

## CAN THE FACEBOOK OVERSIGHT BOARD BUILD LEGITIMACY IN THE ABSENCE OF THE STATE?

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**Abstract:** This article examines the role of the Meta Oversight Board in regulating content on Facebook and Instagram. The board is an independent body that was created by Meta to review content decisions made by the company. The board has the power to overturn Meta's decisions, and it has issued a number of rulings that have challenged the company's content moderation practices. The article discusses the implications of the board's rulings for the future of content moderation on social media.

**Keywords:** Meta, Facebook, Oversight Board, Content moderation, Artificial intelligence, State regulation

### Introduction

There's a crescendo in the struggles—ubiquitous and intense—to find and implement a satisfactory societal response to the severe and seemingly intractable content problems imputed to social media. Social media have been deemed tools, among other things, for promoting genocide, corrupting elections, transmitting live mass killing, and facilitating lynch mobs. Governments are destabilized, ancient loyalties called into question, polarization intensified, and sovereignty threatened. Human rights advocates, regulatory agencies across the globe, social media users, and consumers all invoke the impact of social media as contributing to profound ills. Much of the debate has centered on the need to find mechanisms for adequate content moderation, without quite knowing the metric for adequacy. The standard litany is that these platforms bring enormous benefits and produce opportunities for democratic participation, personal expression, and economic expansion. Unregulated and unchecked, they transmit and even organize existential dangers to persons, communities, and institutions. An intense and almost desperate search for modes of addressing these issues has engaged legislators, citizen groups, advertisers, and courts, among others, confounding democracies and preoccupying authoritarian regimes. Confusion and uncertainty have led governments and media platforms to ad hoc, inconsistent, and censorial exercises of control as a way of coping with threat, incitement, disinformation, and hate speech. Scholarly critics, stakeholders, and politicians, not to mention larger publics, find major grounds for questioning the capacity and the authority of platforms to address the problem of balanced and adequate content moderation.

The scale of the problem of moderation alone is crippling, or certainly seems so. And Meta, to take a prominent platform, was and is plagued by a structural issue: Its financial model and economic interest are often antithetical to the needs and standards for policing the forum. Conflicts of interest are coupled with a worrying absence of the state as regulator. The dilemma of moderation in a context of anemic authority is central to understanding

some Facebook initiatives. In this brief feature article, we look at an effort by Meta to experiment with approaches to content moderation that increase or attempt to increase the legitimacy of its actions. In particular, we chart the implementation of the Facebook Oversight Board as a suggestive instance of how these initiatives emerge and how elements of legitimacy appear to be forged (Douek, 2019).

A few words about legitimacy as we see its relevance. Legitimacy as a concept has displayed considerable pliability (Deephouse & Suchman, 2008, pp. 49–50). Researchers have treated it as a property, as an interactive process of legitimation, and as a perception (Suddaby, Bitektine, & Haack, 2016, p. 451). We treat legitimacy as having characteristics of each approach: Legitimacy is a property with attributes that can be ascribed to it, legitimacy is a dynamic, unstable process involving multiple, conflicting actors, and legitimacy is a set of perceptions—something is legitimate because it is perceived to be. As a shorthand, we point to Marc Suchman’s (1995) definition of legitimacy as “a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions” (p. 574). “Legitimacy” is thus not an intrinsic property of an entity; it is a social relationship where legitimacy is conferred by one or more publics. For the purposes at hand, we lay aside the role of the state since we are focused on attempts by media platforms to pull themselves up by their own bootstraps, so to speak, creating mechanisms that bestow, build, or attract legitimacy.

### **Legitimacy Deficits**

We characterize the problem facing many platforms as a “legitimacy deficit,” namely a gap between the governance tasks various constituencies expect of them and the absence of an environment, agent, or institution that authorizes or directs performance of those responsibilities. These deficits have an ironic turn. Societies demand that the platforms be more responsible but condemn them for overreaching (or undermanaging). Legitimacy needs are heightened where there are aspects of *regulatory failure*: a gap between what a society *anticipates* a regulatory effort should accomplish and what it can or does, in fact, accomplish. A concept of regulatory failure presupposes that there is some level or range of expectation that the society (through a combination of efforts) or a particular actor can muster to be able to effectively respond to a cohort of regulatory needs.

A regulatory failure can precipitate a legitimacy deficit, and the standard responses include lowering or otherwise adjusting public expectations or improving platform performance if the entity is to flourish or even survive. Content moderation is an area where these concepts are frequently in play with shifting public demand or expectation. Legitimacy deficits also stem from ambiguities in setting goals for evaluating performance. Or one can also think of platform content moderation in at least two other ways foundational to legitimacy enhancement: decision-making as theater (a focus on the appearance of meeting pre-existing standards), or performance as direct accomplishment (see Douek, 2022). Demand for fiercer content moderation exists when, for example, there are threats to the body politic (terrorism, pandemic) when social media is thought to be a substantial contributor to societal breakdown and danger, and other occasions when demand for intervention arises. The critical mix of interests in various jurisdictions will result in different gestures of demand for regulation. Different sovereigns have different intensities of interest at different times.

In the absence of regulatory action, Meta and other platforms are both required and desire to act as a state surrogate (though eschewing the implications). Self-regulation becomes the preferred way to close legitimacy deficits and address regulatory failure. This may have fed expectations that social media could and should take a central role in content moderation. As a result, however, platforms often find themselves in contradictory situations, especially if one considers that various publics have different standards and expectations for content moderation. For some free-speech advocates, it is the platforms' very restraint in moderation that is itself legitimizing, whereas for many others, this same restraint has been tantamount to a disavowal of technical, political, and ethical responsibility to intervene. Most platforms face versions of this same dilemma. Their substantial impact on society underscores the need for measures that help to confer legitimacy. Here, too, what we have called the absence of the state is significant. The legitimacy deficits can grow to yawning dimensions. We contend that a regulatory configuration in which "the state" plays too limited a role leads to a special need for manifestations of legitimacy. In modern history, the formal default entity for conferring legitimacy on institutions purporting to govern (including self-governing institutions) has been the state. One form this takes is through state credentialing and state regulatory processes.

Particular states may be absent under many conditions or for any number of different reasons: The technological gap between platform manager and state may be too great, the jurisdictional barriers too daunting, the understanding of the dynamics of use and impact too great. Absence of the state exists in another relevant category: where a pre-existing set of rules, including basic or constitutional tenets bars or constrains a state from adjusting to the demands that accompany a new technology. The First Amendment to the United States Constitution can be read as a constitutionally imposed "absence of the state" in an environment where state involvement (in the form of content moderation) seems an increasingly poignant prerequisite for societal functioning. In some settings, the absence is a consequence of the sheer size of the management challenge or because the governing institutions are fictions. Some societies function in circumstances where the state, or its fragments, are the consequence of unrealized dreams or remnants of dissolved or abandoned social arrangements. Of particular interest for our argument are circumstances where the state or some version of it chooses not to exercise authority, possibly for reasons of regulatory capture. An analysis of "absences" would show a wide range (from incapability to restraint to disdain), with implications for their legitimacy-conferring powers. While we include the previously mentioned examples of limited state involvement as "the absence of the state," we acknowledge great differences among them. One could argue that the state is never wholly absent but often masked and hidden.

This experience should not yield hasty conclusions about performance, but it can produce a new vocabulary of actions designed to illuminate and implement stakeholder goals. For example, Meta can be seen as a strategic communicator with resources and power that enable it to act in ways that lead to a rapid and expert identification of objectives and the capacity to implement them, surmounting existing legal obstacles and bypassing existing formal legal structure.

## The Facebook Oversight Board

In this climate, what most prominent social media companies seek is what we could call *functional* legitimacy. They would like to earn sufficient legitimacy in content moderation to buffer insistent and potentially costly critiques. The Oversight Board was intended to be a deliberative body or tribunal that would be relatively independent of Meta and its administration, provide opportunity for appeal by Facebook users whose work is taken down, and more generally provide oversight of the platform's standards, practices, and evolving norms. An account of the creation and early implementation of the Oversight Board provides important insights into what we call "attributes of legitimacy."

Facebook's history and evolution regarding the Oversight Board and its initial period of implementation is highly documented. A cadre of scholars helped establish a constructive, informed, engaged monitoring tone that has served Facebook (and a community of scholars) quite well as the idea for such a mechanism ripened. Kate Klonick (2018), in a magisterial *Harvard Law Review* article, "The New Governors: The People, Rules, and Processes Governing Online Speech," comprehensively describes the state of play among platforms in the years just before the Oversight Board was conceived and implemented. In fastidious detail, her article documents varying strategies by Google, Facebook, and Twitter; internal processes of review; changing invocation of norms; and differing aspects of profit maximization of each platform. By 2015 or so, Facebook had already established a massive international apparatus of industrial scale dedicated to screening posts and managing material, which was the subject of complaints, including complaints by states. By then there were already thousands of individuals employed as content moderators for Facebook, often as contractors with varying levels of training, working under conditions often criticized as grueling and worse (Satariano & Isaac, 2021). And behind this army—or ahead of it—was the insistent scope of artificial intelligence or moderating by algorithm.

The stakes became more articulated, the gulf between social needs, global demand for moderation, and existing performance clearer. An insistent and unsatisfying pattern had emerged: There were public crises (e.g., massacres, tense elections with violent aftermath, terrorist acts, a pandemic, a corresponding mass vaccination campaign), in which information spread played a part. In their wake, governments sometimes demanded intensified attention to content moderation, launched inquiries, or engaged in harsher actions, such as shutting down a platform. In a series of posts, Mark Zuckerberg, cofounder and CEO of Facebook, lofted the idea of a qualified appeals process. The degree to which legitimacy was at risk and the continuing difficulty in finding acceptable state approaches created an opening for a comprehensive innovation. A strategic intervention would change the conversation between Facebook and its critics, taking some of the responsibility somewhat off Zuckerberg personally and rehousing and rearticulating the machinery of a regularized decision-making process to increase the likelihood of respect.

In order to enhance the legitimacy of this innovation, Facebook organized a series of gatherings around the world to explore ideas and opportunities and consider initial board members, including eminent lawyers, civil society members, journalists, human rights activists, and academics (Klonick, 2021). In these gatherings, the distinguished participants discussed the possible role, procedure, and membership of a Facebook Oversight Board. It was as if there were recognition that, in the absence of a state, a set of rituals was needed to render

legitimate the not-quite-authorized. Consistent with the newness of technology, these gatherings, and the board structure that emerged as a quasilegal public sphere, was carved out through the use of popular media.

Eventually, Facebook distilled from these meetings a structure for an Oversight Board and named prominent jurists, journalists, and human rights advocates. It is not too much of a leap to say that designers of the Board considered that legitimacy is conferred in part by the makeup of the individual members and their diversity overall. That is why there are among them experts in free speech, human rights, civil society, a former prime minister, a former UN rapporteur, a Nobel laureate, legal scholars, communication scholars, and feminists. This is a dramaturgy of seasoned, considered, circumspect professionals, with a diversity thought to guarantee a range of perspectives. These members were chosen because they were thought to be experienced at thoughtfully and collegially deliberating, skilled at making and explaining decisions based on a set of policies or principles, and familiar with digital content and governance.

### **The Oversight Board and Attributes of Legitimacy**

The aspiration is that the insertion of this new element—the Oversight Board—becomes a productive and effective attribute of legitimacy. How that develops is a matter of careful and significant attention. The most immediate and consistent way in which the Board can add legitimacy is for it to exercise productive independence (not independence for its own sake, but independence that advances public goals) and for it to produce or influence changes in content moderation that are seen as effective and useful by a range of stakeholders. We observe several related approaches to this dynamic. In addition to emphasis on the quality of decision-making (cognizant of the limits suggested by Professor Douek, 2022), we would mention efforts at enhancing strategic narratives and strategic aspects of institutional design and reinforcing and deepening an epistemic community that enriches the public understanding of social media platforms.

Attributes of legitimacy are refinements of decision-making processes that build confidence. They work on two levels. Agencies or institutional actors propose actions to improve operation, and they are advertised as ways to enhance capability and mastery. The Oversight Board becomes, in Facebook's aspirations, an engine for articulating attributes, and is itself an attribute. One could see the Oversight Board as an exercise in selecting design elements that would, like beaux arts or classical architecture, create an institutional aesthetic of governance. Facebook's elaborate consultations, global in scope, prior to establishing the Board, served as an opportunity to test what features would be particularly helpful in shaping a legitimacy-redolent institution.

Certain attributes of legitimacy are immediately recognizable; they include characteristics of independence, transparency, assertions of commitment to free expression, the appearance and reputation for noncorrupt decision-making, public reasoning, and the capacity to navigate issues of sovereignty and jurisdiction. More aspirational attributes of legitimacy—as the Oversight Board develops—could include the Board's enhanced capacity to put forward a satisfactory approach to extremely difficult and longstanding issues involving freedom of expression or finding the right formula for understanding the interplay among human rights norms and various constitutional principles. These attributes would strengthen the Board and therefore Facebook's own content moderation. Legitimacy may increase if the Board becomes a more significant voice on larger law and policy questions. For example, legitimacy may be augmented if the Oversight Board helps develop a more accessible

vocabulary to meet expectations of remedy proportionality or to assist in the proper allocation of determinist power between human moderation and artificial intelligence. If other human rights tribunals begin to draw on the language or logic of the Oversight Board's decisions, this will redound to the Board and, by extension, to Meta.

### ***Strategic Narratives***

The Oversight Board will, for its own purposes, try to shape narratives of authority, though, in doing so, friction may be created with Facebook. Calling the Board a “supreme court” is an example of shaping or misshaping a strategic narrative. So too would a failure to recognize the structural limits to achieving legitimacy (for example, through efforts to convey that an error can be largely avoided or that most underlying concerns can be readily addressed; Douek, 2022). And in its efforts to bolster legitimacy, Meta will have its own narrative for what role the Board should play and what the implications could be or should be for Facebook. There is not yet sufficient experience of how the Board or Facebook itself evolves, so we only begin to see the pressures and opportunities the Board has to innovate or develop a distinctive voice. The fuller narrative will emerge from a cluster of decisions, policy queries, and other actions. It will be affected by whether and how those actions come to hold significant precedent in Facebook's subsequent operation.

For Facebook, the Oversight Board can serve as a scaffolding for a calculated strengthening, a selfennobling activity. It can amplify a narrative that borrows from the language of the law and freedom of expression. The Oversight Board may deploy its subtle policy-related role to construct a suitable strategic narrative that goes beyond corporate opportunity. It already represents itself as an instrument of human rights. The narrative might include a response to globalism, an affirmation of freedom of expression and incorporate some mediation with state sovereignty. Policies concerning scope of translation may yield more languages where Facebook builds up technical expertise. The existence of the Board already makes the process seem much more dialogic, with the Board making policy recommendations and Facebook required to respond.

### ***Strategic Architecture***

Legitimacy can also be enhanced by addressing the institutional architecture or environment in which moderation decisions are made. The addition of the Oversight Board might remedy capacities wanting or missing in the original Facebook/Meta arrangements and constraints. The idea of an occasion for review is a popular one, especially if the review is conducted not by the original decision maker but by a more distant entity. In constructing the Board, attention was paid to making it appear to be an entity sharply differentiated from Facebook. Facebook is so byzantine, so overwhelming, so seemingly impervious to massive change that a proposal for improvement based on marginal change in content moderation practices could be uninspiring and simply bolster distrust. There are tens of thousands of moderators who engage in the taxing work of reviewing hundreds of thousands of posts and deciding which should be taken down; how these foot soldiers are trained, the guidelines they are to follow, how consistency is maintained in their work, how they engage with Community Standards, how and whether they are exploited, and how that affects their work are aspects for continued attention and reform. All this makes direct change of Facebook as a mode of gaining legitimacy a complex proposition from a public point of view. The Oversight Board could be characterized as just the reverse of the involuted,

sprawling culture of content moderation at Facebook. The Oversight Board provides an idealized and initially more controlled canvas on which a more ideal moderation process can be depicted, a contained sandbox of content moderation. Where Facebook is sprawling and profusely engaged, the Oversight Board is what might be called deliberately deliberate. The Oversight Board hardly scales, but here small is somewhat beautiful. The Board is where change in processes can be studied and discussed before being applied across the entire world of moderation.

At the outset, the currency of achievement—the contribution to legitimacy—was measured in large part by the quality of process, global consultations, focus groups, and accumulated discussions. What was featured, highlighted as achievements, and celebrated in the blogosphere was the elaborate exercise in elicited collaboration. It was also important to delineate and broadcast how the Oversight Board would maintain independence in every way. For example, complexity and care are evident in the rules concerning the financing of the Board. An innovatively structured trust was set up to guarantee funds while confirming independence. Furthermore, the method of selection of the members of the Board and the details of length of service, compensation, and similar matters underscore how legitimacy of process was seen as significant in enhancing legitimacy.

As the Oversight Board matures, legitimacy will turn, largely, on perceived quality of actions. These actions include choosing which cases to review, the decisions it renders in those cases, but also the nature of its dialogue with Facebook on policy questions and how much influence it eventually wields. In particular, there will be questions of whether the decisions of the Oversight Board sufficiently affect the course of decision-making at Facebook level. Put differently, how much of an actual impact will the decisions of the Oversight Board have on the massive Facebook apparatus (into human moderation and algorithmic review), and will these decisions reverberate in the outcomes of other platforms? Will the Board seek deeper involvement in the mechanisms by which that translation takes place? Thus, the legitimacy of the Board rests not only on its own performance, but also on Facebook's performance vis-a-vis the Oversight Board.

### ***Creating an Epistemic Community***

We offer a final category of legitimacy building related to the Oversight Board. It involves how the Board is supported and continues to be supported by a broad consultative network. The Administrative Procedure Act in the United States is built, in large part, on the idea that agencies should give notice of proposed decisions and be willing to receive copious and presumably helpful comments on the potential action. Decisions gain legitimacy (or at least it is often so suggested) as various entities—administrative agencies, court, executive officials—have dialogues with constituencies and stakeholders who might enrich the decision-making process. Sometimes this is perfunctory, providing the illusion of inclusion; sometimes it is a mode of obtaining consensus, whether warranted or not. But the theory here is that the governing entity is stronger or engenders more respect or cause for adhesion if the discourse surrounding it is broader and deeper, part of a process of examining alternatives. Usually, the mandate for consultation is required by the state. There are different aesthetics and pragmatics of this interchange or process of engagement. It is at times mechanical or box-checking. In Habermasian terms, the

point is to create a domain of social life where public opinion is formed: a verdant, nondominated, noncorrupt public sphere often tailored to the specific entity or decision maker.

One could read the formation of the Oversight Board as an intervention designed more formally to reengineer its relationship to a critical set of interlocutors. The procedures established to govern decisionmaking contain structured efforts to include comments from the public. And the launch of the Board has been the occasion for serious debates that bring together scholarly, governmental, civic, and business zeal. This has been a process that has involved academics writing alone and academics assembling in purposive formations, such as Stanford's project on intermediary liability, the Information Society Project at the Yale Law School, or the Committee of Experts on Internet Intermediaries of the European Council. Building expertise has engendered large-scale foundation-funded studies. A valuable contribution to critical community building is the work of individual scholars, like Evelyn Douek (2019, 2020, 2022), who have become solo institutional critics, generating knowledge, advancing positions, and creating patterns of debate and discussion that raise the quality of decision-making for the Oversight Board, governments, and other stakeholders.

What emerges is what some might call an epistemic community, "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy relevant knowledge within that domain or issue area" (Haas, 1992, pp. 2–3). Epistemic communities marshal information or knowledge to improve operation of an institution. In an inaugural article, Peter Haas (1992) provided four characteristics or typical features: a *shared set of principles*; a *shared understanding of the way things happen*, including problems, policies, and outcomes; *shared ideas of what is acceptable*; and a *common enterprise*, or shared goals (p. 3). When he first wrote about epistemic communities, Haas (1992) rooted his concept of an epistemic community within a formalist understanding of scientific expertise. But the coming together of scholars across disciplines suggests that the description of community can and does change. Mai'a Davis Cross (2012) has written of a more commodious set of characteristics that emphasizes the *episteme*, the core knowledge or knowledge system that undergirds a community.

If, for Haas (1992), an epistemic community is predicated on shared values, shared understandings of the world, and a shared sense of what is valid or acceptable, the Oversight Board has a *diverse* set of understandings of the world and what is acceptable—and this is its *virtue*—indeed one could ask if it is diverse enough (Domino, 2020; Douek, 2020; McSherry & York, 2020). An epistemic community would be a locus for debating the role of human rights, justice as fairness, science and the scientific enterprise, rationality, rule of law, and other hallmarks of liberal democracy. This is part of the system of beliefs that provides a framework for a claim on legitimacy. An epistemic community brings together several senses of "legitimacy," including not only expertise and legitimacy of process. The "community" implicitly buttresses the rightness and moral authority of the Board through what we could term "soft" legitimacy. What evolves may even be a shared sense of moral responsibility, which hearkens back to Lorraine Code's (1983) notion of epistemic community as implying epistemic responsibility.

### **Manufactured Legitimacy?**

We have titled this article "Manufacturing Legitimacy" as a tip of our hats to Herman and Chomsky (1988) and to emphasize the complex forces at play when institutions are introduced that seek to exude democratic values

but may shield, even with contrary intent, how pre-existing hierarchies are involved in creating the aura of authority. Addressing these crises of legitimacy, the responses have yielded a range of modifications. It is too early to determine how to assess the kinds and degrees of legitimacy that an institution like Meta requires to be effective, what deficits will be present and the capability of the system, through the Oversight Board and other mechanisms, to repair these deficits. By the end of its first years of operation, the relationship between the corporation and the Oversight Board was already manifesting strains. Issues of trust, jurisdiction, transparency, and capacity were providing tests of acceptability of the existing arrangements. Epistemic communities were cracking, new strategic narratives were being shaped, and what constitutes attributes of legitimacy could change. Rarely, if ever, has there been so great a gulf between the aspiration for meaningful and appropriate management and the capacity of available instruments to deliver a coherent and feasible system. So monumental is the impact of social media, so conflicted are the human rights standards and commitments to safety and security that standards design—especially when scale requires wholesale dependence on artificial intelligence—is almost impossibly complex. In that context, the Oversight Board’s careful deliberations and crafted decisions, coming at a measured rate, may appear quaint or largely irrelevant; yet, we have taken the position here that an experimental tribunal may potentially play an intriguing role in an emerging architecture of legitimacy, within the social media landscape and beyond.

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