Buy Me Some Peanuts and Ownership: Major League Baseball and the Need for Employee Ownership

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BUY ME SOME PEANUTS AND OWNERSHIP: MAJOR LEAGUE BASEBALL AND THE NEED FOR EMPLOYEE OWNERSHIP

I. INTRODUCTION

In 1994, the World Series was canceled for the first time in ninety years.¹ Although the World Series did not succumb to the Great Depression, two World Wars, or the San Francisco earthquake, it could not endure mutual mistrust and greed. This note discusses the possibility of combining powerful unions and employee ownership to combat avarice and mistrust in Major League Baseball. Section two summarizes the events leading up to the cancellation of the 1994 World Series and the current conflict between the Major League Baseball Players ("Players") and the Major League Baseball Owners ("Owners"). Section three discusses the different possibilities of employee ownership and collective activity. Section four addresses the costs and benefits of employee ownership. The final section hypothesizes and evaluates a new system for Major League Baseball that combines strong union representation with partial employee ownership.

II. EVENTS LEADING TO THE CANCELLATION OF THE WORLD SERIES AND CURRENT SOURCES OF CONFLICT BETWEEN PLAYERS AND OWNERS

A. THE BASEBALL STRIKE

In August 1994, three months before the end of the 1994 regular season, the Major League Baseball Players Association² ("MLBPA") voted to strike.³ When the Players actually went on strike on August 12, 1994,⁴ they did not astound the Owners, sports writers, or American pub-

¹ The only other cancellation of a World Series occurred in 1904 when the New York Giants refused to play the Boston Pilgrims. The series was canceled because John McGraw, the manager of the National League, was still infuriated with Al Johnson, the president of the American League. Johnson had suspended McGraw in 1902, when McGraw was the manager of Baltimore in the American League, for excessive fighting with opponents and umpires. Gerry Fraley, World Series Streak Ends After 90 Years, DALLAS MORNING NEWS, Sept. 25, 1994, at 19B.
² The Major League Baseball Players Association is the collective bargaining unit for the forty-person rosters of each of the Major League Clubs.
lic at least in part because this was the Players’ eighth strike in twenty-three years.\(^5\) The 1994 baseball season began without a collective bargaining agreement or any formal contract between the Players and Owners.\(^6\) Accordingly, baseball enthusiasts knew there was a possibility of a strike. Refusing to play baseball, unfortunately, had become the Players’ only effective weapon to coerce the Owners into signing a collective bargaining agreement which did not include a salary cap.\(^7\) The potential and subsequent actual loss to the Players and Owners did not appear to affect the bargaining, and both sides refused to compromise.\(^8\)

On September 14, 1994, the Owners canceled the rest of the 1994 season and the negotiations continued to stagnate.\(^9\) Neither the Owners nor the Players appeared willing to negotiate on the most controversial point: the Owners wanted to impose a salary cap or an equivalent salary-restraint mechanism.\(^10\) The Owners emphatically stated that they would not open spring training for the 1995 season without a salary cap and the Players, equally emphatic, declared that they would not report to spring training if there was a salary cap in place.\(^11\)

**B. PRELIMINARY PROCEEDINGS IN FEDERAL COURT**

On December 23, 1994, the Owners, pursuant to federal labor law,\(^12\) declared an impasse in negotiations\(^13\) and attempted unilaterally to impose the terms of their most recent proposal to the MLPA.\(^14\) On March 15, 1995, the National Labor Relations Board (“NLRB”) issued a complaint and notice of hearing alleging, *inter alia*, that the Owners had violated § 8(a)(1) and § 5 of the National Labor Relations Act (“NLRA”)\(^15\) by unilaterally eliminating, before an impasse had been reached, salary

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\(^5\) Justice, *supra* note 3, at A22.

\(^6\) Silverman, 880 F. Supp. at 251.

\(^7\) Justice, *supra* note 3, at A1; Richard Justice, *Baseball Closer to a Strike*, WASH. POST, June 9, 1994, at D1, D7 [hereinafter *Closer to a Strike*].

\(^8\) Gordon Edes, *We’ve Nothing to Fear But Baseball Itself*, SUN-SENTINEL FT. LAUDERDALE FLA., Sept. 11, 1994, at 1C. Sports writers estimate that the owners lost between $700 million and $1 billion and the Players lost approximately $350 million. Larry Whiteside, *Q & A*, BOSTON GLOBE, Apr. 4, 1995, at 78.


\(^11\) Id. at A1.

\(^12\) NLRB v. Katz, 369 U.S. 736 (1962) (holding that unilateral action may not be taken before an impasse is reached).

\(^13\) Attempts to negotiate, however, continued until January 1995. Silverman, 880 F. Supp. at 252.

\(^14\) *Talks Collapse, supra* note 10, at A1.

\(^15\) Section 8 provides: “It shall be an unfair labor practice for an employer — (1) [t]o interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 ["Rights of Employees"]; . . . (5) [t]o refuse to bargain collectively with representatives of
arbitration for certain reserve players, competitive bargaining for certain free agents, and the anti-collusion provision of their collective bargaining agreement. The Owners withdrew their demand for a mandatory salary cap after the NLRB threatened to charge them with a violation of unfair labor practice for declaring an impasse before one existed.

In March 1995, the Players achieved a temporary victory. A Federal District Court in the Southern District of New York issued a preliminary injunction prohibiting the Owners from altering the 1994 work rules. The 233-day strike ended almost immediately. When the Southern District court issued the preliminary injunction, the Players offered to return to work under the term of the old agreement and the Owners immediately accepted the offer. After a shortened spring training, the Players began an abbreviated 1995 season on April 25, 1995.

C. THE PRESENT SITUATION

The situation, however, is far from being solved. The Owners and Players have not reached a collective bargaining agreement, and many sports writers believe that without an agreement, the "situation is ripe" for another strike. Arguably, the Owners are now in a stronger position to declare an impasse and unilaterally impose a salary cap. It appears


16 Silverman, 880 F. Supp. at 250.

17 Owners Remove Cap; Bargaining to Start Again, DET. FREE PRESS, Feb. 4, 1995, at 1B. Under section 8(5), "[i]t shall be an unfair labor practice for an employer . . . [to] refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)," NLRA § 8(5). Section 9(a) includes "wages." NLRA § 9(a).

18 Silverman, 880 F. Supp. at 261. U.S. District Judge Sonia Sotomayor ordered the Owners to restore free-agent bidding, salary arbitration and the anti-collusion provisions of baseball's expired collective bargaining agreement. The court held that the injunction would remain effective until: (1) the Players and Owners entered into a new collective bargaining agreement that replaced the expired agreement; or (2) there was a final disposition of the matters pending before the National Labor Relations Board; or (3) a "finding of this court upon petition of players or owners for a dissolution of the injunction demonstrating that an impasse in good faith bargaining occurred despite a reasonable passage of time negotiating in good faith the full mandatory terms of the expired basic agreement." Id.

19 On February 3, 1995, the Owners informed the NLRB that they had rescinded their earlier unilateral changes to the expired collective agreement and they would continue to negotiate with the MLBP. Id. at 252.

20 On March 29, 1995, the Players offered to return to work under the full terms of the expired collective bargaining agreement. Id.


22 Charles D. Marvine, Comment, Baseball's Unilaterally Imposed Salary Cap: This Baseball Cap Doesn't Fit, 43 KANS. L. REV. 625, 626 (1995).

23 Id. The NLRA requires the Owners to negotiate with MLBPA over "wages," see supra note 17. The Owners can now claim they have made a good effort "to bargain collectively with the representatives of [their] employees." Id.
that the Owners are poised to replace the mandatory salary cap once they are confident that the negotiations have reached an impasse.\textsuperscript{24}

Under the current system, baseball is headed for another disaster. In addition to the possibility that the Owners might declare an impasse, fan attendance and television audiences have dwindled since the last strike. One would expect that baseball generates enough money to satisfy both the Players and Owners. Unfortunately, the adversarial relationship between the Owners and Players has fermented over the past two decades and has made the current system unworkable. This note will propose a solution to the current situation. By affording Players partial ownership in their respective teams, the Owners and Players can begin to ameliorate their adversarial relationship and both will prosper.

III. DIFFERENT POSSIBILITIES OF EMPLOYEE OWNERSHIP AND COLLECTIVE ACTIVITY

Before delving into the possibility of player ownership in Major League Baseball, it is necessary to examine different possibilities of employee ownership and the costs and benefits of such possibilities. When discussing ownership, defining "ownership" is important. Ownership is typically construed as the possession of two rights: the right to control and direct the company and the right to appropriate the company's residual earnings.\textsuperscript{25} Control may be exercised either directly or indirectly.\textsuperscript{26} Direct control is characteristic of a direct democracy, where every owner has a vote in every decision. General partnerships are a good example of direct control because, subject to agreement otherwise among the partners, every partner has an equal stake in the corporation's future, and thus has a personal stake in selecting management and running the firm. Indirect control is more prevalent in larger enterprises, in which the owners vote to elect a board of directors. The board then oversees daily decisions of management.

Ownership can also be construed as the possession of only one or two twigs of an entire bundle of potential ownership rights. For example, in a limited partnership an owner may not have the power to control and direct the company but may retain the right to appropriate the com-

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\textsuperscript{24} Mark Maske, Baseball's Waiting Game: Now Both Sides Cool Off, WASH. POST, Feb. 12, 1995, at D1, D7 [hereinafter Waiting Game].
\textsuperscript{26} Id.
\end{flushright}
pany's residual assets. As the subsequent discussion will show, in many employee - "owned" companies, the employee receives residual earnings without the right to participate in daily decisions — and sometimes without the right to participate in any decisions.27

There are two distinct types of employee-owned firms: "employee-owned" and "beneficially worker owned."28 In the former type, employees, through an Employee Stock Ownership Plan ("ESOP"), customarily have a claim on most or all of the company's net earnings but have no control over the direction of the company.29 In such a company, the investors control the direction of the company and receive a portion of the company's residual earnings. In the latter type, the fiduciaries, i.e., the board of directors, control the firm but do not receive residual earnings.30 Under both of these models, it is important to note that the employees customarily do not exercise significant managerial control over the company.

A. THE CREATION OF ESOPs

1. The Enactment of ESOPs

The Employee Retirement and Income Security Act ("ERISA") of 1974 authorized and established the requirements for ESOPs.31 Almost immediately after promulgating ERISA, the federal government began to promote and encourage companies to create ESOPs.32 This policy has continued for the past two decades. In 1991, for example, there were twenty times more companies that had at least twenty percent employee ownership compared with ten years earlier.33 Economists predict that by the year 2000 there will be more employees in companies that are at least fifteen percent employee-owned than there will be in the entire trade union movement.34

When Congress authorized ESOPs in 1974, it immediately gave ESOPs certain tax advantages.35 Over the past two decades, the number of

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27 See generally infra part III.A.2.
28 Hansmann, supra note 25, at 1757.
29 Id.
30 Id.
34 Id. at 12.
35 Doernberg & Macey, ESOPs and Economic Distortion, 23 Harv. J. On Legis 103, 107-108 (1986). The 1974 act provided ESOPs with exemptions from certain requirements unapplicable to other benefit plans. Unlike standardized pension and profit-sharing plans; an ESOP afforded employees the opportunity to borrow money and the act stipulated that ESOP
advantages has increased\(^3\) and the popularity of ESOPs has risen.\(^3\) Theoretically, under ERISA, ESOPs are designed to help employees by creating a deferred compensation plan whereby an employer deposits stock in a trust fund for the benefit of its employees.\(^3\) This fund often serves as a reserve for employee pensions.

2. Providing Participation Only Through Earnings and Not Through Control

A large number of the academics in the field assert that the intent behind the creation of ESOPs was not to give employees control but to enable the owners of capital to control and pacify their employees.\(^3\) How can an owner donate stock to her employees without parting with any control?

An owner can establish an ESOP through a written agreement.\(^4\) This agreement is usually negotiated between company officials and financial representatives and employee representatives (either union or non-union).\(^4\) The agreement establishes a structure and provides authorization for an employee stock ownership trust ("ESOT").\(^4\) The ESOT is a separate document from the actual ESOP, and the ESOT's function is to hold all the assets of the ESOP.\(^4\)

\(^3\) The 1986 Tax Reform Act extended the preexisting tax subsidies to ESOPS (the most important of which was the exclusion from taxable income of 50% of the interest income from loans to ESOPS. I.R.C. § 133 (1986)).

ESOPs have also been encouraged on the state level. For example, in 1982 the California legislature declared that the official state policy was to encourage employee ownership. Employee Ownership Act, 1983 Cal. Legis. Serv. 5347 (West). Two years later, the New York legislature directed its Department of Commerce to assist employee-owned enterprises in various ways, include the issuance of bonds to help finance employee buy-outs at rates below prime. 1983 N.Y. Laws 1476 (McKinney).

ESOPs have also been used to help block hostile takeovers. See, e.g., Shamrock Holdings, Inc., v. Polaroid, Fed. S. L. Rep. (CCH) ¶ 94, 176 (Del. Ch. Jan. 6, 1989, as amended Mar. 20, 1989) (permitting creation of ESOP as takeover defense under particular circumstances). In practice, however, ESOPs are generally used by owners to secure tax advantages and pacify employees. See infra part III.A.2.

See generally Julie Lynn Kaufman, Democratic ESOPs: Can Workers Control Their Futures?, 5 Lab. Law. 825 (1989).

The typical ESOP is roughly equivalent to a stock savings plan where shares are held in trust for the employees. ESOPs are distinguishable in that the company's owners generally appoint a trustee, who is entitled to vote the shares of stock in the trust. This presents an obvious conflict because the trustee owes a fiduciary duty to the employees but her job security depends on pleasing the owners.

Theoretically, the appointed trustee(s) has exclusive authority and discretion to administer the ESOT for the “exclusive benefit of plan participants.” Under ERISA, a fiduciary can appoint the trustee or the trustee can be named in either the document establishing the ESOP or the ESOT. In practice, the owners appoint the majority of fiduciaries and trustees because the owners believe they can coopt the trustee; i.e., the trustee will support ownership decisions — possibly to the detriment of employees.

The Internal Revenue Code also crystallizes the dichotomy between owing a fiduciary duty to the employees and benefiting ownership. The Internal Revenue Code § 401(a) defines an ESOP as an employee benefit or specialized stock bonus plan; notwithstanding such a definition, the regulations promulgated by the Internal Revenue Service view ESOPs as a tax benefit to the owners, not as a benefit for the employees.

Many academics argue that owners use ESOPs as a pacifying technique in the struggle between owners and employees: ESOPs give employees just enough to keep them happy, quiet, and more productive. The owners can prevent their employees from gaining too much control through an ESOP by making sure that a substantial fraction of the stock held by the ESOP is non-voting stock. Henry Hansmann, in his article on employee ownership, describes the traditional view toward employee participation in control of the company:

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45 Id.
47 Id.
48 Kaufman, supra note 39, at 829.
49 I.R.C. § 401 (1995) lists the requirements for a qualifying plan: “A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees . . . .” Id. ESOPs are beneficial to owners because they can finance capital investments more easily with the use of an ESOP. The owner receives loan proceeds from the employee stock owned trust (ESOT) in return for stock to the ESOT. Repayment of the loan by the owner is tax-deductible and is made with future profits.
50 BLASI, supra note 44, at 123-37.
51 U.S. GEN. ACCOUNTING OFFICE, EMPLOYEE STOCK OWNERSHIP PLANS: BENEFITS AND COSTS OF ESOP TAX INCENTIVES FOR BROADENING STOCK OWNERSHIP 18, 39-40 (1986). The median ESOP holds 10% of the total stock of the sponsoring company; however, it holds only 5% of the voting rights. Id.
The fact that workers typically do not participate in governance of these firms suggests strongly that those responsible for structuring them believe that any reduction in agency costs that might result from making management directly accountable to the firm’s workers, even though the workers are already the firm’s beneficial owners, would be outweighed by the cost—perhaps in the form of inefficient decisions or high process costs—that would be engendered by the political process required for such accountability.52

This view toward employee lack of control has been well documented. Hansmann noticed that even in situations where the ESOPs own as much as seventy-five percent of the stock, the employees do not necessarily have any control of the company.53 Some researchers have found that even in a one-hundred percent employee-owned company, workers can be totally insulated from the process of electing board members and from making decisions regarding the company’s future.54

Accordingly, until recently, genuine advocates of employee governance did not support ESOPs.55 The traditional view has been that ESOPs generally do not provide for substantial worker participation, do not eliminate conflict of interests between labor and management, and lack the benefits that normally accompany employee ownership.56 The more recent and optimistic view is that there are some reasons to think that most of the ESOPs of the 1980s will evolve during the 1990s into a “new and exciting form of partial employee control.”57 The recent but moderate view supports the idea that many firms with ESOPs will evolve somewhere between the traditional and optimistic views: with employees exercising a role analogous to that of shareholders with modest stakes in a company but not the type of control generally associated with nineteenth-century worker cooperatives.58

In the twentieth-century billion dollar business world, ESOPs are necessary but not sufficient. Reverting to nineteenth century coopera-

52 Hansmann, supra note 25 at 1799.
53 Id.
58 Id.
tives would be virtually impossible for a multimillion dollar company. If employees want some control of a company, they need an organized and formal structure to obtain control. It is equally clear, however, that ESOPs have not generally afforded employees the opportunity to take a greater role in corporate governance. This note will show that when ESOPs are combined with powerful unions and other forms of strong employee activity, they can afford employees an opportunity to participate in corporate governance to the benefit of both employees and owners.

B. UNIONIZATION

How can ESOPs develop in such a way as to afford employees a greater role in cooperate governance? Stronger unions are the solution. Most employees, as individuals, do not have the power or economic sophistication to participate actively in ESOP agreements without the assistance of powerful unions.

1. Unions' Traditional Role

Traditionally, "[unions'] political process is used not to select the firm's management but to select representatives to bargain with a management chosen by the firm's shareholders." The academic literature suggests that unions are declining in importance. In 1935, unions were expected to become strong adversarial units to enhance employee rights through collective bargaining. Sixty years later, highly skilled employees do not generally belong to unions: in the 1990s unions are generally composed of the lesser skilled employees.

For the last sixty years, union strength has vacillated. At times, the employees that unions represented did not receive significant support from their respective unions. Traditionally, unions bargained with management over a narrow range of issues, including: minimum wages, maximum hours, and job classifications. If a union was not required to

59 Hansmann, supra note 25, at 1804.
60 See generally Hansmann, supra note 25; Hyde, supra note 57; BLASI & KRUSE, supra note 33.
62 Moreover, where unionized jobs were diverse, employees tended to be fractioned into separate bargaining units. Hansmann, supra note 25, at 1804.
63 Under §9(a) unions are only required to bargain over "wages, hours, and other terms and conditions of employment." NLRA, supra note 15, § 9(a). This provision does not prevent negotiations between the union and the employer concerning other issues, however, such issues are permissive rather than mandatory. The distinction between mandatory and permissive is imperative when determining when the union or owners violated § 8(a)(5); both parties owe a higher duty if the unilaterally terminate a mandatory act. For a discussion of the difference between mandatory and permissive issues see Ohio Power Company and Local Union No. 478 (Utility Workers), 317 N.L.R.B. 135 (April 28, 1995).
negotiate over a certain issue, it tended not to concern itself with that issue. Unions tended intentionally to confine their scope of bargaining.

2. Unions' Potential Role in Employee Ownership

Section 9(a) of the NLRA does not specifically confine the union's role. The statute mandates union involvement in certain issues and specifically authorizes union involvement in negotiating permissive issues.

a. Traditional Enemies

In the 1980s, unions did not approve of ESOPs for two reasons. First, unions felt ESOPs interfered with previous union victories. Second, practical and ideological differences existed between union goals and employee ownership goals.

Unions feared that ESOPs would meddle with industry-wide wage rates and would jeopardize employee pension plans. In the 1980s, unions were relatively successful in achieving industry-wide wage rates, i.e., union members would receive the same pay for the same work, regardless of where they worked. The owners, however, demanded concessions in return for an ESOP. In order to participate in an ESOP employees had to make wage and benefit concessions. Accordingly, there could be a vast salary discrepancy between employees doing the same job at different companies. Thus employee ownership violated what some perceived as a basic tenet of unionism.

Unions also feared that ESOPs could jeopardize employee pension plans. ESOPs generally replace rather than supplement pension plans. The unions, understandably, believed that ESOPs were not adequate substitutes for pension plans. A paradigm strength of a pension plan is diversification. With an ESOP, the funds are invested in only one company; accordingly, the funds are not diversified and are subject to a greater risk. The employee, by investing all of her stock in the same

65 The recent literature suggests, however, that unions are beginning to enlarge the scope of bargaining. Stone, Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities, 55 U. Chi. L. Rev. 73, 86-96 (1988).
66 Under § 9(a) the union is afforded the power to negotiate over "rates of pay, wages, and hours of employment, or other conditions of employment. NLRA, supra note 15, § 9(a).
68 Id.
69 Id.
70 Id. at 107-09.
71 Id.
place she works, is putting all of her eggs in one basket. If the company
fails, the employee will not only lose her job, but will also be left with
worthless stock with limited future potential income.\textsuperscript{72}

The discontent with ESOPs also stemmed from a more ideological
fear. Unions viewed employees and owners as irreconcilable enemies.
According to many union leaders, the introduction of ESOPs was simply
another device to coopt workers' sympathies and weaken union strength.
Unions believed that owners would placate the leaders of the new em-
ployee-owners and "persuade" them to side with the owners on contro-
versial issues.

b. Employee Ownership and its Ability to Revitalize the Labor
Movement

Employee ownership could revitalize the labor movement by pro-
viding a structured framework for increased employee participation and
control. Unions could protect employees' interests during the ESOP ne-
gotiations with the owners. If employees want to have input in establish-
ing the control mechanisms of the ESOP, (i.e., the allocation of voting
versus nonvoting stock, mandatory information exchange, the right to
elect board members, and other employee benefits), the time to protect
this employee input is \textit{before} the ESOP instrument is completed and im-
plemented.\textsuperscript{73} Most employees lack the necessary information, education,
experience, and collective force to assert effective influence upon the
ESOP agreement. The unions could provide these missing elements.

Moreover, employees who are ESOP participants have concerns as
shareholders in addition to their concerns as employees. If employees
want to maximize their power as shareholders, they need to act together
in an organized fashion. Coordinated action requires informed investors
who understand the workings of their corporation in particular and the
stock market in general. Unions could fulfill these needs and make em-
ployees equal bargaining partners with the owners.

3. Collective Bargaining and the Role of Unions

In his article, \textit{New Directions in Worker Participation and Collec-
tive Bargaining}, Robert Moberly asserts that all programs for employee
participation depend on successful sharing of information:

The ability of workers to participate in company deci-
sions will always be limited so long as they are unable to

\textsuperscript{72} Tom Petruno, \textit{Market Beat: Standard Brands' Story May Get Even Gloomier}, L.A.
\textsc{times}, April 24, 1991, at D1, col.5; Jesus Sanchez, \textit{Workers Angry Over Big Stock Losses},
L.A. \textsc{times}, Feb. 12, 1991, at D1, col. 2.

\textsuperscript{73} Kaufman, \textit{supra} note 39, at 827.
obtain financial information about the company, including profits, costs, production figures, and other information concerning an employer’s ability to pay or to operate effectively.\textsuperscript{74}

Moberly asserts that unions will be unwilling to agree to wage concessions in return for employee ownership unless the company is completely honest and open with respect to its financial condition.\textsuperscript{75} The company’s duty to share information, however, is very limited under the NLRA. The NLRA does not require an owner to divulge financial information, unless the owner claims an inability to pay.\textsuperscript{76} Consequently, owners avoid claiming inability to pay unless divulging such financial information is to their advantage.\textsuperscript{77}

As discussed earlier,\textsuperscript{78} the NLRA and the Supreme Court have drawn a distinction between mandatory and permissive bargaining.\textsuperscript{79} There are numerous permissive items that are extremely important to employees, such as if their shares of stock will be voting or non-voting. The unions are not required to consider these topics in their collective bargaining agreements with the owners, but the unions do have the statutory power to consider these and other pertinent issues.

C. Employees on a Company’s Board of Directors

Unions not only have the power to influence the appropriate percentage of shares that employees are able to vote, but unions also have the power to negotiate for employee membership on boards of directors.

1. The Chrysler Experiment

Chrysler Corporation was the first major American company to experiment with union representation on a board of directors. In 1979, Chrysler was in great financial distress. In a bold move to climb out of this financial crisis, Chrysler’s management asked the President of the United Auto Workers (“UAW”), Douglas Fraser, to serve on its Board of Directors.\textsuperscript{80} In 1985, when his term expired, Fraser said that his eight years of service were constructive, informative, and useful to both the

\textsuperscript{75} Id.
\textsuperscript{77} Moberly, supra note 74, at 781.
\textsuperscript{78} See supra note 66 and accompanying text.
\textsuperscript{80} Moberly, supra note 74, at 766.
UAW and the Chrysler Corporation.\textsuperscript{81} Accordingly, Chrysler's local union leadership voted to continue the practice of having a union leader on the Chrysler Board of Directors.\textsuperscript{82} Taking their lead from Chrysler Corporation, other large companies began to allow employee participation on their boards of directors.\textsuperscript{83} Generally, however, only those companies in severe financial distress resulting from foreign competition or forced deregulation invited such employee participation.\textsuperscript{84}

In his article, Robert Moberly argues that successful agreements for employee membership on a board of directors should include five elements.\textsuperscript{85} First, the union should have an active role in choosing the individual to sit on the board of directors.\textsuperscript{86} Second, the chosen director should represent the interests of both union and non-union employees.\textsuperscript{87} Third, the union representatives should participate in certain business decisions.\textsuperscript{88} Fourth, the owners should allow the representatives to comment and make suggestions with respect to business plans, major capital expenditures, construction of new facilities or remodeling of existing facilities, and the development of new designs and plans.\textsuperscript{89} Fifth, the union representatives should have unconstrained access to the company's financial information. Moberly concludes that if owners gave employees more control in corporate governance and full information with unlimited union access to financial data, the company's productivity would improve, employees would be happier, and there would be greater job security for the employees.\textsuperscript{90}

\textsuperscript{81} Id.

\textsuperscript{82} The Chrysler Board of Directors was not as enthusiastic. When Mr. Fraser declined to stand for reelection to the Chrysler Board, there was a dispute over the nature of his seat. Mr. Fraser emphatically stated that his seat was granted to the UAW in 1979 in return for labor-cost concessions, and that his role on the board has been to serve as a representative of the Chrysler Workers. According to the Chrysler Corp., however, Mr. Fraser was granted a seat on the board in recognition of his personal talents and stature in the automobile industry. Melinda Grenier Guiles, Fraser Says He Won't Stand for Reelection to Chrysler's Board, WALL ST. J., 1984 WL-WSJ 232964, Mar. 2, 1984; Melinda Grenier Guiles, Chrysler is Likely To Name UAW's Bieber to Board; Union Seen Controlling Seat, WALL ST. J., Oct. 4, 1984, 1984 WL-WSJ 214024 at *1.

\textsuperscript{83} Moberly, supra note 74, at 766.

\textsuperscript{84} For example, the airline, trucking and steel industries all considered the use of an ESOP and employee participation on board of directors. Id.

\textsuperscript{85} Moberly, supra note 74, at 766.

\textsuperscript{86} Id.

\textsuperscript{87} Id.

\textsuperscript{88} Id.

\textsuperscript{89} Id.

\textsuperscript{90} Id.
2. ESOPs and Corporate Governance

Traditionally, employees voted with management in takeover battles because their primary concern was protecting their jobs.\(^9\) With the plethora of mergers and acquisitions in the 1980s, employees quickly learned that if a corporate raider buys a highly leveraged company, the raider will frequently scale back operations to decrease the company's debt.\(^2\) Consequently, the raider will fire numerous employees. For example, "[d]uring 1984 and the first half of 1985, takeovers affected an estimated 550,000 jobs related restructuring decisions."\(^3\) Thus, employees voted with management to block the takeover. The managers voted to block the takeover because they feared that the new owners would replace them with their own management team.

Institutional investors and individuals making tender offers, \textit{i.e.}, corporate raiders, are challenging this view. Corporate raiders are de-emphasizing the use of leveraging takeovers and want rights as shareholders. Institutional investors also want rights as shareholders. Accordingly, when a raider prevails with a tender offer, the company that emerges is generally more financially sound than a company emerging from a leveraged buyout.\(^4\) Thus, there is less need to scale back operations and employees will not necessarily lose their jobs.\(^5\)

Moreover, the growth of institutional investors has increased the power of ESOP participants.\(^6\) In 1991, institutional investors controlled between forty-five and fifty percent of the total stock market and forty-eight percent of the top one thousand companies.\(^7\) Additionally, in 1991, thirty percent of the top one thousand companies were sixty percent owned by institutional investors.\(^8\) The rise of the institutional investors and the decrease in the number of hostile takeovers have set the stage for employees to assert greater influence in corporate decision making.\(^9\) The issues to be decided range from divestment in South Africa to appointment of union leaders on company boards of directors.\(^10\)

As the discussion below will show, employee influence on corporate de-

\(^9\) \textit{ESOP's Might Be a Help to Buyouts}, \textit{PENSIONS AND INVESTMENT AGE}, April 15, 1991, at 8 (hereinafter \textit{INVESTmENT AGE}).
\(^2\) \textit{Id.}
\(^4\) \textit{INVESTmENT AGE}, supra note 91 at 8.
\(^5\) \textit{Id.}
\(^6\) BLASI \& KRUSE, supra note 33, at 2.
\(^7\) \textit{Id.}
\(^8\) \textit{Id.}
\(^10\) \textit{Id.} at D5.
cision making can lead to greater employee satisfaction and prosperity not only for the employees, but also for the owners.

3. Prospects for the future

The recent literature suggests that there are no theoretical or legal problems with employee representation on boards of directors. In his article, *Codetermination in the United States: A Projection of Problems and Potentials*, Professor Robert Summers articulates a theoretical basis through which employee representation on boards of directors could be integrated by statute into the American industrial relations system. Moreover, no legal hindrances to employee ownership exist. The NLRB did not object to Douglas Fraser’s appointment to the Chrysler Board of Directors. The NLRB general counsel stated that there was no unlawful conflict of interest or owner domination.

The future is optimistic but uncertain. Professor Hyde writes:

At this point it is unclear just how much power employee shareholders will assert. Employees have been tentative in using their new power because they are not accustomed to being shareholders. As they become more seasoned and sophisticated in this role, employees are likely to take advantage of the current corporate climate and assert themselves to a greater degree. This will result in a new balance of power in corporate governance.

IV. POTENTIAL COSTS AND BENEFITS OF EMPLOYEE OWNERSHIP

Part III suggested that combining stronger unions with ESOPs would benefit employees and owners. To evaluate this concept fully, it is necessary to appreciate the benefits and costs of employee ownership.

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103 The Federal Trade Commission also sustained employee participation under antitrust laws. *Id.* There are potential problems, however, when a director of a union takes a seat on the board of directors. As a director, she would owe a fiduciary duty to all shareholders. As a union representative, she would owe a fiduciary duty to her union members. This situation has not been clearly addressed by the courts, but it appears that some unions are technically circumventing this potential dilemma by having retired union leaders sit on the board of directors. Telephone Interview with Lynn Williams, Former General Counsel of Steel Workers Union (Nov. 13, 1995).

A. Benefits

Professor Hyde gives an optimistic but qualified view concerning the future of employees’ role in corporate governance. According to Hyde, employee ownership is most appealing where, in addition to the ordinary conflicts of interest between owners and employees, the history of ownership opportunism has led to a lack of trust between owners and employees. Employee ownership in this situation, accompanied by genuine employee control, offers a potential avenue to reduce conflict of interest and supervision costs, increased sharing of information, fewer Prisoner Dilemmas, and more efficient long-term labor contracts for both the employees and the firm.

1. Monitoring and Motivating Employees

In theory, there is a high inverse correlation between the ability to monitor employees and the hazard of employees shirking their responsibilities. The more difficult it is to monitor employees, the greater the opportunity for employees to shirk. Employee ownership would decrease shirking problems. If employees owned the company, they would bear all the costs of their shirking. It is true that each individual employee would only bear a small fraction of the cost of her shirking and there would be problems of “free riding” with employee ownership; however, each employee would have a greater incentive to monitor her fellow employees and pressure them not to shirk.

In practice, this correlation is not completely linear. Initially, one would suspect that monitoring someone doing manual labor would be relatively easier than monitoring someone engaged in a more cerebral profession. Accordingly, one would suspect that there would be less need for employee ownership in the industrial sector than in the service sector. Thus, it would appear logical that there is a high degree of employee ownership in law firms and a relatively low degree of employee ownership in construction firms.

The logic is partially flawed, however, because it has become a common practice in many law firms to compute with relative accuracy the marginal contribution of a lawyer to the law firm’s net earnings. By comparison, computing the marginal contribution of a supervisor in a construction firm would be extremely difficult.

105 Id.
106 Id.
107 Id.
109 Hansmann, supra note 25, at 1763.
Accordingly, monitoring alone does not suffice as an explanation for employee ownership. The other obvious explanation is motivation. Arguably, partners in a law firm work long hours not because other lawyers are monitoring them but for more basic reasons — self-esteem, professional responsibility and a desire to increase the firm's profits. Their wages, however, are based on a percentage of the firm's profits. Thus they also encourage other lawyers to work harder.

2. Employee Lock-in

In addition to the extrinsic factors, employees have intrinsic incentives which not only increase their desire to keep their jobs, but which also make the employees vulnerable to exploitation. By working for a company for a long time, employees make personal investments in the community where they are employed. Employers do not adequately compensate for these investments in the employee's discharge benefit's package. When an employee works for a company for a long time, a spouse may be employed in the same vicinity, her children attend the local schools, and the family makes certain ties with the community. Accordingly, the employee's valuation of her present company may exceed the potential financial compensation from employment elsewhere. Under the antagonistic model of behavior between employees and owners, when the owner realizes that an employee has made these personal investments, the owner will have an incentive to act opportunistically by either reducing her wages or demanding more from her employees.

If the employee perceives this possible exploitation, she will generally insist on higher starting wages. The employee may also resist making otherwise efficient company-specific investments, i.e., training that would help her with her present job. The cumulative effect of this perception will make contracting for employment more costly to owners and employees.

Employee ownership helps negate the antagonistic model. Why would anyone be antagonistic with herself? Employee ownership reduces the incentives for exploitation and reduces the cost of contracting for employment. As employee-owners, they will appreciate the need for long term contracts and other avenues to help avoid this opportunism.

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110 Id. at 1764.
111 Id.
112 Id.
113 Id. The employee may also insist on extensive employment and wage guarantees. Id.
3. Strategic Behavior in Bargaining

Many employees believe that their employers do not comprehend or appreciate their preferences. Accordingly, these employees are poised in an adversarial relationship with their managers/owners. Moreover, employees perceive that the owners want to get the most out of them for the least amount of compensation. Consequently, employees might emphasize certain preferences other than their personal desires if they think the owners will acquiesce to those preferences. Under the antagonistic model, it is a zero-sum game. From the employees’ point of view, every perceived victory for them is a defeat for the owners. When employees and owners play this game to its logical conclusion, employees will not be motivated by their personal desires. Professor Hansmann suggests that “[b]y merging labor and management, [the merger] removes their conflict of interest and assures that they share the same information.” Accordingly, when they share the information, employees and owners will cease playing their respective power games and only negotiate the preferences that truly concern them.

4. Costs of Delegating Decisions to Outside Management

Most investors glean their knowledge about the company solely from the company prospectus, which is prepared by the owners, and thus make their decision to invest solely on the basis of outside knowledge. Investors’ knowledge is second-hand, and they elect a board of directors who may or may not be knowledgeable about the company. Employees, on the other hand, have first hand knowledge. If the employees were owners they would be able to make decisions that were within their area of expertise and would be better equipped to select managers and directors.

5. Enjoyment in Governance

Lastly, employees receive an intangible benefit from employee governance. Hansmann suggests that “[i]ndividual workers might enjoy the process of collective decision-making as a communal activity that is satisfying in itself quite apart from the character of the decision reached.” There is no reason to believe that employees are any different from other individuals who enjoy this process and would not gain psychological satisfaction simply from the sense of being in control. If owners gave their employees some control in making company decisions, employees might be willing to sacrifice a certain percentage of their wages. Moreover, it

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114 Id.
115 Id. at 1766.
116 Id.
117 Id.
is axiomatic that productivity increases when employees are happier and are more concerned about their company’s future. Consequently, instead of the zero-sum game, employee governance will add to the economic and personal satisfaction of both employees and owners.

B. Costs of Employee Ownership

Employee ownership is not all a bed of roses. Employee ownership creates certain problems for the company and the employee.119

1. Raising Capital

A common skepticism about employee ownership is that lenders would be potentially more risk averse to lending money to employee-owned companies because, as shareholders, employees are the equity owners of the firm. Accordingly, employees are first in line to receive the company’s profits. However, if the company goes bankrupt, a bankruptcy court will subrogate their interests to creditors. With employee-owned companies, it is conceivable that the lenders would fear that because the employees are also equity owners, employees would attempt to divert profits into dividends and not worry about paying off liabilities, until perhaps it was too late.

This skepticism is without foundation. Regardless of who owns a company, the owners are always entitled to the residual assets, and lenders are always concerned about owners taking profits rather than paying liabilities. Lenders can (and do) protect themselves by making certain demands in a loan agreement. Lenders typically require companies to specify under what conditions they will pay dividends. Lenders can also require additional security for their loan.

2. Under-Diversification

If employees supply the required capital themselves in the form of a pension plan or another form of personal wealth in the company, the employees in employee-owned companies would be severely under-diversified.120 There are two types of capital: human capital (workers) and investment capital (shares of companies). In an employee-owned company, both types of capital are in the same place. If the company folds, the employee-owner will lose her human capital and her investment capital.

The under-diversification problem becomes exacerbated by the fact that the employees’ pension plans are also located in the same company.

118 See infra Part VI.A.3.
119 See infra Part V.B.2.b to see how these costs, in the context of baseball, are negated.
120 Hansmann, supra note 25, at 1772.
In the last twenty years, diversification has been one of the most profitable investment strategies. By combining their savings, pension plans, and salaries into the same company the employees are taking a greater risk. If employees lose their jobs, they will not only lose their wages but may lose their savings as well.

3. Lack of Managerial Skills

A common concern about employee ownership is that the employees lack the necessary skills to run the company. Hansmann addresses this issue by stating: "an individual worker need not herself have the expertise to make managerial decisions in order for her to exercise her voice effectively as an owner. She need only be able to vote intelligently in electing the firm's directors." Moreover, as partial owners the ESOP agreement could stipulate that the employees could only influence certain decisions. As part owners, the employees would want what is best for the company. Arguably, they will act rationally and not try to influence decisions which should be made by the owners or managers.

V. BASEBALL

A. Wage Scale

The concept of a wage scale in professional sports was first introduced by Darryl Hale, in his article entitled *Step Up to the Scale: Wages and Unions in the Sports Industry*. Hale implicitly supports the idea of greater union involvement in sports bargaining and expressly advocates the elimination of agents. This note incorporates the concept of a wage scale as a base and explicitly encourages combining greater union involvement and ESOPs to the wage scale concept.

1. Sports Bargaining

The MLBPA collectively bargains with Players and Owners about fringe benefits and basic employment conditions. Section 9(a) of the NLRA states that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such a unit for the purposes of collective bargaining. . . ." Baseball, however, is different from most other unionized industries because, in baseball, players can negotiate their individual sal-

121 *Id.* at 1806.
123 *Id.*
124 NLRA, *supra* note 15, § 9(a) (emphasis added).
aries directly with the owners.\textsuperscript{125} This negotiation occurs through a bi-
furcated system. The MLBPA establishes the minimum contract terms
and allows the players’ personal agents to negotiate with the owners over
the contract length and salaries.\textsuperscript{126}

The majority of Players selected the MLBPA for the purpose of
collective bargaining. Accordingly, the MLBPA has exclusive jurisdi-
cction as the bargaining representative for the Players. The union, how-
ever, has implicitly waived its exclusive jurisdiction by failing to pursue
league-wide scales.\textsuperscript{127} As a result, the Players’ personal agents have the
power to negotiate contracts with the owners individually.\textsuperscript{128} Although
most people would not consider million-dollar-athletes deprived or
abused, this bifurcated system creates inequality among the Players. Bi-
furcating the system and affording agents this extensive power makes
certain Players, despite the collectively bargained contract minimums,
vulnerable to agent abuse.\textsuperscript{129}

2. \textbf{Agent Argument that Imposition of a Wage Scale Will
Infringe Upon the Player’s Freedom to Contract and
Participate in Voluntary Exchanges}

The agents assert that imperfections in the system will be cured by
the “market.” The market theory is that with perfect information, the
laws of supply and demand will assure a fair system. The agents argue
that the market will correct the exploitation problems because Players
will pick the fair, honest, and talented agents.\textsuperscript{130} Accordingly, the Play-
ners will drive the corrupt agents out of the market. The core of the
American Constitution, according to these agents, is freedom and indi-
vidual autonomy. According to lawyers in the field of law and econom-
ics, freedom of contracts facilitates efficient labor markets.\textsuperscript{131} Moreover,
the agents argue that a wage scale is a foreign element imposed by a

\textsuperscript{125} Philip J. Closius, \textit{Not at the Behest of Nonlabor Groups: A Revised Prognosis for a
Maturing Sports Industry}, 24 B.C. L. Rev. 341, 385 (1983). Although this note only discusses
professional baseball, there are similar systems in football and other professional sports; the
distinction here is between professional sports and other unionized industries.

\textsuperscript{126} Robert C. Berry & William B. Gould, \textit{A Long Deep Drive to Collective Bargaining:

\textsuperscript{127} Closius, supra note 125 at 385.

\textsuperscript{128} Id.

\textsuperscript{129} Michael A. Weiss, \textit{The Regulation of Sports Agents: Fact or Fiction}, 1 Sports Law.
J. 329, 330-31 (1994). Weiss argues that there are seven common indiscretions associated
with sports agents: (1) income mismanagement; (2) excessive fees; (3) conflicts of interest; (4)
incompentence; (5) overly aggressive client recruitment practices; (6) disruption of existing
contractual relationships; and (7) misappropriation of funds entrusted to the agent by the ath-
lete. Id. at 331.

\textsuperscript{130} Hale, supra note 122 at 125.

remote foreign body that is not likely to have better information concerning the Players' individual preferences.\textsuperscript{132} The actual contracting parties, the Players and Owners, have the best information.

The market is not a panacea. The market does not correct the lack of financial and entrepreneurial skill of athletes, especially entry level athletes. On the other hand, a wage scale negotiated by the Players' union would help equalize the otherwise inherent power differentials. Many Players lack bargaining power because they did not attend big-league sports colleges and were not first-round draft choices.\textsuperscript{133} In addition, some Players lack the financial and educational resources to hire any agent at all and are left with a "take it or leave it contract."\textsuperscript{134}

3. Wage Scale as Negotiated by the Players' Union — Not a Foreign Public Body

The Players' Union is the only collective entity that has both the experience and knowledge necessary to address the concerns facing professional athletes.\textsuperscript{135} Section 8(a)(5) of the NLRA states that the unions have the statutory right to obtain necessary and relevant information from the Owners to protect the bargaining interests of its members.\textsuperscript{136} Section 8(b)(1)(a) of the NLRA states that the unions owe a fiduciary duty to their members.\textsuperscript{137} The Supreme Court has strictly enforced the duty of fair and adequate representation on unions because the Court intends unions to be the exclusive bargaining representatives of their members.\textsuperscript{138} The authority of the exclusive bargaining representative is similar to a legislative body: both have the power to restrict the rights of its representatives but both also have a duty to perform their representation fairly and without discrimination.\textsuperscript{139} Thus, MLBPA as the elected

\textsuperscript{132} Hale, supranote 122, at 125.
\textsuperscript{133} Id. at 125-26.
\textsuperscript{134} Id. at 126.
\textsuperscript{135} Id.
\textsuperscript{136} NLRA, supranote 15, § 8(a)(5). Neither players nor their representative agents have the statutory right to such information. Michael Eggert, Comment, Union Obligations to Disclose Information Under the Duty of Representation: A Survey 25 Duquesne L. Rev. 959 (1987).
\textsuperscript{137} NLRA, supranote 15, § 8(b)(1)(a); The NLRA does not cover agents; accordingly, they do not have a statutory mandate to represent their representatives fairly and without discrimination.
\textsuperscript{138} Steel v. Louisville & Nashville R.R., 323 U.S. 192 (1944). In a recent decision, the NLRB expanded upon the unions obligations. International Union of Elec. Workers, Local 444 (Paramax Sys. Corp.), 311 N.L.R.B. 1031 (May 28, 1993). The board imposed an affirmative duty on unions to provide information to all employees working under union-security clauses requiring "membership in good standing," regardless of whether an employee has requested the information or whether the union has engaged in unlawful conduct. Id.
\textsuperscript{139} Hale, supranote 122, at 134.
bargaining agent for the Players has the statutory right to certain information and the statutory responsibility of treating all players fairly.

B. **Benefits of a League-Wide Wage Scale**

There are three prominent benefits to an imposed wage scale. First, the Players would have greater job security, more structured pension plans, and greater severance and disability benefits.\(^{140}\) Second, a wage scale would foster greater equality among the Players. The scale would funnel some money away from exorbitant contracts for rookies or potential prospects toward veterans and lesser-known Players.\(^{141}\) Without a scale, individual salary negotiations, which largely depend upon the skills of the agent, rather than the skills of the player, determine Player salaries.\(^{142}\) Third, the contracts would be more stable if a wage scale were imposed. Greater contract stability would help alleviate the problem of shifting membership because of professional athletes who have relatively short career spans.\(^{143}\)

1. *Combining Wage Scale with an ESOP*

A system that combines a wage scale with employee ownership would require a strong union. In this system the union would not only set the basic minimums, but would also give Players more influence in management decisions by making the Players part owners. The union, through a collective bargaining agreement, would negotiate with the Owners a fixed percentage of every Players’ contract to be paid in their team’s stock. The union would insist that, as part owners, the Players must have the capacity to influence certain aspects of management.

2. *Formulating a League Wage Scale*

The collective bargaining agreement would state that every player is entitled to the same percentage of the team’s net profit. Players render performance as a team; accordingly, they should distribute economic benefits as a team.\(^{144}\) The collective bargaining agreement would also state that each player would be entitled to additional stock based on his performance.\(^{145}\) Objective criteria should determine the performance bonus at the end of every season. This would increase Players’ motivation and award productivity.

\(^{140}\) *Id.* at 135.

\(^{141}\) *Id.* at 126.

\(^{142}\) Berry & Gould, *supra* note 126, at 801-02.

\(^{143}\) *Id.* at 708-09.

\(^{144}\) Hale, *supra* note 122, at 130-31.

\(^{145}\) *Id.*
Although an ideal system would be based completely on objective performance, clearly this is not possible with professional baseball. Certain factors are difficult to measure. For example, Dwight Gooden drew many New Yorkers to watch him pitch, even when he was past his prime. The Owners would have to have some discretionary power to compensate Players for such non-tangible assets.

3. Players’ Role in Decision Making

Players are more knowledgeable than Owners about a variety of issues. For example, the Players have a greater insight into what makes a good manager. Furthermore, an objectively “good manager” will not necessarily be a successful manager if he does not have the Players’ confidence and respect. Accordingly, it is imperative that the Players have some role in this decision-making process. The ESOP agreement should specifically state which decisions the Players should have input and which decisions should be reserved for Owners.

4. Economic Benefits of an ESOP

As shareholders through an ESOP, Players would be allowed to help control the selection of management and help establish salaries. As part owners, the Players would better appreciate the need to limit their salaries to reasonable levels to maintain the value of their shares that they own in the team. Some sports writers have suggested that the Players’ salaries should be negotiated in the traditional method with agents, except that the Owners should pay a predetermined percentage of the Players’ salaries in the form of an ESOP. That would only solve part of the problem. The inequities due to different agents would still exist.

The tax benefits of an ESOP would benefit both Players and Owners because the Players would retain their shares tax-free and their shares would continue to increase so long as both the Players and Owners controlled their costs. The Owners could take advantage of these tax benefits by paying the Players less money to account for the fact that part of the Players’ salaries were now tax-free. The Players would still receive more than generous monthly incomes and could accumulate large equity interests. The Players could convert these interests into cash or another type of Individual Retirement Account (“IRA”) upon retiring or being

146 Irwin B. Renton, Baseball — Answer is ESOP, SEATTLE TIMES, Mar. 12, 1995, at D2.
147 Id.
148 James A. Dickson, And Now, a Lyrical Poem to Protest, USA TODAY, Sept. 1, 1994, at 5C.
149 See supra note 141 and accompanying text.
150 Renton, supra note 146, at D2.
traded to another team.\textsuperscript{151} The collective bargaining agreement would have to establish a specific buy-out formula for when the Owners traded or fired Players or if Players wanted to be transferred to another team.\textsuperscript{152} If the Owners sold the team, the Players' stock interest would presumably have appreciated as the franchise appreciated.\textsuperscript{153} This would result in a capital gain and deferred compensation when the franchise is sold.\textsuperscript{154}

C. \textbf{WHY BASEBALL WOULD SUCCEED WITH COLLECTIVE GOVERNANCE}

Major League Baseball is the paradigmatic case for employee ownership. According to Professor Hyde, employee ownership is most appealing when, in addition to the ordinary conflicts of interests between owners and employees, there exists a history of opportunism and mutual mistrust.\textsuperscript{155} In 1975 when George Steinbrenner began paying Players exorbitant salaries in an effort to buy a championship team,\textsuperscript{156} the other owners were forced to respond similarly. This race to buy the best Players and the accompanying hardships has led to two decades of escalating conflicts between the Owners and Players, both of whom believe the other is being opportunistic and unfair.

1. \textit{Employee Ownership Can Exist Among Unequals}

According to Professor Hansmann, employee ownership is extremely rare in firms where there is a substantial degree of heterogeneity in the work force.\textsuperscript{157} Hansmann asserts that successful employee ownership exists primarily where all employees have approximately the same level of skill.\textsuperscript{158} Under this theory, it is unlikely that employee ownership can exist where employees have substantially different levels of skill. Hansmann deduces this theory by analogizing to law firms.\textsuperscript{159}

\begin{thebibliography}{9}
\bibitem{151} \textit{Id.}
\bibitem{152} Dickson, \textit{supra} note 148, at 5C. The Owners' limited discretionary fund mentioned in reference to compensating players for non-objective assets could also be used by an Owner who perceived that a player was worth more than his wage scale suggested. This amount should be limited, however, to avoid the same problems that occurred during the mid 1970s. \textit{See supra} note 156 and accompanying text.
\bibitem{153} \textit{Id.}
\bibitem{154} \textit{Id.}
\bibitem{155} Hyde, \textit{supra} note 57, at 174.
\bibitem{156} With the advent of free agency, Steinbrenner began paying exorbitant prices to build a championship team. "Steinbrenner contributed to higher baseball salaries from the beginning of free agency, signing Catfish Hunter to a record contract in 1975, then Reggie Jackson and others in the years that followed, and paying even higher salaries to less-talented players in recent years. Marvin Miller, \textit{Baseball's Bottom-line Logic}, N.Y. Times, Mar. 6, 1992, at A33.
\bibitem{157} Hansmann, \textit{supra} note 25, at 1783.
\bibitem{158} \textit{Id.} at 1783-84.
\bibitem{159} \textit{Id.} at 1783.
\end{thebibliography}
Hansmann asserts that "many of America’s largest and most prosperous law firms have long followed a practice of sharing the partnership’s earnings equally among all partners of a given age, regardless of individual productivity."\textsuperscript{160} He says that this is an "astonishing fact" because law firms generally monitor individual productivity.\textsuperscript{161} The ability to monitor individual activity and to pay accordingly is not as important to the law firm as assuring equal pay and equal type of work among the partners.\textsuperscript{162} Thus, according to Hansmann, the existing partners resist admitting to partnership any lawyer who in not of equal competence and productivity as the existing partners.\textsuperscript{163} Additionally, the existing partners resist letting some partners work fewer hours than average in exchange for a smaller share of the firm’s net profits.\textsuperscript{164}

Owners adopt equal sharing schemes to reduce the costs of collective decision making. Hansmann concedes, however, that some firms adjust the partnership share by monitoring productivity.\textsuperscript{165} Today, most major law firms adjust partnership salaries by productivity. The firms define productivity in terms of how many hours the partners bill or how many new clients they bring in. There can be, however, considerable controversy about how to structure these formulas within the firm.\textsuperscript{166}

When determining each employee's productivity is relatively easy, employee ownership can exist among unequals. Hansmann concedes this point when he asserts that "[i]n general, worker ownership seems to thrive only where, if equal sharing is not practicable, individual worker productivities are sufficiently easy to measure so that some relatively objective, and hence uncontroversial, method of pay that is based on that measure can be employed."\textsuperscript{167}

Baseball players vary in skill and do not deserve equal pay. Fortunately, baseball players produce objective statistics that professional reporters already precisely measure. Under the combined wage scale and

\textsuperscript{160} Id. at 1785. Professor Hyde disagrees with professor Hansmann. Hyde, supra note 57, at 161. Hyde asserts that successful employee ownership exists in a plethora of diverse situations. Successful employee ownership exists among both educated and less educated employees, who perform both simple and complex tasks, in both small and large companies. Hyde states that successful employee ownership can be found in professional partnerships, taxi cab collectives, construction companies, artisan manufacturers, supermarkets, and the large industrial enterprises in Spain. Id.

\textsuperscript{161} Hansmann, supra note 25, at 1785.

\textsuperscript{162} Id. at 1787.

\textsuperscript{163} Id.

\textsuperscript{164} Id. Hansmann admits, however, that this might be changing with the more recent understanding of career parents who want to work part time to take care of their children. Id.

\textsuperscript{165} Id. at 1786.

\textsuperscript{166} For example, if partner A introduces a new client to the firm, but the client agrees to give the firm her work upon the condition the partner B does all the work — how should the firm compensate partner A and partner B?

\textsuperscript{167} Hansmann, supra note 25, at 1786.
ESOP plan proposed, all baseball players would receive the same base percentage of their contracts as shares in an ESOP. All Players would then receive additional shares of stock based on their season’s objective performance.

Hansmann also states that employee ownership is less successful when one employee supervises another employee. The employees’ foreperson is generally one of the few people with specialized skills and is assigned the task of supervising employees. In most successful cooperatives, however, the manager does not participate in the collective ownership.

This would not present a problem under the baseball wage scale theory, because the managers would not participate in the ESOP. The Players would have significant input in hiring the manager, but the manager would not be considered a player-employee or an owner of the team.

2. Combining Employee Ownership and Greater Union Involvement Maximizes Benefits and Minimizes Costs
   a. Benefits

   Partial employee ownership within the context of professional baseball does not violate the two basic tenets of unionism. First, all players would have a standardized portion of the contract paid in stock. The primary variables would be how much their team made and their bonus, which would depend upon specific statistics. Second, by allowing most of the shares of stock to be allocated on an objective basis, the risk of cooption is substantially reduced.
   
   (i) Monitoring

   Affording the Players part ownership would eradicate the "lazy ball player." The ability to sit on the bench or have a lackluster performance and receive an enormous salary would be greatly reduced. A millionaire at the peak of his professional career might not pay attention to a manager whom he does not respect. When the Players become part Owners, this changes for two reasons. First, the Players would have some input in choosing the manager and they will thus more likely respect the manager. Second, the Players will become profit motivated. The more games the team wins, the more money each Player makes.

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168 Id.
170 Id.
171 See supra notes 68-70 and accompanying text.
In addition, fan attendance determines a large portion of teams' revenue. If the Players are exerting greater effort, their fan attendance will increase, which will result in even more money for everyone.

(ii) Employee Lock-In

It is an unsupported assumption that Players enjoy being traded on a regular basis. It is equally plausible that players would prefer not to move around. As with most employees, baseball players have similar ties with the community — their spouses might have jobs, their kids could be in schools, and they might have various friends and relatives in the local community.

Secondly, society should encourage Players to become role models. Many children want to emulate professional athletes. Players are extremely well compensated: as a society we should encourage Players to remain in one town, develop a tie with the community, and "give something back" to the community which is partly responsible for their high compensation.

(iii) Strategic Behavior and Communication

As partial owners, the Players would have greater access to the team's financial records and other pertinent information. Under the present situation, "[t]he Players feel they're not receiving a fair share of the gate, whereas the Owners claim that uncontrolled salaries could bankrupt the company." This results in strategic bargaining and inefficient behavior.

The Players, having played baseball their entire lives, have a specialized understanding of what could potentially benefit or harm the team. Further, the antagonistic model would be dissipated; it would no longer be a zero-sum game. According to one sports writer, "[w]e have a baseball strike for only one reason: with so much money on the table, both parties think the other is getting too much of it." If this antagonistic model were extinguished, Players would only pursue the preferences

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172 Renton, supra note 146, at D2. For example, Kevin Gross made $2.7 million in 1994 with Los Angeles when he finished with a winning record (9-7) for first time in 9 years and only his second time in his 11 year career. The Texas Rangers just recently signed him to a 2 year contract worth $6 million per year; Lee Smith, who is almost 40 years old, made $1.5 million with Baltimore in 1993, with a fast ball that had faded from well over 90 m.p.h. to just over 80 m.p.h., and after starting the 1994 season with a record of 0-4 with a 5.59 E.R.A. Tracey Ringolsby, Owners' Money Woes Have Hollow Ring, ROCKY MTN. Nws, Dec. 18, 1994, at Sports 1.

173 Dickson, supra note 148, at 5C.
that are really important to them and would concede on less important matters.174

(iv) Enjoy Governance

Similar to employee lock-in,175 there is no reason to expect that Players are any different from any other type of employee, and thus would receive the same psychological satisfaction from having a role in the decision making process.

b. Costs Negated

The nature of baseball reduces most of the potential problems associated with employee ownership. First, less capital is needed. After the team rents the ball park, the Players are their own capital. Second, baseball is a proven capital success. Over the past two decades the Players and Owners have made enough money to satisfy their fixed costs. Under this proposed theory, with shared information and player involvement in team decisions, the mistrust and greed should dissipate, and it is fairly certain that Players and Owners will be extremely well compensated. Third, the Players would concede that they lack certain managerial skills. Under the proposed theory the Players would only be partial Owners. Players would have to recognize that they are not prepared to influence all business decisions.

VI. CONCLUSION

Professional baseball players are some of the most highly compensated individuals in the world; yet, the Players felt they had to strike to ensure their rights. The effects of the cancellation of the 1994 World Series are still being felt in unusually low attendance at games and poor television ratings. Furthermore, if the situation does not change, baseball is headed for another strike. Initially, employee ownership might appear to be a sacrifice. Both sides may be reluctant to initiate what might appear to be a risky venture. However, the intrinsic characteristics of baseball maximizes the benefits and minimizes the risks generally associated with employee ownership.

According to Professor Hyde, employee ownership is most appealing where, in addition to the ordinary conflicts of interest between owners and employees, the history of ownership opportunism has led to lack

174 The Owners have some legitimate claims. For example, the players on a particular team might collectively decide that they would rather fly on commercial airlines rather than their own personal plane, which over a season could save a team hundreds of thousands of dollars. The players might decide that they would receive some of that expense as their portion of the of the team’s net profits.

175 See infra Part IV.A.2.
of trust between owners and employees.\textsuperscript{176} Professional baseball has been filled with low trust and high opportunism. Fortunately, there is a solution: stronger unions and partial employee ownership.

\textit{Russell M. Yankwitt}

\textsuperscript{176} Hyde, \textit{supra} note 57, at 174.