PRIVATE SUPREME COURTS

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Public law scholars often consider how to separate power among and within governmental entities in order to encourage these entities to use that power effectively. However, public law scholars only rarely bring the insights they have developed about the separation of powers to bear on questions of how private law should regulate private business firms. But, in order to encourage compliance with their own fundamental objectives, these firms often diffuse authority among their officials, a private separation of powers.

This Article considers an emerging form of the private separation of powers: a private supreme court-like institution internal to a single firm. The consistent application of firm rules may be commercially valuable in some contexts, and private supreme courts can help provide firms with that kind of consistency. Courts and commentators have considered other forms of private separation of powers but have largely failed to consider how the law should treat these court-like institutions.

We pattern our discussion of a court-like structure on the Oversight Board created by Facebook (now Meta) in 2018. The Oversight Board has largely been considered for what it means for speech, but we are interested in what it means for private institutional design more generally. We consider the economic value of this private supreme court-like structure in generating a consistent application of firm rules that attracts customers and manages regulators. Private supreme courts can generate costs for firms as well, so after we consider what these institutions can do, we then discuss when and how private supreme courts can act to be the most useful.

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We consider the case for private supreme courts from the perspective of one illustrative example: sports leagues, and, in particular, the National Basketball Association ("NBA"). We argue that the NBA should create a "Basketball Court," a somewhat independent adjudicatory body that uses the tools of judicial decision-making to interpret league rules in a consistent way that can provide commercial value to the NBA.

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INTRODUCTION

How and whether to separate power within and among branches of the federal government is a constant topic of discussion among courts and commentators interested in public law. James Madison famously foregrounded this issue in *Federalist No. 47*, writing that the "accumulation of all powers . . . in the same hands . . . may justly be pronounced the very definition of tyranny."[1] One of the traditional goals of constitutional law has been to ensure that each branch of

1. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

government possesses a "will of its own," so that the "ambition" of each branch can "be made to counteract [the] ambition" of the other branches.[2]

Public law scholars, though, only occasionally bring the insights they have developed from studying the separation of powers to bear on how and whether power should be separated inside private institutions. But private law must also consider whether and when to divide power. For instance, state laws encourage companies to create institutions like a board of directors with independent members[3] or compliance departments[4] to check the power of corporate officers and help the firm follow internally and externally generated laws, rules, and goals. Firms sometimes hire an external actor like a law firm—at a hefty price—to comply with these legal rules.[5] There is an ongoing debate in private law about exactly how independent institutions like these must and should be.[6]

This Article considers another emerging form of private separation of powers: a private supreme court-like institution internal to a single company or private association.[7] Courts and commentators have considered other forms of private separation of powers but have largely missed the emergence of these court-like institutions. This Article considers why and when it makes sense for the law to support and encourage these private supreme courts as a useful tool for private firms.

It is usually considered an obligation of public institutions that their rules be announced in advance and treat "all persons similarly situated . . . alike."[8] The obligation to act consistently that is mandatory for public actors may be commercially valuable for at least some private businesses in some instances—and

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2. THE FEDERALIST NO. 51, *supra* note 1, at 321–22 (James Madison). Separating powers between branches of government, at least in the United States today, does not always lead to ambition checking ambition, particularly when officials from the same political party dominate each branch. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2330 (2006).

3. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141 (1953) (providing rules for the independence of actors within private business firms); MD. CODE ANN., CORPS. & ASS'NS § 2-401 (1975) (identifying certain actors that are supposed to be independent within private firms). *See also* Sarbanes–Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, 29 U.S.C.) (addressing similar issues). Indeed, firms must have audit committees with independent members to be listed on stock exchanges. *See* Jillian M. Lutzy, *Analysis of the Proposed NYSE Corporate Governance and Audit Committee Listing Requirements*, 2 DEPAUL BUS. & COMM. L.J. 99, 102–06 (2003).

4. *See, e.g.*, Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 253 (2020) ("[T]he responsibility for preventing and detecting misconduct within a[] [corporate] organization lies primarily with the organization itself.").

5. *See* Veronica Root Martinez, *Public Reporting of Monitorship Outcomes*, 136 HARV. L. REV. 757, 758 (2023).

6. *See, e.g.*, Kahn v. M&F Worldwide Corp., 88 A.3d 635, 639 (Del. 2014) (considering how to treat a merger and basing that decision on the degree of independence within a private firm); Stephen M. Bainbridge, *Independent Directors and the ALI Corporate Governance Project*, 61 GEO. WASH. L. REV. 1034, 1037 (1993) (considering these debates).

7. We are not considering the separation of powers in non-profit organizations. The central question we take up is why a profit-seeking institution would create an internal court.

8. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985).

private supreme courts may help provide that kind of consistency.[9] This is why the defining features of a public supreme court have gradually started to become a more common feature in newer institutions located within some private firms.

These firm-specific institutions interpret and apply preexisting firm rules.[10] They explain how they interpret rules in a written opinion that resembles a judicial opinion.[11] These institutions even sometimes have a degree of independence from those in charge of the firms themselves.[12] Institutions with some of these features can be found across the private sector—from General Motors to the National Collegiate Athletic Association ("NCAA").[13]

The trickle of consideration of private supreme courts exploded after the world-dominating social networking company Facebook (now called Meta) proposed and then created the Oversight Board. Facebook faced an enormous amount of public criticism and regulatory interest in its content decisions.[14] One of its responses was to build a new court-like institution with a greater degree of independence and authority than had previously existed at other private firms. Facebook called this institution the Oversight Board and empowered it to review

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9. We do not take a position on whether corporate law *should* address considerations apart from commercial value. We are focusing just on commercial value because it has traditionally been considered to feature a separate category of normative considerations. *See, e.g.*, Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 257 (2021) ("Since the early twentieth century, U.S. corporate law has . . . a view that concerns about . . . the impact of corporations on society will be primarily addressed by laws external to corporate law.").

10. *See, e.g.*, Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 707 (2001) (describing giving certain rules "higher legal status" that prevents them against "ordinary . . . amendment or repeal" as one of the features of a system of judicial review).

11. *See, e.g.*, Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 633–35 (1995) (discussing the importance of giving reasons to the judicial function).

12. *See* THE FEDERALIST NO. 78, at 226–29, 231–32 (Alexander Hamilton) (Roy P. Fairfield ed., 1981) (arguing that the tenure provisions for federal judges in Article III of the Constitution will help "secure a steady, upright, and impartial administration of the laws" and "guard the Constitution and the rights of individuals from the effects of those ill humors, which . . . sometimes disseminate among the people themselves"); Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 965–66 (2007) (describing salary and tenure protection as crucial to judicial independence).

13. In 2017, the Federal Bureau of Investigation uncovered problems in college athletics that promised to "upend" the sports landscape. *See* Marc Tracy, *N.C.A.A. Coaches, Adidas Executive Face Charges; Pitino's Program Implicated*, N.Y. TIMES (Sept. 26, 2017), https://www.nytimes.com/2017/09/26/sports/ncaa-adidas-bribery.html [https://perma.cc/HS5A-X69X]. In response, a blue-ribbon commission noted how other private firms had started to use private supreme courts, and proposed one for the NCAA that was created shortly thereafter. *See* COMM'N ON COLLEGE BASKETBALL, REPORTS AND RECOMMENDATIONS ON THE ISSUES FACING COLLEGE BASKETBALL 9–10 (2018), https://ncaaorg.s3.amazonaws.com/compliance/cbreform/2018CCB_ReportFinal.pdf [https://perma.cc/A63U-PTQ3] (discussing the need for and creation of an "independent . . . adjudication" process).

14. *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1600–01 (2018).

whether some of Facebook's decisions to remove content from the site were proper under the company's pre-announced "Community Standards."[15] The Oversight Board was required to write opinions explaining its decisions.[16] It also went several institutional steps further in the direction of becoming court-like in its independence and finality than prior private supreme court-like institutions. It was staffed by many experts embedded in the legal community, and it was empowered with guaranteed funding and years of job security.[17] Facebook pledged to abide by Oversight Board decisions in most circumstances.[18]

The increasingly voluminous literature on the Oversight Board has focused on what it means for speech and the future of social media.[19] We are interested in something else: what it means for private institutional design more broadly and whether other companies might create similar institutions. We consider the benefits and negatives for private firms of creating institutions such as these.

We focus on the main reasons why a business would adopt law-like rules that are announced in advance and then interpreted and developed in a common-law-like fashion by a court-like body, given that doing so will require missing out on some profitable opportunities. There are three major sets of reasons why creating a court-like institution might help businesses achieve their profit-maximizing ends.

First, having a court-like entity apply pre-announced rules with consistency across customers might help a firm attract a broader and more intense group of consumers. If decisions made by a business are clearly visible to the public and/or the nature of the business puts customers in competition with one another, then the consistent application of pre-announced rules may broaden the appeal of the product, particularly given the substantial empirical evidence of customer preferences for fairness.[20]

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15. *See* Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418, 2463 (2020).

16. Our consideration of the Oversight Board relies substantially on the reporting and analysis of two important legal scholars, Evelyn Douek and Kate Klonick. *See* Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526, 595–98 (2022); *see also* Evelyn Douek, *Governing Online Speech: From "Posts-as-Trumps" to Proportionality and Probability*, 121 COLUM. L. REV. 759, 829–30 (2021); Kate Klonick, *Inside the Making of Facebook's Supreme Court*, NEW YORKER (Feb. 12, 2021), https://www.newyorker.com/tech/annals-of-technology/inside-the-making-of-facebooks-supreme-court [https://perma.cc/7FJJ-5JPY]; Klonick, *supra* note 14, at 1668–69.

17. *See infra* note 60 and accompanying text.

18. *See* Oversight Board, *Bylaws*, FACEBOOK art. 2.3.1 (Jan. 2022) [hereinafter Oversight Board, *Bylaws*], https://about.fb.com/wp-content/uploads/2020/01/Bylaws_v6.pdf [https://perma.cc/DF7N-SG7X] ("Facebook will implement board decisions to allow or remove the content properly brought to it for review within seven (7) days of the release of the board's decision on how to action the content."); Klonick, *supra* note 15, at 2458–64.

19. While we use the Oversight Board as a jumping off point, little in this Article turns on whether its creation will be, in the end, good for Facebook or for the country more broadly.

20. *See infra* notes 117–21 and accompanying text.

Second, applying pre-announced rules may encourage customers to make firm-specific complementary investments, as they will be somewhat reassured that a firm following law-like rules will not take advantage of them.

Third, applying law-like rules might also improve the public legitimacy of business decisions, helping businesses facing substantial regulatory or public scrutiny by removing some questions about motives and providing a clear mechanism for explaining corporate decisions.

We are not arguing that creating a private supreme court-like actor will be constructive for all private firms or all decisions of any firm. Much of the time, following pre-announced rules and treating like cases alike will simply mean abandoning potentially profitable opportunities when either situations change faster than rules can or when price discrimination is possible. In these cases, a private supreme court would not be useful. We simply mean to argue that the possibility of creating a court-like institution can be a useful addition to the toolkit of private institutional design.

We consider the occasional virtues of a private supreme court by highlighting an illustrative private organization, the National Basketball Association ("NBA"). The NBA has its own "Constitution"[21] and many other formal documents that state comparably structured rules. However, while many of the questions that the NBA has to resolve are "law-like," there is no entity that is court-like to resolve them.

We argue that the NBA should create the "Basketball Court," a somewhat independent adjudicatory body with the power to hear appeals of league decisions on and off the court. Such a body—staffed by reputationally independent judges who serve fixed terms and are obligated to provide written reasons for their decisions in interpreting and developing league rules—could help promote the league's business interests.[22] Creating and empowering a court-like body would enhance the NBA's ability to convince all spectators of the fairness of its games, encourage casual spectators to make the types of emotional and financial investments that turn them into rabid fanatics, and dissuade governments from intervening (but encourage them to continue offering subsidies). This discussion is meant to be more of a "proof of concept" to show that a private supreme court can be helpful for some private organizations in making some important decisions.

It is also important to note what we are *not* arguing in addition to what we are arguing. First, scholars have focused extensively on the issues created when

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21. *See* NAT'L BASKETBALL ASS'N, CONSTITUTION AND BY-LAWS OF THE NATIONAL BASKETBALL ASSOCIATION, art. 35A (2012) [hereinafter NBA CONST.], https://ak-static-int.nba.com/wp-content/uploads/sites/3/2015/12/NBA-Constitution-and-By-Laws.pdf [https://perma.cc/6JEF-UAHM] (establishing the league rules governing owner behavior).

22. *Cf.* Jackson, *supra* note 12, at 965–66 (describing salary and tenure protection as crucial to judicial independence); Schauer, *supra* note 11, at 633–35 (discussing the importance of giving reasons to the judicial function).

there is private resolution of public law litigation.[23] Our animating question is almost the converse: when should private institutions resolve private disputes using the tools and values developed in public institutions?[24] While we are borrowing a public law idea for a private law issue, we do not mean to suggest that the contexts are identical. We use the phrase *court-like* to refer to private supreme courts because we need some phrase to describe the collection of institutional attributes that we imagine a private supreme court as having. Describing these attributes as most analogous to a court seems accurate. But we are more concerned, though, with what a private supreme court *does* rather than what it is called.

Further, our goal is to consider private supreme court-like institutions on their own terms—as an emerging tool, and one that can help private firms in particular. We argue they can serve as a complement to, and not a substitute for, other types of private institutional design. Other tools of private separation of powers surely make good and often even better sense for many private firms.[25] There are also important roles that governmental institutions can play in shaping any internal adjudication utilized by private firms. These are important issues but beyond the scope of this Article.

We are also considering these institutions as a potentially constructive addition to the *private* law toolbox. We discuss when and if these court-like institutions can assist corporations with their traditional aim of "maximiz[ing] wealth for their shareholders within the confines of the law."[26] It is also worth

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23. *See, e.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) ("Adjudication['s] . . . job is not to maximize the ends of private parties . . . but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes . . . . This duty is not discharged when the parties settle."); David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 370 (2018) (noting the problems with allowing "corporations [to] draft[ ] around [the] prophylactic layer of judicial review"); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Court, and the Erasure of Rights*, 124 YALE L.J. 2804, 2936 (2015) (discussing how an excessive reliance on private arbitration is equivalent to "an unconstitutional deprivation of litigants' property and court access rights").

24. We engage in this discussion in the context of professional sports, an area where legal scholars have done important work studying rule design but largely have not yet engaged with questions of the institutional design of rule-interpreting institutions. *See, e.g.*, Mitchell N. Berman, "*Let 'Em Play" A Study in the Jurisprudence of Sport*, 99 GEO. L.J. 1325, 1327 (2011) (discussing whether fouls should be called less aggressively at the end of games, but explicitly leaving to the side the question of how such a difference should be institutionalized).

25. For instance, Jack Balkin has argued that free speech during the digital age already is heavily regulated by what is "in essence . . . a system of administrative law." Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011, 2029 (2018); *see also* Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 441 (2009).

26. Stavros Gadinis & Chris Havasy, *The Quest for Legitimacy: A Public Law Blueprint for Corporate Governance*, 17 U.C. DAVIS L. REV. 1581, 1604 (2024) (discussing this traditional assumption). *See generally* Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 122 MINN. L. REV. 1951, 1952–53 (2018) (discussing the intellectual history of this perspective); E. Norman Veasey, *Should Corporation Law Inform Aspirations for Good Corporate Governance Practices—or Vice Versa?*, 149 U. PA. L. REV. 2179, 2184 (2001) (discussing some of the debates within Delaware in particular).

considering whether private supreme court-like institutions are good for the country and not just for corporations—whether they make sense as a tool of quasi-public law. While that is occasionally referenced in this Article, it is not its main point.

Part I of this Article traces the creation of the Oversight Board and how it relates to other institutional analogues within private firms. Part II considers the benefits of a private supreme court-like structure. Part III considers the negatives of this structure and how institution designers might address these negatives. Part IV deploys the analytical framework from the first three parts to demonstrate how an illustrative private firm (i.e., the NBA) would benefit from having its own private supreme court, a Basketball Court. A brief conclusion follows.

I. EMERGENCE

One view of corporate law is that private firms are operated by a few directors and officers who often have nearly unlimited authority to determine that firm's conduct.[27] The primary form of constraint on directorial authority would then be annual elections by shareholders, who may or may not care about managerial adherence to firm rules.[28] The legal reality is obviously more complicated than that. Private firm decision-making is constrained by an "external separation of powers" via lawsuits brought by shareholders in regular courts.[29] It is also often shaped by an "internal separation of powers,"[30] involving the breaking up of both boards and officers into different organizational silos—as encouraged or required by law—that

27. *See, e.g.*, John C. Coffee, Jr., *Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1643 (1989) ("[D]irectors possess unfettered discretion."); Lynn A. Stout, *The Problem of Corporate Purpose*, ISSUES GOV'T STUD., June 2012, at 1, 5, https://www.brookings.edu/wp-content/uploads/2016/06/Stout_Corporate-Issues.pdf [https://perma.cc/WEB9-ACBF] ("[D]irectors of public companies enjoy virtually unfettered legal discretion to determine the corporation's goals.").

28. *See, e.g.*, Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988) (stating that shareholder voting "is critical to the theory that legitimates the exercise of power by some (directors and officers) over vast aggregations of property that they do not own"). For some important examples from the academic literature about the role that shareholder voting plays see, for example, Lucian A. Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 BUS. L. 329, 342–54 (2010); Stephen J. Choi et al., *Does Majority Voting Improve Board Accountability?*, 83 U. CHI. L. REV. 1119, 1123, 1125–28 (2016); David Yermack, *Shareholder Voting and Corporate Governance*, 2 ANN. REV. FIN. ECON. 103, 109, 113–17, 120 (2010).

29. It is important to note how limited this external oversight can be in practice. For instance, the classic formulation of the business judgment rule is that managers cannot be held liable for decisions made with "any rational business purpose." Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) (quoting Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971)).

30. *See* Neal Kumar Katyal, *Internal Separation of Powers*, 115 YALE L.J. 2314, 2316–17 ("The first-best concept of 'legislature v. executive' checks and balances must be updated to contemplate second-best 'executive v. executive' divisions.").

check one another to ensure compliance with the purposes and rules of the firm and external laws.[31]

Facebook found that existing institutional forms such as these were not enough to achieve its goals.[32] As a result, it created the Oversight Board. Like other private firms we discuss in this Article, before the creation of the Oversight Board, Facebook did not need to make its decisions consistently, nor did it need to explain its decisions or even announce the rules it applied to disputes ahead of time.[33] However, Facebook found that the unexplained and arbitrary nature of its decisions about barring content from its site was becoming problematic as a business matter.[34] Facebook Founder and CEO Mark Zuckerberg therefore stated that Facebook needed more "separation of powers."[35] The Oversight Board represented a meaningful institutional innovation in the degree of independence across various dimensions that it enjoys and the degree of near finality that many of its decisions generate.

In order to develop our argument that creating private court-like institutions can help some firms, we focus in particular on the situation leading Facebook to create the Oversight Board. We provide an evaluative account of the origins of the Oversight Board, considering why Facebook might have thought it was within their commercial self-interest to create the Board—rather than considering what they were actually motivated by in creating the Board.

We should note, though, that nothing in the Article turns on whether the Oversight Board is a success for Facebook as a firm or for society. We also do not focus on the particular nature of power at Facebook, where Zuckerberg, due to the "dual class" structure of share ownership, has an extraordinary amount of power.[36]

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31. *See, e.g.*, Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 552 (2003) (noting how corporations feature "a branching hierarchy headed by a board of directors"); Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 788 ("The governance structure prescribed by corporate law since the early nineteenth century is a managerial hierarchy topped by a board of directors that is distinct from shareholders, managers, and employees, and that has fiduciary duties to the corporation itself as well as to shareholders.").

32. *See* Klonick, *supra* note 15, at 2447–50.

33. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432, 439 (1985). But equal protection guarantees only apply to actions of federal and state governments. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 10 (1948) (discussing how the Fourteenth Amendment applies to "discriminatory *state* action" (emphasis added)); *see also* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (stating that "[t]he Fifth Amendment" applicability to the federal government also includes the "concept[] of equal protection").

34. *See* Klonick, *supra* note 15, at 2428–48.

35. *See* The Joe Rogan Experience, *#1863—Mark Zuckerberg*, SPOTIFY, at 1:46:07 (Aug. 25, 2022), https://open.spotify.com/episode/51gxrAActH18RGhKNza598 [https://perma.cc/E68B-XZ5W] (including a discussion with Zuckerberg stating that the Board provided a "separation of powers").

36. *See* Emily Stewart, *Mark Zuckerberg is Essentially Untouchable at Facebook*, VOX, https://www.vox.com/technology/2018/11/19/18099011/mark-zuckerberg-facebook-stock-nyt-wsj# [https://perma.cc/89VG-39UK] (Dec. 19, 2018, 9:19 AM) (describing dual class stock ownership at Facebook).

Our goal is to consider the Oversight Board as a tool of corporate institutional design more broadly, separated from the circumstances of its creation at Facebook.

A. The Oversight Board

The typical dispute resolution mechanism within a firm—whether disputes arise between customers, between customers and the firm, or between officials inside the firm—involves using at-will employees to make decisions without officials having to explain them to outsiders.[37] This is how Facebook made content decisions prior to the creation of the Oversight Board. The problem with that system is what led to a system featuring a more independent actor designed to be more dedicated to applying pre-existing rules and explaining these applications of the rules. As the next Section will discuss, many of the features of this system were meaningful steps beyond what had already been done to create private supreme court-like institutions.

1. Origins

There were three categories of content moderators at Facebook before the Oversight Board that were empowered—to some degree—to enforce Facebook's rules about removing content from Facebook: corporate leaders, professional content moderators, and the artificial intelligence programs the two of them created together.[38] Neither of these categories of decision-makers had the independence to apply Facebook's rules consistently nor an institutional role that compelled them to explain their decisions.[39]

The position and performance of the moderators at Facebook became a source of its problems. Although content moderators were permanent employees and a separate department inside Facebook with a particular type of professional expertise and outlook, they were not independent from Zuckerberg and the other corporate leaders of Facebook in any meaningful way.[40] Both artificial intelligence tools and content moderators received a "performance score" generated by Facebook superiors.[41] Moreover, the decisions of the corporate leadership, and not those of the content moderators, were final. Before the Oversight Board, Mark Zuckerberg spent "a huge proportion of his time . . . devoted to deliberating on whether individual, high-profile posts should be taken down."[42] This is because

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37. For a helpful overview of dispute of typical dispute resolution mechanisms, see Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. REG. 547, 551 (2016) ("[T]he corporation plays . . . key dispute resolution roles. The first is the customer service department . . . .").

38. *See* Klonick, *supra* note 15, at 2428–39; Klonick, *supra* note 14, at 1620–45.

39. *See* Schauer, *supra* note 11, at 633 ("The practice of providing reasons for decisions has long been considered an essential aspect of legal culture.").

40. *Cf.* SARAH T. ROBERTS, BEHIND THE SCREEN: CONTENT MODERATION IN THE SHADOWS OF SOCIAL MEDIA 68–71 (2021).

41. *See* Adam Satariano & Mike Isaac, *The Silent Partner Cleaning Up Facebook for $500 Million a Year*, N.Y. TIMES, https://www.nytimes.com/2021/08/31/technology/facebook-accenture-content-moderation.html [https://perma.cc/MA7T-RNBA] (Oct. 28, 2021).

42. Klonick, *supra* note 16.

"Facebook's corporate structure allows Zuckerberg to make unilateral decisions."[43] In deciding how to manage then-President Donald J. Trump's content, for instance, Zuckerberg would regularly meet with his policy team to make final decisions about what Facebook should do.[44]

Also, none of the organizational actors involved in making content decisions before the Oversight Board had to *explain* their reasoning. Content moderators were supposed to spend ten seconds on a post they were considering removing.[45] The faster they reviewed potentially problematic posts, the better their performance rating, and, therefore, the higher their compensation.[46] Zuckerberg rarely gave reasons, and when he did, his explanations took the form of press releases or public appearances rather than reasoned explanations of principles.

The result of decisions being made without independence and explanation was that Facebook received heavy criticism for creating a system of content moderation that prioritized short-term profit and the interests of the powerful over principle and compliance with Facebook's stated rules. Content moderation prioritized "retaining users, helping business partners and at times placating authoritarian governments."[47] Zuckerberg and others would ignore rules or change rules to help powerful people that drove traffic, like former President Donald J. Trump.[48] Fearful of claims of bias by conservatives, Facebook engaged in "more deferential behavior toward its growing number of right-leaning users."[49]

While there were powerful business reasons to use content moderation to help business partners and placate governments, these decisions also cost Facebook, particularly as its methods for making these decisions became more widely known. User satisfaction levels declined significantly, resulting in fewer new consumers and

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43. *Id.*

44. *See* Mike Isaac, Cecilia Kang & Sheera Frenkel, *Zuckerberg Defends Hands-Off Approach to Trump's Posts*, N.Y. TIMES, https://www.nytimes.com/2020/06/02/technology/zuckerberg-defends-facebook-trump-posts.html [https://perma.cc/U83X-KPFY] (June 3, 2020) ("Mr. Zuckerberg . . . said the president's . . . message, which went up on Friday, was immediately spotted by Facebook's policy team . . . . Mr. Zuckerberg . . . [then] talk[ed] to policy officials and other experts at Facebook.").

45. *See* Aarti Shahani, *From Hate Speech to Fake News: The Content Crisis Facing Mark Zuckerberg*, NPR (Nov. 17, 2016, 5:02 AM), https://www.npr.org/sections/alltechconsidered/2016/11/17/495827410/from-hate-speech-to-fake-news-the-content-crisis-facing-mark-zuckerberg [https://perma.cc/2QS2-7RVJ].

46. *See id.*

47. *See* Justin Scheck et al., *Facebook Employees Flag Drug Cartels and Human Traffickers: The Company's Response Is Weak, Documents Show*, WALL ST. J. (Sept. 16, 2021, 1:24 PM), https://www.wsj.com/articles/facebook-drug-cartels-human-traffickers-response-is-weak-documents-11631812953 [https://perma.cc/4N3F-KYKC].

48. *See* Elizabeth Dwoskin et al., *Zuckerberg Once Wanted to Sanction Trump. Then Facebook Wrote Rules That Accommodated Him*, WASH. POST (June 28, 2020, 6:25 PM), https://www.washingtonpost.com/technology/2020/06/28/facebook-zuckerberg-trump-hate/ [https://perma.cc/67VC-AUMG].

49. *See id.*

less interest in Facebook from old consumers.[50] There was substantial negative press coverage.[51] The prospect of governmental regulation increased, with a bipartisan alliance of progressives like soon-to-be Federal Trade Commission ("FTC") Chair Lina Khan and conservatives like Senator Joshua Hawley discussing the problems with Facebook's system.[52] While one can question how much these problems troubled Facebook as a moral matter, it became clear that addressing them was becoming important as a financial matter. That is, while critics argued Facebook prioritized profit over principle, it was no longer clear that Facebook's content moderation system was protecting profits, at least in the medium- or long-term.

Facebook responded by revising and releasing to the public the company's Community Standards—a massive, roughly 15,000-word document that addresses content moderation.[53] That document created guidance, but this guidance was quite vague. It reads like language meant "to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[54]

There was also an emerging sense that an outside enforcer was needed to ensure these rules were applied consistently. Zuckerberg said that "there are some calls that just aren't good for the company to make by itself."[55] Legal scholar Noah Feldman, working with Facebook's Chief Operating Officer, Sheryl Sandberg, proposed that Facebook develop an Oversight Board that would issue opinions explaining decisions to take down certain content, a "quasi-legal" system governed by a "Supreme Court for Facebook."[56] This resulted in the eventual creation of the Oversight Board.

2. Structure

The Oversight Board is different in material ways from the internal mode of content regulation used previously that solely combined artificial intelligence, content moderators, Zuckerberg, and other leaders within Facebook. The Oversight Board tries to generate a source of authority that is either partially external to Facebook or at least partially external to Facebook's executives. The Oversight Board must also explain its decisions in written opinions and then follow its own precedents.[57] It is staffed by individuals with long tenures, financial independence,

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50. *See* Vindu Goel, *Facebook Scrambles to Police Content Amid Rapid Growth*, N.Y. TIMES (May 3, 2017), https://www.nytimes.com/2017/05/03/technology/facebook-moderators-q1-earnings.html [https://perma.cc/ZN9Q-S3TL] ("Debra Aho Williamson, an analyst . . . , said that all the negative publicity about Facebook's problems with horrific content and fake news appears to have hurt user satisfaction levels.").

51. *See* Scheck et al., *supra* note 47.

52. *See* Rebecca Klar, *Senate Confirms Lina Khan to the FTC*, THE HILL (June 15, 2021), https://thehill.com/policy/technology/558478-senate-confirms-biden-nominee-lina-khan-to-the-ftc/ [https://perma.cc/3HRE-BZ55] ("Notably, Republican Sen. Josh Hawley (Mo.), a leading GOP Big Tech critic, voted in favor of Khan's nomination.").

53. *See* Klonick, *supra* note 15, at 2436, 2438.

54. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

55. Klonick, *supra* note 16.

56. *Id.*

57. *See* Oversight Board, *Bylaws*, *supra* note 18, art. 3.1.7; Oversight Board, *Charter*, FACEBOOK art. 2, § 2 (Sept. 2019) [hereinafter Oversight Board, *Charter*],

and separate professional reputations, and it was promised some degree of respect or even often finality for the authority of its decisions.[58] In this sense, the Oversight Board is *court-like*, even if it is not really a court.

Mark Zuckerberg stated that one of the primary goals of the Board is that "it will prevent the concentration of too much decision-making within our teams."[59] There are many ways in which the Board's independence is meant to accomplish that. One way in which this transpires is through the terms of those serving on the Board. These individuals "will serve initial terms of three years, up to a maximum of two terms total, or until their resignation or removal."[60] This is a much longer tenure than the at-will employment or contractor status of others doing content moderation[61] and the other forms of private supreme courts discussed in the next Section.

Another way in which this independence is achieved is through the kinds of financial independence that usually define an independent entity. Consider, for instance, the protection of judicial salaries in Article III[62] or the authority of the Consumer Financial Protection Bureau to request and essentially be guaranteed to receive funding "reasonably necessary to carry out" its functions.[63] Facebook seeded a separate legal entity, the trust that governs the Board, with $130 million.[64] While Facebook appoints the trustees, they must be independent from the firm.[65] Facebook also appoints members of the Oversight Board, originally including twenty

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https://about.fb.com/wp-content/uploads/2019/09/oversight_board_charter.pdf [https://perma.cc/9MRW-V5GF].

58. *See* Klonick, *supra* note 15, at 2457–67.

59. Mark Zuckerberg, *A Blueprint for Content Governance and Enforcement*, FACEBOOK, https://www.facebook.com/notes/751449002072082/ [https://perma.cc/UGC7-5B4G] (May 5, 2021).

60. Oversight Board, *Bylaws*, *supra* note 18, art. 1.1.2.

61. It is, admittedly, much shorter than the tenure of most judges around the world. *See* Statement of Jamal Greene, Dwight Professor of Law, Columbia Law School to the Presidential Commission on the Supreme Court of the United States, Closing Reflections on the Supreme Court and Constitutional Governance, at 23 (July 20, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/Greene-Testimony.pdf [https://perma.cc/V3TY-4U7U].

62. *See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

63. 12 U.S.C. § 5497(a)(1).

64. *See* Klonick, *supra* note 15, at 2467; Brent Harris, *An Update on Building a Global Oversight Board*, META (Dec. 12, 2019), https://about.fb.com/news/2019/12/oversight-board-update [https://perma.cc/UD6E-LEFD]. It has since put in substantially more money. Sara Fischer, *Meta Provides Another $150 Million in Funding for Its Oversight Board*, AXIOS (July 22, 2022), https://www.axios.com/2022/07/22/meta-facebook-oversight-board-funding [https://perma.cc/Q4HZ-TLMX].

65. *See* Klonick, *supra* note 15, at 2457–62, 2481. Just like the Board itself, the trustees are prominent and independent, including the Chairman Emeritus of Cooley LLP and a former Dean of Yale Law School. *See Governance*, OVERSIGHT BOARD, https://www.oversightboard.com/governance/ [https://perma.cc/EDA8-TKL6] (last visited July 27, 2024).

members, who receive six-figure salaries for putting in about fifteen hours a week of work.[66]

A final way that the Board has independence is the professional status of its members. Even though they were appointed by Facebook, initial members of the Oversight Board have the professional status that gives them independence. They do not have to concern themselves as much with the professional consequences of defying Facebook because they have established reputations. The initial Board members included, for instance, several prominent law professors, a former member of the European Court of Human Rights, and a former Prime Minister of Denmark.[67]

Another court-like feature of the Board—and one largely beyond what other private supreme court institutions have featured—is the relatively authoritative status of its judgments. The Oversight Board was delegated a degree of final authority that content moderators or others besides Zuckerberg never enjoyed. Once a case is selected, the user appealing Facebook's decision and Facebook itself submit written briefs arguing their case.[68] A panel of members from the Board hears the case and may "request that Facebook provide information reasonably required for board deliberations in a timely and transparent manner."[69] If the Board decides that content should be removed from the site, Facebook obliges itself to comply and remove that content, even if that decision is opposed by corporate officers.[70] The Oversight Board can also propose recommendations that Facebook and Instagram change specific policies, to which the firm is obligated to respond.[71]

In deciding cases, the Board is supposed to interpret "Facebook's Community Standards and other relevant policies . . . in light of Facebook's articulated values."[72] The Oversight Board explains these interpretations in a fashion similar to a court. The panel of the Oversight Board that first hears a case drafts a "written decision" that includes "a determination on the content; the rationale for reaching that decision will also include any concurring or dissenting viewpoints, if the panel cannot reach consensus."[73] The entire Board then reviews this draft decision, and if it approves it, the opinion is published on the Board's website.[74]

There are also real limitations on the power of the Oversight Board. The Oversight Board's power of finality is limited only to those specific cases on which

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66. Klonick, *supra* note 16.

67. *See* Elizabeth Clifford, *Who Are the First Members of Facebook's Oversight Board?*, REUTERS, https://www.reuters.com/world/us/who-are-first-members-facebooks-oversight-board-2021-05-05/ [https://perma.cc/Z7YS-2KH7] (May 5, 2021, 3:14 AM).

68. Klonick, *supra* note 16.

69. Oversight Board, *Charter*, *supra* note 57, art. 1, § 4. The charter also requires that "[e]ach case will be reviewed by a panel of board members, with at least one member from the region." *Id.* art. 3, § 2.

70. *See* Oversight Board, *Bylaws*, *supra* note 18, art. 2.3.1 ("Facebook will implement board decisions to allow or remove the content properly brought to it for review within seven (7) days of the release of the board's decision on how to action the content.")

71. *See* Klonick, *supra* note 15, at 2464.

72. Oversight Board, *Charter*, *supra* note 57, art. 1, § 4.

73. *See* Oversight Board, *Bylaws*, *supra* note 18, art. 3.1.7.

74. *See id.* art. 3.1.8.

it has ruled.[75] With no "lower" courts below the Oversight Board, and only twenty members on the Board, only a small number of cases *could* be heard by it.[76]

The Oversight Board has now heard dozens of cases.[77] One of these stands out: former President Donald J. Trump's challenge to being barred from Facebook due to his posts leading up to and on January 6. In a decision that some have described as the Oversight Board's *Marbury v. Madison*, the Board found President Trump's comments violated the Community Standards and thus upheld the imposition of sanctions against President Trump's account.[78] Rather than make clear what the standard should be, as some Board members wanted, the Board required Facebook to reexamine its decision within six months, which would potentially allow the Board to review its decision again.[79] In 2023, Facebook reinstated former President Trump.[80]

The scope and merits of the Trump case are (well!) outside the scope of this project. But the opinion established several things. First, it helped make clear the quasi-independence of the Board. While it went along with the executives' decisions, it also criticized them, creating some distance between the Board and the company. Second, it established a norm of legal-style decision-making, and that this style of reasoning could be used for making corporate decisions. "I was a bit surprised by how much the decision looked like a judicial decision," Feldman said.[81]

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75. *See id.* art. 2.3.1 ("Facebook will undertake a review to determine if there is identical content with parallel context associated with the board's decision that remains on Facebook. If Facebook determines that it has the technical and operational capacity to take action on that content as well, it will do so promptly.").

76. *See* Klonick, *supra* note 15, at 2490.

77. For the full list of decisions, see *Case Decisions and Policy Advisory Opinions*, OVERSIGHT BOARD, https://www.oversightboard.com/decision/ [https://perma.cc/BN62-8HQZ] (last visited July 27, 2024).

78. *Case Decision 2021-001-FB-FBR: Former President Trump's Suspension*, OVERSIGHT BOARD (May 5, 2021), https://www.oversightboard.com/decision/fb-691qamhj/ [https://perma.cc/U5X5-AHSU]; Jeff Neal, *Did Facebook's Oversight Board Get the Trump Decision Right?*, HARV. L. TODAY (May 5, 2021), https://hls.harvard.edu/today/did-facebooks-oversight-board-get-the-trump-decision-right/ [https://perma.cc/Q8XP-K89S]; Evelyn Douek, *It's Not Over. The Oversight Board's Trump Decision Is Just the Start.*, LAWFARE (May 5, 2021, 3:11 PM), https://www.lawfareblog.com/its-not-over-oversight-boards-trump-decision-just-start [https://perma.cc/649Q-NQFD].

79. The opinion also made a variety of policy recommendations to the firm. It questioned Facebook's policy of allowing politicians and public figures more latitude to violate rules, arguing that it is "not always useful to draw a firm distinction between political leaders and other influential users, recognizing that other users with large audiences can also contribute to serious risks of harm." Oversight Board, *Trump Challenge*, *supra* note 78. The Board called on Facebook to make clear what its policy towards influential users really is, produce more information to explain its "newsworthiness" exception, and create and designate and fund specialized staff for addressing posts by influential users, among other requests and demands. *Id.*

80. Sheera Frenkel & Mike Isaac, *Meta to Reinstate Trump's Facebook and Instagram Accounts*, N.Y. TIMES (Jan. 25, 2023), https://www.nytimes.com/2023/01/25/technology/trump-facebook-instagram-accounts-meta.html [https://perma.cc/5AE2-YCTJ].

81. Neal, *supra* note 78.

B. Institutional Analogues

We chose to focus on the Facebook Oversight Board as it provides a highly salient example of how a private supreme court could arise. But it is not the only example of this structure. It is important to situate the Oversight Board within the existing landscape of private firm and public institutional design. Private firms have experimented with creating court-like institutions applying rules with more independence and finality than had previously been the case—but less than what the Oversight Board possesses.

Firms sometimes try to create an "internal" separation of powers as a means of policing behaviors.[82] Public laws encourage this. The Federal Sentencing Guidelines provide sentencing relief for private firms that have a robust internal procedure for monitoring compliance with legal rules.[83] Nearly two-thirds of companies that reached deferred or non-prosecution agreements with the government were required to generate an internal compliance program as a material term of those agreements.[84] Private firms have to decide how to organize their people internally to self-monitor, such as deciding whether they assign all of those employees to the legal department or whether they create a separate compliance department.[85] None of these actors, though, is truly independent in the sense that firms utilize employees who can be terminated at-will, nor are they usually writing opinions justifying their interpretation and application of firm rules.

Private firms have contracted with outside actors to engage in court-like behavior as a temporary matter. Consider the case of misconduct by Robert Sarver, the owner of the Phoenix Suns in the NBA. The NBA retained an outside law firm, Wachtell Lipton ("Wachtell"), to advise the NBA about how to resolve the matter.[86] Wachtell prepared a report comparable to a legal opinion analyzing the situation.[87]

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82. *See generally* Martinez, *supra* note 4, at 253 ("[T]he responsibility for preventing and detecting misconduct within a[] [corporate] organization lies primarily with the organization itself. An underlying assumption of all modern compliance efforts is that organizations are in the best position to monitor and police the behavior of their members."). For more discussion of these issues, see, for example, Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 688 (1997).

83. *See generally* Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 958 (2009) (noting these "system of policies and controls" as internal because they are directed to communicate to "*external* authorities" (emphasis added)).

84. BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 48 (2014).

85. *See, e.g.*, Martinez, *supra* note 4, at 255 (listing questions such as whether "the chief compliance officer [should] report to the general counsel or the audit committee" and whether "compliance professionals [should] be embedded within particular departments or remain separate as a deterrent to capture").

86. *See* WACHTELL, LIPTON, ROSEN & KATZ, REPORT OF INDEPENDENT INVESTIGATORS TO THE NATIONAL BASKETBALL ASSOCIATION CONCERNING ROBERT SARVER AND THE PHOENIX SUNS ORGANIZATION 1 (2022), https://www.wlrk.com/wp-content/uploads/2022/09/Phoenix-Suns-Report.pdf [https://perma.cc/XXE8-JQVY].

87. *Id.*

It featured a long discussion of the facts and a shorter discussion of the relevant "law"—that is, of the rules of the NBA.

These actors all frame themselves as being independent or neutral to a meaningful degree because that is part of the value they provide to private firms.[88] The question is whether this independence is possible when these actors are hired temporarily and, therefore, have their personal financial futures shaped by whether private firms want to hire them again after they make their decisions. The Supreme Court has stated that it violates the Due Process Clause "where a judge had a financial interest in the outcome of a case."[89] That financial interest makes the decision-maker not sufficiently judicial as a matter of constitutional law. There are also examples of private firms having prior relationships with one side to the arbitration and/or having already publicly prejudged some of the issues.[90] As the New York Court of Appeals recently stated in its review of one such private firm mechanism, these institutional designs "are not held to judicial standards."[91] They might seem more like arbitration than judging.[92]

Private firms have gradually moved towards utilizing court-like institutional approaches on a more permanent basis, thereby trying to give the individuals engaged in these approaches more independence. For example, Australian Rules Football has a tribunal to review suspensions, fines and penalties,[93] and the National Hockey League releases video explanations of player suspensions.[94]

There are also private supreme court-like institutions operating at the industry level rather than at the firm level. As Alec Stone Sweet and Florian Grisel have persuasively argued, the system of international arbitration has moved past

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88. *See, e.g.*, *id.* at 1 (describing the report of "independent" investigators); Martin F. Schienman, Esq., *Biographies*, SCHEINMAN ARB. & MEDIATION SERVS., https://scheinmanneutrals.com/martin-scheinman-2/ [https://perma.cc/NFM2-WNAT] (last visited Sept. 13, 2024) (describing Schienman by stating "his practice has evolved to also serving as a neutral in business, consumer, and employment matters").

89. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 877 (2009); *see also* Tumey v. Ohio, 273 U.S. 510, 535 (1927) (requiring judicial recusal because of the judge's "direct pecuniary interest in the outcome").

90. *See, e.g.*, T.C.R. Sports Broad. Holding, L.L.P. v. W.N. Partner, L.L.C., 214 N.E.3d 1137, 1146 (N.Y. 2023) (discussing connections between the arbitrator and the current Commissioner of Major League Baseball, and past statements that cast doubt on the presence of an open mind related to the subject of the arbitration).

91. *Id.* at 1145.

92. Arbitration is a term of a contract, so "the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen." Nat'l Football League Mgt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 548 (2d Cir. 2016).

93. *See* AUSTRALIAN FOOTBALL LEAGUE, AFL TRIBUNAL 2011 (2011), https://web.archive.org/web/20110930213942/http://mm.afl.com.au/Portals/0/afl_docs/Development/AFL%20Tribunal%20Booklet%202011-1.pdf [https://perma.cc/Y7GJ-M57H].

94. *See, e.g.*, David Alder, *NHL Department of Player Safety Explains 3-Game Suspension for Maple Leafs' Michael Bunting*, HOCKEY NEWS (Apr. 19, 2023, 7:00 PM), https://thehockeynews.com/nhl/toronto-maple-leafs/news/nhl-department-of-player-safety-explains-3-game-suspension-for-maple-leafs-michael-bunting [https://perma.cc/5V45-FNNU] (explaining a player suspension by reference to past suspensions).

being a purely private system of mediating disputes and has been judicialized.[95] The big international arbitral houses look more and more like legal systems in their own right. Rather than merely mediating conflicts based on the terms of private agreements, arbitral houses provide things that are like "legislation" through the codifying of best practices, relying on something like precedent, and generating duties to explain decisions.[96] The same thing is true for domestic arbitration—the American Arbitration Association ("AAA") adopted a "Consumer Due Process Protocol," focusing on fairness in arbitration for consumers.[97]

The legal regime surrounding international sport, and particularly the Court of Arbitration for Sport ("CAS"), has also become even more court-like.[98] Applying legal rules from the World Anti-Doping Convention, the Olympic Movement, and international and domestic sports governing bodies (like FIFA, which governs international soccer, or the Football Association of England), CAS is competent to hear cases involving almost all major international sporting disputes.[99] This follows from the agreement of national and international sports authorities and mandatory arbitration clauses that athletes and clubs sign in order to participate in national and international sports.[100] Although CAS deals with the rules governing games, it very much looks and acts like a court. It has a trial and appellate division, generally follows its own precedents, interprets the terms of agreements, relies on public law principles in making decisions, and publishes opinions.[101]

There are institutional analogues to supreme courts within an organization in public law as well. Article I judges located within the executive branch, for instance, adjudicate claims within an institutional context featuring some—but not all—of the features of the Oversight Board.[102] Most notably, administrative law

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95. *See generally* ALEC STONE SWEET & FLORIAN GRISEL, THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE AND LEGITIMACY (2017).

96. *Id.* at 28–30, 56–60, 83–118, 119–45.

97. For a discussion of AAA's rulemaking, see Judith Resnick, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2852–53 (2015).

98. On the role of CAS, see, for example, Antoine Duval, *Transnational Sports Law: The Living Lex Sportiva*, *in* THE OXFORD HANDBOOK OF TRANSNATIONAL LAW 503 (Peer Zumbansen ed., 2020) [hereinafter Duval, *Transnational Sports Law*]; Antoine Duval, *Not in My Name! Claudia Pechstein and the Post-Consensual Foundations of the Court of Arbitration for Sport* (Max Planck Inst. for Compar. Pub. L. & Int'l L. Working Paper, Paper No. 2017-01, 2017) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2920555 [https://perma.cc/8KEE-EDDB]; Ken Foster, *Global Administrative Law: The Next Step for Global Sports Law* (U. Westminster Sch. L. Working Paper, Paper No. 12-10, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2014694 [https://perma.cc/7LQZ-ZD89]; Ken Foster, *Global Sports Law Revisited*, 17 ENT. & SPORTS L.J. 2 (2019) [hereinafter Foster, *Revisited*].

99. *See* Duval, *Transnational Sports Law*, *supra* note 98, at 503–04.

100. Foster, *Revisited*, *supra* note 98, at 5.

101. Lorenzo Casini, *Beyond Dispute: International Judicial Institutions as Lawmakers: The Making of a Lex Sportiva by the Court of Arbitration for Sport*, 12 GERMAN L.J. 1317, 1320–32 (2011) (describing how CAS operates).

102. *See* Butz v. Economou, 438 U.S. 478, 513 (1978) ("[P]roceedings [before an ALJ] are adversary in nature . . . . They are conducted before a trier of fact insulated from political influence.").

judges are not entitled to full salary protections and can be reversed by agency officials, unlike the Oversight Board.[103] The Office of Legal Counsel ("OLC") writes opinions on constitutional issues within the executive branch, although it is not really an adjudicatory body.[104] Bruce Ackerman has proposed an executive branch adjudicatory body to resolve constitutional questions within the executive branch to replace the current system led by the OLC.[105]

II. BENEFITS

If we step back from considering the Oversight Board as an institution specifically adjudicating free speech on platforms, we can see some of the larger questions raised by these institutions. Announcing rules in advance and then following them is often seen as the essential trait of a polity governed by the rule of law.[106] Constitutional prohibitions on applying laws ex post facto—as well as the notice requirements embedded in the idea of due process of law—speak to a commitment to make government officials follow pre-announced rules.[107] The consistent application of rules—treating like cases alike—is a normative value that

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103. *See* Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 799 (2013).

104. The Office of Legal Counsel is led by a political appointee, so in that sense it is different than the Oversight Board. *See* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1460 (2010) ("In addition to the Assistant Attorney General who heads the office, there are also several politically appointed (but not Senate confirmed) Deputy Assistant Attorneys General . . . ."). OLC also does not utilize anything like the adversarial procedures normally featured in Article III federal courts. OLC does write opinions, though, and these opinions have practical value "only to the extent they are viewed by others . . . as fair, neutral, and well-reasoned." Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1311 (2000).

105. *See* BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 143 (2013) (discussing a "Supreme Executive Tribunal" that would serve as "judges for the executive branch").

106. This idea goes back as far as Aristotle, if not earlier. "Aristotle did maintain that law as such had certain advantages as a mode of governance. Laws are laid down in general terms, well in advance of the particular cases to which they may be applied." Jeremy Waldron, *The Rule of Law*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2020), https://plato.stanford.edu/archives/sum2020/entries/rule-of-law/ [https://perma.cc/A96P-3R28]. As Jeremy Waldron notes, this is a standard understanding of what the rule of law means. *See id.* ("Indeed that is what many scholars mean by the Rule of Law: people being governed by measures laid down in advance in general terms and enforced equally according to the terms in which they have been publicly promulgated.").

107. The Hungarian Constitutional Court utilized this principle in a landmark 1991 opinion, striking down *ex post facto* laws that would have allowed prosecutions for communist regime crimes, such as those committed in suppressing the 1956 Revolution. The Court wrote that the rule of law means "predictability and foreseeability" and that "certainty of the law demands of the state, and primarily the legislature, that the whole of the law . . . be clear, unambiguous, its impact predictable and its consequences foreseeable by those whom the laws address. From the principle of predictability and foreseeability, the criminal law's prohibition of the use of retroactive legislation, especially ex post facto legislation . . . directly follows . . . ." Alkotmánybíróság [Constitutional Court] March 5, 1992, 2086/A/1991/14, Section IV.1.

rises to the level of a constitutional principle.[108] When similar categories are being treated differently, *some* minimal justification for treating like cases differently is constitutionally required.[109]

What is constitutionally required of public officials can be commercially valuable for private actors. There are commercial reasons, in other words, why private firms might bind themselves to their own rules and might want their precommitment to be *actually* and *perceived as* self-binding.[110] Treating like cases alike might not only be the right thing to do for public officials, but the profitable thing to do for private actors.

This Part argues that some types of private firms may get substantial value from consistently and equally applied rules in at least three contexts: (1) when the nature of the product requires consistency to attract consumers; (2) when the firm needs to convince customers to make asset-specific investments in the firm, thereby creating a demand for clearly applied rules as a commitment mechanism; (3) when applying consistent rules provides political and regulatory benefits.

We consider this private law innovation from the private law perspective—in other words, we consider what private supreme courts mean for the firms themselves. The next Part considers which firms benefit more (rather than less) and for which types of decisions. The goal of this Part is more to identify the normative benefits that can accrue to private firms with private supreme courts, and the next Part considers *when* and *how* those benefits can be at their greatest.

Existing institutional designs do not always supply the consistent application of rules that can sometimes be commercially valuable. These designs can be complemented by internal adjudicatory bodies like private supreme courts applying internally generated firm rules. Those rules can be "law-like" in that they are announced in advance and create obligations that corporate officials follow even if they create short-term losses for the firm. The institutions can also be "court-like" in that they have some degree of independence, are required to apply the pre-announced rules and their own prior decisions, adapt those rules as necessary in a common-law fashion, and provide reasons for their decisions. These private supreme courts can produce consistency because of their relative independence from firm leadership and their relative emphasis on giving reasons for their decisions.

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108. *See* City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432, 439–42 (1985) (deciding that the Fourteenth Amendment itself requires "all persons similarly situated should be treated alike").

109. *See* Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955) (requiring that—even without any suspect class being treated differently—courts should identify why the legislature "might" have thought its differential treatment of actors was rationally related to the public health and welfare (citations omitted)).

110. This answers, to some degree, the question that Eric Posner and Adrian Vermeule posed about any self-binding in the public law context: why would it be incentive-compatible? Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 898 (2007) ("[A]n executive would not adopt or enforce the internal separation of powers to check himself. . . . [A]n ill-motivated executive might bind himself to enhance strategic credibility."). For a private official, self-binding might be commercially valuable.

The sole point of this Part is to indicate that sometimes certain firms can benefit from creating a private separation of powers that features as a meaningful component something like a private supreme court. The next Part will address the concerns that private supreme courts can raise and the means of addressing these concerns.

A. Valuing Consistency

1. Customers

Customers value consistency from many private firms in many of their transactions. This means there is an economic value to private firms in treating like cases alike. That economic value can increase depending on the nature of the firm and the nature of the transaction.

However, applying pre-announced rules consistently across customers can be costly to a private firm. If conditions change more quickly than rules do, applying pre-announced rules can deprive a firm of profitable opportunities. Similarly, private firms can benefit from engaging in price discrimination—from treating like cases *differently*. Price discrimination is a very common practice in situations where there is any degree of market power.[111] Whether it is by selling products that are differentially attractive to high- and low-demand users, charging high prices for add-ons for high-demand users, creating group or bulk discounts, or using any other method, firms can profit from differentiating between customers and charging them different prices.[112]

For instance, if Facebook agrees to apply a policy that treats offensive posts by John Doe using the same standards it applies to Donald Trump, it is forcing itself to ignore the fact that few people want to read posts by John Doe, but many people want to read posts by Donald Trump. Banning posts by Donald Trump is costly to Facebook in ways that banning similar posts by John Doe would not be. Absent other interests, it would make sense for Facebook to treat high-profile posters differently, allowing them to engage in activity that may get others banned, because high-profile users generate more revenue for the firm. Indeed, this is precisely the type of approach that generated initial skepticism by the Oversight Board.[113]

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111. It does not require market power in the sense the term is used in antitrust, but it does require something other than perfect competition. We see price discrimination in many instances in which there is any degree of "monopolistic competition." Benjamin Klein, *Price Discrimination and Market Power*, 2 ISSUES COMPETITION L. & POL'Y 977, 993 (2008).

112. Daniel J. Gifford & Robert T. Kudrle, *The Law and Economics of Price Discrimination in Modern Economies: Time for Reconciliation*, 43 U.C. DAVIS L. REV. 1235, 1239–55 (2010); Hal R. Varian, *Price Discrimination*, *in* 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 597 (Richard Schmalensee & Robert Willig eds., 1989). Price discrimination promotes efficiency by giving firms with market power a reason to increase output to the efficient point, as it allows them to sell to customers who value their product less without foregoing profits from consumers that value their product more. Mark Armstrong & John Vickers, *Competitive Price Discrimination*, 32 RAND J. ECON. 579, 595 (2001).

113. Monika Bickert, *Working to Keep Facebook Safe*, META (July 17, 2018), https://about.fb.com/news/2018/07/working-to-keep-facebook-safe/ [https://perma.cc/Y8U4-JLWJ].

There are some legal limitations on price discrimination on sales of goods under the Robinson–Patman Act.[114] Firms that sell the exact same goods in the same quantities at around the same times to different commercial customers at different prices may violate the law if the effect of doing so is to lessen competition among downstream users.[115] But this covers only a small subset of price discrimination—a much broader practice that is ubiquitous in the economy and much to the benefit of firms (and, often, the broader economy).[116]

In other words, inconsistency can be financially beneficial *and* legally permissible. Why then would a business firm, dedicated to making profits, value consistency? Why would it agree to rules that limit its power rather than expand it?

A substantial behavioral-economics literature finds that consumers' sense that rules are applied consistently is an independent factor in their consumption decisions.[117] As Richard Thaler argues, "As a practical matter for businesses, big and small, that want to keep operating for the long haul, it makes good sense to obey the law of fairness."[118] A desire not to anger customers is one reason why firms often do not raise prices as much as they can during emergencies like hurricanes or floods—their reputations and thus their ability to attract consumers in the future can be harmed by taking advantage of high-willingness-to-pay consumers during an emergency.[119] Empirical findings from other disciplines confirm that consistency is

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114. *See* 15 U.S.C. § 13(a) (describing the legal limitations on price discrimination).

115. *Id.*; *see also Price Discrimination: Robinson–Patman Violations*, FTC, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/price-discrimination-robinson-patman-violations [https://perma.cc/LV9Z-VHDC] (last visited Aug. 25, 2022).

116. Ling Yu, *Misreading and Clarification of Anti-Monopoly Law Attributes of Algorithmic Consumer Price Discrimination*, 1 LAW SCI. 285, 287 n.5 (2022) ("Price discrimination is a common economic phenomenon."); Louis Phlips, *Price Discrimination: A Survey of the Theory*, 2 J. ECON. SURVS. 135, 135–36 (1988).

117. *See generally* Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 728 (1986) (arguing that the way "to account for apparent deviations from the simple model of a profit-maximizing firm is that fair behavior is instrumental to the maximization of long-run profit"). For some helpful additional data, see, for example, Jens Hainmueller et al., *Consumer Demand for Fair Trade: Evidence from a Multistore Field Experiment*, 97 REV. ECON. & STAT. 242, 242–43 (2015).

118. Richard Thaler, *The Law of Supply and Demand Isn't Fair*, N.Y. TIMES (May 20, 2020), https://www.nytimes.com/2020/05/20/business/supply-and-demand-isnt-fair.html [https://perma.cc/ZKY2-TN9A].

119. *See id.*

compelling to customers.[120] One study found that the return on investment for consistently managing customer disputes is over 100%.[121]

Many customers may be more likely to utilize Facebook and its products if Facebook treats the posts of Democrats and Republicans identically.[122] Similarly, many customers may be more likely to watch a National Football League ("NFL") game if the NFL applies the rules governing fumbles in the same way to all quarterbacks, whether it is Donald Trump-favoring Tom Brady or Colin Kaepernick (who would kneel for the national anthem).[123]

As another illustration, the desire to create the impression (and reality) of fair competition can lead to the embrace of law-like structures in professional sports. In the 1919 Major League Baseball ("MLB") World Series, the Chicago White Sox played against the Cincinnati Reds.[124] Eight White Sox players allegedly conspired to fix the outcome of the series for the Reds in return for financial compensation

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120. *See* Tor Wallin Andreassen, *Antecedents to Satisfaction with Service Recovery*, 34 EURO. J. MKTG. 168, 171 (2000) ("The findings from the present study illustrate the importance of . . . an ability to create a perception of fairness in the outcome of the complaint."); Torben Hansen et al., *Managing Consumer Complaints: Differences and Similarities Among Heterogeneous Retailers*, 38 INT'L J. RETAIL & DISTRIB. MGMT. 6, 9 (2010) (presenting findings demonstrating that consistent decisions across time are highly desirable for customers); Carl L. Saxby et al., *Measuring Consumer Perceptions of Procedural Justice in a Complaint Context*, 34 J. CONSUMER AFFS. 204, 214 (2000) (considering the commercial value of different forms of dispute resolution within private firms).

121. Christian Homburg & Andreas Fürst, *How Organizational Complaint Handling Drives Customer Loyalty: An Analysis of the Mechanistic and the Organic Approach*, 69 J. MKTG. 95, 95 (2005).

122. *See supra* Section I.B. This may not actually be true for Facebook—we do not know—but we strongly suspect it is true for professional sports.

123. That there will be substantial questions about the impartiality and quality of refereeing is almost certain. For instance, one famous social psychology study examined how loyalty to different sports teams clouded one's judgment of referee decisions. *See* Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCH. 129, 130–32 (1954). Relatedly, fan allegiances can map on to other social cleavages, whether racial or political. For instance, Tom Brady's affiliation with President Donald J. Trump is widely known. *See* Mark Leibovich, *The Uncomfortable Love Affairs Between Donald Trump and the New England Patriots*, N.Y. TIMES (Feb. 1, 2017), https://www.nytimes.com/2017/02/01/magazine/the-uncomfortable-love-affair-between-donald-trump-and-the-new-england-patriots.html [https://perma.cc/DY9L-6N4R] ("Brady is friends with President Trump."). In contrast, President Trump used a vulgarity to describe Colin Kaepernick's decision to kneel for the national anthem. *See* Ken Belson, *As Trump Rekindles N.F.L. Fight, Goodell Sides with Players*, N.Y. TIMES (June 5, 2020), https://www.nytimes.com/2020/06/05/sports/football/trump-anthem-kneeling-kaepernick.html [https://perma.cc/DFN5-DTDE] ("During a campaign rally, [Trump] called on owners to fire any players who knelt during the anthem, and used a vulgarity to describe quarterback Colin Kaepernick . . . ."). In this context, it is both important and extremely difficult for leagues to generate respect for rule determinations.

124. *See* Evan Andrews, *What Was the 1919 'Black Sox' Baseball Scandal*, HIST. CHANNEL (Aug. 24, 2023), https://www.history.com/news/black-sox-baseball-scandal-1919-world-series-chicago [https://perma.cc/F7P5-EWLU].

from gamblers.[125] The response to the 1919 scandal was to empower a former federal judge *because* the sense was that baseball needed "an authority . . . outside of [its] own business."[126] A federal district court judge, Judge Kennesaw Mountain Landis, was therefore named the first Commissioner of the MLB and handed all sorts of powers to administer baseball consistently.[127] He stayed on the bench for a while even after he became Commissioner (generating much criticism).[128]

2. Fanatics

Consistency can also generate commercial value because of its appeal to a particular set of customers: fanatics. The term sports *fan* derives linguistically from the fanatical supporters of baseball teams in the United States in the late nineteenth and early twentieth centuries.[129] Yet, it is not just about sports. Some types of firms rely heavily on the most intense supporters—fanatics—to drive both their commercial and public goals. Fanatics buy lots of products, advertise the product to their friends, and lobby governments.

Fans of sports teams expend large amounts of money in endeavors that are unique to that team. Along with that financial investment is the investment of emotional labor in going through the ups and downs that the firm they are attached to experiences. Their connection is therefore partially financial and partially emotionally intimate. The day the Dodgers, a MLB team, left Brooklyn, New York, for Los Angeles has been described as the borough's "defining moment."[130] Writers Pete Hamill and Jack Newfield later captured the mood of city residents when they argued that the three most evil people of the twentieth century, in no particular order, were Adolf Hitler, Josef Stalin, and Walter O'Malley, the owner of the Brooklyn (and then Los Angeles) Dodgers.[131]

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125. *Id.* (noting that the players were eventually acquitted in court but were banned by the league from ever playing again).

126. Finley & Co. v. Kuhn, 569 F.2d 527, 532 (7th Cir. 1978) (citation omitted); *see also* PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW: CASES, MATERIALS AND PROBLEMS 9 (1993) (describing the general sense that this scandal could have been avoided through more neutral, law-like mechanisms).

127. *Finley & Co.*, 569 F.2d at 532–33 (discussing the history).

128. One member of Congress even went so far as to try to impeach Landis as a federal judge because of the conflict of interest created by him serving in both roles at the same time. *See Conduct of Judge Kenesaw Mountain Landis: Hearings Before the H. Comm. on the Judiciary*, 66th Cong. 43 (1921) (statement of Hon. Benjamin F. Welty, M.C.).

129. Barry Popik, *Fan (Sports Enthusiast)*, BARRY POPIK (Sept. 5, 2008), https://www.barrypopik.com/index.php/new_york_city/entry/fan [https://perma.cc/48LJ-FAKH].

130. *See Brooklyn Marks 50 Years of Singing the Dodger Blues*, AUGUSTA CHRON. (Sept. 24, 2007, 6:00 AM), https://www.augustachronicle.com/story/sports/mlb/2007/09/24/bas-144902-shtml/14697417007/ [https://perma.cc/T78K-XZZ5].

131. *See* Jason Zinoman, *The Dodgers Leave Home for Los Angeles, and Brooklyn Feels the Pain*, GUARDIAN (Jan. 6, 2007, 8:22 PM), https://www.theguardian.com/sport/2007/jan/07/ussport.features1 [https://perma.cc/M8QR-EVCA].

The commitments of these more intense customers are therefore, to a meaningful degree, asset-specific, meaning they are not easily transferable.[132] A fanatical supporter of a company invests all sorts of resources into their relationship with that company by buying products, spending time and effort learning about these products, and spreading the gospel of the firm's qualities.

Facebook relies on customers putting huge amounts of their lives on its site: pictures of their children, opinions about politics, and lists of friends. Users may be less likely to do so if they think there are risks associated with doing so. Facebook advertises that it will comply with rules governing customer privacy to help alleviate these concerns.[133] Similarly, users may be less likely to participate if they think they will be confronted with offensive content. In contrast, "power users" that drive engagement with the site, like politicians and celebrities, may be less likely to try to build big followings if they think their speech can be taken down simply because it makes short-term business sense for the firm.

Sports leagues clearly rely on asset-specific investment by fanatics. Fans not only go to an occasional game and own a hat; they memorize lineups, get tattoos, paint their faces, argue on sports radio, and generally act like lunatics.[134] A sports fan, for instance, learns the players on a team and the nuances of that team's stadium. One sociologist wrote that "[j]ust as [Emile] Durkheim suggested aboriginal tribes worship their society through the totem, so do the lads reaffirm their relations with other lads through the love of the team."[135]

Convincing customers to invest at the level of fanatics requires them to trust that the firm is not going to take advantage of them—that it is willing to engage in asset-specific investments in its customers rather than change the terms of their understanding. Sporting leagues, for instance, have real incentives to ignore those asset-specific investments. Leagues want fans in Oklahoma City or Buffalo to invest in their fandom, but they also very much want teams in big markets, like New York City or Los Angeles, to win, as those teams get higher television ratings.

As economists studying the "theory of the firm" have argued, one reason business firms exist at all is that markets filled with independent contractors would

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132. *See* Peter Alexis Gourevitch, *The Governance Problem in International Relations*, *in* STRATEGIC CHOICE AND INTERNATIONAL RELATIONS 137, 144 (David A. Lake & Robert Powell eds., 1999) (noting how various "actors develop investments, 'specific assets,' in . . . relationships, expectations, privileges, knowledge of procedures, all tied to the institutions at work").

133. *Facebook's Commitment to Data Protection and Privacy in Compliance with the GDPR*, FACEBOOK BUS. (Jan. 29, 2018), https://www.facebook.com/business/news/facebooks-commitment-to-data-protection-and-privacy-in-compliance-with-the-gdpr [https://perma.cc/W2EM-XXLG].

134. This is not a description of some others. Schleicher and Fontana can both still recite the starting lineup of the 1986 Mets, even when almost all other aspects of 1986 have been lost to the fog of memory.

135. Anthony King, *The Lads: Masculinity and the New Consumption of Football*, 31 SOCIO. 329, 333 (1997).

be riddled with the problem of hold-ups.[136] To produce some good or service, individuals need to make investments that are specific to that good and service.[137] But once someone makes an investment specific to a particular type of production, the other people necessary to produce the good can "hold up" the person who has invested, making lowball bids that the investor will still need to accept. After all, the investment was specific, and unless it is used to make the good or service in question, it will be wasted.

Knowing that there is a possibility they will be held up, people are reluctant to make asset-specific investments. Creating a single business firm that combines all the actors involved in producing a good or service can avoid this problem by generating more of a stable return for the investment. If everyone involved works for the firm, then there is no capacity for hold up. The boundary of the firm—which is what the firm does for itself rather than buy or sell on the market—is in part defined by the need to avoid holdups for asset-specific investments. But teams cannot easily merge with fans, making it necessary to develop other tools that encourage asset-specific investments.

The empirical literature on consumer loyalty has found that loyalty is developed by meaningful commitments to internal company mechanisms generating consistency. McKinsey & Company, for instance, has informed many of its clients that investing in consistent dispute-resolution mechanisms is more likely to generate customer loyalty than other investments.[138] When there are no fanatical fans of a private firm, the value of that firm's products are simply lower.

Private firms therefore need a mechanism to communicate to consumers that they intend to stick with the rules that first attracted the consumer to purchase products from the firm. One tool of precommitment is to ensure that one pays a price for defecting on that commitment.[139] Mechanisms like contractual agreements can obligate a private firm to persist with certain rules even after it ceases to make commercial sense for the private firm to do so. These agreements can also generate social connections that would be disrupted if private firms changed their arrangements, thereby adding a social cost generated by defection from the rules

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136. For the general theory see, for instance, OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 4 (1975); Benjamin Klein, *Why Hold-Ups Occur: The Self-Enforcing Range of Contractual Relationships*, 34 J. ECON. INQUIRY 444, 444–47 (1996).

137. A silly example: To put on *Henry IV, Part I*, the play, at least one actor has to memorize the lines said by Hotspur. If the actor memorizes the lines in advance, the other people involved (the producer, or the other actors who have not memorized their lines or done their jobs yet) can make low-ball offers for the actor's services, as the actor's time and effort will be lost unless the play is actually put on.

138. *See* Marc Beaujean et al., *The "Moment of Truth" in Customer Service*, MCKINSEY Q. (Feb. 1, 2006), https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/the-moment-of-truth-in-customer-service#/ [https://perma.cc/E3RY-EA9N] (reporting the results of a study that 85% of customers with a positive experience with a company's dispute resolution mechanism return and 70% of those with a negative experience do not).

139. *See* JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 68–69 (2000).

comparable to the financial or legal ones.[140] The private supreme court generates a version of this, making visible what the consistent application of a rule would look like, thereby making it clear if a private firm is defecting from its commitments.

3. Regulators

Private firms also have an economic interest in acting consistently because it can persuade external audiences—particularly regulators—to leave the firm alone to make its own business decisions. The decisions of a private firm may be seen by various audiences as having more or less sociological legitimacy among its customers, employees, and other commercial actors.[141] Possessing more sociological legitimacy in this sense assists a private firm in avoiding disruptive public regulation, as the legitimacy of a firm's decisions might reduce complaints that lead to regulation and might be seen as obviating the need for public regulation.[142]

Many types of firms desire and seek public subsidies for their activities, claiming that they produce public benefits. Sports teams are very much in this camp. State and local governments regularly provide subsidies for sports stadiums to keep teams from leaving town.[143] Economists almost universally describe these subsidies as a bad idea.[144] Having a sports team in town merely causes people to move entertainment dollars around—they go to fewer movies or music shows—and creates few jobs.[145]

But governments persist in offering subsidies. Convincing them to do so requires a public belief that having a sports team promotes happiness or public values of other sorts. Internal rule compliance and treating teams fairly may make it more likely that governments will view subsidies as useful.

While many think of the legitimacy of a private firm's decision as deriving from its compliance with *public* laws, part of the perception of the firm's legitimacy

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140. *See* Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1471–73 (2004) (describing how contracts can "engender valuable collaborative relations").

141. We are using here the definition of legitimacy helpfully provided by Richard Fallon. *See* Richard Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005) ("When legitimacy is measured in sociological terms, a constitutional regime, governmental institution, or official decision possesses legitimacy in a strong sense insofar as the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward."). *See generally* Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 307 (2003) ("Legitimacy is the property that a rule or an authority has when others feel obligated to defer voluntarily.").

142. For a discussion of these empirical realities, see, for example, Timothy Werner, *Gaining Access by Doing Good: The Effect of Sociopolitical Reputation of Firm Participation in Public Policy Making*, 61 MGMT. SCI. 1989, 1994–95 (2015).

143. Daniel Kaplan, *Taxpayers Beware, Subsidies for Sports Venues Back in Vogue Despite Low Returns*, N.Y. TIMES (Apr. 27, 2022), https://www.nytimes.com/athletic/3271278/2022/04/27/taxpayers-beware-subsidies-for-sports-venues-back-in-vogue-despite-low-returns/ [https://perma.cc/9T5M-F3BZ].

144. ROGER G. NOLL & ANDREW ZIMBALIST, SPORTS, JOBS, AND TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS 142–43 (1997).

145. *Id.* at 80.

derives from the nature of the private firm's compliance with its own *private* rules. Producing consistency in the firm's *own* decisions can achieve a similar result of persuading regulators of internal firm legitimacy. The procedural-justice literature has long found that consistent application of rules developed in advance produces positive sentiments among those involved or affected—or even those informed about these decisions.[146]

Acting consistently of its own volition—treating Trump and Biden the same on Facebook, and Brady and Kaepernick the same in the NFL—helps with this perception of legitimacy. There is convincing empirical literature that firms engage in self-regulation as a method of avoiding public regulation (and that doing so can be successful).[147] One means of self-regulation occurs when firms over-comply with existing regulations to avoid even more problematic later regulations.[148]

Private firms take other actions to persuade these audiences of the legitimacy of the decisions they make. The entire discipline of public relations was meant to aid in this function.[149] Companies like Facebook issue press releases explaining their decisions and make their leaders available to the public to explain and justify their decisions. Regulators and civil-society organizations are invited to be a part of firm deliberations to encourage this sense of sociological legitimacy.

Governments often respond to claims by citizens that firms are treating customers inconsistently. Federal regulators have occasionally responded to complaints about firm inconsistencies by enacting new legislation or producing new regulations. The form that these new rules take explicitly attempts to generate internal consistency at the private firm. Federal laws related to airlines mandate handling "bumped" passengers with consistency, as one example.[150]

Economists have long argued that laws against "price gouging," during natural disasters or other periods of increased demand, are a bad idea, as they remove the economic incentives for firms to invest and lead to shortages and queuing.[151] But

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146. *See generally* Tyler, *supra* note 141, at 307.

147. *See* Neil Malhotra et al., *Does Private Regulation Preempt Public Regulation?*, 113 AM. POL. SCI. REV. 19, 34 (2019) ("[C]ompanies can reduce support for . . . regulations by voluntarily doing more than the status quo, but less than what people might demand in the absence of self-regulation.").

148. *See* David Baron, *Self-Regulation in Private and Public Politics*, 9 Q.J. POL. SCI. 231, 260–61 (2014); Daniel Kinderman, *Time for a Reality Check: Is Business Willing to Support a Smart Mix of Complementary Regulation in Private Governance?*, 35 POL. & SOC'Y 29, 39–41 (2016). Sometimes, firms will even support binding legal changes if they think it will forestall larger, future regulatory action. *See* Sheila Kaplan, *Senator McConnell, a Tobacco Ally, Supports Raising Age to Buy Cigarettes*, N.Y. TIMES (Apr. 18, 2019), https://www.nytimes.com/2019/04/18/health/mcconnell-tobacco-vaping-21.html [https://perma.cc/4PJF-DLPF].

149. *See* EDWARD T. WALKER, GRASSROOTS FOR HIRE 51–76 (2014) (discussing corporate communications).

150. 14 C.F.R. § 259.5(b) (2024).

151. Michael Brewer, Note, *Planning Disaster: Price Gouging Statutes and the Shortages They Create*, 72 BROOK. L. REV. 1101, 1137 (2007); Michael Giberson, *The Problem with Price Gouging Laws*, 34 REG. 48, 49 (2011); Dwight R. Lee, *Making the Case*

despite opposition from experts, politicians regularly push for these laws, responding to constituents' concerns about unfair treatment.[152] Firms seeking to avoid draconian price gouging laws will often respond by not raising prices as much as they can. In part, this is to keep consumers from becoming angry at their brands for commercial reasons, as mentioned above, but it is also to keep consumers from asking politicians for more aggressive policies.[153]

Firms adopting public and binding self-governing rules also provide regulators a greater ability to monitor them more easily, which makes regulators more likely to leave these firms alone. What goes on inside most companies is hard for anyone—governments, investors, customers—to know. Business decisions are protected from judicial review through things like the business judgment rule and trade secrets law.[154] Regulators worried that firms engaged in lawbreaking may undertake costly investigations or prosecutions.[155] Legislators concerned with a firm's behavior may pass laws that firms do not like, unless they can be sure the firm is behaving. A firm that wants to avoid political and legal risk can do so by making clear to regulators and legislators how it makes decisions.

As mentioned above, following internal rules consistently is costly because it may require firms to give up profitable opportunities. The fact that consistently applying rules is costly, though, improves the firm's credibility with regulators, for reasons suggested by the economic literature on "signaling."[156] Applying its own internal rules in ways that may limit profitable opportunities can provide a costly signal that the firm is a good firm engaged in behavior that does not need

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Against "Price Gouging" Laws: A Challenge and an Opportunity, 19 INDEP. REV. 583, 596 (2015).

152. *See* Kahneman et al., *supra* note 117, at 729 (reporting that 82% of respondents consider it unfair for a hardware store to raise the price of snow shovels after a large blizzard caused increased demand); Steven Suranovic, *Surge Pricing and Price Gouging: Public Misunderstanding as a Market Imperfection* 3–4 (Geo. Wash. U. Inst. Int'l Econ. Pol'y, Working Paper No. 2015-20, 2016), https://www2.gwu.edu/~iiep/assets/docs/papers/2015WP/SuranovicIIEPWP2015-20.pdf [https://perma.cc/PQU9-GYDB] ("Public condemnation has previously been so strong that 34 U.S. states and the District of Columbia have implemented price gouging legislation prohibiting unconscionable price increases in emergency situations.").

153. *See, e.g.*, Javier E. David, *Uber Hammered by Price Gouging Accusations during NYC's Explosion*, CNBC (Sept. 18, 2016, 6:19 PM), https://www.cnbc.com/2016/09/18/uber-hammered-by-price-gouging-accusations-during-nycs-explosion.html [https://perma.cc/Z8F4-Y6G3]; Jodie L. Ferguson et al., *Suspicion and Perceptions of Price Fairness in Times of Crisis*, 98 J. BUS. ETHICS 331, 335 (2011).

154. *See* Mark V. Nadel, *Corporate Secrecy and Political Accountability*, 35 PUB. ADMIN. REV. 14, 15 (1975).

155. *See* Janis M. Berry, *Defense of Businesses: Individual Officers and Employees in Corporate Criminal Investigations*, 19 PUB. CONT. L.J. 648, 664–65 (1990) (describing the arduous process of defending a corporation from a criminal investigation); Andrew Park, *The Endless Cycle of Corporate Crime and Why It's so Hard to Stop*, DUKE U. SCH. L. (Jan. 13, 2017), https://law.duke.edu/news/endless-cycle-corporate-crime-and-why-its-so-hard-stop/ [https://perma.cc/T9YB-5D26].

156. *See generally* Michael Spence, *Job Market Signaling*, 87 Q.J. ECON. 355 (1973) (discussing signaling).

regulation.[157] In situations where outsiders have trouble telling between types of actors, people or firms can choose to engage in acts that are differentially costly to "good" and "bad" types; their willingness to bear these costs "signal" that they are one of the good ones.[158] Adopting and then consistently applying internal rules, even in the face of situations where rule breaking would be profitable, signals to regulators that a firm is good, and thus less in need of regulation.

B. Producing Consistency

Public officials take an oath to uphold and affirm the Constitution.[159] The Constitution itself[160] and so many of the doctrines created to implement it feature pervasive rules regarding the obligation to treat like cases alike.[161] Because pledges are not enough, there is an entire institutional structure that encourages consistent public behavior (not always successfully, to be sure).

In private law, though, there is no such legal obligation to act consistently, and there is not much of an institutional structure encouraging firms to do so either. The question then becomes, if a firm desired to bind itself to follow its internal rules, what institutional design could help it do so? One of the tools, which our Article highlights, is a private supreme court designed to interpret and apply pre-announced corporate rules. There are several ways that court-like institutions can generate consistent rules for private firms in ways that existing private institutional designs cannot sufficiently provide.

First of all, court-like institutions within private firms face incentives to generate consistency that other institutions within private firms do not because of how members or judges on private supreme courts are selected.[162] Alexander Hamilton wrote in *The Federalist Papers* that people of "intrinsic merit" would be identified and selected for the federal bench because of the combination of

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157. Of course, regulating is usually done by industry or conduct. But the behavior of firms in an industry can make regulators more or less likely to act. Further, the content of regulation can be aimed more at the type of behavior common in one firm, rather than another.

158. Indeed, when the global soccer governing body FIFA fired the chair and several members of its independent governance committee (established in the wake of a major scandal), those members wrote an op-ed calling for "decisive external action" because the shunting aside of their recommendations and dismissal proved that "F[IFA] cannot reform from within." Navi Pillay et al., *Our Sin? We Appeared to Take Our Task at FIFA Too Seriously*, GUARDIAN (Dec. 21, 2017, 2:50 PM) https://www.theguardian.com/football/2017/dec/21/our-sin-take-task-fifa-seriously [https://perma.cc/889Z-4MW4].

159. *See* U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .").

160. *See* U.S. CONST. amend. XIV, § 1, cl. 4 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

161. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (stating that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike").

162. *See* Adrian Vermeule, *Selection Effects in Constitutional Law*, 91 VA. L. REV. 953, 953 (2005) (describing "selection effects" as means that ensure the right kinds of "officials are selected" using "optimal incentives").

presidential selection and senatorial advice and consent.[163] No statute requires that federal judges or Supreme Court Justices possess certain legal credentials. But because we have come to understand federal courts as using legal tools to generate consistent rules, a public expectation has been created about who will be nominated. There is something like a professional "focal point" created to use as a tool to evaluate those selected to the federal bench.[164]

Defining the responsibility of an oversight board, which Facebook has, as dedicated to consistency likewise generates selection mechanisms generating those skilled at producing consistency. Leaders of court-like institutions are likely to be trained to care about consistency and to have public reputations that turn on their capacity to produce justifiable decisions. The idea of the Oversight Board was to stock it with prominent figures with particular types of human capital and reputations.[165] Facebook presumably selected people like Jamal Greene (Professor at Columbia Law School) or Michael McConnell (Professor at Stanford Law School and former federal judge) for the Oversight Board for their judgment and legal acumen.[166]

In contrast, even if a firm tries to commit to following internal rules, corporate leaders face obligations and incentives to maximize profits, particularly in the shorter term. After all, that is why they are there. For-profit corporations, for instance, have as "a central objective . . . to make money."[167] If a for-profit corporation exists to maximize profits for the sake of shareholders, then its leadership will be chosen to try to achieve that.[168] It is true that private firms do not always "pursue profit at the expense of everything else,"[169] but their officers are usually focused on profits. These obligations to pursue profit are also significant because they can be enforced imminently by shareholder lawsuits or by threat of termination by a board of directors.[170] Corporate officials seeking new jobs will almost surely be judged by how well they performed for shareholders, not by the quality of their rule interpretation.

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163. THE FEDERALIST NO. 76, *supra* note 1, at 456–57 (Alexander Hamilton).

164. Of course, the primary discussion of focal points remains. *See* THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 54–58 (1960).

165. Klonick, *supra* note 15, at 2453–62.

166. *Meet the Board*, OVERSIGHT BOARD, https://www.oversightboard.com/meet-the-board/ [https://perma.cc/QBD7-ZCD9] (last visited July 31, 2024) (listing members of the Board and their qualifications); *see also* Clifford, *supra* note 67.

167. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 711 (2014).

168. For a classic statement of this, see Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305, 333–34 (1976).

169. *Burwell*, 573 U.S. at 711–12 (2014). *See generally* 1 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 4:1, at 224 (3d ed. 2010) ("Each American jurisdiction today either expressly or by implication authorizes corporations to be formed under its general corporation act for *any lawful purpose* or business.").

170. *See* Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1991–92 (2018) (finding that judicial mentions of shareholder primacy and profit maximization, and rulings based on the concept, have increased greatly over the past few decades).

Private firm efforts to create an "internal separation of powers" face challenges because most figures inside business firms have similar incentives.[171] A board of directors, for instance, is selected using criteria not all that different from those used to select officers. Directors are increasingly "valued for their perceived ability to effectively scrutinize management."[172] These directors are then formally empowered to pursue similar objectives (like profits) and are responsible for their failure to effectively do so.[173] Indeed, directors often receive a portion of the company's equity—or something comparable to that.[174] Unsurprisingly, some studies have found that legal violations are more common in firms that the directors have more of a financial stake in, and therefore less of a stake in following rules.[175]

Second of all, how a private firm structures its private supreme court can change its level of consistency.[176] Many of the tools considered to be central to judicial independence from political actors can also be central to private supreme court independence from corporate actors. Article III judges enjoy life tenure and salary protection.[177] Those staffing the Oversight Board have longer terms than their corporate counterparts and also have their own funding stream.[178]

Stating that an individual has independence from one group of actors does not necessarily mean they will use that independence to act consistently.[179] It is therefore notable that private supreme court officials likely would be selected from within the legal community. Like with federal judges, the reputations of such figures

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171. *See* REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 50–51 (2017).

172. Yaron Nili, *Out of Sight, Out of Mind: The Case for Improving Director Independence Disclosure*, 43 J. CORP. L. 35, 44 (2017).

173. *See* 19 C.J.S. *Corporations* § 536 ("The elected directors of a corporation have no vested interest in their office, as such, and, generally, may be removed with or without cause, particularly absent a contrary provision of the certificate of incorporation or bylaws.").

174. *See* Steve Pakela & John Sinkular, *Trends in Board of Director Compensation*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Apr. 13, 2015), https://corpgov.law.harvard.edu/2015/04/13/trends-inboardof-director-compensation/ [https://perma.cc/ANP7-5WD8].

175. *See, e.g.*, Marie McKendall et al., *Corporate Governance and Corporate Illegality: The Effects of Board Structure on Environmental Violations*, 7 INT'L J. ORG. ANALYSIS 201, 201 (1999) ("Results demonstrated that the value of stock owned by corporate officers and directors was positively and significantly associated with serious environmental violations.").

176. *See* Vermeule, *supra* note 162, at 953 (describing "incentive-laden" accounts of institutional design).

177. *See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."); *see, e.g.*, Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 966–67 (2007) (describing these features as central to judicial independence).

178. *See supra* notes 58–61 and accompanying text.

179. *See, e.g.*, GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 19 (1993) ("[L]ife tenure and salary protection, which are designed to insulate the judiciary from external political pressures, are not designed to guard against the . . . judge's own assimilation of dominant social values.").

would therefore turn on their ability to write opinions well-regarded in legal circles, not in profit-and-loss figures.[180]

The contrast with other institutional forms within private firms is notable. It is generally accepted that a judge with a clear and immediate personal financial stake in a case cannot be neutral.[181] The "independent" figures, who are brought in to adjudicate some private firm disputes, struggle to have the neutrality necessary to follow the rules. Law firms hired to investigate and resolve matters, like the controversy surrounding Phoenix Suns owner Robert Sarver, receive immediate payment based on their report and have an interest in being hired again to produce other reports.[182]

Another feature of the private supreme court structure that encourages consistency is writing opinions. The existing firm structure does not include reason-giving as part of its process of decision-making. Firm officials make decisions and explain them through something far less than a written document. As Frederick Schauer has brilliantly written, there are ways in which giving reasons promotes the kinds of consistency that we argued earlier can be economically valuable.[183] Giving reasons usually requires some sort of neutral explanation—at least formally stated, even if not sincerely held—that justifies an action. A Facebook official might have thought to himself: "We aren't taking down Trump's posts because they make us so much money, but we are taking the same post by John Doe down." Without having to justify that perspective, he could act on it.

In the longer term, giving reasons usually means abstracting away from the particular circumstances generating a dispute and identifying a category of situations that are similar and therefore should be treated similarly. It is an act of identifying the "likes" that should be treated alike. By putting that in writing, the reason-giver does not necessarily formally oblige themself to later decide a similar case in a similar way. But by creating such a salient focal point to identify as a

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180. *See* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Things Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 15 (1993) (describing reputation "with the legal profession at large" as a major part of "the judicial utility function"); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 628–29 (2000) (noting that judges "like the rest of us, . . . seek to conform their behavior to the demands of the relevant esteem-granting (or withholding) or reputation-creating (or damaging) groups").

181. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876 (2009); *see also* Tumey v. Ohio, 273 U.S. 510, 535 (1927) (requiring judicial recusal because of the judge's "direct pecuniary interest in the outcome").

182. *See generally* Michael McCann, *NBA Turns to Familiar Wachtell Lipton to Investigate Suns Owner Sarver*, YAHOO! SPORTS (Nov. 8, 2021), https://sports.yahoo.com/nba-turns-familiar-wachtell-lipton-150006209.html [https://perma.cc/HU6L-AL7T] (noting Wachtell, Lipton, Rosen and Katz had been hired by the NBA several times before it was hired to produce the Sarver report).

183. *See generally* Schauer, *supra* note 11, at 651 ("One consequence of [reason-giving] . . . is the treatment of consistency for consistency's sake as an independent value."). There is some notable empirical evidence of the effects of giving reasons. *See, e.g.*, EDWARD H. STIGLITZ, THE REASONING STATE 189 (2022); John Zhuang Liu & Xueyao Li, *Legal Techniques for Rationalizing Biased Judicial Decisions: Evidence from Experiments with Real Judges*, 16 J. EMPIRICAL LEGAL STUD. 630, 630 (2019).

precommitment to treat a later case a similar way, there are certainly reputational and potentially other harms that come from the reason-giver not treating like cases alike.[184] Zuckerberg announcing that Facebook is leaving up Trump posts for certain reasons makes it harder for him then to take down identical Biden posts—even if the Trump posts might generate traffic and profit while the Biden posts do not.

A "court-like" institution may also have real advantages in shaping rules to deal with changing circumstances. Courts decide cases in response to real disputes and based on specific factual patterns. When courts behave in a common-law-like way, filling in gaps in rules and helping those rules evolve to fit established values, they can gradually adapt systems of law to changing circumstances.[185]

It is safe to assume that "court-like" institutions may have similar benefits. The Oversight Board chooses cases from among those brought by users of Facebook (and other Meta products) who have had their content taken down by the firm's ordinary content moderation process.[186] That litigants bring challenges suggests that whatever rule application they are unhappy about is not merely "bad" but is problematic to the extent that it is worth it to hire lawyers and sue.[187] One need not adopt strongly formed views about the efficiency of the common law to think that case selection by litigants provides information and creates pressures on decision-makers to interpret and reform the most unclear and costly rules.[188]

Further, that "court-like" institutions would interpret a firm's rules as part of resolving disputes with specific facts may help the firm develop rules over time. Even when changed circumstances call for the evolution of rules, engaging in "legislative" action—i.e., rewriting the rules—may be costly and time-consuming. Further, rewriting the rules may create concerns about consistency, which is the reason a firm would have rules in the first place.

A "court-like" body that interprets rules or standards in response to real-world facts might provide a firm with the capacity to see the effects of its rules and improve them without bearing the costs of rewriting rules. Further, "court-like" institutions may be particularly good at dealing with situations where it is genuinely hard to know what problems may emerge. They can use common law strategies to

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184. *See* Schauer, *supra* note 11, at 648 (noting the "prima facie commitment to other outcomes falling within . . . [the] scope [of the argument]"); *see also id.* ("[G]iving reasons commits the giver is also supported by the fact that quotations directly justifying a result have considerable purchase in legal argument.").

185. As the Supreme Court of New Jersey stated, "[t]he essence of the common law is its adaptability to changing circumstances." Atl. City Convention Ctr. Auth. v. S. Jersey Publ'g Co., 637 A.2d 1261, 1266 (N.J. 1994).

186. Oversight Board, *Charter*, *supra* note 57, art. 2, § 1.

187. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 322 (9th ed. 2014); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 67 (1977).

188. Such strong form beliefs are particularly inapt given the *certiorari*-like power of the Oversight Board to choose cases. But the Board is more likely to decide to hear types of cases that are likely to repeat and that make users upset.

turn loose standards—written generally to address uncertainty—over time, into more solid rules created through binding precedential decisions.[189]

A private supreme court could also generate more consistency by encouraging corporate leaders to internalize consistency as a value.[190] A tradition of public-regarding reasons generated by a private supreme court encourages other actors within the firm to give public-regarding reasons and therefore act a certain way as well.[191] Private supreme courts may create a culture of public-regarding justification.[192] So merely the act of having to give reasons that suggest consistency can generate consistency by forcing individuals to decide certain cases in certain ways in the immediate term.[193]

III. CONCERNS

The benefits a private supreme court-like institution can provide to a private firm can be outweighed by significant costs in many situations. Not every firm will benefit from this structure. Most probably would not. Those firms that will generally benefit will not benefit when it comes to every decision that they must make.

This Part discusses when the costs of a private supreme court are the greatest relative to its benefits, and what can be done to manage these costs. There are many firms—and many decisions—that might not benefit at all from the input of a private supreme court. But while these costs can be weighty, there are still situations in which private supreme courts make sense.

A. Costs

One area of concern about private supreme courts is that they are merely a cover generated by problematic corporate actors as a means of legitimating their misdeeds. The Oversight Board is sometimes portrayed as not doing much of anything except legitimating predetermined decisions by the corporate leaders of

189. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 616–17 (1992).

190. *See* Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435, 1449, 1459–62 (2011) (describing the benefits of a sober second look).

191. *See* Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1280 (2009) ("Because public officials must provide public-regarding justifications for their decisions, other participants in the process have incentives to articulate their claims in public-regarding terms as well. As a result, relatively selfish policy options may be discarded.").

192. *See* Jon Elster, *Deliberation and Constitution Making*, in DELIBERATIVE DEMOCRACY 97, 104 (Jon Elster ed., 1998) ("[T]here are powerful norms against naked appeals to interest or prejudice . . . .").

193. *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1695 (1984) ("If naked preferences are forbidden . . . and the government is forced to invoke some public value to justify its conduct, government behavior becomes constrained."); *see also* Frederick Schauer, *Deliberating About Deliberation*, 90 MICH. L. REV. 1187, 1199 (1992) ("Judges sometimes say 'it won't write,' meaning that there are some reasons that will not stand the test of public explanation.").

Facebook.[194] Corporate leaders can easily change the underlying rules that the Board is interpreting and applying.[195] That means they can also change the rules in which they have pledged to treat Board decisions as usually final.[196]

It is certainly possible that the Oversight Board is merely a cover for decisions rather than a cause of them. Many authoritarian countries feature things that look like courts but do not have any powers of courts.[197] They feature people wearing robes and writing decisions that are supposed to be implemented—but in practice, the decisions are foreordained and, if surprising, simply ignored.[198]

Early reporting suggests that the Oversight Board matters more than that.[199] Even if it does not, though, we should not dismiss an idea because of a single example of its application. It could be that the Oversight Board is feckless, but other private supreme courts would not be or have not been. We might have an overly cramped and narrow view of what a supreme court is and can do.

In this country, judicial supremacy has come to be understood as such a central part of judicial review that it seems like a definitional part of it.[200] There are, though, several constitutional democracies featuring powerful courts whose decisions are not formally final in the same way as we have come to accept in the United States. This is commonly called "weak-form judicial review."[201] In Canada, for instance, the decisions of the Canadian Supreme Court can be overridden by a provincial or national legislature.[202] In New Zealand, the highest court cannot invalidate a law in the first place but can merely note its inconsistencies with other

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194. *See* Thomas E. Kadri, *Juridical Discourse for Platforms*, 136 HARV. L. REV. F. 163, 163 (2022) ("Juridical discourse for platforms . . . can . . . be deceptive. . . . [J]uridical discourse has legitimized and empowered Facebook's Board.").

195. *See, e.g.*, Gardbaum, *supra* note 10, at 707 (stating that rules that are immune from "ordinary . . . amendment or repeal" is at the core of many conceptions of judicial review).

196. *See* Oversight Board, *Bylaws*, *supra* note 18, art. 2.3.1 ("Facebook will implement board decisions to allow or remove the content properly brought to it for review within seven (7) days of the release of the board's decision on how to action the content.").

197. *See, e.g.*, Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 ANN. REV. L. & SOC. SCI. 281, 283–86 (2014) (reviewing the literature on authoritarian courts).

198. *See id.*

199. *See* Steven Levy, *Inside Meta's Oversight Board: Two Years of Pushing Limits*, WIRED (Nov. 8, 2022, 6:00 AM), https://www.wired.com/story/inside-metas-oversight-board-two-years-of-pushing-limits/ [https://perma.cc/P3SX-7USX] ("Of the board's 87 recommendations through the end of 2021, Meta claims to have fully implemented only 19, though it reports progress on another 21.").

200. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution, and that principle . . . .").

201. *See, e.g.*, Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 814 (2003) ("Weak-form systems hold out the promise of protecting liberal rights in a form that reduces the risk of wrongful interference with democratic self-governance.").

202. *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 33 (U.K.), *reprinted in* R.S.C. 1985, app II, no. 44 (Can.).

foundational legal commitments.[203] These high courts have still been influential, and they might be more analogous to a private supreme court because they are not quite as powerful as the U.S. Supreme Court. But they still matter.

Another range of concerns about a private supreme court would center on the converse: that they could end up being too powerful. The core criticism of judicial review outside of private law is that it is counter-majoritarian and therefore too powerful in interfering with democratic sentiments. It was just over 60 years ago that Alexander Bickel famously coined the phrase "counter-majoritarian difficulty" to describe the apparent tension between judicial review and democracy.[204] As Bickel described it, a "root difficulty" with the American constitutional system is that nine unelected justices invalidating laws can act as a "counter-majoritarian force."[205]

There is some displacement of democratic action by private supreme courts. Shareholder power over the managers of a corporation is something of a democratic process.[206] The Supreme Court has lauded the virtues of "corporate democracy."[207] Democratic government in public law is more about "wide-ranging public deliberation" about defining issues of the day like abortion or affirmative action.[208] It is hard to imagine, then, that corporate democracy is entitled to the same normative weight and therefore to the same degree of normative deference that this democracy among the general public is. Disrupting a corporate decision does not generate the same problems under the democratic theory that disrupting a piece of legislation does.

The real problem, though, is that private supreme courts can be more *counter-economic* than *counter-majoritarian*. The corporate officials selected for

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203. *See* New Zealand Bill of Rights Act 1990, cl 4.

204. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

205. *Id.*

206. For discussions of the democratic nature of this process, see the discussions in Lucian Bebchuk et al., *Towards the Declassification of S&P 500 Boards*, 3 HARV. BUS. L. REV. 157, 159–60 (2013), and Stephen J. Choi et al., *Does Majority Voting Improve Board Accountability?*, 83 U. CHI. L. REV. 1119, 1121 (2016), and Yermack, *supra* note 28, at 121.

207. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 354, 361–62, 370 (2010) (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 794 (1978)); *see also id.* at 370 ("With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable."). There have been plenty of convincing replies to this characterization of corporate governance as democratic government. *See, e.g.*, Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 54, 54–55 (2009) (describing the democratic problems with corporate government).

208. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1349 (2006); *see also id.* ("The[] [people] can decide among themselves whether to have laws . . . . If they disagree about any of these matters, they can elect representatives to deliberate and settle the issue by voting in the legislature."). It is also worth noting that those critical of judicial review are also more often targeting strong-form judicial review, in which unelected judges make final and binding decisions that cannot be overridden by the democratic process. *See id.* at 1354 ("My target is strong judicial review."). Private supreme courts do not—as of yet at least—feature that degree of strong judicial review.

and skilled at generating corporate value will have their decisions shaped—and often informally displaced—by the decisions of the private supreme court. The analogy is more akin to a federal court displacing the action of an expert administrative actor.[209] It is more like the debate about *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*[210]

B. Constraints

The key to understanding private supreme courts is that they are not for everyone. Instead, private supreme courts only work (even in theory) for some firms and some decisions.

1. Firms

Private firms that have to concern themselves more with their public reputation will find more benefit from a private supreme court. The public will have more of an expectation of consistency from these firms because the significance of their firm to the public makes them seem more like governmental actors. Since it seems like they are performing more of a "public function," the public has a greater expectation of a consistent application of the rules by the firm.[211]

One type of firm from which consistency might be expected is a firm that is operating what is seen as a "public utility" because the product it generates is so essential.[212] The criticisms of Facebook often sound in this concern. The arbitrary nature of the content moderation seemed to be problematic given the public

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209. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984), *overruled by* Loper Bright Enter. v. Raimondo, 144 S. Ct. 2244 (2024) (stating that "[j]udges are not experts in the [regulatory] field" and therefore judges should defer to many administrative actions). *See generally* Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1682 (2007) ("*Chevron* deference is often defended on the ground that administrative agencies have greater expertise . . . .").

210. 467 U.S. at 865 ("Perhaps [Congress] desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so . . . . Judges are not experts in the field.")

211. The Supreme Court stated that administering amateur athletics is not performing a public function. *See* N.C.A.A. v. Tarkanian, 488 U.S. 179, 199 (1988) (stating that the NCAA was not "a private party . . . acting under color of state law" even though it had a monopoly on amateur athletics). Even if these larger firms are not performing a public function as a matter of law, they might be performing a public function as a matter of perception.

212. *See, e.g.*, Charles Wolff Packing Co. v. Ct. of Indus. Rels., 262 U.S. 522, 538 (1923) ("In nearly all the businesses [that are affected with a public interest], the thing which gave the public interest was the indispensable nature of the service."). Part of evaluating whether a company was a public utility also typically involved whether their behavior was suggestive of outsized market power. *See* Nicholas Bagley, *Medicine as a Public Calling*, 114 MICH. L. REV. 57, 75 (2015) (stating that the doctrinal test usually asked whether "the business in question met an important human need . . . and . . . [whether] some feature of the relevant market presented the risk of oppression").

functions that Facebook was performing.[213] Two-thirds of Americans said Facebook should exercise principled regulatory control over speech.[214]

Customers also expect consistency from firms when the value of the product those firms produce is itself *defined* by consistency. A contemporary example of firms whose value is partially defined by the consistency they offer are firms that serve as platforms for competition among their customers (like Facebook). Platforms that connect buyers to sellers, or that stage competitions of some sort among customers, need to convince the players that they are on a somewhat level platform. In order to attract customers, firms that host these competitions may have a particularly strong incentive to establish clear and binding rules.[215] Posters to social media sites frequently complain that the algorithm that displays posts on Facebook timelines is biased in one way or another.[216] One way to understand Facebook's moderation rules and the creation of the Oversight Board is as a pre-commitment device to reassure posters that they will be treated equally, thus creating greater customer satisfaction.

Sporting leagues are another example of a type of firm that expects consistency. The utility that one derives from watching sporting events is defined by a sense that the sporting event will be resolved consistently with the rules and from thinking that both teams are playing hard, following the same rules, and trying their best to win. When there are breaches of the consistent application of the rules to all parties, customers are outraged. MLB Commissioner and former President of Yale University A. Bartlett Giamatti once remarked that "if participants and spectators alike cannot assume integrity and fairness, and proceed from there, the [sporting] contest cannot in its essence exist."[217]

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213. *See* Nicolas Suzor et al., *Evaluating the Legitimacy of Platform Governance: A Review of Research and a Shared Research Agenda*, 80 INT'L COMMC'N GAZETTE 385, 394 (2018).

214. *See* John LaLoggia, *U.S. Public Has Little Confidence in Social Media Companies to Determine Offensive Content*, PEW RSCH. CTR. (July 11, 2019), https://www.pewresearch.org/fact-tank/2019/07/11/u-s-public-has-littleconfidence-in-social-media-companies-to-determine-offensive-content/ [https://perma.cc/KF4R-43PW].

215. This was surely a concern for Facebook. "Indeed, because 'exit' (i.e. leaving the platform) is easier than physical exit from a state, the costs of illegitimate decisions may be even greater. While network effects make it more unlikely that Facebook will become the next Myspace, a social media graveyard of abandoned profiles, the last few years of scandals no doubt make Facebook afraid to be complacent." Evelyn Douek, *Facebook's "Oversight Board:" Move Fast with Stable Infrastructure and Humility*, 21 N.C. J.L. & TECH. 1, 19–20 (2019).

216. *See* Bobby Allyn, *Facebook Keeps Data Secret, Letting Conservative Bias Claims Persist*, NPR (Oct. 5, 2020), https://www.npr.org/2020/10/05/918520692/facebook-keeps-data-secret-letting-conservative-bias-claims-persist [https://perma.cc/2L4S-8DQR]; Margaret Sullivan, *Pro-Trump Voices Have Mark Zuckerberg's Ear. Is that Why Facebook Undermines Liberal News Sites?*, WASH. POST (Oct. 27, 2020), https://www.washingtonpost.com/lifestyle/media/facebook-news-zuckerberg-conservative-liberal/2020/10/26/04722572-1464-11eb-bc10-40b25382f1be_story.html [https://perma.cc/7TVN-383R].

217. A GREAT AND GLORIOUS GAME: BASEBALL WRITINGS OF A. BARTLETT GIAMATTI 73 (Kenneth S. Robson ed., 1988).

2. Decisions

Another dimension, which limits a private supreme court, is at the level of the *decision* rather than at the level of the *firm*.[218] While certain types of firms might have more public-facing decisions with lesser frequency, many types of firms will encounter these decisions with greater frequency. Many firms, in other words, need some mechanism that decides which cases to resolve and how to resolve them if they decide to generate a supreme court.

Jurisdiction is a foundational element of defining any court. Attempts to constrain the current Supreme Court, for instance, have focused on limiting the jurisdiction of the Court. The Supreme Court can decide to hear a case because the question it presents is "important,"[219] and these efforts at reform would limit that discretion.[220] The Oversight Board's bylaws likewise state that it will only hear "important" cases, which presumably means cases that are of broader public interest with broader public implications.[221] Other private firms might limit the jurisdiction of their supreme court even more substantially than that.

One way that private firms can minimize concerns is to create a private supreme court but maintain control over it in meaningful ways. For one thing, private firms themselves write the rules that private supreme courts are interpreting.[222] Facebook wrote the Community Standards that the Oversight Board interprets, and the NBA wrote the constitution and negotiated the Collective Bargaining Agreement that the Basketball Court would interpret. If either firm does not like how their private supreme courts are interpreting their rules, they can change the rules without the veto-gates that make it hard for Congress to change statutes in response to disfavored judicial interpretations.[223] And it is certainly much easier to

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218. Public law has had to face similar questions about which types of cases are better or worst suited for federal adjudication. The "public rights" exception to Article III is an example of a dispute that can be allocated outside of federal courts because of the nature of the dispute. *See, e.g.*, Stern v. Marshall, 564 U.S. 462, 489 (2011) (discussing the difference between cases that can be resolved outside of federal courts as including cases "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments" and those cases featuring "the liability of one individual to another" which must be resolved by courts (citation omitted)). The Supreme Court has also stated that cases involving "specialized" matters might be decided outside of federal courts. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 845 (1986).

219. *See* SUP. CT. R. 10(c).

220. *See* Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703, 1756–57 (2021); Christopher Jon Sprigman, *Congress's Article III Power and the Processes of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1820–21 (2020).

221. *See* Oversight Board, *Bylaws*, *supra* note 18, art. 1.2.1.

222. *See* Gardbaum, *supra* note 10, at 712 (describing the "American model" of constitutional law as featuring an "entrenched" fundamental law but noting that "[i]n Britain, the sovereignty of Parliament means that it can amend or repeal any previous legislation by ordinary majority. Indeed, it can do so either expressly or impliedly").

223. *See* William N. Eskridge, Jr., *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 527 (1992) ("Article I, Section 7 [is] a sequential game, in which lawmaking is conceptualized as a dynamic interaction between the preferences of the House and Senate (bicameralism) and

change firm rules than to use Article V to amend the Constitution that Article III courts are interpreting and making binding on others.[224]

Another way that the concerns with private supreme court power can be mitigated is by having these courts generate private judicial doctrines that defer to corporate leaders in appropriate circumstances. The Oversight Board is already utilizing proportionality like doctrines that permit Facebook to restrict postings if they satisfy certain standards.[225]

Finally, complicated decisions that private firms make can be reviewed by private supreme courts staffed by those with the technical capacity to understand those decisions. Because these courts are firm-specific, the judges will generally have substantial knowledge of firm operations, almost like how a judge on a specialized court understands that specialized industry better than a generalist would. In particular, judges on a private supreme court with a background in the firm's business may generate consistent rules that create a private supreme court more sympathetic to the private firm.[226] It could be that reaching the professional level of someone who would be qualified for this position would make them already more inclined to understand what corporations need. Indeed, scholars have found socializing these sorts of tendencies into people to be part of legal (and other elite) education more generally,[227] which might be why the Supreme Court has always been more sympathetic to big business than one might expect.[228]

IV. THE BASKETBALL COURT

This Part moves from the telescope observing why private supreme courts can be helpful for some private firms and some of their decisions, to the microscope examining how that would work for one private organization: the NBA. The discussion is necessarily speculative, considering when a private supreme court

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the President (presentment). The advent of the administrative state, in which much 'lawmaking' is accomplished by agencies dominated by the President, has altered the game in an important way.").

224. *See* U.S. CONST. art. V (describing the complicated supermajoritarian process necessary to amend the Constitution).

225. *See Case Decision 2020-004-IG-UA: Breast Cancer Symptoms and Nudity*, OVERSIGHT BOARD (Jan. 28, 2021), https://oversightboard.com/decision/IG-7THR3SI1/ [https://perma.cc/FWH7-9ZUR] (finding that "[a]utomated content moderation without necessary safeguards is not a proportionate way for Facebook to address violating forms of adult nudity").

226. *See* Adrian Vermeule, *Should We Have Lay Justices*?, 59 STAN. L. REV. 1569, 1571 (2007) (arguing a Supreme Court with "at least some lay Justices will reach more right answers across the total set of cases").

227. For the discussions of this in the legal literature, see ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND 52–58 (1992); LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOLS, AND INSTITUTIONAL CHANGE 6 (1998); Howard S. Erlanger & Douglas A. Klegon, *Socialization Effects of Professional School: The Law School Experience and Student Orientation to Public Interest Concerns*, 13 LAW & SOC'Y REV. 11, 11–12 (1978).

228. *See generally* Lee Epstein et al., *When It Comes to Business, the Right and Left Sides of the Court Agree*, 54 WASH. U. J.L. & POL'Y 33, 33 (2017) (finding that "Democratic and Republican appointees [both] support business at record levels").

might work better for the NBA, when it might work worse, and how it would work in the first place. The primary goal is for this discussion to serve as a "proof of concept"—to show how private supreme courts can help a private firm.

The NBA is also a particularly helpful example to use as a proof of concept. It is to some degree typical of large corporations with an enormous public presence, making it an example of a "most representative" case study.[229] It would also be a particularly important corporation to utilize a private supreme court—the NBA is a league with $10 billion in annual revenue and enormous cultural salience.[230]

A. Law-Like Rules Without Court-Like Structure

First, sports leagues like the NBA already have law-like rules that everyone understands as law-like rules, but they do not have many institutions comparable to court-like structures. The NBA has a "Constitution" and a set of bylaws governing league operations, covering everything from the required "character and fitness" of players to the rules governing trades.[231] Article 2 of the NBA Constitution makes clear the law-like ambitions of the document.[232]

As the increasingly large literature on the jurisprudence of sports has shown, rules like these are not *the* law, but they are a lot *like* the law.[233] There are institutions that are meant to make these rules into something like a legal system. However, as the next Section will discuss, the insufficiently court-like structure of this NBA system leaves the NBA falling short from a business perspective. The Basketball Court could help.

B. Demanding the Basketball Court

There are many reasons why the NBA would care about interpreting these various rules consistently. The consumers of the NBA themselves likely want that kind of consistency. Sports leagues have long understood that a reputation for bias would be terrible for their long-term business interests, and some of the most dramatic reforms in these leagues have been in response to events that undermined the perception that these leagues acted consistently. It was the Chicago Black Sox scandal of the 1910s that led to the creation of the professional sports commissioner and the appointment of a federal judge—Kennesaw Mountain Landis—to that

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229. *See* Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMPAR. L. 125, 142 (2005) ("If a researcher wishes to draw upon a limited number of observations or case studies to test the validity of a theory or an argument, these should feature as many key characteristics as possible that are akin to those found in as many cases as possible.").

230. *See* Jabari Young, *NBA Projects $10 Billion in Revenue as Audiences Return After Covid, but TV Viewership is a Big Question*, CNBC, https://www.cnbc.com/2021/10/18/nba-2021-2022-season-10-billion-revenue-tv-viewership-rebound.html [https://perma.cc/V8PJ-P8NP] (Oct. 20, 2021, 1:26 PM).

231. *See* NBA CONST., *supra* note 21.

232. *Id.* art. 2 ("This Constitution and By-Laws constitutes a contract among the Members of the Association.").

233. *See, e.g.*, MITCHELL N. BERMAN & RICHARD D. FRIEDMAN, THE JURISPRUDENCE OF SPORT: SPORTS AND GAMES AS LEGAL SYSTEMS 3 (2021) ("Formalized sports systems at every level . . . resemble state governance yet more closely.").

position.[234] After it was discovered that Tim Donaghy was refereeing NBA games in a way that would please gamblers, the NBA likewise responded with some institutional reforms trying to generate consistent rule application.[235] This problem of referee bias will almost surely reignite with the huge increase in gambling following the legalization of sports gambling in many states.[236]

The persistent topics that upset NBA consumers are those involving systematic, repeated potential inconsistencies in the application of the NBA rules. Is there superstar bias, such that the rules were applied differently to ordinary players than they were to Michael Jordan in the 1990s or Steph Curry and LeBron James now?[237] Another version of superstar bias is "super team" bias, leading referees to favor popular and successful teams like the Golden State Warriors. In 2019, the Houston Rockets issued a formal complaint to the league that referee bias towards the Warriors cost them the NBA championship.[238]

The contrast here would be with professional wrestling. The entertainment value of professional wrestling derives from the fact that the rules appear to be real

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234. Finley & Co. v. Kuhn, 569 F.2d 527, 532–33 (7th Cir. 1978) (describing the reasons for the appointment of Judge Landis); *see also* WEILER & ROBERTS, *supra* note 126, at 1 (providing a similar story about what led to Commissioner Landis being selected).

235. The NBA hired former federal prosecutor Lawrence Pedowitz to investigate the matter and make suggestions as to how to ensure such misconduct did not recur. Once Pedowitz issued his report, NBA Commissioner David Stern promised to implement all of the institutional reforms that Pedowitz suggested. *See Review of NBA Officials Finds Donaghy Only Culprit, Stern Calls for Change*, ESPN (Oct. 2, 2008, 9:33 AM), https://www.espn.com/nba/news/story?id=3621631 [https://perma.cc/UHG8-7E5Q] ("Stern promised to implement all the recommendations included in former federal prosecutor Lawrence Pedowitz's review of the NBA referees operations department . . . .").

236. *See* Will Leitch, *Sports Gambling Is a Disaster Waiting to Happen*, THE ATL., https://www.theatlantic.com/ideas/archive/2021/09/micro-betting-could-destroy-sports/620188/ [https://perma.cc/K4M3-B9KL] (Sept. 24, 2021, 8:45 AM) (describing potential problems).

237. There is disagreement among scholars about whether there is superstar bias. *Compare* Steven B. Caudill et al., *Life on the Red Carpet: Star Players and Referee Bias in the National Basketball Association*, 21 INT'L J. ECON. BUS. 245, 250 (2014) (reporting "findings . . . that marquee NBA players . . . are the beneficiaries of referee bias"), *with* Christian Deutscher, *No Referee Bias in the NBA: New Evidence with Leagues' Assessment Data*, 1 J. SPORTS ANALYTICS 91, 91 (2015) ("The empirical analysis for 113 games and 1229 total calls finds no support of referee bias in foul calling."). Scholarly disagreement—or agreement—will not stop the fans from worrying about and analyzing this potential bias.

238. *See* Zach Lowe & Rachel Nichols, *Rockets audited '18 Game 7, say Finals bid taken*, ESPN (Apr. 29, 2019, 3:04 PM), https://www.espn.com/nba/story/_/id/26634745/rockets-audited-18-game-7-say-finals-bid-taken [https://perma.cc/ZPP9-6T7C] (quoting a memorandum written by the Rockets stating that "[r]eferees likely changed the NBA champion"); Sam Amick & Kelly Iko, *Sources: Rockets' Game 1 Ref Rage Rooted in Extensive Warriors Research*, N.Y. TIMES (Apr. 29, 2019), https://www.nytimes.com/athletic/952359/2019/04/28/sources-rockets-game-one-officiating-rage-is-rooted-in-warriors-research/ [https://perma.cc/W33C-2PBC] ("Super Team Warriors are getting a major officiating advantage.").

but are not.[239] There is a debate among sports analysts about whether fans actually want fair and consistent refereeing, or whether the NBA is more like professional wrestling than many would want to admit.[240] Perhaps bias allows the superstars they pay to see—like Michael Jordan, LeBron James, or Steph Curry—to stay in the game rather than fouling out, and make more plays. Or perhaps referees swallow their whistles at the end of games because the fans like a ruleless sport in the final moments.[241] If these concerns were more important to the league than the need to appear fair, then consistency would not be useful.

Another reason to value consistency in the NBA is that sports (more than most other industries) rely on fanatics—obsessives who buy all sorts of paraphernalia, watch all the games, and so on.[242] Becoming a fanatic is an asymmetric investment. If a fan builds a life, identity, and wardrobe around a sports team, they are at risk of losing that investment if the team or league abuses their trust.[243] Leagues want to encourage this investment but cannot "merge" with fans (absent the type of team ownership by fans required in German soccer).[244]

Sports leagues also have lots of reasons to care about government officials. Sports teams often rely on public subsidies for sports stadiums. Then-Governor Scott Walker (R-WI) supported giving $250 million in public money for a stadium for the Milwaukee Bucks in 2015, despite the team being owned by two hugely successful financiers.[245] In 2013, then-Governor Jerry Brown (D-CA) supported legislation that created a special exemption to his state's Environmental Quality Act

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239. *See* William Baude & Stephen F. Sachs, *The Official Story of the Law*, 20 OXFORD J. LEGAL STUD. 1, 5 (2022) (describing how officials "pretend to follow" the rules of professional wrestling but do not "do so in fact").

240. *See* Maya Bodnick, *How NBA Twitter Fixed Basketball's Bad Officiating*, SLOW BORING (June 19, 2023), https://www.slowboring.com/p/how-nba-twitter-fixed-basketballs [https://perma.cc/MW7B-HPPV] ("[F]avorable calls for superstars also help the NBA increase profits.").

241. *See* Berman, *supra* note 24, at 1327 ("[M]ost fans of professional basketball would affirm that contact that would constitute a foul through most of the game is frequently not called during the critical last few possessions of a close contest.").

242. *See* Megan McArdle, *It's Getting Harder for Sports Leagues to Monetize Their Biggest Fans*, WASH. POST (Oct. 25, 2023, 6:30 AM), https://www.washingtonpost.com/opinions/2023/10/25/basketball-sports-tv-cable-price-nfl-espn/ [https://perma.cc/RA6Q-HQKE] ("Passionate sports fans['] . . . demand for a regular fix is also insistent. And their intense preferences have shaped the economics of not just sports leagues but the entire broadcast market.").

243. Or worse, leaves town. Consider the fate of the obsessive Seattle Supersonics or Hartford Whalers fan.

244. The German Bundesliga requires 50% +1 of the voting shares of a team must be owned by fan organizations. This leads to huge fan involvement in teams, even if it reduces commercial investment. *See German Soccer Rules: 50 +1 Explained*, https://www.bundesliga.com/en/news/Bundesliga/german-soccer-rules-50-1-fifty-plus-one-explained-466583.jsp [https://perma.cc/5TDH-VGTX] (last visited Aug. 1, 2024).

245. *See* Jenna Johnson, *Scott Walker Approves Spending 250 Million on Milwaukee Bucks Arena*, WASH. POST (Aug. 12, 2015, 9:50 PM), https://www.washingtonpost.com/politics/scott-walker-approves-spending-250-million-on-milwaukee-bucks-arena/2015/08/12/5cd72d54-4055-11e5-9561-4b3dc93e3b9a_story.html [https://perma.cc/592J-BKBQ].

for stadiums, allowing the Sacramento Kings to more easily build a stadium.[246] Even where they do not seek subsidies, NBA teams often need zoning changes, infrastructural investments, and regulatory forbearance to get a stadium built. Congress also regularly considers matters related to sports.[247] When Kennesaw Mountain Landis became the first real professional sports commissioner, Congress considered impeaching him for various reasons.[248]

It is worth noting that this need for consistency in sports is part of the reason why sports in other countries are often governed by public laws rather than internal firm rules.[249] In these countries, cabinet-level officials supervise the execution of these public laws.[250] Many constitutions even include a right to sports, making it unsurprising that this right would be enforced by governmental officials using public law.[251]

However, the NBA's legal system does not feature anything court-like to apply its law-like rules. Referees dominate the application of NBA rules during games. They try to signal their commitment to consistency and neutrality in various ways, although their claims to neutrality do not have quite the same public salience as baseball umpires, whom Chief Justice John Roberts referenced during his confirmation hearings as the quintessential example of the actor dedicated to

246. Damien Newton, *New "Kings Arena" CEQA Bill Would Still Nix LOS in "Transit Priority Areas"*, STREETSBLOGLA, (Sept. 13, 2013, 9:58 AM) https://la.streetsblog.org/2013/09/13/the-kings-arena-bill-does-include-a-partial-end-to-los/ [https://perma.cc/728F-9ZTC] (describing bills).

247. *See* Christopher Beam, *Interference: Why is Congress Always Meddling With Sports*, SLATE, (Dec. 9, 2009, 6:55 PM), https://slate.com/news-and-politics/2009/12/why-is-congress-always-meddling-with-sports.html [https://perma.cc/XT3U-Q4FC] ("Congress . . . regularly meddles with [different sports.]").

248. *See* Frederic J. Frommer, *Baseball's First Commissioner Faced Impeachment for Taking the Job*, WASH. POST (Apr. 9, 2022, 7:00 AM), https://www.washingtonpost.com/history/2022/04/09/kenesaw-mountain-landis-baseball-impeachment/ [https://perma.cc/UD4M-KAC7].

249. *See* Berman, *supra* note 24, at 1329 ("While the American sports scene is dominated by three home-grown team sports—baseball, football, and basketball—all of which are governed by official 'rule books,' the most popular global team sports . . . are all formally governed by 'laws,' not 'rules.'").

250. *See, e.g.*, Tariq Panja & Tom Nouvian, *The French Sports Minister's Trials by Fire*, N.Y. TIMES, https://www.nytimes.com/2023/02/27/sports/soccer/france-olympics-le-graet.html [https://perma.cc/D7S4-R3RJ] (Feb. 28, 2023).

251. *See, e.g.*, Constitućion Española, B.O.E. n. 311, § 43(3), Dec. 29, 1978 (Spain) ("The public authorities shall promote health education, physical education and sports. Likewise, they shall encourage the proper use of leisure time.").

consistency.[252] But they try. They wear zebra shirts, for instance, to mark their separation from other actors within and around the game.[253]

Referees, though, have limited tenure and salary protection.[254] The NBA constantly evaluates their performance as a means of deciding on increases in compensation. This puts them in a similar position to the judge with "a financial interest in the outcome of a case" who would have to recuse themself for constitutional reasons.[255] They are also making their decisions with the affected parties next to them and thousands of fans yelling at them.[256] Referee decisions subject to replay are resolved by the NBA office in Secaucus, New Jersey, which is staffed by these same referees.[257] Referees also do not explain their decisions in any formal sense. They sometimes come to the television announcers and *may* explain informally what transpired and why they made their decision.

Further, referees have no formal mechanism for developing rules over time. They may, in their practices, make clear that a certain move, say, is or is not a travel, but this is just a practice, not a new rule interpretation that players can rely on. The NBA has a clunky administrative process for providing "points of emphasis," effectively new rule interpretations, but does so only very occasionally, usually at the beginning of the season and not in response to specific fact situations or complaints.[258]

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252. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of Judge John G. Roberts) ("I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it's my job to call balls and strikes, and not to pitch or bat.").

253. *See* James L. Gibson et al., *Losing, but Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority*, 48 LAW & SOC'Y REV. 837, 838 (2014) ("[C]itizens . . . are influenced by . . . . the robes of judges[.]").

254. The referees do have a collective bargaining agreement with the league and just signed a new seven-year deal, with terms that have not been disclosed. Kurt Helin, *NBA, Referees Union Agree to New Seven-Year Labor Deal*, NBC SPORTS (Sept. 15, 2022, 8:15 AM), https://nba.nbcsports.com/2022/09/15/nba-referees-union-agree-to-new-seven-year-labor-deal/ [https://perma.cc/KTV2-8V92].

255. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 877 (2009); *see also* Tumey v. Ohio, 273 U.S. 510, 535 (1927) (requiring judicial recusal because of the judge's "direct pecuniary interest in the outcome").

256. *See* Vermeule, *supra* note 190, at 1444 ("[C]ascades and other processes of opinion-formation within groups of individuals can radically reduce the epistemic independence of voting members, especially when hot emotions are engaged.").

257. *See* John Brennan, *NBA Replay Center in Secaucus Is a Game Changer in the World of Basketball*, JERSEY'S BEST (July 28, 2020), https://www.jerseysbest.com/community/nba-replay-center-in-secaucus-is-a-game-changer-in-the-world-of-basketball/ [https://perma.cc/8CAU-AAWM].

258. Tim Bontemps, *What's Behind the NBA's New Focus On Traveling, and How Players and Teams Are Adjusting*, ESPN (Dec. 5, 2022, 8:00 AM), https://www.espn.com/nba/story/_/id/35174596/nba-new-focus-traveling-how-players-teams-adjusting [https://perma.cc/NH2C-JDF3] ("Each preseason, the league releases points of emphasis—made available not only to the referees, but to the teams and media—outlining a new focus in rules enforcement.").

The commissioner is a unique—and potentially problematic—combination of different functions.[259] The desire to increase profits can conflict with the need to treat all teams fairly, just as short-run profit-seeking can conflict with long-run sustainability in many businesses. The success of some teams and players improves TV ratings and ticket sales. But favoring them is not in the best interests of the game. Plenty of courts and commentators have noted the problem with this rare combination of power and unified functions.[260]

C. Designing the Basketball Court

We suggest that the NBA create a new entity, the "Basketball Court." Although the NBA would fund and appoint the members of the Basketball Court, it would be required to appoint judges who are independent from the league or its teams. The appointments would be for fixed terms, and the judges removable only for cause. The Basketball Court would be responsible for hearing appeals of league decisions, including referees' interpretations of the rules of the game, Commissioner's Office interpretations of league rules, and decisions by the Commissioner's Office about penalties for player, official, and owner misconduct. The Basketball Court's decisions on these issues would be final, even if made over the objection of league officials. The Court would write opinions explaining its decisions in these cases, and its holdings would serve as binding precedent in future cases.

We imagine that Basketball Court judges would have dual professional identities. They would be experienced in the articulation of consistent principles like many other judges are.[261] But some meaningful number of them would have a background in basketball, sports, or the business of entertainment.

Teams or players adversely affected by certain league decisions—which types will be discussed below—could appeal them to the Basketball Court. Just as the Facebook Oversight Board cannot hear anything but the tiniest fraction of cases involving Facebook's content decisions, the Basketball Court would not hear challenges to the huge number of refereeing and other league decisions made every season. Instead, just as the Supreme Court and the Facebook Oversight Board do, the Basketball Court would have the power to choose which appeals to hear, selecting only those cases that have the biggest effect on league operations as a whole.

The NBA has traditionally distinguished between its power—and that of the Commissioner—on the court versus off the court. While the line between on and

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259. *See* Jimmy Golen & Warren Zola, *The Evolution of Power of the Commissioner in Professional Sports*, *in* THE OXFORD HANDBOOK OF AMERICAN SPORTS LAW 19–20 (Michael McCann ed., 2017) (discussing the complications of the various roles that the Commissioner plays).

260. *See supra* note 31 and accompanying text.

261. *See* Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 FLA. L. REV. 1137, 1138 (2012) ("[T]he Roberts Court Justices have spent more pre-appointment time in legal academia, appellate judging, and living in Washington, D.C., than any previous Supreme Court Justices.").

off the court can be hazy,[262] it is a useful conceptual line to draw initially. Within those decisions related to on-the-court behavior, another helpful conceptual line to draw is between emergency on-court matters (like who touched the ball last before it went out of bounds) and less urgent on-court matters (like the duration of suspensions for on-court misconduct).

The question of when to stop a game to review a decision is a complicated one.[263] Some decisions need to be made quickly. As Samuel Johnson said about delays in medicine, "Take the case of a man who is ill. I call two physicians; they differ in opinion. I am not to lie down, and die between them: I must do something."[264]

Decisions related to games that do not need to be made during a game feature a different structure, but one subject to similar concerns. The Commissioner has broad discretion to impose discipline.[265] Whether a player does something that merits a penalty beyond an in-game foul, or if an owner or team official violates the league rules off the court, the Commissioner's Office doles out punishments. NBA rules also permit players to appeal to a third-party arbitrator for more serious suspensions.[266]

It is less complicated to imagine the Basketball Court reviewing decisions about league rules that govern team decisions in the NBA Constitution and bylaws. These rules often contain ambiguities that require interpretation, or alternatively, are extremely strict in ways that allow teams to maneuver around them in violation of the spirit of the rules. Perhaps the clearest example of Commissioner decisions that could be reviewed by the Basketball Court are suspensions against owners or players. The NBA Constitution and bylaws give the Commissioner the power to discipline players for making statements or engaging in conduct that is "prejudicial or detrimental to basketball or of the Association or a Member," or that does not "conform to standards of morality or fair play, [or] that does not comply at all times with all federal, state, and local laws . . . ."[267] The Commissioner also has the power

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262. *See* Michael R. Wilson, *Why So Stern? The Growing Power of the NBA Commissioner*, 7 DEPAUL J. SPORTS L. 45, 50 (2010) ("The NBA and NBPA's CBA differentiates on the court conduct, where the commissioner has broad, exclusive disciplinary authority, from off the court conduct, where outside review is allowed.").

263. *See, e.g.*, Mitchell N. Berman, *Replay*, 99 CAL. L. REV. 1683, 1703 (2011) ("The introduction of video replay slows down the game. No doubt about it. That's one reason to eliminate instant replay entirely.").

264. 9 JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON 46 (Clement Shorter ed., 1922).

265. The Collective Bargaining Agreement permits the Commissioner to take actions "concerning the preservation of the integrity of, or maintenance of public confidence in, the game of basketball." *See Collective Bargaining Agreement*, NBA art. XXXI, § 1(b)(ii) (July 2023), https://nbpa.com/cba [https://perma.cc/H9DQ-KPHQ].

266. *See* Michael McCann, *NBA CBA's New Evidence Sharing Clause Could Impact Appeals*, SPORTICO (June 29, 2023, 5:30 AM), https://www.sportico.com/law/analysis/2023/nba-cba-evidence-sharing-discipline-appeals-1234727742/ [https://perma.cc/7V5X-H6A7] ("An appeal to a grievance arbitrator can be made if a player is suspended at least 13 games . . . .").

267. NBA CONST., *supra* note 21, art. 35(d).

to punish players who are "guilty of conduct that does not conform to standards of morality or fair play."[268]

We think the Commissioner's decision in any of these situations should be appealable to a newly created Basketball Court. The central goal of having judicial review of suspensions is to bring some clarity and uniformity to the process. Commissioner-determined suspensions vary in severity in ways that seem untethered to any clear standard. For instance, in the 2020–2021 season, the NBA issued suspensions and/or fines to players for a wide-ranging set of conduct, including pleading guilty to a felony for threatening a crime of violence, making anti-Semitic comments while live streaming video games, headbutting another player in game, and directing threatening language at an official.[269] The NBA offers very little explanation as to why the damage to the league for pleading guilty to a felony for threatening someone is several times as much as the damage caused by making anti-Semitic comments while being recorded playing video games, and exactly 12 times as much as an in-game headbutt or directing threatening language at a referee.

As a result, fans and the press have often questioned whether referees, the Commissioner, and other NBA officials are letting their short-term business interests in seeing certain players and teams succeed shape how they enforce the rules, providing advantages to teams in New York City or Los Angeles, or to famous players like LeBron James or Steph Curry, because their success generates high TV ratings.[270] The NBA does not have a straightforward way to explain and legitimize the consistency of its rule interpretations and punishment decisions in the face of these criticisms. And no entity can easily develop rules during the season in response to particular tactics, leaving players and teams with the ability to take advantage of problems in the rules until the next time the league can put together a set of rule changes or administrative guidance.

We also think that in-game decisions should be reviewable by the Basketball Court after the fact, although not in ways that upset game results. Instead, winning cases can set precedents—say, about what is a "charge" and what is a "block," or whether an opposing player's pet move is a travel. The Basketball Court may need to develop particular remedies to encourage parties to bring such suits,

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268. *Id.*

269. *Pacers' JaKarr Sampson Suspended; Spurs' Patty Mills and Rudy Gay Fined*, NBA COMMC'NS (Apr. 21, 2021, 9:12 AM), https://www.nba.com/news/pacers-jakarr-sampson-suspended-spurs-rudy-gay-and-patty-mills-fined [https://perma.cc/E2WH-8XSU] (Sampson suspended for one game for headbutting); *Heat's Meyers Leonard Fined $50,000 and Suspended From Team Activities*, NBA COMMC'NS (Mar. 11, 2021), https://www.nba.com/news/meyers-leonard-suspended-fined-official-release [https://perma.cc/WA9E-L95Z] (Anti-Semitic comments); *Timberwolves' Malik Beasley Suspended 12 Games*, NBA COMMC'NS (Feb. 25, 2021), https://www.nba.com/news/timberwolves-guard-malik-beasley-suspended-12-games [https://perma.cc/F2YY-4LS3] (12 game suspension for pleading guilty to a felony); *Celtics' Marcus Smart Suspended*, NBA COMMC'NS (Apr. 28, 2021), https://www.nba.com/news/celtics-guard-marcus-smart-suspended-1-game [https://perma.cc/2LQ2-QJ9Q] (one game suspension for directing threatening language at a referee).

270. *See supra* note 238 and accompanying text.

awarding winning suits with remedies like supplemental draft picks or salary cap relief.

CONCLUSION

Contemporary public law remains focused on the principle that "power corrupts, and absolute power corrupts absolutely."[271] Giving too much power to too few people generates the risk that this power will be abused. The primary "security"[272] that public law so often contemplates to avoid the abuse of power is to separate that power among "distinct and separate departments."[273] Courts have always been one of the most crucial departments to ensure that governments follow the law consistently and not just conveniently.

The concern that power corrupts should be true not just of excessively powerful officials in government, but also of excessively powerful leaders of companies. The separation of powers that is good for governments can be good for many companies too. Courts can therefore have an important role to play in the separation of powers more broadly, not only for the institutions that govern countries, but also for those that sell products.

271. *See* Letter from Lord Acton to Bishop Mandell Creighton (Apr. 5, 1887), *quoted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 750 (14th ed. 1968) ("Power tends to corrupt and absolute power corrupts absolutely.").

272. THE FEDERALIST NO. 51, *supra* note 1, at 323 (James Madison).

273. *Id.*