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UNTCHED PROTECTION FROM DISCRIMINATION: Private Action in Montana’s Individual Dignity Clause

Tia Rikel Robbin*

I. INTRODUCTION

The Montana Constitution’s equal protection clause guarantees “individual dignity” for each person by “prohibiting private as well as public discrimination.” Moreover, it has the potential of providing this guarantee to a larger number of individuals than does any other state constitution. The individual dignity clause provides:

The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his [or her] civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.2

Although the individual dignity clause has existed since the adoption of the 1972 Constitution, the portion of the clause that prohibits discrimination by private parties has remained dormant.3 If the Montana Supreme Court were to apply a proper analysis to the clause, an analysis founded in the provision’s express language, Montana would provide its citizens greater protection from discrimination than does any other state. Such a result would ensue because Montana’s individual dignity clause guarantees that the “dignity of the human being is inviolable,” by protecting individuals from private, as well as public, discrimination and from unequal protection of the laws.

To assist Montana courts in the full application of Montana’s individual dignity clause, this comment first surveys the history of

* The author thanks Professor Larry Elison, University of Montana School of Law, for his advice and comments; Marshall Murray, Esq., Kalispell, Montana, for furnishing Constitutional Convention research materials; and Mae Nan Ellingson, Esq., Missoula, Montana, for her insight into a possible interpretation of the delegates’ intent. Any omissions or errors, however, are strictly the author’s.

1. V MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPTS 1642 (1972) [hereinafter TRANSCRIPTS].


3. In re Will of Cram, 186 Mont. 37, 606 P.2d 145 (1980), provided the court an opportunity to utilize the private action portion of the individual dignity clause, but the court did not address the clause in its decision. See infra Part III.
the clause’s formation, enumerating the sources of the clause’s language. It then focuses on the intent of the 1972 Montana Constitutional Convention Delegates and the Montana Supreme Court’s reluctance to give substance to that intent. This comment further provides three possible analyses which the judiciary could use to fulfill the delegates’ intent to eradicate discrimination in Montana. Finally, this comment addresses the probable defense that would be raised if the Montana Supreme Court were to enforce the private action provision of the individual dignity clause.

II. BACKGROUND

Prior to the convening of the 1972 Constitutional Convention, the Montana Constitutional Commission hired researchers and analysts to examine the rights and protections guaranteed to Montanans by the United States Constitution and the 1889 Montana Constitution.4 Their findings, conclusions, and recommendations were made available to the Convention delegates while the delegates drafted and debated each of the 1972 constitutional provisions.5 The researchers and analysts reported that the fourteenth amendment of the federal constitution protected Montanans from governmental discrimination,6 and that the 1889 Montana Constitution lacked an express equal protection clause.7 The federal equal protection clause expressly provides, “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”8 In essence, the amendment guarantees that under the law each individual will be treated the same as other individuals who are similarly situated.9 Unfortunately, however, the fourteenth amendment “erects no shield against merely private conduct, however discriminatory or wrongful.”10

4. Interview with Marshall Murray, Attorney and Constitutional Convention Delegate: Rules and Resolutions Committee Chairman, Bill of Rights Committee Member, in Kalispell, Montana (January 25, 1990) [hereinafter Interview with Marshall Murray]. See also V MONTANA CONSTITUTIONAL CONVENTION OCCASIONAL PAPERS: Comparison of the Montana Constitution with the Constitutions of Selected Other States iii.
5. Interview with Marshall Murray, supra note 4.
6. X MONTANA CONSTITUTIONAL CONVENTION COMMISSION STUDIES: Bill of Rights 308. 
7. Id.
9. In McFarland v. Goins, the Mississippi Supreme Court stated, If the fourteenth amendment of the Constitution of the United States means anything at all, it certainly means that all citizens of the United States shall stand equal before the law, and that no special privilege or benefits shall be given to one class of citizens to the exclusion of the other . . . . 96 Miss. 67, 75, 50 So. 493, 493 (1909).
Although the 1889 Montana Constitution included a “Declaration of Rights,” it did not contain a specific “equal protection” provision. Instead, Montanans relied upon the fourteenth amendment and its “equality before the law” guarantee for protection from discrimination. Montanans also benefitted from certain constitutional provisions and statutes designed to prohibit some forms of discrimination. In particular, the 1889 Constitution contained “anti-discrimination” provisions that gave aliens the protection they needed to acquire property and settle in the state. The statutes provided each citizen protection from discrimination in 1) employment and 2) access to public facilities or accommodations, “because of race, creed, color or national origin.” These state provisions, however, did not protect Montanans from either discrimination by the state or by private individuals. This absence of protection from discrimination served as an impetus for the “people’s crusade” of the 1972 Montana Constitutional Convention, which led to the drafting of a “progressive” declaration of rights.

III. THE INDIVIDUAL DIGNITY CLAUSE

When drafting Montana’s individual dignity clause, the convention delegates apparently borrowed portions from the equal protection provisions of one U.S. commonwealth and three states. Specifically, Constitutional Commission researchers highlighted the equal protection clauses of Puerto Rico, New York, Michigan, and Illinois as examples of progressive, protective provisions. The drafters fused the relevant and eloquent portions of these various sources to achieve the current individual dignity provision.

A. “The dignity of the human being is inviolable.”

As one delegate stated while presenting the individual dignity clause to the convention, the provision is “quite similar to that of

11. See Mont. Const. of 1889, art. III.
13. For example, art. III, § 25 of the 1889 Montana Constitution protected an alien’s right to acquisition and possession of mines and other real property.
14. Revised Codes of Montana § 64-301 (1947) [hereinafter Rev. Codes of Mont.].
15. Rev. Codes of Mont. §§ 64-211, -301.
16. Rev. Codes of Mont. §§ 64-211, -301 to -303.
18. Several of these jurisdictions had held conventions within relatively recent years, and the others were considered illustrative state constitutions by authorities. V Montana Constitutional Convention Occasional Papers: Comparison of Montana Constitution with the Constitutions of Selected Other States iii.
the Puerto Rico declaration of rights . . . .”19 A comparison of the two demonstrates their similarity. The Puerto Rico provision provides in part:

The dignity of the human being is inviolable. All men [and women] are equal before the law. No discrimination shall be made on account of race, color, sex, birth, social origin or condition, or political or religious ideas . . . . 20

This provision does not specify exactly “who” is prohibited from discriminating, but implies through its broad language that the prohibition extends to both governmental and private discrimination. Moreover, when the Supreme Court of Puerto Rico has interpreted this broad language, the court has held that this language does extend to private discrimination.21 In Gonzalez v. Superior Court,22 the court held that the family tradition of passing from father to son the rum recipe used in the family business impermissibly excluded female family members solely because of their sex.23 The court found that this practice violated the Puerto Rico Declaration of Rights.24 This holding may aid the Montana Supreme Court when confronted with a similar private discrimination situation.

B. “Neither the state nor any person, firm, corporation, or institution shall discriminate”

The language protecting Montanans from private discrimination originated in the New York equal protection provision, which provides in part:

No person shall, because of race, color, creed or religion, be subjected to any discrimination in his [or her] civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.25

20. P.R. Const. art. II, § 1 (emphasis added).
22. Id.
23. Id. at 791.
24. Id. The Gonzalez court stated,
Whatever the family tradition might be, the Constitution of the Commonwealth does not permit that there be discrimination between [members of the family] by reason of sex. The family tradition may be kept among the heirs and interested parties, but they cannot have the benefit of the court to make good, against the laws and the Constitution, a discrimination.
Id.
Even though the clause purports to prohibit private discrimination, the New York judiciary has refused to apply the clause as such. Rather the courts limit the clause's application to those violations involving "state action," thereby robbing from the New York Constitution the capacity to assist in removing discrimination from the private sector. The New York courts' continued refusal to allow the state equal protection provision to afford greater protection from discrimination than its federal counterpart negates the purpose of having the clause at all, and offers no private action analysis which the Montana courts could adopt.

C. "in the exercise of his civil or political rights"

Drafters of Montana's individual dignity clause modeled the "civil or political rights" language after Michigan's equal protection provision, which provides in part:

No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights . . . .

This language appears to limit protection from discrimination to those instances in which individuals are attempting to exercise their civil or political rights. Rather than basing an equal protection analysis on this distinctive language, however, the Michigan courts have chosen to interpret the clause to "afford 'the same rights as the Federal equal protection clause.'" Therefore, although Montana found this language instructive, judicial interpretation of the Michigan provision provides Montana no guidance in defining the words "civil or political rights," or in understanding the words' application to discriminatory actions.

26. Telephone interview with Larry Kahn, Deputy Solicitor General, New York State Dep't of Law (February 2, 1990). See People v. McCray, which held:

[T]here is nothing in the language or history of our State equal protection provision (art. I, § 11) which suggests that the scope of the rights guaranteed by this provision should extend beyond the rights guaranteed by the equal protection clause of our Federal Constitution . . . .


27. MICH. CONST. art. I, § 2 (emphasis added).

D. "on account of race, color, sex, culture, social origin or condition, or political or religious ideas"

The Constitutional Convention Delegates drafted this language after reviewing several different constitutions, each of which denoted certain classes of individuals as "suspect." Montana’s enumeration of suspect classes is not identical to any one source; however, it strongly resembles the language of the Puerto Rican provision.

The convention transcripts document specific intent for two of the classes. First, the delegates included “sex” in this list because they “saw no reason for the state to wait for the adoption of the federal equal rights amendment.” Second, the delegates included “culture” to protect “groups whose cultural base is distinct from mainstream Montana, especially the American Indians.” These statements imply Montana’s willingness to stand at the forefront of protecting the individual from invidious discrimination.

The Montana Supreme Court has addressed most of the enumerated suspect classes, including race, sex, social or economic condition, religion, and politics. Culture is the only enumerated.

29. The term “suspect class” originated in Korematsu v. U.S., 323 U.S. 214, 216 (1944), and later was defined as one, saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.


30. Each of the state constitutions from which the individual dignity clause’s language originated included an enumeration of suspect classes. By state, they are:

Puerto Rico: “race, color, sex, birth, social origin or condition, or political or religious ideas,” P.R. Const. art. II, § 1.


32. Id.


ated suspect class that the court has not yet had the opportunity to address. The court, however, has expanded this list of suspect classes to include age.38

IV. THE MEANING OF MONTANA’S INDIVIDUAL DIGNITY CLAUSE

A. Intent

The Constitutional Convention transcripts reveal two possible interpretations of the delegates’ intent for the individual dignity clause, while the clause’s language provides a third. These intentions can be summarized as follows: 1) total eradication of discrimination;39 2) eradication of discrimination in the employment, rental and “quasi-public” settings;40 and 3) eradication of discrimination in the exercise of civil or political rights.41

The first possible interpretation of the delegates’ original intent, total eradication of discrimination, is a reasonable one, for three reasons. First, when Delegate and Bill of Rights Committee member Rachell K. Mansfield introduced the clause to the convention floor, she stated that the clause was “a constitutional impetus for the eradication of public and private discrimination.”42 Secondly, the entire language of the clause indicates that total eradication of discrimination was what the drafters intended:

The dignity of the human being is inviolable. No person shall be

considered in criminal sentencing, however, should not be used as a reason for imposing the maximum punishment); McClanathan v. State Comp. Ins. Fund, 186 Mont. 56, 606 P.2d 507 (1980) (social condition was intended to prevent discrimination of the poor, not parents or those totally disabled).


40. Id. at 1643 (statement by Delegate Wade J. Dahood).

41. Convention Delegate Mae Nan Ellingson provided this third possible intent of the drafters. Interview with Mae Nan Ellingson, Attorney, Missoula, Montana (January 28, 1990) [hereinafter Interview with Mae Nan Ellingson].

42. V TRANSCRIPTS, supra note 1, at 1642.
denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his [or her] civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.\[43\\]

Finally, the Montana Constitution as a whole was an original document that broke new ground in state constitutional law by expanding the rights afforded the citizens of Montana. A progressive interpretation of the individual dignity clause, as the clause’s introduction and wording compel, would conform with the general pioneer spirit of the convention and the unique nature of the resulting Montana Constitution.

The second possible interpretation of the delegates’ intent developed from the expressed concerns of certain delegates about the provision’s broad language and the potential for its abuse.\[44\\] This group of delegates feared that the clause’s wording meant that the clause applied to all possible areas of discrimination. Delegate Otto T. Habedank in particular worried about invasion of his privacy, specifically the manner by which this provision could prohibit organizations like the Sons of Norway from enforcing their traditional membership requirements.\[45\\] He hypothesized that the private action portion of the individual dignity clause could force the group to accept persons with whom he would not share a common heritage.\[46\\] In response to these concerns, the chairperson of the Bill of Rights Committee, Delegate Wade J. Dahood, articulated a second possible intent\[47\\] for the individual dignity clause, one that differed markedly from that offered by Delegate Rachell K. Mansfield. Delegate Dahood’s interpretation would restrict the application of the private action portion of the individual dignity clause “to employment, to rental practices, to actual [association] in matters that are public or matters that tend to be somewhat quasi-public.”\[48\\] This interpretation of intent soothed several delegates’

44. Discussion focused on the deletion of “by any person, firm, corporation or institution.” V TRANSCRIPTS, \[supra\] note 1, at 1642.
45. Id. at 1643.
46. Id.
47. See text accompanying \[supra\] note 40.
48. V TRANSCRIPTS, \[supra\] note 1, at 1643. This intent mirrors that of the Illinois equal protection clause as documented in the Commission Studies. See X **MONTANA CONSTITUTION CONVENTION COMMISSION STUDIES: Bill of Rights** 310-11. Illinois limits private action for discrimination to the “hiring and promotion practices of any employer or in the sale or rental
concerns, including Delegate Habedank’s. At the conclusion of the
convention discussion, the motion to delete the words “by any per-
son, firm, corporation or institution” failed, and the delegates
unanimously approved the individual dignity clause as written. Because Delegate Dahood’s interpretation of intent immediately
preceded the clause’s approval, the convention delegates may have
based their votes on that interpretation. For this reason, Delegate
Dahood’s interpretation is perhaps the most plausible explanation
of the intent of the clause.

The third and final possible interpretation of the delegates’
original intent stems from the words “in the exercise of his [or her]
civil or political rights,” which seems to limit the breadth of the
clause. This interpretation, however, may be anomalous. The tran-
scripts themselves do not suggest that the drafters intended to
prohibit discrimination only in the exercise of “civil or political
rights.” Moreover, when deciding discrimination cases involving
state action, the Montana Supreme Court has yet to apply this
limitation. Thus, the court should not then apply this limitation
when confronted with a private discrimination case. To do so
would create a dichotomy of necessary elements between actions
against the state and those actions against private individuals.
Because the words themselves do not impart such a dichotomy, the
Montana Supreme Court should remain consistent and reject this
analysis for private discrimination actions as well.

Assuming the court does choose to require the exercise of civil
or political rights before utilizing the individual dignity clause, the
court must then decide whether to define these rights broadly or
narrowly. A broad definition would, in essence, protect individuals
in all aspects of their lives, similar to the first interpretation. For
example, the Montana Constitution provides Montana citizens ina-
lienable rights, including, in part, the rights “of pursuing life’s ba-
sic necessities . . . and seeking their safety, health and happiness in
all lawful ways . . . .” By defining “seeking happiness” broadly,
the court would interpret the individual dignity clause as encom-

of property.” Ill. Const. art. I, § 17. Also, Delegate Dahood reminded the delegates that the
“federal Civil Rights Act of 1964 . . . encompass[ed] some of the fears that [were] expressed
. . . .” V Transcripts, supra note 1, at 1643. This limited intent also parallels the protections
provided in the Rev. Codes of Mont. contemporaneous with the 1889 Constitution. Supra
notes 14-16.

49. V Transcripts, supra note 1, at 1646. Thirteen (13) delegates voted for the dele-
tion of the private action provision, seventy-six (76) voted against such a deletion. Id.

50. Id.

51. Interview with Mae Nan Ellingson, supra note 41.

52. See supra notes 33-38.

passing almost all activities or interests and, therefore, would enable the court to prohibit discrimination in virtually all circumstances. Conversely, a narrower definition could limit “civil rights” to only those rights or freedoms provided citizens by their government. A narrow definition of civil or political rights was suggested by the Montana Supreme Court in State v. Gafford. In that case, the court stated that the criminal defendant lost his “political and civil rights” due to incarceration. The court defined civil rights as those “incident to citizenship such as the right to vote, the right to hold public office, the right to serve as a juror in our courts and the panoply of rights possessed by all citizens under the laws of the land.” Although this enumeration may permit an expansive reading, the court’s enumeration necessarily constrains the breadth of the individual dignity clause.

If the court adopts a narrow definition of civil or political rights, this final possible interpretation of the delegates’ original intent is the least plausible of the three. First, the overall progressive atmosphere of the convention suggests the delegates’ desire to expand rather than to contract the rights of Montana citizens. Second, the federal equal protection clause does not limit protection from discrimination only to situations in which citizens attempt to exercise civil or political rights. A progressive state constitution would not limit protections in this way either. Finally, the express language of the clause declares the “dignity of the human being” to be “inviolable.” Such a limited protection would violate that dignity.

B. Interpretation

Since the adoption of the 1972 Montana Constitution, the Montana Supreme Court has not interpreted the private action portion of the individual dignity clause. At least one case, In re Will of Cram, however, provided the Montana Supreme Court

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56. Id. at 389-90, 563 P.2d at 1134.
57. Id. See also MONT. CODE ANN. tit. 49, ch. 1, pt. 2 (1989). “Civil rights” include “political rights” because both arise from the government and its laws. Some courts distinguish the two by specifying political rights as those which arise from the administration of and participation in government. Anthony v. Burrow, 129 F. 783 (C.C. Kan. 1904); Byers v. Sun Savings Bank, 41 Okla. 728, 139 P. 948 (1914).
58. If the Montana courts impose such a restriction on the individual dignity clause, the provision could be found unconstitutional because the fourteenth amendment of the U.S. Constitution does not provide for such a limitation.
with the opportunity to use this constitutional tool to assist in the elimination of discrimination.\textsuperscript{60}

In \textit{Cram}, the decedent's will provided for the distribution of funds to male members of either the Future Farmers of America (F.F.A.) or the 4-H clubs who resided in the decedent's home county.\textsuperscript{61} Mr. Cram specifically requested that the male recipients use the cash awards to purchase sheep to raise as F.F.A. and 4-H projects.\textsuperscript{62} The plaintiff alleged discrimination against female members of the groups on the basis of sex.\textsuperscript{63} The trial court found state action involved through the participation of the F.F.A. and 4-H clubs' leaders, who were hired to administer the programs as employees of the Office of the Superintendent of Public Instruction and the State University System.\textsuperscript{64} The trial court, however, did not invalidate the will.\textsuperscript{65} It merely modified the will to remove the participation of the clubs' leaders, thereby removing the state action which the court found to be a violation of the fourteenth amendment of the federal constitution.\textsuperscript{66}

By affirming the district court's holding, the Montana Supreme Court upheld the constitutionality of a will that clearly discriminated on the basis of sex. The appellants had expressly argued that Montana's individual dignity clause had been violated.\textsuperscript{67} Instead of addressing those arguments, however, the court limited its analysis to an interpretation of the federal constitution. In its holding, the court cited only the fourteenth amendment as a source of protection from discrimination in Montana, and virtually ignored the alleged violation of the Montana Constitution.\textsuperscript{68} The Montana Supreme Court's analysis and holding in \textit{Cram} may reveal its predilection to require state action in discrimination actions brought under Montana's Constitution. Since the \textit{Cram} decision, the court has not acknowledged the private action portion of the clause, thus the clause remains dormant, untouched by definition or application.

\textsuperscript{60} Id. Id. at 39, 606 P.2d at 147.

\textsuperscript{61} Id. at 39, 606 P.2d at 147.

\textsuperscript{62} Id.

\textsuperscript{63} Brief for Appellant at 18-19, In re Will of Cram, 186 Mont. 37, 606 P.2d 145 (1980) (No. 14670).

\textsuperscript{64} Cram, 186 Mont. at 44, 606 P.2d at 150.

\textsuperscript{65} Id. at 45, 606 P.2d at 150.

\textsuperscript{66} Id.

\textsuperscript{67} Brief for Appellant at 18-19, In re Will of Cram, 186 Mont. 37, 606 P.2d 145 (1980) (No. 14670).

\textsuperscript{68} Cram, 186 Mont. at 87, 606 P.2d at 145.
V. PROPOSED ANALYSES OF PRIVATE ACTION IN MONTANA'S INDIVIDUAL DIGNITY CLAUSE

To ensure that each individual's dignity remains intact, free from discrimination, attorneys must use the individual dignity clause to the full extent intended by the drafters. Because there are no prior judicial decisions that apply this clause, no guidance for attorneys or judges exists. This section sets forth three analyses, each designed to explain the possible interpretations of the drafters' original intent behind the individual dignity clause. The section then hypothesizes court holdings utilizing the facts of Cram for each analysis. Under all three analyses, the court must answer two initial factual questions: First, did discrimination occur? Second, was that discrimination based on a suspect classification?

A. Analysis One: Total Eradication of Discrimination

Total eradication of discrimination, by either the government or individuals, requires a broad application of the individual dignity clause. If the court, based on the facts of the particular case, were to answer both of the initial questions affirmatively, then no further analysis would be needed. A violation of the individual dignity clause would have occurred. No restriction could limit the existence of this protection or exclude certain entities from its prohibition. Broad application of the individual dignity clause, therefore, would fulfill Delegate Mansfield's intent, as expressed on the convention floor. Further, such an application would ensure that individual dignity would remain inviolable, regardless of who committed the discrimination or when that discrimination occurred.

If the Cram court had used such an analysis, it would have determined first that the will of Cram impermissibly classified men and women, thus the requisite discrimination would have occurred. Secondly, the court would have evaluated the basis for this dis-

69. Because the individual dignity clause is not self-executing, the Montana Legislature could implement a statutory provision to provide Montanans a cause-of-action for private discrimination specifically, or could modify and expand the protections provided by Mont. Code Ann. § 49-102 (1989). Such a provision's language and content though are beyond the scope of this comment. Currently the Montana statutes protect individuals from discrimination in various settings including in part employment, housing and education. See tit. 49, Mont. Code Ann. (1989).

70. "Discrimination" is the act by which one "confer[s] particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between whom and those not favored no reasonable distinction can be found." Black's Law Dictionary 420 (5th ed. 1979).
crimination. Because the trustees of the will had discriminated against female F.F.A. and 4-H members solely because of their gender, the court would have concluded that discrimination based on a suspect classification had occurred. Therefore, under this analysis, the will's trust would have violated the individual dignity clause.

Had the Cram court applied this analysis, the female members would have received the financial benefits of the trust along with their male peers. Such an equal distribution would have furnished financial incentive for females to participate in predominantly male activities. Additionally, equal distribution of financial benefits would have provided each person, regardless of gender, the opportunity to partake fully in the organization's activities and to reap the benefits that those activities provide.

B. Analysis Two: Eradication of Discrimination That Occurs in Employment, Rental or Quasi-Public Settings

If the application of the individual dignity clause were limited in the manner suggested by Delegate Wade Dahood, the protection provided by the clause would ensure the inviolability of an individual's dignity only within public or quasi-public parameters. Outside those parameters, anyone could discriminate. Under this second analysis, after answering the initial factual questions affirmatively, the court then would determine whether that discrimination occurred in a public or quasi-public setting. A positive finding would constitute a violation of the individual dignity clause.

Applying this analysis to Cram, the court would have looked at the will to determine whether it constituted a public or quasi-public setting. Because of the personal nature of such an estate transaction, the court most likely would have determined that this did not constitute a public or quasi-public setting. Therefore, under this analysis, the will's trustees could have denied female members of F.F.A. and 4-H any benefits from the trust, simply because of their gender.

71. V Transcript, supra note 1, at 1643.

72. The Constitutional Convention Transcripts are unclear as to whether Delegate Dahood intended this limitation to apply in public as well as private actions. This limitation could promote governmental discrimination in areas personal in nature and, thus, destroy any meaning in the individual dignity clause's declaration that "[t]he dignity of the human being is inviolable." Mont. Const. art. II, § 4.

73. "Public" may be easy to define, but "quasi-public" poses another definition left for determination by the courts. "Quasi-public" may be those areas private in nature, but regulated through the government, such as rentals.
C. Analysis Three: Eradication of Discrimination Which Occurs When a Person is Exercising Civil or Political Rights

Analysis three is similar to analysis two. Under this analysis, if the court were to limit the protection provided by the individual dignity clause only to those situations when people exercise civil or political rights, the court essentially would establish parameters, outside of which discrimination would be tolerated. After answering the first two factual questions affirmatively, the court would then need to determine if the discrimination occurred while the person was exercising his or her civil or political rights. A positive finding would constitute an individual dignity clause violation.

If the Cram court had applied this analysis, it would have had to determine if receipt of a trust's financial benefits constituted a civil or political right. If the court were to have defined "civil or political rights" broadly, in accordance with the delegates' intent to provide rights and protections beyond those found in the United States Constitution, it undoubtedly would have found the right to receive these benefits embodied in one of the state constitution's broad clauses. Therefore, the female members would have secured the same financial, social, and educational benefits as those received by male members.

Conversely, if the court were to use a narrow definition of "civil or political rights," then the court would necessarily have determined that receiving the benefits of a private trust falls outside the scope of a civil or political right. Thus, the court would have held that the trust could preclude the female members of F.F.A. and 4-H from receiving the financial benefits of the Cram will without violating the individual dignity clause. Consequently, the narrow definition of civil or political rights would encourage such classifications of individuals which would benefit people inequitably.

D. The Solution

Analyses two and three, which limit the application of the individual dignity clause, would eliminate some discrimination in Montana, while allowing purely private discrimination to endure. Under a state constitution founded on individualism, tolerance of any discrimination seems contrary to Montana's stated goals. The Montana Supreme Court should adopt the first, "total eradication"

74. Interview with Mae Nan Ellingson, supra note 41.
75. For example, see text accompanying supra note 53.
76. See text accompanying supra notes 55-57.
analysis, an analysis which would further the drafters’ intent to provide Montanans with broad protection from discrimination.

VI. CONSIDERATIONS WHEN IMPLEMENTING THE PROPOSED ANALYSIS

When private individuals attempt to enforce their right to equal protection through the judicial system, Montana courts may face a challenge to such enforcement based on the discriminating party’s constitutional right to privacy. Montana’s constitution provides that “[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.” The defending party may argue that court enforcement of equal protection constitutes “state action,” and thus requires the state to demonstrate a “compelling state interest” before the state can infringe upon the privacy rights. This argument, however, should fail for three reasons: 1) the Montana Constitution Convention delegates intended the equal protection provision to overcome the state action requirement, 2) the United States Supreme Court in Shelley v. Kraemer, and in similar federal “state action” cases, never envisioned that the holding would extend to private action, and 3) the only way to give both clauses efficacy is to interpret the privacy clause to prohibit governmental intrusion rather than governmental enforcement.

First, the researchers and drafters of Montana’s individual

77. The Montana Supreme Court faced a similar challenge in Montana Human Rights Div. v. City of Billings, 199 Mont. 434, 649 P.2d 1283 (1982). In that case, the city of Billings was accused of discriminating in its employment practices. The court held that the Human Rights Division’s need to investigate the alleged discrimination, by scrutinizing personnel records of employees (who were not the complainants), outweighed the employees’ rights to privacy.

78. MONT. CONST. art. II, § 10.

79. Id.

80. The language of the clause and the transcripts reveal this intent. See note and accompanying text, supra note 1.

81. 334 U.S. 1 (1948). The United States Supreme Court consolidated and ruled on two actions, one from Missouri and one from Michigan, both concerning issues of private agreements which exclude persons based on race or color. In Shelley, landowners sought court enforcement of a covenant which prohibited “any person not of the Caucasian race,” specifically those “people of the Negro or Mongolian Race,” from occupying the residences. Id. at 5. The Supreme Court of Missouri enforced the covenant, and thereby restrained the Shelleys from taking possession of the property. Id. at 6. The United States Supreme Court reversed the lower court’s holding and stated that restrictive covenants alone do not violate equal protection, however, the judicial enforcement of the covenant constituted “state action,” and therefore, violated the fourteenth amendment of the federal constitution. Id. at 20.
dignity clause saw a need to prohibit discrimination and a means to accomplish this goal through an all-encompassing equal protection provision. By including the private action portion in the clause, the drafters prohibited all discrimination and, thus, furthered an intent to eradicate discrimination in Montana. To allow individuals to defend discriminatory acts as a right to privacy would contradict the drafters’ intent to prohibit all discrimination in Montana.

Second, although critics of a strong equal protection clause may argue that judicial enforcement of equal protection would constitute “state action,” similar to the rule dictated in Shelley v. Kraemer, such enforcement of a constitutional right should not be construed as “state action.” The Shelley Court was not interpreting, nor could it have envisioned, an equal protection clause which prohibited the entire spectrum of discrimination; instead, the Court was deciding at what point a private agreement that discriminates becomes state action. The U.S. Supreme Court went to great length to define “state action” in Shelley v. Kraemer, stating that “the prohibitions of the [fourteenth] amendment extend to all action of the State denying equal protection of the laws . . . .” In Shelley, the Supreme Court of Missouri was enforcing restrictive covenants which furthered discrimination, and thereby denied equal protection. Conversely, under Montana’s equal protection clause, the courts would be enforcing a person’s right to equal protection and thereby denying discrimination. This distinction is crucial. Actions to prohibit discrimination should not be labeled “state action” simply because individuals who are discriminated against can seek redress and enforcement of their right to equal protection only through the courts or other governmental agencies of Montana.

Finally, when the Bill of Rights Committee recommended the adoption of the right to privacy provision, the drafters stated that they intended to erect a “semipermeable wall of separation between individual and state . . . .” The drafters clearly intended to protect the privacy of individual persons only, not corporations or any other entity considered a “person” by law. Thus, in Delegate

82. Id. at 1.
83. For the facts of Shelley v. Kraemer, see supra note 81.
84. The Court stated that the fourteenth amendment “erects no shield against merely private conduct, however discriminatory or wrongful.” Shelley, 334 U.S. at 13.
85. Id. at 14 (quoting Virginia v. Rives, 100 U.S. 313, 318 (1879)).
86. V TRANSCRIPTS, supra note 1, at 1681.
87. Id. at 1680-81. The delegates unanimously approved an amendment to the original proposal to limit the right of privacy solely to individuals and thus “exclude any question
Habedank's example, the Sons of Norway could not invoke the protections of the privacy clause to defeat a challenge to their membership policies.

Furthermore, the delegates debated at great length over the inclusion or exclusion of the words "without the showing of a compelling state interest." At one point, the delegates chose to delete the words, then upon reconsideration, voted to replace the words. The final resolution is critical to the application of the privacy clause because the clause as read demonstrates an apparent intent to limit its application only to those intrusions initiated by the government. The constitution drafters, therefore, had a very limited intent in enacting the right to privacy: to erect a wall to protect the individual's privacy from governmental intrusion, absent a compelling state interest. This limited language does not evoke an intent by the drafters also to bar an individual's right to equal protection. Thus, the drafters of the Montana Constitution could not have intended to both create a right and destroy its efficacy in the same hand.

To fulfill the intent of the drafters and eradicate discrimination in Montana, the courts of Montana must prohibit discrimination in both the private and public sectors, a task made easier by the express language of the individual dignity clause which does not require a finding of "state action." Also, the courts cannot allow those who discriminate to argue that their right of privacy protects such discrimination, because that was not the intent of privacy provision drafters, and those arguments would only serve to frustrate the purpose of equal protection. For these reasons, the interpretation of Montana's privacy clause should not override the interests of private individuals seeking their constitutional right of equal protection.

VII. Conclusion

As Montanans consider whether to call another Montana Con-
Institutional Convention, each provision of the current document must be evaluated. Until now, the private discrimination portion of Montana’s equal protection clause has escaped application and definition. However, if the Montana Supreme Court uses a proper, broad analysis, which would facilitate the elimination of discrimination in the state, Montana will provide greater protection from favoritism and intolerance than any other state in the union. The Montana Supreme Court must fashion an analysis similar to that used by the courts of Puerto Rico, which prohibits discrimination by individuals as well as the government.

In 1972 Montanans saw the need for broad protections of the state’s citizens, and consequently ratified a clause which should protect each citizen from all forms of discrimination, both public and private, with malleable language to change as the state changed. Instead of removing this important language, the untouched language of Montana’s individual dignity clause should be given to the judiciary to mold and nurture, and thus promote the eradication of discrimination as the drafters intended.