VIRGINIA LAW & BUSINESS REVIEW

VOLUME 17 FALL 2022 NUMBER 1

FACEBOOK'S CORPORATE LAW PARADOX

Abby Lemert†

ABSTRACT

In response to the digital harms created by Facebook's platforms, lawmakers, the media, and academics repeatedly demand that the company stop putting "profits before people." But these commentators have consistently overlooked the ways in which Delaware corporate law disincentives and even prohibits Facebook's directors from prioritizing the public interest.

Because Facebook experiences the majority of the harms it creates as negative externalities, Delaware's unflinching commitment to shareholder primacy prevents Facebook's directors from making unprofitable decisions to redress those harms. Even Facebook's attempt to delegate decision-making authority to the independent Oversight Board verges on an unlawful abdication of corporate director fiduciary duties. Facebook's experience casts doubt on the prospects for effective corporate self-regulation of content moderation, and more broadly, on the ability of existing corporate law to incentivize or even allow social media companies to meaningfully redress digital harms.

† Yale Law School, J.D. expected 2023. This Article originated under the thoughtful supervision of Aaron Dhir and found its direction thanks to the wise guidance of Daniel Markovits, David Dinielli, Doug Kysar, Pat Reidy, Sherry Tanious, David Yosifon, Rachel Wolbers, Jonathan Macey, Kate Klonick, Evelyn Douek, and Fiona Scott-Morton. I offer my heartfelt thanks to the incredible members of the Tech Accountability & Competition Project at Yale Law School, and I would've given up on this Article long ago without the encouragement and brilliant editing of Atticus Ballesteros. A huge thank you to Amelia Browning, George McMillan, and the staff of the Virginia Law & Business Review for their support for this piece and all-around professionalism. Finally, but most importantly, thanks to my parents for their continued enthusiasm and typo-catching, and to Natalie, Eleanor, and Katie, for their constant support these last three years.

"I saw that Facebook repeatedly encountered conflicts between its own profits and our safety. Facebook consistently resolved these conflicts in favor of its own profits."

- Frances Haugen, Facebook Whistleblower [1]

"One of the nice things about this Board is occasionally people will say but if we did that, that will scupper Facebook's economic model in such and such a country. To which we answer[,] well[,] that's not our problem."

- Alan Rusbridger, Oversight Board Member [2]

"[L]ecturing others to do the right thing without acknowledging the actual rules that apply to their behavior, and the actual power dynamics to which they are subject, is not a responsible path to social progress."

- Leo E. Strine, Jr., Former Chief Justice of the Delaware Supreme Court [3]

INTRODUCTION

IN September 2021, Facebook whistleblower Frances Haugen came forward with a trove of internal documents gathered during her two years as a product manager at the company.[4] The "Facebook Files" fueled dozens of

---

1 *Statement of Frances Haugen Before the Subcomm. on Consumer Prot., Prod. Safety, and Data Sec. of the S. Comm. on Com., Sci. and Transp.*, 117th Cong. 2 (2021) [hereinafter *Statement*] (statement of Frances Haugen, former Facebook Product Manager, Whistleblower Aid) (emphasis removed), https://www.commerce.senate.gov/services/files/FC8A558E-824E-4914-BEDB-3A7B1190BD49.

2 Natasha Lomas, *Facebook's Oversight Board Already 'A Bit Frustrated' – And It Hasn't Made a Call on Trump Ban Yet*, TECHCRUNCH (Mar. 2, 2021, 8:05 PM), https://techcrunch.com/2021/03/02/facebooks-oversight-board-already-a-bit-frustrated-and-it-hasnt-made-a-call-on-trump-ban-yet/.

3 Leo E. Strine, Jr.*, 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, 768 (2015).

4 Adam Geller & Matt O'Brien, *How One Facebook Worker Unfriended the Giant Social Network*, ASSOCIATED PRESS NEWS (Oct. 10, 2021), https://apnews.com/article/facebook-science-

stories by national publications, revealing with damning clarity just how aware Facebook was of the damaging externalities of its products.[5] "Facebook Knows Instagram is Toxic For Teen Girls," one *Wall Street Journal* headline ran.[6] "Facebook did little to moderate posts in the world's most violent countries," *Politico* alleged.[7] "Facebook has known it has a human trafficking problem for years. It still hasn't fully fixed it," *CNN* reported.[8] Commentators called it Facebook's largest public relations crisis since the Cambridge Analytica data privacy scandal in 2018.[9]

In the days that followed, Haugen went public, revealing her identity in a *60 Minutes* interview.[10] She told her interviewer, "[t]he thing I saw at Facebook over and over again was there were conflicts of interest between what was good for the public and what was good for Facebook. And Facebook, over and over again, chose to optimize for its own interests, like making more money."[11] Only a few days later, Haugen was testifying in front of Congress. In her testimony, she outlined the consequences of Facebook's choice of profit over safety: "The result has been more division, more harm, more lies, more threats, and more combat. In some cases, this dangerous online talk has led to actual violence that harms and even kills people."[12]

---

technology-business-congress-frances-haugen 80e92043b7211590b6be84dcc7a05b4a.

5 David Gilbert, *Here Are All the Facebook Papers Stories You Need to Read,* VICE (Oct. 26, 2021, 10:01 AM), https://www.vice.com/en/article/bvngev/here-are-all-the-facebook-papers-stories-you-need-to-read.

6 Georgia Wells et al., *Facebook Knows Instagram Is Toxic for Teen Girls, Company Documents Show*, WALL ST. J. (Sept. 14, 2021, 7:59 AM), https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739.

7 Mark Scott, *Facebook Did Little to Moderate Posts in the World's Most Violent Countries*, POLITICO (Oct. 25, 2021, 10:01 AM), https://www.politico.com/news/2021/10/25/facebook-moderate-posts-violent-countries-517050.

8 Clare Duffy, *Facebook Has Known it has a Human Trafficking Problem for Years. It Still Hasn't Fully Fixed It*, CNN BUS. (Oct. 25, 2021, 7:33 AM), https://www.cnn.com/2021/10/25/tech/facebook-instagram-app-store-ban-human-trafficking/index.html.

9 Kari Paul & Dan Milmo, *Facebook Putting Profits Before Public Good, says Whistleblower Frances Haugen*, THE GUARDIAN (Oct. 4, 2021, 4:35 PM) https://www.theguardian.com/technology/2021/oct/03/former-facebook-employee-frances-haugen-identifies-herself-as-whistleblower.

10 Scott Pelley, *Whistleblower: Facebook Is Misleading the Public on Progress Against Hate Speech, Violence, Misinformation*, CBS NEWS: 60 MINUTES (Oct. 4, 2021, 7:32 AM), https://www.cbsnews.com/news/facebook-whistleblower-frances-haugen-misinformation-public-60-minutes-2021-10-03/.

11 *Id.*

12 Bobby Allyn, *Here Are 4 Key Points from the Facebook Whistleblower's Testimony on Capitol Hill*, NPR (Oct. 5, 2021, 9:30 PM), https://www.npr.org/2021/10/05/1043377310/facebook-whistleblower-frances-haugen-congress.

The response from Congress was heated: Senator Ed Markey called Haugen a "21st century American hero" for coming forward.[13] Senator Blumenthal called her testimony a "big tobacco, jaw-dropping moment of truth" for Facebook.[14] In the weeks that followed, lawmakers, journalists, advocacy groups, and the public seemed united in their demand that Facebook be held accountable for its choice of profits over the public. Greg Bensinger, a member of the *New York Times* editorial board, summarized: "Facebook has endured one of the most punishing stretches of corporate coverage in recent memory, exposing its immense power and blithe disregard for its deleterious impacts."[15]

"But," he went on, "none of it really matters." [16] Since "Facebook's business priorities trump user privacy and safety," until all the negative publicity begins to pose a meaningful threat to the company's bottom line, "Ms. Haugen and the press are but bumps in the road."[17]

As the dust has settled on the Facebook Files, Bensinger's pessimistic prophecy seems to have been borne out by non-events. Besides a corporate rebrand to Meta, little of substance at Facebook has changed. Congress declined to pass any new legislation sanctioning the company's conduct.[18] And although two senators asked the SEC to investigate whether Facebook had

---

13 Dan Milmo, *Frances Haugen Takes on Facebook: The Making of a Modern US Hero*, THE GUARDIAN (Oct. 10, 2021, 3:00 AM), https://www.theguardian.com/technology/2021/oct/10/frances-haugen-takes-on-facebook-the-making-of-a-modern-us-hero.

14 Jill Goldsmith & Ted Johnson, *Whistleblower Frances Haugen Tells Lawmakers Breaking Up Facebook Is Pointless – Update*, DEADLINE (Oct. 5, 2021, 1:24 PM), https://deadline.com/2021/10/facebooka-big-tobacco-moment-sen-richard-blumenthal-whistleblower-hearing-1234849909/.

15 Greg Bensinger, *Face It, Facebook Won't Change Unless Advertisers Demand It*, N.Y. TIMES (Oct. 26, 2021), https://www.nytimes.com/2021/10/26/opinion/facebook-advertisers.html.

16 *Id.*

17 *Id.*

18 On February 17, 2022, as this article was being prepared for submission, Senator Blumenthal (D-Conn.) and Senator Blackburn (R-Tenn.) introduced the "Kids Online Safety Act," described as "comprehensive bipartisan legislation to enhance children's safety online." *Blackburn & Blumenthal Introduce Comprehensive Kids' Online Safety Legislation*, MARSHA BLACKBURN U.S. SENATOR FOR TENN. (Feb. 16, 2022), https://www.blackburn.senate.gov/2022/2/blackburn-blumenthal-introduce-comprehensive-kids-online-safety-legislation. The current version of the bill imposes a duty of care on platforms to act in the best interests of minors that use their platforms and services, enforceable by the Federal Trade Commission or state attorney generals. *The Kids Online Safety Act of 2022: Section-by-Section Summary*, MARSHA BLACKBURN U.S. SENATOR FOR TENN., https://www.blackburn.senate.gov/services/files/1E963833-B931-45F7-9765-181C8E692A06 (last visited Oct. 14, 2022). A discussion of this and a similar bill in the context of the argument is outlined below. *See infra* Section IV.A.3.

misled investors,[19] and several shareholder derivative suits have been filed,[20] the SEC has not announced any formal action on Haugen's revelations.[21]

Congressional inaction is not particularly surprising in an era of legislative stagnation. But what explains the SEC's inaction in the wake of such willful, wanton conduct by Facebook, dramatically revealed by Haugen's high-profile whistleblowing? The paradox of the Facebook Files is that they don't reveal any sort of corporate malfeasance in the traditional sense. "The argument that Facebook prioritized profits isn't convincing, because that's what companies do. . . . There will very likely be an investigation, because it's so high-profile, but it's hard to see a clear case."[22]

Instead, the Facebook Files revealed Facebook's corporate directors behaving exactly as Delaware corporate law compels them to: maximizing profit for shareholders by evading the costs of negative externalities generated by their products. Delaware's firm commitment to the doctrine of shareholder primacy means that, with certain qualifications, corporate directors are legally obligated to prioritize profit before the public interest.[23] Delaware's shareholder primacy doctrine contains no carve-outs for corporate activities that directors, lawmakers, and the public consider to be exploitative or morally reprehensible,

---

19 Senator Warren (D-Mass.) and Senator Cantwell (D-Wash.) asked the SEC to investigate one of the revelations in the Facebook Files, but notably, not any the headline-drawing revelations. Lauren Feiner, *Two Democratic Senators Urge Federal Investigations into Facebook for Allegedly Misleading Claims*, CNBC, (Dec. 9, 2021, 6:01 PM) https://https://www.cnbc.com/2021/12/09/sens-cantwell-warren-urge-federal-investigations-into-facebook.html. Instead, the senators asked the SEC to investigate the claim that Facebook was over-inflating the "Potential Reach" metric it displayed to advertisers in statements to investors. *Id.* Since, on this theory, Facebook misled investors, it is within the SEC's purview as a classic violation of securities law. Cecilia Kang, *Facebook Faces a Public Relations Crisis. What About a Legal One?*, N.Y. TIMES (Oct. 26, 2021), https://https://www.nytimes.com/2021/10/26/technology/facebook-sec-complaints.html.

20 *See, e.g.*, Christina Tabacco, *Facebook Leaders Sued for Mismanagement in Shareholder Derivative Action,* LAW ST., (Feb. 16, 2022), https://lawstreetmedia.com/news/tech/facebook-leaders-sued-for-mismanagement-in-shareholder-derivative-action; Lauren Feiner, *Ohio Attorney General Files Lawsuit Claiming Facebook Misled Investors About Safety Measures*, CNBC (Nov. 15, 2021, 2:17 PM), https://www.cnbc.com/2021/11/15/ohio-ag-accuses-facebook-of-securities-fraud-for-misleading-investors.html.

21 Clare Duffy, *Facebook Says It's Facing 'Government Investigations' Related to Whistleblower Documents*, CNN BUS. (Oct. 27, 2021, 4:47 PM), https://www.cnn.com/2021/10/27/tech/facebook-papers-government-investigation/index.html.

22 Kang, *supra* note 19.

23 Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc, 506 A.2d 173, 182 (Del. 1986); s*ee infra* Section I.B.

unless those activities would undercut the company's short- or long-term profitability.[24]

The trouble is that from Facebook's vantage point, the social harms flowing from its platforms are experienced chiefly as negative externalities. As Bensinger explains, Facebook's "spiraling public relations crisis" doesn't matter, because the company "simply hasn't been compelled to change its behavior."[25] From a shareholder's perspective, "[i]f pure profit, rather than safety or dissemination of correct information, is the company's goal, it is a roaring success."[26] The public relations crises fail to impact the company's bottom line: Facebook "has faced its share of sharp criticism before — remember the Cambridge Analytica scandal way back in 2018? — and congressional inquiries . . . . [T]hrough it all, its stock has proved resilient."[27]

Ideally, Pigouvian mechanisms[28] such as government regulation or user exit would reimpose the costs of these negative externalities back onto Facebook, forcing the company towards a socially optimal level of investment in mitigating digital harms.[29] But currently, both of those Pigouvian mechanisms are broken: "Congress has done, well, nothing. Federal lawmakers profess to be motivated this time. But it's a safer bet that any comprehensive controls on Big Tech will descend into partisan squabbling. And Facebook has little to fear from users, who continue to visit its sites in ever greater numbers."[30] Though public recognition of digital harms has led to perennial reputational crises and threats of regulation, public outrage has not yet translated into serious threats to Facebook's profitability.[31]

The lack of functional Pigouvian mechanisms means that Facebook's bottom line is meaningfully divorced from the costs of the social harms it

---

24 *See Revlon*, 506 A.2d at 182; *see also infra* Section 1.B.

25 Bensinger, *supra* note 15.

26 *Id.*

27 *Id.*

28 The descriptor "Pigouvian" derives from the work of early twentieth-century economist Arthur Pigou, who advocated government taxes on activities which produced negative externalities. Such taxes would reimpose the marginal social costs of the activity onto the activity's doer, thus incentivizing the doer to adjust their activity level to that which is optimal for society. ARTHUR C. PIGOU, THE ECONOMICS OF WELFARE 149, 161 (1920). Rather than the more familiar term "Pigouvian taxes," which implies governmental involvement, this Note uses the broader term "Pigouvian mechanisms" to describe any phenomenon, public or private, with the effect of requiring a digital platform to internalize the costs of its social harms.

29 *See* Guido Calabresi, *Transaction Costs, Resource Allocation and Liability Rules–A Comment*, 11 J. L. & ECON. 67, 69 (1968).

30 Bensinger, *supra* note 15.

31 A discussion of how Facebook's major stock price collapse in February 2022 relates to the argument is provided below. *See infra* note 170.

generates.[32] As long as this situation holds true, it creates a deleterious alignment of incentives for Facebook's directors. Delaware's staunch commitment to shareholder primacy gives Facebook's directors both a duty and an incentive to perpetuate negative externalities as long as possible, since such externalities flow from profit-driving initiatives that benefit investors' bottom lines. Though the business judgment rule affords directors great latitude in the means chosen to maximize shareholder value, any director seeking to put the public interest before profitability must still lie or obfuscate about their motives to remain shielded by the business judgment rule.

Moreover, even if Facebook sought to escape the strictures of shareholder primacy through self-regulation, another doctrine of Delaware corporate law imposes a limit on the extent to which directors may delegate their decision-making powers before such delegations become an unlawful abdication of their fiduciary duties.[33] Under this standard, Facebook's elaborate and high-profile attempt to self-regulate through its "independent Oversight Board (OB)," an initiative that many see as a salutary effort to mitigate Facebook's digital harms, may ultimately be illegal under Delaware law as an unlawful delegation of director duties. For the OB to remain lawful, its jurisdiction must remain narrowly limited; thus, even Facebook's attempt to create its own Pigouvian mechanism was stymied by Delaware corporate law's limits on director delegation. Delaware's shareholder primacy doctrine mandates that Facebook's directors continue externalizing harms, using exploitative means for as long as Pigouvian mechanisms remain ineffective, while director delegation doctrine simultaneously prevents Facebook from tying its own hands to forbid that exploitation.

This gulf between public outrage and legal approbation of Facebook's externalization of harms lays bare one of the deepest tensions in corporate law. Facebook's experience is one instantiation of a broader trend: corporate law has failed to incentivize or even allow digital platforms to invest in adequate remedies for the novel harms flowing from their platforms. Understanding why Delaware corporate law has failed to motivate and actively prohibited Facebook from redressing the harms flowing from its business model and content moderation failures reveals why those same doctrines will also fail when applied to other ad-based business models. In order to prompt meaningful investment in digital harm reduction, regulators will have to change

---

32 *See* Kurt Wagner & Ian King, *Facebook Stock's Familiar Crisis Cycle: Decline, Rebound, Repeat*, BLOOMBERG, (Oct. 6, 2021, 2:37 PM) https://www.bloomberg.com/news/articles/2021-10-06/facebook-stock-s-familiar-crisis-cycle-decline-rebound-repeat.

33 Abercrombie v. Davies, 123 A.2d 893, 899 (Del. Ch. 1956) (discussing the doctrine of corporate director delegation via contract).

the underlying incentive structure facing platforms' corporate directors, either by modifying corporate law itself or by using other legal doctrines to price in the cost of negative externalities.[34]

Facebook and its recently established OB have become a symbol, a fetish, and a fascination for technology law scholars. But while comparisons to *Marbury v. Madison*,[35] First Amendment jurisprudence,[36] and international human rights abound,[37] the most important legal doctrines constraining Facebook's behavior and incentives appear to be far more mundane provisions of Delaware's corporate law. But so far, Facebook's many theorists and commentators haven't squarely addressed the ways in which corporate law structures the company's incentives to mitigate the harms flowing from its platforms. No scholar has yet provided a robust analysis of Facebook and its OB through the lens of corporate law. But in the words of Leo Strine, former Chief Justice of the Delaware Supreme Court and Vice Chancellor of the Delaware Court of Chancery, "lecturing others to do the right thing without acknowledging the actual rules that apply to their behavior, and the actual power dynamics to which they are subject, is not a responsible path to social progress."[38]

This Note begins to fill in that gap by analyzing how two corporate law doctrines constrain Facebook's incentives and ability to self-regulate. Section I of this paper outlines how the doctrine of shareholder primacy intersects with Facebook's ad-based business model to create a general duty on the part of Facebook's corporate directors to maximize user engagement. Corporate law and market pressures require directors to exploit negative externalities to the full extent allowed by law and existing Pigouvian mechanisms—and in

---

34 Haugen herself made this point to Congress:

> When we realized tobacco companies were hiding the harms it caused, the government took action. When we figured out cars were safer with seat belts, the government took action. And today, the government is taking action against companies that hid evidence on opioids. I implore you to do the same here.

Statement, *supra* note 1, at 3.

35 Salvador Rodriguez, *The Facebook Oversight Board Proved It's Not Mark Zuckerberg's Puppet – Now It's His Move*, CNBC (May 5, 2021, 6:15 PM), https://www.cnbc.com/2021/05/05/facebook-oversight-boards-trump-decision-was-marbury-v-madison-moment.html.

36 Kate Klonick, *Facebook v. Sullivan,* KNIGHT FIRST AMEND. INST. AT COLUM. U. (Oct. 1, 2018), https://knightcolumbia.org/content/facebook-v-sullivan.

37 Laurence Helfer & Molly K. Land, *Is the Facebook Oversight Board an International Human Rights Tribunal?*, LAWFARE (May 13, 2021, 8:01 AM), https://www.lawfareblog.com/facebook-oversight-board-international-human-rights-tribunal.

38 Strine, *supra* note 3.

Facebook's case, the two most effective Pigouvian mechanisms, user exit and government regulation, are currently failing. But even if Facebook's corporate directors do voluntarily seek to put the public interest before profitability, the limits of the business judgment rule mean that they must obfuscate or lie about their motives to shareholders.

Section II of this Note assesses Facebook's most creative attempt to escape this corporate law paradox—the Oversight Board. Facebook, in establishing its independent Oversight Board, has attempted to strike a balance between profit maximization and mitigation of negative externalities through a novel delegation of content moderation decision-making authority. Nevertheless, it is possible that the decision-making authority delegated to the OB is a breach of Facebook's directors' fiduciary duties under a different Delaware corporate law doctrine. This Section begins by outlining the legal standard in Delaware for determining when corporate directors' use of a contract to delegate authority crosses the line into unlawful abdication of director duties. Applying that standard to the OB, it becomes apparent that the jurisdiction of the Board has been carefully circumscribed in recognition of this tension in corporate law, allowing Facebook to toe but not necessarily cross the line into director abdication. Even a recent OB ruling affirming the Trump ban seems to be a lawful delegation by Facebook's directors.[39] Although a key distinction from leading case law could endanger the OB if challenged in a shareholder derivative suit, it is my view that the OB has not clearly crossed the line into an unlawful abdication of director duties—at least not yet. Even so, I argue that the corporate law limits on delegations of director authority make corporate self-regulation an untenable solution for costly content moderation failures.

Section III of this Note draws on concepts introduced by Jon Hanson and David Yosifon[40] to assess the theoretical implications of corporate law's failure to incentivize digital platforms to mitigate the harms flowing from their technologies and business models. First, I outline how shareholder primacy drives digital platforms inexorably towards a form of "power economics" where businesses compete to control the unseen situational influences over human behavior. Then, I proceed to analyze how ad-based business models incentivize digital platforms to perpetuate a form of "deep capture," manipulating not only users' interactions with the company, but even how users conceive of their interactions with the company. That Section ends by assessing

---

[39] OVERSIGHT BOARD, CASE DECISION 2021-001-FB-FBR 4-7 (2021), https://www.oversightboard.com/sr/decision/2021/001/pdf-english.

[40] *See* Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003).

the practical implications of these corporate law limits for tech accountability journalists and advocates and the future prospects of the OB.

Section IV of this Note concludes by laying out alternative paths that regulators could take to resolve Facebook's corporate law paradox, either by modifying the company's incentives by reshaping corporate law itself or by using other legal doctrines to force digital platforms to internalize the costs of their social harms. Lawmakers and regulators could modify Facebook's corporate law incentives by passing a constituency statute for digital platforms, converting Facebook into a public benefit corporation, or granting users and other stakeholders the right to vote on Facebook's corporate activities. Alternatively, lawmakers could use other doctrines to force Facebook to internalize the cost of digital harms, including taxing Facebook for the social costs of connection, implementing competition-based reforms, or modifying Section 230 to impose greater civil liability on Facebook and other digital platforms.

I. HOW CORPORATE LAW CONSTRAINS FACEBOOK'S CONTENT MODERATION INCENTIVES

As a Delaware corporation, Facebook is subject to Delaware corporate law, including the fiduciary duties to shareholders imposed on corporate directors.[41] This Section begins by explaining the high-level workings of Facebook's ad-based business model. It then proceeds to outline the legal standard for the doctrine of shareholder primacy in Delaware, then moving on to consider how a separate doctrine, the business judgment rule, shapes the enforcement of shareholder primacy. Then, I will apply those legal standards to Facebook's ad-based business model to explore first how shareholder primacy shapes Facebook's motives to increase user engagement even through exploitative means, and second, how the business judgment rule shapes Facebook's incentives to deceive investors and the public about any attempts to prioritize the public interest.

A. Facebook's Business Model

Facebook offers access to its tools and platforms to its nearly three billion global users for a cash price of zero dollars.[42] Instead, Facebook earns

41 Facebook, Inc., Eleventh Amended and Restated Certificate of Incorporation (2010), https://www.sec.gov/Archives/edgar/data/1326801/000119312512046715/d287954dex31.htm.

42 Meta Platforms, Inc., Annual Report (Form 10-K) (Feb. 2, 2022).

"substantially all" of its revenue through digital advertising.[43] The "product" that Facebook sells to advertisers is the opportunity to place targeted ads in front of the platform's billions of users.[44] On Facebook, as the old adage goes, users are not the customer—they are the product. The more data Facebook collects about a particular user, the more insight Facebook can offer advertisers into that user's interests and demographics, and thus, the more advertisers will pay Facebook to present that user with a targeted ad.[45]

Although users are not Facebook's direct source of revenue, the time and attention users spend on its platforms (a metric the company calls "user engagement") constitute the product it sells to advertisers and are thus the critical ingredients in sustaining Facebook's revenue.[46] Thus, Facebook has strong financial incentive to design its platforms and curate the content on them in ways that maximize the amount of time and attention that users spend online and engaging with content on its platforms. Content moderation is the process by which Facebook curates the content distributed on its platforms to ensure that the particular ads and user-generated content displayed on the platform will maximize user engagement.[47]

1. How Facebook Does Content Moderation

At the simplest level, content moderation is, "the process of deciding what stays online and what gets taken down."[48] Facebook moderates not only the

---

43 *Id.*

44 Meta's Annual Report for 2021 states: "[W]e generate substantially all of our revenue from selling advertising placements to marketers." *Id.*

45 Meta's Annual Report for 2021 states: "Ads on our platforms enable marketers to reach people based on a variety of factors including age, gender, location, interests, and behaviors." *Id.* This fact is the basis for much of the "surveillance capitalist" business model that has been so heavily critiqued elsewhere. SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM 15, 18 (2018). A critique of the privacy-violating aspects of Facebook's ad-based business model is outside the scope of this paper, which instead concentrates on how corporate law fails to incentivize investment in content moderation and other social harms.

46 Meta Platforms, Inc., *supra* note 42.

47 *See id.*

48 PAUL M. BARRETT, WHO MODERATES THE SOCIAL MEDIA GIANTS? A CALL TO END OUTSOURCING, NYU STERN CTR. FOR BUS. & HUM. RTS. 1 (2020). A more nuanced definition comes from the Sustainability Accounting Standards Board (SASB): "'Content moderation' generally refers to the processes and procedures used to detect and potentially action a range of illegal or unwanted content, especially at social media platforms. Using a broader lens that includes the systems used to determine what users see on a given platform (such as algorithms that prioritize or recommend content), a more encompassing label for these activities might be 'content governance.'" SUSTAINABILITY ACCOUNTING STANDARDS

user-generated content created and shared on its platforms but also the advertisements that advertisers pay to distribute.[49] As has been explored at length elsewhere, platforms use a combination of algorithmic and human content moderation to exercise control over the content created and shared on their platforms.[50] Algorithmic moderation relies on artificial intelligence and machine learning to make automated decisions about whether a given piece of content is likely to violate a platform's rules and standards for users or advertisers.[51] Some algorithmic filtering occurs at the moment when users or advertisers attempt to share a piece of content on the platform: if an algorithm finds that a piece of content has a high likelihood of violating content guidelines, platforms can prevent users from posting it in the first place.[52]

If a piece of content survives the algorithmic filters, Meta and other digital platform companies also provide mechanisms for their users to manually flag potentially violative content for additional review by algorithmic or human moderators.[53] Often, human moderators serve as a form of appellate review of initial algorithmic determinations on content that has been flagged as potentially violative of platform standards.[54] Human moderators are provided with lengthy rulebooks and detailed guidelines to assist their manual review of content.[55]

Facebook, in developing its content moderation rules and guidelines, is not chiefly concerned about what limits on expression would be socially optimal.

BOARD, CONTENT MODERATION TAXONOMY: A FOUNDATION FOR STANDARD SETTING ON THE ISSUE OF CONTENT MODERATION 3 (2020), https://www.sasb.org/wp-content/uploads/2020/12/Content-ModerationTaxonomy-v7b.pdf.

49 *Advertising Policies*, META, https://www.facebook.com/policies/ads (last visited Feb. 19, 2022).

50 BARRETT, *supra* note 48, at 4.

51 *How enforcement technology works*, META: TRANSPARENCY CTR., https://transparency.fb.com/enforcement/detecting-violations/how-enforcement-technology-works (Jan. 19, 2022).

52 *How technology detects violations*, META: TRANSPARENCY CTR., https://transparency.fb.com/enforcement/detecting-violations/technology-detects-violations (Jan. 19, 2022).

53 *How enforcement technology works*, *supra* note 51.

54 *Id.*

55 *Id.* Many content moderators are treated as contractors by digital platforms and are significantly underpaid and denied access to health benefits, even though the work has been linked to post-traumatic stress disorder and other physical and mental health conditions. A discussion of the working conditions of content moderators is beyond the scope of this Note, but a useful entry point to that conversation is found in Casey Newton, *The Trauma Floor: The Secret Lives of Facebook Moderators in America*, VERGE, (Feb. 25, 2019, 8:00 AM), https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interviews-trauma-working-conditions-arizona.

Instead, the content moderation teams inside the company face a fundamentally different question: what content moderation rules and guidelines will drive maximum user engagement? Facebook publicly acknowledges the link between content moderation and profitability. The company admits that failure to successfully moderate advertisements[56] and user-generated content[57] could spark declines in user engagement, either by making users "feel that their experience is diminished" or by failing to successfully "manage and prioritize information" while moderating ads or content.[58] And since the company "generate[s] substantially all of [its] revenue from advertising," any loss in user engagement is "likely to have a material and adverse impact" on Facebook's revenue.[59] In other words, since content moderation rules and guidelines affect user engagement rates, they implicate Facebook's profitability in both the short and long terms.

It is important to note here a point which will become central in a later section: user engagement, representing the amount of time a user spends engaging with content on the platform, is a vastly different metric than a user's subjective enjoyment or objective health and well-being. In fact, there is significant evidence in Facebook's own published research that user enjoyment and well-being are often negatively correlated to user engagement—in other words, many users spend even more time on Facebook when engaging with content that makes them subjectively unhappy or objectively unhealthier.[60] But Facebook's business model requires maximizing user engagement, not user enjoyment or user well-being. Thus, when establishing its content moderation policies and designing enforcement mechanisms, Facebook's business model requires the company to adopt policies and enforcement mechanisms that maximize user engagement rather than policies increasing user enjoyment or well-being at the expense of engagement.

Ideally, the two Pigouvian mechanisms of user exit and government regulation would force the company to align its content moderation rules, guidelines, and enforcement mechanisms with what is socially optimal, effectively "pricing in" user enjoyment and user well-being. However, as will be explored later, both of these mechanisms are currently failing to effectively

---

56 Facebook discloses risk that "users feel that their experience is diminished as a result of the decisions we make with respect to the frequency, prominence, format, size, and quality of ads that we display." Meta Platforms, Inc., *supra* note 42.

57 Facebook discloses risk that "we are unable to manage and prioritize information to ensure users are presented with content that is appropriate, interesting, useful, and relevant to them." *Id.*

58 *Id.*

59 *Id.*

60 See *infra* notes 151-56 and accompanying text.

require Facebook to internalize the negative externalities created by its approach to content moderation.[61]

2. What Facebook Spends on Content Moderation

The nature and extent of Facebook's spending on content moderation is largely unknown outside the company. It is universally acknowledged (at least, by government officials,[62] journalists,[63] civil society groups,[64] the OB,[65] and even Facebook itself[66]) that transparency around Facebook's content moderation spending is limited. Facebook does not provide robust public data on how it invests in content moderation, which it often describes as "safety and security" spending.[67] Any understanding of how Facebook spends money on "safety and

---

61 *See infra* Section I.D.

62 Kaya Yurieff & Brian Fung, *CEOs of Google, Twitter, and Facebook Grilled in Senate Hearing,* CNN BUS., (Oct. 28, 2020 4:03 PM), https://www.cnn.com/2020/10/28/tech/section-230-senate-hearing-Wednesday/index.html.

63 Corin Faife & Dara Kerr, *Facebook Said It Would Stop Recommending Anti-Vaccine Groups. It Didn't.*, MARKUP, (May 20, 2021, 8:00 AM), https://themarkup.org/citizen-browser/2021/05/20/facebook-said-it-would-stop-recommending-anti-vaccine-groups-it-didnt.

64 Faiza Patel & Laura Hecht-Felella, Brennan Ctr. for Just., *Oversight Board's First Rulings Show Facebook's Rules Are a Mess,* JUST SEC., (Feb. 19, 2021), https://www.justsecurity.org/74833/oversight-boards-first-rulings-show-facebooks-rules-are-a-mess/.

65 *See Nazi quote*, OVERSIGHT BD. (Jan. 28, 2021), https://oversightboard.com/decision/FB-2RDRCAVQ/.

66 Press Release, Nick Clegg, Vice President Glob. Affs. & Commc'n, Meta, Facebook's Response to the Oversight Board's First Set of Recommendations (Feb. 25, 2021), https://about.fb.com/news/2021/02/facebook-response-to-the-oversight-boards-first-set-of-recommendations/.

67 Press Release, Meta, Our Progress Addressing Challenges and Innovating Responsibly (Sept. 21, 2021) [hereinafter Meta Press Release on Progress], https://about.fb.com/news/2021/09/our-progress-addressing-challenges-and-innovating-responsibly/. It is safe to assume that "platform safety" is essentially synonymous with content moderation, since content moderators are known formally as "trust and safety professionals." *About Us,* TRUST & SAFETY PROS. ASS'N, https://www.tspa.org/about-tspa/ (last visited Feb. 21, 2022). In addition, Facebook said its Community Standards (in other words, its content moderation guidelines) form the "base and foundation" of the company's approach to "safety on our platform." *A safer Facebook is better for everyone*, Answer to *How does Facebook approach safety on its platform?*, META, https://www.facebook.com/business/good-questions/safety [https://web.archive.org/web/20210213085237/https://www.facebook.com/business/good-questions/safety#] (last visited June 24, 2021). It therefore seems likely that a significant portion of the company's "safety and security" expenditure is dedicated to content moderation, even if it remains unclear how the spending is allocated to various elements of Facebook's overall content-moderation efforts.

security" must be cobbled together from news reports, scattered press releases, and SEC filings, which at best yield only high-level generalizations rather than granular understanding of the company's expenditures.[68] In September 2021, the company stated that since 2016, it had spent a total of $13 billion on "safety and security."[69] One scholar estimates that for 2020 alone, Facebook's cost of content moderation was between $5 and $6 billion,[70] approximately 10% of the company's overall costs and 6% of their total revenue.[71]

Facebook's public statements about its content moderation tools and systems allow some rough estimation of expenditures. Some of Facebook's content moderation is done by approximately 30,000 human moderators and fact-checkers located worldwide, usually contractors.[72] Assuming an average salary of $16.50 per hour,[73] Facebook pays approximately $1 billion per year for human content moderation—only 1.14 percent of the company's annual revenue.[74] But a large percentage of Facebook's content moderation is achieved through the use of automated artificial intelligence tools. In some categories of prohibited content, like nudity, up to 96% percent of violative posts are initially flagged by an algorithm rather than a human user.[75] Although the costs of research, development, and deployment of these tools are not as easily calculable, they are likely substantial. If Facebook spends only $1 billion on human content moderators, a significant portion of additional "platform

---

68 Charlotte Jee, *Facebook Needs 30,000 of Its Own Content Moderators, a New Report Says,* MIT TECH. REV., (June 8, 2020), https://www.technologyreview.com/2020/06/08/1002894/facebook-needs-30000-of-its-own-content-moderators-says-a-new-report/.

69 Meta Press Release on Progress, *supra* note 67.

70 Kate Klonick, *Clearly, Facebook Is Very Flawed. What Will We Do About It?*, N.Y. TIMES (Oct. 1, 2021), https://www.nytimes.com/2021/10/01/opinion/facebook-files-content-moderation-zuckerberg.html.

71 Facebook, Inc., Q3 Quarterly Report (Form 10-Q) (July 29, 2021).

72 Many sources say Facebook employs around 15,000 content moderators. S*ee* BARRETT, *supra* note 48. However, one Facebook source says 30,000. Mark Zuckerberg, *A Blueprint for Content Governance and Enforcement*, FACEBOOK (Nov. 15, 2018) https://www.facebook.com/notes/751449002072082/. In 2021, Facebook announced that it had nearly 40,000 trust and safety professionals but did not specify how many of those employees are front-line content moderators versus other types of employees. Meta Press Release on Progress, *supra* note 67.

73 Content moderators in the United States usually earn between $15 and $18 an hour. *See* Josh Sklar & Jacob Silverman, *I Was a Facebook Content Moderator. I Quit in Disgust*, NEW REPUBLIC (May 12, 2021), https://newrepublic.com/article/162379/facebook-content-moderation-josh-sklar-speech-censorship.

74 Press Release, Facebook, Facebook Reports Fourth Quarter and Full Year 2020 Results (Jan 27, 2021), https://investor.fb.com/investor-news/press-release-details/2021/Facebook-Reports-Fourth-Quarter-and-Full-Year-2020-Results/default.aspx.

75 For hate speech, that percentage is 52. Zuckerberg, *supra* note 72.

safety" expenditures may go toward the development and deployment of algorithmic moderation strategies.

The next section will explore Delaware corporate law's imposition of a duty to maximize shareholder value. When the duty to maximize shareholder welfare intersects with Facebook's ad- based business model, it translates (with significant nuance) into a duty to maximize user engagement that discourages Facebook from pursuing some of the most widely called-for content moderation reforms. But some proposed reforms, in particular calls to reduce the addictiveness of Facebook's platforms and cut back on sensationalist content, seem very likely to reduce user engagement with Facebook's platforms in both the short and long terms. Thus, Facebook's corporate directories could not in good faith justify a decision to undertake such unprofitable reforms, unless they lie to shareholders about their motivations. This Section will first examine the scope of directors' legal duty to maximize profits for shareholders under Delaware law and will then assess how the shareholder primacy doctrine and the business judgment rule as understood in Delaware structure Facebook's incentives to modify its business model and invest in content moderation.

B. The Legal Standard for Shareholder Primacy

According to Delaware jurists, directors of Delaware corporations have a mandatory duty to "make stockholder welfare their sole end,"[76] a doctrine known as shareholder primacy or shareholder wealth maximization. Though legal academics ardently debate the scope of Delaware's corporate fiduciary duties and corporate purpose,[77] the near-universal view among jurists

---

[76] Strine, *supra* note 3, at 768.

[77] Though Delaware case law and jurists' opinions on this point seems clear, a prolific cadre of corporate law scholars has questioned Delaware's shareholder primacy doctrine as both descriptively and normatively suspect. While "[i]t would be no shock to find disagreement on the normative question of what the law of corporate purpose should be . . . corporate law scholars are at odds even on the positive question of what the law *is* on this most basic doctrinal issue." David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 183 (2014). Pinning down the scope of Delaware's law of corporate purpose and director duties to stockholders, and what they ought to be, has sparked prolific academic debate in the years since the 2008 financial crash and the rise of environmental, social, and governance-focused (ESG) investing and corporate social responsibility. *Id.* at 181. A full survey of this debate is beyond the scope of this Note, which is concerned chiefly with how Delaware's doctrine of shareholder primacy, as understood by corporate directors and applied by courts, practically shapes digital platform companies' incentives and behavior. The academic debates over corporate purpose and shareholder primacy have not yet, at least in Delaware, spilled over into case law or statutes. *Id.* Because this Note is concerned with how, in practice, Delaware corporate law shapes digital platforms' behavior, this Note follows the approaches of Yosifon and Strine, disaggregating the descriptive and normative

and practitioners is that Delaware law imposes a duty on corporate directors to "manage [a company] for the benefit of shareholders, and not for any other constituency."[78] This means that "[d]irectors of for-profit entities who pursue a social or environmental mission or otherwise fail to maximize profits . . . may be liable to their shareholders for breach of fiduciary duty."[79]

For a doctrine that is "widely accepted in U.S. corporate law,"[80] the origins of shareholder primacy are surprisingly murky.[81] "The duty to maximize profits is not found in any American statute, has no accepted doctrinal foundation, and has been addressed by only two cases of any significance in the last 100 years—*Dodge v. Ford* and *eBay Domestic Holdings, Inc. v. Newmark*."[82] It is accurate that the duty to maximize shareholder value has no clear statutory grounding in the Delaware General Corporation Law. While the D.G.C.L. "feints toward clarity," by requiring every corporation to "set forth . . . the nature of the business or purposes to be conducted or promoted" in its articles of incorporation, the statutory language "lands with obscurity by allowing the purpose to be stated generally as the intent to pursue 'any lawful act.'"[83] For example, Facebook's articles of incorporation, like most Delaware corporations, says merely "[t]he purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the Delaware General Corporation Law."[84]

Although Delaware's statutory law fails to clarify the legal origins of directors' duty to maximize shareholder value, clearer statements of the shareholder primacy doctrine can be found in Delaware case law. But as corporate law scholars broadly agree, this body of case law is thin, with only a few key precedents doing most of the work.[85] And even those leading

---

questions, conceding that shareholder primacy is clearly the governing law in Delaware, while analyzing the normative question separately. *Id.;* Strine, *supra* note 3.

78 Yosifon, *supra* note 77, at 181.

79 David B. Guenther, *The Strange Case of the Missing Doctrine and the "Odd Exercise" of* eBay: *Why Exactly Must Corporations Maximize Profits to Shareholders?*, 12 VA. L. & BUS. REV. 427, 429 (2018).

80 *Id.* at 427.

81 On this point, there is widespread agreement among corporate law scholars, even between shareholder primacy believers and deniers. Guenther, tracing the history of the doctrine, collects sources showing that scholarly consensus is that *Dodge* and *eBay* fail to cite almost any precedent or other source for their holdings about the existence of a duty to maximize shareholder profits. *Id.* at 430 n.4.

82 *Id.* at 427.

83 Yosifon, *supra* note 77, at 185.

84 Facebook, Inc., *supra* note 41.

85 Guenther, *supra* note 79, at 427. Some scholars blame the thinness of the case law on the fact that a violation of the duty of shareholder wealth maximization is so difficult to prove, since it requires insight into the mental state and intentions of the corporate directors. *See, e.g.*,

precedents are seen almost universally by scholars as lacking in citations to other authorities.[86]

The first case of significance, and the most famous statement of the shareholder primacy doctrine, is *Dodge v. Ford*, a 1919 Michigan Supreme Court decision.[87] After nearly fifteen years of issuing valuable dividends to stockholders, automaker Henry Ford announced a plan to stop issuing dividends and instead reinvest all profits, which would allow him to increase workers' wages and decrease car prices for consumers.[88] Ford's stated "ambition" with this plan was not to benefit stockholders, but instead, "to employ still more men, to spread the benefits of this industrial system to the greatest number possible, to help them build up their lives and their homes."[89] A pair of minority stockholders, the Dodges, sued, seeking a judicial mandate that Ford issue the dividends.[90] And in what would become an iconic statement of the shareholder primacy doctrine, Ford was rebuked by the Michigan Supreme Court:

> There should be no confusion (of which there is evidence) of the duties which Mr. Ford conceives that he and the stockholders owe the general public and the duties which in law he and his co-directors owe to . . . shareholders. *A business corporation is organized and carried on primarily for the profit of the shareholders.* The powers of the director are to be employed for that end. The discretion of the directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, *to a reduction of profits*, or the non-distribution of profits among stockholders . . . .[91]

Though the *Dodge* court cited no authority for its statements, one scholar contends that *Dodge* has ample doctrinal support and, "should . . . be regarded as a transitional case, with one foot firmly planted in the nineteenth century,

---

Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177 (2008). A fuller discussion of this argument about the enforceability of shareholder primacy is below. *See infra* Section I.C.

86 While there is agreement that the holdings in *Dodge* and *eBay* lack citations to other authorities, there is disagreement over the reason behind that lack of citation. Some scholars posit that this dearth of citations is evidence that shareholder primacy is a recently invented doctrine with little historical footing; others believe the lack of citation shows that the doctrine was so widely accepted, it was considered obvious by all relevant jurists. *See, e.g.*, Yosifon, *supra* note 77, at 188.

87 Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).

88 Guenther, *supra* note 79, at 448.

89 *Id.* (quoting *Dodge*, 170 N.W. at 671).

90 *Id.*

91 *Dodge*, 170 N.W. at 684 (emphasis added).

and the other set forward into the twentieth."[92] The most transformative elements of the *Dodge* opinion are twofold: first, the court held that a director's discretion does not extend to "the reduction of profits" for shareholders.[93] Second, *Dodge* held that, "it is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefitting others."[94] Thus, the "forward-looking" aspect of *Dodge* which has persisted into modern corporate jurisprudence is "the proposition that the duty of loyalty requires directors . . . to maximize profits for the benefit of shareholders and shareholders alone."[95]

Though *Dodge* is a Michigan case and only symbolically influential elsewhere, "the same understanding appears to have prevailed in Delaware."[96] In 1986, the Delaware Supreme Court handed down *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, taking the opportunity to clarify[97] the doctrine of shareholder

---

92 Under this reading, *Dodge* maintains continuity with the late-nineteenth century doctrine of *ultra vires*, which policed the outer bounds of directors' discretion by preventing them from pursuing actions which were outside of the specific purposes explicitly stated in the corporation's charter. Seeking to head off an *ultra vires* claim, corporations began to include increasingly long lists of boilerplate purposes and powers in their corporate charters. Eventually, the Delaware state legislature gave in to this trend, declaring that "a corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this State." DEL. CODE ANN. tit. 8 § 101(b) (2021). Corporations quickly began to use this generic language to replace specifically enumerated corporate charters, and "[b]y the 1930s, the doctrine of *ultra vires* had attained its present insignificance." Guenther, *supra* note 79, at 446 n.81 (citing David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 212 (1990)). But "[a]t the same time, the rise of the 'modern firm' – with its separation of management and control, vast capital needs, absence of restrictions on purpose of use of capital in the charter, and large number of passive shareholders – made some new, non-contractual fiduciary duty urgently needed." Guenther, *supra* note 79, at 461. And the rule of shareholder profit maximization announced in *Dodge* "arguably met this need." *Id.* Directors' duty of loyalty still obligated them to behave in line with shareholder expectations, as did the *ultra vires* doctrine, but those shareholder expectations "no longer needed to be grounded explicitly in the company charter." *Id.* at 462.

93 *Dodge*, 170 N.W. at 684.

94 *Id.*

95 Guenther, *supra* note 79, at 461.

96 *Id.* at 453. Early Delaware cases on shareholder primacy cited to leading treatises for the premise that, as distinct from not-for-profit corporations, "a corporation for pecuniary profit is a corporation organized for the pecuniary profit of its shareholders." *Id.* (citing Read v. Tidewater Coal Exch., Inc., 116 A. 898, 904 (Del. Ch. 1922) (quoting 1 FLETCHER'S CYCLOPEDIA OF CORPORATIONS 92 (1919))).

97 Delaware's commitment to shareholder primacy had been thrown into doubt by a line in a 1985 case, *Unocal v. Mesa Petroleum Co.*, which said that directors may take into consideration concerns including "the impact on 'constituencies' other than shareholders (i.e. creditors, customers, employees, and perhaps even the community generally)." 493 A.2d 946, 955

primacy in a famous formulation: "A board may have regard for various constituencies in discharging its responsibilities, *provided there are rationally related benefits accruing to the stockholders.*"[98] As interpreted by Delaware jurists, *Revlon* means "stockholders' best interest must always, within legal limits, be the end. Other constituencies may be considered only instrumentally to advance that end."[99]

Nearly a century after *Dodge*, the Delaware Supreme Court addressed shareholder primacy even more squarely in the prominent case of *eBay Domestic Holdings, Inc. v. Newmark*.[100] According to one scholar, "*eBay* is like *Dodge v. Ford* for the 21st century, in Delaware."[101] Co-defendants Craig Newmark and Jim Buckmaster were the founders of Craigslist, Inc., an online classified ads platform organized as a for-profit Delaware corporation.[102] Newmark and Buckmaster served as corporate directors and collectively owned a majority of Craigslist's stock, with the remaining minority of shares owned by eBay.[103] At the time of the case, "Craigslist was . . . operated largely as a community service, generally offering free advertisements and pursuing a non-monetized business model."[104] Newmark and Buckmaster had a falling out with eBay and proactively adopted measures, including a shareholder rights plan, which would effectively prevent eBay from acquiring a controlling share of the company.[105] In defending this plan against legal challenge by eBay, Newmark and Buckmaster argued that "an acquisition of control by eBay would fundamentally alter craigslist's values, culture, and business model. They argued it would depart from the company's community service mission in favor of monetization, and that eBay therefore was a threat to craigslist and its corporate culture and policies."[106] As summarized by one Delaware jurist, "the founders explicitly, proudly, defended their machinations as necessary to protect the public-service orientation of craigslist and keep it from becoming too focused on profit-making."[107]

(Del. Super. Ct. 1985).

98 506 A.2d 173, 182 (Del. 1986) (emphasis added).

99 Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Firms Seek Profit*, 47 WAKE FOREST L. REV. 135, 147 n.34 (2012).

100 eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 (Del. Ch. 2010).

101 Yosifon, *supra* note 77, at 193.

102 *Id.*

103 Guenther, *supra* note 79, at 463.

104 *Id.* (citing *eBay*, 16 A.3d at 8).

105 *Id.* at 464.

106 *Id.* at 465.

107 Yosifon, *supra* note 77, at 193.

Accordingly, the Delaware Chancery Court found that Newmark and Buckmaster "in fact did *not* adopt the Rights Plan in response to a reasonably perceived threat or for a proper corporate purpose."[108] Instead, Newmark and Buckmaster "did prove that they personally believe craigslist should not be about the business of stockholder wealth maximization, now or in the future."[109] The court lauded defendants' desire to "provid[e] a website for online classifieds that is largely devoid of monetized elements. Indeed, I personally appreciate and admire Jim's and Craig's desire to be of service to communities."[110] But the court's sympathy for the defendants ended there: "The corporate form in which craigslist operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment."[111] The court considered it dispositive that, "Jim and Craig opted to form craigslist, Inc. as a *for-profit Delaware corporation* . . . . Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form."[112] According to the court, "[t]hose standards include acting to promote the value of the corporation for the benefit of its stockholders. The 'Inc.' after the company name has to mean at least that."[113] In other words, the for-profit corporate form demands that Delaware corporate directors adhere to the doctrine of shareholder primacy. For this reason, the court "cannot accept as valid . . . a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of stockholders—no matter whether those stockholders are individuals of modest means or a corporate titan of online commerce."[114]

As with the Michigan Supreme Court in *Dodge*, the *eBay* court cited no authority for its holding, perhaps because the conclusion in favor of shareholder primacy "seemed so obvious and fundamental . . . that it needed no citation. Those who prefer to have one now have *eBay*."[115] "*Dodge v. Ford* and *eBay* are hornbook law because they make clear that if a fiduciary admits that he is treating an interest other than stockholder wealth as an end in itself, rather than an instrument to stockholder wealth, he is committing a breach of fiduciary

---

108 Guenther, *supra* note 79, at 465 (quoting *Ebay*, 16 A.3d at 32).
109 *Ebay*, 16 A.3d at 34 (Del. Ch. 2010).
110 *Id.*
111 *Id.*
112 *Id.*
113 *Id.*
114 *Id.*
115 Yosifon, *supra* note 77, at 194.

duty."[116] If there was any ambiguity in Delaware's commitment to shareholder primacy, it was removed by *eBay*.

Delaware's clear affirmation of shareholder primacy in *eBay* came as other states intentionally did away with the doctrine by statute. At least 33 states have adopted constituency statutes, which explicitly allow (or in some cases require) corporate directors to consider other constituencies beyond shareholders when making decisions on behalf of the corporation.[117] The constituencies and interests that may or must be considered vary by state, but include employees, customers, suppliers, creditors, and community and societal considerations.[118] The adoption of constituency statutes by dozens of states makes the absence of such a statute in Delaware all the more glaring. "When other states moved to adopt express constituency statutes that allowed their boards of directors to consider the interests of other constituencies on an equal footing with stockholders, Delaware did not join them."[119] "The failure of the [Delaware] legislature to do so . . . must be read to express legislative acquiescence in that judicial conclusion."[120] Delaware's judicial support for shareholder primacy in *eBay* combined with its legislature's refusal to pass a constituency statute prove that shareholder primacy is in fact the law of Delaware.

---

116 Strine, *supra* note 3, at 20.

117 *See, e.g.*, Christopher Geczy et al., *Institutional Investing When Shareholders are Not Supreme*, 5 HARV. BUS. L. REV. 73, 130-131 (2015). Even among open critics of the shareholder primacy doctrine, opinions on the efficacy of constituency statutes are split. The majority opinion holds that permissive constituency statutes, which merely allow corporate directors to consider other stakeholders' interests, are insufficient to encourage responsible and ethical corporate behavior. Instead, the majority advocates for mandatory constituency statutes, which require corporate directors to consider other stakeholders' interests. However, some scholars have questioned the enforceability of these mandates given the great permissiveness and deference accorded to corporate directors under the business judgment rule. And even assuming their enforceability, some empirical law and psychology scholars warn of a potential "backfire" effect of mandatory constituency statutes, whereby corporate directors are less likely to take beneficent actions because the public believes those good actions are mandated by law, and not done out of the company's goodwill. For a robust discussion of these issues, *see* Hajin Kim, *Can Mandating Corporate Social Responsibility Backfire?*, 18 J. EMPIRICAL L. STUD. 189, 191 n.11 (2021). Other empirical scholarship on the impact of constituency statutes has revealed that they have not lived up to the hopes of corporate social responsibility advocates. *See* Strine, *supra* note 3, at n.21.

118 See Kim, *supra* note 117, at 200.

119 Strine, *supra* note 3, at 786-87.

120 Yosifon, *supra* note 77, at 194.

C. The Business Judgment Rule's Effect on Shareholder Primacy

While shareholder primacy is the law in Delaware, it is difficult, if not impossible, to enforce through litigation. "Shareholder wealth maximization . . . is still at least the law on the books, if not in practice . . . . The problem is not the lack of clarity of the rule. The problem is lack of enforceability."[121] But even if shareholder primacy is difficult for shareholders to enforce in litigation against corporate directors, as explained in this section, the doctrine still holds sway as a norm guiding corporate director behavior and as a constraint on the rhetoric with which directors may describe their decisions and actions.

The source of shareholder primacy's lack of enforceability is the sweeping discretion afforded to corporate directors under the business judgment rule. The business judgment rule states that "directors of . . . [a] corporation are clothed with [the] presumption[,] which the law accords to them[,] of being [motivated] in their conduct by a Bona fide regard for the interests of the corporation whose affairs the stockholders have committed to their charge."[122] When the business judgment rule protects the actions of a corporate director, good faith is presumed, and the standard for a breach of the director's fiduciary duty of care is not merely ordinary negligence, but gross negligence.[123]

The shareholder primacy doctrine is nearly impossible to enforce because a violation hinges on the director's mental state and intentions while making decisions on behalf of the corporation. What determines liability "[i]s not what [directors] did, but what [they] said [they] were doing," and why they said they were doing it.[124] "As long as the goal of the corporation is profit maximization," the business judgment rule gives directors "virtually unfettered discretion to choose the strategies to be employed to that end."[125] Directors' actions become unlawful only if "the directors attempt[] to justify their actions by claiming that they were motivated by a desire to benefit some constituency other than the shareholders."[126] Thus, corporate directors can escape liability merely by articulating for the court some motivation for their actions which is rationally related to maximizing shareholder value.[127]

---

121 Macey, *supra* note 85, at 181

122 Gimbel v. Signal Cos., 316 A.2d 599, 608 (Del. Ch. 1974) (quoting Robinson v. Pittsburgh Oil Refin. Corp., 126 A. 46, 48 (Del. Ch. 1924)).

123 WILLIAM E. KNEPPER & DAN A. BAILEY, LIABILITY OF CORPORATE DIRECTORS AND OFFICERS, § 2.0 (8th ed. 2021).

124 Macey, *supra* note 85, at 183.

125 *Id.*

126 *Id.*

127 *Id.*

In most cases, it is simple for directors to articulate some motive for their actions that aligns with long-term shareholder wealth maximization. "It is true, therefore, that it is nearly impossible to enforce the shareholder primacy norm through litigation absent, essentially, an explicit statement by directors that they are managing the firm toward some other goal."[128] The difficulty of proving a violation of shareholder primacy explains the paucity of case law on the question. Here, the facts of *Dodge* and *eBay* make both cases outliers: in each, corporate directors explicitly stated their intent to prioritize interests other than shareholder value and profitability. "The reason that the Michigan Supreme Court held against Ford is simple. Ford gave them no choice when he asserted that he was pursuing some strategy other than wealth maximization for shareholders."[129] The same is true in *eBay*, given the directors' explicitly stated goal of preserving craigslist's corporate culture and values at the expense of "monetization."[130] But if the directors had simply "lied and said [their] motivation was to maximize profits rather than to benefit workers and other non-shareholder constituencies, [they] would have won the case."[131]

The difficulty of enforcing shareholder primacy has led to "conflation of what the law requires with speculation about what directors can get away with."[132] "Because there is no sure way to tell what [a director's] real motivations were, an unethical lawyer could . . . advise[him or her] to lie without repercussion."[133] However, "[j]ust because shareholder primacy cannot easily be enforced through lawsuits does not alter the fact that it is the prevailing law of corporate governance in Delaware."[134] "The issue . . . is not what directors might get away with in the courtroom but what the law calls on directors to think and do in the boardroom."[135] Delaware's interpretation of shareholder primacy means that "directors' decisions must truly, actually, sincerely, be made in the best interests of the shareholders."[136] Simultaneously, "[s]ince directors are fiduciaries of the corporation and its shareholders, directors have an obligation to speak truthfully to shareholders about what they

---

128 Yosifon, *supra* note 77, at 223.
129 Macey, *supra* note 85, at 182.
130 Guenther, *supra* note 79, at 465.
131 Macey, *supra* note 85, at 183.
132 Yosifon, *supra* note 77, at 222. This quandary also raises interesting legal ethics questions for lawyers advising corporate director clients facing a challenge under the shareholder primacy doctrine. For a discussion, *see* Macey, *supra* note 85, at 183-184.
133 *Id.* at 184.
134 Yosifon, *supra* note 77, at 223.
135 *Id.*
136 *Id.*

are doing with the firm."[137] To fulfill this duty "in good faith, as the law requires them to do, directors must say what they believe and believe what they say. Directors, as fiduciaries, cannot lie about what they are doing and why they are doing it."[138]

Thus, in describing how the business judgment rule limits shareholder primacy, it is important to "distinguish between [1] plausible assertions, duties easily ignored, and tacit undertakings, which faithless servants may abide, and [2] sincere, good faith deliberation and decision-making, which honest men and women will strive for when they are true to their duty." Indeed, shareholder primacy may be more effective not as a doctrine enforceable against corporate directors in litigation, but because it establishes a behavioral norm in favor of shareholder wealth maximization.[139]

A second way in which Delaware's commitment to shareholder primacy has "practical importance" is that, since "Delaware does not countenance directors secretly serving non- shareholders at the expense of shareholders," directors may not openly admit to prioritizing non-shareholder interests.[140] "When a fiduciary confesses that [s]he in fact harbors the personal motive to put another interest, of whatever kind, ahead of stockholders," she loses the valuable protection of the business judgment rule.[141] Shareholder primacy, then, assuredly influences at least the rhetoric of corporate directors. While the business judgment rule "provides directors with sufficient flexibility to *get away with* some amount of attention to non-shareholder interests . . . [a]ny attention that is given to non-shareholders presently has to be done surreptitiously, in hushed tones, through lies."[142] Open prioritization of non-shareholder interests, such as "[i]f a CEO testifies that he and his board were engaging in certain actions for reasons unrelated to maximizing shareholder value," means the board would lose the protection of the business judgment rule and thus "would lose a lawsuit challenging those actions. On the other hand, if the CEO engaged in precisely the same actions but claimed doing so was for the purpose of maximizing shareholder value, they would win the same lawsuit."[143]

Clearly, the interaction of shareholder primacy and the business judgment rule means that a corporate director hoping to prioritize stakeholder interests

---

137 *Id.*

138 *Id.*

139 For a summary of experimental research on how the norm of shareholder primacy influences corporate director behavior, *see* Kim, *supra* note 117, at 191 n.7.

140 Yosifon, *supra* note 77, at 223.

141 Strine, *supra* note 3, at 784.

142 Yosifon, *supra* note 77, at 229 (emphasis added).

143 Macey, *supra* note 85, at 189-90.

over shareholder value has strong incentive to fabricate, distort, or flatly lie about her motives. Under the broad shelter of the business judgment rule, the director's false motives would almost certainly go unchallenged by courts. But to conclude from this that shareholder primacy is not enforceable as the law of Delaware requires reliance on an assumption that corporate directors will willfully breach their fiduciary duties by lying to shareholders about their motives. As Yosifon argues, "corporate law should not wed itself to or promote such duplicity."[144] To scholars claiming that the business judgment rule allows corporate directors to prioritize non-shareholders, he responds "[w]ithin a corporate governance system that explicitly avows process, loyalty, credibility, and deliberation as its essential and most valued qualities, it is wholly inapposite to conclude that anything 'tacit' should play a crucial role in an accurate or desirable conception of proper corporate governance."[145] At present, the limits of the business judgment rule demand that directors lie or obfuscate about any tacit attempts to prioritize non-shareholders. If prioritizing non-shareholder interests requires directors to breach their fiduciary duties of truthfulness and good faith, then the business judgment rule does not truly or meaningfully "allow" directors to prioritize non-shareholders.

Together, the shareholder primacy doctrine and the business judgment rule jointly shape corporate directors' incentives toward non-shareholder interests as well as their rhetoric about these interests. The shareholder primacy doctrine requires corporate directors to make every business decision "truly, actually, [and] sincerely" for the sole end of maximizing profit to shareholders.[146] Meanwhile, the business judgment rule gives directors freedom to surreptitiously get away with prioritizing non-shareholders, but it mandates that such decisions be couched in disingenuous reasoning that pretends to be merely instrumental to long-term shareholder value. The following section will assess how these legal constraints shape Facebook's business model and content moderation incentives as well as the company's rhetoric about its investments in content moderation.

D. How Shareholder Primacy Shapes Facebook's Business & Content Moderation Incentives

The doctrine of shareholder primacy fails to incentivize Facebook and other digital platforms to invest in meaningful reform of its content moderation

144 Yosifon, *supra* note 77, at 223.
145 *Id.*
146 *Id.* at 225.

practices or business model. Instead, it gives Facebook's directors a duty to maximize user engagement on the platform and mandates that the company continue to externalize the costs of its content moderation failures, since externalizing their true cost increases the profits available for shareholders. Because corporate law fails to incentivize adequate investment in remedying the harms flowing from Facebook's platforms, other legal doctrines are necessary to enjoin damaging behaviors or price in the cost of negative externalities.[147]

In Facebook's case, the duty to maximize profit for shareholders translates roughly into a duty to maximize user engagement.[148] Because Facebook operates on a fully ad-based business model, its profitability correlates to the total amount of time and attention users spend on its platforms, a metric the company calls "user engagement."[149] Facebook tells shareholders that its "financial performance has been and will continue to be significantly determined by our success in adding, retaining, and engaging active users."[150] In general, then, Facebook's corporate directors should be expected to make decisions which maximize user engagement, both in the short and long terms. Consequently, director decisions which lead to foreseeable and meaningful decrease in user engagement in the short term must be justified as necessary to increase user engagement or otherwise ensure profitability in the long term.

But this general mandate to maximize user engagement does not equate to a mandate to design digital platforms or invest in content moderation in ways that are optimal for society. The reason is simple: the types of content that drive the most user engagement are not the types of content that are beneficial for society. As Zuckerberg explained as early as 2018, "[o]ne of the biggest issues social networks face is that, when left unchecked, people will engage disproportionately with more sensationalist and provocative content."[151] Facebook's research "suggests that no matter where [they] draw the lines for what is allowed, as a piece of content gets close to that line, people will engage with it more on average—even when they tell [Facebook] afterwards they don't like the content."[152]

---

147 *See* GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 15 (1970).

148 *See* discussion *supra* Section I.A. Facebook's risk disclosures to shareholders reveal how closely tied the company's profitability is to user engagement. Meta Platforms, Inc., *supra* note 42.

149 See *supra* notes 46-47 and accompanying text.

150 Facebook, Inc., Registration Statement (Form S-1) 11 (Feb. 1, 2012).

151 Zuckerberg, *supra* note 72.

152 *Id.*

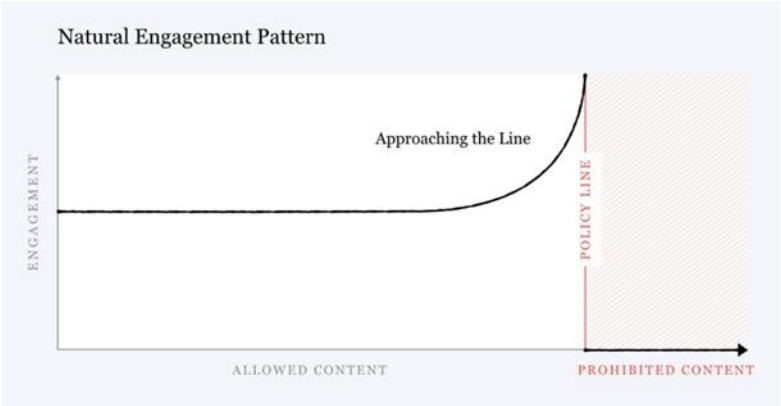

Figure 1: Facebook's Graph of User Engagement Rates vs. Borderline Nature of Content[153]

This leads to a paradox: while users may not consciously enjoy borderline harmful content, Facebook's own research shows that they spend more time viewing and engaging with it. And Facebook's business model requires maximizing user engagement, not user enjoyment.

The same paradox can be found in the experience of those who struggle with addictive use of Facebook. Facebook's own research has proven that "people reporting problematic use[154] report the site as more valuable to them, highlighting the complex relationship between [Facebook] use and well-being."[155] This means that users experiencing Facebook addiction to such an extent that it causes self-evidently detrimental impacts on their daily lives and relationships *still report valuing the site more* than those who aren't experiencing Facebook addiction. Since Facebook's business model obligates the company

---

153 *Id.*

154 "Problematic use" is Facebook's euphemistic term for addictive behavior, which the company defines as "reporting a significant negative impact on sleep, relationships, or work or school performance and feeling a lack of control over site use." Justin Cheng et al., *Understanding Perceptions of Problematic Facebook Use*, 2019 CHI CONF. ON HUM. FACTORS IN COMPUTING SYS. No. 1991 (2019), https://research.facebook.com/publications/understanding-perceptions-of-problematic-facebook-use/. The American Psychiatric Association's leading experts on tech addiction argue that Facebook's definition sets the bar for "problematic" or addictive use far too high, because it requires the user to have awareness of the detrimental impacts of their use disorder. James Sherer & Petros Levounis, *Technological Addictions*, 24 CURRENT PSYCHIATRY REPS. 399, 399-400 (2021). The requirement of self-awareness is absent from most psychologists' definitions of addiction. *See Id.*

155 Cheng et al., *supra* note 154.

to maximize user engagement, not user well-being, this paradoxical finding means that encouraging problematic use represents a profit-maximizing opportunity for Facebook.

But clearly, aiding and abetting the proliferation of borderline, sensationalist content and facilitating addictive use generates a whole slate of harmful consequences on individual and societal levels. Even Zuckerberg admits borderline content, "[a]t scale[,] can undermine the quality of public discourse and lead to polarization."[156] The list of content moderation failures and attendant social harms attributed to Facebook are both familiar and seemingly endless. Leading psychiatric experts on technology addiction estimate that five percent of all Facebook users experience addictive use, meaning approximately 11.6 million Americans.[157] The platform has played host to intentional disinformation and election interference campaigns launched by hostile foreign governments.[158] Instagram use has been shown to increase the likelihood of eating disorders and mental health problems in teen girls.[159] The company is facing a $150-billion lawsuit alleging that it precipitated a genocide against ethnic minority Rohingya Muslims in Myanmar by failing to adequately police hate speech.[160] Facebook has been accused of contributing to digital redlining by allowing housing developers to target ads based on protected characteristics like race and age.[161] The company has enabled the live broadcasting of mass shootings[162] and multiple suicides.[163] Facebook has

---

156 Zuckerberg, *supra* note 72.

157 All addictions are estimated to occur with an incident rate of five percent; thus, the five percent value was used to estimate the incidence of addictive Facebook use. Telephone Interview with James Sherer, Chief Resident, Dep't Psychiatry, Rutgers N.J. Med. Sch. (Feb. 20, 2022). There are approximately 233.63 million Facebook users in the US as of 2021. *Number of Facebook Users in the United States from 2017 to 2026,* STATISTA, https://www.statista.com/statistics/408971/number-of-us-facebook-users/ (last visited Feb. 23, 2022).

158 NATHANIEL GLEICHER, ET AL., FACEBOOK, THREAT REPORT: THE STATE OF INFLUENCE OPERATIONS 2017-2020 3-4, 9-10 (2021), https://about.fb.com/wp-content/uploads/2021/05/IO-Threat-Report-May-20-2021.pdf.

159 Wells et al., *supra* note 6.

160 Michelle Toh, *Facebook Sued for $150 Billion over Violence Against Rohingya in Myanmar*, CNN BUS. (Dec. 7, 2021, 10:44 AM) https://www.cnn.com/2021/12/07/tech/facebook-myanmar-rohingya-muslims-intl-hnk/.

161 Linda Morris & Olga Akselrod, *Holding Facebook Accountable for Digital Redlining*, ACLU (Jan. 27, 2022), https://www.aclu.org/news/privacy-technology/holding-facebook-accountable-for-digital-redlining.

162 Cade Metz & Adam Satariano, *Facebook Restricts Live Streaming After New Zealand Shooting*, N.Y. TIMES (May 14, 2019), https://www.nytimes.com/2019/05/14/technology/facebook-live-violent-content.html.

163 Jessica Guynn, *Facebook Takes Steps to Stop Suicides on Live*, USA TODAY (Mar. 1, 2017, 6:03 AM), https://www.usatoday.com/story/tech/news/2017/03/01/facebook-live-suicide-

facilitated doxing, or the posting of private information like addresses online, leading to increased incidences of stalking and credible death threats against public figures.[164] The President of the United States insisted that Facebook was "killing people" by allowing vaccine misinformation to proliferate during a global pandemic.[165]

The problem is that from Facebook's vantage point, this laundry list of individual and societal harms are experienced primarily as negative externalities. The social costs of Facebook's engagement-driven business model and content moderation failures are borne by others: namely, users, who lack the ability or desire to switch to alternative digital platforms and remain on Facebook despite its content moderation failures, and governments that, as representatives and agents of the broader public, have failed to regulate the company effectively and continue to pay the price.

Perhaps counterintuitively, Facebook's negative publicity and lawmakers' regulatory threats since the Cambridge Analytica scandal in 2018 have failed to translate into any meaningful or permanent impact on Facebook's bottom line. Despite nearly four years as one of the world's most hated companies, and despite data privacy scandals, countless congressional hearings, and massive declines in public trust, market analysts agree that Facebook is "still a growth stock and should be valued like one."[166] Since 2017, the company's market capitalization has grown from around $500 billion to a peak above $1 trillion in August 2021;[167] its global user base has grown from around 2 billion to 3.5 billion,[168] and the average amount of revenue the company generates per North American user has risen from $26.76 to $60.57 per fiscal quarter, a sign of growing user engagement.[169] Because the company's bottom line hinges almost

---

prevention/98546584/.

164 Press Release, Oversight Board, Oversight Board Publishes Policy Advisory Opinion on the Sharing of Private Residential Information (Feb. 2022), https://oversightboard.com/news/673967193790462-oversight-board-publishes-policy-advisory-opinion-on-the-sharing-of-private-residential-information/.

165 Salvador Rodriguez, *Biden on Facebook: 'They're Killing People' with Vaccine Misinformation*, CNBC (Jul. 16, 2021, 2:23 PM), https://www.cnbc.com/2021/07/16/white-house-says-facebook-needs-to-do-more-to-fight-vaccine-misinformation.html.

166 Daniel Sparks, *Facebook Stock: Time to Buy?*, MOTLEY FOOL (Dec. 3, 2021, 6:51 AM), https://www.fool.com/investing/2021/12/03/facebook-stock-time-to-buy/.

167 *Meta (Facebook)*, COMPANIESMARKETCAP.COM, https://companiesmarketcap.com/facebook/marketcap/ (last visited Sept. 28, 2022).

168 *Facebook: Number of monthly active Facebook users worldwide as of 2nd quarter,* STATISTA, https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/ (last visited Sept. 28, 2022).

169 *See* Facebook, Inc., Q2 Quarterly Report (Form 10-Q) at 26 (July 25, 2018) (finding under "Trends in Our Monetization by User Geography" that the company's average annual revenue per user in North America is $26.76); Meta Platforms, Inc., *supra* note 42, at 35

exclusively on user engagement, Facebook' profitability and growth outlook has remained relatively stable and promising for investors. The cloud of negative publicity that has hung over the company's head since 2018 has failed, at least thus far, to translate into any meaningful, sustained loss of profitability.[170]

Facebook's imperviousness to scandal is surprising. Intuitively, there should be at least two Pigouvian mechanisms requiring Facebook to internalize the social costs of its content moderation failures: user exit and government regulation. Facebook acknowledges both of these mechanisms as sources of financial risk in its SEC-mandated disclosures. Regarding user exit, Facebook warns that concerns about "the quality or usefulness" of Facebook's product, or about "privacy, safety, security, well-being, or other factors" could "negatively affect user retention, growth, and engagement."[171] Users, in other words, might vote with their feet by exiting or reducing the amount of time they spend on Facebook in response to its creation of widespread social harm. To the extent to which Facebook's creation of social harm causes users to leave the company's platforms or decrease the amount of time they spend on them, the company's profitability would be negatively impacted.

Regarding government regulation, Facebook warns that governmental actions, including legislative, regulatory, or enforcement actions might cut into the company's profitability in a variety of ways. Adverse U.S. and foreign government actions may lead to a litany of "unfavorable outcomes including increased compliance costs, delays or impediments in the development of new products, negative publicity and reputational harm, increased operating costs, diversion of management time and attention, and remedies that harm our businesses, including fines or demands or orders that we modify or cease

---

(stating that the company's average annual revenue per user in North America is $60.57).

170 Facebook experienced a massive, one-day stock price crash in February 2022, the day after the company announced poor financial results in the final quarter of 2021. The company lost more than $250 billion in market value; the largest single-day drop of any company in history. But this crash is the exception which proves the rule. One leading tech reporter commented that the February 2022 price drop was:

> quite the indictment, since the money crowd has stuck beside the company despite a roiling series of controversies in the 18 years since its founding. Privacy violations, foreign interference, harmful impacts on teenage girls, data breaches, voluminous disinformation and misinformation, and the hosting of citizens charged with seditious conspiracy have made the company into the singular villain of this digital age . . . . But until now, none of these myriad sins have seemed to matter to investors, who have cheered on Facebook's digital advertising dominance that has yielded astonishing profits.

Kara Swisher, *Meta's Horrible, No Good, Very Bad Quarter,* N.Y. TIMES (Feb. 3, 2022), https://www.nytimes.com/2022/02/03/opinion/facebook-meta-stock-crash.html.

171 Meta Platforms, Inc., *supra* note 42.

existing business practices."[172] If the social harms created by Facebook's content moderation failures provoke the ire of foreign or domestic regulators, government actions could force Facebook to internalize a meaningful portion of the cost of the harms its platforms produce.

But while these two Pigouvian mechanisms exist in theory, Facebook's financial imperviousness to recent scandals demonstrates that, at least at present, neither mechanism is functioning effectively.[173] Though Facebook warns investors about user exit, the company's experience over the last four years has demonstrated that users do not, in fact, vote with their feet in response to social harms and content moderation failures.[174] Even as public opinion toward Facebook reached all-time lows, user growth remained steady and monetization rates per user have increased.[175] To the average user, Facebook, the headline-wracked corporation purportedly destroying democracy, seems distinct from Facebook, the platform billions use daily to contact friends, buy and sell goods, and coordinate events. Demand for Facebook's platforms thus appears to be relatively inelastic to changes in the company's public reputation. Facebook itself seems to think that the biggest risks to continued user growth stem not from any form of conscientious user exit in response to the company's creation of social harms, but rather, from competition with TikTok and other ad-based digital platforms.[176]

One could be forgiven for imagining that government regulation is a more promising cost-internalization mechanism, given the frequency with which Zuckerberg and other Facebook executives have been hauled in to testify before Congress.[177] But so far, U.S. policymakers' efforts to "rein in Big Tech"

---

172 *Id.*

173 The causes of the sharp price drop of Facebook stock in February 2022 confirm this theory. The February price crash arose not in response to any of the public relations concerns created by the Facebook Files, or in response to threatening government regulation. Instead, Facebook cited as its primacy financial risks (1) its spending on virtual reality technology, (2) the loss of users to competing ad-based social media platforms, particularly TikTok, and (3) adverse actions taken by rival technology companies, namely, Apple's deployment of a "Do Not Track" feature. *See* META PLATFORMS, INC., FOURTH QUARTER 2021 RESULTS CONFERENCE CALL (2022) [hereinafter META CALL TRANSCRIPT], https://s21.q4cdn.com/399680738/files/doc_financials/2021/q4/Meta-Q4-2021-Earnings-Call-Transcript.pdf. Although Facebook's number of daily active users did marginally decline over this fiscal quarter, a first for the company, Facebook executives seem to believe this decline has more to do with the rise of TikTok and competitor platforms than conscientious user exit in response to the company's creation of social harms.

174 Bensinger, *supra* note 15.

175 *See supra* notes 166-68 and accompanying text.

176 *See supra* note 173.

177 Elizabeth Dwoskin & Craig Timberg, *Apologies Were Once Staples After Facebook Scandals. Now the Company Offers Defiance*, WASH. POST (Oct. 4, 2021 10:00 PM),

have failed to impose any truly serious threats to the platform's profitability. Significantly, in 2019, the Federal Trade Commission (FTC), the federal agency tasked with consumer protection, levied a one-time $5 billion fine against Facebook as part of a consent decree over the company's data privacy practices.[178] But regulating data privacy alone ignores a broad swath of the costliest social harms created by platforms like Facebook. Antitrust lawsuits against Facebook by the FTC and state attorneys-general, at best, will take nearly a decade to wind their way through the court system, but these are also limited to addressing anticompetitive behavior by the company.[179] Meanwhile, in Congress, where the authority to enact sweeping liability for social harms lies, the war has largely been one of words and public relations battles rather than actual legal reform.[180] Foundational internet laws, as Facebook often reminds lawmakers, have remained largely unchanged since 1996.[181] Most experts believe that the passage of comprehensive privacy legislation or other existentially threatening bills in the United States remain only a remote possibility in 2022,[182] although efforts in the United Kingdom appear more promising.[183]

---

https://www.washingtonpost.com/technology/2021/10/04/zuckerbergs-apologies-have-been-staple-facebook-scandals-now-company-offers-defiance/.

178 Katherine Skiba, *Government Hits Facebook With $5 Billion Fine*, AARP (July 24, 2019), https://www.aarp.org/money/scams-fraud/info-2019/facebook-ftc-fine.html.

179 Salvador Rodriguez, *Judge Dismisses FTC and State Antitrust Complaints Against Facebook*, CNBC (June 28, 2021, 8:56 PM), https://www.cnbc.com/2021/06/28/judge-dismisses-ftc-antitrust-complaint-against-facebook.html.

180 One of most promising federal regulatory proposals are a package of bipartisan, competition-focused bills introduced in June 2021. Most of the bills target e-commerce platforms and app store monopolists like Amazon, Apple, and Google; however, one of the bills mandating interoperability would deeply undercut Facebook's business model. Lauren Feiner, *Lawmakers Unveil Major Bipartisan Antitrust Reforms That Could Reshape Amazon, Apple, Facebook, and Google*, CNBC (June 11, 2021, 2:40 PM), https://www.cnbc.com/2021/06/11/amazon-apple-facebook-and-google-targeted-in-bipartisan-antitrust-reform-bills.html. That bill has an estimated three percent chance of passing as of September 2022. *H.R. 3849: ACCESS Act of 2021*, https://www.govtrack.us/congress/bills/117/hr3849.

181 Meta Internet Regulations, META, https://about.meta.com/regulations/ (last visited Sept. 11, 2022).

182 Lauren Feiner, *2022 Will Be the 'Do or Die' Moment for Congress to Take Action against Big Tech*, CNBC (Dec. 31, 2021, 8:53 AM), https://www.cnbc.com/2021/12/31/2022-will-be-the-do-or-die-moment-for-congress-to-take-action-against-big-tech.html.

183 Dan Milmo, *TechScape: UK Online Safety Bill Could Set Tone for Global Social Media Regulation*, THE GUARDIAN (Oct. 13, 2021, 6:54 AM), https://www.theguardian.com/technology/2021/oct/13/techscape-uk-online-safety-bill-could-set-tone-for-social-media-regulation-worldwide-facebook-google. State data privacy legislation is emerging as another potential source of substantive regulation. Some sweeping state laws do pose substantial threats to platform profitability, so digital platforms'

Thus, the two key mechanisms that would require Facebook to internalize the societal costs of its content moderation failures are presently failing to function as effective Pigouvian taxes. And as long as the harms created by Facebook remain negative externalities from the company's vantage point, the shareholder primacy doctrine not only incentivizes but also requires Facebook's directors to continue to exploit those negative externalities as a source of windfall profits. If a company can avoid bearing the full costs of its own operations by shifting a portion of resulting costs onto society without jeopardizing its long-term profitability, those negative externalities represent a windfall for shareholders. "Once directors are charged with managing firms in the shareholder interest, the directors will be motivated to overreach in their dealings with non-shareholders in order to better serve shareholders. . . . Firms pursue shareholder interests not always by serving workers and consumers, but also by exploiting them."[184]

Of course, companies may not deploy exploitative practices that are unlawful. But corporate directors have a duty to maximize profits for their shareholders within the bounds of the law, up to and including ethically unsound and exploitative methods. Such exploitation of workers, consumers, and society is not preventable merely by a corporate director's own sense of personal moral responsibility. Even a director's decision to prioritize individual moral or ethical beliefs ahead of profit-making for shareholders would be subject to legal challenge as a violation of shareholder primacy.[185] Instead, only a good-faith belief that continued exploitation of negative externalities will fail to maximize long-term profit for shareholders could justify an intentional decision to stop exploiting a negative externality.

But Facebook's experience over the last four years makes it increasingly unlikely that its corporate directors could maintain a good-faith belief that they will be called to account for the company's negative externalities anytime soon. As long as government regulation remains unlikely and users fail to vote with their feet, Facebook's directors would likely struggle to maintain a reasonable, good-faith belief that making substantive changes to their business model or costly content moderation investments would be more profitable in the long-

---

responses to these statutes should be closely monitored. Since state laws have gone into effect, digital platforms have switched their lobbying efforts to advocate for a weak federal privacy statute that would preempt stronger state statutes. Todd Feathers, *Big Tech is Pushing States to Pass Privacy Laws, and Yes, You Should Be Suspicious*, THE MARKUP (Apr. 15, 2021, 8:00 AM), https://themarkup.org/privacy/2021/04/15/big-tech-is-pushing-states-to-pass-privacy-laws-and-yes-you-should-be-suspicious.

184 Yosifon, *supra* note 77, at 227.

185 See *supra* notes 100-14 and accompanying text.

term than the current status quo. Unless Facebook's corporate directors believe in good faith that the company's long-term profitability is at stake, they cannot truthfully defend decisions which will injure the company's profitability in the short term.[186] Redesigning Facebook's platforms to reduce their addictiveness would foreseeably cause user engagement on the platforms to majorly and permanently decrease, and is thus unjustifiable to investors as long as Facebook's profitability rests almost purely on user engagement. And while users continue to engage the most with borderline, divisive content, without any corresponding increase in user exit, Facebook's directors cannot in good faith justify decisions to spend billions of dollars removing such content from the platform.

If Facebook's experience has proven that users fail to exit in response to the company's creation of social harms, then Facebook's corporate directors cannot in good faith justify foregoing short-term profits over the invented threat of long-term user exit. Shareholder primacy prevents corporate directors from investing more into self-regulation than their best business judgment suggests is reasonable to maximize long-term shareholder value.[187] Experts agree that substantially improving content moderation would require extensive spending by the company to hire, train, and retain thousands more content moderators and improve its content moderation technologies.[188] It's hard to imagine how a long-term decrease in user engagement and permanent, ever-growing expenditures on content moderation could benefit shareholders in either the short or the long-term.

Thus, as long as regulation stalls, shareholder primacy obligates the directors of Facebook and other digital platforms to exploit their first-mover advantage over regulators: if they "move fast," they can continue to "break things" without paying for the damage.[189] While threats of meaningful regulation remain empty, Facebook's directors will continue to respond to Congressional intimidations and adverse media coverage with mere public relations campaigns. Corporate director duties mandate this weak but proportional response. So long as the battle between Congress and "Big Tech" remains mostly a war of words, reasonable corporate directors of digital platforms, exercising their best business judgment, will answer public criticism

---

186 See *supra* note 145 and accompanying text.

187 See *infra* note 197 and accompanying text.

188 See *infra* Section III.B.

189 Until 2014, Facebook's unofficial motto was "[m]ove fast and break things." J. O'Dell, *Facebook Kills Off Its 'Move Fast, Break Things' Mantra*, VENTUREBEAT (Apr. 30, 2014, 10:15 AM), https://venturebeat.com/2014/04/30/facebook-has-killed-off-the-move-fast-break-things-mantra/.

with press releases rather than costly, substantive reforms to underlying technology or business models. To Congress, regulators, and the media, digital platform executives, assisted by their PR teams, are the picture of contrite compliance, promising to spare no expense in addressing digital harms.[190] But in reality, the shareholder primacy doctrine and Facebook's experience over the last four years leaves its directors with little room for a sincere, good-faith belief that costly content moderation reforms will maximize profitability in the long run.

Facebook's double-talk is not merely incentivized by corporate director duties toward shareholders; in effect, it's required. Facebook's critics complain that "the social media industry has yet to articulate a philosophy of how the pursuit of advertising revenue should be balanced against other social values."[191] But the social media industry hasn't articulated such a philosophy because the law doesn't give it that freedom: instead, Delaware corporate law dictates that corporate director duties are to shareholders only, not stakeholders. As long the potential for windfall profits from digital harms exists, shrewd corporate directors at Facebook have both a duty and an incentive to take full advantage of them. Critics decry that "at crucial moments, [Facebook's safety and security teams] are overruled as decisions about safety, content moderation, and enforcement are made by the executives in charge of the company's growth and lobbying operations."[192] But under Delaware corporate law, this is a corporation behaving properly in line with the shareholder primacy doctrine. Indeed, Facebook's corporate directors and executives can do no other.

E. How the Business Judgment Rule Shapes Facebook's Content Moderation Incentives

While the shareholder primacy doctrine formally leaves no room for the personal moral and ethical beliefs of corporate directors, the business judgment rule creates a cloak behind which corporate directors may act in furtherance of their own ethical beliefs.[193] They must do so, however, "surreptitiously, in

---

190 *But see* Zuckerberg's less-than-apologetic response to the company's spate of public relations crises in September 2021, which indicates that Facebook's capacity for nominal contrition may finally be wearing thin. David Pierce, *The New New Mark Zuckerberg,* PROTOCOL SOURCE CODE (Sept. 27, 2021), https://www.protocol.com/newsletters/sourcecode/new-mark-zuckerberg-attitude.

191 Gilad Edelman, *What Social Media Needs to Learn from Traditional Media*, WIRED (Sept. 22, 2021, 1:05 PM), https://www.wired.com/story/what-social-media-needs-to-learn-from-traditional-media/.

192 *Id.*

193 *See* Yosifon, *supra* note 77, at 229.

hushed tones, through lies."[194] The discretion granted by the business judgment rule means that if a corporate director is willing to lie or obfuscate about their true motives and can articulate some shareholder-value-based reason for their actions, they will almost certainly escape scrutiny. But here, the discussion leaves behind "what the law requires" and enters into the realm of "speculation about what directors can get away with."[195] Delaware's adoption of shareholder primacy still prevents open prioritization of non-shareholder interests, requiring all decisions to be at least cloaked in the rhetoric of profit maximization.[196]

It is true that by lying to shareholders and obfuscating his real motives, Zuckerberg could act in what he believes are society's best interests at the expense of Facebook's profitability. But he may not admit to what he is doing. The trouble this creates for Facebook's directors is that what many of the company's ardent critics demand is an explicit promise that the company will stop putting profits before the public interest.[197] But under Delaware corporate law, that is exactly what corporate directors may not admit that they are doing. The very thing for which the Facebook whistleblower, Congress, and the public have condemned Facebook—choosing to maximize profits instead of prioritizing users' interests—is exactly what Delaware corporate law demands. And the reverse—intentionally investing more in user safety than is optimally profitable—would constitute a prosecutable violation of corporate law.

Facebook is clearly aware of this deep tension between its legal, profit-maximizing duty to shareholders and the public repentance demanded of it by regulators and society. The company has seesawed between contrition (*see, e.g.*, Zuckerberg's "I'm sorry" suit)[198] and an unapologetic reminder to the public of Facebook's for-profit, technology-driven mission.[199] To maintain the protection of the business judgment rule, Facebook must cloak any decisions it makes in the public interest in language of maximizing long-term shareholder value.[200] Zuckerberg's and other Facebook executives' public statements carefully and awkwardly toe this line, sometimes through nonsensical statements or strained rhetoric. After the release of the Facebook Files, Facebook's executives were presented squarely with the question of whether

---

194 *Id.*

195 *Id.* at 222.

196 *Id.* at 229.

197 *See, e.g.*, *Statement*, *supra* note 1.

198 Vanessa Friedman, *Mark Zuckerberg's I'm Sorry Suit*, N.Y. TIMES (Apr. 10, 2018), https://www.nytimes.com/2018/04/10/fashion/mark-zuckerberg-suit-congress.html.

199 Pierce, *supra* note 190.

200 See *supra* note 141 and accompanying text.

"the desire for engagement on the platform and profit outweighs safety in some instances."[201] Zuckerberg's blog post in response to the Facebook Files beautifully illustrates the difficulty of answering that question without running afoul of corporate law. Summarizing Haugen's critiques, Zuckerberg wrote,

> At the heart of these accusations is this idea that we prioritize profit over safety and well-being. That's just not true. For example, one move that has been called into question is when we introduced the Meaningful Social Interactions change to News Feed. This change showed fewer viral videos and more content from friends and family -- which we did knowing it would mean people spent less time on Facebook, but that research suggested it was the right thing for people's well-being. Is that something a company focused on profits over people would do?[202]

It seems as if, in this single paragraph, Zuckerberg has confessed to a textbook violation of Delaware's shareholder primacy doctrine. Like Henry Ford and Craig Newmark before him, Zuckerberg admitted in as many words that he prioritized some stakeholder interest (here, "people's well-being") above shareholders' interest in wealth maximization. By introducing the "Meaningful Social Interactions" feature with full knowledge that it would cause a decline in user engagement and lessen long-term profitability, Zuckerberg opened himself to a shareholder derivative suit for that decision. It's a lawsuit he would likely lose: "The reason that [a c]ourt [would] h[o]ld against [Zuckerberg] is simple. [He] gave them no choice when he asserted that he was pursuing some strategy other than wealth maximization for shareholders."[203]

But in the very next paragraph, Zuckerberg, perhaps conscious of the business judgment rule's limits, adds a rationale for why the very same content moderation decisions are, in fact, in the best interest of the company's profitability after all:

> The argument that we deliberately push content that makes people angry for profit is deeply illogical. We make money from ads, and advertisers consistently tell us they don't want their ads next to harmful or angry content. And I don't know any tech company that sets out to build products that make

---

201 *Facebook's Response to 60 Minutes Report, "The Facebook Whistleblower,"* CBS NEWS (Oct. 3, 2021, 7:41 PM), https://www.cbsnews.com/news/facebook-statement-60-minutes-whistleblower-2021-10-03/.

202 Mark Zuckerberg , FACEBOOK (Oct. 5, 2021, 8:14 PM), https://www.facebook.com/zuck/posts/10113961365418581.

203 Macey, *supra* note 85, at 182.

> people angry or depressed. The moral, business and product incentives all point in the opposite direction.[204]

While it is true that the moral incentives all point toward investing in more effective content moderation, the same is not so clearly true of business and product incentives. Much of the rest of the statement is patently false, or at best, a misdirection. As Zuckerberg has admitted elsewhere, "sensationalist, provocative" content drives higher rates of engagement—the closer a piece of content is to violating Facebook's content moderation guidelines, the more engagement it draws.[205] And while it is true that Facebook earns its money from advertisers, the product it sells to those advertisers is user engagement. Ensuring continued advertiser demand is certainly one of Facebook's driving concerns, but another is ensuring a continued supply of its valuable product, user engagement. It's far from "deeply illogical" to think that, if Facebook has discovered that content which makes users angry also keeps them more engaged, then the company has incentive to push such "sensationalist, provocative" content to keep users on the platform.[206]

And though there is a kernel of truth in the fact that advertisers don't want their ads displayed near harmful content, [207] "brand safety" concerns are of limited value as a Pigouvian mechanism for Facebook's social harms for two reasons. First, when it comes to harms of addictive social media use, the incentives of advertisers align with Facebook's incentives to maximize user engagement, rather than counteracting them. Both Facebook and advertisers want to maximize the amount of time users spend on the company's platforms, since, for Facebook, this increases the supply of user attention they can sell to advertisers, and for advertisers, an increased supply of the product, advertising opportunities, means lower prices.

Second, the advertisers who purchase advertising opportunities on Facebook are not a monolith, so one advertiser's brand safety concerns are unlikely to align with other advertisers' brand safety concerns. Defining content that is "harmful" to a brand will depend heavily on what that brand is and may in fact look very different from the broader public's definition of "harmful." For example, a brand which targets mostly urban, politically progressive consumers

---

204 Zuckerberg, *supra* note 202.

205 See *supra* notes 151-55 and accompanying text.

206 *Id.*

207 *See* Zuckerberg, *supra* note 202. Advertisers' concern that their ads will be displayed alongside objectionable content is known colloquially as "brand safety." According to Zuckerberg's reasoning, brand safety concerns are another Pigouvian mechanism, forcing the company to internalize the costs of its content moderation failures. *Brand Safety Controls*, META, https://www.facebook.com/business/help/1926878614264962?id=176915609319 97771 (last visited Feb. 19, 2022).

would likely consider it a brand safety risk if their advertisements were displayed alongside anti-vaccine content. Meanwhile, a brand that targets mostly rural, politically conservative consumers might find it harmful to be displayed alongside content from a reproductive rights organization like Planned Parenthood. The brand safety pressures that Facebook feels from advertisers do not necessarily point the company in any particular direction with regard to modifying or improving its content moderation guidelines, policies, and enforcement mechanisms.[208] Even if there was sustained advertiser pressure on Facebook to make particular changes to its content moderation policies, there is no guarantee that those changes would in fact be in a socially optimal direction.

Thus, brand safety, while it may function as a limited Pigouvian tax for certain types of universally condemned content (such as child sexual abuse material), certainly cannot correct for the dangerous misalignment of corporate director incentives as they relate to more controversial content moderation failures. Instead, a clever executive would recognize that the most profitable solution to brand safety concerns is not to invest billions removing borderline, divisive content, but instead is to invest in giving every advertiser maximum control, within legal limits, over exactly what types of content their advertisements will appear alongside (and, perhaps, charging a premium for insurance against brand safety risks). In fact, this appears to be the strategy Facebook has taken, giving advertisers increasingly fine-grained controls over the types and topics of content their ads appear alongside.[209]

As if recognizing the thinness of his reasoning, Zuckerberg includes an additional line at the end of his statement which seems to intentionally invoke the protection of the business-judgment rule, using language of long-term profit maximization. He says, "I believe that over the long term if we keep trying to do what's right and delivering experiences that improve people's lives, it will be better for our community and our business."[210] But this is facially illogical. Facebook's business model is not now, and never has been, "do[ing] what's right and delivering experiences that improve people's lives." The company's business model is maximizing the amount of time and attention that users spend on its platforms and then selling that time and attention to advertisers in the form of opportunities to display targeted ads. While designing its platforms to create "experiences that improve people's lives" is certainly one

---

208 *See generally* Andrew Marantz, *Why Facebook Can't Fix Itself*, THE NEW YORKER (Oct. 12, 2020), https://www.newyorker.com/magazine/2020/10/19/why-facebook-cant-fix-itself (reporting on issues of hate speech and disinformation on Facebook).

209 *Brand Safety Controls*, *supra* note 207.

210 Zuckerberg, *supra* note 202.

way to induce users to spend time logged in, the company's own research has revealed that experiences generating anger, shock, outrage, and other negative emotions are even more effective drivers of user engagement. Clearly, as Zuckerberg admits, redesigning Facebook's platforms to internalize the costs of the harms flowing from them would indeed be better for Facebook's global "community" of users. But those cost internalizations would certainly not be better for Facebook's "business."[211]

F. Explaining Facebook's Desire for External Regulation

Zuckerberg's blog post ended with a plea for regulators to help him and the company he leads escape from between this Scylla of public pressure and the Charybdis of Delaware corporate law. Acknowledging these tensions, Zuckerberg said, "Similar to balancing other social issues, I don't believe private companies should make all of the decisions on their own."[212] He reminds readers that the company has "advocated for updated internet regulations for several years now. I've written op-eds outlining the areas of regulation we think are most important related to elections, harmful content, privacy, and competition."[213] And while Facebook is "committed to doing the best work [it] can, . . . at some level the right body to assess tradeoffs between social equities is our democratically elected Congress."[214]

Why would Zuckerberg, on behalf of Facebook, make this plea for external regulation? Very possibly, it's because Facebook knows that regulation with which only large digital platforms can afford to comply would give it an increased edge against smaller, emerging competitors.[215] Or, given the sheer volume of vitriol directed at Facebook over the last four years, it seems plausible that at least some executives, maybe even Zuckerberg himself, have truly begun to feel moral and ethical misgivings about the immense social harms flowing from their platforms. Leaders of the company may be seeking ways to justify more substantial content moderation investment and platform redesigns

---

211 Professor Jack Balkin has pointed out that in the data privacy context, "[w]e cannot rely on the market alone to solve these conflict of interest problems" between users and digital platforms. Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV 1183, 1226 (2016). The same conflict of interest problems exist in relation to other types of social harm produced by digital platforms.

212 Zuckerberg, *supra* note 202.

213 *Id.*

214 *Id.*

215 Ryan McMaken, *3 Reasons Why Facebook's Zuckerberg Wants More Government Regulation*, FEE STORIES (Apr. 9, 2019), https://fee.org/articles/3-reasons-why-facebooks-zuckerberg-wants-more-government-regulation/.

that will be unprofitable in the long run. At the very least, these executives are likely tired of the years-long PR storm that has confronted the company. But whether Zuckerberg truly has had a change of heart, or if he's merely tired of being America's villain,[216] as Facebook's acting chairman of the board, he is trapped between doctrines. Even if Zuckerberg wants to prioritize user safety and well-being ahead of profits, because of Delaware's clear adherence to the doctrine of shareholder primacy, he cannot[217]—at least, not unless some outside circumstance or regulator requires it.

Thus, when Facebook requests updated government regulation, it is asking for the government to create and clarify the external legal constraints on its business model and content moderation practices. Clear, external legal constraints allow the company to justify to shareholders profit-reducing decisions that would otherwise be actionable under the doctrine of shareholder primacy. There are strategic reasons beyond moral scruple that the company's leaders would push for external justifications for internalizing a greater portion of costs flowing from Facebook's platforms. External regulation would increase certainty and predictability in the company's operating environment, reducing the need for costly lobbying, litigation, and public relations expenses. Relatedly, there would be less reputational pressure on the company if it could point to external regulations as the reason for its action and inaction. But unfortunately for Facebook's executives, meaningful external regulation, at least by the U.S. federal government, has been slow in coming.

The company, however, has not waited idly. Instead, in 2019, Facebook hit upon a creative strategy to escape its Delaware corporate law paradox on its own, through a novel use of that very same body of law.[218] If the U.S. government would not provide a meaningful Pigouvian mechanism to constrain the company's externalization of harms, Facebook would create its own: the Oversight Board (OB). Unable to justify to investors why the company would spend significant resources trying to solve digital harms which did not impact its bottom line, Facebook designed its own Pigouvian mechanism, delegating to the OB the authority to force Facebook to internalize some of the costs of the company's content moderation failures. Hounded by the media, lawmakers, and the public to stop putting profits ahead of the public

---

216 *See* Pierce, *supra* note 190.

217 Unless, of course, he lies to shareholders about his motivations, adding a second violation of Delaware corporate law to the initial violation of the shareholder primacy doctrine. *See supra* notes 193-96 and accompanying text.

218 A discussion of the corporate law structure of the Oversight Board is below. *See infra* Section II.A.

interest, the company would attempt to use Delaware corporate law to circumvent Delaware corporate law's commitment to shareholder primacy.

Viewed through this lens, the OB is an intricate attempt to resolve Facebook's corporate law paradox by supplying the company with an external source of regulation. Though technically a form of self-regulation, the OB sits at arms-length from Facebook. The OB is as close to external regulation as a company could successfully create for itself by using the levers of corporate law. The Board allows Facebook, in some instances, to openly prioritize user interests over profits because Facebook's directors are not the ones directly making those decisions. They are merely following the commands of the independent OB, which the company has contractually obligated itself to do.[219]

But even here, despite the creativity of Facebook's attempt, another doctrine of Delaware corporate law may stymie the company's attempt to circumventing shareholder primacy through self-imposed constraints. The following Section explores how the doctrine of unlawful abdication of corporate director duties limits Facebook's ability to successfully self-regulate through the OB.

II. HOW CORPORATE LAW LIMITS FACEBOOK'S ABILITY TO SELF-REGULATE

Delaware corporate law limits the amount of decision-making power directors may lawfully delegate using a contract before such contracts become unlawful abdications of their duties of loyalty and care.[220] Perhaps recognizing that directors might delegate too much power over the corporation to outsiders not constrained by fiduciary obligations to shareholders, corporate law voids any contract which crosses the line into an unlawful delegation of decision-making authority. In other words, the doctrine of unlawful abdication prevents corporate directors from using a contract to tie their own hands too tightly.

The OB seems to be an attempt by Facebook's corporate directors to create exactly that sort of external limit on their own decision-making discretion. While Zuckerberg has publicly lamented that certain content

---

219 A discussion of the legal and contractual relationship between Facebook and the Oversight Board is below. *See infra* Section II.A.

220 *See* DEL. CODE ANN. tit. 8, § 141(a) (2021); *see also* Pepper v. Litton, 308 U.S. 295, 306-07 (1939); Abercrombie v. Davies, 123 A.2d 893, 899 (Del. Ch. 1956); Chapin v. Benwood Found., Inc., 402 A.2d 1205, 1210 (Del. Ch. 1979); Aronson v. Lewis, 473 A.2d 805, 813 (Del. 1984); Rosenblatt v. Getty Oil Co., 493 A.2d 929, 943 (Del. 1985); Grimes v. Donald, No. 13358, 1995 WL 54441, at *7 (Del. Ch. Jan. 11, 1995).

moderation decisions were likely to turn Facebook into an "arbiter of truth,"[221] he apparently spent a "huge proportion" of his time deciding whether "individual, high-profile posts" should be left up, taken down, labelled or otherwise actioned.[222] In November 2018, responding to criticism that Zuckerberg as a lone individual wielded too much power over public discourse, Facebook announced plans to create an independent Oversight Board. In explaining the concept of the OB, Zuckerberg stated that Facebook "should not make so many important decisions about free expression and safety on our own."[223] In the 2018 blog post introducing the idea, Zuckerberg claimed an independent board would "provide assurance" that content moderation decisions are made in the best interests of Facebook's community and "not for commercial reasons."[224]

The legal question addressed in this section is whether the decision-making power delegated to the OB is a breach of Facebook's directors' fiduciary duties under Delaware corporate law. First, this section lays out the legal standard for distinguishing lawful delegations versus unlawful abdications of director fiduciary duties through contracts. It applies those standards to assess the scope of the decision-making powers Facebook has assigned to the OB. Particularly, it considers the legality of the Board's delegated power to issue (1) recommendatory policy guidance and (2) binding decisions on individual, high-profile pieces of content. The OB's decision to ban former President Trump is analyzed as a special case of the OB's ability to issue binding decisions on high-profile content. This Section ends by highlighting one important distinction from existing case law which may endanger the Board.

At this point in the Board's existence, the evidence seems to tip in favor of the OB being narrowly lawful. Since the OB's policy guidance is merely recommendatory, while its binding content decisions are limited to individual pieces of content, it appears the OB's jurisdiction has been carefully circumscribed to avoid this violation of corporate law. The OB is legal, but just barely. If Facebook continues to refer extraordinarily high-profile cases like the decision to ban President Trump to the Board, treats the Board's policy advisory opinions as if they are binding, or attempts to expand the Board's

---

221 Rebecca Klar, *Zuckerberg: 'Facebook Shouldn't Be the Arbiter of Truth of Everything People Say Online'*, THE HILL (May 27, 2020, 8:46 PM), https://thehill.com/policy/technology/499852-zuckerberg-facebook-shoshouldn'tuldnt-be-the-arbiter-of-truth-of-everything-that.

222 Kate Klonick, *Inside the Making of Facebook's Supreme Court,* THE NEW YORKER (Feb. 12, 2021), https://www.newyorker.com/tech/annals-of-technology/inside-the-making-of-facebooks-supreme-court.

223 Zuckerberg, *supra* note 72.

224 *Id.*

jurisdiction, it could expose Facebook's directors to claims of unlawful abdication.

Facebook has paraded the OB as a meaningful solution to some of the company's content moderation woes: an expert, independent board with the power to increase transparency and recommend bold changes to the company's content moderation practices. But if Facebook actually allows the Board to reveal damaging information about content moderation at Facebook or attempts to implement Board recommendations which decrease profitability, the company risks an unlawful abdication of corporate director duties. To avoid these corporate law risks, Facebook continues to evade attempts by the Board to increase its jurisdiction or force more transparency by Facebook.[225] From a corporate liability perspective, Facebook's evasiveness is strategic. But in representing an ultimately toothless Board as an important component of its attempt to mitigate content moderation risks, the OB has been reduced to simply a new source of reputational risk for the company without any possibility of an expanded jurisdiction in the future. Facebook's experience with the Oversight Board demonstrates that, in the long run, corporate self-regulation of content moderation is likely untenable.[226]

A. The Oversight Board's Structure and Function

The Oversight Board been described as a sort of "Supreme Court" for Facebook, an independent body of experts with the power to issue content moderation decisions and policy recommendations.[227] Established under Delaware law as an independent, irrevocable trust, the Board has a structure and purpose that lack any clear precedent in corporate law.[228] The stated goal of the novel trust structure is to create clear institutional separation between the company and the Oversight Board so that Facebook can "avoid frustrating the

---

225 A discussion of particular strategies used by Facebook to avoid power grabs by the Oversight Board is below. *See infra* notes 478-81 and accompanying text.

226 For a full discussion of this conclusion see below. *See infra* Section III.C.

227 Kara Swisher, *Facebook Finally Has a Good Idea*, N.Y. TIMES (Oct. 17, 2019), https://www.nytimes.com/2019/10/17/opinion/facebook-oversight-board.html.

228 The Oversight Board is established as an irrevocable, "noncharitable purpose" trust managed by a single-member Delaware limited liability company established by the trustees for that purpose. For a detailed discussion of the corporate structure as a novel use of Delaware's noncharitable purpose trust statute, s*ee* Vincent C. Thomas et al., *Independence with a Purpose: Facebook's Creative Use of Delaware's Purpose Trust Statute to Establish Independent Oversight*, ABA BUS. L. SECTION (Dec. 17, 2019), https://businesslawtoday.org/2019/12/independence-purpose-facebooks-creative-use-delawares-purpose-trust-statute-establish-independent-oversight/.

independent judgment of the Board."[229] The Board has discretion to select which cases it takes on, but it has the capacity to hear only a tiny fraction of the cases referred to it. At present, only decisions about user-generated content are appealable to the OB; the Board does not have jurisdiction over ads.[230]

The OB exists as two linked legal entities: the Oversight Board Trust and the Oversight Board LLC.[231] The relationship between Facebook and the Oversight Board is governed by three documents: the Trust Agreement, the Charter, and the Services Contract. The Trust Agreement established the Oversight Board Trust as an irrevocable, "noncharitable purpose trust" under Delaware law.[232] Facebook, as the "settlor,"[233] transferred an initial amount of $130 million to the Oversight Board Trust.[234] The legal purpose of the trust as defined in the Trust Agreement is to "facilitate the creation, funding, management, and oversight" of the Oversight Board LLC.[235] The Trustees of the OB "have formed and, collectively, on behalf of the Trust, will be the member of a single-member Delaware limited liability company (the LLC)."[236] The Oversight Board LLC is the entity responsible for retaining OB members as independent contractors and support staff as employees.[237] The Oversight Board LLC "will enter into a service agreement to provide . . . content review services to Facebook."[238]

---

229 META, OVERSIGHT BOARD TRUST AGREEMENT 3 (2019) [hereinafter TRUST AGREEMENT], https://about.fb.com/wp-content/uploads/2019/12/Trust-Agreement.pdf.

230 *See* OVERSIGHT BOARD, OVERSIGHT BOARD BYLAWS 27 (2019) https://www.oversightboard.com/sr/governance/bylaws. Advertisers have no recourse to the OB if Facebook's automated review systems rule unfavorably on their advertisements, although human moderators sometimes conduct appellate review ad quality determinations. *Advertising Policies, supra* note 49.

231 For a detailed discussion, *see* Thomas et al., *supra* note 228.

232 *Id.*

233 TRUST AGREEMENT, *supra* note 229, at 1.

234 Elizabeth Culliford, *Facebook Pledges $130 Million to Content Oversight Board, Delays Naming Members*, REUTERS (Oct. 12, 2019), https://www.reuters.com/article/us-facebook-oversight/facebook-pledges-130-million-to-content-oversight-board-delays-naming-members-idUSKBN1YG1ZG.

235 TRUST AGREEMENT, *supra* note 229, at 2.

236 Thomas et al., *supra* note 228. The LLC will be "managed by a corporate manager . . . and one or more individual managers." *Id.* The corporate manager selected by Facebook is "Brown Brothers Harriman Trust Company . . . a corporate trust company with extensive experience handling large trusts." Press Release, Brent Harris, Dir. of Governance and Glob. Affs., Meta, An Update on Building a Global Oversight Board (Dec. 12, 2019), https://about.fb.com/news/2019/12/oversight-board-update/. The Oversight Board Trustees are dual-hatted as the individual managers of the LLC. Thomas et al., *supra* note 228.

237 Thomas et al., *supra* note 228.

238 *Id.* The service agreement is formally referred to as the "Facebook-LLC Service Provider

The mission of the Board, as defined in the Trust Agreement and Charter, is to "protect free expression" by exercising two key powers: (1) "issuing policy advisory opinions on Facebook's content policies," and (2) "making principled, independent decisions about important pieces of content."[239] First, the Board has the power to recommend broad changes to Facebook's content moderation policies through policy advisory opinions. The Board can provide such "policy guidance" on Facebook's content policies as long as that guidance is related to a case or requested by Facebook.[240] Second, the Board has the power to bind Facebook to high-profile individual content moderation decisions. As explained in the Charter, the Board has binding power to "instruct" Facebook to allow or remove a particular piece of content and to uphold or reverse designations that led to enforcement actions against that piece of content.[241] The Charter includes a provision limiting the Board's powers to those expressly enumerated in the document.[242] An additional express power includes the ability to request information from Facebook (so long as that information is "reasonably required" for Board deliberations).[243]

In the Charter, Facebook also makes commitments on how it will implement Board decisions. Board decisions on individual pieces of content will be binding, and Facebook will implement them promptly unless it considers them potentially unlawful.[244] When "identical content with parallel context" exists, Facebook is committed only to assessing the feasibility of applying the Board's decision to that identical content.[245] If the Board issues policy guidance, Facebook committed merely to "analyzing" the operational requirements for implementing it, "considering" it in the company's policy

---

Contract." This Services Contract is not public, but its existence is referenced in the Charter. A section of the Charter subtitled "Relationship with Facebook" states simply "Facebook will contract for services from the board." META, OVERSIGHT BOARD CHARTER 7 (2019) [hereinafter "CHARTER"], https://about.fb.com/wp-content/uploads/2019/09/oversight_board_charter.pdf. Because the contract is not public, and no details regarding it are included in the Trust Agreement or the Charter, it is impossible to know how the details of the Board's relationship to Facebook are worked out in the Services Contract, including the presence or absence of potential remedies for breach of contract. The Services Contract remains the most opaque part of Facebook's delegation of decision-making authority to the Oversight Board.

239 TRUST AGREEMENT, *supra* note 229, at 2.

240 CHARTER, *supra* note 238, at 3.

241 *Id.* at 3, 7.

242 *Id.* at 3.

243 *Id.*

244 *Id.* at 7.

245 *Id.*

development process, and "transparently communicating about actions taken as a result."[246]

Like most of Facebook's activities, the Board has already faced criticism from across the political aisle. Democratic lawmakers have criticized the OB's narrow jurisdiction as insufficient to "meaningfully improve the incredibly troubling behavior" of Facebook.[247] Free-speech libertarians have bashed the Board for the power it wields to "censor" online expression.[248] But the Board has also been criticized by progressives as simply a "reputational shield" for Facebook, "a smokescreen behind which Facebook's executives will maintain ultimate control over its content moderation decision-making process."[249]

In SEC disclosures, Facebook warns investors of a risks stemming from the existence of the Oversight Board.[250] Namely, Facebook warns investors that it could lose users if it "adopts terms, policies, or procedures . . . or take[s] actions to enforce [its] policies, that are perceived negatively by [its] users or the general public, including as a result of decisions or recommendations from the independent Oversight Board regarding content on [its] platform."[251] Thus, Facebook admits that actions taken and costs incurred as a result of Oversight Board decisions or recommendations may have an adverse impact on the company.

Because the OB is a novel entity in corporate law, it remains uncertain how much a court would allow directors to delegate content moderation decision-making before it becomes an unreasonable exercise of business judgment. This trust-LLC structure is novel and untested by courts, so any attempt to apply corporate law doctrine to the OB is by definition speculative. However, it is reasonable to assume that the OB's novel structure would not alter a court's application of the director abdication doctrines outlined in the following

---

246 *Id.*

247 *See* Nandita Bose, *Democrats Concerned by Facebook Oversight Board's Limited Authority*, REUTERS (Aug. 11, 2020, 2:42 PM), https://www.reuters.com/article/us-usa-democrats-facebook/democrats-concerned-by-facebook-oversight-boards-limited-authority-idUSKCN2572HU.

248 *See* Jordan Boyd, *Facebook Censorship Board Member: Free Speech Is Not a Human Right*, FEDERALIST (July 15, 2021), https://thefederalist.com/2021/07/15/facebook-censorship-board-member-free-speech-is-not-a-human-right/ (calling the OB the "Facebook Censorship Board").

249 Bose, *supra* note 247; Julia Carrie Wong, *Will Facebook's New Oversight Board be a Radical Shift or a Reputational Shield?*, THE GUARDIAN (May 7, 2020, 6:00 AM), https://www.theguardian.com/technology/2020/may/07/will-facebooks-new-oversight-board-be-a-radical-shift-or-a-reputational-shield.

250 Facebook, Inc., Q4 Quarterly Report (Form 10-Q) 51 (July 28, 2021).

251 *Id.*

section. The novelty of the OB's structure would chiefly affect the question of whether the OB is considered to be a distinct, independent legal entity or a derivative entity under Facebook's control. It seems most likely that courts would find the OB to be beyond Facebook's control, not least because the explicit purpose of the trust-LLC structure was to create enough institutional separation to prevent Facebook from "frustrating the independent judgment of the Board."[252]

However, this question of institutional independence is largely irrelevant to the test for abdication of director duties. Despite the intuition that courts would be more reluctant to allow delegations of authority to outsiders, Delaware courts' analysis rarely turns on whether directors are delegating authority to insiders under their control or to independent outsiders like external consultants.[253] Courts are far more concerned with the nature of the duties delegated than with the entity to whom those duties are delegated. For example, in *Chapin v. Benwood*, described below, a court invalidated a board of directors' attempt to delegate authority to *their own past selves*.[254] Because the delegation was too restrictive of the board's future decision-making freedom, the delegation was invalid, even though the entity delegated to was, in fact, a past iteration of the board itself.[255] Thus, even in the unlikely event that courts decide the OB is not legally independent from Facebook, their assessment of the lawfulness of director delegation would likely remain unchanged.

B. The Legal Standard for Lawful Delegation Versus Unlawful Abdication of Director Duties

Under Delaware law, corporate directors have a statutory obligation to "manage[]" and "direct[]" the "business and affairs" of their corporation.[256] They must manage the corporation on behalf of their shareholders,[257] creating a fiduciary relationship between the shareholders and directors.[258] Courts have outlined the fiduciary obligations of corporate directors to include a duty of care and a duty of loyalty.[259] The duty of care has been interpreted to

---

252 TRUST AGREEMENT, *supra* note 229, at 3.

253 Chapin v. Benwood Found., Inc., 402 A.2d 1205, 1210-11 (Del. Ch. 1979).

254 *Id.* at 1211.

255 *Id.*

256 *See* DEL. CODE ANN. tit. 8, § 141(a) (2021).

257 Pepper v. Litton, 308 U.S. 295, 306-07 (1939).

258 *See* Lyman P.Q. Johnson & David K. Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1601 (2005) ("[C]orporate officers are fiduciaries because they are agents.").

259 KNEPPER & BAILEY, supra note 123, at § 1.05.

encompass a responsibility of directors to exercise their best business judgment in managing and directing the corporation.[260] Courts have recognized that the complex nature of modern corporations requires that corporate directors will have to delegate certain managerial responsibilities to executives and others.[261] With certain exceptions, "an informed decision to delegate a task is as much an exercise of business judgment as any other."[262] Thus, director delegations of decision-making authority usually receive highly deferential judicial review under the business judgment rule.

When assessing whether a director's delegation of decision-making authority was proper under the business judgment rule, courts will look to the reason for the delegation and the nature of the task delegated.[263] Corporate delegations of decision-making authority can cross the line from a proper exercise of business judgment into an unlawful abdication of director duties.[264] If a corporate board attempts to abdicate fiduciary duties through a contract, courts will find the contract void as a matter of public policy.[265] When corporate directors authorize such contracts it raises "a question of law . . . . The question whether these contracts are valid or not does not fall into the realm of business judgment . . . . It must be determined by the court."[266]

The leading Delaware case on director abdication via contract is *Grimes v. Donald*.[267] *Grimes* lays out the legal standard for distinguishing contracts which constitute lawful delegations versus unlawful abdications of director duties. The *Grimes* court agrees that the proper inquiry is whether a contract has the "practical effect of preventing a board from exercising its duties," which would constitute "a *de facto* abdication of directorial authority."[268] The *de facto* abdication must have actually occurred; a claim that a contract could create "a *de facto* abdication in possible future circumstances," is merely speculative and unripe for judicial review.[269]

Next, the court examines whether the contractual delegations at issue crossed the line into an unlawful abdication. Usually, "an informed decision to

---

260 *Id.* § 3.03.

261 Rosenblatt v. Getty Oil Co., 493 A.2d 929, 943 (Del. 1985).

262 *Id.* (citing Aronson v. Lewis, 473 A.2d 805, 813 (Del. 1984)).

263 *Rosenblatt*, 493 A.2d at 943.

264 2 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 9:19 (3d ed. 2020).

265 Abercrombie v. Davies, 123 A.2d 893, 899 (Del. Ch. 1956).

266 Grimes v. Donald, No. 13358, 1995 WL 54441, at *7 (Del. Ch. Jan. 11, 1995).

267 Grimes v. Donald, 673 A.2d 1207 (Del. 1996), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

268 *Id.* at 1214.

269 *Id.*

delegate a task" is considered a valid exercise of a director's business judgment.[270] However, directors may not lawfully delegate "those duties which lay 'at the heart of management of the corporation.'"[271] In other words directors may not delegate authority that would enable officers or outsiders "to bind the corporation to extraordinary commitments or significantly encumber the principal asset or function of the corporation."[272] Thus, courts cannot enforce contracts which "have the effect of removing from directors in a very substantial way their duty to use their own best judgment on management matters."[273] Whether the delegation is "very substantial" depends on "the relative quantity of the powers that are delegated, on the length of time the powers are to be held, and perhaps on the purpose of the contract or the situation out of which it arises."[274] If a corporate board is "relatively unfettered to withdraw from the arrangement and substitute its judgment for that of the third party," it may delegate "much greater" powers than when its ability to withdraw is limited.[275] When contracts include such protections for director independence, boards may properly delegate even duties which require the highest degree of judgment and discretion.[276]

In *Grimes*, the court cites *Chapin v. Benwood* and *Abercrombie v. Davies* as examples of contracts unlawfully abdicating authority, while citing *Rosenblatt v. Getty Oil Company* as an example of a contract which lawfully delegates authority.[277] In *Chapin*, the court invalidated a succession agreement which outlined procedures for filling future vacancies on a board of directors.[278] The court reasoned that "[t]o commit themselves in advance[,] perhaps years in advance[,] to fill a particular board vacancy with a certain named person, regardless of the circumstances that may exist at the time that the vacancy occurs," was an unenforceable abdication of the board's duty to "use their best judgment" in filling a vacancy.[279] In *Abercrombie*, the court voided a contract in which shareholders attempted to "commit the directors to a procedure which might force them to vote contrary to their own best judgment" on any "general

---

270 *Id.* (citing Rosenblatt v. Getty Oil Co., 493 A.2d 929, 943 (Del. 1985)).

271 *Id.* (citing Chapin v. Benwood Found., Inc., 402 A.2d 1205, 1210 (Del. Ch. 1979)).

272 2 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 496 (2021).

273 *Grimes*, 673 A.2d at 1214 (quoting Abercrombie v. Davies, 123 A.2d 893, 899 (Del. Ch. 1956)).

274 COX & HAZEN, *supra* note 264, § 9:23.

275 *Id.*

276 FLETCHER, *supra* note 272, at § 495.

277 *Grimes*, 673 A.2d at 1214.

278 Chapin v. Benwood Found., Inc., 402 A.2d 1205, 1207-08 (Del. Ch. 1979).

279 *Id.* at 1211.

policy, plan, or program for the company."[280] The offending provisions were those which "substantially encroach on the duty of directors to exercise independent judgment," and "permit the possibility that director action will be dictated by an outsider."[281]

However, in *Rosenblatt*, the court upheld a board's delegation of authority through a contract.[282] In that case, two oil companies were attempting to merge but were unable to resolve disagreements about the valuation of particular geologic assets.[283] Through a contract, the two companies delegated the final say on the valuation of the assets to D&M, a well-known "independent firm of petroleum geologists."[284] The record supported the fact that "D&M had the requisite reputation and experience" to assist the companies in asset valuation.[285] The court also considered "why the delegation was made, and what task was actually delegated."[286] "Given their disagreements" on future price schedules, the parties "in effect selected an independent appraiser" to value their assets.[287] They did not delegate the additional task of valuing their stock, "nor did they bind themselves to merge."[288] Thus, their delegation met the test for director independence from *Aronson v. Lewis*: while corporate directors may reasonably rely on the expertise of outsiders, "the end result, nonetheless, must be that each director has brought his or her own informed business judgment to bear with specificity upon the corporate merits of the issues."[289]

In *Grimes,* the court found that a board's agreement to a $20-million severance package when hiring a CEO was lawful.[290] The Board's binding commitment to take a certain course of action in the future (in this case, paying $20 million) "do[es] not formally preclude the . . . board from exercising its statutory powers and fulfilling its fiduciary duty."[291] In its holding, the court points to the necessity of opportunity costs: "In a world of scarcity, a decision

---

280 Abercrombie v. Davies, 123 A.2d 893, 897, 900 (Del. Ch. 1956). Interestingly, in *Abercrombie* the court did not require a showing that the directors had, in fact, already voted contrary to their own best judgment. The potential future possibility of such a conflict of interest was sufficient to make the controversy ripe, unlike in *Grimes*.

281 *Id.* at 900.

282 Rosenblatt v. Getty Oil Co., 493 A.2d 929, 945-46 (Del. 1985).

283 *Id.* at 935.

284 *Id.* at 943 (citing Gimbel v. Signal Co., 316 A.2d 599, 611 (Del. Ch. 1974)).

285 *Id.*

286 *Id.*

287 *Id.*

288 *Id.*

289 *Id.* at 944 (citing Aronson v. Lewis, 473 A.2d 805, 816 (Del. 1984)).

290 Grimes v. Donald, 673 A.2d 1207, 1220 (Del. 1996), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000)).

291 *Id.* at 1214.

to do one thing will commit the board to a certain course of action and make it costly and difficult (indeed, sometimes impossible) to change course and do another."[292] Therefore, "[t]his is an inevitable fact of life and not an abdication of directorial duty," even if the severance package agreement constrains the freedom of a future board.[293] Such choices by boards will usually receive deference under the business judgment rule unless it is proven that such decisions "constitute waste or could not otherwise be the product of a valid exercise of business judgment."[294]

Finally, the *Grimes* court examined the extent to which the agreement bound the future board, determining that it was not so limiting that it crossed the line into abdication. The board retained "ultimate freedom to direct the strategy and affairs of the Company."[295] If the board disagreed with the CEO, it could still proceed as it wished, albeit at the cost of paying the CEO a "substantial sum of money in order to pursue its chosen course of action."[296] As the *Grimes* court sees it, the agreement in that case was merely an "unusual contract, but not a case of abdication."[297] The following section applies these standards to Facebook and the OB to assess whether their relationship crosses the line from an unusual contract to unlawful abdication.

C. Facebook and the Oversight Board: Lawful Delegation or Unlawful Abdication?

This section applies the *Grimes* standard to each of the OB's key decision-making powers: (1) issuing nonbinding policy guidance, and (2) issuing binding decisions on individual, high-profile pieces of content. Upon inspection, it appears the OB's powers have been carefully circumscribed to prevent possible claims against Facebook's directors for unlawful abdication of their duty to exercise their business judgment on behalf of the corporation. As in *Grimes,* we must begin with the presumption that Facebook's delegation of independent decision-making authority to the OB is a valid exercise of Facebook's directors' business judgment. Ordinarily, only "duties which lay at the heart of management of the corporation" are nondelegable.[298]

---

292 *Id.* at 1214-15.
293 *Id.* at 1215.
294 *Id.*
295 *Id.*
296 *Id.*
297 *Id.*
298 *Id.* at 1214 (quoting Chapin v. Benwood Found., Inc., 402 A.2d 1205, 1210 (Del. Ch. 1979)).

For most companies, content moderation is not one of those central duties. But given the materiality of content moderation to Facebook, there are likely some content moderation-related duties which "l[ay] 'at the heart of management of the corporation'" and cannot be delegated.[299] Directors may not delegate authority that would enable officers or outsiders "to bind the corporation to extraordinary commitments or significantly encumber the principal asset or function of the corporation."[300] The decision-making powers assigned to the OB must be assessed against this standard to determine whether they can be lawfully delegated.

There are two key powers delegated to the OB which risk infringing upon content moderation duties properly belonging only to Facebook's directors. The two-fold mission of the OB, as defined in the Trust Agreement, is to "protect free expression" in two ways: (1) "by making principled, independent decisions about important pieces of content" and (2) "by issuing policy advisory opinions on Facebook's content policies."[301] First, the Board has the power to bind Facebook to high-profile individual content moderation decisions. Second, the Board has the power to recommend broad changes to Facebook's content moderation policies through policy advisory opinions. The following sections apply the *Grimes* standard to each power, showing that the limits placed on each prong of the Board's jurisdiction allow it to narrowly survive claims of director abdication.

1. Policy Recommendations as a Central Duty for Directors

The OB Charter authorizes the Board to provide broad "policy guidance" on Facebook's content policies if that guidance is related to a case or requested by Facebook.[302] Policy guidance already issued by the Board includes recommendations that Facebook make substantial changes to its content moderation policies, procedures, remedies, and automated tools.[303] The public nature of these recommendations, and Facebook's obligation to respond, distinguishes the OB's recommendatory power from that of a typical advisory consulting firm. But while the public nature of these recommendations lends

---

299 *Id.*

300 FLETCHER ET AL., *supra* note 272, at § 496.

301 TRUST AGREEMENT, *supra* note 229, at 2.

302 CHARTER, *supra* note 238, at 5.

303 Press Release, Nick Clegg, Vice President of Glob. Affs. & Commc'ns, Meta, Facebook's Response to the Oversight Board's First Set of Recommendations (Feb. 25, 2021), https://about.fb.com/news/2021/02/facebook-response-to-the-oversight-boards-first-set-of-recommendations/.

them influence, any policy guidance from the Board is ultimately only advisory. The advisory limit on the OB's policy guidance seems sufficient to head off possible abdication claims against Facebook's directors, since it preserves their independence to choose whether to implement OB recommendations.

The public nature of OB recommendations and Facebook's obligation to respond create reputational pressure on Facebook's directors to at least consider adopting OB policy guidance, which introduces concerns about director independence. While Facebook is not bound to implement the Board's policy guidance, it is obligated by the Charter to at least consider and transparently respond to policy guidance.[304] The media has routinely covered Facebook's response to OB recommendations,[305] increasing the reputational consequences of Facebook's response (or lack thereof) to OB recommendations. Facebook's obligation to make public responses to each recommendation distinguishes the advisory opinions of the OB as having more influence over Facebook than recommendations of a typical executive consulting firm.

Facebook's own risk disclosures reveal that the company recognizes the public nature of the OB's policy recommendations may impact its business operations. In SEC filings, Facebook warns that OB "decisions *or recommendations*" might lead Facebook to adopt policies resulting in significant financial losses.[306] Facebook employees reportedly share those beliefs: "[M]any employees wondered whether the [B]oard would make a decision that killed Facebook . . . . [They would sometimes] ask one another, in nervous tones, 'What if they get rid of the newsfeed?'"[307] Although the OB lacks any binding authority to get rid of the newsfeed,[308] employee fears seem directed toward the Boards' recommendatory power to issue policy guidance which could influence the decisions of Facebook's corporate directors. The OB itself also recognizes the centrality of its recommendations to Facebook's core business operations. In the quote that opened this paper, OB member Alan Rusbridger validated his colleagues' belief that Board recommendations could "scupper Facebook's economic model in such and such a country."[309]

---

304 When the Board issues policy guidance, Facebook has committed to "analyzing" the operational requirements for implementing it, "considering" it in the company's policy development process, and "transparently communicating about actions taken as a result." CHARTER, *supra* note 238, at 9.

305 *See, e.g.*, *Welcome to the FOB Blog: Overseeing the Facebook Oversight Board*, LAWFARE, https://www.lawfareblog.com/fob-blog (last visited May 20, 2020).

306 Meta Platforms, Inc., *supra* note 42, at 13 (emphasis added).

307 Klonick, *supra* note 222.

308 *See supra* notes 244-46 and accompanying text.

309 Lomas, *supra* note 2.

Does the OB's ability to issue policy guidance therefore cross the line into an unlawful abdication of director duty? Given the opinions voiced by Facebook, OB members, and Facebook employees, it seems plausible that these self-imposed reputational pressures could begin to "substantially encroach on the duty of directors to exercise independent judgment," and "permit the possibility that director action will be dictated by an outsider."[310] As with the contract struck down in *Abercrombie,* a Facebook director "might . . . . feel bound to honor a [recommendation] rendered" by the OB, "even though it was contrary to his own best judgment."[311]

But given the high standard of gross negligence for a breach of the business judgment rule, it seems most likely that a court would find the strictly advisory nature of policy guidance sufficient to preserve director independence. Although reputational pressure exists, the Board's influence over Facebook's policies is mediated in all circumstances by intentional decisions of Facebook's directors to rely on and implement the recommendations. Ensuring the continued decisional independence of directors is the hallmark of a lawful delegation of directors' business judgment. In *Grimes*, the court recognized that the lawfulness of broad delegations of authority depends on whether additional protections exist for director independence.[312] Directors may delegate even duties which require "the highest degree of judgment and discretion" where a contract includes sufficient additional protections to ensure continued director independence.[313]

Facebook is clearly relying on the advisory limits on the Board's policy guidance as the chief protection of its directors' decisional independence. Facebook's relationship to the OB lacks many of the other common contractual protections for director independence, such as a short duration or clear provisions for withdrawing from the agreement. The institutional structure of the OB is based, by design, on an irrevocable trust.[314] Because the Services Contract is not public, Facebook's investors lack insight into how easily the company might withdraw from its services agreement with the Board or how costly a breach of contract might be.[315] Given the absence of a finite duration

---

310 Abercrombie v. Davies, 123 A.2d 893, 900 (Del. Ch. 1956).

311 *Id.* at 899.

312 COX & HAZEN, *supra* note 264, at § 9:23.

313 *See* FLETCHER, *supra* note 272, at § 495. For example, the newspaper editor's contract in *Jones v. Williams* delegated editorial authority for a limited term of five years. COX & HAZEN, *supra* note 264, § 9:23.

314 Thomas et al., *supra* note 228.

315 The final document governing the relationship between Facebook and the Oversight Board is referred to as the "Facebook-LLC Service Provider Contract." This Services Contract is not public, but its existence is referenced in the Charter. CHARTER, *supra* note 238, at 12. A

or withdrawal protections, Facebook is clearly relying heavily on the recommendatory limits imposed on the OB's policy guidance power to protect Facebook's directors' independence. In designing the jurisdiction of the OB, Facebook seems to have believed a reviewing court would agree that the recommendatory limits on the OB's policy guidance leave Facebook's directors sufficiently free to "substitute [their] judgment for that of the third party" to withstand a shareholder challenge.[316] Thus, under the current relationship of Facebook and the OB, the advisory nature of the OB's policy guidance is what makes the delegation of that policy guidance authority lawful in the first place.

Importantly, the *Grimes* inquiry considers the *de facto* impact of contracts on director behavior.[317] The OB's policy guidance must be treated as recommendatory in fact, not merely on paper. Thus, if it begins to appear that in practice, Facebook's directors are routinely caving to reputational pressure created by OB recommendations and changing Facebook's policies or algorithms in ways which materially diminish the company's financial prospects, it could provide grounds for an abdication claim against Facebook's directors.

2. Individual Content Decisions as a Central Duty for Directors

The Charter gives the OB the power to "instruct" Facebook to allow or remove individual pieces of content by upholding or reversing designations that led to enforcement actions.[318] Facebook agrees that Board take-down or leave-up decisions on individual content will be binding, and Facebook will implement them promptly unless it considers them potentially unlawful.[319] Because Facebook's agreement to be bound makes no allowances for high-profile or otherwise extraordinary cases, it raises potential concern over director independence. However, given the very narrow scope within which OB opinions are binding, it seems unlikely that any court would hold that this delegated power constitutes an unlawful abdication of director duties, even in the unusual case of former President Donald Trump's Facebook ban.

According to the Trust Agreement and the Charter, the OB's decisions on individual pieces of content are binding on Facebook, without any

---

section of the Charter subtitled "Relationship with Facebook" states simply "Facebook will contract for services from the board." *Id.* at 9.

316 Cox & Hazen, *supra* note 264, § 9:23.

317 Grimes v. Donald, 673 A.2d 1207, 1214 (Del. 1996), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244, 253 (Del. 2000).

318 CHARTER, *supra* note 238, at 4-5.

319 *Id.* at 9.

exception for very high-profile pieces of content.[320] But Facebook's delegation of authority to the OB to make individual high-profile content moderation decisions is legally dubious, given evidence that Facebook considers such decisions to lie "at the heart of the management of the corporation."[321] Currently, high-profile content moderation decisions which are likely to face public scrutiny or political backlash are raised to decision-makers at the highest levels of the company. Seminal content moderation decisions are often elevated to Zuckerberg himself.[322] Zuckerberg has reportedly stated that "a huge proportion of his time was devoted to deliberating on whether individual, high-profile posts should be taken down."[323]

As in *Chapin v. Benwood*, it may be an abdication of Facebook directors' duty "[t]o commit themselves in advance perhaps years in advance," to obeying binding OB decisions on these sorts of high-profile individual content moderation decisions "regardless of the circumstances that may exist at the time" such decisions are issued.[324] Facebook's directors have "a duty to use their best judgment" on substantial issues confronting the corporation[325] and may not delegate the authority "to bind the corporation to extraordinary commitments."[326] When a contract limits a board of directors' ability to "substitute its judgment for that of the third party," there is a corresponding limit on how much authority the contract may properly delegate.[327] The contract upheld in *Grimes* gave the directors the option to break it and proceed with their desired course of action, as long as they paid the CEO a substantial $20-million severance fee.[328] But it appears Facebook has no option to withdraw from its agreements with the OB, and it did not give itself an escape hatch to defy the

---

320 *Supra* note 244 and accompanying text.

321 *Grimes*, 673 A.2d at 1214 (citing Chapin v. Benwood Found., Inc., 402 A.2d 1205, 1210 (Del. Ch. 1979)).

322 There is anecdotal evidence that the decision to indefinitely ban Trump's account was made directly by Zuckerberg himself. Video Recording: Abrams Institute Conversations: The Internet, Elections, and the First Amendment (Info. Soc'y Project at Yale L. Sch. 2021) at 46:52, https://www.youtube.com/watch?v=kylspvFU998. Zuckerberg was also personally involved in the decision to ban the right-wing pundit Alex Jones, creator of Infowars, discussing it "at length with other executives." Kevin Roose, *Facebook Banned Infowars. Now What?*, N.Y. TIMES (Aug. 10, 2018), https://www.nytimes.com/2018/08/10/technology/facebook-banned-infowars-now-what.html.

323 Klonick, *supra* note 222.

324 Chapin v. Benwood Found., Inc., 402 A.2d 1205, 1211 (Del. Ch. 1979).

325 *Id.*

326 FLETCHER ET AL., *supra* note 272, § 496.

327 COX & HAZEN, *supra* note 264, § 9:23.

328 *Supra* notes 290-92 and accompanying text.

Board's rulings in individual high-profile cases. It is unclear whether Facebook would face any contractual penalty if it were to willfully disobey a binding OB decision on a high-profile piece of content or attempt to withdraw from its agreements with the OB.[329]

It seems a weak rebuttal to say that Facebook's Board of Directors has made an all-encompassing business judgment that the reputational benefits of an independent OB are worth pre-delegating their authority in every high-profile content decision that could possibly arise. Even if that was the belief of the Board of Directors, it's unclear whether such an attempt to prejudge every possible circumstance can be a valid exercise of business judgment. The test for whether a director's exercise of judgment is sufficiently independent when relying on outside expertise is whether directors continue to bring their "business judgment to bear *with specificity* upon the corporate merits of the issues."[330] An agreement to rely on the OB's expertise in every possible circumstance makes it seem unlikely that directors are truly bringing their business judgment to bear "with specificity upon the corporate merits" of individual, high-profile content moderation decisions.

Here, it seems that the chief protection for Facebook directors' ability to exercise their business judgment comes from the very narrow scope of the OB's binding decisions. The Board's leave-up or take-down decisions bind Facebook only on the particular piece of content at issue in the case.[331] Even when "identical content with parallel context" exists elsewhere on the platform, Facebook retains discretion on how broadly to enforce the Board's decision, committing only to assessing the feasibility of applying the decision to identical content.[332] Thus, despite the lack of an escape hatch for extraordinary cases, Facebook seems to believe that the narrowness of the OB's binding authority is sufficient to protect director independence, making the delegation of authority lawful. In granting the OB this very narrow binding authority, Facebook was hazarding a guess that a decision about an individual piece of content would never be so significant as to implicate those non-delegable duties "at the heart of the management of the corporation."[333]

---

329 *Supra* note 237 and accompanying text.

330 Rosenblatt v. Getty Oil Co., 493 A.2d 929, 944 (Del.1985) (citing Aronson v. Lewis, 473 A.2d 805, 816 (Del. 1984)) (emphasis added).

331 CHARTER, *supra* note 238, at 4-5.

332 *Id.* at 9.

333 Grimes v. Donald, 673 A.2d 1207, 1214 (Del. 1996), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000) (citing Chapin v. Benwood Found., Inc., 402 A.2d 1205, 1210 (Del. Ch. 1979)).

But that assumption is tested when an individual piece of content is so high-profile that it could warrant a decision directly from Facebook's Board of Directors but is instead subject to a binding decision from the OB. This seems to be exactly the quandary raised by the recent OB decision on Facebook's indefinite ban of former President Trump.[334] However, two peculiar features of that case and the OB's response make it unlikely that the Trump decision could serve as the basis for a claim of director abdication.

First, the Trump case was not taken up by the OB purely of its own volition but was referred to the OB at Facebook's request[335] after public urging.[336] Facebook's indefinite ban of Trump was referred to the Board as a case about the suspension of an entire account rather than the take-down of an individual piece of content.[337] The Charter allows Facebook to voluntarily refer such cases to the OB even when they fall outside of the OB's express jurisdiction to rule on individual pieces of content, and the OB may issue binding decisions on them.[338] However, such referrals from Facebook do not permanently expand the OB's jurisdiction; the Trump suspension is not a case the OB could have taken up solely on its own prerogative.[339] Thus, Facebook's directors did exercise their business judgment on the specific corporate merits of referring this particular case to the OB and of binding themselves by its decision. Given the usual deference accorded under the business-judgment rule, a court would almost certainly find this specific delegation of decision-making power to the OB to be a lawful exercise of the directors' business judgment.[340]

Second, in its decision on the Trump ban, the OB refused to rule definitively on how the indefinite ban on Trump's account should be resolved. Instead, in a widely quoted line, the OB recognized that Facebook was obliged

---

334 Press Release, Guy Rosen, Vice President Integrity & Monika Bickert, Vice President Glob. Pol'y Mgmt., Meta, Our Response to the Violence in Washington (Jan. 6, 2021), https://about.fb.com/news/2021/01/responding-to-the-violence-in-washington-dc/; Mark Zuckerberg, FACEBOOK (Jan. 7, 2021, 10:47 AM), https://www.facebook.com/zuck/posts/10112681480907401.

335 Press Release, Nick Clegg, Vice President Glob. Affs., Meta, Referring Former President Trump's Suspension from Facebook to the Oversight Board (Jan. 21, 2021), https://about.fb.com/news/2021/01/referring-trump-suspension-to-oversight-board/.

336 Evelyn Douek, *The Facebook Oversight Board Should Review Trump's Suspension*, LAWFARE (Jan. 11, 2021, 11:15 AM), https://www.lawfareblog.com/facebook-oversight-board-should-review-trumps-suspension.

337 OVERSIGHT BOARD, *supra* note 39, at 8.

338 CHARTER, *supra* note 238, at 5 – 6.

339 *Id.* at 4-5.

340 Grimes v. Donald, 673 A.2d 1207, 1214 (Del. 1996) *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000) (citing Rosenblatt v. Getty Oil Co., 493 A.2d 929, 943 (Del.1985)).

to have the final word on such an important decision. "In applying a vague, standardless penalty and then referring this case to the Board to resolve, Facebook seeks to avoid its responsibilities. The Board declines Facebook's request and insists that Facebook apply and justify a defined penalty."[341] Kate Klonick compared the OB's ruling in the Trump case to an administrative law decision: rather than substituting their judgment for Facebook's, the Board merely set aside the Facebook's action as "arbitrary and capricious" and sent it back to the company for further deliberation.[342] By referring the final decision on Trump's account back to the company, the OB also dodged any potential abdication claims that may have arisen if they had issued a definitive decision or policy about Trump's account that was binding on Facebook.

D. Distinguishing Facebook and the Oversight Board from Grimes

It seems that under the standard in *Grimes,* the OB would narrowly survive as a valid delegation of director duties under the business judgment rule. However, there is a key distinction from *Grimes* which could enable arguments that the OB may still be an unlawful abdication of director duties. The court's reasoning in *Grimes* rested heavily on the inevitability of opportunity costs as limitations on the board's future freedom: "If the market for senior management, in the business judgment of a board, demands significant severance packages, boards will inevitably limit their future range of action by entering into employment agreements."[343] Because "[t]his is an inevitable fact of life," it is "not an abdication of directorial duty."[344]

But in the case of Facebook, it's far from clear that there was any sort of inevitable external pressure prompting the company's directors to constrain their own future content moderation decision-making through something like the OB. Though it is difficult to verify Facebook's motives, the OB has been criticized as a thinly veiled attempt by Facebook to head off the threat of government regulation through preemptive corporate self-regulation. Such government regulations, however, have been slow in coming and are unlikely to materialize in the near-term.[345] Thus, if Facebook had not established the OB, it

---

341 OVERSIGHT BOARD*, supra* note 39, at 4.

342 We the People, *Trump and the Facebook Oversight Board,* NAT'L. CONST. CTR., at 03:50 (May 6, 2021), https://constitutioncenter.org/news-debate/podcasts//trump-and-the-facebook-oversight-board.

343 *Grimes*, 673 A.2d at 1215.

344 *Id.*

345 Makena Kelly, *Congress Is Way Behind on Algorithmic Misinformation*, VERGE (Apr. 27, 2021, 2:13 PM), https://www.theverge.com/2021/4/27/22406054/facebook-twitter-google-youtube-algorithm-transparency-regulation-misinformation-disinformation.

seems likely that future Facebook directors would have remained relatively free and unfettered in their content moderation decisions. This seems to be a deep difference from the inevitable opportunity costs justifying the contract in *Grimes*. However, since the factual circumstances presented are so novel, it is unclear whether a court would find that inevitability distinction meaningful. As of now, it is fair to apply the conclusion of the *Grimes* court to the OB: "So far, we have only a rather unusual contract, but not a case of abdication."[346]

The examples of Facebook and its Oversight Board raise theoretical challenges for corporate law, casting particular doubt on corporate law's ability to correct for market failures where a company is successfully exploiting negative externalities and typical Pigouvian mechanisms fail. The source of corporate law failure can be traced to a faulty assumption in the neoclassical argument for shareholder primacy. Shareholder primacy rests on the assumption that consumers will behave as rational actors, perfectly expressing their fixed, internal preferences through their consumption patterns.[347] Because these rational actors are guided by self-interest, their internal preferences are assumed to account for both their subjective enjoyment and objective well-being. But, at least in the context of digital platforms, this assumption has proven dramatically untrue. Decades of behavioral economics research have discredited it: human decision-making is frequently irrational, and preferences are often situationally determined and readily manipulable.[348] Given sufficient manipulation, it may be that consumption patterns will tend to align with neither consumers' subjective enjoyment of the product nor their objective well-being. Nowhere is this risk manifest more clearly than in the realm of digital platforms.

Facebook's own research has proven that users engage more with content they do not subjectively enjoy,[349] and that users value Facebook more when they report addictive use that objectively harms their well-being.[350] Consumption patterns, in other words, are not reflecting the fixed, internal preferences of rational Facebook users who accurately take into account their own enjoyment and well-being. Instead, this research demonstrates the susceptibility of digital platform users to situational manipulation of their preferences, as predicted by the findings of behavioral economics.[351]

---

346 *Grimes*, 673 A.2d at 1215.
347 *See infra* notes 357-63.
348 *See infra* notes 366-70.
349 *See supra* note 152 and accompanying text.
350 *See supra* notes 154-55 and accompanying text.
351 *See infra* notes 366-70.

User susceptibility to manipulation creates and enables the negative correlation between user engagement and user enjoyment and well-being. This negative correlation is the source of Facebook's perverse incentive to maximize engagement at the expense of enjoyment and well-being. Facebook's incentives to capitalize off user susceptibility to manipulation are twofold: first, shareholder primacy and the competitive marketplace for attention drive Facebook to compete against other ad-based businesses to maximally control the unseen situational influences leading users to spend time on its platforms.[352] Second, Facebook is incentivized to hide this first-order manipulation through second-order manipulation, capturing not just users' attention, but how users consciously conceive of the nature of their attention transfer.[353] In all this, Facebook is not a neutral actor, employing droves of psychologists, neuroscientists, and marketing experts to launch a sustained campaign of manipulation against users, regulators, and the public.[354]

The following Section will outline in depth the theoretical implications of this argument, using Facebook's experience as one example of a broader trend in which corporate law incentivizes and mandates manipulation while failing to incentivize or even allow corporate directors of digital platform companies to address harms flowing from their products. The next Section will also outline the practical implications of these corporate law tensions for tech accountability journalists and advocates, as well as for the Oversight Board.

III. THEORETICAL AND PRACTICAL IMPLICATIONS

This Section will first examine how the example of Facebook and the Oversight Board raise theoretical challenges for corporate law generally, calling into question corporate law's ability to correct for market failures where a company is successfully exploiting negative externalities and typical Pigouvian mechanisms fail. I will then outline the practical implications of Facebook's corporate law limitations, first for tech accountability advocates and journalists, and then for Facebook and the Oversight Board.

---

352 This competition to control the "unseen, situational influences" over consumer behavior is called "power economics." Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 8 (2004).

353 This second-order manipulation to capture consumers' and regulators' conscious understandings of a corporation and its products is called "deep capture." *See infra* note 404.

354 Chavie Lieber, *Tech Companies Use "Persuasive Design" to Get Us Hooked. Psychologists Say It's Unethical.*, VOX (Aug. 8, 2018, 2:30 PM), https://www.vox.com/2018/8/8/17664580/persuasive-technology-psychology.

A. Theoretical Implications for Corporate Law

Facebook's experience with content moderation is one instantiation of a broader trend: corporate law fails to incentivize digital platforms to adequately invest in socially optimal remedies for the harms flowing from their technologies. Quite the opposite: in Facebook's case, corporate director duties actually obligate the company to continue taking advantage of windfall profits accrued by foisting the negative externalities of content moderation failures onto society at large. Understanding why corporate law fails to incentivize socially optimal investment in content moderation by Facebook reveals why those same doctrines will also fail to vindicate users' and the public's interests when applied to other ad-based business models. Facebook's example validates and expands the leading theoretical explanation of corporate law's failure to vindicate consumer interests, calling into question the continued desirability of shareholder primacy as a doctrine.[355]

1. Shareholder Primacy and "Power Economics"

Traditional justifications for shareholder primacy rely on a view of the consumer as a rational actor with fixed preferences. Under the now dominant "nexus of contracts" theory of the corporation, shareholder primacy is justified as "the principle that all stakeholders in the corporate nexus would agree to if they actually negotiated terms." This is because "maximizing profits for equity investors assists the other 'constituencies' automatically."[356] Corporate directors, in their efforts to maximize profit for shareholders, will be obliged to consider the interests of consumers. "The standard account of shareholder primacy presumes that the profit motive forces firms in competitive markets to discern and satisfy consumer preferences in order to remain profitable."[357] "As long as corporations operate in competitive markets, corporate managers must

---

355 Much of this section adapts and applies an argument by David Yosifon on corporate law's failure to vindicate consumer interests, applying Yosifon's argument to the case of Facebook to understand the unique set of consumer harms that flow from ad-based business models. David G. Yosifon, *The Consumer Interest in Corporate Law*, 43 U.C. DAVIS L. REV. 253 (2009).

356 *Id.* at 259 (quoting FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 38 (1996)).

357 Yosifon, *supra* note 355, at 261.

offer . . . prices that are favorable to their nonshareholding stakeholders lest these constituencies take their business elsewhere."[358]

Because consumers can vote with their feet, consumers' private preferences, in this model, are sovereign. The nexus of contracts theory presumes that consumers are rational actors who have, "either explicitly or implicitly, . . . within them a set of privately ordered preferences for goods and services, among other interests and desires."[359] Because rational consumers will "gather and evaluate appropriate amounts of information regarding options available to them in the market in order to maximize their preference satisfaction through their consumption," consumption patterns accurately reveal these internal preferences.[360] Thus,

> [t]he consumer is and should be sovereign in allocating an economy's resources – ultimately determining by his [or her] choices in free markets what should be produced and in what quantities, by what methods it should be produced, how not only consumer goods but also other goods should be evaluated [e.g., raw materials].[361]

The assumption that consumer preferences are accurately revealed through consumption patterns ultimately lays the blame for negative corporate externalities at the feet of consumers who fail to vote with them: "Under the conventional paradigm, the elevation of the consumer to the position of sovereign, both in the sense of being free and in the sense of commanding the firm, scapegoats the consumer as the party truly responsible for socially deleterious corporate activity."[362] Hence, "if corporations devour rainforests, fill landfills with nondegradable waste, and pollute the waters and air, it can only be because consumers demand ever more products at ever-cheaper prices."[363]

The neoclassical argument supporting shareholder primacy concludes that, "[i]f consumers do indeed represent society generally, then . . . consumption [of harmful or exploitative products] demonstrates that the social effects of corporate behavior are not actually adverse after all, because they reflect collective preferences. If consumers really cared about corporate social responsibility, they would only patronize socially responsible firms."[364] Under

---

358 *Id.* at 260.

359 *Id.* at 262.

360 *Id.*

361 *Id.* at 262-63 (quoting Martin Bronfenbrenner, *The Consumer*, *in* SOCIAL RESPONSIBILITY AND THE BUSINESS PREDICAMENT 169, 172 (James W. McKie ed., 1974)).

362 *Id.* at 283.

363 *Id.*

364 *Id.*

this dominant theoretical justification for shareholder primacy, Facebook users' failure to exit in response to revelations of the company's harms demonstrates that "the social effects of [Facebook's] behavior are not actually adverse after all, because they reflect collective preferences."[365] If Facebook users really cared about the negative externalities created by the company's platforms—damaging the mental health of teenagers, worsening political polarization, or spreading misinformation about coronavirus vaccines—then they would stop patronizing the platform.

But a generation of legal scholarship founded upon behavioral economics has called into question the adequacy of the assumption that consumer preferences are accurately revealed through consumption patterns. Findings from the last several decades of behavioral economics research undermine this assumption in two respects: first, by challenging the notion that consumer preferences are fixed, inherent, and non-manipulable. And second, by identifying that consumers face a collective action problem in expressing preferences for goods whose production processes minimize negative externalities.

First, modern developments in behavioral economics have challenged the traditional "dispositionist," rational-actor view, which posits that consumer preferences are fixed, inherent, and non-manipulable.[366] The dispositionist view "focuses predominantly on the role of individual disposition in accounting for human behavior, to the exclusion of fully appreciating the ubiquity and power of unseen situational influences over human conduct."[367] Since Tversky, Kahneman, and Thaler's pioneering work in the 1970s and 1980s,[368] behavioral economics and social psychology research has revealed that human reasoning is rife with bias and logical fallacies and prone to manipulation, such that the dispositionist view of preference formation is now considered "incomplete, and often misleading."[369] "The deeper implication" of these fields of research "is that situation can be managed, shaped, arranged, and constructed to influence us in ways that we do not anticipate or appreciate."[370] Thus, the situationalist

---

365 *Id.*

366 *Id.* at 263.

367 *Id.*

368 Max Witynski, *Behavioral Economics, Explained*, UCHI. NEWS, https://news.uchicago.edu/explainer/what-is-behavioral-economics (last visited Sept. 20, 2022).

369 Yosifon, *supra* note 355, at 263; *see also* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 633-35 (1999) (contending any reasonable person standard needs to be reevaluated in light of evidence that human decisions are prone to bias).

370 Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical*

understanding of human decision-making directly undercuts dispositionalism's view of humans as rational actors with fixed preferences.

Legal scholars have used these behavioral economic findings to articulate an alternate conception of human agency that takes account of the situational factors that invisibly but powerfully shape decision-making. In a set of two law review articles published in 2003 and 2004, Jon Hanson and David Yosifon systematically attacked the law's reliance on the dispositionist view of human nature as both descriptively inaccurate and normatively suspect.[371] The alternative theoretical lens they propose, "critical realism," incorporates "central lessons about human agency that emerge from the fields of social psychology, political theory, behavioralism, and economics, while highlighting the misconceptions that permeate so much conventional [dispositionalist] thinking about human behavior in lay and legal theoretic discourse."[372] The crux of Hanson and Yosifon's theoretical argument is that "people's behavior is influenced by situational factors. Thus, the ability to influence the situation is also the ability to influence people's behavior."[373] As obvious from Facebook's example,

> [s]uch power can be profitable. Because power is valuable to those who wield it, and insofar as power can be exercised through (invisible, or at least, unobserved) situational variables . . . profit-driven agents will compete to control or influence them and, in turn, the people and institutions that tend to be blindly moved by them.[374]

Hanson and Yosifon call this market competition to control situational influences "power economics."[375] Assessing corporate incentives through the lens of "power economics," Yosifon and Hanson predict that, "[i]f profit can be made by influencing the situation . . . it will be. Market competitors will, to survive in the long run, 'discover' precisely which situational manipulations most effectively influence us and how. Market actors who fail to manipulate situational variables effectively will sooner or later be supplanted by those who do."[376] The authors conclude that "[m]arket forces guarantee the exercise of

---

Realism, Power Economics, and Deep Capture, 152 U. PA. L. REV. 129, 197 (2003) [hereinafter *The Situation*].

371 *Id.* at 155; Hanson & Yosifon, *supra* note 352, at 6.

372 David Yosifon, *Resisting Deep Capture: The Commercial Speech Doctrine and Junk-Food Advertising to Children*, 39 LOY. L.A. L. REV. 507, 513-14 (2006).

373 *The Situation*, *supra* note 370, at 197.

374 *Id.*

375 *Id.*

376 *Id.* at 198.

power through situational manipulation – that is the essence of power economics."[377]

Facebook's ad-based business model and the corporate law paradox it creates turn the company inexorably into a near-perfect demonstration of power economics in action: "Power economics predicts that we are living within an ongoing Milgram experiment,[378] in which we, the subjects, perceive our acts to be free and dispositionally motivated, but in which the experimenters—large business entities—wield far greater influence over our movements through situational manipulations than we tend to recognize."[379] Hanson and Yosifon's theory of "[p]ower economics predicts that the totalitarian bogeyman is invisible but real . . . . Power economics predicts that situation is sold to the highest bidders through largely unseen market processes. Corporate entities manipulate situation to influence our conduct and dispositional self-conceptions, thereby building their wealth and increasing their power."[380] Facebook, in perennial pursuit of user engagement, employs thousands of human-computer interaction (HCI) experts, user-interface designers, and even neuroscientists, whose sole purpose is to deploy unseen situational influences, manipulating consumers' preferences to maximize the amount of time and attention spent on its platforms.[381]

As Facebook's first president-turned-conscientious-objector explained in 2017, "[t]he thought process [behind Facebook's business model] was all about, 'How do we consume as much of your time and conscious attention as possible?'"[382] The companies' experts concluded that "we need to . . . give you a little dopamine hit every once in a while, because someone liked or commented on a photo or a post . . . and that's going to get you to contribute

---

377 *Id.*

378 *Id.* at 200. Milgram ran a famous set of psychological experiments at Yale University in 1963 in which he demonstrated how powerful situational influences are in shaping behavior. Saul McLeod, *The Milgram Shock Experiment* SIMPLYPSYCHOLOGY (2017), https://www.simplypsychology.org/milgram.html. Milgram told study participants they would be delivering electric shocks to an unseen-but-heard participant in an adjoining room. *Id.* Though participants believed they were acting in accord with their own volition, by manipulating situational variables, Milgram was able to get 65% of study participants to deliver what they believed were fatal levels of electric shocks to an unseen-but-heard participant in an adjoining room. *Id.*

379 *The Situation*, *supra* note 370, at 200-01.

380 *Id.* at 200-01.

381 Lieber, *supra* note 354; Jon Brooks, *Tech Insiders Call Out Facebook for Literally Manipulating Your Brain*, KQED (May 25, 2017), https://www.kqed.org/futureofyou/379828/tech-insiders-call-out-facebook-for-literally-manipulating-your-brain.

382 Will Oremus, *Addiction for Fun and Profit*, SLATE (Nov. 10, 2017, 12:20 PM), https://slate.com/technology/2017/11/facebook-was-designed-to-be-addictive-does-that-make-it-evil.html.

more content, and that's going to get you more likes and comments. It's a social validation feedback loop."[383] According to this former Facebook executive, the company's business model relies fundamentally on "exploiting a vulnerability in human psychology."[384]

Examples of manipulative design features that were implemented or tweaked to nudge users into spending incrementally more time and revealing incrementally more data on Facebook's platforms are endless.[385] A 2021 study found that "about 31 percent of social media use among people in our sample is caused by self-control problems. In other words, if people in our study could choose their preferred screen time in advance instead of scrolling uninhibited in the moment, they'd spend nearly one-third less time on social media."[386] The most likely explanation for such a gaping disparity between stated and expressed preferences is that the intentionally manipulative designs and content moderation decisions Facebook and other digital platforms deploy are extremely effective at keeping users online and active for longer. User preferences, far from being fixed, inherent, and non-manipulable, are deeply vulnerable to the sorts of situational manipulations Facebook deploys.

Behavioral economics also reveals that, even if individual users consciously believe that Facebook's societal harms outweigh its societal benefits, they face "a collective action problem [which] undermines the viability of consumer sovereignty as a reliable device for advancing consumer interests in the social effects of consumption."[387] Users' failure to exit Facebook in response to the platforms' negative externalities may not in fact signal that users are apathetic toward those harms. Instead, the lack of exit may reflect a rational calculation by users that their ability to improve corporate behavior through individual action is minimal. "If each consumer thinks she has an idiosyncratic view of the production issue [here, Facebook's social costs], and doubts that her fellow consumers will care enough to" quit Facebook, "then she knows that the [social] environment will be degraded no matter what she does."[388] "Thus, she might as well [stay on Facebook] and pocket" the additional utility it provides her individually.[389] "On the other hand, if she believes her fellow [users] care

---

383 *Id.*

384 *Id.*

385 Brooks, *supra* note 381.

386 Hunt Allcott et al., *How Addicted Are People to Social Media? We Found a Way to Measure It.*, WASH. POST (July 19, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/2021/07/19/social-media-addiction-social-science/.

387 Yosifon, *supra* note 355, at 284.

388 *Id.*

389 *Id.*

enough about [the social] degradation that they will" quit the platform *en masse*, "then she knows that the [social] environment will be saved no matter what she does," and she has no reason to quit the platform.[390] But "[b]ecause all consumers make these same assessments, nobody forbears from consuming" Facebook's individually useful, but collectively harmful, social media products and services.[391] In the case of Facebook, the company's dominant market share,[392] lack of interoperability,[393] and the inherent network effects of social media platforms[394] exacerbate this collective action problem.

"The view that consumer choices in competitive markets reflect consumers' private preferences" is "bedrock" to traditional arguments for how shareholder primacy maximizes social utility.[395] But in truth, consumption patterns among Facebook users may be explained more by users' collective action problems and Facebook's manipulative content moderation and design practices than by fixed and inherent user preferences. If the "bedrock" assumption underlying shareholder primacy is ripe for revision, so, it seems, is the argument that shareholder primacy is the most effective rule for increasing social utility, particularly for consumers.

Instead, Hanson and Yosifon's account of power economics provides a powerful argument that corporate law constraints and market forces will motivate and require Facebook to continue to maximize its corporate wealth and power by manipulating users' psychological vulnerabilities and situational variables more effectively than its competitors. "If corporate law is structured to require and enable firms to maximize shareholder value, then corporations will have the incentive and ability to discern and make use of many of the same . . . motivations[] and visceral drives that social psychologists have tracked, but which lay people themselves tend not to see."[396] Through their control over those situational influences, "corporations can manipulate the formation and manifestation of preferences, thoughts, and will in ways difficult for consumers and regulators, guided by dispositionist schemas, to track."[397] And directors'

---

390 *Id.*

391 *Id.*

392 Debra Cassens Weiss, *FTC's Revised Antitrust Suit Against Facebook Survives Motion to Dismiss*, ABA J. (Jan. 12, 2022, 11:09 AM), https://www.abajournal.com/news/article/ftcs-revised-antitrust-suit-against-facebook-survives-motion-to-dismiss.

393 FIONA M. SCOTT MORTON ET AL., EQUITABLE INTEROPERABILITY: THE "SUPER TOOL" OF DIGITAL PLATFORM GOVERNANCE 5, 11-15 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3923602.

394 *Id.* at 4-5, 9-10.

395 Yosifon, *supra* note 355, at 261.

396 *Id.* at 266.

397 *Id.*

legal obligation to shareholder primacy, when combined with "[t]he pressures of competitive markets[,] will require profit-seeking firms to engage in such conduct, or else firms willing to do so will subsume them."[398] The next section will outline how Facebook's first-order incentive to manipulate leads to a second-order motive to manipulate not only consumers, but also regulators.

2. "Deep Capture" in Ad-Based Business Models

This legally-and market-imposed obligation to manipulate has particularly pernicious effects when applied to corporations whose business models are supported by advertising. An ad-based business model gives corporations incentive and opportunity to reach the end-game of power economics, a level of second-order manipulation which Hanson and Yosifon call "deep capture."[399] Facebook engages in a number of behaviors which perfectly illustrate Hanson and Yosifon's deep capture hypothesis: the company attempts to capture not only users' time and attention, but even what users think they are doing when they make these attention transfers to the company.[400] While Facebook seeks to convince users and regulators that it supplies a set of useful communications tools, in reality, users' only economically relevant activity is that they are viewing advertisements.

Hanson and Yosifon theorize that, in light of human susceptibility to situational influences, the classic theory of regulatory capture required expansion.[401] Their core insight is that, "[b]eneath the surface of behavior, the interior situation of relevant actors is also subject to capture."[402] In other words, powerful actors will attempt to capture not only "the way that people think," but "the way that they think they think," a phenomenon that Hanson and Yosifon label as "deep capture."[403] They define "deep capture" as "the disproportionate and self-serving influence that the relatively powerful tend to exert over all the *exterior* and *interior* situational features that materially influence the maintenance and extension of that power—including those features that purport to be, and that we experience as, independent, volitional, and benign."[404] Humans exhibit a strong bias toward believing that all our actions and behavior stem not from

---

398 *Id.*

399 *The Situation*, *supra* note 370, at 229-30.

400 *See infra* notes 408-13.

401 See *id.* at 202-06 (introducing "shallow capture," the classic regulatory capture theory first developed by Nobel Prize-winning economist George Stigler in the 1960s).

402 *Id.* at 214.

403 *Id.*

404 *Id.* at 218.

subconscious cues or situational influences but entirely from our conscious reasoning, volition, and disposition.[405] Because of the strength of this "fundamental attribution error," Yosifon and Hanson lament that, "it is nearly impossible to convince people that they live in, and are part of, a deeply captured world."[406]

For sellers of typical goods and services, opportunities to manipulate a buyer's situational variables are relatively constrained, since the buyer is alert to the fact that they are engaging in a transaction. Buyers who are aware that they are engaging in a transaction are more likely to be on guard against a seller's attempts to manipulate situational features of the transaction to influence the buyer's preferences or obfuscate the terms of the bargain.[407] Though simple situational manipulations can still allow traditional vendors of goods and services to unfairly capture some of the surplus from a transaction, this surplus extraction is limited by a consumer's ability to vote with their feet when they suspect or become aware of merchant manipulation.[408] But consumers cannot be on guard against merchant manipulation when they lack the prerequisite awareness that they are engaged in a transaction in the first place.

To that end, Facebook is engaged in a form of deep capture, one it intentionally perpetuates through two fictions: first, the fiction that Facebooks' platforms are primarily user-directed social media and communication tools, and second, the fiction that users receive access to these platforms for free. Because Facebook users pay a cash price of zero to access the company's platforms, a large proportion of the company's users lack awareness of the very fact of, let alone the terms of and nature of, their ongoing transfer of value to Facebook.[409] Facebook's decision to set a cash price of zero for its services is likely strategic: "Consumers . . . react to 'free' prices in ways that may be irrational, generally overvaluing free goods and undervaluing their costs."[410]

---

405 *Id.* at 177-78.

406 *Id.* at 177, 219.

407 *See, e.g.*, Thomas Germain, *How to Spot Manipulative 'Dark Patterns' Online,* CONSUMER REPS. (Jan. 30, 2019), https://www.consumerreports.org/privacy/how-to-spot-manipulative-dark-patterns-online-a7910348794/ ("Learning to recognize different types of dark patterns can help you navigate the web and mobile apps more smoothly, spotting settings and boxes that deserve a closer look.").

408 Jamie Luguri & Lior Strahilevitz, *Shining a Light on Dark Patterns*, 13 J. LEG. ANALYSIS 43, 46-48 (2021).

409 *See, e.g.*, Erin Black, *How Facebook Makes Money by Targeting Ads Directly to You*, CNBC (Apr. 2, 2019, 8:00 AM), https://www.cnbc.com/2019/04/02/how-facebook-instagram-whatsapp-and-messenger-make-money.html.

410 Brief for Consumer Reports et al. as Amici Curiae Supporting Plaintiff at 10, Muslim Advocs. v. Zuckerberg, No. 2021-CA-001114-B (D.C. Super. Ct. Apr. 8, 2021); *see generally* Michael S. Gal & Daniel L. Rubinfeld, *The Hidden Costs of Free Goods: Implications for Antitrust*

Thus, even Facebook's decision to price access to its platforms at zero dollars manipulates a psychological vulnerability in users to encourage them to spend additional time on the platform.

Setting the cash price of access to its services at zero also allows the company to rhetorically represent its services as beneficent social media and communications tools intended merely to connect the whole world.[411] "We change the game," said Facebook ads aired during the 2021 Summer Olympics, "when we find each other."[412] In a perfect illustration of Hanson and Yosifon's deep capture hypothesis, Facebook attempts to capture not only users' time and attention, but even what users think they are doing when they trade the company their time and attention. Users believe they are engaging with content from groups, creators, news outlets, friends, family, and colleagues. In reality, users' economically relevant activity, and all that matters to Facebook's shareholders, is that they are viewing advertisements.

Facebook's incredible success in deep capture can be seen in the very term most often used to describe the company: it is a social media platform, as opposed to a digital advertising company. Facebook has intentionally perpetuated this fiction among regulators and law enforcement officials, arguing in court filings that its users are not "consumers," because Facebook offers access to its platforms for free.[413] This form of deep capture also structures the language of regulatory debates among lawmakers: is Facebook truly a neutral "platform," or is it more akin to a "publisher" with editorial control?[414] Even that binary is a misdirection. The meaningful answer is, fundamentally, neither: Facebook is an "attention merchant," a seller of advertising opportunities.[415] The regulatory conversation has centered not on Facebook's manipulative collection of user time and attention, but instead, on

---

Enforcement, 80 ANTITRUST L.J. 521, 528-31 (2015-16) (canvassing literature on the "free effect").

411 Andy Wu, *The Facebook Trap*, HARV. BUS. REV. (Oct. 19, 2021), https://hbr.org/2021/10/the-facebook-trap.

412 *We Change the Game When We Find Each Other*, META, https://about.facebook.com/community/changethegame/ (last visited Sept. 22, 2022).

413 Defendants' Motion to Dismiss Under Rule 12(b) at 19, Muslim Advocs. v. Facebook, Inc. et al., No. 2021-CA-001114-B (D.C. Super. Ct. Apr. 8, 2021) ("[A]ccess to Facebook's platform is free, and therefore providing access to Facebook is not a consumer transaction . . . Facebook 'is not primarily engaged in the business of selling or leasing goods or services' because Facebook 'offers a free service to its users.'" (citations omitted)).

414 Sam Levin, *Is Facebook a Publisher? In Public It Says No, but in Court It Says Yes*, THE GUARDIAN (July 3, 2018, 2:00 AM), https://www.theguardian.com/technology/2018/jul/02/facebook-mark-zuckerberg-platform-publisher-lawsuit.

415 TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS 5, 299 (2016).

the company's failure to adequately moderate user-generated content, though content moderation is only incidental to the company's underlying business model.

Even Facebook's creation of the Oversight Board can be explained in terms of Hanson and Yosifon's concept of deep capture. An important element of the "deep capture hypothesis" is that "the quest to promote certain ideas will include an endeavor to locate, create, and sponsor credible means of conveying those ideas."[416] To that end, the Oversight Board is a highly visible credibility builder for the company: no matter what narrow decisions and recommendations the Board makes, ultimately, the chief idea it conveys and reinforces by its existence is that Facebook is primarily a social media network, providing a set of communications tools to its global users.[417] The Oversight Board, crucially, does not have jurisdiction over advertisements or algorithms.[418] The Board's jurisdiction, limited to content moderation, implies that the chief problem Facebook needs to address is content moderation failures, rather than the harms which flow from its underlying ad-based business model. According to Hanson and Yosifon, "[t]he fact that profit-driven actors spend billions of dollars per year to promote a false dispositionist image of ourselves is direct evidence of . . . deep capture."[419] In the case of the Oversight Board, Facebook was willing to spend $130 million establishing a highly dispositionist tribunal.[420] The elaborate structure of the Board, its emphasis on reasoned, principled, slow, thoughtful decision-making, is a world away from the Facebook described to investors in SEC filings, a digital advertising company that competes ruthlessly through situational manipulation for user time and attention. Facebook is thus "making a huge profit by maintaining two visions of the human animal. The public vision is often that of the dispositional, independent, rational actor. The private vision is that of the

---

416 *The Situation*, *supra* note 370, at 270.

417 To challenge this reification of the idea that Facebook's problems are limited to content moderation, the "Real Oversight Board" project created by digital activists aimed to address not just "content moderation," as Facebook's actual Oversight Board does, but "the whole thing: ads, algorithmic amplification, group recommendations, etc." Casey Newton, *How a Fake "Real Oversight Board" Is Putting Pressure on Facebook*, VERGE, (Sept. 29, 2020, 6:00 AM), https://www.theverge.com/interface/2020/9/29/21472092/real-facebook-oversight-board-stunt-activism-limitations.

418 *Id.*

419 *The Situation*, *supra* note 370, at 268.

420 Jack M. Balkin & Kate Klonick, *Facebook's Oversight Board Was Supposed to Let Facebook Off the Hook. It Didn't.*, WASH. POST (May 6, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/2021/05/06/facebook-oversight-board-trump/.

situational character, capable of manipulation through situational influence."[421] And Facebook, as one of the companies with "the greatest stake in perpetuating the illusion . . . encourage[s], promote[s], and market[s] our dispositionism, in significant part because doing so helps make the situation that much more invisible. It is largely through the unseen situation that consumers, like other individuals, institutions, and entities in our culture, are deeply captured."[422]

By deeply capturing users', lawmakers', and the public's understanding of what the company is, namely, a social media platform, Facebook has succeeded in causing the time- and attention-based transactions at the core of its business model to fade into the background of regulatory conversations. At the same time, the company continues to speak to shareholders in the language of maximizing user engagement, just as corporate law mandates and incentivizes. In the earnings call which precipitated Facebook's stock price crash in February 2022, the Facebook Files and the social concerns they raised made almost no appearance.[423] In the only indirect mention of the controversy, an investor asked about public concern over some of Facebook's harmful externalities (which the investor described as "ESG concerns").[424] But the company's Chief Financial Officer, apparently, hadn't been briefed for the question:

> Investor: "First, on ESG . . . there's been a series of steps that have been taken, reducing the ability to do political targeting, the introduction of the take a break feature within Instagram, and maybe a few other things that arguably have been put out there to kind of address some of the ESG concerns. Where do you think you are in terms of addressing some of those that we've heard in the investment community?"
> Dave Wehner (Facebook's Chief Financial Officer): "I don't have anything specific on the ESG front. So I probably can't comment on that. I can follow up with you offline on that."[425]

Facebook seems to think its time is better spent worrying about other threats to profitability than public outrage generated by the Facebook Files; namely, competition for user attention, adverse actions by major competitors, and a future in which Facebook and other digital advertisers have saturated the global market for attention.[426]

---

421 *The Situation*, *supra* note 370, at 265.
422 *Id.*
423 META CALL TRANSCRIPT, *supra* note 173.
424 *Id.* at 15.
425 *Id.*
426 *Id.* at 11-12.

Facebook's business model makes users particularly vulnerable to the effects of Facebook's deep capture since the ad-based nature of the business model leaves users without adequate post-hoc remedies against the company. In ad-based business models, users or viewers transfer value to a company in the form of their time and attention.[427] Unlike cash-based transactions, users' time and attention, once offered to Facebook, cannot be disgorged, no matter how deceitfully they were obtained. Because of the lack of post-hoc remedies for deceitfully obtained consumer time and attention, ad-based businesses like Facebook can effectuate user manipulation and extraction of surplus without significant fear of costly future accountability.

This finitude of time also increases ad-based businesses' motive to manipulate. The underlying raw material for the digital advertising industry—the pool of human time and attention—is finite. Every ad-based firm consumes human time and attention at the expense of another; thus, the relentless competition for time and attention applies not only to social media companies but also to more traditional publishing outlets.[428] Ultimately, all ad-based businesses face the same driving incentive as Facebook: maximize user engagement, or their own equivalent metric for consumers' time and attention (such as Nielsen ratings for television programming, or subscriber numbers for journalism).[429]

For a generation, global population growth, expansion of high-speed internet, and the invention of new and increasingly portable, mobile, and wearable devices did increase the total amount of human attention available to be sold to digital advertisers.[430] But eventually, due to slowing population growth, market saturation by social media companies, and other factors, the size of the "whole pie" of global user time and attention will stop growing.[431] Facebook's major stock tumble in February 2022 may indicate that the company is already starting to feel some of these constraints on its "raw materials" of user time and attention.[432] The stock lost nearly $200 billion in value after releasing poor financial results from the final quarter of 2021, in

---

427 *See supra* notes 148-50 and accompanying text.

428 WU, *supra* note 415, at 3-5.

429 *Id.*

430 *See generally* TIM HWANG, SUBPRIME ATTENTION CRISIS: ADVERTISING AND THE TIME BOMB AT THE HEART OF THE INTERNET (2020) (arguing that the digital advertising market resembles the subprime mortgage market before the financial crisis of 2008).

431 *Id.*

432 *See, e.g.*, Tom Ryan, *Should Facebook's Eroding User Base Worry Meta Much?*, RETAIL WIRE (Feb. 10, 2022), https://retailwire.com/discussion/should-facebooks-eroding-user-base-worry-meta-much/ (suggesting that Meta's loss of daily active users in the Global South indicates that "Facebook is reaching saturation globally").

which the company lost daily active users for the first time, chiefly due to competition for attention from TikTok and other ad-based platforms.[433]

As competition for attention becomes ever fiercer, it will drive companies toward increasing manipulation of the psychological vulnerabilities in human reasoning. Companies unwilling or unable to exploit consumers' situational susceptibility will fall behind competitors and eventually shut down.[434] Through this lens, the tech industry's recent pivot to the "Metaverse" signals an awareness by not just Facebook but many digital advertising companies about the long-term stagnation risks posed by their saturation of the global market for attention.[435] If Facebook and other ad-based companies are approaching maximal monetization of the time and attention of their global user base on existing devices and platforms, then ensuring continued long-term growth requires luring users into ever more immersive platforms, encouraging them to spend ever more time and attention in all-encompassing digital worlds where ads can be displayed to them.

Facebook's corporate-law paradox, then, is not likely to fade in the "Metaverse" era. If anything, companies with ad-based business models will face growing pressure to manipulate their users and viewers in the context of increasingly stiff competition for attention. In this subsection, it has become clear that ad-based companies are likely to continue pushing the "deep capture" view that their platforms are primarily free communications tools and services, popular because of the dispositionist preferences of their users. Such behavior by Facebook is strategic and rational in light of the corporate law constraints on the company outlined in Section I and II of this note. But what implications do Facebook's reliance on power economics and deep capture raise for tech accountability advocates and journalists, and for the Oversight Board itself? In the section that follows, I will sketch out the practical implications for tech accountability journalists and advocates and for the Oversight Board, and in the final Section of this note, I will outline potential solutions to Facebook and other ad-based firms' corporate law paradox.

---

433 Notably, the causes of loss pointed to by the company have nothing to do with the company's negative externalities as revealed by the Facebook Files and resulting public relations crisis, and attendant Pigouvian mechanisms. While the company identifies "significant headwind[s]" from growing competition by TikTok, it identifies only "moderately increas[ing]" headwinds from the threat of regulation. META CALL TRANSCRIPT, *supra* note 173, at 5, 10.

434 See *supra* notes 375-81.

435 Methodical Investor, *Facebook: The Metaverse Strategy Is a Winner*, SEEKING ALPHA (Nov. 22, 2021, 9:20 AM), https://seekingalpha.com/article/4471167-facebook-the-metaverse-strategy-is-a-winner.

B. Practical Implications for Tech Accountability Reporting and Advocacy

In the words of former Chief Justice Leo Strine of the Delaware Supreme Court, "lecturing others to do the right thing without acknowledging the actual rules that apply to their behavior, and the actual power dynamics to which they are subject, is not a responsible path to social progress."[436] This Note has attempted to outline the actual rules that apply to Facebook's behavior and the actual power dynamics that constrain their business model and investments in content moderation. Under existing Delaware corporate law, Facebook cannot lawfully make voluntary changes to its platform or business model which would tend to decrease its profitability in both the near and long terms—unless it lies to shareholders, establishing a norm of dishonesty which most corporate accountability advocates would not condone.[437] But many of the most serious and prominent calls for reform demand that Facebook make exactly these sorts of unprofitable changes. Leading calls for reform have included: (1) hiring large numbers of human content moderators; (2) creating more institutional separation between the company's business and safety teams; (3) reducing the addictiveness of its platform, particularly for younger users; and (4) cutting back on sensationalist content.[438] But each of these reforms, for reasons discussed below, is likely unprofitable in both the short and long terms and thus impossible for Facebook's directors to undertake voluntarily and in good faith.

The corporate law constraints on Facebook's incentives to reform its business model and invest in content moderation carry practical significance for technology journalists. Much current technology journalism treats it as a shocking secret that Facebook operates not in the public interest, but purely in service of profit. In a book-length exposé, *An Ugly Truth: Inside Facebook's Battle for Domination*, journalists Sheera Frenkel and Cecelia Kang detail how "[t]heir explosive, exclusive reporting led them to a shocking conclusion: The missteps of the last five years were not an anomaly but an inevitability – this is how Facebook was built to perform."[439] The crux of their shocking conclusion? "Facebook's engineers were instructed to create tools that encouraged people

---

436 Strine, *supra* note 3, at 768.

437 *See, e.g.*, Nathalie Maréchal et al., *Better Processes Lead to Better Outcomes*: *Corporate Governance as a Tool to Address Misinformation*, TACKLING THE "FAKE" WITHOUT HARMING THE "NEWS": A PAPER SERIES ON REGULATORY RESPONSES TO MISINFORMATION 10, 10-12 (Michael Karanicolas ed., 2021).

438 *See infra* notes 444-45, 450, 457-58, 460 and accompanying text.

439 *The Book Facebook Doesn't Want You to Read*, Harper Collins Publishers, https://www.harpercollins.com/pages/anuglytruth (last visited Sept. 23, 2022).

to spend as much time on the platform as possible, even as those same tools boosted inflammatory rhetoric, conspiracy theories, and partisan filter bubbles."[440] Frenkel and Kang lay the blame for this profiteering squarely on Facebook's directors and executives: "[S]ealed off in tight circles of advisers and hobbled by their own ambition and hubris, [Zuckerberg and Sheryl Sandberg] ha[ve] stood by as their technology is co-opted by hatemongers, criminals, and corrupt political regimes across the globe, with devastating consequences."[441]

Though the book purports to finally hold Facebook's directors accountable, it seems unlikely that such reporting could truly alter their corporate law incentives, unless it breathed new life into the currently ineffective Pigouvian mechanisms of user exit or government regulation. Frenkel and Kang are not unique in this style of reporting; moral outrage frames nearly all of the coverage of Facebook's social harms.[442] Such outrage is important, both for its power to mobilize regulators and perhaps spur changes to user behavior. But on its own, impugning the moral character of Facebook's directors does nothing to change the incentives created and structured by Delaware corporate law.[443]

Facebook's corporate law paradox also comes with decisive implications for some of the leading social media reforms suggested by technology accountability advocates. Several advocates have called on Facebook to significantly increase the amount of human content moderators it employs, particularly in the Global South or in countries where Facebook is especially likely to contribute to civil or political strife.[444] In the wake of the Facebook Files, one tech columnist argued that Facebook and "other social media sites

---

440 *Id.*

441 *Id.*

442 *See, e.g.*, Salvador Rodriguez, *Facebook Is Getting Hammered by Lawmakers, Consumers and Even Investors*, CNBC (Oct. 6, 2021, 8:30 AM), https://www.cnbc.com/2021/10/06/facebook-getting-hammered-by-lawmakers-consumers-and-even-investors.html.

443 Paul Rosenberg, *Fast Food, Facebook, and the 'Deep Capture' of Democracy: It Didn't Start with Cambridge Analytica*, SALON (Apr. 8, 2018, 12:00 PM), https://www.salon.com/2018/04/08/fast-food-facebook-and-the-deep-capture-of-democracy-it-I-start-with-cambridge-analytica/ (quoting David Yosifon: "Facebook continuously makes public statements committing . . . to behaving in a socially responsible way. . . . But the truth is they can legally only do so, and *will* only do so, when it is profitable to do so. The problem is not with . . . Zuckerberg's conscience or with Facebook's morality. The problem is our corporate law.").

444 Parmy Olson, Opinion, *Facebook Unfriending Itself Won't Make Its Problems Go Away*, BLOOMBERG (Oct. 20, 2021, 3:00 AM), https://www.bloomberg.com/opinion/articles/2021-10-20/facebook-doesn-t-need-10-000-new-hires-for-the-metaverse-it-needs-moderators.

should be pushed to hire more moderators — thousands more — to help clean up their sites."[445] Most sources indicate that Facebook currently employs around 15,000 content moderators, and a well-reported study by New York University researchers called on the company to increase that number to at least 30,000.[446] Critics have noted that Facebook's content moderation failures are particularly egregious in countries where English is not the dominant language, and which are at particular risk of violence or other harms.[447] But even advocates of this idea recognize that it would meaningfully decrease the company's profitability. One commentator put it trenchantly: "The social media company could surely enforce its own rules on false and harmful posts – it just needs to cut into its massive profit margins."[448] Massive scale-ups in the number of content moderators would cost the company additional billions every year, with future costs only increasing to keep pace with user growth. Facebook already reaps exponentially smaller returns per user in the Global South than in English-speaking North America,[449] making disproportionate investment in content moderators in the Global South an even less profitable strategy. Since "[Facebook] has little real competition, and its business is almost wholly free from government regulation . . . the company remains at liberty to spend pretty much whatever it wants on content moderation and fact-checking."[450] Corporate law demands that Facebook's directors spend frugally, since no long-term boost in profitability can be expected to result from such spending.

Another proposal is to create a "firewall" between Facebook's business teams and public interest-focused teams.[451] Facebook has a number of teams focused on mitigating the social harms created by its platforms, spearheaded by the company's Community Integrity team.[452] As the Facebook Files revealed, "at crucial moments, those teams are overruled as decisions about safety, content moderation, and enforcement are made by the executives in charge of the company's growth and lobbying operations."[453] But this is sensible behavior

---

445 *Id.*; *see also* Klonick, *supra* note 70.

446 BARRETT, *supra* note 48, at 4, 24.

447 Tom Simonite, *Facebook Is Everywhere; Its Moderation Is Nowhere Close*, WIRED (Oct. 25, 2021, 7:00 AM), https://www.wired.com/story/facebooks-global-reach-exceeds-linguistic-grasp/.

448 Gilad Edelman, *Stop Saying Facebook Is 'Too Big to Moderate'*, WIRED, (Jul. 28, 2020, 7:10 PM), https://www.wired.com/story/stop-saying-facebook-too-big-to-moderate/.

449 Klonick, *supra* note 70.

450 Edelman, *supra* note 448.

451 Edelman, *supra* note 191.

452 *Protecting and Caring for the Facebook Community*, META CAREERS (May 14, 2020), https://www.metacareers.com/life/protecting-and-caring-for-the-facebook-community.

453 Edelman, *supra* note 191.

by Facebook's corporate directors, since many of the reforms proposed by the public interest teams are likely unprofitable in both the short and long terms. In particular, Zuckerberg, "is extremely inquisitive about [proposed reforms] that impact[] how content gets ranked in the feed — because that's the secret sauce, that's the way this whole thing keeps spinning and working and making profits."[454] In an internal Facebook memo leaked as part of the Facebook Files, Zuckerberg told internal hate speech researchers that a proposed fix "wouldn't launch if there was a material tradeoff with MSI impact"[455] (MSI, or "meaningful social interactions," is Facebook's internal metric for user engagement).[456] As a former member of Facebook's civic integrity team explained, "Our very existence is fundamentally opposed to the goals of the company, the goals of Mark Zuckerberg."[457] Thus, establishing a firewall between business and public interest teams would create similar corporate law problems as Facebook's attempt to delegate authority to the Oversight Board.

Other activists have called on Facebook to reduce the "addictiveness" of its platforms to children, and by extension, to all users. But "Facebook has no incentive to fix this anymore than we expected Philip Morris to develop non addictive cigarettes."[458] The design features which cause problematic overuse among a subset of users are the same features which drive high rates of user engagement among all users.[459] As long as nearly all of the company's revenue comes from advertising, any reform which would tend to permanently decrease user engagement cannot be cost-justified in either the short or the long terms. Prognostications that Facebook is approaching a saturated global market make this particular recommendation even less justifiable—if the company cannot continue to increase total user engagement by acquiring new users, it must instead attempt to increase the amount of *time* that existing users spend engaged with its platforms.[460] Thus, calls to reduce the "addictiveness" of Facebook's

---

454 Elizabeth Dwoskin et al., *The Case Against Mark Zuckerberg: Insiders Say Facebook's CEO Chose Growth Over Safety*, WASH. POST (Oct. 25, 2021, 7:00 AM), https://www.washingtonpost.com/technology/2021/10/25/mark-zuckerberg-facebook-whistleblower/.

455 *Id.*

456 *Id.*

457 *Id.*

458 Jennifer Strong et al., *I Was There When: Facebook Put Profits Overs Safety,* MIT TECH. REV. (Nov. 9, 2021), https://www.technologyreview.com/2021/11/09/1039618/i-was-there-when-facebook-put-profits-over-safety/.

459 Cheng et al., *supra* note 154.

460 Alternatively, or in addition, Facebook could increase its monetization per user by collecting increasingly granular personal data on users, making them more valuable prospects to advertisers. But for this same reason, calls for reform which demand that Facebook reduce its collection of personal data are unlikely to be cost-justifiable in either the short or the long

platforms, which would almost certainly meaningfully and permanently reduce the amount of time average Facebook users spend on its platforms, cannot be justified as profitable for Facebook in the long run.

For the same reason, as long as sensationalist, divisive content is shown by Facebook's research to drive the most user engagement, calls to invest significant resources in eliminating or reducing the spread of such content are similarly untenable under current corporate law. Facebook has acknowledged that borderline content drives the most user engagement and that this phenomenon persists no matter where the company draws the line on allowable content.[461] This means the positive correlation between engagement and sensationalism cannot be done away with simply by making content moderation guidelines stricter. Thus, any choice to make and enforce stricter content moderation guidelines would require Facebook to spend money removing content which would disproportionately increase engagement, and thus, profit, if the company had merely left such content up.

Of course, the fact that none of these reforms can be readily cost-justified by Facebook's corporate directors does not imply that such reforms are unhelpful, unimportant, or unnecessary. These and myriad other reforms are crucial to mitigating the social harms flowing from Facebook and other digital platforms. This Note merely acknowledges that, in pursuit of these unprofitable reforms, moral browbeating is both ineffective and inefficient. Instead, advocates' energy should be directed toward "the more difficult and important task of advocating for externality regulation of corporations," and, ultimately, toward reshaping the incentives facing Facebook's corporate directors, as the normative solutions proposed in Section IV of this Note would do.[462]

C. Practical Implications for the Oversight Board

In light of this Note, what should be made of calls to increase the OB's jurisdiction to give it binding authority over Facebook's policies? Leading experts have called for the OB to take steps to expand its own remit to issue binding decisions on broader policy and information-gathering issues.[463] But it

---

terms. Indeed, Facebook warned investors in February 2022 that Apple's deployment of a simple "Ask App Not to Track" feature would cut $10 billion annually out of Facebook's revenue, since it would make it hard for the company to collecting data on the browsing habits of its users. META CALL TRANSCRIPT, *supra* note 173, at 10.

461 *See supra* notes 138-141 and accompanying text.

462 Strine, *supra* note 3, at 763.

463 A public comment to the Oversight Board and accompanying op-ed by Jameel Jaffer, Katie Glenn Bass, and the Knight First Amendment Institute argues this position. Jameel Jaffer & Katie Glenn Bass, Opinion, *Facebook's 'Supreme Court' Faces Its First Major Test*, N.Y. TIMES

appears that under existing corporate law, it would be illegal for any contract with the OB to tie Facebook's hands too tightly. The OB may be delegated binding authority only in narrow decisions where it cannot inflict material harm to Facebook's operations and business model. Meanwhile, it can be delegated merely recommendatory authority on any broader policy question which could have a material impact on Facebook's operations and business model.[464] Many leading legal scholars have expressed their disappointment with the limited remit of the Board,[465] but few have noted the origins of those limits in corporate law. Moving forward, proposals to expand the jurisdiction of the OB should explicitly reckon with the fine line between director delegation and abdication implicated by the Board's novel structure.

Given the difficulty of expanding the OB's jurisdiction, it could be that, as Evelyn Douek has suggested, the most important function of the OB will be its information-forcing powers.[466] For cases under review, the OB has the power to "[r]equest that Facebook provide information reasonably required for board deliberations in a timely and transparent manner."[467] And when the Board issues policy guidance, Facebook has committed to "transparently communicating about actions taken as a result."[468] However, the OB's decision in the Trump case made clear that Facebook claims the right to define what information is "reasonably required" for OB deliberations.[469] Facebook seemed to draw bright-line rules that information about its content moderation algorithms was not relevant to the OB, declining to answer seven of the Board's forty-six questions.[470] But the OB can still play a key role in encouraging transparency. By publicizing Facebook's refusal to provide key information[471] and investigating misrepresentations by Facebook,[472] the OB can invite media scrutiny and bring public pressure to bear in encouraging disclosures.

(Feb. 17, 2021), https://www.nytimes.com/2021/02/17/opinion/facebook-trump-suspension.html.

464 *See supra* Section III.

465 Evelyn Douek, *How Much Power Did Facebook Give Its Oversight Board?*, LAWFARE (Sep. 25, 2019, 8:47 AM), https://www.lawfareblog.com/how-much-power-did-facebook-give-its-oversight-board.

466 We the People, *supra* note 342, at 47:31.

467 CHARTER, *supra* note 238, at 3.

468 *Id.*

469 CHARTER, *supra* note 238, at 4; Rebecca MacKinnon, *The Facebook Oversight Board Did the Best It Could on the Trump Decision*, SLATE (May 5, 2021, 1:17 PM), https://slate.com/technology/2021/05/trump-facebook-ban-ruling-oversight-board-power.html.

470 *Id.*; We the People, *supra* note 342, at 13:50.

471 OVERSIGHT BOARD, *supra* note 39, at 21.

472 Press Release, Oversight Board, *To Treat Users Fairly, Facebook Must Commit to Transparency*,

In the long-term, however, the Board's viability is less certain. These corporate law tensions reveal that Facebook, through its representations about the OB, has trapped itself in a catch-22 of reputational risk. Facebook has represented the OB as a creative solution to some of the company's content moderation woes: an expert, independent institution with the power to increase transparency and recommend bold changes to the company's content moderation practices.[473] But if Facebook actually allows the Board to reveal damaging information about its content moderation or implements Board recommendations which decrease profitability, the company risks an unlawful abdication of corporate director duties. Thus, Facebook continues to dodge the Board's requests to reveal information about its algorithms,[474] denies the Board jurisdiction over ads,[475] misrepresents its content moderation processes to the Board,[476] and avoids third-party audits, instead self-reporting its "implementation" of Board recommendations.[477] From a corporate liability perspective, these evasions are rational. But in representing an ultimately toothless Board as an important component of its attempt to mitigate material content moderation risks, the OB has been reduced to simply a new source of reputational risk for the company.[478]

This catch-22 invites a deeper consideration of how self-regulatory approaches by digital platforms challenge existing corporate law paradigms. The deep tension between corporate director fiduciary duties to shareholders versus the need for independent, multi-stakeholder decisions about free expression suggests that, in the long-run, corporate self-regulation of content moderation is untenable. Because the most commonly called-for content moderation reforms would tend to be unprofitable in both the short and long terms and cannot be voluntarily undertaken in good faith by corporate directors, costly self-regulation could only be commenced by Facebook and other digital platforms under a meaningful threat of externally imposed regulation. The next

---

(Sept. 2021), https://oversightboard.com/news/3056753157930994-to-treat-users-fairly-facebook-must-commit-to-transparency/.

473 Zuckerberg, *supra* note 72.

474 OVERSIGHT BOARD, *supra* note 39, at 29.

475 Press Release, Oversight Board, *supra* note 472.

476 See *supra* note 230 and accompanying text.

477 Press Release, Oversight Board, Oversight Board Demands More Transparency from Facebook (Oct. 2021), https://www.oversightboard.com/news/215139350722703-oversight-board-demands-more-transparency-from-facebook/.

478 Jeff Horwitz, *Facebook Says Its Rules Apply to All. Company Documents Reveal a Secret Elite That's Exempt.*, WALL ST. J. (Sept. 13, 2021, 10:21 AM), https://www.wsj.com/articles/facebook-files-xcheck-zuckerberg-elite-rules-11631541353 (quoting Kate Klonick discussing the Facebook Files: "Why would [Facebook] spend so much time and money setting up the Oversight Board, then lie to it? . . . This is going to completely undercut it.").

and final Section of this Note will explore options for such externality regulation, which would obligate Facebook to price in the costs of its content moderation failures, or alternatively, would modify how corporate law shapes the company's incentives.

IV. NORMATIVE SOLUTIONS

There are two distinct resolutions to Facebook's corporate law paradox: first, corporate law could be modified to rebalance companies' incentives between profit maximization and public welfare. Second, externality regulation could more efficiently force companies to internalize the costs of the social harms it creates in its drive for profit maximization. Each approach comes with potential theoretical pitfalls, and in practice, the likelihood of any sort of meaningful regulation materializing at the federal level in an era of increasing partisan stagnation is uncertain. But reducing Facebook's destructive power and societal influence is not an all-or-nothing proposition, just as the company's innovations have had neither wholly beneficent nor wholly deleterious impacts. With a clear-eyed understanding of the corporate law rules and incentives constraining Facebook's behavior, as outlined in this Note, regulators can situate a host of incremental reforms as meaningful steps toward two overarching priorities: (1) restructuring Facebook's corporate law incentives, and (2) using externality regulation to price in Facebook's social harms.

A. Restructuring Facebook's Corporate Law Incentives

The first set of potential reforms aims to restructure the corporate law doctrines constraining Facebook's behavior, giving the company either the discretion or a mandate to sacrifice profit in service of the public interest. Each of the following changes, if adopted, would extricate Facebook from its current corporate law paradox, which demands that corporate directors subordinate the interests of stakeholders to maximize shareholder value (or at least, to lie about their motivations if they prioritize stakeholder interests). But no approach to weakening shareholder primacy is without its challenges, as outlined in the following sections.

1. Passing A Constituency Statute for Digital Platforms

Introducing a constituency statute for digital platforms would be the lightest possible reform to Delaware's shareholder primacy doctrine, since it would merely grant corporate directors voluntary discretion to consider the

public interest in their decision-making. Delaware's unwavering commitment to shareholder primacy puts it out of step with the majority of states. Over thirty states have adopted "constituency statutes," which permit directors to consider the interests of not just shareholders, but other constituencies as well, usually including consumers and the public.[479] With at least thirty models to choose from, Delaware could readily borrow from other states to pass its own constituency statute.[480] Limiting the statute to digital platforms could make it more palatable to Delaware legislators, who might otherwise balk at a general constituency statute that would weaken the state's business-friendly reputation. Even if limited to digital platforms, it seems relatively unlikely that Delaware would willingly pass any form of constituency statute—Delaware's current lack of such a statute is clear signaling to corporate interests that helps preserve the state's place as the cornerstone of corporate America.

But even if a constituency statute for digital platforms could overcome the political hurdles it would face in the Delaware legislature, such statutes are limited in their effectiveness, since they merely permit corporate directors to consider stakeholder interests. "[R]elying on the benevolent discretion of firm managers is a very limited mechanism for protecting otherwise vulnerable consumer interests."[481] Constituency statues do not preempt other shareholder-centric doctrines of Delaware's "positive law, which, for example, put[] substantive limits on corporate charitable giving and make[] directors vulnerable to weak but still threatening shareholder derivative suits."[482] Studies on the effectiveness of constituency statutes are generally disparaging.[483] Judge Strine summarizes: "States that have adopted [so-called] constituency statutes . . . have done little, if anything, to make corporations more socially responsible or more respectful of their workers' or communities' interests."[484] "Managerialism," it appears, "is weak medicine."[485] For a more meaningful solution to reshaping Facebook's corporate law incentives, then, reformers ought to look elsewhere.

---

479 Kim, *supra* note 117, at 200-01.

480 For example, Ohio's constituency statue explicitly allows corporate directors to consider "community and societal considerations." DEBEVOISE & PLIMPTON, THE DUTY OF US COMPANY DIRECTORS TO CONSIDER RELEVANT ESG FACTORS 7 (2020), https://www.unpri.org/download?ac=11696.

481 Yosifon, *supra* note 355, at 292.

482 *Id.*

483 Strine, *supra* note 3, at n.21 (summarizing studies of constituency statute efficacy).

484 *Id.* at 767.

485 Yosifon, *supra* note 355, at 292.

2. Converting Facebook into a Public Benefit Corporation

Some commentators have recommended that Facebook convert from Delaware's typical for-profit corporate form into a public benefit corporation (PBC).[486] Delaware created the public benefit corporate form in 2013.[487] A public benefit corporation is statutorily defined as "a for- profit corporation . . . intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner."[488] A public benefit, in turn, is defined as "a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature."[489] Crucially, the PBC form does not merely confer discretion to corporate directors to consider stakeholder interests, as constituency statutes generally do. Instead, the PBC form imposes a mandatory duty to consider those interests: "[t]he board of directors *shall* manage . . . the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation."[490]

On its face, the PBC form seems to resolve, in one stroke, Facebook's corporate law paradox. Supporters of Facebook becoming a PBC have argued that "[a] giant company that is simultaneously essential and pilloried is vulnerable."[491] Adopting the PBC form would both allow and obligate Facebook to consider and balance the social harms it creates against the profit motive without requiring corporate directors to resort to obfuscation or deception of shareholders. And the conversion of a public company to a PBC would not be entirely unprecedented. In January 2021, Veeva Systems, Inc., a

---

486 Ann Florini, *The Innovative Structure That Could Save Facebook*, TECHONOMY (June 18, 2020), https://techonomy.com/the-innovative-structure-that-could-save-facebook/.

487 In total, over 30 states have created some version of the public benefit corporate form since Maryland became the first state to create one in 2010. Tiffany M. Burba, *To "B" or not to "B": Duties of Directors and Rights of Stakeholders in Benefit Corporations*, 70 VAND. L. REV. EN BANC 329, 331 nn. 6, 10 (2017).

488 DEL. CODE ANN. tit. 8, § 362(a) (2021).

489 *Id.* § 362(b).

490 *Id.* § 365(a) (emphasis added).

491 Ann Florini & Brett Hurt, *Facebook Can Save Itself by Becoming a B Corporation*, TECHCRUNCH (Mar. 2, 2021, 6:39 PM), https://techcrunch.com/2021/03/02/facebook-can-save-itself-by-becoming-a-b-corporation/.

cloud software company, became the first publicly traded company to convert to a PBC.[492]

But the Facebook-as-PBC solution suffers from two deficiencies: first, it seems exceedingly unlikely that Facebook would voluntarily adopt the PBC form. A 2021 Facebook shareholder proposal contended that the company should become a PBC, arguing that "[w]hile the Company may profit by ignoring costs it inflicts on society, its diversified shareholders ultimately internalize those costs."[493] Facebook opposed the proposal, calling it not necessary: "[r]eorganizing as a PBC . . . could significantly restrain or limit our capacity to take certain corporate actions and slow our response to the rapidly-changing circumstances present in today's global climate and markets."[494] Plus, the company said, "[i]n light of our extensive existing corporate responsibility efforts, a reorganization as a PBC would not alter our recognition of the importance of working with our stakeholders and serving our community."[495] Ultimately, only ten percent of shareholders voted in favor of the proposal.[496] As long as Zuckerberg continues to control of a majority of Facebook's voting stock, a voluntary conversion to PBC status seems extraordinarily improbable.[497] While it is conceivable that the FTC or another regulatory agency could require Facebook to adopt the PBC form as a part of a future settlement agreement, such a remedy has never been attempted, and its lawfulness is untested.

Second, even if Facebook were willing to become a PBC, Facebook's stakeholders would face another challenge: enforcing their interests against Facebook's corporate directors. The mandatory PBC director duties are narrower than they first appear: while Delaware's PBC statute gives directors "an explicit mandate to consider [third-party] beneficiaries, [directors] have no affirmative duty to act in their interest."[498] The statute explicitly states that a director of a PBC "shall *not* . . . have any duty to any person on account of any

---

492 Christopher Marquis, *Publicly Traded Tech Company Believes Formalizing Stakeholder Governance Will Bring Shareholder Success*, FORBES (Dec. 8, 2020, 10:43), https://www.forbes.com/sites/christophermarquis/2020/12/08/publicly-traded-tech-company-believes-formalizing-stakeholder-governance-will-bring-shareholder-success/?sh=58cea3b06e49.

493 Facebook, Annual Meeting & Proxy Statement 82 (2021).

494 *Id.* at 83.

495 *Id.* at 84.

496 Facebook, Current Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (Form 8-K) (May 26, 2021).

497 Kathryn Underwood, *Facebook's Dual Class Stock Shares Mean Mark Zuckerberg Controls the Company*, MRK. REALIST (Oct. 28, 2021, 9:57 AM), https://marketrealist.com/p/can-shareholders-vote-out-mark-zuckerberg/.

498 Burba, *supra* note 487, at 345-46.

interest of such person in the public benefit or public benefits identified in the certificate of incorporation."[499] Thus, under Delaware's "current benefit corporation model, . . . intended beneficiaries are explicitly denied standing to enforce the creation of a public benefit, both in the courts and in benefit corporations' internal processes."[500] As one scholar has explored at length, other potential private and public enforcement mechanisms are equally impracticable:

> [E]ven shareholders themselves have limited remedies to enforce the creation of a public benefit. Because benefit corporations are for-profit entities and do not receive any unique tax advantages, it is unlikely that, under the current model, state attorneys general would have any power to intervene in a benefit corporation's internal affairs.[501]

For this reason, "benefit corporations are particularly ineffective at providing a remedy for third-party beneficiaries who demand more social responsibility from the board."[502] So even if Zuckerberg, Facebook's majority shareholder, manifested his willingness to turn the company into a public benefit corporation, that decision would not immediately reshape the company's incentives to continue taking advantage of negative externalities.[503]

---

499 DEL. CODE ANN. tit. 8, § 365(b) (2021) (emphasis added).

500 Michael A. Hacker, *"Profit, People, Planet" Perverted: Holding Benefit Corporations Accountable to Intended Beneficiaries*, 57 B.C. L. REV. 1747, 1750 (2016).

501 *Id.*

502 Burba, *supra* note 487, at 338.

503 A related proposal, with supporters including a sitting Supreme Court justice, would designate platforms as public utilities or common carriers and would supplement the traditional duties of corporate directors with additional legal duties to the public interest. Mark MacCarthy, *Justice Thomas Sends a Message on Social Media Regulation*, BROOKINGS (Apr. 9, 2021), https://www.brookings.edu/blog/techtank/2021/04/09/justice-thomas-sends-a-message-on-social-media-regulation/. For example, regulators could consider giving digital platforms a statutory mandate to "operate in the 'public interest,'" like the Communications Act of 1934 requires of broadcast licensees. Stuart N. Brotman, *Revisiting the Public Interest Standard in Communications Law and Regulation*, BROOKINGS (Mar. 23, 2017), https://www.brookings.edu/research/revisiting-the-broadcast-public-interest-standard-in-communications-law-and-regulation/. Such a statutory mandate might allow government officials to circumvent the enforcement challenges of the PBC approach. But critics have challenged the "public interest" mandate as "foolhardy . . . as if there exists some Platonic ideal of a unitary, homogenous public for technocratic regulators to identify and altruistically serve." JOHN SAMPLES & PAUL MATZKO, KNIGHT FIRST AMEND INST., SOCIAL MEDIA REGULATION IN THE PUBLIC INTEREST: SOME LESSONS FROM HISTORY 2 2 (2020), https://knightcolumbia.org/content/social-media-regulation-in-the-public-interest-some-lessons-from-history.

3. Giving Users a Vote

Both constituency statutes and PBCs suffer from deficiencies in the enforceability of their protections for non-shareholder constituencies. Ultimately, "[i]f we believe that other constituencies should be given more protection within corporation law itself, then statutes should be adopted giving those constituencies enforceable rights that they can wield."[504] Many of the leading proposals for these types of corporate law reforms suggest that currently disempowered corporate constituencies, including consumers, employees, and in Facebook's case, users, should be given the right to take part in votes on corporate activities.

Proposals to give stakeholders some form of voting power over corporate activities are numerous and varied and have been described at length elsewhere.[505] Yosifon suggests an approach which merges stakeholder democracy with tools from federal securities law: "one plausible idea would be to allow consumers to vote on social issue proposals made by shareholders under Rule 14 of the Securities Exchange Act. Consumers certainly have as much interest in the subject matter of social issue proposals as do shareholders, and sometimes more."[506] A modified version of this approach "would allow consumers to author proposals and submit them to the shareholders, or further still, to all of the voting stakeholders in the firm, including consumers."[507] This "Rule 14 mechanism would allow consumers to address broad issues that may be implicated in the firm's operation but which are nevertheless not salient at the point of the consumptive act, such as the long-term consequences of consumption, or the social consequences of consumption."[508] This solves users' collective action problem: Facebook users "may prefer that [Facebook's] product be made in a more socially responsible fashion, but may doubt that [their] singular refusal to purchase the product will have any influence. Because everyone makes this calculation, nobody forebears from consumption."[509] But "[a] vote on such matters would allow [users] to have their cake . . . and eat it too, at least until such a time when they can convince [Facebook] to make the product with healthier or more ethical ingredients."[510]

---

504 Strine, *supra* note 3, at 768.

505 *See* Yosifon, *supra* note 355, at 302-12 (summarizing various proposals for giving stakeholders limited democratic control of corporate decision-making).

506 *Id.* at 311.

507 *Id.* at 312.

508 *Id.*

509 *Id.*

510 *Id.*

This article does not attempt to survey the various proposals for giving stakeholders a vote in corporate governance proceedings and remains agnostic on the preferred mechanisms. Instead, this Note seeks chiefly to link those proposals to the regulatory discussion of how to mitigate the social harms flowing from digital platforms. While the particular design of such stakeholder voting mechanisms should be the subject of future scholarship, intelligent reforms which would give meaningful voting power to stakeholders seems to be the most promising path toward corporate law reform as a means of mitigating digital harms.

B. Using Externality Regulation to Price in Facebook's Social Harms

Judge Strine argues that "a more effective and direct way to protect interests such as the environment, workers, and consumers would be to revive externality regulation."[511] Rather than expecting digital platforms to draw their own red lines on which profitable behaviors to avoid, the externality regulation approach holds that it is more efficient to use other legal doctrines to enjoin harmful corporate practices or shift the costs of negative externalities back onto platforms. Once platforms have to bear the full societal costs of their technologies and business practices, it will inspire and mandate a more thoughtful approach to product design and business innovation. The most effective regulation would function as a perfect Pigouvian tax, requiring Facebook to internalize every negative externality created by its platforms. The company could then determine its optimal expenditures on content moderation without any incentive for double-talk to regulators or investors.

Of course, modern legal scholarship has seen the rise and fall of the so-called "externality revolution,"[512] and modern law and political economy scholars have explored how neoclassical law and economics concepts like externalities "effectively disable[d] [legal thought] from centering questions about power and distribution . . . ."[513] Similarly, in light of Hanson and Yosifon's theory of deep capture, relying on prospective of effective

---

511 Strine, *supra* note 3, at 768.

512 A.H. Barnett & Bruce Yandle, *The End of the Externality Revolution*, 26 SOC. PHIL. & POL'Y. 130 (2009).

513 Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1819-20 (2020) ("By refocusing scholarship on questions structured by transactions costs and externalities, law-and-economics analysis placed questions of distribution and coercion outside the lamplight of methodology. It thus neglected the actual social world comprised of highly disparate resource allocations that are themselves products of background legal rules . . . .").

government regulation to head off Facebook's exploitation of negative externalities is a dubious venture.[514]

But as with the corporate law reforms suggested in the previous subpart, regulation of Facebook and other digital platforms is not an all-or-nothing endeavor. While a perfect Pigouvian tax will certainly prove elusive, any externality regulation which reimposes even a portion of the social costs of Facebook's technologies back onto the company is more efficient than the current regime in which Facebook pays nothing for social harms. And meaningful regulation which curtails Facebook's runaway profitability will also reduce the company's economic and political power, and thus, its ability to perpetuate deep capture of the regulatory conversation surrounding it. Though the political consensus around "reining in Big Tech" is fairly shallow, certain avenues of accountability seem ripe for meaningful bipartisan federal legislation. This Section briefly outlines several legal doctrines that lawmakers could use to force Facebook to internalize some of the costs of its digital harms, which include taxes, competition-focused reforms, or the imposition of civil liability by reforming of Section 230.

1. Taxing Facebook for the Social Costs of Connection

Several scholars and journalists have recognized that Facebook's obligation to maximize user engagement is the pervasive driving force behind the company's creation of social harms. These commentators suggest that, in order to justify undertaking costly mitigations for the good of society, Facebook ought to shift from measuring "user engagement" to a different metric, one which captures the cost of some of its negative externalities. One former Facebook engineer suggested that, "[i]f you're a social media company, your goal actually isn't to maximize engagement tomorrow. Your goal should be to maximize engagement a year from now, or five years from now, or 10 years from now."[515] Another scholar called on the company to

> redefin[e] how Facebook determines what a "good" product is. For much of its history, the company's key metric has been user engagement — how long users log in, the pages they spend time on, which ads they click. The greater the user engagement, the more valuable Facebook's ads, and the more profit for shareholders. But the "Facebook Files" stories have

---

514 *See supra* Section III.A.2.

515 Gilad Edelman, *How Facebook Could Break Free From the Engagement Trap*, WIRED (Nov. 19, 2021, 7:00 AM), https://www.wired.com/story/jeff-allen-interview-facebook-engagement-trap/.

> put to rest any doubt that this narrow concept of engagement fails to capture the platform's real impact — both the bad and, yes, the good. Facebook is perfectly capable of measuring "user experience" besides the narrow concept of "engagement," and it is time those measurements were weighted more heavily in company decision-making.[516]

Redefining "user engagement" as "user experience," likely encompassing measures of user enjoyment and well-being, would certainly force Facebook to internalize some of the costs that it currently externalizes. But there is no business case for Facebook to voluntarily adopt these more "expensive" metrics. Unless the potential Pigouvian taxes of user exit or government regulation begin to function more effectively, a voluntary redefinition of the user engagement metric in a way that prices in the company's social harms could not, in good faith, be justified as in long-term value-maximizing interests of shareholders. Facebook would certainly fight any attempt to force it to adopt a metric like "user experience" rather than engagement.

But there is well-known precedent for a government mandate that industry adopt a more "expensive" metric that prices in negative externalities generated by industry's production processes: the "social cost of carbon." Simply explained, the social cost of carbon is "the cost of the damages created by one extra ton of carbon dioxide emissions."[517] The costs are calculated through integrated assessment models which identify the "pathway[s] through which an extra ton of emissions . . . ultimately lead[s] to damages to our economy and human welfare" and "quantify the extra costs associated with carbon emissions that are not reflected in market prices."[518] Though the immediate use of the social cost of carbon metric in U.S. policymaking is in mandatory regulatory cost-benefit analyses, the metric is also helpful to regulators intending to impose a mandatory carbon price, or by corporations voluntarily implementing internal carbon pricing.[519]

Mandatory carbon pricing "impos[es] a *price* on *carbon* emissions to mitigate the negative externalities created by greenhouse gas emissions," functioning, in other words, as a Pigouvian mechanism.[520] The simplest way to implement

---

516 Klonick, *supra* note 70.

517 Isabella Backman, *Stanford Explainer: Social Cost of Carbon*, STAN. NEWS (June 7, 2021), https://news.stanford.edu/2021/06/07/professors-explain-social-cost-carbon/#Definition.

518 *Id.*

519 Sanjay Patnaik & Kelly Kennedy, *Why the US Should Establish a Carbon Price either Through Reconciliation or Other Legislation*, BROOKINGS (Oct. 7, 2021), https://www.brookings.edu/research/why-the-us-should-establish-a-carbon-price-either-through-reconciliation-or-other-legislation/.

520 *Id.*

carbon pricing is through a "carbon tax," in which "governments levy a fixed fee that firms must pay on every ton of carbon they emit. The level of emissions may fluctuate, but officials set the level of the tax according to the projected amount of carbon emissions at that price."[521] A carbon tax "forces firms to internalize the cost of carbon emitted during production, such that they have to incorporate the cost of environmental damage in their production decisions."[522] Ultimately, a carbon price would "force companies to reevaluate their long-term investment decisions, shifting away from emissions-intensive production toward low-carbon technologies."[523] Many European nations and several U.S. states have implemented or are considering carbon taxes.[524] The revenues generated by carbon taxes are typically split among several different ends, including (1) "subsid[ies] for 'green' spending in energy efficiency or renewable energy;" (2) "state general funds;" and (3) "return[s] to corporate or individual taxpayers through paired tax cuts or direct rebates."[525]

Many companies, particularly those with a large carbon footprint, have begun to voluntarily implement "internal carbon pricing," as "a tool . . . to guide [their] decision-making process[es] in relation to climate change impacts, risks, and opportunities."[526] Corporations will often establish their own internal carbon price for use in financial calculations and long-term corporate strategy decisions. "Many companies use the carbon price they face in mandatory initiatives as a basis for their internal carbon price. Some companies adopt a range of carbon prices internally to take into account different prices across jurisdictions and/or to factor in future increases in mandatory carbon prices."[527]

Just as it took decades for scientists and economists to identify, quantify, and persuade the public about the negative externalities of carbon emissions, digital platforms profited from an early golden age where increasing connection was perceived as an unadulterated social good. In the early days of the internet, the democratizing potential of platforms was universally celebrated,[528] and

---

521 *Id.*

522 *Id.*

523 *Id.*

524 *Id.*

525 Jeremy Carl & David Fedor, *Tracking Global Carbon Revenues: A Survey of Carbon Taxes versus Cap-and-Trade in the Real World*, 96 ENERGY POL'Y 50, 50 (2016).

526 *What is Carbon Pricing?*, WORLD BANK, https://carbonpricingdashboard.worldbank.org/what-carbon-pricing (last visited Sept. 24, 2022).

527 *Id.*

528 Julie Moos, *How Obama, Clinton Legitimized Twitter & Facebook as Tools of Democracy in Egypt*, POYNTER (Jan. 31, 2011), https://www.poynter.org/reporting-editing/2011/how-obama-clinton-legitimized-twitter-facebook-as-tools-of-democracy-in-egypt/.

social media companies were glorified for their mission of connecting the whole world.[529] But two decades on, it has become apparent not just to scientists, but also to regulators and the public, that while increased connection does provide meaningful social utility, its byproducts include massive social harms. From the perspective of digital platforms like Facebook, these harms are experienced as negative externalities, and Delaware corporate law mandates that platforms exploit these externalities as a source of windfall profits. Facebook's corporate law paradox is analogous to the incentive structure facing major corporate greenhouse gas emitters that profit from carbon emissions and experience environmental harms as negative externalities.

One plausible approach for resolving Facebook's corporate law paradox is the introduction of a metric that adequately captures the true social costs of connection. Calculating a value for the social cost of connection would require scholars and economists to identify the various pathways through which social media use leads to "damages to our economy and human welfare" that are not currently reflected in Facebook's market price.[530] To start, these pathways would likely include the value of lost time due to Facebook's addictive design features, the cost of mental and physical harm from exposure to damaging content on the platform, and loss of future earnings based on decreased academic performance of young social media users. Other pathways could include the healthcare costs of vaccine misinformation, the costs of terror attacks and mass shootings by those radicalized on Facebook, and the costs of regulatory and legislative stagnation driven by political polarization exacerbated by Facebook.

On the basis of the social cost of connection metric, regulators could impose a direct "connection tax" on Facebook and other digital platforms, forcing them to internalize the costs of the harms flowing from their platform in proportion with the size of their user bases or some other measure of platform scale. Faced with the prospect of a mandatory connection tax, digital platforms would likely adopt internal connection pricing strategies, adapting their financial calculations and decision-making processes to mirror the regulator's calculated social cost of connection, akin to internal carbon pricing.[531] Ultimately, a connection price would force digital platforms like Facebook to "reevaluate their long-term investment decisions," changing their

---

529 Josh Constine, *Facebook Changes Mission Statement to 'Bring the World Closer Together,'* TECHCRUNCH (June 22, 2017, 11:57 AM), https://techcrunch.com/2017/06/22/bring-the-world-closer-together/.

530 Backman, *supra* note 517.

531 Patnaik & Kennedy, *supra* note 519.

underlying ad-based business models and investing in content moderation to levels that are more socially optimal.[532]

One scholar has already proposed a destination for the revenues generated by such a connection tax, borrowing another page from the environmental law playbook: revenues could be used to establish a "superfund for the Internet."[533] Superfund revenue could be used for digital harm reduction efforts, including supporting local journalism, improving digital literacy, or research into the mental health impacts of social media use and other digital harms.[534] Just as a percentage of carbon tax revenue is often set aside for investment in development of green energy technologies, a portion of the returns from a connection tax on digital platforms ought to be set aside for research and investment in more socially-responsible communication tools.

2. Competition-Based Reforms

Some scholars have argued that the market, particularly consumer choice, remains the most effective Pigouvian mechanism to force platforms to invest in socially optimal levels of content moderation.[535] These commenters posit that user exit from large digital platforms like Facebook is presently hindered by platforms' market power and willful anticompetitive practices, compounded by the natural network effects enjoyed by digital platforms.[536] To that end, these scholars propose improving the effectiveness of the Pigouvian mechanism of user exit through various competition-focused reforms.[537]

Certainly, any competition-based reform which increases the variety of social media options available to users, reduces platforms' network effects, and lowers users' switching costs would improve the effectiveness of the Pigouvian

---

532 *Id.*

533 Lisa MacPherson, *Addressing Information Pollution with a "Superfund for the Internet"*, INFO. SOC'Y PROJECT: WIII BLOG (Mar. 2, 2021) https://law.yale.edu/isp/initiatives/wikimedia-initiative-intermediaries-and-information/wiii-blog/addressing-information-pollution-superfund-internet.

534 *Id.*

535 Fiona Scott Morton & David C. Dinielli, *Roadmap for an Antitrust Case Against Facebook*, 27 STAN. J.L. BUS. & FIN. 268, 273-76 (2022).

536 *Id.* at 316-17.

537 Fiona Scott Morton, Opinion, *Why 'Breaking Up Big Tech Probably Won't Work*, WASH. POST (July 16, 2019, 2:41 PM), https://www.washingtonpost.com/opinions/2019/07/16/break-up-facebook-there-are-smarter-ways-rein-big-tech/; Matt Stoller & Shaoul Sussman, Opinion, *The US Government Wants to Break Up Facebook. Good – It's Long Overdue*, THE GUARDIAN (Dec. 11, 2020, 9:48 AM), https://www.theguardian.com/commentisfree/2020/dec/11/us-government-break-up-facebook-long-overdue.

mechanism of user exit. These strategies assume that user demand for Facebook is at least somewhat elastic in response to the company's creation of social harm, and all else being equal, consumers would prefer a social media platform that produces less social harm than one that produces more. But network effects and anticompetitive practices make the transactions costs of leaving one platform and switching to another too high for most users.[538] Because switching costs prevent effective user exit, one of the most promising competition-based reforms, mandated interoperability, works by dramatically lowering users' switching costs.[539] Under an interoperability mandate, large social media platforms would be obligated to design simple interfaces enabling users to transport their profile, data, and connections easily from one platform to another.[540] If users can readily switch from one social media platform to another without losing their data or connections, it makes it more likely that users will actually vote with their feet in response to Facebook's creation of social harms.

But the success of competition-based reforms at internalizing Facebook's social harms depends on whether and to what extent user demand for Facebook is actually elastic to the company's creation of social harms. Proponents of competition-based regulations argue that once anticompetitive pressures are removed and switching costs are lowered, at least some users who were previously trapped in Facebook's walled garden would switch to other platforms.[541] But it seems unlikely that the number of socially-conscious Facebook users who would exit in response to the company's creation of social harms would sufficiently harm Facebook's bottom-line to make previously unprofitable content moderation investments profitable.[542] This skepticism stems, in part, from Hanson and Yosifon's theory of the situational actor, which implies that the effectiveness of reforms relying on users to "vote with

---

538 Cory Doctorow, *The Future Is in Interoperability Not Big Tech: 2021 in Review*, FRONTIER FOUND.: DEEPLINKS BLOG (Dec. 24, 2021), https://www.eff.org/deeplinks/2021/12/future-interoperability-not-big-tech-2021-review.

539 FIONA M. SCOTT MORTON ET AL., EQUITABLE INTEROPERABILITY: THE "SUPER-TOOL" OF DIGITAL PLATFORM GOVERNANCE 5-6, 9 (2021), https://tobin.yale.edu/sites/default/files/Digital%20Regulation%20Project%20Papers/Digital%20Regulation%20Project%20-%20Equitable%20Interoperability%20-%20Discussion%20Paper%20No%204.pdf.

540 *Id.* at 3.

541 Doctorow, *supra* note 538 ("By changing the law to make it easier for users to walk away from Big Tech silos, we change what kind of technology can be built, what kinds of businesses can be operated, and what kinds of lives digital users can make.").

542 Christianna Silva, *We All Hate Facebook. So Why Aren't We Deleting Our Accounts?*, MASHABLE (Mar. 8, 2021), https://mashable.com/article/why-we-dont-delete-facebook-account.

their feet" will always be bounded by human susceptibility to situational influences, power economics, and deep capture.[543] Thus, competition-focused reforms, though important, need to be coupled with other externality regulations limiting the ability of platforms to intentionally manipulate the situational factors shaping user demand. Such regulation could take the form of civil liability for addictive platform designs, as outlined in the following section.

3. Narrowing Section 230 to Expand Facebook's Civil Liability

An alternative tool to price in digital harms requires narrowing Section 230 of the Communications Decency Act, which grants immunity from civil liability to platforms for content moderation decisions.[544] As a shield insulating digital platform companies from the ordinary risks and costs of civil liability that most commercial retailers face, Section 230 currently serves as a government subsidy for platforms' creation of social harm.[545] Section 230 functions as an artificial, Congressionally-created dam holding back a flood of tort litigation led by those most particularly injured by platforms' creation of social harm, one of the classic Pigouvian mechanisms.[546]

Lawmakers have introduced a variety of proposals for narrowing Section 230.[547] A narrower Section 230 could allow limited liability against platforms as publishers of threats or defamatory statements,[548] or as tortfeasors under torts created or repurposed to address particular digital harms, including intrusion

---

543 *See supra* Section III.A.

544 Meghan Anand et al., *All the Ways Congress Wants to Change Section 230*, SLATE (Mar. 23, 2021, 5:45 AM), https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html.

545 David Chavern, *Section 230 Is a Government License to Build Rage Machines*, WIRED (Sep. 14, 2020, 9:00 AM), https://www.wired.com/story/opinion-section-230-is-a-government-license-to-build-rage-machines/ ("While Google and Facebook like to preach libertarian virtues like open competition and free speech, they are really living off a giant government subsidy.").

546 Rebecca Tushnet, *Power Without Responsibility*, 76 GEO. WASH. L. REV. 986, 1008-09 (2008) ("Congress believed that it needed to alter the common law . . . to give Internet intermediaries the chance to make their business models work. In essence, the CDA . . . subsidize[s] new intermediary models by protecting them from otherwise applicable law, but only as a matter of legislative grace.").

547 Agnieszka McPeak, *Platform Immunity Redefined*, 62 WM. & MARY L. REV. 1557, 1579-81 (2021) (summarizing legislative reform proposals).

548 *Id.* at 1581 n.127 (listing proposals to reimpose libel and defamation liability on digital platforms).

upon seclusion,[549] doxing,[550] or misuse of personal information.[551] Novel legal complaints have been suggested or filed against social media companies under public or private nuisance doctrine,[552] in consumer protection law for unfair and deceptive practices and false advertising,[553] and in products liability for design defects or failure to warn.[554] Legislative or judicial creation of new torts that are more directly suited to digital harms can help reduce the burden on plaintiffs to shoehorn digital harms into the elements of existing torts. Because current Article III standing doctrine makes it difficult for plaintiffs facing some novel digital harms to sue in federal court, state legislatures and courts, with lesser standing requirements, may be the most important sources for new causes of action. But Section 230 also stands as a roadblock to state lawmakers by expressly preempting state legislative attempts to impose liability on digital platforms.[555]

Litigation is already proceeding against digital platforms under many creative legal theories, often in state courts, with some suits seeking extraordinarily large damage awards that would cut significantly into Facebook and other platforms' profit margins.[556] But in most cases put forth by plaintiffs seeking redress for platform-related harms, digital platforms raise Section 230 as a defense.[557] In some instances, platforms attempt to stretch the Section 230

---

549 Hannah Harris, *Intrusion Upon Seclusion and Data Privacy: Shifting the Analysis for a New Problem*, 23 TUL. J. TECH. & INTELL. PROP. 101, 108-09 (2021).

550 Julia M. MacAllister, *The Doxing Dilemma: Seeking a Remedy for the Malicious Publication of Personal Information*, 85 FORDHAM L. REV. 2451, 2466-69 (2017).

551 Sarah Ludington, *Reining in the Data Traders: A Tort for the Misuse of Personal Information*, 66 MD. L. REV. 140, 143-46 (2006).

552 Michael J. Gray, Note, *Applying Nuisance Law to Internet Obscenity*, 6 J.L. & POL'Y FOR IINFO. SOC'Y 317, 318 (2010).

553 Amended Complaint & Demand for a Jury Trial at 55-59, Muslim Advocs. v. Zuckerberg, No. 2021 CA 001114 B (D.C. Super. Ct. filed Aug. 9, 2021).

554 Complaint at 67-69, Doe v. Meta Platforms, Inc., No. 4:22-cv-00051-YGR, (N.D. Cal. Jan. 5, 2022); Dorian Geiger, *Connecticut Mom Sues, Says Instagram, Snapchat Complicit in Tween Daughter's Suicide*, OXYGEN, (Feb. 4, 2022, 7:15 PM), https://www.oxygen.com/crime-news/instagram-snapchat-sued-by-mom-over-11-year-olds-suicide.

555 Ambika Kumar & James C. Grant, *State Attorneys General Propose Dramatic Amendment to Section 230*, DAVIS WRIGHT TREMAINE LLP (Sept. 2013), https://www.dwt.com/blogs/media-law-monitor/2013/08/state-attorneys-general-propose-dramatic-amendment ("The law . . . expressly preempts all inconsistent state and local laws.").

556 *See, e.g.*, Elizabeth Culliford, *Rohingya Refugees Sue Facebook for $150 Billion over Myanmar Violence*, REUTERS (Dec. 8, 2021, 2:14 PM), https://www.reuters.com/world/asia-pacific/rohingya-refugees-sue-facebook-150-billion-over-myanmar-violence-2021-12-07/ (alleging Facebook failed to act against "anti-Rohingya hate speech").

557 *See, e.g.,* Calvin Freiburger, *Texas Supreme Court Rejects Facebook's Section 230 Defense in Sex Trafficking Case*, LIFESITE NEWS (June 29, 2021, 4:19 PM), https://www.lifesitenews.com/news/texas-supreme-court-rejects-facebooks-section-230-

defense far beyond its typical scope. For example, in *Muslim Advocates v. Facebook*, a consumer advocacy group filed suit seeking to hold Facebook liable for misrepresentations made by company executives in their testimony to Congress over the company's content moderation practices.[558] In its initial response to the claims, Facebook argued that Section 230 immunizes any public statements made by its executives about the company's content moderation practices against claims of consumer deception or false advertising.[559] And while courts developed certain exceptions to Sections 230's blanket immunity,[560] in many cases, Section 230 still poses a significant hurdle to plaintiffs' attempts to recover from digital platforms. It stands to reason that unless Congress moves to amend the language of the provision, courts will rely on past precedent to continue construing Section 230's liability shield broadly in favor of digital platforms.

There is significant bipartisan consensus that Section 230 has unduly contributed to the massive power amassed by digital platforms, though this consensus disintegrates on how exactly Section 230 should be changed.[561] But reform of Section 230 is not limited to wholesale repeal. Initial legislative efforts have instead attempted to carve out particular causes of action from Section 230's sweeping immunity, reimposing liability for particularly egregious harms on platforms.[562] Though some of the sector-specific reforms have deleterious human rights and privacy implications,[563] starting with piecemeal reform rather than waiting for improbable political consensus to emerge on a total overhaul

---

defense-in-sex-trafficking-case/ ("Facebook cannot invoke [Section 230] . . . to evade a lawsuit . . . .").

558 *Case Overview:* Muslim Advocs. v. Zuckerberg, MUSLIM ADVOCS. https://muslimadvocates.org/court-case/muslim-advocates-v-mark-zuckerberg-et-al/ (last visited Sept. 24, 2022).

559 Defendant's Amended Motion to Dismiss Under Rule 12(b) at 12-13, Muslim Advocs. v. Zuckerberg, No. 2021 CA 001114 B (D.C. Super. Ct. filed Sept. 17, 2021) (arguing that Section 230 bars misrepresentation claims based on Facebook executives' congressional testimony).

560 ASHLEY JOHNSON & DANIEL CASTRO, INFO. TECH. & INNOVATION FOUND., THE EXCEPTIONS TO SECTION 230: HOW HAVE COURTS INTERPRETED SECTION 230? 4-8 (2021), http://www.iitfm.org/pdf/2021-230-report-2.pdf.

561 Anand et al., *supra* note 544.

562 Russell Brandom, Anti-Exploitation Bill Advances in Senate Despite Free Speech Concerns, VERGE (Feb. 10, 2022, 12:06 PM), https://www.theverge.com/2022/2/10/22927346/earn-it-act-markup-senate-judiciary-section-230-csam-non-consensual-porn (The EARN IT Act is "a controversial new bill targeting Section 230 protections for content involving online sexual exploitation.").

563 Quinta Jurecic, *The Politics of Section 230 Reform: Learning from FOSTA's Mistakes*, BROOKINGS (Mar. 1, 2022), https://www.brookings.edu/research/the-politics-of-section-230-reform-learning-from-fostas-mistakes/.

of Section 230 is likely lawmakers' best strategy. While the privacy and human rights risks raised by proposed Section 230 reforms must be taken seriously, modifications to Section 230 that impose additional liability on Facebook for the cost of its social harms will enable civil liability to function more effectively as a Pigouvian mechanism. The prospect of expensive and time-consuming litigation will push Facebook and other digital platforms toward investing in more socially optimal levels of content moderation and driving fundamental changes to their underlying ad-based business model.

CONCLUSION

Since Facebook's launch nearly twenty years ago, its corporate directors have often put profits before people, or as Zuckerberg prefers, "company over country."[564] But the company's critics have consistently overlooked the ways in which Delaware corporate law both mandates and incentivizes Facebook's directors to prioritize shareholder value over the public interest. As long as Facebook continues to experience the majority of its social harms as negative externalities, Delaware's unflinching commitment to shareholder primacy prevents the company's directors from truthfully making unprofitable decisions to redress those harms. Even Facebook's attempt to delegate decision-making authority to the independent Oversight Board verges on an unlawful abdication of corporate director fiduciary duties.

This Note analyzes two corporate law doctrines, shareholder primacy and the limits on director delegation via contract, and how those doctrines shape and constrain Facebook's incentives to increase user engagement and mitigate content moderation failures. Facebook's corporate law paradox casts doubt on the prospects for effective corporate self-regulation of content moderation, and more broadly, on the ability of existing corporate law to incentivize or even allow social media companies to meaningfully redress digital harms. In order to prompt meaningful investment in digital harm reduction, regulators have to change the incentives of digital platforms' corporate directors, either by modifying corporate law itself or by using other legal doctrines to price in the cost of their negative externalities.

---

564 Kate Losse, *I Was Zuckerberg's Speechwriter. "Companies over Countries" Was His Early Motto*, VOX (Apr. 16, 2018), https://www.vox.com/first-person/2018/4/11/17221344/mark-zuckerberg-facebook-cambridge-analytica.