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Kevin Frazier
kevintfrazier@gmail.com

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Privacy Lost: How the Montana Supreme Court Undercuts the Right of Privacy

Kevin Frazier*

ABSTRACT

In 1972, Montanans ratified a new constitution that included a "right of privacy." The plain text of the provision fails to express the intent of the Framers who not only intended to afford Montanans a right but also to impose a responsibility on the State to continuously and thoroughly examine State practices in light of evolving means of invading residents' privacy. This intent has gone unrealized even though the intent of the Framers is clear, readily available, and the primary source state courts ought to use when interpreting the Constitution.

This article delves into the transcripts of the 1972 Constitutional Convention to increase awareness of the true intent of the Framers—to create a right for residents and a responsibility for the government. The first part familiarizes the reader with the arguments made by Framers during the Convention and their intent with respect to the right of privacy. The second part explores how courts have interpreted the right of privacy and details the extent to which courts have diverged from the intent of the Framers; it also assesses the extent to which the legislative and executive branches of the Montana state government have advanced the intent and objectives of the delegates in terms of privacy protections. The third part examines the importance of the Montana Supreme Court as well as the legislative and executive branches reviving the Montana Constitution's right of privacy and applying it to new threats to those rights.

* Kevin Frazier will join the Benjamin L. Crump College of Law at St. Thomas University as an Assistant Professor starting AY 2023. He currently is a clerk on the Montana Supreme Court. Kevin graduated from Berkeley Law and the Harvard Kennedy School in May 2022. He is grateful for the support of his fiancé, Dalton, for the inspiration provided by Professors Chris Hoofnagle, Kathy Abrams, and Paul Schwartz, and for the tireless work of the SJTEIL team including: Minerva Gomez, Megan Biehn, Rachel Woodard-Kelley, Jordan Stapleton, Geneva Sherman, John Eklof, Grace Zangerle, Omid Asgharzadeh, Bradley Howells, and Tyler Rochon.

I. INTRODUCTION

Article II, Section 10, of the Montana Constitution states, "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." In 1972, Montanans ratified a new constitution that included this, "right of privacy." The Montana Supreme Court has defined privacy as "the ability to control access to information about oneself,"[1] and has interpreted the state's constitution as providing explicit and substantial protection of that privacy.[2]

The plain text of the right of privacy provision fails to express the intent of the Framers who not only intended to afford Montanans a right but also to impose a responsibility on the legislative and executive branches of the state government to examine their practices continuously and thoroughly considering the evolving technology that invade a resident's privacy. The Montana Supreme Court has occasionally undermined Montana's right of privacy by relying on federal laws and case law. Perhaps noticing the Court's watering down of the privacy rights of Montanans, the legislative and executive branches have managed to diminish the public's privacy, autonomy, and dignity in many areas.

This article delves into the transcripts of the 1972 Constitutional Convention (Con Con) to increase awareness of the true intent of the Framers—to create a right for residents and a responsibility for the government. The first part familiarizes the reader with the arguments made by Framers during the Con Con and their intent with respect to the right of privacy. The second part explores how courts have interpreted the right of privacy and details the extent to which courts have diverged from the intent of the Framers; it also assesses the extent to which the legislative and executive branches of the Montana state government have advanced the intent and objectives of the delegates in terms of privacy protections. The third part examines the importance of the Montana Supreme Court as well as the legislative and executive branches reviving the Montana Constitution's right of privacy and applying it to new threats to those rights.

II. THE MONTANA SUPREME COURT'S INTERPRETATIVE FRAMEWORK DEMONSTRATES THE EXPANSIVE SCOPE OF MONTANA'S CONSTITUTIONAL RIGHT OF PRIVACY

The intent of the Framers, their objectives, and the broader context in which they drafted the right of privacy serve as the foundation for how courts interpret the scope and meaning of the right.[3] The first section of

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[1] Montana Human Rights Div. v. Billings, 649 P.2d 1283, 1287 (Mont. 1982).
[2] *Id*.
[3] Nelson v. City of Billings, 412 P.3d 1058, 1064 (Mont. 2018) ("The intent of the Framers controls the [Montana Supreme] Court's interpretation of a constitutional provision. . . . Even in the context

this part relies on the transcripts from the Con Con to determine the intent and objectives of the Framers. The delegates did not want to merely protect residents from current invasions of privacy, they also intended to instruct the courts to force the State to reform its practices considering current *and future* potential invasions of privacy.

The second section identifies the, "historical and surrounding circumstances"[4] that informed the Framers' drafting decisions. The 1970s marked an era of technological innovation, unlike the first two decades of the twenty-first century, through which the State acquired new means of collecting and retaining information. Congress adopted a variety of privacy laws to respond to these threats—suggesting that policymakers were acting on complaints from their constituents surrounding grave concerns about unchecked government use of new technologies.[5] Despite these new laws, the delegates felt compelled to carve out a specific right of privacy in the Montana Constitution. The political community in Montana wanted additional assurances that their "right to be let alone" would not be imperiled by any current or future technological innovations, as evidenced by the delegates setting forth substantial privacy protections and the people ratifying those protections.

A. The Intent and Objective of the Framers was to Create an Expansive Right of Privacy for Citizens and to Ensure Courts Adjusted the Scope of that Right in Light of New Privacy Threats

When the right of privacy came up for discussion at the Con Con, the delegates quickly distinguished their intent from pre-existing privacy protections, such as those implicitly and explicitly afforded by the U.S. Constitution.[6] Delegate Campbell, speaking on behalf of the Bill of Rights Committee, defined the right of privacy as an "important right" that modern advances made necessary to be explicitly stated and protected by the Montana Constitution.[7] Campbell made clear that the right should not only be made explicit, but also more expansive. Early in the history of the United States, Campbell alleged there was, "no need to expressly state that an individual should have a right of privacy."[8] He reasoned that the Bill of

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of clear and unambiguous language . . . we have long held that we must determine constitutional intent not only from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve.") (internal citations omitted).

[4] *Id.*

[5] Electronic Privacy Information Center, *The Privacy Act of 1974* (Feb. 26, 2023), https://epic.org/the-privacy-act-of-1974/#:~:text=The%20Privacy%20Act%20of%201974%2C%20Public%20Law%2093-579%2C,substantive%20rights%20in%20personal%20data [https://perma.cc/E3NF-6EHS].

[6] Montana Constitutional Convention, Verbatim Transcripts, March 7, 1972, Vol. V, 1680-81 [hereinafter, Con Con Volume V].

[7] *Id*. at 1680.

[8] *Id*. at 1681.

Rights in the U.S. Constitution adequately addressed the privacy concerns of that era by limiting search and seizures, preventing the quartering of soldiers, and setting guidelines for the issuance of warrants.[9] However, several factors made those protections inadequate in the modern era, according to Campbell—namely, more people and greater proximity to those people and an "increasingly complex society."[10] It follows that Campbell intended the right of privacy in the Montana Constitution to go beyond the federal protections and to adjust for privacy concerns posed by continued population growth and density and societal complexity.

Delegates like Campbell also did not think the courts adequately protected the privacy rights of individuals. He noted that the U.S. Supreme Court had implied a right of privacy in the Constitution in *Griswold v. Connecticut*, but he worried that *Griswold* only expressly protected marital privacy, which left him uncertain about how the Court would interpret that right in future instances of intrusion.[11] He relayed similar concerns about the Montana Supreme Court, which had also recognized an implicit right to privacy, but not defined its scale and scope.[12] By noting the shortcomings of these interpretations, Campbell demonstrated that the delegates wanted to afford Montanans explicit privacy protections that would address all instances of invasion of privacy.

In fact, Campbell wanted to create "a semipermeable wall of separation between individual and state," a wall akin to that between church and state.[13] This wall would not be created by the Montana Supreme Court merely applying U.S. Supreme Court precedent and interpretations of the right of privacy to Montana. Campbell hoped that forcing the government to justify any invasion of privacy with a compelling interest would "cause a complete reexamination and guarantee our individual citizens of Montana this very important right—the right to be let alone."[14] This sort of exhaustive endeavor aligned with Delegate Robinson's belief that privacy "is the right most valued by all men."[15]

Campbell also expressed the objective of the Bill of Rights Committee—to afford all necessary privacy protections required by the maintenance of a free society.[16] Note that this broad objective made no reference to whether maintaining that free society would require only responding to public or private infringements of Montanans' privacy. Also, as indicated by Campbell's desire of a "complete reexamination" of the protections necessary to guarantee "the right to be let alone," the delegates did not aspire to have the Montana courts follow U.S. Supreme

[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id*. at 1684.
[16] *Id*. at 1681.

Court precedent in lockstep.[17] The delegates instead aspired to create privacy protections uniquely tailored to Montana and all privacy invasions faced by Montanans; they sought protections not just related to generic privacy, but a broader "right to be let alone."[18]

Campbell justified this bold objective for the right of privacy by positioning it as a sub-goal of the larger aim of the Convention: to provide Montanans with "a new and more modern governmental charter[.]"[19] He described a "two-pronged approach" to privacy in the new Montana Constitution: Article II, Section 11 would protect a person's papers, homes, and effects;[20] and, Article II, Section 10 would afford a more expansive right of privacy.[21] In other words, federal and state protections over search and seizures were a floor with respect to privacy protections that were supplemented by Article II, Section 10's right of privacy.[22]

Other delegates echoed a desire for an expansive right of privacy. Delegate Harper moved to exclude "without a compelling state interest" from the section out of concern that this qualification would too frequently allow a "state agency [that] happens to have an interest in mind" to invade his privacy "at that particular time."[23] Delegate Dahood spoke in support of Harper's motion.[24] The delegates then conducted a voice vote—at a preliminary stage of the section's consideration—and sided in favor of Harper's motion to such a degree that the Chairman did not even bother to count votes.[25]

Later, the delegates voted to amend Section 10 by reinserting the "compelling interest" language.[26] This change in language reflected the will of delegates who happened to be attorneys—in other words, they were accustomed to relying on courts, rather than the people, to outline the scope of the right of privacy.[27] When Delegate Ask, an attorney himself, urged the other delegates to add "without the showing of a compelling state interest," he explained that conversations with other, non-delegate attorneys motivated his proposal.[28] Ask and his attorney consultants regarded the courts—both federal and state—as having set forth ideas on "what's reasonable, the privacy that's justifiable as in regard to the state."[29] They feared that the Convention could not predict how courts

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[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] Mont. Const. art. II, § 11 (February 26, 2023), https://leg.mt.gov/bills/mca/Constitution/II/11.htm [https://perma.cc/PT7H-EBFS].
[21] *See* Con Con Volume V, *supra* note 6, at 1682.Con Con Volume V at 1682.
[22] *Id*. at 1688.
[23] *Id*. at 1682.
[24] *Id*.
[25] *Id*.
[26] Montana Constitutional Convention, Verbatim Transcripts, March 9, 1972, Vol. VI, 1852. [hereinafter, Con Con Volume VI].
[27] *Id*. at 1850-51.
[28] *Id*. at 1850.
[29] *Id*. at 1850-51.

would interpret a version of Section 10 without the "compelling interest" qualification.[30]

Ask, however, did not want the Montana Supreme Court to merely continue its current approach to protecting privacy.[31] He clarified that his intent was to give "direction to the court on how they are going to interpret this" section. [32] Ask made clear that under his proposal, so long as "there [was] no compelling state interest, you can't invade a person's right of privacy."[33] Again, Ask did not explicitly declare that his proposal was meant only to respond to invasions of privacy conducted by the State. His comments were meant to provide Montanans with a right of privacy reflective of the values of the state's citizenry.[34]

It is possible to read some of Ask's comments as supporting the complete adoption of federal jurisprudence on the right of privacy. He explicitly mentions the U.S. Supreme Court's decision in *Katz v. United States* as delineating justifiable expectations of privacy.[35] He then assumes that *Katz* and its framework must apply to any interpretation of Section 10.[36] However, the delegates voted in favor of Ask's proposal to insert the qualification of the right, no other delegates embraced Ask's assumption that the Montana courts should interpret the state's right of privacy by applying the framework used by the U.S. Supreme Court. In fact, several delegates expressed expanded notions of a right to privacy that would not align with adherence to the federal framework.[37] It appears that delegates shared Ask's broad concerns about courts misinterpreting the right of privacy as absolute, rather than his specific adoption of the *Katz* approach to privacy.[38] Even after the delegates voted to reconsider Section 10 with the inclusion of Ask's amendment, two delegates were compelled to remind the Convention of their intent to provide a robust and expanded right of privacy. Harper, who originally moved to *exclude* the "compelling interest" qualification, acknowledged that the right of privacy had limits, but emphasized that their focus should be on the protection of an individual's privacy rather than on ensuring the interests of the state.[39] Delegate Kelleher worried that Ask's language would render the right "meaningless."[40] The concerns of Harper and Kelleher were shared by others.[41]

The delegates did not intend for the right of privacy to remain stagnant—a possible outcome of lockstep adoption of U.S. Supreme Court

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[30] *Id*. at 1851.
[31] *Id*. at 1852-53.
[32] *Id*. at 1851.
[33] *Id*.
[34] *Id*. at 1851.
[35] *Id*. at 1852.
[36] *Id*.
[37] *Id*. at 1851-52.
[38] *See* Con Con Volume V, *supra* note 6, at 1680-81.
[39] Con Con Volume VI, *supra* note 26, at 1852.
[40] *Id*.
[41] *Id*. at 1851-52.

jurisprudence or overreliance on a federal framework for interpreting the right of privacy. Implicit to the argument that the 1889 Constitution had to be updated in light of "wiretaps, electronic and bugging devices, photo surveillance equipment and computer data banks" is the idea that the right of privacy is technology dependent.[42] The right must respond to privacy invasions such as where "a person's privacy can be invaded without his knowledge and the information so gained can be misused in the most insidious ways."[43] And the right must respond to increases in the government's "power to pry[.]"[44] Campbell elaborated on this idea by arguing for "prudent safeguards against the misuse of [new] technology[.]"[45] He also advocated for a right expansive enough to allow the court to develop other areas in the future that merit privacy protections.[46] Dahood, the Chair of the Bill of Rights Committee, added, "As government functions and controls expand, it is necessary to expand the rights of the individual."[47] These and other delegates recognized that invasive technology was being refined and improved and becoming more broadly available to private and public actors.[48]

As evidenced by the debate over Article II, Section 11, of the Montana Constitution, some delegates, such as Robinson, wanted to go even further to limit the use of new technologies to invade the public's privacy. Robinson questioned whether any checks on the government's use of invasive technologies, such electronic surveillance, would suffice to protect privacy.[49] In her opinion, the use of certain technologies and the maintenance of a right to privacy were simply "incompatible."[50] And, the Bill of Rights Committee, as summarized by Robinson and confirmed by committee member Campbell, reported that they thought "privacy of communications should remain inviolate from state-level interception."[51] These perspectives did not win that day, but nonetheless convey a fear among delegates about the use of new technology by entities keen to invade citizens' privacy.

Courts err when they interpret the intent of the Framers as merely perpetuating the federal approach to protecting privacy. The Con Con delegates demonstrated their intent to afford Montanans more substantial privacy protections in several ways. First, they acted to provide an explicit right of privacy—an unnecessary step if the delegates wanted the status quo to persist. The delegates discussed federal and state court precedent and were aware of the protections and frameworks they set forth, and yet

[42] *See* Con Con Volume V, *supra* note 6, at 1681.
[43] *Id*.
[44] *See id*.
[45] *Id*. (quoting language from a *Montana Standard* editorial).
[46] Con Con Volume VI, *supra* note 26, at 1851.
[47] Con Con Volume V, *supra* note 6, at 1681 (Delegate Campbell quoting Delegate Dahood).
[48] *See infra* notes 49-50.
[49] Con Con Volume V, *supra* note 6, at 1683.
[50] *Id*.
[51] *Id*.

the delegates manifested their intent to go beyond that case law by constitutionalizing a specific right of privacy.

Second, the language adopted by the delegates specified a high threshold for government limitations on the right of privacy. At the prodding of an attorney, delegates included qualifying language to decrease the risk of allowing courts to interpret the right in an unpredictable manner. In doing so, the delegates again demonstrated that they did not want to provide the courts with any opportunity to lower the heightened privacy protections they sought for Montanans.

Third, the debate surrounding the right of privacy indicated that the delegates wanted to provide additional and durable privacy protections to Montana. Several delegates flagged technological progress as a motivating factor for their support of this right—no comments suggested that the delegates thought they were passing a right meant to only respond to then-current sources of invasions of privacy.

B. The Historical and Surrounding Circumstances Indicate the Framers' Heightened Concerns About the Right of Privacy During Eras of Rapid Technological Change

The Con Con occurred in an "era of credit checks and computer banks, wiretaps and bugging devices, and military spying on those exercising their rights of free speech and assembly."[52] These new technologies and intrusive actions led Delegate Foster to note that "[g]overnments, even state governments, collect information on all of us, some of which should not be in the public domain."[53] The Montana public seemed to share this concern about the means and sources of intrusion. At least one paper indicated its support for the express protection of privacy in the Constitution prior to the delegates earnestly debating the subject.[54] So, it may come as no surprise that press outlets across the state celebrated after the delegates "declar[ed] the citizens' right to privacy."[55] Further evidence of Montanans supporting expansive privacy protections in response to current and future threats emerges from the fact that some newspapers published a brochure on the contents of the Constitution prior to the ratification vote that framed the right of privacy as necessary in a "time when opportunities for invasion of privacy are increasing in number and sophistication."[56]

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[52] *Id*. at 1671-72.
[53] *Id*. at 1672.
[54] Con Con Volume VI, *supra* note 9, at 1851.
[55] *See, e.g.,* Mont. Const. Art. 11, § 10 (University of Montana Ratification), https://www.umt.edu/montana-constitution/articles/article-ii/ii-10.php [https://perma.cc/K86Z-EK6P].
[56] *Id*.

Nationally, distrust in government became pervasive in the late 1960s and spread throughout the 1970s.[57] At the same time, the government and private entities made greater use of invasive technologies to interfere with the privacy of Americans.[58] When trust in the government was relatively high, an ambivalent public accepted that wiretapping by the government for national security amounted to a "necessary evil[.]"[59] However, the public regarded wiretapping for domestic law enforcement as "outrageous and an abuse of power."[60] Fears of intrusion by an untrustworthy government exploded when Watergate occurred in 1972.[61] Whereas the public previously had been most fearful of private entities abusing new technologies to invade their privacy, the scandal during President Nixon's administration resulted in the government becoming the primary source of fear with respect to infringing the public's privacy.[62]

In this era of distrust, courts and legislators augmented privacy protections. The U.S. Supreme Court significantly strengthened privacy protections, especially those afforded by the Fourth Amendment.[63] In *Mapp v. Ohio*, the Court concluded that evidence obtained in violation of the Fourth Amendment must be excluded in all criminal proceedings—this was a "landmark" decision that that "significantly changed state law-enforcement procedures throughout the country."[64] In *Katz v. United States*, Justice Harlan composed a concurrence that has since become the dominant approach to resolving the applicability of the Fourth Amendment: [65] first, whether a person exhibited an "actual or subjective expectation of privacy"; and, second, whether the expectation is "one that society is prepared recognize as reasonable."[66] *Katz* remains a "seminal" case as a result of "sound[ing] the official death knell for . . . the proposition that the Fourth Amendment does not protect against surveillance absent either a physical trespass or the seizure of a material object."[67]

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[57] *See* Beyond Distrust How Americans View Their Government, PEW RESEARCH CENTER (Nov. 25, 2015), https://www.pewresearch.org/politics/2015/11/23/1-trust-in-government-1958-2015/ [https://perma.cc/J5HQ-5Z35].
[58] *See* April White, *A Brief History of Surveillance in America*, SMITHSONIAN MAGAZINE (April 2018), https://www.smithsonianmag.com/history/brief-history-surveillance-america-180968399/ [https://perma.cc/ZX2A-PNZM].
[59] *Id*.
[60] *Id*.
[61] *See id*.
[62] *Id*.
[63] *See* Daniel J. Solove, *A Brief History of Information Privacy Law*, George Washington University Law School at § 1:4.2 (2006).
[64] *See, e.g.,* Mapp v. Ohio, CASE WESTERN RESERVE UNIVERSITY: ENCYCLOPEDIA OF CLEVELAND HISTORY, https://case.edu/ech/articles/m/mapp-v-ohio (last accessed Feb. 2, 2022), [https://perma.cc/P2CM-7VRW].
[65] Solove, *supra* note 63, at 12-13.
[66] Katz v. United States, 389 U.S. 347 (1967).
[67] Zachary Silver, *Katz in the Cradle: The Second Justice Harlan and Reasonable Expectations of Privacy in Electronic Transactional Information*, 41 Cardozo L. Rev. 761, 773 (2019).

The U.S. Supreme Court identified privacy protections in other parts of the U.S. Constitution as well. In *Griswold v. Connecticut*, the U.S. Supreme Court "found"[68] constitutional protection of a right to privacy under the "penumbras" of the ten amendments of the Bill of Rights.[69] Notably, *Griswold*'s discovery of privacy protections has had an enduring effect given that it marked the Court's first case establishing "a constitutional right to privacy regarding reproductive decisions."[70] Later, in *Whalen v. Roe*, the U.S. Supreme Court determined that a "zone of privacy" existed in the U.S. Constitution that protected both "independence in making certain kinds of important decisions" and the "individual interest in avoiding disclosure of personal matters."[71] This opinion and its progeny mark yet another important expansion of the fundamental right of privacy. The *Whalen* Court indicated a generally applicable privacy right more expansive than one that applied only in specific situations.[72]

Policymakers also responded to the public's increased concern over privacy in light of increasing use of computers.[73] In 1966, federal policymakers noticed the public's unease with the growing administrative state as well as its extensive collection of information and passed the Freedom of Information Act (FOIA).[74] Under FOIA, public access to government records drastically improved due to the law removing several barriers to requesting and receiving such records.[75] Of course, the Framers of Montana's Constitution acted on a similar impulse *and went further* by including both the right of privacy and the right to know in the document.[76]

Not all bold visions for privacy protections at the federal level survived congressional scrutiny, but they may provide insights into the intent and aspirations of the Framers. In 1973, the United States Department of Health, Education and Welfare issued a report titled, "Records, Computers, and the Rights of Citizens."[77] The report contained

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[68] Solove, *supra* note 63, at 23.
[69] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).
[70] Griswold v. Connecticut, PLANNED PARENTHOOD, https://www.plannedparenthoodaction.org/issues/birth-control/griswold-v-connecticut#:~:text=Connecticut%20case%20established%20—%20for%20the,and%20safe%20and%20legal%20abortion. (accessed Feb. 2, 2023), [https://perma.cc/KTB6-R9KF].
[71] Whalen v. Roe, 429 U.S. 589, 599 (1977); *see* Nixon v. Administrator of General Services, 433 U.S. 425 (1977) (noting constitutional protection of the right to information privacy).
[72] *See* Jessica C. Wilson, *Protecting Privacy Absent A Constitutional Right: A Plausible Solution to Safeguarding Medical Records,* 85 WASH. U. L. REV. 653, 657 (2007).
[73] *See* Solove, *supra* note 63, at 24 (internal citation omitted).
[74] *See id*.; *see also* 5 U.S.C. § 552.
[75] *See, e.g.,* U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press, 489 U.S. 749, 771 (1989).
[76] *See* MONT. CONST. Art. II, §§ 9 - 10.
[77] DEP'T OF HEALTH, EDUC., AND WELFARE, NO. (OS) 73 – 94, RECS., COMPUTS. AND THE RTS. OF CITIZENS: REP. OF THE SECRETARY'S ADVISORY COMM. ON AUTOMATED PERS. DATA SYS. (1973) [hereinafter, HEW Report].
Though this report came out after the conclusion of the Constitutional Convention, it remains relevant to the "historical and surrounding circumstances" with respect to the public's privacy concerns at the time as well as policy efforts to respond to those concerns.

recommended privacy protections responsive to the public's concerns, though many of those recommendations were never enacted.[78] For instance, the report called for a ban on secret record-keeping systems of personal data, a way for individuals to receive an accounting of the information about them in government records and the purpose of the government's retention of that information, and a way for individuals to stop information collected for one purpose from being used for a different purpose without their consent.[79] Though all those recommendations were not codified, the report still played a "significant role in framing privacy laws in the United States," such as the Health Insurance Portability and Accountability Act of 1996 (HIPPA),[80] as well as privacy laws around the world.[81]

Delegates to the 1972 Constitutional Convention, like federal policymakers, were swimming in this deep and expanding pond of potential privacy protections.[82] Several of the delegates were keenly aware of research being done on expansive and substantial invasions of privacy. Robinson, for instance, shared that she had recently read a book in which the author "cite[d] instances after instances where there is no actual proof or even the slightest indication that the gains from wiretapping can ever in any way measure up to the invasion of privacy perpetrated by wiretapping."[83] Campbell summarized law review articles on the topic of privacy and detailed efforts by other states to protect the privacy of their citizens.[84] Delegate Barnard relayed that he had read about "completely innocent" individuals having their "reputations ruined for life" as a result of inadequate protections regarding their right of privacy.[85] Delegates also invited testimony from individuals with expertise pertaining to the extent to which invasions of privacy had proliferated.[86]

The familiarity of the delegates with the public's privacy concerns—as well as their awareness of the limits of federal law and case law with respect to protecting individual privacy—makes it clear that the delegates did not want the future of privacy law in Montana to be dependent on pre-existing federal protections. The Framers sought a forward-looking and expansive right of privacy, and anticipated that courts would help update that right as technology changed. Montanan courts, however, have failed in both of these respects. The legislative and

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[78] *See* Marc Rotenberg, *Fair Information Practices and the Architecture of Privacy (What Larry Doesn't Get),* 1 STAN. TECH. L. REV. 1, 15 (2001).
[79] HEW Report, *supra* note 77, at 41-42.
[80] Margot E. Kaminski & Jennifer M. Urban, *The Right to Contest AI*, 121 COLUM. L. REV 1957, 1996 (2021) (listing HIPAA and COPPA as examples of laws affected by the HEW Report).
[81] Solove, *supra* note 63, at 25 (quoting Rotenberg, *supra* note 78, at 44).
[82] *See id*. at 24-25 (collecting examples of commentators exploring privacy concerns during the 1960s and 1970s).
[83] Con Con Volume V, *supra* note 6, at 1684.
[84] Con Con Volume VI, *supra* note 26, at 1851.
[85] Montana Constitutional Convention, Verbatim Transcripts, March 16, 1972, Vol. VII, 2495.
[86] *See, e.g.,* Con Con Volume V, *supra* note 6, at, 1670-71.

executive branches of the Montana state government have failed in similar ways.

III. THE INTENTION OF THE FRAMERS HAS GONE UNREALIZED BY MONTANA'S BRANCHES OF GOVERNMENT

Despite the Framers' intent and widespread demand among Montanans for greater privacy protections, each branch of the Montana government has failed to protect Montanans against new technological and societal threats to the right to privacy.

Surveillance has become more invasive and widespread than the Framers could have imagined.[87] The public may now be subjected to "dataveillance," which is the tracking of metadata such as email headers.[88] This sort of surveillance marks an era of privacy invasion that "scarcely seems fathomable from the perspective of the 1960s, 1970s, or even the 1980s."[89] The creation and retention of this data poses substantial risk to Montanans. In 2019, more than 233,000 Montanans were affected by data breaches that likely involved the sale of highly sensitive personal information.[90] In 2021, a single data breach of Logan Health Medical Center impacted 174,761 Montanans and involved the exfiltration of personal information such as Social Security numbers and treatment information.[91] This kind of identity theft can cause victims to lose thousands of dollars.[92] Few trends suggest that breaches on the scale and scope of the Logan Health breach will abate in the future. In fact, they may become much more severe.[93]

Public and private actors are also developing new ways to exploit the sensitive information they have gathered, such as through Artificial Intelligence (AI) decision making systems. AI systems can "analyze massive amounts of data [to] make predictions about the future."[94] For example, loan providers have increasingly used AI to determine whether to grant loans to loan applicants.[95] Despite these developments, the federal

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[87] White, *supra* note 58.
[88] *Id*.
[89] *Id*.
[90] Pine Cove Consulting, *Montana Cyber Security Report: Reporting On 2020 Data Breaches In MT*, 5 (2020), https://www.pinecc.com/hubfs/2020%20MT%20Cybersecurity%20Report.pdf [https://perma.cc/VEL4-4BSX].
[91] Mike Kordenbrock, *Logan Health Notifies Patients of Data Breach That Affected Thousands of Montanans*, FLATHEAD BEACON (Mar. 8, 2022), https://flatheadbeacon.com/2022/03/08/logan-health-notifies-patients-of-data-breach-that-affected-thousands-of-montanans/ [https://perma.cc/8QRH-QYKE].
[92] Megan Leonhardt, *Consumers lost $56 billion to identity fraud last year—here's what to look out for*, CNBC (Mar. 23, 2021, 12:56 PM), https://www.cnbc.com/2021/03/23/consumers-lost-56-billion-dollars-to-identity-fraud-last-year.html [https://perma.cc/JF2S-XFGB] (summarizing a report by Javelin Strategy & Research).
[93] Pine Cove Consulting, *supra* note 90, at 8, 10.
[94] Crystal Grant, *Algorithms Are Making Decisions About Health Care, Which May Only Worsen Medical Racism*, ACLU MONTANA (Oct. 3, 2022), https://www.aclumontana.org/en/news/algorithms-are-making-decisions-about-health-care-which-may-only-worsen-medical-racism [https://perma.cc/K9S7-2FUN].
[95] *Id.*

government has failed to create regulations to protect customers' sensitive information from the privacy threats posed by business-oriented AI systems.[96] In fact, the federal government and the Montana state government themselves may have been the responsible for past privacy invasions. The ACLU of Montana, for instance, found that state and federal agencies may have spied on Keystone XL pipeline protestors.[97] Similarly, back in 2013, the ACLU reported that the federal government tracked phone call information, such as the length and recipient of a call, from Verizon Business Network Services accountholders.[98]

In many cases, though, Montana has fought hard to resist modern intrusions into the personal lives of its residents. For instance, legislative and executive officials in Montana fiercely resisted federal efforts to implement stricter driver's license requirements for those wishing to enter federal facilities and U.S. airline flights.[99] Then-Governor Brian Schweitzer cited many of the same concerns as the Con Con delegates when he opposed these efforts, stating that "Montanans don't want the federal agents listening to their phone conversations, rifling through their papers, checking on what books they read, and monitoring where they go and when. We think they ought to mind their own business."[100]

At times, the judicial branch has also defended Montana residents' right to privacy, especially with respect to highly sensitive and personal matters. In 1997, for example, the Montana Supreme Court ruled that anti-sodomy laws were unconstitutional invasions of privacy. Later, in 1999, the Court found that the right of privacy included a woman's right to choose to have an abortion performed by a provider of her choice.[101] The Court's protective efforts, however, have been neither as consistent nor as extensive as the Framers intended.

A. State Courts Have Not Adhered to the Intent and Objectives of the Framers

For a period of time following the Con Con, the Montana Supreme Court indicated it would respect the Framers' insistence on a Montana-specific and expansive right of privacy, even if doing so meant it had to diverge from federal trends. For instance, in a series of decisions, the Court

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[96] *Id.*

[97] *New Documents Reveal Government Plans to Spy on Keystone XL Protesters*, ACLU MONTANA (Sept. 4, 2018), https://www.aclumontana.org/en/press-releases/new-documents-reveal-government-plans-spy-keystone-xl-protesters [https://perma.cc/U9Q7-GS6L].

[98] *Yes, the Government is Spying on You*, ACLU MONTANA (June 6, 2013), https://www.aclumontana.org/en/news/yes-government-spying-you [https://perma.cc/MFL3-7Y4W].

[99] Eric Kelderman, *Two States Lead Revolt Against Real ID*, PEW RESEARCH CENTER (Apr. 18, 2007), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2007/04/18/two-states-lead-revolt-against-real-id [https://perma.cc/R3G4-5XAT].

[100] *Id.*

[101] Kirk Johnson, *Montana Court to Rule on Assisted Suicide Case*, N.Y. TIMES (Aug. 31, 2009), https://www.nytimes.com/2009/09/01/us/01montana.html [https://perma.cc/FLA3-KGNR].

rejected federal precedent when it found that individuals' privacy rights were violated when private parties searched an individual's property without consent. [102] To explain why it was not following the national trend of applying this right only against searches by public parties, the Court referred to the heightened privacy protections that had been established by the Con Con and ratified by the people.[103]

Even nine years after the Con Con, the Court continued to expand the protections given by the right of privacy in Montana beyond the privacy protections already given by the U.S. Constitution. For example, contrary to the federal approach, the Court applied the exclusionary rule—which prevents prosecutors from admitting evidence that had been obtained through an unreasonable search—to both state actors *and* private actors because the "compelling state interest" standard set forth in Article II, Section 10, of the Montana Constitution applied to unreasonable searches and seizures.[104] For instance, in *State v. Helfrich*, the Court affirmed a decision to suppress evidence collected by a private citizen who entered a fenced garden on another citizen's property and took a marijuana plant, which the citizen had then given to the authorities.[105] Similarly, in *State v. Brackman*, the Court stated that private parties violate an individual's right to privacy when electronically intercepting conversations between individuals who neither consented nor knew of the interception.[106]

In 1985, however, the Montana Supreme Court abandoned its practice of affording Montanans protections from invasions of privacy by private parties. In *State v. Long*, despite it noting numerous cases in which the Court had applied the exclusionary rule to private searches, and despite its previous understanding of the Framers' intent, the Court stated that "traditional notions of constitutional principles" required it to rescind protections against privacy invasions by private parties.[107] The *Long* Court acknowledged Montana's unique position as "one of a small minority of states" that expressly provided a right of privacy in its constitution, but nevertheless found it problematic that it had not followed the lead of other state courts, which had only applied the exclusionary rule to public actors and not to private actors.[108]

The *Long* decision diverged from the Court's precedent and inadequately considered the Framers' intent with respect to a right of privacy. Despite having records of the Framers' intent readily available via the Con Con transcripts, the Court instead tried to backwards engineer

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[102] *See* State v. Helfrich*,* 600 P.2d 816, 818 (Mont. 1979).
[103] *See id.*
[104] *See id.*; *see also* State v. Hyem*,* 630 P.2d 202, 208-209 (Mont. 1981) (internal citation omitted); State v. Long, 700 P.2d 153, 155-56 (Mont. 1985) (defining the exclusionary rule as denying the admission of "the fruits of illegally seized evidence in order to deter unlawful police activities[.]")
[105] *Helfrich,* 600 P.2d at 817-18.
[106] *Brackman*, 582 P.2d at 1220-21 (1978) (internal citation omitted).
[107] *Long,* 700 P.2d at 155-56.
[108] *Id*. at 156.

the Framers' intent by using the Constitution's plain meaning.[109] Further, contrary to the Court's claim that "[t]here is *every* indication that the delegates themselves adopted a privacy section which would only proscribe state action,"[110] the intent and objectives of the Framers, as well as the historical and surrounding circumstances, suggest it is at best uncertain whether the delegates sought to only apply the right against public entities. As explained in part above and expanded upon here, the delegates did not unequivocally dismiss the applicability of the right of privacy to private actors. Further, the Montana public—which elected the delegates, helped set their agenda, delineated the scope of their work, and ratified the resulting constitution—did not think this right was confined to government actors.[111]

The Court correctly concluded that the Framers "contemplated" state action, but not for the reasons suggested by the majority. As the Court pointed out, "[t]he language of the section itself indicates that the framer's contemplated state action by allowing an invasion [of privacy] where there was a compelling state interest."[112] Delegate Ask, however, insisted on the inclusion of the "compelling state interest" qualification not to alter the Court's precedent—which at that point clearly extended to private actors—but rather to eliminate the possibility of the courts interpreting new constitutional language in a way that diminished privacy rights.[113]

The Con Con transcripts contain additional indications of the Framers' intentions and other evidence related to the scope of privacy rights that are incongruous with the *Long* Court's blanket statement. For example, every delegate at the Con Con received a copy of a *Montana Standard* editorial in support of the right of privacy.[114] The editorial showed how the public understood the right as a response to "wiretaps, electronic and bugging devices, photo surveillance equipment and computerized data banks[.]"[115] These security threats could enable perpetrators to invade an individual's privacy while remaining undetected and to then use the stolen information in "the most insidious ways."[116] The editorial also expressed concern about "careless" government use of these technologies *as well as* careless use by "political organizations, private information gathering firms, and even [by individuals.]"[117] Based on this,

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[109] *Id.* at 156-57.
[110] *Long,* 700 P.2d at 157-58.
[111] Recall that, prior to *State v. Long*, the people had seen the Montana Supreme Court develop a long and consistent approach to this question. *See id.* at 154-55 (collecting cases extending the exclusionary rule to private searches). If the people opposed the Court's pre-*Long* approach, they could have instructed the delegates to pare back constitutional protections related to private searches. Instead, the delegates reported receiving a mandate from the people to further privacy protections. *See infra* Section II.B.
[112] *Long,* 700 P.2d at 157-58..
[113] *See supra* notes 28-34.
[114] Con Con Volume V, *supra* note 6, at 1681.
[115] *Id.*
[116] *Id*.
[117] *Id*.

the editorial advocated for "prudent safeguards against the misuse of such technology[.]"[118]

After Delegate Campbell cited the editorial in a speech to the Con Con, Campbell emphasized that the focus on the right to privacy should be the protection of the individual, rather than a prohibition on government action.[119] Although Campbell did not formally speak for the entire delegation, his remarks on this topic deserve added weight given that he was a member of the Bill of Rights Committee and was "one of the chief advocates of expanding the individual and collective rights included in the Constitution."[120]

Long was a juncture at which the Court dismissed the will of the Montanan public[121] and the Court's own initial prioritization of the Framers' intent and objectives.[122] Later, in *State v. Hanley* and *State v. Coleman*, the Court continued this trend when it gave the Montana Constitution little to no consideration when it analyzed the constitutionality of search and seizures.[123] Montanan courts have since continued to defer to federal statutes and case law in privacy matters, perpetuating the mistake of assuming federal privacy rights law aligns with Montana's Constitution.[124]

There is evidence that the present Montanan public fears privacy invasions by private entities more than privacy invasions by the government.[125] The fervor that fueled the passage of the right to privacy at the Con Con was neutral about the source of privacy invasions or, at a minimum, was not solely concerned about privacy invasions by the government.

The dangers of inadequate knowledge and enforcement of privacy protections in the Montana Constitution among the Montana State Bar and, in particular, among members of the state's judiciary, may negatively affect the public for decades. Eventually, in 2008, the Montana Supreme Court acknowledged in *State v. Goetz* that it had incorrectly interpreted

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[118] *Id.*
[119] *Id*.
[120] Fritz Snyder & Mae Nan Ellington, *The Lawyer-Delegates of the 1972 Montana Constitutional Convention: Their Influence and Importance*, 72 MONT. L. REV. 53, 59-60 (2011).
[121] *Long,* 700 P.2d at 155 (collecting Montana Supreme Court cases from which the *Long* Court diverged).
[122] *See id.* at 156-57.
[123] State v. Allen, 241 P.3d 1045, 1054-55 (Mont. 2010) (analyzing *State v. Coleman*, 616 P.2d 1090 (Mont. 1980)).
[124] *Id*. at 1055-56.
[125] Brooke Auxier et al., *Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information*, PEW RESEARCH CENTER (Nov. 15, 2019), https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/ (reporting that 81% of Americans feel the potential risks of companies collecting data about them outweigh the benefits; comparatively, that percentage is just 66% in the context of government collection) [https://perma.cc/4UHN-7ZEE]; *see, e.g.,* Mary Beth Dickson, *Montana voters say 'Yes' to digital privacy amendment*, FOX (Nov. 9, 2022), https://www.yourbigsky.com/billings-beat/montana-voters-say-yes-to-digital-privacy-amendment/ (reporting the overwhelming support of Montana voters for an amendment to the Constitution offering them even greater privacy protections) [https://perma.cc/LX29-2J53].

state-based privacy protections in previous cases.[126] Still, even after it had noted this, the *Goetz* Court used the federal *Katz* framework—not the framework provided by Montana's Constitution—to assess the constitutionality of a search or seizure.[127] This was problematic partly because, as noted by Justice Nelson in a special concurrence in *Allen*, the *Katz* framework is susceptible to "vacillat[ing] with the prevailing political winds[.]"[128] Justice Nelson also expressed concern about the immense and undue discretion courts have when they decide whether a claimant's expectation of privacy is reasonable.[129]

Though the Montana Supreme Court has applied the *Katz* test in a manner that ensures privacy protections are updated with changing technologies and societal norms, its reliance on the federal framework threatens the realization of the Framers' objectives and intent.[130] Further, its use of the federal framework may subject the Court's decisions to unnecessary federal scrutiny.[131] It is time for the Court to "honor its own constitution and laws" by adopting a "fully independent analysis for determining whether particular police practices are searches as contemplated by the Montana Constitution."[132]

B. The Legislative and Executive Branches Have Insufficiently Advanced the Right of Privacy

The Montana State Legislature and Governor Greg Gianforte have taken numerous actions at odds with the "personal security and personal liberty" of Montanans, infringing on their right to be "let alone" via a right of privacy.[133] A recent example indicates how the legislative and executive branches have worked together to perform some of the very activities most despised by the delegates—limiting the ability of Montanans to identify by their gender of choice without substantial and undue interference by the State.

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[126] 191 P.3d 489, 497 (Mont. 2008) (noting that earlier cases provided "little, if any guidance," related to privacy protections in search and seizures cases because those cases had relied on federal statutes to interpret Article II, Section 10, of the Montana Constitution).
[127] *Id*. at 497-99.
[128] *Allen,* 241 P.3d at 1077-78 (Nelson, J., specially concurring).
[129] *Id.* (Pointing out the possibility that while the expectations of privacy held by defendants in other cases had been reasonable, the Court lacked the ability to "discern accurately which privacy expectations society is prepared to recognize as reasonable.")
[130] *See* Stephanie Holstein, *Note: State v. Allen: The Connection Between the Right to be Secure From Unreasonable Search and Seizures and Montana's Individual Right of Privacy*, 73 MONT. L. REV. 179, 196 (2012) (arguing that since the Montana Supreme Court adopted the *Katz* framework it "has consistently used it to increase individual rights and effectively diverge from federal doctrine.")
[131] *Id*. (citing David M. Skover, *Address: State Constitutional Law Interpretation: Out of "Lock-Step" and Beyond "Reactive" Decisionmaking*, 51 MONT. L. REV. 243, 252 (1990)).
[132] *Id*.
[133] *Id*.

The legislative branch infringed on the right of Montanans to be "let alone" when both houses passed Senate Bill 280 (SB 280), prohibiting Montanans from changing their gender on their birth certificate unless their sex had "been changed by surgical procedure."[134] Governor Gianforte promptly signed the bill into law.[135] SB 280 replaced the prior rule that allowed Montanans to correct their gender by simply presenting an affidavit to the State.[136] SB 280 possesses many of the problematic aspects that motivated the delegates when they crafted Article II, Section 10 of the Montana Constitution. The law involves the unnecessary retention of sensitive information; it interferes with the ability of Montanans to control their personal affairs; and its passage appears to have been fueled by political concerns.[137] Notwithstanding the significant privacy concerns, a district court judge temporarily suspended enforcement of the law based on "vague" terms.[138]

The executive branch—specifically, the Department of Public Health and Human Services—took additional steps to infringe on the privacy rights of transgender people born in Montana by issuing a new administrative rule in the wake of that court-ordered injunction.[139] The administrative rule dropped the vague language that gave rise to the district court's concerns, but completely denied Montanans the ability to change their gender on their birth certificate.[140] The Department reasoned that it could not reinstate the pre-SB 280 rule because that version exceeded the statutory authority permitting the Department to issue and amend birth certificates.[141] The Department interpreted the applicable statute as referring solely to "sex," which is a "biological concept (and a biological fact)," as opposed to "gender," which the Department defined as a "psychological, cultural, and/or social construct."[142] Consequently, the Department determined any recordation of the "gender" of a Montanan would go beyond the legislature's instructions.[143]

Concerns about individual autonomy related to the right of privacy did not sway the Department's conclusion. Despite the Department

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[134] Section 5-15-224, MCA (2021 MONT. LAWS CH. 332, § 1).
[135] James Factora, *Montana Just Made It Much Harder for Trans People to Correct Their Birth Certificates*, THEM (May 4, 2021), https://www.them.us/story/montana-passes-anti-trans-birth-certificate-bill [https://web.archive.org/web/20230503202733/https://www.them.us/story/montana-passes-anti-trans-birth-certificate-bill].
[136] *See* Admin. R. M. 37.8.311 (2017).
[137] *See supra* Section II.A.
[138] *See* Amelia Marquez v. State of Montana et al., No. DV-21-00873, (Mont. Jan. 28, 2022).
[139] Neelam Bohra and Michael Levenson, *Montana Restricts Changes to Birth Certificates for Transgender People*, N.Y. TIMES (Sept. 13, 2022), https://www.nytimes.com/2022/09/13/us/montana-gender-birth-certificates.html [https://web.archive.org/web/20230503020432/https://www.nytimes.com/2022/09/13/us/montana-gender-birth-certificates.html]; Admin. R. M. 37.8.311 (2022).
[140] *See* Admin. R. M. 37.8.311 (2022).
[141] Department of Public Health and Human Services, Notice of Amendment In the matter of the amendment of ARM 37.8.311 pertaining to changing the identification of sex on birth certificates (Sept. 9, 2022), https://rules.mt.gov/gateway/ShowNoticeFile.asp?TID=11293.
[142] *Id*.
[143] *Id*.

acknowledging that "[r]esearch and reports indicate that many people who identify as transgender and have gender dysphoria have co-existing mental or psychological problems or disorders," the Department argued that improvements to Montana's behavioral health care system were necessary and a sufficient remedy to such issues.[144] Absent from the Department's reasoning is the delegates' expectation that the government would fulfill its obligation to reexamine its practices through the lens of the right of privacy.[145]

Given that other states, such as California, have justified exempting transgender people from certain disclosure mandates to protect their privacy, it seems likely that if the State of Montana truly reexamined its practices, then it would adopt similar policies. An examination of new laws in California reveals the privacy-related justifications for collecting less information from transgender people. To prevent transgender people in California from sharing information with law enforcement or private litigants in states with anti-trans policies, the State banned its clerks and lawyers from issuing a subpoena based on an out-of-state subpoena if it seeks information about sensitive services, such as gender-affirming care, and relates to a foreign penal civil action, such as a suit to punish an offense in the other state.[146] Additionally, California exempted healthcare providers from their obligation to disclose certain medical information to entities when doing so would require sharing a transgender person's information.[147]

The intent of Con Con delegates such as Delegate Campbell, a Bill of Rights Committee member who championed additional privacy protections, indicates that Montana should be following California's lead. Campbell made clear that his committee intended for the right of privacy to "cause a complete reexamination" by the government that resulted in a guarantee that individuals have the "most important right of them all."[148] The odds that such a reexamination would result in greater privacy protections for transgender people in Montana are further heightened by widespread recognition that the right to privacy in the digital age necessitates more deliberate efforts to prevent violations and abuses, especially with respect to persons in vulnerable situations, or marginalized groups.[149] Still, though the State of Montana has failed to reconsider its position, there is reason to conclude that it is capable of reversing its invasion practices.

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[144] *See id*.
[145] Con Con Volume V, *supra* note 6, at 1681.
[146] Adam Schwartz, *California Leads on Reproductive and Trans Health Data Privacy*, ELECTRONIC FRONTIER FOUNDATION (Oct. 1, 2022), https://www.eff.org/deeplinks/2022/09/california-leads-reproductive-and-trans-health-data-privacy (providing an overview of recent legislation in California) [https://perma.cc/GP4Q-A3JD.]
[147] *Id*.
[148] *See* Con Con Volume V, *supra* note 6, at 1681.
[149] *See generally* UNITED NATIONS, The right to privacy in the digital age: report (Sept. 15, 2021) [https://perma.cc/8E87-Y4CW]

Not all actions from the Montana legislative and executive branches fall short of the standard set by the Framers with respect to a right of privacy. As mentioned, the executive branch has previously resisted efforts by the federal government to collect information on Montanans.[150] The Legislature spearheaded legislation to limit law enforcement from accessing and searching DNA databases for forensic or investigative purposes.[151] In these cases, the legislative and executive branches appear to be acting in recognition of the high value Montanans continue to place on their privacy. Most recently, in November of 2022, the public evidenced their willingness to limit undue intrusions into their affairs by amending the Montana Constitution. The amendment requires that state and local governments obtain a warrant prior to accessing Montana citizens' electronic data and communications.[152]

It may be the case that the legislative and executive branches would pay more attention to the right of privacy if the Montana Supreme Court subjected government action to the exacting standard set by the Framers. The Legislature, for instance, would likely be less inclined to consider anti-abortion legislation if the Court had a more established precedent with respect to adhering to the intent and objectives of the delegates. This theory has proven true for several decades. In 1999, citing the right of privacy, the Montana Supreme Court defended and protected a woman's right to choose.[153] The Court unequivocally stated that, in comparison to federal protections, "[t]he roots of Montana's constitutional right of procreative autonomy go much deeper and are firmly embedded in the right of individual privacy guaranteed under" Article II, Section 10, of the Montana Constitution.[154] Decades later, the Court's clear and forceful application of the right of privacy continues to dissuade efforts by those opposed to autonomy to infringe on a woman's ability to choose.[155] Even after winning a supermajority of seats in the Legislature, Senator Greg Hertz identified *Armstrong* as a formidable barrier to Republicans passing any anti-abortion legislation or referring any such constitutional amendments to the ballot.[156]

Montanans deserve to have the Montana Supreme Court apply *Armstrong*-esque reasoning to every issue implicating their right of privacy. In *Armstrong*, the Court analyzed the intent and objectives of the delegates as set forth in the Con Con's transcripts,[157] distinguished the

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[150] *See* Kelderman, *supra* note 99.
[151] Michelle Taylor, *Maryland, Montana Become First States to Restrict Genealogy Searches*, FORENSIC (June 30, 2021), https://www.forensicmag.com/577298-Maryland-Montana-Become-First-States-to-Restrict-Genetic-Genealogy-Searches/ [https://perma.cc/RSM7-4FUU].
[152] Dickson, *supra* note 125.
[153] Armstrong v. State, 989 P.2d 364 (Mont. 1999).
[154] *Id*. at 377-78.
[155] Arren Kimbel-Sannit, *Montana Republicans get their supermajority, but not without ceding some seats*, MONTANA FREE PRESS (Nov. 11, 2022) https://montanafreepress.org/2022/11/15/montana-republicans-win-legislative-supermajority/ [https://perma.cc/UU5D-HUS8].
[156] *Id*.
[157] *See, e.g., Armstrong*, 989 P.2d at 376-77.

Montana Constitution from the U.S. Constitution,[158] and considered the social, political, and historical conditions that may necessitate an expansion of the right of privacy to accommodate modern threats to that right.[159] If the Court followed that framework whenever Montanans had their right of privacy threatened, then the legislative and executive branches would have much less room to threaten that right. As the *Armstrong* Court recognized, the delegates had an "overriding concern that government not be allowed to interfere in matters generally consider private" and the delegates made a "specific determination to adopt a broad and undefined right of individual privacy grounded in *Montana's* historical tradition of protecting personal autonomy and dignity."[160] Based on that clear recognition of the expansive intent of the delegates, it bears asking why each branch of the Montana state government has not asked the following—when applicable—in response to policies related to transgender people and gender on the whole:

> Is it not the case that someone's gender identity is something considered to be "generally private"?
> Is it not the case that excessive conditions on a probationer's release from detention infringes on their "personal autonomy and dignity"?
> Is it not the case that incarcerated individuals still desire and deserve to maintain private lives?

Variants of these questions have or will come before the Montana Supreme Court. Similarly, they all have or will be the subject of legislative or executive action. The Montana-specific right of privacy should shape how each branch resolves the questions raised by these issues—that is what the Con Con delegates wanted, and what the people of Montana deserve.

IV. HOW MONTANA INTERPRETS AND ENFORCES THE RIGHT OF PRIVACY HAS RAMIFICATIONS ON OTHER STATES

In addition to Montana, Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, New Hampshire, South Carolina, and Washington have constitutions with specific protections related to a right of privacy.[161] It follows that how the Montana Supreme Court interprets its right of privacy language may influence how its sister courts interpret

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[158] *See, e.g., id*. at 373-74.
[159] *See, e.g., id*. at 377-78.
[160] *Id*. at 376 (emphasis added).
[161] *Privacy Protections in State Constitutions*, National Conference of State Legislatures (Jan. 3, 2022), available at: https://www.ncsl.org/research/telecommunications-and-information-technology/privacy-protections-in-state-constitutions.aspx.

their own privacy rights.[162] It is likely that how the respective supreme courts in Montana, Alaska, Arizona, California, and Washington interpret the right of privacy influences the other supreme courts. Research conducted by Rachael Hinkle and Michael Nelson revealed that the proximity of two states results in an increase in cross-state citations in judicial opinions.[163]

The theory of state courts influencing one another has been realized in Montana. The number and extent to which other state courts have protected privacy rights has had a documented impact on the jurisprudence of the Montana Supreme Court. For instance, in *Long*, where the Court abandoned its precedent of applying privacy protections to private searches, the Court supported its reasoning by noting that only a "minority" of states followed that practice.[164] It's impossible to know if the Court would have upheld its privacy-protecting precedent in light of more states doing the same, but the *Long* opinion nevertheless shows that "peer pressure" can impact state court decisions. In fact, the Court relied on peer pressure—in the form of privacy-protecting precedent set by state courts in Michigan, Florida, and Wisconsin[165]—in deciding *Brackman*, which reinforced that the state government had to satisfy a stricter standard than the federal standard when infringing the privacy rights of Montanans.[166]

The decisions made by the Montana Supreme Court may have practical consequences on the lives of residents of other states as well. Case in point, Montana has become "an island of [abortion] access in the northern Rocky Mountain states" because of the Montana Supreme Court's decision in *Armstrong*.[167] Without the Court's fidelity to the intention of the delegates, millions of Americans may have been even more negatively affected by the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*.[168] Related decisions by the Montana Supreme Court—in which the Court identifies the privacy concerns that motivated the delegates and responds by ensuring the right of privacy is enforced with respect to modern means of infringing that right—could have a similar positive effect on the residents of other states.

By way of example, if the Montana Supreme Court rules that the State cannot inhibit the ability of a Montanan to declare their gender

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[162] Rachael K. Hinkle and Michael J. Nelson, *The Transmission of Legal Precedent among State Supreme Courts in Twenty-First Century*, 16(4) STATE POLITICS & POLICY QUARTERLY, 391, Abstract (Dec. 2016), https://journals.sagepub.com/doi/abs/10.1177/1532440015625328 [https://perma.cc/6C93-HGGP].

[163] *Id*.

[164] *Long,* 700 P.2d at 156.

[165] *Brackman*, 582 P.2d at 1220.

[166] *Id*. at 1222.

[167] Karin Brulliard, *A little-watched Montana race has become a contentious abortion fight*, WASHINGTON POST (Oct. 12, 2022), https://www.washingtonpost.com/nation/2022/10/12/montana-supreme-court-abortion/ [https://perma.cc/3PYE-Q5UP].

[168] 142 S. Ct. 2228 (2022) (overturning the protections related to abortion afforded by Roe v. Wade, 410 U.S. 113 [1973]).

identity and to have the State respect that choice, then advocates for the extension of that privacy-adjacent right would have additional authority for their assertion of that right in their state. Similarly, if the Court had a chance to adjudicate the use of a new form of technology under Article II, Section 10, of the Montana Constitution and declared certain uses of that technology to be unconstitutional, then the market for that technology would be reduced and perhaps its spread to other states would be diminished.

Finally, the advancement of the right of privacy in Montana can inspire Americans who, like Montanans, have a particular desire to be "let alone." Notably, it appears as though the number of Americans with such a desire is increasing. The Pew Research Center detected substantial privacy concerns among most Americans in a recent survey.[169] More than 80% of Americans feel "[t]hey have very little to no control over the data companies and the government collects."[170] Likewise, 66% of Americans regard the risks of the government collecting data about them as outweighing the benefits; that percentage increases to 81% when companies are collecting data.[171] General fears about the security of personal data have increased in recent years.[172] These fears, even if not grounded in actual invasions of privacy, may have a chilling effect on political discourse and personal decisions—"[c]lose to half (47%) of adults believe at least most of their online activities are being tracked by the government."[173] A perception of being tracked and monitored will not stimulate free speech nor risk-taking.[174] If the right of privacy in the Montana Constitution is given its full effect—being enforced by the Montana Supreme Court and implemented by the legislative and executive branches—then other Americans may be compelled to fight for a similar right in their own state and, upon their success, receive the protections afforded to Montanans.

V. CONCLUSION

This paper identified the implications of the Montana Supreme Court's failure to adhere to the intent of the Framers of the right to privacy enshrined in the 1972 Montana Constitution. The Court's interpretative error marks a turn from its prior recognition of the expansive intent of the Framers and a divergence from the Court's own framework for interpreting the Constitution. In the immediate aftermath of the 1972 Con Con, the Court issued several opinions in recognition of the delegation having made a "specific determination to adopt a broad and undefined right of

[169] Auxier et al., *supra* note 125.
[170] *Id*.
[171] *Id*.
[172] *Id*.
[173] *Id*.
[174] *See id*.

individual privacy grounded in Montana's historical tradition of protecting personal autonomy and dignity." Under this "broad and undefined right," the Court interpreted the state's Constitution as affording Montanans robust privacy protections—often beyond that afforded by the applicable federal framework and federal constitution. The Court's adherence to the will of the Framers aligned with its interpretative rules—starting its constitutional analysis with consideration of the intent of the Framers, including the historical and surrounding circumstances that existed at the time of the Con Con. The 1970s brought on a wave of popular discontent with the government's possession and use of invasive technology. This wave produced a flood of comments from the public to their delegates to use the Con Con as an opportunity to shore up the privacy rights of all Montanans.

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. Consequently, the Court has reversed itself on many privacy issues—leaving Montanans only with the protections afforded by the applicable federal framework. The Court's failure to follow the Framers as well as its precedent has impacted the work of the other branches of the state's government. Montana's current batch of legislative and executive officials have attempted, on numerous occasions, to scale back the privacy protections necessary for residents to experience the personal autonomy and dignity set forth by the Framers. For instance, the Montana State Legislature has persistently advanced legislation limiting the rights of transgender people despite third parties, such as the United Nations, concluding that members of such communities are in need of heightened privacy protections in this digital age.

The failure of the Montana Supreme Court to realize the intent of the Framers with respect to the right of privacy has consequences beyond the state's borders. In an alternative universe, the Court's adherence to the Framers' wishes could have served as persuasive authority for other state courts interpreting their respective rights of privacy and privacy statutes. Instead, this useful precedent is simply non-existent. Until more state courts consistently and clearly advance privacy protections beyond those afforded by the federal Constitution, it is likely that federal law will serve as the floor and ceiling of privacy protections—regardless of whether state law presents the possibility of greater protection.

The Montana Supreme Court should resume its fidelity to the intent of the Framers. Given the increasing number and severity of privacy threats facing Montanans, Americans, and, in particular, members of vulnerable communities, the Framers would not have tolerated the Court's willingness to deprive Montanans of their desired level of autonomy.