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Too Big a Fish in the Digital Pond? The California Consumer Privacy Act and the Dormant Commerce Clause

Russell Spivak
rspivak@jd17.law.harvard.edu

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TOO BIG A FISH IN THE DIGITAL POND?
THE CALIFORNIA CONSUMER PRIVACY ACT AND THE
DORMANT COMMERCE CLAUSE

*Russell Spivak*¹

*“Money often costs too much.” — Ralph Waldo Emerson*²

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1. B.S., Massachusetts Institute of Technology, 2013; J.D., Harvard Law School, 2017. The views expressed here are his personal views and do not necessarily reflect those of any institution with which the author is or will be affiliated.

2. THE CONDUCT OF LIFE 107 (1860).

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ABSTRACT

In 2018, following both the repeal of federal privacy regulations and the passage of Europe’s Global Data Protection Regulation, better known as GDPR, California enacted the California Consumer Privacy Act. The Act, or CCPA, is a large step forward in U.S. privacy regime, particularly because many of the largest technology companies in the world are at home in the Golden State. Following its passage, however, many have suggested that the CCPA may in fact violate the Commerce Clause, and specifically the Inverse or Dormant Commerce Clause, because of its outsized economic impact. No academic literature has yet fleshed out this claim, however. This article seeks to do just that. The article begins by reviewing the science and principles underlying targeted ads and the data shared to advertisers that give rise to the privacy concerns animating the CCPA. In Section II, the article reviews the CCPA, including the events leading up to its passage, the law’s text, its comparison to GDPR, and its initial critical reception. Finally, in Section III, the article lays out the Dormant Commerce Clause’s jurisprudence—including the various standards and tests under which state statutes are analyzed to determine whether they violate the clause—and applies the CCPA to the Clause, arriving at the conclusion that the Act should survive any Commerce Clause challenge.

I. INTRODUCTION

From Facebook's Cambridge Analytica scandal³ to the data breaches of federal and state government organizations,⁴ as well as countless private companies,⁵ digital privacy has been thrust into the forefront of the modern psyche. But the rise in concern about digital privacy parallels the rise of the digital ecosystem's ubiquity in society's day-to-day life, simply lagging by a few years.

One particular aspect of the larger debate on the "right to privacy"—an idea which "dates back to a law review article published in December of 1890 by two young Boston lawyers, Samuel Warren and Louis Brandeis"⁶—pertains to the sale of one's personal information. Put simply, upon logging onto a particular website, a person unwittingly gave over certain information to the site, which can then catalogue the data and sell it. The ethics of these sorts of offerings and purchases are hotly contested,⁷ even when the data is sufficiently anonymized to shield user-specific data.

The Golden State—California—has sought to change all that. California, the home of Silicon Valley and much of the tech industry, took up legislation on the subject of data privacy to fill the void left by insufficient federal law. And so it came to be that on June 28, 2018, California enacted the California Consumer Privacy Act of 2018 (CCPA).⁸

The Act, in short, puts in place much more robust safeguards around users' data by demanding companies buying or selling such data adhere to strict protocols that include giving users proper notice of what data is being collected and sold and affording them the opportunity to opt out of

3. See, e.g., Kevin Granville, *Facebook and Cambridge Analytica: What You Need to Know as Fallout Widens*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html> [<https://perma.cc/AWZ7-GSBG>].

4. See, e.g., Evan Perez & Shimon Prokupez, *First on CNN: U.S. Data Hack May Be 4 Times Larger Than the Government Originally Said*, CNN (June 24, 2015), <https://edition.cnn.com/2015/06/22/politics/opm-hack-18-million/index.html> [<https://perma.cc/WDG5-Q77G>].

5. See, e.g., Robert McMillan, Ryan Knutson & Deepa Seetharaman, *Yahoo Discloses New Breach of 1 Billion User Accounts*, WALL ST. J. (Dec. 15, 2016), <https://www.wsj.com/articles/yahoo-discloses-new-breach-of-1-billion-user-accounts-1481753131> [<https://perma.cc/FS7L-YKC9>] (explaining that Yahoo had 1 billion accounts hacked in 2013).

6. Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1, 1 (1979).

7. See, e.g., Sarah Steimer, *The Murky Ethics of Data Gathering in a Post-Cambridge Analytica World*, AM. MARKETING ASSN. (May 1, 2018), <https://www.ama.org/marketing-news/the-murky-ethics-of-data-gathering-in-a-post-cambridge-analytica-world/> [<https://perma.cc/7LRE-TWB8>]. Such questions of morality and ethics are not in the scope of this article, in no small part because they deserve their own full-throated debates separate from California's attempted regulation thereof.

8. CAL. CIV. CODE §§ 1798.100–199 (West 2019).

such efforts.

In doing so, the CCPA places a tremendous burden on those companies that traffic in data. While said companies could forego the state, that would present a significant obstacle, considering California's economy is larger than all but four countries in the world.⁹ In light of these considerations, the CCPA engenders substantial Dormant Commerce Clause concerns. While others have simply noted this potential challenge,¹⁰ this article is the first to flesh out those concerns and determine whether or not a Dormant Clause challenge to the CCPA is viable and/or likely to succeed.

To do so, this article begins on an explanation of the science of Internet data. Specifically, it looks at Internet Cookies—digital passport stamps marking your browsing history—and how companies compile, analyze, and sell that data. In Part II, the article reviews the CCPA, including the long federal and state legislative history and context of the Act, as well as the Act's text itself. Part III explores Dormant Commerce Clause jurisprudence and culminates in the application thereof to the CCPA; this Part, and the article, concludes with the determination that the CCPA should withstand a Dormant Commerce Clause challenge.

II. THE SCIENCE OF COOKIES AND THE MONEY IN TARGETED ADS

A. Flour, Butter, Water, and Sugar: The History and Basics of Cookies

Before delving into Internet regulations, it may be advantageous to review the foundational science driving the Internet's relevance—namely HyperText Transfer Protocol (HTTP), also known as web cookies.

Lou Montulli, the developer of Lynx, one of the earliest web browsers, also developed cookies in the early 1990s.¹¹ Montulli—then working for Netscape—“was trying to help web sites become viable commercial enterprises.”¹²

9. Lisa Marie Segarra, *California's Economy Is Now Bigger Than All of the U.K.*, FORTUNE (May 5, 2018), <https://fortune.com/2018/05/05/california-fifth-biggest-economy-passes-united-kingdom/> [<https://perma.cc/7NBW-656K>].

10. See, e.g., Eric Goldman, *Ten Reasons Why California's New Data Protection Law is Unworkable, Burdensome, and Possibly Unconstitutional*, TECH. & MARKETING LAW BLOG (July 9, 2018) <https://blog.ericgoldman.org/archives/2018/07/ten-reasons-why-californias-new-data-protection-law-is-unworkable-burdensome-and-possibly-unconstitutional-guest-blog-post.htm> [<https://perma.cc/629U-JE8P>]; Alan Charles Raul et al., *California Enacts Broad Privacy Laws Modeled on GDPR*, SIDLEY AUSTIN: DATA MATTERS (June 29, 2018), <https://datamatters.sidley.com/california-enacts-broad-privacy-laws-modeled-on-gdpr/> [<https://perma.cc/ZG9R-9B4Y>].

11. Simon Hill, *Are Cookies Crumbling Our Privacy? We Asked An Expert To Find Out*, DIG. TRENDS (Mar. 29, 2015, 10:00 A.M. PST), <https://www.digitaltrends.com/computing/history-of-cookies-and-effect-on-privacy/> [<https://perma.cc/2U4G-MQJL>].

12. Solveig Singleton, *How Cookie-Gate Crumbles*, CATO INSTITUTE: COMMENTARY (July 11,

As Montulli quickly realized, websites were not very good at customer relations. In an ordinary store in the “real” world of malls and main street, the shopkeeper can eyeball shoppers coming in to identify regular customers, check out suspicious characters, get a feel for whether his visitors are locals or tourists, likely buyers or merely browsers, and make sure that shoppers can find what they are looking for. Web sites had no mechanism for collecting this information; on the Internet, every visitor was an anonymous stranger.¹³

Montulli’s invention changed this for websites. As the Federal Trade Commission explains,

[a] cookie is information saved by your web browser. When you visit a website, the site may place a cookie on your web browser so it can recognize your device in the future. If you return to that site later on, it can read that cookie to remember you from your last visit and keep track of you over time.¹⁴

The browser accessing said website also stores personal information, such as the location (via an IP address) and other identifiable information of the website’s user. Importantly, cookies also help with website personalization. As Google explains in a Help Center post regarding its targeted ads platform, AdSense:

If you shop on a website, a cookie allows the website to remember which items you've added to your virtual shopping cart. If you set preferences on a website, a cookie allows the website to remember your preferences the next time you visit. Or if you sign into a website, the website might use a cookie to recognize your browser later on, so that you don't have to sign in again . . . All these applications depend on the information stored in cookies.¹⁵

There is also a distinction between first-party and third-party cookies. As the nomenclature would suggest, “[f]irst-party cookies are dropped by the publisher or website owner when a user visits their own site.”¹⁶ On

2000), <https://www.cato.org/publications/commentary/how-cookiegate-crumbles> [https://perma.cc/8JFN-CYMT].

13. *Id.*

14. *Internet Cookies*, FED. TRADE COMM., <https://www.ftc.gov/site-information/privacy-policy/internet-cookies> [https://perma.cc/3BZD-Y8FP] (last updated Mar. 2018).

15. *How AdSense uses cookies*, GOOGLE: ADSENSE HELP, https://support.google.com/adsense/answer/7549925?hl=en&ref_topic=1628432 [https://perma.cc/FGH7-LTEM]. See also *What Are Cookies?*, INDIANA UNIVERSITY: KNOWLEDGE BASE (Jan. 18, 2018), <https://kb.iu.edu/d/agwm> [https://perma.cc/HC8Q-PD93] (“When you select preferences at a site that uses this option, the server places the information in a cookie. When you return, the server uses the information in the cookie to create a customized page for you.”).

16. Jessica Davies, *Know Your Cookies: A Guide To Internet Ad Trackers*, DIGIDAY (Nov. 1, 2017), <https://digiday.com/media/know-cookies-guide-internet-ad-trackers/> [https://perma.cc/448P-T5XR].

the other hand, third-party cookies “are created by ‘parties’ other than the website that the user is currently visiting—providers of advertising, retargeting, analytics and tracking services.”¹⁷

In sum, web cookies are a user’s digital passport: keeping accurate records of Internet history, along with much of a user’s identifying information, and providing website administrators with never before seen user data.

B. Now Add Oatmeal: Further Iterations of Cookies

Traditional cookies have now taken on a life of their own in that there are now multiple types of cookies that track different things and perform different functions.

Consider the Facebook pixel, the social media giant’s user-specific cookie. The Facebook pixel is different from other types of cookies in that it tracks people, not devices. With traditional cookies, if a person visited a site on three different devices, analytics would track that as three separate visits by three separate people. Facebook, on the other hand, tracks visits across devices, so that multiple devices can be attributed to one person.¹⁸

A review of one’s passport can give way to exceptionally important data. For example, one could learn where this author has been outside the United States and how frequently, in addition to his date of birth, mailing address, hair color, eye color, height, and gender identification. And that is only a passport. Now imagine just how detailed one’s web browser history can be and what a third party could learn about a given user from a review thereof.¹⁹

Data itself is one thing, but how exactly do cookies transfer into targeted ads and, thus profit for companies? Put another way, how do advertisers or data brokers make money off of users for free?

17. Michal Wlosik & Michael Sweeney, *What’s the Difference Between First-Party and Third-Party Cookies?*, CLEARCODE, <https://clearcode.cc/blog/difference-between-first-party-third-party-cookies/> [https://perma.cc/3LHV-DWZK].

18. Betsy McLeod, *What Is A Facebook Pixel? A Business Owner’s Guide*, BLUE CORONA (Apr. 14, 2017), <https://www.bluecorona.com/blog/guide-to-facebook-pixel-retargeting> [https://perma.cc/43K3-VZMW].

19. This is the central thesis of the “mosaic theory” in Fourth Amendment jurisprudence. *See, e.g.*, Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311 (2012). Under this theory, “large scale or long-term collections of data reveal details about individuals in ways that are qualitatively different than single instances of observation[.]” Paul Rosenzweig, *In Defense of the Mosaic Theory*, LAWFARE BLOG (Nov. 29, 2017), <https://www.lawfareblog.com/defense-mosaic-theory> [https://perma.cc/T4QW-NLWW].

C. Like Mrs. Fields: Monetizing Cookies in Big Data

The digital ads business is estimated to gross more than \$129 billion from US advertisers in 2019.²⁰ But how does it work? Without detailing each of the unique streams of commerce for the myriad ways in which online advertising takes place, the core idea remains a constant: companies “gather[] information about users and group[] them into sellable ‘segments.’”²¹ But even without such detailed transactional flows, some more detail is worth expounding upon.

Consider an independent merchant selling women’s running shoes in the fictional town of Ames, in the fictional county of Ames County, in the fictional State of Ames.²² The merchant’s ideal customers—and thus the individuals to whom the merchant wants to advertise—are women that run who live in the Town of Ames. Secondly, the merchant would also want to advertise to female runners that shop online for their shoes, even if they are located outside of Ames altogether.

Location is something fairly easy to discern via one’s IP address. IP addresses “will not give a street address,” but they very well can reveal the city in which the user is surfing the web.²³ An IP address will not, however, reveal a user’s gender, let alone if she is active via running as opposed to, say, weightlifting (in which your inventory is largely inapposite). That’s where this hypothetical merchant can use cookies.

If a user has repeatedly viewed active wear, or athleisure, brands, it is a decent bet that he or she is active and willing to purchase athletic apparel online. And if he or she has viewed running-specific sites such as those that scope out running trails, track one’s running distance, or offer tips to would-be runners, that is another important clue. This is especially true if those sites are themselves specifically gendered. Now, of course, a merchant—or an advertising agency—never knows the true identity of the user, but they can create a “profile” with fairly intimate information derived from deductions like those above. That information can then be aggregated across multiple populations and filtered accordingly such that merchants aim to advertise to that user specifically.

20. Kurt Wagner, *Digital Advertising In The US Is Finally Bigger Than Print And Television*, VOX:RECODE (Feb. 20, 2019), <https://www.vox.com/2019/2/20/18232433/digital-advertising-facebook-google-growth-tv-print-emarketer-2019> [<https://perma.cc/7YYK-CZ3Z>].

21. *Getting To Know You*, ECONOMIST (Sept. 11, 2014), <https://www.economist.com/special-report/2014/09/11/getting-to-know-you> [<https://perma.cc/ZY2Q-BVJ2>].

22. This is a tradition at Harvard Law School, wherein professors set their exams in such a fictional world so as to avoid bringing in any biases from a state’s common law or statutes. The name “Ames” is in honor of James Barr Ames, the Law School’s former dean and one of the foremost legal professors in history. *See, generally*, William D. Lewis, *James Barr Ames*, 58 U. PA. L. REV. 289 (1910).

23. Cale Guthrie Weissman, *What is an IP address and what can it reveal about you?*, BUS. INSIDER (May 18, 2015), <https://www.businessinsider.com/ip-address-what-they-can-reveal-about-you-2015-5> [<https://perma.cc/C6N2-6DN5>].

There are multiple ways to do this. Merchants can advertise directly on a social media platform such that the user will see it when browsing on the platform. Alternatively, they can advertise through a company that owns what's called banner ad space, better conceived as digital real estate on websites.²⁴ Every time one goes to a website and sees adverts on the sides or atop it, those are akin to digital billboards, controlled by a company.²⁵ Otherwise, merchants can simply go to an advertising agency who can allocate their money in the way it believes is best—with the merchant's input, of course.²⁶ Even under this last scenario, the owner of the website (the “publisher” in advertising parlance) typically gets a large percentage of the amount the original merchant paid the advertising agency.

At the end of the day, companies compiling the data and creating profiles about specific users are making tremendous amounts of money off of any given user by analyzing his or her browsing history.²⁷ To be sure, users have a simple defense: they can delete their cookies and/or set their browsers to block all cookies for future browsing. Even if a user blocks cookies, advertisements will still be posted, meaning publishers (and potentially advertising agencies) will still profit off of a user—albeit less so; as the advertisement is less precisely targeted, it is rendered less valuable.

III. THE CCPA'S HISTORICAL CONTEXT AND TEXT

The CCPA, like all laws, is a reaction to the circumstances facing the legislative body.²⁸ Interpreting it—the necessary prerequisite for

24. Interactive Advertising Bureau, *The Evolution of Online Display Advertising*, YOUTUBE (May 13, 2012), https://www.youtube.com/watch?v=1C0n_9D0lwE.

25. *Id.*

26. The customer is always right, after all. Additionally, of note is the fact that real-time bidding technology, or programmatic bidding, further drives the digital advertising market. Again, foregoing specifics in the above scenarios, the advertising spaces referenced above are not simply purchased, but are auctioned at light speed with pre-determined inputs. For a primer on real-time bidding, see Jack Marshall, *WTF is real-time bidding?*, DIGIDAY (Feb. 17, 2014), <https://digiday.com/media/what-is-real-time-bidding/> [<https://perma.cc/7XTT-2KRN>].

27. Again, this article does not endeavor to make moral pronouncements on the practice one way or another.

28. Cf. Tracey L. Meares et. al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1204 (2004) (“lawmaking is a dynamic process: Courts, to be sure, react to the policy judgments reflected in legislative enactments, but legislatures also react to the policy judgments made by courts when they interpret statutes.”); Douglas Kriner, *Accountability Without Deliberation? Separation of Powers in Times of War*, 95 B.U.L. REV. 1275, 1275 (2015) (“Congress’ reactive stance is a product of the incentives facing individual members.”); Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1185 (2001) (“To start, Congress is a reactive institution”); Richard D. Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 95 YALE L.J. 1283, 1287 n.24 (1986) (“the Constitution gives the President a selective function, and the Congress a reactive one”).

adjudicating its constitutionality—requires an understanding of the context leading up to its passage in addition to the text itself. This section aims to elucidate both, diving deep into its history and painstakingly detailing its text.

A. How the Measure Came to Be

1. Federal Action . . . And Re-action

Former Congressman turned Chief Judge of the District of Columbia Court of Appeals Abner Mikva once referred to Congress as a “reactive body unable to enact legislation until the problem at hand reaches crisis proportions.”²⁹ So, too, it seems is the California state legislature, as the CCPA’s passage is the culmination of a reaction-driven narrative arc.

Broadly speaking, digital privacy has enjoyed an interesting history, and for sake of the butterfly effect, the CCPA and prior privacy regulations could be traced back to the very roots of the Internet. Cutting to the chase, the appropriate timeline begins in 2012, when the Federal Trade Commission (FTC)³⁰ issued a report entitled *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers*.³¹ The FCC drew upon that report, as well as other administrative guidance, to develop and “adopt a framework that provides heightened protections for sensitive customer information” online.³²

As part of that framework, the FCC, in 2016, passed landmark rules “that force all internet providers . . . to obtain explicit consent from subscribers before selling data about online behavior to third-party marketers.”³³ Like both technology and legislation, the measure was reactive: “supporters of the new regulations, including Democrats,

29. Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C.L. REV. 587, 609 (1983).

30. In the FTC’s own words, “The FTC has been the chief federal agency on privacy policy and enforcement since the 1970s, when it began enforcing one of the first federal privacy laws – the Fair Credit Reporting Act. Since then, rapid changes in technology have raised new privacy challenges, but the FTC’s overall approach has been consistent: The agency uses law enforcement, policy initiatives, and consumer and business education to protect consumers’ personal information and ensure that they have the confidence to take advantage of the many benefits of the ever-changing marketplace.” *Protecting Consumer Privacy and Security*, FED. TRADE COMM., <https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy-security> [<https://perma.cc/FL25-H6KN>].

31. *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers*, FED. TRADE COMM’N, (2012), <https://www.ftc.gov/reports/protecting-consumer-privacy-era-rapid-change-recommendations-businesses-policymakers> [<https://perma.cc/U9T4-LBMY>].

32. FCC, FCC Docket 16-106, 31 FCC Rcd. 13911, PROTECTING THE PRIVACY OF CUSTOMERS OF BROADBAND AND OTHER TELECOMMUNICATIONS SERVICES, (Nov. 2, 2016).

33. April Glaser, *Internet Providers Now Need Permission To Share Or Sell Your Web Browsing Data*, VOX: RECODE (Oct. 28, 2016), <https://www.recode.net/2016/10/28/13442880/internet-providers-fcc-permission-share-web-browsing-data-opt-in> [<https://perma.cc/3U6F-XCPB>].

consumer groups and privacy advocates, fear that Internet service providers are assembling detailed files on their customers without their consent.”³⁴ Compelled by such fears, the

tough new Federal Communications Commission regulations . . . require[d] broadband companies to get explicit customer permission before using or sharing most of their personal information. The data include health information, website browsing history, app usage and the geographic information from mobile devices. The rules also tighten data security requirements.³⁵

The new regulations were far from a solution, as they did not in any way dictate how Internet platforms such as Facebook, Google, and Apple were to comport with the regulations.³⁶ Nevertheless, the regulations were a landmark step in Internet regulation—at least temporarily.

Shortly after a new Congress and Presidential administration took their respective oaths and began legislating, Sen. Jeff Flake and 23 Republican co-sponsors introduced a resolution under the Congressional Review Act (CRA)³⁷ to nullify the FCC’s regulations.³⁸ In a 50-48 vote, the measure passed the Senate, with lawmakers voting down party lines.³⁹ Within weeks, the House followed the Senate in another tight vote, 215 to 205, and the FCC regulations became null and void.⁴⁰

2. Concurrent, then Subsequent, State Measures

“[T]he CCPA is the brainchild of an Oakland real estate developer,

34. Jim Puzzanghera, *House Sends Trump Bill to Kill Landmark Broadband Privacy Regulations*, L.A. TIMES (Mar. 28, 2017), <https://www.latimes.com/business/la-fi-fcc-privacy-house-20170328-story.html> [<https://perma.cc/47GG-QXST>].

35. *Id.*

36. April Glaser, *Internet Providers Now Need Permission To Share Or Sell Your Web Browsing Data*, VOX: RECODE (Oct. 28, 2016), <https://www.recode.net/2016/10/28/13442880/internet-providers-fcc-permission-share-web-browsing-data-opt-in> [<https://perma.cc/3U6F-XCPB>].

37. The Congressional Review Act (CRA), passed in 1996 as part of the Small Business Regulatory Enforcement Fairness Act, endows Congress with the authority to invalidate rules established by federal agencies immediately following the issuance of the prospective rule, provided that both chambers of Congress agree by a simple majority. MAEVE P. CAREY, ALISSA M. DOLAN, & CHRISTOPHER M. DAVIS, *THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS* i (Nov. 17, 2016), <https://fas.org/sgp/crs/misc/R43992.pdf>. If the President were to veto such a measure, both Houses could override the veto as well. *See id.* at 1.

38. Jon Brodtkin, *Senate Votes To Let ISPs Sell Your Web Browsing History to Advertisers*, ARSTECHNICA (Mar. 23, 2017), <https://arstechnica.com/tech-policy/2017/03/senate-votes-to-let-isps-sell-your-web-browsing-history-to-advertisers/> [<https://perma.cc/2795-697Z>].

39. *Id.*

40. Chris Moran, *House Votes To Allow Internet Service Providers To Sell, Share Your Personal Information*, CONSUMER REPORTS (May 4, 2018), <https://www.consumerreports.org/consumerist/house-votes-to-allow-internet-service-providers-to-sell-share-your-personal-information/> [<https://perma.cc/6A27-HPW8>].

Alastair Mactaggart, who triggered this process by spending \$3.5 million of his own money to push for a ballot proposition on data privacy.”⁴¹ Mactaggart “started worrying about data privacy after talking with a Google engineer.”⁴² To assuage his fears, he worked to get an initiative on the ballot to govern data privacy.

Following a deliberative process, the ballot’s “language was set” and “the signatures were collected, but the initiative never made it to the ballot.”⁴³ Instead, the result of the initiative process was the CCPA—a watered down version of the ballot initiative. As *Wired* magazine described it, the bill was passed and signed “in a rush to defeat a stricter privacy-focused ballot initiative that had garnered more than 600,000 signatures from Californians.”⁴⁴

This is absolutely accurate. While the initiative was polling favorably among the California citizenry, lawmakers and the tech industry had significant “misgivings,” including thinking the bill was “unworkable.”⁴⁵ What’s more, California ballot initiatives are “intentionally inflexible” insofar as “the State Legislature cannot amend or repeal a passed proposition without voter input – unless said proposition specifically allows for legislative tampering . . . Thus, to amend or repeal a law passed via the initiative process, the voters have to pass another ballot proposition.”⁴⁶

In light of these opposing forces, Mactaggart and the legislature engaged in legislative horse-trading, bargaining for the law’s passage and guaranteeing its enactment in exchange for the promise to withdraw the initiative.⁴⁷ Ultimately, on June 28, 2018, Gov. Jerry Brown signed Bill No. 375, the California Consumer Privacy Act of 2018.⁴⁸

41. Eric J. Savitz, *California’s Data Privacy Law Will Create a New Headache for Tech Companies*, BARRON’S (June 29, 2018), <https://www.barrons.com/articles/california-consumer-privacy-act-facebook-google-51561154337> [<https://perma.cc/VS5J-53SM>].

42. Ben Adler, *California Passes Strict Internet Privacy Law With Implications For The Country*, NAT’L PUB. RADIO (June 29, 2018), <https://www.npr.org/2018/06/29/624336039/california-passes-strict-internet-privacy-law-with-implications-for-the-country> [<https://perma.cc/JYL9-5NPX>].

43. Jason Tashea, *California’s new data privacy law could change how companies do business in the Golden State*, AM. BAR J. (Jan. 1, 2019), http://www.abajournal.com/magazine/article/gdpr_california_data_privacy_law [<https://perma.cc/KQ2P-5VYD>].

44. Issie Lapowsky, *California Unanimously Passes History Privacy Bill*, WIRED (June 28, 2018), <https://www.wired.com/story/california-unanimously-passes-historic-privacy-bill/> [<https://perma.cc/L2JE-NLGL>].

45. Tashea, *supra* note 43.

46. Carson Bruno, *Is It Time To Reconsider California’s Initiative System?*, HOOVER INSTITUTION (Aug. 30, 2016), <https://www.hoover.org/research/it-time-reconsider-californias-initiative-system> [<https://perma.cc/R6C7-WDCB>]; *see also* Tashea, *supra* note 43 (“California ballot initiatives, if passed, are hard to amend.”).

47. *See* Adler, *supra* note 42.

48. Daisuke Wakabayashi, *California Passes Sweeping Law to Protect Online Privacy*, N.Y.

The law, effective January 1, 2020, purports to “give residents of the state more control over the information businesses collect on them and impose new penalties on businesses that don’t comply.”⁴⁹ Whether that is indeed true depends on the statute’s text as well as whether it can withstand constitutional scrutiny.

B. Without Further Ado ... Law

Upon its passing, CNN called the CCPA the “strictest online privacy law in the country”;⁵⁰ the *New York Times* referred to it as “sweeping”;⁵¹ and the Washington Post considered it “one of the toughest U.S. regulations.”⁵² Whether the law is worthy of such plaudits may well depend on its execution as well as whether the law is amended prior to its enforcement—a process which has already begun.⁵³ To decide who is right, we must interpret the law itself. “Thus, our inquiry begins with the statutory text[.]”⁵⁴

1. Governing Data Collection, Sales, and Consumer Rights

The CCPA states that if businesses collect information, they must “inform consumers as to the categories of personal information to be collected and the purposes for which the categories of personal information shall be used.”⁵⁵ An individual consumer can also “request that [the] business . . . disclose to that consumer the categories and specific pieces of personal information the business has collected.”⁵⁶

Once a business has collected the information, it can then sell that information for profit—this is the very profit engine that powers many Internet-based companies. But, the law reads, businesses “that sell[]

TIMES (June 28, 2019), <https://www.nytimes.com/2018/06/28/technology/california-online-privacy-law.html> [<https://perma.cc/8D5H-LA64>].

49. Lapowsky, *supra* note 44.

50. Heather Kelly, *California Passes Strictest Online Privacy Law In The Country*, CNN (June 29, 2018),

<http://money.cnn.com/2018/06/28/technology/california-consumer-privacy-act/index.html?iid=EL> [<https://perma.cc/MHL4-4VHP>].

51. Wakabayashi, *supra* note 48.

52. Tony Romm, *California Legislators Just Adopted Tough New Privacy Rules Targeting Facebook, Google and Other Tech Giants*, WASH. POST, (June 28, 2018 6:33 PM), <https://www.washingtonpost.com/technology/2018/06/28/california-lawmakers-just-adopted-tough-new-privacy-rules-targeting-facebook-google-other-tech-giants/>.

53. See Sam Adriance, *Amendments to California Privacy Law Expand Exemption for Consumer Financial Data*, NAT’L L. REV. (Sept. 6, 2018), <https://www.natlawreview.com/article/amendments-to-california-privacy-law-expand-exemption-consumer-financial-data> [<https://perma.cc/UBE2-8VTS>].

54. *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004).

55. CAL. CIV. CODE § 1798.100(b) (2019).

56. CIV. § 1798.100(a).

consumers' personal information to third parties shall provide notice to consumers."⁵⁷ As well, consumers may "direct a business that sells personal information about the consumer to third parties not to sell the consumer's personal information."⁵⁸

Beyond the collection and sale of information, the law stipulates consumers' rights and data brokers' responsibilities with respect to deleting data. Specifically, the law reads: "A consumer shall have the right to request that a business delete any personal information about the consumer which the business has collected from the consumer."⁵⁹ What's more, the law states that businesses must provide two methods for consumers to request the business stop collecting and/or selling her information or to delete her data altogether.⁶⁰

The CCPA doesn't just dictate what data brokers must do with respect to compiling and selling data; it also has a strict reporting and disclosure scheme that aim to keep users informed of their rights. As has been recognized in other realms of law, "[s]imply put, if a member does not know of his rights, he cannot exercise them."⁶¹ President Kennedy himself recognized that in the world of consumer rights, "if the consumer is unable to choose on an informed basis, then his dollar is wasted, his health and safety may be threatened, and the national interest suffers."⁶² Actualizing President Kennedy's beliefs, the CCPA requires that "[a] business that collects personal information about consumers shall disclose ... the consumer's rights to request the deletion of the consumer's personal information."⁶³

There are, importantly, a few exceptions to the rule. For example, these

57. CIV. § 1798.120(b).

58. CIV. § 1798.120(a).

59. CIV. § 1798.105(a).

60. CIV. § 1798.130(a)(1).

61. *Knight v. Int'l Longshoremen's Ass'n.*, 457 F.3d 331, 344–45 (3d Cir. 2006) (quoting *Thomas v. Grand Lodge of Int'l Ass'n of Machinists & Aerospace Workers*, 201 F.3d 517 (4th Cir. 2000)). *Cf. Miranda v. Arizona*, 384 U.S. 436, 469 (1966) ("This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system - that he is not in the presence of persons acting solely in his interest.").

62. President John F. Kennedy, Special Message to the Congress on Protecting the Consumer Interest (March 15, 1962), <https://www.presidency.ucsb.edu/documents/special-message-the-congress-protecting-the-consumer-interest> [<https://perma.cc/UX83-WJMA>]. Ironically, this speech, given on March 15, 1962, aimed to promote myriad aspects of consumer rights, including "[t]he right to be informed" and "[t]he right to choose." *Id.* So important was this speech that its anniversary is now celebrated as World Consumer Rights Day. *See World Consumer Rights Day*, CONSUMERS INT'L, <https://www.consumersinternational.org/what-we-do/world-consumer-rights-day/> [<https://perma.cc/P3XC-Q8AJ>].

63. CIV. § 1798.105(b).

provisions do not apply to medical information governed by the Health Insurance Portability and Accountability Act and analogous California regulations.⁶⁴ Additionally, “a business shall not sell the personal information of consumers if the business has actual knowledge that the consumer is less than 16 years of age.”⁶⁵ Lastly, the law clearly states that its provisions do not “restrict a business’s ability to [c]ooperate with law enforcement agencies concerning conduct or activity that the business, service provider, or third party reasonably and in good faith believes may violate federal, state, or local law.”⁶⁶

Lastly, the CCPA ensures that consumers are not barred from exercising their rights under arbitration clauses⁶⁷ and that they are not discriminated against for having so exercised their rights, including by denying or modifying pricing related to goods or services.⁶⁸

2. Violations & Enforcement Thereof

In President Kennedy’s speech, which has since “become known as the ‘consumer bill of rights,’” he “also discussed an equally important issue: how such rights would be enforced. After all, without enforcement, consumer rights are just empty promises.”⁶⁹ For that reason, California wanted to ensure the enforcement regime was robust. To do so, the legislature modeled the CCPA after its predecessor, the “California Online Privacy Protection Act (CalOPPA), a 2003 law which required website operators to ‘conspicuously’ post a privacy policy on their website if the site collects personally identifiable information.”⁷⁰

The CCPA empowers the California Attorney General to fine any company or person found to have violated the Act \$2,500 for each inadvertent violation and \$7,500 for each intentional violation.⁷¹ Note, however, that violating the law multiple times or in multiple ways as it pertains to one individual does not engender multiple individual

64. CIV. § 1798.145(c)(1)(A).

65. CIV. § 1798.120(c).

66. CIV. § 1798.145(a).

67. Any contractual provision “that purports to waive or limit in any way a consumer’s rights under this title, including, but not limited to, any right to a remedy or means of enforcement, shall be deemed contrary to public policy and shall be void and unenforceable.”

68. CIV. § 1798.125(a)(1) (“A business shall not discriminate against a consumer because the consumer exercised any of the consumer’s rights[.]”).

69. Anne Fleming, *Consumer Rights Are Worthless Without Enforcement*, THE CONVERSATION (Mar. 15, 2019), <http://theconversation.com/consumer-rights-are-worthless-without-enforcement-113244> [<https://perma.cc/XZH6-RF6K>].

70. Nicholas Schmidt, *Top 5 Operational Impacts of CCPA: Part 5 - Penalties and enforcement mechanisms*, INT’L ASS’N PRIV. PROFS. (Aug. 21, 2018), <https://iapp.org/news/a/top-5-operational-impacts-of-ccpa-part-5-penalties-and-enforcement-mechanisms/> [<https://perma.cc/K7G4-X7FP>].

71. CAL. CIV. CODE § 1798.155(b) (2019).

violations; rather, damages are accumulated on a per-user basis.⁷² Additionally, the violating entity may also be enjoined from certain business practices, which could be quite the stick.

The enforcement process begins with an enforcement notice from the California Attorney General's office demanding the incident be cured within 30 days.⁷³ In the event a cure is possible and, within 30 days, the business actually cures the noticed violation and provides the consumer an express written statement that the violations have been cured and that no further violations shall occur, no action for individual statutory damages or class-wide statutory damages may be initiated against the business.⁷⁴

3. Applicability

Despite the breadth of the CCPA, it does not in fact apply to all companies and corporations. Rather, it applies only to a business that:

- (A) Has annual gross revenues in excess of twenty-five million dollars[;]
- (B) Alone or in combination, annually buys, receives for the business's commercial purposes, sells, or shares for commercial purposes, alone or in combination, the personal information of 50,000 or more consumers, households, or devices[; or]
- (C) Derives 50 percent or more of its annual revenues from selling consumers' personal information.⁷⁵

A rough estimate put the number of companies affected by the law at approximately 507,280—just over half a million companies.⁷⁶

Just as the law does not apply to all California businesses, it doesn't apply to all persons located in California. Instead, it applies only to those permanently domiciled in California, i.e., those who are not persons simply passing through for business or leisure.⁷⁷ Notably, it also means that the law applies to Californians not currently in the state.⁷⁸

72. Schmidt, *supra* note 70.

73. CIV. § 1798.150(b).

74. CIV. § 1798.150(b).

75. CIV. § 1798.140(c).

76. Rita Heimes & Sam Pfeifle, *New California Privacy Law to Affect More Than Half a Million US Companies*, INT'L ASS'N PRIV. PROFS. (July 2, 2018), <https://iapp.org/news/a/new-california-privacy-law-to-affect-more-than-half-a-million-us-companies/> [<https://perma.cc/9F6G-9633>].

77. CAL. CIV. CODE § 1798.140(g) (2019) (defining a consumer as a "a natural person who is a California resident, as defined in Section 17014 of Title 18 of the California Code of Regulations"); *see also* CAL. CODE REGS. TIT. 18, § 17014 (a)(1) (defining a resident as "every individual who is in the State for other than a temporary or transitory purpose.").

78. CIV. § 1798.140(g) (defining a consumer as a "a natural person who is a California resident, as defined in Section 17014 of Title 18 of the California Code of Regulations."); *see also* CAL. CODE REGS. TIT. 18, § 17014 (a)(2) (defining a resident to include "every individual who is domiciled in the State who is outside the State for a temporary or transitory purpose").

4. Criticisms and Potential Weaknesses

While the Center for Humane Technology and Common Sense Media, two technology non-profits, gave the CCPA largely positive remarks,⁷⁹ not all privacy advocates are happy about the legislation. The ACLU of California disparaged the CCPA, claiming it “utterly fail[ed] to provide the privacy protections the public has demanded and deserves.”⁸⁰ So too have many large tech companies, though for an opposite reason: implementation cost.⁸¹

Reports on the CCPA’s shortcomings have pointed to a few specific loopholes.⁸² While consumers can bar the sale of information, companies may nevertheless “share” that consumers have opted out or, more importantly, if it “is necessary to perform a business purpose[.]”⁸³ Despite the aforementioned provision that businesses cannot discriminate based on a request to restrict or stop data collection, issues still exist. In practice, “the law allows companies to charge higher prices to consumers who opt out of having their data sold” by justifying the higher price as a business proposition.⁸⁴ Indeed, a company “could charge a higher fee for consumers who chose to limit sharing of their personal data . . . equal to the ‘value provided by the consumer’s data[.]’”⁸⁵

Additionally, the legislation states that a business is not “required to comply with a consumer’s request to delete the consumer’s personal information if it is necessary for the business or service provider to maintain the consumer’s personal information in order to” complete the transaction, detect security vulnerabilities, or use the information internally.⁸⁶ Another downfall of the CCPA is that consumers who want to avail themselves of their new rights must submit a “verifiable consumer request.” This means companies must take the time to confirm that the

79. Ina Fried, *What They’re Saying: The Mixed Reactions to California’s New Privacy Law*, AXIOS (June 29, 2018), <https://www.axios.com/mixed-reactions-to-california-privacy-law-d509c509-ebec-41da-b54b-ddcfe67b59e8.html> [<https://perma.cc/9XPR-GPZ5>].

80. *Id.*

81. Marc Vartabedian, Georgia Wells, & Lara O’Reilly, *Businesses Blast California’s New Data-Privacy Law*, WALL ST. J. (July 1, 2018, 7:00 AM), <https://www.wsj.com/articles/businesses-blast-californias-new-data-privacy-law-1530442800> [<https://perma.cc/EGF7-4RFR>].

82. Heather Kelly, *California Passes Strictest Online Privacy Law In The Country*, CNN (June 29, 2018, 12:03 PM), <http://money.cnn.com/2018/06/28/technology/california-consumer-privacy-act/index.html?iid=EL> [<https://perma.cc/Y4YT-9D7W>].

83. Civ. § 1798.140(t)(1)(C).

84. Kelly, *supra* note 82.

85. Tony Romm, *California Lawmakers Just Adopted Tough New Privacy Rules Targeting Facebook, Google and Other Tech Giants*, WASH. POST (June 28, 2018, 6:33 PM), https://www.washingtonpost.com/technology/2018/06/28/california-lawmakers-just-adopted-tough-new-privacy-rules-targeting-facebook-google-other-tech-giants/?utm_term=.27f3c750c46a [<https://perma.cc/2T52-WG5V>].

86. Civ. § 1798.105(d).

request came from the consumer, thereby slowing down the process by which a consumer's request can be acted upon.⁸⁷

Finally, notwithstanding the text reviewed above, there remains a question as to whom the law applies to. As the *Sacramento Bee* notes, “[w]hile the new privacy law allows consumers to opt out of the sale of personal information, many companies maintain they do not sell users’ personal information.”⁸⁸

Once the law is in place, businesses, consumers, and advocacy groups representing both sides will offer additional color to the law’s purported strengths and weaknesses. At its outset, however, the law has not been universally well-received.

5. Comparisons to GDPR

In addition to the aforementioned domestic context, California’s law comes on the heels of the European Union’s General Data Protection Regulation (GDPR).⁸⁹ News reports asserted that the law “is similar to Europe’s new GDPR protections,”⁹⁰ even arguing that the California law is, in some ways, stricter than the GDPR. As such, a brief comparison to the landmark European legislation is warranted. In its report on the new law, the International Association of Privacy Professionals compared and contrasted the two, stating that the California Law:

- [1] Prescribes disclosures, communication channels (including toll-free phone numbers) and other concrete measures that are not required to comply with the EU GDPR.
- [2] Contains a broader definition of ‘personal data’ and also covers information pertaining to households and devices.
- [3] Establishes broad rights for California residents to direct deletion of data, with differing exceptions than those available under GDPR.
- [4] Establishes broad rights to access personal data without certain exceptions available under GDPR (e.g., disclosures that would implicate the privacy interests of third parties).
- [5] Imposes more rigid restrictions on data sharing for commercial

87. Civ. §§ 1798.100(d), 105(c).

88. Bryan Anderson, *California's New Consumer Privacy Law Isn't As Sweeping As You Might Think*, SACRAMENTO BEE (July 5, 2018, 3:49 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article214064999.html>.

89. Parliament and Council Regulation 2016/679 of April 27, 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1 [hereinafter GDPR].

90. Colin Lechler, *California Just Passed One Of The Toughest Data Privacy Laws In The Country*, THE VERGE (June 28, 2018, 3:46 PM), <https://www.theverge.com/2018/6/28/17509720/california-consumer-privacy-act-legislation-law-vote> [https://perma.cc/5NA5-8BZW].

purposes.⁹¹

Others, however, have argued that the “California law is not as expansive” as the GDPR.⁹² This argument partly rests on the GDPR’s extraterritorial application. Article 3(2) of the GDPR reads:

This regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:

- a. The offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or
- b. The monitoring of their behavior as far as their behavior takes place within the Union.⁹³

As a Deloitte report summarizes, “European data protection law will become applicable outside the borders of the European Union.”⁹⁴

In another substantial example, the GDPR distinguishes between data controllers—“the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data”—and processors—“a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.”⁹⁵ Thereafter, the law places different responsibilities on controllers and processors. The CCPA, however, does not distinguish between the two operators.

In another difference to the CCPA, GDPR Article 33 holds:

In the case of a personal data breach, the controller shall without undue delay and, where feasible, not later than 72 hours after having become aware of it, notify the personal data breach to the supervisory authority competent . . . unless the personal data breach is unlikely to result in a risk to the rights and freedoms of natural persons.⁹⁶

Controllers that fail to notify the supervisory authority of a personal data breach within 72 hours must include a reason for the delay upon the notice.⁹⁷

The GDPR also requires each member state set up independent

91. Lothar Determann, *Broad Data and Business Regulation, Applicable Worldwide*, INT’L ASS’N PRIV. PROFS. (JULY 2, 2018), <https://iapp.org/news/a/analysis-the-california-consumer-privacy-act-of-2018/> [https://perma.cc/233D-8KDN].

92. Daisuke Wakabayashi, *California Passes Sweeping Law to Protect Online Privacy*, N.Y. TIMES (June 28, 2019), <https://www.nytimes.com/2018/06/28/technology/california-online-privacy-law.html> [https://perma.cc/L6Y4-8M2K].

93. GDPR, *supra* note 89, art. 3(2).

94. Alexander Garrelfs, *GDPR Top Ten: #3 Extraterritorial Applicability of the GDPR*, DELOITTE (Apr. 3, 2017), <https://www2.deloitte.com/ch/en/pages/risk/articles/gdpr-extraterritorial-applicability.html> [https://perma.cc/7VFN-R8W2].

95. GDPR, *supra* note 89, arts. 4(7), 4(8).

96. GDPR, *supra* note 89, art. 33.

97. Garrelfs, *supra* note 94.

supervisory authorities to oversee the implementation and enforcement of the law.⁹⁸ Further, the GDPR also contemplates specific scenarios not discussed in the CCPA, including how to deal with national identification numbers, religious institutions, or scientific research.⁹⁹

The enforcement regimes of the GDPR and CCPA also differ. Because the GDPR necessarily starts with a different place—multiple sovereigns in the European Union versus California as a lone actor—the GDPR charges each member state to appoint its own Data Protection Authority (DPA). A DPA is an “independent public authorit[y] that supervise[s], through investigative and corrective powers, the application of the data protection law.”¹⁰⁰ As the *Financial Times* notes, “[i]n cross-border cases, national DPAs will recommend enforcement actions to the EDPB for a ruling. If the company were to dispute the EDPB ruling, the case would be fought out in the member country’s court system.”¹⁰¹ Thus, no one state has final, legally-binding authority over GDPR enforcement. Even the fine structures are different—GDPR violations could cost noncompliant companies four percent of their global profits,¹⁰² whereas CCPA violations max out at \$7,500 per intentional violation and \$2,500 per unintentional violation (if not remedied in 30 days).¹⁰³

In sum, CCPA and GDPR are premised on the same goal: privacy, without too severe a cost on business. To achieve that singular aim, they often overlap, but, when the entirety of each piece of legislation is considered, they are definitively unique.¹⁰⁴

IV. THE CCPA AND THE DORMANT COMMERCE CLAUSE—IS THE LAW CONSTITUTIONAL?

As demonstrated above, the merits of the CCPA are certainly up for debate. But one question looms large: is it constitutional? Specifically, is it consistent with the Dormant Commerce Clause doctrine? To determine this analysis, this Part first reviews Dormant Commerce Clause jurisprudence. Thereafter, this Part applies the appropriate tests to the

98. See generally GDPR, *supra* note 89, ch. 6.

99. See generally GDPR, *supra* note 89, ch. 9.

100. *What are Data Protection Authorities (DPAs)?*, EUROPEAN COMM’N, https://ec.europa.eu/info/law/law-topic/data-protection/reform/what-are-data-protection-authorities-dpas_en [<https://perma.cc/RW4B-9L9V>].

101. *The Test for GDPR Will Be Its Enforcement*, FIN. TIMES (May 24, 2018), <https://www.ft.com/content/f9a273a6-5e92-11e8-ad91-e01af256df68> [<https://perma.cc/48C5-D6AK>].

102. GDPR, *supra* note 89, art. 83.

103. CAL. CIV. CODE § 1798.155(b).

104. For a more exhaustive comparison, see ALICE MARINI ET AL., *COMPARING PRIVACY LAWS: GDPR V. CCPA*, FUTURE OF PRIVACY FORUM (2018), https://fpf.org/wp-content/uploads/2018/11/GDPR_CCPA_Comparison-Guide.pdf [<https://perma.cc/7L3B-4UVP>].

CCPA, including comparisons to Internet and unrelated regulations also challenged under the Dormant Commerce Clause, to conclude that the CCPA will survive constitutional scrutiny under the Dormant Commerce Clause.

A. First Principles of the Dormant Commerce Clause

The Commerce Clause endows Congress with the authority “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”¹⁰⁵ The proper scope of the Clause, and the legislation Congress may pass thereunder, has been and continues to be debated in the legal community.¹⁰⁶ Notwithstanding this thorny legal issue, the Clause’s function does not stop at empowering Congress to regulate inter- and intrastate commerce. “Though phrased as a grant of regulatory power to Congress, the [Commerce] Clause has long been understood to have a ‘negative’ aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.”¹⁰⁷ In other words, the Negative, or Dormant, Commerce Clause “is a restriction on State power that is not explicitly articulated in the Constitution but that has been derived as a necessary corollary of a power specifically conferred on Congress by the Constitution.”¹⁰⁸

This aspect of Commerce Clause doctrine, which in this article is referred to as the Dormant Commerce Clause, can be traced back to *Gibbons v. Ogden* and Chief Justice John Marshall.¹⁰⁹ There, the Court held that the Commerce Clause “invalidate[s] local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State.”¹¹⁰ Said otherwise, the Clause bars laws that “erect barriers against interstate trade.”¹¹¹

B. Dormant Commerce Clause Inquiries Step-By-Step

Evaluating the CCPA’s constitutionality under the Dormant Commerce Clause requires multiple steps:

105. U.S. CONST. art. I, § 8, cl. 3.

106. See, e.g., Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

107. *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 98 (1994).

108. *Maryland State Comptroller of Treasury v. Wynne*, 431 Md. 147, 161 (2013), *aff’d sub nom. Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015).

109. See generally 22 U.S. 1 (1824).

110. *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 390 (1994).

111. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980).

Courts evaluating dormant Commerce Clause claims conduct two inquiries. First, the court “determine[s] whether the statute directly burdens interstate commerce or discriminates against out-of-state interests,” in which case the law is “virtually *per se* invalid and the [c]ourt applies the strictest scrutiny.” “A statutory scheme can discriminate against out-of-state interests in three different ways: (a) facially, (b) purposefully, or (c) in practical effect.” Additionally, a “statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority.” But if the law “regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” The party challenging the statute “bears the burden of proof in establishing the excessive burden in relation to the local benefits.”¹¹²

This section conducts these inquiries and ultimately concludes that the CCPA will stand up to constitutional scrutiny under the Dormant Commerce Clause.

1. The CCPA Does Not Discriminate Against Out-of-State Interests

As previously stated, a court hearing a Dormant Commerce Clause challenge to a state regulation or law must first “determine ‘whether the statute directly burdens interstate commerce or discriminates against out-of-state interests.’”¹¹³ In this context, “‘discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”¹¹⁴ Summing up this aspect of Dormant Commerce Clause doctrine, the Supreme Court has stated:

The opinions of the Court through the years have reflected an alertness to the evils of “economic isolation” and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.¹¹⁵

State regulations with dual fee structures are obvious examples of discriminatory conduct. For example, “[i]n *Chemical Waste [Management, Inc. v. Hunt]*, [the Supreme Court] easily found Alabama’s surcharge on hazardous waste from other States to be facially

112. *Ades v. Omni Hotels Mgmt. Corp.*, 46 F. Supp. 3d 999, 1011–12 (C.D. Cal. 2014) (footnote and internal citations omitted).

113. *LensCrafters, Inc. v. Robinson*, 403 F.3d 798, 802 (6th Cir. 2005) (quoting *E. Ky. Res. v. Fiscal Court of Magoffin County, Ky.*, 127 F.3d 532, 540 (6th Cir. 1997)).

114. *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, 511 U.S. 93, 99 (1994).

115. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623–24 (1978).

discriminatory because it imposed a higher fee on the disposal of out-of-state waste than on the disposal of identical in-state waste.”¹¹⁶ Indeed, bifurcated fee structures distinguishing in-state and out-of-state services or products are the frequent target of meritorious Dormant Commerce Clause causes of action.¹¹⁷ So too are export embargoes¹¹⁸ and local processing laws.¹¹⁹

Multiple fee structures need not take the form of a specifically higher fee in order to violate the Dormant Commerce Clause; they may also come as a tax benefit only available to in-state persons or businesses.¹²⁰ In *New Energy Co. of Indiana v. Limbach*, the Supreme Court struck down “a provision that awards a tax credit against the Ohio motor vehicle fuel sales tax for each gallon of ethanol sold (as a component of gasohol) by fuel dealers, but only if the ethanol is produced in Ohio[.]”¹²¹

Arguably, the most appropriate case within Dormant Commerce

116. *Oregon Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1994) (citing *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992)).

117. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 386 (1994); *BNSF Ry. Co. v. California State Bd. of Equalization*, No. 16-CV-04311-RS, 2016 WL 6393507, at *3 (N.D. Cal. Oct. 28, 2016), *aff'd sub nom. BNSF Ry. Co. v. California Dep't of Tax & Fee Admin.*, 904 F.3d 755 (9th Cir. 2018).

118. *E.g., Granholm v. Heald*, 544 U.S. 460, 474 (2005) (striking down Michigan statute that “requires all out-of-state wine, but not all in-state wine, to pass through an in-state wholesaler and retailer before reaching consumers” and New York statute that requires out-of-state wineries “to establish a distribution operation in New York in order to gain the privilege of direct shipment.”); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (striking down New Hampshire statute disallowing export of electricity generated within the state).

119. *E.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970) (striking down Arizona Act that requires state-grown cantaloupes be packed within the state, stating that “the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere.”); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984) (plurality opinion) (striking down Alaska law requiring timber taken from state land be processed in Alaska before export).

120. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 578–79 (1997) (“That the tax discrimination comes in the form of a deprivation of a generally available tax benefit, rather than a specific penalty on the activity itself, is of no moment.”).

121. *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 271 (1988). The latter portion of the provision at issue in *Limbach* was also an important line of argument for the Court. In that case, the Ohio credit would not only be applied for ethanol produced “in a State that grants similar tax advantages to ethanol produced in Ohio.” *Id.* The state argued “that the availability of the tax credit to some out-of-state manufacturers (those in States that give tax advantages to Ohio-produced ethanol) shows that the Ohio provision, far from discriminating against interstate commerce, is likely to promote it, by encouraging other States to enact similar tax advantages that will spur the interstate sale of ethanol.” *Id.* at 274. This idea, one of “reciprocity,” has long been rejected. In a similar case, the Court unanimously held that a state “may not use the threat of economic isolation as a weapon to force sister States to enter into even a desirable reciprocity agreement.” *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 379 (1976). Indeed, the Court has warned that reciprocity provisions “risk[] generating the trade rivalries and animosities, the alliances and exclusivity, that the Constitution and, in particular, the Commerce Clause were designed to avoid.” *Granholm v. Heald*, 544 U.S. 460, 473 (2005). While the idea of reciprocity is not a feature of the CCPA, and thus inapposite to potential arguments as to its constitutionality, it is worth explicating at the outset for the sake of completeness.

Clause jurisprudence is *IMS Health Inc. v. Mills*.¹²² This case adjudicated the potentially discriminatory effects of state data privacy laws.¹²³ The factual predicate of that case is as follows:

In Maine and elsewhere, each time a prescription from a physician or other licensed prescriber is given to a pharmacy, the pharmacy obtains a number of facts that identify the prescriber. Data put together from multiple transactions involving the same prescriber reveal certain patterns and preferences, including her prescribing history, her choice of particular brand-name drugs versus their generic equivalents, and the likelihood she will adopt new brand-name drugs.¹²⁴

The statute at issue in *Mills* “allow[ed] prescribers licensed in Maine to choose not to make . . . identifying information available for use in marketing prescription drugs to [the prescriber].”¹²⁵ Chief Judge Lynch wrote for a unanimous panel that the law, despite only permitting in-state prescribers from opting out of this data collection,

does not discriminate against out-of-state entities in favor of in-state competitors[.] Maine's law does not risk imposing regulatory obligations inconsistent with those of other states. No other states have erected competing regulations, much less opposing regulations requiring the transfer of Maine prescribers' data. This is simply not an example of a state engaged in economic protectionism. . . . Maine has not shifted the costs of regulation to other states whose voters cannot affect its legislative choices, nor does the Maine law “hand local businesses a victory they could not obtain through the political process.” Maine’s political processes produced this statute, and Maine voters can, if they disagree, reverse this policy.¹²⁶

Though the *Mills* decision has been vacated on other grounds, its reasoning still holds and offers a blueprint for a court adjudicating the CCPA’s constitutionality under the Dormant Commerce Clause. As was the case for the Maine statute, California’s CCPA does not favor its own businesses at the cost of the other forty-nine states. If anything, California businesses are at a disadvantage vis-à-vis their American (and international) competition given the costs required to comply with the law.¹²⁷ Again, like Maine’s statute, California faces no state or federal competition in data governance, as other states and Congress have thus

122. *IMS Health Inc. v. Mills*, 616 F.3d 7 (1st Cir. 2010), cert. granted, judgment vacated on other grounds sub nom. *IMS Health, Inc. v. Schneider*, 564 U.S. 1051 (2011), and abrogated on other grounds by *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

123. See generally *id.*

124. *Id.* at 12.

125. *Id.*

126. *Id.* at 28-29

127. See *infra* Part III.B.6.a.

far failed to act.¹²⁸ And, finally, like Maine's statute, the CCPA was enacted via the legislative process and can be tinkered with or reversed at the will of the people.¹²⁹

2. Even If the CCPA Were Incorrectly Deemed Discriminatory, It Was Enacted To Serve a Legitimate Legislative Purpose

Even if a court were to find the CCPA discriminatory, discrimination is not a *per se* a death knell under Dormant Commerce Clause jurisprudence. Rather, a law that may otherwise be considered discriminatory will be upheld if it was not enacted as a discriminatory and protectionist measure. The law must instead “serve a legitimate local purpose, and [said] purpose must be one that cannot be served as well by available nondiscriminatory means.”¹³⁰

The quintessential case determining a discriminatory but legitimate rule is the Supreme Court's 1926 decision in *Oregon-Washington Railroad & Navigation Company v. Washington* (“*Oregon-Washington*”).¹³¹ In that case, the plaintiff challenged a Washington regulation that barred shipments of alfalfa from neighboring states whose fields had been infested by “an injurious insect popularly called the alfalfa weevil, and scientifically known as the *phythonomus posticus*, which fed upon the leaves and foliage of the alfalfa plant, to the great damage of the crop[.]”¹³² While the statute discriminated against neighboring states, the Washington Director of Agriculture investigated the “areas where such pests existed” and determined that those areas would be the ones from which alfalfa could not be imported, thus predicating the statute.¹³³ The Court upheld the regulation in large part due to this investigation, stating that the Dormant Commerce Clause did not invalidate the law because:

the investigation required by the Washington law and the investigation actually made into the existence of this pest and its geographical location ma[de] the law a real quarantine law and not a mere inhibition against importation of alfalfa from a large part of the country without regard to the condition which might make its importation dangerous.¹³⁴

The Court's reasoning in *Oregon-Washington* has been reaffirmed in a wide range of fields of legislation and regulation; indeed, the Court made clear that such laws can be “directed toward any number of

128. *See infra* note 153.

129. *See supra* Part III.A.

130. *Maine v. Taylor*, 477 U.S. 131, 140 (1986).

131. 270 U.S. 87 (1926).

132. *Oregon-Washington R. & Nav. Co. v. Washington*, 270 U.S. 87, 90 (1926).

133. *Id.* at 90–91.

134. *Id.* at 96.

legitimate goals unrelated to protectionism.”¹³⁵ Some of these regulations have been a bit more mundane. For example, the Supreme Court upheld “Maine’s ban on the importation of live baitfish” because the ban was enacted to guard against “the effect that baitfish parasites and nonnative species could have on Maine’s fisheries.”¹³⁶ The Ninth Circuit upheld “California’s regulatory experiment seeking to decrease GHG emissions and create a market that recognizes the harmful costs of products with a high carbon intensity,” despite the fact that the law used regional classifications in its scheme.¹³⁷ Finally, the Supreme Court of Kentucky upheld a regulation that barred owners of newly claimed thoroughbred horses in Kentucky from racing those horses at out-of-state tracks for a short time period but permitted them to race the horses at particular tracks within the state because such a rule was “necessary to [the] classification of thoroughbreds for competitive racing,” which was itself a requirement for the heavily regulated horse-racing industry in Kentucky.¹³⁸

None can deny that privacy is a legitimate purpose in the same vein as environmental safety and food safety.¹³⁹ The CCPA realizes that right in a digital world. It should therefore still be upheld as non-violative of the Dormant Commerce Clause even if it was determined to have an incidentally discriminatory impact on other states.

3. The CCPA Does Not Dictate Extraterritorial Conduct¹⁴⁰

The Supreme Court has also held that a law which effectively

135. *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority*, 550 U.S. 330, 343 (2007).

136. *Maine v. Taylor*, 477 U.S. 131, 151, 148 (1986).

137. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1097 (9th Cir. 2013).

138. *Jamgotchian v. Kentucky Horse Racing Comm’n*, 488 S.W.3d 594, 619 (Ky. 2016).

139. *Cf. Roe v. Wade*, 410 U.S. 113, 152 (1973), *holding modified on other grounds by* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (“The Constitution does not explicitly mention any right of privacy. In a line of decisions, however . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.”). This author would also argue that privacy is far more important than the integrity of claiming races in Kentucky but will spare the reader from wading into those waters here.

140. While most courts view the extraterritorial inquiry as wholly separate from that of the discrimination, the distinction is likely made for sake of clarity rather than legal requirement.

Nowhere did the Supreme Court suggest that the two lines of cases are mutually exclusive; indeed, so-called ‘discrimination’ cases . . . rely heavily on so-called ‘extraterritorial effect’ cases . . . and vice versa. [B]oth types of cases may share the common element of “state laws that are facially neutral but have the effect of eliminating a competitive advantage possessed by out-of-state firms, [thus] trigger [ing] heightened scrutiny.” Thus, while it may sometimes be useful to consider the two types of cases separately for ease of analysis, they are actually just two forms of discrimination, with significant overlap.

Cloverland-Green Spring Dairies, Inc. v. Pennsylvania Milk Mktg. Bd., 462 F.3d 249, 262 n.15 (3rd Cir. 2006) (internal citations omitted); *see also* *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) (“there is no clear line separating the category of state regulation that is

“regulates out-of-state transactions” violates the Dormant Commerce Clause.¹⁴¹ As the Court has explained, “[t]he limits on a State’s power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, ‘any attempt “directly” to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State’s power.’”¹⁴²

In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, the Supreme Court adjudicated a statute that required a distillery that posted specific prices in New York to wait up to a month before modifying its pricing scheme anywhere else in the United States.¹⁴³ “Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce,” the Court concluded.¹⁴⁴ Under this reasoning, the Court has also invalidated rules that “control train operations beyond the boundaries of the state exacting it because of the necessity of breaking up and reassembling long trains at the nearest terminal points before entering and after leaving the regulating state.”¹⁴⁵

In *Healy v. Beer Institute*, the Supreme Court explained the extraterritoriality inquiries under the Dormant Commerce Clause:

The principles guiding [an extraterritoriality] assessment, principles made clear in *Brown-Forman* and in the cases upon which it relied, reflect the Constitution’s special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States with their respective spheres. Taken together, our cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following propositions: First, the “Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State” Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself,

virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach.”). This article also adopts this solely as a framing mechanism rather than suggesting the two tests are wholly inapposite to one another.

141. *Brown-Forman Distillers Corp.*, 476 U.S. 573 at 582.

142. *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977)).

143. 476 U.S. at 582.

144. *Id.*

145. *S. Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 775 (1945).

but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.¹⁴⁶

The CCPA misses the mark for all three inquiries. This section details what each of these standards requires and why the CCPA fails to aggravate the Clause under the inverse standards.

a. The CCPA Neither Applies To Nor Controls Commerce Wholly Outside California's Jurisdiction

The first inquiry under the extraterritorial examination is whether a state statute “directly regulates transactions which take place across state lines[.]”¹⁴⁷ The quintessential case explicating this legal principle is *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*¹⁴⁸ In that case, the Supreme Court struck down a provision in the New York Alcoholic Beverage Control Law “that required liquor distillers and producers doing business in New York to affirm that their prices were no higher than the lowest price at which the same product would be sold in any other state during the month.”¹⁴⁹ The statute also made it illegal for a distiller to lower its prices in other states without *ex anti* permission from said states.¹⁵⁰ The Court determined that New York was unconstitutionally regulating commerce outside of the state; as the justices wrote, “[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce.”¹⁵¹ The CCPA, on the other hand, does no such thing.

The CCPA’s privacy regime binds *only* California businesses. Specifically, the law defines a “business” to which the law applies as:

A sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity that is organized or operated for the profit or financial benefit of its shareholders or other owners, that collects consumers’ personal information, or on the behalf of which such information is collected and that alone, or jointly with others, determines the purposes and means of the processing of consumers’ personal information, *that does business in the State of California*[.]¹⁵²

146. 491 U.S. 324, 336–37 (1989) (plurality opinion) (citations omitted) (modifications in original).

147. *Edgar*, 457 U.S. at 641.

148. 476 U.S. 573 (1986).

149. *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 311 (1st Cir. 2005) (citing *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986)).

150. *Brown-Forman Distillers Corp.*, 476 U.S. at 579.

151. *Id.* at 582.

152. CAL. CIV. CODE § 1798.140(c)(1) (emphasis added).

Therefore, it cannot be said that any such information collection and sale occurs “wholly outside the state’s borders[.]”¹⁵³ Unlike the liquor law at issue in *Brown-Forman*, the CCPA does not affect the actions of businesses operating in other states. It does “not insist that producers or consumers in other States surrender whatever competitive advantages they may possess.”¹⁵⁴ If anything, the CCPA disadvantages California vis-à-vis other states and surrenders an in-state business’ competitive advantage. As such, it cannot be the case that the CCPA is deemed to either regulate or control conduct outside of the Golden State.

b. These Conclusions Remain Intact Even If Other States Enact Similar Legislation

The final instruction of the Dormant Commerce Clause is to ensure that the two prior conclusions remain intact should any other state enact similar legislation.¹⁵⁵ This is animated by the general principle that “the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.”¹⁵⁶ As of September 2019, “[f]ive bills based on the CCPA [we]re still pending in states where the legislature remains in session—one each in Massachusetts, Pennsylvania, and Rhode Island, and two in New York—and it is possible that one of these could gain legislative traction.”¹⁵⁷ Still, if any or all of these laws were to be enacted, the conclusions in the previous section would remain intact.

If other states enact their own versions of the CCPA, then entities that do business in such states will be subject to that specific law. Companies can locate consumers via IP addresses; this information can act as a gating function such that IP addresses from one state will initiate one set of disclosures, whereas an IP address stemming from another state will initiate another. Alternatively, companies can easily prompt a user to

153. *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982).

154. *Brown-Forman Distillers Corp.*, 476 U.S. at 580.

155. *See, e.g., Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989).

156. *Id.* at 336-37 (citing *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88-89 (1987)).

157. Jonathan G. Cederbaum, D. Reed Foreman Jr., & Lydia Lichlyter, *While Congressional Action Stalls, States Continue To Advance Privacy Legislation*, WILMERHALE PRIVACY AND CYBERSECURITY LAW BLOG (July 1, 2019), <https://www.wilmerhale.com/en/insights/blogs/WilmerHale-Privacy-and-Cybersecurity-Law/20190701-while-congressional-action-stalls-states-continue-to-advance-privacy-legislation> [https://perma.cc/BV67-GTUX]. These five do not include other state legislative efforts that have failed in Washington, Texas, Illinois, Louisiana, and Nevada based at least in part on the CCPA. *See* Jonathan G. Cederbaum, D. Reed Foreman Jr., & Lydia Lichlyter, *Current Status of State Privacy Legislation – A WilmerHale Update*, WILMERHALE PRIVACY AND CYBERSECURITY LAW BLOG (Apr. 30, 2019), <https://www.wilmerhale.com/en/insights/blogs/WilmerHale-Privacy-and-Cybersecurity-Law/20190430-current-status-of-state-privacy-legislation-a-wilmerhale-update> [https://perma.cc/25NA-TGGP].

identify the state from which he or she is browsing, which would trigger the requisite protections. In short, this is viable from a technological standpoint.

The genuine patchwork of laws currently governing data breaches demonstrates that the system can survive multiple state regulations. These laws govern the types of data that, if improperly disclosed or breached, trigger user notifications, and govern which types of businesses are subject to these laws. At present, there exists no federal data breach notification law. As of 2018 “all 50 states (plus D.C., Guam, Puerto Rico, and the Virgin Islands) have passed data breach notification laws.”¹⁵⁸ “While most state data breach notification statutes contain similar components, there are important differences”¹⁵⁹ in each. Social security numbers are ubiquitously recognized, but, for example, only Colorado requires user notification if a student identification card number is breached.¹⁶⁰ That these different, sometimes conflicting, regimes continue to operate successfully is proof that the Internet can survive with different state laws governing it and those who use it. Therefore, even if multiple states enact similar CCPA legislation, the numerous pieces of legislation will not interact in such a way that violates the Dormant Commerce Clause.

4. The CCPA Does Not Conflict With Otherwise Uniform Laws

Statutes or laws may be invalidated “under the [D]ormant Commerce Clause that appear to have been genuinely nondiscriminatory, in the sense that they did not impose disparate treatment on similarly situated in-state and out-of-state interests, where such laws undermined a compelling need for national uniformity in regulation.”¹⁶¹ This is often the case when states enact additional, albeit modest, regulations to industries already highly regulated by the vast majority of states or by the federal government;¹⁶² such laws, while “enacted to advance laudable local

158. Petrina McDaniel & Keshia Lipscomb, *Data Breach Laws on the Books in Every State; Federal Data Breach Law Hangs in the Balance*, SQUIRE PATTON BOGGS: SECURITY & PRIVACY // BYTES BLOG (Apr. 30, 2018), <https://www.securityprivacybytes.com/2018/04/data-breach-laws-on-the-books-in-every-state-federal-data-breach-law-hangs-in-the-balance/> [<https://perma.cc/TZC2-P782>].

159. Thomas Chisena et al., *State Data Breach Notification Laws*, JDSUPRA (July 2, 2019), <https://www.jdsupra.com/legalnews/state-data-breach-notification-laws-64843/> [<https://perma.cc/95CD-PUJH>].

160. See COLO. REV. STAT. § 6-1-716 (1)(G).

161. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 n.12 (1997); see also *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88 (1987) (“This Court’s recent Commerce Clause cases also have invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations”).

162. See *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (conflict in state laws governing truck mud flaps); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945) (conflict in state

purposes” nevertheless “pose undue burdens on interstate commerce” by creating conflict among the states.¹⁶³ To be sure, this rule, too, is not absolute, as an advancement “may be so compelling that the innovating State need not be the one to give way.”¹⁶⁴ For better or for worse, that simply is not the case with the CCPA.

In the Supreme Court’s first major decision pertaining to the Internet, *Reno v. American Civil Liberties Union*, the Court stated: “The Internet is an international network of interconnected computers.”¹⁶⁵ Despite its interconnectedness, federal regulations have been anything but unified. As Nuala O’Connor recently wrote in a report published by the Council on Foreign Relations, “[r]ather than a comprehensive legal protection for personal data, the United States has only a patchwork of sector-specific laws that fail to adequately protect data.”¹⁶⁶ The *New York Times* likewise compared the disjointed regulatory schema to a “patchwork quilt” and “a macramé arrangement.”¹⁶⁷

The federal government and other states have explored enacting CCPA-like legislation. The same animating principles that guided Allistair MacTaggart’s push for his ballot initiative, and the California legislature’s enactment of the CCPA, have found their way into hearings and bills across the country.¹⁶⁸ Because bills like the CCPA are on the horizon across the country, courts need not concern themselves with this aspect of Dormant Commerce Clause doctrine.

5. Burdens Are Not Excessive in Relation to Benefits

Even if a state law does not discriminate against out-of-state actors, it may nevertheless be struck down under the Dormant Commerce Clause.¹⁶⁹ The Court has repeatedly reasoned that the Clause demands courts strike down laws that burden interstate commerce far more than they benefit the state’s population.¹⁷⁰ This standard was most explicitly articulated in the Supreme Court’s *Pike v. Bruce Church, Inc.* decision

laws regarding train lengths).

163. *Browning-Ferris, Inc. v. Anne Arundel Cty.*, Maryland, 438 A.2d 269, 276 (Md. 1981).

164. *Bibb*, 359 U.S. at 530.

165. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849 (1997).

166. Nuala O’Connor, *Reforming the U.S. Approach to Data Protection and Privacy*, COUNCIL ON FOREIGN RELATIONS (Jan. 30, 2018), <https://www.cfr.org/report/reforming-us-approach-data-protection>.

167. Natasha Singer, *An American Quilt of Privacy Laws, Incomplete*, N.Y. TIMES (Mar. 30, 2012), <https://www.nytimes.com/2013/03/31/technology/in-privacy-laws-an-incomplete-american-quilt.html>

168. See *supra* Part III.B.3.b.

169. See *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 353 (2008) (“Concluding that a state law does not amount to forbidden discrimination against interstate commerce is not the death knell of all dormant Commerce Clause challenges.”).

170. See *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960).

where the Court presented what has become known as the *Pike* test:¹⁷¹

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.¹⁷²

Therefore, whether the CCPA will stand turns both on a court's interpretation of the CCPA's intent as well as the extent to which it burdens commerce among states.

a. Factors Favoring Upholding the CCPA

Within the *Pike* balancing exercise, there is no clear-cut answer. However, two categories of factors, doctrinaire factors and historical precedent, favor upholding the CCPA in a *Pike* balancing test.

i. Doctrinaire Factors

As the Supreme Court has previously said with respect to the balancing of burdens and benefits of non-discriminatory state laws, “[w]e deal not with absolutes but with questions of degree.”¹⁷³ Several important factors militate toward a finding that the CCPA is in fact constitutional.

First, the CCPA meets the rational basis standard. When performing a *Pike* analysis, “a court should focus ultimately on the regulatory purposes identified by the lawmakers and on the evidence before or available to them that might have supported their judgment.”¹⁷⁴ Thus, the court ought to return to a rational basis examination, namely “whether the lawmakers could rationally have believed that the challenged regulation would foster those purposes.”¹⁷⁵

The court analyzed regulations through a rational basis test in *Raymond Motor Transp., Inc. v. Rice*.¹⁷⁶ In that case, the Court struck down a Wisconsin regulation “governing the length and configuration of

171. See, e.g., *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007) (referring to it as the “*Pike* test”); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (same). It has also been referred to as the “*Pike* balancing test.” *Oregon Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 100 (1994); see also *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 353 (2008) (referring to “the rule” in *Pike*); *Gov't Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1273 (7th Cir. 1992) (referring to *Pike* as the “standard”).

172. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

173. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 530 (1959).

174. *Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662, 680 (1981) (Brennan, J., concurring) (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981)).

175. *Id.*

176. 434 U.S. 429 (1978).

trucks.”¹⁷⁷ Specifically:

State law allow[ed] 65-foot doubles to be operated on interstate highways and access roads in Michigan, Illinois, Minnesota, and all of the States west from Minnesota to Washington through which Interstate Highways 90 and 94 run . . . Wisconsin law, however, generally does not allow trucks longer than 55 feet to be operated on highways within that State.¹⁷⁸

The Court ultimately found that Wisconsin’s unique restriction could not be supported even on a rational basis. This was largely because “[t]he State produced no evidence nor has it made any suggestion in this Court, that 65-foot doubles are less safe than 55-foot singles because of their extra trailer, as distinguished from their extra length.”¹⁷⁹ The Court took specific notice of the fact “that 65 foot twin trailers have as good a safety record as other large vehicles.”¹⁸⁰

Notwithstanding the criticisms levied against the CCPA,¹⁸¹ it is highly doubtful that a court could conclude that the law provides *no* tangible privacy benefits or protections to Californians. Indeed, courts are not “to determine which [alternative regulatory scheme] is best suited to achieve a valid state objective. Policy decisions are for the state legislature, absent federal entry into the field.”¹⁸² Because the CCPA is likely to, at the very least, make progress towards the goals it aims to achieve, it is likely to satisfy this standard.

Second, California’s case will be aided by the fact that Congress has failed to enact privacy legislation of the same stripe. “It has long been recognized that, ‘in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.’”¹⁸³ Because Congress has failed to protect Internet users’ privacy, courts would seemingly be loath to restrict states that aim to fill the void.

Finally, there is the overarching purpose of the Dormant Commerce Clause itself. As the Supreme Court has affirmed:

In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when “conferring upon Congress the regulation of commerce, . . . never intended to cut the

177. *Id.* at 430.

178. *Id.* at 432.

179. *Id.* at 437–38.

180. *Id.* at 438 n.12.

181. *See supra* Part III.B.4.

182. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959).

183. *Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662, 669–70 (1981) (quoting *S. Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945)); *id.* at 671 (“In the absence of congressional action to set uniform standards, some burdens associated with state safety regulations must be tolerated.”).

States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.”¹⁸⁴

These doctrine-driven factors weigh heavily in favor of upholding the law.

ii. Historical Precedent

This is not the first article to examine the relationship between the Internet and the Dormant Commerce Clause. In 2001, professors Jack Goldsmith and Alan Sykes outlined the potentially fraught relationship in a prescient essay published in the *Yale Law Journal*:¹⁸⁵

To see how the [D]ormant Commerce Clause has been applied to the Internet, consider the leading case of *American Libraries Ass’n v. Pataki*. *American Libraries Ass’n* enjoined enforcement of a New York statute that prohibited the intentional use of the Internet “to initiate or engage” in certain pornographic communications deemed to be “harmful to minors.” In enjoining enforcement of the law, the *American Libraries Ass’n* court reasoned as follows: Because it is difficult for content providers to control access to their websites and communications, a content provider outside New York might inadvertently send proscribed content into New York. Fear of liability in New York thus might chill the activities of a content provider operating legally in California, thereby affecting legitimate commerce wholly outside New York. Moreover, because states regulate pornographic communications differently, “a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed.” These extraordinary burdens on Internet communication were said to outweigh any regulatory benefit in New York. In sum, “the Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether.”¹⁸⁶

Despite Goldsmith and Sykes’s warning that viewing the Internet as solely a national medium effortlessly crossing state boundaries “threatens to invalidate nearly every state regulation of Internet communications,”¹⁸⁷

184. *Huron Portland Cement Co. v. City of Detroit, Mich.*, 362 U.S. 440, 443–44 (1960) (quoting *Sherlock v. Alling*, 93 U.S. 99, 103 (1876)).

185. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 *YALE L. J.* 785 (2001).

186. *Id.* at 786.

187. *Id.* at 787.

courts adjudicating analogous cases have generally been unwilling to extend *American Libraries* and are instead largely upholding Internet regulations. Why? Because of *American Libraries*'s logic.

The [*American Libraries*] court concluded the statute contravened the Dormant Commerce Clause for three reasons: (1) the statute projected New York law "into conduct that occurs wholly outside New York"; (2) the burdens of the statute on interstate commerce exceed any local benefit derived from it; and (3) the internet is a "national preserve" that must not be subjected to inconsistent state legislation that could, when taken to its extreme, "paralyze development of the internet altogether."¹⁸⁸

However, none of these factors apply to many Internet regulations, including the CCPA.

Take *Rouso v. State of Washington*, for example. In *Rouso*, the plaintiff challenged the State of Washington's ban on Internet gambling.¹⁸⁹ The Supreme Court of Washington, sitting *en banc*, held that the law indeed

impose[d] a burden on interstate commerce by walling off the Washington market for Internet gambling from interstate commerce. [But] this burden is mitigated somewhat. First, the ban does not prevent or hinder Internet gambling businesses from operating throughout the rest of the world. Second, those businesses can easily exclude Washingtonians.¹⁹⁰

Therefore, the court denied relief under the Dormant Commerce Clause and thought *American Libraries* need not be extended or replicated with respect to that particular statute.¹⁹¹

Similar results can be found where courts upheld more recent state regulations of Internet conduct over Dormant Commerce Clause challenges. For example, the Tenth Circuit upheld a Kansas statute regulating payday lenders' use of the Internet to engage in transactions with Kansans.¹⁹² The Fifth Circuit upheld a Texas statute barring car manufacturers from directly retailing automobiles to consumers online.¹⁹³ The Court of Appeals of Texas upheld a statute that prohibited one person from assuming another's identity online.¹⁹⁴ The Court of Special Appeals in Maryland upheld the Maryland Commercial Electronic Mail Act, which required that commercial e-mail sent to Maryland residents or sent

188. *Ex parte Bradshaw*, 501 S.W.3d 665, 680 (Tex. App. 2016) (citing *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997)).

189. *Rouso v. State of Washington*, 239 P.3d 1084, 1086 (Wash. 2010).

190. *Id.* at 1090.

191. *Id.* at 1092.

192. *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1313 (10th Cir. 2008).

193. *Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493, 505 (5th Cir. 2001).

194. *Ex parte Bradshaw*, 501 S.W.3d at 680.

from equipment located in Maryland be truthful and non-deceptive.¹⁹⁵ The Supreme Court of Washington upheld a similar law.¹⁹⁶ Finally, the California Court of Appeal upheld a law that “required that sellers of water treatment devices (to California consumers) that make ‘health claims’ regarding those devices have those devices certified by the Department of Health Services,” including when such representations are made online.¹⁹⁷ Importantly, the courts in all but one of these cases (the Tenth Circuit) cited *American Libraries*; these courts found its logical reasoning insufficiently persuasive and found the facts at issue in their cases sufficiently distinguishable from *American Libraries* to overcome any persuasive, albeit non-binding, impact that *American Libraries* opinion may have held.

The result of these decisions is that the Internet, while a “national preserve,”¹⁹⁸ is far from immune to state laws aiming to protect its citizens therefrom—or more accurately, from those who would take advantage of the Internet to the detriment of the states’ citizens. Such precedent can itself be considered when calculating the incalculable benefits and burdens, as demanded by the *Pike* test.

Of course, we must also consider the factors pointing in the other direction.

6. Purported Factors Favoring Striking Down the CCPA

Critics of the CCPA, including those who would argue that it violates the Dormant Commerce Clause, can point to two distinct drawbacks of the legislation: the cost of compliance and its lack of related regulations. Notably, however, these arguments can be substantially blunted.

a. Compliance Costs and Fines Are Too Expensive

A critic challenging the law could argue that the costs of compliance are too high. Few estimates of compliance costs have been published—the lone estimate made readily available at the time of this article’s publishing by a non-profit estimated that costs of getting a business up to speed in terms of compliance with the CCPA could be as high as \$50,000 to \$100,000 per year.¹⁹⁹ Because the law has only recently gone into

195. *MaryCLE, LLC v. First Choice Internet, Inc.*, 890 A.2d 818, 840–45 (Md. Ct. Spec. App. 2006).

196. *See generally* *State v. Heckel*, 24 P.3d 404, 406-07 (Wash. 2001).

197. *People ex rel. Brown v. PuriTec*, 64 Cal. Rptr. 3d 270, 275–79 (Cal. Ct. App. 2007), *as modified* (Aug. 15, 2007).

198. *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997).

199. Alan L. Friel, *California’s New Privacy Law: What You Need to Know Now*, TRANSFORMING DATA WITH INTELLIGENCE (Oct. 11, 2018), <https://tdwi.org/articles/2018/10/11/biz-all-california->

effect, no empirical data is available, however. Several factors outside of estimates suggest that the non-profit's estimation is likely not entirely off the mark, but persuasive counterarguments blunt this argument entirely.

First, some cost-benefit analysis studies on privacy regimes broadly suggest that privacy statutes akin to the CCPA provide insufficient benefits. One such estimate, for example, asserted that the law would produce a \$7 – \$8 billion loss annually.²⁰⁰ To arrive at that conclusion, the American Enterprise Institute's (AEI) Roslyn Layton adopted the findings of a study performed by Daniel Pérez, a Senior Policy Analyst from the George Washington University Regulatory Studies Center. Pérez adopted previous estimates of consumers' willingness to pay (WTP) for privacy regulations and calculated the monetary value of privacy regulations "by WTP for a typical privacy configured app (\$3.47), the average number of apps per user (23), the lump sum WTP for privacy functionality (\$13.77), and the number of smartphone users willing to pay for such services (generously estimated to be 25 percent of 257,300,000 smartphone users)."²⁰¹ Comparatively, AEI, purportedly parroting review of Pérez's unpublished work, "estimates the costs at \$24.5 billion for upfront compliance and lost advertising revenue. The present value of the annualized costs are \$57 – \$63 billion in the coming decade. When balanced against the benefits, the outcome is a total loss of \$7 – \$8 billion."²⁰²

This critique can be forcefully blunted by attacking the underlying assumptions of the study. For example, one need only look at the Pérez presentation upon which the AEI based its conclusions to know that Pérez's study incorporates a lump sum WTP based on a figure calculated in 2007.²⁰³ Data breaches of all types²⁰⁴ have "heightened concern about privacy" from consumers, meaning that the figures used may significantly undervalue the benefits consumers derive from privacy today, more than ten years later. In another example, the subtitle of the entire presentation makes clear that the study seeks to inform "U.S. *federal* [p]rivacy [p]olicy."²⁰⁵ AEI makes no effort to discuss whether Californians may

privacy-law.aspx [https://perma.cc/G8SF-NJLD].

200. Rosalyn Layton, *The Costs of California's Online Privacy Rules Far Exceed the Benefits*, AM. ENTER. INST. (Mar. 22, 2019), <http://www.aei.org/publication/the-costs-of-californias-online-privacy-rules-far-exceed-the-benefits/>.

201. *Id.*

202. *Id.*

203. Daniel R. Pérez, Benefits and Costs of Privacy under Different Regimes: Using Back-of-the-Envelope BCA to Inform U.S. Federal Privacy Policy 11 (unpublished presentation) (on file with author).

204. *See supra* notes 3–4 and accompanying text.

205. Daniel R. Pérez, Benefits and Costs of Privacy under Different Regimes: Using Back-of-the-Envelope BCA to Inform U.S. Federal Privacy Policy 1 (unpublished presentation) (on file with author) (emphasis added).

have a higher WTP for whatever reasons, not the least of which is because, given their proximity to the nation's preeminent technology hub, Silicon Valley, Californians may put more of their lives online and thus be willing to pay more for privacy. It is not that Pérez's study is inaccurate, nor necessarily that AEI's estimates are incorrect; rather, the takeaway is that one cannot overrule the will of the people's elected legislature and elected executive for sake of one back-of-the-envelope estimate.²⁰⁶ Thus, such studies should not alone justify overturning the law.

Buttressing the critics' argument, however, may be the enforcement regime. This line of argument would proceed as follows: small businesses that cannot afford to pay the requisite costs to ensure compliance, either for sake of human capital or literal capital, will get fined a significant amount of money for their insufficient controls. This regime is sufficiently punitive insofar as it will result in driving the businesses to close altogether, an outcome the legislature surely was not seeking.

True, fines may accumulate. This is particularly the case if the company is on notice that their data privacy protocols are insufficient, which could give rise to the "intentional" violation penalty. But this is far from a guarantee; "although the imposition of a penalty for each violation is mandatory, if a defendant presents credible evidence establishing a true inability to pay, the court has discretion to impose a relatively nominal penalty."²⁰⁷ California courts have repeatedly affirmed that pursuant to the statutory authority under which the Attorney General would fine noncompliant companies, "the amount of the penalty lies within the court's discretion."²⁰⁸ Therefore, fear of fines should not find its way into a court's calculus.

Notwithstanding the more superficial responses above, the question of costs can be resoundingly answered at a more foundational level. Even if, *arguendo*, one presumes that the AEI's study was correct and that the compliance regime slants unjustly against small businesses rendering the costs of the CCPA as dramatically outweighing its benefits, the judiciary simply should not, and will not, care. Not only are states traditionally afforded "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons,"²⁰⁹

206. This is not to say that cost benefit analyses are not useful and should not, in other scenarios, such as administrative regulations, drive policy-making. *Cf.* CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION (2018); Cass R. Sunstein, *Is Cost-Benefit Analysis for Everyone?*, 53 ADMIN. L. REV. 299 (2001); Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651 (2001).

207. *People v. First Fed. Credit Corp.*, 128 Cal. Rptr. 2d 542, 548 (Cal. Ct. App. 2002).

208. *Hewlett v. Squaw Valley Ski Corp.*, 63 Cal. Rptr. 2d 118, 141 (Cal. Ct. App. 1997).

209. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (internal quotation marks omitted); *see also* *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007) (noting that governments are entitled to a wide berth of policy positions because

but:

a court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.²¹⁰

Therefore, a court should discard an argument that a cost-benefit analysis slants toward rejecting the CCPA.

A similar argument has been borne out in Dormant Commerce Clause jurisprudence. When a petitioner challenged a California environmental regulation under the Clause, citing, among other reasons, that the costs outweighed the benefits, a unanimous panel discarded the argument.²¹¹ The judges stated: “[w]hether or not one agrees with the science underlying those views, those [cost-benefit] determinations are permissible ones for the legislature to make.”²¹² The result of this foundational separation of powers principle is that the CCPA ought not be overturned for sake of purported costs, even if a jurist “think[s] this law is unwise, or even asinine”²¹³ because that decision rests with the legislature, not the courts.

b. No Sister Statutes

There is no analogue whatsoever to the CCPA anywhere in the country. In essence, that means that only one state is driving the entirety of the aforementioned costs. When other statutes have been challenged under the Dormant Commerce Clause, courts have considered whether other states have enacted similar burdens such that an individual regulation does not itself create a substantial marginal cost.²¹⁴

In *State v. Maybee*, the Court of Appeals of Oregon evaluated an Oregon statute that corrected violations of the Master Settlement Agreement (Agreement). Oregon, in addition to forty-six other states, entered into this Agreement with major tobacco companies.²¹⁵ In performing its balancing test, the court was careful to note that “the burden on interstate commerce is minimal, *in light of the fact that 46*

“[u]nlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens.”).

210. *United States v. Butler*, 297 U.S. 1, 63 (1936); *see also* *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (courts “do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.”).

211. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1106 (9th Cir. 2013).

212. *Id.*

213. *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).

214. Admittedly, this fact pattern is not all too frequent, as such statutes are likely challenged under the Clause before other states could enact analogues.

215. *State v. Maybee*, 232 P.3d 970, 971 (Or. 2010).

other states have similar statutes.”²¹⁶ The Supreme Court of Kentucky also noted, in adjudicating a cause of action regarding horse racing, that the regulations were “similar (often identical) to regulations in effect in the large majority of states that allow wagering on thoroughbred horse races[.]”²¹⁷

The argument that the CCPA imposes a unique burden is substantially undercut with the advent of the GDPR.

According to Cynthia Cole, special counsel in the Palo Alto technology practice at the law firm Baker Botts, “GDPR and the CCPA are largely consistent with significant overlap.” Cole, [*sic*] said the data mapping exercises undertaken by U.S. firms in preparation of GDPR will put them in a better starting position for the preparation efforts.²¹⁸

PricewaterhouseCoopers has come to a similar conclusion.²¹⁹ Not only will overlapping provisions of the GDPR and the CCPA assist in efficiency to bring companies up to compliance on the latter regime, but the overlap also undercuts the burden itself under the *Pike* test. Because many companies that need to comply with CCPA are most likely already en route or fully compliant with GDPR, the California law cannot be said to be the sole factor for this increased cost.

If other states have analogously costly regulations, the burdens are less burdensome under the *Pike* test, as those subject to regulations are essentially on notice of said burden. The federal district court in the Western District of Tennessee espoused this reasoning when adjudicating the constitutionality of a Tennessee statute, thereby requiring suppliers to repurchase a retailer’s inventory after the parties terminate a contract.²²⁰

While not identical, the CCPA, like the GDPR, was designed to put companies on notice far before the effects of the legislation would be felt. This notice affords companies a significant amount of time to understand the law’s impact on their business, become compliant with the law, and amortize the cost of doing so. The GDPR was first proposed in January of 2012 and was adopted in April of 2016; it entered into force in May of

216. *Id.* at 977.

217. *Jamgotchian v. Kentucky Horse Racing Comm’n*, 488 S.W.3d 594, 598 (Ky. 2016).

218. Todd Ehret, *Data privacy and GDPR at one year, a U.S. perspective. Part Two - U.S. challenges ahead*, REUTERS (May 29, 2019), <https://www.reuters.com/article/us-bc-finreg-gdpr-report-card-2/data-privacy-and-gdpr-at-one-year-a-u-s-perspective-part-two-u-s-challenges-ahead-idUSKCN1SZ1IUS> [<https://perma.cc/G6HE-KHJ4>].

219. *Your Readiness Roadmap for the California Consumer Privacy Act (CCPA)*, PRICEWATERHOUSECOOPERS, <https://www.pwc.com/us/en/services/consulting/cybersecurity/california-consumer-privacy-act.html> [<https://perma.cc/GCE6-A5FJ>] (“Certain CCPA requirements overlap with the existing GDPR individual rights requirements, which may give GDPR-ready organizations a jump start on building a capability around user-data handling practices.”).

220. *Power & Tel. Supply Co. v. Harmonic, Inc.*, 268 F. Supp. 2d 981, 991 (W.D. Tenn. 2003).

2016, and ultimately became valid and enforceable in July of 2018.²²¹ The CCPA also provided over eighteen months between when the law was enacted and when it goes into force, thereby providing companies with significant notice, as desired by the district court.²²²

V. CONCLUSION

In conclusion, the California Consumer Privacy Act should withstand any challenge under the Dormant Commerce Clause. To come to this conclusion, the article began by reviewing the context in which the CCPA was enacted and the text of the law itself, including its detailed and multi-faceted regime. Thereafter, the article reviewed the Clause's first principles and the ways in which a statute could be invalidated under the Clause. In short, the CCPA withstands all such avenues of attack. First, it does not discriminate against out-of-state businesses; even if it did, such discriminatory effect is forgivable as it was enacted with a legitimate legislative purpose, thereby justifying any incidental discrimination. Moreover, the law does not dictate extraterritorial conduct, nor does it conflict with other states' (currently non-existent) regulatory regimes. Finally, the benefits of privacy outweigh the burdens the law creates.

The CCPA is an important development in the ongoing debates over consumer privacy and protection. If nothing else, it will eventually provide a useful data point as to whether analogous safety regulations are in fact a juice worth squeezing for other states' legislatures.

221. *The History of the General Data Protection Regulation*, EUROPEAN DATA PROTECTION SUPERVISOR, https://edps.europa.eu/data-protection/data-protection/legislation/history-general-data-protection-regulation_en [<https://perma.cc/6SPY-5AMH>].

222. This counterargument is itself undermined by the fact that "consumers may make requests to in-scope business for the 2019 calendar year . . . since the 'look back' requirement for record-keeping provisions started January 1, 2019." Ty Sbano, *What Your Data Security Team Needs to Know About the CCPA*, TechBeacon (Apr. 22, 2019), <https://techbeacon.com/security/what-your-data-security-team-needs-know-about-ccpa> [<https://perma.cc/KE4H-RKGD>]. Nonetheless, the overall thrust of the argument remains intact and a compelling counterpoint to the question of notice and burdens.