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# ARTICLES

## THE POACHER, THE SOVEREIGN CITIZEN, THE MOONLIGHTER, AND THE DENTURISTS: A PRACTICAL GUIDE TO INALIENABLE RIGHTS IN MONTANA

Thomas J. Bourguignon\*

The sacred rights of mankind are not to be rummaged for, among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of divinity itself, and can never be erased or obscured by mortal power.

—Alexander Hamilton<sup>1</sup>

Deep-seated preferences can not be argued about — you can not argue a man into liking a glass of beer . . . . The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.

—Justice Oliver Wendell Holmes<sup>2</sup>

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1. ALEXANDER HAMILTON, *The Farmer Refuted & c.*, in THE PAPERS OF ALEXANDER HAMILTON 81, 122 (Harold C. Syrett ed., (1961) (emphasis in original).

2. Justice Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918).

## I. INTRODUCTION

A. *The Poacher*

On March 3, 1939, C.R. Rathbone gunned down a wild elk that was part of a herd eating feed on Rathbone's ranch near Augusta, Montana.<sup>3</sup> Hunting season was over; the act was in clear violation of regulations promulgated by the Fish and Game Commission.<sup>4</sup> Rathbone had, on many previous occasions, contacted state and federal authorities in an attempt to obtain relief from the damage caused by the elk, but no action had been taken.<sup>5</sup>

At trial, the State proved that Rathbone had shot the elk and then rested its case.<sup>6</sup> Rathbone was convicted in justice court for killing a game animal out of season.<sup>7</sup> He appealed to the district court for a new jury trial. The district judge did not permit Rathbone to introduce evidence showing that the act was necessary to defend his property.<sup>8</sup> Rathbone appealed, arguing that his "inalienable [right] . . . [of] protecting property" was infringed by the regulation and that the district judge erred in not instructing the jury about justifiable use of force in protecting property.<sup>9</sup> In a unanimous decision, the Montana Supreme Court reversed the district court and ordered a new trial, stating the right "to acquire, hold, and protect property is . . . as old as the common law itself. Its origin antedates by many years the guaranty contained in *Magna Charta*."<sup>10</sup>

B. *The Sovereign Citizen*

On May 29, 1985, Rodney Skurdal was pulled over for speeding in Billings, Montana.<sup>11</sup> The police officer asked Skurdal for his driver's license and registration; Skurdal replied by asking "by what authority" the officer was asking for such documents.<sup>12</sup> Skurdal refused to produce a license or registration and told the officer the Constitution did not require him to do so.<sup>13</sup> Skurdal refused to exit his car voluntarily, ultimately resulting in two officers pulling him from the vehicle. .<sup>14</sup> Not surprisingly, a jury

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3. *State v. Rathbone*, 100 P.2d 86, 88 (Mont. 1940).

4. *Id.*

5. *Id.* at 90.

6. *Id.* at 88.

7. *Id.*

8. *Id.*

9. *Rathbone*, 100 P.2d at 90.

10. *Id.* (quoting *Herlihy v. Donohue*, 161 P. 164, 165 (Mont. 1916)).

11. *City of Billings v. Skurdal*, 730 P.2d 371, 372 (Mont. 1986) [hereinafter *Skurdal I*].

12. *Id.*

13. *Id.*

14. *Id.*

found Skurdal guilty of speeding, having no proof of insurance, and obstructing a peace officer.<sup>15</sup> The Montana Supreme Court spent little time in affirming the jury verdict and denying Skurdal's constitutional claims.<sup>16</sup>

Not long after that incident, Skurdal was pulled over for speeding again, this time in Big Horn County, Montana.<sup>17</sup> Skurdal did not have a driver's license and was unwilling to post a bond—thus, the officer arrested him.<sup>18</sup> A jury convicted Skurdal of speeding and operating a motor vehicle without a valid driver's license.<sup>19</sup> Skurdal appealed, appearing *pro se* and submitting a handwritten brief that made a number of constitutional arguments.<sup>20</sup> Skurdal's brief "was not properly filed" and had many "irregularities"; even so, the Court chose to issue an opinion and did not require a reply brief from the State.<sup>21</sup>

Skurdal argued that he was a "free man" and had "no contracts" with the state or federal governments.<sup>22</sup> He argued that the right to travel, although not expressly referenced in the Montana Constitution, is an inalienable right and that it could not be revoked simply by his failure to obtain a valid license.<sup>23</sup> Skurdal's argument was an extension of the sentiment expressed by Alexander Hamilton, reprinted at the beginning of this article: his right to travel is one of the "sacred rights" written by a higher power.<sup>24</sup> A unanimous Court did not agree with him: citing *State v. Rathbone*,<sup>25</sup> the Court observed that "police power exists even when the regulations are an

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15. *Id.* at 372–373.

16. *Id.* at 373.

17. *State v. Skurdal*, 767 P.2d 304, 306 (Mont. 1988) [hereinafter *Skurdal II*].

18. *Id.* at 307–308.

19. *Id.* at 306.

20. *Id.* Skurdal's arguments included the following, as restated by the Court: "it is unconstitutional for the State to require him to procure a driver's license before operating a motor vehicle on the public highways" and that "his constitutional right to freedom of travel and right to use his private property" was violated, *Skurdal II*, 767 P.2d at 306; that "his right to liberty as guaranteed by the Constitution was violated when the Montana Highway Patrol stopped his vehicle and detained him personally," *Skurdal II*, 767 P.2d at 307; that "he is a 'free man' exempt from the laws because he has 'no contracts' with either the state or federal governments," *Skurdal II*, 767 P.2d at 308; "that because he owes nothing on his car (private property) and is not engaged in commercial travel, his liberty interests are infringed by stopping his vehicle," *Skurdal II*, 767 P.2d at 308; that his rights were violated because the officer did not give him a Miranda warning at the time of the traffic stop, *Skurdal II*, 767 P.2d at 308; that his constitutional right to counsel was violated because he was not appointed the counsel of his choice, even if his choice is an individual who is not an attorney, *Skurdal II*, 767 P.2d at 308; and, finally, that the fine imposed on him was improper because Federal Reserve Notes are not "dollars," *Skurdal II*, 767 P.2d at 309.

21. *Id.*

22. *Id.* at 308.

23. *Skurdal II*, 767 P.2d at 306–307.

24. HAMILTON, *supra* note 1, at 122.

25. 100 P.2d 86 (Mont. 1940).

infringement of individual rights.”<sup>26</sup> The Court opined that following Skurdal’s arguments would be “an invitation to anarchy.”<sup>27</sup>

### C. *The Moonlighter*

On February 16, 1990, Shannon Wadsworth, a longtime real estate appraiser for the State of Montana’s Department of Revenue, was fired.<sup>28</sup> The reason for Wadsworth’s termination was his knowing and continued violation of a departmental rule, promulgated in 1981, that prohibited real estate appraisers from engaging in independent work on the side.<sup>29</sup>

Wadsworth filed a wrongful discharge suit, arguing that he had an inalienable right to pursue life’s basic necessities, which includes the right to the opportunity to seek employment. The district judge denied summary judgment for the State and sent the case to a jury. The jury found for Wadsworth, awarding him \$85,000 in damages.<sup>30</sup> The State appealed the jury verdict, arguing the State’s need to regulate its appraisers trumped Wadsworth’s inalienable right. The Montana Supreme Court disagreed with the district court’s denial of summary judgment because the issue “was a legal issue containing no implicit questions of fact.”<sup>31</sup> Still, the Court unanimously concluded the jury had gotten it right and the department’s anti-moonlighting rule violated Wadsworth’s inalienable rights.<sup>32</sup> In doing so, the Court—following a theory almost as expansive as that expressed by Alexander Hamilton—created a new inalienable right: the right to the opportunity to pursue employment.

### D. *The Denturists*

In 1985, the Montana Legislature passed a statute “requiring denturists to refer partial denture patients to dentists ‘as needed.’”<sup>33</sup> Because “as needed” was vague, the state Board of Dentistry (which had authority over dentists and denturists) promulgated a regulation (the “Partial Denture Rule”) requiring denturists to “refer all partial denture patients to dentists before providing partial denture services.”<sup>34</sup> In 1995, the Court held the

26. *Skurdal II*, 767 P.2d at 306 (citing *Rathbone*, 100 P.2d at 92).

27. *Id.* at 308.

28. *Wadsworth v. State*, 911 P.2d 1165, 1168 (Mont. 1996).

29. *Id.* at 1167–1168.

30. *Id.* at 1168–1169.

31. *Id.* at 1171.

32. *Id.* at 1175–1176. The Court was unanimous as to the result; however, two justices wrote special concurrences taking issue with different aspects of the Court’s holding. The majority opinion only received four votes.

33. *Wiser v. State, Dept. of Commerce*, 129 P.3d 133, 136 (Mont. 2006).

34. *Id.* at 136.

Partial Denture Rule was a valid interpretation of the statute;<sup>35</sup> however, the Court did not rule on the constitutionality of the Partial Denture Rule.<sup>36</sup> The denturists sued again, arguing the Partial Denture Rule was an unconstitutional violation of the right to privacy and the right to pursue life's basic necessities.<sup>37</sup>

The first sentence of the Court's opinion stated, "The long struggle between denturists and dentists is well documented in the annals of the legislative, executive, and judicial branches of the Montana government."<sup>38</sup> The Court then held that neither the right of privacy, nor the right to pursue employment described in *Wadsworth*, were grounds to strike down the Partial Denture Rule.<sup>39</sup> Citing *Rathbone* and *Skurdal*, the Court concluded the state's police power authorized the regulation.<sup>40</sup> Thus, it did not matter whether the denturists' rights had been infringed because the state had the authority to infringe those rights. The Court's reaction to the denturists' argument was similar to the sentiment expressed by Justice Holmes, quoted at the beginning of this article: those who believe in the existence of a universal, natural law are "in [a] naïve state of mind."<sup>41</sup>

Why did C.J. Rathbone and Shannon Wadsworth prevail on their claims when Rodney Skurdal and the denturists did not? Are there general rules that can be divined from the Court's decisions on the many claims of violations of inalienable rights? Does the Court enforce these rights consistently?

A contradiction lies at the heart of any inalienable rights provision in a written constitution. Inalienable rights are natural rights that are inherent and exist prior to, and separate from, any written laws.<sup>42</sup> According to Alexander Hamilton's theory, inalienable rights do not need to be found "among old parchments, or musty records" because they are written "by the hand of divinity itself."<sup>43</sup> However, the more modern, positivist theory is that there are no universal, natural laws—or as Justice Holmes said, "you can not argue a man into liking a glass of beer . . . ."<sup>44</sup>

35. *Christenot v. State*, 901 P.2d 545, 548–549 (Mont. 1995).

36. *Wiser*, 129 P.3d at 136 (discussing *Christenot*, 901 P.2d at 549).

37. *Id.* at 137–138.

38. *Id.* at 136.

39. *Id.* at 137–139.

40. *Id.* at 138 (citing *Rathbone*, 100 P.2d at 92; *Skurdal II*, 767 P.2d at 306).

41. Holmes, *supra* note 2, at 41.

42. Thomas B. McAfee, *Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights*, 36 WAKE FOREST L. REV. 747, 748–749 (2001).

43. HAMILTON, *supra* note 1, at 122.

44. Holmes, *supra* note 2, at 41.

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Most state constitutions include a section on inalienable rights;<sup>45</sup> however, the inclusion of a list of inalienable rights appears to be self-defeating. For instance, why codify rights that exist outside of any attempt at codifying law? Isn't there a risk of leaving some of them out? Why not just state in the constitution, "All humans have inalienable rights," and allow the courts to define what those rights are?

And what happens when a state chooses to draft its inalienable rights provision as Montana has: with a fairly long and specific list of enumerated inalienable rights?<sup>46</sup> Is Article II, section 3 of the Montana Constitution a recognition of universal and unchangeable tenets of natural law, as stated by Hamilton; or is it positive law, as Justice Holmes would argue, enacted by a particular group of delegates at a particular time? When it comes to the Court's difficult choice between enacted laws and inalienable rights, clearly some balance is needed. If the Court enforced every natural law right asserted by the Rodney Skurdals of the world, society would be strained by conduct against which the rule of law could not operate. However, if the Court upheld every statute to the very letter of the law, convicting the C.R. Rathbones of the world no matter how good their justification, then we the people would be powerless to defend ourselves against the tyranny of the majority as represented by the legislature.

The purpose of this article is to present a descriptive account of how constitutional delegates at the Montana Constitutional Convention of 1972 and Montana courts have interpreted the inalienable rights provision and the unenumerated rights provision. This article will not make normative arguments about how the constitutional clauses should have been drafted, or how courts should interpret them; rather, it will examine how courts actually have interpreted them.

Section II of this article will provide background on inalienable rights provisions prior to the 1972 Montana Constitution. Section III will provide background on the 1972 Montana Constitution and how courts have interpreted it. Section IV will examine each clause and phrase of the inalienable rights provision separately. This article will observe that the delegates to the 1972 Montana Constitution viewed inalienable rights as universal, natural rights that were merely being recognized (not created) in the constitutional text. In contrast to the delegates' expansive view of inalienable rights, however, Montana courts have tended to apply a positivist interpretation to inalienable rights and have enforced the rights expressly included in the Montana Constitution because they appear in the text and not because they are natural law rights.

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45. McAfee, *supra* note 42, at 748.

46. Montana's inalienable rights provision includes five clauses and a total of about eight distinct rights. MONT. CONST. art. II, § 3.

## II. A BRIEF HISTORY OF THE CODIFICATION OF INALIENABLE RIGHTS

Eight hundred years ago, King John of England deprived his people of rights with such frequency and intensity that the nobility rose up against him and forced him to sign a charter subsequently known as Magna Carta, granting rights from the king to the people.<sup>47</sup> One famous passage of Magna Carta has served as the precursor to many inalienable rights provisions:

Chapter 39. No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.<sup>48</sup>

Magna Carta's due process or inalienable rights provision has been characterized in two manners: first, as the Seventeenth Century legal scholar Edward Coke argued, Magna Carta was a restatement of even more ancient positive laws already in place in England; and second, as early Americans and the framers of the Constitution argued, Magna Carta was an attempt at codifying or incorporating natural law concepts.<sup>49</sup>

American colonists used passages of Magna Carta in some early colonial governments. For instance, the *Concessions and Agreements of West New Jersey*, dated March 13, 1677, stated,

That no Proprietor, freeholder or inhabitant of the said Province of West New Jersey, shall be deprived or condemned of life, limb, liberty, estate, property or any ways hurt in his or their privileges, freedoms or franchises . . .<sup>50</sup>

The Declaration and Resolves [of the First Continental Congress], dated October 14, 1774 stated,

That the inhabitants of the English colonies in North-America, by the immutable laws of nature . . . have the following RIGHTS: . . . That *they are entitled to life, liberty and property* . . .<sup>51</sup>

Such statements of inalienable rights became regular provisions to include in charters and constitutions during the Revolutionary Era. The Virginia Declaration of Rights, dated June 7, 1776, and drafted principally by George Mason, used language that would be highly influential to states in drafting their constitutions:

That all men are by nature equally free and independent, and *have certain inherent rights*, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; *namely*, the enjoyment of

47. A.E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* 8, 10 (1964).

48. *Id.* at 43.

49. J.C. HOLT, *MAGNA CARTA* 15 (1965).

50. NEIL H. COGAN, *CONTEXTS OF THE CONSTITUTION: A DOCUMENTARY COLLECTION ON PRINCIPLES OF AMERICAN CONSTITUTIONAL LAW* 677 (1999) (emphasis added).

51. *Id.* at 27 (emphasis added).

life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.<sup>52</sup>

Perhaps the most famous formulation of inalienable rights is from the second paragraph of the Declaration of Independence, drafted principally by Thomas Jefferson:

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness . . . .<sup>53</sup>

The Bill of Rights to the United States Constitution departed from Jefferson's phrasing and used a phrase more similar to the one used by the First Continental Congress. The Fifth Amendment states, "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."<sup>54</sup>

Inspired by these foundational documents, the states drafted inalienable rights provisions in their respective constitutions. This article will not attempt to exhaustively explain the differences between the various states' manners of expressing inalienable rights.<sup>55</sup> It will note, where relevant, which state constitutions were used as source material during the drafting of Montana's Constitutions of 1884, 1889, and 1972. This article will not attempt to catalogue the history of the framing of the Montana Constitution in 1884, 1889, and 1972—that history has been well-documented elsewhere.<sup>56</sup>

Most states used natural law principles in inserting inalienable rights provisions into their constitutions.<sup>57</sup> But do the court systems tend to enforce those principles as natural rights, or do courts enforce only the literal text? Legal scholar R.A. Helmholz recounts Randy Barnett's quip that two things are true of natural law: everyone believes in it, and it makes no dif-

52. *Id.* at 30 (emphasis added). Note the use of "namely" before the "inherent rights." This creates a closed list—only those rights specifically enumerated are included. As discussed in Section III of this article, Montana's inalienable rights provision is an open list, stating that the people's inalienable rights "include" the following rights.

53. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Unlike the Virginia Declaration of Rights, the Declaration of Independence creates an open list of rights by stating that the three rights enumerated are "among" the inalienable rights possessed by the people.

54. U.S. CONST. amend V. Note that the Fifth Amendment, because of its use of "or," is a closed list of rights.

55. For a broader context on the development of inalienable rights in state constitutions, see G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 11–13 (1998); McAfee, *supra* note 42; Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171 (1992).

56. LARRY M. ELISON & FRITZ SNYDER, THE MONTANA STATE CONSTITUTION 1–27 (G. Alan Tarr ed., The Oxford Cmts. on the State Constitutions of the U.S., 2011).

57. McAfee, *supra* note 42, at 747–748.

ference.<sup>58</sup> Helmholtz then studies a number of court cases in America before concluding that Barnett was, more or less, correct.<sup>59</sup>

### III. BACKGROUND CONCEPTS REGARDING THE MONTANA CONSTITUTION

By some accounts, the inalienable rights provision in Article II, section 3 of the Montana Constitution is not a substantive provision but rather is a “primarily hortatory” statement or a statement of political philosophy.<sup>60</sup> If so, it is best read along with the two provisions preceding it, both of which are broad statements that have little “practical value.”<sup>61</sup> The two preceding provisions are as follows:

#### Section 1. Popular sovereignty

All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole.<sup>62</sup>

#### Section 2. Self-government

The people have the exclusive right of governing themselves as a free, sovereign, and independent state. They may alter or abolish the constitution and form of government whenever they deem it necessary.<sup>63</sup>

Compared to some of the inalienable rights provisions in older documents, Montana’s 1972 Constitution includes a fairly long inalienable rights provision:

#### Section 3. Inalienable rights

All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life’s basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.<sup>64</sup>

Article II, section 3 (hereinafter the Inalienable Rights Clause) consists of three sentences. The first sentence is a general statement recognizing (as opposed to granting) that people possess inalienable rights. This statement

58. R.H. HELMHOLTZ, *NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE* viii, x (2015).

59. *Id.* at 170–172 (“What can be said with some confidence, however, is that the American usage comes close to matching in substance and frequency the evidence drawn from the European and English case law. If the law of nature can be said to have helped shape the law there, it helped shape the law of the United States.”).

60. ELISON & SNYDER, *supra* note 56, at 38; *see also* RICK APPLGATE, *BILL OF RIGHTS* 80–83 (Mont. Constitutional Convention Comm’n, Constitutional Convention Study No. 10, 1972).

61. ELISON & SNYDER, *supra* note 56, at 36–37.

62. MONT. CONST. art. II, § 1.

63. *Id.* art. II, § 2.

64. *Id.* art. II, § 3.

and the verb “include” in the second sentence allow for the recognition of unenumerated rights.<sup>65</sup>

The second sentence consists of a list of five clauses, each of which provides one or more inalienable rights. Because the primary verb in the sentence is “include,” the implication is that the list that follows is not comprehensive but merely several specific examples of inalienable rights.<sup>66</sup> In theory, this is true. In practice, however, the Court has been slow to recognize unenumerated inalienable rights.<sup>67</sup> Of the five clauses in the second sentence of the Inalienable Rights Clause, the first two are simple clauses: the right to a clean and healthful environment, and the right of pursuing life’s basic necessities. The next three clauses are each compound clauses: (i) *enjoying and defending their lives and liberties*; (ii) *acquiring, possessing and protecting property*; and (iii) *seeking their safety, health and happiness*. The second sentence concludes with the limiting phrase “in all lawful ways,” which appears to mean that all of the rights listed in the sentence are only recognized to the extent that the person asserting the right is acting within the scope of the law.<sup>68</sup> Note how this second sentence includes a number of “temporizing” terms that limit the scope of the right: for instance, there is not a broad right to life’s basic necessities but rather a narrow right to *pursue* life’s basic necessities.<sup>69</sup>

The third sentence, the “Corresponding Responsibilities Clause,” asserts that by “enjoying” the inalienable rights listed in the second sentence (and the unenumerated ones implied in the first), all persons “recognize corresponding responsibilities,” whatever those may be. This article will discuss each clause in a separate section below. First, a few general observations must be made.

#### A. “Inalienable” is not the same as “fundamental”

The Montana Supreme Court has long held fundamental rights include all of the rights described in the “Declaration of Rights” in the Montana

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65. See also *id.* art. II, § 34 (“The enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people.”).

66. As stated in Section II of this article, the Virginia Declaration of Rights asserted a closed list of inalienable rights, while the Declaration of Independence asserted an open list.

67. See *infra* Section IV.

68. Yet consider the cases of Mr. Rathbone and Mr. Wadsworth: Mr. Rathbone’s act of poaching was not lawful, nor was Mr. Wadsworth’s nine years of illegal moonlighting. Neither acted “in a lawful way,” and yet the Court recognized their inalienable rights and struck down the laws that they violated.

69. ELISON & SNYDER, *supra* note 56, at 38. All of the rights except the right to a clean and healthful environment include temporizing terms.

Constitution.<sup>70</sup> The Declaration of Rights is all of Article II to the Montana Constitution.<sup>71</sup>

“Inalienable rights,” on the other hand, are a smaller category of rights. The word “inalienable” means “incapable of being alienated, surrendered, or transferred.”<sup>72</sup> The study prepared for use by the delegates during the 1972 Constitutional Convention had this to say: “Inalienable rights are . . . held to be prior to government and not subject to any governmental power.”<sup>73</sup> All inalienable rights are fundamental rights, but not all fundamental rights are inalienable. One question the sections below will attempt to answer is whether courts in Montana have treated a right differently *because* it was included in the inalienable rights section, rather than appearing in a different section within Article II.

### B. *What’s at stake: levels of scrutiny*

Since the mid-1980s, Montana’s jurisprudence regarding levels of scrutiny in constitutional claims has departed from the levels-of-scrutiny analysis under the federal constitution. The Montana Supreme Court has developed a three-tiered approach. First, if any right is included in the Declaration of Rights in the Montana Constitution, a law infringing that right will be reviewed under strict scrutiny.<sup>74</sup> If a right is included in any other part of the Montana Constitution, the law infringing that right will be reviewed under intermediate scrutiny.<sup>75</sup> If neither strict scrutiny nor intermediate scrutiny applies, courts will review the law under rational basis review, the most deferential standard.<sup>76</sup>

Shannon Wadsworth’s argument hung on this balance: is the right to pursue the opportunity to employment included within Article II, section 3 because it is a right without which other rights would have little meaning (thus reviewed under strict scrutiny); or is it a right not expressly included in the Montana Constitution (thus reviewed under rational basis)? So too

70. *Butte Cmty. Union v. Lewis*, 712 P.2d 1309, 1311 (Mont. 1986) (“In order to be fundamental, 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.” (internal quotation marks omitted)).

71. MONT. CONST. art. II.

72. WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1254 (2d ed. 1961); *see also* BLACK’S LAW DICTIONARY 1518 (Bryan A. Garner ed., 10th ed. 2014) (“A right that cannot be transferred or surrendered; esp., a natural right such as the right to own property.”).

73. APPELATE, *supra* note 60, at 80.

74. *Butte Cmty. Union*, 712 P.2d at 1311 (“If a fundamental right is infringed[,] . . . the government has to show a ‘compelling state interest’ for its action.”).

75. *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 450 (Mont. 2004) (“Under middle-tier scrutiny, the State must demonstrate the law or policy in question is reasonable and the need for the resulting classification outweighs the value of the right to an individual.”).

76. *Id.* (“Under the rational basis test, the law or policy must be rationally related to a legitimate government interest.”).

with the denturists: they did not even make an argument that, under rational basis review, the Partial Denture Rule should be struck down. Thus, the only way the denturists could prevail was if the Court applied strict scrutiny.<sup>77</sup>

*C. Inalienable rights and the Court's avoidance of constitutional issues*

In general, the inalienable rights provision has been treated by the Court as somewhat of a Hail Mary pass—the generalized protections offered by this provision are not enforced where other, more specific, remedies exist. If the Court is able to grant relief to the plaintiffs without enforcing the inalienable rights provision, it tends to do so.<sup>78</sup> The avoidance doctrine creates an odd result: inalienable rights, given such prominence by philosophers and the framers of state constitutions, are given lower priority by the Court than other, more specific rights.<sup>79</sup>

IV. ARTICLE II, SECTION 3 OF THE MONTANA CONSTITUTION

A. *“All persons are born free and have certain inalienable rights. They include . . .”*

This phrase, which begins the Inalienable Rights Clause, is similar to its counterpart in the 1889 Montana Constitution. The inalienable rights provision in the 1889 Montana Constitution begins as follows:

All persons are born equally free, and have certain natural, essential and inalienable rights, among which may be reckoned . . .<sup>80</sup>

Note that the 1972 text omits the words “equally,” “natural,” and “essential.” The text of this phrase in the 1889 Montana Constitution is identical to the text of the draft 1884 Montana Constitution.<sup>81</sup> The text of the draft 1884 Montana Constitution is itself identical to the text of the 1876 Colorado Constitution,<sup>82</sup> except that the draft 1884 Montana Constitution added the phrase “are born equally free.” This phrase also resembled the phrase used by George Mason in the 1776 Virginia Declaration of Rights:

77. *Wiser*, 129 P.3d at 138.

78. *E.g.*, *Shammel v. Canyon Res. Corp.*, 167 P.3d 886, 888 (Mont. 2007) (the Court declined to determine whether the “clean and healthful environment” provision creates a cause of action for monetary damages between private parties because other adequate remedies existed (citing *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079 (Mont. 2007))).

79. *Ramirez v. Butte-Silver Bow Cnty.*, 298 F.3d 1022, 1029 (9th Cir. 2002), *cert. granted* 537 U.S. 1231 (2003), *aff'd* 540 U.S. 551 (2004).

80. MONT. CONST. OF 1889, art. III, § 3.

81. DRAFT MONT. CONST. OF 1884, art. I, § 3.

82. The Colorado Constitution of 1876 begins with the following: “That all persons have certain natural, essential and inalienable rights, among which may be reckoned . . .” COL. CONST., art. II, § 3.

“That all men are by nature equally free and independent, and have certain inherent rights . . . .”<sup>83</sup>

During the 1972 Constitutional Convention, Delegate Kelleher attempted to replace the word “born” with the word “conceived” to clarify that a fetus within its mother’s womb also possesses inalienable rights. Kelleher argued, “what’s the use of having rights of the living if I don’t have the right to be born?”<sup>84</sup> Delegate Kelleher’s proposed amendment was voted down by a vote of 71–15.<sup>85</sup>

This first sentence of the Inalienable Rights Clause functions as a recognition that people have “certain” inalienable rights and that those rights “include” the list that follows. In other words, this sentence announces that the list in the second sentence of the Inalienable Rights Clause is an open list. This creates the impression that the provision might be used to protect any number of unenumerated rights and thus has some similarity to the Unenumerated Rights Provision, Article II, section 34.<sup>86</sup> However, courts have not relied on this introductory phrase in their analysis of inalienable rights, even when the court has recognized the existence of an unenumerated inalienable right, such as the right of parents to care for their children.<sup>87</sup> Rodney Skurdal’s argument the constitution protects a right to travel was grounded ultimately in this broad first sentence of the Inalienable Rights Clause; however, the Court held that Skurdal’s right to travel was not infringed by the State’s licensing requirement.<sup>88</sup>

Courts in Montana have been skeptical of litigants who make an argument based on inalienable rights without referring to an expressly enumerated right. When an individual raises her inalienable rights in a court proceeding without pointing to one of the enumerated rights, the courts often answer with something like this: “Counsel for plaintiff call our attention to section 3 of article III of the [1889] Constitution . . . . We fail to see how this declaration affects the matter in any way.”<sup>89</sup> The Montana Supreme

83. COGAN, *supra* note 50, at 30.

84. 5 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 1640 (1981) [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT V].

85. *Id.* at 1641–1642.

86. See ELISON & SNYDER, *supra* note 56, at 39 (“Rights not specifically mentioned elsewhere in the Declaration of Rights might be derived from this section, such as the right to travel.”).

87. Matter of J.L.S., 761 P.2d 83, 840 (Mont. 1988) (citing *In re R.B. Jr.*, 703 P.2d 846, 848 (Mont. 1985)) (“The right of the natural parents to care and custody of their children, however, is a fundamental liberty interest.”); *In re R.B., Jr.*, 703 P.2d 846, 848 (Mont.1985) (“the termination in Montana of a natural parent’s right to care and custody of a child is a fundamental liberty interest, which must be protected by fundamentally fair procedures”). In these two cases, the Court does not cite to Article II, Section 3 of the Montana Constitution, although both cases appear to rely upon the protections recognized therein.

88. *Skurdal II*, 767 P.2d at 306–307.

89. *Conley v. Conley*, 15 P.2d 922, 926 (Mont. 1932).

Court has yet to recognize an individual's inalienable rights if the litigant does not make an argument under one of the enumerated rights.

B. *“the right to a clean and healthful environment”*

The right to a clean and healthful environment was a new addition to the 1972 Constitution.<sup>90</sup> Along with its companion provision, Article IX of the 1972 Constitution, “Environment and Natural Resources,” it was much discussed during the 1972 Convention.<sup>91</sup> Several delegates proposed draft environmental provisions to be included in the Bill of Rights.<sup>92</sup> As shown below, the delegates chose to add “clean and healthful environment” into article II, section 3 because, as discussed below, some of the delegates wished to clarify that the right is an inalienable right. The delegates likely believed that the right to a clean and healthful environment would be better protected if it was included as an inalienable right. It remains to be seen whether they were correct.

The final text that appears in Article II, section 3 was introduced by Delegate Burkhardt during floor debate on March 7, 1972.<sup>93</sup> Burkhardt stated,

This is a statement that we, as a body, have already adopted in another section of our Constitution, in our Natural Resources section. . . . And it seems to me that it's simply striking the other side of the balance to put it here in our Bill of Rights, to *recognize that this is*, for the time in which we're living and for the foreseeable future, *one of the inalienable rights that we hope to assure* for our posterity. I don't care to belabor the issue. It seems to me it's self-evident.<sup>94</sup>

Delegate Dahood asked Burkhardt whether this amendment would allow a citizen to sue under article II, section 3 “when his own health and his own property is not affected.”<sup>95</sup> Burkhardt replied,

I read the Preamble to this section on the Bill of Rights and believed it. 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. I do not see it as an overt attempt to slip in with the opportunity to sue.<sup>96</sup>

90. PROPOSED 1972 CONSTITUTION FOR THE STATE OF MONTANA: OFFICIAL TEXT WITH EXPLANATION 3 (1972) [hereinafter PROPOSED 1972 CONSTITUTION].

91. ELISON & SNYDER, *supra* note 56, at 13, 21.

92. *E.g.*, 1 MONTANA CONSTITUTIONAL CONVENTION CONVENTION VERBATIM TRANSCRIPT 96, 108 (1979) (Delegate Proposal No. 12 by Delegate Cate & Delegate Proposal No. 21 by Delegate McNeil) [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT I].

93. *Id.* at 1637.

94. *Id.* (emphasis added).

95. CONSTITUTIONAL CONVENTION TRANSCRIPT V, *supra* note 84, at 1638 (in other words, if other Article II, Section 3 rights are not infringed).

96. *Id.*

Delegate Eck then clarified somewhat that the Bill of Rights Committee and the Natural Resources Committee coordinated with each other such that the “statement of each individual’s rights” would appear in the Bill of Rights and other provisions would appear in article IX.<sup>97</sup> Delegate McNeil of the Natural Resources Committee opined that “clean and healthful” “isn’t as strong as what we really want, but if that’s the will of the Convention and as strong as they think they can pass, why, I would agree with it.”<sup>98</sup> After this discussion, the delegates voted by a margin of 79–7 in favor of adding “the right to a clean and healthful environment” to the draft article II, section 3.<sup>99</sup>

During the ratification debate, the Proposed 1972 Constitution pamphlet noted the right to a clean and healthful environment as among the new provisions added to the Bill of Rights of the 1889 Constitution.<sup>100</sup> The pamphlet noted that article II, section 3 “[r]evises [the] 1889 Constitution by adding three rights,” one of which was “relating to [the] environment.”<sup>101</sup>

The right to a clean and healthful environment has been the subject of numerous law review articles,<sup>102</sup> and this article will not cover the same ground at length. Further, the specific question of whether the right to a clean and healthful environment is a “self-executing” right has been frequently discussed and will not be analyzed further here.<sup>103</sup> However, compared to other inalienable rights, it has been enforced a number of times. In thirteen of the leading Montana Supreme Court cases involving the right to a clean and healthful environment, the Court has enforced the substantive right six times<sup>104</sup> and declined to enforce it seven times.<sup>105</sup>

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97. *Id.*

98. *Id.*

99. *Id.* at 1640.

100. PROPOSED 1972 CONSTITUTION, *supra* note 90, at 3.

101. *Id.* at 6.

102. *E.g.*, John Bloomquist, *The Agricultural Perspective: TMDLs in the Context of a Clean and Healthful Environment*, 22 PUB. LAND & RESOURCES L. REV. 19 (2001); Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana’s Environmental Provisions*, 64 MONT. L. REV. 157 (2003); Jack Tuholske, *The Legislature Shall Make No Law . . . Abridging Montanans’ Constitutional Rights to a Clean and Healthful Environment*, 15 SOUTHEASTERN ENVTL. L.J. 311 (2007); Bryan P. Wilson, *State Constitutional Environmental Rights and Judicial Activism: Is The Big Sky Falling?*, 53 EMORY L.J. 627 (2004); and Chase Naber, student author, *Murky Waters: Private Action and the Right to a Clean and Healthful Environment: An Examination of Cape-France Enterprises v. Estate of Peed*, 64 MONT. L. REV. 357 (2003).

103. *E.g.*, Rob Natelson, *Montana Constitution Project Unveiled at UM: Documents “May Change Way We Think” About Intent*, MONT. LAW., at 14 (May 2008); ELISON & SNYDER, *supra* note 56, at 39; John L. Horwich, *MEIC v. DEQ: An Inadequate Effort to Address the Meaning of Montana’s Constitutional Environmental Provisions*, 62 MONT. L. REV. 269 (2001).

104. *State v. Bernhard*, 568 P.2d 136, 138 (Mont. 1977); *State ex rel. Dep’t of Health and Env’tl. Scis. v. Green*, 739 P.2d 469, 473 (Mont. 1987); *Mont. Env’tl. Info. Ctr. v. Dep’t of Env’tl. Quality*, 988 P.2d 1236, 1246 (Mont. 1999) [hereinafter MEIC]; *Cape-France Enters. v. Estate of Peed*, 29 P.3d 1011,

The right to a clean and healthful environment has been treated as an aspect of the State's police power when balanced against the article II, section 3 right to acquire and possess property.<sup>106</sup> It has also been employed to rescind a contract between private parties—where there was no state action—as impossible because it required the drilling of a well that might cause environmental damage.<sup>107</sup>

In *Montana Environmental Information Center v. Department of Environmental Equality*,<sup>108</sup> the Court read the provision together with the environmental provisions of article IX and held the right to a clean and healthful environment to be a fundamental right for which strict scrutiny applies.<sup>109</sup> The Court stated that the clean and healthful environment provision may even be used to prevent likely harm that has not yet occurred: “Our constitution does not require that dead fish float on the surface of our state’s rivers and streams before its farsighted environmental protections can be invoked.”<sup>110</sup>

In some cases, the Court has treated the article II right to a clean and healthful environment as merely a remedy of last resort, choosing to avoid enforcing the right in cases where other adequate remedies exist.<sup>111</sup> The Court has also disposed of some cases by holding that plaintiffs lack standing to sue under the right to a clean and healthful environment.<sup>112</sup>

It is impossible to say whether the right to a clean and healthful environment has been enforced more or less than it otherwise would have been due to its inclusion in article II, section 3. Future cases may indicate

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1016–1017 (Mont. 2001); *Seven-Up Pete Venture v. State*, 114 P.3d 1009, 1023 (Mont. 2005); and *Sunburst Sch. Dist. No. 2*, 165 P.3d at 1093.

105. *Kadillak v. Anaconda*, 602 P.2d 147, 153–154 (Mont. 1979); *Merlin Myers Revocable Trust v. Yellowstone Cnty.*, 53 P.3d 1268, 1271–1272 (Mont. 2002); *Shammel v. Canyon Res. Corp.*, 82 P.3d 912, 919 (Mont. 2003); *Lohmeier v. Gallatin Cnty.*, 135 P.3d 775, 777–778 (Mont. 2006); *Tally Bissell Neighbors, Inc. v. Eyrie Shotgun Ranch, LLC*, 228 P.3d 1134, 1142 (Mont. 2010); *Williamson v. Mont. Pub. Serv. Comm’n*, 272 P.3d 71, 85–86 (Mont. 2012); and *N. Plains Res. Council v. Mont. Bd. of Land Comm’rs*, 288 P.3d 169, 174 (Mont. 2012).

106. *Bernhard*, 568 P.2d at 138; *Green*, 739 P.2d at 305 (no inalienable right exists to acquire junk cars without a license because, through the right to a clean and healthful environment, the police power extends to preserving aesthetic values).

107. *Cape-France Enters.*, 29 P.3d at 1016–1017.

108. 988 P.2d 1236 (Mont. 1999).

109. *Id.* at 1249. It is entirely possible that the Court’s sweeping holding in *MEIC*—requiring strict scrutiny for even minor infringements of the right to a clean and healthful environment—had the unanticipated effect of making courts less likely to find that the right was infringed. *See e.g., N. Plains Res. Council*, 288 P.3d at 174–175.

110. *Id.*

111. *E.g., Tally Bissell Neighbors, Inc.*, 228 P.3d at 1142–1143.

112. *Lohmeier*, 135 P.3d at 777–778 (Plaintiffs have no standing to sue under clean and healthful environment to have their properties added into a new sewer district); *Williamson*, 272 P.3d at 85–86 (Plaintiffs have no standing under clean and healthful environment to sue agency to force it to use efficient light bulbs to reduce fossil fuel emissions).

whether environmental plaintiffs are better off for having an inalienable right to a clean and healthful environment (and thus receiving strict scrutiny once in a while) as opposed to having only an article IX right to a clean and healthful environment (thus receiving intermediate scrutiny in a larger number of cases).

C. *“the rights of pursuing life’s basic necessities”*

1. *History of the provision*

On January 27, 1972, Delegate Proposal No. 45, signed by seven delegates, proposed the following addition to the inalienable rights section: “the right to the basic necessities of life including the right to adequate nourishment, housing, and medical care . . . .”<sup>113</sup> The notion of including a right to welfare benefits in the Constitution—as an inalienable right, no less—was controversial, as the following passages will show. On February 23, 1972, the Bill of Rights Committee Proposal stated that it had added “the right to pursue life’s basic necessities” to the draft article II, section 3 “as a statement of principle.”<sup>114</sup> In the Proposal, the Bill of Rights Committee attempted to explain the purpose behind this addition:

The intent of the committee on this point is not to create a substantive right for all for the necessities of life to be provided by the public treasury.

The committee heard considerable testimony, from low income and social services people alike, that the state’s current public assistance programs are not meeting the genuine needs of low income people who, because of circumstances beyond their control, are unable to obtain basic necessities. Accordingly, it is hoped that the legislature will have occasion to review these programs and upgrade them where necessary to provide full necessities to those in genuine need and to curb whatever abuses may exist in the programs.

What was attempted in this part of the proposed section was a statement of the principle that all persons have the inalienable right to pursue the basic necessities of life—that there can be no right to life apart from the possibility of existence.<sup>115</sup>

Thus, the Bill of Rights Committee appears to have anticipated that the basic necessities provision would not result in a massive welfare state. Instead, it would encourage the Legislature to improve programs for public assistance to provide for individuals who have “genuine needs” due to “circumstances beyond their control.”<sup>116</sup> The Committee’s final statement, “there can be no right to life apart from the possibility of existence,” ap-

113. CONSTITUTIONAL CONVENTION TRANSCRIPT I, *supra* note 92, at 142.

114. 2 MONTANA CONSTITUTIONAL CONVENTION CONVENTION VERBATIM TRANSCRIPT 627 (1979) [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT II].

115. *Id.*

116. *Id.*

pears to go further in characterizing this right as one which only applies in dire situations, where life itself is at stake.

The delegates viewed this right as a limited one. For instance, when the delegates debated whether a controversial welfare provision should be included in the Constitution in the Institutions and Assistance section (article XII, section 2), Delegate McNeil proposed an amendment adding “the opportunity to earn.”<sup>117</sup> Delegate Monroe opposed the amendment, stating “It seems to me we’ve kind of covered it in our section 3 of the Bill of Rights. We’ve suggested there that people have a right to pursue some of the basic necessities . . . .”<sup>118</sup> Thus, the Constitutional Convention delegates largely believed that the right to pursue life’s basic necessities should be viewed as a limited right, applying to people in genuine need; and further, that it is the responsibility of the Legislature (not the courts) to provide for those individuals.

In debates on other provisions, two Delegates referred back to the right to life’s basic necessities in more innovative fashion to justify their arguments about other provisions. Delegate Davis argued that an amendment prohibiting businesses from being open on Sunday would infringe the right of pursuing life’s basic necessities for some people, for instance Seventh Day Adventists.<sup>119</sup> Later, Delegate Aronow argued in favor of his own amendment, which added back in a provision creating the office of the Clerk of the Supreme Court: “This morning we adopted . . . the rights of pursuing life’s basic necessities. We’re not here to play God, to take away a man’s livelihood, take away his office; he had a right to rely upon it.”<sup>120</sup>

The Proposed 1972 Constitution pamphlet noted the right to life’s basic necessities as among the new provisions added to the Bill of Rights of the 1889 Constitution.<sup>121</sup> The pamphlet stated that article II, section 3 “[r]evises [the] 1889 Constitution by adding three rights,” one of which was “relating to . . . basic necessities.”<sup>122</sup>

The right to pursue life’s basic necessities, along with some other provisions in article II, section 3, is limited by a “temporizing” verb: to *pursue* life’s basic necessities.<sup>123</sup> According to Elison and Snyder, the use of a

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117. 4 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 2294 (1979).

118. *Id.*

119. 6 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 2370 (1979) [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT VI].

120. 7 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 2690 (1979). Here, Delegate Aronow appears to be arguing that the Clerk of the Supreme Court has a property right in a particular job; as we shall see below, in the discussion on *Wadsworth*, people have no property right in a particular job.

121. PROPOSED 1972 CONSTITUTION, *supra* note 90, at 3.

122. *Id.* at 6.

123. ELISON & SNYDER, *supra* note 56, at 37–38.

temporizing verb is an indication that the right is not “possessed or guaranteed” to the same extent as the “right to a clean and healthful environment,” which is not limited by a temporizing verb.<sup>124</sup> Perhaps the delegates’ use of the temporizing verb “pursue” was intended to treat it as a statement of principal and not a substantive right.

## 2. *Case law on the right to pursue life’s basic necessities*

The lead case determining whether the right to life’s basic necessities includes a right to receive welfare benefits is *Butte Community Union v. Lewis*.<sup>125</sup> The Court struck down a law that restricted welfare benefits, but not because of any provisions in the Montana Constitution’s Declaration of Rights—instead, the Court relied on the economic assistance clause, article XII, section 3, clause 3.<sup>126</sup> The Court stated that the right to welfare is not fundamental because it is not “found within Montana’s Declaration of Rights” and it is not “a right ‘without which other constitutionally guaranteed rights would have little meaning.’”<sup>127</sup>

Outside of the context of welfare, individuals have made arguments under the right to pursue life’s basic necessities after they lost their job or were denied worker’s compensation benefits. The Court has consistently denied these requests. The Court has held there is no inalienable right to earn a living practicing law; rather, the practice of law is “a privilege burdened with conditions.”<sup>128</sup> In a wrongful termination case in which the Court reversed a grant of summary judgment for the employer, Justice Morrison stated in a special concurrence that “the right to terminate is not absolute but subject to exercise in accordance with constitutional principles.”<sup>129</sup> The Court has chosen to avoid application of the inalienable right to pursue life’s necessities where other grounds exist for disposing of the case.<sup>130</sup>

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124. *Id.*

125. 712 P.2d 1309, 1312 (Mont. 1986) (*Lewis* has been cited by the Court in many subsequent cases, e.g., *Zempel v. Uninsured Employers’ Fund*, 938 P.2d 658, 661 (Mont. 1997); *In re T.W.*, 126 P.3d 491, 495 (Mont. 2005); and *Matter of Wood*, 768 P.2d 1370, 1376 (Mont. 1989)).

126. *Id.* at 1313–1314.

127. *Id.* at 1311 (quoting *Matter of C.H.*, 683 P.2d 931, 940 (Mont. 1984)).

128. *Petition of Morris*, 575 P.2d 37, 38 (Mont. 1978).

129. *Dare v. Mont. Petroleum Mktg. Co.*, 687 P.2d 1015, 1021 (Mont. 1984) (Morrison, J., specially concurring).

130. E.g., *Haux v. Mont. Rail Link, Inc.*, 97 P.3d 540, 545 (Mont. 2004) (avoiding the constitutional question because the statute under which Plaintiff sued “does create a cause of action for mismanagement”); *Henry v. State Comp. Ins. Fund*, 982 P.2d 456, 462 (Mont. 1999) (Plaintiff “provides no legal analysis” as to why “the failure of the ODA to provide rehabilitation benefits affects his fundamental right to pursue life’s basic necessities”).

### 3. Case law on the unenumerated right to the opportunity to pursue employment

In *Wadsworth v. State*,<sup>131</sup> the Court used the right to pursue life's basic necessities as the textual basis for the creation of a new, unenumerated right: the right to the opportunity to pursue employment.<sup>132</sup> Justice Nelson, writing the majority opinion in *Wadsworth*, held the right to "the opportunity to pursue employment" was "necessary to enjoy the right to pursue life's basic necessities," and therefore was a fundamental right subject to strict scrutiny review. Justice Nelson reasoned:

[E]mployment serves not only to provide income for the most basic of life's necessities, such as food, clothing, and shelter for the worker and the worker's family, but for many, if not most, employment also provides their only means to secure other essentials of modern life, including health and medical insurance, retirement, and day care.<sup>133</sup>

The case of Shannon Wadsworth was far from the cases of individuals with "genuine needs" because of "circumstances beyond their control."<sup>134</sup> Wadsworth worked as a real estate appraiser for the Department of Revenue, and he was terminated when he violated the agency's conflict of interest rule by doing private appraisal work on the side.<sup>135</sup> In fact, Wadsworth appears not to have put on any evidence showing that a restriction on moonlighting actually affected the "basic necessities" of his life.<sup>136</sup>

In *Wadsworth*, Justice Nelson clarified that the Court's holding did not create a property interest in a particular job: "we distinguish the right to a particular job or employment from the right to pursue life's basic necessities through employment."<sup>137</sup> Even so, the Court's decision in *Wadsworth* created the impression that the Court might enforce the unenumerated right

131. 911 P.2d 1165 (Mont. 1996).

132. *Id.* at 1172. The majority opinion used *Butte Cmty. Union* to conclude that the right to the opportunity to pursue employment was a right "without which [the right to pursue life's basic necessities] would have little meaning." *Butte Cmty. Union*, 712 P.2d at 1311 (quoting *Matter of C.H.*, 683 P.2d at 940). Justice Nelson also cites a U.S. Supreme Court case that concludes, similar to *Butte Cmty. Union*, "First Amendment encompasses those rights that, while not specifically enumerated in the very terms of the Amendment, are nonetheless necessary to enjoyment of other First Amendment rights." *Wadsworth*, 911 P.2d at 1172 (citing *Globe Newspaper Co. v. Super. Court for Norfolk Cnty.*, 457 U.S. 596, 604 (1982)).

133. *Id.*

134. CONSTITUTIONAL CONVENTION TRANSCRIPT II, *supra* note 114, at 627.

135. *Wadsworth*, 911 P.2d at 1167–1168.

136. *Id.* at 1179 (Erdmann, J., specially concurring) ("The majority, however, fails to construe the meaning of 'life's basic necessities.' In fact, there was no discussion in the majority opinion as to whether Wadsworth's second job was needed in order for him to obtain these basic necessities. Life's basic necessities cannot and should not be an infinite term. One person's necessity can be another person's luxury. The right to the opportunity to pursue employment is fundamental to the extent that employment provides those necessities.")

137. *Id.* at 1172 (majority).

to the opportunity to pursue employment as a fundamental right in other cases.

To date, that has not occurred. In all of the four lead cases since *Wadsworth* in which a plaintiff has argued that the right to the opportunity to pursue employment was infringed, courts have declined to enforce the right. First, terminating an employee for misconduct did not infringe his right to the opportunity to pursue employment.<sup>138</sup> Second, the right to the opportunity to pursue employment did not void a law that prohibited game farm operators from allowing patrons to kill animals for a fee because the police power authorized the law.<sup>139</sup> Third, in *Wiser*, the right to the opportunity to pursue employment was not infringed by a regulation that required individuals who intended to have a partial denture procedure performed by a denturist to consult with a dentist before a denturist performed the procedure.<sup>140</sup> As in *Kafka*,<sup>141</sup> the regulation was within the police power.<sup>142</sup> Finally, the right to the opportunity to pursue employment was not infringed by a state law that prohibited medical marijuana providers from charging a fee for their services or for assisting more than three clients—once again, the Court held the police power authorized the law.<sup>143</sup>

It is difficult to distinguish the facts of *Wadsworth* from the facts in *Kafka*, *Wiser*, or *Montana Cannabis*.<sup>144</sup> Similar to *Wadsworth*, the plaintiffs in *Kafka* and *Montana Cannabis* lost their livelihood by statutes that pro-

138. *Hafner v. Mont. Dept. of Labor and Indus.*, 929 P.2d 233, 237–238 (Mont. 1996) (“In contrast to *Wadsworth*, *Hafner* was not terminated for pursuing life’s basic necessities”; rather, he was terminated because he knowingly continued working on a project without disclosing a serious conflict of interest. It was the “serious” nature of that conflict that apparently distinguished *Hafner* from *Wadsworth*”).

139. *Kafka v. Hagener*, 176 F. Supp. 2d 1037, 1043 (D. Mont. 2001) (“No fundamental right is implicated by banning fee killing of game farm animals in Montana. . . . To accept Plaintiffs’ argument would be the equivalent of neutering the regulatory power of state government.”).

140. *Wiser*, 129 P.3d at 139.

141. *Kafka*, 176 F. Supp. 2d at 1043.

142. *Wiser*, 129 P.3d at 139 (“[W]hile one does have the fundamental right to the opportunity to pursue employment, one does not have the fundamental right to practice his or her profession free of state regulation promulgated to protect the public’s welfare.”).

143. *Mont. Cannabis Indus. Ass’n v. State*, 286 P.3d 1161, 1166 (Mont. 2012) (“[T]he legislature, in its exercise of the State’s police powers, decided that it would legalize the limited use of medicinal marijuana while maintaining a prohibition on the sale of medical marijuana. This action prohibits employment as a medical marijuana provider[,] . . . Providers, *who are ultimately horticulturists, remain free to pursue horticulture work* generally, and further, are not proscribed from practicing the art of horticulture—including hydroponic horticulture—for profit.”) (emphasis added). This author has previously argued that the Court was incorrect in *Montana Cannabis* to distinguish *Wadsworth* and that, if *Wadsworth* means what it seems to literally say, the Court should rather have applied strict scrutiny to the 2011 medical marijuana law’s infringement of the right to the opportunity to pursue employment. Thomas J. Bourguignon, Note, *Montana Cannabis Industry Association v. State of Montana and the Constitutionality of Medical Marijuana*, 75 MONT. L. REV. 167, 186–187 (2014).

144. *Id.*

hibited their respective business models.<sup>145</sup> The plaintiffs in *Wiser* lost a portion of their livelihood by a regulation that would allow dentists to talk some people out of partial denture procedures.<sup>146</sup> If *Wadsworth* had been the last of these cases chronologically, one would likely have predicted that the Court would not enforce a substantive right to the opportunity to pursue employment.

One distinguishing feature emerges, however: in *Wadsworth*, the Court did not indicate that the police power authorized the statute restricting Wadsworth's ability to hold a second job. In fact, during the Court's application of strict scrutiny review, it stated that the purpose of the regulation prohibiting moonlighting was "avoiding the appearance of impropriety of real estate appraisers," despite the lack of any actual complaints of the appearance of impropriety.<sup>147</sup> In other words, the State had no valid police power justification for the anti-moonlighting rule.

Thus, based on the reasoning and the holdings in the cases decided to date, the analytical framework that the Court should use in the future to analyze the right to pursue employment is as follows:

1. Does the plaintiff have access to other adequate remedies such that the court can (or must) avoid reaching the constitutional issue?<sup>148</sup>
2. Is the statute or regulation authorized by the state's police power or other authorization?<sup>149</sup>
3. Does the plaintiff's claim rely on an assertion that plaintiff has a property interest in a particular job?<sup>150</sup>
4. Was the plaintiff actually harmed in her ability to pursue life's basic necessities?<sup>151</sup>

#### D. "enjoying and defending their lives and liberties"

This phrase appeared verbatim in the 1889 Montana Constitution, the draft 1884 Montana Constitution, the 1876 Colorado Constitution, and in an almost verbatim formulation in the 1874 Pennsylvania Constitution.<sup>152</sup> An even more ancient version of the phrase appears in the Virginia Declaration

145. *Id.* at 1163–1164; *Kafka*, 176 F. Supp. 2d at 1040–1041.

146. *Wiser*, 129 P.3d at 136 (the Partial Denture Rule requires "that denturists refer all partial denture patients to dentists before providing partial denture services").

147. *Wadsworth*, 911 P.2d at 1174–1175.

148. *E.g.*, *Haux*, 97 P.3d at 545.

149. *E.g.*, *Wiser*, 129 P.3d at 138.

150. *E.g.*, *Wadsworth*, 911 P.2d at 1172–1173.

151. *Id.* at 1179 (Erdmann, J., specially concurring). As stated above, the Court in *Wadsworth* did not make anything of the fact that Wadsworth put on no evidence as to how he was unable to pursue life's basic necessities as a result of the regulation.

152. MONT. CONST. OF 1889, art. III, § 3; MONT. CONST. OF 1884, art. I, § 3; COL. CONST. OF 1876 art. II, § 3; PENN. CONST. OF 1874, art. I, § 1.

of Rights of 1776: “the enjoyment of life and liberty.”<sup>153</sup> Despite its long history, Montana courts have not relied on it as often as the next phrase in the Inalienable Rights Clause: “acquiring, possessing, and protecting property.”

The leading case decided under this provision is *Matter of C.H.*<sup>154</sup> In *C.H.*, a youth court ordered that C.H., a minor, be sent to an institution for 45 days to undertake a “predispositional evaluation,” and placed her on probation for one year.<sup>155</sup> C.H. challenged the statute enabling the youth court on a number of theories, including a personal liberty theory derived from the “lives and liberties” clause from article II, section 3.<sup>156</sup> The Court analyzed whether “physical liberty” is an unenumerated fundamental right. The Court decided to read several constitutional provisions together and concluded physical liberty is a fundamental right because it is a right “without which other constitutionally guaranteed rights would have little meaning.”<sup>157</sup> The Court then held the “deprivation of the physical liberty of C.H. for a period of 45 days” infringed her right to physical liberty.<sup>158</sup> The Court thus stated that it would apply strict scrutiny.<sup>159</sup> However, the Court held, without any express analysis of whether a compelling state interest existed, that the 45-day deprivation of liberty “was not an unreasonable period of time.”<sup>160</sup>

In a subsequent case, the Court chose not to extend its holding in *C.H.* In *Jordan v. Kalin*,<sup>161</sup> the plaintiff sought an order of protection against a former coworker. The defendant Kalin argued that, under the Inalienable Rights Clause, the district court could not punish him “for exercising his right to defend his liberty,” or in other words, that his attempt to defend himself against the order of protection was used by the district court as evidence of his interest in the plaintiff.<sup>162</sup> The Court disagreed with Kalin, observing that the defendant’s in-court behavior was “indicative, not of Kalin’s interest in defending himself, but of his intense interest in pursuing

153. COGAN, *supra* note 50, at 30.

154. 683 P.2d 931 (Mont. 1984). *C.H.* has been cited by the Court many times regarding the right to physical liberty, e.g., *In re T.W.*, 126 P.3d at 499 (Leaphart, J., dissenting); and *Kloss v. Edward D. Jones & Co., Inc.*, 54 P.3d 1, 13 (Mont. 2002).

155. *Id.* at 933.

156. *Id.* at 940.

157. *Id.* The Court considered the cumulative effect of a portion of the Preamble to the Montana Constitution (“We the people of Montana . . . desiring . . . to secure the blessings of liberty . . . do ordain and establish this constitution”); MONT. CONST. art. II, § 3 (“enjoying and defending their lives and liberties”); MONT. CONST. art. II, § 4 (dignity and equal protection); and MONT. CONST. art. II, § 17 (“No person shall be deprived of life, liberty, or property without due process of law.”).

158. *Id.*

159. *Id.*

160. *Matter of C.H.*, 683 P.2d at 941.

161. 256 P.3d 909 (Mont. 2011).

162. *Id.* at 910, 913.

Jordan” and concluded that, although Kalin had a constitutional right to defend himself, the district court was not punishing him for exercising that right.<sup>163</sup>

The Court has used other constitutional provisions to enforce the right to physical liberty. In *Armstrong v. State*,<sup>164</sup> the Court struck down a statute prohibiting physician’s assistants from performing abortions.<sup>165</sup> *Armstrong* did not rely upon *C.H.* or upon the Inalienable Rights Clause for its holding; however, its holding under the right to privacy—article II, section 10 of the Montana Constitution—includes a significant physical liberty or autonomy component:

We hold that the personal autonomy component of this right [to privacy] broadly guarantees each individual the *right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider* free from the interference of the government, except in very limited circumstances not at issue here. More narrowly, we hold that Article II, Section 10, protects a woman’s right of procreative autonomy—here, the *right to seek and to obtain a specific lawful medical procedure*, a pre-viability abortion, *from a health care provider of her choice*.<sup>166</sup>

Arguably, if there was no express right to privacy in the Montana Constitution, then the plaintiffs in *Armstrong* might have prevailed under article II, section 3—as the Court observed in dicta.<sup>167</sup> In either case, the Court in *Armstrong* chose to recognize a new, unenumerated right based on other rights expressed in article II.

#### E. “acquiring, possessing and protecting property”

This phrase appeared verbatim in the 1889 Montana Constitution, the draft 1884 Montana Constitution, the 1876 Colorado Constitution, and the 1874 Pennsylvania Constitution.<sup>168</sup> It also appeared in similar formulation in the Virginia Declaration of Rights of 1776: “with the means of acquiring and possessing property.”<sup>169</sup>

This provision has a long history and has been interpreted and enforced in many cases. Elison and Snyder observe that the 1889 Montana Constitution’s inalienable rights provision “was primarily intended to pro-

163. *Id.* at 913.

164. 989 P.2d 364 (Mont. 1999).

165. *Id.* at 384.

166. *Id.* (emphasis added).

167. *Id.* at 383 (“Article II, Section 3, guarantees each person the inalienable right to seek safety, health and happiness in all lawful ways—i.e., in the context of this case, the right to seek and obtain medical care from a chosen health care provider and to make personal judgments affecting one’s own health and bodily integrity without government interference.”).

168. MONT. CONST. OF 1889, art. III, § 3; MONT. CONST. OF 1884, art. I, § 3; COL. CONST. OF 1876 art. II, § 3; PENN. CONST. OF 1874, art. I, § 1.

169. COGAN, *supra* note 50, at 30.

fect . . . vested property rights.”<sup>170</sup> Many cases have been brought arguing for the application of this provision. In eight of the leading cases prior to the 1972 Montana constitution, the Court enforced the right to acquire, protect, and possess property four times,<sup>171</sup> and declined to enforce it four times.<sup>172</sup>

Recent cases brought under the Property Clause have tested some of the boundaries of the doctrine. In two cases, the Property Clause has justified certain activities of security or police. The right to protect property includes the right of a private security guard to stop and frisk potential criminals to prevent property damage.<sup>173</sup> Further, police officers who entered a residence attempting to protect the property therein from a criminal were authorized to do so by the Property Clause, which provided a compelling state interest for the officers’ infringement of the property owner’s right to privacy.<sup>174</sup>

In two other cases, the Court balanced property rights protected by the Property Clause against aesthetic rights or environmental rights protected by the Clean and Healthful Environment Clause, and the Property Clause was defeated in both. In the earlier case, the Court upheld a law regulating junkyards, the Motor Vehicle Wrecking Facilities Act. The Court held that aesthetic values provide sufficient justification to infringe individual property rights under the Property Clause.<sup>175</sup> In the second case—a challenge to regulations promulgated under the Motor Vehicle Recycling and Disposal Act and Junk Yards Along Roads Act—the Court held more broadly that owners of junkyards do not have an inalienable right to acquire junk vehicles without a license.<sup>176</sup>

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170. ELISON & SNYDER, *supra* note 56, at 38.

171. *Butte & B. Consol. Min. Co. v. Mont. Ore-Purchasing Co.*, 63 P. 825, 827 (Mont. 1901) (statute that retroactively took away vested joint tenancy rights struck down as unconstitutional); *Butte Miners’ Union v. City of Butte*, 194 P. 149, 151 (Mont. 1920) (city held liable for damage caused in a riot even though plaintiffs were a cause of the riot); *Rathbone*, 100 P.2d 86, 91 (defense of property held to be a valid defense against a regulation prohibiting poaching); *State v. Gleason*, 277 P.2d 530, 534 (Mont. 1954) (statute requiring licensing of photographers struck down).

172. *Hersey v. Nelson*, 131 P. 30, 34–35 (Mont. 1913) (statute upheld which required newspapers to sublet certain contracts); *Colville v. Fox*, 149 P. 496, 497, 499 (Mont. 1915) (statute upheld which allowed state inspector to destroy infected fruit); *State v. Johnson*, 243 P. 1073, 1080 (Mont. 1926) (statute upheld which regulated certain transportation companies); *Young v. Bd. of Trustees of Broadwater Cnty. High School*, 4 P.2d 725, 727–728 (Mont. 1931) (school board’s statutory power to rent gymnasium upheld because constitutional protection of property rights does not guarantee anyone a monopoly).

173. *State v. Bradford*, 683 P.2d 924, 928 (Mont. 1984).

174. *State ex rel. Zander v. Dist. Court of Fourth Judicial Dist.*, 591 P.2d 656, 660–661 (Mont. 1979).

175. *Bernhard*, 568 P.2d at 138.

176. *State ex rel. Dep’t of Health and Envtl. Scis.*, 739 P.2d at 471, 473.

F. “seeking their safety, health and happiness”

1. History of the provision

At first blush, neither safety nor health nor happiness appears to be a right that can be inalienably possessed—in other words, we the people enter into unsafe situations, suffer deprivations of health, and suffer through periods of unhappiness. However, the text in the Constitution only protects our right to *seek* safety, health, and happiness.

This provision appeared in similar formulation (“seeking and obtaining their safety and happiness”) in the 1889 Montana Constitution, the draft 1884 Montana Constitution, the 1876 Colorado Constitution, and in similar form in the Virginia Declaration of Rights of 1776.<sup>177</sup> The 1972 Constitution added “health” and deleted “obtaining.”

During the 1972 Constitutional Convention, no delegate proposals added “health” or deleted “obtaining.” Instead, the Bill of Rights Committee itself made those changes, and its February 22, 1972, Proposal included the text as ultimately ratified.<sup>178</sup> According to the Proposal: “An additional right, the right of seeking health was incorporated in recognition of the fact that a right to life without health is a sorry proposition.”<sup>179</sup> Despite being a new addition to the Montana Constitution in 1972, the right of seeking health was not often referenced by the delegates.

The Proposed 1972 Constitution pamphlet noted the right to seek health as among the new provisions added to the Bill of Rights of the 1889 Constitution.<sup>180</sup> The pamphlet noted that article II, section 3 “[r]evises [the] 1889 Constitution by adding three rights,” one of which was “relating to . . . health.”<sup>181</sup>

2. Case law on the right to seek safety, health, and happiness

This clause has not been analyzed frequently by the Court, partly because of the Court’s avoidance of constitutional issues. The “right to seek . . . happiness” has occasionally been mentioned by the Court but has yet to be enforced.<sup>182</sup> For instance, in *Simms v. Eighteenth Judicial District*

177. MONT. CONST. OF 1889, art. III, § 3; MONT. CONST. OF 1884, art. I, § 3; COL. CONST. OF 1876, art. II, § 3; *Virginia Declaration of Rights*, § 1. Reprinted in COGAN, *supra* note 50, at 30.

178. CONSTITUTIONAL CONVENTION TRANSCRIPT II, *supra* note 114, at 620.

179. *Id.* at 627.

180. PROPOSED 1972 CONSTITUTION, *supra* note 90, at 3.

181. *Id.* at 6.

182. *E.g.*, *Welsh v. Pritchard*, 241 P.2d 816, 819 (Mont. 1952) (in suit by married couple against landlord for violation of their common-law right to privacy, the Court supports its adoption of the then current federal right to privacy with several sources, including the following quote from a Missouri case: “The basis of the ‘right of privacy’ is the ‘right to be let alone’ and it is ‘a part of the right to liberty and

*Court*,<sup>183</sup> the Court struck down the use of the police power to compel an individual to undergo at his own expense an out-of-state medical examination.<sup>184</sup> Randall Simms sued his physician for professional negligence. The district court compelled Simms to undergo a medical examination with an out-of-state doctor selected by the defendants, which Simms refused to do.<sup>185</sup> The Court held that, due to the plaintiff's inalienable rights to seek safety, health, and happiness, and specifically because "traveling to Portland would be 'uncomfortable' for Simms," the district court erred in finding "good cause" existed to order the medical examination and that the district court "should consider both the location and nature of the exam."<sup>186</sup>

### 3. Case law on the alleged right to access medication or medical procedures

After the Court's expansive protection of physical liberty and autonomy in *Armstrong*, Montanans might have had reason to believe their rights to access medical procedures and even medication could not be infringed by the State without the showing of a compelling state interest. In two recent cases, *Wiser* and *Montana Cannabis*, plaintiffs argued their respective cases were not distinguishable from the Court's expansive holding in *Armstrong*.<sup>187</sup> In both cases, the Court declined to recognize the right to access medication or medical procedures.<sup>188</sup>

In *Wiser*, the plaintiffs did not argue that their inalienable right to seek health was infringed.<sup>189</sup> Rather, plaintiffs argued their right to the opportunity to pursue employment and their patients' privacy right to obtain a particular lawful medical procedure from a health care provider were infringed.<sup>190</sup> The Court reasoned that the State's police power authorized the

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pursuit of happiness.") (quoting *Barber v. Time, Inc.*, 159 S.W. 2d 291, 294 (Mo. 1952); *State ex rel. Zander*, 594 P.2d at 279 (Shea, J., concurring in part and dissenting in part) (Justice Shea quoted *Olmstead v. United States*, 277 U.S. 438, 478 (1928): "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone the most comprehensive of rights and the right most valued by civilized men.").

183. 68 P.3d 678 (Mont. 2003).

184. *Id.* at 683, 685 ("When a proposed examination risks unnecessary, painful or harmful procedures the scale must favor protecting the individual's rights.").

185. *Id.* at 680–681.

186. *Id.* at 683–685.

187. Appellants' Br. at 14–15, *Wiser v. State, Dept. of Commerce* (Mont. Nov. 22, 2004) (No. 04587); *Mont. Cannabis*, 286 P.3d at 1167.

188. *Wiser*, 129 P.3d at 138; *Mont. Cannabis*, 286 P.3d at 1168.

189. *Wiser*, 129 P.3d at 137.

190. *Id.* (quoting *Armstrong*, 989 P.2d at 380). In all likelihood, the plaintiffs in *Wiser* briefed the privacy issue rather than the right to seek health because of the expansive holding in *Armstrong* and

State to regulate “health care professions necessary for the public’s protection.”<sup>191</sup>

In *Montana Cannabis*, the plaintiffs argued the right to seek health and the right to privacy independently and collectively created a right to access medication regardless of the legality of the medication.<sup>192</sup> The Court followed *Wiser* and held the police power authorized the statute and no fundamental rights were infringed.<sup>193</sup> The Court declined to recognize the existence of an unenumerated right to access medication, reasoning that no other jurisdiction has recognized such a right.<sup>194</sup>

Thus, the unenumerated right to access medication or medical procedures is unlikely to be recognized by the Court anytime soon—although the Court’s reasoning based upon other jurisdictions leaves the door open in case other jurisdictions start recognizing such a claim.

### G. “in all lawful ways.”

The text of article III, section 3 of the 1889 Montana Constitution is identical to the text of article I, section 3 of the draft 1884 Montana Constitution, with one exception: the 1889 Montana Constitution added “in all lawful ways” to the end of the provision.<sup>195</sup> The transcript of the 1889 Constitutional Convention is silent as to the delegates’ rationale for the addition.<sup>196</sup> Elison and Snyder state,

If [the enumerated inalienable rights] were to be given their apparent meaning as generalized limitations upon the exercise of police power, they would prevent government control of a variety of ordinary, as well as more idiosyncratic, human actions. However, the concluding phrase ‘in all lawful ways’ compromises all the listed rights of autonomy, meaning that government is not constitutionally prohibited in placing unspecified limits on individual autonomy . . . .”<sup>197</sup>

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because of the expansive holding in an oft-cited, rarely-followed case out of Texas, *Andrews v. Ballard*, 498 F. Supp. 1038 (S.D. Tex. 1980), which held that “patients have a broad right to health care which includes the fundamental right to seek treatment from acupuncturists who have not been licensed or approved by the relevant licensing or medical board.”

191. *Id.* at 138.

192. *Mont. Cannabis*, 286 P.3d at 1166–1168.

193. *Id.* at 1167–1168.

194. *Id.* at 1167 (citations omitted); see also Bourguignon, *supra* note 143, at 187–188 (where this author argued that although the right to seek health was arguably infringed by the State’s restrictions on medical marijuana, there is no affirmative right of access to marijuana regardless of its legality).

195. MONT. CONST. OF 1889, art. I, § 3, art. III, § 3,

196. PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION HELD IN THE CITY OF HELENA, MONTANA JULY 4TH, 1889, AUGUST 17TH, 1889, at 98, 270–271 (State Publishing Co. 1921). When the Committee of the Whole debated the draft Article III, Section 3 on July 18, 1889, “in all lawful ways” had already been added. The section was not amended during debate, and on July 23, 1889 the entirety of Article III was approved by a vote of 66–1.

197. ELISON & SNYDER, *supra* note 56, at 38.

Elison and Snyder arrive at the general conclusion that “the generalized statement of inalienable rights has not been an effective protection for individual rights claimed in opposition to the exercise of state police power.”<sup>198</sup>

This four-word provision clarifies that inalienable rights are subject to the police power of the State, even more so than other article II rights, because only in article II, section 3 does a phrase such as “in all lawful ways” occur. But how does the Court conduct its balancing between the inalienable rights of the people on one hand and the police power of the State to regulate for public health, safety, and welfare on the other hand? Does this provision instruct courts to apply rational basis review to laws infringing inalienable rights as opposed to applying strict scrutiny, which is normally applied to laws that infringe any portion of article II of the Montana Constitution? The short answer is that the Court has been inconsistent over the decades in how it has chosen to balance inalienable rights against the State’s police power. Consequently, there is no clear guidance about how the Court will balance these conflicting needs in future cases.

In *State v. Gateway Mortuaries*,<sup>199</sup> the Court struck down a law prohibiting most pre-death burial or cremation contracts.<sup>200</sup> The Court asked whether the law “bear[s] a real and substantial relation to the public health, safety, morals, or . . . general welfare.”<sup>201</sup> The Court used the “slippery slope” argument: “we should not treat lightly or disregard the sacred rights recognized and guaranteed [sic] by the Constitution. Were we to sustain the constitutionality of this act, there would be no limit to which the Legislature might not go in depriving persons of the right to contract in a lawful way . . . .”<sup>202</sup> With this reasoning, the Court effectively turned rational basis review inside out: rather than inquiring whether there is any set of facts that can justify the rationality of the law, the Court, in applying its heightened scrutiny, inquired what evils the Legislature would concoct if given broad authority under the State’s police power.

In *Rathbone*, C.R. Rathbone killed an elk on his ranch out of season.<sup>203</sup> Rathbone argued the killing was necessary to defend his property, and that his inalienable right to acquire, possess, and protect property justified the killing because the elk was causing damage to his ranch.<sup>204</sup> The Court used a standard that expressed a narrow view of the police power, holding that the law was authorized by the police power “*only to the extent reasonably*

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198. *Id.* at 38–39.

199. 287 P. 156 (Mont. 1930).

200. *Id.* at 157, 161.

201. *Gateway Mortuaries*, 287 P. at 157 (citing *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 111–112 (1928)). The “real and substantial relation” standard is a higher standard than rational basis.

202. *Id.* at 161 (citing *Gas Products Co. v. Rankin* 207 P. 933, 999 (Mont. 1922)).

203. *Rathbone*, 100 P.2d at 88.

204. *Id.* at 88, 90.

necessary to preserve the public welfare.”<sup>205</sup> Thus, the Court applied “health, safety, and welfare” reasoning under the police power: the State may only exercise the police power as reasonably necessary to preserve the health, safety, and welfare of the citizens of the State.

In *State v. Gleason*,<sup>206</sup> the Court struck down a law regulating the profession of photography because it exceeded the scope of the police power.<sup>207</sup> At the outset, the Court considered two possible ways of framing the police power: first, the health, safety, and welfare concern from *Rathbone* and from courts in other jurisdictions;<sup>208</sup> and second, an “arbitrary and capricious” standard used by the United States Supreme Court.<sup>209</sup> In *Gleason*, the Court chose the “arbitrary and capricious” standard from *Nebbia v. New York*<sup>210</sup> without explaining why that was the proper standard, and struck down the law.<sup>211</sup> The Court’s reasoning was not too different from the slippery slope reasoning in *Gateway Mortuaries*: it observed that “Statutes regulating trades” are so common that they affect “the social and economic life of the State.”<sup>212</sup> As a result, a statute that gives unlimited licensing authority to a state agency is arbitrary and capricious.<sup>213</sup>

In *Garden Spot Market, Inc. v. Byrne*,<sup>214</sup> the Court applied rational basis and struck down a law that imposed a prohibitively high fee on a certain type of sales promotion.<sup>215</sup> The Court stated that the inalienable rights provision is a “constitutional inhibition upon the police power.”<sup>216</sup> The Court did not directly state whether it was following the *Nebbia* “arbitrary and capricious” standard or the health, safety and welfare standard. It did state the police power could not be used to “operate as the virtual prohibition of a useful and legitimate occupation and business.”<sup>217</sup>

205. *Id.* at 92 (emphasis added). Note the lower standard here than the “real and substantial relation” standard in *Gateway Mortuaries*. Also note that Rathbone’s action—killing an elk on his ranch—posed no harm to the public health, safety, or welfare.

206. 277 P.2d 530 (Mont. 1954).

207. *Id.* at 533.

208. *Id.* at 531 (“no profession, otherwise lawful, may be regulated unless it *directly affects* the public health, safety or morals, or the profession or business is one affected with public interest.” (emphasis added)).

209. *Id.* (citing *Nebbia v. N.Y.*, 291 U.S. 502 (1934)). Under this standard, the State may “regulate and license professions so long as the exercise of the police power is not arbitrary or capricious and the means adopted for regulation are reasonably consistent with the ends sought to be obtained.” *Id.*

210. 291 U.S. 502 (1934).

211. *Gleason*, 277 P.2d at 531–532. The Court did state that *Nebbia* “broadened the horizon [of the police power] but did not relinquish the subject of review . . . .”

212. *Id.* at 532 (quoting *North Carolina v. Harris*, 6 S.E.2d 854, 858 (N.C. 1940)).

213. *Id.* at 533.

214. 378 P.2d 220 (Mont. 1963).

215. *Id.* at 229.

216. *Id.* at 227–228.

217. *Id.* at 229 (quoting *Brackman v. Kruse*, 199 P.2d 971, 981 (Mont. 1948)).

In *State v. Bernhard*,<sup>218</sup> the Court held that because the right to a “clean and healthful environment” in article II, section 3 is an inalienable right, the State has police power to regulate “to preserve or enhance aesthetic values . . . .”<sup>219</sup> As a result, the Court upheld an ordinance regulating automobile junkyards.

In *Skurdal II*,<sup>220</sup> the Court held “[t]he ability to drive a motor vehicle on a public highway is not a fundamental right; it is a revocable privilege that is granted upon compliance with statutory licensing procedures.”<sup>221</sup> Here, Mr. Skurdal, arguing his own case, urged the Court to rely on an unenumerated inalienable right, the right to travel, but the Court declined to do so.<sup>222</sup>

In *Wadsworth* and *Armstrong*, two cases during the Court’s high-water period of recognition of fundamental rights, the Court did not analyze the police power in detail. In *Wadsworth* the Court did not expressly analyze whether the police power authorized the regulation prohibiting moonlighting; however, the Court in its strict scrutiny analysis implied that the State did not have a good reason based on public health, safety, or welfare to justify the regulation.<sup>223</sup> In *Armstrong*, the Court did not analyze whether the statute in question was authorized by the police power, although the Court indicated that the right to privacy in making personal health care decisions and in exercising personal autonomy could be infringed by the State if it could show a compelling interest for its exercise of the police power.<sup>224</sup>

Since that high-water mark, the Court’s holdings (specifically, *Wiser* and *Montana Cannabis*) with respect to the balance between police power and individual rights have swung in favor of the police power. In *Wiser*, the Court held that—unlike in *Wadsworth*, where Shannon Wadsworth was “completely proscribed” from moonlighting (and thus the police power was exceeded)—the denturists “remain free to pursue denture work generally,” and the regulation “merely requires a dentist’s referral.”<sup>225</sup> Then, in *Montana Cannabis*, the Court followed *Wiser* in upholding the police power to

218. 568 P.2d 136 (Mont. 1977).

219. *Id.* at 138.

220. 767 P.2d 304 (Mont. 1988).

221. *Id.* at 307.

222. *Id.*; ELISON & SNYDER, *supra* note 56, at 39 (“The court has suggested [in *Skurdal II*] that the right to travel . . . does not encompass the right to drive on public roads free from government regulation.”).

223. *Wadsworth*, 911 P.2d at 1174–1175.

224. *Armstrong*, 989 P.2d at 380. One reason why the police power was not analyzed here is because the bulk of the holding in the case came under Article II, section 10 of the Montana Constitution (the right to privacy), which is not limited by a phrase such as “in all lawful ways” and which expressly requires a showing of a compelling state interest if the right to privacy is infringed.

225. *Wiser*, 129 P.3d at 139.

regulate and again argued that horticulturalists “remain free to pursue horticulture work generally.”<sup>226</sup> In none of these recent cases has the Court used its older formulations of the police power: either the “health, safety and welfare” formulation from *Rathbone* or the “arbitrary and capricious” formulation from *Gleason*. Nor has it used an argument similar to the slippery slope argument from *Gateway Mortuaries*. Rather, the Court invented a simplistic dichotomy between the State “completely proscribing” certain conduct on the one hand, or the State allowing citizens to “remain free” to engage, in at least a limited way, in that conduct on the other hand. It is true that most of the old cases such as *Rathbone* and *Gateway Mortuaries* would be examples of the State “completely proscribing” conduct. Still, the Court’s new test of police power allows for significant amounts of legislative interference so long as the State leaves an escape hatch whereby people “remain free” to do at least some of the conduct in question.

*H. “In enjoying these rights, all persons recognize corresponding responsibilities.”*

The Hawaii Constitution of 1950 includes the following inalienable rights provision:

All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property. *These rights cannot endure unless the people recognize their corresponding obligations and responsibilities.*<sup>227</sup>

The “corresponding responsibilities” clause in article II, section 3 was an addition to the 1972 Constitution. On February 3, 1972, Delegate Proposal No. 116, signed by 18 delegates, proposed deleting the entirety of the inalienable rights section and replacing it with the following:

All people are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty, and the pursuit of happiness. These rights cannot endure unless people recognize their reciprocal responsibilities and obligations to secure and preserve these rights and to protect their property.<sup>228</sup>

On February 22, 1972, the Bill of Rights Committee Proposal retained the basic idea of the final sentence of Delegate Proposal No. 116, which stated: “In enjoying these rights, the people recognize corresponding re-

<sup>226</sup> *Mont. Cannabis*, 286 P.3d at 1166.

<sup>227</sup> HAWAII CONST. art. I, § 2 (emphasis added). This provision from the Hawaii Constitution was reprinted among other materials for the 1972 Constitutional Convention delegates in APPELLEGGATE, *supra* note 73, at 384. It should be noted that the Alaska Constitution—not included among the materials for the delegates’ review—also has a similar provision: “all persons have corresponding obligations to the people and to the State.” ALASKA CONST. art. I, § 1.

<sup>228</sup> CONSTITUTIONAL CONVENTION TRANSCRIPT I, *supra* note 92, at 242–243.

sponsibilities.”<sup>229</sup> The Committee’s report included the following statement about the “corresponding responsibilities” clause:

The final sentence of this section is new having been derived from delegate proposal No. 116. Testimony was received both favoring and opposing the inclusion of a statement of corresponding responsibilities in the declaration of rights. Some expressed the feeling that many were accepting rights without recognizing that they create obligations. Others were adamant that a declaration of rights should contain just that: the rights of persons against governmental abuses and the rights of minorities against the power of unchecked majorities. The committee felt that the inclusion of such a statement does not infringe or impair the rights granted in the declaration of rights but only accords a tone of responsibility to their exercise.<sup>230</sup>

Delegate Monroe referenced the Corresponding Responsibilities Clause as he discussed the “Institutions and Assistance” section of the Constitution:

It seems to me we’ve kind of covered it in our Section 3 of our Bill of Rights. We’ve suggested there that people have a right to pursue some of the basic necessities, and in that same section we also are suggesting that the people have a duty and responsibility—or corresponding responsibility, there—to take some sort of responsibility—for example, if they are receiving assistance. I don’t agree with the idea that people should have to work for, let’s say, welfare benefits, and I don’t disagree with it either . . . .<sup>231</sup>

The Corresponding Responsibilities Clause is paradoxical: it modifies rights that are “inalienable,” exist prior to government, and cannot be taken away; yet it asserts that in accepting rights, people have obligations. The law includes many examples of corresponding responsibilities—in contract law, the duty to mitigate damages when another party has breached the contract.<sup>232</sup> Does the addition of the Corresponding Responsibilities Clause imply any such duty on the part of individuals who have suffered a deprivation of their rights? What corresponding responsibility did Shannon Wadsworth have when he was terminated after continuing to violate the agency’s anti-moonlighting rule?

The task of understanding the meaning of this sentence is made more difficult by the fact that no court cases, in Montana, Hawaii, or Alaska, have relied on it for their holding. Some cases in Montana have mentioned the Corresponding Responsibilities Clause in dicta. For instance, Justice Erdmann in his special concurrence to *Wadsworth* had this to say:

[T]he inalienable rights set forth in our constitution’s declaration of rights impart corresponding responsibilities. Delegates to the 1971–72 Constitutional Convention expressed concern that people were accepting rights with-

229. CONSTITUTIONAL CONVENTION TRANSCRIPT II, *supra* note 114, at 620.

230. *Id.* at 627.

231. CONSTITUTIONAL CONVENTION TRANSCRIPT VI, *supra* note 119, at 2294.

232. RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981).

out recognizing that they create obligations. The convention committee concluded that the inclusion of such a statement would not infringe or impair the rights granted in the Declaration of Rights but would only accord a tone of responsibility to their exercise. In this case, *the majority has failed to acknowledge any corresponding responsibility on the part of Wadsworth in exercising his rights.*<sup>233</sup>

Erdmann's special concurrence implies that, when the Court enforces substantive rights from article II, section 3, it should be analyzing what corresponding responsibilities, if any, the plaintiffs have. However, the Court has never done that.

In his majority opinion in *Armstrong*, Justice Nelson characterized the "corresponding responsibilities" as a "cost":

[W]e must also note that each person's enjoyment of these various constitutional rights is not without a corresponding cost. In fact, Article II, Section 3, requires that those enjoying the inalienable rights set forth in that section "recognize corresponding responsibilities." Whatever may be this cost or corresponding responsibility, however, it does not include the demonization of women who choose to terminate their pregnancies at a time the law allows nor does it mandate the criminalization of providers of abortion services to these women. Likewise, this cost does not require the denigration and condemnation of those who, as a matter of their own good consciences, either favor or reject abortion. Most importantly, this cost does not permit the government's infringement of personal and procreative autonomy in the name of political ideology.

Rather, the price—the corresponding responsibility—for our commitment to the values and ideals of just government and for our enjoyment of our individual rights protected by Montana's Constitution is simply tolerance. And indeed, that is a token sum for, among other freedoms, the right to be let alone.<sup>234</sup>

Nelson's rhetorical flourishes amount to an assertion that, even if the Corresponding Responsibilities Clause imposes a cost on individuals, that cost is small in relation to the deprivation caused by state action such as a law restricting who may perform abortions. His conclusion—that the "corresponding responsibility" is tolerance—makes sense in the context of an emotionally charged issue such as abortion, but it makes less sense in the environmental cases, or in the case of Mr. Wadsworth or the denturists. Should the State Board of Dentistry have shown more tolerance for denturists?<sup>235</sup> This interpretation, however, does not seem to capture the purpose behind the clause: after all, the people who enjoy the inalienable rights

233. *Wadsworth*, 911 P.2d at 1180 (Erdmann, J., specially concurring) (emphasis added) (citations omitted).

234. *Armstrong*, 989 P.2d at 383.

235. See *Wiser*, 129 P.3d at 136 ("The long struggle between denturists and dentists is well documented . . . the battle at its core is the regulation of the dentistry profession by the State Board of Dentistry, which, in the eyes of the denturists, is dominated by dentists who actively oppose dentistry.").

(the denturists) are the people who must recognize corresponding responsibilities. What should the denturists have done? Should Mr. Wadsworth have stopped moonlighting in order to recognize his corresponding responsibilities? If so, he'd simply be declining to "enjoy" his rights. It is difficult to find the balance where Mr. Wadsworth could have simultaneously enjoyed his rights and also recognized a corresponding responsibility.

The use of the term "corresponding," and the fact of its use in Hawaii and Alaska, implies that whatever the responsibility is, it should be roughly proportionate to the "value" of the right being enforced. Because the Court's enforcement of inalienable rights appears to have receded from its high-water mark of in the late 1990s, it appears unlikely that subsequent courts will analyze the Corresponding Responsibilities Clause as central to the holding of future cases.

## V. CONCLUSION

The Court had some very good reasons for enforcing C.J. Rathbone's inalienable right to defend his property and Shannon Wadsworth's right to the opportunity to pursue employment. The Court had equally good reasons for not enforcing Rodney Skurdal's right to travel on Montana's highways without a license. On the one hand, Mr. Rathbone and Mr. Wadsworth were sympathetic litigants: they were both able to argue that their actions in violation of state law were undertaken out of necessity. On the other hand, Mr. Skurdal wished to use his inalienable rights as a shield against any government regulation whatsoever.

The Court's interpretation of the inalienable rights provision has been inconsistent, and there is little guidance as to what the future will hold for this provision. Clearly, the Court has preferred to enforce the rights that are enumerated within the provision rather than recognizing new, unenumerated rights. It is also clear the Court has not treated inalienable rights any differently than other fundamental rights listed in article II of the Montana Constitution; or, if they are different from the rest of article II, inalienable rights may be *more* subject to the police power and thus less effective as individual rights. Any litigants who seek to have their inalienable rights recognized by the Court should be prepared to make arguments as to the following elements: (1) why the Court must reach the constitutional issue, or why other adequate remedies do not exist, (2) why the specific conduct at issue is "within" the right, (3) what evidence demonstrates that the right was infringed, and (4) whether the statute or regulation at issue is authorized by the State's police power. Even though the Delegates to the Montana Constitutional Convention attempted to argue all Montanans into liking the same glass of beer—that is, the same list of inalienable rights—the Court

does not view inalienable rights as universal, God-given rights. Ironically, we must argue even more strenuously when we assert our inalienable rights.