

## State AG Enforcement

### Advantages

- Each state can decide on their own or together (as we see with antitrust lawsuits against Google and Facebook) how much and what areas of the law to enforce
  - [https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5183&context=faculty\\_scholarship](https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5183&context=faculty_scholarship)
    - Decentralized Enforcement
      - Allows for unique approaches as well as a built-in checks
        - “Most federal statutes that provide for state enforcement both require state attorneys general to notify the relevant federal agency prior to filing suit and permit the federal agency to intervene in the case. Such provisions enable federal enforcers to keep tabs on the states and to present their own views regarding enforcement to reviewing courts. But federal enforcers cannot prevent the states from acting in ways that conflict with the federal enforcement strategy.”
        - “Similarly, while state enforcers can and do coordinate with their federal counterparts and with each other, cooperation is voluntary and tends to break down in the face of sustained disagreement.”
      - Local Interests/Knowledge
        - “State enforcers also are likely to have a better understanding of local conditions than their federal counterparts, simply by virtue of living and working in the state rather than in Washington, D.C.”
- If the party in control of the federal government is different than a given state, that state (or a collection of states) can enforce the parts or interpretations of the law that the federal government/agency is not enforcing
- The FTC is not sufficiently funded to handle this problem
  - 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 many have argued the FTC doesn’t have the time/manpower to sufficiently all of them, at least at the same level as one another

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### **Disadvantages**

- States have less resources than the federal government, a lot less, and have to balance their budgets
- The law may create a certain nationwide standard or scheme that only works if it is enforced consistently across states
  - Centralized authority- rules easier to enforce and easier to ensure oversight
    - Page 54 of “[Bridging the Gaps: A path forward to federal privacy legislation](#)” outlines the importance of the FTC leading the charge. Part 3 Section D: Federal and State Enforcement
    - Enables law to be enforced consistently across individuals- Inconsistent enforcement may violate due process clause of the [Fourteenth Amendment](#).
  - State Attorneys General are more likely to be politically motivated
    - “[a]gency attorneys who plan to go into private practice have strong incentives to 'sell out' their agencies in order to curry favor with private-sector attorneys. Such attorneys tend to avoid difficult or complicated cases, focusing instead on developing trial experience and a winning record.”
    - Use of money collected from fees tends to be politically motivated
      - [Many state laws](#) either do not expressly address the use of money recovered through UDAP litigation or they provide AGs and other officials with wide discretion as to how they spend funds received as a result of litigation. When consumer protection funds accumulate large balances, tension can result between AGs and legislatures eying the funds as a source of money for other pressing state needs or to fill budget gaps.

- Some AGs use the position to advance their careers, not always doing the “right” thing, as they try increase their statewide and nationwide image
  - “[The](#) legislative history for the CPSIA shows opponents fearing the power of state attorneys general more generally than the matters covered by the statute's terms. For example, the history shows a concern with "some State attorneys general . . . us[ing] their positions to garner national attention to advance their careers," and a concern that such enforcement provisions "would tempt some [attorneys general] to file frivolous lawsuits that could ultimately undermine the effectiveness of the [Consumer Product Safety Commission]."
- AGs are [not bound by the same standards](#) as the FTC, i.e., AGs don't have to inform companies they are going to be investigated before beginning (due process concern)
  - “There is no such process before an AG decides to bring an action under UDAP laws. Rather, in nearly every state, the AG can immediately seek civil penalties, without first providing notice of a violation or seeking an injunction or other relief for consumers.”
  - There is a very low burden of proof AGs must prove
- To handle current matters, State AG offices are farming out privacy related cases to private attorneys [[Sect 3 Pt A](#)]
  - Silverman, Cary, and Jonathan L. Wilson. "State Attorney General Enforcement of Unfair or Deceptive Acts and Practices Laws: Emerging Concerns and Solutions." *University of Kansas Law Review*, vol. 65, no. 2, December 2016, p. 209-270. *HeinOnline*,

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## However,

The most productive path forward is most likely a federal agency and State Attorneys General working together to enforce a federal privacy law.

Summary of Main Points (of articles outlined below)

- Proven states don't enforce federal statutes differently
  - However, some use more than others
- Privacy in particular has been super successful when enforced by state AGs alongside the FTC ()
- State AGs have led to the charge on many data privacy issues and have achieved positive results (specific examples below)
- Allows targeting of smaller infractions that the federal government simply can't enforce
  - Working together is key

Page 61 of "[Bridging the Gaps](#)" ~ *Importance of State Enforcement*

- "Consistent with both USCDPA and COPRA—a federal privacy law should allow state attorneys general to enforce the federal standards"
- State AGs are effective at targeting smaller privacy violators
- Not only as a hybrid model advised, it is essential: "It would be simply be untenable to preclude all state involvement in the protection of privacy and data security, which are issues of concern everywhere."
- Additionally, "We suggest going one step further than intervention to allow the FTC to step in and assume responsibility for prosecuting an action initially brought by a state official. We expect that this ability would be exercised by the Commission rarely, but it would make it possible for the FTC to ensure that state cases do not interfere with the national privacy regime"

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### **Law Review Summaries that argue in favor of dual enforcement**

*Amy Widman and Prentiss Cox, State Attorneys General's Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws, 33 CARDOZO L. REV. 53 (2011), available at [https://scholarship.law.umn.edu/faculty\\_articles/372](https://scholarship.law.umn.edu/faculty_articles/372).*

This law review article argues that state attorneys general have played a key role in enforcing federal law- however, most state AGs have used their powers more sparingly than anticipated across the board.

- Still agrees that some sort of dual enforcement is key for furthering federal statutes
- "There are currently twenty-four federal laws that explicitly grant enforcement power to the state, or more specifically, state attorneys general. These laws primarily focus on consumer protection and antitrust areas and the enforcement powers provided are generally quite specific."
  - Attorneys generals enforcing federal law is especially common during times of "dwindling Federal resources"
- A "notice requirement" is the most common legislative parameter included in concurrent enforcement powers.
- Important question: in what courts can State AGs bring their claims forward?

- If just federal district court of that state, it prevents groups of states becoming joint plaintiffs (this is common practice in antitrust and environmental, so areas of the law most similar to privacy)
- An interesting note is that historically, some states exercise their authority over federal law far more than others. Would this result in people acting in states that are more favorable?
  - For example, the Illinois state AG is by far the most active in filing claims under federal law (3x more cases than the next highest)
  - When states filed a joint lawsuit, a federal agency aided 58.3% of the time, compared to 14.1% of individual state cases
- “Their conclusion: state attorneys general use concurrent enforcement authority with federal consumer protection laws in a sparing manner . . . federal agency involvement in state cases has been cooperative.”
  - “About half of the statutes were never used by the state attorneys general. Of the sixteen examined statutes, we found no cases brought under seven of the statutes, and three of the statutes were used by the states only once or twice.”
- Preemption isn’t too big of an issue
  - “Neither did preemption of state law coupled with concurrent enforcement authority seem to have much of an impact on the states' use of the examined statutes. Of the five statutes that explicitly preempt some state law, three had been used and two were not used.”
  - However, different states exercise different strategies when contemplating whether to deal with an issue under state or federal law
- The argument that different AGs would interpret statutes differently was *not* supported by the study

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#### The Privacy Policymaking of State Attorneys General by Danielle Keats Citron (2017)

- Article Prof Dellinger recommended
- Major summary: State Attorneys General have done a lot to progress the privacy agenda that the federal government likely never would have achieved on their own. It is paramount that they continue to play an important role in advancing the privacy agenda going forward.

~Key Notes~

#### Intro

- “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.”

- “As California’s Attorney General Kamala Harris aptly put it, ‘We are at an important inflection point, a convergence of AG interest in consumer protection, emerging technologies, and data privacy.’ The result is the emergence of stronger privacy and data security protections.”

#### Part I: The people’s Privacy Lawyers

- Unfair and Deceptive Practices Act (UDAP) → states adopted UDAP laws to empower attorneys general to protect consumers from privacy-invasive business practices. FTC was a huge proponent of this setup.
  - Shows how FTC and State AGs have worked together in the past on similar issues.
  - UDAP remains integral to state AGs privacy enforcement to this day
- Approaches being taken
  - Many state AGs 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)
  - 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)
    - 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)
    - [however, this is not necessary as Massachusetts has been active in privacy enforcement without a formal privacy unit]

#### Part 2: Privacy and Data Security Enforcement

- Policymaking Tools and Potential Impact
  - State AGs often propose and endorse state consumer privacy and data security laws
  - They also often testify before congressional committees
  - They are also very good at bringing groups with common interests to the table (business leaders, advocacy groups, experts, etc.)
  - State AGs issue “best practice guides”
  - Publicity
  - “Companies have a strong incentive to follow the regulatory standards of powerful states. David Vogel has labeled this phenomenon the ‘California effect.’”
    - “If we can strengthen privacy protections here [in California], we can benefit consumers around the world.”

- State AG enforcement activity can spur legislative change
- Norm Creation
  - Transparency of data practices → AGs mandating/encouraging privacy policies for businesses
    - “Paired the pursuit of litigation with legislation”
    - Example: then Attorney General Kamala Harris led the nation’s efforts to require privacy policies and display them easily for people to view before downloading an app
  - Data-Breach Notifications
    - “State attorneys general supported state data-breach notification proposals, which were soon adopted across the nation”
  - Respected Consumer Choice
    - “Attorneys general have set precedent that bypassing a consumer’s privacy settings is, in itself, an unfair practice”
    - Resulted from 39 states suing Google (FTC ultimately tried to join, but was denied by the states due to their interest in injunctive relief)
      - FTC and State AGs oftentimes have different long term interests for taking on different types of cases
  - Use Restrictions
    - Have helped navigate the muddled waters to answer how companies may use personal data that has been collected legally
    - Many more examples where state attorneys general led the charge in creating norms (and later legislation) that shifted privacy laws in the right direction in many areas of the digital ecosystem.
      - [including examples where 40+ state AGs banded together to advance a goal]
  - Norm reinforcement
    - State AG’s are “active first responders” in areas including federal privacy statutes, data security, bankruptcy, privacy governance (including turning the CPO into a legal requirement)

~”State attorneys general have shaped privacy and data security policy in several ways. They have established privacy norms in the absence of federal leadership. They have pressed for thicker consumer privacy protections than those sought by federal agencies. They have reinforced federal norms in areas where federal agencies have had superior technical and policy expertise.”~

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Dual advantages

- 50 smaller entities working towards the same end
- Consumer protection v privacy groups in state AGs office
- In NC consumer protections pays for itself via fines

Federal agencies enforcing both? → preemption

“Concurrent jurisdiction”

- Real concurrent jurisdiction is it limited in ways?

Every state has its own unfair and deceptive trade practices act

COPPA → add to chart because it'll be great for comparison

- State AGs are limited in type of recovery

Federal law shouldn't preempt state laws

- You can preempt specific laws