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Transcript for Episode 41: Last Best Constitution: Looking Back 43 Years on 1972 Constitution

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[Begin Last Best Constitution in the Last Best Place - Anthony Johnstone & Betsy Griffing]

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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.

00:01:17

Evan Barrett: Welcome back to *In the Crucible of Change*. You know we've looked an awful lot in this series about the things that happened with the Montana Constitution. And you know as we've often said that this is a nation of laws and not of men. And when you look at there's--there's a hierarchy in the law. And the top of that pinnacle, the top of that pyramid of laws is the--is the Constitution whether it be the US Constitution in terms of our Federal law or the Montana Constitution in terms of our State laws.

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So we've spent a--a large amount of time in the *Crucible of Change* looking at the changes that came about because of this Constitution. And we've looked at how--how it was put into place by the various Committees and everything that went into play to make this thing happen and give us the--the Constitution that we do have. Today we're going to take a slightly different tack; we're actually going to try to look back at the Constitution after it's been in place for 43 years. We're not talking about how it was formed but how it's rolled out through the decades, what has happened in terms of its implementation, in terms of its Amendment, in terms of how it's been adjudicated and--and handled in Court cases. What do we have; what is this quality--this document that--that you know many of us think is the best in the nation but it is an evolving document? And the time has had an impact on that. And so we have two special guests today who have a unique perspective on the Constitution because both of them are teachers of the Constitution, teachers of the Montana Constitution. Both are Professors of Law, a former Professor of Law and a current Professor of Law who deal with the--who dealt and deal with the Montana Constitution. So we want to welcome as our guest today Betsy Griffing; Betsy is a former Constitutional Law Professor, has a--a very, very interesting history and we'll go through it in a second, and then Anthony Johnstone who replaced Betsy and he is now the--the current Constitutional Law Professor at the University of Montana, looking at Montana Constitution.

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Now Betsy is originally from Great Falls and from Missoula, went to Smith College, decided you had to come back to Montana--

00:03:48

Betsy Griffing: Absolutely.

00:03:48

Evan Barrett: --like most of us do. And you went to UM Law School. Now you spent eight years teaching Con Law but you also were a Clerk for a number of Judge, both Supreme and District Court is that right?

00:04:01

Betsy Griffing: That's correct. I--I had the good fortune of clerking for Justice Gene B. Daly and I don't know if you knew Gene Daly in 1981.

00:04:11

Evan Barrett: Oh sure very well.

00:04:12

Betsy Griffing: And then he lost his election and I--I worked for the person who defeated him, [Les Gulbranson] and you never saw two more different Justices in your life.

00:04:23

Evan Barrett: Well it was a test of your--your capabilities to--

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Betsy Griffing: That's right; that's right. And then after that I worked for Judge Gordon Bennett who I believe you said--

00:04:33

Evan Barrett: He's been one of our principals in one of our programs you know because he was--he was there at the beginning of a lot of this stuff.

00:04:41

Betsy Griffing: A great, great fountain of knowledge as far as Montana law and Montana history is concerned.

00:04:44

Evan Barrett: And then you also worked with the Attorney General's Office for a while did you?

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Betsy Griffing: That's correct. For almost 10 years I was head of the Appellate Bureau which handles all the criminal appeals for the State of Montana but also goes into the 9th Circuit Court of Appeals and the US Supreme Court.

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Evan Barrett: The Appellate Bureau inherently kind of deals an awful lot with the Constitution as part of the--

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Betsy Griffing: That's correct.

00:05:07

Evan Barrett: Yeah; so that kind of prepared you for that--that Law School gig that you had.

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Betsy Griffing: That--that's correct; that's correct.

00:05:14

Evan Barrett: Yeah and you know you also served with the ACLU on the outside of the--you know the other side of the arena so to speak as a litigant.

00:05:26

Betsy Griffing: Totally the other side of the arena. After I went over and taught at the Law School and while I was teaching at the Law School I was also Legal Director of the Montana ACLU which stands for the American Civil Liberties Union and litigates exclusively in terms of individual and constitutional rights. And so I had the--the very good fortune of being an attorney who could focus totally on constitutional litigation.

00:05:51

Evan Barrett: Yeah; so you looked at all sides of this thing in a way which is wonderful for you to join us. By the way, I understand that you know you kind of come by this--by good parentage too; that part of your inspiration of getting into the law and doing what you do had to do with the--the formation of the Constitution. Tell us a little bit about that.

00:06:12

Betsy Griffing: Well I--I--when I was asked to teach Montana Constitutional at the Law School I couldn't have been more thrilled. My mother was President of the Montana League of Women Voters from 1960 to 1968, Virginia Griffing. And she along with a number of others who I think you've talked to, Arlene [Reichard], Marjorie Brown, Dorothy Eck, were very instrumental in pushing for having a new--new Constitution. And when I was in grade school and middle school that's what our household was about was getting that new Constitution passed.

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So when I had the--the opportunity to teach it I couldn't have been more thrilled.

00:06:52

Evan Barrett: Well that's really--that's really great. Well we're sure pleased to have you here with us.

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Betsy Griffing: Thank you.

00:06:56

Evan Barrett: And Anthony, Anthony and I actually worked together a little bit when I was in the Governor's Office and you were in the Attorney General's Office.

00:07:03

Anthony Johnstone: That's right.

00:07:04

Evan Barrett: But Anthony comes from a Montana family, well-known Montana family down in Bozeman. Your grandfather was the Acting President of Montana State University. Your father by the way now is the--on the Board of Regents of the University System.

00:07:18

Anthony Johnstone: Right; he's my boss.

00:07:20

Evan Barrett: He's your boss now. And--and--and but a very preeminent attorney in the business sector with Dorsey Whitney for many, many years, and I obviously had the opportunity to work with their firm an awful lot. But you--though you're from a Montana family you--you ended up going to school in Minneapolis where your dad was--was practicing and--and went to Yale and University of Chicago Law School.

00:07:50

Anthony Johnstone: That's right.

00:07:51

Evan Barrett: So coming back to Montana was a different scene for you in a--in a way really.

00:07:57

Anthony Johnstone: Yeah; well I had the good opportunity to work for now Chief Judge Sid Thomas in Billings right out of Law School. And while after that I went to New York for four years, I quickly had the opportunity to get back involved in Montana, ironically working with the ACLU in a pro bono matter out of my New York law firm in a case in Montana involving public--

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Evan Barrett: So you were in New York and you're sitting around the table and somebody said we got this case we're doing for nothing that involves Montana and either you jumped at it or they just kind of gave to you? What--

00:08:35

Anthony Johnstone: *[Laughs]* Well I--I jumped at it and so over my three or four years of practice there in between spending lots of time reading bankers' emails and discovery matters I'd get out to Montana and I'd talk to lawyers in Montana about the--the criminal defense system here and some of its problems. And the lawyer on the other side was Brian Morris who then became a Supreme Court Justice and now a Montana US District Court Judge. And I have to say after a while it became apparent that he was having a lot more fun at it than I was, and so as things began to wind up I told him to let me know if anything opened up. And in 2004 I got the opportunity to come out and work in the Attorney General's Office and he went and got himself elected to the Supreme Court and took his cases--.

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Evan Barrett: Now of course he's a Federal Judge, right?

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Anthony Johnstone: Yeah.

00:09:24

Evan Barrett: He's a Federal Judge as Sid Thomas was and--and still is. Now you spent seven years in the Attorney General's Office. Your role there--

00:09:34

Anthony Johnstone: Yeah; well I had started out in the Appellate Bureau as well but eventually Attorney General McGrath, now Chief Justice McGrath brought me up to the Solicitor's Office. And the Solicitor is one of the team of lawyers there that works on constitutional litigation. And I was fortunate to be there when bright aggressive lawyers like Betsy and others were coming up with--with new cases involving the Right to Die, the Right to Civil Unions, all sorts of cases, some battles around the First Amendment and our Corrupt Practices Act and I was fortunate to represent the people of the State of Montana in those cases and--and won some and lost some.

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Evan Barrett: Now in terms of topicality by the way you were the--you were the litigator on behalf of Representative on behalf of Montana in the cases that involved the dark money in politics, right that--?

00:10:33

Anthony Johnstone: That's right. So Attorney General Steve Bullock, now Governor Steve Bullock and--and I and a team from the office worked on both Citizens United. We represented 26 States in that case and then in the Western Tradition Partnership case where we won in Montana but lost in DC.

00:10:54

Evan Barrett: I suspect you took some pleasure in the fact that now Governor Bullock somehow successfully negotiated through this Session a--a Bill to put some light on all that dark money in Montana.

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Anthony Johnstone: Yeah; I think the Disclosure Act comes from our history together starting out and seeing these cases coming in, challenging our laws, and deciding to--to fight back and do something about it. And I was happy to see that--that Bill get through and fix some of the holes that those cases punched in our law.

00:11:29

Evan Barrett: Well you know the law has a permanence which is an important aspect of the law and so when we look back and we think of the--the first Public Disclosure Law on the campaigns was the 1912 Corrupt Practices Act which was in place for 100 years until Citizens United. So in a way, it's like you know back to the future I guess when you think of the Disclosure Act.

00:11:55

Anthony Johnstone: Well it goes even beyond that. My--my great, great-grandfather, great, great, great-grandfather was a Republican newspaper editor at the *Fort Bend River Press*.

00:12:05

Evan Barrett: Oh.

00:12:06

Anthony Johnstone: And was one of the proponents of the Corrupt Practices Act, so I'm not sure what it--what it means but the law that he helped get passed unfortunately was struck down on our watch.

00:12:17

Evan Barrett: Now as you know the Corrupt Practices Act which was passed in 1912 was part of that group of things that happened in what I consider the first progressive period of politics in Montana. And it was--it--it mirrored the national progressive period of that time. Teddy Roosevelt was President; a lot of things were happening in terms of anti-trust laws and national parks and environmental things and then there was--it was quite a bit going on in Montana. We even got to where we actually tried to tax minerals fairly after the way the initial Constitution was written against that.

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And so we had a Progressive Act but for about--the premise of this series is that for about 40 years starting in about 19--the early 1920s up until the mid-'60s the copper collar was tightly around Montana. And it wasn't until that collar was being removed that we ended the second progressive era. And in that progressive era we weren't--we didn't just play around with the way the language was written before, we wrote a new Constitution. And now that becomes the bedrock upon which you know it's the foundation I guess but it keeps changing. You know the law is dynamic that way. There's a lot of ways in which it changes. And I think we want to take a look at it and get your perspective now looking back after 43 years, how has our Constitution evolved? Has it lived up to its promise? Are there things that still need to be litigated? How--how do we make these kinds of changes? And I'm kind of thinking maybe we might want to take a look at it in terms of--of--of the decades. It was written in--in the 1970s, in 1972 it was--in 1970, 70-percent of the people voted to have a Convention and then in '72 after they wrote the Constitution it passed by a hair, arguably--one of the subjects of one our programs.

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So it was all the sudden we--we have a new Constitution. What happened in the '70s with this Constitution? Well start with that first decade, start into that '70s; what--what happened with it?

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Anthony Johnstone: Well the--the--I think the 1972 Constitution must be our--the most lasting, concrete legacy of this *crucible of change* we have here in Montana. But as you said, as--no sooner than the ink was dry Montanans engaged the Constitution and very quickly afterwards, you know voted in several Amendments that undid some of the early work that they did with respect to a Waiver of Sovereign Immunity, the--the Legislature proposed and the people affirmed a change to the Constitution to say that the State could be immune by a sufficient vote of the--of the people. They went back to biennial Sessions.

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And then through the 1970s constitutional law moves very slowly and it takes a little bit of time to get going. And so there wasn't really much going on in the Courts under the new Constitution. Lawyers were getting used to it, trying to understand exactly what it meant; the Court was by and large the same Court that at times had resisted the movement to the Constitution. And so the--the 1970s showed the Constitution getting off to a little bit of a slow start.

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Evan Barrett: Well you know it would seem to me--

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Betsy Griffing: I think--

00:16:07

Evan Barrett: Well go ahead.

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Betsy Griffing: Well I think that one of the things we saw in the '70s was legislative change under the Constitution. So even though we didn't have much Court development at that time we had a very comprehensive rewriting of all the Local government laws. You remember Dale Harris, who I'm sure you've talked to, became the Head of the Commission on Local Government following the--the Constitutional Convention. And this Commission on Local Government put together one of the largest bodies of law, House Bill 122, which was submitted to the Montana Legislature to do a total rewrite of the Local government laws in Montana because under the new Constitution you had this new concept of self-governing units which was a very dynamic thought at the time that you could have Local government units in a partnership with State government.

00:16:56

Evan Barrett: Which is an interesting concept because inherently when you watch it in practice, Legislators who are elected by the very same electorate as Local government officials think that they were--the electorate was brilliant when they elected the Legislators but they're incredibly dumb when they elect Local government people.

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Anthony Johnstone: *[Laughs]*

00:17:14

Evan Barrett: They don't tend to want to trust Local government. But nonetheless they passed a lot of legislation on that. What I want to ask you guys about the--the initiative provision that allows which under the '89 Constitution all Amendments had to come through the Legislature. And then under the new Constitution, initiative happened. Right off the bat it was initiative that got--went back to biennial Sessions. And I think the Farm Bureau was the big pusher of that because they were unhappy about the whole Constitution but they got to at least to have the Legislature they wanted which was one that met every two years instead of every year.

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How one--how many States or if you don't know the exact number, but is this a common thing to have initiative Constitutional Amendments in most States or is it kind of limited and then how is it played out?

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Anthony Johnstone: Yeah; most of the States don't have Constitutional Amendments by initiative. They have to use the old model we had in Montana which was a Referendum. So Montana is part of a--a set of States largely centered in the West that adopted the Initiative Process, the--and then finally adopted in '72 the Constitutional Initiative Process. And that makes a big difference. You know at the Federal level we have probably the hardest Constitution to amend in the world. In Montana we have one of the easiest Constitutions to amend and that makes a difference between over more than 200 years we have 27 Federal Amendments, 10 of them all got there in a batch right at the beginning. Under the 1889 Constitution we had just 39 Amendments over that first span of history.

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Evan Barrett: Yeah; that's about 75 years, 80 years.

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Anthony Johnstone: Yeah and since 1972 we've had 31 Amendments depending on how you count them because the Court struck down a few, but we've had about eight a decade.

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Evan Barrett: Those are Amendments suggested or actually done?

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Anthony Johnstone: Those are Amendments actually done. Now almost all of those are Referred Amendments. The Constitutional Initiative again depending on how you count has really resulted in only a handful of Amendments to the '72 Constitution. So about 25, 26 of those Amendments are Amendments that were referred to the people by the Legislature on the average of about eight a decade.

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Evan Barrett: So if we--if we look at the '70s and say one, the Legislature spent a lot of time implementing the Constitution statutorily, the legal system was trying to get used to this new language, hadn't really sorted out what

do you have to argue about and what do you not have to argue about; we're too busy implementing probably. We had a judiciary that was the same judiciary as when the Constitution was formed so therefore they were kind of locked into the previous structure a bit--mentally at least, so not much happened in the '70s in terms--but what about the '80s? Did the '80s, anything significant happen in the '80s on the--?

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Betsy Griffing: There was--really the seeds of what we are going to look at in the '90s of significant progress in the Montana Constitutions, we saw those seeds in the '1980s. We saw for example large discussion on this provision of Full Legal Redress under the Montana Constitution. What does Full Legal Redress mean? And there were a group of Justices with the Montana Supreme Court really headed by Frank Morrison at the time that truly believed that the Montana Constitutional Provision of Full Legal Redress which is Section 16 of Article 2 meant for every wrong there is a remedy and that--that is in fact part of the language of one his cases.

00:21:18

We saw the Right of Privacy starting to get importance in Montana, Section 2 of--Section 10 of Article 2 and we saw how the Right of Privacy started to inform the protection against unreasonable searches and seizures. We saw in the 1980s a real definition of what individual rights meant in Montana. We didn't--under our new Declaration of Rights, Article 2 of the new Constitution we had all these discreet rights that hadn't been there before.

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And the Court and the Bar, the group of lawyers litigating under the Constitution said what--what is the scope and nature of these--of these--of these provisions? And it was in 1980 that--that again it was Justice Morrison said I'm--we're going to hold that all those rights listed in Article 2 of the New Constitution are going to be known as Fundamental Rights. And that's important to call them Fundamental Rights because that affects how the Court looks at legislative action infringing on those rights. If it's a Fundamental Right then the Legislature in order to infringe upon that right or burden that right has to show a compelling State interest. And what is a lot of the litigation you see in constitutional litigation is--what is a compelling State interest and what isn't a compelling State interest? And frequently that means the protection of the health, safety, and welfare, but again it's up to the Courts to determine for the most part the scope of that, although that's a natural separation of power tug between the Legislative Branch and the Judicial on what is a compelling State interest.

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Evan Barrett: Well there's a broad--whether or not the--you know how that--how that is applied depends on how broad the--the group of rights you're looking at are in a way and in that sense I wondered how does Montana for example compare with the US Constitution? And we have--we have a Declaration of Rights in here that looks like it's pretty--pretty strong.

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Anthony Johnstone: We do. And--and it is--it is strong. You know the--the US Bill of Rights back from 1791, a lot of those were cribbed from State Constitutions at the time. And while the Montana--1972 Montana Constitution borrowed back some of the ideas, particularly the ideas of--about equality which it amplified with the Dignity Clause, the Montana Constitution, our Declaration of Rights has depending on how you count at least 17 Rights that the--the Federal Constitution doesn't have. We also have many Rights that are not necessarily unique but rare among State Constitutions in providing an explicit Right to Privacy. Only a handful of States have a--an expressed Right to Privacy, in providing for environmental protection, a Right to a Clean Environment; only a handful of States have that, a Right to Participate and know about government action--not unique but one of the more strongly worded among only a handful. So all of these Rights don't exist at all at the Federal level and are rare among States.

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So the text of our Constitution which was--which we adopted in 1972 gave us a start on--on something new. Now you know where *we the people of Montana* took it is--is the story of the last 40 years.

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Evan Barrett: Uh-hm; well it seems like if we have this more expansive Declaration of Rights and they are supposedly fundamental they're not easy to chip away at then. I mean at this point have we had any serious erosion of any of those things in the Declaration of Rights in the last 43 years?

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Betsy Griffing: Well it's--that's an interesting question because I'm not sure if I'd look at it in terms of erosion because what that litigation over the last 40 years did was really look at what do those Rights mean?

00:25:43

Evan Barrett: What do they mean?

00:25:43

Betsy Griffing: What do they mean? And so it's hard to say whether they've been eroded or not when we weren't sure of the full scope and nature of those Rights. So for example with respect to the Right of Privacy, I mean the Right of Privacy in Montana--I don't know if you've had a program on it, but it's--I mean it was a huge debate by the Con-Con Delegates. But it says the--*the Right of Individual Privacy is essential to the wellbeing of a free society and shall not be infringed without the showing of a compelling State interest.* I mean essential to the wellbeing of a free society; that's a--that's a--that's a pretty--

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Evan Barrett: Pretty darned good statement isn't it?

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Betsy Griffing: --a pretty darned good statement. And we didn't know what that meant in Montana. For the longest time we thought it meant informational privacy and in the sense that it protects from the--the--it protects individuals from having the State government obtain information on you. It protects you from--it protects confidential information because what we have is when the State government obtains confidential information on an individual, we have kind of a companion provision of the Right to Know and that all people have access to the documents of State government.

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So if the government acquires information on an individual under the Right to Know often that information is not held private again without a showing of a compelling State interest. The Court is interestingly set up--

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Evan Barrett: There's a balancing act that is applied right?

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Betsy Griffing: Exactly; there's this balancing act that between the public's Right to Know and the Right of Individual Privacy. And what's interesting is and you've probably--is that--that you have the Right to examine all public documents except in cases in which the demand of individual privacy clearly outweighs the merits of public disclosure. So in a way it almost sets up the Right to Know--

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Evan Barrett: A little higher.

00:27:55

Betsy Griffing: --a little higher than that Right of Privacy.

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Evan Barrett: Now Privacy Rights in the Federal Constitution have been used as the basis upon which women's choice over medical care and ability to have abortions and things like that have been all--*Roe v. Wade* was under privacy. Has the Montana Privacy Right been adjudicated in any way that narrows it or expands it? Has it been a leveraging for--for Rights like the Federal has or have we had enough time for that?

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Anthony Johnstone: Well you know the--the privacy isn't in the Federal Constitution and so those--those cases are a function of our Right to Liberty.

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Evan Barrett: Implied Right--?

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Anthony Johnstone: Implied Right, yeah resulting from the--the obligation of the government to provide due process to us and not deprive us of liberty without--without due process. So Montana provides a much clearer pathway for the recognition of not just these Informational Rights but what the Court has called Autonomy Rights or you know we can think about it as liberty, the freedom to the Right to be left alone. And the Montana Courts have generally been out in front of the US Supreme Court in its interpretation of our Constitution relative to the Federal Constitution, famously really you know going into the '90s now on the **[Greisen]** case--was from 1997--became a model, actually cited dealing with Montana's Deviant Sexual Relations Statute and the Right of--the Right to engage in intimate relationships with a partner of your choice.

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In 1997 our Court recognized that our Montana's Right to Privacy included this Right to be left alone, particularly in these intimate relations. When the US Supreme Court reached the same conclusion in 2003 they cited Montana as one of just a few States that had led the way in recognizing that right showing that you know this is something that Americans value. Look at Montana. Look at these other States that have said this is what our privacy means to us.

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So generally with respect to the Right to Privacy in through the '90s Montana was ahead of the pack in our Court recognizing a relatively strong version of a Right to Privacy including not just a Right to confidential information but a Right to individual autonomy and--and liberty.

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Evan Barrett: So if in the '80s we started nibbling at the edges so to speak of trying to define some of these things and--and give them a little fuller meaning what happened in the 1990s?

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Betsy Griffing: Well in the 1990s I really think that interpretation of the Montana Constitution really took off. And it was Justice James Nelson, Terry Trieweiler; they looked at--

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Evan Barrett: We've had Justice Nelson as a guest by the way.

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Betsy Griffing: Great; great, as you should. And where they really looked at the scope and nature of what this Declaration of Rights means and Justice Nelson brought to the interpretation of the Montana Constitution a kind of dynamism that really is not seen in--in juris prudence very often. Anthony has written a lot of review articles on Justice Nelson that talks about him being a Hercules in terms of judicial interpretation of Constitution. And I think that's an accurate portrayal. And the **[Greisen]** case that we talked about is one; another case on autonomy privacy is the *Armstrong* case. And it as the Right to Choose a Medical Provider in the case of a--an abortion, and *Armstrong* is--is again a leader. I think we were a leader in--in that case as well of what does Montana Right of Privacy mean?

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What Justice Nelson did was he took a kind of holistic view of the Declaration of Rights so that the Right of Human Dignity that we see in our Equal Protection Clause used--he uses that to inform the--the--this already very strong Right of Privacy to give it this idea, this Right to be left alone, this Right of Human Dignity is included into this liberty interest. And I think this is something that is--is so Montanan in the sense of--of our focus on individual Rights. No matter what part of the political spectrum you're from often you can get both the right and the left to agree that we're all fighting individuals and it's this--these individual Rights, this Right to Human Dignity, this Right to Privacy that we can pretty much all--all agree upon.

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Evan Barrett: So the--the holistic approach meant you looked at the totality of the Rights and see how they played off against each other and strengthened each other? Is that the logic behind it or--?

00:33:11

Betsy Griffing: It was really just several Rights involved with respect to Justice Nelson, although he--he does say that the--the Declaration of Rights is not a cookbook. You know we can--what we can do is--is you have to look at

the nature of the Rights and the context in which they were created so that the Right of Human Dignity really becomes something more than just a policy statement. Whether or not that continued after Justice Nelson's decisions is something that--that we still wonder about.

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Evan Barrett: Your sense of the '90s?

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Anthony Johnstone: I think Betsy gets it exactly right. I think that was a--a particular moment in the Court's history--

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Evan Barrett: Some people refer to that as a Golden Age. Perhaps that's a subjective term but it depends on how you look--

00:34:06

Anthony Johnstone: Betsy has famously referred to it as--as a Golden Age. Another practitioner Jim [Gatz] has referred to the Court as sometimes Socratic, sometimes erratic, and I think he'd--. [Laughs] The Court was at its most Socratic in--in the 1990s.

00:34:21

Now this was a rare alignment of a particular set of Justices who were relatively progressive on a Court like Montana's when the State Supreme Courts elsewhere were beginning to turn more conservative. Montana actually tacked the other way and that alignment and actually not just a strong majority but in many of these cases were 6-1 or 7-0 on the--on the ultimate decision, created a constitutional moment in the late '90s that not only reached bold interpretations of the Right to Privacy, of potential--this Right to Dignity, began exploring that, the Right to a Clean and Healthful Environment--all of these--these big moves in Montana constitutional law really culminated in this moment in the late 1990s with the--the set of personnel that they had at the time, Justice

Trieweiler, Justice Nelson, Justice Regnier, Justice Leaphart, and gelled around a particular idealistic vision of our Declaration of Rights in particular.

00:35:45

Evan Barrett: Uh-hm and so the--the expansive--kind of an expansive definition of things was occurring during this period. It's interesting and people can make a difference; I guess that's one of the basics. We talk about elections making a difference. We elect the judiciary. We had in our discussion on judiciary whether that was the best way to do it or not but that's what we do. We choose to elect the judiciary and so who we elect then makes a difference although they can't--supposedly couldn't go too far afield and yet it does make a difference and the mixture of people made a difference right there.

00:36:24

But you know you can also get retrenchment back. There's a political reaction period to things. If--if--there's an inherent thing and you know if you think of politics as--as--it's not a straight line political spectrum like this. It's a bell curve, you know and the bulk of people sit underneath the top--the middle of that bell. And they're kind of common sense, a little right of center, a little left of center, and--and you don't go too far out here and suddenly the electorate is saying pull it back. Now some people want to pull it all the way over here and all the way over there, but inherently are there things that work in the judiciary that kind of keep it under the bell?

00:37:10

Anthony Johnstone: Yeah; well a couple of things. One of the things is the Constitution itself, it provides for elections but it provides for eight-year terms, the longest terms for Justices that our Constitution provides for any elected official. And so that--that eight-year term is intended to be a buffer. One of the reasons that the Constitution was slow to be implemented at the judicial level is the same reason--it goes back to those eight-year terms that the idea is that it should be buffered. Constitutional change should move deliberately.

00:37:43

But the other--in looking at this period that we have to remember is the Constitution by design belongs to the people. The Judges are put there; the people ought to take credit for what the Supreme Court does--

00:37:55

Evan Barrett: It does say *we the people*, right there--*we the people*.

00:37:58

Anthony Johnstone: Right and so the Court will never get too far out of line with values of--of we Montanans and with our constitutional values and with what we take the Constitution to mean. And if the Court ever were to move too far to one side or the other, away from fidelity to the Constitution as we Montanans, not we lawyers or law professors or even we Supreme Court Justices, but the Constitution that we Montanans believe in, those Judges won't last very long. And when the elections come up again and--and even if you went to appointments, that understanding of we the people of Montana, our belief in the Constitution, our faith in the Constitution is what--what ultimately drives the Constitution in one direction or another and we ultimately are going to be the ballast that--that is going to keep the Court from moving too far in one direction or another insuring that they keep faith with our understanding of the Constitution and not--not any lawyer's understanding of the Constitution.

00:39:04

Betsy Griffing: And--and I also think that within not just the electoral process but within the rules of judicial interpretation and philosophies of judicial interpretation itself you'll see the swinging of a pendulum, you know a pendulum. So--so for example you may have had a very activist Court in the late '90s; that goes against maybe against a more conservative philosophy of judicial interpretation which is I think more prevalent today where the--the--the judicial philosophy actually is let's just assign the case in front of us and let's not be so expansive on Constitutional Rights, let's not address constitutional issues if we don't absolutely have to.

00:39:47

So it's not just this check and balance with the electorate which of course is very important but it's also within the--the judicial community itself.

00:39:54

Evan Barrett: Now out of this are there any more hallmark things out of the 1990s that you'd want to mention that jump out at you that came from that period that are worth noting?

00:40:08

Anthony Johnstone: Well we haven't talked too much about--Betsy has referred to the Right to Dignity which opens our Equal Protection Clause and that was something that started going in the late 1990s and really was--reached its peak in the early 2000s. The Right to Dignity is something that's nearly unique to Montana among the States. There are some other States that say dignity but not in the way that--the way that we say it. And it was actually--it has a pedigree in the Constitution of Puerto Rico, the Universal Declaration of Human Rights, the German Constitution; it is in some ways the most international and multinational cosmopolitan idea we have in our Constitution.

00:40:56

Now it's right next to the words that talk about equality but there are some cases in the early 2000s, particularly dealing with a cruel and degrading treatment of individuals with respect to civil commitment, with respect to prison conditions where the Court began to say--in a way that no other Constitution in the United States can say that the Right to Dignity is implicated here and that it is inter-woven with these other Rights of Cruel and Unusual Punishment or Due Process. That really was where this idea that Justice Nelson has of reading these together peaked in around 2000--2003, reached its peak with a Right to Dignity.

00:41:47

That was probably the apex after which there's generally been much less activity. Now just with respect to Dignity but with Respect to Privacy and the Clean and Healthful Environment as well.

00:42:02

Betsy Griffing: That's right. And I think the Court really started, once it recognized or at least implicitly recognized the Right of Human Dignity as a separate Right everybody you know as a litigating attorney and at that time I was with the ACLU, we all jumped on that--that Dignity bandwagon. What you do is--

00:42:21

Evan Barrett: What can we put under that? [*Laughs*]

00:42:23

Betsy Griffing: You bet. *[Laughs]*

00:42:24

Anthony Johnstone: And we saw that at the State perspective, too. Every brief coming in said *dignity, dignity, dignity*, but at the bottom we weren't sure what it meant. And beyond these two cases, the Court didn't have a working definition that could--that lawyers could take anywhere.

00:42:41

Evan Barrett: Uh-hm; now when the Constitution stated things explicitly you think they have meaning, I mean an example there's in terms of the Welfare issue, the question of *May vs. Shall*, I mean the language written by the Constitution says the State shall do certain things. The language written by the Constitution says the State *shall* do certain things. How did that play out? Is that--that seemed like there's been some erosion in that; what does--what does *shall* mean or is it--is it soft?

00:43:09

Betsy Griffing: Well there--there certainly is precedent where the Montana Supreme Court has said *may shall mean shall and shall mean may*, so that's--that's just one of those kinds of things that I think people get frustrated with the legal profession about. But the 1972 Constitution started out with this provision that the Montana Legislature *shall* provide for the needy in the State and that was litigated in the 1980s. And it--there was a big concern then with respect to legislative--when the Legislature attempted to reduce Welfare benefits, the--the Montana Supreme Court said no; you have to have a higher standard. This is a Constitutional Provision. You can't just give us a good reason as to why you're say setting 50 or 30 as the deadline for not obtaining Welfare benefits. You have to give us not quite a compelling reason, not quite just a good reason, but it has to have a legitimate State interest. And they were invalidating the--the Supreme Court was invalidating these limits set on Welfare benefits, so we had a Constitutional Initiative. I don't remember if it was--it must have been a Referendum.

00:44:31

Anthony Johnstone: Yeah; this is--this is one of probably the best episode in Montana constitutional history to understand the--call it a conversation between we the people who get to write the Constitution and get to amend the Constitution, between the Courts and their reading of the Constitution and between the Legislature which also has a duty to read and interpret the Constitution when it makes laws.

00:44:55

This Welfare provision I believe it was Article 12, Section 3 provided--said that the Legislature *shall* provide such economic assistance as may be necessary for those who may need the aid of society. Now this was not a product of the *crucible of change* in 1972; this was around in the 1889 Constitution and--and no one had really pushed it at the time. And in fact, when the voters voted on this they were told that this was not a change from the 1889 Constitution. The voter information said that--that this provision leaves it up to the Legislature to determine whether the State, County, or combination of the two must provide Welfare.

00:45:41

So when the Court began invalidating the Legislature's attempts to pull back Welfare assistance in the 1980s, the Legislature reacted and it just kept passing laws that you know a little less, pushing, pushing, pushing. The Court would strike it down; the Legislature would try again. The Court would strike it down. Finally they appealed to the people who are the master of the Constitution and said we want you to change that *shall* which is the basis for the Court telling us that we have to provide Welfare benefits--we want you to change that to a *may*. And there it was argued and debated publicly and the people said yeah; we'll change it to a *may*. And so the Court's interpretation of this provision changed.

00:46:27

This could be one of those areas in which the Court got out of step with the people's understanding of the Constitution and the--this Amendment provided a reminder that it's the people, not the Courts who are ultimately--get to write the Constitution and say what it means.

00:46:47

Evan Barrett: When you talk about the people being in charge so to speak, as Carl [Sandberg] famously said you know it's the people that are in charge, it--that shows itself through--in Local government structure by saying that every 10 years there would be a review of Local government or the--the choice was there for--for Local

governments to say we're going to either take a good look at it or we're going to live with what we have. Something similar--is that a normal thing, but something similar for our Constitution--

00:47:20

Anthony Johnstone: And it's a--it's a very--Jefferson with the original Constitution, he didn't have much of a say in the writing of it but one thing he thought is whatever you guys come up with I think we ought to revisit every generation.

00:47:32

Evan Barrett: Well you know that old saying that you know today's solution is tomorrow's problem.

00:47:38

Anthony Johnstone: Right; so we have to ask ourselves that. *[Laughs]* And--and so the--the Montana Constitution provides for every two decades--provides for--put to the vote of the people a Constitutional Convention Call and the first one was in 1990 and the people rejected it overwhelmingly. The most recent one was 20 years after that in 2010 and the people rejected the Constitutional Call again although by a slightly narrower margin. And it's not something that a lot of other States or nations have, but it is so important, as you say Evan to re-up our popular commitment to--to this document and what it means to us.

00:48:19

To have every 20 years--in some ways you know it just makes sure that we never get to the point we got in the late '60s where we were all living under a Constitution that everyone had kind of agreed was broken in one way or the other. And last time we checked in 2010 Montanans still loved and stood by our Constitution. And that's something--it's a good reminder to all of us.

00:48:44

Evan Barrett: Well in essence, the vote is an opportunity for affirmation and reaffirmation. So in a sense you've forced the test of time to--for people to take a look at it. It's fairly unique I think but--. Now the way in which change occurs in the Constitution and we talked a little bit before about some of that Amendment interpretation,

how--what's really been the primary vehicle? Has there been any primary vehicle? Do we see more done by Judges in terms of interpretation? Do we see more by Amendment going on as we look at the Constitution for the last 43 years?

00:49:35

Betsy Griffing: Well I think it's really two different aspects, right. The--the types of Amendments unless you look at the Welfare--I think the Welfare cases is a--is a--a good example of judicial decision-making informing the public and then precipitating change. But from my perspective as a litigator I see most of the change occurring through litigation and through judicial decision-making. And that's what really informs the interpretation of the Constitution is actually the judicial interpretation, the nature and scope of those rights. *Marbury vs Madison* are ultimately vested in the judiciary. And so I see the judiciary as really fleshing out what those--what those Constitutional Rights mean.

00:50:27

Evan Barrett: Now where would we be if Justice Marshall hadn't been [*Laughs*] around to talk and say this is what *Mar vs. Madison* is about? Just for those that are watching that's the--the actual Right of Interpretation of Legislative Statute and everything belongs to the Courts.

00:50:46

Betsy Griffing: Judicial review.

00:50:47

Evan Barrett: Judicial review.

00:50:48

Betsy Griffing: But as Anthony mentioned that's something that--especially within the State of Montana is very hotly contested where the--and the Bush Administration hotly contested that as well with the idea that the Executive Branch has an equal authority to interpret the--the Constitution and the Montana Legislature of course says we have

an equal authority to interpret the Constitution. Yes, they do and they go ahead and they pass laws. But who gets to invalidate those laws is the--and has the final say is the Judiciary.

00:51:20

Anthony Johnstone: Well the--the short answer is we'd be in France because when Thomas Jefferson executed the Louisiana Purchase he knew that it was--and he opined that it was unconstitutional. And he actually really resented Chief Justice Marshall who took a broader reading of the Constitution's national powers understood to be a continental power. Jefferson in this instance actually agreed with--with Marshall and went ahead and asked for forgiveness rather than permission from the Courts and Congress and the Louisiana Purchase, the idea of Montana is based on a--an adventurous bold and--and arguably incorrect reading of the Constitution.

00:52:07

Evan Barrett: You know human nature being what it is, isn't it true that the question of whether a--a Court is activist or not activist or whether the judicial review is appropriate or not appropriate kind of depended on where you stand on the issue in front of the Court? I mean--

00:52:24

Anthony Johnstone: Yeah; it does, yeah.

00:52:26

Evan Barrett: I'm not saying the Courts deal with it that way but among the average citizenry what I find is that if people don't like what the Court did, they say oh they're a bunch of activists you know. Look what they did. And if they like what they did they say oh, they're just exercising appropriate judicial restraint and--and doing an appropriate review. So I see--so often it's your ox gored; how is your ox being gored, and if it is then you can argue you know--

00:52:54

Betsy Griffing: I think that's exactly right. Judicial restraint is in the eye of the beholder, right. *[Laughs]* And I think that's what you're saying and--and I think in many ways that's--that's very true. And we see--and we see examples of that but there are certain Justices who I don't think that's true of. I think former Chief Justice Gray for example, she exercised--she loved the Montana Constitution. She is a Montanan Constitutional Scholar. But she believed in judicial restraint. And you will see her for example really taking Justice Nelson on in terms of the expansion of the Right of Human Dignity because she says no; look. Let's look at the context of that--that Right of Human Dignity is in the context of Equal Protection. And you can't tell me that the Right of Human Dignity informs Privacy when it's only in the context of Equal Protection.

00:53:51

Anthony Johnstone: And I mean there is--I think that's a great example. I--I think the more useful way to think about these things is fidelity. Are you faithful to the meaning of the Constitution however you find it, and are you going to make a good effort at trying to figure out what that meaning is?

00:54:07

In the case of--of Chief Justice Gray and then Justice Gray with Chief Justice Turnage in the--in the *[Greisen]* case, you know Justice Nelson wrote a beautiful ode to Privacy in that case. Justice Gray and Chief Justice Turnage wrote a much shorter opinion that said now wait a second; this just seems to treat gay and lesbian Montanans differently than heterosexuals. And this is just a violation of equality. We don't have to go into all of this abstract philosophical privacy stuff. And the--again the--the irony of that is that it was that decision recognizing the basic equality of people regardless of their sexual orientation that had legs as we go through the Constitution. So that's--that is what was vindicated in the *[Inaudible]* case which involved government benefits.

00:55:06

Evan Barrett: Was that--was that a minority opinion?

00:55:09

Anthony Johnstone: It was--yeah; it was a concurrence. They--there were five Justices who said privacy, privacy, privacy, and Chief Justice Turnage and Justice Gray at the time said no; we actually think this is just about equal

citizenship, Equal Rights. And it was their view of the gay rights issue that has eventually prevailed in--in Montana in the *Snetsinger* case which dealt with the unequal provision of--of State benefits to domestic partners.

00:55:37

Evan Barrett: Now one of the things when we drafted a new Constitution back in 1972 was the--it absolutely had to be done based upon the review, it was based upon too much detail, too much legislation in the Constitution. You know let's just pour in the details and then we protect ourselves with all that stuff. How have we fared in terms of avoiding that in the--?

00:55:59

Anthony Johnstone: Well the--the--I think these great debates about dignity and privacy show the opportunities and challenges that happen on the other side when the--you know thinking about Delegate Bob Campbell talking about well if we actually put in the Constitution what we were thinking in terms of the Right to Privacy, the Right to a Clean and Healthful Environment, no one would have voted for it.

00:56:24

Evan Barrett: [*Laughs*] Yeah.

00:56:24

Anthony Johnstone: And that--that raises a problem, right that--that--. Like you're not trying to slip something by the voters when we create a Constitution; so--so you can go too far in the other way. But I think generally with respect to our Declaration of Rights it's--it's framed in a way I think--Section 4 for example, it starts with Dignity but then it moves right on to say Equality and then it moves on even further to say and don't discriminate. That--that really has a kind of elegant structure that--that starts at the most abstract and works down to on the ground, do not discriminate. You know to the extent that legislation is entered into the Constitution it's come as a result of the Legislature proposing Constitutional Amendments or Initiatives. And so some of our Amendments for example an Amendment to Prohibit Real Estate Transfer Taxes or--

00:57:13

Evan Barrett: So that appears to be quite legislative. We're--we're starting to run out of time here. I told you the hour was going to go very fast.

00:57:20

Betsy Griffing: I just wanted to add with respect to that last--that last point; we want these Constitutional Provisions to be broad. That was the right way to approach it. That's the whole point of the Constitution especially in terms of--

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Evan Barrett: Have we stayed true to that though pretty much?

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Betsy Griffing: I think we have. I think we have; yeah.

00:57:37

Evan Barrett: And I think that's a--and--and so as we approach closing this we're entitling this segment *The Last Best Constitution in the Last Best Place*. Is that an appropriate way to look at it?

00:57:52

Betsy Griffing: I hope it's not the last best Constitution. No; I think--I think this is an evolving document. This is a living document. So the Constitution is good but what does the Constitution mean? I worry about the last best; I'll just go with best.

00:58:07

Evan Barrett: I'm comparing it to other States.

00:58:09

Betsy Griffing: I'll just go with best.

00:58:10

Evan Barrett: Well we are--we are pretty much out of time and--and for both of you, you bring so much expertise to the table here. We really, really appreciate this perspective, looking back to see how have we fared with our Constitution because I think we are all proud of what we started with and I think one can say that we still can be proud of what we have. And the *people* is where the power is and that's what this whole series is about. So we have to all keep an eye on our Constitution along with other things. Thank you for joining us *In the Crucible of Change*.

00:58:43

Anthony Johnstone: Thank you Evan.

00:58:43

Betsy Griffing: Thank you very much.

00:58:45

Evan Barrett: We'll look forward to seeing you in the next segment.

00:58:49

[*Music*]

00:59:00

[End Last Best Constitution in the Last Best Place - Anthony Johnstone & Betsy Griffing]