

# The Privacy Patchwork?

## Evaluating the CCPA Under the Dormant Commerce Clause

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Privacy and personal data protection are finally receiving their legislative moment in the sun. The General Data Protection Regulation (GDPR), the strongest set of digital privacy protections of its kind, was enshrined into EU law in 2016 and implemented in May 2018. In what has been called the “Brussel’s effect”, non-EU members are now passing their own data protection laws, seeking regulatory equivalency with the EU in order to avoid a complicated international landscape of inconsistent regulations. Japan has done so and Canada is on its way. Meanwhile, in the United States, state governments are stepping in to fill the regulatory void on data protection left by a quagmired congress. The California Consumer Privacy Act (CCPA) was signed into law in June 2018, and will take effect in January 2020, with enforcement beginning in July. The CCPA has spurred on similar efforts across the country. In at least eleven states, data protection bills are introduced or pending, with Texas the latest to join the fray.

This proliferation of state-level regulations has led businesses to fear the United States becoming a dreaded “patchwork” of regulations, imposing a vast burden on any business that wishes to reach the whole national market. To this end, there has been bipartisan energy in Congress to pass a uniform federal data protection law. However, congressional gridlock and competing legislative priorities (such as healthcare and global warming) may portend a long wait before the federal government steps in and asserts supremacy over state efforts.

This paper aims to address the fate of the CCPA and similar state regulations, should they be challenged in federal court as unconstitutional under the Dormant Commerce Clause. I will outline the precedent governing this clause, drawing on recent cases and legal scholarship to argue that the constitutional question would come down to a pragmatic balancing test between the burden on interstate commerce and local interests in protecting privacy. I suggest that the global, unbounded nature of the Internet, which early commentators assumed would make all state regulations of the internet doomed to failure<sup>1</sup>, actually implies that state-imposed burdens on interstate commerce would be less significant than usually assumed. This would create an opening for the courts to respect the role of the states as “laboratories” for democracy and not intercede in their regulatory efforts. My analysis comes with the caveat that the CCPA is still in the middle of the amendment and rulemaking process, and as such, the legislation cannot be analyzed specifically, but only in general, based on its current provisions.

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<sup>1</sup> David R. Johnson & David Post, Law and Borders-The Rise of Law in Cyberspace, 48 STAN. L. Rav. 1367 (1996).

This paper focuses on the so-called “Dormant Commerce Clause,” though there are other avenues for a constitutional challenge to legislation like the CCPA. Restrictions on data disclosures and sales have been defeated on First Amendment grounds, most prominently in the 2008 case *IMS v Sorrell*, in which the Supreme Court struck down a Vermont law that restricted “the sale, disclosure, and use of pharmacy records that revealed the prescribing practices of individual doctors,” ruling that this unconstitutionally infringed upon the speech of pharmaceutical marketers and data miners. Aware of this precedent, Alastair MacTaggart, the millionaire who got the CCPA on the ballot, mentioned in an assembly hearing that the bill was designed as opt-out of data sharing rather than opt-in “to avoid the *IMS v. Sorrell* case and the risk of constitutional problems.” However, since the CCPA treads much new ground in its restrictions on data use, it is difficult to fully rule out other First Amendment challenges that might arise.

Another potential grounds for precedent in state internet regulations is the ongoing net neutrality battle. Back in 2018, following the FCC repeal of net neutrality, California passed its own version of net neutrality and was promptly sued by the Department of Justice. However, this case has been put on hold, pending a decision in a related suit brought by Mozilla against the FCC, which challenges the FCC rule-change as unconstitutional preemption (that is, the federal government asserting its constitutionally-mandated supremacy over an area of policy, precluding state regulations). Oral arguments for the case, completed this February, suggest that the decision will revolve around the power of the FCC, as opposed to Congress, to preempt state lawmaking, as well as a few other procedural issues. Here net neutrality differs from the CCPA in one significant way: in the case of net neutrality, the FCC made an initial federal ruling, while in the case of data protection, California is the one acting first. Since the CCPA exists in a federal regulatory void, the question of federal preemption is not currently active. This article explores the scenario in which that remains the case, leaving the Dormant Commerce Clause the main vehicle for a constitutional challenge.

The “Dormant Commerce Clause,” sometimes called the “Negative Commerce Clause,” is a judge-created doctrine based on the Commerce Clause of the United States Constitution, which grants Congress the power “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes” (Article I, Section 8, Clause 3). This fundamentally affirmative grant of power has been read, since the landmark 1824 case *Gibbons v Ogden*, to imply a restriction against states passing laws that would inhibit interstate commerce. Throughout the 19th and most of the 20th century, this clause has mainly served to ward off economic protectionism by the states and to secure a national common market.

However, in the past decades, cases invoking this clause have increasingly dealt not with protectionism, but with state regulations that, in their aim to protect residents against legitimate menaces such as obscenity or mail fraud, place a substantial burden on interstate commerce. The 1970 case *Pike v Bruce Church Inc*, lays out the constitutional “test” that continues to govern the application of this doctrine. This test is two-pronged. If a law clearly discriminates against interstate commerce in favor of in-state business, then that law runs afoul the doctrine. A cursory analysis of the CCPA makes clear that it is a non-discriminatory regulation for the purposes of the Commerce Clause, that is, the regulation does not favor in-state business over out-of-state business. All companies are affected

equally. In fact, since California boasts a particularly strong tech sector, this law might even disproportionately affect in-state tech!

Therefore, we move on to the second prong of the Pike test:

“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. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. [*Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)].

In short, for cases in which the law does not discriminate against interstate commerce, the question becomes one of balancing interests.

There are two additional factors that courts have invoked in deciding Dormant Commerce Clause cases: extraterritoriality and inconsistent regulation. In the 1982 case *Edgar v. MITE Corp* the court suggested that the "Commerce Clause... precludes the application of a state statute to commerce that takes place wholly outside the state's borders, whether or not the commerce has effects within the State" ([*Edgar v. MITE Corp*, 457 U.S. 623 (1982)])<sup>2</sup> The other issue is one of inconsistent regulation. In the early case the Supreme Court established that “The power to regulate commerce includes various subject, upon some of which there should be a uniform rule and upon others different rules in different localities” [*Cooley v. Board of Wardens*, 53 U.S. 299 (1851)] The courts have tended to hold uniform regulation necessary in the area of transport, such as in the (1980) *Kassel v. Consolidated Freightways*, in which the Supreme Court invalidated an Iowa state law that limited truck lengths on state highways.

In the early days of the internet, commentators assumed that the internet would also be taken as a subject requiring uniform rule, since the unbounded nature of the internet made territorial limitation impractical. The second circuit court adopted this line of reasoning in *American Libraries Ass'n v. Pataki*, stating:

"The unique nature of the Internet highlights the likelihood that 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. Typically, states' jurisdictional limits are related to geography; geography, however, is a virtually meaningless construct on the Internet. The menace of inconsistent state regulation invites analysis under the Commerce Clause of the Constitution" [*American Libraries Ass'n v. Pataki*, 168-9, (1997)]

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<sup>2</sup> However, the court based its conclusion that the law had a “sweeping extraterritorial effect” in part on the fact that it could regulate tender offers that would not affect any illinois shareholders. The CCPA, which limits its jurisdiction to California residents, would presumably not be considered as sweeping in this regard.

However, this view of the internet is somewhat out of date. In 1997, IP addresses were considered an interesting but unreliable technology. These days, an ordinary person with access to the Internet can determine city, state and ISP when provided with an IP address. This means that, unlike in *Pataki*, a company that does not want to deal with California's regulations can circumvent them by not serving California IP addresses online. Just this happened during the early days of GDPR implementation, when EU residents found themselves blocked from sites that were not compliant and wished to avoid the law's potentially crippling fines. Inconsistent regulation may still be a "menace," but today it is no longer an impossible snare, since companies have the means to adjust their policies based on the location of their users<sup>3</sup>.

In "The Internet and the Dormant Commerce Clause" Jack L. Goldsmith and Alan O. Sykes aim to "deflate the conventional wisdom" that the Dormant Commerce Clause spelled doom for all Internet regulation and "show that the dormant Commerce Clause, properly understood, leaves states with much more flexibility to regulate Internet transactions than is commonly thought."<sup>4</sup> They argue that 'extraterritoriality' and 'inconsistent regulation' are unclear concepts, best understood as elements to be examined as part of the overall balancing test between interstate commerce and local concerns. The article suggests that the determining analysis should be fact-based and economic, varying based on the particularities of a given law.

The Washington State Supreme Court clearly found this reasoning persuasive, citing this article in their 2001 decision that found against a commerce clause attack on a state law that cracked down on spam. In the decision, the court distinguishes this case from the *Pataki* decision, noting, "In contrast to the New York statute, which could reach all content posted on the Internet and therefore subject individuals to liability based on unintended access, the Act reaches only those deceptive UCE messages directed to a Washington resident or initiated from a computer located in Washington . . . We find that the local benefits of the Act outweigh any conceivable burdens the Act places on those sending commercial e-mail messages." (*Washington v. Heckel*, 2001).

The CCPA in its current form applies to companies "doing business in California" that meet certain size requirements and defines consumers as California residents. Because the focus is on businesses and consumers, rather than content creators and viewers, the 'chilling effect' on content creation that the court in *Pataki* feared is less applicable. More relevant is a relatively recent case from 2012, *Nat'l Ass'n of Optometrists & Opticians v. Harris*, decided by the 9th circuit, which would be the likely court to treat a challenge to the CCPA, as it contains California in its jurisdiction.

The case does not deal with internet regulation, but treats an obscure change in the regulation of optometry, challenged on Dormant Commerce Clause grounds. After

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<sup>3</sup> The Supreme Court, treating a "dial-a-porn" firm in an earlier case stated that, "If [the firm's] audience is comprised of different communities with different local standards, [it] ultimately bears the burden of complying with the prohibition on obscene messages." *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 125-26 (1989). As online firms now have the capability to vary their standards, it is unclear why this should not hold true for them as well.

<sup>4</sup>Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. (2001), p787. Available at: <https://digitalcommons.law.yale.edu/ylj/vol110/iss5/2>

establishing that the law equally burdens in-state and out-of-state businesses, and thus is not discriminatory, the court states: “We conclude that Supreme Court precedent establishes that there is not a significant burden on interstate commerce merely because a non-discriminatory regulation precludes a preferred, more profitable method of operating in a retail market. Where such a regulation does not regulate activities that inherently require a uniform system of regulation and does not otherwise impair the free flow of materials and products across state borders, there is not a significant burden on interstate commerce” emphasizing that the determination of burden on commerce turns upon “a change in the flow of goods into the state, not on profits” [*Nat’l Ass’n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1154-55 (2012)]. Though this decision makes no mention of the internet, its logic is highly applicable to the CCPA.

Companies currently favor a data-heavy model, turning personal data into revenue. The California law “disincentivizes” such a model, doubtless harming some companies’ profits. However, as the court makes clear, the loss of profits by particular companies is not enough to establish a significant burden on interstate commerce, as long as other companies can come in to fill the gap. The constitutional interest is that commerce continues to flow, not that certain companies continue to produce profits. “Any work that you do to comply with the California law now will not go to waste,” a [JD Supra article](#) points out. “In fact, compliance will likely be a competitive advantage that you can present over your peers.” This repeated [talking point](#) among consulting firms suggests that for as many firms deciding that doing business with the California market is not worth the costs, many others would be eager to step in, adopting a privacy-centric model to reap the benefits of the California economy, which is the fifth largest in the world. While many firms would be forced to increase spending on data protection and compliance, doubtless cutting into profits, it is difficult to argue that the overall flow of online services in California would suffer.

There is a second factor that complicates any argument painting the CCPA as an undue burden on commerce. Just as the internet is not bound by state borders, nor is it bound by national borders. And outside the United States, data protection is now the name of the game. The GDPR designates consumers as the owners of their personal data. This means that even a company with no physical presence in the EU becomes implicated by the law if it collects the data of EU citizens (residing in the EU at the time of collection.) This includes many US companies. A [PwC survey](#) found that 92% of multinational American companies consider GDPR compliance a top priority. As a [Forbes article](#) explains, “Major U.S. companies are dealing with a lot of business partners that want to be GDPR compliant. And if your U.S. firm isn’t, those potential partners may not want to play with you for fear of contaminating their pristine GDPR compliant databases with your non-compliant data.” A [Reuters article](#) warns, “in today’s digital and global world, it’s almost impossible to avoid dealing with some form of personal data from the European market.” For companies that have already invested in complying with the GDPR, therefore, additional CCPA prep is not exceedingly onerous. Moreover, the “inconsistent regulation” argument loses weight, considering that any company that has worked on compliance for one data protection law is better placed to achieve compliance in others.

Ironically, the companies facing the greatest disadvantage may be smaller, California companies that do not reach a global audience, and therefore have not had to worry about

the GDPR. The impact on California companies is certainly a matter for the California legislature to consider, but it is not an issue that implicates the Dormant Commerce Clause in any way.

Of course, the 2012 case can only be read so far. Optometry is not the internet, and a court may well find it reasonable that the collection and sale of data online are activities that inherently require a uniform system of regulation. However, the desire for uniformity meets a countervailing Federalist instinct for local experimentation. In *Department of Revenue of Ky. v. Davis*, Justice Souter writes that the concerns of the Dormant Commerce Clause are “limited by federalism favoring a degree of local autonomy” [*Department of Revenue of Ky. v. Davis*, 553 U.S. 328 (2008)] In a concurring opinion, Justice Scalia points out, “The Court declines to engage in *Pike* balancing here because courts are ill suited to determining whether or not this law imposes burdens on interstate commerce that clearly outweigh the law’s local benefits, and the ‘balancing’ should therefore be left to Congress” (*ibid*). Scalia’s point here is one of institutional fitness: the court is fit to apply constitutional doctrine, but not to weigh the cost and benefits of a legislature’s decisions. If the courts accept that the *Pike* test comes down to a question of balancing, Scalia’s opinion provides additional weight to the view that the Supreme Court should let existing law, barring naked protectionism, stand, because balancing burdens and benefits reaches outside the court’s mandate<sup>5</sup>.

To conclude, the CCPA is certainly ripe for challenge on Dormant Commerce Clause grounds. Though not facially discriminatory against interstate commerce, the law clearly places a burden on interstate commerce, subjects businesses to an inconsistent patchwork of regulations, and has a sweeping extraterritorial effects, doubtless affecting business practices and transactions taking place outside of California. However, the current trend of jurisprudence on the issue suggests that the law would be evaluated on the basis of *Pike*’s “balancing test” of harm to interstate commerce versus local benefit<sup>6</sup>. When considered in the context of the current global, digital landscape, it becomes clear that the burden imposed by the CCPA may be overstated, since companies are already being forced to make similar adaptations to meet global standards set by the GDPR and its offshoots. Finally, there are broader theoretical concerns that balancing tests improperly put the courts in the position of the legislature and that judge-created doctrine like the Dormant Commerce Clause should be used sparingly, to respect local autonomy. For these reasons, the fate of the CCPA is by no means open-and-shut.

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<sup>5</sup> Scalia has passed on, but it is worth noting that Justice Thomas in his concurrence takes the ultra-originalist stance of arguing to abandon the “negative commerce clause” doctrine altogether, suggesting he would oppose its application in any case.

<sup>6</sup> The fact that the California Constitution grants an “[inalienable](#)” right to privacy suggests that California places a higher premium on this value, since such wording does not appear uniformly across state constitutions. This could positively influence an evaluation of the putative local benefits of privacy in California specifically.