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Data Privacy in Our Federalist System: Toward an Evaluative Framework for State Privacy Laws

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States are enacting data privacy regulations at an ever-increasing pace. California led the way in 2013, enacting several new onerous data privacy laws that drew the ire of the technology sector.

This note addresses the Dormant Commerce Clause implications of statutes like California's new Do Not Track and Online Eraser laws. It overviews the Supreme Court's Dormant commerce clause jurisprudence, including the two primary substantive doctrines constituting the cannon of Dormant Commerce Clause jurisprudence: extraterritoriality and Pike balancing.

Drawing on the above doctrines, along with the parallels between state data privacy laws and earlier statutes invalidated under the Dormant Commerce Clause, this note concludes that many state data privacy laws are unconstitutional regulations of interstate commerce because they impose burdens exceeding the putative benefits of their in-state effects.

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