

THE CASE FOR A SOUTH CAROLINA BILL OF DIGITAL RIGHTS

A State Constitutional Framework for Liberty in the Digital Age

Introduction

The Constitution of the United States has endured for more than two centuries because it was written to protect timeless principles rather than temporary circumstances. The Founders could not have anticipated automobiles, airplanes, telephones, computers, the Internet, artificial intelligence, or satellites. Yet the Constitution continues to govern because it protects liberty rather than technology.

The Constitution of the State of South Carolina reflects those same enduring principles. Like its federal counterpart, it secures fundamental liberties intended to remain constant even as society and technology evolve. Indeed, Article I, Section 10 of the South Carolina Constitution expressly protects the people against unreasonable searches, seizures, and invasions of privacy, providing an important constitutional foundation for liberty in the Digital Age.

Today, however, nearly every aspect of life has become digital. Our communications, finances, travel, medical records, education, employment, purchases, political participation, religious activities, and personal relationships generate digital information. Every advancement in technology creates new opportunities for prosperity and innovation—but also unprecedented opportunities for surveillance, manipulation, and control.

The question facing South Carolina is not whether technology will continue to evolve. It will.

The question is whether our application of enduring constitutional principles will evolve with it.

The South Carolina Bill of Digital Rights answers that question by reaffirming a simple principle:

Technology changes. Rights do not.

Why South Carolina Needs a Bill of Digital Rights

Throughout American history, periods of technological innovation have required lawmakers and courts to apply longstanding constitutional principles to new realities.

The printing press expanded freedom of the press.

The telephone required courts to reconsider privacy.

Automobiles transformed freedom of movement.

Air travel changed commerce.

The Internet revolutionized communication.

Artificial intelligence now challenges assumptions about decision-making, identity, privacy, and personal autonomy.

The Digital Age presents another such moment.

Neither the Constitution of the United States nor the Constitution of the State of South Carolina becomes obsolete because technology advances. Rather, the enduring constitutional principles they secure must be faithfully applied to technologies the Framers and the people of South Carolina could not have imagined.

South Carolina's Constitution already provides an important foundation for that work. Article I, Section 10 expressly protects against unreasonable searches, seizures, and invasions of privacy, demonstrating that constitutional liberty remains the guiding principle even as the methods by which information is collected and used continue to evolve.

The South Carolina Bill of Digital Rights does not create new constitutional rights. It reaffirms that the liberties already secured by the Constitutions of the United States and South Carolina remain fully applicable in the Digital Age.

What is Digital Property?

For purposes of this paper, "digital property" is shorthand for the legally protected interests an individual retains in Protected Digital Information. It includes digital information that identifies, describes, records, predicts, or otherwise reflects an individual's identity, activities, communications, body, location, or personal affairs.

Examples include personal communications, biometric identifiers, location information, financial and medical information, browsing and search history, digital identity and account credentials, photographs, documents, metadata, behavioral profiles, algorithmic inferences, and other electronically stored information associated with that person. The term does not mean that an individual necessarily holds title to every record, copy, expressive work, or item of intellectual property created or lawfully possessed by another. The central principle is that third-party possession, storage, processing, licensing, transmission, or analysis, does not, standing alone, extinguish the individual's constitutionally protected legal interest in qualifying digital information.

Photographs, recordings, and other expressive works may contain Protected Digital Information without transferring ownership of the photograph, recording, or expressive work to the person depicted. The protected interest concerns qualifying information about the individual including

biometric identifiers, location, associations, behavioral information, and information derived or inferred from the image or recording- rather than automatic ownership or control of every expressive work in which the individual appears.

For legislative analysis, capture, publication or distribution, biometric or algorithmic processing, and commercial exploitation should be treated as distinct acts that need not be governed by the same consent standard. Review should expressly consider livestreaming and archived recordings, republication, facial or other biometric extraction, identification, tracking, profiling, and commercial use. An image or recording may also reveal or permit inference of sensitive location, religious or associational activity, political participation, medical activity, companions, movements, or behavior. Any implementing legislation should preserve constitutionally protected speech, press, public-interest reporting, ordinary photography, public proceedings, and other lawful expressive uses while addressing materially different downstream uses.

Protected Interests in the Digital Age

The core question is not who owns every copy of a digital record. It is whether constitutional protection disappears merely because information about a person is generated, stored, processed, or held by someone else. The South Carolina Bill of Digital Rights answers that question no. Throughout American history, rights in persons, papers, property, privacy, speech, association, and due process have served as safeguards of individual liberty. As more of life is recorded and mediated digitally, those constitutional protections should remain effective when the information at issue reflects a person's identity, activities, communications, movements, associations, or private affairs. The framework therefore protects a retained constitutional interest without purporting to transfer ownership of records, expressive works, intellectual property, or information lawfully created by another person.

The Principle of Technological Neutrality

A constitutional right should never depend upon the technology through which it is exercised.

Freedom of speech deserves the same protection whether expressed in a town square, a newspaper, a telephone conversation, an email, or an online forum.

Likewise, the protections against unreasonable searches should not disappear simply because personal papers have become digital records, letters have become emails, or travel has become location data.

Technology changes.

Rights do not.

Government by Proxy

If individuals retain constitutional rights in protected digital information, those protections cannot be circumvented simply because the information is held by someone else.

One of the oldest principles in American law is that government may not accomplish indirectly what it is prohibited from doing directly.

This principle remains equally important in the Digital Age.

Government should not evade constitutional limitations by purchasing information from private companies, relying upon data brokers, or outsourcing surveillance to third-party vendors when those same activities would require constitutional process if performed directly by government agents.

Constitutional protections should not depend upon who controls the technology.

Surveillance and a Free Society

Throughout history, governments have sought information in order to govern more effectively.

Technology has transformed the scale at which information can be collected.

Modern technology enables forms of large-scale and persistent surveillance that were previously impossible, allowing governments and private entities to collect, analyze, and retain vast quantities of information about ordinary people with unprecedented speed and precision.

Modern surveillance systems can document where people travel, whom they associate with, where they worship, where they receive medical care, how they communicate, what they purchase, and what they believe.

Such capabilities require equally robust constitutional safeguards.

A free people should not live under continuous surveillance merely because technology makes such surveillance possible.

Aggregated Surveillance

Historically, courts often evaluated surveillance by examining individual observations in isolation. A police officer seeing a vehicle drive down a public road, observing someone enter a building, or recording a single license plate generally raised few constitutional concerns because each observation, standing alone, revealed relatively little.

Modern technology has fundamentally changed that analysis.

Today's surveillance systems can automatically collect millions of observations over extended periods of time. When combined, those observations may reveal a person's home, workplace, medical providers, religious practices, political activities, friendships, travel habits, daily routines, and countless other details that no single observation could disclose.

The constitutional concern is therefore no longer limited to individual observations. It is the government's ability to aggregate, retain, correlate, and analyze otherwise ordinary information into a detailed pattern of an individual's life.

Recent decisions of the Supreme Court of the United States, together with the protections secured by Article I, Section 10 of the South Carolina Constitution, reflect this evolving understanding.

In *United States v. Jones* (2012), several Justices recognized that prolonged GPS monitoring can reveal an intimate picture of a person's life that differs fundamentally from isolated public observations. The concern was not merely where a person traveled on a particular day, but what months of continuous tracking revealed about that person's private life.

That principle became even clearer in *Carpenter v. United States* (2018). The Supreme Court held that obtaining historical cell-site location information generally requires a warrant because prolonged location records reveal "the privacies of life." Although each individual location point may have been generated through ordinary use of a cellular telephone, the accumulated record created a comprehensive chronicle of the person's movements that deserved constitutional protection.

South Carolina's first appellate decision addressing Flock Safety technology illustrates both the importance and the limits of existing case law. In *State v. Faile*, Unpublished Opinion No. 2026-UP-323 (S.C. Ct. App. July 1, 2026), the Court of Appeals affirmed the denial of suppression where officers used two Flock images, taken one day apart, to identify a vehicle rather than to reconstruct the defendant's movements over time. The opinion is unpublished and expressly has no precedential value except as provided by Rule 268(d)(2), SCACR. It is therefore cited here only as an illustration of how the constitutional analysis may differ between limited observations and persistent, aggregated surveillance capable of reconstructing a person's movements or associations.

Together, these decisions reflect constitutional principles grounded in both the Constitution of the United States and the Constitution of the State of South Carolina. Article I, Section 10 of the South Carolina Constitution independently protects the people against unreasonable searches, seizures, and invasions of privacy, providing an important state constitutional foundation for applying those enduring principles to modern technologies. The South Carolina Bill of Digital Rights seeks to reaffirm and faithfully apply those constitutional protections to technologies capable of collecting, retaining, aggregating, correlating, and analyzing personal information on an unprecedented scale.

The South Carolina Bill of Digital Rights recognizes that constitutional protections should be evaluated based upon the overall nature, duration, precision, persistence, and revealing character

of surveillance rather than by artificially dividing a surveillance program into individual observations, devices, databases, or periods of collection.

Technology has made comprehensive surveillance increasingly inexpensive, automated, and persistent. Constitutional liberty requires that the protections guaranteed by the Constitutions of the United States and South Carolina evolve in their application—not because those Constitutions have changed, but because technology now permits forms of surveillance that previous generations could scarcely imagine.

The General Assembly need not wait for each new surveillance technology to be addressed through years of litigation before reaffirming the constitutional principles that already govern governmental power.

Artificial Intelligence

Artificial intelligence will increasingly assist both governments and private organizations in making decisions that affect individual liberty.

While AI offers tremendous promise, it must remain subject to human accountability.

Human decision-makers must remain constitutionally accountable for decisions affecting individual rights, regardless of whether artificial intelligence assisted the process.

No person should lose liberty, property, employment, benefits, licenses, or constitutional rights solely because an algorithm reached a conclusion.

Technology may assist human judgment. It must never replace constitutional due process.

Innovation and Liberty

Protecting digital rights is not anti-technology.

Innovation and liberty are complementary.

Clear constitutional protections increase public trust, encourage responsible innovation, reduce legal uncertainty, and ensure that technological progress strengthens rather than weakens a free society.

The goal is not to limit innovation.

The goal is to preserve liberty while innovation continues.

Why South Carolina Should Lead

Throughout its history, South Carolina has often stood at the forefront of constitutional debate and the defense of fundamental principles.

Regardless of one's views of every chapter of that history, there is little question that South Carolinians have long believed questions of constitutional liberty deserve serious consideration and principled leadership.

Today, the Digital Age presents another such moment.

Rapid advances in surveillance technologies, artificial intelligence, digital property, biometric identification, and government access to personal information are reshaping the relationship between citizens and government.

States need not wait for Congress or the federal courts to address every emerging challenge. South Carolina possesses both the constitutional authority and the opportunity to act.

By adopting a South Carolina Bill of Digital Rights, our State can become the **first in the South** to establish a comprehensive constitutional framework for protecting digital liberty.

In doing so, South Carolina can provide a principled model for other states while demonstrating that technological innovation and constitutional freedom are not competing values—they are strengthened when each is governed by the rule of law.

Leadership is not measured by adopting the newest technology first. It is measured by ensuring that technological progress remains accountable to enduring constitutional principles.

South Carolina has an opportunity to lead once again by affirming a timeless truth:

Technology changes. Rights do not.

A Call to Leadership

The Constitution of the United States and the Constitution of the State of South Carolina have endured because they protect enduring principles rather than temporary technologies.

The South Carolina Bill of Digital Rights does not create new rights.

It reaffirms that the constitutional liberties already secured to the people remain fully applicable in a world increasingly shaped by digital technology.

Every generation inherits the responsibility to preserve liberty.

This generation's responsibility is to ensure that constitutional rights remain meaningful in a world increasingly shaped by digital technology.

Government derives its powers from the Constitution—not from technological advancement.

Innovation should expand human opportunity—not diminish human freedom.

Every generation must decide whether technology will remain the servant of liberty—or whether liberty will become the servant of technology.

The Constitution leaves no doubt.

Government exists to secure the rights of the people, and those rights endure regardless of how technology evolves.