

III. BUSINESS

A. Discussion Regarding the Current State of Privacy Law



Purpose

The Consulting Group on the Establishment of a Legal Specialization in Privacy Law (Privacy Law Group) is tasked with studying the practice area to assess whether there is sufficient need and interest to create a specialty, as well as whether the area is sufficiently defined as to create a useful specialization.

If the Privacy Law Group determines that certification in this area of law is feasible and appropriate, they will draft appropriate certification standards for review by the California Board of Legal Specialization and the State Bar Board of Trustees.

<https://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Privacy-Law-Group>



Assessment Questions

1. Is there sufficient need and interest to create a privacy law specialty?
2. Is the area sufficiently defined to create a useful specialization?





California Board of Legal Specialization (CBLS)

The State Bar of California's Board of Legal Specialization certifies legal specialists in the following areas:

- Admiralty and Maritime Law
- Appellate Law
- Bankruptcy Law
- Criminal Law
- Estate Planning, Trust and Probate Law
- Family Law
- Franchise and Distribution Law
- Immigration and Nationality Law
- Legal Malpractice Law
- Taxation Law
- Workers' Compensation Law

CA Rule of Court 9.35(a): "Certified specialist" is a California attorney who holds a current certificate as a specialist issued by the State Bar of California Board of Legal Specialization or any other entity approved by the State Bar to designate specialists.



State Bar Accredited Organizations & Areas

American Board of Certification

- Business Bankruptcy Law
- Consumer Bankruptcy Law
- Creditors' Rights Law

American Board of Professional Liability Attorneys

- Legal Malpractice
- Medical Malpractice

National Association of Counsel for Children

- Juvenile Law (Child Welfare)

National Board of Trial Advocacy

- Civil Trial Advocacy
- Criminal Trial Advocacy
- Family Law Trial Advocacy
- Social Security Disability Law

National Elder Foundation

- Elder Law



Requirements to Become a Certified Specialist

- Passage of a written examination in the legal specialty area
- Practiced law continuously for at least five years, spending at least 25 percent of the time given to occupational endeavors practicing in the specialty area
- Completion of continuing education in the specialty area greater than that required of general licensees of the State Bar
- Demonstration of a broad-based and comprehensive experience in the specialty area based on completion of a variety of matters in the specialty area
- Favorable evaluations by other attorneys and judges familiar with the attorney's work in the specialty area of law.



Need and Interest for Privacy Law Specialization



- Application for Accreditation of Specialty Certification Program(s) for Attorneys
 - International Association of Privacy Professionals (IAPP) – December 13, 2019¹
- Proposed New Specialty Application
 - California Lawyers Association (CLA) – September 10, 2021²

1. Action taken at the CBLS Meeting on March 13, 2020. <https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000025984.pdf>

2. Action taken at the CBLS Meeting on September 10, 2020. <https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000028458.pdf>



Privacy Law Today

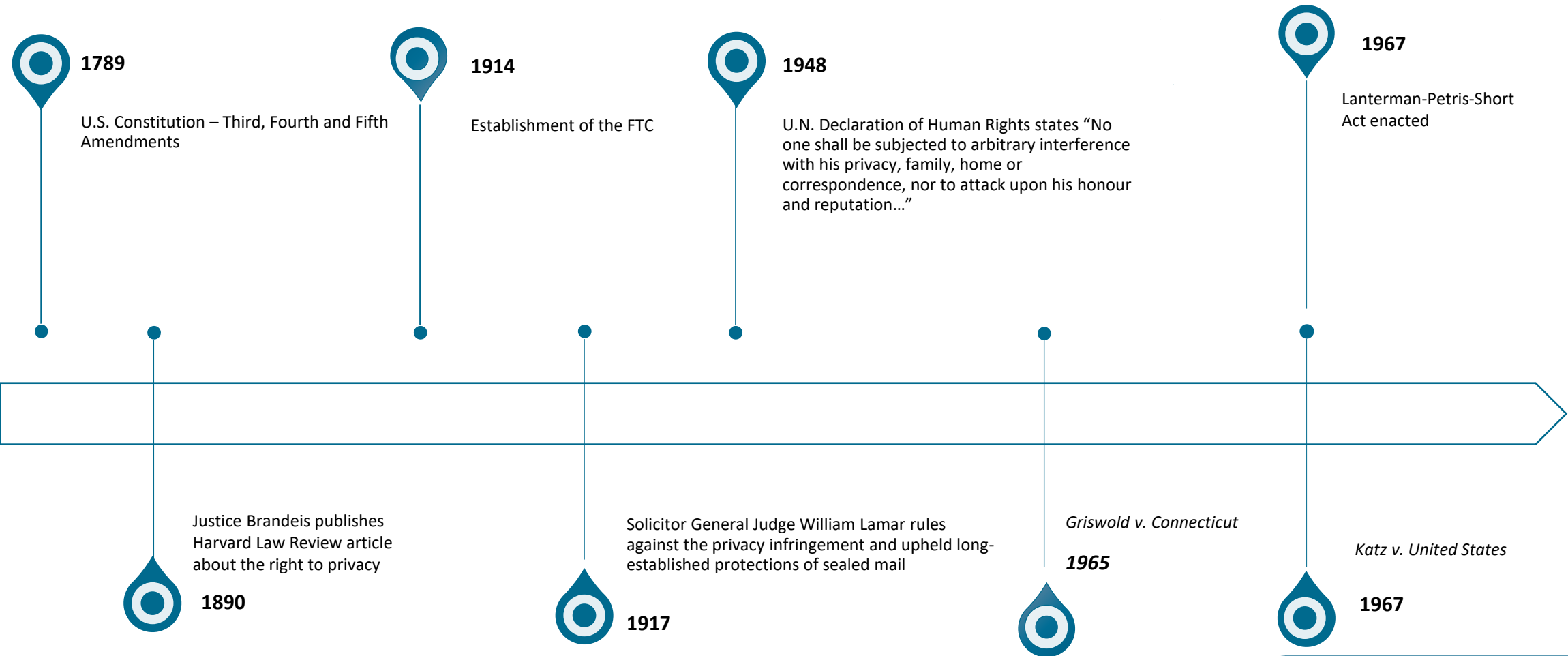


- Various overlapping Federal and State requirements
 - No overarching Federal Privacy Law yet
 - Laws by sector and topic
- International Privacy Laws
- Rapidly evolving
 - Five states, including California, have consumer privacy laws, 17 additional states with consumer privacy bills as of February 2023³

3. Desai, *US State Privacy Legislation Tracker* (Feb. 10, 2023) International Association of Privacy Professionals <<https://iapp.org/resources/article/us-state-privacy-legislation-tracker/>> (as of Feb. 13, 2023).

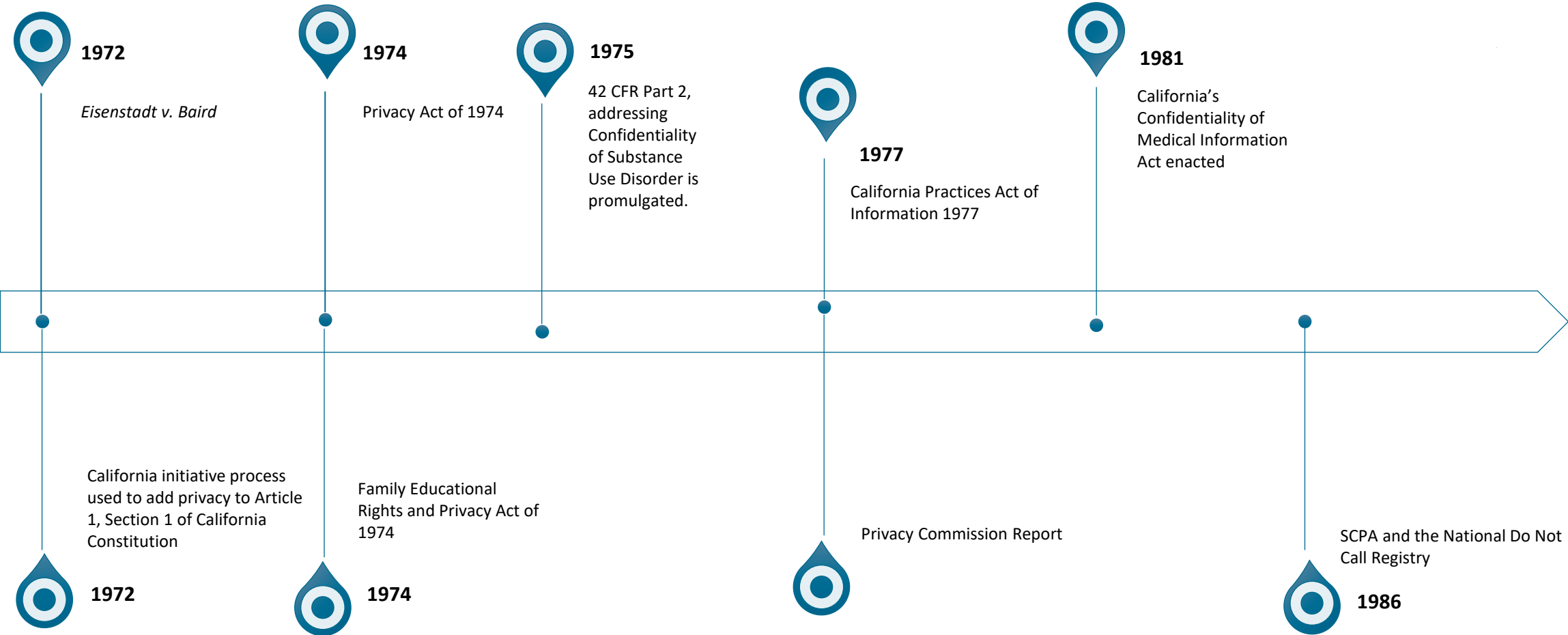


Privacy Law's Development⁴



4. History of Privacy Timeline (2023) University of Michigan <<https://safecomputing.umich.edu/privacy/history-of-privacy-timeline>> (as of March 12, 2023).

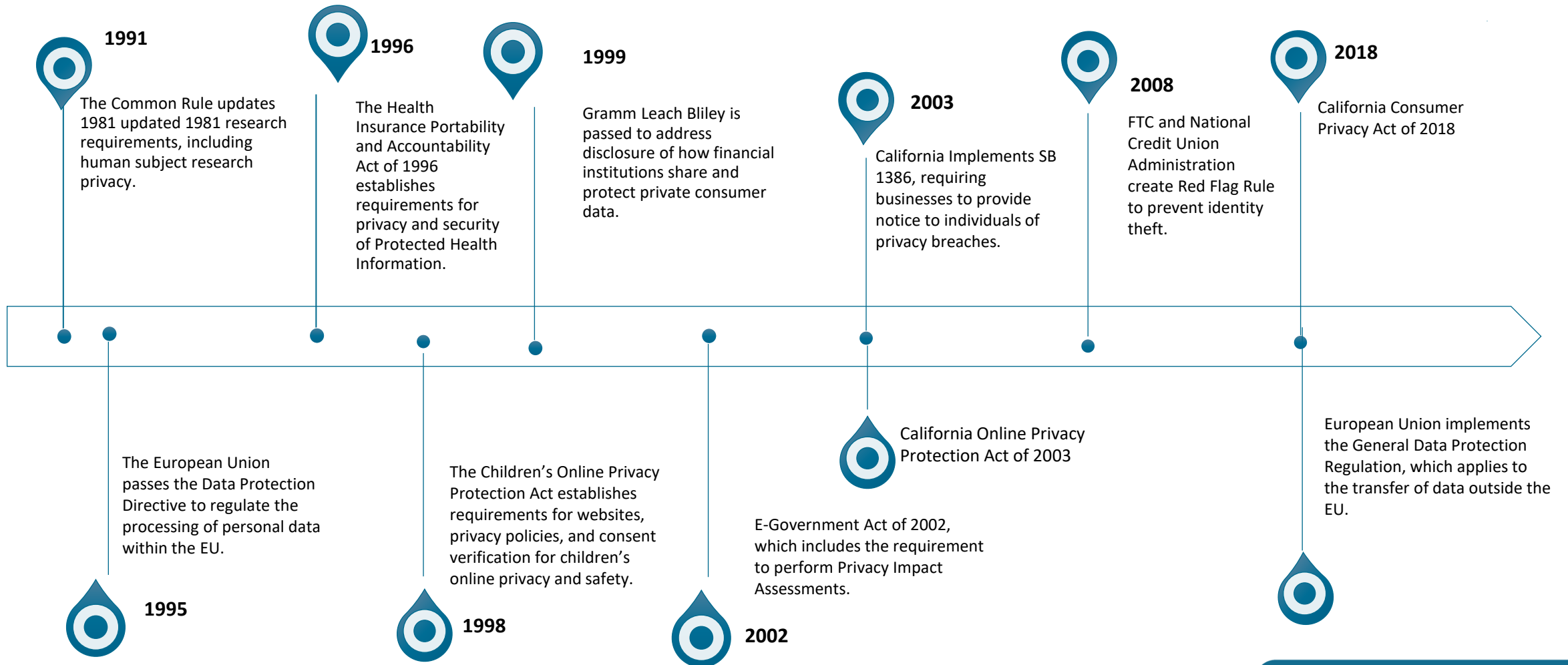
Privacy Law's Development⁴



4. *History of Privacy Timeline* (2023) University of Michigan <<https://safecomputing.umich.edu/privacy/history-of-privacy-timeline>> (as of March 12, 2023).



Privacy Law's Development^{5, 6}



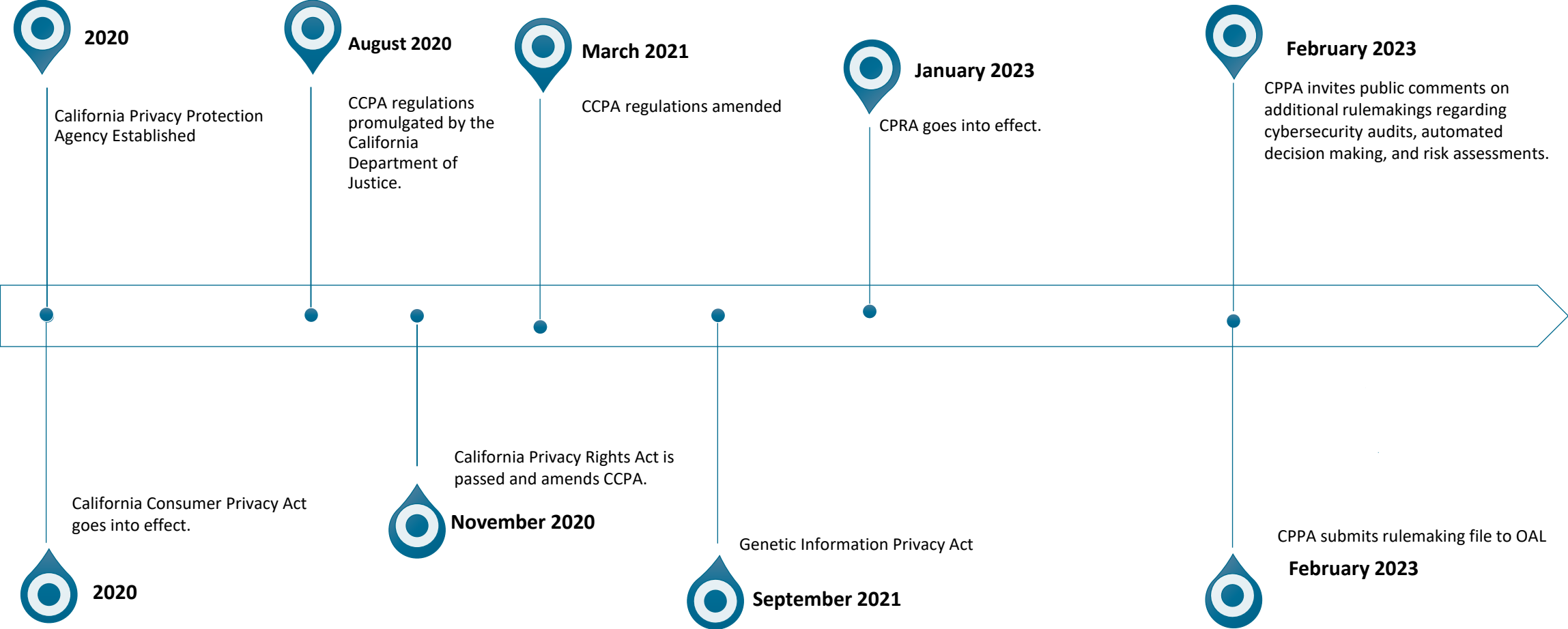
5. Id.

6. *Frequently Asked Questions (FAQs)* (2023) California Privacy Protection Agency <<https://cppa.ca.gov/faq.html>> (as of March 12, 2023).

History of Privacy Timeline (2023) University of Michigan <<https://safecomputing.umich.edu/privacy/history-of-privacy-timeline>> (as of March 12, 2023).



Privacy Law's Development^{5, 6}



5. Id.
6. *Frequently Asked Questions (FAQs)* (2023) California Privacy Protection Agency <<https://cppa.ca.gov/faq.html>> (as of March 12, 2023).
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Federal vs. State

Federal	State
US Constitution does not mention privacy	CA Constitution includes privacy
Federal Statutes	State Statutes
Federal Regulations	State Regulations
Federal case law	State case law
Federal agencies	State agencies



Federal and State Examples

Federal	State
Proposed Legislation	California (CCPA)
COPPA (children)	Virginia (VCDPA)
HIPAA (health)	Connecticut (CDPA)
GLBA (financial)	Colorado (CPA)
FCRA (credit)	Utah (UCPA)
FERPA (education)	Illinois (biometrics)
SCA, ECPA (platforms)	Vermont (data broker)
TCPA/CAN-SPAM (telemarketing & email)	



International Privacy Laws

- Global economy, overseas data access and disclosure triggers international privacy compliance considerations.
- General Data Protection Regulation (GDPR)
- 71% (137/194) of countries have data protection and privacy legislation enacted, with an additional 9% with draft legislation under consideration.⁷

7. *Data Protection and Privacy Legislation Worldwide* (Dec. 14, 2021) United Nations Conference on Trade and Development, <<https://unctad.org/page/data-protection-and-privacy-legislation-worldwide>> (as of Feb. 13, 2023).



**Multiple
jurisdictions
result in multiple
regulators:**

- Federal Communications Commission (FCC)
- Federal Consumer Financial Protection Bureau (CFPB)
- Department of Health & Human Services (HHS)
- Securities and Exchange Commission (SEC)
- Federal Trade Commission (FTC)
- State Attorneys General
- State regulatory departments (e.g., CPPA, CDPH)
- International Authorities (e.g., GDPR's Data Protection Authority)



California Specific Privacy Laws

- California Constitution - "inalienable right" to pursue and obtain "privacy."
- CCPA and CPRA
 - California Consumer Privacy Act signed into law in 2018
 - California Privacy Rights Act passed in November 2018, and amended CPPA on 1/1/2023.
 - California Privacy Protection Agency will begin enforcement actions on 7/1/2023.
 - Proposed additional regulations are under review at the Office of Administrative Law.
 - Additional rules are under development.⁸
- Many other industry-specific CA Privacy Statutes – <https://oag.ca.gov/privacy/privacy-laws>.

8. *Frequently Asked Questions (FAQs)* (2023) California Privacy Protection Agency, <<https://cpa.ca.gov/faq.html>> (as of Feb. 13, 2023).



Overall Privacy Trends

- More statutes and regulations dramatically increases numbers of individuals and companies who are protected and covered and need guidance about their rights and obligations.
- Greater complexity and overlapping legal requirements requires greater knowledge and specialization.
- Privacy practitioners must be nimble and continuous learners to provide quality guidance.
- Technical/Information Security expertise.



Privacy Law's Impact

- ❑ Privacy Law impacts the public and corporations by setting standards that create trust; individuals know their rights and what will happen to their information, and users of the data know their responsibilities.
- ❑ Common standards enable disclosers and recipients to negotiate from a place of common understanding and expectations.

