6 New Accountability Norms

6.1 Where We Stand

This final chapter offers a brief recap of where our inquiry has led us thus far and provides an outlook for what may lie ahead. I propose that we are witnessing the emergence of an entirely new class of norms, mechanisms, and institutions aimed at constraining the immense power wielded by privately incorporated governance structures. Content moderation, and particularly experiments such as the Oversight Board or the EU's out-of-court dispute settlement bodies (ODSs), provide a vivid – if ambivalent – example of the fascinating and innovative efforts to address the core question posed at the outset of this book: how do we control corporate power structures when the traditional locus of authority, the state, is gradually fading? Or, to put it more starkly, how can we constrain powerful corporations that govern critical sectors of the future – platforms, artificial intelligence, space travel, satellites, biotech, quantum computing, and beyond – when they outpace and outscale the regulatory capacity of public institutions?

Over the last 300 or so pages we analyzed these and other questions in the realm of content moderation, particularly how private and regulatory actors alike flocked to emulating a canonized classic of public law – individual rights adjudication – to provide accountability to the fledgling, privately incorporated power structures of social media companies. Such emulative moves are a common pattern in politics as well as managerial practice. Therefore, it seems likely that regulators, academics, and publics will, again and again, draw on historical approaches that have proven effective in the past to solve future problems of organizational and especially corporate power. A crucial role model for controlling private organizational power will remain, for the time being, public

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law. By public law, I refer mostly to constitutional, civil rights, and administrative law. In contrast, by private law, I refer to the body of law governing relationships between private parties, such as contracts and company law. The ideas of public law – self-governance, participation, due process, reason-giving, third-party review – hold a lot of social sway. But like for content moderation, we will, inevitably, face the necessity of adapting those role model solutions to the private law context in which these new power structures operate. These emerging frameworks could well be described as the beginning of a set of new accountability norms – an attempt to rein in corporate power in ways that acknowledge its vast reach and innovative force while seeking to instill checks, balances, and accountability within these unprecedented governance systems.

But before we get to these future developments, we must briefly recapitulate and critically complement the core arguments this book puts forward. The introductory chapter already anticipated these arguments. However, to refresh our memory and frame the preceding chapters, I take the liberty to briefly recapitulate them here once again. First of all, I argue that it makes sense to think about new institutional and normative arrangements in digital governance, and, for the fact of the matter, arguably the governance of many future sectors. In other words, we witness *governance by emulation*. Emulation means the reproduction of commonly known role models from prior contexts in new contexts.[1] Here it means the emulation of individual rights adjudication vis-à-vis a dominant power structure, in this case social media companies' content moderation machineries. Remarkably, emulating public law ideas is by no means a liberal shtick. Various kinds of conservative or libertarian critiques of regulatory programs or platform (self-)governance invoke arguments about viewpoint discrimination, majoritarianism, free speech, and accountability – all public law concepts in their own right. But that more recent episode, arguably the backlash against the phenomena analyzed in the empirical chapters, has to be studied in future work. This book focused on the "liberal" era of platform governance. The case studies analyzed how users might seek to enforce their individual rights vis-à-vis platforms through new adjudicators like the Oversight Board or ODSs. I called these novel adjudicators Emulated Guardians, the latter term referencing the classic question of public law: Who guards the guardians? Emulated Guardians' reproduction of individual rights adjudication for this context is pretty intuitive. After all, who would be against

[1] See Chapters 1 and 2.

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trying to empower users to adjudicate their rights and hold platforms accountable. However, one must pay attention to the contextual factors that enabled the role model in its original context. The two Emulated Guardians that I studied here – the ODSs certified according to Article 21 Digital Services Act (DSA) and Meta's Oversight Board – struggle with lacking the formal powers and institutional postures of their role model.[2] Also, crucially, emulations regularly operate in a context that is markedly different than the original one, here, for example, the new context are profit-driven private governance regimes whereas the role model's context were continually grown rule of law systems. However, second, contexts may change. The characteristic strength of emulative arrangements is their *performative* potential.[3] Emulated Guardians can be powerful not because they are courts but because they *remind* us of courts. Especially the Oversight Board performatively plays with the perception of adjudicative power and reasoning, international human rights law and thereby taps into the still much venerated imaginary of public law-based accountability of organized power. Yet third, every phenomenon carries its own dialectics. The lack of formal powers and inevitable proclivity to public perception may give rise to merely superficial, or as I call it borrowing from organization theory, *ceremonial* compliance.[4] Such ceremonial arrangements may occur whenever an allegedly controlled power structure adopts external feedback but effectuates only outside-facing changes while keeping internal, potentially harmful practices intact. These three elements – emulation, performativity, and ceremony – are inseparably intertwined. Therefore, one should not hope or even wish for governance arrangements that entirely overcome one of them. Emulation, performativity and, to a degree, ceremony can be very fruitful means of organizational growth and the construction of authority. Therefore, we should invest time and attention into continually monitoring and improving the governance arrangements we encounter. Fourth, concretely, regarding the two studied Emulated Guardians – the ODSs and Meta's Oversight Board – I argue that both are innovative fusions of public and private law models.[5] They have, upon closer inspection, vastly different functional logics, and will end up focusing on different things. The authority of both types of bodies may be ambivalent

[2] See Chapters 3 and 4.
[3] See Chapter 2 section on performativity; for a practical example see Chapter 4 on reasoning.
[4] See Chapters 2 and 5.
[5] See at 3.2 and 4.2.

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and even formally weak. For the performativity-argument made above, they might yet expand their authority, nonetheless. Also, for the EU's ODSs, one might even say that at least some of them may develop into mere mediating bodies, which can be a good way to filter out many disputes before they reach the lengthy and costly stage of formal litigation. As the first ODSs became operational through 2024, we also observed another innovative aspect that was not foreseen by the EU. That is ODSs' experimentation with large language models as tools to handle large amounts of cases and construe automated justice architectures; a development that, if successful, might hold fundamental lessons for any form of individualized decision-making in normative contexts ranging from classic bureaucratic tasks to the judiciary. At the time of writing, it is too early to tell how such experiments will turn out. Then, fifth, the book seeks to caution against some claims by regulators, especially the European Union, that platforms are indeed applying the regulators' rules instead of their own. As Chapters 2 and 3 showed, we observe rather the opposite. The European Union largely ceded rulemaking and rule-enforcement capacity to digital corporations, which it then adorns with the public legitimizing label of being tightly regulated by Brussels.[6] How this plays out once the Commission ramped up implementation remains to be seen. Sixth, I believe, and have outlined elsewhere, that for concrete improvements of content moderation regimes and the implementation (and drafting) or regulation thereof, administrative law holds much to offer.[7] Questions of normative hierarchy and deference, scale and unity in complex systems are well studied and, I would argue, reasonably well answered in administrative law. Content moderation is a bureaucratic endeavor, even if it is highly technicized (as most bureaucracies are). Bureaucratic in this sense refers to large, partially hierarchical, partially project-based organizations that deal with high volumes of recurring tasks. Administrative law offers mechanisms and norms to make sense of this and, eventually, improve such bureaucracies whenever they act on the public. And then, lastly, seventh, I believe that all prior points lead to a simple but very exciting prospect: we are witnessing the emergence of new norms of accountability and control for private power structures that exercise global governance.

[6] See Chapters 2 and 3. See also Moritz Schramm, 'Curb Your Enthusiasm: Why the Digital Services Act Might Not Have a "Brussels Effect"' (2025) European Journal of Legal Studies (Special Issue) 61.

[7] See at 2.3 and Moritz Schramm, 'Platform Administrative Law: A Research Agenda' (SSRN, 24 July 2024) <https://perma.cc/JH2A-8ZW2>.

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This book studied said accountability structures for content moderation. But these are, in my opinion, only one of many examples where similar centralized but private, for-profit, corporate-driven global governance arrangements emerge. Think of, for example, artificial intelligence, autonomous vehicles, quantum computing, commercial space travel, satellite infrastructure, health governance, biotechnology, human "enhancement," carbon capture, private surveillance technologies, and so much more. Not all these sectors necessarily will flourish. But some most likely will. And in all these sectors it will to a large extent be private actors making and enforcing the decisive governance decisions. They simply outpace and outscale public power structures. This, however, evinces the necessity to erect new perspectives on and structures of the legitimate exercise of power. Emulated Guardians are a paradigmatic example for this new sphere of norms one could call new accountability norms. These new accountability norms will be the main topic of the remaining pages of this book.

However, before we go there, let me briefly address some of the complementary, more critical takeaways complementing six of the seven core arguments of this book. I make two more critical points. First, that we should not put too much hope in individual rights and adjudicators, second that rulemaking in content moderation requires more ex ante input from the publics bound by the rules. These observations then also pave the way to our outlook at the new accountability norms, which I discuss in the second part of this chapter.

6.1.1 *The Limits of Rights and Courts*

First, one might question whether the European Union and Meta selected the appropriate model by emulating individual rights adjudication.[8] For lawyers, using an adjudicator to operationalize individual rights and hold digital corporations accountable seems self-evident. However, as many scholars – both empiricists and theorists – have argued, the real-world effectiveness of this rights-focused, court-centered approach is far from certain.[9] Only idealistic, and perhaps somewhat self-absorbed, lawyers

[8] Critical of individual rights in this context in general: Rachel Griffin, 'Rethinking Rights in Social Media Governance: Human Rights, Ideology and Inequality' (2023) 2 European Law Open 30.

[9] Gerald N Rosenberg, *The Hollow Hope Can Courts Bring About Social Change?* (University of Chicago Press 1991); Michael Blauberger and others, 'ECJ Judges Read the Morning Papers. Explaining the Turnaround of European Citizenship Jurisprudence' (2018) 25 Journal of European Public Policy 1422.

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would believe that all it requires to domesticize a recalcitrant bureaucratic behemoth is a courageous, Herculean court. This was arguably never true of traditional legal systems, and it is certainly not the case today. There is little reason to believe that Emulated Guardians like ODSs or the Oversight Board, inherently imperfect adjudicators with limited authority, could succeed where their predecessors failed. Dismantling entrenched organizational structures that follow potentially harmful incentives is very, very complicated and takes a lot of external and internal pressure.

Consider, for the sake of argument, one of the biggest presumed victories of rights-based-approaches and courts: the desegregation of public schools in the United States. Many lawyers might intuitively believe that the Supreme Court resolved this issue with Brown v Board of Education in 1954. That decision operationalized the individual rights of several Black students to equal treatment, making a normative statement about the governance of public schools across the United States, where many institutions denied equal access to Black students. However, school desegregation did not occur immediately following the decision.[10] The widely recognized images of the National Guard escorting Black students into a school only represent a specific moment in time, and beyond that event, segregationist practices remain(ed) deeply entrenched. As Lani Guinier observed:

> On its fiftieth anniversary, *Brown v. Board of Education* no longer enjoys the unbridled admiration it once earned from academic commentators. . . . The fact is that fifty years later, many of the social, political, and economic problems that the legally trained social engineers thought the Court had addressed through *Brown* are still deeply embedded in our society.[11]

Evidently, this is not to say that governance practices in content moderation are comparable to past and prevalent racial injustices in US bureaucracy. But the point is that structural change seldom transpires only because of courts, even if it is one of the most prominent decisions of what was at the time perceived the world's most powerful court dealing with an injustice so obvious, few would openly dare to defend it.[12]

[10] See e.g. Alexander M Bickel, 'The Decade of School Desegregation: Progress and Prospects' (1964) 64 Columbia Law Review 193.

[11] Lani Guinier, 'From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma' (2004) 91 Journal of American History 92, 92.

[12] To be fair, rights-based approaches rely never on courts alone but typically build on a rich variety of different stakeholders. This is a point underscored by social mobilization

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Therefore, if even in such a constellation – powerful court, obvious injustice – individual rights adjudication reaches its limits, why are many putting so much hope into an emulated, feeble version of individual rights adjudication to solve problems that appear normatively much more nuanced and whose remedy is much less straightforward?

Arguably, the reason Meta and the EU chose to emulate adjudicators rather than, say, parliaments lies in the deep-seated sociocultural veneration of the former. There is something inherently appealing about the idea of empowering individuals through rights-based adjudication – even if it does not always deliver the structural transformation one might hope for. Much ink has already been spilled on the complexities of courts, individualism, and rights-based approaches, often with far greater theoretical and historical nuance than I can provide here.[13] Therefore, I restrict myself to flagging this issue. These kinds of structural criticism of the Oversight Board, the DSA, and content moderation are important. However, many of these critiques merely reflect well-known general critiques of over-relying on rights and court-based approaches.

There is, however, a more cynical way to look at things. Perhaps individual rights adjudication was not chosen despite its shortcomings in driving real change, but precisely because of them.[14] After all, the effectiveness of such adjudication depends heavily on the rule of law, which in turn relies on the social norms that sustain it. Courts may boast neither purse nor sword, but individual rights and independent review are so deeply embedded in our

theory. However, even when embedded into a broader movement, it remains unclear how important courts actually are compared to public pressure, changing politics, and culturalized habits, cf. for a more optimistic perspective Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998); Gráinne de Búrca, 'Human Rights Experimentalism' (2017) 111 American Journal of International Law 277.

[13] See, somewhat eclectically, esp. Karl Marx, 'Zur Judenfrage' [1844] Deutsch-Französische Jahrbücher 182; on the *right to have rights*: Hannah Arendt, *The Origins of Totalitarianism* (Harcourt, Brace and Company 1951); Frantz Fanon, *The Wretched of the Earth (1963)* (Grove Press 2004); Michael J Sandel, *Liberalism and the Limits of Justice* (2nd ed., Cambridge University Press 1998); Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in C Nelson and L Grossberg (eds.), *Marxism and the Interpretation of Culture* (Macmillan 1988); Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1991); Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* (Harvard University Press 1998); Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Belknap 2019); Jamal Greene, *How Rights Went Wrong: Why Our Obsession With Rights is Tearing America Apart* (Houghton Mifflin Harcourt 2021).

[14] This point was made also early on regarding the Oversight Board, see esp. Evelyn Douek, 'Facebook's "Oversight Board:" Move Fast with Stable Infrastructure and Humility' (2019) 21 North Carolina Journal of Law & Technology 1.

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cultural fabric that setting up these systems offers a win-win opportunity for both the European Union and Meta – even if the structural shifts ushered in by these Emulated Guardians unfold at a glacial pace.

The real beauty, from a strategic standpoint, lies in the shift of responsibility. Once these bodies are in place – and the Oversight Board's immense caseload suggests it already is well on its way – the question of who bears the burden of protecting online rights begins to drift. No longer will Meta or the European Union be the primary targets of scrutiny. Instead, public attention and potential criticism might now zero in on the guardians themselves. And that, in the end, suits both Meta and the EU quite nicely.

6.1.2 Participation

Building on the previous observation, the current discourse surrounding the legitimacy of content moderation remains overly focused on ex post review – hence the fixation on emulating individual rights adjudication – while largely neglecting ex ante improvements. The quality of the rules applied by platforms remains deeply problematic: they are unsystematic, incoherent, and one can only speculate about the quality of algorithmic enforcement of rules that, even for human readers, allow for a wide range of interpretations. As one interviewed former consultant to Facebook put it, "[t]he process for making content rules is basically a room full of US lawyers sits down and makes the rules after the latest crisis."[15] And, as the interviewee continued, "[w]hat the fuck happens when you put a bunch of US lawyers in charge? Well, they started doing things that they're familiar with," which was in this case to come up with more rules and, eventually, an external adjudicator.[16] Admittedly, creating globally scalable speech rules is a Sisyphean task. However, from the perspective of the affected publics and a liberal instinct for self-governance, it is striking how little influence users have in shaping the very rules they are expected to follow.

Calls for more participatory elements in the rulemaking processes of social media companies are not new, and neither are the widely held objections to increased user participation in platform rulemaking.[17] There are three primary objections.

[15] Interview with Academic, Consultant to Facebook in 2018 (1 November 2021); see further Kate Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech' (2018) 131 Harvard Law Review 1598.

[16] Interview with Academic, Consultant to Facebook in 2018 (n 15).

[17] See (in chronological order) in a sense already Yochai Benkler (ed.), *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press

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First, it is argued that users do not constitute a *demos* – they would lack the shared identity or cohesion that forms an actual polity. This argument is, in my mind, a tat esoteric. Claims to self-governance arise from shared affectedness and agency, not from an otherwise constructed ideological, ethnic, or historical bond. As the eminent US constitutional theorist – and Oversight Board trustee – Robert Post put it: "Democratic forms of social ordering have a particular and bounded sphere of appropriate application, which is defined by ... those aspects of society deemed necessary for the success of collective processes of self-determination."[18]

Evidently, a claim to self-governance arises vis-à-vis a state in a different form and quality than vis-à-vis a social media platform. The disciplinary powers of the former are (as of now) significantly more intimidating than deplatforming or downranking of social media posts.[19] However, if digital corporations in general, and social media platforms in particular, were not in some way exceptional – and

2006); Rebecca MacKinnon, *Consent of the Networked: The Worldwide Struggle for Internet Freedom* (Basic Books 2012); Aaron Wachhaus, 'Platform Governance: Developing Collaborative Democracy' (2017) 39 Administrative Theory & Praxis 206; Hannah Bloch-Wehba, 'Global Platform Governance: Private Power in the Shadow of the State' (2019) 72 SMU Law Review 27, esp. 75–76; Bart Cammaerts and Robert Mansell, 'Digital Platform Policy and Regulation: Toward a Radical Democratic Turn' (2020) 14 International Journal of Communication 135; Moritz Schramm, 'Where Is Olive? Or: Lessons from Democratic Theory for Legitimate Platform Governance' (*The Digital Constitutionalist*, 26 January 2022) <https://perma.cc/RL93-CGSY>; Blayne Haggart and Clara Iglesias Keller, 'Democratic Legitimacy in Global Platform Governance' (2021) 45 Telecommunications Policy 102152; Paul Gowder, *The Networked Leviathan: For Democratic Platforms* (Cambridge University Press 2023). See also for data governance Salomé Viljoen, 'A Relational Theory of Data Governance' (2021) 131 Yale Law Journal 370.

[18] Robert C Post, *Constitutional Domains: Democracy, Community, Management* (Harvard University Press 1995) 8. See further Benedict Kingsbury and Nahuel Maisley, 'Infrastructures and Laws: Publics and Publicness' (2021) 17 Annual Review of Law and Social Science 353, 357 et seq; Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999); Jeremy Waldron, 'The Principle of Proximity, NYU School of Law, Public Law Research Paper No. 11-08' (SSRN, 20 January 2011) <https://perma.cc/2JWS-BU2Q>; classic also: Benedict R O'G Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 1983); Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press 1990).

[19] Nonetheless, for example, if we consider also surveillance as "disciplinary" platforms arguably are entirely unprecedented disciplinary regimes, see e.g. Niklas Eder, 'Beyond Automation: Machine Learning-Based Systems and Human Behavior in the Personalization Economy' (2021) 25 Stanford Technology Law Review 1.

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this exception lies in their nearly absolute power over crucial aspects of our lives – this entire conversation would not be happening. Digital corporations possess, program, and structure the very means of our collective processes of self-determination, are indispensable mediators of societal decision-making, in the case of communicative services, and broader societal and economic development, in the case of other industries. Whenever an organization regulates human behavior at this scale, the liberal instinct should not be to condone that exercise of power even if it seems unjust merely because the power structure is incorporated as a private company. Instead, we ought to ask why there is so little say in how these actors govern our online activities. None of this means that participation must be equivalent to what one might consider a democratic ideal. Arguably, that would be counterproductive, as these actors remain corporations, not states or other public entities. Yet, the idea that being ruled necessitates some voice in how one is ruled seems intuitive.

Second, there is the claim that users simply do not care. This is indeed a real problem, amusingly enough one familiar from public governance as well.[20] And admittedly, Meta's experiment with direct voting on some of its terms of service attracted participation from less than one percent of users.[21] However, once we accept that content moderation and comparable power relations in private governance may give rise to valid claims for elements of self-governance, the question becomes how, rather than if. As the Meta example shows, general voting might not be a good idea, and for several other reasons, well explored in democratic theory, general voting might fail. However, various other mechanisms and procedures are necessary and exist to help infuse the interests of affected publics into rulemaking processes.[22] There are numerous civil society groups and activists who could professionalize this participation. None of these processes would be perfect, and all would require continuous review and improvement. However, engaging people before imposing rules on their expression, rather than only revising the most problematic rules after sufficient complaints, would overcome the Silicon Valley-inspired "release early, release often" mentality and reflect a more

[20] Critical of participatory elements in administrative rulemaking (yet conceding the inevitability thereof) Richard B Stewart, 'The Reformation of American Administrative Law' (1975) 88 Harvard Law Review 1667.

[21] Kalev Leetaru, 'Facebook Was a Democracy 2009–2012 But We Didn't Vote So it Turned into a Dictatorship' *Forbes* (13 April 2019) <https://perma.cc/Z5PG-3MBD>.

[22] Iris Marion Young, *Inclusion and Democracy* (Oxford University Press 2002).

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mature understanding of the governance task these companies have assumed. In that sense, and as I argued in greater detail in Chapters 2 and 3, the DSA disappoints.[23] The claims of the EU that "the rules of the game" were now made by Europeans rather than platforms are, unfortunately, largely empty political rhetoric. In fact, it seems plausible that the DSA stabilizes rather than curtails platform power in Europe.

The third and perhaps most problematic objection is the frequently invoked claim that platforms, being private entities, are inherently insulated from any participatory elements in how they regulate user behavior. This argument, however, is unconvincing for both practical and deeper theoretical reasons. On a practical level, it seems contradictory to deny participation in rulemaking while simultaneously framing terms of service and other implementation rules as contractual in nature.[24] If these rules are truly contractual, they ought to be negotiated, not unilaterally imposed.[25] The very essence of a contract is the negotiation between two parties to reach a mutually agreeable arrangement.[26] Of course, this ideal does not fully apply to mass contracts, but to dismiss entirely the idea of user participation in platform rulemaking on the grounds that it would violate platforms' "freedom of contract," as some Commission agents have argued in interviews conducted for this book, strikes me as unpersuasive.[27]

We see many types of contracts where participatory elements are well-established practices, from labor law to shareholder rights in corporate law. Some forms of participation may be mediated through property – such as shareholder voting rights – but others arise purely from the recognition that private entities possess far more power than the individuals whose contributions are crucial to the entities' economic success.

[23] See at 3.2.4.

[24] Another option is, consequentially, to argue that digital corporations' terms of service are not contracts, see e.g. Przemyslaw Jacek Palka, 'Terms of Service Are Not Contracts: Beyond Contract Law in the Regulation of Online Platforms' in Stefan Grundmann (ed.), *European Contract Law in the Digital Age* (Intersentia 2018).

[25] Criticizing "boilerplate" contracts as a problem for the rule of law: Margarete Jane Radin, 'Boilerplate: A Threat to the Rule of Law?' in Lisa M Austin and Dennis Klimchuk (eds.), *Private Law and the Rule of Law* (Oxford University Press 2015).

[26] Some go even further and argue that only such agreements that align with values such as equality and democracy are legitimate contracts, see esp. Martijn W Hesselink, 'Democratic Contract Law' (2015) 11 European Review of Contract Law 81; others highlight the autonomy of private law Matthias Ruffert, *Vorrang der Verfassung und Eigenständigkeit des Privatrechts: Eine verfassungsrechtliche Untersuchung zur Privatrechtswirkung des Grundgesetzes* (Mohr Siebeck 2001).

[27] Interview with European Commission Staffer 1 (29 October 2021).

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This is, after all the foundational principle behind collective bargaining, a practice with a long history that acknowledges the imbalance of power and seeks to redress it through participatory means.

Further, the argument that private incorporation alone grants platforms the right to exclude users from rulemaking doesn't hold up on a deeper theoretical level. To grasp why, we need to briefly revisit the historical purpose of distinguishing between public and private power. This will also set the stage for the discussion in the next section on new accountability norms.

Historically, the public-private divide was designed to safeguard individual freedom from the biggest threat to liberty at the time: the state.[28] Private individuals, privacy, private property, and private law – all these institutions emerged to empower individuals vis-à-vis a power structure that was not only dominant, but utterly all-encompassing. Rulemaking authority gradually shifted away from Church and Crown to guilds, cities, and eventually republics. Conceptualizing those organized power structures, especially the State, as "public" tied it to certain ideals of publicness and, in turn, carved out spheres of individual and collective freedom, the "private."[29] Seen from an abstract vantage point, however, erecting public and private as opposing categories typically sought to defend individual freedoms and confine powers.[30] The purpose of this ideational dichotomy – which in practice is much less pronounced than in theory anyway, for anything private existing in a public context and anything public being constituted by and for private people – was never to blindly distinguish based on form, but eagerly protect individual liberty from emergent power structures.

A bit later, in the late-nineteenth century, the private business corporation emerged as a distinct legal entity.[31] It only gradually disentangled itself from the state, most notably in colonial settings where private incorporation had a "convenient" side effect for its masters: it shielded

[28] From the rich literature on this issue see esp. Morris Cohen, 'Property and Sovereignty' (1927) 13 Cornell Law Quarterly 8; Duncan Kennedy, 'The Stages of the Decline of the Public/Private Distinction' (1982) 130 University of Pennsylvania Law Review 1349; Jody Freeman, 'The Private Role in Public Governance' (2000) 75 New York University Law Review 543; Martin Loughlin, *The Idea of Public Law* (Oxford University Press 2004).

[29] Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010).

[30] Remarkably, at least the baseline contours of this assessment are canonical to various epistemic traditions, cf. John Locke, *Two Treatises of Government* (1689); Hannah Arendt, *The Human Condition* (2nd ed. [1998], University of Chicago Press 1958); Isaiah Berlin, 'Two Concepts of Liberty (1958)' in *Four Essays on Liberty* (Oxford University Press 1969).

[31] See esp. Doreen Lustig, *Veiled Power: International Law and the Private Corporation 1886–1981* (Oxford University Press 2020).

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corporate executives who commanded armies and effectively governed entire continents from demands for transparency and adherence to public ideals. The downstream consequences of the private form, therefore, are profoundly ambivalent: necessary, yet persistently susceptible to abuse.

Today, a significant threat to liberty comes not from what we label "public power" but from privately incorporated entities like social media companies. Today it is not only one power structure – the local sovereign – but a quite dense and confusing web of overlapping power structures, some of which remain public, like States or the European Union, some, however, are private corporations. The power of some of these corporations, at least within their specific sectors, is immense. Arguing that such corporations – armed with more money, resources, data, and infrastructure than many governments – require essentially unrestricted bargaining power turns the traditional understanding of private law on its head. If even a fraction of the claims about the transformative nature of the digital age is true, it is time to reassess how justified the privileges granted to private entities truly are. The idea that such powerful actors should have unrestricted freedom of contract and property simply because they are incorporated in private form appears, at least to me, an utter misunderstanding of what the distinguishing the private from the public is for.

Here, the dialectics presented in the case studies are striking. On the one hand, companies like Meta assert their right – and undoubtedly possess the means – to intervene in the speech of elected officials, including the President of the United States. From a traditional perspective, this is deeply concerning. On the other hand, why should we expect platforms to be complicit in the dissemination of government-sanctioned hate speech? What if a company, rather than a state actor, defends human rights by preventing a government from inciting human rights violations? Do such actions represent legitimate private checks on public power, as discussed in Chapter 5? Conversely, how can we distinguish between "legitimate" requests of state power and the nefarious co-optation of private governance by authoritarian regimes? For instance, the DSA includes provisions designed to "waterproof" its notice-and-takedown mechanism against potentially malicious demands from increasingly authoritarian Member States.[32] What procedures should companies like Meta follow when deciding how to respond to countries

[32] See Chapter 3.

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that adopt platform regulations modeled after the DSA but geared toward authoritarian ends? How can we even make sure that the DSA is not misused for authoritarian purposes in some Member States or even regional authorities, for example against migrants, the LGBTQI community, or simply opposition figures? Should digital corporations comply with potentially authoritarian interpretations (or emulations) of the DSA simply because it claims to advance national sovereignty? Unfortunately, there are no easy answers to these complex questions.

Also, elements of self-governance and participation need to be carefully adapted to fit their new environment. Much of the relationship between individuals and platforms remains private, transactional, and shaped by contractual agreements. And rightly so. It is essential to recognize that ideas often seen as belonging to the public sphere – such as participation and self-governance – also appear in private contexts, though under different names.[33] However, this is not an argument for turning digital corporations into state-like entities, as if that would solve all problems. Such a transformation would be neither politically viable, nor practical, nor desirable. The profit motive driving platforms is vital, as it promotes innovation and efficacy. Moreover, states themselves are not without flaws; many struggle with inefficiencies, and some fail to uphold even basic democratic principles.

As discussed in Chapters 4 and 5, serious dilemmas arise when powerful corporations act as private checks on public power. In certain cases – such as when governments fuel hate speech during ethnic unrest – corporate intervention can prevent real harm.[34] Yet, such actions also undermine key principles of international law and further erode the already fragile concept of state sovereignty. This creates a complex tension: preventing harm on the one hand, while weakening legal norms and sovereignty on the other.

6.2 New Accountability Norms

Reflecting on these ideas, we turn now to consider the future. It is reasonable to assume that in the coming years – indeed, even now – corporate-driven, private governance arrangements will continue to wield vast, largely unchecked power over key sectors of human activity, particularly in the economic realm. Public power still plays a role in all of

[33] Seminal: Philip Selznick, *Law, Society, and Industrial Justice* (Russel Sage Foundation 1969).
[34] See at 4.6.3 and 5.2.4.

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these future sectors. The US government, for instance, funds a significant portion of the research and helps creating demand for new private, profit-driven space corporations.[35] International organizations hold fact-finding commissions and are scrambling to establish normative frameworks for artificial intelligence, while sectors such as quantum computing, biotechnology, human enhancement, and carbon capture thrive on state-funded foundational research.[36] Yet, despite these efforts, the sheer scale, speed, and infrastructural control of many of these industries mean they are predominantly governed by the techno-normative frameworks devised by the small number of corporations that invent and control the relevant technologies and services.[37]

Take, for example, the ongoing discussions around "global AI governance." These debates often focus on abstract normative goals for how this still poorly understood technology should or should not be used. But merely generating rules, reports, and guidelines is far from effective governance. The real governance power – as this book has shown – rests with internal factions within these companies.[38] These are engineers and product developers on one side, compliance, legal, and public relations teams on the other. These actors truly determine how a given technology or service is employed. And indeed, they may consider external norms or regulations. But given the global reach and scale of their operations it appears naïve to hope for the enforcement of public law through traditional public mechanisms.

[35] cf. Mariana Mazzucato and Douglas KR Robinson, 'Co-Creating and Directing Innovation Ecosystems? NASA's Changing Approach to Public-Private Partnerships in Low-Earth Orbit' (2018) 136 Technological Forecasting and Social Change 166.

[36] For the United Nations and the Council of Europe see United Nations and AI Advisory Body, 'Governing AI For Humanity (Final Report)'; European Council, Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law (September 2024); see in general Nathalie Smuha, 'From a "Race to AI" to a "Race to AI Regulation": Regulatory Competition for Artificial Intelligence' (2021) 13 Law, Innovation and Technology 57.

[37] For different perspectives on this infrastructural perspective see Langdon Winner, 'Do Artifacts Have Politics?' (1980) 109 Daedalus 121; Geoffrey C Bowker and Susan Leigh Star, *Sorting Things Out: Classification and Its Consequences* (MIT Press 1999); Paul N Edwards, 'Infrastructure and Modernity: Force, Time, and Social Organization in the History of Sociotechnical Systems' in Thomas J Misa, Philip Brey and Andrew Feenberg (eds.), *Modernity and Technology* (MIT Press 2002); Laura DeNardis and Francesca Musiani, 'Governance by Infrastructure' in Francesca Musiani and others (eds.), *The Turn to Infrastructure in Internet Governance* (Palgrave Macmillan 2016); Kingsbury and Maisley (n 18).

[38] See also Ari Ezra Waldman, *Industry Unbound: The Inside Story of Privacy, Data, and Corporate Power* (Cambridge University Press 2021).

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In many sectors, public power seems to have hit a ceiling in terms of shaping and enforcing its normative demands on these economically powerful, globally active corporations. This was laid out in detail in Chapter 3. The European Union, for instance, is often celebrated as a strict regulator. However, even in one of its flagship political projects of recent years, the DSA, the EU appears to have consolidated, rather than diminished, platform power.[39] Put simply, it seems the regulatory process is no longer capable of generating the kind of outcomes that could meaningfully alter the governance practices of these corporations, at least not to the degree publicly promised.

This leads to an inevitable conclusion: governance will, and arguably must, be exercised also by forces other than public power. And this is not about mundane governance; it is about the control, distribution, and creation of fundamental aspects of social, economic, and public life. For staunch defenders of traditional public law, this may sound heretical. It is worth noting that my own perspective on this issue has shifted – albeit gradually – over the course of writing this book. The book seeks to portray a somewhat transient perspective, combining European and American takes to a hopefully interesting whole. However, based on the power dynamics we have explored, insisting solely on the supremacy of the state in governing these technologies and organizations feels, as Martti Koskenniemi put it, "trite."[40] The world is moving on.

If private ordering is set to become even more prevalent, several questions appear increasingly pressing. How should we think about the legitimacy of these power structures? Should we consider their legitimacy at all? Who should have a say in shaping, implementing, and overseeing these structures? How can we reconcile the legally protected (and often essential) profit motive – after all, we need innovation and efficiency – with broader public concerns? How can we formulate and operationalize normative demands if power is indeed exercised not through communication or human action but via computing and infrastructure? How should the burdens be shared, profits allocated, and externalities mitigated? What should be the fundamental principles – the "grammar" – governing the norms that regulate these corporations? This grammar, spanning from self-imposed standards and technical frameworks to

[39] See Chapters 2 and 3.

[40] Referring not exclusively to private power in transnational governance though, Martti Koskenniemi, 'Performing Legal Expertise: Reflections on the Construction of Transnational Authority' in Emilia Korkea-aho and Päivi Leino-Sandberg (eds.), *Law, Legal Expertise and EU Policy-Making* (Cambridge University Press 2022) 40.

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traditional laws, becomes all the more critical in a landscape of regulatory fragmentation, revolving doors between public and private sectors, and the codification of assumptions that tend to privilege corporate over public interests. How can such norms even be enforced when private corporations are far more centralized and resilient than many entities claiming to act in the public interest?

Attempting to answer these questions could easily fill another book. However, much of it seems to boil down to incorporating better governance and publicness within the power structures as they are. Here, emulation will be an important tool – for all its virtues and vices. Two things will be essential: First, we must repurpose "private" law in global governance, especially corporate and contract law.[41] At a practical level, current private law frameworks struggle to accommodate the public-oriented demands that arise when certain private actors accumulate significant governance power. Also, on a theoretical level, we ought to focus more on the power relationships at play than legal privileges latched to the private form. Yet, classifying something as private has profound legal consequences, many of which may be unjustified given the current power dynamics. Second, it is unclear what role traditional law or other forms of explicated normative material might play in future governance scenarios. In such scenarios, code and infrastructure will be crucial determinants, effectuating their very own ways of closure, discipline, and steering. Lastly, from a normative perspective, any new governance arrangement must be responsive to the affected publics, not just the corporations involved. The mechanisms for ensuring this responsiveness will vary and evolve incrementally, but the trajectory should be one of public accountability rather than unchecked centralization. I firmly believe that the principles of public law will continue to play a pivotal role in advancing these ideals, even if their influence increasingly extends beyond the realm of traditional public law regulation. Public law's adaptability as both a method and a mindset ensures its relevance in shaping the norms and institutions required to navigate the complexities of modern governance. Its ideals of accountability, fairness, and public interest remain indispensable, even as the mechanisms for achieving them evolve. However, this optimistic note is deliberately reserved for the epilogue. By concluding on this forward-looking note, I aim to leave readers with a sense of the transformative potential of public law ideals –

[41] I am indebted to Benedict Kingsbury for the "repurposing" framing.

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an antidote to the fragmentation and uncertainty that so often dominate the landscape.

That is because, on a practical level, it will be extraordinarily challenging to build accountability structures and public-minded governance institutions solely through the private law mechanisms discussed here.[42] This is not to simplistically juxtapose an idealized public and an inherently nefarious private. As said repeatedly throughout the book, private ordering is neither good nor bad. The profit motive is an important driver of innovation and efficiency and, vice versa, the state far off being an always legitimate, let alone effective exercise in organized power. Especially at a global scale, there are few simple answers or absolute truths as to which things should be governed in what way. Likewise, the uncritical idealization of public power that underlies other criticism is itself rather ahistorical. Wherever power becomes comprehensive, it ought to be exercised in alignment with ideals of publicness and self-governance. We simply have more historical experience—and conceptual vocabulary—for thinking about these demands in relation to the state. But they are by no means exclusive to it.

This book showed how private, for-profit actors can be a very effective and indeed important check on state actors. Think of the Oversight Board's attempts to nudge Meta to restrain government hate speech on its services. Consider Meta's ability to do just that, quite literally by pulling the plug. Or think of AI companies' control over foundation models: adjusting such a model even slightly, making it more "aggressive,", more "lenient," or simply less accurate can have immense sociocultural, political, and economic repercussions. The scale of this influence is astonishing, and, I would argue, the way it is governed should be a matter of serious concern. Private law structures characterized by fiduciary duties, trusts, and contracts might very well be an important part of pragmatically repurposing certain private law institutions for publicly minded governance. Such incremental repurposing of contractual vehicles is also neither entirely new nor particularly understudied on an abstract level as numerous conceptual works on transnational law, *lex mercatoria*, private ordering, and entangled legalities indicate.[43]

[42] Drastic: Dorothy Lund and Elizabeth Pollman, 'The Corporate Governance Machine' (2021) 121 Columbia Law Review 2563.

[43] Philip C Jessup, *Transnational Law* (Yale University Press 1956); Avery Katz, 'Taking Private Ordering Seriously' (1996) 144 University of Pennsylvania Law Review 1745; Gunther Teubner (ed.), *Global Law without a State* (Dartmouth 1997); Alfred C Aman, 'The Globalizing State: A Future-Oriented Perspective on the Public/Private Distinction,

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In this sense, these emerging governance arrangements hold both promise and peril. As the case studies show, technological advancements can be harnessed for the common good, but they can just as easily be used for harmful purposes. At the global level, it remains unclear who will differentiate between these two paths, according to what rules, and through which processes. As we move toward addressing these questions of normative and institutional design, we are likely to witness more instances of emulation – complete with both its opportunities and challenges. But there is reason for optimism. The liberal State – which today appears to be under pressure in many parts of the world – did also not emerge overnight. It took decades of protests, reforms, bills, and public pressure to entrench the separation of powers, due process, and democracy in public power structures. No categorical reason exists why similar – but not identical – improvements could not be made for future governance constellations.

6.2.1 *Repurposing Private Law in Global Governance*

Let us now dig briefly into each of these points. The first argument is that we – meaning academics, practitioners, and lawmakers – need to rethink and eventually repurpose private law in constellations of global governance.[44] This is, in essence, an obvious thing to do but it reverberates through our whole conception of the legal system and shakes deep-rooted priors of the role of law, the state, and corporate power.

Unlike the 1990s and 2000s, when private ordering was hailed by some as the inevitable next step in globalization under the Pax Americana, contemporary global governance increasingly unfolds through code, technology, and infrastructural control.[45] At the heart of this shift lie corporations – at the time of this writing predominantly American, with

Federalism, and Democracy' (1998) 31 Vanderbilt Journal of Transnational Law 769; Matthias C Kettemann, *The Normative Order of the Internet* (Oxford University Press 2020); Nico Krisch (ed.), *Entangled Legalities Beyond the State* (Cambridge University Press 2021).

[44] On the national level, some of such rethinking and repurposing is already well under way (and contested) in antitrust law, evinced most prominently by the Neo-Brandeisians in the United States. See esp. Lina M Khan, 'Amazon's Antitrust Paradox' (2017) 126 The Yale Law Journal 710; Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports 2018).

[45] Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Harvard University Press 2016); Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (PublicAffairs 2019); Julie Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press 2019); Gerald J Postema, *Law's Rule: The Nature, Value, and Viability of the Rule of Law* (Oxford University Press 2023) 263 et seq; for a critical account of corporate power in globalization

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a few Chinese contenders – that have centralized the governance of many industries with planetary significance. Meanwhile, the billionaire owners of these corporations, along with Silicon Valley's venture capital vanguard firms, have not only amassed extraordinary influence but have also embedded themselves within the US government – a trend dramatically accelerated by Donald Trump's re-election in 2024.[46] This concentration of wealth, infrastructural control, technological dominance, and legal immunity benefits a small cadre of men – especially Elon Musk, Jeff Bezos, Marc Andreessen, Mark Zuckerberg Larry Page, Larry Ellison, Sergey Brin, and Jensen Huang. As Julie Cohen aptly described, these figures are modern-day oligarchs, wielding power that resembles feudal hierarchies far more than democratic or even traditional market-based systems.[47] In other words, private power structures are becoming ever more dominant, fueled by the ideologies of "tech-solutionism" and underpinned by the prevailing paradigm of American political economy. To an extent, all these actors benefit profoundly from the globally diffused fundamental grammar of private law that champions property rights and contractual freedom rather than communitarian let alone planetary interests, an observation already well established for the US context.[48] Therefore, if the goal is improved governance of such future industries, this book holds several inductive lessons from the regulatory and self-regulatory practices in content moderation in Europe and the United States as to why and how repurposing of the "private" in global governance and particularly private law could take place.

To begin, we must reconceptualize corporate domination not merely as commerce or capitalism, but as a distinct form of governance. To fully comprehend corporate power as a comprehensive form of governance, a historical lens is instructive. By looking back, we can trace how corporations have transitioned from purely economic entities to actors wielding significant influence over societal norms, political structures, and even

since the late 1980s see Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge University Press 1996).

[46] Anja Bossow, Marie Müller-Elmau and Moritz Schramm, 'The Messiah and His Oligarchs' (*Verfassungsblog*, 1 November 2024) <https://perma.cc/55QN-HM2S>.

[47] For the oligarchy quote by Cohen see ibid; referencing feudalism Shoshana Zuboff, 'Big Other: Surveillance Capitalism and the Prospects of an Information Civilization' (2015) 30 Journal of Information Technology 75. See further Cohen, 'Oligarchy, State, and Cryptopia' (SSRN 8 March 2025) <https://perma.cc/HU7F-LF94>.

[48] Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019); Marc Galanter, 'Why the "Haves" Come out Ahead' (1974) 9 Law & Society Review 95.

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legal systems.[49] It is, for example, a mistake to think that particularly questionable extractive practices are illegal – many are not. From a substantive normative perspective, the legal system accommodates such extractive practices through protections of property and contract rather than elevating structurally weaker parties through substantive guarantees.[50] This historical perspective underscores that the power of these entities is not a natural evolution of capitalism but a deliberate engineering of governance structures that prioritize private interests over public accountability. Historically, however, even more extreme government by corporations is not at all unprecedented. Europeans, for example, subjected hundreds of millions of colonized people in India to the privatized "government" of the East India Company. The period between 1773 and 1858 is commonly referred to as one of "company rule" in India. The East India Company, a privately owned corporation, managed from London its own administration, legislation, judicial system, and military forces on the Indian subcontinent.[51] This story is not exclusive to India. Similar sufferings were brought, for example, upon the people of the West Indies by the Danes, upon Borneo by the Dutch, and upon Mozambique by the Portuguese.[52] In other words, substantial parts of sovereignty's nastiest aberration, colonialism, were *privately* governed.[53] These corporations, through their charters, were deeply entwined with the state while simultaneously cultivating

[49] Max Weber, *Wirtschaft Und Gesellschaft (1922)* (Zweitausendeins 2005); Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 1944); Alfred Dupont Chandler, *The Visible Hand: The Managerial Revolution in American Business* (Harvard University Press 1877); Strange (n 45).

[50] cf. Lisa M Austin, 'Enough About Me: Why Privacy Is About Power, Not Consent (or Harm)' in Austin Sarat (ed.), *A World without Privacy: What Law Can and Should Do?* (Cambridge University Press 2014); Julie Cohen, 'Law of the Platform Economy' (2017) 51 University of California Davis Law Review 133.

[51] The literature on the East India Company is vast. See for a coeval account (with the uncritical perspective that entails): John William Kaye, *The Administration of the East India Company* (2nd ed., Richard Bentley 1853). See further Bankey Bihari Misra, *The Central Administration of the East India Company 1773–1834* (Oxford University Press 1959); HV Bowen, *The Business of Empire: The East India Company and Imperial Britain, 1756–1833* (Cambridge University Press 2005).

[52] Eric Allina-Pisano, *Slavery by Any Other Name: African Life under Company Rule in Colonial Mozambique* (University of Virginia Press 2012); Kennedy G Tregonning, *Under Chartered Company Rule: North Borneo 1881–1946* (University of Malaysia Press 1959); Waldemar C Westergaard, *The Danish West Indies under Company Rule (1671–1754)* (Macmillan 1917).

[53] For a critical reconstruction of international legal thought in the wake of its imperial and colonial context in the nineteenth century see Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2001) 98 et seq.

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a distinct autonomy. Remarkably, at one point, members of the East India Company's Board perceived the organization as equal to – or perhaps entirely independent of – the Crown, a view supported by archival evidence suggesting claims to corporate sovereignty.[54] To be clear, this is not to conflate contemporary digital corporations with historical colonial enterprises. However, reflecting on the historicity and discursive construction of our conceptual frameworks enables us to overcome the widespread difficulty of imagining entities like Meta, Google, SpaceX, Starlink, or TikTok beyond the narrow confines of business law. In that sense, such a historically informed perspective also helps complementing existing experimentalist approaches.[55]

From a historical vantage point, the contemporary reluctance in the United States to view centralized and immensely powerful digital corporations as anything more than mere business enterprises is perplexing. In the eighteenth century, Americans openly debated whether Congress should have the authority – mirroring British colonial practices – to charter corporations for both colonial and domestic purposes. At the Constitutional Convention in 1787, James Madison proposed empowering Congress to "grant charters of incorporation where the interest of the US might require & the legislative provisions of individual States may be incompetent."[56] Yet, this motion failed, driven by fears of monopolistic dominance – particularly in banking – and state overreach. In essence, the notion of outsourcing governmental functions to chartered corporations was deliberated and dismissed in the United States over two centuries

[54] Swati Srivastava, 'Corporate Sovereign Awakening and the Making of Modern State Sovereignty: New Archival Evidence from the English East India Company' (2022) 76 International Organization 690.

[55] In governance research, experimentalism became increasingly popular to describe federal and privatized modes of project-oriented governance in the 2010s and is now increasingly applied to platform regulation. For the latter see esp. Evelyn Douek, 'Content Moderation as Systems Thinking' (2022) 136 Harvard Law Review 526, 584 et seq; Elettra Bietti, 'Experimentalism in Digital Platform Markets: Antitrust and Utilities' Convergence' (2024) 2024 University of Illinois Law Review 1277, 147 et seq; more generally Charles F Sabel and Jonathan Zeitlin, *Experimentalist Governance* (Oxford University Press 2012); Gráinne de Búrca, 'Human Rights Experimentalism' (2017) 111 American Journal of International Law 277.

[56] For the Madison quote see Max Farrand, *The Records of the Federal Convention of 1787 Vol 2* (Online Library of Liberty – Ebook 2011) (1911) 491. See further Adolf A Berle, 'Constitutional Limitations on Corporate Activity: Protection of Personal Rights from Invasion Through Economic Power' (1952) 100 University of Pennsylvania Law Review 933, 944 et seq (esp n 19); for a recent reassessment see Elizabeth Pollman, 'Quasi Governments and Inchoate Law: Berle's Vision of Limits on Corporate Power' (2019) 42 Seattle University Law Review 617.

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ago, precisely due to concerns about monopolization and concentrated power. Ironically, these very concerns, if raised today regarding digital giants, are often dismissed as radical, interventionist fantasies. In short, the private corporate form has always served – and continues to serve – as a convenient shield against legitimate and pressing demands for better governance. This tactic is not a historical relic but a persistent strategy, cleverly exploited to deflect responsibility and stave off accountability.

Once we accept that these corporations function as global governors, our focus must shift to the ends they pursue and the means through which they exercise governance. What are their objectives, and what tools do they deploy to achieve them? As organizational theory has taught us, these ends are often conflicting, and the means can be overlapping. For instance, as this book demonstrates, reforms that appear ineffective in addressing structural governance flaws may serve effectively as public relations rituals, deflecting responsibility while shielding unchanged practices from external scrutiny.

The theoretical leap, then, is not simply to advocate for more public regulation of private actors – a model with evident limitations – but to reinterpret enduring ideals such as self-governance, accountability, and privacy for the new realities of private, corporate, for-profit power structures. Consider the example of shifting privacy expectations towards Facebook in the aftermath of the Cambridge Analytica scandal. Chapter 2 (Section 2.1.2 to be precise) revealed disheartening findings: while users still valued privacy, they resigned themselves to a lack of enforcement power, tacitly accepting privacy's erosion. Yet, this does not preclude a more optimistic, normative stance in other matters. Public law ideals like privacy, as hard-won achievements, deserve reinterpretation in light of private power structures. Julie Cohen offers a compelling argument here, suggesting that privacy should no longer be viewed merely as the "protection of the liberal self" as framed during the Enlightenment.[57] Instead, she contends, "[p]rivacy shelters dynamic, emergent subjectivity from the efforts of commercial and government actors to render individuals and communities fixed, transparent, and predictable."[58] Much in the same vein, Lisa Austin's genealogy of privacy unveiled that its contemporary linkage to property and trespassing, which is the basis for the idea that extractive practices are basically merely a matter of consent, cuts out a second, but arguable more

[57] Julie Cohen, 'What Privacy Is For' (2013) 126 Harvard Law Review 1904, 1905.
[58] Ibid 1905.

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important public law dimension of privacy, namely that of the rule of law and protections against search and seizure. In Austin's telling,

> [a] broad rule-of-law approach [of privacy] would focus on the surveilling party and questions of power, its possibility of abuse, and legal safeguards. It would place questions of transparency and accountability at the center of the debate rather than as add-ons to the reasonable expectation of privacy analysis.[59]

Similar reasoning can be extended to other principles of good governance and constellations of domination. These ideals are not relics of a bygone era but tools to be reactivated and adapted to confront the threats posed by private power. By reimagining and operationalizing these principles, we can reinvigorate them for the challenges of today and tomorrow.

One effective way to reactivate these public law ideals – participation, due process, equality, and self-governance – is, somewhat paradoxically, through the framework of domestic private law.[60] Despite their global reach, corporate global governors remain bound by the laws of their jurisdictions of incorporation. This presents a significant opportunity: instead of (only) ascending into increasingly abstract discussions of governance, we can focus on creatively reimagining and operationalizing existing mechanisms within contract and corporate law to drive meaningful change. Privately formed, profit-driven bureaucracies already embed fragments of traditionally "public" elements within their structures, whether through reason-giving, participatory processes, or accountability mechanisms.[61] These incorporations are not coincidental but rather pragmatic adaptations to maintain legitimacy and manage complex stakeholder relationships. Contract and corporate law, with its capacity to mediate obligations and responsibilities, becomes a practical tool for embedding public law ideals into private governance practices.

For instance, the principles of participation and reason-giving can be integrated into contracts by mandating transparent decision-making processes or requiring explicit justifications for corporate actions that

[59] Austin (n 50) 164.

[60] And the osmosis between spheres is by no means novel. For example, US "public forum" jurisprudence distinguishes different types of government property, which then entails different legal obligations for that property's "governance" or "management," see Robert Post, 'Between Governance and Management: The History and Theory of the Public Forum' (1986) 34 University of California Los Angeles Law Review 1713. For a reconceptualization of important aspects of EU law through the prism of "data" see Thomas Streinz, 'The Evolution of European Data Law' in Paul Craig and Gráinne de Búrca (eds.), *The Evolution of EU Law* (3rd ed., Oxford University Press 2021).

[61] Selznick (n 33).

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affect stakeholders. Similarly, contractual frameworks can enforce accountability by setting clear benchmarks for performance and remedies for noncompliance. Equality and self-governance, too, can find footholds in private law by ensuring equitable terms for all parties involved and enabling stakeholders to have a more substantial say in the governance structures they are subjected to. By definition, contract law is highly adaptable to new challenges – much more so than public law. To reiterate, at least in theory, there are few hard limits to establishing governance frameworks through contracts that embody public-interest principles. This, too, is a form of freedom within property and contract law. Therefore, a pragmatic next step toward new accountability norms might be to first theorize what contractual solutions are needed to govern phenomena like those mentioned above in a more public-oriented way, and then to devise practical solutions to implement them.[62]

A particularly instructive – and cautionary – area is the law governing philanthropy, endowments, foundations, and fiduciary contracts. Drafting a contract that binds a corporate executive to serve a specific public interest – whether improving content moderation or ensuring that the data intake of a large language model reflects values like diversity and inclusion – is not particularly difficult. Private law is brimming with fiduciary relationships.[63] Those can be construed between directors and shareholders, trustees and beneficiaries, and others. Typically, these fiduciary duties are anchored to the profit interests of the principal. But that is not a given. It is entirely feasible to create an entity whose fiduciary duty is, for example, to safeguard environmental sustainability or maintain an impeccable human rights record – at all costs.[64] First – cautious and potentially ceremonial – experiments have already begun. In 2023, Anthropic, a leading artificial intelligence company, established a so-called Long-Term Benefit Trust, which is intended gradually to assume influence over the company's board and to steer the firm toward public-interest objectives. Especially in companies controlled by a small group of people, or even a single shareholder, such structures are not only possible but relatively straightforward to implement.

[62] See e.g. Radin (n 25).

[63] Victor Brudney, 'Contract and Fiduciary Duty in Corporate Law' (1997) 38 Boston College Law Review 595; for an economic perspective see Reinier H Kraakman, 'Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy' (1986) 2 Journal of Law, Economics & Organization 53; Jack M Balkin, 'Information Fiduciaries and the First Amendment' (2016) 49 UC Davis Law Review 1183.

[64] The practical viability of such an arrangement may prove nonetheless complicated, see again Lund and Pollman (n 42).

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Choosing not to build such frameworks is, in reality, a normative decision, not a reflection of unavailable options.

In this context, the Oversight Board's model of establishing an irrevocable trust, with trustees whose fiduciary duty is to protect the Board's independent judgment, is a genuinely innovative approach.[65] However, making such arrangements work in practice requires genuine commitment from organizations willing to cede power, capital, and influence on entities whose fiduciary duty is tied to a pre-defined public interest. Separating agents for specific functions is an indispensable structural principle of society and any larger organization.[66] This is also well recognized in economics. Problems arise, the economists taught us, when the interests of the principal diverge from that of the agent.[67] Therefore, any separated entity committed to governance in the public interest must have the authority to challenge practices within the company that conflict with this duty. Establishing such differentiated agents within a single company is not only difficult but likely demands a fundamental cultural shift in how we understand the role of organizations in contemporary economic and social life. Lina Khan has called for such "structural separations" from an antitrust perspective.[68] Evelyn Douek built on this, advocating for a "separation of functions" to disentangle content moderation from the business operations of social media platforms.[69] How exactly these principles might be implemented in practice remains an open question. Yet, it will be the responsibility of lawmakers to offer clear incentives, signaling that these structures are genuinely desired, and ensuring that "internal but separated governance entities" do not become mere ceremonial gestures.

6.2.2 *Infrastructure, Code, and Supply Chains*

But repurposing private law will not be enough. To effectuate new accountability norms, we must move beyond the traditional understanding of the normative. Corporations, after all, are human-run organizations and, as such, are inherently subject to legal regulation and external feedback. Yet, their power extends beyond – indeed, often eclipses – the conventional realm

[65] cf. Oversight Board Trust Agreement Section 2.1 and 2.2; also 4.3.
[66] Famously Emile Durkheim, *De La Division Du Travail Social* (1893).
[67] Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 Journal of Financial Economics 305; Eugene Fama, 'Agency Problems and the Theory of the Firm' (1980) 88 Journal of Political Economy 288.
[68] Lina M Khan, 'The Separation of Platforms and Commerce' (2019) 119 Columbia Law Review 973.
[69] Douek (n 55) 586 et seq.

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of rulemaking and enforcement. Even in content moderation, this book's example of rather unaccountable private power structures, rulemaking, and rule-enforcement covers only one dimension. As discussed in Chapter 2, also here, and even more so in other technologies, corporate influence operates not only through rules but through code, technology, infrastructure, and hardware. Thereby, corporate global governance often bypasses "traditional" mechanisms – normative documents, reports, or public consultations. Instead, it operates through code, technology, and infrastructural control. Consider, for example, the role of Starlink, Elon Musk's satellite-internet company, during the Ukraine war since 2022. Initially, Ukrainian forces depended heavily on Starlink's infrastructure, until, during a critical counteroffensive, intact systems inexplicably went offline or – prior accounts were later disputed – were never activated in crucial areas.[70] Reports suggest this was due to Musk's acquiescence to Russian President Vladimir Putin's threats against Musk's broader business interests and nuclear war if the company continued to aid Ukraine. Whichever concrete version of the story happened, the example epitomizes the level of immediate infrastructural sway such companies and the individuals controlling them hold over world affairs, an effective – yet troubling – form of governance.

Therefore, I echo demands for conceptual expansion in our understandings of regulation and governance: from focusing narrowly on legal forms to examining the organizational and techno-normative structures where power is enacted.[71] These frameworks encode normative decisions into technological systems, shaping societal interactions and individual experiences. Just as digital platforms have disrupted traditional, localized business-to-consumer relationships, new technologies transform and discipline societal and commercial interaction. Regulating these shifts will require more than traditional rulemaking and theorizing constrained by past experience. The focus must move – and already does so in the academy – to include the underlying infrastructures and computational systems themselves. As those systems are largely operated by private, for-

[70] Walter Isaacson, *Elon Musk* (Simon & Schuster 2023) 428–434; Ella Creamer, 'Elon Musk Biographer Admits Suggestion SpaceX Head Blocked Ukraine Drone Attack Was Wrong' *Guardian* (12 September 2023) <https://perma.cc/YR7U-Q68A>.

[71] Edwards (n 37); DeNardis and Musiani (n 37); Benedict Kingsbury, 'Infrastructure and InfraReg: On Rousing the International Law "Wizards of Is"' (2019) 8 Cambridge International Law Journal 171; for data see esp. Angelina Fisher and Thomas Streinz, 'Confronting Data Inequality' (2022) 60 Columbia Journal of Transnational Law 829. For digital infrastructures see famously: Joel R Reidenberg, 'Lex Informatica: The Formulation of Information Policy Rules Through Technology' (1998) 76 Texas Law Review 553; Lawrence Lessig, *Code: And Other Laws of Cyberspace* (Basic Books 1999).

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profit actors, future governance arrangements will arguably further entangle spheres of authority of centralized corporate actors that benefit from stylized guarantees of property and innovative modes of contracting while classic government increasingly adapts entrepreneurial and arguably more pragmatic tactics.[72] Accountability mechanisms and structural, substantive rules should therefore be embedded not only in external regulations, but directly in the code and infrastructure. In this way, good governance must permeate every layer of the complex sociotechnological practices we call artificial intelligence, social media, or any other emerging technology.

This task is made all the more challenging by the technological modalities unique to each sector. Two aspects stand out. First, while vertically integrated corporations may retain control over much of these technologies, their dissemination may give rise to new, semi-autonomous systems beyond the reach of their creators. That is especially the case for "artificial intelligence." It is crucial not to conceive of "artificial intelligence" as a single, monolithic entity crafted by one actor. These are intricate, multifaceted systems, interacting with a variety of players across entire "supply chains" of technology and governance.[73] As Jennifer Cobbe, Michael Veale, and Jatinder Singh demonstrate, the intricate interplay of interconnectedness and centralization in these sectors complicates the attribution of legal responsibility. Yet, this is not a problem unique to new technologies; it mirrors issues long observed in global commerce.[74] Governance proposals and heaps of local laws – think tort, product safety, intellectual property, and so forth – for such scenarios already exist. Legal tools to address such injustices are already in place. They may be underutilized or lack enforcement power at present, but this reflects the shortcomings of political economy and questionable alure of statements of "newness" on behalf of corporate executives more than the inadequacy of legal possibilities.[75] In fact, some of these issues may not require entirely new governance structures, but rather a more assertive application and modern interpretation of existing liability regimes.

[72] For the latter see e.g. Fleur Johns, 'From Planning to Prototypes: New Ways of Seeing Like a State' (2019) 82 Modern Law Review 833.

[73] Jennifer Cobbe, Michael Veale and Jatinder Singh, 'Understanding Accountability in Algorithmic Supply Chains', *2023 ACM Conference on Fairness, Accountability, and Transparency* (ACM 2023).

[74] See e.g. Clodia Vurro, Angeloantonio Russo and Francesco Perrini, 'Shaping Sustainable Value Chains: Network Determinants of Supply Chain Governance Models' (2009) 90 Journal of Business Ethics 607.

[75] For the latter see Lee Vinsel and Andrew L Russell, *The Innovation Delusion* (Currency 2020).

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Second, positively impacting the politics of artifacts requires restructuring the epistemologies and creative processes that produce these artifacts. In other words, a crucial element in effectuating new accountability norms will be to entrench them in the culture and education of engineers, computer scientists, biologists, economists, and, frankly, lawyers. While professional ethics are often considered ineffective and difficult to enforce, we should not underestimate the power of ethical and cultural norms in organizational contexts and, especially, in higher education. If universities do not teach engineers and economists to think about the harms – politely termed "social costs" – that their practices may cause, how can we expect them to recognize these risks?[76] Conversely, when ethical considerations and social awareness become deeply integrated into a sector's culture – often as a result of earlier scandals – these norms can curb questionable but profitable practices. For example, the field of human genetics research is relatively well-regulated through a combination of ex ante regulation, formal accountability procedures, and a cultural commitment to certain ethical standards.[77] In short, eventually, any system of new accountability norms must combine legal rules, technological means, and people.

6.3 Reasons for Optimism

This brings us to the final, and cautiously optimistic, epilogic notes of this book. Any future governance arrangement – whether private or otherwise – exists within a sociopolitical context. Governance, after all, is about shaping human behavior. Therefore, it should respond to the needs and desires of the humans it governs. Crafting concrete frameworks for this will undoubtedly be complex. Even the very definition of "human" might evolve with advances in artificial intelligence, biotechnology, and human "enhancement" (though one cannot help but notice the hype in some of

[76] That is, of course, if the people running those corporations at all finish their higher education, cf. Daub's analysis of the "drop out" culture permeating Silicon Valley entrepreneurship Adrian Daub, *What Tech Calls Thinking: An Inquiry into the Intellectual Bedrock of Silicon Valley* (Farrar, Straus and Giroux 2020).

[77] cf. Eric S Lander and others, 'Adopt a Moratorium on Heritable Genome Editing' (2019) 567 Nature 165; Britta C van Beers, 'Rewriting the Human Genome, Rewriting Human Rights Law? Human Rights, Human Dignity, and Human Germline Modification in the CRISPR Era' (2020) 7 Journal of Law and the Biosciences l; Henry T Greely, *CRISPR People: The Science and Ethics of Editing Humans* (MIT Press 2021).

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these fields).[78] Yet, whenever groups of people are brought together through the imposition of rules or by reliance on technological infrastructures, they inevitably begin to voice demands. These demands will often reflect the classic ideals of public law: individual rights, self-governance, participation, reason-giving, accountability, equal treatment, and due process.

In other words, when publics form – whether entirely transnational or virtual – demands for good governance will inevitably follow. And delivering good governance often hinges on adapting these public law principles. Whether we still call them – or should call them – public law principles is a different question.[79] Maybe, some of the abstract ideas might go down easier in some sectors if they were conceptually repackaged.

However, the striking development of the last centuries is that this adaptation will increasingly occur beyond the realm of the dominant authorities of the time. Consider this: After the unfathomable horrors of two World Wars and the Shoah, the state was the undisputed locus of supreme authority in Europe. States, at the time, had a distinct shape, trajectory, and ideology (the latter especially fueled by the Cold War). In the West, as a matter of principle, states would protect fundamental rights – more so after 1968 and not necessarily in a fair and equal matter (think of Algerians in France and then still prevalent colonialism in general) but bear with me.[80] Nonetheless, the post-War era is also one of transnationalism, especially in Europe. However, it took the European Union – an entity rooted firmly in public law – decades to build a meaningful human rights framework. At the time, the idea that a supranational organization, primarily focused on facilitating trade in Western Europe, should concern itself with human rights seemed baffling. Twice in the late 1950s, the European Court of Justice explicitly dismissed the notion that human rights law had any place within the

[78] cf. Allen Edward Buchanan, *Better than Human: The Promise and Perils of Enhancing Ourselves* (Oxford University Press 2017).

[79] Conceptual scrutiny is paramount here, cf. Megan Donaldson and Benedict Kingsbury, 'Ersatz Normativity or Public Law in Global Governance: The Hard Case of International Prescriptions for National Infrastructure Regulation' (2013) 14 Chicago Journal of International Law 1, 48 et seq.

[80] For postcolonial perspectives on EU law see Signe Rehling Larsen, 'European Public Law after Empires' (2022) 1 European Law Open 6; Lionel Zevounou, 'For a Postcolonial Reading of EU Law' (*Verfassungsblog*, 21 March 2024) <https://perma.cc/A7P2-U5ZA>. In general on the evolution of EU law see Joseph H H Weiler, 'The Community System: The Dual Character of Supranationalism' (1981) 1 Yearbook of European Law 267; Joseph H H Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403.

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Community's acquis.[81] But this position evolved. Gradually, the Court "discovered" that the supranational project had a voice in human rights matters.[82] Decades later, the European Union, now an institutional giant tackling everything from climate policy to migration, applies a comprehensive human rights charter – a charter that is, amusingly, used mostly to holding its Member States to account rather than the Union itself.

None of this would have seemed plausible in the early 1950s. And yet it happened – driven, in no small part, by public pressure and savvy lawyers. The lesson here is that power adapts in unpredictable ways. Today, much like then, power structures evolve in response to the demands of the public, though increasingly beyond the familiar corridors of nation-states.

Therefore, this book's final message is one of cautious yet genuine optimism. Both case studies illuminate the complexity of holding novel power structures, such as social media companies, accountable. These entities operate in ways that challenge traditional regulatory paradigms: classic state-based regulation often reaches its limits, and corporate self-regulation remains, at best, incremental. Yet, despite these challenges, the case studies reveal how quickly, and fundamentally groundbreaking organizations normative regimes, and accountability forums can emerge. Their current shortcomings, when measured against the ideals they aspire to emulate, are not a reason for disillusionment. On the contrary, these limitations serve as a call to action – to imagine more ambitious improvements, devise innovative governance concepts, and craft positive scenarios for accountability in the digital age.

Achieving these goals demands a careful balancing act. We must avoid the pitfalls of narrow doctrinalism, which clings too rigidly to traditional legal forms while neglecting the rich variety of governance methods beyond the state. At the same time, we must reject the temptation of purely ceremonial law-mimicry, which risks reducing accountability efforts to symbolic gestures devoid of substantive impact. Instead, we should embrace the creativity and ingenuity displayed in emerging accountability experiments, which offer fertile ground for exploring new models of governance. The enduring ideals of public law remain central to these efforts, even as their application evolves in response to new challenges. Projects like rights, review, and democratic self-governance might have to be repackaged, adapted, and other means of governance repurposed in light

[81] Stork [1959] European Court of Justice C 1/58, ECLI:EU:C:1959:4; Nold [1960] European Court of Justice Joined cases 36, 37, 38–59, 40–59, ECLI:EU:C:1960:36.
[82] Stauder [1969] European Court of Justice C 26–69, ECLI:EU:C:1969:57.

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of them. In that sense, public law's principles – its emphasis on accountability, fairness, and the protection of public interests – persist as touchstones, even when traditional legal frameworks falter. I allow myself to come back to a quote by Julie Cohen, who, ever a staunch critic of "performances" like the Oversight Board, nonetheless agrees that

> "rule of law" language is intended to supply a framework for talking about power, calling it to account, and constraining systematic abuse. Designing governance institutions for the networked information era requires new thinking about how to translate those broadly framed rule-of-law commitments into mid-level principles capable of being operationalized within networked digital environments.[83]

Emulated Guardians, like the Oversight Board or the EU's ODSs, exemplify this new thinking. Yet, a skeptic might caution, are these institutions not merely flawed facades – empty rituals crafted by corporate executives and starry-eyed Eurocrats?[84] Some of this critique is well-founded. Yet, as this book argues – particularly through its focus on emulation – there is much to be gleaned from these imperfect regulatory and corporate experiments. While undeniably fragile and flawed, they represent a new breed of institution. Born out of necessity and shaped by the ingenuity of legal entrepreneurs, these entities fuse self-serving corporate interests with gestures toward broader public values. Once established, they take on a life of their own, drawing on the residual faith in rule-of-law rhetoric – though, admittedly, such lofty ideals may resonate more strongly in Europe than in the United States.[85] When approached thoughtfully, the rule-of-law language Cohen references offers precisely the mindset, and attracts precisely the individuals, capable of helping to build innovative accountability structures. Can lawyers accomplish this alone? Certainly not. Must we take into account material and distributive aspects beyond norm-creation and institution-building?[86] Absolutely.

[83] Julie Cohen, 'From Lex Informatica to the Control Revolution' (2021) 36 Berkeley Technology Law Journal 1017, 1038, 1047. For prior discussion of this see at 1.1.

[84] Cohen diagnoses depression masqueraded as optimism among tech scholars who, for the lack of feasible alternatives, turn to apologists of those private governance experiments, ibid 1038–1042. See also Cohen's criticism of the creators of the Oversight Board (notably, not of the Board itself) at ibid 1048.

[85] For the latter see Jack M Balkin, 'Constitutional Crisis and Constitutional Rot' (2017) 77 Maryland Law Review 147.

[86] See esp. Griffin, who rightly highlights the material aspects while also mentioning "democracy," a concept whose realization arguably hinges on effective public law (idea[l]s), cf. Rachel Griffin, 'Public and Private Power in Social Media Governance: Multistakeholderism, the Rule of Law and Democratic Accountability' (2023) 14 Transnational Legal Theory 46.

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Yet, until proven otherwise, we might as well explore how the performativity and symbolism inherent in public law ideals can be harnessed to incrementally create meaningful guardians of power that work toward a more just world. I would argue that this is even more critical in times of growing public distrust and widespread uncertainty over who truly holds the reins of power – especially in a world where traditional markers of authority fade away. Arguably, this distinguishes broader questions of governance and organizational power like content moderation from the specific issue of privacy, which lacks a clear organizational program when compared to individual rights adjudication and self-governance, and which therefore appears to be indeed a hard case even for the biggest optimist. Likewise, the shifts in regulatory policy and corporate strategy among US digital corporations in early 2025 – closely aligned with the second Trump administration – underscored just how fluid and precarious these governance arrangements are. To assume that the fight for more accountable technology companies is lost simply because the Oversight Board or the DSA fell short of their initially overblown expectations would accomplish only one thing: further entrenching the status quo.

However, becoming authoritative guardians will require time; after all, courts and other traditional public institutions took generations to achieve their peak authority – an authority, ironically, now seemingly in decline. Yet dismissing these emerging spectacles as fruitless would all but guarantee they yield nothing worthwhile. Public law's role in this shifting landscape transcends formal regulation. It provides a framework for thinking, a lens through which governance can be interpreted and molded. Its enduring power lies in its universality, its ability to resonate with our collective imagination, and its intrinsic value as a guide for accountability and justice. As Megan Donaldson and Benedict Kingsbury have put it, public law is both "a method and a mindset."[87] These qualities ensure that its relevance endures, even as governance increasingly transcends the traditional confines of the state.

Ultimately, public law's legacy lives on not merely through formal statutes or court decisions but through the broader structures that shape how we think, communicate, and envision accountability. It offers a foundation for navigating an uncertain future, not because it has all the answers but because it provides a framework for asking the right questions – and for imagining a governance landscape that is both innovative and principled. The book's opening question centered on how to

[87] Donaldson and Kingsbury (n 79) 48.

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control private power structures beyond the state, particularly as the state's ability to exert its authority gradually diminishes. In response, we may conclude that perhaps the most surprising, and also the most encouraging, takeaway of this book is that public law remains a dominant framework in global governance, even beyond the confines of traditional public law and public actors. Concepts from administrative and constitutional law are seeping into private law structures – often in ways that are twisted, occasionally self-serving, and slightly askew, yet undeniably significant. Public law, then, endures as a vital force, not only for what it has been, but also for what it continues to inspire: a vision of governance grounded in ideals that are universally understood, deeply resonant, and, ultimately, built upon good ideas.

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