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How Supreme a Court?

Thomas Kadri

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Facebook is planning an independent appeals process for content moderation decisions. But how much power will it have?

After a scandal-filled year, Facebook has faced pressure from lawmakers on both sides of the Atlantic. The U.S. Congress grilled CEO Mark Zuckerberg about his company's role in enabling election interference, while British lawmakers were snubbed after asking Zuckerberg to answer questions about Facebook's role in influencing the country's Brexit vote.

In the midst of all this hullabaloo, Zuckerberg raised a fascinating idea that might prove to be a quasi-constitutional moment for his company: What if he delegated some of his immense power to an independent “[Supreme Court](#)” that could decide what speech was “acceptable” in the Facebook community? Many assumed that this idea was bluster—a sleight of hand to distract legislators eager to restrain Facebook's vast power. But on Thursday, Zuckerberg [officially announced](#) plans to create an “independent body” to resolve appeals from Facebook users whose speech has been taken down. Zuckerberg was bullish about how this tribunal would provide “accountability” and “prevent the concentration of too much decision-making” within Facebook's own ranks.

This is good news: It's high time that our most influential “[new governor](#)” offered the public greater transparency and accountability in its role as one of the key “[custodians of the public sphere](#).” But just how transparent and accountable Facebook will now become depends largely on what “constitutional” structure it creates around its new board of overseers. As Zuckerberg makes these structural choices, he could learn a lot from the American and British politicians who've hounded him throughout the year.

In the American constitutional system, three equal branches of government—the legislature, the executive, and the judiciary—each play important roles in restraining one another's ambitions. Most relevant to Facebook's plans, the Supreme Court often hears appeals to determine whether the other branches have

correctly interpreted the law or violated the Constitution. This practice of “judicial review” has bite because, in the United States, the Supreme Court has the final say about the meaning of federal law: Congress and the executive branch can make legal arguments to the justices, but, as the Supreme Court famously declared in *Marbury v. Madison* back in 1803, “it is emphatically the province and duty of the judicial department to say what the law is.” In short, in the American constitutional system, the Supreme Court’s word is supreme.

Contrast that with the system in the United Kingdom: parliamentary sovereignty. The Brits have neither a written constitution nor any court empowered to overturn primary legislation passed by politicians. Instead, the British system of parliamentary sovereignty means that the courts can’t invalidate laws because Parliament is the supreme legal authority. As noted English jurist A.V. Dicey once explained, Parliament has “the right to make or unmake any law whatever,” and “no person or body” may “override or set aside the legislation of Parliament.” In short, in the British constitutional system, Parliament’s word is supreme.

What does all of this have to do with Facebook’s “Supreme Court”? Facebook, it seems, will retain the legislative and executive powers to write and implement its speech rules, and it will even continue to exercise some judicial powers by resolving most moderation decisions in the first instance. But left unanswered is exactly how the new appeals court will alter the balance of power within the company. The American and British models show us two vastly different approaches that Facebook could take—but because Zuckerberg has told us very little about how the tribunal will function, we can only speculate.

On the one hand, Facebook could adopt American-style judicial review, where the appellate body would review decisions made by Facebook’s moderators and have the final say on the meaning of Facebook’s “laws”—the rules that spell out what speech is allowed on the platform. So, for example, if Facebook’s policy against hate speech prohibits attacks on people based on a “serious disease or disability,” the tribunal might interpret that provision to bar speech that disparages people for having a drug addiction. That ruling would be final and binding on Facebook going forward, even if it didn’t like it.

But Facebook could take another path—something more like the British model. It might allow the tribunal to make case-by-case determinations about particular content, and those determinations might even be “binding,” as Zuckerberg said they would be. A misunderstood satirical post that was taken down might go back up; an underappreciated threat that was kept up might disappear. But what will

these one-off decisions do to Facebook's overall rule set? Will its hands really be tied? Or, to return to the earlier hypothetical, if Facebook decides that it wants people to be free to disparage people with drug addictions, could it simply nullify the tribunal's interpretation and pass a new rule saying that addiction isn't a "serious disease or disability"?

If Facebook is free to unilaterally overrule appellate decisions it doesn't like, the talk of a new era of radical transparency and accountability will be overblown. Yet it's true that Facebook has good reason to want some flexibility to alter its speech policies, as it constantly learns and adapts to tackle the Sisyphean task of satisfying a "community" of more than 2 billion people. Binding itself to a 2018 version of its rules will surely be untenable, but amending its legal code willy-nilly would undermine the entire project.

One compromise would be for Facebook to adopt something like [a constitution](#): a code of fundamental principles that would be harder to amend than the company's malleable content moderation rules. Such a charter would also empower the tribunal, whose members would then have the crucial task of judging whether novel speech rules adhered to Facebook's fundamental principles. This move would give the independent body real influence, but it would also mark a real concession of power that Zuckerberg might not be willing to make.

Perhaps foreshadowing this tension, Zuckerberg's announcement posed a vexing question about the members of the tribunal: "How do we ensure their independence from Facebook, but also their commitment to the principles they must uphold?" For all of his talk about ceding power to outsiders, it seems that Zuckerberg isn't ready to give up his role in defining "the principles" that Facebook "must uphold." This makes a very American company just a little more British than you might realize.