

Santa Clara University

Why State Legislatures Shouldn't Regulate Internet Privacy

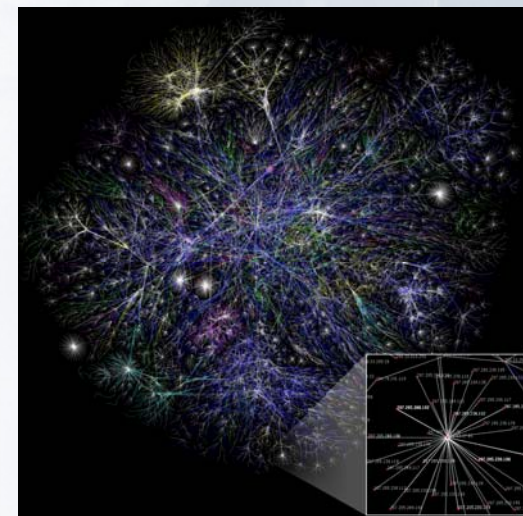
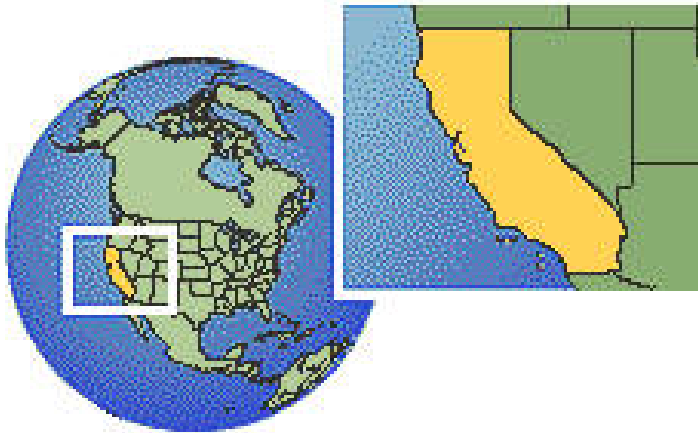
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Regulatory Levels



Source: Wikipedia



Legal Limits on State Regulation

- First Amendment
- Dormant Commerce Clause
- 47 USC 230



“Laboratories of Experimentation”



“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country”

- New State Ice Co. v. Liebmann, 285 U.S. 262 (1932)

The “California Effect”

- California has shaped global environmental policy
 - Local conditions
 - Big market
 - Policy innovation
- Does California have local Internet conditions?



“Laboratories of Experimentation”



- The “Scientific Method”
 - Identify a problem
 - Research the problem and gather data
 - Formulate a hypothesis
 - Conduct an experiment
 - Collect and analyze data from the experiment
 - Accept or reject the hypothesis
- Differences from legislative methods
 - Incomplete research
 - No systematic data collection/analysis
 - No checkpoint to accept/reject hypothesis
- Solutions
 - Consultation beyond lobbyists
 - Post-enactment studies
 - Automatic sunsets

“Laboratories of Experimentation”

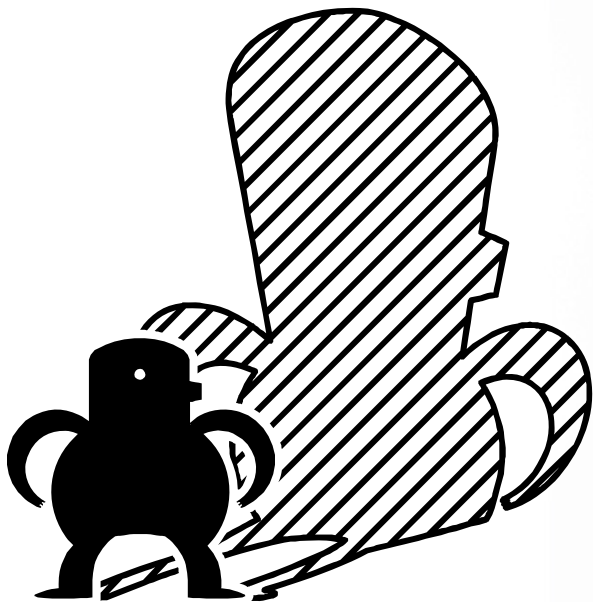


- Scientific Method: Learn from experiment results
- Legislative Method: Legislative Cascades
- Solution: Wait until experiment end before propagating



- Scientific Method: Run A/B Tests
- Legislative Method: Copy and Degrade
- Solution: Design A/B test purposefully

“Laboratories of Experimentation”



- Brandeis: “...try novel social and economic experiments without risk to the rest of the country”
- Scientific Method: one experiment shouldn't taint another experiment
- Legislative Method: let courts figure it out
- Partial Solution: law only applies when everyone knows everyone is in-state
- Better Solution: extraterritorial effects for DCC purposes

State Legislatures vs Congress

- Keep the manufacturing line moving
- Weak expertise (legislators & staffers)
- Thin lobbying community/capture
- Bad drafting
- Rely on judicial system to fix errors
- Solution: moratorium on new state Internet laws

