

The California Constitutional Right to Privacy – A History and a Future Rooted in Intersectional Justice and Integrated Advocacy

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Why did California voters overwhelmingly approve adding an inalienable right to privacy to Article I, Section 1 of the California Constitution, how did that explicit constitutional privacy right come about, and what was it intended to do? An examination of the historical archives of both the California legislature and the ACLU of Northern California, which do not appear to have ever been extensively explored for answering these particular questions, reveal that the California constitutional privacy – both its origins and purpose – are deeply rooted in intersectional social justice and integrated legal advocacy.

The California constitutional right to privacy, the first in the nation, was drafted and passed in 1972. It was a time when many Californians had developed a very personal and visceral understanding about how the government and private actors could weaponize information about their private life and take advantage of new technology to attack and undermine social movements, protect the status quo and further expand government and corporate power, and criminalize gender, sexuality, and reproductive care.

California Constitutional Privacy Was Animated by the Fight for Racial Justice, Gender Justice, and other Important Social Movements at the Dawn of the Modern Digital Age

Lawyers and activists had been working for many years to blow the whistle on the Law Enforcement Intelligence Unit (LEIU), a clandestine nationwide network of police intelligence units operating and using surveillance to try to undermine the Black Liberation Movement and other racial justice movements.² The public had recently learned about widespread wiretapping and other electronic surveillance of Dr. Martin Luther King, Jr. and other civil rights leaders.³

The United States Supreme Court had decided both *Berger v. New York* and *Katz v. United States* in 1967, holding that Fourth Amendment protection against unreasonable search and seizure extends to the interception of communications.⁴ While the federal omnibus crime bill of 1968 legally authorized wiretapping for use by federal law enforcement, activists were successfully fighting California legislative efforts to extend wiretapping powers to local and state law enforcement.⁵

Movements for gender, sexuality, and reproductive justice were at a critical juncture. The United States Supreme Court had decided *Griswold v. Connecticut* in 1965, striking down the state’s anti-contraceptive statute on grounds that it violated a couple’s right to privacy.⁶ The Supreme Court later refined the right to privacy and to “be let alone” in *Stanley v. Georgia* in

1969, holding that it was unconstitutional to criminalize private possession of obscene material.⁷ Writing for the majority, Justice Thurgood Marshall made it clear that the rights to receive information and to personal privacy were fundamental to a free society.⁸ Activist energy was also in full swing to enact the Equal Rights Amendment (ERA), which had been passed by Congress in 1972 and sent to the individual states for ratification.⁹

It was also a significant inflection point for computerization and the exponential growth of technology. In 1969, ARPANET, the precursor to the Internet, delivered its first message from one computer to another – from a research lab at UCLA to a computer at Stanford.¹⁰ The first mobile phones were also in development, with the first mobile phone call being made by April 1973.¹¹ The public was starting to understand the potential implications of computerization and corporate information collection and misuse on society and our personal lives.¹²

California Constitutional Privacy was Elegantly Drafted as a High Impact Strategy Within a Broader Integrated Advocacy Vision

In the spring of 1972, Assembly Constitutional Amendment 51 (ACA 51) was introduced in the California legislature and was an important component of a novel integrated legal advocacy strategy to support social movements and expand rights and protections of Californians in the modern digital world.¹³ It was elegant and efficient, too, bolstering an emerging framework for social change with just a few words, by adding “and privacy” to the inalienable rights in Article I, Section 1 of the California Constitution and changing the word, “men,” to “people.”

Its author, Assemblymember Kenneth Cory,¹⁴ explained what animated the introduction of the constitutional amendment in his letter to the legislative file. He presciently discussed the rising surveillance ecosystem and the threats of surveillance capitalism, writing that “[i]n the face of a cybernetics revolution and the increasingly pervasive amount of information being compiled, it would be highly desirable that our constitution state in clear terms that each person has a fundamental right to privacy...” The constitutional amendment would create a positive, inalienable right to privacy and “put the State and private firms on notice that the people have this fundamental right and it can only be abridged when the public concern is an overriding concern, such as in court-ordered wiretapping.”¹⁵

Legislative testimony prepared in support of ACA 51 by Mary Dunlap, a 1971 Berkeley Law graduate and co-founder of the San Francisco-based legal organization Equal Rights Advocates in 1973, highlighted the importance of the constitutional right to privacy for gender, sexuality, and reproductive justice. She also fervently discussed how crucial it was to change the term, “men” to “persons,” and ensure that fundamental rights in law and practice are extended to all people.¹⁶

The staff report of the Assembly Constitutional Committee on ACA 51 further examined the purpose, reach and goals of the constitutional amendment, explaining that “with the technological revolution,” that the Fourth Amendment and other federal constitutional protections “do not offer sufficient protection...” and we must “develop new safeguards to

meet the new dangers.”¹⁷ The constitutional right would create a distinct, positive, and expansive right to both pursue and obtain privacy. It would chart a new path that did not rely on the case law that so far defined the right solely by prohibiting certain wrongs like unlawful search and seizure, telephone tapping, and unfair credit reporting, and was a formulation of privacy that was not clear “who is protected and from what.”¹⁸

California Constitutional Privacy Was Passed with Organized Political Power and Clear Goals

The legislative archives also reveal both the diversity of support for this effort as well as the significant opposition that it had to combat fifty years ago from powerful forces like government agencies and corporate lobbying interests. Many of the arguments against the constitutional right are the same types of arguments that privacy efforts still regularly face today. Memos from the legislative counsel and support letters in the summer of 1972 reveal that its author was battling opposition arguments from law enforcement that unsuccessfully tried to claim that the effort would undermine policing,¹⁹ from the Department of Motor Vehicles unsuccessfully questioning whether it would affect the “public records” status of automobile registration information,²⁰ and “pressures from those businesses that can profit from the various invasions of privacy...”²¹

Despite these forces in opposition, Assemblymember Cory succeeded in obtaining a two-thirds majority vote for ACA 51 in both houses of the California legislature. It moved to the next step in the constitutional amendment process²² and was put on the November 1972 ballot as Proposition 11.²³

The ballot argument in favor of the Privacy Initiative was officially authored by Assemblymember Cory and State Senate Majority Leader George Moscone. With urgency and precision, it explains its objectives, purpose and scope.

"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 of 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."
(emphasis in original)

The argument in favor continues:

"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. [emphasis in original.] 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..."

The argument continues: "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 a compelling public need..."

The argument concludes by stating that "ACA 51 also guarantees the right of privacy and our other constitutional freedoms extend to all persons by amending Article I and substituting the term "people" for "men." There should be no ambiguity about whether our constitutional freedoms are for every man, woman, and child in this state." (emphasis in original) ²⁴

The ACLU of Northern California strongly supported the constitutional right to privacy, both through the legislative process and as a ballot measure. In the September 1972 *ACLU News*, the organization powerfully explained how the growth of technology has reduced the friction that had been operationally protecting privacy, the importance of enacting the constitutional right with a scope covering both government and companies, and urged its adoption.²⁵

Proposition 11 was passed by the California voters in 1972 by a substantial majority, 62.9% of the vote.²⁶ With its passage, California became the first constitution in the nation – either federal or state – to include an explicit right to privacy.

The constitutional amendment was drafted and passed to set a clear legal trajectory for the courts: that the right to "pursue and obtain privacy" was an inalienable and legally enforceable right and that it applied to both government and private parties and should only be abridged when public concern is an overriding concern and there is a compelling public need. It enacted a modern right to privacy that understood and was specifically intended to address and robustly limit how technological advances and the surveillance ecosystem of both business and government actions could invade our private lives and undermine our fundamental rights.²⁷ It also unequivocally ensured that privacy—and all other inalienable rights in California—applied to all people.

But the archives also illuminate that its passage was also strategically intended to have a much broader integrated advocacy effect. That in addition to what it communicated to the courts, it would serve to educate and mobilize the public and help support additional change in the legislature and other arenas. As the Staff Report of the Assembly Committee on ACA 51 posited, "[w]ith the right of privacy explicitly written into the Constitution, it will itself become the basis for an expansion of constitutional protections."²⁸ This staff report also highlighted, "the major

contribution of this amendment is to make the public aware that its freedoms are being slowly eroded, that this trend must be reversed. Passage of Proposition 11 will serve notice on the Legislature and the Courts that the public will not permit the continual abrogation of their rights. The right to privacy must be clearly spelled out and must be firmly adhered to.”²⁹

California Constitutional Privacy Has Supported Significant Change

The passage of the constitutional right to privacy is an early example in the technology and civil liberties space of integrated advocacy in action – an approach that attorneys and other staff at the ACLU of Northern California have expanded and refined in recent decades.³⁰ With integrated advocacy, organizations and activists utilize an approach to powering social change that considers and strategically leverages all available strategies, both within and outside of formal lawmaking arenas, to both build momentum and better support long-term social change.³¹

The passage of the California constitutional right to privacy has had a very significant impact across legal and policy arenas. It sent an unambiguous message to the legislature that the people demanded privacy and spurred political action to pass dozens of cutting-edge state privacy laws in both the government surveillance and consumer privacy contexts. The laws helped operationalize the inalienable right to privacy by statutorily providing more control over personal information and prohibiting privacy intrusions, rather than requiring Californians to go to court for redress after they have already suffered a privacy invasion.

This legacy includes laws like the landmark California Electronic Communications Privacy Act (CalECPA), which requires a warrant for government demands for electronic information or to search an electronic device,³² and the California Reader Privacy Act, which requires that government and civil litigants demonstrate a compelling interest in obtaining reader records and show that the information contained in those records cannot be obtained by less intrusive means.³³ The constitutional right also undergirds numerous privacy laws that protect against the use of surveillance technology, including face surveillance³⁴ and automatic license plate readers.³⁵

California has also been the national leader in enacting important consumer privacy laws, including the first laws to require businesses to provide people with privacy policies and data-breach notifications as well as provide a statutory right to know about and delete personal information being collected about them.³⁶ Today, these laws protect the privacy and civil rights of people in California and far beyond its state borders because of the diffuse nature of the internet and modern technology.³⁷ The constitutional right to privacy has also been an important lever for successfully pushing California-based technology companies like Facebook and Twitter to have corporate policies that protect against surveillance for people in this state and around the world.³⁸

California Constitutional Privacy at 50 Has Not Yet Achieved Its Full Promise

Though there have been many successes in the past fifty years, the challenges to translate our inalienable privacy rights into practice have also been formidable. Police and other government agencies and businesses have consistently tried to violate rights and undermine the proper scope and reach of the California constitutional right to privacy.³⁹ The California Supreme Court issued strong early rulings like *White v. Davis* in 1975, finding that police surveillance and data gathering activities on a UCLA professor constituted a prima facie violation of the state constitutional right of privacy. But the Supreme Court has also showed an unfortunate tentativeness to fully enforce the reach of the constitutional right and erected regrettable roadblocks to actually obtaining our right to privacy in cases like *Hill v. NCAA*.⁴⁰

But Californians understand what is at stake and strongly support privacy rights, with voters expressing overwhelming support for increased privacy protections both related to government surveillance⁴¹ and company practices.⁴² More than 56% of California voters also supported the passage of Proposition 24 in 2020,⁴³ and earlier polling on consumer privacy suggests that more Californians might have supported it had it provided stronger privacy protections.⁴⁴

What was prescient in 1972 is now reality. There has been a dramatic rise in the reach of technology and most of us are living digital lives. Ninety-three percent (93%) of adults use the Internet⁴⁵ and ninety-seven percent (97%) own a mobile phone.⁴⁶ There has also been a commensurate growth in the financial and political power of technology companies.⁴⁷ Big Tech uses this power and money to actively litigate against privacy claims, undermine the ability to use the courts for redress, and to influence legislation to stop strong privacy laws or pass weak laws that protect its bottom line and do not actually protect rights.⁴⁸ Right now, Big Tech has also been working behind the scenes to try to pass a weak federal privacy law that could preempt and erase both California privacy laws and threaten the reach of the California constitutional right to privacy.⁴⁹

Now is the Time to Make the Constitutional Right to Privacy Meet the Moment and Work for the People

Movements for racial justice, gender and reproductive justice, and other civil rights are more critical today than ever in the aftermath of the Supreme Court decision in *Dobbs* and many states actively attacking reproductive and LGBTQ rights.⁵⁰ It is also evident that the trajectory of justice movements and our lives is increasingly shaped by the way technology is built and used by the government and business.⁵¹ The California constitutional right to privacy, a modern, inalienable right forged from movements for intersectional justice and passed to protect our fundamental rights in the modern digital age, must now rise to the challenge of the times and be made to really work for the people.

The 50th year of the California constitutional right to privacy and this Berkeley Law symposium is an important moment to reflect and think about what California constitutional privacy was intended to be and how it can and must now do more to promote intersectional justice in the digital age. We are fortunate that so many committed lawyers, political leaders, and activists

came together fifty years ago to make the California constitutional right to privacy a legal reality. Now we must rededicate ourselves to also making it a lived reality.

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² *ACLU of Northern California News vol. 47, no. 7*, California Historical Society (Oct. 1982), at 3, https://digitallibrary.californiahistoricalsociety.org/object/16640?islandora_paged_content_page=3 (last visited Sep. 21, 2023).

³ *Federal Bureau of Investigation*, The Martin Luther King, Jr. Research and Education Institute, Stanford University (n.d.), [https://kinginstitute.stanford.edu/federal-bureau-investigation-fbi#:~:text=In%20the%20following%20months%2C%20Hoover,SCLC\)%20offices%20in%20October%201963;FreshAir:DocumentaryExposesHowFBItriedtoDestroyMLKWithWiretaps,Blackmail,NPR](https://kinginstitute.stanford.edu/federal-bureau-investigation-fbi#:~:text=In%20the%20following%20months%2C%20Hoover,SCLC)%20offices%20in%20October%201963;FreshAir:DocumentaryExposesHowFBItriedtoDestroyMLKWithWiretaps,Blackmail,NPR) (Jan. 18, 2021), <https://www.npr.org/2021/01/18/956741992/documentary-exposes-how-the-fbi-tried-to-destroy-mlk-with-wiretaps-blackmail>.

The Citizens' Commission to Investigate the FBI, a group of antiwar activists, broke into an FBI field office in March 1971, stole more than a thousand documents, and first publicly exposed the widespread secret surveillance of the FBI. *The Burglary That Exposed COINTELPRO: Activists Mark 50th Anniversary of Daring FBI Break-in* (Democracy Now! television broadcast Mar. 9, 2021), https://www.democracynow.org/2021/3/9/50th_anniversary_fbi_office_cointelpro_exposure; Tom Jackman, *The FBI break-in that exposed J. Edgar Hoover's misdeeds to be honored with historical marker*, Wash. Post, Sep. 1, 2021, <https://www.washingtonpost.com/history/2021/09/01/fbi-burglary-hoover-cointelpro/>; Bonnie Raines, *I Broke Into an FBI Office and Took Every Document. Here's Why.*, ACLU, Jan. 15, 2014, <https://www.aclu.org/news/national-security/i-broke-fbi-office-and-took-every-document-heres-why>.

⁴ *Berger v. State of N.Y.*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967).

⁵ *Title III of The Omnibus Crime Control and Safe Streets Act of 1968 (Wiretap Act)*, Bureau of Justice Assistance (n.d.), <https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1284>; *ACLU of Northern California News vol. 37, no. 3*, California Historical Society (Apr. 1972), at 4, <https://digitallibrary.californiahistoricalsociety.org/object/16045> (last visited Sep. 21, 2023); *ACLU of Northern California News vol. 33, no. 8*, California Historical Society (Aug. 1968), at 1, <https://digitallibrary.californiahistoricalsociety.org/object/15658> (last visited Sep. 21, 2023).

⁶ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁷ *Stanley v. Georgia*, 394 U.S. 557 (1969).

⁸ “Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one’s own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.” *Stanley v. Georgia*, 394 U.S. 557 (1969).

⁹ *Equal Rights Amendment (ERA) of 1972*, National Archives Foundation (1972), <https://www.archivesfoundation.org/amendingamerica/equal-rights-amendment-era-of-1972/> (last visited Sep. 21, 2023).

¹⁰ *1969: The Internet’s First Message Sent From UCLA*, UCLA 100 (n.d.), <https://100.ucla.edu/timeline/the-internets-first-message-sent-from-ucla>.

¹¹ Michelle Delgado, *From ‘the Brick’ to the iPhone, the Cellphone Celebrates 50 Years*, *Smithsonian Mag.* (Apr. 3, 2023), <https://www.smithsonianmag.com/innovation/from-the-brick-to-the-iphone-the-cellphone-celebrates-50-years-180981910/>.

¹² See *Public Service Announcements by the New Mexico Civil Liberties Union (Godfrey Reggio)*, YouTube (1974), <https://www.youtube.com/watch?v=yah54al6Cks> (last visited Sep. 21, 2023).

¹³ The legislative archives reveal that a similar assembly constitutional amendment, ACA 69, was attempted in the previous legislative year-1971. But ACA 69 did not progress past the Assembly Judiciary Committee. See Staff Analysis, ACA 51 (Cory) As amended May. *Staff Analysis: ACA 51 (Cory), as introduced March 13, 1972*, Linked under *California Constitutional Right to Privacy*, ACLU of Northern California (Mar. 13, 1972), <https://www.aclunc.org/sites/default/files/Staff%20Analysis%20ACA%2051%20%28Cory%29%2C%20as%20introduced%20March%2013%2C%201972.pdf> (last visited Sep. 21, 2023).

¹⁴ Kenneth Cory was a Democratic Assemblymember representing Orange County from 1967-1974 and served as State Controller from 1976-1986. His obituary notes that he was a protégé of longtime Assembly Speaker Jesse M. Unruh and was popular with both Democrat and Republican colleagues. *Ken Cory; State Controller, Assemblyman*, L.A. Times, Nov. 14, 1998, <https://www.latimes.com/archives/la-xpm-1998-nov-14-mn-42652-story.html>.

¹⁵ *Kenneth Cory author letter to the legislative file*, Linked under *California Constitutional Right to Privacy*, ACLU of Northern California (n.d.), at 1-2, <https://www.aclunc.org/sites/default/files/Letter%20Response%20to%20Chairman%20Ignazio%20Vella%20from%20Hon.%20Kenneth%20Cory.pdf> (last visited Sep. 21, 2023).

¹⁶ *Testimony before Assembly Constitutional Amendments Committee by Cheriell Moensch Jensen, prepared by Mary Dunlap (April 24, 1972)*, Linked under *California Constitutional Right to Privacy*, ACLU of Northern California (Apr. 24, 1972), <https://www.aclunc.org/sites/default/files/Testimony%20before%20Assembly%20Constitutional%20Amendments%20Committee%20%28April%2024%2C%201972%29.pdf> (last visited Sep. 21, 2023).

¹⁷ *Staff report of Assembly Constitutional Committee on ACA 51 (before April 24)*, Linked under *California Constitutional Right to Privacy*, ACLU of Northern California (1972), at 5, <https://www.aclunc.org/sites/default/files/Staff%20report%20of%20Assembly%20Constitutional%20Committee%20on%20ACA%2051%20%28before%20April%2024%29.pdf> (last visited Sep. 22, 2023).

¹⁸ *Staff Analysis: ACA 51 (Cory), as introduced March 13, 1972*, Linked under *California Constitutional Right to Privacy*, ACLU of Northern California (Mar. 13, 1972), at 1, <https://www.aclunc.org/sites/default/files/Staff%20Analysis%20ACA%2051%20%28Cory%29%2C%20as%20introduced%20March%2013%2C%201972.pdf> (last visited Sep. 21, 2023).

¹⁹ *Legislative Counsel Memo from George H. Murphy and Marguerite Roth to Hon. Kenneth Cory (June 30, 1972)*, Linked under *California Constitutional Right to Privacy*, ACLU of Northern California (Jun. 30, 1972), <https://www.aclunc.org/sites/default/files/Letter%20from%20George%20H.%20Murphy%20and%20Marguerite%20Roth%20to%20Hon.%20Kenneth%20Cory%20%28June%2030%2C%201972%29.pdf> (last visited Sep. 21, 2023).

²⁰ *Legislative Counsel Memo from George H. Murphy and Marguerite Roth to Hon. Kenneth Cory (June 30, 1972)*, Linked under *California Constitutional Right to Privacy*, ACLU of Northern California (Jun. 30, 1972), at 1, <https://www.aclunc.org/sites/default/files/Letter%20from%20George%20H.%20Murphy%20and%20Marguerite%20Roth%20to%20Hon.%20Kenneth%20Cory%20%28June%2030%2C%201972%29.pdf> (last visited Sep. 21, 2023).

²¹ *Support letter from Carmel-by-the-Sea City Administrator Hugh Bayless to Hon. Donald L. Grunsky (June 12, 1972)*, Linked under *California Constitutional Right to Privacy*, ACLU of Northern California (Jun. 12, 1972), at 1, <https://www.aclunc.org/sites/default/files/Letter%20from%20Carmel-by-the-Sea%20City%20Administrator%20Hugh%20Bayless%20to%20Hon.%20Donald%20L.%20Grunsky%20%28June%2012%2C%201972%29.pdf> (last visited Sep. 21, 2023). The City Administrator of City of Carmel-by-the-Sea may have had a particular interest and engagement in privacy issues at that time due to the city's recent unsuccessful attempt to invalidate a state law requiring financial disclosures of local officials. *City of Carmel-By-The-Sea v. Young*, 2 Cal. 3d 259 (1970), <https://socal.stanford.edu/opinion/city-carmel-sea-v-young-30166>.

²² California ballot measures can be placed on the ballot either by 2/3 legislative passage or by public signature process. *Ballot Measures*, California Secretary of State (n.d.), <https://www.sos.ca.gov/elections/ballot-measures>.

²³ *RIGHT OF PRIVACY California Proposition 11 (1972)*, UC Law SF Scholarship Repository (n.d.), https://repository.uclawsf.edu/ca_ballot_props/762.

²⁴ *RIGHT OF PRIVACY California Proposition 11 (1972)*, UC Law SF Scholarship Repository (1972), at 26-27, https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1761&context=ca_ballot_props (last visited Sep. 21, 2023).

²⁵ *ACLU of Northern California News vol. 37, no. 7*, California Historical Society (Sep. 1972), <https://digitallibrary.californiahistoricalsociety.org/object/16083> (last visited Sep. 21, 2023).

²⁶ *RIGHT OF PRIVACY California Proposition 11 (1972)*, UC Law SF Scholarship Repository (n.d.), https://repository.uclawsf.edu/ca_ballot_props/762.

²⁷ “[T]he moving force behind the new constitutional provision was a more focussed privacy concern, relating to 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.” *White v. Davis*, 13 Cal. 3d 757 (1975), <https://socal.stanford.edu/opinion/white-v-davis-27879>.

²⁸ *Staff report of Assembly Constitutional Committee on ACA 51 (before April 24)*, Linked under *California Constitutional Right to Privacy*, ACLU of Northern California (1972), at 5, <https://www.aclunc.org/sites/default/files/Staff%20report%20of%20Assembly%20Constitutional%20Committee%20on%20ACA%2051%20%28before%20April%2024%29.pdf> (last visited Sep. 21, 2023).

²⁹ *Staff report of Assembly Constitutional Committee on ACA 51 (before April 24)*, Linked under *California Constitutional Right to Privacy*, ACLU of Northern California (1972), at 5, <https://www.aclunc.org/sites/default/files/Staff%20report%20of%20Assembly%20Constitutional%20Committee%20on%20ACA%2051%20%28before%20April%2024%29.pdf> (last visited Sep. 21, 2023).

³⁰ See *Technology & Civil Liberties*, ACLU of Northern California (n.d.), <https://www.aclunc.org/issue/technology-civil-liberties; Fighting High-Tech Government Surveillance>, ACLU of Northern California (n.d.), <https://www.aclunc.org/fighting-high-tech-government-surveillance>.

³¹ See Lucy Bernholz, Nicole Ozer, Kip Wainscott, & Wren Elhai, Stanford Digital Civil Society Lab, *Integrated Advocacy: Paths Forward for Digital Civil Society* (Jan. 2020), https://pacscenter.stanford.edu/wp-content/uploads/2020/01/Integrated-Advocacy-Report_Digital.pdf; See Scott L. Cummings, *Movement Lawyering*, 2017 Univ. Illinois L. Rev. 1645 (2017), UCLA School of Law, Public Law Research Paper No. 17-43, <https://ssrn.com/abstract=3067562>; See also Scott L. Cummings and Deborah L. Rhode, *Public Interest Litigation: Insights From Theory and Practice*, 36 Fordham Urb. L.J. 603 (2009), at 605, <https://ir.lawnet.fordham.edu/ulj/vol36/iss4/1> (“litigation - although a necessary strategy of social change, is never sufficient; it

cannot effectively work in isolation from other efforts”); See also Cause Lawyers and Social Movements (Austin Sarat & Stuart A. Scheingold eds., Stanford University Press 2006).

³² *California Electronic Communications Privacy Act (CalECPA) – SB 178*, ACLU of Northern California (n.d.), <https://www.aclunc.org/our-work/legislation/california-electronic-communications-privacy-act-calecpa-sb-178>.

³³ *Reader Privacy Act Signed into Law*, ACLU of Northern California blog (Oct. 3, 2011), <https://www.aclunc.org/blog/reader-privacy-act-signed-law>.

³⁴ *The Body Camera Accountability Act (AB 1215)*, Legislation, ACLU of Northern California (n.d.), <https://www.aclunc.org/our-work/legislation/body-camera-accountability-act-ab-1215>.

³⁵ *Lagleva v. Doyle (License Plate Surveillance)*, Case page, ACLU of Northern California (Jun. 2, 2022), <https://www.aclunc.org/our-work/legal-docket/lagleva-v-doyle-license-plate-surveillance>.

³⁶ *Privacy Laws*, State of California Department of Justice Office of the Attorney General (n.d.), <https://oag.ca.gov/privacy/privacy-laws#:~:text=Information%2DSharing%20Disclosure%2C%20%22Shine,out%20of%20such%20information%20sharing>.

³⁷ Many California privacy laws have been drafted (and these provisions staunchly defended throughout the legislative process) to support a broad scope by tying the legal requirements not to whether a business is located in California, but whether the business collects information about individuals in California. Many technology businesses may have California individuals using the service and it can sometimes be difficult for the business to ascertain with certainty who is a California individual and who is not. Since the business risks liability under the privacy law for violations and there are also compliance efficiency benefits to just applying the law to all users, many California privacy laws have by default provided privacy protections to people across the country. See e.g., Online Privacy Protection Act of 2003 - Online Privacy Protection Act of 2003 - Cal. Bus. & Prof. Code § 22575-22579 (West), https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=BPC&division=8.&title=&part=&chapter=22.&article=22575 (requiring any operator of commercial web sites or online services that collect personal information on California consumers through a web site to conspicuously post a privacy policy on the site and to comply with its policy); See also Julie Brill, *Microsoft will honor California’s new privacy rights throughout the United States*, Microsoft: Issues blog (Nov. 11, 2019), <https://blogs.microsoft.com/on-the-issues/2019/11/11/microsoft-california-privacy-rights/> (“Microsoft will honor California’s new privacy rights throughout the United States”).

³⁸ Elizabeth Dwoskin, *Facebook says police can’t use its data for ‘surveillance’*, Wash. Post: The Switch blog (Mar. 13, 2017), <https://www.washingtonpost.com/news/the-switch/wp/2017/03/13/facebook-says-police-cant-use-its-data-for-surveillance/>; *ACLU Demands Twitter Take Immediate Action to Stop Developers from Facilitating Government Surveillance of Users*, ACLU of Northern California, Jul. 9, 2020, <https://www.aclunc.org/news/aclu-demands-twitter-take-immediate-action-stop-developers-facilitating-government>.

³⁹ See *White v. Davis*, 13 Cal. 3d 757 (1975), <https://scocal.stanford.edu/opinion/white-v-davis-27879> (police surveillance and data gathering activities of UCLA professor constitute a prima facie violation of the recently enacted state constitutional right of privacy); See *ACLU of Northern California News vol. 45, no. 8*, California Historical Society (Nov.-Dec. 1980), at 8, <https://digitallibrary.californiahistoricalsociety.org/object/16534> (last visited Sep. 21, 2023) (“The right to privacy has been explicitly guaranteed by the California Constitution since 1972, yet the translation of that principle into practice continues to challenge the ACLU. Abuses of this right by state and private agencies are still the norm”).

⁴⁰ *Hill v. Nat’l Collegiate Athletic Assn.*, 7 Cal. 4th 1 (1994); See also *ACLU of Northern California News, vol. 58, no. 2*, California Historical Society (Apr. 1994), <https://digitallibrary.californiahistoricalsociety.org/object/17286> (last visited Sep. 21, 2023); See also Rodolfo R. Aquino, *California’s constitutional privacy guarantee needs a reset*, SCOCA blog (Apr. 9, 2021), <https://scocablog.com/californias-constitutional-privacy-guarantee-needs-a-reset/>.

Between when *White v. Davis* was decided in 1975 and *Hill v. NCAA* was decided in 1994, the California Supreme Court went through a period of significant change with retirements and other departures, including three Democratically appointed Supreme Court Justices, Chief Justice Rose Bird and Associate Justices Joseph R. Grodin and Cruz Reynoso, losing their 1986 retention elections for being perceived as “soft on crime” in the Reagan “War on Drugs” era. Frank Clifford, *Voters Repudiate 3 of Court’s Liberal Justices*, L.A. Times, Nov. 5, 1986, <https://www.latimes.com/archives/la-xpm-1986-11-05-mn-15232-story.html>; The Committee on History of Law in California, *Oral History: Justice Joseph R. Grodin*, 16 Hastings Const. L.Q. 7

(1988), https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1407&context=hastings_constitutional_law_quaterly; Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press 2007).

After these election losses, Republican Governor Deukmejian appointed three new conservative Associate Justices, creating the first conservative majority on the California Supreme Court since the Great Depression. Frank Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. Times, Nov. 5, 1986, <https://www.latimes.com/archives/la-xpm-1986-11-05-mn-15232-story.html>.

Justice Stanley Mosk, who had been a Justice at the time of the *White v. Davis* decision and was one of the remaining Associate Justices still on the court authored a powerful dissent in *Hill v. NCAA*. "I dissent. Article I, section 1 of the California Constitution declares a right of privacy. Its pronouncement is express. Nothing is left to implication. "All people" have an "inalienable right[]" to "pursu[e] and obtain[]" "privacy." Before proceeding to a sentence further, we must make one point pellucidly clear. 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. The majority all but abrogate the right of privacy...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 Assn.*, 7 Cal. 4th 1, 73-74 (1994).

⁴¹ 82% of polled Californians supported requiring a warrant prior to the police getting access to email or internet activity. *Poll: California Voters Say Get a Warrant for Digital Information*, ACLU of Northern California, Sep. 28, 2015, <https://www.aclunc.org/article/poll-california-voters-say-get-warrant-digital-information>.

⁴² Jacob Snow, *Will California lawmakers vote to protect Californians' privacy or tech industry profits?*, ACLU of Northern California blog (Sep. 28, 2015), <https://www.aclunc.org/blog/will-california-lawmakers-vote-protect-californians-privacy-or-tech-industry-profits>; ACLU of Northern California & David Binder Research, David Binder Research Poll from 2019 on behalf ACLU of Norcal on California Voter Support for Consumer Privacy (2019), https://www.aclunc.org/docs/20190327_DBR_Voter_Support_for_Consumer_Privacy_final.pdf (9 out of 10 polled Californians said that even if they don't pay money for products like Google, Facebook or Twitter, they should have a right to privacy and their personal information should only be shared with permission. 94% wanted to make sure you can take a company to court if they violate your privacy rights).

⁴³ *California Proposition 24, Consumer Personal Information Law and Agency Initiative (2020)*, Ballotpedia (2020), [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)).

⁴⁴ ACLU in California and other consumer privacy and civil rights groups actually had to oppose Proposition 24 because it stacked the deck in favor of big tech corporations and did not do enough to properly protect privacy rights. See Proposition Rebuttal. Kevin Baker, Nan Brasmer, John Mathias, *REBUTTAL TO ARGUMENT IN FAVOR OF PROPOSITION 24*, In *AMENDS CONSUMER PRIVACY LAWS. INITIATIVE STATUTE California Proposition 24 (2020)*, UC Law SF Scholarship Repository (2020), https://repository.uclawsf.edu/ca_ballot_props/1389/ (last visited Sep. 22, 2023); *ACLU of Northern California Statement on Prop. 24*, ACLU of Northern California, Nov. 4, 2020, <https://www.aclunc.org/news/aclu-northern-california-statement-prop-24>.

ACLU of Northern California polling of likely California voters in 2019 found that 97% support legislation to make sure companies ask and get our permission before they can share our personal information, 95% want the right to know what information companies have collected about them and who they have shared it with, 94% want the right to take a company to court if they violate their privacy rights, and 86% support rules that stop companies from charging higher prices or providing a worse product to people who exercise their privacy rights. Jacob Snow, *Will California lawmakers vote to protect Californians' privacy or tech industry profits?*, ACLU of Northern California blog (Sep. 28, 2015), <https://www.aclunc.org/blog/will-california-lawmakers-vote-protect-californians-privacy-or-tech-industry-profits>; ACLU of Northern California & David Binder Research, David Binder Research Poll from 2019 on behalf ACLU of Norcal on California Voter Support for Consumer Privacy (2019), https://www.aclunc.org/docs/20190327_DBR_Voter_Support_for_Consumer_Privacy_final.pdf.

⁴⁵ Pew Research Center, *Internet/Broadband Fact Sheet* (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/>.

⁴⁶ Pew Research Center, *Mobile Fact Sheet* (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/mobile/>.

⁴⁷ In 2023, Big Tech companies like Alphabet, Microsoft and Apple are now all ranked by Forbes in the top ten of the largest companies in the world in terms of sales, profits, assets and market value. Forbes, Global 2000 (Jun. 8, 2023), <https://www.forbes.com/lists/global2000/?sh=12e9eefd5ac0>.

⁴⁸ Carlton Fields, 2023 Class Action Survey (2023), at 9, <https://www.carltonfields.com/Libraries/CarltonFields/Documents/Class%20Action%20Survey/2023-carlton-fields-class-action-survey.pdf>; Todd Feathers & Alfred Ng, *Tech Industry Groups Are Watering Down Attempts at Privacy Regulation, One State at a Time*, The Markup, May 26, 2022, <https://themarkup.org/privacy/2022/05/26/tech-industry-groups-are-watering-down-attempts-at-privacy-regulation-one-state-at-a-time>.

⁴⁹ *Governor Newsom, Attorney General Bonta and CPPA File Letter Opposing Federal Privacy Preemption*, Office of Governor Gavin Newsom (Feb. 28, 2023), <https://www.gov.ca.gov/2023/02/28/governor-newsom-attorney-general-bonta-and-cppa-file-letter-opposing-federal-privacy-preemption/>.

⁵⁰ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

⁵¹ *Forum: How Digital Privacy Will Be At Risk in Post-Roe America* (KQED talk show episode released May 23, 2022), <https://www.kqed.org/forum/2010101889275/how-digital-privacy-will-be-at-risk-in-post-roe-america>.