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COMMENTS

CONSTITUTIONAL TEETH: SHARPENING MONTANA'S CLEAN AND HEALTHFUL ENVIRONMENT PROVISION

Hallee C. Kansman*

Explicitly recognizing a right to a healthy environment would alter how people think about the environment and our relationship to it. The mantra “pure water, clean air, and a healthy environment” would take on the stature of an entitlement in people’s minds, becoming far more than what it is now—a “nice idea.” . . . Constitutional amendments protecting the right to a clean environment have the power to change everything about how people interact with one another, with the world, with their decision-makers, and with future generations.¹

— Maya K. Van Rossum

I. INTRODUCTION

Charlie Russell, an American artist, captured the Old American West and its landscapes throughout a series of paintings. Not only did his paintings portray the beauty of Montana, but they served as the catalyst for the establishment of environmental rights in the Montana Constitution. Bob Campbell, a delegate from the 1972 Montana Constitutional Convention, explained how Russell’s paintings gave him the inspiration for the language

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1. Maya K. Van Rossum, *The Green Amendment: Securing Our Right to a Healthy Environment* 13 (2017).

of the “Right to a Clean and Healthful Environment” under Article II, Section 3.² In proposing the language, Campbell became a painter himself and the right became his masterpiece and homage to the American West.

In 1972, Montana adopted a new Constitution, bursting with provisions granting its citizens a plethora of rights. Among those is the right to a clean and healthful environment. Article II, Section 3 describes the inalienable rights provided to the citizens of the state. The provision states:

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 corresponding responsibilities.³

Rights pertaining to the environment are a common constitutional provision amongst states. Commonly, other provisions must accompany these rights to bolster their influence.⁴ For example, in relation to Montana’s right to a clean and healthful environment, the Preamble of the Montana Constitution illustrates the grand desire for environmental protection, and more so, environmental respect. The Preamble states:

We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution.⁵

Additionally, Article IX accounts for the environment and the state’s natural resources. Article IX employs a duty upon the citizens to “. . . maintain and improve a clean and healthful environment for present and future generations.”⁶ The subsequent sections within Article IX detail the importance of Montana’s natural, aquatic, and cultural resources.⁷

Early versions of the right to a healthful environment required the legislature to “. . . set limits, similar to those in the Bill of Rights, beyond which even a majority could not tamper with the environment. . . .”⁸ Additionally, “. . . [that] right should give all interested parties the opportunity to participate effectively in political and economic decision-making processes which, individually or collectively, have a substantial impact on the envi-

2. MONT. CONST. art. II, § 3.

3. MONT. CONST. art. II, § 3 (emphasis added).

4. RICK APPELATE, BILL OF RIGHTS 69 (Mont. Constitutional Convention Comm’n, Constitutional Convention Study No. 10 (1972)) [hereinafter CONVENTION STUDIES].

5. MONT. CONST. pmbi.

6. *Id.* art. IX, § 1.

7. *Id.* art. IX, §§ 2–4.

8. CONVENTION STUDIES, *supra* note 4, at 250.

ronment.”⁹ The right as written endured tumultuous debates amongst the delegates with the intent to make the right as strong as it could be—creating the sharpest teeth.¹⁰ The delegates stressed, “our intent was to permit no degradation from the present environment and affirmatively require enhancement of what we have now.”¹¹ Thus, the Constitution would serve as the strongest source of protection by “. . . not [requiring] that dead fish float on the surface of our state’s rivers and streams before its farsighted environmental protections can be invoked.”¹²

This article stresses the importance of safeguarding inalienable rights, while suggesting a coupling approach between the right to a clean and healthful environment and the environmental rights afforded in Article IX. Section II of this article explores the transcripts and the delegates’ intentions during the 1972 Constitutional Convention to understand the purpose of the right. Additionally, this Section exposes the mixed opinions of the public during the ratification of the Constitution and the different publications at the time, which cast varied interpretations of the right. Section III discusses the legislative and judicial authority pertaining to the Article II right. The case law within this Section is solely comprised of Montana Supreme Court cases, with a particular focus on the importance of the landmark *MEIC* decision. Section IV is a jurisdictional comparison of other state’s environmental rights, exploring the state constitutions of Illinois, Pennsylvania, Massachusetts, Hawaii, and Rhode Island. This section also explores the Constitutions of other nations as well as theories that recognize the inseparable nature of environmental rights and human rights. Section V explains the current difficulties with the Article II right and what changes can be made moving forward. This Section then proposes a strategy for interpretation and a theme for future litigation.

II. THE 1972 CONSTITUTIONAL CONVENTION

A. *The Copper Snake: The Anaconda Copper Company*

Towards the tail-end of the 1960s, Montanans raised the undeniable need for stronger constitutional provisions regarding environmental protection.¹³ The convention delegates, however, did recognize constitutionalizing environmental rights would face obstacles:

9. *Id.* at 250.

10. Cameron Carter & Kyle Karmen, *A Question of Intent: The Montana Constitution, Environmental Rights, and the MEIC Decision*, 22 PUB. LAND & RESOURCES L. REV. 97, 109 (2001).

11. *Id.* at 110.

12. *Id.* (citing *Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality*, 988 P.2d 1236, 1249 (Mont. 1999)).

13. Deborah B. Schmidt & Robert J. Thompson, *The Montana Constitution and the Right to a Clean and Healthful Environment*, 51 MONT. L. REV. 2, 414 (1990).

That there is continuing degradation of the environment is scarcely debated. The solutions proposed for the problem are highly debatable, intensely political issues affecting all manner of private interests—consumer as well as corporate—in an effort to recast the mold of that elusive but crucial “public interest.”¹⁴

The principal reason behind the “intensely political issues” surrounding environmental rights harkens back to the Copper Kings era and their business-centric legacy. During the 1800s, copper stood for wealth and prosperity. Deemed the “richest hill on earth,” Butte, Montana, became an economic center for Irish-American copper miners.¹⁵ Controlled by William Clark and Marcus Daly, the copper industry and its practices emerged as a political powerhouse—determining the layout of the 1889 Montana Constitution.¹⁶ Corporations, principally the copper companies, received far more rights than restrictions during the 1889 Constitutional Convention.¹⁷

The dominant Anaconda Copper Company constricted the health from the natural Montana environment. As one scholar wrote, “the deadly air of Butte, thick with fumes of sulfur, arsenic and smoke from the open roasting of its ores and from stacks of smelters, killed every blade of grass, every flower, and every tree within a radius of miles . . . [t]he richest hill on earth was now called ‘the perch of the devil.’”¹⁸ Early attempts to combat the smoke came from the Butte Smoke Ordinance in 1890—Montana’s first stab at environmental regulation¹⁹—eventually leading to the forced shut-down of the Company’s smelter.²⁰ The fear of legal ambush led the Company to buy out possible plaintiffs upstream and downstream of the operations.²¹

Aside from the minor attempt at repairing the environment through the Smoke Ordinance, the destruction of the Western landscape was of little concern until the mid-1900s. The realization for reclamation and cleanup, driven by the demise of the Copper Company, sparked a strong environmental movement.²² Montanans desired reform that accounted for “their

14. CONVENTION STUDIES, *supra* note 4, at 278.

15. Kathryn R. Owad, *The Role of Geography in the Genesis and Evolution of Environmental Rights in Montana*, UNIVERSITY OF CALGARY, 36 (2018), <https://perma.cc/5KLLK-M75T>.

16. *Id.* at 37–38.

17. *Id.* at 40 (“Fear of offending the territory’s greatest source of capital caused the framers of Montana’s 1889 Constitution to provide corporations with more benefits than restrictions. Afraid of diverting necessary foreign capital away from the developing state, the delegates rejected a proposal making corporate shareholders and company directors jointly liable for corporate debts.”).

18. *Id.* at 37 (quoting C.B. Glasscock, *The War of the Copper Kings: The Builders of Butte and the Wolves of Wall Street* 55 (2002)).

19. *Id.* at 48.

20. *Id.*

21. *Id.*

22. *Id.* at 60.

voice, their perspective” and not “Anaconda’s.”²³ Aware of the 1889 Constitution and its influences, the people of Montana convened the 1972 Constitutional Convention.²⁴ Although impediments were likely, the delegates’ language from the 1972 convention transcripts suggest a unified platform. Spearheaded by several delegates, the environmental provisions in the 1972 Constitution accounted for the concern regarding the declining quality of the environment.

B. Article IX, Section 1: Environment and Natural Resources

In his discussions regarding Article IX’s environmental rights, Delegate Campbell stated, “the state shall maintain an environment which we all say we want to be clean and healthful but we’re too timid to say we want clean and healthful in there because it may cause some problems later.”²⁵ His statement addressed the absolute need for environmental rights, while alluding to the fear of giving the legislature too much authority. Illuminating the concern further, Delegate Eck stated, “I think the red herring came in when we got in the idea that, because they were holding the environment in trust—really the quality of the environment—that meant they were going to take over all of the land in Montana.”²⁶ Delegate Eck’s statement coincides with the Montanan inclination toward individual rights, rather than allowing a more authoritative body to control outcomes.

The Convention debates, moderated by Chairman Graybill, generated the proposed language of Article IX, Section 1, emphasizing the inclusion of the public trust:

The state of Montana shall maintain and enhance a clean and healthful environment as a public trust. The beneficiaries of the trust shall be the citizens of Montana who shall have the right to protect and enforce it by the appropriate legal proceedings against the trustee.²⁷

This proposed amendment sparked the thoroughly articulated commentary by Delegate Brazier—a member of the Committee on Natural Resources and Agriculture. Delegate Brazier relied on an excerpt from the book *Defending the Environment*, to describe the difference between a declaration of an environmental right appearing in a statute and one appearing in a constitution.

‘A right with constitutional status does indeed create the opportunity for its enforcement in the courts, but it also—and herein lies the danger—gives

23. *Id.* at 61.

24. *Id.* at 60.

25. 5 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 1221 (1972) [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT V].

26. *Id.* at 1221.

27. *Id.* at 1222.

courts *ultimate* authority. That is, an environmental right declared by the courts as a matter of constitutional law cannot be overruled by the legislature. By contrast, a court enforcing a statutory right . . . can always be overruled by subsequent legislation.’ A statutory declaration of rights can open environmental matters fully to judicial attention but still leave ultimate decision-making power in the hands of the elected representatives of the public.²⁸

Another amendment to Article IX, brought by Delegate Robinson, concentrated on the rights and duty of individuals with respect to the ability to bring a claim, or standing.²⁹ Delegate Robinson summarized his proposal quite succinctly, stating, “it seems to me that if a few frivolous lawsuits do occur and that a few frivolous lawsuits is the price that we must pay for adequately protecting our environment for ourselves and future generations, the choice should be clear. The citizens should not be helpless to protect themselves and the environment.”³⁰ This proposal stressed the usability of the constitutional provisions to protect the environment and penalize those who degrade it.

Delegate Campbell proposed the final version of the language in Article IX.³¹ His version read, “the State of Montana and each person must maintain and improve a clean and healthful Montana environment for the present and future generations.”³² The proposal received an overwhelming 68 to 19 vote in favor and became the language of Article IX, Section 1.³³ In support of his proposal, Delegate Campbell emphasized the responsibility the state has in supporting a clean and healthful environment.³⁴ He stated, “a clean and healthful environment. . . is something less than the Legislature has already stated in their description of what they want for the state of Montana. I do not feel we can accept anything less than a clean and a healthful environment.”³⁵ The use of “clean and healthful” was not without conflict. Delegate Campbell combatted the differing opinions by citing to the concern of air quality in the state and the present level of pollution.³⁶ He stressed that removing those three key words “. . . would absolutely take away the incentive that the Legislature has had.”³⁷ Thus, “clean and health-

28. *Id.* at 1225–1226; see Joseph L Sax, *Defending the Environment: A Strategy for Citizen Action*, KNOFF PUBLISHING 237 (1971).

29. CONSTITUTIONAL CONVENTION TRANSCRIPT V, *supra* note 25, at 1229.

30. *Id.* at 1230.

31. *Id.* at 1251.

32. *Id.*

33. *Id.*

34. *Id.* at 1246.

35. *Id.*

36. *Id.* at 1247.

37. *Id.*

ful” captured the convention’s aspiration to leave Montana’s copper-riddled past behind.

C. Article II, Section 3: Inalienable Rights

A few months after the approval of Article IX’s provisions, the Bill of Rights Committee asked to add the following eight words to Article II, Section 3: “the right to a clean and healthful environment.”³⁸ As with Article IX, numerous delegates were skeptical of the language and the litigation floodgates it may open. Delegate Dahood interpreted the addition as an avenue for citizens to bring a claim.³⁹ He inquired whether the amendment would provide the citizens of the state with the independent right to initiate a lawsuit when “his own health and his own property is not affected with the contemplation of the present law.”⁴⁰ Meaning, if that individual’s environmental rights were not at issue, then, hypothetically speaking, a person would not be able to use the inalienable right to sue a corporation for polluting the Clark Fork River.

Delegate Burkhardt, who brought the addition, explained how the Preamble to the Constitution allowed him to “believe in [the clean and healthful provision].”⁴¹ He stated, “I think it’s a beautiful statement, and it seems to me that what I am proposing here is in concert with what’s proposed in that Preamble; that what we are talking about here is the goal toward which we try to grow as a society.”⁴² The proposed amendment overwhelmingly passed with a favorable vote of 79 to 7.⁴³ Although enacted subsequent to Article IX, the guaranteed right to a clean and healthful environment and its corresponding responsibilities, established the foundation for Montana’s constitutional environmental protections.⁴⁴ Thus, the delegates chose to adopt a right with constitutional status, ultimately leaving interpretive authority to the courts.

D. Ratification and Voter Information

Throughout the entire constitutional convention, the Public Information Committee apportioned some of the budget for public education pur-

38. *Id.* at 1637.

39. *Id.* at 1638.

40. *Id.*

41. *Id.*

42. *Id.* at 1640.

43. *Id.*

44. Deborah B. Schmidt & Robert J. Thompson, *The Montana Constitution and the Right to a Clean and Healthful Environment*, 51 MONT. L. REV. 2, 422 (1990).

poses.⁴⁵ The delegates attempted to create a committee to oversee public education duties leading up to the June 6 ratification date in 1972 by adopting Resolution 14—the formation of a committee tasked with voter education.⁴⁶ A group of opponents challenged the Resolution in front of the Montana Supreme Court, which held, “. . . voters had already received the proposed constitution along with explanations of what changed fulfilling the public education requirement.”⁴⁷

Due to the Court’s ruling, delegates, instead, raised independent monies to support public education and traveled across the state to attend public meetings and panel discussions.⁴⁸ Although, during signing, all the delegates were in favor of ratification, they were not as supportive during their independent campaigns.⁴⁹ During this time, Montanans wrote into local newspapers addressing their concerns regarding the new Constitution, especially those regarding the environmental provisions. One woman stated, “the environmental issues included in the proposed constitution are good,

45. Natasha Hollenbach, *Ratifying the 1972 Constitution*, MONTANA HISTORICAL SOCIETY, <https://perma.cc/2DNX-875B> (2017).

46. *Id.*; see *Mahoney v. Murray*, 496 P.2d 1120, 1125 (Mont. 1972). (“WHEREAS, The Montana Constitutional Convention has nearly completed its substantive activities and its making arrangements for adjournment sine die in order to meet its election date commitment of June 6, 1972; and WHEREAS, prior to adjournment sine die the Convention will not be able to complete its procedural, administrative and voter education affairs, all of which must be concluded in an orderly and responsible manner; and WHEREAS, the Convention anticipates that it will need to establish an appropriate committee to manage and conclude all of its procedural, administrative and voter education affairs after adjournment sine die; NOW THEREFORE, IT IS RESOLVED BY THE CONSTITUTIONAL CONVENTION OF THE STATE OF MONTANA AS FOLLOWS: 1. The Convention hereby creates a committee to act with the President of the Convention on its behalf after adjournment sine die, delegating to it full authority to manage and conclude all of the Convention’s procedural, administrative and voter education affairs, and to spend the Convention’s funds therefor, but only within the limits of its appropriation and such other funds as the Convention may have. 2. The Convention hereby appoints to said committee the President Leo Graybill, Jr., who shall act as its chairman, and the following delegates: John Toole, Dorothy Eck, Bruce Brown, Jean Bowman, Margaret Warden, Fred Martin, Robert Vermillion, Katie Payne, Betty Babcock, Marshall Murray, Catherine Pemberton, John Schiltz, Thomas Joyce, George Harper, Bill Burkardt, Jerome Loendorf, Oscar Anderson, Gene Harbaugh. 3. No delegate may serve on the committee who shall seek public office in the primary election to be held on June 6, 1972. The President, as chairman of the committee, shall have authority to substitute other Convention delegates for any committee members named herein who may decide to seek public office. 4. The Convention hereby delegates authority to the committee to receive, disburse and account for all Federal funds which the Convention may receive. 5. The Convention also delegates authority to the committee to supervise and edit any and all voter education materials prepared on behalf of the Convention or by other persons relative to the work of the Convention. 6. The committee shall terminate its work at such time as all of the Convention’s procedural, administrative and educational affairs have been completed, and all requirements of the Enabling Act have been met.”).

47. HOLLENBACH, *supra* note 45; see *State ex. rel. Kvaalen v. Graybill*, 496 P.2d 1127 (Mont. 1972).

48. HOLLENBACH, *supra* note 45.

49. *Id.*

but the convention could have done more to protect the environment.”⁵⁰ Another Montanan had quite the opposite view, stating, “the proposed constitution emphasized environmental rights over rights of the individual. The constitution of Montana, whether it is the present or the proposed one, should strike a proper balance between the rights of the individual and those of the environment.”⁵¹

The Constitutional Convention Enabling Act only authorized the dispersal of a Voter Information Pamphlet, which served as the lone explanation of the proposed constitution.⁵² Additional Constitutional Convention materials—including the transcript of the entire Constitutional Convention—were not released until after the Montana Constitution was ratified.⁵³ The Voter Information Pamphlet contained the entire proposed Constitution and a sample ballot.⁵⁴ The sample ballot presented four issues requiring a vote: (1) for or against the proposed constitution; (2) a unicameral or bicameral legislature; (3) for or against authorization of gambling; and (4) for or against the death penalty.⁵⁵ All votes were independent of each other.⁵⁶ However, if the proposed constitution failed to receive a majority of the votes cast, all issues would fail.⁵⁷ Given all the public outreach and information available, the 1972 Montana Constitution barely passed—with 50.55 percent in favor of and 49.44 percent against the new constitution.⁵⁸ Delegate Campbell eloquently summed up the ratification process, “we had the issues, we had the momentum, we had the vote . . . barely.”⁵⁹ Opponents attempted to challenge the vote, however, the Governor and the Montana Supreme Court stepped in—with a 3-2 decision—resulting in the ratification of the 1972 Montana Constitution.⁶⁰

E. Interpretive Theory

Due to the post-ratification release of the Constitutional Convention materials, the interpretive theory behind the provisions in the Montana Constitution endure continuous scrutiny. Tyler Stockton proposes that the Con-

50. Gerald J. Neely, *The Gallatin Voice*, 1 n.2 (1972), <https://perma.cc/58SL-AV98> [hereinafter GALLATIN VOICE].

51. *Id.*

52. Tyler Stockton, *Originalism and the Montana Constitution*, 77 MONT. L. REV. 117, 122 (2016).

53. *Id.* at 122.

54. PROPOSED 1972 CONSTITUTION FOR THE STATE OF MONTANA: OFFICIAL TEXT WITH EXPLANATION (1972) [hereinafter VOTER INFORMATION PAMPHLET].

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Interview with Bob Campbell, Delegate, 1972 Montana Constitutional Convention (March 2019) (on file with author).

60. *Id.*; see also *State ex rel. Casmore v. Anderson*, 500 P.2d 921 (Mont. 1972).

stitution's public meaning during ratification rather than the expressed intentions of the delegates in the transcript served as the proper method of interpretation.⁶¹ Stockton suggests the most reliable sources—in descending order—for interpretation are: (1) the Voter Information Pamphlet; (2) the Roeder Pamphlet; (3) the Neely Pamphlet; (4) The Constitutional Convention Transcripts; (5) the Montana Constitutional Convention Commission Reports; (6) the 1889 Constitution; (7) the ratification era newspaper articles and opinion pieces; (8) the varying private documents, correspondence, or association materials; and (9) opposition materials.⁶² Although a structured approach, Stockton's theory lacks judicial support. Historically, the Montana Supreme Court "has cited or referred to the Constitutional Convention transcripts at least 164 times . . ." and ". . . has referred to only 13 other ratification era sources and only four of those references come after the transcripts were published."⁶³ Given the constant reliance on convention transcripts, it is surprising how the Montana Supreme Court strays away from the delegates interpretation of the Article II right to a clean and healthful environment. This pattern will be discussed further in Section III and Section V.

Of the sources apart from the transcripts, the Neely Pamphlet serves as a detailed critique of the proposed constitution.⁶⁴ In its analysis of the inalienable rights, the pamphlet states:

The immediate question is whether the new provision creates the right for all such necessities of life and health to be provided by the public treasury. The provision is clearly aimed at elevating public assistance benefits from the level of privilege to that of right, and to provide for standards of procedural fairness in their denial.⁶⁵

It is evident from this view, in merely stating that each citizen is afforded this right and leaving out any seemingly working effect, the right itself may be inoperative.⁶⁶ The Neely Pamphlet exposed the consequences and difficulties of making a broad constitutional right and left the looming question of if the right could ever provide public assistance.

Additionally, the Gallatin Voice included an editorial piece focused on the political philosophy behind the bill of rights section.⁶⁷ The editorial de-

61. Stockton, *supra* note 52, at 117–18; see Johnstone, *The Montana Constitution in the State Constitutional Tradition* 12 (2019) (on file with author).

62. *Id.* at 143–48; see VOTER INFORMATION PAMPHLET, *supra* note 54; see also Concerned Citizens for Constitutional Improvement, Proposed Constitution for the State of Montana 11 (1972), available at <http://perma.cc/P5UG-ZPEC>; see also GALLATIN VOICE, *supra* note 50.

63. Stockton, *supra* note 52; see Johnstone, *The Montana Constitution in the State Constitutional Tradition* 12 (2019).

64. NEELY PAMPHLET, *supra* note 62.

65. *Id.*

66. *Id.*

67. GALLATIN VOICE, *supra* note 50.

defines a right as “a moral principle that defines the people’s assured freedoms.”⁶⁸ Some of the qualities of a right are: “they are absolute; they pertain to action; they are the same for everyone.”⁶⁹ The editorial takes the cynical view that the individual’s rights are sacrificed.⁷⁰ It first attempts to determine the meaning of the right to a clean and healthful environment, stating, “presumably, it means that a clean and healthful environment is guaranteed by the government at the expense of the taxpayer through legislation directed toward the people.”⁷¹ The editorial explains when the government is given the right to take measures to provide the right, it does so at the expense of the individuals who are afforded that right.⁷² What such views fail to recognize is the right to the enjoyment of health is an aspect of the right of personal security.

The right to the enjoyment of health is a subdivision of the right of personal security, one of the absolute rights of persons.⁷³ The definition implies a connection with the federally-guaranteed right to personal security within the Federal Constitution. The United States Constitution served as a template for the Montana Constitution, thus it seems fitting the drafters would synonymously associate the right to personal security and health with the right to a clean and healthful environment.⁷⁴ The plain meaning of environment suggests human involvement can attribute to environmental degradation, specifically when incorporating the definition of environmental factors.⁷⁵ If human activity is a known factor of harm then it is likely an environmental factor. Furthermore, the delegates likely considered how to integrate the state within the meaning of environment. Besides the inclusion of the words, “the State,” it is safe to assume the delegates considered the word “organization” in the definition of environmental factors to be synonymous with any authoritative entity, thereby extending to mean the state.⁷⁶

Another angle Neely addresses is the meaning of the final sentence in the inalienable rights, “. . . in enjoying these rights, the people recognize corresponding responsibilities . . .,” and how this impacts the environ-

68. NEELY PAMPHLET, *supra* note 62.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. The Wolters Kluwer Bouvier Law Dictionary, “Health” (2012).

74. G. Alan Tarr, *The Montana Constitution: A National Perspective*, 64 MONT. L. REV. 1, 14–19 (2003).

75. The Wolters Kluwer Bouvier Law Dictionary, “Environment” (2012).

76. CONSTITUTIONAL CONVENTION TRANSCRIPT V, *supra* note 25, at 1218. Referring to Delegate Harper’s comment: “. . . not a one of these states has more to protect than the treasure of the Treasure State.”

ment.⁷⁷ Neely suggests this provision not only creates a right, but also a duty. A strategy he refers to as, “a departure rarely seen in American government.”⁷⁸ He toys with the notion of who is responsible for effectuating the duty—a duty to each other or to the state of Montana.⁷⁹ Neely also elaborates on the Pandora’s box-like properties the right possesses, stating:

This one sentence, in combination with the new rights expressed in the same provision, and in combination with the [P]reamble and the provision regarding the right of privacy can also be construed as standing for a person or the state to regulate conduct that is not currently recognized under our current civil or criminal laws. Which is fine if the people of Montana are adequately apprised of such intent upon acceptance of such a provision.⁸⁰

In another similar analysis, one scholar suggests the words “clean” and “healthful” are vague and the provision provides no instruction as to remedy or enforcement.⁸¹ This approach, although centered around the terminology, provides—yet again—another indication of the provision’s lack of command. However, as mentioned in Professor Johnstone’s evaluation of the Stockton approach,⁸² the Supreme Court continuously utilizes the delegates interpretations and Constitutional Convention transcript rather than the plain meaning of the terms. The clear definitions of the terms, or sister terms, and the intent of the framers provides a substantial basis of the meaning behind the provision and how it can be applied. Further exploration of the provision’s meaning is discussed throughout landmark Clean and Healthful Environment cases.

III. ACCOMPANYING STATUTORY AUTHORITY & CASE LAW

A. Legislative Authority

1. *The Equal Footing & Public Trust Doctrine*

The Equal Footing Doctrine provides “the state’s title to a riverbed vests absolutely as of the time of its admission and is not subject to later defeasance by operation of any doctrine of federal common law.”⁸³ Under the Equal Footing Doctrine, title to the beds of navigable waterways are

77. Gerald J. Neely, *The Bill of Rights*, CONCON NEWSLETTER (1972), <https://perma.cc/65ZU-ULXQ> [hereinafter CONCON NEWSLETTER].

78. *Id.*

79. *Id.*

80. *Id.*

81. See John L. Horwich, *Montana’s Constitutional Environmental Quality Provisions: Self-Execution or Self-Delusion?*, 57 MONT. L. REV. 323, 362 (1996).

82. Stockton, *supra* note 52; see Johnstone, *The Montana Constitution in the State Constitutional Tradition* 12 (2019).

83. Dennison A. Butler, *Riparian Rights, Navigability, and the Equal Footing Doctrine in Montana*, 38 PUB. LANDS & RESOURCES L. REV. 187, 197–98 (2017).

subject to state law, including the Public Trust Doctrine.⁸⁴ “[O]nce the state obtains sovereignty over navigable riverbeds, the United States has ceded all its title and thus the public trust doctrine governing the State’s disposition of such lands ‘remains a matter of state law.’”⁸⁵

In Montana, the Public Trust Doctrine rests under Section 77–1–102 of the Montana Code Annotated.⁸⁶ It states, “the state-owned riverbeds are public lands of the state that are held in trust for the people as provided in Article X, Section 11, of the Montana Constitution.”⁸⁷ Under the Public Trust Doctrine, the active beds of all navigable waterways are public lands that are held in trust for the people of the state.⁸⁸ One of the first proposed amendments to the language of Article IX, Section 1 included the public trust, but was later excluded due to the presumption that it would no longer be the people’s right.⁸⁹

2. *The Montana Environmental Policy Act*

One year before the Constitutional Convention, the Legislature passed the Montana Environmental Policy Act (“MEPA”).⁹⁰ MEPA asserts:

It is the continuing policy of the state of Montana, in cooperation with the federal government, local governments and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can coexist in productive harmony. . . , and to fulfill the social, economic, and other requirements of present and future generations of Montanans.⁹¹

MEPA directs the state to consider substantive versus procedural debate and significant effects.⁹² In a review for significant effects, the state must evaluate any major state action for its effect on the quality of the human environment.⁹³ The directive of the Act and the requirements within it, likely served as a pillar in the development of the fundamental right to a clean and healthful environment. In fact, the Article II right and the Article IX rights encompass some of the same language as contained in MEPA,

84. *Id.*

85. *Id.*

86. MONT. CODE ANN. § 77-1-102 (2019).

87. *Id.*

88. Butler, *supra* note 83, at 198–99 (citing *Montana Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163 (Mont. 1984)).

89. CONSTITUTIONAL CONVENTION TRANSCRIPT V, *supra* note 25, at 1226–27.

90. 1971 Mont. L., § 1, ch. 238 (codified at Mont. Code Ann. § 75-1-103).

91. § 75-1-103(1).

92. § 75-1-201.

93. § 75-1-201(1)(b)(iii).

again illustrating the intent of the delegates in framing the rights as interrelated and interdependent.⁹⁴

3. *The 1973 Water Use Act*

Water was a major focal point during the 1972 Constitutional Convention. It is reasonable, given the tone of the convention, that strong and continuing legislation regarding water rights would follow only a year later.⁹⁵ The Montana Water Use Act of 1973 included a water-rights adjudication process, an administrative permitting system, and a water reservation system.⁹⁶ The Water Use Act—incorporating private property rights and public values—effectuates the “common desire to ensure protections from downstream threats.”⁹⁷ Although not included in the Water Use Act, the Sanitation in Subdivisions Act adopted a more comprehensive approach to the Department of Health and Environmental Sciences’ review of subdivisions, thus expanding the protection of water quality.⁹⁸ These further alterations suggest a positive response to the directives of the 1972 Convention. Moreover, they suggest a correlation with the national trend towards pollution prevention in the late 1980s.

B. *Judicial Authority*

1. *Kadillak v. Anaconda Company*⁹⁹

In 1979, the Montana Supreme Court tackled the relationship between the Article II right to a clean and healthful environment and MEPA.¹⁰⁰ Butte residents—lead by the Kadillak family—challenged the Anaconda Company’s application for a mining permit with the concern of unloading of mining wastes.¹⁰¹ The Department of State Lands requested the Anaconda Company complete an Environmental Impact Statement (EIS) prior to receiving their mining application.¹⁰² In its analysis, the Court evaluated the requirement for an EIS under MEPA, specifically looking at the duty MEPA imposes upon the state.¹⁰³

94. Deborah B. Schmidt & Robert J. Thompson, *The Montana Constitution and the Right to a Clean and Healthful Environment*, 51 MONT. L. REV. 2, 423–27 (1990).

95. *Id.* at 430.

96. § 85-2-101.

97. Schmidt, *supra* note 94, at 431.

98. *Id.* at 438.

99. *Kadillak v. Anaconda Co.*, 602 P.2d 147 (Mont. 1979).

100. *Id.*

101. *Id.* at 151.

102. *Id.* at 150.

103. *Id.* at 151–52 (The Court utilized a specific portion of MEPA: “MEPA provides, in part: “the legislature authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and

The Kadillaks also brought a constitutional challenge centered around the right to a clean and healthful environment.¹⁰⁴ The Court, however, denied the challenge stating it did not contain enough merit for the court to abandon the rationale of *Flint Ridge*.¹⁰⁵ MEPA predates the 1972 constitution and there is no indication that MEPA was enacted to implement the new constitutional guarantee of a clean and healthful environment.¹⁰⁶ The Court found:

[T]hat the statutory requirement of an EIS is not given constitutional status by the subsequent enactment of this constitutional guarantee. If the legislature had intended to give an EIS constitutional status, they could have done so after 1972. It is not the function of this Court to insert into a statute “what has been omitted.”¹⁰⁷

2. Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality¹⁰⁸

The Montana Supreme Court—in 1999—decided *Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality*, known colloquially as the *MEIC* decision.¹⁰⁹ The issue addressed whether a statutory exemption from degradation review for water well or monitoring well tests violated the constitutional right to a clean and healthful environment.¹¹⁰ In understanding the Court's position, it is important to discuss the factual background and applicable approaches of interpretation.

In 1992, a company applied for a mineral exploration license with plans to construct the McDonald Gold Mine Project.¹¹¹ The Montana Department of Environmental Quality (“DEQ”) granted the permit.¹¹² Three years into the project, the company submit a revision of its work plan to the DEQ in hopes of extending pumping of groundwater from the bedrock aquifer underneath the mine.¹¹³ The DEQ initially approved the application,

laws of the state shall be interpreted and administered in accordance with the policies set forth in this chapter; (2) all agencies of the state shall: (c) include in every recommendation or report on proposals for projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment, a detailed statement.””).

104. *Id.* at 153.

105. *Kadillak*, 602 P.2d at 153 (citing *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976)). “We emphasize that *Flint Ridge* and similar federal cases are uniformly based on the unavoidable and irreconcilable conflict between federal statutes. Because MEPA is modeled after NEPA, it is appropriate to look to the federal interpretation of NEPA.”).

106. *Id.* at 154.

107. *Id.*

108. *Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality*, 988 P.2d 1236 (Mont. 1999) [hereinafter *MEIC*].

109. 988 P.2d 1236 (Mont. 1999).

110. *Id.* at 1241–42.

111. *Id.* at 1238.

112. *Id.* at 1239.

113. *Id.* at 1238.

then hastily rescinded its approval upon realizing the water being pumped from the bedrock contained constituents of arsenic.¹¹⁴ The waters within the mining site were considered “high quality” waters pursuant to § 75-5-303 of the Montana Code Annotated.¹¹⁵

The Montana Supreme Court determined the right to a clean and healthful environment is a fundamental right under the Montana Constitution by relying on two previous decisions—*Butte Community Union v. Lewis*¹¹⁶ and *Wadsworth v. Montana*.¹¹⁷ *Butte Community* held “a right must be found within Montana’s Declaration of Rights or be a right ‘without which other constitutionally guaranteed rights would have little meaning’.”¹¹⁸ As the Court explained in *MEIC*, the right to a clean and healthful environment is contained in the Declaration of Rights, and is therefore a fundamental right.¹¹⁹ Additionally, *Wadsworth* held “the most stringent standard of review, strict scrutiny, is imposed when the action complained of interferes with the exercise of a fundamental right or discriminates against a suspect class.”¹²⁰ The *MEIC* Court stated, according to *Wadsworth*, “any statute or rule that implicates [the inalienable right to a clean and healthful environment] must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State’s objective.”¹²¹

The Court made the distinction between the fundamental right in Article II, Section 3 and Article IX, Section 1. The rights in Article IX are not

114. *Id.* at 1238.

115. *MEIC*, 988 P.2d at 1240 (quoting MONT. CODE ANN. § 75-5-303(3) (2017)). Section 303(3) “prohibits degradation of high quality waters unless the proposed degrading activity is reviewed by the [DEQ], and the party seeking approval for degrading activity demonstrates by a preponderance of the evidence that: (a) degradation is necessary because there are no economically, environmentally, and technologically feasible modifications to the proposed project that would result in no degradation; and (b) the proposed project will result in important economic or social development and that the benefit of the development exceeds the costs to society of allowing degradation of high-quality waters; and (c) existing and anticipated use of state waters will be fully protected; and (4) the least degrading water quality protection practices determined by the department to be economically, environmentally, and technologically feasible will be fully implemented by the applicant prior to and during the proposed activity.”

116. 712 P.2d 1309 (Mont. 1986).

117. 911 P.2d 1165 (Mont. 1996); Cameron Carter & Kyle Karmen, *A Question of Intent: The Montana Constitution, Environmental Rights, and the MEIC Decision*, 22 PUB. LAND & RESOURCES L. REV. 97, 107–08 (2001).

118. *MEIC*, 988 P.2d at 1245 (quoting *Butte Cmty. Union v. Lewis*, 712 P.2d 1309, 1311 (Mont. 1986)).

119. *Id.* at 1246.

120. *Id.* at 1245 (quoting *Wadsworth v. State*, 911 P.2d 1165, 1174 (Mont. 1996)).

121. *Id.* at 1246.

subject to strict scrutiny, rather are subject to middle-tier analysis.¹²² The Court relied on *General Agriculture Corporation v. Moore*¹²³ to explain constitutional interpretation, stating:

The prime effort, or fundamental purpose, in construing a constitutional provision, is to ascertain and to give effect to the intent of the framers and of the people who adopted it. The court, therefore, should constantly keep in mind the object sought to be accomplished . . . and proper regard given to the evils, if any, sought to be prevented or remedied.¹²⁴

In its reliance on *General Agriculture* and the transcripts of the 1972 Constitutional Convention, the *MEIC* court determined the framers intended the Article II right and the environmental rights under Article IX, Section 1 to be “interrelated and interdependent.”¹²⁵ Further, the Court held the two articles must be scrutinized consistently—applying strict scrutiny.¹²⁶

The Court’s holding regarding scrutiny provides a method of enforcement. In revisiting Horwich’s argument that the language of the right is vague, the *MEIC* decision would not carry any weight.¹²⁷ Another scholar highlights the inconsistency of Horwich’s argument:

In addition to the right to a clean and healthful environment, other provisions in the Bill of Rights utilizing words like “safety” and “happiness” could also be deemed legally ambiguous. If those rights that have a clear legal meaning are self-executing and those that do not are non-self-executing, then this model of analysis would render the majority of the inalienable rights in the Montana Constitution merely aspirational.¹²⁸

This reasoning, in combination with the location of the fundamental right, likely defeats Horwich’s theory.

3. *Cape-France Enterprises v. Estate of Peed*¹²⁹

Cape-France Enterprises v. Estate of Peed is only the second decision given by the Montana Supreme Court concerning Montana’s constitutionally guaranteed right to a clean and healthful environment.¹³⁰ This case in-

122. *Id.* at 1245. Middle-tier analysis requires the state to demonstrate that its classification is reasonable, and that its interest in classifying is more important than the people’s interest in obtaining the constitutional benefit.

123. 524 P.2d 859 (Mont. 1975).

124. *MEIC*, 988 P.2d at 1248 (quoting *General Agric. Corp. v. Moore*, 534 P.2d 859, 864 (Mont. 1975)).

125. *Id.* at 1246.

126. *Id.* at 1246.

127. See John L. Horwich, *Montana’s Constitutional Environmental Quality Provisions: Self-Execution or Self-Delusion?*, 57 MONT. L. REV. 323, 361–62 (1996).

128. Carter, *supra* note 117.

129. 29 P.3d 1011 (Mont. 2001).

130. Chase Naber, *Murky Waters: Private Action and the Right to a Clean and Healthful Environment*, 64 MONT. L. REV. 357, 357–58 (2003); *Cape-France Enters. v. Estate of Peed*, 29 P.3d 1011 (Mont. 2001).

volved a contractual obligation between parties requiring Cape-France to procure water through a well.¹³¹ A pollution plume had moved underneath the property under contract, of which the DEQ warned Cape-France “if the drilling or pumping of the water caused expansion of the pollution, Cape-France, as the owner of the property, would be held liable for the clean-up costs.”¹³²

The Montana Supreme Court again determined that the right to a clean and healthful environment is a fundamental right and interference with the right required a showing of a compelling state interest.¹³³ Additionally, the Court, once again, highlighted the relationship between the Article II fundamental right and the Article IX environmental rights.¹³⁴ Although Cape-France was a private party, the Court utilized the *MEIC* decision and stated, “while *MEIC* involved state action, we, nonetheless, recognized that the text of Article IX, Section 1 applies the protections and mandates of this provision to private action—and thus to private parties—as well.”¹³⁵ As Justice Nelson concluded:

Causing a party to go forward with the performance of a contract where there is a very real possibility of substantial environmental degradation and resultant financial liability for cleanup is not in the public interest; is not in the interests of the contracting parties; and is, most importantly, not in accord with the guarantees and mandates of Montana’s Constitution, Article II, Section 3 and Article IX, Section 1.¹³⁶

4. Sunburst School District No. 2 v. Texaco, Inc.¹³⁷

Sunburst approached the inalienable right in a strictly monetary sense.¹³⁸ The Montana Supreme Court evaluated the constitutional tort to a clean and healthful environment, stating, “to support its claim that a private party must be able to bring an action seeking monetary damages against another private party for a violation in order to vindicate a fundamental constitutional right. In fact, we expressly framed the issues to be presented at oral argument to include whether ‘the right to a clean and healthful environment . . . is self-executing?’”¹³⁹ The Court backed away from their framework and aligned with the notion “that courts should avoid constitu-

131. *Cape-France Enters.*, 29 P.3d at 1013.

132. *Id.* at 1013.

133. *Id.* at 1016–17 (citing *Armstrong v. State*, 989 P.2d 364, 375 (Mont. 1999)).

134. *Id.* at 1017.

135. *Id.* (citing *Mont. Env’tl. Info. Ctr. v. Mont. Dep’t of Env’tl. Quality*, 988 P.2d 1236, 1246 (Mont. 1999)).

136. *Id.*

137. 165 P.3d 1079 (Mont. 2007).

138. *Id.* at 1088 (Mont. 2007).

139. *Id.* at 1092–93.

tional issues whenever possible.”¹⁴⁰ The Court heavily relied on the apparent remedy available for restoration damages under tort law.¹⁴¹ *Sunburst* provided the foundation for subsequent cases raising a constitutional tort, one of those being *Shammel v. Canyon Resources Corporation*.¹⁴²

5. *Shammel v. Canyon Resources Corporation*¹⁴³

In 2007—a few years after *Cape-France* and in the same year as *Sunburst*—the Montana Supreme Court evaluated the issue of whether the right to a clean and healthful environment provided for the recovery of money damages in a constitutional action between private parties.¹⁴⁴ The Court plainly stated:

Where adequate alternative remedies exist under the common law or statute, the constitutional right to a clean and healthful environment does not authorize a distinct cause of action in tort for money damages between two private parties.¹⁴⁵

This decision highlights the Court’s consistent desire to avoid constitutional questions if another regulatory avenue is available to the parties.

6. *Northern Plains Resource Council, Inc. v. Mont. Board of Land Commissioners*¹⁴⁶

In the most recent case involving the Article II, Section 3 right to a clean and healthful environment, the Montana Supreme Court contended with the right’s ability to serve as a companion with MEPA and the implications of the *MEIC* decision.¹⁴⁷ The Court held that the leases in the *Northern Plains* case were unlike those in the *MEIC* case, thus the leasing interests “did not interfere with the exercise of the fundamental right to a clean and healthful environment under the Montana Constitution so as to require strict scrutiny and demonstration of a compelling state interest.”¹⁴⁸ The Court also held that middle-tier scrutiny was not required, “because the

140. *Id.* (citing *Dorwart v. Caraway*, 58 P.3d 128, 136 (Mont. 2002)).

141. *Id.* at 1093.

142. 167 P.3d 886 (Mont. 2007).

143. *Id.*

144. *Id.* at 887 (Mont. 2007) (citing *Sunburst*, 165 P.3d at 1093).

145. *Id.* at 888.

146. 288 P.3d 169 (Mont. 2012).

147. *Id.* at 174.

148. *Id.* (“Unlike the situation in *MEIC*, the leases at issue in the present case do not remove any action by Arch Coal from any environmental review or regulation provided by Montana law. Because the leases themselves do not allow for any degradation of the environment, conferring only the exclusive right to apply for State permits, and because they specifically require full environmental review and full compliance with applicable State environmental laws, the act of issuing the leases did not impact or implicate the right to a clean and healthful environment in Article II, Section 3 of the Montana Constitution.”).

statute does not adversely impact constitutional rights provided for outside of Article II, such as the provisions of Article IX.”¹⁴⁹ Finally, the Court specifically interpreted the connection to MEPA, holding:

The requirements of an EIS review under MEPA have been enacted by the Legislature in response to the broad directives found in Article II and Article IX of the Montana Constitution. If no constitutionally-significant interests are interfered with, then the state must only demonstrate that the statute has a rational basis.¹⁵⁰

The Court stated because the statute allowed the State Land Board to generate a remedy, while still being held responsible for environmental review, that the statute should receive rational basis and did not infringe upon the Article II right in the Montana Constitution.¹⁵¹

IV. JURISDICTIONAL COMPARISON

A. *The 1970 Illinois Constitution*

1. *Legislative History*

The Constitution of Illinois—as amended in 1970—was the first of its kind to include a separate provision concerning environmental rights.¹⁵² Those rights are found in Article XI, Environment.¹⁵³ Article XI, Section 1 describes that “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.¹⁵⁴ Although not included in the Bill of Rights, the Constitution implies a fundamental-like right upon each person under Section 2 of Article XI, stating, “each person has the right to a healthful environment.”¹⁵⁵ Moreover, this section provides citizens with an avenue for suit.¹⁵⁶

149. *Id.*; see John E. Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071, 1082 (1974) (Nowak calls the middle-tier test a “demonstrable basis standard of review” where the government must show a factual basis of discrimination.) (“Under the intermediate demonstrable basis standard, classification based on a neutral classification will be invalid if the state cannot demonstrate a factual relationship between the state interest capable of sustaining analysis and the means chosen to advance that interest.”).

150. *Northern Plains*, 288 P.3d at 174–75.

151. *Id.* at 175.

152. Art English & John J. Carroll, *State Constitutions and Environmental Bill of Rights*, in THE BOOK OF STATES 18 (The Council of State Governments 2015).

153. ILL. CONST. art. XI.

154. ILL. CONST. art. XI, § 1 (emphasis added).

155. ILL. CONST. art. XI, § 2.

156. ILL. CONST. art. XI, § 2 (stating that “[e]ach person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.”).

2. *Judicial History*

In 1999, the Illinois Supreme Court held a person cannot use the Article XI, Section 1 right to a healthful environment as an avenue for standing.¹⁵⁷ The Court held, where a constitutional provision is ambiguous, a court may consult the drafting history to obtain the meaning.¹⁵⁸ In its reading of the drafting history, the Court found that:

...“healthful environment” was intended to refer to the relationship between the environment and human health. The primary concern of the drafters of Article XI was the effect of pollution on the environment and human health. The right to a “healthful environment” was therefore not intended to include the protection of endangered and threatened species. We also conclude that the drafting history of Article XI indicates that plaintiff’s standing is limited to providing him with an opportunity to enforce his right to a “healthful environment.”¹⁵⁹

Additional reading of the drafting history indicates the intricate thought brought forth by the General Government Committee.¹⁶⁰ The Committee selected the word “healthful” to describe the kind of environment the state ought to obtain. The Committee stated, “healthful is chosen rather than ‘clean’, ‘free of dirt, noise, noxious and toxic materials’ and other suggested adjectives because ‘healthful’ describes the environment in terms of its effect on human life while the other suggestions describe the environment more in terms of its physical characteristics.”¹⁶¹

B. The 1971 Pennsylvania Constitution

1. Legislative History

The Constitution of Pennsylvania incorporates environmental rights within its Declaration of Rights, under Article I, Section 27. This section provides that:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.¹⁶²

In its form, the right creates a mandate on the state to provide for environmental protections, thus its enforcement is purely legislative on its face—

157. *Glisson v. City of Marion*, 720 N.E.2d 1034 (Ill. 1999).

158. *Id.* at 1041.

159. *Id.* at 1042.

160. *Id.*

161. *Id.*

162. PENN CONST. art. I, § 27.

straying away from the self-executing nature of the Illinois constitution a year prior. Pennsylvania's environmental right is detail-oriented and business-like. It imposes an ownership upon the state over the resources as "trustee." Pennsylvania's constitution also adds the language "generations yet to come," mirroring the Montana constitution's "future generations" consideration.¹⁶³

2. *Judicial History*

In 2013, the Supreme Court of Pennsylvania decided *Robinson Township v. Commonwealth*,¹⁶⁴ in which it held that certain provisions of the Pennsylvania Oil and Gas Act were unconstitutional and violated the Commonwealth's duties as trustee of Pennsylvania's public natural resources under the Environmental Rights Amendment.¹⁶⁵ In its opinion, the Court details the process for bringing suit under the Environment Rights Amendment:

We note that the Environmental Rights Amendment accomplishes two primary goals, via prohibitory and non-prohibitory clauses: (1) the provision identifies protected rights, to prevent the state from acting in certain ways, and (2) the provision establishes a nascent framework for the Commonwealth to participate affirmatively in the development and enforcement of these rights. Section 27 is structured into three mandatory clauses that define rights and obligations to accomplish these twin purposes; and each clause mentions "the people."¹⁶⁶

Pennsylvania's Environmental Right speaks for the people, rather than through the people's elected representatives to the General Assembly and it speaks to the generations yet to come.¹⁶⁷ Because the right obligates the Commonwealth to act as the trustee, they have the responsibility to implement and enact new legislation that would benefit the environment.¹⁶⁸ The Court—like the Supreme Court of Montana—relied on the statements of the drafters of the Pennsylvania Constitution regarding the creation of the right.¹⁶⁹ The Court firmly supported the intent of the drafters and described types of Environmental Rights Amendment challenges a party could bring, those being: (1) environmental challenges to development projects; and (2) challenges that implicate a balancing of Article I rights.¹⁷⁰

163. PENN CONST. art. I, § 27; see MONT. CONST. art. IX, § 1.

164. 83 A.3d 901 (Pa. 2013).

165. *Id.* 913.

166. *Id.* at 950.

167. *Id.* at 974.

168. *Id.* at 957.

169. *Id.* at 961 (citing H. JOURNAL, Reg. Sess., 2270 (Pa. 1970) (quoting "[w]e uglified our land and we called it progress.")).

170. *Robinson*, 83 A.3d at 964–69 .

*C. The 1972 Massachusetts Constitution**1. Legislative History*

Massachusetts' environmental right is quite developed. A legislatively enforced right on its face, Massachusetts imposes a comprehensive environmental right for its people. The right details that:

The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose. The general court shall have the power to enact legislation necessary or expedient to protect such rights.

In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefor, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes. Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two-thirds vote, taken by yeas and nays, of each branch of the general court.¹⁷¹

Interestingly, the right specifies a great deal of authority in the legislature's ability to preserve and modify the right. Not only do the citizens of the state have a right to a clean environment, but they have a right to freedom from excessive and unnecessary noise, and to the esthetic qualities of the environment.¹⁷² Article XCVII of the Massachusetts constitution, therefore, provides both a fundamental right and general environmental rights.

2. Judicial History

In 2013, the Supreme Judicial Court of Massachusetts, illuminated the ways in which a party can sue under the Article 97 right to a clean environment.¹⁷³ It held that land taken for urban renewal purposes is distinct from the Article 97 purposes provided.¹⁷⁴ The Court provides adequate background, particularly noting the *Quinn* Opinion, which held that if a project's aims are consistent with the purposes of Article 97, then the project is sub-

171. MASS. CONST. art. XLIX.

172. MASS. CONST. art. XLIX.

173. *Mahajan v. Dep't of Env'tl. Prot.*, 984 N.E.2d 821, 823 (Mass. 2013).

174. *Id.* at 827–28.

ject to the two-thirds vote requirement.¹⁷⁵ In recent case history, however, the Court relies on a more narrow reading of the *Quinn* Opinion.¹⁷⁶ Rather than using the intent of the drafters, the Court takes the approach that “because the spirit of Article 97 is derived from the related doctrine of “prior public use,” cases applying that doctrine inform our analysis. Therefore, Massachusetts relies on judicial precedent involving any project which may affect the public’s use of the environment.

D. The 1978 Hawaii Constitution

1. Legislative History

The Hawaiian Constitution provides a right similar to that of the Montana Constitution. It states, “the State shall have the power to promote and maintain a *healthful* environment, including the prevention of any excessive demands upon the environment and the State’s resources.”¹⁷⁷ Additionally, under Article XI, Hawaii’s Constitution provides that, “each person has the right to a *clean and healthful* environment. . . .”¹⁷⁸ Distinct from Montana’s right, however, the Hawaiian right to a clean and healthful environment is defined by the laws relating to environmental quality.¹⁷⁹ Rather than creating an interrelated and interdependent relationship between articles for enforcement, the Hawaiian right is self-executing in nature.

2. Judicial History

Hawaii’s case law slightly mimics that of Montana. In 2010, the Supreme Court of Hawaii clarified their environmental right to a clean and healthful environment.¹⁸⁰ Not only does Hawaii’s right have similar language, Hawaii also chooses to interpret a constitutional provision in the same manner as Montana: “[m]oreover, ‘a constitutional provision must be construed in connection with other provisions of the instrument, and also in the light of the circumstances under which it was adopted and the history which preceded it.’”¹⁸¹

175. *Id.* at 827–29 (citing Rep. A.G., PUB. DOC. NO. 12, at 142 (1973)). Robert H. Quinn, Opinion of the Attorney General Regarding the Disposition of Public Lands Under the “Clean Environment” Amendment to the Constitution of Massachusetts, 3 B.C. ENVTL. AFF. L. REV. 495 (1974).

176. *Mahajan*, 984 N.E.2d at 828.

177. HAW. CONST. art. IX, § 8 (emphasis added).

178. HAW. CONST. art. XI, § 9 (emphasis added).

179. HAW. CONST. art. XI, § 9

180. *County of Hawai’i v. Ala Loop Homeowners*, 235 P.3d 1103, 1122 (Haw. 2010), abrogated by *Tax Foundation of Hawai’i v. State*, 439 P.3d 127 (Haw. 2019).

181. *Id.* at 1116 (quoting *Carter*, 16 Haw. at 244).

In this case, the Supreme Court of Hawai'i devised a three-part test to determine the relevance of Article IX, Section 8: (1) whether the provision under review is a law relating to environmental quality within the meaning of Article IX, Section 8; (2) whether Article IX, Section 8 is self-executing; and (3) if it is self-executing, whether the legislature had acted to impose reasonable limitations and regulation that are applicable in the circumstances of this case, and which would preclude the party from maintaining an action for alleged violations.¹⁸² Here, the Court found that Chapter 205 was a law relating to the environmental quality within the meaning of Article IX, Section 8 because Chapter 205 pertains to conservation, protection, and enhancement of natural resources, thus falling within the scope of the right.¹⁸³ The Court determined Article IX, Section 8 was self-executing in the circumstances presented due to the legislature's support of the environmental right by creating supporting legislation which bolstered the authority of the right.¹⁸⁴ The Court makes the distinction that this support is strictly scholarly and legislative in nature, stating "this court's other decisions have not directly addressed whether Article IX, Section 8 is self-executing."¹⁸⁵ Finally, the Court held that the law under review does not preclude the party from bringing an action to enforce the alleged violations.¹⁸⁶

E. The 1987 Rhode Island Constitution

1. Legislative History

Rhode Island's Constitution gives its citizens an environmental right tailored specifically to fishery and water rights.¹⁸⁷ Other environmental concerns involving air, natural resources, and wildlife preservation are only implied as a duty upon the legislature rather than included in the inherent right.¹⁸⁸ Article I, Section 17 does, however, allow the legislature to "adopt all means necessary and proper by law to protect the natural environment of the people of the state."¹⁸⁹

2. Judicial History

The Rhode Island Supreme Court has yet to face a challenge pertaining to the "adopt all means necessary and proper" provision in their environ-

182. *Id.* at 1121.

183. *Id.* at 1121.

184. *Id.* at 1122.

185. *Id.* at 1128.

186. *County of Hawai'i*, 235 P.3d at 1137.

187. R. I. CONST. art. I, § 17.

188. R. I. CONST. art. I, § 17.

189. R. I. CONST. art. I, § 17.

ment rights. Instead, cases challenging the provision involving “the privileges of the shore” are more popular.¹⁹⁰ *Ludwig v. Coastal Resource Management Council*¹⁹¹ does, however, provide a glimpse into the controlling authority behind the right—that being the public trust doctrine.¹⁹² In this case, the Rhode Island Supreme Court dealt with the Rhode Island Coastal Resources Management Council’s decision to deny an application to build a wooden walkover on private property.¹⁹³ The Court held because the walkover did not benefit the public and was to be constructed solely on private land, Article I, Section 17 did not apply since its provisions refer to the right of the public.¹⁹⁴

F. International Environmental Rights

At least 100 countries include the right to a healthy environment within their Constitutions,¹⁹⁵ and even more have enacted legislation to that effect.¹⁹⁶ Many of the lawsuits enforcing the constitutional right to a healthy environment are successful in preserving environmental health and integrity.¹⁹⁷ This is primarily due to the common international principle that “all persons have the right to a secure, healthy and ecologically sound environment.”¹⁹⁸ While the exact meaning of a “healthy environment” varies internationally, courts routinely emphasize the necessity to improve environmental conditions:

Courts have ruled that the constitutional right to a healthy environment imposes four types of duties upon government: to respect the right by not infringing it through state action; to protect the right from infringement by third parties (which may require regulations, implementation, and enforcement); to take actions to fulfill the right (by providing services including clean water, sanitation, and waste management); and to promote the right (through public education or mass media).¹⁹⁹

190. *Ludwig v. Coastal Res. Mgmt. Council*, No. WC 2009-0120, 2013 R.I. Super. LEXIS 140, *32; see *Jackvony v. Powel*, 21 A.2d 554 (R.I. 1941); see also *State v. Ibbison*, 448 A.2d 728 (R.I. 1982).

191. *Ludwig*, 2013 R.I. Super. LEXIS 140.

192. *Id.* at *32.

193. *Id.* at *1–2.

194. *Id.* at *32–33.

195. THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT 18 (John H. Knox & Ramin Pejan eds., 2018).

196. *Id.* at 18 (stating that “[i]n total, governments of at least 155 nations have recognized the right to a healthy environment in legally binding instruments, at the national and/or international level”).

197. *Id.* at 29.

198. YANG et al., COMPARATIVE AND GLOBAL ENVIRONMENTAL LAW AND POLICY 385 (Wolters Kluwer 2020) (citing Framework Principles on Human Rights and the Environment, Principle 2, <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/FrameworkPrinciplesReport.aspx>).

199. KNOX, *supra* note 195, at 29 (stating that “[i]n addition, courts have consistently held that laws, regulations, and administrative actions that violate the constitutional right to a healthy environment will be struck down”).

Two scholars—Erin Daly and James May—suggest a method of advancing the human right to a healthy environment by focusing on the meaning, scope, and enforcement of the right.²⁰⁰ They propose a theory of environmental constitutionalism, which is rights-based and human-centered.²⁰¹ Therefore, “whatever the language or intent of the drafters, these provisions tend toward anthropocentrism in application because the rights they guarantee are invariably asserted by humans.”²⁰² For example, a man in Peru challenged the government for a violation of his fundamental rights to live in an adequate and balanced environment.²⁰³ The Peruvian Court held that it had a constitutional obligation to not only protect the man’s rights, but to protect the rights for future generations.²⁰⁴

Similar to the Article II right in Montana’s Constitution, most “healthy environment” provisions in other nation’s constitutions indicate both an absolute right and a duty upon some branch of government or the people.²⁰⁵ However, some constitutions, connect “healthy environment” provisions to other constitutional or international rights.²⁰⁶ In fact, environmental rights can be found alongside civil and political rights.²⁰⁷ For example, some constitutions recognize environmental rights to clean, safe, and potable water.²⁰⁸ “The value of clean water can therefore be augmented by being protected once as a human right and once as an environmental right.”²⁰⁹ The Inter-American Court of Human Rights recognized the presence of a relationship between the protection of the environment and the realization of other human rights and emphasized the “interdependence and indivisibility between human rights and the environment.”²¹⁰

Finally, Daly and May suggest there are four lessons regarding enforcement of environmental international rights: (1) put words to action; (2) think big; (3) think about others; and (4) think about process by explicitly promoting access to information, participation, and justice.²¹¹ Enforcement and development of environmental rights is not an easy task:

200. *Id.* at 50.

201. *Id.* at 51. It assumes that a healthy environment can be assured or at least advanced by guaranteeing individuals the right to assert claims for violations against governmental actors.

202. *Id.* at 51.

203. YANG, *supra* note 198, at 387.

204. *Id.* at 387 (“It should be taken into account that any damage to the environment not only affects the constitutional right in question, but also the rights of future generations. Therefore, the obligation to protect and preserve a suitable and balanced environment must be fulfilled by all jurisdictional bodies at all levels, including those charged with administering constitutional justice.”).

205. *Id.* at 392.

206. KNOX, *supra* note 195, at 51.

207. *Id.* at 53.

208. *Id.*

209. *Id.*

210. YANG, *supra* note 198, at 393.

211. KNOX, *supra* note 195, at 55–56.

The right should be expressed in such a way as to make clear its meaning, its scope, the procedural and substantive rights with which it is associated and meant to be supported by, and the enforcement mechanisms that will ensure its effectiveness. Lessons from the experience at the national level can be informative and influential for those considering whether an international right is beneficial, and if so, why and how.²¹²

Judges evaluate the language and drafting history of environmental provisions; where legislative intent is clear one way or the other, the judiciary will defer.²¹³ Some courts create barriers, for example, “interpreting constitutional provisions as non-self-executing.”²¹⁴ Montana is no stranger to this trend. As previously mentioned, the Montana Supreme Court straddles the line when it comes to execution of the inalienable right; from giving strict scrutiny in *MEIC* to side-stepping constitutional issues entirely in more recent cases like *Sunburst*. This trend bars individuals “from invoking constitutional provisions unless and until the legislature enacts measures to establish precise regulations and standards governing the topic.”²¹⁵

Another concept familiar to international human rights and environmental rights is the use of “healthy” and “clean.” “A safe and healthy environment may be viewed either as a pre-condition to the exercise of existing rights or as inextricably intertwined with the enjoyment of these rights.”²¹⁶ The right to a “clean and healthy” environment is often viewed as a prerequisite for the enjoyment of other rights, especially for the enjoyment and fulfillment of all human rights.²¹⁷ Another theory behind the inclusion of this language is that it is strictly survival based.²¹⁸ “If the right to a clean environment can be viewed as a survival need, it is truly a universal right since the cultural aspect of legitimization is not a factor. The need for survival is universal due to every organism’s inherent need and desire to survive.”²¹⁹ It is no surprise the Montana delegates wanted to include this phrase given the strong international and national desire to advocate for not only environmental rights, but human rights.

G. Relation to Montana

A recent regional study alluded to the public policy behind the decision to include environmental rights provisions rather than exclude them

212. *Id.* at 57.

213. *Id.* at 100.

214. *Id.* at 101.

215. *Id.*

216. EDITH B. WEISS ET AL., INTERNATIONAL LAW FOR THE ENVIRONMENT 1023 (West Academic Publishing 2016).

217. *Id.* at 1023.

218. *Id.*

219. *Id.*

and the impositions placed on the legislatures and the courts of those states.²²⁰ They stated:

. . . it appears the framers of these amendments believed that even if the language in most cases would not support unilateral private action against serial environmental abusers, they would remind lawmakers, judges, political activists and the attentive public that the right to a clean and healthy environment is one of the most fundamental rights to which people are entitled. While these reminders might be considered merely hortatory, they also provide policy guidance to legislators, executives and courts who are encouraged to provide reasonable regulation and implementation by law in light of their public trust to take good care of the environment for future generations.²²¹

Like the authors mention, the language in the rights may be moralistic in nature, however, it provides the legislature and the judiciary with a direction in terms of enforcement. Montana's fundamental right does not include explicit language mandating the legislature or the courts to act like the Massachusetts and Pennsylvanian rights do.²²² It does, however, include the phrase, "in enjoying these rights, all persons recognize corresponding responsibilities."²²³ This phrase instills a mandate on the people, which includes the legislators within the state.

It is citizens who occupy and serve in the legislature in the state of Montana. With 40 to 50 Senate members and 80 to 100 House members representing unique districts across the state, Montana's legislature mirrors the temperament of the state—rural in the east and rugged in the west.²²⁴ A legislator's main responsibility is to serve during the legislative session, which occurs biannually.²²⁵ They must balance the needs of their constituents with what is best for Montanans.²²⁶ Thus, the directive for all persons to recognize corresponding responsibilities regarding the fundamental right would theoretically outweigh the needs of a legislator's constituents. Yet, this is not common practice in Montana. More often, legislators—during their brief tenure—advocate for their constituents, bringing forth bills each session that highlight the concerns of the county they represent.

Should the constitutional convention delegates have added in a mandate for the state to act as a trustee like Pennsylvania's Environmental Right

220. Art English & John J. Carroll, *State Constitutions and Environmental Bill of Rights*, in *THE BOOK OF STATES* 18, 21 (The Council of State Governments 2015).

221. *Id.* at 21.

222. See MASS. CONST. art. XLIX (superseded by Amendments in art. XCVII). Article 97 was adopted in 1972 and references the right to a clean environment; see also PENN. CONST. art. I, § 27.

223. MONT. CONST. art. II, § 3.

224. Montana Legislative Services Division, *A Guide to the Montana Legislature*, 9 (Mar. 2017), <https://leg.mt.gov/content/About-the-Legislature/2019guide-montana-legislature.pdf>.

225. *Id.* at 11.

226. *Id.*

Amendment? Should they have enumerated the specific rights to water, air, and land within the inalienable right to a clean and healthful environment like Massachusetts Environmental right? How will Montanans abide by the directive of Justice Trieweler in *MEIC*? Or, is the dead fish already floating on the surface? In the following section, I suggest a framework for the Montana Supreme Court to apply, primarily drawing upon other state's actions and the existing relationship between the Article II right and Article IX's rights.

V. LOOKING FORWARD

Most importantly, the promise of *MEIC* must be delivered. With the potential to be a lightning rod, it—instead—failed to achieve the spark the 1972 delegates intended for. Article II, Section 3 seems like a self-executing right, however, due to the interrelated and interdependent connection between Article II and Article IX—a legislative mandate—the courts have had no choice but to avoid claims involving solely the fundamental right. The delegates of the 1972 Constitutional Convention had hopeful intentions of creating a right so in-tune with Montanan culture; and, in fact, they created such a right. The problem lies in their comments regarding the relationship between the fundamental right in Article II and the general environmental rights in Article IX. If the delegates would have placed language within Article II, Section 3, indicating a compelling state interest or mandating the legislature, then the right would have more authority. As it stands now, Montana courts—specifically the Montana Supreme Court—consider it to be an aspiration rather than a right to be enforced.

A. Exploring Legal Scholars' Work

As mentioned previously, the problem stems from the coupling of the Article II right and the Article IX right; however, the interdependent and interrelated nature could also pose as a solution. Human rights and environmental rights are indivisible.²²⁷ Fundamental rights “are indivisible, interrelated, and interdependent. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others.”²²⁸ Therefore, the co-dependency of Article II and Article IX creates both a strength and a weakness contingent upon the court's interpretation of them.

The Article IX right instills a greater level of responsibility upon the legislature, thus imposing a duty upon the state. Former Montana District

227. WEISS, *supra* note 216, at 974.

228. *Id.*

Court Judge C.B. McNeil, who served as a delegate in the 1972 Constitutional Convention, provided detailed instruction regarding the heightened scrutiny given to the right during the Natural Resources Committee debates. He stated:

The committee recommends the strongest environmental section of any state constitution. It is the only constitutional provision with an affirmative duty to enhance the environment. It mandates the legislature to maintain and enhance the environment. It mandates the legislature to provide adequate remedies to protect the environmental support system from degradation. It provides that the term environmental life-support system is all encompassing, including but not limited to air, water, and land. And whatever interpretation is afforded this phrase by the legislature and the courts, there is no question that it cannot be degraded.²²⁹

These statements, again, highlight the immense duty resting upon the Montana Legislature. It is an affirmative duty and a prospective duty to not only preserve, but to improve environmental conditions.²³⁰ McNeil, in that same excerpt, referred to the shining potential of the fundamental right, and set the stage for the *MEIC* decision.²³¹ Yet, he refers to the much narrower special concurrence by Justice Gray as the correct encapsulation of the delegates intent.²³² Justice Gray's opinion mirrors that of Justice Leaphart, who communicates in his special concurrence that the application of strict scrutiny, requiring a compelling state interest, is required for either the Article II right or the Article IX rights.²³³ Justice Leaphart further acknowledged the gravity of both rights in connection with state and private actions, stating:

I agree that state action implicating the rights guaranteed by Article II, Section 3 or Article IX, Section 1, must be subject to strict scrutiny. Although Article IX, Section 1, clearly imposes an obligation on private entities, as well as the state, to maintain and improve a clean and healthy environment, I would not, in the context of this appeal, address the question of private action. In resolving this appeal, we are not addressing private action. Rather, we are addressing state action; that is, the constitutionality of a state statute.²³⁴

While Judge McNeil relies on the constitutional convention transcripts for justification of the provisions, Nelson utilizes case law from the Mon-

229. C. B. McNeil, *A Clean and Healthful Environment and Original Intent*, 22 PUB. LAND & RESOURCES L. REV. 83, 86 (2001).

230. *Id.* at 89.

231. *Id.* at 89–90.

232. *Id.* at 93.

233. *MEIC*, 988 P.2d at 1251.

234. *Id.* at 1250.

tana Supreme Court—specifically *Shammel*.²³⁵ Nelson fears that the creation of a constitutional tort would “inevitably invite chaos.”²³⁶ He further explains this fear stating, “[it] will likely result in the removal of predictability in the fields of environment, economic, and industrial policy and regulation.”²³⁷ These conflicting opinions between a delegate from the constitutional convention and a young legal scholar showcase the complexity of the right to a clean and healthful environment. This poses the question: will the right ever be self-executing?

The short answer to that is no—at least not in reading Montana Supreme Court cases following *MEIC*. However, the solution could be as simple as learning from other states or other nations. The Montana Supreme Court and the Montana Legislature already stress the importance of the interrelated and interdependent relationship between the Article II right and the Article IX right.²³⁸ Additionally, both the legislature and the Court utilize a variety of sources pertaining to constitutional construction and interpretation, including the 1972 Constitutional Convention transcripts, case law, and intent. Both the relationship of the rights and the drafting material signify a strong, persuasive, and compelling nature behind the right. Moral rights and legal rights are most certainly connected. There is significance in incorporating human rights into a legally enforceable one:

It is not merely that as a matter of fact men speak of their moral rights mainly when advocating their incorporation in a legal system, but that the concept of a right belongs to that branch of morality which is specifically concerned to determine when one person’s freedom may be limited by another’s and so to determine what actions may appropriately be made the subject of coercive legal rules.²³⁹

Schmidt and Thompson suggest to “inspire a realization of the ‘people duty’ in the constitution.”²⁴⁰ They advocate for the Montana Constitution, stating, “the Montana Constitution is both a legal and a moral document . . . Perhaps the very first words of [it] provide the inspiration for the changes that each Montanan *must* make in order to realize fully the promise for a clean and healthful environment for present and future generations.”²⁴¹ Schmidt and Thompson grapple with the philosophical approach to inter-

235. Kyle Nelson, *Montana’s Constitutional Right to a Clean and Healthful Environment: Can a Value Ever Be Assigned to This Right? Shammel v. Canyon Resources Corp.*, 29 PUB. LAND & RESOURCES L. REV. 191 (2008); see *Shammel v. Canyon Resources Corp.*, 167 P.3d 886 (Mont. 2007).

236. *Id.* at 194.

237. *Id.*

238. See generally *MEIC*, 988 P.2d 1236.

239. Knox, *supra* note 195, at 159.

240. Deborah B. Schmidt & Robert J. Thompson, *The Montana Constitution and the Right to a Clean and Healthful Environment*, 51 MONT. L. REV. 2, 444 (1990).

241. *Id.* at 446 (emphasis added).

pretation; yet, what is lacking is the reference to other states' constitutional rights to a clean and healthful environment.

B. *Love Thy Neighbor*

The idea to draw from other states regarding the interpretation of constitutional rights is not a novel one. Historically, states either lock-stepped with the federal constitution or utilized other states' constitutions in the creation of the first state constitution.²⁴² Judge Sutton suggests a resolution for the lack of honor state courts, specifically state supreme courts, give to its own constitutional rights:

To avoid requiring each state “to construct a complete system of fundamental rights from the ground up,” the editors reasoned that the best approach to developing state constitutional law was a model that “recognizes federal doctrine as a settled floor of rights and asks whether and how to criticize, amplify, or supplement this doctrine to yield more extensive constitutional protections.” They thus proposed that state courts should “acknowledge the dominance of federal law and focus directly on the gap-filling potential of state constitutions.”²⁴³

As Professor John Horwich mentions, “we are not alone: other states and courts have faced these issues.”²⁴⁴ Additionally, Horwich indicates the “isolationism” abused by the Court in failing to consider the path other state courts use in analyzing constitutional environmental rights.²⁴⁵ Montana's constitution employs a “Representative Democracy Model.”²⁴⁶ Under this model, state constitutions are “the means by which the polity agrees to a system of representative democracy through which they will determine policy and govern their interactions.”²⁴⁷ Thompson cautions the use of broad environmental policy provisions under a Representative Democracy Model;²⁴⁸ however, even the weakest environmental states incorporate en-

242. Jeffery S. Sutton, 51 *IMPERFECT SOLUTIONS*, 174 (Oxford University Press 2018).

243. *Id.* at 186–87.

244. John L. Horwich, *MEIC v. DEQ: An Inadequate Effort to Address the Meaning of Montana's Constitutional Environmental Provisions*, 62 *MONT. L. REV.* 2 (2001).

245. *Id.* at 282.

246. Barton H. Thompson, *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 *RUTGERS L. J.* 863, 866 (1996).

247. *Id.* at 881–82.

248. *Id.* at 891 (“Justifications for a broad environmental policy provision under a Representative Democracy Model, however, are relatively weak. First, supporters have urged that, absent special constitutional provisions, legislatures might slight the public's significant interest in environmental protection in comparison to the economic interests of the regulated community. As supporters point out, an unsophisticated public choice model bolsters this fear; the regulated community's opposition to stronger environmental laws is likely to be focused and intense, while the public's support will be more diffuse and thus less effective.”).

vironmental policy in their constitutions.²⁴⁹ The difficulty increases when discussing inalienable rights. Thompson points out, “inalienability arguments for general environmental policy provisions highlight the difficulty of determining what policy goals are sufficiently fundamental to include in a constitution under a Representative Democracy Model.”²⁵⁰ Constitutions utilizing a Representative Democracy Model require the courts to “play an active role in shaping and controlling state environmental policy—a role that courts neither appear to want nor are well designed to undertake.”²⁵¹ The hesitation stems from the concept of separation of powers.²⁵²

The fear is somewhat irrational, however. For example, the Hawaiian Supreme Court, in *County of Hawai'i v. Ala Loop Homeowners*,²⁵³ found that the Article IX right to a clean and healthful environment was a self-executing right due to the legislature's emphasis on the duty upon the people and the state.²⁵⁴ With an environmental right almost identical to Montana's Article II right, it would not be unreasonable for Montana's Supreme Court to take the same position. Indeed, Justice Trieweiler did so in *MEIC* and other states have done so as well.

Internationally, courts recognize the connection between the environment and fundamental rights and the duty placed on the people.²⁵⁵ Some international jurisdictions have found a right to a healthy environment to be judicially enforceable—relying on the right being fundamental in nature—while other jurisdictions have found the right not to be judicially enforceable.²⁵⁶ For example, South Korea's Supreme Court held that its constitutional right to a healthy environment was not susceptible to judicial enforcement.²⁵⁷ The Korean Supreme Court's holding stemmed from the construction of its constitutional right, which places a duty upon the country to

249. *Id.* at 892–93 (“The Alabama Constitution proclaims that environmental protection is an important state policy, while the Alaska Constitution mandates that the legislature preserve and enhance the State's environment.”).

250. *Id.* at 894 (The Montana Constitution serves as the *sole* constitution including an inalienable environmental right.) (“Only one of the environmental policy provisions found in state constitutions includes the term ‘inalienable.’”).

251. *Id.* at 895. (“An informed, courageous judiciary is needed to help stem the tide of political and economic compromises which have resulted in the current, perhaps irreversible levels of environmental pollution.”).

252. *Id.* at 896 (“Courts generally have hesitated to require state legislatures to develop new policy programs or enact new legislation. The rationale is partly constitutional. Courts also fear the potential practical consequences of ordering the legislature to appropriate money or institute significant new regulatory programs.”).

253. 235 P.3d 1103 (Haw. 2010).

254. *County of Hawai'i*, 235 P.3d at 1122.

255. YANG, *supra* note 198 at 376.

256. *Id.* at 390–91.

257. *Id.* at 391; *see* Supreme Court Decisions 2004 MA 1148–49, <https://perma.cc/59UK-BM4S> (2006).

protect the environment and implement various plans so that citizens can live a healthy life.²⁵⁸ The implementation of the duty came from the creation of the Framework Act on Environmental Policy, which precluded the aggrieved party from seeking resolution under the constitutional right to a healthy environment.²⁵⁹ The decision signifies how a nation can meet its constitutional duty pertaining to the environment through implementation of legislation, while leaving open the theory that without legislation the constitutional right is judicially enforceable.

C. *Breaking Apart the Article IX Right*

Article II may not be the governing right that the delegates intended it to be, but that doesn't mean that it isn't the golden standard. Article II likely serves as the "umbrella standard"; something for citizens of the state to abide by and live by. While Article II should most certainly be referenced, Article IX should serve as the powerhouse and provide the avenue for a claim. Article IX, like other rights in the Montana Constitution (i.e. educational rights) provide a directive for drafting a constitutional claim. To demonstrate this, I have diagrammed Article IX's provisions. Below is the complete language of Sections 1 and 2 of Article IX:

SECTION 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.

SECTION 2. RECLAMATION. (1) All lands disturbed by the taking of natural resources shall be reclaimed. The legislature shall provide effective requirements and standards for the reclamation of lands disturbed. (2) The legislature shall provide for a fund, to be known as the resource indemnity trust of the state of Montana, to be funded by such taxes on the extraction of natural resources as the legislature may from time to time impose for that purpose. (3) The principal of the resource indemnity trust shall forever remain inviolate in an amount of one hundred million dollars (\$100,000,000), guaranteed by the state against loss or diversion.²⁶⁰

Section 1, subsection (1) conveys a duty upon the people and the state.²⁶¹ It implores that each person shall maintain and improve the "clean

258. YANG, *supra* note 198 at 391.

259. *Id.*

260. MONT. CONST. art. IX, §§ 1–2.

261. *Id.* art. IX, § 1(1).

and healthful environment” for both present and future generations.²⁶² Again, indicating that this task rests upon all people of the state, not just the legislature. Subsection (1) creates the connection back to Article II with its use of “clean and healthful.” It acts as an homage to the fundamental right, while potentially giving it teeth. Article IX, Section 1, subsection (1) thus serves as a first step in bringing a constitutional claim regarding the Article II right and a first step in the proposed framework suggested in this article. The court’s analysis should consider questions like: Do the people have a duty in maintaining and improving a clean and healthful environment? Or, do the people have a duty in upholding a basic human right to the environment? If the answer is yes, then the court should move to Section 1, subsection (2).

Section 1, subsection (2) demands the legislature provide enforcement of the duty.²⁶³ Enforcement likely comes from accompanying statutory authority, such as MEPA, the Water Use Act, and the Public Trust Doctrine.²⁶⁴ Enforcement may also come from other provisions in Article IX itself, including: Section 2, reclamation; Section 3, water rights; and Section 6, noxious weed management trust fund.²⁶⁵ This subsection should act as the second step in the court’s analysis of a constitutional challenge and should ask: Has the legislature created constitutional or statutory authority relating to the right to a clean and healthful environment? If the answer is yes, then the court should move to Section 1, subsection (3) as the final step.

Section 1, subsection (3) requires the legislature to provide *adequate* remedies to prevent *unreasonable* depletion and degradation of natural resources.²⁶⁶ This provision includes the words “adequate” and “unreasonable,” which can be used as a baseline amount for the court in determining a remedy for a constitutional challenge. During the 1972 Constitutional Convention, Delegate Robinson indicated that “adequate remedies” could perhaps mean that the “Legislature set up access to the courts to sue.”²⁶⁷ Additionally, she stated, “the Legislature could conceivably, and perhaps they would, say that they have created an environmental quality council and the adequate remedy to protect your environment is to file a complaint with that.”²⁶⁸ In the majority proposal, the delegates serving on the Natural Resources and Agriculture Committee purposefully avoided definitions to pre-

262. *Id.* art. IX, § 1(1).

263. *Id.* art. IX, § 1(2).

264. MONT. CODE ANN. §§ 75–1–103, 85–2–101, 77–1–102 (2019).

265. MONT. CONST. art. IX, §§ 2, 3, & 6.

266. *Id.* art. IX, § 1(3) (emphasis added).

267. CONSTITUTIONAL CONVENTION TRANSCRIPT V, *supra* note 25, at 1229.

268. *Id.*

clude being restrictive.²⁶⁹ They created a relationship between the adequate remedies required and the environmental life support system and stated “there is no question that [the environmental life support system] can be degraded.”²⁷⁰

Additionally, the Committee considered how to address suits which did not indicate an actual showing of some damage.²⁷¹ The majority stated that because the proposal requires the legislature to provide whatever remedy necessary to prevent degradation and unreasonable depletion, that “this is the best Article for the protection of the Montana environment for its people.”²⁷² Meaning, Article IX serves as the adequate remedy for a constitutional challenge to the right to a clean and healthful environment. In the court’s analysis, it should ask: Is the adequate remedy found within Article IX? If so, was the degradation and depletion unreasonable, warranting reclamation damages under Section 2?

Sunburst serves as an example of the court awarding reclamation damages in relation to the clean and healthful environment.²⁷³ Although the Court avoided the Article II constitutional tort, it stated, “an award of restoration damages serves to ensure a clean and healthful environment.”²⁷⁴ This statement demonstrates the Court’s willingness to discuss the clean and healthful environment, but also its failure to recognize the existing reclamation remedy under Article IX. If the Montana Supreme Court were to utilize the three-part test under Article IX for any constitutional challenges to Article II, we might see more cases that effectively utilize the right to a clean and healthful environment.

Another case before the Montana Supreme Court which followed the intent of the delegates and diagrammed the right was *Espinoza v. Montana Department of Revenue*.²⁷⁵ The Court bluntly stated that the delegates intent controls the interpretation of a constitutional provision.²⁷⁶ The Court defined the delegates intent as:

‘[N]ot only from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under which the delegates drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve.’ Accordingly, we, ‘determine the meaning and intent of constitutional provisions from the plain meaning of the language used without resort to extrinsic aids except when the language

269. *Id.*

270. *Id.* at 1233.

271. 2 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 555 (1979).

272. *Id.*

273. *See Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1092 (Mont. 2007).

274. *Sunburst*, 165 P.3d at 1093.

275. *Espinoza v. Montana Dept. of Revenue*, 435 P.3d 603, 609 (Mont. 2018).

276. *Espinoza*, 435 P.3d at 609.

is vague, or ambiguous, or extrinsic aids clearly manifest an intent not apparent from the express language.²⁷⁷

The Court took time to diagram each phrase and word within the provision and held that “the plain language of Article X, Section 6, and the Constitutional Convention Transcripts demonstrating the delegates’ clear objective to firmly prohibit aid to sectarian schools lead us to the conclusion that the delegates intended [the Article] to broadly and strictly prohibit aid to sectarian schools.”²⁷⁸ If the Court is willing to diagram a provision from Article X using the delegates’ intent and extrinsic aids, then it should extend this interpretive method to Article IX and thus Article II.

D. Learning from Article X: Education and Public Lands

Article X in the Montana Constitution provides for the rights to education and public lands.²⁷⁹ Like Article IX, Section 1 of Article X begins with broad, overarching rights, then becomes more intricate and specific as to the duty upon the legislature.²⁸⁰ First, subsection (1) provides a duty upon the people to develop a system of education for each person,²⁸¹ much like Article IX, Section 1, subsection (1)’s duty upon the people to provide for a clean and healthful environment. And second, Article X, Section 1, subsection (3) places a duty upon the legislature to provide a basic educational system²⁸², like the environmental life support system mentioned in Article IX and identical to Article IX’s structure in Section 1, subsections (2) and (3).

It is worth noting because the educational rights in Article X are not found in the inalienable rights section of the Montana Constitution, they are not fundamental rights and therefore do not receive strict scrutiny.²⁸³ The comparison between Article IX and Article X should not be a question re-

277. *Id.* at 609.

278. *Id.* at 611–12.

279. MONT. CONST. art. X.

280. *Id.* art. X, § 1(1–3) (“Section 1. Educational goals and duties. (1) It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state. (2) The state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity. (3) The legislature shall provide a basic system of free quality public elementary and secondary schools. The legislature may provide such other educational institutions, public libraries, and educational programs as it deems desirable. It shall fund and distribute in an equitable manner to the school districts the state’s share of the cost of the basic elementary and secondary school system.”).

281. MONT. CONST. art. X, § 1(1).

282. MONT. CONST. art. X, § 1(3).

283. *Bartmess v. Board of Trs of Sch. District No. 1*, 726 P.2d 801, 804–05 (Mont. 1986) (“We further hold that this right is not a fundamental right under the Montana Constitution; but that such right is clearly subject to constitutional protection and that a middle-tier analysis is to be applied for constitutional equal protection purposes.”).

garding the level of scrutiny, rather it should focus on the Montana Supreme Court's interpretation of Article X and how that can be used to interpret Article IX and the clean and healthful environment. In *Helena Elementary School District No. 1 v. State*,²⁸⁴ the Montana Supreme Court utilized the plain meaning of the provision and the intent of the delegates to interpret the provision.²⁸⁵ It stated, "we conclude that the plain meaning of the second sentence of subsection (1) is that each person is guaranteed equality of educational opportunity. The plain meaning of that sentence is clear and unambiguous."²⁸⁶ Furthermore, they indicated the legislature's duty within subsection (3) is not a limitation on the guarantee of equal educational opportunity under subsection (1), stating:

The guarantee provision of subsection (1) is not limited to any one branch of government. Clearly the guarantee of equal educational opportunity is binding upon all three branches of government, the legislative as well as the executive and judicial branches. We specifically conclude that the guarantee of equality of educational opportunity applies to each person of the State of Montana and is binding upon all branches of government whether at the state, local, or school district level. We hold that the last sentence of subsection (3) is not a limiting provision on the guarantee of equal educational opportunity contained in subsection (1).²⁸⁷

Given the structural kinship between Article X and Article IX, the Montana Supreme Court should consider a similar concept regarding the duty to maintain and improve a clean and healthful environment. Although a "guarantee" is not the same as a "right," the Court has held it to that standard in educational cases and thus a right should not be limited to any one branch of government as the *Helena* case holds. If the Court extends this concept to environmental rights, then this analysis should only apply to those contained in Article IX. Recall, however, that Article IX includes the term "clean and healthful environment," which is also included in the fundamental right under Article II, thus the Court should include the fundamental right in its interpretation of Article IX. This method would avoid the need for a strict scrutiny analysis, while accounting for the Article II right under the interrelated and interdependent relationship.

E. Proposing Future Article II/Article IX Cases

A perfect environmental rights case does not exist, yet. Future Article II and Article IX rights cases in front of the Montana Supreme Court should attempt to utilize a three-part test like the one suggested in this article.

284. 769 P.2d 684 (Mont. 1989).

285. *Id.* at 689.

286. *Id.* at 689–90.

287. *Id.* at 689–90.

These cases should also consider the teachings of the *MEIC* and *Northern Plains* cases, as well as international law concepts regarding the interconnection between human rights and the environment.²⁸⁸ Before, if a claim pertained to prospective environmental degradation and no other avenue for remedies exist, then the claim would receive strict scrutiny subject to a showing of a compelling state interest—satisfying *MEIC*. Alternatively, if no constitutionally-significant interests were interfered with, then the State must only demonstrate that the statute had a rational basis—satisfying *Northern Plains*. Now, cases should utilize Article II as the golden standard and Article IX as the enforcer.

Northern Plains serves as a suitable test case for the three-part test under Article IX. The three-part test would require the Court to ask: (1) do the people have a duty in maintaining and improving a clean and healthful environment; (2) has the legislature created a constitutional or statutory authority relating to the right to a clean and healthful environment; and (3) is the adequate remedy found within Article IX; if so, was the degradation and depletion unreasonable, warranting reclamation damages under Article IX, Section 2.

Northern Plains would satisfy step one because it can be reasoned that it is the duty of the people and the state to challenge agencies that wrongfully conduct environmental studies, especially when those studies pertain to potential strip mining. *Northern Plains* would also satisfy step two because the legislature created a procedure for environmental review under MEPA. In fact, the Court stated that “one of the ways that the Legislature has implemented Article IX, Section 1 is by enacting MEPA.”²⁸⁹ Finally, *Northern Plains* would satisfy step three because the legislature provided an adequate remedy under MEPA for damages pertaining to strip mining. The remedies for reclamation under Article IX, Section 2 would only be triggered if the degradation and depletion was unreasonable. The Court, in *Northern Plains*, held deferral of an EIS under the facts of the case until there was a specific proposal to consider was proper and thus the damages were not unreasonable enough to contravene the Montana Constitution. There were adequate remedies available under MEPA and thus there was no need to consider Article IX’s available remedies.

288. See *Mont. Env'tl Info. Ctr. v. Mont. Dep't of Env'tl Quality*, 988 P.2d 1236, 1250 (Mont. 1999); see also *Northern Plains Res. Council, Inc. v. Montana Bd. of Land Comm'rs*, 288 P.3d 169 (Mont. 2012).

289. *Northern Plains*, 288 P.3d at 173.

2020

CONSTITUTIONAL TEETH

287

VI. CONCLUSION

Although Article II is regarded as a fundamental right and one available to all Montanans, it is generally subordinate to a statutory provision having teeth. If the fundamental right has any teeth—based on previous Montana Supreme Court temperament—they are premature at best. Thus, to reach maturity, the fundamental right requires an accompanying provision. The Article II right to a clean and healthful environment should serve as the umbrella standard and Article IX should serve as its enforcer. International environmental law principles should be considered for judicial interpretation of the Article II right in Montana. To do this, however, the Court must harken back to *MEIC* and its promises. Like a Charlie Russell painting, the fundamental right to a clean and healthful environment is a display of affection and admiration to the beauty and principles of the state of Montana rather than a weapon against bad actors.

