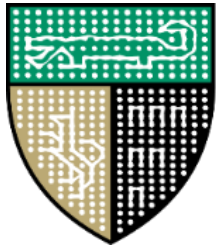


[Ispnews] ISP Newsletter: Feb 3-Feb 9, 2025

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Arun, Chinmayi <chinmayi.arun@yale.edu>  
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# Information Society Project Yale Law School

## Events This Week

Yale Information Society Project  
**Law & Technology Speaker Series**  
**FEDERALISM AND THE NEW NATIONAL SECURITY**  
**Kristen Eichensehr**  
 David H. Ibbeken '71 Research Professor of Law  
 University of Virginia, School of Law  
**February 4, 2025 | SLB 128 | 12:10PM ET Tuesday**  
 YJoLT *Cosponsored by Yale Journal of Law & Technology* <https://law.yale.edu/isp>

Tuesday, February 4, 2025 - 12:10PM-1:30PM - SLB 128

## Federalism and the New National Security

## Kristen Eichensehr

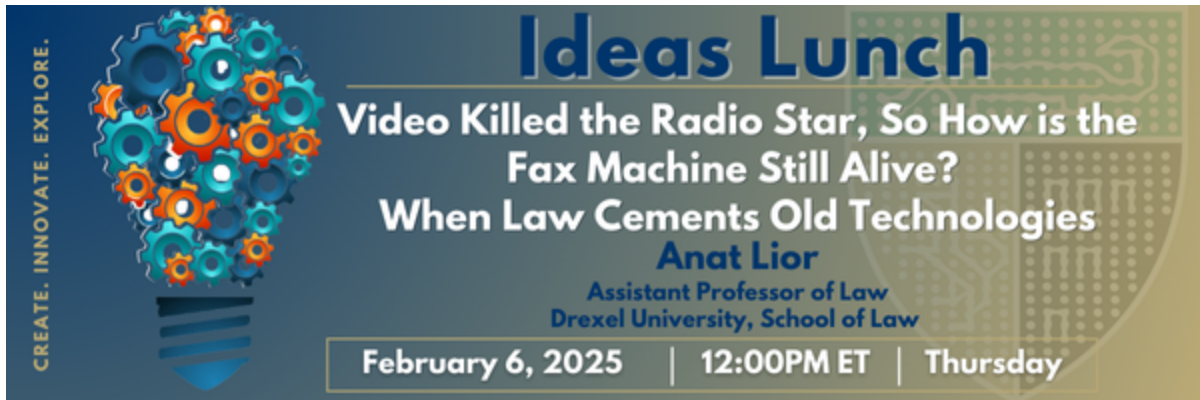
**David H. Ibbeken '71 Research Professor of Law**  
**University of Virginia School of Law**

U.S. states traditionally play a minor role in establishing national security policies, which generally fall within the federal government's remit. But the return of great power competition with China and Russia and the accompanying proliferation of threats, especially technology-related threats, have spurred states to act on national security concerns. With unprecedented speed, breadth, and frequency, U.S. states have taken it upon themselves to address perceived security concerns with TikTok, foreign purchases of real estate, and foreign-made drones, as well as commercial dealings with Russian firms. Drawing on their police powers, they have enacted security-related laws that sometimes parallel and sometimes go beyond the federal government's actions. We term this phenomenon "entrepreneurial federalism" and explain its unique features. The increasing frequency and breadth of states' national security-focused actions have set U.S. states and the federal government on a collision course. Private parties have launched a range of legal challenges to state laws, arguing that courts should hold that those laws are preempted based on existing federal statutes or on broader doctrines that disable states from acting in foreign relations. Courts may be tempted to do so, especially because China and Russia are near-peer threats that require careful federal management. But if the courts adopt broad preemption doctrines in this space, they may inadvertently foreclose two constructive phenomena that can arise from acts of entrepreneurial federalism: useful supplementation by the states of federal efforts to address national security threats and the productive friction that states can introduce into policymaking to improve the quality of U.S. national security policies. Even when there are good reasons for courts to hold that state actions that implicate the U.S. relationship with China or Russia are preempted, judicial decisions that reach that result too readily – or that use a broader form of preemption than necessary – may unintentionally impose longer-term costs on U.S. national security. This Article documents the rise of states' national security actions, distinguishes them from earlier academic models of federalism, and proposes ways that the courts, Congress, the Executive, and the states can foster a positive role for states while minimizing the downsides that could flow from state actions in the national security space.

[Kristen Eichensehr](#) is a professor at the University of Virginia School of Law and a faculty senior fellow at UVA's Miller Center. For the 2024-25 academic year, she is the Samuel Williston Visiting Professor of Law at Harvard Law School. Eichensehr writes and teaches about cybersecurity, foreign relations, national security and international law. Her recent work addresses national security screening of investments, separation of powers in the national security state, the attribution of state-sponsored cyberattacks, and the interaction of the Supreme Court's major questions doctrine with U.S. international agreements. Eichensehr is a member of the U.S. State Department's Advisory Committee on International Law, and she serves as an adviser on the Restatement (Fourth) of the Foreign Relations Law of the United States. She also serves on the editorial boards of Just Security and the Journal of National Security Law & Policy. Eichensehr received the 2018 Mike Lewis Prize for National Security Law Scholarship for her article "Courts, Congress, and the Conduct of Foreign Relations," and her article on "National Security Creep in Corporate Transactions" (with Cathy Hwang) was selected as one of the best corporate and securities articles of 2023 by Corporate Practice Commentator. Prior to entering academia, Eichensehr clerked for Justices Sandra Day O'Connor and Sonia Sotomayor of the Supreme Court of the United States and for then-Judge Merrick B. Garland of the U.S. Court of Appeals for the D.C. Circuit. She also served as special assistant to the legal adviser of the U.S. Department of

State and practiced at Covington & Burling in Washington, D.C.

For ISP fellows interested in joining the Ideas Lunch via Zoom, please email [anat.leshnick@yale.edu](mailto:anat.leshnick@yale.edu) for the updated link.



Thursday, February 6, 2025 - 12:00PM-1:30PM - Baker Hall 405

## Video Killed the Radio Star, So How is the Fax Machine Still Alive? When Law Cements Old Technologies

**Anat Lior**

Assistant Professor of Law, Drexel University, School of Law

'Fax it in' might be the most frustrating request a consumer can hear from its provider. There seems to be no clear justification in 2025 for one to be obligated to either fax or physically mail documents rather than use more readily available technologies. The requestors of these faxed documents, mostly in the health and financial sectors, will explain that this is the best way to protect your privacy and comply with regulations, but that is not the whole picture. This paper offers a first-of-its-kind survey of 'old' technologies still entrenched in our commercial, national security, and governmental systems using the fax machine as its primary case study. It reviews the alleged benefits of these technologies, mostly claims of enhanced security and privacy protection, as a means to justify their survival in the current technological landscape. Three distinct players use these technologies via different levels of interactions: governments, businesses, and customers/citizens. The paper advocates for a change in the technologies deployed in the commercial context. However, it preserves governmental discretion to sustain old tech regarding internal correspondences given national security concerns and business-to-business interactions due to established business practices. Federal agencies advocating for consumer protection, such as the FCC, FTC, CFPB, and HHS, should play an integral part in supporting a shift into advanced technologies to benefit consumers who wish to access essential services. These consumers are experiencing communication barriers given how the system has been structured,

despite the many benefits new technologies have to offer now and will have to offer soon. The paper gleans lessons learned from the fax case and offers insights concerning the adoption and commercial implementation of upcoming emerging technologies focusing on Artificial Intelligence (AI) and Quantum Technologies. Innovation is constantly changing, and consumers' ability to benefit from it should be a priority while navigating their interactions with their providers.

[Dr. Anat Lior](#) is an assistant professor at Drexel University's Thomas R. Kline School of Law, an AI Schmidt affiliated Scholar with the Jackson School at Yale and an affiliated fellow at the Yale Information Society Project. Her research interests include AI governance and liability, quantum computing policy, the intersection of insurance and emerging technologies, and intellectual property law. Her scholarship has been published in the Georgetown Law Journal, Harvard Journal of Law and Technology, Yale Journal of Law and Technology and Utah Law Review, among others. Lior obtained her Doctor of the Science of Law degree from Yale Law School, under the supervision of Professor Jack Balkin, researching the intersection of Artificial Intelligence, tort law, insurance law and antitrust law. She also researches the field of intellectual property, focusing on artworks that were created during the Holocaust and their copyright protection. Lior completed a dual degree in law and business administration (LL.B./B.A, summa cum laude) at Reichman University in Israel, as well as a master's degree in law (LL.M., summa cum laude) at Reichman University and at Yale Law School. She is licensed to practice law both in Israel and in the state of New York. Lior also worked with Professor Aharon Barak, former Chief Justice of the Israeli Supreme Court, focusing on comparative constitutional law. She is a regular speaker at conferences, workshops and events discussing AI regulation and policy, AI liability and insurance of emerging technologies. She aims to bridge the gap between policymakers working on regulating emerging technologies and STEM experts working in these fields. She believes only deep collaboration between the two can lead to meaningful and efficient legislation.

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## What We're Writing

**Chinmayi Arun**


- [The Silicon Valley Effect](#)

**Mason Marks**


- [Psychedelic Medicine Exceptionalism](#)

*If you are a current Affiliated Fellow with the ISP and have an article, blog post, or op-ed you would like to promote, please send it to [Anat Leshnick](#) for inclusion in our next newsletter & to share on social media!*


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The Information Society Project at Yale Law School is an intellectual center addressing the implications of the Internet and new information technologies for law and society, guided by the values of democracy, development, and civil liberties. For more information, visit <https://www.isp.yale.edu>.

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