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The Basketball Court

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Abstract

Public law scholars often consider how to separate power among and within governmental entities in order to encourage that power to be used effectively. However, public law scholars only rarely bring the insights they have developed about the separation of powers to bear on questions of how to design private business firms. But these firms often need their own private separation of powers to diffuse power among their officials and ensure compliance with foundational firm objectives.

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.

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. Creating a court-like body would promote the ability of the NBA to convince spectators of the fairness of competition, encourage casual spectators to make the types of emotional and financial investments that turn them into rabid fans, and dissuade governments from regulating their sports.

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. Creating a court-like institution with independent judges writing opinions justifying their interpretations of private firm rules will be desirable for many, the NBA included.

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I. 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 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 only occasionally bring the insights they have developed from studying the separation of powers to bear on the institutional design of private business firms. But private firms similarly must consider when and whether to divide power. Firms regularly debate whether, for instance, the company's Chief Executive Officer should also be the Chair of the Board of the Directors.[3] There is often even an "internal separation of powers" within private firms. Companies create institutions like audit committees on a board of directors with independent members[4] or compliance departments[5] to check the power of corporate officers and encourage the firm to follow internal and externally generated laws, rules, and goals. Firms will sometimes hire an external actor like a law firm—at a hefty price—to monitor the firm's internal activities.[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] It is usually considered as 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

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

[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, e.g.*, Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

[3] *See* Joseph Mandato & William Devine, *Why the CEO Shouldn't Also Be the Board Chair*, HARVARD BUS. REV. (Mar. 4, 2020) (arguing that this common practice is unwise).

[4] Indeed, firms must have audit committees with independent members to be listed on stock exchanges. Jillian M. Lutzy, *Analysis of the Proposed NYSE Corporate Governance and Audit Committee Listing Requirements*, 2 DEPAUL BUS. & COMM. L.J. 99, 102-106 (2003).

[5] *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.")

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

[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).

is mandatory for public actors may be commercially valuable for at least some private businesses in some instances —and private supreme courts may help provide that kind of consistency.

To make this case, we focus on a particular form of private firm for which a private supreme court would be a very useful form of institutional design: American sports leagues and, in particular, the National Basketball Association ("NBA"). 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 interpreting and developing league rules—could help promote the league's business interests.[9] 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).

The idea of a private business or association having its own semi-independent court system may seem a bit odd. But one of the largest and most important companies in the world just created one. In 2018, the world-dominating social networking company Facebook (now called Meta) faced an enormous amount of public criticism and regulatory interest in its content decisions. One of its responses was to build a new court-like institution, the Oversight Board, that has the power to review whether some of Facebook's decisions to remove content from the site were proper under the company's pre-announced "community standards." The Oversight Board has been staffed by experts embedded in the legal community, empowered with guaranteed funding and years of job security, and is required to write opinions explaining its decisions.[10] The increasingly voluminous literature on the Oversight Board has focused on what it means for speech and the future of

[9] *C.f.* 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); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995) (discussing the importance of giving reasons to the judicial function).

[10] 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 Administration*, 136 HARV. L. REV. 526 (2022); Evelyn Douek, *Governing Online Speech: From "Posts-as-Trumps" to Proportionality and Probability*, 121 COLUM. L. REV. 759 (2021); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018); Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L. J. 2418 (2020) [Klonick, *Facebook*]; Kate Klonick, *Inside the Making of Facebook's Supreme Court*, THE NEW YORKER, Feb. 12, 2021 [hereinafter Klonick, *Inside*].

social media.[11] We are interested in something else: what it means for private institutional design more broadly and whether other companies might create similar institutions.

Consider the following situations from the past year as examples of the types of situations in which a private supreme court—The Basketball Court—might have been helpful:

- The NBA's Rules prohibit any player from engaging in "game disruption," and subjects a player violating that rule to a delay of game warning or a technical foul.[12] During critical junctures of the NBA playoffs in 2022, several players engaged in prolonged standing and cheering on the bench, going substantially beyond ordinary "spontaneous celebration."[13] One player wore street clothes that matched the color of the opposing team's jerseys. Do either of these behaviors constitute improper "game disruption"?

- The NBA has its own Constitution. It prohibits team owners from engaging in conduct "detrimental to the best interests of basketball."[14] The owner of the Phoenix Suns, Robert Sarver, was found to have repeated racial epithets when recounting the statements of others, engaged in conduct demeaning of female employees, made crude jokes of a sexual nature, and generally bullied team employees.[15] Did Sarver violate the NBA Constitution, and if so what punishment should he have received?

- Ja Morant, a superstar player for the Memphis Grizzlies, waved a gun in a video on *Instagram*.[16] The NBA Constitution prohibits this conduct,[17] and Morant had done something similar just a few months

[11] While we use the Oversight Board as a jumping off point, little in this paper turns on whether its creation will be, in the end, good for Facebook or for the country more broadly.
[12] *See* NBA, *NBA Rules* R. 12(A)(5) (2018), https://official.nba.com/rulebook/ [hereinafter NBA Rules].
[13] *See, e.g.*, Mike D. Sykes II, *The NBA's 'Theo Pinson rule' Over Bench Players Standing, Explained*, USA TODAY, Oct. 22, 2022 (describing the behavior of the Dallas Mavericks bench and, in particular, Mavericks reserve Theo Pinson).
[14] *See* NBA, *NBA Constitution and By-Laws* art. 35A (2012), https://ak-static-int.nba.com/wp-content/uploads/sites/3/2015/12/NBA-Constitution-and-By-Laws.pdf [hereinafter NBA Const.] (establishing the league rules governing owner behavior).
[15] The details are summarized in a report solicited by the NBA and produced by the law firm of Wachtell, Lipton, Rosen & Katz. *See* WACHTELL, LIPTON, ROSEN & KATZ, REPORT OF INDEPENDENT INVESTIGATORS TO THE NATIONAL BASKETBALL ASSOCIATION CONCERNED ROBERT SARVER AND THE PHOENIX SUNS ORGANIZATION (2022) [hereinafter Wachtell Report].
[16] *See* Tania Ganguli, *Ja Morant Suspended Again for Possible New Gun Video*, N.Y. TIMES (May 14, 2023), https://www.nytimes.com/2023/05/14/sports/basketball/ja-morant-memphis-grizzlies-suspended-gun-video.htm
[17] *See* NBA Const., *supra* note 14, art. 35(A).

> earlier.[18] But unlike happens during the usual firearms suspension issued by the NBA, Morant was not simultaneously facing any criminal liability,[19] and the NBA Collective Bargaining Agreement primarily targets firearms possession at league events or league places.[20] Should Morant be punished, and how much?

What's notable about each of these decisions is how much they seem like formal legal decisions involving statutory interpretation and criminal sentencing. As the increasingly large literature on the jurisprudence of sports has shown, while the rules of sports are not *the* law, they are a lot *like* the law.[21] Referees interpret game rules and apply them in complex factual situations, much like judges deciding cases involving statutes or regulations.[22] Their factual determinations are sometimes appealable through systems of instant replay, providing many nonlawyers with their closest contact with the concept of standards of review.[23] The job of commissioner of a sports league today is widely understood to be, in part, "quasi-judicial," deciding the extent of fines and suspensions for players, team officials, and even franchise owners, and interpreting league by-laws.[24] For international sports like the Olympics, the World Cup, there is a complex legal system involving a whole host of private and public bodies and an arbitral body — the Court of Arbitration for Sport (CAS)—that renders final decisions about many important issues.[25]

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 think there should be.[26]

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[18] *See* Ganguli, *supra* note 16.

[19] *See* Ben Rohrbach, *Is Ja Morant's 25 Game Suspension For Flashing a Gun Fair If He Has No Been Charged with a Crime?,* YAHOO (June 16, 2023), https://sports.yahoo.com/is-ja-morants-25-game-suspension-for-flashing-a-gun-fair-if-he-has-not-been-charged-with-a-crime-233552626.html#:~:text=Based%20on%20that%2C%20Morant%20has,Ja's%20conduct%20is%20particularly%20concerning.%22

[20] *See* NBA, *Collective Bargaining Agreement*, §9, https://nbpa.com/cba [hereinafter NBA, *Collective Bargaining*] (regulating firearms possession at NBA events or venues).

[21] *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.")

[22] *Id.* at 347-382.

[23] *See* Mitchell N. Berman, *Replay*, 99 CAL. L. REV. 1683 (2011) (discussing jurisprudential issues related to replay).

[24] *See* Jimmy Golen and Warren Zola, *The Evolution of Power of the Commissioner in Professional Sports*, *in* THE OXFORD HANDBOOK OF AMERICAN SPORTS LAW (Michael McCann ed., 2017)

[25] *See infra* Section I.C.

[26] By "should" here, we mean that it would be advisable for sports leagues to have supreme courts from their own perspective—that is, sports leagues with supreme courts would likely be more profitable and successful.

The stakes of these decisions were high, which is not surprising given that the NBA is a league with $10 billion in annual revenue and enormous cultural salience.[27] But while the stakes of these disputes were great, the structures in place to resolve them were not. Referees have to make difficult interpretive decisions, like the decisions they had to make during last year's playoffs about player conduct on the bench. But referees have limited salary and tenure protections and must make snap decisions surrounded by tens of thousands of yelling fans—and make these decisions without giving any explanation.[28] Some referee decisions can be appealed to the NBA replay office in New Jersey, but that office is staffed by referees facing similar pressures.[29]

The NBA Commissioner had to decide what to do about Robert Sarver and Ja Morant. The NBA Commissioner is hired by team owners, and his main job is to make the NBA as much money as possible. Yet the Commissioner was the one put in the position to interpret the NBA Rules and the NBA Constitution, creating substantial conflicts of interest.[30]

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 or Los Angeles, or to famous players like LeBron James or Stephen Curry, because their success generates high TV ratings.[31] The NBA does not have a straight-forward way to explain and legitimate the consistency of its rule interpretations and punishment decisions in the face of these criticisms. And there is no entity that can easily develop rules during the season in response

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

[28] *See* Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435, 1444 (2011) ("[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.")

[29] *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.

[30] *See, e.g.*, Charles O. Finley & Co., Inc. v. Kuhn, 569 F.2d 527, 533 (7th Cir. 1978) (describing the Commissioner of Major League Baseball as "an exception, anomaly and aberration"); JAMES RESTON, JR., COLLISION AT HOME PLATE: THE LIVES OF PETE ROSE AND BART GIAMATTI 271 (1991) ("To join organized baseball was to divest the traditional rights of American citizenship and cede them to the commissioner.").

[31] *See, e.g.*, Sam Amick & Kelly Iko, *Sources: Rockets' Game 1 Ref Rage Rooted in Extensive Warriors Research*, THE ATHLETIC (Apr. 28, 2019), https://theathletic.com/952359/2019/04/28/sources-rockets-game-one-officiating-rage-is-rooted-in-warriors-research/ (quoting a memorandum written by the Houston Rockets stating that "[r]eferees likely changed the NBA champion" to benefit the "Super Team Warriors").

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.

Scholars have focused extensively on the issues created when there is private resolution of public law litigation.[32] Our animating question is almost the converse: when should private institutions resolve private disputes using tools and values developed in public institutions? 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.[33]

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, and describing these attributes as most analogous to a court seems accurate. We are more concerned, though, with what a private supreme court *does* than what it is called.

It is also important to note what we are not arguing in addition to what we are arguing. First, we are not arguing that creating a private supreme court-like actor will be constructive for all private firms or for 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 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.

Second, our goal in considering the commercial value of a private supreme court is not to argue that it should substitute for other types of private institutional design, but rather that it might complement them in some

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[32] *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").

[33] *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).

instances. Other tools of private separation of powers surely make good sense for many private firms.[34] There are also important roles that governmental institutions can play in shaping any internal adjudication utilized by private firms. These are important issues, but issues beyond the scope of this Article. Our goal is to consider private supreme court-like institutions on their own terms.

Part I of the Article uses the Oversight Board that Facebook created as a lens through which to consider private supreme courts. It discusses the problems that Facebook faced with employees who could be easily fired making content removal decisions without any explanation. It then discusses what Facebook did in response by creating the Oversight Board. The goal is to provide an evaluative account of what transpired, not to speculate on what subjectively led Facebook to create the Oversight Board.

In Part II, 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. Having a court-like entity applying 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, consistent application of pre-announced rules may broaden the appeal of the product, particularly given the substantial empirical evidence of customer preferences for fairness. Further, 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. Applying law-like rules might also improve the public legitimacy of the business decisions, helping businesses facing very substantial regulatory or public scrutiny by removing some questions about motives and providing a clear mechanism for explaining corporate decisions.

Part III considers an example of the occasional virtues of a private supreme court by considering whether the NBA should develop a Basketball Court. We consider the unique needs that the NBA has to act consistently, and the unique ways that a Basketball Court could help with that. We consider which rules would guide the Basketball Court, who should staff the Court, and what the jurisdiction of the Basketball Court should be. This Part is meant to be more of a "proof of concept," to show that a private supreme court can be helpful for private firms.

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[34] 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).

II. The Oversight Board

One view of corporate law is that private firms are operated by a few directors and officers who practically have nearly unlimited authority to determine that firm's conduct.[35] 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.[36] The 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.[37] It is also often shaped by an "internal separation of powers,"[38] the breaking up of both boards and officers into different organizational silos that check one another to ensure compliance with the purposes and rules of the firm and external laws.

Such a system works most of the time for many firms. But the experience at Facebook in creating the Oversight Board suggests that existing institutional forms may not be able to provide all of the institutional outputs that at least some private firms will desire. A newer form of internal separation of powers could be commercially valuable for that set of firms.

Like other private firms we discuss in this Article, Facebook did not need to make its decisions consistently, nor did it need to explain its decisions or even announce the rules it applies to disputes ahead of time.[39] However,

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[35] *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 (1999) ("[D]irectors possess unfettered discretion."); Lynn A. Stout, *The Problem of Corporate Purpose*, 48 ISSUES IN GOV. STUD. 1, 5 (2012) ("[D]irectors of public companies enjoy virtually unfettered legal discretion to determine the corporation's goals.").

[36] *See, e.g.*, Blasius Indus v. Atlas Corp., 564 A.2d 651, 659 (Del. Chan. 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 (2010); Stephen J. Choi et al., *Does Majority Voting Improve Board Accountability?*, 83 U. CHI. L. REV. 1119 (2016); David Yermack, *Shareholder Voting and Corporate Governance*, 2010 ANN. REV. FIN. ECON. 103 (2010).

[37] It is important to note how limited this external oversight can be in practice. For instance, the classic formulation of the business judgment role 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).

[38] *See* Neal Kumar Katyal, *Internal Separation of Powers*, 115 YALE L.J. 2314, 2316-17 (stating that "[t]he first-best concept of 'legislature v. executive' checks and balances must be updated to contemplate second-best 'executive v. executive' divisions").

[39] 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" applicablity to the federal government also includes the "concept[] of equal protection").

Facebook found that the unexplained and arbitrary nature of its decisions about barring content from its site was becoming problematic as a business matter.

Before it created the Oversight Board, Facebook had long-standing rules for content moderation that sounded somewhat sensible. But it struggled to generate an institutional structure to apply these rules consistently (and, equally importantly, to generate the appearance of consistency). Facebook had different categories of individuals making these decisions, but none of them enjoyed the independence necessary to make these decisions wisely, nor were they encouraged or required to engage in the deliberation and reason-giving necessary to explain these decisions clearly. Facebook Founder and CEO Mark Zuckerberg stated that Facebook needed more "separation of powers."[40]

In order to develop our argument that creating private court-like institutions can help some firms and organizations—particularly professional sports leagues—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.[41] 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. What Drove Facebook to Create an 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 employees at will to make decisions without those officials having to explain these decisions to outsiders.[42] This is how Facebook made content decisions prior to the Oversight Board.

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[40] *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/J5GT-DCCP] (including a discussion with Zuckerberg stating that the Board provided a "separation of powers").

[41] *See* Emily Stewart, *Mark Zuckerberg is Essentially Untouchable at Facebook*, VOX, Dec. 19, 2018 (describing dual class stock ownership at Facebook)

[42] 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.").

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. None of these categories of decision-makers had the independence to apply Facebook's rules consistently nor an institutional role that compelled then to explain their decisions.[43]

Facebook's early years were marked by an extremely informal system of content moderation, with decisions largely resting with Zuckerberg and stray other corporate employees. After a large magnitude of complaints in 2005, Facebook first started to formalize this structure of its content moderation operation. Facebook codified a set of internal rules governing content moderation and hired a large number of content moderators to apply these rules.[44]

The position and performance of the moderators within 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.[45] As more moderators were needed, Facebook hired outside firms to supply independent contractors to perform content moderation.[46] As either employees or contractors, most content moderators were not well paid and could be terminated for no reason and at any time by corporate leaders.[47] Further, as full-time Facebook employees working in content moderation, or as contractors who relied on Facebook as a key client, they had little status or capacity to stand up to management.[48]

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[43] *See* Schauer, *supra* note 9, at 633 ("The practice of providing reasons for decisions has long been considered an essential aspect of legal culture.").

[44] *See* SARAH T. ROBERTS, BEHIND THE SCREEN: CONTENT MODERATION IN THE SHADOWS OF SOCIAL MEDIA (2021); Monika Bickert, *Updating the Values that Inform Our Community Standards*, FACEBOOK NEWSROOM, Sept. 12, 2019, https://newsroom.fb.com/news/2019/09/updating-the-values-that -inform-our-community-standards [https://perma.cc/2UGB-VBKT].

[45] *See* ROBERTS, *supra* note 46.

[46] *Id.* ("Since 2012 [Facebook] has hired at least 10 consulting and staffing firms globally to sift through its posts, along with a wider web of subcontractors.").

[47] Indeed, one report found that if more than five percent of the decisions these moderators made were opposed by Facebook leadership, these moderators would be terminated. *See id*.; *see also* Casey Newton, *The Trauma Floor: The Secret Lives of Facebook Moderators in America*, THE VERGE, Feb. 25, 2019 https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interviews-trauma-working-conditions-arizona (Their superiors even "micromanage . . . . every bathroom and prayer break.").

[48] *See, e.g.*, Adrian Chen, *The Laborers Who Keep Dick Pics and Beheadings Out of Your Facebook Feed*, WIRED (Oct. 23, 2014), https://www.wired.com/2014/10/content-

Moreover, the decisions of the corporate leadership, and not those of the content moderators, were final.[49] Both artificial intelligence tools and content moderators received a "performance score" that is generated by Facebook superiors.[50] 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."[51] This is because "Facebook's corporate structure allows Zuckerberg to make unilateral decisions."[52] 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.[53]

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.[54] The faster they reviewed potentially problematic posts, the better their performance rating, and therefore the higher their compensation.[55] Artificial intelligence also did not give reasons. Zuckerberg rarely did, and when he did, his explanations were more in the nature of press releases or public appearances than reasoned explanations of principles. For instance, in defending his decision not to take down some posts by President Trump, Zuckerberg appeared at a gathering of Facebook employees and explained his decision.[56]

The result of decisions being made without independence and without explanation was that Facebook received heavy criticism for creating a system of content moderation that prioritized short-term profit and the powerful over principle and compliance with Facebook's stated rules. Content moderation

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moderation (discussing one content moderator who had "graduated from college and followed his girlfriend to the Bay Area, where he found his history degree had approximately the same effect on employers as a face tattoo"); Adam Sataraino & Mike Isaac, *The Silent Partner Cleaning up Facebook for $500 Million a Year*, N.Y. TIMES, Oct. 28, 2021 (noting that Accenture, which supplies large numbers of content moderators, proudly refers to Facebook as a "diamond client").

[49] *See* Cooper v. Aaron, 385 U.S. 1, 18 (1958) ("The federal judiciary is supreme in the exposition of the law of the Constitution, and that principle . . . . . [is] a permanent and indispensable feature of our constitutional system.").

[50] *See* Sataraino & Isaac, *supra* note 50.

[51] Klonick, *Inside*, supra note 10.

[52] *Id*.

[53] *See* Mike Isaac, Cecilia Kang & Sheera Frenkel, *Zuckerberg Defends Hands Off Approach To Trump's Posts*, N.Y. TIMES (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.").

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

[55] *See id*.

[56] *See* Isaac, Kang & Frenkel, *supra* note 55.

prioritized "retaining users, helping business partners and at times placating authoritarian governments."[57] Zuckerberg and others would ignore rules or change rules to help powerful people that drove traffic like former President Trump.[58] Fearful of claims of bias by conservatives, Facebook engaged in "more deferential behavior toward its growing number of right-leaning users."[59]

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 less interest in Facebook from old consumers.[60] There was substantial negative press coverage.[61] The prospect of governmental regulation increased, with a bipartisan alliance of progressives like soon-to-be FTC Chair Lina Khan and conservatives like Senator Joshua Hawley discussing the problems with Facebook's system.[62] 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 10,000-word document that addresses content moderation.[63] 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."[64]

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[57] *See* Justice Scheck, Newley Purnell & Jeff Horwitz, *Facebook Employees Flag Drug Cartels and Human Traffickers: The Company's Response Is Weak, Documents Show,* WALL ST. J., Sept, 16, 2021.

[58] *See* Elizabeth Dwoskin, Craig Timberg & Tony Romm, *Zuckerberg Once Wanted to Sanction Trump. Then Facebook Wrote Rules That Accommodated Him*, WASH. POST, June 28, 2020.

[59] *See id*.

[60] *See* Vindu Goel, *Facebook Scrambles to Police Content Amid Rapid Growth*, N.Y. TIMES (May 3, 2017) ("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.").

[61] See Schechk et al, *supra* note 59.

[62] *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/ ("Notably, Republican Sen. Josh Hawley a leading GOP Big Tech critic, voted in favor of Khan's nomination.").

[63] *See* Klonick, *Facebook*, *supra* note 10, at 2348.

[64] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

Facebook had community standards in place previously, so the problem was not so much the rules but those enforcing the rules. There was an emerging sense, then, that an outside enforcer was needed. Zuckerberg said that "there are some calls that just aren't good for the company to make by itself."[65]

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."[66] Feldman wrote a memo to the Board and later a column in *Bloomberg* proposing the idea.[67] Feldman's idea was that a court that reviewed Facebook's content decisions would provide "a forum for argument" and decision-making that would announce "the reasoning behind their decisions on a case-by-case basis."[68] This resulted in the eventual creation of the Oversight Board.

B. What is the Oversight Board?

The Oversight Board is different in material ways from the internal mode of content regulation used previously that solely combined artificial intelligence, content moderators, and Zuckerberg and other leaders within Facebook. The Oversight Board tries to generate a source of authority that is partially external to Facebook, or at least partially external to Facebook's executives. The Oversight Board also must explain its decisions in written opinions, and then follow its own precedents.[69] In this sense, the Oversight Board is *court-like*, even if it is not really a court.

Users facing an adverse decision by Facebook or Instagram can appeal that decision to the Oversight Board.[70] From among the many appeals they receive, the Oversight Board selects a few dozen every year and reviews these decisions for their compliance with the community standards and Facebook's statement of values, which include a commitment to further international human rights norms. The Oversight Board's decisions are binding in that case, even if opposed by corporate officers. The Oversight Board can also propose recommendations that Facebook and Instagram change specific policies, to which the firm is obligated to respond.

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[65] Klonick, *Inside*, *supra* note 10.
[66] *Id.*
[67] *Global Feedback and Input on the Facebook Oversight Board for Content Decisions*, META *app. D* at 101-114 (June 27, 2019), https://about.fb.com/news/2019/06/global-feedback-on-oversight-board/.
[68] *Id.* at 102.
[69] Oversight Board, *Charter*, art. 3.1.7, https://about.fb.com/wp-content/uploads/2019/09/oversight_board_charter.pdf [hereinafter Oversight Board, *Charter*].
[70] Oversight Board, *Appeals Process*, https://www.oversightboard.com/appeals-process/.

Zuckerberg stated that one of the primary goals of the Board was that "it will prevent the concentration of too much decision-making within our teams."[71] Individuals serving on the Board "will serve initial terms of three years, up to a maximum of two terms total, or until their resignation or removal."[72] This is a much longer tenure than the employment at will or contractor status of others doing content moderation.[73]

Facebook seeded a separate legal entity, the Trust that governs the Board, with $130M.[74] While Facebook appoints the Trustees, they must be independent from the firm.[75] Facebook also appoints Members of Oversight Board, originally including twenty members, who are paid six-figure salaries for putting in about fifteen hours a week of work.[76]

Despite the fact that they are 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 about 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 Justice, and a former Prime Minister of Denmark.[77]

The Oversight Board was also 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.[78] A panel of members from the Board hears the case and may "*request* that Facebook provide information

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[71] Mark Zuckerberg, *A Blueprint for Content Governance and Enforcement*, FACEBOOK (Nov. 16, 2018), https://www.facebook.com/notes/751449002072082/.
[72] Oversight Board, *Charter*, *supra* note 71, art. 1.1.2.
[73] It is, admittedly, much shorter than the tenure of most judges around the world. *See* Statement of Jamal Greene, Dwight Professor of Law, Columbia L. School to the Presidential Comm'n on the Sup. Ct. of the U.S., Closing Reflections on the Supreme Court and Constitutional Governance (July 20, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/Greene-Testimony.pdf [hereinafter Greene, *Testimony*].
[74] *See* Klonick, *Facebook*, *supra* note 10, 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/). 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.
[75] *See* Klonick, *Facebook*, *supra* note 10, at 2457–62, 2481. Just like the Board itself, the trustees are prominent and independent, including the Chairman Emeritus of the Cooley law firm and a former Dean of Yale Law School. Oversight Board, *Governance*, https://www.oversightboard.com/governance/ (last visited Aug. 21, 2022).
[76] Klonick, *Inside*, *supra* note 10.
[77] *See* The Oversight Board, *Initial Members* (May 6, 2020), https://www.oversightboard.com/news/announcing-the-first-members-of-the-oversight-board/.
[78] Klonick, *Inside*, *supra* note 10.

reasonably required for board deliberations in a timely and transparent manner."[79] If the Board decides that content should be removed from the site, Facebook obliged itself to comply and remove that content.[80]

The Oversight Board also explains its decisions. 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."[81] The entire Board then reviews this draft decision, and if it approves it, the opinion will be published on the board's website.[82]

In deciding cases, the Board is supposed to interpret "Facebook's Community Standards and other relevant policies … in light of Facebook's articulated values."[83] The Board applies Facebook's rules and self-announced values about what content may stay up on the site. It does not apply legal rules created by governments, although Facebook's rules incorporate some outside legal norms.[84] As the Board's Charter states, "[w]hen reviewing decisions, the board will pay particular attention to the impact of removing content in light of human rights norms protecting free expression."[85] Further, prior Board decisions have "precedential value and should be viewed as highly persuasive when the facts, applicable policies, or other factors are substantially similar."[86] Facebook retains the power to change its policies, just as a legislature can respond to judicial decisions by changing the law.[87] There is no "constitutional" check on this authority to write its own policies.

There are also real limitations on the power of the Oversight Board. The Oversight Board's power to be final is limited only to those specific cases on which the Oversight Board ruled.[88] With no "lower" courts below the

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[79] Oversight Board, *Charter*, *supra* note 71, art. 1 § 1. 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 § 4.

[80] *See id*. 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."

[81] *See id*. art. 3.1.7.

[82] *See id*. art. 3.1.8.

[83] *Id*. § 4.

[84] Indeed, Facebook can refuse to follow a Board decision if doing so would violate legal rules imposed by a government. *Id.* art. 2.3.1.

[85] *Id*. art. 2 § 2.

[86] *Id*.

[87] Indeed, Zuckerberg's memo announcing the creation of the Board was mostly dedicated to changes in the substantive content policies and to Facebook's administrative structure for reviewing decisions.

[88] *See* Oversight Board, *Charter, supra* note 71, 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.").

Oversight Board, and only twenty members on the Oversight Board, only a small number of cases *could* be heard by the Oversight Board. The Board is supposed to choose cases that "have the greatest potential to guide future decisions and policies[89] As Evelyn Douek has argued, the limited capacity of the Board and the sheer number of content decisions Facebook makes every day means that the Board does not really provide a forum for "due process" for individuals or a means for correcting errors by Facebook in most individual cases.[90] Instead, the certiorari-like process where the Board chooses important cases is intended to improve Facebook's decision making and to improve acceptance of decisions among users. As Douek puts it, the Board "can help highlight weaknesses in the policy formation process at Facebook, removing blockages (such as blind spots and inertia) in the 'legislative process' leading to the formulation of its Community Standards."[91]

Initially, the Oversight Board could review "take downs," or decisions by Facebook or Instagram to remove posts, but not "keep ups," or decisions to allow certain content to appear the site. [92] Given that many of Facebook's problems step from keep ups (*e.g.*, false conspiracy theories), this was a major limitation. In 2021, though, the Oversight Board gained the power to review challenges to keep ups.[93] However, other areas remain off-limits, most importantly the company's algorithms for displaying posts.[94]

The Oversight Board has now heard dozens of cases.[95] One of these stands out: former President Trump's challenge to being barred from Facebook due to his posts leading up to and on January 6th. In a decision that some have described 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.[96]

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[89] *Id*. art. 2 § 1.
[90] Evelyn Douek, *Facebook's "Oversight Board:" Move Fast with Stable Infrastructure and Humility*, 21 N.C. J. L. & TECH. 1, 5–6 (Oct. 2019).
[91] *Id.* at 1.
[92] Klonick, *Inside*, *supra* note 10.
[93] *See* Guy Rosen, *Users Can Now Appeal Content Left Up On Facebook or Instagram to the Oversight Board* (Apr. 13, 2021), https://about.fb.com/news/2021/04/users-can-now-appeal-content-left-up-on-facebook-or-instagram-to-the-oversight-board/
[94] Klonick, *Inside*, *supra* note 10. Some think the Board does have the power to review Facebook's main algorithm. *See* Edward L. Pickup, *The Oversight Board's Dormant Power to Review Facebook's Algorithms,* (Sept. 7, 2021), YALE. J. REG. https://www.yalejreg.com/bulletin/the-oversight-boards-dormant-power-to-review-facebooks-algorithms/
[95] For the full list of decisions, see The Oversight Board, *Board Decisions,* https://www.oversightboard.com/decision/.
[96] Oversight Board, *Case Decision 2021-001-FB-FBR* (May 5, 2021) [hereinafter Oversight Board, *Trump Challenge*]; Jeff Neal, *Did Facebook's Oversight Board Get the Trump Decision Right?*, HARVARD L. SCH. (May 5, 2021), https://hls.harvard.edu/today/did-facebooks-oversight-board-get-the-trump-decision-right/; Evelyn Douek, *It's Not Over. The*

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.[97] In 2023, Facebook reinstated former President Trump.[98]

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 executives' decisions, it also criticized them, creating some distance between the Board and 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.[99]

C. Institutional Analogues

The broad question this Article discusses is when firms create internal courts and whether that logic should extend to the American sports leagues. We chose to focus on the Facebook Oversight Board as it provides a closely related example of how such an institution could arise. But it is not the only example. It is important to situate the Oversight Board within the existing landscape of private firm and public institutional design.

There are institutional analogues to the Oversight Board in public law. 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.[100] Most notably, administrative law judges are not entitled to full salary protections and can be reversed by agency officials, unlike the Oversight Board.[101] The Office of Legal Counsel

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Oversight Board's Trump Decision Is Just the Start., LAWFARE (May 5, 2021), https://www.lawfareblog.com/its-not-over-oversight-boards-trump-decision-just-start [Douek, *It's Not Over*].

[97] 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 "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 93, at 35. 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.* at 36-37.

[98] 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.

[99] Neal, *supra* note 93.

[100] *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.").

[101] *See* Kent Barnett, *Resolving the ALJ Quandry*, 66 VAND. L. REV. 797, 799 (2013).

("OLC") writes opinions on constitutional issues within the executive branch, although it is not really an adjudicatory body.[102] 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.[103]

These are also several existing institutional forms in private law that are comparable to the Oversight Board, if perhaps featuring slightly less independence than the Board and less reason-giving. Firms sometimes try to create an "internal" separation of powers like the Oversight Board as a means of policing behaviors, but these organizational forms are meaningfully different from the Oversight Board.[104] The Sentencing Guidelines provide sentencing relief for private firms that have a robust internal procedure for monitoring compliance with legal rules.[105] 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.[106] Private firms have to decide about how to organize their people internally to self-monitor, such as deciding whether they assign all of those employees to the legal department or if they create a separate compliance department.[107] None of these actors, though, is truly independent

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[102] 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).

[103] *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").

[104] *See generally* Martinez, *supra* note 5, 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).

[105] *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).

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

[107] *See, e.g.*, Martinez, *supra* note 5, 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?").

of the firm in the sense that they utilize employees who can be terminated at will.

Private firms—including sporting leagues—will regularly contract with private firms or arbitrators to engage in something like the actions that the Oversight Board pursues. In the case of the misconduct by Phoenix Suns owner Robert Sarver mentioned in the Introduction, for instance, the National Basketball Association (NBA) retained an outside law firm, Wachtell, Lipton, Rosen & Katz.[108] Wachtell investigated the situation and prepared a report comparable to a legal opinion. It featured a long discussion of the facts and a shorter discussion of the law—that is, of the rules of the NBA. When Major League Baseball had to decide what to do about the suspension of Los Angeles Dodgers pitcher Trevor Bauer, they hired a long-time arbitrator, Martin Scheinman,[109] who has worked on other sports matters.[110] The National Collegiate Athletic Association ("NCAA") uses a separate private firm specializing in the "independent resolution" of NCAA disputes.[111]

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.[112] The question is whether this independence is possible when these actors have their personal financial future shaped by whether private firms want to hire them 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."[113] There are also many examples in professional sports (like the NBA) of these arbitrators having close prior

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[108] *See* Wachtell Report, *supra* note 15.

[109] *See* Gus Garcia-Roberts, *Trevor Bauer Is Reinstated Immediately as Arbitrator Reduces Suspension*, WASH. POST (Dec. 22, 2022), https://www.washingtonpost.com/sports/2022/12/22/trevor-bauer-reinstated/ ("Arbitrator Martin Scheinman reduced Bauer's unpaid suspension from 324 games to 194, Major League Baseball announced.").

[110] *See* Martin F. Schienman, Esq., *About*, https://scheinmanneutrals.com/martin-scheinman-2/

[111] *See* Independent Resolution Panel, *About*, https://iarpcc.org/independent-resolution-panel/. Australian Rules Football has a tribunal to handle matters that was actually suggested by an Australian judge. *See* Australian Rules Football, *Tribunal Rules*, https://web.archive.org/web/20110930213942/http://mm.afl.com.au/Portals/0/afl_docs/Development/AFL%20Tribunal%20Booklet%202011-1.pdf. It is also worth noting that the National Hockey League ("NHL") releases video explanations of player suspensions. *See, e.g.*, David Alder, *NHL Department of Player Safety Explains 3-Game Suspension for Maple Leafs' Michael Bunting*, HOCKEY NEWS, (Apr. 19, 2023), https://thehockeynews.com/nhl/toronto-maple-leafs/news/nhl-department-of-player-safety-explains-3-game-suspension-for-maple-leafs-michael-bunting (explaining a player suspension by reference to past suspensions).

[112] *See, e.g.*, Wachtell Report, *supra* note 15, at 1 (describing the report of "independent" investigators); Scheinman, *supra* note 107 (describing Schienman by stating "his practice has evolved to also serving as a neutral in business, consumer, and employment matters").

[113] Caperton v. A.T. Massey Coal Co., Inc., 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").

relationships with one side to the arbitration and/or having already reached publicly prejudged some of the issues.[114] As the New York Court of Appeals recently stated in its review of one arbitration from Major League Baseball, "arbitrators are not held to judicial standards."[115]

Perhaps the closest example of an institutional structure comparable to the Oversight Board is arbitration. As Alec Stone Sweet and Florian Grisel have persuasively argued, for instance, the system of international arbitration has moved past being a purely private system of mediating disputes and has been judicialized.[116] 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 codification of best practices, rely on something like precedent, and generate duties to explain decisions.[117] 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.[118] Their judicialization makes them more valuable to private parties, just as we suggest the Basketball Court would be valuable to the NBA.

Even more specifically, the Basketball Court proposal draws on the legal regime surrounding international sport, and particularly the Court of Arbitration for Sport (CAS).[119] 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. This follows from

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[114] *See, e.g.*, T.C.R. Sprots Broadcasting Holding, L.L.P. v. W.N. Partner, L.L.C., 2023 WL 3061481, at *2-3, 6 (N.Y. Ct. App. Apr. 25, 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).

[115] *Id*. at *6. 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." National Football League Mgt. Council v. National Football League Players Assn., 820 F.3d 527, 548 (2d Cir. 2016).

[116] *See* ALEC STONE SWEET & FLORIAN GRISEL, THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE AND LEGITMACY (2017).

[117] *Id.* at 28-30, 56-60, 83-118, 119-45.

[118] 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).

[119] On the role of CAS, see, for example, Antoine Duval, *Transnational Sports Law: The Living Lex Sportiva*, in THE OXFORD HANDBOOK OF TRANSNATIONAL LAW 493 (Peer Zumbansen ed. 2020); 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. (2017); Ken Foster, *Global Administrative Law: The Next Step for Global Sports Law* (Working Paper, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2014694; Ken Foster, *Global Sports Law Revisited*, 17 ENT. & SPORTS L. J. 2 (2019) [hereinafter Foster, *Revisited*].

the agreement of national and international sports authorities and mandatory arbitration clauses athletes and clubs sign in order to participate in national and international sport.[120]

CAS has decided cases that have shaken the sports world, including holding that double amputee sprinter Oscar Pistorius could use foot extensions in international competitions and that the International Association of Athletics Federation's regulations governing maximum testosterone levels for female athletes could survive Caster Semennya's challenge.[121] Further, its decisions have had direct effect on sports leagues, importantly applying the "financial fair play" rules that govern soccer teams that seek to compete in major European soccer leagues and in international competitions.[122] 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 as well as interpreting the terms of agreements, relies on public law principles in making decisions, and publishes opinions.[123]

We use the Facebook Oversight Board and not CAS or other arbitral bodies as the animating example for our Basketball Court proposal for one central reason. The Basketball Court we propose and discuss would be internal to one private organization, the NBA, and not part of the international and quasi-governmental institutions that define international sport. The question for us and the NBA is whether courts make sense inside a private organization with its own rules.[124] That said, the example of CAS and the "*lex sportiva*" it creates, and of international arbitration more broadly, provide powerful examples of the benefits that court-like entities can supply to certain forms of private organizations.

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[120] Foster, *Revisited*, *supra* note 121, at 11.

[121] *See* Mark Meadows, *Double Amputee Pistorius Wins Appeal over Ban*, REUTERS (May 16, 2008), https://www.reuters.com/article/idINIndia-33614820080516 (discussing how Pistorious won his case in front of CAS allowing him to compete with foot extensions); Sven Busch, *Caster Semenya Loses Testosterone Case Against the IAAF in CAS Ruling*, Olympics.com (Feb. 10, 2021), https://olympics.com/en/news/caster-semenya-cas-testosterone-decision-iaaf (same procedural structure).

[122] *See, e.g.,* David Conn, *Manchester City's Champions League Ban Lifted by Court of Arbitration for Sport*, GUARDIAN, Jul 13, 2020 (describing CAS's reversal of FIFA's imposition of a penalty for violations of the financial fair play rules).

[123] 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, 1320-1332 (2011) (describing how CAS operates).

[124] Also, many issues that arise for CAS just don't have much application to the Basketball Court. For instance, the underlying basis for CAS's power is that, like all arbitration, it is formally consensual. CAS's ability to hear cases derives from the consent of the parties, whether they be individual athletes, clubs, national sports regulators, or international organizations. In our vision of the Basketball Court, the rulings would only apply to powers the league already has. Players would retain all rights to challenge these rulings under their collective bargaining agreement or in court if they have valid legal claims.

III. Private Supreme Courts

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 having supreme courts within private firms—what we will call *private supreme courts*. Announcing rules in advance and then following them is often seen as the essential trait of a polity governed by the rule of law.[125] 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.[126] The consistent application of rules—treating like cases alike—is a normative value that rises to the level of a constitutional principle.[127] When similar categories are being treated differently, *some* minimal justification for treating like cases differently is constitutionally required.[128]

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.[129] 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.

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[125] 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/entries/rule-of-law/. 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.").

[126] 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 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 . . . ." Judgment of Mar. 5, 1992, 1992/11 ABH 77, pt. IV(1).

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

[128] *See* Williamson v. Lee Optical, 348 U.S. 483 (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 in welfare") (citations and quotations omitted).

[129] 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)

This Part argues that some types of private firms may get substantial value from consistent and equally applied rules in at least three contexts: (a) when the nature of the product requires consistency to attract consumers; (b) 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; (c) when applying consistent rules provides political and regulatory benefits.

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 them 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 and 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.

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. The sole point of this Part is to indicate that some of the time some firms can benefit from creating a private separation of powers that features as a meaningful part of it something like a private supreme court.

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 from 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

("[A]n executive would not adopt or enforce the internal separation of powers to check himself. . . . . an ill-motivated executive might bind himself to enhance strategic credibility."). For a private official, self-binding might be commercially valuable.

power.[130] 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, group or bulk discounts, or any other method, firms can profit from differentiating between customers and charging them different prices.[131]

For instance, if Facebook agrees to apply a policy that treats offensive posts by Jane 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 Jane Doe and 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 Jane 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 one of the policies that generated initial skepticism by the Oversight Board. Facebook had claimed that its policy is to "remove content from Facebook no matter who posts it, when it violates our standards."[132] However, Facebook utilized a program called Cross Check, which treated similar posts differently if they were posted by certain users.[133] A soccer star posting a nude picture of someone accusing him of rape had their picture widely disseminated, but if another user posted the picture it would have been removed.[134]

There are some legal limitations on price discrimination on sales of goods under the Robinson-Patman Act.[135] Firms that sell the exact same goods in the same quantities at around the same times to different commercial customers at different prices may be liable if the effect of doing so is to lessen

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[130] 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 where there any degree of "monopolistic competition." Benjamin Klein, *Price Discrimination and Market Power*, 2 ISSUES IN COMPETITION L & POL'Y 977 (2008).

[131] 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* HANDBOOK OF INDUSTRIAL ORGANIZATION 597 (Elsevier ed., 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. OF ECON. 579 (2001).

[132] Monika Bikert, *Working to Keep Facebook Safe*, July 17, 2018, https://about.fb.com/news/2018/07/working-to-keep-facebook-safe/

[133] *See* Steven Levy, *Inside Meta's Oversight Board: Two Years of Pushing Limits*, WIRED (Nov. 6, 2022), https://www.wired.com/story/inside-metas-oversight-board-two-years-of-pushing-limits/.

[134] *See id*.

[135] *See* 15 U.S.C. § 13 (describing the legal limitations).

competition among downstream users.[136] 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).[137]

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?

One answer is to attract and retain consumers. But at first glance, this does not make much sense. In most instances, consumers' interest in a good or service is independent of others' consumption of it. Absent a more complicated story, the fact that a firm is engaging in price discrimination is not a reason for consumers not to purchase a good or service if it remains worth it to them. After dithering, Schleicher may buy a plane ticket at the last minute and be perfectly willing to pay more for it, even if Fontana planned in advance and paid less for the same ticket.

A substantial behavioral economics literature, though, finds that consumers' sense that rules are applied consistently is an independent factor in their consumption decisions.[138] 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."[139] 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 to their ability to attract consumers in the future can be harmed by taking advantage of high willingness-to-pay consumers during an emergency.[140] Empirical findings from other disciplines confirm that consistency is

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[136] *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 (last visited Aug. 25, 2022).

[137] Ling Yu, *Misreading and Clarification of Anti-Monopoly Law Attributes of Algorithmic Consumer Price Discrimination*, 1 LAW SCI. 285, 287 (2022) ("[P]rice discrimination is a common phenomenon; Louis Phlips, *Price Discrimination: A Survey of the Theory*, 2 J. OF ECON. SURVEYS 135 (1988).

[138] *See generally* Daniel Kahneman, Jack L. Knetsch and Richard Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 738 (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, Michael J. Hiscox, & Sandra Sequeira, *Consumer Demand for Fair Trade: Evidence from a Multistore Field Experiment*, 97 REV. ECON. & STAT. 242 (2015).

[139] 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.

[140] *See id*.

compelling to customers.[141] One study found that the return on investment for managing customer disputes in a consistent fashion is over 100 percent.[142]

Many customers may be more likely to consume Facebook and its products if Facebook treats the posts of Democrats and Republicans identically.[143] Similarly, many customers may be more likely to watch a National Football League game if the NFL applies the rules governing fumbles the same to all quarterbacks, whether it is Tom Brady or Colin Kaepernick.[144]

Customers may have greater expectations of consistency from certain type of firms. 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 they generate is so essential.[145] The criticisms of Facebook often sound in this

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[141] *See* Tor Wallin Andreassen, *Antecedents to Satisfaction with Service Recovery*, 34 J. EURO. 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 AFF. 204, 214 (2000) (considering the commercial value of different forms of dispute resolution within private firms).

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

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

[144] 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 (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 ("Brady is friends with President Trump."). In contrast, President Trump used a vulgarity to describe Kaepernick's decision to keel 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 ("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.

[145] *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.

concern. The arbitrary nature of the content moderation seemed to be problematic given the public functions that Facebook was performing.[146] Two-thirds of Americans said Facebook should exercise principled regulatory control over speech.[147]

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 sorts 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.[148]

Posters on Facebook are in some ways in competition with one another for attention, particularly big posters who seek to use the platform to draw attention to their commercial or political projects. Posters to social media sites frequently complain that the algorithm that displays posts on Facebook timelines is biased in one way or another.[149] Political conservatives complain it is biased against them.[150] Liberals complain it is not sufficiently protective against false or misleading material, a complaint that the site is not policing unfair competition among consumers.[151] Media firms complain that

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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").

[146] *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 GAZ. 385 (2018).

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

[148] 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." Douek, *supra* note 10, at 19–20.

[149] 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; 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.

[150] Allyn, *supra* note 151.

[151] Winni Wintermeyer, *How Facebook Got Addicted to Spreading Misinformation*, MIT TECH. REV., Mar. 11, 2021; Nihal Krishan, *Liberals Accuse Facebook of Lying about Its Moderation of "Stop the Steal" Content*, WASH. EXAM'R (Jan. 12, 2021), https://www.washingtonexaminer.com/news/liberals-accuse-facebook-lying-moderation-stop-the-steal-content.

the algorithm makes it hard for them to optimize for readers.[152] And so forth. 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, and thus create greater customer satisfaction.

Sporting leagues are another example of a type of firms from which consistency is expected. 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, from thinking that both teams are playing hard, following the same rules, and trying their best to win—and no one knows who will win. When there are breaches of the consistent application of the rules to all parties, customers are outraged. Major League Baseball 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."[153]

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 World Series, the Chicago White Sox played against the Cincinnati Reds. Eight White Sox players conspired to fix the outcome of the series for the Reds in return for financial compensation from gamblers. It is also worth noting that 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."[154] A federal district court judge, Judge Kenesaw Mountain Landis, was therefore named the first commissioner of Major League Baseball and handed all sorts of powers to administer baseball consistently.[155] He even stayed on the bench for a while even after he became Commissioner (generating much criticism).[156]

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[152] David Atkins, *How Facebook Is Killing Journalism and Democracy*, WASH. MONTHLY (Mar. 13, 2021)/; Laura Hazard Owen, *Facebook's Pivot to Video Didn't Just Burn Publishers. It Didn't Even Work for Facebook*, NIEMAN LAB (Sep. 15, 2021), https://www.niemanlab.org/2021/09/well-this-puts-a-nail-in-the-news-video-on-facebook-coffin/.

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

[154] Finley & Co. v. Kuhn, 569 F.2d 527, 533 (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).

[155] *Finley*, 569 F.2d at 532-33 (discussing the history).

[156] 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*, 65th Cong. (1921) (statement of Rep. Benjamin F. Welty).

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.[157] 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. When the Brooklyn Dodgers, a Major League Baseball team, left New York City for Los Angeles, fans of the team were openly crying on the streets of New York City. 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.[158]

The commitments of these more intense customers are therefore to a meaningful degree asset-specific, meaning they are not easily transferable.[159] A fanatical supporter of a company invests all sorts of resources into their relationship with that company, both by buying products and spending time and effort learning about these products and spreading the gospel of the firms' qualities.

Facebook relies on customers putting huge amounts of their life on their site: pictures of their children, opinions about politics, 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.[160] Similarly, users may be

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[157] Barry Popik, *Fan (Sports Enthusiast)*, BARRY POPIK (Sep. 4, 2008), https://www.barrypopik.com/index.php/new_york_city/entry/fan.

[158] *See* Jason Zinoman, *The Dodgers Leave Home for Los Angeles, and Brooklyn Feels the Pain*, THE GUARDIAN (Jan. 6, 2007), https://www.theguardian.com/sport/2007/jan/07/ussport.features1.

[159] *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.").

[160] *Facebook's Commitment to Data Protection and Privacy in Compliance with the GDPR*, META FOR BUSINESS (Jan. 29, 2018), https://www.facebook.com/business/news/facebooks-commitment-to-data-protection-and-privacy-in-compliance-with-the-gdpr.

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 line ups, get tattoos, paint their faces, argue on sports radio, and generally act like lunatics.[161] 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."[162]

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 investment. 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 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 be riddled by the problem of hold-ups.[163] In order to produce some good or services, individuals need to make investments that are specific to that good and service.[164] 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 made the investment, making lowball bids that the investor will still need to accept. After all, the investment was specific, and thus unless it is used to make the good or service in question, it will be wasted.

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[161] 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.

[162] Anthony King, *The Lads: Masculinity and the New Consumption of Football*, 31 SOCIOLOGY 329, 331 (1997).

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

[164] 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 line in advance, the other people involved (the producer, or the other actors who have not memorized their line 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.

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—that is, what a 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 to 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.[165] When there are no fanatical fans of a private firm, the value of that firm's products are simply lower. A private firm's actions generating a different product than what the customer invested in can generate durable damage. For instance, NBA referee Tim Donaghy pled guilty to participating in a gambling scandal in which he used his knowledge of the league to bet on professional basketball games. More than a decade later, the league is still dealing with public blowback over the scandal and attempting to restore trust and batting away reports claiming that the full extent of the scandal has not been publicly revealed.[166]

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.[167] 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 comparable to the financial or legal one.[168] The private supreme court generates a version of this, making visible what the consistent application of a rule would look like

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[165] *See* Marc Beaujean et al., *The "Moment of Truth" in Customer Service*, MCKINSEY Q., Feb. 2006 (reporting the results of a study that 85 percent of customers with a positive experience with a company's dispute resolution mechanism return, and 70 percent of those with a negative experience do not).

[166] *See* Tom Ziller, *Tim Donaghy is a Permanent NBA Stain*, SBNATION.COM (Feb. 25, 2019), https://www.sbnation.com/2019/2/25/18237290/tim-donaghy-scandal-nba-referee-david-stern.

[167] *See* JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 68-69 (2000).

[168] *See* Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1472 (2004) (describing how contracts can "engender valuable collaborative relations").

and 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.[169] 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.[170]

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 stadia to keep teams from leaving town.[171] Economists almost universally describe these subsidies as a bad idea. 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.[172]

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 derives from the nature of the private firm's compliance

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[169] 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.").

[170] 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 MGM'T SCI. 1741 (1989).

[171] Daniel Kaplan, *Taxpayers Beware, Subsidies for Sports Venues Back in Vogue despite Low Returns*, THE ATHLETIC (Apr. 27, 2022), https://theathletic.com/3271278/2022/04/27/taxpayers-beware-subsidies-for-sports-venues-back-in-vogue-despite-low-returns/.

[172] ROGER G. NOLL & ANDREW ZIMBALIST, SPORTS, JOBS, AND TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS (2011); 5 ECON. J. WATCH 294 (2008).

with its own *private* rules. 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 a convincing empirical literature that firms engage in self-regulation as a method of avoiding public regulation (and that doing so can be successful).[173] One means of self-regulation transpires when firms over-comply with existing regulations to avoid even more problematic later regulations.[174]

Private firms take other actions to persuade these audiences of the legitimacy of the decisions these firms do make. The entire discipline of public relations was meant to aid in this function.[175] 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.

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. For Noah Feldman, the originator of the Oversight Board idea, avoiding regulatory oversight was one of the primary motivations for developing the Oversight Board. As Feldman said, a "further benefit of a quasi-legal approach is that it would give the platforms much greater authority in resisting the demands of countries who want them to restrict speech in ways they would prefer not to respect."[176]

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.

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[173] *See* Neil Malhotra, Benoit Monin & Michael Tomz, *Does Private Regulation Preempt Public Regulation?*, 113 AM. POL. SCI. REV. 19, 34 (2019) ("companies 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.").

[174] *See* David Baron, *Self-Regulation in Private and Public Politics*, 9 Q.J. POL. SCI. 231 (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 (2016). Sometimes, firms will even support binding legal changes if they think it will forestall larger, future regulatory action. Sheila Kaplan, *Senator McConnell, a Tobacco Ally, Supports Raising Age to Buy Cigarettes*, THE N.Y. TIMES (Apr. 18, 2019), https://www.nytimes.com/2019/04/18/health/mcconnell-tobacco-vaping-21.html,

[175] *See* EDWARD T. WALKER, GRASSROOTS FOR HIRE (2014) (discussing corporate communications).

[176] Meta, *Global Feedback and Input on the Facebook Oversight Board for Content Decisions* app. at 102 (June 27, 2019), https://about.fb.com/news/2019/06/global-feedback-on-oversight-board/.

Federal laws related to airlines mandate handling "bumped" passengers with consistency, as one example.[177]

Economists have long argued that laws against "price gouging," during natural disasters or during 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.[178] But despite opposition from experts, politicians regularly push for these laws, responding to constituents concerns about unfair treatment.[179] 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.[180]

Firms adopting public and binding self-governing rules also provide regulators a greater ability to monitor firms more easily, which makes regulators more likely to leave these firms alone. What goes on inside most companies is hard for anyone—government, investors, customers—to know. Business decisions are protected from judicial review through things like the business judgment rule and trade secrets law.[181] Regulators worried that firms are engaged in law breaking may undertake costly investigations or prosecutions.[182] 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 all of this can do so by making clear its process for making

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[177] 4 C.F.R. § 295.5(b)(2011).

[178] Michael Brewer, *Planning Disaster: Price Gouging Statutes and the Shortages They Create Note*, 72 BROOK. L. REV. 1101 (2007); Michael Giberson, *The Problem with Price Gouging Laws*, 34 REG. 48 (2011); Dwight R. Lee, *Making the Case against "Price Gouging" Laws: A Challenge and an Opportunity*, 19 IND. REV. 583 (2015).

[179] Steven Suranovic, *Surge Pricing and Price Gouging: Public Misunderstanding as a Market Imperfection*, Working Papers Nos. 2015–20, 3–4 (The George Washington University, Institute for International Economic Policy May 2016) ("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."); Kahneman, Knetsch & Thaler, *supra* note 140, at 729 (reporting that 82 percent of respondents consider it unfair for a hardware store to raise the price of snow shovels after a large blizzard caused increased demand).

[180]For example, see Javier E. David, *Uber Hammered by Price Gouging Accusations during NYC's Explosion*, CNBC (Sep. 18, 2016), https://www.cnbc.com/2016/09/18/uber-hammered-by-price-gouging-accusations-during-nycs-explosion.html.; *see also* Kahenman et. al., *supra* note 140; Jodie L. Ferguson et al., *Suspicion and Perceptions of Price Fairness in Times of Crisis*, 98 J. BUS. ETHICS 331 (2011).

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

[182] *See* Janis M. Berry, *Defense of Businesses: Individual Officers and Employees in Corporate Criminal Investigations*, 19 PUB. CONT. L.J. 648 (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 UNIVERSITY SCHOOL OF LAW (Jan. 13, 2017), https://law.duke.edu/news/endless-cycle-corporate-crime-and-why-its-so-hard-stop/;

decisions—avoiding political and legal risk by making clear to regulators and legislators exactly what is going on.

As mentioned above, following internal rules consistently is costly, as it may require firms to give up profitable opportunities. That fact that consistently-applying rules is costly, though, improves the firms credibility with regulators, for reasons suggested by the economic literature on "signaling."[183] 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 regulating.[184] 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.[185] 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.[186] That Constitution itself[187] and so many of the doctrines created to implement it feature pervasive rules regarding the obligation to treat like cases alike.[188] 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 often 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

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[183] *See* Michael Spence, *Job Market Signaling*, 87 Q.J. ECON. 355 (1973) (discussing signaling).

[184] 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.

[185] Indeed, when the global soccer governing body FIFA fired the chair and several members of 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 "Fifa cannot reform from within." Navi Pillay, Miguel Poiares Maduro, and Jospeh Weiler, *Our Sin? We Appeared to Take Our Task at FIFA Too Seriously,* GUARDIAN, December 21, 2017.

[186] *See* U.S. CONST. art. VI ("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.").

[187] *See* U.S. CONST. amend. XIV ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[188] *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").

could help it do so? One of the tools 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 provide sufficiently.

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.[189] 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 presidential selection and senatorial advice and consent.[190] 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.[191]

Defining the responsibility of an oversight board, as 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.[192] 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 judgement and legal acumen.[193]

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."[194] If a for-profit corporation exists to ensure that directors and officials maximize profits for the sake of shareholders, then their leadership

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[189] *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").
[190] THE FEDERALIST No. 76, at 456-57 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
[191] Of course, the primary discussion of focal points remains THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 54-58 (1960).
[192] Klonick, *Facebook*, *supra* note 10, at 2453–62
[193] Oversight Board, *Meet the Board*, https://www.oversightboard.com/meet-the-board/ (listing members of the Board and their qualifications).
[194] 573 U.S. 682, 711 (2014).

will be chosen on the basis of trying to achieve that.[195] It is true that private firms do not always "pursue profit at the expensive of everything else,"[196] 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, for instance.[197] And 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.

Private firm efforts to create an "internal separation of powers" face challenges because most figures inside business firms have similar incentives.[198] 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."[199] These directors are then formally empowered to pursue similar objectives (like profits) and are removable for their failure effectively to do so.[200] Indeed, directors often receive a portion of the company's equity—or something comparable to that.[201] Unsurprisingly, some studies have found that legal violations are more common in firms in which the directors have more of a financial stake in the firm, and therefore less of a stake in following rules.[202]

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[195] 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 (1976).

[196] Burwell v. Hobby Lobby Stores, 573 U.S. 682, 712 (2014). *See generally* 1 JAMES D. COX & THOMAS LEE HAZEN, TREATISE OF 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.").

[197] *See* Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1991 (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).

[198] *See* REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (Jan. 2017).

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

[200] 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.").

[201] *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/.

[202] *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.").

Second of all, how a private firm structures its private supreme court can change its level of consistency.[203] 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.[204] Those staffing the Oversight Board have longer terms than their corporate counterparts and also have their own funding stream.[205]

Stating that an individual has independence from one group of actors does not necessarily mean they will use that independence to act consistently.[206] 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 would therefore turn on their ability to write opinions well regarded in legal circles, not in profit-and-loss figures.[207]

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.[208] Yet, the "independent" figures brought in to adjudicate some private firm disputes struggle to have the kind of neutrality necessary to follow the rules. Law firms hired to investigate and resolve matters like the controversy over matters like the questions surrounding Phoenix Suns owner Robert Sarver receive immediate payment based on their report, and they also have an interest in being hired again to produce other reports.

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[203] *See* Vermeule, *supra* note 30, at 953 (describing "incentive-laden" accounts of institutional design).

[204] *See* U.S. CONST. art. III, § ("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, 965-66 (2007) (describing these features as central to judicial independence)

[205] *See supra* notes 74-7 and accompanying text.

[206] *See, e.g.*, GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 19 (1993) ("Life 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.")

[207] *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").

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

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.[209] 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 Jane 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 themselves to create the later similar case in a similar way. But by creating such a salient focal point to identify as a precommitment to treat a later case a similar way, there are certainly reputational and potentially other harms that comes from the reason giver not treating like cases alike.[210] 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 and 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 on the basis of 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.[211]

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[209] *See generally* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 651 (1995) ("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 reasone—for examples, see EDWARD H. STIGLITZ, THE REASONING STATE (2022); John Zhuang Liu & Xueyao Li, *Legal Techniques for Rationalizing Biased Judicial Decisions: Evidence from Experiments with Real Judges*, 16 J. LEG. STUD. 630 (2019).

[210] *See* Schauer, *supra* note 9, at 645 (noting the "prima facie commitment to other outcomes falling within . . . . [the] scope [of the argument]"). *See also id*. at 648 ("[G]iving reasons commits the giver is also sup-ported by the fact that quotations directly justifying a result have considerable purchase in legal argument.").

[211] As the Supreme Court of New Jersey stated, "The essence of the common law is its adaptability to changing circumstances." Atlantic City Convention Center Authority v. South Jersey Pub. Co., Inc*.,* 637 A.2d 1261, 1266, 135 N.J. 53, 64 (N.J.,1994).

It is safe to assume that "court-like" institutions may have similar benefits. The Oversight Board chooses cases from among the set of cases brought by users of Facebook (and other Meta products) that have had their content taken down by the firm's ordinary content moderation process.[212] That litigants bring challenges suggests that whatever rule application they are unhappy about is not merely "bad" but is problematic to an extent that it is worth it to hire lawyers and sue.[213] One need not adopt strong-form views about the efficiency of the common law to think that case selection by litigants provides information to, and creates pressures on, decision-makers to interpret and reform the most unclear and costly rules.[214]

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—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 re-writing 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 turn loose standards, written generally to address uncertainty, and turn them over time into more solid rules created through binding precedential decisions.[215]

It is also worth noting that a private supreme court is a court of appeal, not an actor in the first instance. The management of a private firm making business decisions will struggle to produce consistency because they suffer from being judges in their own cases.[216] Consider one of John Marshall's defenses of judicial review in *Marbury v. Madison*: Congress was too closely involved in enacting statutes to evaluate the consistency of these statutes with the Constitution.[217]

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[212] Oversight Board Charter, *supra* note 71, art. 3.
[213] RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (9th ed. Jan. 2014); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977).
[214] 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 that make users upset.
[215] *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).
[216] *See, e.g.*, Calder v. Bull, 3 U.S. 386, 388 (1798) (noting that "a law that makes a man a Judge in his own cause" is an act "contrary to the great principles of the social compact").
[217] Marbury v. Madison, 5 U.S. 137, 176 (1803) ("To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?").

A private supreme court could also generate more consistency by encouraging corporate leaders to internalize consistency as a value.[218] 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.[219] Private supreme courts may create a culture of public-regarding justification.[220] 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.[221]

One of the major criticisms of the Oversight Board has been that its decisions have only limited effects on Facebook. Further, there is nothing to stop Facebook from simply changing the rules. 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.[222]

There are several constitutional democracies featuring powerful courts whose decisions are not formally final the same way as we have come to accept in the United States. This is commonly called "weak-form judicial review."[223] In Canada, for instance, the decisions of the Supreme Court can be overridden by a provincial or the national legislature.[224] In New Zealand, the highest court cannot invalidate a law in the first place but can merely note its inconsistencies with other foundational legal commitments.[225] These high

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[218] *See* Vermeule, *supra* note 25, at 1449, 1459-62 (describing the benefits of a sober second look).

[219] *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.").

[220] *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.").

[221] *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (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.").

[222] *See* Cooper v. Aaron, 385 U.S. 1, 18 (1958) ("The federal judiciary is supreme in the exposition of the law of the Constitution, and that principle.)

[223] *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.").

[224] *See* CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), §33.

[225] *See* New Zealand Bill of Rights Act 1990, 1990 S.N.Z. No. 109, §4.

courts have still been influential, and so far the Oversight Board has been somewhat influential as well.[226]

C. Domains

The benefits that a private supreme court-like institution can provide to a private firm can be outweighed by significant costs in many situations. This Section discusses when those costs of a private supreme court are the greatest relative to its benefits, and what can be done to manage these costs. Private supreme courts can feature individuals with expertise in the business of the private firm whose rules they are interpreting and can also limit the constraints that their decisions place on firms. There are also many decisions—and many firms—which might not benefit at all from the input of a private supreme court.

The core criticism of judicial review outside of private law is that it is countermajoritarian. It was just over sixty years ago that Alexander Bickel famously coined the phrase "countermajoritarian difficulty" to describe the apparent tension between judicial review and democracy. 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."[227] 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,[228] albeit nothing like the democratic process that is supposed to generate laws approved by Congress and signed by the President.

The real problem, though, is that private supreme courts can be more *counter-economic* than *countermajoritarian*. The corporate officials selected for 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 to a federal court displacing the action of an expert administrative actor.[229]

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[226] *See* Levy, *supra* note 135 ("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.").

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

[228] *See generally* Lucian Bebchuk, Scott Hirst & June Rhee, *Towards the Declassification of S&P 500 Boards*, 3 HARV. BUS. L. REV. 157 (2013); Stephen J. Choi et al., *Does Majority Voting Improve Board Accountability?*, 83 U. CHI. L. REV. 1119 (2016); David Yermack, *Shareholder Voting and Corporate Governance*, 2 ANN. REV. FIN. ECON. 2.1 (2010).

[229] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (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.").

Second of all, adjudication—even of the limited kind utilized by a private supreme court—generates costs for private firms.[230] Private firms must be willing to endure the costs associated with hiring and compensating qualified individuals.[231] Private firms must be willing to endure the costs associated with consuming and internalizing whatever rules are promulgated by the private supreme court. Most importantly, private firms must be willing to endure the costs associated with not engaging in business practices some percentage of the time that they think are profitable because the private supreme court has told them are against internal firm rules.

One means by which private firms can minimize these two 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.[232] 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 private supreme courts are interpreting their rules, they can change them without the veto-gates that makes it hard for Congress to change statutes in response to disfavored judicial interpretations.[233] And it is certainly much easier to change firm rules than to use Article V to amend the Constitution that Article III courts are interpreting and making binding on others.[234]

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[230] *See, e.g.,* Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011) ("Courts should think carefully before expending scarce judicial resources to resolve difficult and novel questions of constitutional or statutory interpretation that will have no effect on the outcome of the case."); Marin K. Levy, *Judicial Attention As A Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 402 & nn.1–5 (2013) (collecting comments by judges stating that cases generate costs for the legal system, not just benefits).

[231] The value to these private supreme courts comes in part from having the right types of people staffing these courts—those with a reputation and an incentive to behave appropriately. The value also derives from the independence that these courts have, which means that those staffing the courts must be guaranteed compensation for a meaningful amount of time. Facebook, for instance, first seeded the Oversight Board with $130 million in 2019, and then just announced another round of $150 million in 2022. *See* 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.

[232] *See* Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 712 (2001) (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.").

[233] *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 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.").

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

The counter-economic difficulty can also be mitigated by private firms selecting judges that understand their firms to sit on the private supreme court. Judges for the private supreme court with more of a background in the business of the firm and in generating consistent rules can create a private supreme court more sympathetic to the private firm.[235]

Another means of limiting private supreme courts is for these court-like institutions themselves to generate private judicial doctrines that defer to corporate leaders in appropriate circumstances. There could be doctrines of deference comparable to *Chevron* deference, for instance. The Oversight Board is already utilizing proportionality-like doctrines that permit Facebook to restrict postings if it satisfies certain standards.[236] All of these tools can affect how helpful private supreme courts are, but it is harder to believe they are just not at all helpful.

Another means by which these two concerns can be minimized is by recognizing that private supreme courts do not make sense for every firm and for every decision. A supreme court, in other words, is not a normal good, such that more of it is always better. 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 on 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.[237]

Another dimension on which to eliminate a private supreme court is at the level of the *decision* rather than at the level of the *firm*.[238] While certain

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[235] *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").

[236] *See* Oversight Board, *Breast Cancer Symptoms And Nudity*, https://oversightboard.com/decision/IG-7THR3SI1/ [hereinafter *Brazil Case*] (stating that Facebook must "show that its restriction on freedom of expression was necessary to address the threat, in this case the threat to the rights of others, and that it was not overly broad."

[237] The Supreme Court stated that administering amateur athletic 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 actor . . . . 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.

[238] 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, 490 (2011) (citations and quotations omitted) (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

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 by which to decide which cases to resolve even if they decide to generate a supreme court. The Oversight Board's governing charter states that it will only hear "important" cases, which presumably means cases that are of broader public interest with broader public implications.[239] The Supreme Court can decide to hear a case because the question it presents is "important."[240]

IV. Creating the Basketball Court

This Part moves from the telescope looking at 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 National Basketball Association ("NBA"). The discussion is necessarily speculative, considering when a private supreme court might work better for the NBA, when it might work worse, and how it would work in the first place. The discussion transpires in two parts: first considering why the NBA could use a private supreme court, and then moving to the details of how it would operate.

A. Law-Like Rules Without Court-Like Structures

First, sports leagues already have law-like rules that everyone understands as law-like rules, but they do not have anything like court-like structures. The NBA has a "Constitution" and a set of by-laws governing league operations, governing everything from the required "character and fitness" of players to the rules governing trades.[241] Article 2 of the NBA Constitution makes clear the law-like ambitions of the document.[242]

The NBA also publishes a Rulebook, explaining the rules of the game, and a set of commentaries on the rules to provide guidance for referees.[243] The Rulebook gives interpretive guidance for those trying to utilize it. Section 1 of the Commentaries seems to speak to subsequent interpreters by emphasizing the underlying reasons behind these rules.[244] It states that "[t]he

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must be resolved by courts). The Supreme Court has also stated that cases involving "specialized" matters might be decided outside of federal courts. *See, e.g.*, C.F.T.C. v. Schor, 478 U.S. 833, 845 (1986).

[239] *See* OVERSIGHT BOARD CHARTER art. 1.2.1.

[240] *See* SUP. CT. R. 10(c).

[241] *See* NBA Const., *supra* note 14.

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

[243] NBA, *Rulebook*, https://official.nba.com/rule-no-1-court-dimensions-equipment/ [hereinafter NBA, *Rulebook*]; NBA, *Comments on the Rules*, https://official.nba.com/comments-on-the-rules/ [hereinafter NBA Comments].

[244] These parts of the NBA's law-like structure seem to be more clearly speaking to an interpreter on a court than to anyone else. As Fred Schauer has written, one of the functions

restrictions placed upon the player by the rules are intended to create a balance of play, equal opportunity for the defense and the offense, provide reasonable safety and protection for all players and emphasize cleverness and skill without unduly limiting freedom of action of player or team."[245] Section 1 also describes the principles behind penalties, like fouls or ejection: "The purpose of penalties is to compensate a player who has been placed at a disadvantage through an illegal act of an opponent and to restrain players from committing acts which, if ignored, might lead to roughness even though they do not affect the immediate play."[246]

The NBA also regularly publishes "points of emphasis," effectively administrative guidance from the league office to referees, explaining how others should enforce these rules in particular circumstances.[247] The Collective Bargaining Agreement is also a meaningful source of law-like rules for the NBA.[248]

There are many reasons why the NBA would care about interpreting these various rules consistently. The consumers of the NBA themselves want that kind of consistency. Sports leagues have long understood that a reputation for bias would be terrible for their long-run 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 job of the professional sports commissioner, and the appointment of a federal judge—Kennesaw Mountain Landis—to that position.[249] 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.[250] This problem of

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of a judicial opinion is "explanation and justification" while statutes generally "prescribe but do not explain or justify." Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1465 (1995).

[245] NBA Comments, *supra* note 245, §1.

[246] *Id*.

[247] Tim Bontemps, *What's Behind the NBA's New Focus on Traveling, and How Players And Teams Are Adjusting*, ESPN (Dec. 5, 2022) ("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.")

[248] NBA, *Collective Bargaining*, *supra* note 20. Notably, nothing we suggest here would change anything about players' rights under the CBA. We do argue that an internal judicialized process may make league decisions more effective when players seek arbitration to challenge league decisions, or may reduce complaints and appeals to such arbitrators. But conceptually what we propose precedes any appeal to CBA-requires arbitrators.

[249] *See Kuhn*, 569 F.2d at 533. (describing the reasons for the appointment of Judge Landis); *see also* WEILER & ROBERTS, *supra* note 156, at 1 (providing a similar story about what led to Commissioner Landis being selected).

[250] 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

referee bias will almost surely reignite with the huge increase in interest in gambling following the legalization of sports gambling in many states.[251]

The persistent topics that upset consumers of the NBA 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 and Stephen Curry and LeBron James now?[252] Another version of superstar bias is superteam bias, leading referees to favor popular and successful teams like the Golden State Warriors. The Houston Rockets issued a formal complaint to the league that referee bias towards the Warriors cost them the NBA championship one year.[253]

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 but are not.[254] There is a debate among sports jurisprudes about whether fans really want fair and consistent refereeing, or whether the NBA is more like professional wrestling that many would want to admit. Perhaps the superstar bias allows then to stay in the game because the NBA is a product dominated by superstars—Jordan, LeBron, Curry. Perhaps at the end of the game referees swallow their whistles because the fans like a rule-less sport at the end.[255]

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institutional reforms that Pedowitz suggested. *See Review of NBA Officials Finds Donaghy Only Culprit, Stern Calls for Change*, ESPN (Oct. 2, 2008), https://www.espn.com/nba/news/story?id=3621631 ("Stern promised to implement all the recommendations included in former federal prosecutor Lawrence Pedowitz's review of the NBA referees operations department.").

[251] See Will Leitch, *Sports Gambling Is a Disaster Waiting to Happen*, The ATL. MONTHLY (Sept. 24, 2021), https://www.theatlantic.com/ideas/archive/2021/09/micro-betting-could-destroy-sports/620188/ (describing potential problems).

[252] There is disagreement among scholars about whether there is superstar bias. *Compare* Steven B. Caudill, Franklin G. Mixon JR., & Scott Wallace*, Life on the Red Carpet: Star Players and Referee Bias in the National Basketball Association*, 21 INT'L J. ECON. OF BUSINESS 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.

[253] *See* Amick & Iko, *supra* note 33 (quoting a memorandum written by the Rockets stating that "[r]eferees likely changed the NBA champion" because the "Super Team Warriors are getting a major officiating advantage").

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

[255] *See* Berman, *supra* note 35, at 1327 ("[Most 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.").

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. 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.[256] Leagues want to encourage this investment but cannot "merge" with fans (absent the type of team ownership by fans required in German soccer.)[257]

But why be a fan of a team from Sacramento if the League is going to favor the Knicks and Lakers? Leagues have a short-run interest in teams from New York and Los Angeles succeeding. TV ratings are much higher when big market teams succeed.[258] But such bias would risk the willingness of fans being willing to invest in the sport and fandom in the long run. Fan worries of bias can be alleviated by a decision by the league to leave rule interpretation in hands that are not responsible for TV ratings or ticket sales, and that have both incentives and role to promote consistent and fair rule interpretation.

Sports leagues also have lots of reasons to care about government officials. Sports teams often rely on public subsidies for sports stadia. Then Governor Scott Walker (R-WI) supported giving $250M in public money for a stadium for Milwaukee Bucks in 2015, despite the team being owned by two hugely successful financiers.[259] In 2013, then Governor Jerry Brown (D-CA) supported legislation that created a special exemption to his state's Environmental Quality Act for stadiums, allowing the Sacramento Kings to more easily build a stadium.[260] Even where they do not seek subsidies, NBA teams often need zoning changes, infrastructural investments, and regulatory forbearance in order get a stadium built.

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

[257] 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

[258] *See* Caudill, Mixon Jr., & Wallance, *supra* note 254, at 248-50.

[259] *See Scott Walker Approves Spending 250 Million on Milwaukee Bucks Arena*, WASH. POST (Aug. 12, 2015), 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

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

Congress also regularly considers matters related to sports.[261] When Kennesaw Mountain Landis became the first real professional sports commissioner, Congress considered impeaching him for various reasons.[262] The Donaghy cheating scandal from the NBA generated the attention of one congressional committee chair, who met with Commissioner David Stern and wanted hearings into how the NBA handled the situation.[263]

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.[264] There are cabinet-level officials supervising the execution of these public laws.[265] Many constitutions even include a right to sports, making it unsurprising that this right would be enforced by governmental officials using public law.[266]

However, the NBA's legal system does not feature anything court-like to apply the rules in its system that are law-like. Referees dominate the application of NBA rules during games. They try to signal their commitment to consistency and neutrality in various ways. Their claims to neutrality do not have the quite the same public salience as baseball umpires, whom John Roberts referenced during his confirmation hearings as the quintessential example of the actor dedicated to consistency. But they try. They wear zebra shirts, for instance.[267]

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

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

[263] *See Bobby Rush Looking Into NBA Cheating Scandal,* POLITICO (July 26, 2007), https://www.politico.com/blogs/politico-now/2007/07/bobby-rush-looking-into-nba-betting-scandal-002389

[264] *See* Berman, *supra* note 35, 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.'").

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

[266] *See, e.g.*, SPAIN CONST. art.43(3) ("The public authorities shall promote health education, physical education and sports. Likewise, they shall encourage the proper use of leisure time.").

[267] *See* James L. Gibson, Milton Lodge & Benjamin Woodson, *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.").

Referees, though, have limited tenure and salary protection.[268] 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 themselves for constitutional reasons.[269] They are also making their decisions with the affected parties next to them and thousands of fans yelling at them.[270] Referee decisions subject to replay are resolved by the NBA office in Secaucus, New Jersey, which is staffed by these same referees.[271] 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.

Decisions related to games that do not need to be made during the game feature a different structure, but one subject to the similar concerns. The Commissioner has broad discretion to impose discipline.[272] Whether a player does something merits a penalty beyond an in-game foul, or if an owner or team officials violates the league rules off the court, the Commissioner's office doles out punishments. More recent NBA rules have permitted players to appeal to a third-party arbitrator for more serious suspensions.

The Commissioner is a unique—and potentially problematic—combination of different functions.[273] 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 gooses improve TV ratings and ticket sales. But favoring them is not in "the best interests of the game." Plenty of courts and

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[268] 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 Hein, *NBA, referees union agree to new seven-year labor deal*, NBC Sports, Sept. 25, 2022, https://nba.nbcsports.com/2022/09/15/nba-referees-union-agree-to-new-seven-year-labor-deal/.

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

[270] *See* Vermeule, *supra* note 28, 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.")

[271] *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/#:~:text=Joe%20Borgia%2C%20the%20NBA's%20senior,been%20really%20receptive%20to%20it.

[272] 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." NBA, *Collective Bargaining*, *supra* note 20. at 31.1.

[273] *See* Golen and Zola, *supra* note 26 (discussing the complications of the various roles that the Commissioner players).

commentators have noted the problem with this rare combination of power and unified functions.[274]

Taking some decision-making off the shoulders of the Commissioner would be a positive development. It would remove some of the finality of league decisions about suspensions, allowing the decisions, perhaps, to flow from league underlings to the Court without necessarily involving the Commissioner themself. By creating an ultimate arbiter, it would allow the Commissioner to better represent the league in business negotiations or in politics without having to make these unpopular decisions on their own. When disputes arise among owners—owners who are the ultimate boss of the Commissioner—there would be a neutral party to review the situation.

In March of 2015, after complaints about its referees, the NBA decided it needed to take steps in the direction of generating some independent institutional authority. The NBA started to issue Last Two Minute Reports ("L2M") reviewing all decisions made by referees in the final two minutes of a close game.[275] Adam Silver, the Commissioner of the NBA (and a graduate of the University of Chicago Law School) explained the reasons for L2M one year later as being based on "building confidence in the public" based on "explanations" by league officials showing league actions were consistent.[276]

The L2Ms are major step towards the type of review we suggest in this Article. However, the L2Ms do not create any formal consequences—they proclaim that referees got it right or wrong but do not cause anything to happen. Further, they are created by many of the same type of people involving in league matters otherwise. The NBA League Operations Team—part of the senior leadership of the NBA—makes the L2M document. The L2M document does not explain why certain calls were wrong in any meaningful sense. The combination of these factors made teams like the Houston Rockets question the validity of the L2M because of its absence of independence from the NBA.[277]

B. 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

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[274] *See supra* note 32 and accompanying text.
[275] *See* NBA, *NBA Officiating Last Two Minute Archives*, https://official.nba.com/nba-officiating-last-two-minute-reports-archive/.
[276] *See* Jeff Zillgitt, *Refs Union Petitioners to End NBA's Last Two-Minute Reports*, USA TODAY (June 7, 2016), https://www.usatoday.com/story/sports/nba/2016/06/07/nba-referees-association-last-two-minute-reports-adam-silver/85559636/
[277] *See* Amick & Iko, *supra* note 33.

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 Commissioners' 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.

1. Sources of Law

The basic sources of law for the Court would be the Rulebook, the NBA Constitution, and the league's by-laws. But these documents are not self-interpreting. For the Basketball Court idea to proceed, the NBA likely would need to announce some broader interpretative principles and goals. For instance, Facebook's content moderation policies are guided by a set of "values" that inform both the creation of "community standards" and their interpretation.[278] The values are themselves are not very specific, but the Oversight Board has sought to explain its decisions in light of them, building doctrine from their generalities.[279] The Oversight Board also seeks to rule "in light of human rights norms protecting free expression."[280] Further, the Oversight Board has announced a process for interpretation that, following major strands of constitutional interpretation around the world (if less in the United States) calling for explicit balancing of these values as part of a proportionality analysis.[281]

Our suggestion is that, just as the Facebook Oversight Board is asked to interpret Facebook's community standards in line with international human rights law, the so-called "*lex sportiva"* should guide the Basketball Court. *Lex sportiva* is the body of rules developed in a variety of international fora but most notably the Court for Arbitration of Sport (CAS).[282] CAS and other bodies have developed a body of law that develops broader principles for understanding the rules of sports – sometimes referred to as *principa sportiva* or *lex ludica* -- that could be used to help interpret the law-like rules of the NBA.[283]

For instance, CAS has developed an extensive caselaw that applies a concept of seasonality to suspensions. Similar punishments have larger and smaller effects depending on when they are issued, as some seasons have

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[278] *See* Oversight Board, *Charter*, *supra* note 61, § 4.
[279] See Recent Case*, Case Decision 2021-004-FB-UA*, 135 HARV. L. REV. 1971 (2022) (discussing influence of proportionality and international human rights law on Oversight Board decisions)
[280] *See* Oversight Board, *Charter*, *supra* note 71, § 2(2).
[281] *Id*.
[282] *See* notes 123-128 and accompanying text.
[283] Casini, *supra* note 125, at 1319 (describing "principia sportiva"); Foster, *supra* note 121, (describing "*lex ludica"*).

more important sporting events.[284] This doctrine could be relied on by the Basketball Court to determine the proper length of suspensions, perhaps including longer ones if the conduct would keep players out of ordinary regular season games, but shorter ones if they would lead to absences during crucial playoff series.[285]

2. Staffing

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.[286] But some meaningful number of them would have a background in basketball, or sports, or the business of entertainment. The types of people we imagine might serve on the Basketball Court include Len Elmore (former NBA star, CBS College basketball analyst, and Harvard Law graduate) or Glenn Fine (former acting inspector general of the Department of Defense and college basketball star).[287]

However, membership would not have to be limited to lawyers—membership on the Facebook Oversight Board is not—and could include others who are trusted thinkers about the intersection between basketball and business and other relevant fields. Figures like former Secretary of Education and former college basketball player Arne Duncan,[288] former NBA superstar and business mogul Magic Johnson,[289] or polymath and former NBA superstar Kareem Abdul-Jabbar would be ideal.[290]

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[284] Foster, *supra* note 121, at 10 (summarizing cases)

[285] Some distinctions would have to be drawn, though. CAS generally does not get involved in interpreting the actual rules of the game on the field as applied by referees. Foster, *supra* note 121, at 3-4 (summarizing cases where CAS refuses to get involved with rule application during contests). In contrast, we argue the Basketball Court should play a role in interpreting and developing the rules of the game.

[286] *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.").

[287] Len Elmore, Knight Commission on Intercollegiate Athletics, https://www.knightcommission.org/bios/len-elmore/ (discussing Elmore's background in both law and basketball); *Glen Fine, Non-Resident Fellow*, BROOKINGS, HTTPS://WWW.BROOKINGS.EDU/EXPERTS/GLENN-FINE/#:~:TEXT=GLENN%20FINE%20IS%20A%20NONRESIDENT,%2C%20BUSH%2C%20AND%20OBAMA%20ADMINISTRATIONS (noting Fine's success as a lawyer and the fact that he was drafted by the San Antonio Spurts after starring for Harvard's basketball team).

[288] *See* Alexander Wolff, *Game Changer: How Arne Duncan Took on College Sports—And Won*, SPORTS ILLUSTRATED (Dec. 3, 2015), https://www.si.com/college/2015/12/03/arne-duncan-ncaa-barack-obama-alex-wolff-book (discussing Duncan's background in and influence on college sports).

[289] *See* Matt Krantz, *Magic Johnson has Magic Touch in Business, Too*, USA TODAY, Dec. 8, 2008, at A1 (discussing Johnson's hugely successful business career).

[290] *See* Kurt Streeter, *Kareem Abdul-Jabbar Is Greater Than Any Basketball Record*, N.Y. TIMES, (Feb. 7, 2023), https://www.nytimes.com/2023/02/07/sports/basketball/kareem-

3. Process

Certain league decisions—which types will be discussed below—could be appealed to the Basketball Court by teams or players that were adversely affected by them. 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.

Once it decided to hear a case, the Basketball Court would ask for briefs from the league and the relevant parties (*e.g*,. teams, players).[291] Fans or other groups could write amicus briefs. Then, relying on the league rule book and a set of values that the league would adopt as sources of law (more on this below), the Basketball Court would decide the cases, answering questions like what is and what is not an offensive foul, the propriety of a suspension, or what types of trades involving future draft picks are allowed under the NBA Constitution and by-laws. Importantly, the Basketball Court would write opinions explaining these decisions.

4. Jurisdiction

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 off the court can be hazy,[292] it is a useful conceptual line to draw initially. Within those decisions made 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

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abdul-jabbar-record-legacy.html (discussing Jabbar's influence on and off the court). Another possibility is sports journalist Bill Simmons, who proposed the creation of a "Sports Czar," which has some similarities with this proposal. Bill Simmons, *Sports Czar is fired up, ready to go*, GRANTLAND (Nov. 14, 2008), https://grantland.com/features/sports-czar-is-fired-up-ready-to-go/ (discussing possibility of a "Sports Czar").

[291] Unlike the Facebook Oversight Board, publicly available oral argument may be appropriate. One of the secondary benefits of a Basketball Court would be providing more content for NBA fans to obsess over. One could imagine the NBA TV network, or even ESPN, covering live oral argument in these cases. If you doubt that people would watch such programming, remember that the NBA and NFL drafts are very successfully shown on television, with coverage of the NFL draft now providing three nights worth of programming. Jon Benne, *Why is the NFL Draft 3 Days Long?,* SB NATION, Apr. 24, 2017, https://www.sbnation.com/nfl/2017/4/24/15281946/nfl-draft-length-3-days-why; Paulsen, *NBA Draft Drops, But Not Too Bad*, Sports Media Watch, https://www.sportsmediawatch.com/2018/06/nba-draft-ratings-drop-espn/.

[292] *See* Michael R. Wilson, *Why So Stern? The Growing Power of the NBA Commissioner*, 7 DEPAUL J. SPORTS LAW 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.").

urgent on court matters (like the duration of suspensions for on court misconduct).

a. On Court

The Basketball Court could review disputes arising from matters *on the court* and divide them into two conceptual categories: emergency and non-emergency. Emergency matters would be those happening during a game that needed to be decided during that game. Non-emergency matters would be those related to matters happening on the court, but that can be resolved after the game terminates.

The question of when to stop a game to review a decision during the game is a complicated one.[293] Some decisions need to be made quickly. As Samuel Johnson said about delay 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."[294]

A judicial decision is often slower than that made by another branch of government.[295] If the Basketball Court simply convenes to make a decision without having to write an opinion, then there is less reason to think that the Basketball Court would be slower than referees watching from New Jersey. This is particularly so if the Basketball Court does not have to write an opinion resolving a game controversy during the game and can instead write the decision later.[296]

There is some sense in which a mistake during the game cannot be undone later. The usual "standard for granting or vacating a stay pending appeal" requires several factors to be satisfied, including "a likelihood that "irreparable harm will result from the denial of a stay."[297] A mistaken call can change the rest of the game and therefore change the result, so it might qualify.

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[293] *See, e.g.*, Berman, *supra* note 20, at 1703 ("The introduction of video replay slows down the game. No doubt about it. That's one reason to eliminate instant replay entirely.").

[294] 1 JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON, LL.D. 336 (John W. Croker ed., Carter, Hendee and Co. 1832).

[295] *See* Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. 125, 138 (2021) (discussing how slowly federal courts moved in handling matters related to President Trump).

[296] Although, as we discussed in Section II.A, there are many reasons why writing opinions can generate more consistent decisions. *See* Schauer, *supra* note 9. One of the Supreme Court's gravest errors came when it authorized the execution of alleged Nazi saboteurs, and only after their execution did it write a decision. *See* David J. Danelski, *The Saboteurs' Case*, 1 J. SUP. CT. HIST. 61, 80 (1996) (quoting transcriptions of interviews of William O. Douglas, in which Justice Douglas stated "[i]t is extremely undesirable to announce a decision on the merits without an opinion accompanying it").

[297] Conkright v. Frommert, 556 U.S. 1401, 1402 (2009) (Ginsburg, J. in chambers) (citations and quotations omitted).

It is likely an easier question whether the Basketball Court should have jurisdiction over in-game disputes *after* the game. Teams are currently allowed to protest in-game decisions to the NBA Commissioner's Office by paying a small fee and providing evidence of the dispute.[298] We propose giving the Basketball Court this authority, expanding the number of cases it hears and asking it to develop rules in a common-law manner.

A recent revision of the rules provides an excellent example of what we envision. In its discussion defining personal fouls, the NBA rules state that "[a] player shall not hold, push, charge into, impede the progress of an opponent by extending a hand, arm, leg or knee or by bending the body into a position that is not normal."[299] The official comments on "Block-Charge" fouls make it clear that it is an offensive foul for a player to seek to draw a foul by initiating contact "contact in a non-basketball manner (leads with his foot, an unnatural extended knee, etc.)."[300]

However, determining exactly what "contact in a non-basketball manner" proved a major challenge for referees. In the years before the 2021-22 season, a number of players innovated moves and techniques designed to cause defensive players to initiate contact and thus draw fouls on them, in ways that seemed in conflict with the spirit of the rule.[301] James Harden (now of the Philadelphia 76ers, but during much of this period the star of the Houston Rockets) would dribble past a pick set for him by a teammate, and when a defender tracked him over the pick, Harden would stop and shoot, leaning towards the defender.[302] The defender would crash into Harden, fouling him, giving him two free throws. In a catalogue of Harden's foul drawing moves, *The Ringer* described this one as a "Pick and Troll."[303] After letting this problem fester for a number of years, before the 2021-22 season the League announced a new "point of emphasis" for referees, stating "game officials will enforce the playing rules in a manner that reduces the incentive for offensive players to use non-basketball moves to draw fouls."[304]

There is no reason to the league should have had to let the bizarre conduct by stars like Harden and Young go on for as long as it did. Instead,

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[298] Steve Aschburner, *The NBA's Protest Process: How it Works*, NBA.COM, March 4, 2020 https://www.nba.com/news/nba-protest-process-mavericks-await-news (describing protest process)

[299] *See* NBA Rules, *supra* note 12, at B(1)(a)

[300] *See* NBA Comments, *supra* note 238, at C.

[301] Tim Bontemps, *NBA Spells Out Focus on Stopping Players from Drawing 'manipulated' Fouls*, ESPN (Sept. 23, 2021), https://www.espn.com/nba/story/_/id/32264912/nba-spells-focus-stopping-players-drawing-manipulated-fouls.

[302] Rodger Sherman, *All the Ways James Harden Can Make You Foul Him*, THE RINGER, (May 14, 2018), https://www.theringer.com/nba/2018/5/14/17350878/james-harden-fouls-drawn.

[303] *Id*.

[304] NBA Official, Twitter.com, Aug. 8. 2021, https://twitter.com/NBAOfficial/status/1424437967494471692

if the Basketball Court existed prior to the summer of 2021, an opposing team that was the victim of one of these foul-drawing moves could have appealed a referee decision to the Basketball Court. The Court could have then determined whether moves of this sort were offensive fouls, defensive fouls, or neither. Its written decisions would give guidance to referees about how to call similar plays. In making these decisions, the Court could help the league's rules evolve, not spasmodically but gradually.

However, if it was asked to address in-game situations, the Basketball Court's remedial powers would need to be considered. In many cases in which sports leagues have had to interpret league rules, commissioners have held that game results should not be overturned outside of very limited circumstances.[305] CAS has established a strong rule that game results decided on the field should not be overturned on appeal in a courtroom.[306] Because any decision that does not end a game influences the tactical decisions teams engage in afterwards, it is impossible to know absolutely how a particular call impacts the outcome of the game (unless it is on a game-ending play, like a shot to win the game).[307] As a result, we think that, outside of extreme circumstances, the Basketball Court should not overturn final game outcomes.

However, if game results cannot be overturned, teams might not have enough incentive to bring cases challenging calls. We are not *too* worried about this. Teams might seek to have rule clarification about types of plays used by their rivals. Rivals of the Atlanta Hawks might want to see if Trae Young's move of stopping and leaning into the defender was within the rules, as a finding that it was not would be a detriment to the Hawks.

We think it might take a bit more incentive for parties to bring cases. The league might need to provide the equivalent of costs and fees for winning challenges. Here's our idea. Right now, each NBA team is allowed to "challenge" or force instant replay of one call per game.[308] If a team brought a successful challenge to the Basketball Court, we think they should be awarded with extra in-game challenges to use during the season.[309]

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[305] *See* BERMAN AND FRIEDMAN, *supra* note 23*, at* 52-60 (discussing principle and exceptions).

[306] *See* Foster, *Revisited*, *supra* note 121, at 5-7 (summarizing cases)

[307] BERMAN AND FRIEDMAN, *supra* note 23, at 460. NBA Commissioners have occasionally deviated from this rule. When the Atlanta Hawks official scorer wrongly attributed a foul to then Magic superstar Shaquille O'Neal, leading to him fouling out of the game, the Commissioner determined that the action had been grossly negligent, and ordered the game replayed from the moment of the foul. *Id.* at 49. This type of remedy should be in the Basketball Court's "bag" even if it is rarely used.

[308] *See* Coach's Challenge, NBA OFFICIAL, Sept. 19, 2019, https://official.nba.com/coachs-challenge/ (introducing and explaining the coach's challenge).

[309] One could imagine other incentives for bringing cases as well, including extra chances in the draft lottery (such as a modest increase in the chance of securing of a top pick in the draft

b. Off the Court

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.

For instance, as discussed in the introduction, the NBA has rules governing "tampering" or team contact with players or coaches under contract before the opening of the time of year when free agent players are allowed to be signed.[310] These rules, however, are notoriously underenforced and full of ambiguity about what constitutes contact outside of the rules.[311] Several years ago, the Commissioner of the NBA announced an effort to enforce the tampering rules; new by-laws were added to authorize tougher penalties.[312]

But this effort has faded. In the summer of 2021, the Chicago Bulls and Miami Heat engaged in a pretty egregious violation of the tampering rules, announcing new contracts with free agents within minutes of the window for negotiating with players opening up, making clear that they had negotiated the contracts beforehand.[313] After an investigation, the Commissioner announced a very weak penalty—the teams each lost one 2nd round draft pick—as their conduct, while worse, did not stand out that much from other cases of tampering.[314] This past summer two more teams—the New York Knicks and Philadelphia 76ers—engaged in pretty extensive tampering, but again were only penalized by losing 2nd round picks.[315] Perhaps the Basketball Court could hold hearings and differentiate between acceptable and unacceptable conduct, using specific situations to create

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of college players), slight increases in the salary cap for players, reductions in "luxury tax" for teams with excessively high levels of salaries or an extra claim on redistributed luxury tax money.

[310] *See* Jeffrey A. Mishkin, *Dispute Resolution in the NBA: The Allocation of Decision Making Among the Commissioner, Impartial Arbitrator, System Arbitrator, and the Courts*, 35 VAL. U. L. REV. 449, 450 (2001) (defining tampering)

[311] *See* Kevin O'Connor, *Let's Stop Pretending the NBA Cares About Its Tampering Rules*, THE RINGER (Aug. 21, 2017), https://www.theringer.com/nba/2017/8/21/16177684/magic-johnson-nba-tampering-paul-george.

[312] Steve Aschburner, *NBA Increases Fines for Tampering, Unauthorized agreements*, NBA.COM (Sept. 20, 2019) https://www.nba.com/news/nba-increases-fines-tampering.

[313] Phil Watson, *Miami Heat, Chicago Bulls Tampering Penalties Send the Message That the NBA Doesn't Care About the Issue*, SPORTSCASTING (Dec. 2, 2021), https://www.sportscasting.com/nba-tampering-penalties-send-message-doesnt-care-about-issue/

[314] *Id.*

[315] *76ers Lose 2023, 2024 Second-Round Draft Picks after NBA Tampering Investigation*, THE ATHLETIC (Oct. 31, 2022), https://theathletic.com/3749345/2022/10/31/76ers-tampering-pj-tucker-danuel-house/ (noting that the 76ers lost two second round picks for tampering with two players).

precedents that teams would then be obliged to follow. Having done so, it would be free to issue more severe penalties.

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 by-laws give the Commissioner that power to discipline players "for any statement he makes or endorses which is prejudicial or detrimental to the best interests of basketball and to suspend or fine the player for conduct that is detrimental to the NBA."[316] The Commissioner also has the power to punish players who are "guilty of conduct that does not conform to standards of morality and fair play."[317]

The Collective Bargaining Agreement between NBA Players and the league also makes clear that the Commissioner has extensive power to punish players for misconduct: the Commissioner can prescribe and punish "conduct that is harmful to the 'preservation of the integrity of, or the maintenance of public confidence in, the game.'"[318] Players can appeal league decisions on penalties for most off-the-court conduct and the most serious in-game penalties to an independent "grievance" arbitrator. But for penalties for on-court conduct that do not involve penalties greater than $50K and suspensions of more than 12 games, the only appeal of a Commissioner's decision is to the Commissioner themself.[319]

While suspensions are frequently imposed on players, they are also enforced against team owners. For instance, by 2014, Donald Sterling, then-owner of the NBA's Los Angeles Clippers, violated league rules on many occasions. In addition, he once sued the league for blocking his eventually successful effort to move the team from San Diego to Los Angeles.[320] Sterling was also the subject of repeated Justice Department inquiries into Fair Housing Act violations in rental properties he owned. None of these caused any major penalties.

In 2014, recordings of Sterling making racist comments to a girlfriend became public, leading players and advertisers to threaten to boycott games during an important playoff series unless penalties were issued against Sterling.[321] Article 13 of the NBA Constitution allows the league to kick out

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[316] NBA Const., *supra* note 14, § 2.35(d)
[317] *Id.*
[318] *Id.*
[319] *See* NBA, *Collective Bargaining*, *supra* note 2, art. XXXI ("Grievance and Arbitration Procedure and Special Procedures with Respect to Disputes Involving Player Discipline,") Cases involving the overall economic system created by the CBA go to the "system arbitrator," a person selected by the players and league together to decide cases of the highest importance. *Id.* at art. XXXII ("System Arbitration.").
[320] *See* Michael McCann, *Leagues and Owners: The Donald Sterling Story*, *in* THE OXFORD HANDBOOK OF AMERICAN SPORTS LAW (Michael McCann ed. 2017).
[321] *Id*.

owners if they violate one of ten conditions, after a 3/4 vote of the NBA Board of Governors about guilt and 2/3 vote to remove the owner.[322] Before that happened, NBA Commissioner Adam Silver announced that Sterling was banned from the NBA for life and had to pay a $2.5M fine for causing sponsors to abandon the league and for violating the league by-laws.[323] The Board of Governors never voted, as Sterling's wife seized control of the team and then sold it.[324]

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 2020-21, 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, an in-game headbutt, and directing threatening language at an official.[325] The NBA offers very little explanation why the damage to the league for pleading guilty to a felony for threatening someone is several times as much the damage caused by making anti-Semitic comments while being recorded while playing video games, and exactly 12 times as much as an in-game headbutt or directing threatening language at a referee.

The Basketball Court could play a role, developing a jurisprudence that establishes ranges of suspensions for certain behavior, and explaining or reversing decisions in specific cases. Doing so would not only create more horizontal fairness among players; it would reduce accusations that the league is favoring teams or superstars for commercial reasons.

Similar rule development may be appropriate in other situations where the facts on the ground keep changing. For instance, in all sports there

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[322] NBA Const., *supra* note 14.

[323] McCann, *supra* note 322. Article 35A of the NBA Constitution gives the Commission the right to suspend owners for engaging in conduct "prejudicial or determinantal to the Association." NBA Const., *supra* note 14.

[324] McCann, *supra* note 322.

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

is an active debate about what medical substances or technologies constitute illegal performance enhancing drugs or improper aids to gain an unfair advantage in violation of league rules.[326] The Court of Arbitration for Sport has been called on to answer questions about suspensions for violations of the World Anti-Doping Code or whether certain medical devices should be permitted in international athletic competitions. The Basketball Court could do something similar.

V. Conclusion

Contemporary public law remains focused on the principle that "power corrupts, and absolute power corrupts absolutely."[327] Giving too much power to too few people runs the risk that this power will be abused. The primary "security" [328] that public law so often contemplates to avoid the abuse of power is to separate out that power among "different departments."[329] 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 of excessively powerful leaders of companies. The separation of powers that is good for governments can therefore be good for many companies too. Courts can have an important role to play in the separation of powers, not only for the institutions that govern countries, but also for those that sell products.

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[326] BERMAN AND FRIEDMAN, *supra* note 23, at 280-310 (discussing cases).
[327] *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.").
[328] THE FEDERALIST No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).
[329] *Id.*