

California Constitutional Law: Privacy

DAVID A. CARRILLO
STEPHEN M. DUVERNAY
RODOLFO E. RIVERA AQUINO
BRANDON V. STRACENER*

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* © 2022 David A. Carrillo, Stephen M. Duvernay, Rodolfo E. Rivera Aquino, and Brandon V. Stracener. David A. Carrillo is a Lecturer in Residence and the Executive Director of the California Constitution Center at the University of California, Berkeley School of Law. Stephen M. Duvernay and Brandon V. Stracener are attorneys in private practice and senior research fellows at the California Constitution Center. Rodolfo E. Rivera Aquino is a research fellow at the California Constitution Center.

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ABSTRACT

California voters passed Proposition 11 (the Privacy Initiative) in 1972, amending the state constitution to include a fundamental right to privacy. The ballot arguments for Proposition 11 expressed the voters’ intent to set a high bar for invaders to justify privacy invasions: requiring a compelling public need. For the first twenty years of the new constitutional privacy right’s existence, courts required invaders of individual privacy to meet the compelling public need standard to justify such invasions.

Yet the courts reversed course in 1994, abandoned the compelling public need standard, and have since applied a standard that perverts the electorate’s intent: now, the individual must establish a compelling privacy interest against invasions. This approach to California’s constitutional privacy right has sabotaged the Privacy Initiative. This Article presents six substantive arguments for abandoning the current approach and returning this area of the law to its original intent. This Article supports its substantive analysis with an empirical case study showing that the current approach maimed California’s constitutional privacy right.

It’s time to reset this area of the law. California courts should abandon the current analytical approach to the state’s constitutional privacy right and restore the original interpretation of the Privacy Initiative: the compelling public need test that the voters intended.

I. INTRODUCTION

In 1972, California voters amended article I, section 1 of the California Constitution to include privacy among the state constitution’s enumerated inalienable rights.¹ Proposition 11, a legislatively proposed initiative constitutional amendment, added the emphasized words: “All people are

1. CAL. CONST. art. I, § 1.

by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy*.”²

The ballot arguments show that the voters intended Proposition 11—commonly called the Privacy Initiative—to confirm that California citizens enjoy broader privacy protections than those available under the federal constitution.³ Proposition 11 was driven by public concern over government snooping and a fear that technological advancements had enabled private entities and the government to collect massive troves of personal information.⁴ The voters intended the new constitutional privacy right to shield personal privacy and guard against the unnecessary collection or misuse of private information.⁵ But while technological advances since 1972 have only sharpened these concerns, California courts have moved constitutional privacy doctrine backward.

In its first decision construing the Privacy Initiative, the California Supreme Court applied the compelling public need test that appears several times in the ballot arguments.⁶ Yet the court soon retreated, and since 1994 its decisions have fractured into various context-dependent approaches that focus on interest balancing. The only consistent theme since those initial privacy decisions is the failure to acknowledge the electorate’s intent that the privacy right may be abridged “only when there is a compelling public need.”⁷ Now, instead of requiring the invader to show a *compelling public need* to overcome a privacy claim, the individual must prove a privacy interest strong enough to overcome the invader’s *legitimate interest* in the information.⁸ This requirement is a

2. Assemb. Const. Amend. 51, 1972 Leg., Reg. Sess. (Cal. 1972) (emphasis added). The California Constitution gives the Legislature power to propose constitutional amendments. See CAL. CONST. art. XVIII, § 1. Proposed amendments must pass by a two-thirds majority in each house of the Legislature and are then placed on the ballot for majority approval by the voters. *Id.* §§ 1, 4. On November 7, 1972, California voters approved Proposition 11, 62.9% to 37.1%. EDMUND G. BROWN JR., CAL. SEC’Y OF STATE, STATEMENT OF VOTE: GENERAL ELECTION NOVEMBER 7, 1972, at 28 (1972).

3. PROPOSED AMENDMENTS TO CONSTITUTION: PROPOSITIONS AND PROPOSED LAWS TOGETHER WITH ARGUMENTS, GENERAL ELECTION, TUESDAY, NOVEMBER 7, 1972, at 26 (1972) [hereinafter “PROPOSED AMENDMENTS”].

4. *Id.*

5. *Id.*

6. *White v. Davis*, 533 P.2d 222, 224, 234 (Cal. 1975).

7. See PROPOSED AMENDMENTS, *supra* note 3, at 28.

8. See *infra* note 222 and accompanying text.

fundamental error of ballot measure interpretation because it reverses the electorate’s intent, placing the primary and higher burden on the individual rather than the invader. The California Supreme Court should revisit this issue and adopt an approach that is consistent with the electorate’s intent that constitutional privacy claims be judged against a compelling public need standard.

II. GENESIS OF CALIFORNIA’S CONSTITUTIONAL PRIVACY RIGHT

Proposition 11 arose in the context of several distinct sources of authority and a concern for privacy:

- The federal constitutional privacy right, which developed into its current form along with the vote on Proposition 11.
- The steady advance of computer technology and revelations of widespread government surveillance, which fueled public concern over the ability of the government and private entities to collect and misuse private information.⁹
- The California common law privacy right, which existed before Proposition 11.

In the following sections, we briefly overview each of these factors to show how they contributed to the electorate’s motivation in enacting the Privacy Initiative.

A. Federal Privacy Doctrine

Privacy is not a stated right in the federal constitution. Instead, federal constitutional privacy is a judicial creation. Beginning in 1965 with *Griswold v. Connecticut*, the U.S. Supreme Court held that although the federal constitution does not explicitly mention a right of privacy, the right exists within the “penumbras” of certain provisions of the U.S. Constitution and the Bill of Rights.¹⁰ Four years later, in *Stanley v. Georgia*, the high court explained that “the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy” is “fundamental.”¹¹ The *Stanley* opinion adopted Justice Brandeis’s concept of privacy from his dissent in *Olmstead v. United States*:

9. Proposition 11’s legislative history is reproduced in J. Clark Kelso’s seminal article on the state constitutional privacy right. J. Clark Kelso, *California’s Constitutional Right to Privacy*, 19 PEPP. L. REV. 327, 417–25 (1992).

10. *Griswold v. Connecticut*, 381 U.S. 479, 483–85 (1965); *see also id.* at 486–87 (Goldberg, J., concurring).

11. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.¹²

Privacy next appeared as the foundational principle for federal constitutional reproductive rights in *Eisenstadt v. Baird*: “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹³ Less than three months after California voters approved the Privacy Initiative, the Court issued its decisions in *Roe v. Wade*¹⁴ and *Doe v. Bolton*.¹⁵ Justice Blackmun's majority opinion in *Roe* justified the federal right to privacy:

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. These decisions make it clear that only personal rights that can be deemed “fundamental” or “implicit in the concept of ordered liberty” are included in this guarantee of personal privacy.¹⁶

12. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); see *Stanley*, 394 U.S. at 564 (quoting Justice Brandeis's *Olmstead* dissent). Justice Brandeis had long championed the right to privacy; he first set forth the pedigree of the common law right to privacy in a landmark law review article published nearly forty years before *Olmstead*. See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

13. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

14. *Roe v. Wade*, 410 U.S. 113 (1973).

15. *Doe v. Bolton*, 410 U.S. 179 (1973).

16. *Roe*, 410 U.S. at 152 (citations omitted). The Court concluded:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Id. at 153.

Those decisions, issued contemporaneously with California voters approving Proposition 11 in November 1972,¹⁷ are the federal law background for the California Supreme Court's first constitutional privacy decision in *White v. Davis*.¹⁸ The U.S. Supreme Court's privacy jurisprudence evolved along with growing public unease about government surveillance and a recognition that advancements in computer technology enabled the government and private businesses to compile comprehensive files on citizens.¹⁹ As discussed below, those same concerns animated Proposition 11's drafters.

The California and federal constitutional rights to privacy are distinct. Like its federal counterpart, the state right to privacy extends to both informational and autonomy privacy.²⁰ Although the California right is codified in the state constitution, the federal right is only implied: "The federal constitutional right of privacy . . . enjoys no such explicit constitutional status."²¹ Thus, the state right should be broader than its federal counterpart.²²

From this distinction we conclude that while federal privacy decisions may be persuasive authority, federalism principles teach that California courts are not bound to follow federal privacy decisions when interpreting the California Constitution: the state constitution "is, and always has been, a document of independent force" from the federal constitution.²³

17. See *BROWN*, *supra* note 2, at 28.

18. *White v. Davis*, 533 P.2d 222 (Cal. 1975).

19. Although the legislative history does not provide specifics on this point, the late 1960s and early 1970s saw several high-profile revelations of covert government surveillance programs. In 1970, *Washington Monthly* published an article alleging that the U.S. Army maintained a robust data gathering system that tracked civilian political activity. Christopher H. Pyle, *CONUS Intelligence: The Army Watches Civilian Politics*, *WASH. MONTHLY*, Jan. 1970, at 49. This program was the subject of a Senate investigation and made its way to the U.S. Supreme Court in *Laird v. Tatum*, 408 U.S. 1 (1972). And in the spring of 1971, a group calling itself the "Citizens' Commission to Investigate the FBI" burglarized a small FBI field office in Pennsylvania and stole over 1,000 classified documents, which revealed that the FBI had been conducting a long-running domestic surveillance program known as "COINTELPRO." Betty Medsger & Ken W. Clawson, *Stolen Documents Describe FBI Surveillance Activities*, *WASH. POST*, Mar. 24, 1971, at A1, A11; Betty Medsger & Ken W. Clawson, *Thieves Got Over 1,000 FBI Papers*, *WASH. POST*, Mar. 25, 1971, at A1.

20. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the U.S. Supreme Court described privacy as a protected interest implied within the "penumbra" of the enumerated, individual fundamental rights. 381 U.S. at 483. The U.S. Supreme Court later found a federal implied right to privacy to include informational privacy in *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977). The California Supreme Court has consistently affirmed that the right extends to informational and autonomy privacy. See *White*, 533 P.2d at 233–34; *Valley Bank v. Superior Court*, 542 P.2d 977, 979 (Cal. 1975).

21. *Comm. to Def. Reprod. Rts. v. Myers*, 625 P.2d 779, 784 (Cal. 1981).

22. *City of Santa Barbara v. Adamson*, 610 P.2d 436, 440 n.3 (Cal. 1980).

23. *Myers*, 625 P.2d at 783. This principle is enshrined in the state's constitution: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." CAL. CONST. art. I, § 24.

Accordingly, “state courts, in interpreting constitutional guarantees contained in state constitutions, are independently responsible for safeguarding the rights of their citizens.”²⁴ And the California Supreme Court has observed that “the federal right of privacy in general appears to be narrower than what the voters approved in 1972 when they added ‘privacy’ to the California Constitution.”²⁵ The upshot: there is no argument that California’s constitutional privacy right should be linked to or limited by federal law.

B. Early California Privacy Doctrine

Before Proposition 11 was adopted in 1972, privacy in California was a common law right that first appeared in 1931.²⁶ The constitutional right did not codify the existing common law remedy—it was a new right.²⁷ Proposition 11 “was never intended to eliminate the common law tort for invasion of privacy.”²⁸ And the common law privacy tort is still employed

24. *Myers*, 625 P.2d at 783 (quoting *People v. Brisendine*, 531 P.2d 1099, 1113 (Cal. 1975)).

25. *City of Santa Barbara*, 610 P.2d at 440 n.3. The court reaffirmed that the federal privacy right is narrower than the California constitutional privacy right in *American Academy of Pediatrics v. Lungren*:

[N]ot only is the state constitutional right of privacy embodied in explicit constitutional language not present in the federal Constitution, but past California cases establish that, in many contexts, the scope and application of the state constitutional right of privacy is broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts.

Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 808 (Cal. 1997) (plurality opinion).

26. *Kinsey v. Macur*, 165 Cal. Rptr. 608, 612 (Cal. Ct. App. 1980); *Melvin v. Reid*, 297 P. 91, 93 (Cal. Dist. Ct. App. 1931). As early as 1931, California courts began recognizing invasion of privacy as a tort; notably, in *Melvin*:

[P]laintiff, a prostitute, was charged with murder and acquitted after a very long and very public trial. She abandoned her life of shame, married and assumed a place in respectable society, making many friends who were not aware of the incidents of her earlier life. The court held that she had stated a cause of action for privacy against defendants who had made a movie based entirely on Mrs. Melvin’s life some seven years after the trial.

Kinsey, 165 Cal. Rptr. at 613.

27. *Porten v. Univ. of S.F.*, 134 Cal. Rptr. 839, 841 (Cal. Ct. App. 1976) (“The elevation of the right to be free from invasions of privacy to constitutional stature was apparently intended to be an expansion of the privacy right.”); 1 MICHAEL PAUL THOMAS ET AL., CALIFORNIA CIVIL PRACTICE: TORTS § 20:18 (2020) (noting that the California Constitution “may provide the plaintiff with a cause of action where the common law torts are not available”).

28. *Kinsey*, 165 Cal. Rptr. at 612.

as a standalone claim today.²⁹ Thus, California constitutional and common law privacy are distinct, and alleging a violation of the common law right is different from alleging a constitutional violation.³⁰

The elements required to plead each claim are different. Pleading a common law privacy invasion cause of action requires alleging the facts constituting the right of privacy, the wrongful invasion, and the resulting injury.³¹ Pleading a constitutional privacy invasion cause of action requires alleging a legally protected privacy interest, a reasonable expectation of privacy in the circumstances, and conduct by defendant constituting a serious invasion of privacy. And the invasion must be sufficiently serious in its nature, scope, and actual or potential impact to constitute an egregious breach of social norms.³²

California’s constitutional privacy right is therefore neither linked to nor limited by the common law remedy. Unfortunately, as discussed below, some cases erroneously conflate the common law and constitutional rights.

III. THE VOTERS INTENDED A COMPELLING PUBLIC NEED TEST

We rely on two primary sources for evidence to support our argument that the voters intended Proposition 11 to impose a compelling public need test on constitutional privacy claims. One is the ballot arguments, which California courts consult as conclusive evidence of voter intent. The other is the first, contemporaneous interpretation of Proposition 11 by the California Supreme Court, which is better evidence of original intent than a reinterpretation twenty years after the fact.

A. The Ballot Arguments Impose a Compelling Public Need Standard

The ballot argument is the starting point when determining voter intent for an initiative constitutional amendment if its text is unclear, which is true for Proposition 11. California courts first consider a ballot measure’s plain text to determine the drafter’s intent. Because Proposition 11 simply added “and privacy” to article I, section 1, the measure’s language alone does not explain how courts should resolve claimed privacy violations. Thus, the next step is to analyze the ballot arguments and other legislative

29. *Catsouras v. Dep’t of the Cal. Highway Patrol*, 104 Cal. Rptr. 3d 352, 366 (Cal. Ct. App. 2010) (finding that decedent’s family members had sufficient privacy interest in accident scene photographs to maintain invasion of privacy action).

30. *Ignat v. Yum! Brands, Inc.*, 154 Cal. Rptr. 3d 275, 284–85 (Cal. Ct. App. 2013); *see also Kinsey*, 165 Cal. Rptr. at 612 (noting that the constitutional right to privacy supports, rather than replaces, the common law invasion of privacy tort).

31. 5 B.E. WITKIN, CALIFORNIA PROCEDURE: PLEADING § 746 (5th ed. 2020).

32. THOMAS ET AL., *supra* note 27.

history. When a term in an initiative is neither self-explanatory nor defined in the text, California courts examine the ballot pamphlet arguments as evidence of the voters' intent.³³ The focus in that interpretation process is to determine and implement the drafter's intent.³⁴ As with any initiative constitutional amendment, the legislative history and ballot arguments are decisive evidence of that intent.³⁵

We begin with the fundamental rule that our primary task is to determine the lawmakers' intent. In the case of a constitutional provision enacted by the voters, their intent governs. To determine intent, "[t]he court turns first to the words themselves for the answer." "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters)."³⁶

The indicia of intent here show an unequivocal purpose to impose a compelling public need standard:

- Proposition 11's legislative history reflects a concern that the common law right to privacy was insufficient to check government interference with citizens' private lives. One Assembly committee staff report argued: "With the technological revolution and the age of cybernetics, these amendments [to the U.S. Constitution], as they have been traditionally viewed, do not offer sufficient protection against state surveillance,

33. Legislature v. Eu, 816 P.2d 1309, 1315 (Cal. 1991).

34. See, e.g., Avila v. Citrus Cmty. Coll. Dist., 131 P.3d 383, 390 (Cal. 2006) (quoting Esberg v. Union Oil Co. of Cal., 47 P.3d 1069, 1072 (Cal. 2002)).

35. Ballot arguments are the principal piece of evidence for the original public understanding of the state's constitutional right to privacy. The California Supreme Court has explained that the "[ballot] statement . . . represents, in essence, the only 'legislative history' of the constitutional amendment available to us." White v. Davis, 533 P.2d 222, 234 (Cal. 1975). The Privacy Initiative's ballot argument was prepared by the initiative's sponsors, then-Assemblyman Ken Cory and then-Senator George Moscone, who would each go on to a larger political stage. See PROPOSED AMENDMENTS, *supra* note 3, at 27. Cory served three terms as State Controller from 1974 to 1986. Ken Cory; *State Controller, Assemblyman*, L.A. TIMES (Nov. 14, 1998, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1998-nov-14-mn-42652-story.html> [<https://perma.cc/VC49-LW46>]. Moscone served as mayor of San Francisco from 1976 until his assassination in November 1978. Ryan Levi, *Remembering George Moscone, 'The People's Mayor' of San Francisco*, KQED (Nov. 27, 2018), <https://www.kqed.org/news/11708263/remembering-george-moscone-the-peoples-mayor-of-san-francisco> [<https://perma.cc/L29Z-VEQ5>].

36. Delaney v. Superior Court, 789 P.2d 934, 940 (Cal. 1990) (quoting Brown v. Kelly Broad. Co., 771 P.2d 406, 412 (Cal. 1989); and then quoting Lungren v. Deukmejian, 755 P.2d 299, 303–04 (Cal. 1988)).

record collection and government snooping into our personal lives. We must, therefore, develop new safeguards to meet the new dangers.”³⁷ The solution was to install a privacy right in the California Constitution: it “put[] the State on record that privacy is essential to our other freedoms.”³⁸

- The ballot arguments contain repeated references to an intent to require that invaders prove a compelling public need. The full text of the Proposition 11 arguments follows, which in several places describes privacy as a “fundamental” and “compelling” interest that may be abridged only by an equally “compelling” “public” “need” or “necessity.” Those terms are bolded where they appear; the underlining is original.

*Ballot Pamphlet Arguments for Proposition 11*³⁹

(1972)

Argument in Favor of Proposition 11

The proliferation of government snooping and data collecting is threatening to destroy our traditional freedoms. Government agencies seem to be competing to compile the most extensive sets of dossiers of American citizens. Computerization of records makes it possible to create “cradle-to-grave” profiles on every American.

At present there are no effective restraints on the information activities of government and business. This amendment creates a legal and enforceable right of privacy for every Californian.

The right of privacy is the right to be left alone. It is a **fundamental and compelling interest**. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose. It prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us.

Fundamental to our privacy is the ability to control circulation of personal information. This is essential to social relationships and personal freedom. The proliferation of government and business records over which we have no control limits our ability to control our personal lives. Often we do not know that these records even exist and we are certainly unable to determine who has access to them.

37. Kelso, *supra* note 9, at 474 (discussing the staff report of Assembly Constitutional Committee on ACA 51).

38. *Id.*

39. See PROPOSED AMENDMENTS, *supra* note 3, at 26–27.

Even more dangerous is the loss of control over the accuracy of government and business records on individuals. Obviously, if the person is unaware of the record, he or she cannot review the file and correct inevitable mistakes. Even if the existence of this information is known, few government agencies or private businesses permit individuals to review their files and correct errors.

The average citizen also does not have control over what information is collected about him. Much is secretly collected. We are required to report some information, regardless of our wishes for privacy or our belief that there is no public need for the information. Each time we apply for a credit card or a life insurance policy, file a tax return, interview for a job, or get a drivers' license, a dossier is opened and an information profile is sketched. Modern technology is capable of monitoring, centralizing and computerizing this information which eliminates any possibility of individual privacy.

The right of privacy is an important American heritage and essential to the fundamental rights guaranteed by the First, Third, Fourth, Fifth and Ninth Amendments to the U.S. Constitution. **This right should be abridged only when there is compelling public need.** Some information may remain as designated public records but only when the availability of such information is clearly in the public interest.⁴⁰

Rebuttal to Argument in Favor of Proposition 11

To say that there are at present no effective restraints on the information activities of government and business is simply untrue. In addition to literally hundreds of laws restricting what use can be made of information, every law student knows that the courts have long protected privacy as one of the rights of our citizens.

Certainly, when we apply for credit cards, life insurance policies, drivers' licenses, file tax returns or give business interviews, it is absolutely essential that we furnish certain personal information. Proposition 11 does not mean that we will no longer have to furnish it and provides no protection as to the use of the information that the Legislature cannot give if it so desires.

What Proposition 11 can and will do is to make far more difficult what is already difficult enough under present law, investigating and finding out

40. *Id.*

whether persons receiving aid from various government programs are truly needy or merely using welfare to augment their income.

Proposition 11 can only be an open invitation to welfare fraud and tax evasion and for this reason should be defeated.⁴¹

Argument Against Proposition 11

Proposition 11, which adds the word “privacy” to a list of “inalienable rights” already enumerated in the Constitution, should be defeated for several reasons.

To begin with, the present Constitution states that there are certain inalienable rights “among which are those” that it lists. Thus, our Constitution does not attempt to list all of the inalienable rights nor as a practical matter, could it do so. It has always been recognized by the law and the courts that privacy is one of the rights we have, particularly in the enjoyment of home and personal activities. So, in the first place, the amendment is completely unnecessary.

....

The most important reason why this amendment should be defeated, however, lies in an area where possibly privacy should not be completely guaranteed. Most government welfare programs are an attempt by California’s more fortunate citizens to assist those who are less fortunate; thus, today, millions of persons are the beneficiaries of government programs, based on the need of the recipient, which in turn can only be judged by his revealing his income, assets and general ability to provide for himself.

If a person on welfare has his privacy protected to the point where he need not reveal his assets and outside income, for example, how could it be determined whether he should be given welfare at all?

Our government is helping many people who really need and deserve the help. Making privacy an inalienable right could only bring chaos to all government benefit programs, thus depriving all of us, including those who need the help most.

And so because it is unnecessary, interferes with the work presently being done by the Constitution Revision Commission and would emasculate all government programs based on recipient need, I urge a “no” vote on Proposition 11.⁴²

41. *Id.* at 27.

42. *Id.* at 27–28.

Rebuttal to Argument Against Proposition 11

The right to privacy is much more than “unnecessary wordage[.]” It is **fundamental** in any free society. Privacy is not now guaranteed by our State Constitution. This simple amendment will extend various court decisions on privacy to insure protection of our basic rights.

....

The right to privacy will not destroy welfare nor undermine any important government program. It is **limited by “compelling public necessity”** and the public’s need to know. Proposition 11 will not prevent the government from collecting any information it legitimately needs. It will only prevent misuse of this information for unauthorized purposes and preclude the collection of extraneous or frivolous information.⁴³

The prevailing theme of the ballot arguments is the threat of technology empowering the government and businesses to engage in widespread and pervasive privacy invasions. The ballot argument defines the right to privacy in broad terms that echo Justice Brandeis’s *Olmstead* dissent as the right to be left alone being a fundamental and compelling interest.⁴⁴ It also focuses on the practical threat posed by modern technology to an individual’s ability to control their personal information. The argument closes by emphasizing that the right to privacy is rooted in federal constitutional guarantees. The only argument against Proposition 11 was that it would encourage welfare fraud and tax evasion by enabling people to withhold information from the government.⁴⁵ The opponent raised no concern that a compelling public need standard would be too burdensome for businesses or too difficult for courts to apply. The ballot arguments make several things plain:

43. *Id.* at 28 (emphasis added).

44. *See id.* at 26; *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

45. PROPOSED AMENDMENTS, *supra* note 3, at 27–28. The Rebuttal to Argument in Favor of Proposition 11 and Argument Against Proposition 11 were prepared by Senator James E. Whetmore. *Id.* The opponents also made a passing argument that the proposition was “unnecessary” because “[i]t has always been recognized by the law and the courts that privacy is one of the rights we have.” *Id.* at 27.

- The government has some legitimate informational needs.
- But privacy is a fundamental interest. The arguments say this twice.
- So only a compelling public need can justify abridging privacy. The arguments say this three times.

That the voters intended to impose a compelling public need standard is apparent. The ballot arguments employ the term “compelling” several times, both to describe the right as a compelling individual liberty interest and to describe the equally compelling public need required to counterbalance that interest. The upshot is that the ballot arguments show that the voters intended to set a high bar for invaders to justify violations of the new constitutional privacy right.

Yet the ballot arguments should not be read to require strict scrutiny. The rebuttal makes this plain: “The right to privacy . . . is limited by ‘compelling public necessity’ and the public’s need to know. Proposition 11 will not prevent the government from collecting any information it legitimately needs.”⁴⁶ This makes clear that a genuine public need for information can outweigh a privacy interest—when that need is compelling. That is how the California Supreme Court interpreted Proposition 11 for the first two decades after its enactment, as we explain in the next section.

B. The California Supreme Court Adopted a Compelling Need Test in White v. Davis

In the first cases to consider the new constitutional privacy right created by Proposition 11, the California Supreme Court used a compelling public need test to review privacy claims. Just three years after its adoption, the court construed the new privacy right in two cases: *White v. Davis*⁴⁷ and *Valley Bank of Nevada v. Superior Court*.⁴⁸ In *White*, the court held that university students stated a constitutional privacy claim against police officers who covertly infiltrated student groups, declaring that although “the amendment does not purport to invalidate all such information gathering, it does require that the government establish a compelling justification for such conduct.”⁴⁹ In *Valley Bank*, the court held that the new privacy clause required banks to give customers reasonable notice and an opportunity to object before disclosing their personal information.⁵⁰

46. *Id.* at 28.

47. *White v. Davis*, 533 P.2d 222 (Cal. 1975).

48. *Valley Bank v. Superior Court*, 542 P.2d 977 (Cal. 1975).

49. *White*, 533 P.2d at 225.

50. *Valley Bank*, 542 P.2d at 980.

Consistent with the ballot argument, the unanimous decision in *White* applied a compelling public need test to justify privacy invasions. *White* framed its analysis on the ballot arguments, explaining that the “moving force” behind the constitutional amendment was “the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society. The new provision’s primary purpose is to afford individuals some measure of protection against this most modern threat to personal privacy.”⁵¹ The court relied on the ballot argument’s repeated statement that “[t]he right should only be abridged when there is compelling public need.”⁵² The *White* decision concluded that the ballot arguments were “clear” evidence that privacy infringements must be justified by a compelling need.⁵³

C. *White Did Not Endorse Absolute Privacy Rights*

White set the stage for the key practical debate concerning privacy. The decision recognized that privacy invasions could be justified, holding that article I, section 1 “does not purport to prohibit all incursion into individual privacy but rather that any such intervention must be justified by a compelling interest.”⁵⁴ Shortly after *White*, the California Supreme Court noted that the right of privacy is not “absolute,” but must be balanced against the need for disclosure.⁵⁵ By 1983, the court observed that it was “well established” that the right to privacy “may yield in the furtherance of compelling state interests.”⁵⁶ Decisions in this period about litigation discovery established that courts must “indulge in a careful balancing” of the right of litigants to obtain discovery against an individual’s privacy

51. *White*, 533 P.2d at 233; *see id.* at 225 (“[A] principal aim of the constitutional provision is to limit the infringement upon personal privacy arising from the government’s increasing collection and retention of data relating to all facets of an individual’s life.”).

52. PROPOSED AMENDMENTS, *supra* note 3, at 27.

53. *White*, 533 P.2d at 234 (“[T]he statement makes clear that the amendment does not purport to prohibit all incursion into individual privacy but rather that any such intervention must be justified by a compelling interest.”).

54. *Id.* To that end, the court found that the allegations stated a *prima facie* claim for invasion of privacy, but LAPD would have the opportunity “to designate the compelling governmental interests upon which they rely for their intrusive conduct.” *Id.* at 234–35.

55. *Loder v. Mun. Ct.*, 553 P.2d 624, 628 (Cal. 1976) (“The right of privacy added to the California Constitution by a 1972 amendment of article I, section 1, is not absolute.”).

56. *People v. Stritzinger*, 668 P.2d 738, 742 (Cal. 1983).

rights.⁵⁷ These decisions began by valuing privacy at the level of a compelling interest and required invaders to prove a similarly compelling need to overcome the individual's privacy right.

The *White* decision correctly read Proposition 11 as imposing a compelling public need standard on the invader to justify the invasion, and that analysis governed California constitutional privacy doctrine for over twenty years. Between 1972 and 1994, California courts held that the right to privacy protected a wide range of personal information, extending, for example, to financial affairs,⁵⁸ sexual relations,⁵⁹ medical history,⁶⁰ political affiliations,⁶¹ and thoughts.⁶² That all ended in 1994.

IV. THE CURRENT STANDARD INVERTS AND DEFEATS PROPOSITION 11

The California Supreme Court abandoned *White* in 1994 when it decided *Hill v. National Collegiate Athletic Association*, where the court considered a privacy claim raised by college athletes who claimed that a random drug-testing program violated their constitutional privacy rights.⁶³ The court distinguished *White* as concerning privacy interests under First Amendment free speech and association rights.⁶⁴ The court then applied common law privacy tort doctrine to reject the compelling public need standard and reinterpret the state constitutional right to privacy.⁶⁵

Almost immediately after deciding *Hill*, the court reframed its approach again in *Loder v. City of Glendale*.⁶⁶ The current doctrine combines elements of both *Hill* and *Loder* and applies a “lesser-interest” balancing test to balance privacy against any countervailing interests: an invasion justified by a legitimate competing interest is not a constitutional violation, and those legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities.⁶⁷ For convenience, we refer to this current analysis as *Hill–Loder*. That analysis reverses the

57. *Valley Bank v. Superior Court*, 542 P.2d 977, 979 (Cal. 1975); *Doyle v. State Bar*, 648 P.2d 942, 945 (Cal. 1982); *Schnabel v. Superior Court*, 854 P.2d 1117, 1121 (Cal. 1993).

58. *See, e.g., Valley Bank*, 542 P.2d at 979.

59. *Vinson v. Superior Court*, 740 P.2d 404, 410 (Cal. 1987).

60. *Britt v. Superior Court*, 574 P.2d 766, 766 (Cal. 1978); *Bd. of Med. Quality Assurance v. Gherardini*, 156 Cal. Rptr. 55, 61 (Cal. Ct. App. 1979); *Gross v. Recabaren*, 253 Cal. Rptr. 820, 827 (Cal. Ct. App. 1988).

61. *Britt*, 574 P.2d at 772.

62. *Long Beach City Emps. Ass'n v. City of Long Beach*, 719 P.2d 660, 663 (Cal. 1986).

63. *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 637 (Cal. 1994).

64. *Id.* at 652.

65. *Id.* at 646–49.

66. *Loder v. City of Glendale*, 927 P.2d 1200, 1227 (Cal. 1997).

67. *Lewis v. Superior Court*, 397 P.3d 1011, 1019 (Cal. 2017).

electorate's intent for Proposition 11 in two ways: it places the burden of proof on the individual, not the invader; and it requires the individual to establish a higher interest, rather than the invader.

Before detailing our objections to the current test, we first show how two key analytical errors formed the *Hill–Loder* approach.

A. *The First Error: The Lucas Majority Opinion in Hill*

Hill is a fractured decision. Chief Justice Lucas wrote the opinion for the court, Justice Kennard and then-Justice George each wrote concurring and dissenting opinions, and Justice Mosk dissented.⁶⁸ The majority opinion erred by rejecting the *White* compelling public need standard, which the lower courts had applied to the NCAA and required that it show: “(1) a ‘compelling state interest’ in support of drug testing; and (2) the absence of any alternative means of accomplishing that interest.”⁶⁹ After reviewing the common law right to privacy and the federal constitutional right to privacy, the court rejected this “rigid” standard in favor of developing a “flexible and pragmatic approach” that allowed for a contextual assessment of the competing interests at stake.⁷⁰

The *Lucas* opinion adopted a three-part balancing test:

- A plaintiff must identify a “legally protected privacy interest,” judged by whether “established social norms safeguard a particular type of information.”⁷¹ The court highlighted two classes of legally recognized privacy interests:

68. *Hill*, 865 P.2d at 669 (Kennard, J., concurring and dissenting); *id.* at 672 (George, J., concurring and dissenting); *id.* at 679 (Mosk, J., dissenting).

69. *Id.* at 644.

70. *Id.* at 646–49 (reviewing common law right to privacy and observing that “the common law right of privacy is neither absolute nor globally vague, but is carefully confined to specific sets of interests that must inevitably be weighed in the balance against competing interests before the right is judicially recognized”); *id.* at 649–51 (reviewing federal authority and concluding that “the murky character of federal constitutional privacy analysis at this stage teaches that privacy interests and accompanying legal standards are best viewed flexibly and in context”). Even so, the court carved out a narrow category of cases that warrant a “compelling interest” standard: “Where the case involves an obvious invasion of an interest fundamental to personal autonomy . . . a ‘compelling interest’ must be present to overcome the vital privacy interest.” *Id.* at 653; *see also id.* (“[O]ur decision in *White* signifies only that some aspects of the state constitutional right to privacy—those implicating obvious government action impacting freedom of expression and association—are accompanied by a ‘compelling state interest’ standard.”).

71. *Id.* at 654–55.

“informational privacy,” which it defined as “interests in precluding the dissemination or misuse of sensitive and confidential information;” and “autonomy privacy,” which encompasses the “interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference.”⁷²

- A plaintiff must show they had a “reasonable expectation of privacy” under the circumstances.⁷³ Whether a person’s expectation of privacy is “reasonable” “is an objective entitlement founded on broadly based and widely accepted community norms.”⁷⁴ The court further noted that a person’s expectation of privacy is affected by “advance notice” of the conduct and “the presence or absence of opportunities to consent voluntarily to activities impacting privacy interests.”⁷⁵
- The claimant must establish a “serious invasion” of their privacy interest.⁷⁶ To that end, the court explained: “Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy.”⁷⁷

The majority started from the proposition that “[p]rivacy concerns are not absolute; they must be balanced against other important interests.”⁷⁸ From there, it explained that “[i]nvasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest.”⁷⁹ The court therefore held that “[a] defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests.”⁸⁰ A plaintiff,

72. *Id.* at 654.

73. *Id.* at 655.

74. *Id.*; *see id.* at 648 (“A plaintiff’s expectation of privacy in a specific context must be objectively reasonable under the circumstances, especially in light of the competing social interests involved.”).

75. *Id.* at 655.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 655–56.

80. *Id.* at 657.

on the other hand, “may rebut a defendant’s assertion of countervailing interests by showing there are feasible and effective alternatives to defendant’s conduct which have a lesser impact on privacy interests.”⁸¹ Applying this framework, the court upheld the drug testing program because the NCAA’s interests in “safeguarding the integrity of intercollegiate athletic competition” and “protecting the health and safety of student athletes” justified its intrusion on student-athletes’ privacy.⁸²

The *Hill* test is problematic because it places the initial burden of proof on the individual to establish three threshold elements. Only after that showing does the burden shift to the invader, and to prevail, the invader only needs to show that the invasion is justified by a “legitimate” countervailing interest. As Justice Kennard described it: “Under the majority’s approach, nongovernmental action that allegedly abridges privacy rights is not necessarily tested by a compelling interest standard; instead, a less rigorous but still heightened standard of scrutiny will often be proper.”⁸³ The net effect is to impose the initial burden of proof on a plaintiff to show a higher-value privacy interest that outweighs the presumptively legitimate opposing interest.

The primary focus of Justice George’s dispute with the *Hill* majority was how the test would work in practice, particularly the majority’s explanation of potential defenses to a privacy claim. The George opinion is the key to understanding modern privacy jurisprudence—in a series of decisions starting shortly after Governor Pete Wilson chose George to serve as Lucas’s successor in 1996, Chief Justice George worked to rewrite *Hill*’s test to conform with his views and shape the current doctrine.⁸⁴

To Justice George, the problem was the *Hill* majority’s “abandonment” of the “compelling interest” standard, which in his view was required by the clear language of the ballot argument, first adopted in *White*, and relied

81. *Id.*; *see id.* at 656 (“Confronted with a defense based on countervailing interests, [a] plaintiff may undertake the burden of demonstrating the availability and use of protective measures, safeguards, and alternatives to defendant’s conduct that would minimize the intrusion on privacy interests.”).

82. *Id.* at 657–65. Notably, the court highlighted that the plaintiffs’ privacy interest was diminished because of the athletic setting and because the students and the university voluntarily participated with full knowledge of the NCAA’s rules. *Id.* at 659.

83. *Id.* at 670 (Kennard, J., concurring and dissenting).

84. *See infra* text accompanying notes 95–100.

on by the court for the following two decades.⁸⁵ George would have maintained the *White* test:

[The test] calls upon a court to undertake the familiar constitutional task of determining the extent or degree to which a defendant's actions infringe or intrude upon the plaintiff's constitutionally protected interest, and of weighing or balancing that intrusion against the relative importance or compelling nature of the defendant's justifications for its actions.⁸⁶

This, Justice George argued, represents the “traditional constitutional balancing test . . . for evaluating state constitutional privacy claims.”⁸⁷

Justice George was concerned that applying the majority's three-element approach would inadequately protect privacy interests.⁸⁸ In his view, the majority's test would allow invaders to defeat privacy claims by negating just one threshold element, never being put to the burden of justifying their conduct. He explained his concern:

In addition to *increasing the plaintiff's burden* in establishing a prima facie violation of the state constitutional privacy right—i.e., the showing the plaintiff must make in order to warrant requiring the defendant to proffer some justification for its actions—the majority's new legal standard appears to *reduce the defendant's burden* to justify an infringement upon a constitutionally protected privacy interest, by explicitly declining to embrace the well-established principle that requires any such infringement to be justified by a “compelling” interest.⁸⁹

Indeed, all three elements require a showing by the individual, not the invader. And none of the three threshold elements are rooted in the ballot language.

Justice George's compelling interest test, by contrast, would protect privacy rights by requiring a defendant to justify its conduct any time a plaintiff asserts a colorable privacy claim. Yet the disagreement on approach is not entirely a matter of framing. Chief Justice Lucas equated adopting a “compelling interest” test with strict scrutiny and fretted that it would be “strict in theory and fatal in fact.”⁹⁰ Justice George, on the other hand, viewed his test as flexible and accommodating; “compelling” was simply equivalent to “important.”⁹¹ He explained, “Properly interpreted, the ‘compelling interest’ standard does not impose impossible or unrealistic requirements but merely calls for an inquiry that is sensitive to the various

85. *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 673–74 (Cal. 1994) (George, J., concurring and dissenting).

86. *Id.* at 674.

87. *Id.*

88. *Id.* at 674–78.

89. *Id.* at 676.

90. *Id.* at 651 (majority opinion).

91. *Id.* at 674 (George, J., concurring and dissenting).

competing interests.”⁹² As shown by our empirical study below, his concerns about the excessive burden of proof on plaintiffs and the low bar for invaders proved prophetic. As discussed in the next section, Chief Justice George soon substituted his preferred framework—ostensibly a compelling need standard that actually is a balancing of equivalent interests—for the Lucas approach.

B. The Second Error: The George Majority Opinion in Loder

Shortly after *Hill*, George became Chief Justice in 1996.⁹³ Chief Justice George hastened to mold the court’s privacy analysis to conform to his “compelling interest” test. In *Loder v. City of Glendale*, the California Supreme Court considered mandatory drug and alcohol testing as a condition of government employment.⁹⁴ In another fractured decision that produced five separate opinions, Chief Justice George’s lead opinion in *Loder* substantially reframed the *Hill* test.

In just three paragraphs, the new Chief Justice effectively imposed the interest-balancing approach he described in his *Hill* concurring opinion. He explained that *Hill*’s three-part test did not represent a sea change in the court’s privacy jurisprudence and that the decision should not be read to narrow the traditional scope of the right to privacy:

The three “elements” set forth in *Hill* . . . should not be interpreted as establishing significant new requirements or hurdles that a plaintiff must meet in order to demonstrate a violation of the right to privacy under the state Constitution—hurdles that would modify substantially the traditional application of the state constitutional privacy provision (and diminish the protection provided by that provision), by authorizing, in a wide variety of circumstances, the rejection of constitutional challenges to conduct or policies that intrude upon privacy interests protected by the state constitutional privacy clause, without any consideration of the legitimacy or importance of a defendant’s reasons for engaging in the allegedly intrusive conduct and without balancing the interests supporting the challenged practice against the severity of the intrusion imposed by the practice.⁹⁵

92. *Id.* Justice Mosk sided with Justice George. *Id.* at 683 (Mosk, J., dissenting) (explaining his “compelling public need” standard and observing that “conduct adversely affecting, but not abridging, an established right of privacy may be allowed if reasonable”).

93. Chief Justice Malcolm Lucas announced his retirement in October 1995. Maura Dolan, *State Chief Justice Lucas to Retire*, L.A. TIMES, Oct. 1, 1995, at A1. Governor Pete Wilson elevated Justice George to Chief Justice, and he was sworn in spring of 1996. Maura Dolan, *Justice George Sworn in as Court’s Chief*, L.A. TIMES, May 2, 1996, at A3.

94. *See generally* *Loder v. City of Glendale*, 927 P.2d 1200 (Cal. 1997).

95. *Id.* at 1228–29. Justice George struck this same chord in *Hill*:

Interpreting *Hill* too strictly would be a “radical departure” from the court’s earlier privacy decisions, which “uniformly hold that when a challenged practice or conduct intrudes upon a constitutionally protected privacy interest, the interests or justifications supporting the challenged practice must be weighed or balanced against the intrusion on privacy imposed by the practice.”⁹⁶

Next, Chief Justice George recast *Hill* as stating only the “threshold elements” for screening privacy claims, rather than announcing a comprehensive test for analyzing invasions of privacy:

[T]he three “elements” set forth in *Hill* properly must be viewed simply as “threshold elements” that may be utilized to screen out claims that do not involve a significant intrusion on a privacy interest protected by the state constitutional privacy provision. These elements do not eliminate the necessity for weighing and balancing the justification for the conduct in question against the intrusion on privacy resulting from the conduct in any case that raises a genuine, nontrivial invasion of a protected privacy interest.⁹⁷

He concluded: “*Hill* cannot properly be read . . . to have adopted a sweeping new rule under which a challenge to conduct that significantly affects a privacy interest protected by the state Constitution may be rejected without any consideration of either the legitimacy or strength of the defendant’s justification for the conduct.”⁹⁸

Although the Chief Justice does not mention the “compelling interest” standard from his opinion in *Hill* by name, his test in *Loder* is much the same:

- In *Hill*, George explained that courts should determine “the extent or degree to which a defendant’s actions infringe or intrude upon the plaintiff’s constitutionally protected interest,” and “weigh[] or balanc[e] that intrusion against the relative

In elevating the considerations embodied in the second and third “elements” of the new cause of action—whether the plaintiff under the circumstances had a “reasonable expectation of privacy,” and the “seriousness” of the defendant’s invasion of the plaintiff’s privacy—into independent requirements that always must be established before a defendant ever is required to provide a justification for its actions, however, the majority has, in my view, introduced an undesirable and unfortunate inflexibility into the constitutional analysis that, if faithfully applied, is likely to bar privacy claims that properly should be permitted to go forward.

Hill, 865 P.2d at 675 (George, J., concurring and dissenting).

96. *Loder*, 927 P.2d at 1229 (collecting cases). Again, this echoes a point George made in *Hill*. See *Hill*, 865 P.2d at 673–74 (George, J., concurring and dissenting).

97. *Loder*, 927 P.2d at 1230.

98. *Id.* at 1230–31.

importance or compelling nature of the defendant’s justification for its actions.”⁹⁹

- In *Loder*, George wrote that courts must “weigh” and “balance” the privacy interests at stake against an intruder’s justifications.⁹⁹

His declaration that this “weighing and balancing” is a “necessity” “in any case that raises a genuine, nontrivial invasion of a protected privacy interest”¹⁰⁰ is at odds with the “egregious” language used by the *Hill* majority.¹⁰¹ This appears to be calculated to frustrate any attempt by a defendant to seize on *Hill*’s “egregiousness” requirement to evade culpability without providing a justification for their conduct—one of George’s principal concerns in *Hill*.¹⁰²

The Chief Justice’s judicial judo did not go unnoticed. Writing separately in *Loder*, Justice Mosk observed: “The lead opinion now declares, in essence, that the formidable threshold requirements originally set forth in *Hill* . . . are no longer part of the state constitutional law of privacy. In its place the lead opinion would employ a balancing test similar to the one used under Fourth Amendment analysis”¹⁰³ Justice Mosk then made

99 *Hill*, 865 P.2d at 674 (George, J., concurring and dissenting); see also *id.* (explaining that the compelling interest standard “contemplates that a court, in applying the standard, will employ a balancing test that takes into account the nature and the degree of the intrusion: the greater the intrusiveness of the defendant’s conduct, the more ‘compelling’ the interest required in order to justify the intrusion”).

99. *Loder*, 927 P.2d at 1230.

100. *Id.* To a similar end, Chief Justice George explained that *Hill*’s three elements “permit courts to weed out claims that involve so insignificant or de minimis an intrusion on a constitutionally protected privacy interest as not even to require an explanation or justification by the defendant.” *Id.*

101. *Hill*, 856 P.2d at 655 (“Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right.”).

102. *Id.* at 675 (George, J., concurring and dissenting). In particular, Justice George argued:

In my view, no justification exists for limiting the reach of the state constitutional privacy provision only to those breaches of privacy that are “egregious.” . . . I believe the majority errs in adopting a legal standard that, at least on its face, purports to afford no protection to an invasion of a constitutionally protected privacy interest that does not rise to the level of an “egregious” breach of privacy, even when the defendant is unable to provide any justification for an intrusion upon the plaintiff’s constitutionally protected privacy interest.

Id. at 676.

103. *Loder*, 927 P.2d at 1245 (Mosk, J., concurring and dissenting).

explicit what the Chief Justice’s opinion left unsaid: “[T]here no longer appears to be support for the *Hill* test by a majority of this court.”¹⁰⁴

The Chief Justice’s *Loder* framework became the standard.¹⁰⁵ In *Williams v. Superior Court*, the California Supreme Court expressly disapproved *White* and its progeny, holding that the compelling interest test only applies when “obvious invasions of interests fundamental to personal autonomy” are at issue, not in cases involving mere informational privacy.¹⁰⁶ Four days after *Williams*, in *Lewis v. Superior Court*, the court held that for the general, “lesser-interest” balancing test, a privacy interest invasion justified by a legitimate competing interest is not a constitutional violation, and those legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities.¹⁰⁷ The result is a privacy doctrine that combines Chief Justice George’s “compelling interest” test with *Hill*’s three elements as the plaintiff’s prima facie showing.¹⁰⁸ This is the current *Hill–Loder* approach. In the next section, we explain its flaws.

C. Six Reasons the *Hill–Loder* Analysis Is Wrong

The Lucas opinion in *Hill* “rather abruptly rejected” a blanket compelling interest test for cases arising under California’s privacy clause as “overly rigid” and “not compelled by the ballot argument or by prior case law.”¹⁰⁹ That opinion created a novel test for private and governmental intrusions on the state constitutional right to privacy, drawn from common law privacy tort principles and federal case law construing the federal constitutional right to privacy.¹¹⁰ The court rejected the compelling public need test established by the Proposition 11 ballot pamphlet—and by its own earlier decisions. The George opinion in *Loder* reframed the analysis, with the three *Hill* elements serving as a prima facie case for plaintiffs to establish a serious invasion of a protected privacy interest, followed by weighing the justification for the conduct against the intrusion on privacy.¹¹¹ In *County of Los Angeles v. Los Angeles County Employer Relations Commission*, the California Supreme Court confirmed that under the *Hill–Loder* approach,

104. *Id.*

105. *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 811–12 (Cal. 1997) (plurality opinion) (quoting *Loder*, 927 P.2d at 1229); *Sheehan v. S.F. 49ers, Ltd.*, 201 P.3d 472, 477 (Cal. 2009) (quoting *Loder*, 927 P.2d at 1230).

106. *Williams v. Superior Court*, 398 P.3d 69, 86–87 (Cal. 2017).

107. *Lewis v. Superior Court*, 397 P.3d 1011, 1019 (Cal. 2017).

108. *See Sheehan*, 201 P.3d at 477.

109. JOSEPH R. GRODIN, DARIEN SHANSKE & MICHAEL B. SALERNO, *THE CALIFORNIA STATE CONSTITUTION* 53 (2d ed. 2016).

110. *See generally Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d 633 (Cal. 1994).

111. *Loder v. City of Glendale*, 927 P.2d 1200, 1230 (Cal. 1997).

an invader has four chances to win: by negating any of the three prima facie requirements, or by winning the weighing of interests: “[i]n general, the court should not proceed to balancing unless a satisfactory threshold showing is made. A defendant is entitled to prevail if it negates any of the three required elements.”¹¹²

That analysis is erroneous. It perverts the electorate’s intent; it relies on common law tort doctrine; and it conflates the common law and constitutional remedies. The constitutional privacy right is reduced from a “fundamental and compelling interest” to the same level as the legitimate business and governmental interests it is balanced evenly against. That is because the balancing test is unweighted: the claimed privacy interest and the claimed legitimate competing interest are of equal value, and a court need only decide which outweighs the other *after* a plaintiff makes the required prima facie showing. A compelling need requirement survives only when a plaintiff suffers “an obvious invasion of an interest fundamental to personal autonomy”¹¹³—and as our empirical analysis shows, establishing that claim is even more difficult than a general constitutional privacy violation.

The California Supreme Court should abandon the *Hill–Loder* analysis for six reasons:

- It rewrote the ballot argument text and ignored clear evidence of voter intent.
- It violated stare decisis.
- It was wrong on the law; compelling public need does not require strict scrutiny.
- It conflates the constitutional privacy right with the common law tort.
- The voters did not intend to bifurcate informational and autonomy privacy.
- It attempted to avoid equal protection analysis—and copied from it anyway.

The *Hill–Loder* analysis invalidates Proposition 11 and neutralizes the constitutional privacy right. Even with Chief Justice George’s efforts to realign the court’s privacy jurisprudence, a fundamental defect remains: the *Hill–Loder* approach fails to account for the explicit statements in the

112. County of Los Angeles v. L.A. Cnty. Emp. Rels. Comm’n, 301 P.3d 1102, 1115 (Cal. 2013).

113. *Hill*, 865 P.2d at 653.

ballot argument that the right to privacy “should be abridged only when there is compelling public need.” That interpretive error resulted in an analysis that negates the electorate’s intent in adopting Proposition 11.

1. It Rewrote the Ballot Text and Ignored Clear Evidence of Voter Intent

Applying the standard California interpretation method shows that the voters intended Proposition 11 to require a compelling interest test for violations of the new constitutional privacy right. The *Hill-Loder* approach instead frames privacy and public need as equivalent interests and imposes an evenly balanced weighing of interests. That approach fails to validate the electorate’s intent to value privacy highly as a compelling interest and to require an accordingly greater countervailing public need to overcome the privacy right.

Interpreting initiative constitutional amendments is an exercise in examining the text, and secondary evidence as needed, to effectuate the electorate’s intent. When construing a constitutional provision enacted by the voters, “the intent of the enacting body is the paramount consideration.”¹¹⁴ A court’s “task is simply to interpret and apply the initiative’s language so as to effectuate the electorate’s intent.”¹¹⁵

To determine intent, “[t]he court turns first to the words themselves for the answer.” . . . “If the language is clear and unambiguous there is no need for construction nor is it necessary to resort to indicia of the intent . . . of the voters (in the case of a provision adopted by the voters).”¹¹⁶

Proposition 11’s text alone does not resolve the inquiry. While article I, section 1 says that the right to “pursu[e]” and “obtain[.]” privacy is “inalienable,” it says nothing about how to implement that right.¹¹⁷ Yet the privacy right is no empty aphorism—it is self-executing.¹¹⁸ That silence

114. *In re Lance W.*, 694 P.2d 744, 754 (Cal. 1985); see *Kaiser v. Hopkins*, 58 P.2d 1278, 1279 (Cal.1936) (“It is a general rule of statutory construction that the courts will interpret a measure adopted by vote of the people in such manner as to give effect to the intent of the voters adopting it.”).

115. *Robert L. v. Superior Court*, 69 P.3d 951, 955 (Cal. 2003) (quoting *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1093 (Cal. 2000)).

116. *Delaney v. Superior Court*, 789 P.2d 934, 940 (Cal. 1990) (first quoting *Brown v. Kelly Broadcasting Co.*, 771 P.2d 406, 412 (Cal. 1989); and then quoting *Lungren v. Deukmejian*, 755 P.2d 299, 303–04 (1988)).

117. Delving deeply into what, exactly, it means for a right to be “inalienable” is a tail-chasing exercise outside the scope of this paper. For our purposes, the terse definition that follows suffices: “A right that cannot be transferred or surrendered; esp., a natural right such as the right to own property.” *Inalienable Right*, BLACK’S LAW DICTIONARY (10th ed. 2014).

118. “The constitutional provision is self-executing; hence, it confers a judicial right of action on all Californians.” *Porten v. Univ. of S.F.*, 134 Cal. Rptr. 839, 842 (Cal. Ct.

makes it appropriate to “refer to other indicia of the voters’ intent, particularly the analyses and arguments contained in the official ballot pamphlet.”¹¹⁹

The ballot arguments are strong evidence that the voters understood and intended that the individual right to privacy would be subject to a “compelling public need” standard. The argument in favor of Proposition 11 states that the right to privacy “should be abridged only when there is compelling public need.”¹²⁰ The proponents’ rebuttal likewise stressed, in parallel terms, that the right to privacy “is limited by ‘compelling public necessity’ and the public’s need to know.”¹²¹ Necessity and need in this context are synonymous. The ballot arguments stated twice that an intrusion on the right to privacy must be justified by a “compelling public need” or a “compelling public necessity” and described the privacy right as “compelling.”¹²²

The *Hill* opinion acknowledged that the ballot arguments seemed to require a compelling public need standard. Yet Chief Justice Lucas was overtly concerned that applying what he viewed as strict scrutiny for every asserted privacy interest would create an “impermissible inflexibility” for courts.¹²³ He also worried that commerce would be impeded because the business need to collect data to process transactions would never be compelling enough. So he identified a single reference to “legitimate needs” in the proponent’s rebuttal, took it out of context, and used it to support abandoning the compelling public need standard the court previously adopted in *White*.¹²⁴ That amounts to a court substituting its policy view for the electorate’s judgment to justify lowering the standard of review. Such concerns are never an appropriate basis for rewriting an initiative.¹²⁵

App. 1976) (citing *White v. Davis*, 533 P.2d 222, 234 (Cal. 1975) (noting ballot arguments showed state constitutional right of privacy was intended to be self-executing and supported injunctive relief)).

119. *People v. Birkett*, 980 P.2d 912, 923 (Cal. 1999). The California Supreme Court has long relied on ballot arguments to determine the voters’ intent and understanding. *E.g.*, *Carter v. Comm’n on Qualifications of Jud. Appointments*, 93 P.2d 140, 144 (Cal. 1939) (stating arguments presented to voters “may be resorted to as an aid in determining the intention of the framers of the measure and of the electorate when such aid is necessary”).

120. PROPOSED AMENDMENTS, *supra* note 3, at 27.

121. *Id.* at 28.

122. *Id.* at 27–28.

123. *Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d 633, 654 (Cal. 1994).

124. *Id.* at 645–46.

125. *Pro. Eng’rs in Cal. Gov’t v. Kempton*, 155 P.3d 226, 243 (Cal. 2007). According to the California Supreme Court in *Professional Engineers in California Government v. Kempton*:

The Lucas interpretation is erroneous. In the sentence preceding the reference to legitimate need in the proponent’s rebuttal, the proponent reaffirmed the “compelling public need” standard by stating that the right to privacy is limited only by “‘compelling public necessity’ and the public’s need to know.”¹²⁶ The rebuttal’s reference to “legitimate need” does not undermine the compelling need test—“compelling need” appears three times in the ballot arguments.¹²⁷ The first instance of “compelling need” frames the right: “The right of privacy is the right to be left alone. It is a fundamental and *compelling* interest.”¹²⁸ The second instance frames “compelling need” as a test: “The right should *only* be abridged *when* there is *compelling public need*.”¹²⁹

By contrast, “legitimate need” is referenced just once. Read in context, the phrase is not intended to dilute the compelling public need standard: “The right to privacy will not destroy the welfare nor undermine any important government program. *It is limited by ‘compelling public necessity’ and the public’s need to know. Proposition 11 will not prevent the government from collecting any information it legitimately needs.*”¹³⁰ The quotes on “compelling public necessity” are original, suggesting emphasis, and that emphasis links to the earlier references to compelling need as the test. The reference to “a legitimate need” in the following sentence means *genuine* and is neither an alternative nor a modifier to the intended compelling need standard; it only explains that the *effect* of the compelling need standard will not prevent all government data collection.

The *Hill–Loder* approach fails to give effect to the ballot arguments’ clear statement that compelling public need must guide the constitutional privacy analysis. Ballot measures must be reasonably interpreted, with every word’s ordinary meaning given significance, even when a court disagrees with its outcome.¹³¹ A reasonable interpretation of Proposition 11 requires reading the repeated references to compelling public need as the test for

Our role as a reviewing court is to simply ascertain and give effect to the electorate’s intent guided by the same well-settled principles we employ to give effect to the Legislature’s intent when we review enactments by that body. We do not, of course, pass upon the “wisdom, expediency, or policy” of enactments by the voters any more than we would enactments by the Legislature.

Id. (quoting *Cal. Tchr.’s Ass’n v. Governing Bd. of Rialto Unified Sch. Dist.*, 927 P.2d 1175, 1177 (Cal. 1997)) (citing *People v. Rizo*, 996 P.2d 27, 30 (Cal. 2000)).

126. PROPOSED AMENDMENTS, *supra* note 3, at 28.

127. *Id.* at 26–28.

128. *Id.* at 27 (emphasis added).

129. *Id.* (emphasis added).

130. *Id.* at 28 (emphasis added).

131. See *Dempsey v. Mkt. St. Ry. Co.*, 142 P.2d 929, 930 (Cal. 1943); see also *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1300 (Cal. 1978).

state privacy right claims. Instead, the Lucas opinion took the single reference to “a legitimate need” out of context, which when read in its context affirms the “compelling need” test. By writing the “compelling public need” language out of the constitutional right to privacy, the *Hill-Loder* approach substitutes a judicial public policy view for the electorate’s judgment. That was improper. Courts “do not . . . ‘pass upon the wisdom, expediency, or policy’ of enactments by the voters any more than [they] would enactments by the Legislature.”¹³² Rejecting the compelling public need standard intended by the voters was error.

2. *It Violated Stare Decisis*

The Lucas opinion in *Hill* erred by departing from established precedent. The first interpretation of Proposition 11 in *White* affirmed the voter intent to impose a “compelling interest” standard in privacy cases.¹³³ Yet the Lucas opinion in *Hill* held that when “properly analyzed,” its decision in *White* “did not establish a blanket ‘compelling interest’ test for all state constitutional right-to-privacy cases.”¹³⁴ Instead, Lucas read *White* to find only that “no legitimate government interest” was shown. This was a difficult conclusion to reach, given that *White* held that the amendment “does require that the government establish a compelling justification,” and the Proposition 11 ballot pamphlet “makes clear that the amendment” requires “that any

132. Pro. Eng’rs in Cal. Gov’t v. Kempton, 155 P.3d 226, 243 (Cal. 2007) (quoting Cal. Tchr.’s Ass’n v. Governing Bd. of Rialto Unified Sch. Dist., 927 P.2d 1175, 1177 (Cal. 1997)). In his *Hill* dissent, Justice Mosk assailed the majority for enacting their policy choices:

The majority all but abrogate the right of privacy. They plainly consider it “bad policy.” What of their “policy” assessment? Is the right of privacy “good policy[?]” Is it “bad policy[?]” It simply does not matter. To be sure, the right of privacy reflects a choice of policy. But it is a choice that has already been made—by the people, in their capacity as sovereign, in the California Constitution. It is therefore a choice that we as judges must accept and respect, regardless of personal beliefs or predilections. Regrettably, in this case the majority have not so conducted themselves with regard to the people’s constitutional policy declaring a right of privacy.

Hill v. Nat’l Collegiate Athletic Ass’n, 865 P.2d 633, 679–80 (Cal. 1994) (Mosk, J., dissenting) (citations omitted). This calls to mind Justice Mosk’s concurrence a quarter-century earlier in *In re Anderson*: “As a judge, I am bound to the law as I find it to be and not as I might fervently wish it to be.” *In re Anderson*, 447 P.2d 117, 132 (Cal. 1968) (Mosk, J., concurring).

133. See *supra* Section III.B.

134. *Hill*, 865 P.2d at 652.

such intervention must be justified by a compelling interest.”¹³⁵ Thus, Lucas’s opinion in *Hill* cast aside *White*, which had been controlling law for twenty years. This violated the doctrine of stare decisis, “a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices.”¹³⁶

Of course, our argument that the California Supreme Court should abrogate *Hill–Loder* and restore the *White* “compelling public need” standard is itself subject to a stare decisis rebuttal: *Hill–Loder* is currently the standard, and stare decisis should preserve it. Not so: disavowing *Hill–Loder* would validate the principle by correcting the error of deviation and restoring *White*. It is “well established” that stare decisis is a “flexible” policy that “permits [the California Supreme Court] to reconsider, and ultimately to depart from, [its] own prior precedent in an appropriate case.”¹³⁷ The need for flexibility in applying stare decisis is especially true when “the error in the prior opinion is related to a ‘matter of continuing concern’ to the community at large.”¹³⁸ Such is the case here. Stare decisis does not “shield court-created error from correction,”¹³⁹ and the California Supreme Court is not “constrained to follow ‘unworkable’ or ‘badly reasoned’ decisions.”¹⁴⁰ “This is particularly true in constitutional cases,” where “correction through legislative action is practically impossible”¹⁴¹ because the California Supreme Court is the “final arbiter[] of the meaning of the California Constitution.”¹⁴²

Finally, the stare decisis rebuttal to our argument is not persuasive because the *Hill–Loder* analysis itself disregarded stare decisis by deviating from *White*. As the court has candidly observed, “[i]f we have construed [the state constitution] incorrectly, only we can remedy the mistake.”¹⁴³ The court got it right the first time in *White*; by contrast, the current analysis is badly reasoned and inconsistent with the voters’ intent in adopting Proposition

135. *Id.*; *White v. Davis*, 533 P.2d 222, 225, 234 (Cal. 1975).

136. *Moradi-Shalal v. Fireman’s Fund Ins. Cos.*, 758 P.2d 58, 62 (Cal. 1988).

137. *Id.* at 63.

138. *Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669, 673 (Cal. 1995) (quoting *People v. Anderson*, 742 P.2d 1306, 1331 (Cal. 1987)).

139. *Id.* at 673 (quoting *Cianci v. Superior Court*, 710 P.2d 375, 387 (Cal. 1985)).

140. *Johnson v. Dep’t of Just.*, 341 P.3d 1075, 1081 (Cal. 2015) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)); see *Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass’n*, 291 P.3d 316, 322 (Cal. 2013) (acknowledging that the California Supreme Court is free to reconsider a “poorly reasoned opinion”); *County of Los Angeles v. Faus*, 312 P.2d 680, 685 (Cal. 1957) (“Previous decisions should not be followed to the extent that error may be perpetuated and that wrong may result.”).

141. *Johnson*, 341 P.3d at 1081 (quoting *Payne*, 501 U.S. at 828).

142. *People v. Birks*, 960 P.2d 1073, 1077 (Cal. 1998).

143. *Id.*

11. Rather than barring a revision, the doctrine of stare decisis compels judicial self-correction.

3. *Compelling Public Need Does Not Require Strict Scrutiny*

The Lucas opinion in *Hill* erred by conflating the “compelling public need” requirement with a “compelling interest” standard, and declined to impose strict scrutiny because Chief Justice Lucas thought it was excessive.¹⁴⁴ But the compelling public need in Proposition 11 is not the same as the “compelling interest” in federal constitutional parlance, and the Privacy Initiative was not intended to impose strict scrutiny. By proceeding from those false premises, the Lucas opinion reached a conclusion that was both wrong and unnecessary.

The Lucas opinion in *Hill* was poisoned from the start by the Court of Appeal, which had given the NCAA the burden of proving that its drug testing program was supported by a “compelling interest” and that the program represented the “least restrictive alternative” to further its interest.¹⁴⁵ This borrowed from *White*, which endorsed a “compelling governmental interest” standard but did not explain its contours.¹⁴⁶ The lack of explanation started a daisy chain that led some courts to rely on *White* for applying strict scrutiny to constitutional privacy claims.¹⁴⁷

144. See *Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d 633, 651 (Cal. 1994).

145. See *id.* at 652, 663.

146. *White v. Davis*, 533 P.2d 222, 234 (Cal. 1975) (“[T]he [ballot] statement makes clear that the [privacy] amendment does not purport to prohibit all incursion into individual privacy but rather that any such intervention must be justified by a compelling interest.”); *id.* (noting that the allegations raised a “strong suspicion” that the LAPD’s surveillance activities “may be largely unnecessary for any legitimate, let alone ‘compelling,’ governmental interest.”); *id.* at 234–35 (“At trial . . . defendant will be free to contest any of the allegations of the complaint as well as to designate the compelling governmental interests upon which they rely for their intrusive conduct.”).

147. See, e.g., *People v. Stritzinger*, 668 P.2d 738, 742 (Cal. 1983); *City of Santa Barbara v. Adamson*, 610 P.2d 436, 440 (Cal. 1980); *Loder v. Municipal Court*, 553 P.2d 624, 628 (Cal. 1976). The Court of Appeal in *Hill* drew its “compelling interest” test from another appellate court decision that had relied on *White*. See *Hill v. Nat’l Collegiate Athletic Ass’n*, 273 Cal. Rptr. 402, 410 (Cal. Ct. App. 1990) (citing *Luck v. S. Pac. Transp. Co.*, 267 Cal. Rptr. 618, 629 (Cal. Ct. App. 1990)). *Luck* in turn cited *White*, 533 P.2d at 234, for the proposition that an “incursion into individual privacy . . . must be justified by a compelling interest.” *Luck*, 267 Cal. Rptr. at 629.

Motivated by his fear that strict scrutiny would “import[] an impermissible inflexibility into the process of constitutional adjudication” of privacy rights,¹⁴⁸ Chief Justice Lucas structured his analysis to reject a compelling interest and strict scrutiny framework: he dismissed the use of “compelling” when discussing the ballot argument,¹⁴⁹ cited federal law about favoring balancing tests over rigid strict scrutiny formulations,¹⁵⁰ and repurposed California privacy decisions to explain that they did not support a “compelling interest” standard.¹⁵¹ This was all unnecessary because it was based on a misreading of the intended compelling public need test.

Both Justice Mosk and Justice George noted in their separate *Hill* opinions that in the privacy context, a compelling need is a point on a sliding scale where “the greater the intrusiveness of the defendant’s conduct, the more ‘compelling’ the interest required in order to justify the intrusion.”¹⁵² Justice George explained that this does not require strict scrutiny:

Although the standard does require that a defendant have a “compelling,” i.e., important, reason for engaging in conduct that intrudes upon a constitutionally protected privacy interest, . . . a court, in applying the standard, will employ a balancing test that takes into account the nature and the degree of the intrusion: the greater the intrusiveness of the defendant’s conduct, the more “compelling” the interest required in order to justify the intrusion.¹⁵³

The *Hill* majority identified the wrong problem: the “inflexibility” lies not in the test; rather, “the error lies in those courts’ understanding and application of the compelling interest standard [itself].”¹⁵⁴

Chief Justice Lucas was concerned that linking a compelling interest in the privacy context to that concept’s accepted meaning in the federal constitutional context would require applying strict scrutiny.¹⁵⁵ That concern

148. *Hill*, 865 P.2d at 654; *see id.* at 668 (stating, in response to Justices George and Mosk, that “[w]e [the majority] prefer to avoid the continuing uncertainty and confusion inherent in the rigid application of a ‘compelling interest’ test to a multi-faceted right to privacy”). Even if the court had adopted a standard akin to strict scrutiny, there is no guarantee that requiring such rigorous review would have produced anomalous results. Empirical analysis suggests that the “strict in theory and fatal in fact” refrain is overblown. *See generally* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

149. *Hill*, 865 P.2d at 644–46.

150. *Id.* at 651.

151. *Id.* at 652–53.

152. *Id.* at 674 (George, J., concurring and dissenting); *see id.* at 688–89 (Mosk, J., dissenting) (stating that a plaintiff must prove there was a right of privacy and interference, which plaintiff has to counterbalance).

153. *Id.* at 674 (George, J., concurring and dissenting).

154. *Id.*

155. *See id.* at 651; *see also* *Brown v. Superior Court*, 371 P.3d 223, 232 (Cal. 2016) (“[W]hen a word or phrase appearing in a statute has a well-established *legal* meaning, it will be given that meaning in construing the statute.”).

was unwarranted because it neither appears that the voters intended that link, nor is it analytically necessary. The ballot arguments neither referenced nor endorsed an equal-protection-style strict scrutiny standard. Equating “compelling public need” to strict scrutiny was inappropriate because the electorate did not intend the phrase in Proposition 11 in its modern technical legal sense.¹⁵⁶ There is no evidence that the phrases “compelling public need” or “compelling public necessity” had any special legal meaning before 1972; neither phrase appears with any regularity or particular significance in California decisions before then.¹⁵⁷

A *compelling public need* is not equivalent to the *compelling interest* that requires strict scrutiny. One canon of interpretation holds that when the voters use legal terms, courts will presume that the voters intended those terms to have their accepted legal meaning.¹⁵⁸ *Compelling interest*

156. In determining the voters’ intent, courts “look first to the words of the provision in question, giving them their natural and ordinary meaning, unless it appears they were used in some technical sense.” *Steinhart v. County of Los Angeles*, 223 P.3d 57, 71 (Cal. 2010). The Constitution, “unlike the acts of our legislature, owes its whole force and authority to its ratification by the people; and they judged of it by the meaning apparent on its face according to the general use of the words employed where they do not appear to have been used in a legal or technical sense.” *Miller v. Dunn*, 14 P. 27, 29 (Cal. 1887) (quoting *Manly v. State*, 7 Md. 135, 147 (1854)); *accord Kaiser v. Hopkins*, 58 P.2d 1278, 1279 (Cal. 1936) (“The words used in a Constitution ‘must be taken in the ordinary and common acceptance, because they are presumed to have been so understood by the framers and by the people who adopted it.’” (quoting *Miller*, 14 P. at 28–29)).

157. Each phrase appears in two California Supreme Court cases. “Compelling public need” shows up in *Fort v. Civil Service Commission of Alameda City*, 392 P.2d 385, 389 (Cal. 1964), and *Los Angeles Teachers Union v. Los Angeles Board of Education*, 455 P.2d 827, 832 (Cal. 1969). “Compelling public necessity” appears in *Jones v. City of Los Angeles*, 295 P. 14, 19 (Cal. 1930), and *Sunset Amusement Co. v. Board of Police Commissioners*, 496 P.2d 840, 850 (Cal. 1972).

158. When an initiative contains terms that have been judicially construed, “the presumption is almost irresistible” that those terms have been used “in the precise and technical sense” in which they have been used by the courts. *In re Harris*, 775 P.2d 1057, 1060 (Cal. 1989) (quoting *People v. Weidert*, 705 P.2d 380, 385 (Cal. 1985)). In interpreting voter initiatives, California courts apply the same principles that govern statutory construction. *Horwich v. Superior Court*, 980 P.2d 927, 930 (Cal. 1999). The California Supreme Court commonly applies a presumption that the electorate and the legislature use legal terms in their legal sense. *See, e.g., People v. Bullard*, 460 P.3d 262, 267 (Cal. 2020) (stating the court’s presumption that an undefined term in a voter initiative intended to bear the same meaning it had at common law); *People v. Wells*, 911 P.2d 1374, 1377 (Cal. 1996) (“In construing a statute, unless a contrary intent appears, the court presumes that the Legislature intended that similar phrases be accorded the same meaning, particularly if the terms have been construed by judicial decision.” (citations omitted)); *State Bd. of Educ. v. Levit*, 343 P.2d 8, 18 (Cal. 1959) (stating that courts must hold that the electorate meant what it said);

does have an accepted meaning in federal constitutional doctrine.¹⁵⁹ But that canon does not apply here because the terms used are not identical, and there is no evidence of voter intent to import federal interpretive doctrine into a state constitutional principle.

The better method of interpreting “compelling public need” is to give those words their natural and ordinary meaning, which is more likely to reflect the voters’ understanding and intent. Justice Mosk did so in *Hill*, where he explained:

What is demanded is a “need” on the part of the intruding party that is both “compelling” and “public.” “Compelling” means that the “need” is one in the strict sense, denoting something actually required by the intruding party under all the circumstances and not simply “useful” or “desirable.” “Public,” for its part, means that the “need” is one that the community at large deems valid and not merely the intruding party. The “need” in question must extend to the means used as well as the interests furthered. Otherwise, any interests, so long as they were “compelling,” would always justify every means, no matter how offensive.¹⁶⁰

Justice Mosk was right: his conception of the “compelling public need standard” provides “in substance and effect, a kind of ‘balancing’ test,” with a critical caveat: “Its scales . . . do not start out in equipoise, but rather verge in favor of the right of privacy.”¹⁶¹ That is the best reading of the Proposition 11 compelling public need standard. It is consistent with the apparent voter intent, gives effect to the distinct language employed in Proposition 11, and avoids the fatal-in-fact problem of importing strict scrutiny. And California’s privacy right is broader than the federal right.¹⁶² Linking the standard of review for state privacy claims to an unrelated federal doctrine would undermine the California provision’s independent meaning. Reading compelling public need to require strict scrutiny was error.

Oakland Paving Co. v. Hilton, 11 P. 3, 9 (Cal. 1886) (“[When] technical words or words of art [are] employed [in a constitutional provision] . . . we must assume that they are used in their technical meaning.”).

159. See *People v. Chatman*, 410 P.3d 9, 15 (Cal. 2018).

160. *Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d 633, 682–83 (Cal. 1994) (Mosk, J., dissenting) (citation omitted).

161. *Id.* at 683. Specifically, Justice Mosk proposed a standard that would require a defendant to show that “any conduct on his part adversely affecting the right of privacy was justified by a compelling public need if it rose to the level of abridgment or that it was allowed as reasonable if it did not.” *Id.* at 688; see *Loder v. City of Glendale*, 927 P.2d 1200, 1245 (Cal. 1997) (Mosk, J., concurring and dissenting) (restating and proposing the test he offered in *Hill*).

162. See *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 808–09 (Cal. 1997) (holding that “the scope and application of the state constitutional right of privacy is broader and more protective of privacy than the federal constitutional right of privacy,” and citing related cases).

4. It Conflates the Constitutional Privacy Right with the Common Law Tort

The current doctrine is flawed because it conflates a constitutional right with a common law tort—so much so that there are no material differences between them. This conflation is illustrated in *Hernandez v. Hillside, Inc.*, where the California Supreme Court applied the identical analysis in determining whether the plaintiff stated a privacy claim under both the common law and the California Constitution: “The right to privacy in the California Constitution sets standards similar to the common law tort of intrusion.”¹⁶³ The court applied this analysis even though the case concerned autonomy privacy, which under *American Academy of Pediatrics v. Lungren* should have required a compelling interest showing: “For purposes of this balancing function—and except in the rare case in which a fundamental right of personal autonomy is involved—the defendant need not present a compelling countervailing interest; only ‘general balancing tests are employed.’”¹⁶⁴ The result is that for most privacy claims the scales are evenly balanced (at a level far below compelling interests) between constitutional privacy interests and an invader’s competing interest.

That was error because there is no evidence that the voters intended constitutional privacy to be subsumed under common law tort doctrine. Instead, the ballot arguments show an intent to establish the state constitutional doctrine as a novel fundamental right. The ballot argument supporting Proposition 11 is unequivocal: “This measure, if adopted, would revise the language of this section to list the right of privacy as one of the inalienable rights.”¹⁶⁵ The ballot argument stated, “The right of privacy is the right to be left alone. It is a *fundamental and compelling interest*.”¹⁶⁶ Nothing in the ballot arguments suggests that voters intended to constitutionalize common law privacy or tort law. Instead, “[t]he elevation of the right to be free from invasions of privacy to constitutional stature was apparently intended to be an expansion of the privacy right.”¹⁶⁷ The electorate did not intend Proposition 11 to blend common law and constitutional privacy. Even the

163. *Hernandez v. Hillside, Inc.*, 211 P.3d 1063, 1073 (Cal. 2009).

164. *Id.* (quoting *Hill*, 865 P.2d at 653).

165. PROPOSED AMENDMENTS, *supra* note 3, at 26.

166. *Id.* at 27 (emphasis added).

167. *Porten v. Univ. of S.F.*, 134 Cal. Rptr. 839, 841 (Cal. Ct. App. 1976); *see THOMAS ET AL.*, *supra* note 27 (“[T]he constitution may provide the plaintiff with a cause of action where the common law torts are not available.”).

Lucas opinion in *Hill* stated that its “reference to the common law as background to the California constitutional right to privacy is not intended to suggest that the constitutional right is circumscribed by the common law tort.”¹⁶⁸

The distinction is not an accident: inalienable rights are distinct from tort laws.¹⁶⁹ One right is constitutionally guaranteed, while the others are either statutory claims or common law claims.¹⁷⁰ Conflating a constitutional right with tort remedies undermines privacy’s status as a fundamental individual liberty interest and reduces it to a mere civil wrong. Every law student learns that in the law’s hierarchy, constitutional rights are superior to statutory and common law claims. Yet under the *Hill–Loder* framework, the common law and constitutional rights are equivalent.

Reducing constitutional privacy claims to the status of a tort means that their remedies coincide. Tort remedies generally provide compensation, while the default fundamental rights remedy is stopping the intrusive conduct.¹⁷¹ Plaintiffs also have an array of statutory tools to remedy privacy invasions.¹⁷² And the constitutional right apparently does not include damages.¹⁷³ That the respective remedies are different should suggest to

168. *Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d 633, 648 (Cal. 1994).

169. *See id.* at 679–81. (Mosk, J., dissenting).

170. *See, e.g., Kizer v. County of San Mateo*, 806 P.2d 1353, 1356 (Cal. 1991) (“The Tort Claims Act is a comprehensive statutory scheme that sets forth the liabilities and immunities of public entities and public employees for torts.”); *Rowland v. Christian*, 443 P.2d 561, 566–68 (Cal. 1968) (providing a historical analysis of common law torts).

171. *Turpin v. Sortini*, 643 P.2d 954, 961 (Cal. 1982); *Kelso*, *supra* note 9, at 394, 396 n.361 (noting that violation of a fundamental right limits actions and that a violation does not give rise to action for damages absent statutory authorization).

172. *See, e.g., CAL. CIV. CODE* § 56 (Deering 2005) (providing remedy for disclosure of medical information by health care providers); *id.* § 1708.7 (stalking); *id.* § 1708.8 (providing remedy for capturing impression of personal or familial activity); *id.* § 1798 (codifying Information Practices Act of 1977); *id.* § 1798.100 (codifying California Consumer Privacy Act); *CAL. PENAL CODE* §§ 630, 637.2, 637.3 (Deering 2008) (prohibiting wiretapping); *CAL. GOV’T CODE* § 7460 (codifying California Right to Financial Privacy Act) (Deering 2010); *id.* § 6218 (banning posting personal information about providers, employees, volunteers, or patients of reproductive health services facility); *id.* § 6254.21 (banning posting home address or telephone number of public officials without written permission); *CAL. FIN. CODE* § 4050 (Deering 2012) (codifying California Financial Information Privacy Act); *CAL. EDUC. CODE* § 99121 (Deering 2013) (barring schools from forcing students to disclose information about social media use); *CAL. HEALTH & SAFETY CODE* §§ 123115, 123125 (Deering 2012) (placing limits on minors’ medical records, and limits on alcohol and drug abuse records); *CAL. VEH. CODE* §§ 1810(b)(1), 1808(e) (Deering 2019) (prohibiting selling information from motor vehicle registration records and disclosing personal information); *id.* §§ 12800.5, 12800.7(b) (barring disclosing photographs and other identifying information and disclosing personal information).

173. *See Katzberg v. Regents of Univ. of Cal.*, 58 P.3d 339, 347 n.13 (Cal. 2002) (“We have no occasion to consider in the present case the circumstances under which the privacy clause of the state Constitution may support a cause of action for damages.”);

the courts that the constitutional and common law rights are distinct and should stay distinct. Providing a single set of remedies for constitutional and common law claims gives plaintiffs little incentive to pursue the constitutional claim when the tort is arguably easier to prove—and provides compensation.¹⁷⁴

The greater availability and increased likelihood of success with statutory claims compared with the constitutional right are strong incentives to further develop those statutory claims, which explains their comparatively greater expansion and more frequent use.¹⁷⁵ Similarly, the common law privacy right has seen consistent use by plaintiffs and acceptance by the courts, from its first use in 1931¹⁷⁶ to a claim being recognized as recently as 2010.¹⁷⁷ These disincentives discourage further judicial development of the constitutional right because the constitutional claims will be made less often. As shown below, because the constitutional claim is routinely rejected, plaintiffs will be further discouraged from making the claim. A constitutional right that cannot be vindicated is a cold comfort, and erroneously conflating the constitutional and common law privacy rights makes that so.

Hernandez v. Hillside, Inc., 211 P.3d 1063, 1072 (Cal. 2009) (citing *Katzberg* as “suggesting it is an open question whether the state constitutional privacy provision, which is otherwise self-executing and serves as the basis for injunctive relief, can also provide direct and sole support for a damages claim” (citing *Katzberg*, 58 P.3d at 347 n.13)).

174. While the privacy intrusion tort shares similar elements to the constitutional claim, the tort claim is easier to prove because it does not require a balancing of interests. See CACI No. 1800. The privacy intrusion tort also allows for “[d]amages flowing from an invasion of privacy [to] include an award for mental suffering and anguish.” *Id.* Conversely, infringement of constitutional privacy does not necessarily lead to compensation. *Id.* (“[I]t is an open question whether the state constitutional privacy provision . . . can also provide direct and sole support for a damages claim.”).

175. One privacy advocate, Alastair Mactaggart, has twice personally sponsored statutory privacy initiatives: the 2018 Consumer Right to Privacy Act—withdrawn after the California legislature passed a revised version of the initiative called the California Consumer Privacy Act of 2018—and Proposition 24 in 2020, which passed. *California Proposition 24, Consumer Personal Information Law and Agency Initiative (2020)*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_24,_Consumer_Personal_Information_Law_and_Agency_Initiative_\(2020\)](https://ballotpedia.org/California_Proposition_24,_Consumer_Personal_Information_Law_and_Agency_Initiative_(2020)) [<https://perma.cc/C8SZ-3X2A>].

176. *Melvin v. Reid*, 297 P. 91 (Cal. Dist. Ct. App. 1931) (evaluating a privacy right cause of action for public disclosure of private facts).

177. *Catsouras v. Dep’t of the Cal. Highway Patrol*, 104 Cal. Rptr. 3d 352, 366 (Cal. Ct. App. 2010) (finding that decedent’s family members had sufficient privacy interest in accident scene photographs to maintain invasion of privacy action).

5. *It Bifurcates Information and Autonomy*

Proposition 11 showed no voter intent to separate privacy claims into subject-matter categories: it drew no distinction between the importance of informational and autonomy privacy, nor did it distinguish between the protections each merited. On the contrary, Proposition 11 described *privacy* as a “fundamental and compelling interest.”¹⁷⁸ Yet the *Hill-Loder* approach distinguishes between information and autonomy: a balancing test applies to informational claims, and a compelling interest test applies to the most serious autonomy claims.¹⁷⁹ In the same year it decided *Loder*, the California Supreme Court held in *Lungren* that a compelling interest test similar to strict scrutiny applied to intrusions on the “fundamental” right to personal autonomy.¹⁸⁰ “Where the case involves an obvious invasion of an interest fundamental to personal autonomy . . . a ‘compelling interest’ must be present to overcome the vital privacy interest. If, in contrast, the privacy interest is less central, or in bona fide dispute, general balancing tests are employed.”¹⁸¹ The court at least recognized that the voters intended to require a high bar for *some* privacy claims. But Proposition 11 did not distinguish between informational and autonomy privacy, nor did it suggest that different privacy claims merited varying standards. On the contrary, the ballot argument defined *all* privacy interests as “fundamental and compelling” and required a countervailing “compelling public need” to justify all invasions. On that evidence, it is difficult to justify restricting compelling need to only some claims.

The Lucas opinion in *Hill* was concerned about the effect on private business. So were the voters. The ballot arguments were more concerned with private data collection than government surveillance and emphasized the threat to informational privacy posed by private businesses.¹⁸² That suggests that adding an express privacy clause to the California Constitution would provide greater protection against such threats. Fearing the consequences

178. PROPOSED AMENDMENTS, *supra* note 3, at 27.

179. *See, e.g.*, *Lewis v. Superior Court*, 397 P.3d 1011, 1019 (Cal. 2017).

180. *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 810 (Cal. 1997).

181. *Id.* at 810–11 (citing *Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d 633, 653 (Cal. 1994)).

182. Courts have begun to recognize the increasing significance of informational privacy in light of technological advancements in the past decades. The Supreme Court has recognized the significance of the “immense storage capacity” of modern cell phones, noting that trying to lug around a similar amount of information in physical form would require dragging along “a trunk of the sort held to require a search warrant.” *Riley v. California*, 573 U.S. 373, 393–94 (2014). “The sum of an individual’s private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet.” *Id.* at 394.

of doing so, the Lucas opinion abandoned *White* and imposed a new standard that was the opposite of what the voters intended. That was error.

*6. It Attempted to Avoid Equal Protection, Then Circled
Back to Equal Protection*

Attempting to avoid borrowing strict scrutiny from federal equal protection jurisprudence led courts to adopt a rational basis standard, which is also an equal protection standard. This is illustrated by *Sheehan v. The San Francisco 49ers, Ltd.*, where the California Supreme Court considered whether the National Football League (NFL)'s policy that all patrons submit to a pat-down search before entering a stadium violated the patrons' constitutional right to privacy.¹⁸³ In holding that no violation occurred, the court ruled that the NFL's policy need only be "reasonable" and emphasized the necessity of fact-intensive weighing and balancing.¹⁸⁴ The court closed the opinion with an admonition: "The state constitutional right of privacy does not grant courts a roving commission to second-guess security decisions at private entertainment events or to micromanage interactions between private parties."¹⁸⁵ In equal protection parlance, the court applied rational basis review.

Sheehan failed to consider that privacy rights apply to private actors as well as the government. Because privacy interests attach to the person, they exist wherever the person goes, including to a privately owned sports stadium.¹⁸⁶ Thus, the conclusion in *Sheehan* that the state constitutional right of privacy does not apply to private events or interactions is exactly wrong—the privacy right *must* apply there, or there is no private-party privacy right at all.

183. *Sheehan v. S.F. 49ers*, 201 P.3d 472, 475 (Cal. 2009).

184. *Id.* at 477–80.

185. *Id.* at 480. Even so, *Sheehan* is probably better understood as a simple matter of consent. Setting aside peer pressure, no one is forced to attend a football game. The case may be different if, say, Sheehan found herself subjected to a pat-down on the way into the courthouse after being summoned to jury duty.

186. The Court in *Katz v. United States* touches upon this concept, stating:

No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.

Katz v. United States, 389 U.S. 347, 352 (1967) (footnotes omitted).

Writing separately, Justice Werdegar cautioned against “extreme deference to the judgment of private interests” because Proposition 11 “reflects a recognition that market forces alone may not be sufficient to ensure for Californians the ability to retain some semblance of privacy in the course of dealings with government, employers, businesses, and the like.”¹⁸⁷ Safety and security are not trump cards that override all constitutional interests. Permitting market forces to establish the balance of privacy interests is inadequate protection for a constitutional right. Worse, it is normative: if a privacy violation is an industry standard, then a privacy expectation cannot be reasonable. The constitutional right to privacy instead requires close scrutiny, not blind faith:

The Legislature passed the Privacy Initiative, the people approved it, and we must enforce it. In doing so, I am unwilling to substitute for the constitutional right the people endorsed a reflexive faith in the governmental and private actors they deemed wanting. Courts are obligated to ensure private entities do, in fact, act responsibly and reasonably.¹⁸⁸

Finally, Justice Werdegar criticized the majority for failing to address head-on whether the plaintiffs had alleged a sufficiently serious invasion of privacy.¹⁸⁹ In her view, the plaintiffs had done so: “the intrusion at issue, far from being trivial or insignificant, involves a substantial invasion of citizens’ interests and expectations of physical autonomy.”¹⁹⁰

These issues are not unique to *Sheehan*. In *Hernandez v. Hillsides, Inc.*, the director of a residential facility for abused children learned that someone had used the company’s computers after hours to look at pornographic websites.¹⁹¹ Hoping to catch the perpetrator, the director installed a motion-activated hidden camera in one of its offices.¹⁹² Two female employees who used the office to change clothes discovered the camera and sued, alleging both common law and constitutional privacy claims.¹⁹³ The California Supreme Court held that the facility had not violated the employees’

187. *Sheehan*, 201 P.3d at 482 (Werdegar, J., concurring).

188. *Id.*

189. *Id.*

190. *Id.* at 483.

191. *Hernandez v. Hillsides, Inc.*, 211 P.3d 1063, 1066 (Cal. 2009).

192. Defendants installed the equipment as follows:

[Defendants] installed video recording equipment in plaintiffs’ office and in a storage room nearby. First, in plaintiffs’ office, they positioned a camera on the top shelf of a bookcase, among some plants, where it apparently was obscured from view. They also tucked a motion detector into the lap of a stuffed animal or toy sitting on a lower shelf of the same bookcase. Second, these devices connected remotely to a television that [facility employees] moved into the storage room. A videocassette recorder was built into the unit.

Id. at 1069.

193. *Id.* at 1067.

constitutional right to privacy based on the employees' reduced expectation of privacy in the workplace,¹⁹⁴ the company's precautions to limit access to the surveillance equipment, and the recording only happening after regular work hours.¹⁹⁵ There are two primary problems with that balancing of the employees' privacy interests against the facility's justifications for its intrusion. One problem is the conclusion that because the director had not "secretly viewed or taped" plaintiffs, there was not a serious intrusion of privacy: the facility's "successful effort to avoid capturing plaintiffs on camera is inconsistent with an egregious breach of social norms."¹⁹⁶ That misses the point—the presence of covert recording equipment is the intrusion.

The other problem is that the court's approach minimizes the employees' privacy interests and is overly deferential to the facility's justification for its actions. The court agreed that Hillside had a legitimate business reason for its surveillance activities, noting that failing to investigate could have serious consequences—"the offending conduct posed a risk that the perpetrator might expose Hillside to legal liability from various quarters."¹⁹⁷ And the court rejected the employees' arguments that the facility could have employed several simple alternatives that were less invasive of personal privacy.¹⁹⁸ For example, the facility could have installed a visible camera outside the office to monitor who enters and leaves, or required employees to enter their credentials before using the computers. The court rejected these proposed alternatives because they "would not necessarily have achieved at least one of defendants' aims"—identifying who was watching pornography at work.¹⁹⁹

That analysis erroneously resembles rational basis review: because the business behaved reasonably, that offsets any privacy interest. The better approach is to acknowledge the constitutional violation but give the facility

194. *Id.* at 1074–79.

195. *Id.* at 1079–80.

196. *Id.* at 1080; *see id.* at 1082 ("Privacy concerns [in this case] are alleviated because the intrusion was 'limited' and no information about plaintiffs was accessed, gathered, or disclosed.").

197. *Id.* at 1081. The court further noted that "accessing pornography on company computers was inconsistent with Hillside's goal to provide a wholesome environment for the abused children in its care, and to avoid any exposure that might aggravate their vulnerable state." *Id.*

198. *Id.* at 1082. In doing so, it observed that "defendants are not required to prove that there were no less intrusive means of accomplishing the legitimate objectives," at least in part because it was a "private organization, acting in a situation involving decreased expectations of privacy." *Id.*

199. *Id.*

credit for exercising a measure of care by limiting the scope of injunctive relief or by awarding only nominal damages. As Justice O'Connor said, "There are no *de minimis* violations of the Constitution—no constitutional harms so slight that the courts are obliged to ignore them."²⁰⁰

Taken together, *Sheehan* and *Hernandez* permit courts to engage in privacy balancing that is overly deferential to an intruder's justifications at the expense of individual constitutional privacy rights. These cases illustrate the Goldilocks problem the *Hill-Loder* test created: rejecting strict scrutiny as too restrictive but embracing a too-permissive rational-basis-style balancing test. Fortunately, there is a solution that is just right: the "compelling public need" standard addresses this problem by first valuing the privacy interest highly, then requiring a countervailing need to justify an invasion. That standard leaves no doubt that when balancing privacy claims, the scales "verge in favor of the right of privacy."²⁰¹

D. Empirical Proof That Hill-Loder Inadequately Protects Privacy

In theory, the California constitutional privacy right provides greater privacy protection than the narrower federal privacy right.²⁰² In reality, the current *Hill-Loder* test reverses that standard. Rather than requiring the invader to show a compelling need, the existing test requires the *plaintiff* to meet a high standard to state a claim. The result is that *Hill-Loder* effectively bars constitutional privacy claims. We present the empirical data supporting that conclusion in the tables below.

Tables 1 and 2 present all published cases in which courts adjudicated California constitutional privacy claims. Table 1 shows the number of state and federal privacy claims that courts have upheld or denied from 2009 to 2020.²⁰³ Table 2 shows the state privacy claims by state and federal court. These results show that courts reject 80% of constitutional privacy claims.²⁰⁴ From that, we conclude:

200. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 36–37 (2004) (O'Connor, J., concurring).

201. *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 683 (Cal. 1994) (Mosk, J., dissenting).

202. *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 808 (Cal. 1997) ("[I]n many contexts, the scope and application of the state constitutional right of privacy is broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts."); *City of Santa Barbara v. Adamson*, 610 P.2d 436, 440 n.3 (Cal. 1980) ("[T]he federal right of privacy in general appears to be narrower than what the voters approved in 1972 when they added 'privacy' to the California Constitution.").

203. *See infra* Table 1.

204. *See infra* Tables 1, 2.

- The threshold elements prevent plaintiffs from proceeding with their case even if the intruding party has provided no justification for the conduct.²⁰⁵
- The legitimate need required to counterbalance a privacy interest is so trivial that defendants will prevail against most claims that survive the prima facie showing.

TABLE 1: AGGREGATED STATE AND FEDERAL CLAIMS FOR CALIFORNIA'S CONSTITUTIONAL RIGHT OF PRIVACY²⁰⁶

State & Federal Court: Public			
Informational Privacy Claim		Autonomy Privacy Claim	
38		17	
Privacy Claim Upheld (%)	Privacy Claim Denied	Privacy Claim Upheld (%)	Privacy Claim Denied
8 (21%)	30 (79%)	2 (12%)	15 (88%)

State & Federal Court: Private			
Informational Privacy Claim		Autonomy Privacy Claim	
33		4	
Privacy Claim Upheld (%)	Privacy Claim Denied	Privacy Claim Upheld (%)	Privacy Claim Denied
8 (24%)	25 (76%)	1 (25%)	3 (75%)

205. *Willard v. AT&T Commc'ns of Cal., Inc.*, 138 Cal. Rptr. 3d 636, 640 (Cal. Ct. App. 2012) (finding no need to inquire whether appellants had a privacy interest because they could not establish a reasonable expectation of privacy); *Faunce v. Cate*, 166 Cal. Rptr. 3d 61, 63–66 (Cal. Ct. App. 2013) (finding that a prisoner failed to show that he had a reasonable expectation of privacy when he met with prison medical staff); *In re Luis F.*, 99 Cal. Rptr. 3d 174, 180–85 (Cal. Ct. App. 2009) (finding that a student failed to state the elements for an invasion of privacy, so no balancing was required).

206. Data compiled by and on file with the authors. We separated claims against public entities from those against private actors.

TABLE 2: DISAGGREGATED STATE AND FEDERAL CLAIMS FOR CALIFORNIA'S CONSTITUTIONAL RIGHT OF PRIVACY²⁰⁷

State Court: Public				Federal Court: Public			
International Privacy Claim		Autonomy Privacy Claim		Informational Privacy Claim		Autonomy Privacy Claim	
30		14		8		3	
Privacy Claim Upheld (%)	Privacy Claim Denied	Privacy Claim Upheld (%)	Privacy Claim Denied	Privacy Claim Upheld (%)	Privacy Claim Denied	Privacy Claim Upheld (%)	Privacy Claim Denied
5 (17%)	25 (83%)	1 (7%)	13 (93%)	3 (38%)	5 (62%)	1 (33%)	2 (77%)
State Court: Private				Federal Court: Private			
International Privacy Claim		Autonomy Privacy Claim		Informational Privacy Claim		Autonomy Privacy Claim	
11		2		22		1	
Privacy Claim Upheld (%)	Privacy Claim Denied	Privacy Claim Upheld (%)	Privacy Claim Denied	Privacy Claim Upheld (%)	Privacy Claim Denied	Privacy Claim Upheld (%)	Privacy Claim Denied
2 (18%)	9 (82%)	1 (50%)	1 (50%)	6 (27%)	16 (72%)	0 (0%)	1 (100%)

207. Data compiled by and on file with the authors.

Table 1 shows that in 92 state and federal claims, 80% failed.²⁰⁸ Informational privacy claims constitute 77% of the total failed claims.²⁰⁹ Consistent with the weaker standard that the current analysis applies to invaders of informational interests, those claims fail at higher rates. Indeed, if cases disapproved by *Williams* for applying a compelling interest test to informational privacy claims are removed, the rejection rate falls to 76%.²¹⁰ The high failure rate suggests that the interest required to counterbalance a privacy interest is so low that the informational privacy claim is fatal in fact against plaintiffs.

For example, *People v. Laird* upheld a trial court motion denying expungement of DNA data after a felony was reduced.²¹¹ The court reasoned that even with redesignation “to an infraction for all purposes, the state’s legitimate interests in the collection and retention of Laird’s DNA . . . outweighs any privacy interest Laird may have in expungement.”²¹² The court repeatedly used “legitimate interests” to characterize the state’s concern, consistent with the *Williams* view of informational privacy as a “lesser interest.”²¹³ This result shows that the legitimate interest test reverses the electorate’s intended standard because that test only requires a defendant

208. The cases represent claims made to California state courts and federal courts. State cases comprise reported and unreported Court of Appeal decisions (including an Appellate Division of the Superior Court), and California Supreme Court decisions. Similarly, federal cases comprise reported and unreported cases. Because federal district court cases are reported, unlike state trial court cases, they are included alongside Court of Appeals decisions. A variety of cases were omitted even when appellants raised a privacy claim because their procedural posture prevented the court from resolving the claim. *See, e.g.,* Duarte Nursery, Inc. v. Cal. Grape Rootstock Improvement Comm’n, 191 Cal. Rptr. 3d 776, 786 (Cal. Ct. App. 2015) (rejecting plaintiff’s privacy claim because it was not raised in trial court); Grafilo v. Wolfsohn, 245 Cal. Rptr. 3d 564, 570–74 (Cal. Ct. App. 2019) (avoiding the privacy right claim by stating that there was not enough evidence for a subpoena); Strawn v. Morris Polich & Purdy, LLP, 242 Cal. Rptr. 3d 216, 226–29 (Cal. Ct. App. 2019) (stating that a demurrer on appeal does not provide a sufficient factual record to hold on the privacy claim). This analysis is further complicated by the different presumptions a court gives to claims depending on the procedural stance of the case. *Compare In re Q.R.*, 258 Cal. Rptr. 3d 27 (Cal. Ct. App. 2020) (rejecting the privacy claim after reviewing lower court’s holding on abuse of discretion standard), *with* Lopez v. Youngblood, 609 F. Supp. 2d 1125 (E.D. Cal. 2009) (approving the privacy claim on a motion to dismiss standard).

209. *See supra* Table 1.

210. *See supra* Table 1.

211. *People v. Laird*, 238 Cal. Rptr. 3d 313, 316–18 (Cal. Ct. App. 2018).

212. *Id.* at 325.

213. *Id.* at 323–25.

to show a lesser, legitimate interest while a plaintiff must show a fundamental interest.

Table 2 shows that federal courts denied 71% of privacy claims, while state courts denied 84% of privacy claims.²¹⁴ The variance in results flows from some federal courts not applying *Hill-Loder*—instead, they evaluate California constitutional privacy claims using an analysis that is closer to the intended compelling public need test. For example, in *Carter v. County of Los Angeles* a federal court held that a county violated their workers’ privacy rights by surveilling them with a hidden camera to investigate possible misconduct.²¹⁵ The facts resemble those in *Hillsides*, where the California Supreme Court rejected a privacy claim; in *Carter*, the federal court applied strict scrutiny and upheld a privacy claim.²¹⁶ The differing analyses were outcome-determinative: the federal court focused on the egregiousness of the surveillance, and it did not consider whether the actions furthered “legitimate interests” as the California court did in *Hillsides*.²¹⁷ The reverse example is equally probative: when federal courts apply the *Hill* test, the privacy claim gets denied.²¹⁸ The takeaway is that federal courts tend to apply a stricter compelling public need test that better fits Proposition 11, and plaintiffs are more likely to prevail.

These data suggest that *Hill-Loder* is a substantive limitation on state constitutional privacy claims. The number of claims rejected, the apparent difficulty of the threshold questions, and the particularity of the claims that were approved support this conclusion. The difference in the federal treatment of some privacy claims shows the preclusive effect *Hill-Loder* has on plaintiffs, and how differences in the analysis affect the rejection rates. These data show that the state constitutional privacy claim will be upheld or rejected because of the test, regardless of a claim’s merits. In fact, federal courts have commented that the standard California courts apply to state constitutional privacy claims is “a high bar.”²¹⁹ Our data show that federal courts uphold California privacy claims more often than California courts.

Like the strict scrutiny test *Hill* sought to evade, the existing test is similarly fatal in fact—to plaintiffs. The Proposition 11 ballot argument is unequivocal

214. See *supra* Table 2.

215. *Carter v. County of Los Angeles*, 770 F. Supp. 2d 1042, 1045–47, 1054 (C.D. Cal. 2011).

216. *Hernandez v. Hillsides, Inc.*, 211 P.3d 1063, 1082 (Cal. 2009).

217. *Carter*, 770 F. Supp. 2d at 1054.

218. See, e.g., *Cahen v. Toyota Motor Corp.*, 147 F. Supp. 3d 955, 973 (N.D. Cal. 2015) (“As pleaded, defendants’ tracking of a vehicle’s driving history, performance, or location ‘at various times,’ is not categorically the type of sensitive and confidential information the constitution aims to protect.”).

219. *In re Google Assistant Priv. Litig.*, 457 F. Supp. 3d 797, 830 (N.D. Cal. 2020).

about requiring a compelling public need to justify privacy invasions.²²⁰ Yet the *Hill-Loder* approach reverses the electorate's intended burden of proof: it requires a defendant to show a mere legitimate interest, while plaintiffs must show a fundamental interest.²²¹ That perverts the usual judicial approach to initiatives because rather than liberally interpreting the electorate's intent to guard its initiative power, the existing privacy analysis negates the electorate's will. Considering that autonomy claims are in the minority, and that the compelling interest test only applies to a subset of claims within that minority, the result is that the *Hill-Loder* approach bars nearly all constitutional privacy claims. That is empirical proof that the current analysis has maimed Proposition 11 and negated the electorate's intent.

V. WE HAVE A BETTER IDEA

Proposition 11 sets both privacy and necessity at the high end of "compelling" interests, which requires a strong showing of compelling public need from a defendant to permit invasion. The courts correctly required a need equivalent to the privacy interest to justify an invasion but erred by moving both interests to the midpoint on a vertical scale of interests, reducing both from "compelling" to "legitimate." This has several negative effects: it lowers a defendant's required showing; it places the burden on a plaintiff to prove a greater interest; and it devalues privacy from a fundamental right to something ordinary.

That explains why the California Supreme Court has rejected every privacy claim it considered since *Hill*.²²² This is aptly illustrated in *Pioneer Electronics, Inc. v. Superior Court*, where the court dismissed the privacy claim and emphasized the low bar to dismissal: "[T]rial courts necessarily have broad discretion to weigh and balance the competing interests."²²³ Overall, California courts have rejected over 80% of all such privacy

220. See *supra* Section III.A.

221. See *supra* Section IV.

222. See, e.g., *Williams v. Superior Court*, 398 P.3d 69, 74 (Cal. 2017) (holding that disclosure of private employee's contact information to plaintiff in putative class action under the Private Attorney General Act did not violate California's privacy clause); *County of Los Angeles v. L.A. Cnty. Emp. Rels. Comm'n*, 301 P.3d 1102, 1105 (Cal. 2013) (holding that disclosure of employees' contact information to union did not violate California's privacy clause).

223. *Pioneer Elecs. (USA), Inc. v. Superior Court*, 150 P.3d 198, 205 (Cal. 2007).

claims between 2009 and 2020.²²⁴ Abandoning the compelling public need standard in favor of a general balancing test has arguably resulted in California’s constitutional privacy clause providing no greater protections against private intrusions on informational privacy than would have existed without Proposition 11. California courts now have little incentive to expand state constitutional privacy protections; while the current doctrine was developing, new state and federal statutes granted greater privacy protections, particularly for the informational privacy that the current doctrine neglects.²²⁵ As a result, California’s constitutional privacy clause has proven to be far less impactful than California voters intended in 1972.

The solution is to abrogate *Hill–Loder* and restore a compelling public need test. Concerns about invoking strict scrutiny can be addressed by adopting the sliding scale interest-balancing Justice Mosk proposed in his *Hill* dissent.²²⁶ In our proposed approach, constitutional privacy is a compelling individual liberty interest at the high end of the scale, and an invader must show an equally compelling public need to justify an invasion. In the following sections we describe our approach in detail, defend it from anticipated critiques, and show how it might operate in practice.

A. *Abrogate Hill–Loder and Restore the Compelling Public Need Test*

Recognizing the “compelling public need” standard would serve two purposes: it would provide critical guidance to lower courts considering constitutional privacy claims, and it would guard against the potential for privacy analysis to devolve into a boundless reasonableness inquiry. We would adopt Justice Mosk’s definition of compelling public need: “What is demanded is a ‘need’ on the part of the intruding party that is both ‘compelling’ and ‘public.’”²²⁷ That is consistent with the ballot argument.

224. Rodolfo Rivera Aquino, *California’s Constitutional Privacy Guarantee Needs a Reset*, SCOCABLOG (Apr. 9, 2021), <http://scocablog.com/californias-constitutional-privacy-guarantee-needs-a-reset/> [<https://perma.cc/WH6W-6VTN>]. One exception is an opinion published while we drafted this article. In a 4–3 decision, rare for the typically unified modern court, the California Supreme Court held in *Mathews v. Becerra*, 455 P.3d 277, 281 (Cal. 2019), “that plaintiffs have asserted a cognizable privacy interest under the California Constitution and that their complaint survives demurrer.” The Chief Justice dissented, and with two justices concurring, would have held that the claim did not survive a demurrer—where all facts in the complaint are assumed true—because in her view those facts did not “establish that the challenged conduct infringes upon a reasonable expectation of privacy.” *Id.* at 300 (Cantil-Sakauye, C.J., dissenting).

225. See LOTHAR DETERMANN, CALIFORNIA PRIVACY LAW: PRACTICAL GUIDE AND COMMENTARY, U.S. FEDERAL AND CALIFORNIA LAW 1–4 (4th ed. 2020) for a list of and commentary on federal and California privacy statutes.

226. *Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d 633, 682–83 (Cal. 1994) (Mosk, J., dissenting).

227. *Id.*

It is also consistent with *White*, which describes the standard for upholding a constitutional privacy claim as “a strong suspicion” that the material “may be largely unnecessary for any legitimate, let alone ‘compelling,’ governmental interest.”²²⁸

Replacing *Hill-Loder* with Justice Mosk’s position is justified because his position was founded on the Privacy Initiative’s ballot materials and reflects the public’s understanding of the constitutional right to privacy when it was enacted. Fidelity to voter intent is the central concern when interpreting an initiative constitutional amendment: when “[f]aced with a constitutional amendment adopted by initiative, . . . we are obliged to set aside our personal philosophies and to give effect to the expression of popular will, as best we can ascertain it, within the framework of overriding constitutional guarantees.”²²⁹ Justice Mosk’s position expressly relies on that obligation: “This is not a case about the ‘policy’ this court may think it best to formulate and implement with regard to privacy. Rather, it is a case about the California Constitution and the role of the judiciary within the order it establishes.”²³⁰

As we did here, Justice Mosk analyzed the Privacy Initiative’s text and the ballot arguments to determine intent.²³¹ From these sources, Justice Mosk derived eight guiding principles:

1. “[T]he *status* of the right of privacy is variously declared to be ‘fundamental,’ ‘compelling,’ and ‘basic,’” from which “[i]t follows that the right of privacy ‘should be abridged only when there is compelling public need.’”²³²
2. “[T]he *source* of the right of privacy is ‘our traditional freedoms’ and our ‘American heritage’ . . . as reflected in the common law, federal and state statutes, and federal and state constitutional law generally, including . . . the guaranties against unreasonable searches and seizures in the Fourth Amendment to the [U.S.] Constitution and article I, section 13 of the California Constitution.”²³³

228. *White v. Davis*, 533 P.2d 222, 234 (Cal. 1975).

229. *In re Lance W.*, 694 P.2d 744, 747 (Cal. 1985); see *Hodges v. Superior Court*, 980 P.2d 433, 437 (Cal. 1999) (“In the case of a voters’ initiative statute . . . we may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.”).

230. *Hill*, 865 P.2d 633, 679 (Mosk, J., dissenting).

231. *Id.* at 680–82.

232. *Id.* at 682 (quoting PROPOSED AMENDMENTS, *supra* note 3, at 27).

233. *Id.* at 684.

3. “[T]he *definition* of the right of privacy is simply the ‘right to be left alone.’”²³⁴
4. The *substance* of the right of privacy has three major aspects: *informational privacy*, which is “a protectible interest against an intruding party’s obtaining and/or publishing of private information belonging to the party intruded upon;” *autonomy privacy*, which is “a protectible interest against an intruding party’s interference with private conduct by the party intruded upon;” and *privacy* “properly so called,” which is “a protectible interest against an intruding party’s very act of invading the solitude of the party intruded upon.” Each of these interests “is of equal stature.”²³⁵
5. “[T]he *scope* of the right of privacy is broad.”²³⁶
6. “[T]he *nature* of the right of privacy is dynamic.”²³⁷
7. “[T]he *coverage* of the right of privacy is unlimited,” in that “it reaches both governmental and nongovernmental actors. Intrusion is what matters, not the identity of the intruder.”²³⁸
8. “[T]he *character* of the right of privacy is justiciable,” meaning that courts can enforce it and remedy violations.²³⁹

From these principles, Justice Mosk proposed a straightforward test that gave meaning to the “compelling public need” standard enacted by the voters:

Recall that the right of privacy may be abridged only when there is compelling public need; conduct adversely affecting, but not abridging, an established right of privacy may be allowed if reasonable; conduct bearing on a fictive “right of privacy” is not subject to any scrutiny at all.

Accordingly, the plaintiff must plead that he has a right of privacy and that it was interfered with by the defendant. The defendant may then plead, beyond simple denial, that any conduct on his part adversely affecting the right of privacy was justified by a compelling public need if it rose to the level of abridgment or that it was allowed as reasonable if it did not. The plaintiff must prove his right of privacy and the defendant’s interference therewith by shouldering the generally applicable burden of proof by a preponderance of the evidence. The defendant must prove under the same burden the justification or allowance of his conduct.²⁴⁰

234. *Id.*

235. *Id.* at 685.

236. *Id.* at 686.

237. *Id.* at 687.

238. *Id.*

239. *Id.* at 688.

240. *Id.* (citing CAL. EVID. CODE § 115).

Justice Mosk’s application of this proposed standard to the NCAA’s drug-testing program in *Hill* provides further guidance on how it should work in practice. Two key questions refine the mode of analysis:

- Parsing how compelling a public need may be is a dual inquiry. A “compelling public need” must be “a ‘need’ on the part of the intruding party that is both ‘compelling’ and ‘public.’”²⁴¹ A need is compelling “if it is actually required by the intruding party under all the circumstances,” and a need is public “if it is deemed valid by the community at large.”²⁴² Thus, the standard includes a subjective element and an objective community standards element.
- The other question is whether the privacy intrusion is tailored to the interest it purports to serve: the invader’s claimed need “must extend to the means used as well as the interests furthered.”²⁴³ This tailoring is critical: “Otherwise, any interests, so long as they were ‘compelling,’ would always justify every means, no matter how offensive.”²⁴⁴

Considering the ballot materials, contemporary intent evidence, and contemporary judicial interpretation, we conclude that Justice Mosk was right. Our independent analysis of those materials, informed by our empirical analysis of how *Hill–Loder* operates in practice, compels us to agree with his position. Beyond realigning California privacy law with the voters’

241. *Id.* at 694.

242. *Id.*; *see id.* at 683 (“‘Public,’ for its part, means that the ‘need’ is one that the community at large deems valid and not merely the intruding party.”); *id.* (reviewing ballot argument and explaining that that “a ‘legitimate need’ is one that is actually required by the intruding party— it is a *need*—and is deemed valid by the community at large—it is *legitimate*”).

243. *Id.* at 694.

244. *Id.* at 683. Guidance for the tailoring inquiry may be found in the U.S. Supreme Court’s cases applying heightened, but not strict, scrutiny when evaluating the means-end fit in the First Amendment context. The Court in *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014), expressed the necessity of such tailoring:

Even when the Court is not applying strict scrutiny, we still require a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.

The Court further discussed the tailoring demanded by both exacting and strict scrutiny in *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2383–85 (2021).

intent and understanding, several practical reasons motivate revisiting *Hill-Loder*.

First, the steady advance of technology that motivated the Privacy Initiative in 1972 has continued unabated over the ensuing fifty years, placing Californians' privacy interests at greater risk of intrusion. For example, in today's terms, what if the NCAA drug-testing program employed mouth swabs, reasoning that it is less intrusive than urinalysis? Compulsory buccal swabs would provide the NCAA, the school, and others with access to highly sensitive personal information: such swabs can be used to compile a student's complete genetic profile.²⁴⁵ Or perhaps Stanford University requires its student athletes to wear a school-issued activity tracker during their athletic season. Many wearable devices would enable the school to monitor, track, and compile a host of information, including precise location information, heart rate, sleep data, and oxygen saturation.

Next, adopting a Mosk-style compelling public need standard would better protect Californians' privacy rights. Our *Hill-Loder* empirical study above shows that the existing doctrine has drifted from the voter's intent. The result has been to undermine the privacy rights that the voters sought to secure. In *Hillsides*, for example, the existing analysis permitted a ruling that an employer can covertly record employees in a private office.²⁴⁶ The Mosk analysis would have started by recognizing that the employees' right to privacy was invaded by being surreptitiously recorded. The compelling public need analysis then turns to a series of nested questions that ensure that the plaintiffs' privacy claims are fully considered. At the first step, the burden would be on the employer to either prove that the abridgement "was justified by a compelling public need" or establish that the conduct was "reasonable" because it only "adversely affected" the employees' right to privacy.

Assuming there was an abridgement, then the inquiry turns to whether there was a "compelling" need for the surveillance. Was it "actually required" "under all the circumstances?" If so, was the need "public"—was it "deemed

245. See, e.g., Eric Ravenscraft, *How to Protect Your DNA Data Before and After Taking an At-Home Test*, N.Y. TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/smarter-living/how-to-protect-your-dna-data.html> [<https://perma.cc/U5H7-4FUC>]; see also *Maryland v. King*, 569 U.S. 435, 446 and 465 (2013) (holding that buccal swab to obtain arrestee's DNA sample was a reasonable search for Fourth Amendment purposes). Indeed, some research suggests that urine samples can now be used as a source to obtain DNA. Souvick Ghatak, Rajendra Bose Muthukumaran & Senthil Kumar Nachimuthu, *A Simple Method of Genomic DNA Extraction from Human Samples for PCR-RFLP Analysis*, 24 J. BIOMOLECULAR TECHS. 224, 224–25 (2013); Latifa El Bali et al., *Comparative Study of Seven Commercial Kits for Human DNA Extraction from Urine Samples Suitable for DNA Biomarker-Based Public Health Studies*, 25 J. BIOMOLECULAR TECHS. 96, 96 (2014).

246. *Hernandez v. Hillsides*, 211 P.3d 1063, 1082 (Cal. 2009).

valid by the community at large?” This requires the defendant to particularize its interest: to show that it had a compelling interest in preventing staff from viewing pornography (particularly in a children’s residential facility) and that this interest is recognized by the community. The final step is a bulwark against a freeform reasonableness test: the defendant must justify its action by showing that the means used are tailored to the underlying interest. Was the privacy intrusion “actually required” under the circumstances? Given the obvious less-invasive alternatives that were available, the employer would struggle to show that was the case. The compelling public need test thus vindicates the plaintiffs’ privacy interests while accounting for all of the underlying circumstances.

Finally, adopting the compelling public need standard would also correct a critical flaw in *Sheehan*, which placed significant weight on the NFL and the 49ers being private entities.²⁴⁷ As the ballot materials and Justice Mosk made clear, “Intrusion is what matters, not the identity of the intruder.”²⁴⁸ The ballot materials provide that “the *coverage* of the right of privacy is unlimited,” and “it reaches both governmental and nongovernmental actors.”²⁴⁹ Still, we concede that the ultimate result in *Sheehan* would likely be the same under our proposed compelling public need test. While the 49ers would bear the burden of proving their conduct was justified, we expect they would argue that pat-down inspections only “adversely affect” ticketholders’ right to privacy such that their conduct should be allowed as “reasonable.” Alternatively, the team would argue that such inspections were required under all the circumstances to protect the safety of spectators, and that spectator safety is deemed valid by the community at large.

The ballot materials cannot reasonably be read to require a weaker standard than the compelling public need test Justice Mosk proposed. We endorse that test here because we reach the same conclusion from reviewing those materials and our empirical study of the right-devaluing results of the *Hill–Loder* analysis.

247. *Sheehan v. S.F. 49ers, Ltd.*, 201 P.3d 472, 479–80 (Cal. 2009).

248. *Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d 633, 687 (Cal. 1994) (Mosk, J., dissenting).

249. *Id.*

B. Constitutional Privacy Supplements Statutory Remedies

Some might ask why a more robust constitutional privacy, even if it would better reflect voters' intent in passing Proposition 11, is necessary at all when California has an array of privacy statutes that protect similar interests. California does have several statutory schemes that provide robust privacy protections to consumers and citizens, including some laws with civil and criminal penalties.²⁵⁰ Yet as multiple examples below reveal, those statutes all limit their scope to a specific privacy issue and apply only to particular contexts or particular people. A generalized constitutional privacy right has no such limitations. Although statutory damages and other monetary remedies remain an attractive litigation option when a statutory claim applies, robust constitutional privacy can be a backstop protection for privacy interests no matter the context, whether as an alternative to a statutory claim or where no statutory claim would fit. An effective constitutional privacy claim can also vindicate privacy rights where a monetary award is not the sole, or even the primary, interest for a plaintiff. This constitutional privacy protection will remain resilient in the face of an ever-shifting statutory landscape where the legislature or the voters tinker with statutory privacy protections.²⁵¹

For example, the California Consumer Privacy Act of 2018 (CCPA) applies only to certain businesses.²⁵² Under the CCPA, a "business" is an entity that, among other requirements, "collects consumers' personal information, or on the behalf of which such information is collected and that alone, or jointly with others, determines the purposes and means of the processing of consumers' personal information."²⁵³ Thresholds for the volume of business conducted ensure that smaller businesses do not face the burdens of complying with the CCPA.²⁵⁴ But a small business not subject to the CCPA could still violate a consumer's privacy.

250. See sources cited *supra* note 172; see also CAL. PENAL CODE § 502 (Deering 2021) (codifying California's Computer Data Access and Fraud Act, or "CDAFA"); CAL. CIV. CODE §§ 56–56.37 (Deering 2021) (codifying the "Confidentiality of Medical Information Act" or "CMIA").

251. Compare, for example, the California Consumer Privacy Act of 2018, with the same statutory scheme amended nearly two years later by Proposition 24 on the November 2020 ballot, known as the California Privacy Rights Act of 2020, which will become operative on January 1, 2023. See CAL. CIV. CODE §§ 1798.100–1798.199 (Deering 2021) (codifying the California Consumer Privacy Act of 2018); California Privacy Rights Act of 2020, Assemb. B. 1490, 2021–22 Leg., Reg. Sess. (Cal. 2021) (codified in part at CAL. CIV. CODE § 1798.199.10).

252. See CAL. CIV. CODE § 1798.140(c) (Deering 2021).

253. *Id.* § 1798.140(d)(1).

254. Those thresholds include the following: having annual gross revenues in excess of \$25 million; annually buying, receiving for the business's commercial purposes, selling or sharing for commercial purposes, personal information of 50,000 or more consumers,

Another example of a statutory scheme that addresses specific privacy interests in a particular context is California’s Confidentiality of Medical Information Act (CMIA).²⁵⁵ The CMIA obligates a provider of health care, health care service plan, pharmaceutical company, or contractor to maintain “medical information . . . in a manner that preserves the confidentiality of the information contained therein,” and any such party “who negligently . . . maintains, preserves, stores, abandons, destroys, or disposes of medical information” is subject to specified remedies.²⁵⁶ Those remedies include nominal damages of \$1,000 and actual damages from “any person or entity that has negligently released confidential information or records.”²⁵⁷ Like the CCPA and CPRA, this statute will apply only to certain individuals or entities, such as a health care service plan, a health care provider, a pharmaceutical company, or certain contractors as defined by the statute.²⁵⁸ Violating the CMIA requires “an unauthorized, unexcused disclosure of privileged medical information.”²⁵⁹ This privileged information, or “medical information,” must be “individually identifiable information” about “a patient’s medical history, mental or physical condition, or treatment.”²⁶⁰ Thus, the theft of a hospital index containing personal identifying information—including names, medical record numbers, dates of birth, and the last four digits of a person’s Social Security number—would *not* support a CMIA claim unless that index also included information that fell under the statutory definition for medical information.²⁶¹

When examining the limits under statutes such as the CCPA and CMIA, including to whom the statutes do or do not apply and the activity that

households, or devices; or deriving 50% or more of annual revenues from selling consumer’s personal information. *Id.* § 1798.140(d)(1)(A)–(C).

255. *Id.* §§ 56.10–56.37.

256. *Id.* § 56.101(a).

257. *The Confidentiality of Medical Information Act (CMIA)*, CONSUMER FED’N OF CAL., <https://consumercal.org/about-cfc/cfc-education-foundation/cfceducation-foundation-your-medical-privacy-rights/confidentiality-of-medical-information-act/> [<https://perma.cc/AT6J-MVFT>]; CAL. CIV. CODE § 56.36(b) (Deering 2021).

258. CAL. CIV. CODE § 56.10 (Deering 2021); *id.* § 56.05(d), (g), (l), (m); *see id.* § 56.06. The CMIA also requires employers who receive medical information to safeguard that information and prohibits them from disclosing medical information without employee authorization, though there are exceptions. *See id.* §§ 56.20–56.245.

259. *Sutter Health v. Superior Court*, 174 Cal. Rptr. 3d 653, 660 (Cal. Ct. App. 2014) (quoting *Brown v. Mortensen*, 253 P.3d 522, 533 (Cal. 2011)).

260. CAL. CIV. CODE § 56.05(j) (Deering 2021).

261. *Eisenhower Med. Ctr. v. Superior Court*, 172 Cal. Rptr. 3d 165, 166, 168 (Cal. Ct. App. 2014).

falls under the statutes, it is clear that there are several possible privacy interest violations that those statutes would not remedy.²⁶² Thus, a robust constitutional privacy protection has an important place in safeguarding citizens' privacy interests against those violations, especially where a statute will not provide that protection because a business is a particular size or the violation does not involve "medical information." The compelling public need test we endorse will permit appropriate scrutiny of potential privacy violations without requiring a wronged citizen to jump through the hoops of a particular statute.²⁶³ Even if a robust constitutional privacy doctrine still, in most cases, falls under one of California's privacy statutes, there is value in a baseline constitutional value and a default constitutional claim with less possible exposure for a defendant. That scenario permits plaintiffs to vindicate their privacy interests if no statutory claim is available.

A reliable constitutional claim balances the legislature's ability to modify statutory schemes. Having robust constitutional protections—as intended originally by the voters who approved the Privacy Initiative—is an important backstop protection for privacy interests regardless of what statutory changes occur in the future.²⁶⁴ For example, there are recent changes to the CCPA that in some ways expand privacy protections,²⁶⁵ but the amended statute in other ways narrows the subset of businesses to

262. Indeed, courts have recognized this gap between the CCPA and California's constitutional right of privacy. "[T]he CCPA is a statute that is focused on particular practices; namely, it seeks to address the sale of PI [—personal information—] and the disclosure of PI for business purposes." *Kaupelis v. Harbor Freight Tools USA, Inc.*, No. SACV 19-1203 JVS(DFMx), 2020 WL 7383355, at *2 (C.D. Cal., Sept. 28, 2020).

263. The appeal of large amounts of statutory damages possible in class action lawsuits involving large data breaches will still encourage litigants to pursue statutory claims even if an underlying constitutional privacy claim is easier to prove. *See, e.g., In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-MD-02752-LHK, 2020 WL 4212811, at *5, 10, 12 (N.D. Cal. July 22, 2020), appeal dismissed, No. 20-17438, 2021 WL 2451242 (9th Cir. Feb. 16, 2021); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 318 (N.D. Cal. 2018) (involving a settlement fund of \$115 million); *see also* Holly S. Hosford, *Avoiding Annihilation: Why Trial Judges Should Refuse to Certify a FACTA Class Action for Statutory Damages Where the Recovery Would Likely Leave the Defendant Facing Imminent Insolvency*, 81 Miss. L.J. 1941, 1943 (2012) (discussing large amounts of statutory damages awards stemming from large class sizes); Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. REV. 103, 106 (2009) (discussing statutory damages and class actions).

264. *See supra* note 252 (noting that the CPRA amends and expands the CCPA).

265. *See* CAL. CIV. CODE § 1798.140(ah)(1) (Deering 2021) (adding a definition for sharing personal information, to be operative January 1, 2023). *Compare, e.g., id.* § 1798.140(c)(1)(C), *with id.* § 1798.140(d)(1)(C) (expanding definition of business to include businesses that derive 50% or more of annual revenues from selling "or sharing" consumers' personal information, to be operative January 1, 2023). These changes will expand application of the statutory scheme to businesses that profit from sharing, but not necessarily selling, personal information.

which it applies.²⁶⁶ A constitutional privacy claim is a constant floor while the legislature and voters further refine statutory schemes in an effort to maximize statutory goals while minimizing undesired costs and burdens.

Finally, there may be concern about a more robust constitutional privacy doctrine inspiring plaintiffs to bring California constitutional privacy claims. That's unlikely: plaintiffs already raise California constitutional law and common law privacy claims, along with statutory privacy claims, on a regular basis.²⁶⁷ As explained in the next section, our proposed compelling public need analysis will not displace statutory schemes because the California constitutional privacy claim has only limited remedies.²⁶⁸ California's privacy statutes and a robust, accurate view of the California constitutional right to privacy can coexist and complement each other.²⁶⁹

266. Compare, e.g., *id.* § 1798.140(c)(1)(B) (Deering 2021), with *id.* § 1798.140(d)(1)(B) (expanding threshold from 50,000 consumers to 100,000 consumers for a business to qualify under the statute, to be operative January 1, 2023).

267. See, e.g., *McCoy v. Alphabet, Inc.*, No. 20-CV-05427-SVK, 2021 WL 405816, at *6–8, 13–14 (N.D. Cal. Feb. 2, 2021) (considering allegations of constitutional and common law privacy claims as well as allegations of violations of the CCPA and California's Invasion of Privacy Act); *Cohorst v. BRE Props., Inc.*, No. 10cv2666JM (BGS), 2011 WL 3475274, at *3 (S.D. Cal. Aug. 5, 2011) (noting the “essence of Plaintiffs’ claim” as an alleged violation of “California’s constitutional right to privacy and the Privacy Act . . . by monitoring, recording, or eavesdropping on telephonic conversations” and seeking statutory damages available under California Penal Code section 637.2); *Del Campo v. Mealing*, No. C 01-21151 JW, 2011 WL 7479162, at *1 (N.D. Cal. May 20, 2011) (considering claim for actual and statutory damages under the Fair Debt Collection Practices Act as well as liability for violation of California constitutional privacy rights).

268. See, e.g., *Katzberg v. Regents of Univ. of Cal.*, 58 P.3d 339, 348–50 (Cal. 2002) (citing numerous cases in which California courts refused to extend remedies for violations of the California constitution to money damages).

269. This complementary relationship between statutory privacy claims and constitutional privacy claims also is unlikely to create a flood of litigation in federal courts. Aside from the reality that plaintiffs already plead these claims together, see *McCoy*, 2021 WL 405816, at *6, 8, 13, the Supreme Court's recent holding in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), reduces the likelihood of an onslaught of privacy claims. There, the Court required a showing of concrete harm to establish standing to sue in federal court even where a statute authorizes statutory damages. *TransUnion*, 141 S. Ct. at 2214. Thus, a requirement of concrete harm will ensure that both constitutional privacy claims, which do not include the possibility of statutory damages, and statutory privacy claims, many of which do permit statutory damages, do not flood federal courts.

C. Litigants Have Powerful Tools to Vindicate Their Privacy Rights

Remedies for constitutional privacy violations likely do not extend beyond nominal damages and declaratory relief. This is beneficial because it permits courts to vindicate the constitutional right while not displacing the statutory remedies or creating unwarranted incentives for frivolous new claims. As the ballot materials note, although the right is “legal and enforceable” in the courts “for every Californian,”²⁷⁰ whether constitutional privacy claims have a damages remedy remains an open question.²⁷¹ Yet the absence of a damages remedy does not mean that a plaintiff lacks a meaningful remedy. The California Supreme Court has recognized on multiple occasions that other fundamental rights secured by article I can be enforced through declaratory or injunctive relief, or by seeking a writ of mandate.²⁷² Thus, plaintiffs have several options to vindicate their constitutional privacy rights.

Even without the threat of damages, plaintiffs have an important tool: the potential for recovering private attorney general fees under California Code of Civil Procedure section 1021.5.²⁷³ The California Supreme Court has explained:

270. PROPOSED AMENDMENTS, *supra* note 3, at 26.

271. *See, e.g., Katzberg*, 58 P.3d at 359.

272. *Degrassi v. Cook*, 58 P.3d 360, 363 (Cal. 2002) (acknowledging that the free speech clause of article I, section 2(a) supports an action for declaratory relief or injunction); *Katzberg*, 58 P.3d at 342–43 (recognizing that the due process clause under art. I, section 7(a) is enforceable by declaratory relief or injunction). The court’s analysis in each of these cases suggests that it would most likely find that an action for damages is not available under a constitutional tort theory. For example, in *Degrassi*, the court analyzed ballot materials and found “nothing in these materials to suggest that the voters considered, much less intended . . . to create or to foreclose, a damages remedy . . .” *Degrassi*, 58 P.3d at 364. Similarly, the ballot materials for Proposition 11 in 1972 indicate no intent to create a damages remedy. *See Katzberg*, 58 P.3d at 343, 356; *see also id.* at 351–52 (discussing ballot materials). This lack of availability of damages also alleviates concerns about privacy plaintiffs relying on a California constitutional privacy claim and nominal damages request to establish Article III standing in federal court. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796–97 (2021) (upholding standing on the basis of nominal damages for a First Amendment claim); *see also Katzberg*, 58 P.3d at 343–44, 351–52 (discussing *Bivens* federal constitutional claim and still concluding no damages remedy for state constitutional claim); *Degrassi*, 58 P.3d at 362 (noting case originally involved a damages claim under title 42 of the United States Code section 1983, a statute addressing state actors violating federal constitutional rights, along with the separate state constitutional claim for which the court declined to recognize a damages remedy). Privacy plaintiffs in this context will still need to satisfy the requirements of Article III standing if seeking relief in federal court. *See U.S. CONST.* art. III, § 2, cl. 1.

273. Under section 1021.5 of the California Code of Civil Procedure, [A] court may award attorneys’ fees to a successful party . . . in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred

[T]he private attorney general doctrine ‘rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible.’ Thus, the fundamental objective of the doctrine is to encourage suits enforcing important public policies by providing substantial attorney fees to successful litigants in such cases.²⁷⁴

California courts have long recognized that litigation that vindicates constitutional rights satisfies the baseline criteria for private attorney general fees.²⁷⁵ The California Supreme Court has also cautioned that a restrictive approach to fee awards “would allow vital constitutional principles to become mere theoretical pronouncements of little practical value to ordinary citizens who cannot afford the price of vindicating those rights.”²⁷⁶ Enforcing individual constitutional rights protects society as a whole, which justifies a fee award.²⁷⁷

The availability of meaningful remedies, coupled with the potential recovery of private attorney general fees, complements the available common law

on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement . . . are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

CAL. CODE CIV. PROC. § 1021.5 (Deering 2021).

274. *Graham v. DaimlerChrysler Corp.*, 101 P.3d 140, 147 (Cal. 2004) (quoting *Maria P. v. Riles*, 743 P.2d 932, 935 (Cal. 1987)).

275. *See, e.g., Woodland Hills Residents Ass’n, Inc. v. City Council*, 593 P.2d 200, 212 (Cal. 1979) (recognizing that the private attorney general doctrine may justify fees through “the effectuation of a fundamental constitutional or statutory policy”); *Press v. Lucky Stores, Inc.*, 667 P.2d 704, 708 (Cal. 1983); *see, e.g., Planned Parenthood of Santa Barbara, Inc. v. Aakhus*, 17 Cal. Rptr. 2d 510, 515 (Cal. Ct. App. 1993) (awarding fees to successful plaintiff in a constitutional privacy case and observing that the enforcement of “fundamental constitutional rights . . . benefits the entire public”); *County of San Luis Obispo v. Abalone All.*, 223 Cal. Rptr. 846, 856–57 (Cal. Ct. App. 1986) (considering section 1021.5 fees in litigation over the “fundamental right of protest”); *City of Fresno v. Press Commc’ns, Inc.*, 36 Cal. Rptr. 2d 456, 463 (Cal. Ct. App. 1994) (considering freedom of speech and press); *Best v. Cal. Apprenticeship Council*, 240 Cal. Rptr. 1, 13 (Cal. Ct. App. 1987) (considering constitutional right to religious accommodation); *Sokolow v. County of San Mateo*, 261 Cal. Rptr. 520, 528 (Cal. Ct. App. 1989) (considering equal protection).

276. *Press*, 667 P.2d at 708.

277. *Id.* (“There can be no doubt that vindication of the [free speech] rights at stake in this litigation effectuated fundamental constitutional principles,” which “benefits society as a whole” because “only by protecting each individual’s free speech and petition rights will society’s general interests in these rights be secured.”).

and statutory remedies. This approach makes the constitutional privacy claim viable enough that it can be a basis for relief but not so attractive that litigants will rush to the courthouse. This approach, therefore, addresses the Lucas–George concern that an overpowered constitutional privacy right would unleash a flood of litigation and upend California business and government,²⁷⁸ while vindicating Justice Mosk’s position that the voters intended to impose a compelling public need standard for California constitutional privacy violations.²⁷⁹

VI. CONCLUSION

California voters intended the Privacy Initiative to elevate the right to privacy to constitutional stature. Those voters understood that the right to privacy was “fundamental” and “essential” and made clear their intent that the “right should be abridged only when there is compelling *public* need.”²⁸⁰ Yet in *Hill*, the California Supreme Court eschewed the “compelling public need” standard based on faulty analysis and fears that the voters’ standard was unworkable, and substituted its own test for analyzing constitutional privacy claims.²⁸¹ The *Hill–Loder* conclusion that the “compelling public need” standard does not apply to constitutional privacy claims is badly reasoned, at odds with foundational principles governing constitutional interpretation, and upended voter intent.

The result is that the California constitutional privacy right is a nullity. That is error because no part of California’s constitution is meaningless. Section 26 of article I states: “The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.”²⁸² This means that the privacy provision in article I, section 1 is self-executing.²⁸³ The California constitutional privacy right needs no statutory or common law justification. It exists on its own merit, but the state’s courts have wrongly conflated the constitutional with the statutory and common law rights. The voters did not intend to codify the existing common law privacy right; therefore, the voters must have intended to do something new and different, and the constitutional privacy right must guard something beyond the common law and statutory protections.²⁸⁴

278. See *supra* Section IV.A.

279. *Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d 633, 679, 700–01 (Cal. 1994).

280. *Id.* at 645.

281. *Id.* at 654.

282. CAL. CONST. art. 1, § 26.

283. See *State Bd. of Educ. v. Levit*, 343 P.2d 8, 18–19 (Cal. 1959); *French v. Jordan*, 172 P.2d 46, 49 (Cal. 1946).

284. “Our reference to the common law as background to the California constitutional right to privacy is not intended to suggest that the constitutional right is circumscribed by

Yet the existing doctrine conflates the constitutional and common law protections.

This should not be so. The California Supreme Court should revisit the issue and abrogate *Hill-Loder*. This idea is supported by several general principles guiding the judicial role. Article I, section 26's interpretive principle not only commands that constitutional provisions must be obeyed, "but that disobedience of them is prohibited."²⁸⁵ Likewise, the state courts have a duty to validate the electorate's intent:

[They must] give effect to every clause and word of the constitution, and . . . take care that it shall not be frittered away by subtle or refined or ingenious speculation. The people used plain language in their organic law to express their intent in language which cannot be misunderstood, and [the courts] must hold that they meant what they said.²⁸⁶

It may well be that applying a compelling public need standard to constitutional privacy claims is unwise, or bad public policy, or will create problematic results. But courts should not impose their public policy views under the guise of interpretation, and courts "may not . . . interpret [initiative] measure[s] in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less."²⁸⁷ If the electorate becomes dissatisfied with the results of its act, it is within the electorate's power to fix the problem it created.

The California Supreme Court should revisit its privacy doctrine and adopt an approach that is true to the voters' intent that constitutional privacy violations be judged against a "compelling public need" standard. Doing so would reaffirm individual privacy rights and prevent lower courts from being overly deferential to intruders' justifications for their conduct. As Justice Mosk said, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."²⁸⁸

the common law tort. The ballot arguments do not reveal any such limitation." *Hill*, 865 P.2d at 648.

285. *Levit*, 343 P.2d at 19.

286. *Id.*

287. *Hodges v. Superior Court*, 980 P.2d 433, 437 (Cal. 1999); *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200, 207 (Cal. 2008) ("[T]o construe an initiative statute to have substantial unintended consequences strengthens neither the initiative power nor the democratic process.").

288. *Smith v. Anderson*, 433 P.2d 183, 191 (Cal. 1967) (Mosk, J., concurring) (quoting *Wolf v. Colorado*, 338 U.S. 25, 47 (1949) (Rutledge, J., dissenting)).

