 4As and the PANTHER principles stand for the notion that a wide swath of rights bearers are needed to turn RTF education into practical action. Advocacy calls on various governmental agencies – the duty bearers of the rights – to begin to look at existing laws, rules, guidelines and practices to see whether they support or hinder the RTF. Because rights are ultimately held by and fulfilled by individuals, both duty bearers and rights holders with an educated understanding of the 4As within the RTF and working together in a system adhering to the PANTHER guidelines all have an obligation towards the creation and maintenance of a system in which the RTF is a reality.

A number of countries have also set up or committed to setting up oversight authorities to help monitor progress and ensure accountability to the RTF.<sup>117</sup> If an oversight body is charged with measuring success via human rights framework-based monitoring, they can go beyond statistical information to look at disaggregated data, embedded metric collection, and human rights benchmarks.<sup>118</sup> Of course, no human rights realization is a straight line. The ideal progressive implementation of a RTF founded upon the principles of respect, but in the real-world implementation often comes in fits and starts and is subject to many actors outside of government. But passing a constitutional amendment calls for educated and empowered duty bearers and rights holders, both inside and outside the courtroom.<sup>119</sup>

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<sup>116</sup> *Proposing an Amendment to the Constitution of Maine to Establish a Right to Food: Hearing on L.D. 95 Before the J. Comm. on Agric., Conservation & Forestry*, 130th Leg. (Me. 2021) (testimony of Rep. Billy Bob Faulkingham); *Proposing an Amendment to the Constitution of Maine to Establish a Right to Food: Hearing on L.D. 795 Before the J. Comm. on Agric., Conservation & Forestry*, 129th Leg. (Me. 2019) (testimony of Rep. Craig Hickman).

<sup>117</sup> THE FOOD & AGRIC. ORG. U.N., *Framework Laws on the Right to Adequate Food* (2020), <http://www.fao.org/3/cb0447en/CB0447EN.pdf>; *Framework Law on the Right to Food and Food Sovereignty*, LATIN AM. & CARIBBEAN PARLIAMENT (2018), <http://parlatino.org/wp-content/uploads/2017/09/derecho-alimentacion-soberania-ing.pdf>.

<sup>118</sup> THE FOOD & AGRIC. ORG. U.N., INTERGOVERNMENTAL WORKING GROUP FOR THE ELABORATION OF A SET OF VOLUNTARY GUIDELINES TO SUPPORT THE PROGRESSIVE REALIZATION OF THE RIGHT TO ADEQUATE FOOD IN THE CONTEXT OF NATIONAL FOOD SECURITY: IMPLEMENTING THE RIGHT TO ADEQUATE FOOD: THE OUTCOME OF SIX CASE STUDIES (2004); MAARTEN IMMINK ET AL., *METHODS TO MONITOR THE HUMAN RIGHT TO ADEQUATE FOOD, RIGHT TO FOOD METHODOLOGICAL TOOLBOX BOOK 2*, Volume I 13–14, Volume II 61–62, 123 (FAO 2009).

<sup>119</sup> Note that while implementation is not a straight line, it does call for non-retrogression, meaning that once the RTF amendment is in force, progress towards its realization must be advanced. THE FOOD & AGRIC. ORG. U.N., *supra* note 47, at 163.

## VI. INTERPRETING THE RTF IN THE COURTROOM

Eventually, interpretation of the effect of a state constitutional RTF will likely wind up in court before a state court judge.<sup>120</sup> While no U.S. state court judge has experience in legally implementing a RTF, and most have little experience in applying international human rights norms,<sup>121</sup> as discussed above, human rights litigation at the state level still holds the most promise for American implementation. And while state court judges reference international human rights norms more often than their federal counterparts, even at the state level these references to human rights instruments have hardly reached the level of customary use. This is reflected in the fact that many of the references to international human rights norms show up in concurrences, dissents, dicta, and footnotes – as opposed to majority opinions.<sup>122</sup> Even when such references do show up in majority opinions, the reference is often couched in language seeking to reassure the reader that the opinion is not solely relying on such language.<sup>123</sup> Furthermore, to the extent that courts have been willing to incorporate customary international law or treaty principles, they have shown more willingness to do this in areas related to criminal justice than in the areas of economic or social rights, and even then caveats are generally attached to the references.<sup>124</sup> Regardless, a state constitutional principle should be able to avoid many of the reasons American courts have been averse to

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<sup>120</sup> While this essay focuses on state judicial activity around the RTF it is also possible that challenges to the RTF under a federal preemption theory could be brought in federal court. Any such challenges could be countered by recognition that the RTF does not affect U.S. foreign policy, that isolating states from participating in human rights campaigns is not feasible in today's interconnected world, and that federal preemption would undermine state democracy and the voice of the people at the most local level.

<sup>121</sup> A 2010 review found that state courts rarely cited international human rights treaties, but when they did, the most oft-cited instrument referenced was the UDHR. The author posited that this may be due to either the non-binding nature of the UDHR or its relatively older age. Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism After Medellin*, 115 PENN. STATE L. REV. 1051, 1056, 1063 (2011). Five years later, that same author found a large increase in the number of such citations, although the percentage of overall mentions relative to total cases remained small. Johanna Kalb, *Evaluating International State Constitutionalism*, 91 WASH. L. REV. ONLINE, 141, 148 (2016). Other authors have argued that the UDHR itself constitutes customary international law. Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 290 (1996). See also *Servin v. State*, 32 P.3d 1277 (Nev. 2001) (Rose, J., concurring).

<sup>122</sup> *Diatchenko v. Dist. Att'y for the Suffolk Dist.*, 1 N.E.3d 270, n.16 (2013); *King v. State*, 818 N.W.2d 1, 50, 60 (Iowa 2012) (Appel, J., dissenting); *Ex parte E.R.G.*, 73 So. 3d 634, 637 n.14 (Ala. 2011), *cert. denied*, 132 S. Ct. 1535 (U.S. 2012); *Snetsinger v. Mont. Univ.*, 104 P.3d 445, 458–59 (Mont. 2004) (Nelson, J., concurring); *Domingues v. Nevada*, 961 P.2d 1279, 1280–81 (1998) (Springer, C.J., and Rose, J., dissenting); *Moore*, 660 A.2d at 780–82 (Peters, C.J., concurring); *Pauley v. Kelly*, 255 S.E.2d 859, 900 n.5 (1979); *Bixby v. Pierno*, 481 P.2d 242, 251 n.9 (Cal. 1971).

<sup>123</sup> See *Roper*, 543 U.S. at 578 (“The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”)

<sup>124</sup> *Sterling v. Cupp*, 625 P.2d. 123, 131 (Or. 1981) (en banc) (“The various formulations in these different sources in themselves are not constitutional law. We cite them here as contemporary expressions of the same concern . . . .”) Note the majority opinion was authored by Hans Linde, see fn. 122.

incorporating international human rights language.<sup>125</sup> Additionally, state constitutions have arguably more similarities to foreign constitutions than to our federal document, notably when it comes to positive rights.<sup>126</sup> While the Maine Supreme Court in particular has not regularly relied on international jurisprudence,<sup>127</sup> passage of the RTF provides an opportunity to consider other state courts' reasoning when they reference the ICESCR<sup>128</sup> or other international instruments.<sup>129</sup> As Maine is the first of what may likely be numerous states with constitutional RTFs, Maine's experience will help build a foundation of RTF law that can be used elsewhere.<sup>130</sup>

Within the litigation sphere, the question for advocates is how to best forward a RTF.<sup>131</sup> As with any public interest lawsuit, choosing the correct issue, litigants, and timing are all critical components for success. While it is not always possible to be proactive, the advantage in taking the initiative is the increased ability to exert control and to ensure that the

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<sup>125</sup> Hans A. Linde, *Comments*, 18 INT'L L. 77, 77 (1984). Judge Linde was an Oregon Supreme Court Justice and a law professor and worked with the U.S. Delegation to the U.N. General Assembly.

<sup>126</sup> Jonathan L. Marshfield, *Foreign Precedent in State Constitutional Interpretation*, 53 DUQUESNE L. REV. 414, 416 (2015).

<sup>127</sup> THE OPPORTUNITY AGENDA AND THE PROGRAM ON HUMAN RIGHTS AND THE GLOBAL ECONOMY OF NORTHEASTERN UNIVERSITY SCHOOL OF LAW (PHRGE), *Human Rights in State Courts*, at 38 (2014).

<sup>128</sup> While the ICESCR has not been cited often in U.S. state courts, it has been positively referenced by the New Hampshire Supreme Court in a parental rights case, *State v. Robert H.*, 393 A.2d 1387, 1389 (N.H. 1978), *overruled in part by In re Craig T.*, 800 A.2d 819, 820 (N.H. 2002); *but see Moore*, 660 A.2d at 780. Other state courts have declined to consider the ICESCR despite invitations by litigants. *Jordan v. State*, 918 So. 2d 636, 656 (Miss. 2005).

<sup>129</sup> *In re Marriage Cases* were superseded by constitutional amendment as stated in *Perry v. Brown*, vacated and remanded sub nom. *Hollingsworth v. Perry* the court found that the failure to designate the official relationship of same-sex couples as marriage violated the California Constitution and in a footnote referenced with approval article 16 of the UDHR, article 23 of the International Covenant on Civil and Political Rights, article twelve of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and article seventeen of the American Convention on Human Rights. *In re Marriage Cases*, 183 P.3d 384, 426 n.41 (Cal. 2008); *Perry v. Brown*, 671 F.3d 1052, 1065 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012); *Hollingsworth v. Perry*, 570 U.S. 693 (2013). In *City of Santa Barbara v. Adamson*, the same court, when determining the limits of the California Constitution in a case involving interpretation of a city ordinance, the court again used a footnote to reference articles twelve, sixteen, seventeen and twenty-nine of the UDHR. *City of Santa Barbara v. Adamson*, 610 P.2d 436, 439 n.2 (Cal. 1980). And in *Servin v. State* a Nevada State Supreme Court Justice, after examining the United States' reservations to the ICCPR, wrote that banning the execution of juveniles was a customary international norm that precluded the most extreme penalty for juvenile offenders and should be recognized as binding on the United States. *Servin v. State*, 32 P.3d 1277, 1291–92 (Nev. 2001) (Rose, J., concurring). The *Servin* Court vacated a death sentence and instead imposed two consecutive terms of life in prison without the possibility of parole. *See also Moore*, 660 A.2d at 742; *Sterling*, 625 P.2d. at 123; *Pauley*, 255 S.E.2d at 859.

<sup>130</sup> Michael Fakhri, *The US Food System Creates Hunger and Debt – But there is Another Way*, THE GUARDIAN (Apr. 14, 2021); Anna M. Gabrielidis, *Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139 (2006).

<sup>131</sup> Note that other state constitutional rights arguably in this broad topic area, such as the right to farm, fish and hunt, have not followed a human rights framework in adoption or implementation. Additionally, the rights of indigenous peoples to farm, fish and hunt are often based on long standing agreements or traditional rights. Still, as litigation over these rights may be instructive, they are briefly discussed below.

changes the RTF brings respect the intersectionality of human rights.<sup>132</sup> As there are many areas that can affect the RTF, there is no shortage of subject areas. Possibilities include food production, agricultural laws, hunting and fishing regulations, consumer protection, food safety, natural resources protection, and food entitlement programs. Advocates may bring new tools to an issue already in focus or they may proactively target existing situations they do not feel comport with the RTF. All of these areas have their own laws, regulations, history, and cultural adoption within the state, and the choice of where to send the first arrow depends on this multitude of factors. Below is a specific example of how the RTF can be utilized and an overview of other issues that a state level RTF constitutional amendment could affect.<sup>133</sup>

## VII. THE RTF AND WASTE

The RTF is a broad umbrella that advocates in Maine can use to target a wide variety of behaviors, even those that on first blush might not appear to directly fall within the orbit of the right.<sup>134</sup> As an illustrative example, one can argue that the continuation of food waste within the state<sup>135</sup> is an abrogation of the RTF under Article 11 of the ICESCR, under a broad

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<sup>132</sup> Some authors have critiqued Maine's local food sovereignty ordinances for not incorporating interrelated concerns, such as sustainability and environmental preservations. Mia Shirley, *Food Ordinances: Encouraging Eating Local*, 37 WM. & MARY ENV'L. L. & POL'Y REV. 511, 528–530 (2013).

<sup>133</sup> Of course, any of the issues expounded on below can be tackled within or outside of the courtroom. Ideally, behaviors not in comportment with the RTF would be identified and corrected without conflict or litigation. However, this section recognizes that there will likely be one or more lawsuits over RTF issues in the years to come, whether in Maine or elsewhere.

<sup>134</sup> While none of my examples should run afoul of the constraints of federalism, note that Maine has come up against issues of federal preemption in before in the area of food rights. In 2017, the state passed a law that gave Maine towns and cities the right to pass local ordinances allowing a broad array of food products to be exempt from state and federal regulation or inspection. LD 725, 128th Leg. (Me. 2017). In response, the U.S.D.A. questioned whether the state would be able to maintain sufficient food safety standards to enable it to continue sell meat processed at state facilities. Letter from Alfred V. Almanza, Acting Deputy Under Secretary, Office of Food Safety, to Maine Dept. of Agriculture Commissioner Walter Whitcomb (Jul. 6, 2017), (on file with author). Because the loss of this authority would mean fewer facilities for processing, increased and more expensive transportation for farmers, longer waits for products, and increased federal involvement, the state legislature held a special session and amended the bill so that the state inspected meat processing facilities would be able to continue operating.

<sup>135</sup> For purposes of this essay, the terms 'food loss' and 'food waste' are used interchangeably. Various publications define the distinctions between food loss and food waste differently, although in general they distinguish actions that happen at different points along the food chain. *Food Loss and Waste*, FOOD & AGRIC. ORG., (2021) <http://www.fao.org/food-loss-and-food-waste/flw-data>. While it is clear that food loss is extensive, specifically quantifying this loss is challenging. Janet Fleetwood, *Social Justice, Food Loss, and the Sustainable Development Goals in the Era of COVID-19*, 1 SUSTAINABILITY 2, 9 (2020).

reading of the 2021 proposed Maine Constitutional Amendment,<sup>136</sup> and under a full understanding of the RTF.

It is estimated that one third of all food worldwide is lost between production and consumption.<sup>137</sup> The extent of this waste means that the resources invested in producing the food—from the land and water and fossil fuels used to grow it to the energy used to move it to the money invested to the hours people worked – were unnecessary.<sup>138</sup> Food waste tightens the market of availability and has price and access effects for consumers, particularly those with limited ability to travel or to pay higher prices. There is a growing awareness, both internationally and domestically, of the harms this waste produces.<sup>139</sup> However, food waste is not just an economic inconvenience or an ethical failure – it is also a violation of the RTF.

The RTF is inextricably linked with sustainability, and food waste has staggering environmental consequences. Food waste disposed of in landfills – which is primarily where discarded food ends up – produces methane, a greenhouse gas that contributes to climate change. Food waste comprises such a large percentage of U.S. landfills, if it were a country, it “would come in third after the United States and China in terms of impact on global warming.”<sup>140</sup> The link between food waste and climate change, as well as the connection between food waste and resource and supply chain conservation, have all been held to be linked to the RTF.<sup>141</sup> This link is

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<sup>136</sup> The proposed amendment that passed both houses of the Maine legislature this summer reads 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 private property rights, public lands or natural resources in the harvesting, production or acquisition of food.

L.D. 95, 130th Leg., 1st Reg. Sess. (Me. 2021).

<sup>137</sup> HIGH LEVEL PANEL OF EXPERTS ON FOOD SEC. & NUTRITION, *Food losses and waste in the context of sustainable food systems*, at 11 (June 2014). In higher income countries such as the United States, most food loss occurs early in the supply chain, at distribution points, within the service sector and at the consumption stage, and accounts for over 30% of the overall food supply. Pete Smith et al., *Agriculture, Forestry and Other Land Use*, 1 CLIMATE CHANGE 811, 838–39 (2014); FAO, *Global Food Losses and Food Waste – Extent, Causes and Prevention* (2011) (finding that in industrialized countries most food is lost at either the early food supply chain stage or at the consumption stage and that more food is wasted in the global North than in the global South); USDA, *USDA and EPA Join with Private Sector, Charitable Organizations to Set Nation’s First Food Waste Reduction Goals*, News Release No.0257.15 (2015).

<sup>138</sup> Kevin D. Hall et al., *The Progressive Increase of Food Waste in America and Its Environmental Impact*, 4 PLOS ONE 1, 2 (2009).

<sup>139</sup> Beginning in 2020, September 29<sup>th</sup> has been the International Day of Awareness of Food Loss and Waste, as designated by the General Assembly of the United Nations. FAO, *International Day of Food Loss and Waste* (2021), <http://www.fao.org/international-day-awareness-food-loss-waste/en/>.

<sup>140</sup> Chad Frischmann, *Opinion: The climate impact of the food in the back of your fridge*, WASH. POST (2018).

<sup>141</sup> FAO, *Food Loss and Waste and the Right to Adequate Food*, (2018), <http://www.fao.org/3/CA1397EN/ca1397en.pdf>.

backed up by the RTF language found in many international documents.<sup>142</sup> The ICESCR's Article 11 tells state parties that they must take all measures to improve "conservation" of food and "achieve the most efficient development and utilization of natural resources." It is not a stretch to read these mandates as including both agricultural and systematic incidences of inefficiency and waste.<sup>143</sup> The U.N. Zero Hunger Challenge categorically states that in order to eliminate hunger all food systems need to adapt to "eliminate loss or waste of food."<sup>144</sup> The SDGs not only seek to end hunger, but also seek to ensure sustainable consumption.<sup>145</sup> ICESCR general comment 12 states that "sustainability is intrinsically linked to the notion of adequate food or food security, implying food being accessible for both present and future generations."<sup>146</sup> Commitment three of the World Food Summit Plan of Action holds that states must "pursue, through participatory means, sustainable, intensified and diversified food production, increasing productivity, efficiency, safety gains, pest control and reduced wastes and

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<sup>142</sup> As with many human rights ideals, subnational entities unwilling to wait for movement from national entities have looked to international instruments and begun to act on their own. As one example, in 2015 a number of cities and metropolitan areas formed the Milan Urban Food Policy Pact in order to "to develop sustainable food systems . . . in a human rights-based framework, that minimize waste and conserve biodiversity while adapting to and mitigating impacts of climate change." FAO, *Milan Urban Food Policy Pact*, <https://www.milanurbanfoodpolicycompact.org/>. The Pact has grown to over 200 signatories and recognizes members making progress in a number of areas. *Id.* As of the 2020 awards three signatories received recognition for their work in food waste: Guadalajara, Mexico; Bandung, Indonesia; and Almere, Netherlands. *Id.*; see also THERRY GEORGIDANO ET AL., THE ROLE OF CITIES IN THE TRANSFORMATION OF FOOD SYSTEMS: SHARING LESSONS FROM MILAN PACT CITIES 4 (2018). Furthermore, as more governments at all levels start to address food loss, international bodies continue to produce guidance, much of which included instructions for those working at the subnational level. FAO, *Voluntary Code of Conduct for Food Loss and Waste Reduction* (2021), <http://www.fao.org/3/nf393en/nf393en.pdf> (addressing measures to be taken by all stakeholders in the food chain, including subnational entities).

<sup>143</sup> Anastasia Telesetsky, *Waste Not, Want Not: The Right to Food, Food Waste and the Sustainable Development Goals*, 42 DENV. J. INT'L L. & POL'Y 479, 483 (2014).

<sup>144</sup> U.N. Secretary-General's High-Level Task Force on Global Food & Nutrition Sec., Advisory Notes by the HLTF Working Groups to Respond to the 5 "Zero Hunger Challenge" Elements, at 3, 5, 35, 51–61 (Nov. 2015), <https://www.un.org/en/issues/food/taskforce/pdf/HLTF%20-%20ZHC%20Advisory%20Notes.pdf>.

<sup>145</sup> U.N. Dep't of Econ. & Soc. Affs., Sustainable Dev. Goals, Goal 12: Ensure sustainable consumption and production patterns, <https://sdgs.un.org/goals/goal12> (last visited Nov. 19, 2022).

<sup>146</sup> Econ. & Soc. Council, Comm. Econ. Soc. & Cultural Rts., Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Gen. Comment No. 12, U.N. Doc. E/C.12/1999/5, ¶ 7 (May 12, 1999). The Committee went on to state, that "[t]he obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the State must proactively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly." Econ. & Soc. Council, Comm. Econ. Soc. & Cultural Rts., *supra*, at 5; *Id.* at ¶ 15.

losses, taking fully into account the need to sustain natural resources.”<sup>147</sup> These documents all understand that it is not appropriate—or sustainable—for a system to waste or lose food resources if it is fulfilling the RTF.<sup>148</sup>

Other nations seeking to fully realize the RTF have come to understand the connection between food waste and the RTF, and have sought to address waste through legislation and, more recently, through the courts.<sup>149</sup> In fact, the first ever case in the world holding that the waste of surplus food violates the RTF occurred in Pakistan in 2019.<sup>150</sup> In this case, a volunteer organization<sup>151</sup> brought a public interest petition alleging that food waste violated (among other things), Articles 4, 9, 14 and 38(d) of the Pakistan Constitution<sup>152</sup> as well as international treaties, most critically the

<sup>147</sup> World Food Summit, Rome Declaration on World Food Security, (Nov. 13, 1996), <https://www.fao.org/3/w3613e/w3613e00.htm>; Objective 3.2(d) further discusses the obligation of state parties to reduce waste in fisheries. *See also* FAO, The Right to Food: Voluntary Guidelines to Support the Progressive Realization of the Right to Food in the Context of National Food Security (Nov. 2004), <https://www.fao.org/3/y7937e/y7937e.pdf> (“States should promote adequate and stable supplies of safe food through a combination of domestic production, trade, storage and distribution.”).

<sup>148</sup> FAO, Food Wastage Footprint: Impact on Natural Resources 4 (FAO Nat. Res. & Mgmt. Dep’t Working Paper, 2013), <http://www.fao.org/3/i3347e/i3347e.pdf>.

<sup>149</sup> One notable example of a nation trying to confront their food waste problem is France, where a 2016 law forbids grocery stores from throwing away edible food. Until that point, stores had been disposing of food nearing its expiration date or deemed unsellable, sometimes even dousing the food with chemicals or placing their refuse bins in locked warehouses to prevent people from going through their dumpsters. At the same time, the country’s unemployment rate was rising, and food banks were reporting a spike in visits. Under the food waste law, stores must have systems in place to donate the food (for human or animal consumption) and can claim a tax break (up to 60% of inventory value). This has led to over 45,000 tons a year in additional food bank donations. Of course, the law is imperfect. Despite provisions for disobedience of the law no one has yet been held liable for noncompliance. Further, as there are no quality checks on donations stores can donate food and get tax breaks even if the donated food is not edible. Finally, there is still room to expand the law, so that other venues, such as agriculture or processing centers, are included. Pierre Condamine, *France’s Law for Fighting Food Waste*, ZERO WASTE EUR. (2020), [https://zerowasteurope.eu/wp-content/uploads/2020/11/zwe\\_11\\_2020\\_factsheet\\_france\\_en.pdf](https://zerowasteurope.eu/wp-content/uploads/2020/11/zwe_11_2020_factsheet_france_en.pdf); Melanie Saltzman et al., *Is France’s Groundbreaking Food-Waste Law Working?*, PBS NEWSHOUR WEEKEND (Aug. 31, 2019), <https://www.pbs.org/newshour/show/is-frances-groundbreaking-food-waste-law-working>; *5 Countries Leading the Fight to End Food Waste*, FOODHERO (Sept. 2, 2019), <https://foodhero.com/blogs/countries-fighting-food-waste>. Other nations trying various legislative approaches to tackling food waste include Bangladesh, Britain, Denmark, France, India, Italy, Japan, Norway, Pakistan, the Philippines and South Korea.

<sup>150</sup> Muhammad Ahmad Pansota v. Federation of Pakistan, (2019) H CJ DA 38 (Lahore) Writ Petition No. 840 (Pak.).

<sup>151</sup> This organization is the Robin Hood Army, an NGO that operates in the global South to redistribute food. ROBIN HOOD ARMY, <https://robinhoodarmy.com> (last visited Oct. 13, 2021).

<sup>152</sup> PAKISTAN CONST. art. 4:

Right of individuals to be dealt with in accordance with law, etc.

(1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be and of every other person for the time being within Pakistan.

(2) In particular — (a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

PAKISTAN CONST. art. 9 (“Security of person. No person shall be deprived of life or liberty save in accordance with law”); PAKISTAN CONST. art. 14 (“Inviolability of dignity of man, etc. (1) The dignity of man and, subject to law, the privacy of home, shall be inviolable”); PAKISTAN CONST. art. 38(d) (“Promotion of social and economic well-being of the people. The State shall— (d) provide basic necessities of life such as food . . . for all citizens, irrespective of sex, caste, creed or race, as are permanently or temporarily unable to earn their livelihood[.]”)

ICESCR, which Pakistan had ratified in 2008.<sup>153</sup> In rendering its final judgment,<sup>154</sup> the Lahore High Court explained that the right to life clearly includes the RTF, holding that, “[p]roviding its citizens with food, especially those who do not have access to it and/or cannot afford it is a primary obligation of the State, violation of which will not just breach the right to food but also the right to life, security and dignity.”<sup>155</sup> The Court relied on Article 11 of the ICESCR, general comment 12, as well as environmental implications and the SDGs in finding that “[t]he Government bears a responsibility to ensure equitable distribution of food within its borders and has committed to preventing food wastage in all forms.”<sup>156</sup> The recognition of the connection between food waste, equity and sustainability is a principle with global applicability.

In the United States, the environmental impact of food waste already has some U.S. officials,<sup>157</sup> as well as a number of states,<sup>158</sup> seeking solutions.<sup>159</sup> Maine is no exception. The State has evinced an understanding of the connection between food waste and environmental concerns and has tried a variety of avenues in an effort to reduce waste in general<sup>160</sup> and food

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<sup>153</sup> The court noted that “under international law the right to food is recognized as an intrinsic human right. The Universal Declaration of Human Rights of 1948 first recognized the right to food as a human right, it was then incorporated in the International Covenant on Economic, Social and Cultural Rights, 1966 (Article 11).” Muhammad Ahmad Pansota v. Federation of Pakistan, (2019) HCJ DA 38 (Lahore) at 5.

<sup>154</sup> Like the *PUCL* case in India (to which the Pakistani court referenced) the *Pansota* case was held under mandamus by the High Court, which issued a number of interim orders during the course of the proceedings. Under these interim orders regulations on the donation and disposal of excess food by the Punjab Food Authority were promulgated. *Id.*

<sup>155</sup> *Id.* at 17.

<sup>156</sup> *Id.* at 28.

<sup>157</sup> Press Release No. 0275.15, USDA, USDA and EPA Join with Private Sector, Charitable Organizations to Set Nation’s First Food Waste Reduction Goals (Sept. 16, 2015), <https://www.usda.gov/media/press-releases/2015/09/16/usda-and-epa-join-private-sector-charitable-organizations-set>; *Food Loss and Waste*, USDA, <https://www.usda.gov/foodlossandwaste> (last visited Nov. 19, 2022); Cultivating Organic Matter through the Promotion of Sustainable Techniques (COMPOST) Act, H.R. 4443, 117th Cong. (1st Sess. 2021).

<sup>158</sup> Elaine Povich, *Waste Not? Some States Are Sending Less Food to Landfills*, STATELINE (July 8, 2021),

<https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/07/08/waste-not-some-states-are-sending-less-food-to-landfills>; *see also*, An Act to Amend the Environmental Conservation Law, in Relation to Requiring Supermarkets to Make Excess Food Available to Qualifying Entities, Assemb. Bill 4398-A, 2019-2020 Reg. Sess. (N.Y. 2019).

<sup>159</sup> Samantha Holloway, *Homeless, Hungry, and Targeted: A Look at the Validity of Food-Sharing Restrictions in the United States*, 46 HOFSTRA L. REV. 733, 736 (2017) (arguing in favor of a U.S. food waste law and ratification of the ICESCR).

<sup>160</sup> Note that Maine has been a national leader in some areas of waste reduction. For example, Maine recently passed a first-in-the-nation packaging waste law to address the waste created by packaging sold or distributed within the state. An Act to Support and Improve Municipal Recycling Programs and Save Taxpayer Money, H.P. 1146, 130th Me. Legis. (2021). Over one hundred individuals testified at the public hearings on this legislation, the vast majority in favor of passage. Maine also has a positive history of using incentives, mandates and even bans in the environmental arena. Maine was an early bottle bill adopter, and the state has active stewardship programs for mercury, batteries, electronic waste, paint, and cellular phones. *Maine’s Product Stewardship Programs*, ME. DEP’T ENVIRON. PROT.,

waste in particular.<sup>161</sup> Specifically, while the state had a commitment to reducing greenhouse gas emissions,<sup>162</sup> an expansive bill to address food waste and hunger was introduced in the 2017–18 legislative session, which would have investigated food waste in the state and provided incentives for waste reduction.<sup>163</sup> While the bill was eventually scaled back, its passage did create a food recovery database to track, and among other things, surplus food sharing.<sup>164</sup> A study released soon after this bill was introduced estimated that only approximately 5% of the state’s food waste was finding its way to hunger relief.<sup>165</sup> It was also estimated that approximately one-third of edible crops on Maine farms were plowed under machinery annually.<sup>166</sup> The year after that, another study found that most food waste in Maine was burnt or sent to a landfill,<sup>167</sup> and that food waste in the state remained high.<sup>168</sup> This despite the fact that Maine has a hierarchy of solid waste management, under which the first priority is to reduce both the amount and toxicity of waste generated, the second priority is reuse, and the third priority is recycling—landfill disposal is the sixth (and last) option.<sup>169</sup>

In other words, it is clear that Maine understands the problem of food waste, particularly its connection to issues of hunger and sustainability. And yet, food waste in the state remains a problem. This is where a

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<https://www.maine.gov/dep/waste/productstewardship/index.html> (last visited Nov. 19, 2022); TRAVIS BLACKMER ET. AL., UNIV. ME. SEN. GEORGE J. MITCHELL CTR FOR SUSTAINABILITY SOLS., *SOLID WASTE MANAGEMENT IN MAINE: PAST, PRESENT AND FUTURE* (2015), <https://umaine.edu/mitchellcenter/wp-content/uploads/sites/293/2015/02/FINALSolid-Waste-Whitepaper-2.pdf>; The state was also the first in the nation to ban certain expanded polystyrene foam products. ME. STAT. tit. 38, §§ 1571–73.

<sup>161</sup> As one example, Maine is home to an anaerobic digestion facility. Anaerobic digestion is a method of handling food waste in a sealed container, where bacteria break down organic matter in the absence of oxygen. AGRICYCLE OF PORTLAND, ME., <https://www.agricycleenergy.com> (last visited Oct. 12, 2021). Maine’s Climate Council has noted that food waste contributes to Maine’s greenhouse gas emissions. MAINE WON’T WAIT: A FOUR-YEAR PLAN FOR CLIMATE ACTION, MAINE CLIMATE COUNCIL 69 (2020), [https://www.maine.gov/future/sites/maine.gov/future/files/inline-files/MaineWontWait\\_December2020.pdf](https://www.maine.gov/future/sites/maine.gov/future/files/inline-files/MaineWontWait_December2020.pdf).

<sup>162</sup> ME. STAT. tit. 38, § 577.

<sup>163</sup> The bill was An Act to Address Hunger, Support Maine Farms and Reduce Waste, H.P. 1054, 128th Leg., (Me. 2017). It would have, inter alia, set up a Commission, to “evaluate the economic, environmental and human costs of food waste in Maine,” created a food producers donation tax credit. Note that LD 1534 was introduced by legislator Craig Hickman, who is also one of the long-term advocates for a RTF in the state of Maine.

<sup>164</sup> ME. STAT. tit. 38, § 2137-A.

<sup>165</sup> LD 1534 STAKEHOLDER WORKING GROUP, *WASTE IS NOT THE MAINE WAY*, SENATOR GEORGE J. MITCHELL CTR. FOR SUSTAINABILITY SOL. UNIV. OF ME. (2018), <https://umaine.edu/mitchellcenter/wp-content/uploads/sites/293/2018/01/FINAL-FULL-REPORT.pdf>.

<sup>166</sup> *Lee Advocates for Reducing Food Waste in Maine*, UNIV. ME. (Nov. 4, 2021), <https://umaine.edu/portland/2021/11/04/lee-advocates-for-reducing-food-waste-in-maine/>.

<sup>167</sup> Skyler Horton et al., *Circular Food Systems in Maine: Findings from an Interdisciplinary Study of Food Waste Management*, 28 ME. POL’Y REV. 59, 59–71 (2019).

<sup>168</sup> *Food Waste a No Go in Sebago*, NAT. RES. COUNCIL ME. (Nov. 13, 2017), <https://www.nrcm.org/blog/spotlight-on-sustainability-in-maine/food-waste-no-go-sebago/>.

<sup>169</sup> ME. STAT. tit. 38, § 2101. Maine’s landfills are owned commercially, by municipalities, and by the state and have not met their recycling goals. Nomawethu Moyo et. al., *The State of Municipal Solid Waste in Maine*, STATE ME.’S ENV’T, COLBY COLL. (2014), <https://web.colby.edu/stateofmaine2014/the-state-of-municipal-waste-in-maine/>.

constitutional RTF can come in. Under the reasoning used by the *Pansota* court, Maine's RTF constitutional amendment signifies that the state is committed to realizing the human RTF and to an infrastructure that completely respects this right.<sup>170</sup> Such an infrastructure seeks to eliminate food waste.<sup>171</sup> The State has arguably abrogated its responsibilities by allowing hunger to occur at the same time that it permits food to be wasted and continues to allow subpar food distribution schemes.

Advocates can use the Maine RTF to address issues of food waste overall, as explained above, or to focus on aspects of food waste. For example, although uniform and clear labeling on food products can lower food waste, because there are no uniform food labeling laws in the U.S.,<sup>172</sup> the resulting array of labeling has led to unnecessary waste at the consumption end.<sup>173</sup> In an effort to correct this waste, bills were introduced to the Maine legislature in 2016 and 2019<sup>174</sup> aiming to standardize food labeling. Under a state constitutional RTF, Maine advocates can address food waste in as targeted an area as passage of standardized food labeling laws, using the RTF to establish the obligation of the state to reduce waste. Other areas in the realm of reducing food waste include tax incentives for food waste reduction, charging for food waste in landfills, investing in infrastructure to reduce transport related waste costs, managing landfills by asking the state to refuse out of state waste, and managing facilities waste in

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<sup>170</sup> The *Pansota* Court held:

Pakistan has ratified international human rights treaties which enshrine the right to food. The language of these agreements signifies that Pakistan has agreed to work within an international human rights framework and has an obligation to take steps to respect and fulfill such rights. This creates moral, legal and ethical imperatives to bring this human right framework home by developing a domestic food policy infrastructure based on the right to food. As signatory to the above conventions and treaties, Pakistan is bound to honor its international commitments. Respondents are duty bound to adhere to their own policies under the doctrine of sovereignty in the light of case law[.]

Muhammad Ahmad Pansota v. Federation of Pakistan, (2019) HCJ DA 38 (Lahore) R 40.

<sup>171</sup> The Maine constitutional amendment states that, “[a]ll individuals have a . . . right to . . . consume the food of their own choosing.” While this is narrower than the RTF found in some international documents, future advocates in the state can use the explanatory language found in official sources explaining the RTF, such as general comments of the ICESCR itself and those of international bodies. H.P. 61, 130th Me. Leg. 1st Reg. Sess. (Me. 2021).

<sup>172</sup> The exception to this is infant formula. FDA, LABELING OF INFANT FORMULA: GUIDANCE FOR INDUSTRY (2016), <https://www.fda.gov/media/99701/download>.

<sup>173</sup> Various states allow diverse labels on food. Some of these labels are directed at the retailer and some are directed at the consumer, some refer to the safety of the product and some to the quality. Examples include “Sell By,” “Use By,” “Expires On,” “Made On,” “Best By,” “Best Before,” “Best if Used By,” and “Better if Used by.”

<sup>174</sup> In an effort to correct this, in 2016 and 2019 a Maine Congressional representative helped forward bills to standardize food labeling. The 2016 bill was “To establish requirements regarding quality dates and safety dates in food labeling, and for other purposes.” H.R. 3981, 114th Cong. (2016). The 2019 bill was “To establish requirements for quality and discard dates that are, at the option of food labelers, included in food packaging, and for other purposes.” H.R. 3981, 116th Cong. (2019). Both were introduced by Maine Representative Chellie Pingree.

schools, hospitals, and prisons.<sup>175</sup> Each of these ideas speaks to the resourceful ways in which a state RTF can be executed for practical implementation.

#### VIII. AN OVERVIEW OF THE RTF WITH GARDENS, SAFE GROWING AND LAND USE

In addition to areas arguably more peripheral, the RTF can be used to address a plethora of areas with a more obvious direct connection to an individual's ability to feed themselves. This article will provide a sampling of topics the RTF can affect, in Maine and in future states with a RTF. In addition to these examples, there are of course other areas of food availability, accessibility, adequacy, and appropriateness that merit consideration, and in order to fully understand the areas most necessitating action a needs assessment, as discussed earlier in the essay, can help. But while each subnational entity can determine how best to incorporate a RTF in their own locality, the commonalities of law and practice found in the subjects below can provide ideas and guidelines to assist in implementation.

The benefits of personal and community gardens are too obvious to need explanation—the connection with food, the environmental benefits of sourcing food nearby, the community building qualities, the increase in food security, the positive expenditure of time.<sup>176</sup> The connection with the RTF is also clear—a garden of ones' own is the epitome of the 4As.<sup>177</sup> Community

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<sup>175</sup> Right now, Maine is one of the states that does not offer a state level tax incentive (credit or deduction) for food donations, so donors receive only federal benefits. HARV. FOOD LAW & POL'Y CLINIC, *Legal Fact Sheet: Maine Food Donation: Tax Incentives for Businesses*, 1 (2018), <https://www.nrcm.org/wp-content/uploads/2018/09/TaxIncentivesMEFactsHarvard.pdf>. Other states offering tax incentives for food redirection include Arizona (ARIZ. REV. STAT. ANN. § 42-5074, § 43-1025 (LEXISNEXIS 2022)), California (CAL. REV. & TAX. CODE § 17053.88.5 (Deering 2022) (repealed effective Dec. 1, 2027) and CAL. REV. & TAX. CODE § 17053.12 (Deering 2022)), Colorado (COLO. REV. STAT. § 39-22-536 (2022) and COLO. REV. STAT. ANN. § 39-22-301 (2022)), Iowa (IOWA CODE §§ 190B.101-.106, 422.11E, 422.33(30) (2022)), Kentucky (KY. REV. STAT. ANN. § 141.392), Maryland (MD CODE ANN., TAX-GEN. §§ 10-745, 10-746 (LexisNexis 2022)), Missouri (MO. REV. STAT. § 135.647 (effective Aug. 28, 2018)), New York (N.Y. TAX LAW § 210-B (Consol. 2022)), Oregon (OR. REV. STAT. §§ 315.154, 315.156 (2022)), South Carolina (S.C. CODE ANN. § 12-6-3750 (2022)), and Virginia (VA. CODE ANN. § 58.1-439.12:12 (2022)). See RUTE PINHO, CONN. GEN. ASSEMB. OFF. LEGIS. RSCH., TAX INCENTIVES FOR FOOD DONATIONS, 2015-R-0201 at 1 (2015), <https://www.cga.ct.gov/2015/rpt/2015-R-0201.htm>; Sarah Nichols, *Why You Should Care About Landfills*, NAT. RES. COUNCIL ME. (Sept. 10, 2020), <https://www.nrcm.org/blog/why-you-should-care-about-landfills>.

<sup>176</sup> Jean C. Bikomeye et al., *Resilience and Equity in a Time of Crises: Investing in Public Urban Greenspace Is Now More Essential Than Ever in the US and Beyond*, 18 INT. J. ENVIRON. RES. PUB. HEALTH 1, 14 (2021); Jill S. Litt et al., *The Influences of Social Involvement, Neighborhood Aesthetics and Community Garden Participation on Fruit and Vegetable Consumption*, 101(8) J. AM. PUB. HEALTH 1466, 1466 (2011).

<sup>177</sup> In Maine, there is an understanding that local food production is not only personally beneficial, but also positively affects the environment. MAINE WON'T WAIT: A FOUR-YEAR PLAN FOR CLIMATE ACTION, MAINE CLIMATE COUNCIL 69 (2020), [https://www.maine.gov/future/sites/maine.gov.future/files/inlinefiles/MaineWontWait\\_December2020.pdf](https://www.maine.gov/future/sites/maine.gov.future/files/inlinefiles/MaineWontWait_December2020.pdf).

and personal gardens are available, as they are providing food desired by individuals; they are accessible, as they are in immediate proximity; they are adequate, in that they provide wholesome options; and they are appropriate, as they are a dignified and sustainable method of acquiring food. The benefit of gardens to urban and marginalized communities who do not always have access to food meeting the 4As is even more profound, and there are numerous examples across the country of subnational governments, usually in partnership with nonprofits, seeking to bolster and support personal gardens, community gardens and urban farms, either through the legislative process or through the courts.<sup>178</sup> There is also increasing evidence that green spaces can positively affect the safety and mental health conditions of a community.<sup>179</sup>

These efforts have addressed garden and farm access for individuals in private homes, in rental units, those who are unhoused, and those in subsidized housing, where residents often have to travel for full-service markets. For example, New York's Housing Authority has a Garden and Greening Program that supports community gardens and urban farms for the city's public housing.<sup>180</sup> In Colorado, Denver Urban Gardens operates the nation's largest garden network and has partnered with the Denver Housing Authority on community gardens in several low-income housing complexes. This partnership includes monies budgeted to plan and maintain the gardens.<sup>181</sup> In Seattle, the Housing Authority works with public housing residents to maintain community gardens on public housing property.<sup>182</sup> In Minnesota, the Land Stewardship Project, a nonprofit working towards

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<sup>178</sup> For example, California's 2014 Neighborhood Food Act voids language in leases or HOAs preventing tenants from growing food for personal consumption. This law holds that a landlord must allow most tenants to participate in personal agriculture in portable containers for growing in the tenant's private area. Assemb. B. 2561, 2013-2014 Leg. (Cal. 2014); *The Neighborhood Food Act (AB 2561): Frequently Asked Questions*, SUSTAINABLE ECONOMIES L. CTR., <https://ucanr.edu/sites/UrbanAg/files/263834.pdf> (last visited Nov. 18, 2022).

<sup>179</sup> Eugenia C. South, *To Combat Gun Violence, Clean Up the Neighborhood*, N.Y. TIMES (Oct. 8, 2021), <https://www.nytimes.com/2021/10/08/opinion/gun-violence-biden-philadelphia.html> (reporting a large-scale study co-led by the author, as well as other efforts across the country, where vacant parcels of land are 'greened' and the surrounding neighborhoods see benefits in crime statistics and mental health self-reporting).

<sup>180</sup> *Urban Growing and Gardening*, NYC FOOD POL'Y, <https://www1.nyc.gov/site/foodpolicy/programs/urban-growing-and-gardening.page> (last visited Nov. 18, 2022).

<sup>181</sup> *Tapiz Community Garden*, DENVER URB. GARDENS, <https://dug.org/garden/tapiz/> (last visited Nov. 18, 2022); *Projects*, DENVER HOUS. AUTH., <https://www.denverhousing.org/projects-highlights/> (last visited Nov. 18, 2022); Donna Bryson, *A Garden Grows in Sun Valley*, DENVERITE (Sept. 30, 2019, 5:00 AM), <https://denverite.com/2019/09/30/a-garden-grows-in-sun-valley/>; FOOD SYSTEM POLICIES AND POPULATION HEALTH: MOVING TOWARD COLLECTIVE IMPACT IN DENVER, DENVER DEPT. ENV'T. HEALTH 17 (2014), [https://www.denvergov.org/content/dam/denvergov/Portals/746/documents/Food%20System%20Policy%20Scan%20Report\\_FINAL\\_12.15.2014.pdf](https://www.denvergov.org/content/dam/denvergov/Portals/746/documents/Food%20System%20Policy%20Scan%20Report_FINAL_12.15.2014.pdf).

<sup>182</sup> COMMUNITY GARDENING: POLICY REFERENCE GUIDE, PUB. HEALTH L. CENT. MITCHELL HAMLIN SCH. L. 26 (2017), <https://publichealthlawcenter.org/sites/default/files/resources/Community-Gardening-Guide-2017.pdf>.

sustainable agriculture, partnered with the Hope Community, an intentional neighborhood with low- and moderate-income apartments, to create growing space for three gardens.<sup>183</sup> Maine, which has been first in the nation in a number of food related areas,<sup>184</sup> is generally a grower-friendly state. In fact, the state has seen considerable activity around community gardens, urban farms, and personal gardening. For example, the Auburn-Lewiston area is the second largest urban metropolis in the state and a center of food access work.<sup>185</sup> The area is also home to the Lots to Garden programs, which aims to bring community gardens to areas most in need of food access.<sup>186</sup> Additionally, a number of Maine housing authorities have developed regulations around growing food.<sup>187</sup>

Despite these successes, there are equally numerous instances across the country where trying to grow ones' own food is prohibited.<sup>188</sup> As the examples below illustrate, this has happened in parks, unused lots, rental units, privatized public housing complexes,<sup>189</sup> and even in private homes operating under HOAs.<sup>190</sup> These prohibitions range from outright bans on

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<sup>183</sup> Shannon Prather, *Community Gardens More Than Triple in Twin Cities*, STAR TRIB. (Sept. 3, 2016, 9:36 PM), <https://www.startribune.com/community-gardens-more-than-triple-in-twin-cities/392254821/>. See also LAND STEWARDSHIP PROJECT, <https://landstewardshipproject.org/> (last visited Oct. 29, 2022); and HOPE COMMUNITY, <https://hope-community.org/about/> (last visited Oct. 29, 2022).

<sup>184</sup> In addition to passing the country's first RTF constitutional amendment, Maine has one of the earliest cottage food laws in the country and the State has been a leader in forwarding local ordinances to exempt small local producers selling products for home consumption from state license and inspection regulations.

<sup>185</sup> The area is also one of the largest per-capita centers of Somali refugees and Muslims in the country and well over half of downtown Lewiston and downtown Auburn residents live below 200% of the federal poverty level. CYNTHIA ANDERSON, HOME NOW: HOW 6000 REFUGEES TRANSFORMED AN AMERICAN TOWN, 5-6 (2019); U.S. EPA et al., COMMUNITY ACTION PLAN FOR LEWISTON-AUBURN 4 (2019), <https://goodfood4la.org/wp-content/uploads/2020/01/LFLP-L-A-Community-Action-Plan-FINAL.pdf>. According to this plan the area needs include a year-round farmers market, increased sustainable land access, passage of an urban agriculture ordinance and a low-cost local food store (in a neighborhood with high food insecurity, many residents without vehicles, and no full-service grocery stores within a mile).

<sup>186</sup> The Lots to Garden program was founded in 1999, sponsored by St. Mary's Health System. In 2006, St. Mary's founded their Nutrition Center to house the program and advance their belief that access to food is a fundamental right. *Nutrition Center*, ST. MARY'S HEALTH SYS., <https://www.stmarysmaine.com/nutrition-center/> (last visited Nov. 18, 2022).

<sup>187</sup> As one example, the city of Bangor, Maine allows prior approved vegetable gardens up to a certain size. *Dwelling Lease (O)3-5*, HOUSING AUTH. CITY BANGOR (Jan. 2017), <https://www.bangorhousing.org/wp-content/uploads/2018/09/PH-Lease-1-1-17.pdf>.

<sup>188</sup> Kaitlyn Greenidge, Opinion, *My Mother's Garden*, N.Y. TIMES (Mar. 26, 2016), <https://www.nytimes.com/2016/03/27/opinion/sunday/my-mothers-garden.html> (relaying how her mother was told to get rid of her vegetable garden, planted in an unused section of lawn in the housing project where they lived, or be evicted).

<sup>189</sup> Public housing units are increasingly being run by private entities who contract to run these developments.

Jaime Alison Lee, *Rights at Risk in Privatized Public Housing*, 50 TULSA L. REV. 759, 767 (2015).

<sup>190</sup> HOAs are homeowner associations that govern certain communities. Very often their rules forbid or seriously curtail gardens. Nicole Schauder, *HOA Bans Vegetable Gardens*, PERMACULTURE GARDENS, <https://growmyownfood.com/hoa-bans-vegetable-gardens/> (last visited Nov. 18, 2022);

gardening to specific proscriptions based on particular issues such as plant type or size, garden location, and water use. For example, it is currently illegal to grow particular plants in certain parts of Maine,<sup>191</sup> because of a concern that a fungus associated with plants in the genus *Ribes* would infect Eastern white pine trees.<sup>192</sup> Because white pine is such an economic asset to the state, timber and forestry advocates pushed back against a proposed lifting of the ban.<sup>193</sup> While Maine residents formed a petition to try and repeal this restriction, in other locales advocates have responded to various restrictions by bringing lawsuits, turning to their legislatures, giving up, or proceeding in defiance of the prohibition.<sup>194</sup>

Presently, states and localities across the country have a maze of often confusing regulations around personal gardens, community gardens, and urban farms. In Florida, homeowners had to go to court after they were told that the vegetables they had been growing in their front yard for years violated a new local ordinance.<sup>195</sup> After losing their six year court battle, the state passed a law prohibiting local governments from stopping residential homeowners from having vegetable gardens.<sup>196</sup> Note that because Florida does not have a RTF in their constitution, the homeowners had to rely on other, unsuccessful, legal arguments and eventually turn to the legislature. As another example, an Illinois city allows front yard vegetable gardens, but bans other gardening necessities. Here, homeowners constructed a high

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Joseph Barnes, *The 5 Most Common HOA Landscaping/Gardening Policies (And Why They Matter to Your Community)*, YELLOWSTONE LANDSCAPING (Dec. 28, 2020, 12:06 PM) <https://www.yellowstonelandscape.com/blog/most-common-hoa-landscaping-gardening-policies-why-matter-your-community>. For a response to HOA restrictions on edible gardening, see Coleman Alderson, *HOA Guidelines Rules and Workarounds for Growing Food*, GARDENS ALL, <https://www.gardensall.com/gardens-not-allowed-hoa-homeowners-associations-and-yard-gardens/> (last visited Oct. 13, 2021).

<sup>191</sup> Me. Dep't of Agric., Conservation & Forestry, Bureau Forestry, White Pine Blister Rust, Quarantine on Currant and Gooseberry Bushes (re-adopted Dec. 28, 1979), [https://www.maine.gov/dacf/mfs/forest\\_health/diseases/white\\_pine\\_blister\\_rust\\_rule.htm](https://www.maine.gov/dacf/mfs/forest_health/diseases/white_pine_blister_rust_rule.htm).

<sup>192</sup> Sam Schipani, *Growing Currants and Gooseberries is Illegal in Maine and There's a Good Reason for It*, BANGOR DAILY NEWS (Aug. 16, 2021), [https://www.bangordailynews.com/2021/08/16/homestead/growing-currants-and-gooseberries-is-illegal-in-maine-and-theres-a-good-reason-for-it/#:~:text=Outside%20the%20areas%20with%20the,for%20white%20pine%20blister%20rust.](https://www.bangordailynews.com/2021/08/16/homestead/growing-currants-and-gooseberries-is-illegal-in-maine-and-theres-a-good-reason-for-it/#:~:text=Outside%20the%20areas%20with%20the,for%20white%20pine%20blister%20rust.;);

WILLIAM H. LIVINGSTON ET AL., *FIELD MANUAL FOR MANAGING EASTERN WHITE PINE HEALTH IN NEW ENGLAND*, MISCELLANEOUS PUB. 764, ME. AGRIC. & FOREST EXPERIMENT STATION 7 (2019).

<sup>193</sup> Tom Atwell, *Maine Gardener: Currant Events*, PORTLAND PRESS HERALD (Jan. 9, 2011), [https://www.pressherald.com/2011/01/09/currant-events\\_2011-01-09/](https://www.pressherald.com/2011/01/09/currant-events_2011-01-09/); David Spahr, Forum Post to *Maine Permaculture: Repeal the Ribes (Currants, Gooseberries, Jostaberries) Ban in Maine*, MEETUP (Dec. 14, 2010),

<https://www.meetup.com/maine-permaculture/messages/boards/thread/10166569#initialized>.

<sup>194</sup> Sarah Schindler, *Unpermitted Urban Agriculture: Transgressive Actions, Changing Norms, and the Local Food Movement*, 2014 WIS. L. REV. 369, 369 (2014).

<sup>195</sup> Alisha Ebrahimji, *Six Years Later, Florida Couple Wins Right to Plant Veggies in Their Front Yard*, CNN (July 3, 2019, 2:07 PM), <https://edition.cnn.com/2019/07/03/us/florida-vegetable-gardens-trnd/index.html>.

<sup>196</sup> Fla. S. CS/SB 82: Vegetable Gardens (Fla. 2019), <https://www.flsenate.gov/Session/Bill/2019/82/?Tab=BillHistory>.

tunnel hoop house (an impermanent greenhouse used to cover plants and extend the growing season) in their backyard and were told by city officials that this violated a prohibition on temporary structures.<sup>197</sup> In Minnesota, a homeowner was told not to proceed with his large front yard vegetable garden until city officials had time to study ‘the problem.’ The City Council then passed an interim ordinance banning front yard gardens, which they later made permanent, despite a petition (that garnered over 10,000 signatures) asking that the ordinance be rescinded.<sup>198</sup> Many would argue that for the most part these restrictions are in direct conflict with a RTF constitutional amendment and had these advocates had the benefit of residing in a RTF state such as Maine, they would have had a more powerful tool with which to contest these issues. In fact, many believe advocates in a RTF state can do more than just challenge restrictions – they can use the RTF to argue for support for community and personal gardens and for urban farms.

It is also worth noting that the bans detailed above generally use aesthetic concerns to ban home food cultivation and that the individuals targeted are usually people of color. Aesthetic concerns are a catch-all that have at least some connection with issues of equity, as in America prosperity has become connected with homes that have no evidence of the work that maintains life.<sup>199</sup> Many places differentiate between ornamental growth, which is generally permitted, and edible growth, which is prohibited, regulated, or denigrated. Even when advocates have removed anti-gardening laws or helped pass pro-gardening legislation, they have had to combat issues of inequity during the process. As one example, while San Francisco amended its zoning so that agricultural activity could proceed everywhere in the city, advocates had to overcome an effort to add an ornamental fencing requirement to the new legislation, a requirement that would have made participation price-prohibitive for many parties.<sup>200</sup> In other words, issues of

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<sup>197</sup> Nicole Virgil, Opinion, *Commentary: I’m Fighting for My Right to Garden*, CHI. TRIBUNE (Aug. 28, 2020), <https://www.chicagotribune.com/opinion/commentary/ct-opinion-garden-hoop-property-rights-elmhurst-20200828-n64y471345fb7hegkuce6c6e7m-story.html>. Illinois had a Right to Garden Act that would have allowed for such structures introduced in the 2020-2021 legislative session. Right to Garden Act, S.B. 3329, 101st Gen. Assemb. (Ill. 2020), <https://trackbill.com/bill/illinois-senate-bill-3329-right-to-garden-act/1896812/>. See also *Our Mission*, ADVOCATES FOR URBAN AGRIC., <https://www.auachicago.org/home/our-mission/> (last visited Oct. 29, 2022) (noting the group’s support for policies supporting urban agriculture in the Chicago area).

<sup>198</sup> Joey Peters, *Not in His Front Yard: Falcon Heights Tells Would-be Vegetable Gardener to Hold the Lettuce, Hold the Tomato, While it Studies the Menu*, SAHAN J. (May 20, 2020), <https://sahanjournal.com/culture-community/not-in-his-front-yard-falcon-heights-tells-would-be-vegetable-gardener-to-hold-the-lettuce-hold-the-tomato-while-it-studies-the-menu/>; Falcon Heights, Ramsey County, Minn., An Interim Ordinance Prohibiting the Cultivation of Gardens in the Front Yard Ordinance No. 20-04 (May 13, 2020).

<sup>199</sup> Sarah B. Schindler, *Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores*, 87 TUL. L. REV. 231, 252–53, 257–59 (2012).

<sup>200</sup> Antonio Roman-Alcalá, *San Francisco Passes Progressive Urban Agriculture Policy*, CIV. EATS (Apr. 14, 2011), <https://civileats.com/2011/04/14/san-francisco-passes-most-progressive-urban-agriculture-policy-in-u-s/>.

bias within the arena of food justice reflect problems of inequity within our larger society, a connection that is as true in Maine as it is elsewhere.<sup>201</sup> One of the goals of the RTF is to identify and address these issues.<sup>202</sup>

Restrictions on urban farms, community gardens and personal gardens can prove good targets as advocates flex their new RTF muscles, as can related areas such as raising backyard chickens or keeping bees.<sup>203</sup> It is also worth noting that while access to natural resources may, at first glance, seem to demand a review identical to that utilized when evaluating issues such as personal and community gardens, the analysis here may in fact differ.<sup>204</sup> This is because, while access to these resources is also an important aspect of the RTF, it is one that is held for the collective good and requires assessment to ensure that all present and future interests are balanced.<sup>205</sup> The few court cases that have concluded in this realm either involve interests ancillary to the right to feed oneself<sup>206</sup> or challenge hunting or fishing restrictions<sup>207</sup> and merely illustrate the point that sustainability and the RTF

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<sup>201</sup> As an example, during the legislative debate over the RTF amendment in Maine, a legislator testifying in opposition asserted concerns about the amendment permitting inappropriate farm animal husbandry in urban areas such as Lewiston, Auburn and Portland. These are the areas that are the immigrant centers of Maine, and Lewiston has one of the highest per capita Muslim populations in the United States. Proposing an Amendment to the Constitution of Maine to Establish a Right to Food: Hearing on L.D. 95 before the House of Representatives, 130th Legis. (2021) (testimony of Kathleen Dillingham).

<sup>202</sup> Megan Horst et al., *The Intersection of Planning, Urban Agriculture, and Food Justice: A Review of the Literature*, 83 J. AM. PLAN. ASS'N 277, 277 (2017).

<sup>203</sup> *How Law & Policy Can Support Growing Food Where You Live*, HEALTHY FOOD POL'Y PROJECT, <https://healthyfoodpolicyproject.org/growing-food-where-you-live/how-law-policy-can-support-growing-food-where-you-live> (last visited Nov. 11, 2022).

<sup>204</sup> As noted *infra*, state constitutional rights to farm, hunt or fish are more the result of special interest advocates than they are of human rights proponents and litigation over these amendments provide little direct guidance. Young-Eun Park, *Life, Liberty, and the Pursuit of Hunting & Fishing: The Implications of Kentucky's "Right to Hunt" Constitutional Amendment*, 7 KY. J. EQUINE, AGRIC., & NAT. RES. L. 357, 357, 359. (2015) (arguing that state constitutional amendments on the right to fish and hunt are unnecessary, as these activities are already allowed and will still be subject to reasonable state restrictions.) Note that these rights are relatively new – until the mid 1990s only one state had a right to fish and hunt in their state constitution. CONG. SPORTSMEN'S FOUND., 2021 ISSUE BRIEFS, 154–55 (2021).

<sup>205</sup> U.N. FAO, *THE RIGHT TO FOOD AND ACCESS TO NATURAL RESOURCES* 23 (2008) (explaining how access to natural resources is a means to an end).

<sup>206</sup> For example, a Virginia case dealt with clay shooting and the state constitutional right to hunt. The court held that “shooting sporting clays does not qualify as hunting under the Virginia constitutional right to hunt, fish, and harvest game.” *Orion Sporting Group, L.L.C. v. Nelson County Board of Supervisors*, 68 Va. Cir. 195, 199 (2005).

<sup>207</sup> Courts generally find the challenged restrictions reasonable. For example, there was a case where the plaintiffs challenged the formation of a hunting season for mourning doves. *Wis. Citizens Concerned for Cranes and Doves v. Wis. Dep't Nat. Res.*, 677 N.W.2d 612, 616 (Wis. 2004). In denying their claim, the court discussed the “Right to Hunt” amendment in the Wisconsin Constitution and held that while Wisconsinites had the right to hunt, this right could be subject to reasonable regulations. *Id.* at 629. Similarly, in a Tennessee case challenging restrictions on catching paddlefish, the court held that while the state constitution guaranteed a personal right to fish and hunt, that right was subject to reasonable restrictions. Tom Humphrey, *Judge Dismisses Lawsuit Based on TN 'Right to Hunt and Fish,'* KNOXBLOGS: HUMPHREY ON THE HILL (May 29, 2015), <http://knoxblogs.com/humphreyhill/2015/05/29/judge-dismisses-lawsuit-based-on-tn-right-to-hunt-and-fish/>. *But see* *Hunter Nation Inc. v. Wis. Dep't Nat. Res.*, No. 2021CV000031, *order issued* (Wis. Cir.

are intertwined rights that require a healthy environment.<sup>208</sup> Therefore, while state constitutional guarantees of the right to hunt, farm, and fish may provide some elucidation in the future,<sup>209</sup> in general litigation over these amendments may practically provide less guidance for RTF advocates than RTF cases from overseas.

In addition to ensuring availability, accessibility, adequacy and appropriateness of gardens and urban farms, the RTF can provide a means to challenge issues that impact growing food safely. For example, the issue of PFAS contamination garnered national attention because of the experiences of Maine farmers. PFAS are chemicals that were used in an array of products, and in fertilizers, do not break down easily, and have proven harmful to humans.<sup>210</sup> When PFAS contaminate fertilized land they can migrate into crops, animals, and water supplies. Since PFAS accumulate, it can be years before their impact is evident.<sup>211</sup> In Maine, Fred Stone was a third-generation farmer who had to halt selling his dairy products after he was told in 2016 that a test well and a milk tank on his property both registered PFAS high above levels recommended by the Environmental Protection Agency. Maine officials determined that the contamination originated from a state sponsored fertilizer sludge program that had run until 2004. In an effort to correct the situation, Stone purchased a filtration system, engaged in voluntary testing, and culled his herd, all at

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Ct., Jefferson Cnty. Nov. 18, 2021) (where plaintiffs sued to force the state to schedule a wolf hunt, which they claimed was mandated under Wisconsin law and by the state constitutional provision giving the people the right to fish, hunt, trap, and take game. The court held that the state had to hold such a hunt in February 2021). Danielle Kaeding, *Wolf Hunt Will Move Forward After Panel of Judges Dismisses DNR Appeal*, WIS. PUB. RADIO (Feb. 19, 2021, 6:25 PM), <https://www.wpr.org/wolf-hunt-will-move-forward-after-panel-judges-dismisses-dnr-appeal>; Complaint at ¶ 4, *Hunter Nation Inc. v. Wis. Dep't Nat. Res.*, No. 2021CV000031, (Wis. Cir. Ct., Jefferson Cnty. Feb. 2, 2021).

<sup>208</sup> Olivier de Schutter (Special Rapporteur on the Right to Food), *Final Report: The Transformative Potential of the Right to Food*, ¶ 16, U.N. Doc. A/HRC/25/57 (Jan. 24, 2014); Anastasia Telesetsky, *Fulfilling the Human Right to Food and a Healthy Environment: Is It Time for an Agroecological and Aquaecological Revolution?*, 40 VT. L. REV. 791, 793 (2016).

<sup>209</sup> For example, a current North Carolina lawsuit alleging that the state has mismanaged its coastal fisheries such that the rights of present and future generations to fish are being threatened may prove illustrative in the future. The complaint relies in part on the state's constitutional guarantees of the right to fish, hunt and harvest wildlife and argues that the "privilege granted to a relative few citizens or companies to fish for profit must yield in priority to the constitutionally protected public-trust rights of the broader public." Complaint at ¶ 8, *Coastal Conservation Ass'n v. N.C.*, No. 20-CVS-12925, 2021 WL 9405572 (N.C. Super. 2021). In July of 2021 the Court rejected the State's Motion to Dismiss. *Major Victory for Citizen Coalition in NC Coastal Fisheries Lawsuit*, COASTAL CONSERVATION ASS'N, <https://www.joincca.org/major-victory-for-citizen-coalition-in-nc-coastal-fisheries-lawsuit/> (last visited Nov. 11, 2022).

<sup>210</sup> "PFAS" stand for per- and polyfluoroalkyl substances, a group of man-made chemicals. *Basic Information on PFAS*, E.P.A., (Apr. 28, 2022) <https://www.epa.gov/pfas/basic-information-pfas>; Bevin Blake & Suzanne E. Fenton, *Early Life Exposure to Per- and Polyfluoroalkyl Substances (PFAS) and Latent Health Outcomes: A Review Including the Placenta as a Target Tissue and Possible Driver of Peri- and Postnatal Effects*, TOXICOLOGY 443 (Oct. 2020).

<sup>211</sup> *Managing PFAS in Maine*, MAINE PFAS TASK FORCE 3 (Jan. 2020), <https://www.maine.gov/pfastaskforce/materials/report/PFAS-Task-Force-Report-FINAL-Jan2020.pdf>.

his own expense.<sup>212</sup> Despite the level of contamination, Stone's farm only briefly qualified for a federal program set up to help farmers whose products are contaminated.<sup>213</sup> Nor could he pursue any other remedies in Maine as the contamination had occurred many years earlier and Maine law only allows suits over PFAS to be brought within six years of the pollution occurring.<sup>214</sup> Since the extent of PFAS contamination is unknown and testing is expensive, many farmers and gardeners will not discover the pollution within that six year time frame. When that happens the law effectively shuts Maine's courtroom doors on them and they must shoulder the burdens themselves.<sup>215</sup> A bill to address this issue, by allowing suits by farmers and other Maine citizens to be brought within six years of discovering PFAS pollution, was introduced in the Maine legislature, but did not pass,<sup>216</sup> even though numerous other states have longer timelines for injuries caused by chemicals with "latent harmful effects."<sup>217</sup> A RTF constitutional amendment can provide support for this effort, as well as for other food growing safety concerns. These include lead levels in congested areas with manufacturing histories that raise urban gardening safety concerns,<sup>218</sup> soil contamination in

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<sup>212</sup> Shantal Riley, *Toxic Synthetic 'Forever Chemicals' Are in Our Water and on Our Plates*, NOVA (Nov. 2, 2020), <https://www.pbs.org/wgbh/nova/article/pfas-synthetic-chemicals-water-toxic/>.

<sup>213</sup> This is the federal Dairy Indemnity Program. See U.S.D.A., FACT SHEET: DAIRY INDEMNITY PROGRAM, (April 2011), [https://www.fsa.usda.gov/Internet/FSA\\_File/dairy\\_ind\\_pay\\_program.pdf](https://www.fsa.usda.gov/Internet/FSA_File/dairy_ind_pay_program.pdf).

<sup>214</sup> *An Act Relating to the Statute of Limitations for Injuries or Harm Resulting from Perfluoroalkyl and Polyfluoroalkyl Substances: Hearing on L.D. 2160 before the J. Standing Comm. on the Judiciary*, 129th Legis., 2d Spec. Sess. (Me. 2020) (testimony of Rep. Henry Ingwersen).

<sup>215</sup> Although limited testing makes the extent of the problem unknowable, PFAS contamination was also found at the White family farm in Presque Island, Maine, forcing the family to purchase a filtration system, stop eating their garden vegetables and cease selling the meat they raised. *An Act Relating to the Statute of Limitations for Injuries or Harm Resulting from Perfluoroalkyl and Polyfluoroalkyl Substances: Hearing on L.D. 2160 before the J. Standing Comm. on the Judiciary*, 129th Leg., 2d Spec. Sess. (Me. 2020) (testimony of Dan White). Contamination was also found at the Tozier farm in Maine's Somerset County, which may have had the "highest milk contamination levels ever recorded in North America." Sharon Anglin Treat, *With a Second Farm Shuttered Due to Massive PFAS Contamination, Maine Legislators Weigh Easing Access to the Courts*, INS. FOR AGRIC. & TRADE POL'Y (July 30, 2020), <https://www.iatp.org/blog/202007/second-farm-shuttered-due-massive-pfas-contamination-maine-legislators-weigh-easing>.

<sup>216</sup> *An Act Relating to the Statute of Limitations for Injuries or Harm Resulting from Perfluoroalkyl and Polyfluoroalkyl Substances*, H.P. 1544, 129th Leg., 2d Spec. Sess. (Me. 2020).

<sup>217</sup> *An Act Relating to the Statute of Limitations for Injuries or Harm Resulting from Perfluoroalkyl and Polyfluoroalkyl Substances: Hearing on L.D. 2160 before the J. Standing Comm. on the Judiciary*, 129th Leg. 2d Spec. Sess. (Me. 2020) (testimony of Susan Faunce).

<sup>218</sup> Julia Bayly, *There is Lead-Contaminated Soil in Maine. Here's What You Need to Know Before You Plant*, BANGOR DAILY NEWS (May 1, 2021), <https://www.bangordailynews.com/2021/05/01/homestead/there-is-lead-contaminated-soil-in-maine-heres-what-you-need-to-know-before-you-plant/>; Laura Heinlein, *Lead Contamination in Maine's Soils*, PLANT ME.!, <https://plantsomethingmaine.org/lead-contamination-in-maines-soils/> (last visited Oct. 8, 2021).

residential areas located near chemical and municipal waste sites,<sup>219</sup> or water quality issues that impact farms and gardens.<sup>220</sup>

While there are numerous possible soil safety issues that impact the RTF, there is also the issue of having enough soil in the first place. In fact, many states, including Maine, struggle over having enough agricultural land overall. Between 2012 and 2017, Maine was one of the states in the country that lost the most farmland.<sup>221</sup> This land loss is due to a number of factors, including rising prices and land amassment by private owners.<sup>222</sup> This concentration of land wealth is not unique to Maine, and the RTF provides proponents with an opportunity to reexamine the connection between private property and sustainable agriculture. While landowners in the state have the option to enter into conservation easements,<sup>223</sup> or land trusts,<sup>224</sup> the state can also set up community-based land trusts, parks, reserves or enter into longer lease agreements with cooperatives and community gardens.<sup>225</sup> Across the country, communities have been active in creative ways to preserve or capture more land for farms and gardens. As one example, New York garden enthusiasts engaged in a years' long legal and community battle in order to preserve community gardens slated to be sold in a city as eager for affordable housing as it is for gardens.<sup>226</sup> In other places, advocates have developed or

<sup>219</sup> STEPHEN LESTER & ANNE RABE, CENTER FOR HEALTH, ENV. & JUST., SUPERFUND: IN THE EYE OF THE STORM 48 (2010).

<sup>220</sup> MARS HILL COMPREHENSIVE PLAN COMM., TOWN OF MARS HILL COMPREHENSIVE PLAN UPDATE II 8–6 (2014).

<sup>221</sup> U.S. DEP'T AGRIC. NAT'L AGRIC. STAT. SERV., 2017 CENSUS OF AGRICULTURE – MAINE STATE AND COUNTY DATA 18 (2019); See also Liz Barrett Foster, *States That Have Lost the Most Farms the Last 100 Years*, STACKER (Oct. 22, 2020), <https://stacker.com/stories/4716/states-have-lost-most-farms-last-100-years> (noting that the total number of acres devoted to farming in Maine declined 76% between 1920 and 2019); Jennifer Dempsey, *New Census of Agriculture Shows Decline in Number of America's Farms, Farmers, and Farmland*, AM. FARMLAND TRUST (Apr. 20, 2019), <https://farmland.org/new-census-of-agriculture-shows-decline-in-number-of-americas-farms-farmers-and-farmland/> (noting Maine has one of the country's largest percentage decreases in farmland).

<sup>222</sup> Currently, J.D. Irving, Peter Buck and John Malone are the three largest private landowners in Maine, with the Pingree Family also holding significant acreage. *Largest Landowners by State 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/largest-landowners-by-state> (last visited Nov. 11, 2022); *ME Landowner Tops Land Holdings List*, MAINEBIZ (Oct. 13, 2011), <https://www.mainebiz.biz/article/me-landowner-tops-land-holdings-list> (noting Maine land holdings by John Malone, Irving Woodlands and the Pingree family); Andy Kiersz, *The 20 Biggest Landowners in America*, BUSINESS INSIDER (Apr. 11, 2019), <https://www.businessinsider.com/the-20-biggest-landowners-in-america-2019-4> (noting the large amounts of Maine land owned by John Malone, the Irving Family, the Buck Family and the Pingree heirs).

<sup>223</sup> *Agricultural Easements, MAINE FARMLAND TRUST*, <https://www.maine-farmland-trust.org/farmland-protection-new/agricultural-easements/#1456520719996-2a66b881-ec7a> (last visited Nov. 11, 2022).

<sup>224</sup> *What is a Land Trust?*, MAINE LAND TRUST NETWORK (Sept. 15, 2022), <https://www.mltm.org/trusts/what-is-a-land-trust/>.

<sup>225</sup> Katherine Kelley, et al., *Lewiston Food Policy Audit*, CMTY. ENGAGED RSCH. REPS. 59, 23 (2018); Adam Calo, et al., *Achieving Food System Resilience Requires Challenging Dominant Land Property Regimes*, 5 FRONTIERS SUSTAIN. FOOD SYST. 1 (2021) (reviewing land ownership structure studies in the global North).

<sup>226</sup> Jennifer Steinhauer, *Ending a Long Battle, New York Lets Housing and Gardens Grow*, N.Y. TIMES, Sept. 19, 2002 at A1.

revised zoning districts and agricultural zones, utilized residential cluster developments, provided funds, directed federal and state grant programs, raised bond money, received startup and maintenance costs, entered agreements on utility bills, transportation and access issues, provided matching grants, engaged in participatory budgeting, and inventoried public land available for gardening.<sup>227</sup> Even when local governments have not inventoried or provided public land for growing food on their own, individuals and groups have taken over vacant land or proposed land use agreements for these unused spaces.<sup>228</sup> As Maine has a goal to increase the percentage of lands under conservation to 30% by the year 2030 innovative forms of land tenure initiatives, informed by a RTF amendment, are called for.<sup>229</sup>

## IX. CONCLUSION

The reach of a state constitutional RTF has yet to be tested. And as this article illustrates, the RTF can implicate not only matters that are more obviously impacted by a right to feed oneself, but it also implicates issues that call for more in-depth examination. In short it is clear that the RTF provides anti-hunger advocates, farmers, and other RTF supporters with the grounds to seek advancements in numerous areas. Maine is the first state with the ability to explore these options and the experience there will provide guidance for activists across the country.

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<sup>227</sup> ZONING FOR URBAN AGRICULTURE: A GUIDE FOR UPDATING YOUR CITY'S LAWS TO SUPPORT HEALTHY FOOD PRODUCTION AND ACCESS, HEALTHY FOOD POL'Y PROJECT, 1 (2020); ASHTON O'CONNOR, GRASSROOTS GARDENS OF WESTERN N.Y., COMMUNITY GARDENING: CASE STUDIES AND RECOMMENDATIONS FOR THE BUFFALO COMMUNITY 4 (2020); *Municipal Action: Local Policies and Ordinances*, ME. FARMLAND TRUST, <https://www.mainejarmlandtrust.org/building-farm-friendly-communities/local-policies-ordinances/> (last visited Nov. 11, 2022). For ideas about what subnational governments can do to promote urban farms see LAURA DRISCOLL, BERKELEY FOOD INST., URBAN FARMS: BRINGING INNOVATIONS IN AGRICULTURE AND FOOD SECURITY TO THE CITY 4, (2017).

<sup>228</sup> See *Dig, Eat, & Be Healthy*, CHANGELAB SOLS., <https://www.changelabsolutions.org/product/dig-eat-be-healthy> (offering model agreements when planning on growing food on public land).

<sup>229</sup> Maine currently has about 20% of its lands under conservation. Me. Climate Council, *Maine Won't Wait: A Four-Year Plan for Climate Action* (Dec. 2020) [https://www.maine.gov/future/sites/maine.gov/future/files/inline-files/MaineWontWait\\_December2020.pdf](https://www.maine.gov/future/sites/maine.gov/future/files/inline-files/MaineWontWait_December2020.pdf) (last visited Oct. 3, 2021).