

2015

Transcript for Episode 17: Freedoms & Protections: Montana's Remarkable Constitutional Bill of Rights

Wade Dahood

Rick Applegate

Evan Barrett

Executive Producer, ebarrett@mtech.edu

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Recommended Citation

Dahood, Wade; Applegate, Rick; and Barrett, Evan, "Transcript for Episode 17: Freedoms & Protections: Montana's Remarkable Constitutional Bill of Rights" (2015). *Crucible Written Transcripts*. 8.
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[End Freedoms & Protections-The Remarkable Bill of Rights in Montana's 1972 Constitution]

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[Music]

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Narrator: From the beginning of Montana's distinctive yet troubled history, the Treasure State was dominated both economically and politically by powerful outside interests who shipped in capital and bought control of the State.

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Historians tell us that as the Anaconda Company and its friends ran Montana, economic and political power flowed out into the hands of distant capitalists and corporations.

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Policy was determined in far off New York City and control of the press was rigid. Anaconda's corporate dominance in Montana's political affairs was unique in American history. For its first 75 years, Montana was a one-company State. But then big winds of change roared across the Treasure State; between 1965 and 1980 Montanans ripped off their copper collar, transforming Montana from a corporate colony into a free modern State.

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The people finally controlled their own destiny. The pitched battle between the people and the established power structure was not easily won but fired In a Crucible of Change a new Montana was born. Join Evan Barrett and real history makers of the time as they shine the light on this remarkable era.

00:01:20

Evan Barrett: Welcome back to *In the Crucible of Change*. You know in this series we're talking about the progressive changes of Montana in the period from 1965 to 1980, a period sometimes known as the second progressive era in Montana where dramatic changes took place and the reallocation of power, governmental and political power, away from the vested interests of the first 75 years of Montana to the people of Montana.

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And when you talk about that power allocation, of course nothing is more important in the--in that allocation of power than the Constitution that was written during that period. And within that Constitution nothing is more important than the Bill of Rights, which we call the Declaration of Rights, in the Constitution. And that's what we're going to cover today (on) *In the Crucible of Change*. And we have two terrific guests here that are very important in Montana's history, probably the two people-- although the whole Convention was responsible for the document and the Committee was responsible--I like to think that the two people most responsible for what is perhaps the most complete and powerful statement of rights in any Constitution in the United States than the Chairman of the Committee and the Chief Staff Person for the Committee. And we're blessed to be able to have both of them here today.

00:02:44

So I'd like to recognize first Wade Dahood; Wade is the Chair--was the Chairman of the Bill of Rights Committee that produced that Declaration of Rights. Wade has been a practicing attorney since about 1951 when he--during the Korean War you entered the JAG Corps and did some work in Washington, DC for a while, but you have been a practicing attorney in Anaconda, Montana since 1952, so you've had 63 years of active practice. And in that period of time in addition to being one of the premier practitioners of law in the State of Montana and being a member of this Constitutional Convention of such great importance, you were also a--a creator and founder of the Montana Trial Lawyers Association. Most of the people I know would say if I have a case I'd like to have Wade Dahood do it for me. So we're happy to have you here to talk about that.

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And with you is Rick Applegate. Rick Applegate was the staff member for the Constitutional Convention Bill of Rights Committee, prior to that was the staff member on the Convention Committee and wrote about a 440-page treatise on the Bill of Rights. And I read it last night. *[Laughs]* But--but actually was--was very, very important in the broader knowledge and the preparation so the Committee could move forward on that. Rick is originally from Libby, graduate of U of M, went to the--the School of Social--

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Rick Applegate: New School for Social Research.

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Evan Barrett: New School for Social Research in New York City, and then found his way back to Montana where he was a--in the Legislature, in the Con-Con; you were one of the first staffers of a Committee in the Legislature in 1971 and then you helped out with the Con-Con. And then you were the head guy, the staff guy for the first Environmental Quality Council under the New Constitution. Since that time he went back to DC. You worked with two Senators and a Congressman; frankly you've been a terrific practitioner of the art of government and politics over many, many years and many of us have known you for all that time and--but we look up on the Constitutional Convention as being a really unique experience where your contributions and your contributions have made a difference for millions of Montanans since that time.

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Let me ask you first, as we get into this thing, kind of broadly, Wade there was a lot to get done in this Bill of Rights. How did you get it done? You had only two months to do it in essentially. How did you get this done?

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Wade Dahood: Evan I think that's a great question and I think everybody in Montana should understand just precisely the background that was created for the Constitutional Convention to be a success. In the early '60s the League of Women Voters in Montana realized that our Old Constitution was not fitted for contemporary times and of course they were involved in a campaign to have a New Constitution.

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The Legislature of course heard that roll of the drums and they decided all right let's find out if the people of Montana want to have a Constitution. That was put on the ballot.

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Evan Barrett: In 1970; yeah.

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Wade Dahood: The citizens of Montana almost 2 to 1 said we should have a Constitutional Convention. It first started out with a Constitutional Revision Commission. There were 16 members; 4 were appointed by the Montana

Supreme Court. I was one of the 4 that was appointed. We studied the problems with the Old Constitution; decided yes we should recommend to the Legislature that we have a Constitutional Convention.

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The Legislature then passed a Bill for a Constitutional Convention, provided for 100 Delegates, and we then of course all of us that were elected got together at the end of November after we were elected and decided what the format would be. But before all that happened, the Constitutional Revision Commission and then the subsequent Commission called the Constitutional Convention Commission of course were pretty much managed by Dale Harris, who was an academic, who was retained. He was a constitutional scholar. And he hired a staff of young academics, Rick Applegate one of them, very fortunate to have him as the analyst for our Committee. And they did all the background work.

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So when we arrived at our Convention on January 17, 1972 we already had booklets, pamphlets, research studies of Constitutions, of what should be in a Declaration of Rights or a Bill of Rights. So we were well-educated on the first day that the Convention convened. So we were able then to participate as Montanans for 56 days and agree on a Constitution. All 100 Delegates signed that Constitution.

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I would like to say this and I think it's a good lesson for today. There were 58 Democrats, 36 Republicans and 6 Independents elected to serve as Delegates. The first 10 days there may have been some partisanship. After those 10 days there were no political labels. There were 100 Montanans dedicated to the task that had been placed before them to try and write a Constitution that would be good for today and for always in Montana.

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The research analysts were absolutely important to us. Rick Applegate provided our Committee with all of the materials that were necessary to fully understand what should be in a Bill of Rights. What was contained in other Constitutions, what provisions would be good for the citizens of the State of Montana; of course our Committee held hearings. We held over 20 hearings. We considered 46 different proposals. We listened to 138 witnesses. We finally of course put together a Declaration of Rights.

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In 1989 our Constitutional Society which needless to say is probably the most inclusive society in the State of Montana because you have to serve in the Constitutional Convention to be a member, and we're down to 22 today from the 100. But in any event, in 1989, the Constitutional Convention Society decided to publish a booklet called *100 Delegates: Montana Constitutional Convention in 1972*. I wrote an essay for our Bill of Rights Committee. I want to read one paragraph that I wrote then that I would write again and again and again.

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Our work on the Bill of Rights Committee I'm sure would not have succeeded so completely without the intent and dedication of our research analyst Rick Applegate who listened to our desires and expertly analyzed and researched the issues and provided the logical and authoritative support necessary to frame these concepts, and then present persuasive argument to support such charges and additions to our Declaration of Rights.

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Every time I've had a chance to appear in public I do thank Rick who is a dear friend of mine for all that he did in contributing to our success.

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Evan Barrett: That's really--

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Wade Dahood: As we proceed during this hour we'll talk about some of the concepts that are in the Declaration of Rights that were not in the Old Constitution but which represent a great framework for protecting security and the rights of the individuals.

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Evan Barrett: And basically because among other things from what our previous discussions were that--that you started out with--we had an 1889 Constitution and there was a conscious decision made to not trim back any or change those rights, but to expand upon those rights rather than limit or change them. And that was kind of the context upon which you--is that how it--from your perspective you looked at it on a broader framework and there was a lot more that could be done without changing what we had already? Was that--?

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Rick Applegate: Well it was very clear from the start, Wade made it clear to the--to the members of the Committee, he thought it was important that we not tamper with the existing civil liberties, political freedoms in the--in the Declaration of Rights. So we built on that foundation in a number of important areas and my own sense of that is that--that it was phenomenal and an unexpected outcome what we were able to put together in the Declaration of Rights. And a lot of that goes to the--to the--the talent of Wade as--as the Chair of the--of the Committee.

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I've told people he would--he would walk up to you and look you in the eye and put his--put his hand on your arm and what you realized fairly quickly is he--he wasn't going to let go of your arm until (a) he was finished and (b) you agreed. **[Laughs]** And it was very personable and very articulate and worked very well with the other Delegates who were all very much involved and produced I think an astonishing Declaration of Rights. One of the leading constitutional scholars in the country saw--Pat **[Ober]** who taught at New School among other places put together a compendium of what he called *The Sources of Democracy*, all the way back past the Magna Carta up to the current time. The very last document in that book, the pinnacle if you will of what he thought were the most important sources of democracy is the Montana Declaration of Rights. And it has features that are unique that we'll talk about some among--among any document.

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Now the Delegates themselves as--as Wade has said, arrived in town and fairly quickly shed the partisan divides, the ideological divides. This wasn't about Democrats and Republicans; in fact they went out of their way not just in the way they sat but in the selection of Committee Chairs and in many other ways to dissolve those kinds of barriers. And they were newly elected. They--they you know, existing sitting elected officials could not run under a surprising Supreme Court decision for those slots. So they were in some cases relatively new and in some cases former elected officials.

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And they were able to work in a collaborative way that--that for those who follow contemporary politics knew very well we've moved at a great cost, far away from that kind of collaborative spirit that focuses as the

Declaration of Rights says the sole function of government is to focus on the common good. That's what they did and in a short period of time that enabled them to do the kinds of things we have in this Declaration.

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Evan Barrett: Well these were citizens in Montana, some former elected officials but because of that decision of the Court not current elected officials, so current Legislators sitting at the time were out of it. And so these citizens came together. I mean then to forge this document overall was terrific, and by the way, interestingly that 70-percent of the people said yeah, let's have a Convention and then when the vote came it was won by 2,500 votes which means that as things advanced oppositions started to occur. And we'll talk a little bit more about some of the more important potential opposition that might have cratered this whole convention or this whole Constitution that you guys were both involved in trying to solve that problem. And that's a really interesting story that we want to get into.

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But if you look at this, expanding the Bill of Rights, the Declaration of Rights, you had some special things that when you came as a practicing attorney you had found that there were things happening in the law that affected individuals that needed to be repaired. Can you--things like the third party lawsuit and those things--can you hit on those a little bit?

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Wade Dahood: I'd like to explain it Evan but before I do that I would like the citizens of Montana to understand just how important the research analysts were to the success of our Convention. Rick and I worked very hard to put together what's called a Bill of Rights Proposal. And I brought with me a copy of that proposal that we worked on diligently to put together, list every particular Right that we thought was important, 35 Sections of Article 2 provide for all the Rights that we all enjoy in Montana. But I think in the preface to our proposal which was given to every Delegate so as we started the debates they would understand exactly what we were talking about, we made these particular statements that I think were very appropriate then and are most appropriate now and I want to read two of those paragraphs.

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In presenting this Proposed Declaration of Rights the Committee notes that the guidelines, the protections for the exercise of liberty in a free society come not from government but from the people who create that government. It is that spirit which has motivated this Committee to insure for Montana's future through the Bill of Rights a more responsible government that is constitutionally commanded never to forget that government is created solely for the welfare of the people so that the people can more fully enjoy the heritage of American liberty within the structure of that government.

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That was our epistle to our fellow Delegates as we started the debates. Yes; there were provisions placed into the Declaration of Rights that had not existed before. Three were the result of my experiences. I was always very concerned about individual rights. That's why I became a lawyer. In eminent domain which is where the government has the authority and the power to take private property with compensation to the owner of the property--it's in the 5th Amendment to the United States Constitution; it was in the Old Constitution and Section 29 in our present Constitution. And I was involved in a lot of litigation involving condemnation. The State would come forward with all of its experts, money was no object, they had all the exhibits, all of the assistance they needed to try and defeat the landowner with respect to his concept of value. The landowner would hire a lawyer like me; we would do the best we could. We might bring in an agronomist, an agricultural economist--whatever we had to bring in to try and establish what we thought was just compensation.

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When it was all over and in those days usually the landowner won the verdict from the jury then we had to pay all the expenses. I thought that was unfair. So I talked with Rick and I said Rick; I said we've got to have a provision that's really protective to the Montana citizen. So if he is compelled to go into litigation to protect the value of his property that if he prevails he should be able to recover from the State of Montana all of his expenses including all litigation costs. So we put that in there and said if the landowner prevails he is to be compensated to the full extent of his loss including all litigation costs.

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One provision that I thought was absolutely important because it had really and truly troubled me throughout my legal career and that was the concept of sovereign immunity. And that was the government had immunity, if somebody from government injured you in some way you could not have recourse, you could not have

remedy, you could not file a lawsuit to recover your damages, because we had this concept called sovereign immunity created by the Judiciary by the way. And they would never go back and say we made a mistake. Sovereign immunity came from England.

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Evan Barrett: The king.

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Wade Dahood: That was based on the concept the king can do no wrong. And I argued to the Convention Delegates we don't have a king in Montana. Why do we have that particular concept in Montana? So we passed a Section, Section 18 of our Article 2 that did away with sovereign immunity. I was also concerned about the fact that in 1971 the Montana Supreme Court upheld a concept that took away what's called third party litigation in workers' compensation cases. It's a long story about the case in which they made that decision. The individual's name was [Ash Craft]. He was injured on dangerous premises of Montana Power. The Montana Supreme Court had held overruling--

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Evan Barrett: Not surprising--not surprisingly in favor of the Montana Power Company.

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Wade Dahood: Exactly; not surprisingly in favor of the Montana-- So we got that in. There were a lot of other provisions that we put in there. And I want to say this sincerely. I would talk to Rick. I had so much respect for him and his analysis was always very sharp in my judgment and in the judgment of the other members of the Committee. We all got along just fine. We had our hearings. We got involved in a lot of rather high-tempered discussions. But you know we were all after one objective, to have a Declaration of Rights that would be good for all the citizens of the State of Montana. And there are a lot of other provisions and I know you're going to want to talk to Rick about the trio of Sections 8, 9, and 10, the the Right to Know, the Right to Participate, the Right of Privacy. So I'm going to turn this particular part of the program back to Rick.

00:21:23

Rick Applegate: Well in--in working on the Bill of Rights we were actually focused on four different features of statements of civil liberties in particular--and political freedom. A lot of times when people think about a Bill of Rights they think it's designed to protect an individual from government abuse. And that clearly is a key function of Bills of Rights ever since the adoption of the US--the Federal Bill of Rights.

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So for example, you can't be denied life, liberty, or property without due process of law. So if the State comes after you, you get due process of law. Now the Constitution doesn't add a lot of detail to that. The Federal Constitution doesn't nor does the State. So that--that's a concept that develops over time; that's one feature of a Bill of Rights. A second one--

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Evan Barrett: Yeah; there's a tendency of people to think of it especially in this political era where there's--people are demonizing government that we have to be protected from our government and we do but it's a lot more than that.

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Rick Applegate: It is. So a second feature that--that we paid some attention to is the old business of protecting minorities from runaway majorities, particularly where it adversely affects their rights. So you can have majority--majority decision-making is how we decide things. We all get that. But when it tramples on fundamental rights, privileges, and immunities of citizens then it's a very different issue. So you can have a majority that favors one particular thing that is very damaging to a minority and Constitutions try to address that. Gender discrimination would be a classic of that in the past.

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Evan Barrett: Watch out for the tyranny of the majorities.

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Rick Applegate: Racial discrimination another and there are plenty of other examples. Third, statements of civil liberties should protect folks from concentrations of power in the private sector. It's not just about government. And so you think about it; even in the Federal debates now over the Right of Privacy, I don't frankly know how much of the Right of Privacy is left honestly with interception of communications and--and collection of--of data and so on. But it's clearly not just a governmental issue when you for example use the internet or your location is available through cell phones and on and on and on. The Right of Privacy is under some attack.

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Evan Barrett: It is interesting when you talk about the private side because the private power is one of the things that--and the abuse of private power for 75 years when we were essentially a corporate colony of the Anaconda Company helped lead to the whole period of change that we're talking about.

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Rick Applegate: That's right.

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Evan Barrett: So and you're saying--

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Rick Applegate: And we were dealing with some of that within the narrow confines of the Bill of Rights in the anti-discrimination provision that was written which explicitly applies to persons and firms and--and so on. But also the Right of Privacy when you read it closely I think there's a fair argument that if the Right of Privacy can only be infringed upon a showing of a compelling State interest, that means to me that the private sector cannot freely invade your privacy as well. So we can--we can get into that kind of thing.

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The fourth feature of a Bill of Rights and I think in some ways becomes the most important, certainly on a par with the others is that a Declaration of Rights covers the things we've already talked about. But in addition to

that it should provide citizens with the means by which they can more effectively participate in public life. So it's not just about protecting them against government or against majorities or against the private sector, but it's providing the ability to engage in public life. And that comes about when you get information on government, when you have some version of a Right of Participation and--and certainly your Right of Privacy.

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So all of these things were--were things we were working on in the document. I think the--the Committee and the Convention as a whole took them about as far as they could. And again they did that; they did that because they were focused on a common approach rather than making ideological arguments with each other. There was very little of that--that went on with the Convention. It just reminds me of a--of an old line that you've probably heard before. The question is why did the Canadian cross the road? And the answer is to get to the middle. **[Laughs]** And there is a lot to that--that we can learn from. It's an over-simplification. We want the debates. We want all the discussion. But fundamentally what the Convention do I think and the Declaration of Rights and elsewhere, they kept their eye on the ball. They were working on solutions to common issues, looking for the public good. And the sooner we get back to that I think the better of we'll--.

00:26:17

Wade Dahood: Well let me add to what Rick just said. We had a Committee of 11. I was Chairman of the Bill of Rights Committee. We all worked together. Dorothy Eck, a Vice President of the Convention was on our Committee. Bob Campbell was a pharmacist and a lawyer--was on our Committee. Marshall Murray who had run for Attorney General in the State of Montana was on our Committee. We had a lot of great Montanans on our Committee. And we spent a lot of time really looking at every particular Section that we finally adopted. And quite often we would say to Rick, you've got to research this particular facet to see whether or not we think it belongs in our Constitution. So we ended up with 35 Sections. The last one provides that the Legislature may give preference to servicemen, servicewomen and Veterans. Those 35 Sections represent the heritage that we have in Montana with respect to individual rights. Every individual should take time to read those 35 Sections. Our educational system is failing in Montana and in the United States because we don't emphasize Montana history, American history; we now have a vanishing Americanism, a vanishing patriotism because we don't understand our heritage.

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Every lay person and every lawyer should review the Declaration of Rights from time to time and see what's really there that protects us all. The language is constitutional in its tenor but it provides a protection for everything that we hold dear within the concept of the American heritage. We did not have an easy time convincing all the Delegates that this particular Bill of Rights proposal should be adopted. We finally succeeded. There were Delegates that questioned some of those particular provisions. We put provisions in that we thought were absolutely necessary. For example, misdemeanor cases, criminal cases would require only four out of six in Justice Court for conviction. Two could hold out; you could still get convicted. That's beyond a reasonable doubt. We changed that. For all criminal cases in Montana you have to have a unanimous verdict. If an individual was convicted and was under State supervision, complete and State supervision, if he wanted his Civil Rights restored he had to secure a pardon from the Governor. We put a provision in there that once you're removed from State supervision all of your Civil Rights were restored. Our Committee also talked about the fact that at the age of 18 you're old enough to go fight for your country and die for your country. You should have all the Civil Rights of an adult. We passed that provision. We gave that particular protection to all those under the age of 18 with the specific provision that there are certain laws that we have to have for the protection of the minor person, so we did everything--

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Evan Barrett: But the minors do have rights.

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Wade Dahood: But they have rights.

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Evan Barrett: Yeah.

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Wade Dahood: And we did everything we could to balance it out. If you look at those 35 Sections you will find that you've got in my judgment the finest Bill of Rights that you can have, constitutional scholars have said that the Declaration of Rights that's in our Constitution is the finest of any State in the Union. And we're proud that we

were able to succeed. And once again I want to say this; all the preparation that took place before we actually started our debates was the key to our success.

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Evan Barrett: Nothing like being armed with information to start with and a sense of vision. You know we're going to dive into the four elements, 8, 9, and 10 as well as the non-discrimination. But before we do that let's take a dive into for very quickly into something--we're covering, some of these things we cover in other programs as well but that's the Clean and Healthful Environment. And we're going to take about the whole Environmental Provision but the strength of the Environmental Provisions of the Constitution is found in this--in the--in the Declaration of Rights isn't it, Rick?

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Rick Applegate: Yeah; there are a couple places where Clean and Healthful Environment comes up in the document. But the strongest language is in the Inalienable Rights Section of the Declaration of Rights. And I think there was some fear at the time that having a sort of self-executing if you will Right to a Clean and Healthful Environment could generate a lot of problems. I think history has shown that--that didn't occur. And as I look back on it, frankly from a--from a more personal level having seen that the predicted horrors have not occurred from that provision, I'm reminded of the--the town where I was born and grew up. In 1999, it burst on the public scene that--that was in fact a super-fund site with very high levels of asbestos coming from the vermiculite zone operations there. Several hundred people many of them I knew and grew up with, their families, have died in Libby from that and it is--has been a very complex super-fund cleanup for a long time.

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There's one--one story I have to tell about it. There was a gentleman who worked at one of the processing plants. And in the evening he would drive his truck home and park it in his yard and take off his coveralls and throw them up on the hood of the truck. His son then would come out and hose down the truck and the--the coveralls to get the dust off of them. He couldn't get showers at his--his place of work so he could clean off there. Both the father and the son passed away from asbestosis. And the kid was just doing his chores when you think about it. The Inalienable Right to a Clean and Healthful Environment speaks directly to that kind of thing. Now that may be a

more dramatic example than many that--that you encounter in the environmental arena, but it's worth people--I guess my point about all this is it's worth people being very thoughtful about that kind of provision rather than just reacting to it in the typical environment versus the economy kind of rhetoric and discussion we run into all the time. There's a very real reason it's there. And it's--it's--it's to basically make the point that if you don't have the possibility of existence then what's the Right to Life about?

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Evan Barrett: Well and you know the--the Libby situation is the most dramatic--

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Rick Applegate: Very dramatic; it is.

00:33:05

Evan Barrett: --single episode. And of course Wade and I both live in the area which is the largest super-fund site in the nation which is--runs all the way from Butte to Missoula. And it speaks to 75 years where some of it was with animus and some of it was just ignorance of what was environmentally right back in those days. But--but the fact is we've all seen the evidence of the kind of damages where the Right to a Clean and Healthful Environment comes out of the experience of a State that lived through a lot of things where--where things were not good. Things were not good and it's dramatically not good. But we're covering that a lot more in another segment of this but I'd like to dive into the--the Right to Participate, the Right to Know, and the Right to Privacy. And again, we dealt with that a little bit in the segment we did with Mike Meloy but you guys wrote the language. And the way those worked together starting with Participation was really, really critical. Tell us a little bit about where you guys were coming from on that.

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Rick Applegate: Well the Right of Participation is novel. It's unique as far as I know in constitutional provisions. And it was written to make a basic statement at the constitutional level, so these things are kind of general, that people had the right to expect that they would be able to participate in substantial decisions in the process of getting

them made. They wouldn't have to just read about them in the papers or try to decide whether to sue somebody once a decision had been made, but they'd be actively involved. And you couldn't provide a lot of specificity for that. But I think the general discussion was that--that was a useful concept, a useful right to elevate to constitutional status.

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Now on the Floor of the Convention as the discussion proceeded that Right did get changed, so that it's a Right of Participation as provided by law which in itself is a bit unusual in a Declaration of Rights because typically you don't say you have this right if the Legislature fills in the details. You announce the right. You don't have due process of law as provided by a Legislature.

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So it is--it's--these provisions are typically the kind that can be embellished by the Legislature but can also be interpreted by the Courts. Now some people would say well we don't want to have the Courts have too big a role. I'm--I'm a little tired of that argument frankly because it seems to me if Judges do what you like then they're strictly interpreting the Constitution. If they don't then they're activist Judges. And we've heard this argument from all sides for--for many, many years. I just think generally in the Constitution you try to specify rights that stand on their own. I do think the Right of Participation as it was crafted even is a very important impetus. It kind of serves notice to everybody that--that we have work to do to make sure people can be effectively involved.

00:35:57

Evan Barrett: You know it's worth noting that--that as in all levels of the government but perhaps the most egregious offenses occurred in the Legislature which is why the public was aware of the fact that when they finished talking about a Bill they would say today's Executive Session would be well you guys sit here and watch but those of us sitting around the table have to deal with this Bill. In the old days it was Chairman would say get out of here; we're going to take care of this Bill and they closed the doors and citizens didn't know what happened until they got the result. So Right of Participation was driven by--by that substantially as--as--well as so much was because people saw the Legislature was more in the control of vested interest and everyone--if you had a lot of power you got your own way. If you were an average citizen you didn't know what was going on.

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Rick Applegate: This provision is the kind of thing that can help level the playing field. I think that's what you're getting at and it's a very important feature of it.

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Wade Dahood: But Evan there's a lot of resistance to what we were doing to make government transparent.

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Evan Barrett: Yeah.

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Wade Dahood: And notwithstanding that resistance, we modified where we had to because we knew having the Constitution passed was going to be a Herculean task. As a matter of fact it passed by 2,532 votes and I suppose we might as we talk about the mistake that we made. We decided to have three separate issues on the ballot to try and get the Constitution passed, to have people interested in coming to the ballot box and voting. And Leo Graybill who was the magnificent President of our Constitutional Convention and a number of us decided you know what we're going to do? We're going to be clever. We're going to put side issues on the constitutional ballot that will appeal--

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Evan Barrett: The hot button issues.

00:37:44

Wade Dahood: --appeal to everybody particularly gambling because gambling under the Old Constitution was prohibited. The Old Constitution said the lotteries in Montana are prohibited. Our Supreme Court defined lottery to mean all forms of gambling. People wanted gambling in Montana. They may regret that we have it now but at that time they wanted gambling in Montana. So we said we'll put that as a side issue on the ballot. So we had the death penalty as a side issue, we had the Unicameral Legislature on the ballot as a side issue, whether or not you wanted to have one body or two bodies, a Senate and a House or just have a Senate, and we put gambling.

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So the people rushed to the ballot box and they voted for gambling and a great number forgot to vote for the Constitution.

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Evan Barrett: We did--you know we had a whole program on what happened with that which was that whole lawsuit and everything that came out of it. And it was a very interesting thing that--you know but when--when it all came together you know even though it was a narrow win the Court finally resolved to go along with the argument that it was a majority. But--

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Wade Dahood: But Evan it was very tight.

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Evan Barrett: Yeah; oh yeah.

00:39:02

Wade Dahood: We won it 3 to 2. And then it goes into the Federal system. The United States District Court ruled in our favor that the Constitution was valid. The Circuit Court of Appeals ruled it was valid. And then they filed a petition for tertiary which is the document you file at the Supreme Court of the United States asking them to take the case because it's not automatic appeal to the Supreme Court of the United States. And they rejected the petition for tertiary. What had happened and I think all those watching the program should understand it; if you counted the votes for the Constitution itself as against all those that votes for gambling we did not have a majority. So that became the argument that was being made by those that opposed the Constitution.

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And had we not received the endorsement of all the leading newspapers in the State of Montana, the Constitution would not have passed. And here we are 43 years later we have a Constitution that's timely, that protects individual rights, that allows government to function in a very efficient fashion, a Constitution us legal scholars say is the finest Constitution of any in the United States. We just barely made it. And we tried in our Bill of

Rights Committee at all times to have provisions that were not going to be debated with any great bigger out in the public forum. So we would modify from time to time. As Rick pointed out, we somewhat modified the Right to Participate leaving a lot of things up to the Legislature thinking the Legislature in its infinite wisdom would know what's good for the citizens of Montana and pass laws that would allow the Right to Participate. But I thought that point should be made.

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Evan Barrett: Yeah; and--

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Wade Dahood: That the Constitution just barely passed as it was.

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Evan Barrett: And you know what you said about it narrowly passing and that the newspapers all endorsed it, leads to a place for us to springboard and talk to--about the Right to Know and the Right to Privacy and the balancing and how that affected the newspapers and there's some wonderful stories in this. So I wonder if Rick if you might hit the Right to Know and the Right of Privacy and then we'll springboard into the newspaper discussion related to that.

00:41:17

Rick Applegate: You would think if you listened to discussions today that the Right to Know was non-controversial and that everybody likes the new transparency in State government. It wasn't--that wasn't the case. It was one of the most contentious provisions that we wrote. And the reason is inevitably in the--in trying to get more disclosure of information to citizens you run into questions how far you go with that when you come up against the Right of Privacy which is another fundamental Constitutional Right. Incidentally, the Right of Privacy is not in the US Constitution. You know you hear people say--

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Evan Barrett: It's implied by decisions.

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Rick Applegate: Well but you'll hear people say well I want the Constitution read literally word-for-word that's it; don't go beyond it. The Right of Privacy emerged in a US Supreme Court case that discussed the shadow if you will that is cast by the Bill of Rights. And it was in the penumbra, the shadow that the Right of Privacy was defined. Of course the Montana Constitution has one.

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Evan Barrett: We put it in explicitly.

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Rick Applegate: So in any case even if it wasn't there the Right to Know and the Right of Privacy can come into conflict. So what we were trying to do and--and the--the press was--was weighing in very heavily on this, we were trying to figure out how to make that balance clear. What we did was in the document, the--the Convention adopted, the Right to Know but it was checked only in cases where the demands of individual privacy clearly exceeded the merits of disclosure. So there in a--in a brief bit of language, constitutional level, you've got that--that tension playing out.

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And it took some time, not just days and not just weeks to come to ground on that provision and get it into a form that I think for--for folks were generally more acceptable once everybody had to struggle with the same tension we did as we were--as we were working on it. But it was not easy.

00:43:19

Wade Dahood: High-tempered public meeting that we had of our Committee was over the Right of Privacy. The press was there; the published for the *Billings Gazette* was there. They had published an issue of the paper where the headline was in yellow. The Right to Conceal--that's what they called the Right of Privacy. We were in the Governor's conference room, wall-to-wall people, the high-tempered language was such that I'm sure that it tested

all of the acoustical ability of that room, but in any event we were arguing with the Representatives for the State, the press, that the Right of Privacy was good for everybody; that it was no concealing anything from the press; that the press should understand that all our Rights under the Constitution were there to protect the rights of the individual-- that they were the guardians of liberty and our society and they should be proud of that particular position that they take. And we're not going to do anything at all to abridge the power of the press. I think after three and a half hours we reached some accommodation because when we adjourned after 56 days I think on March 22nd of 1972 every major newspaper in Montana endorsed the Constitution.

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Evan Barrett: Well in both the--the show that we did with Chuck Johnson who was a representative of the press and he pointed that out and the one we did with Mike Meloy who is a big practitioner in the Right to Know, both addressed this tension that occurred between Privacy and the Right to Know and it seemed like it was at loggerheads until you came up with the use of the word *clearly* that when it said privacy--you had privacy; you know you had a Right to Know unless the Right of Privacy was you know offended. But the use of the word *clearly* kind of took it off--out of this secrecy thing that they were trying to get at I think. Tell--

00:45:25

Rick Applegate: I think that helped a lot. I think what people finally came to realize is it was important in the Constitution to have an expression of the Right to Know. But once you start down that path then it's important to deal with the potential immediate conflict that involves privacy. And you just have to work your way through that somehow. And I understand the initial reaction of the press. I mean they don't see the business as just making money on newspapers. They see they're the way people get information and that's true because most of us as citizens, we don't have the time every day to dig into these issues the way they are supposed to when journalism is-- is practiced well. So I think everybody understood that; it was just that it was very difficult to come up with the right balance. And the only real alternative we could see was just to abandon the field and not put in a Right to Know provision and I think that would have been a huge gap in--in the--in the Declaration of Rights. We would have regretted that I believe.

00:46:23

Evan Barrett: So we have this Right to Participate which is unique.

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Rick Applegate: Yes.

00:46:28

Evan Barrett: No other State Constitution has that apparently. And imagine giving the power to people saying this is your government and you have a right to be involved completely in any and all levels. And you look at it in the Legislative Article where it says gee, every meeting has to be done in the open. That now applies to County Commissioner meetings--with the exception; there's a little exception on the privacy side.

00:46:58

Rick Applegate: Right.

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Wade Dahood: But Evan there are a lot of governmental bureaus and departments that don't like it. What they don't have in mind is simply this. They exist for the purpose of protecting our liberties. Article 2 is the first substantive Article in our Constitution. Article 1 has to do with the compact with the United States with respect to Indian land over which we have no jurisdiction. Articles 5, 6, and 7, the Legislature, the Executive, and the Judiciary are there for one purpose and one purpose only and they should always remember it. That's to protect the 35 Sections in the Declaration of Rights. That's the only reason why we have government. That's why people gather together at a Constitutional Convention and say all right; here's what we want in the way of government that's going to make sure that we're able to enjoy all the blessings of liberty. And I think too often people in government tend to forget that they're there to be public servants. And I think the sooner they come to that realization the better off it's going to be for all of us. But everything that's in that Declaration of Rights was there to protect the individual, to make our government better, to make this a more satisfying society--for all citizens.

00:48:13

Evan Barrett: Well Mike Meloy makes a point in our discussions that--that when there's a constant education of elected officials who inherently start coming to office and think I can do this much more efficiently if I just had a little private meeting over here. And then they gradually have to learn the process of openness which is called for in the Constitution and the balancing provisions of that--that are called for in that. But you know in addition to the uniqueness of Participation, the balancing of the Right to Know and Privacy, which by the way when you did resolve that big fight and the newspapers endorsed it think about how--what was the likelihood of passage of that document if the newspapers had not endorsed it when it only won by 2,500 votes anyway.

00:49:01

Rick Applegate: It would have been the ballgame. I think it would have--would have been over if substantial portions of the Montana media did not reflect upon it and see the wisdom really of the entire document, then I don't think there's any way--even a couple of major urban areas would have made the difference. Twenty five hundred votes is not--

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Evan Barrett: So I think that meeting you folks had in the Governor's Reception Room with the press there and all the bombast that occurred and all that--that had to get out on the table that when you finally got the balancing act together, I know Chuck said we finally figured out when we could say as long as you know the Rights to Privacy are not clearly violated then we have a right to see it. I mean so--.

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Another thing that is in this Constitution in terms of rights is fairly unique and you have to find it in there is--and it's very, very relevant today as we see at the Federal level the rights of--the anti-discrimination issues coming to the fore as we've come to realize in our societies that we want to protect the--those that are different from the majority and doesn't like different(ness) let's say. We have an anti-or non-discrimination stuff that's found both publicly and privately in Section 4 don't we of--?

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Rick Applegate: Yes; and--and that Section to me is one of--one of the most innovative of the Declaration of Rights. When you think about it, one of the most important things you can do when--as Wade was saying earlier, you study your history as a country--is to be honest about what has happened and to not try to shade it ideologically one way or another. And it is clear in this country we've made tremendous advances in a wide variety of areas, but there was a history and there still is a reality of discrimination in a variety of ways. It--it went to folks of Chinese origin, the Irish, African Americans certainly, Native Americans, on and on and on. There is that history. And we struggle to get beyond that to a--to a better place and it's always difficult.

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This statement makes it clear that government and individuals and firms are not to discriminate in a long-list of areas including race and creed and origin and gender and political beliefs. It's a very dramatic statement and I think a very powerful one that over time I think will serve--serve very well. And it could be along with some of the other provisions the kind of models people were hoping for when they had States revising their Constitutions. The idea at the time was that the States would become--it was--the phrase was little laboratories to test new constitutional initiatives. And some States did that and Montana did that big-time. And I think the test of time, the--looking back on it now--what folks see and it's--I'm away from a lot of the contemporary debates but what they see is a document that is actually serving quite well. Would they write it the same way today? No. And I don't know whether it would be a good idea for us to open up this kind of thing unless we were pretty clear we could get back to the kind of spirit you saw in the '72 Convention where people came together and tried to work on things as opposed to the kind of rhetoric I'm seeing now in--in the area where I used to work in Washington, DC for example where a lot of it really has very little to do with trying to solve the problems, the real problems that people face.

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So I think we got to be careful about that.

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Evan Barrett: Let me take a second and look at the two Sections of Inalienable Rights, Section 3 and Individual Dignity, Section 4. And the--the breadth of the language in terms of the discrimination talking about you can't be discriminating against in the exercise of civil or political rights on account of race, color, sex, culture, social origin, or condition or political or religious ideas. That's a broad range of things; that's--that's really a compendium to--to

capture you know a lot of protection. At the same time the Inalienable Rights Section talks about enjoying and defending life and liberty and possessing property and safety, health, happiness, and--and it gives the right to the individual that way. These are powerful; I mean if you look at those Sections 3 and 4 when you say we ought to read this language, people ought to go look at these 35 Sections and say yes on every one of them. And when you look at those they're very, very powerful.

00:53:48

Rick Applegate: Well and I think those needed to be that broad. It's not like the list you know you can--you can try to edit some of this stuff; writing short is always harder than writing long. But in this case I think every one of those is fundamentally important in a discrimination statement and in an Inalienable Rights statement. It's hard to know where you might--where you might cut.

00:54:09

Wade Dahood: You know 43 years later I can say this sincerely. You could not write a better Declaration of Rights today. What was written 43 years ago was timeless. It's up to the Executive, the Legislative Branch, the Judiciary to make sure that all those Rights are respected and are interpreted for the benefit of the individual of our Montana society. Too often that's not happening. And as a consequence we do have an-erosion with respect to those particular Rights. But the way they were framed, the way they were debated, the way they were finally approved is for the benefit of all Montanans and they're just as powerful today as they were 43 years ago.

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Rick Applegate: That's right; yeah.

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Evan Barrett: Well as you know the kind of sub-title of this series is that you know we're moving from a--you know a corporate colony to a citizen State and the challenge of keeping it that way. And we know that whenever there's a--there was a great shift of power that occurred at the time including within this Constitution. And that doesn't mean that those folks whose powers were changed, corporate dominance, those who believed in the--

perhaps a stronger governmental intrusion into rights and stuff, aren't every day trying to erode away these things. Vigilance is a very, very important thing, but one of the purposes we have in this whole series is to try to make people aware of what--what are the changes we made 40 years ago? Sometimes people think they've always been that way. Well it hasn't always been that way. And they were trying to correct problems that occurred at that time up to that point. So but we're--we're getting close to the end of this hour and we could go on forever because you guys are terrific and we could--and then nothing could be more important than this, but I'd like to kind of get your general reflections on here you are. You kind of said it 43 years later; what would be your kind of parting comments to the citizenry of this State?

00:56:16

Wade Dahood: Evan I think the Constitutional Convention was the most important political event of the last century in the State of Montana. I ran for the Constitutional Convention because I think I believed in the principles of individual liberty and I wanted a Constitution that would provide increased protection for all those Rights that we all respected.

00:56:43

I look back over the 43 years and I'm reminded of a great quatrain by Henry Wadsworth Longfellow. *Lives of great men all remind us we can make our lives sublime and departing leave behind us footprints on the sands of time.* Rick and I left our footprints on the political sands of time. I'm proud of what we did to try and make Montana a better State for all of us. I was so proud to have Rick as my research analyst and I'm proud he's still my great friend today. And I thank you so much for the invitation to come and participate in this hour.

00:57:25

Evan Barrett: Yeah; that's great. Rick looking back on it now, you've had a lot more experience since then but what--what about this Constitutional Convention?

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Rick Applegate: Well first Evan I'd just like to say thanks to you. I know it's a lot of work to embark on a project like this and to bring together all the people you have. And I think it's going to have a lot of value for people who

otherwise wouldn't delve as deeply into the period of time that you're covering and understand as well as they will at the end of this what actually transpired.

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For--for me as I've looked back over the years I remember at the time I was hired and I first met Wade and we started working together, I worried that maybe I'd never have another chance to do something like this.

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Evan Barrett: And you don't.

00:58:06

Rick Applegate: It was that special. It was a--it was a real privilege and I think the Delegates who served there did it right; they did their jobs.

00:58:14

Evan Barrett: As I said at the beginning of this program, nothing more defines us than our Constitution and nothing more defines our Constitution than our Bill of Rights and our Declaration of Rights. Both of you have definitely--I think it's well said--put your--your footprints on the sand of time in Montana in a way that will never be forgotten and it should be appreciated you know for centuries going forward. Thank you for coming here and joining us; we'll be back to see you *In the Crucible of Change* next time.

00:58:48

[*Music*]

00:59:46

[**End Freedoms & Protections-The Remarkable Bill of Rights in Montana's 1972 Constitution**]