THE PRIVACY POLICYMAKING OF STATE ATTORNEYS GENERAL

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ABSTRACT

Accounts of privacy law have focused on legislation, federal agencies, and the self-regulation of privacy professionals. Crucial agents of regulatory change, however, have been overlooked: the state attorneys general (AGs). This Article is the first in-depth study of the privacy norm entrepreneurship of state attorneys general. Because so little has been written about this phenomenon, I engaged with primary sources by examining documentary evidence received through Freedom of Information Act (FOIA) requests submitted to attorney general offices around the country and interviewing state attorneys general and current and former career staff.

Much as Justice Louis Brandeis imagined states as laboratories of the law, offices of state attorneys general have been laboratories of privacy enforcement. State attorneys general have been nimble privacy enforcers whereas federal agencies have been more constrained by politics. Local knowledge, specialization, multistate coordination, and broad legal authority have allowed AG offices to fill in gaps in the law. State attorneys general have established baseline fair-information protections and expanded the frontiers of privacy law to cover sexual intimacy and youth. Their efforts have reinforced and strengthened federal norms, further harmonizing certain aspects of privacy and data security policy.

Although certain systemic practices enhance AG privacy policymaking, others blunt its impact, including an overreliance on weak informal agreements and a reluctance to issue closing letters identifying data practices that comply with the law. This Article offers ways state attorneys general can function more effectively through informal and formal proceedings. It addresses concerns about the potential pile-up of enforcement activity, federal preemption, capture, and the dormant Commerce Clause. It urges state enforcers to act more boldly in the face of certain shadowy data practices.

INTRODUCTION

Accounts of privacy law have focused on legislation, federal agencies, and the self-regulation of privacy professionals. Crucial agents of regulatory change, however, have been neglected: the state attorneys general. This Article fills that void with the first in-depth study of the privacy policymaking of state attorneys general.

The privacy norm entrepreneurship of state attorneys general is ripe for assessment. In the past fifteen years, attorneys general have devoted significant time and energy to privacy and data security enforcement. State attorneys general have worked on privacy and data security issues individually,


collectively, and through the National Association of Attorneys General (NAAG). The Privacy Working Group, coordinated by NAAG, has enabled offices to share expertise and resources. Some offices have led the charge; others have played a supporting role by joining multistate efforts.

State attorneys general have been on the front lines of privacy enforcement since before the intervention of federal agencies. In the 1990s, while the Federal Trade Commission (FTC) was emphasizing self-regulation, state attorneys general were arguing that consumer protection laws required the adoption of Fair Information Practice Principles (FIPPs). Then, as now,

4 NAAG, a professional membership organization, helps organize multistate litigation, develop model statutes and best practices, and write reports articulating a common approach amongst the states. See State Attorneys General: Powers and Responsibilities 246 (Emily Myers & Nat’l Ass’n of Att’ys Gen. eds., 3d ed. 2013) [hereinafter State Attorneys General].


7 See infra note 52 and accompanying text (explaining that twenty-seven states have participated in one or more multistate investigations in the past five years).


state unfair and deceptive trade acts and practices laws (known as “UDAP laws”) were central to privacy-related enforcement activity.

In certain areas, the proactivity of state attorneys general has preceded that of their federal regulatory counterparts. Their offices established baseline protections for privacy policies, data-breach notification, do-not-track browser settings, and certain uses of bank-history databases. Even as attorneys general shaped conceptions of what privacy enforcement should achieve, they extended privacy enforcement to new frontiers, including sexual intimacy and youth.

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. Because attorneys general do not have to wrestle with the politics of agency commissioners or deal with layers of bureaucracy, they can move quickly on privacy and data security initiatives. Career staff have developed specialities and expertise growing out of a familiarity with local conditions and constituent concerns. Because attorneys general are on the front lines, they are often the first to learn about and respond to privacy and security violations. Because constituents express concern about privacy and data security, so in turn do state attorneys general who tend to harbor ambitions for higher office.

This is an auspicious time to study the contributions of state privacy enforcers. Even as Congress has been mired in gridlock, attorneys general have helped fill gaps in privacy law through legislation, education, and enforcement. They have worked with state lawmakers on consumer privacy issues. AG offices have set privacy and security norms in the absence of federal leadership, a trend that may escalate in the coming years. They have

10 FIPPs’ protections enhance individuals’ ability to control the extent to which their personal data is collected, used, and shared. See Bamberg & Mulligan, supra note 3, at 21. FIPPs include providing notice to data subjects, securing consent for data practices, ensuring data security, and securing opportunities for people to check the accuracy of data held about them. Id. at 22.

11 See infra subsections II.B.5–6.

12 Given the impending presidential administration of Donald Trump and the Republican Party’s control of both Houses of Congress, federal agencies like the FTC and FCC will likely slow down their consumer privacy enforcement efforts. See Jedidiah Bracy, What Will a Trump Administration Mean for Privacy, IAPP (Nov. 10, 2016), https://iapp.org/news/a/what-will-a-trump-administration-mean-for-privacy/. There are three open commissioner seats (of five) at the FCC and two open seats (of five) at the FTC, as well as the seat of outgoing Chairwoman Edith Ramirez, which will be filled by President-elect Trump. Id. The Consumer Financial Protection Bureau (CFPB), an agency created by the Dodd-Frank Wall Street Reform Act, could be dramatically reshaped, as promised by Republican lawmakers, as might its role in enforcing the Fair Credit Reporting Act, the first federal privacy law passed in 1970. See James Rufus Koren, Trump Administration Could Uplend Post-
reinforced and strengthened federal norms on data security among other issues. 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.”\textsuperscript{13} The result is the emergence of stronger privacy and data security protections.

This Article has three Parts. Part I provides an overview of the state attorney general’s consumer-privacy mission. It identifies AG offices leading consumer privacy efforts and offices supporting their work. Part II describes the regulatory tools available to states to shape privacy practices. Then, it documents key areas where offices of attorneys general have set, shaped, and entrenched privacy and data security norms. Part III evaluates the strengths and weaknesses of AG privacy policymaking and offers suggestions for improvement. It addresses concerns about the potential pile-up of enforcement activity and interest group capture. It explores limits imposed by federal preemption and dormant Commerce Clause doctrine. Part III ends with suggestions about potential new directions for privacy enforcement.

Before turning to my analysis, let me explain my methodology. Because so little had been written about the privacy enforcement of state attorneys general, my research focused on primary sources. I filed open sunshine requests with AG offices around the country. FOIA requests sought materials related to AG offices’ education campaigns, legislative efforts, and enforcement activity related to consumer privacy and data security.\textsuperscript{14} An overwhelming majority of states responded, providing crucial evidence of AG privacy policymaking.\textsuperscript{15}

To put into context the material obtained through FOIA requests, I conducted semi-structured interviews with state attorneys general from four states and former and current career staff from thirteen states.\textsuperscript{16} Interviews


\textsuperscript{14} A sample FOIA request letter is included in Appendix I.

\textsuperscript{15} Appendix II lists the responses to my FOIA requests. Forty-two states and one territory provided responsive materials. See Appendix II. In accord with their open sunshine laws, four states—Alabama, Arkansas, Tennessee, and Virginia—denied my request because I am not a state citizen. \textit{Id.} Two states—New Jersey and South Dakota—and five of the six territories never responded to my request. \textit{Id.} Two states conditioned a response on my payment of significant fees ($263.79 for Montana, and $4255.76 for Nebraska) despite my request as an academic for a waiver of the fee. \textit{Id.} It is easy to understand states that denied my request on the basis of state citizenship; those states owe no obligation of transparency to noncitizens. The fees asserted by Montana and Nebraska, however, seemed exorbitant because independent research suggested that neither state had considerable material to disclose.

\textsuperscript{16} I conducted in-person interviews with California AG Kamala Harris and Connecticut AG George Jepsen and telephone interviews with Indiana AG Greg Zoeller and former
focused on the following questions: In what respect has the AG’s office worked on consumer privacy and data security concerns? How do privacy and data security issues come to your office’s attention? Has the office worked on proposed state or federal privacy and data security legislation? Does the office devote resources to educating consumers and companies about best practices? Does the office meet with companies to discuss privacy and data security? Are particular investigative techniques and litigation strategies more effective than others? What legal authority does the office rely on when pursuing privacy and data security investigations? Are current laws, notably UDAP laws, sufficient to the task? What has been the office’s role in multistate investigations concerning consumer privacy and data security? What are the strengths and weaknesses of informal agreements versus litigation? To what extent has the office worked with federal agencies on privacy and data security issues? Do staff have privacy training or expertise? Does the office have technical experts in house or on retainer? How have the FTC’s guidance and white papers influenced enforcement activity? In what areas does the office look to the FTC or other federal agencies for guidance and leadership?

Interviews with career staff varied from interviews with state attorneys general. Discussions with staff tended to focus on the day-to-day experience of working on privacy and data security issues. Staff discussed the enforcement process, including the ins and outs of investigations, pros and cons of enforcement strategies, and practical challenges. They talked about their offices’ legislative work and education efforts. Interviews with attorneys general focused on the bigger picture—the office’s goals and priorities for privacy enforcement, the practical limits of their work, and the substantive areas in which their activity has had the biggest impact. Public comments of attorneys general and staff, views of privacy professionals, media coverage of AG enforcement, and scholarly perspectives on the work of attorneys general also informed my analysis.

I. The People’s Privacy Lawyers

The office of the state attorney general has deep roots in American history. All thirteen colonies had offices of attorneys general whose role was to represent the sovereign in England.17 After the Revolution, these offices were reestablished as state attorneys general under state constitutions or state
Today, all fifty states and six territories have an office of attorney general or its functional equivalent. The vast majority of attorneys general are publicly elected. In designing a popularly elected AG’s office, states aimed to “weaken the power of a central chief executive and further an intrabranch system of checks and balances.” The popular election of attorneys general helped reinforce federalism’s commitment to enhance governmental responsiveness to local priorities.

A crucial part of an attorney general’s work as the state’s chief law enforcer involves protecting the public interest. As this Part explores, in the mid- to late-twentieth century, AG offices took up the mantle of consumer protection, which grew to include privacy and data security concerns. This Part identifies the core group of offices that have taken the lead on privacy enforcement and the significant number of offices that have supported those efforts.

A. Consumer Protection Mission

In the late 1960s and 1970s, state attorneys general embraced their role as consumer watchdog. An important first step was the establishment of consumer protection divisions. Frank Kelley, who served as Michigan Attorney

18 See State Attorneys General, supra note 4, at 33–37.
22 See Devins & Prakash, supra note 21, at 2125 n.78.
General from 1961 to 1999, explained that one of his first acts in office was starting a consumer protection division.25

Passing supportive legislation was the next step. With the encouragement of the FTC and attorneys general, states adopted UDAP laws.26 Much like section 5 of the Federal Trade Commission Act,27 the typical UDAP law bans deceptive commercial acts and practices and unfair trade acts and practices whose costs exceed their benefits.28 UDAP laws empower attorneys general to seek civil penalties, injunctive relief, and attorneys' fees and costs.29

AG offices started focusing on privacy issues in the 1990s. Early enforcement actions targeted intrusive telemarketing, spam, spyware, and the absence of privacy policies.30 Attorneys general relied on UDAP laws and their common law authority to protect consumers from privacy-invasive business practices.31 Over the years, AG enforcement power has expanded with the passage of specific privacy and data security laws, many of which were proposed or endorsed by state attorneys general.32 Although those laws have been helpful, UDAP laws remain crucial to AG privacy enforcement.33

25 See id.; see also Dale A. Reinholtsen, The Role of California's Attorney General and District Attorneys in Protecting the Consumer, 4 U.C. DAVIS L. REV. 35, 43 (1971) (discussing how the California Consumer Fraud Unit was established in 1959 to protect consumers from unfair, fraudulent, or deceptive business practices).

26 Kelley & Lessenberry, supra note 24, at 101–02 (explaining that Frank Kelley helped convince Michigan lawmakers to pass his state's consumer protection act in 1976). Texas AG John Hill's office helped draft the state Deceptive Trade Practices Act, which passed in 1973. See John Hill, Jr. & Ernie Stromberger, John Hill for the State of Texas: My Years as Attorney General 17–33 (2008); see also Robert Morgan, The People's Advocate in the Marketplace—The Role of the North Carolina Attorney General in the Field of Consumer Protection, 6 WAKE FOREST INTRAMURAL L. REV. 1, 4 (1969) (discussing his role, as the AG of North Carolina, in lobbying the state legislature to adopt a broad UDAP law so his office could serve as the "consumers' advocate").


29 See, e.g., California Unfair Business Act, Cal. Bus. & Prof. Code § 17206 (West 2016) (imposing $2500 per violation); Illinois Consumer Fraud Act, 815 Ill. Comp. Stat. Ann. 505/7 (West 2016) (allowing civil penalty of $50,000 per unlawful act); see also Steven J. Cole, State Enforcement Efforts Directed Against Unfair or Deceptive Practices, 56 ANTITRUST L.J. 125, 128 (1987) (explaining that in states like Maryland the "consumer protection authority resides wholly within the Attorney General’s Office").

30 Henrichsen Interview, supra note 8.

31 See infra note 288 and accompanying text.

32 See, e.g., Cal. Const. art. 1, § 1; Sheehan v. S.F. 49ers, 201 P.3d 472, 479 (Cal. 2009) (holding the right to privacy applies to state actors and private parties).

33 See, e.g., Telephone Interview with Nathan Black, Assistant Att’y Gen., Office of the Att’y Gen. of Iowa (June 21, 2016).
B. The Privacy Enforcers

In the past fifteen years, a core group of states have taken the lead on privacy enforcement: California, Connecticut, Illinois, Indiana, Maryland, Massachusetts, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Texas, Vermont, and Washington. Their offices have spearheaded multistate investigations on privacy and data security matters. They have active individual enforcement dockets. Their offices have worked on privacy and data security legislation; they have educated consumers and businesses about best practices.

Because privacy and data security investigations often involve complicated technical questions, privacy leaders have “brought expertise in-house.” Some have hired technologists and have computer labs onsite; others have partnered with computer science departments at local universities. Thanks to funding secured through multistate agreements, AG staff have undergone training with the International Association of Privacy Professionals; many have been certified as privacy professionals.

The FTC—with its extensive technical and policy expertise—has been a crucial source of inspiration for state attorneys general. The FTC’s policy reports and research have inspired states to devote resources to investigating certain data practices. FTC policy has been particularly influential in

34 See infra notes 43–50, 134, 156, 219, 227, 264–65, 268–70 and accompanying text (discussing the work and activism of state attorneys general).
35 For some privacy leaders, the bulk of enforcement activity related to privacy is spent on multistate investigations. Ohio, for instance, recently led a multistate investigation into the systematic failure of credit-reporting agencies to correct inaccurate credit reports. See Press Release, Office of the Att’y Gen. of Ohio, Attorney General DeWine Announces Major National Settlement with Credit Reporting Agencies (May 20, 2015), http://www.ohioattorneygeneral.gov/News-Releases/May-2015/Attorney-General-DeWine-Announces-Major-National-S; FOIA Response Letter from Erin Leahy (June 24, 2016) (Ohio) (on file with author). Pennsylvania has served on the executive committee of several multistate investigations. See FOIA Response Letter from Robert A. Muller (Dec. 22, 2015) (Pennsylvania) (on file with author). As explored in Part II, other privacy leaders have devoted significant resources to both individual and multistate investigations.
36 See infra notes 375–88 and accompanying text (discussing data security and privacy enforcement actions and resulting AVCs or consent judgments).
37 Harris Interview, supra note 13. AG Harris’s first technical consultant was Ashkan Soltani, who went on to lead the FTC’s Technology Unit. Id.
38 See, e.g., Telephone Interview with Ryan Kriger, Assistant Att’y Gen., Office of the Att’y Gen. of Vt. (Sept. 21, 2015) [hereinafter Kriger Interview] (explaining that Vermont AG’s Office has partnered with Norwich University’s computer science department and has a computer science professor on retainer); Telephone Interview with Paula Selis, Chief of High Tech Unit, Office of the Att’y Gen. of Wash. (June 30, 2015) [hereinafter Selis Interview].
39 See, e.g., Kriger Interview, supra note 38. Vermont Assistant AG Ryan Kriger helped coordinate the privacy training of forty-four lawyers from offices around the country with funds from the TJX multistate settlement. See id.
40 See infra note 222 and accompanying text (discussing how an FTC report inspired the New York Attorney General’s Office’s investigation of credit-reporting agencies).
states’ approach to data security investigations. As former Maryland Assistant Attorney General Steven Ruckman explained, the FTC has served as the “mother ship” on data security issues because it has unique technical know-how that would be hard to reproduce at the state level.41 AG staff have looked to the FTC’s privacy jurisprudence in interpreting their own UDAP laws.42

Privacy has been built into the infrastructure of leading privacy offices. California has a privacy enforcement and protection unit in the Consumer Protection Bureau and an e-crime unit in the Criminal Division.43 Illinois has a privacy and identity theft group in the Consumer Protection Division.44 New York has an Internet bureau with six attorneys and a data security technologist.45 Ohio and Indiana have identity theft units in their consumer protection divisions.46 Connecticut was the first to establish an independent privacy division whose head reports directly to the attorney general.47 Connecticut AG George Jepsen started a privacy task force in 2011,48 which was turned into a separate division in 2015.49 Two full-time attorneys and three part-time staff work in the Office’s Privacy and Data Security Division.50

41 See Interview with Steven Ruckman, former head of Privacy Unit, Office of the Att’y Gen. of Md., in Wash., D.C. (Sept. 11, 2015) [hereinafter Ruckman Interview].
42 See id. As Part II documents, AG offices have not simply followed the lead of federal agencies. In important areas, they have set privacy policy in the absence of federal norms; in others, they have pressed the FTC to offer greater privacy protections to consumers than those afforded by federal agencies. In the near future, there may be more aggressive state AG privacy and data security enforcement than enforcement activity at the federal level.
45 See Telephone Interview with Kathleen McGee, Chief of Internet Bureau, Office of the Att’y Gen. of N.Y. (Dec. 8, 2015) [hereinafter McGee Interview].
50 Id.
Having a formal privacy unit or division is not necessary for a state attorney general to take a leading role on consumer privacy matters. Massachusetts has aggressively pursued data security investigations without having a dedicated privacy unit or division. Experienced career staff and supportive attorneys general have been crucial to the office’s work on security and privacy issues. Nonetheless, the creation of privacy units and the hiring of technical experts have solidified many offices’ commitment to privacy and data security enforcement.

In the past five years, twenty-seven states have joined one or more multistate investigations spearheaded by privacy pioneers. They contribute to

51 This is certainly true of Massachusetts Assistant AG Sara Cable, who worked for AG Martha Coakley during her tenure (2007–2015) and now works for AG Maura Healey (2015–present). Of course, outgoing attorneys general cannot control the agendas of their successors. During his tenure, Maryland AG Doug Gansler (2007–2015) established an Internet Privacy Unit with a special focus on youth privacy. See Ruckman Interview, supra note 41. AG Gansler made data privacy his key initiative when serving as president of NAAG. See Telephone Interview with Douglas Gansler, Former Att’y Gen., Office of the Att’y Gen. of Md. (Aug. 31, 2016). When AG Gansler’s term ended, his chief of the Internet Privacy Unit went into private practice. See Ruckman Interview, supra note 41. Privacy continues to be a part of the Office’s work, but time will tell if it remains a central mission of the Office.

52 See, e.g., FOIA Response Letter from Craig W. Richards (Dec. 8, 2012) (Alaska) (on file with author) (providing materials showing individual and multistate enforcement activity); FOIA Response Letter from Bethany Diaz (Jan. 12, 2016) (Arizona) (on file with author) (same); FOIA Response Letter from Stefanie Mann (Dec. 3, 2015) (Colorado) (on file with author) (providing materials showing it was a signatory to multistate AVCs but not individual enforcement actions); FOIA Response Letter from Tony Towns (July 26, 2016) (District of Columbia) (on file with author) (same); FOIA Response Email from Mark Hamilton (Aug. 30, 2016) (Florida) (on file with author) (same); FOIA Response Letter from Stella Kam (Dec. 4, 2015) (Hawaii) (on file with author) (same); FOIA Response Email from Cari Sagar (Oct. 22, 2015) (Iowa) (on file with author) (same); FOIA Response Letter from Cheryl Whalen (Sept. 16, 2015) (Kansas) (on file with author) (providing materials showing both individual and multistate enforcement activity); Telephone Interview with Lonnie Styron, Office of the Att’y Gen. of La. (Feb. 3, 2016) (Louisiana) (providing materials showing it was a signatory to multistate AVCs but not individual enforcement actions); FOIA Response Letter from Linda Conti (Nov. 24, 2015) (Maine) (on file with author) (same); FOIA Response Letter from Christy Wendling-Richards (July 19, 2016) (Michigan) (on file with author) (same); FOIA Response Letter from James W. Canaday (Aug. 4, 2016) (Minnesota) (on file with author) (providing materials showing individual and multistate enforcement activity); FOIA Response Letter from Rochelle Reeves (Feb. 25, 2016) (Missouri) (on file with author) (providing materials showing it was a signatory to multistate AVCs but not individual enforcement actions); FOIA Response Letter from Laura Tucker (Sept. 11, 2015) (Nevada) (on file with author) (same); FOIA Response Email from Liz Brocker (Nov. 24, 2015) (North Dakota) (on file with author) (same); FOIA Response Letter from Aaron Cooper (Dec. 16, 2015) (Oklahoma) (on file with author) (same); Telephone Interview with Michael Kron, Office of the Att’y Gen. of Or. (Jan. 11, 2015) (Oregon) (hereinafter Kron Interview); FOIA Response Letter from Steven A. Travis (Dec. 22, 2015) (West Virginia) (on file with author) (providing materials showing individual and multistate enforcement activity); FOIA Response Letter from Paul Ferguson (Dec. 18, 2015) (Wisconsin) (on file with author) (providing materials showing
multistate investigations by providing assistance on discovery review and
other discrete assignments. Their offices also have joined forces with pri-


vacy pioneers on education efforts. Thus, in both leading and supporting
roles, a sizeable majority of states have been engaged in privacy
enforcement.

II. PRIVACY AND DATA SECURITY ENFORCEMENT

This Part shows how important state attorneys general have been to U.S.
privacy regulation. It sets the stage by introducing the regulatory tools avail-
able to attorneys general and an office’s potential to shape privacy practices
beyond its borders. Then, it documents areas where attorneys general have
helped establish privacy and data security protections and areas where they
have harmonized and sharpened existing federal norms. As this Part high-
lights, attorneys general have been most effective in influencing privacy pol-
icy when they have pursued a combination of regulatory tools.

A. Policymaking Tools and Potential Impact

State attorneys general can influence privacy policy through legislation,
persuasion, and litigation. Since the 1990s, state AGs have proposed and
endorsed state consumer privacy and data security laws. Attorneys general

multistate activity but no individual enforcement actions); FOIA Response Letter from
Ryan Schelhaas (Dec. 1, 2015) (Wyoming) (on file with author) (providing materials show-
ing individual and multistate enforcement activity). In the past five years, Alabama, Ark-
ansas, Montana, Nebraska, South Dakota, Tennessee, and Virginia have joined multistate
consumer privacy investigations; for different reasons, they never provided a substantive
response to my FOIA requests. See supra note 15.

53 See, e.g., Telephone Interview with Linda Conti, Assistant Att’y Gen., Office of the
Att’y Gen. of Maine (June 22, 2015) [hereinafter Conti Interview] (discussing her contri-
butions to multistate investigations).

54 This is true of Missouri AG Chris Koster who has worked closely with Indiana AG
Greg Zoeller to combat illegal robocalling and more generally to protect telephone pri-

vacy. See Alexandra Kruczek, AG Zoeller Launches National Do Not Call Summit, WLFI
gram/ (reporting that AG Koster and AG Zoeller have run annual summits devoted to
educating state and federal law enforcers on how to combat Do Not Call violations).

55 In response to FOIA requests, three states explained that they had no consumer
privacy or data security enforcement activity in the past five years. See FOIA Response
Letter from Daniel Walsh (Nov. 30, 2015) (Georgia) (on file with author); FOIA Response
Email from James Boffetti (Nov. 30, 2015) (New Hampshire) (on file with author); FOIA
Response Letter from Ché Arguello (Jan. 22, 2016) (Utah) (on file with author). In May
2016, the attorneys general of Utah and Georgia supported efforts to ban transgender
individuals from using bathrooms designated for the sex of their chosen (but not birth)
identity. I am grateful to Dissent Doe for pointing that out to me.

56 In many states, attorneys general are authorized to propose legislation. See Colin
Provost, State Attorneys General, Entrepreneurship, and Consumer Protection in the New Federalism,
33 PUBLIS: J. FEDERALISM 37, 39 (2005) (discussing the legislative role of attorneys gen-
eral); Smoyer et al., supra note 6. Delaware, for instance, recently adopted four privacy
and data security laws proposed by AG Matt Denn. See Press Release, Office of the Att’y
have extended their legislative agenda to Capitol Hill. State AGs, for instance, routinely testify before congressional committees.

Persuasion is another way that attorneys general can shape privacy practices. Attorneys general establish task forces with business leaders, advocacy groups, and experts in the hopes that participants reach consensus on best practices. They reach out to companies with concerns about products and services. Staff provide advice to companies. The California Attorney General’s Office, for instance, has offered to review privacy policies. In partnership with a local university’s cyber security department, the Vermont Attorney General’s Office has offered free penetration tests to businesses to identify basic security vulnerabilities. Connecticut AG George Jepsen

57 See Clayton, supra note 19, at 535. Attorneys general successfully lobbied to have authority to enforce federal consumer privacy laws. Id.


59 See IAN A YRES & JOHN B RAITHWAITE, R ESPONSIVE R EGULATION: T RANSCENDING THE D EREGULATION D EBATE 35 (1992); Telephone Interview with Sara Cable, Assistant Att’y Gen., Office of the Att’y Gen. of Mass. (Aug. 13, 2015) [hereinafter Cable Interview]; Fitzsimmons Interview, supra note 5; Hagan & Van Hise Interview, supra note 5; Kriger Interview, supra note 38; Telephone Interview with Joanne McNabb, Chief Privacy Educator, Cal. Att’y Gen.’s Privacy Unit (July 20, 2015) [hereinafter McNabb Interview July 20]; Ruckman Interview, supra note 41; Selis Interview, supra note 38.

60 See infra notes 182–86 and accompanying text (discussing California AG Kamala Harris’s reliance on her power to convene to change practices concerning mobile privacy and exploitation of nonconsensual pornography); see also Divonne Smoyer & Christine Czuprynski, Q&A: Connecticut AG Talks Privacy Enforcement, Collaboration with the FTC, IAPP (Aug. 26, 2014), https://iapp.org/news/a/qa-connecticut-ag-talks-privacy-enforcement-collaboration-with-the-ftc/ (explaining how after meetings with Connecticut AG George Jepsen, Google agreed to review the privacy implications of any app using facial recognition software on Google Glass). As Part III explores, informal agreements lack the force of law, though violations can be the basis of a subsequent lawsuit. Part III assesses the weaknesses of those agreements and prescribes solutions. See infra Part III.


62 See, e.g., Cable Interview, supra note 59.

63 See Vindu Goel, California Urges Websites to Disclose Online Tracking, N.Y. TIMES: B RITS BLOG (May 21, 2104, 12:00 AM), http://bits.blogs.nytimes.com/2014/05/21/california-urges-websites-to-disclose-online-tracking/?_r=0 (explaining that the California AG’s Office “would review companies’ privacy policies and work with them to make sure they followed the new law”).

explained it is more efficient to help companies ensure their privacy and security policies comply with the law than to catch them after they have broken it.65

Another important strategy is the issuance of best practice guides.66 Guidance documents explain an attorney general’s understanding of privacy and data security laws.67 They provide examples of practices that would be considered unfair and deceptive. In preparing guides, staff consult with stakeholders from a broad range of interests.68 Massachusetts Assistant AG Sara Cable explained, “We want companies to tell us how we can be clear about what we expect and how that clarity can help them satisfy the law and innovate.”69 Stakeholder meetings can involve dozens of participants: the goal is to get as many perspectives as possible.70 AG offices educate stakeholders about best practices.71 The California Attorney General’s Office held workshops featuring developers talking about how they dealt with privacy concerns in designing mobile apps.72 Joanne McNabb, the Office’s Chief Privacy Educator, explained that “a key part of the education process was having the audience at workshops hear from peers about how they complied with the law.”73

Publicity is another way to encourage compliance. Attorneys general discuss privacy and data security lapses with the public to change the social meaning of problematic behavior.74 To retain consumers’ trust and contain reputational damage, companies bring their practices into line with the law.75


65 See Jepsen Interview, supra note 49. Not all offices, however, have the inclination or bandwidth to provide retail advice to companies. See, e.g., IDAHO ATT’Y GEN., IDAHO CONSUMER PROTECTION MANUAL 5 (2015) [hereinafter IDAHO ATT’Y GEN.]; http://www.ag.idaho.gov/publications/consumer/ConsumerProtectionManual.pdf.

66 See, e.g., McNabb Interview July 20, supra note 59 (discussing how California has released best practice guides focused on mobile app developers, healthcare providers, cyber security for small-to-medium businesses, and the development of privacy policies). Consumers are also the audience for the state’s best practice guides. See id.

67 See id.

68 See, e.g., McNabb Interview Mar. 3, supra note 43.

69 Cable Interview, supra note 59.

70 See, e.g., McNabb Interview July 20, supra note 59.


72 See McNabb Interview July 20, supra note 59.

73 Id.

74 See CAL. DEP’T OF JUSTICE, CAL. DATA BREACH REPORT 4 (2014) (discussing entities reporting more than one breach in 2013, including American Express, Discover Financial Services, Massachusetts Mutual Life Insurance, and Kaiser Health).

75 See AITRE & BRAITHWAITE, supra note 59, at 35–38.
When soft-law efforts fail to convince businesses to comply with the law, attorneys general may turn to litigation. Their efforts often begin with a warning letter. Warning letters routinely influence the behavior of regulated entities, eliminating the need for further action.\textsuperscript{76} If not, attorneys general may initiate a formal investigation.\textsuperscript{77} Indispensable to any investigation is the state AG's authority to obtain discovery before initiating a lawsuit.\textsuperscript{78} Under their broad powers of original inquiry, attorneys general can "investigate merely on suspicion that the law is being violated, or even just because [they] want[ ] assurance that it is not."\textsuperscript{79} Administrative subpoenas, referred to as civil investigative demands (CIDs), are crucial to investigations.\textsuperscript{80} CIDs can be issued to individuals who are not targets of an investigation if "a reasonable basis exists to believe the non-violator possesses information relevant to the investigation."\textsuperscript{81}

Attorneys general often join forces to investigate unfair and deceptive commercial practices affecting consumers across the country.\textsuperscript{82} Multistate investigations are coordinated through NAAG's Privacy Working Group.\textsuperscript{83} An attorney general's office or a group of offices (known as the executive committee) will lead an investigation.\textsuperscript{84} In multistate actions, states file separate lawsuits, though offices collaborate on aspects of the proceedings. States issue similar requests for information, share information through common-interest agreements, and engage in joint negotiations.\textsuperscript{85}

States—proceeding individually or as a group—often eschew formal adjudication for informal agreements that close investigations.\textsuperscript{86} In some states, the attorney general must give an entity the chance to sign an informal agreement, often called an assurance of voluntary compliance (AVC), before pursuing litigation.\textsuperscript{87} Under an AVC, an entity or individual typically agrees

\textsuperscript{76} See, e.g., McNabb Interview Mar. 3, supra note 43.

\textsuperscript{77} See, e.g., Commonwealth v. Pineur, 533 S.W.2d 527, 529 (Ky. 1976) (“Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.” (quoting United States v. Morton Salt Co., 338 U.S. 632, 652 (1950))).

\textsuperscript{78} See \textit{State Attorneys General}, supra note 4, at 232.

\textsuperscript{79} \textit{Morton Salt}, 338 U.S. at 642–43.

\textsuperscript{80} \textit{State Attorneys General}, supra note 4, at 232–33.

\textsuperscript{81} \textit{Everdry Mktg. & Mgmt., Inc. v. Carter}, 885 N.E.2d 6, 10 (Ind. Ct. App. 2008).

\textsuperscript{82} Attorneys general also undertake investigations with federal agencies. \textit{See infra} subsection III.A.3 (discussing the synergistic relationship between attorneys general and federal agencies).


\textsuperscript{84} See Ruckman Interview, supra note 41.

\textsuperscript{85} \textit{State Attorneys General}, supra note 4, at 246.

\textsuperscript{86} See Cable Interview, supra note 59.

\textsuperscript{87} See, e.g., \textit{Idaho Att’y Gen.}, supra note 65, at 4.
to engage in, or refrain from, certain conduct and to pay a fine and attorneys’ fees. 88

Attorney general enforcement activity naturally influences private behavior within a state’s borders, but it also can have an impact beyond the state. Businesses may follow the most restrictive AG-endorsed norms to avoid the costs of piecemeal compliance. 89 This dynamic allows smaller states to “punch above their weight.” 90 By adopting the strictest standards, firms can operate in all jurisdictions with some assurance about legal compliance. 91

Companies have a strong incentive to follow the regulatory standards of powerful states. 92 David Vogel has labeled this phenomenon the “California effect.” 93 As Vogel explains, stronger state standards are more likely to be adopted if they emanate from powerful jurisdictions and enjoy wide support from policy groups. 94 In recognition of this phenomenon, Attorney General Harris has said: “If we can strengthen privacy protections here [in California], we can benefit consumers around the world.” 95

Attorneys general also influence each other, both in individual efforts and in multistate investigations on issues of national import. That is the upside of state experimentation as imagined by Justice Louis Brandeis. 96 pol-

88 Under most AVCs, a broken promise constitutes prima facie evidence of a legal violation. See, e.g., WASH. REV. CODE ANN. § 19.16.470 (West 2016) (“[F]ailure to perform the terms of any such assurance shall constitute prima facie proof of a violation of this chapter for the purpose of securing an injunction . . . .”). Attorneys general may sue the violator, pointing to the broken promise as proof of the underlying lawbreaking. Some informal agreements, however, have more teeth: violations, if proven in court, warrant immediate relief. See, e.g., Press Release, Office of the Att’y Gen. of Md., AG Gansler Secures Agreement to Protect Children on Ask.fm (Aug. 14, 2014) [hereinafter Ask.fm Settlement], http://www.marylandattorneygeneral.gov/Pages/NewsReleases/2014/081414.aspx (discussing the assurance of voluntary compliance between Maryland and Ask.fm). Part III explores the weaknesses in the typical AVC and offers solutions. See infra Part III.


90 See Jepsen Interview, supra note 49.


92 See id. at 267–68.

93 Id. at 247–70.


96 See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).
icy experiments so successful that they persuade fellow enforcers to follow suit. As former Maine Attorney General James Tierney and former Maine Solicitor General Peter Brann have noted, there is a “remarkable congruence that exists between states and state attorneys general when addressing similar challenges and issues.”

Then too, attorney general enforcement activity can spur legislative change. According to Peter Swire who served as President Bill Clinton’s Chief Privacy Officer, attorneys general “are why Congress adopted the financial privacy provisions of the Gramm-Leach-Bliley Act of 1999.” They forced federal lawmakers’ hand by suing banks for sharing consumers’ financial data with third parties without notifying consumers or providing a chance to opt out. Congressmen Ed Markey applauded attorneys general for making clear that financial privacy required a federal response.

B. Norm Creation

State enforcers have pioneered baseline privacy norms related to privacy policies, data-breach notification, consumer choice, use restrictions, youth privacy, sexual privacy, and telephone privacy. Federal agencies have built upon some of these norms in their enforcement actions.

1. Transparency of Data Practices

A central principle of data privacy law is that individuals should be notified when their data is collected, analyzed, shared, and stored. Attorneys

97 Lemos, supra note 94, at 751. As Jessica Bulman-Pozen insightfully explores in her work, state experimentation does not always follow the same playbook, that is, with states engaging in self-contained experiments. Jessica Bulman-Pozen, Partisan Federalism, 127 Harv. L. Rev. 1077, 1124–25 (2014). State AGs serve as laboratories of democracy in different ways, including by joining together on national issues. Experimentation can involve individual states striking out in unique ways, but it also can involve multistate investigations on national issues. Id. Variety is characteristic of AG privacy and data security innovation. Along those lines, multistate privacy and data security AG efforts do not always follow partisan commitments, as is true in other contexts like the environment and healthcare. They often garner the support of both Republicans and Democrats. Although the majority of the thirteen AG privacy pioneers are Democrats (such as California, New York, and Massachusetts), some are Republicans (such as Texas and Indiana).


99 Interview with Peter Swire, Professor of Law & Ethics, Ga. Inst. of Tech., in Berkeley, Cal. (June 4, 2015) [hereinafter Swire Interview].

100 Id.

101 Congressman Ed Markey offered a privacy amendment to the bill, pointing to Minnesota Attorney General Hatch’s lawsuits against banks for sharing customers’ data without permission. See id. The Markey amendment—which was adopted—required banks to get consumers’ opt-in consent before sharing personal data with third parties. See id.

102 A prominent FIPPs principle is the right to have notice about how data will be collected, used, and shared. Bamberg & Mulligan, supra note 3, at 21–22.
general have turned the aspiration of notice into a baseline norm by requiring entities to have privacy policies.\footnote{103} The idea is that in drafting privacy policies, businesses have to think about, and commit to, certain data practices.\footnote{104} Regulators and consumer groups can inspect those policies and hold companies to their promises; consumers can find out what is happening with their personal data.\footnote{105}

After failing to persuade technology companies to adopt privacy policies voluntarily in the late 1990s,\footnote{106} state attorneys general turned to the courts.\footnote{107} In 2001, ten attorneys general sued DoubleClick for using cookies to track users’ online activities without providing clear notice to consumers.\footnote{108} Although the FTC dropped its investigation because no promises had been broken, the states argued that DoubleClick’s failure to make its data practices transparent constituted an unfair commercial practice.\footnote{109} DoubleClick ultimately agreed to adopt a privacy policy, allow consumers to opt out of cookies, and undergo annual privacy audits for three years.\footnote{110}

State attorneys general paired the pursuit of litigation with legislation. In 2003, California Attorney General William Lockyer proposed the California Online Privacy Protection Act ("CalOPPA"),\footnote{111} the first state law to require online services and websites to have privacy policies.\footnote{112} Most

\footnote{103} The FTC has never gone so far as to say that not having a policy is a deceptive or unfair practice. See Solove & Hartzog, New Common Law of Privacy, supra note 2, at 599. Under federal law, only a few sectors of the economy must have a privacy policy, including financial institutions, healthcare providers, and websites collecting information about children under thirteen.

\footnote{104} See Henrichsen Interview, supra note 8; McNabb Interview of July 20, supra note 59.

\footnote{105} See Peter P. Swire, The Surprising Virtues of the New Financial Privacy Law, 86 MINN. L. REV. 1263, 1266–67 (2002). Ryan Calo has done important work exploring the importance of notice and prescribing ways to ensure that it is meaningful. See Ryan Calo, Against Notice Skepticism in Privacy (and Elsewhere), 87 NOTRE DAME L. REV. 1027 (2012).

\footnote{106} Henrichsen Interview, supra note 8 (explaining that in the late 1990s, the attorneys general from California, New York, Washington, Texas, and Illinois convened a series of meetings with Silicon Valley leaders including Sergey Brin and Larry Page).


\footnote{111} See CAL. BUS. & PROF. CODE § 22575 (West 2016).

\footnote{112} Henrichsen Interview, supra note 8. Attorneys general have played an important role in updating those laws. See, e.g., Christine Czuprynski & Divonne Smoyer, Illinois AG Targets ID Theft, Earlier Breach Notification, IAPP (Apr. 28, 2015), https://privacyassociation.org/news/a/illinois-ag-targets-id-theft-earlier-breach-notification (discussing the efforts of
recently, Delaware Attorney General Matt Denn successfully spearheaded legislation requiring privacy policies.\textsuperscript{113} Attorney General Denn modeled the law after CalOPPA.\textsuperscript{114}

Recent state enforcement efforts have focused on the mobile ecosystem. In 2011, nearly three-quarters of mobile applications lacked privacy policies.\textsuperscript{115} The FTC’s 2012 report on mobile apps for children found that in virtually all cases, neither app stores nor app developers informed parents what data was being collected from their children.\textsuperscript{116}

California Attorney General Kamala Harris spearheaded an initiative to change this state of affairs. She convened a working group to discuss how developers could be encouraged to post privacy policies. In February 2012, Attorney General Harris obtained, from the six companies whose platforms comprise the majority of the mobile apps market, an agreement to display apps’ privacy policies so that consumers could review the policies before installing them.\textsuperscript{117} Her office issued a guidance document urging industry to build FIPPs into mobile services, including the posting of privacy poli-

\textsuperscript{114}See id.; Telephone Interview with Christian Wright, Chief of Consumer Prot. Bureau, Office of the Att’y Gen. of Del. (Oct. 9, 2015) [hereinafter Wright Interview].
\textsuperscript{115}See FPF Staff, FPF Finds Nearly Three-Quarters of Most Downloaded Mobile Apps Lack a Privacy Policy, FUTURE OF PRIVACY F. (May 12, 2011), https://fpf.org/2011/05/12/fpfinds-
\textsuperscript{117}See Kamala D. Harris, Office of the Att’y Gen. of Cal., Joint Statement of Principles (Feb. 22, 2012), http://ag.ca.gov/cms_attachments/press/pdfs/n2630_signed_agreement .pdf. Amazon, Apple, Google, Hewlett-Packard, Microsoft, and Research in Motion were the initial signatories; Facebook signed on in June 2012.
The goal was to align mobile data practices with consumers’ reasonable expectations.119 Soft-law efforts were followed with coercive ones. Attorney General Harris sent warning letters to 100 companies whose apps lacked privacy policies.120 The letters demanded compliance with CalOPPA within thirty days or risk penalties of $2500 per download by a California consumer.121 Attorney General Harris reinforced these warnings on social media. A tweet from Attorney General Harris’s verified account said, “Fabulous app, @United Airlines, but where is your app’s #privacy policy?”122 The tweet included a link to CalOPPA.123 Within a day’s time, United Airlines had an easily accessible mobile privacy policy.124 Attorney General Harris’s office sued Delta Airlines after a warning letter failed to elicit a response.125

118 CAL. DEP’T OF JUSTICE, PRIVACY ON THE GO: RECOMMENDATIONS FOR THE MOBILE ECOSYSTEM 9 (2013), http://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/privacy_on_the_go.pdf. Relatedly, attorneys general are working on putting “flesh on the bones” of privacy policies by forging norms concerning their form, timing, and content. California’s policy is to have two privacy policies: a succinct privacy policy for consumers and a comprehensive one for watchdogs and regulators. See CAL. DEP’T OF JUSTICE, MAKING YOUR PRIVACY PRACTICES PUBLIC: RECOMMENDATIONS ON DEVELOPING A MEANINGFUL PRIVACY POLICY 4 (2014), https://oag.ca.gov/sites/all/files/agweb/pdfs/cybersecurity/making_your_privacy_practices_public.pdf; see also Final Judgment and Permanent Injunction, People v. Comcast, No. RG15786197 (Cal. Sup. Ct. Sept. 17, 2015), (agreeing to provide simple and easy-to-read disclosures about treatment of unlisted phone numbers and to pay a $25 million penalty after allegedly posting customers’ personal data even though they paid for unlisted services).


121 Id.


124 Interview with Travis LeBlanc, Chief of the Bureau of Enf’t, FCC, in Wash., D.C. (July 10, 2015) [hereinafter LeBlanc Interview].

Attorney General Harris’s efforts transformed the transparency of the mobile app marketplace. According to John Simpson of Consumer Watchdog’s Privacy Project, Attorney General Harris “tam[ed] the Wild West in the mobile world.”126 "From September 2011 to June 2012, the number of free Apple Store apps with a privacy policy doubled, from 40 percent to 84 percent."127

The FTC has attributed the increase in mobile privacy policies to Attorney General Harris’s agreement with platform providers.128 The change, however, was due to far more than the platforms’ design change. Attorney General Harris’s guidance documents and workshops, her issuance of warning letters, and ultimately her pursuit of litigation helped reinforce the basic norm that mobile apps must have privacy policies.

In establishing a baseline requirement for privacy policies, state attorneys general have paved a path for federal agencies to build upon. Although the FTC has never taken the position that section 5 requires companies to have privacy policies,129 it reinforced the norm set by state attorneys general by suing companies for deceptively breaking promises made to consumers in their privacy policies.130

2. Data-Breach Notification

In the 1990s, companies had no legal obligation to notify consumers about data breaches. As a result, they had little incentive to improve data security because data breaches cost them nothing.131 Consumers whose sensitive personal data had been leaked were in the dark: they had no warning that they should check their credit reports for signs of theft.

State attorneys general supported state data-breach notification proposals,132 which were soon adopted across the nation.133 Those laws have been

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127 Kennedy & Bai, supra note 119.
129 See Solove & Hartzog, New Common Law of Privacy, supra note 2, at 599.
130 See id. at 628–30 (discussing FTC enforcement actions based on companies’ broken promises).
131 Under federal law, breach notification is only required by certain sectors of the economy, such as covered healthcare providers and financial institutions. See id. at 587.
132 See Henrichsen Interview, supra note 8 (explaining that Attorney General William Lockyer supported California’s passage of a data-breach notification law). California was the first state to pass a data-breach notification law, thanks to the hard work of then-Assemblyman Joe Simitian. See E-mail from Deirdre Mulligan, Assoc. Professor, Berkeley Sch. of Info., to Danielle Citron, Professor of Law, Univ. of Md. Francis King Carey Sch. of Law (Aug. 12, 2016) (on file with author).
kept up to date thanks to the efforts of attorneys general.\textsuperscript{134} Companies suffering breaches have to provide notice to consumers and to attorney general offices.\textsuperscript{135} Attorneys general have defended state breach notification laws from federal efforts to preempt them.\textsuperscript{136}

State attorneys general have enforced data-breach notification laws, setting norms in the process. Enforcement actions have fleshed out what breach notification statutes mean when they require companies to notify consumers “in the most expedient time possible and without unreasonable delay.”\textsuperscript{137}

An emerging rule of thumb is that notice should proceed on a rolling basis.\textsuperscript{138} California, for instance, sued Kaiser Foundation Health for allegedly waiting four months to notify consumers about a breach, even though


\textsuperscript{136} See Letter from the Nat’l Ass’n of Att’y’s Gen. to Cong. Leaders (July 7, 2015), http://www.naag.org/assets/redesign/files/sign-on-letter/Final%20NAAG%20Data%20Breach%20Notification%20Letter.pdf (signed by forty-seven attorneys general, arguing against preemption of state breach notification laws and emphasizing the important role that attorneys general play in investigating and enforcing data security lapses); see also Divonne Smoyer et al., Beware the Growth of State AG Enforcement Efforts, CORP. COUNS. (May 22, 2015), http://www.corpcounsel.com/id=1202727264255/Beware-the-Growth-of-State-AG-Enforcement-Efforts.


\textsuperscript{138} See People v. Kaiser Found. Health Plan, Inc., No. RG14711370 (Cal. Sup. Ct. Feb. 10, 2014) (order granting permanent injunction); see also Assurance of Voluntary Compliance, In re Affinity Health Plan, Inc. (Office of the Att’y Gen. of N.Y., Bureau of Consumer Frauds & Prot. Mar. 18, 2008) [hereinafter Affinity Health Plan AVC] (on file with author) (agreeing, with the state of New York, to provide notice in most expedient time possible and to pay $50,000 where company allegedly notified consumers eleven months after discovering breach).
the company knew the identity of affected consumers two months before.\textsuperscript{139} In 2014, Kaiser agreed to provide notice of future breaches as soon as a portion of affected consumers could be identified rather than waiting until the completion of an internal investigation.\textsuperscript{140}

Privacy practitioners predict that the \textit{Kaiser} agreement will influence how other state enforcers interpret the timing requirements of their breach notification laws.\textsuperscript{141} Time will tell if California’s interpretation of its data-breach notification law is adopted elsewhere. California’s approach may have spillover effects as companies adopt it to avoid the costs of piecemeal compliance.

In sum, state enforcers—through legislation and litigation—have changed how companies respond to inadequate data security. Notification of breaches has allowed state and federal enforcers to investigate whether inadequate security was responsible for countless data leaks.\textsuperscript{142}

3. Respecting Consumer Choice

Do-not-track settings on browsers prevent advertisers from tracking consumers’ online activities. What happens if online providers ignore consumers’ privacy settings? What if they have promised to respect consumers’ settings but fail to keep those promises?

Attorneys general have set precedent that bypassing a consumer’s privacy settings is, in itself, an unfair practice. This precedent emerged from an investigation of Google and the advertising firm PointRoll. Google’s privacy policy promised that the privacy settings of users’ browsers would be honored.\textsuperscript{143} Nevertheless, Google and PointRoll placed third-party cookies on Safari users’ browsers whose default settings signaled that they should not be tracked.\textsuperscript{144} Google deployed a program that invisibly simulated the user changing the default setting by clicking on the “track me” instruction.\textsuperscript{145}


\textsuperscript{142} \textit{See infra} note 235 (discussing data security actions involving failure to provide notice in a timely fashion).


\textsuperscript{145} Julia Angwin & Jennifer Valentino-DeVries, \textit{Google’s iPhone Tracking}, \textit{WALL ST. J.} (Feb. 17, 2012), http://www.wsj.com/articles/SB10001424052970204880404577225380456599176. As Chris Hoofnagle explained, “It was as if a Google engineer grabbed the
The incident drew the attention of federal and state authorities. The FTC’s case singled out Google, focusing on the company’s broken promise to consumers.\(^{146}\) In a consent decree with the FTC, Google agreed to erase the cookies it had placed on users’ computers.\(^{147}\) The consent decree, however, placed no prohibition on Google’s future behavior.\(^{148}\) In short, the FTC pursued thin protections for consumers based on the agency’s long history of using section 5 to ensure that companies live up to their promises in privacy policies.\(^{149}\)

The FTC invited a group of thirty-nine attorneys general investigating Google to join the consent decree.\(^{150}\) The multistate group, however, declined the FTC’s invitation because it was far more interested in injunctive relief.\(^{151}\) For the attorneys general, the enforcement action was not about broken promises, though promises had been broken.\(^{152}\) More important to them was the surreptitious manipulation of consumers’ browsers to turn on tracking in contravention of their settings.\(^{153}\) As the multistate investigation of Google continued, a smaller group of attorneys general pursued an investigation of PointRoll for placing cookies on consumers’ Safari browsers despite their settings indicating that cookies should be blocked.\(^{154}\)

Although the multistate investigations of Google and PointRoll were resolved separately, the substance of the resulting AVCs was the same. Google and PointRoll were prohibited from bypassing consumers’ privacy settings unless they received consumers’ affirmative, or opt-in, consent.\(^{155}\)

The message from the states was that evading privacy controls—including default privacy controls—is unfair and perhaps even deceptive, whether

\(^{146}\) See Hoofnagle, supra note 2, at 338.


\(^{148}\) See id.

\(^{149}\) See Solove & Hartzog, New Common Law of Privacy, supra note 2, at 628–30 (discussing FTC’s pursuit of thin norms based on enforcement of promises).

\(^{150}\) See Ruckman Interview, supra note 41. The ten-state executive committee included Connecticut, Florida, Illinois, Maryland, Ohio, New Jersey, New York, Texas, Vermont, and Washington. Id.

\(^{151}\) See id.

\(^{152}\) See id.

\(^{153}\) See id.


or not any promises are broken. Acting New Jersey Attorney General John Hoffman explained: “People have every right to surf the Web without fear that businesses are employing technical tricks to bypass their privacy settings.”

The broader impact of the informal agreements with Google and PointRoll is unclear. An open question is whether other companies will internalize the norm to honor consumers’ privacy settings—whether or not promises were made—because circumventing consumers’ privacy choices would be unfair.

If attorneys general want to ensure that companies respect consumers’ privacy settings, they should reinforce that norm with all tools available to them. Attorneys general have not yet proposed or advocated for legislation requiring companies to respect consumers’ privacy settings. They would do well to reinforce the standard set in the Google and PointRoll matters with supportive legislation, education efforts, and additional enforcement activity.

4. Use Restrictions

Consumer privacy law is often silent on the question of how companies may use personal data that has been collected legally. This is because norms surrounding use restrictions are hotly contested. Attorneys general

156 See Justin Brookman, State Attorneys General: Evading Privacy Settings Is Illegal, CDT BLOG (Nov. 20, 2013), https://cdt.org/blog/state-attorneys-general-evading-privacy-settings-is-illegal/. As Illinois Assistant Attorney General Matt Van Hise explained, the attorneys general based their investigation of PointRoll on the premise that it was fundamentally unfair to nullify a consumer’s choice not to be tracked. Hagan & Van Hise Interview, supra note 5.

157 Press Release, Office of the Att’y Gen. of N.J., N.J. Leads Multi-State Settlement Resolving Allegations That Digital Ad Co. Breached Internet Privacy Settings (Dec. 11, 2014), http://nj.gov/oag/newsreleases14/pr20141221c.html. An important question, taken up in Part III, is whether AVCs, as currently conceived, are the most effective vehicle to shape norms. See infra Part III.

158 Attorney General Harris supported an amendment to CalOPPA, which requires companies to notify consumers about their response to do-not-track settings. See Lei Shen, Unpacking the California AG’s Guide on CalOPPA, IAPP (May 27, 2014), https://iapp.org/news/a/unpacking-the-california-ags-guide-on-caloppa/. The amendment, however, said nothing about companies’ substantive obligations to honor consumers’ choices. Similarly, Illinois Attorney General Lisa Madigan lobbied to amend state privacy law to require privacy policies to notify consumers about entities’ response to do-not-track settings. See Czuprynski & Smoyer, supra note 112.


160 Schneider, supra note 159, at 750–51.
have entered the fray by limiting the use of certain personal data to deny financial services to consumers.

New York Attorney General Eric Schneiderman spearheaded an investigation into the major banks’ use of a company’s database containing information about individuals with less than perfect banking records.\(^{161}\) The investigation revealed that when individuals were included in the database, they were prevented from opening bank accounts, even if they had immediately paid back money they owed or bounced a single check years before.\(^{162}\) In that regard, the database was used as a blacklist.\(^{163}\) Once denied banking services, lower-income applicants often turned to high-cost alternatives like check-cashing outlets.\(^{164}\)

Three major banks, Santander, Capital One, and Citibank, agreed to refrain from using the database (and others like it) to deny banking services so that no one is rejected for isolated or minor mistakes.\(^{165}\) The agreement applied to the banks’ offices nationwide. Practitioners have warned financial service providers to consider the possibility that they could face an enforcement action for using the company’s database.\(^{166}\) The broader norm-setting work of the informal agreement remains to be seen.

More generally, use restrictions are on the enforcement agenda of state attorneys general.\(^{167}\) Under consideration is whether there should be restrictions on uses of health data held by sites and services that are not covered by


\(^{163}\) Danielle Citron, *The Blacklist’s Power*, FORBES (June 17, 2014), http://www.forbes.com/sites/daniellecitron/2014/06/17/the-blacklists-power/#2715e4857a0b138390be5c9c.


\(^{165}\) *Santander Agrees to Change ChexSystems Policies, Which Kept Many from Obtaining Bank Accounts, supra* note 162. Citibank agreed that applications only could be denied if individuals have two or more reported incidents of account abuse, the total loss from those incidents exceeds $500, and the losses remain unpaid. CHI CHI WU & KATIE PLAT, NAT’L CONSUMER LAW CTR. & CITIES FOR FIN. EMPOWERMENT FUND, ACCOUNT SCREENING CONSUMER REPORTING AGENCIES: A BANKING ACCESS PERSPECTIVE 18 (2015), https://www.nclc.org/images/pdf/pf-reports/Account-Screening-CRA-Agencies-BankingAccess101915.pdf.


\(^{167}\) Jepsen Interview, *supra* note 49.
5. Sexual Privacy

Until 2014, if someone’s nude image appeared online without permission, little could be done. Websites routinely ignored requests to take down nude images because they enjoyed immunity from liability for user-generated content under federal law; law enforcement turned away victims, urging them to turn off their computers rather than make a big deal about it. All the while, victims had difficulty finding and keeping jobs because their nude images and contact information appeared prominently in online searches of their names. They were terrified that strangers would confront them in person. They moved; some changed their names; all were distraught. The fallout was devastating.

California Attorney General Kamala Harris has fought for the adoption of baseline practices that combat invasions of sexual privacy. Attorney General Harris sponsored bills giving law enforcement the tools to investigate and prosecute invasions of sexual privacy. She convened meetings with major Internet companies, including Microsoft, Facebook, Twitter, Yahoo, and Google, urging them to consider adopting policies permitting the removal of nude images posted without consent.

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170 Id. at 181.

171 Id. at 202.


173 Id. I have served as an adviser to Attorney General Harris and her executive team on revenge porn, harassment, and privacy since the fall of 2014.


organized a Cyber Exploitation Task Force made up of victim advocates, fifty major technology companies, law enforcement representatives, and experts. The Task Force worked on strategies for educating law enforcement and best practices for online platforms.

Attorney General Harris’s efforts influenced the practices of online intermediaries, including search engines and social networks. After sustained public conversation about nonconsensual pornography and participation in the Task Force, Google and Microsoft agreed to remove nude images from searches of victims’ names upon their request. Twitter banned the nonconsensual posting of someone’s nude images. Facebook clarified its nudity ban with a detailed explanation of the difference between nudity addressing social issues like photos of mastectomies, which are permitted, and images of buttocks and genitals posted without the subject’s permission, which are banned. Attorney General Harris created an online hub providing resources for law enforcement, victims, and companies interested in addressing invasions of sexual privacy, harassment, and stalking.

Important precedent has also been set concerning the operation of sites that extort money from victims of nonconsensual pornography. In her

cacy groups, and experts in her San Francisco office. As an adviser to Attorney General Harris, I spoke at the meeting, describing cyber exploitation, its various forms and impact, and ways to combat it.


182 Cyber Exploitation, supra note 175.

capacity as California’s “top cop,” Attorney General Harris successfully prosecuted operators of sites that encouraged users to post nude photos and charged for their removal. For instance, the operator of UGotPosted, Kevin Bollaert, faced charges of extortion, conspiracy, and identity theft for allegedly urging users to post their ex-lovers’ nude photos and then charging individuals up to $350 for the removal of a photo. Bollaert’s conviction signaled that extorting money from individuals whose confidential nude images were posted without permission is an illegal enterprise.

The FTC followed Attorney General Harris’s lead by bringing an enforcement action against revenge porn site operator Craig Brittain. The FTC’s charges focused on the site’s solicitation of individuals’ nude photos and contact information and the disclosure of that information to the public. The FTC argued that it was unfair for Brittain to exploit nude images shared in confidence for commercial gain. In the consent decree, Brittain pledged not to disclose anyone’s nude images online without first getting express written consent. Here again, it was state attorney general enforcement setting precedent protecting sexual privacy, which the FTC emulated under its section 5 authority.

6. Youth Privacy

Teenagers—youth between thirteen and eighteen years old—are vulnerable to exploitation when their personal data is collected, analyzed, and shared. Nonetheless, federal privacy law provides little protection to children...
who are thirteen and older. Attorneys general have endeavored to protect the privacy of teenagers. Recent attorney general efforts have focused on the adoption of laws limiting the commercial use of student data collected by education technology companies.

Teenagers’ social media interactions have attracted the attention of attorneys general, particularly as to child predators and cyber bullying. In 2006, forty-nine attorneys general formed a task force to investigate predators’ use of social networks to contact teenagers. At the time, MySpace was a main site of teen interaction. MySpace agreed to improve its privacy features. Pursuant to the AVC, the default setting for profiles of users under eighteen would be “private,” so only established friends could visit their pages. Friend requests from users over eighteen could be sent to users under sixteen only if requesters knew the users’ last names or email addresses. Even if users under sixteen overrode the privacy settings, their profiles would still only be viewable by other users under eighteen. The company agreed to undergo biannual audits of their consumer complaint.


193 The Delaware Attorney General’s Office is currently working on a rulemaking related to its new student privacy law. Wright Interview, supra note 114. See Kamala D. Harris, Cal. Dept. of Justice, Ready for School: Recommendations for the Ed Tech Industry to Protect the Privacy of Student Data (2016), https://oag.ca.gov/sites/all/files/agweb/pdfs/cybersecurity/ready-for-school-1116.pdf? (laying out best practices for education technology companies collecting, using, and storing sensitive student data, including medical histories, social and emotional assessments, child welfare or juvenile justice system involvement, progress reports, location data, and test results, in light of the adoption of new California student data privacy laws). In 2005, forty-two attorneys general alleged that it was a deceptive trade practice to ask high school students to fill out surveys implying they were meant for colleges and universities when in fact they were given to advertisers. Press Release, Office of the Att’y Gen. of N.Y., States Settle with Student Data Collection Company (Jan. 13, 2005), http://www.ag.ny.gov/press-release/states-settle-student-data-collection-company. The company settled with the states, agreeing to give parents and students the opportunity to opt out of participation in the survey. Id.


195 Thierer, supra note 194.

handling and response procedures. More recently, in agreements with Maryland and New York, the anonymous social network Ask.fm has pledged to adopt a comprehensive risk management plan and program, including the hiring of a trust and safety officer.

7. Telephone Privacy

Attorneys general were central to the establishment of state Do Not Call registries. Even before a federal Do Not Call list was established, states created their own registries. After the adoption of a federal Do Not Call registry, states supplemented federal law with stronger protections for consumers. State Do Not Call laws have been extended to cellphones.

A number of states have aggressively enforced federal and state Do Not Call laws. Since 2002, the Indiana Attorney General’s Office has obtained 314 settlements with, or judgments against, telemarketers, resulting in awards totaling more than $22 million, which has reduced the number of telemarketing calls made to state citizens. Indiana Attorney General Greg Zoeller explained that Missouri was the first state to pass a Do Not Call law. Telephone Interview with Ind. Att’y Gen. Greg Zoeller (July 8, 2016) [hereinafter Zoeller Interview]. While working on a Do Not Call bill as the Deputy Attorney General to then-Indiana Attorney General Nixon, Greg Zoeller talked to the Missouri Attorney General’s Office about the strengths and weaknesses of its bill. Crucial to Zoeller was that there be no exemptions included in Indiana’s Do Not Call bill, such as the preexisting relationship exemption in the Missouri law that permitted a significant number of unwanted marketing calls to consumers. Indiana’s legislature passed the strongest state Do Not Call law, thanks to lobbying by Attorneys General Nixon and Zoeller.


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Zoeller and Missouri Attorney General Chris Koster have also led an annual Do Not Call training for states and federal agencies.

Recent attorney general efforts have focused on reversing a change to the federal Telephone Consumer Privacy Act (TCPA), which exempts federal debt collectors from Do Not Call obligations. In May 2016, Attorney General Zoeller testified that the recent TCPA amendments undermined his state’s tough Do Not Call law by legitimizing robocalls from debt collectors. Along with twenty-four state attorneys general, Attorney General Zoeller called upon Congress to defend the telephone privacy rights of citizens by passing the HANGUP Act, which would reinstate the application of Do Not Call laws to debt collectors. In 2015, Attorney General Zoeller succeeded in convincing the Federal Communications Commission (FCC) to permit phone companies to implement call blocking technology; his office, on behalf of forty-five other attorneys general, urged the major phone companies to adopt such call-blocking technology.

Through legislation, education, and enforcement, state attorneys general have set norms protecting consumers’ telephone privacy. Over the years, their policymaking has made a significant difference in combating intrusive and unwanted phone calls.

C. Norm Reinforcement

Along with norm-setting work, state attorneys general have entrenched and, at times, augmented established data security and privacy norms set at the federal level. This Section explores how.

1. Federal Privacy Statutes

Federal privacy regulations related to healthcare, children’s online activities, and credit reporting agencies are enforceable by state and federal authorities. Attorneys general have taken up the mantle of enforcement with vigor. Precedent set by federal agencies has guided their investigations of alleged violations of the Health Insurance Portability and Accountability Act (HIPAA).

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203 The TCPA amendment allows debt collection robocalls to people’s cell phones if the debt is owned or guaranteed by the United States. 47 U.S.C. § 227. Crucially, it preempts stronger state laws prohibiting unsolicited cellphone calls by federal debt collectors.


205 Id.

206 NAAG played an important role in lobbying for concurrent enforcement power for federal privacy statutes. Provost, supra note 56, at 39.
Act (HIPAA), the Fair Credit Reporting Act (FCRA), and the Children’s Online Privacy Protection Act (COPPA).

Connecticut was the first state to sue a healthcare provider for failing to secure health data as required by HIPAA. When the Department of Health and Human Service’s Office of Civil Rights does HIPAA training for staff at offices of attorneys general, it uses Connecticut’s litigation of the case as the exemplar of how to bring a HIPAA action. New York, Maryland, Massachusetts, Texas and Vermont have brought HIPAA cases as well.

Attorneys general have fought for credit-reporting agencies to comply with the basic requirements of FCRA. The three major credit-reporting agencies recently agreed to improve the accuracy of credit reports, to enhance the fairness of procedures for resolving consumer disputes about errors, and to protect consumers from unfair harm to their credit histories in connection with medical debt. New York initiated its investigation of the credit-reporting agencies after the FTC released a study finding that twenty-

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six percent of consumers had errors in their credit reports.\(^{214}\) Subsequently, thirty-one attorneys general, led by Ohio, entered into a separate agreement with the three credit-reporting agencies under similar terms.\(^{215}\)

Attorneys general have strengthened the privacy protections accorded children under COPPA, which requires website operators to obtain verified parental consent before collecting, using, or disclosing personal information collected from children under thirteen.\(^{216}\) COPPA does not limit the type of data that can be collected from children.\(^{217}\) Texas has sharpened COPPA’s protections in cases against app providers that collected location data from children without telling their parents. Agreements included injunctive relief forbidding app providers from collecting location data from children under thirteen, whether or not parents provided consent.\(^{218}\)

2. Data Security

Attorneys general have been active “first responders” to data breaches involving entities that are not regulated by federal privacy laws.\(^{219}\) State


\(^{217}\) Complying with COPPA: Frequently Asked Questions, F ED. T RADE C OMM’N (Mar. 20, 2015), https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions#General Questions (explaining that operators under COPPA must provide notice to parents before collecting personal information from children, give parents the choice of consenting to collection and internal use of a child’s information, and give parents the opportunity to prevent further use or online collection of a child’s personal information); see also Solove & Hartzog, New Common Law of Privacy, supra note 2, at 603.


\(^{219}\) Christopher R. Nolen, State Attorneys General Offer Perspectives on Data Breaches, LEX-OLOGY (Dec. 15, 2015), http://www.lexology.com/library/detail.aspx?g=54a5a467-747b-4d85-ad1d-3fafaed85b79 (“[T]he state attorney general is the ‘front-line’ regulator dealing with companies that have suffered data privacy breach incidents.”).
enforcement activity has been pursued under state data security,\textsuperscript{220} data disposal,\textsuperscript{221} encryption,\textsuperscript{222} breach notification,\textsuperscript{223} and UDAP laws.\textsuperscript{224}

The FTC has embraced a process-based approach to data security, which entails assessing steps taken by entities to achieve “reasonable security.”\textsuperscript{225} Multistate AVCs and settlement agreements have emulated the FTC’s approach.\textsuperscript{226} An added benefit of state enforcement is that attorneys general can seek civil penalties for data security violations under UDAP and other state statutes.\textsuperscript{227}


\textsuperscript{223} See, e.g., Cal. Civ. Code § 1798.82.


\textsuperscript{225} Thomas J. Smedinghoff, An Overview of Data Security Legal Requirements for All Business Sectors (Oct. 8, 2015), http://ssrn.com/abstract=2671323. That approach assesses whether entities have a security program, engage in periodic risk assessments, provide adequate training to employees, have plans to deal with potential breaches, ensure that outside data vendors secure data, and employ technical, physical, and administrative safeguards. \textit{Id.}

The process-based approach was adopted by Massachusetts in its data security regulations. See generally 201 Mass. Code Regs. 17.00 (2010).


\textsuperscript{227} Civil penalties have ranged from $70,000 to more than $9 million. See, e.g., Villareal, No. 2010-CI-13625 ($70,000); TJX Cos. AVC, supra note 226 ($9.75 million). Under section 5, the FTC cannot seek civil penalties for unfair or deceptive data security practices. Hartzog & Solove, \textit{Scope and Potential}, supra note 2.
Attorneys general have strengthened security protections for sensitive data. Consider the recent investigation of Uber’s internal location tracking system. Uber executives allegedly used the tracking system—called “God View”—to access the location of journalists’ locations. On January 6, 2016, Uber agreed to adopt security measures that would protect the real-time locations of riders. The agreement required Uber to encrypt rider location data, adopt multi-factor authentication before employees could access “especially sensitive rider personal information,” and limit access to location data.

Another aspect of data security strengthened by state attorneys general relates to the assistance provided data-breach victims. Attorneys general routinely ask companies to provide victims with a year of free credit monitoring and identity-theft insurance. Connecticut Attorney General George Jepsen has argued that consumers should receive two years of identity-theft insurance and credit monitoring in data breaches involving “highly sensitive information” even though state law only requires one year of credit monitoring.

3. Bankruptcy

The FTC and state attorneys general have set important standards for the sale of consumer data in bankruptcy proceedings. Fifteen years ago, in FTC v. Toysmart.com, LLC, the FTC and forty-four state attorneys general

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229 Kim Bellware, Uber SETTLES INVESTIGATION INTO CREEPY ‘God View’ TRACKING PROGRAM, HUFFINGTON POST (Jan. 6, 2016, 8:42 PM), http://www.huffingtonpost.com/entry/uber-settlement-god-view_568da2a6e4b0c8beacf5a8f.


231 Id.


asked a bankruptcy court to stop a toy retailer from selling customers’ data because the company had promised not to share the data with third parties in its privacy policy. Their argument was that the sale would amount to a deceptive practice.235

Although the FTC offered to settle the case by allowing the sale to a qualified buyer, the attorneys general continued to object on the grounds that any sale would be unlawful without consumer consent.236 The settlement was never approved, and consumers’ data was destroyed.237 Attorneys general next lobbied Congress to require the appointment of a consumer privacy ombudsman in bankruptcy proceedings.238 The amendment was adopted in 2005.239

Since Toysmart, state attorneys general have challenged the sale of customer data in other bankruptcies, securing stronger protections than sought by the FTC.240 In the bankruptcy proceedings for RadioShack, the FTC argued that the buyer should agree to be bound by RadioShack’s privacy policy, which said that consumers’ data would not be sold, or, alternatively, that RadioShack would obtain consumers’ affirmative consent before transferring their personal data.241 Thirty-eight attorneys general, however, insisted upon stronger protections. RadioShack settled with the states, agreeing to destroy most of the data, including Social Security numbers, telephone numbers, and dates of birth, and to reduce the number of data points per customer available for sale from 170 to 7.242

Attorneys general have secured protections for consumers’ data beyond promises made in privacy policies. With their enforcement leadership, sales of highly sensitive personal data, such as sexual and dating preferences, have been prevented.243 In cases where privacy policies were silent as to what would happen to data in the event of bankruptcy, attorneys general have convinced bankruptcy ombudsmen to ban the sale of sensitive data and to give consumers a chance to opt out of the sale of the remaining data.244

236 Id.
237 Id.
238 Id.
239 Id.
240 Id.

242 Id.


244 See, e.g., States Active in Recent Mega Bankruptcies, supra note 235 (reporting that attorneys general secured protections for consumer data in Circuit City bankruptcy, including banning sale of data that would trigger data-breach notification laws).
4. Privacy Governance

In the past fifteen years, major businesses have hired chief privacy officers to address privacy and data security concerns.\(^{245}\) Emulating the approach of the FTC, state attorneys general have turned privacy’s presence in the C-Suite from a voluntary practice into a legal requirement.\(^{246}\) In multistate and individual actions, state attorneys general have required companies to integrate privacy professionals into corporate boardrooms.

Consider the multistate investigation of Google for collecting data from unsecured wireless networks nationwide through its Street View vehicles. An eight-state executive committee, led by Connecticut, investigated Google for its collection of network identification information and “payload data” transmitted over unsecured business and personal wireless networks between 2008 and March 2010.\(^{247}\) Google acknowledged the possibility that the collected data included partial or complete email communications.

Thirty-eight states and the District of Columbia signed an AVC with Google resolving consumer protection and privacy claims.\(^{248}\) As part of the AVC, Google agreed to adopt a privacy program requiring notification of senior management about the terms of the agreement, designation of an employee to coordinate the privacy program, employee training about the importance of user privacy, and development of policies and procedures for responding to events involving the unauthorized collection, use, or disclosure of user data. Google agreed to provide privacy awareness training to

\(^{245}\) Bamberger & Mulligan, supra note 3, at 251.

\(^{246}\) FTC consent decrees in consumer privacy cases typically require companies to establish comprehensive privacy programs that include the designation of an employee to coordinate and be responsible for the privacy program. See, e.g., Decision and Order, In re Google Inc., No. C-4336 (Oct. 13, 2011), https://www.ftc.gov/sites/default/files/documents/cases/2011/03/110330googlebuzzagreeorder.pdf.


counsel advising product teams. The company paid a seven-million-dollar fine to the states.

California has embraced this approach in recent cases. In 2015, California sued Houzz, an online home remodeling retailer, for recording telephone calls with consumers without informing them that they were being recorded in violation of California’s wiretap and UDAP laws. In a stipulated judgment, the company agreed to appoint an individual to serve as a chief privacy officer to oversee compliance with privacy laws and report concerns to company executives. Houzz agreed to conduct a privacy risk assessment addressing its compliance with relevant privacy laws and that of its business partners with whom it shares consumers’ personal data. Wells Fargo similarly agreed to adopt a privacy program in its 2016 settlement with the California Attorney General’s Office.

As Kenneth Bamberger and Deidre Mulligan document in their important work, the presence of privacy professionals in corporate boardrooms is on the rise. Following the lead of the FTC, attorneys general have reinforced such self-regulation with law, for the good of consumers.

* * *

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. The next Part assesses that work and makes suggestions for moving forward.

III. Moving Forward

As responses to FOIA requests and qualitative interviews demonstrate, attorneys general have been privacy pioneers. This Part turns from the past and looks towards the future. It highlights key features of AG offices that have been crucial to privacy policymaking in the hopes that those features can be replicated and improved. It assesses criticism of state privacy

250 Id.
251 Id.
252 People v. Wells Fargo Bank, No. BC611105 (Cal. Super. Ct. Mar. 28, 2016), https://oag.ca.gov/system/files/attachments/press_releases/Court%20approved%20Wells%20Fargo%20Stip%20Judgment%2016%2003%2028.pdf. Wells Fargo agreed to designate officers to oversee the company’s compliance with its agreement not to record phone calls with consumers without notifying them that they are being recorded. Id.
253 See Bamberger & Mulligan, supra note 3.
254 Several states have expressed interest in learning from the privacy-related work of other offices. See, e.g., Wright Interview, supra note 114 (discussing his desire, as Chief of
enforcement, including concerns that multiple enforcers risk over-deter-
rence and interest group capture. It evaluates calls for federal preemption of
both AG enforcement power and state laws. It explores the implications of
the dormant Commerce Clause doctrine. This Part identifies weaknesses in
state enforcement activity and offers suggestions to enhance its efficiency,
efficacy, and transparency. It ends with a turn to substance by urging state
enforcers to address troubling practices that deserve regulatory oversight.

A. Strengths

States' chief law enforcers have responded quickly to consumer privacy
concerns. This is partially because staff can pursue initiatives with little
bureaucratic wrangling. After all, the buck stops with a single boss—the state
attorney general. As Kathleen McGee, the Chief of New York’s Internet
Bureau, explains, "we do not have the politics of five commissioners so it is
easier for us to move forward on cases."255

Also, unlike federal agencies, state attorneys general are directly
accountable to voters, many of whom voice concerns about privacy and data
security. Idaho AG Lawrence Wasden echoed others in noting that because
privacy and data security are at the top of his constituents’ list, they are at the
top of his.256 This Section explores the deeper structural reasons for such
swift and nimble privacy policymaking.

1. Specialization

Offices of attorneys general—particularly career staff—have developed
specialties that grow out of a familiarity with local conditions. They “are the
first to see and understand the cons and conmen working their way through
the system, receiving and fielding consumer complaints about every-
thing . . . . [They] often see problems consumers are facing before [the FTC
does] in Washington.”257 In turn, staff focus on the privacy and data security
problems in their states.

Consider the specialization of the privacy leaders’ offices. Since the
birth of Silicon Valley, California’s attorneys general have been finely attuned

255 McGee Interview, supra note 45.
256 Divonne Smoyer & Frederick Lah, Idaho AG Talks Breach Notification, His Role as Pri-

notification-his-role-as-privacy-enforcer/; see also, e.g., Lemos, supra note 94, at 722–23
(explaining that attorneys general have incentive to respond to interests of constituents,
which is amplified by their ambitions for higher office).

257 Comm’r Julie Brill, Keynote Address to the Nat’l Ass’n of Att’ys Gen.: Federal and
State Law Enforcement Cooperation: A Lesson from Baseball (Mar. 6, 2012), https://www
.ftc.gov/sites/default/files/documents/public_statements/federal-and-state-law-enforce-
ment-cooperation-lesson-baseball/120305maagspeech.pdf.
to privacy and data security issues in the technology sector.\textsuperscript{258} Health privacy and data security are focal points for Massachusetts\textsuperscript{259} and Connecticut,\textsuperscript{260} an outgrowth of the high concentration of hospitals and insurance compa-

\textsuperscript{258} This theme was clear from responses to FOIA requests, research, and interviews of AG Kamala Harris, see Harris Interview, \textit{supra} note 13, and current and former staff, see, \textit{e.g.}, Henrichsen Interview, \textit{supra} note 8; LeBlanc Interview, \textit{supra} note 124; McNabb Interview Mar. 3, \textit{supra} note 43.


nies within their borders. The New York attorney general’s office has long focused on privacy issues involving the financial sector.

Concerns of citizens heavily influence an attorney general’s agenda. As former Illinois Assistant AG Erik Jones explained, “[A]ttorneys general hear directly from the residents they serve on a daily basis.” For that reason, identity theft and data security have been a priority for Illinois AG Lisa Madigan. Her office has heard from thousands of residents whose identities were stolen in the wake of data breaches. Her constituents’ struggles were behind her recent efforts to update the state’s data-breach notification law. For the same reason, combating illegal telemarketing is a priority for Indiana and North Carolina.


Jones, supra note 94, at 747. Jones is now a partner at Venable with a practice focusing on data privacy and state attorney general activity. Erik Jones, VENABLE LLP, https://www.venable.com/erik-jones/ (last visited Sept. 22, 2016). As Jones noted in our session on state AG privacy policymaking at the 2016 Privacy and Security Forum, inadequate data security was a crucial issue for AG Madigan because countless constituents struggled with the economic and emotional fallout of data breaches.

See Jones, supra note 134.

Id.

Id.

The most common complaint made to the Indiana AG’s Office is unwanted telephone calls. See AG Zoeller, Missouri AG’s Office Host 3rd Annual No Call Summit Focused on New Efforts to Stop Unwanted Calls, CITY COUNTY OBSERVER (Apr. 23, 2016), http://citycountyobserver.com/ag-zoeller-missouri-aggs-office-host-3rd-annual-no-call-summit-focused-on-new-efforts-to-stop-unwanted-calls/. In 2015, the Office received 14,000 complaints about unwanted calls, the majority of which were about robocalls. See AG Zoeller Urges Congress to Pass HANGUP Act, Ban All Robocalls to Cell Phones, IN.gov (Feb. 10, 2016), http://www.in.gov/activecalendar/EventList.aspx?view=EventDetails&eventidn=242410&information_id=237505&type=&syndicate=syndicate. AG Greg Zoeller helped strengthen the state’s telephone privacy laws, banning nearly all types of robocalls. See supra note 209. Indiana has joined forces with Missouri to hold annual Do Not Call conferences to educate AG offices about consumers’ rights and potential penalties. See Do Not Call: The History of Do Not Call and How Telemarketing Has Evolved, 1 NAGTRI J. 4 (2016), http://www.naag.org/publications/nagtri-journal/volume-1-number-4/do-not-call-the-history-of-do-not-call-and-how-telemarketing-has-evolved.php.

Staff expertise extends beyond local concerns. The Texas Attorney General’s Office has been at the forefront of privacy protections in bankruptcy sales since 2000.270 Through changing administrations, career staff have secured protections for consumer data in various bankruptcy proceedings, including Living.com,271 DrKoop.com,272 True.com,273 and RadioShack.274

The Vermont Attorney General’s Office has shown an avid interest in data security.275 Like other states, the Vermont data-breach notification law requires businesses to notify the office within fourteen days of discovering a
breach.\textsuperscript{276} This has allowed the office to intervene on behalf of Vermont citizens—with the chance of improving data security beyond its borders.\textsuperscript{277}

2. Multistate Cooperation

Another strength is the ability of state enforcers to collaborate with each other.\textsuperscript{278} Members of the NAAG Privacy Working Group hold monthly telephone calls to discuss best practices and emerging risks.\textsuperscript{279} They coordinate responses to data breaches impacting citizens across the country.\textsuperscript{280}

Interviews with attorneys general and career staff have highlighted the importance of multistate efforts to share expertise and conserve resources.\textsuperscript{281} The Texas Attorney General’s Office, for instance, often takes the lead in bankruptcy proceedings,\textsuperscript{282} while Connecticut and Illinois frequently spearhead data security cases.\textsuperscript{283} Members of the NAAG Privacy Working Group also take turns leading multistate investigations.\textsuperscript{284} Small states join multistate efforts in cases where they would have lacked the resources and expertise to proceed alone.\textsuperscript{285} Crucially, multistate investigations grow in strength as more states participate. The Chief of the Illinois Consumer Protection Bureau, Deborah Hagan, explained that attorneys general enjoy more lever-

\begin{footnotesize}
\begin{enumerate}
\item 276 VT. STAT. ANN. tit. 9, § 2435 (West 2016).
\item 277 Kriger Interview, supra note 38. Vermont Assistant AG Ryan Kriger explained that a small state like Vermont can impact data security practices across the country when it investigates data breaches impacting citizens nationwide. Id. To take just one month—July 2014—the Vermont AG’s Office communicated with thirty-one companies, mostly with national operations, to press for remedial actions in the wake of data breaches. FOIA Response Letter (Vermont) (on file with author).
\item 279 Cable Interview, supra note 59.
\item 280 Id.
\item 281 Fitzsimmons Interview, supra note 5; Hagan & Van Hise Interview, supra note 5; Jepsen Interview, supra note 49; McNabb Interview July 20, supra note 59.
\item 282 See supra notes 270–74 (discussing bankruptcy cases led by Texas).
\item 284 See id.
\item 285 Conti Interview, supra note 53 (discussing Maine’s involvement in various multistate investigations).
\end{enumerate}
\end{footnotesize}
age proceeding together than if they pursue cases individually. Particularly in data-breach matters, multistate efforts garner considerable support, likely because constituents express considerable concern about identity theft.

To be sure, in any given multistate investigation, there are usually a handful of states that decline to participate. Why would states remain on the sidelines? One possibility is that their offices are preoccupied with other issues; another is the potential influence of lobbyists. Nonetheless, what can be said is that cooperation has been the overwhelming trend when it comes to consumer privacy and data security matters.

Of course, productive relationships among state attorneys general are not inevitable. AG offices could interfere with multistate cooperation. For instance, an attorney general could offer a weak settlement to a company, undermining the negotiating position of a multistate group interested in establishing thicker protections for consumers. Staff could break away from a multistate effort to earn political points for the boss. These scenarios are possible, but the experience of the NAAG Privacy Working Group shows that cooperation happens more frequently than not. Productive relationships amongst career staff and limited state budgets weigh in favor of collaboration.

Then too, multistate agreements can harmonize norms across jurisdictions, especially as more and more states participate. They set privacy policy for a company’s activities in the signature states. Crucially, multistate settlements have stabilized and entrenched norms set by the FTC, especially in the area of data security.

3. Federal Agencies: Synergies and Dialogue

Attorneys general have enjoyed a synergistic relationship with federal agencies working on privacy and data security issues. This has been true since the earliest days of AG engagement with consumer protection issues. In the 1970s, the FTC was crucial to the passage of state UDAP laws, which gave enforcement power to attorneys general.

286 Hagan & Van Hise Interview, supra note 5.
287 Former Maryland Assistant AG Steven Ruckman helped me think through these possible scenarios.
288 Some limelight-seeking is inevitable and potentially productive. See Lemos, supra note 94, at 742 (explaining that because attorneys general are elected, they have “incentive to make a name for themselves”). An attorney general might break away from others’ efforts to press for greater protections for constituents.
289 Cable Interview, supra note 59.
290 See supra note 247 (discussing how precedent set in Google matters went further than the FTC consent decree in protecting consumers’ privacy choices).
291 See supra notes 226–27 (discussing multistate AVC in the TJX data-breach case).
292 See, e.g., TJX Cos. AVC, supra note 226; Assurance of Voluntary Compliance, In re Choicepoint (Or. Dep’t of Justice May 30, 2007) (on file with author).
293 See Cole, supra note 29, at 126. The FTC promoted state UDAP laws because state attorneys general lacked authority to enforce section 5 and the FTC needed help protecting consumers from unfair and deceptive trade practices. Id.
The FTC has remained a strong supporter of state privacy enforcers. Then-FTC Commissioner Julie Brill, who stepped down from her post near the end of her term, has emphasized the crucial role played by attorneys general in privacy regulation.\textsuperscript{294} At a NAAG meeting, she noted that the FTC has “relied on our partners in the states to help us carry out our mission to protect consumers as they navigate the marketplace . . . in today’s fast-paced, technologically advanced world, we depend on you more than ever.”\textsuperscript{295}

Federal agencies and state attorneys general have joined forces in efforts to nudge compliance.\textsuperscript{296} For instance, New York AG Eric Schneiderman and the FCC criticized PayPal’s proposal to condition service on consumers’ receipt of robocalls.\textsuperscript{297} As AG Schneiderman and the FCC noted in public statements, PayPal’s proposed policy would violate the Telephone Consumer Protection Act.\textsuperscript{298} In social media, consumers expressed their disapproval of PayPal’s plan.\textsuperscript{299} PayPal soon reversed course, agreeing to make robocalls only to consumers who explicitly opted in to receiving them.\textsuperscript{300} FCC’s Chief of Enforcement Travis LeBlanc explained that PayPal—like other companies faced with bad publicity—went further than what the law required to contain the damage to its reputation.\textsuperscript{301}


\textsuperscript{295} Brill, supra note 257.

\textsuperscript{296} The relationship between attorneys general and federal agencies reflects a “polyphonic federalism” that Robert Schapiro envisions in his work. See, e.g, ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009) (exploring state and federal relations as promoting plurality, diversity, and productive dialogue in a dynamic, bottom-up way).


An important illustration of the synergistic relationship between the FTC and attorneys general involves Google. In 2011, the FTC entered into a consent order with Google requiring it to obtain outside audits of its privacy practices for the next twenty years.\(^{302}\) Attorneys general reinforced the FTC’s efforts.\(^{303}\) In a letter sent by NAAG in 2012, thirty-nine attorneys general criticized Google’s unified privacy policy, which allowed the company to share consumers’ personal data across its services.\(^{304}\) As the group of state attorneys general argued, consumers did not have a real choice to “exit the Google products ecosystem.”\(^{305}\) The group pressed Google to give consumers the ability to review and delete data collected about them from different Google services.\(^{306}\) The attorneys general urged the company to be more transparent about the types of personal data collected by each service.

In 2013, Google agreed to changes related to the transparency of its data practices. Consumers were notified of ways that they could keep information associated with one service separate from information associated with another; consumers were given the ability to see how some data was collected and shared across services. FTC Commissioner Brill noted: “That 39 AGs recently called on Google to explain its new privacy policies shows we are not only on the same team—we are on the same page of a winning playbook.”\(^{307}\)

The relationship between federal agencies has also generated productive dissent, the sort of “uncooperative federalism” explored by constitutional law scholars Jessica Bulman-Pozen and Heather Gerken.\(^{308}\) The case involving Google’s failure to respect consumers’ do-not-track settings exemplifies the point.\(^{309}\) There, state attorneys general pressed for thicker consumer privacy protections, forsaking the thinner protections in the FTC’s consent decree.\(^{310}\)

The precedent set in multistate agreements—such as the Google and PointRoll matters—could prod a change in the FTC’s privacy jurisprudence,


\(^{303}\) Brill, supra note 257.


\(^{305}\) Id.


\(^{307}\) Brill, supra note 257.


\(^{309}\) See supra notes 143–45 and accompanying text.

\(^{310}\) See supra notes 148–54. The Google Street View investigation fits in the same mold. Although privacy advocacy group EPIC urged the Department of Justice and the FCC to investigate Google’s collection of consumers’ unencrypted Wi-Fi payload data in 2010, only the states, with the leadership of Connecticut, pursued the matter vigorously, ending with an AVC with thirty-eight states. See supra note 154; see also Comments of Marc Rotenberg, Bright Ideas Discussion at EPIC, July 15, 2016 (on file with author).
much in the way that Daniel Solove and Woodrow Hartzog have called on the
FTC to press for thicker norms.311 The FTC is more likely to embrace evolv-
ing norms if they reflect existing best practices. The precedent set by state
attorneys general could help nudge best practices towards greater consumer
 protections that the FTC might endorse in its privacy jurisprudence. Because
attorneys general serve as “connected critics” to the FTC, they may have a
powerful bid for the FTC’s attention.312 In short, attorneys general serve as
crucial partners, dissenters, and enforcement gap fillers vis-à-vis federal
agencies.

4. EU Harmonization

Might industry look favorably on AG enforcement activity because, in
certain respects, it comports with EU requirements, especially if companies
collect data from European citizens? In 2016, the Department of Commerce
and European regulators struck a deal that will allow U.S. companies to han-
dle European citizens’ personal data if they agree to follow certain data pro-
tection principles.313 Depending on the circumstances, U.S. companies may
be expected to comply with the EU General Data Protection Regulation

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311 Solove & Hartzog, New Common Law of Privacy, supra note 2.
312 See Bulman-Pozen & Gerken, supra note 308, at 1288 (discussing the role of the
connected critic in the uncooperative federalism model).
313 Under the European Commission’s Directive on Data Protection of 1998, EU Mem-
ber States cannot transfer personal data to countries that lack an “‘aquia[te]’ standard
build.export.gov/main/safehaven/egov/eg_main_018476. Under the EU-U.S. Safe Harbor
agreement, U.S. companies could handle the personal data of the citizens of EU Member
States if they agreed to follow seven data-practice principles. Id. In 2015, a European
Court of Justice decision, Case C-362/14, Schrems v. Data Prot. Comm’r, 2015 E.C.R. 362/
14, invalidated the EU Safe Harbor agreement based on the U.S. surveillance practices
exposed by Edward Snowden. On February 2, 2016, European authorities and U.S. offi-
cials struck an agreement that renegotiated the Safe Harbor deal, allowing businesses to
continue moving people’s digital information across the Atlantic. See Mark Scott, U.S. and
Europe in ‘Safe Harbor’ Data Deal, but Legal Fight May Await, N.Y. TIMES (Feb. 2, 2016), http://
The deal was officially approved by the EU’s Member States. See Hogan Lovells, Privacy
Shield Receives Final Approval from European Commission—Some Initial Practical Advice, GRCHON.
DATA PROT. (July 12, 2016), http://www.hldataprotection.com/2016/07/articles/interna-
tional-eu-privacy/privacy-shield-receives-final-approval-from-european-commission-some-
initial-practical-advice-for-clients/?utm_source=feedburner&utm_medium=feed&utm_cam-
paign=Feed%3A+ChronicleOfDataProtection+%28HL+Chronicle+of+Data+Protection%29;
see also Press Release, Eur. Comm’n, Statement by Vice-President Ansip and Commis-
ioner Jourová on the Occasion of the Adoption by Member States of the EU-U.S. Privacy
.htm. As Omer Tene, Vice President of Research and Education at the International Asso-
ciation of Privacy Professionals, explains, there are lingering concerns that the Privacy
Shield may not satisfy the additional requirements and burdens of the GDPR. Bradley
Barth, Survey: 34% of Privacy Pros Expect Their Companies to Certify Under Privacy Shield, SC
Mag. (Sept. 1, 2016), http://www.scmagazine.com/survey-34-of-privacy-pros-expect-their-
companies-to-certify-under-privacy-shield/article/519777/.
Paul Schwartz has discussed efforts to harmonize EU-U.S. privacy policymaking in the shadow of a looming collision with EU data regulations. Adhering to AG privacy policymaking would enable compliance with the European approach in certain respects. Data-breach notification norms are similar to the GDPR’s requirement that data controllers notify individuals about data breaches without “undue delay” in certain circumstances. State AG enforcement has provided special protection for sensitive information, which resonates with provisions of the GDPR. California urges companies to explain their privacy policies in a clear and understandable manner, much as in the EU. Compliance with AG privacy norms cannot avoid all of the collisions that Paul Schwartz insightfully explores, but to the extent that they do, there is an upside to following them. Adhering to the norms set by AG enforcement actions can facilitate compliance with certain EU regulations.

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314 EU Member States accord omnibus protections to the handling of all personal data. See Schwartz, The Value of Privacy Federalism, supra note 1. Each EU Member State has its own data protection commission. Id. By contrast, privacy regulation in the United States does not come from a single source or regulator but rather from a combination of federal and state legislation, federal agencies, and state attorneys general. Id.


316 Thanks to Tanya Forsheit, Jules Polonetsky, Peter Swire, and Chris Wolf, who emphasized this point with me. As Tanya Forsheit noted, with the passage of California’s Electronic Communications Privacy Law and the work of AG Harris, California could be understood as compliant with EU data protection laws, if such a possibility could exist. Telephone Interview with Tanya Forsheit, Partner, Frankfurt, Kurnit, Klein & Selz (Dec. 9, 2015).


318 See supra notes 185–87, 218, 230 (discussing, respectively, California’s approach to the nonconsensual posting of nude images, Texas’s various informal agreements banning the collection of children’s location data due to its sensitive nature, and New York’s informal agreement to protect highly sensitive location data).

319 Say What You Do and Do What You Say: Guidance for Privacy Policies, and for Life, INFORMATIONLAWGROUP (May 26, 2014), http://www.infolawgroup.com/2014/05/articles/privacy-law/guidelines-for-your-privacy-policies-and-your-life-say-what-you-do-and-do-what-you-say/. California’s best practices urge companies to inform consumers about what types of data are collected, with whom data is shared, how long data is retained, and how data can be corrected in a clear and easily understandable way, akin to the approach of the GDPR. Id.

320 I am grateful to Margot Kaminski for urging me to frame the issue in this way.
B. Objections and Proposals

AG privacy enforcement has been subject to criticism. Some object to having more than fifty state enforcers on the beat and to the diverse array of state laws applied by them. This Section addresses concerns about the potential pile-up of enforcement activity and calls for federal preemption. It discusses the possibility of interest group capture and the implications of dormant Commerce Clause doctrine. It turns to weaknesses in the tactics and strategies employed by state attorneys general, and it offers solutions. This Part ends by exploring new directions for AG privacy policymaking.

1. Threshold Concerns

A common objection to AG privacy enforcement is that “having fifty-plus attorneys general and federal agencies on the beat leads to over-enforcement and overwhelms companies.” Federal administrative law has something to teach us in this respect. In *FTC v. Standard Oil Co. of California*, the Supreme Court held that the cost of an investigation by one agency is “part of the social burden of living under government.” But does that presumption change if a company faces investigations by fifty or more regulators? Is there something legally significant about the potential pile-up effect? Should Congress preempt state enforcement? Should it preempt state data security and privacy laws in favor of a uniform federal standard? Instead of over-deterrence, is the risk one of too little enforcement due to capture by corporate interests?

a. Pile-Up Effect

The specter of fifty state attorneys general pursuing a company for privacy or data security violations is more theoretical than real. As Massachusetts Assistant AG Sara Cable remarked, “The idea that all 50 attorneys general will jump on a company separately is an illusion.” Of course, state attorneys general could bring separate actions against companies, but they hardly ever do so in practice. Entities do not face fifty or more separate investigations and enforcement actions, let alone more than one.

That trend will likely continue. Because states have limited resources, AG offices look for partners to share the burdens of litigation. Similarly,
businesses favor multistate litigation because it is cheaper and easier to negotiate with an office (or group of offices) representing several states. States and companies have strong incentive to prefer multistate proceedings rather than separate actions.

Overlapping state investigations—though rare—have been productive. Recall that three major credit-reporting agencies faced an investigation by New York and a separate multistate investigation, which resulted in agreements with similar terms. Although there were duplicate costs, the pile-up was productive. As Chris Hoofnagle explained, the major credit-reporting agencies had brazenly ignored the mandates of FCRA for years and federal agencies did nothing about it.325 Under-enforcement was the norm for decades. The concurrent investigations put important pressure on credit-reporting agencies to clean up their acts.326

What about duplicative state and federal actions? Again, though rare, when entities have faced separate federal and state investigations, productive dialogue has been the result. Recall that the FTC and the multistate group investigated Google for deploying code that changed consumers’ no-track settings.327 There, overlapping federal-state jurisdiction and separate enforcement actions led to valuable dissent, rather than the same result for double the price.

Of course, if the pile-up effect becomes a reality, entities could urge state legislators to cut the budget of attorneys general or to limit the scope of their authority.328 As Margaret Lemos explains, business interests are capable of being heard by state legislatures and shutting down state AG enforcement.329 Industry could lobby Congress to limit the role of state attorneys general in privacy and data security enforcement.

Now to the normative question of whether Congress should shut attorneys general out of the enforcement calculus.


325 Memorandum from Chris Hoofnagle, Adjunct Professor of Law, Berkeley Sch. of Law (Jan. 15, 2015) (on file with author).
326 Id. There have been pile-ups of state attorneys general, notably in the tobacco litigation. See Martha A. Derthick, Up in Smoke: From Legislation to Litigation in Tobacco Politics (3d ed. 2012).
327 See supra note 144.
329 Lemos, supra note 94, at 748.
b. Preempting State Enforcers

Should Congress curtail or eliminate the enforcement role of state attorneys general in privacy and data security matters on the grounds that their participation risks undue complexity, high costs, and over-deterrence? Federal laws could limit or remove AG offices’ ability to enforce privacy and security consumer protections.

In considering such proposals, Congress should proceed carefully. State enforcers are essential to the efficient deterrence of privacy and data security violations given the increasing marginalization of private law and the practical constraints on federal agencies. Typically, public enforcement and private law claims operate together to discipline the market. But this is not so for data harms, by which I mean setbacks to consumers’ legally protected interests due to inadequate data security or other privacy violations. Why not?

Although the most logical place for plaintiffs to begin is with the privacy torts, they provide little relief for contemporary privacy and security problems. Overly narrow interpretations of the privacy torts—intrusion on seclusion, public disclosure of private fact, false light, and misappropriation of image—have prevented their ability to redress data harms. Similarly, negligence, contract, and private UDAP claims are routinely dismissed due to a lack of an “injury in fact” sufficient to support a finding of standing or cognizable harms, or due to the economic loss rule. For most courts, privacy and data security harms are too speculative and hypothetical, too based

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331 David C. Vladeck, Preemption and Regulatory Failure Risks, in PREEMPTION CHOICE, supra note 23, at 54, 56 (explaining that tort law helps fill regulatory gaps by forcing the disclosure of information, deterring excessive risk taking, and securing redress for injuries).


on subjective fears and anxieties, and not concrete and significant enough to warrant recognition.\footnote{335}

Given that private litigation is not an avenue for efficient deterrence, the more salient risk of curtailing or, more drastically, eliminating state AG enforcement is under-deterrence.\footnote{336} Federal authorities cannot attend to most privacy and security problems because their resources are limited and their duties ever expanding.\footnote{337} Simply put, federal agencies have too few resources and too many responsibilities.

If enforcement were solely in the hands of federal agencies, local matters would surely be overlooked. This is especially true for data security matters. Vermont’s Assistant AG Ryan Kriger explained, “Attorneys general fill an important niche by serving as the local cop on the beat. They investigate local actors whose poor data practices impact citizens of our state.”\footnote{338} The FTC has brought a little over fifty data security cases in the past ten years due to limited resources.\footnote{339} State enforcers have been filling enforcement gaps. Attorneys general were given the authority to pursue HIPAA violations precisely because Congress recognized that the Department of Health and Human Services’ Office of Civil Rights could not do it all. State attorneys general complement the efforts of federal agencies, and, as we have seen, they strengthen existing protections.\footnote{340}

The FTC has been applauded for its norm-setting and norm-guiding efforts, and rightly so.\footnote{341} Since 1997, the FTC has held workshops, issued guidance documents, and met with stakeholders.\footnote{342} The FTC’s settlements have established a jurisprudence of privacy.\footnote{343} But what will happen in the


\footnote{336 Municipalities may have power to enforce UDAP laws, and some do engage in privacy policymaking. The costs of coordination, however, would be significant, and no network like NAAG exists to facilitate those efforts.


\footnote{338 Kriger Interview, supra note 38. Since the 1980s, the FTC has explicitly focused on national trade practices. Hoofnagle, supra note 2.


\footnote{340 Id. at 2256. In 1969, an ABA commission urged the FTC to coordinate with local enforcement agencies to have them handle local consumer abuses. Report of the ABA Comm’n to Study the Fed. Trade Comm’n (1969), reprinted in 1 J. Reprints for Antitrust L. & Econ. 883, 948 (1969) [hereinafter Report of the ABA Comm’n].

\footnote{341 Solove & Hartzog, New Common Law of Privacy, supra note 2, at 600.

\footnote{342 Id. at 625.

\footnote{343 Id. at 619.}
coming years is unclear. President-elect Donald Trump has two commissioner seats to fill and will appoint a new chairperson to lead the agency. Career staff’s consumer privacy and data security efforts may be stymied by politics.

Added to that concern are federal lawmakers’ efforts to slash the FTC’s budget. Attorneys general would serve as a crucial fail-safe in the event that the FTC was forced to slow down its privacy and security work. Chris Hoofnagle has written about the role that state attorneys general played after an angry Congress shut down the FTC not once but twice in the 1980s after the agency crusaded too vigorously against used car salesmen, the funeral industry, and children’s advertising. Reagan-era leadership brought the FTC nearly to a halt, and during this time, class action lawyers and state attorneys general took up the slack. More recently, state attorneys general stepped in to address predatory lending, discriminatory lending, and foreclosure abuse when federal enforcers failed to address fraudulent practices related to the mortgage crisis of the late 2000s. This possibility cautions against efforts to preempt the privacy enforcement power of state attorneys general.

Given the important role that attorneys general have played in addressing privacy and data security issues, their enforcement power should not be curtailed or eliminated without careful consideration. Attorneys general have pioneered, shaped, and stabilized privacy norms while ensuring that

344 The FTC is led by five commissioners appointed by the president and confirmed by the Senate for seven-year terms. Id. at 608. “No more than three commissioners can be members of the same political party.” Id. The president chooses one commissioner to act as chairperson. Id. There are currently two empty FTC commissioner seats; President-elect Donald Trump can appoint members of the Republican Party to fill those seats.


348 Hoofnagle, supra note 2, at 66.

349 Id. at 73. In the 1960s, sharp disagreement among the five commissioners rendered its consumer protection mission ineffective. REPORT OF THE ABA COMM’N, supra note 340, at 891. During that period, the FTC endorsed the adoption of state UDAP laws. That history underscores the importance of attorneys general in the protection of consumer privacy.

companies internalize some of the costs of data harms that would otherwise be borne by consumers alone. State enforcers have engaged in a productive dialogue with federal enforcers, resulting in more comprehensive protection for consumers. They have been able to pursue privacy initiatives quickly because career staff do not have to worry about whether a majority of federal commissioners endorse their actions. Attorneys general should remain equal enforcement partners to federal agencies given their unique ability to leverage local knowledge and expertise quickly and efficiently.

c. Preempting State Law

Should Congress adopt data protection legislation that supplants state laws? Whether preemptive federal laws should be adopted depends upon the specific protections afforded consumers and the concomitant gains in efficiency. If a federal law would offer a strong level of protection or set a statutory floor that could be strengthened by state law, then the question is worth serious consideration. Once a federal bill with a real chance of passage is proposed, its costs and benefits can be meaningfully explored.

The issue of federal preemption is often raised in the context of data-breach notification proposals. The FTC has taken the position that “a strong and consistent national requirement would simplify compliance by businesses while ensuring that all consumers are protected.” The National Conference of State Legislatures and forty-nine attorneys general support federal legislative proposals that would set a floor for breach notification but allow state lawmakers to layer on more restrictive rules. Along these lines,
Congress adopted health privacy and financial privacy laws that set a floor for breach notification, thus allowing states to adopt stricter requirements.\textsuperscript{359} In the absence of a preemptive federal data-breach notification law (or other such laws), state attorneys general should work to harmonize the patchwork of state laws, as California recently suggested.\textsuperscript{360} Idaho AG Lawrence Wasden has urged state attorneys general to work together to identify the “best aspects” of data-breach laws and work to amend them so “that they are more homogenous.”\textsuperscript{361} The NAAG Privacy Working Group provides an effective forum for organizing such activity.\textsuperscript{362} Attorneys general have proposed state privacy legislation modeled after another state’s law.\textsuperscript{363} Harmonization around security and privacy best practices is something career staff and attorneys general have emphasized as a goal, and it should be.

More broadly, calls for federal preemption are animated by concerns that AG enforcement will result in a one-way ratchet to stronger regulation. Upward regulatory creep could serve as a barrier to entry.\textsuperscript{364} Companies like Microsoft, Facebook, Twitter, and Google have ample resources to pay for legal compliance, but smaller companies or startups may not. Consider a startup mobile app developer. As soon as the developer’s app is offered in the iTunes store, consumers in all fifty states can download it. Will the developer be able to shoulder the expense of compliance with the privacy and data security rules in all of those states? Will the cost of compliance squeeze out startups like the developer? Not always. New businesses can outsource compliance to lawyers who specialize in helping startups with regulatory hurdles.\textsuperscript{365} Alternatively, they might accept the risks associated with being mostly compliant or ignore the rules since law enforcers tend to focus on larger companies than smaller ones.\textsuperscript{366}

Then too, it is important to recognize that the costs of stronger regulation are offset by its benefits. Improvements in data security mean less fraud and identity theft, which would reduce the negative externalities borne by

\textsuperscript{359} Relatedly, preemption attacks on state UDAP laws have been unsuccessful. Section 5 of the Federal Trade Commission Act does not preempt them. Am. Fin. Servs. Ass’n v. FTC, 767 F.2d 957, 989 n.41 (D.C. Cir. 1985).

\textsuperscript{360} See Kamala D. Harris, Cal. Dep’t of Justice, California Data Breach Report 2012–2015 (Feb. 2016), https://oag.ca.gov/breachreport2016. Other attorneys general emphatically agree with this point. See, e.g., Zoeller Interview, supra note 200. Federal lawmakers have tried to pass a federal data-breach notification law since 2005 but with no success. See Citron, supra note 170; see also Data, Privacy & Security Practice Grp., supra note 355, at 4 n.9. Gridlock has prevented federal legislation across the board.

\textsuperscript{361} Smoyer & Lah, supra note 256.

\textsuperscript{362} Cable Interview, supra note 59.

\textsuperscript{363} California legislation served as a model for Delaware Attorney General Matt Denn when he drafted the recently enacted student privacy bill and a law requiring privacy policies. Wright Interview, supra note 114.

\textsuperscript{364} Thanks to David Law for raising this concern with me.


\textsuperscript{366} Id.
consumers, banks, payment processors, and merchants. Stronger privacy and data security protections would enhance consumers’ trust in companies’ products and services.\textsuperscript{367} They would emulate certain aspects of the EU’s data protection regime, thus encouraging cross-Atlantic commerce. Ultimately, however, if state privacy regulation becomes so complex and onerous and its costs far exceed its benefits, federal lawmakers should take seriously the question of a preemptive national data protection regime.

d. Capture Concerns

What about the opposite concern—that state attorneys general are vulnerable to influence designed to discourage privacy enforcement? Attorneys general are increasingly subject to aggressive lobbying.\textsuperscript{368} In a prize-winning series of articles for \textit{The New York Times}, Eric Lipton exposed troubling practices by lawyers and former attorneys general, including the “use [of] campaign contributions” and “personal appeals at lavish corporate-sponsored conferences,” to push attorneys general “to drop investigations, change policies, negotiate favorable settlements or pressure federal regulators.”\textsuperscript{369}

Lobbying might explain why some attorneys general tread lightly when it comes to privacy or data security violations.\textsuperscript{370} But even if some states fall

\textsuperscript{367} For an important work on trust and privacy, see Neil Richards & Woodrow Hartzog, \textit{Taking Trust Seriously in Privacy Law}, 19 STAN. TECH. L. REV. (forthcoming 2016).


\textsuperscript{369} \textit{Id.} Indeed, the point is particularly salient in the 2016 presidential election. See Steve Eder & Megan Twohey, \textit{Donald Trump’s Donation Is His Latest Brush with Campaign Fund Rules}, \textit{NY Times} (Sept. 6, 2016), http://www.nytimes.com/2016/09/07/us/politics/donald-trump-pam-bondi.html?r=0. In 2013, Florida AG Pam Bondi’s office was investigating Trump University for violating the state’s UDAP law. While the investigation was ongoing, AG Bondi solicited Donald Trump for a campaign contribution, which his foundation arranged. After the donation was received, the Florida AG’s Office dropped its investigation of Trump University. The donation (and a subsequent fundraiser held by Trump in AG Bondi’s honor) has been subject to complaints about the corrupting influence of money in politics. See Sara Gonzales, \textit{The Trump University Corruption Story Just Got Worse for Pam Bondi (and Donald Trump)}, \textit{RedState} (Sept. 7, 2016), http://www.redstate.com/saragonzales/2016/09/07/trump-university-corruption-story-just-got-worse-pam-bondi-trump/.

prey to influence peddling, other states will not. As Mark Totten has insightfully argued, while no individual state attorney general is resistant to capture, it is unlikely that all fifty attorneys general will succumb to the demands of lobbyists.371

Further militating against interest group capture is politics.372 State attorneys general are an ambitious lot; many go on to higher office.373 Many of the privacy leaders of the 1990s are now U.S. senators and governors.374 Elected attorneys general further their careers with high-visibility investigations.375 They win favor with constituents by pursuing consumer protection matters.376

As this study shows, influence peddling has not eliminated AG interest in privacy and data security issues. Attorneys general have investigated privacy violations of industry players from all sectors of the economy, including major credit-reporting agencies, retailers, technology companies, banks, hospitals, and insurance companies. When attorneys general have intervened, their enforcement activity has had important spillover effects.

The increasing level of lobbying of attorneys general is troubling, to be sure. It does “create[ ], at the minimum, the appearance of undue influence.”377 The problem could be partially addressed with more robust disclosure laws. But concerns about capture do not justify the removal of state attorneys general from the privacy enforcement calculus.

e. Dormant Commerce Clause

What about federalism concerns implicated by the dormant Commerce Clause? Does the array of state privacy and data security laws interfere with the integration of the nation into a single market and national polity? The dormant Commerce Clause is an implied restraint on state activity stemming from the Supreme Court’s construction of the Commerce Clause.378 Under the Court’s jurisprudence, states may regulate interstate commerce unless a

played little role in the enforcement of data privacy and security matters. See Christopher R. Nolen, State Attorneys General Offer Perspectives on Data Breaches, LEXOLOGY (Dec. 15, 2015), http://www.lexology.com/library/detail.aspx?g=54a5a467-747b-4d85-ad1d-3fafade085b7 (stating that privacy and data security are on the agenda “whether it is the Republican Attorneys General Association, the Democratic Attorneys General Association or the National Attorneys General Association”).

371 Totten, supra note 350, at 1658.
372 Lemos, supra note 94, at 721–22.
373 Provost, supra note 56, at 37.
375 Devins & Prakash, supra note 21, at 2145, 2145.
376 Id. at 2145; see also Clayton, supra note 19; Provost, supra note 328, at 612.
377 Lipton, supra note 368.
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state regulation “clearly discriminate[s] against interstate commerce” and is not “demonstrably justified by a valid factor unrelated to economic protectionism”379 or “the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”380

Do state laws invoked by attorneys general in multistate and individual enforcement actions, notably state data-breach notification laws, violate those principles? To date, no court has struck down a state data-breach notification law on the basis of the dormant Commerce Clause analysis.381

As a start, breach notification laws would not violate the anti-discrimination principle.382 The burden imposed on interstate commerce by data-breach notification laws arguably is not “clearly excessive” in relation to the benefits of those laws. Companies can readily identify the state citizens covered by the statutes and thus can provide notice according to each state’s law.383 The cost of compliance is not excessive in light of the benefits to consumers. The state interest in ensuring notification of data breaches is strong. Without notice, consumers would not know to monitor their credit for fraud; companies might be inclined to skimp on data security since breaches would cost them nothing if hidden from the public and regulators.384 State data-breach notification laws fill an important gap. Federal

382 Bilyana Petkova, who has written insightfully about privacy federalism, writes that the anti-discrimination approach is wise given that “[t]here is no way of knowing whether a state experiment is going to be successful without giving it time to unfold.” Bilyana Petkova, The Long-Term Promise of Privacy Federalism, Part I, TECH. & MKTG. L. BLOG (Sept. 1, 2015), http://blog.ericgoldman.org/archives/2015/09/the-long-term-promise-of-privacy-federalism-part-1-guest-blog-post.htm.
383 The recently amended California data-breach notification law requires companies to disclose breaches involving login information. Anthony Glosson argues that “[b]ecause log-in information, by itself, provides no indication of a user’s state of residence, the law forces websites either to post embarrassing breach notifications prominently to their own pages, or to collect more information in order to distinguish between California or non-California users.” Glosson, supra note 381. That dormant Commerce Clause argument is worth close study given the potential burdens on companies and the possibility that consumers may be worse off if companies have to engage in re-identification to accomplish the statute’s goals. Such study must acknowledge the important reason behind the amendment. Because consumers often use the same login information for different accounts, notice of a breach would nudge consumers to change their login information across the board, preventing fraud at other sites.
384 Donald G. Gifford presents a thoughtful separation of powers argument about multistate tobacco litigation in his book, SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES: GOVERNMENT LITIGATION AS PUBLIC HEALTH PRESCRIPTION (2010). As Gifford explains, the separation of powers inquiry does not apply to the state in its relationship with Congress. See id. Gifford argues that attorneys general become legislators when they invoke ill-defined common law doctrines to create a national regulatory regime in multistate settlements. See id. By contrast, in multistate privacy and security cases, attorneys general are
health and financial privacy laws require notice of breaches, but they only apply to certain data holders and certain types of health and financial data.

2. Tactics and Strategies

Attorneys general have successfully employed various tactics, including legislative efforts and persuasion campaigns. Other tactics, however, are worth close inspection.

a. Reimagining Informal Agreements

The norm-shaping efforts of attorneys general may not be as effective as they could be due to their overreliance on informal agreements known as AVCs. Under the typical AVC, violations amount to prima facie evidence of lawbreaking. Violators incur no obligations, fines, or penalties unless the attorney general files a lawsuit on the substantive violation and wins. In other words, noncompliance can only be punished if offices file a formal complaint.

Companies favor AVCs with such terms because violations do not result in automatic penalties. Many companies that agree to change their practices will do so, but some may not. AVCs drafted in this way will fail to generate the same fear and interest sparked by lawsuits and consent decrees because companies risk little when they ignore them. That violators have little to worry about if they break their promises undermines the privacy-norm entrepreneurship of attorneys general. Informal agreements can influence privacy and data security practices if they are taken seriously. If, however, AVCs are viewed as paper tigers, then they are virtually worthless. AVCs would be more influential if attorneys general brought suit in the wake of a violation.

All AVCs should employ strong terms. Attorneys general should insist that violations of agreements amount to lawbreaking. In Maryland and Iowa, violations of informal agreements warrant immediate penalty. Multistate AVCs similarly provide that states have automatic authority to enforce or seek sanctions for violations of their terms. That should be true of all AVCs. As Iowa Assistant Attorney General Nathan Blake explains, when informal agreements make clear that violations put the party into contempt and those agreements are widely available to the public, they can be as influential as consent decrees.

applying state UDAP laws, other state statutes, or federal sectoral laws. There is no legislative usurpation where attorneys general are enforcing state and sometimes federal laws.

385 See, e.g., Affinity Health Plan AVC, supra note 138 (stating that evidence of violation amounts to “prima facie proof of a violation of the applicable statutes”).
386 Telephone Interview with Divonne Smoyer, Partner, Reed & Smith (July 6, 2015).
387 See Telephone Interview with Nathan Blake, Iowa Assistant Attorney Gen. (June 21, 2016) [hereinafter Blake Interview]; see also Ask.fm Settlement, supra note 88.
388 See, e.g., PointRoll AVC, supra note 154.
389 Blake Interview, supra note 387.
Stronger terms should be coupled with careful compliance checks. Those checks should involve independent audits by third parties that report results directly to states.390 States should impose strong sanctions if audits reveal non-compliance.391 Stronger terms coupled with aggressive compliance would enhance the norm-setting potential of AVCs.392

Another aspect of informal agreements should be assessed: their transparency. AVCs can change practices and policy only if the public finds out about them. If AVCs are covered by non-disclosure agreements, they cannot educate the public. To be sure, there may be costs to proceeding publicly: trust between regulators and entities could be lost.393 Career staff explained that some non-disclosure agreements engendered proactive compliance.394 Concerns about trust should be considered, but with a thumb on the scale in favor of transparency.

Attorneys general should follow the lead of the FTC in not only publicizing agreements, but also frequently weaving them together to show the lessons of those agreements. After a number of consent decrees, the FTC often circles back in blog posts to discuss the significance of recent cases.395 This can help educate the public, established businesses, and startup companies alike. This approach would reinforce the norm-setting work of state attorneys general.

b. Formal Adjudication

A broader critique relates to state enforcers’ preference for informal agreements over formal adjudication. To be sure, there are states with active

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390 Informal agreements sometimes secure opportunities for state oversight. Multistate AVCs often require that states be allowed to inspect privacy programs. See, e.g., PointRoll AVC, supra note 154; see also In re Maloney Props., Inc., Civ. No. 12-112 (Mass. Sup. Ct. Mar. 21, 2012) (order granting assurance of discontinuance/assurance of voluntary compliance). Others require third-party audits but say nothing about reporting them to states. See, e.g., Health Net AVC, supra note 226 (requiring a third-party audit by security professionals after the loss of an unencrypted hard drive with consumer data).

391 In the 1960s, the FTC was strongly criticized for its overreliance on informal agreements that had little bite and no oversight. Report of the ABA Comm’n, supra note 340. An ABA commission made recommendations along the lines I suggested above, and the FTC’s current approach focuses on seeking cease and desist orders and filing formal actions. See Solove & Hartzog, New Common Law of Privacy, supra note 2.


393 See Richards & Hartzog, supra note 367.

394 Ruckman Interview, supra note 41.

privacy litigation dockets.\textsuperscript{396} Some states display a preference for litigation over informal agreements.\textsuperscript{397} But, as responses to FOIA requests show, the better part of state investigations end in informal agreements.

The preference for informal agreements has everything to do with the fact that states have limited resources. Within those constraints, state enforcers should consider the important role that formal adjudication plays. Pleadings and other litigation documents educate the public.\textsuperscript{398} Complaints articulate a state’s theory of why an entity’s actions constitute an unfair or deceptive act or practice.

To the extent that states have resources, they ought to think about the expressive and coercive advantages of formal proceedings. The FTC’s primary tool of enforcement is litigation, which usually ends in consent decrees. As Daniel Solove and Woodrow Hartzog have shown, those consent decrees are greeted with public fanfare and close inspection by regulated entities.\textsuperscript{399}

To be sure, the FTC has been subject to criticism for its reliance on consent decrees. Critics have attacked the substance of those agreements, contending that they pay insufficient attention to cost-benefit analysis.\textsuperscript{400} During his tenure, FTC Commissioner Joshua Wright argued that the agency needed to engage in more rigorous economic analysis in its section 5 cases.\textsuperscript{401} In co-authored scholarship, then-Professor Wright argued that adjudications of private claims under state UDAP laws showed that those acts were not truly “Little-FTC Acts” because they failed to engage in rigorous cost-benefit analysis.\textsuperscript{402}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{396} Texas is the most actively engaged in individual enforcement activities. The FOIA response from the Texas Attorney General’s Office produced eleven AVCs, seven settlement agreements, three judgments, and one ongoing case over the past five years. Two of the Office’s cases proceeded through the stages of litigation. Texas has taken the lead in several multistate actions.
\item \textsuperscript{397} Some states eschew informal agreements (or AVCs) in favor of litigation. This is true of California’s privacy cases. Based on the response to a FOIA request, in the past five years, the Attorney General’s Office filed five lawsuits, all ending in settlement agreements; no AVCs were filed. Similarly, the FOIA response from Massachusetts indicated that the Attorney General’s Office entered into two AVCs and seven consent judgments in the past five years. California and Massachusetts are actively involved in multistate investigations.
\item \textsuperscript{398} See Citron, supra note 170 (exploring the powerful expressive role of law).
\item \textsuperscript{399} See Solove & Hartzog, \textit{New Common Law of Privacy}, supra note 2, at 607.
\item \textsuperscript{401} \textit{Id.} Commissioner Wright dissented from the agency’s policy reports on Data Brokers and the Internet of Things on the grounds that they lacked economic analysis of the privacy issues.\textit{Id.}
\item \textsuperscript{402} Henry N. Butler & Joshua D. Wright, \textit{Are State Consumer Protection Acts Really Little-FTC Acts?}, 63 FLA. L. REV. 163 (2011) (finding that successful private suits under state UDAP laws would not have been successful under section 5, which does not allow private rights of action). Private claims assessed by Butler and Wright did not focus on privacy or data security issues. If they had, courts would have likely dismissed them on the grounds that plaintiffs failed to show cognizable harm. See Solove & Citron, \textit{supra} note 332.
\end{enumerate}
\end{footnotesize}
Yet, as Ryan Calo thoughtfully shows, privacy protections embedded in the FTC’s privacy jurisprudence support market mechanisms.403 The FTC’s section 5 cases addressing inadequate data security and privacy violations stem from its attention to the market benefits of privacy and its engagement in cost-benefit analysis.404 This accords with interviews with career staff and state attorneys general: cost-benefit analysis is crucial to state enforcers when considering whether to begin an investigation.405 Both the market benefits of innovation and privacy should be considered, as it seems they are for federal and state enforcers.

c. Closing Letters

The FTC has issued closing letters, which explain why it has dropped an investigation. Closing letters explain why the agency thought a company’s practices met the law’s requirements. Attorneys general do not issue closing letters or advisory opinions on privacy and data security issues, but should they? Might a closing letter or advisory opinion signal and solidify norms by identifying activity that falls within the bounds of the law?

Career staff have expressed skepticism about the idea. Of advisory opinions, Massachusetts Assistant AG Sara Cable remarked:

> It could put the AG in a tight spot if [it] put out an advisory opinion and it goes stale. The office could put out an opinion and then come to realize it did not have a full grasp on things. The landscape shifts so quickly. Also, there may be a disincentive to do an advisory opinion because it could weaken the office’s enforcement posture.406

State attorneys general and career staff might understand their legislative advocacy as akin to closing letters or rulemakings. Recent legislation, from bans on employer access to employees’ social media to limits on the use of student data for marketing, addresses practices that are unfair and deceptive. Typically, violations of those laws constitute per se violations of UDAP laws. If understood in that light, state attorneys general might reconsider the usefulness of closing letters or advisory opinions.

d. Thicker Norms and Blind Spots

State attorneys general should continue to press for thicker privacy norms to address emerging challenges. As pressures mount to ensure that U.S. data practices are adequate in the eyes of European authorities, state

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404 See id.
405 See, e.g., Cable Interview, supra note 59; Fitzsimmons Interview, supra note 5; Kriger Interview, supra note 38. To be sure, when UDAP laws do not have an explicit harm requirement, offices have more flexibility to think about cases where the privacy harm is more intangible but no less real. Cable Interview, supra note 59; Kriger Interview, supra note 38.
406 Cable Interview, supra note 59.
enforcers should continue to work on areas of convergence to enhance trust and facilitate trade.

State enforcers should continue to address new frontiers for privacy protection. There are shadowy data practices in need of oversight. Certain uses of Big Data should be on the agendas of state attorneys general. For instance, behavioral-scoring algorithms rate consumers’ likelihood to engage in risk-taking activities, to underperform on the job, or to develop mental illnesses. Some of those uses of Big Data may fall outside the domain of FCRA or anti-discrimination laws. Attorneys general should investigate unfair and deceptive uses of scoring algorithms given their potential to further marginalize vulnerable populations. Because use restrictions are hotly contested, the FTC’s privacy jurisprudence has not addressed them. Attorneys general should continue their role as pioneers to curtail certain uses of scoring products.

The data brokerage industry similarly deserves the scrutiny of state enforcers. Data brokers “amass digital dossiers on individuals that include incomplete and misleading data, selling them to potential employers,” insurers, and landlords. In most instances, consumers have no idea that such dossiers have cost them crucial opportunities. Individuals have no leverage to force data brokers to disclose or correct those dossiers. Former FTC Commissioner Julie Brill pressed attorneys general to investigate data brokers under FCRA and state UDAP laws. Attorneys general can go further than the procedural protections of FCRA. Relying on state UDAP laws, state attorneys general should seek stronger restrictions on the data brokerage industry.

Last, there are stalking cellphone apps whose entire enterprise is arguably illegal. Once installed on someone’s phone, stalking apps secretly track everything someone does with a cellphone and upload the activity to a


409 There are offices interested in investigating such practices though their work has yet to be publicly revealed.


site that stalkers can watch in real time.\textsuperscript{413} In previous work, I have called upon state attorneys general to seek civil penalties and injunctive relief against spyware and stalking app providers under state UDAP and wiretap laws.\textsuperscript{414} Attorneys general should devote efforts to updating state wiretap laws to ensure the illegality of the sale of apps designed to secretly intercept communications.\textsuperscript{415}

These are but a few examples of blind spots: privacy-invasive practices that have largely been ignored by enforcers. As this study shows, state attorneys general have been pioneers. They have a variety of tools to forge thicker privacy norms and to address blind spots. As a group, they have more resources than federal agencies.\textsuperscript{416} They should harness their collective power to tackle these problems and to press for thicker protections.

CONCLUSION

State attorneys general have played a critical role in U.S. privacy law, which until now has received scant appreciation and study. Much as Justice Louis Brandeis imagined states as laboratories of the law, offices of state attorneys general have been laboratories of privacy enforcement. Attorneys general have used their broad legal authority and unique local knowledge to address gaps in the law. They have established baseline privacy protections and paved new frontiers for privacy practices. In areas where federal agencies have valuable technical and policy expertise but less manpower, AG offices have been crucial enforcement partners, harmonizing federal norms. AG privacy policymaking will be even more important if federal agencies slow down consumer privacy and data security efforts.

Looking forward, state attorneys general should harness their collective power to press for thicker data protections. They should act more boldly in the face of uses of Big Data and scoring algorithms that disadvantage the vulnerable. This Article hopefully marks the beginning of a more sustained conversation about the privacy policymaking of state attorneys general and the future directions that it can take.

\textsuperscript{413} Id.
\textsuperscript{414} See id.
\textsuperscript{415} Id. at 1274–77 (arguing that state wiretapping laws should be updated to cover the sale and manufacturer of stalking apps and suggesting legislative language to update the law).
Dear FOIA Coordinator:

Under [specific state open records law], I am requesting an opportunity to inspect or obtain information regarding the Attorney General’s efforts related to the collection, use, storage, and/or disclosure of consumers’ personal data.

For the purpose of this request, the phrase “collection, use, storage, and/or disclosure of consumers’ personal data” encompasses various issues, including but not limited to data breaches; data security; data-breach notification; spyware; spam; robocalls or unwanted telephone calls; facial recognition software; privacy policies; sale of consumer data; collection or use of consumers’ personal data without notice and/or consent; and the like.

1. Please provide copies of all pre-investigatory letters your office sent to an entity or person regarding the collection, use, storage, and/or disclosure of consumers’ personal data covering the period of 2010 to the present.

2. Please provide copies of all assurances of voluntary compliance (or assurances of voluntary discontinuance) your office entered into with an entity or person regarding the collection, use, storage, and/or disclosure of consumers’ personal data covering the period of 2010 to the present.

3. Please provide copies of all litigation-related documents (including but not limited to pleadings and settlements) your office filed or entered into with an entity or person regarding the collection, use, storage, and/or disclosure of consumers’ personal data covering the period of 2010 to the present.

4. Please provide copies of all assurances of voluntary compliance (or assurances of voluntary discontinuance) or consent decrees/settlements related to multistate investigations regarding the collection, use, storage, and/or disclosure of consumers’ personal data covering the period of 2010 to the present.

5. Please provide copies of all documents, including best practice guides, issued by your office in which the office gives advice to companies or consumers regarding the collection, use, storage, and/or disclosure of consumers’ personal data covering the period of 2010 to the present.

6. Please provide copies of all documents related to your office’s efforts to propose, lobby for, or support state or federal legislation related to the collection, use, storage, and/or disclosure of consumers’ personal data covering the period of 2010 to the present.

If there are any fees for searching or compiling this information, please inform me in advance. However, I would like to request a waiver of all fees because the disclosure of the requested information is in the public interest, is made in connection with a scholarly project, and will contribute significantly to the public’s understanding of your state’s interest in consumer protection. My scholarship focuses on information privacy law. This request is made in connection with research focusing on the privacy policymaking of state attorneys general. This information is not being sought for commercial purposes.
Thank you for considering and responding to this request. I look forward to hearing from you. Your open records law requires a response within [ ] business days. If my request will take longer, please contact me with information about when I might expect copies or the ability to inspect the records.

If you deny any or all of these records, please cite each specific exemption you feel justifies the refusal to release the information requested and notify me of your appeal procedures under the law. I can be reached at [email address] or [cell phone number].
## APPENDIX II: FOIA Request and Interview Data

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