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MEIC v. DEQ: An Inadequate Effort to Address the Meaning of Montana's Constitutional Environmental Provisions

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COMMENTARY

MEIC V. DEQ: AN INADEQUATE EFFORT TO ADDRESS THE MEANING OF MONTANA'S CONSTITUTIONAL ENVIRONMENTAL PROVISIONS

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I. INTRODUCTION

In October 1999, the Montana Supreme Court rendered a decision in *Montana Environmental Information Center v. Department of Environmental Quality*[1] (hereinafter "MEIC") for the first time interpreting the environmental quality provisions inserted in Montana's Constitution in 1972.[2] The parties involved in the case, as well as the environmental and business

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1. 1999 MT 248, 296 Mont. 207, 988 P.2d 1236 [hereinafter *MEIC*].

2. MONT. CONST. art. II, §3 ("All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment. . . ."); MONT. CONST. art. IX, § 1 ("(1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations. (2) The legislature shall provide for the administration and enforcement of this duty. (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.").

communities in Montana, and certainly the justices of the Montana Supreme Court, all recognized the potential landmark status of the case. I, as a professor of environmental law in Montana, and as someone who had published two law review articles related to the subject of the case,[3] also eagerly anticipated the Supreme Court's decision on this important matter.

Upon hearing the *MEIC* decision had been released, I promptly printed a copy from my computer and read through it quickly. My initial reaction to the decision was confusion over the exact nature of the holding. I studied the opinion further in preparation for discussing it with my Introduction to Environmental Law class. I wanted to ask my class what they thought of the Court's holding, how they viewed the Court's analysis and how they would advise the district court judge to whom the case was remanded. What I discovered in preparing for that class shocked me. The Supreme Court in *MEIC* had rendered a decision of monumental significance to the citizens of this state without fulfilling what ought to be even the minimum standards of judicial decision making.

I wrote the initial drafts of this article shortly after the Court rendered its decision. The article was not published at that time; and I contemplated shelving the article for good, partly in hopes that the case might return to the Court following its remand and the Court could rectify the errors of its original opinion, and partly out of reluctance to publicly criticize the Court. In the ensuing 18 months, the district court on remand found the case moot,[4] and my concerns with the Court's approach have not found voice elsewhere.

The Court could have resolved the case in the plaintiff's favor, as it did, without reaching the constitutional issues.[5] But,

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3. John L. Horwich, *Montana's Constitutional Environmental Quality Provisions: Self-Execution or Self-Delusion?* 57 MONT. L. REV. 323 (1996) [hereinafter *Self-Execution*]; John L. Horwich, *Water Quality Nondegradation in Montana: Is Any Deterioration Too Much?* 14 PUB. LAND & RESOURCES L. REV. 145 (1993).

4. Montana Envtl. Info. Ctr. v. Department of Envtl. Quality, No. BVD 95-1184, slip op. at 6 (Mont. June 16, 2000).

5. The water well discharges at issue in the case were allowed by the state pursuant to § 75-5-317(2)(j). Section 75-5-317(2) sets forth a list of activities (subsections (a) through (t)) that may cause changes in water quality that the legislature has determined are nonsignificant because of their low potential for harm to human health or the environment. (*See* MONT. CODE ANN. § 75-5-317(1) (1995)). Because the activities identified in subsections (a) through (t) are deemed nonsignificant, they are exempted from the nondegradation review process that otherwise would apply to any activity resulting in a decrease in water quality. (*See* MONT. CODE ANN. § 75-5-303 (1995) which

once the Court determined to decide the case on constitutional grounds, it assumed an awesome responsibility. The constitutional issues in *MEIC* were complex and fraught with implications. Along with them came sensitive political issues, not only in the balancing of environmental and business interests in a state where that balance is often difficult to strike, but also in striking a balance between the legislature and the judiciary. The decision to resolve this case on constitutional grounds carried with it the obligation for the Court to thoroughly understand the issues and implications of its decision, to fully appreciate the literature and relevant court precedents from Montana as well as other jurisdictions, and to exhaustively and meticulously explain its rationale and provide thoughtful guidance for lower courts, the legislature and agencies faced with implementing the Court's decision.

The Montana Supreme Court failed to fulfill its responsibilities in any of these areas. The Court's decision never mentions that any other state constitutions contain environmental provisions, (indeed, a third of all state constitutions now contain such provisions);[6] it never mentions

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sets forth the general nondegradation review process and the standards that govern whether an activity may be authorized despite resulting in water quality degradation.) In its entirety, § 75-5-317(2)(j) as it existed in 1995 provided:

> (j) discharges of water from water well or monitoring well tests, hydrostatic pressure and leakage tests, or wastewater from the disinfection or flushing of water mains and storage reservoirs, *conducted in accordance with department-approved water quality protection practices.* (Emphasis added.)

The Court never considered the statutory condition that discharges from test wells are deemed nonsignificant *only if* the discharge is conducted in accordance with Department of Environmental Quality (DEQ)-approved water quality protection practices. The real issue in this case was not constitutional–it was whether the DEQ's conditions were adequately protective of the environment to meet the statutory standards established by §§ 75-5-317(1) and 75-5-301(5)(c). In this case, the Court could well have determined that the DEQ's conditions failed to meet these *statutory* standards, especially § 75-5-301(5)(c)(iv) which required that greater significance be accorded carcinogens (such as arsenic). This conclusion is further buttressed by the DEQ's rules adopted pursuant to § 75-5-301 which provide that a discharge containing a carcinogen is only nonsignificant if the carcinogenic discharge is at a concentration less than or equal to the concentration in the receiving water. (ARM 17.30.715(1)(b) (1995)). As a result, the Court could have held in the plaintiffs' favor, overturning the nondegradation exemption *as applied in this case*, without ever reaching the constitutional issues.

6. *See infra* note 44 and accompanying text. *See, e.g.,* FLA. CONST. art. II, § 7 (effective Jan. 7, 1969); HAW. CONST. art. IX, § 8, art. XI §§ 1, 9 (effective Jan. 1, 1979); ILL. Const. art. XI, §§ 1-2 (effective July 1, 1971); LA. Const. art. IX, § 1 (effective Jan. 1, 1975); MASS. CONST. amend. art. XCVII (effective Nov. 7, 1972); MICH. CONST. art. IV, § 52 (effective Jan. 1, 1964); N.M. CONST. art. XX, § 21 (effective Nov. 2, 1971); N.Y. CONST. art. XIV, §§ 4-5 (effective Jan. 1, 1970); N.C. CONST. art. XIV, § 5 (effective July 1, 1973); PA. CONST. art. I, § 27 (effective May 18, 1971); R.I. CONST. art. I, § 17 (effective

that courts in other states have struggled with the meaning of those provisions; it never discusses the legal issue of self-execution which is universally acknowledged as critical to interpreting such provisions; it never cites nor discusses the substantial legal commentary on the subject of state constitutional environmental provisions; and it never confronts the Court's own precedents that are contrary to its decision. The decision is also confusing, if not self-contradictory.

As the above comments make clear, this is not your ordinary law review article. This article is not intended as a broad discussion of Montana's constitutional environmental provisions. I previously authored a piece offering a general discussion of these provisions, and the reader is referred to that piece for general background.[7] Instead, this article has two purposes. The first is a general critique of the Court's decision making in the case. Regardless of how one feels about the substantive conclusions reached by the Court, we all ought to expect a higher quality of research, analysis and explanation of the law by this state's highest court, at least when dealing with issues of such significance. The second purpose for the article is to discuss what the Court's decision means. From my discussions with the parties involved in the litigation, state legislators and attorneys around the state, I believe there is consensus that no one has much of an idea what the Court really decided. Thus, the Court has come up short both in its approach to the issues of the case and in its explanation of the holding.

With those purposes in mind, Part II of the article summarizes the factual setting of the case, the legal issues and the Court's decision. Part III then critiques the Court's decision making process and analysis. Part IV contains some thoughts on how the Montana Supreme Court might proceed, in light of its inadequate effort to address the meaning of Montana's constitutional environmental provisions.

II. THE CASE AND THE DECISION

A. Factual and Legal Setting

MEIC arose from the activities of Seven-Up Pete Joint

Nov. 3, 1970); VA. CONST. art. XI, §§ 1-2 (effective July 1, 1971).

7. *See generally* Horwich, Self-Execution, *supra* note 3.

Venture (SPJV) in connection with its proposed McDonald Gold Mine Project near Lincoln, Montana. Operation of the mine would have required that the area of the mine be dewatered; that is, groundwater at the mine site would have to be pumped out and discharged away from the mine site. In order to evaluate the environmental effects of long-term dewatering, SPJV sought approval in 1995 to operate several test wells.[8]

The water from these test wells was to be discharged into the shallow aquifers of the Blackfoot and Landers Fork Rivers. The pumped water contained arsenic at concentrations greater than the arsenic concentrations in the groundwater to which the pumped water was discharged.[9]

Montana's nondegradation policy generally prohibits any degradation of high-quality waters.[10] Under this policy, any discharge into high quality waters, where the quality of the discharged water is less than that of the receiving water, is prohibited, unless the discharge is approved by the state Department of Environmental Quality (DEQ) following a nondegradation review.[11] However, Mont. Code Ann. § 75-5-317, contains a list of activities that because of their "low potential for harm to human health or the environment"[12] are exempted

8. *MEIC*, 1999 Mont. 248, ¶ 8, 296 Mont. 207, ¶ 8, 988 P.2d 1236, ¶ 8.

9. *Id.* ¶¶ 13-14.

10. MONT. CODE ANN. § 75-5-303 (1995). "High-quality waters" are defined in section 75-5-103(9), in such a way as to include most surface and ground waters in Montana. There was no dispute in this case that the waters receiving the discharge qualified as "high-quality waters."

11. Before the DEQ can authorize a discharge that will result in degradation, the DEQ must find that there are no economically, environmentally, or technologically feasible modifications to the proposed project that would result in no degradation; that existing and anticipated uses of state waters will be fully protected; that the proposed project will result in important economic or social development and that the benefit of the development exceeds the costs to society of allowing the degradation. MONT. CODE ANN. § 75-5-303(2) - (3) (1995).

12. In addition to their low potential for harm to human health or the environment, activities exempted under § 75-5-317 are found by the legislature to conform to the guidance set forth in section 75-5-301(5)(c). The guidance in section 75-5-301(5)(c) includes: (1) equating significance with the potential for harm to human health, a beneficial use, or the environment; (2) considering both the quantity and the strength of the pollutant; (3) considering the length of time the degradation will occur; and (4) considering the character of the pollutant so that greater significance is associated with carcinogens and toxins that bioaccumulate or biomagnify and lesser significance is associated with substances that are less harmful or less persistent. § 75-5-301(5)(c). The standards in section 75-5-301(5)(c) are also to be employed by the Board of Environmental Review in establishing criteria by which additional activities may be administratively characterized as "nonsignificant" and therefore exempted from nondegradation review.

from the nondegradation review process. These "nonsignificant" activities may proceed without DEQ nondegradation approval, although they still may not cause the receiving water to exceed state water quality standards.[13]

At the time of SPJV's application for approval to discharge from the test wells, one of the nonsignificant activities identified by the legislature in § 75-5-317 was:

> (j) discharges of water from water well or monitoring well tests . . . conducted in accordance with department-approved water quality protection practices.[14]

Pursuant to this statutory provision, the proposed test well pumping by SPJV was not subject to nondegradation review by the DEQ. Nonetheless, the pumping was required to be conducted in accordance with DEQ-approved water quality protection practices.[15]

Shortly after SPJV received DEQ's approval for the discharge, MEIC and others filed suit against DEQ seeking, among other things, an order requiring DEQ to subject SPJV's request to nondegradation review and a declaration that the statutory nondegradation exclusions violate Montana's Constitution.[16] The District Court, however, granted DEQ's motion for summary judgment.[17] On appeal to the Supreme Court, the plaintiffs narrowed the issue, contending, at least in cases where it is shown degradation will occur, the exclusion of certain activities from review pursuant to Montana's nondegradation policy as set forth in Mont. Code Ann. § 75-5-

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13. *See* MONT. CODE ANN. § 75-5-605 (1995), which makes it unlawful for any person to "cause pollution" of any state waters. "Pollution" is defined in the Montana statutes to include, among other things, contamination or other alteration of the physical, chemical or biological properties of state waters that exceeds that permitted by Montana water quality standards. MONT. CODE ANN. § 75-5-103(25)(a)(i) (1999). A discharge that is authorized under the pollution discharge permit rules of the board of environmental review is not pollution. MONT. CODE ANN. §75-5-103(25)(b) (1995).

14. MONT. CODE ANN. § 75-5-317(2)(j) (1995). This section was amended by the legislature in 1999 to limit its application to "discharges of water *to ground water* from water well or monitoring well tests . . . ." (emphasis added). MONT. CODE ANN. § 75-5-317(2)(j) (1999).

15. *MEIC*, 1999 MT 248, ¶¶ 8-9, 296 Mont. 207, ¶¶ 8-9, 988 P.2d 1236, ¶¶ 8-9. Because of concern over the arsenic concentrations in the discharged water, DEQ ultimately conditioned its approval of the discharge on the identification of mixing zones in the groundwater. *Id.* at ¶ 9. A mixing zone is an area of receiving water in which water quality standards may be exceeded in order to allow assimilation of the discharge. Water quality standards may not be exceeded beyond the mixing zone. MONT. CODE ANN. § 75-5-103(18) (1999).

16. *MEIC*, 1999 MT ¶ 17, 296 Mont. ¶ 17, 988 P.2d ¶ 17.

17. *Id.* ¶ 36.

317(2)(j) violates Montana's constitutional provisions regarding the right to a clean and healthful environment.[18]

The DEQ responded, first that MEIC and the other citizen environmental groups lacked standing to bring the action, and second that Montana's statutory provisions and DEQ's actions in the case did not violate the Montana Constitution.[19]

B. The Decision

In deciding *MEIC*, the Court summarily found the plaintiffs had standing to bring the action,[20] then moved on to the more substantive matter of the constitutional question. It began its analysis of the constitutional question by considering what level of scrutiny should be applied to actions alleged to infringe on the environmental rights, then discussed the implications of those rights. A summary of the Court's conclusions is set forth below.

1. The Right to a Clean and Healthful Environment is a Fundamental Right

The Court reached several conclusions regarding the nature of the environmental rights established by the Montana Constitution. The Court concluded that the right to a clean and healthful environment guaranteed by the Declaration of Rights

18. *Id.* ¶ 37.

19. *Id.* ¶ 38.

20. I say the Court "summarily" found the plaintiffs had standing, because although it identified the criteria used to establish standing, *see id.* ¶ 41, it failed to apply the criteria to the plaintiffs. Instead, the Court simply recited language from two 1997 cases and concluded the plaintiffs' allegations established their standing to challenge conduct that "has an arguably adverse impact on the area in the headwaters of the Blackfoot River in which [the plaintiffs' members] fish and otherwise recreate, and which is a source for the water which many of them consume." *Id.* ¶¶ 42-45. While the focus of this article is on the Court's constitutional analysis, I note the Court's failure to actually apply its cited standing criteria to the plaintiffs raises questions. The cited criteria require an alleged injury to a property or civil right. Id. ¶¶ 41-45. The only example the Court referred to in this regard was its recent decision in *Missoula City-County Air Pollution Control Bd. v. Board of Envtl. Review*, 282 Mont. 255, 937 P.2d 463 (1997), in which the Court based the plaintiff's standing on "potential economic injury." *MEIC*, 1999 MT ¶ 42, 296 Mont. ¶ 42, 988 P.2d ¶ 42. Does this mean the plaintiffs in *MEIC* have also shown potential economic injury? Or is it sufficient for standing for the plaintiffs to have alleged threatened injury to a civil right - for example, the right to a clean and healthful environment? The Court did not base its standing decision on the allegation of a threatened injury to a civil right. However, the Court also made no finding of threatened economic injury in this case. Thus, we are left to speculate whether in the future an allegation of a threatened injury to a plaintiff's right to a clean and healthful environment will suffice to support that plaintiff's standing.

in Article II, Section 3 is a fundamental right,[21] based on earlier decisions of the Court that a right is fundamental if it is set forth in the constitution's Declaration of Rights or it is a right without which other constitutionally guaranteed rights would have little meaning.[22]

The Court further concluded that the right to a clean and healthful environment guaranteed by Article II, Section 3, and the environmental rights set forth in Article IX, Section 1 are interrelated and interdependent.[23] The Court did not distinguish between the rights created by these two provisions; indeed its subsequent discussion suggests the two may be read together as creating a single right. At least for purposes of this case, the Court saw no reason to distinguish between the two provisions.

2. Actions Implicating the Right to a Clean and Healthful Environment

Once the Court concluded that the constitutional right to a clean and healthful environment is a fundamental right, the question for the Court became what action implicates the right. The Court framed the question as an inquiry into what level of government interference with an individual's right to a clean and healthful environment triggers judicial review of the government action.[24]

The state argued in this case, and the District Court agreed, that whatever else the environmental provisions might mean, they are not implicated unless the action complained of posed a

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21. *MEIC*, 1999 MT ¶ 63, 296 Mont. ¶ 63, 988 P.2d ¶ 63.

22. *Id.* ¶ 56 (citing Butte Community Union v. Lewis, 219 Mont. 426, 430, 712 P.2d 1309, 1311 (1986) and In the Matter of C.H., 210 Mont. 184, 201, 683 P.2d 931, 940 (1984).

23. *MEIC*, MT ¶ 64, 296 Mont. ¶ 63, 988 P.2d ¶ 64. This conclusion *should* lead to significant difficulties because of the delegation of authority to the legislature in Article IX, § 1(2). If the constitution delegates to the legislature the administration and enforcement of the rights and obligations of Article IX, § 1, and the right under Article II, § 3 is interrelated and interdependent, then it would seem the right under Article II, § 3 is also dependent on legislative action. As discussed *infra,* notes 63 to 64 and accompanying text, this implication never occurs to the Court because the Court ignores Article IX, § 1(2) entirely.

24. The majority opinion holds that these rights also may not be interfered with by private action, although the case before the Court only dealt with government action. *MEIC*, ¶ 64, 296 Mont. ¶ 64, 988 P.2d ¶ 64. The majority opinion does not explain how the principles of its decision would apply to private action. Both concurring opinions reject the majority's extension of these rights to private action as beyond the issues raised by the case. *Id.* ¶¶ 83 & 86.

demonstrable threat to public health or resulted in a significant impact on the environment.[25] The plaintiffs argued, on the contrary, that the rights are implicated by government actions adversely affecting the environment well before those actions pose a demonstrable threat to public health or result in a significant impact on the environment.[26]

The Court devoted a substantial portion of its opinion to this important question.[27] Beginning from the principle that "[t]he prime effort or fundamental purpose, in construing a constitutional provision, is to ascertain and to give effect to the intent of the framers and of the people who adopted it,"[28] the Court examined at length the record of the Constitutional Convention surrounding the adoption of Article II, Section 3 and Article IX, Section 1.[29]

Persuaded by the notes from the Constitutional Convention, the Court rejected the notion that the environmental provisions were not implicated unless public health was threatened or there was a significant adverse impact on the environment.[30] Instead, it determined that the provisions provided protections that were "both anticipatory and preventative."[31]

The Court concluded that the state action here, by which the state authorized the addition of a known carcinogen into a receiving water where the concentration in the discharged water exceeded that in the receiving water, met the threshold necessary to implicate the constitutional environmental rights.[32] The Court relied for this conclusion, at least in part, on the fact that the DEQ has an administrative rule that generally requires that discharges containing carcinogens at concentrations greater than the receiving water must undergo nondegradation review before being allowed.[33]

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25. *Id.* ¶¶ 35-37.

26. *Id.* ¶ 37.

27. *Id.* ¶¶ 13-17.

28. *Id.* ¶ 76 (quoting from General Agric. Corp. v. Moore, 166 Mont. 510, 518, 534 P.2d 859, 864 (1975)).

29. *MEIC*, ¶¶ 65-76, 296 Mont. ¶¶ 65-76, 988 P.2d ¶¶ 65-76.

30. *Id.* ¶ 78.

31. *Id.* ¶ 77.

32. *Id.* ¶ 79.

33. *Id.* This seems an interesting juxtaposition in which the court looks to an administrative rule to overturn a statute.

3. The Standard for Determining Whether State Action Complies with Montana's Constitutional Environmental Provisions

Assuming that a state action meets the threshold of environmental impact to implicate the right to a clean and healthful environment, we then need standards by which a court can determine whether the state action violates the right. The Court could have determined that the right to a clean and healthful environment is absolute-subject to no infringement. As with most fundamental constitutional rights, however, some infringement is acceptable under appropriate conditions.[34] The task for the Court is to provide some guidance to the circumstances under which the right to a clean and healthful environment may be infringed.

4. Strict Scruinty

Courts have developed a hierarchy of scrutiny to reflect how closely they will examine state action that infringes on a personal right. In light of the Court's determination that the right to a clean and healthful environment, as expressed in both Article II, Section 3 and Article IX, Section 1, is a fundamental right,[35] the Court concluded that state action implicating this right is subject to the most stringent standard of judicial review: strict scrutiny.[36] A court may not simply accept on its face a legislative or administrative determination that an infringement of this environmental right is justified. A court must inquire into the justification for and impact of the infringement.[37]

5. Compelling State Interest

Consistent with earlier decisions by the Court that a government action may intrude upon an individual's fundamental constitutional right only if there is a compelling

34. *See, e.g.,* the famous statement by Justice Holmes: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. Schenck v. United States, 249 U.S. 47, 52 (1919). *See also* Gilbert v. State of Minnesota, 254 U.S. 325, 332 (1920) ("[freedom of speech] is natural and inherent, but it is not absolute; it is subject to restriction and limitation.").

35. *See supra* note 21.

36. *MEIC*, 1999 MT ¶ 64, 296 Mont. ¶ 64, 988 P.2d ¶ 64.

37. *Id.* ¶¶ 61, 63. *See also*, Wadsworth v. State, 275 Mont. 287, 303, 911 P.2d 1165, 1174 (1996).

state interest for doing so,[38] the Court established that an infringement of the environmental right may only be justified if the infringement is necessary to further a compelling state interest.[39] The Court did not further explain what it meant by a "compelling state interest" in this context, except for its instruction that on remand the District Court was to determine "whether there is a compelling state interest for the enactment of the statute based on the criteria we articulated in *Wadsworth v. State*."[40]

6. *Means Closely Tailored to the Ends*

When a court requires that a government action must advance a compelling state interest if it is to be allowed to infringe on a fundamental right, the focus is on the end sought to be achieved by the government action. The Court in *MEIC* also established standards for reviewing the means selected by the state to accomplish the compelling state interest. In quoting with approval from *Wadsworth*, the Court noted that the state action must be "closely tailored to effectuate only that compelling state interest," and in order to sustain the invasion of a fundamental right, the state must show that "the choice of legislative action is the least onerous path that can be taken to achieve the state objective."[41] If the state must infringe on a fundamental right in furtherance of a compelling state interest, then that infringement must be as slight as possible while still furthering the state objective.

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38. State v. Pastos, 269 Mont. 43, 47, 887 P.2d 199, 202 (1994); Wadsworth v. State, 275 Mont. at 302, 911 P.2d at 1174 (1996).

39. *MEIC*, ¶¶ 63-64, 296 Mont. ¶¶ 63-64, 988 P.2d ¶¶ 63-64.

40. *Id.* ¶ 81. In *Wadsworth*, the Court did not actually provide any criteria for identifying a compelling state interest. The Court did hold that when the government intrudes upon a fundamental right, any compelling state interest for doing so must be closely tailored to effectuate only that compelling state interest, and that to sustain the validity of an invasion to a fundamental right, the state must also show that the choice of legislative action is the least onerous path that can be taken to achieve the state objective. 275 Mont. at 302, 911 P.2d at 1174. However, neither of these "criteria" address the question of what constitutes a compelling state interest. While the Court in *Wadsworth* concluded that the state action in that case (limiting a state employee's right to engage in other employment) was not supported by a compelling state interest, the Court never provided any criteria or guidance on how one distinguishes a compelling state interest from one that is not compelling.

41. *MEIC*, ¶ 61, 296 Mont. ¶ 61, 988 P.2d ¶ 61 (quoting *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174).

7. Elements of the Standard for Determining Whether State Action Complies with Montana's Constitutional Environmental Provisions

The *MEIC* decision seems to establish several elements of the standard for determining whether a state action that implicates Montana's constitutional environmental right complies with that right:

1. The state action will be subject to strict scrutiny by the courts;

2. The action will be upheld only if it furthers a compelling state interest; and

3. The action must be limited so as to interfere with the right to the least amount possible while achieving the state's objective.

In the Court's words:

> [A]ny statute or rule which implicates [the environmental] right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective.[42]

This is the Court's most logical and succinct statement of the relevant standards for implementing the environmental right. Unfortunately, the process by which the Court arrived at this conclusion was flawed and the Court's characterization of the issues on remand varied from this statement of the relevant standards.

III. A CRITIQUE OF THE COURT'S DECISION MAKING PROCESS AND ANALYSIS

Interpreting constitutional provisions is always important and often difficult. My criticisms of the Court do not flow from a belief that constitutional interpretation is easy. Quite the contrary, they are based upon a belief that constitutional interpretation is complex. Courts need to exploit every available resource to assist in such a significant task. The overarching theme of my criticism is the failure of the Court in *MEIC* to appreciate and confront the underlying legal issues posed by the case. The Court appears satisfied to deal with the issues posed by this case on only the most superficial level, without

42. *Id.* ¶ 63.

appreciating either the context or implications of the decision.[43]

More specifically, as discussed below, from all appearances the Court overlooked the substantial decisions from other jurisdictions and the significant professional commentary on state constitutional environmental provisions. In contrast to other courts and commentators, the Court does not frame its analysis of these constitutional provisions to address the issues of self-execution and the separation of legislative and judicial authority. Finally, the Court fails to either distinguish or overrule its own conflicting precedents.

Some attorneys and students who reviewed drafts of this article have asked why any of this makes a difference. Would the Court have reached a different decision if it had approached the issues as I will be suggesting? The truth is that I do not, and cannot, know whether the outcome of the case would have been any different. But, therein lies much of my concern.

First, a court's decision, even that of the highest court of the state, earns its legitimacy not from the mere pronouncement of "the law of the land," but from a reasoned analysis based upon precedent, logic and policy. That, after all, is one of the reasons courts issue opinions, rather than merely render decisions. It is difficult to grant much legitimacy to a judicial opinion that fails to acknowledge and confront conflicting precedent - both its own and that of other jurisdictions, and fails to address the significant legal issues, in this case, self-execution and separation of powers, that dominate the legal literature and other court opinions. Thus, I, and others, cannot critique the Court's analysis of these issues or argue how the Court's decision should have been different, or why the Court's decision is correct, because the Court did not provide any analysis of these issues in the first place. To this extent, the Court's decision is vulnerable to criticisms that detract from a focused discussion of the substantive issues.

Second, by providing such an inadequate analysis of the issues in the case, compounded by internal inconsistencies in the opinion, the Court has created unnecessary confusion. Certainly

43. As I have discussed the following criticisms with colleagues around the state and with students, I am invariably asked why I believe the Court rendered such an inadequate decision. I don't have an answer. I know all of the justices of the Court, and I have no reason to assume ill-motives or a dereliction of duty on the part of any of them. I know the Court's workload is horrendous and that may well have contributed to inadequate attention to the difficult issues posed by this case. Ultimate responsibility, however, rests with the entire Court — all of whom joined in most of the majority opinion and none of whom demanded rigor.

one objective of a Supreme Court opinion is to provide insight and guidance to those who will subsequently be affected by the Court's decision. There was never any doubt that many in Montana would be looking to this opinion for guidance on the meaning of Montana's constitutional environmental provisions. That is not to suggest the Court is obliged to deliver a treatise on the subject, nor should the Court decide issues not before it. But it is to suggest the Court should render a thorough analysis of the important issues before it and the Court should write its opinion with due regard for the legislators, state agency personnel and citizens of the state who will be looking to the opinion for important guidance.

A. We Are Not Alone: Other States and Courts Have Faced These Issues

As noted in a recent, thoughtful article on the subject of state constitutional environmental provisions:

> All state constitutions written since 1959 have included environmental provisions addressing, to varying degrees, modern concerns of pollution and preservation. Half a dozen states with pre-1960 constitutions also have amended their constitutions to address broad environmental concerns. In total, over a third of all state constitutions now contain environmental policy provisions.[44]

In *MEIC*, the Court never mentions that other state constitutions have similar environmental provisions or that other state high courts have confronted what those provisions mean.[45] Certainly, the Montana Court is not bound by either the approaches adopted by those other courts or the conclusions reached by those courts. It is, nevertheless, troubling that the Court apparently found it unnecessary to consider how other state courts have dealt with such a significant issue.

In the context of this case, this "isolationism" allowed the Court to overlook two of the most significant issues raised by these types of constitutional provisions. Courts that have struggled with interpreting and applying these types of constitutional environmental provisions have been concerned

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44. Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 871 (1996).

45. Montana is not alone in seeking the meaning of state constitutional environmental provisions. In the past two-and-a-half decades, numerous states have adopted entirely new constitutions containing environmental provisions, or they have amended their constitutions to add environmental provisions. Time and again, state courts have limited the impact of these environmental provisions. Horwich, *Self-Execution, supra* note 3, at 325-26. (Citations omitted.)

with the active role the judiciary would have to play in setting environmental standards.[46] For thirty years our federal and state legislatures and our federal and state environmental administrative agencies have struggled with establishing environmental standards applicable to air pollution, water pollution, and hazardous and toxic substances. Injecting the judiciary as the final arbiter of environmental quality is a step not to be taken lightly.

This is not to say the Court is wrong to inject the Montana judiciary into that position. It is to say, however, that the Court is wrong to do so without acknowledging on the record that such a decision is fraught with difficulties[47] and explaining why, despite these difficulties, the Court deems it proper to do so.[48]

The second issue this "isolationism" conceals is that most other courts addressing the meaning of state constitutional environmental provisions have applied a fairly consistent analytical framework to these provisions.[49] As discussed in the

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46. Thompson, *supra* note 44, at 895-96:

> [T]he traditional justifications for environmental policy provisions, moreover, would require the courts to play an active role in shaping and controlling state environmental policy-a role that courts neither appear to want nor are well designed to undertake. . . . .In theory, of course, courts could develop their own judicial environmental policies and rules-directly enjoining private and public actions that threaten a "healthful" environment. Yet here again courts have refrained from taking an active role. Courts occasionally have interceded in extreme situations where state agencies, without any consideration of the possible environmental implications of their actions, have granted permits or pursued projects that posed an environmental threat. For this reason, environmental policy provisions were of some value in the 1970s, before state environmental assessment acts were in place and before the environment was integrated into most state programs. Courts, however, have refused to use environmental policy provisions as a general means of regulating the specific actions of governmental or private entities. As a result, environmental policy provisions have played an increasingly marginal role in those states where they are found.

See also, e.g., the discussion by Professor J.B. Ruhl on the "innumerable conundrums" that an environmental quality amendment to the federal constitution would pose. J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 NOTRE DAME L.R. 245, 276-77 (1999).

47. Indeed, difficulties of such magnitude have dissuaded most other courts from placing the judiciary in that position. *See supra* note 46.

48. This is a prime example of a topic where I have been asked whether it would have made any difference to the Court's decision if the Court had addressed the issues I think are important. Obviously, I cannot know whether the members of the Court would have been influenced by a consideration of these topics. Certainly, I believe these issues are central to a decision interpreting and applying these environmental provisions.

49. *See, e.g.,* Upper Big Blue Natural Resources Dist. v. City of Fremont, 495 N.W.2d 23 (Neb. 1993); Borough of Moosic v. Pennsylvania Pub. Util. Comm'n., 429 A.2d 1237 (Pa. Commw. Ct. 1981); Robb v. Shockoe Slip Found., 324 S.E.2d 674 (Va. 1985);

next section, the academic literature on the subject and the court decisions on point from other jurisdictions consistently analyze these provisions from the point of view of the legal theory of self-execution. By never acknowledging this literature or these other opinions, the Court avoids confronting the theory that has persuaded other courts to rule against the judicial enforcement of similar provisions.[50]

B. The Threshold Issues of Self-Execution and the Separation of Legislative and Judicial Authority

According to most courts and commentators, the first question for a court when asked to employ a constitutional provision as a judicially enforceable right, obligation or limit is whether the provision is self-executing.[51] Traditionally, a constitutional provision is considered self-executing if the judiciary can enforce the provision without the aid of a legislative enactment.[52] By contrast, under traditional self-execution analysis, a non-self-executing provision lies dormant until given legal effect by the legislature.[53] At its essence, then, the question of self-execution is a question of the respective roles of the legislature and the judiciary. If a provision is non-self-executing, the substance of the constitutional provision is determined by legislative action. On the other hand, if the constitutional provision is self-executing, the judiciary may provide the substance of the provision through judicial interpretation. Because of the significance of these separation of powers issues, most courts confronting similar constitutional provisions have begun their analysis with the question of whether the provisions at issue are self-executing.[54]

In *MEIC*, the Court never employed the phrase "self-execution" and the Court ignored the separation of powers issues raised by self-execution. But perhaps even more troubling, the

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Commonwealth v. National Gettysburg Battlefield Tower, Inc., 311 A.2d 588 (Pa. 1973). In addition to ignoring relevant cases from other jurisdictions, the Court neither cites nor acknowledges the extensive commentary on the subject in legal journals. See the numerous articles referenced in my article, *supra* note 3 and two excellent articles published since: Thompson, *supra* note 46 and Ruhl, *supra* note 46.

50. *See* cases cited *supra* note 49.

51. Horwich, Self-Execution, *supra* note 3, at 334 and commentators and cases cited therein.

52. For a fuller discussion, *see* Horwich, Self-Execution, *supra* note 3, at 335.

53. *Id.*

54. For general background and a more in-depth discussion of self-execution, *see* Horwich, Self-Execution, *supra* note 3, at 335-38.

Court disregarded its own precedents dealing with self-execution and state constitutional provisions. Reading the *MEIC* decision one would presume the Montana Supreme Court had never considered the issue whether a state constitutional provision was self-executing. On the contrary, the Court has specifically addressed this issue several times in the past.[55]

Squarely on point is the Court's decision in *State ex rel. Stafford v. Fox-Great Falls Theatre Corporation* in which the Court confronted a constitutional provision addressing lotteries.[56] Article XIX, § 2 of Montana's 1889 Constitution provided:

> The legislative assembly shall have no power to authorize lotteries, or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this state.

Although the constitutional provision left no doubt that its drafters and those who voted for the provision desired to outlaw lotteries in Montana, the Court reaffirmed its obligation to interpret only the language employed in the provision.[57] Because that language did not itself outlaw lotteries, but instead mandated that the legislature do so (which it had not done), the Court agreed with the defendant that its games of chance were not illegal.[58] The Court stated: "The obvious meaning of the words cannot be ignored in order to obtain a short-cut, however desirable the end."[59]

Stafford also illustrates the Montana Supreme Court's historical respect for the separation of powers as a fundamental principle of constitutional interpretation. The legislature had not responded to the clear mandate in the constitution for legislation making lotteries illegal. In *Stafford*, the state asked the Court to do what the legislature had failed to do: outlaw lotteries as desired by those who drafted and adopted the constitutional provision. Even though outlawing lotteries and similar games of chance is not a complicated matter,[60] the Court

55. State ex rel. Stafford v. Fox Great Falls Theatre Corp., 114 Mont. 52, 132 P.2d 689 (1942); In re Lacy, 239 Mont. 321, 780 P.2d 186 (1989). *See also* General Agri. Corp. v. Moore, 166 Mont. 510, 534 P.2d 859 (1975); Weston v. State Highway Comm'n, 186 Mont., 46, 606 P.2d 150 (1980).

56. 114 Mont. 52, 132 P.2d 689 (1942).

57. 114 Mont. at 72, 132 P.2d at 699.

58. *Id.* at 81, 132 P.2d at 703-04.

59. *Id.* at 72, 132 P.2d at 699.

60. Indeed, it would seem a much simpler matter for the Court to outlaw lotteries and games of chance than to establish what level of environmental impact crosses the threshold of a "clean and healthful" environment.

steadfastly refused to tread on turf clearly dedicated to the legislature. "We agree, of course, that the constitutional purpose should be obeyed; but so should the more fundamental constitutional purpose that the legislative function be not usurped by the judicial branch."[61]

Why should *Stafford*, and other related precedents, be relevant to *MEIC*? For one thing, both cases squarely confront the Court with resolving the relative roles of the legislature and judiciary in implementing a constitutional provision. In *Stafford*, the constitution mandated that the legislature "shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this state."[62] The legislature having failed to pass such laws, the Court concluded it was powerless to implement the constitutional prohibition against lotteries. The people in their Constitution had delegated that authority to the legislature and not the judiciary.

In reading *MEIC*, one might never see the parallel with *Stafford*. That is because when the Court quotes from Article IX, Section 1 of the constitution, it includes subsections (1) and (3), but deletes subsection (2). In its entirety, Article IX, Section 1 provides as follows:

> (1) The State and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
>
> (2) The legislature shall provide for the administration and enforcement of this duty.
>
> (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

In quoting Article IX, Section 1 in its opinion, the Court says it is quoting the section "in relevant part."[63] How is subsection (2) not relevant, particularly in light of the Court's own precedents such as *Stafford*?[64] Subsection (2), just like the provision at issue in *Stafford*, reflects the intention of the

61. *Id.* at 80, 132 P.2d at 703.

62. Mont. Const. art XIX, § 2 (1889)

63. *MEIC*, 1999 MT 248, ¶ 48, 296 Mont. 207, ¶ 48, 988 P.2d 1236, ¶ 48.

64. If an attorney in a brief to the Court were to so selectively quote from Article IX, Section 1, it would likely be grounds for sanction as a clear effort to mislead the court. MONT. RULES OF PROFESSIONAL CONDUCT, Rule 3.3(a)(3) (1999). ("A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.")

drafters and adopters of the constitution to defer to the legislature and not to the courts.

In *MEIC*, the Court relies heavily in justifying its decision on the principle that in construing a constitutional provision, the Court's fundamental purpose is to ascertain and give effect to the intent of the framers and of the people who adopted it.[65] As such, it would seem that the Court must address the clearly expressed intent that it is the legislature and not the Court that is to administer and enforce the constitutional mandate for a clean and healthful environment.[66]

C. The Trap of Looking to "Intent"

Having concluded that the constitutional environmental provisions create judicially enforceable rights, the Court turned to the substantive content of those rights. The Court had to address what is meant by the constitutional standard that requires, both in terms of the individual right and the state obligation, a "clean and healthful environment." As discussed previously, the state argued that these environmental provisions are not implicated unless the action complained of poses a demonstrable threat to public health or results in a significant impact on the environment.[67] The plaintiffs, on the other hand, argued that these environmental rights are implicated by government actions adversely affecting the environment well before those actions pose a demonstrable threat to public health or result in a significant impact on the environment.

One of the resources to which courts may turn for assistance in interpreting constitutions, like statutes, is the intent behind the provision. The Court in *MEIC* noted:

> The prime effort or fundamental purpose, in construing a constitutional provision, is to ascertain and to give effect to the intent of the framers and of the people who adopted it. The court, therefore, should constantly keep in mind the object sought to be

65. *MEIC*, ¶ 77, 296 Mont. ¶ 77, 988 P.2d ¶ 77. See additional discussion on this *infra*, note 68 *et seq.* and accompanying text.

66. The Court's approach encourages a cynical view that the Court is at liberty to select which "intent" of the framers and adopters it wishes to implement-even to the point of deleting relevant language expressing an intent contrary to that which the Court wishes to enforce. The foregoing discussion is not intended to suggest that the *MEIC* decision should have been dictated by the Court's earlier decision in *Stafford*. It is to suggest, however, that it is either arrogance or ignorance to decide *MEIC* without either expressly overruling or distinguishing *Stafford* (among other cases).

67. *See supra* note 25 and accompanying text.

> accomplished . . . and proper regard should be given to the evils, if any, sought to be prevented or remedied. . . .[68]

Indeed, it is clear from a reading of the case that the Court placed significant weight on the record of the 1972 Constitutional Convention when addressing the substantive content of the right to a clean and healthful environment. The Court devoted more than four pages of its opinion to a review of the deliberations on the environmental provisions by the Natural Resources and Agricultural Committee and the full Convention. After which the Court stated:

> We conclude, based on the eloquent record of the Montana Constitutional Convention that to give effect to the rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution, they must be read together and consideration given to all of the provisions of Article II, Section 1 as well as the preamble to the Montana Constitution. In doing so, *we 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.*[69]

This is an important conclusion going to the very essence of the substantive reach of these environmental provisions.

The Court may be correct in its conclusion emphasized above regarding the intention of the delegates to the Convention. But the matter is not so simple—based upon the Court's own criteria and the history of these provisions as recited by the Court. Recall that the Court recited that "the prime effort or fundamental purpose, in construing a constitutional provision, is to ascertain and to give effect to the intent of the framers and of the people who adopted it."[70] The Court, in reviewing the minutes from the Convention deliberations, may gain some insight into the intent of those who "framed" the provision. But what of the intent of those who "adopted" the provision—i.e., the citizens of the state who voted to approve the constitution in 1972? Relying on the intent of those who adopted the provision raises serious questions in state constitutional law, and most especially in the circumstances surrounding these environmental provisions.

The first obvious issue is how one can even presume to know the intent of those who adopted the provision. What was in the

68. *MEIC*, ¶ 76, 296 Mont. ¶ 76, 988 P.2d ¶ 76.
69. *Id.* ¶77 (emphasis added).
70. *Id.* ¶76.

minds of the state's citizens who voted to approve the provision? This is made even more difficult where, as here, the citizens voted on an entire constitution-not just the provision now before the Court. Maybe most of the voters objected to this particular provision-but on balance they preferred the new constitution to the old. Could we then ignore this provision-since the intent of a majority of those who adopted it was that it be ignored?

State constitutions are not like legislation where we can at least hope to discern the intent of the adopters, since the adopters debate the provision in committee hearings and on the floor of the legislature. Indeed, with regard to legislation, the framers are a subset of the adopters and the adopters have ready access to statements of intent. The situation is obviously far different concerning a state constitution when the adopters are the general population and the framers are a small group whose deliberations, while publicly available, we cannot assume were in the minds of most voters.

This particular situation highlights this dilemma. The Court notes that Article IX, Section 1 when reported to the floor of the Constitutional Convention by the Natural Resources and Agricultural Committee required that "the state and each person . . . maintain and enhance the Montana environment for present and future generations."[71] The record of the convention reveals that the majority of the committee intentionally did not add adjectives such as "healthful" or "unsoiled" because they believed that such qualifications might allow some to argue that the environment could be adversely affected so long as the adverse effect did not reach the threshold of an adverse health effect. The majority of the committee believed their proposal was stronger than if the word "healthful" were added.[72]

When the committee's proposal came before the entire convention, there was further discussion on whether the provision should simply require the state and each citizen to maintain and enhance the Montana environment or whether the standard of environmental quality should be expressed by adjectives such as "clean" and "healthful."[73] Delegates from the Natural Resources and Agricultural Committee reiterated their belief that the language as reported by the committee *without*

71. *Id.* ¶66.
72. *Id.*
73. *Id.* ¶¶ 66-68.

adjectives was the most protective of the environment.[74] Other convention delegates, however, insisted that the provision would be made stronger, not weaker, by the addition of descriptive language such as "clean and healthful."[75] In the end, the Convention agreed on the version including the adjectives "clean" and "healthful" even though a majority of the committee members who oversaw the drafting of the section believed that language would reduce the environmental standard they wanted to establish.

So, when the citizens of Montana entered the ballot booth to vote, did they interpret "clean and healthful" as setting a less protective standard, as the majority of the committee believed, or did they believe it was even a stronger standard than would be the case without those terms? (Or, did they even give it a second thought either way?) I can see no justification for ascribing to the voters the interpretation offered by those who amended the language at the Constitutional Convention, any more than ascribing to them the interpretation that the majority of the committee that carefully studied the wording of the provision believed would apply if the words were added.

This example, I believe, shows the folly of looking to the "intent" of the framers and the adopters, most especially where the citizens are voting up or down on an entire constitution as opposed to a single amendment. The Court simply presumes that the "intent of the framers and of the people who adopted" the constitution is a single concept. But there is no foundation for that assumption and, if there is an intent that is far more important it is the intent of those whose votes actually ratified or defeated the constitution. Since we do not have a poll in which each citizen exiting the ballot booth has told us what they "intended" to approve by means of an environmental standard when they voted for the constitution, the recourse is to simply look to the language itself and ask what the average voter would have thought the provision meant. And that meaning is not dictated by what may or may not have been in the minds of those who drafted and approved the proposed language in the Convention. It was the task of those in the Convention to propose language that accurately reflected their intent to the citizens of the state. It is that language itself that was before the citizens and was before the Court in *MEIC*, to be interpreted

74. *Id.* ¶¶ 69, 73-74.
75. *Id.* ¶ 75.

without embellishment by statements of intent from those who drafted the language.

Unfortunately, other than this misplaced reliance on the intent of those who drafted the language, the Court provided no other foundation for its conclusions regarding the meaning of the constitutional environmental provisions. The Court never considered alternative interpretations of this language nor the implications of its interpretation.

D. Confusing Instructions on Remand

The Court remanded the *MEIC* case to the District Court for a determination on constitutionality.[76] The District Court has since found the case moot and, thus, the substantive issues raised in the case were not reached.[77] Nevertheless, the Supreme Court's instructions on remand in *MEIC* should be an important source of insight into the meaning of the decision. Unfortunately, the Court's specific guidance to the District Court was at odds with the general standards established by the Court. This leads to even greater confusion over what the Court actually held in *MEIC*.

The Court's specific guidance to the District Court on remand can be found in two statements:

> [T]o the extent § 75-5-317(2)(j), MCA (1995) arbitrarily excludes certain "activities" from nondegradation review without regard to the nature or volume of the substances being discharged, it violates those environmental rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution.[78]

And:

> [We] remand to the District Court for strict scrutiny of the statutory provision in question [§ 75-5-317(2)(j)], and in particular for a determination of whether there is a compelling state interest for the enactment of that statute based on the criteria we articulated in *Wadsworth v. State*.[79]

These two statements raise serious questions central to the future understanding of these constitutional provisions.

The first statement could have several different meanings with significantly different implications. One interpretation of the Court's statement focuses on the characterization that § 75-

76. *Id.* ¶ 81.

77. Montana Envt'l. Info. Ctr. v. Department of Envtl. Quality, No. BVD 95-1184, slip op. at 6 (Mont. June 16, 2000).

78. *MEIC*, 1999 MT 248, ¶ 80, 296 Mont. 207, ¶ 80, 988 P.2d 1236, ¶ 80.

79. *Id.* ¶ 81.

5-317(2)(j) is unconstitutional only *to the extent* it excludes certain activities from nondegradation review *without regard to the nature or volume of the substances being discharged.* Justice Leaphart, in concurrence, believed this is what the Court's statement meant.[80] And Justice Leaphart went a step further to find that since, in his view, the very essence of § 75-5-317(2)(j) is to exempt a category of water discharges from nondegradation review without consideration of the nature or volume of substances in the water discharged, the statutory section is unconstitutional on its face.[81] Under Justice Leaphart's reading of the majority opinion, it would seem that all of the nonsignificant categories in § 75-5-317 would be unconstitutional on their face because it is their very essence that they categorically exempt certain discharges from nondegradation review without consideration of the specifics of the contents of the discharge.

Under this interpretation, however, if a discharge exempted from nondegradation review by § 75-5-317(2)(j) is otherwise subject to review with regard to the nature or volume of its discharge, then the provision is not unconstitutional. If this is the accurate interpretation, then § 75-5-317(2)(j) would seem to be constitutional, since any discharge falling within its terms must be "conducted in accordance with [DEQ]-approved water quality protection practices."[82] In order for DEQ to establish water quality protection practices, DEQ must consider the nature and volume of the substances being discharged. As evident from the facts of this case, for example, DEQ did indeed consider the nature and volume of the substances being discharged in establishing its approved water quality protection practices as they governed this discharge.[83] The Court, including Justice Leaphart in concurrence, overlooked this condition to the § 75-5-317(2)(j) exemption.

Another interpretation of the Court's statement emphasizes the fact that the Court did not say § 75-5-317(2)(j) is unconstitutional simply because it excludes certain activities

80. *Id.* ¶ 85 (Leaphart, J., concurring).

81. *Id.*

82. *See* the previous discussion related to this point *supra* note 5 and accompanying text.

83. *See MEIC*, ¶¶ 9-16, 296 Mont. ¶¶ 9-16, 988 P.2d ¶¶ 9-16, in which the Court recites at length the information available to the DEQ as it evaluated the proposed discharge. The parties may disagree over how the state responded to the information, but there can be no doubt in this case that the DEQ considered the nature and volume of the discharge.

from nondegradation review without regard to the nature or volume of the discharge. The Court said it is unconstitutional only to the extent it *arbitrarily* excludes activities from nondegradation review without regard to the nature or volume of the discharge. Under this interpretation, the concept of categorical nonsignificance (i.e., the practice of excluding categories of activities from nondegradation review, which is the essence of § 75-5-317) is not inherently unconstitutional. It is unconstitutional *only if* the legislature's decision to exclude such activities is arbitrary.[84]

This leaves the following possible analyses of § 75-5-317(2)(j). First, since the section does not exclude covered activities from nondegradation review without regard to the nature or volume of the substances being discharged, the provision is constitutional on its face. This may leave open the question whether, as the section was applied in this particular instance, the environmental review by the DEQ was adequate to meet constitutional or other standards.[85] Second, assuming for the sake of argument that the Court considered the DEQ review under § 75-5-317(2)(j) as somehow inherently constitutionally insufficient, § 75-5-317(2)(j) is still not unconstitutional on its face. That is, statutory, categorical exemptions from nondegradation review are not *per se* unconstitutional. Section 75-5-317(2)(j), and presumably similar nonsignificant exemptions from nondegradation review, are unconstitutional

84. Even this interpretation poses somewhat of a dilemma in this case, because, as noted above, § 75-5-317(2)(j) does not exclude activities within its ambit without regard to the nature or volume of the substances being discharged. As a result, one response to applying this standard to § 75-5-317(2)(j) is that the section survives constitutional scrutiny, because by its very terms it requires the DEQ to consider the nature and volume of the discharge in order for the nondegradation exemption to apply.

The Court's failure to acknowledge that § 75-5-317(2)(j) requires a consideration of the nature and volume of the discharge is problematic. It raises a question whether: (1) the Court simply failed to understand the provision in its entirety (in which case the provision may indeed be constitutional, even under the Court's express standard), (2) the Court did not consider the review required under the statute to be sufficient to meet its constitutional standard (although this is a difficult interpretation to accept when the Court never acknowledges the provision exists), or (3) the Court did not consider the review *undertaken by DEQ in this case* to be sufficient to meet the constitutional standard (although this interpretation is also difficult to accept when the Court never criticizes the DEQ review). I believe the Court simply failed to even consider the condition to the statute that requires DEQ review of the nature and volume of the discharge. This oversight by the Court is certainly confirmed by the fact the Court throughout the opinion seems unaware of this condition to the statute at issue.

85. *See* the previous discussion related to this point *supra* note 5 and accompanying text.

only to the extent they *arbitrarily* exclude such activities from nondegradation review. If the nondegradation exemption is not arbitrary, then it is constitutional. The question becomes whether there is a rational basis for the legislature to have exempted the activity from nondegradation review. If there is a rational basis for the exemption, then the exemption is not arbitrary.

Can these interpretations be squared with the Court's second instruction to the District Court noted above[86] to determine "whether there is a compelling state interest for the enactment of the statute?"[87] The first statement says the statute is unconstitutional if it *arbitrarily* excludes certain activities from nondegradation review. The second statement seems to return to earlier language in the opinion indicating a statute that infringes on a fundamental right will be constitutional only if it advances a compelling state interest. Certainly, a statute may not be arbitrary, although it does not further a compelling state interest. Is it enough that the statute's categorical exemption not be arbitrary, or must it also further a compelling state interest? This is a conflict in the opinion that I think cannot be reconciled. The Court has simply suggested two standards that are not the same. Perhaps because the Court refers only once to the "arbitrary" standard and several times to the "compelling state interest" standard, we should ignore the reference to "arbitrary." This is not, however, much of a foundation on which to base the interpretation of such an important standard.

E. Did the Supreme Court Decide MEIC on an As-Applied or Facial Basis?

Yet another problem is the uncertainty whether the Court addressed the issue in the case as an as-applied or facial challenge to the constitutionality of § 75-5-317(2)(j). The majority opinion insists that the decision "is limited to § 75-5-317(2)(j), MCA (1995), as applied to the facts in this case."[88] The Court goes on: "We have not been asked to and do not hold that this section [§ 75-5-317(2)(j)] facially implicates constitutional rights."[89]

86. *See supra* note 79.
87. *MEIC*, 1999 MT 248, ¶ 81, 296 Mont. 207, ¶ 81, 988 P.2d 1236, ¶ 81.
88. *Id.* ¶ 80.
89. *Id.*

The questions raised by the Court, and the standards articulated by the Court, all belie Justice Trieweiler's efforts to make this an "as-applied" decision. As characterized by Justice Leaphart in concurrence, the challenge to the constitutionality of § 75-5-317(2)(j) in this case is not limited to the facts in the present case but "inheres in the statute's creation of a blanket exception."[90] Except for the Court's assertions that this is an as-applied rather than a facial challenge, there is nothing in the majority opinion to support that conclusion.

Whether *MEIC* was an as-applied or facial challenge has substantial implications for how the holding of the case is to be understood by all concerned. It makes a substantial difference whether the statute itself or the application of the statute is to be tested against the standards for constitutionality established by the Court. For example, under the facts of *MEIC,* should a court closely scrutinize the legislature's adoption of § 75-5-317(2)(j) or the DEQ's particular approval of the well water discharges from SPJV pursuant to § 75-5-317(2)(j)? Is the question whether the legislature had a compelling state interest for adopting § 75-5-317(2)(j) or whether there is a compelling state interest for allowing SPJV's test wells to discharge in this instance without undergoing nondegradation review? These are two entirely different avenues of inquiry. The Court's instruction to the District Court to determine "whether there is a compelling state interest for the enactment of that statute"[91] certainly indicated the subject of the inquiry is the legislature's objective in adopting the statute in the first place. Yet that very instruction comes only one sentence after the Court stated forcefully that it is not addressing the facial validity of the statute. Again, the Court has made understanding its decision far more difficult than necessary.

The same dilemma arises in addressing the standard that the state action must be limited so as to interfere with the environmental right to the least amount possible while still achieving the state's objective. Is the inquiry whether § 75-5-317(2)(j) is closely tailored to meet the state's objective, or whether the DEQ's approval of the discharge limited the discharge to the maximum extent feasible? Again, under one approach the focus is the action of the legislature in adopting the statutory provision; under the other approach the focus is

90. *Id.* ¶ 85 (Leaphart, J., concurring).
91. *Id.* ¶ 81.

the action of the agency in dealing with the particular proposed discharge.[92]

F. The Court's Endorsement of § 75-5-303.

The Court included an interesting, and I think very informative, endorsement of the general nondegradation statute:

> We conclude that for purposes of the facts presented in this case, § 75-5-303, MCA is a reasonable legislative implementation of the mandate provided for in Article IX, Section 1 . . . .[93]

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92. The Court's analysis and standards speak louder than the Court's attempt to characterize that analysis and those standards. The Court has called into question the facial validity of § 75-5-317(2)(j). The criteria and standards set forth by the Court all go to the essential nature of that statutory exemption; they do not depend on the particular facts of this case. Although the Court did note that the discharge here contained a known carcinogen which would be discharged in concentrations higher than the concentration present in the receiving water, the essence of the Court's concern is not the discharge itself, but rather that the discharge appears to have been authorized without regard to the nature or volume of the substances being discharged.

93. *MEIC*, ¶ 80, 296 Mont. ¶ 80, 988 P.2d ¶ 80. Section 75-5-303 provides:

> (1) Existing uses of state waters and the level of water quality necessary to protect those uses must be maintained and protected.
>
> (2) Unless authorized by the department under subsection (3) or exempted from review under 75-5-317, the quality of high-quality waters must be maintained.
>
> (3) The department may not authorize degradation of high-quality waters unless it has been affirmatively demonstrated by a preponderance of evidence to the department that:
>
> (a) degradation is necessary because there are no economically, environmentally, and technologically feasible modifications to the proposed project that would result in no degradation;
>
> (b) the proposed project will result in important economic or social development and that the benefit of the development exceeds the costs to society of allowing degradation of high-quality waters;
>
> (c) existing and anticipated use of state waters will be fully protected; and
>
> (d) the least degrading water quality protection practices determined by the department to be economically, environmentally, and technologically feasible will be fully implemented by the applicant prior to and during the proposed activity.
>
> (4) The department shall issue a preliminary decision either denying or authorizing degradation and shall provide public notice and a 30-day comment period prior to issuing a final decision. The department's preliminary and final decisions must include:
>
> (a) a statement of the basis for the decision; and
>
> (b) a detailed description of all conditions applied to any authorization to degrade state waters, including, when applicable, monitoring requirements, required water protection practices, reporting requirements, effluent limits, designation of the mixing zones, the limits of degradation authorized, and methods of determining compliance with the authorization for degradation.
>
> (5) An interested person wishing to challenge a final department decision may

This comment is noteworthy in several respects. First, it strongly suggests that the constitutional infirmity in *MEIC*, if there was one, rested not with the fact that SPJV was allowed to discharge from its wells to the waters of the state (even where that discharge contained a carcinogen in a concentration greater than existed in the receiving water), but with the fact that this discharge was allowed to proceed without first undergoing the nondegradation review dictated by § 75-5-303.

Second, and perhaps even more significant, is the balancing approach of § 75-5-303. Note again — the Court's statement that this section "is a reasonable legislative implementation of the [constitutional] mandate."[94] The very essence of the nondegradation policy expressed in § 75-5-303 is a balancing of environmental protection with economic and social values. Section 303 does not prohibit water quality degradation, rather it allows degradation, but only where:

1. existing and anticipated uses of state waters will be fully protected;[95]

2. the proposed activity will result in important economic or social development and the benefit of that development exceeds the costs to society of allowing the degradation;[96]

3. there are no economically, environmentally and technologically feasible modifications to the proposed activity that would result in no degradation;[97] and

4. the least degrading water quality protection practices that are economically, environmentally and technologically feasible will be implemented during the activity.[98]

Thus, while the Court in *MEIC* concluded that the

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request a hearing before the board within 30 days of the final department decision. The contested case procedures of Title 2, chapter 4, part 6, apply to a hearing under this section.

(6) Periodically, but not more often than every 5 years, the department may review authorizations to degrade state waters. Following the review, the department may, after timely notice and opportunity for hearing, modify the authorization if the department determines that an economically, environmentally, and technologically feasible modification to the development exists. The decision by the department to modify an authorization may be appealed to the board.

(7) The board may not issue an authorization to degrade state waters that are classified as outstanding resource waters.

(8) The board shall adopt rules to implement this section.

94. *MEIC*, ¶ 80, 296 Mont. ¶ 80, 988 P.2d ¶ 80.

95. MONT. CODE ANN. § 75-5-303(3)(c) (1999).

96. MONT. CODE ANN. § 75-5-303(3)(b) (1999).

97. MONT. CODE ANN. § 75-5-303(3)(a) (1999).

98. MONT. CODE ANN. § 75-5-303(3)(d) (1999).

environmental rights in Montana's 1972 Constitution are fundamental[99] and that they create enforceable limits at least on legislative action,[100] the Court has also held that these rights are subject to a balancing against other, important public values such as economic and social development. As with other fundamental rights, they are subject to infringement in appropriate circumstances. The Court's endorsement of § 75-5-303 indicates economic and social development are among the values to be balanced against these environmental rights.

IV. SOME SUGGESTIONS FOR HOW THE COURT MIGHT PROCEED

The Court's decision in *MEIC* has done little to advance our understanding of Montana's constitutional environmental provisions. Indeed, the Court's inadequate effort to address these provisions has simply added to the confusion and uncertainty over what these provisions mean and how they are to be applied. Further, the lack of rigorous analysis and failure to confront the complex issues posed by these provisions denies the opinion the jurisprudential and moral force essential to such an important opinion.

My suggestion for the Court is it either withdraw the MEIC opinion or otherwise repudiate it. Fortunately, the District Court has since held the case moot, so the particular case itself has been resolved without reliance on the opinion.[101] There is no shortage of other cases that can provide the Court the opportunity to expound on the meaning of Montana's constitutional environmental provisions. When that opportunity arises, the Court should exhibit the courage to acknowledge the shortcomings of the *MEIC* opinion and proceed afresh to address the meaning and application of these provisions. Rather than trying to explain its way around the shortcomings and inconsistencies in *MEIC*, the Court needs to place *MEIC* on a shelf behind closed doors. The Court can then squarely confront the difficult issues and implications raised by the interpretation of these provisions, and provide a decision to guide the citizens

99. *MEIC*, ¶ 56, 296 Mont. ¶ 56, 988 P.2d ¶ 56. *See supra* note 21 and accompanying text.

100. *See supra* note 42 and accompanying text.

101. Montana Envtl. Info. Ctr. v. Department of Envtl. Quality, No. BVD 95-1184, slip op. at 6 (Mont. June 16, 2000).

of Montana, as well as their legislature and courts.