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Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions

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ARTICLE

CONSTITUTIONALIZING THE ENVIRONMENT: THE HISTORY AND FUTURE OF MONTANA'S ENVIRONMENTAL PROVISIONS

Barton H. Thompson, Jr.*

The United States Constitution relies primarily on institutional design and process to ensure that the government pursues wise public policy. By contrast, virtually all state constitutions set out a myriad of policy-specific directives to the legislature. Historically, these directives have addressed state taxes and budgetary issues, public education, state school lands, corporate policy, employment relationships, and public utilities. Some state constitutions, again unlike the United States Constitution, have awarded various affirmative rights – e.g., the right to a quality education – that require legislative action.

The rise of environmentalism in the United States during the second half of the twentieth century brought a call for "constitutionalizing" the environment. Prior to the first Earth Day in 1970, Senator Gaylord Nelson of Wisconsin proposed an amendment to the United States Constitution that would have recognized in every person an "inalienable right to a decent environment" and required both the federal and state

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governments to "guarantee" that right.[1] Nelson's proposal and numerous other efforts to add an environmental right to the United States Constitution have failed, in part because an affirmative environmental guarantee seems inconsistent with the limited nature of the federal constitution and its existing provisions.

States, by contrast, took quickly to the idea of adding the environment to the affirmative rights and substantive directives already found in their constitutions. More than a third of all state constitutions, including all written since 1959, address modern concerns of pollution and resource preservation.[2] Montana's 1972 Constitution illustrates this trend. The "right to a clean and healthful environment" literally leads the list of "inalienable rights" set out in Article II, Section 3. The Montana Constitution also sets out a number of specific environmental directives in Article IX ("Environment and Natural Resources"), which tellingly comes before "Education and Public Lands" (Article X), albeit immediately after "Revenue and Finance" (Article VIII).

Such environmental provisions have had little consequence in most of the states that have adopted them. The passage of strong federal and state environmental laws beginning in the early 1970s has reduced the potential importance of the constitutional provisions in most contexts. A surprisingly small number of environmental lawsuits have invoked the state constitutional provisions and, even in those lawsuits, the constitutional arguments often have been secondary to the plaintiffs' statutory claims. State courts also have helped ease most of the constitutional provisions into relative obscurity by holding that the provisions are not self-executing, by denying standing to private citizens and groups trying to enforce the provisions, or by establishing relatively easy standards for meeting the constitutional requirements. Although it is empirically difficult to determine whether the constitutional provisions may have had a more indirect effect on state environmental policy (e.g., by emphasizing to administrators and bureaucrats the critical importance of protecting the

1. S.J. Res. 169, 91st Cong. (2d Sess. 1970) ("Every person has the inalienable right to a decent environment. The United States and every state shall guarantee this right.").

2. *See* Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 871 (1996) (discussing state adoption of environmental policy provisions).

environment), some states with the weakest environmental policies have constitutional provisions affirming the importance of the environment, while none of the five states with the strongest environmental policies and programs have any environmental policy provisions in their constitutions.[3]

For the first quarter century after the people of Montana passed the 1972 Constitution, its environmental provisions seemed headed for the same ignoble obscurity.[4] In the last several years, however, the Montana Supreme Court has broken league with other state supreme courts and taken an activist approach to the provisions. In *Montana Environmental Information Center v. Department of Environmental Quality*,[5] the court held that the constitutional provisions subject state legislation that risks environmental degradation to strict scrutiny. Two years later in *Cape-France Enterprises v. Estate of Peed*,[6] the Montana Supreme Court suggested that the provisions also directly restrict private actions that would lead to environmental harm.

The Montana Supreme Court's new activism provides an opportunity to consider how state courts might use constitutional provisions to promote the environmental goals that they embody. A number of prior articles have considered whether state constitutions should contain environmental policy provisions[7] and, where such provisions exist, whether courts should treat them as self-executing.[8] I start with the proposition

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3. *Id.* at 892-893, 925 tbl. 5 (comparing the environmental policy ranking of states, as determined by the 1991-92 Green Index, with whether the states' constitutions contained environmental policy provisions).

4. *See, e.g.*, Kadillak v. Anaconda Co., 184 Mont. 127, 138, 602 P.2d 147, 154 (1979) (environmental provisions in the Montana Constitution do not mandate an environmental impact statement); Mont. Power Co. v. Mon. Dep't of Pub. Serv. Regulation, 218 Mont. 471, 709 P.2d 995 (1977) (state EPA could issue permit for hard-rock mining without conducting preconstruction review).

5. 1999 MT 248, ¶ 63, 296 Mont. 207, ¶ 63, 988 P.2d 1236, ¶ 63.

6. 2001 MT 139, ¶ 32, 305 Mont. 513, ¶ 32, 29 P.3d 1011, ¶ 32.

7. *See, e.g.*, J. B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 NOTRE DAME L. REV. 245 (1999) (arguing that environmental policy provisions are neither wise nor practical); Thompson, *supra* note 2 (concluding that only limited goals and situations justify environmental policy provisions); John C. Tucker, *Constitutional Codification of an Environmental Ethic*, 52 FLA. L. REV. 299 (2000).

8. *See, e.g.*, John L. Horwich, *Montana's Constitutional Environmental Quality Provisions: Self-Execution or Self-Delusion?*, 57 MONT. L. REV. 323 (1996) (arguing that the Montana provisions are not self-executing); Cameron Carter & Kyle Karinen, Note, *A Question of Intent: The Montana Constitution, Environmental Rights, and the MEIC Decision*, 22 PUB. LAND & RESOURCES L. REV. 97 (2001) (defending the implicit holding

that the Montana constitutional provisions, whether advisable or not, are self-executing and ask how the Montana Supreme Court might then wield this powerful instrument. In what type of situations are the constitutional provisions likely to be raised? What standards should the courts use in applying the provisions? What problems will the applications raise? The answers to these questions, of course, shed light back onto the questions that I will begin by ignoring: should the 1972 Montana Constitution have included broad environmental provisions, and should the Montana Supreme Court treat them as self-executing?

Part I of this Article provides general background on environmental policy provisions in state constitutions, including the Montana Constitution. Part I also includes an overview of how the Montana Supreme Court has interpreted the Montana provisions to date. Part II then examines how environmental groups and interested citizens may try to use the environmental provisions in future cases and asks the tough questions that the Montana Supreme Court will need to face in those cases. With both the opportunities and problems of "constitutionalizing" the environment in mind, Part III briefly concludes by reconsidering the fundamental wisdom of including self-executing environmental policy provisions in a state constitution.

I. THE CONSTITUTIONAL LANDSCAPE

A. State Environmental Provisions

All state constitutions drafted since 1959 address modern concerns of pollution and preservation. Half a dozen states with pre-1960 constitutions also have amended their constitutions to address modern environmental issues. In total, more than a third of all state constitutions now contain environmental policy provisions.

These provisions vary enormously. The provisions differ first in their functional purposes. At the weak end, two state constitutions simply give the legislature the authority to enact environmental legislation – an authorization with little, if any, practical significance given the inherent police power of state governments.[9] The Georgia Constitution, for example, provides

of the Montana Supreme Court that the provisions are self-executing).

9. *See, e.g.*, Hayes v. Howell, 308 S.E.2d 170, 176 (Ga. 1983) (noting that

that the "General Assembly shall have the power to provide by law for . . . [r]estrictions upon land use in order to protect and preserve the natural resources, environment, and vital areas of this state."[10]

Four states go a slight step further and set out a constitutional policy to protect the environment. The Virginia Constitution, for example, provides not only that the General Assembly "*may* undertake" various environmental measures,[11] but that it is the "policy of the Commonwealth to conserve, develop, and utilize its natural resources" and "to protect its atmosphere, lands, and waters from pollution."[12] The Puerto Rico Constitution similarly declares that it is the "public policy of the Commonwealth to conserve, develop and use its natural resources in the most effective manner possible for the general welfare of the community." Not surprisingly, state courts have concluded that such provisions are not self-executing and do not require either state or private parties to take any particular actions.[13]

Most of the state constitutions that contain environmental provisions go considerably further and award environmental rights to their citizens, require the legislature to address particular environmental issues, or both. The constitutions of a number of southern states, as well as Michigan and New York, mandate environmental legislation, but set out no environmental rights.[14] The Massachusetts Constitution creates a right "to clean air and water," among other environmental amenities, but then merely awards its legislature the "power to enact legislation necessary or expedient to protect such rights."[15] The constitutions of Hawaii, Illinois, Montana, and Pennsylvania both establish rights and call for state action to support those rights.[16]

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environmental legislation would be legitimate exercise of state police power even absent constitutional provision).

10. GA. CONST. art. III, § VI, para. II(a)(1). *See also* R.I. CONST. art. I, § 16 (providing that environmental regulation "shall be an exercise of the police powers of the state, shall be liberally construed, and shall not be deemed to be a public use of private property").

11. VA. CONST. art. XI, § 2 (emphasis added).

12. VA. CONST. art. XI, § 1.

13. *See, e.g.*, Robb v. Shockoe Slip Found., 324 S.E.2d 674, 676 (Va. 1985).

14. *See* FLA. CONST. art. II, § 7; LA. CONST. art. IX, § 1; MICH. CONST. art. IV, § 52; N.Y. CONST. art. XIV, § 4; S.C. CONST. art. XII, § 1.

15. MASS. CONST. amend. XLIX.

16. *See* HAW. CONST. art. XI, §§ 1, 7, 9; ILL. CONST. art XI, §§ 1-2; MONT. CONST. art. IX, §§ 1-3; PA. CONST. art. I, § 27. The New Mexico Constitution similarly states

These more substantive constitutional provisions vary across a number of dimensions. First, the provisions differ in how specifically they set out environmental goals. Most of the constitutional provisions, including those of the Montana Constitution, focus broadly on the need for a "clean" or "healthful" environment or the protection of scenic beauty and natural resources, sometimes with a list of illustrative examples. Some of the constitutional provisions, however, set out explicit but circumscribed lists of environmental directives or rights that differ considerably from state to state. The lists include clean air and water, noise abatement, wildlife preservation, protection and conservation of other specific natural resources, and maintenance of historic buildings and sites.

These constitutional provisions also vary in the degree to which they recognize competing values. Most state constitutions encourage the pursuit of environmental goals with no explicit recognition of potential tradeoffs. Some state constitutions require the legislature to pursue both environmental and developmental goals, implicitly recognizing a balance. The Hawaii Constitution, for example, emphasizes the need both to protect the state's natural resources and to "promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State."[17] A few state constitutions place explicit limits on the degree to which the legislature can pursue environmental ends. The Louisiana Constitution, for example, mandates a "healthful" environment but only "insofar as possible and consistent with the health, safety, and welfare of the people."[18]

Finally, constitutions differ in the degree to which they permit ordinary citizens to seek judicial enforcement of these provisions. The vast majority of the constitutions are conspicuously silent about enforcement, perhaps because the framers assumed that courts would use standard rules of constitutional interpretation to determine how and when citizens could enforce the provisions.[19] Of those constitutions

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that environmental protection is of "fundamental *importance* to the public interest," and orders the legislature to control pollution and despoilment of the environment. N.M. CONST. art. XX, § 21 (emphasis added).

17. HAW. CONST. art. XI, § 1.

18. LA. CONST. art. IX, § 1.

19. For a more general discussion of the self-execution of state constitutional provisions, see David M. Gareau, *Opening the Courthouse Doors: Allowing a Cause of*

that mandate legislative action without creating separate environmental rights, only the New York Constitution explicitly addresses enforcement – authorizing citizens to sue on notice to the state attorney general and with the consent of the state's supreme court.[20] Of the five constitutions that create rights or duties in their citizenry, only the Hawaii and Illinois constitutions explicitly authorize citizens to enforce the rights in court against the government or private parties, and even these states permit the legislature to impose "reasonable limitations" on such lawsuits.[21] The remaining three constitutions, including the Montana Constitution, are silent on whether and how citizens can enforce the environmental rights.[22]

Despite the many differences among these provisions, environmental groups and individual citizens have found it extremely difficult to use the provisions to affect environmental policy. Courts occasionally have interceded in relatively extreme situations where state agencies, without any consideration of the environmental consequences of their actions, have pursued actions that posed an environmental threat. For this reason, the provisions were of some value in the 1970s before most state legislatures passed laws constricting state actions that might harm the environment and requiring state agencies to conduct environmental assessments prior to acting. Most state courts, however, have rebuffed efforts to use the constitutional provisions to direct either governmental policy or private actions.[23] As a result, such constitutional provisions today play at best a marginal role in most states.

State courts have used a number of different legal arguments to avoid "constitutionalizing" environmental policy. Some of the arguments have been procedural. Where state constitutions are silent regarding judicial enforcement, for

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Action to Arise Directly from a Violation of the Ohio Constitution, 43 CLEV. ST. L. REV. 459, 477-84 (1995).

20. N.Y. CONST. art. XIV, § 5 ("A violation of any of the provisions of this article may be restrained at the suit of the people or, with the consent of the supreme court in appellate division, on notice to the attorney-general at the suit of any citizen.").

21. The Hawaii Constitution, for example, provides that "[a]ny person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law." HAW. CONST. art. XI, § 9. *See also* ILL. CONST. art. XI, § 2.

22. Both the Massachusetts and Pennsylvania constitutions also are silent regarding enforcement, despite setting out explicit constitutional rights. *See* MASS. CONST. art. XCVII, § 1; PA. CONST., art. I, § 27.

23. *See* Robert A. McLaren, *Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation*, 12 U. HAW. L. REV. 123, 128-45 (1978).

example, some courts have held that there is no cause of action under the constitutional provisions.[24] Even where constitutions provide explicitly for citizen enforcement, courts often have used standing or ripeness principles to dismiss lawsuits challenging state or private actions.[25]

A common justification for dismissing private lawsuits has been that the constitutional provisions are not "self executing."[26] To most courts, a key question in deciding whether an environmental provision is self-executing is whether the provision sets out a sufficient rule by which to decide cases without any legislative guidance.[27] As discussed later, most state courts have felt very uncomfortable determining the appropriate methodology and standards for evaluating environmental issues such as the permissible level of pollution or appropriate land uses.

State courts also have narrowly interpreted the scope of environmental provisions. Some courts have restricted the applicability of constitutional provisions to a narrow set of issues. In *Glisson v. City of Marion*,[28] for example, the Illinois Supreme Court held that the term "healthful environment" addresses only those actions such as polluting that might directly harm human health and does not permit suits seeking to protect biodiversity. Other courts have held that administrative actions are entitled to strong deference or have established evaluative standards that are easy for state or private actors to meet.[29] In evaluating the constitutionality of state legislation, virtually every state court to consider the issue has employed a reasonableness standard, refusing plaintiffs'

24. *See, e.g.*, State v. Gen. Dev. Corp., 448 So. 2d 1074, 1080 (Fla. Dist. Ct. App. 1984), *aff'd*, 469 So. 2d 1381 (Fla. 1985) (individual state attorney did not have authority under constitutional provision to challenge creation and modification of artificial waterways).

25. *See, e.g.*, City of Elgin v. County of Cook, 660 N.E.2d 875, 891 (Ill. 1995) (standing required to bring suit under constitutional provision); Parsons v. Walker, 328 N.E.2d 920, 924-25 (Ill. App. Ct. 1975) (lawsuit dismissed as premature); Enos v. Sec'y Envt'l Affairs, 731 N.E.2d 525, 532 n.7 (Mass. 2000) (constitutional provision does not provide separate standing).

26. *See, e.g.*, Advisory Op. to the Gov'r, 706 So. 2d 278, 281 (Fla. 1997) (environmental amendment to Florida constitution not self-executing); Petition of Highway US-24, 220 N.W.2d 416 (Mich. 1974); County of Delta v. Michigan Dept. of Nat. Resources, 325 N.W.2d 455 (Mich. Ct. App. 1982); Kimberly Hills Neighborhood Assn. v. Dion, 320 N.W.2d 668 (Mich. Ct. App. 1982).

27. *See, e.g.*, Advisory Op. to the Gov'r, 706 So.2d at 281 (Fla. 1997), citing Gray v. Bryant, 125 So. 2d 846 (Fla. 1960).

28. 720 N.E.2d 1034 (Ill. 1999).

29. *See, e.g.*, Payne v. Kassab, 361 A.2d 263 (Pa. 1976).

requests to apply strict scrutiny.[30]

Three of the five state constitutions that establish environmental rights also appear to impose private duties on citizens to protect the environment. Illinois and Montana are the most explicit. The Illinois Constitution provides that "the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations,"[31] while the 1972 Montana Constitution, as discussed below, establishes a duty to "maintain and improve a clean and healthful environment."[32] Although the Hawaii Constitution does not explicitly set out an environmental duty, its enforcement language, by authorizing suits against "any party, public or private," suggests that the environmental duties extend to private individuals.[33] Neither the Hawaii nor Illinois courts, however, have used the provisions in their constitutions to scrutinize and regulate private actions. Indeed, the Illinois appellate courts have suggested that the Illinois provision does not create an independent cause of action against private parties.[34]

B. The 1972 Montana Constitution

1. The Constitutional Provisions

When the delegates to the 1972 Montana Constitutional Convention turned their attention to the environment, they concluded that the environmental provisions in other state constitutions were insufficient to provide the type of protection that the delegates believed was necessary.[35] The provisions that they drafted are, in many ways, still at the cutting edge of constitutional provisions protecting the environment. Only Montana, for example, labels as "inalienable" the "right to a

30. *See, e.g.*, Ill. Pure Water Comm. v. Dir. of Pub. Health, 470 N.E.2d 988, 991 (Ill. 1984) (using reasonableness standard to review statute requiring mandatory fluoridation of public water supply).

31. ILL. CONST. art. XI, § 1.

32. MONT. CONST. art. IX, § 1. In section 3 of Article II, after establishing the "right to a clean and healthful environment," the 1972 Montana Constitution also notes that "[i]n enjoying these rights, all persons recognize corresponding responsibilities."

33. HAW. CONST. art. XI, § 9.

34. *See* Morford v. Lensey Corp., 442 N.E.2d 933 (Ill. App. Ct. 1982) (constitutional duty does not give tenants a cause of action against their landlords for unhealthful premises).

35. 5 MONT. CONST. CONV. TR. 1200.

clean and healthful environment."[36] As noted, moreover, Montana is one of only two states to impose a duty on each and every citizen to protect that environment. Finally, Montana is one of only three states to recognize the environmental interests of not only the current population but "future generations."[37]

The Montana constitutional provisions also set out a more nuanced set of standards than other state constitutions. Most state constitutions tend to provide for the blanket protection of a "healthful environment" or a laundry list of environmental interests such as clean air, clean water, and noise abatement. The 1972 Montana Constitution, by contrast, sets up several standards. First, the Constitution provides a strict standard of protection for those elements of the environment required to protect human life. Section 3 of Article II thus provides an inalienable right to a "healthful" environment. Section 1(3) of Article IX, moreover, mandates that the legislature "provide adequate remedies for the protection of the environmental life support system from degradation."

Second, the Constitution suggests, in both Articles II and IX, that there is also a relatively strict obligation to provide a "clean" environment. Whether the Constitution mandates a totally pollution-less environment is not clear from the language of the Constitution by itself. What is clear, however, is that the Constitution demands more than the mere preservation of the current level of environmental quality. Almost unique among state constitutions, the Montana Constitution provides not only for maintenance of current environmental quality but for the improvement of the environment. Section 1(1) of Article IX creates a duty in both the state and each person to "improve" the environment for the benefit of present and future generations. Section 2(1) of the same article provides that all "lands disturbed by the taking of natural resources shall be reclaimed."

Finally, the Constitution provides a lower standard of protection for those natural resources that are not essential for life. Section 1(3) of Article IX thus mandates that the legislature provide adequate remedies only "to prevent unreasonable depletion and degradation of natural resources."

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36. MONT. CONST. art. II, § 3.

37. *See* MONT. CONST. art. IX, § 1, cl.1 ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present *and future generations.*") (emphasis added). The other states that explicitly recognize the interests of future generations are Hawaii and Illinois. *See* HAW. CONST. art. XI, § 1; ILL. CONST. art. XI, § 1.

The Constitution does not attempt to define "unreasonable."

2. Judicial Interpretation

In the years immediately following passage of the 1972 Montana Constitution, the Montana Supreme Court, much like other state courts, pursued a conservative interpretation of the Constitution's environmental provisions. The court summoned the environmental provisions when necessary to help uphold state actions protecting or improving the environment, but eschewed efforts to use the environmental provisions to challenge actions harming the environment. *Douglas v. Judge*[38] exemplified the court's use of the provisions to support governmental action. In *Douglas*, a property owner challenged the constitutionality of a state law that used bond financing to provide loans and grants for the development of "renewable resources." The plaintiff argued that the law authorized the levying of taxes for a private purpose in violation of Article VIII, Section 1 of the 1972 Montana Constitution. In rejecting the challenge, the court relied on the Constitution's environmental provisions: "In view of the mandate of Article IX, §1, 1972 Montana Constitution that: 'The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations,' we feel the purpose of this act is a 'public purpose.'"[39]

When asked to hold that the Constitution required a full and adequate environmental review of subdivision plans before they were approved, however, the Supreme Court declined. The subdivision at issue in *Montana Wilderness Association v. Board of Health & Environmental Sciences*,[40] required the approval of both local governments (as to land use) and the Department of Health and Environmental Sciences (as to the water and sewer systems). The Montana Environmental Policy Act (MEPA) required state, but not local, agencies to prepare an environmental impact statement (EIS) before taking any major action that might significantly affect the human environment. Although the Department had prepared an EIS, two environmental groups claimed that it was inadequate; defendants, in turn, challenged the groups' standing. Originally, the court authored an opinion siding with the

38. 174 Mont. 32, 568 P.2d 530 (1977).
39. 174 Mont. at 36, 568 P.2d at 532-33.
40. 171 Mont. 477, 559 P.2d 1157 (1976).

plaintiffs. The court held that the plaintiffs had standing because the alleged failure to prepare an adequate EIS "threatened injury to a civil right of the Associations' members, that is, the 'inalienable . . . right to a clean and healthful environment.'"[41] According to the court, the inalienable right to a clean and healthful environment "certainly places the issue of unlawful environmental degradation within the judicial cognizance."[42] In passing, the court also held that the right to a clean and healthful environment was a "fundamental" right.[43] After reconsidering its original decision, however, the court changed course and issued a new, somewhat confused opinion holding that the local governments could approve the subdivision despite the challenge to the Department's EIS.[44]

In *Kadillak v. Anaconda Company*,[45] property owners challenged the development and operation of a mining waste dump in their neighborhood, again attacking the adequacy of the state's EIS. The Supreme Court held that MEPA did not require the state to conduct an EIS for the mining activity because MEPA required the preparation of an EIS only "to the fullest extent possible." Because state law required a mining permit to be issued within 60 days of an application, a "woefully inadequate period for the preparation of a proper EIS," the court concluded that an EIS was not possible.[46] Although the plaintiffs argued that the court should give MEPA a liberal interpretation in light of the environmental rights established by the 1972 Montana Constitution, the court unanimously declined, noting that MEPA had been passed prior to the Constitution. "This Court finds that the statutory requirement of an EIS is not given constitutional status by the subsequent enactment of this constitutional guarantee . . . It is not the function of this Court to insert into a statute 'what has been omitted.'"[47]

For the next twenty years, the environmental provisions in the Montana Constitution were quiescent. In 1999, however, the Montana Supreme Court breathed new life into the

41. 171 Mont. at 497, 559 P.2d at 1167 (Haswell, J., dissenting).

42. *Id.*

43. 171 Mont. at 498, 559 P.2d at 1168 (Haswell, J., dissenting).

44. 171 Mont at 482-86, 559 P.2d at 1160-61.

45. 184 Mont. 127, 602 P.2d 147 (1979).

46. 184 Mont. at 134-36, 602 P.2d at 152-53.

47. 184 Mont. at 138, 602 P.2d at 154, (quoting Security Bank v. Connors, 170 Mont. 59, 67, 550 P.2d 1313, 1317 (1976)).

provisions, creating an exceptionally strong legal tool for environmentalists seeking to challenge governmental or private actions that potentially threaten the environment.[48] The issue in *Montana Environmental Information Center v. Department of Environmental Quality*[49] (*MEIC*) was the constitutionality of an exemption from Montana's policy of preventing the degradation of high quality waters. A mining venture known as Seven-Up Pete sought to discharge arsenic-laced groundwater that it was pumping from several test wells into two infiltration galleries that fed the Blackfoot River and the Landers Fork River. Although the arsenic levels in the groundwater exceeded not only the background levels of the infiltration galleries but also state health standards, the arsenic levels would drop by the time the water reached the rivers. State experts testified that the level of arsenic in the rivers would be below human health standards and not interfere with any human uses of the rivers. The arsenic levels would be "close to a nondetectable" level in the case of the Landers Fork and only slightly above the background level in the case of the Blackfoot. Despite the low arsenic levels, state law normally would have required the discharges to undergo a rigorous nondegradation review. In 1999, however, the legislature had amended the state water quality laws to exempt certain "nonsignificant" activities, including well tests.

The court addressed two interrelated issues: the plaintiffs' standing to challenge the constitutionality of the 1999 amendments, and the appropriate substantive standard of review. Curiously, the court did not address another threshold question that, over a quarter of a century after the 1972 Montana Constitution was passed, remained unanswered: were the environmental provisions of the Montana Constitution self-executing? Instead, the court seemed to assume an affirmative answer to the question.[50]

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48. The Supreme Court also has rediscovered the environmental provisions' value in defending governmental actions. In *State v. Boyer*, 2002 MT 33, 308 Mont. 276, 42 P.3d 771, for example, the court used the environmental provisions to help defend and uphold the government's search of the well of a fisherman's boat for illegal catch. In light of the environmental provisions, the fisherman did not have a reasonable expectation of privacy in the well. The environmental provisions, as well as other state laws and regulations, "mandate special considerations to assure that our wild places and the creatures that inhabit them are preserved for future generations." *Id.* at ¶ 22.

49. 1999 MT 248, 296 Mont. 207, 988 P.2d 1236.

50. Professor John Horwich justifiably has criticized the Montana Supreme Court's opinion in *MEIC* for this and other failings. *See* John L. Horwich, *MEIC v. DEQ: An*

As to standing, the court rejected the defendants' argument that the plaintiffs lacked standing because they had failed to show that the arsenic levels in the rivers were unsafe and thus that they had suffered either an injury in fact or a violation of their right to a "clean and healthful environment." According to the court, the environmental provisions were meant to be "both anticipatory and preventative."[51] The plaintiffs had met the threshold test for a constitutional challenge and established standing to raise that challenge by showing that the test waters had concentrations of arsenic greater than background levels and that normally the state would have required a nondegradation review in such circumstances. The court in essence concluded that the Montana Constitution embodied a precautionary principle.[52] "The delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked."[53] According to the court, any degradation to the environment implicates the rights ensured by Articles II and IX of the Constitution and can trigger judicial review.

As to the appropriate standard of review, the court began by deciding that the right to a "clean and healthful" environment is a fundamental right. As a consequence, "any statute or rule which implicates that 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."[54] In dictum, the court also announced that it would also apply strict scrutiny to (1) any state action that implicates the "rights provided for in Article IX, Section 1" (presumably including prevention of "unreasonable

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Inadequate Effort to Address the Meaning of Montana's Constitutional Environmental Provisions, 62 MONT. L. REV. 269 (2001).

51. *MEIC*, ¶ 77.

52. Increasingly accepted as a principle of international environmental law, the precautionary principle provides that where "there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." *1992 Rio Declaration on Environment and Development*, U.N. Conference on Environment and Development (UNCED), U.N. Doc. A/CONF.151/5/Rev. 1, 31 I.L.M., Principle 15.

53. MEIC, ¶ 77.

54. *Id.* ¶ 63.

depletion and degradation of natural resources" that do not affect the "environmental life support system"), and (2) any "private action" that implicates either Article II, Section 3 or Article IX, Section 1.[55] Turning to the facts of the case, the court concluded that the nondegradation review procedures of state law were a "reasonable legislative implementation" of the constitutional rights and that the legislature had "violated those environmental rights" by "arbitrarily" excluding test wells and other activities from the review "without regard to the nature or volume of the substances being discharged."[56] Although this could be read as the end of the matter, the court instead remanded to the district court "for strict scrutiny of the statutory provision in question, 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 *State v. Wadsworth* [sic]."[57]

Two years after *MEIC*, the Supreme Court reached out to apply the environmental provisions to private actions. In *Cape-France Enterprises v. Estate of Peed*,[58] the owner of a tract of land in Bozeman had entered into a contract to subdivide and sell a portion of the land for a motel or hotel. When subdividing the property proved difficult and financially risky, the owner sought to rescind the agreement on grounds of mutual mistake, impossibility, and impracticability of performance. One of the obstacles to subdividing the property was the presence of an underground pollution plume in the vicinity of the tract. Because the subdivision would rely on groundwater, the Department of Water Quality insisted that the property owner drill a test well, but warned that if the well broadened the pollution plume, the owner would be held liable for the resulting cleanup costs. The district court concluded that this risk absolved the owner of its contractual obligation.

Although the Supreme Court agreed with the district court that the contract could be rescinded on common law grounds, it went on to hold that the contract also was invalid under the environmental provisions of the Montana Constitution. The Supreme Court already had held in *MEIC* that the constitutional provisions applied to private action and private

55. *Id.* ¶ 64.

56. *Id.* ¶ 80.

57. *Id.* ¶ 81, (citing presumably to Wadsworth v. State, 275 Mont. 287, 911 P.2d 1165 (1996)).

58. 2001 MT 139, 305 Mont. 513, 29 P.3d 1011.

parties. As a result, it would be "unlawful" for the property owner "to drill a well on its property in the face of substantial evidence that doing so may cause significant degradation of uncontaminated aquifers and pose serious public health risks."[59] A court, moreover, could not order specific performance of the contract without itself violating the environmental provisions of the constitution.

The Supreme Court reemphasized that the environmental "guarantee" in the Montana Constitution is a "fundamental right that may be infringed only by demonstrating a compelling state interest."[60] The compelling state interest test, moreover, requires exceptionally strong justification. According to the court, a compelling state interest is "at a minimum, some interest 'of the highest order and . . . not otherwise served'" or "the gravest abuse, endangering a paramount government interest."[61] The law's interest in the enforcement of contracts clearly was not the sort of compelling state interest that would justify specific performance of the contract at issue in the case.

The court's efforts to apply the constitutional provisions to private action have proven controversial. Three of the seven justices in *Cape France Enterprises* would not have addressed the constitutional issues, particularly given that the parties neither raised nor briefed them. Justice Gray in particular expressed concern that the court was addressing an issue "still in its infancy" without adequate guidance or facts. "Montana constitutional rights relating to the environment are hugely important and impactful to the citizens of Montana and should not be dallied with by this Court in the absence of issues being raised in the District Court and fully briefed in this Court."[62]

Neither *MEIC* nor *Cape France* attempted to set out in detail how strict scrutiny will work in the environmental context, and the future development of the constitutional provisions will largely depend on how the Montana Supreme Court works out those details. Strict scrutiny remains a relatively vague concept that has varied considerably from case to case and from court to court. The Montana Supreme Court has emphasized in other contexts that strict scrutiny of state action is a "delicate matter" that eschews "mechanical

59. *Id.* ¶ 33.

60. *Id.* ¶ 31.

61. *Id.*, (quoting Armstrong v. State, 1999 MT 261, n.6, 296 Mont. 361, 376 n.6, 989 P.2d 364, 375 n.6.)

62. *Id.* ¶ 75 (Gray, J., dissenting).

approaches."[63] The court therefore has not set out any specific formula for determining "what makes a state interest 'compelling,'" but instead has left the issue for case-by-case determinations.[64]

II. IMPLEMENTING FUNDAMENTAL ENVIRONMENTAL RIGHTS

A. The State Role in U.S. Environmental Law

When the Montana electorate ratified the state Constitution in June 1972, environmental law was in its infancy, and Congress had only begun to federalize the field. Congress had passed the National Environmental Policy Act, addressing the environmental performance of federal agencies, and the Clean Air Act, establishing tough new national air quality standards.[65] But the vast array of national environmental statutes that today pervade the field were yet to come. In setting out environmental rights and obligations, the drafters of the Montana Constitution thus were writing on a virtually blank slate with little experience in the complexities of environmental policy. They also were devising constitutional rights and directives at a time when states were still the major players in the environmental field.

Since ratification of the Montana Constitution, Congress has largely nationalized environmental law. In the 1970s and early 1980s, Congress passed major laws addressing water pollution, safe drinking water, solid waste disposal, toxic substances, endangered species, and the cleanup of hazardous waste.[66] National environmental laws today address to varying degrees virtually every major environmental issue. In interpreting environmental provisions in state constitutions, state courts must consider these national environmental laws, much as they must consider the national Bill of Rights in interpreting parallel state bills of rights.[67] Like the national Bill

63. *Wadsworth*, 275 Mont. at 303, 911 P.2d at 1174, (quoting Robinson v. Cahill, 303 A.2d 273, 282 (N.J. 1973)).

64. *Armstrong*, 1999 MT 261, n.6.

65. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 101-113 (3d ed. 2000) (providing a brief history of environmental law in the United States).

66. *See id.* at 105-107 (setting out a chronology of major federal environmental legislation).

67. For discussion of some of the issues raised by parallel federal and state bills of rights, see Ronald K.L. Collins, *The Once "New Judicial Federalism" and Its Critics*, 64

of Rights, federal environmental laws provide a floor below which states cannot drop. In a few instances, national environmental laws or other federal legal principals also may prevent the imposition of higher standards. National environmental laws may preempt stricter state standards,[68] for example, or the "dormant" commerce clause may prohibit state regulation of issues that implicate interstate commerce.[69]

State environmental provisions, nonetheless, remain exceptionally important. Despite the federalization of U.S. environmental law, states remain on the front line of a wide number of important issues.[70] The national government has yet to pass laws in some areas, abandoning effective regulation for the moment to the states. Examples here range from global climate change, where the national government has adopted an approach consisting largely of research and voluntarism, and the overdrafting of groundwater aquifers.[71] In other areas, national environmental laws have purposefully addressed only some aspects of a problem, carving other aspects out for state regulation. The Clean Water Act, for example, does not directly regulate non-point pollution from agriculture, mines, construction sites, and other diffuse sources, leaving regulatory

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WASH. L. REV. 5 (1989) (discussing the debate over the proper role for state interpretation of state bills of rights); Ronald K.L. Collins, *Reliance on State Constitutions – The Montana Disaster*, 63 TEX. L. REV. 1095 (1985) (criticizing the Montana Supreme Court's position that the Montana right against self-incrimination affords no greater protection than the equivalent federal right).

68. In most cases, Congress has explicitly preserved the right of states to set higher environmental standards. *See, e.g.*, Clean Water Act § 510, 33 U.S.C. § 1370 (2002). Some federal statutes, however, do preempt both weaker and stricter standards. The Clean Air Act, for example, strictly limits the ability of states to set automobile emission standards that are stricter than those set by the national government. Clean Air Act § 209, 42 U.S.C. § 7543 (2002). The Federal Insecticide, Rodenticide, and Pesticide Act restricts the ability of states to pass stricter pesticide regulations. Federal Insecticide, Rodenticide, and Pesticide Act § 24, 7 U.S.C. § 136v (2002).

69. *See, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617 (1978) (states cannot prohibit disposal of out-of-state waste).

70. For a valuable discussion of the role of states today in the environmental field, see Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001).

71. Some states have responded to the vacuum. In the face of Congressional failure to reduce the United States' emissions of global greenhouse gases, for example, environmental groups in California recently pushed legislation through the California legislature mandating that the California Air Resources Control Board develop regulations to reduce emissions of carbon dioxide from California vehicles. *See* Danny Hakim, *Detroit and California Rev Their Engines Over Emissions*, N.Y. TIMES, July 28, 2002, at 4. A number of states have taken steps to regulate groundwater mining. *See* William Blomquist, *Exploring State Differences in Groundwater Policy Adoptions, 1980-1989*, PUBLIUS: THE JOURNAL OF FEDERALISM, Spring 1991, at 101.

choices over non-point pollution largely to the states.[72] The Endangered Species Act focuses most of its attention on species at the brink of extinction, leaving more general biodiversity management largely to the states.[73] Even where the national government has chosen to regulate an environmental problem, state governments have chosen to adopt additional or stricter environmental policies in fields as diverse as air pollution and hazardous waste cleanups.[74] Most national environmental laws, moreover, adopt a policy of "cooperative federalism" under which the national government sets overall environmental policy but delegates authority over implementation and many of the regulatory details to states.[75] In summary, although the environmental field has changed dramatically since the 1972 Montana Constitution, state constitutional provisions are still of great importance.

B. The Potential Promise

The Montana Supreme Court's decisions in *MEIC* and *Cape France Enterprises* are stunningly breathtaking in both their potential reach and their potential to change the face of environmental law. Environmental interests will be tempted to use the newly invigorated environmental provisions of the Montana Constitution in at least three significant ways. First, environmental interests will want to tighten and expand Montana's environmental laws, either through judicial challenges to legislative actions and inactions or through direct constitutional entreaties to the legislature. Second, environmental interests will wish to strengthen judicial review of administrative actions implicating the environment. Finally, environmental interests will desire to broaden the opportunity for private individuals and groups to bring lawsuits challenging both public and private actions that threaten environmental harm. If environmentalists succeed in large part in achieving

72. *See* JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 897-900 (3d ed. 2000) (noting that the Clean Water Act leaves the regulation of non-point pollution primarily up to states and local governments).

73. *See* Jon Weiner, *Natural Communities Conservation Planning: An Ecosystem Approach to Protecting Endangered Species*, 47 STAN. L. REV. 319 (1995) (commending California's Natural Communities Conservation Planning approach as an alternative to the "emergency room" approach of the Endangered Species Act).

74. Revesz, *supra* note 70, at 578-626.

75. *See* Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1148-78 (1995) (discussing Congress' adoption of various cooperative federalism approaches).

these goals, *MEIC* and *Cape France Enterprises* will have revolutionized environmental policy in Montana.

1. Strengthening environmental laws.

Despite the advances in environmental law over the past thirty years, environmental interests remain dissatisfied with state and national policy on a number of fronts. In some areas such as global greenhouse gas emissions, neither the national nor state governments have taken any effective regulatory action. In other areas such as water contamination, national and state laws carve out various exceptions that can undermine ultimate environmental goals. In yet other areas such as air quality, national and state laws are relatively comprehensive, but environmental interests are dissatisfied with the chosen level of protection.

In many cases, environmental dissatisfaction can be chalked up to policy disagreements. Environmentalists often see environmental issues in moral terms with little, if any, room for economic considerations. From the environmentalist's perspective, no level of pollution or harm to natural resources may be acceptable, no matter how costly it might be to society to eliminate the problem. Legislatures and the median voter, by contrast, sometimes take a more utilitarian approach to environmental issues and consciously trade off environmental harm for economic gain.

In other cases, however, legislative pathologies may make it difficult to enact environmental laws even where the measures are widely supported by the population. Political economists have long worried that industries, which readily can mount concerted and intensive lobbying efforts when faced by costly regulatory measures, may have a political advantage over the more diffuse environmental interests of the general public. Environmental groups, in fact, do appear to have difficulty mustering significant political leverage in state legislatures. In one of the most exhaustive studies of state environmental policy, Professor Evan Ringquist found that "environmental group strength" (as measured by the number of national environmental group members per 1,000 residents of a state) correlated only weakly with the strength of environmental laws.[76]

76. EVAN J. RINGQUIST, ENVIRONMENTAL PROTECTION AT THE STATE LEVEL: POLITICS AND PROGRESS IN CONTROLLING POLLUTION 119-20 (1993).

Empirical studies, however, have not shown that industries in general have a disproportionate effect on environmental policy. The Ringquist study, for example, concluded that manufacturing industries in the 1980s did not enjoy excessive sway over state environmental legislation. Thus "polluting industry strength" (as measured in each state by the value added by manufacturing in the most polluting industries as a percentage of the gross state product) did not contribute to lower environmental standards. Indeed, polluting industry strength was correlated with stronger air pollution laws, perhaps because the greater pollution threat increased the perceived need for stronger laws.[77] The same study, however, concluded that extractive industries were an exception to the general rule. "Mining strength" (as measured by the value of mining output as a percentage of gross state product), for example, was correlated with weaker water quality regulations.[78] Other, more anecdotal studies suggest that agriculture also enjoys disproportionate political power over environmental legislation at both the national and state levels.[79]

As a consequence, the agricultural and extractive industries often enjoy lenient regulatory treatment when compared with other industries with equivalent impacts on the environment. Nonpoint water pollution is a good illustration. Although the federal Clean Water Act and most state laws tightly limit effluent discharges from sewage facilities and other point sources, agricultural return flow, mining runoff, and other nonpoint sources of pollution generally are subject to relatively vague and loose management standards at best.[80] Montana enjoys relatively high quality water, yet as of 2002, Montana reported that less than five percent of the waterways that it surveyed fully supported their designated beneficial uses; almost fifty percent of the stream miles and over eighty percent of the lake and wetland area were impaired, with the remainder needing reassessment.[81] Of the lakes, reservoirs, and wetlands designated for drinking water use, over half (by acreage) did not

77. *Id.* at 116-20.

78. *Id.* at 161-65.

79. For an excellent survey of the advantages enjoyed by agriculture under national environmental laws, see J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263 (2000).

80. *Id.* at 287-92.

81. 2002 Montana 305(b) Report, at 9, *available at* http://nris.state.mt.us/wis/TMDLApp/pdf2002/305text.pdf (visited Feb. 5, 2003).

support the designated use; almost 20 percent of the stream miles designated for drinking water use did not support the use.[82] Nonpoint pollution was the main culprit. Agricultural runoff was a contamination source for approximately two thirds of the impaired stream mileage and 80 percent of the impaired lake acreage; mining was a source for over a quarter of the impaired stream mileage and almost 60 percent of the impaired lake acreage.[83] No other source approached these levels of significance. Groundwater contamination from agriculture similarly remains a problem in much of the nation.[84]

Water pollution is not the only area in which agriculture gets a break. Both federal and state governments, for example, generally regulate pesticide applications far less rigorously than they do other forms of hazardous exposures.[85] Cost is an open and direct consideration in the regulation of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), but not in the regulation of hazardous substances under the Clean Air Act or the Resource Conservation and Recovery Act. As a result, farm workers consistently come into contact with pesticides that, as waste, are subject to strict disposal regulations. FIFRA also is the only major federal environmental statute that does not permit citizens to bring enforcement actions when the government has failed to act.

Yet another example of the power of the agricultural lobby at the national level is wetlands regulation. The majority of wetlands remaining in the United States are in agricultural regions.[86] While section 404 of the federal Clean Water Act requires landowners to obtain permits from the Army Corps of Engineers before filling a wetland, section 404(f) exempts a number of activities from permitting requirements, including

82. *Id.* at 10.

83. *Id.* at 13.

84. *See* David E. Adelman & John H. Barton, *Environmental Regulation for Agriculture: Towards a Framework to Promote Sustainable Intensive Agriculture*, 21 STAN. ENVTL. L.J. 3, 16 (2002) (noting that agricultural use of fertilizers and pesticides is one of the leading causes of groundwater contamination in the United States).

85. *See, e.g.*, Kristen C. Chapin, *Pest Eradication Programs and Fundamental Rights: Evolving Constitutional Concerns and the Case for Strict Scrutiny Judicial Review*, 22 ENVTL. L. 1067 (1992); Victor M. Sher, *Pests, Poisons, and Power: Constitutional Implications of State Pest Eradication Projects in California*, 1 J. ENVTL. L. & LITIG. 89 (1986).

86. Jeffrey A. Zinn, *Soil and Water Conservation Issues* (Cong. Res. Service Issue Brief No. 96030, Jan. 22, 2001), *available at* http://www.cnie.org/nle/ag-18.cfm (last visited Feb. 5, 2003).

"normal farming, silviculture, and ranching activities."[87] Only some property owners interested in using their wetlands in a manner that subjects them to section 404, moreover, must apply for individual permits. The remaining property owners proceed under nationwide general permits that do not require case-by-case environmental review by the Army Corps of Engineers.[88] In 1994, almost 90 percent of non-exempt agricultural activities were approved under nationwide general permits.[89]

Various forms of cognitive error also may hinder the enactment of environmental laws. People, for example, appear to find it difficult to make the economic sacrifices needed to eliminate longterm environmental problems, such as global climate change or pesticide toxicity, that are clouded by scientific uncertainty. In these settings, people tend to engage in wishful thinking and assume that the problem is less serious than scientific studies would suggest.[90] They tend to buy into the more optimistic studies and projections. People also heavily discount the future benefits of current sacrifice, in part because the sacrifice is immediate and thus more salient.[91] For these and other reasons, people may well oppose steps that would appear to be in their personal interest and often will simply avoid confronting an environmental issue until serious harm has occurred.

Whatever the source of discontent, the Montana constitutional provisions provide environmental groups with a means to try to strengthen state law through the courts. *MEIC* is likely to be only the first and perhaps easiest in a series of cases challenging legislative action and inaction in the environmental field. As discussed further in the next section, *MEIC* presented the courts with a relatively simple and standard legal issue: was the challenged exclusion constitutional? The Montana Supreme Court did not have to develop a new environmental standard or, even worse, an

87. 33 U.S.C. § 1344(f) (2002).

88. Ralph E. Heimlich et al., *Wetlands and Agriculture: Private Interest and Public Benefits* 104 (U.S. Dept. of Agric., Agric. Econ. Report No. 765, Sept. 1998), *available at* http://www.ers.usda.gov/publications/aer765/aer765.pdf (last visited Feb. 5, 2003). During the Clinton Administration, however, efforts were made to tighten the requirements for nationwide permits. *Id.* at 38.

89. *Id.* at 27

90. *See* Barton H. Thompson, Jr., *Tragically Difficult: The Obstacles to Governing the Commons*, 30 ENVTL. L. 241, 258-59 (2000) (elaborating on the problem in the context of commons dilemmas).

91. *Id.* at 262-263.

entirely new environmental program. If the exception was unconstitutional, the basic nondegradation standard would take over.

Future lawsuits, however, may prove more challenging by requiring courts to become more actively involved in environmental policymaking and regulation. An environmental group, for example, might challenge the current state air quality standard for particulates as "unhealthful" – forcing the courts to determine whether the particular standard is too low and also perhaps, if the standard is too low, what is the appropriate standard.[92] Yet another environmental group might challenge the state's failure to reduce emissions of various greenhouse gases, on the theory that the failure of the state to act threatens the climate and thus both the "environmental life support system" and a "healthful environment."[93] In cases where the environmental plaintiff challenges legislative inaction rather than action, the courts might find themselves faced with the daunting task of designing and implementing a regulatory system from scratch.

Some plaintiffs also will push for more intrusive remedies. In most cases, environmental plaintiffs are likely to seek equitable relief that either declares particular legislation to be unconstitutional or orders particular state action. In *Orr v. State of Montana*,[94] however, a number of asbestos victims are seeking damages from the state for failing to regulate asbestos. Plaintiffs claim that, by not ensuring them a "clean and healthful environment," the state has committed a constitutional tort entitling them to damages. Although the district court has concluded that damages cannot be awarded, the claim presents a difficult issue. Courts have recognized constitutional torts in other contexts, and many constitutional scholars have argued in favor of a greater use of damages in the

92. Under Mont. Code § 75-2-207, the Montana Board of Environmental Review must adopt the federal ambient air quality standard unless it finds that a higher standard is needed to protect public health and is "achievable with current technology." One constitutional issue is whether the public has a right to a clean and healthful environment only where it is technologically feasible for industry to reduce their emissions without closing down.

93. As discussed in note 71, California now has taken an initial step to regulate greenhouse gas emissions from automobiles. An environmental group readily could argue that the Montana constitutional provisions demand no less of the Montana legislature.

94. No. BDV-201-423 (1st Judicial Dist. Ct., Aug. 16, 2002) (order dismissing plaintiffs' claims).

constitutional setting.[95] In *Dorwart v. Caraway*,[96] the Montana Supreme Court itself recently found that there is a private right of damages for violations of the state constitutional rights to due process, privacy, and freedom from unreasonable searches and seizures. In dictum, moreover, the court suggested that there is a private cause of action for monetary damages for all "self-executing" provisions of the Montana Constitution.[97] Justice Nelson, in concurrence, went further. Noting that the Montana Constitution provides for various affirmative rights including that to a clean and healthful environment, Nelson concluded that Article II, Section 34 of the Montana Constitution provides for a "direct action for damages" for violations of the "fundamental rights protected under Montana's Constitution."[98]

Recognition of a damage action for violations of constitutional rights to a healthful environment, however, would be unprecedented, provide a new incentive to sue, and raise critical questions. No state courts has ever read a damage remedy into a state constitution's environmental provisions, and the drafters of the Montana Constitution expressly declined to create a cause of action for violation of the environmental provisions.[99] Where courts have recognized damage actions in other context, moreover, employees of the government have affirmatively invaded constitutional rights. An action against the state itself for failing to provide an affirmative right raises significantly different issues. Given the vast array of environmental harms, and the lengthy period during which the Montana Supreme Court did not actively wield the constitutional provisions, recognition of a damage action could open the state up to sizable claims for past injuries. As the district court noted in its decision in *Orr*, a damage cause of action "would make the State potentially liable for failure to prevent every environmentally related problem suffered by anyone in Montana," including perhaps lung cancer from

95. For recent discussions of the issue, see John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999). The vast majority of states that have considered the issue, as well as federal courts, have recognized private causes of action for at least some constitutional violations. *See* Gail Donoghue & Jonathan I. Edelstein, *Life After Brown: The Future of State Constitutional Tort Actions in New York*, 42 N.Y.L. SCH. L. REV. 447, n.2 (1998).

96. 2002 MT 240, 312 Mont. 1, 58 P.2d 128.

97. *Id.* ¶ 44.

98. *Id.* ¶ 110 (Nelson, J., specially concurring).

99. 5 MONT. CONST. CONV. TR. 1228, 1241, 1246, 1254 (1972).

second-hand smoke.[100]

Lawsuits, of course, are inherently costly, time consuming, and risky. As a result, environmental groups will typically turn to the courts only as a last resort. Before suing, environmental groups are likely instead to use cases like *MEIC* to urge the legislature itself to eliminate exceptions, adopt stronger standards, and enact new regulatory programs. Cases like *MEIC* provide environmental organizations with greater leverage in their lobbying. Environmental groups can argue that the legislature has a constitutional obligation to strengthen environmental law, can claim the constitutional mantle in public debate, and can threaten to sue if forced to do so. Supportive legislators also can use the constitutional provisions to try to sway wavering representatives in debate. During the 2001 debate over amendments to the Montana Environmental Policy Act, State Senator Mike Halligan made exactly this type of argument in favor of an amendment that would have given agencies greater discretion to condition permits in order to protect a "clean and healthful environment."[101] Many legislators, of course, may ignore these entreaties, particularly if the State Supreme Court does not continue to employ the constitutional provisions actively. In the end, environmental groups are likely to find it necessary to bring lawsuits both to challenge what the legislature does or does not do and to strengthen their leverage in political negotiations. Plaintiffs, however, are likely to temper their claims since the loss of a lawsuit could undermine that leverage.

2. Strengthening judicial review.

Although environmental groups frequently challenge administrative actions, they are at a distinct legal disadvantage in most cases. Burden and standard of proof are immensely important in environmental cases. Environmental issues are

100. "For example, the suggestion put forth by Plaintiffs would make the State liable in tort for every case of lung cancer that could have been caused by second hand smoke. Plaintiffs in those cases could argue that it was the duty of the State to maintain a clean and healthy environment which it failed to do by allowing other people to smoke." No. BDV-201-423 (1st Judicial Dist. Ct., Aug. 16, 2002) (order dismissing plaintiffs' claims).

101. Mont. Envtl. Info. Ctr., *Legislature Cripples the Montana Environmental Policy Act*, http://www.meic.org/2001_Legislature/2001MEPA.html (last visited Feb. 5, 2003). Senator Fred Thomas, however, responded that the Supreme Court, not state agencies, should be determining what is required under the Montana Constitution. *Id.*

frequently clouded by uncertainty. Scientists often are not sure of the likely impacts of particular activities or substances. Estimates of the costs or feasibility of regulation also are often highly uncertain. Given the high level of uncertainty, it often is extremely difficult to prove that an agency determination is incorrect.

At both the national and state level, however, plaintiffs generally have the burden of proving that an agency erred or acted illegally.[102] In reviewing agency actions, moreover, both national and state courts strongly defer to agency factual determinations. Under the national Administrative Procedure Act, for example, courts can overturn agency rulemaking determinations only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[103] Although the standard is not toothless, it tilts the balance heavily in favor of the agency on factual issues. Montana law is similar. A court may reverse an agency's factual judgment only if the judgment is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record."[104] A "reviewing court must affirm the findings unless they are clearly erroneous. If the findings of fact are supported by reliable and substantial evidence, the reviewing court may not reweigh the evidence."[105]

The strict scrutiny approach adopted by the Montana Supreme Court in *MEIC* and *Cape France* could transform judicial review in the environmental field. As noted in Part I, the Montana Supreme Court has not specified in any detail how strict scrutiny will work in environmental cases. *MEIC*, however, suggests that a plaintiff need only show that a state action *may* undermine the constitutional guarantees in order to invoke strict scrutiny.[106] Once strict scrutiny is triggered, the

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102. *See, e.g.*, Trustees v. Anderson, 232 Mont. 501, 503, 757 P.2d 1315, 1317 (1988) ("[A] rebuttable presumption exists in favor of the agency's decision and . . . the burden of proof is on the party attacking it to show that it is erroneous.").

103. 5 U.S.C. § 706 (2)(A) (2002). In the case of adjudicatory proceedings, courts can invalidate decisions that are "unsupported by substantial evidence." 5 U.S.C. § 706(2)(E) (2002).

104. Mont. Code Ann. § 2-4-704(2)(a)(v) (2001). *See* State Pers. Div. v. Child Support Investigators, 2002 MT 46, ¶ 18, 289 Mont. 407, ¶ 18, 43 P.3d 305, ¶ 18 (applying Mont. Code Ann. § 2-4-704(2)(a)(v)); Ulrich v. State, 1998 MT 196, ¶ 13, 289 Mont. 407, ¶ 13, 961 P.2d 126, ¶ 13.

105. *Anderson*, 232 Mont. at 503, 757 P.2d at 1317.

106. The constitutional provisions thus do not require that a plaintiff "conclusively link" an action to "ill health or physical endangerment." *MEIC*, ¶ 77.

government has the burden of proving that a compelling state interest justifies the action. The Constitution demands that the court decide for itself, based on the evidence presented to it, whether a compelling state interest exists. "Simply because the State alleges a compelling interest, does not obviate the necessity that the State prove the compelling interest by competent evidence."[107] Turning to the compelling state interest standard itself, the state action must be "carefully tailored" to achieve that interest and not any ulterior purposes.[108] Moreover, there must not be any other means of achieving the compelling state interest that poses less of a threat to the environmental guarantee. The challenged action must be the "least onerous path that can be taken to achieve the state objective."[109]

To see the potential ramifications of the strict scrutiny standard, imagine that an environmental group pushes in Montana for a higher ambient air quality standard for sulfur dioxide. The Montana Board of Environmental Review considers raising the standard, but ultimately decides that a higher standard is neither justified nor feasible. Scientists are split on the health risk posed by the current standard, and companies claim that they would have to close down if the standard were adopted. The environmental group sues. Under traditional judicial review, the environmental group probably would lose. The board has reached a reasonable factual determination under the applicable state statute. Under strict scrutiny, however, the board arguably would have the burden to show that company closures are a compelling state interest and that they justify the board's decision.

3. Creating new private causes of action.

One of the most important innovations in the modern environmental era has been the involvement of citizens and environmental groups in the enforcement of environmental laws.[110] All but one of the major national environmental laws passed since 1970 has included a citizen suit provision.[111] Under

107. *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174.

108. *Id.*; State v. Pastos, 269 Mont. 43, 47, 887 P.2d 199, 202 (1994).

109. *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174; Pfost v. State, 219 Mont. 206, 222, 713 P.2d 495, 505 (1985).

110. *See generally* Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185 (2000).

111. As mentioned earlier, the anomalous exception is the Federal Insecticide,

the typical citizen suit section, any individual or organization with constitutional standing can initiate a lawsuit against anyone alleged to be in violation of one or more specified provisions of the statute. All citizen suit provisions authorize injunctive relief. A growing number of citizen suit provisions also authorize courts to impose monetary penalties. Environmental organizations have used citizen suits to ensure effective enforcement of the environmental laws, shape interpretation of the laws, and steer governmental policy.[112]

Outside the context of citizen suits, however, environmental organizations and individual citizens often have only a limited ability to file judicial actions to protect the environment. Most states, including Montana, do not provide citizens or organizations with a right to pursue violations of the state environmental laws. In most states, moreover, environmental groups and individual citizens do not have standing to bring public nuisance actions against environmentally harmful activities unless they can show that they have suffered a "special" injury different from that sustained by the general public.[113] Only property owners can file actions in private nuisance.[114] Furthermore, although courts have used both private and public nuisance to eliminate and regulate environmental harms, the substantive standards are weaker than many of the health-based standards found in many of the major environmental statutes. Nuisance standards emphasize balancing and "reasonableness" and eschew "extreme rights."[115]

MEIC and *Cape France* again offer environmentalists the hope of eliminating (or, perhaps more accurately, bypassing) these traditional limits. Under a broad reading of the Montana Supreme Court's decisions, environmental organizations and individual citizens have the standing to file actions seeking to enjoin any public or private action that threatens environmental harm. The Montana Supreme Court previously had held that

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Fungicide, and Rodenticide Act. *Supra* text accompanying note 85.

112. For a detailed discussion of the provisions and uses of citizen suit provisions, see Thompson, *supra* note 110.

113. For a discussion of the traditional standing rules and efforts in a handful of states to broaden standing, see Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755 (2001). *See also* RESTATEMENT (SECOND) OF TORTS § 821 cmt. c (1979).

114. RESTATEMENT (SECOND) OF TORTS § 821 cmt. d (1979).

115. *See* Missouri v. Illinois, 200 U.S. 496 (1906) (warning that parties cannot expect to "stand on extreme rights"); RESTATEMENT (SECOND) OF TORTS § 821 cmt. c (1979) (describing "reasonableness" standard).

standing to assert constitutional rights requires an alleged injury that is "distinguishable from the injury to the complaining party," although the injury does not need to be "exclusive to the complaining party."[116] Relying on several recent cases, however, the Montana Supreme Court in *MEIC* emphasized that a citizen who is directly affected by pollution or other environmental harms generally will satisfy this standard.[117] If the plaintiffs can establish an interference with their environmental rights under the Montana Constitution, moreover, courts arguably must enjoin the challenged activity unless they can find a compelling state interest for the interference. As the court stressed in *Cape France*, the environmental rights are "fundamental" and "may be infringed only by demonstrating a compelling state interest."[118] *MEIC* and *Cape France* thus provide for much stronger standards than the type of balancing test traditional to nuisance actions.

Under this reading, *MEIC* and *Cape France* radically expand the opportunity for private citizens and environmental organizations to help shape environmental policy through the courts. Where the legislature has enacted a regulatory scheme but it is not being effectively enforced, environmental groups and citizens may be able to sue the violators directly in the courts on the ground that the defendants are violating their constitutional rights, as defined by the legislative provisions that are being violated. Where the legislature has failed to act, or environmentalists are dissatisfied with the level of protection, moreover, environmentalists may be able to proceed directly against a source of environmental harm on constitutional grounds rather than seeking to force the legislature to address the issue. Under this reading of *MEIC* and *Cape France*, the Montana Constitution could become a combination of (1) a comprehensive citizen suit provision and (2) a roving environmental common law in which the courts, at the request

116. Helena Parents Comm'n v. Lewis & Clark Cty., 277 Mont. 367, 370, 922 P.2d 1140, 1142 (1996).

117. *MEIC*, ¶¶ 43-45. Thus, in *Missoula City-County Air Pollution Control Board v. Board. of Environmental Review*, 282 Mont. 255, 937 P.2d 463 (1997), a resident of Missoula had standing to complain of local air pollution because he was "more particularly affected by the State Board's acts than is a citizen of another area." 282 Mont. at 267, 937 P.2d at 467-68. In *MEIC*, the plaintiffs had standing because the challenged conduct would have "an arguably adverse impact on the area in the headwaters of the Blackfoot River in which they fish and otherwise recreate, and which is a source for the water which many of them consume." *MEIC*, ¶ 45.

118. *Cape France*, ¶ 31.

of environmental groups and citizens, directly evaluate and regulate challenged activities.

C. The Potential Problems

For all of these reasons, environmentalists certainly will encourage the Montana Supreme Court to expand on *MEIC* and *Cape France* in future cases. But efforts to "constitutionalize" environmental protection raise a number of jurisprudential or policy issues with which the court will need to wrestle. The major concerns are three. First, what do the constitutional provisions protect and, more importantly, to what degree? How far society should go to protect the environment is a highly contentious political question on which there currently is no clear societal consensus. Second, how can courts implement and enforce the constitutional provisions? Although implementation and enforcement might be relatively easy where the state legislature already has created a regulatory regime, many cases may seek judicial protection against currently unregulated activities. Even where a regulatory regime currently exists, courts must worry about how to ensure that the administrative agency implements and enforces the court's order even in the face of budgetary restraints and political hostility. Finally, how will the court's decisions affect the legislative process? Although strong judicial opinions might encourage the legislature to take more action itself to protect the environment, judicial intervention also could reduce the chances of legislative action.

1. Designing environmental standards.

The environmental provisions in the Montana Constitution suggest that there are certain basic, absolute levels of environmental protection that society can readily achieve. The Constitution thus guarantees a "clean and healthful environment" and demands protection of the "environmental life support system." A combination of political idealism and scientific naivety in the early 1970s helped foster this perspective. Many people saw environmental issues in moral terms: environmental degradation that harmed humans or the environment was morally wrong and unacceptable. Society should and could outlaw it much like it had outlawed discrimination. Many people, moreover, assumed that there were certain minimum levels of pollution, land use, and resource development that were harmless and that society could achieve

these levels with an acceptable investment of resources.

Over the past thirty years, however, policymakers have learned that environmental regulation frequently involves difficult tradeoffs. Virtually all forms of economic activity produce some environmental harm, and thus the question is often how much society should give up in order to achieve varying levels of environmental health. Reflecting the idealism and naivety of the early 1970s, many of the earliest federal statutes talk in environmental absolutes, but the federal government has never demanded the levels of economic cost needed to achieve those absolutes. The Clean Air Act states that ambient air quality standards protect human health with an adequate margin of safety,[119] but EPA always has made tradeoffs in setting the standards, as it compares the additional protection versus additional costs of ever more stringent standards.[120] The Clean Water Act promised that all waterways would be "fishable" and "swimmable" by 1983 and that the nation would eliminate all water pollution by 1985,[121] but almost two decades after these deadlines only 16 percent of the nation's watersheds enjoyed "good" water quality.[122] In other statutes such as the Safe Drinking Water Act and the Toxic Substances Control Act, Congress explicitly called for balancing environmental benefits and regulatory costs.[123]

Whether explicitly or implicitly, environmental law must grapple with the question of how much various types and levels of environmental protection are worth. Some environmental harms can be completely eliminated or avoided at finite and socially acceptable costs. In many other cases, however, the question is how much reduction or remediation is affordable. Consider the decision, for example, of how much forest to preserve in order to protect an endangered species from extinction. A 1994 study of the northern spotted owl revealed

119. Clean Air Act, 42 U.S.C. § 7409(b) (2002).

120. *See* Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303 (1999).

121. Clean Water Act, 33 U.S.C. § 1251(a)(1), (2) (2002).

122. *See* SAX ET AL., *supra* note 72, at 878 (1997 EPA Index classified 16% of watersheds as enjoying good water quality, 36% as suffering moderate water quality problems, and another 21% as suffering serious problems).

123. *See* Safe Drinking Water Act, 42 U.S.C. § 300g-1(b)(4)(B) (2002) (providing for the consideration of feasibility in setting of maximum contaminant levels for drinking water); Toxic Substances Control Act, 15 U.S.C. § 2605(c)(1) (2002) (requiring EPA to consider the economic consequences of regulation in determining the reasonableness of risks).

that the marginal economic cost of achieving ever higher probabilities of owl survival by preserving forest acreage grew extremely large.[124] Increasing the probability of survival from 90 to 91 percent carried a marginal price tag of $1.4 billion. Improving the survival probability even further to 95 percent cost another $13 billion (or an average of $2.6 billion per percentage point). At even this cost, however, there remained a significant (five percent) chance that the spotted owl would become extinct. Although it is simple in the abstract to say that society must do everything possible to preserve endangered species, few people would probably say that it is worth $13 billion to reduce the probability of extinction for the spotted owl from 9 percent to 5 percent. Environmental law unfortunately must inevitably grapple with tradeoffs of this nature.

Most courts have felt uncomfortable resolving these tradeoffs in a constitutional setting.[125] Although courts historically have weighed costs and benefits in nuisance cases, constitutional cases threaten to make the courts into the ultimate societal arbiter of environmental tradeoffs. Few societal norms or standards, however, are available to guide a resolution. Legislatures have taken widely differing approaches to environmental tradeoffs. Some statutes, for example, demand environmental protection up to the limits of technological feasibility; others worry about general economic feasibility, but do not care if costs are high so long as companies do not go out of business; yet others call for a broad cost-benefit comparison.[126] Absent an existing or emerging societal norm, courts have felt rudderless trying to decide how much of society's resources to devote to increasing the chances that an endangered species will recover or to decreasing the chances of asthmatic attacks. Comparing the costs and benefits of particular actions, moreover, requires some metric for comparison, but the costs and benefits in environmental disputes are often incommensurate.[127] Under these circumstances, many courts

124. *See* Claire A. Montgomery, Gardner M. Brown, Jr., & Darius M. Adams, *The Marginal Cost of Species Preservation: The Northern Spotted Owl*, 26 ENVTL. ECON. & MGMT. 111 (1994) (examining the costs and benefits of increased habitat protection).

125. Thompson, *supra* note 2, at 897.

126. *Compare* Clean Water Act, 33 U.S.C. § 1311(b) (2002) (technological feasibility), *with* Occupational Safety & Health Act, 29 U.S.C. § 665(b)(5) (2002) (economic feasibility) *and* Toxic Substance Control Act, 15 U.S.C. § 2605(c) (2002) (cost-benefit comparison).

127. *See* Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 794 n.48 (1994).

have viewed environmental tradeoffs as quintessentially political questions.

The Montana Supreme Court has not yet had to confront these problems. *MEIC* considered an exemption to a legislatively designed anti-degradation policy. The only question facing the court was whether the exempt activities were sufficiently different from other regulated activities to pass strict scrutiny. The court simply assumed that the legislatively adopted anti-degradation standard was adequate under the Montana Constitution and therefore did not have to address the appropriate standard of protection overall for the state's waterways. In *Cape France*, no one argued that the value of the test well was worth the environmental risk. The plaintiff did not want to take the risk of drilling the well and sought the courts' protection under contract law. The Montana Supreme Court therefore again did not have to consider under what, if any, circumstances parties should be entitled to drill groundwater wells if the wells risk the spreading of a contamination plume.

Perhaps because neither *MEIC* nor *Cape France* required the Montana Supreme Court to confront the difficult tradeoffs often found in environmental law, the court concluded without any apparent controversy or concern that the environmental provisions of the Montana Constitution trigger strict scrutiny and a compelling state interest test. The legal case for strict scrutiny is decidedly strong. The Montana Constitution places a "clean and healthful" environment at the top of its list of inalienable rights. During the constitutional convention, a majority of the delegates also emphasized that they wished to enshrine the strongest possible environmental protections (although the intent of the delegates, of course, is not necessarily the same as the intent of the voters who ratified the Constitution). The right to a "healthful environment," moreover, seems as fundamental as (and, in a few cases, considerably more important than) many of the interests that the United States Supreme Court has identified as fundamental including interstate travel[128] and the right of parents to direct the upbringing and education of their children.[129]

128. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (explaining that residency standards for welfare payments are subject to strict scrutiny because of potential impact on interstate travel).

129. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (invalidating Oregon law requiring all children to attend public school).

In future cases, however, the Montana Supreme Court will need to mesh strict scrutiny analysis with the economic tradeoffs common in the environmental field. Unfortunately, strict scrutiny, at least as developed in other substantive settings, may not provide courts with the degree of flexibility needed for such tradeoffs. The court's application of constitutional strict scrutiny to environmental policy is unprecedented. In other constitutional settings, however, the Montana Supreme Court has emphasized that, under the compelling state interest standard, a defendant "must show, at a minimum, some interest 'of the highest order and . . . not otherwise served,' or 'the gravest abuse[ ], endangering [a] paramount [government] interest[ ].'"[130] In the few cases to discuss the issue of cost outside Montana, courts have held that cost generally is not a compelling state interest.[131] Strict scrutiny by nature is not a balancing approach and, in the typical case, provides for almost automatic invalidation of challenged actions.[132]

The realities of environmental law, however, are likely to push the Montana Supreme Court in future cases toward a more flexible approach that admits of environmental tradeoffs. The court could obtain that increased flexibility in several ways. First, it could either abandon strict scrutiny or, perhaps more likely, redefine it to permit more open tradeoff of costs. In other constitutional settings, the Montana Supreme Court has emphasized that there is no specific formula for determining "what makes a state interest 'compelling'"[133] and that judicial review is a "delicate matter" that eschews "mechanical approaches."[134] Strict scrutiny in the environmental context therefore need not be the same as strict scrutiny in racial discrimination cases or other settings. Strict scrutiny could require courts to take a hard look at legislative policy judgments and even to err in favor of environmental protection, without forswearing all consideration of costs.

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130. Armstrong v. State, 1999 MT 261, ¶ 41 n.6, 269 Mont. 361, ¶ 41 n.6, 989 P.2d 364, ¶ 41 n.6, (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) and Thomas v. Collins, 323 U.S. 516, 530 (1945)).

131. *See, e.g.*, Cooper v. Utah, 684 F. Supp. 1060, 1070 (D. Utah 1987) ("[A] state's interest in saving welfare costs is not a compelling state interest.").

132. *See* Keith J. Bybee, *The Political Significance of Legal Ambiguity: The Case of Affirmative Action*, 34 LAW & SOC'Y REV. 263, 269 (2000) (noting that strict scrutiny typically results in the automatic invalidation of racial discrimination).

133. *Armstsrong*, ¶ 41.

134. *Wadsworth*, 257 Mont. at 302, 911 P.2d at 1174, (quoting Robinson v. Cahill, 303 A.2d 273, 282 (N.J. 1973)).

In deciding how to apply strict scrutiny, the court also might decide to vary the standard depending on the constitutional protection that is threatened. In *MEIC*, the Montana Supreme Court indicated in dictum it would apply strict scrutiny to all violations of either Article II, Section 3 or Article IX, Section 1.[135] But some violations, such as a threat to human health or the "environmental life support system," would seem substantively more significant than others, such as unreasonable degradation of natural resources. The Montana Constitution itself, moreover, creates an implicit hierarchy by including only a "clean and healthful environment" in its list of inalienable rights. The court therefore might decide to guard some protections through a strong version of strict scrutiny while securing others through a more lenient standard.

Second, the court might find balancing required by other provisions of the Montana Constitution. The list of inalienable rights in Article II of the 1972 Constitution does not stop with a "clean and healthful environment" but also goes on to include the "rights of pursuing life's basic necessities [and] acquiring, possessing, and protecting property." The Montana Supreme Court, moreover, has held that the opportunity to pursue employment is essential to "pursuing life's basic necessities" and thus a fundamental right itself, preventing the State from firing a state employee for the mere appearance of a conflict of interest.[136] Where elimination of a pollutant or protection of a resource would require the shuttering of an industrial plant or the closing of a refinery, the Montana Constitution therefore presents an apparent conflict between two fundamental rights. Virtually all economic-environmental tradeoffs, moreover, could be categorized as involving the right to pursue employment or the acquisition and possession of property.

Finally, the Montana Supreme Court can control the flexibility that it enjoys through its interpretation of what triggers constitutional review in the first place. At least some of the constitutional provisions, for example, would appear to call for balancing from the very outset. Article IX, Section 1, for example, prohibits only "*unreasonable* depletion and degradation of natural resources." Although the term "unreasonable" could be read narrowly to look only at the nature and extent of the depletion and degradation, the term's more

135. *MEIC*, ¶ 64.

136. *Wadsworth*, 275 Mont. at 287, 911 P.2d at 1165.

traditional legal meaning would call for a balancing of harms and benefits.[137] The Montana Constitution thus might find any given level of depletion or degradation "reasonable" if the societal benefits outweigh the impact on the resource. Even more absolute terms such as "clean" and "healthful" could be read to incorporate a balance, although the argument is more difficult. What a society considers to be "clean" and "healthful" may depend both on existing conditions and the technological and economic impediments to improvement.[138] What is considered "healthful" in a coal mine, for example, is unlikely to be the same as what is considered "healthful" in a bakery.

If and where the Montana Supreme Court chooses to apply a strong strict scrutiny standard, the inflexibility of the standard may suggest a narrow interpretation of the constitutional protections. Terms such as "clean" are exceptionally broad and could implicate a wide variety of activities. At an extreme, "clean" might implicate intentional agricultural fires, tire yards, or even the upkeep of a suburban home. The court will need to decide the exact reach of such terms and, in deciding the reach, may consider the flexibility of the standard that would be triggered.

2. Implementation and enforcement.

The Montana Supreme Court also must consider the procedural implications of "constitutionalizing" the environment. Policy analysts historically have assumed that legislatures have a comparative advantage both in the fact finding needed to formulate environmental law and in its implementation.[139] Legislatures can form specialized committees to investigate

137. *See, e.g.*, Mullane v. Central Hanover Bank & Trust, 339 U.S. 306 (1950) (applying a cost-benefit analysis to determine reasonableness in due process context); Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1530 (1982) (noting in the context of homeowners' associations that "many judges have viewed the 'reasonableness' standard as entitling them to undertake an independent cost-benefit analysis of the decision under review").

138. *Cf.* Indus. Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 642 (1980) ("[A] workplace can hardly be considered 'unsafe' unless it threatens the workers with a significant risk of harm.").

139. *See, e.g.*, William Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality*, 52 IOWA L. REV. 186, 195-201 (1966) (discussing the deficiencies of the common law process in addressing water pollution). Analysts have made similar arguments regarding other complex institutional litigation. *See* Michael A. Rebell & Robert L. Hughes, *Efficacy and Engagement: The Remedies Problem Posed by Sheff v. O'Neill – and a Proposed Solution*, 29 CONN. L. REV. 1115, 1122 (1997) (outlining the criticisms of new public law litigation).

issues and develop proposals, hire expert staffs to assist the committees, and hold broad-ranging hearings with no concern for evidentiary etiquette. Legislatures also can create and fund expert administrative agencies to implement and enforce their policies.

All environmental cases under the Montana Constitution are likely to present at least some unique procedural issues. Environmental law is a particularly technical field and typically requires significant fact collection and evaluation. Some cases, however, are likely to present more issues than others. Where a constitutional issue arises in a case such as *Cape France* involving only private parties, the court may not have anyone before it who can adequately represent the broader public interest. Where the legislature has not yet addressed a field, courts may have to not only evaluate information but use it to formulate new policies that both reflect existing environmental laws at all levels of government and deal with the inevitable complexities of economic regulation. Courts, moreover, may have to create totally new institutional structures, although they often may be able to enlist existing agencies with similar responsibilities. Even in cases where courts can rely on existing agencies, however, courts must worry how to get effective implementation from an agency in the face of budgetary limits and, in some cases, hostility either from within the agency or from the legislature.

Courts throughout the United States, of course, have dealt effectively with similar procedural issues in both a wide array of institutional litigation (involving school desegregation, prison reform, mental health care, and educational policy)[140] and in multi-plaintiff conflicts involving exposure to toxins.[141] Courts in these cases have used a number of effective fact-finding and analytical mechanisms to deal with the often complex technical issues. Some judges, for example, have appointed special masters to evaluate information, consult with public officials, and develop policies and implementation plans.[142] Other judges

140. Rebell & Hughes, *supra* note 139, at 1124; Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 1995 (1999).

141. *See, e.g.*, Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010 (1997) (discussing the procedural innovations of Judge Jack Weinstein in the Agent Orange case and the DES cases).

142. *Id.* at 2013.

have appointed expert panels to accomplish these tasks.[143] In some cases, the special masters or expert panels have even held community-wide hearings and adopted other techniques to promote public debate and obtain broad information about public interests and concerns.[144] In other cases, courts have held hearings that more closely resemble those run by legislatures or administrative agencies than a traditional trial hearing.[145]

In other public litigation, courts also have effectively dealt with the complexities of implementation and have often overcome administrative and legislative resistance. Courts will never feel comfortable actively intervening in the operations of the other branches of government, but they have intervened where necessary to enforce constitutional rights. Courts today oversee a broad range of administrative agencies in institutional cases.[146] In 1984, approximately a quarter of the nation's state prisons operated under court order.[147] Courts also are not total strangers to the creation of new institutional systems. To implement their decisions in mass tort cases, many judges have created what Professor Martha Minnow has appropriately called "temporary administrative agencies."[148]

The procedural issues facing the courts also must be viewed in perspective. While constitutional litigation involving the environment may raise often difficult procedural issues for the courts, legislative and administrative processes also are not ideal.[149] As discussed earlier, political pathologies may prevent the legislative and administrative branches from addressing significant environmental problems. Legislatures and administrative agencies also do not have the tradition of neutral reflection found in the judicial system.

Given the procedural and implementation difficulties, however, courts occasionally may wish to first try to force the issue back on the legislature. In some institutional litigation, courts after finding existing policies unconstitutional have withheld ordering specific relief in order to give the legislative and executive branches an opportunity to evaluate and choose

143. Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1357, 1371-73 (1991).

144. Minow, *supra* note 141, at 2014.

145. Sturm, *supra* note 143, at 1370-71

146. *Id.* at 1357-58

147. Schlanger, *supra* note 140, at 2004.

148. Minow, *supra* note 141, at 2019.

149. Rebell & Hughes, *supra* note 139, at 1137-38.

the appropriate policy solutions.[150] In other cases, courts have declared the current policy unconstitutional and issued broad orders for remediation that have left the details largely to the other two branches of government.[151] Through these approaches, courts can retain the freedom to design and implement a more specific remedy if the legislative and executive branches do not act effectively, while hoping that they ultimately will not need to develop an administrative program of their own or run the risk of clashing with the other branches. The potential benefits of deferring initially to legislative and executive action are particularly strong in the environmental field given both the breadth of the field and the lack of clear normative rules to guide judicial remedies.

3. Potential impacts on the legislative process.

A final practical issue raised by cases such as *MEIC* and *Cape France* is the potential effect on the legislative process. One can tell both positive and negative stories here, and unfortunately no empirical studies exist to help courts determine which story is correct. In the positive story, judicial decisions help create and endow new social norms that influence legislative action and make future judicial action less necessary. Significant constitutional decisions may influence the views of legislators, government officials, and the general public.[152] In issuing a decision such as *MEIC*, the Montana Supreme Court signals to society that environmental protection is of fundamental importance. In the future, members of the Montana legislature therefore may be more likely to vote for strong environmental legislation both because societal norms have changed and out of fear that the court otherwise will

150. In a major education financing case, for example, the Connecticut Supreme Court wrote that while it "'is emphatically the province and duty of the judicial department to say what the law is,' the fashioning of a constitutional system for financing elementary and secondary education in the state is not only the proper function of the legislative department but its expressly mandated duty under the provisions of the constitution of Connecticut. . . . The judicial department properly stays its hand to give the legislative department an opportunity to act." Horton v. Meskill, 376 A.2d 359, 374-75 (Conn. 1977) (quoting United States v. Nixon, 418 U.S. 683, 703 (1974)).

151. Rebell & Hughes, *supra* note 139, at 1137-38.

152. *See* Gregory A. Caldiera, *Courts and Public Opinion, in* THE AMERICAN COURTS (J.B. Gates & C.A. Johnson, eds., 1991); Jonathan D. Caspar, *The Supreme Court and National Policymaking*, 70 AM. POL. SCI. REV. 50 (1976); Lee Epstein & Thomas G. Walker, *The Role of the Supreme Court in American Society: Playing the Reconstruction Role, in* CONTEMPLATING COURTS (Lee Epstein, ed., 1995).

denigrate their actions in future cases. Legislators also may be able to resist lobbying by environmental opponents by arguing that the Montana Constitution demands new legislation.

Judicial decisions, however, also may undermine effective environmental legislation. In some cases, judicial decisions may make necessary political compromises more difficult by reducing legislative options. One potential lesson of *MEIC*, for example, is that courts in the future will strictly scrutinize special exceptions to state environmental standards. In drafting new environmental protections, therefore, the legislature should expect that courts may invalidate any exceptions that are not well justified. However, in many cases, the exceptions may be politically needed to gain sufficient votes to pass the new protections. Without the exceptions, special interests may have enough votes to kill the proposal. The legislature thus might fail to enact the protections at all. Although the courts ultimately might step in and require the protections in a future constitutional case, effective protections will be delayed and far more complicated.

Active judicial intervention, moreover, may make it easier for the legislature to ignore environmental issues. Many legislators may be more than happy to avoid making difficult decisions in the environmental field. Rather than risk displeasing particular constituents, legislators therefore may be more than willing to leave environmental policy to the courts. If so, active judicial intervention will lead to a reduction rather than increase in legislative environmental action.

III. CONCLUSION

As I have discussed elsewhere,[153] the normative case for including self-executing environmental rights in state constitutions is far from strong. State constitutions might include self-executing rights or directives, whether involving the environment or other issues, for at least two reasons. First, an issue might be too fundamental or principle-driven to delegate to democratic discretion even in a well-functioning governmental system. Second, the state's system of representative government might suffer from inherent imperfections that make the legislative or executive branches suspect forums for addressing and resolving the issue without constitutional

[153] Thompson, *supra* note 2.

oversight.

Although environmental protection is critically important, enough disagreement remains over the socially appropriate levels and types of environmental protection that constitutional enshrinement of any particular environmental policies seems premature. As discussed in Part II, environmental policy involves troublesome tradeoffs that may be more appropriate for legislative than for constitutional resolution. The legislative process suffers from various political pathologies that, as described earlier, can undermine environmental protection. But the legislative pathologies for most environmental issues are not significantly different from or worse than political failings in other substantive fields. The focus thus should be on improving the legislative process.

There may be particular environmental issues where the normative argument for constitutional intervention is stronger. Environmental issues that involve future generations, such as the depletion of exhaustible resources, the endangerment of species, global climate change, and the use of long-lived toxics, are one example. The traditional political process does not account fully for the interests of future generations, arguing for some form of intergenerational constitutional protection. As consensus forms around minimum environmental rights, the argument for constitutionalizing these rights also will grow. In the meantime, however, courts should be cautious not to employ existing constitutional provisions in a manner that shuts off valuable democratic debate concerning the environment. The courts can valuably use existing constitutional provisions to improve environmental policymaking, but only if the courts recognize both the benefits and risks of trying to constitutionalize the environment.