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## JURIDICAL DISCOURSE FOR PLATFORMS

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*Facebook founder Mark Zuckerberg has created a private “Supreme Court,” or so he says. Since 2021, his company’s Oversight Board has issued verdicts on a smattering of Facebook’s decisions about online speech. Cynics frame the Board as a Potemkin village, but defenders invoke analogies to separation of powers to claim that this new body empowers the public and restrains the company. Some are even calling for a single “platform supreme court” to rule over the entire industry.*

*Juridical discourse for platforms is powerful, but it can also be deceptive. This Response explores how juridical discourse has legitimized and empowered Facebook’s Board, building on Professor Evelyn Douek’s critique of how a “stylized” picture likens content moderation to judicial review. While Douek focuses on how scholars and lawmakers preach this misleading picture, I expose how platforms drive juridical discourse for their own gain. This deeper understanding of platform complicity is key. Without it, we’ll struggle to comprehend or contest the illusory picture of content moderation favored by platforms. With it, we might better resist platforms’ attempts to thwart regulation that would better serve the public’s interests.*

### INTRODUCTION

Love it or hate it, Facebook’s fledgling Oversight Board is poised to usher in a new era of content moderation for online platforms.<sup>1</sup> The Board, launched two years ago to mixed fanfare and disdain, will review a smidgen of the company’s decisions about what may be shared on

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<sup>1</sup> See Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526, 526 n.2 (2022) (defining content moderation as “platforms’ systems and rules that determine how they treat user-generated content on their services”); SARAH T. ROBERTS, BEHIND THE SCREEN: CONTENT MODERATION IN THE SHADOWS OF SOCIAL MEDIA 33–51 (2019) (providing a seminal account of “commercial content moderation”); James Grimmelmann, *The Virtues of Moderation*, 17 YALE J.L. & TECH. 42, 47 (2015) (defining moderation as “the governance mechanisms that structure participation in a community to facilitate cooperation and prevent abuse”).

Facebook and Instagram. Discourse about the Board from both Facebook insiders and outsiders frequently invokes traditional governance concepts of separation of powers and judicial independence.<sup>2</sup> Indeed, as Professor Evelyn Douek writes in her recent article, the Board “exemplifies” how standard accounts of content moderation can lead to “judicial review–style solutions — and platforms’ encouragement of this framing.”<sup>3</sup> In this analogy, platforms have acted as legislatures by making rules, as executives by enforcing them, and as judiciaries by resolving ensuing disputes. But external oversight via the new Board purportedly devolves part of that adjudicatory power to a new “quasi-judicial” external entity intended to provide process, transparency, and impartiality.<sup>4</sup> Facebook’s embrace of judicial analogies is no accident. The company’s Chief Executive Officer Mark Zuckerberg has compared Facebook’s overseers to a “Supreme Court,”<sup>5</sup> and the Board’s “Charter” outlines how its “cases” will have “precedential value.”<sup>6</sup> People inside and outside Facebook use juridical discourse to claim that the platform is ceding power through external oversight.<sup>7</sup>

In the Board’s shadow, momentum is also growing to create a cross-platform body to oversee other companies, not just Facebook.<sup>8</sup> There’s a surprising discursive harmony between platform insiders and outsiders in advancing such proposals. Scholars and activists propose that a

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<sup>2</sup> See generally Josh Cowls, Philipp Darius, Dominiquo Santistevan & Moritz Schramm, *Constitutional Metaphors: Facebook’s “Supreme Court” and the Legitimation of Platform Governance*, NEW MEDIA & SOC’Y (2022), <https://doi.org/10.1177/14614448221085559> [<https://perma.cc/676A-W3YA>].

<sup>3</sup> Douek, *supra* note 1, at 567.

<sup>4</sup> See Kate Klonick, Feature, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418, 2457–87, 2499 (2020) (describing the Board’s structure and claiming that Facebook has “voluntarily divest[ed] itself of part of its power in order to create an independent oversight body,” *id.* at 2499).

<sup>5</sup> Ezra Klein, *Mark Zuckerberg on Facebook’s Hardest Year, And What Comes Next*, VOX (Apr. 2, 2018, 6:00 AM), <https://www.vox.com/2018/4/2/17185052/mark-zuckerberg-facebook-interview-fake-news-bots-cambridge> [<https://perma.cc/57FE-TAQH>].

<sup>6</sup> OVERSIGHT BD., OVERSIGHT BOARD CHARTER (2019), <https://oversightboard.com/governance> [<https://perma.cc/J4D6-AE5Z>].

<sup>7</sup> In framing these developments in terms of discourse, I draw inspiration from sociolegal scholarship by Professor Ari Ezra Waldman, who in turn builds on Michel Foucault’s work. See ARI EZRA WALDMAN, *INDUSTRY UNBOUND: THE INSIDE STORY OF PRIVACY, DATA, AND CORPORATE POWER* 4, 47, 272 n.6 (2021). Waldman recounts how platforms use the “power of discourse” to “influence how we think about privacy not just to erode our interest in and capacity to enact robust privacy laws, but to entrench corporate-friendly ideas as common sense and mainstream among their workers.” *Id.* at 6. This Response builds on Waldman’s insights, mainly focusing on platform discourses about expression rather than about privacy. See *id.* at 46 (observing that there are “numerous discourses at play in informational capitalism”).

<sup>8</sup> See Evelyn Douek, *The Limits of International Law in Content Moderation*, 6 U.C. IRVINE J. INT’L TRANSNAT’L & COMP. L. 37, 73 (2021) (canvassing various proposals for “independent or quasi-independent institutions” to oversee platforms).

“platform supreme court”<sup>9</sup> or “Social Media Council”<sup>10</sup> could supervise the entire industry, rule on inter-platform controversies, and establish common procedures and standards. Legislators, meanwhile, are toying with laws to encourage or mandate centralized oversight and governance through external bodies and uniform standards. Facebook’s management has enthusiastically endorsed this trend, with Zuckerberg and his team openly hoping the Board will expand to “include more companies across the industry”<sup>11</sup> and provide uniformity as “an industry-wide body.”<sup>12</sup>

In *Content Moderation as Systems Thinking*, Douek challenges a “stylized” or “standard” picture of content moderation that props up these recent trends in platform governance.<sup>13</sup> Though she addresses the broader landscape of content moderation,<sup>14</sup> her article’s insights are essential to understanding the genesis and trajectory of Facebook’s Board.

Douek’s central claim is that a “misleading and incomplete” picture has dominated regulatory and academic discussion of platform governance.<sup>15</sup> This stylized picture depicts content moderation as a “rough online analog of offline judicial adjudication of speech rights”<sup>16</sup> whereby each platform applies “legislative-style rules drafted by platform policy-makers to individual cases and hears appeals from those decisions.”<sup>17</sup> As a result of this narrative, much discussion about platform governance obsesses over “paradigm cases involving ‘a platform’s review of user-generated content posted on its site and the corresponding decision to

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<sup>9</sup> See Rory Van Loo, *Federal Rules of Platform Procedure*, 88 U. CHI. L. REV. 829, 873–75 (2021) (suggesting, with wise caveats, that “a central appeals court — a platform supreme court — is worth considering at the very least to provide effective remedies,” *id.* at 874).

<sup>10</sup> See, e.g., ARTICLE 19, THE SOCIAL MEDIA COUNCILS: CONSULTATION PAPER (2019), <https://www.article19.org/wp-content/uploads/2019/06/A19-SMC-Consultation-paper-2019-v05.pdf> [<https://perma.cc/38QS-PLTA>]; DAVID KAYE, SPEECH POLICE: THE GLOBAL STRUGGLE TO GOVERN THE INTERNET 122 (2019).

<sup>11</sup> Mark Zuckerberg, *Facebook’s Commitment to the Oversight Board*, FACEBOOK (Sept. 17, 2019), <https://about.fb.com/wp-content/uploads/2019/09/letter-from-mark-zuckerberg-on-oversight-board-charter.pdf> [<https://perma.cc/2P5R-RW3S>].

<sup>12</sup> New America, *The Future of Free Expression Online in America*, YOUTUBE, at 38:39 (July 18, 2019), <https://www.youtube.com/watch?v=fTIOQsZJ-Mo> [<https://perma.cc/VDG5-9ZA6>].

<sup>13</sup> Douek, *supra* note 1, at 528; see generally Robert Gorwa, *What Is Platform Governance?*, 22 INFO., COMM’N & SOC’Y 854, 855 (2019) (defining platform governance as “the layers of governance relationships structuring interactions between key parties in today’s platform society”).

<sup>14</sup> See, e.g., Douek, *supra* note 1, at 535–64.

<sup>15</sup> *Id.* at 528; see also Ari Waldman, *Shifting the Content Moderation Paradigm*, JOTWELL (Mar. 1, 2022), <https://cyber.jotwell.com/shifting-the-content-moderation-paradigm> [<https://perma.cc/T3TW-XQGA>] (critiquing the “standard picture” that likens content moderation to “an old Roman emperor whose thumbs up or thumbs down decides the fate of a gladiator: some all-powerful person or all-powerful thing is deciding whether a post stays up or comes down”).

<sup>16</sup> Douek, *supra* note 1, at 528.

<sup>17</sup> *Id.* at 535.

keep it up or take it down.”<sup>18</sup> Moreover, the “range of remedies is limited: the original decision is affirmed or reversed.”<sup>19</sup>

As Douek shows, this stylized picture misleadingly evokes a “day-in-court ideal” of content moderation by suggesting that “individual utterances get carefully measured against lofty speech rules and principles.”<sup>20</sup> The reality is quite different — and more complex — in part because the “scale and speed” of online speech means that content moderation goes far beyond the aggregation of many “individual adjudications.”<sup>21</sup> The stylized picture ignores these dynamics. Instead, it “invokes analogies to the practice of offline constitutional law,” such that key questions of content moderation “resemble those raised in First Amendment cases”<sup>22</sup> and can be answered by developing “a body of precedent”<sup>23</sup> and constructing “governance systems similar to the offline justice system.”<sup>24</sup>

The stylized picture isn’t just abstract theory. Lawmakers, Douek explains, have channeled this picture, seeking to hold platforms accountable and correct errors by mandating “individual *ex post* review,”<sup>25</sup> an “appeal” to an “independent” arbiter,<sup>26</sup> “reasons” for adverse decisions,<sup>27</sup> and “ever more due process rights.”<sup>28</sup> Some platforms have touted their own voluntary efforts to give users these “rule-of-law” goodies, reaching for the stylized narrative to pat themselves on the back.<sup>29</sup> These trends carry prospective risks, as lawmakers seem poised to “overlook[] many of the most important forms of platform decisionmaking” and “lock[] in a form of oversight that is limited in its ambition.”<sup>30</sup> In short, Douek

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<sup>18</sup> *Id.* at 535–36 (quoting Klonick, *supra* note 4, at 2427).

<sup>19</sup> *Id.* at 537.

<sup>20</sup> *Id.* at 538 (citation omitted); *see, e.g.*, Kate Klonick, *Inside the Making of Facebook’s Supreme Court*, *NEW YORKER* (Feb. 12, 2021), <https://www.newyorker.com/tech/annals-of-technology/inside-the-making-of-facebooks-supreme-court> [<https://perma.cc/S3YP-3HKR>] (asserting that Facebook “has developed a set of rules and practices in the ad-hoc manner of common law”).

<sup>21</sup> Douek, *supra* note 1, at 528.

<sup>22</sup> *Id.* at 538.

<sup>23</sup> *Id.* at 556.

<sup>24</sup> *Id.* at 529.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 565.

<sup>27</sup> *Id.* at 566.

<sup>28</sup> *Id.* at 528; *see also* Waldman, *supra* note 15 (observing that the stylized picture of content moderation as mainly involving “*ex post* judicialish review” of one-off platform decisions creates the misimpression that the best reforms should rely on “procedural due processish protections”).

<sup>29</sup> *See* Douek, *supra* note 1, at 553. In a related move, a Facebook-commissioned group of Yale academics has presented recommendations on how to improve “procedural justice” in Facebook’s “appeals” process, including through using “citizens juries” to “evaluate appeals.” BEN BRADFORD, FLORIAN GRISEL, TRACEY L. MEARES, EMILY OWENS, BARON L. PINEDA, JACOB N. SHAPIRO, TOM R. TYLER, DANIELI EVANS PETERMAN, JUST. COLLABORATORY, YALE L. SCH., REPORT OF THE FACEBOOK DATA TRANSPARENCY ADVISORY GROUP 44 (2019), [https://law.yale.edu/sites/default/files/area/center/justice/document/dtag\\_report\\_5.22.2019.pdf](https://law.yale.edu/sites/default/files/area/center/justice/document/dtag_report_5.22.2019.pdf) [<https://perma.cc/8T43-HYWX>]; *see also id.* at 14–15, 36–39 (expanding upon these recommendations).

<sup>30</sup> Douek, *supra* note 1, at 548.

concludes, the stylized picture is likely to produce “accountability theater rather than actual accountability.”<sup>31</sup>

But who is responsible for this juridical discourse around content moderation? And why paint such a misleading and incomplete picture?

This Response sheds light on these questions and builds on Douek’s observations. But while she frames her critique as a story of scholars leading lawmakers astray, I center the role of *platforms* in cultivating the stylized narrative that dominates popular, academic, and legislative debates.<sup>32</sup> To do so, I use the example of Facebook’s Oversight Board — in some ways, the embodiment of platforms’ juridical discourse because the Board’s creators justified its role through a theory of separation of powers and the image of a supreme court.<sup>33</sup> Excavating the history behind the Board illuminates how scholars, lawmakers, *and platforms* shape discourse in this space.<sup>34</sup>

Like Douek’s tale, mine is a cautionary one. Based partly on fieldwork I conducted as the Board took shape, I reveal how and why key figures at Facebook and the Board exploited legal analogies when portraying this novel institution and justifying its potential expansion to oversee other platforms.<sup>35</sup> Though my main focus is on Facebook and

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<sup>31</sup> *Id.* at 528.

<sup>32</sup> For example, Douek asserts that a “wealth of early and current academic, civil society and public discourse,” *id.* at 535, invokes the stylized picture, which gives lawmakers “an inaccurate understanding” of moderation, *id.* at 533. Douek isn’t naïve to platforms’ complicity, but her account often casts platforms as grateful bystanders or beneficiaries of these narratives without comprehensively interrogating the companies’ roles in fostering them. *See, e.g., id.* at 535–64.

<sup>33</sup> *See* The Joe Rogan Experience, #1863 — Mark Zuckerberg, SPOTIFY, at 1:46:07 (Aug. 25, 2022), <https://open.spotify.com/episode/51gxrAActH18RGhKNza598> [<https://perma.cc/J5GT-DCCP>] (featuring Zuckerberg praising the Board as a kind of “separation of powers” because that form of governance is “one of the things that our country and our government gets right”).

<sup>34</sup> *See* Chinmayi Arun, *Facebook’s Faces*, 135 HARV. L. REV. F. 236, 236 (2022) (reminding us that Facebook “has many faces — different teams working towards different goals, and engaging with different ministries, institutions, scholars, and civil society organizations”).

<sup>35</sup> Interview quotes in this Response are from conversations that weren’t subject to nondisclosure agreements, nor was anything in this Response restrained by any embargo. Before I conducted interviews at Facebook’s headquarters, a company representative told me that, although I wasn’t required to sign a nondisclosure agreement, I couldn’t disclose any quotes without providing a draft and receiving the company’s permission. This kind of preclearance agreement *is* a nondisclosure agreement. Although Facebook’s representative told me other academics had accepted these terms, I declined to use quotes from those interviews to ensure academic integrity. *See* WALDMAN, *supra* note 7, at 6, 90–93 (condemning Facebook’s relationships with “friendly academics” who let the company review and preclear their work); Thomas E. Kadri, *Digital Gatekeepers*, 99 TEX. L. REV. 951, 982 n.187 (2021) (criticizing Facebook’s “ask Facebook first” policy under which some academics give the company “review, revision, and veto powers over their work”). Since December 2020, I’ve participated in a group convened by Meta (Facebook’s parent company) to provide expertise on addressing online abuse. Participants receive annual honoraria of \$6000 to attend roundtable discussions that are subject to nondisclosure agreements covering nonpublic and confidential information. I donated the first honorarium to the Equal Justice Initiative and accepted the second after concluding that it was appropriate, even advisable, for a for-profit company to compensate us for

its Board, my research offers insights applicable across platforms, especially dominant incumbents that exert the greatest power. Without acknowledging how companies are complicit in painting the stylized picture of content moderation, we'll struggle to confront the "stickiness" of deceptive narratives that shape what Douek calls the "first wave" of platform-governance discourse.<sup>36</sup>

Debates about platform governance are evolving in legislative chambers, public discussions, and company boardrooms. At this critical juncture, we should scrutinize how platforms entrench their power and the discourses that influence decisionmakers.<sup>37</sup> While external oversight could play *some* role, we should be skeptical of claims that a body like Facebook's Board will meaningfully enhance users' participation in governance or restrain a platform's discretion.<sup>38</sup> The Board won't accomplish either goal, and expansion across the industry can't fix its defects.<sup>39</sup>

Following this account, I briefly sketch an idea of *platform federalism* to assist a "second wave" of discourse and regulatory efforts. Federal systems can promote liberty, innovation, competition, pluralism, and expertise — values important in any scheme of platform governance. Lessons from traditional federalism could guide us in regulating platform power and fostering healthier digital environments, whether through law, policy, or technology.<sup>40</sup>

This Response proceeds in two Parts. Part I explores the Board's past and its possible futures. Part II casts a critical eye over the juridical discourse that has legitimized and empowered the Board and surveys Facebook's motives for adopting this discourse. The conclusion suggests that values and tools associated with federalism, rather than separation of powers, offer better guidance for platform governance.

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our labor, time, and expertise. My decision was influenced by the fact that honoraria aren't associated with any academic research, but rather with discussions involving other scholars. My initial experiences also reassured me that I could use this forum to help abuse victims by scrutinizing Meta's policies without jeopardizing my integrity. Finally, Meta's decision not to publicize the discussions suggested that the company wasn't exploiting us to gain positive publicity or legitimacy.

<sup>36</sup> See Douek, *supra* note 1, at 534.

<sup>37</sup> See generally JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM (2019) (exploring how legal and technical discourses combine to advance platforms' power); Thomas E. Kadri, *Platforms as Blackacres*, 68 UCLA L. REV. 1184 (2022) (critiquing how cyber-trespass law gives platforms broad decision-making power to limit access to their services).

<sup>38</sup> See, e.g., Klonick, *supra* note 4, at 2418 (proclaiming that the Board "has great potential to set new precedent for user participation in private platforms' governance and a user right to procedure in content moderation").

<sup>39</sup> See *infra* sections II.B–D, pp. 187–97.

<sup>40</sup> See generally Thomas E. Kadri, *Networks of Empathy*, 2020 UTAH L. REV. 1075 (exploring how digital abuse might be addressed through both legal and extralegal regulation).

## I. A JOURNEY FROM “I’M CEO . . . BITCH!” TO A “PLATFORM SUPREME COURT”

What follows is an account of how various stakeholders have framed Facebook’s Oversight Board. Many people have shaped perceptions of the Board, including academics, activists, and legislators. But I show that leaders within Facebook and the Board were protagonists in these efforts. With this fuller history told, we can better understand why platforms harness juridical discourse and how it serves their interests.

### A. *The Board’s Origins*

Once upon a time, Facebook’s moderation practices were opaque and improvised. Few outsiders knew how the company dealt with content, and even insiders tell a tale of haphazard evolution from a time when there were “no rules on the books.”<sup>41</sup> Over the years, the company created standards and structures to make moderation decisions, blending off-site contractors from the Global South, policymakers in the Global North, artificial intelligence, and top executives making one-off calls in prominent disputes.<sup>42</sup>

In 2005, Zuckerberg’s corporate business card proclaimed: “I’m CEO . . . Bitch!”<sup>43</sup> The narrative surrounding his power and his company has changed markedly since then. By 2018, one scholar claimed that Facebook’s moderators “act in a capacity very similar to that of judges,”<sup>44</sup> while another asserted that companies were developing a kind of “platform law.”<sup>45</sup> As it turns out, similar juridical discourse was circulating contemporaneously within Facebook as its leaders fathomed a

<sup>41</sup> Jeffrey Rosen, *The Delete Squad*, NEW REPUBLIC (Apr. 29, 2013), <https://newrepublic.com/article/113045/free-speech-internet-silicon-valley-making-rules> [<https://perma.cc/8R3R-H4Y3>].

<sup>42</sup> See Anupam Chander, *A Facebook Supreme Court?*, BALKINIZATION (May 31, 2019), <https://balkin.blogspot.com/2019/05/a-facebook-supreme-court.html> [<https://perma.cc/PM2M-VYUF>] (observing that an unofficial policy of “Mark Decides” has seen Zuckerberg make ad hoc exceptions to Facebook’s rules in key moments); Jason Koebler & Joseph Cox, *The Impossible Job: Inside Facebook’s Struggle to Moderate Two Billion People*, VICE (Aug. 23, 2018, 1:15 PM), [https://www.vice.com/en\\_us/article/xwk9zd/how-facebook-content-moderation-works](https://www.vice.com/en_us/article/xwk9zd/how-facebook-content-moderation-works) [<https://perma.cc/DXP2-MNJB>] (quoting an early Facebook employee as saying that Sheryl Sandberg “was the court’s highest authority” on big moderation questions); IM SCHATTEN DER NETZWELT [THE CLEANERS] (Gebrueder Beetz Filmproduktion 2018) (exposing the harsh realities of content moderation, including the labor conditions faced by platform workers based in the Philippines).

<sup>43</sup> DAVID KIRKPATRICK, *THE FACEBOOK EFFECT: THE INSIDE STORY OF THE COMPANY THAT IS CONNECTING THE WORLD* 129 (2010).

<sup>44</sup> Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1647 (2018). Professor Rory Van Loo inspired Professor Kate Klonick’s work during a workshop of his prescient article exploring how “[c]orporations are increasingly assuming roles associated with courthouses” through the rules that govern their relationships with and between their customers, including how platforms like Twitter and Reddit play a “quasi-judicial role” through content moderation. See Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. ON REG. 547, 554, 602 (2016).

<sup>45</sup> David Kaye (Special Rapporteur), *Report of the Special Rapporteur on the Promotion and*

new institution — the Oversight Board — to rule over the kingdom of “Facebookistan.”<sup>46</sup>

The Board sits at the “apex” of Facebook’s moderation system.<sup>47</sup> Composed of twenty-three members, the Board reviews a smattering of Facebook’s judgments about individual pieces of content and issues decisions that are “highly specific to their unique factual context, under Facebook’s community standards, values, and international human rights norms.”<sup>48</sup> The Board may also issue nonbinding policy recommendations.<sup>49</sup> Its website proudly states its goal: “Ensuring respect for free expression, through independent judgment.”<sup>50</sup>

The Board has been infused with juridical discourse from the start. Harvard Law School’s Professor Noah Feldman was cycling around Stanford’s campus in early 2018 when he apparently “dreamt up” the idea of a “Facebook Supreme Court,” not long after writing a book on James Madison.<sup>51</sup> Feldman pitched it to his college friend, who conveniently happened to be Facebook Chief Operating Officer Sheryl Sandberg, and before long an “intrigued” Zuckerberg commissioned Feldman to flesh out his ideas in writing.<sup>52</sup> In a pair of slender memos, Feldman drew on his expertise in constitutional law and urged platforms like Facebook to establish “their own quasi-legal systems”<sup>53</sup> that would enable them “to act like governments and establish the private equivalent of a constitutional principle of expression.”<sup>54</sup> According to Feldman,

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*Protection of the Right to Freedom of Opinion and Expression*, at 3, U.N. Doc. A/HRC/38/35 (Apr. 6, 2018); see also Kate Klonick, *Facebook v. Sullivan*, in *THE PERILOUS PUBLIC SQUARE* 333, 337 (David E. Pozen ed., 2020) (analogizing Facebook’s speech policies to “a common law system”).

<sup>46</sup> See REBECCA MACKINNON, *CONSENT OF THE NETWORKED* 150 (2012) (referring to Facebook’s “digital kingdom” as “Facebookistan”); Anupam Chander, *Facebookistan*, 90 N.C. L. REV. 1807, 1808 (2012) (using the same moniker when exploring “[w]ho makes the rules” on and for Facebook).

<sup>47</sup> Douek, *supra* note 1, at 567.

<sup>48</sup> *Id.* at 568.

<sup>49</sup> Evelyn Douek, *Facebook’s “Oversight Board”: Move Fast with Stable Infrastructure and Humility*, 21 N.C. J.L. & TECH. 1, 36–37 (2019).

<sup>50</sup> OVERSIGHT BD., <https://www.oversightboard.com> [<https://perma.cc/7LVM-MGQ5>].

<sup>51</sup> Mark Sullivan, *Exclusive: The Harvard Professor Behind Facebook’s Oversight Board Defends Its Role*, FAST CO. (July 8, 2019), <https://www.fastcompany.com/90373102/exclusive-the-harvard-professor-behind-facebooks-oversight-board-defends-its-role> [<https://perma.cc/UDY3-VVMS>]; see also Steven Levy, *Why Mark Zuckerberg’s Oversight Board May Kill His Political Ad Policy*, WIRED (Jan. 28, 2019, 2:00 PM), <https://www.wired.com/story/facebook-oversight-board-by-laws> [<https://perma.cc/QJ7U-B6MB>].

<sup>52</sup> Sullivan, *supra* note 51.

<sup>53</sup> Noah Feldman, *A Supreme Court for Facebook* (Jan. 30, 2018), reprinted in ZOE MENTEL DARMÉ, MATT MILLER & KEVIN STEEVES, *GLOBAL FEEDBACK AND INPUT ON THE FACEBOOK OVERSIGHT BOARD FOR CONTENT DECISIONS* app. at 101, 101 (2019) (Feldman’s memos were originally authored in January and March of 2018).

<sup>54</sup> *Id.* app. at 103.



“we need a Supreme Court of Facebook”<sup>55</sup> — a corporate institution to “protect and define free expression and association on Facebook.”<sup>56</sup>

A devotee of Feldman’s work might have been surprised. Not long before, he seemed to scoff at the idea of platforms playing such a role: “These social media giants are private actors, not the state,” he wrote, warning that they “can’t be trusted to protect free speech, nor is it their obligation.”<sup>57</sup> Even after the Board’s launch, he admitted that it’s “a strange thing” because “Facebook is not a country, and this body looks sort of like the court.”<sup>58</sup>

But Zuckerberg relished the analogy, parroting it soon after Feldman’s memos reached his desk. In an April 2018 podcast, Facebook’s chief invited listeners to “imagine some sort of structure, almost like a Supreme Court, that is made up of independent folks who don’t work for Facebook, who ultimately make the final judgment call on what should be acceptable speech in a community that reflects the social norms and values of people all around the world.”<sup>59</sup> With that, the judicial parallel entered public discourse and has stuck ever since.

### B. *Juridical Discourse and the Board*

As the Board took shape, Facebook’s team doubled down on its juridical discourse. At the Aspen Ideas Festival, Zuckerberg told Professor Cass Sunstein that the Board was an “appeal system” and “a judicial analog in creating some separation of powers.”<sup>60</sup> One of the Board’s architects within Facebook, Zoe Darmé, called the Supreme Court metaphor “correct” because the Board “will be at the top of an appeals process” and feature “learned people deciding on very tough value-balancing questions.”<sup>61</sup> Shaarik Zafar, a Facebook Public Policy Manager, framed the Board as an “independent” and “deliberative” body to issue decisions with “the value of precedent.”<sup>62</sup> Facebook employees working on the Board called its charter a “constitution” and its bylaws the “rules of the court,” even going so far as to use feather-topped pens during meetings to mimic the Framers’ quills.<sup>63</sup>

<sup>55</sup> *Id.* app. at 101.

<sup>56</sup> Noah Feldman, *Facebook Supreme Court: A Governance Solution* (Mar. 2018), reprinted in DARMÉ, MILLER & STEEVES, *supra* note 53, app. at 104, 104.

<sup>57</sup> Noah Feldman, *Free Speech Isn’t Facebook’s Job*, BLOOMBERG (June 1, 2016, 4:08 PM), <https://www.bloomberg.com/view/articles/2016-06-01/it-s-not-facebook-s-job-to-guarantee-free-speech> [<https://perma.cc/S8XJ-DS5G>].

<sup>58</sup> See Levy, *supra* note 51.

<sup>59</sup> Klein, *supra* note 5.

<sup>60</sup> Aspen Institute, *A Conversation with Mark Zuckerberg*, YOUTUBE, at 43:49, 44:34 (June 26, 2019), <https://www.youtube.com/watch?v=uHk2WfL5Gs4> [<https://perma.cc/525D-QH2D>].

<sup>61</sup> The Lawfare Podcast, *Zoe Darmé on the Facebook Oversight Board*, LAWFARE, at 22:55 (Nov. 14, 2019, 10:40 AM), <https://www.lawfareblog.com/lawfare-podcast-zoe-darm%C3%A9-facebook-oversight-board> [<https://perma.cc/K4TB-5FSC>].

<sup>62</sup> New America, *supra* note 12, at 34:25.

<sup>63</sup> Klonick, *supra* note 20.

Many in the media, civil society, and academia adopted similar language, albeit critically or skeptically at times. Some described the Board as a group of “pseudo-jurists”<sup>64</sup> forming a “pseudo-independent group”<sup>65</sup> to act as a “pseudo-judiciary,”<sup>66</sup> “pseudo-judicial body,”<sup>67</sup> or “pseudo-Supreme Court”<sup>68</sup> for the “Republic of Facebook.”<sup>69</sup> Others queried if this “quasi-judicial body”<sup>70</sup> with a “quasi-legal structure”<sup>71</sup> and “quasi-normative and executive powers”<sup>72</sup> would play a “quasi-judicial role”<sup>73</sup> and provide “quasi-constitutional checks and balances to one of the planet’s largest quasi-states.”<sup>74</sup> Some framed the institution as a “para-judicial apparatus” for “corporate justice,”<sup>75</sup> a “judicial-like body” that we might nickname “Facecourt,”<sup>76</sup> an “independent

<sup>64</sup> Editorial Board, Opinion, *Will Facebook’s Oversight Board Actually Hold the Company Accountable?*, WASH. POST (May 17, 2020, 12:23 PM), [https://www.washingtonpost.com/opinions/will-facebooks-oversight-board-actually-hold-the-company-accountable/2020/05/17/e1d46f50-93cd-11ea-9f5e-56d8239bf9ad\\_story.html](https://www.washingtonpost.com/opinions/will-facebooks-oversight-board-actually-hold-the-company-accountable/2020/05/17/e1d46f50-93cd-11ea-9f5e-56d8239bf9ad_story.html) [https://perma.cc/3U33-TL24].

<sup>65</sup> Tyler Sonnemaker, *As Facebook Prepares to Outsource Tough Content Decisions to Its New “Supreme Court,” Experts Warn It Still Operates Within a Dictatorship and Can’t Legislate a Better Government*, BUS. INSIDER (Sept. 26, 2020, 7:22 AM), <https://www.businessinsider.com/facebook-oversight-board-is-a-supreme-court-in-zuckerberg-dictatorship-2020-9> [https://perma.cc/8APL-7JZN].

<sup>66</sup> David Morar, Opinion, *Open Forum: Facebook’s Empty Action on Content Moderation*, S.F. CHRON. (Sept. 27, 2019), <https://www.sfchronicle.com/opinion/openforum/article/Open-Forum-Facebook-s-empty-action-on-content-14471550.php> [https://perma.cc/9Q6R-YZTH].

<sup>67</sup> David Morar, *Facebook’s Oversight Board Makes an Imperfect Case for Private Governance*, BROOKINGS INST. (Feb. 23, 2021), <https://www.brookings.edu/blog/techtank/2021/02/23/facebook-oversight-board-makes-an-imperfect-case-for-private-governance> [https://perma.cc/ZTF6-32X8].

<sup>68</sup> Adi Robertson, *Go Read About How Facebook’s Pseudo-Supreme Court Came Together*, THE VERGE (Feb. 12, 2021, 12:04 PM), <https://www.theverge.com/2021/2/12/22280003/facebook-oversight-board-supreme-court-feature-new-yorker> [https://perma.cc/38J2-F4LV].

<sup>69</sup> David Kaye, *The Republic of Facebook*, JUST SEC. (May 6, 2020), <https://www.justsecurity.org/70035/the-republic-of-facebook> [https://perma.cc/NXV8-KQ88].

<sup>70</sup> Gaurav Laroia & Carmen Scurato, *Free Press Comments on Facebook Oversight Board*, FREE PRESS (May 13, 2019), [https://www.freepress.net/sites/default/files/2019-05/Facebook\\_Oversight\\_Board\\_Comments.pdf](https://www.freepress.net/sites/default/files/2019-05/Facebook_Oversight_Board_Comments.pdf) [https://perma.cc/6VFC-JPJK].

<sup>71</sup> Roger McNamee & Maria Ressa, *Facebook’s “Oversight Board” Is a Sham. The Answer to the Capital Riot Is Regulating Social Media*, TIME (Jan. 28, 2021, 10:30 AM), <https://time.com/5933989/facebook-oversight-regulating-social-media> [https://perma.cc/7A4L-9MJG].

<sup>72</sup> Oreste Pollicino & Giovanni De Gregorio, *Shedding Light on the Darkness of Content Moderation*, VERFASSUNGSBLOG (Feb. 5, 2021), <https://verfassungsblog.de/fob-constitutionalism> [https://perma.cc/QE74-N53V].

<sup>73</sup> Billy Perrigo, *Facebook’s New Oversight Board Is Deciding Donald Trump’s Fate. Will It Also Define the Future of the Company?*, TIME (Jan. 29, 2021, 11:55 AM), <https://time.com/5934393/facebook-oversight-board-big-tech-future> [https://perma.cc/GWL2-LDKE].

<sup>74</sup> Max Read, *Facebook Is Going to Have a Supreme Court. Will It Work?*, N.Y. MAG.: INTELLIGENCER (Jan. 30, 2019), <https://nymag.com/intelligencer/2019/01/facebook-new-oversight-board-is-a-supreme-court.html> [https://perma.cc/MG2K-M2VY].

<sup>75</sup> Genevieve Lakier (@glakier), TWITTER (Jan. 21, 2021, 3:01 PM), <https://twitter.com/glakier/status/1352345704644161536?s=20> [https://perma.cc/5545-2U2Z].

<sup>76</sup> Mark F. Walsh, *Facebook Plans to Create a Judicial-Like Body to Address Controversial Speech*, ABA J. (May 1, 2019, 12:45 AM), <http://www.abajournal.com/magazine/article/facebook-judicial-review-controversial-speech> [https://perma.cc/SJ59-RP6G].

arbitrator,”<sup>77</sup> a “corporate supercourt,”<sup>78</sup> and a “high court” that “benevolent dictator” Zuckerberg is creating for his “empire.”<sup>79</sup> Sticking with legalistic language, some likened the Board’s members to a “Star-Studded Jury,”<sup>80</sup> a “council of sage advisers,”<sup>81</sup> and the “‘dream team’ of freedom of expression,”<sup>82</sup> while others called the Board a “legal UFO,”<sup>83</sup> a “special censorship committee,”<sup>84</sup> and the “United Nations” for online speech.<sup>85</sup> More dismissively, others belittled the whole institution as a “toothless advisory council”<sup>86</sup> or “toothless Supreme Court”<sup>87</sup> presided over by “a crack team of 40 very expensive and learned experts to tackle an infinitesimally smaller number of content decisions.”<sup>88</sup>

What does the Board make of all this legal kinship? It too, for the most part,<sup>89</sup> has embraced the separation-of-powers, checks-and-balances, court-themed branding. The Board’s “Charter” describes it as a body to “protect free expression by making principled, independent

<sup>77</sup> Andrew Hutchinson, *Facebook Responds to First Rulings from Its New Oversight Board*, SOC. MEDIA TODAY (Feb. 25, 2021), <https://www.socialmediatoday.com/news/facebook-responds-to-first-rulings-from-its-new-oversight-board/595747> [<https://perma.cc/8S37-GX2W>].

<sup>78</sup> Ben Smith, *Trump Wants Back on Facebook. This Star-Studded Jury Might Let Him.*, N.Y. TIMES (July 12, 2021), <https://www.nytimes.com/2021/01/24/business/media/trump-facebook-oversight-board.html> [<https://perma.cc/FCJ7-6SRU>].

<sup>79</sup> Read, *supra* note 74.

<sup>80</sup> Smith, *supra* note 78.

<sup>81</sup> Klonick, *supra* note 20.

<sup>82</sup> *Facebook and Instagram: Who Are the “Wise Men” of the Council Responsible for Monitoring Networks Closely?*, WORLD TODAY NEWS (Feb. 12, 2021), <https://www.world-today-news.com/facebook-and-instagram-who-are-the-wise-men-of-the-council-responsible-for-monitoring-networks-closely> [<https://perma.cc/U4VZ-BGCJ>].

<sup>83</sup> *Id.*

<sup>84</sup> Nancy Scola, *Facebook’s Smooth New Political Fixer*, POLITICO (May 14, 2020, 7:55 PM) (quoting Senator Josh Hawley), <https://www.politico.com/news/magazine/2020/05/14/facebook-nick-clegg-profile-122836> [<https://perma.cc/2DW3-RBL5>].

<sup>85</sup> Kara Swisher, Opinion, *Who’s Up for the Job of Decontaminating Facebook?*, N.Y. TIMES (May 6, 2020), <https://www.nytimes.com/2020/05/06/opinion/facebook-independent-oversight-board.html> [<https://perma.cc/LG53-4TCL>].

<sup>86</sup> Emily Bell, *Facebook’s Oversight Board Plays It Safe*, COLUM. JOURNALISM REV. (Dec. 3, 2020), [https://www.cjr.org/tow\\_center/facebook-oversight-board.php](https://www.cjr.org/tow_center/facebook-oversight-board.php) [<https://perma.cc/TW3W-NXB7>].

<sup>87</sup> David Morar, *Facebook’s Oversight Board: A Toothless Supreme Court?*, INTERNET GOVERNANCE PROJECT (Oct. 2, 2019), <https://www.internetgovernance.org/2019/10/02/facebooks-oversight-board-a-judiciary-with-no-constitution> [<https://perma.cc/QK5G-2UYN>].

<sup>88</sup> 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> [<https://perma.cc/X5WY-WP22>].

<sup>89</sup> One member who expressed some hesitancy is American political theorist John Samples, at least before he joined the Board. While Facebook was still deciding who would sit on the Board, Samples criticized Feldman’s view that the members should be lawyers, partly because Samples felt that Facebook users would need more representation in the platform’s rulemaking process for its “basic law” — the Community Standards — to have the legitimacy accorded to law. John Samples, *The Limits of Law for Facebook’s Legitimacy*, CATO INST. (July 24, 2019, 11:05 AM), <https://www.cato.org/blog/limits-law-facebooks-legitimacy> [<https://perma.cc/VSK3-EXCJ>] (suggesting that the Board’s “judicial model of content moderation” was an attempt to “appropriate the legitimacy accorded to law and the courts in the offline world”).

decisions.”<sup>90</sup> Board co-chair, American constitutional law scholar, and former federal judge Michael McConnell stressed that he and his peers “are not frontline internet cops” but rather “a deliberative second look at the end of the process — kind of an appeal, if you will.”<sup>91</sup> McConnell believes “[t]he analogy to the Supreme Court is not bad” because “[t]he immediate holding of our decision is binding and I do think that they are going to set precedent.”<sup>92</sup> Before joining the Board, Professor Nicolas Suzor argued that “Facebook needs a more useful set of principles that can guide the Board’s decisions,” because “[i]f the Oversight Board is a type of Supreme Court, it needs a Bill of Rights.”<sup>93</sup> British Board member Alan Rusbridger, meanwhile, has claimed that the Board’s rulings are “almost like legal judgments.”<sup>94</sup> And the Board’s Director Thomas Hughes has asserted that the Board’s closest analogy “is really of a deliberative body like a court” whose “relevance and impact will be on the cases that it hears and the decisions that it will take.”<sup>95</sup>

Others at the Board were more coy or skeptical when discussing comparisons between the Board and a supreme court, though they still embraced some features of the comparison. After being pushed on whether the Board was a “sort of a Supreme Court,” Board co-chair and legal scholar Professor Jamal Greene equivocated:

I would be inclined to just say we have a role in resolving disputes over very difficult questions of content moderation. The Supreme Court also has a role in resolving difficult legal disputes, but we’re not all lawyers. . . . And so I try not to use the legal analogy just because it’s not all law. But we are a dispute resolution body, and we do try to be independent in just the way the Supreme Court does.<sup>96</sup>

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<sup>90</sup> OVERSIGHT BD., *supra* note 6.

<sup>91</sup> *Meet the New Facebook Oversight Board*, ASPEN INST., at 8:10 (May 18, 2020), <https://www.aspeninstitute.org/events/meet-the-new-facebook-oversight-board> [<https://perma.cc/H57V-DEJM>]; see also Swisher, *supra* note 85 (quoting McConnell as saying “[w]e are not the internet police”).

<sup>92</sup> Greg Bensinger, Opinion, *A Verdict in Facebook’s Show Trial*, N.Y. TIMES (May 5, 2021), <https://www.nytimes.com/2021/05/05/opinion/facebook-trump-ban.html> [<https://perma.cc/G92X-LZYL>].

<sup>93</sup> Nicolas Suzor & Rosalie Gillett, *Facebook’s Oversight Board and the Challenges of Making Policy We Can Trust*, MEDIUM (May 27, 2019), <https://medium.com/@nicsuzor/facebooks-oversight-board-and-the-challenges-of-making-policy-we-can-trust-9088482601b8> [<https://perma.cc/7P4Z-ZAXN>].

<sup>94</sup> Rob Pegoraro, *Facebook Oversight Board to Elon Musk: Do No Harm, Don’t Piss Off the Advertisers*, PCMAG (Nov. 4, 2022), <https://www.pcmag.com/news/facebook-oversight-board-to-elon-musk-do-no-harm-dont-piss-off-the-advertisers> [<https://perma.cc/49ZQ-KZGA>].

<sup>95</sup> CogX 2020: What Does “Good” Look Like in a Technosociety?, ADA LOVELACE INST., at 7:05 (June 8, 2020), <https://www.adalovelaceinstitute.org/event/what-does-good-look-like-in-a-technosociety> [<https://perma.cc/N3MG-5B4Z>].

<sup>96</sup> Michel Martin, *Conversation with Co-Chair of Facebook’s Oversight Board*, NPR (May 17, 2020, 5:13 PM), <https://www.npr.org/2020/05/17/857636413/conversation-with-co-chair-of-facebooks-oversight-board> [<https://perma.cc/QY5A-VXDU>].

Dexter Hunter-Torricke, the Board's Head of Communications, has also said he's "not in love with" the Supreme Court analogy, though he still stressed his view that the Board has "some of the functions" of a "legal body."<sup>97</sup> Suzor, too, has half-heartedly distanced himself from the analogy since becoming a Board member, but he still sees the Board as a court-like body. When asked if a "Supreme Court" was the right model for thinking of the Board's role, he replied, "I don't think that we're using that language any more[.] . . . We are an adjudicatory body that is the avenue of last appeal for Facebook users."<sup>98</sup>

Though Facebook has always cast the Board as an independent entity, the platform was heavily involved in selecting the Board's initial staff, as well as building a team within Facebook to liaise with the Board. Facebook again framed the Board in juridical terms through these hiring practices. A 2019 job posting for the position Hughes ultimately assumed said that the Board's Director would "guide the process by which the Board will hear cases, decide on cases and publish those decisions."<sup>99</sup> The preferred qualifications were a law degree and experience in "legislation, litigation or policy development" (as well as a "[d]eep understanding of Facebook and belief in its principles").<sup>100</sup>

Facebook also advertised for a "Governance" manager to work within the platform on "governance initiatives" and "[s]upport adherence to the Board's scope and jurisdiction."<sup>101</sup> The ideal candidate would have a degree in fields like "Law" or "Policy," along with experience in "legislation, litigation, or policy development."<sup>102</sup> An interview I conducted with a candidate for this position revealed how juridical discourse permeated Facebook's recruitment efforts. Ben was clerking for a judge on a federal appeals court when his co-clerk told him that Facebook was actively recruiting law clerks, especially appellate clerks.<sup>103</sup> Ben applied. In his conversations with Facebook, the company's representatives styled the role as a kind of "law clerk" who would support the Board and help create "case law."<sup>104</sup> As an example of the work he might do, they suggested creating a database — "like a

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<sup>97</sup> Seth Arenstein, *A Chat with Dexter Hunter-Torricke, Lead Communicator, Facebook Oversight Board*, PR NEWS (May 5, 2021), <https://www.prnewsonline.com/Facebook-oversight-board> [<https://perma.cc/5L92-FCY4>].

<sup>98</sup> John Morgan, *Scholars Overseeing Facebook: Supreme Court or Fairness Washing?*, TIMES HIGHER EDUC. (Mar. 10, 2021), <https://www.timeshighereducation.com/news/scholars-overseeing-facebook-supreme-court-or-fairness-washing> [<https://perma.cc/37Z9-MCZU>].

<sup>99</sup> *Director of Board Administration, Governance*, FACEBOOK CAREERS, <https://www.facebook.com/careers/jobs/2466727386710728> [<https://perma.cc/KP9P-GPBE>].

<sup>100</sup> *Id.*

<sup>101</sup> *Manager, Governance*, FACEBOOK CAREERS, <https://www.facebook.com/careers/jobs/318215372207653> [<https://perma.cc/MPB2-TU5W>].

<sup>102</sup> *Id.*

<sup>103</sup> Telephone Interview with Ben (June 17, 2019) (on file with author). In order to protect the interviewee's confidentiality, I've used a pseudonym.

<sup>104</sup> *Id.*

Westlaw” — to organize the Board’s decisions and show if there was “precedent” addressing similar content.<sup>105</sup> Though Ben was tempted, he withdrew shortly before his callback in Menlo Park and instead became a lawyer.<sup>106</sup>

When the Board began ruling on disputes in 2021, the juristic analogies only intensified.<sup>107</sup> In a nod to the famed opinion establishing the U.S. Supreme Court’s power of judicial review, Professors Nate Persily and James Grimmelman predicted that the decision on Donald Trump’s Facebook suspension would be the Board’s *Marbury v. Madison*.<sup>108</sup> Another account by Professor Kate Klonick dubbed the Board “a global court for the Internet,” suggesting that Facebook, “like a fledgling republic,” was instituting “democratic reforms” by giving “would-be judges” the “jurisdiction” to “hear appeals over what kind of speech should be allowed on the site.”<sup>109</sup> Stanford Law School offered a course on “Creating a Social Media Oversight Board” in which students and faculty wrote a report to Facebook jampacked with legal lingo and court analogies,<sup>110</sup> and the *Yale Law Journal* even commissioned a “Feature” on the Board that embraced “the analogy between the Board and a court to contextualize and understand the Board.”<sup>111</sup> In short, Facebook had sold the idea that this new institution would act as its highest “court.”

### C. Future Ambitions: A Platform Supreme Court?

While Feldman’s initial idea was to create a “Supreme Court of Facebook,”<sup>112</sup> it didn’t take long for the company’s leadership to begin flirting with other platforms jumping aboard. Zuckerberg was particularly vocal on this score: “We’re starting this as a project just for Facebook,” he said, “but over time I could see this expanding to be something that more of the industry joins.”<sup>113</sup> Zuckerberg expanded upon his vision in a conversation with Feldman and Stanford Law School’s dean:

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See Shira Ovide, *Facebook Invokes Its “Supreme Court,”* N.Y. TIMES (Oct. 21, 2021), <https://www.nytimes.com/2021/01/22/technology/facebook-oversight-board-trump.html> [https://perma.cc/VX7T-8NP7].

<sup>108</sup> *Metaphors Matter: Why We Shouldn’t Call the Facebook Oversight Board a Court*, HERTIE SCH. (Nov. 2, 2021), <https://www.hertie-school.org/en/news/detail/content/metaphors-matter-why-we-shouldnt-call-the-facebook-oversight-board-a-court> [https://perma.cc/3PLR-XHQT].

<sup>109</sup> Klonick, *supra* note 20.

<sup>110</sup> STANFORD L. SCH. L. & POL’Y LAB, RECOMMENDATIONS FOR THE FACEBOOK CONTENT REVIEW BOARD (2019), <https://law.stanford.edu/publications/recommendations-for-the-facebook-content-review-board> [https://perma.cc/5WLM-EREN].

<sup>111</sup> Klonick, *supra* note 4, at 2418, 2476.

<sup>112</sup> Feldman, *supra* note 53, app. at 101 (emphasis added).

<sup>113</sup> Aspen Institute, *supra* note 60, at 44:42.

[T]here's a lot that this Board could eventually do. The goal is going to be to start narrowly and then eventually over time expand its scope and hopefully include more folks in the industry as well. . . . [T]he point is to build up almost a case law analog and precedents and rationale for why certain decisions are being made that hopefully, over time, will not just influence our systems here in the different services that we run, but the way that people think about this across the industry. . . . [I]f this works well, you could see this expanding to be something where other companies directly want to use a board like this to help adjudicate and deal with appeals on some of the most complex issues that they face as well.<sup>114</sup>

Feldman, too, enlarged his ambitions, telling one interviewer that he “imagined that other tech companies might one day bring their predicaments to the Oversight Board if they agreed the decision would be binding.”<sup>115</sup> Nick Clegg, then Facebook’s Vice President and now one of Zuckerberg’s closest advisors, shares this vision, hyping the Board as “a critical step towards what we hope will become a model for our industry”<sup>116</sup> and aspiring that the body will “get buy-in from other platforms.”<sup>117</sup> While Facebook once branded the organization as the “*Facebook* Oversight Board,”<sup>118</sup> both the company and the Board have now dropped the F-word entirely.<sup>119</sup>

Other company insiders voiced similar aspirations.<sup>120</sup> Fay Johnson, a Facebook liaison with the Board, confirmed that the company “would

<sup>114</sup> *A Conversation with Mark Zuckerberg, Jenny Martinez and Noah Feldman*, META, at 3:24, 29:29 (June 27, 2019), <https://about.fb.com/news/2019/06/mark-challenge-jenny-martinez-noah-feldman> [<https://perma.cc/63W8-WYZB>]; see also Zuckerberg, *supra* note 11, at 2 (“We expect the board will only hear a small number of cases at first, but over time we hope it will expand its scope and potentially include more companies across the industry as well.”).

<sup>115</sup> Mark Latonero, *Can Facebook's Oversight Board Win People's Trust?*, HARV. BUS. REV. (Jan. 29, 2020), <https://hbr.org/2020/01/can-facebooks-oversight-board-win-peoples-trust> [<https://perma.cc/N82U-BAJC>].

<sup>116</sup> Brent Harris, *Establishing Structure and Governance for an Independent Oversight Board*, META (Sept. 17, 2019), <https://about.fb.com/news/2019/09/oversight-board-structure> [<https://perma.cc/4F49-AYLJ>].

<sup>117</sup> Smith, *supra* note 78.

<sup>118</sup> See, e.g., DARMÉ, MILLER & STEEVES, *supra* note 53, at 1 (emphasis added).

<sup>119</sup> See OVERSIGHT BD., *supra* note 50; *Oversight Board*, META, <https://transparency.fb.com/oversight> [<https://perma.cc/8EKK-ULKS>].

<sup>120</sup> E.g., Call with Facebook Oversight Board Team (Aug. 1, 2019) (on file with author) (featuring Facebook employee explaining how the company designed the Board’s charter so “that the Board may grow over time” and expressing “hope that eventually this might lead to industry-wide efforts toward better content governance, which could support a variety of social media platforms”); Transcript of Call on Oversight Board for Content Decisions Charter, META 8–9 (Sept. 17, 2019, 5:30 AM), <https://about.fb.com/wp-content/uploads/2019/09/530transcript.pdf> [<https://perma.cc/WZ7S-LR0E>] (statement of Brent Harris, Director of Governance and Strategic Initiatives at Facebook) (“We believe that this is an important step forward for how to govern content and operate Internet services. And as a part of that as we described, we’ve consulted with a wide range of people, not only experts and stakeholders, but also people across this industry and a variety of

love to partner with organizations like Twitter and Google or YouTube.”<sup>121</sup> Brent Harris, Director of Governance and Strategic Initiatives, stressed the platform’s “conscious” decision to design the Board so that “it can go beyond Facebook and go to more parts of the industry.”<sup>122</sup> Darmé also asserted that the Board is “being taken seriously as a laboratory of experimentation” by rival platforms, leading Facebook to “set up [a] governance structure” that allows others to join easily.<sup>123</sup> In Darmé’s telling:

We’ve set it up in this way so that if other companies say “Gosh, Facebook, this turned out to be the most brilliant idea, and it’s working so well that we want to join too,” they can. My husband is into video games, so I liken it to an expansion pack. We’re putting out the main videogame, I would say, and we’re structuring it in such a way that other companies could come in if they so choose, and they could also provide funding to the [Oversight Board] Trust, and they could also start referring cases to the Board.<sup>124</sup>

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industry bodies. And so we are in the process of building this in a way that structurally is set up so that others are in a position to join. And we really — we really believe that this is an important step forward.”); *id.* at 9 (statement of Heather Moore, Manager of Governance and Strategic Initiatives at Facebook) (“[W]e tried to set up a structure that could be flexible enough to accommodate partners in the future which is why we have the [Oversight Board Trust], the board, and then Facebook. The trust is designed so that it can — it can bring in other partners in the future that can join in and commit money or help appoint trustees as well.”); *see also* Cat Zakrzewski & Tonya Riley, *The Technology 202: Facebook Seeks Outside Help as It Grapples with Content Moderation Problems*, WASH. POST (July 19, 2019, 9:17 AM), <https://www.washingtonpost.com/news/powerpost/paloma/the-technology-202/2019/07/19/the-technology-202-facebook-seeks-outside-help-as-it-grapples-with-content-moderation-problems/5d30ad0e1ad2e5592fc359a0> [<https://perma.cc/LEN8-GMQ5>] (reporting on how Facebook insiders “hope” the Board “will one day govern decisions across Silicon Valley”); Levy, *supra* note 51 (revealing that “[s]ome Facebook people are already talking about the board becoming a model for the industry”); Morar, *supra* note 87 (asserting, based on his experience as part of “a small group of experts giving feedback on an intermediary draft of the charter,” that “the final goal of the board is supposedly not to create many boards for each company, but to coalesce the industry into one board”).

<sup>121</sup> Levy, *supra* note 51.

<sup>122</sup> Issie Lapowsky, *How Facebook’s Oversight Board Could Rewrite the Rules of the Entire Internet*, PROTOCOL (May 6, 2020), <https://www.protocol.com/facebook-oversight-board-rules-of-the-internet> [<https://perma.cc/3JAT-PSYQ>].

<sup>123</sup> The Lawfare Podcast, *supra* note 61, at 32:20 (statement of Darmé) (“One of the huge pieces of feedback that we heard throughout the global consultation was ‘don’t build just for Facebook; if you’re going to pour all of these resources into it, figure out a way that it could potentially serve to help advance the industry overall.’”).

<sup>124</sup> *Id.* at 33:30; *see also* META, OVERSIGHT BOARD TRUST 1 (2019), <https://about.fb.com/wp-content/uploads/2019/12/Trust-Agreement.pdf> [<https://perma.cc/8XUE-BACG>] (providing that entities, “including but not limited to” Facebook, may make transfers to fund the Trust); Agustina Del Campo & Chinmayi Arun, *Facebook’s New Oversight Board Is a Step Forward — But It Can’t Help Kashmiris*, SCROLL.IN (Oct. 14, 2019, 7:30 AM), <https://scroll.in/article/940020/facebook-s-new-oversight-board-is-a-step-forward-but-it-cant-help-kashmiris> [<https://perma.cc/PW2R-LEUK>] (observing that “[i]t seems feasible that this process of independent third party review created by Facebook will extend to other companies’ content decisions in the future” because the Trust “is structured such that it may be possible for other companies to join in later”); Lapowsky, *supra* note 122 (explaining how “Facebook’s leaders deliberately structured [the Board] so that it could have a



Multi-platform oversight also has admirers at the highest levels of the Board itself. Helle Thorning-Schmidt, a Board co-chair, has effusively endorsed expansion: “It would be much better,” she said, “if the global community in the [United Nations] could come up with a content moderation system that could look into all social media platforms.”<sup>125</sup> But, since that’s not on the horizon, she believes a body overseeing Facebook is the “second best” option.<sup>126</sup> She’s quick to stress, though, that she has other platforms in her sights:

I want to go back a little bit about what is the purpose of the Oversight Board. . . . I don’t really care about Facebook. My interest is not in Facebook. My interest is how do we actually find out where the balance is — what content you can have. And it’s not only for Facebook. I think it will not only create precedents for the other decisions on Facebook and Instagram, but I also think it will have an impact on other platforms. And don’t forget that we also envisage that, if this is a success, then other platforms and other tech companies are more than welcome to join and be part of the oversight that we will be able to provide.<sup>127</sup>

Key figures in the Board’s administration share Thorning-Schmidt’s goals, with Hunter-Torricke claiming that the body will “test a model for online governance that could serve many other services over the long term, not just Facebook.”<sup>128</sup> After all, he said, “[c]ontent moderation is a huge challenge for many platforms, and the Oversight Board believes fewer highly consequential decisions should be made by companies alone.”<sup>129</sup> (Before joining the Board’s staff, Hunter-Torricke spent four

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life beyond the company” and provide oversight for “YouTube, Twitter or any other platform that makes content moderation decisions”).

<sup>125</sup> Leo Kelion, *Facebook “Supreme Court” to Begin Work Before US Presidential Vote*, BBC (Sept. 24, 2020), <https://www.bbc.com/news/technology-54278788> [<https://perma.cc/DMW7-HRDH>].

<sup>126</sup> *Id.*

<sup>127</sup> *A Conversation with the Oversight Board — Facebook’s Trump Ban and the Future of Online Speech*, C-SPAN, at 17:00 (Feb. 11, 2021), <https://www.c-span.org/video/?508917-1/discussion-online-speech> [<https://perma.cc/LJ9M-YVSJ>]; see also Taylor Hatmaker, *Facebook Oversight Board Says Other Social Networks “Welcome to Join” if Project Succeeds*, TECHCRUNCH (Feb. 11, 2021, 4:30 PM), <https://techcrunch.com/2021/02/11/facebook-oversight-board-other-social-networks-beyond-facebook> [<https://perma.cc/5FGN-YRZG>] (reporting on Thorning-Schmidt’s claim that the Board is “historic” because, “[f]or the first time in history, we actually have content moderation being done outside one of the big social media platforms”); Lapowsky, *supra* note 122 (quoting Thorning-Schmidt as saying that the Board “is a big, big mission” in “basically building a new model for platform governance”); The Journal, *An Interview with a Member of the Facebook Oversight Board*, WALL ST. J., at 15:45 (Feb. 25, 2021, 4:06 PM), <https://www.wsj.com/podcasts/the-journal/an-interview-with-a-member-of-the-facebook-oversight-board/95eeddce-bo4d-4fa3-9fee-ae717567fa72> [<https://perma.cc/PT5T-9MZW>] (featuring Thorning-Schmidt saying that “[w]e are trying to solve who should do the content moderation on these platforms” and “we will contribute to a new kind of conversation around these issues”).

<sup>128</sup> Hatmaker, *supra* note 127; see also *A Conversation with the Oversight Board — Facebook’s Trump Ban and the Future of Online Speech*, *supra* note 127 at 59:48 (statement of Hunter-Torricke) (“Over time, it is something that will absolutely evolve and grow. . . . So we are on a journey. It’s not something that we necessarily know the final destination yet, but we are looking to test this model and refine it further.”).

<sup>129</sup> Hatmaker, *supra* note 127.

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years with Facebook’s executive communications team and served as a speechwriter for both Zuckerberg and Sandberg.<sup>130</sup>)

These desires played out publicly soon after Elon Musk bought Twitter. The day after Musk became the company’s Chief Executive Officer, he tweeted that Twitter “will be forming a content moderation council with widely diverse viewpoints” and that “[n]o major content decisions or account reinstatements will happen before that council convenes.”<sup>131</sup> Less than an hour later, the Board’s Head of Global Engagement, Rachel Wolbers, retweeted Musk with a playful reply: “Welcome, @elonmusk! the @OversightBoard has over two years of experience creating a ‘content moderation council.’ It’s not easy, but independent governance has a lot to offer when dealing with these tricky issues!”<sup>132</sup> Before long, the Board’s official account chimed in with another retweet of Twitter’s new owner, asserting that “[i]ndependent oversight of content moderation has a vital role to play in building trust in platforms and ensuring users are treated fairly.”<sup>133</sup> The Board’s tweet ended with a direct plea to Musk: “We would welcome the opportunity to discuss Twitter’s plans in more detail with the company.”<sup>134</sup> The following week, Hunter-Torricke — who previously worked for Musk as head of communications for SpaceX — publicly declared that the Board was open to working with other platforms and would welcome a conversation with Musk.<sup>135</sup> Even a Board member made overtures to Musk, with Rusbridger declaring that “it would pay him to give us a ring.”<sup>136</sup>

Other Board members have implicitly endorsed this grander vision. Another co-chair, Catalina Botero Marino, spoke in industry-wide terms when explaining why she signed up. By her lights, it’s “essential to establish a clear set of rules for moderating internet content,” and “large platforms should not be the ones in charge of the final decision regarding whether content of public interest should remain in the digital

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<sup>130</sup> *Id.*

<sup>131</sup> Elon Musk (@elonmusk), TWITTER (Oct. 28, 2022, 2:18 PM), <https://twitter.com/elonmusk/status/1586059953311137792> [<https://perma.cc/3R56-MR9Y>]; *see also* Sheera Frenkel, *Elon Musk Moves to Form a Content Moderation Council for Twitter*, N.Y. TIMES (Oct. 28, 2022), <https://www.nytimes.com/2022/10/28/technology/twitter-elon-musk-content-moderation.html> [<https://perma.cc/RWM3-8VN5>].

<sup>132</sup> Rachel Wolbers (@rachelwolbers), TWITTER (Oct. 28, 2022, 3:10 PM), <https://twitter.com/rachelwolbers/status/1586072840893501442> [<https://perma.cc/3BBW-D2SR>].

<sup>133</sup> Oversight Board (@OversightBoard), TWITTER (Oct. 28, 2022, 4:08 PM), <https://twitter.com/OversightBoard/status/1586087538829266949> [<https://perma.cc/LK6Y-8KFJ>].

<sup>134</sup> *Id.*

<sup>135</sup> Ashley Gold, *Facebook Oversight Board Has Advice for Elon Musk*, AXIOS (Nov. 4, 2022), <https://www.axios.com/2022/11/04/facebook-oversight-board-advice-elon-musk> [<https://perma.cc/D5PQ-78B3>]; Pegoraro, *supra* note 94.

<sup>136</sup> Pegoraro, *supra* note 94; *see also* Gold, *supra* note 135 (quoting Rusbridger as saying that “[i]t took Mark Zuckerberg 15 years to figure out he needed an independent group of experts to solve content moderation problems,” whereas “[i]t took Elon Musk three days”).

sphere.”<sup>137</sup> Botero Marino stressed that the “best way to . . . prevent the adoption of harmful regulations by states is for companies, in particular for the major platforms, to self regulate.”<sup>138</sup> Her new colleague John Samples, meanwhile, predicted that the Board “may set a standard for other social platforms.”<sup>139</sup>

Beyond the specific idea for an industry-wide board, more general calls for cross-platform cohesion have been fueled by platform representatives. Zuckerberg wrote an op-ed declaring that “[t]he Internet needs new rules.”<sup>140</sup> Adopting an earnest tone, he reported that “[l]awmakers often tell me we have too much power over speech, and frankly I agree.”<sup>141</sup> His preferred solution? “It’s impossible to remove all harmful content from the Internet,” he says, “but when people use dozens of different sharing services — all with their own policies and processes — we need a more standardized approach.”<sup>142</sup> He suggested that “third-party bodies” could “set standards governing the distribution of harmful content,” with laws holding platforms accountable for failing to adhere to those standards.<sup>143</sup> In testimony before Congress the following year, Zuckerberg stressed that Facebook supports legally mandated “industry collaboration.”<sup>144</sup>

Some industry endorsements of greater uniformity have been more implicit. Platforms increasingly engage in “cascade” actions<sup>145</sup> in which one platform’s decisions “can ripple across the internet” and lead others to “fall like dominoes in banning the same accounts or content.”<sup>146</sup>

<sup>137</sup> Oversight Board (@OversightBoard), TWITTER, at 0:10 (May 8, 2020, 7:00 PM), <https://twitter.com/OversightBoard/status/1258894608542531585?s=20> [<https://perma.cc/F335-B6LA>].

<sup>138</sup> Lapowsky, *supra* note 122.

<sup>139</sup> Alexandra S. Levine, *Q&A with a Member of Facebook’s New Oversight Board*, POLITICO (May 7, 2020, 10:00 AM), <https://www.politico.com/newsletters/morning-tech/2020/05/07/q-a-with-a-member-of-facebooks-new-oversight-board-787410> [<https://perma.cc/6KXH-RXTJ>].

<sup>140</sup> Mark Zuckerberg, Opinion, *The Internet Needs New Rules. Let’s Start in These Four Areas.*, WASH. POST (Mar. 30, 2019, 3:00 PM), [https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f\\_story.html](https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html) [<https://perma.cc/88Q5-N23Y>].

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Emily Birnbaum, *Mark Zuckerberg Calls for Changes to Section 230*, PROTOCOL (Oct. 27, 2020), <https://www.protocol.com/bulletins/mark-zuckerberg-calls-for-changes-to-section-230> [<https://perma.cc/L6EL-V46Q>]. Likewise, Facebook’s Head of Global Policy Management Monika Bickert has argued that “social media companies, governments, and civil society groups should commit to working together, voluntarily, to create well-informed content standards and effective enforcement mechanisms.” Monika Bickert, *Defining the Boundaries of Free Speech on Social Media*, in *THE FREE SPEECH CENTURY* 254, 271 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019).

<sup>145</sup> *The Future of Democracy Episode 37: Post, Platforms, and Power*, KNIGHT FOUND., at 17:36 (Jan. 21, 2021) (statement of Professor Danielle Citron), <https://knightfoundation.org/episode-37-posts-platforms-and-power> [<https://perma.cc/4MQ3-W7P5>].

<sup>146</sup> Evelyn Douek, *Facebook Has Referred Trump’s Suspension to Its Oversight Board. Now What?*, LAWFARE (Jan. 21, 2021, 12:16 PM), <https://www.lawfareblog.com/facebook-has-referred-trumps-suspension-its-oversight-board-now-what> [<https://perma.cc/PG8V-RVH2>].

Microsoft president Brad Smith even favors a “joint virtual command center” to “enable tech companies to coordinate during major events and decide what content to block and what content is in ‘the public interest.’”<sup>147</sup> Other trends complement the idea of a cross-platform board, such as the recent launches of a professional association for content moderators and external advisory councils at platforms like TikTok and Spotify.<sup>148</sup> Though some of these moves might suggest that platform-specific oversight is becoming the new norm, it also clears a path toward multiple companies combining their boards.

In recent years, a chorus of academics and activists praised the idea of an industry-wide oversight body.<sup>149</sup> Before becoming Director of the

<sup>147</sup> Emma Llansó, Opinion, *Platforms Want Centralized Censorship. That Should Scare You*, WIRED (Apr. 18, 2019, 9:00 AM), <https://www.wired.com/story/platforms-centralized-censorship> [<https://perma.cc/H428-75M8>]; see also Brad Smith, *A Tragedy that Calls for More than Words: The Need for the Tech Sector to Learn and Act After Events in New Zealand*, MICROSOFT (Mar. 24, 2019), <https://blogs.microsoft.com/on-the-issues/2019/03/24/a-tragedy-that-calls-for-more-than-words-the-need-for-the-tech-sector-to-learn-and-act-after-events-in-new-zealand> [<https://perma.cc/Q274-63SL>] (featuring Smith calling for an “industrywide approach” and “collaborative mechanisms” between platforms to deal with harmful content). Smith isn’t alone in calling for greater industry collaboration and consistency. See, e.g., Nick Clegg (@nickclegg), TWITTER (June 11, 2020, 4:17 PM), [https://twitter.com/nick\\_clegg/status/1271174832860696577?s=20](https://twitter.com/nick_clegg/status/1271174832860696577?s=20) [<https://perma.cc/3X5P-3SWT>] (featuring Facebook’s then-Vice President of Global Affairs, Nick Clegg, publicizing that the platform’s Project Protect featured “an unprecedented level of cooperation from the tech industry to combat child exploitation” because “[n]o company can solve this extremely serious issue on its own”); Nathaniel Gleicher (@ngleicher), TWITTER (June 16, 2020, 2:27 PM), <https://twitter.com/ngleicher/status/1272958902682828800?s=20> [<https://perma.cc/N9AJ-SYTS>] (featuring Facebook’s Head of Security Policy, Nathaniel Gleicher, arguing that “[c]ollaboration across industry, and with civil society and government, is essential” to tackle online misinformation campaigns); Washington Post, *The Path Forward: Social Media — A Conversation with YouTube CEO Susan Wojcicki*, YOUTUBE (June 18, 2020), <https://www.youtube.com/watch?v=MkUoDXBGI2Q> [<https://perma.cc/58W6-LBXF>] (featuring YouTube Chief Executive Officer, Susan Wojcicki, favoring uniform definitions across platforms for matters like “hate” and “harassment”).

<sup>148</sup> See, e.g., *What We Do*, TRUST & SAFETY PRO. ASS’N, <https://www.tspa.org/what-we-do> [<https://perma.cc/7XSQ-VK9Q>] (explaining how the association seeks to “create spaces for people to meet their industry peers [and] share best practices,” *id.*, while fostering “a shared community of practice,” TRUST & SAFETY PRO. ASS’N, <https://www.tspa.org> [<https://perma.cc/A399-3F4E>]); Vanessa Pappas, *Introducing the TikTok Content Advisory Council*, TIKTOK (Mar. 18, 2020), <https://newsroom.tiktok.com/en-us/introducing-the-tiktok-content-advisory-council> [<https://perma.cc/BNR4-WQ4Y>] (asserting that TikTok’s U.S. Content Advisory Council will “plan ahead for the next set of issues that our industry will face”); Dawn Chmielewski, *Spotify Forms Council to Deal with Harmful Content*, REUTERS (June 13, 2022, 10:59 AM), <https://www.reuters.com/technology/exclusive-spotify-forms-safety-advisory-council-2022-06-13> [<https://perma.cc/5Y5C-K6JV>] (discussing how Spotify’s “Safety Advisory Council [will] provide third-party input on issues such as hate speech, disinformation, extremism and online abuse”). Interestingly, a member of Spotify’s new Safety Advisory Council, Ronaldo Lemos, also serves on Facebook’s Oversight Board. See *id.*; *Meet the Board*, OVERSIGHT BD., <https://www.oversightboard.com/meet-the-board> [<https://perma.cc/TFV9-2YKB>].

<sup>149</sup> See, e.g., Letter from David Kaye, Special Rapporteur on the Promotion and Prot. of the Right to Freedom of Op. and Expression, to Mark Zuckerberg, at 8 (May 1, 2019), [https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL\\_OTH\\_01\\_05\\_19.pdf](https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL_OTH_01_05_19.pdf) [<https://perma.cc/>]

Board's administrative staff in 2020,<sup>150</sup> Hughes served as Executive Director of ARTICLE 19, where he and his colleagues championed the idea of a Social Media Council as a self-regulatory oversight body for the entire industry.<sup>151</sup> Other groups endorsed ARTICLE 19's idea or offered analogous proposals.<sup>152</sup> Of special note, BSR, an organization that Facebook commissioned to undertake a "human rights review" of the Board, praised the Board's possible growth or influence beyond Facebook.<sup>153</sup> Its report asserted that the Board "will set a precedent in ongoing attempts to define new methodologies, processes, and accountability mechanisms for use across the social media industry," while expressing "hope that other social media companies, alone or in collaboration, adopt similar approaches."<sup>154</sup>

Facebook's team paid attention. When introducing the Board, they noted "some similarities" between the Board and ARTICLE 19's "industry-wide 'Social Media Council.'"<sup>155</sup> When I asked Heather Moore, Facebook's Manager of Governance and Strategic Initiatives,

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J9K4-XHHW]; Van Loo, *supra* note 9, at 873–74; TIMOTHY GARTON ASH, ROBERT GORWA & DANAË METAXA, GLASNOST! NINE WAYS FACEBOOK CAN MAKE ITSELF A BETTER FORUM FOR FREE SPEECH AND DEMOCRACY 21 (2019); Danielle Tomson & David Morar, Opinion, *A Better Way to Regulate Social Media*, WALL ST. J. (Aug. 19, 2018, 3:45 PM), <https://www.wsj.com/articles/a-better-way-to-regulate-social-media-1534707906> [<https://perma.cc/U6Z8-XL3F>]; Heidi Tworek, *Social Media Councils*, CTR. FOR INT'L GOVERNANCE INNOVATION (Oct. 28, 2019), <https://www.cigionline.org/articles/social-media-councils> [<https://perma.cc/YA6Y-BXPY>]; Dipayan Ghosh & Jared Schroeder, *Facebook's Oversight Board Needs Greater Authority*, PROTEGO PRESS (May 20, 2020), <https://proteGOPress.com/facebooks-oversight-board-needs-greater-authority> [<https://perma.cc/Q5FS-KU9U>].

<sup>150</sup> Sam Shead, *Human Rights Expert to Keep Zuckerberg in Check*, BBC (Jan. 28, 2020), <https://www.bbc.com/news/technology-51279555> [<https://perma.cc/ZMJ9-MP8E>].

<sup>151</sup> See, e.g., STANFORD GLOB. DIGIT. POL'Y INCUBATOR, ARTICLE 19 & UNITED NATIONS SPECIAL RAPPORTEUR ON FREEDOM OF OP. & EXPRESSION, SOCIAL MEDIA COUNCILS: FROM CONCEPT TO REALITY 6, 8, 12, 32 (2019); ARTICLE 19, THE SOCIAL MEDIA COUNCILS: CONSULTATION PAPER (2019).

<sup>152</sup> See, e.g., GLOB. PARTNERS DIGIT., A RIGHTS-RESPECTING MODEL OF ONLINE CONTENT REGULATION BY PLATFORMS 27–28 (2018), <https://www.gp-digital.org/wp-content/uploads/2018/05/A-rights-respecting-model-of-online-content-regulation-by-platforms.pdf> [<https://perma.cc/4WC9-PJ65>] (favoring the creation of a global "Online Platform Standards Oversight Body" governed by a set of uniform "Online Platform Standards" to "promote standardisation and consistency, providing benefits for users themselves when they use multiple platforms, and helping platforms achieve greater efficiency in content moderation and comparison"); Gus Rossi, *Our Thoughts on Facebook's Oversight Board for Content Decisions*, PUB. KNOWLEDGE (Feb. 11, 2019), <https://www.publicknowledge.org/blog/our-thoughts-on-facebooks-oversight-board-for-content-decisions> [<https://perma.cc/RC29-KDB2>] (arguing for a "multiplatform and multi-stakeholder board" in which "all the dominant social media platforms would subject themselves to a single independent multistakeholder oversight body that would also draft a baseline set of minimum standards, agreed to by platforms, relating to online content regulation"); TRANSATLANTIC WORKING GRP., FREEDOM AND ACCOUNTABILITY: A TRANSATLANTIC FRAMEWORK FOR MODERATING SPEECH ONLINE 26–27 (2020) (advocating for "social media councils" and online "e-courts" to review moderation decisions).

<sup>153</sup> BSR, HUMAN RIGHTS REVIEW: FACEBOOK OVERSIGHT BOARD 1 (2019), [https://www.bsr.org/reports/BSR\\_Facebook\\_Oversight\\_Board.pdf](https://www.bsr.org/reports/BSR_Facebook_Oversight_Board.pdf) [<https://perma.cc/XV4B-CGUP>].

<sup>154</sup> *Id.* at 4.

<sup>155</sup> DARMÉ, MILLER & STEEVES, *supra* note 53, at 8.

about the company's decision to design the Board so that other platforms could join, she said her team "took notice" of the "strong movement within the civil-society community to build what they were calling a Social Media Council."<sup>156</sup> In a nice synergy, Social Media Council advocates also drew parallels between their proposal and Facebook's body, with Eileen Donahoe asserting that the Board is "absolutely . . . an example of a Social Media Council"<sup>157</sup> like the one she

<sup>156</sup> Telephone Interview with Brent Harris & Heather Moore, Facebook Governance Team (Apr. 27, 2020) (on file with author); see also Call with Facebook Oversight Board Team, *supra* note 120 ("The reason that we're thinking so carefully about this governance structure and setting it up in a way that it could possibly change over time and expand over time is specifically because we have heard the call from civil society. We know that ARTICLE 19 and folks at Stanford and other places have called for Social Media Councils of the order — something like the Facebook Oversight Board, but for other platforms. . . . We're trying to build something not just for us — not just for us, Facebook — but for digital governance overall.").

<sup>157</sup> Aspen Institute, *Freedom & Accountability: Moderating Speech Online*, YOUTUBE, at 31:15 (June 23, 2020), <https://www.youtube.com/watch?v=g75KfBKtgqs> [<https://perma.cc/TRY8-DSGS>]. Like Donahoe, Professor David Kaye has highlighted connections between a Social Media Council and Facebook's Board. Kaye has been a proponent of an industry-wide oversight body both in his academic writing and during his tenure as the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression. See KAYE, *supra* note 10, at 122 (arguing that platforms should subject their "rules and decisions to industry-wide oversight and accountability"); Kaye, *supra* note 45, ¶¶ 58, 72 (praising ideas for "an independent 'social media council,' modelled on the press councils that enable industry-wide complaint mechanisms and the promotion of remedies for violations," *id.* ¶ 58, and arguing that platforms should make this council "a top priority," *id.* ¶ 72); Facebook, *Free Speech and Democracy*, UNIV. OF OXFORD LIVE, at 1:40:40 (Feb. 28, 2019), <https://livestream.com/oxuni/facebook-freespeech-democracy/videos/188101461> [<https://perma.cc/4VK8-4NSH>] (featuring Kaye advocating for "cross-industry" standard-setting and oversight mechanisms because "there's so much convergence" and "[t]he hard questions are similar from platform to platform"). Not long after Facebook announced plans to create its Board, Kaye wrote an open letter to Zuckerberg reiterating his support for a "cross-industry Social Media Council." See Letter from David Kaye, *supra* note 149, at 8. Kaye later framed Facebook's Board as a "promising" step toward "better appeals processes" for all platforms: "Across social media, the companies should develop a model of industry self-regulation that involves the careful selection of hard cases, evaluated by experts, assessing whether company decisions are in keeping with human rights norms, and binding on company policy." KAYE, *supra* note 10, at 122; see also Walsh, *supra* note 76 (quoting Kaye as saying that Facebook's Board "is heading in the right direction" toward industry-wide oversight). Indeed, Kaye even predicted that the Board "could expand to take on that kind of industry-wide role." Kaye, *supra* note 69. A host of other scholars and activists have advanced similar proposals to establish industry-wide oversight mechanisms, including some people who argue that other platforms should simply join Facebook's existing Board. See, e.g., Ghosh & Schroeder, *supra* note 149 (arguing that "Facebook should expand its board to encourage the creation of an industry wide, independent content policy oversight board"); GARTON ASH, GORWA & METAXA, *supra* note 149, at 21 (observing the "growing interest in exploring some form of industry-wide self-regulatory body" and arguing that "[t]he goal of industry-wide self-regulation should be actively pursued"); MARK BUNTING, KEEPING CONSUMERS SAFE ONLINE: LEGISLATING FOR PLATFORM ACCOUNTABILITY FOR ONLINE CONTENT 21 (2018), <http://www.commcham.com/keeping-consumers-safe> [<https://perma.cc/3P3F-Z35A>] (proposing the creation of an "oversight body" to maintain a "Code of Practice" for platforms); Tomson & Morar, *supra* note 149 (advocating for a "content congress" in which multiple platforms and other stakeholders could form a "deliberative body" and begin "engaging one another and their users to shape content-moderation policies in a more transparent and consistent way"); Tworek, *supra* note

proposed with her colleagues at Stanford's Global Digital Policy Incubator.<sup>158</sup>

What began as a thought bubble by a Harvard Law School professor has become a global institution with a \$280 million trust fund.<sup>159</sup> And it might not stick to its current remit of overseeing Facebook alone. Influential figures within the company and the Board are courting expansion, with some notable outsiders singing similar tunes.<sup>160</sup> Even if an industry-wide body never emerges, the Board's softer effects will extend beyond its corporate creator by serving as a much-talked-about example of platform governance on the world's largest social network.<sup>161</sup> The Board, in short, seems destined to be an influential institution.

This Part has offered an account of key events leading to this current moment, excavating how Facebook and Board leaders propagated juridical discourse around their efforts. What follows is a critical examination of their motivations and the implications.

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149 (comparing Facebook's Board to "social media councils" that could "improve platform governance" by creating "a forum to bring together platforms and civil society, potentially with government oversight"); *Facebook, Free Speech and Democracy*, *supra*, at 18:55 (featuring Professor Timothy Garton Ash asserting that "industry-wide self-regulation, like a social media council, is normatively a very attractive idea" while framing platform-specific boards as a second-best alternative because "the best should not be the enemy of the good"); Aspen Institute, *supra*, at 35:50 (featuring Susan Ness discussing a report in which she and her coauthors envision an "independent type of social media council, which would have a number of companies, not just one company" as is the case with Facebook's Board).

<sup>158</sup> See generally STANFORD GLOB. DIGIT. POL'Y INCUBATOR, ARTICLE 19 & UNITED NATIONS SPECIAL RAPPORTEUR ON FREEDOM OF OP. & EXPRESSION, *supra* note 151.

<sup>159</sup> Sara Fischer, *Meta Provides Another \$150 Million in Funding for Its Oversight Board*, AXIOS (July 22, 2022), <https://www.axios.com/2022/07/22/meta-facebook-oversight-board-funding> [https://perma.cc/ZC67-8GEE].

<sup>160</sup> See *supra* section I.C., pp. 176–85; Steven Levy, *Inside Meta's Oversight Board: 2 Years of Pushing Limits*, WIRED (Nov. 8, 2022, 6:00 AM), <https://www.wired.com/story/inside-metas-oversight-board-two-years-of-pushing-limits> [https://perma.cc/H52C-699Q] (reporting that people within Facebook and the Board seem "intoxicated" by the idea of the Board having "extended purview" and influencing other platforms).

<sup>161</sup> See ACCESS NOW, PROTECTING FREE EXPRESSION IN THE ERA OF ONLINE CONTENT MODERATION 9 (2019), <https://www.accessnow.org/cms/assets/uploads/2019/05/AccessNow-Preliminary-Recommendations-On-Content-Moderation-and-Facebooks-Planned-Oversight-Board.pdf> [https://perma.cc/M8KY-WYQR] (predicting that the Board's decisions "could contribute to a body of knowledge and shared experience that could be useful for other platforms and services, as well as public authorities, to critique and consider in crafting norms, rules, policy, and regulations for online speech"); STANFORD L. SCH. L. & POL'Y LAB, *supra* note 110, at 46 (suggesting that annual reports created by the Board "might include . . . lessons for other social media platforms"); Levy, *supra* note 160 (quoting Hughes as saying that people at the Board "are seeking to understand how we might interrelate with other companies" and "how we might interact with companies setting up different types of councils or bodies").

## II. JURIDICAL DISCOURSE AS SLEIGHT OF HAND

Facebook has sold its vision of the Board as a private supreme court from the start.<sup>162</sup> Feldman styled it that way from the get-go. Zuckerberg introduced it to the world in those terms. Leaders in Facebook's teams tiptoed around the analogy, some embracing it more enthusiastically than others. Journalists seized upon the legalistic language for their headlines. A few scholars echoed the judicial comparisons, while some activists used them to pitch new regulatory proposals.

This Part challenges the juridical discourse that has legitimized empowered Facebook's Board and its possible successors. This discourse, ostensibly concerned with serving the public's interests, is actually a corporate-friendly narrative that obscures the reality of external oversight and minimizes its limitations. Naïve acceptance of this discourse risks misdirecting attention away from meaningful regulatory efforts to constrain platform power and create healthier digital environments.

Who's responsible for this juridical discourse around content moderation? And why paint such a misleading and incomplete picture? As Part I has revealed, key figures at Facebook and the Board crafted positive narratives based on analogies to supreme courts, separation of powers, and judicial review.<sup>163</sup> This Part drills down on why platforms push these kinds of narratives. It's hardly a damning indictment to say that money drives these corporations' decisions. Nor is it necessarily problematic for platforms to prioritize efficient policies that they can actually implement given the amount of content they host. The problem with juridical discourse, though, is that it cloaks these decisions. This deception, in turn, lays the foundation for platforms to avoid or mold unfavorable forms of regulation.<sup>164</sup>

### A. *Sincere Belief*

Most benignly, platform insiders might use juridical discourse because they believe the attendant analogies are accurate or useful. As Dudley Field Malone once said: "One good analogy is worth three hours' discussion."<sup>165</sup> Platforms discuss content moderation *a lot* — it's an "essential, constant, and definitional part of what [they] do"<sup>166</sup> — so allusions to courts and constitutionalism might conceivably help company insiders be parsimonious and perceptive in their internal and public discourse.

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<sup>162</sup> See, e.g., Klonick, *supra* note 20 (styling the Board as "a sort of private Supreme Court that [Facebook] was creating to help govern speech on its platforms").

<sup>163</sup> See *supra* section I.B, pp. 171–76.

<sup>164</sup> See Cowls, Darius, Santistevan & Schramm, *supra* note 2, at 17–19.

<sup>165</sup> *United States v. Van Buren*, 940 F.3d 1192, 1196 (11th Cir. 2019), *rev'd and remanded*, 141 S. Ct. 1648 (2021).

<sup>166</sup> Tarleton Gillespie, *Platforms Are Not Intermediaries*, 2 GEO. L. TECH. REV. 198, 201 (2018).



There's some superficial appeal to comparing content moderation to judicial decisionmaking and likening external oversight to judicial review. To quote Klonick, "Facebook has created a body of 'laws' and a system of governance that dictate what users may say on the platform."<sup>167</sup> In this telling, Facebook's approach before developing the Board was "an unchecked system" that gave the company "the kind of arbitrary power that, unrestrained, can trample individual rights."<sup>168</sup> But after the Board, we're told, Facebook has "divest[ed] itself of part of its power."<sup>169</sup> At this level of abstraction, people might have good-faith reasons for viewing courts as a model for how to settle disputes, and adopting corresponding juridical discourse could be helpful in contemplating and implementing reforms. Indeed, some platform insiders might feel this discourse helps to probe and justify viable restraints on platform power — a goal that, while perhaps inconsistent with their employer's bottom line, might nonetheless be genuine.<sup>170</sup>

This motivation might be stronger within the Board, which doesn't have a similar financial stake in content moderation. Its members and staff are paid, so there's an incentive for the endeavor to succeed and endure. But my experiences observing and speaking with Board members and staff suggest that at least some of them welcome juridical discourse because they honestly seek the kind of independence from Facebook that this discourse implies. Board members also wish to highlight their careful *judgment* and the fact that, in a limited sense, they can *bind* Facebook with their *reasoned decisions*, including those that draw on principles of *law* and *rights*. We might worry about the Board using juridical discourse to prop up its own power, but those concerns are of a different ilk than those raised by Facebook's discourse.

### B. Legitimacy

A more selfish reason for platforms to adopt the language of statehood is to legitimize their actions and disguise their motives.<sup>171</sup> Platforms become "governors," users become a "community," terms of service become "laws," complaint mechanisms become "appeals," oversight bodies become "courts." Even if a particular decision seems wrong, platforms can frame their processes as fair, neutral, and transparent,

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<sup>167</sup> Klonick, *supra* note 4, at 2418.

<sup>168</sup> *Id.* at 2476.

<sup>169</sup> *Id.* at 2499.

<sup>170</sup> Cf. Thomas Kadri, *How Supreme a Court?*, SLATE (Nov. 19, 2018, 1:59 PM), <https://slate.com/technology/2018/11/facebook-zuckerberg-independent-speech-content-appeals-court.html> [<https://perma.cc/8LKY-VYU2>] (using juridical discourse to advance this kind of claim).

<sup>171</sup> See generally Gilad Abiri & Sebastián Guidi, *From a Network to a Dilemma: The Legitimacy of Social Media*, STAN. TECH. L. REV. (forthcoming) (manuscript at 17–35, 50–53), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4230635](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4230635) [<https://perma.cc/H9HV-574G>] (exploring how Facebook tries "to acquire legitimacy by adopting the regalia of law" and "mimicking the functioning of state bureaucracies and high courts" such as through the Board).

while simultaneously minimizing how their decisions are inevitably shaped by questions of profit, efficiency, speed, and scale.

There are, to be sure, different types of juridical discourse, not all of which carry a patina of legitimacy. Professor David Pozen, for example, argues that content moderation is closer to a “system of authoritarian or absolutist constitutionalism” than a “common law system.”<sup>172</sup> His vernacular is juridical, but it’s hardly complimentary. By contrast, the discourse pushed by platforms is, unsurprisingly, self-serving. Zuckerberg claims that “[i]n a lot of ways Facebook is more like a government than a traditional company” because “[w]e have this large community of people, and more than other technology companies we’re really setting policies.”<sup>173</sup> Monika Bickert, Facebook’s Head of Global Policy Management, dubs Facebook’s biweekly policymaking meeting a “mini-legislative session,”<sup>174</sup> while Board member John Samples casts Facebook’s rules as its “basic law.”<sup>175</sup> This language has positive heft.

In the context of external oversight, platforms seem especially eager to tie content moderation to notions of judicial independence, constitutional rights, and separation of powers. The discursive implications are profound. After being ensconced in Facebook’s self-styled “Governance” team, Klonick argued that the “analogy to a constitution that guarantees substantive and procedural rights through review by an independent judiciary is crucial for understanding the founding documents that create the Board.”<sup>176</sup> She styled the company’s commitment to accept the Board’s decisions as a “grant of judicial deference” that’s “crucial for ensuring users’ effective redress” against the company.<sup>177</sup> This framing sustains her optimistic conclusion that the Board “holds great potential” and is “significant for global freedom of expression”<sup>178</sup> because it “replaces the historically opaque private system marked by cronyism and influence”<sup>179</sup> with a “procedural right of review by an independent adjudicator,” giving users “more process and ability to be heard than ever before.”<sup>180</sup>

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<sup>172</sup> David E. Pozen, *Authoritarian Constitutionalism in Facebookland*, in *THE PERILOUS PUBLIC SQUARE*, *supra* note 45, at 329, 330.

<sup>173</sup> KIRKPATRICK, *supra* note 43, at 254.

<sup>174</sup> KAYE, *supra* note 10, at 53–54.

<sup>175</sup> Samples, *supra* note 89 (analogizing Facebook’s rules to constitutional provisions or amendments that users didn’t ever “ratify”).

<sup>176</sup> Klonick, *supra* note 4, at 2477.

<sup>177</sup> *Id.* at 2479.

<sup>178</sup> *Id.* at 2491.

<sup>179</sup> *Id.* at 2492.

<sup>180</sup> *Id.* at 2491; *see also id.* at 2491–92 (arguing that “giving users a right to appeal” to the Board “promises to hold Facebook accountable for content-moderation inaccuracies and give users equal access to an equitable remedy”).

Facebook's discourse affects how people perceive the company and its Board.<sup>181</sup> Facebook wants its creation to be seen as legitimate and independent, and part of the battle is convincing people that the Board has power to hold the company accountable. As the Board took shape, one Facebook policy director "joked" about making the body *seem* autonomous from Facebook, querying: "How many decisions do we have to let the Oversight Board win to make it legit?"<sup>182</sup> Perhaps this candid question was meant in jest, but using a few early decisions to create an aura of impartiality and make the Board seem "legit" would surely serve the company's interests. Facebook, too, can leech off the Board's perceived legitimacy by situating itself as a trustworthy actor inside this oversight system. (Consider, for example, that the company's own representative before the Board is nicknamed "Facebook's solicitor general" by some within the company.<sup>183</sup>) Additionally, pitching the Board as a precursor to a cross-platform body, regardless of whether this materializes, lends legitimacy to Facebook's endeavor, because these aspirations further suggest the Board's separation from Facebook and company interests.

Zuckerberg recently relied on juridical discourse to legitimize the Board in a conversation with prominent podcaster Joe Rogan. When Rogan expressed skepticism about Facebook's moderation practices, Zuckerberg was quick to bring up the Board.<sup>184</sup> His language was telling: he justified the Board as a kind of "separation of powers" inspired by a form of governance that he thinks is "one of the things that our country and our government gets right."<sup>185</sup> He even name-dropped Board co-chair McConnell as someone who was appointed to a federal judgeship and "considered for the Supreme Court at some point."<sup>186</sup> With evident pride, Zuckerberg bragged that such a "prominent" and "celebrated" figure "helped me set the [Board] up."<sup>187</sup>

Juridical discourse can also launder legitimacy by masking the Board's narrow scope and influence. Despite Facebook's best efforts to set up this new organization as a court-like body that will serve as an external "judiciary" distinct from Facebook's "legislative" and "executive" branches, the Board offers, at best, an incomplete "separation of powers" and a meager form of "judicial review." Even if we accept Facebook's preferred analogical framing, the Board enjoys little "jurisdiction," hears very few "cases," and creates minimal "precedent." Given these structural limitations, much of the discourse surrounding its work

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<sup>181</sup> See Levy, *supra* note 160 (suggesting that the Board's support staff are "like clerks for Supreme Court justices").

<sup>182</sup> Klonick, *supra* note 20.

<sup>183</sup> *Id.*

<sup>184</sup> See The Joe Rogan Experience, *supra* note 33, at 1:46:07.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 1:54:48.

<sup>187</sup> *Id.*

is a form of accountability theater.<sup>188</sup> The analogies are deceptive in at least three ways.

First, the Board's branding misleadingly simplifies platforms by suggesting that their only (or primary) power comes from content moderation. Decisions about speech are an important feature of platform influence, but the Board lacks authority to oversee so many other facets of platform power — including many at the heart of informational capitalism, such as those tied to data collection, behavioral profiling, algorithmic targeting, and advertising practices.<sup>189</sup> Though it's tempting to think of major online platforms as “Big Speech,”<sup>190</sup> a platform is so much more than a “speech machine.”<sup>191</sup> As Professor Julie Cohen has observed, when it comes to platforms and their behaviorist practices, “what people say to each other matters far less than what they do.”<sup>192</sup> If the Board is a supreme court, its “jurisdiction” is measly because Facebook is relinquishing only a sliver of its power.<sup>193</sup>

Second, juridical discourse obscures how Facebook has devolved only a tiny part of its adjudicatory power over content. Facebook still retains exclusive authority over the vast majority of “cases,” including the first round of “appeals” from its initial decisions. In just three months between April and June 2022, the company reported taking action on 2,361,143,700 pieces of Facebook and Instagram content, while the Board decided a grand total of three cases — a ratio of roughly one Board decision for every 787 million actions by Facebook (without even counting the company's internal responses to over 17 million requests to review those initial actions).<sup>194</sup> What's more, the Board can't oversee “many of the most important decisions in content moderation” because

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<sup>188</sup> See COHEN, *supra* note 37, at 250 (criticizing forms of performative oversight that are “designed to express a generic commitment to accountability without . . . meaningful scrutiny of the underlying processes”); WALDMAN, *supra* note 7, at 93–96 (detailing how the Board is a paradigmatic example of “performing accountability,” *id.* at 93).

<sup>189</sup> See generally COHEN, *supra* note 37; Amy Kapczynski, *The Law of Informational Capitalism*, 129 YALE L.J. 1460 (2020) (book review).

<sup>190</sup> Kate Klonick, *Big Speech*, J. FREE SPEECH L. (forthcoming); Stanford Cyber Pol'y Ctr., *Big Speech*, YOUTUBE (May 10, 2022), <https://www.youtube.com/watch?v=wr1YQykLrIE> [<https://perma.cc/4V2J-AFS6>].

<sup>191</sup> Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, 57.

<sup>192</sup> Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 198 (2017); see also DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 191 (2014) (“Online platforms host a dizzying array of activities. Some sites are hybrid workplaces, schools, social clubs, and town squares.”).

<sup>193</sup> *But see* Klonick, *supra* note 4, at 2481 (alleging that “[u]ntil the Board's creation, Facebook had exclusive control over the jurisdiction of its platform — like a territorial sovereign”).

<sup>194</sup> See *Community Standards Enforcement Report: Q2 2022 Report*, META: TRANSPARENCY CTR., <https://transparency.fb.com/data/community-standards-enforcement> [<https://perma.cc/SW42-NBSM>]; *Case Decisions and Policy Advisory Opinions*, OVERSIGHT BD., <https://www.oversightboard.com/decision> [<https://perma.cc/M2H5-NKQK>]; see also Levy, *supra* note 160 (reporting that the Board has received almost two million appeals and ruled on only twenty-eight of them).

they happen “upstream” at a systemic level “before any individual content moderation case even arises.”<sup>195</sup> If the Board is a supreme court, Facebook still runs the rest of the judiciary, as well as the legislature and the executive.<sup>196</sup>

Finally, narratives surrounding the Board conceal its negligible authority to set “precedent.” The Board may force Facebook to reinstate content that Facebook removed or block content that Facebook allowed — and nothing else.<sup>197</sup> This “up-or-down” decision applies only to particular pieces of content and has no compulsory effect on Facebook’s future decisionmaking.<sup>198</sup> If the Board is a supreme court, it has little power to bind Facebook.<sup>199</sup>

### C. *Scapegoats*

Another perk for platforms is that juridical discourse creates scapegoats. This is especially true for the idea that external oversight represents a form of separation of powers. If a supervisory board is seen as autonomous, it’s easier to shift focus and blame away from the platform and toward its overseers.

External bodies can deflect criticism for platforms’ business practices in various ways. Most immediately, by outsourcing consequential decisions to another entity, platforms can distance themselves from controversy that might jeopardize their public standing. In the short term, this helps platforms retain advertisers and users. But in the long term, platforms can also use these reputational dividends to evade lawmakers’ ire and discourage regulations that threaten their power or profits. This buck-shifting motivation only deepens when applied to a cross-platform board, which could shift responsibility away from an entire industry onto a single entity. If Board co-chairs Botero Marino, Greene, McConnell, and Thorning-Schmidt could replace platform CEOs Chew, Musk, Wojcicki, and Zuckerberg at feisty congressional and parliamentary hearings, the company chiefs would breathe sighs of relief.

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<sup>195</sup> Douek, *supra* note 1, at 530.

<sup>196</sup> *But see* Klonick, *supra* note 4, at 2476 (analogizing the Board to a “court” in order to identify how “Facebook’s governance might be effectively restrained by an external adjudicator”); *id.* at 2498 (arguing that the Board will become a “vital procedural element of protecting users’ right to global free expression” if Facebook moves exclusively to “automated content moderation”).

<sup>197</sup> Beginning in October 2022, if the Board decides to leave up or reinstate a particular piece of content, it may also force Facebook to apply a “warning screen” to mark material with labels like “disturbing” or “sensitive.” *See* Chavi Mehta, *Meta Oversight Board Can Now Apply Warning Screens on Content*, REUTERS (Oct. 20, 2022, 10:35 AM), <https://www.reuters.com/technology/meta-oversight-board-can-now-apply-warning-screens-content-2022-10-20> [https://perma.cc/YJW9-D2RU].

<sup>198</sup> *See* Kadri, *supra* note 40, at 1092 (warning that the Board would have promise only if it “establishes itself as a persuasive force that holds Facebook accountable”); Kadri, *supra* note 170 (raising doubts about the Board’s likely influence).

<sup>199</sup> *But see* Klonick, *supra* note 4, at 2499 (declaring that the Board “signifies a step towards empowering users” and that the Board’s founding documents are “a promising new tool for ensuring free speech around the world”).

External oversight — especially if centralized for the entire industry — also makes it easier for governments and powerful private figures to jawbone platforms into making decisions in their favor by providing a “central choke point” to target.<sup>200</sup> Sometimes platforms resist these efforts, but there’s often a shared interest in “swift and comprehensive” removal of controversial content that can sweep up lots of valuable speech.<sup>201</sup> This dynamic enables a species of scapegoating because platforms appear one step further removed from consequential decisions, while they can also shift responsibility to outsiders if there’s public backlash.

Some of these benefits would exist even if external oversight wasn’t shrouded in grandiose legalistic analogies. But invoking supreme courts and separation of powers adds rhetorical weight by conjuring images of independence and impartiality. Zuckerberg clearly concluded as much when he made Facebook’s Board a personal priority. Not only did he repeatedly use juridical discourse in his public statements, but he also edited drafts of the Board’s founding documents to remove “dry” legal language and make the prose “more approachable.”<sup>202</sup> For example, references to “users” were replaced by “people,”<sup>203</sup> as if to suggest that the Board served nobler purposes than ordinary corporate legalese would imply.

#### D. *Shaping Legislation*

1. *Avoiding Unwanted Regulation.* — Using juridical discourse to frame external oversight can provide lawmakers with excuses not to regulate platforms more restrictively. The underlying narratives make legislation seem unnecessary because platforms are supposedly regulating themselves — through constitutionalism and court-like institutions, no less! More subtly, the pomp surrounding a high-profile board like Facebook’s — led by prominent figures from law, politics, and journalism — can take oxygen away from other regulatory moves that lawmakers could pursue.

2. *Legislating the Status Quo.* — Even if legislators aren’t fully appeased, the narratives that platforms have cultivated can influence the character of proposed regulations. By pitching private judiciaries as meaningful forms of platform governance, companies might hope that lawmakers will seize on the idea and pass laws requiring these kinds of institutions. Indeed, we’ve already seen a slew of lawmakers draw inspiration from Facebook’s Board and the stylized picture of content moderation that sustains it.

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<sup>200</sup> Mark A. Lemley, Lecture, *The Splinternet*, 70 DUKE L.J. 1397, 1425 (2021).

<sup>201</sup> Llansó, *supra* note 147.

<sup>202</sup> Klonick, *supra* note 20.

<sup>203</sup> *Id.*

Institutions like the Board were initially plugged as voluntary forms of self-regulation, but it didn't take long for governments to take heed. In Poland, for example, legislators proposed a new state body, the Freedom of Speech Council, to hear user appeals and issue binding decisions.<sup>204</sup> Even before the Board's launch, Germany's NetzDG law<sup>205</sup> immunized platforms for failing to remove "unlawful" content if they referred decisions to an external "self-regulation institution."<sup>206</sup> The hypothetical institution, which must be funded by "several" platforms, would provide "independence and expertise" to "review" user "complaints."<sup>207</sup> German regulators have approved no such institution to date, but an industry-wide body seems like exactly what legislators had in mind.<sup>208</sup>

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<sup>204</sup> Richard Wingfield, *Poland: Draft Law on the Protection of Freedom of Speech on Online Social Networking Sites*, MEDIUM (Feb. 8, 2021), <https://richard-wingfield.medium.com/poland-draft-law-on-the-protection-of-freedom-of-speech-on-online-social-networking-sites-ce8815d3f85c> [<https://perma.cc/7GM8-LPSV>]. Regulators around the world are considering similar initiatives. The Hungarian Data Protection Authority has called for government officials to act as external adjudicators by reviewing platforms' decisions to suspend people's accounts. Fred Porter, *Hungary Justice Ministry Announces Plans for Tougher Social Media Regulation*, JURIST (Jan. 26, 2021, 6:05 PM), <https://www.jurist.org/news/2021/01/hungary-justice-ministry-announces-plans-for-tougher-social-media-regulation> [<https://perma.cc/P6DW-A54Z>]. The Indian government has issued new rules requiring platforms to give people an "adequate and reasonable opportunity to dispute" moderation decisions. Anumeha Chaturvedi, *How Facebook Oversight Board Sees India's New Social Media Rules*, ECON. TIMES (Mar. 1, 2021, 5:11 AM), <https://economictimes.indiatimes.com/tech/technology/how-facebook-oversight-board-sees-indias-new-social-media-rules/articleshow/81264476.cms> [<https://perma.cc/TSD9-KBFD>]. Senior government ministers in the United Kingdom have proposed a new regulator to cultivate a "culture of cooperation" between platforms, observing that coordination "will be essential" to "prevent harms spreading from one provider to another." SEC'Y OF STATE FOR DIGIT., CULTURE, MEDIA & SPORT & SEC'Y OF STATE FOR THE HOME DEP'T, ONLINE HARMS WHITE PAPER 45 (2019). And a group of government ministries in France submitted a report to the French Secretary of State for Digital Affairs suggesting that external oversight boards could provide a form of "accountability by design." MISSION DE RÉGULATION DES RÉSEAUX SOCIAUX, CREATING A FRENCH FRAMEWORK TO MAKE SOCIAL MEDIA PLATFORMS MORE ACCOUNTABLE 13 (2019); *see also id.* at 12 (identifying the need for industry "peer review"); *id.* at 23 (contemplating "[a]n independent administrative authority" with a "mandate to encourage the pooling of resources and knowledge for the benefit of smaller social networks"). Some of these proposals were likely made in bad faith, for political posturing, or without much hope of adoption, but the discourse surrounding them remains rhetorically powerful.

<sup>205</sup> *Netzwerkdurchsetzungsgesetz* [NetzDG] [Network Enforcement Act], Sept. 1, 2017, BUNDESGESETZBLATT, Teil I [BGBl. I] (Ger.).

<sup>206</sup> *Id.* § 3.

<sup>207</sup> *Id.* § 3(6).

<sup>208</sup> *See* ARTICLE 19, SELF-REGULATION AND "HATE SPEECH" ON SOCIAL MEDIA PLATFORMS 18, 20–22 (2018), [https://www.article19.org/wp-content/uploads/2018/03/Self-regulation-and-hate-speech-on-social-media-platforms\\_March2018.pdf](https://www.article19.org/wp-content/uploads/2018/03/Self-regulation-and-hate-speech-on-social-media-platforms_March2018.pdf) [<https://perma.cc/3UXA-JXHN>] (observing some similarities between the multi-platform NetzDG institution and an independent Social Media Council).

In a significant new development, the European Union has adopted “extensive procedural protections” in the Digital Services Act,<sup>209</sup> which forces platforms to provide “reasons for any content removal, a right of appeal open for six months in all cases, a human in the loop for all appeals, and a further right of appeal to a third-party arbitrator.”<sup>210</sup> Steven Neal, chair of the Oversight Board Trust, has revealed that the Board might even assume a role within this new regulatory regime.<sup>211</sup> As one commentator observed, if the Board becomes part of the “mandatory appeals systems” required under the Act, the body would be “closer to becoming, as some members dream, a more global force in content policy, with influence over other companies.”<sup>212</sup>

American lawmakers have shown an appetite for similar measures. Representative Ro Khanna favors creating a consortium of platforms to ensure that someone sharing harmful content can’t be “kicked off Facebook and just go open an account on Twitter.”<sup>213</sup> In 2019, then-Senator Kamala Harris also weighed in, arguing that platforms are “so powerful” that “you can’t have one set of standards for Facebook and another for Twitter” — instead “[t]here have to be standards, and the standards have to be the same.”<sup>214</sup> Building on this vision, the recently introduced Platform Accountability and Consumer Transparency Act<sup>215</sup> would encourage platforms to “share best content moderation practices”<sup>216</sup> and require them to provide users with “individual notice, appeals, and reasons” for their decisions.<sup>217</sup> On the state level, Utah politicians floated a law requiring platforms to “engage the services of an independent review board” to review content decisions — essentially forcing platforms “to hire Facebook’s Oversight Board (or some other

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<sup>209</sup> *Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and Amending Directive 2000/31/EC*, COM (2020) 825 final (Sept. 7, 2022).

<sup>210</sup> Douek, *supra* note 1, at 566 (footnotes omitted).

<sup>211</sup> Levy, *supra* note 160.

<sup>212</sup> *Id.*

<sup>213</sup> Cat Zakrzewski & Tonya Riley, *The Technology 202: Silicon Valley’s Congressman Wants Tech Companies to Collaborate on Disinformation*, WASH. POST (June 12, 2019, 8:34 AM), <https://www.washingtonpost.com/news/powerpost/paloma/the-technology-202/2019/06/12/the-technology-202-silicon-valley-s-congressman-wants-tech-companies-to-collaborate-on-disinformation/5cfff01a7a0a4030c3fda41> [<https://perma.cc/7PTZ-UT92>].

<sup>214</sup> Chandelis Duster, *Kamala Harris Defends Her Push to Get Trump’s Twitter Account Suspended*, CNN (Oct. 16, 2019, 11:27 AM), <https://www.cnn.com/2019/10/16/politics/kamala-harris-trump-twitter-suspension-cnntv/index.html> [<https://perma.cc/G8RZ-F3MK>].

<sup>215</sup> Platform Accountability and Consumer Transparency Act, S. 4066, 116th Cong. (2020).

<sup>216</sup> Cat Zakrzewski & Tonya Riley, *The Technology 202: Lawmakers Unveil Bipartisan Proposal to Make Social Media Moderation More Transparent*, WASH. POST (June 25, 2020, 9:06 AM), <https://www.washingtonpost.com/news/powerpost/paloma/the-technology-202/2020/06/25/the-technology-202-lawmakers-unveil-bipartisan-proposal-to-make-social-media-moderation-more-transparent/5ef3c84f602ff1080718e3a1> [<https://perma.cc/3NYQ-SJCZ>].

<sup>217</sup> Douek, *supra* note 1, at 566.



brand new entity that does the same basic thing).”<sup>218</sup> Though these kinds of measures might face insurmountable First Amendment hurdles, that might not stop lawmakers from giving them a go.

Though the Board could be an antiregulatory ploy to thwart all government intervention, Facebook higher-ups seem bullish about legislated external oversight. Clegg hopes the Board will “be co-opted in some shape or form by governments,”<sup>219</sup> while Brent Harris muses that “regulators increasingly will call for the forms of oversight and transparency and user appeals we’re building.”<sup>220</sup> Bickert also applauds states forcing platforms to provide “meaningful independent oversight,” endorsing regulation to “incentivize” or “require” platforms to provide channels to appeal content decisions “to some higher authority within the company or some source of authority outside the company.”<sup>221</sup>

Clegg, Harris, and Bickert might all be telling corporate fibs, but there’s good reason to take them at their word when they summon legislated external oversight. A legal mandate for Facebook to do what Facebook’s already doing would suit the platform quite nicely. And if governments get into the business of requiring independent oversight through law, calls to consolidate these efforts into a single industry-wide body will likely grow. Such laws would be less disruptive for platforms who’ve already created oversight boards, appeals systems, and procedural protections because those companies won’t have to start from scratch. Legislated external oversight might be more onerous than voluntary measures adopted by platforms, but the upshot would be that moderation processes at companies like Facebook would be blessed, not reformed.

3. *Protecting Incumbents.* — Relatedly, juridical discourse can support regulation that aids incumbents and deters newcomers, locking in structures that existing platforms prefer and that they alone can handle. As Douek observes, “[o]btaining regulations that reflect the current dominant operating models favors incumbents, a kind of ‘regulatory capture through design.’”<sup>222</sup> What’s more, their accumulated market power

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<sup>218</sup> Mike Masnick, *Utah’s Horrible, No Good, Very Bad, Terrible, Censorial “Free Speech” Bill Is a Disaster in the Making*, TECHDIRT (Mar. 1, 2021, 12:19 PM), <https://www.techdirt.com/articles/20210228/23033346341/utahs-horrible-no-good-very-bad-terrible-censorial-free-speech-bill-is-disaster-making.shtml> [<https://perma.cc/7CJF-LPDW>]; see also S.B. 228, Gen. Sess. (Utah 2021); Douek, *supra* note 1, at 566 (discussing Texas and Florida laws requiring platforms to provide notice, appeals, and reasons).

<sup>219</sup> Smith, *supra* note 78.

<sup>220</sup> Issie Lapowsky, *Facebook Tells Us How Its New Board Will Oversee Mark Zuckerberg*, PROTOCOL (May 6, 2020), <https://www.protocol.com/facebook-oversight-board-interview> [<https://perma.cc/RG8N-D9VY>].

<sup>221</sup> MONIKA BICKERT, CHARTING A WAY FORWARD: ONLINE CONTENT REGULATION 10 (2020), [https://about.fb.com/wp-content/uploads/2020/02/Charting-A-Way-Forward\\_Online-Content-Regulation-White-Paper-1.pdf](https://about.fb.com/wp-content/uploads/2020/02/Charting-A-Way-Forward_Online-Content-Regulation-White-Paper-1.pdf) [<https://perma.cc/7SVF-S5YK>].

<sup>222</sup> Douek, *supra* note 1, at 567 (quoting Andrew I. Gavil, Essay, *The FTC’s Study and Advocacy Authority in Its Second Century: A Look Ahead*, 83 GEO. WASH. L. REV. 1902, 1912 (2015)).

makes it easier to bear the financial and logistical burdens of complying with these new legal mandates.

Most prevailing and proposed forms of content moderation through external oversight — especially cross-platform initiatives — can protect dominant firms by locking in their preferred norms, facilitating capture, and raising the bar for what’s expected of platforms. The juridical discourse shaping these measures will only further entrench the visions advanced by Facebook, the Board, and other proponents of industry-wide expansion. Facebook isn’t shy about its comparative edge in building complex and pricey moderation systems. As Zuckerberg once boasted: “The amount of our budget that goes toward our safety systems is greater than Twitter’s whole revenue this year[.] . . . We’re able to do things that I think are just not possible for other folks to do.”<sup>223</sup>

Consider what might happen if Facebook’s Board were to oversee the entire industry. Although including new platforms could theoretically trigger some tinkering with the Board’s procedural or structural features, a major organizational overhaul seems unlikely. The institutional limitations discussed above would probably remain, and that’s just the tip of the iceberg. The temptation to conform moderation rules and processes across participating platforms would be significant. Even if different platforms maintained distinct content standards and systems, the Board’s decisions might promote homogeneity for the substance and procedure of content moderation.

Although platforms sell themselves as a diverse set of online “communities,” incumbents might be tempted by greater standardization because “industry consistency can dilute public criticism.”<sup>224</sup> It’s easier to fend off competition when existing platforms act in unison: there’s strength in conformity, with no platform being left to defend controversial positions that the entire industry has endorsed. All the better if dominant platforms’ most important constituency — advertisers — approves of these efforts.<sup>225</sup> To cap things off, there are financial benefits to cross-platform consistency because different companies can rely on the same tools, and even the same external institutions, to moderate content.

Consider, again, why Facebook might want its current competitors to join its brainchild. Company leaders are candid about their desire for consistency and efficiency. Zafar shared an aspiration for the Board

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<sup>223</sup> Lauren Feiner & Salvador Rodriguez, *Mark Zuckerberg: Facebook Spends More on Safety than Twitter’s Whole Revenue for the Year*, CNBC (May 23, 2019, 7:16 PM), <https://www.cnn.com/2019/05/23/facebook-fake-account-takedowns-doubled-q4-2018-vs-q1-2019.html> [<https://perma.cc/M24L-T8KJ>].

<sup>224</sup> Evelyn Douek, *The Rise of Content Cartels*, KNIGHT FIRST AMEND. INST. (Feb. 11, 2020), <https://knightcolumbia.org/content/the-rise-of-content-cartels> [<https://perma.cc/QUE3-PN7B>].

<sup>225</sup> See Alex Barker & Hannah Murphy, *Advertisers Strike Deal with Facebook and YouTube on Harmful Content*, FIN. TIMES (Sept. 23, 2020), <https://www.ft.com/content/d7957f86-760b-468b-88ec-aead6a558902> [<https://perma.cc/V4R3-TWPT>] (discussing Facebook, YouTube, and Twitter agreeing to a definition of hate speech brokered by the World Federation of Advertisers).

“to be an industry-wide body” with “some type of consistency across platforms,”<sup>226</sup> while Moore expressed hope that competitors would “have an appetite” for an organization like the Board to create a broader “standard of consistency.”<sup>227</sup> In an interview I conducted with Moore, she admitted that it was always “in the back of our minds” when designing the Board that “these issues surrounding content and freedom of expression don’t just happen on Facebook, but content is posted on Twitter and YouTube, and you have similar interactions.”<sup>228</sup> She worried that it can “be really confusing for a user to have one thing taken down on Facebook, but then to go to YouTube or Twitter and it’s still up,” before asking rhetorically: “Shouldn’t there be a standardized approach?”<sup>229</sup> This homily for uniformity across incumbents sidelines concerns about how industry homogeneity could harm both inter-platform competition and online pluralism.<sup>230</sup>

#### CONCLUSION: FEDERALISM FOR PLATFORM GOVERNANCE?

This Response has exposed how key figures surrounding Facebook’s Board use juridical discourse to frame the Board as a form of separation of powers and judicial review. Not only does the Board offer less than the analogies imply, but these deceptive narratives obscure how current regulatory trends serve corporate interests. My account centers how platforms are promoting these narratives and thereby expands Douek’s critique of the stylized picture of content moderation — a picture that misleadingly and incompletely likens moderating to judging.

But Douek does more than critique. After she offers a more realistic and comprehensive account of content moderation, she pivots to a constructive posture and calls for a “second wave” of reforms characterized by experimental, incremental, and diverse approaches to platform governance.<sup>231</sup> To conclude this Response, I accept her invitation and sketch an idea that could guide these efforts. Unlike Douek, I offer no slate of specific proposals; rather, I suggest a frame through which we might assess current and future regulatory efforts: *platform federalism*.

For all of platforms’ talk about separation of powers, a different form of public governance — federalism — might provide wiser lessons

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<sup>226</sup> Zakrzewski & Riley, *supra* note 120; *see also* New America, *supra* note 12, at 39:10 (statement of Zafar) (“It would be great if it was something that more companies participated in.”).

<sup>227</sup> Kara Swisher, Opinion, *Facebook Finally Has a Good Idea*, N.Y. TIMES (Oct. 17, 2019), <https://www.nytimes.com/2019/10/17/opinion/facebook-oversight-board.html> [<https://perma.cc/KAS7-F92P>].

<sup>228</sup> Telephone Interview with Brent Harris & Heather Moore, *supra* note 156.

<sup>229</sup> *Id.*

<sup>230</sup> *See generally* Nikolas Guggenberger, *Moderating Monopolies*, 38 BERKELEY TECH. L.J. (forthcoming 2023); Nathan S. Chapman, *Tech Pluralism*, FIRST THINGS (Nov. 2021), <https://www.firstthings.com/article/2021/11/tech-pluralism> [<https://perma.cc/N7FB-X2SQ>].

<sup>231</sup> Douek, *supra* note 1, at 584; *see id.* at 584–606 (outlining those reforms).

for platform governance. Federal systems can promote liberty, innovation, competition, pluralism, and expertise, while mediating rival governance claims between overlapping regulators.<sup>232</sup> Generally speaking, federalism serves these ends and mediates these claims by presumptively dispersing power among different regulators and leaving room for beneficial forms of central governance. Traditional federalism, in theory and practice, offers tools to advance federal goals and navigate competing arguments about the wisdom of centralized and decentralized governance.

Platform governance can draw from federalism's example. As with traditional federal systems, regulation "*of and by* [p]latforms" also occurs across multiple levels.<sup>233</sup> I use the capacious term "regulation" not to suggest equivalence between public lawmaking and private ordering but to capture how behavior can be enabled and constrained by multiple regulatory forces, only one of which is law.<sup>234</sup> This is true descriptively, as Professor Hannah Bloch-Wehba observes, because platform governance often "muddles state and private power."<sup>235</sup> But normatively, too, platform governance *should* involve a blend of legal and extralegal approaches to account for how law, technology, and norms can all play valuable regulatory roles.<sup>236</sup> Likewise, platform governance can — and, I believe, *should* — try to promote liberty, innovation, competition, pluralism, and expertise.

To be clear, federalism analogies go only so far because of salient differences between public and platform governance.<sup>237</sup> Invoking federalism in this context could also entice the kinds of juridical discourse that I've criticized, though the language of governance can explain and

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<sup>232</sup> See Daniel Halberstam, *Federalism: Theory, Policy, Law*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 576, 586–88 (Michel Rosenfeld & András Sajó eds., 2012); Heather K. Gerken, Feature, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1891 (2014).

<sup>233</sup> See Tarleton Gillespie, *Regulation of and by Platforms*, in THE SAGE HANDBOOK OF SOCIAL MEDIA 254, 254 (Jean Burgess, Alice Marwick & Thomas Poell eds., 2017) (emphases added).

<sup>234</sup> See Evelyn Douek, *Governing Online Speech: "Posts-As-Trumps" to Proportionality and Probability*, 121 COLUM. L. REV. 759, 763 (2021) (observing that "[o]nline speech governance stands at an inflection point" that could usher in both new laws and "self-regulatory innovations and reforms").

<sup>235</sup> Hannah Bloch-Wehba, *Global Platform Governance: Private Power in the Shadow of the State*, 72 SMU L. REV. 27, 66 (2019).

<sup>236</sup> See generally LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999) (exploring how law, code, norms, and markets can all regulate human behavior); Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 554 (1998) (discussing how law isn't "the only source of rulemaking" in online environments because "[t]echnological capabilities and system design choices impose rules on participants").

<sup>237</sup> Cf. JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 107 (2008) ("Analogies are only bad when they ignore the key difference between the two things being analyzed.").

justify meaningful restraints on platform power without blessing platforms' self-serving co-optation of these concepts.<sup>238</sup>

Mindful of these caveats, we might draw lessons from traditional federalism to illuminate the stakes of different platform-governance regimes. I'll suggest a few in the spirit of scholarly provocation. Much as states in federal systems can serve as laboratories of experimentation to address new challenges, so too can regulation encourage (or discourage) innovation from different platforms to address harms tied to networked technologies.<sup>239</sup> Regulation can urge or force platforms to compete and develop expertise in addressing "local" conditions in different online environments, rather than enabling them to centralize governance in service of efficiency or profit. To protect and stimulate online pluralism, regulation can cultivate platform diversity and variety, as opposed to homogeneity and conformity. At the same time, regulation can embrace the other side of federalism's ledger. Some centralized and uniform directives can serve federal values in platform governance, as can collaboration and cohesion between platforms. Here, too, regulators might learn from how traditional federal systems justify central power, not merely local sovereignty.<sup>240</sup>

As with traditional federalism, platform federalism might involve various conceptions of centralized/decentralized regulation and central/local regulators. While scholars of federal systems historically focused on only two levels of government, some favor extending federalism "all the way up" and "all the way down."<sup>241</sup> We might, for example, expand conceptions of traditional federalism to consider how global or regional regimes interact with nations or how local districts, private institutions,<sup>242</sup> and even individual autonomy can be "continuous with federal principles and federal design."<sup>243</sup> Similarly, in the platform context, we might conceive of many possible regulations and regulators. Depending on the context, people might have more or less control in curating their experiences online; groups might get more or less deference in setting distinct rules; different platforms might adopt more or less diverse approaches; or the entire industry might use standards reflecting more or less collaboration or conformity. On each of these levels, regulation could be legal, extralegal, or a blend of both, and it might

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<sup>238</sup> See, e.g., Kadri, *supra* note 170 (analogizing to different structures of traditional governance to illuminate how the Board could curtail Facebook's moderation power).

<sup>239</sup> See Douek, *supra* note 1, at 553, 564; see, e.g., Evelyn Douek, "What Kind of Oversight Board Have You Given Us?," U. CHI. L. REV. ONLINE (May 11, 2020), <https://lawreviewblog.uchicago.edu/2020/05/11/fb-oversight-board-eDouek> [<https://perma.cc/639L-QLYV>] (asserting that "platforms are the laboratories of online governance" where people are facing the challenge of "[s]olving the content moderation puzzle").

<sup>240</sup> See Halberstam, *supra* note 232, at 578–79.

<sup>241</sup> See *id.* at 604–07.

<sup>242</sup> *Id.* at 604–05.

<sup>243</sup> *Id.* at 605.

affect not only content moderation but also other facets of platform governance like privacy, security, and competition.

Given the expansive slate of options that could fall under the federalism rubric, we'll need a framework to assess the merits of different approaches to platform governance. To separate the wheat from the chaff, traditional federalism might again guide us. Through the principle of subsidiarity — the idea that governance should generally occur at the lowest expedient level — we can sketch the boundaries of when cooperation or consistency between platforms warrant sacrificing the values of decentralization.<sup>244</sup> Subsidiarity can foster careful and repeated consideration of how centralization might harm diverse communities, endorsing centralized regulation only when justified by the incapacity of decentralized action. At the same time, subsidiarity can justify centralized regulation, especially when marginalized groups are likely to suffer without it. Inspired by federalism's values and methods, regulators could adapt subsidiarity to mediate platform power and foster healthier digital environments through law, policy, and technology.

To be sure, as Professor Daniel Halberstam warns, “subsidiarity is easier said than applied.”<sup>245</sup> Arguments about different regulators' capacities often involve complex empirical judgments, and some of these competing claims raise questions about goals and values that can't be resolved “absent moral argumentation and political contest.”<sup>246</sup> When do externalities created by one platform justify singular regulation of all platforms? How incapable must decentralized regulators be before a central regulator should step in? What happens if a particular regulation disparately affects different marginalized groups? The principle of subsidiarity, by itself, offers no clear answers to these questions. We might reason our way to answers by referencing concepts like pluralism and expertise, but “we will often need politics to get there.”<sup>247</sup> This is true of traditional federalism, as it would be if we applied subsidiarity to platform governance.

To give an example of how subsidiarity might guide platform governance, consider two initiatives — HeartMob and StopNCII — developed by private organizations in conjunction with multiple platforms. HeartMob allows people to document and report online harassment through tools created partly through partnerships with Facebook,

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<sup>244</sup> *Id.* at 585–86; *see also* Douek, *supra* note 1, at 552 (arguing that community-based moderation reflects “an ideal similar to the federalism principle of subsidiarity”); Alan Z. Rozenshtein, *Moderating the Fediverse: Content Moderation on Distributed Social Media*, 2 J. FREE SPEECH L. (forthcoming 2023) (manuscript at 12), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4213674](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4213674) [<https://perma.cc/DJR5-UUW4>] (outlining a model of “[f]ederated [m]oderation” and “content-moderation subsidiarity” that would devolve moderation decisions and allow each online community to “choose its own content moderation standards according to its own needs and values”).

<sup>245</sup> Halberstam, *supra* note 232, at 593.

<sup>246</sup> *Id.* at 595.

<sup>247</sup> *Id.* at 593.

Twitter, and Reddit;<sup>248</sup> StopNCII, meanwhile, lets people detect and remove their intimate images if they appear on Facebook and Instagram.<sup>249</sup> Both resources would benefit from coordination between platforms so people could report abuses occurring across different services. There are also compelling reasons to favor centralized systems when responding to serious digital abuse: some harassment and intimate intrusions can pose imminent safety and privacy risks that can't be undone, and forcing people to repeatedly contact multiple platforms and navigate idiosyncratic reporting mechanisms in the midst of abuse can be overwhelming and traumatic.<sup>250</sup> HeartMob and StopNCII are also designed to address types of interpersonal harms that are disproportionately experienced by marginalized peoples or that have marginalizing effects.<sup>251</sup> Finally, both initiatives provide optional tools to empower people in ways that respect their autonomy, rather than foisting a form of moderation on them unwillingly. These features, among others, suggest that both endeavors are good candidates for more uniform and collaborative regulations across platforms, perhaps even encouraged or mandated by law. Then again, while StopNCII involves intimate content with relatively consistent definitions across contexts, HeartMob targets harassing content that has diverse and contested boundaries — a distinction that arguably makes StopNCII's tool a better candidate for mandatory industry-wide adoption than HeartMob's.

We can also assess external oversight through a federal lens. Facebook's Board offers an innovative approach to platform governance, though one far less potent than prevailing narratives suggest.<sup>252</sup> If we strip away deceptive juridical discourse, the Board might appear as something quite different. Rather than "justices" resolving cases, the Board's members might be a diverse group of experts publicly sharing views about difficult issues, expressing informed opinions about how a powerful company is handling one key facet of its business that affects individuals and society. In short, an external board could be less of a supreme court and more of an expert forum.

I saw some of this conceptual tension firsthand. About a year before the Board's launch, I spoke with two Facebook employees tasked with its design. Moore, a former appellate lawyer, framed the Board in terms

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<sup>248</sup> *Social Media Safety Guides*, HEARTMOB, [https://iheartmob.org/resources/safety\\_guides](https://iheartmob.org/resources/safety_guides) [<https://perma.cc/PX9L-7JWN>].

<sup>249</sup> STOPNCII.ORG, <https://stopncii.org> [<https://perma.cc/V227-JZJT>]; see also *FAQ: Non-consensual Intimate Image Sharing*, STOPNCII.ORG, <https://stopncii.org/faq> [<https://perma.cc/449Z-A7S2>].

<sup>250</sup> See Thomas E. Kadri, *Brokered Abuse*, J. FREE SPEECH L. (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4159924](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4159924) [<https://perma.cc/D2VS-LZND>] (exploring how the decentralized process of removing personal information from data brokers can exacerbate post-abuse trauma).

<sup>251</sup> See Kadri, *supra* note 40, at 1082–83, 1085–86, 1105, 1113.

<sup>252</sup> See *supra* section II.B, pp. 187–91; Douek, *supra* note 239.

of jurisdiction and independence, discussing the Board's potential powers vis-à-vis Facebook's and stressing that the Board couldn't be merely an advisory body.<sup>253</sup> Fariba Yassaee, meanwhile, seemed guided by her background in diplomacy, not law, having previously worked with former U.S. Secretary of State Madeleine Albright to create governmental advisory committees.<sup>254</sup> Toward the end of my interview with the pair, Yassaee lamented that our conversation had focused too much on checks and balances. In her view, the Board shouldn't be about checking Facebook's power but rather sharing transparent expertise.<sup>255</sup>

Moore's vision of the Board ultimately prevailed, at least as a matter of discourse.<sup>256</sup> But we needn't necessarily banish external oversight from platform governance entirely. Though Facebook's creation is largely incapable of *forcing* meaningful reforms through its one-off and narrow decisions, its members can use their Board opinions to share expertise and evaluate Facebook's broader moderation systems.<sup>257</sup> Facebook might ignore them, but that fact alone wouldn't sap the Board of all value. Returning to federalism as a guide, the Board's public pronouncements could contribute toward innovation and expertise on the world's largest platform — or at least to public conversations about these issues.

The federal scales might start to tip, however, if a single body oversaw multiple platforms, whether voluntarily or through legal mandates. Such a development might involve applying uniform rules or processes across platforms or at least create tendencies toward industry homogeneity, thereby undermining federal goals like innovation, competition, and pluralism. There would be ways to counteract these risks — such as a cross-platform body that recognized a principle akin to a “margin of appreciation” to endorse diverse approaches by different platforms<sup>258</sup> — but we've already explored why incumbents might push for regulations that entail greater uniformity, reflect current practices, and deter newcomers.<sup>259</sup> Though applying subsidiarity requires empirical evidence and political argumentation beyond the scope of this Response, it seems likely that the types of centralized oversight favored by Facebook and its peers couldn't be justified by the incapacity of decentralized action.

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<sup>253</sup> Interview with Heather Moore & Fariba Yassaee, Facebook Governance Team (May 13, 2019) (on file with author).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> See *supra* section I.B, pp. 171–76.

<sup>257</sup> See Douek, *supra* note 239.

<sup>258</sup> See generally ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY (2012).

<sup>259</sup> See *supra* section II.D, pp. 192–97.



Fleshing out platform federalism requires more work. Even if the idea ultimately proves unhelpful, I hope this Response has, at least, offered persuasive reasons why platform governance should shun misleading juridical discourse that distorts the nature of existing moderation and oversight approaches. But even if the Board were characterized differently — say, as a kind of expert forum — its structural limitations still make it an incomplete approach to content moderation. As Douek implies, when initiatives like the Board focus mainly on “downstream outcomes in individual cases,” they fail to interrogate more important “upstream choices about design and prioritization in content moderation that set the boundaries within which downstream paradigm cases can occur.”<sup>260</sup> At the end of the day, with or without juridical discourse, a regulatory regime focused on “ex post individual error correction” won’t provide “meaningful accountability of content moderation systems as a whole or encourage necessary innovation.”<sup>261</sup>

My account of the Board and its possible cross-platform successor buttresses Douek’s central arguments. Though her gaze is wider than external oversight bodies, our claims are complementary. Reforms should do more than offer greater transparency, process, and neutrality for individual decisions. Knowing more about what platforms are doing is a start, but it shouldn’t be an end; privatized procedure can have value, but it can’t address how incumbents seek to entrench their power by building increasingly ornate institutions of private governance; and impartial experts might be preferable to corporate executives, but they can’t address structural or systemic platform pathologies through one-off decisions about particular pieces of content.

Likewise, Douek and I agree that regulation should promote “innovation and iteration,” rather than “creating barriers to entry or locking in a vision of content moderation that is fixed and reflects the practices of the current dominant firms.”<sup>262</sup> Crafting this kind of regulation is, in part, what I believe platform governance can learn from federalism. Although collaboration and uniformity can be valuable, we should be suspicious of attempts to centralize platforms’ power and conform their behavior to a rigid model. Some have already sounded similar alarms: Douek warns of dangers posed by “content cartels” formed through voluntary cross-platform cooperation,<sup>263</sup> while Professor Danielle Citron highlights how some laws create “compelled conformity” across platforms.<sup>264</sup> Still more work remains to develop theories and tools to critically assess collaboration and conformity within this industry.

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<sup>260</sup> Douek, *supra* note 1, at 585.

<sup>261</sup> *Id.* at 606.

<sup>262</sup> *Id.* at 585.

<sup>263</sup> Douek, *supra* note 224.

<sup>264</sup> Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035, 1070 (2018).

Forging new paths for platform governance will require a different set of discourses, shaped by a different picture of content moderation. Douek's critique of the stylized picture will be an important part of that disruptive effort, as will her ideas about a new wave of regulatory reforms. I hope this Response, too, can play a role.