WATERGATE, WIRETAPPING, AND WIRE TRANSFERS: THE TRUE ORIGIN OF FLORIDA'S PRIVACY RIGHT

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The United States Supreme Court's recent opinion in *Dobbs v. Jackson Women's Health Organization* has significantly increased the importance of the intersection between state constitutional law and potential abortion rights.[1] Because restrictions on abortion no longer violate federal constitutional rights under this precedent, the analysis now turns to state constitutional rights.[2] In 1989, the Florida Supreme Court found that Florida's independent freestanding privacy right included an expansive right to an abortion while invalidating a parental consent statute.[3] Following the *Dobbs* decision, however, the Florida legislature passed a law prohibiting abortion after fifteen weeks of pregnancy.[4] As of this writing, this law is being litigated in Florida courts.[5]

The Florida Supreme Court has made clear that the meaning of the Florida Constitution's text turns in significant part on how voters would have understood its meaning when proposed as a potential amendment.[6] Lacking from public commentary—and from *In Re: TW*—is any sociohistorical analysis of the cultural context precipitating the ballot initiative that became the Florida constitutional privacy guarantee.[7] The aim of this article is to identify and address the historical record leading up to drafting and proposing the explicit constitutional privacy right—a record which demonstrates that the origin of the amendment springs directly from concerns over informational privacy in the mid-

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[1] 142 S. Ct. 2228 (2022).

[2] *See id.* at 2242.

[3] *In Re T.W.*, 551 So. 2d 1186, 1192–96 (Fla. 1989).

[4] FLA. STAT. § 390.0111 (2022).

[5] *See State v. Planned Parenthood of Sw. & Cent. Fla.*, 344 So. 3d 637, 638 (Fla. Dist. Ct. App. 2022) (reversing the stay of the temporary injunction of the new abortion statute while litigation is pending).

[6] *See infra* Section III and accompanying text.

[7] *See infra* Section III, Section A.

1970s, exemplified by, *inter alia*, Watergate, wiretapping, and wire transfers.[8] Further, this historical record is consistent with the ordinary public meaning of the text of the amendment as adopted by Floridians in 1980, which was intended to protect against the discovery and dissemination of private facts—to guarantee the "right to be let alone" as conceptualized by Justice Brandeis.[9]

INTRODUCTION

In 1980, Floridians adopted a proposed state constitutional amendment creating a freestanding privacy right, which became article I, section 23: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the

[8] *See infra* Sections II–III.

[9] *See infra* Section VI.

public's right of access to public records and meetings as provided by law."[10]

The origin of the amendment springs directly from developments in information technology and concerns over informational privacy in the 1970s, exemplified by, *inter alia*, Watergate, wiretapping, and wire transfers. Informational privacy was a significant concern to the United States Congress, which passed the Privacy Act of 1974[11] and launched the Privacy Study Commission of 1977 to study informational privacy.[12] The Commission's final report urged states to look closely at informational privacy because of the lack of an express privacy right in the federal Constitution.[13]

Against this backdrop, Florida's unique Constitution Revision Commission ("CRC"), which meets once every twenty years,[14] gathered in 1977, where informational privacy was extensively debated and discussed.[15] An amendment proposed by the CRC was placed on the ballot in the 1978 general election but was rejected by the voters.[16] Two years later, the Florida legislature proposed a similar privacy amendment, passing with 60.6% of votes in the 1980 general election, thereby ratifying article I, section 23 of the Florida Constitution.[17]

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[10] FLA. CONST. art. I, § 23, *amended by* FLA. CONST. amend. XIII. The original version of the privacy amendment as adopted by the people in 1980 used the masculine pronoun "his" instead of the current words "the person's." *Id.* cmt. However, the Florida Constitution Revision Commission of 1997–1998 proposed Amendment XIII, entitled "Miscellaneous Matters and Technical Revisions," which removed "gender-specific references" throughout the Florida Constitution. *Id.*; *Florida Miscellaneous Matters and Technical Revisions, Amendment 13 (1998)*, BALLOTPEDIA, https://ballotpedia.org/Florida_Miscellaneous_Matters_and_Technical_Revisions,_Amendment_13_(1998) [https://perma.cc/5TW4-9ECE].

[11] 5 U.S.C. § 552a.

[12] *See* PRIVACY PROTECTION STUDY COMM'N, PERSONAL PRIVACY IN AN INFORMATION SOCIETY xv, 3 (1977).

[13] *See id.* at 488–89, 490–91.

[14] *See* FLA. CONST. art. XI, § 2(a).

[15] Steven J. Uhlfelder & Robert A. McNeely, *The 1978 Constitution Revision Commission: Florida's Blueprint for Change*, 18 NOVA L. REV. 1489, 1491–92 (1994); COMMON CAUSE FLORIDA, Florida Constitution Revision Commission, https://www.commoncause.org/florida/our-work/protect-the-constitution-courts-other-democracy-reforms/florida-constitution-revision-commission/ [https://perma.cc/N6CU-63MX] (last visited December 3, 2022).

[16] *See* Uhlfelder & McNeely, *supra* note 15, at 1490; *November 7, 1978 General Election Official Results*, Florida Dep't of State, Div. of Elections (Oct. 29, 2022, 1:02 AM), https://results.elections.myflorida.com/SummaryRpt.asp?ElectionDate=11/7/1978&COUNTY=WAL&PARTY=&DATAMODE= [https://perma.cc/8TUK-ZY7E].

[17] *November 4, 1980 General Election Official Results*, Florida Dep't of State, Division of Elections,

In 1989, the Florida Supreme Court found this privacy right to include an expansive right to an abortion and invalidated a parental consent statute.[18] Now, however, with the *Dobbs* decision, the 2021 Florida legislature has prohibited abortion after fifteen weeks of pregnancy,[19] and as of this writing, the law is in active litigation and is expected to eventually be heard by the Florida Supreme Court.[20] So, the critical question is whether the *In Re T.W.* court correctly found that the Florida Constitution's "right to privacy" carries with it abortion rights, and the Florida Supreme Court's analysis of the fifteen-week bill will likely turn on how the "right to privacy" was publicly understood by voters at the time of its passage in 1980. An "exhaustive review of [the] official historical documents [in the Florida Archives] clearly reveal[] that 'informational privacy' was the exclusive reason the privacy amendment was proposed" in 1978 by Florida's Constitution Revision Commission, and then again by the Florida Legislature, and adopted by Floridians in 1980.[21]

This historical record is consistent with the origin of the amendment's guarantee of the "right to be let alone," which was made famous by then-professor—eventually-Justice—Louis Brandeis's 1890 Harvard Law Review article, "The Right to Privacy."[22] At least in the United States, this article was the first to advocate for a right to privacy vindicable in court—the "right to be let alone"—and is widely considered to be amongst the most influential American legal essays.[23] This phrase also has its origin in informational privacy and intellectual property.[24]

In sum, the underexamined historical record—both culturally and legally—demonstrates that Florida's privacy right was intended to

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https://results.elections.myflorida.com/Detail-Rpt.Asp?ELECTIONDATE=11/4/1980&RACE=A02&PARTY=&DIST=&GRP=&DATAMODE= [https://perma.cc/KAJ8-NKW7] (last visited Oct. 29, 2022).

[18] *In re* T.W., 551 So. 2d 1186, 1192–96 (Fla. 1989).

[19] FLA. STAT. § 390.0111 (2022).

[20] *See State v. Planned Parenthood of Sw. & Cent. Fla.*, 344 So. 3d 637, 638 (Fla. Dist. Ct. App. 2022).

[21] John Stemberger, *The True Origin of Florida's Privacy Right*, TALLAHASSEE DEMOCRAT (June 26, 2022, 6:00 AM), https://www.tallahassee.com/story/opinion/2022/06/26/true-origin-floridas-privacy-right-not-abortion-opinion/7719260001/ [https://perma.cc/UA4E-CGLQ].

[22] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193, 205 (1890).

[23] J. Thomas McCarthy, *Melville B. Nimmer & The Right of Publicity: A Tribute*, 34 UCLA L. REV. 1703, 1704 (1987); *see* Warren & Brandeis, *supra* note 22, at 193.

[24] *See* McCarthy, *supra* note 23, at 1705–07.

proscribe the discovery and dissemination of private facts and issues, not to prescribe substantive affirmative rights of conduct such as abortion.

I. ORIGINAL PUBLIC MEANING AND HISTORICAL SOURCES

Before addressing the historical record, it is worth noting *why* it is important. In this section, we address why it is likely the Florida Supreme Court will find the surrounding cultural and social historical context critical to interpreting the ordinary public meaning of the privacy right granted by article I, section 23.

a. The polestar of originalist jurisprudence is to ascertain the "original public meaning" of the text

Broadly, the two camps of originalist jurisprudence are "original intent" and "original public meaning."[25] The "original intent" camp seeks to ascertain the constitutional enactor's intended meaning in utilizing the relevant text.[26] The "original public meaning" camp, by contrast, seeks to ascertain what a well-informed reader would have understood the text to mean at the time of enactment.[27]

These two modes of interpretation are not always—and perhaps not even usually—in tension.[28] And indeed, the Florida Supreme Court appears to have settled on a mode of analysis that incorporates both forms of originalism.[29] The court has explained that it "endeavors to construe a constitutional provision consistent with the intent of the framers *and* the voters."[30] The intent of the framers, of course, appears to privilege "original intent" originalism.[31] The intent of the voters, by contrast, appears to privilege "ordinary public meaning" originalism, i.e., what would a reasonably informed voter have understood the constitutional provision to mean?[32] When push comes to shove, however,

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[25] *See* John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1376 (2019).

[26] *See* Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 229–30 (1988).

[27] *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 92 (2004) ("'[O]riginal [public] meaning' originalism seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.").

[28] *See* McGinnis & Rappaport, *supra* note 25, at 1376, 1390–91.

[29] *See* Zingale v. Powell, 885 So. 2d 277, 282 (Fla. 2004).

[30] *Id.* (emphasis added) (quoting Caribbean Conservation Corp. v. Fla. Fish & Wildlife Conservation Comm'n, 838 So. 2d 492, 501 (Fla. 2003)).

[31] *See* Kay, *supra* note 26, at 230.

[32] *See* BARNETT, *supra* note 27, at 92.

the court appears to favor the latter over the former. Consider the sources the Florida Supreme Court has highlighted as helpful to the constitutional interpretation analysis.[33] The court has stressed that "unless the text of a constitution suggests that a technical meaning is intended, words used in the constitution should be given their usual and ordinary meaning because such is the meaning most likely intended by the people who adopted the constitution."[34] Of course, where a constitutional amendment is adopted via ballot initiative—as is the case here—the "people who adopted the constitution[al]" provision are the voters.[35] Second, the court has noted that "a dictionary may provide the popular and common-sense meaning of terms *presented to the voters*."[36] Highlighting how the voters would have understood the text of a constitutional enactment—at least one that is put to ballot initiative—prioritizes the ordinary public meaning of the constitutional text.[37]

b. Historical sources are critical to understanding the original public meaning of the text

There is a significant caveat which must be addressed—that is, the Florida Supreme Court's oft-repeated assertion that if a constitutional provision is precise, plain, or unambiguous, "its *exact letter* must be enforced and extrinsic guides to construction are not allowed to defeat the plain language."[38] This approach appears to adopt a form of "strict constructionism," or what some scholars have called "muscular textualism," which stresses literal meaning based on grammar and usage without considering—or at least strongly downplaying—interpretative

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[33] *See e.g.*, Lawnwood Med. Ctr., Inc. v. Seeger, 990 So. 2d 503, 512 (Fla. 2008).

[34] *Id.* (citing Advisory Opinion to the Governor—1996 Amendment 5, 706 So. 32d 278, 282 (Fla. 1997)).

[35] *See id.*

[36] Brinkmann v. Francois, 184 So. 3d 504, 510 (Fla. 2016) (emphasis added) (quoting *Lawnwood*, 990 So. 2d at 512). As the court further explained, this requires looking to, inter alia, "the circumstances leading to [the term's] inclusion in our constitutional document[.]" *Id*. at 509–10 (quoting In re Apportionment Law Appearing as Senate Joint Resolution 1E, 414 So. 2d 1040, 1048 (Fla. 1982)).

[37] *Cf.* Chiafalo v. Washington, 140 S. Ct. 2316, 2335 (2020) (Thomas, J., concurring) ("[T]he Framers' expectations aid our interpretive inquiry only to the extent that they provide evidence of the original public meaning of the Constitution."); *see also* Ison v. Zimmerman, 372 So. 2d 431, 434 (Fla. 1979) (looking to the "history of the [constitutional] provision" to interpret an ambiguous phrase).

[38] *See* Fla. League of Cities v. Smith, 607 So. 2d 397, 400 (Fla. 1992) (emphasis added) (first citing State *ex rel.* West v. Gray, 74 So. 2d 114, 115–16 (Fla. 1954) (en banc) (per curiam); and then citing City of Jacksonville v. Cont'l Can Co., 151 So. 488, 489 (Fla. 1993)).

tools such as structure, context, and how the text would have been understood at the time.[39]

Perhaps the best recent example of this originalist debate is found in *Bostock v. Clayton County*.[40] There, the Supreme Court addressed whether Title VII's prohibition against "discriminat[ing] against any individual . . . because of such individual's . . . sex" prohibited discrimination on the basis of sexual orientation and/or sexual identity.[41]

Justice Gorsuch, writing for the majority, posited that the phrase "because of" establishes a "but-for" causation test and "sex" refers to biological differences between male and female.[42] Next, he explained that "a but-for test directs us to change one thing at a time and see if the outcome changes[,] [and] [i]f it does, we have found a but-for cause."[43] For this reason, taken literally (as Justice Gorsuch held that it must), Title VII prohibits discrimination "because of" sexual orientation or sexual identity:

> Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.[44]

Justice Gorsuch includes no analysis of what a reasonably informed public would have understood the prohibition against discrimination "because of sex" to mean and specifically whether it would have understood the term to prohibit discrimination "because of" sexual orientation or sexual identity.

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[39] *See* Elena Schiefele, *When Statutory Interpretation Becomes Precedent: Why Individual Rights Advocates Shouldn't Be So Quick to Praise* Bostock, 78 WASH. & LEE L. REV. 1105, 1110–11 (2022).

[40] *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

[41] *Id.* at 1738.

[42] *Id.* at 1739.

[43] *Id.*

[44] *Id.* at 1741–42.

In his dissent, Justice Kavanaugh, by contrast, posited that "courts must follow ordinary meaning, not literal meaning. And courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase."[45] He argued that interpreting words based on their "ordinary public meaning" is necessary because "[a] society governed by the rule of law must have laws that are known and understandable to the citizenry."[46] As such, he turned to "common parlance" and historical sources to "demonstrate the widespread usage of the English language in the United States: Sexual orientation discrimination is distinct from, and not a form of, sex discrimination."[47]

Taken in isolation, the Florida Supreme Court has appeared to prescribe Justice Gorsuch's methodology—at least as an initial matter—by holding that if the words of constitutional text are precise or unambiguous, their "exact letter" must be enforced without resort to extrinsic sources.[48] Strict construction of this edict would require strict constructionism in interpreting the Florida Constitution.[49] A closer look, however, suggests this has not been and will not be the approach taken by the Florida high court as a practical matter. For example, in *Florida League of Cities v. Smith*, it is true that the Florida Supreme Court reiterated the "exact letter" analytical rule and held it to be "settled."[50] But even in that case, the court identified the text's meaning by looking not only to dictionary definitions but also to "historical context."[51] Similarly, in subsequent cases, while reiterating that courts should not look to extrinsic sources if language is plain or precise, the court has

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[45] *Id.* at 1825 (Kavanaugh, J., dissenting).

[46] *Bostock*, 140 S. Ct. at 1825.

[47] *Id.* at 1828–30.

[48] *See* Fla. League of Cities v. Smith, 607 So. 2d 397, 400 (Fla. 1992).

[49] Perhaps the clearest folly of this approach—if it were indeed the Florida Supreme Court's approach—is seen by looking to freedom of speech. Like its federal counterpart, the Florida Constitution is absolute on this point: "*No law* shall be passed to restrain or abridge the liberty of speech." FLA. CONST. art. I, § 4 (emphasis added). This language is "precise" and "unambiguous." If it were correct that therefore its "exact letter" must be enforced, then the Florida legislature is foreclosed from enacting any restraints or restrictions on speech. *See Fla. League of Cities*, 607 So. 2d at 400. But of course, the Florida legislature has enacted numerous commercial speech or time, place, and manner restrictions, for example, and has done so constitutionally. *See, e.g.*, Fla. Stat. § 501.059(8)(a) (restricting speech based on a distinction between commercial and noncommercial speech); Turizo v. Subway Franchisee Advert. Fund Tr. Ltd., 603 F. Supp. 3d 1334, 1348–49 (S.D. Fla. 2022) (holding that section 501.059 is a constitutional restriction on commercial speech).

[50] 607 So. 2d at 400.

[51] *Id.* at 399.

nevertheless looked to historical sources to identify the plain meaning of the text.[52]

This aligns with the court's directive that constitutional provisions must be interpreted consistent with the intent of the voters that enacted the provision.[53] Ascertaining the intent of voters in enacting a constitutional provision requires identifying what the voters would have understood the text of the provision to mean—in other words, the ordinary public meaning of the provision at the time.[54] And ascertaining the public meaning of the text at the time requires to at least some extent consultation not only with dictionary definitions but also historical sources.[55] Dictionary definitions might be sufficient to show the meaning of words in a phrase, but properly analyzing the meaning of the phrase requires historical analysis.[56]

Notably, this is consistent with the recent trend particularly in the jurisprudence of not only the United States Supreme Court but also the Florida Supreme Court, which have placed even more significance on historical sources than had previously been the case. One example is *New York State Rifle & Pistol Ass'n v. Bruen*, where Justice Thomas authored the sixty-three-page majority opinion.[57] A full eighteen pages of the opinion consisted entirely of historical analysis.[58] And Justice Thomas was explicit that this historical analysis is required: rather than imposing a cost-benefit analysis or outlining types of scrutiny to apply, the test prescribed for Second Amendment challenges is whether the regulation "is consistent with the Nation's historical tradition of firearm regulation."[59] Arguably, *requiring* this type of analysis—rather than merely engaging in it to buttress an opinion—is somewhat unique to the Second Amendment, but it is notable that Justice Thomas, in justifying the "historical tradition" test, appealed to other constitutional jurisprudence, arguing that to comport with the First Amendment, the Court has required the state to show a regulation on speech is generally justified by "point[ing] to historical evidence about the reach of the

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[52] *See, e.g.*, Brinkmann v. Francois, 184 So. 3d 504, 511–13 (Fla. 2016) (analyzing historical sources, including amendment commentary, to identify the meaning of a constitutional provision).

[53] *See* Lawnwood Med. Ctr., Inc. v. Seeger, 990 So. 2d 503, 512 (Fla. 2008).

[54] *See* BARNETT, *supra* note 27, at 92.

[55] *See id.* at 92–93.

[56] *See* Thomas E. Baker, *Constitutional Theory in a Nutshell*, 13 WM. & MARY BILL RTS. J. 57, 73 (2004) ("Originalism thus is an exercise in historiography.").

[57] 142 S. Ct. 2111 (2022).

[58] *Id.* at 2138–56.

[59] *Id.* at 2130.

First Amendment's protections."[60] He also pointed to Sixth Amendment challenges, where the Supreme Court has "require[d] courts to consult history to determine the scope of that right[,]" and to the Establishment Clause, where "[m]embers of this Court 'loo[k] to history for guidance.'"[61]

It is perhaps debatable the extent to which Justice Thomas is reflecting Supreme Court jurisprudence versus attempting to shape it. But even if it is more the latter than the former, Justice Thomas is achieving his goal: the Supreme Court has continued to place more and more emphasis on historical sources and the historical record when engaging in textual analysis.[62] One obvious—and pertinent—example is the majority opinion in *Dobbs v. Jackson Women's Health Organization*.[63] There, Justice Alito devoted six pages to a historical analysis of abortion restrictions from English common law through 1973.[64] This is necessary because, in determining whether a right is constitutionally guaranteed by the Due Process Clause, courts must determine whether it is "fundamental to our scheme of ordered liberty and deeply rooted in this Nation's history and tradition."[65] Another example is *American Legion v. American Humanist Ass'n*, where Justice Alito's majority opinion—addressing whether an Establishment Clause violation had occurred—rested almost entirely on historical analysis of use of the symbol of a cross in secular contexts.[66] This is because, as Justice Alito explained, modern jurisprudence has eschewed other tests for analyzing potential Establishment Clause violations in favor of addressing the specific facts at hand while "look[ing] to history for guidance."[67]

This trend of placing increasing significance in historical sources and analysis can also be seen in recent Florida Supreme Court jurisprudence. One example is *Norman v. State*, where both the majority opinion (authored by Justice Pariente) and the dissent (authored by Justice Canady) engaged in extensive historical analysis in addressing whether Florida's open-carry restrictions comported with the federal and state constitutional right to bear arms.[68] Another example is *Davis v. State*,

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[60] *Id.* (emphasis omitted).

[61] *Id.* (second alteration in original) (first citing Giles v. Cal., 554 US. 353, 358 (2008); and then citing Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019) (plurality opinion)).

[62] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[63] *Id.*

[64] *See id*. at 2248–54.

[65] *Id*. at 2246–47 (internal quotation marks omitted).

[66] 139 S. Ct. 2067, 2067–90 (2019).

[67] *Id*. at 2087.

[68] 215 So. 3d 18, 28–36, 43–46 (Fla. 2017).

where the court's holding that Florida's dying declaration hearsay exception did not violate the Sixth Amendment's Confrontation Clause relied largely on historical sources of the common-law dying declaration exception.[69]

In sum, identifying the ordinary public meaning of Florida's guarantee of privacy requires analysis of historical sources of what a reasonably informed member of the public would have understood the term privacy and the text of the amendment to mean. Particularly given the Florida Supreme Court's increasing commitment to originalist jurisprudence, we think it likely that the Florida Supreme Court will do so in addressing its constitutionality.

II. THE BACKDROP OF FLORIDA'S INFORMATION PRIVACY RIGHT

To ascertain the true origin and purpose behind Florida's freestanding privacy right found in article I, section 23, of the Florida Constitution, an examination of the historical events which unfolded in the decade prior to the adoption of the amendment is critical. These events are critical to understanding the birth of the idea, the drafting of the language, and what was top of mind for the voters as they read and cast their ballots for or against Florida's unique privacy right on November 4, 1980.

On January 22, 1973, the landmark case of *Roe v. Wade* was decided by the United States Supreme Court, which found a fundamental right to abortion in the United States Constitution.[70] However, as detailed in the subsections below, after *Roe* was decided and for the remainder of the 1970s and into the 1980 election, the thrust of the public conversation and concern surrounding privacy rights both in legal and public circles predominantly related to informational privacy.[71] This article reviews various areas where concerns were growing because of the rapidly developing technologies and advancement in communications devices that the government and private companies would be able to gather purely personal and private data and information without the consent of, or respect for, the privacy of the individual person.[72]

After *Roe*, abortion as a privacy right found in the penumbras of United States Constitution was, at least for that period, considered legally "settled."[73] Indeed, in 1980, voters in the presidential election

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[69] 207 So. 3d 177, 200–04 (Fla. 2016).

[70] 410 U.S. 113, 164 (1973).

[71] *See infra* Sections a–e.

[72] *See* Daniel J. Solove, *A Brief History of Information Privacy Law*, in PROSKAUER ON PRIVACY, PLI 1–1, 1–24 (Practicing Law Institute Press 2016).

[73] *Roe v. Wade*, 410 U.S. 113, 164–65 (1973).

did not focus significantly on abortion.[74] Presidential candidates Jimmy Carter and Ronald Reagan both opposed federal funding of abortion.[75] While the two major candidates disagreed on a Federal Human Life Amendment, the public was largely unaware of this difference and where the candidates stood on abortion.[76] Therefore abortion was not a centerpiece or hard driving wedge issue in that election.[77] The United States Supreme Court decided the case of *Harris v. McRae* in the summer of 1980, upholding the Hyde Amendment prohibition against using certain federal funds for abortion.[78] This case garnered little media attention but did give additional reason for Carter and Reagan to both support the Hyde Amendment in the election. The next abortion case from the United States Supreme Court would not come until 1989, when the Court decided *Webster v. Reproductive Health Services*.[79] By contrast, privacy rights relating specifically to personal information was the overarching legal and political theme of the decade of the 1970s and right up to the general election in 1980 as outlined *infra*.[80]

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[74] *See* Donald Granberg & James Burlison, *The Abortion Issue in the 1980 Elections*, 15 FAM. PLAN. PERSP. 231, 231 (1983), https://pubmed.ncbi.nlm.nih.gov/6653742/https://pubmed.ncbi.nlm.nih.gov/6653742/ [https://perma.cc/24DV-YCUE] ("However, it is not clear that abortion was an overriding or decisive factor in determining [the 1980 election] outcomes. Democrats and Republicans, Carter voters and Reagan voters did not differ significantly in their attitudes toward abortion. The presidential voter groups were divided on several other issues, and along income and racial lines, to a far greater extent than they were on abortion. Voters were not likely to name abortion as one of the more important problems facing the nation. Carter supporters rated abortion as more important than did Reagan supporters. Although the party platforms and the presidential candidates were clearly differentiated in their abortion stands, these differences were not well communicated to the citizenry. When voters attempted to describe the position of each candidate on abortion, they displayed a great deal of uncertainty, error[,] and confusion.").

[75] Emma Green, *Why Democrats Ditched the Hyde Amendment*, THE ATLANTIC (June 14, 2019), https://www.theatlantic.com/politics/archive/2019/06/democrats-hyde-amendment-history/591646/ [https://perma.cc/4EWX-H22R].

[76] *See* Granberg & Burlison, *supra* note 74, at 235. "Forty-one percent of the CPS respondents said they did not know what Carter's position was on abortion, and [forty-six] percent claimed ignorance of Reagan's position. . . . It is somewhat remarkable that the electorate as a whole had no better than a vague impression of where each of the candidates stood on the issue of abortion." *Id.*

[77] *See id.*

[78] 448 U.S. 297, 326 (1980).

[79] 492 U.S. 490, 521 (1989) (upholding the decision in *Roe v. Wade*).

[80] *See infra* Sections a–e.

a. 1972–1974: Watergate and Wiretapping

On June 17, 1972, Frank Willis, a security guard with the Watergate Hotel in Washington, D.C., wrote six words that would change the course of American politics: "1:47 AM Found tape on doors; call police. . . ."[81] The Watergate scandal was the blockbuster story of the decade and brought to light the fact that illegal wiretapping was not just in the White House and Washington, D.C., but rampant across the country.[82] This illegal invasion of privacy rocked the political and legal world.[83] Americans were exposed to more than two years of heavy reporting on the Watergate scandal and President Richard Nixon's eventual impeachment and resignation.[84] But the Watergate wiretapping scandal was not merely a big news story—it was a watershed incident in American history that left an indelible mark upon the American psyche.[85]

Wiretapping is "the act of intercepting or recording messages or voice conversations transmitted over electronic communications networks."[86] Wiretapping is a practice that has been occurring at least since 1862.[87] As far back as the Civil War, "telegraph operators in the Union and Confederate armies . . . [used] wiretaps to intercept enemy dispatches and transmit disinformation."[88] The significance of Watergate was in part that it exposed the scale and breadth of this illegal and ethically questionable activity; for instance, after the Watergate

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[81] *See* DeNeen L. Brown, *'The Post' and the forgotten security guard who discovered the Watergate break-in,"* WASH. POST (Dec. 22, 2017, 8:00 AM), https://www.washingtonpost.com/news/retropolis/wp/2017/12/22/the-post-and-the-forgotten-security-guard-who-discovered-the-watergate-break-in/ [https://perma.cc/YG52-HBSC].

[82] *See, e.g.*, Nicholas H. Horrock, *Electronic Surveillance: Scope of Wiretapping and Bugging an Issue of Rising Concern*, N.Y. TIMES, Feb. 20, 1975, at 16 ("From the advent of Watergate nearly three years ago, national attention has been drawn again and again to the question of electronic surveillance; the issue of exactly how much wiretapping and bugging really goes on in the United States. Recent disclosures that the Central Intelligence Agency engaged in domestic operations and that the Bell Telephone System monitored calls have served only to increase interest in the issue.").

[83] *See id.*

[84] *See* Andrew Kohut, *From the Archives: How the Watergate Crisis Eroded Public Support for Richard Nixon* (Sept. 25, 2019), https://www.pewresearch.org/fact-tank/2019/09/25/how-the-watergate-crisis-eroded-public-support-for-richard-nixon/ [https://perma.cc/26R7-HZBZ].

[85] *See* BRIAN HOCHMAN, THE LISTENERS: A HISTORY OF WIRETAPPING IN THE UNITED STATES at 175, 177 (Harvard Univ. Press 2022).

[86] *See id.* at 23.

[87] *See* A History of Wiretapping in the United States, COMMONWEALTH CLUB, at 02:44 (Mar. 17, 2022), https://www.commonwealthclub.org/events/archive/podcast/history-wiretapping-united-states [https://perma.cc/8WFF-XVV9] (explaining that California passed the first wiretapping law in the United States in 1862).

[88] HOCHMAN, *supra* note 85, at 4.

scandal broke, the New York Times reported that the CIA "conducted a massive, illegal domestic intelligence operation during the Nixon Administration against the antiwar movement and other dissident groups in the United States."[89] This caused significant debate and concern over the government's ability to surveil and gather information about its citizens.[90]

The obsession with Watergate in particular, and wiretapping more generally, was not limited to the political sphere—it was also culturally a dominant theme and was the subject of several of the most popular films of the 1970s.[91] These films were of course seen by tens of millions of Americans and heightened awareness of, and concern for, informational privacy. For example, *The Conversation*, released in 1974, was directed by Francis Ford Coppola and starred Gene Hackman.[92] This thriller involves the story of "a paranoid, secretive surveillance expert . . . [who] suspects the couple he is spying on will [eventually] be murdered."[93] Hackman, who plays Harry Caul, the lead character, is fictionally one of the best wiretappers and "buggers" in the business and makes his own surveillance equipment.[94]

The movie *All the President's Men* was released in 1976 and won eight Academy Awards, including Best Picture, Best Director, and Best Screenplay.[95] Starring Robert Redford and Dustin Hoffman, the film depicted the story of the two Washington Post reporters, Bob Woodward and Carl Bernstein, "who uncover[ed] the details of the Watergate scandal that le[d] to President Richard Nixon's resignation."[96] *All the*

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[89] Seymour M. Hersh, *Huge CIA Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, N.Y. TIMES, Dec. 22, 1974, at 1, https://www.nytimes.com/1974/12/22/archives/huge-cia-operation-reported-in-u-s-against-antiwar-forces-other.html [https://perma.cc/TGX6-ZL6L].

[90] *See* Horrock, *supra* note 82, at 16.

[91] *See* HOCHMAN, *supra* note 85, at 177.

[92] *See The Conversation*, IMDB, https://www.imdb.com/title/tt0071360/ [https://perma.cc/WQK4-9C5A] (last visited Oct. 25, 2022).

[93] *Id.*

[94] *See* HOCHMAN, *supra* note 85, at 173, 175. "For many viewers in 1974, and for many in the decades since, current events would offer a convenient explanation. Almost as soon as *The Conversation* premiered, filmgoers and critics began enumerating a laundry list of chance connections between the film's plot and the Watergate scandal, another affair of hidden bugs and empty icons that had shaken the faith of so many Americans in the early 1970s." *Id.* at 175.

[95] *See All the President's Men: Awards*, IMDB, https://www.imdb.com/title/tt0074119/awards/?ref_=tt_awd [https://perma.cc/2PGC-FZ6Z] (last visited Oct. 27, 2022).

[96] *All the President's Men*, IMDB, https://www.imdb.com/title/tt0074119/ [https://perma.cc/3N3G-R8RK] (last visited Oct. 27, 2022); *see* Alex von Tunzelmann, *All the President's Men: Hoffman and Redford Fight the Powers that be*, THE GUARDIAN (July 14, 2017, 5:51 PM), https://www.theguardian.com/film/2014/oct/10/all-the-presidents-

President's Men won four Oscar Award nominations, garnered four Oscar Award wins, and grossed over $70 million at the box office.[97]

Six other movies in the 1970s contain wiretapping in some form.[98] "On stage, the playwright Arthur Miller made the ubiquity of electronic surveillance the basis for *The Archbishop's Ceiling* (1977), a drama set in eastern Europe that revolves around a group of writers who discuss their dissident political views in a bugged sitting room."[99] These shows and films evidence that the wiretapping and privacy was a predominant theme in 1970s—not only in news coverage and technology advancements but also in popular culture—and showcase the national public's concern with informational privacy at that time.

b. 1973: International Bank Wire Transfers through SWIFT

As of 1970, wire transfers had been occurring among domestic United States banks for many years, but there was not a trusted unified system to communicate payments that crossed the border of one country into another.[100] "In 1973, 239 banks from [fifteen] different countries got together to solve [this] problem."[101] "The banks formed a cooperative utility, the Society for Worldwide Interbank Financial Telecommunication [("Swift")], headquartered in Belgium."[102] Swift went live in 1977, providing messaging services and "replacing the Telex technology that was then in widespread use . . . rapidly bec[oming] the reliable, trusted global partner for [financial]

men-watergate-conspiracy-richard-nixon-woodward-bernstein-redford-hoffman [https://perma.cc/Z9NM-KSKE].

[97] Michael J. Gaynor, *All the President's Men: An Oral History*, WASHINGTONIAN, (April 3, 2016), https://www.washingtonian.com/2016/04/03/all-the-presidents-men-movie-oral-history/ [https://perma.cc/V8XD-2LM7]; *All the President's Men (1976)*, BOX OFFICE MOJO BY IMDB, https://www.boxofficemojo.com/title/tt0074119/ [https://perma.cc/KFW7-9TSL] (last visited October 27, 2022).

[98] HOCHMAN, *supra* note 85, at 177 (2022). Several lesser-known movies such as Alan Pakula's Klute (1971) and Sydney Lumet's The Anderson Tapes (1971) "prominently featured wiretapping in an effort to dramatize quotidian assaults on individual privacy." *Id.* Other movies such as The French Connection (1971), The Day of the Jackal (1973), The Parallax View (1974), Three Days of the Condor (1975) "used wiretaps and bugs as throw-away plot devices, tools that fictional characters could rely on to survive in the corrupt worlds they inhabit." *Id.*

[99] *Id.*

[100] *See* Bryan Borzykowski, *Explaining the History of How Money is Transferred Internationally*, CHARTERED PROFESSIONAL ACCOUNTANTS CANADA (June 21, 2022), https://www.cpacanada.ca/en/news/pivot-magazine/history-of-swift [https://perma.cc/A3TQ-TMT7].

[101] *Swift history*, SWIFT, https://www.swift.com/about-us/history [https://perma.cc/4DAD-JHV8] (last visited Oct. 29, 2022).

[102] *Id.*

institutions all around the world."[103] "By the time Swift went live in 1977, 518 institutions from [twenty-two] countries were connected to Swift's messaging services. . . . Less than [twelve] months after operations began, Swift had processed a total of 10 million messages."[104] This was, and still is, a member-owned cooperative network designed to improve the communication of financial transactions.[105] But Swift's success and growth in the late 1970s also raised concerns for the confidentiality and security of these international transfers of money from one bank to another, which continue to exist in even greater forms today.[106]

Again, informational privacy was top of mind as Swift was exploding in use around the world in the late 1970s and into 1980.[107] Indeed, the possibility of Swift—or something like it—and other expansions in "the capacity of public and private authorities to place the individual under . . . surveillance" was a key concern for legal theorists and jurists, leading to the critical challenge of "develop[ing] new public policies to protect privacy from unreasonable surveillance."[108] Even as recent as 2016, security and privacy issues were still challenging Swift bank transactions.[109] "Hackers have used the SWIFT network to steal money from banks around the world" in 2013, 2015, and 2016.[110]

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[103] *Id.*

[104] *Id.*

[105] *Discover Swift*, SWIFT, https://www.swift.com/about-us/discover-swift [https://perma.cc/6QVM-UWC5] (last visited Oct. 29, 2022).

[106] *See* Marine Cole, *Identify Potential SWIFT Cybersecurity Gaps*, WALL ST. J.: CFO J (July 5, 2022, 3:00 PM) https://deloitte.wsj.com/articles/identify-potential-swift-cybersecurity-gaps-01656602328 [https://perma.cc/4TN5-WNF6] ("SWIFT is a global cooperative of about 12,000 organizations established in the 1970s that brought a single secured and standardized communication system to banks and other organizations that wanted to transfer money using wires or an automated clearinghouse network. While there were quite a few cyberattacks involving SWIFT customers, a 2016 cyberattack caught global attention.").

[107] *See Swift history*, *supra* note 101 (showing that Swift experienced a "rapid expansion of users" in the 1908s).

[108] *See* Alan F. Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's: Part II: Balancing the Conflicting Demands of Privacy, Disclosure, and Surveillance*, 66 COLUM. L. REV. 1205, 1205 (1966).

[109] *See* Jim Finkle, *Exclusive: SWIFT Discloses More Cyber Thefts, Pressures Banks on Security*, REUTERS (Aug. 30, 2016, 7:08 PM), https://www.reuters.com/article/us-cyber-heist-swift-idUSKCN11600C [https://perma.cc/Y4EZ-8TR2].

[110] Penny Crosman, Kristin Broughton, & John Heltman, *Real Breach in Swift Heists May Be Banks' Complacency*, AMERICAN BANKER (June 1, 2016, 2:53PM), https://www.americanbanker.com/news/real-breach-in-swift-heists-may-be-banks-complacency [https://perma.cc/E4W7-ZGCA].

c. Mid 1970s: Growth and Saturation of Facsimile Machines

A facsimile machine is defined as "an image . . . sent over a phone network."[111] While the earliest versions of the facsimile machine were used as early as 1843,[112] the "debut" and explosion of this technology came starting in the mid-seventies.[113] In 1971, Xerox told its stockholders that "facsimile transmission may well become as indispensable to the office as the telephone itself."[114] "[I]nstalled [fax] machines in the United States grew from 20,000 in 1970 to over 250,000 in 1980."[115] In 1972, the Federal Communications Commission ("FCC") received requests from the Xerox company "to allow acoustic coupling for overseas transmission and from Western Union International . . . to provide unrestricted overseas voice, data, and fax communications."[116] "In 1976, the FCC allowed overseas data transmission over the telephone network, effectively enabling direct faxing."[117] "By 1980, single unit[] [fax machines] were so common that 'fax machine' had replaced 'transceiver.'"[118]

As with every new technology that transmits information, security and privacy issues become areas of concern:

> The problem was fourfold: ensuring that only the recipient read the fax, missent faxes, intercepted communications, and fraudulent faxes. . . . Not until the computer-based fax systems of the 1990s restricted access to incoming faxes did privacy automatically increase. Computer-based faxing ended public spectating but not error, state surveillance, and espionage.[119]

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[111] *The History of Fax (From 1843 to Present Day)*, FAXAUTHORITY (Aug. 9, 2021), https://faxauthority.com/fax-history [https://perma.cc/G9XY-HAS3].

[112] *Faxing Has Come A Long Way – And Isn't Going Anywhere*, FAXCORE, https://faxcore.com/blog/online-fax-service/faxing-has-come-a-long-way-and-isnt-going-anywhere/ [https://perma.cc/GS6W-LFK6] (last visited Oct. 26, 2022).

[113] Nicholas Jackson, *The Age of the Fax Machine Is (Finally) Coming to an End*, THE ATLANTIC (Aug. 2, 2011), https://www.theatlantic.com/technology/archive/2011/08/the-age-of-the-fax-machine-is-finally-coming-to-an-end/242660/ [https://perma.cc/CNQ3-4E9H].

[114] JONATHAN COOPERSMITH, FAXED: THE RISE AND FALL OF THE FAX MACHINE 6 (John Hopkins Univ. Press 2015).

[115] *Id.* at 106.

[116] *Id.* at 107–08.

[117] *Id.* at 108.

[118] *Id.* at 109.

[119] *Id.* at 175–77 ("The rarely mentioned area of security was deliberate interception, a secret world populated by governments with equipment to monitor, analyze, and even, according to some, alter fax transmissions. Mining faxed messages for information actually proved easier than voice calls, because written faxes tended to be more succinct and optical character recognition enabled automated searching. As one vendor warned, 'In effect, every transmission is an open-envelope invitation to preying eyes.'" (footnote omitted)).

Beyond this, "fax" machines went on to have their greatest use in the decade of the 1980s.[120] The cooling of the fax machine as the hottest form of communication slowly occurred over a ten-year period when personal computers and emails entered the scene in the 1990s.[121] However, while fax machines were a technology on the rise in the late 1970s, there were significant concerns over informational privacy and data collection with their use.[122]

d. 1973-1974: The Early History of the Internet

Like the television, the internet did not have a single inventor; a group of scientists and communication technology experts gradually developed the internet over time.[123] Two of the most significant players in this process were Vinton G. Cerf and Robert E. Kahn.[124] Kahn is President of the Corporation for National Research Initiatives,[125] and Cerf is currently the Vice President and "Chief Internet Evangelist" at Google.[126]

The idea of the Internet starts in the late 1960s and is being used widely by many high-level researchers and developers by the time of the 1980s.[127] However, the creation, testing, and development of the Internet were done primarily during the decade of the 1970s.[128] "In October 1972, Kahn organized a large, very successful demonstration of the ARPANET at the International Computer Communication Conference ([ICCC"]])."[129] The ARPANET was the precursor to the Internet and allowed communication between host-to-host computers that were networked together using a special protocol and software.[130] This was "the first public demonstration of this new network technology to the public."[131] "It was also in 1972 that the initial 'hot'

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[120] *Faxing Has Come A Long Way – And Isn't Going Anywhere*, *supra* note 112.
[121] *See* COOPERSMITH, *supra* note 114, at 2.
[122] *See id.* at 175–79.
[123] *See* BARRY M. LEINER, ET AL., A BRIEF HISTORY OF THE INTERNET 3–4 (Internet Society 1997), https://www.internetsociety.org/wp-content/uploads/2017/09/ISOC-History-of-the-Internet_1997.pdf [https://perma.cc/P83Y-3ULX].
[124] *See id.* at 3–7.
[125] *Robert E. Kahn*, CORPORATION FOR NATIONAL RESEARCH INITIATIVES, https://www.cnri.reston.va.us/bios/kahn.html [https://perma.cc/FF2Z-GSUQ] (last visited Nov. 11, 2022).
[126] *Vinton G. Cerf*, GOOGLE RESEARCH, https://research.google/people/author32412/ [https://perma.cc/2LQB-QBD9] (last visited Nov. 11, 2022).
[127] BARRY M. LEINER ET AL., HISTORY OF THE INTERNET 3, 9 (Internet Society 1997).
[128] *See* LEINER, ET AL., *supra* note 123, at 10, 13.
[129] *Id.* at 4.
[130] *See id.*
[131] *Id.*

application, electronic mail, was introduced."[132] "In the spring of 1973, after starting the internetting [project], [Kahn] asked Vint Cerf (then at Stanford) to work with him [to develop a] detailed design of the protocol."[133] "So armed with Kahn's architectural approach to the communications side and with Cerf's . . . experience, they teamed up to [create] what became [known as the] TCP/IP [protocol]."[134]

"In 1976, Kleinrock published the first book on the ARPANET. It included an emphasis on the complexity of protocols and the pitfalls they often introduce. This book was influential in spreading the lore of packet switching networks to a very wide community."[135]

> TCP/IP was adopted as a defense standard . . . in 1980. This enabled defense to begin sharing in the DARPA Internet technology base and led directly to the eventual partitioning of the military and non-military communities. By 1983, ARPANET was being used by a significant number of defense R&D and operational organizations.[136]

The widespread commercial and consumer development of the Internet did not flourish until the decades of the 1980s and 1990s when personal computers and LAN workstations were available.[137] However, the early work of developing the Internet was mostly known only to leaders in government, military, and technology during the decade of the 1970s.[138] This was just one of several major watershed developments in information technology and naturally provoked interest and concern over informational privacy. Taken together, developments in computing and the Internet significantly increased the capacity to gather and store data, while developments in facsimile machines significantly increased the capacity to disseminate that information, which led to concomitantly increasing concerns over informational privacy.[139]

In sum, these developments confirmed Alan Westin's definition of privacy as "the claim of individuals to determine for themselves when, how, and to what extent information about them is communicated to others."[140] As one commentator put it, since Westin's article—

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[132] *Id.*
[133] *Id.* at 6.
[134] LEINER, ET AL., *supra* note 123, at 6.
[135] *Id.* at 8.
[136] *Id.* at 9.
[137] *Id.* at 8.
[138] *See id.* at 9.
[139] *See generally* MALCOM WARNER & MICHAEL STONE, THE DATA BANK SOCIETY: ORGANIZATIONS, COMPUTERS AND SOCIAL FREEDOM (George Allen and Unwin Ltd., 1970); ARTHUR R. MILLER, THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS (The University of Michigan Press 1971).
[140] ALAN WESTIN, PRIVACY AND FREEDOM 7 (1967).

and certainly in the 1970s, given the aforementioned cultural and political developments—"there has almost not been a publication on this subject in which this definition is not presented."[141]

e. Congress Acts out of Concern

Predominantly because of the Watergate scandal, Congress passed the Privacy Act of 1974.[142] It established a "code of fair information practices [which] governs the collection, maintenance, use, and dissemination of information [about persons] that is maintained in systems of records by federal agencies."[143] The Privacy Act does not apply to the records or information of every "individual," defined as "a citizen of the United States or an alien lawfully admitted for permanent residence" but only to records held by an "agency."[144] "The Act was passed in great haste during the final week of the Ninety-Third United States Congress. No conference committee was convened to reconcile differences in the bills passed by the House and Senate."[145] "Section 5 of the original Privacy Act established the 'Privacy Protection Study Commission' to evaluate the statute and to issue a report containing recommendations for its improvement."[146] The Commission "was directed by the Congress, to make a 'study of the data banks, automatic data processing programs, and information systems of governmental, regional, and private organizations, in order to determine the standards and procedures in force for the protection of personal information.'"[147] The Commission's work lasted two years.[148] "Sixty days of hearings and meetings were held" in which testimony was taken from over 300 witnesses.[149]

In 1977, the Commission concluded and published its final report entitled Personal Privacy in an Information Society.[150] In the final

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[141] Jan Holvast, *History of Privacy*, 298 IFIP ADVANCES IN INFO. AND COMMC'N TECH. 13, 16 (2009); Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896–1910 (codified as amended 5 U.S.C. § 552a).

[142] *See Overview of the Privacy Act of 1974*, U.S. DEP'T OF JUST. ARCHIVES (February 24, 2021), https://www.justice.gov/archives/opcl/policy-objectives [https://perma.cc/E3Z3-4R8Y].

[143] *Privacy Act of 1974*, U.S. DEPT. OF JUST.: OFFICE OF PRIVACY AND CIVIL LIBERTIES (2020), https://www.justice.gov/opcl/privacy-act-1974 [https://perma.cc/R3GJ-XT49].

[144] *See* 5 U.S.C. § 552a(a)(1)–(2), (b).

[145] U.S. DEP'T OF JUST., OVERVIEW OF THE PRIVACY ACT OF 1974: 2020 EDITION 4 (Feb. 5, 2021), https://www.justice.gov/media/1122281/dl?inline [https://perma.cc/H6BK-V8DD].

[146] *Id.*

[147] *See* PRIVACY PROTECTION STUDY COMM'N, *supra* note 12, at xv.

[148] *See id.* at xvi.

[149] *Id.*

[150] *Id.* at 1.

report, the Commission "concluded that trends in *information* handling practices, coupled with the explosion of information technologies, pose one of the most significant threats to individual rights in this century."[151] "In formulating its recommendations, the Commission . . . recognized and encouraged the existing role of the States in providing individuals with the ability to protect their own interests."[152] The Commission stated:

> The volume underscores the central role the States can play as protectors of personal privacy and, more broadly, individual liberty. . . . The States have demonstrated that they can, and do, provide conditions for experiments that preserve and enhance the interests of the individual in our technological, information-dependent society.[153]

Further congressional action is seen in the Foreign Intelligence Surveillance Act ("FISA"), which "was introduced on May 18, 1977, by Senator Ted Kennedy and was signed into law by President Carter on 25 October 1978."[154] The acronym F.I.S.A. (Fi-Za) was born, and the Act "regulates certain types of foreign intelligence collection," especially the collection of information that occurs when United States telecommunications companies are forced to cooperate.[155] "The [A]ct was created to provide judicial and congressional oversight of the government's covert surveillance activities of foreign entities and individuals in the United States, while maintaining the secrecy needed to protect national security."[156] "The FISA resulted from extensive investigations by Senate Committees into the legality of domestic intelligence activities."[157] "These investigations were led separately by Sam Ervin and Frank Church in 1978 as a response to President Richard Nixon's usage of federal resources, including law enforcement agencies, to spy on political and activist groups."[158]

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[151] *Fair Financial Information Practices Act: Hearings on S. 1928 Before the Subcomm. on Consumer Affs. of the Comm. on Banking, Hous., and Urb. Affs.*, 96th Cong. 8 (1980) (emphasis added) (testimony of Luther H. Hodges, Jr., Deputy Secretary of Commerce).
[152] PRIVACY PROTECTION STUDY COMM'N, *supra* note 12, at 491.
[153] PRIVACY PROTECTION STUDY COMM'N, PERSONAL PRIVACY IN AN INFORMATION SOCIETY: PRIVACY LAW IN THE STATES 27 App. (1977).
[154] *See Foreign Intelligence Surveillance Act*, WIKIPEDIA, https://en.wikipedia.org/wiki/Foreign_Intelligence_Surveillance_Act [https://perma.cc/H2AR-ACF3].
[155] *Foreign Intelligence Surveillance Act of 1978 (FISA)*, NATIONAL SECURITY AGENCY, https://www.nsa.gov/Signals-Intelligence/FISA/[https://perma.cc/4R3Y-3AYH].
[156] WIKIPEDIA, *supra* note 154.
[157] *Id.*
[158] *Id.*; *see also* Staff, *FISA Debate Involves More Than Terrorism*, DAILY NEXUS U.C., SANTA BARBARA (Feb. 20, 2008, 4:59 AM), https://dailynexus.com/2008-02-20/fisa-debate-involves-more-than-terrorism/ [https://perma.cc/RU7M-ERZD].

In addition to FISA, several other bills were passed during the Carter Administration relating to the protection of personal informational privacy rights. Among those were the Right to Financial Privacy Act of 1978[159] and the Electronic Fund Transfers Act.[160] In April of 1979, President Carter's message to Congress announced his pledge to pass a "wide range of initiatives 'to protect individual privacy in an information society.'"[161] Here again, less than a year and a half from the vote on Florida's Privacy Amendment, the President of the United States was championing in the news, as a major achievement, laws passed in the late 1970s dealing with informational privacy.[162]

III. FLORIDA TAKES NOTICE

a. 1977 Constitution Revision Commission

Florida has five ways to amend its constitution.[163] One of those ways is through the Constitution Revision Commission ("CRC").[164] This unique thirty-seven-member decision-making body gathers once every twenty years.[165] Appointed by the Governor, Speaker of the House, Senate President, and the Chief Justice of the Florida Supreme Court, the CRC holds public hearings around the state, listening to the public's ideas and input and then debating and discussing them as a body to narrow down which amendments will go to the ballot for a vote of the people.[166] The CRC was created through the major 1968 revision of the Florida Constitution.[167] The work of each CRC spans over two calendar years.[168] Florida's first CRC gathered and met in 1977 during the height of informational privacy awareness in America.[169]

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[159] 12 U.S.C. §§ 3401–22.
[160] 15 U.S.C. §§ 1693–93r.
[161] *Fair Financial Information Practices Act: Hearings on S. 1928 Before the Subcomm. on Consumer Affs. of the Comm. on Banking, Hous., and Urb. Affs.*, 96th Cong. 1303 (1980).
[162] *See, e.g.*, Martin Tolchin, *Carter Maps Policy to Protect Privacy*, N.Y. TIMES, April 3, 1979, at A1, A17.
[163] *See* FLA. CONST. art. XI, §§ 1–5.
[164] *Id.* § 2.
[165] *Id.*
[166] *See id.*
[167] *See History*, CONSTITUTION REVISION COMM'N, http://library.law.fsu.edu/Digital-Collections/CRC/CRC-2018/about/history.html [https://perma.cc/82E6-WPND].
[168] *See id.*
[169] *See History*, *supra* note 167; *see supra* Section II.

At the time, Justice Ben F. Overton was serving as the Chief Justice of the Florida Supreme Court.[170] He was also a member of the 1977–1978 CRC.[171] During the opening session of the Constitution Revision Commission on July 6, 1977, Chief Justice Overton recognized the national debate and discussion over personal information privacy and foreshadowed the creation of a state privacy amendment when he stated:

> [W]ho, ten years ago, really understood that personal and financial data on a substantial part of our population could be collected by government or business and held for easy distribution by computer operated information systems? There is a public concern about how personal information concerning an individual citizen is used, whether it be collected by government or by business. The subject of individual privacy and privacy law is in a developing stage. . . . It is a new problem that should be addressed.[172]

The proceedings of the Constitution Revision Commission reveal that the right to informational privacy was a major concern of the amendment's drafters, and the CRC spent much of its time discussing this amendment along with many others.[173] Notably, Pat Dore, who was a law professor at Florida State University College of Law, was on staff for the 1978 CRC.[174] She served as a legal advisor who guided CRC commissioners in drafting amendments and specifically regarding the language of the privacy amendment.[175] In 1978, Dore wrote a detailed law review article cataloging the history of the debate and discussion over the eight amendments proposed by the 1978

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[170] *See Justice Ben F. Overton*, FLORIDA SUPREME COURT (last modified March 13, 2019), https://www.floridasupremecourt.org/Justices/Former-Justices/Justice-Ben.-F.-Overton [https://perma.cc/2RU7-CQMN].

[171] *Id.*

[172] Gerald B. Cope, Jr., *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 FLA. STATE UNIV. L. REV. 671, 722 (1978).

[173] *See* Steven J. Uhlfelder & Robert A. McNeely, *supra* note 15, at 1490–92. While hundreds of ideas were considered, only eight amendments were actually placed on the ballot to be voted on in 1978. *Id.* at 1490 n.4 ("The CRC developed eight amendments containing 87 proposals which were placed in the 1978 general election ballot.").

[174] *Id.* at 1491 n.13.

[175] *See* Talbot "Sandy" D'Alemberte & Stephen R. MacNamara, *Farewell, Ms. Dore*, 19 FLA. STATE UNIV. L. REV. 957, 958–59 (1992). "[T]he privacy amendment to the Florida Constitution will long be associated with [Dore's] name. The Senate sponsor of the amendment . . . called the amendment "Pat's Right to Privacy Act. And, true to her style, she never took credit, even though the privacy amendment was widely praised at the service as her proudest achievement. As speaker Vivian Feist Garfein so properly put it: 'Through her efforts, our right to privacy is now guaranteed by the Florida Constitution.'" *Id.* at 959 (footnotes omitted).

Constitutional Revision Commission.[176] The extensive explanation of the Privacy Amendment's development never mentions abortion—the entire context is the right to informational privacy—namely the committee was divided over the policy questions of (i) whether that right should be against the government only or also other citizens and (ii) whether it should be qualified or absolute.[177] Indeed, "all [the] reasons" that "the 1978 CRC found compelling . . . for a privacy provision" in the state's constitution "focused on information gathering by Florida government—especially widespread surveillance of citizens and public officials in Florida."[178] The only decision-making or behavioral issue that was ever referenced "involved the possession of marijuana in homes."[179]

b. 1978 CRC Ballot Initiative Fails

The final language produced by the CRC for the ballot proposed only the first sentence of what was eventually adopted in 1980 as article I, section 23: "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein."[180] In 1978, the CRC version of the privacy amendment was incorporated into a large bundle of amendments on the ballot at the time with other constitutional changes known as "Revision 1."[181]

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[176] See Patricia A. Dore, Of Rights Lost and Gained, 6 FLA. STATE UNIV. L. REV. 609, 610–13 (1978).

[177] *Id*. at 650–57. One recent article in the Tallahassee Democrat put forth a claim by a friend of Pat Dore that abortion was mentioned in "private meetings and side chats that wouldn't be captured in records." *See* Kathryn Varn, *Florida Has a Unique Right Protecting Abortion. Its Framers Designed it That Way*, TALLAHASSEE DEMOCRAT (June 8, 2022, 6:00 AM), http://www.tallahassee.com/story/news/local/state/2022/06/08/can-florida-privacy-law-protect-abortion-rights-roe-v-wade/7536003001/ [https://perma.cc/U4A9-XMZY]. This seems odd given that Dore did not even mention it in the law review article written shortly thereafter purporting to explain the amendment's language and drafting process. *See* Dore, *supra* note 176. Moreover, "out of thousands of officially archived documents, the record is curiously void of any mention of this 'assumption.'" John Stemberger, *The True Origin of Florida's Privacy Amendment* (June 26, 2022, 6:00 AM), https://www.tallahassee.com/story/opinion/2022/06/26/true-origin-floridas-privacy-right-not-abortion-opinion/7719260001/ [https://perma.cc/6XBT-283W]. It appears that in the entire two-year process, none of the archived CRC records or transcripts contains the word "abortion." *Id.* "Also missing are the words 'personal autonomy,' 'termination of pregnancy,' 'substantive due process,' 'Roe vs. Wade,' or any hint of a right to abortion." *Id.*

[178] *See* Daniel R. Gordon, *Upside Down Intentions: Weakening the State Constitutional Right to Privacy, A Florida Story of Intrigue and a Lack of Historical Integrity*, 71 TEMP. L. REV. 579, 590 (1998).

[179] *Id.*

[180] *Proposed Revisions of the Florida Constitution*, FLORIDA CONSTITUTION REVISION COMMISSION, http://library.law.fsu.edu/Digital-Collections/CRC/CRC-1998/conhist/1978rev.html [https://perma.cc/X9CP-NV8U].

[181] *See id.*

The major problem with the 1978 privacy language was that it was grouped with what the opposition political committee claimed as "[eighty-seven] [other] major changes to the constitution without adequately being informed of their impact."[182] In contrast, the League of Women Voters advocated for a yes vote on Revision 1 and stated, "FOR #1. Strengthen the Basic Document! Includes *revisions to most articles*."[183]

What voters actually read on the ballot before voting in 1978 was the following description:

> Revision No. 1[,] Basic Document[:] Proposing a revision of the Florida Constitution, generally described as the Basic Document, embracing the subject matter of Articles I (Declaration of Rights), II (General Provisions), III (Legislature), VIII (Local Government), X (Miscellaneous), XI (Amendments) and XII (Schedule), except for other revisions separately submitted for a vote on this ballot.[184]

The word privacy, much less any concept related to it, is not even mentioned in this generic description of Revision 1.[185] It is no small wonder that Revision 1 failed at the ballot box, gathering only 29.20% of the vote.[186]

Notably, Florida news media generally, and specifically Florida's daily newspaper editorial boards, opposed the 1978 version of the amendment.[187] They expressed concern the proposed powerful

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[182] Political Brochure, Save Your Vote, Inc., Say Yes to Your Rights. Vote No on Revisions 1, 4 & 8 on November 7 (on file with Florida Archives, Misc. 1978 Comp.). The political brochure described Revision 1 as:

> 'The Catch-All' With a Catch. This cleverly designed revision to the state's constitution is a 'take-it-or-leave-it' grab bag of [eighty-seven] major changes to both the constitution itself and many aspects of Florida law. You, the Florida voter, are being asked to vote for [eighty-seven] major changes to the constitution without adequately being informed of their impact.

Id.

[183] Campaign Door Hanger Brochure, League of Women Voters of Tallahassee (on file with Florida Archives, Campaign Lit. '78 Misc.) (emphasis added). The full language related to Revision 1 on the brochure stated: "Strengthen the Basic Document! Includes revisions to most articles. Gives the public right to know with constitutionally open meetings and records. Reforms bail bond system. No binding arbitration for public employees. Polling places to be accessible to public. . . . Limits terms of statewide elected officials. Establishes separate health department." *Id.* Of interest, the privacy language was not even listed as one of the things included in Revision 1.

[184] Associated Press, *Here's Ballot Revision Language*, OCALA STAR-BANNER, Nov. 5, 1978, at 11B.

[185] *See id.*

[186] *See November 7, 1978 General Election Official Results*, *supra* note 16.

[187] *See, e.g.*, Editorial, Rights in Conflict, ST. PETERSBURG TIMES, December 6, 1977, at 10–A; Danger in Privacy Guarantee, ORLANDO SENTINEL STAR, January 12, 1978.

informational privacy right would prevent journalists from obtaining public records and gaining access to public meetings.[188]

c. 1980 Joint Resolution of Legislature

In 1980, the leadership of the Florida Legislature felt that even though the privacy amendment failed at the 1978 ballot box, the idea still had merit and should be presented again.[189] One of the five ways Floridians can amend their constitution is through a joint resolution of the legislature.[190] If the joint resolution passes both houses, then the measure goes on the ballot for citizens to vote upon. [191]

The revised privacy proposal in the Florida Legislature was labeled Senate and House Joint Resolution No. 387.[192] After the resolution passed out of the legislature, it was placed on the 1980 ballot and then became known as Amendment 2.[193] Amendment 2 adopted the first sentence drafted by the CRC but then added a second sentence that read: "This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."[194] The purpose of this additional language was to clarify to the news media that the informational privacy amendment would not prohibit their access to public records or attending public meetings.[195]

Many concerns arose about the possibility of overbroad judicial interpretations of the amendment.[196] State attorneys feared that the amendment would limit their ability to use surveillance tools and other

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[188] *See* Danger in Privacy Guarantee, *supra* note 187.

[189] *See* Fla. S. Comm. on Rules and Calendar, S.J.R. 935 (1980) Senate Staff Analysis 1 (May 6, 1980) (available at Fla. Dep't of State, Fla. State Archives, Series 18, Carton 832); Fla. H.R. Comm. on Governmental Operations, H.J.R. 387 (1980) Staff Analysis 1 (Feb. 7, 1980) (available at Fla. Dep't of State, Fla. State Archives, Series 19, Carton 731).

[190] FLA. CONST. art. XI, § 1.

[191] *Id.* ("Proposal by legislature.—Amendment of a section or revision of one or more articles, or the whole, of this constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the legislature. The full text of the joint resolution and the vote of each member voting shall be entered on the journal of each house.").

[192] Fla. H.R. Comm. on Governmental Operations, H.J.R. 387 (1980) (available at Fla. Dep't of State, Fla. State Archives, Series 19, Carton 731).

[193] *See Florida Amendment 2, Constitutional Right of Privacy Measure (1980)*, BALLOTPEDIA, https://ballotpedia.org/Florida_Amendment_2,_Constitutional_Right_of_Privacy_Measure_(1980) [https://perma.cc/2ZUZ-6LVJ].

[194] *See* Fla. H.R. Comm. on Governmental Operations, *supra* note 192; FLA. CONST. art. I, § 23.

[195] *See* Fla. S. Comm. on Rules and Calendar, *supra* note 189.

[196] See R. Michael Anderson, *Right to Privacy Amendment Debated*, Florida Times Union, October 26, 1980, at B5.

means to investigate crimes.[197] "The prosecutors [also] believe[d] the amendment would make crimes such as possession of [drugs] in the home . . . 'easier to perpetrate with impunity.'"[198] State Senator Don Childers, D-West Palm, was one of the most ardent opponents of the amendment.[199] Senator Childers' concerns included the legitimization of homosexual relationships, the use of marijuana in homes, and police search and seizure.[200]

Even the most vocal opponents of the amendment, however, expressed no concern for the possibilities of its being construed to grant a possible right to abortion; there was also no evidence of public opposition from any pro-life organizations who opposed abortion rights.[201]

Rep. Jon Mills, D-Gainesville, sponsored the house version of the privacy amendment initiative and at the time claimed it was being widely misinterpreted.[202] He reported to the press that he felt it was "necessary to ward off a growing government whose curiosity about people's private lives . . . [was] increasing."[203] "The goal is to provide individual and informational privacy. . . . The bigger government gets, the more it tends to collect information on people."[204] "'Anybody [governmental bureaucracies] who wants information just throws it into forms,' Mills said, adding businesses and homeowners are inundated with all sorts of official forms containing questions that are not the government's business."[205] Furthermore, "Mills said he would expect . . . courts to express a conservative view on the amendment's applicability."[206]

Additionally, "[t]he Center for Governmental Responsibility at University of Florida's Holland Law Center . . . said the purpose of the amendment is to require the state to justify the reasonableness of its intrusions upon informational privacy."[207] A report prepared by the

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[197] Larry Lipman, *Conservatives, Gays Backing Privacy Rule*, ORLANDO SENTINEL STAR, October 27, 1980.

[198] *Id.*

[199] *See id.*

[200] *See id.*

[201] There is no record of any opposition to Amendment 2 by The Florida Council on Catholic Bishops, Carole Griffin of Big Bend Right to Life, Florida Right to Life, The Southern Baptist Convention, Eagle Forum, and/or the Moral Majority. We were unable to identify or find any instances where an anti-abortion advocacy group or religious organization opposed Amendment 2 on the basis that it conferred—or could be interpreted to confer—abortion rights.

[202] *See* Anderson, *supra* note 196, at B1.

[203] *Id.*

[204] *Id.*

[205] *Id.* at B5 (alteration in original).

[206] *Id.*

[207] *Id.* at B1.

Center said, "[t]he impact of the privacy amendment would be to constrain the collection of information about individuals, and not limit public access to information properly collected."[208]

While there are no historical references to the word or concept of abortion anywhere in the archived record from the 1977–1978 CRC's proceedings, there are four references to abortion during the 1980 effort to create and pass the Privacy Amendment.[209] The first two references are in 1980 news articles uncovered in 2022 by Kathryn Varn, a reporter with the Tallahassee Democrat.[210] In the articles, gay rights activists supported Amendment 2 and mentioned that the amendment could affect abortion rights.[211]

The third reference to abortion is found in a discussion on federal privacy laws in the staff committee analysis.[212] The analysis was not rendering an opinion that the Joint Resolution language in Amendment 2 would confer a right to abortion but was merely discussing federal privacy rights under the United States Constitution and included a reference to *Roe v. Wade*.[213]

The fourth reference to abortion comes right before the vote on the privacy amendment language in the Florida Senate in a direct exchange between the Senate sponsor Jack Gordon, a Democrat from Miami, and Senator Ed Dunn, a Democrat from Daytona Beach.[214]

> **Senator Dunn**: Senator, what do you think the effect of this amendment will be on the existing controversy involving right to life and abortion?

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[208] *See* Anderson, *supra* note 196, at B1, B5.

[209] *See infra* notes 210–214 and accompanying text.

[210] *Kathryn Varn*, TALLAHASSEE DEMOCRAT, https://www.tallahassee.com/staff/9344499002/kathryn-varn/ [https://perma.cc/FCT8-WANV] (last visited March 21, 2023).

[211] *See* Associated Press, *Amendments Under Attack as Vote Nears*, BRADENTON HERALD, October 29, 1980, at B5 (quoting Bob Kunst, who "contend[ed] [the amendment] would void anti-abortion laws"); *see also* Julius Karash, *Psychologist Stumps for Amendment*, FORT MYERS NEWS PRESS, October 3, 1980 (quoting Alan Rockway, who said that "the amendment could effect the right of women to have abortions, gay rights[,] and the private use of small amounts of marijuana").

[212] Fla. H.R. Comm. on Governmental Operations, *supra* note 192.

[213] *See id.* at 1, 3–4. The report was prepared by Tina M. Williams and appears to include a separate general legal analysis of the Right to Privacy as it existed at that time. *Id.* at 1–4. Under the section titled "Federal Constitutional Right of Privacy," there is a discission about the Griswold Constellation, decisional autonomy, and *Roe v. Wade*. *Id.* at 1. This separate legal analysis and section does not specifically address the privacy amendment nor does the committee analysis itself attempt to infer that Amendment 2 (HB 387) would confer a right to abortion. *See id.*

[214] *The Florida Senate 1980–82*, THE FLA. SENATE, https://www.flsenate.gov/UserContent/Publications/SenateHandbooks/pdf/80-82_Senate_Handbook.pdf [perma.cc/Y75X-CW9V] (last visited Oct. 30, 2022).

> **Senator Gordon**: I don't see that uhh—I don't see that it has any effect on that Senator.
>
> **Senator Dunn**: Senator you don't uh—you don't—you can't honestly say that this amendment addressing as you have contended the question of privacy will be the focal point of state litigation on the question of all laws dealing with, with the question of abortion or the taking of a uhh— of a—of a fetus under any condition?
>
> **Senator Gordon**: No, I don't see that at all. I don't know what that has to do with, with—I don't see what that has to do with intrusion in your—in—in—privacy in your home, I don't see that at all.[215]

During the Constitution Revision Commission of 2017–2018, Proposal 22 sought to clarify Florida's Privacy right and confine it to informational privacy.[216] The CRC Staff did original research into the Florida archives and produced a memorandum of their findings regarding "Florida's Right of Privacy and Considerations of Abortion."[217] CRC Staff Attorney William Hamilton wrote to General Counsel William Spicola and asserted that "[t]he primary concern of the 1977–78 CRC was that technological advances in communication rendered private citizens more vulnerable to government intrusion. . . . Abortion does not appear to have been a concern of the Commissioners or the Legislators when they were considering proposing a State Constitutional Right of Privacy."[218]

In summary, upon examination of the existing documentation of the amendment's development and adoption, the historical record is devoid of evidence that Florida's Right of Privacy was intended to confer a right to abortion.[219] The historical record behind Amendment 2

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[215] Audio tape: Proceedings of the Fla. Senate, at 17:40 (May 14, 1980) (available at Fla. Dep't of State, Fla. State Archives, Series S1238, Box 57) (discussion regarding impact on abortion under SJR 935).

[216] *See Watch John Stemberger Live at 1 p.m. Today Before the Florida CRC on Pro-Life Privacy Proposal*, FLORIDA FAMILY POLICY COUNCIL (Mar. 21, 2018), https://www.flfamily.org/updates/watch-crc-commissioner-stemberger-privacy-proposal [https://perma.cc/CG5Y-ZNC7]. John Stemberger, one of the authors of this article, personally served as a commissioner on the 2017–2018 CRC and was appointed by Florida Speaker of the House Richard Corcoran. *Id.* He was the Vice Chairman of the Declaration of Rights Committee and sponsored Proposal 22 to restore Florida's Privacy Clause to be confined to its original meaning to protect informational privacy.

[217] Memorandum from William Hamilton to William Spicola, CRC General Counsel, regarding Florida's Right of Privacy and Considerations of Abortion, October 12, 2017 (on file with author).

[218] *Id.*

[219] Audio tapes: H.R. Subcomm. on Executive Reorganization (February 12, 1980); H.R. Subcomm. on Executive Reorganization (March 11, 1980); H.R. Comm. on Governmental Operations (April 9, 1980); H.R. Comm. on Governmental Operations (April 16, 1980); S. Comm. on Rules and Calendar (May 6, 1980) (copies reproduced from the collections of the Florida State Archives).

compellingly indicates that the origin and purpose behind Florida's Privacy Law was informational privacy.

d. 1980 Ballot Measure on Privacy Passes

It is in this historical context that, in 1980, Floridians adopted Amendment 2, creating a freestanding, independent privacy right codified in article I, section 23 which reads: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."[220]

One quick note before concluding this section: a forthcoming law review article authored by Adam Richardson posits that an originalist understanding of section 23 grants a freestanding abortion right.[221] As we do here, Mr. Richardson attempts to marshal historical evidence supporting his argument—and to his credit, Mr. Richardson acknowledges that the drafting process from the CRC and comments therefrom "almost entirely concerned informational privacy."[222] Tellingly, Mr. Richardson was unable to identify a single piece of evidence showing that abortion was contemplated to be within the "right to be let alone" granted by section 23. Instead, Mr. Richardson identifies a scattershot of newspaper articles focusing almost exclusively on gay rights, suggesting this shows section 23 covered both decisional and informational privacy, notwithstanding that, as he admits, this departed from the consensus view and "befuddled" lawmakers and CRC members.[223] At most, Mr. Richardson demonstrated that over the course of a few years, there was, on the margins, some concern that the language was overbroad such that litigants might attempt to contort and stretch its meaning beyond recognition—and that extreme (at the time, at least) gay rights groups were happy to make such attempts. Indeed, the only mention of abortion identified by Mr. Richardson comes after section 23 passed, where a gay rights activist announced the intention to begin filing test cases on "marijuana, co-habitation, abortion, pornography,

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[220] FLA. CONST. art. I, § 23.

[221] *See* Adam Richardson, *The Originalist Case for Why the Florida Constitution's Right of Privacy Protects the Right to an Abortion*, 53 STETSON L. REV. (forthcoming 2023) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4187311 [https://perma.cc/S6PM-585N]).

[222] *See id.* (manuscript at 28).

[223] *Id.* (manuscript at 30–48).

government surveillance, adult movie houses, swingers' clubs, nude dancing, [and] adult bookstores."[224]

A few articles mentioning gay rights and a single reference to abortion after the initiative had already passed does not outweigh or even seriously call into question the mountain of counterevidence showing that informational privacy was the concern that gave rise to section 23—nor indicate that sixty-one percent of Floridians were voting to prevent the government from "intruding upon" the right to nude dancing, swingers' clubs, pornography—or abortion. Rather, the attitudes of the American people, coupled with the federal government's initiatives, were factors that strongly influenced the outcome of Florida's Right of Privacy Amendment.[225] Public debate during the years prior to the planning and adoption of section 23 was such that the information age permeated the minds of Florida voters on this issue and resulted in a solid sixty-one percent majority approval of the amendment.[226]

The Florida Court, therefore, should recognize these circumstances and be guided by them in construing Florida's Right of Privacy.

IV. THE HISTORY AND CONTEXT OF THE "RIGHT TO BE LET ALONE"

These historical sources of Florida's Privacy Right are consistent with the history, context, and original meaning of the "right to be let alone," which is a term of art that confirms the privacy right guaranteed is a negative right to privacy against "intrusion" of or obtainment and disclosure of information.

a. "Right to be let alone"

Beginning with the "right to be left alone," it is important to note that this phrase is a term of art[227] coined by Judge Cooley and popularized by Justice Brandeis.[228] The phrase was first used by Judge Cooley in 1879 as a "right of complete immunity."[229] Critically, he juxtaposed

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[224] *Id*. (manuscript at 47) (emphasis omitted) (internal quotation marks omitted) (quoting Dary Matera, *Gay forces read rights legislation their way*, MIAMI NEWS, Nov. 5, 1980, at 7A).

[225] *See* Gerald B. Cope, Jr., *A Quick Look at Florida's New Right of Privacy*, 55 FLA. BAR J. 12, 12 (1981).

[226] *See id.*

[227] Notably, while constitutional analysis generally assumes words are used in their ordinary and normal meaning, if it is clear that a phrase is a "term of art," it is interpreted in the "technical sense" of the word. *See* Butterworth v. Caggiano, 605 So. 2d 56, 58 (Fla. 1992) (quoting City of Jacksonville v. Cont'l Can. Co., 151 So. 488, 489–90 (Fla. 1933)).

[228] *See infra* notes 229, 233.

[229] THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (Callaghan & Co. 1879).

the right "to be let alone" against the "corresponding duty[] . . . not to inflict an injury" and not "to attempt the infliction of an injury."[230] In other words, at common law, individuals possessed a "right to be let alone"—as against other individuals, not (in this context) the state—so long as they were not injuring another nor attempting to injure another.[231] This makes sense, of course; absent the "right to be let alone," individuals would have no cause of action for intrusions upon seclusion, trespassing, and so forth. Obviously, it would be somewhat nonsensical to attempt to situate the right to an abortion within this context.[232]

Doctrinal explanation came in the form of an 1890 Harvard Law Review, where Samuel Warren and Louis Brandeis further developed the right "to be let alone" as a right protecting "thoughts, emotions, and sensations" from invasion—and, perhaps more importantly, disclosure—by the "press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds."[233] Given recent technology and business practices at that time, Warren and Brandeis apprehended that, absent a legally recognized right "to be let alone," individuals would live with the constant threat that "what is whispered in the closet shall be proclaimed from the house-tops."[234] Warren and Brandeis were clear that they were explaining and advocating for the extension of the "right to be let alone" given these developments in technology and the increasing possibility of discovering and publicizing purely private information.[235] Indeed, they noted other common-law developments through the eighteenth and nineteenth centuries—the tort of battery was extended to include assault, protection of tangible property was extended to intangible property through the law of trademarks, and so on.[236]

In the same vein, Warren and Brandeis took strands and implications from disparate and somewhat incoherent cases forbidding or awarding damages for publication of private facts—personal letters or

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[230] *See id*.

[231] *See id.*

[232] Even if abortion could theoretically be situated within this context, it would simply raise the question of whether abortion is "injuring another" or "attempting to injure another." We do not think it necessary to address that question in this context, however, because it is frankly impossible to conceive of how an individual could invade the "right to be let alone" by preventing someone else from aborting a fetus. A doctor declining to perform an abortion could in some sense be said to be preventing an abortion, but of course that would not mean the doctor is invading the woman's "right to be let alone."

[233] Warren & Brandeis, *supra* note 22, at 205–06.

[234] *Id*. at 195.

[235] *Id.*

[236] *Id*. at 193–95.

pictures being the prominent examples—which courts justified by situating it within laws preventing unwanted publication of things with literary or artistic value.[237] They pointed out, however, that it makes little sense to conceive of what are essentially private facts as being property—instead, the principle "is in reality not the principle of private property, but that of an inviolate personality."[238] Said another way, "[t]he principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy," not a right to property.[239]

The first case referencing "the right to be let alone" was *Schuyler v. Curtis*, where a New York court held that the right to be let alone protected a private person's right to not have a monument made of her, even after she died.[240] Quoting the Brandeis article, the court explained that, just as the "right to be let alone" prevented the publication of private photographs, it also prevented the public depiction of a private citizen.[241] Over the coming decades, courts gave teeth to this right—but always to prevent against either the discovery of private information[242] or the publication or dissemination of private facts, issues, or name and likeness.[243] The exception is that some cases show that courts continued to conceive of the right as also protecting against invasions of property rights—privacy not only of information but also of property.[244] Thus began the jurisprudence on the right to be let alone.

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[237] *See id.* at 198–99.
[238] *Id.* at 205.
[239] Warren & Brandeis, *supra* note 22, at 213.
[240] 27 Abb. N. Cas. 387, 400–02 (N.Y. Sup. Ct. 1891).
[241] *Id.* at 400–01.
[242] *See* Kroska v. United States, 51 F.2d 330, 332 (8th Cir. 1931) (stating that the "right to be let alone" protects against unjustifiable searches and seizures by the government); Zimmermann v. Wilson, 81 F.2d 847, 849 (3d Cir. 1936) (stating that the right to be let alone protects taxpayers from having their bank records searched by authorities without cause).
[243] *See* Marks v. Jaffa, 26 N.Y.S. 908, 908 (N.Y. Sup. Ct. 1893) (protecting against the unauthorized publication of a photograph in a newspaper); Caspar v. Prosdame, 14 So. 317, 317–18 (La. 1894) (protecting against the oral publication of a defamatory falsehood); Goodyear Tire & Rubber Co. v. Vandergriff, 184 S.E. 452, 454–55 (Ga. Ct. App. 1936) (protecting against the impersonation of another); Kerby v. Hal Roach Studios, Inc., 127 P.2d 577, 580 (Cal. Dist. Ct. App. 1942) (protecting against the unauthorized publication of a name in a written advertisement); Cason v. Baskin, 20 So. 2d 243, 253–54 (Fla. 1944) (protecting against the publication of name, likeness, and private information in a book); McGovern v. Van Riper, 43 A.2d 514, 525 (N.J. Ch. 1945) (protecting against the dissemination of a criminal defendant's fingerprints, photograph, and identifying information prior to conviction or fugitive status).
[244] *See* Welsh v. Pritchard, 241 P.2d 816, 819 (Mont. 1952) (holding that tenants have privacy rights in a rented home against landlord); Eureka Foundry Co. v. Lehker, 13 Ohio Dec. 398, 402–03 (Ohio Sup. Ct. 1902) (concluding that businesses have right to be left alone from violent or potentially picketers).

Perhaps the most well-known explanation comes once again from Brandeis, this time as a United States Supreme Court Justice, through his dissent in *Olmstead v. United States*.[245] Arguing that evidence that the government obtained by tapping phone lines was inadmissible as an unreasonable search and seizure, Brandeis wrote the Founders "conferred, as against the [G]overnment, *the right to be let alone*—the most comprehensive of rights and the right most valued by civilized men" and concluded that "[t]o protect[] that right, every unjustifiable intrusion by the [G]overnment upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."[246] As with his law review article, Brandeis emphasized that the role of the "right to be let alone" is to protect private information from discovery and disclosure by the government and private citizens.[247] Additionally, several more Supreme Court opinions referenced the "right to be let alone," all in the context of privacy of information.[248] Perhaps most notably, Justice Douglass's dissent in *On Lee v. United States* specifically referenced one of the very concerns highlighted in the Brandeis law review article—a private conversation recorded via a receiving set through a wired confidential informant.[249]

In the 1960s, several cases began conceiving of the right to be let alone to apply not only to the discovery and/or dissemination of private information but to also to protect the decisional autonomy of citizens against proscriptions from the state. For example, Justice Harlan posited in a dissenting opinion that the right to be let alone prevented the state of Connecticut from prohibiting certain contraceptives.[250] While the majority upheld the Connecticut law, Harlan's dissent marked the first time that the right to be let alone was implicated in the question of the states' rights to police the behavior of their citizens.[251] It would not be the last, however, as courts (or individual judges on panels) posited that the right to be let alone prevents states from regulating, for

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[245] 277 U.S. 438, 477–78 (1928).
[246] *Id*. at 478 (emphasis added).
[247] *See id.* at 477–79.
[248] *See* Okla. Press Pub. Co. v. Walling, 327 U.S. 186, 189, 203 n.30 (1946) (discussing the "right to be let alone" in the context of determining whether a subpoena for business information was enforceable); Davis v. United States, 328 U.S. 582, 587 (1946) (discussing how the "right to be let alone" is the underpinning of the Fourth Amendment right against unlawful searches and seizures); Harris v. United States, 331 U.S. 145, 159 (1947) (Frankfurter, J., dissenting) (explaining that the "Court has construed the Fourth Amendment liberally to safeguard the right of privacy" (internal quotation marks omitted)).
[249] 343 U.S. 747, 762–65 (1952) (Douglass, J., dissenting).
[250] Poe v. Ullman, 367 U.S. 497, 536–39 (1961) (Harlan, J., dissenting).
[251] *See id.* at 536–39.

example, freedom of movement,[252] the hair style of students,[253] and the right to contraceptives.[254]

There is a level of conceptual incoherence to these opinions. Textually and historically, the "right to be let alone" is a negative right that prevents other people or the state from doing something to the individual. These courts, however, conceived of the right as also including the freedom to do certain things or make personal choices without prevention by the state. These rights may exist—and they may even be conceived of as a privacy-adjacent right, in that they ostensibly concern personal choices—but whatever they are, they are not a right to be let alone. Presumably for this reason, courts—including the United States Supreme Court—began backing away from situating decisional autonomy within the right to be let alone. Most notably, in *Roe*, the Court conceived of the right to terminate a pregnancy as a privacy right, but one that is derived from a *liberty* interest protected by the Due Process Clause.[255] True or not—and under *Dobbs*, it no longer is—liberty is at least conceptually the more sensible framework.

As such, at the time Florida citizens were provided with the possibility of passing what became section 23, the predominant cultural understanding of privacy rights concerned the discovery and dissemination of informational privacy.[256] And the predominant legal structures for the right to be let alone in particular concerned the discovery and dissemination of private facts and issues.[257] A few courts had seemingly expanded the concept beyond such framework—such that theoretically the term could, as a legal construct, address both informational privacy and decisional autonomy—but such expansion had limited influence and has not been sanctified by the preeminent abortion rights case.[258] Given the sociohistorical context addressed above, it is exceedingly likely that the outlier expansion of the "right to be let alone" legal concept would not have impacted the ordinary public meaning of section 23. And the structure and surrounding text of section 23 dispenses with the small possibility that the general public would have grasped on to the idiosyncratic expansion in interpreting the meaning of the phrase as used in section 23, as addressed below.

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[252] State v. Abellano, 441 P.2d 333, 386-96 (Haw. 1968) (Levinson, J., concurring).
[253] *E.g.*, Parker v. Fry, 323 F. Supp. 728, 731–33 (E.D. Ark. 1970).
[254] Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).
[255] Roe v. Wade, 410 U.S. 113, 153 (1973).
[256] *See* FLA. CONST. art. I, § 23 cmt.
[257] *See supra* Section III.
[258] *See supra* notes 250–255.

b. Structure and Surrounding Text

As the Florida Supreme Court—and others—have explained, phrases, terms, or words in constitutional or statutory text are not read in isolation.[259] So for example, in *Zingale v. Powell*, the court addressed whether article VII, section 4(c), which provides that everyone who is "entitled to a homestead exemption" shall have the assessed value capped based on a certain formula, applies to anyone who is eligible for a homestead exemption or only applies to those that actually have applied for and received a homestead exemption.[260] The Fourth District had posited the latter, focusing exclusively on the word "entitled," which does not seem to impose any requirement to actually receive the exemption.[261] However, the Florida Supreme Court reversed because such interpretation was inconsistent with the context and broader constitutional scheme.[262]

Here, the historical record overwhelmingly suggests the public understanding of the privacy right proposed—and enacted—addressed informational privacy.[263] The historical development of the "right to be left alone" as a term of art is consistent with this understanding. But to the extent that the expansion of the term to include decisional autonomy creates any doubt, the surrounding context of section 23 appears to remove such doubt. As explained above, one of the major reasons for the failure of the 1978 proposed amendment was pushback from the press that it would inhibit the ability to gather political and public information.[264] Presumably for this reason, after guaranteeing "the right to be let alone and free from governmental intrusion," section 23 clarifies that "[t]his section shall not be construed to limit the public's right of access to public records and meetings as provided by law."[265] Of course, this makes sense in light of concerns from the press and media about the potential impact of section 23. But it makes little to no sense if the guaranteed privacy right is substantive—that it needed to be clarified that the "right to access public records and meets" is unaffected only makes sense if what was being protected was information.

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[259] *See* BellSouth Telecomms., Inc. v. Meeks, 863 So. 2d 287, 290 (Fla. 2003) ("To ascertain the meaning of a specific statutory section, the section should be read in the context of its surrounding sections."); *see also* Coastal Fla. Police Benevolent Ass'n v. Williams, 838 So. 2d 543, 548 (Fla. 2003) ("The rules which govern the construction of statutes are generally applicable to the construction of constitutional provisions.").

[260] 885 So. 2d 277, 279, 283 (Fla. 2004).

[261] *See id.* at 283.

[262] *See id.* at 283–84.

[263] *See supra* Section IV(a).

[264] *See supra* note 188 and accompanying text.

[265] FLA. CONST. art. I, § 23.

V. FLORIDA SUPREME COURT'S INCONSISTENT INTERPRETATION OF THE NEW PRIVACY RIGHT

None of the above was addressed by the Florida Supreme Court in deciding *In re T.W.*[266] There, the court addressed the constitutionality of a statute preventing minors from receiving an abortion without parental consent.[267] The court held that (i) article I, section 23 guaranteed the right to an abortion, (ii) the right extended to minors, and (iii) the state did not have a sufficiently compelling interest in requiring parental consent.[268]

The decision was not based on textual analysis—there simply is not any. The opinion quotes section 23 and never returns to it.[269] Nor does the majority opinion address or even reference any of the historical record, background, committee notes, or any other support. The entirety of the analysis was to (i) note that the court had previously found the privacy right to be implicated in both "activities dealing with the public disclosure of personal matters" and "personal decisionmaking[,]" and (ii) observe that other courts and treatises had found abortion rights to be fundamental privacy rights.[270]

Presumably, the majority assumed that if other courts believed abortion was a privacy right, the drafters of section 23 and the voters must have thought the "right to be let alone" at least included the right to abortion (although the majority did not even explicitly say so).[271] The two concurring opinions are clear—Justice Overton goes so far as to say that the voters "codified within the Florida Constitution the principles of *Roe v. Wade* as it existed in 1980."[272] He does not point to any support for the assumption, however, other than that *Roe* had been decided. Justice Overton also did not address the oddity that, under his interpretation, section 23 codified *Roe* yet immediately clarified that such codification "shall not be construed to limit the public's right of access to public records and meetings as provided by law."[273]

Setting aside whether *In re T.W.* reached the correct conclusion, it cannot be disputed that the court did not reach its conclusion through the analysis it otherwise requires when considering the meaning of the Florida Constitution. As previously explained, "[i]n construing

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[266] 551 So. 2d 1186 (Fla. 1989).
[267] *Id.* at 1188–89.
[268] *Id.* at 1191–94.
[269] *Id.* at 1191.
[270] *Id.* at 1192–93.
[271] *Id.* at 1191–92.
[272] *In re T.W.*, 551 So. 2d at 1201 (citation omitted) (Overton, J., concurring in part, dissenting in part).
[273] *See id.*

provisions of the Florida Constitution, [the court is] obliged to ascertain and effectuate the intent of the framers and the people."[274] And to do so, "[the court is] guided by circumstances leading to the adoption of a provision."[275] The *In re T.W.* court's failure to address the historical record is particularly odd given the court's handling of section 23 two years prior in *Rasmussen v. South Florida Blood Service, Inc*.[276] There, the court addressed issues related to discovering the identity of blood donors in civil litigation to determine if a plaintiff transacted AIDS through a blood transfusion.[277] Unlike *In re T.W.*, this time the court engaged in its normal historical analysis, looking to the "proceedings of the Constitution Revision Commission" and finding that "a principal aim of the constitutional provision is to afford individuals some protection against the increasing collection, retention, and use of information relating to all facets of an individual's life."[278] This analytical mode is consistent with the court's goal, discussed *supra* Section I(b), of ascertaining and effectuating "the intent of the framers . . . as to fulfill the intent of the people"[279] by looking to the "circumstances leading to the adoption of a provision."[280]

This is not the case for *In re T.W.*[281] This is important because it means that the only value of *In re T.W.* is the court's reliance on stare decisis.[282] If a case is followed simply because it is precedent, it is of little use in actually analyzing whether article I, section 23 guarantees abortion rights based on its text and the historical record surrounding its adoption. So as commentators, litigants, and jurists analyze whether historical sources indicate section 23 was understood to guarantee abortion rights, we hope this article serves as a small contribution towards identifying and understanding that record.

CLOSING

History, like memories, sometimes needs a refreshing of the recollection to get a more accurate picture of the past. This is particularly true with the history behind Florida's forty-two-year-old privacy right. The evidence in the historic record leading up to the two privacy

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[274] Gallant v. Stephens, 358 So. 2d 536, 539 (Fla. 1978) (first citing State ex rel. Dade Cnty. v. Dickinson, 230 So. 2d 130 (Fla. 1969); then citing Gray v. Bryant, 125 So. 2d 846 (Fla. 1960)).
[275] *Id.*
[276] 500 So. 2d 533 (Fla. 1987).
[277] *Id.* at 534–38.
[278] *Id.* at 536.
[279] Zingale v. Powell, 885 So. 2d 277, 282 (Fla. 2004) (emphasis omitted).
[280] Gallant v. Stephens, 358 So. 2d 536, 539 (Fla. 1978).
[281] 551 So. 2d 1186 (Fla. 1989).
[282] *See In re T.W.*, 551 So. 2d 1186, 1192–93 (1989).

proposals and the ultimate adoption of article I, section 23, points to a single conclusion. No matter which way you turn to gaze upon this two-sentence diamond, the answer comes back the same—informational privacy.

The text of the amendment does not mention abortion—an odd omission if the goal were to codify *Roe*.[283] The intellectual origin of the phrase "right to be let alone" is rooted in protecting against the discovery and dissemination of private facts.[284] The second sentence of the amendment expressly creates a limitation to the first sentence, ensuring that the public's right to access public information and meetings will not be hindered.[285]

The historical record is consistent with this textual analysis. Cultural and political events in the years leading up to the passage of the amendment created a significant public concern with and interest in informational privacy, given the government's increasing ability (and willingness) to collect data through emerging technologies.[286] Wiretapping, internet, wire transfers, fax machines, and similar technologies were all advancing significantly or beginning to be used during the decade of the seventies.[287] The entire archived public record of the debate and discussion of privacy in the CRC of 1977–1978 never mentions the word abortion—instead, a robust discussion about informational privacy is replete throughout the two-year process.[288] And the legislative history behind the debate and discussion of the privacy proposal in the Florida Legislature in 1980 is also overwhelmingly about informational privacy.[289] The single mention of abortion in the legislative debate was a clear public statement by the Senate sponsor that the resolution had nothing to do with abortion.[290] Likewise, the media's coverage of the amendment's purpose and effect was primarily about information privacy.[291] Many major daily newspapers in Florida opposed both the 1978 version, and even the revised 1980 version, because they had great concerns they would not be able to access information.[292]

When Floridians voted in the general election of 1980, *Roe v. Wade* had legally secured abortion rights for over seven years.[293] The

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[283] *See* FLA. CONST. art. I, § 23.
[284] *See supra* Section IV(a).
[285] FLA. CONST. art. I, § 23.
[286] *See* discussion *supra* Section II.
[287] *See* discussion *supra* Section II.
[288] *See* discussion and sources cited *supra* Section III(c).
[289] *See supra* Section III(c).
[290] *See supra* note 215.
[291] *See supra* notes 196–208.
[292] *See supra* text accompanying notes 187–188, 197, 200.
[293] 410 U.S. 113 (1973).

two major candidates, President Jimmy Carter and Governor Ronald Reagan, both shared some pro-life positions.[294] Church denominations and other pro-life organizations that were the leading opponents of abortion rights were silent on the privacy amendment in 1980.[295] We were unable to identify any example of opposition or concern over privacy amendment by pro-life groups. Even the amendment's fiercest organized opponents did not mention abortion.[296]

Based on the totality of the evidence presented in this article, clearly the original and plain public meaning of the amendment's language as understood by voters in Florida on Tuesday, November 8, 1980, was related to informational privacy, not abortion. The overwhelming evidence of this conclusion was either not adequately considered or ignored by the Florida Court in deciding the *In re T.W.* case in 1989. The historical record presented above should help to collectively refresh the legal recollection of judges, professors, lawyers, and advocates concerning the origin and purpose behind article I, section 23 of the Florida Constitution.

[294] *See supra* notes 74–76.
[295] *See supra* note 201.
[296] *See supra* text accompanying note 201.