2 Theory and Context

Governance by emulation describes a mode of governance that relies on reproducing preexisting models of public governance – here long-standing ideas of administrative and constitutional law – in new, privately governed contexts. In our case, these privately governed contexts are the corporate-controlled content moderation machineries of social media platforms. The emulated public law role model here is individual rights adjudication, meaning the rights-based control and, ideally, long-term improvement of administrative governance structures through courts. Some of the most prominent examples of this approach – think of human and civil rights cases or the European Court of Justice's role in European integration – have become part of the shared politico-legal canon, especially in Europe and the United States. Throughout the last seven decades or so, courts assumed a very active and, despite ambivalent downstream effects, widely venerated role in operationalizing individual rights as mediators for structural change in large governance structures like administrative agencies, the police, or the workplace. Remarkably, governance by emulation appears to be a strategy that, yet for slightly different reasons, appeals as much to democratic actors like the European Union as it does to corporate actors like Meta.

This book investigates the construction of this new type of governance regime by focusing on two paradigmatic examples of such governance by emulation: the European Union's out-of-court dispute settlement bodies (ODSs) and Meta's Oversight Board. As anticipated in the introduction, I call them Emulated Guardians. That is because they seek to emulate aspects of individual rights adjudication and in reference to one of the aporia of public accountability: Who guards the guardians?

Both Emulated Guardians are designed to protect – or at least appear to be protecting – individual rights and to control massive and increasingly

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bureaucratic private power structures. Although these specific power structures – social media platforms – are relatively novel (with social media and its content moderation existing for only the better part of two decades at the time of writing), the underlying questions, ideas, and mechanisms shaping the power dynamics between platforms and their users are far from new. The demands to emulate individual rights adjudication draw from long-established traditions. These dynamics are not only legal but also deeply political, social, and cultural, grounded in the familiar rather than the innovative.

Therefore, the key observations made and questions raised in this book go well beyond the already important issue of content moderation and digital governance. Rather this book provides a way to think about developments that seem all but certain to play out in similar form in other future sectors whose global governance is dominated by centralized and vertically integrated private power structures like today's social media companies. The power dynamic we observe here – corporate control over infrastructure, rulemaking, and rule enforcement, combined with the absence of viable exit options for individuals – may be particularly stark and easy to grasp in the regulation of speech by platforms, but it is by no means confined to that area. Consider sectors such as artificial intelligence, satellite internet, commercial space travel, human "enhancement," carbon capture, biotechnology, and many others. Not all of these fields will thrive, but some certainly will. And all appear poised to be respectively dominated by a few, perhaps even just one, centralized entity – a private corporation, likely based in the United States or China, rather than a democratically governed institution operating within a rule of law framework. Private ordering is, of course, not inherently problematic. Do not mistake my concern as ideological refusal of the inevitable. Private ordering is important and especially the profit motive – derided by some and with indeed complicated downstream impacts as we will see in the case studies – is an important driver of innovation and efficiency. However, it is equally obvious that some things of public concern ought to be governed according to some higher order principles like representation and a sense of publicness. An informed look into the papers shows that the structures we currently conceptualize as private ordering (in the American wording) or private governance (the European way to put it) cannot achieve these public goals solely through innovation, efficacy, and managerial Icarianism.

Therefore, once the power of these corporations becomes apparent, public demand for accountability will inevitably follow. And when people

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call for accountability in response to a massive, organized power structure, borrowing concepts from public law – particularly administrative and constitutional law – seems a natural course of action. Rights, due process, independent review, participatory rulemaking. All these principles will resurface in the discussions ahead. This book identifies and critically engages with that mode of thinking – governance by emulation – and offers analytical tools to better understand and assess it.

It is important to emphasize that I do not argue that governance by emulation is inherently good or bad. It is, above all, a reality. Emulating public law ideals to manage private power structures holds significant potential – as we will explore throughout the coming chapters – but also presents serious risks, which we will encounter in equal measure.

To these ends, this chapter lays the contextual and theoretical groundwork for our investigation, zeroing in again on content moderation. In the following four sections, we address four key questions. First, who are the main actors in this story? Second, what exactly are these actors – our so-called Emulated Guardians – tasked with doing? Third, what is content moderation and why does it make sense to look at it through the prism of administrative law? And finally, since governance by emulation involves adapting public law models to private governance, how does this leap from the public to the private actually unfold?

Along the lines of these four questions, this chapter follows four lines of enquiry. First, I briefly introduce Emulated Guardians as the key concept of the book. Emulated Guardian is the overarching term used here for bodies like the EU's out-of-court dispute settlement bodies or the Oversight Board. The term "Emulated Guardians" points to both bodies' two key characteristics: First, they are presumed to act as guardians of individual rights, in the same way that courts or other adjudicators became guardians that protect individuals from overweening public power. Second, they are novel bodies whose structural features reflect or *emulate* ideas regarding judicial protection, individual rights, adjudication, and judicial review. This aspect is crucial. Emulated Guardians are important and potentially powerful because they *remind* us of courts and adjudication – not necessarily because they can already fully do the job. From a grander historical perspective, Emulated Guardians may be a first version of new accountability structures for power beyond public authority. Fascinatingly, traditions and revered imaginaries of courts and judicial power live on in those "novel" institutions. Here we also reflect on Emulated Guardians' performativity. Their performativity works bidirectionally. On the one hand, they may performatively self-legitimize by mere appearance while, on the other, they might incrementally modify

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conceptions of whether and to what extent individual rights are protectable and enforceable online and in so-called "post-state" governance.

Second, we look at what Emulated Guardians are supposed to do: adjudicate individual rights. *Individual rights adjudication* is a widely practiced and culturally venerated mechanism to control power. Here, we step far back from our notional "information age" and recapitulate the elements required to subject power structures to an adjudicatory review of individual rights. This analysis condenses legal-political practice from the last two centuries of liberal government.

Third, we look at the power structures Emulated Guardians shall control, that is, social media platforms. We will address how social media platforms design, regulate, and police digital infrastructures, particularly with regard to how regulatory co-option and self-interest has driven platforms to become private governance actors that devise increasingly sophisticated administrative and bureaucratic ways of working. Consequently, there have been growing demands to introduce control mechanisms into these private power structures whose lack of accountability has become increasingly concerning from the mid-2010s. Here, I draw on administrative law to explain how elements like hierarchy and heteronomy, deference and coherence, review, regulation and reform transform content moderation into an ever more administration-like enterprise.

Fourth, by this point, tensions were becoming apparent – between, on one side, fledgling guardian institutions and, on the other, extensive yet unaccountable power in private hands. To examine the fruits of that tension, descriptively (and later normatively), this chapter draws from research in organization theory and political science to explain why and how organizations *emulate* institutions like individual rights adjudication. In simple terms, to emulate means to imitate, reproduce (or even strive to improve upon) a role model. The primary drive to emulate is to appear more legitimate. As organizations seek legitimacy, emulation becomes an increasingly widespread mechanism of organizational development. Yet emulation's track record may be Janus-faced. Does it diffuse tried and tested practices or merely build ceremonial façades?

2.1 Emulated Guardians

This chapter looks at the contextual and theoretical framework of *Emulated Guardians*. Starting point for those observations are Emulated Guardians themselves. What are their characteristics? How do they reproduce adjudicative functionality and performatively play with judicial

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symbolism? I develop the term Emulated Guardians inductively from the theoretical framework and empirics presented in this book. In that sense, the term predominantly addresses a distinct phenomenon: the emulation of adjudication to control content moderation. However, as I argue more detailed in the introduction and in Chapter 6, the Oversight Board and Article 21 Digital Services Act (DSA) should be seen as placeholders for a more fundamental development in global governance. Since ever more power is exercised beyond public authority, designing "new" accountability structures will become more pertinent. I argue that many of these allegedly "new" accountability structures are anything but new and unprecedented. Instead, they *emulate* bits and pieces of preexisting role models to publicly legitimize and – ideally – control emergent power structures. Emulated Guardians that seek to adjudicate individual rights are one particularly salient example of that development and, therefore, the focus of this book. But I encourage the reader to keep this meta level in mind when reading through the coming chapters.

2.1.1 Characteristics

Emulated Guardian is the overarching term used here for bodies like ODSs or the Oversight Board. The term points to both bodies' two key characteristics. First, they are presumed to act as guardians of individual rights, in a similar way that courts or other adjudicators became guardians that protect individuals from overweening public power. I use the term *guardian* to reminisce the famous "who guards the guardians" issue in public law.[1] Second, they are novel bodies whose structural features reflect or *emulate* ideas regarding judicial protection, individual rights, adjudication, and judicial review.

Emulation describes how organizational actors, such as the EU or Meta, build new policies and formal structures by imitating older institutionalized policies from other contexts. Emulating existing institutions has two advantages: first, emulating something is easier than entirely reinventing the wheel.[2] Second, because institutionalized policies and formal structures are generally (that is, publicly) considered legitimate, emulating these to address novel problems maps the perception of legitimacy from

[1] Originally, that phrase predates the emergence of public law altogether. It originates from Roman poet *Iuvenal's* "Quis custodiet ipsos custodes?" For a modern adaptation see Martin M Shapiro, *Who Guards the Guardians? Judicial Control of Administration* (University of Georgia Press 1988).

[2] With the caveat, of course, that only very few ideas are truly new.

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the old context onto the new institution.[3] Simply put, emulating adjudicatory control over public – and especially administrative – power promises a smooth path toward controlling social media platforms and enables those social media platforms to present themselves as (more) legitimate.

Viewed through a legal lens, emulation is an unwieldy category, because actors like ODSs or the Oversight Board do not fit traditional conceptual frames. By dint of their emulative natures, ODSs and the Oversight Board reflect diverse aspects of various adjudicatory role models without, however, becoming the "original" – either in concept or in practice. Recent conceptual takes on Emulated Guardians range from supreme court,[4] to sub-courts,[5] de facto courts,[6] to human rights tribunals,[7] to (as yet unspecified) transnational adjudicators.[8] But, in my view, superimposing traditional concepts onto novel phenomena might risk "foreclos[ing] rather than foreground[ing] debates" about the current reshuffle of power relations at play.[9] In turn, to borrow Martin Shapiro's words, "[i]f we turn to the work of those persons and institutions to which we normally award the titles judges and courts, we shall see that in reality they are simply at one end of a spectrum rather than constituting an absolutely distinct entity."[10]

[3] The idea of "mapping" traditional meaning onto a novel context originates from Lakoff's work on metaphors, George Lakoff and Mark Johnson, *Metaphors We Live By* (University of Chicago Press 1980).

Metaphorical mapping with the effect of legitimizing design choices and practices is a common practice in discourses about Emulated Guardians as a showed elsewhere: Josh Cowls, Philipp Darius, Dominiquo Santistevan and Moritz Schramm, 'Constitutional Metaphors: Facebook's "Supreme Court" and the Legitimation of Platform Governance' (2024) 26 New Media & Society 2448.

[4] Ezra Klein, 'Mark Zuckerberg on Facebook's Hardest Year, and What Comes Next' *Vox.com* (2 April 2018) <https://perma.cc/5W3N-Y37S>; Kate Klonick, 'Inside the Making of Facebook's Supreme Court' *New Yorker* (12 February 2021) <https://perma.cc/44Y7-S8VH>; Cowls, Darius, Santistevan and Schramm (n 3).

[5] European Parliament Committee on Legal Affairs and Tiemo Wölken (Rapporteur), 'DRAFT REPORT with Recommendations to the Commission on a Digital Services Act: Adapting Commercial and Civil Law Rules for Commercial Entities Operating Online (2020/2019(INL))' 21 et seq <https://perma.cc/VC3U-7Y97>.

[6] Daniel Holznagel, 'The Digital Services Act Wants You to "Sue" Facebook over Content Decisions in Private de Facto Courts' (*Verfassungsblog*, 24 June 2021) <https://perma.cc/6W8K-E3GM>.

[7] Laurence R Helfer and Molly K Land, 'The Facebook Oversight Board's Human Rights Future' (2023) 44 Cardozo Law Review 2223.

[8] Rishi Gulati, 'Meta's Oversight Board and Transnational Hybrid Adjudication: What Consequences for International Law' KFG Working Paper Series No. 53 March 2022.

[9] See, referring to the Supreme Court metaphor regarding the Oversight Board Cowls, Darius, Santistevan and Schramm (n 3) 17.

[10] Martin M Shapiro, *Courts, a Comparative and Political Analysis* (University of Chicago Press 1981) 8.

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On the contrary, analogizing amorphous and ambiguous emulators like ODSs or the Oversight Board to existing – and often patently legitimizing – ideas like "supreme" or "quasi-courts," attaches public legitimacy and an assumed certainty to phenomena (yet) undeserving of these epithets.[11] Simultaneously, as outlined in the introduction, pressing Emulated Guardians in schematic templates of public or private oversimplifies reality. For example, ODSs are formally private bodies. Yet, they only exist because the EU envisaged them in the DSA and national administrators license them. The EU's "vision" for ODSs in turn, albeit formally emerging in legislative procedures, was shaped at least in parts by lobbying and backchanneling during legislation. Tucking phenomena into somewhat undercomplex conceptual boxes like "public" and the "private" is important to highlight indeed existing and important differences, yet the reality in those boxes seldom manifests as purely as dichotomous labels would suggest.

Therefore, I assume a deferential approach toward the criteria of adjudication just outlined. I investigate the diverse and at times convoluted practices in the case studies through the prism of individual rights adjudication as their paragon, point of reference, and model – but not as a strict deductive category.[12] The practices of the Oversight Board and the out-of-court dispute settlement bodies appear to be heavily inspired by individual rights adjudication. Yet this observation does not necessarily tick all the boxes.[13] For example, the out-of-court dispute settlement bodies cannot bindingly decide cases and Meta retained some influence over the Board's composition and docket, thereby undermining its independence.[14] Nonetheless, both bodies mirror many functional aspects of adjudicators and performatively play with their (limited) reproduction of adjudicative features like individual appeals, impartiality, norm-based decision-making, and juridical "habitus."[15]

[11] See for an empirical analysis and critical discussion of the prevalence of the Oversight Board as Supreme Court Metaphor in US News media discourse Cowls, Darius, Santistevan and Schramm (n 3). See also Thomas Kadri, 'Juridical Discourse for Platforms' (2022) 136 Harvard Law Review (Forum) 163.

[12] See in that regard also Bourdieu's reflection on the mistaken antinomy of "subjective" and "objective" accounts in social sciences, Pierre Bourdieu, *The Logic of Practice* (Stanford University Press 1992) 25–29.

[13] See at Chapter 5.

[14] See at 3.6, 3.7, and 4.3.3.

[15] Highlighting the discursive dominance of juridical concepts and imaginaries in debates about platform governance, Kadri (n 11) 169 et seq; see already Cowls, Darius, Santistevan and Schramm (n 3).

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The key trait of Emulated Guardians is, therefore, not that they are indeed courts or human rights tribunals but that they *remind* us of adjudicators without being "classic" specimens of the species. Resemblance without identity, one could say. Thus, focusing on the aspect of *emulation* acknowledges Emulated Guardians' reflexive status as operating in a space between law and self-regulation, public expectation, self-serving interest, institutionalized and culturally dependent beliefs about controlling power structures, and the real practice of controlling power structures.

2.1.2 *Performativity*

If Emulated Guardians' characteristic is that they oscillate between positive law and self-regulation, public imagination and actual authority, ceremony and actual control, they are quintessentially performative. In other words, Emulated Guardians' practice, symbolism, and perception reflect changes in common and legal discourse and, reflexively, may change the very discourse itself. The idea is simple. Emulated Guardians can – and do[16] – bring with them a rich arsenal of symbols, practices, and argument-based resources that might channel some of the public legitimacy attached to classic adjudicatory institutions.[17] They appear – and are designed to appear[18] – as adjudicative institutions. However, compared to traditional individual rights adjudication, Emulated Guardians suffer from in-built design flaws. For example, the Oversight Board remains financially dependent on Meta, and neither ODSs nor the Oversight Board can issue binding decisions at scale.[19]

Yet if their practice is perceived as sufficiently adjudicative, they may be able to incrementally build their own public legitimacy and authority vis-à-vis the power structure they shall control. Through practice and narration, Emulated Guardians may dress themselves in the publicly legitimizing guise of adjudicatory appearance. Because adjudication is such a powerful and revered societal institution Emulated Guardians may construct their own authority, outgrow inbuilt design flaws, and yield larger cultural changes toward more meaningful accountability. That

[16] See at 3.7, 3.8, 4.5, 4.6, and Chapter 5.

[17] See already Cowls, Darius, Santistevan and Schramm (n 3) 1–8, 16–19; for an empirical analysis of the "Supreme Court metaphor's" prevalence in the US news discourse between 2018 and 2021 see: ibid 8–16. For a normative critique of platforms' overuse of juridical concepts see Kadri (n 11) 186 et seq.

[18] See at 3.2, 3.3, 4.2, and 4.3.

[19] See 3.6, 4.3.3, and 4.6.

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would be public legitimation by emulation or, from a cynical point of view, self-legitimation by appropriation.

In turn, Emulated Guardians' practice, which is related to but not quite adjudication in a classic sense, might reflexively alter the shared understanding of how individual rights adjudication works in the digital sphere or, perhaps, in the whole realm of post-state governance. We can observe similar performative reconstructions of crucial social concepts in many aspects of life.

Take the example of privacy. Changing societal perspectives on privacy and its enforceability offer a cautionary tale in a closely related field.[20] Only two decades ago, much of the hyper-personalized data mining of Amazon, Google, and Meta would have arguably been viewed as an outrageous breach of individual privacy. In her comprehensive genealogy of what she calls "surveillance capitalism" in Silicon Valley during the 1990s and early 2000s, Shoshana Zuboff points out Google's pioneering role in privacy-eroding "datafication":

> Google would no longer mine behavioral data strictly to improve service for users but rather to read users' minds for the purposes of matching ads to their interests, as those interests are deduced from the collateral traces of online behavior. With Google's unique access to behavioral data, it would now be possible to know what a particular individual in a particular time and place was thinking, feeling, and doing. That this no longer seems astonishing to us, or perhaps even worthy of note, is evidence of the profound psychic numbing that has inured us to a bold and unprecedented shift in capitalist methods.[21]

Yet by virtue of practice and rhetoric[22] (especially through imaginaries of endless connectivity, possibility and, ironically, individual freedom) our

[20] The term "enforceability" underscores the importance of perspective in understanding whether individuals reinterpret the ideal of privacy – what is considered protected from outside view and what is not – or merely adjust their stance toward accepting breaches of that ideal, along with the extent to which they modify their behavior accordingly. This tension – between a persistently strong normative desire for privacy and the increasing acceptance of privacy violations – is often framed as the "privacy paradox." For an overview see Spyros Kokolakis, 'Privacy Attitudes and Privacy Behaviour: A Review of Current Research on the Privacy Paradox Phenomenon' (2017) 64 Computers & Security 122; Tobias Dienlin, Philipp K Masur and Sabine Trepte, 'A Longitudinal Analysis of the Privacy Paradox' (2023) 25 New Media & Society 1043.

[21] Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (PublicAffairs 2019) 78.

[22] The importance of rhetorical devices to discursively construct specific, and regularly industry-serving, imaginaries cannot be overstated. See e.g. Tarleton Gillespie, 'The Politics of "Platforms"' (2010) 12 New Media & Society 347; referring to the conceptual "blank area" of informational capitalism, which is then flooded with legitimizing

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conceptions of privacy, or at least of privacy's enforceability, have fundamentally changed.[23] Quantitative empirical research found that "previous privacy violation experiences" had only "small effects on ... subsequent online privacy concerns and no substantial effects on online information disclosure."[24] In other words, past experiences of eroding privacy do not raise a great deal of concern and most of the time do not elicit behavioral consequences, like withdrawing from social media platforms. Thus, the shared understanding of privacy changed.

Qualitative empirical findings corroborate these quantitative results. For example, after a privacy breach of eighty-seven million North American Facebook accounts by Cambridge Analytica in 2018, many users around the globe (especially younger ones) appear to have changed their perception of what Facebook could legitimately do with its – and by extension, their – data.[25] Instead of anger or discomfort, which could have changed their usage of social media, some people began to modify their perception of privacy. As Hagar Afriat et al. argue:

At that critical moment, users reestablished in their minds Facebook's legitimacy and right to harvest data ... In this view, it is the users' responsibility to manage

metaphors: Shoshana Zuboff, 'Big Other: Surveillance Capitalism and the Prospects of an Information Civilization' (2015) 30 Journal of Information Technology 75, 83; Maria Lindh and Jan Michael Nolin, 'GAFA Speaks: Metaphors in the Promotion of Cloud Technology' (2017) 73 Journal of Documentation 160; Zuboff (n 21) 74; Julia Slupska, 'War, Health and Ecosystem: Generative Metaphors in Cybersecurity Governance' (2021) 34 Philosophy & Technology 463; Cowls, Darius, Santistevan and Schramm (n 3); Kadri (n 11). See also the grim picture painted by Ari Ezra Waldman based on qualitative field work with data protection professionals: Ari Ezra Waldman, *Industry Unbound: The Inside Story of Privacy, Data, and Corporate Power* (Cambridge University Press 2021) 210 et seq.

[23] Various studies provide ample empirical evidence for this phenomenon. For example, Mary Culnan and Pamela Armstrong found already in 1999, that individuals were willing to give away data more freely "when people were explicitly told that fairness procedures in the form of fair information practices are observed" – irrespective of whether that practices were really observed. That trend manifested over time. In a 2011 literature survey of 500 studies on privacy, France Bélanger and Robert Crossler found that "[t]he most intriguing finding in information privacy attitudes research is that, in the presence of privacy attitudes, greater concern for information privacy no longer influences willingness to disclose personal information." See for the first quote Mary J Culnan and Pamela K Armstrong, 'Information Privacy Concerns, Procedural Fairness, and Impersonal Trust: An Empirical Investigation' (1999) 10 Organization Science 112; for the second quote see France Bélanger and Robert E Crossler, 'Privacy in the Digital Age: A Review of Information Privacy Research in Information Systems' (2011) 35 MIS Quarterly 1017, 1021.

[24] Philipp K Masur and Sabine Trepte, 'Transformative or Not? How Privacy Violation Experiences Influence Online Privacy Concerns and Online Information Disclosure' (2021) 47 Human Communication Research 49, 66–67.

[25] For the relevance of the Cambridge Analytica scandal in the creation of the Oversight Board see at 5.2.

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their privacy, as it is Facebook and other social media companies' right to profit from activities on their platforms. After all, as one participant remarked: "This is capitalism. It is not illegal."[26]

Such changes of overall perception induced by changing practice and language can be (broadly) described as performative.[27] The iterative repetition of concepts, practices, and symbols in different times and places *attaches* a general meaning to these concepts, practices, and symbols, but over time *alters* the general meaning of these concepts and the significance of practices and symbols pertaining to them.[28]

The formative effects of practice and language on reality, power, politics, and, therefore, law should not be misunderstood as a merely constructionist or postmodern quip.[29] History is full of examples, ranging

[26] The findings are based on fifty qualitative interviews conducted in Israel partly before and partly after the Cambridge Analytical scandal, Hagar Afriat, Shira Dvir-Gvirsman, Keren Tsuriel, and Lidor Ivan '"This Is Capitalism. It Is Not Illegal": Users' Attitudes toward Institutional Privacy Following the Cambridge Analytica Scandal' (2021) 37 The Information Society 115, 116.

[27] The concept of performativity goes back to John Austin's philosophy of language and has been adapted in various and sometimes conflicting ways in linguistics, the philosophy of language, sociology, cultural studies, and law. Austin's "performative utterances" highlighted that speech acts – depending on context, speaker, and utterance – may materially alter people's lives (or what Husserl called the "life world"). See e.g. the "christening Mr. Stalin" example in John L Austin, *How to Do Things with Words* (Oxford University Press 1962) 4 et seq; posing at 7 the famous question "can saying make it so?" For various adaptations of performativity throughout the disciplines see e.g., Julie Cohen's observations of performativity at work in platforms' terms of service, Julie Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press 2019) 45. For European law: Thomas Diez, 'Speaking "Europe": The Politics of Integration Discourse' (1999) 6 Journal of European Public Policy 598. In the United States see already the related work on rhetoric and narratives by Peter Brooks and Paul Gewirtz (eds.), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press 1996); see also Ingo Venzke's application of linguistic philosophy to the interpretation of international law (and especially also regarding Austin and Brandom): Ingo Venzke, *How Interpretation Makes International Law* (Oxford University Press 2012) 54–57 (regarding performativity), 144 et seq (regarding the performative effects of international adjudication) esp. 167 et seq (on the influence of institutional changes).

[28] Variations of this idea can be found also in Foucauldian conceptions of "discourse," cf. Michel Foucault, *The Archaeology of Knowledge* (Pantheon Books 1972) 56 et seq; Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (Vintage Books 1973) 17 et seq.

[29] Reinhart Koselleck, *Begriffsgeschichten* (Suhrkamp 2006) 32 et seq, 297 et seq; Venzke (n 27) 27–29, 58–64. Importantly, one would be mistaken to consider language-focused perspectives inherently "progressive" or "liberal." Venzke points to a quote by an (infamously) renowned twentieth century German scholar, who, in a letter to another eminent anti-Weimar intellectual, equated power with the ability to form concepts and meaning (see ibid at 59). Regarding the later unfolding interpretative changes in German law during the Third Reich, which can also be understood as performative, see seminally:

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from the extreme to the mundane. A vivid example of the former were the "*propagandistes*" in post-Revolutionary France who sought to revamp the entire French language by fixating revolutionary spirit in everyday parlance to enable (but also to guardrail) citizens to speak (and think) only in revolutionary terms.[30] Many examples of performative change and incremental shifts in meaning are less flashy and abrupt than the one just mentioned. Arguably, those changes that really stick are not paternalistically declared, but gradually normalized.

2.2 Individual Rights Adjudication

That being said, we begin zooming in on the contextual details of Emulated Guardians. To repeat, Emulated Guardian is the overarching term used here for bodies that (partly) reproduce individual rights adjudication in private governance. The two studied examples are the out-of-court dispute settlement bodies and the Oversight Board. The former are a child of the European Union's DSA, the letter an offspring of the world's largest social media company, Meta, formerly known as Facebook. The following section deconstructs what exactly Emulated Guardians emulate here, that is, individual rights adjudication.[31] The key takeaway is that the very basic configurations that Emulated Guardians seek to reproduce mirror a century-old model of public governance, that is, in plain language, going to court to sue the police department whose officer battered you.

We will therefore dig into the theory and history of enforcing individual rights through an adjudicator vis-à-vis a dominant power structure, which is, historically, the state. Therefore, we leave contemporary

Bernd Rüthers, *Die unbegrenzte Auslegung: zum Wandel der Privatrechtsordnung im Nationalsozialismus* (8th ed, Mohr Siebeck 2017). Insightful in addressing how to navigate epistemes of questionable provenance in legal scholarship – a topic that warrants deeper reflection than I can offer: Gwinyai Machona, 'Das Provenienz-Problem der Rechtswissenschaften: Zum Umgang mit Antisemitismus, Rassismus und Sexismus im Juristischen Wissenskanon' (2022) 55 Kritische Justiz 437, 447, 452.

[30] Reinhart Koselleck unearthed several quotes from the French revolutionary era that declared language the ultimate sovereign, e.g. "*les paroles nationales seront souverains de tous les souverains*" ("the national words will be sovereign of all sovereigns"), Koselleck (n 29) 297–302.

[31] This book predominantly uses the term "individual rights adjudication" rather than "courts," as the latter excludes numerous adjudicative actors that are essential to the external, independent, and rights-based review of power structures but are not labelled as courts. Ultimately, the concept of a court is largely a projection shaped by a range of diverse institutional preconceptions.

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phenomena like social media platforms or private governance altogether and take a step back, to look at the bigger picture.

The next few pages will be somewhat theory-heavy and abstract. But bear with me, it is important to deconstruct these underlying patterns to later identify structural flaws and missing contextual factors in the practice of Emulated Guardians.

2.2.1 Individual Rights

Individual rights adjudication refers to rights-based, adjudicative ex-post control over power structures. If, for example, a police officer exceeds their power against a protestor, the latter may initiate individual rights adjudication, claiming civil rights violation and the likes. Individual rights adjudication rests on two pillars. These are, on one side, power mediators in the hands of individuals, or what I call broadly individual rights.[32] In the police example given above, the relevant individual rights could be those to bodily integrity, free expression, and freedom of assembly. On the other side, individual rights adjudication relies on adjudication as a mechanism to effectuate these power mediators. The adjudicator would be, in all likelihood, some kind of court.

The normative basis of individual rights adjudication are individual rights. The term "individual rights" is a functional concept. Functionally, individual rights can be viewed as normative practices that enable individuals (or other rights holders) to make normative claims to limit the exercise of power on the part of a dominant power structure.[33] Individual rights can be human, constitutional, civil, or fundamental rights (depending on one's jurisdiction) and other more specialized or derivative rights. Individual rights can be substantive (e.g., the right to freedom of expression) or procedural (e.g., the right to judicial protection). Individual rights need not follow a specific terminology or form, nor must they share a specific normative or philosophical underpinning.[34] The key idea behind individual rights, which is the only relevant aspect at this point, is that

[32] I borrow the term "power mediator" from Christian Reus-Smit, *Individual Rights and the Making of the International System* (Cambridge University Press 2013) 196.

[33] For a historical functionalist conceptualization of individual rights as mechanism in the incremental construction of sovereignty see ibid 36 et seq.

[34] Of course, in Europe and North America individual rights share common historical and philosophical contexts. These contexts are, among other things, the emancipation of politics from the Church and the ascent of Westphalian sovereignty, Enlightenment, and the rise of individualism. Yet, the practice of individual rights widely diversified throughout space and time.

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they provide the basis for normative claims formulated by individuals to structure their relationship with a powerful actor. In this sense, rights are solely a functional category. They are "usefully understood as power mediators, as normative [practices] that materially weak actors can invoke to alter the power relationship between themselves and materially preponderant actors or institutions (empires, sovereign states, etc.)."[35] That could entail, for example, claims that a powerful actor must not curtail personal liberties or take property without due process, cannot discriminate based on gender or race, or is prohibited from constraining intra-European trade for protectionist reasons.

Equalizing these power relations by exercising individual rights inevitably *individualizes* said relationships because it shifts the focus from underlying, structural factors to the exercise of power vis-à-vis individual rights holders. This aspect of individualization simultaneously constitutes individual rights' main advantage and impediment. On the one hand, individual rights grant far-reaching agency to individuals, allowing them to challenge the exercise of power and thereby to act as agents for the common good.[36] On the other hand, many rights violations occur arguably not as individual transgressions but reflect more deeply underlying issues relating to embedded structures, habits, procedures, and policies. Salvaging those structural issues requires proactive reforms that regularly go beyond vindication of individual legal guarantees.

2.2.2 *Enforcement and Adjudication*

Individual rights require an enforcement mechanism. Only if enforced, individual rights function as "power mediators." Various enforcement mechanisms exist. Every individual can verbalize a claim, directly or implicitly referencing that they believe a *right* corroborates their normative position. Sometimes, the power structure might respond to such voice and voluntarily subject itself to cogently formulated arguments.[37] However, that is not always the case. Therefore, many "guardians" of (public) power exist. We are familiar with various accountability mechanisms, procedures, and entities that hold to account large power structures, especially entities embodying public power. We may distinguish

[35] Reus-Smit (n 32) 38.

[36] Highlighting the "massification" of individual rights adjudication: Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press 1989) 268–274.

[37] Albert O Hirschman, Exit, *Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press 1970).

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ex-ante influence exercised via participatory mechanisms[38] from continuous oversight and scrutiny by elected representatives,[39] auditors,[40] ombudspersons,[41] the public,[42] or the press. Further, many administrative organizations feature individually accessible, internal though not independent review mechanisms.

However, one of the oldest, most institutionalized and revered practices for enforcing individual rights vis-à-vis administrative power is *adjudication*. Adjudication is characterized here as independent, norm-based dispute settlement between an individual and a power structure. "Adjudicator" refers to the independent entity that resolves the dispute and thereby exerts control over the power structure.

Depending on time and context, adjudication is formalized and institutionalized in various shapes and with diverse labels. The most prominent term for adjudicators is the "court" label.[43] But there are other names as well. Adjudicators controlling administrative power might be called (administrative) tribunals,[44] administrative courts,[45]

[38] Articles 10, 11 TFEU.

[39] Highlighting the role of parliamentary accountability in English administrative law: Matthias Ruffert, *Law of Administrative Organization of the EU: A Comparative Approach* (Edward Elgar 2020) 140 et seq.

[40] Alex Brenninkmeijer, Laura Frederika Lalikova and Dylan Siry, 'Public Audit Accountability' in Peter Cane and others (eds,), *The Oxford Handbook of Comparative Administrative Law* (Oxford University Press 2020) 789.

[41] cf. Michał Krajewski, *Relative Authority of Judicial and Extra-Judicial Review: EU Courts, Boards of Appeal, Ombudsman* (Hart 2021) 139 et seq; Herwig Hofmann and Jacques Ziller (eds.), *Accountability in the EU: The Role of the European Ombudsman* (Edward Elgar 2017).

[42] Public pressure can influence governance in many ways. A widely used mechanism with, however, volatile efficacy is so-called "naming and shaming," see further Emilie M Hafner-Burton, 'Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem' (2008) 62 International Organization 289.

[43] For the institutionalization of courts in various political systems throughout history see: Shapiro, *Courts, a Comparative and Political Analysis* (n 10). For the ascent of courts as controllers of public power see Peter Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press 2016) 325 et seq.

[44] Peter Cane, *Administrative Tribunals and Adjudication* (Hart 2010); Kieran Bradley, 'Tribunals and Adjudication' in Peter Cane, Herwig C Hofmann, Eric C Ip, Peter L Lindseth (eds.), *The Oxford Handbook of Comparative Administrative Law* (Oxford University Press 2020); Lewis Mayers, *The American Legal System: The Administration of Justice in the United States by Judicial, Administrative, Military, and Arbitral Tribunals* (Rothman 1981); James E Pfander, 'Article I Tribunals, Article III Courts, and the Judicial Power of the United States' (2004) 118 Harvard Law Review 643; Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (Cambridge University Press 2006).

[45] Christine Steinbeiß-Winkelmann, '§ 4 Formen Der Verwaltungsgerichtsbarkeit Auf Reichsebene' in Karl-Peter Sommermann and Bert Schaffarzik (eds.), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019).

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commissions,[46] boards,[47] or committees.[48] Adjudication as a control mechanism of rule enforcement and rulemaking exists on the international level,[49] in the EU,[50] and within any rule of law system. Generally speaking, adjudication occupies a special place on the cusp of our sociocultural imaginary of taming the sovereign, advancing the rule of law, and making the putatively "liberal" political project a reality. Over time, adjudicators have also devised strategies for moving beyond individualized vindication of rights and aim at ameliorating those structural governance problems that give rise to individual rights violations in the first place.[51] Yet remedying structural governance flaws inductively by adjudicating individual rights remains complicated for several reasons – accessibility, adjudicative expertise when it comes

[46] Hiroshi Okayama, *Judicializing the Administrative State: The Rise of the Independent Regulatory Commissions in the United States, 1883–1937* (Routledge 2021) 39 et seq.

[47] With a comprehensive empirical analysis of the (dysfunctional) review exercised by the Board of Immigration Appeals in the US: David Hausman, 'The Failure of Immigration Appeals' (2016) 164 University of Pennsylvania Law Review 1177.

[48] Questionable prominence achieved the Greek Asylum Appeal Committees, which decide appeals by asylum seekers against deportation based on the so-called "EU-Turkey Deal." See Mariana Gkliati, 'The EU-Turkey Deal and the Safe Third Country Concept before the Greek Asylum Appeals Committees' (2017) 3 movements 213.

[49] See Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15, 39 et seq; Karen J Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014) 199 et seq; focusing mostly on internal adjudication: Armin von Bogdandy and Ingo Venzke, *In wessen Namen? Internationale Gerichte in Zeiten globalen Regierens* (Suhrkamp 2014) 107 et seq; but more general at 283.

[50] In EU law, the normative anchor point is Article 47 CFR, see Volker Roeben, 'Judicial Protection as the Meta-Norm in the EU Judicial Architecture' (2020) 12 Hague Journal on the Rule of Law 29; and Anthony Arnull, 'The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?' (2011) 36 European Law Review 51. In contrast, the emergence of adjudication beyond formal judicial institutions since the 1990s presents a so far unresolved conceptual challenge to EU law, cf. Jacopo Alberti, 'The Position of Boards of Appeal: Between Functional Continuity and Independence' in Merijn Chamon and Mariolina Eliantonio (eds.), *Boards of Appeal of EU Agencies* (Oxford University Press 2022) 245 et seq; Marco Lamandini and David Ramos Muñoz, 'Law and Practice of Financial Appeal Bodies (ESAs' Board of Appeal, SRB Appeal Panel): A View from the Inside' [2020] Common Market Law Review 119, 120; in contrast, see Krämer's convincing functional perspective: Hannes Krämer, *Rechtsschutz im EG-Eigenverwaltungsrecht zwischen Einheitlichkeit und sektorieller Ausdifferenzierung: eine Untersuchung unter besonderer Berücksichtigung des Gemeinschaftsmarkenrechts* (Duncker & Humblot 2007) 90–93.

[51] Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 Harvard Law Review 1281; Judith Resnik, 'Managerial Judges' (1982) 96 Harvard Law Review 374; from a constitutional law perspective see: Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford University Press 2002); Alec Stone Sweet, 'Judicialization and the Construction of Governance' (1999) 42 Comparative Political Studies 147.

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to administrative practices, and advisable adjudicative restraint due to the notion of tripartite government.

Demands for, and the affirming of, the practice of adjudicatory control of administrative power are not limited to traditional administrative contexts. In modified form, adjudication that seeks to protect individuals from dominant power structures exists in various governance frameworks. For example, the UN Guiding Principles on Business and Human Rights oblige private power structures to be subject to public judicial and administrative review mechanisms and encourage businesses to make use, if necessary, of independent review mechanisms. Referring to the entire range of administrative or administration-like[52] actors, Kingsbury, Stewart, and Krisch noted,

> administrative infringement of individual rights ... generally requires ... the possibility of review by an independent body. Under such an approach, it is presumed to be irrelevant who interferes with rights: whether it is a domestic regulator, or an international administrative body does not matter.[53]

In sum, practice and theory have yielded idealized and widely diffused concepts of adjudication that build on and structure adjudicators, which again are much more diverse than purported by idealized notions. Further, many scholars, practitioners, and discourses identify adjudicative control of power as something we aspire to and desire.

2.2.3 *Disputes and Power Relations*

The ignition spark of adjudication is a dispute or, in other words, the desire to control an adverse, potentially dominant power structure.[54] Regularly,

[52] Note that the term "administration" is here not understood in the US American way, where it is sometimes used synonymously with (federal) government.

[53] Kingsbury, Krisch and Stewart (n 49) 46.

[54] The functions of adjudication – resolving disputes and controlling power – are deeply interconnected. However, domestic conceptions of these functions vary significantly. In Germany, for instance, a "dispute" (*Rechtsstreit*) arises only when individuals bring a case to court, whereas interactions between individuals and administrative actors are typically not framed as disputes. Moreover, the adjudicative control of administrative power in Germany is often viewed primarily as serving individual interests, rooted in the concept of the "subjektives Recht" (*subjective right, i.e. a litigable individualized legal position*) rather than addressing broader societal concerns or power control.

In contrast, the United States embraces a broader understanding of "dispute" – and of adversarial proceedings more generally – encompassing many forms of administrative adjudication. Even first-order decision-making can appear as a "dispute," as in the trial-like proceedings of individual claims before an administrative law judge. At the same time, ex post adjudicative control of administrative power in the US is widely understood as serving the public interest and contributing to societal oversight.

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the dispute concerns some form of prior exchange, act, or communication. Further, an individual's desire to "control" a potentially adverse, dominant power structure. If there is no such desire, then there is no dispute, and consequently no need for adjudication. The disputes discussed in this book arise as a result of power imbalances, namely between individuals and social media platforms' content moderation policies.[55] The disputes concern how social media platforms unilaterally regulate and police the communication of their users. As this chapter explains in greater detail in Section 2.3, people often have little possibility to exit the platforms due to network effects and generally have no say in the rules applied to them.[56]

2.2.4 *Impartiality and Independence*

To settle disagreements about the exercise of power that cannot be resolved directly between the individual and the power structure, the individual might turn to a third party.[57] That third party, the adjudicator, provides the forum for effectuating individual rights as "power mediators."[58] Or, in Alex Stone Sweet's more abstract formulation,

For context see Johannes Buchheim and Christoph Möllers, '§ 46 Gerichtliche Verwaltungskontrollen als Steuerungsinstrument' in Andreas Voßkuhle, Martin Eifert and Christoph Möllers (eds.), *Grundlagen des Verwaltungsrechts*, vol II (3rd ed., Beck 2022) paras 9–15, 38–44 (esp. 41, 42a); for the broad US American understanding of "disputes" see again Michael Asimov, 'Five Models of Administrative Adjudication' (2015) 63 The American Journal of Comparative Law 3, 4.

[55] For a useful introduction to the phenomena "platform" and "content moderation" see: Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* (Yale University Press 2019); Cohen (n 27) 98 et seq; Kate Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech' (2018) 131 Harvard Law Review 1598; Evelyn Douek, 'Content Moderation as Systems Thinking' (2022) 136 Harvard Law Review 526, 539 et seq.

[56] Regarding the structure of digital (platform) markets and platforms' network effects see Stigler Center for the Study of the Economy and the State (University of Chicago), 'Stigler Committee on Digital Platforms Final Report' (2019) 7 et seq, 34–43 (esp. 38–39).

Individuals' lack of "voice" in platform rulemaking was criticized repeatedly, see e.g. Rebecca MacKinnon, *Consent of the Networked: The Worldwide Struggle for Internet Freedom* (Basic Books 2012) 12–14; Zuboff (n 22) 83; Nicolas P Suzor, 'Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms' (2018) 4 Social Media + Society 1, 5–8; 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>.

[57] For a theorization of triadic dispute resolution in general see Stone Sweet (n 51) 149, 153–155.

[58] For a private law-oriented theorization of courts dispute-resolvers in triadic situations see Shapiro, *Courts, a Comparative and Political Analysis* (n 10). See further Cappelletti (n 36) 217–222. For the conception of individual rights as "power mediators" see Reus-Smit (n 35).

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a dyadic relationship between two parties transforms into a triad consisting of two parties and an adjudicator.[59]

To fulfill its umpire-like[60] role in the triad, an adjudicator must be *impartial* toward the parties and hence cannot be a "part" of either disputant. Typically, that separation between the impartial third party and the disputing parties is conceived of as *independence*.

The relationship between impartiality and independence is not entirely intuitive. Whereas we might use the two concepts interchangeably in common parlance, they denote different aspects of adjudication. Independence denotes a predominantly *organizational* and *external* criterion whereas impartiality refers to a mainly *functional* and *internal* one. For example, in its decisions on Polish judicial "reforms," the European Court of Justice (ECJ)'s judges interpreted impartiality as an adjudicator's fair-mindedness and objectivity.[61] Adjudicators are therefore impartial if their staff make decisions uninfluenced by considerations other than those based on the relevant norms. In this idealized view, (adjudicatory) impartiality is clearly a myth. Implicit norm-derived sentiments are so embedded in our thinking, language, and informational landscape that "truly" impartial decision-making seems impossible.[62] A pragmatic solution, therefore,

[59] Stone Sweet (n 51) 149.

[60] Simon Palmer and Michael Roberts conceptualize this third-party role as umpiring – in contrast to mediation (which does not result in decisions). In historical context, such umpires could be either private arbitrators, or public and religious courts. For the control of administrative power however, adjudication remained a largely public endeavor. See Michael JE Palmer and Simon Roberts, *Dispute Processes: ADR and Primary Forms of Decision-Making* (2nd ed., Cambridge University Press 2005) (building on Shapiro) 221–223, 264–266.

[61] Commission v Poland (Indépendance de la Cour suprême), Judgment European Court of Justice C-619/18, ECLI:EU:C:2019:531 [73–74].

[62] Impartial decision-making can be conceptualized as a specific rationality. However, as psychological and sociological research shows, humans have difficulties following through on such binary rationalities due to internal, often subconscious "biases," competing rationalities and other factors. See the work of Daniel Kahneman and Amos Tversky, summarized in Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux 2011). See for a critical legal studies perspective discussing the 'indeterminacy' of judging Jules L Coleman and Brian Leiter, 'Determinacy, Objectivity, and Authority' (1993) 142 University of Pennsylvania Law Review 549, 559 et seq.

Implicit biases' relevance for (criminal) adjudication is empirically well documented, especially in racialized contexts. For example, Rachlinski et al. find that judges hold implicit biases that influence their judgment. However, "[j]udges can, at least in some instances, compensate for their implicit biases": Jeffrey J Rachlinski, Sheri Johnson, Andrew J Wistrich and Chris Guthrie 'Does Unconscious Racial Bias Affect Trial Judges?' (2009) 84 Notre Dame Law Review 1195, 1197; see further: Justin D Levinson, Mark W Bennett and Koichi Hioki, 'Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes' (2017) 69 Florida Law Review 63, 70 et seq, 82 et seq, 110 et seq.

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is to confine elements and influences that might unduly affect decision-making and at least maintain the impression of a decision's impartiality and safeguard its norm-based verifiability through normative reasoning, which ties adjudication to the existing normative backdrop.

In turn, *independence* can be seen as the adjudicating organization's autonomy from outside pressure or factual constraint.[63] In other words, independence is the organizational and somewhat objectifiable means toward the goal of impartial decision-making.[64] Contemporary discussions mainly revolve around these organizational aspects, summarized as judicial independence.[65] On the most fundamental level, independence demands that adjudicators be free from any external command, hierarchy, or intervention. As the ECJ formulates it:

> The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.[66]

[63] Commission v Poland (Indépendance de la Cour suprême), Judgment (n 61) paras 77, 108; Associação Sindical dos Juízes Portugueses v Tribunal de Contas [2018] European Court of Justice (Grand Chamber) C-64/16, ECLI:EU:C:2018:117 [43–45].

[64] In that sense see also Vauchez' conceptualization of independence as a "technique that allows one to insulate decision-making from the pressure of partisan politics," Antoine Vauchez, 'The Genie of Independence and the European Bottle: How Independence Became Europe's Most Contentious Legal and Political Category' (2022) 20 International Journal of Constitutional Law 1, 4.

[65] That goes for the UN level, the Venice Commission, and the European Union. For example, since 1994, the United Nations entertain a Special Rapporteur on the Independence of Judges and Lawyers. See further the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985.

See further: European Commission for Democracy through Law (Venice Commission), 'Report on the Independence of the Judicial System Part I: The Independence of Judges' (2010) Study No. 494/2008; CDL-AD(2010)004.

In the EU, see recently Associação Sindical dos Juízes Portugueses v Tribunal de Contas (n 63) paras 43–52; Commission v Poland (Indépendance de la Cour suprême), Judgment (n 61) paras 71–97, 108–124. In that context, see e.g. Krista Kovács and Kim Lane Scheppele, 'The Fragility of an Independent Judiciary: Lessons from Hungary and Poland – and the European Union' (2018) 51 Journal of Communist and Post-Communist Studies 189; Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3, 9 et seq.

[66] Associação Sindical dos Juízes Portugueses v Tribunal de Contas (n 63) para 44; Commission v Poland (Indépendance de la Cour suprême), Judgment (n 61) para 74.

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Although its precise contours vary, independence requires a guarantee that there are independently derived, specified procedures for appointment and nomination, fixed tenure and remuneration of the adjudicating personnel, removal for cause only, a preset budget and, crucially, no encroachment on the power structures an adjudicator is tasked with controlling.[67]

Yet from a historical perspective, adjudication's foundational criterion is impartiality, not independence. Adjudication of private disputes (but to a degree also for disputes between individuals and the organized and powerful, yet private nobility)[68] predates independent judiciaries in the modern sense. Also, as various judicial institutions in the Catholic Church or imperial China indicate, courts as institutions are not limited to constitutional power structures in liberal democracies.[69] That being said, adjudicating individual rights against a given context's dominant power structure, instead of merely smoothing over social and commercial disputes, remains largely exclusive to the liberal project. Individual rights adjudication, in that sense, reflexively relates to the very emergence of modern public law itself.[70] Even though, as Mauro Cappelletti highlights, "nobody would deny that even at the time of the absolute state . . . there

[67] For an overview of the relevant legal standards in Europe see European Commission for Democracy through Law (Venice Commission) (n 65) 5–17. See further, highlighting the importance of remuneration, tenure and removal only for cause, absence of hierarchical command or other undue influence, and budget, Associação Sindical dos Juízes Portugueses v Tribunal de Contas (n 63) paras 43–52; Commission v Poland (Indépendance de la Cour suprême), Judgment (n 61) 71–97.

From an American perspective see Kaufman's historical contextualization of judicial independence in England and the United States, Irving R Kaufman, 'The Essence of Judicial Independence' (1980) 80 Columbia Law Review 671, 672 et seq, resp. 679 et seq.

[68] cf. Rita Sailer, *Untertanenprozesse vor dem Reichskammergericht: Rechtsschutz gegen die Obrigkeit in der zweiten Hälfte des 18. Jahrhunderts* (Hochschulschrift Universität Freiburg i. Br. 1999).

[69] Especially Mauro Cappelletti, referring to private-law disputes, highlighted that adjudication and judicial decision-making is not at all limited to "independent" judiciaries but can be found also in absolutist, unitarian regimes. There "[t]he ruler, in person or through his officers, was from time to time the legislator, the administrator, and the judge. He functioned as judge when he settled his subjects' disputes, condemning, absolving, and, in sum, adjudicating as an imperial organ super partes." Cappelletti (n 36) 218. See in that sense also Kaufman's historic contextualization of the American understanding of judicial independence that developed out of an English judiciary whose history "is largely that of an institution dependent upon and deferential to the King or Parliament," Kaufman (n 67) 672; see further regarding imperial China Shapiro, *Courts, a Comparative and Political Analysis* (n 10) 157 et seq.

[70] See Martin Loughlin's insightful genealogy how medieval "fundamental law" discursively morphed into modern "public law" (which should be understood more broadly than as mere positive-legal counterpart to private law): Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010).

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were nevertheless judicial decisions,"[71] absolutist adjudication's liberty-impairing and erratic nature ended up necessitating and enabling an independent judiciary and individual rights adjudication.[72] Using individual rights as power mediators requires disentangling the accountability mechanism from the encroaching power structure. Metaphorically put, a leash is no use if nobody is holding it.

The degree and design of independence remain contingent on each adjudicator's organizational setup.[73] As Cappelletti says, "[T]here exist, of course, thousands of definitions of the terms 'court,' 'judge' and 'judicial,' and no one who has a comparativist's mind would insist on any of them as absolute."[74] The focus on an independent judiciary permeated through Europe and the United States after the American and French revolutions and the ensuing adoption of the principle of tripartite government.[75] As a means of controlling public power in general as well as the burgeoning forms of administrative power, judicial independence stabilized external accountability but also created frictions between idealized notions and practice. Debates are legion, from the much discussed "counter-majoritarian difficulty" to courts' legitimacy and practical ability to control the expanding administrative state's "independent" agencies and informal acts.[76] The control of administrative power by adjudicating individual rights is never detached from public power or, in the case of administrative

[71] Cappelletti (n 36) 218.
[72] cf. Montesquieu, *The Spirit of Laws* (1748) XI.6.
[73] Shapiro, *Courts: A Comparative and Political Analysis* (n 10).
[74] Cappelletti (n 36) 217.
[75] Practical foundations of judicial independence originate especially from England. The Magna Carta of 1215 exempted barons from the Crown's jurisdiction (Clause 21 Magna Carta 1215). Later, after repeated influence by the Crown over judges in the seventeenth century, the 1701 Act of Settlement guaranteed judges *quamdiu se bene gesserint*, i.e., tenure and removal only for cause. Based on these English experiences, Montesquieu theorized in his 1748 *l'esprit des lois* that "there is no liberty, if the judicial power be not separated from the legislative and executive," Montesquieu, *The Spirit of Laws* (1748) XI.6. Montesquieu's theorization then influenced the drafters of the American constitution, whose first three Articles sharply distinguish the federal government's three branches. Consequentially, Alexander Hamilton highlighted that "[t]he complete independence of the courts of justice is peculiarly essential" in the new constitutional system, Hamilton, 'Federalist No. 78' (28 May 1788).
[76] From the vast literature see, for example, regarding the counter-majoritarian difficulty: Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed., Yale University Press 1986) 16–28; for the interplay of courts and agencies in the US: Martin Shapiro, 'APA: Past, Present, Future' (1986) 72 Virginia Law Review 447, 455; for the EU: Mariolina Eliantonio, 'Judicial Review in an Integrated Administration: The Case of "Composite Procedures"' (2015) 7 Review of European Administrative Law 65.

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adjudicators, not even independent of administrative power structures.[77] In these contexts, adjudication was *itself* an exercise of public power.

To reconcile impartial and independent adjudication with the practical need to finance, staff, and (democratically) legitimize[78] adjudicators, public-law adjudicators developed various, graded stages of adjudicatory independence. Courts and the judiciary are not the sole torchbearers of the judicial function. Rather, many systems such as those of the European Union, the United States or England are familiar with sites of "administrative justice" revolving around adjudicators that are not courts.[79] These adjudicators often lack the same independence safeguards as those enjoyed by "classic" courts.[80] But such non-court adjudicators are, as a result of their respective legal and political systems' peculiarities, endowed with "sufficient" independence safeguards.[81] For example, members of EU Boards of Appeal also have fixed tenure, can only be removed for cause, are not entrenched in "their" agency's hierarchical apparatus, and are required to make decisions independently and impartially.[82] Particularly for adjudicators that

[77] See generally Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2013).

[78] cf. ibid 51 et seq.

[79] See the literature cited in n 44.

[80] See e.g., Moliterno's theorization of administrative law judges as impartial but not independent in a judicial sense. Note, however, that Moliterno refers to the American system only and consequentially employs the broad American understanding of adjudication as both the initial decision and appeals, James E Moliterno, 'The Administrative Judiciary's Independence Myth' (2006) 41 Wake Forest Law Review 1191, 1211 et seq.

[81] For the United States see William Baude, 'Adjudication Outside Article III' (2020) 133 Harvard Law Review 1511, 1515 et seq.

[82] Boards of Appeal are, in principle, equipped with robust institutional and normative safeguards to ensure their independence. This is why the four oldest Boards of Appeal were established as mandatory first-instance review bodies before annulment actions could be brought before the General Court. Article 58a (1) of the CJEU Statute explicitly refers to an "independent board of appeal." Nevertheless, scholarly evaluations of the independence of Boards of Appeal – particularly those beyond these four – often grapple with the tension between their safeguards and the ideal of "pure" judicial independence. See e.g., the diverging perspectives by, on the one hand, Chamon and Frommage and, on the other hand, Tovo on whether Boards of Appeal should be understood as "independent," Merijn Chamon and Diane Fromage, 'Between Added Value and Untapped Potential: The Boards of Appeal in the Field of EU Financial Regulation' in Merijn Chamon, Annalisa Volpato and Mariolina Eliantonio (eds.), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Oxford University Press 2022) 13; Carlo Tovo, 'The Boards of Appeal of Networked Services Agencies: Specialized Arbitrators of Transnational Regulatory Conflicts?' in ibid 36–40. Others argue that Boards of Appeals can be conceptualized as functional courts. From a German administrative law perspective, that argument indeed makes sense as in Germany, in contrast to the UK or the US, the judicial function in administrative matters is indeed largely restricted to administrative courts, cf. Krämer (n 50) 90–93.

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provide accountability to administrative power structures, tensions between impartial decision-making, organizational independence, and structural entrenchment are a necessary side effect of the diffusion of judicial functions beyond the traditional judicial system.[83] Assessing an adjudicator's independence thus remains necessarily context-sensitive and flexible.

2.2.5 *Rules*

Once an individual who seeks to protect their rights has turned to an impartial and independent adjudicator, the adjudicator cannot decide at whim but only based on a particular normative framework.[84] This normative framework must meet several requirements. On the one hand, it should be *preset*. This means that rules should not be made ad hoc but should reflect the relationship between the individual and the power structure as it was when the alleged rights-infringement took place. The preset rules upon which the adjudicator bases its decisions can be of various origins; typically, they will be the law of a given state, public organization, or stipulations contained in international law. Further, it is crucial that the rules are – at least in part – *external* to the controlled entity. For example, adjudicators control whether administrative agencies comply with external provisions like the EU treaties, the US Constitution, the agency's founding regulation, or the relevant act of Congress. The adjudicator then applies the facts of the case, in terms of how the power structure exercised its power, to the normative material at hand – that is, the law regulating the agent's powers – and then decides whether the agent's acts conform with this normative material or not.

If the normative material violates higher-ranking rules, individual rights adjudication may also include reviewing the normative material itself. For example, if the adjudicator considers statutory provisions to conflict with constitutional requirements, depending on its authority, the adjudicator might declare the lower-level rules void or inapplicable. However, whereas reviewing rule enforcement is the bread and butter of individual rights adjudication, reviewing rulemaking is a more complex endeavor.

[83] See, for example, tensions about Administrative Law Judge's endangered decisional independence by reforms of their nomination process under the Trump administration, Jennifer Nou, 'Dismissing Decisional Independence Suits' (2019) 86 University of Chicago Law Review 1187.

[84] cf. Christoph Möllers, *Gewaltengliederung: Legitimation und Dogmatik im nationalen und internationalen Rechtsvergleich* (Mohr Siebeck 2005) 95 et seq.

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2.2.6 Outcomes

When an individual goes to an adjudicator to enforce their rights and control power, adjudication may yield several outcomes. The stereotypical outcome of adjudication – especially if conceptualized mainly as a dispute – is a *decision*. A decision assesses the normative material and typically orders the losing party to commit or omit a certain act. For example, a court may decide that an agency's approval for specific medication did not follow the required procedural steps and violated the relevant normative material. The court would then annul said approval and perhaps order the agency to examine the approval again, following all the necessary procedural steps. Thus, the role of individual rights adjudication is typically to review and control decisions made by (administrative) actors – and not to make a new "administrative" decision.

In a historical context, an adjudicator's decision is typically legally *binding* for both parties, especially the public agent. In constitutional democracies, public power is conditioned by the rule of law. In fact, the ability to make legally binding decisions constitutes perhaps *the* crucial feature distinguishing adjudicators who really *control* public power, like courts, from other more marginal guardians that provide more circumscribed services like mediation, arbitration, expert review, or transparency.[85]

However, from a functional perspective, we should not overemphasize the importance of a decision's legally binding nature, because the efficacy of legally binding decisions is conditioned by the degree to which the controlled actor abides by the rule of law. Reversing this formulation, legally binding decisions are only effective in rule of law systems whereas less stable, novel, and still emerging normative systems require other mechanisms to safeguard a decision's real-world effectiveness.

Even within stable rule of law systems, adjudicators use a variety of instruments to control organizational behavior. Binding decisions are an important instrument, but by no means the only one. As argued above, disputes about individual rights often merely reflect more deeply rooted governance problems. Such problems could manifest as recurring patterns or institutionalized structures within an organization that inevitably and persistently produce individual rights violations. We can identify various examples whereby adjudicators addressed deeper organizational patterns that had led to various kinds of individual rights violations. Among the

[85] Shapiro, *Courts: A Comparative and Political Analysis* (n 10) 8 passim.

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most notable are racial bias within police departments,[86] administrative inadequacies leading to "systemic deficiencies" in EU Member States' asylum systems,[87] or the lack of political will to take measures necessary for meeting carbon reduction targets.[88] In such cases, judges often act in ways that are "forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees."[89] This is because correcting structurally flawed patterns within a powerful organization, especially administrative ones, is ultimately "not a dispute between private individuals about private rights, but a grievance about the operation of public policy."[90] Remedying structural patterns or, in Abram Chayes' words, to "operate public policy," adjudicators resort to flexible, more forward-looking remedial approaches. These can be more effective than singular, backward-looking, but binding decisions. In all the abovementioned cases – despite their variety – the adjudicator outlined future handrails for the controlled organization that would remedy the underlying governance issue. In *COPPAR v Rizzo*, an example I borrow from Chayes, a District Court required a police department to "submit ... a comprehensive program for dealing adequately with civilian complaints alleging police misconduct."[91] Such a program should, for example, safeguard "[a]ppropriate revision of police manuals and rules of procedure spelling out in some detail, in simple language, the 'dos and don'ts' of permissible conduct in dealing with civilians."[92] In *N.S.*, the ECJ described how a Member State could assess whether "systemic deficiencies" imbue the asylum procedures in another Member State, namely by resorting to "regular and unanimous reports of international non-governmental organizations bearing witness to the practical difficulties in the implementation

[86] COPPAR v Rizzo District Court, 357 F. Supp. 1289 (E.D. Pa. 1973), add'd sub nom. Goode v Rizzo, 506 F.2d 542 (3rd Cir. 1974), rev'd, 96 S. Ct. 598 (1976); see esp. the remarks in Chayes (n 51) 1305–1309; see further Rizzo v Goode, US Supreme Court 96 S. Ct. 598 (1976).

Adjudication's track record of tackling such structural problems is ambivalent. In the abovementioned case, the US Supreme Court overturned the District Court's decision with questionable factual assessments. Further, cases raising concerns of structural maltreatment of persons of color by police departments are by no means a US American particularity, cf. Oury Jalloh, Bundesgerichtshof 4 StR 473/13; Basu v Germany, European Court of Human Rights [215/19], 18 January 2023 paras 31–39.

[87] NS [2011] European Court of Justice (Grand Chamber) C-411/10, ECLI:EU:C:2011:865.

[88] Klimabeschluss, Federal Constitutional Court (Bundesverfassungsgericht) 1 BvR 2656/18.

[89] Chayes (n 51) 1302.

[90] Ibid.

[91] COPPAR v Rizzo (n 86) 1321.

[92] Ibid.

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of the Common European Asylum System."[93] The Bundesverfassungsgericht (Germany's constitutional court) ordered the German legislator (!) to ramp up its carbon reduction plans "according to the guidelines [*Maßgaben*]" formulated by the Bundesverfassungsgericht.[94]

Taking a normative perspective on the separation of functions, adjudicatory review of the deeper flaws of power structures seems intuitively more contentious than superficial remedies of individual rights violations.[95] However, drawing the line between "effective" adjudication that tackles the root of governance problems on the one hand and misguided adjudicatory creep into the realm of policymaking on the other requires fine-tuned measuring instead of principled simplifying.[96] Adjudicatory efficacy depends on an adjudicator's authority within its legal system, the applicable normative framework, and other control tools at hand.[97] Hence, a clear-cut, generalizable normative solution as to what exactly constitutes effective judicial protection arguably does not – and cannot – exist.

For the purposes of this book, we can conclude that adjudicators use various tools to exercise control over large scale organizations, ranging from binary, binding decisions to open-ended, flexible recommendations, which are of course reinforced by most adjudicators' *ability* to issue binding decisions in cases of noncompliance. Therefore, to ensure that adjudicators' influence over structural reforms at large organizations can be properly wielded, binding decision-making powers serve as a sword of Damocles lending weight to non-binding normative sentences issued by the adjudicator.

2.2.7 *Appellate Review*

As we are jumping back and forth between Europe and the United States, another terminological note seems warranted. The term "adjudication" has different connotations in England (and most other countries that

[93] NS (n 87) paras 90–91 (the ECJ formulates less directly but makes it clear nonetheless what sources Member States should consult to assess systemic deficiencies in other Member States).

[94] Klimabeschluss (n 88) para 268.

[95] See concretely Chayes (n 51) 1313–1316.

[96] Famously: Abweichende Meinung der Richterin Lübbe-Wolff zum Beschluss des Zweiten Senats vom 14 Januar 2014 [2014] Bundesverfassungsgericht 2 BvR 2728/13, BVerfGE 134/366.

[97] For the relevance of narratives in judgments see recently Freya Schramm, 'Judges as Narrators of the Climate Crisis? An Illustrative Analysis of the Decision of the German Constitutional Court from 24 March 2021' (2022) 7 European Papers 361.

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follow common law) than in the United States.[98] In England,[99] adjudication refers to third party appellate review of administrative decisions.[100] In contrast, in US parlance, adjudication broadly refers to independent decision-making related to administrative decisions as well as to their appellate review by a third party.[101] This broader American concept of adjudication reflects the US's Administrative Procedure Act of 1946, which applies adjudicating as an umbrella term for various types of administrative decision-making.[102]

Here, our concern is with the ex-post control of platforms' administration-like rulemaking and, especially, rule enforcement. Thus, we use the narrower understanding of adjudication as appellate review as this is more common, especially in England and many of its former colonial areas (such as Canada or Australia).

2.3 Platforms as Administrators

Above, I introduced individual rights adjudication as a mechanism to control power. But how should we understand the power of social media companies, which are ultimately the power structures the here studied Emulated Guardians shall provide accountability for?

Historically, individual rights adjudication resolves disputes regarding the exercise of *public* power by a large power structure, for example, an administrative actor vis-à-vis an individual. In our context, the EU's

[98] Prompting Jeffrey Lubbers to call the US Model "the outlier," Jeffrey S Lubbers, 'Administrative Adjudication: The United States Is the Outlier' in Marc Hertogh and others (eds.), *The Oxford Handbook of Administrative Justice* (Oxford University Press 2022) 45.

[99] I refer to England and not the United Kingdom in general as there are (considerable) differences in the English, Welsh (between these two not so much), Scottish, and Northern Irish legal subsystems within the UK.

[100] Cane (n 43) 325–326.

[101] Arguably, the historical context of the broader US American understanding is that, in the US, many first-instance decisions are made by independent officers (so-called administrative law judges) who are not subject to hierarchical command. From a functional perspective, "judicializing" already the first-instance decision emphasizes the various ways in which organizations can reinterpret the separation of functions. See the comprehensive historical study by Jerry L Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (Yale University Press 2012) esp. 251 et seq. See further Okayama (n 46) 10 et seq; Lubbers (n 98) 49 et seq; Jeffrey S Lubbers, 'Federal Administrative Law Judges: A Focus on Our Invisible Judiciary' (1981) 33 Administrative Law Review 109, 110–112.

[102] Adjudicating is here understood as the administrative process to formulate an order (in contrast to rulemaking), cf. 5 US Code Subchapter II §§ 551(7), 554–558.

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out-of-court dispute settlement bodies and Meta's Oversight Board emulate individual rights adjudication to resolve disputes about how a *private* power structure exercises its rulemaking and rule enforcement power vis-à-vis individuals. These private power structures are social media platforms. Social media platforms make and enforce rules concerning individual and social communication and thereby affect, as mediating entities, how individuals exercise their public rights, especially freedom of expression. Vice versa, regulating how individuals exercise their freedom of expression reflexively affects how political communities engage in societal, political, economic, and cultural discourse. Thus, social media platforms' private exercise of power can be viewed as affecting the public rights of individuals and the public interest of democratic societies. These *private* power structures then become de facto administrators.

This section therefore further develops – along prior work – the analytical toolkit and normative effects of understanding social media platforms as administrators.[103] This is, I believe, particularly important given current debates in the United States and particularly in Europe, which champion a predominantly constitutional law perspective on platform power.[104] However, as I will outline below, administrative law – alongside the broader sociological and economic studies of bureaucracy and organization theory – provides sharper analytical tools and more effective prescriptive solutions.

2.3.1 Constitutional or Administrative?

It is by now a truism that some of these digital corporations – or whatever comes after them – became so pervasive, inescapable, and powerful that

[103] Moritz Schramm, 'Platform Administrative Law: A Research Agenda' (SSRN, 24 July 2024) <https://perma.cc/JH2A-8ZW2>; Moritz Schramm, 'Averting Zombie Mode: Learning from (the Critique of) Global Constitutionalism for Digital Constitutionalism' in Giovanni De Gregorio, Oreste Pollicino and Peggy Valcke (eds.), *Oxford Handbook on Digital Constitutionalism* (Oxford University Press 2025).

[104] See from the broad field of "Digital Constitutionalism" esp. Andrea Simoncini, *The Constitutional Dimension of the Internet – Some Research Paths, EUI Working Papers LAW 2016/15* (2016); Dennis Redeker, Lex Gill and Urs Gasser, 'Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights' (2018) 80 International Communication Gazette 302; Oreste Pollicino, *Judicial Protection of Fundamental Rights on the Internet: A Road towards Digital Constitutionalism?* (Hart 2021); Giovanni De Gregorio, *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society* (Cambridge University Press 2022); notably without engaging with any of the above Anu Bradford, 'Europe's Digital Constitution' (2023) 64 Virginia Journal of International Law 1. For complementary accounts see Schramm, 'Where Is Olive? Or: Lessons from Democratic Theory for Legitimate Platform Governance' (n 56); Róisín Á Costello, 'Faux

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we must think about them in public law terms.[105] Public law imagery is so pervasive that it transcends political divides. Liberal voices call for expanded rights, adjudication, and procedural safeguards, while increasingly vocal "conservative" critics, especially since the 2024 US elections, demand greater majoritarianism, denounce alleged viewpoint discrimination, and rail against "woke" content moderation policies.

This book focuses on the first wave of public law arguments: rights, adjudication, and due process. Yet many of the critiques leveled against these frameworks are themselves rooted in public law reasoning. In a sense, we are witnessing a reenactment of familiar public law debates – countermajoritarianism, freedom of speech, and institutional design – now transposed onto the realm of private and regulatory governance.

However, in general and scholarly discourse, these public law terms are often framed as *constitutional* rather than *administrative*. That is especially the case for discourses about content moderation. In principle, that dominance of constitutionalist discourse about platforms is not surprising. Content moderation intuitively links to freedom of speech, which is often understood as a quintessentially constitutional issue.

However, this book takes a slightly different approach. I emphasize the administrative and bureaucratic elements of much of content moderation and, for the fact of the matter, private governance in general. This complements the descriptive insights and prescriptive ideas by digital constitutionalists.[106] The motivation to focus on the administrative instead of the constitutional dimension comes predominantly from an empirical, rather than a solely normative perspective. Of course, many norms of constitutional law like non-discrimination or a minimum of legal coherence as it is implicit in any rule of law-based system would improve platform governance. However, if one looks at how content moderation actually looks like, analogies to administration and bureaucracies appear much more obvious. Platforms design, regulate, and police

Ami? Interrogating the Normative Coherence of "Digital Constitutionalism"' (2023) 12 Global Constitutionalism 326; Angelo Jr Golia, 'Critique of Digital Constitutionalism: Deconstruction and Reconstruction from a Societal Perspective' (2023) 10 Global Constitutionalism 1; Petros Terzis, 'Against Digital Constitutionalism' [2024] European Law Open 1; Schramm, 'Averting Zombie Mode: Learning from (the Critique of) Global Constitutionalism for Digital Constitutionalism' (n 103).

[105] This book is mostly about content moderation, but see e.g. regarding Google (and the lingering question of fundamental rights and the state action doctrine): David Gray, 'Is Google a State Agent?' (2024) 27 Stanford Technology Law Review 206.

[106] Schramm, 'Averting Zombie Mode: Learning from (the Critique of) Global Constitutionalism for Digital Constitutionalism' (n 103).

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infrastructures with eminent importance for public life. They enact a myriad of extremely detailed norms – much more detailed than "free expression" – and devise the most intricate specifics of their technological infrastructures. Platforms organize these practices globally, partly accommodating to specific normative needs of local jurisdictions, partly striving for global coherence to maintain their economies of scale. These elements entail choices and practices that could be described as hierarchy and deviation, deferral and review, coherence and flexibility. Seen in the abstract these normative and organizational dilemmas remind us of structural features of the administrative state. In that sense, content moderation – especially through its co-optation by regulators – becomes a globalized transnational yet privately dominated administrative space.

Crucially, I use the notion administration or administrative law broadly. It refers to the acquis of transnational administrative law as we know it from the European Union or global governance structures but also domestic administrative law. In that sense, I particularly draw inspiration from the body of theories devised in the 2000s as "Global Administrative Law" (GAL) initiated by Benedict Kingsbury, Richard Stewart, and Nico Krisch. Importantly, (global) administrative law is now also met with great interest by private lawyers. Especially the work of Rodrigo Vallejo on "Private Administrative Law" highlighted the administrative elements in private standardization mechanisms and administrative law's potential beyond the ubiquitous but epistemologically laden "governance" paradigm.[107] Others have rightly highlighted the relevance of standards, transnational private governance, and private ordering.[108]

Coming from that empirical starting point, focusing on the administrative and bureaucratic rather than the constitutional dimension of content moderation and private governance offers several advantages. To begin with, administrative law is more detailed than constitutional law. Freedom of speech in an individual case is a constitutional issue

[107] Rodrigo Vallejo Garretón, 'The Private Administrative Law of Technical Standardization' (2022) 40 Yearbook of European Law 172; Rodrigo Vallejo Garretón, 'After Governance?: The Idea of a Private Administrative Law' in Poul F Kjaer (ed.), *The Law of Political Economy* (Cambridge University Press 2020); see the critique of the concept of "governance" in the EU context Christoph Möllers, 'European Governance: Meaning and Value of a Concept' (2006) 43 Common Market Law Review 313.

[108] Avery Katz, 'Taking Private Ordering Seriously' (1996) 144 University of Pennsylvania Law Review 1745; Harm Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Hart 2005); Olia Kanevskaia, 'Governance of ICT Standardization: Due Process in Technocratic Decision-Making' (2020) 45 North Carolina Journal of Law & Technology 549; Anna Beckers, Hans-Werner Micklitz, Rodrigo Vallejo and Pia Letto-Vanamo, *The Foundations of European Transnational Private Law* (Hart 2024).

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about balancing one fundamental right against another. In contrast, governance of millions of speech acts becomes primarily an administrative issue as said balancing exercise hinges upon effective and faithful implementation down the line. Constitutional law's brushstrokes are often too broad for the phenomenally complex and thickly layered content moderation bureaucracies we have today. Surely, procedures ought to be fair and nondiscriminatory and align with all kinds of constitutionalist values. But what does that mean for the organizational and procedural structuring of contemporary moderation behemoths? Especially so if our political economy protects platforms' profitability in often very absolute terms. These companies direct tens of thousands of human moderators, lawyers, engineers and, to a still ill-understood extent, automatic decision-making. Administrative law offers answers to these questions.

In addition, administrative law comes with way fewer side effects than constitutional law. Applying constitutional law notions descriptively to private actors like Meta may be justified through the latter's humungous power. But doing so may remain a bad description as most to all big social media companies are anything but "constitutional" in a liberal sense.[109] Neither do they feature meaningful participatory – not to say democratic – elements, nor do social media platforms meaningfully self-restrict their power or value the "public interest" higher than their own interest in profit. To be clear, that is not at all meant pejoratively. It is just the very purpose of a company. However, adorning companies too quickly with the label of being "constitutionalized" may cloak them in a legitimacy they do not deserve. Administrative law on the other hand, although also developed in the context of public power, comes with way less legitimatory grandezza. Administrative law is often perceived as boring. That is, in this case, an asset. Saying that platforms *administrate* is descriptively accurate, as they deal with millions of customers and do so – intriguingly – increasingly more informed (if not necessarily guided) by a public law understanding of what good administration entails.

Emulating individual rights adjudication for content moderation is expected therefore to achieve a similar goal as historic individual rights adjudication achieved vis-à-vis administrative actors: protecting

[109] The underlying problem here is the extent to which it is meaningful to examine factually powerful structures of order through the inherently normative lens of the "constitutional," or more specifically, "constitutionalism." While these structures clearly wield significant power, the question remains whether (uncritically) applying constitutional frameworks – typically reserved for public, i.e. democratic, governance – offers a useful or accurate perspective on private or hybrid forms of authority.

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individual rights, advancing accountability, and controlling otherwise largely unchecked power structures.

2.3.2 *Platforms*

To substantiate this plea for a more administrative-focused perspective on content moderation, platforms, and private governance in general, I proceed with a quick look at the phenomenon of the *platform*. Although predominantly economic, it gives rise to social and normative implications. The term "platform" is a metaphor relating to a specific way in which data is presented and economic transactions are conducted in the information economy.[110]

In the abstract, a platform can be conceived of as an intermediary, virtual "structure" that allows people to communicate publicly.[111] Remarkably, the very term "platform" epitomizes the inevitable performative spin of any discourse about or practice of emergent digital power structures. As Gillespie has argued, companies have been strategically advancing the term "platform" to promote ideals of egalitarian connectivity at least since this century's first decade.[112] By framing companies like Facebook or Amazon as "platforms" and not, for example, as "online wholesale outlets" or "data mines," the metaphor implies the very criteria by which those companies will be judged.[113]

We can distinguish platforms from other communication tools like messaging, email, or chatrooms by their degree of public availability, accessibility, and direction of communication. Although the details vary, the underlying idea of a platform is to facilitate contemporaneous communication among a group of people. Communicative acts on platforms are "public" in that they are multidirectional since communication on platforms is often directed to a specific or unspecified audience. In contrast, emails or chats tend to be bidirectional because communication often occurs along the lines of existing social relations and, crucially, cannot be accessed or detected by other program users.[114] The term

[110] Information economy refers to the data-driven, largely dematerialized, and increasingly platform-dominated digital economic sector. For prominent theorizations and genealogies of the information economy see especially: Cohen (n 27) 15 et seq; and generally: Zuboff (n 21).

[111] For a brief overview see Robert Gorwa, 'What Is Platform Governance?' (2019) 22 Information, Communication & Society 854, 856.

[112] Gillespie, 'The Politics of "Platforms"' (n 22) 348 et seq.

[113] Ibid 359–360.

[114] Metaphorically distinguishing between "platforms" and "channels," Paul M Leonardi, Marleen Huysman and Charles Steinfield, 'Enterprise Social Media: Definition, History,

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"platform" also entered black letter law, with the EU's DSA defining the platform as an online infrastructure that "stores and disseminates information to the public" at the request of users.[115]

On some platforms, like Amazon or Alibaba, interaction is mainly commercial and based on trading. This type of platform can be seen as a marketplace bringing together buyers and sellers.[116] On other platforms, such as X, formerly Twitter, communication is generally social, cultural, or political. Many platforms blend elements, for example Facebook, which is primarily a social network but also includes more transaction-oriented features on its site. Even gaming or pornography sites can be seen as platforms as many offer channels of communication or even monetary exchange.

Platforms that focus mainly on social, cultural, or political communication are called *social media* or social networks and are sometimes described as a "digital marketplace of ideas" or, in reference to Habermas, a "digital public sphere."[117] However, the events of the last decade emphasize the deeply ambivalent effects of social media.[118] On one side, social media platforms have helped to foment discourses and social movements that have upended or at least shaken normatively questionable power structures.[119] Yet social media has also enabled and intensified discourses and movements that many

and Prospects for the Study of Social Technologies in Organizations' (2013) 19 Journal of Computer-Mediated Communication 1, 2.

115 cf. Article 2(1)(i) DSA.

116 Cohen (n 27) 37.

117 For a good summary of contemporary perspectives using that approach (based on Reckwitz and Habermas) see Philipp Staab and Thorsten Thiel, 'Social Media and the Digital Structural Transformation of the Public Sphere' (2022) 39 Theory, Culture & Society 129. See further Joshua Cohen and Archon Fung, 'Democracy and the Digital Public Sphere' in Lucy Bernholz, Hélène Landemore and Rob Reich (eds.), *Digital Technology and Democratic Theory* (University of Chicago Press 2021) 23 et seq. For the originals see Jürgen Habermas, *Strukturwandel der Öffentlichkeit: Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft* (Suhrkamp 1990). Recently, Habermas revisited some of his arguments in: Jürgen Habermas, 'Überlegungen und Hypothesen zu einem erneuten Strukturwandel der politischen Öffentlichkeit' in Martin Seeliger and Sebastian Sevignani (eds.), *Ein neuer Strukturwandel der Öffentlichkeit?* (Nomos 2021) 487 et seq.

118 Habermas put it more dramatically: "[T]he lava of this simultaneously anti-authoritarian and egalitarian potential, which was still palpable in the early Californian entrepreneurial spirit, soon solidified in Silicon Valley into the libertarian grimace of world-dominating digital corporations." see Habermas, 'Überlegungen und Hypothesen zu einem erneuten Strukturwandel der politischen Öffentlichkeit' (n 117) 488 (translation by the author).

119 Examples abound, from the Arab Spring to the #MeToo movement, Black Lives Matter, or Fridays for Future. All these developments would not have transpired the same way if not for their publicity on social media.

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view as normatively problematic, such as misinformation and anti-vaccine sentiments during the Covid-19 pandemic, as well as a slurry of xenophobic, racist, misogynous, antisemitic, or otherwise hateful content. To a degree, social media's "democratization" of discourse has given airtime to unsavory viewpoints that were formerly hard to access by most people because editorially mediated news outlets tended not to feature these kinds of content. It seems almost ironic that many now point to Habermas when lamenting the demise of twentieth century mass media – television, newspapers, radio – as Habermas himself held those very outlets responsible for what he described as the demise of the public sphere when compared to direct, face-to-face debates in bourgeois European circles in nineteenth-century Vienna, Berlin, London, and Paris. But aristocrat-studded salons have their own problems. Whether nineteenth-century discussions in salons and at dinner tables – all male and with a lot of smoking, I suppose – were indeed preferable to what we have today may be ultimately a matter of taste. Either way, idealizing phenomena we did not experience ourselves – especially historic ones – often risks idealizing a narrative that reflects only a fraction of what in and of itself is a rather complicated and ambivalent phenomenon.

Last, we should not misinterpret the notion that social media is about social, cultural, or political communication. Communication on social media platforms is inherently commercial. Many social media companies rely on advertising, which is personalized and then placed on their sites and those of others. Social media companies "mine" the behavioral data of their users and exploit it for advertising, profiling, and other forms of monetization.[120] Against this backdrop, any communication, even someone's not explicitly communicative behavior or activity, is of commercial value to the company that owns and maintains the platform because it still yields information – data which can then be monetized – about that person.

2.3.3 *Design, Regulation, Enforcement*

These observations bring us to *content moderation*, the umbrella term for social media companies' governance of online communication.[121] Content

[120] However, note that companies increasingly work with "synthetic" data, i.e. data that is not mined from users but modeled by "artificial intelligence" to emulate mined data, cf. Cade Metz and others, 'How Tech Giants Cut Corners to Harvest Data for AI' *New York Times* (6 April 2024) <https://perma.cc/WW5D-EXXS>; Shirin Ghaffary, 'Microsoft, Google and Meta Bet on Fake Data to Build AI Models' *Bloomberg* (2 May 2024) <https://perma.cc/MX2F-NSLU>.

[121] For example, James Grimmelmann positively defines content moderation as "the governance mechanisms that structure participation in a community to facilitate cooperation and prevent abuse." Grimmelmann, 'The Virtues of Moderation' (2015) 17 Yale

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moderation as well as the broader term "platform governance"[122] has been described in detail by others.[123] For our purposes, it suffices to carve out several key elements of current, and still evolving, conceptions of content moderation.

First, content moderation should be interpreted *broadly*. It refers to the design and construction of a type of digital infrastructure – the platform – and the devising of rules that govern the operations of that infrastructure as well as the enforcement of those rules. As argued above, content moderation comprises at least three elements: design, rulemaking, and rule enforcement. As Kate Klonick's influential piece in the Harvard Law Review argued, the governance by "new governors" of online speech "bear[s] remarkable resemblance to heuristics and structures familiar in

Journal of Law & Tech 42, 47. Kate Klonick uses "governance" and "content moderation" largely synonymously, arguing that "platforms have developed a detailed system rooted in the American legal system with regularly revised rules, trained human decision-making, and reliance on a system of external influence." See Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech' (n 55) 1599, 1617 et seq, 1630 et seq, 1664. Evelyn Douek broadened that picture, highlighting that content moderation "is a vast system of administration that includes a far broader range of decisions and decisionmakers than the standard picture admits." Douek, 'Content Moderation as Systems Thinking' (n 55) 531; see also Elettra Bietti, 'A Genealogy of Digital Platform Regulation' (2023) 7 Georgetown Law and Technology Review 1; Robert Gorwa, *The Politics of Platform Governance: How Governments Shape Online Content Moderation* (Oxford University Press 2024).

[122] The term platform governance is, or at least used to be more prevalent in political science literature. Broadly, one can distinguish between the governance of platforms by regulators and the governance of users by platforms. Historically, platform governance was often understood broadly, also including aspects like data management and platform design. Following the conceptual broadening of content moderation (esp. by Evelyn Douek, regarding its implications for future reforms at 6.2), the two concepts appear increasingly aligned. The only exception may be data and privacy, which often remains a somewhat siloed discussion. For the concept of platform governance see Gorwa (n 111); thinking content moderation and data together esp.: Cohen (n 27); De Gregorio (n 104) 216 et seq. For the discursive effects of separating discussions on content moderation and data see also 4.2.4.

[123] See in general especially: Grimmelmann (n 121) 48 et seq; Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech' (n 55); Gillespie, *Custodians of the Internet* (n 55); Jack M Balkin, 'Free Speech Is a Triangle' (2018) 118 Columbia Law Review 2011; Nicolas P Suzor, *Lawless: The Secret Rules That Govern Our Digital Lives* (Cambridge University Press 2019); Sarah T Roberts, *Behind the Screen: Content Moderation in the Shadows of Social Media* (Yale University Press 2019); Douek (n 55); see further regarding more specific aspects like automated decision-making and "design" aspects: Tarleton Gillespie, 'Content Moderation, AI, and the Question of Scale' (2020) 7 Big Data & Society; Jing Zeng and D Bondy Valdovinos Kaye, 'From Content Moderation to Visibility Moderation: A Case Study of Platform Governance on TikTok' (2022) 14 Policy & Internet 79.

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legal decision-making."[124] These rules prohibit certain kinds of communication and are unilaterally devised by social media companies[125] as well as often bleeding into various other contexts. As we will encounter those rules repeatedly in the empirical parts of the book, we will not go into greater detail here.[126]

But content moderation is more than just rulemaking and rule enforcement.[127] Content moderation also refers to the *design* of a platform and its business model.[128] The type of content a platform's algorithm amplifies, the data on which a platform's algorithms base their operations, and the many other normative decisions and technological issues involved in creating and operating a platform all, one way or another, moderate the content that users access.[129]

Second, platform power in content moderation is largely *unilateral* and generally unaccountable. Although social media platforms operate within legal systems, their leeway in designing content moderation systems is broad. Sheltered by particular conceptions of liability developed in US and European legal frameworks, platforms are considered by their owners to be mere "intermediaries" that are not liable for the content of information posted by their users. Historically, platform owners' motivation to moderate is not predominantly for legal reasons, as they tend not to be liable for illegal content anyway, but rather on the basis of their own interest in maintaining a (relatively socially acceptable) discursive environment that keeps users on the platform and accommodates the advertisers and potential buyers of the products those ads promote. To keep communication "civil," platforms therefore began formulating ever more specific rules and intensified the initially human and then algorithmic enforcement of those rules. Simultaneously, platform owners and employees sometimes made conflicting choices, designing their offerings

[124] Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech' (n 55) 1630.

[125] Ibid 1631 et seq; Gillespie, *Custodians of the Internet* (n 55) 45 et seq; Suzor (n 123) 10 et seq.

[126] See 3.3 and 4.3 as well as, highlighting the DSA's omission of regulating platform rulemaking 3.2.4.3.

[127] Douek (n 55).

[128] Highlighting the importance to reform social media companies' business model: Jack M Balkin, 'How to Regulate (and Not Regulate) Social Media' (2021) 1 Journal of Free Speech Law 71; Jack M Balkin, 'To Reform Social Media, Reform Informational Capitalism', in Lee C Bollinger and Geoffrey R Stone (eds.), *Social Media, Freedom of Speech, and the Future of Democracy* (Oxford University Press 2022) 233.

[129] In the US, the key texts are: Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech' (n 55); Douek (n 55); Kate Klonick, 'Of Systems Thinking and Straw Men' (2023) 136 Harvard Law Review Forum 339.

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in such a way as to amplify offensive content, which they discovered would intensify user engagement more than "positive" content.[130]

Third, as mentioned above, we should think of content moderation as an *exemplar*. Clearly, social media is a relatively novel phenomenon. Nonetheless, private rulemaking and private governance of communication, resources, and people is by no means new. Although the future picture of world politics, trade, and digitization is necessarily blurry, it seems plausible that globally active, vertically integrated corporations with unilateral governance capacities over important sectors, in one form or the other, come what may, will become an ever more prevalent trend. Perhaps even more plausible is that digitization will play a huge role in future governance and that the power of a few, oligopolistic private power structures will strongly shape these developments. In other words, social media platforms and content moderation are not the first, nor will they be the last, power structure in potential need new forms of adjudicative guardianship.

Assuming future policymakers, managers, lawyers, and other experts might again come up with the idea to emulate individual rights adjudication to control private power, this study seeks to keep this overarching context in mind. For that reason, I do not speak of content moderation all the time but also about, for example, *private governance* or private ordering.

2.3.4 *Private Content Moderation*

After outlining these definitional contours, we now move on to dissect the public and private aspects of social media platforms' content moderation. We begin with the private aspects.

Social media platforms like Meta or X are private organizations – in other words, they are almost all pivately owned and controlled.[131]

[130] Jeremy B Merril and Will Oremus, 'Five Points for Anger, One for a "Like": How Facebook's Formula Fostered Rage and Misinformation' *Washington Post* (26 October 2021) <https://perma.cc/7E55-RPZL>.

[131] The two US giants Meta and X are either listed at the New York Stock Exchange (Meta) or got de-listed in a change of private ownership (Twitter, now X). The only notable exception is TikTok, which has more than 220 million monthly active users in Europe, 150 million in the US and whose parent company ByteDance is partly owned by the Chinese government. The government of the People's Republic of China owns so-called "golden shares" of various internet companies. According to insiders, the government particularly focuses on companies "possessing large amounts of key data." However, momentarily, these golden shares apparently only concern ByteDance's business within the People's Republic but not the TikTok version that is available in the rest of the world. In

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Generally speaking, one can portray the relationships between these private organizations and hundreds of millions of individuals as solely private. A corporation offers a service and consumers access and use it, paying mainly by making their private data available to the company.[132] In that sense, controlling the private bureaucracies of platforms is only "customer service" – a characterization used by an interviewee working for Meta's Oversight Board.[133] Correspondingly, we see many private-law elements in Emulated Guardians' formal structure. For example, corporate law imbues the Oversight Board's formal structure, set up by a noncharitable trust based in Wilmington, Delaware.[134] Similarly, one core ideational role model for the DSA's out-of-court dispute settlement bodies was alternative dispute resolution in consumer relations. As we will see in Chapter 3, the European Commission modeled its proposed adjudicators that were supposed to "tame the giants" in parts on oversight bodies that, for instance, enforce passenger rights in disputes with airlines or resolve contractual disputes between customers and car insurers.[135]

However, analyzing the power relation between social media platforms and individuals based only on their formal structure obfuscates the functional dynamics at play.[136] As Deirdre Curtin and Linda Senden argued, "[t]he distinction between private and public regulation is, in any event, blurred and unclear, with traditional public administration becoming ever more 'unbounded' as outside actors become involved to varying degrees."[137] So "private law is public law in the sense that private

the mid-2020s, the US sought to transfer ownership of TikTok's US operations to a group of US investors. At the time of writing the results of that process were not yet clear.

See Reuters Staff, 'Fretting about Data Security, China's Government Expands Its Use of "Golden Shares"' (*Reuters*, 16 December 2021) <https://perma.cc/XT6C-LFHT>

132 Seminal: Zuboff (n 21).

133 Interview with Oversight Board Staffer 3 (6 May 2022); see in that respect also Catalina Goanta and Pietro Ortolani, 'Unpacking Content Moderation: The Rise of Social Media Platforms as Online Civil Courts' in Xandra Ellen Kramer and others (eds.), *Frontiers in Civil Justice: Privatisation, Monetisation and Digitisation* (Edward Elgar 2022).

134 See at 4.3.1.

135 See 3.2 and 3.3.

136 cf. Hannah Bloch-Wehba, 'Global Platform Governance: Private Power in the Shadow of the State' (2019) 72 SMU Law Review 27, 33 et seq.

137 Deirdre Curtin and Linda Senden, 'Public Accountability of Transnational Private Regulation: Chimera or Reality?' (2011) 38 Journal of Law and Society 163, 164. See already: Alfred C Aman, 'The Globalizing State: A Future-Oriented Perspective on the Public/Private Distinction, Federalism, and Democracy' (1998) 31 Vanderbilt Journal of

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regulation is part and parcel of democratic self-rule by a collective."[138] In turn, privately organized actors, like platforms, are subject to public-law scrutiny as they exercise power as it affects people on issues related to public law, such as freedom of expression. Yet, in our context, an idealized picture of private rulemaking as "democratic self-rule by a collective" is euphemistic. The rules governing the relationship between social media platforms and users are formal contracts. But a meeting of minds when it comes to such contracts is pure fiction; their provisions are periodically amended and unilaterally dominated by social media companies. Some researchers have even begun questioning whether social media platforms' terms of service can even be interpreted as contracts at all.[139] Others highlighted that "the law" stabilizes platform power through accommodating the political economy in which informational capitalism operates. In other words, platforms do not need to break the law as the law itself became part of the power relationship between platform, public authority, and user.[140] It would then follow that neither rulemaking by platforms, nor public regulation thereof can be reasonably construed as pure democratic self-government.

2.3.5 *Communication and Fundamental Rights*

However, despite the private law elements just mentioned, understanding (social media) platforms through a public law lens is now widely accepted. Such a public-law perspective becomes especially relevant whenever a private protagonist *acts on* the public. Social media platforms touch upon two aspects of crucial public concern. These are, on the one hand, communication and, on the other, fundamental rights, especially freedom of expression.

The space social media platforms design for their users serves as a forum for public and private communication. The importance of communication as a formative source of the self and as a cornerstone of

Transnational Law 769, 816 et seq; Duncan Kennedy, 'The Stages of the Decline of the Public/Private Distinction' (1982) 130 University of Pennsylvania Law Review 1349, 1353.

[138] Curtin and Senden (n 137) 164.

[139] 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).

[140] At the end of the day, both perspectives point to the same problem: the way platforms structure their relationship with their users veers far away from idealized, moral notions of egalitarian contracting and individual liberty. See e.g. Julie Cohen, 'Law of the Platform Economy' (2017) 51 University of California Davis Law Review 133, 154–155.

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society and politics is well-known.[141] Society and politics are products of communication, which perhaps points to the core of the human condition.[142] People are "political animals" by virtue of their ability to communicate.[143] Hence, enabling and regulating communication – as social media platforms like Meta and X do – means enabling and regulating a key ingredient of the social and political order we inhabit. Later theorists of justice,[144] deliberative democracy,[145] or the linguistic "turn"[146] have emphasized the importance (and fragility) of communication. Therefore, the governance of people's communication on social media platforms will inevitably warrant public-law scrutiny. As Linnet Taylor put it,

> This creates the potential for power relations of domination, and demands that we decide what constitutes the legitimacy to act on the public. Business ethics and private law are not designed to answer these questions, which are primarily political. If people have lost the right to disengage with commercial technologies, we may need to hold the companies that offer them to the same standards to which we hold the public sector.[147]

Second, communication's value is not only a philosophical or sociological truism but has long been established in law. The fundamental right of freedom of expression protects online communication.[148] Further, many specific fundamental rights, ranging from freedom of religion, and

[141] The classic text on communication's societal importance is Habermas, *Strukturwandel der Öffentlichkeit* (n 117). If you read German, see the recent special issue in this matter: Martin Seeliger and Sebastian Sevignani (eds.), 'Ein Neuer Strukturwandel Der Öffentlichkeit?' [2021] Leviathan Sonderband 37.

[142] Hannah Arendt, *The Human Condition* (2nd ed. [1998], University of Chicago Press 1958) 22 et seq (esp. 25–26).

[143] Aristotle, *Politics*, III iv 2.

[144] John Rawls' *Theory of Justice* built on the deliberative elements of agreeing on what is "just" instead of deducing it from abstract, higher order principles. He argued that "[t]he intuitive idea of justice as fairness is to think ... of an original agreement in a suitably defined initial situation. [Justice is whatever] rational persons concerned to advance their interests would accept in this position of equality to settle the basic terms of their association." See John Rawls, *A Theory of Justice* (Rev ed., Belknap 1999 [1971]) 102.

[145] See the two Habermas texts cited in n 117.

[146] From the perspective of the philosophy of language see Austin (n 27); Ludwig Wittgenstein, *Philosophical Investigations* (1st ed., Basil Blackwell 1953); John R Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University Press 1969); Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge 1997).

[147] See in general: Linnet Taylor, 'Public Actors Without Public Values: Legitimacy, Domination and the Regulation of the Technology Sector' (2021) 34 Philosophy & Technology 897.

[148] Article 11 CFR.

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association, to the freedom to conduct business as enshrined in the EU's Charter of Fundamental Rights, make up a panoply of applicable rights. Platforms have become indispensable forums for the exercising of such rights, especially freedom of expression but also freedom of religion and the freedom to conduct business.[149] As the EU's DSA states in its preamble, to "exercise their fundamental rights," EU citizens are dependent on "responsible and diligent behavior" by platforms.[150] Public and especially administrative law offers a toolkit for normatively evaluating the organizational behavior that enables and sometimes restricts fundamental rights. Albeit platforms are not directly bound by fundamental rights, their actions shape how others exercise theirs. Further, platforms' gatekeeping function may impose procedural duties on them, such as those outlined by Germany's constitutional court in its *Stadionverbot* decision.[151] In the United States, in contrast, the Supreme Court appears not at all poised to envelope social media platforms in a denser net of obligations of how to moderate the content of their users.[152]

2.3.6 *Regulatory Administrification*

However, as important as communication and fundamental rights are, they cover only the subject of platform power but not its functionality. Because platforms deal with "public goods" like public communication and fundamental rights at a massive scale, they are increasingly regulated to abide to public law norms. These norms regulate how platforms

[149] See in general De Gregorio (n 104) 157 et seq; regarding US doctrine Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech' (n 55) 1609–1613; Regarding German doctrine Sophie Knebel, *Die Drittwirkung der Grundrechte und -freiheiten gegenüber Privaten: Regulierungsmöglichkeiten sozialer Netzwerke* (Nomos 2018); human rights perspective: Jonathan Andrew and Frédéric Bernard (eds.), *Human Rights Responsibilities in the Digital Age: States, Companies, and Individuals* (Hart 2021); Rikke Frank Jørgensen (ed.), *Human Rights in the Age of Platforms* (MIT Press 2019); human and fundamental rights responsibilities for non-state actors, of course, are nothing new: Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006); See further: Evangelia Psychogiopoulou and Federica Casarosa, 'Social Media before Domestic Courts in Europe: An Analysis of Free Speech Cases' (2020) 27 Maastricht Journal of European and Comparative Law 791; Redeker, Gill and Gasser (n 104); Edoardo Celeste, Amélie Heldt and Clara Iglesias Keller (eds.), *Constitutionalising Social Media* (Hart 2022).

[150] Recital 3 DSA.

[151] Stadionverbot [2018] Bundesverfassungsgericht 1 BvR 3080/09, BVerfGE 148, 267-290; Hassrede [2021] Federal Court of Justice (Bundesgerichtshof) III ZR 179/20 and III ZR 192/20.

[152] Moody v NetChoice LLC [2024] Supreme Court of the United States 22-277 and 22-555, 603 ____ (2024); cf. Gray (n 105).

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shall deal with their users. The normative model for many such rules – fundamental rights, due process, proportionality, nondiscrimination, hearing rights, duties to give reasons, and so on – is public law, or more precisely administrative law. I call this the *administrification* of platform governance.

There are two key drivers behind platforms' increasing administrification.[153] These are, on the one hand, regulatory co-opting of platforms and, on the other, increasing public scrutiny and demands for heightened platform accountability.[154] Social media platforms represent what the GAL project has characterized as *hybrid intergovernmental-private administrations* (in the case of the endowment to a public mandate) or entirely *private administrators*.[155] Such private governance organizations, like companies, "have adopted certain procedures of accountability and review in order to enhance their effectiveness and legitimacy; these may have parallels in domestic administrative and private law that are so far underexplored."[156] Hence, studying platforms as "part of global administration [allows us] to trace similarities as well as differences in mechanisms of accountability developed for public and private bodies."[157] This section outlines how regulatory co-option, which will only intensify with the newly enshrined DSA, incentivizes platforms to adopt administration-like procedures, rules, and formal structures. So far, except for remarks by Balkin, Bloch-Wehba, and Douek, this perspective was not explored in the literature.[158]

In 2016, several social media platforms, including Facebook and Twitter, now X, agreed with the European Commission on a code of conduct when it came to countering illegal hate speech online.[159] The social media platforms agreed to "have in place clear and effective processes to review notifications regarding illegal hate speech" and committed "to review such requests against their rules and community

[153] De Gregorio *en passant* called the DSA an "administrativization" of content moderation. Yet his framework focuses strongly on constitutionalism and not on administrative law. See De Gregorio (n 104) 213.

[154] Consequentially, even in the US, calls are increasingly emerging to treat digital corporations – especially social media companies – as state agents. cf. Gray (n 105).

[155] Kingsbury, Krisch and Stewart (n 49) 22.

[156] Ibid 54.

[157] Ibid 23.

[158] However, neither Douek nor Balkin dig (much) deeper into administrative law's prescriptive potential for improving platform governance, cf. Douek (n 55) 584 et seq; Balkin, 'Free Speech Is a Triangle' (n 123) 2028 et seq; in later pieces, the administrative law aspect disappeared: Balkin, 'To Reform Social Media, Reform Informational Capitalism' (n 128).

[159] Platform Code of Conduct on countering illegal hate speech online in the EU 2016.

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guidelines."[160] Since platforms operate at scale, their commitments toward EU authorities are likely to affect, and perhaps water down, their global standards. In this context, Anu Bradford argued in her eminent book that platforms' normative material (the so-called community standards) increasingly mirrors the normative acquis of EU law.[161] However, it remains unclear whether their terms of service really "reflect the European standard of hate speech" as Bradford argues, or merely echo the overall tone of EU law rather than reflecting the EU acquis in any meaningful way.[162] Bradford points out that we do not know how these commitments are put into practice; especially since platform rules consist of many sublayers and platform lawyers "ultimately use their own judgment on what constitutes illegal hate speech. The outcome is therefore less likely to be perfectly aligned with the Commission's regulatory approach."[163] Building on the preexisting *division du travail* between social media platforms and European regulators, the Commission proposed a major overhaul of parts of the governance of social media platforms in December 2020.[164]

2.3.7 *Especially, the Digital Services Act*

This overhaul, the DSA, reiterated that platforms would be relatively free to devise their own procedures, decision-making processes, and substantive rules if they orient their dealings toward criteria like "objectivity," "proportionality," and "due regard for fundamental rights."[165] The DSA imposed several administrative law-inspired duties on platforms, for example the duty to give reasons for decisions against their users (Article 17 DSA) and to "act in a diligent, objective and proportionate manner in applying and enforcing" their terms of service (Article 14(2)).[166] The DSA stipulates that platforms should act with

[160] Ibid 2.

[161] Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020) 161 et seq.

[162] Ibid 158; for a critical account see 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.

[163] Ibid 162.

[164] See 3.2.

[165] See in detail 3.2.

[166] That trend is not limited to the DSA. Earlier frontrunners were the German Netzwerkdurchsetzungsgesetz or Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online (OJ L 172, 1752021, pp. 79–109).

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due regard to the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service, such as the freedom of expression, freedom, and pluralism of the media, and other fundamental rights and freedoms as enshrined in the Charter.

In other words, the DSA infuses public-law ideas and administrative-law procedures into the otherwise private governance of online platforms. In response to this intensifying regulatory framework, platforms ramped up procedures, formulated norms, trained people, and formalized structures that could be characterized as "private bureaucracies."[167] Social media platforms must deal with notices, state reasons, and take down content that might be illegal.[168] In some cases, platforms are in effect auxiliary agents of public power.[169] In consequence, legal scholarship is increasingly conceptualizing platforms, more specifically content moderation, as systems of administration or even as bureaucracies.[170]

As a result, Balkin concludes, we observe a "burgeoning dialectic of governing power and public-private cooperation. Private infrastructure companies develop greater governing capacities than ever."[171] Indeed, governmental pressure on platforms has grown in recent years. In sum, regulatory frameworks like the DSA oblige platforms to enforce regulatory interests relating to copyright, personal rights or criminal law, for instance, which in practice compels platforms to be *functional* administrators. In turn, analyzing platforms through the lens of administrative law appears imperative.

2.3.8 *Autochthonous Administrification*

The previous sections showed how regulatory co-option molds social media platforms into ever more administration-like entities. However, regulatory endowment is not the only driver behind platforms' burgeoning private bureaucracies. Platforms' emulation of administration-inspired rulemaking and rule enforcement reflects demands from users – and, perhaps more importantly, ad-buyers – for "clean"

[167] Balkin, 'Free Speech Is a Triangle' (n 123) 2021.

[168] C-18/18 (Glawischnig-Piesczek) [2019] European Court of Justice ECLI:EU:C:2019:821 33–47; Clara Rauchegger and Aleksandra Kuczerawy, 'Injunctions to Remove Illegal Online Content under the eCommerce Directive: Glawischnig-Piesczek' (2020) 57 Common Market Law Review 1495.

[169] That is particularly relevant in cases like Glawischnig-Piesczek (n 168).

[170] Douek (n 55) 530 et seq; Balkin, 'Free Speech Is a Triangle' (n 123) 2021 et seq. Also arguing for a more administrative law inspired perspective on platform governance Schramm, 'Where Is Olive? Or: Lessons from Democratic Theory for Legitimate Platform Governance' (n 56).

[171] Balkin, 'Free Speech Is a Triangle' (n 123) 2020.

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platforms.[172] Users and investors demand a platform that is not littered with hate speech, sexism, or xenophobia.

To achieve this, platforms established their own rulemaking and enforcement regimes to monitor and regulate the communications of their users.[173] Faced with growing demands to take down harmful or violent speech, platform companies morphed from mere technology companies to complex regulatory bureaucracies.[174] As Kate Klonick's extensive empirical work shows, "platforms have developed a system that has marked similarities to legal or governance systems. This includes the creation of a detailed list of rules, trained human decision-making to apply those rules, and reliance on a system of external influence to update and amend those rules."[175] In turn, the intricate work of nudging such complex bureaucracies toward normatively desirable behavior is familiar – and has been well documented for social media platforms, particularly in the area of privacy.[176]

This private rulemaking appears deficient from an administrative law perspective or, in fact, any normative position linked to a notion of self-governance and publicness. Although platforms' private rulemaking is comprehensive, it remains incoherent and imprecise.[177] Still, social media platforms devise their rules unilaterally. Rulemaking remains largely decoupled from the "meaningful consent" (to quote Suzor) by the users whose behavior the platforms govern.[178] Rulemaking on platforms has been described as autocratic[179] and authoritarian[180] but, due to its pervasiveness and normative properties, also as "quasi-legislative" or simply as

[172] cf. Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech' (n 55) 1625 et seq; Gillespie, *Custodians of the Internet* (n 55) 74 et seq.

[173] Seminal: Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech' (n 55); see also Gillespie, *Custodians of the Internet* (n 55) 5 et seq.

[174] Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech' (n 55) 1630–1669; Balkin, 'Free Speech Is a Triangle' (n 123) 2028–2032; De Gregorio (n 104) 110–122.

[175] Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech' (n 55) 1602.

[176] See especially the empirically grounded contribution by Ari Ezra Waldman on information companies' (i.e., Google, Facebook, etc.) handling of privacy. Waldman argues that motivated and high-minded privacy professionals nonetheless tacitly embrace anti-privacy discourse and policies as they are swallowed by the platforms' thrust towards exploiting rather than protecting privacy, Waldman (n 22) 7–8, 210 et seq.

[177] See especially at 4.4 and 5.2.

[178] cf. Suzor, *Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms* (n 56) 5.

[179] Balkin, 'Free Speech Is a Triangle' (n 123) 2024.

[180] De Gregorio (n 104) 116; Evelyn Douek, 'Facebook's "Oversight Board:" Move Fast with Stable Infrastructure and Humility' (2019) 21 North Carolina Journal of Law & Technology 1, 10.

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"law."[181] Although I am skeptical when it comes to equating platform rulemaking with blurry, legitimacy-seeking notions like "quasi-legislative,"[182] the fact remains that platforms have huge influence in the way they frame and present the norms their private owners deem appropriate.

Further, the administration/administrative law analogy does not stop at cases where platforms are co-opted by governments or when they make and enforce "rules." The analogy also pertains to the way digital infrastructures are designed by platforms. This "administrification" goes beyond formal rulemaking but includes, especially, infrastructure design and programming.[183] What do users see, and when? Do algorithms nudge people to attack and insult other users?[184] A good way to think about all these questions is inspecting them through the method and mindset ofadministrative law. Imagine, for example, a big highway. When the local transport authority plans such a highway, it must discuss plans with the public, make an environmental impact assessment, and may not build it right through a national park. Similar design principles are imaginable for social media platforms too.

Arguing for a more nuanced understanding of the many ways platforms influence user behavior and regulate speech, Evelyn Douek has highlighted that it would be wrong to understand content moderation as "just the aggregation of many (many!) binary decisions to take down or leave up individual pieces of content."[185] Instead, Douek argues, content moderation "is a vast *system of administration* that includes a far broader range of decisions and decision-makers than the standard picture admits."[186] This book further explores the descriptive and normative

[181] De Gregorio (n 104) 117; Luca Belli, Pedro Augusto Francisco and Nicolo Zingales, 'Law of the Land or Law of the Platform? Beware of the Privatisation of Regulation and Police' in Luca Belli and Nicolo Zingales (eds.), *Platform Regulations: How Platforms Are Regulated and How They Regulate Us [Official Outcome of the UN IGF Dynamic Coalition on Platform Responsibility]* (FGV Direito Rio 2017) 44 et seq; Orly Lobel, 'The Law of the Platform' (2016) 101 Minnesota Law Review 87, 142 et seq; adopted by David Kaye, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (United Nations Human Rights Council 2018) A/HRC/38/35.

[182] See in detail Cowls, Darius, Santistevan and Schramm (n 3).

[183] See further Douek (n 55).

[184] This is apparently what happened at Facebook, cf. Merril and Oremus (n 130).

[185] Douek, 'Content Moderation as Systems Thinking' (n 55) 530–531; the extent to which what Douek calls the "standard picture" was indeed prevalent is disputed, see esp. Kate Klonick, 'Of Systems Thinking and Straw Men' (2023) 136 Harvard Law Review Forum 339; see also already regarding platform governance in general Robert Gorwa, 'What Is Platform Governance?' (2019) 22 Information, Communication & Society 854.

[186] Douek, 'Content Moderation as Systems Thinking' (n 55) 530–531 (emphasis added).

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implications of content moderations (and, by extension, private governance's) resemblance to administration. So far, the literature only mentioned the resemblance or used administration as a metaphor but did not really dig into the normative "downstream consequences."[187]

2.4 From Public to Private: Emulation

We have now examined the phenomenon of individual rights adjudication and have justified our administrative-law perspective on social media platforms' private governance. Individual rights adjudication is an institutionalized – meaning, widely used and expected – method for controlling public power. Platforms now wield huge power. And yet, as the previous section argued, platforms are *private* organizations – so why and crucially, how would they adopt quintessentially *public*-law ideas?

To also theorize this last part of the analytical framework I now zoom out from the public-law perspective adopted above and invite the reader to don their sociology and political science glasses once again. In previous remarks, I anticipated that organizations conform to societal institutions, like individual rights adjudication, to increase their legitimacy.[188] We can now unpack this process of organizational conformance and identify its most important but double-edged tool: *emulation*.

The argument goes as follows: organizations want to appear legitimate. Platforms are powerful organizations that engage in extensive administration-like practices. They create a space where private individuals can exercise their rights, make rules regulating how their users interact, and enforce the rules governing this space. However, we – meaning the public, regulators, and scholars – instinctively perceive uncontrolled power as illegitimate, especially if it can potentially erode individual and societal communication and fundamental rights. At the political level, therefore, attempts are being made to regulate this "digital public sphere" and make private power's private governance of crucial public rights like freedom of expression more accountable. In turn, social media platforms arguably try to avoid regulation or even a breaking-up of their business models by making the exercise of their power appear more efficiently (self-)controlled and thus more legitimate.[189] In their attempts to legitimize this exercise of power –

[187] Ibid 584 et seq.
[188] See above at 2.1.
[189] The Federal Trade Commission (FTC), the US consumer protection and antitrust watchdog, lodged several complaints with the goal of potentially breaking up Facebook,

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or at least, in the case of platforms, to make it appear legitimate – both actors decided roughly at the same time to do something that could represent a paradigm shift in private governance: they began *emulating* individual rights adjudication.

2.4.1 *Defining Emulation*

To emulate is to "imitate" and to "strive to equal or to excel."[190] Emulation comes from the Latin noun *aemulus*, or "rival," and the related verb *aemulare*, "to rival" or "to strive after another earnestly."[191] In this book we will encounter both meanings of emulation, connoting imitation, mimicry, and copying on the one hand, and innovation, rivalry, and competition on the other. In the social sciences, emulation is a concept used mainly in organizational sociology,[192] political science,[193] and, increasingly, law.[194] Political scientists and organizational sociologists have studied such patterns in intermingled but slightly diverging contexts, which are combined here to situate emulation in both the political and the sociological contexts of Emulated Guardians.

2.4.2 *Types of Emulation*

Based on Simmons et al., we can distinguish three types of emulation.[195] These types differ in how actors choose what policy or formal structure they deem "appropriate" to emulate. All types are featured in this book. In

Instagram, and WhatsApp. See e.g. Federal Trade Commission Facebook Inc, Case No 1:20-cv-03590 (Complaint for injunctive and other equitable relief) (United States District Court, District of Colombia).

[190] Merriam Webster, emulate – meaning 1a and 1b, <https://perma.cc/GA24-A2H2>.

[191] Online Etymology Dictionary, 'emulation (n),' accessible via: <https://perma.cc/8QED-6GXE>.

[192] In sociology, emulation is used synonymously to "imitation" and "mimesis." See e.g. Paul J DiMaggio and Walter W Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' (1983) 48 American Sociological Review 147, 151 et seq.

[193] In political science the term emulation was introduced by Eleanor Westney and became a discursive fixture. See Eleanor Westney, *Imitation and Innovation: The Transfer of Western Organizational Patterns to Meiji Japan* (Harvard University Press 1987) 9 et seq; Charles R Shipan and Craig Volden, 'The Mechanisms of Policy Diffusion' (2008) 52 American Journal of Political Science 840, 840 et seq; Beth A Simmons, Frank Dobbin and Geoffrey Garrett, 'Introduction: The Diffusion of Liberalization' in Beth A Simmons, Frank Dobbin and Geoffrey Garrett (eds.), *The Global Diffusion of Markets and Democracy* (Cambridge University Press 2008) 31 et seq; Fabrizio Gilardi and Fabio Wasserfallen, 'The Politics of Policy Diffusion' (2019) 58 European Journal of Political Research 1245.

[194] Describing India's "emulation" of the GDPR: Bradford (n 161) 48.

[195] Simmons, Dobbin and Garrett (n 193) 31 et seq.

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practice, the types are interrelated and often converge. We distinguish between the "follow the leader" model, expert theorization, and normalization.

The first type is the "follow the leader" approach, in which social acceptance and notions of the "appropriateness" of policy choices emanate from exemplars of leading actors.[196] Emulating leading actors' policies and institutions is common practice in legal policies, especially in comparative law and the EU's legislative procedures.[197]

The second type is the emulation of policy choices or institutional designs because expert groups theorize and provide actors with a rationale to implement them.[198] Such "expert theorization" develops in epistemic communities that theorize, define, and sometimes lobby for new policy solutions or institutional designs for existing governance problems.[199] Here, no particular real-world example has to exist, although what it is that experts theorize about tends to be informed by existing policies and governance practices.[200]

Expert theorization was a strong driver behind the DSA's out-of-court dispute settlement bodies and the Oversight Board.[201] Decisive design choices for both the EU DSA's out-of-court dispute settlement bodies as well as Meta's Oversight Board were lobbied for and developed by scholars. The roles of experts, professionals, and scholars in legal and organizational practice have been extensively studied in organizational sociology and socio-legal scholarship.[202] Experts' stances and professional backgrounds will tend to inform their advice to policymakers and

[196] See ibid 34. See further Frances Stokes Berry and William Berry, 'Innovation and Diffusion Models in Policy Research' in Christopher M Weible and Paul A Sabatier (eds.), *Theories of Policy Process* (Routledge 2018) 230.

[197] Bradford (n 161) 10. See further David Vogel, *The Politics of Precaution: Regulating Health, Safety, and Environmental Risks in Europe and the United States* (Princeton University Press 2012).

[198] Simmons, Dobbin and Garrett (n 193) 34.

[199] Ibid 34–35.

[200] Ibid 35–36.

[201] See 4.2.

[202] See e.g. Päivi Leino-Sandberg, *The Politics of Legal Expertise in EU Policy-Making* (Cambridge University Press 2021); Antoine Vauchez, 'The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)' (2008) 2 International Political Sociology 128; Tommaso Pavone, *The Ghostwriters: Lawyers and the Politics behind the Judicial Construction of Europe* (Cambridge University Press 2022); Antoine Vauchez and Bruno de Witte (eds.), *Lawyering Europe: European Law as a Transnational Social Field* (Hart 2013); Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 American Journal of International Law 1; Antonin Cohen and Antoine Vauchez, 'The Social Construction of Law: The European Court of Justice and Its Legal Revolution Revisited' (2011) 7 Annual Review of Law and Social Science 417.

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executives of private companies. Or, put more bluntly, as one interviewee who advised Facebook on creating the Oversight Board put it:

> They could have started totally different paths. They could've issued three-page decisions like the [French] court of cassation does. It could've done that. It didn't. ... It didn't do because of sociological factors, because they put a bunch of US lawyers in charge. What the fuck happens when you put a bunch of US lawyers in charge? Well, they started doing things that they're familiar with.[203]

This type of expert-driven emulation builds on input from experts conveyed to lawmakers or private-sector executives tasked with devising solutions to a particular governance problem. Whereas expert theorization's "appropriateness" may be more contested than the "follow the leader" type of emulation (two lawyers, three opinions, as the saying goes), expert-advised emulation banks on the social status of experts and their expertise. Another factor at play is the sheer constraint of time and resources faced by legislators. In particular, ambitious and time-sensitive projects like the DSA often rely on the expertise of people who deal with specific issues far more comprehensively than the average legislator can within the limits of their day-to-day.

Third, the emulation of policy choices or organizational designs often happens when the relevant policy choice and organizational design is considered by experts in the field or by the general public as a standard, a necessary operating procedure, or a norm.[204] The generating of norms, or "normalization," often builds on previous exemplars, which are then emulated based on the follow the leader model by other actors and on previous or subsequent theorization by experts.[205] As Simmons et al. note: "Once a new policy reaches a certain threshold, policymakers take it for granted as necessary."[206] This is very visible here. Platforms accrue more and more power. Therefore, accountability appears "appropriate." The "appropriate" form of accountability then, again, appears to be individual rights adjudication – after all freedom of speech is the one constant tune in this overture.

[203] Interview with Academic, Consultant to Facebook in 2018 (1 November 2021).
[204] See Simmons, Dobbin and Garrett (n 193) 37–40. What Simmons et al. describe as third and fourth type are bundled as one general type in this book.
[205] Ibid 38.
[206] Ibid 39.

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2.4.3 *Policy Diffusion*

The intellectual history of emulation builds on two strands of scholarship. On one side it builds on research into policy diffusion, which examines how certain policies diffuse around the globe or within federal structures. Eleanor Westney first introduced the concept of emulation to comparative politics in a 1987 study of Japan's construction of "Western"-style institutions during the Meiji Restoration in the nineteenth century.[207] To evade colonization, Japan established a Western-style administrative system, legal frameworks, newspapers, and educational institutions. Within several years, formerly insular Japan had overhauled many of its institutional (as well as organizational) structures. Beth Simmons et al. contrast emulation with coercion (involuntary policy choices), competition (policy choices according to market expectations, that is, a general thrust toward liberalization), and learning (policy choices made after lengthy soul-searching, adapted to specific purposes, often inspired by others).[208] Political scientists describe such processes as *policy diffusion*.[209] Empirical research suggests that emulation is among the most common mechanisms of policy diffusion.[210] Actors reproduce preexisting policy choices because they deem them "appropriate."[211] What an actor considers "appropriate" is influenced by what the actor believes internal adversaries, relevant stakeholders, and the general public consider legitimate. As Eleanor Westney noted, "a foreign organizational model may be used [for emulation] to legitimate changes desired by innovators but which require justification by the appeal to the outside model."[212] Translated to our

[207] Westney (n 193) 9 et seq.

[208] Simmons, Dobbin and Garrett (n 193) 9 et seq.

[209] For an introduction see Simmons, Dobbin and Garrett (n 193); Shipan and Volden (n 193); Berry and Berry (n 196); Susanne Lütz, 'Policy-Transfer und Policy-Diffusion' in Arthur Benz and others (eds.), *Handbuch Governance: Theoretische Grundlagen und empirische Anwendungsfelder* (VS Verlag für Sozialwissenschaften 2007); Gilardi and Wasserfallen (n 193). For a critical assessment of the literature see Erin R Graham, Charles R Shipan and Craig Volden, 'The Diffusion of Policy Diffusion Research in Political Science' (2013) 43 British Journal of Political Science 673.

[210] Simmons, Dobbin and Garrett, 'Conclusion' in Simmons, Dobbin and Garrett (n 193) 353–355; Christine Min Wotipka and Francisco O Ramirez, 'World Society and Human Rights: An Event History Analysis of the Convention on the Elimination of All Forms of Discrimination against Women' in Simmons, Dobbin and Garrett (n 193); Shipan and Volden (n 193) 842–843.

[211] See also Chang Kil Lee and David Strang, 'The International Diffusion of Public Sector Downsizing: Network Emulation and Theory-Driven Learning' in Simmons, Dobbin and Garrett (n 193) 148.

[212] Westney (n 193) 27.

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context: if a policy maker, Meta executive, or external consultant wants to change how the company is run, they might reference convincing outside examples how things are done in other contexts, for example, through "something like a Supreme Court." Correspondingly, a key denominator for what *is* considered appropriate and legitimate by actors throughout the case studies are the values and dogmas of two sociopolitical trends in Western governance since the 1950s: *juridification* and *judicialization*. Juridification is "a process in which human conflicts are torn through formalization out of their living context and distorted by being subject to legal processes."[213] In simple terms, juridification implies that we now interpret more issues as *legal* than we used to. The ever-increasing regulatory acquis on the domestic, supranational, and international levels provides ample anecdotal evidence.[214] Judicialization, in turn, refers to the institutions that benefit most from juridification: courts[215] and other adjudicators.[216] The more we see power imbalances as legal issues and the more we "juridify" and break down a governance actor's legitimacy into atomized rights disputes, the more powerful courts become. Evidence for judicialization has been observed for various systems, polities, and policies, from the United States to the European Union and its Member States, as well as in the workings of international law.[217] Examples range from the establishing of adjudicatory control over the burgeoning administrative state from the late-nineteenth century to landmark cases like *Brown v. Board of Education* in the United States

[213] Gunther Teubner, 'Juridification Concepts, Aspects, Limits, Solutions' in Gunther Teubner (ed.), *Juridification of Social Spheres* (De Gruyter 1987) 6. The main other text is Gunther Teubner (ed.), *Global Law without a State* (Dartmouth 1997). See for related approaches e.g. John H Barton, 'Behind the Legal Explosion' (1975) 27 Stanford Law Review 567; Eric A Posner, *The Perils of Global Legalism* (University of Chicago Press 2009); Lars C Blichner and Anders Molander, 'Mapping Juridification' (2008) 14 European Law Journal 36.

[214] Blichner and Molander (n 213).

[215] See Stone Sweet (n 51); Shapiro and Stone Sweet (n 51); Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004).

[216] See e.g. Okayama (n 46); Merijn Chamon, Annalisa Volpato and Mariolina Eliantonio (eds.), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Oxford University Press 2022); Lamandini and Muñoz (n 50).

[217] Alec Stone Sweet, 'Judicialization and the Construction of Governance' (1999) 42 Comparative Political Studies 147; Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004); Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford University Press 2002). Recently, critical voices are becoming more prominent see Fuad Zarbiyev, 'On the Judge Centredness of the International Legal Self' (2021) 32 European Journal of International Law 1139.

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to *van Gend & Loos* in Europe.[218] Hence, paired with the sociopolitical and cultural significance of courts in Western discourses and cultures, the appropriate policy to emulate, almost self-evidently, has been adjudicative control over power. Norms and traditions that help to construct ideals of appropriateness may well conflict in detail, often leading to hybrid or adapted emulations trying to balance competing objectives and rationales. Yet policy diffusion is not the only perspective – especially because it does not account in full for why and when emulations fall short or remain uncompleted. For that, in the next part we need to turn to organizational sociology.

2.4.4 Organization Theory

The sociological angle then highlights the role of public legitimacy and the lingering danger of mere sugarcoating or, as Meyer and Rowan put it, ceremonial reforms. Organizations strive to appear more legitimate by conforming often uniformly to public demands of how a good organization should look like. Organizational theorists describe this emulation of what is seen elsewhere and considered "a best practice" – that is, this trend toward conformity – as *institutional isomorphism*.[219] That strand of work, soon called "neo-institutionalist," emerged in the 1980s as a response to then-dominant "rational choice" theories in sociology (and economics).[220] Rational choice perspectives posited that "efficient"

[218] See this chapter at 2.2.

[219] The concept "isomorphism" originates from mathematics, denoting a resembling relationship between mathematic, typically algebraic, structures. It derives from the ancient Greek words ἴσος (translit: isos) for "equal," and μορφή (translit: morphe) for "shape" or "form."

For the pioneering but largely forgotten work of Gabriel Tarde see his *The Laws of Imitation* (Henry Holt 1903) 37 et seq. See further Barbara Czarniawska, 'Gabriel Tarde and Organization Theory' in Paul Adler (ed.), *The Oxford Handbook of Sociology and Organization Studies* (Oxford University Press 2009) 258–260.

[220] Pioneering authors are John Meyer and Brian Rowan and later Walter Powell and Paul DiMaggio who studied the emergence of recurring patterns among various organizations, mainly in the private sector. Neo-institutionalism builds on classic accounts by Durkheim and Weber and the (often forgotten) work of Gabriel Tarde on imitation as the driving force behind social resemblance. See DiMaggio and Powell (n 192); John W Meyer and Brian Rowan, 'Institutionalized Organizations: Formal Structure as Myth and Ceremony' (1977) 83 American Journal of Sociology 340. For an overview see Swaran Sandhu, 'Grundlagen und Kernbegriffe des Neo-Institutionalismus' in Swaran Sandhu, *Public Relations und Legitimität* (Verlag für Sozialwissenschaften 2012) 74 et seq; Paul DiMaggio and Walter W Powell (eds.), *The Neo-Institutionalism in Organizational Analysis* (University of Chicago Press 1991). For a good historical contextualization see R Jepperson, 'The Development and Application of Sociological Neoinstitutionalism

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organizational patterns prevail, whereas inefficient patterns fade away. In contrast, neo-institutionalists argue that many organizational patterns and structures are not necessarily "rational" in terms of efficacy but reflect social and culturally constructed patterns, models, ideas, and a consensus regarding what constitutes a "good" and "legitimate" organization.[221] Since organizations compete for "political power and institutional legitimacy," they seek to appear as legitimate as possible.[222] One common and relatively easy way to do so is to emulate institutions and organizations that are widely accepted as legitimate. This is why corporate actors have established a panoply of guardianship-oriented institutions ranging from compliance departments to auditors, diversity reports or, as this book shows, self-styled adjudicators.

Notably, emulation often leads to *ceremonial* changes in the formal structure instead of deep-rooted changes in "policy or strategy."[223] Emulating ceremonies and formal structures is more easily observable by the public and is perhaps for this reason more effective from a self-regulatory perspective, even though more complex policy changes may be "less easily noticed."[224] Again, the reason is that a ceremonial add-on like a new adjudicator promises immediate societal legitimacy. In contrast, a lengthy overhaul of internal governance practices may go unnoticed by the public.[225] Hence, as Meyer and Rowan argued: "the formal structures of many organizations ... dramatically reflect the myths of their institutional environments instead of the demands of their work activities."[226] In simple terms, the myth this book investigates is that ever more adjudicators bring more justice.

The "myths" of out-of-court dispute settlement bodies and the Oversight Board's institutional environment arise from the sociocultural significance of individual rights, judicial review, and widespread belief in an ever-increasing "judicialization" of politics and governance.[227] Empirical data compiled by sociologists for decades suggests that

(2002)' in John W Meyer and Ronald L Jepperson (eds.), *Institutional Theory: The Cultural Construction of Organizations, States, and Identities* (Cambridge University Press 2021) 67 et seq.

[221] Seminal: Meyer and Rowan (n 220).

[222] DiMaggio and Powell (n 192) 150.

[223] Ibid 152.

[224] Ibid.

[225] Ibid 155.

[226] Meyer and Rowan (n 220) 341.

[227] See e.g. Stone Sweet (n 51); Shapiro and Stone Sweet (n 51); Stone Sweet (n 215); Stein (n 202); Pavone (n 202); Jack M Balkin, 'What Is Postmodern Constitutionalism?' (1992) 90 Michigan Law Review 1966. Largely critical, albeit from different perspectives: Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in*

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organizations use emulation to establish ceremonial, formal structures that are decoupled from the organizations' work requirements. Doing new things, building fresh formal structures, and (metaphorically) putting on a new ceremony may merely serve to project a legitimizing image onto essentially unchanged practices. From the start, organizational sociologists highlighted the risk of *decoupling* between emulated, ceremonial structures shown to the outside and organizations' internal practices which often did not conform to the narratives characterizing the organization's public image.[228] Meyer and Rowan argued: "To maintain ceremonial conformity, organizations that reflect institutional rules tend to buffer their formal structures from the uncertainties of technical activities by becoming loosely coupled, building gaps between their formal structures and actual work activities."[229] Such decoupling serves as a clear warning. If out-of-court dispute settlement bodies or the Oversight Board were merely ceremonial, formal structures decoupled from the activities they were supposed to control, then they could be considered a failure from a public law perspective.

2.4.5 *Legal Transplants*

Lastly, we should distinguish emulation, as presented in political science and sociological scholarship, from *legal transplants*, a notion from the field of comparative law. Legal transplants are normative regimes originating in a particular legal system that is then adopted by other legal systems.[230] These political science and sociological viewpoints have two advantages over a legal transplant perspective. First, legal transplants refer chiefly to legal norms and not to organizations. Even though more recent scholars studying legal transplants have taken a more context-oriented perspective, the key question is still how a specific set of norms fit into another

Judicial Policymaking (Nijhoff 1986); 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; 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; Emma Kaufman, 'The New Legal Liberalism' (2019) 86 University of Chicago Law Review 187.

[228] Meyer and Rowan (n 220) 341 et seq.

[229] Ibid 341.

[230] For a legal theory perspective on the latter see foundationally *Alan Watson, Legal Transplants: An Approach to Comparative Law* (2nd ed., University of Georgia Press 1993). As well as the useful introduction by William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 The American Journal of Comparative Law 489.

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legal system.[231] Here, however, we mainly see evidence of the emulation of a formal structure – for example, the Oversight Board and Article 21 DSA emulating adjudicators – but not necessarily the "transplanting" of legal norms. On the contrary. As we will see in the case studies, many legal norms that might be of great value are not "transplanted" to their new context in private governance. Perhaps the most crucial aspect is the adjudicators' authority. In any serious rule of law system, it is "axiomatic" (using Paul Craig's word) that adjudicators protect individual rights, in one way or another, by *bindingly* deciding disputes between individual and public power structures.[232] However, the authority of both the Emulated Guardians studied here to bindingly decide cases concerning the activities of social media platforms is severely limited. Hence, perhaps the most fundamental rule of individual rights adjudication has not been successfully transplanted into private governance. If this is the case, then out-of-court dispute settlement bodies and the Oversight Board are the opposite of legal transplants. They transplant an institution – the adjudicator – without transferring the underlying norms. Chapter 5 details how this incomplete emulation impedes both bodies' roles and activities as guardians.

2.4.6 *"Designing This Thing"*

Applied to the Emulated Guardians studied here, we may theorize that their creators – the EU and Meta – emulate existing practices, here: individual rights adjudication, to conform to societal expectations. In other words, organizations emulate other organizations, policies, or institutions because they wish to be perceived as legitimate and because existing policies, role models, and institutions demonstrably work. Bound by time and resource constraints, large organizations – private and public – cannot search for a comprehensive solution for each governance problem. Instead, they "borrow heavily from their neighbors and ideological peers."[233] As one interviewee said:

[231] See e.g. Pierre Legrand, 'The Return of the Repressed: Moving Comparative Legal Studies Beyond Pleasure' (2001) 75 Tulane Law Review 1033; Liesel Spencer, 'Comparative Legal Geography – Context and Place in "Legal Transplants"' in Tayanah O'Donnell, Daniel F Robinson and Josephine Gillespie (eds.), *Legal Geography: Perspectives and Methods* (Routledge 2020) 149 et seq.

[232] cf. Paul P Craig, *EU Administrative Law* (3rd ed., Oxford University Press 2018) 265.

[233] Graeme Boushey, *Policy Diffusion Dynamics in America* (Cambridge University Press 2010) 25; Simmons, Dobbin and Garrett (n 193) 32; DiMaggio and Powell (n 192).

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[We looked at] an ideational structure ... like what understandings from the background could be learned ... to design this thing.[234]

Hence, when the EU regulates the internal digital market, or Meta presumably tries to escape regulation, this involves making a policy choice that would be widely understood as legitimate. In the very first memos sketching the outline of the Oversight Board, the Board's court-like structure was praised as its most important asset because this would make it, literally, "widely understood as legitimate."[235] In turn, the EU equally strove to infuse legitimate procedures into social media companies' private governance and thus initially sought to subject private power to "simplified legal procedures" that would "fit the nature of content moderation disputes."[236]

Creating adjudicatory oversight to protect the rights of individuals is something we might generally consider legitimate. After all, who would object to more individual rights protection? Politicians, managers, and consultants, for all kinds of justified practical reasons, cannot devise an "original" solution for every governance problem. Arguably, few genuinely "new" solutions exist anyway since all ideas build on previous notions and experiences. It is thus natural that decision-makers draw inspiration from the wealth of existing models; drawing inspiration and even reproducing and emulating is a common form of human and organizational learning. Therefore, in principle, emulation is neither "good" nor "bad."

However, adopting models that have been devised elsewhere requires careful fitting.[237] Even the most attractive-looking ready-to-wear garment will not fit if you pick the wrong size. In the next chapters we will assess whether ODSs and the Oversight Board indeed "fit" their new contexts.

2.4.7 The Wrong Role Model?

Further, from a more critical perspective and beyond questions surrounding the power relationships between individual and platform, the idea that more adjudication leads to more justice rests on shaky ground. If emulating judicial control over administrative power is to

[234] Interview with Academic, Consultant to Facebook in 2018 (n 203).
[235] Noah Feldman, 'Facebook Supreme Court: A Governance Solution (March 2018), Published in: Global Feedback and Input on the Facebook Oversight Board for Content Decisions Appendix, Appendix D' 104; See further Douek (n 180) 46 et seq.
[236] European Parliament Committee on Legal Affairs and Tiemo Wölken (Rapporteur) (n 5) 22.
[237] cf. Richard Harvey Brown, 'Bureaucracy as Practice: Towards a Political Phenomenology of Formal Organizations' (1978) 23 Administrative Science Quarterly 365, 375.

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work, as argued above, it requires an actor in an agreed leadership position to follow or adapt theorization of a functioning model. The specific exemplars and theorizations contributing to Emulated Guardians share their epistemological basis in the rise of courts and rights-based approaches that have arisen since the 1950s in the United States and Europe.[238] However, these meta-narratives of "rights-based approaches" enabling individuals as controllers of powerful institutions have been criticized from historical, political, and sociological perspectives.[239] Famously, Gerald Rosenberg argued that courts are a "hollow hope," which often cannot bring about social change. Courts that tend to align, so the critique goes, with public opinion more often than not (as Friedman argues) often fail to implement structural changes. Even landmark cases like *Brown v. Board of Education* may be pyrrhic victories placating lawyers, activists, and policymakers with the self-aggrandizing idea of changing institutional practice with one normative verdict issued after judicial processes, or ceasing to control public power altogether because of institutional self-interest.

Therefore, the leading exemplars from the state context and their theories championing the power of courts and the normative traction of individual rights are perhaps compromised. In fact, over the short period of writing this book, the approval ratings of the US Supreme Court dipped from a ten-year high of 58 percent in July 2020 to a record low of only 39 percent approval in July 2025. And, to add more anecdotal evidence, whenever presenting the research on this book to a US American audience at least one person would question the wisdom of emulating what more and more people consider a flawed institution.[240] This does not mean that individual rights adjudication is

[238] For an overview see Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998); Reza Banakar (ed.), *Rights in Context: Law and Justice in Late Modern Society* (Ashgate Pub Co 2010). Also, European integration and the "constitutionalization" of its treaties can be understood as a rights-based approach which made the individual an "auxiliary agent of the Community," see Robert Lecourt, *L'Europe des juges* (Bruylant 2008).

[239] Guinier (n 227). See further Rosenberg (n 227); Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar, Straus and Giroux 2009); Kaufman (n 227). For the European context and the ECJ's backtracking of some of its citizenship jurisprudence see Blauberger and others (n 227).

[240] Skepticism toward prominent courts is, of course, a recurring phenomenon not necessarily limited to one particular political perspective.

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not a hallmark of legitimate government and deserving of praise and repurposing in new governance contexts. Yet when emulating individual rights adjudication, such criticism provides valuable insights into the parameters, circumstances, and conditions essential for effective adjudicatory control of power.

This is not the place to discuss whether the above critiques are entirely accurate. Yet, the abovementioned criticism provokes the question of whether emulating individual rights adjudication to control platform power is the correct approach at all. Suppose traditionally constituted adjudicators are criticized for sometimes failing to protect individuals in the face of power imbalances vis-à-vis powerful administrative institutions. How can emulated adjudicators, often with markedly inferior authority and legitimacy, fare any better? Are there perhaps other, more innovative forms of controlling power equally able to protect individuals from the largest administrators of the twenty-first century? Evidence from the case studies presented here, especially those in the private realm, therefore require us to ask the question Martin Laughlin bitingly posed for public law in general: does it make sense to base "a political order on individual rights, and therefore paradoxically basing the legitimacy of society on a thoroughly asocial principle?"[241]

Chapter 6 engages deeper with these criticisms. But as the first wave of organizational and normative emulations in the form of the DSA and the Oversight Board consolidates itself, we can fairly say that thinking about rights permeates legislation, self-regulation, and academic approaches like "digital constitutionalism."[242] Ultimately, the fact that discourses around controlling platform power have homed in on relationships between individualized (and therefore relatively powerless) users and independent, autonomous, dominant platforms shows how individual rights can become merely an affirmatory feature in the operation of power instead of power's counterbalance.[243] In much the same vein, Douek recently called for a more systemic approach to content moderation, arguing that "the current regulatory focus on procedure in *individual cases* is a mistake."[244] Therefore, emulating individual rights adjudication must not appear as a "natural"

[241] Martin Loughlin, *The Idea of Public Law* (Oxford University Press 2004) 130.
[242] See e.g. Redeker, Gill and Gasser (n 104); De Gregorio (n 104) 273 et seq.
[243] cf. Nikolas Rose and Peter Miller, 'Political Power beyond the State: Problematics of Government' (1992) 43 British Journal of Sociology 173, 174.
[244] Douek (n 55) 532.

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evolutionary step for the judicial process tailing the locus of power from the public domestic level to the supranational level and then to private actors. Instead, it may equally well reproduce those power dynamics and mechanisms that tend to stabilize existing power structures.

2.5 Conclusion

This chapter introduced Emulated Guardians as the book's key concept. Drawing from administrative law, political science, and organizational sociology it argued that ostensibly "new" governance solutions like the Oversight Board or the EU's out-of-court dispute settlement bodies are in fact reproductions of preexisting, culturally venerated role models. Such emulations are particularly attractive for the emulator as they often build on best practice in different contexts and, by extension, promise public legitimacy for the solution of the problem at hand. However, emulation is not easy. Many role models function only under specific contextual factors. These contextual factors – like an overall commitment to the rule of law, legitimate rulemaking, and extensive adjudicatory authority – are not necessarily given in new contexts. In such cases, emulation may demise to mere ceremony that cloaks organizations in the legitimizing appearance of accountability albeit the Emulated Guardians are rather powerless. However, crucially, the Emulated Guardians studied here reproduce individual rights adjudication, which is at the cusp of our contemporary sociocultural imaginary. That public imagination about courts, rights, and their power – potentially – lends power to Emulated Guardians vis-à-vis the power structures they control. After all, also courts incrementally expanded their authority vis-à-vis public power through bold moves and public support. The next two chapters, investigate to what extent out-of-court dispute settlement bodies and the Oversight Board can indeed deliver on that promise.

Thus, abstractly spoken, studying new phenomena through the prism of emulation is not limited to the Oversight Board, the DSA, content moderation or the internet. Quite the contrary. As emulations' underlying social mechanism – an easy way to attract public legitimacy – is so fundamental, we will likely see many more emulations of accountability mechanisms guarding (or pretending to guard) future

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power structures. Concretely, both the Oversight Board as well as out-of-court dispute settlement bodies are designed to be emulated.[245] Further, one may read the whole book as an allegory for future struggles of legal and adjudicatory authority in (privately dominated) transnational governance.

[245] Meta's "Corporate Human Rights Policy" explicitly states: "We believe the Oversight Board breaks new ground for access to remedy in the social media industry, and hope it serves as a useful model for other companies and initiatives," at 03, accessible via: <https://perma.cc/EK3G-FC7E>. The EU designed the whole DSA to be a "global standard-setter," European Commission, Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/32/EC 2020 [COM(2020) 825 final] explanatory memorandum at 2.

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