

Private markets for individual data have received significant and sustained attention in recent years. But data markets are not for the private sector alone. In the public sector, the federal government, states, and cities gather data no less intimate and on a scale no less profound. And our governments have realized what corporations have: It is often easier to obtain data about their constituents from one another than to collect it directly. As in the private sector, these exchanges have multiplied the data available to every level of government for a wide range of purposes, complicated data governance, and created a new source of power, leverage, and currency between governments.

This Article provides an account of this vast and rapidly expanding intergovernmental marketplace in individual data. In areas ranging from policing and national security to immigration and public benefits to election management and public health, our governments exchange data both by engaging in individual transactions and by establishing “data pools” to aggregate the information they each have and diffuse access across governments. Understanding the breadth of this distinctly

modern practice of data federalism has descriptive, doctrinal, and normative implications.

In contrast to conventional cooperative federalism programs, Congress has largely declined to structure and regulate intergovernmental data exchange. And in Congress's absence, our governments have developed unorthodox cross-governmental administrative institutions to manage data flows and oversee data pools, and these sprawling, unwieldy institutions are as important as the usual cooperative initiatives to which federalism scholarship typically attends.

Data exchanges can also go wrong, and courts are not prepared to navigate the ways that data is both at risk of being commandeered and ripe for use as coercive leverage. I argue that these constitutional doctrines can and should be adapted to police the exchange of data. I finally place data federalism in normative frame and argue that data is a form of governmental power so unlike the paradigmatic ones our federalism is believed to distribute that it has the potential to unsettle federalism in both function and theory.

The last two decades have witnessed an explosive growth in private markets for individual data. Firms gather more and more data directly from individuals, but they have also developed refined systems to buy and sell data from one other, accelerating aggregation and facilitating the power that comes uniquely from large aggregations of data. But data markets are not for the private sector alone.

In the public sector, the federal government, states, and cities gather data no less intimate and on a scale no less profound, both directly from individuals and, like private firms, indirectly from other levels of government. Our governments, in short, have realized what corporations have: It is often easier to obtain data about their constituents in compilations ready made than it is to collect it piecemeal from those people themselves. As in the private sector, these exchanges have multiplied the data available to every level of government for a wide range of purposes, created a new source of leverage and tension between levels of government, and deeply complicated data use and governance.