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## California's Constitutional Right to Privacy

J. Clark Kelso

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# California's Constitutional Right to Privacy

J. Clark Kelso\*

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\* Professor of Law, University of the Pacific, McGeorge School of Law. I would like to acknowledge the counsel and advice of Professor Brian Landsberg of the McGeorge School of Law.

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## I. INTRODUCTION

In 1972, at the Legislature's urging, the people of California used the initiative process to add "privacy" to the list of "inalienable rights" guaranteed by Article 1, Section 1 of the California Constitution.<sup>1</sup> The Supreme Court of California has relied upon the state constitutional privacy clause to strike down state laws restricting abortion funding;<sup>2</sup> to prevent police officers from posing as college students and gathering intelligence on what is said in the classroom when the intelligence gathered bears no relation to any suspected illegal activity;<sup>3</sup> to strike down a local zoning ordinance which prevented more than five unrelated people from living in the same house;<sup>4</sup> to limit discovery in civil litigation of confidential financial

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1. The privacy amendment was originally proposed by Representative Kenneth Cory in 1972 as Assembly Constitutional Amendment 51. The legislative initiative was placed upon the November 1972 ballot and was approved by the people. Article 1, section 1 was subsequently amended and now provides in full: "All people are 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." CAL. CONST. art. I, § 1 (amended 1972).

2. *Committee to Defend Reproductive Rights v. Myers*, 625 P.2d 779 (Cal. 1981).

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

4. *City of Santa Barbara v. Adamson*, 610 P.2d 436 (Cal. Ct. App. 1980).

information held by banks;<sup>5</sup> and to limit discovery of the sexual history and practices of the plaintiff in a sexual harassment suit.<sup>6</sup>

In many of these rulings, the Supreme Court of California has indicated that the scope of the protection granted by the state constitution's explicitly enumerated privacy right is sometimes greater than the scope of the United States Constitution's unenumerated right of privacy.<sup>7</sup> A comparison of the results reached by the California Supreme Court with decisions by the Supreme Court of the United States on many similar issues bears this out.<sup>8</sup>

One argument in support of this position is that although privacy is implicitly guaranteed under the federal constitution, the explicit declaration of a state right to privacy somehow suggests that the right should be broader than the corresponding federal right.<sup>9</sup> Yet it is not altogether obvious why an explicit right should necessarily be broader in scope than an implicit right. Of course, to the extent that an implicit right is closely connected to other textually explicit rights, as is apparently true of the federal constitutional right of privacy, the implicit right will be limited by the scope of the textually explicit rights.<sup>10</sup> However, the same is not necessarily true of an explicitly declared right which stands upon its own foundation.<sup>11</sup> On the other hand, making explicit what has previously been implicit may involve nothing more than codification of existing law, with no intention to change the law one way or another.<sup>12</sup>

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5. *Valley Bank of Nevada v. Superior Court*, 542 P.2d 977 (Cal. 1975) (holding that a litigant seeking confidential financial information about a non-party from a bank must make reasonable efforts to locate and inform customer about discovery request in order to give customer opportunity to assert privilege pursuant to article 1, section 1).

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

7. *Adamson*, 610 P.2d at 440 n.3 (noting that the federal right to privacy "appears to be narrower than what the voters approved in 1972 when they added 'privacy' to the California Constitution"); *Committee to Defend Reproductive Rights v. Myers*, 625 P.2d 779, 784 (Cal. 1981).

8. *Compare City of Santa Barbara v. Adamson*, 610 P.2d 436 (Cal. 1980) with *Village of Belle Terre v. Borass*, 416 U.S. 1 (1974). *Compare Committee to Defend Reproductive Rights v. Myers*, 625 P.2d 779 (Cal. 1981) with *Harris v. McRae*, 448 U.S. 297 (1980). See *infra* notes 314-467 and accompanying text.

9. *Committee to Defend Reproductive Rights*, 625 P.2d at 784. "The federal constitutional right of privacy, by contrast, enjoys no such *explicit* constitutional status." *Id.* (emphasis in original).

10. See *infra* notes 329-33 and accompanying text.

11. See *infra* notes 334-36 and accompanying text.

12. For example, many provisions in California's Civil Code are merely declarative of existing law. See, e.g., CAL. CIV. CODE § 5 (Deering 1990) (stating that "[t]he provisions of this code, so far as they are substantially the same as existing statutes or the



Another argument in favor of a broader state right of privacy relates to the different functions of state and federal governments. It may be appropriate for state government to protect rights to privacy more vigorously than the federal government since the state government is primarily responsible for exercising its power to protect the health, safety and welfare of its citizens (whereas the federal government has more limited functions and powers).<sup>13</sup> State protections usually come in the form of new common law actions or the enactment of state legislation to protect the right of privacy beyond those protections guaranteed by the federal constitution; there has been a long history of such state law developments.<sup>14</sup> However, there is no reason in principle, why such state law protections may not be found in state constitutional provisions that are interpreted more broadly than similar federal provisions. Moreover, the California Constitution explicitly declares that state constitutional rights are independent of corresponding federal constitutional rights,<sup>15</sup> an independence recently emphasized by the Supreme Court of California in striking

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common law, must be construed as continuations thereof, and not as new enactments").

That a statutory or constitutional enactment is merely declarative of existing law does not necessarily freeze the law as it stood at the time of enactment. For example, in *Li v. Yellow Cab Company of California*, 532 P.2d 1226 (Cal. 1975), in which the Supreme Court of California judicially adopted comparative fault principles seemingly in the teeth of Civil Code section 1714, the court explained that "it was not the intention of the Legislature in enacting section 1714 of the Civil Code, as well as other sections of that code declarative of the common law, to insulate the matters therein expressed from further judicial development; rather it was the intention of the Legislature to announce and formulate existing common law principles and definitions for purposes of orderly and concise presentation and with a distinct view toward continuing judicial evolution." *Li*, 532 P.2d at 1233.

13. See, e.g., Hans A. Linde, *Without "Due Process"—Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970) (reviewing and criticizing then-recent decisions by the Oregon Supreme Court which relied upon "substantive due process" concepts in reviewing state and local laws); William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761, 777 (1960) (stating "It is reason for deep satisfaction that many of the states effectively enforce the counterparts in state constitutions of the specifics of the Bill of Rights. Indeed, some have been applied by states to an extent beyond that required of the national government by the corresponding federal guarantee").

14. See *infra* notes 248-54 and accompanying text.

15. Article 1, section 24, which was added in 1974, provides in part that "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." CAL. CONST. art. I, § 24 (amended 1974).

Not all rights guaranteed under the California Constitution are given an interpretation broader than that adopted by the Supreme Court of the United States, however. For example, with respect to privacy claims by criminal defendants, the Supreme Court of California held in *People v. Crowson*, 660 P.2d 389, 392 (Cal. 1983), that the privacy clause guarantee is "coextensive" with federal protections under the Fourth Amendment. In *In re Lance W.*, 694 P.2d 744, 752 (Cal. 1985), the court upheld an initiative which required state courts to follow the federal exclusionary rule in search and seizure cases. In *People v. Frierson*, 599 P.2d 587, 613-14 (Cal. 1979), the court upheld another initiative which required that California courts interpret the state cruel and unusual punishment clause consistent with federal law.

down a voter initiative that substantially altered the independent vitality of many state constitutional rights.<sup>16</sup>

On the other hand, the mere possibility of greater state protection of privacy should not be mechanically converted into a certainty of greater state protection of privacy. The question that remains is whether the state constitution's explicit reference to privacy was *intended* to mean anything more than the federal protection of privacy.<sup>17</sup>

In the context of privacy claims by defendants in criminal trials, the Supreme Court of California held that the right to privacy guaranteed by article 1, section 1 is "coextensive" with the federal right guaranteed by the Fourth Amendment.<sup>18</sup> Apart from the privacy rights of defendants in criminal trials, the scope of privacy rights under the state constitution ultimately becomes a question of interpreting the privacy clause now contained in article 1, section 1. Interpreting constitutional provisions is always a delicate task. The task is complicated further here because there is only a sparse legislative history for the privacy initiative. Moreover, the courts have ignored the most important portions of the legislative history and have focused their sole attention upon a ballot argument that, with casual reading, goes far beyond what the legislature intended in approving the privacy amendment.<sup>19</sup>

The Supreme Court of California has long held that ballot arguments are an aid in interpreting initiatives.<sup>20</sup> The reliance on ballot arguments has been based largely upon the premises that voters read and understand the ballot arguments, and that the ballot arguments are thus a good indication of the considerations that influenced a majority of the voters to approve a particular initiative. These premises are purely fictional and speculative and in fact, contrary to recent empirical studies which demonstrate that ballot arguments play a relatively minor role in influencing voters.<sup>21</sup> Moreover, reliance upon ballot arguments is contrary to an equally settled rule that the personal statements of individual legislators or persons is ordinarily en-

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16. *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990), discussed *infra* at notes 243-46 and accompanying text.

17. On the importance of intent to the proper interpretation of constitutional provisions, see *infra* notes 89-167 and accompanying text.

18. *People v. Crowson*, 660 P.2d 389 (Cal. 1983).

19. See *infra* notes 143-66 and accompanying text.

20. See *infra* notes 142-43 and accompanying text.

21. See *infra* notes 144-46 and accompanying text.

titled to almost no weight in the interpretive process.<sup>22</sup>

In fact, although the Supreme Court of California pays lip service to voter intent by its professed reliance upon ballot arguments, the court's track record strongly suggests an opposite rule. Ballot arguments are ignored when convenient, and the court, more generally, has *strictly* construed voter initiatives, evidencing a thinly-veiled hostility towards direct voter participation in the law-making process.<sup>23</sup>

As indicated above, the Supreme Court of California has already given article 1, section 1 a broader construction in some areas than has been given by the federal courts to the federal right of privacy. So far, however, the Supreme Court of California has utilized article 1, section 1 only for the purpose of limiting state action. This is consistent with the federal right of privacy<sup>24</sup> and the notion that constitutions are designed primarily to organize government and define the relationship between the government and the people, rather than between one person and another.<sup>25</sup> Several lower state courts, however, have extended article 1, section 1 to cover claims against purely private actors.<sup>26</sup> The commentators are thus far in agreement with this extension.<sup>27</sup> The California Supreme Court has not addressed itself to this issue under article 1, section 1, even in dicta, except by way of noting the lower court decisions discussing the issue,<sup>28</sup> which are poor indicators of what the high court may do.<sup>29</sup>

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22. See *infra* note 137 and accompanying text.

23. See *infra* notes 167-88 and accompanying text.

24. The federal constitutional right to privacy is grounded in various provisions in the Bill of Rights, which are made applicable to the states by the Fourteenth Amendment, and in the Fourteenth Amendment itself. The Fourteenth Amendment has consistently been construed to require state action before its protections are triggered. The Civil Rights Cases, 109 U.S. 3 (1883); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). See *infra* notes 365-411 and accompanying text. Accordingly, a purely private actor can not violate the federal right to privacy.

25. See *infra* notes 351-364 and accompanying text.

26. See, e.g., *Luck v. Southern Pac. Trans. Co.*, 267 Cal. Rptr. 618 (Cal. Ct. App. 1990); *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194 (Cal. Ct. App. 1989); *Semore v. Pool*, 266 Cal. Rptr. 280 (Cal. Ct. App. 1990); *Porten v. University of San Francisco*, 134 Cal. Rptr. 839 (Cal. Ct. App. 1976).

27. KURT H. DECKER, *EMPLOYEE PRIVACY LAW AND PRACTICE*, §§ 3.10-3.11 at 130-32 (1987); Deborah Holmes McBride, *The NCAA Drug-Testing Program and the California Constitution: Has California Expanded the Right of Privacy?*, 23 U.S.F. L. REV. 253 (1989); Patricia A. Hunter, *Your Urine or Your Job: Is Private Employee Drug Urinalysis Constitutional in California?*, 19 LOY. L.A. L. REV. 1451 (1986); Allison Rose, *Mandatory Drug Testing of College Athletes: Are Athletes Being Denied Their Constitutional Rights?*, 16 PEPP. L. REV. 45 (1988); Lawrence M. Newman, Note, *Rediscovering the California Declaration of Rights*, 26 HASTINGS L.J. 481 (1974).

28. See *Schmidt v. Superior Court*, 769 P.2d 932, 945 n.14 (Cal. 1989).

29. Cf. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 392-93 (Cal. 1988) (retreating from dicta in prior supreme court decision which had been widely interpreted by the lower courts as approving the existence of a cause of action for wrongful termination). See generally Lawrence C. Levine, *Judicial Backpedaling: Putting the Brakes on California's Law of Wrongful Termination*, 20 PAC. L.J. 993, 1021 n.108 (1989).

The Seven Worthies have seized the opportunity to address this issue by granting review of a recent controversial decision by California's Sixth Circuit Court of Appeals in *Hill v. NCAA*, a drug testing case.<sup>30</sup> The court in *Hill* relied exclusively on article 1, section 1 in upholding an injunction prohibiting Stanford from enforcing the NCAA's drug testing programs, even where both the NCAA and Stanford appeared to be private actors under federal state action law.<sup>31</sup>

The Court will discover that its task will not be an easy one. On the one hand, extending a right of privacy to purely private conduct has exceedingly broad ramifications for virtually all aspects of civil law and remedies. It seems likely that the presently-constituted court would hope to restrain such a broad basis for civil liability.<sup>32</sup> On the other hand, the ballot arguments in support of the privacy initiative may suggest that it was intended to reach some purely private conduct.

If the court's other decisions involving initiatives are any indication,<sup>33</sup> it is likely that the court in *Hill* will respect the enactment of the privacy initiative, but simultaneously, interpret the initiative in a way that minimizes any sweeping changes in California law.<sup>34</sup> In political terms, the court will save face publicly by proclaiming privacy to be a fundamental right, but will substantially limit that right to minimize the privacy clause's effect upon California's organic law.

A principled basis for limiting the privacy clause can be found in the fragments of legislative history that are stored in the state archives. This legislative history, which includes committee reports and a drafting history, has not been cited or discussed in the cases arising under article 1, section 1, although it is clear that the material has been available to both bar and bench. Because this material is not easy to come by, a copy of the relevant materials appears in Appendix A, and an analysis of the material in Part IV of this Article. Based upon an analysis of this material, this Article will conclude that the privacy initiative was intended to put California's privacy

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30. 273 Cal. Rptr. 402 (Cal. Ct. App.), *cert. granted*, 801 P.2d 1070 (1990).

31. An analysis of *Hill* appears *infra* notes 672-684 and accompanying text.

32. See generally Bill Blum, *Toward a Radical Middle*, A.B.A. J., Jan. 1991, at 48, 50 ("In tort law . . . the [California Supreme Court] has embarked on a clear course of cutting back the principles of liability and the bases for relief").

33. See *infra* notes 167-88 and accompanying text.

34. Cf. *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990) (striking down Proposition 115 as an unconstitutional revision because it constituted a "fundamental change in our preexisting governmental plan").

guarantee upon an independent foundation (which may support broader state privacy rights than exist under the Federal Constitution), but that the privacy initiative was almost surely *not* intended to limit purely private conduct. The decision in *Hill* should probably be reversed and decisions from the courts of appeals extending the privacy clause to private employers should be disapproved.

Scholarly completeness demands careful attention to some preliminaries. The privacy clause was added by a legislative initiative, and Part II proposes principles of interpretation for both voter and legislative initiatives. Part III reviews privacy protections apart from the privacy clause (i.e., the common law causes of action and constitutional doctrines), including a discussion of state action requirements under the federal and state constitutions. Part IV contains an analysis of the legislative history of the privacy clause. Part V critically reviews the cases arising under the privacy clause in light of the legislative history discussed in Part IV. Readers primarily interested in the legislative history and the cases are encouraged to skip ahead to Parts IV and V.

## II. THE INITIATIVE PROCESS AND PRINCIPLES OF INTERPRETATION

### A. *Direct Voter Participation in California*

To consider the initiative process in its proper context, we must first review briefly the different ways of enacting law in California.<sup>35</sup> Voters participate both directly and indirectly in the lawmaking process. The most common indirect participation in lawmaking is voting for representatives to fill the legislative and executive branches, and voting to confirm judges and other officers.<sup>36</sup> According to James Madison in *The Federalist* No. 10, a representative form of government in which citizens participate only indirectly in the lawmaking process is the most enduring form of government, primarily because

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35. This discussion will be focused primarily upon California procedures and California law. California is obviously not alone in permitting direct voter participation, although California has been recognized in literature as one of the states with the greatest experience with direct voter participation through initiatives and referendums. THE REFERENDUM DEVICE, 51-53 (Austin Ranney ed., 1981); DAVID B. MAGLEBY, DIRECT LEGISLATION (1984); REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY, 87-122 (David Butler & Austin Ranney eds., 1978) [hereinafter REFERENDUMS]. Because California has had more experience with initiatives than other states, California's experience may well be relevant to a proper interpretation of other initiative measures.

36. Historically, even our selection of certain important political positions at the federal level was indirect. For example, members of the United States Senate were originally chosen by state legislators and not by the people. U.S. CONST. art. I, § 3. One of the great victories of the Progressive movement in the early part of this century was to replace indirect selection of senators with direct selection. U.S. CONST. amend. XVII (1917) (repealing U.S. CONST. art. I, § 3).

it avoids the evils of faction and tyranny of the majority.<sup>37</sup> Madison's views represented the dominate view at the time. Consequently, the United States Constitution provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."<sup>38</sup>

The history of our representative form of government at the local, state, and federal levels confirms that even with only an indirect voice in government affairs, public sentiment has a substantial influence over the actions of government.<sup>39</sup> At the federal level, citizen participation is entirely indirect. It is only by exercising our constitutionally protected rights to vote, to speak, to petition, and to litigate that the voters can influence the federal government.<sup>40</sup>

By contrast, at the state and local level, it is more common for vot-

37. From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

THE FEDERALIST NO. 10 (James Madison). See generally Cynthia L. Fountaine, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733, 747-51 (1988) [hereinafter "Lousy Lawmaking"].

38. U.S. CONST. art. IV, § 4. Arguably, a "Republican" form of government means a purely representative form of government, and permitting direct voter participation in government by way of initiatives may thus violate the Guaranty Clause. However, in *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912), the Court held that a challenge to Oregon's initiative process under the Guaranty Clause raised a political question which the judiciary was not competent to answer. *Id.* at 133; *Lousy Lawmaking*, *supra* note 37, at 759-76. On the political question doctrine, see generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 3-13, (2d ed. 1988).

39. Needless to say, many people may disagree with this broad generalization. However, this Article is primarily about how courts should interpret legislation produced by the voter initiative process; it would serve no useful purpose to engage in an extended discussion of the merits of representative government and the extent to which it works in the United States. Accordingly, for purposes of this Article, we shall adopt as an express premise that representative government in practice by and large lives up to its theoretic promise.

40. See *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

ers to participate directly in government affairs. Such participation most often takes the form of voting to approve particular measures proposed by local and state government. This is generally referred to as the "power of referendum."<sup>41</sup> Virtually all states, including California, permit voters to participate directly in approving legislatively proposed amendments to the state constitution.<sup>42</sup> That is how the privacy amendment made its way into California's Constitution. In California, a two-thirds vote by the legislature will place a proposed constitutional amendment on the ballot, and a majority vote of the electors then suffices to make the proposed amendment a part of the constitution.<sup>43</sup> Voter approval is ordinarily not necessary for statutory changes by the legislature.<sup>44</sup>

Only a few states have taken the next step towards pure democracy by permitting private persons to draft, and put before the people, "voter initiatives," which may propose changes either at the statutory or constitutional level. In California, a solitary person can propose both statutory and constitutional changes.<sup>45</sup>

Relatively few such proposals actually reach the ballot, because to qualify a constitutional amendment, the proponent must first secure signatures from eight percent of the electors eligible at the most recent election for governor, and to qualify a statutory initiative, the

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41. Confusion exists over the terminology used in describing the different mechanisms of direct voter participation. The most widely accepted definitions of "referendum" and "initiative" are as follows:

In the United States, . . . the referendum is an arrangement whereby a measure that has been passed by a legislature does not go into force until it has been approved by the voters (in some specified proportion) in an election. The initiative, on the other hand, is an arrangement whereby any person or group of persons may draft a proposed law or constitutional amendment and, after satisfying certain requirements of numbers and form, have it referred directly to the voters for final approval or rejection. Thus, the referendum enables the voters to accept or reject the legislature's proposals, while the initiative allows the voters both to make their own proposals and to pass upon the proposals of other voters.

REFERENDUMS, *supra* note 35, at 67; *see also* MAGLEBY, *supra* note 35, at 1.

These scholarly definitions are not always followed in practice, however. In California, a legislatively proposed constitutional amendment is referred to as a "Legislative Initiative." Yet under the definitions above, a "Legislative Initiative" actually involves the referendum process. For purposes of discussing California law, this Article adopts the California terminology and will use the label "Legislative Initiative" to describe constitutional amendments proposed by the legislature and approved or disapproved by the people.

42. REFERENDUMS, *supra* note 35, at 71-72, table 4-2.

43. CAL. CONST. art. XVIII, § 1.

44. A statutory initiative may not be amended or repealed without the prior or subsequent approval of the people. CAL. CONST. art. II, § 10(c).

45. Article IV, section 1, of the constitution provides that, although the "legislative power of this State is vested in the California Legislature . . . the people reserve to themselves the powers of initiative and referendum." CAL. CONST. art. IV, § 1. Article II, Section 8 provides, in pertinent part, that "[t]he initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." CAL. CONST. art. II, § 8.

proponent must secure signatures from five percent of the eligible electors.<sup>46</sup> Increasingly, however, well-financed interest groups are able to spend the money necessary to secure those signatures, and electors in California have indicated their dissatisfaction with representative government by signing on.<sup>47</sup> Once on the ballot, an initiative is approved if it secures a majority of the votes cast.

The political inspiration for permitting voter initiatives is found in the popular notions that the power to govern emanates from the electors, and the government serves at the pleasure of the electors. Article 2, section 1 of the California Constitution sets forth this political philosophy in providing that "[a]ll political power is inherent in the people."<sup>48</sup>

It is, however, a large step from acknowledging that government exists to serve the people and that political power is inherent in the people, to accepting that the people should have a voice in governing themselves by directly adding statutory or constitutional provisions (rather than by influencing legislation through voting for particular representation or lobbying). The former principle may co-exist in a purely republican and representational form of government.<sup>49</sup> The initiative, by contrast, "is a nearly pure exercise of democracy."<sup>50</sup>

46. CAL. ELEC. CODE § 3524 (West Supp. 1991).

47. The process of qualifying measures for the ballot has become big business. Today, experienced consultants are available who know the best way to secure the necessary signatures for any particular proposal. See, e.g., REFERENDUMS, *supra* note 35, at 101-07; MAGLEBY, *supra* note 35, at 59-76.

48. Article II, section 1, of the constitution provides in full: "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter it or reform it when the public good may require." CAL. CONST. art. II, § 1.

The power to amend the constitution by initiative does not include the broader power of constitutional revision. See *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990) (declaring a portion of Proposition 115 to be an unconstitutional revision); *McFadden v. Jordan*, 196 P.2d 787, 790-96 (Cal. 1948) (invalidating proposition which added 21,000 words to the constitution and revised 15 of its 25 articles). See generally Douglas C. Michaels, Note, *Preelection Judicial Review: Taking the Initiative in Voter Protection*, 71 CAL. L. REV. 1216, 1224 (1983).

49. The federal government is the prime example of a purely representational form of government that, nevertheless, reserves non-delegated rights to the people. The Ninth Amendment specifically provides that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. The Tenth Amendment further provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

50. Joseph T. Henke & Miles A. Woodlief, *The Effect of Proposition 13 Court Decisions on California Local Government & Revenue Sources*, 22 U.S.F. L. REV. 251, 254 (1988).



The arguments in favor of and against the powers of referendum and initiative have been well described in the political literature. The arguments in favor of direct voter participation through referendum and initiative include the following:<sup>51</sup> (1) in the case of referendums, legitimation of government decisions; (2) the ideal of pure democracy; (3) distrust of organized interest groups in favor of the individual; (4) tough decisions not ignored; (5) public decisions arrived at through the most accurate measure of public sentiment; and (6) increased voter awareness and participation in government. The arguments against direct voter participation include the following: (1) weakened power of elected officials and organized government; (2) inability of ordinary voters to make wise and reasoned decisions concerning complex issues; (3) inability to negotiate consensus positions through legislative compromise; and (4) danger to the rights of minorities through tyranny of the majority.

Although Hiram Johnson was a proud proponent of government-by-the-people as an antidote to government-by-those-corrupt-elected-officials, it seems likely that he would be disappointed in the use of the initiative process, especially in recent years.<sup>52</sup> The historical use of initiatives in California displays all of the short-comings of pure democracy in action in a large society. In the case of voter initiatives, there is often an inadequate opportunity for careful, negotiated drafting of the language which appears in the initiatives. Whether the initiative is drafted by private persons or proposed by the legislature, empirical study suggests that electors remain relatively uneducated about the details of the legislation they are approving. Special interest groups can capture or create attention for temporarily popular causes largely because of their financial resources. Our recent experience in California includes massive media campaigns, most often involving slick television and radio commercials by famous personalities. Because of the power of the media, particularly television, these campaigns may be particularly influential in swinging public opinion. Unfortunately, most of the commercials provide little in the way of education, and are dominated by mindless slogans and

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51. REFERENDUMS, *supra* note 35, at 24-33; Howard Eastman, *Squelching Vox Populi: Judicial Review of the Initiative in California*, 25 SANTA CLARA L. REV. 529, 530-36 (1985); Kara Christenson, Note, *Interpreting the Purposes of Initiatives: Proposition 65*, 40 HASTINGS L.J. 1031, 1034-36 (1989).

52. Johnson's campaign for governor was centered on the proposition that state government had become corrupted by powerful special interest groups (to wit, the railroads and large industry). BOYLE, *THE STUDY OF AN ISOLATIONIST*, 23-27 (U.C.L.A. dissertation 1970). The initiative, along with other progressive reforms during Johnson's administration, such as the referendum, recall, woman's suffrage, presidential primary, the enactment of a Blue Sky law, and so on, was intended to bring government back to the people. The irony is that the expense of the initiative process has grown to the point that its use has become united almost exclusively to well-financed interest groups.

half-truths, if not outright misrepresentations. If the initiative was to be an antidote for government by the corrupt, then the result appears to have been government by the uninformed.

### 1. Drafting Initiatives

The text of a statute is the end product of a rigorous drafting process in which substantive positions and compromises are reduced to specific words and provisions with an appreciation of the critical role which the executive, administrative agencies, and courts will play in implementing the policy expressed by the statute. The text of a legislatively proposed initiative, such as the privacy clause, goes through this same legislative process.

The drafting of voter initiatives is much less formalized. Some voter initiatives are based upon prior legislative acts which were *not* approved by the legislature.<sup>53</sup> The text of these initiatives has been through at least part, and perhaps all, of the legislative drafting process. In a few cases, the text and substance of a voter initiative has undergone public review, before being qualified for the ballot, through a series of town-hall like meetings to which the public is invited.<sup>54</sup> By far the largest number of California voter initiatives, however, are the result of drafting by the private interest group that is pushing the initiative.<sup>55</sup> The risk is that an interest group, focused primarily upon its pet project, is less likely to consider all of the ramifications of changing the law. There may be inadequate consideration of opposing and legitimate interests; there may be an inadequate understanding of how the initiative will affect other aspects of California law; and, there may be an inadequate appreciation of drafting errors that opponents would have pointed out in a more open drafting process.<sup>56</sup> In addition, whereas legislators have a responsibility to consider the constitutionality of every act which is en-

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53. MAGLEBY, *supra* note 35, at 60.

54. *Id.*

55. *Id.*

56. Proposition 13 has been regularly criticized for its many ambiguities. See INITIATIVE AND REFERENDUM IN CALIFORNIA: A LEGACY LOST? 40 (LEAGUE OF WOMEN VOTERS OF CALIFORNIA, 1984) [hereinafter LEAGUE OF WOMEN VOTERS]. The proponents of Proposition 13 attempted to cure some of its ambiguities in 1986 with Proposition 62. Proposition 62 has its own difficulties, however, not the least of which is that the lower courts have thus far declared Proposition 62 to be unconstitutional. See *Rider v. County of San Diego*, 272 Cal. Rptr. 857 (Cal. Ct. App.), *cert. granted and superseded*, 799 P.2d 1280 (Cal. 1990). In 1990, the Howard Jarvis Taxpayers' Foundation sponsored Proposition 136, which again was designed to clarify Proposition 13. The proposition was not approved by the voters.

acted, a private interest group has *no* responsibility to make an independent assessment of the constitutionality of a proposed initiative.<sup>57</sup> The fact that the drafters of an initiative are well motivated is no guarantee of quality.<sup>58</sup>

## 2. Validation of the Process by Voter Participation

Ultimately, neither the interest group nor the legislature has final say, the voters do. Direct voter participation is supposed to be the key ingredient in what otherwise would appear to be a system designed to produce government by and for special interest groups. Voter participation is supposed to validate the process.

The early proponents of voter initiatives correctly recognized that voter participation the mere act of people punching holes in ballot cards would validate the process only if the voters were sufficiently educated about the initiatives to make their votes something more than a random walk through the ballot. Voter education and involvement has accordingly been stressed from the inception of the process.<sup>59</sup>

Voters are involved in two stages of the process. First, in the context of voter initiatives only, the proponent must secure a certain number of voter signatures in order to qualify a measure for the ballot. Second, if a measure qualifies, all voters are given the opportunity to vote the initiative up or down. Unfortunately, both common sense and empirical research suggest that voters remain relatively uneducated about and uninterested in the details of most initiative measures at either stage of the process.

State law requires the Attorney General to prepare a title and short summary (not to exceed 100 words) of the "chief purpose and points" of a proposed initiative.<sup>60</sup> The summary must appear on each page of the petition that contains voter signatures.<sup>61</sup> The primary purpose of the short summary is to give the voters the opportunity to read a short, impartial description of a proposed initiative before signing a petition which supports putting that proposed initiative on the ballot. Recognizing that voters are not likely to read the full text of many proposed initiatives, the short title and summary is one effort at voter education.

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57. It is of course no answer to suggest that the people will make their own determination of constitutionality or that such a determination is entitled to any weight. The people have no obligation to enact constitutional initiatives and have in practice proven themselves remarkably adept at enacting unconstitutional initiatives. *See infra* notes 197-247 and accompanying text.

58. Henke & Woodlief, *supra* note 50, at 255.

59. MAGLEBY, *supra* note 35, at 22, 122-23.

60. CAL. ELEC. CODE §§ 3501-3504 (West 1977 & Supp. 1991).

61. CAL. ELEC. CODE § 3501 (West 1977).

Unfortunately, other factors have tended to overwhelm the state's effort to educate voters. Producing the requisite number of signatures to qualify an initiative measure is an expensive task that is now left up to professional signature gatherers.<sup>62</sup> The most widely used strategies for securing signatures downplays education in favor of a quick and uninformed decision to sign.<sup>63</sup> And it has not been unusual for signature gatherers to conceal by one device or another even the short title and summary by the use of a ballot card which contains the proponents own short title and summary.<sup>64</sup> Educating voters takes time, time costs money, and securing the requisite number of signatures is already an expensive process.<sup>65</sup>

Once an initiative is on the ballot, it is likely to become the subject of an expensive and slick media campaign by proponents and opponents. Our recent experience in California includes, among other things, expensive television and radio commercials, Madison Avenue slogans, and celebrity endorsements or criticisms. So pervasive is the campaign in some instances, that a voter cannot hope to avoid the publicity. Not surprisingly, voters indicate that most of their information about initiatives comes from the mass media newspapers, television, and radio.<sup>66</sup>

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62. MAGLEBY, *supra* note 35, at 61-65.

63. Magleby's summary of the signature-gathering process suggests some of the abuses:

The practices of both volunteer and professional petition circulators lead to the same questions: Do those citizens who sign petitions actually read what it is they are signing? The answer is generally no. Most people trust the petition circulator's description of the proposition to be accurate, and they desire to comply with the request for assistance. The *Los Angeles Times* report on signature collection for the 1980 rent initiative concluded that "voters who signed petitions rarely bothered to read what they were signing." Many of the circulators "misunderstood what it was they were asking people to sign." The petition circulators who understood the proposition "frequently kept silent when uninformed signers drew the wrong conclusion," and in some cases they "lied to voters about what the initiative was intended to do." Social psychologists studying the process of signature solicitation have determined that both situational factors—how and where someone is approached—and inner convictions about the initial question predict the likelihood of signing. (citation omitted) Petition circulators in both the Common Cause and the farmworkers' cases framed the requests so as to maximize the likelihood of signing: "Want to stop corrupt politics?" and "Want to help the farm workers?" In an effort to play upon the conforming tendencies in most people, circulators also encourage quick signing rather than discussion.

MAGLEBY, *supra* note 35, at 62-63 (citations omitted); see also LEAGUE OF WOMEN VOTERS, *supra* note 56, at 46-48.

64. *Lousy Lawmaking*, *supra* note 37, at 746-47.

65. MAGLEBY, *supra* note 35, at 62-65 (indicating that it may cost anywhere from \$500,000 to well over \$1,000,000 to qualify a measure for the ballot).

66. MAGLEBY, *supra* note 35, at 130-35.

The voter can always attempt to ignore the media campaign, of course, and focus upon the words which appear in the ballot pamphlet. The ballot pamphlet contains the text of each initiative, a legislative analysis of each initiative, and arguments both for and against each initiative.<sup>67</sup> Although the ballot pamphlet would be a useful guide to an already interested and involved electorate, it is difficult to believe that substantial numbers of voters today are influenced more by the dryly drafted ballot pamphlet than by the multi-million dollar media blitz that is now a mandatory part of any successful initiative campaign.<sup>68</sup> As anyone who has seen the ballot pamphlet in California knows, it would require a herculean effort simply to read all of the material, much less to understand it. The most recent state ballot pamphlet, for example, was 110 pages of closely-spaced type, and many electors also received bulky pamphlets with respect to local issues. How many Californians read these documents? How many Californians understand what they read?

The small amount of empirical research which has been directed at voter initiatives generally supports the common sense conclusion that electors do not rely significantly upon the ballot arguments contained in the ballot pamphlet. In the first place, when asked about the importance of information sources concerning initiatives, voters rank the voter pamphlet and arguments pro and con *below* newspapers and television.<sup>69</sup> Moreover, the arguments pro and con printed in the

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67. CAL. ELEC. CODE §§ 3567.5-3579 (West 1977 & Supp. 1991); CAL. GOV'T CODE §§ 88000-88007 (West 1987).

68. This is not to say, however, that the one who spends the most money in a media campaign is assured of success. There is a healthy debate among commentators about the effectiveness of one-sided campaign spending on initiative measures. See David A. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505 (1982); MAGLEBY, *supra* note 35, at 145-65; LEAGUE OF WOMEN VOTERS, *supra* note 56, at 44-49.

69. The few studies concerning this topic are well summarized in MAGLEBY, *supra* note 35, at 130-36. He reports, for example, that when asked in 1976 to rank the important sources of information regarding Proposition 13, voters responded with television at 46%, newspapers at 31% and voter's handbook at only 13%. MAGLEBY, *supra* note 35 at 132. In 1982, 27% of the voters listed the handbook as an important source of information. *Id.* at 133. This apparent increase in reliance on the handbook may be misleading, however, because 15% of the voters in this study also indicated that they used the handbook as an important source of information about candidates even though the handbook contained proposition information only and no information about candidates. *Id.* at 233 n.37.

There are, of course, polls which apparently prove, contrary to what Magleby suggests, that the voter's pamphlet is very important to voters. The Charlton Research Company of San Francisco released the results of a telephone poll conducted during the November 1990 election which purported to show that "[t]he most powerful sources of information, according to the voters, were newspaper articles or analysis, and voter pamphlets sent out by the state, both of which had more than seven out of ten voters saying they were either extremely or somewhat important in their decision making." Television news stories or analysis were ranked just below the voter pamphlet in this study, and television advertisements, especially by celebrities, were ranked near the bottom of the heap.

ballot pamphlet may do little more than mirror the media campaign, providing equally misleading information to the voters. This is certainly not true in every case (or even in many cases), but there are virtually no controls over what may be said in an argument by either side,<sup>70</sup> which counsels for judicial caution.

In the second place, there is good reason to believe that only a portion of the electorate, perhaps as little as thirty percent, can even comprehend the information presented in the ballot arguments.<sup>71</sup> Studies of readability indicate that most ballot arguments require at least an eighth-grade reading ability, which is possessed by at most fifty percent of the voting public. The neutral analysis that appears on the ballot is even harder to understand, requiring a third-year college reading level. The best that can be said is that the information contained in the voter pamphlet and the ballot arguments is simply one chunk of information that may affect some undetermined percentage of the electors. The notion that a significant percentage of voters have educated themselves about the *details* of most initiative measures is pure fiction.<sup>72</sup>

Some may complain that the criticisms which I have levelled at the understanding and competence of the people apply with equal force to ordinary legislative behavior. No one believes that all or many leg-

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70. State law provides that "[t]he following statement shall be printed at the bottom of each page [of the pamphlet] where arguments appear: 'Arguments printed on this page are the opinions of the authors and have not been checked for accuracy by any official agency.'" CAL. GOV'T CODE § 88002(f) (West 1987).

It is theoretically possible to correct gross misrepresentations in the ballot pamphlet pursuant to Government Code section 88006, which provides for a writ of mandate to amend or delete any language in the ballot pamphlet. As a practical matter, however, such a writ is almost impossible to secure. In the first place, the copy for the ballot pamphlet is publicly released only twenty days before the copy is to be sent to the printer. This doesn't give a potential plaintiff much time to act. Second, the writ issues only upon a showing of "clear and convincing proof that the copy in question is false, misleading or inconsistent with the requirements of this chapter or the Elections Code." CAL. GOV'T CODE § 88006 (West 1987). Third, even if this burden is met, the court must be satisfied that "issuance of the writ will not substantially interfere with the printing and distribution of the ballot pamphlet as required by law." *Id.*

71. Magleby summarizes the results of the available empirical research in his work. MAGLEBY, *supra* note 35, at 137-39.

72. *Lousy Lawmaking*, *supra* note 37, at 738-42. This is of course not to say that voters lack a *general* understanding of what they are voting on, and recent research suggests that voters may indeed have a general understanding of the issues being addressed by various initiative measures. The Charlton study, *supra* note 69, concluded that "[m]essages on major initiatives got through to voters who voted down most of the initiatives, yet they were informed in their vote decisions." But a general understanding of what a particular piece of legislation may do is usually not very helpful when it comes to solving specific problems of statutory construction.

islators actually know the details of the legislation that is now enacted at the state and federal level. No one believes that all legislators read committee reports. Yet there remains a critical difference between the process which leads to ordinary legislation and the process which leads to an initiative. In the case of ordinary legislation, the hearings and speeches that make up the remainder of the history are to some extent controlled by our elected representatives. And even if all legislators do not know the details of a particular piece of legislation, there are at least one or two members who have been responsible for the legislation from the beginning and who probably do know what is in the act. In effect, then, we have permitted the entire legislative body to delegate its overall responsibility for sweating the details to a much smaller, and more manageable, group of people.<sup>73</sup>

With voter initiatives, by contrast, control is not exercised by *any* elected official. And it stretches reality beyond the breaking point to assert that the public has somehow delegated the responsibility for sweating the details to any particular interest group. The critical premise that *informed* voter participation validates the initiative process appears to be only weakly supportable.

### *B. Judicial Review and Interpretation*

The history and empirical research briefly described above suggest problems with the initiative process in California. The process may be prone to producing poorly drafted and poorly thought out changes in California's organic law. If there were reason to believe that the people cast truly educated votes, the process might be saved. Unfortunately, the research described above undermines this critical component of the initiative system by quantifying what common sense naturally suggests: the majority of the electorate is terribly underinformed when it comes to voting on initiatives.

The weaknesses in the initiative process should have important implications when it comes time for a court to review or interpret initiative measures. As a general rule, anything that depends upon the fictional "will of the people" or the "intent of the electorate" should be handled with extreme caution. There should be a Rule of Caution.

The first consequence of the Rule of Caution relates to the materials which make up the legislative history for initiatives. One likely extrinsic source for initiatives (especially voter initiatives) is the ballot pamphlet, which contains an analysis of the initiative and pro and con arguments. Ballot arguments, however, are drafted by interested

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73. See *infra* note 105 and accompanying text.

parties, and their reliability as an indication of voter intent depends upon the fiction that voters read and understand the arguments. Yet as discussed above, few persons actually rely significantly on the ballot pamphlet, and fewer still are able to understand what is in the ballot pamphlet.<sup>74</sup> Ballot arguments (along with the rest of the media campaign) should be relegated to an especially low rung on the legislative history ladder.<sup>75</sup>

Furthermore, the legislative counsel's analysis of an initiative, which is also printed in the ballot pamphlet, is entitled to no greater weight although that analysis appears to be drafted by a government official and is intended to be a largely unbiased interpretation of the initiative. The difficulty is that the legislative counsel does not play a constitutional role in the passage of voter initiatives. A legislative analysis is not constitutionally required and has no constitutional significance. Instead, the reliability of the analysis as an indication of voter intent, like the reliability of ballot arguments, depends upon the fiction that voters read and understand the analysis.

The legislative history for a legislative initiative, such as the initiative which added the privacy clause, additionally includes any materials developed by the legislature as it considered the initiative. This would include committee reports, staff reports, drafting history, and similar documents. These materials, unlike the legislative counsel's analysis, are created by an institution which has a constitutional role to play in putting the initiative on the ballot. The significance of these materials thus does not depend upon the fictional intent of the electorate. These materials should be respected by the courts.

A second consequence of the Rule of Caution relates to a fundamental rule of statutory construction. Unlike ordinary legislation, voter initiative measures especially those which change significant aspects of our organic law should be strictly construed in order to minimize the changes to California law. This rule finds its inspiration in the rule (still applied in some jurisdictions) that statutes in derogation of the common law should be strictly construed,<sup>76</sup> which, in turn, found its inspiration in judicial distrust of the competence of the legislative branch to improve upon the perfection of the common

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74. See *supra* notes 66-72 and accompanying text.

75. As will be seen below, this proposed rule is contrary to the rule stated by the courts. See *infra* notes 142-66 and accompanying text.

76. See, e.g., *Lichtman v. Nadler*, 426 N.Y.S.2d 628 (N.Y. App. Div. 1980); *Grayson v. Town of Huntington*, 545 N.Y.S.2d 633 (N. Y. App. Div. 1989).



law.<sup>77</sup> The rule fell into disrepute as courts recognized the constitutional supremacy of the legislative branch and as legislatures became increasingly expert in performing their constitutional tasks.<sup>78</sup> Although the people are in theory constitutionally supreme,<sup>79</sup> until the people prove themselves to be better legislators,<sup>80</sup> courts should interpret voter initiatives strictly to protect the people from themselves.<sup>81</sup>

A third consequence of the Rule of Caution is that voter initiative measures should not be entitled to a presumption of constitutionality. Unlike members of the legislature, the people have no constitutional obligation to vote against unconstitutional initiatives, and the people's constitutional track record is abysmal.<sup>82</sup> By contrast, legislative initiatives such as the initiative which added the privacy clause need not be strictly construed and are entitled to a presumption of constitutionality because these measures do not entirely depend for their validity upon the "intent of the electorate." Instead, these involve the significant participation of the legislature.

Despite the obvious problems with the initiative process, the Supreme Court of California has not publicly adopted the Rule of Caution and has, instead, been careful not to offend the voters who, after all, have the power to recall the justices by denigrating the initiative process. In decisions involving the initiative process itself, the court has spoken in grand terms favoring direct democracy. Thus, for example, in *Associated Home Builders v. City of Livermore*,<sup>83</sup> the court declared the "judicial policy to apply a liberal construction to the [initiative] power wherever it is challenged in order that the right be not improperly annulled," and described the initiative process as

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77. For example, Sir Frederick Pollock observed that the English courts' disrespectful treatment of statutes "cannot well be accounted for except upon the theory that Parliament generally changes the law for the worse, and that the business of the judge is to keep the mischief of its interference within the narrowest possible bounds." F. POLLOCK, *ESSAYS IN JURISPRUDENCE AND ETHICS*, 85 (London, Macmillan 1882). See also W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, § 1, at 10 (1765) (praising the perfection of the common law).

78. See John M. Kernochan, *Statutory Interpretation: An Outline of Method*, 3 *DALHOUSIE L.J.* 333, 345 (1976). In California, the legislature early on asserted its supremacy by enacting the following provision in 1872 when the Civil Code was initially promulgated: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice." CAL. CIV. CODE § 4 (West 1973).

79. See CAL. CONST. art. II, § 1 (providing that "[a]ll political power is inherent in the people").

80. See *infra* notes 197-247 and accompanying text.

81. Legislative initiatives should not be subject to this rule of strict interpretation because of the participation of the legislature in the drafting of the initiative.

82. See *infra* notes 197-99 and accompanying text.

83. 557 P.2d 473 (Cal. 1976).

"one of the most precious rights of our democratic process."<sup>84</sup> The court has indicated that "the power of initiative must be *liberally construed* . . . to promote the democratic process."<sup>85</sup> Moreover, in considering broad constitutional challenges to initiative measures, the courts "are required to resolve any reasonable doubts in favor of the exercise of this precious right," thus accepting the presumed constitutionality of initiative measures.<sup>86</sup> Finally, in interpreting initiatives, the text must "receive a liberal, practical common-sense construction which will meet changed conditions and the growing needs of the people."<sup>87</sup>

Such pro-initiative statements are a bit overblown. If the initiative process was so fundamental to democratic institutions, why is it that the initiative was not included in the California Constitution originally? Why has direct democracy never found its way into the United States Constitution or into the constitutions of a majority of the states? Although the court's rhetoric in favor of the initiative process is poor history, it is good politics.

When the issue relates not to the process itself but to actual judicial review and interpretation of initiatives, the court's rhetoric is more restrained, and, more important, the results are much less favorable.<sup>88</sup> In general, the court does not formally recognize any distinct canons of construction when it comes to interpreting constitutional or statutory initiatives. Instead, the court officially treats initiatives as simply another form of legislation, subject to the same canons of construction as any other piece of legislation. As will be seen in the next several sections, however, the results of the cases suggest the court has effectively followed the Rule of Caution (*i.e.*, rejection of the ballot argument when expedient, strict construction, and, especially, no presumption of constitutionality).

### 1. "Legislative Intent" and the "Intent of the Electorate" - Extrinsic Aids

When attempting to interpret or apply an ordinary statute, a

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84. *Id.* at 477.

85. *Amador Valley Joint Union High School District v. State Board of Equalization*, 583 P.2d 1281, 1283 (Cal. 1978) (emphasis added) (citing *San Diego Bldg. Contractors Assn. v. City Council*, 529 P.2d 570 (1974); *Associated Home Builders, Inc. v. City of Livermore*, 557 P.2d 473 (1976)).

86. *Brosnahan v. Brown*, 651 P.3d 274, 277 (Cal. 1982).

87. *Amador*, 583 P.2d at 1300.

88. James D. Gordon & David B. Magleby, *Pre-Election Judicial Review of Initiative & Referendums*, 64 NOTRE DAME L. REV. 298, 301 (1989).

court's function is to "ascertain the intent of the Legislature so as to effectuate the purpose of the law."<sup>89</sup> This has been the law in California from the very earliest cases until the present<sup>90</sup> and is grounded in the constitutional supremacy of the legislature in making law.<sup>91</sup> Indeed, the second case ever decided by the California Supreme Court involved a determination of whether, in the court's words, the "*legislature* in the 3d sec. of the act of 28th of February, *intended* only to transmit to this court all such appeals from the courts of First Instance, in which the amount in controversy shall exceed in value the sum of \$200."<sup>92</sup>

There is admittedly an argument that "legislative intent" should not be the touchstone for statutory interpretation. Professor Kernochan's delightfully written article on statutory interpretation recites many of the traditional complaints about "legislative intent" in the following excerpt:

Note that the concept of legislative intent has been much criticized. It has been labeled a "fiction"<sup>93</sup> and called "beclouding."<sup>94</sup> "[A] composite body," it is said, "can hardly have a single intent."<sup>95</sup> Even if such an intent exists, it has been argued that it is undiscoverable<sup>96</sup> and, if discoverable, irrelevant.<sup>97</sup>

Notwithstanding these long-standing complaints, courts continue to rely upon the concept of "legislative intent" as a convenient and practical guide to interpretation. After all, "legislative intent" has a common sense, albeit fictional, referent, that is, the intent of the body

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89. *California Teachers Assoc. v. San Diego Community College Dist.*, 621 P.2d 856, 858 (Cal. 1981).

90. See, e.g., *Moyer v. Workmen's Comp. Appeals Bd.*, 514 P.2d 1224, 1229 (Cal. 1973); *Select Base Materials v. Board of Equalization*, 335 P.2d 672, 675-76 (Cal. 1959); *California Toll Bridge Auth. v. Kuchel*, 251 P.2d 4, 9 (Cal. 1952); *County of Alameda v. Kuchel*, 195 P.2d 17, 20 (Cal. 1948); *Dickey v. Raisin Proration Zone No. 1*, 151 P.2d 505, 508 (Cal. 1944); *In re Haines*, 234 P. 883 (1925).

91. Kernochan, *supra* note 78, at 345. "The first premise is the supremacy of the legislature. This premise provides our fundamental interpretive guideline." *Id.*

92. *Luther v. The Master and Owners of Ship Apollo*, 1 Cal. 15, 16 (1850) (emphasis added). Section 1859 of the Civil Procedure Code, added in 1872, provides that "[i]n the construction of a statute the intention of the legislature . . . is to be pursued, if possible." CAL. CIV. PROC. CODE § 1859 (West 1973).

93. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869-70 (1930); J.A. Corry, *The Use of Legislative History in the Interpretation of Statutes*, 32 CAN. B. REV. 624, 625 (1954); E. DRIEDGER, *THE CONSTRUCTION OF STATUTES* 82 (1974) (footnote in original).

94. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538 (1947) (footnote in original).

95. John Willis, *Statute Interpretation in a Nutshell*, 16 CAN. B. REV. 1, 3 (1938). See also J.A. Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. TORONTO L.J. 286, 290 (1936); Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 KAN. L. REV. 1, 14 (1954); DRIEDGER, *supra* note 93, at 82 (footnote in original).

96. Radin, *supra* note 93, at 870-72 (footnote in original).

97. Kernochan, *supra* note 78, at 346-47. See also Harry W. Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. UNIV. L.Q. 2 (1939).

which drafted and enacted the provision. To the extent that a particular "legislative intent" is drawn out of the words of the statute alone, the fiction of a "legislative intent" is simply a convenient way of talking about the meaning attributed to any type of written document (as in, "Upon reading this document, I conclude that the person who wrote it must have intended that . . .").<sup>98</sup>

The fiction of a "legislative intent" has had an additional and important consequence. It has made it more plausible for courts to resort to certain extrinsic aids in construing a statute.<sup>99</sup> Because courts employ the fiction of a "legislative intent," it has been natural to accept the argument that evidence of that intent can be found not only in the text of the statute, but also in other official documents or records promulgated by the body which enacted the statute. At the very least, those documents or records help to establish the context in which the language was drafted.<sup>100</sup>

Critics of reliance upon these extrinsic sources complain that legislative histories can be manipulated and that the Senate and House ultimately vote only upon the words of the statute rather than the words contained in committee reports.<sup>101</sup> The traditional response has been to indulge in the fiction that the reports and other documents were read by all of the members who voted on the legislation.<sup>102</sup> This rationale is subject to the familiar criticism that

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98. This use of "legislative intent" is consistent even with the plain meaning rule, as can be seen in a series of decisions authored by Justice Anthony Kennedy. *See, e.g., K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 290 (1988) (using the plain meaning rule to "give effect to the unambiguously expressed intent of Congress").

99. *See, e.g., K Mart*, 486 U.S. at 1821-26 (Brennan, J., concurring in part and dissenting in part); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987).

100. Jones, *supra* note 97, at 3-4 (emphasizing the importance of establishing historical context); 2A SUTHERLAND ON STATUTORY CONSTRUCTION, 191 (Sands 4th ed. 1989).

101. *See, e.g.,* Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1299-1310 (1990); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 200 (1983); Corry, *The Use of Legislative History in the Interpretation of Statutes*, 34 CAN. B. REV. 624 (1954).

102. Harry W. Jones, *Extrinsic Aids in the Federal Courts*, 25 IOWA L. REV. 737, 743 (1940). *See* *Hutnick v. U.S. Fidelity and Guaranty Co.*, 763 P.2d 1326 (Cal. 1988) stating:

The rationale for considering committee reports when interpreting statutes is similar to the rationale for considering voter materials when construing an initiative measure. In both cases it is reasonable to infer that those who actually voted on the proposed measure read and considered the materials presented in explanation of it, and that the materials therefore provide some indication of how the measure was understood at the time by those who voted to enact it.

*Id.* at 1331 n.7. *See also* Elizabeth A. McNellie, Note, *The Use of Extrinsic Aids in the*

members of the legislature do not actually read the committee reports and supporting documents.<sup>103</sup> Moreover, even if the members have read the reports (and there may be reason to believe that members are more likely to read a committee report than the bill itself),<sup>104</sup> there is no assurance that the members interpreted what they read in the same way. Legislators may have based their votes upon differing interpretations of this legislative history.

There is a second and more convincing theory which explains why it is appropriate to rely upon committee reports and other similar extrinsic aids. When a committee acts in its official capacity, it is acting *on behalf of* the legislature.<sup>105</sup> The official documents and reports of those committees are, in effect, documents on behalf of the entire legislature. We may then utilize a familiar rule from the law of agency that knowledge by an agent will be imputed to the principal.<sup>106</sup> It is for this reason that documents and reports generated by a committee may appropriately be relied upon to interpret a statute enacted by the entire body. The work of the committee is the work of the entire body.<sup>107</sup> As will be seen below, this explanation of why committee reports and documents are properly consulted as part of the legislative history has important consequences when it comes to

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*Interpretation of Popularly Enacted Legislation*, 89 COLUM. L. REV. 157, 161 (1989); Note, *Nonlegislative Intent as an Aid to Statutory Interpretation*, 49 COLUM. L. REV. 676, 677-78 (1949).

103. Zeppos, *supra* note 101, at 1311; Jones, *supra* note 102, at 746-47.

104. Zeppos, *supra* note 101, at 1311 n.61.

105. See, e.g., STANDING RULE OF THE UNITED STATES SENATE XXVI(11); STANDING RULES OF THE CALIFORNIA ASSEMBLY 56.5, 68.6, 68.7; STANDING RULES OF THE CALIFORNIA SENATE 16, 21.5, 29.8.

106. RESTATEMENT (SECOND) OF AGENCY § 9(3) (1958). Although imputing an agent's knowledge to the principal involves the use of a legal fiction, this legal fiction is to be preferred to the factual fiction that legislators actually read the reports and documents generated in the legislative process. A factual fiction is demonstrably wrong. A legal fiction, by contrast, may represent a delicate legal response to a recurring situation based upon significant policy judgments. The law of agency, for example, in which the tortious acts of a servant are imputed to a master, involves just such a careful balancing of interests. See generally L. FULLER, *LEGAL FICTIONS* (1967); Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871 (1986).

107. This agency rationale was clearly put forth by Judge Learned Hand as follows:

It is of course true that members who vote upon a bill do not all know, probably very few of them know, what has taken place in committee. On the most rigid theory possibly we ought to assume that they accept the words just as the words read, without any background of amendment or other evidence as to their meaning. But courts have come to treat the facts more really; they recognize that while members deliberately express their personal position upon the general purposes of the legislation, *as to the details of its articulation they accept the work of the committees; so much they delegate because legislation could not go on in any other way.*

SEC v. Collier & Co., 76 F.2d 939, 941 (2d Cir. 1935) (emphasis added). See also Zeppos, *supra* note 101, at 1344-47; Wald, *supra* note 101, at 201 n.48 (stating that "[t]he committee is the 'work place' of the Congress. Members of the committee . . . act as the 'agents' of the rest of the members").

interpreting initiative measures.<sup>108</sup>

The referent for "legislative intent" becomes less clear in the context of legislative initiatives that are approved by voters and in the context of voter initiatives, which do not involve the legislature at all. The problem is that legislative initiatives are ultimately approved by the people, and voter initiatives are drafted by one private person and then approved by the people. "The people," unlike a legislative body, is not a readily identifiable institution. There is no simple, even if fictional, referent.

The courts in California have solved this problem by treating the people as some sort of super-legislature, and the courts then speak about the "intent of the electorate" in approving a particular measure.<sup>109</sup> The courts thus have fictionalized an "electorate intent" in much the same way that they fictionalized a "legislative intent." For example, in discussing the plain meaning rule in *Lungren v. Deukmejian*,<sup>110</sup> the court noted that "[i]f 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)."<sup>111</sup> Similarly, in *Davis v. City of Berkeley*,<sup>112</sup> the court explained that "[w]hen construing a constitutional provision enacted by initiative, the intent of the voters is the paramount consideration."<sup>113</sup>

Of course, the fiction of an identifiable "people" is not made up out of whole cloth. There is indeed a constitutional basis for paying obeisance to this fiction. According to the Preamble to the California Constitution, "We, the People of the State of California . . . do establish this Constitution."<sup>114</sup> The California Constitution also provides that "[a]ll political power is inherent in the people."<sup>115</sup> These references themselves appear to assume a fictional "people."

Although the constitution's text provides a basis for assuming the

108. See *infra* notes 136-67 and accompanying text.

109. Commentators have generally followed this approach. See, e.g., Kara Christenson, Note, Interpreting the Purposes of Initiatives: Proposition 65, 40 HASTINGS L.J. 1031, 1042 (1989).

110. 755 P.2d 299 (Cal. 1988).

111. *Id.* at 303-04 (emphasis added).

112. 794 P.2d 897 (Cal. 1990).

113. *Id.* at 900. See also *In re Lance W.*, 694 P.2d 744, 754 (Cal. 1985). "In construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration." *Id.*

114. CAL. CONST. pmb1.

115. CAL. CONST. art. II, § 1.

fictional existence of an "intent of the people," the nexus between the fiction and reality is so much more attenuated than is the case with "legislative intent," that courts should employ the fiction cautiously. It is surely permissible to refer to an "intent of the electorate" when a court is doing nothing more than looking at the language of an initiative. The statement, "the voters intended by this language to accomplish X," is both understandable and harmless.

It is less clear, however, that the fictional "intent of the electorate" can properly be invoked to justify resort to extrinsic aids in interpreting an initiative. The legislature has a constitutional role to play in the passage of legislative initiatives. These initiatives are first considered by the legislature and are then proposed to the people for their approval. Because of this constitutional role, it would be appropriate to treat the official documents and records of the legislature as evidence of a legislative initiative's "legislative intent."

It is "the people" (or more properly, the electorate) who ultimately vote to approve an initiative. Are there any extrinsic aids to help a court determine what "the people" intended when they voted to approve an initiative? There are a wealth of possible sources which might indicate the historical context in which an initiative was approved: the material which is printed in the ballot in addition to the language of the initiative itself (i.e., the analysis by the legislative counsel and arguments pro and con); the content of television and radio advertisements; the content of newspaper and magazine articles; voter polls (both preceding the vote and upon exit from the voting booth); advertisements on billboards; and so on.

In the context of a legislative enactment, it can be argued that committee reports and similar documents are entitled to judicial respect because such reports are produced by a committee which has been delegated the responsibility of studying the legislation.<sup>116</sup> However, such an argument is not possible in the context of a voter initiative. No one could plausibly claim, for example, that the people have delegated to the proponents of a voter initiative the power to create a legislative history in the form of television commercials. Accordingly, if any of these materials are a proper part of the "legislative history" of an initiative, it is because they represent materials that were before the electorate in order to influence votes, and of which the electorate was presumptively aware when voting.<sup>117</sup> The question for the courts is whether any of this material (or all of it) should be examined when attempting to interpret an initiative.

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116. See *infra* note 121 and accompanying text.

117. This is similar to the argument that committee reports are a proper part of an ordinarily legislative history because the reports were presumably before the full legislature. See *supra* notes 131-33 and accompanying text.

*a. Legislative Hearings and Reports*

Legislative initiatives are almost invariably constitutional proposals because, apart from constitutional amendments, the legislature has power to enact statutes without seeking the approval of the electorate.<sup>118</sup> In order to put a constitutional initiative on the ballot, both houses of the legislature must approve the proposal by a two-thirds vote.<sup>119</sup> A legislative constitutional initiative becomes effective if approved by a majority of the qualified electors.<sup>120</sup>

Legislative initiatives are treated by the legislature very much like proposed statutes. A legislative initiative is proposed by a member of either the assembly or the Senate. The initiative is first referred to the appropriate committee or committees which may hold hearings and propose amendments to the initiative. The committee may then report back to the house with a recommendation. When one house has voted favorably on the initiative, it is sent to the other house for its consideration. Throughout this normal legislative process, the usual set of documents and reports are generated.<sup>121</sup> There may be a transcript of testimony before committees. The committees usually will issue a report to accompany the measure.

It would be natural to expect courts to rely upon the documents generated in this customary legislative process. These documents, after all, are probably a pretty good indication of what the drafter of the initiative intended and what the legislature intended in proposing the initiative to the people.

Voter initiatives, unlike legislative initiatives, are usually drafted entirely by private parties. There is no requirement of formal public hearings at which opposing parties are given an opportunity to present their views. There is ordinarily no drafting history whatsoever. The draft that appears on the ballot is the *only* draft.<sup>122</sup>

Occasionally, legislative committees will hold hearings on voter initiatives prior to their enactment. However, the legislature has no constitutional role to play in the consideration of voter initiatives.<sup>123</sup>

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118. As already noted, one significant exception to this rule is that the legislature may not amend or repeal a statutory initiative without the approval of the voters (either expressed in the initiative itself or through a subsequent statutory initiative). CAL. CONST. art. 2, § 10(c).

119. CAL. CONST., art. XVIII, § 1.

120. *Id.*

121. See generally REFERENDUMS, *supra* note 35.

122. *Id.*

123. CAL. CONST. art. IV.



Legislative committees have no power to approve, disapprove, or amend a voter initiative. Accordingly, such hearings (and reports based on such hearings) are not a proper part of the legislative history of a voter initiative. A committee hearing on a voter initiative is thus entitled to no more weight than would be attached to a privately held hearing on a voter initiative.

The California Supreme Court has recognized that legislative reports on voter initiatives are not ordinarily a proper part of the legislative history. In *People v. Castro*,<sup>124</sup> the issue was whether a section in the Victims' Bill of Rights which provided that prior felony convictions "shall subsequently be used without limitation for purposes of impeachment" was intended to displace the trial court's discretion under Evidence Code section 352 to exclude evidence if its probative value is substantially outweighed by its probable prejudicial effect.<sup>125</sup> The State was of the opinion that the Victims' Bill of Rights was intended to abrogate section 352 insofar as evidence of prior felony convictions was concerned, and the State supported this argument in part by proffering majority and minority reports prepared by the Assembly Committee on Criminal Justice. *Both* reports directly supported the State's argument.<sup>126</sup>

The court quite properly rejected the State's effort to include these reports in the legislative history for the Victims' Bill of Rights.<sup>127</sup> Since the Victims' Bill of Rights was a voter initiative, neither the Assembly nor the Senate had any constitutional role to play in the process of enactment. Accordingly, as noted by the court, "[t]he reports represent the opinions or understandings of individuals who happen to be legislators but who were not drafters of the proposed initiative. These opinions, of themselves, do not provide aid in determining the intent of the electorate."<sup>128</sup> According to the court, if these legislative reports had been widely disseminated to the voters (either by direct mail or by widespread reporting), the substance of the reports might have been relevant in determining what the voters believed they were deciding by their votes.<sup>129</sup> There was, however,

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124. 696 P.2d 111 (Cal. 1985).

125. *Id.* at 113.

126. The majority report contained the following sentence: "The initiative will require the use of prior felony convictions for impeachment even though the probative value is outweighed by the danger of substantial prejudice." ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE, ANALYSIS OF PROPOSITION 8, THE CRIMINAL JUSTICE INITIATIVE, 31 (Mar. 24, 1982) (quoted in *Castro*, 696 P.2d at 117). The minority report did not dispute this conclusion, and provided that the initiative "'will end the abuse of justice associated with the prohibition against presenting to the jury felony records of witnesses.'" IN DEFENSE OF THE VICTIMS OF CRIME, AN ANALYSIS OF PROPOSITION 8, THE CRIMINAL JUSTICE INITIATIVE, 18 (Mar. 24, 1982) (quoted in *Castro*, 696 P.2d at 117).

127. 696 P.2d at 117.

128. *Id.*

129. *Id.*

no evidence that the contents of these reports had been widely reported, and, as a result, the court could "only speculate the extent to which the voters were cognizant of them."<sup>130</sup>

In deciding whether a legislative committee report is properly part of the legislative history, it is critical to distinguish between legislative initiatives and voter initiatives. Committee reports (and similar documents) are part of the history of a legislative initiative; they are ordinarily not part of the history of a voter initiative.

Unfortunately, in *Lungren v. Deukmejian*,<sup>131</sup> the court appears to have confused matters by relying in part upon the rule in *Castro*, a voter initiative case, to reject consideration of a committee staff report in a legislative initiative case. The issue in *Lungren* was whether the constitutional confirmation requirements were met when the governor's nominee for the office of Treasurer had been confirmed by one house of the legislature and rejected by the other house.<sup>132</sup> The relevant portion of the initiative provided as follows:

Whenever there is a vacancy in the office of the . . . Treasurer . . . , the Governor shall nominate a person to fill the vacancy who shall take office upon confirmation by a majority of the membership of the Senate and a majority of the membership of the Assembly and who shall hold office for the balance of the unexpired term. In the event the nominee is neither confirmed nor refused confirmation by both the Senate and the Assembly within 90 days of the submission of the nomination, the nominee shall take office as if he or she had been confirmed by a majority of the Senate and Assembly . . . .<sup>133</sup>

Lungren, the governor's nominee to fill the office of Treasurer, had been confirmed by the assembly but rejected by the Senate. According to Lungren, since he had been "neither confirmed nor refused confirmation by *both* the Senate and the assembly within 90 days," he was permitted to take office as though he actually had been confirmed by both houses.

Lungren's legislative history argument was premised upon a single sentence in a staff report concerning prior legislation that had *not* been enacted, but which was virtually identical to the language ultimately adopted in Article X, Section 5(b) of the California Constitution. The staff report stated that "[i]t is understood that the author will submit amendments to permit the nominee to take office on the 91st day after nomination unless both Houses vote to reject the nominee."<sup>134</sup> The critical language in Section 5(b) was subsequently added

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130. *Id.*

131. 755 P.2d 299 (Cal. 1988).

132. *Id.*

133. CAL. CONST. art. V, § 5(b).

134. 696 P.2d at 308-09.

by an amendment proposed by the author of the bill. According to Lungren, the court was required to give the second sentence in Section 5(b) the meaning suggested by the staff report, since the staff report had apparently predicted that the second sentence would be added to Section 5(b).<sup>135</sup>

There were any number of reasons to reject this single sentence as being of controlling importance in interpreting Section 5(b). In the first place, the sentence did not actually purport to describe Section 5(b) as it was finally proposed. Rather, the sentence only predicted that *some* future amendment would be proposed. It is at best unclear whether the subsequent amendment was in fact the same amendment predicted by the staff report. Second, and probably more important, the author of the staff report submitted a declaration that the language which appeared in the second sentence was substantially different from what he had anticipated.<sup>136</sup> Thus, there was a strong basis in the record for rejecting the staff report as an indication of what the second sentence in Section 5(b) meant.

The court did not rely upon these arguments alone, however. In its effort to bury the staff report, the court also drew upon two relatively well-established rules of statutory interpretation -unfortunately, application of the rules was unwarranted in the circumstances presented. Citing *California Teachers Association v. San Diego Community College District*,<sup>137</sup> the *Lungren* court held that the staff report was nothing more than the individual view of "an unnamed staff member of a legislative committee, derived from an unnamed source."<sup>138</sup> *California Teachers* does indeed stand for the proposition that the personal views of a single legislator are not properly part of the legislative history unless those views are communicated to the legislature and are a part of the legislative debate. Nothing in *California Teachers*, however, indicates that a written staff report prepared in the normal course of the legislative process and submitted to a committee that is considering a piece of legislation should not be considered as part of the legislative history. Such a conclusion is entirely unwarranted. Courts routinely have considered such documents to be a part of the legislative history.<sup>139</sup> Staff reports may be given less weight than committee reports, but they are certainly part of the history.

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135. *Id.* at 309.

136. *Id.* at 309 n.17.

137. 621 P.2d 856 (Cal. 1981).

138. *Lungren*, 755 P.2d at 309.

139. *See, e.g.*, *Hutnick v. U.S. Fidelity and Guaranty Co.*, 763 P.2d 1326, 1331 n.7 (Cal. 1988) (considering assembly committee report despite court of appeals' observation that "the views of a committee staff member are not appropriate legislative history").

Yet according to the court in *Lungren*, the staff report was not relevant because "it appears that the report was distributed only to the members of the committee that was considering the bill and its author, and was not before the general membership of either house of the legislature."<sup>140</sup> This is a poor rationale for rejecting the staff report. Committee reports, even though available, may not be widely read by legislators. However, that is no reason for rejecting committee reports as an important part of the legislative history.

The Supreme Court of California appears to be confused. The court's major premise seems to be that a legislative history properly includes only those matters which were brought to the attention of the *entire* membership of the legislature. This premise is unnecessarily narrow. When a legislature sends a bill to committee for consideration, it is delegating some of its power and responsibility to that committee. When the committee acts, it is acting on behalf of the entire legislature. The official acts of committees are thus properly part of the legislative history because they are properly considered official acts of the legislature itself.

The court in *Lungren* was not content to misapply *California Teachers*, however. Citing *Castro*, the court held that the staff report was not part of the legislative history because the voters who approved the initiative were not aware of the report.<sup>141</sup> In proper context, this holding is unremarkable. There were only two ways in which the staff report could properly be considered part of the legislative history: (1) if the report was properly before the legislature; or (2) if the report was before the voters. The court held that the report was not before the legislature, citing *California Teachers*. In order to reject the report, the court was forced to consider whether the report was before the voters. The evidence did not indicate the report was before the voters.

The court's discussion did not proceed so clearly, however. Instead of simply noting that the report was not before the electorate, the court described *Castro* in the following terms:

[I]n *Castro*, we rejected as evidence of the voters' intent in adopting an initiative measure the majority and minority reports of a legislative committee on the ground that these reports did not represent either the intent of the drafters or of the electorate in approving the measure. We stated that because the reports were not included in the voters' pamphlet they were not helpful in

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140. *Lungren*, 755 P.2d at 309. Cf. *Hutnick*, 763 P.2d at 1331 n.7 (explaining that committee reports are a valid part of the legislative history because the members presumably read and consider those reports).

141. *Lungren*, 755 P.2d at 309.

interpreting the intent of the voters . . . 142

This language could easily be interpreted as holding that committee reports are *never* a proper part of the legislative history of any initiative whether a voter initiative or a legislative initiative. Hopefully the court will clarify this discussion when it next has an opportunity to address the importance of committee reports in construing legislative initiatives. Committee reports are a proper part of the legislative history of a legislative initiative.

*b. Ballot Analysis and Arguments*

The court has explicitly relied upon ballot analysis and arguments in construing statutory and constitutional initiatives. Indeed, resort to the ballot pamphlet has now acquired the virtually unassailable status of a long-accepted position.<sup>143</sup> The court has justified its reliance upon the ballot analysis and arguments by use of a fictional educated electorate: "We repeat our observation of some time ago that we ordinarily should assume that the voters who approved a constitutional amendment . . . 'have voted intelligently upon an amendment to their organic law, the whole text of which was supplied each of them prior to the election and which they must be assumed to have duly considered.'"<sup>144</sup>

As set forth above, the premise that voters rely significantly upon the ballot argument or ballot pamphlet is contrary to both common sense and empirical research.<sup>145</sup> In light of these considerations, the courts should not give ballot arguments much weight in the interpretation process. Instead, the ballot arguments should be treated as what they truly are: an individual statement by a biased advocate whose primary aim is to influence a voter, which may or may not include an effort to educate the voter.<sup>146</sup> Such statements are entitled

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142. *Id.*

143. According to the court in *Lungren*, "[t]he rule that the ballot pamphlet is an important aid in determining the intent of the voters in adopting a constitutional amendment or statute is too well settled to require extensive citation of authority." *Id.* at 307 n.14.

144. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1299 (Cal. 1978) (quoting *Wright v. Jordan*, 221 P. 915, 919 (Cal. 1923)). Ironically, the complete quote from *Wright* suggests that the court had previously viewed ballot arguments with less enthusiasm and that the assumption was the electorate would understand the text of the legislation *in spite of* the ballot arguments. The *Wright* court stated that we must assume the electorate has "voted intelligently upon an amendment to their organic law, the whole text of which was supplied each of them prior to the election and which they must be assumed to have duly considered, *regardless of any insufficient recitals in the instructions to voters or the arguments pro and con of its advocates or opponents accompanying the text of the proposed measure.*" *Wright*, 221 P. at 919 (emphasis added).

145. See *supra* notes 51-53, 59-72 and accompanying text.

146. A ballot pamphlet even contains the following warning on each page of pro

to extremely little or even no weight in the interpretive process.<sup>147</sup> Although the court says that it gives statements in the ballot pamphlet significant weight, that rule appears to be true only when it suits the court's purpose. When the court is determined to reach a particular result, the ballot arguments become largely irrelevant. In cases arising under the privacy clause, the court has relied upon the ballot pamphlet only now and then, ignoring the ballot when expedient.<sup>148</sup> The court has also ignored the ballot in cases interpreting portions of Proposition 13, the Jarvis-Gann tax initiative. Among its many provisions, Proposition 13 requires a two-thirds vote of the electorate to approve any proposed special taxes levied by a special district.<sup>149</sup> In *Los Angeles County Transportation Commission v. Richmond*,<sup>150</sup> the court held that "special districts" (which ordinarily would seem to include transportation districts, school districts, fire districts, etc.) does *not* include any district that lacks power to tax real property.<sup>151</sup> In reaching this holding, the court indicated that the primary purpose of Proposition 13 was to reduce only property taxes, rather than to reduce all taxes, and that contrary statements contained in the ballot pamphlet were somehow ambiguous.<sup>152</sup>

The pamphlet analysis included the following seemingly clear statements about the effect of Proposition 13: "Authorizes imposition of special taxes by local government (except on real property) by 2/3 vote of qualified electors."<sup>153</sup> "[A]uthorizes local governments to impose certain nonproperty taxes if two-thirds of the voters give their approval in a local election."<sup>154</sup> "This measure would authorize cities, counties, special districts and school districts to impose unspecified 'special' taxes only if they receive approval by two-thirds of the

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and con arguments: "Arguments printed on this page are the opinions of the authors and have not been checked for accuracy by any official agency."

147. In the interpretation of statutes, the courts have held that even a contemporaneous interpretation given to a statute by a single legislator is not a proper part of the legislative history, recognizing that statements by individual legislators or proponents are a poor indication of legislative intent, unless those statements were part of the legislative debate itself. See, e.g., *California Teachers Assoc. v. San Diego Community College Dist.*, 621 P.2d 856, 860-61 (Cal. 1981); *In re Marriage of Bouquet*, 546 P.2d 1371, 1374-75 (Cal. 1976).

148. See *infra* notes 167-246 and accompanying text.

149. CAL. CONST. art. XIII A, § 4 (added 1978).

150. 643 P.2d 941 (Cal. 1982).

151. 643 P.2d at 946 n.9.

152. *Id.* at 945-46.

153. 1978 Voter Pamphlet, at 56.

154. *Id.*

voters.”<sup>155</sup> These statements were generally consistent with the public debate about Proposition 13, which focused on government waste and overall lower taxes.<sup>156</sup>

The court manufactured ambiguity by implication from other language in the ballot analysis that had nothing directly to do with the taxing power of special districts. The analysis explained that because of Proposition 13's stringent requirements (*i.e.*, requiring a two-thirds vote to approve tax increases), special districts would have difficulty “replacing” lost property tax revenues.<sup>157</sup> According to the court, a special district had *need* to “replace” lost property tax revenue only if the special district had *power* to raise property taxes.<sup>158</sup> Accordingly, districts without power to impose property taxes were not “special districts.” The court's reasoning is strained here.<sup>159</sup> To reach the desired result, the court was willing to ignore clear language directly on point dealing with the power to tax in favor of an implication painfully drawn out of language that dealt with the difficulties that local government would face if Proposition 13 were enacted. The ballot language did not control.

In *People v. Castro*,<sup>160</sup> the court ignored clear language in the ballot analysis that was directly contrary to the court's interpretation of one provision of the Victims' Bill of Rights. The issue in *Castro* was whether the Victims' Bill of Rights had amended the Constitution in such a way as to require in all cases the admission into evidence of prior convictions of a witness for impeachment purposes. As amended, article I, section 28(f), provided that “[a]ny prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding.” This language could not be clearer, as even the court recognized.<sup>161</sup>

Unfortunately for the Victims' Bill of Rights, section 28(d) provided that “[n]othing in this *section* shall affect . . . Evidence Code, Sections 352, 782 or 1103.”<sup>162</sup> Section 352 of the Evidence Code generally authorizes the trial court to exclude any evidence the probative value of which is outweighed by the danger of prejudice or confu-

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155. *Id.*

156. “The authors of proposition 13 and most voters, in fact, wanted and intended not only property tax relief, but relief from taxes in general and a reduction in governmental waste and spending as well.” Henke & Woodlief, *supra* note 50, at 260.

157. 643 P.2d at 945-46.

158. *Id.*

159. See Henke & Woodlief, *supra* note 50, at 264-67.

160. 696 P.2d 111 (Cal. 1985).

161. *Castro*, 696 P.2d at 115 (quoting CAL. CONST. art. I, § 28(f)).

162. CAL. CONST. art. I, § 28(d) (emphasis added).

sion.<sup>163</sup> Thus, the language of article I, section 28(d) appeared to trump the otherwise clear language in section 28(f). On the other hand, the use of the word "section" in section 28(d) appears to have been a drafter's error; the word "subsection" appears to have been actually intended and would have prevented the modification of section 28(d).<sup>164</sup>

The language contained in the ballot analysis was just as clear as Section 28(f): "The measure would amend the State Constitution to require that information about prior felony convictions be used without limitation to discredit the testimony of a witness, including that of a defendant. *Under current law, such information may be used only under limited circumstances.*"<sup>165</sup> Focusing its attention only upon the *second* sentence, the court concluded that this language did not refer to section 352, but referred only to a series of special court created rules excluding evidence of prior convictions.<sup>166</sup> It is not clear from the court's opinion how the *second* sentence, which does not mention either section 352 or the line of cases that the court mentions, is supposed to modify or limit the clear meaning of the

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163. CAL. EVID. CODE § 352 (West 1966).

164. The argument in support of poor drafting is as follows. Section 28(d) provides in full as follows:

Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

CAL. CONST. art. I, § 28(d).

The reference to Evidence Code section 352 comes at the *end* of section 28(d) in a proviso. Ordinarily, such a proviso has reference to what immediately precedes it. Applying this rule of interpretation, Section 28(d) would mean that all relevant evidence would be admissible except to the extent that its probative value was outweighed by its prejudicial value. This makes perfect sense.

Moreover, section 28(d) would not be the only example of poor drafting in the Victims' Bill of Rights. Section 28(b) provides that "[t]he Legislature shall adopt provisions to implement this *section* during the calendar year following adopting of this *section*." CAL. CONST. art. I, § 28(b). As the majority notes, the first use of the word "section" in section 28(b) is incorrect and should be read as "subdivision." *Castro*, 696 P.2d at 116 n.6. The court rejects the obvious conclusion that the drafter of Section 28 was not too careful with the observation that "there is . . . no rule of statutory construction to the effect that one instance of sloppy draftsmanship compels courts to presume a habit." *Id.*

165. *Castro*, 696 P.2d at 116 (emphasis in original) (citing Analysis by the Legislative Analysts, Ballot Pamphlet, Proposed Amend. to Cal. Const., Primary Election 54 (June 8, 1982)).

166. *Castro*, 696 P.2d at 116.



first sentence. The court in *Castro* appears to have run roughshod over the ballot pamphlet in order to reach what the court believed was a better rule of evidence.

These examples suggest that the ballot analysis and arguments are used only fitfully by the court. When the ballot pamphlet supports the court's result, it cites the pamphlet in support. When the ballot pamphlet is contrary to the result the court wishes to reach, it manufactures ambiguities that do not exist and ignores the common sense meaning of the pamphlet language. Instead of engaging in extraordinary gymnastics to overcome language in the ballot pamphlet, the court would do well to adopt a consistent rule which places the ballot pamphlet near the bottom of the list of acceptable legislative history materials.<sup>167</sup>

## 2. Strict Interpretation

Although the court has indicated that it will liberally construe initiative measures, its actual decisions do not support this rule. Initiatives that make far-reaching changes in California's organic law appear to be given a more cautious, narrow construction.<sup>168</sup> The best example of this tendency is the interpretation of Proposition 13.

In 1978, California led the voter anti-tax revolution of the 1980's by enacting Proposition 13.<sup>169</sup> The general purpose of the initiative was to reduce taxes and limit the power of state and local governments to raise taxes in the future.<sup>170</sup> The drafters of Proposition 13 foresaw a

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167. Cf. Christenson, *supra* note 109, at 1048-52 (arguing that ballot arguments should be entitled to substantial, though not conclusive, weight as an indication of the intent of the electorate).

Perhaps the only material lower on the ladder would be newspaper reports and campaign slogans. Newspapers and, more generally, the media blitz, should be used only for the very limited purpose of helping to identify the historical circumstances existing at the time an initiative was enacted. See, e.g., *California Hous. Fin. Agency v. Patitucci*, 583 P.2d 729, 733 (Cal. 1978) (relying upon newspaper and campaign literature to identify "historical context" of an initiative enacted in 1950). Such material has no place in the interpretation of specific language appearing in an initiative or in the interpretation of recently enacted initiatives where the historical context is fresh in the mind of the court. But see Elizabeth A. McNellie, Note, *The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation*, 89 COLUM. L. REV. 157, 174-78 (1989) (arguing that courts should consider, in addition to ballot arguments, the media campaign and the results of reliable exit polls).

168. If the changes are too fundamental or far-reaching, the court has the option of declaring even a constitutional initiative to be an unconstitutional revision. *Raven v. Deukmejian*, 801 P.2d 107, 1086 (Cal. 1990). Short of this drastic remedy, the court always has the power simply to rewrite what the people have approved, although such judicial intervention creates its own serious legitimacy problems for the courts. See *People v. Skinner*, 704 P.2d 752 (Cal. 1985) (reading the word "and" in one section of Proposition 8 as "or" in order to avoid constitutional problem).

169. CAL. CONST. art. XIII A.

170. *Huntington Park Redevelopment v. Martin*, 695 P.2d 220, 222 (Cal. 1985). See Henke & Woodlief, *supra* note 50, at 260-63.

practical problem: What would state and especially local governments do if deprived of taxes on real property? Like any good legislature, they would be likely to raise other taxes to offset the loss of real property taxes. In order to keep local and state governments from taking with the left hand what could not be taken with the right, language was inserted in section 4 of Article XIII A "to prevent the government from recouping its losses from decreased property taxes by imposing or increasing other taxes."<sup>171</sup> Section 4 provides as follows:

Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.<sup>172</sup>

Consistent with the sloppy drafting that seems to pervade voter initiatives, section 4 does not, in plain terms, prohibit cities, counties and special districts from raising special taxes by less than a two-thirds vote. The section is instead drafted in permissive terms. The meaning was clear, however, and although section 4 is drafted in permissive terms (*i.e.*, what cities, counties and special districts *may* do), it has been properly understood as imposing a constitutional limitation upon local government's power to impose special taxes.<sup>173</sup> Specifically, cities, counties and special districts may *not* impose a "special tax" upon a district unless approved by a two-thirds vote of the district's qualified electors.<sup>174</sup> Section 4's two-thirds vote requirement is thus triggered if (1) the tax imposed is a "special tax", and (2) the taxing entity is a city, county or "special district."<sup>175</sup>

The two-thirds vote requirement of section 4 has severely limited local government's ability to finance even necessary operations. Historically, general fund taxes, which, even after the enactment of Proposition 13 can be approved by a simple majority of the voters, have been unpopular and generally unsuccessful. Voters are suspicious of approving a tax increase without knowing precisely what the politicians are going to do with the extra money. For example, a special tax to support the local public library is much more likely to be approved since the voters have a better understanding of what they

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171. Henke & Woodlief, *supra* note 50, at 220.

172. CAL. CONST. art. XIII A, § 4.

173. See generally Daniel G. Nauman, *Local Government Taxing Authority Under Proposition 13*, 10 SW. U. L. REV. 795, 811 (1978).

174. Los Angeles County Transp. Comm'n v. Richmond, 643 P.2d 941, 943 (Cal. 1982); *Amador*, 583 P.2d at 1283.

175. City and County of San Francisco v. Farrell, 648 P.2d 935, 941 (Cal. 1982); *Richmond*, 643 P.2d at 943.

are getting for their money, which may be why section 4 is directed at special taxes that had become a primary method by which local government raised taxes.

Section 4 has not fared well at the hands of the Supreme Court of California, and was saved from oblivion only by the court's most recent section 4 case.<sup>176</sup> Although initiatives are ordinarily to be liberally construed to further their purposes, the Supreme Court of California found in Proposition 13 a reason to reverse this accepted canon of construction. Instead of liberally construing Proposition 13, the court strictly and narrowly construed it because, according to the court, Proposition 13 is anti-majoritarian. This rule appeared in *Los Angeles County Transportation Commission v. Richmond*,<sup>177</sup> the first case to consider the two-thirds requirement under section 4:

In view of the fundamentally undemocratic nature of the requirement for an extraordinary majority . . . , the language of section 4 must be strictly construed and ambiguities resolved in favor of permitting voters of cities, counties and 'special districts' to enact 'special taxes' by a majority rather than a two-thirds vote.<sup>178</sup>

The great irony of this analysis is that, by a parity of resuming, nearly all significant constitutional restrictions should be strictly construed because all such provisions on government are, in their nature, anti-majoritarian and undemocratic. The Bill of Rights is anti-majoritarian; the Fourteenth Amendment is anti-majoritarian. Further, most constitutional language, like much of Proposition 13, is both general and ambiguous. The ambiguities in the Bill of Rights are indeed part of its strength. Are we to construe the Bill of Rights and the Fourteenth Amendment narrowly because they are anti-majoritarian and ambiguous? Obviously not. Instead, the fact that such anti-majoritarian restrictions have been placed in a constitution is a significant reason for giving that restriction a liberal reading consistent with its purpose, a reading that will permit the restriction to achieve its full purpose.

Proposition 13 has not received this treatment, however. In *Richmond*, applying its rule of strict construction, the court came very close to gutting Proposition 13 by defining "special district," an undefined and ambiguous term, to exclude districts that lack real property taxing power.<sup>179</sup> Given this definition, state and local governments could easily evade the requirements of Proposition 13 by vesting power to raise other ad valorem taxes (e.g., sales taxes) in an entity that otherwise lacks power to tax real property.<sup>180</sup> Since such an en-

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176. *Rider v. County of San Diego*, 820 P.2d 1000 (Cal. 1992).

177. 643 P.2d 941 (Cal. 1982).

178. *Id.* at 945.

179. *Id.* at 945-46. See also *Huntington Park Redevelopment v. Martin*, 695 P.2d 220, 223 (Cal. 1985).

180. A discussion of various methods of avoiding Proposition 13's strictures and of

tity would not appear to be a "special district" under the *Richmond* court's definition, section 4's super-majority voting requirement would apparently not be triggered.

The court in *Richmond* recognized this danger. Unfortunately, the court's solution was to put the issue off until another day:

Nor are we impressed with a suggestion that our interpretation of section 4 could result in the wholesale avoidance of the purpose of article XIII A by the Legislature, which could reorganize existing "special districts" to remove their property-taxing power or create new ones without such power, thereby allowing them to adopt a "special tax" by majority vote. We cannot assume that the Legislature will attempt to avoid the goals of article XIII A by such a device. In any event, that problem can be dealt with if and when the issue arises. The legislation creating [the county transportation commission] and granting it the power to levy only a sales tax antedated Proposition 13 by two years. Thus, there can be no claim here that the Legislature was attempting to evade the restrictions imposed by section 4.<sup>181</sup>

It took local government and the legislature several years to catch on to the game, but catch on they ultimately did. The courts are now facing the issue in cases challenging an attempt by the legislature and local government to establish county justice facilities financing commissions (that of course do not have real property taxing power), whose predominant purpose is to raise sales taxes to finance the construction and operation of county jails.

The Superior Court for the County of San Diego declared the legislation affecting that county unconstitutional, finding that the financing commission was created with the sole purpose of avoiding section 4. Applying the language from *Richmond* quoted above, the court struck down the authorizing legislation.<sup>182</sup> However, the California Court of Appeals for the Fourth District has reversed the San Diego Superior Court's decision.<sup>183</sup> The fourth district did not read the language in *Richmond* as requiring the courts to deal with the problem once it arose, noting that the *Richmond* court said only that the "problem can be dealt with if and when the issue arises."<sup>184</sup> It is fair to ask the fourth district: "Who is supposed to deal with the problem?" The fourth district's answer was the "electorate and/or the State Legislature."<sup>185</sup> This answer cannot be taken very seriously.

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other supreme court cases is contained in Joseph Henke & Woodlief, *supra* note 50, at 251.

181. *Richmond*, 643 P.2d at 947 (emphasis added).

182. The superior court's decision was reversed in *Rider v. County of San Diego*, 272 Cal. Rptr. 857 (Cal. Ct. App. 1990), *rev'd* 820 P.2d 1000 (Cal. 1992).

183. *Rider*, 272 Cal. Rptr. 857.

184. *Id.* at 860 (citing *Richmond*, 643 P.2d at 947).

185. *Id.* at 861.

How can we rely upon the legislature to deal with the problem when it is the legislature itself that is attempting to avoid the constitutional provision? Further, is it plausible to require the electorate to enact *another* constitutional initiative to protect the purposes of a prior initiative?

If the court of appeals' decision had been affirmed, Section 4 would have become essentially a dead letter. The California Supreme Court reversed, however, saving at least some of Section 4's limiting principle.<sup>186</sup> Although it reversed, the Court did not explicitly repudiate *Richmond's* strict construction rule, and it remains unclear just how much of an impact the *Rider* decision will have.<sup>187</sup>

There are, of course, other examples where the court has interpreted an initiative consistently with its apparent intent.<sup>188</sup> But even in such cases, the votes tend to be close, suggesting disagreement among the members of the court as to the respect due to voter initiatives.<sup>189</sup> In light of the many problems created by the enactment of voter initiatives, the court should abandon the liberal construction rule in favor of a rule that voter initiatives will be strictly, or at least cautiously, construed so as to minimize their damage to the law. The voters simply do not have the expertise of a legislature and do not deserve the same deference.

### 3. The Presumption of Constitutionality

Because the court formally treats an initiative measure as though it was an ordinary piece of legislation, initiatives are supposedly entitled to a presumption of constitutionality. The presumption has been stated in a number of different ways: "[A]ll presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears."<sup>190</sup> If the constitutionality of an initiative is "fairly debatable," the courts must uphold it.<sup>191</sup> And, of course, courts "do not consider or weigh the economic or social wisdom or

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186. *Rider v. County of San Diego*, 820 P.2d 1000 (Cal. 1992).

187. The court set forth six factors which it directed lower courts to consider in determining whether a particular local tax agency was created with the predominate purpose of avoiding Section 4. *Id.*, 820 P.2d at 1006. Only time will tell whether the legislature will discover a way to create new local taxing agencies that satisfy those six factors and whether courts will permit such a subterfuge.

188. See, e.g., *In re Lance W.*, 694 P.2d 744 (Cal. 1985) (interpreting Victims' Bill of Rights as abrogating court-created exclusionary rule).

189. See, e.g., *In re Lance W.*, 694 P.2d at 745 (4-3 vote).

190. *In re Ricky H.*, 468 P.2d 204 (Cal. 1970) (quoted in *Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247, 1251 (Cal. 1989) (reviewing Proposition 103)).

191. *Associated Home Builders of Greater East Bay, Inc. v. City of Livermore*, 557 P.2d 473, 483 (Cal. 1976).

general propriety of the initiative. Rather, [their] sole function is to evaluate [it] legally in the light of established constitutional standards."<sup>192</sup>

The presumption that legislatively enacted statutes are constitutional is supported by two powerful principles. First, the legislature is a co-equal branch of government, and the separation of powers counsels judicial caution when reviewing the acts of a co-equal branch.<sup>193</sup> Second, each member of the legislature, like each judicial officer, has taken a constitutional oath which obligates each member to consider the constitutionality of legislative acts.<sup>194</sup> Although the judicial branch has in a practical sense the last word on the constitutionality of legislative acts,<sup>195</sup> the judicial branch must recognize that its word is not the *only* word.<sup>196</sup> The legislative branch and the executive branch have already passed upon the constitutionality of an act before the judiciary gets a look, and thus the judiciary must be well convinced of an act's unconstitutionality before striking it down.

A voter initiative, by contrast, may be proposed by a self-centered interest group that has no constitutional obligation to even consider the constitutionality of what is proposed. Individual citizens (even if they understood the constitutional problems created by a particular initiative) likewise have no constitutional obligation to vote against an unconstitutional initiative. It is therefore inappropriate to presume that a voter initiative is constitutional. Instead, voter initiatives should be given a careful review because the "intent of the electorate" is not always to be trusted.

Although the Supreme Court of California has declared that initiatives are entitled to a presumption of constitutionality, the court managed to strike down as unconstitutional all or significant portions

192. *Amador*, 583 P.2d at 1283.

193. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (Burger, C.J.); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973); *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J.).

The Supreme Court of California has also noted that since the California Constitution, unlike the federal Constitution, only limits the power of the legislature (rather than grants it limited powers), the Legislature's interpretation of the state Constitution is entitled to "a strong presumption of constitutionality." *California Hous. Fin. Agency v. Patitucci*, 583 P.2d 729, 731 (Cal. 1978). See also *Methodist Hosp. of Sacramento v. Saylor*, 488 P.2d 161, 166 (Cal. 1971); *Delaney v. Lowery*, 154 P.2d 674, 678 (Cal. 1944).

194. U.S. CONST. art. II, § 1 of art. VI; CAL. CONST. art. XX, § 3.

195. *Marbury v. Madison*, 5 U.S. 137 (1803).

196. *But see Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (stating that "the federal judiciary is supreme in the exposition of the law of the Constitution"). See LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-4 (2d ed. 1988) (discussing *Cooper*).

of seven of fourteen voter initiatives between 1964 and 1990.<sup>197</sup> This track record indicates either (a) the court is actually not according voter initiatives a presumption of constitutionality, or (b) the court in the future should not accord voter initiatives a presumption of constitutionality because voters historically have approved a significant number of unconstitutional initiatives (in short, voters have abused the presumption).<sup>198</sup> In either case, it is time to acknowledge what is really going on; the court treats the “intent of the electorate” as expressed in voter initiatives with understandable skepticism as seen in the case discussions that follow.

Proposition 15 on the November 1964 ballot was the “Free Television Act.” The Free Television Act absolutely prohibited the business of home subscription or pay television in California. In *Weaver v. Jordan*,<sup>199</sup> the court struck down the Act as a violation of the free speech clauses of the federal and state constitutions. Characterizing the Act as involving a prior restraint, the court reversed the presumption of constitutionality, holding that the Act came before the court “bearing a heavy presumption against its constitutional validity.”<sup>200</sup> Finding no “clear and present danger,”<sup>201</sup> and also rejecting as insubstantial the Act’s stated goals,<sup>202</sup> the court easily found the Act constitutionally defective.

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197. *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990); *Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247 (Cal. 1989); *People v. Ramos*, 639 P.2d 908 (Cal. 1982); *Citizens for Jobs & Energy v. Fair Political Practices Comm’n*, 547 P.2d 1386 (Cal. 1976); *Santa Barbara Sch. Dist. v. Superior Court*, 530 P.2d 605 (Cal. 1975); *Mulkey v. Reitman*, 413 P.2d 825 (Cal. 1966); *Weaver v. Jordan*, 411 P.2d 289 (Cal. 1966).

This list of unconstitutional initiatives enacted by the voters does not include two proposed initiatives which the court held could not even be placed upon the ballot because of constitutional defects. *ALF-CIO v. Eu*, 686 P.2d 609 (Cal. 1989); *Legislature v. Deukmejian*, 669 P.2d 17 (Cal. 1983). See Eastman, *supra* note 51; Carol Sue Hunting, Note, *Pre-Election Review of Voter Initiatives*, *AFL-CIO v. Eu*, 60 WASH. L. REV. 911 (1985); Greg M. Salvato, Note, *New Limits on the California Initiative: An Analysis and Critique*, 19 LOY. L.A. L. REV. 1045 (1986).

198. In light of this miserable record, it is hard to credit Mr. Eastman’s conclusion that “by and large, citizens have proved to be responsible lawmakers.” Eastman, *supra* note 51, at 553.

199. 411 P.2d 289 (Cal. 1966).

200. *Id.* at 293 (quoting *Freedman v. Maryland*, 380 U.S. 51, 57-58 (1965)). Justice Mosk in a lonely dissent took issue with the reversed presumption: “First of all, it appears that the majority finds this Act presumptively unconstitutional, ignoring the well-established rule that a legislative enactment is presumed to be valid and that persons adversely affected must sustain the burden of demonstrating constitutional intrusion. Neither First nor Fourteenth Amendment cases alter the basic principle.” *Id.* at 300 (Mosk, J., dissenting) (footnote omitted).

201. *Id.* at 296.

202. The Act itself declared that “[t]he development of any subscription television business would have an adverse effect upon presently licensed television stations which do not make a charge to viewers; and would tend to deprive the members of the public, who have made a substantial investment in television receiving equipment, of their present freedom of choice with respect to television programs, and of the information, instruction and entertainment now readily and freely available to them. It

Proposition 14, which was also on the 1964 ballot, amended the California Constitution to create a private right in the owner of real property "to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."<sup>203</sup> In *Mulkey v. Reitman*,<sup>204</sup> the court declared Proposition 14 unconstitutional under the Fourteenth Amendment's Equal Protection Clause. In reaching this conclusion, the court correctly noted that "Proposition 14 generally nullifies both the Rumford and Unruh Acts as they apply to the housing market,"<sup>205</sup> and that Proposition 14 thus "provides for nothing more than a purported constitutional right to *privately* discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment *should state action* be involved."<sup>206</sup> Because Proposition 14 amended the California Constitution, striking it down under the California Constitution would have been difficult (though not impossible).<sup>207</sup> The problem under the Fourteenth Amendment was to find state action.<sup>208</sup> In a decision that has been properly criticized by scholars as fundamentally unprincipled,<sup>209</sup> the court found that the enactment of Proposition 14 constituted sufficient state "encouragement" of private discrimination so as to constitute state action.<sup>210</sup> They found this state action despite the fact, noted by the dissenters, that Proposition 14 technically did nothing more than repeal the Rumford and Unruh Acts and thereby restore California law to a position of race neutrality in the

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would tend to create a monopoly. For those and related reasons it would be contrary to the public policy of this State." *Id.* at 292 n.1.

Among other criticisms of the Act, the majority noted that "any suggested 'evil' appears to be speculative and illusory." *Id.* at 296. Justice Mosk criticized his colleagues for second-guessing the stated legislative goal: "the syllogism may be weak or debatable, but this would hardly be unprecedented in the legislative arena. A disputatious posture does not justify finding as a matter of law that the logic is captious or the conclusions capricious or arbitrary." *Id.* at 308 (Mosk, J., dissenting).

203. CAL. CONST. art. I, § 26 (repealed 1974).

204. 413 P.2d 825 (Cal. 1966), *aff'd*, 387 U.S. 369 (1967).

205. *Id.* at 829.

206. *Id.* at 830 (emphasis added).

207. See *infra* notes 366-412 and accompanying text.

208. The federal state action requirement is discussed *infra* notes 350-412 and accompanying text.

209. See, e.g., Kenneth L. Karst & Harold W. Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39; ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 65-70 (1970). *Reitman* involved a state action problem similar to that addressed by the Court in *Shelley v. Kraemer*, 334 U.S. 1 (1948). For a criticism of *Shelley* that applies with equal force to *Reitman*, see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

210. *Reitman*, 413 P.2d at 833.



transfer of real property (a constitutionally acceptable position under the Fourteenth Amendment).<sup>211</sup> The court did not even mention the supposed presumption of constitutionality in its analysis, and the resolution of the state action issue was far from clear.<sup>212</sup>

Proposition 21, which appeared on the November 1972 ballot, added section 1009.6 to the Education Code, providing that “[n]o public school student shall, because of his race, creed, or color, be assigned to or be required to attend a particular school.”<sup>213</sup> The Proposition also repealed the Bagley Act, enacted in 1971, which directed school districts to “eliminate racial and ethnic imbalance in public enrollment.”<sup>214</sup> In *Santa Barbara School District v. Superior Court*,<sup>215</sup> the court struck down that portion of Proposition 21 which added section 1009.6. Section 1009.6 was clearly unconstitutional with respect to school district efforts to remedy prior *de jure* segregation under *North Carolina v. Swann*,<sup>216</sup> which struck down a virtually identical North Carolina statute.<sup>217</sup> It was less clear, however, whether section 1009.6 was unconstitutional with respect to school district efforts to remedy *de facto*, but not *de jure*, segregation. There were intimations from the supreme court as early as 1973 that *de facto* segregation did not constitute a constitutional violation.<sup>218</sup> It could plausibly be argued, then, that section 1009.6 was unconstitutional only insofar as it interfered with remedies for *de jure* segregation, but that it was constitutional insofar as it interfered only with remedies for *de facto* segregation. The court rejected this argument, however, asserting that the distinction between *de jure* and *de facto* segregation was so uncertain, that prohibiting a school board from taking steps to remedy *de facto* segregation would unduly interfere with the constitu-

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211. *Id.* at 840, 845 (White, J., dissenting, and McComb, J., dissenting).

212. The United States Supreme Court affirmed, but was obviously uncomfortable with the state action analysis and placed unusually heavy reliance upon the California Supreme Court's conclusion that Proposition 14 constituted state encouragement of discrimination in California. *Reitman*, 387 U.S. at 373-76.

The Court's reliance upon the California Supreme Court's finding of encouragement is suspect because, among other reasons, that finding was based upon the California court's reading of the Supreme Court's state action cases. A more rigorous analysis would have involved a *de novo* review by the Supreme Court itself. Instead, the Court seemingly treated the California court's finding of state encouragement as a finding of fact that would not be reconsidered by the Court. The majority's reliance upon the California court's finding was the center-piece of the four-justice dissent in *Reitman*. *Reitman*, 387 U.S. at 387-96 (Harlan, J., dissenting).

213. CAL. EDUC. CODE § 1009.6 (West 1978 & Supp. 1991) (recodified as CAL. EDUC. CODE § 35351).

214. CAL. EDUC. CODE §§ 5002 & 5003 (West 1978) (*repealed by* Proposition 21).

215. 530 P.2d 605 (Cal. 1975).

216. 402 U.S. 43 (1971). *See also* *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

217. *Swann*, 402 U.S. at 46.

218. *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973). *See generally* TRIBE, *supra* note 196, at § 16-18, 1492-93 n.39.

tional obligation to remedy *de jure* segregation.<sup>219</sup> The court did not indulge in a presumption of constitutionality or a presumption that school districts could generally determine whether segregated conditions were likely to have been the result of prior *de jure* segregation.<sup>220</sup>

Proposition 9, enacted by the voters in June 1974, limited the amount of funds which could be spent campaigning for or against statewide ballot propositions. In *Citizens for Jobs and Energy v. Fair Political Practices Commission*,<sup>221</sup> the court, in a short opinion, declared the limits on campaign spending unconstitutional in light of the Supreme Court's then-recent decision in *Buckley v. Valeo*.<sup>222</sup>

The California Supreme Court's battle with the electorate over the death penalty marks one of the more interesting and controversial stories in California judicial history. Perhaps more than with any other issue discussed in this section, the death penalty cases reveal a court openly hostile to the electorate (and an electorate that ultimately fought back and won). In *People v. Anderson*,<sup>223</sup> the court struck down California's death penalty statute as violative of the California Constitution, article I, section 6.<sup>224</sup> The voters responded the same year with an initiative that overruled *Anderson*.<sup>225</sup> In 1973, the

219. *Santa Barbara Sch. Dist.*, 530 P.2d at 614-15.

220. The Supreme Court of California subsequently held that *de facto* segregation in schools violated the state due process clause. *Crawford v. Board of Educ.*, 551 P.2d 28 (Cal. 1976). The legislature and voters reacted to this decision with Proposition I, which amended the state due process clause to prohibit busing of students to achieve racial balance unless a violation of the federal constitution had been shown. That proposition was held constitutional in *Crawford v. Board of Education*, 458 U.S. 527 (1982).

The decision in *Santa Barbara* may have been correct for a reason quite different from that given by the California court. In *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), the Supreme Court struck down a Washington initiative that took away from school boards the power to assign students to schools on anything other than a geographic basis. The Court held that the initiative had reallocated political "power nonneutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process." *Seattle School District*, 458 U.S. at 470 (emphasis in original).

221. 547 P.2d 1386 (Cal. 1976).

222. 424 U.S. 1 (1976).

223. 493 P.2d 880 (Cal. 1972).

224. *Id.* at 898.

225. The initiative added article I, section 27, to the California Constitution which provided that:

All statutes of this state in effect on February 17, 1972 [the date of the *Anderson* decision], requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum. The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or

legislature responded to the Supreme Court's decision in *Furman v. Georgia*,<sup>226</sup> which struck down death penalty statutes that granted too much discretion to the sentencing authority, by enacting a new death penalty statute. The new statute was ultimately declared unconstitutional in *Rockwell v. Superior Court*,<sup>227</sup> because of the statute's incompatibility with a series of Supreme Court decisions in the mid-1970's.<sup>228</sup> The California Legislature again quickly acted to reinstate the death penalty, and this statute was held constitutional by the court in *People v. Frierson*.<sup>229</sup>

The people, meanwhile, had been working on a death penalty initiative measure which, when approved in 1978, set the stage for a battle with the court. The death penalty initiative added several sections to the Penal Code setting forth, in substantial detail, the procedural and substantive rules to be followed in the penalty phase of a criminal trial in which the death penalty was an issue.<sup>230</sup> The court responded in a series of cases that either struck down a portion of the initiative or found a constitutional violation in the manner in which the trial court had instructed the jury in the penalty phase.<sup>231</sup> In 1986, the people, frustrated in their efforts to see the death penalty enforced by the supreme court, refused to retain three justices on the court who were perceived to be part of the problem.<sup>232</sup> A newly-constituted court has acceded to the people's will by upholding California's death penalty statutes and affirming several death penalty sentences.<sup>233</sup>

In *Calfarm Insurance Co. v. Deukmejian*,<sup>234</sup> the court struck down one of the most significant portions of Proposition 103, the insurance relief initiative. Proposition 103 provided for an immediate roll-back

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unusual punishments within the meaning of Article I, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.

CAL. CONST. art. I, § 27.

226. 408 U.S. 238 (1972).

227. 556 P.2d 1101 (Cal. 1976).

228. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

229. 599 P.2d 587 (Cal. 1979). *See also* *People v. Jackson*, 618 P.2d 149 (Cal. 1980).

230. CAL. PENAL CODE §§ 190-190.5 (West 1991).

231. *See, e.g.*, *People v. Davenport*, 710 P.2d 861 (Cal. 1985); *People v. Brown*, 726 P.2d 56 (Cal. 1985); *People v. Easley*, 671 P.2d 813, 834 (Cal. 1983); *People v. Robertson*, 655 P.2d 279, 302-05 (Cal. 1982) (Broussard, J., concurring); *People v. Ramos*, 639 P.2d 908 (Cal. 1982).

232. Chief Justice Rose E. Bird and Associate Justices Joseph R. Grodin and Cruz Reynoso were voted out of office by a 66% negative vote. Anthony Paonita, *Voters in 3 States Reject Chief Justices*, NAT'L L.J., Nov. 17, 1986, at 3.

233. *See, e.g.*, *People v. Anderson*, 285 Cal. Rptr. 523 (Cal. 1991); *People v. Jennings*, 760 P.2d 475 (Cal. 1988); *People v. Bonin*, 758 P.2d 1217 (Cal. 1988); *People v. Miranda*, 744 P.2d 1127 (Cal. 1987); *People v. Anderson*, 742 P.2d 862 (Cal. 1987) (overruling *Carols v. Superior Court*, 672 P.2d 862 (Cal. 1983)).

234. 771 P.2d 1247 (Cal. 1989).

of most consumer insurance rates to a level twenty percent below the level which existed at the time Proposition 103 was proposed (roughly one year prior to its enactment).<sup>235</sup> Insurers could apply to the newly-created Insurance Commissioner for relief from the roll-back, but during the first year of its operation, Proposition 103 prevented the Insurance Commissioner from granting relief except upon a showing "that an insurer is substantially threatened with insolvency."<sup>236</sup> After the first year, the Commissioner could grant relief upon a showing that the rate applied for was not "excessive, inadequate, unfairly discriminatory or otherwise in violation of [the initiative]."<sup>237</sup> The court held in *Calfarm* that the insolvency standard, which was applicable only during the first year, was unconstitutionally confiscatory because it denied insurers a fair rate of return.<sup>238</sup> By striking down the rate roll-back, the court took away one of Proposition 103's major selling points.<sup>239</sup>

The most recent constitutionally defective initiative is Proposition 115, which purported to make sweeping changes in the administration of criminal justice in California. In *Raven v. Deukmejian*,<sup>240</sup> the court held that Proposition 115's modification of the state constitutional protections accorded to criminal defendants was so fundamental and far-reaching that the proposition constituted a revision of the constitution (rather than an amendment to the constitution) and was therefore unconstitutional.<sup>241</sup> One of Proposition 115's many provisions would have made the constitutional rights of criminal defendants under the state constitution no broader than rights guaranteed under the federal Constitution.<sup>242</sup> Although voters may propose

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235. CAL. INS. CODE § 1861.01(a) (West Supp. 1991).

236. CAL. INS. CODE § 1861.01(b) (West Supp. 1991).

237. CAL. INS. CODE § 1861.05 (West Supp. 1991).

238. *Calfarm*, 771 P.2d at 1252-59.

239. The court also struck down a provision which required the creation of a consumer advocacy corporation as violative of article II, section 12, of the constitution, which, among other things, prohibits any initiative from naming or identifying a private corporation to perform any function or have any power. *Id.* at 1263.

240. 801 P.2d 1077 (Cal. 1990).

241. *Id.* at 1089-90.

242. Article I, section 24, provided prior to Proposition 115 that "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." CAL. CONST. art. I, § 24. Proposition 115 proposed to add the following paragraph to section 24:

In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against

amendments to the state constitution through initiative, a revision of the constitution can be achieved only by a legislative initiative or constitutional convention.<sup>243</sup> Although the distinction between an amendment and revision is hazy, the court's focus is upon "both the quantitative and qualitative effects of the measure on our constitutional scheme."<sup>244</sup> Although Proposition 115 survived the quantitative analysis,<sup>245</sup> it failed the qualitative analysis because the proposition purported to "vest all judicial *interpretive* power, as to fundamental criminal defense rights, in the United States Supreme Court."<sup>246</sup> Such a fundamental modification of the federalism principle, a modification that would undermine the independent vitality of the state constitution, was too great a qualitative change in state government to be achieved through the amendment process.<sup>247</sup>

Although the courts claim to treat voter initiatives with the same respect that is accorded to legislative action, the above review of decisions casts that claim in doubt. In practice, the court appears to follow the path that I have laid out in theory. Voter initiatives are strictly construed, and ambiguities are corrected by narrow, technical constructions. The presumption of constitutionality is easily overcome, if it exists at all. Ballot arguments are taken seriously only occasionally. The experience with initiatives suggests that the court views the "intent of the electorate" with a somewhat jaundiced eye. Indeed, the track record over the last twenty-five years is quite remarkable for its consistency.

So far, however, the court has been unwilling to insult the voters by verbalizing what it apparently feels: initiatives tend to be poorly drafted and thought out, and the electorate possesses a marked propensity to enact constitutionally unacceptable measures (confirming to some extent Madison's original fears of faction). Silence is politically expedient for the court, which remains subject to voter recall, but the bar especially should be aware of what is really going on.

It is in light of these actual rules of interpretation that the privacy

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himself or herself, to not be placed twice in jeopardy for the same offense, and not to suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this state in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.

Izazaga v. Superior Court, 815 P.2d 304, 326 n.3 (Mosk, J., dissenting) (quoting section 3 of Proposition 115).

243. CAL. CONST. art. XVIII, §§ 1-3.

244. *Raven v. Deukmejian*, 801 P.2d 1007, 1091 (Cal. 1990).

245. *Compare Fadden v. Jordan*, 196 P.2d 787 (Cal. 1948) (striking down a proposition which added 21,000 words to the constitution and modified 15 of its 25 articles).

246. *Raven*, 801 P.2d at 1087 (emphasis in original).

247. *Id.* at 1087-90.

clause should be judged. First, because the privacy clause was a legislative initiative, the legislative history will include assembly and senate committee reports and a drafting history, as well as the state of the law in existence at the time the privacy clause was proposed and adopted. The ballot argument and analysis, which depend for their validity upon the fictional intent of an educated electorate, should be largely ignored. Second, as a legislative initiative, the privacy clause is entitled to a liberal construction consistent with its general purpose. Third, as a legislative initiative, the privacy clause is entitled to a presumption of constitutionality.

### III. THE RIGHT TO PRIVACY APART FROM ARTICLE 1, SECTION 1

The interest in "privacy" was protected by California and federal law long before the privacy initiative added privacy to our state constitution in 1972. A cause of action for invasion of privacy developed through the common law and ultimately made its way into certain sections of the California Code. The Supreme Court of California had recognized that the right to privacy under both the federal and state constitution protected a woman's right to decide whether to have an abortion. At the federal level, privacy had found a place in the short list of unenumerated rights. In accord with customary rules of statutory and constitutional interpretation, a proper interpretation and understanding of article 1, section 1 can be had only against this broad background of pre-existing privacy law.<sup>248</sup>

#### A. *The Common Law and Civil Code Right to Privacy*

The interest in privacy was traditionally protected against invasions by private actors through the common law tort action for "invasion of privacy" and through various code provisions that protected relatively narrow aspects of privacy. A few introductory comments concerning the common law's approach to decision-making in the field of civil liability are in order. There will be nothing novel in this introduction, only a restatement of what others, after a more complete study, have concluded.<sup>249</sup>

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248. *In re Harris*, 775 P.2d 1057, 1060 (Cal. 1989); *People v. Overstreet*, 726 P.2d 1288, 1292 (Cal. 1986).

Although some of the cases discussed below post-date the privacy initiative, for present analytical purposes, they may be treated as part of the background to enactment of the privacy initiative since they represent only further developments and refinements of doctrines that pre-dated the privacy initiative.

249. On the process of judicial decision-making and the development of common

At bottom, the common law seeks to resolve conflicts between private litigants by balancing conflicting interests in a way to achieve justice. The interests include the public's interest in health and safety, the injured person's interest in freedom from injury and in compensation once injured, and the defendant's interest in liberty from state regulation which burdens the defendant's freedom of choice.<sup>250</sup> Ordinarily, this balancing of interests takes place "behind the scenes," in the judges' chambers or in a judicial conference room where particular rules of law and causes of action are put together. The results of the balancing—particular rules of law or requirements for causes of action—are then reported in judicial opinions, sometimes with an explanation of the balancing process which led to the rules. The rules, once created, are then applied by the courts to specific factual situations. Because the rules are designed to reflect an appropriate balancing of the relevant interests, it is hoped that an application of the rules makes it unnecessary to engage in an *ad hoc* balancing of interests in every case. But, if the rules are widely perceived to produce unfair results, the balance may be reconsidered and the rules recast. In this way, the common law can grow and adapt to changing conditions in society.

The common law action for invasion of privacy follows this pattern. Through a careful balancing of interests, the courts developed specific causes of action which protected somewhat well-defined aspects of personal privacy. Although privacy was clearly identified as an interest worthy of some legal protection, courts generally did not give privacy a privileged place or undue weight in the balancing process. As will be seen, the balancing has thus far resulted in causes of action for invasion of privacy that contain some rather strict limitations which have created pressure to look elsewhere for protection of privacy interests.<sup>251</sup>

The creation of "invasion of privacy" as a distinct tort cause of action can be traced to a law review article published in 1890 by Messrs. Brandeis and Warren.<sup>252</sup> The inspiration for the article came from Warren's own personal annoyance at the press, which with some regularity reported on Warren's private life, newsworthy due, in part, to

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law, see Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986); K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960); E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1949). On the importance of balancing interests in civil tort litigation, see sources cited in PROSSER & KEETON ON TORTS § 3 (W. Page Keeton & Dan B. Dobbs eds., 5th ed. 1984).

250. See *supra* note 248.

251. See *infra* notes 255-311 and accompanying text.

252. Louis D. Brandeis & Earl Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

Warren's marriage to the daughter of a prominent politician.<sup>253</sup>

Given this unique and personal pedigree, it is something of a wonder that invasion of privacy was so quickly thereafter adopted by courts. There are no doubt two reasons for the proposed tort taking root. First, the authors of the article were highly respected lawyers of the time, and their belief that a tort should exist was given substantial weight. Second, the abuses of the press were well known even in 1890, and the invasion of privacy tort seemed ideal for keeping the press in check since it apparently did not suffer from any of the inconvenient defenses available in a defamation action (such as truth or lack of harm to reputation). Indeed, in a privacy action, these traditional defenses actually are part of the plaintiff's arsenal.<sup>254</sup> Disclosure of the truth about a person is often more damaging than lies.

Because the word "privacy" is so ill-defined, it is not surprising that an action for invasion of privacy has been the refuge of plaintiffs who have been, for one reason or another, unable to satisfy the technical requirements for other tort causes of action such as defamation, intentional or negligent infliction of mental distress, trespass, conversion, or misrepresentation, to name just a few. Recognizing this fact, courts have been careful to establish relatively well-defined limits to the invasion of privacy action.

Over time, the cases were organized into classifications. Dean Prosser, the great tort classifier, identified four distinct causes of action for invasion of privacy: (1) intrusion into private matters; (2) public disclosure of private facts; (3) false light; and (4) misappropriation of name or picture.<sup>255</sup> These four categories have been widely adopted in jurisdictions around the country. Although all four of these causes of action have been grouped under the privacy rubric, they actually have little to do with one another. For example, each cause of action protects an entirely distinct interest. Thus, the cause of action for intrusion protects the interest in seclusion; the cause of action for public disclosure protects the interest in controlling the extent to which private information is made widely known to the public; the false light cause of action protects the interest in the truthful dissemination of information about one's self; the misappropriation cause of action protects an economic interest in the value of one's

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253. A. MASON, BRANDEIS: *A FREE MAN'S LIFE* 70 (1956).

254. RESTATEMENT (SECOND) OF TORTS § 652 (1989).

255. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).



name or picture.<sup>256</sup>

Moreover, because different interests are protected, different defenses are available for each cause of action. For example, truth is a defense to a claim of false light, yet truth is no defense to a claim of public disclosure of private facts.<sup>257</sup> Indeed, the truth of the matter disclosed is what makes the public disclosure so damaging.

### 1. The Right to Be Let Alone

“A man’s home is his castle.” This saying adequately sums up the public policy that supports a cause of action for invasion of “the right to be let alone” or intrusion.<sup>258</sup> The American concept of personal dignity and worth includes a sphere of private thoughts and conduct that we should all reasonably be able to expect will be held inviolate.<sup>259</sup>

At the same time, however, we live in a crowded society, with people bumping up against each other (actually and figuratively). Moreover, even conduct that takes place in the relative seclusion of one’s own bedroom may have an effect on society and on the way society develops. Accordingly, from a constitutional and common law perspective, the zone of privacy is relatively small. The state may regulate seemingly private conduct in the interests of health, safety and morals.<sup>260</sup> The law of torts has been similarly careful in recognizing a right to be let alone, lest the courts become a battleground for all manner of trivial, personal disputes. Two mechanisms exist in the law of intrusion which keep it within bounds. First, intrusion is an *intentional* tort. Negligently invading another’s seclusion does not give rise to a cause of action. Second, whether an intrusion is actionable depends upon whether the *reasonable* person would find the intrusion *objectionable or offensive*.<sup>261</sup> Courts thus can exercise some control over the cause of action by declaring what is offensive or not offensive and what is reasonable or unreasonable in the circumstances.<sup>262</sup>

The Restatement formulation, which California courts have relied

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256. PROSSER & KEETON ON TORTS § 117, at 849 (W. Page Keeton & Dan B. Dobbs eds., 5th ed. 1984).

257. *Id.*

258. *See, e.g.,* Gill v. Curtis Publishing Co., 239 P.2d 630, 652 (Cal. 1952).

259. *See* Katz v. United States, 389 U.S. 347 (1967).

260. *Compare* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding the constitutionality of state sodomy laws against a privacy claim) *with* Stanley v. Georgia, 394 U.S. 557 (1969) (striking down a state law that criminalized possessing and reading obscene material in the privacy of one’s own home on First Amendment grounds).

261. *See, e.g.,* Noble v. Sears, Roebuck and Co., 109 Cal. Rptr. 269, 272 (Ct. App. 1973) (quoting Redner v. Workmen’s Comp. Appeals Bd., 485 P.2d 799, 807 n.13 (Cal. Ct. App. 1971)).

262. *See* Miller v. NBC, 232 Cal. Rptr. 668, 678-79 (Ct. App. 1987).

upon, is similar.<sup>263</sup> The Restatement (Second) of Torts section 652B provides that "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."<sup>264</sup>

Although the above principles are easily stated, their application is not so easy. As one court has noted, "Since the 'right to be let alone' can be violated in contexts immensely diverse in consequences and degree, the common law which recognized the right did not easily lend itself to analysis."<sup>265</sup>

Certain recurring fact patterns can be seen in the cases, however. It is not surprising that there is a line of cases dealing with intrusion by private investigators since they make their living, in part, by invading others' privacy. The major issue in these cases is whether the investigation was "unreasonably intrusive."<sup>266</sup> Under this standard, a jury question was presented when an investigator for the defendant in a personal injury action "gained admittance to a hospital room where plaintiff was confined and, by deception, secured" information that the plaintiff did not want disclosed to the defendant.<sup>267</sup> In discussing cases from other jurisdictions, the court in *Noble* noted that causes of action could also be stated for unreasonably intrusive shadowing or trailing and for investigations performed in a frightening manner.<sup>268</sup>

Another line of cases deal with invasions, physical and otherwise, into the home. In *Miller v. National Broadcasting Co.*,<sup>269</sup> a cause of action was stated against NBC when a camera crew, as part of a documentary, accompanied fire department paramedics into the plaintiff's home without consent and videotaped unsuccessful efforts to revive the plaintiff's husband, who had suffered a heart attack. The court held that "[i]n our view, reasonable people could regard the NBC camera crew's intrusion into Dave Miller's bedroom at a time of vulnerability and confusion occasioned by his seizure as 'highly offensive' conduct, thus meeting the limitation on a privacy cause of action

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263. See *id.* at 678; *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762 (Ct. App. 1983).

264. RESTATEMENT (SECOND) OF TORTS § 652B (1989).

265. *Miller*, 232 Cal. Rptr. at 677.

266. See, e.g., *Noble v. Sears, Roebuck & Co.*, 109 Cal. Rptr. 269, 275 (Ct. App. 1973).

267. *Id.* at 268-71.

268. *Id.* at 272.

269. 232 Cal. Rptr. 668 (Ct. App. 1987).

that the Restatement of Torts section 652B imposes.”<sup>270</sup>

Similarly, in *Vescovo v. New Way Enterprises, Ltd.*,<sup>271</sup> a cause of action was stated against a newspaper that published, “with intent and design to injure, disgrace and aggrieve plaintiff,” an advertisement giving the plaintiff’s address and stating as follows: “Hot Lips Deep Throat; Sexy young bored housewife; Norma.”<sup>272</sup> The advertisement triggered a large number of letters and visitors “soliciting her to perform lewd, immoral and criminal sexual acts.”<sup>273</sup> Although the physical intrusions in this case were committed by third persons, the intent allegation in the complaint was sufficient to charge the newspaper with responsibility for purposes of a demurrer.

In addition to the common law causes of action for intrusion, there are statutory causes of action for wiretapping, electronic eavesdropping, and use of a voice stress analyzer without consent.<sup>274</sup> These statutes have been drafted so broadly that they bring within their scope a case in which one party to a conversation, unbeknownst to the other party, has a third person listen in on an extension phone.<sup>275</sup> These statutes also prohibit one party to a conversation from recording the conversation without consent.<sup>276</sup> There are, as might be expected, a number of statutory exceptions that permit law enforcement agencies and others to eavesdrop.<sup>277</sup>

Finally, there is a statutory cause of action for harassment, defined as “a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or harasses such person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff.”<sup>278</sup> The remedy for harassment is an injunction.<sup>279</sup>

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270. *Id.* at 682.

271. 130 Cal. Rptr. 86 (Ct. App. 1976).

272. *Id.* at 87-88.

273. *Id.*

274. CAL. PENAL CODE §§ 630-637.5 (West 1988). These sections were enacted in 1967 as Chapter 1.5, entitled “Invasion of Privacy.” See generally Note, *Right of Privacy — Assault upon Solitude — a Remedy?*, 11 SANTA CLARA L. REV. 109 (1970); Walter Karabian, *The Case Against Wiretapping*, 1 PAC. L.J. 133 (1970).

275. *Ribas v. Clark*, 696 P.2d 637 (Cal. 1985).

276. *People v. Wyrick*, 144 Cal. Rptr. 38, 41-42 (Ct. App. 1978); *Forest E. Olson, Inc. v. Superior Court*, 133 Cal. Rptr. 573, 574 (Ct. App. 1976).

277. See, e.g., CAL. PENAL CODE §§ 631(b), 632(e), 633 (West 1988). See also *People v. Soles*, 136 Cal. Rptr. 328, 330 (Ct. App. 1977) (motel manager may furtively listen in to calls to keep his premises free of criminal activity since tenants cannot reasonably expect privacy in their conversations given the motel’s interest).

278. CAL. CIV. PROC. CODE § 527.6(b) (West Supp. 1992).

279. *Id.* at § 527.6(a).

## 2. Public Disclosure of Private Facts

According to Restatement (Second) of Torts, section 652D, "[o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."<sup>280</sup> California law is roughly in accord. The elements of the cause of action have been stated as follows: "(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern."<sup>281</sup>

One of the early California cases to recognize a cause of action for invasion of privacy involved public disclosure of private facts. In a movie called "The Red Kimono," the plaintiff's true-life story as a prostitute was told, using the plaintiff's maiden name. She sued, alleging that she had given up that life, become rehabilitated, and that the picture caused her to lose her friends and subjected her to scorn and obloquy. The court held that a cause of action for public disclosure of private facts was stated.<sup>282</sup>

More recently, in *Briscoe v. Reader's Digest Association, Inc.*,<sup>283</sup> the defendant identified the plaintiff in a magazine article as a former hijacker. The hijacking incident had occurred eleven years prior to publication, and the plaintiff had in the interim become rehabilitated and a respectable member of society. The court held that the plaintiff stated a cause of action in these circumstances. In reaching this conclusion, the court noted that, although reports of recent criminal activity are public, newsworthy information, publication of the name of a former felon who has long since been released serves no important interest.<sup>284</sup> Moreover, publication of a rehabilitated criminal's name may interfere with the state's compelling interest in the rehabilitative process.<sup>285</sup>

Although the passage of time was relevant in each case, *Melvin* and *Briscoe* do not stand for the proposition that a public figure may, simply with the passage of time, become a private figure who may bring an action for invasion of privacy when historical accounts are

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280. RESTATEMENT (SECOND) OF TORTS § 652D (1987).

281. *Diaz v. Oakland Tribune*, 188 Cal. Rptr. 762, 768 (Ct. App. 1983).

282. *Melvin v. Reid*, 297 P. 91 (Cal. Ct. App. 1931).

283. 483 P.2d 34 (Cal. Ct. App. 1971).

284. *Id.* at 39-40.

285. *Id.* at 40.

written. In *Forsher v. Bugliosi*,<sup>286</sup> the court emphasized that in *Melvin* and *Briscoe*, there were independent state interests in discouraging those particular disclosures, namely, that in each case the state had an interest in the rehabilitation of criminals and that publication might have the effect of interfering with the rehabilitation process.<sup>287</sup>

*Forsher* also made it plain that one of the key questions in public disclosure cases is whether the information disclosed is private or is newsworthy and, therefore, public. If the information is public and newsworthy, then the publication of the information is privileged. The court identified in *Forsher* a number of factors relevant to making this determination:

Among the factors to consider are the depth of the intrusion into the plaintiff's private affairs, the extent to which the plaintiff voluntarily pushed himself into a position of public notoriety, the exact nature of the state's interest in preventing the disclosure, and whether the information is a matter of public record. Additionally, we look to any continued public interest in the event so that the passage of time does not per se extinguish the privilege of the publisher; if a report made reasonably contemporaneously with the incident would have been in the public interest, the weighing process continues in light of the circumstances prevailing at the time of publication.<sup>288</sup>

Consideration of these factors requires the court and jury to balance the public's interest in knowing versus the person's interest in keeping certain information private. For example, in *Diaz v. Oakland Tribune*,<sup>289</sup> a college student body president had kept hidden the fact that she had undergone a sex change operation some years before. This was discovered and reported by the school paper. The court held that a jury question was presented regarding whether the information was private or newsworthy, and the court noted that "[p]ublic figures more celebrated than she are entitled to keep some information of their domestic activities and sexual relations private."<sup>290</sup>

The action for public disclosure of private facts is also limited to situations in which the information is widely published—there must be a public, as opposed to a limited or private, disclosure of private facts.<sup>291</sup> This limitation, like the privilege to publish newsworthy pri-

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286. 608 P.2d 716 (Cal. Ct. App. 1980).

287. *Id.* at 726.

288. *Id.* at 727. See also *Kapellas v. Kofman*, 459 P.2d 912, 922 (Cal. 1969).

289. 188 Cal. Rptr. 762 (1983).

290. *Id.* at 772-73.

291. Comment a to RESTATEMENT (SECOND) OF TORTS, section 652D, explains as follows:

The form of invasion of the right of privacy covered in this Section depends upon publicity given to the private life of the individual. "Publicity," as it is used in this Section, differs from "publication," as that term is used in § 577 in connection with liability for defamation. "Publication," in that sense, is a word of art, which includes any communication by the defendant to a third person. "Publicity," on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.

vate facts, arises out of a balancing of interests. Although courts recognize that a private person has an interest in maintaining the privacy of certain facts, the courts also recognize that, absent a confidential relationship (the breach of which would give rise to its own cause of action), no one can reasonably expect people not to pass among their circle of friends private information about other people. So long as such communications are true and thus not defamatory, there is no cause of action. Gossip has not yet been made tortious.<sup>292</sup>

There currently exists a statutory remedy for disclosure of private information contained in governmental records under the Information Practices Act of 1977.<sup>293</sup> This Act, which was intended to implement the privacy clause,<sup>294</sup> provides a civil remedy against a governmental agency which improperly discloses private information,<sup>295</sup> and also provides a civil remedy against *any person* (including a private person) who "intentionally discloses information, not otherwise public, which they know or should reasonably know was obtained from personal information maintained by a state agency."<sup>296</sup>

### 3. False Light

According to Restatement (Second) of Torts section 652E, "[o]ne who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."<sup>297</sup>

The false light cause of action obviously bears a similarity to an action for defamation. The theoretic difference is that a false light claim may be maintained even though there has been no harm to the reputation, or where harm to reputation may not be presumed, and there is no evidence of harm to reputation. In these cases, false light may be used to recover for emotional distress and other non-reputa-

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RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1989).

292. See *Kinsey v. Macur*, 165 Cal. Rptr. 608, 611 (Ct. App. 1980) "Warren and Brandeis expressed the belief that it was mass exposure to the public gaze and not just backyard gossip which provided the *raison d'être* for the tort" *Id.*

293. CAL. CIV. CODE §§ 1798.45-56 (West 1985).

294. *Id.* at § 1798.1.

295. *Id.* at § 1798.45.

296. *Id.* at § 1798.53.

297. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

tional damage.<sup>298</sup> As a practical matter, however, there is little difference between the two torts, and there remains a question as to whether false light is or should be an independently existing tort.<sup>299</sup>

Even if false light is an independent cause of action, California courts have held that all of the defenses available in a defamation action (including statutory privileges) are available in a false light case.<sup>300</sup> Truth, of course, is an absolute defense. Moreover, the Supreme Court of the United States has held that the constitutional rules which govern defamation actions also govern false light actions.<sup>301</sup> False light is an insignificant tort which, as a general matter, may be ignored in considering actions for invasion of privacy.

#### 4. Misappropriation of Name or Picture

Although treated as a species of privacy, misappropriation of name or picture is more naturally thought of as a species of unfair competition, conversion or restitution. The primary justification for the tort is that there is economic value in each person's name or picture, and use of that value by another without permission is wrongful. A secondary justification, entirely apart from the economics, is that each person should have the right to control use of his picture or name.

The Restatement provision gives greater weight to the economic rationale than the privacy rationale. According to Restatement (Sec-

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298. The court in *Selleck v. Globe International, Inc.*, 212 Cal. Rptr. 838 (Ct. App. 1985), described the difference between false light and libel as follows:

There is a distinction between causes of action for invasion of privacy and defamation with regard to the respective interests protected and compensated by each. "The gist of a cause of action in a privacy case is not injury to the character or reputation but a direct wrong of a personal character resulting in injury to the feelings without regard to any effect which the publication may have on the property, business, pecuniary interest, or the standing of the individual in the community. The right of privacy concerns one's own peace of mind, while the right of freedom from defamation concerns primarily one's reputation. The injury is mental and subjective."

*Id.* at 846-47 (citations omitted).

Although the court in *Selleck* articulated a possible difference between false light and libel, on the specific facts presented, the court dismissed as surplusage a false light claim because the plaintiff had also alleged a libel cause of action. *Id.* at 847.

299. See J. Clark Kelso, *False Light Privacy: A Requiem*, — Santa Clara L. Rev. — (1992); Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light that Failed*, 64 N.Y.U. L. REV. 364 (1989) (advocating rejection of the tort).

300. In a series of decisions, the California Supreme Court has extended virtually all of the limitations placed upon a libel action to a false light claim. See *Fellows v. National Enquirer, Inc.*, 721 P.2d 97 (Cal. 1986) (analyzing CAL. CIVIL CODE § 48a (1982), dealing with proof of damages, applicable to false light claims); *Reader's Digest Assoc. v. Superior Court*, 690 P.2d 610 (Cal. 1984) (actual malice requirement applied equally to defamation and false light); *Kapellas v. Kofman*, 459 P.2d 912 (Cal. 1969) (dismissing as superfluous a claim for false light when complaint also contained libel claim).

301. *Time v. Hill*, 385 U.S. 374 (1967); *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974).

ond) of Torts section 652C, "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."<sup>302</sup>

California law appears to be largely in accord. In *Eastwood v. Superior Court (National Enquirer, Inc.)*,<sup>303</sup> the court set forth the requirements for stating a cause of action: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury."<sup>304</sup>

A cause of action is clearly stated when the defendant uses the plaintiff's name or likeness in an advertisement in a manner that suggests the plaintiff's endorsement.<sup>305</sup> A cause of action was also stated in *Stilson v. Reader's Digest Association, Inc.*,<sup>306</sup> when the defendant included the plaintiff's name without consent in a contest solicitation which stated that the recipient of the solicitation and the plaintiff, among others, had been selected to receive "lucky numbers."<sup>307</sup>

Misappropriation can occur, however, even with use not directly related to an advertisement or promotional activity, so long as the use involves commercial exploitation. Thus, in *Eastwood v. Superior Court (National Enquirer, Inc.)*,<sup>308</sup> the court held that the National Enquirer's use of Clint Eastwood's name, even in the context of a story in the magazine, constituted a misappropriation. The court analyzed the facts as follows:

The first step toward selling a product or service is to attract the consumers' attention. Because of a celebrity's audience appeal, people respond almost automatically to a celebrity's name or picture. Here, the Enquirer used Eastwood's personality and fame on the cover of the subject publication and in related telecast advertisements. To the extent their use attracted the readers' attention, the Enquirer gained a commercial advantage. Furthermore, the Enquirer used Eastwood's personality in the context of an alleged news account, entitled 'Clint Eastwood in Love Triangle with Tanya Tucker' to generate maximum curiosity and the necessary motivation to purchase the newspaper.

Moreover, the use of Eastwood's personality in the context of a news account, allegedly false but presented as true, provided the Enquirer with a ready-made 'scoop' — a commercial advantage over its competitors which it

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302. RESTATEMENT (SECOND) OF TORTS § 652C (1977).

303. 198 Cal. Rptr. 342 (Ct. App. 1983).

304. *Id.* at 347.

305. *Fairfield v. American Photocopy Equip. Co.*, 291 P.2d 194, 197 (Cal. Ct. App. 1955).

306. 104 Cal. Rptr. 581 (Ct. App. 1972).

307. *Id.* at 582.

308. 198 Cal. Rptr. 342 (Ct. App. 1983).



would otherwise not have.<sup>309</sup>

In 1971, the California Legislature enacted section 3344 of the Civil Code, which generally mirrors the common law rules. According to section 3344(a)

[a]ny person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.<sup>310</sup>

As can be seen, this section is, like the common law, focused primarily on commercial exploitation. To deal with cases like *Eastwood*, in which the use was not directly tied to advertising, section 3344(e) provides as follows:

The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required under subdivision (a) solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use of the person's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under subdivision (a).<sup>311</sup>

The Supreme Court of California held in *Lugosi v. Universal Pictures*<sup>312</sup> that the common law cause of action for appropriation does not survive the death of the person whose name or figure was used. In the court's view, this cause of action is personal and private in nature. This holding was subsequently overturned by Civil Code section 990, which recognized a cause of action for the appropriation of a deceased personality's name, voice, signature, photograph or likeness.<sup>313</sup>

This was roughly the state of the common law's approach to privacy, as supplemented by certain statutes, when the privacy clause was enacted. Courts did not attempt to define "privacy" itself. Rather, particular aspects of privacy were identified as deserving protection: freedom from intrusion, freedom from the unwanted glare of public notoriety, freedom from false statements about oneself, and freedom from the unauthorized commercial use of one's name or features. These were the limited areas which the common law courts traditionally protected, and in each area, the courts were careful to create rules that balanced the privacy interest against legitimate, but conflicting, interests.

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309. *Id.* at 349.

310. CAL. CIV. CODE § 3344(a) (West Supp. 1991).

311. *Id.* at § 3344(e).

312. 603 P.2d 425 (Cal. 1979).

313. CAL. CIV. CODE § 990 (West Supp. 1991).

### B. *The Constitutional Right to Privacy Before the Privacy Clause*

The common law and Civil Code sections discussed above protect a person against invasions of privacy by other private actors (as well as by state actors in cases arising under a state or federal tort claims act). Limitations on state invasions of privacy (apart from tort claims acts), prior to enactment of the privacy initiative, were found in neither the state or federal constitutions. In declaring the existence of such a right against government interference, courts pointed in the federal Constitution to the Equal Protection Clause, the Due Process Clause, the First Amendment, the Fourth Amendment, and the Ninth Amendment, among other things.<sup>314</sup> California courts could look to similar provisions contained in California's Declaration of Rights. The broad outlines of the state and federal constitutional right to privacy must of course be outlined to put the privacy clause in its proper perspective.

#### 1. Federal Constitutional Right to Privacy

The general concept of a right to privacy is a topic that has drawn the thoughtful attention of great thinkers from a wide spectrum of disciplines. Treatment of the federal constitutional right to privacy has been equally exhausting, including significant contributions by virtually all of the most respected constitutional scholars. The quantity and quality of this output give reason for pause before attempting to enter the fray.

The task is made somewhat easier by the rather limited purpose making this review necessary. The privacy clause needs to be put in its proper context, and that context includes the broad, general contours of the federal right to privacy. There is no need, however, to offer a reinterpretation of the federal right of privacy.<sup>315</sup> There is no need to comment significantly upon the alleged illegitimacy of reliance upon an unenumerated right or the discovery in the Constitution of rights that were undoubtedly not contemplated by the Framers.<sup>316</sup> Instead, this review will be limited to the decisions of

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314. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977).

315. See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15, at 1302-1435 (2d ed. 1978).

316. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 928-29 (1973); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 7-12 (1971).

the Supreme Court of the United States and its approach to the topic.

Although the following generalization substantially obliterates the rich detail of the Supreme Court's privacy decisions, it is possible at a very general level to discern three quite distinct periods in the Supreme Court's development of a constitutional right to privacy. The first period stretches from the 1920s until 1965, when *Griswold v. Connecticut* was decided,<sup>317</sup> and includes the following cases, among many others: *Pierce v. Society of Sisters*,<sup>318</sup> *Meyer v. Nebraska*,<sup>319</sup> *Skinner v. Oklahoma ex rel. Williamson*,<sup>320</sup> *Prince v. Massachusetts*,<sup>321</sup> and *NAACP v. Alabama*.<sup>322</sup> During this first period, the Court, by fits and starts, protected an increasing number of what might be characterized as "private" activities from government regulation. In this pre-*Griswold* era, the Court seemed only faintly aware that it was creating a right to privacy.<sup>323</sup> In these early cases, the Court was usually careful to ground its decisions in one of the substantive constitutional protections contained in the Bill of Rights or the Fourteenth Amendment,<sup>324</sup> and the Court's attention was focused primarily upon the "absorption" or "incorporation" into the Fourteenth Amendment of the specific rights contained in the Bill of Rights.<sup>325</sup>

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317. 381 U.S. 479 (1965).

318. 268 U.S. 510 (1925).

319. 262 U.S. 390 (1923).

320. 316 U.S. 535 (1942).

321. 321 U.S. 158 (1944).

322. 357 U.S. 449 (1958).

323. The pre-*Griswold* history of a constitutional right of privacy is well described in William H. Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212. After concluding that the Fourth Amendment jurisprudence to date did not protect a right to privacy apart from "search and seizure," the author concluded his analysis with the following:

It has been suggested that the Due Process Clauses of the Fifth and Fourteenth Amendments, or the provisions of the First Amendment, might provide a basis for developing adequate protection of the right to privacy. But of the various statements on the constitutional right to privacy contained in the Court's opinions to date, one might say: And be these juggling fiends no more believed, That palter with us in a double sense; That keep the word of promise to our ear, And break it to our hope.

1962 SUP. CT. REV. at 251.

324. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (state statute interfered with Fourteenth Amendment substantive due process); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (limitation on instruction in foreign languages violates Fourteenth amendment); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (sterilization of habitual criminals violated the Equal Protection Clause); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *NAACP v. State of Alabama*, 357 U.S. 449, 462 (1958) (protecting "freedom to associate and privacy in one's associations," noting that freedom of association is grounded in the First Amendment).

325. Justice Brennan succinctly describes this slow development in Brennan, Jr., *supra* note 13, at 768-70.

Justice Brandeis's dissent in *Olmstead v. United States*, 277 U.S. 438 (1928), is one of the rare pre-*Griswold* opinions to speak broadly in terms of a constitutional right to privacy. Brandeis defined the constitutional right to privacy as "the right to be let

*Griswold* began the second phase and marked a significant change in the Court's consciousness. The Court explicitly recognized in *Griswold* that there was no explicit textual support for the constitutional privacy right which the Court declared existed, apart from the Fifth and Fourteenth Amendments' declaration of "liberty" as a constitutionally protected interest.<sup>326</sup> Some members of the Court highlighted in *Griswold* the possibility that the Ninth Amendment would authorize the judicial branch to find new constitutional rights in the "great silences" of the Constitution.<sup>327</sup>

By untethering the right of privacy from any specific provision in the Bill of Rights or Fourteenth Amendment, the Court in *Griswold* set the stage for the assertion of a wide variety of privacy interests. The sweeping language contained in both Justice Douglas's opinion for the Court and in Justice Goldberg's often-cited concurring opinion suggested the wide scope that could be given to the newly declared right. Justice Douglas spoke in terms of "penumbras, formed by emanations" from the specific guarantees contained in the Bill of Rights.<sup>328</sup> Justice Goldberg maintained that the protections of the Bill of Rights were not limited to the specific guarantees contained in the first eight amendments, but, by virtue of the Ninth Amendment, included the protection of other undeclared fundamental rights.<sup>329</sup> There followed a series of cases expanding the scope of privacy rights protected under the Constitution from state or federal interference.<sup>330</sup>

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alone — the most comprehensive of rights and the right most valued by civilized men." *Id.* at 478. The reference by Brandeis is aberrational, however, and is clearly attributable to Brandeis's own parentage of the common law cause of action for invasion of privacy.

326. *Griswold*, 381 U.S. at 485-86.

327. *Griswold*, 381 U.S. at 487-93 (Goldberg, J., concurring). Justice Goldberg recognized that his use of the Ninth Amendment was novel. *Id.* at 490 (Goldberg, J., concurring) (noting that "this Court has had little occasion to interpret the Ninth Amendment"). See also Norman Redlich, *Are There "Certain Rights" \* \* \* Retained by the People?*, 37 N.Y.U. L. REV. 787 (1962); Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309 (1936) (the Ninth and Tenth Amendments reserve certain rights to the people, including the rights to personal security and personal liberty).

328. *Griswold*, 381 U.S. at 484.

329. *Id.* at 488-93. The Ninth Amendment provides that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

330. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (state statute preventing racially mixed marriages violates Due Process and Equal Protection Clauses of the Fourteenth Amendment); *Katz v. United States*, 389 U.S. 347 (1967) (electronic eavesdropping in a public telephone booth violated privacy rights of petitioner); *Stanley v. Georgia*, 394

The very freedom which *Griswold* gave to the courts was also a primary source of criticism. A number of scholars questioned the constitutional legitimacy of decisions that were not grounded in any particular substantive provision of the Constitution. They argued that such decisions were a judicial power-grab contrary both to separation of powers and federalism and reminiscent of the now discredited doctrine of substantive due process most often associated with the *Lochner* decision.<sup>331</sup>

The second phase of federal constitutional privacy law came to an end with the watershed decision of *Bowers v. Hardwick*.<sup>332</sup> In *Bowers*, the Court took cognizance of the criticisms of illegitimacy,<sup>333</sup> and the Court in effect put a halt to the development of additional privacy interests by adopting a test that is virtually impossible to meet. Subsequent to *Bowers*, the Court has not found any new privacy interests and has indicated a reluctance to give its prior privacy decisions a liberal interpretation.<sup>334</sup>

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U.S. 557 (1969) (First Amendment protects private possession of obscene material); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (constitutionally protected right to privacy protects distribution of contraceptives to unmarried persons); *Roe v. Wade*, 410 U.S. 113 (1973) (state criminal abortion laws violate the Due Process Clause of the Fourteenth Amendment which protects right of privacy against state action); *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977) (state statute preventing distribution of contraceptives to minors infringes on individual privacy interests). Scholars carefully reviewed, catalogued, and in many cases encouraged, these judicial developments. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15, at 1302-1435 (2d ed. 1988).

331. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 (1973); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971).

332. 478 U.S. 186 (1986).

333. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

*Bowers*, 478 U.S. at 194-95. See also *Michael H. v. Gerald D.*, 491 U.S. 110, 121-22 (1989); *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977); *Carey*, 431 U.S. at 544 (White, J., dissenting).

334. See, e.g., *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990) (upholding constitutionality of parental notification statute when a minor seeks an abortion because the statute contains a judicial bypass mechanism); *Osborne v. Ohio*, 495 U.S. 103 (1990) (distinguishing *Stanley v. Georgia*, 394 U.S. 557 (1969), to uphold state law criminalizing possession and viewing of child pornography); *Cruzan v. Director, Missouri Dep't of Health*, 110 S. Ct. 2841, 2852 (1990) (assuming but not deciding that decision to refuse life-sustaining medical treatment implicates constitutional liberty interest); *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989) (upholding state ban on use of public employees and facilities for nontherapeutic abortions); *Michael H. v. Gerald D.*, 491 U.S. 110, 127-28 n.6 (1989) (rejecting claim that relationship between natural father

*Bowers* achieved this about-face by changing the questions that the Court would ask in privacy cases. Before *Bowers*, it was constitutionally acceptable to speak about a constitutional "right to privacy." The issue was whether the particular right being asserted fell within the boundaries of protected privacy interests.<sup>335</sup> The Court in *Bowers* rejected this approach, however, indicating that it would no longer be satisfied with a generalized allegation that privacy interests have been invaded. According to the Court, there was not so much a single constitutional right to privacy in the abstract as there was a series of independent, fundamental rights that roughly corresponded to the Court's cases.<sup>336</sup> This change in perspective makes it more difficult to rely upon prior cases to establish *new* privacy interests, especially in light of the Court's also newly-declared "resistance to expand the substantive reach" of the relevant constitutional provisions.<sup>337</sup>

The Court in *Bowers* also drew upon pre-*Griswold* cases to reestablish a relatively narrow test for determining whether the interest being asserted qualified as a fundamental *liberty* (as opposed to privacy) interest. In order for an interest to qualify as a fundamental liberty interest, deserving of the highest protection from government

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and child born into a woman's existing marriage with another man constituted a constitutionally protected liberty interest); *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (rejecting lower court's reliance on dicta in *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965), in upholding municipal ordinance restricting admission to certain dance halls to persons between the ages of 14 and 18); *Bowen v. Gilliard*, 483 U.S. 587, 601-03 (1987) (employing rational basis scrutiny to uphold Federal Aid to Families with Dependent Children provision generally requiring that eligibility for benefits be determined by reference to total income of parents, brothers, and sisters living in the same home).

335. See, e.g., *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (noting that "[o]ur cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government"); *Griswold*, 381 U.S. at 486 (noting that we are dealing "with a right of privacy older than the Bill of Rights").

336. This new approach is most clearly seen in the Court's review of its prior cases. Each case was narrowly described in terms of a particular interest being asserted rather than in terms of a generalized interest in privacy. *Bowers*, 478 U.S. at 190.

That this is what the majority was doing in *Bowers* is highlighted by the first paragraph of Justice Blackmun's dissent:

This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, . . . than *Stanley v. Georgia*, 394 U.S. 557 (1969), was about a fundamental right to watch obscene movies, or *Katz v. United States*, 389 U.S. 347 (1967), was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone." *Olmstead v. United States*, 277 U.S. 438 (Brandeis, J., dissenting) (citation omitted).

*Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting).

337. *Bowers*, 478 U.S. at 195.

burdens, an interest must be either: (1) "implicit in the concept of ordered liberty; [or (2)] deeply rooted in this Nation's history and tradition."<sup>338</sup> Needless to say, even if a generalized interest in privacy is part of the concept of ordered liberty and part of our history, it is less clear that all or even many of the specific interests that might be classified as privacy interests are "implicit in the concept of ordered liberty [or] deeply rooted in the Nation's history and tradition."<sup>339</sup>

The analysis of the specific claim in *Bowers* indicates how the new analytic structure can be used to uphold even significant governmental burdens on allegedly private conduct. The plaintiff in *Bowers* filed a declaratory judgment action challenging a statute which made sodomy a criminal offense subsequent to the plaintiff's arrest for having engaged in repeated acts of homosexual sodomy. Although the plaintiff asserted a constitutional right to privacy and, somewhat more narrowly, a constitutional right to engage in consensual sexual conduct in the privacy of one's own home, the Court saw the case as involving a much narrower issue: a constitutional right to engage in homosexual sodomy.

Having identified the narrow interest at stake—homosexual sodomy—the next issue was whether that interest was fundamental under the Court's two-part test. Implicitly adopting the premise that we presently live (and for some time have been living) within a system of "ordered liberty," the Court was quick to find that the interest being asserted was not fundamental because, among other things, the "ancient roots" of the proscriptions against homosexual sodomy included at one time or another criminal laws against such conduct in all fifty states.<sup>340</sup> Since a right to engage in homosexual sodomy was not a fundamental right, the Court reviewed the criminal statute under the rational basis test, and easily found a rational basis for the statute in the state legislature and electorate's apparent belief that homosexual sodomy is immoral and unacceptable.<sup>341</sup>

Cases subsequent to *Bowers* confirm that the Court appears to have adopted a new analytic approach to what previously might have been right to privacy cases,<sup>342</sup> although there is clearly some disagreement on the Court about how much *Bowers* changed the law.<sup>343</sup> For pur-

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338. *Bowers*, 478 U.S. at 191-92.

339. *Id.*

340. *Id.* at 192-94.

341. *Id.* at 196.

342. See, e.g., *Cruzan v. Director, Missouri Dep't of Health*, 110 S. Ct. 2841, 2851 n.7 (1990) "Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest." *Id.* See also *Bowers*, 478 U.S. at 194-95.

343. Justice Scalia has relied upon *Bowers* for the proposition that long-standing historical practices by the states are almost *per se* constitutional, but Justice Scalia

poses of this article, the most significant fact is that *Bowers*, decided in 1988, marked a significant break with the analytic approach taken by the Court in prior post-*Griswold* cases. Whether the privacy clause, enacted in 1972, was intended to adopt any particular federal approach (e.g., the *Griswold* approach) will be discussed below.<sup>344</sup>

## 2. State Constitutional Right to Privacy

Even before the Supreme Court of the United States discovered privacy in the Constitution in *Griswold*, courts in California had discovered in the California Declaration of Rights an implied right to privacy. The first case to rely upon the Declaration of Rights in order to find a right to privacy was *Melvin v. Reid*,<sup>345</sup> discussed above in the context of the common law action for public disclosure of private facts. The court in *Melvin* was concerned that in the absence of a constitutional or statutory provision, it somehow lacked power to create a new cause of action for public disclosure of private facts. The court was, "[i]n the absence of any provision of law, . . . loath to conclude that the right of privacy as the foundation for an action in tort, in the form known and recognized in other jurisdictions, exists in California."<sup>346</sup> The court resolved its difficulty by finding in the happiness clause of article I, section 1, a right of privacy: "The right to pursue and obtain happiness is guaranteed to all by the fundamental law of our state. This right by its very nature includes the right to live free from the unwarranted attack of others upon one's liberty, property, and reputation."<sup>347</sup> In subsequent cases, the constitutional basis for the decision in *Melvin* was discarded, and the cause of action in *Melvin* was ultimately absorbed into the common law.

More significant than *Melvin* was the Supreme Court of California's decision in *People v. Belous*,<sup>348</sup> where the court anticipated the decision in *Roe v. Wade*, finding that the constitutional right to privacy protected a woman's decision whether to bear children.<sup>349</sup> Ex-

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does not appear to have persuaded his colleagues. See *Rutan v. Republican Party*, 110 S. Ct. 2729, 2741 n.2 (1990); *Burnham v. Superior Court*, 495 U.S. 604, (1990) (Scalia, J., plurality); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (O'Connor, J., concurring).

344. See *infra* notes 447-90 and accompanying text.

345. 297 P. 91 (1931).

346. *Id.* at 97. The concern was illusory, of course, because state courts in California, like virtually all state courts in the United States, clearly have power to create any cause of action necessary to secure justice. State courts, unlike federal courts, are courts of general (rather than limited) jurisdiction.

347. *Id.*

348. 458 P.2d 194 (Cal. 1969).

349. *Id.* at 199.



plicitly recognizing the legitimacy of a theory of unenumerated rights, the court found that both the United States Constitution and the California Constitution protected the woman's interest.<sup>350</sup> There was no need in *Belous* to distinguish between a state and federal constitutional right to privacy; indeed, the court cited both federal and state cases in support of its conclusion.

There was no indication in *Belous* (or any other state case) that the state constitution's protection of the right of privacy was any greater than that afforded by the federal constitutional right to privacy. Thus, at the time the privacy clause was enacted, state constitutional privacy law had not expanded beyond the federal protection.

### 3. The Federal "State Action" Requirement

Because one of the most significant issues arising under the privacy clause is whether the clause is intended to regulate anything other than state action and because the privacy clause may have been modeled upon the federal right of privacy, we must review federal "state action" rules, which limit the application of the federal right of privacy.

Although most of the important federal state action questions now arise under the Fourteenth Amendment,<sup>351</sup> it is clear that an implied "governmental action" requirement *predated* passage of the Fourteenth Amendment and limited the types of claims that could be pursued under the Bill of Rights. Pre-Fourteenth Amendment cases may be of particular interest here because, unlike cases arising under the Fourteenth Amendment, these cases considered the question of whether a governmental action requirement should be implied in a constitutional provision which, as drafted, contained no such requirement—the precise issue that arises under the privacy clause.

#### *a. Pre-Fourteenth Amendment State Action*

The first case to address a governmental or state action requirement in the Bill of Rights was *Barron v. Baltimore*.<sup>352</sup> The plaintiff in *Barron* owned a successful wharf in the City of Baltimore. Over the course of several years, and as a result of the implementation of several city ordinances, the water around the plaintiff's wharf became so shallow that the wharf lost all or nearly all of its commercial value. The plaintiff sued the City of Baltimore in state court for

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350. *Id.* at 200.

351. For example, Professor Tribe's exhaustive chapter on the state action requirement discusses only the Fourteenth Amendment's state action requirement and cites no pre-Fourteenth Amendment cases. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 18.1-18.7, at 1688-1721 (2d ed. 1988).

352. 32 U.S. 243 (1833). Justice Brennan discusses *Barron* in his article cited *supra* note 13, at 764-65.

damages. The trial court found in favor of the plaintiff in the sum of \$4,500. The court of appeals reversed and entered judgment in favor of the defendants. The plaintiff then sought review in the Supreme Court of the United States.<sup>353</sup>

The dispositive issue in *Barron* was whether the Supreme Court had jurisdiction under section 25 of the Judiciary Act, which generally limited the Court's appellate jurisdiction to federal questions. The only federal question arguably present was whether the city's action violated the Takings Clause of the Fifth Amendment. Chief Justice Marshall recognized that the issue was "of great importance," but with customary confidence, he declared that it was "not of much difficulty."<sup>354</sup>

Marshall began by recognizing the federal structure created by the Constitution, noting that the federal Constitution "was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states."<sup>355</sup> This proposition may be somewhat short of the truth, because article I, section 10, of the Constitution by its express terms put specific limits upon the exercise of state power, as did the Supremacy Clause.<sup>356</sup> The Constitution is thus not *entirely* oriented towards the federal government.<sup>357</sup> Marshall's basic point is clear, however, and not subject to substantial dispute. The United States Constitution was written *predominately* with the motive of establishing only the federal government; state governments had their own constitutions.

Since the Constitution was written with the predominate purpose of granting power to the federal government, common sense suggested to Marshall that "the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to

353. *Barron*, 32 U.S. at 244.

354. *Id.* at 247.

355. *Id.*

356. See U.S. CONST. art. I, § 10 & art. VI, § 2 (the "Supremacy Clause").

357. Marshall actually used article I, section 10, in his opinion, against the plaintiff. *Barron*, 32 U.S. at 248. Marshall noted that section 10's restrictions on state power were *textual* and *explicit* ("No state shall enter into any Treaty, Alliance, or Confederation" U.S. CONST. art. I, § 10 (emphasis added)). The Takings Clause of the Fifth Amendment, by contrast, was written in only *general* terms, and did not explicitly limit state power. U.S. CONST. amend. V. According to Marshall, "[h]ad the framers of these amendments [the Bill of Rights] intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention . . . in plain and intelligible language." *Id.* at 249.

the government created by the instrument.”<sup>358</sup> Accordingly, since the Takings Clause was a limitation “expressed [only] in general terms,” the Takings Clause (and, by implication, the rest of the Bill of Rights) did not limit the exercise of state power.<sup>359</sup>

Marshall appears to have believed that constitutions are generally drafted with the primary purpose of organizing government and structuring the relationship among governments and between government and the people, rather than with the purpose of protecting private rights against private infringement.<sup>360</sup> Under this view, a Bill of Rights is conceived more properly as limiting government power over persons as opposed to creating personal rights, the deprivation of which by a private person or by government could be the basis for a judicial remedy.<sup>361</sup>

Marshall was not alone in holding these beliefs, of course. *The Federalist No. 84* contains a useful discourse on bills of rights in the context of an argument *against* inclusion of a separate bill of rights in the Constitution:

It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was Magna Charta, obtained by the barons, sword in hand, from King John. Such were the subsequent confirmations of that charter by succeeding princes. Such was the *Petition of Rights* assented to by Charles I., in the beginning of his reign. Such, also, was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of parliament called the Bill of Rights.<sup>362</sup>

It was in light of this widespread historical understanding that Mar-

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358. *Id.* at 247.

359. It follows from the Court's analysis that the Bill of Rights also did not restrict purely private conduct. Marshall treated the Bill of Rights as containing only limitations on the power of the federal government, implying into the Bill of Rights a “federal action” requirement. *See id.* at 247-50.

360. This belief is most clearly seen in the following sentences:

Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests.

*Id.* at 247. “In their several constitutions they [the states] have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves.” *Id.* at 247-48.

361. Accordingly, violation of a “right” guaranteed by the Bill of Rights does not invariably give rise to a cause of action in damages absent a statute creating such a remedy. *See, e.g.,* *Bush v. Lucas*, 462 U.S. 367 (1983) (refusing to create nonstatutory damages remedy for government employees whose First Amendment rights are violated by their superiors). *But see* *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing that the violation by a federal officer of a person's Fourth Amendment rights gave rise to a federal cause of action for damages).

362. THE FEDERALIST NO. 84, at 558 (Alexander Hamilton) (Modern Library ed. 1937).

shall read the provisions of the Bill of Rights as merely limiting government power.

Having made this decision, it was a simple step for Marshall to conclude that the limitations in the Bill of Rights applied only to the federal government and not to state governments. Article I, section 10, contained specific limitations on state power, and Marshall argued that if the Bill of Rights was intended to restrict state power, it would have contained an explicit provision like article I, section 10.<sup>363</sup>

Marshall was also fortified in his conclusion by the federal structure of our national government. It was widely understood that the state governments were primarily responsible for the health, safety and welfare of their citizens, and that the federal government was created by the people with only limited powers with respect to matters of national concern. The states then had the primary obligation to provide a court system for the redress of private grievances, and the federal judicial system was, at its inception, of exceedingly limited purpose and scope.<sup>364</sup> The application of the Bill of Rights to the states would have marked a significant expansion of federal judicial power. Marshall was understandably reluctant to expand federal judicial power in this way absent textual support in the Constitution.<sup>365</sup>

#### *b. Fourteenth Amendment State Action*

With the enactment of the Fourteenth Amendment, the federal doctrine of state action was given a textual basis. The Fourteenth Amendment by its own terms is a restriction upon only state action.<sup>366</sup> The Court's first significant state action case confirmed the limitations contained in the Fourteenth Amendment. In *The Civil*

363. *Barron*, 32 U.S. at 249.

364. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-1 to 5-24 (2d ed. 1978).

365. *Barron*, 32 U.S. at 349.

366. The Fourteenth Amendment, section 1, provides as follows:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

U.S. CONST. amend XIV, § 1 (emphasis added).

By contrast, the Thirteenth Amendment contains no language limiting its application to state action. The Thirteenth Amendment, section 1, provides as follows: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

*Rights Cases*,<sup>367</sup> the Supreme Court held, over Justice Harlan's eloquent dissent, that the Fourteenth Amendment did not empower Congress to enact legislation which had the effect of regulating purely private racial discrimination.<sup>368</sup>

The Court's analysis proceeded on three fronts. First, relying upon the text of the Fourteenth Amendment, the Court concluded that its scope, and Congress's power under Section 5, was limited to correcting only state action which denied equal protection.<sup>369</sup>

Second, with a deep bow toward the principle of federalism, the Court reasoned that the Fourteenth Amendment must not be interpreted to permit Congress to displace the states in the regulation of purely private conduct.<sup>370</sup> According to the Court, statutes enacted pursuant to the Fourteenth Amendment

cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them.<sup>371</sup>

Such a result would contravene the Tenth Amendment,<sup>372</sup> and to the Court, there was no indication that the Civil Rights Amendments were intended to repeal either the Tenth Amendment or our federalist form of government, the Civil War notwithstanding.<sup>373</sup>

Third, implicitly adopting Marshall's view that bills of rights in constitutions are generally intended only to limit governmental action and thereby create only private immunities as opposed to enforceable rights, the Court drew a sharp distinction between the denial by a state of civil rights and the impairment or interference of civil rights by a private person.<sup>374</sup> According to the Court, "civil rights, such as are guaranteed [sic] by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals,

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367. 109 U.S. 3 (1883).

368. *Id.* at 24-25. In so holding, the Court struck down section 1 of the Civil Rights Act of 1875, 18 Stat. 335, which provided generally for equal racial access to public accommodations and businesses. It was not until the Civil Rights Act of 1964 that equal access to public accommodations and businesses was guaranteed under federal law. The Court upheld this aspect of the modern civil rights law pursuant to Congress's broad commerce power, an analysis which made it unnecessary to overrule the state action holding in *The Civil Rights Cases*. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

369. *The Civil Rights Cases*, 109 U.S. at 10-12.

370. *Id.* at 13-14.

371. *Id.* at 13.

372. *Id.* at 15.

373. The extent to which the drafters of the Civil War Amendments and related statutes intended to alter the balance between federal and state sovereigns remains a lively topic of debate on the Court. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (reaffirming *Runyon*).

374. *The Civil Rights Cases*, 109 U.S. at 17.

unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings."<sup>375</sup>

*The Civil Rights Cases* established that state action was required under the Fourteenth Amendment. The definition of state action developed slowly over the years. The leading modern case setting forth the federal state action doctrine is *Lugar v. Edmondson Oil Co.*<sup>376</sup> The federal state action doctrine is easily stated, even if not easily applied. In general, there is "state action" whenever a constitutional deprivation is "fairly attributable to the State."<sup>377</sup> The Court presently employs a two-part test in determining whether a particular deprivation is "fairly attributable to the State":

First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible . . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.<sup>378</sup>

The first part of the test is apparently satisfied whenever the deprivation is caused by a public official acting within the scope of employment.<sup>379</sup> The first part is also satisfied when the deprivation is caused by a private person (or public official acting outside the scope of employment) if that private person is exercising a right or privilege granted by the state. For example, state statutes often give private persons the right to obtain prejudgment attachments in private civil litigation.<sup>380</sup> In such cases, the private person is exercising power granted by state law, and there is thus a nexus between what the state clearly has done and what the private person has done (namely, the state has created a power to cause a deprivation and vested it in the private person).<sup>381</sup>

The second part of the test is less clearly defined. It is clear that

375. *Id.* at 17. The remainder of the analysis is as follows:

The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress.

*Id.* The last clause of this quote naturally raises the issue of whether the failure of the state to provide redress would be unconstitutional state action.

376. 457 U.S. 922 (1982).

377. *Id.* at 937.

378. *Id.*

379. *See, e.g.*, *Monroe v. Pape*, 365 U.S. 167, 172 (1961).

380. *See, e.g.*, *Fuentes v. Shevin*, 407 U.S. 67 (1972).

381. *Cf.* *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (holding that there was no nexus between private discrimination and a state liquor board which regulated liquor practices of a private person).

when a private party does nothing more than invoke procedures created by a presumptively valid state statute, that private party's conduct is not fairly attributable to the State, even if the private party misuses the state procedures. Thus, for example, the private party in *Flagg Brothers, Inc. v. Brooks*<sup>382</sup> who invoked the self-help procedures under New York's warehouseman lien law (U.C.C. § 7-210), was *not* a "state actor."<sup>383</sup> In order for a private person to be a state actor, there must be "something more." The "something more" varies with the facts of the case. The Court has held that a private person is a state actor if the private person is engaging in a pervasively "public function," or is acting under "state compulsion," or is engaged in "joint action" with a state official, or when the private person's conduct has a sufficiently close "nexus" to the state.<sup>384</sup>

In *Lugar*, the Court found state action when the private party invoked a prejudgment attachment procedure pursuant to which state officials, without holding a hearing, seized disputed property identified by the private party.<sup>385</sup> The statutorily required participation of state officials in the seizure was sufficient to make the private party a state actor.<sup>386</sup>

Based on the reasoning in *Lugar*, a state actor might include a private person who files a lawsuit and then secures the participation of state officials in prosecuting that suit (*e.g.*, by accepting the complaint for filing, issuing summons, and so forth). The Court held in *Dennis v. Sparks*,<sup>387</sup> however, that *merely* filing and being on the winning side of a lawsuit does not make a private person a state actor, and the Court specifically limited *Lugar* to cases involving prejudgment attachments.<sup>388</sup>

A critical difference between *Dennis* and *Lugar* relates to the *reasons why* the person who files the suit wins (or loses, as the case may be). If the plaintiff wins because the rule of decision applied by the court violates the Constitution, then there clearly is state action in the court's own application of the rule to the facts. Thus, for example, state action existed in *New York Times Co. v. Sullivan*<sup>389</sup> because of the state court's application of a common law rule which

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382. 436 U.S. 149 (1978).

383. *Id.* at 165-66.

384. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982).

385. *Id.* at 941-42.

386. *Id.*

387. 449 U.S. 24 (1980).

388. *Lugar*, 457 U.S. at 939 n.21. It appears likely that the Court would extend *Lugar* to encompass the invocation by a private litigant of post-judgment procedures (*i.e.*, a supersedeas bond requirement and lien provisions) designed to secure a judgment pending appeal. See *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 19 (1987) (Brennan, J., concurring); *id.* at 27 (Blackmun, J., concurring); *id.* at 30 n.1 (Stevens, J., concurring).

389. 376 U.S. 254 (1964).

permitted the recovery of compensatory and punitive damages in favor of a public figure without requiring a showing of "actual malice" in the publication of the defamatory material.<sup>390</sup> Similarly, state action existed in *Shelley v. Kraemer*<sup>391</sup> because of the state court's decision to enforce a racially restrictive covenant.<sup>392</sup>

If, on the other hand, the plaintiff wins because of the application of constitutionally permissible rules of law to the facts, then the existence of what might otherwise be private, impermissible motives in filing the action do not transform the private actor into a state actor. Thus, for example, a property owner who discriminates on the basis of race by excluding minorities is ordinarily not a state actor, despite the existence of a motive which, if held by the state in managing its own property, would be constitutionally impermissible.<sup>393</sup> The applicable common law rules make the motive of the property owner irrelevant when determining whether there has been a trespass.<sup>394</sup>

If the Constitution *required* the property owner's motive be considered in the law of trespass, then there could be a constitutional violation by a state actor if a court (the state actor) granted relief to the property owner either through damages or by injunction. The critical issue then becomes a substantive one: whether the Constitution's substantive protections require the law of trespass to include an examination of the motive of the property owner and to deny relief if the property owner is motivated by racial bias.<sup>395</sup> In this way, the state action analysis becomes inextricably intertwined with the substantive constitutional protection being asserted.<sup>396</sup> A sufficiently

390. *Id.* at 284-86.

391. 334 U.S. 1 (1948).

392. *Id.* at 14-18.

393. It was therefore necessary to invoke the Commerce Clause in support of provisions in the Civil Rights Act of 1964 that proscribed private discrimination in accommodations and public businesses. *Cf. Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (the existence of a symbiotic relationship between a private actor and the state was sufficient to make that private actor a state actor). The Thirteenth Amendment, unlike the Fourteenth Amendment, does not require state action, and statutes based in part upon the Thirteenth Amendment may also reach purely private conduct. *See, e.g., Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

394. *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 158 (1965) (setting forth elements of the cause of action for trespass to land).

395. *Cf. Shelley v. Kraemer*, 334 U.S. 1 (1948) (refusing to enforce racially restrictive covenants); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (striking down California's Proposition 14, which amended the California Constitution to permit private property owners to dispose of their property in any manner they choose).

396. This is one of the central contributions of Professor Tribe's discussion of state action in Chapter 18 of his treatise. *See* LAURENCE H. TRIBE, AMERICAN CONSTITU-



broad substantive constitutional principle may convert what seems to be a situation involving private action into a situation involving state action.<sup>397</sup>

If this analysis is taken one step further, when a state court applying the common law *fails* to provide a cause of action for the interference with a private right by a purely private actor, the *refusal* may be state action, subject to constitutional attack. In order for this refusal to be constitutionally impermissible, we would need to find a rule of constitutional law that imposes upon the state the obligation to provide a remedy for the deprivation of a private right by a private actor. The key question then is as follows: Does a state have a constitutional obligation to provide a remedy for every infringement of private rights? To the extent to which the Bill of Rights and the Fourteenth Amendment are interpreted, as they were in the *Civil Rights Cases*,<sup>398</sup> as creating only immunities from government-created burdens, the answer to this question is a resounding “no.”<sup>399</sup> The burden in these cases is created originally by a private actor; the state is directly responsible only for failing to ease the burden after the fact, and that creates constitutional questions dramatically different from whether the state may itself impose the burden.<sup>400</sup> There

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TIONAL LAW § 18-6, at 1715 (2d ed. 1978) (stating that “[t]he approach to state action advocated in this chapter provides no sudden solution to . . . problem[s] of substantive constitutional law; its mission is simply to reveal how the search for state action, properly conducted, ends by identifying the precise substantive constitutional issue to be addressed”).

397. This blend of substance and state action may be the basis for the Court’s recent holding in *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991), which forbids private counsel in private litigation from using race as the basis of peremptory challenges in jury selection. In many cases, the only government participation in jury selection at the voir dire stage is that the state has created a system in which peremptory challenges exist. The mere existence of the peremptory challenge system would not seem to violate the Fourteenth Amendment, however. If there is a constitutional violation, it is because the private litigant is motivated by race in the exercise of peremptory challenges. But in what way is this private decision different from a private landowner filing a trespass action solely on account of race? The answer may be that the Fourteenth Amendment requires, as a matter of substantive law, a peremptory challenge system to take into account the motivation of counsel.

398. 109 U.S. 3 (1983).

399. *Cf. Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 113 (1989) (Kennedy, J., dissenting) (arguing that a city’s improper interference with a labor dispute did not give rise to a cause of action for damages because the interference was improper only by virtue of the Supremacy Clause, which focuses on federalism, not private rights, the violation of which are remediable by money damages). *See generally* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 55-58 (1913).

400. *See, e.g., Zinerman v. Burch*, 110 S. Ct. 975 (1990); *Daniels v. Williams*, 474 U.S. 327 (1986); *Hudson v. Palmer*, 468 U.S. 517 (1984); *Parratt v. Taylor*, 451 U.S. 527 (1981).

The state is partially or indirectly responsible for the burden because, by failing to recognize a cause of action, the state has made it much more likely that the burden would be imposed. Ordinarily, however, this sort of indirect burden is insufficient to constitute state action; *but cf. Shelley v. Kraemer*, 334 U.S. 1 (1948).

may be, after all, sufficiently important state interests to justify limiting the state's responsibility for easing the burden.<sup>401</sup>

If, on the other hand, a declaration of rights is interpreted to guarantee to each individual the full measure of the interests identified (*i.e.*, to guarantee a "right"), then the State's failure to provide a meaningful remedy for the deprivation of that right by a private actor would undoubtedly be unconstitutional state action. The state must either compensate the injured victim from the state's own coffers or, at a minimum, permit the injured victim access to the courts in order to file a damages action against the private actor.<sup>402</sup>

The issue then is whether the Constitution requires that the state provide a remedy for every injury. To date, the Supreme Court has not extended the protections of the Bill of Rights or the Fourteenth Amendment that far, although the Court has carefully avoided addressing the precise question whenever it has been raised. The Court flirted with this issue most recently in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*<sup>403</sup> The issue in *Duke Power* was whether Congress could limit the tort liability of nuclear power producers to an arbitrary ceiling in the event a nuclear power accident caused injuries.<sup>404</sup> Challenges to the Act were brought under the Due Process and Equal Protection Clauses. The critical aspect of the court's decision was holding that the Act was merely an economic regulation, requiring only rational basis scrutiny.<sup>405</sup> The Act was economic regulation, according to the Court, because Congress had balanced the public interest in the development of new energy sources against the public interest in compensation for injuries resulting from a nuclear catastrophe—a balancing which involved "a legislative effort to structure and accommodate 'the burdens and benefits of economic life.'" <sup>406</sup>

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401. For example, the legislatively perceived insurance crisis was in many jurisdictions a sufficient reason for limiting the availability of certain common law rights and remedies for personal injuries. *See, e.g.*, *Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985) (upholding \$250,000 cap on noneconomic damages in medical malpractice cases); *Beatty v. Akron City Hosp.*, 424 N.E.2d 586 (Ohio 1981) (upholding constitutionality of statute requiring medical review board proceeding prior to tort action in medical malpractice cases); *Eastin v. Broomfield*, 570 P.2d 744 (Ariz. 1977) (same); *Everett v. Goldman*, 359 So. 2d 1256 (La. 1978).

402. *See, e.g.*, *Carson v. Maurer*, 424 A.2d 835 (N.H. 1980) (striking down tort reform measure which limited recovery of noneconomic damages to \$250,000).

403. 438 U.S. 59 (1978).

404. *Id.* at 62 (challenging the Price-Anderson Act which imposed a liability ceiling of \$560 million).

405. *Id.* at 83-84.

406. *Id.* at 83 (quoting *Usury v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)).

It seems clear that the public interest in the development of nuclear energy is primarily an economic and social concern. It is less clear, however, that the entitlement to a remedy for injuries is only a matter of economics. Our common law heritage is in some instances so strong that failure to follow common law practices amounts in effect to the denial of a fundamental right, a denial which might trigger strict scrutiny. The Seventh Amendment explicitly adopts the common law rule that requires trial by juries in suits at common law, and the Court has respected that explicit reference.<sup>407</sup> In addition, the Court has elevated common law practice to constitutional stature even in the absence of a textual reference. For example, in the First Amendment context, the Court has required criminal trials (and procedures akin to criminal trials) to be open to the press and public because such trials have historically been open to the public.<sup>408</sup> The law of defamation has of course been partially constitutionalized by the Court in its series of decisions beginning with *New York Times Co. v. Sullivan*.<sup>409</sup>

Nevertheless, recognizing that the common law itself changes, the Court has several times indicated broadly that common law rights are generally not fundamental rights and are subject to legislative modification.<sup>410</sup> It follows then that if a legislature has a legitimate basis for its decision, it may abolish particular common law causes of action or refuse to recognize the assertion of new causes of action.<sup>411</sup> In *Duke Power*, the Court easily found a legitimate basis for the liability limitation in Congress's dual concern for promoting nuclear power and insuring the existence of a federal fund for compensation of possible victims.<sup>412</sup>

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407. See, e.g., *Tull v. United States*, 481 U.S. 412, 417-18 (1987).

408. See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

409. 376 U.S. 254 (1964).

410. Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of the common law." *Second Employers' Liability Cases*, 223 U.S. 1, 50 (1912) (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1877)). The "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," *Silver v. Silver*, 280 U.S. 117, 122 (1928), despite the fact that "otherwise settled expectations" may be upset thereby. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976).

*Duke Power*, 438 U.S. at 88 n.32.

411. The Court in *Duke Power* never ruled whether a legislature could abolish an existing cause of action without providing a reasonable substitute for the cause of action — a *quid pro quo* — because the Court found that the Price-Anderson Act's federal guarantee of a substantial fund for compensation was itself a benefit to potential plaintiffs. *Id.*, 438 U.S. at 88-92. The Court had previously used the *quid pro quo* rationale to uphold workers' compensation schemes which limited the amount which an injured claimant could recover. See *Crowell v. Benson*, 285 U.S. 22 (1932); *New York Central R.R. Co. v. White*, 243 U.S. 188, 201 (1917).

412. *Duke Power*, 438 U.S. at 84-87.

It is appropriate at this point to make a few general observations about federal state action jurisprudence. The Supreme Court has generally interpreted the Bill of Rights and the Fourteenth Amendment as creating only private immunities against unconstitutional state action and not as creating private causes of action against private actors.<sup>413</sup> The two most important factors leading to this interpretation are: (1) recognition of our federal system of government in which states are primarily entrusted with the responsibility of protecting private rights against private harms; and (2) a belief that bills of rights contained in constitutions are generally intended only to act as limitations upon the power of the government created by the Constitution. The final observation is that the existence of state action in a particular case depends in part upon the substance of the constitutional right being asserted. A sufficiently expansive constitutional right can convert what is private action in one context into state action in another context. The substantive constitutional right being asserted cannot be ignored in the state action analysis.

#### 4. A Proposed State "State Action" Requirement

Article I of the California Constitution is the California Declaration of Rights — our version of the Bill of Rights. It now includes, among other things, an equal protection clause,<sup>414</sup> a due process clause,<sup>415</sup> a search and seizure clause,<sup>416</sup> a cruel and unusual punishment clause,<sup>417</sup> a free speech provision,<sup>418</sup> and a religious liberty provision.<sup>419</sup>

*None* of these basic provisions declaring fundamental rights indicate on their face that they are limited to situations involving *state* burdens on the declared rights. For example, prior to the privacy initiative, section 1 provided that:

[a]ll men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.<sup>420</sup>

Section 1 contains no reference to a state action requirement. Thus,

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413. Congress created a cause of action for damages in 42 U.S.C. § 1983 (1988).

414. CAL. CONST. art. I, § 7.

415. *Id.*

416. CAL. CONST. art. I, § 13.

417. CAL. CONST. art. I, § 17.

418. CAL. CONST. art. I, § 2.

419. CAL. CONST. art. I, § 4.

420. CAL. CONST. art. I, § 1.

the section may be read as declaring rights (as well as recognizing other rights contained in the Declaration of Rights) that are enforceable against both private and public actors. Under this approach, for example, the law of trespass might be viewed as based upon the article I, section 1, right to possess and protect property. The laws of false imprisonment and battery might find their source in the rights of liberty and safety. Section 2, which provides that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right,"<sup>421</sup> might be interpreted as creating a cause of action when one private individual interferes with another's right to freely speak or publish. Section 7 provides that "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."<sup>422</sup> It could be interpreted to create causes of action similar to conversion, battery, wrongful death, false imprisonment, discrimination, and so on. Section 13 guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches."<sup>423</sup> This section might be interpreted to create a cause of action against private snooping.<sup>424</sup>

The Supreme Court of California has in only a few cases addressed itself to the question of whether the Declaration of Rights contains an implied state action requirement or should create a cause of action against a purely private actor. In those cases, the court has held that the provision at issue restricts *only* state action despite the absence of any explicit limitation in the Declaration of Rights.<sup>425</sup> In one important free speech case, the court did not discuss the issue explicitly, but by its emphasis suggested that the state free speech clause would be invoked only if the defendant had, in effect, taken on public or quasi-public responsibilities.<sup>426</sup>

*a. A Theory Respecting a "State Action" Requirement in California's Declaration of Rights*

Before discussing the few cases that have addressed this question, a fundamental point needs to be made. Because the California Constitution exists independently of the United States Constitution, it is possible for the Declaration of Rights in the California Constitution to contain a state action requirement that is *different* from the federal state action requirement. The choice between adopting the fed-

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421. CAL. CONST. art I, § 2(a).

422. CAL. CONST. art. I, § 7(a).

423. CAL. CONST. art. I, § 13.

424. See, e.g., Note, *Rediscovering California's Declaration of Rights*, 26 HASTINGS L.J. 481 (1974).

425. See *infra* notes 437-53 and accompanying text.

426. See *infra* notes 447-53 and accompanying text.

eral version of state action and no state action requirement at all is a false dichotomy. California courts may create their *own* version of a state action requirement, and, as will be seen below, the California Supreme Court has done so in at least one instance.

Assuming that there should be any state action requirement under a state constitution, there are good reasons to believe that such a requirement should be satisfied more easily than the federal state action requirement. As discussed above, the federal state action requirement has been interpreted with a keen eye upon federalism issues. As a general matter, the federal courts have been unwilling to apply the Bill of Rights and the Fourteenth Amendment against the states except in those cases where the state may fairly be held responsible for the burden on private interests.<sup>427</sup>

Federalism concerns are absent in the context of a state constitution. Further, because states remain primarily responsible for promoting the health, safety and welfare of their citizens,<sup>428</sup> it would not be surprising if a state were to adopt a slightly broader definition of state action providing a slightly greater degree of protection to its citizens.

This reasoning can be carried to the extreme of abolishing *any* requirement of state or public action under a state constitution's declaration of rights. Yet there may be convincing reasons why a constitution, whether state or federal, generally should not be interpreted as regulating purely private conduct.

In the first place, as a matter of American tradition, state constitutions are generally designed to *limit* the power of state government.<sup>429</sup> The focus of most state constitutions is upon the structure of state government and the relation of state government to the people. It would thus be natural to expect that a declaration of rights contained in a state constitution pertains primarily to restrictions upon what the state may do to its citizens.<sup>430</sup>

In the second place, we must remember "it is a constitution we are interpreting." Constitutions are not drafted at the same level of detail as statutes or as judicial opinions, and caution should therefore

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427. See *supra* notes 366-412 and accompanying text.

428. U.S. CONST. amends. IX & X.

429. See *supra* notes 351-52 and accompanying text where the same argument was used to interpret the Bill of Rights as containing an implied *federal* action requirement.

430. See the discussion of *Barron v. Baltimore*, *supra*, notes 352-365 and accompanying text.

be exercised in interpreting the sometimes broad generalizations contained in a constitutional declaration of rights to create privately enforceable rights.<sup>431</sup>

That caution should be at its zenith when a court interprets a constitutional provision as limiting not only governmental or public action, but also purely private conduct. When government limits itself in favor of an individual's liberties, the burden of the limitation lies primarily upon the government itself and not upon other members of society. There is *some* burden on *some* members of society whenever government accommodates private interests, but the burden is indirect, usually insubstantial, somewhat speculative, and is spread throughout society.

The situation is quite different when one private person asserts a right to recover damages from another private person or to enjoin another private person's conduct. In that sort of case, it is much more likely that every assertion of individual rights by one private person will directly and substantially conflict with another private person's assertion of their own individual rights. The balancing of private interests in these cases can be more problematic than balancing private interests against governmental interests. The harm caused by an error in the balancing process here is concentrated upon the affected private person rather than being spread across society.

The common law system recognizes the difficulties inherent in balancing competing private interests by giving courts freedom to decide cases upon their particular facts and to create relatively well-focused rules that apply to particular fact situations (and do not necessarily apply to slightly different fact situations). The same may be said about statutes, which are typically drafted to solve a relatively specific problem. In either case whether making common law or interpreting a statute, a wrong decision is correctable by the more democratic branches of government.

The broad provisions of a constitution, by contrast, do not give courts the same concrete and specific guidance provided by either the common law or statutes. The risk is accordingly greater that a court, even the highest court in the jurisdiction, will incorrectly resolve the balance between conflicting private interests. Since a high court's error in these cases would involve interpretation of the constitution, the error could be corrected only in the unlikely event of a constitutional amendment or subsequent overruling by the same court. Our constitutional jurisprudence is dotted with such catastrophic er-

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431. This caution explains the reluctance of many courts to interpret state or federal constitutional provisions as being self-executing in the absence of implementing statutes. See *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1 (1986); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

rors,<sup>432</sup> the risk of which counsels caution.

In the third place, common law and civil law primarily regulate private conduct, as opposed to public or governmental conduct. Indeed, until the widespread passage of tort claims acts and the abolition of governmental immunities, the common law was virtually powerless to limit state action. It was most appropriate then for one to look to the constitution to place limits upon the exercise of state power.

Given that private conduct is already regulated by common law or statute, one may fairly ask: Why should private conduct *also* be regulated and controlled by general constitutional provisions? Are statutes and the common law inadequate to protect private rights from infringement by private actors? If the courts deem a particular right sufficiently important, and there is no statutory remedy (as rights which would be included in a declaration of rights would undoubtedly be), they can create a common law remedy against a private actor who burdens or infringes that right. If a state legislature subsequently attempts to limit the availability of such a remedy by enacting a statute, the passage of the statute will itself constitute state action which is then subject to judicial review. It is thus completely unnecessary for a state court to find a constitutional basis for the protection of private interests against invasion by private conduct. The common law and statutes are always sufficient if a state court has the desire and will to protect private rights from private infringement.

Assuming the validity of this last statement, one may wonder what motivates state courts to look to a state constitution for the protection of private interests from private conduct. Two reasons, apart from simple analytic confusion and sloppy thinking, stand out.<sup>433</sup> First, judges not serving on the highest court of the state may properly feel constitutionally bound to apply the common law as declared in prior decisions from the highest court despite dissatisfaction with the results (and even judges on the high court may feel constrained by the principle of *stare decisis* to adhere to previous declarations of common law). Faced with common law or statutory rules that reach what are perceived to be unjust results, these judges feel pressured to

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432. See, e.g., *Dred Scott v. Sandford*, 60 U.S. 393 (1856); *The Slaughter-House Cases*, 83 U.S. 36 (1872); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Lochner v. New York*, 198 U.S. 45 (1905).

433. *Melvin v. Reid*, 297 P. 91 (Cal. 1931) (serves as an example of such confused thinking); see also *supra* notes 344-46 and accompanying text.



look elsewhere to support their judgments.<sup>434</sup> The broad declarations of rights found in a state constitution are a potential gold-mine of support.

This is an illegitimate and inappropriate response to what may truly be outdated or unfair statutes or rules of common law. A statute which burdens rights found in the declaration of rights may be struck down. A common law rule which is unfair or outdated should be changed appropriately. One of the alleged strengths of the common law system is its supposed ability to adapt to changing conditions in society.<sup>435</sup> For the common law system to retain its vitality, courts should resist the temptation to ignore the common law system in favor of what seems to be an easy route to a desired result.

Courts may also turn to the constitution from a distrust of the other branches of government. By placing rights on a constitutional footing, courts can largely insulate their judgments from attack by the legislative or executive branches. The difficulty with this motivation is that it runs counter to separation of powers principles and claims a degree of competence and perfection that courts may not have. Courts do not have an inside track to truth and justice. Particularly when the issues involve a delicate balancing of public policies and private interests, courts, somewhat insulated from the democratic process and the voters, are in a comparatively poor position to make a proper accommodation of interests. In fact, courts often defer to legislative judgment on matters of public policy<sup>436</sup> and are reluctant to reach constitutional issues except when absolutely required to do so. The crisis of legitimacy and risk of error were important reasons why the Supreme Court reassessed its privacy jurisprudence in *Bowers*.<sup>437</sup>

The above analysis suggests that courts should interpret a declaration of rights in a state constitution as requiring some form of state or public action to trigger its protections. The degree of state action required can be less than that required under the federal Constitution since federalism issues do not cloud a state court's interpretation of a state constitution. Conceivably, the requirement could be stricter than the federal state action requirement because a state court can always protect private rights through development of the common law. The few decisions by the California Supreme Court concerning state action under the California Declaration of Rights

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434. See Kennedy, *supra* note 248.

435. See *supra* note 77.

436. See, e.g., *Foley v. Interactive Data Corp.*, 765 P.2d 373, 401 (Cal. 1988) (indicating that the issue of providing tort-like remedies for wrongful termination was more properly a subject for legislative resolution).

437. See *supra* notes 331-43 and accompanying text.

suggest that the court has adopted an approach slightly more liberal than federal state action requirements.

*b. Cases Involving "State Action" Under the California Declaration of Rights*

In *Kruger v. Wells Fargo Bank*,<sup>438</sup> a bank customer brought suit against her bank for deducting from her checking account an amount that was owing on her credit card (which was held by the same bank).<sup>439</sup> The complaint alleged violations of the federal and state due process clauses. The California Supreme Court held that the bank was a private actor for purposes of the federal constitution, and that the Due Process Clause therefore did not apply.<sup>440</sup>

The court separately addressed the question whether the *state* due process clause contained a state action requirement. An amicus brief pointed out to the court that the state due process clause, unlike the Fourteenth Amendment, did not explicitly require state action.<sup>441</sup> However, the court rejected this argument. First, it noted that the state due process clause, initially adopted in 1849, tracked the language found in the Fifth Amendment. The Supreme Court of the United States had already held in *Barron v. Baltimore*<sup>442</sup> that the Fifth Amendment was a limitation only upon action by the federal government.<sup>443</sup> The California court reasoned that the Supreme Court's earlier interpretation of the Fifth Amendment, limiting its scope to federal governmental conduct, undercut any argument that the court should interpret the state due process right, which was based on the Fifth Amendment, to limit purely private conduct.<sup>444</sup>

The court's analysis in *Kruger* is only partly complete. The

438. 521 P.2d 441 (Cal. 1974).

439. *Id.* at 443.

440. *Id.* at 442. The court later adopted its *Kruger* analysis of state action in a case arising under the privacy clause. In *Schmidt v. Superior Court*, 769 P.2d 932 (Cal. 1989), the plaintiff claimed that a private mobile home park rule which limited residence in the park to persons 25 years or older violated, among other things, the privacy clause. Citing *Kruger*, the court first noted that no state action was present, since the private rule was authorized, but not compelled, by a state statute regulating mobile home parks. *Id.* at 943-44. The court's state action discussion in *Schmidt* is properly treated as dicta, though it appears to have been well-considered dicta since the court held that even if the privacy clause applied, there would be no violation. *Id.* at 944 n.14. The court expressly declined to consider under what circumstances the privacy clause might apply to private conduct. *Id.*

441. *Id.* at 366.

442. 32 U.S. 243 (1833).

443. *Id.*

444. *Kruger*, 521 P.2d at 449-50.

Supreme Court in *Barron* interpreted a state due process clause in the context of a federal constitution that clearly intended to preserve a large measure of sovereign control by individual states.<sup>445</sup> The principles of federalism that inspired the Court in *Barron* are absent in the context of a state constitution, and were absent in *Kruger*. The only rationale from *Barron* applicable to analysis of a state constitution is Justice Marshall's argument that limitations on power contained in a constitution should be interpreted only as a limit upon the power of the government created by that particular constitution unless a contrary intent is made clear and explicit.<sup>446</sup> The California Supreme Court in *Kruger* apparently adopted this rationale, concluding that "[t]o construe article 1, section 13, to apply to private action would involve a judicial innovation which, as of this date, is without precedent."<sup>447</sup>

The Supreme Court of California next examined a state action problem in *Robins v. Pruneyard Shopping Center*.<sup>448</sup> The issue in *Pruneyard* was whether the owner of a private shopping center could constitutionally prohibit persons from engaging in expressive activity on the premises unrelated to the commercial purposes of the shopping center. The plaintiffs in *Pruneyard* were high school students who wanted to solicit support and signatures for a petition protesting a United Nations resolution against Zionism.<sup>449</sup>

In *Lloyd v. Tanner*,<sup>450</sup> the Supreme Court of the United States held that the decision by the owner of a private shopping center to exclude persons engaging in speech activities unrelated to the business purpose of the shopping center did not constitute state action sufficient to trigger the protections of the First Amendment.<sup>451</sup> If

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445. U.S. CONST. amend. X.

446. See *supra* notes 351-62 and accompanying text.

447. *Kruger*, 521 P.2d at 450 (subsequently followed by the court in *Garfinkle v. Superior Court*, 578 P.2d 925, 933-34 (Cal. 1978)).

The court might also have reasoned in *Kruger* that by adopting the precise language of the federal Due Process Clause, the drafters of the state constitution intended to incorporate into the constitution all of the limitations which had been judicially declared to exist with respect to the federal Due Process Clause. However, *Barron* clearly interpreted the federal Due Process Clause in light of other provisions in the federal Constitution that find no counterpart in the state Constitution. It is thus problematic to assert that the drafters of the state constitution intended to incorporate in the state due process clause limitations that arose out of *other* provisions in the federal Constitution.

448. 592 P.2d 341 (Cal. 1979).

449. *Id.* at 342.

450. 407 U.S. 551 (1972).

451. *Id.* at 570. The Court had previously indicated in *Amalgamated Food Employees Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968), that the Constitution required the owner of a private shopping center to permit the picketing of a business within the shopping center. Although *Lloyd* did not explicitly overrule *Logan Valley*, in *Hudgens v. NLRB*, 424 U.S. 507, 518 (1976), the Court acknowledged that *Lloyd* had actually overruled *Logan Valley*.

the state constitution's free speech clause contained a state action requirement identical to the federal state action requirement, then the plaintiffs in *Pruneyard* should have been denied relief pursuant to *Lloyd*.

In *Pruneyard*, the court granted relief, however, clearly indicating that the free speech clause of the California Constitution is *not* limited by a state action requirement identical to the *federal* state action requirement. Unfortunately, the court in *Pruneyard* did not explicitly discuss the issue of whether there existed a state action requirement under the free speech clause. Thus, the court in *Pruneyard* does not resolve whether the free speech clause applies to *all* private conduct which burdens speech or only to private conduct imbued with public elements sufficient to trigger the protections of the Declaration of Rights. However, there are some strong hints in the court's analysis.

In reaching its conclusion, the court in *Pruneyard* emphasized, as it had in prior cases, the "public character" of the property at issue, explicitly drawing an analogy between shopping centers and public streets, parks, and even entire downtowns.<sup>452</sup> This suggests that the court recognized the necessity for some form of public or state action before the court would invoke the free speech clause. Subsequent cases have recognized that the *Pruneyard* rule applies only where private actors have taken on some of the characteristics of a public or state actor by ownership and operation of premises that share the attributes of a park, city street, or public business district.<sup>453</sup>

The only other opinion to address the state action issue is *People v. Zelinski*,<sup>454</sup> a search and seizure case. The defendant was observed shoplifting in Zody's Department Store by Zody's privately-employed security personnel. Immediately after the defendant left the store, the security guards placed the defendant under arrest pursuant to Penal Code section 484 and asked that she accompany them back into the store. The security guards then performed a weapons search including a search of her purse, where the defendant had hidden some of the purloined merchandise. The guards also found in her purse a

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452. 592 P.2d 341, 346-47 (Cal. 1979) (citations omitted).

453. See *Laguna Publishing Co. v. Golden Rain Found.*, 182 Cal. Rptr. 813, 825-26 (Ct. App. 1982); *H-CHH Assoc. v. Citizens for Representative Gov't*, 238 Cal. Rptr. 841, 850 (Ct. App. 1987).

454. 594 P.2d 1000 (Cal. 1979). It is important to note that this case was superseded by article I, section 28, subdivision 2, of the California Constitution (as amended by Proposition 8). CAL. CONST. art. I, § 28(d).

vial which allegedly contained heroin, and the defendant was subsequently charged with possession of a controlled substance. Her motion to suppress introduction of the vial into evidence was denied, and she then pled guilty.<sup>455</sup>

There were two issues on appeal: whether the search was reasonable, and, if not, whether the exclusionary rule applied in the context of searches by a private person. Applying case and statutory law, the court first held that the security guards exceeded the scope of their authority in searching the defendant's purse.<sup>456</sup> Turning to the state action issue, the court noted that "California cases have generally interpreted this provision [article I, section 13, the search and seizure clause] as primarily intended to protect the people against such governmental initiative or governmentally directed intrusions."<sup>457</sup> On the other hand, the court recognized that private security guards may "pose[] a threat to privacy rights of Californians that is comparable to that which may be posed by the unlawful conduct of police officers."<sup>458</sup>

Ultimately, the court avoided the difficult issue of whether the search and seizure clause applied to all private conduct by finding that the private security guards were state actors and therefore subject to the search and seizure clause even assuming that clause contained a state action requirement.<sup>459</sup> The private security guards were state actors for two reasons. First, the arrest and detention were effected pursuant to a state statute.<sup>460</sup> Second, the security guards went beyond mere self-help (*i.e.*, simply demanding return of the merchandise) and purported to vindicate the public's interest by holding the defendant for criminal prosecution and by searching her.<sup>461</sup> The court summarized its holding as follows: "[W]e conclude that under such circumstances, *i.e.*, when private security personnel conduct an illegal search or seizure while engaged in a statutorily-authorized citizen's arrest and detention of a person in aid of law enforcement authorities, the constitutional proscriptions of article 1, section 13, are applicable."<sup>462</sup>

The court in *Zelinski* rested its analysis upon the state constitutional search and seizure provision rather than the Fourth Amend-

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455. *Zelinski*, 594 P.2d at 1002.

456. *Id.* at 1002-04.

457. *Id.* at 1004-05.

458. *Id.* The court was careful not to cite the Privacy Clause in its analysis of the case. Subsequently, the court in *People v. Crowson*, 660 P.2d 389 (Cal. 1983), held that the Privacy Clause protections are not greater than those secured by article I, section 13.

459. *Zelinsky*, 594 P.2d at 1005-06.

460. *Id.* at 1006.

461. *Id.*

462. *Id.*

ment. Yet in discussing the state action issue, the court cited both state and federal precedent, which might suggest that its analysis was informed by, if not governed by, federal state action law.<sup>463</sup> Although the Supreme Court has not settled the issue, it appears likely that a detention and search by a private security guard pursuant to a statutory merchants' privilege does not constitute state action. In the most analogous Supreme Court case, *United States v. Jacobsen*,<sup>464</sup> the Court held that a search by Federal Express employees of a damaged package did not violate the Fourth Amendment because the search was conducted by private persons.<sup>465</sup> This of course is a situation far removed from an arrest and search by a department store security guard. The lower courts have unanimously held, however, that such a detention and search does not constitute state action.<sup>466</sup> Thus, it appears that the California Supreme Court in *Zelinski* relied upon a state action rule that is somewhat broader than the federal rule.<sup>467</sup> However, we may never know for sure because Proposition 8 requires California state courts to interpret the state exclusionary rule consistent with the federal rule, and *Zelinski* may be partially overruled.<sup>468</sup>

When the privacy initiative was offered, there existed no precedent in California for the proposition that *any* rights contained in the Declaration of Rights created a cause of action against *purely* private conduct. To the contrary, although the issue had not been confronted by the Supreme Court of California, lower courts and the supreme court acted generally on the assumption that the declaration limited *only* state action.

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463. *Id.*

464. 466 U.S. 109 (1984).

465. *Id.* at 115.

466. See, e.g., *White v. Scrivner Corp.*, 594 F.2d 140 (5th Cir. 1979) (finding no state action in store employee's search of purse pursuant to statutory merchants' privilege); *Iodice's Estate v. Gimbel's, Inc.*, 416 F. Supp. 1054 (D.C.N.Y. 1976) (no state action in detention of shoplifter); *Davis v. Carson Pirie Scott & Co.*, 530 F. Supp. 799 (D.C. Ill. 1982) (same). The only authority arguably contrary appears to be *Rojas v. Alexander's Dept. Store, Inc.*, 654 F. Supp. 856 (E.D.N.Y. 1986). However, it is easily distinguished, since the private guard in *Rojas* was also a "special patrolman" appointed by the New York City Police Commissioner pursuant to a special statutory scheme, and the guard made the arrest in her dual capacity as private employee and city police officer. *Rojas*, 654 F. Supp. at 858.

467. The Ninth Circuit in *Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989), strongly hinted that *Zelinski* had gone beyond federal state action principles.

468. See *In re Lance*, 694 P.2d 744, 753 (Cal. 1985); *Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989).

#### IV. ARTICLE I, SECTION 1 AND ITS LEGISLATIVE HISTORY

##### A. *Restating the Problem*

Despite the protection of privacy already afforded by the common law, the civil code, and both the state and federal constitutions (an implied right in both), the legislature proposed, and the voters adopted, an explicit guarantee of privacy in article 1, section 1. Privacy was added to a list of “inalienable rights” that includes “enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, [and] happiness.”<sup>469</sup>

As already noted, the word “privacy” is so ill-defined as to be virtually useless for deciding concrete cases. It conceivably knows no useful limit since it may plausibly be asserted that any exercise of private rights involves an exercise of a right of privacy. For example, it may be asserted that requiring one to give one’s name to the government is an invasion of the right to control personal information.<sup>470</sup> When government taxes income, it invades privacy by denying citizens the opportunity to spend their money in the way they choose. The invasion is particularly pernicious since the government requires withholding by employers, thereby denying the citizens the right of civil disobedience—disobedience that fundamentally expresses a private autonomy and independence from government.

Common law courts solved the definitional problem by placing strict limits on the causes of action for invasion of privacy. There is not so much a cause of action for invasion of privacy as four separate causes of action dealing with different subjects.<sup>471</sup> Moreover, common law courts balanced the asserted private interest against the interests of society generally,<sup>472</sup> usually employing what could be described as “rational basis” scrutiny.

Decisions under both the federal and state constitutions presented a slightly more difficult problem. Ultimately, however, the penumbral theory provided one concrete limit to privacy rights. In particular, the general contours of the Bill of Rights limit the extent to which new privacy rights may be declared.<sup>473</sup> Although some complain that these “penumbral” rights do not deserve protection because they are not explicitly enumerated in the Constitution, at the

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469. See Exhibit A. Throughout this section, citations to “Exhibits” will refer to materials appearing in the Appendix to this Article.

470. Cf. *Bowen v. Roy*, 476 U.S. 693 (1986) (rejecting claim under Free Exercise Clause that social security regulations requiring state welfare agency to use social security number burdened the exercise of applicant’s religion because use of number rather than name “may harm his daughter’s spirit”).

471. See *supra* notes 259-311 and accompanying text.

472. See *supra* notes 248-311 and accompanying text.

473. See *supra* notes 322-30 and accompanying text.

very least, the penumbral rights bear some nexus to rights that are explicitly stated in the Constitution. Because this nexus is a prerequisite to recognition of a penumbral right, there is a limit on how far the Court can go in creating new privacy rights. A more generalized right to privacy appeared to exist in the early cases where the court's reasoning was based upon the Ninth and Fourteenth Amendments. However, *Bowers* would appear to have largely shut that door by imposing a high threshold for recognition of a privacy interest.<sup>474</sup>

By giving "privacy" explicit status in the California Constitution, "privacy" under our constitution, unlike privacy under the federal constitution, is set free from the constraints of other constitutional protections. Indeed, traditional canons of construction would lead a court to conclude that it *must* give privacy a definition different from other protections simply to give the word some effect. The risk then is that "privacy" may become completely untethered from any moorings whatsoever, and a reference to "privacy" in article 1, section 1 may become a convenient substitute for analysis.

A legislative history much more complete than that which has been relied upon by the courts and commentators provides a reasoned basis for limiting the right of privacy as declared in article 1, section 1. Because the materials making up this legislative history are not easy to collect, and have not been cited, or reviewed by the courts, the relevant documents have been reproduced in full in the Appendix to this Article.<sup>475</sup>

### *B. Legislative Precursors to the Privacy Initiative*

Assemblyman Kenneth Cory carried the privacy initiative in 1972 and wrote the ballot argument in favor of the initiative. The 1972 legislation was not Cory's first attempt at adding privacy to the California Constitution. His prior attempt sheds light upon the meaning

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474. See *supra* notes 331-42 and accompanying text.

475. Researching state legislative history can be a frustrating experience, especially for dated legislation. The privacy initiative was referred to the Assembly Committee on Constitutional Amendments and to the Senate Judiciary Committee. Unfortunately, the State Archive's files for these two committees contain almost no useful information about the initiative. The committee reports are simply not where they should be. It is even difficult to reconstruct the various drafts of the privacy initiative (it was amended twice during its consideration) since the relevant volume which would contain the drafts is inexplicably missing from the stacks at the State Library. Much of the material relied upon in this Article and all of the significant material was discovered by examining, at the suggestion of a helpful archivist at the State Archives, the personal files for Assemblyman Cory, who authored the initiative. Fortunately, Cory kept what appear to be the assembly and senate committee reports.



which should be given to article 1, section 1. It is common to interpret a statutory or constitutional provision in light of prior legislative action directed at the same general topic.

In 1971, Representative Cory proposed Assembly Constitutional Amendment (ACA) 69<sup>476</sup> and a companion bill, AB 2933.<sup>477</sup> ACA 69 proposed to add privacy to article 1, section 1.<sup>478</sup> The companion bill, AB 2933, contained a variety of provisions dealing with government control over private information about individuals.<sup>479</sup> Representative Cory was apparently concerned about the evils associated with the growing tendency of government to collect large amounts of private information about people. Cory perceived government's collection and use of such information as part and parcel of a shrinking orbit of privacy.

The detailed provisions of AB 2933 make it clear that Cory's predominate interest was *not* in purely private invasions of the privacy of another. Instead, virtually every provision in AB 2933 is directed at government collection and use of private information, and, more particularly, with government cooperation with private business in the widespread dissemination of private information. Undoubtedly, Cory was concerned about private businesses knowing private facts about private people, but AB 2933 was limited in its scope to *government cooperation and complicity* in invading an individual's privacy.

The primary changes proposed by AB 2933 were to California's Public Records Act.<sup>480</sup> With only a few statutory exceptions, sections 1-3 of AB 2933 would have prevented state or local agencies from "sell[ing] or otherwise distribut[ing] lists of information in bulk or aggregate form identifiable by name or address."<sup>481</sup> This would have protected an individual's right to be left alone and right to control distribution of name and address. Section 3 of AB 2933 would also have given an individual a right to examine and correct any information about that individual held by a government agency.<sup>482</sup>

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476. See Exhibit B, Assembly Constitutional Amendment, No. 69 (1971) [hereinafter ACA 69].

477. See Exhibit C, Assembly Bill, No. 2933 (1971) [hereinafter AB 2933].

478. ACA 69, *supra* note 475. The bill described itself as "A resolution to propose to the people of the State of California an amendment to the Constitution of the state, by amending Section 1 of Article I thereof, relating to inalienable rights." *Id.* If ACA 69 had passed and been approved by the people, article I, section 1 would have read as follows: "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety, happiness, and privacy." *Id.*

479. AB 2933, *supra* note 476.

480. CAL. GOV'T CODE §§ 6250-6265 (West 1980 & Supp. 1991).

481. AB 2933, *supra* note 476, § 3(e). See also *id.* at § 2 (definitions of terms used).

482. *Id.* at § 3(b).

Even with these changes, Cory was not satisfied with the access restrictions on government-held private information. Cory was concerned that too many government agencies and too many private entities were examining government files without adequate justification. In section 4 of AB 2933, he created a special mechanism for deterring unreasonable snooping. Subsection (a) would have required a governmental agency to include along with an individual's record the name and address of any government agency or private person who had accessed the record. Under section 3 of AB 2933, as explained above, any person can request a copy of their file from any government agency, and the file would include the name and address of all persons and entities that had accessed the file.<sup>483</sup> Then, pursuant to section 4(b), that individual could request from anyone who accessed the record a statement of reasons why the record was used.<sup>484</sup> Section 4 made it a misdemeanor to refuse to provide reasons when requested and also created a civil action for actual damages if the reasons given were false.<sup>485</sup>

Section 5 of AB 2933 directed the Intergovernmental Board on Electronic Data Processing to report to the legislature concerning the confidentiality and security of personal data maintained on government computer systems.<sup>486</sup> Section 6 mandated a similar report from the Office of Management Services and designated that office "[t]o act as the central review and coordinating body for the implementation of state policy regarding individual privacy and the security of information."<sup>487</sup>

The *only* changes proposed by AB 2933 that would have regulated purely private conduct were contained in sections 7 and 8. Section 631 of the Penal Code, described above,<sup>488</sup> made wire-tapping a crime in California. Section 7 of AB 2933 would have made unauthorized connection with a computer system a crime under section 631, California's wire-tap statute, regardless of whether the computer system was state or privately owned.<sup>489</sup> The state obviously would not be cooperating in such an invasion. Section 8 would have added a new section to the Penal Code, section 631.1, making it a crime to "attempt[] to obtain personal data of another person from any confidential com-

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483. *Id.* at § 3(c).

484. *Id.* at § 4(b).

485. *Id.* at § 4(b), (c).

486. *Id.* at § 5.

487. *Id.* at § 6(f), (g).

488. *See supra* notes 274-77.

489. AB 2933, *supra* note 476, at § 7.

puterized record by fraud, bribery, or other deceit.”<sup>490</sup> Again, state complicity is not a requirement under Section 8.

Although sections 7 and 8 do not involve state cooperation or complicity in an invasion of privacy, it is equally clear that neither section is triggered by an invasion of privacy pure and simple. Section 8 is triggered by “fraud, bribery, or other deceit.” Section 7 is triggered by “unauthorized access,” which is similar to a breaking and entering. All of this conduct may be independently wrongful entirely apart from privacy concerns.

Although ACA 69 and AB 2933 died in committee, their provisions are important in understanding the privacy initiative which Cory successfully re-introduced in 1972. ACA 69 and AB 2933 are directed almost exclusively at the problem of government collection and use of private information about citizens. AB 2933 also indicated a concern with private persons and businesses invading our privacy, but, with the exception of sections 7 and 8, the bill limits its scope to instances in which government cooperates with business by giving business access to private information held by the government, either for free or for remuneration. Sections 7 and 8, which do not involve state complicity or action, do not prevent the lawful collection of private information by private persons or businesses; rather, they only prevent the collection of private information by *unlawful means*, such as unauthorized access, bribery, fraud, or other deceit. These sections protect privacy only indirectly and only partially; they appear to be focused primarily on whether the *means* used are lawful, rather than upon whether the information sought and disclosed is private.

ACA 69 was much more general than AB 2933, of course, since it proposed to add the word “privacy” to the constitution, and no definition of “privacy” was given. Both ACA 69 (1971) and ACA 51 (1972) should be read in light of AB 2933 (1971).<sup>491</sup> AB 2933 evidences a concern with government invasions of privacy, and government cooperation with private business in invasions of privacy. At the very least, then, AB 2933 should suggest that ACA 69 be limited to instances involving *government* invasions of privacy—either through direct government action or through government cooperation with private actors. Such an interpretation would be fully consistent with federal cases interpreting the state action requirement under the Fourteenth Amendment to include both direct state action and private state action under the auspices or with the cooperation of state government.

If AB 2933 were the only additional piece of legislative history uncovered, a limited definition of privacy might still be unwarranted,

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490. *Id.* at § 8.

491. See *infra* note 490 and accompanying text.

but AB 2933 does not stand alone. Instead, the legislative history associated with ACA 51 itself confirms what AB 2933 only suggests.

### C. ACA 51 As Initially Drafted

Representative Cory did not give up with the defeat of ACA 69 and AB 2933 in 1971. In 1972, he again proposed an amendment, ACA 51, to add privacy to the California Constitution.<sup>492</sup> This time, however, there was no associated statutory change, and ACA 51 was assigned to the Committee for Constitutional Amendments rather than the Judiciary Committee, which had defeated ACA 69 and AB 2933.

In addition to getting a new committee, Cory had picked up some political support between 1971 and 1972. The 1971 privacy amendment would simply have added the word privacy to article I, section 1, which would then have read "[a]ll men . . . have certain inalienable rights, among which are . . . privacy."<sup>493</sup> The 1972 amendment as originally proposed would have changed the word "men" to "persons" and would have also changed a few other constitutional provisions to make them gender neutral.<sup>494</sup> Because of his sensitivity to the gender issue, Cory picked up the support of women's groups, and there was testimony in favor of ACA 51 before the Assembly Constitutional Amendments Committee by a pro-Equal Rights Amendment law professor from Boalt Hall.

ACA 69 indicated in its descriptive title that it dealt with the general topic of "inalienable rights."<sup>495</sup> However, the descriptive title for ACA 51 was slightly different. As proposed, ACA 51 described itself as "[a] resolution to propose to the people of the State of California an amendment to the Constitution of the state, by amending Section 1 of Article I, Sections 2 and 6 of Article IV, and Section 11 of Article IX thereof, relating to state government."<sup>496</sup> The title of ACA 51, which is properly considered as part of the legislative history, explicitly indicates that the privacy amendment related to "state government." It did *not* indicate that the amendment created "inalienable rights," which conceivably might be enforceable against purely private actors. Even standing alone, the descriptive title of ACA 51 could be used to limit the scope of ACA 51 to state actors. The use of

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492. Exhibit D, Assembly Constitutional Amendment, No. 51 (1972) [hereinafter ACA 51].

493. ACA 69, *supra* note 475, at § 1 (emphasis added).

494. ACA 51, *supra* note 491.

495. ACA 69, *supra* note 476.

496. ACA 51, *supra* note 491 (emphasis added).

the phrase “state government” in the title to ACA 51 is especially significant in light of the different language in ACA 69, that could have been interpreted more broadly.<sup>497</sup>

#### D. *Consideration by the Assembly Committee on Constitutional Amendments*

ACA 51 was referred to the Assembly Committee on Constitutional Amendments. This committee produced both a staff report and a final report.<sup>498</sup> The committee’s report strongly indicates that the committee thought the privacy amendment related exclusively to government conduct. In discussing the “background” for the privacy initiative, the committee report noted that, although “[t]he right to privacy does not exist per se in the Federal Constitution or any other state constitutions . . . the courts . . . have articulated a right to be free from certain kinds of intrusion of *government acts*.”<sup>499</sup>

Next, in describing “federal decisions” involving the right of privacy, the report discusses only *Griswold v. Connecticut*,<sup>500</sup> a case which involved *government* invasions of privacy. The report further noted that, although “no definition has been formulated of a constitutional right of privacy . . . it appears, that the courts draw from the entire Bill of Rights and various amendments, but it is not clear from case law who is protected and from what.”<sup>501</sup> This last phrase might suggest some room for argument. If it is not clear who is protected and *from what*, then it is possible to argue that people are protected from both public and private snooping. However, in the context of a paragraph devoted entirely to a discussion of the federal right to privacy, it is more reasonable to reject this broad interpretation.

Only one sentence in the committee report is even arguably directed at purely private conduct. The discussion of the background of the legislation includes a comment that “the Courts’ work in the privacy field is defining the right solely by the wrong . . . (libel, unlawful search and seizure, telephone tapping, fair credit reporting act, etc.)”<sup>502</sup> By referring to causes of action such as libel, telephone tapping, and violations of the fair credit reporting act, the parenthetical impliedly refers to protection from private conduct since private actors are the typical defendants in such cases.

The reference remains somewhat ambiguous, however, since the

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497. The title was subsequently amended in another respect, but the reference to “state government” remained. See Exhibit K (final text as approved).

498. The staff report on ACA 51 appears in Exhibit F, and the committee report on ACA 51 appears in Exhibit G.

499. See Exhibit G (emphasis added).

500. 381 U.S. 479 (1965).

501. See Exhibit G.

502. *Id.*

sentence is directed primarily at defining privacy rather than whether the privacy right in ACA 51 regulates purely private conduct. The statement's apparent meaning is that in the absence of a clear definition of privacy itself, courts have resorted to protecting privacy interests by identifying otherwise wrongful conduct. The parenthetical also includes examples which define privacy solely by the wrong committed, citing various types of wrongful conduct. Following this analysis, this parenthetical merely makes the point that adding "privacy" to the state constitution forces courts to define it directly, rather than to continue to protect privacy by identifying conduct which is already unlawful. That is a far cry from saying that the privacy initiative was intended to apply to purely private conduct.

Although this report, properly read, does not indicate that the privacy clause was intended to apply to purely private conduct, the report does suggest that the privacy clause was intended to do more than simply codify existing constitutional and common law doctrines. The report recognizes that privacy had previously been protected only indirectly, either by reference to specific protections in the Bill of Rights or by various common law causes of action. In light of this recognition, the drafter of the privacy clause and the legislature must have been aware that if the word "privacy" was added to the declaration of rights, courts would be forced to give privacy an independent definition. Arguably, the courts could create a definition that would in effect go no further than the federal constitutional right to privacy, but the tenor of this report suggests that the privacy clause was intended to do something different from what had come before.

#### *E. The Assembly Committee's Staff Report*

The legislative history includes a staff report that appears to have been drafted for the use of the Assembly Committee on Constitutional Amendments. The staff report is a more complete analysis of the privacy initiative than appears in the committee report. Although less detailed, the committee's final report is a reflection of what is in this more complete document.

The staff report is largely a review of the law of privacy with the apparent intention of indicating (1) why the privacy amendment was needed, and (2) what the scope of the privacy right might be. The perceived need for the amendment originated from the absence of an explicit guarantee of privacy in either the state or federal constitutions and a perceived concern among the people about invasions of their privacy. The very first sentence of the analysis emphasizes that

"[t]his Constitutional Amendment puts the State on record regarding the right of privacy."<sup>503</sup>

The remainder of the analysis described case-law protections of the right of privacy, focusing *entirely* upon federal constitutional cases. The memorandum first quotes from Justice Douglas' opinion in *Griswold v. Connecticut*, noting that the right to privacy, in Douglas' view, "emanat[es] from the penumbral application of the fundamental rights guaranteed by the First, Third, Fourth, Fifth and Ninth Amendments to the Constitution."<sup>504</sup>

The memorandum then turns to *Stanley v. Georgia*,<sup>505</sup> the Supreme Court's next significant privacy case after *Griswold*. Significantly, the memorandum correctly describes the holding in *Stanley* as "explicitly founded upon the inherent limitations on the State's power to inquire into the 'private' lives of its citizenry."<sup>506</sup> Next, the memorandum describes *Wisconsin v. Constantineau*,<sup>507</sup> as involving "limitations on the ability of the State to collect and to disseminate potentially derogatory information about individuals."<sup>508</sup>

The final paragraphs of this memorandum emphasize that the privacy initiative was intended to restrict the activities of only the state and state actors. These final paragraphs are sufficiently important to include them in full:

With the technological revolution and the age of cybernetics, these amendments [i.e., the Bill of Rights], as they have been traditionally viewed, do not offer sufficient protection against state surveillance, record collection and government snooping into our personal lives. We must, therefore, develop new safeguards to meet the new dangers.

Proposition 11 puts the State on record that privacy is essential to our other freedoms. It further expands the evolving view of privacy emerging from case law. The right of privacy has emanated from our other constitutional protections. With the right of privacy explicitly written into the Constitution, it will itself become the basis for an expansion of constitutional protections.

The growing pervasiveness of government demands our immediate attention. Proposition 11 will be a definitive statement of the necessity to control government interference in our personal lives and bring the issue clearly before the public and the courts. 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.<sup>509</sup>

It will be noted that nowhere in these paragraphs is there even a single indication that the privacy initiative would be interpreted to

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503. See Exhibit G.

504. *Id.*

505. 394 U.S. 557 (1969).

506. Exhibit G (emphasis added).

507. 400 U.S. 433 (1971).

508. Exhibit G (emphasis added).

509. *Id.*

restrict purely private conduct. Instead, these paragraphs highlight a concern only with government surveillance, government data collection, government snooping, and government interference in personal lives. Proposition 11 was intended to "serve notice on the Legislature and the Courts"<sup>510</sup> that *they* no longer could invade our privacy; it was not intended to serve notice upon each one of us that we could be sued for invading someone else's privacy.

If the privacy initiative had been intended to apply to purely private conduct, one would expect the staff analysis to have commented upon that fact, which would have been a significant extension of the constitutional law of privacy. The report does not even remotely suggest that possibility. Indeed, the only troubling question which the report asks is whether "this measure [would] have legal implications beyond the readily obvious; for instance, would the right to privacy overturn legal authority for wiretapping, etc."<sup>511</sup> This sentence is significant first because it indicates that the privacy amendment should have "readily obvious" implications. The readily obvious implications are undoubtedly the material discussed in the staff report, all of which relate to state action. Second, the only concern expressed in this sentence is whether the privacy right would overturn a particular form of state action that was already regulated by state statute and case law, that is, wiretapping.<sup>512</sup>

Although this document is only a staff analysis, it should be weighed heavily in the balance. Along with the opinions from the Office of Legislative Counsel, discussed below, this staff report is the most complete *legal* analysis of the background leading up to the introduction of the privacy initiative. Moreover, it appears certain that this staff analysis was used as the basis for the assembly committee's final report. The staff analysis thus informed the assembly committee, which in turn, favorably reported the bill to the floor.

#### F. The Senate Judiciary Report

After approval of ACA 51 as amended by the assembly, the bill made its way to the senate where it was assigned to the Senate Judiciary Committee. We have only one short document which appears

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510. ACA 51, *supra* note 491.

511. *Id.*

512. The reference to wiretapping in this question cannot refer to private wiretapping, because the sentence is concerned only with "legal authority for wiretapping." This is manifestly a reference to wiretapping by legally authorized state actors.



to have come from the Senate Judiciary Committee.<sup>513</sup> The report makes only two points. First, it notes that the fundamental right to privacy had been judicially recognized in *Griswold*.<sup>514</sup> Second, it questions the scope of the privacy clause:

Because all fundamental rights are not absolute in nature, what, if any, limitations would exist with respect to the right of privacy created by this Constitutional Amendment, i.e., does it extend to corporations, criminal accused, public figures, wire taps and eavesdropping, etc.?<sup>515</sup>

Unfortunately, this report does nothing to answer this question. The committee apparently had some concerns about the ultimate scope of the privacy clause, but was not willing to enter the fray with its own interpretation.

### G. *The Ballot Arguments*

In the hierarchy of materials which may appear in a complete legislative history, ballot arguments should be placed as low as individual statements by representatives reported in newspapers.<sup>516</sup> Under ordinary and proper rules of statutory construction, such statements would be ignored entirely as mere campaign statements that do not fairly indicate legislative intent. If the ballot arguments with respect to ACA 51 are ignored, then the legislative history described above strongly supports the view that the privacy right contained in article I, section 1 was intended only as a limitation upon state action.

Of course there is a long line of California decisions holding that reliance upon ballot arguments is proper.<sup>517</sup> In light of these authorities, a complete consideration of ACA 51 requires a discussion of the ballot arguments. The ballot argument drafted by Assemblyman Cory, interpreted in light of the legislative history discussed above, does not support the conclusion that article I, section 1 was intended to apply to purely private conduct.

The very first sentence of the ballot argument in favor of the proposition indicates the proper scope of the initiative: "The proliferation of government snooping and data collecting is threatening to destroy our traditional freedoms."<sup>518</sup> The remainder of the first paragraph is similarly focused entirely upon government collection of information.

The second paragraph, which was underlined in the ballot pamphlet, contains the first reference to a private actor: "At present there are no effective restraints on the information activities of gov-

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513. Exhibit I, Report of Senate Judiciary Committee on ACA 51 (1972) [hereinafter Senate Judiciary Report].

514. *Id.* (citing *Griswold*, 394 U.S. at 564).

515. *Id.*

516. See *supra* notes 74-75, 143-167 and accompanying text.

517. See cases cited *supra* note 143-44.

518. Exhibit L, Ballot Analysis & Arguments for Proposition 11 [hereinafter Ballot Argument].

ernment and business."<sup>519</sup> Courts interpreting the privacy initiative have latched upon the inclusion of the word "business" within the ballot argument to support the conclusion that article I, section 1 can apply to purely private conduct.<sup>520</sup>

There is, however, a competing interpretation of this language that explains why the word "business" appears in the ballot argument. Assemblyman Cory was concerned about both purely governmental action and about governmental cooperation *with* business. That is demonstrated by AB 2933 and by documents which appear in Cory's personal files relating to ACA 51.<sup>521</sup> As noted above, it is no stretch of federal state action law to conclude that a business which cooperates with the state in securing private information is a state actor subject to the requirements of the Fourteenth Amendment.<sup>522</sup> Accordingly, when Cory refers to "government and business" in the ballot argument, he is arguably intending to extend the privacy right only to those cases in which government and business act together in invading an individual's privacy. The phrase "government and business" appears five times in Cory's ballot argument.<sup>523</sup> *Nowhere* in the ballot argument does Cory use the word "business" apart from the phrase "government and business." This supports the view that Cory intended the privacy initiative to apply only to government and to government cooperation with business. It does not support the view that Cory intended the privacy initiative to apply to purely private actors.

It could be contended, of course, that Cory had much more in mind in proposing ACA 51 than he had in mind in proposing ACA 69 and AB 2933. The ballot argument refutes that contention, however. The

519. *Id.*

520. *See infra* notes 584-92 and accompanying text.

521. *See supra* notes 474-76 and accompanying text.

522. *See supra* notes 143-67 and accompanying text.

523. Ballot Argument, *supra* note 517. The first reference is quoted in the text. The other references are as follows:

- (a) 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.
- (b) The proliferation of government and business records over which we have no control limits our ability to control our personal lives.
- (c) Even more dangerous is the loss of control over the accuracy of government and business records on individuals.
- (d) Even if the existence of this information is known, few government agencies or private businesses permit individuals to review their files and correct errors.

*Id.*

specific provisions of AB 2933 are sprinkled liberally throughout the ballot argument for ACA 51. In the third paragraph, Cory states that the amendment will prevent government and business from “misusing information gathered for one purpose in order to serve other purposes or to embarrass us.”<sup>524</sup> AB 2933 would have prevented county clerks from making voter registration lists available except for “election or government purposes.”<sup>525</sup> The intent behind this proposed statutory change was to prohibit government from dispensing information collected for specific purposes to a person who has an entirely different purpose in mind. The ballot argument recalls this purpose.

In the fourth paragraph of the ballot argument, Cory observes that “[o]ften we do not know that these records even exist and we are certainly unable to determine who has access to them.”<sup>526</sup> AB 2933 would have permitted an individual to demand production by government agencies of any file about that individual, giving each individual the chance to determine what records exist.<sup>527</sup> AB 2933 also would have permitted an individual to find out who had accessed their government-held files, and would have permitted that individual to demand an explanation for why the file had been accessed.<sup>528</sup>

The very next sentence in the ballot argument warns voters that “[e]ven more dangerous is the loss of control over the accuracy of government and business records on individuals. . . . [F]ew government agencies or private businesses permit individuals to review their files and correct errors.”<sup>529</sup> AB 2933 would have created a mechanism by which an individual could have corrected incorrect information contained in a government-held file.<sup>530</sup>

The next paragraph in the ballot argument, the sixth out of eight, contains the only reference to purely private conduct. The paragraph reads in full as follows:

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 informational profile is sketched.* Modern technology is capable of monitoring, centralizing and computerizing this information which eliminates any possibility of individual privacy.<sup>531</sup>

The courts have seized upon the emphasized sentence in this quote as proof positive that the privacy clause applies to purely private con-

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524. *Id.*

525. AB 2933, *supra* note 476, at § 1.

526. Ballot Argument, *supra* note 517.

527. AB 2933, *supra* note 476, at § 3.

528. *Id.*

529. Ballot Argument, *supra* note 517.

530. AB 2933, *supra* note 476, at § 3.

531. Ballot Argument, *supra* note 517 (emphasis in original).

duct. On first blush, such a conclusion would appear to be justified. Cory refers in this sentence to data collection in the context of applying for a credit card, a life insurance policy, and a job. The question remains whether these three references near the end of the ballot argument are sufficient by themselves and in context to permit a court to ignore every other indication in the legislative history that the privacy initiative was to be limited to government conduct and government cooperation with business.

It is important to remember that the ballot argument is a campaign statement which is intended to influence voters in favor of a particular constitutional or statutory change. Courts are permitted to take judicial notice of the fact that campaign statements are, at times, not accurate. The First Amendment guarantees the right to engage in a certain amount of hyperbole in the political arena.<sup>532</sup> Since the ballot pamphlet is published by the state, it seems likely that the state could constitutionally review the contents of ballot arguments to insure accuracy.<sup>533</sup> However, ballot arguments in California are not screened carefully—the state merely warns voters that arguments pro and con have not been reviewed by any governmental official for accuracy.<sup>534</sup> Consequently, statements in ballot arguments should not be adopted by courts as a definitive interpretation of the legislation proposed. Ballot arguments can be drafted to mislead; courts should not be so gullible.

The underlined sentence in the quote above undoubtedly qualifies as a political statement designed to excite the voters into approving the initiative. How many voters like banks and credit card companies? How many voters like insurance companies? How many voters like to pay taxes? How many voters like job interviews? How many voters like the Department of Motor Vehicles? The sentence reads like a campaign speech, not like an important part of the legislative history.

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532. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990), is not to the contrary. The narrow holding in *Milkovich* is that a statement couched in the language of opinion is not entitled to constitutional immunity simply by virtue of its costume when the so-called opinion implies the assertion of an objective fact. *Milkovich*, 110 S. Ct. at 2705.

533. Cf. *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (state may regulate commercial speech that is false or misleading); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (school district may control content of school newspaper financed and operated by the school).

534. CAL. GOV'T CODE § 88002(f) (West 1991).

Further, it is possible to conclude that banks which issue credit cards, insurance companies, and some private employers are sufficiently imbued with public responsibilities, that they should be treated as state actors. This would not be an entirely unwarranted assumption. Courts have already recognized the quasi-public nature of insurance companies in other contexts.<sup>535</sup> Banks, credit card companies, and certain private employers might also fall into that category. Lower courts in California have certainly tried in one way or another to impose public duties upon these entities,<sup>536</sup> although the Supreme Court of California has clearly indicated its reluctance to enter the field.<sup>537</sup>

Although the reference to banks, insurance companies, and employers initially may appear to be a clear reference to purely private conduct, on further examination, the reference is ambiguous. The topic sentence for the paragraph indicates that the paragraph is directed primarily at the problem of "control" over private information, as opposed to the collection of that information.<sup>538</sup> The next three sentences simply identify ways in which information may be gathered, either secretly or because information is required to be disclosed in order to receive certain benefits (such as a bank loan, credit, a life insurance policy, and so forth).<sup>539</sup> These sentences by themselves do not explicitly indicate that the collection of the information is itself a violation of the privacy clause. That the predominate concern of the paragraph is not data collection but control over data once collected is then confirmed by the final sentence, which warns that "[m]odern technology is capable of monitoring, centralizing and computerizing this information which eliminates any possibility of individual privacy."<sup>540</sup> The concern is thus not with the initial collection of the information, but with the risk that information collected for one purpose may be improperly disclosed to a central data bank for redistribution to third parties. The central data bank that Cory was most concerned about was government itself, which in 1972 had the most extensive computer data banks containing private information.<sup>541</sup> But through the use of modern communications technology, the distinction between the government's database and privately-held

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535. See *Foley v. Interactive Data Corp.*, 765 P.2d 373, 390 (Cal. 1988).

536. See, e.g., *Commercial Cotton Co. v. United California Bank*, 209 Cal. Rptr. 551, 554 (Cal. Ct. App. 1985) (holding that bank owes quasi-fiduciary duties to its customers).

537. See discussion of employment cases in *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988).

538. Ballot Argument, *supra* note 517.

539. *Id.*

540. *Id.*

541. AB 2933, *supra* note 476. The provisions of AB 2933 indicate that Cory's predominate concern was with government information banks.

databases could break down. It would be plausible to argue that the privacy clause was intended to reach not only government databases, but privately owned and operated databases that share some of the salient characteristics of a government database.<sup>542</sup>

The remaining paragraphs in the ballot argument confirm that state action is the predominate focus. The first sentence in the seventh paragraph references the federal right to privacy, a right which is good only against state actors. The second sentence recites the "compelling interest" test which is sometimes used in federal privacy cases. The third sentence returns to the theme of government records by noting that "[s]ome information may remain as designated public records but only when the availability of such information is clearly in the public interest." The final paragraph in the ballot argument simply notes the change from "men" to "people."<sup>543</sup>

The rebuttal to the argument in favor of the privacy initiative and the argument against the initiative contain little helpful information. Responding to the campaign statement about credit cards, life insurance policies, and so forth, the rebuttal correctly notes that

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.<sup>544</sup>

A reasonable argument can be made that if the privacy initiative was not intended to reach purely private conduct, then the rebuttal would have said so. Instead, the rebuttal appears to concede that the privacy initiative reaches private conduct, but only says that the initiative would not, in those particular instances, prevent a private business from asking necessary questions.<sup>545</sup> But an equally reasonable argument is that the drafter of the rebuttal, Senator James E. Whetmore, did not believe that a state action argument would be understood by the voters and did not believe that such an argument would respond to the fears stirred up by Cory's argument. Whetmore might have concluded that the best way to undermine Cory's campaign statement was to explain why the privacy initiative

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542. *Cf. Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979) (applying state Free Speech Clause to privately-owned shopping center because shopping center possessed many of the characteristics of an open street, park, or downtown business center).

543. Ballot Argument, *supra* note 517.

544. *Id.*

545. *Id.*

would not prevent collection of information by banks, insurance companies, and employers.

The remainder of Whetmore's rebuttal contains the sort of campaign rhetoric that courts should expect to see in ballot arguments. Whetmore warns that the real problem with the initiative is that it will make it more difficult to discover welfare and tax fraud. He concludes by arguing that "Proposition 11 can only be an open invitation to welfare fraud and tax evasion and for this reason should be defeated."<sup>546</sup> Whetmore's argument against the privacy initiative merely restates the same basic themes found in the rebuttal.

Cory's rebuttal to Whetmore's arguments are short and sweet. First, Cory claims that "[p]rivacy is not now guaranteed by our state constitution."<sup>547</sup> This is a campaign statement in response to Whetmore's observation that privacy is already protected both by the constitution and by the common law. This particular campaign statement by Cory is misleading as drafted. Cory knew that privacy was already guaranteed under the state constitution. He knew that the California Constitution, as well as the federal Constitution, had already been interpreted to include a right to privacy. Yet Cory's rebuttal tells the voters that privacy is not now guaranteed and that his initiative is therefore critically important. Cory's statement would have been more accurate if he had said that privacy was not "explicitly guaranteed" by the state constitution. Some may argue that the change is insignificant. I suspect, however, that Cory knew exactly what he was doing when he drafted the rebuttal, and that he very consciously left out the word "explicitly" because including that word would have made his argument less convincing.

The remainder of Cory's rebuttal responds to Whetmore's inflammatory allegation about welfare cheats. Cory correctly says that the privacy initiative will not prevent the government from collecting any information it "legitimately" needs—"[i]t will only prevent misuse of this information for unauthorized purposes and preclude the collection of extraneous or frivolous information."<sup>548</sup> Nowhere in Cory's rebuttal does he respond to Whetmore's claims concerning credit cards, insurance policies, or job interviews. The rebuttal deals entirely with government issues.

In summary, the ballot arguments do not readily support the argument that the privacy initiative was intended to apply to purely private conduct in light of the other legislative history now available. Without the additional legislative history, the single statement in the ballot argument may have been a bright light. However, in the con-

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546. *Id.*

547. *Id.*

548. *Id.*

text of substantial additional legislative history, that bright light is reduced to a faint glimmer.

#### *H. Summary*

Two conclusions appear to be supported by the legislative history of the privacy clause. First, the legislature intended the privacy clause to rest upon its own foundations and not be limited by other rights (or penumbras of those rights) contained in the Declaration of Rights. The committee reports indicate that the Legislature was well aware of the limited extent of the federal right to privacy and that the federal right to privacy existed only by virtue of penumbral emanations from other provisions in the Bill of Rights. The legislature must have known that courts would attempt to give the word "privacy" a definition of its own, and that this definition might well extend beyond the scope of other provisions in the Declaration of Rights.

Second, the legislature did not intend that the privacy clause would apply to purely private conduct. There is virtually nothing in the legislative history that suggests so drastic a change in California's constitutional law. In the absence of a clear understanding by the legislature that this would be the effect of the privacy clause, a court should not assume the legislature intended such a far-reaching change.

#### V. CASES (MIS-)APPLYING ARTICLE I, SECTION 1

As Johnny Carson often says, if you buy the premise, you'll buy the bit. The courts and commentators have bought two premises about article I, section 1: first, that the ballot argument is an important part of the legislative history of legislative initiatives; second, that the ballot argument is the only piece of significant legislative history for article I, section 1. The first premise is bad law, albeit law that is supported by a long line of supreme court decisions. Ballot arguments are a poor indication of legislative intent, and should be so treated.

But even if the first premise were accepted, the second premise, which has been critical to the courts' interpretation of article I, section 1, fails. I have shown above that the second premise is simply wrong as a matter of fact—there is more to the legislative history than the ballot arguments. Courts should now consider these portions of the legislative history, portions which suggest that the pri-



vacy right in article I, section 1 is a limited right against the government.

In order to appreciate the magnitude of the error created by these two misguided premises, this section reviews the leading cases decided under article I, section 1. Almost everything that the *lower* courts have said about article I, section 1 is wrong, and the Supreme Court of California has done better only because it has heard few cases on the subject.

#### A. *Cases in the Supreme Court of California*

The Supreme Court of California first faced the privacy clause in *White v. Davis*.<sup>549</sup> *White* was a taxpayers' suit brought to enjoin the Los Angeles Police Department from using undercover agents posing as students at the University of California at Los Angeles to collect "police dossiers" on students when the information collected bore no relation to any specific illegal activities. The trial court sustained a demurrer to the complaint. In reversing, the supreme court found that the complaint adequately pled violations of two independent constitutional rights. First, the court held that the police activity as alleged unconstitutionally abridged freedoms of expression and association in violation of both federal and state constitutional provisions.<sup>550</sup> Second, the court held that the police activity as alleged also violated the recently enacted privacy clause.<sup>551</sup>

The analysis and discussion in *White* set the tone for virtually all of the subsequent opinions involving the privacy clause. Virtually all of the discussion in *White* was built upon the two premises identified above. Following "long recognized" precedents, the court held that the contents of the ballot argument were "an aid in construing legislative measures and constitutional amendments adopted pursuant to a vote of the people."<sup>552</sup> The court then adopted the second premise by describing the ballot argument as "a statement which represents, in essence, the only 'legislative history' of the constitutional amendment available to us."<sup>553</sup>

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549. 533 P.2d 222 (Cal. 1975).

550. *Id.* at 227-32.

551. *Id.* at 232-34.

552. *Id.* at 234 n.11.

553. *Id.* at 234. It is worth noting that, out of an abundance of caution, the supreme court did not in this language entirely foreclose the possibility of relying upon other extrinsic aids. The court says that the ballot argument is "in essence" the only legislative history available. As will be seen below, the courts of appeal readily dropped that qualification, and have adopted the unqualified position that the ballot argument is the only legislative history for the privacy clause. See *infra* notes 587-89 and accompanying text.

This gives the supreme court a way out if it wants to repudiate the decisions of the courts of appeals without reconsidering its own decision in *White*. For purposes of the decision in *White*, it was sufficient to consider only the ballot argument. Nothing in

The court needed the ballot argument to give some context to the privacy clause. As the court noted, the word "privacy" by itself evoked a potentially wide ranging set of interests. Implicitly recognizing the dangers of too broad an interpretation of "privacy," the court suggested a narrower scope for the privacy clause, "relating to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society."<sup>554</sup> This narrower scope was drawn entirely out of the ballot argument, which the court quoted at length.<sup>555</sup> The court declared the law to be as follows with respect to the privacy clause:

First, the statement identifies the principal "mischiefs" at which the amendment is directed: (1) "government snooping" and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party; and (4) the lack of a reasonable check on the accuracy of existing records. Second, the 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. Third, the statement indicates that the amendment is intended to be self-executing, i.e., that the constitutional provision, in itself, "creates a legal and enforceable right of privacy for every Californian."<sup>556</sup>

In light of these principles, the court easily held that covert police surveillance and data collection constituted "government snooping" in the extreme," and that the complaint correctly alleged the absence of any legitimate state interest in gathering or retaining the information because the information collected did not relate to any specific illegal activity.<sup>557</sup>

*White* was followed in the supreme court by *Valley Bank v. Superior Court*.<sup>558</sup> The issue in *Valley Bank* was whether the privacy clause protected a person's interest in the confidentiality of bank

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the additional legislative history would contradict the ballot argument in a way that would require a different result in *White*. For purposes of *White*, then, the ballot argument was properly, "in essence," the only *relevant* legislative history.

554. The complete sentence is as follows: "Although the general concept of privacy relates, of course, to an enormously broad and diverse field of personal action and belief, the moving force behind the new constitutional provision was a more focused privacy concern, relating to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society." *White*, 533 P.2d at 233 (footnote omitted).

555. *Id.* at 233.

556. *Id.* at 234.

557. *Id.* at 235.

558. 542 P.2d 977 (Cal. 1975).

records in the context of a request for those records pursuant to ordinary civil discovery procedures.<sup>559</sup> The bank records sought were unquestionably relevant to a defense being asserted in the case.<sup>560</sup> Furthermore, the Evidence Code, the exclusive source of evidentiary privileges in California,<sup>561</sup> did not create a privilege for confidential bank records. Ordinarily, then, the request would have to be honored. However, the court found, in the privacy clause, "overriding constitutional considerations . . . which impel us to recognize some limited form of protection for confidential information given to a bank by its customers."<sup>562</sup>

As it had in *White*, the court in *Valley Bank* recognized that the scope of the privacy clause was uncertain. Unlike the court in *White*, however, the court in *Valley Bank* did not explicitly consult the ballot argument to determine whether the privacy interest being asserted reasonably fell within the intended scope of the privacy clause. Instead, citing a search and seizure case arising under article I, section 13, of the California Constitution, the court held that a depositor has a reasonable expectation that confidential bank records will not be disclosed even pursuant to a valid civil discovery request.<sup>563</sup> In evaluating a privacy claim by a depositor, courts are to "indulge in a careful balancing of the right of civil litigants to discover relevant facts, on the one hand, with the right of bank customers to maintain reasonable privacy regarding their financial affairs, on the other."<sup>564</sup> To insure the depositor an opportunity to present a privacy claim, the court held that the bank subject to the discovery request must make reasonable efforts to notify the customer of the pendency of the proceedings and the request.<sup>565</sup>

The dangerous tendency to extend "privacy" to cover a myriad of interests is clearly present in *Valley Bank*. Instead of consulting the legislative history for the privacy clause, the court was quick to jump to the conclusion that because confidential bank records are protected from unreasonable searches and seizures, they should also be protected from civil discovery requests. The court's entire analysis is contained in the following uninformative sentence: "Although the amendment is new and its scope as yet is neither carefully defined

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559. "In this case we consider under what circumstances a litigant may, through ordinary civil discovery procedures, obtain from a bank information disclosed to it in confidence by a customer." *Id.* at 979.

560. *White*, 533 P.2d at 234-35.

561. CAL. EVID. CODE § 911(b) (West 1966 & Supp. 1991). See, e.g., *Pitchess v. Superior Court*, 522 P.2d 304, 310 (Cal. 1974) (holding that "the Evidence Code . . . is the sole and authoritative arbiter of all matters which come within its purview").

562. *Valley Bank*, 542 P.2d at 996-97.

563. *Id.* at 997 (citing *Burrows v. Superior Court*, 529 P.2d 590 (Cal. 1974)).

564. *Id.* at 997.

565. *Id.* at 998.

nor analyzed by the courts, *we may safely assume* the right of privacy extends to one's confidential financial affairs as well as to the details of one's personal life."<sup>566</sup>

In a more rigorous analysis, nothing would be "assumed"; rather, the issue would be whether the privacy clause, in light of its legislative history, was intended to protect the interest being asserted. If the court had undertaken this analysis, it could plausibly have reached the same result. As summarized in *White*, the ballot argument indicated a concern with "the improper use of information properly obtained for a specific purpose; for example, the use of it for another purpose or the disclosure of it to some third party."<sup>567</sup> This language would seem to naturally fit a request for civil discovery.

A more difficult question is whether the *Valley Bank* rule would be consistent with a requirement of state action. On the specific facts of *Valley Bank*, state action was clearly present. The bank refused to produce the records upon request and had sought a protective order from the trial court.<sup>568</sup> The trial court ordered that the records be produced.<sup>569</sup> This trial court order is sufficient to establish state action.<sup>570</sup>

But the court in *Valley Bank* also indicated that when faced with a discovery request for customer records, a bank is obligated to take reasonable steps to contact the customer so the customer may decide whether to seek a protective order. This obligation, triggered simply by the discovery request, would result from private action, not a specific trial court order. It is problematic to imply state action under these circumstances. At the very least, there is a reasonable argument that although a person making a civil discovery request acts "under color of law," that person may not fairly be characterized as a "state actor," in which case no state action would be present.<sup>571</sup> If this is true, then it might appear that at least part of the *Valley Bank* decision implicitly recognizes that the privacy clause applies to purely private conduct.

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566. *Id.* at 997 (emphasis added).

567. *White*, 533 P.2d at 234.

568. *Valley Bank*, 542 P.2d at 996.

569. *Id.*

570. See, e.g., *Carey v. Hume*, 492 F.2d 631, 634-36 (D.C. Cir. 1974); *Baker v. F. & F. Investment*, 470 F.2d 778, 783 (2d Cir. 1972); *Cervantes v. Time, Inc.*, 464 F.2d 986, 992-95 (8th Cir. 1972); *Britt v. Superior Court*, 574 P.2d 766, 773 n.3 (Cal. 1978).

571. See *Flagg Brothers v. Brooks*, 436 U.S. 149 (1978) (finding no state action when private party sells another's property without judicial intervention to satisfy a warehouseman's lien).

*Valley Bank* can be read in a way that avoids this difficulty, however. *Valley Bank* recognizes that a court (i.e., a state actor) may not order disclosure of confidential bank records without considering the customer's interests, and that if the customer's interests are sufficiently important, the court must refuse to compel the disclosure. In order to safeguard this constitutional right, the court has created a *common law* duty upon the bank to take reasonable steps to notify the customer about a pending discovery request. In this way, *Valley Bank* can be reconciled with a requirement of state action under the privacy clause.<sup>572</sup>

The next case to reach the supreme court under the privacy clause was *People v. Privitera*.<sup>573</sup> The issue here was whether the privacy clause created a constitutional right of access to drugs not approved by the government for treatment of diseases. In particular, the defendants, who were prosecuted for distributing drugs not on the state or federal governments' approved list of drugs, claimed that their cancer patients had a constitutional right of access to the drug laetrile. In an extensive analysis, the court rejected the notion that such a right could be found in the federal constitution.<sup>574</sup> In a much shorter analysis, the court came to a similar conclusion under the privacy clause.<sup>575</sup>

In *Privitera*, the court returned to the type of analysis found in *White* and ignored in *Valley Bank*. In determining whether the privacy clause supported the existence of the claimed right, the court examined the legislative history of the privacy clause to determine whether there existed an "intent" to create a "right of access to drugs of unproven efficacy."<sup>576</sup> Consulting the ballot argument (which the court again described as "in essence" the only legislative history for the privacy clause), the court could find no evidence whatsoever "that the voters in amending the California Constitution [intended] to create a right of privacy . . . to protect conduct of the sort engaged in by defendants."<sup>577</sup>

The first truly significant extension of the privacy clause beyond what the legislative history could plausibly have supported came in *City of Santa Barbara v. Adamson*,<sup>578</sup> the court's next privacy clause case.<sup>579</sup> The City of Santa Barbara's zoning ordinances provided that

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572. This interpretation of *Valley Bank* is especially appropriate in light of the Supreme Court's own subsequent statement that the state action issue under the privacy clause is undecided. See *infra* notes 551-55 and accompanying text.

573. 591 P.2d 919 (Cal. 1979).

574. *Id.* at 921-26.

575. *Id.* at 926-27.

576. *Id.* at 926.

577. *Id.* at 926-27.

578. 610 P.2d 436 (Cal. 1980).

579. A student commentator has taken the position that the court's decision in

in certain areas, all occupants of houses must be members of a "family." "Family" was defined to include, among other things, "[a] group of not to exceed five (5) persons, excluding servants, living together as a single housekeeping unit in a dwelling unit."<sup>580</sup> Pursuant to these zoning laws, the City had enjoined appellants, a group of 12 adults, from living together in their single-family dwelling.

As a result of *Village of Belle Terre v. Boraas*<sup>581</sup> and its progeny, it was clear that the city zoning law was constitutional under the federal constitution. Before the Supreme Court of California, the appellants challenged the ordinance only under the privacy clause, asserting that the zoning laws violated the privacy clause's broader protections.

It should be recalled that in *White v. Davis*, the court had identified the "moving force behind" the privacy clause as "a more focused privacy concern, relating to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society."<sup>582</sup> It would require an extraordinary feat of linguistic legerdemain to read this "focused privacy concern" as encompassing the interest in living in a house with more than four other unrelated persons.<sup>583</sup> With little fanfare, the court in *Adamson* simply ignored this language from *White*.

The court in *Adamson* did not abandon the ballot argument, however. It found support for a "right to live with whomever one wishes or, at least, to live in an alternate family with persons not related by blood, marriage, or adoption" in the following language contained in the ballot argument:<sup>584</sup>

"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.*"<sup>585</sup>

According to the court, the highlighted passages "evidenced the vot-

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*Britt v. Superior Court*, 574 P.2d 766 (Cal. 1978), involved "the scope of California privacy rights." See Note, *supra* note 273, at 258. The commentator is in error, however. *Britt* involved claims brought under the Free Speech and Association Clauses of the federal and state constitutions. The privacy clause was not a basis for the court's decision.

580. *Adamson*, 610 P.2d at 438.

581. 416 U.S. 1 (1974).

582. *White*, 533 P.2d at 232-33.

583. I feel obliged to credit Pierce O'Donnell, a practitioner in Los Angeles, with the phrase "linguistic legerdemain."

584. *Adamson*, 610 P.2d at 439 (footnote omitted).

585. *Id.* (quoting Ballot Argument) (emphasis added by supreme court opinion).

ers' intent in 1972 to ensure a right of privacy not only in one's family but also in one's home."<sup>586</sup> From this premise, the court jumped to its conclusion that the right to live with whomever you choose was a right guaranteed by the privacy clause.

To describe the court's discussion as an analysis is overly charitable. The ballot argument identifies the home, the family, and the right of association as general areas which the right to privacy may protect. However, the ballot argument fails to suggest the *extent* to which the right to privacy protects these areas. There is no indication that *all* aspects of home life, *all* aspects of family, and *all* rights of association are protected by privacy interests. The ballot argument, therefore, does not answer whether the particular right being asserted—"the right to live with whomever one wishes or, at least, to live in an alternate family with persons not related by blood, marriage, or adoption"—is protected by the privacy clause.

The court skips this step in its analysis, a skip criticized strongly by the three-justice dissent.<sup>587</sup> Having quickly determined that the right to live with whomever you choose is a right protected by the privacy clause, the court then proceeds to a "strict scrutiny" analysis using the "compelling interest" test.<sup>588</sup> The court predictably strikes the statute down under this test focusing upon the arbitrary line (*i.e.*, no more than five unrelated persons living together) drawn by the statute.<sup>589</sup>

One of the important lessons which the court learned in *Adamson* was that the privacy clause provides freedom to go far beyond the constitutional boundaries set by the Supreme Court of the United States. In *Adamson*, the court reached a result under the privacy clause contrary to the decision in *Village of Belle Terre v. Boraas*.<sup>590</sup> In the court's next privacy clause case, *Committee to Defend Reproductive Rights v. Myers*,<sup>591</sup> involving state limitations on the funding of abortion, the court reached a result contrary to the decision in *Harris v. McRae*,<sup>592</sup> which involved federal limitations on funding abortions.

It would stretch the truth to claim that the court heavily relied upon the privacy clause in *Myers*. In fact, the California Supreme Court had declared in *People v. Belous*, before the privacy clause ex-

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586. *Id.* at 439.

587. *Id.* at 447-48 (Manuel, J., dissenting).

588. The ballot argument specifically identifies privacy as a "fundamental and compelling interest . . . [which] should be abridged only when there is a compelling public need." Ballot Argument, *supra* note 517. The court in *White* also indicated that strict scrutiny was the appropriate form of analysis. *White*, 533 P.2d at 234.

589. *Adamson*, 610 P.2d at 440-43.

590. 416 U.S. 1 (1974).

591. 625 P.2d 779 (Cal. 1981).

592. 448 U.S. 297 (1980).

isted, that the abortion decision was constitutionally protected under both the federal and state Constitutions.<sup>593</sup> In theory, then, the court could have decided *Myers* without citing the privacy clause. Yet the temptation to rely upon the privacy clause was too great for the court, hence it relied upon the "explicit constitutional status" of privacy in the California Constitution to support its holding.<sup>594</sup>

As it had done in *Valley Bank*, the court in *Myers* did not carefully examine the ballot argument to determine whether the privacy clause was intended to protect the abortion decision, much less to give greater protection to the abortion decision than was given under the federal constitution. Instead, the court engaged in a facile but misleading syllogism: the right to bear children is a privacy right; the privacy clause protects the right of privacy; therefore, the privacy clause protects the right to bear children.

The fallacy in this argument is that it sweeps within the scope of the privacy clause *all* common law and statutory causes of action that in one way or another protect an interest which may properly be characterized as a privacy interest. For example, the right to be free from unwanted bodily contact is a privacy right; the privacy clause protects the right of privacy; therefore, the privacy clause protects the right to be free from unwanted bodily contact. Voilá! The law of battery now has an independent constitutional basis.<sup>595</sup>

Or consider this: The right to be left alone is a privacy right; when government taxes me, it invades my right to be left alone; the privacy clause protects the right of privacy; therefore, the privacy clause protects me from unwanted government taxes.<sup>596</sup>

As can be seen, the type of analysis engaged in by the court can lead to the creation of a dizzying variety of privacy interests and doubtful constitutional protections. Of course, this result is no surprise. Common law courts long have recognized that the word "privacy" has such amorphous contours, that any common law cause of

593. 458 P.2d 194 (Cal. 1969). The court in *Belous* had no need to distinguish between the scope of protection afforded under the state as opposed to the federal constitution. The court cited both state and federal cases in support of its conclusion that the right to choose whether to bear a child was protected under both constitutions. *Id.* at 203.

594. *Myers*, 625 P.2d at 789 (emphasis in original).

595. See, e.g., *People v. McDonnell*, 163 P. 1046, 1056 (Cal. Dist. Ct. App. 1917) (holding that the state may not "deprive a person — at least a person who is not a wrongdoer — of the right of self-defense. The right to defend life is one of the inalienable rights guaranteed by the constitution of the State. CAL. CONST. art I., § 1").

596. Does anyone believe that the Tax Code could survive strict scrutiny?



action for so-called invasions of privacy must in truth be grounded in other interests. The definitional problem is no simpler in the context of a constitutional right of privacy; indeed, the problem is, if anything, magnified in the constitutional context because of the judicial branch's supremacy in matters of constitutional law. Nor is the problem made any simpler by explicitly including the word "privacy" within the text of the constitution. The problem is not one of implicit versus explicit status; the problem is simply one of definition.

In *White v. Davis*, the Supreme Court of California clearly recognized these definitional dangers, noting that "the general concept of privacy relates, of course, to an enormously broad and diverse field of personal action and belief."<sup>597</sup> That is what led the court in *White* to focus its attention upon the legislative history in search of "a more focused privacy concern."<sup>598</sup> Finding nothing explicit in the legislative history that was then available, the court in *Myers* simply assumed that a privacy interest was implicated.<sup>599</sup> *White* and *Myers* thus represent two vastly different approaches to the interpretation of the privacy clause.

*Myers* is the last significant case from the California Supreme Court interpreting the privacy clause. There are, to be sure, several cases subsequent to *Myers* in which the court relied in part upon the privacy clause, but the cases are not as significant. In *Perkey v. Department of Motor Vehicles*,<sup>600</sup> the court held that a mandatory fingerprint requirement as a condition to receipt of a driver's license did not violate the applicant's right to privacy, but the court cited only the Fourth, Fifth and Fourteenth Amendments in its discussion.<sup>601</sup> In *Long Beach City Employees Association v. City of Long Beach*,<sup>602</sup> the court, in extended dicta covering six pages,<sup>603</sup> indicated that requiring a public employee to take a polygraph examination as a condition to continued employment burdened privacy rights protected, in part, by the privacy clause.<sup>604</sup> The court's extended discussion was

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597. *White*, 533 P.2d at 233.

598. *Id.*

599. *Myers*, 625 P.2d at 796. In light of the legislative history discussed above, *Myers* can now be put upon a more solid foundation. *Belous* had already been decided, and the committee reports, although not citing *Belous*, highlighted *Griswold* (which the court relied upon in *Belous*).

600. 721 P.2d 50 (Cal. 1986).

601. *Id.* at 53. An issue was raised in the case whether the Department of Motor Vehicle's practice of permitting public access to its fingerprint file, upon payment of a fee, violated the privacy clause. The court did not have to decide this issue, however, since it interpreted the Information Practices Act of 1977, which was enacted to implement the privacy clause, as forbidding DMV's practice. *Id.* at 53-54.

602. 719 P.2d 660 (Cal. 1986).

603. *Id.* at 663-66.

604. In reaching this conclusion, the court noted that the ballot argument indicated that privacy "protects our homes, our families, our thoughts, our emotions, our expressions, our personalities." *Id.* at 663 (emphasis in Supreme Court opinion). Ac-

dicta because the court ultimately struck down the requirement under the equal protection clause rather than under the privacy clause.<sup>605</sup> Finally, in *Vinson v. Superior Court*,<sup>606</sup> the court discussed whether a plaintiff had a privacy interest in the details of her prior sexual history. In the context of a sexual harassment and intentional infliction of emotional distress suit the court strongly suggested that a privacy right existed.<sup>607</sup> The case was ultimately decided on the basis of a recently enacted amendment to the Civil Procedure Code limited discovery of prior sexual history in such cases by requiring, among other things, a showing of "specific facts showing good cause for that discovery."<sup>608</sup>

### B. *Applying the Privacy Clause to Purely Private Conduct and Actors*

Even if the decisions above are contrary to the intent of the privacy clause, the damage done is slight. The cases all involve the relationship of government to the people. Although a few of the decisions have far reaching social implications, such as the decisions involving the right to procreative choice,<sup>609</sup> the bulk of the decisions relate to less controversial subjects.

Much more significant than any of these decisions, however, is the holding by several courts of appeals that the privacy clause regulates private actors as well as the state. With these holdings, the scope of the privacy clause is dramatically widened to potentially encompass the full range of civil disputes among private persons. To date, the Supreme Court of California has addressed this issue only by noting decisions by the lower courts with neither approval nor disapproval.<sup>610</sup>

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according to the court, polygraph examinations burden a privacy interest in "exclud[ing] others from our mental processes" because "[a] polygraph examination is specifically designed to overcome this privacy by compelling communication of 'thoughts, sentiments, and emotions' which the examinee may have chosen not to communicate." *Id.* at 663.

605. *Id.* at 666 n.12 (stating that "[s]ince [plaintiff] relies primarily on its contention that Bureau employees were denied equal protection, we need not decide at this juncture whether their right of privacy was improperly violated. . ."). See also *id.* at 672 (Bird, C.J., concurring) (concluding that compulsory polygraph testing violates right to privacy).

606. 740 P.2d 404 (Cal. 1987).

607. *Id.* at 410-11.

608. *Id.* at 411 (discussing CAL. CIV. PROC. CODE § 2036.1).

609. *Committee to Defend Reproductive Rights v. Myers*, 625 P.2d 779 (Cal. 1981).

610. *Schmidt v. Superior Court*, 769 P.2d 932, 944 n.14 (Cal. 1989).

Extending the privacy clause to purely private conduct would not be controversial if the results reached in the cases were essentially consistent with the results reached pursuant to a statute or the common law. It appears clear, however, that the courts of appeal in California are using the privacy clause to reach results that are contrary to the results which would be reached under a statutory or common law analysis. The courts are thus engaging in precisely the sort of illegitimate decision-making identified above.

It should come as no surprise that the results being reached under a privacy clause analysis go far beyond what is known to the common law or what is required by statute. Having found that the privacy clause applies and that the defendant's conduct burdens the plaintiff's interest in privacy, these courts mechanically apply language found in the ballot argument to the effect that only a "compelling interest" can justify burdening the right to privacy. The "compelling interest" test, which usually goes hand-in-hand with strict scrutiny, is virtually impossible even for the *government* to satisfy when defending a *public* statute enacted by the *legislature*.<sup>611</sup> Needless to say, a private person will have extraordinary difficulty in establishing a "compelling interest" in *anything* the person does.<sup>612</sup> The "compelling interest" test loads the scales heavily in favor of the plaintiff, dramatically altering the balance achieved by the common law and statutes in adjusting the competing rights of private parties.<sup>613</sup>

Extending the privacy clause to purely private conduct was accomplished in *Porten v. University of San Francisco*.<sup>614</sup> The plaintiff in *Porten* was a student at the University of San Francisco ("USF") who had applied to the State Scholarship and Loan Commission for a loan. The complaint alleged that the University, a private school, sent to the Commission, a state agency, a copy of the grades the applicant had received at Columbia University before transferring to USF, despite a promise by USF not to disclose the grades and despite the alleged absence of a request from the Commission for the

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611. "When expressed as a standard for judicial review, strict scrutiny is, in Professor Gunther's formulation, 'strict' in theory and usually 'fatal' in fact." LAURENCE H. TRIBE, *AMERICAN CONSTITUTION LAW* § 16-6, at 1451 (2d ed. 1988).

612. Certain situations can be imagined when a private person would have a compelling interest in adopting a particular course of conduct. A private person no doubt has a compelling interest in self-preservation. *See, e.g.,* *People v. McDonnell*, 163 P. 1046, 1057 (Cal. Dist. Ct. App. 1917) (grounding the right of self-defense in article I, section 1). Therefore, a private person is able to invade even the privacy of someone's bedroom if that is the only way to avoid being killed by a pursuer.

613. *See supra* notes 249-301 and accompanying text.

614. 134 Cal. Rptr. 839 (Cal. Ct. App. 1976). The court in *Porten* did not need to apply the "compelling interest" test. Thus, the first case to extend the privacy clause to purely private conduct did so without being forced to confront the analytical problems created by the extension.

grades.<sup>615</sup> The superior court dismissed plaintiff's *pro per* complaint for breach of a confidential relationship after sustaining a demurrer.<sup>616</sup>

The demurrer was properly sustained insofar as the complaint rested upon the common law or statutes. There simply was no statute which even remotely addressed the facts raised in the complaint.<sup>617</sup> The only plausible common law privacy theories were public disclosure of private facts and breach of confidential relationship.<sup>618</sup> Public disclosure had been interpreted by prior cases to require widespread communication.<sup>619</sup> Therefore, the elements for public disclosure of private facts were not met because the grades were disclosed only to the Commission.<sup>620</sup> Breach of confidential relationship, which the plaintiff had originally pled but subsequently abandoned, was unavailable because there was no evidence of a confidential relationship between the plaintiff and the defendant.<sup>621</sup> There was an unenforceable assurance given by the defendant to the plaintiff that the grades would not be disclosed. However, there was not the sort of confidential relationship that imposed upon the defendant a duty of nondisclosure.

The court of appeals reversed.<sup>622</sup> The court agreed that there was no statutory or common law cause of action.<sup>623</sup> However, it found that the complaint alleged a *prima facie* violation of the privacy clause.<sup>624</sup> One would expect that the first case to extend the privacy clause to purely private conduct would have contained a discussion of that significant extension. However, the court did not satisfy this expectation. Instead, the court's *entire* discussion of the state action issue is contained in the following passage, as though the issue were either already decided or perfectly clear:

Privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone. The language of the election

615. *Id.* at 840, 843 n.6.

616. *Id.* at 840.

617. *Id.*

618. *Id.* The other three common law privacy theories were clearly inapplicable. The defendant did not misappropriate the plaintiff's name or likeness, the defendant did not intrude upon the plaintiff's solitude, and the defendant did not place the plaintiff in a false light. Indeed, quite the opposite was true.

619. *See, e.g.*, *Schwartz v. Thiele*, 51 Cal. Rptr. 767, 770-71 (Cal. Ct. App. 1966) (citing *Santieseban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9, 11 (5th Cir. 1962)).

620. *Porten*, 134 Cal. Rptr. at 841.

621. *See id.* at 840.

622. *Id.* at 844.

623. *Id.* at 841.

624. *Id.* at 843.

brochure argument refers to "effective restraints on the information activities of government and business."<sup>625</sup>

Despite the citations to the voters pamphlet, one case, and a student note in the *Hastings Law Journal*, the issue had not been settled. As discussed in detail above, the phrase "government and business" which appears in the Voters Pamphlet is ambiguous.<sup>626</sup> The phrase may suggest that the privacy clause applies to purely private conduct and not merely to that private cooperation with the state which so links the two that state action is implied. The court of appeals in *Porten* adopted the former construction without discussion.<sup>627</sup>

The court in *Porten* relied upon *Annenberg v. Southern California District Council of Laborers*,<sup>628</sup> which did not arise under the privacy clause. *Annenberg* involved the right of a domestic servant to picket his employer's private residence, which was also the servant's place of employment. The employer had successfully sought a preliminary injunction from the superior court upon a showing that the pickets involved "disturbances, coercion and harassment."<sup>629</sup> In reversing, the court of appeals noted that resolution of the issue involved a balancing of the employee's right to picket peacefully against the homeowner's right to privacy.<sup>630</sup> This unexceptional observation was well supported by a plethora of cases involving picketing private residences.<sup>631</sup> As additional support for this holding, and to support the statement that the "right to privacy, if not becoming more important, is, at least, receiving better recognition,"<sup>632</sup> the court cited to the privacy clause in a string cite along with *Griswold v. Connecticut*,<sup>633</sup> *Roe v. Wade*,<sup>634</sup> and *People v. Cahan*.<sup>635</sup> The cite was the court's only ref-

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625. *Id.* at 842 (citing *Annenberg v. Southern Cal. Dist. Council of Laborers*, 113 Cal. Rptr. 519 (1974)); CALIFORNIA VOTERS PAMPHLET 26 (1972); Lawrence M. Newman, Note, *Rediscovering the California Declaration of Rights*, 26 HASTINGS L.J. 481 (1974).

626. CALIFORNIA VOTERS PAMPHLET, *supra* note 625, at 26. See also *supra* notes 518-624 and accompanying text.

627. *Porten*, 134 Cal. Rptr. at 843.

628. 113 Cal. Rptr. 519 (Cal. Ct. App. 1974).

629. *Id.* at 521.

630. *Id.* at 523-24.

631. *Id.* at 522. The court cites the following cases which balanced the rights of the employees against the rights of the private homeowner in the context of private residence picketing: *State v. Zanker*, 229 N.W. 311 (Minn. 1930); *State v. Perry*, 265 N.W. 302 (Minn. 1936); *People v. Kaye*, 1 N.Y.S.2d 354 (N.Y. Civ. Ct. 1937); *Petrucci v. Hogan*, 27 N.Y.S.2d 718 (N.Y. Sup. Ct. 1941); *Hebrew Home & Hosp. for Chronic Sick, Inc. v. Davis*, 235 N.Y.S.2d 318 (N.Y. Sup. Ct. 1962); *Pipe Machinery Co. v. DeMore*, 76 N.E.2d 725 (Ohio Ct. App. 1947).

632. *Annenberg*, 113 Cal. Rptr. at 524.

633. 381 U.S. 479 (1964).

634. 410 U.S. 113 (1972).

635. 282 P.2d 905 (Cal. 1955). The entire paragraph leading up to the string cite reads as follows: "On the other hand, we have the unquestioned right of the householder or the home owner to privacy, to a sanctuary reasonably secure from outside

erence to the privacy clause.

The fleeting reference to the privacy clause in *Annenberg* was transmogrified by the court in *Porten* to stand for the proposition that the privacy clause creates "an inalienable right which may not be violated by anyone."<sup>636</sup> *Annenberg* established no such thing. The injunction in *Annenberg* was not based upon the privacy clause. It was based upon principles of labor law and nuisance.<sup>637</sup> The privacy interest related only to a balancing of interests made necessary by the defendants' claim that their picketing activity was constitutionally exempt from regulation by the state by virtue of the rights of speech and association.<sup>638</sup> The defendants claimed that the state could not enjoin their conduct because of their constitutional rights, and the court then balanced those constitutional rights against the privacy interest of the homeowner. The court in *Annenberg* did not cite the privacy clause to establish a cause of action against the picketers. Rather, it cited the privacy clause for the simple proposition that the right of privacy has received increasing recognition by the law.<sup>639</sup> *Porten's* reliance upon *Annenberg* is completely unwarranted.

The *Porten* court's reliance upon footnote 138 in a student note published in the *Hastings Law Journal* is only marginally justified. The student note is titled "Rediscovering the California Declaration of Rights,"<sup>640</sup> and the note is written with the general purpose of discussing the extent to which rights guaranteed under the state constitution may be broader than analogous rights guaranteed under the federal constitution. In the course of a discussion of impermissible searches and seizures, the note proposes that the privacy clause might be used as the basis for a cause of action by one private citizen against another private person for an unreasonably intrusive search, notwithstanding the existence of a civil tort cause of action for the same wrong.<sup>641</sup> Later the student author sees the clause as a trigger

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intrusion, and to a sheltered place for the family. As our society desperately attempts to drown itself in overpopulation, this right of privacy, if not becoming more important, is, at least, receiving better recognition. It has been judicially declared that this right of privacy is well within the penumbra of the Bill of Rights. (California Constitution, art. 1, section 1; see *Griswold v. Connecticut*, . . .)." *Annenberg*, 113 Cal. Rptr. at 524.

636. *Porten*, 134 Cal. Rptr. at 842.

637. *Annenberg*, 113 Cal. Rptr. at 523-24.

638. *Id.*

639. *Id.* at 524.

640. See Newman, *supra* note 625.

641. *Id.* at 503.

for application of an exclusionary rule in cases where the searcher has turned over the fruits of the search to government authorities for use in a criminal proceeding.<sup>642</sup>

The author of the note recognized that there was a state action issue involved in applying the privacy clause to purely private conduct. Footnote 138, cited by the *Porten* court, was intended to supply the relevant argument and authorities in support of the position that the privacy clause applied to purely private actors. Footnote 138 provides, in relevant part, as follows:

This section [article I, section 1] is, of course, a part of California's bill of rights, a document primarily aimed at limiting government power. However, the right to privacy is not by its terms limited to state action. Current case law indicates the right to privacy will protect citizens against all persons, not just government officials.<sup>643</sup>

This argument falls apart under scrutiny. First, the author relies upon *Annenberg*, which does not stand for the proposition that the privacy clause applies to purely private conduct.<sup>644</sup> Second, the author suggests that the absence of any language in the privacy clause explicitly limiting its application to state actors means that the privacy clause may apply to purely private actors. Yet the author recognizes that California's bill of rights is generally aimed at limiting only government power.<sup>645</sup> Further, many of those provisions do not by their terms contain a state action requirement, yet the Supreme Court of California has, in at least one case, imposed such a requirement.<sup>646</sup> The student note thus fails to adequately support the *Porten* court's conclusion that the privacy clause applies to purely private conduct.

Although the holding in *Porten* clearly rests upon shaky ground, the courts of appeal and subsequent commentators have accepted *Porten* as a proper interpretation of the privacy clause.<sup>647</sup> One of the most complete recent discussions of the issue is contained in *Wilkinson v. Times Mirror Corp.*, a drug testing case arising in the context of a private employer.<sup>648</sup> The issue was whether the privacy clause is violated when a private employer requires prospective employees to

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642. *Id.* at 504.

643. *Id.* at 504 n.138 (citing *Annenberg*, 113 Cal. Rptr. at 519).

644. See *supra* notes 635-43 and accompanying text.

645. Newman, *supra* note 625, at 491-92.

646. *Kruger v. Wells Fargo Bank*, 521 P.2d 441 (Cal. 1974).

647. See, e.g., *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194 (Cal. Ct. App. 1989). It should be remembered that *Porten* could be decided the same way even if a state action requirement were read into the privacy clause. Although the University of San Francisco is a private institution, even a private university could arguably satisfy a state action requirement only somewhat more liberal than the federal state action requirement. See discussion of *Pruneyard*, *supra* notes 447-52 and accompanying text.

648. *Wilkinson*, *supra* note 647. See David F. Linowes & Ray C. Spencer, *Privacy: The Workplace Issue of the '90s*, 23 J. MARSHALL L. REV. 591 (1990) (discussing invasions of privacy by private employers).

undergo urinalysis as a condition to an offer of employment.<sup>649</sup>

The court began its analysis of the state action issue by incorrectly noting that "courts have recognized the ballot argument in support of the amendment as its only available legislative history."<sup>650</sup> To support this statement, the court cited *White v. Davis*<sup>651</sup> and *People v. Privitera*.<sup>652</sup> Yet those cases said only that the ballot argument "represents, in essence, the only 'legislative history' of the constitutional amendment available to us."<sup>653</sup> In fact, as revealed above, there is a rich legislative history for the privacy clause which goes far beyond the ballot argument and, equally important, makes it possible to understand the ballot argument.

The court's review of the ballot argument focuses predictably upon the references to "business" and the explicit mention of applications for credit cards and life insurance policies. The court concludes its analysis of the ballot argument as follows:

If the collection and retention of information by private businesses were intended to be excluded from the reach of the amendment, the ballot argument would not have mentioned credit card applications and insurance policies. The argument's repeated references to information-gathering activities by both government and business lead inexorably to the conclusion that the amendment was intended to reach both governmental and nongovernmental conduct.<sup>654</sup>

In light of the complete legislative history, these references are unconvincing.<sup>655</sup>

The court next turns to the cases, and finds that although the

649. *Wilkinson*, 264 Cal. Rptr. at 196. There are no civil statutes which prohibit this practice, and it seems apparent that the common law does not proscribe drug testing by urinalysis either as a condition for the offer of employment or as a condition for continued at-will employment. Drug testing in these circumstances is viewed by the common law as a voluntary act of consent by the prospective or current employee. The fact that the applicant or employee who refuses to take the test will not be offered continued employment does not vitiate the applicant's or employee's consent.

The Supreme Court upheld government-mandated drug testing of employees in a regulated industry when on-the-job drug use could have serious safety consequences. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989). The Court also upheld testing of certain employees in the customs service. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). These results in these cases are an additional reason why California courts have turned to the privacy clause to justify contrary results.

650. 264 Cal. Rptr. at 197-98.

651. 533 P.2d 222 (Cal. 1975).

652. 591 P.2d 919 (Cal. 1979).

653. *White*, 533 P.2d at 234 (emphasis added). *Privitera*, 591 P.2d at 926 (quoting *White*, 533 P.2d at 234).

654. *Wilkinson*, 264 Cal. Rptr. at 198.

655. See *supra* notes 468-545 and accompanying text.



Supreme Court of California has not addressed the issue except by way of dicta, the courts of appeal and one federal district court have unanimously applied the privacy clause to purely private conduct.<sup>656</sup> Each of the cases cited relied upon *Porten* and the ballot argument.<sup>657</sup> The court also notes that “[m]any commentators” have come to the same conclusion.<sup>658</sup> Each of those commentators relied again upon *Porten*, subsequent cases and the ballot argument.<sup>659</sup> Finally, the court incorrectly relies upon *Robins v. Pruneyard Shopping Center*<sup>660</sup> for the proposition that “a conclusion that this state’s Constitution provides some protection for its citizens against private conduct breaks no new legal ground.”<sup>661</sup> This, of course, overstates the holding in *Pruneyard*, which involved quasi-public action.<sup>662</sup> Further, the court in *Porten* failed to consider whether the circumstances that led the court in *Pruneyard* to extend the state free speech clause to a large shopping center were present in the context of a suit against The Times Mirror Company, a private employer engaged in publishing and television broadcasting.<sup>663</sup>

*Wilkinson* is one of the few cases where the court of appeals held that there was no constitutional violation even though the privacy clause applied.<sup>664</sup> The court reached this holding by explicitly aban-

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656. *Wilkinson*, 264 Cal. Rptr. at 199-200.

657. See *Cutter v. Brownbridge*, 228 Cal. Rptr. 545, 549 (Cal. Ct. App. 1986); *Chico Feminist Women’s Health Ctr. v. Scully*, 256 Cal. Rptr. 194, 200 (Cal. Ct. App. 1989); *Chico Feminist Women’s Health Ctr. v. Butte Glenn Med. S.*, 557 F. Supp. 1190, 1202-03 (E.D. Cal. 1983).

658. *Wilkinson*, 264 Cal. Rptr. at 200.

659. KURT H. DECKER, *EMPLOYEE PRIVACY LAW AND PRACTICE* §§ 3.10-3.11, at 130-32 (1987); Patricia A. Hunter, Note, *Your Urine or Your Job: Is Private Employee Drug Urinalysis Constitutional in California*, 19 LOY. L.A. L. REV. 1451, 1482-83 (1986); Allison Rose, Comment, *Mandatory Drug Testing of College Athletes: Are Athletes Being Denied Their Constitutional Rights*, 16 PEPP. L. REV. 45, 58 n.129 (1988).

660. *Wilkinson*, 592 P.2d 341 (Cal. 1979).

661. 264 Cal. Rptr. at 200.

662. See *supra* notes 452-68 and accompanying text. *Pruneyard* does not necessarily stand for the proposition that the California Constitution protects citizens against all purely private conduct. *Pruneyard* stands only for the proposition that the free speech clause of the California Constitution applies to certain private owners of shopping centers which, from the perspective of the public, are like public streets, parks and downtown business districts. There are significant reasons to believe that most private employers are not sufficiently public to make it fair to characterize their conduct as state or government action. See *infra* notes 602-606 and accompanying text.

663. *Wilkinson*, 264 Cal. Rptr. at 194. Cf. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 393 (Cal. 1988) (stating that in the court’s view, “the underlying problem in the line of cases relied on by plaintiff lies in the decisions’ uncritical incorporation of the insurance model into the employment context, without careful consideration of the fundamental policies underlying the development of tort and contract law in general or of significant differences between the insurer/insured and employer/employee relationships”).

664. See also *Miller v. Murphy*, 191 Cal. Rptr. 740, 744-45 (Cal. Ct. App. 1983) (upholding ordinance which required pawnbrokers to obtain customers’ fingerprints).

There are a number of cases which hold that the privacy clause’s protections are triggered only if the plaintiff has a personal and objectively reasonable expectation of

doing the "compelling interest" test and applying something akin to the "rational basis" test, asking only "whether the challenged conduct is reasonable."<sup>665</sup> According to the court, "even if challenged conduct has some impact on the right of privacy, as long as that right is not substantially burdened or affected, justification by a compelling interest is not required."<sup>666</sup>

Although the court's language here suggests that it is creating a two-tiered analysis—if an insubstantial burden, then rational basis, if a substantial burden, then compelling interest—other language in the opinion suggests a sliding scale approach.<sup>667</sup> Thus, in introducing its actual analysis, the court asks: "Did [the defendant's] request so substantially burden plaintiffs' right of privacy that the request was constitutionally unreasonable and therefore impermissible?"<sup>668</sup>

Focusing primarily upon the plaintiff's status of job applicant, as opposed to an existing employee, the court held that his interest in privacy was not substantially burdened by requiring the applicant to reveal whatever private information would be disclosed by drug and alcohol testing. The holding also required that the testing take place during an ordinary physical examination, and the circumstances surrounding the testing minimize the intrusion upon the applicant's privacy.<sup>669</sup> In light of *Foley v. Interactive Data Corp.*,<sup>670</sup> the court's

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privacy. See, e.g., *Chico Feminist Women's Health Ctr. v. Scully*, 256 Cal. Rptr. 194 (Cal. Ct. App. 1989); *Alarcon v. Murphy*, 248 Cal. Rptr. 26, 29 (Cal. Ct. App. 1988); *People ex rel. Franchise Tax Bd. v. Superior Court*, 210 Cal. Rptr. 695, 703-04 (Cal. Ct. App. 1985); *Stackler v. Department of Motor Vehicles*, 164 Cal. Rptr. 203 (Cal. Ct. App. 1980); *Armenta v. Superior Court*, 132 Cal. Rptr. 586, 588 (Cal. Ct. App. 1976). In one sense, these cases implicitly reject the "compelling interest" test because the defendant's conduct need merely be reasonable. Only if the defendant's conduct were unreasonable could the plaintiff have a reasonable expectation of privacy.

665. *Wilkinson*, 264 Cal. Rptr. at 203.

666. *Id.* In reaching this conclusion, the court relied heavily upon the supreme court's decision in *Schmidt v. Superior Court*, 769 P.2d 932 (Cal. 1989). The court in *Schmidt* did not articulate the standard enunciated by the *Wilkinson* court. Indeed, the court in *Schmidt* did not clearly articulate *any* standard for its decision. It does appear, however, that the *Wilkinson* court correctly interprets *Schmidt* as requiring something less than a "compelling interest," although what that something is is not clear from *Schmidt*.

667. The difference between two-tiers of scrutiny and a sliding scale may be only semantic. Various justices of the Supreme Court of the United States have noted that the two- or three- tiers of constitutional review employed by the Court in assessing equal protection challenges may be more accurately described as a sliding scale, in which the benefits of particular governmental action are compared with the burdens on private rights. See, e.g., *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (Marshall, J., dissenting).

668. *Wilkinson*, 264 Cal. Rptr. at 203.

669. *Id.* at 203-04.

reliance upon the distinction between a prospective employee and an existing employee would appear doubtful, at least in the context of an at-will employee.<sup>671</sup>

The approach adopted in *Wilkinson* mirrors a common law approach in which the interests of both parties are balanced against each other without giving any one interest overwhelming weight. Having adopted a test that approximates a common law balancing of interests, it should come as no shock that the result reached in *Wilkinson* is the result that probably would be reached by a common law court. The prospective employee's consent to the test, which in context is not a consent rendered under duress, makes the employer's conduct privileged.

In stark contrast to *Wilkinson*, is the decision by the California Court of Appeal for the Sixth Appellate District in *Hill v. National Collegiate Athletic Association*.<sup>672</sup> The drug testing program in *Hill* was implemented by the NCAA and Stanford University. Both Stanford and the NCAA are private actors for federal constitutional purposes.<sup>673</sup> Relying upon *Porten* and other cases, the court in *Hill* held that the absence of state action was no bar to the action.<sup>674</sup>

Unlike the court in *Wilkinson*, the court in *Hill* brought the full weight of "strict scrutiny" and the "compelling interest" test to bear upon the drug testing program.<sup>675</sup> The program naturally collapsed under the heavy weight for a variety of interconnected reasons. The NCAA advanced only two rationales for the program: to promote athlete health and fair competition.<sup>676</sup> Athlete health was rejected as a compelling justification because, among other reasons, (1) the

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670. 765 P.2d 373 (Cal. 1988)

671. *Id.* Strictly speaking, *Foley* dealt only with the tort of wrongful discharge, and nothing in *Foley* would suggest any limitation upon a cause of action under the privacy clause. The predominate import of *Foley* seems to be that an at-will employee is little better than a prospective employee — neither one has a significant, legally protectable interest, with the single exception of a cause of action under *Tameny* for termination in violation of public policy. Therefore, the court in *Luck v. Southern Pacific Transportation Co.*, 267 Cal. Rptr. 618 (Cal. Ct. App. 1990), recognized the implications of *Foley* by denying recovery of tort damages for wrongful discharge *despite* finding that the private employer's drug testing program resulted in a significant burden upon the plaintiff's privacy interests. The court permitted recovery on a contract theory for bad faith breach of contract and based the finding of bad faith upon the Privacy Clause.

672. 273 Cal. Rptr. 402 (Cal. Ct. App. 1990).

673. *See, e.g.*, *NCAA v. Tarkanian*, 488 U.S. 179 (1988). As noted above, there may exist a different state action analysis under state law, and the Supreme Court of California should, in its review of *Hill*, begin its analysis by discussing whether either Stanford or the NCAA should be considered a state actor under the state constitution. *See supra* notes 416-67 and accompanying text.

674. *Hill*, 273 Cal. Rptr. at 408.

675. *Id.* at 410 n.7. The court acknowledged *Wilkinson's* rational basis standard in a footnote, but did not explain why the intrusion in *Hill* was more substantial than the intrusion in *Wilkinson*.

676. *Id.* at 417-21.

NCAA could not prove that drug use was any more prevalent among athletes than the population generally, (2) there was no evidence to suggest that drug use had contributed to any competition-related injury, and (3) there were many substances *not* on the list of banned substances that could be even more harmful to athletes (*e.g.*, alcohol and cigarettes).<sup>677</sup> The court rejected the second reason—fair competition—because the NCAA failed to prove that use of any substance on the banned list gave any athlete a competitive advantage.<sup>678</sup>

Even if there had been a compelling need for the program, the court still may have struck it down because all drug testing programs are prone to significant errors of both overinclusion and underinclusion in virtually all aspects of their operation.<sup>679</sup> The court noted the following problems, among others: (1) the list of banned drugs does not include many harmful drugs;<sup>680</sup> (2) the list of drugs includes some over-the-counter or prescription drugs that may, in proper circumstances, actually be necessary for the athlete's health;<sup>681</sup> (3) the testing program only affects post-season tournament play rather than year-round competition;<sup>682</sup> (4) athletes are disqualified not because of actual use of drugs, but only because of a positive NCAA drug test result (*i.e.*, a negative NCAA test result will be followed even if the school's own test result is positive and even if the student has confessed to drug use);<sup>683</sup> and (5) significant errors in the testing process itself are likely to occur (with both false positives and false negatives).<sup>684</sup>

The problem with *both Wilkinson and Hill* from the perspective of judicial administration is that both courts rely explicitly upon a delicate balancing of private interests in reaching their conclusions. The courts have no other choice because the privacy clause is devoid of substantive content. It identifies an interest, but nowhere indicates how that interest is to be balanced against competing interests. Under the privacy clause, a court has no choice but to balance the interests being asserted in an essentially *ad hoc* manner in every case.

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677. *Id.* at 415-16.

678. There was in fact expert testimony to the effect that "there was no scientific evidence to show that anabolic steroids would enhance performance in any athlete." *Id.* at 421-22.

679. *Id.*

680. *Id.* at 411-12.

681. *Id.* at 412.

682. *Id.* at 412-13.

683. *Id.*

684. *Id.* at 414-15.

That is the ultimate nature of a balancing approach to decision-making.

By contrast, the common law rules applicable to the facts in *Wilkinson* and *Hill* are both well-established and relatively easy to apply because they are comparatively specific. Undoubtedly, the rules themselves have been crafted in an effort to balance competing interests, but the balancing has been done in the formulation of the rule itself, and it then becomes less critical in every case to reappraise the balance.

The evils associated with an ad hoc balancing of private interests are amplified when one interest is singled out for special treatment and protection. By invoking strict scrutiny and a compelling interest test, the court in *Hill* has dramatically altered the balance that had been achieved at common law. Indeed, under a strict scrutiny analysis, little attempt is made to balance interests. Instead, the interest in privacy is permitted to trump almost all other interests.

## VI. CONCLUSION

The significant body of authorities that now support the proposition that the privacy clause applies to purely private conduct are teetering perilously upon a single slim reed: that the ballot argument, supposedly the *only* piece of legislative history available, mentions "business" and refers to credit card and life insurance policies. When this reed is cut down to size by an analysis of the complete legislative history, the entire set of case authorities and commentary comes crashing down. The Supreme Court of California should use *Hill* to accomplish this demolition.

In subsequent cases involving state action, the courts should pay greater attention to the legislative history for the privacy clause and should heed the warning in *White v. Davis* that, in the absence of some significant limitations, "privacy relates . . . to an enormously broad and diverse field of personal action and belief."<sup>685</sup> The legislature was aware that by adding the privacy clause to the constitution, the interest in privacy was being given an independent footing. This suggests that the privacy clause is properly interpreted as protecting something more than, or at least different from, the federal constitutional right to privacy.

The challenge is one of finding an appropriate limitation. Two possibilities stand out for future development. First, the legislative history—including the ballot arguments—suggests a primary concern with the improper collection and distribution of personal informa-

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685. *White*, 553 P.2d at 233.

tion.<sup>686</sup> The privacy clause could be limited to that type of privacy interest, to the exclusion of other asserted privacy interests, such as the interest in living with whomever one chooses.<sup>687</sup> Second, the California Supreme Court could attempt to define "privacy" narrowly (e.g., as involving only "fundamental privacy interests"). This would be something like what the U.S. Supreme Court has attempted to do in its interpretation of the federal right to privacy.<sup>688</sup> The Supreme Court was of course interpreting the Fourteenth Amendment's protection of "liberty" by drawing upon cases defining "liberty." The California Supreme Court does not have this luxury and must instead formulate a free-standing definition of "privacy." This will not be an easy challenge to meet, and the fact that the court has so far failed to offer such a definition in its privacy clause cases suggests that the court is wary of making the attempt.

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686. Of course the legislative history also includes references to *Griswold v. Connecticut*, suggesting that the privacy clause's scope is broader than improper collection and misuse of information.

687. *City of Santa Barbara v. Adamson*, 610 P.2d 436 (Cal. 1980). *Adamson*, which was based entirely upon the privacy clause, should accordingly be overruled. Under this test, it would appear that the privacy clause would also not protect a woman's constitutional right to seek abortion, the restriction of which by state law would not seem to involve misuse or improper collection of information by the government. This is not to say that the abortion funding decision in *Committee to Defend Reproductive Rights v. Myers*, 625 P.2d 779 (Cal. 1981), must be overruled. The privacy clause was not the centerpiece of the decision in *Myers*, and *Myers* could well be decided the same way without the benefit of the privacy clause.

688. See the discussion of *Bowers*, *supra* text accompanying notes 331-343.

**APPENDIX**

**EXHIBIT A.**

**Article I, Section 1, Prior to Amendment.**

All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.

**EXHIBIT B.**

**Assembly Constitutional Amendment No. 69 (1971).**

*Assembly Constitutional Amendment No. 69—A resolution to propose to the people of the State of California an amendment to the Constitution of the state, by amending Section 1 of Article I thereof, relating to inalienable rights.*

**LEGISLATIVE COUNSEL'S DIGEST**

ACA 69, as introduced, Cory (Jud.). Inalienable rights.

Amends Sec. 1, Art. I, Cal. Const.

Includes pursuing and obtaining of privacy among inalienable rights.

Vote 2/3; Appropriation—No; Fiscal Committee—No.

*Resolved by the Assembly, the Senate concurring, the Legislature of the State of California at its 1971 Regular Session commencing on the fourth day of January, 1971, two-thirds of the members elected to each of the two houses of the Legislature voting therefor, hereby proposes to the people of the State of California that the Constitution of the state be amended by amending Section 1 of Article I thereof, to read:*

Section 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness, *and privacy.*



## EXHIBIT C.

### Assembly Bill No. 2933 (1971).

An act to add Section 456.8 to the Elections Code, to amend Sections 6252, 6253, and 11731 of, and to add Section 6253.5 and 11702 to, the Government Code, and to amend Section 631 of, and to add Section 631.1 to, the Penal Code, relating to personal data.

### LEGISLATIVE COUNSEL'S DIGEST

AB 2933, as introduced, Cory (Jud.). Personal data.

Amends, adds, various secs., Ed.C., Gov.C., Pen.C.

Specifies that a county clerk can only make voter registration information available for election or governmental purposes.

Provides every person has right to read and copy any record or writing, whether public or confidential, pertaining directly to him and to add to or correct any such record or writing on presenting specified information.

Requires recording on such records of date, name, and address of person using record and requires such person to respond in writing to written request of person whose record is inspected stating reason for inspection.

Makes failure to so respond a misdemeanor.

Makes giving of false reasons in response to such request a misdemeanor and subjects person giving false reasons to civil liability to person whose record inspected.

Requires state agencies to file statement of all personal information maintained in computer systems with Office of Management Services on July 1, 1972, and to update statement every six months. Directs such office to report annually to Legislature on efforts to maintain privacy for personal data held in computer files by the state.

Prohibits, with specified exceptions, the selling or distributing by state or local agencies of lists of information which contain names or addresses.

Makes certain eavesdropping on computer systems punishable by criminal penalties.

Makes certain attempts to obtain personal data of another from confidential computerized record a felony.

Vote—Majority; Appropriation—No; Fiscal Committee—Yes.

*The people of the State of California do enact as follows:*

SECTION 1. Section 456.8 is added to the Elections Code, to read:

456.8 A county clerk may make voter registration information

available, as authorized in this chapter, to any person only for election or government purposes.

SEC. 2. Section 6252 of the Government Code is amended to read:  
6252. As used in this chapter:

(a) "State agency" means every state office, officer, department, division, bureau, board, and commission or other state agency, except those agencies provided for in Article IV (except Section 20 thereof) or Article VI of the California Constitution.

(b) "Local agency" includes a county; city, whether general law or chartered; city and county; school district; municipal corporation; district; political subdivision; or any board, commission or agency thereof; or other local public agency.

(c) "Person" includes any natural person, corporation, partnership, firm, or association.

(d) "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

(e) "Writing" means handwriting, typing, printing, photostating, photographing, and every other means of recording upon any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums, and other documents.

(f) "Governmental agency" includes any federal, state, local or other government agency within or without the United States.

(g) "Reports of intelligence information" do not include reports maintained by the Military Department.

SEC. 3. Section 6253 of the Government Code is amended to read:

6253. (a) Public records are open to inspection at all times during the office hours of the state or local agency and every citizen has a right to inspect any public record, except as thereafter provided. Every agency may adopt regulations stating the procedures to be followed when making its records available in accordance with this section.

(b) *Every person, upon proof identification, shall have the right to read and copy any public or confidential record or writing kept by a state or local agency which pertains directly to him to determine whether the information in such record is correct. The agency shall correct all errors in such record within 30 days after receiving from*

*such person proof of the correct information satisfactory to the agency.*

*(c) Any state or local agency with computerized confidential records in existence on the effective day of the amendments to this section enacted at the 1971 Regular Session of the Legislature shall provide such record of use or request as described in this section, by January 1, 1974; all computerized installations coming into existence after such date shall provide such record of use or request as of the date of their origin.*

*(d) All state agencies shall file a statement of all personal information maintained in computer systems with the Office of Management Services on July 1, 1972, and update such statements every six months thereafter.*

*(e) No state or local agency may, except as provided in Section 1811 of the Vehicle Code, Sections 456.5, 456.6, 456.8, 457, and 459 of the Elections Code, and Section 9407 of the Uniform Commercial Code, sell or otherwise distribute lists of information in bulk or in aggregate form identifiable by name or address. No provision of this section is intended to prevent inspection or other use of any public record in accord with the other sections of this chapter.*

**SEC. 4.** Section 6253.5 is added to the Government Code, to read:

**6253.5 (a)** When any governmental agency or person reads, copies, corrects, or otherwise requests any record of the state or local agency relating to any person, the state or local agency maintaining such records shall record with the record of the person whose record was so used the name and business address (if applicable) or home address of the person so using the record and the date of such use. The state or local agency shall verify the name and address of the person so using the record by requiring such person to produce appropriate means of identification.

**(b)** The person whose record was used as described in subdivision 9a) may make a written request of the person so using the record to state the reason or reasons why the record was so used. Any person so using the record who fails to so respond in writing within 30 days of the mailing of the written request to the person making the written request is guilty of a misdemeanor.

**(c)** Any person required by subdivision (b) to respond to a written request of the person whose record was used in the manner described in subdivision (a) who states false reasons in such response for such record use is guilty of a misdemeanor and shall be liable to the person making such request in a civil action for actual damages, reasonable attorney's fees and court costs.

**SEC. 5.** Section 11702 is added to the Government Code, to read:

**11702.** The Intergovernmental Board on Electronic Data Process-

ing shall report annually to the Legislature on its efforts to protect confidentiality and security of personal data maintained in computerized intergovernmental information systems.

SEC. 6. Section 11731 of the Government Code is amended to read:  
11731. The functions of the Office of Management Services are:

(a) To develop a short-range master plan to operate until June 30, 1969, and a long-range *Maintain* a master plan that will provide optimum utilization of electronic data processing systems for state government.

(b) To develop recommendations to be submitted to the State Electronic Data Processing Policy Committee concerning electronic data processing policies, procedures and standards; *administer state policy as adopted in the Long-Range Electronic Data Processing Master Plan.*

(c) To maintain continued evaluation of operational effectiveness and performance (including costs) of electronic data processing applications in state government;

(d) To serve as general adviser to the state on policy and planning matter pertaining to information systems and data processing; and.

(e) To work closely with the Intergovernmental Board on Electronic Data Processing, including assisting in the development of statewide policies for intergovernmental information exchange. In addition, to provide facilities and services to the Intergovernmental Board on Electronic Data Processing as mutually agreed upon by the Office of Management Services and the intergovernmental board.

(f) *To report annually to the Legislature on its efforts to protect the confidentiality and security of personal data maintained in computer files by the State of California.*

(g) *To act as the central review and coordinating body for the implementation of state policy regarding individual privacy and the security of information.*

SEC. 7. Section 631 of the Penal Code is amended to read:

631. (a) Any person who, by means of any machine, instrument, or contrivance, or in any other manner, intentionally taps, or makes any unauthorized connection *with*, whether physically, electrically, acoustically, inductively, or otherwise, *with* any telegraph or telephone wire, line, cable, or instrument, including the wire, line, cable, or instrument of any internal telephonic communication system or *computer system*, or who willfully and without the consent of all parties to the communication, or in any unauthorized manner, reads, or

attempts to read, or to learn the contents or meaning of any passage, report, or communication while the same is in transit or passing over any such wire, line, cable, or is being sent from, or received at any place within this state; or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained, or who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts of things mentioned above in this section, is punishable by a fine not exceeding two thousand five hundred dollars (\$2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding three years, or by both such fine and imprisonment in the county jail or in the state prison. If such person has previously been convicted of a violation of this section or Section 632 or 636, he is punishable by fine not exceeding ten thousand dollars (\$10,000), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding five years, or by both such fine and imprisonment in the county jail or in the state prison.

(b) This section shall not apply (1) to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the acts otherwise prohibited herein are for the purpose of construction, maintenance, conduct or operation of the services and facilities of such public utility, or (2) to the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of such a public utility, or (3) to any telephonic communication system used for communication exclusively within a state, county, city and country, or city correctional facility.

(c) Except as proof in an action or prosecution for violation of this section, no evidence obtained in violation of this section shall be admissible in any judicial, administrative, legislative or other proceeding.

SEC. 8. Section 631.1 is added to the Penal Code, to read:

631.1 Any person attempting to obtain personal data of another person from any confidential computerized record by fraud, bribery, or other deceit shall be guilty of a felony.

EXHIBIT D.

Assembly Constitutional Amendment No. 51 (Feb. 16, 1972).<sup>1</sup>

Feb. 16, 1972

Req. #2332

Assembly Constitutional Amendment No. —. A resolution to propose to the people of the State of California an amendment to the Constitution of the state, by amending Section 1 of Article I, Sections 2 and 6 of Article IV, and Section 11 of Article IX thereof, relating to state government.

*Resolved by the Assembly, the Senate concurring*, that the Legislature of the State of California at its 1972 Regular Session commencing on the third day of January, 1972, two-thirds of the members elected to each of the two houses of the Legislature voting therefor, hereby proposes to the people of the State of California that the Constitution of the state be amended as follows:

First—That Section 1 of Article I be amended to read:

Section 1. All men *persons* are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and, happiness, *and privacy*.

Second—That Section 2 of Article IV be amended to read:

Sec. 2. (a) The Senate has a membership of 40 Senators elected for 4-year terms, 20 to begin every 2 years. The Assembly has a membership of 80 Assemblymen *and Assemblywomen* elected for 2-year terms.

(b) Election of Assemblymen *and Assemblywomen* shall be on the first Tuesday after the first Monday in November of even-numbered years unless otherwise prescribed by the Legislature. Senators shall be elected at the same time and places as Assemblymen *and Assemblywomen*.

(c) A person is ineligible to be a member of the Legislature unless he *such person* is an elector and has been a resident of his *the district to be represented by the person* for one year, and a citizen of the United States and a resident of California for 3 years, immediately preceding his *the person's* election.

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1. This version found in Assemblyman Cory's files is dated February 16, 1972, and contains a stamp at the top "AUTHOR'S COPY." Assemblyman Cory introduced his bill on March 13, 1972. Final Calendar of Legislative Business, Regular Session 1972, p. 864.

(d) When a vacancy occurs in the Legislature the Governor immediately shall call an election to fill the vacancy.

Third—That Section 6 of Article IV be amended to read:

Sec. 6. For the purpose of choosing members of the Legislature, the State shall be divided into 40 Senatorial and 80 Assembly districts to be called Senatorial and Assembly districts. Such districts shall be composed of contiguous territory, and Assembly districts shall be nearly equal in population as may be. Each Senatorial district shall choose one Senator and each Assembly district shall choose one member of Assembly. The Senatorial districts shall be numbered from one to 40, inclusive, in numerical order, and the Assembly districts shall be numbered from one to 80 in the same order, commencing at the northern boundary of the State and ending at the southern boundary thereof. In the formation of Assembly districts no county, or city and county, shall be divided, unless it contains sufficient population within itself to form two or more districts, and in the formation of Senatorial districts no county, or city and county, shall be divided, nor shall a part of any county, or city and county, in forming any Assembly or Senatorial district. The census taken under the direction of Congress of the United States in the year 1920, and every ten years thereafter, shall be the basis of fixing and adjusting the legislative districts; and the Legislature shall, at its first regular session following the adoption of this section and thereafter at the first regular session following each decennial Federal census, adjust such districts, and reapportion the representation so as to preserve the Assembly districts as nearly equal in population as may be; but in the formation of Senatorial districts no county or city and county shall contain more than one Senatorial district, and the counties of small population shall be grouped in districts of not to exceed three counties in any one Senatorial district; provided, however, that should the Legislature at the first regular session following the adoption of this section or at the first regular session following any decennial Federal census fail to reapportion the Assembly and Senatorial districts, a Reapportionment Commission, which is hereby created, consisting of the Lieutenant Governor, who shall be chairman, and the Attorney General, State Controller, Secretary of State and State Superintendent of Public Instruction, shall forthwith apportion such districts in accordance with the provisions of this section and such apportionment of said districts shall be immediately effective the same as if the act of said Reapportionment Commission were an act of the Legislature, subject, however, to the same provisions of referendum as apply to the acts of the Legislature.

Each subsequent reapportionment shall carry out these provisions and shall be based upon the last preceding Federal census. But in

making such adjustments no persons who are not eligible to become citizens of the United States, under the naturalization laws, shall be counted as forming a part of the population of any district. Until such districting as herein provided for shall be made, Senators and, Assemblymen, *and Assemblywomen* shall be elected by the districts according to the apportionment now provided for by law.

Fourth—That Section 11 of Article IX be amended to read:

Sec. 11. All property now or hereafter belonging to "The California School of Mechanical Arts," an institution founded and endowed by the late James Lick to educated males and females *persons* in the practical arts of life, and incorporated under the laws of the State of California, November twenty-third, eighteen hundred and eighty-five, having its school buildings located in the city and county of San Francisco, shall be exempt from taxation. The trustees of said institution must annually report their proceedings and financial accounts to the Governor. The Legislature may modify, suspend, and revive at will the exemption from taxation hereby given.



## EXHIBIT E.

### Testimony before Assembly Constitutional Amendments Committee (April 24, 1972).

Testimony of Cheriell Moench Jensen of ACA 5 before the Assembly  
Constitutional Amendments Committee

April 24, 1972

Much of the following testimony was prepared by Mary Dunlap, attorney from Bolt Hall [sic], who has the flu and could not be here to present it herself.

There are two basic changes in Assembly Constitutional Amendment No. 51 which will be dealt with separately and then their relationship to each other and their timeliness will be described.

CHANGE THE TERM "MEN" TO "PERSONS" AND  
CHANGE THE TERM "ASSEMBLYMEN" TO "ASSEMBLYMEN" AND "ASSEMBLYWOMEN"

Webster defines "Man: . . . ) 1a) a human being; *especially* an adult male human. . ." (emphasis in original)

The ambiguity that accompanies the use of the term "man" is incorporation in our Constitution as presently worded. This ambiguity is inconsistent with the Constitutional right of equal protection. The California Supreme Court (*Sail'er Inn, Inc. v. Kirby* 485 P.2d 529 (1971)) ruled that sex was a "suspect" classification. The state has never shown compelling interest to so classify. The United States Supreme Court (*Reed v. Reed* 30 L. Ed. 2d 225) ruled that, "To give mandatory preference to members of one sex over members of the other. . . is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment. . ."

Therefore, whether the Equal Rights Amendment is ratified or not, the equal protection clause partially covers this area and the change we propose would bring the California Constitution up to date.

There is no gender clause in either the California Constitution or the United States Constitution. Therefore, any reference to a particular sex does not automatically mean the sex as well. We can be reasonably certain that those who drafted the California Constitution did not intend this Article I, Section 1 to include women. For example, the ownership and possession of property protections in Article I, Section 1 were *never* read to expand the common law rights of women with respect to property. Such rights were extremely limited before the passage of the Married Women's Property Acts in this country. Even after these acts were passed, the state legislature continued to pass laws that restricted and disenfranchised women.

These laws were never found unconstitutional under Article I, Section 1.

It was not until 1875 that even the United States Court recognized that women were "persons" and that they had always been citizens but in this same case (*Minor v. Happersett* 21 Wall 162, 22 L. Ed. 627 (1874 U.S.)) the court ruled that the fact of their citizenship did not entitle women, by virtue of the privileges and immunities clause to the right to vote.

An example of the exclusionary treatment of women is:

Article X, Section 1 of the California Constitution which allows for punishment, treatment, supervision, custody and care of females in a manner and under circumstances different from men similarly convicted. Such differential treatment effects safety, happiness, freedom and independence, life and liberty.\*

This shows that the framers did mean only men because men were the only citizens.

Examples of private actions excluding women from these rights include but are not limited to:

A woman who has been refused admission to a hospital because her husband cannot sign the permission form does not have the right to obtain safety or defend her life. This is common practice.

A woman who has been denied automobile insurance because of her husband's bad driving record has been denied the entire list of rights under the Section under discussion.

A married woman who is not allowed to purchase stock without her husband's consent has been denied the right to acquire and protect property.

While it would be more comfortable and efficient to rely upon the good faith of government to preserve and protect these basic rights in Article I, Section 1 for all persons, the history of the legal status for women proves that course to be unsafe.

The change of the term "men" to "persons" is easily accomplished but is not, as a function of that ease, a petty matter. Such a change would provide the theoretical basis upon which fundamental rights in law and practice could be extended to all persons. To perpetuate the present wording on this point would afford leeway to those who, now and in the future, may misunderstand or misrepresent the relation of women to fundamental rights. Thus it is a minuscule change, but a crucial one.

May it also be mentioned before proceeding to the next point that

the Equal Rights Amendment refers only to rights under the law. As we have seen there are many practices involving fundamental rights that fall outside the scope of the law but are in some ways more important to the individual such as the right to defend one's own life by being able to sign into a hospital. Changing this part of the Constitution could have a persuasive effect in those areas.

**"PURSUING AND OBTAINING . . . PRIVACY"—ADDED TO ARTICLE I, SECTION 1.**

The right to pursue and obtain privacy is not spelled out in either the state or the federal constitutions but has a firm basis as established by the United States Supreme Court.

Webster defines "Privacy. . . ) 1) the quality or condition of being private; withdrawal from public view or company; seclusion. 2) secrecy."

Webster defines "Private. . . belonging to oneself, not public or of the state. . ."

The Supreme Court has defined privacy as a basic right and has furnished us with more complete definitions. To quote Justice Douglas:

"[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incriminating Clause enables the citizen to create a zone of privacy which the government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.'

"The Fourth and Fifth Amendments were described in *Boyd v. United States*, 116 U.S. 616, 630, 6 S. Ct. 524, 532, 29 L. Ed. 746, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.'"

Marriage is described in *Griswold v. Connecticut* as containing a right of privacy older than the Bill of Rights. . .". Even more specifically "the constitutional right of privacy inheres in the individual, not in the marital couple." (Above Court Citations from *Griswold v. Connecticut* 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510.)

The Court in *Stanley v. Georgia* 394 U.S. 564, 89 S. Ct. 1247 helps to further define the right of privacy:

"Also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

"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."

The Courts have broadly defined the right of privacy. No right can be interpreted as absolute, however. We have the well-established right to freedom of speech but that right does not allow us to slander other persons, to yell fire in a crowded theater or to disturb the peace because these actions would, in the balancing test, infringe on rights possessed by others. There would have to be two tests used by the legislature and the courts in defining this right to *pursue and obtain privacy*. The first would be a balancing test and the second would be the test of "*compelling interest*" that the state might have. The "Government is instituted for the protection, security and benefit of the people" (emphasis added) and therefore enumerating the people's right to *pursue and obtain privacy* would not only *not* take away any powers the government now has, it would be carrying out the responsibility set forth in Article I, Section 2 of the California Constitution.

#### THE RELATIONSHIP OF CHANGING "MEN" TO "PERSONS" AND OF ADDING THE RIGHT TO PURSUE AND OBTAIN PRIVACY

With the pending passage of the Equal Rights Amendment many persons have been worried that some basic aspects of privacy would be jeopardized because the Separate-But-Equal doctrine was abandoned in *Brown v. Board of Education* 347 U.S. 483 (1954). Although the Supreme Court has held that persons have a right to privacy the people charged with carrying out the law are not necessarily familiar with the court's decisions. It is important then that the right to pursue and obtain privacy be understood by the people lest individuals

take it upon themselves to deprive others of privacy in the name of equality.

“One important part of the right of privacy is to be free from official coercion in sexual relations. This would have a bearing on the operation of some aspects of the Equal Rights Amendment. Thus, under current mores, disrobing in front of the other sex is usually associated with sexual relationships. Hence the right of privacy would justify policy practices by which a search involving the removal of clothing would be performed only by a police officer of the same sex as the person searched. Similarly the right of privacy would permit the separation of the sexes in public rest rooms, segregation by sex in sleeping quarters in prisons or similar public institutions, and appropriate segregation of living conditions in the armed forces.” (Yale Law Journal, Vol. 80:871, 1971)

Such facilities of course would have to be equal in both quality and convenience.

Even more important than facilities and official treatment is the fact that some people think that the laws prohibiting various types of sexual assault are couched in terms which would make them unconstitutional. With the right to pursue and obtain privacy spelled out these criminal statutes would have a firmer basis on which to be revised on non-sexist terms and would be more likely to stand if they were not revised in time.

Because the principles herein described carry such importance for at least half of the people we hope this committee will not treat them lightly.

\*Further examples of the exclusionary treatment of women are:

A married woman who cannot control her half of the community property within a marriage cannot protect her property. The United States Supreme Court has ruled that she is liable for the tax on such property even though she may lack any control of it even to the extent of knowledge about its existence.

A married woman who cannot retain her domicile is not able to pursue and obtain safety and happiness and more importantly may be disenfranchised altogether in such a way that she has no choice of the law which affects her or her voice in her government.

A married woman who has been denied the right to set up a business separate from her husband and has therefore been denied the right to earn a living the way she wishes has been denied the right to acquire property.

Once a married woman has deposited her own paycheck into the joint bank account her husband becomes the sole manager of such

money. Thereby the laws have denied her the right to protect her half of such community property.

The requirement that females have a higher grade point average than males to attend such institutions as Lowell High School in San Francisco denies to them ultimately the right to acquire property as such action may have a substantial effect on future education and employment.

## EXHIBIT F.

### Staff report of Assembly Constitutional Committee (?) on ACA 51 (before April 24).<sup>2</sup>

#### ACA 51 - PRIVACY

##### Staff Analysis

- Source:* John Billett
- Purpose:* Make privacy an inalienable right guaranteed by the Constitution.
- History:* The measure is similar to ACA 69 (1971) session which was defeated in the Assembly Judiciary Committee along with a companion bill, AB 2933.
- Legislative Counsel:* Miss Roth
- Analysis:* Adds pursuing and obtaining privacy to the inalienable rights mentioned in the State Constitution. Already in this category are pursuing and obtaining safety and happiness.
- In addition, it substitutes "persons" for "men" in Section 1 of Article I of the State Constitution.
- Comment:* This Constitutional Amendment puts the State on record regarding the right of privacy. At a time when people are becoming increasingly uneasy about potential and real abuses of privacy, it would be highly desirable for the California Constitution to state that individuals are entitled to privacy. The right to privacy has been upheld in the Supreme Court case of *Griswold v. Connecticut*.
- Question:* Would this measure have legal implications beyond the readily obvious; for instance, would the right to privacy overturn legal authority for wiretapping, etc.
- Staff:* Milner

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2. This document does not clearly indicate that it is a staff report submitted to the Assembly Constitution Amendment's committee. There is, however, strong circumstantial evidence that supports such a conclusion. The staff report picks up specific quotes from the testimony before the Committee. Indeed, someone, probably the person who drafted the staff report, actually wrote on the written testimony "Insert 1" and "2" beside quotes that appear in the staff report. There is no date on the staff report, but the Assembly Committee's report was drafted no later than April 24 (see Exhibit G), and the staff report was undoubtedly drafted prior to the committee report.

## THE RIGHT TO PRIVACY - CASE LAW

The right to pursue and obtain privacy is not spelled out in either the State or the Federal Constitutions but has a firm basis as established by the United States Supreme Court and other case law.

In *Griswold v. Connecticut* (1965), the U.S. Supreme Court recognized the constitutional right of privacy emanating from the penumbral application of the fundamental rights guaranteed by the First, Third, Fourth, Fifth and Ninth Amendments to the Constitution. Justice Douglas wrote:

"[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of any soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incriminating Clause enables the citizen to create a zone of privacy which the government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.'

"The Fourth and Fifth Amendments were described in *Boyd v. United States*, 116 U.S. 616, 630, 5 S. Ct. 524, 532, 29 L. Ed. 746, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.'"

(1. *Griswold v. Connecticut* 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510.)

With *Stanley v. Georgia*, the right of privacy had become a constitutional imperative. The decision in the "Stanley" case was explicitly founded upon the inherent limitations of the State's power to inquire into the "private" lives of its citizenry.

"Also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the sig-



nificance 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.”

More recently, in *Wisconsin v. Constantineau* (1971), the supreme Court recognized limitations on the ability of the State to collect and to disseminate potentially derogatory information about individuals.

When our Constitution was drafted, physical searches and seizures and interrogation constituted the primary forms of governmental surveillance. Our privacy was protected then by the Fourth Amendment against unreasonable searches and seizures and the Fifth Amendment protection against compulsory self-incrimination. (2. *Stanley v. Georgia* 394 U.S. 564, 89 S. Ct. 1247)

With the technological revolution and the age of cybernetics, these amendments, as they have been traditionally viewed, do not offer sufficient protection against state surveillance, record collection and government snooping into our personal lives. We must, therefore, develop new safeguards to meet the new dangers.

Proposition 11 puts the State on record that privacy is essential to our other freedoms. It further expands the evolving view of privacy emerging from case law. The right of privacy has emanated from our other constitutional protections. With the right of privacy explicitly written into the Constitution, it will itself become the basis for an expansion of constitutional protections.

The growing pervasiveness of government demands our immediate attention. Proposition 11 will be a definite statement of the necessity to control government interference in our personal lives and bring the issue clearly before the public and the courts. 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.

EXHIBIT G.

Report of Assembly Constitutional Committee on ACA 51  
(April 24, 1972).<sup>3</sup>

*STAFF ANALYSIS: ACA 51 (Cory), as introduced March 13, 1972*

*SUBJECT:* Adds privacy to inalienable rights. . . .Makes technical changes

*SUMMARY:* Amends existing Art. I (Declaration of Rights) to include pursuing and obtaining "privacy" among the State Constitution's inalienable rights.

Changes masculine words such as "he," "his," and "males" to *persons* and adds the word *Assemblywomen* to the existing sections where the word "Assemblymen" is presently used.

*BACKGROUND:* The right to privacy does not exist per se in the Federal Constitution or any other state Constitutions. . . .the courts, however, have articulated a right to be free from certain kinds of intrusion of governmental acts. . . .the Courts' work in the privacy field is defining the right solely by the wrong. . . .(libel, unlawful search and seizure, telephone tapping, fair credit reporting act, etc.).

Author carried similar measure last session as a companion to his personal data bill, regulating use of and access of personal data by public agencies.

*FEDERAL DECISIONS:* Best known of so-called "right to privacy" cases is *Griswold v. Conn.* 381 U.S. 479 (1965), in which the Supreme Court struck down Connecticut's anti-contraceptive statute on ground that it violated a couple's right to privacy. . . .the court articulated that the fear of governmental voyeurism was though to be almost as destructive of personality as would be a physical intrusion. However, to date no definition has been formulated of a constitutional right of privacy. . . .it appears, that the court draws from the entire Bill of Rights and various amendments, but it is not clear from case law who is protected and from what.

*COMMENT:* "Persons," according to sec. 17 of Code of Civil Procedure, includes a corporation as well as a natural person. Does the author wish to extend inalienable rights to the corporate person?

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3. This report was typed on letterhead of the Assembly Committee on Constitutional Amendments and is quite clearly that committee's report. The bill was reported from committee to the Assembly floor on April 27, only three days after the date which is stamped on this report.

**EXHIBIT H.**

**Proposed by Amendment by Assembly Constitutional  
Committee to ACA 51 (April 26, 1972).**

April 26, 1972

Req. #9582

**AMENDMENTS TO ASSEMBLY CONSTITUTIONAL AMEND-  
MENT NO. 51  
AMENDMENT 1**

In line 4 of the title of the printed measure, strike out “, Sections 2 and 6 of Article IV, and ”, and in line 5 strike out “Section 11 of Article IX”.

**AMENDMENT 2**

On page 1, strike out lines 7 and 8 and insert: Constitution of the state be amended by amending Section 1 of Article 1 thereof to read:

**AMENDMENT 3**

On page 2, strike out lines 2 to 40, inclusive, on page 3, strike out lines 1 to 40, inclusive, and on page 4, strike out lines 1 to 18, inclusive.<sup>4</sup>

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4. The effect of this amendment was to remove from ACA 51 all changes except adding the word “privacy” to Article I, Section 1.

**EXHIBIT I.**

**Report of Senate Judiciary Committee(?) on ACA 51 (June 7,  
1972),<sup>5</sup>**

ACA 51 (Cory)  
As amended May 1  
Constitution

***RIGHT OF PRIVACY***  
**HISTORY**

Source: Constituent

Prior Legislation: ACA 69 (1971) - held in Assembly Committee on  
Judiciary

Support: Unknown

Opposition: No known

**DIGEST**

Provides that *all persons, rather than men*, have certain inalienable rights among which is the right to pursue and obtain *privacy* (Sec. 1, Art. I, Const.).

**PURPOSE**

Establish the inalienable right to privacy as a right guaranteed to citizens of this state by the California Constitution.

**COMMENT**

1. The U.S. Supreme Court in *Griswold v. Connecticut* (381, U.S. 479, 1965) upheld the right of privacy as applied to the marriage relationship by declaring this right to be within the penumbra of several fundamental constitutional guarantees.
2. Because all fundamental rights are not absolute in nature, what, if any, limitations would exist with respect to the right of privacy created by this Constitutional Amendment, i.e., does it extend to corporations, criminal accused, public figures, wire taps and eavesdropping, etc.?

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5. There is strong circumstantial evidence to establish that this document is the Senate Judiciary Committee's report.

**EXHIBIT J.**

**Amendment by Senate Judiciary Committee to ACA 51 (June  
7, 1972).**

[The volume in the State Archives which contains this amendment was missing. It is possible to reconstruct the amendment, however, by comparing the final text with the text as amended by the Assembly Constitutional Committee. The amendments changes a reference to "Article 1" to "Article I" and substituted the word "people" for "persons."]

**EXHIBIT K.**

**The Privacy Clause as Finally Approved, Resolution Chapter  
56 (July 5, 1972).**

**RESOLUTION CHAPTER 56**

*Assembly Constitutional Amendment No. 51 - A resolution to propose to the people of the State of California an amendment to the Constitution of the state, by amending Section 1 of Article I thereof, relating to state government.*

[Filed with Secretary of State July 5, 1972.]

*Resolved by the Assembly, the Senate concurring, That the Legislature of the State of California at its 1972 Regular Session commencing on the third day of January, 1972, two-thirds of the members elected to each of the two houses of the Legislature voting therefor, thereby proposes to the people of the State of California that the Constitution of the state be amended by amending Section 1 of Article I thereof to read:*

**SECTION 1.** All people are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety, happiness, and privacy.

## EXHIBIT L.

### Ballot Analysis and Arguments.

#### *Title*

**RIGHT OF PRIVACY. Legislative Constitutional Amendment.**  
Adds right of privacy to inalienable rights of people. Financial impact: None.

#### *General Analysis by the Legislative Counsel*

A "Yes" vote on this legislative constitutional amendment is a vote to amend the Constitution to include the right of privacy among the inalienable rights set forth therein.

A "No" vote is a vote against specifying the right of privacy as an inalienable right.

For further details, see below.

#### *Detailed Analysis by the Legislative Counsel*

The Constitution *now* provides that all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness.

THIS MEASURE, if adopted, would review the language of this section to list the right of privacy as one of the inalienable rights. It would also make a technical nonsubstantive change in that the reference to "men" in the section would be changed to "people."

#### *Cost Analysis by the Legislative Analyst*

The right to privacy, which this initiative adds to other existing enumerated constitutional rights, does not involve any significant fiscal considerations.

#### *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 not 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 the records even exist and we are certainly unable to determine who has access to them.

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 informational 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 a 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.

Proposition 11 also guarantees that 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.*

KENNETH CORY  
Assemblyman, 69th District  
GEORGE R. MOSCONE



*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 whether persons receiving aid from various government programs truly are 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.

JAMES E. WHETMORE  
State Senator, 35th District

*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.

For many years it has been agreed by scholars and attorneys that it would be advantageous to *remove* much unnecessary wordage from the Constitution, and at present we are spending a great deal of money to finance a Constitution Revision Commission which is working to do this. Its work presently is incomplete and we should not begin to lengthen our Constitution and to amend it piecemeal until at least the Commission has had a chance to finish its work.

The most important reason why this amendment should be de-

feated, 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?

Suppose a person owned a house worth \$100,000 and earned \$50,000 a year from the operation of a business, but had his privacy protected to the point that he did not have to reveal any of this, and thus qualified for and received welfare payments. Would this be fair either to the taxpayers who pay for welfare or the truly needy who would be deprived of part of their grant because of what the wealthy person was receiving?

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.

JAMES E. WHETMORE  
State Senator, 35th District

*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 work of the Constitution Revision Commission cannot be destroyed by *adding two words* to the State Constitution. The Legislature actually followed the Commission's guidelines in drafting Proposition 11 by keeping the change simple and to the point. Of all the proposed constitutional amendments before you, this is the simplest, the most understandable, and one of the most important.

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.

KENNETH CORY  
Assemblyman, 69th District