Article

Catalyzing Privacy Law

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INTRODUCTION

When the General Data Protection Regulation (GDPR) took effect in May 2018, it positioned the European Union as the world’s privacy champion. A flurry of emails updating privacy policies landed in inboxes across the globe, attesting to the international reach of the European rule. A month later, California enacted the California Consumer Privacy Act (CCPA), establishing the nation’s most stringent omnibus privacy protections, effective as of January 1, 2020. California, the home of many of the world’s largest data-based enterprises, emerged as a dark horse contender in the privacy regulator race. In the past year, state after state considered broad data privacy legislation, and eleven comprehensive federal privacy bills were introduced in Congress.

5. See infra Part III.B.1.
What is catalyzing U.S. privacy law? The conventional wisdom holds that Europe is setting the global standard for information privacy. There is much truth to this—some 142 countries and counting now have a broad data privacy law, typically modeled on the GDPR. Scholars writing insightfully about the global race to information privacy have tracked the spread of data privacy laws across the world, noting Europe’s influence on these developments. In a recent article, Paul Schwartz observes that the European Union pioneered international privacy law to enable commerce among nations within the bloc itself. He argues that other countries largely adopted the European


9. Paul M. Schwartz, Global Data Privacy: The EU Way, 94 N.Y.U. L. REV. 771, 810 (2019) (“[The EU’s] power in this regard first developed in response to issues that it faced internally. It needed to harmonize the data processing practices of EU member states. The inward-facing elements of EU data protection law then became an important factor in its adaptability to the rest of the world. Here is a global diffusion story
Union’s data privacy model, reflecting its “success in the marketplace of ideas.”

Schwartz cites the CCPA as an example of Europe’s success in spurring other jurisdictions to enact similar laws.11 Journalists reporting on the CCPA’s enactment, too, have frequently referred to it as “GDPR lite”12 and “California’s version of GDPR.”13 And as the push for federal legislation intensifies, many characterize it as a national response to the GDPR.14

This Article challenges this emerging consensus. Despite decades of European privacy law, the United States showed little appetite until now for broad privacy legislation.15 Instead, norm entrepreneurs in California helped establish a new privacy framework that, as we show, differs significantly—and consciously—from the European model.16 Our close comparison of the new California and European laws reveals that the CCPA is not simply GDPR-lite: it is both more and less demanding on various points.17 It offers a fundamentally different regime for data privacy. And the numerous legislative proposals in state


10. Schwartz, supra note 9, at 818.

11. Id. at 816 (“Ideas matter. Even though the adequacy requirement provides an impressive fulcrum for international influence, the global success of EU data protection is also attributable to the sheer appeal of high standards for data protection. This appeal cannot alone be explained by the force of EU market power or even specific EU negotiating strategies. To illustrate, this Article can point to an example from the United States, namely, the enactment of the California Consumer Privacy Act (CCPA) of 2018.”). Global legal convergence can indeed be the result of normative agreement. See, e.g., Anupam Chander & Randall Costa, Clearing Credit Default Swaps: A Case Study in Global Legal Convergence, 10 CIT. J. INT’L L. 639, 640 (2010) (arguing that in the wake of the 2008/2009 financial crisis, the United States and Europe “converged on a similar clearing structure largely because of its compelling logic”).


15. See infra note 20 and accompanying text.

16. See infra Part II.

17. See infra Part II (comparing the GDPR and the CCPA).
houses show greater fealty to California’s model than to the European antecedent. Bills pending before Congress reflect pressure not from Brussels, but from Sacramento.

Thus, California has emerged as a kind of privacy superregulator, catalyzing privacy law in the United States. Rather than the supranational EU, the subnational state of California—and, more specifically, a small network of determined individuals within that state—is now driving privacy in a significant part of the world. The emergence of the CCPA demonstrates the central role of local networks and norm entrepreneurship, contesting on the ground of what we call “data globalization.”

We are thus witnessing a paradigm shift in the policy conversation around data privacy law. Until now, the rules of transatlantic privacy rested on awkward negotiated mechanisms to transfer data between two seemingly irreconcilable regimes. Now we are witnessing what might be characterized as a regulatory race on both sides of the ocean.

This Article is the first to critically evaluate the relationship between California’s privacy law, Europe’s data protection regulation, and possible future state and federal privacy law. This study is also of practical interest, answering questions for individuals and

19. See discussion infra Part III.C (explaining how data globalization helped propel the CCPA to its current status).
20. See Directive 95/46/EC, 1995 O.J. (L 281) 31 (establishing pre-GDPR rules regulating the processing and movement of personal data); PAUL M. SCHWARTZ & JOEL R. REIDENBERG, DATA PRIVACY LAW: A STUDY OF UNITED STATES DATA PROTECTION 1–2 (1996) (comparing European countries’ comprehensive data protection laws to other countries’ less thorough laws). But see Kenneth A. Bamberger & Deirdre K. Mulligan, Privacy on the Books and on the Ground, 63 Stan. L. Rev. 247, 281–92 (2011) (arguing that the regimes are more similar than different in practice); see also William McGeveran, Friending the Privacy Regulators, 58 Ariz. L. Rev. 959, 1025 (2016) (demonstrating similarities in enforcement between different data privacy regimes despite differences in the law on the books).
22. The focus of our study is on regulation of the data protection practices of private parties, rather than on the protection of privacy against intrusions by the state—on the regulation of “surveillance capitalism” rather than on more traditional state surveillance. See Shoshana Zuboff, Big Other: Surveillance Capitalism and the Prospects of an Information Civilization, 30 J. INFO. TECH. 75, 75 (2015) (defining “surveillance capitalism” as a “new form of information capitalism [that] aims to predict and modify human behavior as a means to produce revenue and market control”).
businesses alike: For businesses, whose laws should I follow? For individuals, who will protect my privacy? Studying these questions leads, in turn, to another set of inquiries about the ways in which catalysis from the GDPR and CCPA govern privacy outside either Europe or California. When Europe’s laws meet California’s, who wins? If indeed European or Californian regulation will be applied globally de facto, why then should anyone else legislate?

The answers to all of these questions have implications not only for the shape of information privacy law but for understanding inter-jurisdictional regulatory dynamics in the digital economy. While data shares some characteristics with cars, pollution, and corporate charters—all the subject of prior globalizations of legal compliance and legal rules—23—it also differs because of its simultaneous and instantaneous global effects. Data disobeys borders and operates at Internet speed. Equally important, the answers to these questions shed light on the prospects of countries across the world as they vie for advantage in the information age. Ultimately, our account of privacy catalysis tests the operation of both federalism and international regulatory competition in the twenty-first century.

Our analysis proceeds as follows. Part I situates our discussion of regulatory catalysis in data privacy within the broader frame of the theory of regulatory competition, borrowing lessons from areas such as corporate and environmental law. Part II compares the substance of the GDPR and the CCPA and the ways in which their structures promote catalysis in other jurisdictions. Part III turns to the race for data privacy law. We are the first to disentangle the catalytic effects on U.S. federal and state laws coming from both Brussels and Sacramento and to show that the resulting proposals are distinctly American and owe a greater debt to the CCPA than to the GDPR. As it once did with pioneering environmental regulation, California has emerged as a super-regulator again, this time with respect to data in the information age.

I. SUPERREGULATORS

U.S. privacy law can be periodized as pre-CCPA and post-CCPA. Until the CCPA, no state or federal statute in the United States imposed privacy protections across all industry sectors and technologies in the manner that European data protection law had done for decades. Ever since the CCPA, Congress and state legislatures across the country

have been considering huge numbers of data privacy proposals of that scope.\textsuperscript{24}

What is prompting this new interest in comprehensive data privacy law in the United States? Many point to the EU’s GDPR. After all, the GDPR went into effect in May 2018 to much fanfare. Countries around the world changed their laws to conform more closely with the GDPR, drawn by hopes of achieving a finding of “adequacy,” which would facilitate their data trade with European economies.\textsuperscript{25} The GDPR also prompted global companies to establish expensive compliance programs and infrastructure.\textsuperscript{26} It makes sense, at first glance, to think that Europe has, through the GDPR, driven U.S. states and the federal government to take privacy seriously at last. If so, this development would fit neatly with the larger phenomenon that is sometimes called the “Brussels Effect.”\textsuperscript{27}

But if this is the case, why did it take so long? Anu Bradford coined the phrase back in 2012,\textsuperscript{28} and the EU promulgated its original data protection directive in 1995.\textsuperscript{29} If European law prompted soul-searching among American lawmakers, its voyage across the Atlantic proved quite slow.

This Part summarizes overlapping theories of regulatory competition and catalysis, drawn from varied subject matter areas, including corporate and environmental law. In all of these domains, early claims of a race to the bottom spurred by globalization have been challenged by scholars who suggested alternative regulatory dynamics that might lead to a race to the top or a race to the optimum.\textsuperscript{30} Often these effects are named for the places where they were first detected: Delaware,
California, or Brussels. In different ways, these three jurisdictions have emerged as “superregulators.” Later in the Article we will consider which of these superregulator effects have catalyzed data privacy rules across the United States.

A. THE DELAWARE EFFECT

Regulatory competition has been investigated in the greatest depth in corporate law. An early view argued that corporations would charter themselves in the most permissive state, leading U.S. states to compete with each other to offer ever more lax corporate law. Some dubbed this the “Delaware Effect” because two-thirds of all Fortune 500 companies are incorporated in that state.

A critical legal rule made regulatory competition possible. State laws defer to a corporation’s decision on its state of incorporation—known as the “internal affairs” doctrine. Thus, a corporation operating principally in California or Kansas can incorporate in Delaware and be assured that relations between its shareholders, directors, and officers will be governed by Delaware law. Without this “internal affairs” rule, a corporation might have to conform to the corporate law

31. See infra Parts I.A–C.
33. Justice Louis Brandeis explained the liberalization of corporate law through this dynamic:

Lesser States, eager for the revenue derived from the traffic in charters, had removed safeguards from their own incorporation laws. Companies were early formed to provide charters for corporations in states where the cost was lowest and the laws least restrictive…. The race was one not of diligence but of laxity.


34. See, e.g., Bradford, supra note 28, at 5.

36. Rogers v. Guar. Tr. Co. of N.Y., 288 U.S. 123, 130 (1933) (“It has long been settled doctrine that a court—state or federal—sitting in one State will as a general rule decline to interfere with or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another State but will leave controversies as to such matters to the courts of the State of the domicile.”); VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1112 (Del. 2005) (“The internal affairs doctrine is a long-standing choice of law principle which recognizes that only one state should have the authority to regulate a corporation’s internal affairs—the state of incorporation.”).

37. See VantagePoint Venture Partners 1996,871 A.2d at 1112.
of all the jurisdictions in which it operates. The internal affairs doctrine thus allows a company to establish a single regulator for the corporate law affairs of the corporation.\textsuperscript{38}

The classic analyses posited that Delaware had cornered the market for incorporations through dubious efforts to favor corporate officers and directors.\textsuperscript{39} Ralph Winter famously rejected this claim of an inevitable race to the bottom, arguing that corporate leaders were not in fact free to choose the most permissive jurisdiction because shareholders would penalize them for failing to maximize shareholder value.\textsuperscript{40} Where some had derided Delaware’s efforts as “law for sale,”\textsuperscript{41} Roberta Romano argued that Delaware’s efforts were part of the genius of American law.\textsuperscript{42} Instead of seeking to race to the bottom to attract corporate charters, Delaware courts, for their part, saw their role as providing special corporate law expertise.\textsuperscript{43} Regulatory
competition, seen from this perspective, can occur not just through the content of the governing rules but also through the quality of their adjudication.

The Delaware Effect therefore can be summarized as the emergence of certain jurisdictions as highly influential overseers of particular behavior based on proactive elections made by regulated entities—an opt-in to a particular jurisdiction. If enough regulated entities make the same choice, that jurisdiction may come to dominate the field. Both the substantive law and the regulatory techniques of a jurisdiction may then gain influence outside its borders as other regulators defer to it. While this arrangement could result in a race to the bottom, it could also enable the emergence of highly specialized expert regulatory oversight that then becomes the standard to which other jurisdictions defer.

B. THE CALIFORNIA EFFECT

David Vogel famously challenged a similar hypothesis of a race to the bottom in environmental regulation and consumer protection law. Where many argued that international trade would inevitably lead to the erosion of consumer and environmental regulation, Vogel countered that “under certain circumstances, global economic integration can actually lead to the strengthening of consumer and environmental standards.” Instead of a race to the bottom (what he, adopting the traditional view, called a "Delaware Effect") he offered that regulatory competition might result in a "California Effect." This outcome hinged on “the critical role of powerful and wealthy ‘green’ political affairs of Delaware corporations.” In re Activision Blizzard, Inc., 86 A.3d 531, 547 (Del. Ch. 2014). For support for this statement, Vice Chancellor Laster cited Roberta Romano’s book The Genius of American Corporate Law: “The most important transaction-specific asset in the chartering relation is an intangible asset, Delaware’s reputation for responsiveness to corporate concerns,” which stems from “a comprehensive body of case law, judicial expertise in corporation law, and administrative expertise in the rapid processing of corporate filings.” Id. at 547 n.7 (citing ROMANO supra note 42, at 38–39).

44. See, e.g., Dore, supra note 38, at 325–29 (describing the EU’s shift toward the internal affairs rule).

45. David Vogel & Robert A. Kagan, Introduction: National Regulations in a Global Economy, in Dynamics of Regulatory Change 1, 1 (David Vogel & Robert A. Kagan eds., 2004); David Vogel, Trading Up: Consumer and Environmental Regulation in a Global Economy 5 (2004) ("To the extent that trade liberalization has affected the level of consumer and environmental protection, it has more often strengthened than weakened it.").

46. Vogel, supra note 45, at 5–8.
jurisdictions in promoting a regulatory ‘race to the top’ among their trading partners.”

Unlike the Delaware Effect, in which a jurisdiction tempts companies to opt into its regulatory scheme and other jurisdictions then defer to that one’s expertise, the California Effect occurs when one jurisdiction pushes other jurisdictions to improve their own laws.48 This race to the top is de jure in nature, rather than de facto or deferential; other jurisdictions pass laws that mimic the superregulator jurisdiction.

Vogel identified three conditions under which a California Effect might occur.49 First, a race to the top is more likely to be triggered if the standards are supported by a coalition of public interest groups with regulated companies that wish to impose the regulatory costs they face on their competitors in other, more lax jurisdictions.50 Second, the superregulator must have a large market that is sufficiently attractive that companies would rather absorb the cost of regulation than forego the market.51 Third, a race to the top is more likely to occur if there is a strong institution capable of harmonizing standards across jurisdictions, such as the U.S. federal government or the EU.52

The classic example of the California Effect is California’s emissions regulations for automobiles. As Ann Carlson explains, from the mid-1960s onward, the state pioneered strong tailpipe emissions standards.53 When Congress amended the Clean Air Act to preempt state standards for emissions, it grandfathered in “any state” that had emissions controls in place prior to March 30, 1966—a standard applicable only to California, as lawmakers understood perfectly well.54 The Clean Air Act of 1970 explicitly recognized California as a superregulator: it became the only state allowed to set stricter-than-federal standards, and other states could then opt to follow California’s standards.55 Twelve eastern states and the District of Columbia announced

47. Id. at 6.
48. See id. at 5–8.
51. Id. at 261–63.
52. Id. at 263–68.
54. Id.
55. See Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1078–79 (9th Cir. 2013) (“Other states could choose to follow either the federal or the California standards, but they could not adopt standards of their own.”); Carlson, supra note 53,
in 1994 that they would follow California.\textsuperscript{56} Auto emissions rules illustrate all three of Vogel’s conditions: a coalition of public interest groups alongside regulated companies, a superregulator with a large and attractive market, and a strong institution (the federal government) capable of harmonizing standards.

The mechanism of the California Effect differs from the Delaware Effect. Under the Delaware Effect, other jurisdictions defer to the regulatory choices of the superregulator, magnifying the impact of those choices.\textsuperscript{57} Under the California Effect, other jurisdictions themselves adopt the same rules as the superregulator jurisdiction.\textsuperscript{58}

C. \textsc{The Brussels Effect}

In the late twentieth century, as the authority and institutions of the European Union grew, another superregulator emerged: Brussels, the seat of the EU bureaucracy. As Anu Bradford vividly describes it: “Few Americans are aware that EU regulations determine the makeup they apply in the morning, the cereal they eat for breakfast, the software they use on their computer, and the privacy settings they adjust on their Facebook page. And that’s just before 8:30 AM.”\textsuperscript{59}

Where the California Effect depends on jurisdictions racing to strengthen their regulations in response to each other, the Brussels Effect operates principally as a \textit{de facto} mechanism, when market actors conform their global products to European rules.\textsuperscript{60} Bradford observes, “[T]he Brussels Effect is more about one jurisdiction’s ability to override others than it is about triggering an upward race.”\textsuperscript{61}

\textsuperscript{56} See supra Part I.A.
\textsuperscript{57} See supra notes 47–50 and accompanying text.
\textsuperscript{58} Bradford, \textit{supra} note 28, at 3 (citations omitted).
\textsuperscript{59} “Unilateral regulatory globalization occurs when a single state is able to externalize its laws and regulations outside its borders through market mechanisms, resulting in the globalization of standards.”
\textsuperscript{60} Id. at 8.
Why might a corporation change its practices outside Europe, adopting stricter codes absent legal compulsion? Bradford explains, “[M]ultinational corporations often have an incentive to standardize their production globally and adhere to a single rule.” Of course, sometimes these enterprises do decide to observe different regulatory regimes in different locations. Just as Vogel distilled the conditions for a California Effect, Bradford identifies circumstances under which a Brussels Effect is more likely to occur. First, as with the California Effect, the Brussels Effect is likely to occur only when the unilateral regulator represents a large and attractive market. Second, that superregulator must have significant regulatory capacity, through which it tends to aim strict rules at “inelastic targets” such as consumer markets, thus creating rules that can’t be readily evaded. Third, the operations of the firm must be “nondivisible,” meaning that it is less costly for a firm to comply with the one higher standard worldwide than to set up different compliance standards.

Unlike the effects named for Delaware and California, the Brussels Effect depends on the choices of the entities subject to regulations, not those of governments or regulators. Indeed, if organizations decide to obey a particular jurisdiction’s requirements in all their activities, then that jurisdiction will gain influence even if other jurisdictions might strongly prefer a different rule, so long as the superregulator’s demands do not actually violate the law in other places.

While the literature names certain cross-jurisdictional effects after particular superregulators who are especially likely to cause them, it is a mistake to overinterpret these names. As we shall see, superregulators can affect other jurisdictions in various ways. So, for example, when other nations adopt new data protection laws to harmonize their rules with those in the EU, this is a California Effect that happens to emanate from Brussels. When websites began posting globally applicable privacy policies partly in response to a 2003 California statute requiring they do so, this was a Brussels Effect triggered by a California law. We will delve into these catalytic effects in privacy law

62. Id. at 6.
63. Id. at 10–19; see also Schwartz, supra note 9, at 780–83 (discussing and applying Bradford’s factors).
64. Bradford, supra note 28, at 11–12.
65. Id. at 12–17.
66. Id. at 17–19.
67. See supra Parts I.A–B; Bradford, supra note 28, at 48–49.
68. See infra Part III.
more fully below. First, however, we explain the substance of the GDPR and the CCPA, demonstrating in the process both their overlaps and differences and revealing the emergence of California as a contender to be a data privacy superregulator.

II. GDPR VERSUS CCPA

Which data privacy regime is driving the wave of legislative activity related to data privacy across the United States, and what is the mechanism of that influence? To answer this question, we need first to understand the two regimes. This Part reveals both similarities and differences between the GDPR and the CCPA. After all, if the CCPA can be described as a copy of the GDPR, then even if we can show that state legislators and Congress are copying California, Schwartz and others would be correct that the European Union is the ultimate source behind new U.S. privacy proposals. But if, as we argue, the CCPA is a fundamentally different regime—only similar to the GDPR at the surface, while lacking major structural elements of the GDPR—then the question of who the superregulator is becomes one with meaningful consequences for understanding all these federal and state proposals.

A paperback of the GDPR runs some 130 pages, its sections literally divided into chapters. The CCPA, by contrast, is around 25 pages. The two laws were also written on vastly different timelines. If the GDPR is a doctoral thesis, the CCPA is a term paper written the night before the deadline.

In this Part, we compare the two regimes, addressing where they apply, whom they cover, and what they require. We also address differences in the regulatory style, enforcement mechanisms, and legal

70. See infra Part III.
71. See supra notes 7–14 and accompanying text.
72. See supra note 6 (listing data privacy bills proposed in Congress in 2019 and 2020).
settings of the GDPR and the CCPA. This understanding of the two systems sets up our analysis in Part III, where we consider the influence of the new European and Californian laws across the United States.

A. European Data Protection Versus U.S. Consumer Protection

First, it helps to understand the fundamental differences between a U.S.-style and an EU-style data privacy regime. When discussing data governance, European lawyers do not even use the same language as American lawyers; they refer to statutes that govern the handling of personal data as "data protection" laws, not "privacy" laws. This reflects a fundamental difference in approach: "data protection" is universal in Europe, while most American law focuses on "consumer protection." Data protection laws like the GDPR proceed from the principle that data protection is a fundamental human right safeguarded through constitutional protections in the European Convention on Human Rights and the EU Charter. This places data protection rights on the same plane as free speech or due process. As a result, the default in Europe is that personal information cannot be collected or processed unless there is a specific legal justification for doing so.

In the United States, by contrast, privacy law most often follows a "consumer protection" model, with regulators focused on ensuring that consumers receive the benefit of their bargain in individual business-to-consumer transactions. The consumer protection model frequently relies on the much-criticized premise that disclosure and a right of refusal (so-called "notice and choice") adequately empower


77. McGeveran, supra note 20, at 966 ("[D]ata protection law begins with an assumption that control over personal information is a human right . . . U.S. regulators, such as the FTC or state attorneys general, regulate privacy by policing the fairness of particular transactions.").


80. See id. art. 8.

81. See McGeveran, supra note 20, at 966.
consumers. Unlike in Europe, there is no protection in the U.S. Constitution against activities by nongovernmental entities including the collection of personal data. And unlike a data protection regime, in which protections follow the data, the consumer protection model focuses on governing both a more discrete interaction and a more direct relationship. Until the CCPA, most American law permitted entities to collect and use personal data however they wished by default, absent a specific legal rule forbidding a particular practice.

A second difference between Europe and the United States is that U.S. privacy law has always been fragmented and “sectoral.” Different statutes are enforced by different regulators in different sectors such as health care, financial services, education, or credit reporting. A few of these sectoral regimes are constructed like data protection rules, but they apply only within their narrow domains. Most U.S. laws function on the transactional consumer protection model described above. As a final backstop, general-purpose consumer protection regulators, such as the Federal Trade Commission (FTC) and state attorneys general, address a subset of cases falling outside any sectoral rules, again largely following a consumer protection model.

By contrast, in every European nation, specialized data protection regulators have long enforced omnibus statutes applicable to all organizations when they handle any personal data. While these data protection laws contain extra protections for especially sensitive

84. See Schwartz & Peifer, supra note 76, at 147.
85. See Reidenberg, supra note 76, at 505–06; Schwartz, supra note 76, at 908–13.
88. Charter of Fundamental Rights of the European Union, supra note 78, art. 8 (“Everyone has the right to the protection of personal data concerning him or her.”); Consolidated Version of the Treaty on the Functioning of the European Union art. 16(1), Oct. 26, 2012, 2012 O.J. (C 326) 47 (“Everyone has the right to the protection of personal data concerning them.”).
information, their basic human rights frameworks impose uniform requirements every time personal data is collected, processed, or transferred. These rules apply through sweeping definitions of “data controllers” and “data processors” that encompass not only businesses of every size and type but also governments, nonprofit organizations, political campaigns, and even individuals—anyone engaged in the “processing” of personal data.

B. Substantive Similarities

At first glance, the CCPA may seem more “European” than existing U.S. privacy laws. True, it is the first U.S. statute that has some data protection characteristics without being narrowly sectoral. For example, under the CCPA, legal protections follow personal data, regardless of whether an individual has a direct relationship with the regulated company. This differs from many existing regulatory models in the United States. Because the FTC’s general consumer protection authority focuses only on the relationship between individuals and companies, it claims to have little power over data brokers who obtain individual information from other companies or public sources rather than from consumers themselves. The CCPA, by contrast, regulates

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90. GDPR, supra note 7, art. 4(2) (defining “processing” as “any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction”); see Case C-40/17, Fashion ID GmbH & Co. KG v. Verbraucherzentrale NRW e.V., ECLI:EU:C:2019:629 (July 29, 2019) (holding Facebook jointly responsible as a data controller when a third-party website uses a Facebook “Like” button that facilitates user tracking). The first European Court of Justice case dealing with the GDPR’s predecessor, the Data Protection Directive, involved a criminal charge against an individual who had posted (seemingly innocuous) information about fellow parishioners to a webpage without their consent. Case C-101/01, Lindqvist v. Åklagarkammaren i Jönköping, 2003 E.C.R. I-12971.

91. CAL. CIV. CODE § 1798.105(d) (Deering 2018).

data brokers directly—a critical move targeting an industry that has an enormous impact on individuals’ privacy.93

Some core elements of the CCPA also seem to echo aspects of the GDPR. Both laws define personal information very broadly, far beyond most existing U.S. privacy laws.94 Both laws foundationally emphasize transparency, reflecting the Fair Information Principles on which many data privacy regimes in both Europe and the United States are built, and both laws share the contours of a number of additional individual rights.95

In the past, narrow definitions of personal information have sharply limited the effect of many U.S. privacy laws.96 Under most U.S. laws, only certain types of information counted as personal data, making the definition limited, technical, and static. The GDPR and CCPA both break with this past by using the real-world potential for identifiability as the touchstone. The GDPR’s broad and open definition of personal data includes not just information that directly identifies a person, but also information that renders a person identifiable.97 The CCPA similarly applies to information that is “capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household.”98 Both laws provide expansive and open lists of examples of covered personal information, from IP addresses to biometric information.

Another similarity between the GDPR and the CCPA is the central role of transparency. Transparency is a core principle of the GDPR.99 The GDPR’s recitals proclaim it a fundamental tenet of data protection law that people should know that personal data has been collected and be able to understand the extent to which that information is processed.100 The CCPA likewise focuses on giving people notice and

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93. JULIA ANGWIN, DRAGNET NATION 7 (2014) (“Stalkers and rogue employees have consistently found ways to abuse these databases.”). The federal Fair Credit Reporting Act, a narrow sectoral statute, does regulate some segments of the data broker industry, but largely within the context of business relationships among credit reporting agencies and the lenders or employers who rely on their products. 15 U.S.C. § 1681.

94. See GDPR, supra note 7; CAL. CIV. CODE § 1798.

95. GDPR, supra note 7; CAL. CIV. CODE § 1798.


97. GDPR, supra note 7, art. 4(1).

98. CAL. CIV. CODE § 1798.140(o)(1).

99. GDPR, supra note 7, art. 5(1)(a).

100. Id. recital 39.
access rights so that they can trace what is happening to their personal information. The California legislature's articulated intent for the CCPA was to give consumers "an effective way to control their personal information" by giving them "[t]he right . . . to know what personal information is being collected about them," and "[t]he right . . . to know whether their personal information is sold or disclosed and to whom." 101

Beyond this hortatory language, both laws embed transparency principles in their requirements. Under the GDPR, organizations must provide individuals both notice and access. 102 They must affirmatively provide detailed general notice that includes the purpose of data processing, the recipients of the data, the period for which the data will be stored, and other information. 103 Organizations that collect personal information from a third party must also provide such notice, 104 and all these disclosures must be clear and intelligible. 105

The GDPR also establishes a right of individual access, 106 building on "subject access rights" that have been in place throughout Europe at least since the 1990s under the Data Protection Directive. 107 In response to an individual's access request, data controllers must disclose, among other things: the purposes of processing, the categories of personal information concerned, the recipients of personal data, retention or storage time, and the source of the data if they have not been collected from the individual. 108 Additionally, they must provide a copy of the data itself in a commonly used electronic form. 109

The CCPA likewise gives individuals both notice and access rights. Like the GDPR, it requires companies to disclose the purpose of processing, categories of information gathered, and the existence of individual rights with respect to that data (it does not, however, require disclosure of the precise identities of the recipients of the data or the storage period). 110 Such disclosures, according to regulations

101. See Assem. 375, 2018 Leg. § 2(i) (Cal. 2018).
102. GDPR, supra note 7, arts. 13–14.
103. Id.
104. Id. art. 14(1)(d).
105. Id. art. 12.
106. Id. art. 15.
108. GDPR, supra note 7, art. 15.
109. Id. art. 15(3); see also id. recital 63 ("Where possible, the controller should be able to provide remote access to a secure system which would provide the data subject with direct access to his or her personal data.").
110. CAL. CIV. CODE § 1798.105 (2018); CAL. CODE REGS. tit. 11, § 999.305 (2020).
promulgated by California’s attorney general, must be “designed and presented in a way that is easy to read and understandable to consumers.”\textsuperscript{111} The CCPA goes well beyond notice requirements in prior U.S. law, such as a California statute requiring websites to post privacy policies.\textsuperscript{112}

Like the GDPR, the CCPA also gives individuals access rights. The statute creates a right for consumers to request both the categories and specific pieces of personal information that a business has collected.\textsuperscript{113} Consumers have a right to request disclosure of the categories of sources from which the personal information is collected, the business or commercial purpose for collecting, and the categories of third parties with whom the business shares personal information.\textsuperscript{114} Unusually for a U.S. law, the rules apply not just to companies that have a direct relationship with the consumer, but also to companies that collect and sell personal information even if they obtain that information from somebody other than the consumer.\textsuperscript{115} CCPA access rights represent a significant advance from very limited rights under previous law, such as access to credit scoring information and the annual free credit report.\textsuperscript{116}

The two regimes share, too, the core elements of a number of additional individual rights (though they differ in the details): data portability, opt-out rights, a duty of nondiscrimination, and a right to deletion or erasure. The GDPR contains a right to data portability—that is, a right to receive one’s personal data in a format that enables an individual to switch service providers.\textsuperscript{117} This right is aimed at giving individuals more control over their data and more choices about IT services\textsuperscript{118} but is also understood to potentially enhance competition.\textsuperscript{119} The CCPA quietly creates a data portability “right” of its own: personal data delivered electronically in response to an access request “shall be

\textsuperscript{111} CAL. CODE REGS. tit. 11, § 999.305(2).
\textsuperscript{112} CAL. CIV. CODE § 22575 (Deering 2014).
\textsuperscript{113} Id. §§ 1798.100(a), 110(a); CAL. CODE REGS. tit. 11, §§ 999.300(q), 308(c)(1), .318.
\textsuperscript{114} CAL. CIV. CODE § 1798.110(a).
\textsuperscript{115} Under the CCPA, consumers can request access to certain information from (a) a business that collects personal information and (b) a business that sells personal information or discloses it for a business purpose. Id. §§ 1798.100(a), .110(a), .115(a).
\textsuperscript{116} 15 U.S.C. § 1681(g).
\textsuperscript{117} GDPR, supra note 7, art. 20, recital 68; ARTICLE 29 DATA PROT. WORKING PARTY, GUIDELINES ON THE RIGHT TO DATA PORTABILITY (2017).
\textsuperscript{118} ARTICLE 29 DATA PROT. WORKING PARTY, supra note 117, at 3–4.
\textsuperscript{119} Id. at 4.
in a portable and ... readily usable format." In fact, the CCPA's data portability "right" may be broader than the GDPR's in some ways, as it applies to inferred data about an individual, where the GDPR's right does not.

Both the CCPA and the GDPR contain a right for individuals to "opt out" and deny permission for handling of their personal data in certain ways. The CCPA establishes an opt-out right for consumers to tell a business not to sell their personal information. If a business has actual knowledge that a consumer is sixteen years old or younger, it must obtain affirmative authorization ("opt-in") for any sale of personal information—from the individual themselves if they are between thirteen and sixteen years old or from a parent or guardian if the individual is under thirteen years old. The GDPR, by comparison, establishes three analogous rights: the right to restrict data processing, the right to object to data processing, and the right to withdraw consent. Although the GDPR has broader rights to opt out—they apply well beyond the sale of information—they are also less absolute than those in the CCPA.

Both regimes contain a duty of nondiscrimination: companies cannot "discriminate" against individuals who choose to exercise rights related to personal data. This means that a business cannot, for example, deny goods or services, charge different rates, impose

120. CAL. CIV. CODE § 1798.100(d).
121. Article 29 Data Prot. Working Party, supra note 117, at 10; CAL. CIV. CODE § 1798.140(e). (f), (k), (m).
122. CAL. CIV. CODE § 1798.120. Vermont's new data broker law, H. 764, requires transparency as to whether a data broker allows consumers to opt out of collection or sale of information but does not require a data broker to do so. See Vt. STAT. ANN. tit. 9, § 2430 (2019).
123. CAL. CIV. CODE § 1798.120(d).
124. GDPR, supra note 7, art. 18.
125. Id. art. 21, recitals 60, 70.
126. Id. art. 7(3).
127. Id. art. 2(1). There is also a balancing test specific to scientific or historical research purposes or statistical purposes. Id. art. 21(6).
128. CAL. CIV. CODE § 1798.125; GDPR, supra note 7, recital 42; EUR. DATA PROT. BD., GUIDELINES 05/2020 ON CONSENT UNDER REGULATION 2016/679 ¶ 48 (2020), https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_202005_consent_en.pdf [https://perma.cc/PK3G-F7MP] (giving as an example of "consent without detriment" that a company may "show that a service includes the possibility to withdraw consent without negative consequences e.g. without the performance of the service being downgraded to the detriment of the user"); CAL. CODE REGS. tit. 11, § 999.336(a) (2020) ("A financial incentive or a price or service difference is discriminatory, and therefore prohibited ... if the business treats a consumer differently because the consumer exercised a right conferred by the CCPA or these regulations.").
penalties, or provide a different level of services to customers who opt out of data transactions. The CCPA regulations, however, contemplate a compensation scheme whereby a business can offer financial incentives or a price or service difference if they are “reasonably related to the value of the consumer’s data.”129 This changes the duty of nondiscrimination in at least some circumstances from an absolute duty into an information-forcing mechanism regarding how companies value consumer data.130

The GDPR famously contains a right to erasure, also known as the “right to be forgotten.”131 The CCPA creates a more limited right to deletion.132 The GDPR’s right to erasure gives individuals the right to obtain the erasure of personal data both from companies with which they have a direct consumer relationship and from third parties, under certain circumstances.133 There are exceptions to the right to erasure, including freedom of expression and public interest in the area of public health.134 As many have noted, this so-called “right to be forgotten” is not absolute but is in large part a balancing test between competing values, outsourced to private companies.135 The CCPA creates a much narrower right to deletion. Unlike the GDPR’s right to erasure, which applies to third parties, the CCPA’s right to deletion applies only to businesses that collect information directly from the consumer.136

129. CAL CODE REGS. tit. 11, § 999.336(b).
130. See id. § 999.337.
131. GDPR, supra note 7, art. 17. See generally MEG LETA JONES, CTRL + Z: THE RIGHT TO BE FORGOTTEN (2016).
133. GDPR, supra note 7, art. 17(1)(a)–(f) (permitting an individual to exercise the right to erasure in circumstances including, but not limited to, when the personal data is no longer necessary for the purpose it was originally collected or processed for, the individual withdraws their consent where the organization relied on said consent as the lawful basis of processing, or when the individual objects to the processing of their data for direct marketing purposes).
134. Id. art. 17(3)(a), (c).
136. CAL. CIV. CODE § 1798.105(a).
This more restricted scope is an accommodation of First Amendment law and values in the United States, which may constrain erasure requirements imposed on third parties.\textsuperscript{137}

In sum, the CCPA moves closer to a data protection regime like the GDPR in certain ways, which helps explain the widespread assumption that it represents a U.S. embrace of the European-style data protection model. While the CCPA’s broad definition of personal data, emphasis on transparency, and establishment of some individual rights do go further than previous U.S. law, none of these shifts go nearly as far as the GDPR. As we shall see in the next Section, these similarities are overshadowed by fundamental substantive differences between the two models.

C. SUBSTANTIVE DIFFERENCES

Once an analysis moves beyond these similarities, it becomes clear that the CCPA regime differs sharply from the GDPR. First, and perhaps most importantly, the two laws do not share the same underlying principles, leading to great differences in the scope and nature of the rights and duties imposed by each. Second, while the CCPA is broader than past American sectoral laws, it still regulates a much narrower set of entities than does the GDPR. Third, the two laws have different enforcement mechanisms. Fourth, their regulatory styles contrast, with significant practical and substantive consequences. And finally, California and Europe are each quite distinct in what we call their “legal setting”—the backdrop against which privacy laws exist and will develop over time. We consider each of these differences in order.

First and foremost, for all its moves toward broader coverage and the creation of individual rights, the CCPA does not treat privacy as a human right in the way data protection laws like the GDPR do.\textsuperscript{138} It


\textsuperscript{138} Compare CAL. CIV. CODE § 1798.105, with GDPR, supra note 7, art. 1.
remains, in the American tradition, a transactional privacy law concerned with protecting consumers in their dealings with commercial entities. For this reason, the CCPA does not embrace several principles that have been at the core of constitutionally influenced European data protection law since long before the GDPR—back to its predecessor, the 1995 Data Protection Directive, and back even further to national data protection laws in many European countries dating from the 1970s and 1980s.

The GDPR is built around the concept of “lawful processing” of data. That is, personal data cannot be processed unless a data controller has obtained individual consent or one of five other enumerated categories of lawful processing applies. The CCPA does not require that processing be lawful. Rather, it shares the presumption of most other American privacy law that personal data may be collected, used, or disclosed unless a specific legal rule forbids these activities. This is likely the single most meaningful difference between the two regimes.

Moreover, the GDPR imposes multiple additional conditions on all data processing, even when it is authorized by consent or another of the legitimizing conditions. The GDPR requires that personal data may be collected only for “specified, explicit and legitimate purposes,” stated at the time of collection. Additional principles include purpose limitation (processing data only for those previously stated purposes), data minimization (collecting no more data than necessary for those purposes), data retention (limiting storage of data to periods justified by those purposes), privacy by design, as well as privacy impact assessments for high risk data processing, among others.


141. GDPR, supra note 7, art. 6(1)(a).

142. Id. art. 6(1)(a)–(f).

143. CAL. CIV. CODE § 1798.100.

144. Id.

145. GDPR, supra note 7, art. 5(1).

146. Id. art. 5(1)(b).

147. Id. art. 5(1)(b)–(f).
The CCPA imposes few requirements concerning the purposes for data collection or the proportionality of data handling to those purposes. The CCPA's text does not even go as far as the Health Insurance Portability and Accountability Act (HIPAA), which requires that downstream disclosures of patient data be the "minimum necessary" to achieve a purpose. \footnote{148} Instead, the CCPA requires a business to provide notice if it is "collect[ing] personal information collected for additional purposes." \footnote{149} This rule on its face does not stop companies from using data for new purposes—it just requires disclosure if they do so. As in many other places, the CCPA's approach relies on transparency rather than following the GDPR by imposing substantive duties on companies that collect and process personal data. The implementing regulations promulgated by the California attorney general do require that a business "shall not use a consumer's personal information for a purpose materially different than those disclosed in the notice at collection." \footnote{150} If a business wishes to use personal information for a new, undisclosed, materially different purpose, it must obtain explicit consent from the consumer for that use. While this is more than mere transparency, it is far from the extensive conditions on all data processing in the GDPR.

The divergence in the two regimes' animating principles also influences their treatment of individual rights. The CCPA, apart from allowing individuals to opt out of sales of their personal data, affords individuals little control. It does nothing to enable individuals to refuse to give companies their data in the first place. The GDPR strives to do so by requiring stringent forms of consent in a number of circumstances \footnote{151} and by granting individuals robust rights throughout the life cycle of data processing, including the right to rectification of incorrect information; \footnote{152} the right to prevent automated individual decision-making and to receive explanation of any automated decision; \footnote{153} and broader rights related to erasure of data and withdrawal.
of consent.\textsuperscript{154} Additionally, the GDPR’s requirement of lawful processing bestows more individual control than the CCPA.\textsuperscript{155} The CCPA relies primarily on transparency, and apart from access and notice rights, grants individuals only the two limited rights discussed above: to opt out of sale and to request deletion.\textsuperscript{156}

Fundamentally, then, the CCPA is not a comprehensive European-style data protection regime. The GDPR quintessentially targets compliance from an organizational perspective: it attempts to build up a particular kind of responsible corporate infrastructure, including internal positions and processes.\textsuperscript{157} The GDPR’s affirmative regulatory requirements range from data minimization to risk assessments to recording requirements, and they are imposed on data collectors even where there is not a corresponding individual right.\textsuperscript{158} The CCPA regulations require compliance training and record-keeping,\textsuperscript{159} but overall appear to be geared more towards providing transparency into industry practices—in this case, how a company responds to consumer requests under the CCPA—than towards reinforcing good data practices or creating substantive protections for consumers. It remains to be seen if the GDPR will succeed in entrenching more privacy-protective corporate practices, but its aims are far broader, and approach far deeper, than the CCPA’s.

A second difference between the GDPR and CCPA relates to regulated entities. As noted earlier, the GDPR covers anyone that processes personal data, including not only companies but also individuals, non-profit organizations, and governments.\textsuperscript{160} The CCPA applies only to businesses, and only to those that meet a complex set of overlapping requirements related to their size or the extent of their involvement in personal data trade.\textsuperscript{161} Here again, the two laws reflect the

\textsuperscript{154} GDPR, supra note 7, art. 17.

\textsuperscript{155} Id. art. 6(1)(a).

\textsuperscript{156} CAL. CIV. CODE § 1798.120 (2018).


\textsuperscript{158} GDPR, supra note 7, art. 5(2); see also Kaminski, supra note 157.

\textsuperscript{159} CAL. CODE REGS. tit. 11, § 999.317 (2020).

\textsuperscript{160} GDPR, supra note 7, art. 2(1).

\textsuperscript{161} CAL. CIV. CODE §§ 1798.100, .105, .110,.115,.120. The CCPA targets three kinds of commercial entities as “businesses.” Id. § 1798.140(c). It targets (1) larger businesses (with over twenty-five million dollars in annual gross revenue) that collect California residents’ personal data, regardless of how many people are impacted by this collection; (2) for-profit businesses of any size that buy, receive, sell, or share personal information concerning a significant number of residents (50,000 or more); and (3) businesses that derive half or more of their annual revenues from selling personal information—regardless of their size or how many people are affected by this activity.
dominant approach on each side of the Atlantic. A data protection model inherently aims to be comprehensive. The CCPA, while broader than many sectoral U.S. privacy laws of the past, still limits its aim to protecting consumers from certain data handling practices within a specific context defined by commerciality, geography, and scale.

The regimes’ respective enforcement mechanisms are a third area of divergence. Both provide for monetary penalties for non-compliance. The GDPR authorizes administrative fines issued by national data protection regulators of up to 4% of a company’s annual worldwide revenue, while the CCPA includes civil penalties of up to $2,500 per violation or $7,500 per intentional violation, a number that can exact enormous sums when multiplied by the number of people affected in many privacy violations.162 However, there is no private right of action for affected individuals to enforce most elements of the CCPA. This is in keeping with the trend for U.S. privacy laws of at least the last twenty years, including the FTC Act,163 HIPAA,164 and the Children’s Online Privacy Protection Act (COPPA).165 There have been proposals in the California legislature to authorize private CCPA lawsuits, but for now only the state attorney general may enforce most provisions of the law.166 In Europe, a constitutionally guaranteed right of redress for violations of individual rights means the GDPR can be enforced by individual complaints.167 While class actions are largely unfamiliar in European law, the GDPR does allow a claims representation model so that individuals do not have to file claims on their own behalf only. There is also a well-developed regulatory structure in the GDPR, with specialized data protection regulatory authorities in each EU country and coordination of their efforts through a European Data Protection Board.168 Although the recently enacted California Privacy Rights Act (CPRA) establishes a new privacy-specific regulator,169 there is no tradition of dedicated data protection regulators in the United States, which instead relies on agencies with numerous other

162. GDPR, supra note 7, art. 83; CAL. CIV. CODE § 1798.155(a)–(b).
166. The CCPA does, however, authorize private lawsuits for a narrow set of claims related to data security breaches.
167. GDPR, supra note 7, arts. 77–79.
168. Id. arts. 51–59.
obligations, including the FTC, state attorneys general, and sectoral regulators in areas such as health, banking, or education.

Fourth, the regulatory styles of the two regimes differ greatly. This can create both substantive and cultural gaps. The CCPA establishes limited but granular requirements that California’s attorney general has fleshed out further in recently promulgated regulations.170 The GDPR, on the other hand, consists of broad standards in its text and relies heavily on cooperation with companies and various forms of guidance (including the GDPR’s Recitals, European Data Protection Board Guidelines, and interpretations from individual national data protection authorities) to fill in the details.171 In other words, the GDPR’s approach to regulation exemplifies collaborative governance, also known as “coregulation” or “new governance.”172 The GDPR’s vagueness is arguably deliberate. EU authorities wanted to allow companies and sectors to fill in details of how to comply with the law over time, whether formally by establishing codes of conduct or certification mechanisms (although these have yet to materialize more than two years after the GDPR came into force),173 or informally through self-regulation, recording and reporting, impact assessments, and ongoing conversations with regulators.174 By contrast, the CCPA’s granularity appears, in places, to value detail and certainty over adaptability.

For example, where the GDPR simply states that it requires clarity and intelligibility in its access and notice rights, the statutory text of the CCPA specifies that companies provide a toll-free telephone number and website address for consumers to make access requests.175 For those businesses subject to the CCPA’s opt-out, the CCPA mandates a clear and conspicuous link titled “Do Not Sell My Personal Information” and a description of the consumer’s right to opt out of the sale of personal data.176 The CCPA regulations go into even more detail about the precise mode and content required for notice at

171. See Kaminski, supra note 157; McGeveran, supra note 20.
173. GDPR, supra note 7, arts. 40, 42.
174. See Kaminski, supra note 157; McGeveran, supra note 20.
collection, notice of opt-out, notice of financial incentive, and privacy policies. These examples demonstrate a stylistic difference between the two laws that could have real consequences for businesses trying to comply with both. For certain obligations, the CCPA and its regulations offer a clear, if inflexible, roadmap for compliance. Often, however, it is so detailed that it creates the possibility of divergence from the GDPR—even where in broad strokes the two laws might appear similar.

Finally, the backdrop against which these two privacy laws were enacted, or what we call their legal setting, differs significantly. While the CCPA is constrained by increasingly deregulatory First Amendment doctrine, the GDPR is backed by European courts that have increasingly recognized the importance of both privacy and data protection as fundamental rights. In recent years, these courts have applied the right to be forgotten to search engines, found the Data Retention Directive to violate fundamental rights, and twice invalidated the primary mechanism for transferring data to the United States because of fears that American national security surveillance would trample on Europeans’ rights.

Crucially, European constitutional structures enforce affirmative rights against private conduct, not just against state actors as in the United States. And, while European constitutional traditions safeguard the right to freedom of expression, it is usually balanced against other rights, and it can and does often lose out to constitutional data protection rights. By contrast, the U.S. Supreme Court in recent years has interpreted free speech doctrine to restrict both data privacy regulations and other consumer protection disclosure regimes. Some observers worry that the First Amendment is becoming an increasingly blunt tool, subjecting many regulations concerning

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177. Id. §§ 999.305–308.
178. Schwartz & Peifer, supra note 76.
182. See Schwartz & Peifer, supra note 76, at 126, 155.
184. See infra Part III.D.2.
privacy and other topics to often-fatal strict scrutiny. Additionally, the Supreme Court has been skeptical of data privacy harms, in cases addressing both privacy damages and standing to sue. The U.S. Constitution contains no explicit data privacy right, and the Fourth Amendment protects only against state action, not the actions of private parties.

Overall, these five differences overshadow the similarities. Asserting that the CCPA is remotely equivalent to a data protection regime like the GDPR overstates the importance of a few resemblances. It is true that the CCPA departs from some common characteristics of previous U.S. privacy law and that it overlaps with some aspects of the GDPR. But the California law’s motivations, mechanisms, scope, and legal setting keep it well within the consumer protection tradition of American privacy law. The question now is which of these two fundamentally different laws is catalyzing the recent legislative activity around privacy in Congress and state legislatures.

III. CATALYZING PRIVACY

The standard account of transatlantic privacy describes two fundamentally incompatible privacy regimes reflecting deep philosophical divides between legal cultures. According to this story, a laissez-faire approach to data privacy in the United States reflects broader liberal norms that prioritize individual autonomy in the face of big government, while the more interventionist EU approach reflects “social-protection norms” aimed at protecting human dignity. Researchers (including one of us) have argued that this conventional wisdom oversimplifies matters by focusing on disparities in law-on-the-books and ignoring similarities in practices-on-the-ground. Nonetheless, the EU and United States have been unable, or at least

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187. Some state constitutions do, however, provide an explicit right to privacy, even against private parties. See, e.g., CAL. CONST. art. 1, § 1 (“All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending…privacy.”).

188. See Joel R. Reidenberg, Resolving Conflicting International Data Privacy Rules in Cyberspace, 52 STAN. L. REV. 1315, 1343 (2000); Whitman, supra note 76, at 1161.

189. Bamberger & Mulligan, supra note 20, at 260; McGeveran, supra note 20, at 960.
disinclined, to come to an international consensus on data privacy, instead forging *sui generis* and unstable bilateral arrangements governing data transfers between the two regimes.\textsuperscript{190}

The CCPA and the GDPR herald a possible paradigm shift for data privacy. Rather than two fundamentally incompatible frameworks, one European and one American, we identify the emergence of a race between California and the European Union as regulatory catalysts, driving the U.S. states, and possibly the U.S. federal government, to enact new data privacy laws.\textsuperscript{191}

This Part first outlines the argument that the GDPR has been the dominant influence on both de facto and de jure spread of privacy law worldwide. We argue that the United States represents an exception to this narrative—a narrative that largely, and in our view mistakenly, adheres to a notion of nation-states (and supranational entities) as unitary actors rather than considering the various players within them.\textsuperscript{192}

We then examine a number of recently proposed and several recently enacted state and federal data privacy laws, aiming to answer the question: which jurisdiction is driving this race to propose and enact new privacy rules? We find that although the commonly accepted narrative credits new strong European rules as the driver,\textsuperscript{193} in fact, the proposals in U.S. states have largely copied California. And although the CCPA does not always provide the substantive content for recently proposed federal legislation, it has been the impetus behind those bills. California, not Europe, is catalyzing the recent and ongoing development of U.S. data privacy law.

The story of the CCPA and its imitators, we argue, is not the commonly assumed story about the unilateral power of Brussels. It

\textsuperscript{190} See cases cited supra note 181.


\textsuperscript{192} See, e.g., Harold Hongju Koh, How Is International Human Rights Law Enforced?, 74 IND. L.J. 1397, 1401–09 (1999) (contrasting five theories of how international human rights law is enforced: power, self-interest, liberal explanations, communitarian explanations, and legal process explanations—and noting the role of “transnational norm entrepreneurs” in legal process [in contrast to state-centric theories such as realism]); Anne-Marie Slaughter, A Liberal Theory of International Law, 94 AM. SOC’Y INT’L L. PROC. 240, 241 (2000) [describing liberal IR theory as “a view that preserves an important role for states but deprives them of their traditional opacity” in contrast to traditional IR theory, “which conceive[s] of the international system as composed of unitary, identical state actors with fixed preferences (the billiard ball model).”].

\textsuperscript{193} See supra notes 10–14 and accompanying text.
demonstrates instead how networked individuals can harness processes at the state and local level to promote the adoption of new legal norms. Rather than causing a race to the bottom, the backdrop of what we call “data globalization” both influences and empowers norm entrepreneurs advocating for stricter requirements.

Why are other states now copying the CCPA? We posit a number of reasons. First, in an echo of the Delaware Effect, California may have established itself nationally as an expert jurisdiction on data privacy law, through both the CCPA and numerous earlier statutes regulating data privacy. Second, since so many data-centered companies have a significant presence in California, other states may be presuming a California-driven “Brussels” Effect: that is, many companies already complying with the CCPA with respect to California residents would de facto comply with, or be readily able to comply with, CCPA-like requirements in other states. Third, state legislators motivated to enact privacy protections are far more likely to model their laws on a roughly twenty-page law from a U.S. jurisdiction than a foreign law consisting of 99 articles and 173 recitals.

We do not deny that the GDPR influenced the direction of American privacy law. It certainly reduced the costs of compliance with new American privacy law for multinationals that were already bringing themselves into compliance with the GDPR. The strong new European law also brought attention to the comparative deficit in U.S. law. But the effect from the EU has been more circumscribed than generally reported, and it is clearly secondary to a very real California Effect.

We will close Part III with some cautious predictions. We examine some of the countervailing forces unique to the United States that may contain the spread of privacy rules from one jurisdiction to the next, including the dormant commerce clause, the possibility of federal preemption, and the First Amendment. We hypothesize, however, that the spread of data privacy law in the United States will continue, with the CCPA as the new minimum threshold for protection. A new data privacy equilibrium is being established in the United States, whether it progresses state-by-state, encourages development of

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194. See supra note 192.
195. For an argument of how to curtail the race to the bottom with respect to online service providers, see Anupam Chander, The Electronic Silk Road: How the Web Binds the World in Commerce 166–69 (2013).
model state legislation, results in a uniform federal law, or some combination of the above.

A. **BRUSSELS AS THE WORLD’S PRIVACY CATALYST**

As Paul Schwartz and others have observed, the GDPR is driving the enactment of new data privacy laws around the world.\(^{197}\) This matches what we described in Part I as a (de jure) “California” Effect.\(^{198}\)

The EU has strictly limited the export of personal data outside of the EU since the 1995 Data Protection Directive came into effect, and this policy continued in the GDPR.\(^{199}\) Both the Directive and the GDPR allow crossborder transfers of personal data only in one of three ways. Two of the methods are cumbersome, requiring individual companies to go through complex, inflexible, and often bureaucratic processes to adopt either “binding corporate rules” or “model contract clauses.”\(^{200}\)

The third method is the “adequacy mechanism,” which operates on the national level instead of at the level of an individual organization. If the European Commission declares a foreign country’s data protection laws and enforcement to offer an “adequate level of protection,”\(^{201}\) then data can flow to any organization in that country with no further constraint. Because an adequacy ruling greatly simplifies data transfer in comparison to the more onerous options, many countries have sought to modify their laws to obtain such a ruling.\(^{202}\)

The adequacy process can thus be characterized as a deliberate legal export strategy. By making it much easier for companies doing business in the EU to transfer data across borders if their home jurisdictions adopt data protection laws that satisfy European authorities, the EU deployed the Brussels Effect (de facto compliance) to cause a California Effect (de jure regulatory changes). As Schwartz cautions, the dynamic is more complicated in reality, because other jurisdictions have pushed back against the adequacy process, resulting in

\(^{197}\) See generally Schwartz, supra note 9, at 771 ("The cornerstone of EU law in this area, the General Data Protection Regulation (GDPR), is now widely regarded as a privacy law not just for the EU, but for the world.").

\(^{198}\) See supra Part I.B.

\(^{199}\) See GDPR, supra note 7, art. 45; Directive 95/46/EC, art. 25, 1995 O.J. (L 281).

\(^{200}\) GDPR, supra note 7, arts. 46–47 (describing binding corporate rules and standard contractual clauses, among other mechanisms); Directive 95/46/EC, art. 25 (outlining procedures for derogations from Article 25 limitations on cross-border transfers).

\(^{201}\) Directive 95/46/EC, art. 25(1).

\(^{202}\) See Schwartz, supra note 9, at 786–95 (comparing UK, Japan, U.S. and noting that Israel and others have received adequacy determinations).
more of a give-and-take than pure export. But at the end of the day, the laws of other countries do look much more like EU law than they did before their adequacy determinations.

The GDPR also demonstrates a (de facto) Brussels Effect, spurring many multinational companies to comply with its provisions worldwide, even where other jurisdictions do not adjust their laws, and not only for operations dealing with European persons. Some enterprises decided to avoid GDPR exposure by excluding Europe altogether. For example, the Los Angeles Times and the Chicago Tribune disabled access for Internet users in the EU. National Public Radio took a different approach: "Users could either agree to the new terms, or decline and be taken to a plain-text version of the site, looking for all the world like it had last been updated in 1996." Chinese smart-home manufacturer Yeelight disabled Internet-connected lightbulbs in the European Union. For these firms, even the potential benefits of serving the huge European market could not justify the costs of compliance or the risks of non-compliance. And surely many smaller organizations disregard GDPR requirements because their exposure to Europe is minor.

Nonetheless, when the GDPR went into effect in May 2018, people across the world, including Americans, begin receiving a fusillade of messages from companies updating their privacy policies. Some companies have adopted the compliance infrastructure required in the GDPR—designating data protection officers, running impact assessments, baking in some form of privacy by design—throughout their international operations. Just as the scholarship on the Brussels Effect anticipates, these companies have found it desirable to maintain a unified firm-wide compliance architecture and adhered to the more

203. Id. (illustrating negotiations between the EU and external countries to allow personal data to flow freely between economies).


207. Id.
stringent GDPR requirements. A few companies have gone even further by adopting aspects of the GDPR other than its compliance rules; Microsoft, for example, announced that it would “extend the rights that are at the heart of GDPR to all of our consumer customers worldwide.”

Through both the Directive and the GDPR, EU authorities successfully exported their approach to data protection to many places around the globe, both through national responses to the adequacy mechanism and institutional efforts to unify data compliance operations. But the influence of EU privacy law has been much more limited in other respects, starting with its capacity to catalyze legal change in the United States.

B. BUT SEE THE UNITED STATES

While the GDPR’s adequacy mechanism and its direct effect on global companies may entice other jurisdictions worldwide to enact or amend data privacy law, it is not the catalyst for recently proposed laws in the United States. Indeed, as Part II shows, the CCPA is not modeled on the GDPR, though both share similarities founded in the long-established Fair Information Practice Principles. The forces behind both the CCPA and its counterparts across the United States do not seek an adequacy ruling from the European Union. Nearly a quarter century of European data protection law did not prompt the United States to take up a broad law of its own.

Why has the United States gone its own way? We will note later that the exceptional American approach to free expression, and its tension with some portions of the GDPR framework, are likely inhibiting factors. But we believe that an earlier moment of norm entrepreneurship was equally critical.

The EU prohibition on cross-border data transfers became effective in 1998 under the Data Protection Directive. Faced with the near certainty that U.S. law would not be found adequate for unrestricted data flow from the European Union, the Clinton administration set


209. An adequacy determination would not have been forthcoming from the EU without dramatic legal and regulatory changes in the U.S. See Opinion 1/99 of the Working Party on the Protection of Individuals with Regard to the Processing of Personal Data: Concerning the Level of Data Protection in the United States and the Ongoing Discussions Between the European Commission and the United States Government, at 2, art. 29 (Jan. 26, 1999), https://ec.europa.eu/justice/article-29/documentation/opinion
out to negotiate an exception because U.S. companies wanted to avoid using the more cumbersome mechanisms for data transfer available under the European law. Bolstered by its close relationship to Europe as well as America’s economic and other soft power, the Clinton administration worked out a bespoke exemption from the European rules. American and European diplomats worked for years to negotiate a separate data trade agreement applicable only to their bilateral relationship. In 2000, the Clinton administration and the European Commission signed the “U.S.-EU Safe Harbor Agreement,” which allowed U.S. companies to certify annually that they adhered to a narrow set of general data protection principles in order to transfer personal data from the EU.\(^\text{210}\)

The U.S. thus inoculated itself against any catalyzing effect from EU data protection law, of either the de facto or de jure variety. The European Commission (effectively the EU’s executive branch) ratified the Safe Harbor as consistent with EU data protection law.\(^\text{211}\) But in a 2015 decision, the Court of Justice of the European Union, citing the revelations of Edward Snowden about the scope of U.S. national security surveillance, struck down the Safe Harbor.\(^\text{212}\)

Even then, the response was not for the U.S. to conform its law to the EU adequacy standard, or even to concede that American data controllers would need to use one of the other mechanisms for cross-border data transfers. Instead, the two sides returned to the negotiating table and reached a new compromise, known as the “EU-U.S. Privacy Shield.”\(^\text{213}\) The carrot of adequacy that enticed countries from Argentina to Thailand to change their data privacy laws still failed to


move U.S. privacy law. In 2020, the EU’s highest court once again invalidated the special transatlantic arrangement as still inconsistent with EU law. It remains to be seen how the EU and U.S. will respond this time. But there is little indication that American jurisdictions have become any more inclined to harmonize U.S. law with the GDPR model.

We now turn to examine the recent extensive state and federal legislative activity in the United States. Our close comparison of the GDPR and the CCPA in Part I and our examination below of various state and federal privacy bills shows that the CCPA, not the GDPR, has played the leading role in the legislative response across the United States. The various state bills are often modeled on provisions of the CCPA. Federal bills in turn are the political response to state legislative activity prompted by the CCPA.

1. State Laws

Since the advent of the GDPR and the CCPA, the United States has seen an unprecedented volume of legislative proposals that would regulate data privacy at the state level. According to the National Conference of State Legislatures, in 2019 alone, consumer privacy bills were introduced or filed in at least twenty-five states and Puerto Rico. Legislatures in nearly half of the states (twenty-one by our count) considered or enacted data security bills in 2018 and 2019.

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214. In a rare exception to this rule, as part of the negotiations leading to the adoption of the Privacy Shield, the U.S. Congress passed the Judicial Redress Act in 2015, 5 U.S.C. § 552a, to help assure Europeans that they would have the ability to bring claims under the Privacy Act of 1974, 5 U.S.C. § 552a, against U.S. governmental intrusions.


Data privacy and data security are related but not identical issues, although legislators frequently conflate them—evidenced by Colorado’s “data privacy” law, which focuses on data security matters. At least ten states considered privacy laws aimed at Internet service providers (ISPs), presumably in response to Congress’s 2017 repeal of the Federal Communications Commission’s broadband privacy rules. And legislators in many states proposed narrower privacy laws, on topics from student privacy to the protection of biometric or geolocation information.

218. See Derek E. Bambauer, Privacy Versus Security, 103 J. CRIM. L. & CRIMINOLOGY 667, 668-69 (2013) (“While legal scholars tend to confine privacy and security, they are distinct concerns.”); William McGeveran, The Duty of Data Security, 103 MINN. L. REV. 1135, 1141 (2019) (“Data security is just one element of the broader concept of data privacy; the latter also relates to the collection, use, and disclosure or personal data in addition to its secure storage.”).


Our focus here is on the unprecedented flurry of comprehensive data privacy legislation. Restricting the focus to comprehensive data privacy laws, we count at least seventeen states in addition to California and Puerto Rico that considered or enacted comprehensive data privacy laws in 2018 and 2019.\footnote{221} Five states established task forces with the goal of proposing data privacy legislation.\footnote{222} Including task forces, there were in 2018 and 2019 at least nineteen states (and Puerto Rico) considering or enacting comprehensive data privacy legislation.\footnote{223} In California, the California Privacy Rights Act (CPRA), enacted via ballot initiative in November 2020 but with most provisions not going into effect until January 2023, establishes the new California Privacy Protection Agency, a privacy-specific regulator in that state.\footnote{224} In addition to these individual state proposals, the Uniform Law Commission (ULC) is developing a proposed uniform law that would establish “a comprehensive legal framework for the treatment of data privacy,” guided to a large degree by the scope of the CCPA.\footnote{225}

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\footnote{223}{North Dakota and Connecticut are each counted once in our analysis, as both states proposed comprehensive data privacy legislation and ultimately instead established a task force.

\footnote{224}{See de la Torre & Brown, supra note 169.

\footnote{225}{Katie Robinson, New Drafting and Study Committees To Be Appointed, UNIF. L. COMM’N (July 24, 2019, 4:37 PM), https://www.uniformlaws.org/committees/community-home/digestviewer/viewthread?MessageKey=bc3e157b-399e-4490-9c5c-608cec5cabc0&CommunityKey=d4b05b84-c2f4-d8b1-90e9-48b11b84ca39a&}
has drafted and promoted hundreds of model statutes, from the Uniform Commercial Code to the Uniform Trade Secrets Act. Once the ULC votes to publish model bills, it is up to individual state legislatures to adopt them.  

We focus here on a few of these proposals to identify their intellectual origins in either the CCPA or the GDPR. We find that, despite popular claims to the contrary, the catalysis for data privacy proposals in state legislatures is emanating not from Brussels, but from California.

Take, for example, Connecticut’s proposed comprehensive data privacy bill, SB 1108. The original version of the bill, introduced in January 2019, effectively copied the CCPA, with minor edits. The definition of “personal information” was identical; the definition of a covered “business” was identical. Like the CCPA, the proposed Connecticut bill granted individuals access rights, a right to deletion, and a right to opt out of the sale of one’s data. Like the CCPA, the proposed Connecticut bill prohibited businesses from discriminating against consumers for exercising their rights. The proposed bill so closely tracked the CCPA’s requirements that it, too, required a toll-free number for requesting access, and a conspicuous “Do Not Sell My Personal Information” link for opting out of sale. Ultimately, however, legislators replaced the bill with a substitute act establishing a task force concerning consumer privacy, signed into law on July 9, 2019. The Act instructs the task force to “examine what information businesses in this state should be required to disclose to

tab=digestviewer#bmhc3e157b-399e-4490-9c5c-608ec5caabcc [https://perma.cc/98JG-TQQ3].

226. See FAQs, UNIF. L. COMM’N, https://www.uniformlaws.org/aboutulc/faq [https://perma.cc/8XGL-CALF]. One of the authors of this Article, William McGeveran, previously served as the reporter for the committee drafting this model legislation; another of the authors of this Article, Margot Kaminski, serves as research director for the Developments in Privacy Law Committee.


229. Id. § 3.

230. Id. § 7.

231. Id. § 8.

232. Id. §§ 9(1), 10(1).

such examination shall include, but not be limited to, the California Consumer Privacy Act of 2018, as amended, to consider what provisions could be implemented in this state.”

Massachusetts’s proposed data privacy bill, S. 120, provides another clear example of this mimicry. Also introduced in January 2019, S. 120 contains language identical to the California law in multiple places. Like the CCPA, the proposed Massachusetts bill applies to “businesses,” and like the CCPA, this includes both businesses with gross revenues over a certain threshold (ten million dollars in Massachusetts, twenty-five million dollars in California) and businesses that derive fifty percent or more of annual revenue from the disclosure of personal information. S. 120’s exception for publicly available information, too, almost perfectly adopts CCPA language. While S. 120 does not contain the CCPA’s exhaustive list of examples of personal information, its core definition of personal information differs by just one word. The proposed Massachusetts bill would establish notice, access, and deletion requirements that largely correspond to those in the CCPA. Like the CCPA, the rights are not waivable.

In some places, the proposed Massachusetts bill is stronger than the CCPA. It gives consumers the right to opt out of not just the sale of personal information, but also of third-party disclosure. And unlike the CCPA, it provides for a private right of action, with statutory

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237. Compare Mass. S. 120 § 1(m)(1) (defining “personal information” as “information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or the consumer’s device” [emphasis added]), with CAL. CIV. CODE § 1798.140(v)(1) (defining “personal information” as “information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household” [emphasis added]).
238. Mass. S. 120 § 2 (requiring disclosure of categories of personal info, business purpose, consumer rights, and more); id. § 3 (establishing the right to request specific pieces of personal info, names of third parties to whom disclosed, sources, and business purpose); id. § 5 (covering the right to delete info collected from the consumer); id. § 6 (including the right to opt out of third-party disclosure instead of sale).
damages of $750 per consumer per incident, plus attorney fees. Mirroring the CCPA, it directs the state attorney general to write regulations and empowers that office to enforce the new privacy rules.

Also, in January 2019, North Dakota introduced data privacy legislation with significant similarities to the CCPA. That legislation seems to have been inspired by a news report about European privacy law that one of the drafters watched. Despite this inspiration, when the time came to draft a bill, North Dakota also looked to California for substantive language. The bill defined a covered business nearly word-for-word identically to the CCPA’s definition. The definition of “personal information,” too, closely tracked that in the CCPA. It created a right of access similar to the CCPA’s. Unlike the CCPA, however, in a few provisions, the North Dakota bill emulated a more

241. Id. § 9.
242. Id. §§ 10–11.
245. Id. (noting that some states have “largely follow[ed] the lead of California” in drafting consumer privacy laws).
246. Compare N.D. H.R. 1485, § 51-37-01 (“[A] [c]overed entity . . . a. Has annual gross revenues in excess of twenty-five million dollars; b. Annually buys, receives, sells, or shares personal information of at least fifty thousand consumers, households, or devices; or c. Derives at least fifty percent of its annual revenues from selling personal information.”), with California Consumer Privacy Act of 2018, CAL. CIV. CODE § 1798.140(c) (West 2018) (defining business as “[a] sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity 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. (C) Derives 50 percent or more of its annual revenues from selling consumers’ personal information.”).
247. Compare N.D. H.R. 1485 § 51-37-01 (“Personal information’ means information that identifies, describes, or could reasonably be linked with a particular individual. The term does not include publicly available information lawfully made available to the general public from federal, state, or local government records.”), with California Consumer Privacy Act of 2018, CAL. CIV. CODE § 1798.140(o)(1) (West 2018) (“Personal information’ means information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household.”).
248. N.D. H.R. 1485 § 51-37-03 (providing that upon “request from an individual, a covered entity shall disclose” the content of personal data that it possesses).
European approach; for example, it would have prohibited disclosure of personal information without express written consent (more of an opt-in than an opt-out) and it would have created a private right of action.249 On the other hand, other departures from the CCPA took it further from the GDPR, because it lacked a notice requirement or a right to deletion. Ultimately, the bill was replaced by a proposal for a legislative study of data privacy laws.250

These three states are just a sampling of this dynamic. We find proposals in at least seven other states that could similarly be characterized as CCPA clones to a large degree.251 Bills in Mississippi, Pennsylvania, and Rhode Island, like those in Connecticut and Massachusetts, copied portions of the CCPA wholesale.252 One proposed Texas bill largely tracked the CCPA as well.253 Texas ultimately enacted a different bill into law, the Texas Privacy Protection Act; while initially it too was a broad data protection law, it was ultimately amended to create a council to report back on proposed statutory changes.254 In Illinois, the proposed Data Transparency and Privacy Act would apply the CCPA definition of “businesses” and would grant consumers both notice and access rights and a right to opt out of sale, although it

249. Id. § 51-37-02 (“Prohibition against disclosure of personal information except upon written consent.”); id. § 51-37-05 (“If an individual's personal information is purchased, received, sold, or shared by a covered entity in violation of this chapter, the individual may bring a civil action in a court of this state . . . .”).

250. N.D. H.R. 1485; see also N.D. LEGIS. COUNCIL, DISCLOSURE OF CONSUMERS’ PERSONAL DATA—BACKGROUND MEMORANDUM (2019), https://www.legis.nd.gov/files/resource/committee-memorandum/21.9058.01000.pdf [https://perma.cc/7U2L-7BLV] (noting that “House Bill No. 1485 was amended to provide for a mandatory Legislative Management study on protections, enforcements, and remedies regarding the disclosure of consumers’ personal data, and both chambers passed the bill as a mandatory study”).


carved out the use of data for advertising and other exemptions.\textsuperscript{255} 

Maryland’s bill and Hawaii’s original bill (later replaced with a task force) offered a set of rights for data subjects similar to the CCPA, though they differ in some significant respects.\textsuperscript{256}

Nevada is one of the only states to not just consider but actually enact new data privacy law in this period. The new law, expanding on previously existing protections, went into effect in 2019.\textsuperscript{257} Nevada law had already required websites and online services that collect certain personal information to provide notice to consumers.\textsuperscript{258} While not directly importing language from the CCPA, the new Nevada law echoes the conceptual core of the CCPA by prohibiting companies from selling consumer information on receipt of a “verified request” from the consumer to opt out.\textsuperscript{259} That said, the new Nevada law proves considerably less ambitious in scope than the CCPA: it covers a narrower definition of personal information, and a narrower subset of businesses, and requires less of them (no access requests, no deletion).\textsuperscript{260} It also defines “sale” less broadly than does the CCPA.\textsuperscript{261} But its focus on an opt-out for restricting sale of personal data is distinctly Californian, and not European.\textsuperscript{262}

In summary: a considerable number of states are mimicking the precise language of the CCPA, while others are adopting its core consumer-oriented framework. No state has proposed adopting European-style comprehensive data protection law. We found very few state proposals that even focused on GDPR-like compliance obligations in addition to individual consumer rights, including Washington’s recently failed Privacy Act\textsuperscript{263} (discussed further below) and one of the two bills proposed in Texas.\textsuperscript{264} One of New York’s proposals reflects a third competing concept of data privacy, which we introduce and discuss in the next Section.\textsuperscript{265} But our close analysis clearly shows

\begin{footnotesize}
\begin{enumerate}
\item 256. S. 418, 30th Leg., Reg. Sess. (Haw. 2019); S. 613, 2019 Gen. Assemb., Reg. Sess. (Md. 2019); see also Marmor et al., supra note 251 (describing the differences between the states’ draft laws).
\item 257. S. 220, 80th Sess. (Nev. 2019).
\item 260. Nev. S. 220.
\item 261. Id. § 1.6.1.
\item 262. Id. § 2.2.
\item 264. H.R. 4390, 86th Leg. (Tex. 2019).
\item 265. S. 5642, 2019–2020 Leg. Sess, Reg. Sess. (N.Y. 2019); see Issie Lapowsky, New York’s Privacy Bill Is Even Bolder Than California’s, WIRED (June 4, 2019),
\end{enumerate}
\end{footnotesize}
that California, not Europe, is catalyzing comprehensive data privacy legislation in states around the country.

2. Federal Laws

While state bills are typically modeled on the CCPA, many proposed federal privacy bills may not look much like the CCPA at all. Yet, we argue, they are clearly drafted in response to it. There were by our count at least ten federal data privacy proposals introduced in 2018 and 2019.266 New federal bills continue to be introduced all the time.267 We compare several of these proposed federal laws to show how they differ from both the GDPR and the CCPA—and note how a third model has also emerged. We close this Section by explaining why, nonetheless, the CCPA can be understood as the primary catalyst of federal data privacy proposals.

We compare below the following proposed legislation to the CCPA and GDPR: Senator Ron Wyden’s Consumer Data Protection Act,268 Senator Marco Rubio’s American Data Dissemination Act,269 and Senator Brian Schatz’s Data Care Act.270 We conclude that the substantive provisions of several of the bills draw from older privacy laws or from academic proposals, not the GDPR or the CCPA. At least among


the bills analyzed here, only Senator Wyden’s bill shows direct signs of influence from both the CCPA and GDPR.

The proposed Consumer Data Privacy Act (CDPA),\textsuperscript{271} introduced by Senator Wyden in November 2018, incorporates language and concepts from both the CCPA and GDPR, yet differs from both. For example, like the CCPA, the CDPA’s definition of personal information focuses on whether information is not just individually identified but “reasonably linkable” to an individual.\textsuperscript{272} Like the CCPA, the CDPA does not cover businesses below a certain size, as long as they meet other restrictions.\textsuperscript{273} The CDPA, however, would incorporate a number of aspects of the GDPR: it would require reporting in some circumstances;\textsuperscript{274} create access rights,\textsuperscript{275} including with respect to companies that lack a direct relationship with consumers;\textsuperscript{276} create a right of correction;\textsuperscript{277} and require impact assessments for automated decision-making.\textsuperscript{278} Unlike either the GDPR or CCPA, however, the CDPA would build enforcement around a robust consumer right to opt out of data sharing with third parties.\textsuperscript{279} The CDPA directs the FTC to promulgate regulations, and houses enforcement with the FTC, to which it allocates considerable additional resources.\textsuperscript{280} It does not preempt state regulation.

The proposed Data Care Act (DCA) introduced in December 2018 by Senator Schatz with fourteen cosponsors, differs fundamentally


\textsuperscript{272} Compare id. § 2.12 (defining “personal information” as “any information, regardless of how the information is collected, inferred, or obtained that is reasonably linkable to a specific consumer or consumer device”), with California Consumer Privacy Act of 2018, CAL. CIV. CODE § 1798.140(o)(1) (West 2018) (defining “personal information” as “information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household”).

\textsuperscript{273} Compare S. SIL18B29, 115th Cong. § 2.5(B)(i) (2018) (excluding companies with less than fifty million dollars in average annual gross receipts and requiring that they not collect information on over one million people and devices and are not data brokers), with CAL. CIV. CODE § 1798.140(1)(A) (2018) (excluding companies with less than twenty-five million dollars in annual gross revenues).

\textsuperscript{274} S. SIL18B29, 115th Cong. § 5 (2018).

\textsuperscript{275} Id. § 7(b)(1)(D).

\textsuperscript{276} Id. § 7(b)(1)(D)(iii); see GDPR, supra note 7, art. 14 (“Information to be provided where personal data have not been obtained from the data subject”).

\textsuperscript{277} S. SIL18B29 § 7(b)(1)(F).

\textsuperscript{278} Id. § 7(b)(1)(G).

\textsuperscript{279} Id. § 7(b)(1)(D)(iii).

\textsuperscript{280} See generally id.
from both the CCPA and GDPR. The DCA would impose duties of care, loyalty, and confidentiality on online service providers. The DCA focuses on duties owed by companies with a direct relationship to consumers, not on data brokers or other third parties. Thus, the DCA advances a consumer protection rather than data protection model of privacy and does not impose any of the transparency requirements that are central to both the California and EU regimes. The DCA embodies an emerging strain of thought about privacy among U.S. scholars who advocate redefining privacy as a matter of "trust" or "information-like duty" on the part of large-scale data collectors. The "information fiduciary" model of data privacy has not been limited to Senator Schatz’s federal proposal; the recent New York Privacy Act was modeled on the concept. This shows the possibility of a third potential catalyst on the field—the concept of an “information fiduciary,” stemming from a number of academic proposals—and indicates perhaps an upcoming battle of the norm entrepreneurs, discussed further below.


282. Id. § 3.

283. Id.


The proposed American Data Dissemination Act (ADD), introduced by Senator Rubio in January 2019, directs the FTC to propose privacy rules "substantially similar, to the extent practicable, to the requirements applicable to agencies" under the 1974 Privacy Act. Unlike the Privacy Act, which applies only to the federal government, these rules would apply to private sector actors that collect certain types of personal information. The ADD resembles the GDPR and CCPA only to the extent that those two regimes, like the 1974 Privacy Act, build on Fair Information Practice Principles. It directs the FTC to adopt regulations that restrict disclosures of records; create an access right and create a correction right of sorts, or at least a means to amend and dispute inaccurate records based on process established under the Fair Credit Reporting Act. Thus, the ADD draws on neither the CCPA nor the GDPR directly, but instead uses existing federal privacy law as its model. The ADD would preempt state privacy laws.

While the three federal bills do not mimic the CCPA to the extent state laws do, the CCPA laid the groundwork for federal legislation in two key ways. First, because U.S. corporations with national reach will likely find themselves having to comply with the CCPA (and possibly also the GDPR), a federal rule presents less of a regulatory burden for U.S. corporations than it would have in the absence of the CCPA. Second, many hope to limit the potential regulatory burden of multiple, varying state laws by enacting a federal law that preempts state laws. Given the flurry of activity in state houses across the country, a federal law seems to many businesses like the "least worst" option. In this sense, the federal response may well be a backlash against the CCPA rather than an embrace of it.

291. Id. § 4(b)(1)(C).
292. Id. § 4(b)(1)(D)–(E).
293. Id. § 6.
C. CALIFORNIA AS U.S. PRIVACY CATALYST

The above analysis—in Part II comparing the CCPA and GDPR, and in this Part above analyzing in detail a number of recent state and federal proposals—leads us to a new understanding of what is happening in the race to influence U.S. data privacy law. The true story is more complex, and more interesting, than the conventional narrative of a long-armed, unilateral Brussels. California, not Europe, has been catalyzing privacy proposals across the United States.

In this Section, we offer this alternative story. We begin with a discussion of how our departure from the GDPR-centric narrative is more than just a shift in location from Brussels to Sacramento. The story of California as the U.S. data privacy catalyst involves not just state government actors but also tightly networked norm entrepreneurs, acting against backdrop forces of what we call "data globalization." The spread of the CCPA to other states, we posit, reflects a number of overlapping dynamics, and the influence of the GDPR is only one of them. This version of the story may be messier than a pure Brussels Effect, but it is more accurate and leads to several insights about the near future of U.S. data privacy law.

The theories of regulatory catalysis that we discussed in Part I are essentially realist or rational choice theories of lawmaking. That is, the Brussels Effect largely conceives of States (and states) as unitary actors, using power to achieve compliance on an international stage or balancing sticks with carrots to drive both government and private entities towards rationally choosing a regulatory goal.

The story of the CCPA, when examined in greater detail, is far more complex. It is not the story of California as a unified state actor but of a collection of individual norm entrepreneurs that harnessed the state legislative process to produce the law. In this sense, it is a legal process story made up not just of governments but of individuals, issue networks, and interpretative communities, one that reflects Harold Koh’s characterization of vertical legal process in style if not in transnational nature.294

If the origin story of the CCPA teaches anything, it is that individuals and networks of individuals play significant roles in the process of regulatory catalysis. Before 2018, California, like every other U.S.

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294. See generally Koh, supra note 192, at 1406 (explaining compliance with international law norms in part through "the vertical process whereby transnational actors interact in various fora, generate and interpret international norms, and then seek to internalize those norms domestically"); Harold Hongju Koh, Transnational Legal Process, 75 NEB. L. REV. 181 (1996) (providing a broad overview of transnational legal process and its significance in international legal scholarship).
state and the federal government, had no comprehensive data privacy law. Real estate developer Alastair Mactaggart wanted to enact such a law in California.\textsuperscript{295} Mactaggart and his friend Rick Arney, who had worked in the California legislature, knew they could use California’s referendum process to avoid being tangled up by lobbying in the legislature.\textsuperscript{296} Mactaggart befriended Mary Stone Ross, who had worked for the CIA and the House Intelligence Committee.\textsuperscript{297} They collaborated on drafting the ballot initiative through a group they named Californians for Consumer Privacy, the political committee that then pushed the bill (although Ross and Mactaggart later had a falling out).\textsuperscript{298} Mactaggart looked up privacy experts, and contacted UC Berkeley Professor Chris Jay Hoofnagle, who put him in touch with former FTC Chief Technologist Ashkan Soltani.\textsuperscript{299} Mactaggart then hired Soltani to help revise the proposed ballot initiative, the bones of which became the CCPA.\textsuperscript{300} Then, as Soltani has put it, “Mactaggart . . . offered Silicon Valley a take-it-or-leave-it privacy policy—the same kind that Silicon Valley usually offered everyone else.”\textsuperscript{301}

By using the California ballot initiative process, Mactaggart and his allies forced the state legislature’s hand.\textsuperscript{302} The California legislature, fearing the practical difficulties of a ballot initiative that would become nearly unchangeable law with immediate effect,\textsuperscript{303} scrambled...
to draft a bill that would persuade the initiative’s sponsors to withdraw it.\textsuperscript{304} State Assembly member Ed Chau and State Senator Robert Hertzberg, both from districts neighboring Los Angeles, introduced the bill.\textsuperscript{305} The enactment of the CCPA does not represent the action of a legislature that independently recognized a social problem it could help address or a response spurred by companies advocating for legislation under the pressures of the GDPR. Instead, it was the legislature’s reaction to leverage exerted by highly motivated, connected, and—at least in Mactaggart’s case—wealthy individuals.\textsuperscript{306}

Rather than causing a race to the bottom, the backdrop of data globalization appears to have both influenced and empowered these norm entrepreneurs. First, news stories about the effects of data globalization enabled Mactaggart to frame the importance of the initiative, as he repeatedly pointed to the story of the British consulting firm Cambridge Analytica using U.S. persons’ data to allegedly manipulate voters in the 2016 election.\textsuperscript{307} In the preamble to the CCPA, the California legislature eventually echoed this motivation.\textsuperscript{308} Second, data...
globalization may have lowered some of the bigger hurdles to privacy lawmaking in California (and possibly Congress) by imposing GDPR compliance costs on the large Silicon Valley enterprises, almost all of which have a substantial European presence. Faced with significant privacy compliance costs from the GDPR, the marginal cost of a state privacy statute to their business model was now much lower. Third, data globalization enabled the GDPR itself to touch U.S. citizens in the form of both updated privacy policies and news stories about protective European privacy law. This affected both public opinion and elite responses, whether causing U.S. citizens to wonder why Europeans should get privacy protections that we do not, or inspiring lawmakers like the North Dakota legislator to take action on a privacy bill.

What happened next—the spread of the CCPA—was intended and predicted by its origins, who hypothesized that, like California emissions standards, a baseline data privacy law would spread. We offer four explanations, beyond the usual dynamics of the California Effect, as to why this is happening.

First, even prior to the CCPA, California established itself nationally as an expert jurisdiction on data privacy law, given both previous pioneering legislation and the presence of Silicon Valley within its borders. California has been a forerunner in laws governing online data privacy and data security for over fifteen years. The California Online Privacy Protection Act (CalOPPA) was enacted in 2003 and went into effect in 2004. It was the first U.S. law “to require commercial

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309. See, e.g., Adam Satariano, GDPR, a New Privacy Law, Makes Europe World’s Leading Tech Watchdog, N.Y. TIMES (May 25, 2018), https://www.nytimes.com/2018/05/24/technology/europe-gdpr-privacy.html (”[T]he European Union ... enacts the world’s toughest rules to protect people’s online data.”).


311. Confessore, supra note 295 (noting how Mactaggart compares privacy legislation to auto-emission legislation).

websites and online services to post a privacy policy.”\(^{313}\) In the intervening years, privacy policies have become ubiquitous across the Internet.\(^{314}\)

Also, in 2003, California enacted a data breach notification law: legal rules requiring companies that have suffered a qualifying data security breach to notify users whose information may have been compromised.\(^{315}\) Prior to California’s intervention, few companies voluntarily disclosed security breaches of their customers’ personal information, fearing the public relations disaster of such a revelation.\(^{316}\) At first, some companies limited their compliance with the new data breach notification law to the borders of California. In 2004, the data broker ChoicePoint suffered a huge data breach.\(^{317}\) Initially, it reported that breach to Californians only, as the state’s law required.\(^{318}\) However, observers quickly noted how odd it would be if a data breach at an Atlanta-based nationwide operation affected only Californians. Faced with intense criticism for failing to inform customers outside California, ChoicePoint voluntarily issued a nationwide notice to all Americans whose information had been compromised.\(^{319}\)


\(^{314}\) See, e.g., supra note 208 and accompanying text.

\(^{315}\) Cal. Civ. Code § 1798.82 (West 2003) (providing disclosure requirements for any person or business in California who owns or licenses computerized data, including personal information, when there is a security breach of the system).


\(^{318}\) See id. (“ChoicePoint informed only 35,000 Californians that their information might have been compromised in [breach] because California is currently the only state that requires companies to make such disclosures.”).

\(^{319}\) ChoicePoint explained its delay in notifying non-Californians as follows: “The company said it first notified consumers in California because that was where most of the victims lived, and then prepared more notices when investigators suggested that residents in nearly every state were affected.” Id. Most analysts discredit this explanation. See, e.g., Ronald I. Raether, Jr., There Has Been a Data Security Breach: But Is Notice Required?, A.B.A. (Aug. 31, 2011), http://apps.americanbar.org/buslaw/blt/content/2011/08/article-raether.shtml [https://perma.cc/E57W-NQLT] (“ChoicePoint decided initially to notify only California consumers. The backlash was swift and
This notification also resulted in an enforcement action by the FTC. ChoicePoint, a provider of credit reporting services, had violated the federal Fair Credit Reporting Act by allowing access to some 163,000 consumer reports to persons who were not duly authorized to receive access.\textsuperscript{320} So far, this story resonates with our account of the Brussels Effect: a large business found it unwise to compartmentalize its compliance efforts based on the law of particular jurisdictions and was forced to provide a higher level of protection across its operations.

By 2005, the California breach notification law had unleashed a “wave” of additional reported security breaches in the state.\textsuperscript{321} These notifications in California alerted consumers nationally of breaches that might have affected them but remained unreported under their own states’ laws. Very swiftly, in a textbook de jure California Effect, dozens of other states adopted their own notification laws.\textsuperscript{322} Today, all fifty states have enacted data security breach notification laws.\textsuperscript{323} The laws that followed California’s not only copied but also both expanded\textsuperscript{324} and contracted\textsuperscript{325} California’s model. And in 2018, the
GDPR introduced security breach notification into European law, explicitly borrowing from California’s innovation.326

This history of following California law lays the groundwork for states to imitate the CCPA. And California may be seen as an expert jurisdiction on digital data policy for other reasons. If a state legislature is going to copy another state and wants to strike a balance between individual rights and business needs, California law represents an appealingly pre-packaged compromise from the state that houses both a generally pro-consumer electorate and Silicon Valley industry.

Second, we believe states may be copying California because they presume that the CCPA will create a Brussels Effect of de facto compliance, originating in California. This is probably part of what caused the copycat data breach notification statutes. Lawmakers in other states should anticipate that companies are less likely to oppose a bill if it tracks the contours of a California law that those businesses must obey already. Even though the CCPA protects only California residents, companies may find it difficult to partition that data or may calculate the cost is low enough to extend their compliance infrastructure to consumers in other states. This makes those companies with exposure to the CCPA, but not to the GDPR, less likely to fight a local law that mimics the CCPA.

Third, compared to the GDPR, the CCPA is a better legal meme for U.S. legislators.327 The GDPR contains 99 articles and 173 recitals, and it harnesses an existing complex regulatory system against the backdrop of European court decisions and constitutional doctrine. The GDPR is long, complicated, and foreign.328 The CCPA’s relative brevity and simplicity, however, likely make it more appealing to state legislatures. A state could only “copy” the GDPR after condensing it and transposing it into an American legal setting. A state can copy the CCPA simply by cutting and pasting.

Fourth, while not directly catalyzing U.S. privacy law, the GDPR continues to play an important role. For the most part the GDPR has not had a (de jure) “California Effect” on the U.S. federal government or U.S. states, but it has had a (de facto) “Brussels Effect” on companies whose information is compromised by the breach. Vermont requires that, if an organization makes such a determination, the organization must provide notice and an explanation to the Attorney General or to the applicable department of banking, insurance, securities and health care administration.

326. See GDPR, supra note 7, art. 33 (“Notification of a personal data breach to the supervisory authority.”).
327. We thank Christina Mulligan for this insightful characterization.
328. See supra note 73 and accompanying text.
operating in U.S. jurisdictions. This may lower the resistance of global companies to both state and U.S. data privacy law. While many of the companies most affected by the GDPR were already shouldering regulatory costs under the prior Data Protection Directive, the GDPR has heavier obligations, more explicit extraterritorial reach, and more severe penalties, all of which have dramatically increased corporate investment in GDPR compliance over the levels under the Directive.

A clear example of this dynamic is the proposed Washington Privacy Act, which has twice come relatively close to passage only to fail late in the process.\(^\text{329}\) This bill had more similarities with the GDPR than other state legislation.\(^\text{330}\) It used GDPR terminology such as “controller” and “processor.”\(^\text{331}\) It would have established “GDPR lite” requirements for notice, access, correction, deletion, and restriction of processing requirements, and would have imported aspects of the EU concept of lawful processing.\(^\text{332}\) Unlike other proposed state laws, the Washington bill included privacy risk assessments, another idea borrowed from the GDPR.\(^\text{333}\) It even drew on the GDPR’s limitations on automated decision-making.\(^\text{334}\)

The key to understanding why the Washington proposal borrowed so many elements of the GDPR may be one of the state’s largest companies: Microsoft.\(^\text{335}\) Microsoft has declared that it complies with

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330. Id.
331. See generally id.; GDPR, supra note 7, art. 33 (using the terms “controller” and “processor”).
332. Wash. S. 5376 § 7 (requiring controllers to provides consumers a privacy notice that includes: the categories of personal data collected, purposes for which that data is used, rights that consumers may exercise, categories of personal data shared with third parties, and whether it sells personal data to data brokers).
333. Compare id. § 8(4) (“The controller must make the risk assessment available to the attorney general upon request. Risk assessments are confidential and exempt from public inspection and copying.”), with GDPR, supra note 7, art. 35 ¶ 7 (“Data protection impact assessment.”).
334. Washington Privacy Act, H.R. 5376, 66th Leg., Reg. Sess. §§ 6(7), (14)(1) (Wash. 2019) (“A consumer must not be subject to a decision based solely on profiling which produces legal effects concerning such consumer or similarly significantly affects the consumer . . . Controllers using facial recognition for profiling must employ meaningful human review prior to making final decisions based on such profiling where such final decisions produce legal effects concerning consumers or similarly significant effects concerning consumers.”).
the GDPR worldwide.\textsuperscript{336} With over 451,000 employees in the state, the company has a significant voice in Washington.\textsuperscript{337} The company actively promoted adoption of the Washington statute; Microsoft President Brad Smith described it as “build[ing] on the best aspects of approaches elsewhere.”\textsuperscript{338} In introducing the bill, Washington Chief Privacy Officer Alex Alben tellingly explained that “companies that already comply with Europe’s General Data Protection Regulation . . . shouldn’t have a hard time complying with the proposed law in Washington.”\textsuperscript{339}

The Brussels Effect on Microsoft may thus be driving it to push for state privacy legislation that more closely maps on to the GDPR and therefore does not raise regulatory costs for Microsoft—but may raise regulatory costs for non-GDPR-compliant local competitors. Microsoft also gains by assuring users that their information is well-protected, with legal sanctions for failures.

After sailing through the state senate by a vote of 46-1,\textsuperscript{340} the Washington bill foundered amid controversy in 2019. After portions of the original legislation were stripped out, the state ACLU and

\begin{itemize}
  \item \textsuperscript{336} Julie Brill, \textit{Microsoft’s Commitment to GDPR, Privacy and Putting Customers in Control of Their Own Data}, \textit{MICROSOFT ON ISSUES} (May 21, 2018), https://blogs.microsoft.com/on-the-issues/2018/05/21/microsofts-commitment-to-gdpr-privacy-and-putting-customers-in-control-of-their-own-data [https://perma.cc/P5D2-TZZ8] (“That’s why today we are announcing that we will extend the rights that are at the heart of GDPR to all of our consumer customers worldwide. Known as Data Subject Rights, they include the right to know what data we collect about you, to correct that data, to delete it and even to take it somewhere else.


\end{itemize}
consumer advocacy organizations opposed the bill as too weak.341 Critics objected that the bill’s departure from elements of the GDPR, especially in its enforcement mechanisms, would make it ineffective; they also complained that industry lobbyists had too much influence over a legislative process they considered opaque.342 After working to mend fences with privacy advocates and expand industry support, the bill’s sponsors reintroduced it in 2020, with most of the same core features, but again fell short at the end of the legislative session.343 Microsoft’s chief privacy officer, former FTC commissioner Julie Brill,344 has signaled that the company will continue to support legislation modeled at least loosely on the GDPR, declaring, "We believe privacy is a fundamental human right."345

This story of the Washington Privacy Act displays the GDPR’s Brussels Effect in action. But again, it also underscores the power of individual or corporate norm entrepreneurs. A global company that already complies with the GDPR has good reason to want to impose costs on its competitors while publicly promoting stronger privacy rights for its users and thus enhancing their trust in that company. In addition, Brill, a former FTC commissioner who was well regarded among privacy advocates, appears to be driving the agenda and bringing in compliance norms from a U.S. government agency.


342 Ropek, supra note 255.


Finally, the GDPR may be playing an important framing role in policy discussions, acting to rhetorically normalize and ground current conversations around data privacy. The publicity accompanying the advent of the GDPR may have stoked American public interest in data privacy. The GDPR may be leading U.S. citizens—including the North Dakota legislator mentioned above—to wonder why EU persons get stronger privacy rights than Americans, and to question the longstanding narrative that imposing digital privacy regulation will break the Internet or otherwise kill innovation.

Some may doubt the sincerity of California as a privacy regulator. Data protection rules, critics will observe, encumber some of its leading corporations. They may assume that these corporations will hobble any real regulatory enforcement by the state. But California’s economy is far bigger than Silicon Valley alone. Of course, diffuse voices fare poorly against actors with concentrated interests, as Mancur Olson observed. But Mary Stone Ross, Alastair MacTaggart, and others demonstrated that California’s initiative process could be leveraged to tap into a widely shared desire to protect privacy that could overcome even concentrated industry opposition. Indeed, MacTaggart and his organization led the successful campaign to pass CCPA revisions by ballot measure. This time, however, Mary Stone Ross opposed the ballot measure, arguing that “the initiative would roll

346. See supra note 244 and accompanying text.

347. For a description of the role of privacy law in the rise of U.S. Internet companies, see Anupam Chander, How Law Made Silicon Valley, 63 EMORY L.J. 639, 642 (2014), which states that “legal innovations in the 1990s that reduced liability concerns for Internet intermediaries, coupled with low privacy protections, created a legal ecosystem that proved fertile for the new enterprises of what came to be known as Web 2.0.”

348. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 2 (1965) (“[U]nless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, rational, self-interested individuals will not act to achieve their common or group interests.”).


back the CCPA’s protections and weaken core definitions of the law, while making the biggest companies even more powerful."\(^\text{350}\)

Vogel argues that the California Effect requires that “nonstate actors in rich and powerful political jurisdictions prefer stronger regulatory standards.”\(^\text{351}\) Content-based industries based in Los Angeles have long complained that Silicon Valley enterprises are insufficiently attentive to intellectual property claims. The CCPA’s principal authors\(^\text{352}\) both represent districts bordering Los Angeles.\(^\text{353}\) Many Silicon Valley enterprises themselves support data privacy law, though some suggest that the support is a strategic effort to undermine California’s privacy law with a weaker, preemptive federal law.\(^\text{354}\) There is a reason for responsible Silicon Valley enterprises to embrace privacy law. Silicon Valley enterprises depend on users’ confidence that revealing more of themselves to their electronic assistants will not create privacy risks. Companies that violate that trust undermine trust for other companies as well.\(^\text{355}\) Ultimately, whether Californians or those outside the state trust the state’s privacy regulators will depend on their performance.\(^\text{356}\)

There are many more individual norm entrepreneurs at work here in the spread of the CCPA to other states, and the federal response to it, than we have thus far allowed. As mentioned above, the Uniform Law Commission’s new project to draft model state legislation represents one of the most formal such networks: commissioners from every state consciously seek to replicate successful innovations across state boundaries in a uniform way. Individual federal

\(^{350}\) Grande, supra note 349.

\(^{351}\) Vogel, supra note 45, at 268.


\(^{353}\) Chau represents the 49th Assembly District and Hertzberg represents the 18th Senate District. ED CHAU, https://a49.asmdc.org [https://perma.cc/NBG3-GUY9]; SENATOR ROBERT HERTZBERG, https://sd18.senate.ca.gov [https://perma.cc/Q4SK-9DYQ].


\(^{355}\) See Ari Ezra Waldman, Privacy as Trust: Sharing Personal Information in a Networked World, 69 U. MIA. L. REV. 559, 598 (2015); see also Balkin, supra note 137; Richards & Hartzog, supra note 284, at 435.

representatives are catalysts for change. Senator Wyden, for example, has been a privacy advocate for years and may be taking advantage of current dynamics to push for changes to federal law.\textsuperscript{357} Civil society groups such as the Center for Democracy and Technology have proposed discussion legislation in hopes of influencing the federal debate.\textsuperscript{358} The North Dakota legislator who watched a GDPR documentary, too, can be characterized as a norm entrepreneur. David Hoffman at Intel Corporation, characterized as a longtime “industry leader on privacy,” developed a draft federal proposal that Intel released for comments.\textsuperscript{359} These stories likely represent the tip of a very large iceberg of individuals and knowledge networks working to harness existing forces to propagate new law.

This suggests the early growth of what we call “catalysis networks.” Paul Schwartz has noted the existence of “harmonization networks” (a term coined by Anne-Marie Slaughter) in privacy law—networks of “regulators in different countries [who] work together to harmonize or otherwise adjust different kinds of domestic law.”\textsuperscript{360} What we are seeing here is not solely attempts by various actors to harmonize U.S. and EU law on the ground (although it is certainly in the interest of global companies to minimize disparities). We predict that we are seeing the emergence of both individuals and networks taking advantage of the moment to drive both broader geographic coverage and perhaps new forms of law.

In one version of this story, the CCPA becomes not just a catalyst but a floor of protection nationwide. There are certainly plenty of reasons to believe this might be the case. That said, we turn now to several potential limits on Californian catalysis.

D. CONSTRAINTS ON CALIFORNIAN CATALYSIS

There are at least three possible constraints on the nationwide spread of CCPA-like privacy law. First, the complex relationship between state and federal sovereignty in the U.S. constitutional order interacts substantially with the ability of state laws like the CCPA to operate or spread nationally. Both the dormant commerce clause and

\textsuperscript{357} See Sara Morrison, \textit{The Year We Gave Up on Privacy}, Vox (Dec. 23, 2020, 8:00 AM), https://www.vox.com/recode/22189727/2020-pandemic-ruined-digital -privacy; Kerry, \textit{supra} note 266.


\textsuperscript{359} Kerry, \textit{supra} note 266.

potential federal preemption of state law could limit the reach of state law and the catalytic effect of the CCPA. Second, while it is beyond the scope of this Article to address these arguments at length, recent First Amendment doctrine may create problems for the CCPA and similar laws. Finally, we note the possibility that new models, notably including "trust" or "fiduciary" concepts, may take root and out-race both the GDPR and the CCPA to become the dominant catalyst for new privacy law.

1. The Dormant Commerce Clause

Because Internet regulation inevitably spills over jurisdictional lines, the dormant commerce clause plays an important role in disciplining any individual state's Internet regulation. As the Supreme Court has explained, "By prohibiting States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval, [the dormant commerce clause] strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce."  

The dormant commerce clause imposes two separate conditions on regulatory spillovers: (1) the regulation at issue must not discriminate against interstate commerce, and (2) it must not impose excessive burdens on interstate commerce. The Supreme Court has offered a general principle: "Where [a] 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."

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361. One of the authors of this Article has spoken to attorneys who are already planning to challenge the CCPA under the dormant commerce clause.
362. For an account of the ways that the First Amendment has limited U.S. privacy law, see Chander & Lê, supra note 137, at 516–22.
364. Dep’t of Revenue v. Davis, 553 U.S. 328, 338 (2008) ("Under the … protocol for dormant Commerce Clause analysis, we ask whether a challenged law discriminates against interstate commerce.").
365. Id. ("A discriminatory law is virtually per se invalid, and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives" [citations omitted] [internal quotation marks omitted]).
366. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). A finding that a statute is discriminatory could "be overcome by a showing that the State has no other means to advance a legitimate local purpose." United Haulers Ass’n v. Oneida-Herkimer Solid
Early cases challenging state Internet regulation on commerce clause grounds met with some success. Among the first was a 1997 decision in *American Library Ass’n v. Pataki*, overturning a New York statute that prohibited the transmission of obscene content to minors. 367 Into the early twenty-first century, a number of courts followed the lead of *Pataki* when evaluating similar statutes. 368 However, courts in other contexts have departed from *Pataki*’s approach, upholding, for example, state anti-spam statutes against commerce clause challenges. 369 A California appeals court “reject[ed] *Pataki*’s holding that any State regulation of Internet use violates the dormant commerce clause.” 370

A federal district court case from California seems particularly relevant. That case considered a dormant commerce clause challenge to an earlier California privacy law. In 2014, two Californians filed a class action against Omni Hotels, alleging a violation of the California Invasion of Privacy Act, a 1967 statute that makes it illegal to record a conversation without consent of both parties. Omni Hotels had set up its call center in Nebraska and complied fully with Nebraska law. Nebraska offered “an employer friendly law that exempts business from state wiretap statutes and gives employers the right to intercept, disclose and use e-mails in the ordinary course of business.” 371 Omni argued that practically speaking, to comply with California law, it would have to notify all callers to its customer service about the recording, not just Californians, and that this constituted a per se violation of the commerce clause. 372

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367. *Am. Librs. Ass’n v. Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997) (“[T]he 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.”). For a critique of this decision, see Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 786–87 (2001).


370. *Ferguson*, 115 Cal. Rptr. 2d at 265.


372. *Id.* at 1012 (“Omni asserts that because the portability of mobile phone numbers makes it unfeasible to distinguish between Californian and non-Californian calls,
The court decided that the California law did not discriminate against out-of-state providers and went on to consider whether the statute unduly burdened interstate commerce.\textsuperscript{373} It concluded, “Overall, the Court finds that the interests of California in the privacy of its consumers would be affected more by the application of Nebraska law than Nebraska’s pro-business interests would be affected by the application of California law.”\textsuperscript{374} If Omni had prevailed, then Nebraska would have, wittingly or not, created the ideal conditions for a privacy race to the bottom: locate your call center in Nebraska and ignore privacy laws in the other jurisdictions where your callers reside. The district court’s ruling avoided that result.

The CCPA does not appear to facially discriminate against interstate commerce.\textsuperscript{375} The statute is written broadly to cover all businesses that deal with the private information of California residents, regardless of where they are located. As long as the California attorney general does not enforce the law against foreign companies in a discriminatory fashion, the CCPA would likely survive at least this prong of the doctrine.

The more realistic potential basis for a challenge would be the contention that the CCPA poses an “excessive burden” on interstate commerce. While it is possible that enforcement of the CCPA would occur in a manner that leads to such an excessive burden, a federal court may well conclude that the important interests at stake justified the CCPA’s reasonable interventions across state lines. While businesses will complain of heightened compliance costs (as Omni complained of the California recording law), California’s interests in protecting its residents’ privacy may well justify those additional costs (as the court concluded in the Omni litigation).\textsuperscript{376} However, uncertainty may yet deter other states from following the CCPA’s lead, at least until any commerce clause challenge is resolved.

\textsuperscript{373} Id.
\textsuperscript{374} Id.
\textsuperscript{375} As the Supreme Court has explained this aspect of dormant commerce clause doctrine, “discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338–39 (2007) (quoting Or. Waste Sys. v. Dep’t of Env’t Quality, 511 U.S. 93, 99 (1994)).
\textsuperscript{376} Omni Hotels Mgmt. Corp., 46 F. Supp. 3d at 1015.
2. Preemption

The CCPA could face another federalism-based challenge to its catalytic effect on other states, coming not from the courts but from Congress. State laws may be preempted when compliance with both state and federal mandates is impossible, and thus the introduction of a comprehensive federal privacy law could lead to preemption of part or all of the CCPA.\footnote{377} In many domains, Congress has adopted federal statutes that explicitly preempt state law in the same area, thus establishing uniform national standards on a topic.\footnote{378} A new federal statute with an express preemption clause would unravel the CCPA and any potential imitators at the state level. The sudden support of many industry groups for federal privacy law is likely motivated by the desire for just this outcome.\footnote{379}

Who should regulate privacy in the United States? Should states regulate privacy, should the federal government, or should both? There are thoughtful arguments for federal preemption of stricter state regulation, but we conclude that, on balance, the federal government should establish a national minimum, not a national maximum, for data privacy. This is what William Buzbee has called “floor preemption,” allowing a one-way ratchet for standards—upwards—across the United States.\footnote{380} In fact, preemption may be the issue that kills proposed federal data privacy law, as powerful Californians and Democrats line up against the industry and Republicans. House Speaker Nancy Pelosi has vowed not to support any federal privacy law that provides fewer protections than the CCPA or indeed that preempts state law at all.\footnote{381} However, industry will be less interested in any federal law if it would not supersede the CCPA.

\footnote{379} Writing of this dynamic in other contexts, Roderick Hills Jr. explains this apparent contradiction: “[F]ederal regulation frequently results from lobbying efforts by industry interests that oppose regulation. The apparent paradox of this statement dissolves when one takes into account industry’s desire for uniformity of regulation.” Roderick M. Hills, Jr., Against Preemption: How Federalism Can Improve the National Legislative Process, 82 N.Y.U. L. Rev. 1, 20 (2007).
There are virtues of a single national standard. A national privacy law would establish uniformity across the region—rather than promising higher or lower protections depending on where a person is or where their data is processed or held. It would facilitate data flows across state borders without requiring legal review of the laws of multiple jurisdictions. It would avoid the possibility of inconsistent mandates such as inconsistent notice requirements. Compliance costs likely would go down with only one legal standard.

But a federal preemption ceiling raises substantial concerns. It risks establishing a minimal level of privacy—one lower than that a state such as California could have demanded. Second, it may reduce existing enforcement capacity and expertise by sideling state attorneys general who currently engage in significant enforcement of data privacy and data security law. States have a long history of regulating privacy, much of it developed through the common law. As Peter Swire has documented, existing federal privacy legislation generally serves as a regulatory floor, not a ceiling, including sector-specific preemption provisions adopted since the mid-1990s. This reflects what Buzbee observes, that "[i]n most areas focused on regulation of risks... such as discrimination and efforts to enhance public welfare through regulation of environmental, occupational, and product risks, the protective 'one way ratchet' of floor preemption... has been the

cannot accept anything—for example, the Republicans would want preemption of state law. Well, that's just not going to happen,' [Pelosi] said. 'We in California are not going to say, "You pass a law that weakens what we did in California." That won't happen.""

383 Bellia, supra note 382, at 897.
legislative and regulatory norm." Most importantly, a federal preemption ceiling risks losing the regulatory innovation that continued state legislation in the area might supply.

New federal privacy law could provide a nationwide floor, permitting states to intervene only to the extent that they raise privacy standards further. This allows for state innovations and experimentation. Writing of an earlier narrow California law that permits minors to delete certain information they uploaded to Internet sites, Heather Gerken and James Dawson argue that “[i]f the experiment proves workable, California’s ‘eraser’ law may serve as a model for future regulation; if the experiment fails, policy-makers will be all the wiser.” Of course, a national floor sacrifices the uniformity of a single national standard, increasing compliance costs. But if any state offers a too-strict privacy rule—one that is too difficult to comply with given its business model—a corporation might simply refuse to provide it the relevant product or service.

Yet an additional option, raised previously by Paul Schwartz, might be a Clean Air Act model for data privacy: Congress could designate California as a kind of superregulator, granting it the exclusive right to deviate upwards from the federal privacy standard. This would allow California alone the opportunity to innovate in the area and permit other states to choose either California’s or the federal government’s rules. It would lower regulatory compliance costs but preserve some room for upward regulation. However, it would forego the possibility of experimentation in other states, which might regulate differently, more clearly, or more stringently than California. For example, this approach could destroy the prospect of a new "trust" model emerging from legislation such as the bill proposed in New York.

Regulating in the face of substantial uncertainty will require a dynamic approach. Because of the pace of change in data gathering and processing, information privacy is a study in surprising turns. Data can be used in unexpected ways; its benefits and drawbacks are yet to

387. Buzbee, supra note 380, at 1552.
388. See Schwartz, supra note 76, at 917 (describing states as "laboratories for innovations in information privacy law").
390. Schwartz, supra note 76, at 935 (referencing Ann Carlson’s scholarship).
392. See supra note 217 and accompanying text.
be fully discovered. The last handful of years have brought us tracking pixels, facial recognition, deep fakes, robot dogs, and even omnipresent satellites.393 If a federal bill ossifies the rules, we may not be able to generate the regulations needed for yet more surprising turns. Of course, the federal government is capable of more agile versions of governance such as collaborative governance or responsive regulation, including through a regulatory agency like the FTC.394

If a federal law preempts state information privacy law, the CCPA might be lost to history, a mere footnote in the centuries of evolution of privacy law. Yet we believe it would still have served a critical role: prompting an omnibus federal privacy law for the first time since the dawn of the Internet age. As Gerken and Dawson observe, “By creating a spillover, a single innovative state can put an item on the national agenda even if nearly everyone else—Congress, interest groups, and other states—would prefer that the issue go away.”395 This would be a significant and long-lasting California Effect, indeed.

3. The First Amendment

Another potential constraint on the enactment of state and federal laws, and indeed the survival of the CCPA, is the First Amendment. Discussed above in the context of the differing regulatory settings of the European Union and United States, the First Amendment potentially poses constraints on drafters of U.S. privacy law. While in-depth coverage of these constraints—and their limitations—is outside of this Article’s scope, we outline a few basic concepts here.


The First Amendment protects freedom of speech. It also protects expressive activity (speech mixed with action) and penumbral activity necessary for speech to take place (such as the placement of newspaper kiosks to distribute newspapers or the purchase of pen and paper). A series of First Amendment cases on public records established significant limitations on laws restricting the distribution of lawfully obtained information. More recently, the Supreme Court applied the First Amendment to find unconstitutional a Vermont law regulating the sale of prescription drug user data. And in 2018, the Supreme Court found unconstitutional a series of disclosure requirements aimed at protecting patients from pro-life organizations posing as abortion providers in a decision that could have consequences for other disclosure-based consumer protection regimes.

Recently, the expansive coverage and protection of First Amendment doctrine has led some to decry its potential deregulatory effects. On the other hand, privacy scholars have noted that the First Amendment also provides arguments for effective privacy law, as a lack of privacy can chill free expression. Commentators disagree on
how much of data privacy law might survive First Amendment challenges. Through court challenges or through its expanding cultural penumbra, the First Amendment may chill the spread of the CCPA.

CONCLUSION

What does all of this mean for our privacy? The end result of the race between the GDPR and the CCPA may well be a hybrid of both. The de facto privacy law governing global corporations may be the strictest aspects of both California and European law—a figurative, but not literal, highest common denominator. Thanks to a Brussels Effect, some large global enterprises would adhere to GDPR norms. But thanks to a California Effect in one of the various forms we have described, that state would have outsized influence on the substance of U.S. privacy law—as Alastair Mactaggart has boasted, "Under [the CCPA], the attorney general of California will become the chief privacy officer of the United States of America." Many corporations will find themselves comporting with both regimes simultaneously, rather than configuring their services or offerings by jurisdiction. Call this hybrid the "CDPR"—the CCPA + the GDPR.

But this de facto reality only goes so far. Those outside either jurisdiction will not be able to assert those rights directly with either regulators or courts. Both regimes grant individual rights only to their own residents. For example, the much-embattled facial recognition company Clearview provides only Californians and European Union residents the opportunity to opt out.

We predict that within the United States, the CCPA will yet continue to drive both businesses and legislatures. The CCPA, both de facto and de jure, will likely call the tune for the march of a new American data privacy spreading to other jurisdictions. California, not Brussels, has emerged as the superregulator of U.S. privacy law.

Indiscretion in an Internet Age, in THE OFFENSIVE INTERNET 124, 134 (Saul Levmore & Martha Nussbaum eds., 2010).

402. For a sampling of this extensive debate, see Jane Bambauer, Is Data Speech?, 66 STAN. L. REV. 57, 60–61 (2014); Richards, supra note 137, at 1521–22; and Volokh, supra note 137, at 1050–51.

403. A more mathematical analogy might be two curves mapping out various issues on the x axis with y being the level of strictness for each issue, resulting in a third operational curve consisting of the highest peaks between the two curves.

404. Confessore, supra note 295.