Preface

This book, like the world it describes, is transitional. It explores what I believe to be a groundbreaking shift in how the normativity of public law ideals – such as individual rights, formalized accountability, and self-governance – unfolds in an era where the state, the traditional locus of organized authority for several hundred years, gradually recedes. Rather than focusing on the starting point or ultimate destination of this transition, the book delves into the process itself. It conceptualizes, problematizes, and evaluates *emulation* as a fundamental pattern of governance beyond the state, especially in private and regulatory contexts. Emulation describes how organizational actors, such as the European Union or Meta, build new policies and formal structures by imitating older institutionalized policies from other contexts. In our context, these older institutionalized policies are those commonly known from administrative, constitutional, and civil rights law. In short, when in need for good governance, many turn to public law for inspiration. Remarkably, this inspiration transcends political divides. Throughout the 2010s and early 2020s, debates centered largely on "liberal" public law elements – rights, adjudication, and due process. These demands form the core focus of this book. Yet, rather recently – and at an exponential pace during the final months of this manuscript's production – a crescendo of countervailing voices has grown so powerful that it ultimately swept the White House with the second Trump administration. In a stunning shift, it also appears to have partially reshaped corporate policy among major social media companies, especially Meta. How lasting and entrenched these changes are remains to be seen (and how entrenched prior liberal configurations indeed ever were is one of the continuing questions of this book). Further, a closer look reveals that even Silicon Valley's apparent political realignment with Trump's "Make America Great Again" (MAGA)-conservatism remains framed in (potentially twisted understandings of)

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public law terms. Calls for majoritarianism, free speech absolutism, and the curbing of alleged viewpoint discrimination follow a superficially different but structurally similar logic to the liberal arguments that dominated the previous decade. Both sides evoke public law concepts, sometimes twisted and self-serving but nonetheless thoroughly rooted in a common frame of reference. That frame of reference is public law. In effect, we are witnessing a revival of classic public law debates – on individual freedom, the countermajoritarian difficulty, minority protections, the rule of law – now transposed onto the private governance of social media platforms, and potentially other emerging centers of power such as artificial intelligence. In short, public law ideals – from rights to majoritarianism, from courts to self-governance – continue to exert immense cultural and normative influence, even as traditional legal institutions struggle to enforce them. Consequently, regulators and corporations, driven partly by self-interest and partly by the proven utility of public law as a counterbalance to concentrated power, have begun to adopt and internalize these ideals within managerial frameworks. Remarkably, they do so not exclusively, perhaps not even predominantly, because of traditional regulation, but through discourse, appropriation, repackaging, and so forth. Unsurprisingly, that internalization of public law ideas by private and regulatory actors is feeble and imperfect. But the following 300 pages or so make the case that such an internalization of public law mechanisms in contractual, corporate, and regulatory settings may be ambivalent, yet an important avenue to further explore to tame power structures beyond the state.

The empirical heart of the book lies in its case studies on content moderation and the novel, yet fragile adjudicators tasked with overseeing it. These are, namely, Meta's Oversight Board and the European Union's out-of-court dispute settlement bodies established under Article 21 of the Digital Services Act. These adjudicators emulate key aspects of public law, particularly the adjudication of individual rights vis-à-vis bureaucratic power structures. While these cases are compelling in their own right, I believe they also exemplify a larger trend. As governance increasingly shifts to powerful, vertically integrated, infrastructure-controlling corporations, demands for accountability are bound to follow. Why not, for better or worse, model these new accountability structures after those that have worked – imperfectly but effectively – within the state? Whether this emulation succeeds is, of course, a matter of how its conditions and ends are defined. In that sense, this book is just one chapter in a much longer story about liberalism's struggles, promises, and pitfalls in an increasingly digital, complex, and interconnected world. A world that

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now teeters between tech-feudalism, the resurgence of brute-force territorialism, and the uncertainty of planetary futures yet to unfold.

The book's transitional nature also reflects its creation. It began as a PhD project at Humboldt-University of Berlin in October 2019, sustained through the dark winters of the pandemic, punctuated by travel, fellowships, and conferences once the world reopened, and reached its first culmination in 2023 with its defense.

The dissertation was awarded several prizes. These were, in chronological order, the Best Doctoral Thesis Award by the European Law Faculties Association (Edinburgh, 2024), the Konrad-Redeker-Prize for the best dissertation in administrative law and constitutional law, awarded by the Faculty of Law of Humboldt-University of Berlin and endowed by the Konrad Redeker Foundation (Berlin, 2024), and the Best Thesis Prize by the European Public Law Organization (Athens, 2024). Also, the thesis was shortlisted for the Best Thesis Award by the Institute for World Business Law of the International Chamber of Commerce (Paris, 2023).

What you hold in your hands (or read on your screen) is the evolved product of that dissertation, shaped by the new perspectives and opportunities afforded to me since summer 2023 at New York University. The book transitions, much like its subject, between European and American perspectives. Ironically, it belongs fully to neither. In Europe, my project is often perceived as oddly American, while in the United States, my occasional skepticism toward profit-driven corporations acting in the public interest betrays my European roots. Yet, as the issues discussed here transcend Europe, the United States, or any specific jurisdiction, this interplay of perspectives is, I hope, among the book's strengths.

This book engages with material up until November 2024, with events beyond that – particularly those surrounding the 2024 US elections – falling largely outside its scope. As the Oversight Board and the Digital Services Act continue their bold, ambivalent, and complex experiments, the mid 2020s mark the beginning of a new, more uncertain chapter. I try to provide a comprehensive account of how we got here. For one book, that should, hopefully, be enough.

Apart from the two public foundations mentioned in the acknowledgments and the support of New York University School of Law through Guarini Global Law & Tech, I never accepted – nor was offered – any funding by other actors. I affirm that, to the best of my knowledge, no conflicts of interest exist in relation to the research, writing, or publication of this book.

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A final word on the book's cover. To spare myself the indignity of overly earnest (and likely cringeworthy) forays into art history, I limit myself to three simple observations. First, the cover features Francis Bacon's 1968 painting *Portrait of George Dyer in a Mirror*. Second, I selected Bacon as an artist specifically for his nuanced engagement with emulation. Third, though many of Bacon's pieces explicitly reference other artworks, this one does not. Yet, as the distorted reflection in the mirror reveals, it grapples with themes of perception, guise, and societal power in ways that resonate deeply with the book's subject.

Moritz A. Schramm

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