Montana Law Review

Volume 84 | Issue 1 Article 5

4-15-2023

Montana's Basic Necessities Clause and the Right to Earn a Living

Anthony B. Sanders
Director of the Center for Judicial Engagement at the Institute for Justice

MONTANA'S BASIC NECESSITIES CLAUSE AND THE RIGHT TO EARN A LIVING

Anthony B. Sanders*

Like most state constitutions, the Montana Constitution includes soaring language in its Declaration of Rights that is descended from George Mason's initial draft of the Virginia Declaration of Rights of 1776.[1] But unlike other "Lockean Natural Rights Guarantees," as they have elsewhere been called,[2] Article II, Section 3 of Montana's 1972 Constitution has a handful of unique features. One has been well recognized, the "right to a clean and healthful environment."[3] But another, the subject of this essay, has not—the right "of pursuing life's basic necessities."[4]

In a twist of irony, this Lockean *negative* right comes from an effort to create a non-Lockean *positive* right. The original effort for a positive right was defeated at Montana's 1972 Constitutional Convention, but the delegates turned the proposal on its head and into its present form.[5] This right to *pursue*—not be given—basic necessities is in line with other rights that descend from the hand of Mason.[6] The "new" right is, in fact, as old a right as any other in the Montana Constitution. It was just given specific articulation for the first time.

The Montana Supreme Court has been inconsistent, to say the least, in protecting the right to pursue basic necessities. This essay details Article II, Section 3, Basic Necessity Clause's origins and how the Court has glimpsed the meaning and promise of the Clause through the hammer of strict scrutiny but then blinked and failed to protect the livelihoods of Montanans. However, rediscovering the Clause's first principles—of 1776 and 1972—would not be difficult for the Court to do, and I propose a compromise for how to do so in light of its inconsistent case law. The compromise would

* Director of the Center for Judicial Engagement at the Institute for Justice.

1. MONT. CONST. art. II, § 3; Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. Rev. 1299, 1314 (2015) (quoting George Mason, *First Draft of the Virginia Declaration of Rights (May 20–26, 1776)*, 1 THE PAPERS OF GEORGE MASON, 1725–1792, at 276–77 (Robert A. Rutland ed., 1970)).

2. Calabresi & Vickery, *supra* note 1, at 1303–04. As explained below, the moniker comes from the English philosopher John Locke and, more generally, enlightenment social contract theory, which then influenced Founders such as George Mason.

3. *See, e.g.*, Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 988 P.2d 1236 (Mont. 1999).

4. MONT. CONST. art. II, § 3.

5. 2 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 620, 627 (1979) [hereinafter CONVENTION TRANSCRIPT VOL. 2].

6. *See* Calabresi & Vickery, *supra* note 1, at 1317–19 (detailing Mason's draft and its various guarantees, all of which are negative rights of individuals to be free, not positive rights for goods to be provided to individuals); CONVENTION TRANSCRIPT VOL. 2, *supra* note 5, at 620.

lead to Montana being among the forefront of states in protecting the right of its citizens to pursue life's basic necessities in the most straightforward way: exercising the right to earn a living.

I. How John Locke Reached Montana

A. Masonic Origins

Our story begins with George Mason in May 1776. At that time, what would later be known as the American War of Independence had begun and an outright call for independence was in the air.[7] In preparation, Virginia held a state constitutional convention to draft a constitution to organize and legitimize its fledgling government.[8] Mason had the task of writing a declaration of rights to accompany the constitution.[9] Drawing on remarks he had given previously on his natural-rights theory of government,[10] Mason penned a list of important freedoms, including:

> That all Men are born equally free and independant [sic], and have certain inherent natural Rights, of which they can not by any Compact, deprive or divest their Posterity; among which are the Enjoyment of Life and Liberty, with the means of acquiring and possessing Property, and pursueing [sic] and obtaining Happiness and Safety.[11]

The wording proved controversial at the convention due to the "born equally free" language, in light of its potential impact on slavery.[12] In the end, when Virginia adopted a final Declaration of Rights just two weeks later, the delegates tweaked some language to make it more palatable to the pro-slavery forces who were present.[13] However, Mason's first draft was widely republished in newspapers of the day[14] and the first draft's language made its way into other early state constitutions, including Pennsylvania's

7. *See* Hugh Blair Grigsby, The Virginia Convention of 1776: A Discourse Delivered Before the Virginia Alpha of the Phi Beta Kappa Society, in the Chapel of William and Mary College, in the City of Williamsburg, on the Afternoon of July the 3rd, 1855, at 8 (1855).

8. *See id.* at 5–8.

9. Calabresi & Vickery, *supra* note 1, at 1314.

10. *Id.* at 1313–14.

11. *Id.* at 1315 (quoting George Mason, *First Draft of the Virginia Declaration of Rights (May 20–26, 1776)*, 1 The Papers of George Mason, 1725–1792, at 276–77 (Robert A. Rutland ed., 1970)).

12. *Id.*

13. *Id.* at 1315–16. The final language was: "That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." Va. Const. of 1776, Dec. of Rights § 1.

14. Calabresi & Vickery *supra* note 1, at 1317–18.

(1776),[15] Vermont's (1777),[16] Massachusetts's (1780),[17] and New Hampshire's (1784).[18]

Whether using Mason's initial language or the final Virginia language, these provisions drew from social contract theory, which was widely popular in eighteenth-century America.[19] Although the exact influence of English philosopher John Locke on the Founders is a contested topic,[20] there is strong textual evidence that George Mason took the language in Locke's *Second Treatise of Government* and placed it directly into his draft Declaration of Rights.[21] Further, whether taken from Locke or not, the three broad rights Mason identifies—(1) enjoying life and liberty, (2) acquiring and possessing property, and (3) pursuing happiness and safety—are "Lockean" concepts, or more broadly, Enlightenment social contract theory concepts.[22] Thus, Calabresi and Vickery's labeling of these provisions as "Lockean Natural Rights Guarantees" is both—at least broadly—accurate and descriptive.[23] These are rights all individuals possess by their nature both to pursue certain ends and for others (including the government) to respect those pursuits.[24] Individuals give up some rights when they enter into society, but these rights they retain (hence their "inherent" or "inalienable" nature).[25]

By 1868, a majority of states (24 out of 37) had a Lockean Guarantee in their constitution.[26] But its use did not end there. Colorado adopted one with the rest of its constitution when it joined the Union in 1876,[27] as did all but one of the six states who hurriedly joined, along with Montana, during

15. *Id.* at 1318 (using the "born" and "natural rights" language).

16. *Id.* at 1328–29 (using the "born free and equal" language).

17. *Id.* at 1330 (using the "born" and "natural rights" language).

18. *Id.* at 1323 (providing a natural rights guarantee).

19. *See, e.g.*, Mark Hulliung, The Social Contract in America 25–27 (2007).

20. *Compare* Claire Rydell Arcenas, America's Philosopher: John Locke in American Intellectual Life 50–51 (2022) (arguing that Jefferson was not directly influenced by Locke in writing the Declaration), *with* Jerome Huyler, Locke in America: The Moral Philosophy of the Founding Era 39–41 (1995) (arguing Locke was a strong influence on various Founders).

21. Calabresi & Vickery, *supra* note 1, at 1316–17 ("George Mason appears to have borrowed almost directly from John Locke's Second Treatise of Civil Government, which included the statements '[t]hat all men by nature are equal' and that '[m]an being born, . . . hath by nature a power, . . . to preserve his property, that is, his life, liberty and estate.' ").

22. *See id.* at 1317.

23. *Id.* at 1303–05.

24. *Id.* at 1304–06.

25. *Id.* at 1314–15.

26. *Id.* at 1303 n.23 (citing Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 88 (2008)).

27. Colo. Const. art. II, § 3 ("All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness.").

the administration of President Benjamin Harrison.[28] Montana's "Masonic first draft" language read as follows:

> All persons are born equally free, and have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties, of acquiring, possessing and protecting property, and of seeking and obtaining their safety and happiness in all lawful ways.[29]

At Montana's first constitutional convention, in 1889, the Bill of Rights Committee proposed the provision and, perhaps because it was familiar with so many other constitutions, accepted it without objection or discussion.[30] The language stood until 1972.[31]

B. The Spirit of '72

When Montanans came together again to write a new constitution, they gave a new spin on the old Masonic words. On January 27, 1972, Delegate Lyle B. Monroe introduced a suggested change to what had been Article III, Section 3 of the Montana Constitution; his proposal read in full:

> A PROPOSAL AMENDING ARTICLE III, SECTION 3 OF THE CONSTITUTION OF THE STATE OF MONTANA RECOGNIZING THE RIGHT TO BASIC NECESSITIES.
>
> BE IT PROPOSED BY THE CONSTITUTIONAL CONVENTION OF THE STATE OF MONTANA:
>
> Section 1. Article III, Section 3 of the present Constitution is amended to read as follows:
>
> "Sec. 3. All persons are born equally free, and have certain natural, essential, and inalienable rights, among which ~~may be reckoned~~ are the right of enjoying and defending their lives and liberties, the right to the basic

28. *See* IDAHO CONST. art. I, § 1 ("All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety."); N.D. CONST. art. I, § 1 ("All men are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property and reputation; and pursuing and obtaining safety and happiness."); S.D. CONST. art. VI, § 1 ("All men are born equally free and independent, and have certain inherent rights, among which are those of enjoying and defending life and liberty, of acquiring and protecting property and the pursuit of happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed."); WYO. CONST. art. 1, § 1 ("All power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness; for the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish the government in such manner as they may think proper."). Washington's constitution lacks a guarantee with any of the three canonical interests, but nevertheless contains a clause with the often-accompanying Lockean principles: "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights." WASH. CONST. art. I, § 1.

29. MONT. CONST. OF 1889, art. III, § 3, *available at* https://perma.cc/E9CW-GPWX.

30. PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION HELD IN THE CITY OF HELENA, MONTANA, JULY 4TH, 1889, AUGUST 17TH, 1889, at 98 (1921).

31. CONVENTION TRANSCRIPT VOL. 2, *supra* note 5, at 620.

> necessities of life including the right to adequate nourishment, housing, and medical care, of acquiring, possessing, and protecting property, and of seeking and obtaining their safety and happiness in all lawful ways."[32]

The proposal, Number 45, was referred to the Bill of Rights and Public Health, Welfare, Labor & Industry Committees.[33] And it had six other noted sponsors: delegates Richard B. Roeder, Harold Arbanas, Bob Campbell, Lucile Speer, Dorothy Eck, and Virginia H. Blend.[34] The proposal was one of several others seeking to change whatever the resulting new Bill of Rights would be.[35]

On February 22, 1972, the Bill of Rights Committee issued a "proposed new Declaration of Rights."[36] In a short preface, the Committee stated it had tried to give due attention to all of the proposals, had provided the subject a full debate with the free airing of different opinions, and that "not one of the traditional rights of [the previous] Declaration has been diminished."[37] Section 3 of this new, proposed Declaration of Rights had some of the language from Delegate Monroe's proposal, but by no means all:

> Section 3. INALIENABLE RIGHTS. All persons are born free and have certain inalienable rights which include the right of pursuing life's basic necessities, of enjoying and defending their lives and liberties, of acquiring, possessing and protecting property and of seeking their safety, health and happiness in all lawful ways. In enjoying these rights, the people recognize corresponding responsibilities.[38]

"Basic necessities" was still in there, but now it was not a right "to" those necessities but a right "to pursue" them. This mirrored the "acquiring" of property and "seeking" of safety, health and happiness later in the language.[39]

Why this change? The Bill of Rights Committee gave a detailed explanation:

> In addition, it is recommended that the right to pursue life's basic necessities be incorporated as a statement of principle. The intent of the committee on this point is not to create a substantive right for all for the necessities of life to be provided by the public treasury.
>
> The [C]ommittee heard considerable testimony from low income and social services people alike, that the state's current public assistance programs are not meeting the genuine needs of low income people who, be-

32. 1 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 142 (1979) (alterations in original) [hereinafter CONVENTION TRANSCRIPT VOL. 1].

33. *Id.*

34. *Id.*

35. CONVENTION TRANSCRIPT VOL. 2, *supra* note 5, at 618.

36. *Id*.

37. *Id*.

38. *Id*. at 620. Readers will notice "health" was another addition.

39. *Id*.

> cause of circumstances beyond their control, are unable to obtain basic necessities. Accordingly, it is hoped that the legislature will have occasion to review these programs and upgrade them where necessary to provide full necessities to those in genuine need and to curb whatever abuses may exist in the programs.
>
> What was attempted in this part of the proposed section was a statement of the principle that all persons have the inalienable right to pursue the basic necessities of life—that there can be no right to life apart from the possibility of existence.[40]

This reveals a compromise of sorts. Several people wanted the Convention to enshrine some form of a positive right to basic subsistence, at least as far as food, shelter, and healthcare. Although not stated directly, it seems the Bill of Rights Committee thought such a "substantive" positive right was not a good idea, for whatever reason—perhaps on the merits, or perhaps because it would risk the voters rejecting the draft constitution. Instead, the Committee included a right of pursuing life's basic necessities "as a statement of principle." But they did not *just* mean it as a principle. They gave it a new verb: "pursuing." The Committee does not explain why it chose "pursuing" and not another verb, but it sits very comfortably alongside the verbs related to property and safety, health, and happiness. Those are rights to *try* and *get* things, not the rights *to* the things themselves. Thus, the "pursuing" fits with the already existing verbs and nouns of this Lockean Natural Right Guarantee more than perhaps the Committee realized. Finally, although the Bill of Rights Committee said the Clause did not create a "substantive right" to proceeds from the public treasury, it did not say that the resulting negative right is *not* "substantive," implying that, to the extent the other rights in Article II, Section 3 are substantive, it is as well.[41]

Later on in the drafting, the "right to a clean and healthful environment" was inserted in Article II, Section 3, just before the Basic Necessities Clause.[42] This is interesting for present purposes as the Montana Supreme Court has said that *is* a right "to" something,[43] not just a right to "pursue" or "acquire" something. This contrast reinforces the text's commitment to a substantive right to protect the ability of persons to try and get "basic necessities," not simply a polite request for the legislature to give something out of the public treasury to those in need.[44]

40. *Id.* at 627.

41. Convention Transcript Vol. 2, *supra* note 5, at 627.

42. *Id.* at 957.

43. Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 988 P.2d 1236, 1249 (Mont. 1999).

44. Convention Transcript Vol. 2, *supra* note 5, at 627.

II. Basic Necessities Not Receiving the Bare Necessities

After Montana voters adopted the new Montana Constitution in June 1972, the stage was set for the interpretation of the Basic Necessities Clause. However, this took a surprisingly long time. It was not until 1996 that the Montana Supreme Court examined the Clause in any depth, and even since then, it has only analyzed it in two other cases. As we will see, in those cases, the Court has been embarrassingly all over the place, at first championing the Clause as George Mason might have against the British and then almost impersonating Benedict Arnold.

But before we move on to the Court's zigzag on basic necessities, we should first start with the Clause's text. What are "life's basic necessities" anyway?

A. Twentieth-Century Basics

Unlike other rights-protecting phrases in American constitutions—such as "the right of the people to be secure . . . against unreasonable searches and seizures,"[45] the "right to worship Almighty God,"[46] or the "inalienable rights" of "acquiring, possessing and protecting property"[47]—"pursuing life's basic necessities" is *sui generis* to Montana. A search of that phrase in American case law prior to 1972 yields zero results in the Lexis "All Courts" database. Even the simple phrase "basic necessities of life" only receives sixteen hits, most being from the previous two decades and most in family law or government assistance cases. For example, in a child support case, a Louisiana appeals court described the payments by the ex-husband as "made up of items representing the basic necessities of life."[48] In another, concerning how welfare benefits are distributed, a federal court remarked that "[r]ecipients of regular public assistance . . . are dependent upon timely receipt of such assistance for meeting the basic necessities of life, including food, clothing, and shelter."[49] In these cases, the phrase is what one might expect: essential needs for survival, especially food, clothing, and housing.

Beyond the courts and looking more widely in American discourse, we can find that "basic necessities of life" was used regularly in the mid-twentieth century in the same sense. The governor of Tennessee in 1967 vowed

45. U.S. Const. amend. IV.

46. *See, e.g.*, Ark. Const. art. II, § 24; Pa. Const. art. I, § 3; Tex. Const. art. I, § 6.

47. Mont. Const. art. II, § 3.

48. Reid v. Reid, 194 So. 2d 159, 160 (La. Ct. App. 1967). *See also* Cahen v. Cahen, 135 A.2d 535, 536 (N.J. Super. Ct. App. Div. 1957) (statute's use of the word "desert" means "a willful failure to provide food, or other basic necessities of life").

49. Adens v. Sailer, 312 F. Supp. 923, 924 (E.D. Pa. 1970).

that no new taxes would be imposed "on the basic necessities of life,"[50] while an unnamed pundit wrote in a Missouri newspaper in 1932—in the depths of the Great Depression—that "[f]ood, clothing and shelter are the basic necessities of life, whether mankind is in a state of savagery, barbarism or civilization."[51] Going back a bit further, the *New York Times* asserted, in a piece about competition policy, that "the farmers propose to limit the supply of the basic necessities of life by the same sort of combination which they forbid to capitalists."[52]

Go back much earlier, though, and the hits run out. The phrase seems to be absent before 1900, and even "basic necessities" does not arise very much. "Basic necessities of life" does not appear in the Newspapers.com database before 1898 and is featured in almost nothing in the Google Books database before the turn of the twentieth century.[53] It is also missing from other resources of pre-1900 English, including the Corpus of Founding Era American English and the BYU-Corpus of Early Modern English.[54] Therefore, it appears the phrase is a creation of the twentieth century. Further, though it was used before the Great Depression, perhaps that event may have given some added fuel to the phrase's popularity. Thus, although it has a plain and non-technical meaning of what a person needs to merely survive, at the point at which it was introduced at Montana's 1972 Constitutional Convention, it seems to have had a bit of a political or legal edge to it—which, of course, makes it natural to use when talking about rights.

B. Strict Scrutiny for an Economic Regulation: Wadsworth v. State

The first analysis of the Basic Necessities Clause at the Montana Supreme Court—and, to date, by far the most complete analysis—came in 1996 in *Wadsworth v. State*.[55] There, the plaintiff, Mr. Shannon Wadsworth, was fired as a real estate appraiser by the Montana Department of Revenue (DOR) because of his repeated moonlighting as a private appraiser.[56] His private business conflicted with an internal conflict-of-interest policy adopted a number of years after he began working for the DOR.[57] After Wadsworth unsuccessfully challenged the policy through internal pro-

50. *Delivers "State of the State" address . . . Gov. Ellington Vows To Propose No Tax On The "Basic Necessities of Life,"* JOHNSON CITY PRESS-CHRONICLE, Jan. 21, 1967, at 1.

51. *News From Over the County*, LACLEDE CTY. REPUBLICAN, May 6, 1932, at 2.

52. *Authorizing Good Trusts*, N.Y. TIMES, May 2, 1908, at *8.

53. The author searched "basic necessities of life" at https://books.google.com, with a custom date range for before 1900, and then checked false positives for works purportedly before that date.

54. Search of BYU-Corpus of Early Modern English databases, BYU LAW & CORPUS LINGUISTICS, *available at* https://perma.cc/XH3U-8GKP.

55. 911 P.2d 1165 (Mont. 1996).

56. *Id.* at 1168.

57. *Id.* at 1167.

cedures and after DOR had issued him several warnings for him to divest himself of the side business, DOR fired him, and he then sued for wrongful discharge.[58] In the lawsuit, Wadsworth argued the policy was unconstitutional under the Basic Necessities Clause.[59]

Wadsworth is an astounding opinion. There is almost nothing like it in post-New Deal America. Its implications are far-reaching and exceedingly libertarian. It takes the Basic Necessities Clause at its word and does not wince in giving it its full effect. You like *Lochner*?[60] You'll *love Wadsworth*. That squishy-moderate case about bakers' hours[61] has nothing on *Wadsworth*'s full-throated defense of economic liberty. And perhaps because it is *so* principled and straightforward, the Court has had trouble taking the opinion seriously in the years since.

A cribbed interpretation of the Basic Necessities Clause could be that someone must *literally* be in danger of dying of starvation, thirst, exposure, etcetera, for it to apply. Wadsworth himself provided no evidence that this was the case. After all, he already had a job, which assumedly at least put bread on his table and some kind of roof over his head. Instead, the Court simply stated that the right to provide basic necessities for oneself entails the right to earn a living:

> [E]mployment is a necessary means to pursue life's basic necessities, without which the latter fundamental constitutional right could not be enjoyed. As such, the right to the opportunity to pursue employment is itself a fundamental right and is encompassed within the right to pursue life's basic necessities as declared under Article II, section 3 of Montana's constitution.[62]

This Lockean reasoning seemed straight out of the mind of George Mason himself. Further, the Court took a broad view of "basic necessities":

> As a practical matter, employment serves not only to provide income for the most basic of life's necessities, such as food, clothing, and shelter for the worker and the worker's family, but for many, if not most, employment also provides their only means to secure other essentials of modern life, including health and medical insurance, retirement, and day care.[63]

There may be an upper limit on what "basic necessities" are, but the Court certainly thought it did not just protect, say, a stone age or frontier lifestyle. The implication is that Wadsworth's second job fits comfortably within what Montanans have a right to do to satisfy their needs, including even simply the need to acquire extra savings for retirement.[64]

58. *Id.* at 1168.
59. *Id.* at 1171.
60. *See generally* Lochner v. New York, 198 U.S. 45 (1905).
61. *Id.* at 53.
62. *Wadsworth*, 911 P.2d at 1174.
63. *Id.* at 1172.
64. *Id.*

To justify these conclusions, the Court did not just look at the text of Article II, Section 3 and the obvious fact that most adults acquire basic necessities through employment. It also cited cases from several other states on the right to earn a living, which claimed it was a "fundamental right."[65] Of course, these are states where there is no Basic Necessities Clause, with the cases decided under different or more general provisions of state constitutions.[66] But this American recognition of the right to earn a living having a fundamental status seemed important to the Court.[67] This dovetailed with the Court's previous statement that if a right is included in the Declaration of Rights, it is a "fundamental right."[68] And that was true in Wadsworth's case. Thus, for that reason, "The inalienable right to pursue life's basic necessities is stated in the Declaration of Rights and is, therefore, a fundamental right."[69]

And the word "fundamental" was about to do a lot of work. In Montana, if a right is "fundamental" and in the Declaration of Rights, that combination, in turn, means strict scrutiny applies.[70] The application of strict scrutiny meant there was very little chance for the DOR policy to survive. The government had not produced any evidence that employee moonlighting had created a problem or that any ethical compromises had arisen.[71] Thus, the Court concluded Wadsworth was unlawfully discharged and upheld a jury's award of damages of $85,000.[72]

One caveat the Court gave—which was to do a lot of work in future cases—was that the right to pursue employment did not entail the right to a "particular job."[73] By this, the Court simply meant that no one has a right to be given a government job.[74] And the Court pointed out that Wadsworth did

65. *Id.* (citing, *i.a.*, Lee v. Delmar, 66 So. 2d 252, 255 (Fla. 1953); Kirtley v. Indiana, 84 N.E.2d 712, 714 (Ind. 1949)). The Court even noted that one case it cited, Town of Milton v. Civil Service Commission, 312 N.E.2d 188, 192 (Mass. 1974), quoted Truax v. Raich, 239 U.S. 33, 41 (1915), for the statement that "the opportunity to earn a living is a fundamental right in our society." The use of *Truax* is kind of remarkable because it was one of the "*Lochner* era's" most ringing endorsements of the right to earn a living. In that case, a private restaurant fired a cook in order to comply with an Arizona law capping the number of non-citizens who could be employed. *Truax*, 239 U.S at 36. The Court found the law unconstitutional under the Fourteenth Amendment. *Id.* at 43.

66. *Delmar*, 66 So. 2d at 254–55; *Kirtley*, 84 N.E.2d at 713–14; *Town of Milton*, 312 N.E.2d at 191–92; *Truax*, 239 U.S. at 40–42.

67. *See Wadsworth*, 911 P.2d. at 1172.

68. *Id.* at 1171–72 (citing Butte Cmty. Union v. Lewis, 712 P.2d 1309, 1311–13 (Mont. 1986)) ("We have held a right may be 'fundamental' under Montana's constitution if the right is either found in the Declaration of Rights or is a right 'without which other constitutionally guaranteed rights would have little meaning.' ").

69. *Id.* at 1172.

70. *Id.* at 1174.

71. *Id.* at 1175.

72. *Id.* at 1165, 1175–77.

73. *Wadsworth*, 911 P.2d. at 1172–73.

74. *Id.* at 1173 (citing Minielly v. State, 411 P.2d 69, 73 (Or. 1966)).

not claim this either; he just argued he should not be prevented from seeking his own employment in addition to that job.[75] Although this is straightforward in the opinion, later cases would expand this "particular job" exception in ways far beyond the context of *Wadsworth*.[76]

Six of the Court's seven justices agreed on this basic framework.[77] Justice Erdmann concurred, but he did not join the Court's analysis of the Basic Necessities Clause.[78] He read the right much more narrowly. Wadsworth failed to produce evidence that he needed the second job given his circumstances, and "[l]ife's basic necessities cannot and should not be an infinite term. One person's necessity can be another person's luxury."[79] Justice Erdmann conceded that another right in Article II, Section 3—the right to acquire property—could encompass what Wadsworth wanted to do, but that such a right would not encompass a right "to a particular job," such as being a real estate appraiser or being a lawyer, and in any case would not be a fundamental right.[80] Justice Erdmann conceived "a particular job" in a much broader sense than the majority and also narrowed the right to pursue basic necessities.

C. Strict Scrutiny? I Don't See No Strict Scrutiny: Wiser v. State

The next time the Montana Supreme Court addressed the Basic Necessities Clause, it essentially pretended it had not said what it said in *Wadsworth*—reading one opinion after the other is frankly shocking. And when you read the *briefs* in the *second* case, *Wiser v. State*,[81] you are shocked even more. Twist yourself into a pretzel, and you still cannot explain them together. Did *Wiser, therefore,* overrule *Wadsworth*? No, not at all. It just made the Court's precedents not make any sense.

Unlike the employee-moonlighting rule in *Wadsworth*, *Wiser* was a classic story of economic protectionism, where vested interests try to box out lower-cost competitors.[82] Without going into too much detail here, it involved a battle of dentists versus "denturists," that is, people who make dentures who are not dentists.[83] The denturists were briefly allowed to sell products directly to the public without customers having to obtain a referral

75. *Id.*
76. *See generally* Mont. Cannabis Indus. Ass'n v. State, 286 P.3d 1161 (Mont. 2012).
77. *Wadsworth*, 911 P.2d at 1177 (Trieweiler, J., with Hunt, J., specially concurring).
78. *Id.* at 1179 (Erdmann, J., specially concurring).
79. *Id.*
80. *Id.* at 1180.
81. 129 P.3d 133 (Mont. 2006).
82. *Id.* at 136.
83. *Id.*; *see also* Mont. Code Ann. § 37-29-102(3) (2021).

from a dentist.[84] However, the dental board—which regulated both dentists and denturists but was dominated by dentists—issued a rule requiring any denturist customer to first obtain a referral from a dentist.[85] This added costs to obtaining dentures from denturists, and, so argued the plaintiff denturists, took away much of their business.[86] The denturists argued many customers simply obtain dentures directly from the dentist, instead of visiting a denturist following a dentist's referral.[87] This rent-seeking behavior is very recognizable to anyone familiar with the classic case *Williamson v. Lee Optical of Oklahoma, Inc.*,[88] where the state mandated that customers obtain a prescription from an ophthalmologist or optometrist before having lenses replaced by an optician.[89]

The United States Supreme Court upheld the rule in *Lee Optical* under the federal rational basis test.[90] With the Basic Necessities Clause, and *Wadsworth*, at their back, however, one would think the Montana denturists stood a much better chance. Instead, the Montana Supreme Court's opinion, authored by Justice Jim Rice, essentially rewrote the denturists' story to sound like Justice Douglas's judicial abdication in *Lee Optical*.

We can tell the story was rewritten by reading, for ourselves, the briefs in the appeal. Now, the denturists' briefing was not a model of appellate advocacy, but it did get the point across.[91] And that was that the denturists had been outgunned in the legislative process by a much more powerful economic interest group—the dentists. This is contrary to the public interest, something that Article II, Section 3 protects against if it protects against anything.[92] Although the plaintiffs' argument did not use the Basic Necessities Clause itself all that much—focusing more on Article II, Section 3's protection of property—the denturists explicitly argued *Wadsworth* applied and, therefore, so did strict scrutiny.[93]

84. *See* Appellants' Brief, *Wiser v. State*, 2004 WL 3101936, at *11 (Mont. Nov. 22, 2004) (No. 04-587).

85. *Wiser*, 129 P.3d at 136.

86. *See generally* Appellants' Brief, *supra* note 84.

87. *Id.*

88. 348 U.S. 483 (1955).

89. *Id.* at 486.

90. *Id.* at 491.

91. In full disclosure, I should state that I, as a law clerk for Justice Leaphart, briefly reviewed the briefs while clerking at the Court. However, I did not do substantive work on the case for the Court, and my time at the Court ended when the opinion was issued.

92. Otherwise, the Legislature would have a free hand to simply prevent certain Montanans from earning a living for nakedly protectionist reasons, breaching the principles articulated in *Wadsworth*. *See* Wadsworth v. State, 911 P.2d 1165, 1172 (Mont. 1996).

93. Appellants' Brief, *supra* note 84, at *18–21.

The denturists' briefing did not lack in facts, either, stating that denturists offer substantially less expensive products than dentists do,[94] and that implementing the dentist referral rule had strained their businesses.[95] They even had a licensed (and apparently brave) dentist testify on their behalf as an expert witness, claiming that denturists "are more qualified to evaluate, diagnose, design, construct, fit and repair complete and partial dentures than are the majority of Montana dentists."[96] Further, the denturists did not argue they were in some way immune from the state's police power to regulate their businesses; they conceded that "for example, the police power can be used to impose on denturists health-based standards for sterilization of tools."[97] However, they clarified that "when enacting restrictions which impact employment opportunity the [dental board] needs to show a compelling state interest for so acting."[98]

In response, the state argued that *Wadsworth* only concerned government employees who moonlight.[99] Otherwise, the case—and the Basic Necessities Clause—would represent a complete break with a long tradition of deferring to the government when it comes to economic regulation.[100] The state even quoted the language from the 1972 Constitutional Convention, labeling the Clause as a "statement of principle."[101] And the state had very little to say about the facts of denturist practice or the financial impact on them or their customers.[102] As the case was decided on summary judgment, the state essentially conceded those facts, including that denturists were better qualified to make dentures.[103] Thus, even if those facts were true, the state implied it should still prevail.

What did the Court do with *Wadsworth* in light of the compelling story of these denturists? Essentially, it ignored most of what it had said previously and much of the denturists' briefing. The Court characterized the denturists' position as asserting they "have a fundamental right to practice denturity free of regulation."[104] Period. Again, although the denturists argued for strict scrutiny when it comes to "employment opportunity," as one

94. One plaintiff, a dental customer, testified that for the same work a dentist quoted him a cost of between $3,600 and $4,000 while a denturist made him a set of dentures for $725. *Id.* at *13.

95. *Id.* at *29–30.

96. *Id.* at *16.

97. *Id.* at *21.

98. *Id.*

99. Brief of Respondent, *Wiser v. State*, 2005 WL 487220, at *9 (Mont. Jan. 16, 2005) (No. 04-587).

100. *Id.* at *14–16.

101. *Id.* at *15.

102. *Id.* at *24.

103. Wiser v. State, 129 P.3d 133, 137 (Mont. 2006) (before the Court on an appeal from the grant of summary judgment).

104. *Id.* at 138.

would expect given *Wadsworth*, they did not ask for anything so sweeping as being "free of regulation" with no qualification.[105] Further, the Court reasoned that since *Wadsworth* was not about freeing someone from all economic regulation, it could not apply.[106] In *Wadsworth*, argued the Court, the plaintiff was completely prohibited from outside employment, whereas here, the denturists could work as denturists; they just had to live under the referral rule. The Court tied this to the "all lawful ways" qualification at the end of Article II, Section 3.[107]

Of course, the "all lawful ways" language could nullify any claim under Article II, Section 3 if making something illegal makes Article II, Section 3 not apply. And, of course, in *Wadsworth*, the plaintiff was not completely barred from working since it was precisely because he *already* was working that he could not engage in outside employment. Which is a bigger barrier to pursuing basic necessities: the moonlighting rule or the referral rule? Who knows, but the Court made no attempt to measure either. Further, there was no discussion of the financial impact on denturists and their customers from the record, making a case decided on summary judgment—where numerous facts were presented—essentially fact-free.

Without knowing the constitutional text and specific precedent in question, *Wiser* could be seen as an unremarkable decision in the tradition of *Lee Optical*. But this was not a case in federal court applying the modern rational basis test and the Fourteenth Amendment's Due Process Clause. This was a case in the Montana Supreme Court applying a specific clause of the Montana Constitution molded in the tradition of George Mason's framing of natural rights, with a recent case championing the natural right in question and applying strict scrutiny. In a case just a decade later with some of the same justices, the discontinuity is truly inexplicable.

It should be said, though, that the state argued for an even *more* deferential approach.[108] It asserted that almost anything the Clause might protect, other than under the facts of *Wadsworth*, should receive rational basis scrutiny.[109] The Court did not do this, however, and instead said that rational basis applies in cases like *Wiser* but not in cases like *Wadsworth*, without much of an explanation as to where the line between them lies.[110]

105. Appellants' Brief, *supra* note 84, at *21.

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

107. *Id.*

108. Brief of Respondent, *supra* note 99, at *20–23.

109. *Id.*

110. *See Wiser*, 129 P.3d at 139.

D. Basic Necessities and Marijuana: Montana Cannabis Industry Association v. State

The third case where the Montana Supreme Court addressed the Basic Necessities Clause was rather less telling as to the Clause's meaning than the first two. In a dazed sign of confusing times—at least when it comes to marijuana policy—the legislature had allowed the use of marijuana for medical purposes but not the sale of it.[111] In *Montana Cannabis Industry Association*, a group of marijuana growers challenged the ban under the state constitution, including under the Basic Necessities Clause.[112] They argued that as the drug (or plant, if you will) was legal in Montana, this meant the Clause protected their right to pursue their occupation of growing and selling it.[113] And the district court, based on *Wadsworth*, agreed, issuing a preliminary injunction against portions of the new Montana Marijuana Act.[114]

The Montana Supreme Court again made use of the "all lawful ways" qualification in Article II, Section 3 to say that the full brunt of the Clause and strict scrutiny did not apply.[115] It did not help, of course, that marijuana had been illegal prior to the recent allowance for its medical use.[116] Further, the Court also emphasized *Wadsworth*'s statement that the Basic Necessities Clause does not protect a right to a *particular* job.[117] Characterizing the plaintiffs as "horticulturalists," the Court said they are completely free to pursue their occupation with other plants, just not with marijuana.[118] In addition, the plaintiffs had brought a claim under the right to "seek health" from Article II, Section 3's "seeking safety, health, and happiness" language, but the Court also found that did not apply, as there is no fundamental right to take any particular drug.[119]

Justice Nelson dissented on jurisdictional grounds, contending that, as marijuana was still wholly illegal under federal law, the Court did not have jurisdiction to hear the challenge.[120] He made some interesting comments, however, about the scope of the rights in Article II, Section 3 and the scope

111. Mont. Cannabis Indus. Ass'n v. State, 286 P.3d 1161, 1163 (Mont. 2012).

112. *Id.* at 1165.

113. *Id.*

114. *Id.*

115. *Id.* at 1166–67.

116. *Id.* at 1163 (The use of medical marijuana was allowed through a voter-driven initiative in 2004.).

117. *Mont. Cannabis Indus. Ass'n*, 286 P.3d at 1166.

118. *Id.*

119. *Id.* This seems a much bigger hit to the scope of the "seeking health" protection of Article II, Section 3 than what the Court said about the Basic Necessities Clause, but that's a story for a different article.

120. *Id.* at 1171 (Nelson, J., dissenting).

of *Wiser*. The majority was wrong, he argued, to imply the rights in Article II, Section 3—or, indeed, in the rest of the Declaration of Rights—were "circumscribed by the police power."[121] And it was wrong not to apply strict scrutiny to a right in the Declaration of Rights.[122] Even though, as he admitted, he had joined in the *Wiser* opinion, he rejected the current majority's "expansion of *Wiser*'s holding . . . to stand for the proposition that the parameters of the Article II, Section 3 rights are dictated, circumscribed, or trumped by the State's police power."[123] *Wiser*, he contented, was about a claim of being "free of regulation," not much more.[124]

III. A Basic Compromise to Protect Basic Necessities?

After the whiplash of the *Wadsworth*/*Wiser*/*Montana Cannabis Industry Association* trilogy, where does that leave the right to pursue basic necessities in Montana today? It actually leaves the right pretty robust. Although the Montana Supreme Court inexcusably gave short shrift to the right in *Wiser*, it did not take the state's invitation to limit *Wadsworth* to its facts. Instead, it recharacterized the plaintiffs' claims into something easily rejected. And *Montana Cannabis Industry Association* essentially follows from the state's power to make a product illegal. Whether or not that is a good idea, if that power is conceded then the right to ban selling that product to make a living follows—Basic Necessities Clause or not. The question for the future is whether the Court will have the courage to give the Clause meaningful scope when other restrictions are challenged.

Doctrinally there remains a very strong general right to pursue an occupation, as long as it is not for a "particular job."[125] An aggressively narrow reading of the Clause itself, and of some of the language in *Wiser*, would entail that the state cannot completely ban an occupation, but can regulate an occupation in any way it wants. But given the facts of *Wadsworth*, this argument would likely fail. As we have seen, claims concerning earning a living do not tend to arise when the government completely bans an entire occupation.–[126] It hardly ever actually does that. Mr. Wadsworth himself was not banned from working in real estate. He just could

121. *Id.* at 1172.

122. *Id.*

123. *Mont. Cannabis Indus. Ass'n*, 286 P.3d at 1173 (Nelson, J., dissenting).

124. *Id.*

125. *See* Wadsworth v. State, 911 P.2d 1165, 1172 (Mont. 1996).

126. In this way the facts of *Montana Cannabis Industry Association* were pretty extraordinary: The state *did* ban the occupation of marijuana salesman (even if the Court tried to characterize it as a subcategory of horticulturalists), *see Mont. Cannabis Indus. Ass'n*, 286 P.3d at 1163, and has banned occupations in a few other obvious areas, such as prostitute, hitman, art thief, etc. *See, e.g.*, Mont. Code Ann. § 45-5-601 (2021). If protecting the complete elimination of an occupation were all the Basic Necessities Clause did, these would be its only targets. That would be more than a little absurd.

not work in it on his own as long as he kept his government job. Similarly, all measures of regulations interfere with earning a living but stop short of prohibiting someone from working in that occupation. Licensing laws, of course, require workers to jump through various hoops before working—such as obtaining a certain degree, passing an exam, paying fees, etc.—but do not outright prohibit an occupation—otherwise, those occupations would not be licensed; they would be prohibited. Yet, licensing laws sometimes are so irrelevant to public health and safety that courts have found them to be unconstitutional, even under the federal rational basis test.[127] Recognizing the right to earn a living as fundamental should only make those laws more suspect in Montana, not less.

Of course, this was essentially the argument in *Wiser*, and yet the plaintiffs came up short. Part of the problem may have been the fact that *Wadsworth* applied something that was "too good to be true." And that was strict scrutiny. The Court was correct to say that its precedent required strict scrutiny to be applied in cases involving the Declaration of Rights.[128] The Court was also right to say that the Basic Necessities Clause encompassed the right to earn a living. Indeed, how else would it? By just protecting our right to forage? Or installing a right to steal a loaf of bread?

But the problem is that putting the right and strict scrutiny together is strong medicine. Thus, faced with this amazing statement of libertarian principle in *Wadsworth*, instead of applying strict scrutiny to the laws that come before it and proclaiming *fiat justitia ruat caelum* (at least if you believe invalidation of much of state economic regulation means the sky is falling), the Court has simply avoided the application of the Clause altogether. This is akin to the "hydraulic pressure" that Justice Gorsuch has recognized, but in reverse: "When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines."[129] The Montana Supreme Court has bound itself to apply strict scrutiny to a class of claims, but it now is afraid to actually adjudicate those claims, so it pretends the claims are really something else.

127. *See, e.g.*, St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013) (finding no rational relation between the challenged law, which restricted casket sales to funeral directors, and the asserted interests of consumer safety and public health); Clayton v. Steinagel, 885 F. Supp. 2d 1212, 1215–16 (D. Utah 2012) (finding no rational relation between the Utah Legislature's public health and safety interests in enacting cosmetology license requirements and the plaintiff's hair braiding business).

128. *Wadsworth*, 911 P.2d. at 1171–72 ("We have held a right may be 'fundamental' under Montana's constitution if the right is either found in the Declaration of Rights or is a right 'without which other constitutionally guaranteed rights would have little meaning.'") (citing Butte Cmty. Union v. Lewis, 712 P.2d 1309, 1311–13 (Mont. 1986)).

129. Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting).

As someone who believes most economic regulation is counterproductive, wasteful, and often enriches the already politically powerful—as well as often unconstitutional under other provisions of both federal and state constitutions—I would love for strict scrutiny to apply to the Basic Necessities Clause. But if that means the Court will repeatedly just say the Clause does not apply *at all*, that does not help anyone very much, especially Montanans pursuing life's basic necessities. Thus, I have a compromise proposal to suggest if Montana's courts will not otherwise give the Clause any meaning.

This compromise is simply a meaningful standard of review that is not strict scrutiny. This standard should also be different from the rational basis standard in *Lee Optical*. If it were like *Lee Optical*'s rational basis standard, the right explicitly guaranteed by the Montana Constitution would be excused away, just like the right to earn a living has been at the federal level in all but the most absurd cases. Some state courts have adopted standards of review on economic liberty claims that are stronger than federal rational basis, although they still give wide deference to the government.[130] That would be a start, but Montana could do much better. Something that looks like what is often called "intermediate scrutiny," such as that used in commercial speech and gender discrimination cases, would be more appropriate.[131] The burden would then rest on the government as to why a restriction on earning a living is constitutional. The government could only overcome that burden with evidence demonstrating that there is a real-world connection between the law and a real-world problem and that the law makes a difference in addressing that problem. But it would not have to be narrowly tailored to addressing that problem, unlike in cases where strict scrutiny applies, such as with content-based restrictions on speech[132] or challenges to discrimination against out-of-state products under the dormant Commerce Clause.[133]

How would this work in practice? A recent case that my colleagues at the Institute for Justice litigated can serve as an example. The case, *Bridges v. Montana Board of Medical Examiners*,[134] was a challenge to Montana's ban on "doctor dispensing." That term means when a doctor prescribes you

130. *See* Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 87 (Tex. 2015); Ladd v. Real Estate Comm'n., 230 A.3d 1096, 1108–09 (Pa. 2020).

131. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (applying heightened scrutiny to a case of commercial speech); United States v. Virginia, 518 U.S. 515, 532–33 (1996) (applying heightened scrutiny to a case of gender discrimination).

132. *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

133. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) ("At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.").

134. *See generally* Compl., *Bridges v. Mont. Bd. of Med. Examiners*, https://perma.cc/QS39-V4SS (Mont. 4th Jud. Dist. Jun. 12, 2020) (No. DV-32-2020-647-DK).

medicine, and you purchase it directly from her clinic and not from an independent pharmacy. This service is something the vast majority of doctors nationwide can provide to their patients.[135] But a handful of states have banned or narrowly curtailed it, despite the obvious convenience and the fact that patients can get their needed medications faster if they pick them up right after seeing their doctor than having to visit a separate business.

Montana was one of that handful of states. There were narrow exceptions, such as if a doctor practiced more than ten miles from any pharmacy, gave away samples for free, or had an emergency.[136] Otherwise, doctors were forbidden from selling medicine—including routine drugs such as those for seasonal allergies or combatting high cholesterol—to their patients.[137] Understandably, the state's pharmacies favored this law.[138] Indeed, their trade association later admitted that protectionism was "the root" of its support.[139] But other than protecting pharmacies from competition, it is hard to determine a reason for the law. Doctors—they are *doctors* after all—provide medicine just as safely as pharmacists can, and there is no evidence that doctors in other states take advantage of consumers by selling drugs at a higher price than their patients could obtain elsewhere. If anything, the opposite is true through these laws suppressing competition.

Thus, two family doctors joined with my colleagues to challenge the law as unconstitutional under the Montana Constitution, including under the Basic Necessities Clause. Although previous attempts to scrap the law had failed, the case generated a backlash, and the legislature repealed the law in its 2021 session.[140] The case never left the state trial court before it was mooted.

What might have happened had the challenge gone to judgment and then to the Montana Supreme Court? Arguably the law was so weak that it could have failed the federal rational basis test. Under strict scrutiny, it *certainly* would have failed. But would the Court have said the Basic Necessities Clause does not cover it at all because, for example, the doctors just wanted "to be free from regulation"? That absolutely and emphatically was not what the doctors were asking for. All they wanted to be held unconstitutional was this bar on them selling medicine to their patients. But perhaps the Court would have avoided applying strict scrutiny to medical regu-

135. *Id.* at 2.

136. *Id.* at 8–9.

137. *Id.* at 10, 12.

138. Matt Powers, *New Law Allows Montana Doctors to Dispense Medications Directly to Patients*, INST. FOR JUSTICE (May 12, 2021), https://perma.cc/Z97T-R6SP.

139. *Id.*

140. Amy Beth Hanson, *Gianforte signs 2 bills to reduce prescription drug costs*, AP (May 13. 2021), https://perma.cc/3JQX-5HDD; *see also* Powers, *supra* note 138.

lation in fear that every other regulation of the practice of medicine would have a sword of strict scrutiny hanging above it.

My suggestion is that if something like a form of intermediate scrutiny were applied, those fears would be alleviated.[141] This would still allow the Basic Necessities Clause to do real work, knocking down this plainly anti-competitive and anti-health law. Then, future regulations that have some amount of substance to them would be secure, and other laws that do not further legitimate state interests would not be.

IV. Conclusion

In the twenty-first century, George Mason's underappreciated handiwork protects natural rights, or has the potential to protect natural rights, all over the country. That includes its latest articulations in Montana, especially the Basic Necessities Clause. Perhaps part of the reason the Montana Supreme Court has whipsawed in interpreting this right is precisely its uniqueness and the lack of recognition of its "Masonic" roots. Future interpretations of this right should take this into account, as well as its roots in 1972, and its purpose of allowing people to provide for themselves, free from the state barring their way. The Montana Supreme Court understood this briefly in 1996 with *Wadsworth* but backed away later. Re-embracing that precedent, but in a way that will not prevent it from ever applying the Clause, would help realize this most basic and necessary right.

141. This could be something like the Montana Supreme Court's other use of "middle-tier scrutiny," but need not be. *See, e.g.*, Driscoll v. Stapleton, 473 P.3d 386, 393 (Mont. 2020) ("Middle-tier scrutiny is used '[i]f a law or policy affects a right conferred by the Montana Constitution, but is not found in the Constitution's declaration of rights.' Under middle-tier scrutiny, the State must demonstrate that the law is reasonable and that the need for the law outweighs the value of the right to the individual." (citations omitted) (alteration in original)).