Why State Legislatures Shouldn't Regulate Internet Privacy

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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 & staffs)
- Thin lobbying community/capture
- Bad drafting
- Rely on judicial system to fix errors
- Solution: moratorium on new state Internet laws