

June 1994

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### Recommended Citation

15 Pub. Land L. Rev. 219 (1994)

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# COMMENTS

## THE DOCTRINE OF SELF-EXECUTION AND THE ENVIRONMENTAL PROVISIONS OF THE MONTANA STATE CONSTITUTION: "THEY MEAN SOMETHING"

Tammy Wyatt-Shaw\*

### I. INTRODUCTION

On June 27, 1975 the Montana Department of State Lands (DSL) issued a hard rock gold mine operating permit to Golden Sunlight Mines, Inc. (Golden Sunlight).<sup>1</sup> Since the mine's inception, DSL has amended Golden Sunlight's operating permit eight times, effectively expanding the mine with each amendment. The mine is currently permitted for operations through 2005.<sup>2</sup>

The mine will cumulatively produce 50 million tons of tailings, 300 million tons of waste rock, and a pit covering approximately 209 acres.<sup>3</sup> The near-circular pit will be 2000 feet in diameter and contain a "lake" approximately 52 acres in size and 225 feet deep.<sup>4</sup> The pit highwall will be approximately 325 feet above the water level.<sup>5</sup> The water in the pit is "expected to be of poor quality . . . (with) Ph levels close to 2.4 . . . (and) elevated metal contents particularly for cadmium, iron, copper, zinc, and nickel, which exceed drinking water standards."<sup>6</sup> DSL does not know whether the pit water will leak from the pit into groundwater or nearby surface waters, but Golden Sunlight has committed to treatment of pit seepage.<sup>7</sup>

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\* The author wishes to thank Professor Larry M. Elison for his thoughts, theories, and ideas; The Honorable Charles B. McNeill for his kindly reviewing this article; and Beth Brennan, Martha Colhoun, and Stu Levit for their invaluable comments and suggestions.

1. DSL permit 00065 (on file with DSL, Helena, Mont.).

2. MONT. DEPT. OF STATE LANDS & U.S. BUREAU OF LAND MANAGEMENT, GOLDEN SUNLIGHT MINING, INC., APPLICATION FOR AMENDMENT (008) ENVIRONMENTAL ASSESSMENT 4 (1990)(on file with *The Public Land Law Review*) [hereinafter GSM EA].

3. *Id.*

4. *Id.* at 54.

5. *Id.*

6. *Id.*

7. GSM EA, *supra* note 2, at 54, 125, Record of Decision and attached Stipulations.

DSL amended Golden Sunlight's permit for the eighth time knowing that meaningful pit reclamation would not take place.<sup>8</sup> The Golden Sunlight mine will become Montana's largest gold mine in terms of waste rock handled and acres disturbed.<sup>9</sup>

In March 1992, various environmental advocacy groups filed suit against DSL and Golden Sunlight, opposing DSL's approval of Amendment 008.<sup>10</sup> In their complaint, the plaintiffs alleged, among other claims, that DSL violated Article IX, sections 1(3) and 2(1) of the Montana State Constitution in approving Amendment 008.<sup>11</sup> DSL moved to dismiss the plaintiffs' constitutional claims on the basis that the provisions at issue were not "self executing."<sup>12</sup> The Honorable Thomas Honzel, Judge for Montana First Judicial District Court, Lewis and Clark County, denied DSL's Motion.<sup>13</sup>

In construing Article IX, Judge Honzel referred to the "inalienable" right of a clean and healthful environment found in the Montana Constitution.<sup>14</sup> Judge Honzel wrote:

With respect to Count Five which alleges a violation of Article IX, Section 2, [requiring that all lands disturbed by the taking of natural resources shall be reclaimed] the case may not be as strong to find an independent cause of action based on an alleged failure to require reclamation of the lands disturbed. It seems to the Court, however, that reclamation is directly tied to a clean and healthful environment. Therefore, if the legislature has

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8. The only pit reclamation considered in the GSM EA was reclamation of the benches, or talus slopes, by using tree plantings on oxidized materials, or amended unoxidized materials. GSM EA, *supra* note 2, at 122. The GSM EA further stated that reclamation of these pit benches was not feasible because of material friability. *Id.* The GSM EA considered no highwall or steep slope reclamation.

9. GSM EA, *supra* note 2, at 1.

10. Complaint and Application for Alternative Writ of Mandate, National Wildlife Fed'n, Montana Envtl. Info. Ctr., Mineral Policy Ctr., Gallatin Wildlife Ass'n, Sierra Club v. Montana Dep't of State Lands, and Golden Sunlight Mines, Inc., No. CDV 92-486 (D. Mont. filed Mar. 30, 1992).

11. *Id.* at 2. MONT. CONST. art. IX, § 1, provides that:

(1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations. . . .

(3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

MONT. CONST. art. IX, § 2, provides that:

(1) All lands disturbed by the taking of natural resources shall be reclaimed. The legislature shall provide effective requirements and standards for the reclamation of lands disturbed.

12. Montana Dep't of State Lands Brief in Support of Motion to Dismiss at 4, National Wildlife Fed'n v. Montana Dep't of State Lands, No. CDV-92-486 (D. Mont. filed May 17, 1992).

13. National Wildlife Fed'n v. Montana Dep't of State Lands, No. CDV-92-486 (D. Mont. Dec. 11, 1992) (order denying defendant's motion to dismiss).

14. "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment . . . ." MONT. CONST. art. II, § 3.

failed to provide effective requirements and standards for reclamation, or if DSL, the agency in charge of the project, has allowed the project to proceed without effective reclamation requirements and standards, Plaintiffs should be able to pursue their claim. *The constitutional provisions at issue here are not merely advisory. They mean something.*<sup>15</sup>

Plaintiffs moved for summary judgment, arguing in part that DSL has violated the self-executing provisions in Article IX by amending the operating permit.<sup>16</sup> This motion is pending.

This comment first explores the judicially developed constitutional doctrine of "self-execution," and its historical interpretation by courts. The comment will emphasize the Montana Supreme Court's interpretation and application of the doctrine.

Next, this comment will survey the interpretation of environmental provisions in state constitutions, and the application of the self-execution doctrine to those provisions. Third, the comment will posit a theory of self-execution which better reflects the ideals of a constitutional democracy and the role a constitution plays in that democracy. The comment finds that Montana's constitutional protections are self-executing.

Finally, this comment discusses two potential problems that Montana's self-executing environmental provisions may create. First, the comment will analyze who has standing to sue under these constitutional provisions. Second, it will discuss what remedies currently are available to aggrieved parties under the environmental provisions of the Montana State Constitution, and what additional remedies, if any, the Montana Supreme Court should fashion.

## II. THE DOCTRINE OF SELF-EXECUTION

### A. *Defining the Parameters of Self-Execution*

Under the doctrine of self-execution, the judiciary should start with the presumption that all constitutional provisions "mean something."<sup>17</sup> However, in the final analysis, not all constitutional provisions do "mean something," and some mean more than others. To have substantive, enforceable meaning, a constitutional provision must be "self-executing." If a constitutional provision is not self-executing, the provision has no more

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15. *National Wildlife Fed'n v. Montana Dep't of State Lands*, No. CDV-92-486 (D. Mont. Dec. 11, 1992) (order denying defendant's motion to dismiss) (emphasis added).

16. Brief in Support of Motion for Partial Summary Judgment at 15-16, *National Wildlife Fed'n v. Montana Dep't of State Lands*, No. CDV-92-486 (D. Mont. filed Oct. 8, 1993).

17. *Fenton v. Groveland Community Serv. Dist.*, 185 Cal. Rptr. 758, 762 (1982); 16 Am. Jur. 2d *Constitutional Law* § 142 (1979).

than moral force.<sup>18</sup>

A constitutional provision is "self-executing" if the judiciary can enforce the provision without the aid of a legislative enactment.<sup>19</sup> Generally, a court will follow one of three approaches in determining whether a provision is self-executing: (1) Professor and Judge Thomas J. Cooley's articulation of the doctrine; (2) the original intent of the constitutional drafters; and (3) bright-line classification of constitutional provisions into self-executing and non-self-executing categories according to the language employed.

Historically, courts have followed Professor Thomas J. Cooley's theory of self-execution.<sup>20</sup> According to Professor Cooley, to be immediately enforceable, the constitutional provision must supply the judiciary with a

rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and [the provision] is not self-executing when it merely indicates principles without laying down rules by means of which those principles may be given the force of law.<sup>21</sup>

Professor Cooley argues that if a constitutional provision merely sets forth principles, it has no effect until the legislature enacts supplemental legislation.<sup>22</sup> Moreover, the judiciary cannot order the legislature to enact the requisite legislation; the "right intended to be given is only assured when the legislation is voluntarily enacted."<sup>23</sup> In other words, rights contained in provisions which are not self-executing lie dormant until a statute implements the right.<sup>24</sup>

If the constitution directs the legislature to implement a policy or principle, the constitutional directive has "only a moral force" until the legislature acts.<sup>25</sup> In the case of a provision which is not self-executing, Professor Cooley acknowledges that under his theory an unjust law, or law inconsistent with a constitutional provision, remains enforceable until the legislature chooses to repeal the law.<sup>26</sup> This is true even if the purpose of the

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18. *County of Erie v. City of Erie*, 6 A. 136, 137 (Pa. 1886); THOMAS J. COOLEY, 1 COOLEY'S CONSTITUTIONAL LIMITATIONS 165 (Walter Carrington ed., 8th ed. 1927).

19. BLACK'S LAW DICTIONARY 1360 (6th ed. 1990); 16 C.J.S. *Constitutional Law* § 46 (1984).

20. *See, e.g., Davis v. Burke*, 179 U.S. 399, 403 (1900); *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 591 (Pa. 1973).

21. COOLEY, *supra* note 18, at 167-68.

22. *Id.* at 165; *see, e.g., Butte Community Union v. Lewis*, 745 P.2d 1128, 1130 (Mont. 1987).

23. COOLEY, *supra* note 18, at 165; *see, e.g., Dade County Classroom Teachers Ass'n v. Legislature*, 269 So. 2d 684, 686 (Fla. 1972).

24. COOLEY, *supra* note 18, at 169; *see, e.g., Spinney v. Griffith*, 32 P. 974, 975 (Cal. 1893).

25. COOLEY, *supra* note 18, at 165.

26. "[Constitutional provisions] do not displace the law previously in force, though the purpose

constitutional enactment was to displace current law.<sup>27</sup>

Professor Cooley qualifies his theory by noting that a constitutional provision does not lose its self-executing character simply because the provision mandates that the legislature shall enact implementing legislation.<sup>28</sup> "[T]he mere fact that legislation might supplement and add to or prescribe a penalty for the violation of a self-executing provision does not render such provision ineffective in the absence of such legislation."<sup>29</sup> Cooley uses the Fifteenth Amendment to the United States Constitution as an example.<sup>30</sup>

The Fifteenth Amendment provides that the right to vote shall not be denied on account of race, color, or previous condition of servitude.<sup>31</sup> The amendment also gives Congress the power to enforce it with appropriate legislation.<sup>32</sup> In this case, Professor Cooley argues that the amendment immediately abolishes all distinctions in suffrage based on race, color, and servitude.<sup>33</sup> Professor Cooley reasons that the legislative directive in the second part of the provision does not alter the self-executing character of the first provision.<sup>34</sup> Professor Cooley argues that the legislative directive is simply a recognition by the constitutional drafters that the constitutional rule may be insufficient to comprehensively protect the right to its fullest extent.<sup>35</sup> In other words, a provision is self-executing "so far as it is susceptible of execution."<sup>36</sup>

In *Davis v. Burke*, the U.S. Supreme Court cited Professor Cooley's articulation of the self-execution doctrine.<sup>37</sup> In that case, the Court examined a provision contained in the Idaho Constitution.<sup>38</sup> However, in expounding on Professor Cooley's rule, the Court articulated a more generous interpretation of the self-execution doctrine. The Court agreed that when a constitutional provision only "lays down general principles,"<sup>39</sup> implementing legislation may be needed. The Court seems to quietly part

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may be manifest to do away with it by the legislation required." *Id.*

27. *Id.*

28. *Id.* at 170.

29. *Id.* at 170; *see, e.g.*, *General Agriculture Corp. v. Moore*, 534 P.2d 859, 862 (Mont. 1975).

30. COOLEY, *supra* note 18, at 166.

31. U.S. CONST. amend XV.

32. *Id.*

33. COOLEY, *supra* note 18, at 166.

34. *Id.*

35. *Id.*

36. *Davis*, 179 U.S. at 403.

37. 179 U.S. at 403.

38. "No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prosecutor, after a commitment by a magistrate . . ." IDAHO CONST. art. 1, § 8.

39. *Davis*, 179 U.S. at 403.

company with Professor Cooley regarding "certain" rights and "certain"<sup>40</sup> principles of law and procedure.

But where a constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provision . . . For us to say that the accused had been denied due process of law would involve the absurdity of holding that what the people had declared to be the law was not the law.<sup>41</sup>

The Court's plain language provides persuasive authority that rights do not "lie dormant" until the legislature acts.<sup>42</sup> Nevertheless, courts continually cite Professor Cooley and *Davis* in tandem, but apply the stricter Cooley interpretation.<sup>43</sup>

A second approach to determining whether a constitutional provision is self-executing is to examine the intent of the constitutional drafters. In *Student Government Ass'n of Louisiana State University v. Board of Supervisors of Louisiana State University*,<sup>44</sup> the majority concluded that the essence of Professor Cooley's articulation is essentially one of intent.<sup>45</sup> Thus, a provision is immediately enforceable without legislation if the judiciary's failure to enforce the provision would frustrate the intent of the drafters.<sup>46</sup>

Under the facts of that case, the court construed as self-executing the constitutional mandate that the University "shall be under the direction, control, supervision and management" of its Board of Supervisors.<sup>47</sup> The majority concluded that the drafters' intent was "to remove the administration of the daily affairs of the University from both the Governor and Legislature and place them under a nonpolitical board."<sup>48</sup> Therefore, any legislation that interfered with the board's autonomy must be held unconstitutional given the drafters' intent.<sup>49</sup>

The dissent framed the issue of intent more narrowly. Intent should be "ascertained from the language used, the object to be accomplished, and

40. *Id.* The court appears to use "certain" in the sense of "fixed, settled or stated." WEBSTER'S THIRD INT'L DICTIONARY 367 (Philip Babcock Gove ed., 1961).

41. *Id.* at 403-04.

42. COOLEY, *supra* note 18, at 169; *Spinney*, 32 P. at 975.

43. See, e.g., *National Gettysburg Battlefield Tower*, 311 A.2d at 591.

44. 264 So. 2d 916 (La. 1972).

45. *Student Gov't Ass'n of LSU*, 246 So. 2d at 919.

46. "[I]f the purposes of the constitutional will be enactment frustrated unless immediately effective without legislation, it may be regarded as 'self-executing.' The ultimate question, actually, is one of constitutional intent . . . ." *Id.*

47. LA. CONST. art. XII, § 7.

48. *Student Gov't Ass'n of LSU*, 246 So. 2d at 919.

49. *Id.* at 920.

the surrounding circumstances."<sup>50</sup> According to the dissent, the drafters' "object to be accomplished," or purpose, did not include the creation of "a separate unit of government free of all interference from the legislative, executive, and judicial branches."<sup>51</sup> The dissent's interpretation of intent is frequently cited.<sup>52</sup>

Finally, commentators attempt to isolate and establish the bright-line rules courts use in determining whether a constitutional provision is self-executing.<sup>53</sup> Such attempts focus on a constitutional provision's character and the language employed. This doctrinal approach classifies constitutional provisions as non-mandatory, mandatory, non-prohibitory, and prohibitory.<sup>54</sup> A single constitutional provision may contain combinations of each type, complicating the classification process.<sup>55</sup>

Non-mandatory provisions do not direct the legislature, impose a duty or obligation, or grant a right.<sup>56</sup> These provisions are often statements of public policy, or sentiment.<sup>57</sup> For example, "The people declare that Montana servicemen, servicewomen, and veterans may be given special considerations determined by the legislature" is a statement of public policy.<sup>58</sup> These provisions universally fail the self-execution test.<sup>59</sup> Thus, they have no more than moral force.

In contrast, mandatory provisions direct the legislature, grant a right, or impose a duty.<sup>60</sup> For example, "The people shall have the right peaceably to assemble, petition for redress or peaceably protest governmental action,"<sup>61</sup> or "The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."<sup>62</sup> Whether a mandatory provision is self-executing depends on whether it is prohibitory or non-prohibitory.<sup>63</sup>

Mandatory-prohibitory provisions present an easy case. These provisions generally prohibit certain legislative acts. Examples from the Montana Constitution include such provisions as "The state shall make no

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50. *Id.* at 922.

51. *Id.* at 923.

52. 16 C.J.S. *Constitutional Law* Sec. 46 (1984).

53. See generally Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333 (1993).

54. See *id.* at 341-42; 16 C.J.S. *Constitutional Law* §§ 46-47, 52 (1984).

55. Fernandez, *supra* note 53, at 351-53.

56. *Id.* at 342.

57. *Id.*

58. MONT. CONST. art. II, § 35.

59. 16 C.J.S. *Constitutional Law* § 46 (1984). "Constitutional provisions are not self-executing if they merely indicate a line of policy or principles . . ." *Id.*

60. Fernandez, *supra* note 53, at 342.

61. MONT. CONST. art. II, § 6.

62. MONT. CONST. art. IX, § 1, cl. 1.

63. Fernandez, *supra* note 53, at 343-53.



law respecting an establishment of religion or prohibiting the free exercise thereof,"<sup>64</sup> or "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies . . ."<sup>65</sup> Any legislation which is contrary to the principle contained in a mandatory-prohibitory provision may be struck down as unconstitutional.<sup>66</sup>

Mandatory-nonprohibitory provisions present the most difficulty to courts. These provisions often direct the legislature to do something, but fail to prohibit certain legislative acts. For example, "The legislature shall provide for a Department of Agriculture and enact laws and provide appropriations to protect, enhance, and develop agriculture."<sup>67</sup> When faced with such a provision, courts refrain from enforcing the principle contained in the provision, i.e., protect, enhance and develop agriculture, and, moreover, refuse to direct the legislature to do so, despite the clear constitutional directive.<sup>68</sup> This judicial restraint is premised upon preserving the separation of powers.<sup>69</sup>

Further, a mandatory-nonprohibitory provision may purport to grant a right. For example, "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment . . ."<sup>70</sup> In such instances, courts may construe the provision as self-executing.<sup>71</sup> Generally, these provisions are construed as being "complete but for the lack of a remedy."<sup>72</sup> Therefore, the court may establish an appropriate equitable or legal remedy, and enforce the right.<sup>73</sup>

A more difficult scenario arises when a mandatory provision is followed by a legislative directive, for example, the Montana Constitution's Article IX provisions.<sup>74</sup> Courts seem to part company in their

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64. MONT. CONST. art. II, § 5.

65. MONT. CONST. art. II, § 9.

66. State *ex rel.* Stafford v. Fox-Great Falls Theatre Corp., 132 P.2d 689, 700 (Mont. 1942) (quoting Wren v. Dixon, 161 P. 722, 729 (Nev. 1916)); Fernandez, *supra* note 53, at 350; 16 Am. Jur. 2d *Constitutional Law* § 146 (1979).

67. MONT. CONST. art. XII, § 1, cl. 1.

68. See, e.g., Montana Stockgrowers Ass'n v. Montana Dep't of Revenue, 777 P.2d 285 (Mont. 1989).

69. Dade County Classroom Teachers Ass'n, 269 So. 2d at 686.

70. MONT. CONST. art. II, § 3.

71. Fernandez, *supra* note 53, at 353; 16 C.J.S. *Constitutional Law* § 48 (1984). "Constitutional provisions designed to guarantee or safeguard individual rights may be self-executing, as, for example, provisions of a negative or prohibitive character forbidding violations of individual rights." *Id.*

72. Fernandez, *supra* note 53, at 353.

73. *Id.* at 354.

74. "The state and each person shall maintain and improve a clean and healthful environment . . . The legislature shall provide for the administration and enforcement of this duty . . ." MONT. CONST. art. IX, § 1, cl. 1-2.

"All lands disturbed by the taking of natural resources shall be reclaimed. The legislature shall provide effective requirements and standards for the reclamation of lands disturbed." MONT. CONST.

interpretations of such provisions.<sup>75</sup> Some courts hold that until the legislature acts, any right purportedly granted is "naked," like the "earth before creation."<sup>76</sup> Other courts hold that the legislative directive is only intended to supplement the right, or aid enforcement of a duty.<sup>77</sup>

## 2. Application of "self-executing" in Montana

No clear test of self-execution emerges from Montana decisions. The Montana Supreme Court has, at times, gleaned portions from each of the theories discussed above.<sup>78</sup> The most lengthy and detailed discussion of the doctrine is found in *State ex rel. Stafford v. Fox-Great Falls Theatre Corp.*<sup>79</sup>

In that case, the court examined a provision contained in 1889 Montana Constitution.<sup>80</sup> The court recited a "fundamental test" of self-execution which appears to synthesize the three self-execution theories.<sup>81</sup> The court first explained that "prohibitory provisions in a constitution are usually self-executing to the extent that anything done in violation of them is void."<sup>82</sup> Next, the court decided whether the language used in the provision is addressed to the legislature or the court.<sup>83</sup> If the provision is addressed to the court, the court next examined the "language used" and the "intrinsic nature of the provision itself"<sup>84</sup> to determine whether "the extent of the right conferred and to the liability imposed" can be determined from the provision itself.<sup>85</sup>

Other Montana cases apply a single approach more directly. For example, in a recent case construing the right-to-know provision of the Montana Constitution,<sup>86</sup> the court simply concluded from the plain

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art. IX, § 2, cl. 1.

75. Fernandez, *supra* note 53, at 343-49.

76. Spinney, 32 P. at 975; *see also* Fernandez, *supra* note 53, 345-46.

77. *General Agriculture Corp.*, 534 P.2d at 862 (quoting 16 C.J.S. *Constitutional Law* § 48).

78. *See supra* notes 20-77 and accompanying text.

79. 132 P.2d 689.

80. "The legislative assembly shall have no power to authorize lotteries, or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this state." MONT. CONST. art. XIX, § 2 (1889).

81. *Fox-Great Falls Theatre*, 132 P.2d at 700; *see supra* notes 20-77 and accompanying text.

82. *Fox-Great Falls Theatre*, 132 P.2d at 700 (quoting *Wren v. Dixon*, 161 P. 722, 729 (Nev. 1916)); *see supra* notes 64-66 and accompanying text.

83. *Fox-Great Falls Theatre*, 132 P.2d at 700.

84. *Id.* (quoting *Broderick v. Weinsier*, 293 N.Y.S. 889, 901 (1937)); *see supra* notes 50-52 and accompanying text.

85. *Fox-Great Falls Theatre*, 132 P.2d at 700 (quoting *Broderick*, 293 N.Y.S. at 901); *see supra* notes 20-24 and accompanying text.

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

language of the provision "that there was no intent on the part of the drafters to require any legislative action in order to effectuate its terms."<sup>87</sup> The Montana Supreme Court has also indicated its willingness to consider whether a provision is mandatory and prohibitory.<sup>88</sup>

At least two Montana cases illustrate a departure from the harsh interpretation and effects of these self-execution theories. In *General Agriculture Corp. v. Moore*<sup>89</sup> the court construed a mandatory-nonprohibitory provision qualified by a legislative directive found in Article IX.<sup>90</sup> The court reasoned that:

The fact that a right granted by a constitutional provision may be better or further protected by supplementary legislation does not of itself prevent the provision in question from being self-executing; nor does the self-executing character of a constitutional provision necessarily preclude legislation for the better protection of the right secured, or legislation in furtherance of the purposes, or of the enforcement, of the provision.<sup>91</sup>

Further, the court recognized the supremacy of a constitution as fundamental law.<sup>92</sup> The court concluded that it could not rightfully ignore the mandate of a sovereign people.<sup>93</sup>

On one occasion, the Montana Supreme Court has observed and enforced the principles contained in a constitutional provision although it held the constitutional provision at issue was not self-executing.<sup>94</sup> In construing Article XII, section 3, the welfare provision,<sup>95</sup> the court held

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87. *Allstate Insurance Co. v. City of Billings*, 780 P.2d 186, 188 (Mont. 1989); see also *Helena Elem. Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989). In *Helena Elem.*, the court interpreted article X, section 1, "Equality of educational opportunity is guaranteed to each person of the State." MONT. CONST. art. X, § 1, cl. 1. While not specifically addressing a self-execution question, the court looked at the plain language of the provision and rejected the state's argument that the provision was simply an aspirational goal. *Helena Elem.*, 769 P.2d at 689. See generally *Student Gov'n Ass'n of L.S.U.*, 264 So. 2d at 919.

88. *Alexander v. State*, 381 P.2d 780, 781 (Mont. 1963); *Fox-Great Falls Theatre Corp.*, 132 P.2d at 700.

89. 534 P.2d 859 (Mont. 1975).

90. "All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed." MONT. CONST. art. IX, § 3, cl. 1.

"The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records." MONT. CONST. art. IX, § 3, cl. 4.

91. *General Agriculture Corp.*, 534 P.2d at 862 (quoting 16 C.J.S. *Constitutional Law* § 48).

92. *Id.*

93. *Id.* at 862-63.

94. *Butte Community Union*, 745 P.2d at 1130.

95. The court considered the following provision: "The legislature shall provide such economic assistance and social and rehabilitative services as may be necessary for those inhabitants who, by reason of age, infirmities, or misfortune may have need for the aid of society." *Id.* at 1129 (quoting MONT. CONST. art. XII, § 3, cl. 3 (amended 1988)).

that the provision was not self-executing, and that legislation was needed to give the provision force.<sup>96</sup>

Pursuant to the constitution, the legislature enacted a statutory scheme of general welfare assistance benefits.<sup>97</sup> However, the legislature limited benefits to able-bodied persons without dependent children to two months of nonmedical general relief assistance within a twelve-month period.<sup>98</sup> Defendant Social Rehabilitation Services argued that able-bodied persons without dependent minor children are not "misfortunate" given the legislative definition of the constitutional term "misfortune."<sup>99</sup>

The court reasoned that once the legislature chose to act, it could not escape its constitutional duty to aid the "misfortunate" by "defining out" persons to whom the constitutional protection applied.<sup>100</sup> The court concluded that the constitution contemplated aid to *all* persons suffering misfortune.<sup>101</sup>

Although the court held that the welfare provision was not self-executing, the court in its equal protection analysis concluded that the welfare provision gave protected persons a sufficient interest in welfare benefits that any legislative distinctions among protected individuals must be reasonable.<sup>102</sup> Moreover, the governmental interest in limiting welfare benefits to certain individuals must be more important than the people's interest in obtaining welfare benefits.<sup>103</sup> Applying this heightened standard of scrutiny, the court found the enacted general welfare assistance scheme unconstitutional.<sup>104</sup>

At least one other plaintiff has attempted to extend the holding in the welfare case to other legislative directives in the Montana constitution.<sup>105</sup> In *Montana Stockgrowers Ass'n v. Department of Revenue*, the plaintiff urged the court to review a tax classification scheme which taxed livestock, but exempted business inventory, under a heightened level of scrutiny.<sup>106</sup>

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This welfare provision was amended on Nov. 8, 1988. The amended provision now provides that, "[t]he legislature may provide such economic assistance and social and rehabilitative services for those who, by reason of age, infirmities, or misfortune are determined by the legislature to be in need." MONT. CONST. art. XII, § 3, cl. 3.

96. *Butte Community Union*, 745 P.2d at 1130.

97. *Id.* at 1129. This case involves the Montana Legislature's second attempt to enact general assistance legislation which would pass constitutional muster. The Montana Supreme Court struck down the first enactment in *Butte Community Union v. Lewis*, 712 P.2d 1309 (Mont. 1986).

98. *Butte Community Union*, 745 P.2d at 1129.

99. *Id.* at 1130.

100. *Id.*

101. *Id.*

102. *Id.* at 1131 (following *Butte Community Union v. Lewis*, 712 P.2d at 1313).

103. *Id.*; *Butte Community Union v. Lewis*, 712 P.2d at 1314.

104. *Butte Community Union*, 745 P.2d at 1133.

105. *Montana Stockgrowers Ass'n*, 777 P.2d at 288.

106. *Id.* at 288.

Relying on *Butte Community Union v. Lewis*, the stockgrowers argued that Article XII, section 1,<sup>107</sup> expressed a constitutional principle to protect, enhance and develop agriculture which possessed enough constitutional significance to give the stockgrowers a constitutionally protected interest in agriculture.<sup>108</sup> Thus, the stockgrowers argued that any distinctions between livestock and business inventory must be reasonable.<sup>109</sup> Further, the government's interests in taxing livestock while exempting business inventory must be more important than the stockgrowers' interests in developing and enhancing agriculture.<sup>110</sup>

The court rejected the stockgrowers' argument, concluding that Article XII, section 1, is simply a "broad directive whose specifics are implemented through legislative decision, not constitutional mandate."<sup>111</sup> As such, the court reasoned that any distinctions need only be reasonable, and bear a fair and substantial relationship to the legislative objective.<sup>112</sup> Under this lower level of scrutiny, the court declared the tax scheme constitutional.<sup>113</sup> Thus, after *Montana Stockgrowers Ass'n*, the law is inconsistent, and no definitive guidelines emerge as to when the court will enforce the principle contained in a provision which is not self-executing.

### III. INTERPRETATION AND APPLICATION OF THE SELF-EXECUTION DOCTRINE TO ENVIRONMENTAL PROVISIONS IN STATE CONSTITUTIONS

#### A. *Historical Perspective and Lessons from Other Jurisdictions*

State constitutional environmental protection is a clear response to federal legislative and judicial failure to provide such protection.<sup>114</sup> In 1970, Congress made two attempts to amend the federal constitution to provide environmental protection.<sup>115</sup> Both amendments failed. Environmentalists next turned to the federal judiciary. They unsuccessfully argued that the Fifth, Ninth, and Fourteenth Amendments implicitly encompass a substantive due process right to environmental protection.<sup>116</sup> However,

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107. "The legislature shall . . . enact laws and provide appropriations to protect, enhance, and develop all agriculture." MONT. CONST. art. XII, § 1, cl. 1.

108. *Montana Stockgrowers Ass'n*, 777 P.2d at 288.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 290.

114. See Mary Ellen Cusack, Comment, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENVTL. AFF. L. REV. 173, 175-79 (1993); Robert A. McLaren, Comment, *Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation*, 12 U. HAW. L. REV. 123, 124-26 (1990).

115. S.J. Res. 169, 91st Cong., 2d Sess. (1970); H.R.J. Res. 1321, 90th Cong., 2d Sess. (1968).

116. *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1429-30 (9th Cir. 1989); *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971); *Hawthorn Env'tl. Preservation Ass'n v. Coleman*, 417 F. Supp. 1091, 1093,

some courts have suggested that a federal right might exist under these provisions in the future.<sup>117</sup> One court stated, "Such claims, even under our present Constitution, are not fanciful and may, indeed, some day, in one way or another, obtain judicial recognition."<sup>118</sup>

State constitutional provisions enacted in response to the federal legislative and judicial failure to afford protection include (1) statements of public policy;<sup>119</sup> (2) statements of individual rights to a clean and healthy environment;<sup>120</sup> and (3) statements incorporating the public trust doctrine.<sup>121</sup> With few exceptions, courts have been reluctant to enforce the constitutional mandates found in these provisions.<sup>122</sup>

Courts generally hold that public policy statements are not self-executing, thus, these type of provisions offer little environmental protection.<sup>123</sup> For example, Virginia has held that its public policy statement is not self-executing.<sup>124</sup> In so holding, the court noted that the provision was neither prohibitory nor negative in character, not included in the state bill of rights, not declaratory of common law, and failed to lay down rules "by means of which the principles which it posits may be given the force of

1095 (N.D. Ga. 1976), *aff'd*, 551 F.2d 1055 (5th Cir. 1977); *Environmental Defense Fund v. Corps of Engineers of the U.S. Army*, 325 F. Supp. 728, 739 (E.D. Ark. 1970).

117. *Stop H-3 Ass'n*, 870 F.2d at 1430 n.21; *Environmental Defense Fund*, 325 F. Supp. at 739.

118. *Environmental Defense Fund*, 325 F. Supp. at 739.

119. "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty . . . ." FLA. CONST. art. II, § 7.

120. "Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law." ILL. CONST. art. XI, § 2.

"All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment . . . ." MONT. CONST. art. II, § 3.

121. "Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." PA. CONST. art. I, § 27.

122. *Robb v. Shockey Slip Found.*, 324 S.E.2d 674, 676-77 (Va. 1985); *Kadillak v. Anaconda Co.*, 602 P.2d 147, 153-54 (Mont. 1979); *Montana Wilderness Ass'n v. Board of Health and Envtl. Sciences*, 559 P.2d 1157, 1161 (Mont. 1976); *Commonwealth v. Gettysburg Nat'l Battlefield Tower, Inc.*, 311 A.2d 588, 590-95 (Pa. 1973); *but see State ex rel. Dep't of Health and Envtl. Sciences v. Green*, 739 P.2d 469, 473 (Mont. 1987); *Florida Power Corp. v. Gulf Ridge Council*, 385 So. 2d 1155, 1156 (Fla. Dist. Ct. App. 1980).

123. *See, e.g., Robb*, 324 S.E.2d at 676-77.

124. *Id.* at 677.

To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.

VA. CONST. art. XI, § 1.

law."<sup>125</sup>

Florida's constitution also contains a public policy statement.<sup>126</sup> While this provision may not be self-executing, Florida does acknowledge the constitutional values contained therein.<sup>127</sup> For example, courts have held that in condemnation proceedings, the condemnor must consider the environmental and aesthetic damage that would accompany condemnation.<sup>128</sup> Thus, at a minimum, state agencies must show that they balanced the public interest in natural resource protection against further development.<sup>129</sup>

Illinois' constitution grants a right to a healthful environment and includes a citizens' right to sue provision.<sup>130</sup> A healthful environment is "that quality of physical environment which a reasonable man would select for himself were a free choice available . . . ." <sup>131</sup> By including the citizens' right to sue clause, the provision eliminates the traditional "special injury" requirement of standing.<sup>132</sup> Parties may bring suit to prove a violation of the right even though the wrong "may be a public wrong, or one common to the public generally."<sup>133</sup> The drafters are clear that the section creates no new remedies. Traditional remedies of injunction and declaratory relief are the only available remedies absent strict proof of economic or personal injury.<sup>134</sup>

Pennsylvania's constitutional amendment grants a right to a clean and healthful environment, and purports to create a public trust.<sup>135</sup> Pennsylvania courts have developed a complete and extensive body of case law interpreting and applying these environmental provisions.<sup>136</sup> More-

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125. *Robb*, 324 S.E.2d at 676 (quoting 1 COOLEY CONSTITUTIONAL LIMITATIONS 167-68 (8th ed. 1927)).

126. "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty." FLA. CONST. art. II, § 7.

127. *See, e.g., Seadade Indus. v. Florida Power & Light Co.*, 245 So. 2d 209, 214 (Fla. 1971); *Florida Power Corp.*, 385 So. 2d at 1156.

128. *Florida Power Corp.*, 385 So. 2d at 1156-57.

129. *Id.*; *Seadade Indus.*, 245 So. 2d at 214.

130. ILL. CONST. art. XI, § 2.

131. Constitutional Commentary, ILL. CONST. art. XI, § 2.

132. *Id.*; *see infra* notes 216-41 and accompanying text.

133. Constitutional Commentary, ILL. CONST. art. XI, § 2.

134. *Id.*; *see infra* notes 242-65 and accompanying text.

135. "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." PA. CONST. art. I, § 27.

136. *See, e.g., National-Gettysburg Battlefield Tower*, 311 A.2d 588; *Snelling v. Department of Transp.*, 366 A.2d 1298 (Pa. Commw. Ct. 1976); *Community College of Del. County v. Fox*, 342 A.2d 468 (Pa. Commw. 1975); *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976).

over, Pennsylvania courts have examined the self-execution question as it relates to the environmental provisions, but have never reached a consensus on the issue.<sup>137</sup>

The court exhaustively examined self-execution in *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*<sup>138</sup> In that case, the Attorney General brought suit on behalf of the citizens of Pennsylvania against a party who contracted with the National Park Service to build an observation tower on a "[battlefield] setting which once was marked by the awful conflict of a brothers' war."<sup>139</sup> The Commonwealth argued that construction of the tower would violate each Pennsylvanian's right to a clean and healthful environment guaranteed by the constitution.<sup>140</sup>

Two justices reasoned that if the constitutional right to a clean and healthy environment existed alone, the provision might be self-executing.<sup>141</sup> However, they concluded that the inclusion of the public trust doctrine eviscerated the guaranteed right.<sup>142</sup>

This trust provision named the Commonwealth of Pennsylvania the "trustee" of the state's public natural resources.<sup>143</sup> The provision also gave the state the power to "conserve and maintain [the resources] for the benefit of all the people."<sup>144</sup> These justices found no precedent for holding a constitutional provision which tended to expand, rather than limit, the exercise of governmental power as self-executing.<sup>145</sup>

Moreover, the public trust provision did not provide the judiciary with a "sufficient rule by means of which the right given might be enjoyed and protected."<sup>146</sup> These two justices reasoned that the executive branch of government, through the attorney general, could not alone decide how and when to enforce the principles contained in the provision.<sup>147</sup> Further, the provision did not define the powers of the trustee, or the values the principle purported to protect.<sup>148</sup> In addition, the provision did not establish procedures by which private property could fairly be regulated.<sup>149</sup>

In a concurring opinion, three justices expressed no opinion on the

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137. *Payne*, 312 A.2d at 94 n.2.

138. 311 A.2d at 590-95.

139. *National Gettysburg Battlefield Tower*, 311 A.2d at 590.

140. *Id.* at 590-91.

141. *Id.* at 592.

142. *Id.*

143. *Id.*; PA. CONST. art I, § 27.

144. *National Gettysburg Battlefield Tower*, 311 A.2d at 592; PA. CONST. art I., § 27.

145. *National Gettysburg Battlefield Tower*, 311 A.2d at 592.

146. *Id.* at 593-95; see *supra* notes 20-24 and accompanying text.

147. *National Gettysburg Battlefield Tower*, 311 A.2d at 593.

148. *Id.* at 593, 595.

149. *Id.* at 593.



self-execution question, affirming the opinion on other grounds.<sup>150</sup> Two justices dissented, concluding that the self-execution doctrine served only to emasculate the constitutional provision at issue.<sup>151</sup> They reasoned that the provision was not addressed to the legislature, and that its meaning was clear.<sup>152</sup> The drafters created a public trust: the res was the natural, scenic, historic, and aesthetic values of the Commonwealth; the state was the trustee; and the citizens of the Commonwealth were the trust beneficiaries.<sup>153</sup> The dissenting judges concluded that such a constitutional device was enforceable in an equitable action.<sup>154</sup>

In a later case, a Pennsylvania Commonwealth court noted that no majority was reached in the *National Gettysburg Battlefield Tower* case and treated the provision as self-executing.<sup>155</sup> After concluding that the public natural resources of Pennsylvania had been constitutionally placed in public trust, the Pennsylvania court devised a three-pronged test to determine whether government action violated the constitutional environmental protection:

1. Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
2. Does the record indicate a reasonable effort to reduce the environmental incursion to a minimum?
3. Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?<sup>156</sup>

While such a test may appear sound on its face, it has nullified any additional environmental protection offered by the Pennsylvania Constitution. The Pennsylvania Constitution does not require "consideration of factors beyond those which, by statute, must be considered in evaluating projects which are potentially harmful to the environment."<sup>157</sup> Indeed, a Pennsylvania court may refuse to examine the second and third prongs of the test if the state agency involved in making the challenged decision has complied with all the applicable statutes.<sup>158</sup> Thus, Pennsylvania's constitutional protections appear to add nothing to existing statutory and regula-

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150. *Id.* at 595-96 (Roberts, J., concurring).

151. *Id.* at 596 (Jones, C.J., dissenting).

152. *Id.* at 595 (Jones, C.J., dissenting).

153. *Id.*

154. *Id.*

155. *Payne*, 312 A.2d at 94 n.2, *aff'd*, 361 A.2d 263 (Pa. 1976).

156. *Id.* at 94.

157. *Snelling*, 366 A.2d at 1305.

158. *Community College of Del. County*, 342 A.2d at 481.

tory protections in that state.

### B. *Montana's Interpretation to Date*

Montana courts have not definitively interpreted the environmental protections found in the Montana Constitution. Moreover, the Montana Supreme Court has not decided whether the Article II or Article IX provisions are self-executing. To date, the Montana Supreme Court simply construes the right to a clean and healthful environment<sup>159</sup> as legitimizing the state's exercise of its police power.<sup>160</sup> In *State v. Bernhard*, the court reviewed the constitutionality of a regulation which required the shielding of junk vehicles before the state would issue a license to maintain a motor vehicle graveyard.<sup>161</sup> The property owner, Bernhard, argued in part that the regulation and the statute under which it was promulgated constituted a taking of property without due process.<sup>162</sup> The court concluded that the crux of the pro se litigant's argument was that the shielding requirement was without foundation, and could not properly support the state's exercise of its police powers.<sup>163</sup> The state argued that its police powers encompassed aesthetic considerations, and the court agreed, relying in part on case law from other jurisdictions and the constitutional right to a clean and healthy environment:

Article II, Section 3 . . . declares that the right to a "clean and healthful environment" is an inalienable right of a citizen of this state. Consistent with this statement . . . we hold that a legislative purpose to preserve or enhance aesthetic values is a sufficient basis for the state's exercise of its police power. . . .<sup>164</sup>

More recently, a defendant argued that as a property owner he possessed an inalienable right to acquire junk vehicles on his property without a license.<sup>165</sup> The 1987 Montana court disagreed, citing *Bernhard* as dispositive.<sup>166</sup> The court concluded that while a person does have a constitutional right in Montana to acquire and possess real property, the court must balance that right against competing rights, including the right to a clean and healthy environment.<sup>167</sup>

Private parties attempting to constitutionally challenge state action

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159. MONT. CONST. art. II, § 3.

160. See *Green*, 739 P.2d at 473; *State v. Bernhard*, 568 P.2d 136, 138 (Mont. 1977).

161. *Bernhard*, 568 P.2d 136.

162. *Id.* at 138.

163. *Id.*

164. *Id.*

165. *Green*, 739 P.2d at 473.

166. *Id.*

167. *Id.*

have not fared as well as government agencies challenging private action. The Montana Supreme Court has had two opportunities to define and enforce the principles encompassed in the right to a clean and healthy environment and the Article IX provisions.<sup>168</sup> On each occasion, when construing the Montana Environmental Protection Act (MEPA),<sup>169</sup> the court concluded that MEPA's protective requirements must give way to other statutory schemes.<sup>170</sup>

First, in *Montana Wilderness Ass'n v. Board of Health and Environmental Sciences*,<sup>171</sup> the Montana Supreme Court concluded that MEPA did not displace two subdivision acts in which the legislature vested control of subdivision planning in local government.<sup>172</sup> As such, the Department of Health and Environmental Sciences' (DHES) role in subdivision approval was limited to review of water supply, sewage, and solid waste disposal.<sup>173</sup> Given this limited role, the court concluded that the Environmental Impact Statement (EIS) prepared by DHES was adequate, and that DHES need not consider in its EIS the myriad of factors and alternatives enumerated under MEPA.<sup>174</sup>

Justice Haswell filed a vigorous dissent in which he set out the original decision "from which [the court] . . . made a 180 degree turn."<sup>175</sup> That withdrawn opinion is illustrative because it defines the right to a clean and healthy environment. In its original opinion, the court concluded that the right was a civil right, existing "on a parity" with other more traditional,

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168. *Kadillac*, 602 P.2d at 147; *Montana Wilderness Ass'n*, 559 P.2d 1157.

169. MONT. CODE ANN. §§ 75-1-101 to -324 (1993).

170. MEPA requires all state agencies to examine the environmental consequences of any proposed major state action capable of significantly affecting the quality of the human environment. MONT. CODE ANN. § 75-1-201(1)(b). The state agency must address (1) the environmental impact of the proposed state action; (2) adverse environmental effects which cannot be avoided should the proposed action take place; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of man's environment; (5) the maintenance and enhancement of long-term productivity; and (6) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. *Id.*

171. 559 P.2d 1157 (Mont. 1976).

172. *Montana Wilderness Ass'n*, 559 P.2d at 1161.

173. *Id.* Plaintiffs challenged DHES' approval of water and sewer systems for a subdivision infringing on wildlife habitat. *Id.* at 1158. Plaintiffs argued that the EIS prepared by DHES was inadequate because the agency did not disclose whether it used a systematic, interdisciplinary approach in drafting the EIS. *Id.* at 1159. Further, plaintiffs argued that the EIS was inadequate because DHES did not include (1) a detailed statement of alternatives to the development; (2) a detailed statement of the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity; (3) a detailed statement of the environmental impact of the proposed subdivision; and (4) consideration of the full range of the economic and environmental costs and benefits of the alternative actions available. *Id.*

174. *Id.*; see *supra* note 170 for an outline of MEPA requirements.

175. *Montana Wilderness Ass'n*, 559 P.2d at 1161-1177 (Haswell, J., dissenting). The court issued the opinion reprinted by Justice Haswell, but on rehearing, withdrew it and issued a new opinion. *Id.*

inalienable rights.<sup>176</sup> Moreover, the court concluded that the right to a clean and healthy environment was a fundamental right.<sup>177</sup>

In a later case, *Kadillak v. Anaconda Co.*,<sup>178</sup> the court considered the statutory interaction of MEPA with the Hard Rock Mining Act (HRMA).<sup>179</sup> In that case, the Anaconda Company filed an application with the DSL to secure an operating permit for mining activities in close proximity to a subdivision in Butte.<sup>180</sup> The permit would have allowed the company to construct "a mountainous waste dump of overburden and discard from open pit mining operations" within 200 hundred feet of the subdivision.<sup>181</sup> The Commissioner of State Lands considered the issuance of the permit to be a major state action requiring an EIS under MEPA.<sup>182</sup> An EIS was prepared, on the basis of which the Commissioner issued a permit.<sup>183</sup> The plaintiff homeowners challenged the adequacy of the EIS and the validity of the permit.<sup>184</sup>

The court agreed that Anaconda Company's activities constituted "activity capable of significantly affecting the human environment."<sup>185</sup> However, the court found that MEPA conflicted with the HRMA which, at that time, mandated the DSL to automatically issue a permit if it had not acted within sixty days. "Given that the 60 day period is a woefully inadequate period for the preparation of a proper EIS,"<sup>186</sup> the court concluded that the MEPA and HRMA were in conflict. The court framed the issue as whether MEPA authorized an extension of HRMA's time limits.<sup>187</sup>

The court looked to the federal interpretation of the National Environmental Policy Act (NEPA)<sup>188</sup> for guidance. The court reviewed the U.S. Supreme Court's decision in *Flint Ridge Development Co. v. Scenic Rivers Ass'n*,<sup>189</sup> which held that NEPA must give way in cases of statutory conflict.<sup>190</sup> Based upon this interpretation, the Montana Su-

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176. *Id.* at 1167 (Haswell, J., dissenting).

177. *Id.* at 1168 (Haswell, J. dissenting).

178. 602 P.2d 147 (Mont. 1979).

179. MONT. CODE ANN. §§ 82-4-301 to -362 (1993).

180. *Kadillak*, 602 P.2d at 150.

181. *Id.* at 151.

182. *Id.* at 150.

183. *Id.* at 150-51.

184. *Id.* at 151.

185. *Id.* at 152.

186. *Id.*

187. *Id.* at 153.

188. 42 U.S.C. §§ 4321-4370d (1988 & Supp. III 1993).

189. 426 U.S. 776 (1976).

190. *Flint Ridge Dev.*, 426 U.S. at 788. "Not even the policies of NEPA, which are of the utmost importance to the survival of our environment, can rewrite section 201(b) to undermine the property rights of prospecting permittee lease applicants." *Natural Resource Defense Council, Inc., v.*

preme Court reasoned that NEPA and MEPA were similar, and, following the federal interpretation, held that MEPA must give way to more specific statutory schemes when there is an "unavoidable and irreconcilable" conflict.<sup>191</sup>

Plaintiffs argued that the Article II right to a clean and healthy environment together with the protections contained in Article IX provided, in essence, independent state grounds for departing from the federal interpretation of NEPA.<sup>192</sup> Justice Haswell, ironically, rejected this argument, reasoning that the legislature did not enact MEPA to supplement the right to a clean and healthy environment because MEPA predated the constitution.<sup>193</sup> Justice Haswell concluded that "the statutory requirement of an EIS is not given constitutional status by the subsequent enactment of [the] constitutional guarantee."<sup>194</sup>

#### IV. AN APPROPRIATE THEORY OF SELF-EXECUTION

The self-execution doctrine, largely an instrument of judicial restraint,<sup>195</sup> allows the legislature to effectively overturn an organic document and subvert fundamental law by simply failing to legislate in a given area. "The declarations of constitutions are placed therein to be obeyed, and are not to be 'frittered away by construction.'" <sup>196</sup> Before addressing the self-execution doctrine anew, a Montana court should revisit the judiciary's role in a constitutional democracy.

Interpreting the constitution is exclusively a judicial function.<sup>197</sup> By awaiting legislative action to enforce a constitutional duty, or define a right, the court allows other branches of government to function in disregard of fundamental law. If the court allows the legislature to assume such a role, "we no longer have a system of democracy in a republic of three equally balanced departments of government."<sup>198</sup>

The constitution is either a superior paramount law unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then

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Berklund, 609 F.2d 553, 559 (D.C. Cir. 1980) (referring to the Fed. Coal Leasing Amendments Act of 1976, 30 U.S.C. § 201(b) (1975)).

191. *Kadillak*, 602 P.2d at 153.

192. *Id.*

193. *Id.* at 154.

194. *Id.*

195. *Fernandez*, *supra* note 53, at 382-84.

196. *Alexander v. State*, 381 P.2d 780, 782 (Mont. 1963) (quoting *McElroy v. Kansas City*, 21 F. 257 (1884)).

197. *Allstate Insurance Co. v. City of Billings*, 780 P.2d 186, 188 (Mont. 1989).

198. *Jones v. Burns*, 357 P.2d 22, 39 (Mont. 1960) (Bottomly, J., dissenting).

a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.<sup>199</sup>

A state constitution is a compact between the citizenry and its government. Courts should construe these compacts as meaningful, positive law since a constitution is "the mandate of a sovereign people to its servants and representatives."<sup>200</sup> Therefore, courts should generally effectuate all principles found in a constitution.<sup>201</sup>

Constitutional provisions can essentially be divided into three types: (1) broad public policy statements; (2) general principles; and (3) clearly detailed rules. Detailed rules will seldom, if ever, face a self-execution challenge.<sup>202</sup> However, the lines are blurred with regard to public policy statements and more general principles.<sup>203</sup>

To be an effective check and balance against the legislature, courts must take cognizance of each constitutional principle. If the constitutional provision includes only general principles, for example, clauses which are mandatory, but not prohibitory, or if a constitutional provision is a detailed rule, such as mandatory-prohibitions, the court has a constitutional duty to apply the principle embodied in the constitution so long as the principle is applicable to the case before it.

When reviewing mandatory-nonprohibitory provisions, the court is obligated to apply and enforce these general principles to the greatest extent possible even though the legislature has yet to amplify and explain the principles with legislation. For example, a Montana court should not wait for the legislature to define the right to a clean and healthy environment.

The Montana Supreme Court has already laid the foundation for an appropriate interpretation of that right. Having held that the right is an inalienable right,<sup>204</sup> and that the right exists "on a parity" with other

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199. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

200. *General Agriculture Corp. v. Moore*, 534 P.2d 859, 862 (Mont. 1975) (quoting 16 Am. Jur. 2d *Constitutional Law* § 56).

201. *Id.* (quoting 16 C.J.S. *Constitutional Law* §§ 14-16). "The words of a constitution may not be ignored as meaningless . . . ." *Id.*

202. Detailed rules are most analogous to mandatory-prohibitory provisions. See *supra* notes 60-66 and accompanying text.

203. General principles are most analogous to the mandatory- nonprohibitory provisions discussed *supra* notes 67-77 and accompanying text. Broad public policy statements are most analogous to the non-mandatory, non-prohibitory classification discussed *supra* notes 56-59 and accompanying text.

204. *State ex rel. Dep't of Health and Envtl. Sciences v. Green*, 739 P.2d 469, 473 (Mont. 1987); *State v. Bernhard*, 568 P.2d 136, 138 (Mont. 1977).

rights,<sup>205</sup> the court should not hesitate to establish an appropriate balancing test when the right comes into conflict with other rights, such as the right to acquire and possess real property,<sup>206</sup> or when the right conflicts with the public interest in resource development. The Montana Supreme Court should use *Bernhard* and *Green* as an appropriate foundation to expound on this constitutional right.<sup>207</sup>

When construing the legislative directives accompanying the mandatory, nonprohibitory duties to maintain and improve the environment, and to reclaim all lands disturbed by the taking of natural resources,<sup>208</sup> the Montana court should follow the precedent of *General Agriculture Corp.*<sup>209</sup> In such instances, the right or duty should be protected or enforced to the greatest extent possible, although supplemental legislation might better aid or protect the right, or enforce the duty.

In such cases, the court should narrowly tailor its holding, resolving the dispute before it in the context of the particular facts of the case as presented. The legislature is the more appropriate branch to give detailed meaning to these general principles. Hopefully, legislative detail will answer a broad range of prospective problems and hypothetical questions which the judiciary can use to resolve future cases.

Insofar as any legislative explanation and amplification is compatible with the constitutional principle, the court should look to the applicable legislation when construing constitutional provisions of general principle. However, if legislation conflicts with a constitutional provision, the court must strike the legislation as unconstitutional.

Moreover, if the Montana Supreme Court again faces conflict between MEPA and another statutory scheme, the court should revisit its holding in *Kadillak*.<sup>210</sup> At a minimum, such conflicts should be resolved in favor of MEPA based on adequate, independent state grounds in the Montana Constitution. Generally, courts should continue to hold that public policy statements are not self-executing. However, courts should review legislative enactments closely to see if they comport with the values found in the public policy statement. *Butte Community Union* provides the Montana court with precedent for such review.<sup>211</sup> Indeed, if the electorate has given a value constitutional status, the court may be justified in scrutinizing under a higher standard legislative action affecting that

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205. *Green*, 739 P.2d at 473.

206. *Id.*

207. See *supra* notes 163-169 and accompanying text.

208. MONT. CONST. art. IX, §§ 1-2.

209. See *supra* notes 89-93 and accompanying text.

210. See *supra* notes 180-96 and accompanying text.

211. *Butte Community Union v. Lewis*, 745 P.2d 1128, 1130 (Mont. 1987); see *supra* notes 94-104 and accompanying text.

value.<sup>212</sup> In the context of statements of environmental public policy, Florida jurisprudence serves as an appropriate model.<sup>213</sup>

## V. SOME PROBLEMS GENERATED BY SELF-EXECUTING ENVIRONMENTAL PROVISIONS IN STATE CONSTITUTIONS

### A. Standing

Environmental plaintiffs still face certain obstacles after clearing the self-execution hurdle. Given the recent U.S. Supreme Court decision in *Defenders of Wildlife v. Lujan*,<sup>214</sup> standing may be the largest and highest.<sup>215</sup>

Standing is a mechanism whereby the court assures that the plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues."<sup>216</sup> Standing derives from notions of judicial restraint, as well as from the case or controversy requirement in the U.S. Constitution.<sup>217</sup> Montana interprets the "cases in law or equity" clause in the Montana Constitution<sup>218</sup> as embodying the same requirements as the federal case or controversy requirement.<sup>219</sup> Generally, a plaintiff must show that he or she

has personally been injured or threatened with immediate injury by the alleged constitutional or statutory violation. Before [the court] can find a statute to be unconstitutional, "the party who assails it must show, not only that the statute is invalid, but that he has sustained, or is in immediate danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."<sup>220</sup>

The U.S. Supreme Court has recognized that injury is not confined to economic injury, but includes aesthetic and environmental harm.<sup>221</sup> In a dissenting opinion, former Chief Justice Haswell of the Montana Supreme

212. See *supra* notes 102-04 and accompanying text.

213. See, e.g., *Florida Power Corp. v. Gulf Ridge Council*, 385 So. 2d 1155 (Fla. Dist. Ct. App. 1980); *supra* notes 128-131 and accompanying text.

214. 112 S. Ct. 2130 (1992).

215. See generally Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 Duke L.J. 1141 (1993).

216. *Olson v. Department of Revenue*, 726 P.2d 1162, 1166 (Mont. 1986) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

217. *Olson*, 726 P.2d at 1166; U.S. CONST. art. III, § 2.

218. "The district court has original jurisdiction in . . . cases at law and equity." MONT. CONST. art. VII, § 4, cl. 1.

219. *Olson*, 726 P.2d at 1166.

220. *Id.* (quoting *Chovanak v. Matthews*, 188 P.2d 582, 585 (Mont. 1948)).

221. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).



Court argued that environmental harm is a cognizable injury, and offered a three-pronged test to determine if an environmental group has standing to sue a state agency.<sup>222</sup> Justice Haswell concluded that an environmental plaintiff has standing if it can show:

- (1) past, present or threatened injury to a property or civil right;
- (2) the injury is distinguishable from the injury to the public generally, but need not be exclusive to the plaintiff; and
- (3) the issue presents a case or controversy within the judicial cognizance of the state sovereignty.<sup>223</sup>

Justice Haswell reasoned that the right to a clean and healthy environment was a civil right, as well as a fundamental and inalienable right, and environmental degradation was within judicial cognizance.<sup>224</sup> Moreover, the dissent concluded that an environmental group's injury is distinguishable from the general public's if it uses the public lands adjacent to the site of the challenged action.<sup>225</sup>

Not only were these standards articulated in a dissenting opinion, but they predate *Defenders of Wildlife*. Thus, environmental plaintiffs should be prepared to meet the harsher standing test set out in *Defenders of Wildlife*. First, an environmental plaintiff must show an injury in fact.<sup>226</sup> An injury in fact is an invasion of a legally protected interest, and the injury must be concrete and particularized, as well as actual or imminent.<sup>227</sup> Presumably, the right to a clean and healthy environment is a legally protected interest. However, "particularized" will preclude many plaintiffs, especially environmental groups, who cannot make a strong showing that their injury is distinguishable from injury to the public.<sup>228</sup> Further, a court could interpret "actual or imminent" as something more than a mere "threat" of injury.<sup>229</sup>

Second, plaintiffs must show a causal connection, fairly traceable to the defendant, between the injury and the challenged action.<sup>230</sup> Finally,

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222. *Montana Wilderness Ass'n v. Bd. of Health and Envtl. Sciences*, 559 P.2d 1157, 1167 (Mont. 1976) (Haswell, J., dissenting).

223. *Id.* at 1167.

224. *Id.*

225. *Id.* at 1168.

226. *Defenders of Wildlife*, 112 S. Ct. at 2136.

227. *Id.*

228. [T]he injury in fact test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured. . . . [Defenders of Wildlife must] submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of [its] members would thereby be "directly" affected apart from their "special interest" in th[e] subject.

*Id.* at 2137-38 (emphasis added) (quoting *Morton*, 405 U.S. at 735, 739).

229. *Defenders of Wildlife*, 112 S. Ct. at 2138 n.2.

230. *Id.* at 2136.

plaintiffs must show that a favorable decision is "likely, as opposed to merely speculative," to redress the injury.<sup>231</sup>

Environmental plaintiffs may shoulder a lesser burden under one exception in Montana standing jurisprudence. If the general public is intended to benefit by a constitutional provision which has been "the victim of legislative strangulation," any registered voter has standing to sue.<sup>232</sup>

This exception has successfully been invoked in at least one Article IX challenge. In *Butte-Silver Bow Local Government v. State*,<sup>233</sup> plaintiffs sought a declaratory judgment that the Resource Indemnity Trust Act (RITA)<sup>234</sup> violated the constitutional duty to reclaim all lands disturbed by the taking of natural resources.<sup>235</sup> Several individuals sued in their individual capacity as registered voters and taxpayers alleging that they would suffer serious adverse impacts to their environmental and aesthetic well-being if proper reclamation in the city of Butte, Montana, did not occur.<sup>236</sup>

The court concluded that these individual citizens indeed had standing to sue. The court reasoned that the individual plaintiffs had standing as registered voters because the constitutional duty to reclaim lands was enacted for the public benefit.<sup>237</sup> The court further reasoned that the legislature was strangleholding the principle of reclamation by enacting the RITA, which allows funds to be expended for programs and projects other than reclamation.<sup>238</sup>

In addition, the individual plaintiffs had standing to sue as taxpayers. The court reasoned that a taxpayer has standing "to question the validity of a tax, or the expenditure of the tax monies, provided the issue(s) presented directly affect the constitutional validity to collect or use the proceeds of the tax by the state" or local government unit.<sup>239</sup>

Thus, environmental plaintiffs face strong standing challenges under the U.S. Constitution. Likewise, given Montana's incorporation of federal standing requirements through the "cases in law or equity" clause, environmental plaintiffs may have few independent state grounds to deviate from federal standing jurisprudence. Nevertheless, some windows of opportunity remain through the public interest exceptions defined in *Butte Silver-Bow Local Government*.

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231. *Id.*

232. *Committee for an Effective Judiciary v. State*, 679 P.2d 1223, 1225 (Mont. 1984).

233. 768 P.2d 327 (Mont. 1989).

234. MONT. CODE ANN. §§ 15-38-101 to -203 (1993).

235. *Butte-Silver Bow*, 768 P.2d at 328.

236. *Id.*

237. *Id.* at 329.

238. *Id.*

239. *Id.*

### B. Remedies

The Montana Constitution purports to open the courts to every person.<sup>240</sup> However, the Montana Supreme Court has held that the state constitution only guarantees a right of access to seek a remedy recognized by common law.<sup>241</sup> The Montana Constitution does not guarantee a fundamental right to full legal redress.<sup>242</sup> Further, a party does not have a vested right in a particular common law cause of action or rule.<sup>243</sup>

The legislature may also require a plaintiff to exhaust all available administrative remedies before filing a complaint.<sup>244</sup> Thus, the legislature may effectively curtail the environmental protections found in the constitution by enacting "reasonable procedural requirements."<sup>245</sup> These requirements need only be rationally related to a legitimate government interest.<sup>246</sup> Environmental plaintiffs should be prepared to argue for a higher level of scrutiny<sup>247</sup> since the Montana Supreme Court has stated the right to a clean and healthy environment is an inalienable right.<sup>248</sup>

Once a court takes judicial cognizance of a constitutional environmental claim, an environmental plaintiff should be prepared to argue for a particular remedy. For an environmental plaintiff bringing a cause of action under Article IX, there is little chance for securing a political remedy, e.g., requesting the court to compel the legislature to enact legislation to enforce the duty to maintain a clean and healthful environment, or enacting reclamation standards which fulfill the constitutionally contemplated standard. "[I]t is too well settled to need any citation of authority that the judiciary cannot compel the Legislature to exercise a purely legislative prerogative."<sup>249</sup>

However, if the legislature refuses to act, environmental plaintiffs might successfully argue for a structural injunction remedy similar to that which civil rights plaintiffs secured in the school segregation cases<sup>250</sup> or the Arkansas prison cases.<sup>251</sup> Courts seem to design such a remedy when the

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240. "Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character." MONT. CONST. art. II, § 16.

241. *Meech v. Hillhaven West, Inc.*, 776 P.2d 488, 491-92 (Mont. 1989).

242. *Id.* at 493.

243. *Id.* at 493-94.

244. *See, e.g., Harrison v. Chance*, 797 P.2d 200, 206 (Mont. 1990).

245. *Id.*

246. *Id.*

247. *See, e.g., Butte Community Union v. Lewis*, 745 P.2d 1128, 1131 (Mont. 1987); *but see Montana Stockgrowers Ass'n v. Department of Revenue*, 777 P.2d 285, 288 (Mont. 1989).

248. *State ex rel. Dep't of Health and Envtl. Sciences v. Green*, 739 P.2d 469, 473 (Mont. 1987); *State v. Bernhard*, 568 P.2d 136, 138 (Mont. 1977).

249. *Dade County Classroom Teachers Ass'n v. Legislature*, 269 So. 2d 684, 686 (Fla. 1972).

250. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

251. *See, e.g., Hutto v. Finney*, 437 U.S. 678 (1978).

legislature has refused to take action. The right to a clean and healthy environment, when construed with the Article IX legislative mandates, provides the court with some legitimizing grounds to assume a legislative cloak.

We think it is appropriate to observe here that one of the exceptions to the separation-of-powers doctrine is in the area of constitutionally guaranteed or protected rights. The judiciary is in a lofty sense the guardian of the law of the land and the Constitution is the highest law. A constitution would be a meaningless instrument without some responsible agency of government having authority to enforce it . . . . When the people have spoken through their organic law concerning their basic rights, it is primarily the duty of the legislative body to provide the ways and means of enforcing such rights; *however, in the absence of appropriate legislative action, it is the responsibility of the courts to do so.*<sup>252</sup>

Further, while a writ of mandamus will not lie to compel an administrative agency, or similar body, to perform a discretionary duty,<sup>253</sup> environmental plaintiffs could successfully secure such a writ if "there has been such an abuse of discretion as to amount to no exercise of discretion at all."<sup>254</sup>

Environmental plaintiffs may also argue for a direct cause of action for damages under the state constitution. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>255</sup> the U.S. Supreme Court allowed a direct cause of action for damages against agents, who under color of federal authority, made a warrantless entry into the plaintiff's premises. The court ruled that such a cause of action was available when "no special factors counselling hesitation in the absence of affirmative action by Congress" exist.<sup>256</sup> Later cases clarify that the existence of comprehensive procedural and substantive statutory or administrative mechanisms which give meaningful relief will bar a cause of action under the Constitution.<sup>257</sup>

States have followed *Bivens* and its progeny, allowing direct constitutional actions.<sup>258</sup> Moreover, some courts have held that the doctrine of

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252. *Dade County Classroom Teachers Ass'n*, 269 So. 2d at 686 (emphasis added).

253. *Reep v. Board of County Comm'rs of Missoula County*, 622 P.2d 685, 688 (Mont. 1981).

254. *Id.* at 687-88.

255. 403 U.S. 388 (1971).

256. *Bivens*, 403 U.S. at 396.

257. *Schweiker v. Chilicky*, 487 U.S. 412, 422-23 (1988); *Bush v. Lucas*, 462 U.S. 367, 388-90 (1983).

258. *Corum v. University of N.C.*, 413 S.E.2d 276 (N.C. 1992); *Fenton v. Groveland Community Services Dist.*, 185 Cal. Rptr. 758 (1982).

sovereign immunity must give way to the supremacy of the constitution.<sup>259</sup> Nevertheless, special factors may counsel against a constitutional claim for money damages based on the environmental provisions in the Montana Constitution.

Foremost, such provisions were enacted to protect the resources of the state, and a citizens' right to sue amendment was specifically rejected.<sup>260</sup> As a matter of public policy, the court must consider the litigation increase which would occur by allowing direct constitutional claims. When fashioning a remedy for violations of the constitutional protections, the Montana Supreme Court would do well to follow the North Carolina's court reasoning in *Corum v. University of North Carolina*.<sup>261</sup>

Any remedy fashioned should "bow to established claims and remedies where these provide an alternative to inherent constitutional authority," and remedies should "minimize encroachment on other branches of government by seeking the least intrusive means."<sup>262</sup> Looking at Illinois' reasoning, injunctive and declaratory remedies seem adequate in all instances except in cases where the plaintiff presents clear and convincing proof of economic or personal injury.<sup>263</sup>

## VI. CONCLUSION

The Montana Supreme Court will inevitably face the opportunity to give meaning to the environmental provisions in the state constitution. The court should be prepared to protect the right to a clean and healthful environment,<sup>264</sup> enforce the duty to maintain a clean and healthy environment,<sup>265</sup> and ensure proper reclamation of disturbed lands.<sup>266</sup>

The court should continue to construe the right to a clean and healthful environment as an inalienable right existing on a parity with other historical rights, such as the right to possess real property.<sup>267</sup> The

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259. It would indeed be a fanciful gesture to say on the one hand that citizens have constitutional individual civil rights that are protected from encroachment actions by the State, while on the other hand saying that individuals whose constitutional rights have been violated by the State cannot sue because of the doctrine of sovereign immunity.

*Corum*, 413 S.E.2d at 291; see also *Fenton*, 185 Cal. Rptr. at 763; *Alexander v. State*, 381 P.2d 780, 782 (Mont. 1963). But see *Figueroa v. State*, 604 P.2d 1198, 1205 (Haw. 1980) (distinguishing between claims against state officials and claims directly against the state).

260. See C. Louise Cross, *The Battle for the Environmental Provisions in Montana's 1972 Constitution*, 51 MONT. LAW REV. 449, 452-55 (1990).

261. 413 S.E.2d 276.

262. *Corum*, 413 S.E.2d at 291.

263. Constitutional Commentary, ILL. CONST. art. XI, § 2.

264. MONT. CONST. art. II, § 3.

265. MONT. CONST. art. IX, § 1, cl. 1.

266. MONT. CONST. art. IX, § 2, cl. 1.

267. *Green*, 739 P.2d at 473; *Bernhard*, 568 P.2d at 138.

court should protect this right by balancing the right against competing rights and interests.<sup>268</sup>

When enforcing the duty to maintain a healthful environment, in the absence of clarifying legislation, the court should enforce the duty, but narrowly tailor its holding to the facts before it.<sup>269</sup> Further, the court should ensure that state reclamation standards meet a constitutionally acceptable level. If legislative and regulatory reclamation standards fail to meet the requisite level, the court must strike those standards.<sup>270</sup> Finally, if applicable, the court should view the environmental provisions of the state constitution as providing independent state grounds for departure from federal court interpretations of environmentally protective statutory and regulatory schemes.<sup>271</sup> Under no circumstances should the court adopt the protective cloak of the self-execution doctrine to escape publicly tumultuous and unsettled environmental issues. To do so would subvert the fundamental law as declared by Montanans, as well as deny protection to the "quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains . . . ." <sup>272</sup> In the words of Judge Honzel, the constitutional provisions at issue here are not merely advisory. They mean something.

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268. *Green*, 739 P.2d at 473.

269. See *supra* note 211 and accompanying text.

270. See, e.g., *Butte Community Union*, 745 P.2d at 1130-33 (striking legislation failing to meet constitutional standard of providing economic assistance to the aged, infirm and misfortunate).

271. See *supra* notes 180-196 and accompanying text.

272. MONT. CONST. Preamble.

