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A Judicial Duty: Interpreting and Enforcing Montanan's Inalienable Right to a Clean and Healthful Environment

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**A JUDICIAL DUTY: INTERPRETING AND ENFORCING
MONTANANS’ INALIENABLE RIGHT TO A CLEAN AND
HEALTHFUL ENVIRONMENT**

Nathan Bellinger* & Roger Sullivan**

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I. INTRODUCTION

In the oft-cited passage from *Marbury v. Madison*,¹ Chief Justice Marshall stated over 200 years ago that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” Constitutions, both state and federal, of course, are the supreme law of the land.² According to Chief Justice Marshall, a written constitution—which he called “the greatest improvement on political institutions”—establishes a rule for government, and it is the duty of judges to interpret constitutions in the context of particular cases.³ To foreclose any constitution to inspection by the courts would be “worse than solemn mockery.”⁴

While Justice Marshall penned those famous words long before Montana was even a state, Montana’s Supreme Court has since affirmed that “[t]he office of ultimately interpreting the Constitution lies exclusively in the judiciary.”⁵ Montana’s Constitution, adopted shortly after its 1972 Constitutional Convention, explicitly states that each of the three branches of government have distinct powers, and that one branch cannot usurp the powers or duties of another branch of government.⁶ As such, only the judiciary can interpret the Constitution, as Montana’s courts are routinely called upon to do.⁷ But even more than having the exclusive

1. 5 U.S. (1 Cranch) 137, 177 (1803).

2. See, e.g., *Becky v. Butte-Silver Bow Sch. Dist. No. 1*, 906 P.2d 193, 196 (Mont. 1995) (“The Montana Constitution is the supreme law of the state.”).

3. *Marbury*, 5 U.S. at 137, 178.

4. *Id.* at 180.

5. *In re Lacy*, 780 P.2d 186, 188 (Mont. 1989) (citing *State v. Toomey*, 335 P.2d 1051, 1056 (Mont. 1959)).

6. MONT. CONST. art. III, § 1; see also *Merlin Myers Revocable Tr. v. Yellowstone County*, 53 P.3d 1268, 1272 (Mont. 2002) (“[T]he legislative branch makes the laws, the executive branch carries out the laws, and the judicial branch construes and interprets the laws.”); *State ex rel. Morales v. City Comm’n of City of Helena*, 570 P.2d 887, 889 (Mont. 1977) (“One of the cornerstones of our system of government is the separation of powers of the three branches of government.”).

7. *Merlin Myers Revocable Tr.*, 53 P.3d at 1272 (“It is the exclusive power of the courts to determine if an act of the legislature is unconstitutional.”); see also *Nelson v. City of Billings*, 412 P.3d 1058, 1063 (Mont. 2018) (“This Court exercises plenary review over matters of constitutional interpretation.”).

power to interpret the Constitution, the judiciary has a *duty* to interpret the Constitution when presented with a justiciable case or controversy.⁸

That said, in a recent decision the Montana Supreme Court (“the Court”) expressed reservations about its role in interpreting one of Montana’s most remarkable and unique constitutional protections, the right to a clean and healthful environment, which is enshrined in two separate constitutional provisions: Article II, § 3 and Article IX, § 1.⁹ In *Park County Environmental Council v. Montana Department of Environmental Quality*¹⁰ (“*Park County*”), the Court observed in dicta that it was “not asked here to engage in a difficult exercise of determining what attributes constitute a ‘clean’ or ‘healthful’ environment, or an ‘unreasonable’ amount of degradation, or what the judiciary’s role should be in answering these questions.” As it turns out, however, the framers of Montana’s 1972 Constitution had a robust debate on this very question—who should be entrusted with the responsibility of interpreting the fundamental constitutional right to a clean and healthful environment, the judiciary or the legislature? Their answer: the judiciary.¹¹

This article aims to answer the question posed by the Court in *Park County*, and in so doing, to demonstrate that it is within the judiciary’s competence and duty to elucidate what constitutes a “clean” or “healthful” environment or “unreasonable” degradation, if posed such a question in a justiciable case or controversy. Part I of this article provides a brief background of Montana’s constitutional right to a clean and healthful environment and the key Supreme Court cases addressing the right. Part II carefully analyzes the history of Montana’s 1972 Constitutional Convention, through a separation of powers lens, to illustrate that a majority of the delegates ultimately voted in favor of language enshrining the constitutional right to a clean and healthful environment knowing that the judiciary would, with the help of lawyers and the presentation of scientific evidence, inevitably be called upon to interpret the meaning of the provision, including the specific words “clean” and “healthful.” Part III looks to other cases implicating Montanans’ fundamental rights—including the right to liberty, the right to life’s basic necessities, the right to protect property, the right to know, the right of privacy, and the right to be free from unreasonable searches and

8. In re Clark’s Estate, 74 P.2d 401, 406 (Mont. 1937) (if a statute “is in fact unconstitutional, to decline to so declare would be a violation of our oaths of office. Therefore, the question must be decided.”).

9. MONT. CONST. art. II, § 3, art. IX, § 1.

10. Park Cty. Env’t Council v. Mont. Dep’t of Env’t Quality, 477 P.3d 288, 307–08 (Mont. 2020) [hereinafter *Park County*].

11. At least according to a majority of the delegates. See *infra* Part II.

seizures—to show that courts routinely interpret the meaning of other fundamental constitutional rights; thus, there is no reason why the courts should avoid doing so when it comes to interpreting the right to a clean and healthful environment. Part IV explains the role that the legislative and executive branches play in protecting and enforcing the right to a clean and healthful environment. Finally, Part V offers suggestions for what attributes would constitute a clean and healthful environment. Part V also demonstrates that, regardless of how clean and healthful is defined, Montana’s environment has been significantly and unreasonably degraded in the 50 years since Montana’s Constitution was ratified as a result of the ongoing climate crisis, to which Montana has contributed substantially.

II. MONTANA’S CONSTITUTIONAL RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT

In 1972, during the “rise of environmentalism in the United States,” and at a time when state constitutions were being “rediscovered,” Montana held a Constitutional Convention to revise its Constitution.¹² That Constitutional Convention, the specifics of which are detailed below, resulted in the adoption of “cutting edge”¹³ constitutional provisions that set forth explicit protections for Montana’s environment, which was then, and still is, considered to be one of Montana’s most treasured assets.¹⁴

12. Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana’s Environmental Provisions*, 64 MONT. L. REV. 157, 157 (2003); LARRY M. ELISON & FRITZ SNYDER, *THE MONTANA STATE CONSTITUTION: A REFERENCE GUIDE* xii, 9 (2001).

13. Thompson, Jr., *supra* note 12, at 165; *see also Montana Frames New Constitution*, N.Y. TIMES (Mar. 19, 1972), <https://www.nytimes.com/1972/03/19/archives/montana-frames-new-constitution-assemblys-document-will-go-to.html> [<https://perma.cc/PMD2-DR2V>] (taking note of the right to a clean and healthful environment in Montana’s 1972 Constitution); ELISON & SNYDER, *supra* note 12, at 14 (noting that Montana’s 1972 Constitution contained the strongest environmental protections of any state constitution).

14. *See, e.g.,* Montana Constitutional Convention Proceedings vol. 4, 1205 (Mont. Legis. & Legis. Council 1972) (available at https://courts.mt.gov/external/library/mt_cons_convention/vol4.pdf) (Delegate Burkhardt stating: “Nothing is as important that we will do here as guarantee the future of our citizens, and those who come from all over this country and the world, to enjoy the sense of cleanliness and the health of our environment in Montana.”) [hereinafter Const. Convention Vol. 4]; *see also* MONT. CONST. pmb1. (“We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution.”).

Montana's newly enshrined right to a "clean and healthful environment," which was codified in two separate constitutional provisions, Article II, § 3 and Article IX, § 1, was noteworthy in that it was identified as an "inalienable right" and applied to both present and future generations.¹⁵ It was also novel in the sense that it imposed a duty on both the state and its citizens to not only "maintain" Montana's environment, but also to "improve" the environment.¹⁶ Unlike other constitutional provisions, there was no comparable provision in the state's 1889 Constitution, so the delegates were "plowing new ground" in drafting and adopting such provisions.¹⁷

For 27 years following the adoption of Montana's landmark constitutional right to a clean and healthful environment, the Montana courts pursued a largely narrow interpretation of the state's constitutional environmental protections, or avoided interpreting them all together, as environmental litigation largely revolved around the myriad of state and federal statutes that were adopted to protect the environment and natural resources.¹⁸ However, that changed in 1999 with the Court's decision in *Montana Environmental Information Center v. Department of Environmental Quality*¹⁹ ("MEIC").

In *MEIC*, the Court addressed a challenge to the constitutionality of a Montana statute that issued a blanket exemption from water quality nondegradation review for certain water discharges.²⁰ According to the plaintiffs, the challenged statute, which would have allowed a gold mine's exploratory operations to discharge arsenic-laced water into the Blackfoot River and Landers Fork River without any environmental review, violated their constitutional right to a clean and healthful environment.²¹ The Court first addressed the issue of standing, holding that the plaintiffs'

15. Thompson, Jr., *supra* note 12, at 165–66.

16. *Id.* at 166; MONT. CONST. art. IX, § 1(1).

17. 100 DELEGATES: MONTANA CONSTITUTIONAL CONVENTION OF 1972 28 (Montana Constitutional Society of 1972 Book Committee) (1989).

18. See, e.g., Deborah Beaumont Schmidt & Robert J. Thompson, *The Montana Constitution and the Right to a Clean and Healthful Environment*, 51 MONT. L. REV. 411, 422–41 (1990) (describing the role of state and federal statutes in regulating environmental impacts in Montana); see also Michelle Bryan Mudd, *A "Constant and Difficult Task": Making Local Land Use Decisions in States with a Constitutional Right to a Healthful Environment*, 38 ECOL. L.Q. 1, 29 (2011); MARY CHRISTINA WOOD, *NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE*, Part I (2013) (describing the key federal statutes and the ways they largely failed to effectuate their intended protections for the environment).

19. 988 P.2d 1236 (Mont. 1999) [hereinafter *MEIC*].

20. *Id.* at 1238.

21. *Id.* at 1239–40.

recreational interests in the Blackfoot River sufficed for the purposes of standing, but noted that whether the alleged harms “implicate their constitutional rights . . . is a separate issue.”²² Turning to the constitutional analysis, the Court carefully reviewed Montana’s Constitutional Convention transcripts to determine that Article II, § 3 and Article IX, § 1(1) “must be read together” and “cannot be interpreted separately.”²³ The Court then held, for the first time, that because the right to a clean and healthful environment was included in Article II’s “Declaration of Rights,” it was a fundamental right, and strict scrutiny would apply to any statute or rule implicating that right.²⁴ Of relevance here, the Court added, “[W]e look to the records of the convention discussion and debate to determine the showing that must be made before the rights are implicated and strict scrutiny applied.”²⁵ Turning to the evidence before it, the Court determined that the right to a clean and healthful environment was implicated when the Department of Environmental Quality exempted from review the discharge of waters that it knew contained carcinogens, such as arsenic.²⁶ Ultimately, the Court remanded the case to the lower court to apply strict scrutiny to the challenged statute.²⁷

Shortly after the seminal *MEIC* decision, which vitalized the constitutional right to a clean and healthful environment, the Court decided several other cases implicating that right, further clarifying its reach and meaning. In *Cape-France Enterprises v. In re Estate of Peed*,²⁸ the Court applied the right to a clean and healthful environment to void a buy-sell agreement between private parties. The terms of the sale required subdivision approval, which entailed drilling a well to establish the availability of water; however, a pollution plume was spreading through groundwater in the area, possibly under the tract.²⁹ Citing *MEIC* and its reliance on the environmental provisions in Montana’s Constitution, the Court ruled it would be unlawful for a private party to drill a well for water when there was substantial evidence that doing so “may cause significant degradation of uncontaminated aquifers and pose serious public health risks.”³⁰ Moreover, the Court recognized that absent a demonstration of a compelling state interest, the judicial power could not be invoked in a

22. *Id.* at 1243.

23. *Id.* at 1246, 1249.

24. *Id.* at 1246.

25. *Id.*

26. *Id.* at 1249.

27. *Id.*

28. 29 P.3d 1011, 1017 (Mont. 2001).

29. *Id.* at 1013.

30. *Id.* at 1016–17.

manner that would abet the violation of Article II, § 3 and Article IX, § 1.³¹ Therefore, the Court declined to enforce a contract for the sale of land because a water source could not be obtained in a manner consistent with the constitutional provisions.³²

In *Merlin Myers Revocable Trust v. Yellowstone County*,³³ the Court affirmed the judiciary's exclusive power to say when the right to a clean and healthful environment is violated. *Merlin Myers* concerned a gravel mining application on land governed by zoning statutes that required authorization of the proposed mining subject only to reasonable conditions of operation.³⁴ The Yellowstone County Commissioners denied the application on the basis that it would violate the constitutional right to a clean and healthful environment of those in the surrounding area.³⁵ In reversing the Commissioners' denial, the Court explained that, "as an arm of the executive branch, the Commissioners were required to faithfully execute the laws of Montana," and it was a violation of the separation of powers doctrine for *the Commissioners* to rule on the constitutionality of the conduct at issue.³⁶ The Court stated that determining whether a statute or a project violated the right to a clean and healthful environment was a job "exclusively reserved for the judicial branch."³⁷ Eventually, because Yellowstone County failed to develop its constitutional arguments during the judicial proceedings, the Court declined to address the constitutional issue, instead deciding the case on statutory grounds.³⁸

One decade ago, in *Northern Plains Resource Council, Inc. v. Montana Board of Land Commissioners*,³⁹ the Court considered whether entering into coal leases on state land with Arch Coal violated the right to a clean and healthful environment. The Court determined that the right to a clean and healthful environment was not implicated by the leases themselves because Arch Coal had only the exclusive right to apply for mining permits from the state, but had no right to mine until all necessary permits were obtained and environmental impacts were reviewed under the Montana Environmental Policy Act ("MEPA").⁴⁰ Thus, the Court explained that "[u]nlike the situation in *MEIC*, the leases at issue in the

31. *Id.* at 1016.
32. *Id.* at 1017.
33. 53 P.3d 1268, 1272 (Mont. 2002).
34. *Id.* at 1269.
35. *Id.* at 1270.
36. *Id.* at 1272.
37. *Id.*
38. *Id.* at 1272–73 (Nelson, J., specially concurring).
39. 288 P.3d 169, 171 (Mont. 2012).
40. *Id.* at 174.

present case do not remove any action by Arch Coal from any environmental review or regulation provided by Montana law. Those reviews are only deferred from the leasing stage to the permitting stage.”⁴¹ Because the right to a clean and healthful environment was not implicated, the Court applied rational-basis review and ultimately upheld the leases.⁴² Implicit in the Court’s reasoning was that, if the challenged conduct *did* harm Montana’s environment, the Constitution’s environmental provisions would apply and require strict scrutiny review. Thus, while ultimately deemed premature, the plaintiffs’ case was not wholly unfounded.⁴³

In other cases decided since *MEIC*, the Court has declined to address questions implicating the right to a healthful environment.⁴⁴ For example, in cases that include statutory and constitutional claims, based on the doctrine of constitutional avoidance, the Court will decide cases on statutory bases, instead of constitutional grounds.⁴⁵ On those grounds, the Court has also avoided squarely deciding whether Article II, § 3 and Article IX, § 1 support a cause of action for monetary damages, but has indicated that damages may well be available if statutory or common law remedies are insufficient.⁴⁶ In 2011, the Court declined to hear a case, filed as an original proceeding before it, that argued Montana’s greenhouse gas emissions violated the plaintiffs’ right to a clean and healthful environment and Montana’s public trust doctrine.⁴⁷ According to the

41. *Id.*

42. *Id.* at 174–75.

43. *Cf.* *Seven Up Pete Venture v. State*, 114 P.3d 1009, 1023 (Mont. 2005) (where the Court relied on Art. II, § 3, and Art. IX, § 1(1), in upholding as a reasonable exercise of the police power Initiative 137, which banned open pit mining using cyanide heap leaching).

44. Bryan Mudd, *supra* note 18, at 30.

45. *See, e.g., Merlin Myers Revocable Tr. v. Yellowstone County*, 53 P.3d 1268, 1272 (Mont. 2002); *N. Cheyenne Tribe v. Mont. Dep’t of Env’t Quality*, 234 P.3d 51, 58 (Mont. 2010).

46. *See, e.g., Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1092–93 (Mont. 2007); *Tally Bissell Neighbors, Inc. v. Eyrle Shotgun Ranch, LLC*, 228 P.3d 1134, 1142 (Mont. 2010).

47. *Petition for Original Jurisdiction at 14–16, Barhaugh et al. v. State*, 264 P.3d 518 (Mont. 2011), No. OP 11-0258.

Court, the case involved factual questions that needed to be resolved by a trial court.⁴⁸

Then, in December 2020, the Court issued the most important decision addressing the constitutional right to a clean and healthful environment since *MEIC*. In *Park County*, the Court addressed, among other things, whether a MEPA provision that prohibited courts from granting equitable relief in the face of an ongoing violation of MEPA violated Article II, § 3 and Article IX, § 1 of Montana’s Constitution.⁴⁹ The challenged provision, amended into MEPA in 2011, limited courts to remanding a defective environmental review to the agency, leaving the courts with no power to halt the project in the interim.⁵⁰

The Court reiterated its findings in *MEIC* that the right to a clean and healthful environment is intended to be “both anticipatory and preventative,” and affirmed that Montanans have a right to not just remediate environmental harms, “but to be free of its occurrence in the first place.”⁵¹ As in *MEIC*, the Court looked to the 1972 Constitutional Convention proceedings, this time to underscore the importance of equitable relief, including injunctions, as a way to prevent environmental harms from occurring.⁵² Ultimately, the Court held that the challenged MEPA provision unconstitutionally interfered with the ability of plaintiffs to prevent environmental harms from happening in the first instance, and failed to withstand strict scrutiny, therefore making it facially unconstitutional.⁵³ The Court then concluded that, “[v]acatur of the previously issued exploration permit is an equitable remedy suitable to the present MEPA violations.”⁵⁴

The *Park County* decision is an important and timely reminder of the significance of Montana’s constitutional right to a clean and healthful environment. Indeed, *Park County* actually went further than the *MEIC* decision in terms of relief granted. In *MEIC*, the Court limited its holding “as applied” to the facts of the case and remanded to the lower court to

48. Barhaugh et al. v. State, 264 P.3d 518 (Mont. 2011). In 2020, a new case was filed in the trial court alleging, among other things, that Montana’s fossil fuel energy system violated the rights of 16 youth plaintiffs to a clean and healthful environment. See Held v. State, No. CDV-2020-307 (Mont. 1st Dist. Ct. Aug. 4, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210804_docket-CDV-2020-307_order.pdf [<https://perma.cc/T634-4HE7>].

49. *Park County*, 477 P.3d 288, 302 (Mont. 2020).

50. *Id.* at 303.

51. *Id.* at 303–04.

52. *Id.* at 304, 307.

53. *Id.* at 307–09.

54. *Id.* at 310.

determine if the challenged statute would pass strict scrutiny.⁵⁵ Disparately, in *Park County*, the Court held that the challenged statute failed strict scrutiny and was facially unconstitutional.⁵⁶

Collectively, the aforementioned cases show that Montana courts are not afraid to give teeth to the constitutional right to a clean and healthful environment in certain instances. At the same time, many cases implicating environmental issues continue to be statutory in nature, and under the doctrine of constitutional avoidance, the Court will avoid constitutional questions where possible.⁵⁷ The Court in *Park County* also raised an interesting and important question in dicta, that, while not yet squarely addressed in Montana's clean and healthful environment jurisprudence, could end up before the Court in the future. The Court noted that "[w]e are not asked here to engage in a difficult exercise of determining what attributes constitute a 'clean' or 'healthful' environment, or an 'unreasonable' amount of degradation, or what the judiciary's role should be in answering these questions."⁵⁸ The remainder of this article offers an answer to that open question of the judiciary's role, and, relying on the history of Montana's Constitutional Convention and other Supreme Court cases implicating fundamental rights, shows that the judiciary has an essential role to play in interpreting and protecting Montana's right to a clean and healthful environment.

III. VIEWING MONTANA'S 1972 CONSTITUTIONAL CONVENTION PROCEEDINGS THROUGH A SEPARATION OF POWERS LENS

Montana's "eloquent record" of its 1972 Constitutional Convention is an invaluable resource for clarifying any ambiguity about the meaning of various constitutional provisions or the framers' intent.⁵⁹ Indeed, this history is frequently relied on by the courts in cases implicating Montanans' constitutional rights, including cases that implicate the right to a clean and healthful environment.⁶⁰ The right to a clean and healthful environment is contained in two of Montana's

55. *MEIC*, 988 P.2d 1236, 1249 (Mont. 1999). In concurrence, three justices would have declared the statute facially unconstitutional. *Id.* at 1250.

56. *Park County*, 477 P.3d at 309–10.

57. For a cogent overview of the limitations of statutory cases, see WOOD, *supra* note 18, at Part I.

58. *Park County*, 477 P.3d at 307–08.

59. *MEIC*, 988 P.2d at 1249.

60. See, e.g., *id.* at 1246–48; *Park County*, 477 P.3d at 304.

constitutional provisions.⁶¹ However, the debate surrounding the phrase identified in *Park County*, “clean and healthful,” took place within the context of Article IX, § 1, which was debated six days before the delegates took up Article II, § 3.⁶² While the 1972 Constitutional Convention proceedings reveal robust debate among the delegates throughout the convention, the precise terminology of Article IX, § 1 was “[o]ne of the most debated phrases at the Convention.”⁶³ This was likely because many of the delegates considered the constitution’s environmental protections to be “one of the most important things” addressed at the Convention.⁶⁴

As noted, the Court has reviewed this Constitutional Convention history in past cases, and in so doing, articulated two guiding principles. First, the two separate provisions that refer to a “clean and healthful environment,” Article II, § 3 and Article IX, § 1(1), were intended by the delegates to be interpreted and applied in tandem, not separately.⁶⁵ Importantly, because of its inclusion in Article II’s “Declaration of Rights” of the Constitution, the right to a clean and healthful environment is a fundamental right; thus, government conduct that implicates the right is subject to strict scrutiny.⁶⁶ Second, the Court respects the delegates’ intentions to adopt the most protective constitutional provisions possible.⁶⁷

61. MONT. CONST. art. II, § 3 (Inalienable Rights), art. IX, § 1(1) (Environment and Natural Resources).

62. See Const. Convention Vol. 4, *supra* note 14, at 1198–216; Montana Constitutional Convention Proceedings vol. 5, 1217–250 (Mont. Legis. & Legis. Council 1972) (available at https://courts.mt.gov/external/library/mt_const_convention/vol5.pdf) [hereinafter Const. Convention Vol. 5]. The delegates did not debate or discuss the meaning of the word “unreasonable” during the Convention.

63. Fritz Snyder & Mae Nan Ellingson, *The Lawyer-Delegates of the 1972 Montana Constitutional Convention: Their Influence and Importance*, 72 MONT. L. REV. 53, 95 (2011); see also ELISON & SNYDER, *supra* note 12, at 13 (noting that the debates on Article IX, § 1 “proved to be particularly controversial.”).

64. Const. Convention Vol. 4, *supra* note 14, at 1206 (Delegate Cate); see also *id.* at 1204 (Delegate Robinson stating: “I believe that the Environmental Article is probably the most important thing we will be dealing with in this Constitutional Convention.”); *id.* at 1205 (Delegate Burkhardt stating: “Nothing is as important that we will do here as guarantee the future of our citizens, and those who come from all over this country and the world, to enjoy the sense of cleanliness and the health of our environment in Montana.”).

65. *MEIC*, 988 P.2d 1236, 1246 (Mont. 1999).

66. *Id.* at 1245–46.

67. See, e.g., *id.* at 1246–47 (looking to Montana’s Constitutional Convention history for a conclusion that all the delegates had the goal to implement the strongest environmental protections); see also Const. Convention Vol. 4, *supra* note 14, at 1205 (Delegate McNeil stating: “[O]ur intention was to permit no degradation from the present environment of Montana and affirmatively require enhancement of what we have now.”).

The delegates expressed intergenerational concerns, including concerns about the environment their own children and grandchildren would inherit,⁶⁸ they were clear that their goal was to prevent any additional degradation of Montana's environment going forward and to enhance the state's current environment.⁶⁹

These two principles are beyond dispute, but as the Court noted in *Park County*, what the judiciary's role should be in deciding what constitutes a "clean" or "healthful" environment or an "unreasonable" amount of degradation has not yet been squarely addressed by the courts. However, a close look at the 1972 Constitutional Convention history reveals that the delegates had a vigorous, and at times contentious, debate on this very point. Because of the importance of the history of Montana's Constitutional Convention to the courts in interpreting the Constitution, the remainder of this section takes a close look at that history to help answer the question posed in *Park County* regarding the judiciary's role in determining what constitutes a "clean and healthful" environment.

A. The Debate Over "Clean and Healthful" in Article IX, § 1

The answer to the question posed in *Park County* can be found in the 1972 Constitutional Convention debate about whether or not Article IX, § 1(1) should include the adjectives "clean and healthful" before the noun "environment." In *MEIC*, the Court looked to this debate to illustrate that the delegates intended to adopt the most protective constitutional provision possible.⁷⁰ Simultaneously, when viewed through a separation of powers lens, this debate answers the question of which branch the

68. Const. Convention Vol. 4, *supra* note 14, at 1208 (Delegate James stating: "I think we have to consider the future generations."); Const. Convention Vol. 5, *supra* note 62 at 1231 (Delegate Bugbee stating: "I'd just like each of you to question yourselves about your own children, your own grandchildren, and your own great-grandchildren, and I submit to you that we are using something right now that belongs to them. We're using their land, and we're using their air, and we're using their water; and we have no right to do this. We have no right to take it away from them . . ."); *id.* at 1238 (Delegate Siderius stating: "I think we're doing a disservice to our children and our grandchildren if we don't do something about this environment . . ."). This inter-generational concern finds expression in the Preamble ("for this and future generations") and Article IX, § 1(1) ("for present and future generations.").

69. *MEIC*, 988 P.2d at 1246-47; Const. Convention Vol. 4, *supra* note 14, at 1205.

70. *MEIC*, 988 P.2d at 1248.

framers intended to define the attributes of a “clean” or “healthful” environment.

The language proposed by the majority of the Natural Resources and Agriculture Committee for Article IX, § 1(1) was arrived at after five weeks of debate and testimony from 95 witnesses, including the aviator-ecologist Charles E. Lindbergh, and *did not* include the words “clean and healthful.”⁷¹ The Committee’s proposed language for Article IX, § 1(1) read: “The State of Montana and each person must maintain and enhance the environment of the state for present and future generations.”⁷² According to the comments on the majority proposal, the “[C]ommittee considered at length an exhaustive list of descriptive adjectives to precede the word environment . . . and finally concluded that no descriptive adjective was adequate or necessary.”⁷³ Delegate McNeil, a member of the Committee, explained that “[t]his was not considered by the majority to be a compromise, but rather an acknowledgement of the present Montana environment as encompassing all of those descriptive adjectives.”⁷⁴ Thus, after careful consideration, the Committee recommended excluding any adjectives to modify Montana’s environment.

Notwithstanding the Committee’s recommendation to exclude any adjectives modifying the word “environment,” a lengthy debate ensued among the full assemblage of delegates regarding whether to include “clean and healthful” in Article IX, § 1(1). Infused throughout this debate was an important separation of powers question. Specifically, the delegates debated whether the legislature or the courts should be entrusted with the obligation to determine the attributes of Montana’s environment that they sought to protect.

On the one hand, delegates that opposed the inclusion of modifying adjectives expressed concerns that by including “clean and healthful,” or any other modifiers of “environment” in the constitutional provision, they were improperly infringing on the province of the legislature. According to Delegate McNeil, the Committee “was urged by many to detail the manner of accomplishing this duty [to protect the environment], but the temptation to legislate in the Constitution was resisted and confidence reposed in the Legislature.”⁷⁵ While Delegate Brazier conceded that including the words “clean and healthful” made the

71. Montana Constitutional Convention Proceedings vol. 2, 551 (Mont. Legis. & Legis. Council 1972) (available at https://courts.mt.gov/external/library/mt_cons_convention/vol2.pdf) [hereinafter Const. Convention Vol. 2].

72. *Id.* at 552.

73. *Id.* at 554.

74. Const. Convention Vol. 4, *supra* note 14, at 1200.

75. *Id.*

provision stronger, his position was that such modifying language should be the work of the legislature.⁷⁶ Delegate Scanlin explained how “the tremendous steps that the last session of the Montana Legislature took to face these problems renewed my confidence in what a Legislature can do.”⁷⁷ Delegate Swanberg, noting that Montana’s environment had already experienced significant impacts from pollution, said:

Do we have a right to a healthful environment in view of our past actions? I submit that probably we do not. I submit that what we have instead is an unholy mess that’s going to have to be cured by legislative action. . . . Now, for the edification of the rest of the body, our state Legislature has not been exactly remiss in this matter.⁷⁸

Opponents also raised concerns about relying on the courts to clarify the meaning of “clean and healthful.” For example, Delegate Brazier expressed concern that when the Court was called upon to interpret the meaning of “clean and healthful”—which he saw as inevitable—the Court, perhaps under pressure by “big industry,” would narrowly interpret the words and ultimately make the constitutional provision less protective.⁷⁹ As Delegate Brazier stated:

Although we all seem to know and be aware that we’re drafting a Constitution, I think we sometimes overlook the implications. Now, the reason that the majority of your [C]ommittee, in its wisdom, saw fit not to put qualifying adjectives in the Constitution is that this provision is destined to be interpreted by the Montana Supreme Court. *The Supreme Court is going to decide what this Constitution means; and if it decides wrong, if it decides something conservative that you don’t like, it’s locked in. You can’t change the Constitution.* Whereas, if you put

76. *Id.* at 1209 (Delegate Brazier explaining his “no” vote on Delegate James’ motion to add the words “clean and healthful” to Article IX, § 1(1)).

77. Const. Convention Vol. 5, *supra* note 62, at 1219.

78. *Id.* at 1238; *see also* Const. Convention Vol. 4, *supra* note 14, at 1209 (Delegate Brazier stating that while he felt including the “clean and healthful” made the provision stronger, “it properly belongs in the Legislature.”).

79. Const. Convention Vol. 5, *supra* note 62, at 1209 (Delegate Brazier stating: “[T]here’s going to come a time when there’s a big case against a big industry, and they’re going to bring in some doctors from Pittsburgh to testify that it’s a healthy environment back there, and our Supreme Court is going to set us back instead of forward.”).

the qualifying adjectives in the legislation . . . if the Supreme Court, in your opinion, abuses its discretion and makes a conservative interpretation, it is subject to the checks and balances of being overruled by the Legislature. But if you put it in this Constitution, you lock it in—there’s no chance to correct it.⁸⁰

Delegate Gysler also expressed a lack of confidence in the courts saying, “What the committee really wants to do . . . is to make sure that there is no judicial interpretation that can come along that can say that the environment . . . can go downhill from time to time.”⁸¹

As this history illustrates, opponents of including the modifiers “clean and healthful” in the constitutional language favored strong protections for the environment, but they did not trust the judiciary to effectuate their intended high-level environmental protections. They were concerned that the Court would interpret the language in a manner less protective than intended, and because the language would be in the Constitution, it could then only be changed with another constitutional amendment, a difficult task. Instead, opponents thought that any qualifying language as to the type of environment protected by Montana’s Constitution should be provided by the legislature. In short, one of the key arguments those opposed to including the phrase “clean and healthful” raised was that the legislature, not the courts, should define which attributes of Montana’s environment the new constitutional provision sought to protect. However, that argument, as detailed below, did not prevail.

On the other side of the debate, delegates that supported including “clean and healthful” in Article IX, § 1(1) expressed reservations about trusting the legislature to decide what type of protections Montana’s environment should be afforded. To the supporters, it was squarely within the judiciary’s competency and duty to interpret and define the meaning of constitutional provisions, and they argued the addition of “clean and healthful” would aid in the courts’ interpretation. For example, Delegate Cross expressed skepticism about placing too much faith in the legislature, stating, “Do we have to leave everything up to the Legislature and hope that they will do the job? . . . Can we construct a framework within which

80. *Id.* at 1206 (emphasis added); *see also id.* at 1236 (Delegate Brazier stating: “I’ll bet you—I’ll give you odds that [the Supreme Court] come[s] up with an interpretation that sets you back, and then you have no remedy short of another constitutional amendment. This is all I’m trying to tell you. Don’t leave it to interpretation.”).

81. *Id.* at 1248.

the means and rights are provided to protect these rights?”⁸² Delegate Reichert added that “[t]hese people who say the Legislature can take care of this adequately, I feel, are wrong. I think that our Constitution must contain a provision to protect our environment.”⁸³ Delegate Robinson was blunter, laying blame squarely on the legislature for the state’s current environmental problems: “The present problems we have with our environment are the product of the inability or unwillingness of legislatures to recognize environmental problems and to take proper corrective action.”⁸⁴

The delegates advocating for inclusion of the adjectives “clean and healthful” made no attempt to define the words. However, they were clear about what branch should: the judiciary. Delegate Robinson cut right to the point saying, “I’m not going to attempt to tell you . . . what these things [clean or healthful] mean; but *I can guarantee to you that the Supreme Court will certainly be able to tell you.*”⁸⁵ For Delegate Robinson and others, including the adjectives was important to aid the Court in its inevitable interpretation of the provision. As Delegate Robinson explained, “[W]e need these qualifying adjectives to enable the Supreme Court to interpret what kind of environment we want. Without these qualifying adjectives, the [C]ourt is going to have a very hard time.”⁸⁶ Delegate Cate, a lawyer, said, “I can envision going into court to prove that something is not healthful, but I can’t envision going into court to prove ‘maintain and enhance the environment.’”⁸⁷

After robust and protracted debate that included votes on four different versions of Article IX, § 1(1), the delegates, by a vote of 68 to 19, passed a motion amending Article IX, § 1(1) to read: “The State of Montana and each person must maintain and improve the Montana environment for the present and future generations.”⁸⁸ The language “clean and healthful” was conspicuously absent. While many delegates may have considered their work on Article IX, § 1(1) complete, Delegate Campbell was not yet ready to give up on inclusion of the words “clean and healthful,” and he immediately introduced a motion proposing their addition.⁸⁹ The delegates, apparently having exhausted the debate about whether to include the phrase, declined Chairman Graybill’s invitation for

82. Const. Convention Vol. 4, *supra* note 14, at 1200.

83. Const. Convention Vol. 5, *supra* note 62, at 1232.

84. *Id.* at 1229.

85. *Id.* at 1235 (emphasis added).

86. Const. Convention Vol. 4, *supra* note 14, at 1204.

87. *Id.* at 1206.

88. Const. Convention Vol. 5, *supra* note 62, at 1249.

89. *Id.*

further discussion on the amendment and proceeded directly to a vote. By a vote of 49 to 38, Delegate Campbell's motion passed.⁹⁰ The final language that the delegates agreed to for Article IX, § 1(1) reads: "The State of Montana and each person must maintain and improve a clean and healthful Montana environment for the present and future generations."⁹¹

The debate on the language of Article IX, § 1(1), and specifically whether or not to include "clean and healthful," reveals that the delegates grappled with the very question of what branch—the courts or the legislature—should be responsible for defining the type of environment Montanans are constitutionally entitled to. At the end of the day, a majority of the delegates voted in favor of including "clean and healthful," knowing that the judiciary would be called upon to interpret and define those precise words. Thus, while the Court in *Park County* expressed uncertainty about the judiciary's role in deciding what attributes constitute a "clean" or "healthful" environment,⁹² the history of the 1972 Constitutional Convention reveals that the majority of framers intended for the judiciary to interpret the meaning of those words, and in so doing, to act as a check on the power of the legislature and protect Montana's invaluable environment.

B. Intersection of Article IX, § 1(1) and Article II, § 3

Six days after the delegates voted to add "clean and healthful" to Article IX, § 1(1), they took up debate on the Constitution's Declaration of Rights, which includes Article II, § 3, Inalienable Rights. According to the Chairman and Vice Chairman of the Bill of Rights Committee, "[N]o part of the Constitution being drafted is more important."⁹³ The Bill of Rights Committee's proposal for Article II, § 3 recommended adding two new inalienable rights, the right to basic necessities and the right to seek health,⁹⁴ but intentionally excluded any reference to environmental issues.⁹⁵ That, however, did not dissuade Delegate Burkhardt from promptly making a motion to add "the right to a clean and healthful

90. *Id.* at 1250.

91. *Id.* at 1251 (the remaining non-substantive edits to the section were made by the Committee on Style and Drafting to arrive at the current language in Article IX, § 1(1)).

92. *Park County*, 477 P.3d 288, 307–08 (Mont. 2020).

93. Const. Convention Vol. 2, *supra* note 71, at 619.

94. Const. Convention Vol. 5, *supra* note 62, at 1636–37.

95. *Id.* at 1638 (Delegate Eck stating: "Our Bill of Rights Committee discussed environmental issues at some length and decided that we really shouldn't include a section on environmental bill of rights.").

environment” as the first of Montanans’ inalienable rights.⁹⁶ After a very brief discussion, without any delegates expressing opposition to Delegate Burkhardt’s motion, it passed overwhelmingly by a vote of 79 to 7, and with that, the right to a clean and healthful environment was enshrined as an inalienable right in Article II, § 3.⁹⁷

The addition of the right to a “clean and healthful environment” to Article II, § 3 is extremely important. As the Court stated in *MEIC*, “[T]he right to a clean and healthful environment is a fundamental right *because* it is guaranteed by the Declaration of Rights found at Article II, Section 3.”⁹⁸ The Court went on to say that “[s]tate action which implicates those rights provided for in Article IX, § 1 would normally not be subject to strict scrutiny because those rights are not found in Montana’s Declaration of Rights.”⁹⁹ Therefore, by adding the right to a clean and healthful environment to the list of inalienable rights, the delegates made it unambiguous that it was a self-executing fundamental right deserving of the highest level of protections.¹⁰⁰

Further, inclusion of the right to a clean and healthful environment in the Declaration of Rights provides additional support for the argument that it is the duty of the courts, not the legislature, to decide what “clean and healthful” means, and to play an essential role in protecting such rights. As the Court has made clear, “The rights found in Article II, the Montana Constitution’s Declaration of Rights, are ‘fundamental,’ meaning these rights are significant components of liberty, any infringement of which will trigger the highest level of scrutiny, and thus the highest level of protection *by the courts.*”¹⁰¹ The following section looks to other decisions rendered by the Court where rights located in the

96. *Id.* at 1637; Beaumont Schmidt & Thompson, *supra* note 18, at 421.

97. Const. Convention Vol. 5, *supra* note 62, at 1640.

98. *MEIC*, 988 P.2d 1236, 1246 (Mont. 1999) (emphasis added). The *MEIC* Court relied on its earlier decision in *Wadsworth v. State* as authority for the proposition that rights found in Article II’s “Declaration of Rights” were “fundamental” and therefore triggered strict scrutiny of action that implicates such a right. 911 P.2d 1165, 1172 (1996).

99. *MEIC*, 988 P.2d at 1246.

100. *See, e.g.*, Const. Convention Vol. 5, *supra* note 62, at 1644 (Delegate Dahood stating: “[C]onstitutions are based on the premise that they are presumed to be self-executing, particularly within the Bill of Rights.”).

101. *Ramsbacher v. Jim Palmer Trucking*, 417 P.3d 313, 317 (Mont. 2018) (emphasis added) (citations omitted); *see also Wadsworth*, 911 P.2d at 1171–72 (“We have held a right may be ‘fundamental’ under Montana’s constitution if the right is either found in the Declaration of Rights or is a right ‘without which other constitutionally guaranteed rights would have little meaning.’”) (citing *Butte Cmty. Union v. Lewis*, 712 P.2d 1309, 1311–13 (Mont. 1986)).

Declaration of Rights were implicated to provide further support for the proposition that Montana's courts can, and should, interpret the meaning of the right to a clean and healthful environment, just as they do in other fundamental rights cases.

IV. THE JUDICIARY'S LONG-STANDING PRACTICE OF INTERPRETING THE MEANING OF MONTANANS' FUNDAMENTAL RIGHTS

Reliance on the judiciary to interpret the contours and meaning of Montanans' fundamental constitutional rights is nothing new. As the following examples illustrate, the Court has embraced its duty to "say what the law is"¹⁰² and "interpret[] the Constitution"¹⁰³ in a multitude of cases involving Montanans' fundamental rights. There is no reason the Court should avoid doing so in cases implicating the right to a clean and healthful environment.

A. Inalienable Rights to Liberty, Life's Basic Necessities, and the Protection of Property – Article II, §§ 3 and 17

In addition to the right to a clean and healthful environment, Montanans' inalienable rights protected by Article II, § 3 include the right to liberty, which is also protected by § 17, the right to pursue life's basic necessities, and the right to protect one's property. Although it is difficult to define words and phrases like "liberty," "life's basic necessities," and "protecting property," Montana courts have not been dissuaded from trying.

As a nation, we have long held up "liberty" as one of the most important rights to protect; it is something we have been willing to go to war for and to die for.¹⁰⁴ In 1775, at the Second Virginia Convention, Founding Father Patrick Henry famously declared "Give me liberty, or give me death!"¹⁰⁵ Nevertheless, actually *defining* the right to liberty remains a difficult task, and the Founding Fathers did not leave us a clear

102. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

103. *In re Lacy*, 780 P.2d 186, 188 (Mont. 1989) (citing *State v. Toomey*, 335 P.2d 1051, 1056 (Mont. 1959)).

104. *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 2 (1776) ("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.").

105. Patrick Henry, Give Me Liberty or Give Me Death (Mar. 23, 1775) (transcript at https://avalon.law.yale.edu/18th_century/patrick.asp) [<https://perma.cc/75VM-AZHG>].

definition.¹⁰⁶ During Montana's 1972 Constitutional Convention, Delegate Robinson pointed out this inherent ambiguity to support her argument for including the words "clean and healthful" in Article IX, § 1(1), stating:

I'd like to indicate to you that in the Bill of Rights . . . we have certain metaphysical terms such as "inalienable rights[.]" which include "the right of pursuing life's basic necessities" or "of enjoying or defending their lives and liberty[.]" "of acquiring, possessing and protecting property[.]" and "of seeking their safety, health, happiness in all lawful ways[.]" These are pretty metaphysical terms, too, it seems to me. But it seems that, judging by contemporary community standards, we've had no trouble in determining what "liberty" means, what "freedom" what "inalienable rights" mean. I submit that we are not going to have any trouble in determining what "clean" and "healthful" and "high-quality" means.¹⁰⁷

Delegate Arbanas added "we could have days and days" trying to figure out what "liberty" means, "yet, these are the things that have been the ideal of our country. . . . They have . . . defined the quality of our life. They've been things we've fought for and have—our sons and daughters have died for. Liberty."¹⁰⁸ While Delegates Robinson and Arbanas noted the difficulty of defining "liberty" during the debate surrounding the inclusion of "clean and healthful" in Article IX, § 1(1), no one raised any questions or concerns about the meaning of "liberty" or any other inalienable rights when the delegates considered Article II, § 3. Despite the ambiguity surrounding the meaning of liberty, Montana's courts still attempt to define it in certain cases. For example, in *Armstrong v. State*,¹⁰⁹ the Court held that the right to liberty includes the "rights of personal and procreative autonomy."

The courts have also attempted to define the meaning of "life's basic necessities" and "protecting property," which also lack a clear

106. Chester James Antieau, *Natural Rights and The Founding Fathers – The Virginians*, 17 WASH. & LEE L. REV. 43, 64 (1960) ("Although all of the Founding Fathers recognized liberty as a natural right, they have not left clear evidence of what they meant by the term.").

107. Const. Convention Vol. 5, *supra* note 62, at 1240.

108. *Id.* at 1259–60.

109. 989 P.2d 364, 383 (Mont. 1999).

definition. In *Wadsworth v. State*,¹¹⁰ the Court held that the fundamental right to “life’s basic necessities” includes the right to pursue employment. According to the Court, “While not specifically enumerated in the terms of Article II, § 3 of Montana’s Constitution, the opportunity to pursue employment is, nonetheless, necessary to enjoy the right to pursue life’s basic necessities.”¹¹¹ In *State v. Rathbone*,¹¹² the Court held that the right to protect property includes the right to kill game animals out of hunting season if the use of such force is “reasonably necessary” to protect the property. In these examples, and numerous others, the Court has not shied away from defining the contours of Montanans’ inalienable rights, notwithstanding their “metaphysical” nature.¹¹³

B. Right to Know – Article II, § 9

Montana’s constitutional right to know is another area where the courts have weighed in to interpret the meaning of specific words.¹¹⁴ In *Becky v. Butte-Silver Bow School District No. 1*,¹¹⁵ the Court noted that the phrase in Article II, § 9, “documents . . . of . . . public bodies,” had never been defined in Montana’s Constitution or statutes and had not yet been addressed by any court. As such, the Court undertook the task of defining that specific constitutional language.¹¹⁶ In coming up with a definition, the Court looked to a relevant statute which defined “public records” and stated that “this Court may look beyond the Constitution’s specific language to interpret a constitutional provision when an existing state statute is relevant to, and does not conflict with, the constitutional provision.”¹¹⁷ Importantly, while the Court found it appropriate to consider relevant statutes, it did underscore that the statutory definition could not

110. 911 P.2d 1165, 1172 (Mont. 1996).

111. *Id.*

112. 100 P.2d 86, 93 (Mont. 1940).

113. Const. Convention Vol. 5, *supra* note 62, at 1240.

114. MONT. CONST. art. II, § 9 (“No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.”).

115. 906 P.2d 193, 196 (Mont. 1995).

116. *Id.* at 197 (defining “documents of public bodies” to mean “documents generated or maintained by a public body which are somehow related to the function and duties of that body.”); *see also* Worden v. Mont. Bd. of Pardons & Parole, 962 P.2d 1157, 1162 (Mont. 1998) (holding that inmates’ files are “documents of public bodies.”).

117. *Becky v. Butte-Silver Bow Sch. Dist. No. 1*, 906 P.2d 193, 196 (Mont. 1995).

conflict with the Constitution given that “the Montana Constitution is the supreme law of the state and preempts contrary statutes.”¹¹⁸

As with other fundamental rights cases, the Court often looks to the history of Montana’s 1972 Constitutional Convention to decide right to know cases that present an issue of first impression.¹¹⁹ For example, in *Nelson v. City of Billings*,¹²⁰ the Court thoroughly reviewed the Constitutional Convention proceedings in order to determine that attorney-client and attorney-work-product privileges are not subject to disclosure under the constitutional right to know. In so deciding, the Court acknowledged the framers’ recognition that, “like other fundamental rights protected in the federal and state constitutions, the parameters of the right to know would be interpreted over time in the context of particular factual situations.”¹²¹ So too, the right to a clean and healthful environment should be “interpreted over time” when courts are presented with justiciable cases and fully developed factual records.

C. Right of Privacy – Article II, § 10

The constitutional right of privacy is yet another area where significant judicial interpretation exists.¹²² In *State v. Nelson*,¹²³ for example, the Court noted that the constitutional guarantee of privacy includes “autonomy privacy” and “informational privacy.” Regarding “autonomy privacy,” the Court held in *Gryczan v. State*¹²⁴ that the personal autonomy component of the right of privacy protects “same-gender, consensual sexual conduct.” While acknowledging that the delegates of the 1972 Constitutional Convention rejected a provision that would have protected private sexual acts between consenting adults from criminal prosecution, the Court noted that there was no explanation as to why the provision was rejected, and in any case, did not bear on the Court’s recognition of such a right.¹²⁵

Two years later, in *Armstrong v. State*, another privacy case, the Court noted it had not yet defined the full scope of the personal autonomy

118. *Id.*

119. *Crites v. Lewis & Clark County*, 444 P.3d 1025, 1030 (Mont. 2019).

120. 412 P.3d 1025, 1030 (Mont. 2018).

121. *Id.* at 1066.

122. MONT. CONST. art. II, § 10 (“The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”).

123. 941 P.2d 441, 448 (Mont. 1997).

124. 942 P.2d 112, 122 (Mont. 1997).

125. *Id.* at 123.

component of the right of privacy, and it acknowledged that “defining personal autonomy has and continues to challenge courts, philosophers and authors.”¹²⁶ The Court again looked to the history of the 1972 Constitutional Convention, and noted how the Bill of Rights Committee intentionally declined to define the right of privacy so as to give the courts maximum flexibility to interpret the right.¹²⁷ Fulfilling the duty the framers entrusted to the courts, *Armstrong* interpreted the right of privacy to include the right of each individual “to make medical judgments affecting her or his bodily integrity and health,” and more specifically, the right for women “to seek and to obtain a specific lawful medical procedure, a pre-viability abortion, from a health care provider of her choice.”¹²⁸

In the context of “informational privacy” cases, Montana courts also routinely grapple with difficult questions about what privacy means.¹²⁹ For example, the Court has held that the right of privacy protects one’s medical records,¹³⁰ private telephone conversations,¹³¹ and private conversations held in one’s home or car,¹³² but it does not protect conversations with an undercover agent¹³³ or text messages sent directly to an undercover agent.¹³⁴ Overall, it is clear that Montana courts have provided significant interpretation when it comes to the constitutional right to privacy, demonstrating the courts can do the same for the right to a clean and healthful environment.

126. 989 P.2d 364, 374 (Mont. 1999).

127. *Id.* (citing Const. Convention Vol. 2, *supra* note 71, at 632–33; Montana Constitutional Convention Proceedings vol. 6, 1851 (Mont. Legis. & Legis. Council 1972) (available at https://courts.mt.gov/external/library/mt_cons_convention/vol6.pdf)).

128. *Armstrong*, 989 P.2d at 384; *see also* *Weems v. State*, 440 P.3d 4 (Mont. 2019) (granting the plaintiffs a preliminary injunction against a state statute that restricts the performance of pre-viability abortions to licensed physicians).

129. The 1972 Constitutional Convention history is also influential in “informational privacy” cases. *See, e.g.*, *State v. Goetz*, 191 P.3d 489, 499–500 (Mont. 2008) (looking to Montana’s 1972 Constitutional Convention history to determine whether society would recognize an expectation not to have private conversations electronically recorded).

130. *State v. Nelson*, 941 P.2d 441, 448 (Mont. 1997).

131. *State v. Allen*, 241 P.3d 1045, 1061 (Mont. 2010).

132. *State v. Goetz*, 191 P.3d 489, 499 (Mont. 2008).

133. *State v. Leighty*, 588 P.2d 526, 529 (Mont. 1978).

134. *State v. Staker*, 489 P.3d 489, 507 (Mont. 2021).

*D. Right to be Secure from Unreasonable Searches and Seizures –
Article II, § 11*

Finally, the Court has defined “search” in the many cases examining whether a search or seizure is “unreasonable,” in violation of Article II, § 11.¹³⁵ Further, the Court has delineated factors to evaluate whether a search or seizure is “unreasonable.” Recall that in *Park County* “unreasonable” was the very word that caused the Court to question its interpretative role and ability. In *State v. Hardaway*,¹³⁶ the Court defined “search” as “the use of some means of gathering evidence which infringes upon a person’s reasonable expectation of privacy.” In *State v. Goetz*,¹³⁷ the Court set forth three factors to consider in determining if a search was “unreasonable”: “[1] [W]hether the person challenging the state’s action has an actual subjective expectation of privacy; [2] whether society is willing to recognize that subjective expectation as objectively reasonable; and [3] the nature of the state’s intrusion.”

While Montana’s Supreme Court has acknowledged that “the law of search and seizure is complex and often difficult to apply,” Montana courts have nevertheless decided many questions and controversies regarding what constitutes a search or seizure, and when a search or seizure rises to the level of being unreasonable and thus unconstitutional.¹³⁸ While the test set forth in *Goetz* to determine if a search is “unreasonable” is not directly transferable to deciding if there has been an “unreasonable” depletion or degradation of Montana’s natural resources, it does show the judiciary has the power and competency to set forth factors to evaluate unreasonableness.

*E. Key Lessons from Montana’s Fundamental Constitutional Rights
Jurisprudence*

Taken as a whole, the above examples, which are not exhaustive, illustrate that the Court routinely grapples with difficult cases requiring

135. MONT. CONST. art. II, § 11 (“The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.”).

136. 36 P.3d 900, 905 (Mont. 2001); *see also* *State v. Carlson*, 644 P.2d 498, 501 (Mont. 1982) (defining search).

137. 191 P.3d 489, 497–98 (Mont. 2008).

138. *Carlson*, 644 P.2d at 503 (quoting *Anderson v. State*, 555 P.2d 251, 259 (Alaska 1976)).

interpretation, definition, and refining of the meaning and contours of Montanans' fundamental constitutional rights. In these examples, the Court has, in the context of specific cases, defined the following words and phrases: "liberty," "life's basic necessities," "protect property," "documents of public bodies," "privacy," "search," and "unreasonable." In relying on the history of Montana's 1972 Constitutional Convention, the Court attempts to maintain fidelity to the framers' "constitutional vision." Former Justice James Nelson, who turned to the proceedings of the Constitutional Convention in authoring a number of seminal decisions construing the meaning of various constitutional provisions, described this "interpretational approach" by stating:

I believe this vision is informed by the intent of the framers, by the text of the Constitution, and, importantly, by the ineffable spirit of the living document. Read as an integrated whole, the constitution—the peoples' organic law—not only establishes the structure of tripartite governance, but also, just as importantly, protects the purity, beauty, and diversity of our state's land, air, and water¹³⁹

Taken together, Montana's 1972 Constitutional Convention history and the Court's long-standing practice of interpreting the meaning of Montanans' fundamental rights provide an answer to the question that *Park County* posed about the judiciary's role: courts can and should answer the question of what attributes constitute a "clean and healthful" environment or "unreasonable" degradation when presented with a justiciable case.¹⁴⁰

139. James C. Nelson, *Keeping Faith with the Vision: Interpreting a Constitution for This and Future Generations*, 71 MONT. L. REV. 299, 320 (2010).

140. It is also worth noting that Montana's courts have been interpreting the meaning and scope of Montana's constitutionally grounded public trust doctrine for decades. MONT. CONST. art. IX, § 3(3) ("All Surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."); *see, e.g.*, *Mont. Coal. for Stream Access v. Curran*, 682 P.2d 163 (Mont. 1984); *Galt v. State*, 731 P.2d 912 (Mont. 1987); *In re Adjudication of the Existing Rights to Use of All the Water*, 55 P.3d 396 (Mont. 2002); *Public Lands Access Ass'n v. Bd. of Cty. Comm'rs of Madison Cty.*, 321 P.3d 38 (Mont. 2014).

V. THE UNIQUE ROLES THE LEGISLATIVE, EXECUTIVE, AND JUDICIAL BRANCHES PLAY IN PROTECTING MONTANA'S ENVIRONMENT

While Montana's Constitutional Convention reveals a majority of delegates clearly anticipated that the judiciary would ultimately decide what constitutes a "clean and healthful" environment, the legislative and executive branches also have a role to play in protecting these, and other, constitutional rights. Indeed, Article IX, § 1(2)–(3) expressly state that "the legislature shall provide for the administration and enforcement" of the duty to maintain and improve a "clean and healthful" environment, and the "legislature shall provide adequate remedies for the protection of the environmental life support system."¹⁴¹

The case of *Hagener v. Wallace*¹⁴² illustrates the role that the executive and legislative branches can play in enforcing and providing remedies to protect Montana's environment. In *Hagener*, the Director of the Montana Department of Fish, Wildlife and Parks ("FWP") sought an injunction prohibiting defendants from illegally transferring some 500 elk raised on their game farm to the Crow Indian Reservation for release into the wild.¹⁴³ In upholding the grant of injunctive relief to enforce the statutes, the Court explained:

The statutes at issue in this case are not mere technicalities or unreasonable obstacles to private enterprise. They are essential to ensure the health and safety of Montana's natural wildlife population. They reflect the theory underlying environmental protection that being proactive rather than reactive is necessary to ensure that future generations enjoy both a healthy environment and the wildlife it supports.¹⁴⁴

In sum, the role of the legislative and executive branches in protecting and enforcing constitutional rights is consistent with Montana's separation of powers doctrine, which tasks the legislature with making the laws and the executive branch with carrying out the laws.¹⁴⁵ Thus, while the legislative and executive branches clearly have a role to play in protecting and enforcing constitutional rights, the courts, as an

141. MONT. CONST. art. IX, § 1(2), (3).

142. 47 P.3d 847, 849 (Mont. 2002) (overruled on other grounds by *Shammel v. Canyon Res. Corp.*, 82 P.3d 912 (Mont. 2003)).

143. *Id.*

144. *Id.* at 854 (citing *MEIC*, 988 P.2d 1236, 1249 (Mont. 1999)).

145. MONT. CONST. art. V, § 1, art. VI, § 4(1), art. III, § 1.

independent third branch of government, have the unique power to define the contours of the constitutional right to a “clean and healthful” environment, or, as Justice Marshall put it in *Marbury v. Madison*, “to say what the law is.”¹⁴⁶ This aged refrain, premised on a power and an attendant duty, has found contemporary expression in the context of Montana’s Constitution: “Our courts (judges and justices, really)—and the Montana Supreme Court in particular—bear the critical responsibility of construing and interpreting [the Constitution]. The courts say what the law is; what the Constitution means.”¹⁴⁷ The Court itself has acknowledged an obvious logical corollary to this critical responsibility of the judiciary: “Constitutional rights that cannot be enforced are illusory. It is as if those rights cease to exist as legal rights.”¹⁴⁸ For example, in *Bryan v. Yellowstone County Elementary School District No. 2*,¹⁴⁹ the Court was faced with the task of construing the meaning of “reasonable” in the context of the right to participate. It rejected the defense of a *pro forma* mechanical compliance offered by the district, stating:

Such a superficial interpretation of the right to participate to simply require an uninformed opportunity to speak would essentially relegate the right of participation to paper tiger status in the face of stifled disclosure and incognizance. Given the tenor of the delegates’ insistence upon open government and citizen participation, we find it improbable that they envisioned and subsequently memorialized such a hollow right.¹⁵⁰

Saying what the law is, so that rights are not relegated to paper tiger status, includes deciding what attributes constitute a “clean and healthful” environment or “unreasonable” degradation. Put differently, the Court’s duty is to define the meaning of constitutional provisions, and set constitutional standards, based on the evidence presented in justiciable cases, as they have done in so many other constitutional cases.¹⁵¹

146. 5 U.S. (1 Cranch) 137, 177 (1803).

147. Nelson, *supra* note 139, at 322.

148. Kloss v. Edward D. Jones & Co., 54 P.3d 1, 13 (Mont. 2002) (Nelson, J., majority concurrence).

149. 60 P.3d 381, 392 (Mont. 2002).

150. *Id.* at 392.

151. See *supra* Part IV.

Setting constitutional standards is a job “exclusively reserved for the judicial branch.”¹⁵² Importantly, by setting constitutional standards, the courts provide the legislative and executive branches with guardrails to guide their conduct and ensure all branches are acting in a constitutionally compliant manner while fulfilling their affirmative constitutional obligations. By maintaining this vital separation of power, the nation avoids a concentration of too much power in the political branches—after all, the branch that makes and carries out the laws of the state should not also judge the constitutionality of those laws.

In addition to defining words and phrases, and setting constitutional standards, once the legislature or executive agencies act, the courts have a duty to review the actions of the political branches to ensure that they satisfy the state’s affirmative constitutional obligation to maintain and improve a “clean and healthful” environment and avoid unreasonable depletion or degradation of Montana’s natural resources. As the Court stated in the school funding case *Columbia Falls Elementary School District No. 6 v. State*,¹⁵³ once the legislature has “executed” its constitutional mandate, “[a]s the final guardian and protector of the right to education, it is incumbent upon the court to assure that the system enacted by the Legislature enforces, protects and fulfills the right.” So too with the right to a “clean and healthful” environment, the courts must ensure that legislative and executive actions properly enforce, protect, and fulfill the right.¹⁵⁴ Doing so is an essential part of fulfilling the judiciary

152. *Merlin Myers Revocable Tr. v. Yellowstone County*, 53 P.3d 1268, 1272 (Mont. 2002).

153. 109 P.3d 257, 261 (Mont. 2005).

154. The Montana Legislature has acted through a myriad of legislative schemes to implement the constitutional right to a clean and healthful environment. *See, e.g.*, MONT. CODE ANN. § 75-1-102(1) (2021) (“The legislature, mindful of its constitutional obligations under Article II, [§] 3, and Article IX of the Montana constitution, has enacted the Montana Environmental Policy Act.”); MONT. CODE ANN. § 82-4-202(1) (“The legislature, mindful of its constitutional obligations under Article II, [§] 3, and Article IX of the Montana [C]onstitution, has enacted The Montana Strip and Underground Mine Reclamation Act.”); MONT. CODE ANN. § 15-24-3101 (energy development must be consistent with maintaining a clean and healthful environment); *State v. Boyer*, 42 P.3d 771, 776 (Mont. 2002) (describing role of Montana’s wildlife laws in protecting right to clean and healthful environment); *Cnty. Ass’n for N. Shore Conservation, Inc. v. Flathead County*, 445 P.3d 1195, 1199–200 (Mont. 2019), *reh’g denied* (Aug. 20, 2019) (statutory protections for Montana’s lakes founded on the constitutional right to a clean and healthful environment).

branch's constitutional obligation to act as a check on the conduct of the political branches.

VI. DEFINING “CLEAN AND HEALTHFUL” AND “UNREASONABLE” IN
THE CONTEXT OF THE RIGHT TO A CLEAN AND HEALTHFUL
ENVIRONMENT

While the preceding sections look to the history of Montana's 1972 Constitutional Convention and Montana's constitutional jurisprudence to argue that it is within the competency and duty of the courts to determine what attributes constitute a “clean and healthful” environment and “unreasonable” depletion or degradation, the question of what those terms actually mean remains unanswered. Ultimately, that question should be decided by the courts in the context of individual cases implicating the right to a “clean and healthful” environment, with the help of a fully developed factual record, including expert testimony. However, this section proffers ideas—based on the 1972 Constitutional Convention and the framers' intent, relevant statutory schemes, and dictionary definitions—as to what attributes constitute a “clean and healthful” environment or “unreasonable” degradation.

As previously noted, there was widespread consensus among the framers that Montana's constitutional protections for the environment were intended to be as strong as possible. The framers' clear intent was to ensure that Montana's environment experienced no degradation beyond what it had already experienced by 1972, which many already saw as too much, and to implement proactive improvements. As Delegate Robinson explained, “I think it's clear that we do not want to maintain the present environment, for example, in Missoula or Columbia Falls or other places, since the rate of death by cancer is twice as high in Butte and Anaconda as it is anywhere else in the State of Montana.”¹⁵⁵ Delegate McNeil, a member of the Natural Resources and Agriculture Committee, noted that “our intention was to *permit no degradation from the present environment of Montana* and *affirmatively require enhancement* of what we have now.”¹⁵⁶ Delegate Gysler, also a member of the Natural Resources and Agriculture Committee, added the goal was to ensure that the environment

155. Const. Convention Vol. 4, *supra* note 14, at 1204.

156. *Id.* at 1205 (emphasis added); *see also* *MEIC*, 988 P.2d 1236, 1247 (Mont. 1999).

would not “go downhill from time to time,” but that “[t]he only way it can go is uphill, is get better.”¹⁵⁷

The delegates were also clear about their intention that the Constitution offer long-standing protections for Montana’s environment and citizens, including its children and future generations.¹⁵⁸ As Delegate Cross noted, “This Constitution is not for today or even for tomorrow, but must stand the test of time.”¹⁵⁹ The Constitution’s Preamble also reflects these intergenerational concerns:

We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty *for this and future generations* do ordain and establish this constitution.¹⁶⁰

While this history offers critical context and background for interpreting the meaning of “clean and healthful” consistent with the constitutional vision of the framers, it does not provide a specific definition.¹⁶¹ Montana’s constitutional jurisprudence instructs that statutory schemes and dictionary definitions can provide additional guidance as to what constitutes a “clean and healthful environment.”¹⁶² Based on a review of relevant statutes and dictionary definitions, including definitions from dictionaries that were available to the framers, and

157. Const. Convention Vol. 5, *supra* note 62, at 1258 (Delegate Dahood stating: “And the environment that we have now is not going to become worse by any degree. It is going to improve.”).

158. Const. Convention Vol. 4, *supra* note 14, at 1208 (Delegate James stating: “I think we have to consider the future generations.”); Const. Convention Vol. 5, *supra* note 62, at 1231, 1238.

159. Const. Convention Vol. 4, *supra* note 14, at 1199.

160. MONT. CONST. pmbl. (emphasis added).

161. *Nelson v. City of Billings*, 412 P.3d 1058, 1064 (Mont. 2018) (“[W]e have long held that we must determine constitutional intent not only from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve.”).

162. *See, e.g., Becky v. Butte-Silver Bow Sch. Dist. No. 1*, 906 P.2d 193, 196–97 (Mont. 1995) (looking to statutes for support in defining “documents of public bodies.”).

keeping the framers' intent in mind, some of the essential attributes of a clean¹⁶³ and healthful¹⁶⁴ environment¹⁶⁵ include an environment that:

- (1) Is free from pollution that threatens or harms human health or safety;¹⁶⁶
- (2) Is free from pollution that threatens or harms Montana's environment or natural resources;¹⁶⁷
- (3) Protects and preserves Montana's climate, biodiversity, and ecological communities;¹⁶⁸
- (4) Protects and preserves Montana's cultural heritage and diversity;¹⁶⁹
- (5) Fulfills social and economic needs and development;¹⁷⁰
- (6) Fulfills the needs of both present and future generations; and¹⁷¹
- (7) At minimum, meets federal and state environmental and health standards.¹⁷²

Recall, in *MEIC*, the Court instructed that Article II, § 3, and Article IX, § 1(1), as well the Preamble “must be read together.”¹⁷³ Thus, keeping these attributes of a “clean and healthful environment” in mind, “unreasonable” depletion or degradation of natural resources occurs when there is any depletion or degradation of any of the above attributes. In keeping with the framers' intent, these proposed attributes are protective

163. According to Webster's Dictionary, “clean” means “free from dirt or pollution . . . not fouled . . . free from contamination.” *Clean*, WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 154 (7th ed. 1971).

164. According to Webster's Dictionary, “healthful” means “beneficial to health of body or mind,” and “health” was defined as “the condition of being sound in body, mind, or soul . . . freedom from disease of pain.” *Id.* at 383.

165. According to Webster's Dictionary, “environment” means “a: the complex of climatic, edaphic, and biotic factors that act upon an organism or an ecological community and ultimately determine its form and survival”; or “b: the aggregate of social and cultural conditions that influence the life of an individual or community.” *Id.* at 278.

166. MONT. CODE ANN. §§ 17-6-302, 75-1-103(2)(b)–(c), 75-2-102(2).

167. *Id.* § 75-2-102(2).

168. *Id.* § 75-1-103(2)(e).

169. *Id.* § 75-1-103(2)(b), (e).

170. *Id.* §§ 75-1-103(1), 75-2-102(2).

171. *Id.* § 75-1-103(1), (2)(a).

172. *Id.* § 17-6-302(2).

173. *MEIC*, 988 P.2d 1236, 1249 (Mont. 1999).

and err on the side of *preventing* environmental harms from happening in the first place. The Court captured this sentiment in *MEIC*, stating:

[W]e conclude that *the delegates' intention was to provide language and protections which are both anticipatory and preventative.* The delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. Our constitution does not require that dead fish float of the surface of our state's rivers and streams before its *farsighted environmental protections can be invoked.*¹⁷⁴

Whether or not these proposed attributes of a “clean and healthful” environment are overly protective or not protective enough, there is one thing that is beyond dispute: Montana’s current environment is not “clean” or “healthful,” and it has been unreasonably depleted and degraded since 1972, contrary to the framers’ clear intent.¹⁷⁵ There are various metrics by which to measure both changes in Montana’s environment since 1972 and the status of Montana’s current environment. But one need not be a scientist or health expert to know that Montana’s environment and Montanans’ health are under siege from the existential harms posed by the ongoing climate crisis.

Since the right to a “clean and healthful” environment was enshrined in Montana’s Constitution in 1972, the global atmospheric carbon dioxide (“CO₂”) concentration has increased dramatically from 327 parts per million (“ppm”) in 1972 to approximately 416 ppm today,¹⁷⁶ well above the maximum safe concentration of 350 ppm, the level at which Earth’s energy balance would be restored.¹⁷⁷ The rising atmospheric CO₂ concentration and resulting climate crisis is caused by human activities,

174. *Id.* (emphasis added).

175. *See, e.g.,* Beaumont Schmidt & Thompson, *supra* note 18, at 442 (“Unfortunately, our post-convention history evidences limited efforts at preventing—as opposed to controlling—pollution.”).

176. Global Monitoring Laboratory, *Trends in Atmospheric Carbon Dioxide*, NAT’L OCEANIC AND ATMOSPHERIC ADMIN., <https://gml.noaa.gov/ccgg/trends/data.html> [<https://perma.cc/TY6Q-MNGH>] (last visited Apr. 3, 2022).

177. Karina von Schuckmann et al., *Heat Stored in the Earth System: Where Does the Energy Go?*, 12 EARTH SYS. SCI. DATA 2013, 2014 (2020); James Hansen et al., *Assessing “Dangerous Climate Change”: Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature*, 8 PLOS ONE 1, 5 (2013) (stating Earth’s energy balance occurs when the incoming solar radiation is equal to the outgoing radiation).

namely the extraction, transport, and combustion of fossil fuels.¹⁷⁸ Montana, with its vast fossil fuels reserves, history of fossil fuel development, and ongoing affirmative support for increasing utilization and development of coal, oil, and gas has been and continues to be a significant contributor to the climate crisis.¹⁷⁹ The historic and ongoing combustion of Montana's fossil fuels contributes to and exacerbates the climate crisis, resulting in a myriad of adverse impacts to Montana's environment and Montanans' health. There are also a whole host of environmental and human health impacts separate and apart from the climate impacts that result directly from fossil fuel extraction, transportation, and combustion.

Temperatures have risen steadily across Montana over the past 50 years. For example, in Billings and Bozeman, average spring temperatures have increased by 1.8°F and 2.4°F, respectively, from 1970 to 2020.¹⁸⁰ Rising temperatures are responsible for several destructive impacts in Montana, including increasingly frequent and severe droughts and wildfires, declining snowpack, and retreating glaciers.¹⁸¹ Wildfires and droughts are among the most devastating climate impacts affecting Montana, taking a significant toll on Montanans' environment, property, economy, health, and safety, and both have increased in frequency and severity in the past 50 years.¹⁸² Since the 1970s, the length of Montana's

178. CATHY WHITLOCK ET AL., 2017 MONTANA CLIMATE ASSESSMENT 1, 13 (2017).

179. Between 1972 and 2019, approximately 1,690,000 thousand short tons of coal, 2,980,000 million cubic feet of natural gas, and 1,220,000 thousand barrels of crude oil were produced in Montana. *State Energy Data 2019: Production, Table PT1 Primary Energy Production Estimates in Physical Units, Montana, 1960–2019*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/state/seds/sep_prod/pdf/PT1_MT.pdf [<https://perma.cc/6B5R-3MVW>] (last visited Apr. 4, 2022).

180. *2021 Spring Package: Average Spring Temperature*, CLIMATE CENTRAL, <https://www.climatecentral.org/outreach/alert-archive/2021/2021SpringPackage.html> [<https://perma.cc/2PJQ-ZY28>] (last visited Apr. 4, 2022).

181. WHITLOCK ET AL., *supra* note 178, at 72 (“Montana’s snowpack has declined over the observational record (i.e., since the 1930s) in mountains west and east of the Continental Divide; this decline has been most pronounced since the 1980s. [*high agreement, medium evidence*] . . . Changes in snowpack and runoff timing will likely increase the frequency and duration of drought during late summer and early fall. [*high agreement, medium evidence*]”); *id.* at 86 (“One of the most visible manifestations of climate warming in Montana is the rapid melting of the last remaining glaciers in Glacier National Park.”); *id.* at 174 (“Across Montana, conditions that lead to high fire risk (i.e., likelihood of occurrence) are becoming more common: seasonal maximum temperatures are increasing, snowmelt is occurring earlier, minimum relative humidities are decreasing, and fuels are becoming drier.”).

182. *See generally id.*

wildfire season has doubled, and there has been a *40-fold increase* in the numbers of acres burned by wildfires each year.¹⁸³ These climate disasters are causing significant social and economic impacts across the state. Of the 29-billion-dollar weather and climate disasters that affected Montana between 1980 and 2021, 22 of them were drought or wildfire related.¹⁸⁴

In addition to causing physical destruction, impacts associated with rising temperatures threaten Montanans' physical health. For example, wildfires are a significant cause of the increasingly unhealthy air quality in many parts of Montana. In 2021, Montana was home to four of the top 25 counties in the U.S. most affected by short-term particle pollution: (1) Lewis and Clark County, (2) Ravalli County, (3) Lincoln County, and (4) Missoula County.¹⁸⁵ Missoula was ranked as the ninth-worst city affected by short-term particle pollution.¹⁸⁶ According to the Daily Air Quality Index for Missoula, over two-thirds (68%) of the days in July and August 2021 had "moderate" or worse air quality, and nearly one out of every three days (29%) had air quality that was "unhealthy for sensitive groups," which encompasses children, or simply "unhealthy."¹⁸⁷

A recent report, *Climate Change and Human Health in Montana: A Special Report of the Montana Climate Assessment*, affirmed that climate change is already harming Montanans' health and way of life, and it will get worse in the future if it goes unaddressed.¹⁸⁸ According to the report, rising temperatures and increasing wildfires "will worsen heat- and smoke-related health problems such as respiratory and cardiopulmonary illness," and "worsen[] allergies and asthma."¹⁸⁹ Climate changes are also

183. Mont. Dep't of Nat. Res. & Conservation, *Montana Statewide Assessment of Forest Conditions*, MONTANA FOREST ACTION ADVISORY COUNCIL 1, 55 (Dec. 15, 2020), <https://www.montanaforestactionplan.org/pages/assessment> [<https://perma.cc/MXC3-ZADC>]; Alyson Kenward et al., *Western Wildfires: A Fiery Future*, CLIMATE CENTRAL 26 (June 2016), <http://assets.climatecentral.org/pdfs/westernwildfires2016vfinal.pdf> [<https://perma.cc/X9VB-28JG>].

184. Nat'l Ctrs. for Env't Info., *Billion-Dollar Weather and Climate Disasters*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., <https://www.ncdc.noaa.gov/billions/summary-stats/MT/1980-2021> [<https://perma.cc/A6A3-GS9X>] (last visited Apr. 4, 2022).

185. Am. Lung Ass'n, *State of the Air 2021*, LUNG.ORG 18 (2021), <https://www.lung.org/getmedia/17c6cb6c-8a38-42a7-a3b0-6744011da370/sota-2021.pdf> [<https://perma.cc/LPJ4-SHXW>].

186. *Id.* at 14.

187. *Montana: Current Air Quality*, AIR NOW, <https://www.airnow.gov/state/?name=montana> [<https://perma.cc/MCT4-2DWC>] (last visited Apr. 4, 2022).

188. ALEXANDRA ADAMS ET AL., CLIMATE CHANGE AND HUMAN HEALTH IN MONTANA: A SPECIAL REPORT OF THE MONTANA CLIMATE ASSESSMENT (2021); *see generally* WHITLOCK ET AL., *supra* note 178.

189. ADAMS ET AL., *supra* note 188, at XIX.

“reducing the availability of wild game, fish, and many subsistence, ceremonial, and medicinal plants, which threatens food security, community health, and cultural well-being, particularly for tribal communities.”¹⁹⁰ In addition to taking a toll on physical health, the report also found that increased stress and mental illness are an “under recognized but serious health consequences of climate change.”¹⁹¹

In short, there is ample and alarming evidence that Montana’s environment is not clean *or* healthful, in large part due to the climate crisis, to which Montana’s vast fossil fuel resources substantially contribute.¹⁹² Given the recalcitrance of Montana’s political branches to addressing the crisis, and insistence on continuing to rely on fossil fuels as a primary energy source, despite longstanding knowledge of the dangers posed by climate change and fossil fuels,¹⁹³ the courts may well be called upon to decide cases that seek to address how Montana’s fossil fuel extraction and combustion infringes on Montanans’ constitutional right to a “clean and healthful” environment.¹⁹⁴ However, given the gravity of the crisis, the urgent need for action, and the magnitude of what is at stake, it is imperative that all three branches of government fulfill their respective duties—consistent with Montana’s separation of power doctrine—to ensure that Montanans’ fundamental right to a clean and healthful environment is protected for this and future generations.

VII. CONCLUSION

On November 29, 1971, the first day of Montana’s Constitutional Convention, then-Governor Forrest Anderson delivered opening remarks

190. *Id.*

191. *Id.*

192. *See generally* WHITLOCK ET AL., *supra* note 178.

193. For example, in 1968, the Montana Department of Health held the conference “*A Montana Strategy for a Livable Environment*” at the Montana House of Representatives. The conference proceedings produced a report that included information about the harmful impacts of air pollution and rising greenhouse gas emissions, and a warning that rising temperatures “could spell disaster.” *A Montana Strategy for a Livable Environment: Conference Proceedings*, MONTANA DEP’T OF HEALTH 1, 35 (Sep. 15, 1969), <https://ia800907.us.archive.org/15/items/montanastrategyf1968mont/montanastrategyf1968mont.pdf> [<https://perma.cc/4UYV-CR5Y>]; *see also* JAMES GUSTAVE SPETH, *THEY KNEW: THE US FEDERAL GOVERNMENT’S FIFTY-YEAR ROLE IN CAUSING THE CLIMATE CRISIS* (2021).

194. One such case is *Held v. State*, No. CDV-2020-307 (Mont. 1st Dist. Ct. Aug. 4, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210804_docket-CDV-2020-307_order.pdf [<https://perma.cc/T634-4HE7>].

to the delegates.¹⁹⁵ In language reminiscent of Justice Marshall's words on the import of a written constitution in *Marbury v. Madison*, Governor Anderson told the delegates that a "properly written constitution will define the structure and responsibilities of government and provide for the protection of the rights of the people of this State. Many generations of Montanans not yet born will live under these laws if you do your job well."¹⁹⁶ Governor Anderson added that the delegates were charged with drafting a constitution intended to "withstand the seasons of history."¹⁹⁷

By all accounts, the delegates took to heart their responsibility to draft a constitution that this and future generations of Montanans can successfully live under.¹⁹⁸ The intergenerational concerns of the delegates were especially apparent in their debates about constitutional protections for Montana's environment and natural resources. The delegates were clear that it was their goal to adopt the strongest constitutional protections possible so that Montana's unique and precious environment could be enjoyed by both present and future generations.¹⁹⁹ As Delegate Cross presciently stated,

This Constitution is not for today or even for tomorrow, but must stand the test of time. . . . Project yourselves 50 years into the future, if you will, and from that vantage point look back at us here in Convention Hall. Ask yourselves if we are seizing our moment in history to do something that makes us great.²⁰⁰

Now, we are 50 years in the future as 2022 marks the 50th anniversary of the ratification of Montana's Constitution. Looking back, few would doubt that the delegates met Governor Anderson's charge to draft a constitution intended to "withstand the seasons of history."²⁰¹ The delegates set up a framework to ensure protection and improvement of Montana's environment and life support systems. But, by design, they did

195. Montana Constitutional Convention Proceedings vol. 3, 2 (Mont. Legis. & Legis. Council 1972) (available at https://courts.mt.gov/external/library/mt_cons_convention/vol3.pdf) [hereinafter Const. Convention Vol. 3].

196. *Id.* at 3.

197. *Id.*

198. *See, e.g.*, MONT. CONST. pmbl.; *see also* ELISON & SNYDER, *supra* note 12, at 17 (Montana's Constitution "is a grand document but is not perfect. . . . Mistakes, compromises, and political grievances were minimal. Grand ideas and powerful, if not always precise, language dominated the document.").

199. *See generally* Const. Convention Vol. 4, *supra* note 14.

200. Const. Convention Vol. 4, *supra* note 14, at 1199.

201. Const. Convention Vol. 3, *supra* note 195, at 3.

not define the contours of the constitutional right to a “clean and healthful” environment, or the precise meaning of the words “clean,” “healthful,” or “unreasonable”—just as they did not define the precise contours or meaning of other constitutional provisions. A review of the 1972 Constitutional Convention history reveals that the delegates expressly debated which branch of government—the judiciary or the legislative branch—should be tasked with defining Montana’s newly enumerated constitutional protections for the environment.²⁰² After robust debate, a majority of the delegates ultimately approved two separate constitutional provisions that enshrined Montanans’ fundamental right to a “clean and healthful environment,” accepting as an inevitability that the judiciary would be called upon to interpret and define the meaning of “clean and healthful.”²⁰³

That a majority of the delegates expected the courts to interpret and define the meaning of the constitutional right to a “clean and healthful” environment, and other constitutional rights—or put differently, expected the courts to “say what the law is”²⁰⁴—is hardly surprising. After all, in our constitutional democracy, courts have been interpreting the meaning of constitutional rights for over 200 years. And, as illustrated in Part III, Montana’s courts routinely interpret the meaning of Montanans’ fundamental constitutional rights. Accordingly, while the Court in *Park County* questioned what the judiciary’s role should be in determining what attributes constitute a “clean” or “healthful” environment, or an “unreasonable” amount of degradation, the answer is clear.²⁰⁵ Consistent with the intent of the framers of Montana’s Constitution, and the obligation of an independent judiciary in a constitutional democracy to say what the law is, it is within the duty and competence of Montana’s judiciary to define the attributes of the right to a “clean and healthful” environment and “unreasonable” degradation.

Unfortunately, despite the delegates best efforts to set up a constitutional framework to protect and improve Montana’s environment and natural resources for present and future generations, 50 years later, Montana’s environment, and the health and safety of its citizens, face unprecedented dangers and degradation due to the climate crisis, to which Montana is a significant contributor.²⁰⁶ While all three branches of government should play a role in addressing the threats posed by this crisis, Montana’s courts have a unique and essential role to play in

202. *See supra* Part III.

203. MONT. CONST. art. II, § 3, art. IX, § 1(1).

204. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

205. *Park County*, 477 P.3d 288, 307–08 (Mont. 2020).

206. *See supra* Part VI.

protecting the fundamental right to a “clean and healthful” environment, as well as other fundamental rights, implicated by the climate crisis.

On this 50th anniversary of the ratification of Montana’s Constitution, it is worth recalling the words of Delegate Aronow who, speaking to the importance of an independent judiciary, said:

I would like to point out to you some general observations on the importance of the courts; and I would like to call to your attention that no matter what broad powers or rights you provide for people in the Bill of Rights, the value of those rights are dependent entirely on how the court interprets them. . . . Having those rights be meaningful is dependent entirely upon the courts. . . . *The Constitution is, true enough, the framework of government, but on the other hand, it is a last bulwark and protection that the people have.*²⁰⁷

Delegate Aronow then explicitly referred to the environmental and natural resources provisions of the Constitution, adding: “I understand there’s a strong Natural Resources Article coming out. There’s going to be some strong statements made as to ecology. *Those statements are meaningless unless you have an independent Judiciary that’s willing and able to enforce those rights guaranteed to you.*”²⁰⁸

Delegate Aronow, along with the majority of other delegates,²⁰⁹ understood that without an independent judiciary, the rights protected by Montana’s new Constitution would be essentially worthless. Fortunately, Montana does have a strong and independent judiciary that has a tradition of standing up to the political branches when necessary to protect

207. Const. Convention Vol. 4, *supra* note 14, at 1069 (emphasis added).

208. *Id.* at 1070 (emphasis added).

209. After Delegate Aronow’s comments, Art. VII, § 3, which addresses the organization of Montana’s Supreme Court, was passed by an overwhelming majority with 90 delegates voting “aye” and five voting “no.” *Id.* at 1071 (emphasis added).

individuals' fundamental constitutional rights.²¹⁰ In order to ensure that the fundamental right to a “clean and healthful” environment does not become “meaningless,” and the delegates' vision of protecting Montana's unparalleled environment for generations to come is realized, the courts must fully embrace their duty to interpret and enforce Montanans' inalienable right to a “clean and healthful” environment.

210. As this article goes to press, a hopeful harbinger of the continued vitality of this tradition comes in the form of a concurring opinion by Chief Justice McGrath of the Montana Supreme Court, who authored the question posed in *Park County*. In *Cottonwood Env't Law Ctr., et al. v. Austin Knudsen*, an original proceeding, the petitioners successfully challenged the Attorney General's legal sufficiency determination regarding a ballot initiative to provide statutory protections to designate sections of specified rivers. In his concurrence, Chief Justice McGrath explained: “Although we have determined on the record here that the Attorney General's conclusions were incorrect as a matter of law—resolving this specific case—it is important to clarify that even if the Attorney General's grasp of the constitutional doctrine were correct, he lacks the power to reject a proposed ballot initiative based on an opinion about its constitutionality. Under our constitutional structure and separation of powers, only the court may make determinations about a law's constitutionality.” 505 P.3d 837, 843 (Mont. 2022).