Agency Enforcement/Option to Sue Agency

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Option to sue agency

Advantages

- In regard to ability to sue the agency for failing to correctly enforce a regulation: Has proven very effective
    - Example: Environmental Protection Agency (EPA)
        - As argued by Professor Dennis Hirsch in the Georgia Law Review (2007), environmental law and a federal privacy law are extremely similar in nature
        - There have been hundreds of lawsuits against the EPA that have led to better enforcement of rules
            - Notable Examples
                - SCOTUS: *Massachusetts v. Environmental Protection Agency*
                    - This ruling has had a tremendous impact on mitigating climate change
                    - Holding: The petitioners had standing and "[G]reenhouse gases fit well within the Clean Air Act's capacious definitions of "air pollutant"
                        - Could serve as a good model for any lawsuits that would inevitably come out of Federal Privacy Legislation
                    - Influence towards policy goals: a long list, but here are the highlights [once Clean Car Standards are fully implemented (due to the ruling) in 2025]
                        - "Increased efficiency will provide **savings of more than $8,000 in gasoline over the lifetime of a vehicle**, compared to a similar vehicle in 2010. Across America, the Clean Cars Standards will **save Americans more than $1 trillion at the pump**."
                        - "Americans will have **saved 12 billion barrels of oil**, increasing U.S. energy security."
                        - "Over the lifetime of vehicles covered by the Phase 2 Standards (model years

2019-2029), the standards will **reduce 1 billion tons of carbon pollution, save nearly 2 billion barrels of oil** and **save truck owners $170 billion in fuel costs**. The Phase 2 benefits are *in addition* to the benefits of simply leaving the Phase 1 Standards in place."

- "Existing power plants' **carbon dioxide pollution will fall approximately 32 percent** from 2005 levels. The U.S. has already achieved about two-thirds of that reduction."
- **"Methane pollution will be reduced by 510,000 short tons in 2025**, which has the same 20-year climate benefit as closing 11 coal-fired power plants or taking 8.5 million cars off the road."
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- 9th Circuit: Juliana v. United States
  - While Juliana did not win the suit, it made some huge steps forward in the fight to control climate change
    - Firstly, the case did a great job raising awareness:
      - The case was featured on *60 Minutes* twice.
    - Outlined by this Harvard Law Review article, while the case was dismissed due to lacking standing, there are two main areas where the "doctrinal path that the Ninth Circuit chose in Juliana may have significant legal and practical implications"
      - 1: "Juliana's central doctrinal suggestion - that courts lack the Article III authority to issue injunctions implicating 'complex policy decisions' unless 'limited and precise' 'legal principles' require as much - is novel. To be sure, '[e]quitable relief in a federal court' has always been 'subject to restrictions.'"

        - 2: “[M]ore practically, Julians’s focus on “limited and precise” legal stands could conceivable disrupt long standing judicial practice in large-scale structural reform cases”
- Some of most successful lawsuits have been under the Clean Water Act and Clean Air Act (very similar pieces of legislation) where Congress empowered citizens to be “private attorneys general”
    - Examples of successful lawsuits and their implications:
        - Waterkeeper and Wilson v. Formosa Plastics Corp resulted in a $50M fine, the largest fine under the Clean Water Act as of 2019. They additionally had to agree to comply with “zero discharge” in the future and clean up existing pollution.
            - This case is significant because it was brought forth by a group of Texas residents - hence taking the role of a “private attorney general”
        - County of Maui v Hawaii Wildlife Fund held that “The statutory provisions at issue require a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge.”
            - This was a major win for environmental advocates because it kept the Clean Water Act intact and required stricter supervision from the EPA.
        - Again, look to Massachusetts v EPA for the biggest ruling concerning the Clean Air Act [discussed above]
    - “If a regulatory agency fails to take enforcement actions against a violator of the Clean Water Act or does not get acceptable results from their enforcement actions, citizens have the right to file citizen suits against the state regulatory agency or the U.S. EPA”
    - Subchapter V, General Provisions, Section 505, of the Clean Water Act (USC 33, Section 1365)
    - Guide to Citizen Suits under Clean Water Act
- However, important to note there are 9 provisions citizens can sue the EPA under, such as the Clean Water and Clean Air Acts. These two acts likely serve as the best model for data privacy legislation for the reasons discussed above.
    - Here is a comprehensive list of every lawsuit ever filed against the EPA

- **Federal Privacy Legislation can use the Clean Water Act/Clean Air Act as a guide** when it comes to enforcement…
  - Advocacy/Accessibility (compared to other agencies) of Citizen suits
  - Ability of state attorney generals to hold the agency accountable (and vice versa)
    - One idea: can state attorney generals sue the agency but also help the agency enforce laws?
  - Fees/imprisonment as primary enforcement mechanism imposed by government agency
  - Many others as well that can rather swiftly be transitioned to a federal privacy law (outlined in the law linked above)

Disadvantages

- ~~Suing a government agency (FTC in particular) is extremely complicated and bureaucratic- private right of action would be better served to directly sue companies~~
  - ~~Bringing a class action against a large company (or simply filing a complaint with the FTC) could ultimately be more effective than suing the agency itself for lack of enforcement~~
  - Historically very difficult to establish **standing** when suing a government agency
    - For example, this case brought against the FTC (the FTC is very rarely sued so this is one of the only examples) was dismissed due to a lack of standing
    - Here is an analysis from Law360 on why the plaintiffs lacked standing, and it provides some insight to why it is so difficult to establish standing when bringing a lawsuit against the FTC.
      - Recent SCOTUS decision brought down in TransUnion v. Ramirez holds that "a concrete injury requires more than the existence of a risk of harm that never materializes. Accordingly, the vast majority of the absent class members who could not prove that allegedly inaccurate credit reports were disseminated to any third party did not have standing to assert a claim under the Fair Credit Reporting Act (FCRA)."
        - This will make it harder to establish standing in the future and especially makes class action suits more complicated for the plaintiff.
- FTC officials are generally working hard to enforce rules and do the right thing. Suing them would slow down the fight for good as they are forced to reallocate their limited resources to defending against a lawsuit when they could be spending that time bringing the companies at fault into order
  - This is likely another large reason why the FTC is seldom sued

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Agency vs no agency

Advantages

- Centralized authority- rules easier to enforce and easier to ensure oversight
    - Enables law to be enforced consistently across individuals- Inconsistent enforcement may violate due process clause of the Fourteenth Amendment.
- Historically, federal agency enforcement of a law like this is extremely standard. Every law our team has investigated is enforced by a federal agency.
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Agency	Statute
FCC	Telephone Consumer Protection Act of 1991(TCPA)
HUD	Fair Housing Act (FHA)
NHTSA	National Traffic and Motor Vehicle Safety Act (NTMVSA)
EEOC	Title VII Civil Rights Act
SEC	Securities Act of 1933
FTC	Fair Credit Reporting Act (FCRA)
HHS	Health Insurance Portability and Accountability Act (HIPAA)
EPA	Clean Water Act/Clean Air Act
FDA	Federal Food, Drug, and Cosmetic Act (FD&C)

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- Algorithms/AI will be key in detecting poor privacy practices. These algorithms often lead to challenges under current anti-discrmination law
    - “Both COPRA and USCDPA contain provisions on algorithms that recognize, in different ways, that such concerns may implicate federal anti-discrimination laws. We believe these differing provisions can be combined to make the FTC an effective adjunct to the federal agencies currently charged with federal anti-discrimination enforcement” (Brookings)
- An agency is the fastest/easiest/most efficient method to solve issues outside of the courts (as opposed to litigation)

Disadvantages

- The FTC doesn't have the funding or the manpower to enforce a federal privacy law; they barely have the bandwidth to enforce existing statutes and regulations under their current purview
    - It is widely argued the FTC would need ~400-500 more employees to sufficiently enforce a federal privacy law (for comparison, they currently have only 40 doing privacy work)
        - This would obviously require a much larger budget- however fines for breaking rules could potentially fund this effort
            - "Even with 500 additional employees, the FTC would be lean to compare to privacy enforcers in the Europe—the UK's Information Commissioner's Office alone has over 500 employees for a country with one-fifth the population of the United States" (Brookings)
            - "Finally, in addition to these many legal constraints, the F.T.C. is woefully understaffed in privacy, with some 40 full-time staff members (as of the spring) dedicated to protecting the privacy of more than 320 million Americans. This compares to hundreds of staff members in Britain, and almost 150 each in Ireland and Canada — all countries with far smaller populations than the United States."
    - There are currently 82 statutes enforced by FTC and they arguably don't time/manpower to sufficiently manage those
- Takes away autonomy of states to enforce rules
    - States' differing priorities and and resources must be taken into account for effective public policy
        - What works in Silicon valley might not work in rural Alabama.
        - A model with State Attorneys General playing a law enforcement role alongside the FTC/agency could ease some of these federalism concerns

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FTC vs New Privacy Agency

This article from New America : "Does Data Privacy Need its Own Agency?" breaks down the nuances and implications of rooting federal privacy legislation enforcement in the FTC vs. a new privacy agency

FTC

- It is much simpler/cheaper/more efficient to expand the FTC's budget and have them enforce a federal privacy law than to create an entirely new agency
    - It took 5 years for Congress to get the the Privacy and Civil Liberties Oversight Board up and running
        - "However, the agency did not actually come into existence until 2012 when the Senate confirmed its first four board members. This five-year period delayed the agency's ability to fulfill its mission and serve the public" (New America).
    - It is difficult just to get an office up and running
    - Using the FTC would lead to a new agency not starting in the unknown
- Brookings' report "Bridging the Gaps: A path forward to federal privacy legislation" spends an entire report making the argument that the FTC is the right group to enforce a federal privacy law.
- "We think using the FTC Act as a jurisdictional baseline covers enough without covering too much. With the addition of jurisdiction over common carriers and nonprofits, as discussed next, the FTC would have broad authority to cover much of the U.S. economy without running up against existing federal statutes and, with those, additional affected industries and congressional committees of jurisdiction" (Brookings)
    - The FTC has extensive experience in consumer protection in most areas of the U.S. economy, it already covers data privacy protections, so adding more general data privacy protections and a few more industries to it's purview makes sense. Giving the FTC authority is an efficient way to structure enforcement of this new law.

New Privacy Agency

- The FTC has stricter rulemaking standards than any other government agency under the Magnuson-Moss Warranty Act rather than the standard Administrative Procedures Act (APA) which governs most government agencies. The Magnuson-Moss procedures include about 20 additional procedures and analysis requirements not found in the APA that are now required for the FTC. FTC rulemaking under this stricter standard takes, on average, six-times longer than rulemaking done under the APA standard.
    - While this is a potential problem, one solution is enforcing laws under APA rather than Magnuson-Moss Warranty Act (as what has been done with COPPA, a law the FTC is currently tasked with enforcing)
- "These proposals reflect a concern that simply allocating more resources to the FTC or expanding its rulemaking power would not necessarily equip the agency to sufficiently protect user privacy rights. Some argue that the FTC lacks the "digital DNA" to regulate the distinctive digital economy Others point to the FTC's lackluster track record on regulating digital platforms as reason to create a new agency."
    - Look to section 4 in the New America report (referenced earlier as well):

- In other countries, privacy has its own agency (such as Data Protection Agencies throughout the EU)
    - Article outlining why US needs a DPA, a main reason is it is a way to offer help to the FTC who (as shown above) is understaffed.
        - Additionally, the US is the only OECD country without a Data Protection Agency
    - Here is a blog from Senator Kirsten Gillibrand (D-NY) outlining why the US needs a DPA. She contends it should have 3 more missions:
        - 1. "Give Americans control and protection over their own data by enforcing data protection rules"
        - 2. "Work to maintain the most innovative, successful tech sector in the world and ensure fair competition within the digital marketplace"
        - 3. "Prepare the American government for the digital age"
- A new agency and the FTC could potentially work together to address privacy issues (similar to how the FTC and DOJ antitrust division work together in the status quo)
    - However, it would be simpler to consolidate into one or another to maximize efficiency since different federal agencies working together has been historically inefficient at times

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However, another option is having a dual enforcement between a federal agency and state AG's

- [look to state AG doc for examples/summarizes of law review articles on how dual enforcement could be structured]

- A hybrid model would likely be best- Brookings' report "Bridging the Gaps: A path forward to federal privacy legislation" outlines the importance of the FTC leading the charge with assistance from state attorney generals in smaller disputes
    - Part 3 Section D: Federal and State Enforcement from the Brookings' article outlines perfectly
    - This balances the interests of the federal government with the unique nuances of each state.
    - The FTC has a long history of working with state AG's → major recent example is after the Equifax data breach in 2017 that affected half of the US population
        - *The Privacy Policymaking of State Attorneys General by Danielle Keats Citron (2017)*
            - This article explains why the dual enforcement of privacy has been so effective and provides examples of state AG's enforcing rules/moving interests forward that could not have been achieved by the FTC alone: "State attorneys general have been nimble privacy enforcement pioneers, a role that for

practical and political reasons would be difficult for federal agencies to replicate."

- Approaches are being taken to ensure State Attorneys General are equipped for the job:
    - Many state attorneys general have undergone training with the International Association of Privacy Professionals and some have been certified as privacy professionals.
    - Many states have also hired outside help (such as technologists and university computer science departments) to guide discussions on privacy
    - FTC has played a large role in influencing states' approach to data security investigations
        - As of 2017, there are ~14 states leading the privacy enforcement charge
    - Privacy is built into the infrastructure of leading privacy offices (e.g., privacy units in Consumer Protection Bureau)
        - For example, Connecticut was the first state to launch a privacy task force, staffed with 2 full time attorneys and 3 part time staff (as of 2016)
- Some examples of where Stage AG's have successful intervened include in advancing federal privacy interests forward:
    - Setting standards for data-breach notifications, increased transparency of data practices involving corporations, helped outline how data should be handled after collected legally, increased respect for consumer choice, and have been great for norm reinforcement in AG's role as "active first responders"
        - [These instances are explained in more detail in the Law Review Article cited above]

- A dual enforcement model enables state Attorneys General to solve localized problems that could not be adequately solved by the FTC. However, the FTC would still maintain central control and would be able to use their expertise to assist and advise State Attorneys General.