

NOTES

CERTIFYING STATUTORY CLASS ACTIONS IN THE SHADOW OF DUE PROCESS

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Recognizing privacy harms, Congress has created a patchwork of statutes that provide private rights of action with statutory damages. These statutes allow individuals to vindicate procedural and substantive violations without having to show actual damages. At the same time, however, through the rise of the Internet, some companies interact with millions of users a day. If the claims are aggregated, these companies rightly fear that an inadvertent violation of one of these statutes will lead them into bankruptcy. And they rightly fear that users with weak claims will seek class certification to coerce them into settlements for the benefit of class counsel alone. However, refusing to certify these classes practically eliminates the substantive rights Congress attempted to protect.

By raising due process concerns at the certification stage, courts can signal to litigants that the liability faced will not be as astronomical as rote multiplication would imply. This could, somewhat, level the playing field in settlement negotiations while maintaining the deterrence effect Congress intended to create. And it allows large, Internet-based companies to decide to go to trial against weak claims without the fear of crippling liability.

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INTRODUCTION

Facebook has about 1.9 billion subscribers, and Google processes more than 3.5 billion searches daily.¹ Both companies offer their services free of charge to their users and make money by recognizing the potential harm from the misuse of the personal information selling both targeted advertising and aggregated user data.² Congress has recognized the potential harm from the misuse of the personal information that Internet-based companies receive in large quantity.³ It has regulated the use of such information through a patchwork of statutes, creating private rights of action⁴ and granting regulatory and enforcement power to various administrative agencies.⁵

When a class action based on the Fair Credit Reporting Act reached the Supreme Court in 2016, eight major Internet-based com-

¹ *Google Search Statistics*, INTERNET LIVE STATS, <http://www.internetlivestats.com/google-search-statistics/> <https://perma.cc/Z6NB-NZUY> (last visited Aug. 5, 2017); *Number of Monthly Active Facebook Users Worldwide as of 4th Quarter 2016 (in Millions)*, STATISTA, <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> (last visited Aug. 5, 2017).

² See Wayne Duggan, *How Does Facebook Make Money?*, YAHOO FINANCE (Feb. 27, 2015), <http://finance.yahoo.com/news/does-facebook-money-134721342.html> (“About \$11.5 billion (92 percent) of the company’s \$12.6 billion in 2014 revenue came from ads.”).

³ See, e.g., Fair Credit Reporting Act of 1970, 15 U.S.C. § 1681(a)(3)–(4) (2012) (“(3) Consumer reporting agencies . . . assembl[e] and evaluat[e] consumer credit and other information on consumers. (4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer’s right to privacy.”).

⁴ See, e.g., Right to Financial Privacy Act, 12 U.S.C. § 3417 (2012); Fair Credit Reporting Act of 1970, 15 U.S.C. § 1681; Children’s Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–6506 (2012); Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2515 (2012); Stored Communications Act, 18 U.S.C. §§ 2701–2712 (2012); Video Privacy Protection Act (1988), 18 U.S.C. § 2710(c)(1) (2012); Telephone Consumer Protection Act (1991), 47 U.S.C. § 227 (2012); Cable Communications Policy Act (1984), 47 U.S.C. § 551 (2012).

⁵ Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 598 (2014) (“At the urging of Congress in 1995, the FTC became involved with consumer privacy issues.”). The Federal Trade Commission, the primary agency that enforces privacy violations, is limited to enforcing privacy policies created by these companies through its power to sanction “deceptive” and “unfair” trade practices. Federal Trade Commission Act (FTCA), 15 U.S.C. § 45(a) (2012); see also Solove & Hartzog, *supra*, at 600. But, compliance with FTC rules has become “largely voluntary.” James P. Nehf, *Shopping for Privacy Online: Consumer Decision-Making Strategies and the Emerging Market for Information Privacy*, 2005 U. ILL. J.L. TECH. & POL’Y 1, 1.

panies argued as *amici curiae* that their “huge volume of daily interactions with millions of different people renders them particularly vulnerable to putative class actions that . . . claim statutory damages for enormous putative classes.”⁶ In other words, because Internet-based companies are able to touch—and to harm—vast numbers of people, the class action device should not be available against them for these statutory violations. What so concerns Facebook, Google, and their ilk is that an aggregated action under one of these statutes can break the bank.⁷

The harm that occurs from such misuse is difficult to quantify.⁸ To ensure enforcement of these substantive policies, Congress added statutory damages to many (but not all) privacy statutes.⁹ The amount of statutory damages ranges by statute, usually without the need to show actual damages: They can apply per violation,¹⁰ per user,¹¹ or even per day of violation.¹² In some statutes, Congress requires actual damages but sets a statutory floor.¹³ These statutory damages, when aggregated, can create enormous liability, deterring actions by Internet-based companies that endanger privacy, threatening to put them out of business, and providing over-compensation for plaintiffs. Facebook and Google argue that liability of that magnitude is simply

⁶ Brief for eBay, Inc. et al. as Amici Curiae Supporting Petitioner at 14, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339).

⁷ For example, in 2015 Facebook had \$49.4 billion in total assets. FACEBOOK, INC., ANNUAL REPORT (Form 10-K) 30, 56 (Jan. 28, 2016). If Facebook were found liable under the Electronic Communications Privacy Act to a class comprising all its users, it would face statutory damages between fifty and five hundred dollars per user. 18 U.S.C. § 2520(c)(1)(A). Even if a court assessed the damages at the low end of the range, Facebook would be on the hook for approximately \$95 billion—almost double its current assets. See STATISTA, *supra* note 1. Fifty dollars multiplied by 1.9 billion subscribers equals \$95 billion, almost two times the \$49.4 billion Facebook had in total assets in 2015.

⁸ See *In re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 324–27 (E.D.N.Y. 2005) (dismissing a suit alleging the airline shared passengers’ personal information because “plaintiffs failed to proffer any . . . form of damages that they would seek if given the opportunity to amend the complaint”).

⁹ See, e.g., Fair Credit Reporting Act, 15 U.S.C. § 1681o (2012) (allowing only an award of actual damages for negligent conduct).

¹⁰ See, e.g., Stored Communications Act, 18 U.S.C. § 2707(c) (2012) (providing a floor of \$1000 per violation of the act).

¹¹ See, e.g., Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2520(c)(1)(A) (2012) (providing statutory damages of not less than \$50 and not more than \$500 per user).

¹² See, e.g., Cable Communications Policy Act of 1984, Pub. L. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 47 U.S.C.) (providing statutory damages of \$100 for each day of violation or \$1000, whichever is higher).

¹³ See, e.g., 18 U.S.C. § 2707(c) (requiring a showing of “actual damages” but providing a floor of \$1000 per violation of the act); see also *Van Alstyne v. Elec. Scriptorium, Ltd.*, 560 F.3d 199, 205 (4th Cir. 2009) (holding that the Stored Communications Act requires a showing of actual damages to permit an award of statutory damages).

too much: They are too valuable a service, provided free-of-charge,¹⁴ to face such stiff penalties.¹⁵ If the Supreme Court took these arguments to their logical extremes, however, it could gut consumer and privacy laws as currently formulated.¹⁶

¹⁴ Nothing is free. Advertising revenue based on targeted marketing is very lucrative. Jawad Kahn, *How to Create Profitable Facebook Ads in Your Niche Without Going Broke and Why People Love Cats*, NICHEHACKS (June 26, 2017), <http://nichehacks.com/niche-facebook-ad-targeting/>. Google and Facebook will always try to harness the amount of data they receive for profit, and their users should know that. The question is whether their users owe them unbridled use of that data as a “fee” for their service and what the limits are, if any. Defining these limits is far beyond the scope of this Note, which analyzes statutory limits already set by Congress.

¹⁵ Brief for eBay, Inc., *supra* note 6. The Supreme Court has seemingly given companies a way to avoid this problem. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (holding that the “effective vindication” doctrine did not exempt mandatory arbitration and class waiver agreements from the Federal Arbitration Act’s reach even when they effectively make vindication of a statutory right impossible); *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011) (holding that the Federal Arbitration Act preempted state laws that struck down consumer contract provisions providing for mandatory arbitration and waiving class treatment). Many Internet-based companies have taken up the Supreme Court’s suggestion and added binding arbitration and class waiver clauses into their terms of service. See, e.g., *eBay User Agreement*, EBAY (Aug. 1, 2017), <http://pages.ebay.com/help/policies/user-agreement.html>; *Netflix Terms of Use*, NETFLIX § 15 (Aug. 1, 2017), <https://help.netflix.com/legal/termsofuse>; *Spotify Terms and Conditions*, SPOTIFY § 24.2–3 (Nov. 1, 2016), <https://www.spotify.com/uk/legal/end-user-agreement/plain/>. However, Facebook, Google, and several other major Internet-based companies have not done so, choosing instead to rely solely on a choice-of-forum clause. See, e.g., *Statement of Rights and Responsibilities*, FACEBOOK (Jan. 30, 2015), <https://www.facebook.com/terms/>; *Google Terms of Service*, GOOGLE (Apr. 14, 2014), <https://www.google.com/policies/terms/>; *User Agreement*, LINKEDIN (June 7, 2017), <https://www.linkedin.com/legal/preview/user-agreement>; *Twitter Terms of Service*, TWITTER (Sept. 30, 2016), <https://twitter.com/tos?lang=EN>. It seems that, for Facebook at least, these companies do not have binding arbitration clauses for public relations reasons. See Greg Beck, *Facebook Dumps Binding Mandatory Arbitration*, CONSUMER LAW & POLICY BLOG (Feb. 26, 2009, 6:33 PM), <http://pubcit.typepad.com/clpblog/2009/02/facebook-dumps-binding-mandatory-arbitration.html> (describing the immediate reverse-course Facebook took after heavy online blow back to its addition of a binding arbitration clause to its terms of service in 2008).

¹⁶ See Nathan Newman, *Google, eBay, Facebook and Yahoo! Team Up to Gut Consumer and Privacy Laws*, HUFFINGTON POST (Apr. 27, 2015), http://www.huffingtonpost.com/nathan-newman/google-ebay-amazon-and-yahoo_b_7153408.html (stating that “critical laws meant to protect user privacy” will become “nearly unenforceable” if the Supreme Court overturns the Ninth Circuit decisions requiring no specific demonstration of harm). Some have argued that the Roberts Court is on a mission to do just that. See Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 828 (2013) (suggesting that “several Justices are determined to cut back on class actions whenever they can”); Edward A. Purcell, Jr., *From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts*, 162 U. PA. L. REV. 1731, 1741 (2014) (describing a recent decision of the Roberts Court as “doubling down on its effort to defeat class actions”). *Contra* Paul G. Karlsgodt & Dustin M. Dow, *The Practical Approach: How the Roberts Court Has Enhanced Class Action Procedure by Strategically Carving at the Edges*, 48 AKRON L. REV. 883, 884 (2015) (arguing that “the Justices are pruning at the edges, selectively cutting back foliage to ensure the long-term

Statutory damages-based class actions are not the only way to curb privacy harms—user privacy can be protected through the market,¹⁷ through enforcement by the executive branch,¹⁸ or by attorneys general.¹⁹ Some have argued that the Internet has changed the name of the game, making class actions simply inapplicable to the challenges created by the pervasive reach of Internet-based companies.²⁰ But those are policy decisions best left to Congress. Congress has created enforcement schemes that recognize private rights of action, so the availability of these alternative enforcement procedures is no reason to write privacy class actions out of the federal code. Instead, courts should enforce the privacy rights created by Congress.

Even so, Facebook and Google have a point. Since the early 20th century, the Supreme Court has recognized that statutory damages that are “grossly excessive” raise constitutional due process concerns.²¹ Courts today have noted that these privacy statutes may implicate the Due Process Clause if aggregated damages are imposed,²² but have either resolved the issue by denying certification²³ or by delaying review until after class certification.²⁴

viability of the [class-action] procedure”); Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. REV. 971 (Oct. 2017) (arguing that “the plaintiffs’ [class-action] bar has reason for optimism”).

¹⁷ See Nehf, *supra* note 5, at 5 (explaining that studies in behavior economics suggest that consumers highly value privacy and are “likely to take steps to protect their own interests . . . [by] avoiding firms” with weaker privacy policies).

¹⁸ See Solove & Hartzog, *supra* note 5, at 600 (“[M]any privacy lawyers and companies view the FTC as a formidable enforcement power . . .”).

¹⁹ Divonne Smoyer & Aaron Lancaster, *State AGs: The Most Important Regulators in the U.S.?*, THE PRIVACY ADVISOR (Nov. 26, 2013), <https://iapp.org/news/a/state-ags-the-most-important-regulators-in-the-us/> (“Given that we are not likely to see federal preemption of state authority in this area anytime soon—and that the FTC is encouraging state action on data privacy—it remains critical that privacy professionals . . . consider AGs, who are rapidly becoming the most important data privacy regulators around.”).

²⁰ See Jeremy R. McClane, *Class Action in the Age of Twitter: A Dispute Systems Approach*, 19 HARV. NEGOT. L. REV. 213, 213–14, 216 (2014) (arguing that class actions no longer function in the Internet world and that, “[b]y engaging groups at different levels, more democratic and effective mass dispute resolutions can be achieved”).

²¹ See *Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U.S. 86, 111 (1909) (“We can only interfere with such legislation . . . if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law.”) (citing *Coffey v. Harlan Cty.*, 204 U.S. 659 (1907)); see also Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 116–17 (2009).

²² See, e.g., *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 351 (N.D. Ill. 2011) (“Consideration of the financial impact is proper when based on the disproportionality of a damage award that has little relation to the harm actually suffered by the class, and on the due process concerns attended upon such an impact.”) (citing *Parker v. Time Warner Entm’t Co.*, 198 F.R.D. 374, 383–84 (E.D.N.Y. 2001), *vacated*, 331 F.3d 13 (2d Cir. 2003)).

²³ See *id.* at 351.

²⁴ See *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 954 (7th Cir. 2006) (“An award that would be unconstitutionally excessive may be reduced, but constitutional limits are

According to Judge Frank Easterbrook, only after a class has been certified may a judge “evaluate the defendant’s overall conduct and control its total exposure.”²⁵ Professor Sheila Scheuerman counters that potential due process violations must be addressed at the class certification stage, and “[o]nce the due process violation created by an aggregated statutory damages award is acknowledged, class certification should be denied.”²⁶ But, as Judge Easterbrook contends, “forcing everyone to litigate independently—so that constitutional bounds are not tested, because the statute cannot be enforced by more than a handful of victims—has little to recommend it.”²⁷

This Note proposes a middle ground. Potential due process violations should be addressed at the class certification stage, as Professor Scheuerman suggests, but class certification should nonetheless be granted, assuaging Judge Easterbrook’s concerns. This solves two problems: First, by acknowledging, at the class certification stage, potential due process violations that could result if liability were fully imposed and aggregated, courts would lessen the impact of “blackmail” settlements—one of the key concerns raised by Facebook and Google.²⁸ Companies would be on more equal footing in settlement negotiations and would be more willing to litigate against perceived weak claims. Second, it avoids writing congressionally created causes of action out of the federal code.²⁹

This Note proceeds in three parts. Part I describes the contours of privacy harms recognized by Congress in statutes and the three main concerns with aggregating those harms. Part II wades into the Supreme Court’s excessive-damages doctrine and explains how the Due Process Clause limits the potentially ruinous aggregated statutory damages awards that could otherwise result in the Internet age. Part III suggests that federal courts should certify statute-based privacy class actions and explicitly, in the certification order, recognize the limitation on total damages imposed by the Due Process Clause, balancing consumer statutory interests in privacy with the Internet-based economy’s interest in providing free and low-cost Internet services. This approach enforces the statutory schemes created by Congress

best applied after a class has been certified.” (citation omitted) (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)).

²⁵ *Id.* at 954.

²⁶ Scheuerman, *supra* note 21, at 146.

²⁷ *Murray*, 434 F.3d at 954.

²⁸ Brief for eBay, Inc., *supra* note 6, at 20 (“[T]he *in terrorem* effect of the damages exposure often leads to high-dollar settlements, even in the face of strong defenses.”).

²⁹ *Murray*, 434 F.3d at 954 (“While a statute remains on the books, however, it must be enforced rather than subverted.”).

and ensures deterrence, while at the same time partly alleviating fears of “blackmail” settlements based on weak or technical claims.

I PRIVACY CLASS ACTIONS

The Supreme Court and Congress have recognized several types of privacy harms, ranging from those with direct ties to common law harms to more modern notions of privacy arising out of the growth of the Internet. These privacy harms are difficult to quantify. Using a traditional law-and-economic analysis of tort law, one would ask what a consumer would be willing to pay to ensure that a company like Google did not share their personally identifiable information. The answer is different for every person and for every type of information. It is less invasive to tie a zip code to your name than it is to link your social security number or entire credit card number to your name.³⁰ Also, it is nearly impossible to calculate actual damages for most privacy harms, such as the following: “My girlfriend broke up with me because a website erroneously reported that I was married,” or even: “I may have trouble finding a girlfriend because a website erroneously reported that I was married.”³¹ Love, after all, is unquantifiable³² but nevertheless—I contend—concrete.

This problem led Congress to create several statutory damage regimes.³³ Part I.A. describes two emblematic privacy statutes: the Wiretap Act, as amended by the Electronic Communications Privacy Act (“ECPA”)³⁴ and the Video Privacy Protection Act of 1988 (“VPPA”).³⁵ Part I.B. surveys a recent class action involving major Internet-based companies to describe the kinds of actions that are typ-

³⁰ Compare *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016) (“It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.”), with *Slip Showing? Federal Law Requires All Businesses to Truncate Credit Card Information on Receipts*, FED. TRADE COMM’N (May 2007), <https://www.ftc.gov/tips-advice/business-center/guidance/slip-showing-federal-law-requires-all-businesses-truncate> (“Credit card numbers on sales receipts are a ‘golden ticket’ for fraudsters and identity thieves.”).

³¹ In *Spokeo, Inc. v. Robins*, the plaintiff alleged that Spokeo.com listed him as married when he is in fact single. 136 S. Ct. at 1546 (“His profile, he asserts, states that he is married, has children, is in his 50’s, has a job, is relatively affluent, and holds a graduate degree. According to Robins’s complaint, all of this information is incorrect.” (citation omitted)). Spokeo advertises its service to be used in this precise way. See *Is He Cheating on You?*, SPOKEO, <https://www.spokeo.com/is-he-cheating> (last visited Aug. 15, 2017) (posting a “customer testimonial” that reads: “Thanks to Spokeo, I found out that I was dating a married man and it broke my heart. This website was very helpful indeed.”).

³² See THE BEATLES, CAN’T BUY ME LOVE (Capitol Records 1964).

³³ See *supra* note 4.

³⁴ 18 U.S.C. § 2510 (2012).

³⁵ 18 U.S.C. § 2710 (2012).

ical of privacy violations. Part I.C. then describes the main grievances Internet-based companies have with these statutory-based class actions.

A. Emblematic Statutes

The Electronic Communications Privacy Act amended the Wiretap Act, and they are used interchangeably in the case law.³⁶ To prove a violation of the act, a plaintiff must show that the defendant “(1) intentionally (2) intercepted, endeavored to intercept or procured another person to intercept or endeavor to intercept (3) the contents of (4) an electronic communication, (5) using a device.”³⁷ The express purpose of the Wiretap Act is “to afford privacy protection to electronic communication.”³⁸ This act covers, for example, all emails sent over Google’s Gmail server as well as every private message shared on Facebook.³⁹

The Video Privacy Protection Act⁴⁰ has a fascinating origin story. After a Washington, D.C., reporter discovered that he shopped at the same video rental store as Robert Bork—then nominee to the Supreme Court—he requested Judge Bork’s rental history, which the store promptly handed over without fuss.⁴¹ The reporter published a description of Judge Bork’s (quite tame)⁴² viewing habits,⁴³ and Congress swiftly acted.⁴⁴ In less than a year, it became illegal to share

³⁶ See, e.g., *Blumofe v. Pharmatrak, Inc.*, 329 F.3d 9, 18 (1st Cir. 2003) (explaining that the ECPA amended the Wiretap Act and then proceeding to use the Wiretap Act throughout opinion).

³⁷ *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125, 135 (3d Cir. 2015) (quoting *Blumofe v. Pharmatrak, Inc.*, 329 F.3d 9, 18 (1st Cir. 2003)).

³⁸ *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 874 (9th Cir. 2002).

³⁹ See, e.g., *Matera v. Google Inc.*, No. 15-cv-04062-LHK, 2016 WL 5339806, at *2 (N.D. Cal. Sept. 23, 2016) (describing a class action against Google for reading the email of its Gmail users—and non-users who communicated with Gmail users—without their knowledge or permission for targeted advertising).

⁴⁰ 18 U.S.C. § 2710.

⁴¹ See Michael Dolan, *Borking Around*, NEW REPUBLIC (Dec. 20, 2012), <https://newrepublic.com/article/111331/robert-bork-dead-video-rental-records-story-sparked-privacy-laws>.

⁴² See Peter Maass, *Was Petraeus Borked?*, NEW YORKER (Nov. 14, 2012), <http://www.newyorker.com/news/news-desk/was-petraeus-borked> (“There were a hundred and forty-six rentals in less than two years, including lots of Hitchcock and Bond, as well as movies featuring Meryl Streep and Bette Midler. As Dolan wrote, ‘Despite what all you pervs were hoping, there’s not an X in the bunch, and hardly an R.’”).

⁴³ *Id.* (describing the congressional action as “unusually rapid” and speculating that it “was perhaps aimed at protecting the privacy of Legislator X as much as Citizen Y”).

⁴⁴ *Id.*

video rental or purchase records⁴⁵ or even to store those records for too long.⁴⁶ The VPPA provides a private cause of action to any consumer of a “video tape service provider” that “knowingly discloses, to any person, personally identifiable information” about the consumer.⁴⁷

To put flesh on the bones of these statutes, the next section traces a recent class action alleging violations of the ECPA and the VPPA. I also use this example to introduce a major contention Internet-based companies have regarding these statutes: These so-called “no-injury” class actions force settlements that only benefit plaintiffs’ lawyers.⁴⁸

B. Emblematic Case: Facebook’s Beacon

Facebook is a social networking site that enables users to share their daily lives with their friends and the world at large. In Facebook’s world, a “friend” is somebody who has full access to your profile. If you write a “status update” complaining about your wife, Facebook will show the message to your friends on their “News Feed.” If you “like” somebody else’s post (or an artist or a corporation), that information will be conveyed to your friends as well. Depending on your chosen privacy settings, all this information will be provided to “friends of friends,” to the entirety of Facebook, or to anyone with Internet access.⁴⁹

Your chosen privacy settings often do not shield you from new, innovative ways Facebook develops to sell advertising. In November 2007, Facebook debuted Beacon, which enabled third-party sites to post notifications on a Facebook user’s profile without their affirma-

⁴⁵ 18 U.S.C. § 2710(b)(1) (“A video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person for the relief provided in subsection (d).”).

⁴⁶ *Id.* § 2710(e) (“A person subject to this section shall destroy personally identifiable information as soon as practicable . . .”). Some circuits have held that there are no statutory damages available for a violation of this provision because the statutory damages section appears in the statute as subsection (c), and therefore can only apply to violations of subsection (b) and cannot be applied to a violation of subsection (e). *See, e.g.,* *Sterk v. Redbox Automated Retail, L.L.C.*, 672 F.3d 535, 538 (7th Cir. 2012); *Rodriguez v. Sony Comput. Entm’t Am., L.L.C.*, 801 F.3d 1045, 1050–51 (9th Cir. 2015). Courts, however, retain the equitable power to provide injunctive relief. *Sterk*, 672 F.3d at 539 (citing *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979)).

⁴⁷ 18 U.S.C. § 2710(b)(1).

⁴⁸ *See generally* Part I.C.1 (discussing costs and benefits to Internet companies and consumers of no-injury class actions forcing settlements).

⁴⁹ *Privacy Basics: Reactions & Comments*, FACEBOOK, <https://www.facebook.com/about/basics/manage-your-privacy/my-likes-and-comments> (last visited Oct. 30, 2017) (click through pages using the right arrow button) (explaining that it is the author of a post who has control over who can see likes and comments on that post, rather than the user who liked or commented on the post).

tive permission.⁵⁰ For example, if you were listening to music on Spotify, a music streaming service, on the day Beacon was rolled out, every song you listened to was blasted to your friends' (and friends of friends') News Feeds. If you rented a video on Blockbuster.com, everyone was told which movie you watched, and as one judge pointed out, some of those Blockbuster disclosures "doubtless included erotica."⁵¹

Upon its launch, Beacon included an opt-out mechanism, but the mechanism was merely "a transient pop-up window[, which] treated inaction as consent, and there was no way to disable Beacon prospectively except on a site-by-site basis as each site tried to send notifications" to your friends.⁵² You had to vigilantly click "deny" every time you took an action anywhere across the Internet. At first, Facebook refused to offer a universal opt-out service, despite an online petition which garnered signatures from more than 50,000 Facebook members in ten days.⁵³ In addition, Facebook suggested, misleadingly, that they only collected information about your Internet habits outside of Facebook if you remained logged in to Facebook as you browsed.⁵⁴ In fact, even if you had logged out of Facebook, the company continued to collect data on your browsing and purchase activity. They collected this data even if you exercised the transient opt-out option on every site you visited.⁵⁵ Later, Facebook decided to allow users to fully opt-out of Beacon,⁵⁶ and eventually discontinued Beacon altogether.⁵⁷

⁵⁰ See Louise Story & Brad Stone, *Facebook Retreats on Online Tracking*, N.Y. TIMES, Nov. 30, 2007, at C1.

⁵¹ *Lane v. Facebook, Inc.*, 696 F.3d 811, 827 (9th Cir. 2012) (Kleinfeld, J., dissenting).

⁵² James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1148 (2009).

⁵³ Story & Stone, *supra* note 50.

⁵⁴ See Press Release, Facebook, Inc., *Leading Websites Offer Facebook Beacon for Social Distribution* (Nov. 6, 2007), <http://web.archive.org/web/20080214193303/http://www.facebook.com/press/releases.php?p=9166> (suggesting that Beacon is only engaged "[w]hen users who are logged into Facebook visit a participating site").

⁵⁵ See Stefan Berteau, *Facebook's Misrepresentation of Beacon's Threat to Privacy: Tracking Users Who Opt Out or Are Not Logged In*, RES. BLOG (Nov. 29, 2007, 11:39 PM), <http://web.archive.org/web/20071202063213/http://community.ca.com/blogs/securityadvisor/archive/2007/11/29/facebook-s-misrepresentation-of-beacon-s-threat-to-privacy-tracking-users-who-opt-out-or-are-not-logged-in.aspx> (discovering that even when Facebook said it was not tracking activity, it really was). This post seems to have been removed from its website. It is still available, however, through the Internet Archive, which preserves web pages by taking images of them at various times. The Internet never forgets. See generally Jeffrey Rosen, *The End of Forgetting*, N.Y. TIMES, July 25, 2010 (Magazine), at 30.

⁵⁶ Betsy Schiffman, *Zuckerberg Caves In, Lets Facebook Users Turn Off Beacon*, WIRED (Dec. 5, 2007, 12:26 PM), <http://www.wired.com/2007/12/zuckerberg-cave/>.

⁵⁷ Juan Carlos Perez, *Facebook Will Shut Down Beacon to Settle Lawsuit*, PCWORLD (Sept. 18, 2009, 10:20 PM), http://www.pcwORLD.com/article/172272/facebook_will_shut_down_beacon_to_settle_lawsuit_html [hereinafter Perez, *Facebook Will Shut Down Beacon*].

This decision was the result of a class action filed against Facebook and its Beacon partners alleging violations of the Electronic Communications Privacy Act and the Video Privacy Protection Act.⁵⁸ One of the named plaintiffs complained that Facebook spoiled a surprise for his wife by posting on her News Feed, “Sean Lane bought 14k White Gold 1/5 ct Diamond Eternity Flower Ring from overstock.com,” without his permission.⁵⁹ This harm is unquantifiable, but its impact is intuitively obvious.

After certification, the parties settled. Facebook had to settle or face billions of dollars in statutory damages.⁶⁰ Facebook would describe this settlement as “blackmail” because users were not required to prove that they were harmed by Facebook.⁶¹ The settlement included injunctive relief—ridding Facebook of the Beacon program—and monetary relief, in the form of a cy pres award to a privacy charity.⁶² Some absent class members objected to the settlement because “class members received *no* money . . . whatsoever and because the cy pres recipient was a new charity in which [Facebook] had an interest.”⁶³ In addition, the agreement “inexplicably permitted

⁵⁸ Complaint at 1, *Lane v. Facebook, Inc.*, No. C 08-03845 RS, 2010 WL 9013059 (N.D. Cal. Mar. 17, 2010). The plaintiffs also alleged state law claims that are not relevant here. *Id.*

⁵⁹ Cohen, *Why the Supreme Court Finally Ended the Facebook Beacon Class-Action Lawsuit*, ADWEEK (Nov. 4, 2013), <http://www.adweek.com/digital/supreme-court-rejects-beacon/>; see also Complaint at 6–7, 29–30, *Lane*, 2010 WL 9013059 (quoting Ellen Nakashima, *Feeling Betrayed, Facebook Users Force Site to Honor Their Privacy*, WASH. POST, Nov. 30, 2007, at A1).

⁶⁰ See *supra* note 7 (explaining how a class action for statutory damages could bankrupt an Internet company of the size and financial position of Facebook).

⁶¹ See *infra* Part I.C.1 (outlining characteristics of blackmail settlements and problems complained of by companies like Facebook).

⁶² The cy pres doctrine originates in trusts and estates law and literally means “[a]s near as (possible).” *Cy-pres*, BLACK’S LAW DICTIONARY (6th ed. 1990) (“The rule of *cy-pres* is a rule for the construction of instruments in equity, by which the intention of the party is carried out *as near as may be*, when it would be impossible or illegal to give it literal effect.”). In some class action settlements, the cy pres doctrine is used to distribute awards to charitable organizations when it is difficult to ascertain who the class members are, when there are unclaimed funds, or when the administrative costs of distribution would be more than the compensation received. Courts require that the charitable organizations have a close nexus to the underlying lawsuit. See, e.g., *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1308 (9th Cir. 1990) (“The district court’s proposal benefits a group far too remote from the plaintiff class. Even where cy pres is considered, it will be rejected when the proposed distribution fails to provide the ‘next best’ distribution.”). For a description of the background of cy pres awards, their use in class actions, and a possible solution that responds to critics, see generally Chris J. Chasin, Comment, *Modernizing Class Action Cy Pres Through Democratic Inputs: A Return to Cy Pres Comme Possible*, 163 U. PA. L. REV. 1463 (2015).

⁶³ Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97, 129–30, 132 (2014).

Facebook ‘to reinstitute [Beacon] under a different name.’⁶⁴ Even so, the district court, with whom the Ninth Circuit agreed, upheld the settlement as “fair, reasonable, adequate, and proper”⁶⁵ Regardless of whether one views the settlement as fair,⁶⁶ Beacon went far beyond the reasonable privacy expectations of Facebook’s users. The class action device pushed Facebook to issue a press release acknowledging that the company had learned “how critical it is to provide extensive user control over how information is shared.”⁶⁷

C. Grievances

Nearly all litigation arising from privacy statutes involves class actions.⁶⁸ Individual litigants have little incentive to pursue an action, and the companies would rather settle a small claim than waste resources in court. Even if the companies could be held accountable to individual users in court, there is no real deterrence unless plaintiffs can sue as a class: A thousand-dollar judgment does not scare Facebook; a thousand dollars multiplied by the number of its users in California may. If the class action is certified, the parties will settle

⁶⁴ *Id.* at 131 (quoting *Lane v. Facebook, Inc.*, 696 F.3d 811, 828 (9th Cir. 2012) (Kleinfeld, J., dissenting)).

⁶⁵ *Lane v. Facebook, Inc.*, No. C 08–03845 RS, 2010 WL 9013059, at *3 (N.D. Cal. Mar. 17, 2010), *aff’d*, 696 F.3d 811 (9th Cir. 2012). *See generally* FED. R. CIV. P. 23(e)(2) (“If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.”).

⁶⁶ *Compare Lane*, 696 F.3d at 826 (holding that the settlement was “fair, adequate, and free from collusion” (internal quotation marks omitted) (quoting *Lane*, 2010 WL 9013059, at *6)), *with Wasserman*, *supra* note 63, at 129–34 (arguing persuasively that it was not).

⁶⁷ *Perez*, *Facebook Will Shut Down Beacon*, *supra* note 57 (quoting Barry Schnitt, Facebook’s Director of Policy Communications). Facebook, however, did not admit liability. Only a few years later, Facebook was enmeshed in another privacy lawsuit over its “Sponsored Stories” feature, which, similarly to Beacon, took users pictures and posts and used them in advertisements without their permission. *See Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939, 940, 942 (N.D. Cal. 2013), *aff’d sub nom.*, *Fraley v. Batman*, 638 F. App’x 594 (9th Cir.), *cert. denied*, 137 S. Ct. 68 (2016); *see also* Jacqui Cheng, *No Opting Out of Facebook Turning Your Check-Ins, Likes into Ads*, WIRED (Jan. 26, 2011, 5:37 PM), <http://www.wired.com/2011/01/facebook-check-ins-likes-ads> (“The effort is eerily similar to parts of the now-defunct Facebook Beacon, but Facebook is now calling them ‘sponsored stories,’ and users won’t be able to opt out of their posts being used to advertise to friends.”).

⁶⁸ The major exceptions to this rule are actions brought by public figures, who often can allege large actual damages. *See, e.g.*, Peter Sterne, *Jury Awards Hulk Hogan \$115 Million as Gawker Looks to Appeal*, POLITICO (Mar. 18, 2016, 8:07 PM), <http://www.politico.com/media/story/2016/03/jury-awards-hulk-hogan-115-million-as-gawker-looks-to-appeal-004433> (reporting the compensatory and punitive damages awarded to Terry Bollea (Hulk Hogan) for a privacy violation). These privacy suits, unlike those for statutory damages, do not require aggregation because they are “positive-value” claims. These cases often rely on common law torts, including defamation and libel. *See, e.g.*, *Professionally v. Media*, 2016 Fla. Cir. LEXIS 4703, at *12 (listing common law causes of actions sought—and won—by Terry Bollea).

because the aggregated, mandatory statutory damages are too large to risk going to trial.⁶⁹

Large privacy class actions can create problems, and Internet-based companies make three main arguments when attempting to prevent class certification. First, certification of large class actions forces defendants to settle even meritless claims because of the potentially business-collapsing liability they face if they go to trial. Second, to these companies, large class actions are often “no-injury” suits, pursued by plaintiffs’ lawyers seeking a payday. Third, aggregation stretches Congress’s intent away from any stable mooring. I consider each of these grievances in turn.

1. *Blackmail Settlements*

As a Hail Mary, defendants often invoke the specter of forced settlements to try and prevent class certification. Judge Richard Posner ardently advanced this argument in *Rhone-Poulenc* to reverse a class certification.⁷⁰ Judge Posner argued that when claims are potentially meritless, certification merely facilitates undeserved settlements.⁷¹ Recent decisions deride this argument as an attempt by defendants to avoid any responsibility for meritorious claims.⁷² These skeptics point out that blackmail settlements are already considered in the structure of Rule 23, because the 1998 revision “created a pressure relief valve” by allowing defendants to appeal certification orders precisely to avoid these settlements.⁷³

Even so, Internet companies have a compelling complaint. They face colossal statutory damages due to the sheer number of their

⁶⁹ See Scheuerman, *supra* note 21, at 149 n.350 (2009) (citing Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1875 (2006) (“Whatever their partisan stakes in a given litigation, all sides recognize that the overwhelming majority of actions certified to proceed on a class-wide basis (and not otherwise resolved by dispositive motion) result in settlements.”)).

⁷⁰ See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299–1300 (7th Cir. 1995). This argument, along with others, was so persuasive to Judge Posner and his panel that they reversed the certification decision by granting a writ of mandamus, which is only issued in “extraordinary cases.” *Id.* at 1294, 1299. At the time, there was no procedure to appeal from a certification order except through an ordinary writ; now, the Federal Rules of Civil Procedure allow interlocutory appeals of class certification orders. See FED. R. CIV. P. 23(f).

⁷¹ See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1299–300.

⁷² See, e.g., *Klay v. Humana, Inc.*, 382 F.3d 1241, 1275 (11th Cir. 2004) (arguing that “mere pressure to settle is not a sufficient reason” to not certify a class).

⁷³ Charles Silver, “*We’re Scared to Death*”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1358 (2003); see also *Klay*, 382 F.3d at 1275 (acknowledging that “settlement pressures . . . were the main reason behind the enactment of Rule 23(f),” which allows for interlocutory appeals).

users.⁷⁴ Because of the difficulty in quantifying damages for privacy harms and because of the steep statutory damages available when a class is certified, most statutory damages-based litigation ends in settlement.⁷⁵ Only 2.5% of “no-injury class action[s]” between 2005 and 2015 “were resolved at trial; the rest were resolved by settlement.”⁷⁶

Professor Joanna Shepherd argues that these settlements are not efficient because they “impose significant costs on businesses,” which pass on those costs “to consumers through increased prices, fewer innovations, and lower product quality.”⁷⁷ Because defendants are risk-averse, threat of class action “motivates them to settle claims for more than their expected value, often inducing a quick but expensive settlement.”⁷⁸ Therefore, she concludes, “forcing compensation or deterrence through litigation produces little, if any, tangible benefit to consumers.”⁷⁹

This analysis underplays the value of deterrence in preventing privacy harms. The Facebook Beacon litigation serves as a useful frame. When consumers complained about Beacon, Facebook did make superficial changes.⁸⁰ However, it was only after a class was certified that Facebook abandoned Beacon and announced that it had

⁷⁴ See *supra* note 7 and accompanying text.

⁷⁵ See Jason Scott Johnston, *High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions Under Federal Consumer Protection Statutes*, 2017 COLUM. BUS. L. REV. 1, 4–5 (2017) (finding that over half of consumer class action plaintiffs rely on statutory damages provisions rather than allegations that they were harmed, and over 80% of filed consumer class actions end in settlement); *cf.* Solove & Hartzog, *supra* note 5, at 585 (“Despite over fifteen years of FTC enforcement, there are hardly any judicial decisions to show for it. The cases have nearly all resulted in settlement agreements . . . [to which] companies look to . . . guide their decisions regarding privacy practices.”).

⁷⁶ Shepherd, *supra* note 48, at 1–2. Professor Shepherd classified court documents found on WestLaw and Lexis based on “standards suggested by the defendants and amici” in *Spokeo*. *Id.* at 1. She analyzed cases in which one of the following four criteria were satisfied:

- (1) If the plaintiffs suffered no actual or imminent concrete harm giving rise to an injury-in-fact;
- (2) If the only harm was a technical statutory violation;
- (3) If any economic loss was negligible or infinitesimal; or
- (4) If the sought recovery was typically unrelated to compensating plaintiffs for economic or other harm.

Id.

⁷⁷ *Id.* at 23.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See Juan Carlos Perez, *Facebook’s Beacon More Intrusive than Previously Thought*, PCWORLD (Nov. 30, 2007), <http://www.pcworld.com/article/140182/article.html> (After the initial public outcry, “Facebook tweaked Beacon to make its workings more explicit to Facebook users and to make it easier to nix a broadcast message and opt out of having activities tracked on specific Web sites. Facebook didn’t go all the way to providing a general opt-out option for the entire Beacon program, as some had hoped.”).

learned a lesson. After the settlement, Facebook’s Director of Policy Communications stated: “We learned a great deal from the Beacon experience. For one, it was underscored how critical it is to provide extensive user control over how information is shared. We also learned how to effectively communicate changes that we make to the user experience.”⁸¹

But the Beacon litigation involved a strong claim. Facebook’s actions were properly deterred by the class certification and the settlement ended its practice. However, blackmail settlements are more likely when weak claims are litigated against the backdrop of high statutory damages. Those settlements would be out of proportion with the deterrence effect that the underlying claim requires. Without some limit on statutory damages, large settlements for weak claims will incentivize even more litigation of weak claims for large settlements, and even further disproportional deterrence.

2. Congressional Intent

Opponents also argue that Congress could never have intended statutory damages to be vindicated through aggregate litigation.⁸² Congress, they argue, created private rights of action as a different litigation incentive for *individual* plaintiffs to pursue.⁸³

At first blush, however, class actions seem perfectly suited to these claims. Congress could not have expected individual litigants to march into federal court seeking one hundred dollars in statutory damages—the filing fees alone would be prohibitive.⁸⁴ These are quintessential “negative-value” cases that call for aggregate treatment.⁸⁵ In addition, allowing aggregate treatment helps achieve one of Rule 23’s

⁸¹ Perez, *Facebook Will Shut Down Beacon*, *supra* note 57.

⁸² See Scheuerman, *supra* note 21, at 111–15 (“Combining the litigation incentives of statutory damages and the class action in one suit . . . creates the potential for absurd liability and over-deterrence.”).

⁸³ See *id.* at 110–11 (“[S]tatutory damages are intended to make individual litigation marketable.”); see also *id.* at 107–08 (“[W]here a statute provides statutory damages as well as attorneys’ fees, the class action is unnecessary to render the suit marketable.”).

⁸⁴ Currently, the filing fee for opening a civil action in federal court is \$400. Fee Schedule, U.S. DIST. COURT, http://www.flsd.uscourts.gov/?page_id=2396 (last visited Sept. 15, 2017).

⁸⁵ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.” (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))); see David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and “Indivisible” Remedies*, 79 GEO. WASH. L. REV. 542, 546–47 (2011) (defining “‘small-stakes’ or ‘negative-value’ cases” as “cases in which no class member has an incentive to bring a case on his or her own”).

important goals: efficiency in the judicial system.⁸⁶ Rule 23(b)(3), which provides for opt-out classes, strives to preserve judicial resources by adjudicating similar claims in one go.

Simple statutory interpretation principles also refute this congressional-intent argument. Congress knows how to limit aggregate litigation or aggregate damages and has often chosen not to do so.⁸⁷ For example, in the Truth in Lending Act and in the Fair Debt Collection Practices Act—subsections of the Consumer Credit Protection Act (“CCPA”)—Congress limited aggregate damages to the lesser of a set dollar amount or one percent of the net worth of the creditor or debt collector, respectively.⁸⁸ In fact, there are seven subchapters of the CCPA, and only the Fair Credit Reporting Act (“FCRA”) does not limit the amount of statutory damages in an aggregate lawsuit.⁸⁹ The only conclusion is that Congress intended to allow aggregated damages for FCRA violations and not its six sister subchapters.

Professor Scheuerman contends that “[a]ggregating statutory damages warps the purpose of both statutory damages and class actions.”⁹⁰ Her argument is premised on the underlying purpose of both class actions and statutory damages: “encouraging litigation by offsetting disincentives to suit where the alleged wrongdoing involves nominal financial harm.”⁹¹ She concludes, therefore, that Congress could not have meant to create both incentives because it would lead to “absurd liability and over-deterrence.”⁹²

However, without the ability to form class actions—and the incentive for plaintiffs’ lawyers to take these cases—there would be no deterrence from statutory damages at all.⁹³ Congress could have limited damages for aggregated suits, but chose not to do so.

⁸⁶ See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.03(b) cmt. b (AM. LAW INST. 2010) (listing “[e]fficient use of litigation resources as the central purpose of aggregation”).

⁸⁷ See *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 720 (9th Cir. 2010) (“Had Congress been sufficiently concerned about disproportionate damages as a result of FACTA class actions, it would have limited class availability or aggregate damages.”).

⁸⁸ Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(B) (2012) (limiting aggregate damages to “the lesser of \$1,000,000 or 1 per centum of the net worth of the creditor”); Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(2)(B) (2012) (limiting aggregate damages to “the lesser of \$500,000 or 1 per centum of the net worth of the debt collector”).

⁸⁹ See Scheuerman, *supra* note 21, at 115 n.81 (2009).

⁹⁰ *Id.* at 115 (citing Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475, 505 (calling treble damages under the Sherman Act awarded in a class action a “form of double counting”).

⁹¹ *Id.* at 111.

⁹² Scheuerman, *supra* note 21, at 111.

⁹³ See *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006).

3. *No-Injury, Lawyer-Driven Litigation*

One of the defense bar's most prevalent complaints about statutory damages for privacy harms is that many plaintiffs do not seem to have suffered any "compensable" harm. Defendants claim that these actions are inefficient because they merely transfer wealth away from companies providing vital services to plaintiffs' lawyers.⁹⁴ This argument has recently been raised by Internet-based companies during the standing stage of litigation—defendants argue that even if these statutes allow aggregate recovery, many individuals will not have standing to bring the claims in federal court.⁹⁵ The court would therefore have to conduct individual standing determinations of all putative class members, which would defeat the expediency purposes undergirding class actions and fail Rule 23(a)(2) commonality analysis. Ultimately, any putative privacy-claim class would not be certified.

However, the Court has held for decades that procedural rights receive some special solicitude for standing analysis.⁹⁶ In general, Article III standing has three elements: (1) injury in fact: "an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not "conjectural" or "hypothetical"',"⁹⁷ (2) causation: "[T]he injury has to be 'fairly . . . trace[able] to the challenged action of the defendant'";⁹⁸ and (3) redressability: "[I]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"⁹⁹ For procedural rights, a plaintiff does not have to "meet[] all the normal standards for redressability and immediacy."¹⁰⁰ A plaintiff may not, however, "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III."¹⁰¹ In other words, despite the special solicitude, "the procedural right must protect a concrete interest impacted by the alleged conduct. Otherwise, the plaintiff is left with 'a procedural right *in vacuo* . . . insufficient to

⁹⁴ *See id.* ("If the lion's share of the damage award is allocated to litigation expenses or attorneys' fees, the actions inefficiently compensate plaintiffs and instead, benefit primarily the lawyers.")

⁹⁵ *See, e.g.,* Brief for Amici Curiae eBay Inc., Facebook, Inc., et al. in Support of Petitioner at 7–10, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339). If courts accepted this argument, these privacy statutes would effectively be eliminated from the federal code. As federal statutes, any case brought in state courts would be removable. Once removed, the cases would be dismissed for lack of standing.

⁹⁶ *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

⁹⁷ *Id.* at 560 (footnote omitted) (citations omitted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

⁹⁸ *Id.* (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976)).

⁹⁹ *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43).

¹⁰⁰ *Id.* at 572 n.7.

¹⁰¹ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

create Article III standing.’”¹⁰² The Court punted on this exact question in *Spokeo, Inc. v. Robins*,¹⁰³ but if *Spokeo* is interpreted broadly by lower courts, it will probably be considered the death knell for statutory class actions.¹⁰⁴

As amici curiae in *Spokeo*, Internet-based companies argued that litigants suing based on privacy statutes cannot have standing to sue without showing actual damages, regardless of what the statute allows.¹⁰⁵ Justice Alito, writing for the majority, did not agree with their argument completely. He acknowledged that *intangible* harms—like those Congress attempted to recognize in these statutes—would be concrete for Article III purposes, but maintained that “bare procedural violation[s]” cannot satisfy that intangible injury.¹⁰⁶ The Court remanded for a determination of “whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement.”¹⁰⁷

The Court made clear that “a risk of real harm may suffice as concrete and, in these instances, the violation of a procedural right can qualify as injury in fact absent additional harm.”¹⁰⁸ As a counterexample, Justice Alito noted that “[i]t is difficult to imagine” how disseminating an inaccurate zip code, a violation of a procedural right, “could work any concrete harm.”¹⁰⁹ The procedural requirements in

¹⁰² For a recent example of this at Harvard, see *The Supreme Court, 2015 Term—Leading Cases: Spokeo, Inc. v. Robins*, 130 HARV. L. REV. 437, 441–42 (2016) (first citing *Lujan*, 504 U.S. at 573 n.8; and then quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)).

¹⁰³ See Linda S. Mullenix, *Class Actions: A Court Divided*, 43 PREVIEW U.S. SUP. CT. CASES 291, 295 (2016) (“[T]he Court no doubt disappointed in deflecting resolution of the central issue of standing requirements for statutory class litigation In short, the Court punted *Spokeo* to the lower court.”).

¹⁰⁴ See Greg Herbers, *Spokeo Making Its Mark on No-Injury Privacy Class Actions*, LAW360 (Aug. 22, 2016, 10:49 AM), <https://www.law360.com/articles/830221/spokeo-making-its-mark-on-no-injury-privacy-class-actions> (“Data security and privacy claims are particularly susceptible to *Spokeo*’s heightened injury-in-fact analysis because so often the plaintiffs fail to allege any injury in the pleadings Several recent cases demonstrate that . . . *Spokeo* can stop [privacy] lawsuits in their tracks.”).

¹⁰⁵ Brief for eBay, Inc., *supra* note 6, at 7–10.

¹⁰⁶ *Spokeo*, 136 S. Ct. at 1549.

¹⁰⁷ *Id.* at 1550.

¹⁰⁸ *The Supreme Court, 2015 Term—Leading Cases*, *supra* note 102, at 439 (citing *Spokeo*, 136 S. Ct. at 1549).

¹⁰⁹ *Spokeo*, 136 S. Ct. at 1550. This aside about the zip code cannot be taken literally. It is quite easy to imagine, as one commentator has, that disseminating the inaccurate fact that a consumer lives in zip code 90210 could injure their job prospects for middle-class jobs. See Daniel Solove, *When Is a Person Harmed by a Privacy Violation? Thoughts on Spokeo v. Robins*, TEACHPRIVACY (May 17, 2016), <https://www.teachprivacy.com/thoughts-on-spokeo-v-robins/>. Further, it is equally easy to imagine that an inaccurate zip code could change the hiring calculus for an employer wanting to hire someone with a short commute. See *id.*

most privacy statutes, however, should easily meet this standard. For example, the FCRA requires consumer reporting agencies to provide a toll-free number to consumers.¹¹⁰ The toll-free-number requirement was not a mere dalliance of Congress—it is a procedure tied directly to a substantive right. The presence of a toll-free number enables consumers to request their credit reports to check for inaccuracies.¹¹¹ If they find an inaccuracy, they can call the number to request that it be corrected, furthering the policy goal of the statute: “to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer’s right to privacy.”¹¹² The VPPA destruction requirement, in addition, preemptively prevents the dissemination of subscribers’ video watching habits, which is precisely the substantive harm Congress legislated to avoid.¹¹³ These procedural rights are concrete interests—the violation of which gives right to Article III standing. Recognizing a concrete interest in a statutory procedure avoids the certification roadblock that defendants would like to erect.¹¹⁴

* * *

Facebook and Google’s concerns are justified, but the solution should not be no class actions, no litigation, no deterrence, no enforcement of congressional policy. Instead, the rights should be vindicated in a way that balances the interests of these companies with the interests of their users. Google should not go bankrupt because they used an algorithm to provide targeted advertisements based on the content of its users’ emails,¹¹⁵ but Google also should not read those emails.¹¹⁶ Due process already provides such a balance, by ensuring that rights are enforced and policing the bounds of the liability that can be imposed. The next Part explores the contours of the

¹¹⁰ See 15 U.S.C. § 1681j(a)(1)(C)(i) (2012).

¹¹¹ Cf. *id.* § 1681j(a)(1)(A) (mandating credit agencies annually provide all information the subsection requires “upon request of the consumer and without charge to the consumer”).

¹¹² 15 U.S.C. § 1681(a)(4).

¹¹³ See *supra* notes 40–47 and accompanying text.

¹¹⁴ See Rand L. McClellan & Keesha Warmsby, *Concrete and Particularized Part II: What Spokeo May Mean for Class Actions*, CLASS ACTION LAWSUIT DEF. (May 20, 2016), <https://www.classactionlawsuitdefense.com/2016/05/20/concrete-and-particularized-part-ii-what-spokeo-may-mean-for-class-actions/> (“In class-action speak, *Spokeo* may raise the bar on certification, particularly with respect to the predominance and (depending on your Circuit jurisdiction) ascertainability elements of the Rule 23 analysis.”).

¹¹⁵ See, e.g., *Matera v. Google Inc.*, No. 15-cv-04062-LHK, 2016 WL 5339806 (N.D. Cal. Sept. 23, 2016) (describing a class action against Google for reading the email of its Gmail users).

¹¹⁶ See *supra* notes 37–39 and accompanying text.

due process “excessiveness” limit on statutory damages and punitive damages, before proposing a unified analysis of the doctrine.

II

STATUTORY DAMAGES & THE DUE PROCESS CLAUSE

In a series of earth-shattering opinions beginning in the early 1990s, the Supreme Court announced that “excessive” punitive damages awards—awards that, typically, exceed “a single-digit ratio between punitive and compensatory damages”—violate the Due Process Clause.¹¹⁷ The Due Process Clause, the Court held, prohibits the imposition of “a ‘grossly excessive’ punishment on a tortfeasor”¹¹⁸ because “the requirement of proportionality is implicit in the notion of due process.”¹¹⁹ In announcing the due process limits on punitive damages awards, the Court cited directly to a line of early 20th century cases that held the Due Process Clause has something to say about statutory damages.¹²⁰

TXO Production Corp. v. Alliance Resources Corp., one of the first of these punitive-damages cases, produced a fractured court.¹²¹ Justice Stevens, writing for a plurality of three, based his opinion that punitive damages can be reviewed for excessiveness on five early 20th century cases, all of which considered the application of mandatory statutory damages.¹²² Justice Stevens explicitly rejected the respondents’ argument that those cases should be overlooked because they were “*Lochner*-era precedents,” noting that “the Justices who had dissented in the *Lochner* case itself joined those opinions.”¹²³ In dissent, Justice O’Connor, writing for herself and Justice White, agreed precisely with this proposition:

[The plurality does not] deny that our prior decisions have a strong basis in historical practice and the common law. On the contrary, it reaffirms our precedents once again, properly rebuffing respondents’ attempt to denigrate them as *Lochner*-era aberrations. *It is*

¹¹⁷ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003); *see also* *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582–83 (1996); *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 458 (1993) (plurality opinion).

¹¹⁸ *Gore*, 517 U.S. at 562 (citing *TXO*, 509 U.S. at 454).

¹¹⁹ *TXO*, 509 U.S. at 479 (O’Connor, J., dissenting).

¹²⁰ *Id.* at 454–55 (plurality opinion).

¹²¹ *See id.* at 445 (describing a plurality of three justices, which was joined by Justice Kennedy for only two parts; two concurring opinions, which fundamentally disagreed with the plurality in substance; and a dissent joined by three justices, one of whom only as to four subparts).

¹²² *Id.* at 454–55.

¹²³ *Id.* at 455.

*thus common ground that an award may be so excessive as to violate due process.*¹²⁴

Thus, the two dissenting votes in *TXO*, when added to the plurality, created a majority for the notion that any excessive monetary award could violate the Due Process Clause, rooting this idea in cases that considered statutory damages. Justice O'Connor “part[ed] company” with the plurality solely on how to determine whether the award did violate due process, concluding (contrary to the plurality) that the damages were unconstitutional in that case.¹²⁵

Shortly before *TXO*, Justice Brennan, writing for himself and Justice Marshall, who joined the opinion, noted that, “[E]ven where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are ‘grossly excessive.’”¹²⁶

This Part begins by surveying the early decisions that outlined due process concerns created by statutory damages awards. Then, it considers how the Court threaded those holdings into the modern due process review of punitive damages. It concludes with a proposed unified analysis of these two strands of due process doctrine.

A. Original Statutory Damages Cases

The Supreme Court first grappled with the issue of statutory damages and the resulting due process concerns in a series of early 20th century decisions. Their first opportunity was in 1907, when the Court noted in passing that “there are limits beyond which penalties may not go—even in cases where classification is legitimate.”¹²⁷ Despite its use of the word “penalty,” the Court was analyzing a civil statutory damages statute, which set civil damages awards of “fifty dollars for each and every” violation of the statute.¹²⁸

The very next year, the Court reviewed a statutory damages judgment against a Texas oil company for violating two state antitrust laws. *Waters-Pierce Oil Company* was liable for statutory penalties at the rate of \$1500 per day under one statute (decided by the jury based on a statutory range of \$200 to \$5000) and a fixed \$50 per day under the other. In total, the oil company was on the hook for \$1,623,500.

¹²⁴ *Id.* at 479–80 (O'Connor, J., dissenting) (emphasis added).

¹²⁵ *Id.* at 480.

¹²⁶ *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 280–81 (1989) (Brennan, J., concurring) (emphasis added) (quoting *Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U.S. 86, 111 (1909)).

¹²⁷ *Seaboard Air Line Ry. v. Seegers*, 207 U.S. 73, 78 (1907) (noting also that the statute “impose[d] a not exorbitant penalty”).

¹²⁸ *Id.* at 76.

The Court held that they could “only interfere with such legislation . . . if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law.”¹²⁹ In deciding whether this award was too excessive, the Court looked at several factors: (1) the defendant was highly profitable;¹³⁰ (2) the defendant continued its former illegal course of business, despite an earlier judgment against it for the same activity;¹³¹ (3) the defendant was guilty of the violation for a number of years;¹³² and (4) the defendant was transacting business on a large scale.¹³³ Each of these factors focused on the defendant’s conduct or on the defendant’s assets—relevant for deterrence purposes, but not compensation.¹³⁴ Because of these facts, the Court was “not prepared to say, after confirmation of the verdict and judgment in courts of the State, that there was want of due process of law in the penalties assessed.”¹³⁵

Southwest Telegraph & Telephone Co. v. Danaher provided the Court its first opportunity to flex the power it declared in *Seaboard Air* and *Waters-Pierce*. The Arkansas legislature passed a statute that required telephone companies, as publicly funded utilities, to provide full access to telephone service regardless of the consumer.¹³⁶ As a deterrent, the statute allowed an aggrieved citizen to recover “\$100 per day” for each day of discrimination.¹³⁷ The statute also gave leeway for “reasonable regulations” by the telephone company, and Southwest Telegraph created regulations that removed service from consumers who were in arrears.¹³⁸ The plaintiff in *Danaher* filed suit alleging that this regulation was in violation of the statute because it discriminated between users who had paid their bills and those who had not.¹³⁹ The Arkansas Supreme Court agreed and construed the statute to find unreasonableness in distinguishing between subscribers

¹²⁹ *Waters-Pierce Oil*, 212 U.S. at 111 (citing *Coffey v. Harlan County*, 204 U.S. 659 (1907)).

¹³⁰ *Id.* at 111–12 (“The business carried on by the defendant corporation in Texas was very extensive and highly profitable, as the record discloses. The property of the defendant amounted to more than forty millions of dollars, as testified by its president. Its dividends had been as high as seven hundred percent per annum.”).

¹³¹ *Id.* at 112 (“[T]he former course of business was continued, notwithstanding the judgment of ouster in the former case.”).

¹³² *Id.* (“[A]ssuming for this purpose that the defendant was guilty of a violation of the laws over a period of years . . .”).

¹³³ *Id.* (“[T]he defendant . . . transact[ed] business upon so large a scale . . .”).

¹³⁴ See *infra* notes 161–68 and accompanying text (showing that compensatory damages and punitive damages serve different purposes).

¹³⁵ *Waters-Pierce Oil*, 212 U.S. at 112.

¹³⁶ *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 485 (1915).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

who were paid up and those who were not. Therefore, Southwest Telegraph should be liable for statutory damages.¹⁴⁰ The United States Supreme Court reversed, holding that “[i]n these circumstances to inflict upon the company penalties aggregating \$6300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law.”¹⁴¹ The “circumstances” that so concerned the Court implicated deterrence values—the Court focused primarily on the fact that the telephone company acted in good faith because they could not have predicted that the state supreme court would rule their regulation unreasonable later.¹⁴²

The Court next considered whether statutory-based damages violated the Due Process Clause in *St. Louis, Iron Mountain, & Southern Railway Company v. Williams*.¹⁴³ The state court awarded the plaintiffs—“two sisters . . . returning to their home from a school commencement”—seventy-five dollars based on an allegation that the railroad overcharged them by sixty-six cents.¹⁴⁴ In upholding the award, the Court was clear that the question was not whether the damages were disproportionate to the overcharge—the compensatory harm—“but whether, in light of the legislative purpose behind the statutory damages in question, the award was ‘so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable.’”¹⁴⁵ In other words, the due process limit on statutory damages is considered in relation to the conduct of the regulated entity; it is grounded in deterrence principles, not compensatory ones.

The Court made clear that this review was deferential:

[W]hat disposition shall be made of the amounts collected, are merely matters of legislative discretion That [the Due Process Clause] places a limitation upon the power of the States to prescribe penalties for violations of their laws has been fully recognized, but always with the express or tacit qualification that the States still possess a wide latitude of discretion in the matter and that their enactments transcend the limitation only where the penalty prescribed is

¹⁴⁰ *Id.* at 488. The discrimination lasted for sixty-three days, which totaled \$6300 in statutory damages. *Id.* at 487.

¹⁴¹ *Id.* at 491.

¹⁴² *Danaher*, 238 U.S. at 490.

¹⁴³ 251 U.S. 63 (1919).

¹⁴⁴ *Id.* at 64.

¹⁴⁵ Steve D. Larson & Mark A. Friel, *The Legacy of Ratner v. Chemical Bank: Aggregate Statutory Damages in the Class Action Context*, 28 CLASS ACTION REPO. 233, 240 (2007) (quoting *Williams*, 251 U.S. at 67); see also *Williams*, 251 U.S. at 67 (“When the penalty is contrasted with the overcharge possible in any instance it of course seems large, but, as we have said, its validity is not to be tested in that way.”).

so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.¹⁴⁶

The Court considered three factors: (1) the “interests of the public,” (2) the “opportunities for committing the offense,” and (3) the need for “uniform adherence” to the law by the defendant.¹⁴⁷ These deterrence-focused factors weighed against finding a due process violation because the public interest was strong, the defendant had “numberless opportunities” to violate the law again, and it was important for passenger rates to be consistent.¹⁴⁸

B. Tracing Early 20th Century Statutory Damages Cases Through Modern Punitive Damages Cases

Upon the foundation of these few cases, the modern Court constructed its punitive damages due process review. In the mid-1980s, the Court was itching to apply due process limits to punitive damages awards.¹⁴⁹ In *Browning-Ferris Industries of Vermont v. Kelco Disposal*, the Court recognized that “there is some authority” in the early-20th century cases “for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme.” But the Court noted that it had “never addressed the precise question [of] . . . whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit.”¹⁵⁰

The Court reached the question in 1991, holding that due process does indeed limit excessive punitive damages awards.¹⁵¹ Even so, the Court upheld the award in that case, approving Alabama’s “detailed substantive standards it has developed for evaluating punitive awards.”¹⁵² The Court distinguished the Alabama system from the state court processes that were so concerning in those 1980s cases.¹⁵³ Alabama had “elaborated and refined . . . criteria for determining whether a punitive award is reasonably related to the goals of deterrence and retribution,” including:

¹⁴⁶ *Williams*, 251 U.S. at 66–67.

¹⁴⁷ *Id.* at 67.

¹⁴⁸ *Id.*

¹⁴⁹ See *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276–77 (1989) (choosing not to reach the punitive damages question because it was not preserved below); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 76 (1988) (same); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986) (noting the due process in punitive damages issue but not reaching it because the case was decided on an alternate holding).

¹⁵⁰ *Browning-Ferris*, 492 U.S. at 276–77.

¹⁵¹ *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17–18 (1991).

¹⁵² *Id.* at 21.

¹⁵³ *Id.* at 21 n.10.

(a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the 'financial position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.¹⁵⁴

According to the majority, Alabama's "postverdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages."¹⁵⁵ Some of these factors later became the backbone for the substantive due process review of punitive damages.

After its first foray into reviewing punitive damages awards, the Court began reviewing more cases and conducting a more substantive review. In *BMW of North America v. Gore*, the Court struck down an outsized award and outlined three "guideposts" for constitutionally excessive awards: (1) the reprehensibility of the defendant's conduct; (2) the relationship between the actual harm or potential harm to the plaintiff and the damages award; and (3) comparable civil or criminal penalties for the defendant's conduct.¹⁵⁶ The Court also held that conduct performed outside of the state could not be considered in calculating punitive damages, but could be considered in analyzing the reprehensibility of the defendant's conduct.¹⁵⁷ A few years later, the Court applied these guideposts and announced that a ratio higher than a single-digit multiplier is "more likely to comport with due process, while still achieving the State's goals of deterrence and retribution" than a higher award.¹⁵⁸ Further, because the awards are imposed by one of the states, they cannot be imposed for conduct conducted outside of the state that bears little relation to the harm alleged in the

¹⁵⁴ *Id.* at 21–22. These considerations would go on to form the base of due process excessiveness review.

¹⁵⁵ *Id.* at 22.

¹⁵⁶ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–75 (1996). Compare *id.* at 574–75 (describing three "guideposts" for due process review of a punitive damage award), with *St. Louis, Iron Mountain, & S. Ry. Co. v. Williams*, 251 U.S. 63, 65–66 (1919) (describing three guideposts for due process review of a statutory damage award).

¹⁵⁷ *Gore*, 517 U.S. at 572–73.

¹⁵⁸ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

suit.¹⁵⁹ The guideposts for punitive damages are based directly on their deterrence and retributive purposes, that they are awarded by juries, and that they are imposed by the states.

C. A Unified “Excessiveness” Analysis

This Note is not the first to advocate for the use of the Court’s punitive damages guideposts beyond punitive damages,¹⁶⁰ or even to consider those guideposts in relation to statutory damages.¹⁶¹ Some have advocated that they should be used directly in statutory damages cases;¹⁶² others have argued that they are simply inapposite.¹⁶³ This Part argues that due process review of punitive damages and statutory damages is neither two separate strands of analysis nor a single “excessiveness” test. Instead, any liability imposed on a defendant is subject to broad due process constraints: They cannot be “grossly excessive.”¹⁶⁴ However, the meat of this determination—the factors to consider—depends upon the underlying source and purposes of the award itself.¹⁶⁵

Punitive damages, statutory damages, and compensatory damages arise from different sources of law and have different, though sometimes overlapping, purposes. The purpose of an award helps inform the “guideposts” to consider when determining whether a specific award is unconstitutionally “excessive.” The Supreme Court has already conducted this analysis for both punitive and statutory damages,¹⁶⁶ but lower courts have not applied their differences systematically. Because courts often deny certification or parties settle soon

¹⁵⁹ *Id.* at 420–21.

¹⁶⁰ See, e.g., Mark Geistfeld, *Constitutional Tort Reform*, 38 LOY. L.A. L. REV. 1093, 1093–94 (2005) (arguing that the Court’s punitive damages due process framework should be applied to extreme compensation awards).

¹⁶¹ See generally Scheuerman, *supra* note 21; Blaine Evanson, Note, *Due Process in Statutory Damages*, 3 GEO. J. L. & PUB. POL’Y 601 (2005).

¹⁶² Scheuerman, *supra* note 21.

¹⁶³ See *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 907–08 (8th Cir. 2012) (“It makes no sense to consider the disparity between ‘actual harm’ and an award of statutory damages when statutory damages are designed precisely for instances where actual harm is difficult or impossible to calculate.”).

¹⁶⁴ *Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U.S. 86, 111 (1909) (citing *Coffey v. Harlan Cnty.*, 204 U.S. 659 (1907)).

¹⁶⁵ The Court said as much in *Gore*: “[T]he federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996).

¹⁶⁶ See *id.* at 574–75 (analyzing the source of punitive damages); *St. Louis, Iron Mountain, & S. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919) (analyzing the source of statutory damages). For a description of how the due process clause could be used to cabin compensatory damages, see Geistfeld, *supra* note 160, at 1093–94 (arguing that the Court’s punitive damages due process framework should be applied to extreme compensation awards).

after, and because courts defer analysis of potential due process concerns until the liability stage,¹⁶⁷ there is a dearth of case law analyzing statutory damages awards that collide with the due process clause.

In fact, there are only two cases since the 1920s in which a district court struck down a statutory damages award as beyond the due-process pale, and both cases were overturned on appeal. The First Circuit acknowledged that it is not clear whether to apply the *Williams* standards or the *Gore* standards to statutory damages because the purposes behind punitive damages and statutory damages are different.¹⁶⁸ The Sixth Circuit noted an “uncertainty regarding the application of *Gore* . . . to statutory-damage awards” and instead reviewed the award under *Williams*.¹⁶⁹ When these courts apply *Williams* however, they merely consider their review as more deferential than their review under *Gore*. Neither the First Circuit nor the Sixth Circuit recognized that the source of the review is the same, and that similar considerations are at issue. By analyzing the differences between the two kinds of damages, district courts—and eventually the Supreme Court—should use the guideposts that are attuned to the source of the award and its underlying purposes.

This binary question—either *Gore* or *Williams*—is untenable because the underlying purposes of statutory damages and punitive damages overlap. Even though they are applied differently, statutory damages are much like punitive damages because they are “quasi-criminal punishment.”¹⁷⁰ Justice O’Connor, in defining punitive damages, describes quasi-criminal punishment:

Unlike compensatory damages, which serve to allocate an existing loss between two parties, punitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant’s misconduct was especially reprehensible. Hence, there is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award.¹⁷¹

The same is equally true for statutory damages.¹⁷² Because privacy harms are difficult to quantify, statutory damages are intended to do

¹⁶⁷ Scheurman, *supra* note 21, at 147 n.341 (2009) (collecting cases).

¹⁶⁸ See *Sony BMG Music Entm’t v. Tenenbaum*, 660 F.3d 487, 512–13 (1st Cir. 2011) (discussing both cases and noting that “[t]he concerns regarding fair notice to the parties of the range of possible punitive damage awards present in *Gore* are simply not present in a statutory damages case”).

¹⁶⁹ *Zomba Enters. v. Panorama Records, Inc.*, 491 F.3d 574, 587 (6th Cir. 2007).

¹⁷⁰ *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 54 (1991) (O’Connor, J., dissenting).

¹⁷¹ *Id.*

¹⁷² See *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919) (noting that because statutory damages are “imposed as a punishment for the violation of a public law, the legislature may adjust [their] amount to the public wrong rather than the private injury”).

more than simply compensate plaintiffs. They are akin to punitive damages, added on top of de minimus compensation for trespass harms at common law to effectuate deterrence. The stigma attached to punitive damages, discussed by Justice O'Connor, is also present with statutory damages.¹⁷³ Like punitive damages, statutory damages "further . . . legitimate interests in punishing unlawful conduct and deterring its repetition."¹⁷⁴

The 1919 *Williams* Court also described statutory damages as "essentially penal," even though "the penalty . . . is to be enforced by a private and not a public suit."¹⁷⁵ But unlike with punitive damages, the involvement of the legislature opens the proportionality consideration to include public harms; "for . . . the power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government."¹⁷⁶ Because the politically accountable legislature is setting the damages amount, "giving the penalty to the aggrieved [party] [does not] require that it be confined or proportioned to his loss or damages."¹⁷⁷ Punitive damages, conversely, are awarded by the jury often with little substantive guidance.¹⁷⁸

Even though these "[p]unishment and deterrence principles are often used to justify statutory penalty schemes as well, [] they are not the only interests at stake."¹⁷⁹ Statutory damages also provide compensation for the violation of difficult-to-quantify rights and effectuate congressional policy by providing an enforcement mechanism. These interests are already weighed by the legislature, in contrast to the ad hoc weighing by juries considering punitive damages.

In addition, defendants have better notice of potential statutory damages than they do of potential punitive damages, decreasing the potential for due process violations. Because of these differences, an excessiveness standard for punitive damages is cabined to be proportional to the harm of the litigant herself, while the excessiveness stan-

¹⁷³ See Russell M. Gold, *Compensation's Role in Deterrence*, 91 NOTRE DAME L. REV. 1997, 1999 (2016) (arguing that "[a]voiding reputational harm constitutes a largely unrecognized form of deterrence").

¹⁷⁴ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996)

¹⁷⁵ *Williams*, 251 U.S. at 66.

¹⁷⁶ *Id.* (citing *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, 523 (1885)).

¹⁷⁷ *Id.*

¹⁷⁸ *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 474-75 (1993) (O'Connor, J., dissenting) ("Jurors may be told that punitive damages are imposed to punish and deter, but rarely are they instructed on how to effectuate those goals or whether any limiting principles exist.").

¹⁷⁹ Daniel R. LeCours, Note, *Steering Clear of the "Road to Nowhere": Why the BMW Guideposts Should Not Be Used to Review Statutory Penalty Awards*, 63 RUTGERS L. REV. 327, 345 (2010).

dard for statutory damages can include an assessment of public harm.¹⁸⁰

To summarize, the purposes of statutory damages and punitive damages involve both overlapping and independent considerations. Punitive damages are focused solely on retribution and deterrence and are limited in proportion to the harm done to the particular plaintiff or class. Statutory damages, like punitive damages, are somewhat retributive and promote deterrence. But, in addition, they provide compensation for difficult-to-quantify harms and reflect a legislature's policy regarding the public interest.

It is beyond the scope of this Note to provide a full explanation of how a court should develop due process guideposts in light of these purposes. It is enough to point out that “due process excessiveness” applies to both statutory and punitive damages and that the analysis is neither identical nor entirely distinct. With this understanding, I propose in Part III that a court should apply this analysis at the class certification stage in a litigation based on statutory damages.

III

BALANCING CONSUMER INTERESTS AND INDUSTRY FEAR BY RAISING DUE PROCESS CONCERNS AT CERTIFICATION

The due process “excessiveness” limitation solves nothing on its own, because of the near universal settlement of privacy class actions upon certification.¹⁸¹ As Judge Easterbrook argues and courts consistently hold, any due process “excessiveness” standards, if applicable to statutory damages,¹⁸² should be considered only after a finding of lia-

¹⁸⁰ See Colleen P. Murphy, *Reviewing Congressionally Created Remedies for Excessiveness*, 73 OHIO ST. L.J. 651, 702–03 (2012) (comparing excessiveness review of statutory damages to the courts' Excessive Fines Clause jurisprudence and concluding that “the level of judicial review under the Excessive Fines Clause should constitute a ceiling for the level of scrutiny under due process that courts should give awards of legislatively created remedies” because both are legislatively created remedies that consider harm to the public as a whole).

¹⁸¹ Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 104–05 n.115 (1996) (“[The] vast majority of class actions settle before an adjudication on the merits.”) (quoting Samuel M. Hill, *Small Claimants Class Actions: Deterrence and Due Process Examined*, 19 AM. J. TRIAL ADVOC. 147, 150 (1995)).

¹⁸² Some courts have refused to apply the punitive damages cases to statutory damages because, to them, it would “extend the holdings of *Gore* and *Campbell* beyond their intended application.” *Accounting Outsourcing LLC v. Verizon Wireless Pers. Commc'n, L.P.*, 329 F. Supp. 2d 789, 809 (M.D. La. 2004). These opinions do not track the Supreme Court's precedent. Although there are different concerns at stake when reviewing punitive damages and statutory damages—such as whether a different standard should apply for “punishments” than for “compensation”—the due process foundations are the same. See

bility.¹⁸³ However, there is little practical reason to wait until the liability stage to discuss due process for statutory damages, and blackmail settlements provide ample reasons to discuss it earlier. As Professor Scheuerman points out, “[n]othing relevant to the due process inquiry is gained by delaying consideration of the defendant’s due process rights until after judgment.”¹⁸⁴ Unlike punitive damages, which are calculated by a jury, potential statutory damages are fixed and known at the certification stage.¹⁸⁵ A judge can calculate the potential number of class members multiplied by the minimum damages awarded by statute. Applying the appropriate “excessiveness” goalposts, a court has all the information it needs to discuss in its certification order whether there will be a likely due process violation.

Some courts have noted the potential for due process problems at the certification stage and have simply denied certification on that basis, as Professor Scheuerman argues they should.¹⁸⁶ Professor Scheuerman bolsters her argument that courts should deny certification after noting potential due process concerns by citing a case that held that courts should “den[y] class certification where certification would be ‘likely to implicate the due process rights of *absent class members*.’”¹⁸⁷ But she misses a fundamental difference between the *potential* for a damages award which would violate the *defendant’s* due process rights if the case proceeds to liability and the *certification itself* implicating the due process rights of *absent class members*. The certification process safeguards absent class members’ due process rights.¹⁸⁸ If these rights cannot be protected by the certification

supra Part II; *TXO*, 509 U.S. at 478–79 (O’Connor, J., dissenting) (first citing *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 491 (1915); then citing *Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U.S. 86, 111 (1909); and then citing *Williams*, 251 U.S. at 66–67) (arguing that “punishment should be proportionate to the offense” and that “the requirement of proportionality is implicit in the notion of due process”).

¹⁸³ *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 954 (7th Cir. 2006).

¹⁸⁴ Scheuerman, *supra* note 21, at 147.

¹⁸⁵ *See id.* (“[T]he amount of an aggregated statutory damages award is a mere mathematical exercise, calculated by multiplying the number of class members by the statutory damages amount.”).

¹⁸⁶ *See id.* at 151 (“The proper solution is for courts to deny class certification when faced with aggregated statutory damages that are constitutionally excessive under *BMW* and *State Farm*.”); *see, e.g.*, *Spikings v. Cost Plus, Inc.* 2007 U.S. Dist. LEXIS 44214, at *9–11 (May 25, 2007) (“[C]ertification is not denied solely because of the possible financial impact it would have on a defendant, but based on the disproportionality of a damage award that has little relation to the harm actually suffered by the class, and on the due process concerns attendant upon such an impact.”) (citing other examples).

¹⁸⁷ *Id.* at 146 n.338 (2009) (emphasis added) (quoting *Encarnacion ex rel. George v. Barnhart*, 191 F. Supp. 2d 463, 469 (S.D.N.Y. 2002)).

¹⁸⁸ *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) (describing how the requirements of Rule 23 ensure that class actions comply with the Due Process Clause).

requirements, the class should not be certified. Conversely, certification does not attend to the rights of the defense. A defendant's due process concerns can only be vindicated upon a finding of liability.¹⁸⁹ Denying certification because of a potential violation of due process to the defendant puts the cart before the horse.

The logical next step should not be to then ignore defendant's due process concerns at the class certification stage, as Judge Easterbrook contends.¹⁹⁰ To the contrary, recognizing that most statutory damages-based class actions are either not certified or settled after certification, the district court should note probable due process problems with the eventual liability award.

By raising due process, the court will cast a large shadow over post-certification settlement negotiations. This would help alleviate some "blackmail settlement" concerns raised by Facebook and Google.¹⁹¹ Further, with the knowledge that the court is concerned about due process, defendants could be more willing to go to trial to fight off weak claims.

At least one federal judge has argued that courts have the power to attend to the defendant's due-process rights at certification. Judge Newman agrees that "[a] district judge ought to be able to exercise informed discretion to certify a class entitled to receive no more than some specified aggregate amount."¹⁹² He argues that considerations of due process "would seem appropriate to inform the customarily broad discretion of a district judge in the context of class certification."¹⁹³ Judge Newman "think[s] that potential due process concerns and avoiding a result not intended by Congress can appropriately be considered by a district judge in determining that a class will be certified only up to some reasonable aggregate amount of damages."¹⁹⁴ I agree.

In a footnote, he describes two ways that a district court could make such a determination procedurally:

¹⁸⁹ See *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 954 (7th Cir. 2006) ("An award that would be unconstitutionally excessive may be reduced, but constitutional limits are best applied after a class has been certified. Then a judge may evaluate the defendant's overall conduct and control its total exposure.").

¹⁹⁰ See *id.* at 954 ("[C]onstitutional limits are best applied after a class has been certified.").

¹⁹¹ See *supra* Part I.C.1 (addressing the blackmail settlement concerns of Facebook and Google).

¹⁹² *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 28 (2d Cir. 2003) (Newman, J., concurring).

¹⁹³ *Id.* (listing the wide range of discretionary decisions district courts make when certifying a class action).

¹⁹⁴ *Id.*

[A] judge might accomplish this by modifying the proposed class in the certification order. Another option would be for the judge to inform the plaintiffs, before deciding on the motion for certification but after having received argument on the subject from all parties, of the aggregate statutory amount above which (b)(3) superiority concerns would arise, and to permit the plaintiffs to amend their motion for class certification to seek reduced aggregate damages before a certification decision is rendered.¹⁹⁵

Beyond these two possibilities, a court could simply include a discussion of the “excessiveness standard” and its application to the case at hand in its certification order. Congress could make this a non-issue by providing for statutory caps for every statutory violation it creates,¹⁹⁶ however, such statutes create *ex ante* limits on damages without consideration of individual cases. Not every case in which a damages award would bankrupt a company violates the Due Process Clause—it is only breached when the eventual award is “grossly excessive.”¹⁹⁷ A due-process excessiveness analysis would depend on a number of case-specific factors.¹⁹⁸

The Rules Enabling Act seems to present a hurdle to this proposal. It states that the Federal Rules of Civil Procedure “shall not abridge, enlarge or modify any substantive right.”¹⁹⁹ Some argue that any class action that does not compensate class members identically as they would have been compensated had they brought the action on their own violates this Rules Enabling Acts dictate.²⁰⁰ Professor Scheuerman briefly makes this argument in explaining why district courts must deny class certification after noting a potential due process violation.²⁰¹ To her, if a court acknowledges that it will have to reduce the award if liability attaches, each class member will not receive the full amount they would have received had they pursued litigation on their own.

This is a cramped reading of the Rules Enabling Act. Without the class action mechanism, individual plaintiffs would not be able to bring a lawsuit at all, and there would be no vindication of any sub-

¹⁹⁵ *Id.* at 28 n.7.

¹⁹⁶ *See supra* notes 88–89 and accompanying text (describing the statutory cap on aggregated damages in the Truth in Lending Act).

¹⁹⁷ *See supra* Part III.

¹⁹⁸ *See supra* Part II.C.

¹⁹⁹ 28 U.S.C. § 2072(b) (2012).

²⁰⁰ *See, e.g.,* Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 77, 81–82 (arguing that bounty hunter class actions may pose problems under the Rules Enabling Act).

²⁰¹ Scheuerman, *supra* note 21, at 146 & n.338.

stantive rights.²⁰² The vast majority of class members would receive nothing.

Compensation is not the only substantive right involved—deterrence matters.²⁰³ Deterrence is achieved through the threat of a large monetary payment, regardless of who it goes to—class members, charities via *cy pres* awards, attorneys.²⁰⁴ The mere fact “that they pay money deters wrongdoing.”²⁰⁵ Reputational harm is also a deterrent, and without any compensation (i.e. without certification) defendants are able “to portray class action filings or settlements as mere nuisances generated by money-grubbing plaintiffs’ lawyers [and therefore] . . . support the narrative that there are no victims because there was no harm.”²⁰⁶ These are the exact claims made in suits like *Lane v. Facebook* and *Spokeo, Inc. v. Robins*.²⁰⁷ Allowing large Internet-based companies to avoid class certification because of the number of people with whom they interact bolsters their ability to control the narrative and to avoid the deterrent effect of stigmatic harm.

Some have argued that allowing a judge to reduce damages after liability is found would “violat[e] the plain meaning of the statute,”

²⁰² See *supra* note 85 and accompanying text; see also *Gammon v. GC Servs. Ltd. Partnership*, No. 93 C 5338, 1995 U.S. Dist. LEXIS 8940, at *23 (June 26, 1995) (recognizing the “practical reality” that “few individuals will pursue the filing of a federal lawsuit, with its attendant costs, when their statutory damage recovery is capped at \$1000. Class certification is not barred simply because some class members may recover lesser statutory damages than they would have had they brought their claims individually.”).

²⁰³ See David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1874, 1890–91 (2002) (“Sacrifice of optimal deterrence is misbegotten policy.”).

²⁰⁴ *But see* Russell M. Gold, *Compensation’s Role in Deterrence*, 91 NOTRE DAME L. REV. 1997, 1999 (2016) (arguing that “[a]voiding reputational harm constitutes a largely unrecognized form of deterrence” and that “[a] class action judgment will likely do more harm to a defendant’s reputation if class action damages are typically paid primarily to victims than if they are typically paid primarily to attorneys or charities”).

²⁰⁵ *Id.* at 2005–06.

²⁰⁶ *Id.* at 2030 (citing Jonathan Baron & Ilana Ritov, *Intuitions About Penalties and Compensation in the Context of Tort Law*, 7 J. RISK & UNCERTAINTY 17, 31 (1993)); cf. Jessica Erickson, *Corporate Misconduct and the Perfect Storm of Shareholder Litigation*, 84 NOTRE DAME L. REV. 75, 129 (2008) (arguing that directors and others have framed shareholder derivative suits as a “flawed litigation system,” and that this “limits the deterrent impact”).

²⁰⁷ *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012) (discussing plaintiffs’ claim that Facebook’s Beacon program harmed their reputation by broadcasting their online activity without permission); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (discussing plaintiff’s claim that Spokeo harmed their reputation by publishing false information about them to potential romantic partners, landlords, and employers).

and therefore should not be done.²⁰⁸ However, as Judge Newman persuasively points out:

[S]tatutes are not to be applied according to their literal terms when doing so achieves a result manifestly not intended by the legislature [I]n specifying a . . . minimum payment for [statutory] violations, Congress [could not have] intended to expose a cable television provider to liability for billions of dollars Congress [also could not have] intended to permit a violator to avoid payment of at least some compensation to numerous victims of its violations simply because its actions affected a large number of subscribers.²⁰⁹

The best way to effectuate congressional policy, as laid out by Judge Newman, is to certify the class and reduce the award after a finding of liability. But, because of the overwhelming settlement pressures, courts are never able to reach this question. I agree with Judge Newman that a district judge should “be able to exercise informed discretion to certify a class entitled to receive no more than some specified aggregate amount,” because that determination is “not significantly different than determining what issues will be available for classwide adjudication.”²¹⁰

Once the Rule 23 certification prerequisites are met, courts should certify classes to vindicate congressional policy of compensation and deterrence. However, certification could produce inequitable outcomes, especially if plaintiffs have weak claims or defendants feel obligated to settle for higher amounts. The shadow of the Due Process clause provides a way out.

CONCLUSION

Recognizing privacy harms, Congress has created a patchwork of statutes that provide private rights of action with statutory damages. These statutes allow individuals to vindicate procedural and substantive violations without having to show actual damages. At the same time, however, through the rise of the Internet, some companies interact with millions of users a day. If the claims are aggregated, these companies rightly fear that an inadvertent violation of one of these statutes will lead them into bankruptcy. And they rightly fear that users with weak claims will seek class certification to coerce them into settlements for the benefit of class counsel alone. However,

²⁰⁸ Holly S. Hosford, Comment, *Avoiding Annihilation: Why Trial Judges Should Refuse to Certify a FACTA Class Action for Statutory Damages Where the Recovery Would Likely Leave the Defendant Facing Imminent Insolvency*, 81 Miss. L.J. 1941, 1975 (2012).

²⁰⁹ *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 27 (2d Cir. 2003) (Newman, J., concurring).

²¹⁰ *Id.* at 28.

refusing to certify these classes practically eliminates the substantive rights Congress attempted to protect.

By raising due process at the certification stage, courts can signal to litigants that the liability faced will not be as astronomical as rote multiplication would imply. This could, somewhat, level the playing field in settlement negotiations, while maintaining the deterrence effect Congress intended to create. And it allows large Internet-based companies to decide to go to trial against weak claims without the fear of crippling liability.