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GOING WITH THE FLOW: THE MONTANA COURT'S CONSERVATIVE APPROACH TO CONSTITUTIONAL INTERPRETATION

Jack Tuholske*

I. INTRODUCTION

Article II of the Montana Constitution enumerates individual rights, including several that are not present in the United States Constitution. The right to participate in government, its corollary, the right to know, the right of individual privacy, and the right to a clean and healthful environment protect Montanans' individual freedom and counter the potential for overreaching government power. Enshrining these rights in the Constitution was a bold, unique, and far-reaching step in 1972. However, these rights are no more "radical" than the rights embodied in the United States Constitution. Nor was the enumeration of these rights accidental or ill-considered; the rights reflect the overriding desire of the delegates to the 1972 Montana Constitutional Convention to develop a civil society responsive to the needs of its citizens.

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2. Id. at art. II, § 9.
3. Id. at art. II, § 10.
4. Id. at art. II, § 3; id. at art. IX, § 1.
5. At the time the Constitution and Bill of Rights were ratified, no other country in the world had a written constitution with such expansive individual rights.
The Montana Constitution furthers the democratic premise that the ultimate power rests with the people by allowing voters to determine, once every 20 years, whether to call a new constitutional convention. The first of these votes occurred in 1990, when Montanans rejected a convention. In 2010, the issue was again on the general ballot. Proponents of a new constitutional convention argued that the 1972 Constitution needs major revision and that some constitutional rights should be eliminated. As discussed below, the proponents of revision had no legal or economic bases supporting their claims. The campaign was premised on misinformation and a misunderstanding of how the Montana Supreme Court has interpreted the Constitution. The voters wisely rejected the call. However, supporters of amending Montana's Constitution remain active in state politics, and the 2011 Montana Legislature recently debated several bills that would have asked voters to reconsider multiple provisions of the 1972 Constitution.

The Montana Constitution does not need to be rewritten or amended. The rights contained in the 1972 Constitution have been developed in accordance with long-standing judicial principles of constitutional interpretation, reflecting the delegates' intentions and gradually reshaping our legal traditions. While the Court has not hesitated to give effect to these rights, its approach has been measured and restrained. Contrary to what the proponents of a new constitutional convention claimed, the rights unique to the Montana Constitution have not been confused by the courts, interpreted to

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7. Montanans voted against calling a new constitutional convention in 1990 by a vote of 245,009 to 55,630. Mont. Sec. of St., 1990 Montana State Election Results: Statewide General Election Canvass, Nov. 6, 1990 (data on file with the Mont. L. Rev.).
9. Justice James Nelson has provided a powerful counterpoint, arguing that the rights guaranteed in 1972 are even more important today, given the wide-ranging problems we face. James C. Nelson, Keeping Faith with the Vision: Interpreting a Constitution for This and Future Generations, 71 Mont. L. Rev. 299 (2010).
11. For example, Joe Balyeat, an author of the Proponents' statement contained in the Voter Information Pamphlet, is a Montana State Senator.
trample on private property, or used to suppress the economy. In fact, the Montana Supreme Court has been rather conservative in its constitutional interpretation and has certainly not been overzealous.

This article examines how the Montana Supreme Court has interpreted the rights to open government, privacy, and a clean and healthful environment. The federal Constitution lacks textual counterparts to these rights; thus, the Montana Court must define them de novo. Surveying the Court’s approach to these rights helps test whether the moniker of judicial activism is properly affixed to the Montana Court’s interpretation of new rights or whether the Court has utilized a more conservative approach, applying long-recognized canons of constitutional construction. This article demonstrates that the Court has construed new constitutional rights conservatively. Claims that the Court interprets constitutional rights to “micro-meddle” in business, property, and personal affairs—claims that formed the backbone of a call for a new Constitutional Convention in 2010—are simply false.

II. A BRIEF BACKGROUND OF THE 1972 MONTANA CONSTITUTIONAL CONVENTION

In the 1960s, the Montana Legislature began investigating ways to improve the 1889 Montana Constitution. The Legislature assigned this task to the Legislative Council, which found that the Constitution required significant changes to better serve Montanans. At the end of this investigation, the Revision Committee unanimously supported convening a constitutional convention. Montanans voted in favor of calling a constitutional convention in a referendum held in November 1970; the referendum passed by 133,482 to 71,643 votes.

The Constitutional Convention convened in January 1972 in the state capital of Helena. Montanans had elected 100 delegates to draft the new constitution, none of whom had any experience in constitution drafting. The delegates included 58 Democrats, 36 Republicans, and 6 independents.

13. Of course the United States Supreme Court has recognized a right to privacy in various contexts; however, it is not a textual right. See Griswold v. Conn., 381 U.S. 479 (1965) (holding that the First Amendment contains a penumbra of rights, including the right to privacy).
16. Id.
17. Id.
18. Id. at 9.
19. Id.
20. Id. at 10.
ents, but no sitting legislators because the 1889 Constitution prohibited current legislators from serving as delegates. Instead, Montanans from a variety of backgrounds, occupations, and age groups came together. The Constitution drafted by these delegates was ratified by Montana voters in June 1972—albeit by a slim margin in a vote of 116,415 to 113,883.

The 1972 Constitution is remarkable for several reasons. As stated above, the delegates were a diverse group of citizens from many walks of life. Also, the 1960s and early 1970s were a time of unparalleled activism—civil rights, anti-war protests, feminism, and the nascent environmental movement were powerful elements of the political discourse that was the context for the Convention. The document drafted contains 17 rights or obligations that have no textual counterpart in the United States Constitution. Because these rights could only be given meaning through the interpretations of the Montana Supreme Court, the 1972 Constitution ensured that the State’s constitutional jurisprudence would be rich and contentious in the decades that followed.

III. THE NORMS OF CONSTITUTIONAL CONSTRUCTION

Over two centuries ago, the United States Supreme Court had to invent a way to interpret our federal Constitution. The very notion of a written constitution, containing three distinct branches of government, protecting a wide range of individual rights, and with a decidedly anti-majoritarian amendment procedure, was novel in 1789. Who would have the final say as to what the Constitution’s often vague, imprecise phrases actually

22. Id. at 9.
23. Id. at 10 (citing 42nd Legis. Assembly v. Lennon, 481 P.2d 330 (Mont. 1971)).
24. Id. at 11.
25. Id. at 15.
27. See Elison & Snyder, supra n. 15, at 20 (citing Ronald K. L. Collins, Reliance on State Constitutions—The Montana Disaster, 63 Tex. L. Rev. 1095, 1122 (1985)). Collins lists the following Article II sections not contained in the Bill of Rights: § 4 (rights to dignity, equality, and nondiscrimination), § 8 (right to participate), § 9 (right to know), § 10 (right of privacy), § 14 (adult rights), § 15 (rights of non-adults), § 16 (administration of justice), § 18 (state subject to suit), § 20 (initiation of criminal proceedings), § 23 (detention), § 27 (imprisonment for debt), § 28 (rights of the convicted), § 29 (award of litigation expenses in eminent domain proceedings), § 30 (treason and descent of estates), § 32 (civilian control of the military), § 33 (importation of armed persons), and § 35 (special considerations for servicepersons and veterans). Collins, 63 Tex. L. Rev. at 1122 n. 184.
28. Though the United States inherited much of its common law from England, England—a monarchy—could not provide a model for constitutional governance. As Professor Erwin Chemerinsky notes, the framers could have chosen a different model, such as a series of statutory enactments, to form a new government. The choice of a constitution was deliberate, with dramatic consequences. Erwin Chemerinsky, Constitutional Law: Principles and Policies 8–9 (3d ed., Aspen 2006).
meant? Chief Justice John Marshall answered that question relatively early in this country’s history in *Marbury v. Madison.* 29 Marbury and other early opinions defined both the role of the judiciary and the path that courts should take in resolving constitutional questions. These norms, some of which are outlined below, establish how the United States Supreme Court has both asserted and limited its role in interpreting the Constitution. These norms provide a yardstick to assess how the Montana Supreme Court has interpreted and implemented the 1972 Montana Constitution.

A. The Supreme Court Is the Final Arbiter of the Law

Vital to the separation of governmental powers, the judiciary serves as the only check on the tyranny of the majority as expressed through legislative action or the unbridled exercise of executive authority. 30 Chief Justice John Marshall established a touchstone principle of American jurisprudence when he stated: “It is emphatically the province and duty of the judicial department to say what the law is.” 31 With those words, the Court overruled the Congressional Act of 1789 for violating Article III, § 2, clause 2 of the Constitution and established the authority of the judiciary.

The Court also developed means to balance constitutional rights against other important societal interests, particularly in the realm of the individual rights contained in the Bill of Rights and Fourteenth Amendment. 32 A right may be given strong protection under a strict scrutiny analysis, which often renders laws unconstitutional—“strict in scrutiny, fatal in fact.” In other contexts, the same right may be afforded a lesser level of protection. 33 In other cases, competing constitutional rights have to be balanced against each other. 34 Oliver Wendell Holmes’s oft-quoted metaphor that some speech—like falsely shouting “fire” in a crowded theater—is not

32. E.g. *U.S. v. Carolene Products,* 304 U.S. 144, 152 (1938). The path to give some rights more legal strength than others began with the famous Footnote 4 in *Carolene Products.* There, the United States Supreme Court established the norm that even “absolute” constitutional rights like the demand for equal protection or due process could be interpreted differently, depending on the nature and purpose of the government’s intrusion on those rights.
protected despite the absolute language of the First Amendment\textsuperscript{35} embodies the Court's practice of balancing constitutional rights against broader societal concerns.

The Montana Supreme Court has adhered to these norms when interpreting the Montana Constitution. Indeed, the Constitution itself vests the Montana Supreme Court with "the exclusive power to construe and interpret legislative Acts, as well as provisions of the Constitution."\textsuperscript{36} The Court, respectful of its duty as the final arbiter of the law, has frequently voided actions of the legislative and executive branches when they run contrary to the rights and responsibilities found in the Montana Constitution.\textsuperscript{37}

The Montana Supreme Court also follows the United States Supreme Court's balancing approach, weighing the severity of an infringement against other societal interests to implement the constitutional rights adopted under the 1972 Constitution. The Montana Court utilizes the different levels of scrutiny to analyze constitutional rights, typically applying strict scrutiny to the fundamental rights contained in Article II and lesser degrees of scrutiny to rights contained in other portions of the constitution.\textsuperscript{38} When competing constitutional rights such as privacy and open government are at issue, the Montana Court balances the interests protected by both rights.\textsuperscript{39}

B. Avoidance of Constitutional Issues When Cases Can Be Resolved on Other Grounds

The United States Supreme Court has long recognized that courts should avoid constitutional interpretation when cases can be resolved on other grounds.\textsuperscript{40} The avoidance doctrine is premised on judicial self-restraint; declaring statutes unconstitutional is a counter-majoritarian infringement on the democratic process.\textsuperscript{41} The avoidance doctrine prompts courts confronted with a challenge to a statute's constitutionality to resolve ambiguities in favor of preserving the constitutionality of the statute.\textsuperscript{42}

\begin{footnotesize}
\begin{itemize}
  \item[35.] Schenck v. U.S., 249 U.S. 47, 52 (1919).
  \item[36.] In re License Revocation of Gildersleeve, 942 P.2d 705, 709 (Mont. 1997) (quoting State v. Leslie, 50 P.2d 959, 962 (1935)).
  \item[37.] See Nelson, supra n. 9, at 306–308.
  \item[39.] The Montana Court is faced with a unique constitutional balancing act because of the textual fundamental rights to both privacy and open government. The Court's treatment of these rights is discussed in detail in Sections V and VI below.
  \item[42.] See Clark v. Martinez, 543 U.S. 371, 385 (2005) ("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be
\end{itemize}
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derlying theory rests on the presumption that Congress legislates within the bounds of the Constitution.

The principle of constitutional avoidance is enshrined in Montana jurisprudence as well:

Certain constraints govern the Court's power to determine the constitutionality of statutes. Among those constraints is the principle that we will not rule on the constitutionality of a legislative act if we are able to decide the case without reaching constitutional considerations.\(^\text{43}\)

For example, in Baxter v. State,\(^\text{44}\) a coalition of “right-to-die” advocates sought to have portions of Montana's criminal code declared an unconstitutional infringement on the constitutional rights to privacy and individual dignity under Article II of the Montana Constitution. However, the Court determined that the statutes at issue were constitutional and resolved the case on statutory grounds, expressly avoiding a constitutional analysis of right-to-die issues.\(^\text{45}\) Constitutional avoidance also extends to cases where application of common law principles can resolve a case. In Sunburst School District No. 2 v. Texaco, for example, the Court held that the jury should not have been instructed on a constitutional tort theory when the common law of public nuisance provided an adequate remedy.\(^\text{46}\) These recent cases reflect the Montana Court's long history of avoiding constitutional questions when possible.

### C. Appropriate Use of the Delegates' Intent to Give Meaning to the Constitution's Text

The United States Supreme Court strives to give meaning to the United States Constitution that is consistent with both the plain words of the text and the intentions of its drafters. Because the Constitution pronounces rights and responsibilities in broad, vague terms,\(^\text{47}\) sometimes couched in

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\(^{43}\) Gildersleeve, 942 P.2d at 709.

\(^{44}\) Baxter v. State, 224 P.3d 1211 (Mont. 2009).

\(^{45}\) Id. at 1215. Justice Nelson concurred, but would have reached the constitutional question: "Although the Court has chosen to decide this case on the narrow statutory ground suggested by the State of Montana (as an alternative approach) in its briefs on appeal . . . and although physician aid in dying is protected statutorily (as the Court holds under this alternative approach), physician aid in dying is also firmly protected by Montana's Constitution." Id. at 1224 (Nelson, J., concurring).


\(^{47}\) The list of broad and vague terms in both the United States and Montana Constitutions is long indeed and does not require much elaboration. Such phrases in the federal Constitution include "commerce among the several States," "equal protection," and "due process." The same is true for
impossible absolutes, courts must interpret their meaning. Judicial construction has become grounded in paradigms like original intent, original meaning, and evolving norms (a "living" or "pragmatic" constitution). The impact of these various paradigms on the law reflects the philosophies of those who command a majority of the Court at any given time.

Undertaking the "originalist" versus "living" constitution debate—a hot topic among the current justices of the United States Supreme Court—is not necessary in Montana. Montana’s Constitution was adopted only 40 years ago, and the verbatim transcript of the 1972 Convention provides relatively clear guidance as to the delegates’ intentions. Also, the context of Montana’s Constitution is modern; it is not necessary to sift through centuries-old historical records to glean the real meaning of constitutional rights and responsibilities—currently the approach favored by proponents of the original meaning paradigm. The Montana Supreme Court has consistently turned to the 1972 Convention transcript as an authoritative source for its interpretation of key phrases. In so doing, the Court has remained faithful to its duty to reflect the delegates’ intentions and understanding as to how those phrases should operate to affect the lives of Montana citizens.

These principles of constitutional interpretation—the Court as final arbiter of the Constitution, constitutional avoidance, respect for the profound importance of the document, and respect for the framers’ intentions—provide a means to assess how the Montana Supreme Court has addressed three of the important and controversial rights contained in the 1972 Constitution: the rights to a clean and healthful environment, privacy, and to participate in government. As shown below, the Court interprets the Montana Constitution with great respect for accepted canons of constitutional construction.

Montana; terms like “privacy,” “clean and healthful environment,” and “dignity of the human being” require judicial interpretation to effectuate their constitutional meaning.

48. For example, the absolute pronouncement in the First Amendment to the United States Constitution that Congress shall make no law that abridges freedom of speech has never been literally interpreted. Chemerinsky, supra n. 28, at 924–925.


50. See Nelson, supra n. 9, at 317. Justice Nelson argues that the 1972 Constitution was intended to be interpreted as a living document that adapts to the changing conditions and evolving norms of our society—not a collection of rules to be rigidly applied based solely on the knowledge, experience, and understandings at the time of ratification.


IV. THE RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT

The right to a clean and healthful environment, embodied in Article II, § 3, and Article IX, § 1, is both unique and controversial. While the Montana Constitution is one of several state constitutions that contain explicit environmental rights, Montana is the only state to recognize that right as fundamental, on par with other fundamental rights such as freedom of speech. The Court’s interpretation of this right has plenty of critics. Advocates of another constitutional convention decry the right to a clean and healthful environment as being anti-business. However, a careful parsing of the Court’s decisions regarding the right demonstrates that the Court has approached its duties with caution and has adhered to accepted tenets of constitutional construction.

In 1999, in Montana Environmental Information Center v. Department of Environmental Quality (“MEIC”), the Court unanimously held that Article II, § 3 and Article IX, § 1 created a “fundamental right” to a clean and healthful environment. State actions that implicate this right are therefore subjected to strict scrutiny—the highest level of judicial review. Although decided 27 years after the 1972 Constitution was enacted, MEIC was the Court’s first definitive interpretation of the Constitution’s environ-

53. The environmental provisions read as follows (emphasis added):

Mont. Const. art. II, § 3: Inalienable Rights. All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life’s basic necessities, enjoying and defending their lives and liberties, acquiring, possessing, and protecting property, and seeking their safety, health, and happiness in all lawful ways. In enjoying these rights, all persons recognize the corresponding responsibilities.

Mont. Const. art. IX, § 1: Protection and Improvement. (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations. (2) The legislature shall provide for the administration and enforcement of this duty. (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

54. E.g. Ill. Const. art. XI, § 1 (“The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations.”).


57. The proponents argued that the Court’s interpretation of the right to a clean and healthful environment “empowers judges and bureaucratic rulemakers to micro-meddle in your property rights, business affairs, and personal conduct. . . . When Montana’s expansive constitution is placed in the hands of our overzealous courts, the net result is an assault with a deadly weapon on Montana’s economy and jobs.” Balyeat & Miller, supra n. 8, at 2–3.


59. Id.
mental provisions. The Court’s analysis—based on the plain language of the Constitution, prior case law, and the delegates’ intentions as expressed in the Convention transcript—tracks the norms of constitutional construction. Though the holding had a profound effect on environmental law in Montana, it can hardly be depicted as unfettered judicial activism. Rather, the Court effectuated the plain language of the Constitution and the clearly expressed intent of the delegates to afford environmental rights constitutional protection.

In MEIC, the Court voided a statute that exempted certain types of discharges from review under the Water Quality Act. Giving fealty to the concept of stare decisis, the Court turned to its own precedent regarding other fundamental rights in Article II to determine, first, when the right to a clean and healthful environment is implicated and, second, the appropriate level of scrutiny. In both In the Matter of C.H. and Wadsworth v. State, the Court determined that rights enumerated in the Declaration of Rights (Article II) are fundamental and that fundamental rights are traditionally provided strict scrutiny.

The Court also turned to the transcripts of the Constitutional Convention. The Court did not have to probe deeply to understand that the delegates intended environmental rights to be fundamental. The environmental provisions were intensively debated at the Constitutional Convention, and the Court in MEIC cited to the transcripts more than a dozen times to construe the meaning of the right to a clean and healthful environment. The debates reveal a profound desire among several of the delegates to create a strong environmental right; some delegates even argued that “clean and healthful” did not go far enough, because it would allow ongoing degradation. The Court also found that the transcript reveals the delegates’ intention to conjoin Article II’s “inalienable right” to a clean and healthful environment with the more specific commands of Article IX. Article IX provides that individuals and the State have a duty to “maintain and improve a clean and healthful environment in Montana for present and future generations.” The MEIC Court concluded, based on both the text of the 1972

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60. Id. at 1237.
61. Id. at 1245.
65. Mont. Const. art. II, § 3; id. at art. IX, § 1.

https://scholarship.law.umt.edu/mlr/vol72/iss2/2
Constitution and the delegates’ intent, that there is a fundamental environmental right in Montana’s Constitution. 68

Determining when that fundamental environmental right is implicated has proven more difficult. The task is often easier with other rights. For example, when the government passes a law making it unlawful to burn a flag, the law clearly implicates an individual’s right to free expression. 69 Or when the government restricts a woman’s right to choose to have an abortion, the government infringes on her liberty interests under the Due Process Clause. 70 The question of when the government affects environmental rights is less clear-cut.

To answer this question in MEIC, the Court again turned to the Convention transcript:

[T]he delegates’ intention was to provide language and protections which are both anticipatory and preventative. The delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. Our constitution does not require that dead fish float on the surface of our state’s rivers and streams before its farsighted environmental protections can be invoked.

The right to a clean and healthful environment does not require a person to suffer harm before the right is implicated. As the United States Supreme Court has noted, “[e]nvironmental injury, by its nature . . . is often permanent or . . . irreparable.” 71 It makes no sense to create a constitutional environmental right, but require that the harm it seeks to prevent come to pass before a court can provide redress. In MEIC, the Montana Supreme Court found that the threat of harm caused by adding arsenic-laden groundwater to the Blackfoot River was sufficient to invoke the “anticipatory and preventative” constitutional right to a clean and healthful environment. 72

The Court’s reasoning in MEIC does not reflect an unusual or extreme version of constitutional interpretation; the Court instead used a conservative approach. The Court did not fashion a new right from a self-designed walk through history, as original meaning proponents advocate, 73 or create

73. Even if one uses an original meaning paradigm to interpret the Constitution’s environmental provisions, those provisions would still be strictly construed in favor of environmental protection. The early 1970s was a time of powerful citizen activism in favor of environmental protection. The first Earth Day was held on April 22, 1970. According to the late Senator Gaylord Nelson: “[I]t was on that day that Americans made it clear that they understood and were deeply concerned over the deterioration
a new right based only on current societal norms. To interpret the right to a clean and healthful environment, the Court used the Constitution's text, along with the delegates' intent, as evidenced by the Constitutional Convention transcripts. The Court applied strict scrutiny because that is the analysis the Court uses for all fundamental rights. The fact that this holding was unanimous, from a diverse panel of justices, underscores the soundness of the decision.

Shortly after MEIC, the Court was confronted with a local government's refusal to permit a new gravel pit near a school. The regulatory scheme for permitting gravel pits did not give the County veto power under the circumstances; the County's zoning law permitted gravel extraction in the area, so the County Commissioners could only impose mitigating conditions. However, the Commissioners denied the permit on the grounds that it violated the Constitution's right to a clean and healthful environment, notwithstanding the fact that the gravel pit met relevant statutory requirements; they cited the possibility the gravel pit would have adverse health impacts on the nearby schoolchildren. On appeal, the Court upheld the district court's conclusion that the Commissioners could not ignore a statutory mandate and assert a constitutional violation, effectively nullifying a legislative act. The Court based its decision on both the separation of powers doctrine and the constitutional avoidance doctrine. The Court thus properly reserved for itself "the exclusive power of the courts to determine if an act of the legislature is unconstitutional."
Subsequent decisions of the Court have also shown a strong respect for the canon of constitutional "avoidance." In Sunburst School District No. 2 v. Texaco,80 plaintiffs sought tort damages for groundwater contamination under alternative theories based upon common law nuisance, restoration damages, and a constitutional tort.81 Plaintiffs styled their constitutional tort claim after the so-called "Bivens action,"82 asserting that Texaco breached its duty to maintain their right to a "clean and healthful environment."83 The Court declined the plaintiff's invitation to extend the application of constitutional torts to private parties asserting environmental injury when common law remedies are adequate.84 Because common law theories grounded in the Restatement (Second) of Torts allow for restoration damages,85 the Court distinguished the plaintiffs in Sunburst from those in the original Montana case recognizing constitutional torts, Dorwart v. Caraway.86 In Dorwart, alternative remedies were unavailable;87 in Sunburst, existing common law remedies provided an adequate remedy.88 That avoidance demonstrates a restrained approach to discerning the boundaries of Articles II and IX. In the Court’s words: “The availability of restoration damages under the common law leads us to decline to resolve the issue of whether a constitutional tort for monetary damages exists pursuant to Article II, Section 3 of the Montana Constitution for damages caused by a private party.”89

More recently, the Court rejected the theory that environmental constitutional rights require a different burden of proof in cases alleging violation of environmental laws. In Clark Fork Coalition v. Montana Department of Environmental Quality,90 the plaintiffs drew upon the “anticipatory and preventative” language from the MEIC decision to argue that courts should not grant the usual deference to administrative agency rules when the rules implicate constitutional environmental rights.91 The administrative regulation

80. Sunburst, 165 P.3d 1079.
81. Id. at 1084.
82. Montana recognized constitutional tort theory in Dorwart v. Caraway, 58 P.3d 128 (Mont. 2002). In Dorwart, the Montana Court permitted such a claim against the government. In Sunburst, the Plaintiffs sought to extend the constitutional tort theory to private parties.
83. Sunburst, 165 P.3d at 1084.
84. The Court stated: "Accordingly, we conclude that the District Court erred in instructing the jury on the constitutional tort theory where, as here, adequate remedies exist under statutory or common law.” Id. at 1093.
85. Restatement (Second) of Torts § 929 (1979).
86. Dorwart, 58 P.3d 128.
87. Sunburst, 165 P.3d at 1093 (citing Dorwart, 58 P.3d 128).
88. Id.
89. Id. at 1098.
91. Petr.'s Br. 39–40 (Mar. 5, 2007), Clark Fork Coalition, 197 P.3d 482. The author does not wish to heap too much praise on his now-rejected theory. However, it seemed logical to extend the
at issue allowed the Department of Environmental Quality ("DEQ") to grant a perpetual pollution discharge permit to a proposed silver and copper mine in northwestern Montana.92 The permit would allow the company to perpetually discharge polluted groundwater into the Clark Fork River long after the mine closed.93

The Court again declined the invitation to extend MEIC. The Court emphasized that review of administrative regulations "falls squarely within the established standards" for judicial review of administrative regulations.94 The DEQ was entitled to a measure of deference even though the regulation was aimed at preventing pollution.95 However, the Court did overturn the DEQ's interpretation of the regulation as contrary to the purposes of the Montana Water Quality Act.96 The Court therefore voided the permit under traditional canons of statutory interpretation.

The Court's interpretation of the Montana Constitution's environmental provisions evidences a traditional approach to constitutional interpretation. The seminal MEIC decision required the Court to determine the nature of the right and the appropriate level of scrutiny to apply to statutes implicating the right. The Court's strict scrutiny analysis was consistent with other decisions implicating fundamental rights. Subsequent decisions have shown judicial restraint, not activism. Where alternative statutory or common law remedies exist, the Court has avoided deciding environmental cases on constitutional grounds.

V. THE RIGHTS TO OPEN GOVERNMENT

The Montana Constitution contains two related rights that pertain to open government—the right to know and the right of participation.97 These provisions, along with provisions for voter initiatives and referendums,98 are reflective of broader societal movements towards open government in
the 1960s and 1970s. They also implicate another distinct textual right, the right of privacy, which is discussed in greater detail in the next section.

The United States Constitution lacks open government provisions. Thus, the Montana Supreme Court lacks federal precedent to aid its interpretation of the right to know and right of participation. While a fundamental right to open government has potentially far-reaching applications, the Court’s interpretation of that right has been grounded in the same constitutional interpretation principles discussed throughout this article. For example, in *Havre Daily News, LLC v. City of Havre*, the Court again demonstrated restraint when it refused to analyze a constitutional question because the dispute was both unripe for judicial review and rendered moot by the City of Havre’s actions. The *Havre Daily News* had requested that a court order the City of Havre to release unredacted initial offense reports and to implement a policy requiring immediate dissemination of such reports to the public upon request. The Court dismissed the case on jurisdictional grounds: the controversy was not ripe for judicial review because the record was devoid of a “‘concrete fact situation in which the competing [constitutional right to know and right to privacy] can be weighed.’”

Though the Court ultimately concluded the dispute was not ripe for review, it first provided a method for analyzing the conflicting rights found in Article II, § 9 (the right to know) and Article II, § 10 (the right of privacy). The Court stated it was necessary to undertake a fact-intensive inquiry when balancing these rights. A court must then determine whether an individual has an actual expectation of privacy and whether society is willing to recognize that expectation as reasonable. The Court provided examples of relevant inquiries in examining the reasonableness of an individual’s expectation of privacy. Though the Court could have followed this roadmap to decide the case, it instead exercised judicial restraint, holding that the dispute was non-justiciable because the “‘mere absence of a policy governing dissemination of documents does not ripen into a violation

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99. For example, the United States Congress passed the Freedom of Information Act (FOIA) in 1966 to provide citizens access to government documents. In response to the Watergate scandal, Congress strengthened the FOIA in 1974 and overrode President Ford’s veto of the amendments, signifying broad national support for more open government.


101. *Id.* at 873, 877.

102. *Id.* at 868.

103. *Id.* at 872 (quoting *Cal. Bankers Assn. v. Shultz*, 416 U.S. 21, 56 (1974)).

104. *Id.* at 870.

105. *Id.* at 871 (citing *Bozeman Daily Chronicle v. City of Bozeman Police Dept.*, 859 P.2d 435 (Mont. 1993)).

of the constitutional right to know unless and until an identifiable person is actually denied access to a particular document . . . .”

More recently, in Disability Rights Montana v. State, the Court upheld Montana Code Annotated § 41–3–205 as properly balancing the right to know with the right of privacy. The case focused on the conflict between the public’s right to know and the privacy interests inherent in child abuse and neglect cases. The statute requires that “all records concerning reports of child abuse and neglect must be kept confidential except as provided by this section.” Subsection (2) permits courts to review records in camera and disclose them to the public if necessary for the fair resolution of the issue before the court. Disability Rights Montana argued that § 41–3–205 violates the right to know in Article II, § 9 of the Constitution.

Deferring to the Legislature, the Court determined that subsection (2) provides a constitutional “mechanism for a court to evaluate on a case by case basis whether the public’s right to know exceeds the individual rights to privacy.” The Court had previously held in Associated Press, Inc. v. Montana Department of Revenue that the Department of Revenue’s blanket determination that all tax returns were confidential violated the right to know under Article II, § 9 because it lacked a mechanism to balance the right to know with the right of privacy. In Disability Rights Montana, the Court accepted the balancing mechanism outlined in § 41–3–205(2) as constitutional by relying on Associated Press. Justice Morris, writing for a unanimous court, rejected an unyielding construction of the right to know. He relied instead on settled canons of constitutional construction to “construe statutes narrowly to avoid a finding of unconstitutionality.”

Another right that is part of the Montana Constitution’s open government requirements is embodied in Article II, § 8—the right to participate in

107. Id. at 872. In addition, the Court held that the case was moot because the City of Havre provided the requested reports to the newspaper. Id. at 874. The newspaper argued that the “capable of repetition, yet evading review” exception to the mootness doctrine applied, but the Court rejected the argument stating that the newspaper provided no “concrete evidence suggesting that Havre will perpetrate a substantially similar wrong.” Id. at 877.
109. Id. at 1096.
110. Id. at 1095.
112. Id.
113. Disability Rights Mont., 207 P.3d at 1094.
114. Id. at 1096.
116. Id. at 11.
117. Disability Rights Mont., 207 P.3d at 1095 (citing Associated Press, 4 P.3d at 11).
118. Id.
government, also known as the “open meetings provision.”\textsuperscript{119} The Court has not hesitated to exercise its responsibility to apply the plain terms of this provision when government entities act behind closed doors.\textsuperscript{120} Voiding actions taken at closed meetings fulfills the Court’s role as a check on abusive government power. However, the Court has also developed a three-part test to analyze open meeting violations, consistent with the Legislature’s effort to implement Article II, § 9.\textsuperscript{121} Application of the three-part test can lead the Court to avoid the constitutional question altogether.\textsuperscript{122} Again, this jurisprudence demonstrates the Court’s unwillingness to analyze a constitutional question when it can avoid doing so. Such reticence exemplifies the Court’s cautious development of the Montana Constitution, and its willingness to employ long-standing constitutional standards to avoid constitutional questions.\textsuperscript{123}

VI. THE RIGHT OF PRIVACY

The right to know cases establish that the Montana Supreme Court balances Article II, § 9 with the right of privacy under Article II, § 10 when both rights are implicated. However, the right of privacy extends to other spheres as well. Interpretation of the right of privacy under the Montana Constitution is complicated by the United States Supreme Court’s recognition of a “right to privacy” in the United States Constitution, despite the lack of an explicit textual right.\textsuperscript{124} Thus, the Montana Supreme Court must address the United States Supreme Court’s development of privacy jurisprudence while simultaneously charting a course based on the plain language of Article II, § 10.

The delegates’ decision to include a fundamental, textual right to privacy signaled a desire to create a right of privacy more protective than the “penumbral” right espoused in \textit{Griswold}\textsuperscript{125} in 1965.\textsuperscript{126} One of the most

\begin{itemize}
    \item \textsuperscript{119} Mont. Const. art. II, § 8.
    \item \textsuperscript{120} \textit{See Bd. of Trustees, Huntley Proj. Sch. Dist. No. 24 v. Bd. of Co. Commrs. of Yellowstone Co.}, 606 P.2d 1069 (Mont. 1980).
    \item \textsuperscript{121} \textit{Com. Cause v. Statutory Comm. to Nominate Candidates for Comm. of Political Pract.}, 868 P.2d 604, 607 (Mont. 1994) (noting that the three-part analysis was necessary to determine whether the Constitution was even implicated (e.g. is the contested event even a meeting?) because courts should avoid constitutional questions if an issue can be resolved otherwise).
    \item \textsuperscript{122} \textit{Nelson v. Bucks}, 236 P.3d 1 (Mont. 2010).
    \item \textsuperscript{123} \textit{See Pet. of Billings High Sch. Dist. No. 2 v. Billings Gazette}, 149 P.3d 864 (Mont. 2006) (relying on \textit{Havre Daily News} in declining to address a similar constitutional issue by holding that the controversy was moot).
    \item \textsuperscript{124} In \textit{Griswold v. Conn.}, six Justices recognized the right of privacy as a fundamental constitutional right, finding the right implicit in the numerous other privacy-oriented rights in the Constitution, 381 U.S. 479 (1965). The United States Supreme Court has more recently placed the right within the “liberty” guarantees of the Due Process Clause. \textit{See e.g. Lawrence v. Tex.}, 539 U.S. 538 (2003).
    \item \textsuperscript{125} \textit{Griswold}, 381 U.S. 479.
\end{itemize}
significant Montana Supreme Court decisions interpreting the right of privacy occurred in the 1999 case *Gryczan v. State.* One could argue that the Court embodied an activist, expansive approach to constitutional rights when it declared a statute that criminalized consensual same-sex sexual relations unconstitutional. After all, the Court broke ranks with the United States Supreme Court’s decision in *Bowers v. Hardwick,* the United States Supreme Court had refused to find a similar Georgia statute unconstitutional based on the penumbral right of privacy. But a close reading of *Gryczan* reveals a more conservative, traditional approach to constitutional interpretation.

In *Gryczan,* the Court confronted the obvious. Unlike the federal Constitution, the Montana Constitution includes an express, textual right to privacy. Unlike the United States Supreme Court, which has struggled to find a constitutional footing for a right that was indispensable to the founding of our nation and is integral to the fabric of a civil society, the Montana Supreme Court can rely on the textual right of privacy. Moreover, because the right of privacy is stated in our Constitution’s Declaration of Rights, it requires a strict scrutiny analysis. Unlike the right to know cases, in which privacy is balanced with another fundamental right, the statute in *Gryczan* had to stand or fall on its own. The Court held the State lacked a compelling interest to ban certain forms of sexual activity for homosexuals while allowing the activity for heterosexuals. Not only was the Court’s decision sound because it applied a heightened level of scrutiny to a funda-

126. Id. at 482–487.
128. Id. at 115.
129. See *Gryczan,* 942 P.2d 112.
131. The U.S. Constitution does not contain a textual right of privacy. In Griswold, the majority opinion authored by Justice Douglas found the right in “penumbras” that were “emanating” from textual rights. Justice Goldberg relied on the Ninth Amendment while concurrences by Justices Harlan and White found the right of privacy in the due process clause. The divergent views demonstrate the difficulty the Court had in finding a doctrinal basis for the right, though the Court recognized that the tradition of individual privacy runs strong in American history and culture. More recently, the Court has consistently based the right of privacy on the liberty interests of the due process clause. Chemerinsky, supra n. 28, at 815–816; see also *Lawrence,* 529 U.S. 538; *Planned Parenthood of S.E. Pa.,* 505 U.S. 833.
132. See *Olmstead v. U.S.,* 277 U.S. 438 (1928). Justice Brandeis’s eloquent words bear repeating: “The makers of our Constitution... conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.” Id. at 478 (Brandeis, J., dissenting). The Montana Court paid homage to these words in *Gryczan.* 942 P.2d at 121.
134. Id. at 126.
mental right, but it was prescient as well. Four years later, the United States Supreme Court overruled Bowers and held a similar Texas prohibition unconstitutional under the liberty interests of the Due Process Clause of the United States Constitution.135

Gryczan is a powerful interpretation of the right to privacy. However, the path the Court took was well within the norms of constitutional construction. The right to privacy is fundamental like other Article II rights: the Court was obliged to apply a strict scrutiny analysis.136 The State's compelling interest argument—to protect the public from HIV transmission—melted in the face of the statistical evidence in the record.137 The public morality argument was also rejected. Rather than engage in judicial activism based on morality, the Court based its analysis on the traditional strict scrutiny analysis.138

Moreover, the Court has not used Gryczan to launch a campaign to expand the right. Rather, the Court has shown restraint. In Baxter v. State, the Court avoided applying the right to privacy to a criminal statute in the context of rights for the terminally ill. Though both sides had briefed the constitutional issues extensively, the Court instead resolved the case on statutory grounds.139

In the civil context discussed in this article, the Montana Supreme Court’s privacy jurisprudence has been consistent with norms of constitutional interpretation. Because privacy, like the right to a clean environment, is fundamental, the Court applied strict scrutiny to statutes implicating the right. The result in Gryczan was to protect the rights of citizens from state-sponsored meddling in personal matters. But when the right to privacy was asserted in contravention of the right to know, the Court balanced both rights. In Baxter, the Court, consistent with the principle of constitutional avoidance, avoided a thorny constitutional issue by interpreting a statute instead.

135. Lawrence, 539 U.S. 558.
137. While the State argued that the statute protected public health by preventing the transmission of HIV, Montana’s own statistics showed that heterosexual contact is “now the leading mode of HIV transmission in this country.” Id. at 124 (referencing Centers for Disease Control data).
138. Id. at 125. The Court also relied on Madison’s words in The Federalist No. 51 regarding the role of a Constitution to protect against the “tyranny of the majority.” Id.
139. Baxter, 224 P.3d at 1215. The Baxter case was controversial and politically charged; the list of amici on both sides attests to the volatility of the right to die issue in Montana and the pressure on the Court to address the constitutional aspects of the issue. Id. at 1211.
VII. Why PropONENTS OF THE CALL FOR A CONSTITUTIONAL CONVENTION WERE MISGUIDED

The purpose of this article is not simply to catalogue a few Montana constitutional cases and show how the Montana Supreme Court has generally followed long-established and even conservative legal norms. The impetus for this article was the misinformation about the Court’s interpretation of the 1972 Constitution that surrounded the 2010 debate over the need for a constitutional convention. A careful review of how the Court has actually interpreted the Constitution reveals that its approach has been well within the mainstream of constitutional interpretation and that the proponents’ call for a new constitutional convention relied on overblown rhetoric rather than cogent legal analysis.

Certainly, urging voters to reconsider the Constitution was an appropriate topic for public debate. Indeed, the 1972 Constitution requires it. However, the proponents’ claims were long on innuendo and short on specifics. For example, one leading proponent stated in a guest editorial:

Montana’s constitution is a lawyer’s dream. Why? Because it’s filled with ambiguities, self-contradictions, and misadventures into guaranteeing costly entitlements. All three errors are fodder for multiple lawsuits. These same three problems which give lawyers a healthy income brokering lawsuits, also give courts ample opportunity to adjudicate those lawsuits with an unhealthy dose of dictatorial judicial intrusion into Montana’s economy, schools, politics, and individual rights.140

But the editorial provided no examples of the ambiguities and misadventures inherent in the Constitution, nor did it provide a detailed list of cases that represent the Court’s “unhealthy dose of dictatorial judicial intrusion.” Other criticisms were similarly unfounded.141

Proponents further claimed the Court interprets the Constitution to the detriment of citizens. In their words, the Constitution “empowers judges and bureaucratic rulemakers to micro-meddle in your property rights, business affairs, and personal conduct.”142 However, proponents failed to provide any examples of judges “micro-meddling” in personal affairs. If anything, decisions like Gryczan demonstrate the opposite is true; the rights in

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142. Balyeat & Miller, supra n. 8, at 2.
the Constitution have been interpreted to prevent the government from meddling in private affairs.

Additionally, proponents claimed the Constitution spurs “overzealous” courts to limit property rights.143 The constitutional provision at the heart of this disdain is the right to a clean and healthful environment. Criticism centered on this provision in both the Voter Information Pamphlet and newspaper editorials and letters to the editor.144 For example, in the Voter Information Pamphlet, the proponents stated: “The ‘clean and healthful’ provision, for example, has been expanded by Montana’s overzealous courts to prohibit any public or private activity which ‘implicates’ the environment unless you can prove a compelling state interest .”145 This assertion is both a misstatement of the law and a gross exaggeration.

As explained above, the Montana courts have not been “overzealous” by any objective measure. The decisions in Merlin Meyers and Clark Fork Coalition demonstrate that the Montana Court has taken a restrained approach, rejecting opportunities that an “overzealous” court might use to expand the provision’s reach. Moreover, to say that any public or private activity that implicates the environment must be justified by a compelling state interest is wrong. A new gravel pit and the permanent discharge of pollutants—the private actions at issue in Merlin Meyers and Clark Fork Coalition—implicate the environment, yet the Court declined to review whether they violate the right to a clean and healthful environment because those activities are subject to state regulatory schemes. In fact the Court’s actual record following MEIC reveals only one other case where constitutional environmental provisions affected a business or property dispute.146 Though proponents decry the use of the Constitution as a usurpation of the legislative and political processes,147 in both the Merlin Meyers and the Clark Fork Coalition cases, the Court deferred to the Legislature and decided the cases on the basis of statutory law, not the right to a clean and healthful environment.148

144. Balyeat & Miller, supra n. 8, at 2 (emphasis in original).
145. Cape-France Enters. v. Est. of Lola Peed, 29 P.3d 1011 (Mont. 2001). There, the Court applied Articles II and IX to a contract dispute and held that “[i]n light of these two provisions of Montana’s Constitution, it would be unlawful for Cape-France, a private business entity, to drill a well on its property in the face of substantial evidence that doing so may cause significant degradation of uncontaminated aquifers and pose serious public health risks.” Id. at 1017.
146. See Johnson, supra n. 56.
147. Merlin Meyers, 53 P.3d at 1272; Clark Fork Coalition, 197 P.3d at 489–493. The author wants to make clear his view that, notwithstanding the limited judicial application of Montana’s constitutional
The one specific example of judicial misfeasance cited by the proponents, *Marshall v. State ex rel. Cooney*, lends no credence to the call for reform. *Marshall* involved a challenge to the constitutionality of CI-75, a voter-approved initiative that amended multiple parts of the 1972 Constitution.\(^{149}\) The Montana Court determined that CI-75 violated Article XIV, §11, which requires that amendments to the Constitution be voted on separately, because CI-75 amended numerous portions of the Constitution in a single initiative.\(^{150}\) The proponents claimed the *Marshall* case makes it "virtually impossible to achieve significant constitutional reform through the initiative process."\(^{151}\) Yet the same proponents then criticize the Constitution for having been amended numerous times.\(^{152}\)

The problem in *Marshall* was that the drafters of CI-75 failed to read the plain language of Article XI and included more than one amendment in a single initiative, which the Constitution flatly prohibits. The Montana Constitution is not difficult to amend. The Constitution’s amendment procedures are highly democratic and provide for amendment by (1) legislative referendum, (2) constitutional convention, and (3) initiative.\(^{153}\) In fact, the Montana Constitution has been amended 13 times by citizen initiative in 40 years. In the decade following the *Marshall* decision, 26 constitutional initiatives have been proposed and two have passed.\(^{154}\) The vast majority of these initiatives did not reach the ballot due to insufficient voter interest in placing the measure on the ballot.\(^{155}\) The claim that constitutional reform cannot be achieved because of the *Marshall* decision is not justified by the facts.

Not only did the proponents fail to advance cogent and accurate reasons for a new constitutional convention, they were short on real-life examples of how the Court’s “micro-meddling” in business or personal affairs has hurt Montanans. By many economic measures, Montana has prospered in the last four decades.\(^{156}\) The decline of traditional industries—logging,
for example—can be traced to market forces and federal land management policies, not the state Constitution. Those claiming the Montana Court has “micro-meddled” in business affairs have never provided an extensive list of examples to support their contention. In fact, the reported cases regarding Montana Constitution’s environmental protections reveal a dearth of activities that were actually halted by the Constitution. The other rights discussed in this article, privacy and open government, hardly can be traced to judicial “micro-meddling” because they serve to protect individuals from overly intrusive government activities.

VIII. Conclusion

While today’s political climate is susceptible to manipulation by slinging phrases like “overzealous courts” or “activist judges,” the actual record of the Montana Supreme Court belies such charges. As discussed above, the Montana Court follows well-established norms of constitutional interpretation, but that truth was missing from the arguments advanced by those seeking a new constitutional convention. Therein lies the real damage of the proponents’ argument for a new constitutional convention. It is vital to engage in a debate about the wisdom of how our Constitution has been interpreted and whether there is need for change. But a misinformed debate tears at the heart of our political fabric and undermines the very institutions that we must respect and cherish in a constitutional democracy.

158. The decline of the Montana timber industry is tied to several factors, none of which implicate the Montana Constitution. Of major concern are allegedly subsidized Canadian softwood imports that have led to one of the world’s longest-running trade disputes. See Ministry of Forests, Lands, & Natural Resource Operations, Brit. Colum., Softwood Lumber Trade Dispute with the United States, http://www.for.gov.bc.ca/het/softwood/ABCPF%20softwood%20dispute%20section%202004%20rev.pdf (last accessed Mar. 23, 2011). As recently as 2006, Montana Senator Max Baucus urged the federal government to do more to protect domestic timber companies. U.S. Sen. Comm. on Fin., Baucus, Chambliss Seek Full Enforcement of Softwood Lumber Agreement with Canada, http://finance.senate.gov/newsroom/chairman/release/?id=7db13165-f983-456f-b1cc-2bc2a010f1de (last accessed Mar. 23, 2011). A 2002 article from the Federal Reserve Bank explained a complex web of factors that affect the timber industry. The article stated: “Global competition, the high value of the dollar compared with other currencies, limited logging on federal lands and weakness in the domestic economy are affecting all parts of the forest products industry, which are in simultaneous down cycles for the first time in recent memory.” Jane Brisset, Theme Song for Softwood Lumber: Oh, Canada, http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=2051 (last accessed Mar. 23, 2011). While the loss of traditional natural resource jobs to local communities is indeed tragic for those affected, none of the contributing factors have anything to do with the constitutional right to a clean and healthful environment.

159. For example, the Seven-Up Pete cyanide heap leach gold mine that tried to conduct the groundwater pump tests halted by the MEIC decision eventually failed because the voters passed Initiative 137, which outlawed the practice of cyanide heap leach gold mining. Seven-Up Pete Joint Venture v. Mont., 114 P.3d 1009, 1015 (Mont. 2005), cert. denied, 546 U.S. 1170 (2006).
Those advocating changes in the Constitution bear a responsibility to examine the Montana Court’s jurisprudence. The development—and limitation—of constitutional rights and responsibilities occurs over decades. The richness of our state Constitution’s provisions and the Court’s interpretations of them evolve slowly. The Montana Court’s decisions remain open to critique; constitutional meaning will change over time. However, significantly reforming the document after a mere 40 years defeats the very purpose of having a constitution. As the great United States Supreme Court Justice John Marshall explained, “we must never forget that it is a constitution we are expounding.”