

## Speeches

# Bargaining, Race, and Globalization: How Baseball and Other Sports Mirror Collective Bargaining, Law, and Life†

By WILLIAM B. GOULD IV\*

IT IS AN HONOR and pleasure to speak here and to give the Ninth Annual Pemberton Lecture on the centennial of the University of San Francisco School of Law.<sup>1</sup> I have enjoyed my association with this law school for many years and am particularly proud of Professor Maria

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The author is grateful to Eric Weitz, Stanford Law School 2014, and Veronica Francis, University of San Francisco 2015, for their valuable research assistance. Of course, I take full responsibility for any errors or deficiencies in this article.

1. The University of San Francisco created the annual Jack Pemberton Lecture on Workplace Justice in 2005. See William B. Gould IV, *A Tribute to Professor John De. J. Pemberton, Jr. at the Commencement of the Jack Pemberton Lecture on Workplace Justice*, 29 U.S.F. L. REV. 693 (2005). The lecture features nationally recognized labor and employment law scholars and focuses on emerging workplace issues with students, alumni, and practitioners. *Annual Jack Pemberton Lecture on Workplace Justice*, U.S.F. SCHOOL OF LAW, <http://www.usfca.edu/law/pembertonlectures/> (last visited Oct. 23, 2013).

Ontiveros whom Stanford Law School counts as its own for her distinguished graduate degree at Stanford.

The honor is particularly important to me given my close friendship and professional working relationship with Jack Pemberton in the 1970s and early 1980s. He was my valued co-counsel in employment discrimination class actions<sup>2</sup> as well as co-teacher for our employment discrimination seminar alternating between Stanford and USF week by week. Beginning with Equal Employment Opportunity Commission hearings in 1971, we became close personal friends interested in collective bargaining as well as racial issues and discrimination cases (two of today's subjects), though I daresay Professor Pemberton had little interest in sports—but he kept up, I am told, a very good tennis game.

Though today's subject is sports generally, as well as labor and race, my focus is disproportionately weighted toward baseball and issues relating to it, particularly given the timing of the lecture with this new season. For April 2013 marks the celebration of two out of three world championships (perhaps properly characterized as *national*, given the fact they involve only the United States and Canada) for the San Francisco Giants, a team which along with my own Boston Red Sox, are two clubs that have won twice in this still relatively new century.<sup>3</sup> The Oakland Athletics, still winners of what has been characterized as their game of “moneyball,”<sup>4</sup> defend a Western Division championship and, in keeping with the idea of spring and new beginnings, there will be an ever so brief exposure to exciting new twenty-

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2. See, e.g., *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich. 1973), *rev'd in part*, *Equal Emp't Opportunity Comm'n v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), *vacated*, *Stamps v. Detroit Edison Co.*, 431 U.S. 951 (1977), *remanded to the Sixth Circuit in light of Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Jones v. Pac. Intermountain Express*, 536 F.2d 817 (9th Cir. 1976); *United States v. Trucking Emp'rs, Inc.*, 561 F.2d 313 (D.C. Cir. 1977); *Black Musicians of Pittsburgh v. Local 60-471, Am. Fed'n of Musicians*, 375 F. Supp. 902 (W.D. Pa. 1974).

3. Since this lecture was delivered in April, the Red Sox have won their third world championship in the past decade. David Waldstein, *Monster Achievement: Red Sox Clinch First Title at Fenway Since 1918*, N.Y. TIMES, Oct. 31, 2013, at B13; Dan Shaughnessy, *Tested and Triumphant*, BOSTON GLOBE, Oct. 31, 2013, at Y1; David Waldstein, *In Baseball's Time Machine, 21st Century Belongs to the Red Sox*, N.Y. TIMES, Nov. 3, 2013, at Y1.

4. MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2003) (portraying a limited and somewhat misleading examination of the Oakland Athletics' approach to being a competitive baseball team despite a lack of financial revenue).

two-year-old rookie Jackie Bradley, Jr. who may yet return to patrol the left or centerfield territory of Fenway Park.<sup>5</sup>

Nearly thirty years ago the ex-Boston Red Sox second-string catcher Roy Partee gave me a photo of the infamous dash to home plate by Enos Slaughter in the seventh game of the 1946 World Series, which allowed the St. Louis Cardinals to prevail four games to three, allowing for the Cardinals to win the World Series in the final game.<sup>6</sup> The photo is signed by all in it, and for years I was intrigued by the identity of one individual excluded from it just a few feet away down the third base line, e.g., the Cardinals's hot corner coach, Mike Gonzalez, a man with a Latin name at the time of the last game of the twentieth century's color bar.<sup>7</sup>

The following spring Jackie Robinson broke that century's color bar,<sup>8</sup> though contrary to much public belief, he was not the first black player in organized baseball. Approximately thirty-three black players were part of "white baseball" between 1878 and the close of that century, three standouts being Frank Grant, John "Bud" Fowler, and Moses Fleetwood Walker, who were three of the more well-known players<sup>9</sup> before Jim Crow and "separate but equal"<sup>10</sup> sealed the door to black players in the 1890s.

But in the twentieth century with the advent of some Latin players, particularly from baseball-dominant and baseball-crazy Cuba (where the game has been played nearly as long as in the United

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5. Zach Schonbrun, *Boston's Center Fielder of the Future Gets a Second Chance at Now*, N.Y. TIMES, June 2, 2013, at SP3, available at <http://www.nytimes.com/2013/06/02/sports/baseball/bostons-center-fielder-of-future-gets-a-second-chance-at-now.html>.

6. George Vecsey, *John Pesky: The Man Who Held the Ball*, N.Y. TIMES (Oct. 23, 2004), <http://www.nytimes.com/2004/10/23/sports/baseball/23vecsey.html>. As second baseman Bobby Doerr told me, Slaughter scored because Leon Culberson, subbing for Dominic DiMaggio, was tardy in retrieving Harry Walker's hit. Telephone interview with Bobby Doerr, former Major League Baseball second baseman and coach (Oct. 14, 2009).

7. The 1946 season was extraordinarily memorable and is chronicled in FREDERICK TURNER, *WHEN THE BOYS CAME BACK: BASEBALL AND 1946* (1996). See also ROBERT WEINTRAUB, *THE VICTORY SEASON: THE END OF WORLD WAR II AND THE BIRTH OF BASEBALL'S GOLDEN AGE* (2013). Likewise, the author has discussed the 1946 season in WILLIAM B. GOULD IV, *BARGAINING WITH BASEBALL: LABOR RELATIONS IN AN AGE OF PROSPEROUS TURMOIL* 25–37 (2011) [hereinafter GOULD, *BARGAINING WITH BASEBALL*].

8. JULES TYGIEL, *JACKIE ROBINSON AND HIS LEGACY* (1984); ARNOLD RAMPERSAD, *JACKIE ROBINSON: A BIOGRAPHY* 158–67 (1998); William B. Gould IV, *Black Player Jackie Robinson's Influence Still Noticeable Today*, SAN JOSE MERCURY NEWS, Apr. 15, 2007, at 5P.

9. RICK SWAINE, *THE INTEGRATION OF MAJOR LEAGUE BASEBALL: A TEAM BY TEAM HISTORY* 12 (McFarland 2009).

10. See *Plessy v. Ferguson*, 163 U.S. 537 (1896). Separate but equal was undercut in *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954), and was later overruled in *Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala. 1956), *aff'd*, *Gayle v. Browder*, 352 U.S. 903 (1956).

States<sup>11</sup>) the situation took on added complexity. Cuba, from whence Mike Gonzalez hailed, produced

at least one unheralded ebony-skinned Cincinnati pitcher of Cuban birth (Tommy de la Cruz) [who preceded] Robinson in crossing baseball's twentieth-century racial barriers during the 1944 National League season. Even before [Branch] Rickey's plan had materialized in 1945 and 1946, other Cubans (Jack Calvo and José Acosta with the 1920s Senators) and Puerto Ricans (Hi Bithorn with the 1942–1944 Cubs and perhaps Luís Olmo with the Dodgers from 1943 to 1945) had also slipped behind the racial barriers quietly and almost unnoticed.<sup>12</sup>

Cuban, Adolfo “Dolf” Luque, was sufficiently light-skinned to pass the color barrier,<sup>13</sup> as others presumably did by characterizing themselves as American Indians, in my judgment—and Luque “stood supreme as one of the most feared hurlers in baseball.”<sup>14</sup> Present for the 1919 Black Sox World Series scandal, and a survivor of both the Ty Cobb dead-ball era as well as the beginnings of Babe Ruth's supremacy in the long-ball era, Luque won nearly 200 games over a two-decade major league career, going 27–8 with a 1.93 ERA in 1923.<sup>15</sup> His alleged aggressiveness on the field seemed to be mirrored by pitcher Samuel Deduno of the Dominican Republic in the 2013 World Baseball Classic as he taunted San Francisco centerfielder Ángel Pagán subsequent to fanning him with two on and two out in the critical fifth inning of the championship game between the Dominican Republic and Puerto Rico here in San Francisco.<sup>16</sup> And before Robinson, Branch Rickey apparently considered signing dark-skinned Cuban, Silvio García<sup>17</sup>—the pre-1947 twentieth century test for Latin Americans being skin complexion rather than racial identity. Thus

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11. For in-depth examinations of the history of baseball in Cuba, see ROBERTO GONZÁLEZ ECHEVARRÍA, *THE PRIDE OF HAVANA: A HISTORY OF CUBAN BASEBALL* (1999), and PETER C. BJARKMAN, *HISTORY OF CUBAN BASEBALL, 1864–2006* (2007).

12. PETER C. BJARKMAN, *BASEBALL WITH A LATIN BEAT: A HISTORY OF THE LATIN AMERICAN GAME 13–14* (1994).

13. The all-black Cuban Giants spoke an infield chatter gibberish they hoped would avoid their identification as black Americans. See Alvin Harlow, *Unrecognized Stars*, *ESQUIRE*, Sept. 1938, at 75 (quoting former Cuban Giants player Sol White).

14. BJARKMAN, *supra* note 12, at 14.

15. MLB Player Stats of Dolf Luque, MLB.COM, [http://reds.mlb.com/team/player.jsp?player\\_id=118012&c\\_id=cin#gameType='R'&sectionType=career&statType=2&season=2013&level='ALL'](http://reds.mlb.com/team/player.jsp?player_id=118012&c_id=cin#gameType='R'&sectionType=career&statType=2&season=2013&level='ALL') (last visited Nov. 25, 2013).

16. Tom Goldman, *Dominican Republic Wins World Baseball Classic* (NPR News radio broadcast Mar. 20, 2013), available at <http://www.npr.org/2013/03/20/174812890/dominican-republic-wins-world-baseball-classic>.

17. ECHEVARRÍA, *supra* note 11, at 262.

did the often-nuanced interplay between race and globalization emerge long before the past quarter-century of globalization.

And what followed Robinson, of course, was the advent of a number of black superstars like Larry Doby (who was the first in the American League, following Robinson by just a few weeks), Roy Campanella, Don Newcombe, Monte Irvin, Satchel Paige (then somewhere beyond forty years old and essentially limited to his effective “hesitation pitch”),<sup>18</sup> the great Willie Mays, as well as black Latins like Orestes “Minnie” Miñoso. In those years, the few black players in the majors out-hit whites by more than twenty points.<sup>19</sup> This became the era which the Court of Appeals for the Ninth Circuit here in San Francisco, speaking through Judge Stephen Reinhardt, characterized as “the racist culture that permeated baseball from the 1940’s through [the] early 1970’s [which] led to an unwritten quota of two black players per [MLB] team after the color barrier was broken, and those two players were usually . . . of outstanding talent.”<sup>20</sup> Soon thereafter, in the 1970s, blacks went to 30% of the player universe<sup>21</sup>—though black Americans constituted only approximately 17–18% of the total complement—and then, after much controversy, rounding out with Los Angeles Dodger Al Campanis’s controversial comments about blacks not possessing the necessities to be a manager,<sup>22</sup> Frank Robinson broke that barrier with the Cleveland Indians in 1975.<sup>23</sup>

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18. See LARRY TYE, *SATCHEL: THE LIFE AND TIMES OF AN AMERICAN LEGEND* 147, 213, 271 (2009).

19. See Gerald W. Scully, *Economic Discrimination in Professional Sports*, 38 *LAW & CONTEMP. PROBS.* 67, 71 (1973).

20. *Moran v. Selig*, 447 F.3d 748, 756 n.12 (9th Cir. 2006) (internal quotations omitted); see also N. Jeremi Duru, *Exploring Jethroe’s Injustice: The Impact of an Ex-Ballplayer’s Legal Quest for a Pension on the Movement for Restorative Racial Justice*, 76 *U. CIN. L. REV.* 793, 799 (2008).

21. Ann Killion, *Baseball Struggles to Reach Black America*, *S.F. CHRON.* (Mar. 17, 2013), <http://www.sfgate.com/sports/article/Baseball-struggles-to-reach-black-America-4360778.php>.

22. Richard L. Harris, *For Campanis, a Night that Lived in Infamy*, *L.A. TIMES* (Aug. 5, 2008), <http://articles.latimes.com/2008/aug/05/sports/sp-campanis5>; see also William B. Gould IV, *Time for Affirmative Action: Baseball Urged to Seek Out, Train Blacks as Managers and Executives*, *S.F. CHRON.*, July 6, 1986, at C8 [hereinafter Gould, *Time for Affirmative Action*] (quoting Campanis, to the same effect, prior to his well-publicized April 1987 interview with Ted Koppel).

23. Gould, *Time for Affirmative Action*, *supra* note 22; cf. N. JEREMI DURU, *ADVANCING THE BALL: RACE, REFORMATION, AND THE QUEST FOR EQUAL COACHING OPPORTUNITY IN THE NFL* 176 n.2 (2011).

Then began the great decline of African-American baseball players,<sup>24</sup> professionally as well as in the so-called amateur ranks—a phenomenon in sharp contrast to the rise of blacks in football and basketball. Indeed, it has been noted that the San Francisco Giants, once an employer of Willie Mays and Monte Irvin,<sup>25</sup> in 2013 do not have one black American player on the roster or in camp.<sup>26</sup>

Baseball, the last of the major sports to have a black manager (Bill Russell was the first in any of the major sports, becoming Boston Celtics head coach in 1966) and one which continues to lag in the employment of minorities at the so-called steppingstone positions of bench and third base coach,<sup>27</sup> has seen a dwindling number of players on the field. Indeed, in the 2013 World Series only one (Quentin Berry of the Red Sox) of the fifty roster players was black.<sup>28</sup> The alleged reasons for this are numerous and frequently debated.<sup>29</sup>

A leading baseball executive has said that the “decline of black children playing baseball [is] the inability to get instant gratification in baseball; these kids think they can come out of high school and go right to the pros in basketball and football.”<sup>30</sup> But this seems both stereotypical and to ignore the fact that, in football anyway, one cannot go directly to the pros from high school, as is possible in baseball under the Second Circuit’s ruling in *Clarett v. National Football*

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24. Steve Treder, *The Persistent Color Line: Specific Instances of Racial Preference in Major League Player Evaluation Decisions After 1947*, 10 NINE 1, 3, 6, 27 (2001).

25. Andrew Baggarly, *Extra Baggs: Giants Only Club with No African-Americans, etc.*, CSN BAY AREA (Feb. 26, 2013, 6:00 PM), <http://www.csnbayarea.com/blog/andrew-baggarly/extra-baggs-giants-only-club-no-african-americans-etc>; see also John Shea, *Why Robinson Turned Down the Giants*, S.F. CHRON. (Apr. 16, 2013), <http://www.sfgate.com/giants/shear/article/Why-Robinson-turned-down-Giants-4440239.php>. The Giants purchased Robinson from the Dodgers in 1958, when he was near the end—he immediately retired. Shea, *supra*.

26. Baggarly, *supra* note 25.

27. As of 2010, 67% of first-base coaches were minorities compared to just 23% of third-base coaches. Michael S. Schmidt & Andrew Keh, *Baseball’s Praised Diversity Is Stranded at First Base*, N.Y. TIMES, Aug. 12, 2010, at B13, available at [http://www.nytimes.com/2010/08/12/sports/baseball/12baseball.html?\\_r=0](http://www.nytimes.com/2010/08/12/sports/baseball/12baseball.html?_r=0).

28. Bill Shaikin, *In the Year of ‘42,’ a World Series with One African-American Player*, L.A. TIMES, Oct. 26, 2013, available at <http://www.latimes.com/sports/sportsnow/la-sp-sn-world-series-bud-selig-african-american-player-20131026,0,117671.story#axzz2jWpdrj00>; William C. Rhoden, *Jackie Robinson’s Legacy Recedes on Baseball Rosters*, N.Y. TIMES, Oct. 30, 2013, at B12.

29. William B. Gould IV, *On Blacks and Baseball*, BOSTON GLOBE, Apr. 12, 2006, at A13; William B. Gould IV, *A Fan’s Complaint: Red Sox Shortchange Blacks*, BOSTON GLOBE, Apr. 14, 1986, at 19.

30. GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 249 (internal quotations omitted).

*League*.<sup>31</sup> Indeed, the instant gratification argument relies upon the idea that in baseball, except for players like first baseman John Olerud of Washington State or twirler Mike Leake of Arizona State, an apprenticeship in the minor leagues of some duration must be served prior to promotion to the majors even after college. In basketball, where at one time the jump could be made from high school to the National Basketball Association immediately,<sup>32</sup> one year in college or the equivalent time period must precede advancement,<sup>33</sup> though the recent emergence of the developmental league, as well as European and Chinese basketball, creates a minor league apprenticeship which has no analogue in football.

Second, in my view there are a number of reasons for the substantial decline of black players in baseball. It is noticeable that, not only are facilities and equipment expensive and more easily available in the suburbs, but also even the existence of a batting cage is entirely unavailable in some of the major cities where blacks are more likely to reside.<sup>34</sup> Travel teams have become the training ground for young baseball players as early as eight, nine, or ten years old who aspire to play high school, college, and professional ball down the road.<sup>35</sup> Third, and arguably the second cousin of the instant gratification argument, there is the oft-cited reason of the disproportionate absence of fathers in black households.<sup>36</sup> But that hardly seems to have affected football and basketball.

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31. 369 F.3d 124, 139–41 (2d Cir. 2004) (upholding NFL’s draft eligibility rules requiring players to be three full college football seasons removed from high school).

32. *Haywood v. Nat’l Basketball Ass’n*, 401 U.S. 1204, 1206 (1971) (reinstating preliminary injunction preventing league from taking sanctions against team for signing a player less than four years after graduating from high school).

33. NAT’L BASKETBALL ASS’N, CBA 101: HIGHLIGHTS OF THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NATIONAL BASKETBALL ASSOCIATION AND THE NATIONAL BASKETBALL PLAYERS ASSOCIATION 13 (2010), available at <http://www.nba.com/.element/mp3/2.0/sect/podcastmp3/PDF/CBA101.pdf>. Under the current NBA-NBPA collective bargaining agreement, “U.S. players must . . . be at least one year removed from high school” to be eligible for the NBA draft. *Id.*

34. GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 252.

35. Tim Keown, *Why African Americans Don’t Play Pro Baseball*, ESPN, [http://espn.go.com/mlb/story/\\_/id/9186117/why-african-americans-play-pro-baseball](http://espn.go.com/mlb/story/_/id/9186117/why-african-americans-play-pro-baseball) (last updated Apr. 19, 2013).

36. Dexter Rogers, *Bob Costas on Being Commissioner, Changes Major League Baseball Needs and Race*, HUFFINGTON POST (May 26, 2013), [http://www.huffingtonpost.com/dexter-rogers/bob-costas-on-being-commi\\_b\\_3303551.html](http://www.huffingtonpost.com/dexter-rogers/bob-costas-on-being-commi_b_3303551.html). In addition to discussing the expense of baseball and the lack of scholarships available, Costas mentions, “[b]aseball tends to be a father son game—at least when a kid is first introduced to it. As we know, in certain portions of the black community, fatherlessness is a problem that goes well beyond base-

The role of colleges, previously unimportant in baseball where, in contrast to football and basketball, the professional game antedates and dwarfs the rise of college play,<sup>37</sup> is surely a factor. In the past thirty years more than 50% of the players filling the professional ranks have attended college.<sup>38</sup> Of course, it will be said that football and basketball receive more attention in the black community than does baseball. But the college statistics demonstrate that this reasoning is superficial and circular:

The standard argument is that diversity in the college game suffers because of baseball's dwindling popularity among young African Americans. But this gives an incomplete picture. A lower percentage of African Americans participate in college baseball than cross-country, fencing, soccer, volleyball and wrestling. These sports don't exactly compete with basketball or football for dominance in black neighborhoods. They don't exactly match baseball's level of black participation on the professional stage, either.<sup>39</sup>

King football, the great revenue-producer, in Division I possesses eighty-five full-time scholarships—in contrast to baseball, where the number is 11.7 and rarely is a full-scholarship given to any player.<sup>40</sup> In contrast, baseball scholarships “must be divided up like morsels among the entire roster. Players are expected to cover the rest.”<sup>41</sup> This is a problem exacerbated by the recruitment of out-of-state students by public universities and the college baseball dominance of some private universities like Rice, Miami, and Stanford, which now has two black players on its roster (but in some years past has had none). All of “this translates to a huge tuition bill that's hard for anybody but the most well-heeled to pay, whatever color they are.”<sup>42</sup>

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ball, but probably is a factor when it comes to declining baseball participation among black youth.” *Id.*

37. GOULD, *BARGAINING WITH BASEBALL*, *supra* note 7, at 12–13.

38. However, few probably graduate, in substantial part, because players become eligible to contract with professional teams after their junior year.

39. Gregory Ruehlmann, *The Incredibly White College World Series*, *THE ROOT* (June 20, 2008), <http://www.theroot.com/views/incredibly-white-college-world-series>.

40. See Bob Nightengale, *MLB Hopes to Invigorate African-American Participation*, *USA TODAY SPORTS* (Apr. 10, 2013), <http://www.usatoday.com/story/sports/mlb/2013/04/10/mlb-bud-selig-creates-diversity-task-force/2071305/>. Compare *Football Recruiting*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/Test/Issues/Recruiting/Football+Recruiting> (last updated Mar. 9, 2012), with Dave Pickle, *In the News: March 24*, *NCAA INSIDER BLOG* (Mar. 25, 2011), <http://www.ncaa.org/blog/2011/03/in-the-news-march-24/>.

41. Ruehlmann, *supra* note 39; see also Telephone interview with Mark Marquess, Stanford baseball, (Dec. 7, 2004).

42. Ruehlmann, *supra* note 39.



The average black youngster may be drawn away, blacks constitute 4.1% of all college baseball players, a number which has actually declined in the past decade.<sup>43</sup> The comparable figure in football is 34.5% and in basketball, where thirteen scholarships are available, the comparable number is 45.6%.<sup>44</sup> Moreover, only 0.5% of college baseball coaches are black, Tony Gwynn at San Diego State standing as a lonely exception that proves the rule. True, black players in football and basketball are more likely to play for white coaches in that sport as well, but the presence of a critical mass of players may diminish any reticence attached with the coaching racial composition.<sup>45</sup>

There is a particular irony in the statistical data relating to the Southeastern Conference, where baseball-dominant Louisiana State University and the University of Florida (in a conference which barred black players altogether until the 1970s) reside in states where the black population is at its highest and where the percentage of blacks in basketball and football is more than 70% at the University of Alabama, University of Georgia, University of South Carolina, University of Mississippi, Mississippi State University, and the University of Tennessee.<sup>46</sup> The percentage difference between blacks in the undergraduate student body and on these revenue-generating sports teams is dramatic, going from a 63% difference at the University of Florida all

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43. NAT'L COLLEGIATE ATHLETIC ASS'N, 1999-2000 — 2009-10 NCAA STUDENT-ATHLETE RACE/ETHNICITY REPORT 111 (2010).

44. *Id.* at 112, 115.

45. *Cf.* *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977) (finding lower court erred in comparing racial composition of teacher workforce with that of the student population); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (rejecting the so-called role model theory by stating “[t]here are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind. In fact, there is no apparent connection between the two groups”). I am of the view that the best position in this area has been set forth by Justice Ginsburg in her dissenting opinion in *Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2432-34 (2013) (Ginsburg, J., dissenting) (“[T]hose that candidly disclose their consideration of race [are] preferable to those that conceal it.”) (internal quotations omitted). *See also Ricci v. DeStafano*, 557 U.S. 557, 608, 644 (2009) (Ginsburg, J., dissenting) (disagreeing with the majority’s finding that “a city in which African-Americans and Hispanics account for nearly 60 percent of the population, must today be served—as it was in the days of undisguised discrimination—by a fire department in which members of racial and ethnic minorities are rarely seen in command positions”).

46. SHAUN R. HARPER, COLLIN D. WILLIAMS, JR. & HORATIO W. BLACKMAN, CTR. FOR THE STUDY OF RACE AND EQUITY IN EDUC., UNIV. OF PENN. GRADUATE SCH. OF EDUC., *BLACK MALE STUDENT-ATHLETES AND RACIAL INEQUITIES IN NCAA DIVISION I COLLEGE SPORTS* 14 (2013).

the way up to 73% at the University of Mississippi.<sup>47</sup> Baseball statistics are not remotely comparable.

And the figures relating to the absence of blacks are even more dramatic at the elite level where teams in the College World Series (“CWS”) often do not have any black players at all.<sup>48</sup> Thus, “NCAA baseball has a race problem that dwarfs anything in the major leagues.”<sup>49</sup> All of this means that one of the main avenues<sup>50</sup> to professional baseball is shut down for black players through raw economics.<sup>51</sup> Major League Baseball has appropriately engaged in discussions in recent years about providing financial aid to the NCAA to remedy this,<sup>52</sup> but to date nothing has happened and at present I fear nothing will happen. Of course, there remains the elephant in the room in this

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47. *Id.*

48. *E.g.*, Ruehlmann, *supra* note 39 (noting that three of eight teams in the 2008 CWS had no black players); Pat Borzi, *Black Players Often Stand Alone in College Baseball*, N.Y. TIMES, June 25, 2005, at D5 (noting that the four finalists in the 2005 CWS had a total of four black players and one team had none); *Three CWS Teams Have No Black Players*, ESPN (June 25, 2005), <http://sports.espn.go.com/ncaa/news/story?id=2094459> (noting that three teams in the 2005 CWS had no black players).

49. Ruehlmann, *supra* note 39.

50. In 2012, Baseball America found that 54% of drafted players on major league forty-man rosters came from four-year colleges. See Conor Glassey, *MLB 40-Man Roster Analysis*, BASEBALL AMERICA (Mar. 30, 2012), <http://www.baseballamerica.com/today/majors/season-preview/2012/2613177.html>; GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 257.

51. Bob Cook, *Baseball's Lack of Black Players Reflects Flawed U.S. Development System*, FORBES (Apr. 10, 2013), <http://www.forbes.com/sites/bobcook/2013/04/10/baseballs-lack-of-black-players-reflects-flawed-u-s-youth-development-system/> (“[Sports like baseball] generally require their participants to have families with the luxury of money to spend thousands of dollars on equipment each year and the luxury of time to be able to tag along during the extensive travel schedule those teams require, a process that begins when players still haven’t reached double digits in age. They also require those families to live in communities where there is access to such programs.”); see also *id.* (“Major League Baseball, if it’s serious about wanting to increase African-American player development, will have to do more than a few promotional programs here and there. It will have to engage in some level of what it’s doing in Latin America for urban America. In other words, spend a ton of money to even the playing field, no pun intended, between black kids and their richer, whiter counterparts.”); Tim Keown, *What the MLB Committee Will Find*, ESPN (Apr. 19, 2013), [http://espn.go.com/mlb/story/\\_/id/9186117/why-african-americans-play-pro-baseball](http://espn.go.com/mlb/story/_/id/9186117/why-african-americans-play-pro-baseball) (“The committee members need to see the industry of youth baseball for what it has become: A business enterprise designed to exclude those without the means and mobility to participate. Over the past 15 to 20 years, the proliferation of pay-for-play teams in youth baseball—and the parallel proliferation of parents willing to pay for them and coaches willing to cash their checks—has had more of an impact on African-American participation than anything another sport has to offer.”).

52. See Andy Gardiner, *NCAA, MLB Ponder Partnership on Additional Scholarships*, USA TODAY (May 15, 2012), <http://usatoday30.usatoday.com/sports/college/baseball/story/2012-05-15/ncaa-mlb-ponder-partnership-on-scholarships/54977248/1>.

entire discussion, i.e., the professionalization of so-called amateur athletics and the question of whether college athletes ought to be considered employees within the meaning of the National Labor Relations Act.<sup>53</sup> But in the confines of the system as it currently is, baseball, along with the NCAA, needs to step up to the plate so that poor or less-affluent kids of all races have an opportunity to benefit from available scholarships, something that the NCAA appears unwilling to do because of the privileged position of the revenue-producing sports in its hierarchy.<sup>54</sup>

Baseball has taken a number of steps to address this issue through the establishment of a so-called RBI (Reviving Baseball in Inner Cities) program, of which Carl Crawford, Coco Crisp, Jimmy Rollins, CC Sabathia, and Dontrelle Willis are some of the most prominent alumni.<sup>55</sup> A similar program, aimed at the community, has been instituted in the form of the Major League Baseball Urban Youth Academy in Compton, California. An additional facility has been opened in Houston, Texas. It may be that these programs will bear fruit and reverse the decline at some point in the future. At present there is no sign of this.<sup>56</sup>

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53. 29 U.S.C. §§ 151–169 (2006); Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71 (2006); Taylor Branch, *The Shame of College Sports*, ATLANTIC (Sept. 7, 2011), <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>; Joe Nocera, *Let's Start Paying College Athletes*, N.Y. TIMES (Dec. 30, 2011), available at <http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html?pagewanted=all&r=0>; see also Boston Medical Ctr. Corp., 330 N.L.R.B. 152 (1999) (determining that interns and residents are employees); William B. Gould IV, *Globalization in Collective Bargaining, Baseball, and Matsuzaka: Labor and Antitrust Law on the Diamond*, 28 COMP. LAB. L. & POL'Y J. 283 (2007) [hereinafter Gould, *Globalization in Collective Bargaining*].

54. Mike Axisa, *MLB Creating Committee to Study Decline in African-American Players*, CBS SPORTS (Apr. 10, 2013), <http://www.cbssports.com/mlb/blog/eye-on-baseball/22045063/mlb-creating-committee-to-study-decline-of-africanamerican-player> (“I think at least part of the reason the number of African-Americans in baseball has declined has to do with the lack of baseball scholarships colleges can offer. NCAA Division I schools are allowed only 11.7 baseball scholarships, and may fund fewer. Other sports like football (85 scholarships in the FBS) and basketball (13 in Division I) can offer more, which may be luring young athletes—of all races, not just African-Americans—away from the diamond.”).

55. But see Phil Taylor, *In Oakland and Cities Across the Country, Baseball a Forgotten Game*, SPORTS ILLUSTRATED (Apr. 17, 2013), <http://sportsillustrated.cnn.com/mlb/news/20130417/baseball-diversity/>.

56. Nick Cafardo, *MLB Still Lacks Interest from African-Americans*, BOSTON GLOBE, Apr. 14, 2013, at C9 (“The RBI program has been a noble undertaking. RBI has seen more than 200 of its kids drafted to major league teams. But it hasn’t created that interest of a kid gathering up his pals and heading over the park for a pickup game, like Willie Mays, Hank Aaron, and Ernie Banks etc. used to do. Nowadays, if it’s not organized or structured, it usually doesn’t happen.”).

And there is another factor that must be taken into account. This is the development of globalization, which, similar to its advent in the general economy,<sup>57</sup> contains both its positive and negative aspects.

### I. The Jurisprudence of Title IX and Its Potential Applicability to Blacks in College Baseball

Here, Title IX, with regard to the NCAA, is instructive. The statute was designed to combat sex-based discrimination in education admissions but, notwithstanding the fact that there appeared to be little discussion of intercollegiate athletics in the legislative history,<sup>58</sup> Senator Birch Bayh stated that the exceptions to discriminatory prohibitions were narrow, i.e., “[Title IX is not designed to] mandate the desegregation of football fields.”<sup>59</sup> The proposed Tower Amendment provided for a revenue-based exemption to the sex discrimination prohibition and was subsequently rejected,<sup>60</sup> but Congress replaced it with another amendment in late 1974, the Javits Amendment, which directed the Secretary of the Department of Health, Education, and Welfare (“HEW”) to prepare regulations regarding “intercollegiate athletic [activities providing for] reasonable provisions considering the nature of particular sports.”<sup>61</sup> Subsequent attempts to exempt revenue-producing sports were introduced between 1974 and 1976, but they all failed.<sup>62</sup> The Secretary of HEW noted that, while “revenue production could not justify disparity in average per capita expenditure between men and women,” there were nonetheless differences

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57. Cf. ROBERT J. FLANAGAN, *GLOBALIZATION AND LABOR CONDITIONS: WORKING CONDITIONS AND WORKER RIGHTS IN A GLOBAL ECONOMY* 7 (2006) (examining how mechanisms of globalization alter working conditions and labor rights). See generally INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE, AND PUBLIC POLICY (Robert J. Flanagan, William B. Gould IV eds., Stanford Univ. Press 2003) (examining current regulations and standards, along with recent proposals and mechanisms to compel developing countries to adopt labor standards).

58. See, e.g., Charles Spitz, Note, *Gender Equity in Intercollegiate Athletics as Mandated by Title IX of the Education Amendments Act of 1972: Fair or Foul?*, 21 SETON HALL LEGIS. J. 621, 625–26 (1997).

59. *Id.* at 626 n.22 (quoting 117 CONG. REC. S5807 (1972)).

60. See *id.* at 627, 627 n.26; *Cohen v. Brown Univ.*, 991 F.2d 888, 894 n.6 (1st Cir. 1993).

61. Spitz, *supra* note 58, at 627 n.30 (quoting The Education Amendments of 1974, Pub. L. 93-380, § 844, 88 Stat. 612 (1974)).

62. See Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 11 n.36 (1992); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 532 n.22, 533 n.24 (1982) (noting amendments aimed at limiting Title IX’s applicability to athletics).

that could be tolerated because of the high expenditures required, for instance, for “expensive protective equipment.”<sup>63</sup>

As a matter of Title IX law, it seems that equality is not required in each sport but rather in treatment overall,<sup>64</sup> and thus, even assuming the law applied to race as well as sex, a violation could not be made out because of the unfair treatment of blacks and other poor players, so long as the programs such as football and basketball produce large numbers of black athletes. It seems to me nonetheless that given the relevance of lack of interest on the part of students to sports opportunities, the fact that black, minority, and poor baseball players may be diverted from that sport by superior benefits in others, is a matter to which policymakers ought to attend as part of an attempt to remedy the absence of blacks in college baseball—and thus the relative absence of blacks in professional baseball.

## II. Globalization

The backdrop for these developments is globalization, which, as we have seen, had already been developing prior to Robinson in 1947. At the time of the embargo of Cuba in 1961, ninety-six Cubans and twelve Dominicans had played in Major League Baseball.<sup>65</sup> After more than a half-century the Cubans keep coming—notwithstanding the le-

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63. Office of Civil Rights, Office of the Secretary, HEW, *Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71421 (1979). *But see* Stanley v. Univ. of S. Cal., 13 F.3d 1313 (9th Cir. 1994) (upholding pay disparities between coaches of men’s and women’s basketball teams in part based on the claim that the men’s team generated much more revenue and thus warranted a higher-paid coach); Bartges v. Univ. of N.C. at Charlotte, 908 F. Supp. 1312 (W.D.N.C. 1995), *aff’d*, 94 F.3d 641 (4th Cir. 1996) (unpublished table decision).

64. *See, e.g.*, Kelley v. Bd. of Trustees, 35 F.3d 265, 271 (7th Cir. 1994) (rejecting discrimination allegation brought by members of men’s swimming program that was cut by the University of Illinois when the women’s swimming program and other men’s sports were not).

Requiring parallel teams would certainly have been the simplest method of ensuring equality of opportunity—and plaintiffs would doubtless have preferred this approach since, had it been adopted, the men’s swimming program would likely have been saved. It was not unreasonable, however, for the agency to reject this course of action. Requiring parallel teams is a rigid approach that denies schools the flexibility to respond to the differing athletic interests of men and women. It was perfectly acceptable, therefore, for the agency to chart a different course and adopt an enforcement scheme that measures compliance by analyzing how a school has allocated its various athletic resources.

*Id.*

65. Mark Kurlansky, *Cuba’s Major-League Cachet*, WALL ST. J. (Apr. 10, 2010), <http://online.wsj.com/article/SB10001424052702303720604575170171909416204.html>.

gal prohibitions—at least sixty defectors have played in the majors.<sup>66</sup> But since the Cuban embargo the numbers have shifted dramatically toward the Dominican Republic.<sup>67</sup>

In the wake of free agency, baseball decided to fight so as to limit or reverse Peter Seitz's 1975 award providing that players were free to sign with another club subsequent to the expiration of the option year at the end of their individual contract<sup>68</sup> and the 1976 collective bargaining agreement which followed it.<sup>69</sup> But a near thirty years' war,<sup>70</sup> culminating in the mother of all strikes in 1994–95, which produced

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66. *Id.*; see also Rachel D. Solomon, Note, *Cuban Baseball Players, the Unlucky Ones: United States-Cuban Professional Baseball Relations Should Be an Integral Part of the United States-Cuba Relationship*, 101 J. INT'L BUS. & L. 153, 157 (2011) (noting impact of legislation on Cuban defectors); Walter T. Champion & Danyahel Norris, *Why Not Row to the Bahamas Instead of Miami?: The Conundrum That Awaits Cuban Elite Baseball Players Who Seek Asylum and the Economic Nirvana of Free Agency*, 9 VA. SPORTS & ENT. L.J. 219, 231–32 (2009) (explaining incentive to defect in light of MLB "loophole" rules); Matthew J. Frankel, Note, *Major League Problems: Baseball's Broken System of Cuban Defection*, 25 B.C. THIRD WORLD L.J. 383, 408 n.218 (2005); Andrea Kupfer Schneider, *Baseball Diplomacy*, 12 MARQ. SPORTS L. REV. 473, 479–85 (2002) (explaining the hiring of Cuban defectors and focusing on the MLB rules for hiring individual players from Cuba once they arrive in the United States); Scott M. Cwiertny, Note, *The Need for a Worldwide Draft: Major League Baseball and Its Relationship with the Cuban Embargo and United States Foreign Policy*, 20 LOY. L.A. ENT. L. REV. 391, 411–21 (2000) (examining the evolution of MLB rules, including the MLB "loophole," regarding the recruiting and signing of Cuban baseball players). More recently, the MLB has made it increasingly difficult to sign Cuban defectors. Ben Badler, *MLB Delays Cuban Signings*, BASEBALL AMERICA, Sept. 17–Oct. 1, 2013, at 3 (on file with author); cf. Ben Badler, *Slugging First Baseman Abreu Leaves Cuba*, BASEBALL AMERICA, Sept. 3–17, 2013, at 19 (on file with author) (acknowledging that despite increasing difficulty of signing, Jose Abreu, a premiere offensive Cuban player, has left Cuba to try to sign with a major league team). However, Cuba has begun to lift restrictions on Cuban players who seek to play abroad. See Randal C. Archibold, *Cuba to Let Its Athletes Play Abroad*, N.Y. TIMES, Sept. 28, 2013, at A2.

67. See discussion *infra* Part III.

68. Professional Baseball Clubs, 66 Lab. Arb. Rep. (BNA) 101 (1975) (Seitz, Arb.).

69. See GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 115 (noting the suggestion that Miller, long-time executive director of the Major League Baseball Players Association, initially feared that free agency might lead to an oversupply of players); CHARLES KORR, THE END OF BASEBALL AS WE KNOW IT: THE PLAYERS UNION, 1960–81 (2002) (discussing background dynamics), see also MARVIN MILLER, A WHOLE DIFFERENT BALLGAME: THE INSIDE STOCK OF THE BASEBALL REVOLUTION (2004).

70. ROBERT C. BERRY, WILLIAM B. GOULD IV ET AL., LABOR RELATIONS IN PROFESSIONAL SPORTS 60–73 (1986); William B. Gould IV, *The 1994-'95 Strike and National Labor Relations Board*, in REVERSING FIELD: EXAMINING COMMERCIALIZATION, LABOR, GENDER AND RACE IN 21ST CENTURY SPORTS LAW 92–105 (André Douglas Pond Cummings & Anne Marie Lofaso eds., 2010); Robert C. Berry & William B. Gould IV, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls and Strikes*, 31 CASE W. RES. L. REV. 685, 748–53 (1981) (discussing Seitz's 1975 award); William B. Gould IV & Robert C. Berry, *Views of Sport: Labor Trouble Is Brewing*, N.Y. TIMES, Aug. 10, 1986, at L\_1\_S2; see generally William B. Gould IV, *Labor Issues in Professional Sports: Reflections on Baseball, Labor, and Antitrust Law*, 15 STAN. L. & POL'Y REV. 61 (2004) (discussing thirty years of war with particular focus on the 1994–95 strike).

the elimination of the World Series and ultimately brought the intervention of the National Labor Relations Board prior to Opening Day 1995 to rescind the owners' unilateral changes on free agency and salary arbitration, brought the players back to the field and produced peaceable relationships for two decades and counting.<sup>71</sup> Though the 1996 collective bargaining agreement following the end of the 1994–95 strike brought peace, salary escalation continued, and the search was on for both new revenues and new talent.<sup>72</sup> It is not entirely coincidental that Hideo Nomo was able to exploit contractual loopholes and to become the first Japanese player in the United States since the 1960s in the immediate wake of the 1994–1995 bitterly fought strike.<sup>73</sup> Today the average annual salary for major league players is \$3.2 million.<sup>74</sup>

The roots of globalization, however, go far beyond the search for more inexpensive labor from both the Far East and Latin America, but also it has involved baseball in a search for new revenues to compensate for ever-increasing labor costs. At its most fundamental level the sale of hats, shirts, and other paraphernalia in countries such as Indonesia and Turkey, where baseball is little known, was part of the MLB strategy. Moreover, the *Boston Globe* noted that buying an advertisement behind home plate in Rangers Ballpark in Arlington, Texas, costs between \$120,000 and \$160,000 per half inning, if the advertiser buys an entire season's worth of ads.<sup>75</sup> Buying for just a few games cost more per half inning, and the same is true in Kansas City, Seattle, and elsewhere.<sup>76</sup> "With the advent of Japanese players of superstar quality, many Japanese companies began to express interest

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71. GOULD, *BARGAINING WITH BASEBALL*, *supra* note 7, at 97–112.

72. *Baseball's Revenue Gap: Pennant for Sale? Hearing Before the Subcomm. on Antitrust Business Rights, and Competition of the S. Comm. on the Judiciary*, 106th Cong. 5 (2000) (statement of Sen. Herbert Kohl), available at <http://www.gpo.gov/fdsys/pkg/CHRG-106shrg74416/pdf/CHRG-106shrg74416.pdf>.

73. Claire Smith, *Dodgers Look East*, N.Y. TIMES (Feb. 13, 1995), available at [http://www.nytimes.com/packages/html/sports/year\\_in\\_sports/02.13.html](http://www.nytimes.com/packages/html/sports/year_in_sports/02.13.html).

74. *Average Major League Baseball Salary Climbs to \$3.2 Million*, L.A. TIMES (Dec. 7, 2012), available at <http://articles.latimes.com/2012/dec/07/sports/la-sp-newswire-2012-12-07>; cf. WILLIAM B. GOULD IV, *A PRIMER ON AMERICAN LABOR LAW* 61–63 (5th ed. 2013) (noting luxury tax and revenue sharing impacts on players' salaries).

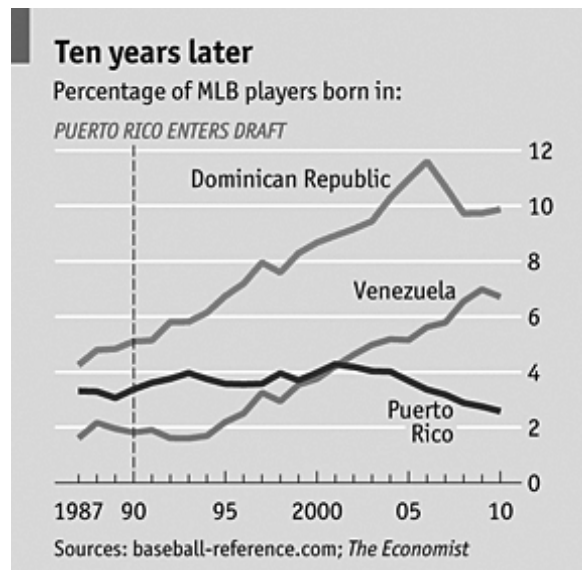
75. Keith Reid, *Sox Have Dice-K but Rivals Reaping Ad Dollars*, BOSTON GLOBE, Apr. 25, 2007, [http://www.boston.com/sports/baseball/redsox/articles/2007/04/25/sox\\_have\\_dice\\_k\\_but\\_rivals\\_reaping\\_ad\\_dollars/](http://www.boston.com/sports/baseball/redsox/articles/2007/04/25/sox_have_dice_k_but_rivals_reaping_ad_dollars/).

76. GOULD, *BARGAINING WITH BASEBALL*, *supra* note 7, at 259; see also David Jacobson, *The Revenue Model: Why Baseball Is Booming*, CBS MONEYWATCH (July 11, 2008), [http://www.cbsnews.com/8301-505125\\_162-51210671/the-revenue-model-why-baseball-is-booming/](http://www.cbsnews.com/8301-505125_162-51210671/the-revenue-model-why-baseball-is-booming/).

in this advertising, aimed as it was at Japanese audiences watching Major League Baseball.”<sup>77</sup>

But much more was involved. Though the Commonwealth of Puerto Rico had been a source in the 1950s and 1960s, it is generally thought that baseball’s institution of the draft applicable to Puerto Rico and Canada in 1990 dried up the flow of talent from the Commonwealth. As *The Economist* has noted:

In theory, this should not have affected the number of Puerto Ricans signed, since undrafted players become free agents, who can sign with any team they wish. But in practice, MLB clubs rarely sign them; they tell them to go to university and try their luck in the draft later on. The draft thus forced Puerto Ricans to compete with Americans for a fixed number of places. Moreover, whereas Puerto Ricans could previously be signed at age 16, a high-school degree (usually given at 18) is required for the draft. Since the island’s schools do not have baseball teams, its 16- and 17-year-olds had nowhere to train. As a result, the number of Puerto Rican MLB signings fell by 13% in 1991–92.<sup>78</sup>



**Figure 1 - Reproduced from *The Economist***

Substituted for Puerto Rico and Cuba was the Dominican Republic and, secondarily, Venezuela. Separate protocols or agreements were negotiated with Japan, Korea, and, less noticed (because it is

77. GOULD, *BARGAINING WITH BASEBALL*, *supra* note 7, at 259.

78. *Baseball in Latin America: Draft Dodgers No More*, *ECONOMIST*, Feb. 4, 2012, at 40, available at <http://www.economist.com/node/21546064>.



football, or soccer, crazy), Mexico. The new recruiting grounds were initially a real cost-saver. For instance, Pedro Martínez received a \$6,500 bonus compared to the incredible but hardly comparable Mike Mussina's \$225,000.<sup>79</sup> Shortstop Troy Tulowitzki of Colorado got \$2.3 million as opposed to the mere \$23,000 that the Boston Red Sox paid for Hanley Ramírez.<sup>80</sup> And so it goes: "The average signing bonus for American players drafted in 2011 was \$232,000; for international players, it was approximately half that."<sup>81</sup> The philosophy, furthered by the COMPETE Act of 2006, which made it easier to obtain visas for minor league players from abroad during the Bush administration,<sup>82</sup> meant that as of 2012 42% of minor leaguers were from Latin American countries and almost 29% of major leaguers were born there as well, the highest percentage ever except for 2005.<sup>83</sup>

The Dominican Republic, to which baseball came in the late-1800s presumably through Cuban immigrants, became the primary ground of recruitment, with clubs utilizing so-called "academies" and training camps where players could be signed at the age of sixteen rather than the age of eighteen as is the case in the United States.<sup>84</sup> Clubs were "parachuting in to look for big-time talent at bargain basement prices. As former Colorado Rockies executive Dick Balderson once explained, 'Instead of signing four American guys at \$25,000 each, you sign 20 Dominican guys for \$5,000 each.'"<sup>85</sup>

This meant that players had less of a chance to advance to professional baseball than their American counterparts and approximately 20% the chance of getting to the majors.

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79. Ian Gordon, *Played*, MOTHER JONES, March/April 2013, at 44.

80. *Id.*

81. *Id.*

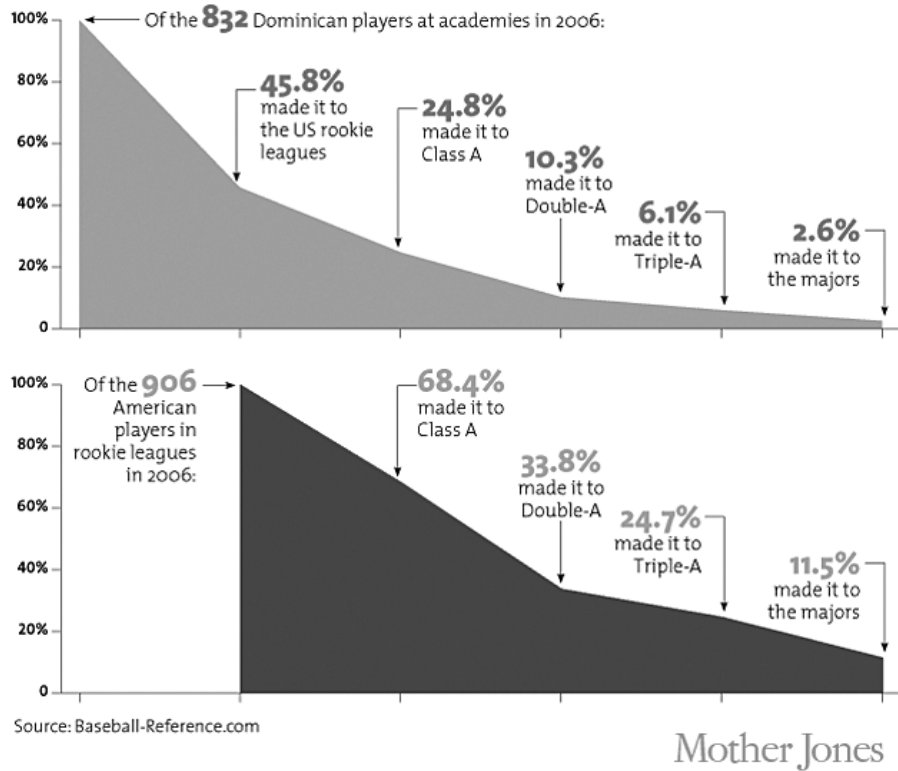
82. Pub. L. No. 109-463, 120 Stat. 3477 (2006) (codified at 8 U.S.C. § 1184 (2006)); see also Joel Millman, *Foreign Talent Loads the Bases in Minor Leagues*, WALL ST. J., (Aug. 15, 2009), <http://online.wsj.com/news/articles/SB124966930911615069>.

83. Gordon, *supra* note 79; GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 248.

84. Michael S. Schmidt, *Baseball Considers Plan to Curtail Age Fraud*, N.Y. TIMES (Feb. 9, 2010), [http://www.nytimes.com/2010/02/10/sports/baseball/10baseball.html?\\_r=0](http://www.nytimes.com/2010/02/10/sports/baseball/10baseball.html?_r=0);

GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 257.

85. Gordon, *supra* note 79.



**Figure 2 - Reproduced from *Mother Jones***

As time went on, however, bonuses began to increase, rising from \$29,000 for the Dominican Republic to \$108,000.<sup>86</sup> Meanwhile, secondarily, organized baseball began to lose out in the court of public opinion when abuses emerged. Not all of the academies had certified trainers.<sup>87</sup> A 2009 Sandy Alderson report advocated changes aimed at diminishing the steroid problem in the Dominican Republic<sup>88</sup>—as

86. *Baseball in Latin America: Draft Dodgers No More*, *supra* note 78.

87. Gordon, *supra* note 79, at 43.

88. Memorandum from Sandy Alderson for Bud Selig, Commissioner of Major League Baseball 9–10 (Sept. 23, 2009) (on file with University of San Francisco Law Review) [hereinafter Alderson Report]; *see also* ARTURO J. MARCANO & DAVID P. FIDLER, *STEALING LIVES: THE GLOBALIZATION OF BASEBALL AND THE TRAGIC STORY OF ALEXIS QUIROZ* 51 (2002); Arturo J. Marcano Guevara & David P. Fidler, *Fighting Baseball Doping in Latin America: A Critical Analysis of Major League Baseball's Drug Prevention and Treatment Program in the Dominican Republic and Venezuela*, 15 U. MIAMI INT'L & COMP. L. REV. 107, 120–26 (2007); Arturo J. Marcano & David P. Fidler, *The Globalization of Baseball: Major League Baseball and the Mistreatment of Latin American Baseball Talent*, 6 IND. J. GLOBAL LEG. STUD. 511, 542–47 (1999) (examining the less than favorable treatment of players at baseball academies); Arturo J. Marcano & David P. Fidler, *Global Baseball: Latin America*, in *THE CAMBRIDGE COMPANION TO BASEBALL* (Leonard Cassuto ed., 2011).

well as age and identity fraud<sup>89</sup>—providing for three-year contracts so that teams could recoup their losses if they had been misled in signing what they perceived to be a younger player.<sup>90</sup> The regulation of the so-called “buscones,” the recruiters who feed these players to the clubs and their academies, was sought as well. The biggest development is the 2011 collective bargaining agreement, which limits the salaries of both draftees as well as international players and provides for substantial tax and draft disallowance sanctions for violations. The collective bargaining agreement provides that these sanctions grow more severe in both the fines and the draft losses and thus a kind of poison pill in the event that the negotiation of an international draft is not—and it was not—achieved by June 1, 2013.

It remains to be seen, but these changes may diminish academy abuses and perhaps, as in Puerto Rico, the recruitment of Latin American players as well. The question of whether American players, black or white, will obtain more job opportunities remains a matter of conjecture. The principle thrust of the 2011 agreement was to fashion a quid pro quo for expanding free agency for major league players<sup>91</sup> in exchange for wage constraints for those entering the market. Like draftees who are the subject of rookie wage scales in basketball and football, they are, of course, unrepresented.<sup>92</sup> Undoubtedly these provisions are an attempt to not only move away from both academy abuses and escalating Latin American draft bonuses but also are devised in anticipation of the inevitable diminution of extant Cold War

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89. For instance, Fausto Carmona of the Cleveland Indians was revealed to be playing under a false identity, having been born Roberto Hernández. Subsequently, he assumed his real identity with the Tampa Bay Rays. Joe Smith, *Hernandez Evoking the Carmona of Old*, TAMPA BAY TIMES, March 11, 2013, at 1C, available at <http://www.tampabay.com/sports/baseball/rays/rays-roberto-hernandez-looking-like-same-old-pitcher-under-new-name/2108356>.

90. Alderson Report, *supra* note 88, at 6–7.

91. The 2011 collective bargaining agreement substantially modified the rules for free agent compensation by eliminating the Type A and Type B free agent designations (former Type C designations were eliminated in an earlier collective bargaining agreement) for determining compensation and replacing them with a uniform system based on qualifying offers. See MLB-MLBPA 2012–2016 BASIC AGREEMENT 87–88 (2011) [hereinafter BASIC AGREEMENT]; Matthew Leach, *As Expected, New Rules Impact Free-Agent Market*, MLB (Feb. 12, 2013), [http://mlb.mlb.com/news/article.jsp?ymd=20130212&content\\_id=41560238&c\\_id=mlb](http://mlb.mlb.com/news/article.jsp?ymd=20130212&content_id=41560238&c_id=mlb). If a team makes one of its players who is becoming a free agent a qualifying offer (equal to the average salary of the 125 highest paid players), the free agent declines the offer, and the free agent is signed by another team, then the team losing the free agent is entitled to a compensatory draft pick. Leach, *supra*.

92. See generally *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954 (2d Cir. 1987) (involving antitrust action brought by college basketball players challenging certain provisions of collective bargaining agreement with the NBA).

barriers vis-à-vis Cuba. MLB knows that a gold rush could be on once Helms-Burton is modified and the potential for a draft system may well head off what would otherwise be a relatively expensive free agency scramble.

The first and most prominent of the country-specific arrangements involves Japan.<sup>93</sup> The Japanese protocol arrangement grew out of the Los Angeles Dodgers's signing of Nomo in the 1990s as well as a dispute relating to Japanese pitcher Hideki Irabu, who was the subject of an attempted exclusive working agreement between the San Diego Padres and Chiba Lotte Mariners.<sup>94</sup> After it was clear that he wanted to play in the United States, Irabu was assigned to the Padres but he resisted this transaction.

The MLBPA threatened legal and arbitral action if the Padres did not trade Irabu's negotiating rights to the team of his choice. The MLB Players Relation Committee questioned the authority of the MLBPA to file a grievance on Irabu's behalf. The Committee maintained that the MLBPA could not properly represent a Japanese player who was not already part of the bargaining unit composed of major league players.<sup>95</sup>

But the fact is that not only is the Rule 4 amateur draft system part of the collective bargaining agreement, but also the draft has served as compensation for major league free agents, a compensation, as noted above, considerably diminished by the 2011 agreement.<sup>96</sup> Earlier rulings by both the courts and arbitrators supported the idea that MLBPA could act on behalf of applicant players as well as incumbents inasmuch as unilateral changes could undermine or affect the incumbent player's benefit protected by the collective bargaining agreement.<sup>97</sup> Noting that bargaining historically sometimes involved amateur matters and sometimes did not, the arbitrator was of the view that the parties had routinely recognized the promotion of players to the majors and the demotion of players to the minors.<sup>98</sup> Moreover, the arbitrator concluded that the right to challenge changes in the amateur draft had not been waived by the MLBPA in collective bar-

93. GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 268–72; *see also* Gould, *Globalization in Collective Bargaining*, *supra* note 53.

94. *See* GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 262–63.

95. *Id.* at 263.

96. *See* Alderson Report, *supra* note 88, at 8–9.

97. *See* Major League Baseball Players' Association and the Twenty-eight Major League Clubs (Amateur draft) (Aug. 19, 1992) (on file with author); BASIC AGREEMENT, *supra* note 91, at 1–2.

98. William B. Gould IV, *Baseball and Globalization: The Game Played and Heard and Watched 'Round the World (With Apologies to Soccer and Bobby Thomson)*, 8 *IND. J. GLOBAL & L. STUD.* 85, 111 (2000) [hereinafter Gould, *Baseball and Globalization*].

gaining.<sup>99</sup> Further, the arbitrator believed that the changes in the case before him were significant because they assigned a college-bound player to a club for five years and eliminated the pressure to sign a player upon pain of losing him during the following year.<sup>100</sup> As a practical matter, the opportunity to improve his position in succeeding drafts was foreclosed. Subsequent arbitral decisions confirmed this reasoning.<sup>101</sup>

Although these baseball arbitration cases avoided the question of whether the duty to bargain about hiring decisions was a mandatory subject of bargaining within the meaning of the National Labor Relations Act,<sup>102</sup> the Court of Appeals for the Second Circuit has held that the basketball draft and salary cap were not “the product solely of an agreement among horizontal competitors but [rather was] embodied in a collective agreement between an employer or employers and a labor organization reached through procedures mandated by federal labor legislation.”<sup>103</sup> Accordingly, the court reasoned that federal labor policy precluded a player from obtaining his true market value through antitrust litigation simply because he was dissatisfied with his salary.<sup>104</sup> Analogizing to collective negotiations between labor and management in construction, maritime, and other industries,<sup>105</sup> the court stated:

The choice of employer is governed by the rules of the hiring hall, not the preference of the individual worker. There is nothing that prevents such agreements from providing that the employee either work for the designated employer at the stipulated wage or not be referred at that time. Otherwise, a union might find it difficult to provide the requisite number of workers to employers. Such an agreement is functionally indistinguishable from the college draft.<sup>106</sup>

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99. *Id.*

100. *Id.*

101. *See* Major League Baseball Players’ Association and the Twenty-eight Major League Clubs (Amateur draft) (June 10, 1993) (on file with author); Major League Baseball Players’ Association and the Thirty Major League Clubs (May 18, 1998) (on file with author).

102. 29 U.S.C. § 151 (2006); *cf.* NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958) (holding that bargaining may be divided into mandatory and non-mandatory or permissive subjects and establishing different rules for each).

103. *Wood v. Nat’l Basketball Ass’n*, 809 F.2d 954, 959 (2d Cir. 1987).

104. *Id.* at 960–61.

105. *Houston Chapter, Associated Gen. Contractors (Houston AGC)*, 143 N.L.R.B. 409 (1963), *enfd.*, 349 F.2d 449 (5th Cir. 1965) (deciding the question of whether the hiring hall is a mandatory subject of bargaining within the meaning of the National Labor Relations Act).

106. *Wood*, 809 F.2d at 960.

“The court noted that ‘newcomers’ like Wood, who sought to bargain as a rookie free of both cap and draft status which limited him to one team, are frequently disadvantaged in collective bargaining relationships primarily because they lack seniority.”<sup>107</sup> Judge Winter’s opinion for the Second Circuit rejected the argument that individuals who were not current members of the bargaining unit could not be regulated by collective bargaining agreements and noted that the NLRA “explicitly defines ‘employee’ in a way that includes workers outside the bargaining unit.”<sup>108</sup> “Accordingly, the court brought ‘potential employees’ and current employees within the purview of the labor exemption immunity to antitrust liability established [in this case].”<sup>109</sup>

Moreover, the NLRB, during my chairmanship in the 1990s, held that an employer is obliged to provide the union with information about applicants where there was possible discrimination in the workplace as evidenced by the parties’ inclusion of a no-discrimination clause in the collective bargaining agreement, so that it may discharge its duty as collective bargaining representative under some circumstances.<sup>110</sup> Subsequently, in the 1994 baseball strike, the Second Circuit again reasoned:

A mix of free agency and reserve clauses combined with other provisions is the universal method by which leagues and player unions set individual salaries in professional sports. Free agency for veteran players may thus be combined with a reserve system, as in baseball, or a rookie draft, as in basketball, for newer players. . . . To hold that any of these items, or others that make up the mix in a particular sport, is merely a permissive subject of bargaining would ignore the reality of collective bargaining in sports.<sup>111</sup>

These authorities, along with potential antitrust liability, undoubtedly convinced MLB to support the proposition that a trade could and should send Irabu to the team of his choosing, the New York Yankees, where to the regret of both Irabu and the Yankees, he did not flourish.

“In the wake of the *Irabu* matter, baseball has negotiated agreements with commissioners’ offices of baseball in Japan and Korea. These agreements do not include the MLBPA or the Japanese players’

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107. GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 263.

108. *Wood*, 809 F.2d at 960.

109. GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 263.

110. *Hertz Corp.*, 319 N.L.R.B 180 (1995), *enf. denied*, *Hertz Corp. v. NLRB*, 105 F.3d 868 (3d Cir. 1997); *cf.* *NLRB v. U.S. Postal Serv.*, 18 F.3d 1089 (3d Cir. 1994).

111. *Silverman v. Major League Baseball Player Relations Comm.* (*Silverman I*), 67 F.3d 1054, 1061–62 (2d Cir. 1995) (citation omitted).

union as a party to them.”<sup>112</sup> One potential consequence of this is to presumably make unavailable the so-called non-statutory labor exemption to antitrust law, which has played such a major role in sports generally.<sup>113</sup>

Though baseball historically—beginning with the landmark decision in *Federal Baseball Club v. National League*,<sup>114</sup> authored by Justice Oliver Wendell Holmes—was deemed to have an antitrust exemption, the Curt Flood Act of 1998 has partially reversed that authority insofar as major league employment relations are concerned. Given the previously noted treatment of applicants in the form of draftees as well as international signings, the subject matter would seem to involve major league relations and thus fall within the Curt Flood Act’s reversal of the seventy-six years of baseball antitrust jurisprudence.<sup>115</sup> But the 1998 statute also states that the labor exemption shields baseball owners, as it does the owners of football, basketball, and hockey, unless the union has disappeared or is moribund—this is what has prompted a number of the sports unions to threaten decertification and disaffiliation<sup>116</sup>—and the Major League Baseball Players Association is certainly alive and well! Does the Supreme Court precedent of *Brown v. Pro Football, Inc.*,<sup>117</sup> now made applicable to baseball by virtue of the Curt Flood Act, allow for the elimination of the non-statutory labor exemption where the subject matter in question has not been bargained by the union, the union is not a signatory to the agreement in question, and yet the subject would be, if the union raised it, a mandatory subject of bargaining within the meaning of the Act?<sup>118</sup>

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112. GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 268.

113. See *Mackey v. Nat’l Football League*, 543 F.2d 606, 611–13 (8th Cir. 1976); *Robertson v. Nat’l Basketball Ass’n*, 556 F.2d 682, 686 (2d Cir. 1977); *Powell v. Nat’l Football League*, 930 F.2d 1293, 1308 (8th Cir. 1989); *McNeil v. Nat’l Football League*, 790 F. Supp. 871, 882–83 (D. Minn. 1992).

114. 259 U.S. 200 (1922); see also *Flood v. Kuhn*, 407 U.S. 258, 285 (1972); STUART BANNER, THE BASEBALL TRUST: A HISTORY OF BASEBALL’S ANTITRUST EXEMPTION 91 (2013).

115. The Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824 (1998); BANNER, *supra* note 114, at 246–47; GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 265.

116. See, e.g., *McNeil*, 790 F. Supp. at 886; *Jackson v. Nat’l Football League*, 802 F. Supp. 226, 235 (D. Minn. 1992); *White v. Nat’l Football League*, 822 F. Supp. 1389, 1408 (D. Minn. 1993); cf. *Brady v. Nat’l Football League*, 640 F.3d 785 (8th Cir. 2011) (avoiding the issue, given the Eighth Circuit’s conclusion that the Norris-LaGuardia Act of 1932 precluded the issue of an injunction against the NFL’s lockout regardless of the disaffiliation or decertification issue).

117. 518 U.S. 231 (1996).

118. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (holding that applicants are employees within the meaning of the Act); *Hertz Corp.*, 319 N.L.R.B. 180 (1995), *enf. denied*, *Hertz Corp. v. NLRB*, 105 F.3d 868 (3d Cir. 1997); cf. *Bd. of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952); see generally Gould, *Baseball and Globalization*, *supra* note 98

The protocol between the Japanese and American baseball systems applies to major league players within the Japanese reserve system, although a dispute has already emerged in connection with the Boston Red Sox signing of Junichi Tazawa from the Industrial League in Japan as to whether such players are governed by the system. The Japanese claimed that such players (Tazawa played for Nippon Oil) are really off-limits to the Americans as a result of a “gentlemen’s agreement.”<sup>119</sup> (The San Diego Padres created controversy by signing an eighteen-year-old Japanese pitcher prior to his graduation from high school!)

In Japan, only a player who has played for nine years is a free agent and can be recruited and signed by Major League Baseball at that time,<sup>120</sup> just as players in the United States, ever since the 1976 collective bargaining agreement, are free agents at the end of six years of major league service.<sup>121</sup> The protocol applies to Japanese players *prior* to their nine-year period.

If an MLB club wishes to engage a Japanese player who has “played baseball in Japan and/or is under contract with a Japanese club,” the club must request that the MLB Commissioner determine the status and availability of the Japanese player in the same manner that the status and availability of the MLB player is determined. If no approval is needed, the club immediately contacts the Japanese player. If approval is needed, that contact can be initiated only

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(discussing how labor-management relations in the MLB has created controversies in U.S. antitrust and labor law that are inseparable from the global and domestic growth of the MLB). The issue of retirees is also relevant. *See Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) (holding that retirees are not employees within the meaning of the Act; therefore, employers are not obliged to bargain about their conditions); *Nedd v. United Mine Workers*, 556 F.2d 190, 200 (3d Cir. 1977) (“When a Union elects to undertak[e] bargaining over retiree benefits, the union’s duty of fair representation must apply.”); *Toensing v. Brown*, 528 F.2d 69, 72 (9th Cir. 1975) (similar holding). *But see United Auto Workers v. Yard-Man*, 716 F.2d 1476, 1486 n.16 (1983) (suggesting that the duty of fair representation should not extend to retirees, even when the union acts in ways that affect retiree interests); *Anderson v. Alpha Portland Indus., Inc.*, 727 F.2d 177, 183 (8th Cir. 1984) (holding that the duty of fair representation does not apply to contract *administration* on behalf of retirees); *Eller v. Nat’l Football League Players Ass’n*, 872 F. Supp. 2d 823, 833–34 (D. Minn. 2012) (dismissing retirees’ claims against NFLPA because of the lack of a fiduciary duty). Conditions involving retirees as they relate to active incumbent employees are a mandatory subject of bargaining. *See S. Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1356 (D.C. Cir. 2008); *Inland Steel Co. v. NLRB*, 170 F.2d 247, 250–51 (7th Cir. 1948).

119. *See Alan Schwarz & Brad Lefton, Japanese Are Irked by U.S. Interest in Pitcher*, N.Y. TIMES, Nov. 19, 2008, at B12.

120. *Japan Tries to Discourage Amateurs from Playing in MLB with Ban*, ESPN (Oct. 8, 2008), <http://sports.espn.go.com/mlb/news/story?id=3632083>; GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 268.

121. BASIC AGREEMENT, *supra* note 91, at 86.



when the club has provided approval. Similar provisions are provided in the Korean agreement, which was entered into in 1996.<sup>122</sup>

All of these procedures were brought into play by the *Irabu* matter and the fear on the part of American baseball that litigation—perhaps raising antitrust issues protecting a boycott of Japanese players under the Curt Flood Act—would ensue in the absence of new mechanisms. The attempt is to address those Japanese players who have reached an advanced stage in moving toward free agency and thus provide an early exit for them with compensation for the Japanese team. In a way, this is a rough analogue to the way in which American clubs may treat American players who are about to obtain free agency and are traded away by their clubs so that the latter can obtain some compensation for them beyond what they would be entitled to under the collective bargaining agreement when the player has obtained free agent status.

With regard to those players for whom approval is required, e.g., those who have not reached the end of their nine-year service period, the MLB Commissioner posts the Japanese player's availability by notifying

all U.S. Major League Clubs of the Japanese clubs to make the player available. Requests for Japanese club postings are made from November 1 to March 1. Within four business days of the posting all interested MLB clubs are required to submit a bid to the MLB Commissioner composed of monetary consideration only, to be paid to the Japanese Club as consideration for the Japanese Club relinquishing its rights to the player in the event that the U.S. Club reaches an agreement with the Japanese player. The MLB Commissioner determines the highest bidder and that determination is 'conclusive and binding on all parties. The Japanese commissioner must then determine whether the bid is acceptable to the Japanese club. If it is not acceptable, then no contract may be had with the player until the next window period. If the highest bid is acceptable, the MLB Commissioner is to award the sole, exclusive and non-assignable right to negotiate with and sign the Japanese player. If the MLB team cannot come to terms with the player within thirty days from the date that the MLB Commissioner indicates that the bid is acceptable to the Japanese club, the obligation to compensate lapses, as do the negotiation rights of the club, and no contract may be had with the player until the following window period.<sup>123</sup>

Both the original Japanese and Korean agreements have since expired, but by their terms are automatically renewed each year unless

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122. GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 268.

123. *Id.* at 269 (internal citations omitted).

either league objects in advance.<sup>124</sup> Why were they entered into in the first instance and why might their renewal potentially come under debate? In the first place, the idea was to avoid future litigation of the kind described previously. In the second place, as more Japanese players are recruited, there will always be eighteen MLB clubs which are displeased by virtue of any exclusive or preferential working agreements. This is because there are thirty MLB teams and only twelve Japanese teams. Thus, access for all MLB clubs to Japanese players became an important principle.

Third, the approval mechanisms were included so that Japanese sensibilities about MLB baseball imperialism would not be ignored.<sup>125</sup> The Japanese do not want to see their own professional league become a farm system for MLB and to see their best teams raided for top talent, a concern shared by the Koreans and one that is sure to be manifested by the Cubans who have a well-established league of their own. "As noted above, this problem has become more considerable as attendance and TV ratings in Japan have dropped. The problem of American baseball imperialism remains an important one."<sup>126</sup> And since 1999, when the Japanese system went into effect, twenty-two Japanese players<sup>127</sup> have been posted through the system and only one Korean, the Dodger lefty Ryu Hyun-jin.

The same holds true for other nations that may fear talent depletion because of an MLB international draft. Thus, Japan and other

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124. E-mail from Joe Garagiola, Jr. to the author (Apr. 3, 2013, 18:00:52 PST) (on file with author); cf. Ben Badler, *Teams Keeping Close Watch on Japan's Tanaka*, BASEBALL AMERICA, Sep. 17–Oct. 1, 2013, at 18 (on file with author) (detailing that Japan's Tanaka is being closely watched even though there may be changes to MLB's posting system that could affect his future).

125. American baseball has not always been concerned with this problem. See generally ROBERT ELIAS, *THE EMPIRE STRIKES OUT: HOW BASEBALL SOLD U.S. FOREIGN POLICY AND PROMOTED THE AMERICAN WAY ABROAD* (2010) (providing an examination of baseball's historic relationship with American's foreign policy).

126. GOULD, *BARGAINING WITH BASEBALL*, *supra* note 7, at 269.

127. There have been thirteen successful postings from Japan through which players from the Japanese league were acquired by American teams. Brad Lefton, *Focus on a Star and a System*, N.Y. TIMES, Nov. 10, 2011, at B14, available at [http://www.nytimes.com/2011/11/10/sports/baseball/you-darvish-situation-puts-spotlight-on-japanese-player-posting-system.html?\\_r=0#](http://www.nytimes.com/2011/11/10/sports/baseball/you-darvish-situation-puts-spotlight-on-japanese-player-posting-system.html?_r=0#). The players with the four highest winning bids have been Yu Darvish in 2011 (\$51.7 million from the Texas Rangers), Daisuke Matsuzaka in 2006 (\$51.1 million from the Boston Red Sox), Kei Igawa in 2006 (\$26.0 million from the New York Yankees), and Ichiro Suzuki in 2000 (\$13.1 million from the Seattle Mariners). *Id.* There have been nine unsuccessful postings from Japan, including seven players who did not draw any bids from American teams. *Id.* The Athletics won exclusive negotiating rights to pitcher Hisashi Iwakuma in 2010 and the Yankees to infielder Hiroyuki Nakajima in 2011, but in both cases the team and player failed to reach an agreement in the allotted time. *Id.*

countries have an interest in restraining and regulating the future *Irabu* disputes. But there are many problems with this arrangement. The nonassignability of the rights obtained by the highest bidder is presumably designed to avoid another *Irabu* situation in which the Yankees were waiting in the wings to receive *Irabu*'s assigned negotiating rights. But teams like the Yankees, Red Sox (it was the Red Sox, after all, which provided the record-breaking \$51 million purchase price for Seibu's Daisuke Matsuzaka)<sup>128</sup> and other high rollers will still benefit from the post-*Irabu* mechanism because they are most likely to be the highest bidder for the players that are perceived to be of premium quality. This is particularly true given the fact that only monetary compensation may be provided.<sup>129</sup>

After the highest bidder wins, the negotiating rights lapse if no arrangement is reached with the player within thirty days. Some teams may want to keep the player off the market and to provide the highest bid, knowing that their bargaining stance makes a contract with the player impossible since no dispute resolution mechanism such as arbitration is contained in the agreement. It is unclear how this and other potential abuses by teams can be adjudicated.

Another problem with the current system is that bidding and potential bargaining are not transparent. Teams are bidding in the dark, i.e., they do not know what the other teams are offering. In the case of the Red Sox bid of \$51 million for Matsuzaka, the next-highest bid, put forward by the New York Mets, was almost \$20 million less.<sup>130</sup> The Red Sox undoubtedly thought the New York Yankees would come much closer (the Yankees were reputed to have offered \$33 million). The Americans want the system to be one of open-bidding so that the Japanese teams do not get a windfall, and obviously the Japanese resist this for the very same reasons that the Americans want it. Another related point is the view of the Americans that it is difficult to sign such players because of the high bid which goes to the Japanese team. MLB has proposed that the players get more, perhaps assuming that the teams are an obstacle to both negotiations and thus make the sys-

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128. GOULD, *BARGAINING WITH BASEBALL*, *supra* note 7, at 269.

129. In my view, the transaction arrangements, other than those providing for monetary compensation exclusively, should be part of the system. It is unclear why a trade between the two countries cannot be arranged unless the Commissioners thought that an agreement could not be negotiated with the players. The promotion of trades across national boundaries will lend more credibility to foreign leagues, such as those in Japan, and promote and enhance foreign baseball, which will lead to a genuine World Series between clubs, as well as national teams, at some point in the future.

130. ROGER D. BLAIR, *SPORTS ECONOMICS* 399 (2012).

tem more inflexible—but, of course, the Japanese teams obviously are of a different view.

The Japanese players' union—while the players' value is diminished by the bidding process that gives everything to the clubs and therefore inhibits the amount of future bargaining that will go to the player—has thus far said little to express dissatisfaction. As a result, as the *Japan Times* noted, “[p]layers currently have little leverage and are essentially held hostage by the process.”<sup>131</sup> Said the *Times*:

Japanese teams have to not only first agree to post a player, but then also deem the posting fee acceptable. The Yomiuri Giants' Koji Uehara [now with the Boston Red Sox], the Hanshin Tigers' Kyuji Fujikawa and the Seibu Lions' Hiroyuki Nakajima all hit the wall in this regard in past seasons. That trio was eventually forced to wait out the nine-year service time requirement needed to reach international free agency.<sup>132</sup>

Presumably, the American Major League Baseball Players Association is not terribly concerned about this process given the fact that the union is not fundamentally responsive to applicants who are Japanese players. We have seen that the union has willingly negotiated severe de facto caps in the form of monetary and draft-loss sanctions relating to draftees in the 2011 agreement, though in the latter instance this was bargained-for enhanced free agent leverage.<sup>133</sup>

Japan and Korea have established leagues, thus the previously noted agreements. Similarly, Mexico has an established league about which it is alleged that Major League Baseball has a “cozy, lucrative, and exclusive relationship.”<sup>134</sup> It is said that some of the Mexican teams arrange to have a commission from signings with American teams even though they have not played for the former and are not under contract with them.<sup>135</sup> Cuba has perhaps the most prestigious although defector-marked league system, which thus far has had no relations with the United States because of the embargo initiated by President Eisenhower and President Kennedy and now solidified by the Helms-Burton Act of 1996.<sup>136</sup> Perhaps it is Cuba as much as the previously described problems in Latin America, particularly the Do-

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131. Jason Coskrey, *NPB Players Should Speak out About Posting System*, JAPAN TIMES (Dec. 4, 2012), available at <http://www.japantimes.co.jp/sports/2012/12/04/baseball/npb-players-should-speak-out-about-posting-system/#.UIWY1WT5kqo>.

132. *Id.*

133. BASIC AGREEMENT, *supra* note 91, at 213.

134. *Id.*

135. Complaint at 12–13, *Camacho v. Major League Baseball*, No. 12-CV-2859L, 2012 U.S. Dist. LEXIS 171298 (S.D. Cal. Nov. 30, 2012).

136. Pub. L. 104-114, 110 Stat. 785 (codified at 22 U.S.C. §§ 6021–91 (2006)).

minican Republic, which has induced Major League Baseball to take the next step in a process long discussed and debated, e.g., an international draft system. The Cuban free agents, beginning with Orlando Hernandez or El Duque,<sup>137</sup> have negotiated successful free agent agreements subsequent to establishing residence in other countries so as to escape draft coverage that would limit their bargaining.<sup>138</sup>

### III. The International Draft

The idea of an international draft is of long standing: formerly advocated by a so-called “blue ribbon panel” which was created by baseball—the union or no other independent party had any representation—and the reason was the same one behind the institution of the Rule 4 amateur draft in 1965, i.e., to stop the clubs bidding with one another for valuable talent. From the beginning, however, this objective was something that baseball approached with some caution given the earlier-described economic benefits involved in signing young boys at the age of sixteen who came out of academies in the Dominican Republic. In the 2006 collective bargaining agreement, a committee had been established to consider the implementation of the international draft, but the draft did not materialize.

Again in the 2011 collective bargaining agreement, a more extensive so-called “international talent committee” contractual provision was negotiated “to discuss the development and acquisition of international players, including the potential inclusion of international amateur players in a draft, and to examine the rules and procedures pursuant to which international professional players sign contracts with Clubs.”<sup>139</sup> The committee was charged with advising both the Players Association and the Office of the Commissioner on (1) “if there is an international draft, whether international players should be part of a single worldwide draft (including players currently covered by the Rule 4 draft), or a separate draft (or drafts)”; (2) the age for signing such international players; and (3) the status of Puerto Rico in the event that there is more than one draft.<sup>140</sup> Other matters to be addressed are appropriate country-by-country plans (including the revision of plans in Mexico, Korea, Japan, and Taiwan, and “[h]ow

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137. See generally STEVE FAINARU & RAY SÁNCHEZ, *THE DUKE OF HAVANA: BASEBALL, CUBA, AND THE SEARCH FOR THE AMERICAN DREAM* (2001) (providing an in-depth background on El Duque).

138. See, e.g., Champion & Norris, *supra* note 66; Frankel, *supra* note 66.

139. BASIC AGREEMENT, *supra* note 91, at 265.

140. *Id.*

Cuban players should be treated in an amateur talent system in light of the legal-political factors that affect their signability”),<sup>141</sup> the establishment of a league in the Dominican Republic,<sup>142</sup> problems relating to representation or in the Dominican Republic the so-called buscones,<sup>143</sup> and the programs in the international academies.<sup>144</sup>

Since the negotiation of the agreement in early 2012, Bud Selig has called the international draft “inevitable.”<sup>145</sup> There are built-in motivations. As we have seen, Latin American bonuses, particularly in the Dominican Republic, have been inferior to those obtained by American players. But they are now on the move upward and it may be that a draft would be the best way to retard this development. Moreover, this might assist MLB in addressing age and identity fraud, performance-enhancing drug use—dramatized by the documentary *Sugar*<sup>146</sup>—and abuses including bonus-skimming by agents (or buscones) as well as Americans who work with them.

Problems abound. Many clubs may see their investment in the academies diminished by virtue of the draft. There remains the question of what to do with the established leagues. And an abandonment of the country-by-country program would make MLB vulnerable to charges of more naked imperialism.

But the elephant in the room is Cuba where, along with the Dominicans, lies the finest talent in the world.<sup>147</sup> Initially confronting the defectors two decades ago, baseball devised a number of drafts for them. Beginning with Orlando Hernández, who signed with the New York Yankees in 1998,<sup>148</sup> players began to establish residence else-

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141. *Id.* at 266.

142. *Id.*

143. *Id.*

144. *Id.* at 265–66.

145. Josh Leventhal, *Selig Calls International Draft “Inevitable,”* BASEBALL AMERICA (Feb. 23, 2012), <http://www.baseballamerica.com/today/majors/news/2012/2613020.html>.

146. *SUGAR* (Sony Pictures 2008).

147. Badler, *MLB Delays Cuban Signings*, *supra* note 66; *cf.* Badler, *Slugging First Baseman Abreu Leaves Cuba*, *supra* note 66; Shereen Marison Meraji, *Cuban Defector Yasiel Puig Ignites Los Angeles Dodgers*, NPR (Sept. 24, 2013), <http://www.npr.org/2013/09/24/225659451/profile-of-dodgers-yasiel-puig>; Leventhal, *supra* note 145 (explaining despite the inevitability of an international draft, Latin American teams may still face difficulties).

148. *See* FAINARU & SÁNCHEZ, *supra* note 137, at 66–68, 99. The first Cuban players to defect in the early 1990s were dealt with on a relatively ad hoc basis. In 1991, pitcher René Arocha defected and MLB arranged a special, one-player lottery for teams to bid on the right to negotiate with him. In the following years, special lotteries were organized for small groups of Cuban defectors, including future New York Mets shortstop Rey Ordóñez in 1993. Yet, in 1995, top pitching prospect Ariel Prieto defected and was held eligible for the June amateur draft; he was selected fifth overall in the 1995 draft by the Oakland Athletics. This ad hoc system was phased out of existence after agent Joe Cubas began

where and thus acquire free agent status. It is to this phenomenon that the draft is aimed, as well as in anticipation of the death of Fidel Castro and a new arrangement with Cuba. Thus the collective bargaining agreement creates an incentive, i.e., if there is no draft agreement by June 1 of this year for the 2014 season, new sanctions for violation of the salary caps will be put in place, including an increased tax on “pool overage” and more severe bonus restrictions.<sup>149</sup>

If an international draft is put into effect, antitrust law would be applicable<sup>150</sup> as is the case with the national draft.<sup>151</sup> The fact that the union is signatory to the collective bargaining agreement, and that the agreement as well as the system is bargained, brings into play the non-statutory labor exemption which should immunize the agreement from attack in this country, so long as a collective bargaining relationship exists.<sup>152</sup>

But, as in connection with the basketball and hockey labor disputes discussed *ante*, frequently the question is which country’s law applies and one of the matters which the committee is to consider relates to the “laws of the countries from which international players are signed and how those laws should affect the actions of the parties.”<sup>153</sup> In examining some of the precedent on this subject, it may be useful to consider the most vivid and recent illustration of baseball globalization, the World Baseball Classic.

#### IV. World Baseball Classic

In the wake of the Olympics’ 2005 decision to drop baseball,<sup>154</sup> a calculated decision was made based upon the idea that there is a greater prospect for major league players in the United States to par-

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exploiting the loophole of having his client defectors establish residency outside of the United States, which allowed pitchers Osvaldo Fernández and Liván Hernández (future All-Star and half-brother of Orlando Hernández) to sign lucrative contracts as free agents in 1996. See Frankel, *supra* note 66, at 395–99; Champion & Norris, *supra* note 66, at 221–22.

149. Ben Badler, *Nine Questions MLB Must Address for an International Draft*, BASEBALL AMERICA (May 28, 2013), <http://www.baseballamerica.com/international/nine-questions-mlb-must-address-for-an-international-draft/>.

150. *United States v. Pac. & Arctic Ry. & Navigation Co.*, 228 U.S. 87, 105–06 (1913). The same theme is echoed in Judge Hand’s opinion in *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945).

151. See *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1177 (D.C. Cir. 1978) (discussing the legality of the National Football League draft under antitrust laws).

152. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 248–50 (1996).

153. BASIC AGREEMENT, *supra* note 91, at 266.

154. Lynn Zinser, *I.O.C. Drops Baseball and Softball in 2012*, N.Y. TIMES (July 9, 2005), <http://www.nytimes.com/2005/07/09/sports/othersports/09olympic.html>; William B.

ticipate in other kinds of competition rather than through a two-week interruption in August every four years for the Olympics—the kind of result which Commissioner Selig finds intolerable and which has therefore resulted in the Olympic exclusion of baseball. While the Olympics' decision can be reconsidered, it seems unlikely that baseball will change its mind.<sup>155</sup> Thus the World Baseball Classic (“WBC”) is a first step toward a true World Series, the world always viewing our characterization of the Autumn Fall Classic as insular at best and arrogant at worst. More modestly, Selig has openly stated that he hopes that there will be a true World Series between what seem to be the countries with the greatest talent and infrastructure, the United States and Japan.<sup>156</sup>

The WBC has now gone through three iterations, in 2006, 2009, and 2013. With each contest the attendance as well as the profits have increased, albeit gradually.<sup>157</sup> The ratings in Japan and Cuba are far beyond those in the United States,<sup>158</sup> the finals this year in AT&T Park in San Francisco being played to less-than-capacity crowds.<sup>159</sup> (Curiously, however, Cuba played to near-empty stadiums in Fukuoka, Japan, when Japan was not in competition with them.) Japan has won twice, defeating once-preeminent Cuba (hobbled as it is by the numerous defections of its best talent to the United States)<sup>160</sup> and the

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Gould IV, *Baseball Classic Mirrors World Events*, SAN JOSE MERCURY NEWS, Mar. 20, 2006, at 13A.

155. In fact, once again baseball has been excluded from the Olympics. See Jeré Longman, *Wrestling, with Revamped Rules, Returns to Summers Games*, N.Y. TIMES, Sep. 9, 2013, at D9, available at [http://www.nytimes.com/2013/09/09/sports/olympics/wrestling-is-restored-to-the-olympics.html?\\_r=0](http://www.nytimes.com/2013/09/09/sports/olympics/wrestling-is-restored-to-the-olympics.html?_r=0) (noting baseball will not be a part of the 2016 Summer Olympics being held in Rio de Janeiro, Brazil).

156. J.J. Cooper, *Selig: True World Series Is Eventual Goal*, BASEBALL AMERICA (Mar. 8, 2013), <http://www.baseballamerica.com/majors/selig-true-world-series-is-eventual-goal/>.

157. Mike Berardino, *Despite Successes, World Baseball Classic Still Finding Its Footing*, BASEBALL AMERICA (Feb. 28, 2013), <http://www.baseballamerica.com/international/despite-successes-world-baseball-classic-still-finding-its-footing-14790/>.

158. *Id.*

159. Bill Shaikin, *Is WBC a Success Despite Poor Attendance for Final Round?*, L.A. TIMES (Mar. 19, 2013), <http://articles.latimes.com/2013/mar/19/sports/la-sp-sn-wbc-attendance-bud-selig-20130319>.

160. By some counts, there have been at least 240 Cuban baseball players that have defected to the U.S. over the last few decades. *Complete List of Known Cuban Baseball Defectors*, CUBAN BALL (2012), <http://www.cubanball.com/Images/History/RedBall/Defect/Defect.pdf>. This includes at least thirty former members of the Cuban national team. *List of Cuban Defectors*, BASEBALL REFERENCE (Apr. 8, 2013), [http://www.baseball-reference.com/bullpen/List\\_of\\_Cuban\\_Defectors](http://www.baseball-reference.com/bullpen/List_of_Cuban_Defectors). Of course, Cuba is the only team that has lost its players to Major League Baseball; the Dominican Republic, Venezuela, Puerto Rico, Japan, Korea, and even the Netherlands are playing with some major leaguers. This is because the defecting Cubans cannot return to Cuba. See, e.g., *2013 Baseball Roster for WBC Participat-*



Republic of South Korea has been a strong competitor. The third championship, in 2013, went to the Dominican Republic, defeating the Commonwealth of Puerto Rico, which had two days earlier upset Japan.<sup>161</sup> The level of play, particularly in the finals in San Francisco, was excellent if not exquisite. Rarely will one be able to see Robinson Canó, José Reyes, and Carlos Santana playing on the same team, with Canó ranging far to his left making the difficult look easy, as did Reyes with his quick hands at short. On the other hand, the United States has never advanced beyond the semifinals and the participation of players signed to major league contracts has been uneven at best because of the fear of injury by the clubs, and subtle discouragement (explicit prohibitions are not permitted) by the clubs of the players.

In fact, it is said that studies show that players who play in the WBC from Major League Baseball are less likely to be on the disabled list than those who do not.<sup>162</sup> But timing is a problem for the WBC in a number of respects. For the United States, the games are played in February and March when Spring Training commences and where exhibitions in Florida and Arizona are not played competitively. Cuba, on the other hand, is marching down the final laps of its pennant race. But Japan is in the same seasonal situation as the United States and the 2013 WBC champion Dominican Republic team was led by players who were part of the American spring training system. Yet, as noted previously, the reality is that clubs are reluctant to have their players play, a factor which undermines competition or at least the position of the United States.

Timing is a problem. But if not March, when? The American All-Stars used to tour Japan in November when the weather was still decent in that country (it would not be so in the United States except on the West Coast and perhaps portions of the South). But it is difficult to have players at their highest level at that time, particularly with the now almost year-round regimen beginning in February and concluding after a 162-game schedule—including an All-Star Game which is supposed to be an exhibition but which Selig has now declared other-

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*ing Teams*, BASEBALL REFERENCE, [http://www.baseball-reference.com/bullpen/2013-World\\_Baseball\\_Classic\\_\(Rosters\)](http://www.baseball-reference.com/bullpen/2013-World_Baseball_Classic_(Rosters)) (last visited Nov. 25, 2013).

161. *Dominican Republic Blanks Puerto Rico to Win WBC Championship*, ESPN (Mar. 19, 2013, 8:00 PM), <http://espn.go.com/extra/baseball/wbbc/recap?gameId=330319117>; Jim Caple, *Puerto Rico's Upset Upsets Japan*, ESPN (Mar. 17, 2013), [http://espn.go.com/mlb/worldclassic2013/story/\\_/id/9064764/wbc-japan-loss-puerto-rico-gain](http://espn.go.com/mlb/worldclassic2013/story/_/id/9064764/wbc-japan-loss-puerto-rico-gain).

162. Jayson Stark, *Busting the WBC Injury Myth*, JAYSON STARK BLOG (Jan. 17, 2013, 12:24 PM), [http://espn.go.com/mlb/blog/\\_/name/stark\\_jayson/id/8853591/busting-world-baseball-classic-injury-myth](http://espn.go.com/mlb/blog/_/name/stark_jayson/id/8853591/busting-world-baseball-classic-injury-myth).

wise by providing that its winner will have home field advantage in the World Series<sup>163</sup>—through the end of October and now sometimes in November itself. Another alternative is the middle of the season around the time of and in lieu of the All-Star Game.

The fact is that the All-Star Game has been denigrated by the strange idea (dictated by the awkward tie game of a decade ago) that the victory determines the location of the rubber game in the World Series. The players have never regarded the game as any more than an exhibition and rightly so. Some of the more vivid testimony to this proposition is the game of 2010 when José Valverde laughed and smiled with Marlon Byrd as he attempted to show him that he would confuse or fool him on the next pitch. This kind of thing, of course, would never take place in true regular season competition—or a true World Baseball Classic competition. Probably one of the best answers would be to set aside the All-Star Game every three or four years and allow for WBC games then. The difficulty with scheduling all of the games in midsummer is the same problem of the Olympics, a substantial gap of time which will interfere with the regular schedule, particularly just as the pennant race heats up and heads into its final lap.<sup>164</sup>

Until the final four teams emerge as winners, one intermediate position might be to play the WBC through to the final four teams perhaps a little later in March when players are in better shape and to postpone the final series of three games for the time when the All-Star Game is played. This would have the games at peak midseason and when baseball interest is at its greatest, children are out of school, vacations are being taken, etc. In part the lackluster attendance in San Francisco in March was attributable to Japan's departure, and with it the music and songs emanating from the outfield! Of course, no team's entry can be assured. But the identity of the finalists under the existing system is an uncertainty, not this year resolved until the evening before the finals commenced. If the finals were scheduled for

163. GOULD, *BARGAINING WITH BASEBALL*, *supra* note 7, at 274, 279.

164. See Joe Sheehan, *Changing the World*, *SPORTS ILLUSTRATED*, Mar. 18, 2013, at 27.

A move to July would also put the WBC on a stage by itself, at a relatively quiet time on the sports calendar: pre-NFL training camps, post-NBA and NHL play-offs. The shift wouldn't be easy; it would require coordination with global leagues, and a year in which the U.S. didn't advance to the final eight—they nearly missed last week—would present a marketing challenge. Major league teams would have to make up the dates by playing a handful of doubleheaders, but sacrificing two or three home dates every four years is a small price. It's too late for this year, of course, but a 2017 World Baseball Classic that takes center stage at baseball's midseason would elevate the event on and off the field.

*Id.*

midsummer, people would have an opportunity to make plans around the actual competition and even if, as seems likely, the United States is absent, beyond baseball purists and enthusiasts, people from countries such as Japan and the Dominican Republic can make their plans considerably before the time of the games, thus likely swelling attendance, ratings, and general interest.

This is the biggest problem with international competition in baseball—although there are others as well—American dominance and the question of who is to be the host country. Perhaps in future years Japan and (with political changes) Cuba could play this role.

Though baseball has been viewed as America's national pastime, (football's more substantial revenues<sup>165</sup> seem to rebut that proposition today) MLB must be careful to avoid the idea of American hegemony or cultural imperialism. For instance, the bracketing has been excessively in favor of the United States, which has wound up playing teams like Mexico, Canada, and even South Africa, and never in the so-called killer bracket where the Dominican Republic, Venezuela, and Puerto Rico hold sway.<sup>166</sup> Cuba, the only country whose major leaguers in the United States do not play for their own country team inasmuch as they are defectors, was pushed several time zones into the Far East in 2013 up against the highly competitive Japanese and Korean teams—although it must be noted that the Cinderella-story Netherlands team survived both the severe competition and the jetlag as it emerged from the difficult Far East competition itself.<sup>167</sup>

The pitch limit rules<sup>168</sup> are designed to favor the United States (as well as Japan and Korea) given the fact that American players (the Japanese traditionally have had a more severe regimen) are in Spring Training shape. Again, this disadvantages Cuba, which is in the home stretch of its regular season.

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165. Monte Burke, *How the National Football League Can Reach \$25 Billion in Annual Revenues*, FORBES (Aug. 17, 2013), <http://www.forbes.com/sites/monteburke/2013/08/17/how-the-national-football-league-can-reach-25-billion-in-annual-revenues/>; *MLB Revenue Reaches \$7.5 Billion*, YAHOO! SPORTS (Dec. 10, 2012), <http://sports.yahoo.com/news/mlb-revenue-reaches-7-5-164013039—mlb.html>.

166. See GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 274 (noting the need for more balance in bracketing).

167. Jason Coskrey, *Netherlands' Success No Overnight Phenomenon*, JAPAN TIMES (Mar. 9, 2013), <http://www.japantimes.co.jp/sports/2013/03/09/baseball/netherlands-success-no-overnight-phenomenon/#.UhKDPWT70Vk>.

168. *The World Baseball Classic Tournament's Rules and Regulations*, WORLD BASEBALL CLASSIC, [http://web.worldbaseballclassic.com/wbc/2013/about/rules.jsp#rules\\_pitcher](http://web.worldbaseballclassic.com/wbc/2013/about/rules.jsp#rules_pitcher) (last accessed Oct. 9, 2013).

And then there is the matter of the umpires, which are now divided fifty-fifty between the United States and countries abroad. This is better than previous contests, the worst being 2006 when during a major league umpire strike, American minor league umpires almost caused an international incident by blowing a call involving a sacrifice fly by concluding incorrectly that the Japanese runner had left the base too early.<sup>169</sup> It took Sadaharu Oh's calming presence to circumvent more severe international discord.

Penultimately, because Venezuela, like Cuba, poses special diplomatic relations problems for the United States, it is important that the World Baseball Classic adhere to some measure of neutrality. This was not done for instance in 2013 at the time of Hugo Chávez's death:

Chávez's death produced an awkward moment for Major League Baseball. Before Venezuela played the Miami Marlins in Jupiter, Fla., on Tuesday, representatives of the Venezuelan team asked for their country's flag to be lowered and a moment of silence for Chávez to be observed before the game. Both requests were denied.

Major League Baseball, which runs the W.B.C., takes its cue in such matters from the State Department. Chávez was no friend of the United States.<sup>170</sup>

Other kinds of problems must be addressed as we begin to think about a true World Series. And then as well, in that process there is the question of law. Thus far these issues—perhaps presaged by the apparent interest of the Toronto Blue Jays in acquiring the services of Cuba's Omar Linares to play in Canada where there is no embargo and the fact that the writ of Helms-Burton does not run that far—are presented in disputes cutting across national boundaries where leagues are based in the United States but some of the teams are in Canada.

## V. The Law of Sports National Boundary Disputes

The law, as articulated by the United States Supreme Court in *Brown v. Pro Football, Inc.*,<sup>171</sup> has deemed sports leagues to be multiemployer bargaining associations,<sup>172</sup> each franchise constituting one of the employers that is bound together for the purpose of the collective

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169. GOULD, *BARGAINING WITH BASEBALL*, *supra* note 7, at 159.

170. Ken Belson, *Venezuelans Recall Leader's Love of Game*, N.Y. TIMES, Mar. 7, 2013, at B12.

171. 518 U.S. 231 (1996).

172. See *Retail Assocs., Inc.*, 120 N.L.R.B. 388, 391 (1958); *Evening News Ass'n*, 154 N.L.R.B. 1494, 1495-97 (1965), *enfd.*, 372 F.2d 569 (6th Cir. 1967); *El Cerrito Mill & Lumber Co.*, 316 N.L.R.B. 1005, 1006 (1995).

bargaining process in North America. Because of scheduling, common standards of employment and discipline, as well as player mobility between the teams through both free agency, trades, and releases, the strikes<sup>173</sup> and lockouts<sup>174</sup> and the rules pertaining to them created issues by virtue of collective bargaining agreements negotiated in the United States but covering both the U.S. and Canada.<sup>175</sup> The labor market in sports is unique insofar as it relates to employee mobility and interrelated issues in contrast to regular multiemployer associations.<sup>176</sup> Thus the appropriate unit for the purpose of collective bargaining<sup>177</sup> generally prevails in the absence of so-called “unusual circumstances” within the meaning of NLRB precedent.<sup>178</sup>

Disputes which cut across national boundaries involving relationships between organized labor and multiemployer entities are properly characterized as so-called mixed territory cases because of the fact that more than one country is involved. The touchstone decision reflecting the prevailing consensus about NLRB jurisdiction over conduct in two countries is *California Gas Transport, Inc.*<sup>179</sup> where a unanimous Board held that “it is appropriate to assert jurisdiction over . . . violations which occurred in Mexico” where the “effects in the U.S.” occur within United States borders.<sup>180</sup> This holding, based upon the United States Supreme Court’s 2005 reiteration of an “ef-

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173. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345–46 (1938); *NLRB v. Int’l Van Lines*, 409 U.S. 48, 50 (1972); *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 454 (1982).

174. See *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 96–97 (1957); *Am. Ship Bldg. v. NLRB*, 380 U.S. 300, 307, 323 (1965); *Weyerhaeuser Co.*, 166 N.L.R.B. 299 (1967).

175. *Silverman v. Major League Baseball Player Relations Comm., Inc. (Silverman II)*, 880 F. Supp. 246, 257 (S.D.N.Y. 1995); *Wood v. Nat’l Basketball Ass’n*, 809 F.2d 954, 961–62 (2d Cir. 1987).

176. See WILLIAM B. GOULD IV, *LABORED RELATIONS: LAW, POLITICS AND THE NLRB—A MEMOIR* 138–41 (2000).

177. See *Mallinckrodt Chemical Works*, 162 N.L.R.B. 357, 399 (1966); *General Motors Corp., Cadillac Motor Car Div.*, 120 N.L.R.B. 1215, 1221 (1958).

178. *Retail Assocs., Inc.*, 120 N.L.R.B. 388, 395 (1958); see also, e.g., *James Luterbach Constr. Co., Inc.*, 315 N.L.R.B. 976, 982 (1994) (Gould, Chairman, concurring); *Chel LaCort*, 315 N.L.R.B. 1036, 1036–37 (1994); *Resort Nursing Home*, 340 N.L.R.B. 650, 651, 654 (2003) (implicitly approving the *Chel LaCort* doctrine), *enf’d*, 389 F.3d 1262 (D.C. Cir. 2004); *Lexington Fire Prot. Grp., Inc.*, 318 N.L.R.B. 347, 348 n.9 (1995) (Gould, Chairman, concurring).

179. 347 N.L.R.B. 1314 (2006), *enf’d*, 507 F.3d 847 (5th Cir. 2007); see also *Gen. Dynamics Land Sys.*, Case No. 19-RC-76743 (N.L.R.B. July 20, 2012) (distinguishing this line of authority from the application of the statute to permanent employment abroad where assignments inside the United States are not present).

180. *California Gas Transport, Inc.*, 347 N.L.R.B. 1314, 1316 (2006).

fects test,”<sup>181</sup> which allowed for the assertion of jurisdiction regarding conduct engaged in outside the United States where the effect was considerable inside the United States, negated or substantially qualified the presumption against extraterritoriality under the National Labor Relations Act and related statutes followed by the Court until the early 1990s. *California Gas* reiterated the position of the Board taken more than a decade ago when it asserted jurisdiction where the “main effect of the Respondent’s actions . . . was not extraterritorial . . . [inasmuch as] the results of the [Employer’s] conduct were principally felt in the United States.”<sup>182</sup>

*California Gas* adhered to precedent in the antitrust arena, most particularly a landmark opinion by Judge Learned Hand for the Court of Appeals for the Second Circuit.<sup>183</sup> This precedent was followed in Supreme Court decisions relating to antitrust and other statutes,<sup>184</sup> as well as with regard to foreign flagships operating in U.S. waters and the applicability of American antidiscrimination law to conduct both in and outside of the United States.<sup>185</sup>

Similarly, the Board was following precedent involving NLRB assertion of jurisdiction over employees who have engaged in protected concerted activities while in Canada.<sup>186</sup> In sum, a presumption against

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181. *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 130–31 (2005).

182. *See Asplundh Tree Expert Co.*, 336 N.L.R.B. 1106, 1107 (2001), *enf. denied*, 365 F.3d 168 (3d Cir. 2004) (involving American workers allegedly discriminated against in violation of the Act while on temporary assignment in Canada).

183. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 446 (2d Cir. 1945); *cf. Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 600–01, 608 (9th Cir. 1976) (concerning the application of U.S. antitrust law to activities in other countries).

184. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 779 (1993); *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004).

185. *Spector*, 545 U.S. at 130 (plurality opinion); *see also id.* at 142–45 (Ginsburg, J., concurring in part and concurring in the judgment) (advocating an even broader interpretation of the effects test and less focus on a requirement of explicit congressional intent); *see generally* Todd Keithley, Note, *Does the National Labor Relations Act Extend to Americans Who Are Temporarily Abroad?*, 105 COLUM. L. REV. 2135 (2005) (arguing the Act applies extraterritorially to workers temporarily abroad).

186. *Asplundh Tree Expert Co.*, 336 N.L.R.B. at 1107; *see also Dowd v. Longshoremen I.L.A.*, 975 F.2d 779, 789 (11th Cir. 1992) (the Board asserting jurisdiction over secondary boycott activity engaged in by Japanese unions in Japan acting in concert with their American counterparts); *Coastal Stevedoring Co.*, 323 N.L.R.B. 1029, 1031 (1998) (Gould, Chairman, dissenting). American labor law has been applied to foreign flag-ships, *Int’l Longshoremen’s Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 196 (1970), and the Court has held that a union refusal to upload cargo shipped from the Soviet Union in protest against the country’s invasion of Afghanistan constituted a secondary boycott violation of the Act, notwithstanding the Board’s absence of jurisdiction over either country, *Int’l Longshoremen’s Ass’n v. Allied Int’l, Inc.*, 456 U.S. 212, 214, 225–26 (1982).

extraterritoriality in the United States<sup>187</sup> has not always applied,<sup>188</sup> unless the case involves only American workers permanently assigned elsewhere.<sup>189</sup> Both Canada and the United States have struggled with the question of what this means when sports teams are involved in labor disputes. For instance, the NLRB sought injunctive relief in 1981 and 1995 against Major League Baseball and its constituent teams including the Canadian teams—at that time the Montreal Expos and the Toronto Blue Jays—and was successful in the latter instance<sup>190</sup> but unsuccessful in the former.<sup>191</sup> This decision, though arguably prosecutorial rather than adjudicative,<sup>192</sup> contradicted a position that the Board took in the 1970s in soccer when bargaining practices and procedures had not yet been established.<sup>193</sup> In contrast, as in baseball, jurisdiction was asserted over Canadian teams in basketball by the New

187. *EEOC v. Arabian Am. Oil Co. ("Aramco")*, 499 U.S. 244, 248 (1991); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20 (1963). *But see* *Koibel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 1664–65 (2013) (potentially reviving the *Aramco* holding).

188. *See* Keithley, *supra* note 185, at 2145 (“Although it is fair to infer that *Aramco* posited a strict territoriality view, subsequent Supreme Court decisions have backed away from such a strict definition of extraterritorial conduct—and for good reasons . . . .”); *id.* at 2149 (“*Aramco*’s strict presumption against extraterritoriality . . . was overtaken by the effects test. Two years after *Aramco*, the Supreme Court endorsed the use of the effects test to evaluate the jurisdictional reach of the Sherman Act.”); *Alcoa Marine Corp.*, 240 N.L.R.B. 1265, 1265 (1979) (holding that, notwithstanding precedent excluding permanent assignments from American labor law coverage, national labor law nonetheless applies to a ship’s “indefinite—even permanent—stay outside United States territorial water”); *Aguayo v. Quadratech Corp.*, 129 F. Supp. 2d 1273, 1280 (C.D. Cal. 2000) (holding that the relocation of facilities to Tijuana, Mexico, for antiunion reasons was unlawful even though the relocation was to a foreign country not covered by the Act, and ordering the employer to restore to its California facility any bargaining unit work which had been subcontracted or relocated to Mexico, thus rescinding all agreements to subcontract work to Mexico) (footnote omitted). *But see Koibel*, 133 S. Ct. at 1664–65 (potentially reviving the *Aramco* holding).

189. *See* *Computer Scis. Raytheon*, 318 N.L.R.B. 966, 970–71 (1995) (holding that the Board’s jurisdiction does not extend to cover employees of American companies working at military bases in foreign territories); *GTE Automatic Elec. Inc.*, 226 N.L.R.B. 1222, 1223 (1976) (holding that the Board’s jurisdiction does not extend to cover workers permanently assigned to Iran); *RCA OMS, Inc.*, 202 N.L.R.B. 228, 228 (1973) (holding that the Board’s jurisdiction does not extend to cover Greenland-based employees).

190. *Silverman II*, 880 F. Supp. 246, 250 (S.D.N.Y. 1995); *Silverman I*, 516 F. Supp. 588, 589 (S.D.N.Y. 1981).

191. *See Silverman I*, 516 F. Supp. at 589 n.1.

192. *E.g.*, *Muffley ex rel. NLRB v. Spartan Mining Co.*, 570 F.3d 534, 540 (4th Cir. 2009) (finding that the Board’s ability to seek injunctive relief under section 10(j) is prosecutorial rather than adjudicative); *Overstreet v. El Paso Disposal*, 625 F.3d 844, 852 (5th Cir. 2010) (same); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 847–48 (8th Cir. 2011) (Colloton, J., concurring) (same).

193. *N. Am. Soccer League*, 241 N.L.R.B. 1225, 1228–29 (1979) (holding North American Soccer League to be a single entity, but refusing to exert jurisdiction over the Canada-

York City regional director.<sup>194</sup> North of the border, the picture is more complicated. For instance, the Ontario Labor Relations Board in both baseball and basketball disputes involving referees has held that, notwithstanding the right to replace in the United States, umpires could not be dealt with in this manner in Canada.<sup>195</sup> On the other hand, in the hockey cases the NLRB General Counsel indicated that case law involving temporary assignments was to be contrasted with the permanent assignment cases, and thus demonstrated an interest in jurisdiction over the NHL.<sup>196</sup> In hockey, both the Alberta<sup>197</sup> and British Columbia boards<sup>198</sup> have declined to assert jurisdiction because of the “unique nature of the league structure . . . [which] can be summarized as an interdependent joint enterprise with a common set of rules.”<sup>199</sup> A similar issue was pending before the Quebec Labor Relations Board,<sup>200</sup> where that Board was to address the same issue prior

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based clubs on the grounds of extraterritoriality), *enfd*, 613 F.2d 1379 (5th Cir. 1980) (declining to address the extraterritoriality issue).

194. Nat'l Basketball Ass'n, Case No. 2-RD-1354 (N.L.R.B. R.D. July 26, 1995) (on file with author).

195. See *Advice Memorandum: National Hockey League Players' Ass'n*, No. 2-CB-20453 (N.L.R.B. G.C. June 30, 2006) (on file with author) (holding that Canadian franchises, as part of the multi-employer bargaining arrangement, fall within the ambit of the NLRA); Richard Sandomir, *Union Umps Make Call on Replacements*, N.Y. TIMES, Apr. 27, 1995, at B12; Clifton Brown, *NBA Refs Get New Offer*, N.Y. TIMES, Nov. 17, 1995, at B18; GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 273.

196. In representation proceedings, the NLRB has refused to take jurisdiction over the Canadian clubs. *N. Am. Soccer League*, 236 N.L.R.B. 1317, 1322–23 (1978) (Murphy, Chairman, dissenting in part) (“I agree with the Union and would assert jurisdiction over the Canadian clubs. . . . [T]he exercise of sound discretion compels the Board to do so.”); *N. Am. Soccer League*, 241 N.L.R.B. at 1225, 1226 n.7, 1228 (holding North American Soccer League to be a single entity, but refusing to exert jurisdiction over the Canada-based clubs on the grounds of extraterritoriality), *enfd*, 613 F.2d 1379 (5th Cir. 1980) (declining to address the extraterritoriality issue).

197. Re: Application Brought by the NHLPA, Chris Butler et al., Board File No. GE-06474, Alberta Labour Relations Board (Oct. 10, 2012) [hereinafter Application, Chris Butler].

198. Orca Bay Hockey Limited Partnership, [2007] B.C.L.R.B. No. B172/2007 (July 31, 2007), available at [http://www.lrb.bc.ca/decisions/B172\\$2007.pdf](http://www.lrb.bc.ca/decisions/B172$2007.pdf). The British Columbia Labour Relations Board declined to exercise jurisdiction because to do so would undermine that stability which is integral to the collective bargaining process on a multi-employer basis. See *id.*

199. Application, Chris Butler, *supra* note 197, ¶¶ 66–67.

200. Re: Application Brought by the NHLPA, Colby Armstrong et al., C.M. No. CM-2012-4431, Commission des relations du travail (Sept. 12, 2012). The author was an expert witness in this case as well as the British Columbia case. See John MacDonald, Note, *Don't Cross That Line! The Case for the Extraterritorial Application of the National Labor Relations Act*, 64 U. MIAMI. L. REV. 369, 380–81 (2009); William B. Gould IV, *Labor Law Beyond U.S. Borders: Does What Happens Outside of America Stay Outside of America?*, 21 STAN. L. & POL'Y REV. 401 (2010).



to the resolution of the 2012–13 hockey lockout, thus mooted the legal issues pending in that province in early 2013.

Again, the difficulty here is that whatever the persuasiveness of the authority cited, as sports become more international some set of rules regarding a more effective method of dispute resolution will be required.<sup>201</sup>

## Conclusion

Baseball, sparked by Jackie Robinson and his audacious bid to break the twentieth century color bar, was important in diminishing racial barriers in the United States, notwithstanding the unwritten quota which limited black participation in the game to only the most outstanding black American players until the 1970s. The game became truly desegregated toward the end of the 1970s until the past decade or two when the number of black players began to decline appreciably. The factors for this decline are numerous, but some of them can be effectively addressed by the NCAA by establishing parity between athletic scholarships available in the revenue-producing sports like football and basketball, and baseball. Major League Baseball itself can play a role, not only through its continued reliance upon programs aimed at the central cities like the RBI Program, but also by financially augmenting baseball athletic scholarships.<sup>202</sup>

Globalization has been a factor in black American decline and has been relied upon by MLB as it pursues new markets and revenue and labor sources, which have been more inexpensive than the American player pool. The globalization process is valuable in making the game more international along with the benefits always associated with the expansion of the talent pool. Internationalization suffered a setback with baseball's exclusion from the Olympics, the American game bringing this upon itself by refusing to set aside a period of time once every four years to compete. The World Baseball Classic is an important first step toward a genuine World Series which may obtain as much international recognition for the sport than would have been the case had the Olympic route been pursued. The transnational boundary disputes, which have emerged principally in hockey but have affected baseball and basketball, warn us about some of the

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201. See Matthew J. Mitten & Hayden Opie, "Sports Law": *Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution*, 85 TUL. L. REV. 269, 283, 321–22 (2010).

202. See *supra* notes 51–53 and accompanying text.

issues that are likely to arise in connection with both an international draft, contemplated by the 2011 collective bargaining agreement, as well as future international competition.