

# **“Put Me in Coach!” Recognizing NBA Players’ Need for Legal Protection as Stakeholders in the League and Increased Participation in Governance**

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## I. INTRODUCTION

The current cultural, economic, and societal influence sports have in our nation is unprecedented. This is especially true of the National Basketball Association (NBA). Current television broadcasting rights have nearly tripled, franchise valuations have soared, and for several seasons, average player salaries were near five million dollars.<sup>1</sup> To top it off, the league debuted corporate sponsorship logos on uniforms for the first time this past

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1. Steve Aschburner, *League has healthy outlook, but checkup is needed*, NBA (Feb. 12, 2016, 6:18 PM), [http://www.nba.com/2016/news/features/steve\\_aschburner/02/12/league-has-healthy-outlook-but-a-check-up-is-needed/index.html](http://www.nba.com/2016/news/features/steve_aschburner/02/12/league-has-healthy-outlook-but-a-check-up-is-needed/index.html).

season (2016–17).<sup>2</sup> These are undeniably “fat times for the NBA. More money is pulsing through the system and into players’ and teams’ pockets than ever before.”<sup>3</sup> There has never been a time that the league was “more avidly and widely followed, domestically and globally, using whatever metric you prefer.”<sup>4</sup> As the league undergoes so much transformation, there are many important decisions—corporate, personnel, economic, and otherwise—to be made about how to sustain and expand the enterprise. It is unclear just how far this prolific growth will span. What is clear, however, is that the players themselves are not legally entitled to provide input in these processes, despite the fact that the decisions made impact them profoundly and, arguably, primarily.

The corporate decisions that owners and other key actors in governance make not only impact the players in their role as employees of the league, but also interests they have as stakeholders in the league. This is a classification that the NBA has yet to recognize, but as this Note argues, is necessary and equally as important as the players’ employee classification. As employees, players hold interests in matters such as compensation, safe and healthy working conditions, and benefits. However, as stakeholders, players possess interests—comparable to the interests held by shareholders<sup>5</sup>—in the league’s operations, sponsor and partnership decisions, disciplinary actions of team owners, and other terms of governance generally.<sup>6</sup> Though there are areas where the interests of the player as both an employee and stakeholder converge, there are also remarkable distinctions that necessitate the separate recognition of each classification and which this Note will further address.

The divergence of interests that arise as result of the classification issue, and the fact that the players are not legally entitled to a seat at the decision-making table, are only exacerbated by the fact that the NBA exists (by way of its governance structure) in a *de facto* unregulated vacuum as far as traditional corporate, antitrust, labor, and employment law is concerned.<sup>7</sup> This combination of factors is troubling from a legal standpoint because it permits a lack of accountability for key governance actors (either to one another or the players) for which legal recourse could be sought if necessary. There is no external oversight or regulation which the league is really being checked by, leaving the players in a position where they possess significant and cognizable interests, but no remedy to seek if those interests are infringed upon.

As the league’s popularity and value have skyrocketed, so has the list of interests that players have in the league’s governance and the need for legal safeguarding of them. In response to this parallel relationship, several measures aimed at player protection developed. The National Basketball Players Association (NBPA), a union, was created to advocate for players as employees addressing issues of collective bargaining, benefits, and

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2. Press Release, NBA, NBA Board of Governors approves jersey sponsorships (Apr. 15, 2016), <http://www.nba.com/2016/news/04/15/nba-board-of-governors-approves-jersey-ads-for-2017-18-season/>.

3. Aschburner, *supra* note 1.

4. *Id.*

5. In this setting, shareholders would be owners and others who have invested monetary capital into the league or an individual team.

6. As a point of clarification, this Note does not assert that players’ vested interest in league governance should be remedied through permitting direct participation in governance (i.e. holding board seats). Rather, it argues that having legal entitlement to weigh in on these matters through indirect methods, which are discussed in subsequent Parts, is a modification the NBA should explore and implement.

7. See Nadelle Grossman, *What is the NBA?*, 25 MARQ. SPORTS L. REV. 101 (2014) (explaining that the NBA’s governance structure has yet to be clearly classified, which allows it to evade traditional forms of statutory and federal regulation to which other business associations are subject).

other employment related concerns; while agents have assumed responsibility for handling several interest areas players have outside of their employment context.<sup>8</sup> However, neither agents nor the NBPA have been able to adequately address players' interest in the sound league governance.

This Note discusses NBA players as stakeholders in the league whose interests under this classification can best be advocated for through legal entitlement to increased participation in league governance and how the NBA's current governance structure acts as an obstacle to fulfilling this goal. It will also address the effects that failure to recognize players under this stakeholder classification has generated. Part II explores the NBA's governance structure, the legal concerns it produces for players as stakeholders, and how the NBPA's historical development and purpose render it an inappropriate entity to address the issue at hand. Part III analyzes the justifications for classifying players as stakeholders and discusses why allowing increased participation in governance is an adequate and timely remedy for the proffered issues. Part IV recommends three methods of implementation the NBA can use in order to recognize players as stakeholders with legal entitlement to increased participation in governance.

## II. BACKGROUND

### *A. Understanding the NBA's Organizational Structure*

#### *1. Corporate Governance Overview*

If a foundational understanding of corporate governance does not exist, the gravity of not having legal entitlement to input in corporate decisions is lost. Corporate governance "refers to the system for setting policy at the highest level, establishing and monitoring management processes and establishing risk control."<sup>9</sup> It "includes arrangements for deciding on the composition of the board, the groups or persons to whom it is accountable and the criteria to be applied when assessing the board's performance."<sup>10</sup> It also involves the various ways that ownership and control are separated, a dynamic that at times "raises significant issues" about the best ways to operate a business while also protecting those with ownership interests from "opportunistic behavior and poor management."<sup>11</sup> These definitions demonstrate the enormous amount of power those vested with structuring and governing an entity possess. Traditional corporate theory emphasizes shareholder profit maximization as the primary goal to be achieved by the corporation.<sup>12</sup> Under this system of governance,<sup>13</sup> "employees have either limited or no rights of participation as

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8. See generally NBPA, <https://nbpa.com> (last visited Mar. 25, 2018); see also *infra* Part II.B.1. (discussing the NBPA's development and purpose); see also THE BUSINESS OF PROFESSIONAL SPORTS 16 (Paul D. Staudohar & James A. Mangan eds., 1991) (explaining that agents are "the representatives of players in individual salary negotiations and on other business matters" and that they "provide services that are vital to players' economic prosperity and security").

9. Michael LP Lower, *Employee Participation in Corporate Governance: an ethical analysis*, in SELECTED WORKS OF MICHAEL LP LOWER (2009), [https://works.bepress.com/michael\\_lower/5/download/](https://works.bepress.com/michael_lower/5/download/).

10. *Id.* at 4 (explaining the specific task each group in the governance structure is appointed with).

11. PINTO & BRANSON, UNDERSTANDING CORPORATE LAW 87 (LexisNexis 3rd ed., 2009).

12. *Id.* at 89.

13. See *infra* Part IV (providing an explanation of the shareholder-primacy model typically used in the U.S.)

stakeholders as the corporation's sole aim is maximizing shareholder profit."<sup>14</sup> Supporters of the traditional corporate model typically subscribe to the viewpoint that increased focus on the interests of employees or non-shareholding stakeholders could lead to lower profits for the enterprise.<sup>15</sup> However, "a broader view has long been advocated for by some because the governance of these large economic units have an impact on other interests who do not supply [monetary] capital to the business, e.g., stakeholders including labor[ers] (who invests human capital)."<sup>16</sup>

In the context of large publicly held corporations, these two viewpoints tend to exist in direct opposition to one another. Focusing on addressing the interests of one group must occur at the expense of the other's interests. The size of the corporation and the amount of separation between the employee/stakeholder and shareholder is wide. Because of this, employee/stakeholder's interests and daily experience in the corporation varies greatly from the shareholder's. This gap makes it difficult to assess and generate an efficient way to meet the needs of both parties. One can imagine how a major corporation—with multiple subsidiaries and operating sites—would have a difficult time worrying about maximizing shareholder profits while simultaneously considering how their employees or other stakeholders believe the company should be run. In this scenario, it is easy to understand why suggesting that employees/stakeholders have an increased role in governance might seem if not implausible, at least inefficient.

However, in the context of professional sports, such a suggestion is not so farfetched. Perhaps, in fact, the NBA is the perfect context in which the both models of governance can coexist and function symbiotically to increase the league's profitability. This is because the nature of the enterprise very closely aligns the players' interests in the league with those of the shareholders. Additionally, the obstacles that size and number of employees/stakeholders presents for large publicly held corporations do not exist for the NBA—there are a finite number of players that can be on a team at any given time.<sup>17</sup>

Part III elaborates on the unique nature of professional sports, as opposed to other business entities, and discusses the specific interests players hold that support analogizing them to shareholders.

## *2. Entity Classification*

The majority of the issue at hand can be attributed to the NBA's organizational structure and the questions it raises. The first question is: what type of business entity is the NBA? Generating an answer to this question is beyond the scope of this Note, primarily because it requires a lengthy analysis and ends only with suppositions rather than a concrete answer. However, this Part conveys that the current governance structure is problematic, as evidenced by the difficulty in entity classification, and thus could benefit from reorganization.

According to its Constitution and Bylaws, the NBA's purpose is to "operate a league consisting of professional basketball teams, each of which shall be operated by a Member

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14. Tom C. Hodge, *The Treatment of Employees as Stakeholders in the European Union: Current and Future Trends*, 38 SYRACUSE J. INT'L L. & COM. 91, 93 (2010).

15. PINTO & BRANSON, *supra* note 11, at 89.

16. *Id.*

17. The NBA limits the number of players each team can have to 15. *NBA Frequently Asked Questions*, NBA (Sept. 23, 2016, 11:51 AM), <http://www.nba.com/news/faq>.

of the Association.”<sup>18</sup> It also explicitly states that the Association “shall not be operated for profit.”<sup>19</sup> Under this language, one might assume that the NBA’s Constitution and Bylaws are simply private contracts between the league and Member-Owners and should be governed by the rules of contract law. Structurally, there is a Commissioner, a Board of Governors (“Board”), Owners,<sup>20</sup> Members,<sup>21</sup> managers, coaches, teams and players.<sup>22</sup> Although the components of the structural organization are known, its legal classification as an entity is not.<sup>23</sup> Is it a partnership, or is it a corporation? To date, it has not been incorporated; formed as a limited partnership or limited liability company; nor structured under any other organizational form by making a filing with the Secretary of State.<sup>24</sup> Rather, it is established through two private agreements—its Constitution and Bylaws, in which it refers to the league simply as the “Association.”<sup>25</sup> “The inquiry into classification is important “because the NBA’s organizational form impacts the rights and duties of the member team-owners,”<sup>26</sup> board of governors, and the commissioner. Furthermore, it supports a finding that neither the commissioner, member-owners, nor the board have any legal duties to the employees when it comes to governance decisions.<sup>27</sup> The NBA Constitution requires that the Commissioner in his discretion<sup>28</sup> act in the “best interest of

18. *Constitution & By-laws of the Nat’l Basketball Ass’n*, NBA 5 (May 29, 2012), <http://prawfsblawg.blogs.com/files/221035054-nba-constitution-and-by-laws.pdf> [hereinafter *NBA Constitution & By-Laws*].

19. *Id.*

20. Owner means “a Member and each individual or Entity (including both the trustees and beneficiaries of any trust) that, directly or indirectly (including through one or more intermediate Entities), owns of record or beneficially an interest in, or has effective control over, a Member or its Membership.” *Id.* at 2, ¶12.

21. A Member is “a person or Entity that has been rated a Membership in the Association. For purposes of this Constitution and By-Laws, an action on behalf of a Member by any of its Owners, employees, officers, directors, managers, agents or representatives, or its Governor or Alternate Governors, shall be the action of a Member. *Id.* at 2, ¶8.

22. *See id.* at 1–4 (providing the league’s interpretation of what various positions entail). *See generally id.* (providing more details about the parameters attached to each position).

23. *See* Grossman, *supra* note 7 (providing a full discussion of the various possible classifications of the NBA’s organizational structure).

24. *Id.* at 105.

25. *NBA Constitution & By-Laws*, *supra* note 18, art. 1.

26. *See* Grossman, *supra* note 7, at 115–16 (providing examples of entity structures in which fiduciary duties are due).

27. JAMES D. COX & THOMAS LEE HAZEN, *BUSINESS ORGANIZATIONS LAW* 11 (4th ed. 2016). Since it is unclear what type of business association the NBA ought to be classified as, it makes deducing the scope of legal duties that exist and to whom they are owed, if not impossible, quite difficult. For example, clearly defining an organization as a partnership indicates that “[t]he relationship between partners is a fiduciary one of mutual power and responsibility. It is usually accepted that partners owe *each other* a fiduciary duty of the ‘utmost good faith and loyalty’” (emphasis added to denote that the duty is owed between partners and not from the partners to the employees of the entity). *Id.*

28. Gregor Lentze, *The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternative Approach from a Corporate Perspective*, 6 MARQ. SPORTS L. REV. 65, 72 (1995). The NBA Constitution states:

[T]he Commissioner does not act under the direct supervision and control of the owners. In fact, the Commissioner may carry out the business of the professional sports league without direct control of the owners. Largely, many of the decisions involve the Commissioner’s sole discretion. The impact is remarkable: the Commissioner acts as an employee of the league, but is not under the control and supervision of its employer. Therefore, the employed Commissioner represents an almost autonomous authority within the internal structure of the league, uncontrolled by its principal owners.

the Association,”<sup>29</sup> that each Member operate “in accordance with its own business judgment,”<sup>30</sup> and that any actions taken by the Board “be final, binding, and conclusive.”<sup>31</sup> These standards provide an enormous amount of deference and discretion to these governing groups, which in turn makes it difficult to challenge any actions they happen to take, even if they have detrimental effects for players—in their capacity as stakeholders or even employees.

Although the NBA Constitution explicitly forbids any player from being a member on the board, it does indicate to whether players may have an active role in selecting who gets appointed.<sup>32</sup> In certain companies that recognize employees as stakeholders, the power to appoint members to the board reinforces the consensus nature of decision-making and provides the stake-holding employee an opportunity to monitor board performance.<sup>33</sup> However, affording stake-holding employees with the power to appoint may prove to have little significance if there is no legal accountability running from the board members to those employees.<sup>34</sup> Instituting some form of legal accountability, such as a fiduciary duty, can incentivize and help ensure that the appointed person(s) not only act in protection of the interests of the appointing constituency, but also provides that constituency with a legal mechanism for redress if that duty is violated.<sup>35</sup>

Without concrete legal entity classification, and even less help offered by the terms of the NBA Constitution, it is unclear how traditional notions of corporate law (i.e. what, if any, fiduciary duties exist between board members and others in the Association) are applicable to the NBA’s organizational structure.

### 3. De Facto Unregulated Existence

As a part of the inquiry into classification, it is also helpful to understand where the NBA’s organizational structure fits within the law. In a technical sense, the NBA is a private enterprise in which the relationship among the members of the NBA is contractual.<sup>36</sup> The constitution refers to the Association as “a contract among the

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*Id.*

29. *NBA Constitution & By-Laws*, *supra* note 18, art. 13(e), 24.

30. *Id.* at 44.

31. *Id.* at 33.

32. *NBA Constitution & By-Laws*, *supra* note 18, art. 18(b). The NBA Constitution states:

Each Member shall submit to the Commissioner in a Writing the name of such Governor and the names of up to three Alternate Governors, who may be replaced at will by such Member (and who shall be persons qualified to serve as Governors). No player shall be permitted to serve as a Governor or Alternate Governor or to vote at any meeting of the Board of Governors.

33. LOWER, *supra* note 9, at 27. This model of governance is sometimes referred to as codetermination, and is the primary system instituted in Germany. Part IV elaborates on this model.

34. This Note advocates for implanting this theory—and others expressed throughout—in the narrow context of professional sports and not all employee-employer relationships.

35. For example, under the traditional Anglo-American business law, the fiduciary duties that corporate directors owe to shareholders are enforceable via shareholder derivative suits. Although shareholders generally “have no direct individual right of action for corporation wrongs that impair the value of their investment,” derivative suits enable shareholders as a collective to address “[i]njuries to the corporation such as those resulting from negligence, mismanagement, or fraud of its directors or officers.” COX & HAZEN, *supra* note 27. This example illustrates how corporate directors, who have been designated to act in the best interest of shareholders, are held accountable by law to execute that task.

36. Grossman, *supra* note 7, at 103–04; *see* Part II.A. (explaining that although the relationship between

Members” established to operate as a league of basketball teams.<sup>37</sup> Implicit in and integral to the NBA’s purpose is the idea of competition. Since the league’s purpose is based on teams competing against one another, it must ensure that each team in the Association remains economically viable so that it is able to participate in the competition. Ensuring such requires deliberate collusion amongst teams “[b]ecause the product offered for consumption is the match itself, an economically monopolistic club will not be successful because, if it effectively eliminates the existence of weaker teams, as a monopoly does, it will be left with no on-field competitors.”<sup>38</sup> “Generally, monopolies are considered negative for economies and consumers because they misallocate resources” and therefore are heavily regulated in the United States.<sup>39</sup> As a matter of public policy, there are rarely any industries that are excluded from the reach of antitrust laws.<sup>40</sup> However, the league must participate in collusive and monopolistic practices to remain in existence. One might think that such passive acceptance and intentional engagement in traditionally frowned upon practices would not be enough to withstand a court’s judgment in matters of antitrust violations, but it often does. Although three of the four major professional sports leagues do not have any general exemption from federal antitrust laws, there are statutory exemptions that exist.<sup>41</sup>

Antitrust is not the only body of law that courts have recognized exemptions for when it comes to professional sports—labor law is another. Via the preeminent sports non-statutory labor exemption case, *Mackey v. National Football League*,<sup>42</sup> basketball, along with two other professional sports, have non-statutory labor exemptions for collective bargaining agreements.<sup>43</sup> In addition to these statutory exemptions, the NBA has also leveraged the ambiguity in its entity classification and relied on principles of contract law to decrease the amount of court interference in its dealings. The courts have been generally “reluctant to take jurisdiction over the affairs of private associations and to review their internal actions . . . [a]s confirmed by courts, judicial review of every sanction imposed by the Commissioner would provide an unworkable system for the league[.]”<sup>44</sup> This also helps explain the lack of legislative interference in the industry.

Thus, in many of the areas where the law would stand in as a regulator and protector of interests, the NBA has managed to circumvent them via ambiguous entity classification, reliance on contract law when convenient, and statutory exemptions. Though in a broad sense, these measures have proven positive for the league’s success overall, it is worthwhile to analyze the ways in which this is harmful to players as employees and stakeholders in the league.

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the NBA and its members is established via contract, the organization’s “structure is surprisingly opaque”). *Id.*

37. *NBA Constitution & By-Laws*, *supra* note 18, art. 2.

38. Leah Farzin, *On the Antitrust Exemption for Professional Sports in the United States and Europe*, 22 JEFFREY S. MOORAD SPORTS L.J. 75, 78 (2015).

39. *Id.* at 75.

40. *Id.* at 76.

41. For example, professional baseball, football, and basketball are statutorily exempt from U.S. antitrust laws for the purpose of collectively selling the rights to television broadcasts for games. Farzin, *supra* note 38.

42. *Mackey v. National Football League*, 407 F. Supp. 1000 (Minn. Dist. Ct. 1975).

43. *Id.* Baseball and hockey are also statutorily exempt. Farzin, *supra* note 38, at 76 n.4.

44. Lentze, *supra* note 28, at 76–77.

*B. History and Context for the National Basketball Players Association*

*1. Historical Development of the NBPA*

Labor relations in the NBA have been a topic of discussion since the 1950s.<sup>45</sup> At the time of the National Basketball Players Association's ("NBPA") creation in 1954, the average player's salary was only \$8,000, there were no pensions, no health insurance, and no athletic trainers on the road.<sup>46</sup> Work and labor related issues spanned far beyond basketball; injustices in the area of workers' rights was a national concern that many were advocating for even before the 1950s.<sup>47</sup> In 1964, Larry Fleisher took office as legal counsel for the NBPA and four years later he played an integral role in the NBA and the NBPA entering their first collective bargaining agreement. As the league has grown and evolved, so has the NBPA, which has triumphed in advocating for both current and retired players in an extensive number of ways.<sup>48</sup> Its current mission is to "ensure that the rights of NBA players are protected and that every conceivable measure is taken to assist players in maximizing their opportunities and achieving their goals both on and off the court."<sup>49</sup> But, what if the league does not recognize a certain right? A large portion of existing rights or interests have been informed primarily by the players' status as employees of the league.<sup>50</sup> Relying on this status as the primary context for understanding players' interests worthy of advocacy is limiting and has led to failure to consider some other interests outside of that framework. Failing to recognize that employees can be stakeholders in the organization effectively excludes an entire subset of interests and rights that could also be considered. As Berry points out, it is about interest balancing.<sup>51</sup> If labor negotiations between the NBPA and the league are to take place, distinct interests must be served—the league/union and the team/player.<sup>52</sup> Although his illustration is labor focused, the message stands in the context of stakeholder interests too. Managing such a task of interest balancing is not easily done, but, necessary. The initial step "is to reach a process by which the various interests can advance both the welfare of the individual player, [ ] the players as a unit,"<sup>53</sup> and the actors in governance.

45. ROBERT C. BERRY, LEGAL ISSUES IN AMERICAN BASKETBALL 97 (2011).

46. *Id.* at 99.

47. Evidencing the fact that there was heightened awareness surrounding labor issues and employer-employee relationships is the creation of the National Labor Relations Board (NLRB). The NLRB, created in 1934, is a federal agency authorized "[t]o investigate issues, facts, practices, and activities of employers or employees in any controversies arising under section 7 (a) of the National Industrial Recovery Act". Exec. Order No. 6763, June 29, 1934, <https://congressional-proquest-com.proxy.lib.uiowa.edu/congressional/docview/t66.d72.1934-eo-6763?accountid=14663>.

48. See *About & History*, NBPA, <http://nbpa.com/about/> (last visited Mar. 25, 2018) [hereinafter *About & History of NBPA*] (providing examples of the organization's history and accomplishments).

49. *Id.*

50. As the organization tasked with ensuring "that the rights of NBA players are protected," the NBPA explicitly notes that it negotiates the terms of the "collective bargaining agreement with the NBA, which governs all aspects of the players' employment," monitors and negotiates "the administration of retirement and insurance benefits," and that it is "the exclusive, certified labor union representative of all NBA players". *About & History of NBPA*, *supra* note 48 (last visited Mar. 25, 2018). Each of these stem from rights or interests that relate to the players' status as employees of the league.

51. BERRY, *supra* note 45, at 94–95.

52. *Id.*

53. *Id.* at 95.



2. *The NBPA in Today's Context and Why It Has Not Sufficiently Been Able to Address the Issue*

While the NBPA has done an outstanding job of addressing players' needs and interests as employees, it—like the league—has not yet recognized players as actual stakeholders in the NBA. As stakeholders, players have substantial, organization-specific investments that put them at risk and give them an incentive to see that the enterprise is efficiently managed—perhaps even more so than shareholders. By way of their employee status, players also are more intimately acquainted with the inner workings of the enterprise and therefore are more informed than the typical shareholder might be.<sup>54</sup> But unlike shareholders, employees players do not have the protection of portfolio diversification and limited liability, nor are they owed any fiduciary duties on behalf of board members, member-owners, or the commissioner.<sup>55</sup>

Up until now, much of the NBPA's advocacy for players' rights has occurred against the backdrop of labor law.<sup>56</sup> But seeking to remedy the gap between players' interests as employees and players' interests as stakeholders by focusing only on labor law “is to omit a key impediment to realizing the parties' preferences: [the] system of corporate governance.”<sup>57</sup> As Jacoby puts it, the issue is one of representation.<sup>58</sup> As a union, the NBPA is tasked with asserting protection and advocating for the players' employment rights and labor conditions. Thus, the NBPA is the players' representative when it comes to all things related to or stemming from their employee classification.<sup>59</sup> Since stakeholder has yet to be encompassed in the definition of employee or recognized as a standalone, the interests that fall under that classification are not being advocated for in the same way that the employee rights are. There is no organization or mechanism in place for representation of those interests. This point is further reinforced by the fact that the NBA operates under the traditional Anglo-American “shareholder primacy norm.”<sup>60</sup> This model conceptualizes

54. Sanford M. Jacoby, *Employee Representation and Corporate Governance: A Missing Link*, 3 U. PA. J. LAB. & EMP. L. 449, 459 (2001).

55. See *supra* Part II.A. (discussing the NBA's organizational structure which confuses legal relationships and does not explain to whom certain duties if any are owed).

56. “The NBPA is a labor organization recognized by the NBA and certified by the National Labor Relations Board as the exclusive collective bargaining representative of all NBA players.” *National Basketball Ass'n v. National Basketball Players Ass'n*, No. 04 Civ. 9528, 2005 WL 22869, at \*2 n.3 (2005). By virtue of it being a labor union, advocating via labor law is inherent in many of the claims it brings on behalf of the players. A significant portion of these claims arise under the Collective Bargaining Agreement (CBA)—a contract between the NBA and NBPA, sets forth the rules governing player contracts, salary caps, compensation and benefits, and other terms. *Collective Bargaining Agreement*, NBA, 3c90sm37lsaecdwtr32v9qof-wpengine.netdna-ssl.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf (last visited Mar. 25, 2018). For examples of NBPA cases implicating labor law and the CBA, see *Bridgeman v. Nat'l Basketball Ass'n*, 675 F. Supp. 960 (D.N.J. 1987); *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954 (2d Cir. 1987); *Nat'l Basketball Ass'n v. Williams*, 857 F. Supp. 1069 (S.D.N.Y. 1994).

57. Jacoby, *supra* note 54, at 450.

58. *Id.*

59. Some of these might include “[p]roviding on-staff security professionals to help with proprietary or sensitive matters . . . assisting charity and community organizations . . . promoting the positive image and reputation of NBA players, both on and off the court” as described on the NBPA's website. *About & History of NBPA*, *supra* note 48.

60. See Justice Randy J. Holland, Keynote Address at the 8th Annual Summit of the Taiwan Corporate Governance Association: Corporate Social Responsibility Delaware and Taiwan 15 (Nov. 14, 2014) (on file with author); see *infra*, Part IV.B. (expounding upon the shareholder primacy norm and contrasting it with the

management's responsibility and also corporate law's commitment to shareholder welfare as the primary objective of corporate activity.<sup>61</sup> It also supposes that the interests of constituencies other than shareholders are sufficiently protected by contract.<sup>62</sup> Thus, the failure to recognize employees' interests as stakeholders also means that there is no legal entitlement to relief if these interests are infringed upon.<sup>63</sup>

Take, for example, the incident that occurred in 2014 with Donald Sterling. Sterling was the owner of the Los Angeles Clippers and as a member-owner, had a duty to operate in his best business judgment and for the best interest of the Association.<sup>64</sup> After making racist remarks, Sterling was banned from the league and fined \$2.5 million.<sup>65</sup> Sterling eventually had to sell the franchise, but that mandate was only reached after complex probate court litigation.<sup>66</sup> Throughout this upheaval, the players—the majority of whom were African-American—engaged in silent protests toward the owners in order to express their discontent with the situation.<sup>67</sup>

In an instance like this, there is ample evidence that the players were impacted by the actions of a member-owner, not only on a personal level but also in terms of their ability to adequately perform their jobs.<sup>68</sup> However, the players had no legal means of affecting the outcome of Sterling's fate. They could only "trust that [Commissioner] Adam Silver" would "do the right thing."<sup>69</sup> The NBA's constitution does lay out a mechanism for other member-owners, the board, or Commissioner to legally terminate a member-owner's affiliation with the league,<sup>70</sup> but no mechanism of the sort is afforded to the players. It is clear that by making such racist statements, Sterling was not acting in the best interest of the league, and it is highly unlikely that any court would consider that behavior in accordance with good business judgment—a standard used by courts analyzing similar behavior in the corporate context.<sup>71</sup> But, since Sterling owed no fiduciary duties to the players as employees, there was nothing they could do in terms of using the law or NBA's Constitution and Bylaws to ensure his termination. This example illustrates how the NBPA and its employee-focused approach is not the appropriate entity to address matters of this nature. In their employee capacity, there was no real legal action that the players

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stakeholder-primacy model of governance).

61. Holland, *supra* note 60, at 16–17.

62. *Id.*

63. *See infra* Part III.A (describing how NBA players should be seen as stakeholders within the NBA).

64. *NBA Constitution & By-Laws*, *supra* note 18 (discussing duties of member-owners and the NBA Constitution generally for complete list of member-owner responsibilities).

65. *Donald Sterling Timeline*, NBA (Aug. 12, 2014, 6:27 PM), <http://www.nba.com/2014/news/08/12/sterling-timeline/index.html>.

66. *Id.*

67. *Clippers Stage Silent Protest to Owner*, NBA (April 27, 2014, 4:09 PM), <http://www.nba.com/2014/news/04/27/clippers-silent-protest-donald-sterling.ap/>.

68. *See id.* (explaining that the distraction caused by the controversy was a factor in why the team lost that night).

69. *Id.*

70. *See NBA Constitution & By-Laws*, *supra* note 18, art. 13 (providing substantive grounds for termination and Article providing the procedure for termination).

71. The Business Judgment Rule is used in the corporate context and "is a standard of judicial review used to analyze director conduct to determine whether a board decision will be challenged or a director will be personally liable. . . . The rule applies to suits by shareholders acting for themselves or derivatively on behalf of the corporation." CORPORATE LAWS COMMITTEE, CORPORATE DIRECTOR'S GUIDEBOOK 11 (ABA Bus. Law Section, 6th ed. 2011).

collectively could have taken to fire Sterling. There is no adequate cause of action—applicable in this situation—available to an individual or group of employees can bring against an individual director for making a decision that resulted in harm for the business.<sup>72</sup> But, if they were recognized as stakeholders with legal entitlement to participation in governance, they would have been equipped with more options for recourse. The NBPA's limits and other obstacles to recognizing players' interests as stakeholders will be further discussed in Part III.

### III. ANALYSIS

When looked at on a large scale, employee participation in corporate governance seems to be a stark shift away from the traditional hierarchical model that many businesses and corporations have thrived upon thus far. Rather than propose that all employees in every sector of the nation's workforce be allowed to participate in the governance of their respective organizations, this Note seeks to narrow the scope of the proposal by using professional sports as the sole context in which these changes should be considered. The NBA will be used as a specific case study by which to analyze the details of this proposal and to give support for the assertion that players should be recognized as stakeholders in the league and legally entitled to the opportunity to participate in the governance of their respective leagues.

#### *A. Why the NBA, Why Now? Outlining Several Interests at Stake*

Professional sports in the most general sense is just a field of employment that implements a hierarchical governance structure. However, there are numerous ways in which professional sports leagues have confounded traditional notions of employment and have begun occupying their own realm in the workforce.<sup>73</sup> Several of the legal mechanisms that leagues use to isolate themselves from legal regulation—at the state level—have already been mentioned.<sup>74</sup> This intentionally insular design not only illustrates why professional sports leagues are in fact unique and should be distinguished from the average employer-employee relationship, but also demonstrates why this proposed change actually falls in line with the innovative ways leagues have been distinguishing themselves from other revenue generating business organizations over the years. Certain aspects of the NBA serve as clear examples of why the proposed change in governance structure is necessary.<sup>75</sup> Looking at the NBA specifically will not only help understand the issue, but will also help illustrate possible solutions.

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72. In some limited circumstances, individual corporate officers can be held liable for misconduct, if they “authorize[ ], [direct[ ], or in some meaningful sense actively participate[ ] in the wrongful conduct,” personal liability will attach even though the actions were taken by the corporation.” Other common instances where personal officer or director liability might apply are when fraud has occurred or the director knowingly approved of unlawful actions. Fred Fenster, *When Corporate Officers Are Personally Liable*, GREENBERG GLUSKER (Apr. 2012) <http://www.greenbergglusker.com/news/articles/When-Corporate-Officers-Are-Personally-Liable> (quoting *Frances T. v. Vill. Green Owners Ass'n*, 42 Cal. 3d 490, 504 (Cal. 1986)). None of these commonly relied upon tort actions apply to situations where athletes, in their capacity as stakeholders, can bring action against individual directors or owners.

73. See Grossman, *supra* note 7 and accompanying text (explaining the organizational structure of the NBA and possible forms of entity classification); see also *supra* Part II.A.

74. *Supra* Part II.A.3.

75. See *infra* Part II.A.2. (referring to the ambiguity in its classification as an entity).

Where there is no right to be found, there can be no remedy for it.<sup>76</sup> This idea is expressed by the maxim *ubi jus ibi remedium*.<sup>77</sup> As it stands, professional players are not recognized as having rights as stakeholders in their respective sports, and therefore have no legal recourse for the violation of interests generated under that classification. By acknowledging that players are also stakeholders in the league, with interests that are similar to those of a shareholder, there is recognition of an entirely new set of rights to be found for which protective remedies can be implemented. Three overarching and identifiable rights that players have as stakeholders in the league are to follow.

First, like shareholders, players may desire that the Board act in their best interest or, at minimum, in the best interest of the league. The Board and Member-Owners are currently endowed with the latter responsibility<sup>78</sup> however, the fiduciary duty that would typically result in scenarios like this does not exist between the players, and the Member-Owners or between the players and the Governors.<sup>79</sup> Establishing a fiduciary duty between the players and these actors would allow them at least one avenue of legal recourse—if it were found that this duty was violated.

Another cognizable interest that players might have in the governance of their league is simply in representation. There are currently two bodies that represent the players: the NBPA and agents. The mere fact that there are already two established types of player representatives shows that professional players' needs are expansive, distinct, and cannot be encompassed by just one entity. Despite the existence of these two forms of representation, players still do not have a voice in the boardroom. There is no designated player representative who is specifically tasked with being the players' ambassador in the room where league decisions are made. Because of this lack of player advocacy, there is no way to be certain if Member-Owners or their appointed Governors are acting in the best interest of the league or in the best interest of the players collectively. The only system of checks and balances that exists is between the Member-Owners and Governors themselves.<sup>80</sup> This one-sided approach to governance might not always produce the best results. Acknowledging this player interest could promote legal accountability, foster player relations, and promote trust between the Member-Owners and players.

A third interest that warrants recognition involves the handling of corporate and business decisions. There are several examples of league-related business topics that players might have an interest in, despite not being directly involved with them. Two key examples are the recent decision to add corporate logos to jerseys<sup>81</sup> and the NBA's ongoing financial support of the Women's National Basketball Association (WNBA).<sup>82</sup> Though corporate decisions made about these two areas might not directly involve the individual player, perhaps he could offer worthwhile perspective or speak to what some of the

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76. *What is Uberrima Fides?*, BLACK'S LAW DICTIONARY, <http://thelawdictionary.org/uberrima-fides/> (last visited Mar. 25, 2018).

77. *Id.*

78. *NBA Constitution & By-Laws*, *supra* note 18, art. 14A (stating that a Member must act in the best interest of the league or its creditors).

79. See Grossman, *supra* note 7, at 104 (explaining that it is still unclear whether or not there is even a fiduciary duty between the governors and members).

80. *Supra* notes 21–30 and accompanying text.

81. Press Release, NBA, *supra* note 2.

82. According to a 2011 report, “[t]he NBA assists the WNBA financially by giving a reported \$8 million annually to subsidize the league, and will continue to do so . . .” SCOTT ROSNER & KENNETH L. SHROPSHIRE, *THE BUSINESS OF SPORTS* 348 (Jones & Bartlett Learning eds., 2d ed. 2011).

implications of such a decision would be for him and others similarly situated. These two examples serve to illustrate how some of the players' interests as stakeholders can also be related to positive aspects of the league and not only when violations of duties occur. Players' interests might also stem from players wanting to contribute substantively to the league's success and profitability. This list of identifiable interests is by no means exhaustive. It only serves to outline three examples of interests that players might have in participating in league governance.

### *B. Justifications*

#### *1. Exploitation Still a Cause for Concern: Expendability, Capital Investment, and Player Safety Justifications*

Although players retain the title of employee when speaking in the employment and labor context, it is important to note that players in this profession are unlike the average corporate or factory employee. This is because “the workers in [professional] sports are a unique group, highly proficient in their craft” and not expendable in the same way that other employees outside of this context would be.<sup>83</sup> However, in order to retain this value, players must subject their bodies to specialized, continued, and sometimes extreme physical exertion. While many make the valid argument that they are more than fairly compensated for doing so, it does not ignore the fact that (1) players—interested in staying stateside—are essentially precluded from deciding to take their labor elsewhere due to the NBA's monopsony on professional basketball in the United States<sup>84</sup> and (2) not every NBA player signs multi-million dollar contracts with their franchises. Therefore, for the pool of “regular” NBA players who do not sign substantial contracts with the team, there is an incentive to put their bodies on the line simply for the ability to retain employment. While the highly specialized skill set that players have allows them to reach the NBA, it does not always secure a position there, and for the players not in the millionaire's club, having the added value of representation in governance could be beneficial.

At the opposite side of the spectrum, representation serves as another potential intangible benefit for those players whose market value is set above what team salary caps permit them to earn. It can be thought of as a form of “sweat equity” where players are essentially “trading labor for equity or an interest in the company.”<sup>85</sup> Some of the highest paid NBA players could make the argument that they are actually being undercompensated relative to their contributions and revenue they help generate. Having a right to participation in governance via representation could turn out to be an appropriate and welcomed trade-off for players who find themselves in that situation.

This proposal is further justified under concerns of exploitation, expendability, and player safety for another reason. The NBA presents the rare instance in which the

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83. BERRY, *supra* note 45, at 94.

84. See Farzin, *supra* note 38, at 75–92 (explaining the labor and antitrust exemptions for professional sports leagues in the United States).

85. Cameron Keng, *What Entrepreneurs Call 'Sweat Equity' the IRS Calls 'Taxable'*, ENTREPRENEUR (Sept. 26, 2014), <https://www.entrepreneur.com/article/237712>.

commodity<sup>86</sup>—the player—is being asked to commodify<sup>87</sup>—by way of their participation in the games. Under the Marxist theory of commodity fetishism and alienation, this dynamic can be dangerous and sometimes get out of hand.<sup>88</sup> Marx’s theory “discusses the social-psychological aspects of consumption and its problematic”<sup>89</sup> effects. In particular, he was intrigued by the way in which consumption in capitalistic markets can become “a key way in which people” become “estranged from their own humanity.”<sup>90</sup> Marx’s model referred to these effects as they pertained to the consumer, but the effects of commodification might be even more socio-psychologically harmful to the commodity, when that commodity is a class of people rather than goods. This model is especially true of the NBA players who are not considered to be cultural icons and do not have the media outlets reminding consumers that they are real people with real lives. Allowing the players to participate in the governance of their sport can not only “re-humanize” them to sports consumers, it also can give them an added sense of personal value and feel as if their contribution to the sport is more than just physical.

## 2. Board Diversity

### a. History of Race in Sports

As the NBA has grown, so have the players’ presence in mainstream culture. Professional sports as an industry have begun to occupy a space in society in which it is becoming increasingly difficult to separate professional sports from everyday life. Whether or not one is a sports fan, it can be difficult to ignore the way that sports are being used as social and political platforms, thus impacting those who typically might not otherwise be tuned in. In light of this, it is equally difficult to ignore the underlying racial dynamic that is intertwined in the very fabric of sports. The most salient examples of this are the NFL protests that took place in 2017. These protests—in which some players knelt during the national anthem to protest social injustices in communities of color—garnered so much attention throughout the nation that President Donald Trump weighed in, saying “[w]ouldn’t you love to see one of these NFL owners, when somebody disrespects our flag, to say ‘Get that son of a [expletive] off the field right now?’ ‘He’s fired!’”<sup>91</sup> There was much public discourse on the matter and people from all walks of life, age groups, and other demographics were pulled into the world of sport.<sup>92</sup>

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86. In an effort to contextually define this word, commodity refers to “anything intended for exchange” or anything that has economic value. Arjun Appadurai, *Definitions: Commodity and Commodification*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* 35 (Martha Ertman & Joan C. Williams eds., 2005).

87. Contextual definition of this word refers to the transformation of goods, services, ideas, and people into commodities. *NEW FORMS OF CONSUMPTION: CONSUMERS, CULTURE, AND COMMODIFICATION* 3–4 (Mark Gottdiener ed., 2000).

88. *See id.* at 4 (quoting Lefebvre, who notes that “the commodity form possesses the peculiar capacity of concealing its own essence and origin from the human beings who live with it and by it. The form is fetishized. It appears to be a thing endowed with boundless powers.”).

89. *Id.* at 4.

90. *Id.*

91. Domenico Montanaro, *Trump, the NFL, and The Powder Keg History of Race, Sports, and Politics*, NAT’L PUB. RADIO (Sept. 25, 2017), <https://www.npr.org/2017/09/25/553478047/trump-the-nfl-and-the-powder-keg-history-of-race-sports-and-politics>.

92. *See, e.g.* Catherine Lucy, *Donald Trump Relishes Feud with the NFL, reviving issue with new tweets*

However, this dynamic between race, sport, and politics, did not only recently appear on the scene. There has been “a long and complicated history of black—and other minority groups like women—athletes protesting in sports.<sup>93</sup> For centuries—and even outside of the United States<sup>94</sup>—players have been using sports as a vehicle for social and political change. A few historical and modern examples of prominent athletes who’ve been committed to these endeavors include Curt Flood, Jesse Owens, Muhammad Ali, and, more recently, Colin Kaepernick.<sup>95</sup> Due to the historical systemic oppression of African-Americans in the United States, there has been a long-standing call to activism for civil rights and racial equity.<sup>96</sup> Sports were a vehicle for socio-political advocacy and progressive social change.<sup>97</sup> For high-profile athletes like Jackie Robinson or Muhammad Ali their platform as athletes gave them access to a broader audience and allowed them to catalyze national conversations on matters of racial and social injustice.<sup>98</sup> The opportunity to speak on television or to newspapers in a non-hostile environment<sup>99</sup> and in a manner premised on

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*this morning*, CHICAGO TRIB. (Sept. 25, 2017), <http://www.chicagotribune.com/sports/football/ct-donald-trump-nfl-national-anthem-twitter-20170925-story.html> (recounting the President’s tweets as well as the reactions of several NFL owners like Robert Kraft who was “deeply disappointed by the tone” of the remarks made); Miranda Green, *NFL chief, team owners, NBA stars slam Trump*, CNN (Sept. 24, 2017), <https://www.cnn.com/2017/09/23/politics/nfl-goodell-trump-response/index.html> (detailing NFL Commissioner, Roger Goodell’s comments on the President’s “divisive” remarks); Vice President Mike Pence counter-protested by leaving an Indiana Colts game after seeing players refuse to stand for the national anthem. *Trump defends Pence NFL protest walkout amid claims of stunt*, BBC NEWS (Oct. 9, 2017) <http://www.bbc.com/news/world-us-canada-41556337>. Many discussants utilized Twitter or other social media platforms to weigh in on the conversation.

93. *Id.*

94. WILLIAM C. RHODEN, *FORTY-MILLION DOLLAR SLAVES: THE RISE, FALL AND REDEMPTION OF THE BLACK PLAYER* 35–46 (William C. Rhoden ed., 2006). This section of the book tells the story of Tom Molineaux, a black boxer in Sussex, England in 1810.

95. See DAVID REMNICK, *KING OF THE WORLD* 221 (1998) (providing a brief example of Muhammad Ali’s political and social advocacy through sport); Jesse Owens and 17 other black athletes went into the 1936 Olympics in Germany, accumulating a quarter of the entire U.S. team’s medals despite the racism and lack of fully integrated rights as citizens in America. Montanaro, *supra* note 91. See also Leola Johnson, “Hertz, Don’t It?” *White “Colorblindness” and the Mark(et)ings of O.J. Simpson*, in *AMERICAN CROSSROADS: COLORED WHITE: TRANSCENDING THE RACIAL PAST* 68 (Univ. of Cal. Press ed., 2002) (explaining the social, racial, and political context in which O.J. Simpson ascended to fame as a player); *Id.* at 73. (making reference to Muhammad Ali’s refusal “to be inducted into the military as a draftee”)

96. For a brief overview of the historical oppression African-Americans have endured in the United States, see Library of Congress, Exhibition, *The Civil Rights Act of 1964: A Long Struggle for Freedom*, Exhibition Overview. The Exhibition provides that “President Lyndon B. Johnson reflected that Americans had begun their ‘long struggle for freedom’ with the Declaration of Independence. Although that document had proclaimed that ‘all men are created equal,’ such freedom had eluded most Americans of African descent until the Thirteenth Amendment, which formally abolished slavery in the United States in 1865.” *The Civil Rights Act of 1964: A Long Struggle for Freedom*, LIBR. CONGRESS, <https://www.loc.gov/exhibits/civil-rights-act/overview.html> (last visited Mar. 20, 2018).

97. Peter Kaufman & Eli A. Wolff, *Playing and Protesting: Sport as a Vehicle for Social Change*, 34 J. SPORT & SOC. ISSUES 156 (2010).

98. See generally DAVID ZIRIN, *A PEOPLE’S HISTORY OF SPORTS IN THE UNITED STATES: 250 YEARS OF POLITICS, PROTEST, PEOPLE AND PLAY* 119, 138–44 (2008). Zinn discusses Jackie Robinson’s eagerness “to speak out against Jim Crow and racism” and that he “insisted day in and day out on challenging America on the matter of race and justice.” *Id.* at 119. There is also much discourse in Zinn about Ali’s impact on the racial, religious, and cultural landscape of America at the time. See *id.* at 138–44.

99. As opposed to the charged and often violent environment that surrounded protests and other common forms of protest at the time.

something other than political and racial opinions served as the perfect platform for players to speak on issues that concerned and affected them.

Understanding this landscape and how race has been a part of sports' historical development is important in order to grasp the weight of the next justification. Despite the advancements of African-Americans in society, there are still players today who are using sports to voice socio-political opinions.<sup>100</sup> While African-Americans make up only 13.3% of the U.S. population, they make up 74.4% of NBA athletes.<sup>101</sup> This statistic on its own is thought-provoking, but taking it one step further emphasizes why allowing players to participate in governance is of dire importance. According to a study conducted in 2013 by Richard Lapchick, director of the Institute for Diversity and Ethics in Sport at the University of Central Florida, "[t]he fraction of African-Americans shrinks as we move up the management chain."<sup>102</sup> At the time of the report only 2% of the NBA's majority owners were black.<sup>103</sup> That 2% was made up solely by Michael Jordan.<sup>104</sup> As further acknowledgement of this massive disparity in the NBA and other professional sports, music mogul Sean Combs (colloquially known as "P. Diddy") voiced his desire to purchase the Carolina Panthers, an NFL team.<sup>105</sup> Per reports, Combs "is serious about purchasing the Carolina Panthers . . . [and] is already looking to set up meetings with potential investors."<sup>106</sup> Additionally, athletes Colin Kaepernick and Stephen Curry expressed interest in being involved in the venture.<sup>107</sup>

The reasons for this drastic disparity in league ownership and contradiction in representation between ownership and player are manifold and beyond the scope of this Note, but important to address as they inform employer-employee relations, the power hierarchy in the NBA, and the need for increased representation and participation.

#### *b. Racial Breakdown of NBA Ownership*

Being a Member in the league or having controlling ownership interest in a franchise

100. Nick Wagner, *Colin Kaepernick continues anthem protest; other 49ers, Rams join*, ESPN (Sept. 13, 2016), [http://www.espn.com/nfl/story/\\_id/17534211/colin-kaepernick-san-francisco-49ers-again-kneels-national-anthem](http://www.espn.com/nfl/story/_id/17534211/colin-kaepernick-san-francisco-49ers-again-kneels-national-anthem); Tom Pelissero, *Chris Long: Attention I've Received Shows Power of Protests*, NFL (Aug. 22, 2017), <http://www.nfl.com/news/story/0ap3000000833295/article/chris-long-attention-ive-received-shows-power-of-protests>.

101. Steven A. Riess, *Professional Team Sports in the United States*, OXFORD RES. ENCYCLOPEDIA AM. HIST. (Feb. 2017), <http://americanhistory.oxfordre.com/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-198#acrefore-9780199329175-e-198-note-10>; see also Richard Lapchick & Theren Bullock Jr., *The 2016 Racial and Gender Report Card: National Basketball Association*, UNIV. CENT. FLA. INST. FOR DIVERSITY & ETHICS IN SPORT (July 14, 2016), <http://nebula.wsimg.com/b9943b418cddb15b914afb9d18b62e16?AccessKeyId=DAC3A56D8FB782449D2A&disposition=0&alloworigin=1>; *QuickFacts: United States*, U.S. CENSUS BUREAU. (2016), <https://www.census.gov/quickfacts/fact/table/US/RHI225216>.

102. Mona Chalabi, *Three Leagues, 92 Teams and One Black Principal Owner*, FIVETHIRTYEIGHT (Apr. 28, 2014), <http://fivethirtyeight.com/datalab/diversity-in-the-nba-the-nfl-and-mlb/>.

103. *Id.*

104. Jordan is currently the majority owner for the Charlotte Hornets. *Id.*

105. Scott Rafferty, *Sean 'Diddy' Combs Wants to Buy Carolina Panthers Football Team*, ROLLING STONE MAG. (Dec. 18, 2017), <https://www.rollingstone.com/sports/news/sean-combs-wants-to-buy-carolina-panthers-curry-kaepernick-want-in-w514272>.

106. *Id.*

107. *Id.*



are just two ways in which one can participate in the governance of the league and have a when it comes to corporate decision-making.<sup>108</sup> Team owners and those with membership<sup>109</sup> through the NBA's Constitution and Bylaws, hold influential power in the governance structure of the league.<sup>110</sup> They are tasked with having "general supervision of the affairs of the Association, which general supervision shall be carried out through a Board of Governors."<sup>111</sup> The Constitution further provides that "each member shall be represented on the Board of Governors by a Governor who may be replaced at will by such Member (and who shall be an individual who is an Owner), and who shall be vested with the full power and authority to represent such Member and to bind such Member by his or her vote."<sup>112</sup> If the Members, and thereby the Board, are the main bodies tasked with the general supervision of the league, and therefore the key decision makers when it comes to decisions impacting league operation and governance, it is not advantageous to have such homogeneity in the demographic make-up of this group. So, the better question is, why does the demographic make-up of the Members and Board fail to reflect that of the actual league?

Board diversity is one of the most significant governance issues facing managers, directors, and shareholders in modern business associations.<sup>113</sup> Although there is still a lack of diversity on boards throughout the United States, "a recent movement has developed to further increase the amount of diversity on boards. Stakeholders, organizations, and shareholder groups are becoming increasingly interested in board diversity."<sup>114</sup> New research has provided "compelling evidence that diversity unlocks innovation and drives market growth."<sup>115</sup> This research discusses two types of diversity: inherent and acquired.<sup>116</sup> "Inherent diversity involves traits you are born with such as gender, ethnicity, and sexual orientation," while acquired diversity involves traits gained from personal experience.<sup>117</sup> Professional sports leagues are perhaps one of the best examples of where increased levels of both inherent and acquired diversity is needed. There are not many other places where a player's experience, opinion, input, and ideas are more relevant and beneficial.<sup>118</sup> Surely players should not have to ascend to Michael Jordan or Sean Combs' status to prove themselves credible and worthy of having a seat at the table when discussing issues of league governance. This is about empowering players from more than an economic perspective. Having representation in the realm of governance is

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108. *NBA Constitution & By-Laws*, *supra* note 18, at 6 (discussing the rights of owners).

109. By the league's definition, membership confers on a person or entity "rights, privileges, and benefits . . . including, without limitation, the right to organize and operate a professional basketball team to play in the league operated by the Association." *Id.* at 2.

110. *See id.* (providing comprehensive details about the power these actors hold).

111. *Id.* at 32 (discussing the Board of Governors).

112. *NBA Constitution & By-Laws*, *supra* note 18, at 32 (discussing Article 18).

113. David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REV. 33, 34 (2003).

114. Melissa Breuer, *Next Stop for Diversity Initiatives: Corporate Boardrooms*, 42 J. CORP. L. 223, 225 (2016).

115. Sylvia Ann Hewlett et al., *How Diversity Can Drive Innovation*, HARV. BUS. REV. (Dec. 2003), <https://hbr.org/2013/12/how-diversity-can-drive-innovation>.

116. *Id.*

117. The article refers to this as "2-D Diversity." *Id.*

118. *See* Breuer, *supra* note 114, at 228–29 (discussing other potential benefits of increasing board diversity including: an increase in the company's reputation with consumers, interested investors, and shareholder value).

imperative because it allows players to advocate for those interests that fall outside of those covered by the NBPA and the league's scope of control, while also ensuring that the decisions made for the league continue to promote growth.

Opponents of allowing the players' voice to be heard at the governance level might subscribe to the viewpoint that governance should be left to those with considerable experience leading successful businesses. After all, the people who are owners of professional basketball teams are either individuals who have amassed a large amount of wealth through personal business ventures or entities or the like. So why not leave governance and corporate operations to those who have proven that they know how to handle that task? Because "for one thing, experience in business or finance does not necessarily translate to knowledge of a specific industry, nor does it guarantee future success."<sup>119</sup>

If membership, ownership, or a seat on the Board are the key mechanisms in which one can participate in corporate governance, it would make sense to implement a system in which players have access to that process. Although the current NBA Constitution prohibits any player from serving as a Governor or from voting at any meeting of the Board, it does not prohibit the players from electing a representative to sit on the board.<sup>120</sup> This and several other proposed methods of remedying the issue will be discussed in the next Part.

### *3. The NBPA is Not Enough and Agents Are Not Jacks of All Trades*

While unions and employers are not always adversaries, there is an inherent level of tension built into the union-employer dynamic by virtue of the positions they hold and interests they serve, which can serve as a barrier for advancing the prerogatives of each respective side. This inherent tension also limits the level of optimal effectiveness either can ultimately attain; the relationship is further muddled in instances when the players' interests fall outside of the employee classification that the two entities recognize. Robert Berry helps illustrate this division between areas of player concern that fall within the scope of the union's capabilities and those that fall to other outside actors or entities.

[I]t is a bifurcated process, particularly from the players' standpoint. There is the union—in this case the National Basketball Players Association (NBPA)—on the one side and an uneasy juxtaposition of those who represent the player's interest on an individual basis on the other . . . . [t]he first goal is to reach a process by which the various interests can advance both the welfare of the individual player and the players as a unit.<sup>121</sup>

Currently, the majority of a player's personalized concerns fall into either the hands of the union or an agent, who is not always the appropriately equipped actor to address these concerns.<sup>122</sup> The core task of an agent has traditionally revolved around contract

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119. Interview with Joseph Yockey, Professor, Univ. of Iowa Coll. of Law, in Iowa City, Iowa (Sept. 23, 2016).

120. *NBA Constitution & By-Laws*, *supra* note 18, art. 18(b); see Gelter & Helleringer, *infra* note 139, at 1 (discussing the notion that "[s]ome directors are appointed by individuals or groups who have a specific interest in the manner the company operates", and these directors are known as constituency directors).

121. BERRY, *supra* note 45, at 91, 94–95.

122. MATTHEW MITTEN ET AL., *SPORTS LAW: GOVERNANCE AND REGULATION* 343 (Aspen Coll. Series ed., 2013).

disputes and negotiations.<sup>123</sup> As players' individual interests began to develop, the job of the agent expanded and "the proliferation in the use of agents" was accompanied by "the range of services that they performe[d]."<sup>124</sup> Because there is no designated body to handle the players personal interests, agents are being left to perform functions including "endorsement advice and solicitation, tax, estate, and financial planning . . . career, personal development, legal, insurance, and sports medicine consultation."<sup>125</sup> This is yet another example of areas that impact players, but ones which neither the league nor NBPA are addressing and thus have haphazardly fallen to agents to handle. This is not meant to suggest that the failure to address these issues has been intentional. The fact that the NBPA and league have not addressed these issues<sup>126</sup> serves to strengthen the proposition that players should be allowed to participate in the governance of the league rather than detract from it. The "agent catch-all" illustration shows that there are, in fact, areas that fall outside the scope of what the current structures and mechanisms can do for the players. Like the interests associated with players' stakeholder classification, the aforementioned areas of concern should not be directly put in the hands of either the NBPA or the league to remedy. However, just because these concerns fall outside of that jurisdiction does not abrogate the players' interest in seeing that they get addressed. The difference between the interests that have fallen in the hands of agents and those proposed here are that the latter have yet to be recognized as legitimate interests under the law.

Acknowledging players as stakeholders in the league provides a new area and classification for some of these individualized interests—interests that do not involve employment or labor—to be grouped. By grouping them as such, the foundation is then laid to begin recognizing the rights connected to these interests, establishing potential remedies, and designing an entity, representative, or governance mechanism to specifically oversee the protection of the rights and enforcement of the remedies.

#### IV. RECOMMENDATION

The following Part will outline three proposed methods for recognizing players' needs for legal protection as stakeholders in the league and increasing their participation in governance. Each method has varying degrees of likely implementation. However, all, if implemented, could be effective. The first, constitutional restructuring, is the simplest but least likely. The second is electing constituency directors, which would require more work than the first, but is more feasible. The final recommendation, legislative intervention, is the broadest and would take the most amount of work, but it is the ideal solution. There is also the possibility that any combination of recommendations could be taken. Often times, change occurs in stages. Another option would be to implement recommendation one or two first, allowing time for the third recommendation to be set in motion and developed. The justifications mentioned in Part III should be kept in mind when choosing a recommendation to implement.

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123. *Id.*

124. *Id.*

125. *Id.*

126. It is important to note that there are many considerations in the NBPA's pipeline that may seek to address some of these issues, but were not in progress at the time this Note was written. I do not want to negate or take away from those efforts.

### A. Constitutional Restructuring

The most direct method of achieving increased player participation in league governance would be for the NBA to explicitly permit it via a constitutional or bylaw amendment. As noted, the NBA has undergone substantial change and growth since the time of its inception.<sup>127</sup> The economic and cultural landscape in the late 1940s was immensely different than it is now. At the time that the NBA was created, there were other professional basketball leagues in the United States and there was not the exclusivity the NBA enjoys today.<sup>128</sup> With this in mind, it becomes apparent that the Constitution written for the NBA 70 years ago might not be as relevant for the current league. The rules of the game have changed, the level of notoriety players can achieve has changed, legislation has been adjusted to accommodate the league's functioning, and professional sports have developed their own niche in society.<sup>129</sup> Therefore, the NBA's Constitution and Bylaws should reflect this modernity and be anticipatorily malleable for changes to come.

Under the current Constitution and Bylaws, the only rules governing amendments are related to the actual procedure of passing proposed amendments.<sup>130</sup> The Constitution and Bylaws are silent as to who or what groups may actually propose an amendment.<sup>131</sup> Under common corporate governance practices, "shareholders may submit proposals to the company" regarding issues of interest or "seeking to change current corporate governance policies."<sup>132</sup> They are also "given explicit power to vote on such issues as the election of directors, and amendments to bylaws and articles of incorporation."<sup>133</sup> Empowering [stakeholders] in this way ensures that they have a voice in matters impacting the business and its governance.<sup>134</sup> This also acts as a safeguard in instances where they believe that directors or governors are not acting in the corporation's best interest. It is important to clarify that re-writing the NBA Constitution to allow players to participate in governance is not the same as re-writing the Constitution to give them a seat on the Board.

Given the NBA Constitution and Bylaws' silence on the matter, there are presumably a number of potential actors who could submit an amendment proposal. The much-needed amendment would be for the league to recognize the players it employs as stakeholders with rights analogous to shareholders. Potential proposers might include current shareholders in the league, individual board members, or even the players themselves.<sup>135</sup> Suggestion and subsequent acceptance of this proposal would not only allow the players to increase their voice and participation in governance, but it would also generate fiduciary

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127. See *supra* Part II (discussing the background and historical development of the league).

128. The NBA was founded in 1946, but as the Basketball Association of America. During this time there were also two other professional basketball leagues, the NBL and the ABL. At the time of its inception, there were only 11 teams. Leonard Koppett, *The NBA—1946: A New League*, NBA (Dec. 7, 2007, 2:37 PM), [http://www.nba.com/heritageweek2007/newleague\\_071207.html](http://www.nba.com/heritageweek2007/newleague_071207.html).

129. See *supra* Parts II.A.2, II.A.3 (discussing the league's development and place in today's society and how the legislation has developed to exempt professional sports from certain labor and antitrust laws).

130. *NBA Constitution & By-Laws*, *supra* note 18, art. 17.

131. *Id.* (illustrating that there is no language in the Constitution and Bylaws about who can propose amendments).

132. CORPORATE LAWS COMMITTEE, *supra* note 71.

133. PINTO & BRANSON, *supra* note 11, at 112.

134. Since it has been established that players as stakeholders have interests analogous to those of shareholders, the premise of the proposal remains relevant.

135. It is unclear what limitations the league would impose on who or what entities can propose amendments. This is perhaps a question that warrants further exploration outside the scope of this Note.

duties owed to them as stakeholders from the Board of Governors.

The two key obstacles associated with this recommendation are that (1) the Commissioner is free to construe the Constitution's silence on who is able to propose amendments more narrowly than this Note does<sup>136</sup> and (2) even if the Commissioner conceded to interpret constitutional silence as to include the vast list of potential proposers, the Board could still vote against accepting the proposed amendment. The question in either of these instances comes down to whether or not the proposal is in the league's best interest.<sup>137</sup> Does modifying the NBA's Constitution or Bylaws to recognize players as stakeholders in the league—thereby affording them rights and duties analogous to those of shareholders—fall within the scope of the NBA's best interest clause? If the answer to this was no, then the players would find themselves back at square one. There would be no system in place to advance their position or advocate for the idea that as contributors of human capital, as one of the main groups affected by governance decisions, players should have legal entitlement to urge the Commissioner or Board to do anything on their behalf.

### B. Constituency Directors

In the event that direct proposition of an amendment fails, the next best suggestion might be for the players to have at least one representative on the Board of Governors. Traditionally, governors are likely to “have some ownership interest in or connection to the corporation or its owners,” but this proposal advocates for a representative who does not.<sup>138</sup> Instead, the players would benefit from a representative known as a constituency director to sit on the Board.<sup>139</sup> These directors are “appointed to represent the interest of a designated stakeholder” or stakeholder group.<sup>140</sup> The presence of a constituency director on a board can be invaluable.<sup>141</sup> An example of a constituency director that would be relevant in this context would be a retired NBA player. This is because constituency directors are appointed not only to “represent these groups or individuals in a symbolic sense, but . . . they are also intended to be knowledgeable about and sympathetic to” the interests of the group they are representing.<sup>142</sup> Having an individual who specifically represented player interests—as a stakeholder sitting on the board—would diversify the conversation and encourage business decisions to be made through a lens that could be economically beneficial to the league, while also maximizing player satisfaction.

Since the Constitution prohibits players from sitting on the Board or voting on Board decisions, this suggestion provides an indirect method for players to voice the needs or

136. See Lentze, *supra* note 28, at 72–75 (discussing the wide range of powers that the Commissioner has); *NBA Constitution & By-Laws*, *supra* note 18, art. 24 (detailing the powers that the Commissioner has).

137. See *supra* note 78 and accompanying text (reiterating that both the Commissioner and the Board of Governors are tasked with acting in the best interest of the league per the Constitution).

138. CORPORATE DIRECTOR'S GUIDEBOOK, AMERICAN BAR ASSOCIATION 5 (5th ed., 2007).

139. “Director” and “Governor” refer to the same position in terms of duties undertaken. Compare *NBA Constitution & By-Laws*, *supra* note 18, at Interpretation a(6) and art. 18(b) (explaining that a Governor “shall mean a person who has been appointed by a Member” and is “vested with the full power and authority to represent such Member”); Martin Gelter & Geneviève Helleringer, *Constituency Directors and Corporate Fiduciary Duties*, in *THE PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 1* (Andrew S. Gold & Paul B. Miller eds., 2014) (explaining that directors are “appointed to represent the interest of a designated stakeholder”).

140. Gelter & Helleringer, *supra* note 139.

141. Constituency directors are different than independent directors who by definition “are expected to distance themselves from any particular interest.” *Id.* at 2 n.2.

142. *Id.* at 3.

interests that are not being addressed by the NBPA, league, or agents. Aside from the value this proposal has for players, “being responsive to stakeholder interests and concerns can help to contribute positively to a[n] [association’s] values, its workplace culture and its reputation for integrity and ethical behavior.”<sup>143</sup> Players have league-specific investments that are “difficult to transfer to another job”<sup>144</sup> and “give them an incentive to see that the enterprise is efficiently managed.”<sup>145</sup> These league-specific investments<sup>146</sup> likely do not get brought up in the context of the NBPA’s duties, simply because they do not fall within the scope of employment or labor. Therefore, allowing players to appoint a constituency director to represent them on the Board provides assurance that their interests as stakeholders—i.e. league-specific-investments—are being advocated for and protected, while simultaneously substantively enhancing the Board’s decision making processes by adding player perspective.

This proposal may prove to be less than ideal if the players are only allowed to elect one representative to sit on the Board simply because, when it comes to boards and voting on proposals, there is power in numbers. The NBA’s Constitution requires at least a three-fourths majority in order for a proposed amendment to be passed.<sup>147</sup> With this rule in place, it is obvious that it would take more than one player representative to change the tide of the entire board. However, having the player representative at the table can enlighten or influence other voters’ decisions and make meaningful change more likely than if the representative were not in the room. Appointing a constituency director on behalf of the players would be a step towards increased player participation in league governance. After all, there is power in representation.

### C. Legislative Action: The Employee-Stakeholder Model and German Co-Determination

The focus on reshaping corporate governance models in order to empower employees as stakeholders has gained traction in other fields outside of sports and the United States in general, specifically in Germany.<sup>148</sup> “Under the German codetermination system employees are given quasi-parity with shareholders,” which is in contrast to several other EU Member States that implement shareholder-primacy governance systems that have no legal requirements for employee participation on the board.<sup>149</sup> This idea of codetermination is an example of the stakeholder-pluralism model.<sup>150</sup> In 1976 Germany passed labor legislation governing this codetermination system known as the *Mitbestimmungsgesetz*.<sup>151</sup>

143. CORPORATE LAWS COMMITTEE, *supra* note 71, at 14.

144. Gelter & Hellinger, *supra* note 139, at 16.

145. Jacoby, *supra* note 54, at 457.

146. For example, human capital, certain training and skill sets, foregoing educational opportunities, etc.

147. *NBA Constitution & By-Laws*, *supra* note 18, art. 17. The three-fourths majority rule only applies when all of the governor are present and the amendment was proposed with prior written notice. In instances when the amendment was not proposed in that manner, the Constitution requires a unanimous vote.

148. Hodge, *supra* note 14, at 93. Also note that the shareholder-primacy model is the governance system most commonly used in the United States.

149. *Id.*

150. The stakeholder-pluralist model or codetermination system describes a governance system in which not only do “[s]hareholders appoint members to the board of directors” but so do internal employees and other stakeholders (i.e. relevant government employees). Hodge, *supra* note 14, at 102. Examples of countries that have implemented this model are China and Germany—“Under the 1993 Company Law, China adopted a stakeholder-pluarlist system of governance based on the German Codetermination model with a two-tier board structure.” *Id.*

151. For purposes of this Note, the term *Mitbestimmungsgesetz* will be referred to as *Mitbestimmungs*.

[Co-determination Act].<sup>152</sup> *Mitbestimmungs* created minimum standards for employee involvement, or voice, in corporations and enabled workers to elect representatives to be appointed to a portion of the supervisory board of directors.<sup>153</sup> This Act and implementation of a stakeholder-pluralist model of governance can be viewed as an extension of the proposal in Part VI.B. This proposal differs from the last because it is implemented by legislation and typically involves unions (the selected representatives are usually chosen from the union rather than other non-union individuals suggested in the previous proposal).<sup>154</sup> It also usually requires—via the legislative terms—that more than one representative be on the board.<sup>155</sup>

Much of the scholarly work surrounding this model and legislation like *Mitbestimmungs* stem from the realization that the shareholder-primacy model of governance provides employees with “either limited or no rights of participation as stakeholders” since the corporate employer’s main goal is to “maximize[] shareholder profit.”<sup>156</sup> Whereas the stakeholder-pluralist model<sup>157</sup> shifts the governance focus away from incentivizing board members to strive for “profit maximization in order to protect their own interests” to a model where, although optimal profit generation is still a goal, there is an added focus on employee representation in governance decisions.<sup>158</sup> The stakeholder-pluralist model is also different than the shareholder-primacy model in that it “considers a wider variety of interests than just shareholders, i.e. non-shareholding stakeholders.”<sup>159</sup> Apart from the fact that the shareholder-primacy model accounts only for a narrow set of interests, it has also often been regarded as shaky or suspicious ever since the collapse of U.S. financial markets, which were rooted in shareholder-primacy based capitalism.<sup>160</sup>

There is, however, one area in which the two models converge. “[B]oth groups believe that the purpose of corporate governance is to benefit society” through acting in the best interest of the business.<sup>161</sup> The caveat to this convergence “is the means of achieving this.”<sup>162</sup> Shareholder-primacy’s definition of “best interest for the company” is a much more narrowly construed corporate objective, primarily—though not exclusively, encompassing the needs and interests of shareholders.<sup>163</sup> The phrase construed under a

152. Hodge, *supra* note 14, at 103.

153. *Id.* at 116.

154. The specifics of the stakeholder-pluralist model in terms of how it is structured and which parties play what role, structure, etc. are not explored for the sake of brevity, but can be found in their entirety in Hodge, *supra* note 14.

155. For example, in countries like the Czech Republic that implement codetermination, legislation requires “all corporations with fifty or more employees must have one third of the supervisory board as employee representatives.” Hodge, *supra* note 14, at 150.

156. Hodge, *supra* note 14, at 91; *see also* Jacoby, *supra* note 54 (discussing comparative law approaches to increased employee participation in governance from Japan and Germany).

157. Hodge, *supra* note 14, at 126.

158. *See generally id.* (discussing how the stakeholder-pluralist model allows for enhanced employee participation in governance).

159. *Id.* at 95.

160. *Id.*

161. *Id.* at 102.

162. Hodge, *supra* note 14, at 102.

163. *See id.* at 105–06 (discussing the holding from a classic precedential case in this area, *Dodge v. Ford*, as it relates to shareholder-primacy and its objectives. The holding states “[a] business corporation is organized and carried on primarily for the profit of the stockholders.”).

stakeholder-pluralist theory is “considered to be a significantly ‘broader corporate objective than mere shareholder wealth’” finding that directors owed their duties to the *enterprise as a whole* and not just the shareholders.<sup>164</sup>

If the goal is to increase player participation in league governance, the stakeholder-pluralist model might prove more effective than the current shareholder-primacy model in achieving that end. Although the NBA is not a corporation, its hierarchical governance system functions like one, therefore analogizing it to a corporation for purposes of this Part’s analysis is suitable.<sup>165</sup> Implementing a stakeholder-pluralist model like *Mitbestimmungs* would “provide the necessary balance” between wealth creation and equity that is necessary in the NBA.<sup>166</sup> If players are to gain a voice as stakeholders in the league and advocate for those interests, the league’s governance must change to accommodate that. Under the NBA’s current use of the shareholder-primacy model, the Commissioner and Governors are aiming to maximize profits via focusing on shareholder interests. Therefore, what is in the best interest of the league typically means, what is in the best interest of the shareholders’ ability to make profit. Moving to a stakeholder-pluralist model would encourage them to construe what it means to maximize profits more broadly so that considering stakeholder—player—interests also falls in the scope of the league’s best interest. The NBA’s shift is further supported by Franklin Allen’s suggestion that “shareholder-primacy models function better in economies that are primarily service based [] whereas the stakeholder-pluralist model may work better in [industries] geared toward manufacturing.”<sup>167</sup>

Further evidence illustrating the feasibility of legislatively enacted stakeholder participation can be found by looking at the various stakeholder statutes here in the United States. These statutes were “developed to provide corporate leaders with a mechanism for considering stakeholder interests without breaching their fiduciary obligations to shareholders.”<sup>168</sup> Stakeholder statutes can enable or perhaps even incentivize directors and governors to consider the interests of groups other than just shareholders. Proponents of stakeholder statutes “sought to change corporate law to reflect their belief that ‘[c]orporations are more than just investment vehicles for owners of financial capital’ and argued that corporate law should account” for the ways in which corporations and enterprises impact constituencies “besides shareholders by allowing directors and executives to consider how their actions will affect stakeholders.”<sup>169</sup> Stakeholder statutes are evidence of the growing prevalence of what *Mitbestimmungs* embodies. Although *Mitbestimmungs*’ implementation in the German labor system is more established and favored, state stakeholder statutes might be the very foundation necessary for proposals like those proffered in this Note to take root.

One foreseeable drawback of this proposal is that it would potentially require

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164. Hodge, *supra* note 14, at 105 (emphasis added).

165. See *supra* notes 17–19 and accompanying text (explaining that the NBA’s entity classification is unclear and, although its constitution refers to the league as being not run for profit, there is a quite obviously much revenue generated from the commodity it produces. The league also aligns itself with many corporate sponsors so there is an incentive to maximize value for its corporate partners).

166. Hodge, *supra* note 14, at 99.

167. *Id.* at 98. See also *supra* Part III.B.1 (discussing the ways in which NBA players are commodities being asked to commodify and therefore are in a sense manufacturing something to be sold).

168. Holland, *supra* note 60, at 17–18.

169. *Id.*



Congressional action seeing as *Mitbestimmungs*, the strongest form of stakeholder-pluralism, was legislatively enacted by the German parliament. As mentioned, the NBA's insular design is seemingly oppositional to outside legal regulation. This would also imply that the model might be stretched beyond the context of professional sports, meaning that the resulting change would be perhaps more expansive and thus make sustainability more difficult. A second issue this proposal and its legislative involvement face is due to the NBA's lack of entity classification. Courts have typically construed disputes, issues, or questions arising within the NBA as those occurring between private contracting parties.<sup>170</sup> This inclination to construe the NBA as a private enterprise discourages formal external regulation<sup>171</sup> and makes it difficult for anyone other than the parties to the contract to initiate change.

Other common arguments that shareholder-primacy advocates make in support of keeping the current system are that "it is in the interest of stakeholders to maximize wealth as this makes the [league] a viable enterprise" or that "it is only through directors owing their duties solely to shareholders that the [league] will function in the most economically efficient manner."<sup>172</sup> In response to assertions like this, some scholars suggest that "[t]he link between corporate governance and economic growth is tenuous."<sup>173</sup> If this is true, then modifying an enterprise's governance system to accommodate other interests does not necessarily implicate a loss in revenue or inability to still seek profit maximization. Although there are obstacles that might arise from legally implementing a stakeholder-pluralist model, it is still a viable option for increasing player participation in governance while still allowing for profit maximization.

## V. CONCLUSION

There is currently no recognition of players' interests as stakeholders in the league and therefore, no legal rights attached to them. This lack of recognition leaves players with no legal recourse if current governing leaders act in a way that is contrary to their interests. It also prevents players from voicing positive suggestions for the league's growth and profit maximization. The current entities' and actors tasked with handling player interests as stakeholders have either not recognized these interests at all or failed to adequately do so. In light of this, the NBA should implement one of the recommended proposals to ensure that players have an enhanced role in league governance. Justifications for the proposal suggest that doing so will increase board diversity and address concerns of player exploitation and physical safety.

Ultimately, the league exists because of the players' talents and contributions. Just as those making governance decisions for the league, they have an interest in seeing the league succeed. Players are often directly impacted by governance decisions, yet the league has

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170. *NBA Constitution & By-Laws*, *supra* note 18, art. 2 (referring to the NBA's Principles of Organization which state that the "Constitution and By-Laws constitutes a contract among the Members of the Association"). *See also* Lentze, *supra* note 28, at 76–79 (explaining why courts do not tend to intervene on issues in the NBA and other problems of that arise from lack of judicial interference).

171. *See supra* Part II.A.3. (discussing the NBA's *de facto* unregulated existence).

172. Hodge, *supra* note 14, at 106–07.

173. Brett H. McDonnell, *Professor Bainbridge and the Arrowian Movement: A Review of the New Corporate Governance in Theory and Practice*, 34 DEL. J. CORP. L. 139, 183 (2009). *See also* Hodge, *supra* note 14, at 106.

failed to recognize them as a group worthy of weighing in on those decisions. Recognizing players as stakeholders in the league with significant interests that warrant legal protection will not only benefit the players, but will also increase the NBA's long term economic growth and sustainability.