
A SKEPTICAL VIEW OF INFORMATION FIDUCIARIES

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A SKEPTICAL VIEW OF INFORMATION FIDUCIARIES

Lina M. Khan* & David E. Pozen**

The concept of “information fiduciaries” has surged to the forefront of debates on online-platform regulation. Developed by Professor Jack Balkin, the concept is meant to rebalance the relationship between ordinary individuals and the digital companies that accumulate, analyze, and sell their personal data for profit. Just as the law imposes special duties of care, confidentiality, and loyalty on doctors, lawyers, and accountants vis-à-vis their patients and clients, Balkin argues, so too should it impose special duties on corporations such as Facebook, Google, and Twitter vis-à-vis their end users. Over the past several years, this argument has garnered remarkably broad support and essentially zero critical pushback.

This Article seeks to disrupt the emerging consensus by identifying a number of lurking tensions and ambiguities in the theory of information fiduciaries, as well as a number of reasons to doubt the theory’s capacity to resolve them satisfactorily. Although we agree with Balkin that the harms stemming from dominant online platforms call for legal intervention, we question whether the concept of information fiduciaries is an adequate or apt response to the problems of information insecurity that he stresses, much less to more fundamental problems associated with outsized market share and business models built on pervasive surveillance. We also call attention to the potential costs of adopting an information-fiduciary framework—a framework that, we fear, invites an enervating complacency toward online platforms’ structural power and a premature abandonment of more robust visions of public regulation.

INTRODUCTION

Digital businesses such as Facebook, Google, and Twitter collect an enormous amount of data about their users. Sometimes they do things with this data that threaten the users’ best interests, from allowing predatory advertising and enabling discrimination to inducing addiction and sharing sensitive details with third parties. Online platforms may also disserve their users and the general public in myriad other ways, including by facilitating the spread of disinformation and the harassment of certain categories of speakers. The European Union has responded to some of these concerns with a comprehensive personal data law, the General Data Protection Regulation¹ (GDPR). After years of relative neglect, U.S. policymakers, roused by Russian interference in the 2016

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¹ Council Regulation 2016/679, 2016 O.J. (L 119) 1. The GDPR, which was adopted in 2016 and entered into force in May 2018, *id.* at 87, replaced a 1995 directive on data protection, Council Directive 95/46/EC, 1995 O.J. (L 281) 31.

presidential election and the Facebook–Cambridge Analytica scandal, have begun to consider a range of reforms to enhance consumer privacy, corporate transparency, and data security on the internet.² To an unprecedented degree, technology firms in general and online platforms in particular find themselves “in Congress’s sights.”³

Among the reforms under consideration is the idea of treating online platforms as “information fiduciaries.” Professor Kenneth Laudon appears to have coined this phrase in the early 1990s.⁴ Since 2014, it has been identified with Professor Jack Balkin, who has developed the idea over a series of papers.⁵ Ordinary people, Balkin observes, are deeply dependent on and vulnerable to the digital companies that accumulate, analyze, and sell their personal data for profit. To mitigate this vulnerability and ensure these companies do not betray the trust people place

² See, e.g., MARK R. WARNER, POTENTIAL POLICY PROPOSALS FOR REGULATION OF SOCIAL MEDIA AND TECHNOLOGY FIRMS 5–23 (2018), <https://graphics.axios.com/pdf/PlatformPolicyPaper.pdf> [<https://perma.cc/8VCL-TSHM>] (surveying policy options).

³ HEATHER WHITNEY, EMERGING THREATS: SEARCH ENGINES, SOCIAL MEDIA, AND THE EDITORIAL ANALOGY 2 (David Pozen ed., 2018), <https://s3.amazonaws.com/kfai-documents/documents/4959005632/Search-Engines--Social-Media--and-the-Editorial-Analogy.pdf> [<https://perma.cc/2RT4-A9HE>].

⁴ See Kenneth C. Laudon, *Markets and Privacy*, ICIS 1993 PROC. 65, 70–71 (proposing a “National Information Market,” *id.* at 70, within which “information fiduciaries would naturally arise” and “would accept deposits of information from depositors and seek to maximize the return on sales of that information in national markets or elsewhere in return for a fee,” *id.* at 71).

⁵ Balkin first promoted the idea in a 2014 blog post. Jack M. Balkin, *Information Fiduciaries in the Digital Age*, BALKINIZATION (Mar. 5, 2014, 4:50 PM), <https://balkin.blogspot.com/2014/03/information-fiduciaries-in-digital-age.html> [<https://perma.cc/L277-CZLG>] [hereinafter Balkin, *Digital Age*]. He most fully elaborated his views in Jack M. Balkin, Lecture, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016) [hereinafter Balkin, *Information Fiduciaries*]. Additional discussions include Jack M. Balkin, Essay, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1160–63 (2018) [hereinafter Balkin, *Algorithmic Society*]; Jack M. Balkin, Essay, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011, 2047–54 (2018) [hereinafter Balkin, *Triangle*]; Jack M. Balkin & Jonathan Zittrain, *A Grand Bargain to Make Tech Companies Trustworthy*, THE ATLANTIC (Oct. 3, 2016), <https://www.theatlantic.com/technology/archive/2016/10/information-fiduciary/502346> [<https://perma.cc/3PL4-3SQT>]; and Jack M. Balkin, *Fixing Social Media's Grand Bargain* 11–15 (Hoover Working Grp. on Nat’l Sec., Tech. & Law, Aegis Series Paper No. 1814, 2018), https://www.hoover.org/sites/default/files/research/docs/balkin_webready.pdf [<https://perma.cc/774R-AD7D>] [hereinafter Balkin, *Fixing Social Media*]. Professor Jonathan Zittrain has also been an important theorist and advocate of the information-fiduciary concept. See, e.g., Balkin & Zittrain, *supra*; Jonathan Zittrain, *Facebook Could Decide an Election Without Anyone Ever Finding Out*, NEW REPUBLIC (June 1, 2014), <https://newrepublic.com/article/117878/information-fiduciary-solution-facebook-digital-gerrymandering> [<https://perma.cc/K2EE-8YJ5>]; Jonathan Zittrain, *How to Exercise the Power You Didn’t Ask For*, HARV. BUS. REV. (Sept. 19, 2018), <https://hbr.org/2018/09/how-to-exercise-the-power-you-didnt-ask-for> [<https://perma.cc/W233-C7Q6>] [hereinafter Zittrain, *How to Exercise*]; Jonathan Zittrain, Opinion, *Mark Zuckerberg Can Still Fix This Mess*, N.Y. TIMES (Apr. 7, 2018), <https://nyti.ms/2EsJoLa> [<https://perma.cc/LMA7-EVKE>] [hereinafter Zittrain, *Fix This Mess*].

in them,⁶ Balkin urges that we draw on principles of fiduciary obligation. Just as the law imposes special duties of care, confidentiality, and loyalty on doctors, lawyers, accountants, and estate managers vis-à-vis their patients and clients, so too should it impose such duties on Facebook, Google, Microsoft, Twitter, and Uber vis-à-vis their end users — although Balkin concedes that the duties would be “more limited” in the digital context.⁷

Support for this idea is swelling. Dozens of legal scholars have endorsed Balkin’s proposal or discussed it approvingly.⁸ Journalists have covered it with undisguised enthusiasm; a recent *Bloomberg* subheadline reads: “America needs data rules that won’t crush the tech industry. One law professor may have figured out a solution.”⁹ Lawmakers from both parties have expressed interest.¹⁰ Last December, a group of fifteen

⁶ In recent years, a number of privacy law scholars have highlighted ways in which privacy and trust are intertwined online, if not co-constitutive. See, e.g., ARI EZRA WALDMAN, *PRIVACY AS TRUST: INFORMATION PRIVACY FOR AN INFORMATION AGE* (2018); Neil Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 19 STAN. TECH. L. REV. 431 (2016).

⁷ Jack M. Balkin, Lecture, *2016 Sidley Austin Distinguished Lecture on Big Data Law and Policy: The Three Laws of Robotics in the Age of Big Data*, 78 OHIO ST. L.J. 1217, 1229 (2017) [hereinafter Balkin, *Three Laws of Robotics*]; Balkin, *Information Fiduciaries*, *supra* note 5, at 1226; Balkin, *Fixing Social Media*, *supra* note 5, at 12.

⁸ On our reading, the academic literature taking up the idea of information fiduciaries has been overwhelmingly supportive. For representative responses from leading scholars of internet law, see Frank Pasquale, Lecture, *Response: Toward a Fourth Law of Robotics: Preserving Attribution, Responsibility, and Explainability in an Algorithmic Society*, 78 OHIO ST. L.J. 1243, 1244 (2017) (“I believe that Balkin’s concept of information fiduciary is well developed and hard to challenge.”); and Tim Wu, Opinion, *An American Alternative to Europe’s Privacy Law*, N.Y. TIMES (May 30, 2018), <https://nyti.ms/2LlrMy4> [<https://perma.cc/8FHR-CMTG>] (“[Technology] companies should be considered, to borrow a term coined by the law professor Jack Balkin, ‘information fiduciaries’ . . .”). The closest we have found to a skeptical note is Professor Jane Bambauer’s suggestion that an “expansion of Balkin’s proposal” to cover additional classes of data collectors, such as Netflix and Amazon, “could cause unsettling distortions of free speech protection.” Jane R. Bambauer, Response, *The Relationships Between Speech and Conduct*, 49 U.C. DAVIS L. REV. 1941, 1949 (2016) (emphasis added). As far as we are aware, this Article is the first to apply any sustained critical scrutiny to the information-fiduciary concept.

⁹ Editorial, *How to Make Facebook and Google Behave*, BLOOMBERG (Apr. 24, 2018, 8:00 AM), <https://www.bloomberg.com/opinion/articles/2018-04-24/make-facebook-and-google-information-fiduciaries> [<https://perma.cc/5SFX-FK25>] [hereinafter Bloomberg Editorial]. On a single day this past spring, Balkin’s proposal received glowing coverage in multiple popular pieces. See Russell Brandom, *This Plan Would Regulate Facebook Without Going Through Congress*, THE VERGE (Apr. 12, 2018, 11:32 AM), <https://www.theverge.com/2018/4/12/17229258/facebook-regulation-fiduciary-rule-data-proposal-balkin> [<https://perma.cc/WHW7-G3AP>]; Yves Faguy, *Regulating Facebook to Make It an Information Fiduciary*, NAT’L MAG. (Apr. 12, 2018), <https://web.archive.org/web/20180416050935/http://www.nationalmagazine.ca/Articles/April-2018/Regulating-Facebook-to-make-it-an-information-fidu.aspx> [<https://perma.cc/WS8N-XTBF>]; Nathan Heller, *We May Own Our Data, but Facebook Has a Duty to Protect It*, NEW YORKER (Apr. 12, 2018), <https://www.newyorker.com/tech/annals-of-technology/we-may-own-our-data-but-facebook-has-a-duty-to-protect-it> [<https://perma.cc/KN75-RSZ5>].

¹⁰ See, e.g., 164 CONG. REC. S2026 (daily ed. Apr. 10, 2018) (statement of Sen. John Cornyn) (“Perhaps we should treat social media platforms as information fiduciaries and impose legal obligations on them, as we do with lawyers and doctors, who are privy to some of our most personal,

Democratic senators took the next step and introduced legislation that would require online service providers to act as fiduciaries for their users, drawing directly from Balkin's proposal.¹¹ Facebook CEO Mark Zuckerberg has now signaled his support as well.¹² Balkin is the legal academy's preeminent diagnostician of how theories can move over time from the margins to the mainstream, from "off-the-wall" to "on-the-wall."¹³ He is also an ingenious idea entrepreneur whose own theory of information fiduciaries is rapidly making this very transition.

We admire Balkin's ingenuity and applaud his efforts to advance the cause of platform regulation. Yet while we largely agree with his analysis of why certain digital firms should be regulated more vigorously, we question whether the concept of information fiduciaries is an adequate or apt response to the problems of information asymmetry and abuse that he stresses, much less to more fundamental problems associated with market dominance and with business models that demand pervasive surveillance. The primary aims of this Article are, first, to identify a number of lurking ambiguities and tensions in the theory of information fiduciaries and, second, to raise concerns about the theory's capacity to resolve them satisfactorily.¹⁴ The Article also calls attention

private information."); WARNER, *supra* note 2, at 14–15 (listing Balkin's idea first on a list of policy options for Congress to consider in the area of "Privacy and Data Protection," *id.* at 14); Heller, *supra* note 9 (observing that, "[t]o a striking degree, the fiduciary model was the one toward which discussion . . . converged" in an April 2018 Senate hearing on Facebook); *see also* Zittrain, *How to Exercise*, *supra* note 5 ("We've found that our [information-fiduciary] proposal has bipartisan appeal in Congress . . .").

¹¹ Data Care Act of 2018, S. 3744, 115th Cong. (2018); *see also* Press Release, Office of Senator Brian Schatz, Schatz Leads Group of 15 Senators in Introducing New Bill to Help Protect People's Personal Data Online (Dec. 12, 2018), <https://www.schatz.senate.gov/press-releases/schatz-leads-group-of-15-senators-in-introducing-new-bill-to-help-protect-peoples-personal-data-online> [<https://perma.cc/4PPN-WJL7>] (describing the proposed legislation, referred to as the "Data Fiduciary Act" by Senator Cory Booker, as "establishing a fiduciary duty for online providers").

¹² When Senator Brian Schatz, a lead sponsor of the Data Care Act, raised Balkin's information-fiduciary idea at a high-profile hearing last year, "Zuckerberg seemed to perk up. 'I think it's certainly an interesting idea,' Zuckerberg said, 'and Jack is very thoughtful in this space, so I do think it deserves consideration.'" Brandom, *supra* note 9. At a more recent event with Zittrain, Zuckerberg described the "idea of [Facebook] having a fiduciary relationship with the people who use our services" as "intuitive" and consistent with Facebook's "own self-image . . . and what we're doing." *At Harvard Law, Zittrain and Zuckerberg Discuss Encryption, "Information Fiduciaries" and Targeted Advertisements*, HARV. L. TODAY (Feb. 20, 2019), <https://today.law.harvard.edu/at-harvard-law-zittrain-and-zuckerberg-discuss-encryption-information-fiduciaries-and-targeted-advertisements> [<https://perma.cc/5JNH-T8DQ>] [hereinafter *Zittrain and Zuckerberg*].

¹³ JACK M. BALKIN, CONSTITUTIONAL REDEMPTION 12 (2011); *see id.* at 61, 69–70, 88, 119, 177–83; Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012), <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040> [<https://perma.cc/Y4LD-8RR5>].

¹⁴ Given that the firms Balkin would designate as information fiduciaries vary in the services they provide, the business models they use, and the market dominance they enjoy, any analysis of the designation's appropriateness or helpfulness will necessarily vary to some extent by firm. For

to the potential costs of adopting an information-fiduciary framework — a framework that, we fear, invites an enervating complacency about issues of structural power and a premature abandonment of more robust visions of public regulation.

I. FIDUCIARIES FOR WHOM?

Balkin offers his theory of information fiduciaries as a response to problems of asymmetric vulnerability and dependency online. A key feature of the digital economy, he observed in his original essay on the subject, is that “[m]any of the online services that people use require them to trust companies with sensitive personal information.”¹⁵ These companies have “increasing capacities for surveillance and control” of their users, but users have little ability to monitor the companies.¹⁶ Users therefore worry, with good reason, that the companies will take advantage of them. To help level the playing field and allay such worries, Balkin proposes that we draw on principles of fiduciary law that assign one actor (the fiduciary) “special obligations of loyalty and trustworthiness” toward another actor (the beneficiary).¹⁷ As Balkin emphasizes, fiduciary relationships have been created in a variety of contexts, including where ordinary individuals surrender sensitive information to a professional expert — such as a doctor, lawyer, or accountant — to obtain the benefit of the fiduciary’s valuable-yet-not-fully-comprehensible skills and services.¹⁸

The principal goal of designating digital companies as fiduciaries for their users, Balkin explains, is to prevent these companies from engaging in “egregious . . . bad behavior.”¹⁹ No longer will they be able to “act like con artists.”²⁰ “The long-term goal is to create legal incentives” for

purposes of this analysis, we focus above all on Facebook, both because Facebook is Balkin’s main example of a digital information fiduciary and because it is the company whose practices have most galvanized privacy reformers in recent years. Facebook also happens to offer a particularly stark case study in the inadequacies of the information-fiduciary framework.

¹⁵ Balkin, *Digital Age*, *supra* note 5.

¹⁶ Balkin, *Fixing Social Media*, *supra* note 5, at 12; *see also* Balkin, *Algorithmic Society*, *supra* note 5, at 1162 (“End-users are transparent to these organizations, but their operations are not transparent to end-users, and it is difficult if not impossible to monitor their operations.”).

¹⁷ Balkin, *Information Fiduciaries*, *supra* note 5, at 1207. Throughout this Article, we will use “beneficiaries” as a catch-all term for those to whom fiduciary obligations are owed.

¹⁸ *See* Balkin, *Algorithmic Society*, *supra* note 5, at 1160 (discussing the development of fiduciary relationships in settings where a “client relies on the fiduciary to perform valuable services” but “is not well-equipped to understand and monitor the fiduciary’s operations”).

¹⁹ Balkin, *Fixing Social Media*, *supra* note 5, at 11.

²⁰ Balkin, *Three Laws of Robotics*, *supra* note 7, at 1229; Balkin, *Algorithmic Society*, *supra* note 5, at 1163; Balkin, *Triangle*, *supra* note 5, at 2053; *see also* Lindsey Barrett, *Confiding in Con Men: U.S. Privacy Law, the GDPR, and Information Fiduciaries*, 42 SEATTLE U. L. REV. 1057, 1094–95 (2019) (echoing Balkin’s “con artist” formulation and surveying how advocates of the information-fiduciary framework have defined the obligations that digital fiduciaries would owe their users).

the development of “public-oriented” corporate cultures and industry norms.²¹ Importantly, Balkin maintains that these goals can be pursued without running afoul of the First Amendment²² or disrupting “the basic business model of free or subsidized online services” furnished in exchange for the collection and monetization of user data.²³ A fiduciary approach, in the words of Balkin’s collaborator Professor Jonathan Zittrain, “protects consumers and corrects a clear market failure without the need for heavy-handed government intervention.”²⁴

Assessing these claims requires consideration of, among other things, the legal status quo faced by the relevant companies. Start with corporate law.²⁵ Balkin’s central example of a purported information fiduciary, Facebook, is a Delaware corporation.²⁶ So are his other main examples, Google, Twitter, and Uber.²⁷ Under Delaware law, the officers and directors of a for-profit corporation already owe fiduciary duties — to the corporation and its stockholders. Although the doctrinal details are complex, the core duty of loyalty is fairly straightforward. As the Court of Chancery explained in 2017, “Delaware case law is clear” that to act loyally, officers and directors “must, within the limits of [their] legal discretion, treat stockholder welfare as the only end, considering other interests only to the extent that doing so is rationally related to stockholder welfare.”²⁸ Or put another way: “Non-stockholder constituencies and interests can be considered, but only instrumentally, . . . when giving consideration to them can be justified as benefiting the

²¹ Balkin, *Fixing Social Media*, *supra* note 5, at 11.

²² See *infra* section IV.A, pp. 530–34 (reviewing and critiquing this line of argument).

²³ Balkin, *Information Fiduciaries*, *supra* note 5, at 1227.

²⁴ Zittrain, *How to Exercise*, *supra* note 5.

²⁵ Part III turns, briefly, to consumer protection and contract law.

²⁶ See Facebook, Inc., Registration Statement (Form S-1), at 6 (Feb. 1, 2012) (listing Delaware as Facebook’s jurisdiction of incorporation).

²⁷ See Google Inc., Registration Statement (Form S-1), at 1 (Apr. 29, 2004); Twitter, Inc., Registration Statement (Form S-1), at 9 (Oct. 3, 2013); Uber Techs., Inc., Registration Statement (Form S-1), at 13 (Apr. 11, 2019). Additional companies that Balkin has characterized as information fiduciaries, including Airbnb and OkCupid, are likewise Delaware corporations. See Balkin, *Three Laws of Robotics*, *supra* note 7, at 1230; Airbnb, Inc., Notice of Exempt Offering of Securities (Form D) (Mar. 9, 2017); Match Grp., Inc., Amendment No. 2 to Registration Statement (Form S-1), at 8 (Nov. 9, 2015). Microsoft also makes Balkin’s list and is incorporated in the state of Washington. See Jack M. Balkin, Lecture, *The First Amendment in the Second Gilded Age*, 66 BUFF. L. REV. 979, 1006 (2018) [hereinafter Balkin, *Second Gilded Age*]; MICROSOFT CORP., AMENDED AND RESTATED ARTICLES OF INCORPORATION OF MICROSOFT CORPORATION 1 (Nov. 24, 2009); cf. Shanika Weerasundara, *State of the “Incorporation” — Delaware or Washington?*, TEQLAA (Mar. 16, 2016), <http://www.teqlaa.com/state-of-the-incorporation-delaware-or-washington> [https://perma.cc/S7G5-749V] (stating that “Washington corporate law is largely similar to Delaware law” and that “Washington courts often refer to Delaware case law as guidance” in interpreting the Washington Business Corporation Act).

²⁸ Frederick Hsu Living Tr. v. ODN Holding Corp., No. 12108, 2017 WL 1437308, at *17 (Del. Ch. Apr. 24, 2017) (quoting Leo E. Strine, Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71, 107 (2015)).

stockholders.”²⁹ In 2013, Delaware created by statute a new category of corporations, public benefit corporations, whose directors are permitted to “balance[] the pecuniary interests of the stockholders” against “the best interests of those materially affected by the corporation’s conduct” and other public values.³⁰ The creation of this category reinforces the conventional view that Delaware fiduciary law simply “does not permit traditional corporations to consider non-stockholder constituencies.”³¹

Right off the bat, these observations give reason to question the feasibility, if not also the coherence, of applying the information-fiduciary idea to the leading social media companies. A fiduciary with sharply opposed loyalties teeters on the edge of contradiction.³² Insofar as the interests of stockholders and users diverge, the officers and directors of these companies may be put in the untenable position of having to violate their fiduciary duties (to stockholders) under Delaware law in order to fulfill their fiduciary duties (to end users) under the new body of law that Balkin proposes — at least barring some sort of “heavy-handed government intervention”³³ that clearly prioritizes the latter set of duties.

²⁹ *Id.* at *17 n.14 (quoting Leo E. Strine, Jr., Essay, *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 771 (2015)); see also *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010) (stating that Delaware fiduciary principles require directors “to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders”); Julian Velasco, *Fiduciary Principles in Corporate Law*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 61, 64 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019) (“In Delaware, at least, . . . a corporate fiduciary’s duties ultimately are owed to the shareholders alone.”).

³⁰ Act of July 17, 2013, ch. 122, § 8, 79 Del. Laws ch. 122, 1, 3 (codified at DEL. CODE ANN. tit. 8, § 365(a) (2019)).

³¹ ELLEN J. ODoner, STEPHEN A. RADIN, LYUBA A. GOLTSEY & ANDREW E. BLUMBERG, MILLSTEIN CTR. FOR GLOB. MKTS & CORP. OWNERSHIP, FIDUCIARY DUTIES OF CORPORATE DIRECTORS IN UNCERTAIN TIMES 4 (2017), https://millstein.law.columbia.edu/sites/default/files/content/docs/105715_millstein_fiduciary_duties.pdf [https://perma.cc/9K5Y-RYMR]. The extent to which Delaware fiduciary law actually protects shareholders against managerial negligence and self-dealing, compliance failures that result in penalties on the firm, and other bad behavior by corporate officers has been debated for decades. See generally Velasco, *supra* note 29, at 62–63 (discussing the many “compromises” made by corporate fiduciary law to conserve legal resources and minimize “interference with risky business decisions,” *id.* at 63). In her response to this Article, Professor Tamara Piety contends that Delaware law has not proven an effective deterrent to much of this behavior and that this track record supplies an additional reason for skepticism about Balkin’s proposal. Tamara Piety, *Radical Skepticism About Information Fiduciaries*, LAW & POL. ECON. (May 31, 2019), <https://peblog.org/2019/5/31/radical-skepticism-about-information-fiduciaries> [https://perma.cc/757G-ENQT].

³² Cf. Paul B. Miller, *Multiple Loyalties and the Conflicted Fiduciary*, 40 QUEEN’S L.J. 301, 303, 306 (2014) (explaining that the beneficiary’s “right to [the fiduciary’s] loyalty is commonly understood as being an *exclusive* claim enjoyed by the beneficiary over the exercise of discretionary power by a fiduciary,” *id.* at 303, but noting that there are some “difficult” cases in which fiduciaries are “authorized to act in the face of a known conflict,” *id.* at 306). We consider in Part II how some of the standard legal strategies for managing conflicts among classes of beneficiaries might be mapped onto Balkin’s proposal.

³³ Zittrain, *How to Exercise*, *supra* note 5.

It is not hard to imagine how the interests of a social media company's stockholders and users could come apart. We will return to this point in section II.B, but just consider for a moment Facebook's situation. Facebook is primarily a digital advertising venture. It charges users no monetary price for using the platform and instead makes the vast majority of its revenue through selling targeted advertising placements to third parties.³⁴ Like other corporations with comparable business models, Facebook therefore has a strong economic incentive to maximize the amount of time users spend on the site and to collect and commodify as much user data as possible.³⁵ By and large, addictive user behavior is good for business.³⁶ Divisive and inflammatory content is good for business.³⁷ Deterioration of privacy and confidentiality norms is good for business.³⁸ Reforms to make the site less addictive,

³⁴ See *Facebook's Annual Revenue from 2009 to 2018, by Segment (in Million U.S. Dollars)*, STATISTA, <https://www.statista.com/statistics/267031/facebooks-annual-revenue-by-segment> [<https://perma.cc/L2LA-MD4P>] (indicating that over 98.5% of Facebook's total revenue in 2018, more than \$55 billion, came from advertising). This is not true of dating sites or of gig-economy companies like Uber and Airbnb, which charge customers for services. See, e.g., IAC/Interactive Corp., Annual Report (Form 10-K), at 4 (Mar. 1, 2018); Uber Techs., Inc., *supra* note 27, at F-30 to F-31.

³⁵ As Balkin notes, "advertising revenues depend on the amount of time and attention spent on the site." Balkin, *Fixing Social Media*, *supra* note 5, at 2.

³⁶ See generally ADAM ALTER, IRRESISTIBLE: THE RISE OF ADDICTIVE TECHNOLOGY AND THE BUSINESS OF KEEPING US HOOKED (2017).

³⁷ See Sue Halpern, *Apologize Later*, N.Y. REV. BOOKS (Jan. 17, 2019), <https://www.nybooks.com/articles/2019/01/17/facebook-apologize-later> [<https://perma.cc/E469-NEH8>] ("While the formula [Facebook] came up with was quite simple — growth is a function of engagement — it so happened that engagement was best served by circulating sensational, divisive, and salacious content. Allowing discordant and false material on the platform was not a glitch in the business plan — it was the plan."); Emily Bell & Taylor Owen, *The Platform Press: How Silicon Valley Reengineered Journalism*, TOW CTR. FOR DIGITAL JOURNALISM (Mar. 29, 2017), https://www.cjr.org/tow_center_reports/platform-press-how-silicon-valley-reengineered-journalism.php [<https://perma.cc/EZ37-BQ7R>] ("[T]he structure and the economics of social platforms incentivize the spread of low-quality content over high-quality material."); Nicholas Thompson & Fred Vogelstein, *Inside the Two Years that Shook Facebook — and the World*, WIRED (Feb. 12, 2018, 7:00 AM), <https://www.wired.com/story/inside-facebook-mark-zuckerberg-2-years-of-hell> [<https://perma.cc/7DUP-PFMV>] (discussing the growing recognition after the 2016 presidential election "that Facebook had long helped to create an economic system that rewarded publishers for sensationalism, not accuracy or depth").

³⁸ See BERNARD E. HARCOURT, EXPOSED: DESIRE AND DISOBEDIENCE IN THE DIGITAL AGE 19 (2015) (discussing the degree to which social media companies' data-mining and surveillance practices foster and depend upon "a society of *exposure* and *exhibition*," in which people are "dulled into not caring" about privacy "because there is 'nothing to hide' and 'no place to hide'") (first quoting DANIEL J. SOLOVE, NOTHING TO HIDE (2011); and then quoting GLENN GREENWALD, NO PLACE TO HIDE (2014)); Bruce Schneier, *How We Sold Our Souls — and More — to the Internet Giants*, THE GUARDIAN (May 17, 2015, 6:00 AM), <https://www.theguardian.com/technology/2015/may/17/sold-our-souls-and-more-to-internet-giants-privacy-surveillance-bruce-schneier> [<https://perma.cc/TXH6-FDV8>] (explaining, with reference to Facebook, that "[s]urveillance is the business model of the internet" and that people's "tendency to undervalue privacy is exacerbated by companies deliberately making sure that privacy is not salient to users").

to deemphasize sensationalistic material, and to enhance personal privacy would arguably be in the best interests of users. Yet each of these reforms would also pose a threat to Facebook's bottom line and therefore to the interests of shareholders.³⁹

Doctors, lawyers, accountants, and the like do not experience such acute tensions within their sets of fiduciary obligations. Tensions do arise, both because these fiduciaries may stand to profit from selling beneficiaries as many products and services as possible (whatever the beneficiaries' true needs) and because there may be misalignments among beneficiaries, as in the case of a financial servicer acting on behalf of multiple investors⁴⁰ or a law firm partner with fiduciary duties to her copartners as well as to her clients.⁴¹ Some of these fiduciaries may even be employed by publicly traded companies,⁴² although most are not; longstanding rules of professional conduct, for instance, prohibit nonlawyer ownership of law firms in the United States.⁴³ Yet while Delaware law allows for directors' duties to shareholders to be qualified

³⁹ Recent market developments corroborate this concern. In January 2018, Facebook adjusted its algorithm to favor more content from "friends" and less content from brands and publishers, a move its CEO promoted as ensuring that time spent on the platform is "time well spent." Mark Zuckerberg, FACEBOOK (Jan. 11, 2018, 4:28 PM), <https://www.facebook.com/zuck/posts/10104413015393571> [<https://perma.cc/A2MW-UX5N>]. Immediately after Facebook announced that the adjustment had led users to spend less time on the platform, the company's stock fell by five percent, "a rare decline for a company that consistently outpaces Wall Street's estimates." Seth Fiegerman, *Facebook Users Are Spending Less Time on the Site*, CNN (Jan. 31, 2018, 6:01 PM), <https://money.cnn.com/2018/01/31/technology/facebook-earnings/index.html> [<https://perma.cc/97ZA-3VAY>].

⁴⁰ See Steven L. Schwarcz, *Fiduciaries with Conflicting Obligations*, 94 MINN. L. REV. 1867 *passim* (2010) (discussing this phenomenon); see also Kent Greenfield, *New Principles for Corporate Law*, 1 HASTINGS BUS. L.J. 87, 103 (2005) (noting that corporate directors "owe fiduciary duties to holders of all classes of stock even when the interests of the various classes are in conflict").

⁴¹ See Robert W. Hillman, *The Impact of Partnership Law on the Legal Profession*, 67 FORDHAM L. REV. 393, 399 (1998) ("A lawyer as fiduciary serves two masters — the lawyer's partners and the lawyer's clients. The differing interests of the beneficiaries of a partner's loyalty obligation may diverge significantly and even be in conflict."); cf. Raymond T. Nimmer & Richard B. Feinberg, *Chapter 11 Business Governance: Fiduciary Duties, Business Judgment, Trustees and Exclusivity*, 6 BANKR. DEV. J. 1, 27 (1989) (describing how debtor-in-possession fiduciaries bear "not only the obligation to protect the estate, but also the explicit power to make choices that benefit some claimants and harm others").

⁴² Numerous companies that own or operate U.S. hospitals are publicly traded, for example. See *Publicly Traded Healthcare Facilities*, INVESTSNIPS, <http://investsnips.com/list-of-publicly-traded-healthcare-facilities-blood-banks-emergency-rooms-treatment-facilities-and-urgent-care-centers/> [<https://perma.cc/8D5N-K2NK>].

⁴³ See Roberta S. Karmel, *Will Law Firms Go Public?*, 35 U. PA. J. INT'L L. 487, 490–91 (2013) (reviewing these rules and explaining that "[t]he basic concern animating [them] is that permitting nonlawyer ownership or direction would subject lawyers to meeting the goals of the nonlawyers rather than meeting their duties to clients," *id.* at 491). There has been some debate in recent years about whether these rules should be relaxed, as they have been in several Commonwealth countries, but as of now they still hold. See generally *id.* at 511–25; Nick Robinson, *When Lawyers Don't Get All the Profits: Non-Lawyer Ownership, Access, and Professionalism*, 29 GEO. J. LEGAL ETHICS 1 (2016); Elizabeth Olson, *A Call for Law Firms to Go Public*, N.Y. TIMES: DEALBOOK (Feb. 18, 2015, 8:56 AM), <https://nyti.ms/2jBfbxU> [<https://perma.cc/Z4EN-VKTS>].

by other legal duties,⁴⁴ and while digital information fiduciaries would not be unique in facing crosscutting fiduciary obligations, the nature and scope of the conflicts they would face seem qualitatively distinct. As Balkin acknowledges, traditional commercial fiduciaries are not nearly as invested as digital firms in eliciting ongoing personal exposure from, or monetizing the personal data of, their customers.⁴⁵ The potential conflicts between equity owners and end users that arise from these practices are not isolated or incidental but go to the core of the firms' business.

Traditional fiduciaries are also embedded in thicker relationships of care. Doctors, lawyers, and accountants have a limited number of patients or clients on whose behalf they perform specialized tasks and exercise judgment, in all cases guided by the beneficiary's individual preferences and circumstances as well as by shared norms of a knowledge community.⁴⁶ Within the context of such relationships, the law is generally able to manage the problem of divided loyalties by requiring fiduciaries to minimize self-dealing and obvious conflicts; to furnish informed disclosure when conflicts are unavoidable; and, above all, to prioritize the interests of clients and patients over the fiduciary's own interests and the interests of any other beneficiaries.⁴⁷

Would the same legal strategies work for digital information fiduciaries? Can the duties they already owe to stockholders be harmonized with the new duties they would owe to users without doing too much violence either to the companies themselves or to fundamental principles of fiduciary law?

⁴⁴ This is the import of the phrase "within the limits of [their] legal discretion" in the passage quoted earlier. *Supra* p. 503 (quoting *Frederick Hsu Living Tr. v. ODN Holding Corp.*, No. 12108, 2017 WL 1437308, at *17 (Del. Ch. Apr. 24, 2017)).

⁴⁵ Balkin, *Three Laws of Robotics*, *supra* note 7, at 1229; see also Balkin, *Triangle*, *supra* note 5, at 2049 (contrasting social media companies and search engines, on the one hand, with doctors and lawyers, on the other, and remarking that the former "will always be tempted to use the data [they collect] in ways that sacrifice the interests of their end users to the company's economic or political interests").

⁴⁶ On the idea of professions as knowledge communities, see Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1241-42, 1248-54 (2016).

⁴⁷ See, e.g., MODEL CODE OF PROF'L RESPONSIBILITY EC 5-1 (AM. BAR ASS'N 1980) ("The professional judgment of a lawyer should be exercised . . . solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."); Robert W. Hillman, *Loyalty in the Firm: A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms*, 55 WASH. & LEE L. REV. 997, 1031 (1998) (observing that, across numerous areas of legal practice, "the overriding value of protecting the interests of clients serves to temper fiduciary duties that run between law partners"); Martha S. Swartz, "Conscience Clauses" or "Unconscionable Clauses": *Personal Beliefs Versus Professional Responsibilities*, 6 YALE J. HEALTH POL'Y L. & ETHICS 269, 348 (2006) (noting that the principle "that the 'patient's interest comes first'" "appears in all medical professionals' codes of ethics").

II. FIDUCIARIES IN WHAT SENSE?

A. *Managing Divided Loyalties*

Balkin has never squarely addressed the issue of crosscutting loyalties.⁴⁸ Nor, as far as we can tell, has any other advocate of the information-fiduciary proposal. But it is possible to imagine at least four ways one might try to reconcile a corporation like Facebook's fiduciary obligations to stockholders with fiduciary obligations to end users.

First, it might be argued that Delaware law does not categorically demand that the interests of equity owners (or the corporation itself, understood in some distinct sense⁴⁹) be prioritized over the interests of other constituencies. If this were true, then perhaps a Facebook director's duties to stockholders could simply be subordinated to her duties to users when the two collide, much like a law firm partner's duties to her fellow partners must sometimes give way to her duties to clients. The fundamental flaw in this argument, however, is that it runs counter to the prevailing understanding of Delaware doctrine — which, according to the Chief Justice of the Delaware Supreme Court, “could not have been more clear” since the mid-1980s “that directors of a for-profit corporation must at all times pursue the best interests of the corporation's stockholders.”⁵⁰

Second, it might be argued that reforms to advance the best interests of users by reducing addiction, limiting advertising, protecting privacy, and so on would *also* advance the best interests of an online platform and its shareholders, for instance because fostering trust in the present period may make it easier to retain and recruit users in future periods. Delaware law broadly permits, and on some accounts even requires, directors to take a long-run perspective.⁵¹ The fact that corporations like Facebook have persistently declined to self-regulate along such lines,⁵² however, suggests that their boards do not see these reforms as likely to enhance firm value or shareholder wealth either in the short term or in the long term.

⁴⁸ Indeed, the term “Delaware” does not appear once in any of Balkin's writings in this area.

⁴⁹ See generally Robert Bartlett & Eric Talley, *Law and Corporate Governance*, in 1 THE HANDBOOK OF THE ECONOMICS OF CORPORATE GOVERNANCE 177, 194–99 (Benjamin E. Hermalin & Michael S. Weisbach eds., 2017) (discussing the persistent “ambiguity” in Delaware fiduciary law about how to handle situations in which “the interests of the corporation writ large” appear to diverge from “the short-term interests of its common shareholders”).

⁵⁰ Strine, *supra* note 29, at 771.

⁵¹ See ODoner, Radin, Goltser & Blumberg, *supra* note 31, at 4.

⁵² See, e.g., DIG., CULTURE, MEDIA & SPORT COMM., U.K. HOUSE OF COMMONS, DISINFORMATION AND “FAKE NEWS”: FINAL REPORT 20–42 (2019), <https://publications.parliament.uk/pa/cm201719/cmselect/cmcmums/1791/1791.pdf> [<https://perma.cc/PC89-M39T>] (detailing how Facebook has repeatedly taken actions that increased revenue at the expense of users' privacy and data security).

Third, as alluded to above,⁵³ corporate law might be modified through state or federal legislation to authorize or compel platforms to put users' interests ahead of stockholders' interests (either in general or in specific respects). In a much-noted 2016 essay in *The Atlantic*, Balkin and Zittrain call for a preemptive federal statute to strike "a new, grand bargain organized around the idea of fiduciary responsibility."⁵⁴ As they describe it, however, the state and local laws this statute would displace are not laws about shareholder primacy but rather "laws about online privacy."⁵⁵ At no point has Balkin or Zittrain indicated that their proposal would require modification of companies' existing fiduciary duties to accommodate new duties to users.

On the contrary, information-fiduciary advocates generally appear to endorse a fourth and final strategy for managing conflicts between stockholders and users, which is to cabin any fiduciary duties afforded to users so that they do not seriously threaten firm value — and thus might even be implemented by judges in the absence of legislation.⁵⁶ Balkin has stated repeatedly that the new obligations he would impose on entities like Facebook, Google, and Twitter are "more limited" than the obligations imposed on lawyers, doctors, and accountants.⁵⁷ One way to understand this formulation is as an effort to elicit better behavior from digital companies without undermining the shareholder-primacy norm. If traditional professional fiduciaries must temper their duties to any other beneficiaries with a higher duty of loyalty to patients and clients, it seems that Facebook, Google, and Twitter would, as a rule, have to temper their duties to users with a higher duty of loyalty to shareholders. Delaware law would remain unaffected. The interests of shareholders would still come first.⁵⁸

⁵³ See *supra* p. 504.

⁵⁴ Balkin & Zittrain, *supra* note 5.

⁵⁵ *Id.*

⁵⁶ It is unclear whether, and how, Balkin believes judges could implement his proposal on their own, without prior statutory or regulatory reform, but certain passages seem to hold out the possibility of a lead role for courts in creating as well as enforcing new fiduciary obligations. See, e.g., Balkin, *Fixing Social Media*, *supra* note 5, at 15 (asserting that one advantage of the fiduciary approach is "[i]t can be implemented . . . by judges, legislatures, or administrative agencies"); Balkin, *Digital Age*, *supra* note 5 (suggesting that "common law courts," as distinct from "the state," might "treat online service providers as information fiduciaries").

⁵⁷ E.g., Balkin, *Three Laws of Robotics*, *supra* note 7, at 1229; Balkin, *Information Fiduciaries*, *supra* note 5, at 1226; Balkin, *Fixing Social Media*, *supra* note 5, at 12.

⁵⁸ For the reasons given in the main text, this strikes us as the most natural reading of the literature to date. In recent conversations, Balkin has informed us that he assumes the corporate-law fiduciary duties owed by digital platform directors *would* have to be curtailed in important respects to operationalize his proposal. That is, Balkin embraces some version of the third strategy on our list. We will consider this Article a (partial) success if it pushes Balkin and other advocates of the information-fiduciary idea to clarify their position here — and to grapple explicitly with the question of whether and to what extent they envision sacrificing stockholders' economic interests to advance users' noneconomic interests.

Pursuant to this strategy, reformers may indeed be able to mitigate the problem of conflicting fiduciary obligations and purchase legal coherence — but at a steep price. For if the concept of digital information fiduciaries does not require online platforms to place their users' interests above all other interests, it is unclear what work the concept is supposed to be doing. More than that, it is unclear how this is a fiduciary approach in any meaningful sense.

*B. Online Behavioral Advertising and the
Implausibility of Putting Users First*

Balkin is quick to emphasize that fiduciary duties are not one-size-fits-all in the law and that they can and do vary from context to context.⁵⁹ This is true, but within limits. The one thing that does not vary, in contexts where professional firms owe fiduciary duties to individual customers, is that the fiduciary always must act in the customer's best interest. As Zittrain himself has written, "at its core [a fiduciary relationship] means that the professionals are obliged to place their clients' interests ahead of their own."⁶⁰

Abandon this core tenet, and it is unclear what is left of the legal analogy to doctors, lawyers, accountants, and estate managers. The social media executive who is exhorted to treat users well (and prohibited from engaging in certain especially egregious behaviors) yet not required to place users' interests first resembles, instead, the used-car dealers and restaurateurs who are classic examples in the case law of service providers who are *not* ordinarily fiduciaries for their customers.⁶¹ "Although each of these relationships involves significant information asymmetries," as Professor Evan Criddle has explained, "the relationships are all presumptively arm's-length; none by definition

⁵⁹ See, e.g., Balkin, *Information Fiduciaries*, *supra* note 5, at 1223 ("[A] changing society generates new kinds of fiduciary relations and fiduciary obligations that the law can and should recognize. The scope of the fiduciary duty, however, is not the same for every entity."); Balkin, *Digital Age*, *supra* note 5 ("[T]here are many types of fiduciary duties.").

⁶⁰ Zittrain, *Fix This Mess*, *supra* note 5; see also *Bayer v. Beran*, 49 N.Y.S.2d 2, 5 (Sup. Ct. 1944) (citing *Winter v. Anderson*, 275 N.Y.S. 373, 376 (App. Div. 1934)) ("The fiduciary must subordinate his individual and private interests to his duty to the corporation whenever the two conflict."); John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1658 (1989) (describing as the "central conceptual difference" between contracting parties and fiduciaries "that a contracting party may seek to advance his own interests in good faith while a fiduciary may not"); Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331, 350 (2009) ("In all cases the fundamental fiduciary duty is to exercise the entrusted power exclusively for the other-regarding purposes for which it is held or conferred.")

⁶¹ See Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEX. L. REV. 993, 1041 (2017).

involves an entrustment of power from one party to another to be exercised under a purposive and other-regarding mandate.”⁶² Again, the United States Congress or the Delaware General Assembly could impose a broad user-regarding mandate on social media companies and thereby try to create duties of loyalty and care where none currently exist. But to succeed in this effort and wind up with anything recognizable as a fiduciary relationship, it seems to us that the legislators would have to force fundamental changes in the companies’ business practices — changes that information-fiduciary advocates have suggested are unnecessary and unwarranted⁶³ — and preempt or dilute the stockholder-regarding norms under which the companies currently operate.

Part III will consider the practices that digital information fiduciaries, on Balkin’s account, would be barred from engaging in. But Balkin is clear that at least one core practice would survive his reforms: the selling of targeted advertisements tied to personally identifiable information.⁶⁴ This concession alone highlights how strained the fiduciary designation is here. A business model built around behavioral advertising⁶⁵ demands that companies like Facebook assemble a maximally detailed portrait of their users’ lives, which the companies then sell to marketers and developers.⁶⁶ While targeted advertising is not new, the internet has vastly expanded its scope and sophistication. Advertising

⁶² *Id.* “The injuries that arise within these relationships can be remedied,” accordingly, through nonfiduciary regimes “such as contract law, tort law, property law, and criminal law.” *Id.*

⁶³ See *supra* notes 19–24, 54–58 and accompanying text.

⁶⁴ See, e.g., Balkin, *Information Fiduciaries*, *supra* note 5, at 1227 (“It cannot be the case that the basic business model of free or subsidized online services inherently violates fiduciary obligations”); Balkin, *Fixing Social Media*, *supra* note 5, at 12 (“Social media companies and search engines provide free services in exchange for the right to collect and analyze personal data and serve targeted ads. This by itself does not violate fiduciary obligations.”).

⁶⁵ The Federal Trade Commission has defined online behavioral advertising as the practice, “typically invisible to consumers,” of “tracking . . . consumers’ online activities in order to deliver tailored advertising” that is more closely aligned with their “inferred interests.” FTC, FTC STAFF REPORT: SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING 2 (2009), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-staff-report-self-regulatory-principles-online-behavioral-advertising/po85400behavadreport.pdf> [<https://perma.cc/BFC3-3ECA>].

⁶⁶ Facebook denies that it sells user data to third parties. But as Professor Michal Kosinski has pointed out, any time a user clicks on an advertisement, Facebook automatically reveals facets of the user’s identity to the advertiser by virtue of the fact that the advertiser has paid Facebook to target specific types of individuals. Michal Kosinski, Opinion, *Congress May Have Fallen for Facebook’s Trap, but You Don’t Have To*, N.Y. TIMES (Dec. 12, 2018), <https://nyti.ms/2zV3jho> [<https://perma.cc/S49N-UR6M>]. And as Professor Chris Hoofnagle has observed, Facebook also grants developers access to user data, a form of exchange that he argues should also be considered a “sale.” Chris Hoofnagle, *Facebook and Google Are the New Data Brokers*, DIGITAL LIFE INITIATIVE @ CORNELL TECH (Jan. 16, 2019), <https://www.dli.tech.cornell.edu/blog/facebook-and-google-are-the-new-data-brokers> [<https://perma.cc/6YFK-9NQK>].

of this sort may have some benefits.⁶⁷ Balkin asserts that it “allows more efficient advertising campaigns” and can “give social media [companies] opportunities to structure and curate content for end users that they will find most engaging and interesting.”⁶⁸ Yet, as long as such companies make most of their money through personally targeted advertisements, they will be economically motivated to extract as much data from their users as they can — a motivation that runs headfirst into users’ privacy interests as well as any interests users might have in exercising behavioral autonomy or ensuring that their personal data is not stolen, sold, mined, or otherwise monetized down the line.⁶⁹

Balkin acknowledges that permitting online providers to collect personal data and serve targeted advertisements “creates a perpetual conflict of interest” between the providers and their users.⁷⁰ Rather than

⁶⁷ Experts debate whether and under what conditions online behavioral advertising actually enhances consumer welfare. See, e.g., Veronica Marotta, Kaifu Zhang & Alessandro Acquisti, Who Benefits from Targeted Advertising? 2–5 (Oct. 8, 2015) (unpublished manuscript), https://www.ftc.gov/system/files/documents/public_comments/2015/10/00037-100312.pdf [<https://perma.cc/8BZ3-V8NW>] (reviewing potential costs and “benefits of increasingly widespread and precise collection and usage of consumer data for the targeting of online ads,” *id.* at 2, and developing a model that suggests consumer welfare is generally higher “when less information is exchanged” with advertisers, *id.* at 5 (emphasis added)).

⁶⁸ Balkin, *Fixing Social Media*, *supra* note 5, at 2.

⁶⁹ Some predict that the GDPR will lead to fundamental changes in the business models of Facebook and other behavioral-advertising-based companies, at least in the European Union. See, e.g., Kimberly A. Houser & W. Gregory Voss, *GDPR: The End of Google and Facebook or a New Paradigm in Data Privacy?*, 25 RICH. J.L. & TECH., no. 1, 2018, at 1, 109, https://jolt.richmond.edu/files/2018/11/Houser_Voss-FE.pdf [<https://perma.cc/TX8S-LNT9>] (arguing that the GDPR “may be an end to Facebook and Google as they currently operate”); Paul M. Schwartz & Karl-Nikolaus Peifer, *Transatlantic Data Privacy Law*, 106 GEO. L.J. 115, 143 (2017) (stating that the GDPR’s ban on tying, or the extension of “terms within a single contractual agreement . . . to include processing of personal data beyond that which is necessary to the purpose of the contract,” “takes aim at myriad new digital business models based around data trade”); Henry Farrell & Abraham Newman, *Here’s How Europe’s Data Privacy Law Could Take Down Facebook*, WASH. POST MONKEY CAGE (May 25, 2018, 10:03 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/25/heres-how-europes-gdpr-may-take-down-facebook> [<https://perma.cc/GQV2-DL65>] (“Privacy activist Max Schrems and his new organization . . . have used the GDPR to launch four major court cases against Facebook and its subsidiaries. If Schrems’s interpretation prevails, Facebook’s business model will be fundamentally challenged.”). It is too early to assess these predictions. But it is worth noting that while Facebook’s user growth in Europe initially slowed after the GDPR took effect in May 2018, it has since rebounded — without any evident changes to the company’s core business model. See Elizabeth Schulze, *Facebook’s User Growth in Europe Is Bouncing Back, Defying Stricter Privacy Laws*, CNBC (Apr. 25, 2019, 8:11 AM), <https://www.cnb.com/2019/04/25/facebook-q1-2019-user-growth-in-europe-is-bouncing-back-despite-gdpr.html> [<https://perma.cc/CM5J-BAUE>]. Facebook is currently the subject of numerous GDPR-related investigations, including eleven by the Irish Data Protection Commission. See Elizabeth Schulze, *Facebook’s EU Regulator Says It “Remains to Be Seen” if Mark Zuckerberg Is Serious About Privacy*, CNBC (June 13, 2019, 6:26 AM), <https://www.cnb.com/2019/06/13/facebook-investigations-by-eu-ireland-regulator-nearing-conclusions.html> [<https://perma.cc/3NKE-KEMN>].

⁷⁰ Balkin, *Fixing Social Media*, *supra* note 5, at 12; see also Balkin, *Information Fiduciaries*, *supra* note 5, at 1226 (“The value of end-user data, and its centrality in the business models of many online service providers, creates an inherent potential for conflicts of interest between the digital

see this as an insuperable obstacle to a fiduciary relationship, however, he submits that “the goal should be to ameliorate or forestall conflicts of interest.”⁷¹ “[T]he law should limit how social media companies can make money off their end users, just as the law limits how other fiduciaries can make money off their clients and beneficiaries.”⁷² Sketching out what these limits might look like, Zittrain suggests that a digital information fiduciary would be prohibited from harnessing user data to enable “predatory” advertisements but permitted to expose users to non-predatory advertisements.⁷³

Even if we accept for argument’s sake the soundness of the predatory/nonpredatory distinction in this context — although we are doubtful⁷⁴ — it is unclear how a digital fiduciary is supposed to fulfill its duty of loyalty to users under conditions of profound and “perpetual” conflict. Fiduciary theorists debate the best way to conceptualize the duty of loyalty. On thicker, “prescriptive” accounts, a loyal fiduciary must not only avoid conflicts of interest but also act with “affirmative devotion”⁷⁵ or “obedience”⁷⁶ toward her beneficiary. On thinner, “proscriptive” accounts, the fiduciary must “avoid conflicts between pursuit of his self-interest and fulfilment of his duty to act for the benefit of the beneficiary” and “between this duty and the pursuit of others’ interests.”⁷⁷ Even under this *less* demanding theory of loyalty, fiduciary law cannot tolerate an arrangement that places the fiduciary’s economic livelihood and its beneficiaries’ well-being fundamentally at odds. The whole

company and the end-user.”); Zittrain, *Fix This Mess*, *supra* note 5 (“It may be that aspects of an advertising-based business model are indeed incompatible with ethically serving users . . .”).

⁷¹ Balkin, *Fixing Social Media*, *supra* note 5, at 13.

⁷² *Id.*

⁷³ See Zittrain, *How to Exercise*, *supra* note 5 (“A fiduciary duty wouldn’t broadly rule out targeted advertising — dog owners would still get dog food ads — but it would preclude predatory advertising, like promotions for payday loans.”).

⁷⁴ Cf. SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* 90 (2019) (“The word ‘targeted’ is another euphemism. It evokes notions of precision, efficiency, and competence. Who would guess that targeting conceals a new political equation in which Google’s concentrations of computational power brush aside users’ decision rights as easily as King Kong might shoo away an ant, all accomplished offstage where no one can see?”); Louise Matsakis, *Facebook’s Targeted Ads Are More Complex Than It Lets On*, WIRE (Apr. 25, 2018, 4:04 PM), <https://www.wired.com/story/facebooks-targeted-ads-are-more-complex-than-it-lets-on> [<https://perma.cc/ZG2Y-WYJX>] (noting that “companies who use Facebook have a near-endless number of data points with which to target their ads,” allowing them to pick out “hyper-specific audiences with extreme precision,” and that users are “significantly more likely to click on . . . psychologically tailored ads”); Piety, *supra* note 31 (“[L]ine drawing between [online] advertising that is ‘abusive’ or ‘manipulative,’ versus that which is not, . . . will not be easy: it is virtually all manipulative.”).

⁷⁵ Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 557 (2015).

⁷⁶ *Id.* at 558.

⁷⁷ *Id.* at 557 (quoting Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235, 257 (2011)).

point of proscriptive rules implementing the duty of loyalty is to minimize “biasing factors that might induce the fiduciary to subjugate the interests of beneficiaries” to any other end.⁷⁸

To appreciate just how odd it is to think that a behavioral-advertising company could be a fiduciary for its users, imagine visiting a doctor — let’s call her Marta Zuckerberg — whose main source of income is enabling third parties to market you goods and services. Instead of requesting monetary payment for services rendered, Dr. Zuckerberg floods you (and her two billion other patients) with ads for all manner of pills and procedures from the second you set foot in her office, and she gets paid every time you try to learn more about one of these ads or even look in their direction. In fact, this is just about the only way she gets paid — as her financial backers are apt to remind her. The ads themselves, moreover, are tightly tailored to your economic, demographic, and psychological profile and to any consumer frailties you exhibit.⁷⁹ They are also continually updated in light of information Dr. Zuckerberg collects on you; to be sure she does not miss anything, she has planted surveillance devices all around your neighborhood as well as her office.⁸⁰ Can this institutional sociology and incentive structure plausibly be reconciled with a commitment to prioritizing your health?⁸¹

⁷⁸ *Id.*

⁷⁹ See generally Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995 (2014). Dr. Zuckerberg may even assign scores to patients based on their susceptibility to certain sorts of ads, and then share those scores with third parties. See generally Danielle Keats Citron & Frank Pasquale, Essay, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1 (2014).

⁸⁰ Your data, accordingly, is the payment you make to Dr. Zuckerberg. Cf. Shoshana Zuboff, *The Real Reason Why Facebook and Google Won't Change*, FAST COMPANY (Feb. 22, 2019), <https://www.fastcompany.com/90303274/why-facebook-and-google-wont-change> [<https://perma.cc/39HN-Q5DD>] (“Users [of Facebook] are not customers They are merely free sources of raw material.”).

⁸¹ Consider, by way of contrast with this hypothetical, the rules limiting real-life doctors from receiving gifts valued at \$100 or more from pharmaceutical-company sales representatives. See Elaine K. Howley, *Do Drug Company Payments to Doctors Influence Which Drugs They Prescribe?*, U.S. NEWS & WORLD REP. (Aug. 31, 2018, 9:00 AM), <https://health.usnews.com/health-care/patient-advice/articles/2018-08-31/do-drug-company-payments-to-doctors-influence-which-drugs-they-prescribe> [<https://perma.cc/E387-9JFA>] (describing these rules). Of course, Facebook is not a health care provider, and prioritizing a medical patient’s interests may require very different activities and assurances than prioritizing a social network user’s interests. Our point is simply that unlike doctors, Facebook does not come close to putting its customers first in any serious sense — notwithstanding Zuckerberg’s protestations to the contrary, see, e.g., Mark Zuckerberg, Opinion, *The Facts About Facebook*, WALL ST. J. (Jan. 24, 2019, 7:03 PM), <https://www.wsj.com/articles/the-facts-about-facebook-11548374613> [<https://perma.cc/U4Y6-6AP6>] — and that this follows from the structure of its business.

Apart from the business model, perhaps the most basic distinction between a real-life doctor and Facebook is that a doctor is a trained professional who makes individualized judgments, whereas Facebook is an automated communications network. We bracket in this Article the deep questions raised by the notion that a fiduciary’s relationship with its beneficiaries could be mediated

In other words, the business model matters. It determines the degree to which a commercial enterprise is motivated to advance the best interests of its customers, or the exact opposite. Although the economic incentives of commercial fiduciaries will sometimes diverge from the interests of their customers and raise difficult issues at the margins — truly perfect alignment might obviate the need for fiduciary duties in the first place⁸² — there are cases where the degree of misalignment renders fiduciary loyalty implausible. Businesses built on behaviorally targeted advertising appear to be one such case.

Moreover, if Balkin's fiduciary obligations may be too weak or too compromised where they apply, one might also worry that they do not apply widely enough. Balkin never discusses the advertisers or content producers who rely on social media companies such as Facebook. Nor does he discuss the millions of *nonusers* whose data is systematically swept up by Facebook through user uploads of phone and email contacts⁸³ and through "sites that use Facebook's advertising pixel or other social APIs linking back to Facebook."⁸⁴ Like Facebook's end users, these parties surrender to Facebook certain forms of information that they have an interest in keeping private. Facebook, however, has an economic incentive to monetize this information as well. For example, even though an advertiser is unlikely to want its marketing campaign data to be shared with competitors, Facebook may incorporate this data

almost entirely by computer algorithms, although we note that Balkin's theory is potentially vulnerable on this ground as well. As Professor Julie Cohen puts it in a response piece:

Classic fiduciaries — doctors, lawyers, priests — operated on small scales and at human rhythms for a reason. The fiduciary construct implies a mutual encounter predicated on the knowability of human beings as human beings, with mutually intelligible desires and needs. The information fiduciaries proposal abstracts speed, immanence, automaticity, and scale away from that encounter and then assumes they never mattered in the first place.

Julie E. Cohen, *Scaling Trust and Other Fictions*, LAW & POL. ECON. (May 29, 2019), <https://peblog.org/2019/05/29/scaling-trust-and-other-fictions> [<https://perma.cc/C65Z-75J3>].

⁸² Cf. Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 811 (1983) ("When the fiduciary's interests coincide with those of the entrustor, the entrustor is partially protected because as the fiduciary acts in his own interest he will automatically act in the interest of the entrustor. . . . The fiduciary may have an incentive to abuse his power, however, if the loss from the joint enterprise is smaller than his gain from abuse of his power.")

⁸³ See Kashmir Hill, *How Facebook Figures Out Everyone You've Ever Met*, GIZMODO (Nov. 7, 2017, 9:39 AM), <https://gizmodo.com/how-facebook-figures-out-everyone-youve-ever-met-1819822691> [<https://perma.cc/E9CG-V8K8>].

⁸⁴ Kurt Wagner, *This Is How Facebook Collects Data on You Even if You Don't Have an Account*, VOX: RECODE (Apr. 20, 2018, 1:02 PM), <https://www.vox.com/2018/4/20/17254312/facebook-shadow-profiles-data-collection-non-users-mark-zuckerberg> [<https://perma.cc/7GAG-J8EZ>]; see also David Ingram, *Facebook Fuels Broad Privacy Debate by Tracking Non-Users*, REUTERS (Apr. 15, 2018, 7:04 AM), <https://www.reuters.com/article/us-facebook-privacy-tracking/facebook-fuels-broad-privacy-debate-by-tracking-non-users-idUSKBN1HM0DR> [<https://perma.cc/FZ2M-LM22>] ("Facebook often installs cookies on non-users' browsers if they visit sites with Facebook 'like' and 'share' buttons, whether or not a person pushes a button."); Wagner, *supra* ("There is no way to opt out of this kind of data collection.")

into its algorithms regardless — thereby passing on to rivals the benefits of the advertiser’s proprietary information. Many advertisers and content producers are just as captive to Facebook as its end users are, or even more so. Insofar as the purpose of the information-fiduciary proposal is to rebalance the relationship between dominant online intermediaries and those who depend on them, it is unclear why its protections should cover only one set of dependents.

C. *Constructed Vulnerability*

Beyond their reliance on targeted advertising, certain online platforms have other features that strain the fiduciary paradigm. Balkin notes that a hallmark of the expertise-based fiduciary relationships on which he focuses is that the fiduciary stands in a position of power over the beneficiary.⁸⁵ The sources of this relational power are typically twofold. First, the fiduciary possesses professional skills and competencies that the beneficiary lacks. This explains both why the beneficiary is seeking the fiduciary’s services and why she is hampered in monitoring the fiduciary’s conduct. Second, obtaining the fiduciary’s services requires the beneficiary to disclose personal information that the fiduciary could potentially abuse.⁸⁶ The fiduciary’s expertise and the beneficiary’s vulnerability are thus interrelated in a deep sense.

Balkin suggests that end users’ relationships with online platforms involve a similar combination of (1) valuable expertise and (2) personal exposure necessary to enlist that expertise.⁸⁷ Each proposition warrants scrutiny.

Whether an online platform offers expertise may vary. In the case of Facebook, users are offered, first and foremost, access to a communications network, a vast infrastructure for social and economic exchange.⁸⁸ Facebook employs hundreds of skilled professionals, such as the software engineers who create and maintain its database applications and search functions. But so do automobile manufacturers, oil and gas outfits, and any number of other firms not traditionally seen as fiduciaries for their customers. Expertise underwrites commercial fiduciary law only insofar as it enables specialized, individualized judgments and services to be rendered on the beneficiary’s behalf. Individuated

⁸⁵ See, e.g., Balkin, *Information Fiduciaries*, *supra* note 5, at 1216–17.

⁸⁶ See *id.*; see also Frankel, *supra* note 82, at 810 (“The delegated power that enables the fiduciary to benefit the entrustor also enables him to injure the entrustor, because the purpose for which the fiduciary is allowed to use his delegated power is narrower than the purposes for which he is capable of using that power.”).

⁸⁷ See, e.g., Balkin, *Information Fiduciaries*, *supra* note 5, at 1222 (“[E]nd-users’ relationships with many online service providers involve significant vulnerability, because online service providers have considerable expertise and knowledge and end-users usually do not. Online service providers have lots of information about us, and we have very little information about them . . .”).

⁸⁸ Cf. K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1669 (2018) (describing Facebook, Google, and Amazon as leading “examples of online-enabled infrastructure for the modern economy”).

experience on Facebook is largely limited to choosing certain settings and inputting certain information (friends requested, groups joined, posts “liked”), which trigger a series of automated responses. Maintaining a twenty-first-century version of the Yellow Pages coupled with a communications infrastructure and search database requires significant technical expertise, to be sure, but not the kind of expertise that has helped justify fiduciary relationships in the past.

The one Facebook service that has involved a more context-sensitive form of judgment is content moderation. Content moderation refers to the practice of establishing and enforcing a set of rules to govern which kinds of speech are permitted on a platform.⁸⁹ Facebook’s content moderators, however, do not apply their judgment for the benefit of any given user. Rather, they are called upon to protect community standards and the economic viability of the platform as a whole.⁹⁰ In this way, an online content moderator is more akin to a traffic cop — applying rules that benefit the collective and keep traffic flowing — than to a doctor or a lawyer. The fact that Facebook outsources the vast majority of its content moderation jobs,⁹¹ moreover, is some indication that it does not view the service as a core part of the business.⁹²

What about exposure? Here, too, the nature of the problem is notably distinct. Unlike in the case of obtaining legal advice or medical care, the sharing of intimate personal information with the provider is not a functional prerequisite to accessing Facebook or any other social media network. It is the price the online providers have chosen to set. Doctors and lawyers need to learn sensitive details about the individuals who engage their services to be able to serve them well. Social media companies do not.

The loss of privacy and control experienced by Facebook users therefore does not stem, organically, “from the structure and nature of the

⁸⁹ For an overview and analysis of how platforms like Facebook moderate user-generated content, see Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1630–62 (2018).

⁹⁰ See, e.g., *id.* at 1625 (“Platforms create rules and systems to curate speech out of a sense of corporate social responsibility, but also, more importantly, because their economic viability depends on meeting users’ speech and community norms.”).

⁹¹ See Casey Newton, *The Trauma Floor*, THE VERGE (Feb. 25, 2019, 8:00 AM), <https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interviews-trauma-working-conditions-arizona> [<https://perma.cc/6L87-EYUB>] (detailing the psychological trauma that contractors may endure as part of their content moderation jobs, which pay a fraction of what full-time Facebook employees make); Queenie Wong, *Facebook Content Moderation Is an Ugly Business. Here’s Who Does It*, CNET (June 19, 2019, 12:53 PM), <https://www.cnet.com/news/facebook-content-moderation-is-an-ugly-business-heres-who-does-it> [<https://perma.cc/DHQ9-GVMD>] (listing companies that have contracted with Facebook to provide content moderation).

⁹² Cf. ZUBOFF, *supra* note 74, at 508–09 (discussing the secretive, “outcast function of ‘content moderation,’” *id.* at 508, which always “operates at a distance from the corporation’s core functions,” *id.* at 509).

fiduciary relation.”⁹³ It stems from Facebook’s deliberate efforts to *create* such vulnerabilities. Facebook’s dominant market position supports this strategy. To the extent that users feel beholden to Facebook, it is not because the company offers them especially skillful services or judgments so much as because of a lack of viable alternatives.⁹⁴ By virtue of owning four of the top five social media applications, Facebook makes it difficult to escape the company’s ecosystem.⁹⁵ As legal scholars⁹⁶ and German antitrust authorities⁹⁷ have concluded, this market position enables Facebook to extract more data from its users — who often feel they have nowhere else to go — and thereby compounds their vulnerability.

⁹³ Frankel, *supra* note 82, at 810 (emphasis omitted).

⁹⁴ This raises another point of disanalogy with traditional professional fiduciaries: unlike Balkin’s information fiduciaries, traditional fiduciaries not only tend to “operate[] on small scales,” Cohen, *supra* note 81, but they also generally face meaningful competition, *see* Frankel, *supra* note 82, at 814–15. The need to compete with others in their profession gives doctors and lawyers a business reason to serve the interests of their beneficiaries. This is especially true today, when patients and clients can publicly post ratings and reviews. Dominant digital platforms, by contrast, operate in concentrated markets. While the targeted-advertising-based business model of these platforms creates (from a user’s perspective) bad incentives, the underlying market structure attenuates good incentives.

⁹⁵ In 2017, the top five most popular social media applications were WhatsApp, Facebook, Messenger, Instagram, and Snapchat. Michael Grothaus, *Facebook Owns Four of the Five Most Downloaded Apps in 2017*, FAST COMPANY (Apr. 18, 2017), <https://www.fastcompany.com/4035007/facebook-owns-four-of-the-five-most-downloaded-apps-in-2017> [https://perma.cc/PT9G-MAUG]. Facebook purchased Instagram in 2012 and WhatsApp in 2014. *See* Nathan Reiff, *Top Companies Owned by Facebook*, INVESTOPEDIA (June 25, 2019), <https://www.investopedia.com/articles/personal-finance/051815/top-11-companies-owned-facebook.asp> [https://perma.cc/4AFP-XGJC]. In 2013, Facebook reportedly attempted to purchase Snapchat, but Snapchat rebuffed the offer. *See* John Shinal, *Mark Zuckerberg Couldn’t Buy Snapchat Years Ago, and Now He’s Close to Destroying the Company*, CNBC (July 14, 2017, 6:08 PM), <https://www.cnbc.com/2017/07/12/how-mark-zuckerberg-has-used-instagram-to-crush-evan-spiegels-snap.html> [https://perma.cc/P6FF-F6U4]. Users who decided to leave Facebook in light of recent privacy breaches discovered to their dismay that cutting it out entirely would require deleting Instagram and WhatsApp as well. *See* Will Oremus, *If You Delete Facebook, Do You Also Have to Delete Instagram and WhatsApp?*, SLATE (Dec. 22, 2018, 5:45 AM), <https://slate.com/technology/2018/12/can-you-deletefacebook-if-you-dont-also-delete-instagram-and-whatsapp.html> [https://perma.cc/2LQ7-P5XG]; *see also id.* (“After all, the unfortunate reality is that there aren’t a lot of prominent social networks that Facebook *doesn’t* own.”).

⁹⁶ *See* Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist’s Journey Towards Pervasive Surveillance in Spite of Consumers’ Preference for Privacy*, 16 BERKELEY BUS. L.J. 39, 40 (2019) (arguing that Facebook’s ability to extract so much data from users “is merely this titan’s form of monopoly rents”).

⁹⁷ *See* Press Release, Bundeskartellamt, Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources 2 (Feb. 7, 2019), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook.pdf?_blob=publicationFile&v=2 [https://perma.cc/A527-RYHE] [hereinafter Bundeskartellamt Press Release] (describing a February 2019 decision by the German national competition regulator concluding that “[t]he extent to which Facebook collects, merges[,] and uses data in user accounts constitutes an abuse of a dominant position”). In August 2019, the Higher Regional Court of Düsseldorf issued a preliminary ruling suspending the Bundeskartellamt’s Facebook decision. *See* Oberlandesgericht Düsseldorf Aug. 26, 2019, VI-Kart 1/19, http://www.olg-duesseldorf.nrw.de/behoerde/presse/Presse_aktuell/20190826_

By glossing over these points of disanalogy with doctors and lawyers, Balkin's proposal risks obscuring the contingent and constructed character of the power imbalances that exist between ordinary individuals and the major online providers — imbalances that stem both from the business model these firms employ and from the market dominance they enjoy. This blind spot, in turn, risks foreclosing a broader discussion about interventions that might prevent those imbalances from arising in the first place.

D. First-Order and Second-Order Information Asymmetries

Implicit in the discussion above, traditional fiduciary relationships are marked by asymmetries of information. The duty of loyalty responds to these asymmetries by committing the fiduciary to the beneficiary's best interests and thereby allowing the beneficiary "to take advantage of the [fiduciary's] superior information and expertise" without having "to expend significant resources to monitor the [fiduciary's] behavior."⁹⁸ In justifying his proposal, Balkin emphasizes that there are "strong asymmetries of information" between end users and online platforms, whose "operations, algorithms, and collection practices are mostly kept secret" and might be hard to interpret even if they were disclosed.⁹⁹ Balkin is surely right about this.

Yet not all information asymmetries are asymmetric in the same way. We might describe the information asymmetries that obtain in traditional fiduciary settings as *second-order* asymmetries: while the beneficiary may not grasp or even hear about any number of technical details concerning the fiduciary's efforts on her behalf, she understands the core terms of their relationship.¹⁰⁰ This shared understanding enables the beneficiary to give meaningful consent and, in many cases, to exercise

PM_Facebook/20190826-Beschluss-VI-Kart-1-19-V_.pdf [https://perma.cc/BTY4-7PPJ], translated in OLG Düsseldorf on Facebook, 26 August 2019, a Non-Translation, D'KART (Aug. 26, 2019), https://www.d-kart.de/wp-content/uploads/2019/08/OLG-D%C3%BCsseldorf-Facebook-2019-English-1.pdf [https://perma.cc/ZZ3W-7E8Y]. The Bundeskartellamt is currently appealing the regional court's ruling to the Federal Court of Justice. See Sara Germano, *Facebook Wins Appeal Against German Data-Collection Ban*, WALL ST. J. (Aug. 26, 2019, 5:04 PM), https://www.wsj.com/articles/facebook-wins-appeal-against-german-data-collection-ban-11566835967 [https://perma.cc/U6YW-UQYA].

⁹⁸ Maxwell J. Mehlman, *Fiduciary Contracting: Limitations on Bargaining Between Patients and Health Care Providers*, 51 U. PITT. L. REV. 365, 390 (1990); see also Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209, 1244 (1995) ("[I]n fiduciary law, the duty of loyalty is grounded in asymmetric information.")

⁹⁹ Balkin, *Information Fiduciaries*, *supra* note 5, at 1226.

¹⁰⁰ Cf. Dennis F. Thompson, *Democratic Secrecy*, 114 POL. SCI. Q. 181, 185–86, 192–93 (1999) (distinguishing analogously between "[f]irst-order secrecy" and "second-order publicity," *id.* at 185).

some control over the fiduciary's behavior.¹⁰¹ It also identifies the dimension along which the fiduciary is obligated to serve the beneficiary. Because a patient (say) is seeking medical services, the doctor's duty is to protect and promote the patient's health interests.

What happens when the service provider and the customer lack this shared understanding of the core terms of their relationship? We might describe the information asymmetries that obtain in some of the digital settings in question as *first-order* asymmetries: beyond the technical details of an online platform's operations, algorithms, and data collection practices, the typical user does not even understand — much less approve of — their basic contours. Most Facebook users, to stick with Balkin's main example, rely on the platform to communicate with other Facebook users. According to a recent Pew Research Center survey, seventy-four percent of them do not know that the platform collects data to classify their interests and traits.¹⁰² Other surveys have found that an overwhelming majority of Facebook users do not want to be exposed to *any* targeted political or commercial advertisements, reflecting a “re-sounding consumer rejection of surveillance-based ads and content.”¹⁰³ As a rule, it appears that Facebook users tend to be deeply ignorant of the ways the company serves (or disserves) them, and deeply unnerved when they find out.

This is not just an unusually stark asymmetry of information. It is an elaborate system of social control whose terms are more imposed than chosen. Seen in this light, the idea that the law could convert such companies into fiduciaries for their users without the need for fundamental restructuring looks even more far-fetched.

III. SOLVING WHICH PROBLEMS?

If the information-fiduciary proposal would not disrupt the basic business model of online platforms, what would it do to advance users' interests? And how exactly would the new fiduciary duties be enforced? Balkin is strikingly unclear on these questions. Reconstructing his potential answers gives still more reason to doubt that a fiduciary characterization is appropriate or that his proposal is adequate to the problems at hand.

¹⁰¹ Cf. David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 271 (2010) (“‘Second-order’ publicity rules . . . give citizens a platform for participating in the development of ‘first-order’ secrets, which affords them a degree of comprehension and control.” (quoting Thompson, *supra* note 100, at 185)).

¹⁰² Lee Rainie, *Facebook Algorithms and Personal Data*, PEW RES. CTR. (Jan. 16, 2019), <http://www.pewinternet.org/2019/01/16/facebook-algorithms-and-personal-data> [<https://perma.cc/5494-DJHC>].

¹⁰³ Joseph Turow & Chris Jay Hoofnagle, Opinion, *Mark Zuckerberg's Delusion of Consumer Consent*, N.Y. TIMES (Jan. 29, 2019), <https://nyti.ms/2Sczvup> [<https://perma.cc/K77W-VMED>].

A. Substantive Issues

Supporters of the information-fiduciary proposal have touted the “many benefits”¹⁰⁴ and “enormous consequences”¹⁰⁵ its adoption would bring. On closer inspection, however, the main prescriptions that Balkin associates with the proposal turn out not to require fiduciary law or theory at all. Balkin has repeatedly suggested, for instance, that treating digital companies as information fiduciaries will prevent them from acting like “con artists” toward their users.¹⁰⁶ But deception is already prohibited by a suite of state and federal consumer protection statutes,¹⁰⁷ as well as by common law antifraud doctrines¹⁰⁸ and ordinary contract law, which imposes a duty of good faith and fair dealing that (unlike many fiduciary duties) may not be waived or contracted away even in arm’s-length transactions.¹⁰⁹ When Google was accused in the early 2010s of acting like a con artist by biasing its search results in favor of its own services and passing off content from competing websites as its own, the Federal Trade Commission (FTC) conducted “a

¹⁰⁴ Bloomberg Editorial, *supra* note 9.

¹⁰⁵ Ariel Dobkin, *Information Fiduciaries in Practice: Data Privacy and User Expectations*, 33 BERKELEY TECH. L.J. 1, 11 (2018).

¹⁰⁶ See *supra* note 20 and accompanying text. “At base,” Balkin recently stated, “the obligations of loyalty mean that digital fiduciaries may not act like con artists.” Balkin, *Fixing Social Media*, *supra* note 5, at 13.

¹⁰⁷ See 15 U.S.C. § 45(a)(1)–(2) (2012) (declaring unlawful all “unfair or deceptive acts or practices in or affecting commerce,” *id.* § 45(a)(1), and empowering the Federal Trade Commission (FTC) to prevent such acts and practices); Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 165–67 (2011) (noting that many state mini-FTC Acts are broader than the federal analog in their definitions of unlawful conduct, the remedies they afford, and their provision of private rights of action); Jim Rossi, *Dynamic Incorporation of Federal Law*, 77 OHIO ST. L.J. 457, 463 (2016) (“Many state consumer protection agencies operate under ‘mini-FTC Acts’ that incorporate [FTC] definitions of ‘unfair,’ ‘deceptive,’ or ‘misleading’ trade practices.”). See generally Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 NOTRE DAME L. REV. 747 (2016) (describing the proactive role of state attorneys general in enforcing privacy norms under state unfair and deceptive trade acts and practices laws); Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583 (2014) (describing the FTC’s growing role since the late 1990s in enforcing both privacy statutes and companies’ privacy policies).

¹⁰⁸ See, e.g., RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 9 (AM. LAW INST., Tentative Draft No. 2, 2014).

¹⁰⁹ See Paul M. Altman & Srinivas M. Raju, *Delaware Alternative Entities and the Implied Contractual Covenant of Good Faith and Fair Dealing Under Delaware Law*, 60 BUS. LAW. 1469, 1469–80 (2005) (observing that, while fiduciary duties may be modified by contract under Delaware law, “[t]he implied covenant of good faith and fair dealing in contract law may not be waived or contracted away by the parties to an agreement,” *id.* at 1480); see also Paul MacMahon, *Good Faith and Fair Dealing as an Underenforced Legal Norm*, 99 MINN. L. REV. 2051, 2065 (2015) (“The duty of good faith and fair dealing has been invoked in several thousand [contemporary U.S. contract] cases, often successfully. And the duty has sometimes served as the basis for strikingly liberal impositions of liability.”). Standard legal definitions of good faith invoke the “absence of intent to defraud or to seek unconscionable advantage.” *Good Faith*, BLACK’S LAW DICTIONARY (11th ed. 2019).

wide-ranging investigation”¹¹⁰ under the Commission’s organic statute that asked, in essence, whether Google had “acted in good faith” toward its users.¹¹¹

At other points, Balkin has suggested that the information-fiduciary model would shelter users from “abusive”¹¹² and “manipulat[ive]”¹¹³ corporate behaviors. But depending on how one defines these terms,¹¹⁴ almost all such behaviors may likewise be proscribed by state tort law¹¹⁵ or by state and federal consumer protection statutes, which prohibit “unfair” as well as “deceptive” practices.¹¹⁶ Perhaps, then, the information-fiduciary model is best understood as a restatement or refinement of consumer protection law, with particular application to online privacy.¹¹⁷ In that case, however, it is fair to ask why we need an abstract new theorization of the consumer-provider relationship, instead of an institutionally sensitive account of how existing legal norms can be more effectively elaborated and administered, whether by the FTC or a European-style data protection agency.¹¹⁸

¹¹⁰ Google Inc., FTC File No. 111-0163, at 1 (Jan. 3, 2013) (statement regarding Google’s search practices), https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstntofcomm.pdf [<https://perma.cc/Y2KW-W5BM>]; see also *id.* at 3 n.2.

¹¹¹ James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868, 935 (2014). Professor James Grimmelmann argues that the FTC was right to reject the “search bias” allegations against Google, but that the Commission should have given more “thought as to how to carry out” the continual monitoring of Google that it pledged to undertake. *Id.* at 936.

¹¹² *E.g.*, Balkin, *Triangle*, *supra* note 5, at 2049; Balkin, *Information Fiduciaries*, *supra* note 5, at 1229; see also, *e.g.*, Balkin, *Algorithmic Society*, *supra* note 5, at 1164 (“An information fiduciary may not betray or abuse the trust of its end-users.”).

¹¹³ *E.g.*, Balkin, *Three Laws of Robotics*, *supra* note 7, at 1229; Balkin, *Triangle*, *supra* note 5, at 2052, 2053; Balkin, *Information Fiduciaries*, *supra* note 5, at 1227, 1232.

¹¹⁴ In his most recent piece on the regulation of social media, Balkin defines manipulation as “techniques of persuasion and influence that (1) prey on another person’s emotional vulnerabilities and lack of knowledge (2) to benefit oneself or one’s allies and (3) reduce the welfare of the other person.” Balkin, *Fixing Social Media*, *supra* note 5, at 4.

¹¹⁵ See, *e.g.*, Francesca Fontana, *Lawsuits Against Facebook over Data Privacy Issues Are Piling Up*, THE STREET (Mar. 29, 2018), <https://www.thestreet.com/story/14536213/1/everyone-who-is-suing-facebook-for-cambridge-analytica.html> [<https://perma.cc/829Y-GEL4>] (listing privacy-related lawsuits, some of which involve tort claims, filed against Facebook in the wake of the Cambridge Analytica scandal).

¹¹⁶ *E.g.*, 15 U.S.C. § 45(a)(1) (2012); CAL. CIV. CODE § 1770(a) (West 2017).

¹¹⁷ Cf. James Grimmelmann, *When All You Have Is a Fiduciary*, LAW & POL. ECON. (May 30, 2019), <https://peblog.org/2019/05/30/when-all-you-have-is-a-fiduciary> [<https://perma.cc/Y762-PPTY>] (suggesting that while fiduciary principles are ill-suited to problems of self-dealing, content moderation, and market concentration on online platforms, the “best version” of U.S. information privacy law “would cash out fiduciary principles in specifying when and how platforms can use and share user data”).

¹¹⁸ A number of prominent scholars and advocates have urged the creation of such an agency in the United States, sometimes pointing to the failures of the FTC at protecting the privacy of online platform users. See, *e.g.*, Paul M. Schwartz, *Privacy and the Economics of Personal Health Care Information*, 76 TEX. L. REV. 1, 66–68 (1997); *EPIC to Congress: FTC Has Failed to Protect Privacy, New Data Protection Agency Urgently Needed*, ELECTRONIC PRIVACY INFO. CTR. (May 6, 2019), <https://epic.org/2019/05/epic-to-congress-ftc-has-failed.html> [<https://perma.cc/MF9A-S5LJ>].

Balkin's frequent refrain that digital information fiduciaries would have to act in "good faith" toward their users¹¹⁹ is telling in what it leaves out. Again, all parties involved in all contracts, including terms-of-service contracts, must always act in good faith toward each other.¹²⁰ As a matter of law, Balkin's proposal would change nothing in this regard. What is distinctive about fiduciaries is that they are generally held to a standard of "*utmost*" good faith.¹²¹ The omission of "utmost" in Balkin's narrative supplies further evidence that he does not really mean to hold online platforms to anything resembling traditional fiduciary obligations, so much as to basic standards of honesty and decency to which they are already held (however imperfect the enforcement).

This is not to say that every prescription Balkin associates with the information-fiduciary model would duplicate existing consumer protection or contract law. In particular, he has suggested in recent writing that digital information fiduciaries would be obligated to vet third parties before affording them access to user data¹²² (although not necessarily obligated to obtain users' consent) and prohibited from encouraging addiction among users.¹²³ If adopted, both suggestions might entail extra legal responsibilities for online platforms. Yet it is precisely in these areas where Balkin's proposal seems to depart from current law

Other commentators, however, suggest that the FTC may be doing a better job than European data protection agencies at catalyzing and enforcing consumer privacy norms. See, e.g., Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy on the Books and on the Ground*, 63 STAN. L. REV. 247, 308–11 (2011). For an overview of the FTC's legal authorities and use of those authorities to regulate privacy and data security, see generally Woodrow Hartzog & Daniel J. Solove, *The Scope and Potential of FTC Data Protection*, 83 GEO. WASH. L. REV. 2230 (2015).

¹¹⁹ E.g., Balkin, *Three Laws of Robotics*, *supra* note 7, at 1230; Balkin, *Algorithmic Society*, *supra* note 5, at 1161; Balkin, *Triangle*, *supra* note 5, at 2053, 2055; Jack M. Balkin, *Mark Zuckerberg Announces that Facebook Is an Information Fiduciary*, BALKINIZATION (Mar. 21, 2018, 8:00 PM), <https://balkin.blogspot.com/2018/03/mark-zuckerberg-announces-that-facebook.html> [<https://perma.cc/N2KV-B589>].

¹²⁰ See *supra* note 109 and accompanying text.

¹²¹ See Robert W. Hillman, *Private Ordering Within Partnerships*, 41 U. MIAMI L. REV. 425, 458 (1987) ("[A]dmonitions concerning the duty of 'utmost good faith' dominat[e] judicial analyses of fiduciary responsibilities." (footnote omitted) (quoting *Couri v. Couri*, 447 N.E.2d 334, 337 (Ill. 1983))); David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 890 (2016) ("Fiduciaries of all sorts are held to a standard of 'utmost good faith.'").

¹²² See, e.g., Balkin, *Second Gilded Age*, *supra* note 27, at 1008 ("The duties of care and confidentiality require information fiduciaries to keep data secure and not to disclose it to third parties unless those third parties are equally trustworthy and agree to the same duties of care, confidentiality, and loyalty as the fiduciary."); see also Dobkin, *supra* note 105, at 36–43 (proposing similarly that information-fiduciary duties should prohibit sharing data with third parties under certain circumstances); Theodore Rostow, Note, *What Happens When an Acquaintance Buys Your Data?: A New Privacy Harm in the Age of Data Brokers*, 34 YALE J. ON REG. 667, 700 (2017) (noting that, under Balkin's framework, "[t]he responsibilities of information fiduciaries could be expanded to limit what data companies can sell to brokers").

¹²³ See, e.g., Balkin, *Fixing Social Media*, *supra* note 5, at 14 ("[I]f social media companies are information fiduciaries, they should also have a duty not to use end-user data to addict end users . . .").

that the tensions become most acute between the fiduciary duties that he would create and the fiduciary duties that directors owe to shareholders — as an online platform’s bottom line certainly could benefit from broad data sharing practices and addictive user behaviors. To break new legal ground here, reformers may have to sacrifice shareholder value to a degree that the information-fiduciary literature has not yet acknowledged or considered.

B. Enforcement Issues

If Balkin is vague on the substantive legal duties that digital information fiduciaries would owe to users, he is all but silent on how these new duties would be enforced. He has been similarly silent on what the remedies for breach would be. These are no small matters given the number of beneficiaries potentially involved, not to mention the many respects in which rights, remedies, and their enforcement are “inextricably intertwined.”¹²⁴

In fiduciary law generally, beneficiaries may enforce their rights in court¹²⁵ and remedies “tend to be supracompensatory in order to deter abuse.”¹²⁶ Judges in Delaware and beyond are often loath to “wield the stick” and impose legal liability,¹²⁷ but across every private law context of which we are aware, the fiduciary relationship is a juridical relationship overseen by courts. Would the same hold true for the fiduciary relationship between online platforms and their end users? Or would some sort of purely internal or administrative complaint process suffice?

If private judicial enforcement is contemplated, the scale of such litigation could be staggering. As of July 2019, Facebook and Google each had well over 200 million monthly users in the United States alone.¹²⁸ Given that cases involving newly minted information-fiduciary duties would likely raise a host of novel legal issues and technical complexities, Balkin’s proposal has the potential to swallow judicial dockets even with the aid of class actions, all while further undermining the defendant companies’ ability to serve their shareholder beneficiaries.

¹²⁴ Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999).

¹²⁵ See Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1146 (2014) (“Private law labels some relationships of power and dependence between persons ‘fiduciary.’ With the label come duties, enforceable through private rights of action . . .”).

¹²⁶ Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 708 (2013).

¹²⁷ Ethan J. Leib, David L. Ponet & Michael Serota, *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91, 101 (2013) (“Within the fiduciary field, courts are long on rhetoric precisely because they rarely wield the stick . . .”).

¹²⁸ See *Most Popular Multi-platform Web Properties in the United States in July 2019, Based on Number of Unique Visitors (in Millions)*, STATISTA (Sept. 2, 2019), <https://www.statista.com/statistics/271412/most-visited-us-web-properties-based-on-number-of-visitors> [<https://perma.cc/0G3J-SNPP>].

If, on the other hand, private judicial enforcement is not contemplated, then we have to ask once again whether this is an adaptation or an abdication of core fiduciary principles. Notably, the Balkin-inspired legislation introduced by Democratic senators in December 2018 would treat fiduciary breaches as actionable only by the FTC and, in the FTC's absence, state attorneys general.¹²⁹ Short of direct judicial enforcement, Balkin could alternatively urge courts to enlist fiduciary principles in an indirect, gap-filling manner when adjudicating contractual, tort, or statutory claims brought against online platforms. Courts already do a version of this in other contexts.¹³⁰ Yet while limiting information-fiduciary duties to indirect enforcement might halt the flood of lawsuits, it would relegate these duties to a supporting and possibly marginal legal role, rather than the starring role that advocates seem to have in mind, as well as to a kind of second-class status within the fiduciary family.

The prospect of judicial enforcement also raises questions about how individual users or institutional bodies are supposed to know when an online platform has violated its fiduciary obligations. In recent years, many of the leading examples of data breaches, privacy invasions, and other reckless behaviors by social media companies have been uncovered by journalists, with some of the reporting coming close to two years after the relevant events took place.¹³¹ Robust and enterprising investigative journalism would be crucial, it seems, to identifying fiduciary violations by the dominant online platforms. And yet, the stranglehold that these same platforms have on the digital advertising market is itself

¹²⁹ Data Care Act of 2018, S. 3744, 115th Cong. §§ 3–4 (2018).

¹³⁰ Cf. John C. Coffee, Jr., *Privatization and Corporate Governance: The Lessons from Securities Market Failure*, 25 J. CORP. L. 1, 28 (1999) (“[T]he common law’s concept of fiduciary duty both enables and instructs the common law judge to fill in the gaps in an incomplete contract.”); Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 25 (similar); Pozen, *supra* note 121, at 890 (noting that principles of good faith may be used by courts “in a ‘gap-filling’ role to disallow conduct that otherwise would not run afoul of controlling legal texts”).

¹³¹ See, e.g., Issie Lapowsky, *The 21 (and Counting) Biggest Facebook Scandals of 2018*, WIRED (Dec. 20, 2018, 7:00 AM), <https://www.wired.com/story/facebook-scandals-2018> [<https://perma.cc/9EF8-4KC6>]; Emily Stewart, *Facebook’s Very Bad Year, Explained*, VOX (Dec. 21, 2018, 11:20 AM), <https://www.vox.com/technology/2018/12/21/18149099/delete-facebook-scandals-2018-cambridge-analytica> [<https://perma.cc/MUG6-NET8>]; Selina Wang, *Twitter Sold Data Access to Cambridge Analytica—Linked Researcher*, BLOOMBERG (Apr. 30, 2018, 2:17 PM), <https://www.bloomberg.com/news/articles/2018-04-29/twitter-sold-cambridge-analytica-researcher-public-data-access> [<https://perma.cc/48EC-FMJE>]. As far as we are aware, the only significant recent revelation about Facebook not brought to light by journalists occurred when a UK Member of Parliament pressured an app maker engaged in litigation against Facebook into turning over a cache of internal Facebook documents about data and privacy controls. See Cyrus Farivar, *Six4Three Exec “Panicked” in UK MP’s Office, Gave Up Facebook Internal Files*, ARS TECHNICA (Nov. 26, 2018, 7:10 PM), <https://arstechnica.com/tech-policy/2018/11/six4three-exec-panicked-in-uk-mps-office-gave-up-facebook-internal-files> [<https://perma.cc/G9MS-7CL8>].

one of the biggest threats to the economic viability of such reporting.¹³² Whether or not any new fiduciary duties are needed, achieving effective legal enforcement under these conditions may require not just lawsuits but regular investigations and inspections, along with the imposition of affirmative duties to disclose data breaches and other compliance failures promptly and publicly.¹³³

C. Problems Unaddressed

The plight of journalism raises a more general issue. If it is unclear which problems Balkin's proposal would solve, it seems quite clear that the information-fiduciary model would leave many profound problems untouched. This is not the place to offer a detailed inventory, but beyond the issues of privacy and data security that Balkin foregrounds, the dominant online platforms have been credibly associated with a host of social ills, from facilitating interference in U.S. elections;¹³⁴ to serving as a tool for the incitement of genocide in Myanmar;¹³⁵ to decreasing users' mental and physical health;¹³⁶ to enabling discrimination and

¹³² See generally ZUBOFF, *supra* note 74, at 506–07; Bell & Owen, *supra* note 37; Daniel Funke, *What's Behind the Recent Media Bloodbath? The Dominance of Google and Facebook*, POYNTER (June 14, 2017), <https://www.poynter.org/business-work/2017/whats-behind-the-recent-media-bloodbath-the-dominance-of-google-and-facebook> [https://perma.cc/3REK-L4NJ]. From 2008 to 2018, newsroom employment in the United States dropped by twenty-five percent, while newspaper employment dropped by nearly double as much. See Elizabeth Grieco, *U.S. Newsroom Employment Has Dropped by a Quarter Since 2008, with Greatest Decline at Newspapers*, PEW RES. CTR. (July 9, 2019), <https://www.pewresearch.org/fact-tank/2019/07/09/u-s-newsroom-employment-has-dropped-by-a-quarter-since-2008> [https://perma.cc/G66K-JB3R]. Facebook also impedes investigative journalism more directly through its terms of service, which ban reporters and researchers from using automated collection techniques or temporary research accounts to study the platform. See Alex Abdo, Opinion, *Facebook Is Shaping Public Discourse. We Need to Understand How*, THE GUARDIAN (Sept. 15, 2018, 6:00 AM), <https://www.theguardian.com/commentisfree/2018/sep/15/facebook-twitter-social-media-public-discourse> [https://perma.cc/H4H3-D78U].

¹³³ The European Union's major privacy law, the GDPR, requires that covered firms notify the relevant authorities of any data breach within seventy-two hours of having become aware of it. Council Regulation 2016/679, 2016 O.J. (L 119) 52.

¹³⁴ See, e.g., Nancy Scola, *Massive Twitter Data Release Sheds Light on Russia's Trump Strategy*, POLITICO (Oct. 17, 2018, 10:36 AM), <https://www.politico.com/story/2018/10/17/twitter-foreign-influence-operations-910005> [https://perma.cc/5GLB-8LET] (“Twitter and Facebook have been widely criticized since the 2016 election for not doing more to stem the abuse of their platforms by Russians and other foreign actors hoping to manipulate the American political landscape.”).

¹³⁵ See, e.g., Paul Mozur, *A Genocide Incited on Facebook, with Posts from Myanmar's Military*, N.Y. TIMES (Oct. 15, 2018), <https://nyti.ms/2QToYQA> [https://perma.cc/94LU-3NLA] (describing “a systematic campaign on Facebook” by members of the Myanmar military to incite violence against the country's Rohingya minority group).

¹³⁶ See, e.g., Holly B. Shakya & Nicholas A. Christakis, *A New, More Rigorous Study Confirms: The More You Use Facebook, the Worse You Feel*, HARV. BUS. REV. (Apr. 10, 2017), <https://hbr.org/2017/04/a-new-more-rigorous-study-confirms-the-more-you-use-facebook-the-worse-you-feel> [https://perma.cc/TS9T-ZK5D] (“[M]ost measures of Facebook use in one year predicted a decrease in mental health in a later year. We found consistently that both liking others' content and clicking links significantly predicted a subsequent reduction in self-reported physical health, mental health, and life satisfaction.”). See generally ZUBOFF, *supra* note 74, at 461–65 (reviewing

harassment against women and racial minorities;¹³⁷ to amplifying the influence of “fake news,” conspiracy theories, bot-generated propaganda,¹³⁸ and inflammatory and divisive content more broadly.¹³⁹ Betrayal of users’ trust as to how their data will be handled is just one category of concerns raised by these companies, and not necessarily the most worrisome category.

Many of the broader harms associated with these platforms are magnified or made possible by a behavioral-advertising-based business model coupled with outsized market share. While these are distinct features — a company could have the business model without the market position, and vice versa — the problems they create tend to be mutually reinforcing. For example, in recent years Google and Facebook together have captured roughly three-quarters of all digital advertising sales in the United States and an even higher percentage of growth.¹⁴⁰ Their control over digital advertising networks appears to be an important factor behind the past decade’s consolidation within the publishing industry and tens of thousands of layoffs at newspapers and magazines.¹⁴¹

a “growing body of evidence [that] testifies to the psychic toll of life in the hive” of social media, *id.* at 461, especially for younger users).

¹³⁷ See, e.g., OLIVIER SYLVAIN, EMERGING THREATS: DISCRIMINATORY DESIGNS ON USER DATA 3, 8–16 (David Pozen ed., 2018), <https://s3.amazonaws.com/kfai-documents/documents/28a74f6e98/Discriminatory-Designs-on-User-Data.pdf> [<https://perma.cc/6QMN-WAAX>] (discussing such discrimination and harassment and linking them to design features of online intermediaries).

¹³⁸ See, e.g., TIM WU, EMERGING THREATS: IS THE FIRST AMENDMENT OBSOLETE? 11–17 (David Pozen ed., 2017), <https://s3.amazonaws.com/kfai-documents/documents/5d8aof848d/Is-the-First-Amendment-Obsolete-.pdf> [<https://perma.cc/EHR5-CVCZ>] (discussing the proliferation of “fake news,” *id.* at 15, 16, 17, “junk news,” *id.* at 16 (quoting PHILIP N. HOWARD ET AL., PROJECT ON COMPUTATIONAL PROPAGANDA, JUNK NEWS AND BOTS DURING THE U.S. ELECTION: WHAT WERE MICHIGAN VOTERS SHARING OVER TWITTER? 1 (2017), <http://comprop.oii.ox.ac.uk/wp-content/uploads/sites/89/2017/03/What-Were-Michigan-Voters-Sharing-Over-Twitter-v2.pdf> [<https://perma.cc/JQ85-FTMA>]), “abusive online mobs,” *id.* at 11, “reverse censorship,” *id.* at 11, 15, and “bots,” *id.* at 15, 16, on leading digital platforms).

¹³⁹ See *supra* note 37 and accompanying text.

¹⁴⁰ See Alex Heath, *Facebook and Google Completely Dominate the Digital Ad Industry*, BUS. INSIDER (Apr. 26, 2017, 4:48 PM), <https://www.businessinsider.com/facebook-and-google-dominate-ad-industry-with-a-combined-99-of-growth-2017-4> [<https://perma.cc/4NM4-L8SN>].

¹⁴¹ Commentary on this subject is copious. See *supra* note 132; see also, e.g., Josh Constine, *How Facebook Stole the News Business*, TECHCRUNCH (Feb. 3, 2018, 12:10 PM), <https://techcrunch.com/2018/02/03/facebooks-siren-call> [<https://perma.cc/3YRJ-RY2U>]; Roy Greenslade, *Why Facebook Is Public Enemy Number One for Newspapers, and Journalism*, THE GUARDIAN (Sept. 20, 2016, 4:54 AM), <https://www.theguardian.com/media/greenslade/2016/sep/20/why-facebook-is-public-enemy-number-one-for-newspapers-and-journalism> [<https://perma.cc/E7XB-Y3WD>]; Michael Miller, Opinion, *Google Is Not Journalism’s Friend and Now It’s Trying to Undermine Paywalls*, FIN. REV. (May 31, 2017, 12:00 AM), <https://www.afr.com/opinion/google-is-not-journalisms-friend-and-now-its-trying-to-undermine-paywalls-20170530-gwghgp> [<https://perma.cc/YM3Z-P9L4>]. In Farhad Manjoo’s pithy formulation, “[t]he cause of each [media] company’s troubles may be distinct, but collectively the blood bath points to the same underlying market pathology: the inability of the digital advertising business to make much meaningful room for anyone but monopolistic tech giants.” Farhad Manjoo, Opinion, *Why the Latest Layoffs Are*

As the professional media has shrunk, more and more local communities have been left with little to no meaningful news coverage.¹⁴² On multiple interacting levels that transcend any given user's experience, the behaviors of a few platforms have been affecting the fabric and functioning of our democracy — often for the worse.

Against this backdrop of platform dominance and democratic decay, the user-centric nature of the information-fiduciary proposal should give pause. The relevant inquiry for legal reformers, we submit, should be not just how a firm such as Google or Facebook exercises its power over end users, but whether it ought to enjoy that kind of power in the first place. Limiting the dominance of some of these firms may well have salutary effects for consumer privacy, both by facilitating competition on privacy protection and by reducing the likelihood that any single data-security failure will cascade into a much wider harm.¹⁴³ More than that, the very effort to think through the ramifications of platform power would force policymakers to grapple with a wide range of systemic concerns that fall outside the fiduciary frame.

To be clear, we do not believe that addressing the market clout of companies like Facebook will remedy the full panoply of harms associated with them. Nor do we view antitrust enforcement as the sole tool for addressing this dominance. Our point here (which we will develop further in section IV.B) is that any broad regulatory framework or “grand bargain”¹⁴⁴ for social media that focuses on abusive data practices, without attending to issues of market structure or political-economic influence, is bound to be at best highly incomplete and at worst an impediment to necessary reforms.

Devastating to Democracy, N.Y. TIMES (Jan. 30, 2019), <https://nyti.ms/2GgrPke> [<https://perma.cc/TGY5-4YS8>].

¹⁴² See, e.g., Yemile Bucay, Vittoria Elliott, Jennie Kamin & Andrea Park, *America's Growing News Deserts*, COLUM. JOURNALISM REV. (Spring 2017), https://www.cjr.org/local_news/american-news-deserts-donuts-local.php [<https://perma.cc/CKL7-MSMP>]; Riley Griffin, *Local News Is Dying, and It's Taking Small Town America with It*, BLOOMBERG (Sept. 6, 2018, 10:02 AM), <https://www.bloomberg.com/news/articles/2018-09-05/local-news-is-dying-and-it-s-taking-small-town-america-with-it> [<https://perma.cc/Y6VJ-2BJ5>].

¹⁴³ For example, one of the biggest data breaches that Facebook suffered in 2018 derived from the site serving as a central passport to the internet, such that one's Facebook login can serve as a credential for numerous third-party sales. Once hackers stole the single access key, they won access to users' non-Facebook logins as well. See Issie Lapowsky, *The Facebook Hack Exposes an Internet-Wide Failure*, WIRED (Oct. 2, 2018, 10:12 AM), <https://www.wired.com/story/facebook-hack-single-sign-on-data-exposed> [<https://perma.cc/N53B-PJW5>]. The primary problem here was not necessarily insufficient protection on Facebook's part, so much as the structurally central role that the company plays in the digital realm. On the general relationship between market structure and the capacity to absorb unexpected shocks, see BARRY C. LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION 78–83 (2010); and Peter C. Carstensen & Robert H. Lande, *The Merger Incipency Doctrine and the Importance of “Redundant” Competitors*, 2018 WIS. L. REV. 783, 787–89, 826–45.

¹⁴⁴ Balkin & Zittrain, *supra* note 5; see *supra* p. 509.

IV. WITH WHAT BENEFITS AND COSTS?

We have argued that the information-fiduciary proposal could cure at most a small fraction of the problems associated with online platforms — and to the extent it does, only by undercutting directors' duties to shareholders, undermining foundational principles of fiduciary law, or both. Why, then, has the idea proven so popular?

At a theoretical level, Balkin's proposal is consilient as well as creative; it seems to resolve a tangle of thorny issues with a single, timeworn legal concept. The failure to specify institutional or operational details can thus be held out as a feature, not a bug.¹⁴⁵ At a political level, the proposal comes across as consumer protective yet conflict suppressive, promising to deliver broad social benefits without overly threatening the tech giants or their profits. At an aesthetic level, there is something attractive about the way in which a fiduciary framework would hold platforms to their own rhetoric of trustworthiness. In other areas of law, too, a number of legal scholars have been pressing in recent years for increasingly expansive accounts of fiduciary obligation.¹⁴⁶ Perhaps the very idea of recasting powerful institutions as duty-bound, other-regarding agents, as if they "operate outside the capitalist free-for-all of exchange relations,"¹⁴⁷ has become more alluring in an age of widespread anxiety about the state of capitalism and liberal democracy.

Whatever the sources of its appeal (and there may be different sources for different audiences), the biggest *legal* benefit of Balkin's proposal, on his telling, is that a fiduciary framework would allow regulations enacted in its name to withstand First Amendment challenges that might otherwise be fatal.¹⁴⁸ Meanwhile, Balkin has clarified that his proposal is not meant to be a cure-all and could be complemented with other reforms, including "pro-competition rules or increased antitrust enforcement."¹⁴⁹ The implication is that there is no basis for worrying that the proposal does not accomplish enough on its own.

¹⁴⁵ See, e.g., Balkin, *Fixing Social Media*, *supra* note 5, at 15 ("The fiduciary approach has many advantages. It is not tied to any particular technology. It can adapt to technological change. It can be implemented at the state or the federal level, and by judges, legislatures, or administrative agencies.").

¹⁴⁶ See Evan J. Criddle & Evan Fox-Decent, *Keeping the Promise of Public Fiduciary Theory: A Reply to Leib and Galoob*, 126 *YALE L.J.F.* 192, 193 (2016) (discussing the recent "revival of public fiduciary theory"); Grimmelmann, *supra* note 111, at 904 ("[W]e are undergoing something of an academic fiduciary renaissance, with scholars arguing for treating legislators, judges, jurors, and even friends as fiduciaries." (citations omitted)); Daniel Yeager, *Fiduciary-isms: A Study of Academic Influence on the Expansion of the Law*, 65 *DRAKE L. REV.* 179, 184 (2017) (describing "how academic writing, deploying a sense of *fiduciary* so open as to be empty, has influenced courts to designate" an ever-expanding set of actors as fiduciaries).

¹⁴⁷ Yeager, *supra* note 146, at 183 ("Fiduciaries are said to operate outside the capitalist free-for-all of exchange relations . . .").

¹⁴⁸ This is a central theme of Balkin's first, and still most extensive, academic statement of the proposal. See Balkin, *Information Fiduciaries*, *supra* note 5, at 1209–20.

¹⁴⁹ Balkin, *Fixing Social Media*, *supra* note 5, at 15.

Both of these arguments are tantalizing. But both, in our view, are seriously flawed. We see little constitutional upside to the information-fiduciary proposal and significant policy downside. Let us consider each issue in turn.

A. The False Promise of First Amendment Flexibility

The First Amendment, Balkin observes, “may be a potential obstacle to laws that try to regulate private infrastructure owners in order to protect end-users’ freedom of speech and privacy.”¹⁵⁰ For example, broadband companies have challenged network neutrality regulations (unsuccessfully to date) as a violation of their corporate free speech rights.¹⁵¹ And social media companies might challenge new measures “restricting how they use, distribute, or sell the consumer data that they collect” on the ground that this data is their “speech or knowledge.”¹⁵² First Amendment law, at least in its current “Lochnerian” form,¹⁵³ works almost exclusively to the advantage of the online platforms. “Instead of empowering users to challenge their policies, the First Amendment empowers the companies themselves to challenge statutes and regulations intended to promote antidiscrimination norms or users’ speech and privacy, among other values.”¹⁵⁴

If these companies were to be recognized as fiduciaries for their users, however, Balkin argues that the constitutional calculus would tip in the regulator’s favor. He maintains that because the speech that occurs in fiduciary settings concerns special services rendered in the context of special relationships of vulnerability and dependency, the “First Amendment treats information practices by fiduciaries very differently than it treats information practices involving relative strangers.”¹⁵⁵ “Generally speaking, when the law prevents a fiduciary from disclosing or selling information about a client — or using information to a client’s disadvantage — this does not violate the First Amendment, even though

¹⁵⁰ Balkin, *Second Gilded Age*, *supra* note 27, at 982.

¹⁵¹ See, e.g., *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 740–44 (D.C. Cir. 2016) (rejecting a First Amendment challenge to a 2015 Federal Communications Commission (FCC) order imposing common carrier obligations on telecommunications companies). *But cf.* *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 418 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (arguing that the FCC order is unconstitutional because “the First Amendment bars the Government from restricting the editorial discretion of Internet service providers, absent a showing that an Internet service provider possesses market power in a relevant geographic market”).

¹⁵² Balkin, *Second Gilded Age*, *supra* note 27, at 982.

¹⁵³ See Jeremy K. Kessler & David E. Pozen, Introduction, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1959–64 (2018) (reviewing the contemporary debate over “First Amendment Lochnerism,” *id.* at 1962). Roughly speaking, First Amendment Lochnerism refers to “a First Amendment jurisprudence that disables redistributive regulation and exacerbates socioeconomic inequality.” *Id.* at 2007.

¹⁵⁴ *Id.* at 1973.

¹⁵⁵ Balkin, *Information Fiduciaries*, *supra* note 5, at 1209.

the activity would be protected if there were no fiduciary relationship.”¹⁵⁶ In support of this claim, Balkin cites four state court cases, three from the 1970s and one from the 1990s, recognizing a doctor’s duty not to disclose patient information.¹⁵⁷ He also interprets a 1985 securities law case that was decided by the Supreme Court on statutory grounds, *Lowe v. SEC*,¹⁵⁸ as signaling that “ordinary First Amendment doctrine — including even the ban on prior restraints — would not apply to communications” between certain professional fiduciaries and their beneficiaries.¹⁵⁹

Balkin’s argument here is elegant and insightful, but it does not appear to track the approach that the Roberts Court would actually employ when evaluating First Amendment claims brought by online platforms that had been designated as fiduciaries for their users (whether by Congress, an administrative agency, or the Court itself). Last year, in *National Institute of Family & Life Advocates v. Becerra*,¹⁶⁰ Justice Thomas’s opinion for the Court was emphatic that the Court has never “recognized ‘professional speech’ as a separate category of speech.”¹⁶¹ Nor did the Court see any “persuasive reason” to reconsider that stance now.¹⁶² There is good reason to think that Justice Thomas overstated this point and that certain narrow categories of professional speech, such as doctors’ advice to patients, will continue to be treated differently from other categories of speech (or treated as non-speech) under the First Amendment, unless the Court wishes to wreak havoc on longstanding regimes of professional licensing, informed consent, and malpractice liability.¹⁶³ But at a minimum, *National Institute of Family & Life Advocates* signals skepticism about Balkin’s broader claim that “the law does not treat speech in professional or other fiduciary relationships as part of public discourse” and instead treats such

¹⁵⁶ *Id.* at 1210.

¹⁵⁷ *Id.* at 1210 n.120.

¹⁵⁸ 472 U.S. 181 (1985).

¹⁵⁹ Balkin, *Information Fiduciaries*, *supra* note 5, at 1219. Balkin maintains that “most professional relationships are fiduciary relationships.” *Id.* at 1209.

¹⁶⁰ 138 S. Ct. 2361 (2018).

¹⁶¹ *Id.* at 2371; *see also id.* at 2371–72 (“Speech is not unprotected merely because it is uttered by ‘professionals.’”). Justice Thomas added that the Court “has been especially reluctant to ‘exemp[t] a category of speech from the normal prohibition on content-based restrictions.’” *Id.* at 2372 (alteration in original) (quoting *United States v. Alvarez*, 567 U.S. 709, 722 (2012) (plurality opinion)). In her largely sympathetic 2016 response to Balkin, Bambauer anticipated a version of this rejoinder. *See* Bambauer, *supra* note 8, at 1950 (“[A]ny attempt to harness the power of fiduciary relationships in order to achieve broad privacy policy runs into an unavoidable problem: it violates the cardinal rule of content-neutrality.”).

¹⁶² *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2375.

¹⁶³ *See* Claudia E. Haupt, *The Limits of Professional Speech*, 128 YALE L.J.F. 185, 188 (2018) (arguing forcefully that “despite the [National Institute of Family & Life Advocates] Court’s insistence that it has never recognized professional speech as a category,” professional speech — when “narrowly defined” — is and should remain “a type of speech doctrinally distinct from others”).

speech “as part of ordinary social and economic activity that is subject to reasonable regulation.”¹⁶⁴

Even if the Court were to affirm some sort of relaxed standard of First Amendment review for regulations of traditional fiduciary-beneficiary communications, it is not at all clear that the Court would apply this standard to the special case of digital information fiduciaries. Justice White’s concurring opinion in *Lowe*, which was joined by Chief Justice Burger and Justice Rehnquist, suggested that regulations of a profession should be given more lenient First Amendment treatment only when there is a “personal nexus between professional and client” and the professional is “exercising judgment on behalf of [a] particular individual with whose circumstances he is directly acquainted.”¹⁶⁵ A “personal nexus” of this sort is arguably lacking altogether in the context of online platforms.¹⁶⁶ Moreover, Balkin’s crucial concession that the fiduciary duties owed by online platforms to their users will be “more limited”¹⁶⁷ than the duties of traditional fiduciaries leads naturally to the possibility that the government’s regulatory leeway may be more limited as well. Balkin is at pains to emphasize that fiduciary relationships are not one-size-fits-all in the law;¹⁶⁸ why, then, should we assume that First Amendment review of these heterogeneous relationships will always take the same form?

In short, the notion that designating online platforms as fiduciaries would yield a significant First Amendment payoff strikes us as resting on an overly simple (if not nominalist) view of how judges would respond to such a designation, and as contradicted by the Roberts Court’s case law. Balkin’s argument here, in any event, extends only to regulations that could be characterized as speech regulations — most notably, restrictions on what platforms can do with the consumer data they gather. It is inapplicable to other policy tools that could not plausibly be characterized as speech regulations even by proponents of the “data is speech” view,¹⁶⁹ including most antitrust and procompetition tools; public certification or safe harbor programs “in which companies opt into various promises (backed by regulatory enforcement) in exchange

¹⁶⁴ Balkin, *Information Fiduciaries*, *supra* note 5, at 1217.

¹⁶⁵ *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring in the result).

¹⁶⁶ See *supra* sections II.B–C, pp. 510–19.

¹⁶⁷ See *supra* note 7 and accompanying text.

¹⁶⁸ See *supra* note 59 and accompanying text.

¹⁶⁹ See generally Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57 (2014). For a contrary perspective, see, for example, Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1169 (2005) (“I believe that most privacy regulation that interrupts information flows in the context of an express or implied commercial relationship is neither ‘speech’ within the current meaning of the First Amendment, nor should it be viewed as such.” (footnotes omitted)).

for” certain legal or reputational benefits;¹⁷⁰ requirements that firms pay people for their data;¹⁷¹ data portability and interoperability mandates;¹⁷² co-regulation schemes that incentivize businesses to continually produce and share compliance information;¹⁷³ and any number of front-end limits or “taxes” on private data collection.¹⁷⁴ Especially given the extraterritorial reach of the GDPR’s personal data protections,¹⁷⁵ these sorts of policy tools may have more bite at this time than the regulations Balkin has in mind.

Furthermore, within the domain where it does apply, we question whether Balkin’s argument makes the strongest case for the constitutionality of public-interested platform regulation. Balkin grounds his argument in the special nature of the relationships that digital information fiduciaries, like all other fiduciaries, purportedly have with their beneficiaries. First Amendment theory, however, supplies numerous other possible grounds for justifying regulations meant to enhance platform users’ privacy, security, and control of their own data — from arguments that commercial speech and computer algorithms deserve only modest, if any, constitutional protection;¹⁷⁶ to the contention that online service providers should be treated as public trustees¹⁷⁷ or public utilities;¹⁷⁸ to “systemic” perspectives on free speech that read the First

¹⁷⁰ Bambauer, *supra* note 8, at 1952. Information-fiduciary principles might themselves be instituted through a safe-harbor program, *see* Balkin & Zittrain, *supra* note 5, but so presumably could other, more concrete legal obligations related to the goals of the program.

¹⁷¹ *See, e.g., Data Workers of the World, Unite*, THE ECONOMIST (July 7, 2018), <https://www.economist.com/the-world-if/2018/07/07/data-workers-of-the-world-unite> [<https://perma.cc/W8L2-BVVQ>]; Eric A. Posner & E. Glen Weyl, *Want Our Personal Data? Pay for It*, WALL ST. J. (Apr. 20, 2018, 11:19 AM), <https://www.wsj.com/articles/want-our-personal-data-pay-for-it-1524237577> [<https://perma.cc/W8N5-FDN4>].

¹⁷² *See, e.g., Bennett Cyphers & Danny O’Brien, Facing Facebook: Data Portability and Interoperability Are Anti-Monopoly Medicine*, ELECTRONIC FRONTIER FOUND. (July 24, 2018), <https://www EFF.org/deeplinks/2018/07/facing-facebook-data-portability-and-interoperability-are-anti-monopoly-medicine> [<https://perma.cc/Z22M-7ZE8>] (suggesting that the FTC could impose such mandates on Facebook as “part of an antitrust remedy or negotiated settlement”).

¹⁷³ *See, e.g., Dani Rodrik & Charles Sabel, Building a Good Jobs Economy 9* (Apr. 2019) (unpublished manuscript) (on file with Harvard Law School Library).

¹⁷⁴ *See* Omri Ben-Shahar, *Data Pollution 6–7*, 33–44 (Univ. of Chi., Pub. Law & Legal Theory Working Paper No. 679, 2018), <https://ssrn.com/abstract=3191231> [<https://perma.cc/95WW-H4G3>] (contrasting data “taxes,” *id.* at 6, with “command-and-control” limits, *id.* at 33).

¹⁷⁵ *See* ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD 143 (forthcoming 2020) (on file with Harvard Law School Library) (discussing the GDPR’s broad extraterritorial reach and “the extent to which [global companies] are choosing to adopt EU privacy policy as their company standard”); Chris Jay Hoofnagle, Bart van der Sloot & Frederik Zuiderveen Borgesius, *The European Union General Data Protection Regulation: What It Is and What It Means*, 28 INFO. & COMM. TECH. L. 65, 98 (2019) (providing an overview of the GDPR and the ways in which it “will influence [privacy] policy worldwide”).

¹⁷⁶ *See* Kessler & Pozen, *supra* note 153, at 1988 nn.164–65 (collecting sources to this effect).

¹⁷⁷ WU, *supra* note 138, at 23.

¹⁷⁸ Rahman, *supra* note 88, at 1668–80.

Amendment as permitting or even requiring the government to take affirmative measures “to engineer a fairer, fuller, ‘freer’ expressive environment for everyone.”¹⁷⁹

We are not suggesting that these theories are without serious problems of their own, much less that the Roberts Court is likely to embrace any of them. But neither is the Court likely to embrace Balkin’s approach.¹⁸⁰ And whatever their defects, these other theories at least focus attention on the most constitutionally salient feature of companies like Google and Facebook: not that their end users must be able to trust and depend on them, but that they are extraordinarily powerful actors with the potential to do great harm to (as well as good for) the freedoms of speech, assembly, and the press. Put more sharply, a First Amendment jurisprudence that analogizes the dominant online firms to doctors and lawyers, while ignoring their status as increasingly essential platforms for mass communication and the “New Governors” of the public sphere,¹⁸¹ is not credible. It obscures the real social stakes.

B. Downside Risks

Against this highly speculative and very possibly nonexistent First Amendment upside, a full analysis of the information-fiduciary proposal also needs to consider its potential downsides. We see several significant ones. As with the critical legal and conceptual points raised in Parts II and III, we have not encountered any discussion of these policy risks in the growing literature on the subject.

First, and most simply, a fiduciary framework paints a false portrait of the digital world. It characterizes Facebook, Google, Twitter, and other online platforms as fundamentally trustworthy actors who put their users’ interests first. As we tried to show in Part II, this is not a plausible depiction of what most of these companies — even if chastened in the ways Balkin outlines — are really like. The tension between what it would take to implement a fiduciary duty of loyalty to users, on the one hand, and these companies’ economic incentives and duties to shareholders, on the other, is too deep to resolve without fundamental reform. To suggest otherwise is to risk mystification of “surveillance capitalism,”¹⁸² entrenchment of prevailing business models, and legitimation of

¹⁷⁹ Kessler & Pozen, *supra* note 153, at 2002.

¹⁸⁰ See *supra* notes 161–168 and accompanying text.

¹⁸¹ Klonick, *supra* note 89, at 1663.

¹⁸² ZUBOFF, *supra* note 74; cf. Kessler & Pozen, *supra* note 153, at 1971–73 (reviewing the critical literature on “informational capitalism” and “communicative capitalism,” *id.* at 1972 (first quoting Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. 369, 371 (2016); and then quoting JODI DEAN, DEMOCRACY AND OTHER NEOLIBERAL FANTASIES: COMMUNICATIVE CAPITALISM AND LEFT POLITICS (2009))).

a wide range of troubling practices, if not also the unraveling of fiduciary law itself.¹⁸³

Second, this false portrait of reality invites policy misfires. To a large extent, it seems that Balkin's prescriptions would simply mirror or marginally refine longstanding consumer protection guarantees and anti-fraud doctrines,¹⁸⁴ in which case our time and energy may be better spent figuring out how to strengthen enforcement of the existing rules rather than proliferating legal categories.¹⁸⁵ Meanwhile, to the degree that Balkin's prescriptions depart from existing consumer protection law,¹⁸⁶ his theory lacks the resources to justify prioritizing those departures over countless other moves that might be made. The "grand bargain organized around the idea of fiduciary responsibility" that Balkin and Zittrain have put forward,¹⁸⁷ in which a new federal statute would preempt state laws about online privacy, strikes us as an especially bad deal for proponents of online privacy, given the watered-down version of fiduciary responsibility such a statute would codify and the "pioneer[ing]" role that state attorneys general have played in enforcing their own unfair and deceptive trade acts and practices laws.¹⁸⁸

Third, the information-fiduciary proposal conceives of systemic problems in relational terms. The reason a company like Facebook can and should be regulated in a special way, it tells us, is that Facebook has (or should have) a special relationship of trust and dependency with each of its users. Not only does this argument ignore how Facebook generates dependency,¹⁸⁹ but it also recasts what ought to be questions of the public interest — questions about what kind of social media landscape is good for our democracy — in a narrow quasi-contractarian frame that asks, instead, what Facebook owes any given individual who signs up for its service. This framing implicitly downgrades other accounts of the appropriate bases for government intervention and other models of public regulation, in particular those that conceptualize privacy as a public good¹⁹⁰ or that aim to ward off extreme asymmetries

¹⁸³ Even if "the law of fiduciary obligation has developed through analogy to contexts in which the obligation conventionally applies," Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 879, presumably some analogies would be so strained as to degrade rather than coherently advance this developmental process.

¹⁸⁴ See *supra* notes 104–121 and accompanying text.

¹⁸⁵ For a recent argument that the FTC's ability to protect consumer privacy has been "severely curtailed" by the Commission's lack of general rulemaking authority, its reluctance to target unfair practices as distinct from deceptive practices, and inadequate funding levels, among other factors, see Barrett, *supra* note 20, at 1073–78.

¹⁸⁶ See *supra* notes 122–123 and accompanying text.

¹⁸⁷ Balkin & Zittrain, *supra* note 5; see *supra* notes 54–55 and accompanying text.

¹⁸⁸ Citron, *supra* note 107, at 750, 785, 800, 811.

¹⁸⁹ See *supra* section II.C, pp. 516–19.

¹⁹⁰ On the ways in which digital privacy can be seen as a public good, see generally Joshua A.T. Fairfield & Christoph Engel, *Privacy as a Public Good*, 65 DUKE L.J. 385 (2015); Zeynep Tufekci,

of knowledge and power or “structural stranglehold[s] over digital media.”¹⁹¹ By the same token, the information-fiduciary proposal implicitly acquiesces in the legal decisions that enabled certain online platforms to become so dominant. It takes current market structures as a given.

Recently, Balkin has suggested that a fiduciary approach to regulating online platforms can be combined with more ambitious approaches, in effect giving us the best of both worlds.¹⁹² “The fiduciary approach,” Balkin writes, “meshes well with other forms of consumer protection” and, “[i]n particular, it does not get in the way of new pro-competition rules or increased antitrust enforcement.”¹⁹³ These policy tools would potentially “restructure how digital advertising operates”¹⁹⁴ and “break up the largest companies into smaller companies that can compete with each other or create a space for new competitors to emerge.”¹⁹⁵ Balkin’s interest in such tools resonates with and responds to a growing body of neo-Progressive scholarship that urges greater emphasis on structural (or infrastructural) solutions to problems of discrimination and domination online.¹⁹⁶

While we commend Balkin’s turn toward structural analysis of this sort, we are deeply skeptical of the claim that the fiduciary approach

Opinion, *The Latest Data Privacy Debacle*, N.Y. TIMES (Jan. 30, 2018), <https://nyti.ms/2Guv05G> [<https://perma.cc/BE8W-QARK>]; and Ben-Shahar, *supra* note 174, at 10–16.

¹⁹¹ David Pozen, *Authoritarian Constitutionalism in Facebookland*, BALKINIZATION (Oct. 30, 2018, 12:14 PM), <https://balkin.blogspot.com/2018/10/authoritarian-constitutionalism-in.html> [<https://perma.cc/KG6A-2LU7>].

¹⁹² This suggestion is echoed in Barrett, *supra* note 20, at 1107–12; and Grimmelmann, *supra* note 117.

¹⁹³ Balkin, *Fixing Social Media*, *supra* note 5, at 15.

¹⁹⁴ *Id.* at 10–11.

¹⁹⁵ *Id.* at 11. Traditional antimonopoly and procompetition remedies include horizontal and vertical breakups, interoperability and portability regimes, and common carriage requirements. For a taxonomy of “competition catalysts” used by agencies like the FTC and FCC, see Tim Wu, *Antitrust via Rulemaking: Competition Catalysts*, 16 COLO. TECH. L.J. 33, 47–61 (2017). For discussions of how some of these remedies might be applied to digital platforms like Facebook, see TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* 133 (2018) (“The simplest way to break the power of Facebook is breaking up Facebook.”); Barry Lynn & Matt Stoller, Opinion, *Facebook Must Be Restructured. The FTC Should Take These Nine Steps Now*, THE GUARDIAN (Mar. 22, 2018, 10:28 AM), <https://www.theguardian.com/commentisfree/2018/mar/22/restructure-facebook-ftc-regulate-9-steps-now> [<https://perma.cc/H8DB-KCB5>] (proposing a series of reforms for Facebook, including a spinoff of its advertising network, divestiture of WhatsApp and Instagram, and limits on future acquisitions); and Luigi Zingales & Guy Rolnik, Opinion, *A Way to Own Your Social-Media Data*, N.Y. TIMES (June 30, 2017), <https://nyti.ms/2tvfnHc> [<https://perma.cc/V7DK-T9L9>] (advocating a data-portability regime that would reduce the cost of switching social networks and likely generate greater competition).

¹⁹⁶ See generally, e.g., Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019); Frank Pasquale, *Privacy, Antitrust, and Power*, 20 GEO. MASON L. REV. 1009 (2013); Rahman, *supra* note 88; K. Sabeel Rahman, *Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities*, 2 GEO. L. TECH. REV. 234 (2018); Gigi Sohn, *A Policy Framework for an Open Internet Ecosystem*, 2 GEO. L. TECH. REV. 335 (2018).

“meshes well” with it. On the contrary, we suspect that the fiduciary approach, if pursued with any real vigor, would tend to cannibalize rather than complement procompetition reforms. This fourth and final downside risk may be the most practically consequential of them all.

When introducing the information-fiduciary proposal, Balkin and Zittrain billed it as a kind of regulatory third way that could transcend ordinary political divides and policy tradeoffs. Highlighting the proposal’s “bipartisan appeal,” Zittrain explained that it “protects consumers and corrects a clear market failure without the need for heavy-handed government intervention.”¹⁹⁷ Elsewhere, he suggested that a fiduciary approach might “nudge” companies like Facebook to “do the right thing,” “without outright requiring it.”¹⁹⁸ The details were fuzzy but the message was clear. A fiduciary approach would promote users’ interests without necessarily causing too much trouble for the online platforms or their business models, thereby allowing Balkin and Zittrain to win wide support while sidestepping contentious questions like whether to restructure or break up Facebook, a step for which a number of commentators have called.¹⁹⁹ The basic selling point of the fiduciary approach was that it would be flexible, light-touch, un-“heavy-handed” — in contrast to *and in lieu of* structural reforms.

Balkin and Zittrain’s early advocacy traded on an insight that remains as valid today as it was then: lawmakers can regulate the leading online platforms as information fiduciaries or target their market dominance and business models, but lawmakers very likely will not do both. To assume otherwise is to overlook the opportunity costs, path dependencies, and expressive effects inherent in creating a new fiduciary regime. Mark Zuckerberg seems to grasp this. He is presumably attracted to the information-fiduciary proposal not just because of its “thoughtful[ness]”²⁰⁰ and “intuitive[ness]”²⁰¹ but also because of its political implications. An entity that is designated by the government as a loyal caretaker for the personal data of millions of Americans is not an entity that is liable to be dismantled by that same government. Facebook-as-fiduciary is no longer a public problem to be solved, potentially through radical reform. It is a nexus of sensitive private relationships to be managed, nurtured, and sustained.

¹⁹⁷ Zittrain, *How to Exercise*, *supra* note 5.

¹⁹⁸ Zittrain, *Fix This Mess*, *supra* note 5.

¹⁹⁹ See, e.g., ROGER MCNAMEE, ZUCKED: WAKING UP TO THE FACEBOOK CATASTROPHE 263 (2019); WU, *supra* note 195, at 132–33; Lynn & Stoller, *supra* note 195; Sarah Miller & David Segal, Opinion, *Break Up Facebook: Latest Hack Proves It’s a Dangerous Monopoly that a Fine Won’t Fix*, USA TODAY (Oct. 5, 2018, 12:55 PM), <https://www.usatoday.com/story/opinion/2018/10/05/facebook-dangerous-monopoly-divest-instagram-whatsapp-messenger-column/1512215002> [<https://perma.cc/CHG3-KX8R>].

²⁰⁰ Brandom, *supra* note 9 (quoting Zuckerberg).

²⁰¹ Zittrain and Zuckerberg, *supra* note 12 (quoting Zuckerberg).

V. ALTERNATIVE ANALOGIES

This Article is an exercise in critique, not prescription. We have interrogated the increasingly popular analogy between online platforms and their end users, on the one hand, and professional fiduciaries and their patients and clients, on the other, and we have found this analogy inapposite on multiple levels. Analogical reasoning can retard rather than advance the cause of legal reform when it elides important institutional differences or normative considerations.²⁰² Although we do not elaborate any reform program of our own in this Article, we will close by noting two analogies that strike us as more felicitous starting points than traditional fiduciary relationships for the project of platform regulation.

First, in the case of Facebook, Google, and other large online platforms, we might draw an analogy to “offline” providers of social and economic infrastructure.²⁰³ To the degree that these platforms serve as key channels of communication, commerce, and information flow, they can be recognized as controlling the terms of access to essential services. In the Progressive Era, policymakers feared that concentrated private control over infrastructure would create an intolerable imbalance of power between a small number of firms and the communities, businesses, and individuals dependent on them.²⁰⁴ Regulatory interventions were therefore focused on directly disciplining this power through a combination of legal tools, including nondiscrimination and common carrier regimes, limits on the lines of business in which firms could engage, interoperability requirements, corporate governance reforms, and public options.²⁰⁵

The same regulatory principles deserve close consideration today. To the extent that Facebook and Google have achieved their dominance through anticompetitive means, antitrust lawsuits reversing key acqui-

²⁰² For a valuable argument to this effect, focused on the analogy that some have drawn between digital media companies and traditional news publishers, see generally WHITNEY, *supra* note 3.

²⁰³ We have already previewed this analogy. See *supra* note 88 and accompanying text; *supra* note 196 and accompanying text.

²⁰⁴ See Rahman, *supra* note 88, at 1628–39. Professor K. Sabeel Rahman defines infrastructure as “those goods and services which (i) have scale effects in their production or provision . . . ; (ii) unlock and enable a wide variety of downstream economic and social activities . . . ; and (iii) place users in a position of potential subordination, exploitation, or vulnerability if their access . . . is curtailed in some way.” *Id.* at 1644.

²⁰⁵ See *id.* at 1645–47; see also Khan, *supra* note 196, at 1037–52 (providing an overview of “separations regimes,” *id.* at 1037, applied throughout the twentieth century to proscribe certain organizational structures for railroads, bank holding companies, television networks, and telecommunication carriers); cf. GANESH SITARAMAN & ANNE L. ALSTOTT, THE PUBLIC OPTION: HOW TO EXPAND FREEDOM, INCREASE OPPORTUNITY, AND PROMOTE EQUALITY (2019) (describing and defending “public option[s]” that offer people a choice between governmental and private provision of a good or service).

sitions and penalizing forms of monopoly leveraging might play a complementary role by opening up both primary and adjacent markets.²⁰⁶ Importantly, however, “structural” interventions do not necessarily have to break up firms. They can also reshape business incentives through bright-line prohibitions on specific modes of earning revenue, and they can reshape markets by creating the conditions for greater competition and consumer autonomy.²⁰⁷ Data interoperability requirements, for example, allow users to move their data across platforms, which in turn requires incumbent services to continuously compete.²⁰⁸ With such requirements in place, a platform that perennially violated users’ privacy would likely lose ground to more privacy-conscious rivals, instead of benefiting from high switching costs that keep users trapped within unhealthy environments.²⁰⁹

Second, in thinking about the regulatory challenges posed by digital platforms’ collection, aggregation, and use of personal data, we might draw an analogy to environmental pollution. Professor Omri Ben-Shahar has recently proposed this analogy as a way to move beyond the privacy paradigm in addressing the *social* harms of these practices — not just the concerns they may raise for any given individual subject to surveillance but also the negative externalities they may cause for third parties and for public interests more generally.²¹⁰ A pollution perspective helps to highlight why private law solutions are inadequate to the nature of the threat.²¹¹

²⁰⁶ Versions of this argument are made in the sources cited *supra* note 199.

²⁰⁷ See K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 117–18 (2016) (distinguishing “structuralist” regulatory strategies, which “limit the underlying powers and capacities” of certain firms, from “managerialist” approaches that rely on “fine-tuning expert management,” *id.* at 118); Wu, *supra* note 195, at 34–35 (cataloging a range of “industry-specific statutes, rulemakings, [and] other tools of the regulatory state to achieve the traditional competition goals associated with the antitrust laws,” *id.* at 34).

²⁰⁸ Interoperability is thus what Professor Tim Wu calls a “switching cost reducer[.]” Wu, *supra* note 195, at 35, 56; *see also id.* at 56–57 (“Switching costs are a barrier to competition because they require that a competitor not just be slightly better, but quite a bit better to compensate for the costs incurred in changing providers.”).

²⁰⁹ *Cf. supra* notes 93–97 and accompanying text (suggesting that Facebook currently benefits from high switching costs of this sort).

²¹⁰ See Ben-Shahar, *supra* note 174. Other scholars have drawn similar environmental analogies. *See, e.g.,* A. Michael Froomkin, *Regulating Mass Surveillance as Privacy Pollution: Learning from Environmental Impact Statements*, 2015 U. ILL. L. REV. 1713, 1742–45; Dennis D. Hirsch, *Protecting the Inner Environment: What Privacy Regulation Can Learn from Environmental Law*, 41 GA. L. REV. 1, 23–30 (2006); Ian Samuel, *The New Writs of Assistance*, 86 FORDHAM L. REV. 2873, 2914–24 (2018).

²¹¹ See Ben-Shahar, *supra* note 174, at 16–31. Like all analogies, this one is imperfect even if illuminating. *See, e.g.,* Ronen Avraham, *Personal Data as an Environmental Hazard*, JOTWELL (Nov. 14, 2018), <https://torts.jotwell.com/personal-data-as-an-environmental-hazard> [<https://perma.cc/L88N-XD93>] (noting that, unlike air pollution, “data pollution does not only create negative externalities, it also creates positive externalities”).

The pollution analogy points away from individualistic, consumer-centric frameworks and toward a different set of techniques for reducing surveillance-related harms: namely, ex ante prohibitions on which sorts of data can be gathered and to what extent; Pigouvian taxes on data collection and retention that force firms to internalize their social costs; and ex post liability rules for data “spills” and other data disasters that facilitate deterrence and compensation.²¹² We take no stance here as to the optimal design of or balance among these techniques. We do, however, endorse the implicit insight that the harms from digital surveillance must be met with clear prohibitions and economic disincentives, rather than morally laden standards.

A fiduciary approach that targets “con artist[ry]”²¹³ invites the dominant platforms to shun a small set of behaviors and then claim the mantle of trustworthiness, both narrowing the scope of public debate and normalizing the basic operations of surveillance capitalism.²¹⁴ Without inviting these responses, outright limits or harsh penalties on certain forms of data collection and retention could help to detoxify the larger online ecosystem while preventing platforms from conditioning access to essential services on the ever-greater surrendering of personal data. The German competition authority recently provided an example of such an approach when it ruled that “Facebook will no longer be allowed to force its users to agree to the practically unrestricted collection and assigning of *non*-Facebook data [culled from third-party sources] to their Facebook user accounts.”²¹⁵ The upshot, the Bundeskartellamt’s president said, will be a “divestiture” of data²¹⁶ — or, in other words, less power for Facebook and less pollution for everyone.

CONCLUSION

Figuring out how to regulate digital firms such as Facebook, Google, and Twitter is one of the central challenges of the “Second Gilded Age,”²¹⁷ and Balkin deserves credit for moving the conversation forward. His information-fiduciary proposal, however, is also moving the conversation backward — redirecting attention away from all of the problems associated with high levels of market concentration, away

²¹² Ben-Shahar, *supra* note 174, at 7; *see id.* at 6–7.

²¹³ *See supra* note 20 and accompanying text; *supra* note 106 and accompanying text.

²¹⁴ *Cf.* Woodrow Hartzog & Neil Richards, *Privacy’s Constitutional Moment*, 61 B.C. L. REV. (forthcoming 2020) (manuscript at 41), <https://ssrn.com/abstract=3441502> [<https://perma.cc/9P2K-3C6L>] (arguing that “data protection” regimes, including the GDPR, “advance fair processing rules at the same time as they condition us to a world and society in [which] data processing is inevitable and inevitably good”).

²¹⁵ Bundeskartellamt Press Release, *supra* note 97, at 1–2 (emphasis added).

²¹⁶ *Id.* at 1.

²¹⁷ *See* Balkin, *Second Gilded Age*, *supra* note 27, at 980 (“The Second Gilded Age begins, more or less, with the beginning of the digital revolution in the 1980s, but it really takes off in the early years of the commercial Internet in the 1990s, and it continues to the present day.”).

from all of the problems plaguing the speech environment on social media, away from all of the problems inherent in targeted-advertising-based business models. We do not claim to know what precise mix of regulatory strategies is best, and the answer will likely vary across markets. But for the reasons detailed above, we believe that structural reforms should assume a more prominent place in the debate. By contrast, we doubt that the information-fiduciary idea should play any significant role in the struggle to rein in the leading online platforms and reclaim the online public sphere. If this Article's main arguments have been persuasive, the burden is on supporters of the information-fiduciary idea to clarify how it can be reconciled with the relevant firms' economic incentives and with the facts of digital life, what it adds to existing theories and practices of consumer protection, and why anyone other than the dominant platform owners should see it as a promising path forward.