Montana Law Review

Volume 85 | Issue 1 Article 5

10-27-2024

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I. Introduction

In recent years, the Montana Supreme Court's interpretation of the Montana Constitution has become, as some have said in other contexts, "a matter of extreme importance."[1] Across the nation, eyes focus on state supreme courts and their interpretations of state constitutions to decide the most important issues of the day.[2] Political observers note the increased spending on those races,[3] and in 2022, the race between incumbent Justice Ingrid Gustafson and challenger James Brown was the most expensive supreme court race in Montana history[4]—indicating the terrain is shifting here, too.[5]

Given the constancy of cases coming before the Montana Supreme Court concerning state constitutional law,[6] there is a want for scholarship discussing the Court's interpretative methods. Tyler M. Stockton's 2016 essay, *Originalism and the Montana Constitution*, is the only attempt in recent years to seriously look at this important question.[7] This Comment seeks to critique and build on Stockton's piece. In doing so, the analysis here rests on three assumptions.

First—it has been said many times, to the point of becoming cliché,[8] but—"[w]e are all originalists now."[9] To that extent, this Comment agrees with

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1. *See* Rasul v. Bush, 542 U.S. 466, 489 (2004) (Scalia, J., with Rehnquist, C.J. & Thomas, J., dissenting) (whether habeas statute extends to aliens detained by the U.S. military overseas); Alicia Keys, *Teenage Love Affair*, *on* As I Am (J Records 2007) (one's first teenage love affair).

2. Kate Zernike, *A Volatile Tool Emerges in the Abortion Battle: State Constitutions*, N.Y. Times (Jan. 29, 2023), https://perma.cc/W3CZ-4WPR.

3. Nathaniel Rakich, *How Did State Supreme Court Races Get So Expensive?*, FiveThirtyEight (Mar. 16, 2023), https://perma.cc/JQ39-SSJ9.

4. *Id.*

5. Zernike, *supra* note 2 (quoting John Dinan).

6. *See* Monte Cole & Adam Taub, *The Montana Supreme Court – The Statistics*, 84 Mont. L. Rev. 371, 383 (2023).

7. *See generally* Tyler M. Stockton, *Originalism and the Montana Constitution*, 77 Mont. L. Rev. 117 (2016).

8. *See, e.g.*, Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. Pa. L. Rev. 261, 270 n.22 (2019); James E. Fleming, *The Inclusiveness of the New Originalism*, 82 Fordham L. Rev. 433, 438 (2013) (part of *Symposium: The New Originalism in Constitutional Law*); Steve Emmert, *Are We All Originalists Now?*, ABA Appellate Issues (Feb. 18, 2020), https://perma.cc/G4VQ-LCT2.

9. *The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing on S. 111–1044 Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010), https://perma.cc/RBG4-8PWB. *See also* G. Alan Tarr, *State Constitutional Design and State Constitutional*

Stockton's insistence on originalism (in some form) as the proper method of interpreting the Montana Constitution. To those who still hold out hope that originalism will soon be replaced by some other interpretative framework—as it has been said in other contexts, "That is not going to happen."[10]

Second, in spite of the above—"I am not a nut."[11]

Third and finally, there should be "fierce independence regarding the meaning of state constitutions."[12] In analyzing the work of the Montana Supreme Court, this Comment will devote only as much ink as is necessary to the originalist academy's scholarship, given the primary focus of that scholarship on the federal constitution. However, originalism is not and should not be limited to federal constitutional law, as its origins lie in the interpretation of state constitutions.[13] This Comment concerns itself not with appeasing the saints and martyrs of the originalist movement,[14] but in settling on and defending an interpretive framework that is workable when applied to the Montana Constitution. Call it faint-hearted originalism,[15] lion-hearted originalism,[16] or some new pejorative.[17]

Part II of this Comment looks at the relevant background in building a response to Stockton, including the drafting and ratification of the 1972 Montana Constitution and the 1979–81 publication of the *Montana Constitutional Convention Verbatim Transcript*, referred to throughout as simply "the Transcripts." Part II also discusses the different flavors of originalist methodology and examines which one the Montana Supreme Court applies in its use of the Transcripts. Part III looks at Stockton's advocacy for the use of other

Interpretation, 72 MONT. L. REV. 7, 7 (2011) ("There is a growing consensus that the interpretation of the federal Constitution should be rooted in the document's text and original meaning.").

10. *See Breaking Bad: Blood Money* (AMC television broadcast Aug. 11, 2013), *available at* https://perma.cc/4EQ8-2N2R.

11. Adam Liptak, *In Re Scalia the Outspoken v. Scalia the Reserved*, N.Y. TIMES (May 2, 2004), https://perma.cc/P7QJ-93XF (quoting Antonin Scalia speaking to the Philadelphia Bar Association). Justice Scalia apparently also used this characterization to distinguish his interpretive philosophy from that of Justice Clarence Thomas. *See* FORA.tv, *Justice Scalia on Justice Thomas' Originalist View*, YOUTUBE (Dec. 10, 2012), https://perma.cc/ZSG9-4Y3H (Jeffrey Toobin sharing an anecdote from a prior encounter with Justice Scalia).

12. Jeffrey S. Sutton, *Browning Symposium Opening Comments*, 84 MONT. L. REV. 9, 13 (2023).

13. Tarr, *supra* note 9, at 9.

14. *See, e.g.*, Peter Shamshiri, *The Enduring Myth of Robert Bork, Conservative Martyr*, BALLS & STRIKES (Nov. 29, 2021), https://perma.cc/59NY-4W6J.

15. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

16. Lawrence B. Solum & Max Crema, *Originalism and Personal Jurisdiction: Several Questions and a Few Answers*, 73 ALA. L. REV. 483, 531 (2022) (citing Logan Olson, Presentation at the University of Montana Graduate Conference: Lion Hearted Originalism and the Second Amendment (Feb. 28, 2020)).

17. The term "originalism" is believed to have been created by one of its critics. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 n.1 (1980) ("John Ely uses the term 'interpretivism' to describe essentially the same concept. . . . At the cost of proliferating neologisms I have decided to stick with 'originalism.'").

ratification-era documents and argues against their usefulness in seeking the original meaning of the Montana Constitution. This Comment then argues for the continued centrality of the Transcripts as the best evidence of that meaning, while offering a revised framework for the Court to use in consulting them. Part IV concludes this Comment.

II. Background

A paper analyzing a method of constitutional interpretation that has been described as "a backward-looking theory that focuses on the decisions of long-dead people" would be remiss to not include a little history.[18] However, rather than rehashing everything that could be—and has already been—written on the history of the Montana Constitution, this Comment seeks to provide a foundation that is "sufficient, but not greater than necessary."[19]

In taking some liberties on what constitutes a constitution, one could view Montana's current constitution as its fifth. As the source of fundamental law during the territorial period, providing for Montana's inaugural legislature, governor, and supreme court, the 1864 Organic Act could be considered Montana's first constitution.[20] The second had its moment in 1866, when a skeleton crew of "delegates" met in Helena for a "convention" and drafted a proposed constitution for statehood to be submitted to Congress.[21] After that, it was lost—either on the journey to Washington,[22] or under a stack of papers in Helena.[23] Almost 20 years later, Montana took another shot, and its third constitution fared better, in the sense that scholars at least know

18. John O. Mcginnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 Geo. L.J. 1693, 1695 (2010).

19. 18 U.S.C. § 3553(a) (2018) (standard for imposition of a sentence under Federal Sentencing Guidelines).

20. Larry M. Elison & Fritz Snyder, The Montana State Constitution 3 (2011). Public figures—and Montanans generally—like to claim that President Abraham Lincoln, upon signing the Organic Act, said, "My favorite state has not yet been invented. It will be called Montana, and it will be perfect." *See, e.g.*, Lauren Wilson, *Hundreds gather for Monica Tranel general campaign kickoff*, Missoula Cnty. Democrats (July 14, 2022), https://perma.cc/M545-YLKP (referencing congressional candidate's use of the quote at a campaign event); *Home page*, Resort at Paws Up, https://perma.cc/E3BZ-6YBV (last accessed Nov. 22, 2023) (luxury resort using the phrase to market to potential out-of-state clients). But he probably never said that, as it is absent from reputable compilations of Lincoln quotations despite its popularity and poeticism. *See, e.g.*, *Lincoln Quotes*, Abraham Lincoln Presidential Library & Museum, https://perma.cc/6Q3A-N94V (last accessed Nov. 22, 2023); *Abraham Lincoln*, Wikiquote, https://perma.cc/L5B8-KCNH (last accessed Nov. 22, 2023); David Widger, *Quotes and Images from the Writings of Abraham Lincoln*, Project Gutenberg (Oct. 26, 2012), https://perma.cc/J8ZL-B8M6. *See also* Geoff Nunberg, *Lincoln Said What? Bogus Quotations Take on a New Life on Social Media*, NPR (May 15, 2017), https://perma.cc/UW8L-DUHJ (discussing proliferation of fake Lincoln quotes).

21. Kim Briggeman, *Montana History Almanac - State's first constitution drafted, lost*, Missoulian (Apr. 8, 2008), https://perma.cc/Q8YW-53HJ; Anthony Johnstone, The Montana Constitution in the State Constitutional Tradition 21 (2022).

22. Johnstone, *supra* note 21, at 21.

23. Briggeman, *supra* note 21.

where it went to die: Following an 1884 constitutional convention—where full records were kept of the proceedings—the delegates submitted their new proposed constitution twice to Congress without success.[24]

In 1889, after Congress enacted legislation enabling the admission of Montana into the Union, delegates met again to give it another shot.[25] With their goal to create what has since been viewed as merely a "tool to achieve statehood," rather than a "well-thought-out structure of governance," the delegates simply re-adopted the failed 1884 constitution almost in its entirety[26]—a detail that is important for interpretive purposes, discussed later in Part III. After the territorial residents ratified the document—which, at a length of 28,000 words, one doubts they read[27]—Montana became a state at last.[28]

For a number of social and political reasons outside the scope of this Comment, by the mid-20th century, Montanans had become dissatisfied with their constitution, and calls came from both elected officials and the electorate for a new constitutional convention.[29] A legislatively-created committee recommended a referendum be put to the voters on whether to call such a convention,[30] and with one on the ballot in November 1970, the voters demanded a constitutional convention by nearly a two-to-one margin.[31] One year later, the people elected their delegates to the convention,[32] with all current members of the Montana Legislature barred from serving.[33] The first regular session of the convention met in Helena on January 17, 1972, and over 56 days, the delegates drafted a new constitution for the State of Montana, concluding their work on March 24.[34] On June 6, 1972, the voters ratified the new constitution—but, in contrast to the referendum calling the convention, by only the slimmest of margins: 116,415 to 113,883.[35]

In 1977, the Legislature tasked a group of legislative staff to edit and publish the convention proceedings, eventually appropriating $316,000 to the

24. Elison & Snyder, *supra* note 20, at 5.

25. *Id.* at 6.

26. *Id.*

27. *See, e.g.*, The Daily Show, *Jordan Klepper Sees It All at the Capitol Insurrection*, YouTube (Jan. 12, 2021), https://perma.cc/SV6H-7LHJ (agitated Trump supporter at U.S. Capitol on January 6, 2021, taken aback at the prospect of reading the "entire" 7,591-word U.S. Constitution).

28. Elison & Snyder, *supra* note 20, at 7.

29. *Id*. at 9–12.

30. Brian Cockhill, *The Movements for Statehood and Constitutional Revision in Montana, 1866-1972*, *in* 1 Montana Constitutional Convention Verbatim Transcript v, vi (1979).

31. Elison & Snyder, *supra* note 20, at 12.

32. Cockhill, *supra* note 30, at vi.

33. Leo Graybill, Jr., *Foreword*, *in* 1 Montana Constitutional Convention Verbatim Transcript i, i 1979).

34. *Id.* at ii; Cockhill, *supra* note 30, at vi.

35. Cockhill, *supra* note 30, at vi.

project.[36] The first two volumes—containing background information, rules, and proposals from the committees and individual delegates made throughout the convention—were published in 1979.[37] Finally, in 1981, after four years of work by dedicated staff, the Legislature published five additional volumes containing the full transcript of proceedings and debates throughout the entire convention.[38]

This history created at the convention and compiled and edited in the decade that followed now "serves as an important source of constitutional meaning."[39] The Montana Supreme Court relies on these Transcripts to such a degree in determining the meaning of the text that its interpretative framework is now described as originalist.[40] However, the proper role of these Transcripts in determining the meaning of the Montana Constitution—its *original* meaning—remains disputed.

First, in Section A, this Comment reviews the prominent schools of originalist thought relevant to framing the debate regarding the interpretation of the Montana Constitution. Later, in Section B, this Comment discusses the Montana Supreme Court's use of the Transcripts in determining the meaning of the text.

A. A Crash Course on Originalism

Stated in the plainest terms, originalism is the interpretive philosophy that asserts a written constitution must be "interpreted as it was understood when it was drafted and ratified," typically to the exclusion of "the meaning that subsequent generations have ascribed to it."[41] Although non-originalists occasionally consult historical sources as persuasive authority in resolving constitutional questions,[42] originalism is unique among other

36. Diana S. Dowling, *Preface*, *in* 3 Montana Constitutional Convention Verbatim Transcript (1981).

37. *See generally* 1 Montana Constitutional Convention Verbatim Transcript (1979); 2 Montana Constitutional Convention Verbatim Transcript (1979).

38. *See generally* 3 Montana Constitutional Convention Verbatim Transcript (1981); 4 Montana Constitutional Convention Verbatim Transcript (1981); 5 Montana Constitutional Convention Verbatim Transcript (1981); 6 Montana Constitutional Convention Verbatim Transcript (1981); 7 Montana Constitutional Convention Verbatim Transcript (1981).

39. Johnstone, *supra* note 21, at 27.

40. Stockton, *supra* note 7, at 134.

41. Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. Rev. 217, 226 (2004).

42. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 489 (1954) ("[O]ur own investigation convince[s] us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced.").

interpretive methods in that it "assigns dispositive weight to the original understanding of . . . the constitutional provision at issue."[43]

James Madison, the so-called father of the federal constitution,[44] is cited as an advocate for originalist interpretation.[45] Madison indeed expressed that the text of the constitution must be "fixed in its meaning and operation,"[46] as "changing the meaning of words and phrases" over time would defeat the purpose of a written constitution in facilitating stability and order.[47] However, the truth is that Madison's philosophy on constitutional interpretation was not itself fixed. Earlier in his life, including during the 1787 constitutional convention in Philadelphia and the subsequent ratification debates, Madison viewed the constitution as an incomplete document that would need new meanings and constructions to be drawn from as time went on.[48]

Central to the issue of this Comment is that, even among originalists, "there is plenty of room for disagreement."[49] There are at least four approaches to originalism—approaches to determining the "original meaning" of the text—that merit discussion. First, some interpreters look to "original intent," or what the text meant to the framers who drafted it.[50] Second, others look to "original understanding," or what the text meant to those who voted to ratify it.[51] Third, there is its "original *public* meaning," or what the text would have meant "to ordinary readers, speakers, and writers of the English language, reading a document of this type, at the time adopted."[52] A final flavor of originalist interpretation is the idea that a text should be interpreted consistent only with its "original expected application," or how those living

43. Smith, *supra* note 41, at 226.

44. *See, e.g.*, West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 n.9 (1994).

45. *See, e.g.*, Stockton, *supra* note 7, at 127.

46. Letter from James Madison to Charles K. Ingersoll (June 25, 1831), *in* 4 Letters and Other Writings of James Madison 183, 184 (J.B. Lippincott & Co. ed. 1865), *available at* https://perma.cc/CN8Y-LWF5.

47. Unsent Letter from James Madison to Professor Davis (1833), *in* 4 Letters and Other Writings of James Madison 232, 249 (J.B. Lippincott & Co. ed. 1865), *available at* https://perma.cc/CN8Y-LWF5.

48. Jonathan Gienapp, The Second Creation: Fixing the American Constitution in the Founding Era 332 (2018).

49. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 45 (1997) (discussing disagreement in determining the original meaning of a text); *see also* Smith, *supra* note 41, at 226–27 ("Some have argued that the understanding of the framers themselves is authoritative; others have maintained that the understanding of those who voted in state ratification conventions is dispositive; still others have focused on the understanding of average citizens at the time of the framing.").

50. Rob Natelson, *Documentary History of the Ratification of the Montana Constitution*, Alexander Blewett III Sch. of Law, https://perma.cc/LGN8-Z9S5 (last accessed Nov. 22, 2023).

51. *Id.*

52. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 Geo. L.J. 1113, 1118 (2003). The literature uses both an "ordinary person" and a "reasonable person" standard for the purpose of determining the original public meaning of a text. *See id*. This Comment does not see an important distinction between the two terms and uses them interchangeably. *See also* Natelson, *supra* note 50.

at the time the text was ratified "would have expected it would be *applied*."[53] This narrow interpretive method is especially controversial and has been particularly criticized; for example, such an interpretation would arguably preclude the Fourteenth Amendment's equal protection guarantee from applying to women.[54]

In the interplay between original understanding and original public meaning, some have argued that the former should trump the latter, and that original public meaning should only come in "[w]hen no unified understanding is recoverable," such as when the ratifiers were the public at the polls.[55] However, prominent originalist Robert H. Bork argued it is the other way around, describing original understanding as "a shorthand formulation" of original public meaning, as the ratifiers' understanding should be interpreted as being consistent with what a reasonable member of the public—even one who did not participate in the ratification vote—would have understood the text to mean.[56]

Central here, Stockton's thesis rested on his criticism of original *intent* as a source of constitutional interpretation.[57] Similar sentiments are common, with one scholar arguing that "almost no competent constitutional lawyers think the meaning of a constitution is set by the intent of its drafters."[58] Such criticism is perhaps hyperbolic, however, and reasonable minds can disagree. For example, there was a time when the U.S. Supreme Court agreed that interpreting the constitution "must necessarily depend on . . . the meaning and intention of the convention which framed and proposed it for adoption and ratification."[59] Even Chief Justice Salmon Chase looked to "the discussions *in* the Convention" and "the intention *of* the Convention" in determining the scope of Congress's taxation power.[60] Madison himself discussed the role of the courts in interpreting the constitution as "settl[ing] its meaning and the intention of its authors."[61]

Admittedly, however, if there is a consensus, it has been a move away from original intent and toward something else.[62] This distaste for original

53. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 296 (2007) (emphasis added).

54. *See id.* at 302.

55. Natelson, *supra* note 50; *see also* John Wolff, *Trailing in the Wake: The Freedom of Speech in Montana*, 77 MONT. L. REV. 61, 73 n.62 (2016) ("'Original public meaning' is often used when the 'original understanding of the voters' is unascertainable.").

56. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990).

57. *See* Stockton, *supr*a note 7, at 117.

58. Rob Natelson, *Montana Constitution Project Unveiled at UM Documents*, MONT. LAW., May 2008, at 14, 14.

59. Rhode Island v. Massachusetts, 37 U.S. 657, 721 (1838).

60. Veazie Bank v. Fenno, 75 U.S. 533, 540–41 (1869) (emphasis added).

61. Unsent Letter from James Madison to Professor Davis, *supra* note 47, at 249.

62. Smith, *supra* note 41, at 226.

intent, at least in interpreting the federal constitution, is supported by the fact that the delegates to the 1787 Philadelphia Convention declined to keep any official transcript or record of the proceedings besides noting the motions and votes.[63] Some delegates even proposed destroying what little records *were* kept, as they could not see "any interpretive value to the records of the convention."[64] In addition, although Madison took notes throughout the convention for his own records, he refused to publish them during his lifetime.[65]

Later, in Part III, this Comment takes sides on the most appropriate method for interpreting the Montana Constitution. However, before getting there, it is necessary to discuss the Montana Supreme Court's current approach.

B. The Transcripts in Constitutional Interpretation

Since the ratification of the current Montana Constitution in 1972, the Montana Supreme Court has been criticized for its "pattern of inconsistent interpretations."[66] This is probably—at least in part—the result of frequent turnover among the justices, who, although not constrained by term limits, must run again for their seat every eight years.[67] Further, while the Court is "largely unanimous" in its decisions,[68] this may be the result of compromises among the justices that seek to rectify their competing judicial philosophies but in a manner that is ultimately "not useful in developing a theory of constitutional interpretation."[69]

However, if there is one invisible string that ties the justices together from one term to the next, it is their devotion to the Transcripts,[70] "the most commonly cited historical source" in Montana courts.[71] The Montana Supreme Court frequently looks to the Transcripts not only as persuasive authority

63. Paul Finkelman, *Intentionalism, the Founders, and Constitutional Interpretation*, 75 TEX. L. REV. 435, 441 (1996) (book review of JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996)).

64. *Id.* at 441 n.21.

65. *See, e.g.*, Adrienne Koch, *Introduction*, *in* JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787, vii, viii–ix (Ohio Univ. Press 1966).

66. ELISON & SNYDER, *supra* note 20, at xv.

67. *Id.*; *see also* MONT. CONST. art. VII, § 7(2).

68. Blake Koemans & Denise LaFontaine, *The Montana Supreme Court – The Statistics*, 83 MONT. L. REV. 399, 401 (2022).

69. ELISON & SNYDER, *supra* note 20, at xv.

70. *Compare* Brown v. Gianforte, 488 P.3d 548, 557–59 (Mont. 2021) (majority in 6–1 opinion citing extensively to the Transcripts), *with id.* at 567–68 (McKinnon, J., dissenting) (dissent also citing extensively to the Transcripts). *See also* TAYLOR SWIFT, *Invisible String*, *on* FOLKLORE (Republic Records 2020) ("And isn't it just so pretty to think, all along there was some invisible string tying you to me?").

71. JOHNSTONE, *supra* note 21, at 27.

but as "dispositive of questions arising under the Montana Constitution."[72] The Court has "consistently turned to the 1972 Convention transcript as an authoritative source" not only to gauge the general intentions of the delegates but "for its interpretation of *key phrases*."[73]

Before the publication of the Transcripts in 1981, the Court was more cautious about using the records of the 1972 Convention in interpreting the Montana Constitution. Although the Court had stated during this period that "[i]n determining the meaning of a given provision, the intent of the framers is controlling,"[74] it also asserted that it had "purposely refrained from using" the minutes of the Convention as a "basis of interpretation," as those records could be cherry-picked and "used to support either position, or even a third position" in any given case.[75]

The Court's first use of the newly published verbatim Transcripts came the year following their publication, in *Montana Human Rights Division v. Billings*,[76] where the Court relied on the Transcripts to interpret the meaning of "the right of individual privacy" in Article II, Section 10 more narrowly than the district court, in litigation regarding the breadth of the Human Rights Commission's investigative powers.[77] This perhaps foreshadowed the key role the Transcripts would play in future cases interpreting Article II, Section 10.[78]

Over the next several years, the Court quickly developed a taste for the Transcripts. In addition to consulting them twice in 1984 alone to again interpret the right to privacy,[79] the Court also turned to them for the meaning of "the right of trial by jury" in Article II, Section 26,[80] and the meaning of "other judges"—which the chief justice may assign for "temporary service"—in Article VII, Section 6.[81]

The Court's first landmark decision relying on the Transcripts came in 1985 in *State v. Long*,[82] where the Court again interpreted the right to privacy. In *Long*, the Court leaned on the delegates' remarks in the Transcripts to support its holding that "the privacy section of the Montana Constitution contemplates privacy invasion by state action only."[83] Justice Sheehy wrote

72. *Id.*

73. Jack Tuholske, *The Montana Court's Conservative Approach to Constitutional Interpretation*, 72 Mont. L. Rev. 237, 244 (2011) (emphasis added).

74. Keller v. Smith, 553 P.2d 1002, 1006 (Mont. 1976).

75. *Id.* at 1008.

76. 649 P.2d 1283 (Mont. 1982).

77. *Id.* at 1288–89.

78. *See, e.g.*, Armstrong v. State, 989 P.2d 364, 377 (Mont. 1999).

79. Missoulian v. Bd. of Regents, 675 P.2d 962, 967 (Mont. 1984); State v. Solis, 693 P.2d 518, 521–22 (Mont. 1984).

80. Downs v. Smyk, 651 P.2d 1238, 1242 (Mont. 1982).

81. State ex rel. Wilcox v. District Court, 678 P.2d 209, 213–14 (Mont. 1984).

82. 700 P.2d 153 (1985).

83. *Id.* at 157.

a blistering dissent against the Court's "dilut[ing]" of the delegates' "beautiful conception" of a strong right to privacy against private action, which he found evidence of in the Transcripts.[84]

The Court's 1999 decision in *Armstrong v. State* showcased an emboldened Court that had become more audacious in its license to use the Transcripts to reach controversial decisions about the meaning of constitutional provisions. In *Armstrong*, rather than consulting the Transcripts to seek a benign clarification on a narrow question, the Court embarked on a journey into the Transcripts in search of evidence that the right to individual privacy included the right to abortion.[85] Of the four reasons the Court felt it was "clear" that Article II, Section 10 did protect such a right, two of those reasons were rooted in the words of delegates as documented in the Transcripts.[86]

Admittedly, not every constitutional case is resolved using the Transcripts. For example, in a case involving the scope of the right to know enumerated in Article II, Section 9, the Court relied almost exclusively on its own precedent to resolve the controversy and made no mention of the Transcripts.[87] In contrast, Justice McKinnon, as the lone dissenter, relied heavily on the Transcripts to reach the opposite conclusion as to Section 9's meaning.[88]

In his essay, Stockton criticizes both the Court's "almost exclusive use" of the Transcripts in seeking the original meaning of the Constitution, as well as the focus of the Court's approach on "intent as the interpretive goal."[89] Regarding this first criticism, Stockton pointed out that the Court had referred to the Transcripts "at least 164 times between 1972 and 2015."[90] This statistic is probably misleading for several reasons, including that the official verbatim Transcripts were not published until 1981, so anything the Court had used in the first decade after the 1972 Convention would have been a different version of the record.[91] Regardless, it appears Stockton's criticism of the Court's reliance on the Transcripts has not succeeded in changing the Court's direction.[92]

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84. *Id.* at 163–64 (Sheehy, J., dissenting).

85. *See* Armstrong v. State, 989 P.2d 364, 374–77 (Mont. 1999).

86. *Id.* at 377.

87. AP v. Usher, 503 P.3d 1086, 1090 (Mont. 2022).

88. *Id.* at 1092–95 (McKinnon, J., dissenting).

89. Stockton, *supra* note 7, at 135.

90. *Id.* at 117.

91. Perhaps more importantly, Stockton's methodology of searching Westlaw merely for any mention of "constitutional convention" in the Court's opinions between 1972 and 2015 would have surely led to results that did not actually refer to the Transcripts. *See id.* at 117 n.3.

92. Search of Lexis+ for "transcript* & (convention or delegate*)", limited to the Montana Supreme Court, over a 34-year date range from the *Montana Human Rights* decision on August 16, 1982, to August 15, 2016—which would have coincided with the approximate publication date of Stockton's essay—yielded 96 cases, or 2.8 per year. The same search over a six-year period from August 16, 2016, to August 15, 2022, yielded 24 cases, or 4.0 per year. *But see* Brown v. Gianforte, 488 P.3d 548, 569 (Mont. 2021) (McKinnon, J., dissenting) (citing the Voter Information Pamphlet, championed by Stockton—albeit to

III. The Transcripts: The Best Source of Original Meaning

Because of the role of direct democracy in the process of ratification, "state constitutional originalism and federal constitutional originalism never fully reconcile."[93] Because it is the voters who typically ratify a state constitution—rather than delegates to ratifying conventions, as the federal Constitution was ratified—the collective original understanding of the voters is likely unrecoverable.[94] This is the first issue on which this Comment diverges from Stockton, who views original understanding—where the "original meaning" of the text is defined by what the text meant to those who voted to ratify it—as the correct approach to interpreting the Montana Constitution.[95]

Nonetheless, originalism has its place in state constitutional interpretation.[96] In fact, given state constitutions' tendency toward "detailed and explicit" provisions, their "very nature . . . encourages a textualist or original meaning approach."[97] The powers and rights as drafted by the framers and ratified by the people should be interpreted by state courts in a manner that is "grounded in the text of the constitution and the original meaning of its words."[98] However, in contrast to Stockton's reverence for original understanding, this Comment asserts that the Montana Constitution—and probably other constitutions ratified by the public at the polls—should be interpreted consistent with its original *public* meaning. In other words, the meaning of the text of the Montana Constitution is fixed at what it would have meant "to ordinary readers, speakers, and writers" at the time of ratification in 1972.[99] The authority and legitimacy of the Montana Constitution derive from the fact that it was adopted by the people of Montana in exercising their right "to establish a government for themselves and their posterity."[100]

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show the framers' intent); Kevin Frazier, *Privacy Lost: How the Montana Supreme Court Undercuts the Right of Privacy*, Seattle J. Tech., Env't & Innovation L., May 2023, at 1, 24, *available at* https://perma.cc/F9EG-NV7T ("Despite the clear intent of the Framers—and the fact that Montana Supreme Court precedent at times relied on that intent—the Court has since abandoned its practice of grounding its constitutional analysis in robust consideration of the intent of the Framers.").

93. Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 Ala. L. Rev. 1459, 1485 (2010).

94. *See* Natelson, *supra* note 50; Wolff, *supra* note 55, at 73 n.62.

95. *See* Stockton, *supra* note 7, at 117 ("Montana is blessed with a ratification-era history replete with documents that shed light on the understanding the people of Montana had when they enacted the 1972 Constitution."); *id.* at 138 ("[I]f there is a meaning understood by all the voters, the voters' understanding should trump the delegates' understanding, since the voters were the ones who actually enacted and ratified the document.").

96. *See* Sutton, *supra* note 12, at 16.

97. Tarr, *supra* note 9, at 8 (quoting William Swindler, *State Constitutions for the Twentieth Century*, 50 Neb. L. Rev. 577, 593 (1971)) (internal quotation marks omitted).

98. *Id.* at 26.

99. *See* Kesavan & Paulsen, *supra* note 52, at 1118.

100. Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 Geo. Wash. L. Rev. 1127, 1132 (1998).

Therefore, the words first drafted by their delegates to the Convention should "be interpreted—to the best of our ability—as [the people] meant them."[101]

Section A argues that Stockton and others overestimate the value of certain ratification-era documents as sources of the ratifiers' original understanding of the Montana Constitution. Section B argues that Stockton underestimates the value of the Transcripts in determining what the courts should be looking for—original public meaning. Section C proposes a new rebuttable presumption framework for the Court to adopt in constitutional litigation.

A. The (Low) Value of Ratification-Era Documents in Determining Original Understanding

Despite the frequency with which the Court turns to the Transcripts in constitutional interpretation, Stockton and others have argued that "they are not as definitive as they may seem."[102] Because the Transcripts were not published until nearly a decade after the close of the 1972 Convention, "voters as lawmakers had to rely on other sources in their deliberations and debates."[103] Stockton and those who have cited him portray what this Comment asserts is an undeserving reverence for these so-called "ratification-era sources."[104] From these sources, which also include "contemporary reports of the Convention in newspapers and published commentaries,"[105] the top three sources on Stockton's list will be analyzed here.

First, *Proposed 1972 Constitution of the State of Montana: Official Text with Explanation*, more commonly known as the Voter Information Pamphlet, was an official publication of the Constitutional Convention[106] that provided "explanatory notes" on the provisions of the proposed constitution.[107] This pamphlet was only one part of what the delegates intended to be a broader education effort, the other components of which were ultimately blocked by a lawsuit.[108] Stockton considers the 24-page Voter Information Pamphlet to be "the best" among the ratification-era sources in seeking "the meaning of

101. *Id.* at 1132.

102. *See* Johnstone, *supra* note 21, at 27. *Cf. id.* at 27–28 ("The recorded deliberations and debates on the 1972 Constitution are all the more important because of the narrow margin by which Montanans ratified the document. . . . [T]he narrow margin of ratification serves as a reminder that every argument . . . on the floor of the Convention . . . may have been essential to its adoption.").

103. *Id.* at 27.

104. *See* Stockton, *supra* note 7, at 137.

105. Johnstone, *supra* note 21, at 27.

106. Proposed 1972 Constitution of the State of Montana: Official Text with Explanation 6 (1972), *available at* https://perma.cc/M2Q7-Z4UZ [hereinafter Voter Information Pamphlet].

107. *See* Keller v. Smith, 553 P.2d 1002, 1007 (Mont. 1976).

108. *See* State ex rel. Kvaalen v. Graybill, 496 P.2d 1127, 1135 (Mont. 1972) ("[W]e hold that the Constitutional Convention . . . lacks power or authority to receive or expend further public funds for voter education . . . .").

ambiguous provisions," as the voters who read the pamphlet would have used it "as an explanation, therefore relying on it, and voted accordingly."[109]

Second, *The Proposed Constitution for the State of Montana*, otherwise known as the Roeder Pamphlet because it was a project primarily of Delegate Richard Roeder, was included as a supplement in more than a dozen newspapers throughout the state.[110] This 12-page pamphlet provided additional explanations on the meaning of each provision.[111] Stockton considers the Roeder Pamphlet as an "excellent" source given its "extensive distribution."[112]

Third, *The New Montana Constitution: A Critical Look*, more commonly referred to as the Neely Pamphlet, was drafted by Billings attorney Gerald J. Neely and included additional commentary on select provisions of the proposed constitution and their significance.[113] Although Stockton holds the 28-page Neely Pamphlet in lower esteem than the Roeder Pamphlet, Stockton nonetheless considers it a useful source for original understanding, as voters "would have used it as an explanation of what [some] provisions meant."[114]

Stockton and others argue that the existence of these "widely available source material" renders it inappropriate that "the Court has relied almost exclusively on one resource beyond text to establish constitutional intent"—the Transcripts.[115]

The value of these aforementioned documents is typically characterized in the scholarship in the form of conclusory statements lacking evidentiary support. One example of the typical commentary on the ratification-era documents is the assertion by one author that "[t]he voter pamphlets establish that Montanans expected Art. VII, § 8 to produce a merit selection process with limited gubernatorial influence."[116] Although these documents may serve as evidence of original understanding among the ratifying public, they most definitely do not "establish" anything about what Montanans expected about Article VII, Section 8—or that they expected anything at all.[117]

Another example of these conclusory remarks is the assertion that, based on the distribution of the Voter Information Pamphlet, "[t]he ratifiers of the 1972 Constitution understood [Article V,] Section 12 to be substantively

109. Stockton, *supra* note 7, at 144.

110. Concerned Citizens for Constitutional Improvement, Proposed Constitution for the State of Montana (1972), *available at* https://perma.cc/T4KT-P32J [hereinafter Roeder Pamphlet].

111. Stockton, *supra* note 7, at 143–44.

112. *Id.* at 144.

113. *See generally* Gerald J. Neely, The New Montana Constitution: A Critical Look (1972), *available at* https://perma.cc/Q59W-EW5F [hereinafter Neely Pamphlet]; *see also* Stockton, *supra* note 7, at 122–23, 145.

114. Stockton, *supra* note 7, at 145.

115. J T Stepleton, Comment, *Reconsidering* Brown v. Gianforte *and the Elimination of the Montana Judicial Nominating Commission*, 83 Mont. L. Rev. 379, 383 (2022).

116. *Id.* at 389; *see also id.* at 383–84 (citing Stockton's essay as "underscor[ing] the value of ratification-era sources from which voters collected information").

117. *See Establish*, Black's Law Dictionary (11th ed. 2019) ("To prove; to convince someone of").

identical to the 1889 provision."[118] Page 10 of the Voter Information Pamphlet did indeed include a single line under the proposed text of Article V, Section 12, stating, "No change except in grammar," so one could accept that the ratifiers were informed of this, or at least put on notice.[119] However, it is a bold and almost certainly untrue assumption that many voters substantively "understood" anything about Article V, Section 12's prohibition of special legislation when they entered the voting booth on June 6, 1972.[120]

A final example in this non-exhaustive list of conclusory and unsupported assertions about these ratification-era documents is that the Voter Information Pamphlet was "[t]he document that most likely helped voters understand the new freedom of speech provision."[121] Although this statement at least qualifies its confidence with an ambiguous probability estimating voters' familiarity with page six of the Voter Information Guide, it begs the same question as the others: *Says who?*

Related to these issues is Stockton's argument that voters who read the Voter Information Pamphlet and other ratification-era materials would have relied on them "and voted accordingly,"[122] which is undermined by the total lack of evidence shedding any light on the proportion of Montanans who took the time to educate themselves using those specific materials. The low voter turnout in the June 6 ratification vote compared with the higher turnout in the November 1972 general election suggests Stockton overestimates how engaged the average Montanan was in the approaching special ratification election.[123] Even for those voters who were invested in the outcome of the ratification vote, an assertion that they formed their understandings based on a reading of the Neely Pamphlet—as opposed to, for example, a totality of everyday conversations—requires something to support it. And in imagining that it *was* indeed everyday conversations that shaped most ratifiers' understandings of the Constitution's content, would not that collective understanding be best interpreted as being consistent with "what the public

118. Constance Van Kley, Comment, *Article V, Section 12 of the Montana Constitution: Restoring Meaning to a Forgotten Provision*, 79 MONT. L. REV. 115, 132 (2018); *see also id.* at 116 n.6 (citing Stockton in footnote that precedes conclusory remarks).

119. *See* VOTER INFORMATION PAMPHLET, *supra* note 106, at 10.

120. *See Understand*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("To apprehend the meaning of; to know"). Further, even if the Voter Information Pamphlet did leave the public with this understanding that there had been "[n]o change except in grammar" between the 1889 and 1972 special legislation provisions, this would have been a misunderstanding. *Compare* MONT. CONST. art. V, § 12 (20 words), *with* MONT. CONST. OF 1889, art. V, § 26 (359 words).

121. Wolff, *supra* note 55, at 73.

122. Stockton, *supra* note 7, at 144.

123. *Compare* REPORT OF THE OFFICIAL CANVAS OF THE VOTE CAST AT THE PRIMARY ELECTION HELD IN THE STATE OF MONTANA AND OF THE VOTE CAST AT THE SEPARATE ELECTION FOR RATIFICATION OR REJECTION OF THE PROPOSED CONSTITUTION (1972), *available at* https://perma.cc/2X94-FYXR (237,600 voters), *with* REPORT OF THE OFFICIAL CANVAS OF THE VOTE CAST AT THE GENERAL ELECTION HELD IN THE STATE OF MONTANA, NOVEMBER 7, 1972 (1972), *available at* https://perma.cc/TA63-P6GT (327,176 voters).

of that time would have understood the words to mean"[124]—as derived from the words of their fellow citizens sent as delegates to Helena?

There is also the question of, even if people did consult the sources elevated by Stockton, whether those documents would have shed any significant light on the meaning of the text. As an example, one of the most controversial questions the Court has faced in interpreting the Montana Constitution is the meaning of "the right of individual privacy" in Article II, Section 10.[125] In looking at the interpretive value of these ratification-era documents—which Stockton is sure voters would have used "as an explanation" in informing their vote,[126] we see that the Voter Information Pamphlet explained the meaning of Article II, Section 10 as a "[n]ew provision prohibiting an invasion of privacy unless the good of the state makes it necessary."[127] The Roeder Pamphlet explained: "Section 10 establishes a right of privacy. The courts in Montana have recognized the existence of a right of privacy, but at a time when opportunities for invasion of privacy are increasing in number and sophistication, section 10 emphasizes that this right is essential for the preservation of a free society,"[128] and added that the right to know and right to privacy "are not contradictory," because "[t]he right to know is intended to guarantee the citizen opportunity for access to information about the operation of the government," while "[t]he right to privacy is intended to protect the citizen from Government invasion of his privacy."[129] The Neely Pamphlet explained: "A new provision in the proposed constitution (Art. II, sec. 10) provides that the privacy of the individual is not to be infringed without the showing of a compelling state interest."[130]

If this is how we derive the ratifiers' original understanding, then that "understanding" was no understanding at all. These pamphlets could have been distributed to every voter in Billings, Bozeman, Butte, and East Jabib and still not have made any difference in what those voters understood "privacy" to mean in ratifying a constitutional right to it.[131]

Although Stockton justifies an originalist interpretation of the Montana Constitution as democratic in nature, he then goes on to miss the obvious antidemocratic character of insisting that Montana's democratically-elected judiciary should interpret the text of its democratically-ratified constitution based on

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124. Bork, *supra* note 56, at 144.

125. *See, e.g.*, Armstrong v. State, 989 P.2d 364, 384 (Mont. 1999); Gryczan v. State, 942 P.2d 112, 126 (Mont. 1997); State v. Long, 700 P.2d 153, 157 (Mont. 1985).

126. Stockton, *supra* note 7, at 144.

127. Voter Information Pamphlet, *supra* note 106, at 6.

128. Roeder Pamphlet, *supra* note 110, at 2.

129. *Id.* at 11.

130. Neely Pamphlet, *supra* note 113, at 7.

131. *Cf. generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

a few pamphlets that *maybe* some people read—and that this is preferable to interpreting them consistent with what the words of the text would have meant to ordinary Montanans, as evidenced by the language invoked in debates by the citizens elected to represent the views of the people at the Convention.

B. The (High) Value of the Transcripts in Determining Original Public Meaning

At the outset, this Comment concurs with Stockton's criticism of the Montana Supreme Court's "use of *intent* as the interpretive goal."[132] Indeed, although the Court's approach to the Montana Constitution "*is* originalist,"[133] what the Court is often doing is not seeking original public meaning or even original understanding, but looking for original intent—in other words, what "the delegates to the Montana Constitutional Convention intended" by the text.[134]

However, even in taking this approach, "[t]he intent of the framers in 1972 may . . . prove helpful, if primarily to point *to* the public meaning" of those provisions.[135] In other words, consulting the Transcripts does not have to be an exercise in looking for what the delegates "subjectively intended" the words to mean.[136] Indeed, even those most critical of the Court's original intent approach may concede that, in Montana, the "transcripts are one kind of evidence" to "reconstruct original public meaning."[137] As a federal analog, Bork noted that "[Madison's] notes of the discussions at Philadelphia are . . . evidence of what informed public men of the time thought the words of the Constitution meant."[138]

Although the Court typically looks to "the records of the Constitutional Convention . . . to support claims about the original intent of the Framers," the Court need only reframe its analysis as looking for evidence of the Constitution's original public meaning.[139] Just as contemporary dictionaries can be consulted to determine the meaning of words during a period of history, the Transcripts of the 1972 Convention come from the relevant era being consulted and thus provide evidence of "how the people of the period, including the Framers, used the word[s]."[140]

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132. Stockton, *supra* note 7, at 135 (emphasis added).

133. *Id.* at 134 (emphasis added).

134. *See* State v. Covington, 272 P.3d 43, 47 (Mont. 2012).

135. Van Kley, *supra* note 118, at 132 (emphasis added).

136. Gregory E. Maggs, *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as a Source of the Original Meaning of the U.S. Constitution*, 80 GEO. WASH. L. REV. 1707, 1739 (2012) (part of *Symposium: Commemorating the 100th Anniversary of Farrand's Records of the Federal Convention*) (discussing in the context of the federal constitution).

137. Natelson, *supra* note 58, at 14.

138. BORK, *supra* note 56, at 144.

139. Maggs, *supra* note 136, at 1737.

140. *Id.* at 1738–39.

Stockton argues that "[w]hile the transcripts might provide meaning for what the delegates believed a provision meant, since they were not publicly available, they could not have formed the basis for the broad public meaning."[141] Here, Stockton confuses original public meaning with original understanding. The question is not whether the record of the delegates' debates influenced other Montanans participating in the ratification vote, but whether the delegates' debates reflect what Montanans would have understood the proposed provisions to mean in 1972. If the goal of an originalist constitutional interpretation is to determine the original meaning of the text, regardless of and in contrast to the framers' subjective intention, then it is far from "ill-advised" to use the "drafting history of the Constitution as another extratextual source of constitutional meaning."[142] If the drafting history reveals what the text meant to an ordinary Montanan, "its use would not only be permissible, but indeed strongly encouraged and perhaps required under an original public meaning approach to constitutional interpretation."[143]

As another application of originalist interpretation in state constitutionalism, one scholar has advocated for a similar approach in interpreting the Arizona constitution, acknowledging that "[t]he subjective intent of the drafters is useful . . . as an indicator of how the broader citizenry might have objectively understood the constitution."[144] In other words, the subjective understandings of the delegates are relevant "to the extent that they can help jurists understand the objective meaning that the public would have originally assigned to the constitutional provision at issue."[145]

Once the analysis is correctly framed, the Transcripts not only provide strong evidence of the original public meaning of the constitutional provisions but probably the most useful tool for interpreting the Montana Constitution under an originalist framework.[146] In accepting that the pursuit of its original public meaning will yield a more reliable answer in constitutional questions than chasing after the original understanding of the 116,415 "yes" votes in June 1972—in other words, that "what we are trying to determine is the original public meaning of the Constitution" to the hypothetical ordinary Montanan, "not the original understanding of the actual Ratifiers"[147]—it

141. Stockton, *supra* note 7, at 138.

142. Kesavan & Paulsen, *supra* note 52, at 1118.

143. *Id.*

144. Kory A. Langhofer, *Arizona Together and the Fabricated Founding: The Original Meaning of the Separate Amendment Rule*, 40 Ariz. St. L.J. 85, 90 (2008).

145. *Id.* at 100.

146. *Cf.* Tarr, *supra* note 9, at 25 ("[I]n interpreting a state constitution on the basis of text and original meaning, judges are expected to look to the origins of the [borrowed] provisions [from another state's constitution,] as elaborated by the courts of the originating state.").

147. Kesavan & Paulsen, *supra* note 52, at 1118.

becomes clear that the Transcripts are superior, not inferior, to the ratification-era documents Stockton champions.

It is important to remember that the delegates were "everyday citizens" that represented many professions and backgrounds, far from being "political insiders" or insulated members of a ruling class.[148] In contrast to the delegates sent to the 1787 Philadelphia Convention, the delegates elected to the 1972 Montana Constitutional Convention were more representative of the public—and therefore, their language would have been representative of the public's language.[149] They were elected because of their ability to speak for their ordinary constituents.[150]

One argument put forward in support of employing Stockton's ratification-era sources in constitutional interpretation is that "in 1972 the attitudes of the convention delegates often varied from those of the wider electorate," so their words are not illustrative of original public meaning.[151] Aside from the lack of evidence cited to support this assertion, this also seems unlikely on its face, given that the delegates were not members of the legislature—and only 18 of the 100 were even former legislators—or otherwise "indebted to special interests," but were instead ordinary Montanans elected by their communities for this specific and limited task.[152] The Convention was a "grass-roots" effort, where their likeness to the average citizen was apparent in their "virtually complete ignorance of the art of constitution writing."[153] In contrast, why should the Court assume in its constitutional interpretation that the attitudes of, let us say, Gerald Neely, did *not* "often var[y]" from those of

148. Eric Dietrich, *As it turns 50, is Montana's 'progressive' state Constitution facing a conservative midlife crisis?*, Mont. Free Press (Mar. 21, 2022), https://perma.cc/PEJ8-LRF2; *see also* Rob Natelson, *The other side of the Montana Constitution*, Missoulian (Mar. 31, 2023), https://perma.cc/3NTN-CCNJ ("[S]itting legislators were barred from running for election as delegates . . . .").

149. Of the 100 Montanans elected as delegates, "[n]ineteen were women, most of them housewives and educators. The oldest delegate was Lucille Speer, 73, a retired librarian; the youngest was a graduate student, Mae Nan Robinson, 24." Jesse Birnbaum, *Montana: Fresh Chance Gulch*, Time (Apr. 10, 1972), https://perma.cc/CQP2-V3WG. Compare that to the constitution drafted in Philadelphia in 1787, whose meaning reflected "the views of white, Christian men from over two centuries ago." Caitlin E. Borgmann, *Now What? The Right to Privacy in Montana After* Dobbs, 84 Mont. L. Rev. 2, 18 (2023). *But see* Shaylee Ragar, *Montana politicians gather to remember the 1972 Constitutional Convention*, Mont. Pub. Radio (Mar. 23, 2022), https://perma.cc/5DPW-Q9SA ("Montana failed to elect a single Native American delegate to the Constitutional Convention.").

150. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1459 (1987) (at least in the context of debating the ratification of the federal constitution in each state, a "convention was superior to its ordinary legislature, for the convention was in theory the virtual embodiment of the People of that state").

151. Rob Natelson, *The Montana Supreme Court's University firearms decision was wrong*, Missoulian (July 10, 2022), https://perma.cc/D4UY-SV66; *see also* Johnstone, *supra* note 21, at 34 ("Is it possible the delegates who framed the Constitution might have originally intended some of its text to bear an esoteric (and potentially controversial) legal meaning while hoping the public originally (mis) understood the text to be less controversial for ratification's sake?").

152. Elison & Snyder, *supra* note 20, at 12–13.

153. Birnbaum, *supra* note 149.

the electorate, or that his views and the views of other ratification-era documents' authors can be imputed on the electorate just because the voters might have been exposed to those views?

C. The Proper Role of the Transcripts: A Rebuttable Presumption

This Comment posits that the Transcripts "provide a substantial body of linguistic evidence of how words and phrases—especially the words in phrases in the [Montana] Constitution—were used," and are therefore the best source for its original public meaning.[154] However, this Comment does not argue that the Court should treat the Transcripts as "dispositive of questions arising under the Montana Constitution."[155] While the Transcripts provide this strong evidence, they are not the only evidence, and any other evidence may be helpful on occasion "to determine the objective meaning of the words in the Constitution at the time of its adoption."[156]

This Comment proposes an analysis in three steps to be employed in constitutional litigation. First, if Party A can point to evidence in the Transcripts where the delegates' words clarify a particular word or phrase in the Constitution, Party A's definition will be entitled to a presumption that this meaning is consistent with the original public meaning of that phrase. Second, Party B can then rebut this presumption with either (1) evidence from other ratification-era materials contradicting the delegates' words as illustrative of the public meaning, or (2) evidence that ordinary Montanans would have been unfamiliar with the meaning suggested in the Transcripts. Third, Party A can offer a final rebuttal, such as with evidence that Montanans were *not* unfamiliar with that meaning.

Admittedly, this approach to constitutional construction would result in parties doubling down on the Transcripts more than ever and the Transcripts taking center stage in most or all constitutional cases. For the justices, reading the briefs would be less an "intellectual feast,"[157] and more a "boring supper."[158] Nonetheless, this procedure would facilitate an adversarial approach that would be effective in resolving the question of original public meaning.[159]

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154. Maggs, *supra* note 136, at 1739.

155. JOHNSTONE, *supra* note 21, at 27.

156. Maggs, *supra* note 136, at 1739.

157. *Bork Nomination Day 5*, at 2:32:10, C-SPAN (Sept. 19, 1987), https://perma.cc/MP4B-5973 ("I think it would be an intellectual feast just to be there and to read the briefs . . . .").

158. *See Check It Out! with Dr. Steve Brule: Church* (Adult Swim television broadcast Mar. 7, 2014), *available at* https://perma.cc/KB5P-KE7H (discussing holy communion).

159. *See* Sutton, *supra* note 12, at 11.

Although Stockton assigns them lower weight than the Voter Information Pamphlet, the Roeder Pamphlet, and the Neely Pamphlet due to their limited geographic distribution,[160] newspaper articles would likely prove persuasive as evidence of the original public meaning of certain words and phrases in the Constitution, such as by evidencing broader trends in the recognition and scope of novel legal protections.[161] For example, in hypothetical litigation challenging laws passed in the 2023 legislative session restricting access to abortion in Montana, a litigant might argue that *Armstrong v. State* was correct in holding that "individual privacy" in Article II, Section 10 includes the right to a pre-viability abortion because Delegate Bob Campbell's references to *Griswold v. Connecticut*[162] during the floor debate show that the original public meaning of "individual privacy" included procreative autonomy[163]—and therefore, that this definition of privacy is entitled to a presumption that it is consistent with the original public meaning of that term. The attorney general might then attempt to rebut this presumption by pointing to the Roeder Pamphlet's reference to "a time when opportunities for invasion of privacy are increasing in number and sophistication" in its explanation of Article II, Section 10, as evidence that "individual privacy" would have been construed by ordinary Montanans as something more akin to information privacy[164]—with the conception of privacy in the context of reproductive autonomy being wholly unfamiliar to Montanans in June 1972, seven months before the U.S. Supreme Court's decision in *Roe v. Wade*.[165] As a final rebuttal to the State's argument, however, the challengers could point to an October 1971 article in the *Great Falls Tribune*, titled *Emotion-Packed Abortion Issue May Face Con Con Delegates*, where *Tribune* reporter Frank Adams wrote:

> The right to privacy may be a key issue if the delegates decide to debat[e] abortion. The California Supreme Court ruled in 1965 that the right of privacy in the U.S. Constitution covers the right of a woman to an abortion . . . . [T]he issue would probably be centered in the question of whether the state has a compelling interest in the regulation of abortions and to what extent it can be pursued without infringing individual rights.[166]

This reporting in a major Montana newspaper would thus provide an effective rebuttal to the State's Roeder Pamphlet-based argument, evidencing

160. Stockton, *supra* note 7, at 147.

161. *See* Ben McKee, *How Strong Is* Armstrong*? What To Make of Montana's Ambiguous Autonomy Rights in a Post-Roe World*, 83 MONT. L. REV. 323, 329 (2022).

162. 381 U.S. 479 (1965).

163. *See* 5 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT, *supra* note 38, at 1681.

164. *See* ROEDER PAMPHLET, *supra* note 110, at 2.

165. 410 U.S. 113 (1973).

166. Frank Adams, *Emotion-Packed Abortion Issue May Face Con Con Delegates*, GREAT FALLS TRIBUNE (Oct. 29, 1971), *available at* https://perma.cc/FL99-JUH2. *Cf.* MONT. CONST. art. II, § 10 ("The *right* of *individual privacy* is essential to the well-being of a free society and shall not be *infringed without* the showing of a *compelling state interest*." (emphasis added to show shared phrasing with Adams)).

that ordinary Montanans would *not* have been unfamiliar with this construction of the right to privacy.[167]

As a final note, there is an exception to the general rule that the Transcripts provide the best evidence of the original public meaning of the Montana Constitution, and that is when the relevant timeframe is not 1972, but the 1880s. Several provisions of the 1972 constitution were carried over almost verbatim from the 1889 constitution, and thus, their existing original public meaning was baked into the new constitution upon ratification.[168] One example of this is Article V, Section 1's vesting of the "legislative power" in a senate and house of representatives.[169] Although the 1972 constitution borrowed this language from the 1889 constitution, it had first been carried over verbatim into the 1889 constitution from the failed 1884 constitution.[170] Therefore, to determine the original public meaning of the "legislative power" under the current, 1972 Montana Constitution, the best evidence of its meaning is likely found in the records of the proceedings from the 1884 constitutional convention.[171]

IV. Conclusion

Although this Comment is in some respects a defense of the Court's constitutional jurisprudence in validating its affinity for the Transcripts, it is also a call to action. The meaning of the Montana Constitution is correctly understood as consistent not with the delegates' original intent, as the Montana Supreme Court approaches the question, nor with the ratifying voters' original understanding, as Stockton and others assert, but with the original public meaning of the language it contains based on how ordinary Montanans would have understood those words and phrases. The Transcripts provide the best

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167. *Cf.* Langhofer, *supra* note 144, at 101 ("Had the Supreme Court of Arizona considered the objective meaning of the separate amendment rule, it likely would have concluded that because the Arizona voters of 1911 were *unfamiliar with* [the South Dakota Supreme Court's decision in State ex rel. Adams v. Herried, 72 N.W. 93 (S.D. 1897),] and had no reason or opportunity to read South Dakota legal reporters and digests, Herried had no effect on the objective original meaning of the Arizona separate amendment rule." (emphasis added)).

168. This principle of interpreting the Montana Constitution was discussed, of all places, at the U.S. Supreme Court:

> Respondents and one dissent argue that Montana's no-aid provision was cleansed of its bigoted past because it was readopted for non-bigoted reasons in Montana's 1972 constitutional convention. They emphasize that the convention included Catholics . . . . [I]t emphatically does not matter whether Montana readopted the no-aid provision for benign reasons. The provision's uncomfortable past must still be examined. And here, it is not so clear that the animus was scrubbed.

Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2273 (2020) (Alito, J., concurring) (cleaned up).

169. *See* Mont. Const. art. V, § 1; Mont. Const of 1889, art. V, § 1. *See also* Voter Information Pamphlet, *supra* note 106, at 9 ("No change except in grammar.").

170. *See* Mont. Const. of 1884, art. IV, § 1 (proposed).

171. *See* Records of the Montana Constitutional Convention (1884) (available at the William J. Jameson Law Library in Missoula, Montana, and the Montana Historical Society in Helena, Montana).

evidence of this original meaning, but the Court's use of the Transcripts to instead seek the framers' subjective intent discredits its decisions on important constitutional questions. A shift toward the framework proposed here would alleviate this issue and bring the Court more in line with the growing consensus not only in originalist circles but in the whole of constitutional law.

At a length of more than 14,000 words,[172] our state constitution perhaps invites certain shortcuts on the part of practitioners and the courts. Despite the relative simplicity of the framework proposed in this Comment, honest constitutional analysis must avoid the streetlight effect, including by "draw[ing] on several sources of legal meaning where available."[173] The continued use of constitutional history—including, but not limited to, the Transcripts—will help the Court, the bar, and the people to preserve "the lessons embodied" in the text of the Montana Constitution while seeking new and innovative applications of its original meaning.[174]

Although originalist interpretations of state constitutions "play[ ] out in ways that are neither consistently liberal nor consistently conservative from a political perspective,"[175] the elephant in the room—and why all eyes are on the Court, as discussed in Part I—is, of course, abortion.[176] Although this Comment does not seek to uncover, aside from the use of the illustration in Part III, whether a right to abortion is consistent with the original public meaning of Article II, Section 10, existing scholarship probably answers that question.[177] Just as the Court might benefit from the research and analysis discussed there, the intent of this Comment is that the Court will seriously consider a different approach to its constitutional interpretation, not only to bolster its interpretive methods against criticism, but to discover the right answers.[178]

172. Tarr, *supra* note 9, at 13.

173. JOHNSTONE, supra note 21, at 33; *see also* Cullen S. Hendrix, *The Streetlight Effect in Climate Change Research on Africa*, 43 GLOB. ENVT'L CHANGE 137, 137 (2017) (invoking the metaphor of a drunkard looking only for his lost keys where the light is available, "[t]he streetlight effect is the tendency for researchers to focus on particular questions, cases and variables for reasons of convenience or data availability rather than broader relevance, policy import, or construct validity").

174. *See* Tarr, *supra* note 9, at 8 n.4 (quoting Stephen Gottlieb, *Foreword*, 53 ALB. L. REV. 253, 258 (1989) (part of *Symposium on State Constitutional History: In Search of a Usable Past*)).

175. *Id.* at 15.

176. *See* Robert F. Williams, *Toward the End of the Last Wave: The Montana State Constitution at Fifty*, 84 MONT. L. REV. 1, 7 (2023).

177. *See* McKee, *supra* note 161, at 327–31.

178. *See* LINCOLN (DreamWorks Pictures 2012), *available at* https://perma.cc/HU4V-2NNZ ("If we submit ourselves to law, . . . we may discover other freedoms previously unknown to us.").