Technology's Future Impact on State Constitutional Law: The Montana Example

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We live at a time of great technological development in areas like biotechnology and cyberspace. Indeed, science fiction is becoming reality. In August 2002, a controversial American-based scientist, Dr. Panos Zavos, appeared on Connie Chung’s CNN television show, along with an infertile married couple, and announced he was going to clone children for that couple at a secret foreign location.\(^1\) MSNBC subsequently reported on a Great Falls, Montana, woman who seeks to clone her deceased daughter, the victim of a tragic car accident.\(^2\) This all follows the 1997 cloning of the sheep “Dolly” in Scotland.\(^3\)

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\(^3\) Lee M. Silver, *Remaking Eden: How Genetic Engineering and Cloning*...
There have been advances in other assisted reproduction technologies. Pre-implantation genetic diagnosis (or embryo screening) is perhaps the most controversial form of high tech reproduction.\(^4\) It allows prospective parents who use In Vitro Fertilization (IVF) to choose their child’s sex. Their doctor implants into the woman’s womb an embryo that has a particular gender’s DNA.

The mapping of the human genome opens new doors.\(^5\) Doctors can screen out embryos with a genetic predilection for Alzheimer’s disease.\(^6\) Genetic engineering may permit scientists to alter the genes of embryos and negate predilections for certain illnesses.\(^7\) In addition, scientists are trying to find the genetic key for living longer.

These developments have influenced drug treatments. The field of pharmaco-genetics is based on research showing a person’s genetic makeup may determine the effectiveness of medications in treating their illness.\(^8\) Moreover, increased knowledge about the brain enables doctors to prescribe serotonin enhancing medications, like Prozac and Zoloft, to alleviate depression.\(^9\) This is neuro-technology.\(^10\)

Many of these developments are only possible because of augmentations in computer power and function. Perhaps the most significant technological development of our time, the Internet, derives from the networking of computers throughout the world.\(^11\) This is the computer and information age.\(^12\)

\(4.\) Aaron Zimmer, Screening Lets Out Genetic Genie: Embryo Choice Based on Gender, Disease Creates Ethical Firestorm, \(\text{DENVER POST}\) Aug. 4, 2002, at 18A.


\(7.\) See generally SILVER, supra note 3, at 266; GREGORY STOCK, REDESIGNING HUMANS, OUR INEVITABLE GENETIC FUTURE (Houghton Mifflin 2002).

\(8.\) Interview with Gary Pulsinelli, Law Professor, in Knoxville, Tennessee, July 11, 2002. Professor Pulsinelli is a law professor with a PhD. in molecular biology.


\(10.\) Open Your Mind, \(\text{THE ECONOMIST}\), May 25, 2002 at 77 (“Genetics may yet threaten privacy, kill autonomy, make society homogeneous and gut the concept of human nature. But neuroscience could do all of these things first.”)

Interestingly, code is at the heart of bio-technology (genetic code) and computers (computer programming code).\(^\text{13}\)

This article focuses on biotechnology and the Internet because of their significance. However, important developments are also occurring in artificial intelligence,\(^\text{14}\) nano-technology,\(^\text{15}\) and cryonics.\(^\text{16}\) The question is whether we are moving towards Aldous Huxley's "Brave New World" or whether these developments will make the world better. No simple answer is available because technologies can be used for good or bad. Cloning could help infertile couples. Or, it could create body parts for harvesting. A person who knows their genetic makeup may make informed choices about elective medical procedures. But a health insurer could use that information to deny coverage.

These possibilities are summarized by two scholars. In his book, *Our Posthuman Future*, Johns Hopkins University Professor Francis Fukuyama argued that we have "a fear that, in the end, biotechnology will cause us in some way to lose our humanity, that is, some essential quality that has always underpinned our sense of who we are and where we are going...."\(^\text{17}\)

In *Remaking Eden*, however, Princeton University Professor Lee Silver states of biotechnology:

> Why not seize this power? Why not control what has been left to chance in the past? Indeed, we control all other aspects of our children's lives and identities through powerful social and

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12. *Id.*

13. Regarding computers and the Internet, see generally LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (Basic Books 1999).


17. *FUKUYAMA, supra* note 9, at 101.
environmental influences and, in some cases, with the use of powerful drugs like Ritalin and Prozac. On what basis can we reject positive genetic influences on a person's essence when we accept the right of parents to benefit their children in every other way.\textsuperscript{18}

This article does not, in the end, examine biotechnology and cyberspace issues from ethical or medical perspectives. Instead it discusses how these technologies will impact the Montana Supreme Court's interpretations of the Montana Constitution. Now, predicting the future is tricky business. But a cautious prognosis is possible. This prognosis has three parts. Part One discusses what makes the Montana Constitution unique, with a focus on those provisions relevant to technology. It also shows how federal laws may be enacted, which preempt the state on many of these issues. For example, U.S. Attorney General John Ashcroft's efforts to negate Oregon's assisted suicide law and California's medical marijuana law demonstrate the possibility of federal preemption.\textsuperscript{19}

Assuming federal law is not preemptive, Part Two discusses some general legal effects these new technologies will have on Montana constitutional law. One effect is that the Montana Supreme Court will have to carefully weigh\textsuperscript{20} multiple parties' interests rather than just applying strict scrutiny (and striking down the law) or rationality review (and upholding the law). For example, disputes may arise over embryos produced by IVF that create constitutional interests in a genetic father, a genetic mother, a surrogate mother, and others. Strict scrutiny then resolves nothing.

These technologies will also force the Montana Supreme Court to decide how the Montana Constitution's privacy provision applies to non-government actors. This will determine what health insurers and employers can do with genetic data.

Part Three then examines two cases that could come up in Montana. Specifically, the state legislature could ban cloning. An insurance company could also use genetic data without

\textsuperscript{18} Silver, supra note 3, at 277. One wonders if Professor Silver is familiar with the concept of hubris from the Greek tragedies.


\textsuperscript{20} Universal City Studios, Inc. v. Corley, 273 F.3d 429, 445 (2d Cir. 2001)("Last year, in one of our Court's first forays into First Amendment law in the digital age, we took an 'evolutionary' approach to the task of tailoring familiar constitutional rules to novel technological circumstances, favoring narrow' holdings that would permit the law to mature on a 'case-by-case' basis.").
permission. My view is that Montana can prohibit reproductive cloning but the question is not so clear with therapeutic cloning. I also believe Montana's privacy provision protects genetic data from misuse by non-government entities.

I. THE MONTANA CONSTITUTION AND FEDERAL PREEMPTION.

A. The Montana Constitution

The Montana Constitution differs from the U.S. Constitution in many ways. The Montana Constitution explicitly protects individual dignity and privacy. It also has provisions which restrict non-government actors, whereas the U.S. Constitution generally only restricts the government. In addition, Montana guarantees the public's right to know, with some limitations. The Montana Constitution contains a right to a clean and healthful environment, as well as provisions regarding education and welfare. The U.S. Constitution contains no references to socio-economic matters.

Some of these rights provisions were based on concerns about technology. During the 1972 Montana Constitutional Convention debates. During the privacy debate, delegate Bob Campbell said:

Today, with wiretaps, electronic and bugging devices, photo surveillance equipment and computerized data banks, a person's privacy can be invaded without his knowledge and the information so gained can be misused in the most insidious ways. It isn't only a careless government that has this power to pry; political organizations, private information gathering firms, and even an individual can now snoop more easily and more effectively than ever before. We certainly hope that such snooping is not as widespread as some persons would have us believe, but with technology easily available and becoming more refined all the time, prudent safeguards against the misuse of such technology are needed.

Campbell's statement reveals that Montana adopted its privacy provision to defend against improving technological surveillance and data collection techniques, bolstered by computerization. His statement also shows the privacy provision applies to non-government snooping.

Moreover, the framers were right to be concerned with technology. In State v. Siegal, the court held the warrantless use of thermal imaging technology violates the right to privacy. The court relied for support on delegate Campbell’s statements. In Armstrong v. State, the court discussed various medical practices before ruling that women have a fundamental right to obtain abortion before viability. But what about preemption?

B. Federal preemption.

The Supremacy Clause of the U.S. Constitution means the U.S. Constitution and federal law trump state constitutions or laws. This is preemption. For example, the USA PATRIOT Act’s provisions enhancing cyberspace surveillance mechanisms cannot be challenged as violating the Montana Constitution’s privacy provision. Similarly bills have been proposed in Congress to ban cloning, prohibit genetic testing and discrimination, and govern the Internet. If adopted, these laws would leave little room for the Montana Constitution to have an impact.

Of course, these bills may not pass. And any bills that becomes law could be vulnerable. For example, federal laws prohibiting the distribution of pornography to children over the Internet, and banning the development of DVD decryption code, have been challenged as violating freedom of speech. But even if these federal laws are invalidated, the Montana legislature may face problems filling these gaps because its laws

23. 281 Mont. 250, 934 P.2d 176 (Mont. 1997).
28. See Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001)
might be subject to First Amendment and dormant Commerce Clause attacks.\textsuperscript{29} The Montana Constitution might not play a role in these issues.

Proposed federal laws banning cloning raise the most interesting preemption issue. Nuclear transfer cloning is a process whereby human embryos could be produced without needing the union of sperm and egg.\textsuperscript{30} A special cell would be taken from an adult and fused with a female egg that has had its nucleus removed. After fusion, the egg would start dividing, not unlike in a pregnancy, and an embryo could be created. The embryo's DNA would essentially come from the cell, not the egg whose nucleus was removed.

But is there a federal constitutional power to regulate cloning? If not, the states would be free to regulate cloning. Indeed, six states have enacted cloning laws.\textsuperscript{31} The Montana Supreme Court would also remain free to address cloning. To assess federal power here, one must examine the Commerce Clause.

Article One, Section 8, of the U.S. Constitution says Congress may regulate commerce among the several states. Congress may not regulate matters purely internal to a state because of federalism principles, namely the idea that states have police powers with which the federal government cannot interfere. For most of the 20th Century, the U.S. Supreme Court did not question Congress on its broad uses of Commerce power.\textsuperscript{32} But in 1995, the Court refused to allow Congress to regulate a non-economic activity purely internal to a state.\textsuperscript{33}


\textsuperscript{30} \textit{See generally} \textit{Silver}, supra note 3; Kyla Dunn, \textit{Cloning Trevor}, \textit{The ATLANTIC MONTHLY}, June 2002 at 31.


\textsuperscript{32} \textit{See, e.g.,} Wickard v. Filburn, 317 U.S. 111 (1942).

\textsuperscript{33} \textit{See, e.g.,} United States v. Morrison, 529 U.S. 598 (2000).
Where does cloning fit?

Jack Balkin at Yale and Glenn Reynolds at Tennessee argue that a law banning cloning might be viewed by the U.S. Supreme Court as regulating the creation of children which is a family matter, not economic activity.\(^{34}\) Our national government cannot legislate childbirth policies as China does. Moreover, there's currently no economic market for human cloning. The Supreme Court's decisions in *United States v. Morrison*\(^ {35}\) and *United States v. Lopez*\(^ {36}\) show the Court's restrictive approach to Commerce Clause power. In addition, state licensing boards typically govern the medical profession. Thus, the federal government would be interfering unconstitutionally in a traditional state activity. This would mean Montana could still regulate cloning.

Anne Lawton at Miami, Lori Andrews at Kent, and Curtis Bradley at Notre Dame, however, argue cloning is part of the national economic market for high tech reproductive services similar to IVF clinics.\(^ {37}\) Certainly, one suspects Dr. Zavos is not donating his services to couples. Moreover, people who want to engage in cloning will often have to travel across state lines as only certain facilities and doctors will have the expertise. The knowledge and equipment these doctors rely upon will frequently have interstate origins. Thus, cloning is economic unlike the activities regulated in *Morrison* and *Lopez*. And the proposed federal laws on cloning contain findings of an effect on

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35. 529 U.S. at 617 (2000) (Court struck down Violence Against Women Act despite voluminous Congressional findings regarding effect on interstate commerce because the Court ruled no economic activity was implicated).

36. 514 U.S. 549, 566 (1995) (Court invalidated federal law that prohibits the carrying of a weapon near a public school because no economic activity was regulated).

I believe this latter group of scholars is right in arguing the Commerce Clause could support a federal anti-cloning law for the reasons just mentioned. If such a federal law were enacted, and if it survived constitutional challenges, there would be no room for state laws in that area. But that's an awful lot of "ifs." So for now, it is safe to assume the Montana Constitution will be relevant on the technology questions mentioned.

II. TECHNOLOGY'S FUTURE IMPACT ON THE MONTANA CONSTITUTION.

New technologies will effect Montana constitutional law in at least two ways. First, the Montana Supreme Court will have to employ balancing tests in certain cases. Second, the Court will address how Montana's privacy provisions apply to non-government actors.

A. Balancing Tests.

New technologies often pressure established legal categories by posing unforeseen situations. Sometimes courts stay with the old categories, which can be awkward. Courts can also adopt new categories, or they can develop more flexible tests.


40. Planned Parenthood v. Casey, 505 U.S. 833 (1992) (flexible "undue burden" test adopted). One well known scholar has said of balancing that:

Judges in the eighteenth and nineteenth centuries were willing to balance the need for private papers against the seriousness of the crime, and were far more willing to compel the production of diaries and letters in cases involving mass murders than in civil and white-collar investigations. If eighteenth-century values are to be translated into the age of cyberspace, Congress today could require judges or special privacy masters to engage in the same constitutional balancing test, issuing court orders to decrypt secret documents only in cases where individual suspicion is high and the crime being investigated is very serious indeed.

JEFFREY ROSEN, THE UNWANTED GAZE 181 (Random House 2000). See also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 491 (2nd ed. 2002) (Regarding the state action doctrine, "some scholars have advocated that the Court should engage in an explicit balancing test rather than choose entirely based on the identity of the actors."). This section uses the word "balancing" interchangeably with the
Biotechnology and the Internet often raise issues that implicate multiple parties, and this will likely force the Montana Supreme Court to balance the interests of these parties, rather than utilize blunt strict scrutiny or easy rationality.

1. Montana Scenarios on Balancing.

One area where Montana courts will have to use balancing is in Montana divorce proceedings if there's a custody dispute about embryos in out of state IVF clinic freezers. In 2001, a Montana legislator recognized the problem and introduced a comprehensive bill, but it did not advance.1

The seminal case is the 1992 Tennessee Supreme Court decision in *Davis v. Davis.*2 The court ruled a genetic father's interest in not being a parent outweighed his ex-wife's interest in donating the embryos to other infertile couples despite her being the genetic mother. The court said that there is a fundamental right to procreate, but also a fundamental right not to procreate. Besides weighing the interests of the genetic father, the genetic mother, the embryo, the infertile couple, and society, the court explained that modern technology creates at least four different types of parenting interests: genetic, gestational, bearing, and rearing.3 The court also said, unlike abortion cases, the woman's body integrity interest was not present in regard to embryos in a freezer.

Cyberspace poses complex issues as well.4 Suppose Montana passed a law banning out of state Web site owners from placing a cookie, without permission, on a Montana resident's computer and tracking the resident's Internet

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4. A Cincinnati court administrator thought he would facilitate the public's access to court records by putting them on the Internet. Yet certain people in the community protested, claiming the Web site provided overly easy access to highly embarrassing personal information from divorce court and traffic violations files. These people in effect asked the administrator to value privacy interests more and the public's right to know less. Jennifer Lee, *Dirty Laundry, Online for All to See,* N.Y. TIMES, Sep. 5, 2002, available at http://www.nytimes.com/2002/09/05/technology/circuits/05CINC.html.
habits. Although this law has a good purpose, it might violate the dormant Commerce Clause, which says states can’t pass laws that unduly interfere with the nation’s business. How is undue interference determined? The U.S. Supreme Court in Pike v. Bruce Church, Inc announced courts must weigh the importance of the state’s interest against the law’s burden on interstate commerce. Thus, Montana’s constitutional privacy interest in blocking cookies would be weighed against the burden on those Web sites that use cookies to facilitate business. In State v. Heckel, the Washington Supreme Court ruled a Washington law restricting e-mail spam did not violate the dormant Commerce Clause. Cookies are more invasive than spam so Montana’s privacy interest seems stronger in this hypothetical.

Lastly, cyberspace free speech cases do not resemble the classic scenario of the government suppressing an individual’s speech. A law regulating porn on the World Wide Web can effect the free speech interests of on-line companies, Web site owners, content creators and publishers, adults who want to see the material, children who should not see it, and others. These free speech questions are particularly difficult for public

47. An interesting question is whether a state’s interest in its citizen’s privacy can receive more weight in the dormant Commerce Clause assessment, as against the interstate commerce burden, if the state has a history of court decisions that provide an especially strong endorsement of privacy rights as in Montana.
49. Three courts have ruled that state efforts to ban the distribution of Internet porn to minors in the state violate the dormant Commerce Clause. ACLU v. Johnson, 194 F.3d 1149, 1160-1161 (10th Cir. 1999); Cyberspace Communications, Inc. v. Engler, 55 F.Supp.2d 737, 753 (E.D. Mich. 1999); ALA v. Pataki, 969 F. Supp. 160, 183-184 (S.D.N.Y. 1997). The reasoning used by the courts suggests they would find that a state law banning spam outright would violate the dormant Commerce Clause.
libraries.  


Luckily, balancing tests are not foreign to Montana constitutional law. In *Kapstein v. Conrad Sch. Dist.*, the Montana Supreme Court ruled that a private school student did not have a constitutional right to participate in the neighboring public school's extracurricular activities. But the court did not employ rationality review because the student had a legitimate educational interest at stake, though not a fundamental one. The court said "the [student's] asserted right to participate must be balanced against the School District's interests." The right to know cases require judicial balancing. Thus in *Great Falls Tribune Co., Inc. v. Sheriff*, the Montana Supreme Court ruled a police officer's right to privacy regarding his disciplinary record was outweighed by the public's right to know.

These kinds of cases should guide the Montana Supreme Court. New technologies make rigid categorical approaches awkward. Thus, courts should engage in fact specific balancing analyses which leave room for different results later if the technology changes. The court can also draw on

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51. The United States Supreme Court has agreed to decide the constitutionality of a federal law that requires public libraries to install filtering software on Internet accessible computers as a condition to the library receiving federal funds. See *ALA v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002).


53. *Kapstein*, 281 Mont. at 160, 931 P.2d at 1316 (emphasis added). Justice Rice said the Montana Supreme Court should be careful in certain environmental rights cases to balance those rights against the right to acquire, possess, and protect property. *Cape France Enterprises v. Estate of Peed*, 2001 MT 139, ¶ 61, 305 Mont. 513, ¶ 61, 29 P.3d 1011, ¶ 61. In *Butte Community Union v. Lewis*, 219 Mont. 426, 712 P.2d 309 (1986), the court said there was no fundamental right to welfare. The court, however, also said that a law restricting such important benefits deserves more than rationality. The court then weighed the individual's interest against the state's particular justification and ruled against the state. The court said, "Where constitutionally significant interests are implicated by governmental classification, arbitrary lines should be condemned. Further, there should be balancing of the rights infringed and the governmental interest to be served by such infringement." (emphasis added) *Butte* though is not well regarded because the court ignored the welfare provision's mandatory language. Later, a constitutional amendment resolved the textual problem and effectively upheld the court's ruling.


56. *Id.*; *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); Kende, *supra* note 50.
comparative constitutional law. Countries like Canada and South Africa use “proportionality analysis” when examining rights questions.\(^{57}\) Their courts balance individual interest against state’s interest. The Montana Supreme Court, however, should not abandon strict scrutiny. The doctrine still makes sense when the government is impairing fundamental rights, or when government is barring speech based on hostility to the viewpoint. But it may not make sense in these more complex situations.

B. Non-government Actors.

The Montana Supreme Court in cases like Cape France Enterprises v. Estate of Peed\(^ {58}\) and Montana Environmental Information Center v. Department of Environmental Quality\(^ {59}\) has indicated the Constitution can apply to non-government actors in environmental matters.\(^ {60}\) Can the Montana Constitution also apply to such actors in cases involving new technologies? Take e-mail monitoring for example. One study estimates that 3/4 of major U.S. firms spot-check the e-mails, computers files, Internet activities, and phone calls of employees.\(^ {61}\) In a recent Montana law review article, I argued that electronic eavesdropping by a non-government employer may well violate Montana’s privacy protections.\(^ {62}\) What is the basis for the view that non-government employees have a right not to be monitored?

First, as already mentioned, the Montana Constitution’s framers intended the privacy right to restrict non-government actors from electronic eavesdropping (e.g. e-mail monitoring) and most other forms of computerized data acquisition. Several

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57. U.S. Supreme Court Justice Breyer has recently supported the use of such a proportionality analysis in certain cases. Stephen Breyer, Our Democratic Constitution, 77 NYU L. REV. 245, 253 (2002).

58. Cape-France, ¶ 32.


62. Kende, supra note 61.
scholars such as Professor Larry Elison have confirmed this in their writings.  

Second, the privacy provision’s language is not limited to government. It says, “The right of individual privacy is essential to the well being of a free society and shall not be infringed without the showing of a compelling state interest.” The provision’s passive tense (“shall not be infringed”) does not restrict who may do the infringing. Thus non-government actors qualify.

Third, a contrary ruling would be bad public policy because electronic eavesdropping is a serious workplace problem. It would be a mistake for the court to dismiss the privacy provision’s relevance just because a non-government actor is involved. Interestingly, the California Supreme Court has interpreted the California Constitution privacy provision as encompassing non-government actors.  

Lastly, the Montana Constitution’s dignity provision, which explicitly protects against non-government violators, shows that Montana citizens should be protected against such privacy intrusions.  

One major problem with this argument is the Montana Supreme Court’s 1985 decision in State v. Long which seemed to say the privacy provision only restricts government actors. Long refused to suppress evidence of marijuana possession even though the marijuana was discovered by a private landlord who illegally entered the renter’s apartment. Long, however, should be read narrowly to cover only the criminal search and seizure context, and not 21st Century e-mail situations. A broader interpretation of Long would be inconsistent with the intent behind the privacy provision and with its text, as shown previously.


64. Hill v. NCAA, 865 P.2d 633, 642 (Cal. 1994). In Hill, the Court, however, refused to employ the compelling interest test. This is not an option in Montana because the “compelling interest” language is actually incorporated in its constitutional privacy provision.


66. 216 Mont. 65, 700 P.2d 153 (1985). The Montana Supreme Court essentially avoided the constitutional issues raised by computer “monitoring” in Harris v. Smartt, 2002 MT 239, 311 Mont. 507, 57 P.3d (The Court upheld discipling a Montana Justice of the Peace for downloading child pornography onto a work computer.)
In *Long*, however, the court said the privacy provision’s reference to a “compelling state interest” shows it only restricts state actors. Yet, that language merely requires those entities, who intrude on privacy interests, to employ compelling considerations the state would usually endorse e.g. a private company could justify monitoring e-mail based on evidence an employee is committing a crime at work.67

Moreover, subsequent Montana Supreme Court decisions suggest *Long’s* restrictive privacy view (announced over strong dissent) should be limited to search and seizure. Cases like *Armstrong v. State*,68 upholding a woman’s right to an abortion, and *Gryczan v. State*,69 striking down sodomy laws, demonstrate the court seeks to provide heightened privacy protection. *Gryczan* says adults expect their consensual sexual activities will “not be subject to the prying eyes of others or to governmental snooping” and that “consenting adults expect that neither the state nor their neighbors will be co-habitants of their bedrooms.”70 These excerpts show a concern with non-government privacy violations.

III. TWO CASES

To sum up so far, if federal law is not preemptive, new technologies will cause the Montana Supreme Court to use more balancing tests and to apply the state constitution more frequently to non-government actors. In this last section, cloning and genetic privacy are discussed.

**A. Cloning.**

Suppose a controversial scientist moves his laboratory to a remote location in Montana where he hopes to engage in all types of nuclear transfer cloning experimentation. The Montana legislature finds out and passes two laws. First it prohibits

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67. Prior to *Long*, the Montana Supreme Court ruled on several occasions that Montana’s privacy provision restricted non-government actors. In State v. Hyem, 193 Mont. 151, 630 P.2d 202 (1981) the court concluded that no compelling state interest justified the privacy intrusion because the state did not carry out the intrusion. *Hyem’s* approach, however, rendered the compelling state interest test somewhat useless because the test could never be satisfied when a non-government actor was involved. By contrast, this paper provides a coherent interpretation of the compelling state interest test that gives it substance.

68. 1999 MT 261, 296 Mont. 361, 989 P.2d 364.


70. *Id. at 450, 942 P.2d at 122* (emphasis added).
anyone from conducting or attempting to conduct human reproductive cloning. Second, it bans anyone from conducting or attempting to conduct therapeutic cloning. Would these bans be consistent with the Montana Constitution?

1. Reproductive Cloning.

Suppose the Montana scientist wants to help the Great Falls woman who lost her daughter. How would he do it? He would try to clone a cell from the Great Falls woman's daughter, implant the embryo in the woman's womb, and allow it to mature into a fetus and then a baby. The baby would have virtually the same genetic makeup as the deceased daughter. As an aside, reproductive cloning can involve stranger scenarios. A woman could clone one of her own cells and give birth to a child who is her younger twin genetically.

The Montana Supreme Court will probably not rule that reproductive cloning is a fundamental right. There's no tradition, current consensus, or broad societal movement in favor of a right to asexual reproduction. Strict scrutiny therefore would likely not be applied.

Even if the court found a fundamental right, the government could likely show the ban is narrowly tailored to promote a compelling interest. Despite Dr. Zavos' pronouncements, scientists don't know how to do reproductive cloning. Thus, President Bush's Council on Bioethics recently said that, "Given the high rates of morbidity and mortality in the cloning of other mammals, we believe that cloning to produce children would be extremely unsafe." The non-


72. Pres. Bush Council on Bioethics, Exec. Summary, xvii (Prepublication version); Art Caplan, Cloning Ethics: Separating the Science from the Fiction, MSNBC Health, http://www.msnbc.com/news/768366.asp (last visited Feb. 13, 2003) ("Nearly all experts on primate cloning believe that monkey and human beings will never be cloned because the biology of primate reproduction is simply unlike that of cats, goats, sheep and mice."); Robert A. Weinberg, Of Clones and Clowns, THE ATLANTIC MONTHLY, June 2002 at 54-55 ("Working with cows, [Advanced Cell Technology's cloning efforts] produced 496 embryos...Implanting the embryos...led to 110 established pregnancies, thirty of which went to term. Five of the newborns died after birth, and a sixth died several months later." He said there ended up being 24 surviving cows though they almost all had enlarged placentas and "respiratory distress typical of Large Offspring Syndrome" that often seems to result from animal cloning.) To date, ACT has only managed to have a cloned human embryo reach six cells before it stopped dividing. Dunn, supra note 30, at 31. For a comparative perspective, see Danrich W. Jordon, Human Reproductive Cloning: A Policy Framework for South Africa, 119 S. AFR. L.J. 294 (2002).
partisan National Academy of Sciences agrees. It took 277 failed attempts to clone "Dolly" the sheep and she has developed a peculiar premature arthritis. A ban on reproductive cloning ensures a parade of horribles does not take place. And there are numerous other possible state interests, such as preventing identity confusion when the clone becomes aware she is someone’s twin.

One could criticize this reasoning by saying that reproductive cloning technology cannot work unless experiments are allowed. Moreover, any ban can be circumvented by people going to other countries. In addition, the person who’s being prohibited from cloning may feel their individual dignity has been impugned by the state telling them what they cannot do.

Yet we have generally not allowed scientific experimentation on humans where the subjects could be injured. And cloning involves experimenting with fetuses, including those past viability, as well as with the lives of newborns. The fact that people can travel abroad to avoid our laws does not mean we must change them. The indignity some people might feel at being prohibited from reproductive cloning is outweighed by the indignity of creating fetuses with high rates of morbidity and mortality.

2. Therapeutic Cloning.

Therapeutic cloning involves creating embryos for stem cells. The likely motivation for Montana banning therapeutic cloning would be the perceived denigration of life. However, the constitutional analysis would not be the same as in the previous
In therapeutic cloning, the cloned embryo would be allowed to grow up to fourteen days. During that growth, stem cells would be extracted from the embryo. Many scientists believe these cells can address serious health problems. Then the embryo would be discarded. None of its cells would have begun to resemble organs, it would not have any functioning nervous system or brain, and it could be measured in millimeters.

Many scientists say embryonic stem cells will generate new tissues and organs for transplants or surgery, and that use of such cells will eliminate the rejection problem because the embryo could have the same DNA as the sick person. Stem cells could help cure severe spinal injuries, such as that suffered by the actor Christopher Reeve, and illnesses like Parkinson’s disease. There are some promising experimental results already, mostly in animals.

Now with that additional background: Is this therapeutic cloning ban constitutional? In *Armstrong v. State*, the Montana Supreme Court ruled unconstitutional a law banning physician assistants from performing abortions. The court used strict scrutiny and concluded the law deprived women of a convenient and safe health care option. The court also said Montana’s privacy right encompasses medical decision-making generally. In addition, the court expressed frustration with the Montana legislature’s interference with medical licensing procedures.

*Armstrong’s* emphasis on an individual’s autonomy to make medical decisions, and its respect for the medical community, supports the argument that a therapeutic cloning ban would be unconstitutional as applied to a situation where such cloning provides a key treatment option for a very sick person. As the court stated, “...it is the individual making the decision, and no one else, who, if he or she survives, must live with the results of that decision. One’s health is a uniquely personal possession. The decision of how to treat that possession is of a no less

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76. Peter Aldhous, *Can They Rebuild Us*, NATURE, April 5, 2001 at 622. For example, some scientists have reportedly reversed Parkinson’s in rats. But others believe that stem cells taken from adults work just as effectively. A recent Stanford University study, however, seemed to show the adult stem cells don’t work as well, though the study has been questioned. *Adult Stem Cells a Bust*, at http://www.grg.org/IWeissman.htm (Sep. 9, 2002).

77. 1999 MT 261, 296 Mont. 361, 989 P.2d 364.
personal nature." This is not a fantasy. The Atlantic Monthly published a story in June 2002 titled "Cloning Trevor" which was about a young boy who may die from a rare genetic disease ALD, that ravages the brain, unless he receives a successful bone marrow transplant. His family tried cloning. People like Trevor should have the right to clone one of their cells to generate the necessary tissue. The state has no interest to justify costing Trevor his life.

Outside of that life threatening scenario, banning therapeutic cloning prohibits promising scientific research and experimentation. This would not seem to infringe on a fundamental right. Perhaps the Montana Supreme Court should therefore use rationality review and uphold the ban. But there are reasons to think rationality would be too deferential.

Article II, Section 3, of the Montana Constitution says persons have the right to seek health and happiness. This is reinforced by Section Four's reference to individual dignity. Therapeutic cloning therefore seems deserving of constitutional protection, because it may facilitate better medical care for individuals like Trevor. Moreover, some scholars have argued the First Amendment protects scientific research. The U.S. Supreme Court decision in Miller v. California, which involved obscenity, says writings cannot be banned if they have serious scientific value.

Because of the extraordinary health benefits that could result from embryonic stem cell research and experimentation, the Montana Supreme Court should avoid rationality. Instead, the court should balance these benefits against the state's interests. The result would depend on the evidence at trial.

78. Id. ¶ 54. See also Scott A. Fink, The Last Best Place to Die: Physician-Assisted Suicide and Montana's Constitutional Right to Personal Autonomy Privacy, 59 MONT. L. REV. 301 (1998).

regarding the promise of embryonic stem cells, how many embryos would have to be discarded, can we use existing stem cell lines, can adult stem cells perform as effectively, etc.80

The court could look for assistance to the National Academy of Sciences which has endorsed therapeutic cloning, as has pro-life U.S. Senator Orrin Hatch. But the court should also consider the contrary statements of President Bush and his national Bioethics Council.81 And the court should respect the Montana legislature’s judgement if it reveals careful deliberation.

In conclusion, the ban on reproductive cloning would be upheld under the Montana Constitution. The ban on therapeutic cloning would not be valid as applied to a specific sick person with few alternatives. But the therapeutic cloning ban might otherwise be constitutional, though that would depend on how the court balances the competing interests.

B. Genetic Privacy.

Suppose a Montana life insurance company obtains genetic data about one of its customers from an Internet data bank and then boosts the customer’s premium. Would that violate Montana’s privacy provision?

As background, it is important to note that a confusing scheme of federal82 and state laws83 exist that partially regulates

80. Some commentators assert that the moral value and dignity of an existing life exceeds the moral value and dignity of an embryo less than fourteen days old in which no cells have differentiated and no organs yet exist. Michael S. Gazzaniga, Zygotes and People Aren’t Quite the Same, N.Y. TIMES, April 25, 2002 at A35. Gazzaniga is on the Bush Commission. Many women miscarry embryos at this stage and don’t even realize they are pregnant. Mark S. Kende, Michigan’s Proposed Prenatal Protection Act: Undermining a Woman’s Right to an Abortion, 5 AM. U. J. OF GENDER & SOCIAL POLICY LAW 247, 248 (1996). No funeral is held if a miscarriage occurs, unlike the death of a living human being.

81. Jerome Groopman has authored a well reasoned article critiquing the Bush Commission’s proposed moratorium on therapeutic cloning. Jerome Groppman, Holding Cell: Why the Cloning Decision was Wrong, THE NEW REPUBLIC, Aug. 5 &12, 2002 at 14.

genetic testing and discrimination. But the scheme has gaps. Thus state constitutional protection could be very important.

Woud the insurance company be violating the Montana Constitution by setting premiums based on the genetic data? In *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, the U.S. Court of Appeals for the Ninth Circuit said, “[o]ne can think of few subject areas more personal and more likely to implicate privacy interests than that of one’s health or genetic make-up.”

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84. Montana, for example, prohibits, the use of genetic testing and information by “insurers, health service corporations, HMO’s, fraternal benefit societies, and other issuers of individual, group policies, or certificates of insurance. MONT. CODE ANN. § 18-901 to 904 (2001). But those statutes except “life, disability income, and long-term care insurance.” One insurance law expert says of Montana that:

- it makes no sense whatever to prohibit insurance companies from using genetic data when writing health insurance policies while simultaneously allowing those same companies to use the same genetic information when writing other types of insurance policies for the same person. Either genetic information is so private that it is off limits to insurance companies, or it is not that private. Either there is a risk that the companies will misuse the information or there is not.

Jerry Elmer, *Human Genomics: Toward a New Paradigm for Equal-Protection Jurisprudence*, 50-APR R.I. B.J. 5, 30 (2002). The Montana scheme gets even more confusing if one takes into account. MONT. CODE ANN. § 33-18-206 (2001) which says that, (3) “An insurer may not refuse to consider an application for life or disability insurance on the basis of a genetic condition... (4) The rejection of an application or the determining of rates, terms, or conditions of a life or disability insurance contract on the basis of genetic condition... constitutes unfair discrimination unless the applicant’s medical condition and history and either claims experience or actuarial projections, establish that substantial differences in claims are likely to result from the genetic condition... ”

85. 135 F.3d 1260, 1269 (9th Cir. 1998).
Moreover, the Montana Constitution delegates feared misuse of computerized data banks even by private entities. Genetic information about people is often kept on computers or other data banks. Thus, the framers would have found the use of such data to violate privacy rights and to deserve strict scrutiny.

Assuming the financial security of insurance companies is a compelling state interest, the use of genetic data is not narrowly tailored. Genetic data usually indicates a person has a greater chance of developing a condition than others. But except for a few illnesses, like Huntington's disease, often the condition does not develop. Thus, use of such imprecise personal data would violate the privacy provision.

IV. CONCLUSION

The effect of new technologies on the Montana Constitution will be complex. Assuming there is no complete federal preemption, the Montana Supreme Court will face issues that require the use of balancing tests, and application of the state constitution to private actors.

In the midst of all this legal analysis, it is important not to lose sight of a more basic point. These technologies offer us exciting opportunities, but they also pose risks to our humanity. Cyberspace shows the societal significance of computer code as reflected in the World Wide Web. The human genome project has revealed the DNA code at our roots.

These codes break down legal categories and other barriers. Better computer code leads to more sophisticated computers that possess an artificial intelligence which at times seem human. Cloning in turn allows humans to play God. Hopefully courts in Montana and elsewhere will show an awareness that the dignity of humanity must be maintained even as we advance in developing more sophisticated codes.