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Learning From Mistakes: A Guide to Expanding the Oversight Board

Kevin Frazier

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LEARNING FROM MISTAKES: A GUIDE TO EXPANDING THE OVERSIGHT BOARD

*Kevin Frazier**

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More than 4.4 billion people use social media—the vast majority of these users are young and reside outside of the United States.¹ A few platforms attract a significant number of those users—for example, 2.9 billion people use Facebook, 2.3 billion use YouTube, and 1.2 billion use WeChat.² It follows that how these major platforms govern themselves with respect to content moderation has an impact on billions of users and may lead to policy changes across other platforms that affect billions more. That is why it is so important to analyze Meta’s Oversight Board—an independent body created for the purpose of “promot[ing] free expression by making principled, independent decisions regarding content on Facebook and Instagram and by issuing recommendations on the relevant Facebook company content policy.”³ Though decisions made by the Oversight Board with respect to specific posts receive substantial media

¹ *Social Media Statistics Details*, UNIV. OF MAINE (Sept. 2, 2021), <https://umaine.edu/undiscoveredmaine/small-business/resources/marketing-for-small-business/social-media-tools/social-media-statistics-details/>; *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/> (stating that only a fraction of these users reside in the United States and that 72% of American adults used social media as of January 1, 2020, or 174 million social media users); *Quick Facts United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045221> (last visited Apr. 15, 2023) (reporting that 77.8% of 331,893,745 Americans were over the age of 18 in 2021, which amounts to 242,653,333 people. Based on Pew’s estimate of 72% of American adults using social media, 174,710,400 Americans used social media in 2021).

² UNIV. OF MAINE, *supra* note 1.

³ *The Purpose of the Board*, META OVERSIGHT BD., <https://www.oversightboard.com/> (last visited Apr. 15, 2023). To avoid confusion, for the remainder of the paper, any reference to Facebook will be to the social media platform rather than the earlier incarnation of Meta, the company, even though Meta only became the official name of the company in October 2021. Brett Molina & Jessica Guynn, *Facebook Changes Name to Meta: Mark Zuckerberg Announces Company Rebrand as It Moves to the Metaverse*, USA TODAY (Oct. 28, 2021), <https://www.usatoday.com/story/tech/2021/10/28/facebook-meta-name-change-metaverse-instagram-whatsapp-zuckerberg/6180303001/>.

attention,⁴ less attention has been paid to the structure of the Board as well as how the Board plans to expand to increase the number of posts it reviews per year. This article aims to fill that gap.

Federal courts serve as a useful, albeit imperfect comparable system for the Board when assessing how best to expand Meta’s content adjudication system.⁵ Lessons from prior expansions of the federal courts serve as the template from which this article will make recommendations for the expansion of the Oversight Board. The first lesson is that the Board must make timely adjustments to its structure—including the number of lower courts or “Content Moderation Commissions” (CMCs) as well as the number of members on the Board and on any commissions—in response to increases in its jurisdiction and caseload. The second lesson is that members of the Board and, assuming the creation of CMCs, the selected commissioners must reflect the diversity of users on platforms under their jurisdiction; additionally, Board members and CMC commissioners must possess the requisite expertise to resolve the complexities presented by appeals. The third lesson is that Meta should surrender some of its authority over the creation and selection of Board memberships and, once established, the creation and selection of “commissionships” on CMCs.

The first part of the article introduces the Board, its origin, purpose, track record, and plans for the future. The second part assesses to what extent the Board should be analyzed as a court by evaluating its mission, body of law, and operations under Roscoe Pound’s framework of developed legal systems. The third part begins by evaluating how and to what effect the federal courts have evolved in response to population growth across the United States as well as an increase in diversity among citizens. Finally, the article explores each of the three aforementioned lessons for the Board based on the successes and failures revealed by the evolution of the federal court system.

I. THE ORIGIN, PURPOSE, PERFORMANCE AND FUTURE PLANS OF THE OVERSIGHT BOARD

Calls for “transparency and accountability” from external stakeholders preceded any effort on behalf of Meta to create an oversight entity.⁶ Meta’s

⁴ See, e.g., Naomi Nix, *Oversight Board Tells Meta to Restore Post Comparing Russians to Nazis*, WASH. POST, <https://www.washingtonpost.com/technology/2022/11/16/facebook-oversight-board-ukraine-war/> (Nov. 16, 2022) (describing the Board’s recent reversal of Facebook’s decision to remove a post equating Russian soldiers to Nazis because of Russia’s invasion of Ukraine).

⁵ Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418, 2476 (2020).

⁶ *Id.* at 2428.

approach to formulating and enforcing rules, referred to as “Community Standards,”⁷ for acceptable posts to Facebook and Instagram received increased scrutiny following Meta making public the previously secret standards in April 2018.⁸ That public release came nearly a year after pressure mounted on Meta to detail its guidelines and processes for taking down content.⁹

In May 2017, Nick Hopkins of *The Guardian* summarized insights he gleaned from “more than 100 internal training manuals, spreadsheets and flowcharts[.]”¹⁰ Hopkins revealed how Meta attempted to moderate content pertaining to everything from hate speech to cannibalism by leaning on an automated system with minimal human involvement.¹¹ When a human moderator did have an opportunity to review questionable content, Hopkins exposed that they made decisions in less than ten seconds due to the incredible volume of posts that may have violated the Community Standards.¹² As of 2017, Meta employed only 4,500 human content moderators.¹³ Those moderators received just two weeks of training and some manuals to guide their work prior to being tasked with reviewing social media posts.¹⁴ The public that seeks to hold Meta to a higher standard responded to *The Guardian* disclosure by voicing continued displeasure with the inadequacy of their transparency and the content review processes.¹⁵ For example, an assistant professor of Information Studies at UCLA, Sarah Roberts, called on Meta to provide more information on their “internal mechanisms” with respect to content moderation.¹⁶

⁷ *Id.* at 2423.

⁸ *Id.* at 2438 (citing Monika Bickert, *Publishing Our Internal Enforcement Guidelines and Expanding Our Appeals Process*, FACEBOOK NEWSROOM (Apr. 24, 2018), <https://newsroom.fb.com/news/2018/04/comprehensive-community-standards>).

⁹ Nick Hopkins, *Revealed: Facebook’s Internal Rulebook on Sex, Terrorism, and Violence*, GUARDIAN (May 21, 2017), <https://www.theguardian.com/news/2017/may/21/revealed-facebook-internal-rulebook-sex-terrorism-violence>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* (reporting that one document said Facebook reviewed more than 6.5 million reports of fraudulent accounts on a weekly basis).

¹³ Nick Hopkins, *Facebook Moderators: A Quick Guide to their Job and Its Challenges*, GUARDIAN (May 21, 2017) <https://www.theguardian.com/news/2017/may/21/facebook-moderators-quick-guide-job-challenges>.

¹⁴ *Id.*

¹⁵ See Hopkins, *supra* note 9.

¹⁶ Julia Carrie Wong & Olivia Solon, *Facebook Releases Content Moderation Guidelines – Rules Long Kept Secret*, GUARDIAN (Apr. 24, 2018), <https://www.theguardian.com/technology/2018/apr/24/facebook-releases-content-moderation-guidelines-secret-rules>; see Melina Delkic, *Leg Booty? Panoramic? Seggs? How TikTok Is Changing Language*, N.Y. TIMES, <https://www.nytimes.com/2022/11/19/style/tiktok-avoid-moderators-words.html?smid=nytcore-ios-share&referringSource=articleShare> (Nov. 21, 2022)

In the lead up to Meta finally making their full set of Community Standards public in April 2018,¹⁷ they announced a process for users to appeal certain decisions.¹⁸ More specifically, Mark Zuckerberg issued a statement expressing his goal of “develop[ing] a more democratic and independent system” of content moderation and adjudication.¹⁹ He also announced the forthcoming establishment of a “new appeals process so [users will] be able to appeal decisions about individual posts if [the user] think[s] [Facebook] made a mistake.”²⁰ However, the public did not relent in its skepticism as to whether Meta was competent to serve as the sole arbiter of what constituted acceptable speech on a global platform.²¹ Instead, “civil society, academics, and journalists” felt empowered by the public release and started to exert greater pressure on the company to change its ways.²² The public’s skepticism may have emerged from the fact that Meta’s content moderation strategy was always skewed by the fact that two of its goals—user safety and freedom of expression—are often (if not always) in tension with Meta’s other goal—attracting advertisers to the platform.²³

In November 2018, Zuckerberg introduced Facebook’s plans to create an “independent body, whose decisions would be transparent and binding.”²⁴ At that point, Zuckerberg planned to have the oversight entity “advise on content policy and listen to user appeals on content decisions[,]” as summarized by Kate Klonick—a scholar who received exclusive access to Meta’s efforts to formulate and initiate the entity.²⁵ A variety of factors led Zuckerberg to the surprising act of ceding a part of Meta’s control over Facebook and Instagram.²⁶ Klonick lists “goodwill” generating good public relations, creating a “convenient scapegoat for controversial content-moderation decisions[,]” reducing regulatory pressure, and plain-and-simple economics as potential motivations and incentives for Zuckerberg’s decision.²⁷ From all these potential nudges toward an oversight entity, the largest push likely came from maintaining and, in some cases,

(describing the complaints of TikTok users and stakeholders regarding the company’s lack of transparency and, perhaps, excessive reliance on automated processes for removing content).

¹⁷ Wong & Solon, *supra* note 16.

¹⁸ Hopkins, *supra* note 9.

¹⁹ Mark Zuckerberg, FACEBOOK (Apr. 24, 2018), <https://www.facebook.com/zuck/posts/10104874769784071>.

²⁰ *Id.*

²¹ Klonick, *supra* note 5, at 2438–39.

²² *Id.* at 2438.

²³ See Wong & Solon, *supra* note 16.

²⁴ Mark Zuckerberg, *A Blueprint for Content Governance and Enforcement*, FACEBOOK, <https://www.facebook.com/notes/751449002072082/> (May 5, 2021).

²⁵ Klonick, *supra* note 5, at 2425.

²⁶ *Id.* at 2426.

²⁷ *Id.*

restoring users' trust in Meta platforms.²⁸

The Meta leadership team took deliberate steps to increase the odds of the oversight entity earning the trust of users—a trust that Meta hoped would extend to Facebook and Instagram as well.²⁹ Rather than lean on internal (and, potential biased) guidance, Meta sourced the idea for an oversight entity from Harvard Law School Professor Noah Feldman, “[a]n expert in constitutional law.”³⁰ Intrigued by the concept, Meta asked Feldman to write a white paper on this proposal.³¹ In 2019, Meta published a draft charter for the oversight entity³² and solicited input from stakeholders around the globe on the merits of an oversight entity and what features it would require to fulfill its mandate.³³ The company hosted six workshops and twenty-two roundtables, which cumulatively brought in the feedback of 650 people from nearly eighty-eight countries.³⁴

The consultation process also included several other iterations of Meta releasing draft ideas and receiving feedback on those ideas,³⁵ including reviewing more than 1,200 public comment submissions on the proper scope, setup, and mission of the oversight entity.³⁶ Meta identified several major themes from this outreach. Two of the most important themes were the entity's independence from Meta and its adoption of a thorough decision-making process, including consultation with experts in specific cultures, technologies, and content moderation writ large.³⁷

²⁸ See *id.* (“Facebook’s creation of the Oversight Board is an investment in building user trust, which is a long-term strategy for continued economic growth.”); Wong & Solon, *supra* note 16 (highlighting Meta’s increased transparency and establishment of new procedures as an effort to regain the trust of users).

²⁹ See Klionick, *supra* note 5, at 2426–27 (noting that user trust in the platform is essential to users spending time on the platform—“the core of Facebook’s economic model”—and that the creation of the Board speaks to Meta’s financial stake in increasing both time spent and trust in Facebook and Instagram among users).

³⁰ See, e.g., HLS News Staff, *Harvard Law Professor Plays Instrumental Role in Creation of Facebook’s Content Oversight Board*, HARV. L. SCH. (June 27, 2019), <https://hls.harvard.edu/today/harvard-law-professor-plays-instrumental-role-in-creation-of-facebooks-content-oversight-board/>; see also Steven Levy, *Inside Meta’s Oversight Board: 2 Years of Pushing Limits*, WIRED (Nov. 8, 2022), <https://www.wired.com/story/inside-metas-oversight-board-two-years-of-pushing-limits> (covering Feldman’s role in developing the concept of an oversight entity).

³¹ HLS News Staff, *supra* note 30.

³² Nick Clegg, *Charting a Course for an Oversight Board for Content Decisions*, META (Jan. 28, 2019), <https://about.fb.com/news/2019/01/oversight-board/>.

³³ Brent Harris, *Getting Input on an Oversight Board*, META (Apr. 1, 2019), <https://about.fb.com/news/2019/04/input-on-an-oversight-board/>.

³⁴ HLS News Staff, *supra* note 30.

³⁵ Brent Harris, *An Update on Building a Global Oversight Board*, META (Dec. 12, 2019), <https://about.fb.com/news/2019/12/oversight-board-update/>.

³⁶ HLS News Staff, *supra* note 30.

³⁷ *Id.*

On December 12, 2019, Meta announced the creation of the Oversight Board Trust—an entity tasked with providing independent funding and governance support to the Oversight Board.³⁸ The announcement also detailed other ways Meta planned to guarantee the independence of the Oversight Board, including an independent staff and means outside the control of Meta for handling the Board’s accounting and monitoring the Board’s compliance with its bylaws.³⁹ Despite these efforts, the Board’s ties to Meta were hard to miss—for instance, Meta contributed \$130 million to the Trust to allow the Board to get up and running. Moreover, Meta indicated that it anticipated serving as the Board’s source of funding into the future.⁴⁰

On January 28, 2020, Meta published more information about the actual operation of the Board.⁴¹ The Board’s bylaws, pending actual approval by the Board, were shared.⁴² The director of the Oversight Board Administration, the entity tasked with supporting the members of the Board, was announced.⁴³ Perhaps most importantly, the Board’s means for reviewing posts and assisting Meta with policy questions were outlined:

Cases will initially [not include disputes around ads, algorithms, and groups, but rather] only involve individual pieces of content that we have taken down, and will be referred to the board through two avenues. First, anyone who disagrees with the outcome of [Meta’s]’ decision to take down their content on Instagram or Facebook, and has exhausted appeals, will have 15 days to submit an appeal to the board. Second, Facebook itself will be able to directly refer significant and difficult cases.⁴⁴

From the appealed posts, a Board member-formed case selection committee would determine those best suited for adjudication.⁴⁵ Panels of five Board members would then be assigned to evaluate each selected case.⁴⁶ Meta agreed to adhere to the Board’s rulings on single posts—for example, whether to leave the post up or remove it.⁴⁷ However, Meta refrained from ceding all of its authority over its Community Standards to the Board. While Meta permitted the Board to include recommendations in its decisions, it retained discretion as to

³⁸ See Harris, *supra* note 35.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Brent Harris, *Preparing the Way Forward for Facebook’s Oversight Board*, META (Jan. 28, 2020), <https://about.fb.com/news/2020/01/facebooks-oversight-board/>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*; see *Oversight Board Charter*, META OVERSIGHT BD., art. II, sec. 1 (2019), https://about.fb.com/wp-content/uploads/2019/09/oversight_board_charter.pdf.

⁴⁵ Levy, *supra* note 30; see META OVERSIGHT BD., *supra* note 44.

⁴⁶ Levy, *supra* note 30; see META OVERSIGHT BD., *supra* note 44, art. III, sec. 2.

⁴⁷ Levy, *supra* note 30; see META OVERSIGHT BD., *supra* note 44, art. V, sec. 3.

whether to adopt those recommendations.⁴⁸ Meta also devised another procedural mechanism to solicit the Board's feedback: policy advisory opinions.⁴⁹ Under this mechanism, the Board receives a request from Meta for the Board's input on a weighty Community Standards issue, then Meta again exercises its discretion as to whether to adopt the Board's approach.⁵⁰

Meta anticipated that eventually the Board would have the capacity to hear cases where Meta opted not to remove a piece of content.⁵¹ Beyond Meta's planned course for the Board's evolution, it acknowledged the need to allow the Board to develop in response to "shifts in how people use [Meta's] services," such as expanding the content within the Board's bailiwick.⁵² Meta also identified two larger goals: timely adjudication and resolution of disputes⁵³ and prioritization of cases "that have the greatest potential to guide [Meta's] future decisions and policies."⁵⁴ On the whole, Meta specified that the Board "is meant to be dynamic."⁵⁵

To fulfill this aspired dynamism as well as the other goals for the Board, Meta planned to place 40 members on the Board and to surround them with a staff of clerks—akin to those who serve U.S. Supreme Court justices.⁵⁶ Meta reserved a role for itself in the selection of the first set of members, which may explain why the Board still has more than a dozen vacancies and lacks members with the sort of technical expertise required to dive into the algorithms used by Meta.⁵⁷ According to some, qualified applicants have been turned down by Meta because of the company's fear that the applicant would act on prior criticism of Meta and that the applicant may have the sort of expertise that could steer the Board closer to evaluating more than just content.⁵⁸

Renée DiResta's candidacy serves as an example of both of the flaws with the selection process for Board members. As summarized by Steven Levy in *Wired*, DiResta's "inclusion [on the Board] made a lot of sense."⁵⁹ Given her role as the technical research manager of the Stanford Internet Observatory, DiResta would

⁴⁸ Levy, *supra* note 30; see META OVERSIGHT BD., *supra* note 44, art. III, sec. 4.

⁴⁹ Levy, *supra* note 30; see META OVERSIGHT BD., *supra* note 44, art. III, sec. 7.3.

⁵⁰ Levy, *supra* note 30.

⁵¹ Harris, *supra* note 41.

⁵² *Id.*

⁵³ *Id.* (planning to have "the board to come to a case decision, and for [Meta] to have acted on that decision, in approximately 90 days" and, more specifically, for Meta to have implemented "the board's decision on individual pieces of content within seven days[.]").

⁵⁴ *Id.* (explaining that, in support of this goal, Meta created a process for the Board's expedited review of certain cases).

⁵⁵ *Id.*

⁵⁶ Levy, *supra* note 30.

⁵⁷ *See id.*

⁵⁸ *Id.*

⁵⁹ *See id.*

have filled an expertise gap on the Board related to algorithms.⁶⁰ Furthermore, she had the sort of enthusiasm one would expect from someone joining such a novel effort—DiResta explained that she wanted to join the Board because it “would be an opportunity to shape the direction of something that I think has real potential.”⁶¹ However, DiResta also had been a “consistent critic of Meta’s failure to deal with the harmful disinformation on its platform.”⁶² So, after an eleven-month process finally ended, DiResta did not get selected.⁶³ Instead, three board members—all of which fit the Board’s typical lawyer or journalist profile and all of which lacked a technical background—were added to the Board.⁶⁴

If the DiResta story can serve as an accurate glimpse into the Board selection process, then drastic reforms are necessary for the Board to fulfill its mission. DiResta’s experience demonstrates that the current selection process allows for “Meta’s reservations” about a candidate’s prior statements to unnecessarily extend the application process and, ultimately, rob the Board of someone capable of improving the quality of its deliberations.⁶⁵ As pointed out by Levy, for the Board to become truly independent, Meta cannot play a role in how the Board selects its members and who the Board ultimately selects.⁶⁶

Though the Oversight Board has met some of Meta’s goals—such as allowing users to appeal Meta’s decisions to leave content up⁶⁷—in other regards it appears to be falling short of the expectations of Meta as well as those of members of the Board.⁶⁸ Four shortcomings stand out: the limited capacity of the Board with respect to its caseload; the limited jurisdiction of the Board, which currently excludes ads, algorithms, and groups, and only includes content from a few of Meta’s platforms; and, a failure to establish true independence from Meta, which affects the Board’s ability to increase its size and, likely, to improve the odds of Meta adopting recommendations from the Board.⁶⁹

The Board has so far disappointed a co-chair, Stephen Neal, with its capacity to review appealed posts—as Neal reported to *Wired*, the Board’s limited caseload has reduced its ability to “have a real impact on where platform content

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ Guy Rosen, *Users Can Now Appeal Content Left Up on Facebook or Instagram to the Oversight Board*, META (Apr. 13, 2021), <https://about.fb.com/news/2021/04/users-can-now-appeal-content-left-up-on-facebook-or-instagram-to-the-oversight-board/>.

⁶⁸ *See* Levy, *supra* note 30.

⁶⁹ *See id.*

moderation[s]” go.⁷⁰ Though the Board has received 2 million appeals on content, it has only ruled on 28 of them as of November 2022.⁷¹ As of the end of 2021, Meta had only implemented 19 of the Board’s 87 recommendations; the company dismissed 13 other recommendations by claiming that the Board’s recommendations constituted “work Meta already does.”⁷² Further evidence of the Board’s limited capacity and lack of sufficient resources emerges from the Board’s relatively slow pace—according to analysis conducted by Evelyn Douek and Tia Sewell, as of mid-July 2022, the Board missed its internal deadline to issue a decision in more than 20 percent of its cases.⁷³ It seems “appropriate” for the Board to increase in size to address a greater number of appeals and to increase its ability to timely issue recommendations and decisions and monitor the extent to which Meta follows those recommendations and decisions.⁷⁴

Article I, Section I of the Charter allows the Board to “increase or decrease in size as appropriate.”⁷⁵ An appropriate increase in the size of the Board must go beyond just filling the 40 slots that Meta initially anticipated. In fact, the Board needs all 40 of those members as well as to designate and staff Content Moderation Commissions, the equivalent of lower courts. If Meta truly regards “[f]reedom of expression [as] a fundamental human right”⁷⁶ and expects the Board to provide “an accessible opportunity for people to request [the Board’s] review *and be heard*[.]”⁷⁷ then even a marginal increase to the size of the Board will not suffice. Even if the Board realized Co-Chair Neal’s goal of handling two or three times as many cases as it currently does, it would still not provided even a fraction of users with a chance to “be heard.”⁷⁸ It is also unclear if a Board without any members with technical expertise can truly hear any dispute,⁷⁹ even if the Board in its current form has the authority to consult outside experts with that expertise.⁸⁰ As in the federal court system, the power of the Oversight Board (and, eventually, the entire content adjudication system over which the Board

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Evelyn Douek & Tia Sewell, *Meta’s Oversight Board Often Turns in Its Homework Late. Does It Matter?*, LAWFARE (July 15, 2022), <https://www.lawfareblog.com/metass-oversight-board-often-turns-its-homework-late-does-it-matter>.

⁷⁴ *See* META OVERSIGHT BD., *supra* note 44, art. I, sec. 1.

⁷⁵ *Id.*

⁷⁶ *See id.* at Introduction.

⁷⁷ *See id.* (emphasis added).

⁷⁸ Levy, *supra* note 30.

⁷⁹ *See, e.g.*, David L. Faigman, *Judges as “Amateur Scientists”*, 86 B.U. L. REV. 1207, 1208 (2006) (noting that legal decision makers simply cannot properly use scientific knowledge if they do not understand the premises of research methods and statistics).

⁸⁰ META OVERSIGHT BD., *supra* note 44, art. III, sec. 3.

sits) “depends on its judgment rather than control of the purse or sword[.]”⁸¹ The Board’s legitimacy will diminish if the Board lacks members well-versed in the language of “content moderation,” including algorithms.

Whether the Board can further freedom of expression also hinges on when *and if* Meta ever acquiesces and allows the Board to adjudicate disputes regarding more than just posts to Facebook and Instagram.⁸² Meta’s other platforms, such as WhatsApp, which has 2 billion users,⁸³ and Horizon Worlds, which attracts as many as 300,000 people operating as V.R.-based versions of themselves,⁸⁴ place freedom of expression in tension with user protections, such as authenticity, in similar ways as Facebook and Instagram. WhatsApp, for example, has been used by members of groups like ISIS to elude detection by U.S. and European spy agencies and to coordinate deadly attacks.⁸⁵ Content moderation is also necessary on V.R. platforms, where users can exploit their avatars to perform actions that would violate Meta’s Community Standards.⁸⁶ Where content moderation occurs, the freedom of expression of users is always implicated.⁸⁷ As Meta’s portfolio of platforms changes in terms of user base and, relatedly, potential impact on society, the inflexibility of the Board’s jurisdiction will become more apparent and calls for an expansion of its mandate will likely spread and become louder.⁸⁸

Furthermore, few platforms outside of the Meta umbrella are likely to subject their content moderation decisions to review by the Oversight Board until the

⁸¹ Cf. Faigman, *supra* note 79, at 1211.

⁸² See, e.g., META OVERSIGHT BD., *supra* note 44, at Introduction (limiting the Board’s ability to make “principled, independent decisions” to “important pieces of content”); see also Levy, *supra* note 30.

⁸³ UNIV. OF MAINE, *supra* note 1.

⁸⁴ Kashmir Hill, *This Is Life in the Metaverse*, N.Y. TIMES (Oct. 7, 2022), <https://www.nytimes.com/2022/10/07/technology/metaverse-facebook-horizon-worlds.html>.

⁸⁵ See, e.g., Sebastian Rotella, *ISIS via WhatsApp: ‘Blow Yourself Up, O Lion’*, PROPUBLICA (July 11, 2016), <https://www.propublica.org/article/isis-via-whatsapp-blow-yourself-up-o-lion>.

⁸⁶ See, e.g., Aaron Mak, *I Was a Bouncer in the Metaverse*, SLATE (May 9, 2022), <https://slate.com/technology/2022/05/metaverse-content-moderation-virtual-reality-bouncers.html> (detailing an example of possible sexual harassment occurring in Microsoft’s metaverse platform, AltSpaceVR).

⁸⁷ See generally *id.* (discussing the difficulties of assessing whether conduct in VR constitutes expression or an unintended act).

⁸⁸ See, e.g., Jonathan Vanian, *Facebook Scrambles to Escape Stock’s Death Spiral as Users Flee, Sales Drop*, CNBC, <https://www.cnbc.com/2022/09/30/facebook-scrambles-to-escape-death-spiral-as-users-flee-sales-drop.html#:~:text=The%20number%20of%20daily%20active,2024%2C%20according%20o%20FactSet%20estimates> (Sept. 30, 2022) (“The number of daily active users [of Facebook] in the U.S. and Canada has fallen in the past two years, from 198 million in mid-2020 to 197 million in the second quarter of this year. Globally, user numbers are up about 10% over that stretch and are expected to increase 3% a year through 2024, according to FactSet estimates.”).

Board has proven its technical and procedural competencies.⁸⁹ When Elon Musk acquired Twitter and identified his intent to create a content moderation council, the Oversight Board offered to serve as such a council.⁹⁰ As of this writing, Musk has yet to take the Oversight Board up on their offer. Levy, of Wired, seems to think that skepticism of the Board spans the industry; he quipped, “Twitter, Snap, YouTube, and TikTok aren’t exactly beating down the doors to get a piece of the Oversight Board.”⁹¹ An expansion of the Board’s jurisdiction though, would increase the odds of the Board having a meaningful impact on content moderation and assisting in the creation and adoption of industry-wide standards.⁹² When asked if she thought the Board has had enough impact, Emi Palmor, a member of the Board who once served as the director general of Israel’s Justice Ministry, replied, “[m]y answer is no. I wish we had made more of a difference.”⁹³

Finally, Meta still exerts too much influence on the Board, which, at least partially explains the Board’s slow pace of appointing new members and Meta’s apparent ambivalence as to whether the Board’s recommendations are worth adopting. The DiResta application process demonstrates how insufficient independence from Meta has capped the Board’s potential: she was eminently qualified for the role and, in fact, would have filled a problematic gap in the Board’s expertise given her technical background; she was subjected to a lengthy application process that typically only moves forward once a candidate has earned consensus support;⁹⁴ and, she was effectively penalized for having previously demonstrated a willingness to call Meta out for inadequate content moderation practices.⁹⁵

A different selection process, independent of Meta, is necessary to give candidates like DiResta a better chance of joining the Board and in a more expeditious fashion. The removal of Meta from the selection process would have the potential effect of making Board members—no longer the beneficiaries of Meta’s approval—more willing to call out Meta for failing to timely implement

⁸⁹ See generally Levy, *supra* note 30.

⁹⁰ Chavi Mehta, *Meta’s Oversight Board Open to Discussing Content Moderation with Twitter*, REUTERS (Oct. 28, 2022), <https://www.reuters.com/technology/metas-oversight-board-open-discussing-content-moderation-with-twitter-2022-10-28/>.

⁹¹ Levy, *supra* note 30.

⁹² See *id.*

⁹³ *Id.*

⁹⁴ *Id.* (“Meta . . . explains it is not unusual for multiple people to withhold their endorsement, and that the exceptions are the candidates who earn consensus and get hired. (That’s a big reason why the board has trouble filling its vacancies.)”).

⁹⁵ *Id.* (referring to DiResta’s failed application, Brent Harris, of Meta, remarked, “[T]he company has expressed concern in some instances about who may or may not be more effective in certain lights as a board member.”).

recommendations from the Board.⁹⁶ The status quo is untenable if the Board is going to have a real impact on the Meta, let alone the industry—less than a quarter (21.8%) of the Board’s recommendations have been implemented by Meta.⁹⁷

Internal and external pressure would mount for Meta to adopt the Board’s reasoned and case-based recommendations if the Board had an expanded jurisdiction and greater capacity to review content with the “the greatest potential to guide future decisions and policies.”⁹⁸ Internal pressure has already been building at Meta as a result of whistleblower Frances Haugen releasing company records that revealed, among many other things, that Meta knew about the negative effects of Instagram on the mental health of teenagers.⁹⁹ If the Board had jurisdiction over the entirety of the Meta portfolio of platforms, the ramifications of Meta failing to adopt the Board’s decisions and recommendations would grow and likely merit additional consternation from employees and members of the public displeased with Meta’s refusal to take necessary steps to improve its platforms.

By way of example, under the status quo, if a presidential candidate made a video on Horizon Worlds and shared that video through their Instagram,¹⁰⁰ and Meta decided to leave that video up on both platforms despite the video containing hate speech, the Board could only reverse Meta’s decision and compel the removal of the video on Instagram. If this scenario played out, it is easy to imagine that employees and the public would take issue with this internal inconsistency and urge Meta to take the video down on Horizon Worlds as well. This same sort of analysis would apply to a situation in which the Meta implemented a Board recommendation with respect to Facebook and Instagram but declined to make those same changes to the company’s other platforms.

In the same way, the ramifications of the Board’s recommendations and, thus, pressure on Meta to adopt those recommendations would grow if the Board had jurisdiction over platforms outside of Meta’s portfolio. If, for example, Musk

⁹⁶ See generally *id.*

⁹⁷ See generally Douek & Sewell, *supra* note 73.

⁹⁸ META OVERSIGHT BD., *supra* note 44, art. II. sec. 1.

⁹⁹ See, e.g., Sara Morrison & Shirin Ghaffey, *Meta Hasn’t “Really Learned the Right Lesson,” Whistleblower Frances Haugen Says*, VOX (Sept. 6, 2022), <https://www.vox.com/recode/2022/9/6/23333517/frances-haugen-code-meta-facebook-whistleblower>; see generally John Hendel, *‘This is NOT Normal’: Facebook Employees Vent Their Anguish*, POLITICO (Oct. 25, 2021), <https://www.politico.com/news/2021/10/25/facebook-employees-message-anguish-517012> (summarizing discontent among Meta employees following the disclosures made by Haugen).

¹⁰⁰ See Amanda Silberling, *No One Asked for This, but You Can Share Horizon Worlds Videos to Instagram Reels*, TECHCRUNCH (Oct. 11, 2022), <https://techcrunch.com/2022/10/11/horizon-worlds-instagram-reels/>.

did accept the Oversight Board's offer to serve as Twitter's content moderation council and the Board made a recommendation that Twitter adopted but Meta declined, then the public would likely question Meta's sincerity with respect to empowering the Board to make meaningful decisions as well as to contributing to the development of an industry-wide set of best practices and standards.¹⁰¹ Given that Meta has so far accepted less than a quarter of the Board's recommendations, it seems unlikely that it will ever adopt every recommendation from the Board. However, if the stakes of ignoring a piece of Board advice increased as a result of the Board having an expanded jurisdiction, the probability of Meta compliance would likely increase as well—a win for the public and for Meta employees concerned about the company's fidelity to the values at the center of the Oversight Board's charter.¹⁰²

That probability would also increase as a result of a sort of peer pressure that has already been detected among platforms.¹⁰³ For instance, when one platform started issuing warnings alongside content they had deemed untrustworthy, others soon followed suit.¹⁰⁴ Similarly, Musk contemplating the creation of a content moderation council for Twitter would likely not have occurred if Meta had not already taken that step.¹⁰⁵ This peer pressure effect may indicate that social media employees and users learn from the evolution of platforms and have an increased willingness to adopt changes made by one platform in the content of another.¹⁰⁶

This review of the Oversight Board's member selection, jurisdiction, and effect on Meta policies suggests that the realization of the Board's main goal—broad impact—requires that it first increase its capacity to select and adjudicate cases.¹⁰⁷ The successful development of a set of “lower courts” or Content Commissions will accomplish that step. Because no other oversight entity exists in the social media world, Meta and the Oversight Board can and should learn from efforts to expand the federal court system when considering how best to realize the expansion of Meta's content adjudication system.

¹⁰¹ See Levy, *supra* note 30.

¹⁰² See generally META OVERSIGHT BD., *supra* note 44.

¹⁰³ Ben Kaiser et al., *Warnings That Work: Combating Misinformation Without Deplatforming*, LAWFARE (July 23, 2021), <https://www.lawfareblog.com/warnings-work-combating-misinformation-without-deplatforming>.

¹⁰⁴ *Id.*

¹⁰⁵ See 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>.

¹⁰⁶ See *id.*

¹⁰⁷ See Levy, *supra* note 30 (describing co-chair Neal's desire for the Board to have a “real impact”).

II. TO WHAT EXTENT DOES THE OVERSIGHT BOARD OPERATE, IN THEORY, AS A COURT?

Whether the evolution of federal courts can serve as a guide for the evolution of Meta’s content adjudication system depends, in part, on the extent to which the Board operates like a court within a system that mirrors a developed legal system. This part predominately relies on Roscoe Pound’s theory of judicial decision-making as a framework for this comparison. Pound’s framework for what constitutes a developed legal system should be applied here because, decades later, it continues to guide how courts think about their roles,¹⁰⁸ and it provides clear tests for this assessment of the operations of the Board and the design of Meta’s content adjudication system. Pound identifies three elements of “the law” in a developed legal system. The first element is “a number of legal precepts more or less defined[.]”¹⁰⁹ The second element is “a body of traditional ideas as to how legal precepts should be interpreted and applied and causes decided, and a traditional technique of developing and applying legal precepts whereby these precepts are eked out, extended, restricted, and adapted to the exigencies of administration of justice[.]”¹¹⁰

The third element is:

a body of philosophical, political, and ethical ideas as to the end of law, and as to what legal precepts should be in view thereof, held consciously or subconsciously, with reference to which legal precepts and the traditional ideas of application and decision and the traditional technique are continually reshaped and given new content or new application.¹¹¹

To paraphrase, a developed legal system requires a body of rules; canons of interpretation and a means to apply interpretations to related cases; and background information as to what constitutes justice in a given case.

A. Are Meta’s Community Standards the Equivalent of Legal Precepts

Whether Meta’s Community Standards satisfy Pound’s first element—serving as a body of legal precepts—hinges on how one defines legal precepts or laws. Lon Fuller, in his book *The Morality of Law*, set forth several principles for laws.¹¹² His principles for the law included making them “general, public,

¹⁰⁸ See, e.g., *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 156 (3d Cir. 2002).

¹⁰⁹ Roscoe Pound, *The Theory of Judicial Decision I. The Materials of Judicial Decision*, 36 HARV. L. REV. 641, 645 (1923).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See generally Jeremy Waldron, *The Rule of Law*, STAN. ENCYC. OF PHIL. (June 22, 2016), <https://plato.stanford.edu/entries/rule-of-law/?ref=refind#ProcAspe> (citing LON L.

prospective, coherent, clear, stable, and practicable[.]”¹¹³ Fuller worried that other law-related activities, such as law-making, would break down without laws complying with these principles.¹¹⁴ Additionally, he contended that these principles had more than just instrumental value to a legal system; Fuller insisted that compliance with these principles would also advance the “freedom and dignity” of those subject to the laws as well as efficient adjudication of disputes.¹¹⁵

Meta’s Community Standards comply, albeit loosely in some respects, with Fuller’s principles. The Community Standards, in theory, apply to all Facebook and Instagram users and, thus, are general. However, the generality of the Community Standards has been rightfully questioned in recent months. A policy advisory opinion issued by its Oversight Board in late 2022 disclosed that Meta had been operating a “cross-check” program under which the company applied its Community Standards differently to content posted by high-profile public figures.¹¹⁶ The opinion observed that these users were receiving a more hands-on, deferential moderation process than the typical user—resulting in delays for the review of content posted by general users as well as the application of a different standard depending on the author of the post.¹¹⁷ Whether Meta acts on the numerous Board recommendations for how to pare this program back may determine whether the Community Standards can be regarded as “general” in practice. For the sake of this review, though, the theoretical general applicability of the rules provides enough of a basis to move on to Fuller’s next principle.

Though Meta previously withheld these so called “legal precepts” from the public, the company published its Community Standards in 2018—well before the launch of the Oversight Board.¹¹⁸ This publication arguably made the Community Standards “public.” Some observers may contest this characterization on the basis that the creation and alteration of these Community Standards is not public, in contrast to much of the process used to shape laws subject to the jurisdiction of federal courts.

FULLER, *THE MORALITY OF LAW* (Yale Univ. Press ed., rev. ed. 1969)).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See META OVERSIGHT BD., POLICY ADVISORY OPINION ON META’S CROSS-CHECK PROGRAM 3 (2022).

¹¹⁷ Adi Robertson, *Meta Oversight Board Demands Changes to ‘Cross-Check’ Program that Protected Donald Trump*, VERGE (Dec. 6, 2022), <https://www.theverge.com/2022/12/6/23495248/meta-oversight-board-cross-check-program-report-recommendations>.

¹¹⁸ See generally Todd Haselton, *Here’s Facebook’s Once-Secret List of Content that Can Get You Banned*, CNBC, <https://www.cnbc.com/2018/04/24/facebook-content-that-gets-you-banned-according-to-community-standards.html> (Apr. 24, 2018).

This challenge has merit. Members of the public have few to no opportunities to participate in Meta’s decisions about when and how to update its standards.¹¹⁹ According to Meta, the process of updating its Community Standards involves a series of internal bureaucratic checks: the Content Policy Team is responsible for drafting updates; the Integrity Team develops the technical capacity to enforce the update world-wide; the Global Operations team monitors the enforcement of the update and evaluates the need for any subsequent changes.¹²⁰ Though Meta acknowledges that external researchers and members of the press could help initiate the development of an update, the company’s process does not include any specific role for members of the public.¹²¹ Still, because the end product of an update—a change in the Community Standards—is “public,” it seems as though this principle can be checked-off.

The Community Standards likely do not satisfy of the “prospective” principle. According to the Oversight Board Charter, Meta has the authority to apply Oversight Board decisions to “identical content with parallel context[.]”¹²² The Charter does not define what constitutes “identical content” and “parallel context,” which means that already published content may be subjected to a new interpretation of the Community Standards.¹²³ Retroactive decisions can also occur depending on the author of the content.¹²⁴ Meta has altered content moderation decisions made by its fact-checking partners only after discovering that those partners had removed a post from a high-profile user.¹²⁵

The fact that the Community Standards fail the “prospective” principle may not be as problematic as retroactive application of a new interpretation of the law. Meta users post with the understanding that Meta retains the authority to subsequently remove that post.¹²⁶ Comparatively, the general public conduct

¹¹⁹ *Facebook Community Standards*, META, <https://transparency.fb.com/policies/community-standards/> (last visited Apr. 17, 2023); Mary Pat Dwyer & Faiza Patel, *Facebook’s New ‘Dangerous and Individuals Organizations’ Policy Brings More Questions Than Answers*, BRENNAN CTR. (July 21, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/facebooks-new-dangerous-individuals-and-organizations-policy-brings-more>.

¹²⁰ *How We Update the Facebook Community Standards*, META, <https://transparency.fb.com/policies/improving/deciding-to-change-standards/> (Jan. 20, 2022).

¹²¹ *See id.*

¹²² META OVERSIGHT BD., *supra* note 44, art. IV.

¹²³ Monika Bickert, *Responding to the Oversight Board’s First Decisions*, META (Jan. 28, 2021), <https://about.fb.com/news/2021/01/responding-to-the-oversight-boards-first-decisions/>.

¹²⁴ Jeff Horwitz, *Facebook Says Its Rules Apply to All. Company Documents Reveal a Secret Elite That’s Exempt*, WALL ST. J. (Sept. 13, 2021), <https://www.wsj.com/articles/facebook-files-xcheck-zuckerberg-elite-rules-11631541353>.

¹²⁵ *Id.*

¹²⁶ *See* META, *supra* note 119 (describing that the community standards apply to “what is and isn’t allowed on Facebook.”).

their lives with the understanding that a law cannot be retroactively applied to penalize their behavior. Retroactive application of content moderation decisions may be inherent to operating a global platform.¹²⁷ Still, retroactive decisions may threaten Meta’s ability to reach its goal of creating “a place for expression and [to] give people a voice.”¹²⁸ Users, for instance, may opt not to post something due to a lack of clarity around whether it will be removed and when it may be removed. This principle as applied to content adjudication system deserves more analysis beyond the scope of this paper.

The extent to which the Community Standards are “coherent, clear, stable, and practicable” is highly subjective. For example, Meta’s Dangerous Individuals and Organizations Community Standard (DIO Standard) has been the subject of several Oversight Board decisions—indicating a lack of stability and practicability.¹²⁹ The DIO Standard has been critiqued for its “opaque, [and] overbroad” language, and its use to target the political speech of certain minority groups.¹³⁰ However, legal precepts likely always contain some ambiguity. Pound accepted that legal precepts should be “more or less defined[.]”¹³¹ The lack of clarity regarding a few or even several Community Standards should not disqualify them as legal precepts.

Similarly, though some Community Standards appear to be in flux, due to factors such as whether Meta will implement Oversight Board recommendations pertaining to those standards, when that apparent lack of transparency is contextualized, things look a lot steadier. As of July 2021, the Oversight Board had issued just 13 decisions and four of them pertained to the DIO Standard.¹³² While that may serve as a sign of fatal flaws with respect to the DIO Standard, the Board’s limited caseload (though problematic for other reasons) suggests that most Community Standards have remained in place.

Whether the Community Standards qualify as coherent and practicable likely depends too much on the perspective of the adjudicator. If these are relative principles, then one could compare Meta’s Community Standards to the equivalent content moderation policies at Google, Apple, and similarly large companies.¹³³ Alternatively, one could compare the Community Standards to

¹²⁷ See generally *The Limitations of Automated Tools in Content Moderation*, NEW AMERICA, <https://www.newamerica.org/oti/reports/everything-moderation-analysis-how-internet-platforms-are-using-artificial-intelligence-moderate-user-generated-content/the-limitations-of-automated-tools-in-content-moderation/> (last visited Apr. 17, 2023).

¹²⁸ See META, *supra* note 119.

¹²⁹ Dwyer & Patel, *supra* note 119.

¹³⁰ *Id.*

¹³¹ Pound, *supra* note 109.

¹³² Dwyer & Patel, *supra* note 119.

¹³³ See generally *Our Approach to Information Quality and Content Moderation*, GOOGLE,

the laws adjudicated by the federal court system. In either case, one could likely argue either way that the Community Standards are more or less coherent and practicable than other legal precepts. Again, this topic deserves additional examination beyond the scope of this paper. As applied, the Meta Community Standards Enforcement Report from the Second Quarter of 2022 suggests the Community Standards possess both coherency and practicability.¹³⁴ That iteration of the Report demonstrated the coherency of the Community Standards through summaries of how the standards had addressed bullying and harassment, hate speech, and violence and incitement—all major content moderation issues.¹³⁵ The Report demonstrated the practicability of the Community Standards by outlining how Meta had trained AI technology to enforce those standards.¹³⁶

The Community Standards generally comply with Fuller’s principles for legal precepts. Although the Community Standards fall short of some principles—such as prospective enforcement, these shortcomings have valid explanations that merit continued analysis of the Oversight Board as a court under Pound’s framework.

B. Does the Oversight Board Follow Canons of Interpretation?

The first part of the second element of Pound’s framework is the existence of “a body of traditional ideas as to how legal precepts should be interpreted and applied and causes decided[.]”¹³⁷ Here, the Oversight Board can easily satisfy Pound’s requirements. The Board is specifically tasked with interpreting Meta’s Community Standards “in light of [Meta’s] articulated values[.]”¹³⁸ Meta lists authenticity, safety, privacy, and dignity as the values that inform its content moderation practices.¹³⁹ Additionally, the company provides brief summaries as to what those values actually mean in the context of content moderation.¹⁴⁰ For instance, it provides this overview of Dignity as a value: “[w]e believe that all people are equal in dignity and rights. We expect that people will respect the

https://blog.google/documents/84/information_quality_content_moderation_summary.pdf/ (last visited Apr. 17, 2023); *Apple Store Review Guidelines*, APPLE, <https://developer.apple.com/app-store/review/guidelines/> (last visited Apr. 17, 2023).

¹³⁴ See generally Monika Bickert, *Community Standards Enforcement Report, Second Quarter 2022*, META (Aug. 25, 2022), <https://about.fb.com/news/2022/08/community-standards-enforcement-report-q2-2022/>.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Pound, *supra* note 109.

¹³⁸ META OVERSIGHT BD., *supra* note 44, art. I, sec. 4.

¹³⁹ META, *supra* note 119.

¹⁴⁰ *Id.*

dignity of others and not harass or degrade others.”¹⁴¹ Though the Board would obviously benefit from additional information—such as Meta’s definition of dignity and to which rights it was referring, this general nonetheless assists the Board with the interpretation and application of the Community Standards.

Pound provided several wide-ranging examples of what traditional ideas could undergird a legal system. First, he noted that equally valid legal systems could place different weights on the value of precedent and still fulfill this part of the second element so long as the system featured the consistent application of those values.¹⁴² Second, equally valid legal systems could prioritize different remedies for certain violations and still comply with this part of the framework.¹⁴³ Third, equally valid legal systems could vary in their use and options of statutory interpretation and still comply.¹⁴⁴ Each of these examples build on Pound’s idea that legal systems ought to have guiding procedures and values—; the Oversight Board has such procedures and values and, therefore, satisfies the first part of the second element.

C. Are Oversight Board Decisions Applied to Similar Disputes?

The second part of the second element exposes a loose thread in the effort to connect Meta’s Oversight Board to a court. This part of Pound’s framework requires that a legal system have “a traditional technique of developing and applying legal precepts whereby these precepts are eked out, extended, restricted, and adapted to the exigencies of administration of justice.”¹⁴⁵ Though Meta’s values provide “traditional ideas” for the interpretation of the company’s Community Standards, the Board has yet to develop an explicit approach for applying its decisions to other cases as well as how to adapt its broader interpretative approach to “the exigencies of administration of justice.”¹⁴⁶ As mentioned previously, the Oversight Board charter allows Meta to apply Board decisions to “identical content with parallel context.”¹⁴⁷ The Board has yet to set forth a traditional technique for Meta to apply when assessing what constitutes identical content and parallel context.¹⁴⁸

¹⁴¹ *Id.*

¹⁴² *See* Pound, *supra* note 109, at 646–47 (comparing the difference in Roman Law and Continental Law with respect to the application of precedent).

¹⁴³ *See id.* at 647 (comparing the attitudes of legal systems toward specific and substituted redress).

¹⁴⁴ *See id.* at 647–48 (examining how civil and common-law systems interpret statutes).

¹⁴⁵ *Id.* at 645.

¹⁴⁶ *Id.*

¹⁴⁷ META OVERSIGHT BD., *supra* note 45, art. IV.

¹⁴⁸ *Id.*

Board decisions—unmoored by a specific approach to enforcing those decisions, preferring certain remedies in those decisions, or interpreting Community Standards under a set of fixed cannons—may undermine some of the principles necessary to Pound’s first element, legal precepts. By way of example, the clarity of the Community Standards may be undermined if Meta defines “parallel context” too broadly or too narrowly. What if the Board mandated that a post containing hate speech related to a presidential candidate of a certain religion—would Meta take down questionable posts related to a *different* presidential candidate of a *similar* religion? Similarly, the general applicability of the Community Standards could be diminished if Meta failed to sufficiently invest in its content moderation structure to ensure that Board decisions that ushered in a new interpretation of the Community Standards were enforced evenly across geography and languages.

The need for a more extensive content adjudication system to enforce Board decisions is discussed in greater detail below. However, even if Meta’s content adjudication system included a series of “lower courts” as well as the Board, the system would still lack “a traditional technique of developing and applying legal precepts whereby these precepts are eked out.”¹⁴⁹ It follows that the Board looks less like a court in this respect—until the Board develops “modes of looking at and handling and shaping legal precepts,” it will not meet this test from Pound.¹⁵⁰ The development of such modes may simply require time. Of the examples Pound provided for this second element,¹⁵¹ all pertained to legal systems with decades, if not centuries, of case law. Pound offered support for this theory by summarizing his second element as “mental habits governing judicial and juristic craftsmanship.”¹⁵² Habit development, of course, takes time. It seems safe to assume that Meta’s content adjudication system will eventually develop such habits. From many more decisions, the Board will have the opportunity to identify its approach to developing and applying Community Standards. The Board will likely engage in this process because doing so will make future cases easier to resolve and advance many of Fuller’s principles related to the Community Standards by providing users with a better sense of how interpretations of those standards will apply in like cases.

D. Does the Oversight Board Have Guidance on What Constitutes Justice in a Given Case?

Pound’s third and final element of a legal system is, in part, “a body of

¹⁴⁹ Pound, *supra* note 109, at 645.

¹⁵⁰ *Id.* at 648.

¹⁵¹ *Id.* at 646–47.

¹⁵² *Id.* at 648.

philosophical, political, and ethical ideas as to the end of law, and as to what legal precepts should be in view thereof.”¹⁵³ He lists the development of rules by the American judicial system for how to incorporate English legal rules, institutions, and doctrines as an example of this element.¹⁵⁴ Another example comes from American courts relying on broad principles such as “the nature of free government” to guide their interpretation of legal precepts to “novel legislation and new means of securing newly pressing interests[.]”¹⁵⁵ Unlike the other elements, this element has little tie to the past—Pound points out that the rules American courts developed regarding English laws were not based in any “traditional techniques” but rather by reference to “an idealized picture of pioneer, rural, agricultural America[.]”¹⁵⁶

The Oversight Board Charter contains the sort of idealized guidance required by this element by explicitly referring to “human rights norms protecting free expression.”¹⁵⁷ Just as in the early post-Revolutionary era, there was no “traditional technique of receiving the law of one country as the law of another,” in this early era of content moderation on a global scale, there is no fixed framework for which bodies of law and guiding principles ought to be applied.¹⁵⁸ Yet, the Charter filled this potential gap in its credentials as a legal system by stating that “[w]hen reviewing decisions, the board will pay particular attention to the impact of removing content in light of human rights norms protecting free expression.”¹⁵⁹

Pound stresses that this sort of guiding principle is essential when courts embark on novel tasks.¹⁶⁰ He notes that American courts had to rely on “the ‘spirit’ of constitutional texts” to engage in the novel task of interpreting written constitutions.¹⁶¹ In doing so, the courts “give a content” to abstract ideals.¹⁶² A failure to incorporate such ideals can lead to unjust outcomes. Pound argues that the *Dred Scott* decision in which the U.S. Supreme Court denied an enslaved man’s legal claim to freedom was the product of a court operating without “a

¹⁵³ *Id.* at 645.

¹⁵⁴ *Id.* at 651.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 652.

¹⁵⁷ META OVERSIGHT BD., *supra* note 44, art. II, sec. 2.

¹⁵⁸ *See, e.g.*, Heidi Tworek, *History Explains Why Global Content Moderation Cannot Work*, BROOKINGS (Dec. 10, 2021), <https://www.brookings.edu/techstream/history-explains-why-global-content-moderation-cannot-work/> (analyzing the difficulties associated with content moderation across borders).

¹⁵⁹ META OVERSIGHT BD., *supra* note 45, art. II, sec. 2.

¹⁶⁰ *See In re Linerboard Antitrust Litig.*, 305 F.3d 145, 156 (3d Cir. 2002); Pound, *supra* note 109.

¹⁶¹ Pound, *supra* note 109, at 652.

¹⁶² *Id.*

body of philosophical, political, and ethical ideas.”¹⁶³

Though the Board satisfies this element by installing human rights law and freedom of expression as its sources of ideas, it is unclear the extent to which the Board has the capacity to act on these ideas. As described below, the make-up of the Board as well as some of its initial decisions have led observers to question its familiarity with and competency in applying human rights law. Nevertheless, the Board meets this element, at least on paper. Pound cautions that the Board must persist in earnestly and accurately applying these ideas. According to Pound, any attempts by the Board to apply the Community Standards without “something more”—in this case, human rights law—in the background could “impair lay confidence in [this] institution” because “courts and jurists have always proceeded on the basis of something more than the formal body of legal precepts for the time being.”¹⁶⁴

E. Meta’s Content Adjudication System Generally Resembles a Developed Legal System

The Oversight Board and, generally, Meta’s content adjudication system currently meet or likely will soon meet Pound’s requirements. The Community Standards serve as legal precepts. Though the Board does not currently apply a clear set of canons of interpretation, it seems likely to do so in the future as it develops a body of cases from which to derive its own “traditional techniques.”¹⁶⁵ And, the Board refers to human rights law and freedom of expression as its sources of justice when answering novel questions.¹⁶⁶

Those not convinced that Meta’s content adjudication system should be treated like a developed legal system may have a strong case if Meta retains its current, excessive level of influence over the Board. As outlined below, Meta has a problematic financial relationship to the Board and still exerts substantial influence over its operation and evolution. Meta’s profit motive may frustrate the ability of the Board to adhere to the requirement of a developed legal system that an adjudicator first, seek “to attain justice in that particular cause,” and, second, do so in accordance with the law.¹⁶⁷ In the case of the Board, human rights law serves as a guide for justice, but whether Meta allows human rights

¹⁶³ *Id.* at 654.

¹⁶⁴ *Id.* at 655.

¹⁶⁵ *Id.* at 652.

¹⁶⁶ *See, e.g.,* Dunstan Allison-Hope, *A Human Rights Review of the Facebook Oversight Board*, BSR (Dec. 12, 2019), <https://www.bsr.org/en/blog/a-human-rights-review-of-the-facebook-oversight-board> (“The charter requires the board to pay particular attention to the impact of removing content in light of human rights norms protecting free expression.”).

¹⁶⁷ Roscoe Pound, *The Theory of Judicial Decision III*, 36 HARV. L. REV. 940, 940 (1923).

law to play an integral role in the Board's adjudication depends on the extent to which Meta deprives the Board of the freedom and capacity to consider those ideas. If Meta and the Board implement the recommendations below—based on a comparison of the company's content adjudication system to the federal court system and lessons learned from the latter, then these doubts should be alleviated.

Regarding Meta's content adjudication system as a developed legal system is important because it allows users and the public to hold Meta, the Board, and other features of the content adjudication system to a higher, more exact standard. Presently, Meta shrouds its content adjudication system in the language of a legal system, using words like "appeals process" and "binding decisions," but unless and until users and the public actually treat it as such, those words will ring hollow.¹⁶⁸

If and when the Board is seen as a court within a legal system, the meaning and ramifications of Meta's use of language, such as the Board "will provide an accessible opportunity to request [the board's] review and to be heard,"¹⁶⁹ will no longer be within the company's control. Instead, if users and the public regard the Board as a court, then formal considerations such as the availability of procedural due process elements become attached to Meta's language. Treating the Board as a court will enable users to argue that the opportunity "to be heard" must include some, if not all, of Judge Friendly's procedural protections, such as the making of a record, attendance by the public, and a right to have a decision based exclusively on the evidence presented.¹⁷⁰ Additionally, this treatment would give users and the public a stronger point from which to argue that Meta must strive to have its Community Standards comport with Fuller's principles.

The alternative—the Board persisting as a quasi-court that evades definition and categorization—affords users few benefits. Under this scenario, Meta can continue to justify its intervention in a theoretically-independent but practically-reliant adjudicative body. Similarly, under this scenario, Board members and their staff may feel more pressure to comply with edicts from Meta and less able to render and enforce path-breaking decisions. So, even though Meta's content adjudication system does not perfectly fit into the shape of a court as determined by Pound, the close resemblance as well as the benefits of regarding the Board as a court to users justifies blurring the lines and treating Meta's system as a legal system.

¹⁶⁸ *Appeal to Shape the Future of Facebook and Instagram*, META OVERSIGHT BD. (last visited Mar. 17, 2023), <https://www.oversightboard.com/appeals-process/>.

¹⁶⁹ META OVERSIGHT BD., *supra* note 44, at 2.

¹⁷⁰ Henry J. Friendly, "Some Kind of Hearing", 123 UNIV. OF PENN. L. REV. 1267, 1278–1279 (1975).

III. WHY THE OVERSIGHT BOARD SHOULD LEARN FROM THE FEDERAL COURT SYSTEM

Even if federal courts and the Board share similarities when analyzed under Pound's framework, they may still seem incomparable due to differences in the scope and scale of their respective jurisdictions as well as the nature of their opinions. Nevertheless, they share common goals and restraints which makes analysis of the expansion of the judicial system informative to the potential expansion of the Board and Meta's content adjudication system on the whole. Both courts within the federal court system as well as the Board and Content Commissions within the Meta's content adjudication system serves geographically-diverse, culturally-diverse, and growing populations.¹⁷¹ Second, both systems share a goal of resolving complex disputes in a timely fashion.¹⁷² Third, both systems strive to protect the fundamental rights of those subject to the laws or rules they interpret.¹⁷³ The structure and evolution of the federal court system provides three lessons for Meta's content adjudication system for how to address their shared goals and restraints.

To account for a large and growing population, the federal court system includes tiers of courts and, occasionally, has expanded the number of judges within certain tiers to increase the capacity of the court considering additional population growth.¹⁷⁴ The federal court system includes three tiers: district courts (the trial court), circuit courts (the first level of appeal), and the U.S. Supreme Court (the final level of appeal).¹⁷⁵ The lower the tier the more numerous the courts: there are 94 district courts, 13 circuit courts, and one Supreme Court.¹⁷⁶ This structure serves several purposes: a greater number of district and circuit courts evidences the system's intent to hear cases in a timely

¹⁷¹ See, e.g., UNIV. OF MAINE, *supra* note 1.

¹⁷² See, e.g., Victor Williams, *A Constitutional Charge and a Comparative Vision to Substantially Expand and Subject Matter Specialize the Federal Judiciary: A Preliminary Blueprint for Remodeling Our National Houses of Justice and Establishing a Separate System of Federal Criminal Courts*, 37 WM. & MARY L. REV. 535, 535–36 (1996) (identifying the “speed and quality” of federal court system as components of the system’s integrity); META OVERSIGHT BD., *supra* note 44, art. IV (specifying that Board decisions will be binding and promptly implemented by Meta).

¹⁷³ See, e.g., Helen Hershkoff & Arthur R. Miller, *Courts and Civil Justice in the Time of Covid: Emerging Trends and Questions to Ask*, 23 N.Y.U. J. LEGIS. & PUB. POL’Y 321, 408 (identifying the protection of rights as a key role of federal courts); *Oversight Board Charter*, *supra* note 44, at 2 (“The purpose of the board is to protect free expression . . .”).

¹⁷⁴ See Maggie Jo Buchanan & Stephanie Wylie, *It Is Past Time for Congress to Expand the Lower Courts*, CTR. FOR AM. PROGRESS (July 27, 2021), <https://www.americanprogress.org/article/past-time-congress-expand-lower-courts/>.

¹⁷⁵ See *Introduction to the Federal Court System*, OFF. U. S. ATTY’S, <https://www.justice.gov/usao/justice-101/federal-courts> (last accessed Nov. 29, 2022).

¹⁷⁶ *Id.*

fashion with as few appeals as possible;¹⁷⁷ the geographic distribution of district and circuit courts and consideration of geography in the selection of their respective judges increases the odds of those courts' decisions reflecting the norms and culture of particular areas of the U.S.;¹⁷⁸ and, complex and controversial cases, which may have greater odds of being appealed, will receive additional scrutiny as the case moves "up" the judicial system.¹⁷⁹

Though the structure of the federal court system reveals distinct purposes, the system has often failed to realize those purposes in practice, by making timely adjustments to the structure to reflect modern realities.¹⁸⁰ Consequently, the federal court system requires parties to endure lengthy periods prior to appearing before a judge,¹⁸¹ lacks a roster of judges that reflects the increase in size and diversity of the country,¹⁸² and needs judges with more expertise in complex matters, such as statistics, that come before district and circuit courts with increasing frequency.¹⁸³ It follows that whether an adjudicative system can fulfill its goals depends both on its original structure as well as its modification of that structure in light of new circumstances. How the federal court system has failed to evolve provides three lessons for Meta's content adjudication system: both the structure and size of an adjudicative body must change over time; the decision makers within an adjudicative system need to reflect the diversity of the population it presides over; and the structure, as well as the decision makers

¹⁷⁷ *Understanding the Federal Courts*, NAACP, <https://naacp.org/find-resources/know-your-rights/understanding-federal-courts> (last accessed Nov. 29, 2022) (reporting that more than 90% of cases in the federal court system have their ultimate determination made by a district or circuit court); Democracy and Government Reform Team, *Examining the Demographic Composition of U.S. Circuit and District Courts*, CTR. FOR AM. PROGRESS (Feb. 13, 2020), <https://www.americanprogress.org/article/examining-demographic-compositions-u-s-circuit-district-courts/> (referring to district courts and circuit courts as the "workhorses" of the federal court system give that "the [U.S.] Supreme Court only hears approximately 2 percent of cases it is asked to review each year.") (internal citation omitted).

¹⁷⁸ CONG. RSCH. SERV., RS22510, "STATE REPRESENTATION" IN APPOINTMENTS TO FEDERAL CIRCUIT COURTS (2011) (stating that "[g]eography is often a factor in [the President's] decision [of who to nominate to fill a vacancy on the federal court of appeals], particularly whether the new judge will be nominated from the same state as the predecessor," and noting that federal law requires that a judge reside in the circuit at the time of appointment).

¹⁷⁹ See Shay Lavie, *Are Judges Tied to the Past? Evidence from Jurisdiction Cases*, 43 HOFSTRA L. REV. 337, 351 (2014) (interpreting regression analysis of appealed cases as evidence that less complicated cases receive less scrutiny by appellate courts).

¹⁸⁰ See Buchanan & Wylie, *supra* note 174.

¹⁸¹ See *id.*

¹⁸² Democracy and Government Reform Team, *supra* note 177.

¹⁸³ Faigman, *supra* note 79 ("Although the demands of the twenty-first century require judges to be amateur scientists, they are not well prepared to assume this role, nor will it be easily achieved.").

within that structure, must have the capacity to resolve cases of immense complexity.

A. Summary of Federal Court System Expansion and Stagnation

“[T]he [federal] bench is experiencing historic neglect,”¹⁸⁴ as demonstrated by a decades-long lack of investment in the size of the federal court system. For more than 30 years, the size of the federal court system has remained the same, despite a significant increase in both court filings and the U.S. population.¹⁸⁵ 1990 marks the last time Congress invested in an expansion of the system, when they created 61 new district judgeships and 11 new circuit judgeships.¹⁸⁶ Just a dozen years earlier, in 1978, Congress similarly acted on its recognition of the need for an expanded judiciary:

the 1978 judgeship bill increased the number of trial judges by 30 percent following an eight-year period in which the trial case load increased by 37 percent, and the bill increased the number of appellate judges by 36 percent following a ten-year period in which the federal appellate case load increased by 108 percent.¹⁸⁷

In both 1978 and 1990, Congress acted—as it had on 28 prior occasions—to ensure that the federal court system had the resources necessary to adjudicate cases in a timely fashion and to do so with sufficient quality.¹⁸⁸ However, not all stakeholders regarded these seemingly random yet substantial infusion of judgeships as the proper way of addressing a shortage in judicial resources.¹⁸⁹

Stakeholders reflecting on the passage of the 1978 bill noted that Congress made necessary investments in the size of the federal court system, but failed to institute a more predictable, sustainable, and effective means of achieving future increases.¹⁹⁰ Carl Baar, the author of a 1980 report completed for the Federal Judicial Center, identified a fundamental flaw with having congressionally initiated increases in judgeships: “the need for judgeships grows relatively

¹⁸⁴ Buchanan & Wylie, *supra* note 174.

¹⁸⁵ *See id.*

¹⁸⁶ *See generally* Civil Justice Reform Act of 1990, S. 2027, 101st Cong. (1990) (enacted).

¹⁸⁷ CARL BAAR, JUDGESHIP CREATION IN THE FEDERAL COURTS: OPTIONS FOR REFORM, at 4 (1981) https://www.google.com/books/edition/Judgeship_Creation_in_the_Federal_Courts/7eHTWCXI6m4C?hl=en&gbpv=1.

¹⁸⁸ Mark Joseph Stern, *Congress Might Actually Expand the Courts*, SLATE (Feb. 24, 2021), <https://slate.com/news-and-politics/2021/02/congress-expand-courts.html> (explaining “Congress expanded these courts nearly 30 times without much fanfare” from 1891 to 1991).

¹⁸⁹ *See* BAAR, *supra* note 187, at 1–3.

¹⁹⁰ *Id.*

continuously, but the legislative action necessary to create them is often delayed.”¹⁹¹ The “erratic nature” of increasing judgeships poses at least three problems on the effectiveness of the system, according to Baar.¹⁹² First, it results in long periods of insufficient judgeships; second, a wave of new judgeships necessarily results in a flood of nominees for those judgeships—those nominees may have less partisan diversity and may pose an administrative burden to Congress, which can only vote on nominations so quickly; and, third, it perpetuates the assumption that more judgeships rather than other reforms will reduce an existing backlog in cases.¹⁹³

So, while stakeholders generally approved the increase in judgeships, they perceived Congress as having missed an opportunity to make a structural change that would have diminished the need for future “hits” of judgeships—delegating at least some of the authority to create judgeships to the judicial branch itself. The American Judicature Society, for instance, stated that in “an ideal system the power to create judgeships should be removed from the exclusive power of the legislature.”¹⁹⁴ If, however, the U.S. Supreme Court or another commission of judicial officials could create judgeships as necessary based on caseloads, the nature of cases, and the character of the population,¹⁹⁵ then some of the costs of the current approach could be avoided—namely, a waste in judicial resources due to improperly-timed increases in judgeships and the denial of justice to citizens forced to endure excessive delays during periods in which the number of judgeships is too low.¹⁹⁶ Similarly, Chief Justice Warren Burger of the U.S. Supreme Court used his State of the Federal Judiciary Address in 1980 to advocate for additional judicial control over the creation of judgeships.¹⁹⁷ Baar supported a modest delegation of power to the judicial branch to alleviate at least some of the issues with the status quo; his preferred model would have allowed the judicial branch to create a fixed number of judgeships on an annual basis.¹⁹⁸

Notably, Congress appears to have missed or ignored these recommendations in 1990 when it passed another large increase in judgeships and ever since; the federal court system remains largely stagnant.¹⁹⁹ Congress’s failure to consider

¹⁹¹ *Id.* at 1.

¹⁹² *Id.* at 1, 3.

¹⁹³ *Id.* at 3.

¹⁹⁴ C. MANNING, JUDGESHIP CRITERIA: STANDARDS FOR EVALUATING THE NEED FOR ADDITIONAL JUDGESHIPS, AMERICAN JUDICATURE SOCIETY 19 (1973).

¹⁹⁵ *See id.*

¹⁹⁶ *Id.* at 1.

¹⁹⁷ Phillip K. Kurland, *Mr. Chief Justice Burger on The State of the Judiciary – 1981*, 15 SUFFOLK U. L. REV. 1105, 1107 (1980).

¹⁹⁸ BAAR, *supra* note 187, at 48.

¹⁹⁹ Mark Joseph Stern, *Congress Might Actually Expand the Courts*, SLATE (Feb. 24, 2021), <https://slate.com/news-and-politics/2021/02/congress-expand-courts.html> (reporting

this meaningful reform deserves scrutiny from the public given the existence of the Judicial Conference of the United States, a nonpartisan entity created by statute and tasked with serving as the “policy-making body of the federal courts[.]”²⁰⁰ The Judicial Conference fits the description of the sort of entity imagined by the American Judicature Society and endorsed by Chief Justice Berger—in fact, it already produces regular recommendations for increases to the number of judgeships at the district and circuit court levels based on judicial workload.²⁰¹

Though the current mechanisms for increasing the size of the federal court system—which rely on Congressional action—may have flaws, a failure to increase the system at all presents more significant issues: the costs of Congress not having performed similar maintenance as legislators in 1978 and 1990—i.e. supporting the ability of each tier of the federal court system to fulfill its role—have grown with each year of neglect.²⁰² The cumulative toll of Congress’s inaction is substantial. A recent congressional hearing included testimony that for every one circuit court judgeship there are 294 filings, which aligns with the fact that the number of cases filed with circuit courts has increased by 20 percent since 1990.²⁰³ And, despite an increase in the number of district court judgeships in 2003, one district court judge, Larry A. Burns, testified that some judges preside over more than 600 cases a year.²⁰⁴ Judge Burns as well as other witnesses flagged that such an extensive caseload results in several injustices—for instance, criminal defendants experience significant delays and victims, such as wronged employees and defrauded consumers, may wait years for a court to issue its verdict.²⁰⁵ According to the Center for American Progress, “[t]he average time between filing and trial in federal civil suits, for example, is two years.”²⁰⁶ Such a shortage of judicial resources makes it unsurprising that high-ranking senators on both sides of the aisle have recently acknowledged the need to, at a minimum, consider expanding the system.²⁰⁷

Some, such as Judge Burns, think that the only necessary remedy to this issue

that Congress increased the number of district court judgeships in 2003).

²⁰⁰ Elizabeth Wydra, *There’s More to Repairing Federal Courts Than Supreme Court Expansion*, HILL (Feb. 2, 2021), <https://thehill.com/opinion/judiciary/538176-theres-more-to-repairing-federal-courts-than-supreme-court-expansion/>.

²⁰¹ *Id.* (detailing that in March 2019, the Judicial Conference recommended creating 65 new district court judgeships and five new circuit court judgeships).

²⁰² Buchanan & Wylie, *supra* note 174; Wydra, *supra* note 200.

²⁰³ Stern, *supra* note 199.

²⁰⁴ *Id.* (restating testimony provided by U.S. District Judge Larry A. Burns).

²⁰⁵ *Id.* (summarizing testimony from several district court judges, including Judge Burns).

²⁰⁶ Buchanan & Wylie, *supra* note 174.

²⁰⁷ Wydra, *supra* note 200.

is the immediate creation of more judgeships.²⁰⁸ However, others remain convinced that an increase in size does not necessarily improve the ability of an adjudicative system to achieve its objectives. Justice Felix Frankfurter, for example, contended that an increase in the number of federal judgeships would diminish the “judicial currency.”²⁰⁹ Baar identified alternative means of reforming the federal court system as potentially preferable options.²¹⁰ He listed “improvements in administrative efficiency, increased use of magistrates, [and] development of nonjudicial methods of dispute resolution.”²¹¹ The American Judicature Society qualified its support for increasing judgeships by noting that such an increase would only be beneficial if the rest of the system was prepared for such an increase, otherwise, “[i]f additional judgeships are created before they can be fully utilized, the result is waste, and the taxpayer bears the burden.”²¹²

B. What Meta Can Learn from Adopted as Well as Bypassed Reforms of the Federal Court System

Three main lessons emerge from the previous review of adjustments to the federal court system in light of a changing population, an increased caseload, and a great frequency of complex cases. First, lower courts play an important role in filtering out cases that do not deserve additional review. The Board should create Content Moderation Commissions to provide a similar benefit to the content adjudication system. Second, expansion efforts often are stalled by funding. The Board should improve its financial practices and identify substantial and non-Meta sources of financial support. Third, a boom-and-bust approach to expanding judgeships is better than no new judgeships at all, but results in administrative costs and diminished legitimacy during periods when courts lack enough judges to resolve cases in a timely manner and in a way that reflects changes to the culture, economy, and demographics of the country. The Board needs to obtain authority over the creation of new commissions and memberships on the Board to allow it to grow contemporaneously with the population of users, the number of platforms, and diversity of issues under its

²⁰⁸ Stern, *supra* note 199.

²⁰⁹ *Mutual Casualty Co. v. Elbert*, 348 U.S. 48, 59 (1954) (J. Frankfurter, concurring); Jon O. Newman, *The Current Challenge of Federal Court Reform*, 108 CAL. L. REV. 905, 905 (2020) (“[T]he likely growth of federal court caseloads risks a variety of adverse consequences, not the least of which is the loss of the distinctive nature of the federal court system.”).

²¹⁰ BAAR, *supra* note 187, at 4.

²¹¹ *Id.*

²¹² MANNING, *supra* note 194, at 1.

jurisdiction.

1. *Creating a System of “Lower Courts” Will Improve the Efficiency and Impact of the Board*

If district courts did not exist, the federal court system could not function. Consider that from March 2021 to March 2022, more than 461,000 civil cases and 64,999 criminal cases were filed in 94 district courts,²¹³ whereas approximately 43,000 cases were filed in 12 circuit courts.²¹⁴ Though the number of judgeships within these two tiers has not expanded at the necessary rate to timely adjudicate these filings, it is hard to imagine just how much slower and ineffectively the federal court system would operate without district courts serving as the first line of review. District courts reduce the workload of circuit courts by providing detailed written decisions “expounding upon the law for the parties and the future,”²¹⁵ as well as by “helping structure the dispute and . . . declaring applicable law[.]”²¹⁶ Additionally, district courts lessen the load for appellate courts by determining the veracity and legal weight of facts,²¹⁷ reviewing the legal determinations of other judicial entities,²¹⁸ and filtering cases out of the federal court system when, for example, “litigants obtain a clear statement of applicable law from the district court, [and, therefore,] decide to resolve their case without an appeal’s added expense and delay.”²¹⁹

The Oversight Board is in the position of an appellate court with no support from lower courts. This content adjudication system cannot fulfill its mandate given the absence of a series of “lower courts” and a Board that is too small. The Board lacks the resources necessary²²⁰ to perform the critical task of case selection.²²¹ By way of example, in the Board’s first year it “culled through more than 500,000 requests from users to examine Facebook’s content moderation

²¹³ Table C—U.S. District Courts—Civil Federal Judicial Caseload Statistics (March 31, 2022), United States Court (accessed Mar. 17, 2023); Table D—U.S. District Courts—Civil Federal Judicial Caseload Statistics (March 31, 2022), United States Court (accessed Mar. 17, 2023).

²¹⁴ Table B-1—U.S. Courts of Appeals Federal Judicial Caseload Statistics (March 31, 2022), United States Court (accessed Mar. 17, 2023).

²¹⁵ D. Brock Hornby, *The Business of the U.S. District Courts*, 10 GREEN BAG 2D 453, 457 (2007).

²¹⁶ *Id.* at 460.

²¹⁷ *See id.* at 457–59.

²¹⁸ *Id.* at 458.

²¹⁹ *Id.*

²²⁰ Levy, *supra* note 30 (Explaining that “staffers sift[] through thousands of appeals to find cases that fit” the Board’s desire to handle complaints with the “most potential for broad impact.”).

²²¹ *See id.* (quoting Nicolas Suzor, a board member, who said, “Case selection is the whole game.”).

decisions, taking on 20 cases and issuing 15 decisions,” which amounted to the Board considering 0.0004% of appeals.²²² The small size of the Board has also affected its ability to comply with internal deadlines,²²³ despite aspiring to take on more cases from the more than 2 million appealed contest decisions.²²⁴

A tiered content adjudication system is necessary to improve the system’s ability to review, select, and adjudicate cases. Under the current system, a subset of the Board—the Case Selection Committee—and a set of staffers—the Case Selection Team—work to identify cases for consideration by the Board.²²⁵ The Case Selection Team relies on the Case Management Tool to identify cases that “meet pre-determined selection criteria.”²²⁶ The Team then performs a *manual review* of those cases to prepare a “reviewable longlist” for the Case Selection Committee.²²⁷ From there, the Case Selection Committee forms a shortlist of cases for consideration.²²⁸ Meta then has an opportunity to review the shortlist to determine whether the cases fit within the Board’s jurisdiction—Meta has the authority to exclude cases from any additional consideration.²²⁹ Once the shortlist has been Meta-approved, the Case Selection Team performs additional analysis to assist the Case Selection Committee in the next step of the process—a meeting of the Committee during which they will, ideally by consensus, pick cases for adjudication by a panel of Board members.²³⁰ This is a thorough, lengthy process.

By creating Content Moderation Commissions, operated by commissioners and their staffers, the case selection process can be streamlined and improved. The process would be streamlined as a result of removing steps in current selection procedure. For example, given that any decision by a commission

²²² Lakshmi Gopal, *Facebook’s Oversight Board & the Rule of Law: The Importance of Being Earnest*, A.B.A. (Oct. 12, 2021), https://www.americanbar.org/groups/business_law/publications/blt/2021/10/fb-oversight-board/.

²²³ See Douek & Sewell, *supra* note 73.

²²⁴ Levy, *supra* note 30 (“[T]he board has received nearly 2 million appeals on content and ruled on 28 of them.”).

²²⁵ META OVERSIGHT BD., RULEBOOK FOR CASE REV. AND POL’Y GUIDANCE 8 (Nov. 2020), <https://oversightboard.com/sr/rulebook-for-case-review-and-policy-guidance> [hereinafter RULEBOOK FOR CASE REV.].

²²⁶ *Id.*; The Case Management Tool allows a small group of employees to “take notes, deliberate, vote and write decisions in an efficient manner while keeping data secure within the tool.” Fay Johnson, *A Privacy-Protected Way to Refer Cases to the Oversight Board*, META (Oct. 22, 2022), <https://about.fb.com/news/2020/10/privacy-protected-way-to-refer-cases-to-oversight-board/>

²²⁷ RULEBOOK FOR CASE REV., *supra* note 225.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

could be appealed to the Board, legal review of whether a case falls under the content adjudication system's jurisdiction would only occur after a case had been selected and adjudicated by a commission—in other words, the Board would serve as a backstop to prevent any non-jurisdictional decision from becoming final. Additionally, consensus among the Case Selection Committee would only be required when the Board was deciding whether to accept an appeal from a commission—moving this time-intensive step further down the stream in the case adjudication process and applying only to cases appealed from a commission. Initial selection and adjudication by a commission would additionally provide the Board with a more complete record when determining whether to accept an appeal from the commission's decision because the staffers and commissioners would have developed their factual findings and conclusions at the initial stage of review. It is also likely that commissions, made up of commissioners who possess greater familiarity with the culture, laws, norms, etc. with the posts under their geographic and categorical bailiwick, would have better odds of identifying cases with the highest probability of having a major impact.

2. *Diversifying the Sources and Increasing the Total Amount of Financial Support is Necessary*

An adjudicatory system cannot claim independence from other entities unless it has adequate resources.²³¹ Yet, just as the Oversight Board currently relies on Meta for funding, the federal court system relies on the legislative and executive branches to allocate funds to the judiciary. The reliance of the federal court system on the other branches for funding has diminished the judiciary's capacity and undermined discussions of expanding judgeships.²³² Insufficient funding makes it more challenging for the courts to continue modern efforts to review cases with “thoroughness to achieve fairness”—thoroughness comes at a cost to both the system, as well as the parties to the system.²³³

The result of courts facing increased caseloads while instituting more

²³¹ See, e.g., *ABA Policies Pertaining to Federal Judicial Independence*, A.B.A. at 1, 5, 8–10 (Oct. 2019), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/policies-on-jud-independence.pdf (“An independent judiciary must have adequate resources including a budget that provides for adequate facilities and equipment, security and just compensation for judges.”).

²³² See *Federal Court Funding*, A.B.A. (Dec. 31, 2020), https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_judiciary/federal-court-funding/ (detailing how the judicial branch has not been exempted from recent across-the-board cuts to the federal budget).

²³³ Jon O. Newman, *The Current Challenge of Federal Court Reform*, 108 CAL. L. REV. 905, 906 (2020).

procedural safeguards is “delays and attendant escalating costs [that] drive many out of the federal court system and into arbitration or abandonment of claims[.]”²³⁴ Despite leaders of the Judicial Conference of the United States going before Congress on numerous occasions and asking for long-term funding for additional permanent judgeships, Congress has declined to make any substantial outlay and instead appropriate fewer funds than requested and only for temporary judgeships.²³⁵ According to Judicial Conference Secretary James C. Buff, “uncertainty” around funding for judgeship strains the federal court system and makes it harder for the courts to establish permanent judgeships. Moreover, Buff notes that the “administration of justice [will be] disrupted and delayed” in districts that receive inadequate financial support for necessary increases in the number of judgeships.²³⁶

A lack of financial independence and financial security may diminish the legitimacy of the federal court system. Former judges fearful of courts lacking the resources to comply with constitutional requirements around a speedy trial, for example, have resorted to writing op-eds to put public pressure on Congress to increase its judicial appropriations.²³⁷ Charles Clark, the former chief judge of the U.S. Court of Appeals for the Fifth Circuit, for example, wrote a piece in the *Washington Post* to raise awareness of the need for additional funding.²³⁸ He hypothesized that some courts would lack funds to pay their rent, that “[m]ore than 17,000 offenders [would] no longer be supervised by probation officers,” and that staffing cuts to clerks as well as security officers would have to take place.²³⁹ His fears of insufficient funding were amplified by the fact that “[c]ourts and judges have few supporters in the political arena.”²⁴⁰

Clark’s consideration of support among the public and political actors reveals a troubling dynamic—the judicial branch, though intended to act independently, may alter its actions and decisions to recruit (or at least not lose) “supporters in the political arena.”²⁴¹ This dynamic has been a cause for concern since the

²³⁴ *Id.*

²³⁵ See *Judiciary Department Fiscal Year 2021 Budget Request: Before the Subcomm. on Fin. Serv. & Gen. Gov’t of the Comm. on Appropriations*, 116th Cong. 8–9 (2020) (statement of James C. Buff, Director, Administrative Office of the U.S. Courts), <https://docs.house.gov/meetings/AP/AP23/20200226/110547/HHRG-116-AP23-Wstate-DuffJ-20200226.pdf>.

²³⁶ See *id.*

²³⁷ See e.g., Charles Clark, *Stiffing the Federal Courts*, WASH. POST (Sept. 18, 1992), <https://www.washingtonpost.com/archive/opinions/1992/09/18/stiffing-the-federal-courts/2c10c0a3-3d09-4f7b-abae-6ac0c1d583df/>.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

ratification of the Constitution, but several modern trends make the dynamic all the more troubling.²⁴² As of 2006, observers regarded “the under-funding of court systems, increased politicization of the judicial appointment process, further rise of deeply contentious social issues onto the court dockets, and advent of the Internet and a relentless 24/7 media” as such trends.²⁴³ Notably, these trends have only deepened since the 2000s, resulting in even greater doubts as to the independence of the judiciary.²⁴⁴ Though the creation of a truly independent *and sufficient* source of funding for the judiciary would not necessarily reverse deepening distrust in the judicial branch, it would at least take one source of concern about judicial bias off the table, given that judges would no longer have to tacitly lobby for additional funding from political actors.

Numerous trends have also imperiled the independence of the Oversight Board. Left unchecked, these trends threaten to undermine the Board’s work as well as any decisions made in the future by Content Moderation Commissions. Chief among those trends is the Board’s reliance on Meta for financial support at a time when Meta is facing significant business and regulatory headwinds.²⁴⁵ Yet, the Board cannot afford to merely hope that Meta continues to provide sufficient financial support with no strings attached. For one thing, as long as the Board shares formal ties with Meta, the public will have cause to doubt the independence of the Board. The public has become increasingly skeptical of social media companies, including Meta.²⁴⁶ If Meta’s public reputation continues to sour, then the Board may be tainted by affiliation. Likewise, any ties to Meta will likely slow, if not stall, efforts to expand the content adjudication system as evidenced by Meta slow-walking other attempts to increase the efficacy of the Board.²⁴⁷

The creation of an additional tier of content review within the content

²⁴² *The Courts and Public Opinion*, SYRACUSE UNIV. MAXWELL SCH. CITIZENSHIP & PUB. AFF. (Sept. 1, 2006), <https://www.maxwell.syr.edu/news/article/the-courts-and-public-opinion> (citing in support remarks from Keith Bybee, then-Director of the Study of the Judiciary, Politics, and the Media).

²⁴³ *Id.* (citing in support remarks from Keith Bybee, then-Director of the Study of the Judiciary, Politics, and the Media).

²⁴⁴ *See, e.g., Positive Views of Supreme Court Decline Sharply Following Abortion Ruling*, PEW RSCH. CTR. (Sept. 1, 2022), <https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/>.

²⁴⁵ *See, e.g., Meta Fined €265m By Irish Data Watchdog Over Breach*, BBC (Nov. 28, 2022), <https://www.bbc.com/news/technology-63784393>.

²⁴⁶ *See* Heather Kelly & Emily Guskin, *Americans Widely Distrust Facebook, TikTok and Instagram with Their Data, Poll Finds*, WASH. POST (Dec. 22, 2021), <https://www.washingtonpost.com/technology/2021/12/22/tech-trust-survey/>.

²⁴⁷ *See* Levy, *supra* note 30 (describing Meta engaging in a lengthy review of DiResta’s candidacy for a seat on the Board and ultimately rejecting her).

adjudication system requires additional funding. The easiest, but most problematic, source of funds would come from Meta. The company launched the Oversight Board by allocating funds to the Oversight Board Trust, which bears the responsibility of maintaining the financial side of the Board.²⁴⁸ The Board has yet to find another source of funding. As recently as July 2022, Meta sent another tranche of funds to the Trust for the Board's continued operation and development.²⁴⁹ However, it is not clear the Board is currently using its funds in a sustainable manner—even at its current, limited size—which raises the question of whether it could operate a larger Board as well as several Content Moderation Commissions. According to Levy, the Wired reporter, the board members made upwards of six-figure salaries despite working about 15 hours per week.²⁵⁰

It is likely that prospective investors in the expansion of the Board would like to see a change in fiscal practices prior to providing any funds. The Board could also receive additional funds from any companies that opt to subject their content appeals to the Board's analysis (including review by any established Content Moderation Commissions) as a sort of "content review fee." This funding possibility, though, presents a bit of a chicken-and-egg problem—companies likely won't help fund the Board nor cede any content moderation authority to it until the Board expands its members and creates "lower courts," both of which require money. That is why the best option in the short run is continued reliance on Meta for financial support, but this poses a cost that drags on the Board's ability to institute another necessary reform—obtaining the authority to select members, increasing the size of the Board, and setting up Content Moderation Commissions.

3. *Greater Control Over the Creation of Commissionships and Board Memberships Will Enhance the Legitimacy and Effectiveness of the Content Adjudication System*

Though Congress has yet to adopt the advice of scholars and judges by granting the federal court system at least some authority to create new judgeships,²⁵¹ the Board should not and need not follow that flawed path. For

²⁴⁸ *Securing Ongoing Funding for the Oversight Board*, META OVERSIGHT BD. (July 2022), <https://www.oversightboard.com/news/1111826643064185-securing-ongoing-funding-for-the-oversight-board/> (listing the company's initial investment of \$130 million in 2019 and its July 2022 investment of \$150 million).

²⁴⁹ *Id.*

²⁵⁰ Levy, *supra* note 30.

²⁵¹ See BAAR, *supra* note 187, at 1, 3; MANNING, *supra* note 194, at 1, 19.

the commissions to start their work sooner rather than later as well as ensure they evolve in size and expertise as required by the users and platforms within the content adjudication system, the Board must wrest control over the creation and fulfillment of commissionships and Board memberships from Meta.

Meta's control over the selection of members and, consequently, the size of the Board has deprived the Board of necessary resources and expertise as well as legitimacy. The Board remains seventeen seats short of its potential capacity due, at least in part, to Meta insisting on candidates earning consensus.²⁵² Notably, as of February 2023, the Board's by-laws allowed it to operate with just eleven members²⁵³—a possibility that would seriously jeopardize its capacity, but is nonetheless foreseeable.²⁵⁴ By granting the Board more authority to oversee the selection of new members, it can avoid a worst case scenario of operating with a skeleton crew of members and it can accelerate the Board's pursuit of having a broad impact by building out an additional tier of review through Content Moderation Commissions. If Meta retains control over the size, scope, and structure of the Board it may eventually opt to pursue some of these changes, albeit at the same, slow pace it has used when exercising its authority over Board-member selection.

From an expertise standpoint, the Board lacks members with the technical expertise necessary to better assess how Meta's use of algorithms, automation, and artificial intelligence/machine learning may influence its content decisions.²⁵⁵ Meta retaining control over who joins the Board and when will likely perpetuate these expertise gaps.²⁵⁶ It appears as though Meta has a bias toward American lawyers when it comes to selecting Board members—lawyers form a supermajority of the Board and a plurality of those lawyers are American.²⁵⁷ Though the selection of lawyers may have reflected Meta's instruction for the Board to “pay particular attention to the impact of removing

²⁵² Levy, *supra* note 30.

²⁵³ *Oversight Board Bylaws*, META OVERSIGHT BD., at 11 (Feb. 2023) (identifying eleven as the minimum number of Board Members).

²⁵⁴ Levy, *supra* note 30 (discussing instances where Meta declined to provide the Board with tools necessary for selecting cases).

²⁵⁵ See 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), <https://techcrunch.com/2021/03/02/facebook-oversight-board-already-a-bit-frustrated-and-it-hasnt-made-a-call-on-trump-ban-yet/> (outlining concerns of stakeholders about the lack of Board members with technical expertise).

²⁵⁶ Levy, *supra* note 30 (describing how Meta subjected a candidate for an opening on the Board to a lengthy review process and, despite her technical qualifications, did not select her).

²⁵⁷ See, e.g., Jenny Domino, *Why Facebook's Oversight Board is Not Diverse Enough*, JUST SEC. (May 21, 2020), <https://www.justsecurity.org/70301/why-facebook-oversight-board-is-not-diverse-enough/>.

content in light of human rights norms protecting free expression,”²⁵⁸ it is not clear the Board is operationally set up to adequately adjudicate cases on the basis of international human rights law.²⁵⁹ Moreover, it is possible that the Board’s use of international human rights law “in an imaginative and incoherent fashion,” as described by Brenda Dvoskin of Georgetown University Law Center, may actually setback efforts to identify the global public’s interest in content moderation.²⁶⁰

In addition to the shortcomings caused by a lack of professional diversity, the Board’s ability to fulfill its mandate as well as to have a broad, positive impact on content moderation is also affected by its lack of geographic and demographic diversity. At a time when the Board included just one member from Southeast Asia—a newspaper editor from Indonesia,²⁶¹ it conducted an initial review of a post made by the former prime minister of Malaysia.²⁶² Observers, such as Jenny Domino of Just Security, question whether a Board with such little regional diversity can accurately adjudicate such important and context-specific cases, which requires knowledge of an area’s priorities, as well as of the biases commonly asserted against the people in that area.²⁶³

A lack of professional, geographic, and demographic diversity not only hinders the quantity and caliber of the Board’s review, but also creates doubt among users, especially those lacking a representative that shares their background and values, as to the legitimacy of the Board. Domino posits that the absence of geographic representation on the Board and within its administration may affect whether users even know about the appeals process—in support of her claim, Domino points out that Meta users from regions that lack representation on the Board submit “relatively fewer complaints[.]”²⁶⁴ From that disparity, Domino theorizes that Board has developed “inadequate

²⁵⁸ META OVERSIGHT BD., *supra* note 44, at ART. II, § 2.

²⁵⁹ See Alice Doyle, *Lost in Translation: How the Facebook Oversight Board’s Limited Language Capabilities Undermine Human Rights*, (Univ. of Cal. Irvine, Working Paper, 2021), <https://ijclinic.law.uci.edu/2021/05/25/lost-in-translation-how-the-facebook-oversight-boards-limited-language-capabilities-undermine-human-rights/>; see also Gopal, *supra* note 222 (negating claims that the Board operates in a way similar to an international human rights tribunal).

²⁶⁰ Brenda Dvoskin, *What the United Nations Guiding Principles for Business and Human Rights (Don’t) Say About Content Moderation*, LAWFARE (Oct. 31, 2022), <https://www.lawfareblog.com/what-united-nations-guiding-principles-business-and-human-rights-dont-say-about-content-moderation>.

²⁶¹ Domino, *supra* note 257.

²⁶² Billy Perrigo, *Facebook’s Oversight Board Is Reviewing Its First Cases. Critics Say It Won’t Solve the Platform’s Biggest Problems*, TIME (Dec. 7, 2020), <https://time.com/5918499/facebook-oversight-board-cases/>.

²⁶³ Domino, *supra* note 257.

²⁶⁴ *Id.*

procedures and [performed inadequate] outreach” to ensure users from all regions make use of the appeals process.²⁶⁵ Yet, a profound mismatch in the geographic distribution, the demographics of users, and those of the Board continues. As of July 2020, the United States and Canada were “the geographic bloc with the most representatives on the [Board], [despite] hav[ing] the lowest number of monthly and daily active Facebook users[.]”²⁶⁶

Granting the Board more authority over the creation and selection of Board memberships and commissions on Content Moderation Commissions would not necessarily resolve the diversity issues impacting the content adjudication system. However, as evidenced by recent appointments to the federal court system by the Biden Administration, if the entity responsible for selecting adjudicators makes diversity a priority, then that diversity can be realized.²⁶⁷ Additionally, assuming the Board opted to expand its membership and create Content Moderation Commissions, then it would have manifold opportunities to select more diverse adjudicators. This process of expanding and diversifying the ranks of adjudicators will hopefully result in more awareness of the appeals process among users as well as improved decision-making by commissioners and members. Research on the effect of diversity on the decision-making of panels of federal judges suggests that more diverse panels reach more reasoned decisions.²⁶⁸

IV. CONCLUSION

Nearly 4.5 billion people use social media.²⁶⁹ The content that these users produce has shaped elections, ended regimes, and endangered lives.²⁷⁰ Despite

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ See, e.g., Caroline Fredrickson & Alan Neff, *Diversity in Federal Judicial Selection During the Biden Administration*, BRENNAN CTR. JUST. (Apr. 5, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/diversity-federal-judicial-selection-during-biden-administration> (“To date, President Biden has nominated the most demographically diverse set of judicial candidates in history, including the first LGBTQ woman to serve on a court of appeals, the first Muslim American to serve as a federal judge, and the first Black woman to ever serve on the Supreme Court. Twenty-six percent of all Black women currently serving as active judges were nominated by President Biden. Nearly 30 percent of Biden’s nominees have served as public defenders.”).

²⁶⁸ See generally Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L. J. 1761–83 (2005); see also Dermot Feenan, *Editorial Introduction: Women and Judging*, 17 FEM. LEG. STUD. 1 (2009); Monica Anderson, *Vast Majority of Blacks View the Criminal Justice System as Unfair*, PEW RSCH. CTR. (Aug. 12, 2014), <https://www.pewresearch.org/fact-tank/2014/08/12/vast-majority-of-Blacks-view-the-criminal-justice-system-as-unfair/>.

²⁶⁹ UNIV. OF MAINE, *supra* note 1.

²⁷⁰ See generally Guy Schleffer & Benjamin Miller, *The Political Effects of Social Media Platforms on Different Regime Types*, TEX. NAT’L SEC. REV., Summer 2021, at 73.

the significance of online activity in the “real world,” an international framework for governing these platforms has remained out of reach. The expansion of the Oversight Board offers the best chance of these platforms serving as digital public spheres that further democratic collaboration, rather than exchanges of hate that facilitate discord. Though the Board claims to operate as an independent entity that adjudicates Meta’s decisions to leave up or takedown posts on Facebook and Instagram, it must take several steps to become truly independent from Meta as well as to actually give users a chance to “be heard.”²⁷¹

Social media users and the global public deserve better platform governance. Individual governments have not sufficiently regulated these spaces²⁷² and the Oversight Board lacks the capacity to respond to more than 1% of appealed content decisions.²⁷³ When state or national level governments have attempted to moderate platforms, they have often done so in a way that reflects their narrow political and cultural preferences rather than those of a global set of users. For instance, Florida passed a bill that would have prevented platforms from removing posts from political candidates.²⁷⁴ Though courts have thus far blocked enforcement of the law, its passage provides a warning of the sort of disjointed and, frankly, dangerous regulation that could emerge if content moderation occurs on a state-by-state or nation-by-nation basis.²⁷⁵

Moreover, it is not clear that state or national level governments have the technical capacity and expertise to govern global platforms. The algorithms used by TikTok, Facebook, and the like, present a level of complexity beyond the expertise of a typical legislator.²⁷⁶ In theory, the United Nations or some other international forum could fill the regulatory void—after all, such an entity would not have a stake in the financial success of a platform and could appropriately balance freedom of expression and user protection such as ensuring the authenticity of users, their safety, and their privacy. However, there is little

²⁷¹ META OVERSIGHT BD., *supra* note 44, at Introduction.

²⁷² See, e.g., Jason Kelley and Aaron Mackey, *KOSA Would Let the Government Control What Young People See Online*, ELEC. FRONTIER FOUND. (Nov. 17, 2022), <https://www.eff.org/deeplinks/2022/11/kosa-would-let-government-control-what-young-people-see-online>; See generally Jillian C. York, *Turkey’s New Disinformation Law Spells Trouble for Free Expression*, ELEC. FRONTIER FOUND. (Nov. 7, 2022), <https://www.eff.org/deeplinks/2022/11/turkeys-new-disinformation-law-spells-trouble-free-expression>.

²⁷³ Gopal, *supra* note 222.

²⁷⁴ VALERIE BRANNON, CONG. RSCH. SERV., LSB10748, FREE SPEECH CHALLENGES TO FLORIDA AND TEXAS SOCIAL MEDIA LAWS 2 (Sept. 22, 2022).

²⁷⁵ See *id.*

²⁷⁶ See, e.g., *Explained: The Algorithms That Run Facebook*, ECON. TIMES (Oct. 26, 2021), <https://economictimes.indiatimes.com/tech/trendspotting/explained-the-algorithms-that-run-facebook/articleshow/87282136.cms?from=mdr>.

evidence that the UN intends to take on such a weighty responsibility, nor that it has the resources to do so.²⁷⁷

Platforms themselves should not be counted on to police themselves. Unlike an independent regulator, the Metas and Googles of the world have a financial stake in their platforms (namely, ad revenue) that inevitably skews attempts to balance freedom of expression with the aforementioned user protections.²⁷⁸ In two years of existence, the Oversight Board has proven capable of weighing that balance, however, three flaws have emerged.²⁷⁹

First, the Board lacks sufficient capacity to address the millions of appeals it receives. As pointed out by Levy, the Wired journalist, the Board has received 2 million appeals on content, ruled on 28 of them, and made 119 recommendations to Meta based on those cases.²⁸⁰ In light of these statistics, a Board member has stated a goal of “doubl[ing] or tripl[ing] the number of cases” handled by the Board.²⁸¹ Beyond seeking changes to allow for such a caseload, members have also pressed for means to ensure Meta applies the Board’s case law to similar appeals—currently, the Board lacks the sort of “lower courts” necessary to identify appeals that one of its prior decisions may resolve.²⁸²

Second, the Board does not reflect the global user base it governs. Though the Board’s charter calls for 40 members, only 23 people have been appointed.²⁸³ Such a small group, even when supplemented by staff, cannot represent the entirety of Meta users nor possess the totality of expertise necessary to rule on cases spanning from child exploitation to hate speech.²⁸⁴

Third, the Board is not truly independent because it relies on Meta for its funding and because Meta plays an excessive role in determining when and who

²⁷⁷ See, e.g., Dvoskin, *supra* note 260 (discussing the limited applicability of international law to corporations).

²⁷⁸ See, e.g., Yi Liu, et al., *Implications of Revenue Models and Technology for Content Moderation Strategies*, WHARTON 1, 7; 24 (Sept. 9, 2021), <https://marketing.wharton.upenn.edu/wp-content/uploads/2021/09/09.09.2021-Liu-Yi-JMP.pdf>.

²⁷⁹ See, e.g., David Morar, *Facebook’s Oversight Board Makes an Imperfect Case for Private Governance*, BROOKINGS (Feb. 23, 2021), <https://www.brookings.edu/blog/techtank/2021/02/23/facebooks-oversight-board-makes-an-imperfect-case-for-private-governance/> (“Relying on international human rights law and on the expertise of its members, the [first batch of Board] decisions were taken with immense care, benefited from external expertise, and included local knowledge, while also tackling with the conflict between speech rights and potential ensuing harm.”).

²⁸⁰ Levy, *supra* note 30.

²⁸¹ *Id.*

²⁸² Morar, *supra* note 279 (“The ‘lower courts’ that would decide other cases are either context-deficient algorithms or overworked, underpaid people making a few decisions every minute, oftentimes also devoid of local context, and not benefitting from external expert guidance.”).

²⁸³ Levy, *supra* note 30.

²⁸⁴ See generally Domino, *supra* note 257.

to select for membership on the Board. Though Meta appropriates funds for the Board to an independent trust,²⁸⁵ such a dynamic places the Board in a difficult position—it can only expand at the rate possible based on Meta’s appropriations. A slew of factors could nudge Meta away adopting major reforms, such as expanding the Board to 40 members and creating “lower courts” or Content Moderation Commissions. For instance, Meta could decide that regulatory headwinds, such as a recent privacy fine levied by the Data Protection Commission,²⁸⁶ make the Board a duplicative source of frustration for the company. In this event, Meta may start to provide funding on a more limited and infrequent basis, thereby jeopardizing the Board’s potential.

Thankfully, the evolution of the federal court system offers three lessons that should inform the Board’s rapid expansion. These lessons are applicable to the Board and Meta’s content adjudicative system because, for the most part, Meta’s system fulfills the requirements of a developed legal system as set forth by Roscoe Pound—in particular, Meta’s Community Standards bear the hallmarks of legal precepts and the Board acts on the sort of traditional techniques indicative of courts and jurists.

The first lesson from the federal court system is to invest in a multi-level judicial system that expands in size as its caseloads grows. The second is to appoint adjudicators that reflect the diversity of the population served and the complexity of the cases in its queue. The third is to allocate more authority to the Board over the creation of Board memberships as well as commissionships on Content Moderation Commissions.

An adjudicative system must grow to handle the size of its caseload. When the number of appellate filings jumped by 108 percent in the span of a decade, but the number of judges remained the same, Congress passed the 1978 Omnibus Judgeship Act to increase the number of judgeships by 36 percent – 117 district court judgeships and 35 circuit court judgeships.²⁸⁷ Though not every post deserves appellate review, a review rate of 0.0004 percent is insufficient to fulfill the Board’s mandate of “protect[ing] free expression by making principled, independent decisions about important pieces of content[.]”²⁸⁸ By creating a series of Content Moderation Commissions to serve as the lower courts of the Oversight Board, the content adjudication system would drastically expand its capacity to review posts. Of course, the number of members on the Oversight

²⁸⁵ Harris, *supra* note 35.

²⁸⁶ *Meta Fined €265m By Irish Data Watchdog Over Breach*, BBC (Nov. 28, 2022), <https://www.bbc.com/news/technology-63784393>.

²⁸⁷ BAAR, *supra* note 187, at Forward V.

²⁸⁸ Gopal, *supra* note 222 (reporting statistics from the Board’s first year); META OVERSIGHT BD., *supra* note 44, at Introduction.

Board should also be increased to assist with its review of so much content.

Expansion of Meta's content adjudication system is also necessary to ensure the adjudicators reflect the diversity of the users it serves. Six of the 23 Board members are from the United States despite U.S. users accounting for just 180 million of Facebook's more than 2 billion users.²⁸⁹ The establishment of dozens of Content Moderation Commissions with 10 to 20 commissioners would allow for the appointment of adjudicators more reflective of Meta users. Congress recognized the importance of having judges serve communities that they are familiar with by allocating the new judgeships to the areas where caseloads had experienced an uptick; Meta should do the same.

Finally, the Oversight Board should learn from a reform that Congress has yet to adopt, despite several stakeholders advocating for its adoption—granting the adjudicative system some authority over when to expand and how to expand. From independent organizations to U.S. Supreme Court Justices, a wide range of stakeholders have recognized the value of avoiding expansion that occurs in fits and starts. The decades-long gap that has occurred between expansions of the federal court system results in long periods in which adjudicators become increasingly isolated and unrepresentative of the population. Furthermore, sudden bursts of expansion can pose administrative issues that diminish the effect of that expansion. Meta must surrender at least some of its current authority of the selection of Board members to allow the Board to adjust in a timelier matter to the size and complexity of its caseload as well as the size and diversity of its users.

The Oversight Board has proven to be capable of making reasoned, thoughtful decisions. As Meta expands into new realms and as other platforms see the Board's promise, this content adjudication system will inevitably expand—that expansion should occur sooner than later.

²⁸⁹ See UNIV. OF MAINE, *supra* note 1; PEW RSCH. CTR., *supra* note 1; U.S. CENSUS BUREAU, *supra* note 1.

