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Baseball's Accidental Racism: The Draft, African-American Players, and the Law

JOANNA SHEPHERD BAILEY AND GEORGE B. SHEPHERD

Major League Baseball has recently experienced two puzzling upheavals. First, the number of foreign players has grown, to twenty-eight percent of all players. At the same time, the fraction of African-American players has declined, and is now at its lowest level in more than thirty years. The solution to the puzzle lies within the league itself. In 1965, MLB instituted two regulations that penalized domestic players: the draft and age minimums. Because the regulations applied only to U.S. players, teams shifted their scouting and development resources to foreign countries. Our empirical analysis, using a new data set, shows that the shift has caused growth in the numbers of foreign MLB players and a decline in U.S. players, especially harming disadvantaged groups such as African-Americans.

The regulations violate the Civil Rights Act of 1964 in two ways. First, because they explicitly burden only U.S. players, they constitute intentional discrimination based on national origin. Second, because the regulations' impact falls disproportionately on African-Americans, the league has engaged in unlawful racial discrimination. The appropriate remedy is that the draft and age limits should be eliminated.

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JOANNA SHEPHERD BAILEY AND GEORGE B. SHEPHERD*

I. INTRODUCTION

Major League Baseball (“MLB”) ended its official segregation in 1947, when Jackie Robinson shattered professional baseball’s color barrier. A new era dawned in which, over the next two decades, African-American players streamed into the league, with many becoming the league’s best players.

However, in the late 1970s, MLB began to experience two fundamental shifts that have changed the face of baseball. First, although MLB teams hired only a handful of foreign players in the late 1940s, they now import almost half of their players from other countries: 46% of current major and minor league professional baseball players in 2010 were born outside the United States.¹ The foreign players are mainly Latins:² in 2010, 28% of major league players were from Latin America.³ The fraction of foreign players in minor league baseball is even higher; 48% of minor league players are from outside the United States.⁴ Necessarily, at the same time, the number of U.S.-born players has declined equivalently.

Second, in a stunning reversal of the trend that Jackie Robinson had begun, professional baseball began to re-segregate. The fraction of African-American players—defined as a player who is black and was born in the United States—began to decline, and is now at its lowest point in

* Associate Professor of Law and Professor of Law, Emory Law School, respectively. We thank participants in seminars at the Clemson University Department of Economics, Emory Law School, the University of Kentucky College of Law, and the 2003 Annual Meetings of the American Law & Economics Association for helpful comments, and Cameron Fraser, Brian Luong, Adam Severt, Doug Shaw, Christine Stemm, and Jason Vaupen for expert research assistance.

¹ Bill Madden, *Bud Drafts Plan Would Hit Rich with Tax of 50%*, DAILY NEWS, July 15, 2000, at 50; Alden Gonzalez, *Rosters Showcase Foreign-Born Players*, MLB.COM (Apr. 6, 2010, 11:56 AM), http://mlb.mlb.com/news/print.jsp?ymd=20100406&content_id=9103912&vkey=news_mlb&fext=.jsp&c_id=mlb; Tom Singer, *Should There Be a Worldwide Draft? Debate Over How to Distribute Foreign Players Continues*, MLB.COM (May 9, 2002, 2:03 PM), http://mlb.mlb.com/news/article.jsp?ymd=20020509&content_id=21299&vkey=news_mlb&fext=.jsp&c_id=null.

² Throughout the paper, “Latins” refers to people born in Latin America. It does not include people of Hispanic descent born in the United States.

³ RICHARD LAPCHICK, UCF INST. FOR DIVERSITY AND ETHICS IN SPORTS, 2010 RACIAL AND GENDER REPORT CARD: MAJOR LEAGUE BASEBALL 3 (2010), available at http://web.bus.ucf.edu/documents/sport/2010_MLB_RGRC.pdf.

⁴ Gonzalez, *supra* note 1.

more than thirty years, more than 50% lower than at its peak.⁵

Together, the two trends mean that players from Latin American have replaced African-Americans. In the 1960s, teams might have hired African-American players such as Willie Mays. Now, they are more likely to hire Latin players such as Manny Ramirez and Pedro Martinez.

Commentators have struggled to explain the disappearance of African-American players. Some suggest that, influenced by African-American basketball stars, African-Americans' preferences have changed to playing basketball.⁶ Others attempt to explain the decline by noting the high number of athlete-aged African-Americans in jail.⁷ Another possible explanation is that improved prospects for African-Americans in other professions have made baseball less desirable.

Worried about the decreasing number of African-Americans, MLB has instituted many programs to attract African-American players. A top MLB official noted, "We are, without question, going to aggressively pursue the development of the African-American ballplayer Turning this thing around is one of baseball's top priorities."⁸ The league has gone so far as to open four Urban Youth Academies to train underprivileged teenagers in disadvantaged areas.⁹

However, the solution to the puzzle lies within the league itself. As explained in Part II of this paper, in 1965, at the height of the civil rights movement—and the same year that the Civil Rights Act became effective—MLB itself imposed seemingly innocent rules that had the

⁵ David C. Ogden & Michael L. Hilt, *Collective Identity and Basketball: An Explanation for the Decreasing Number of African-Americans on America's Baseball Diamonds*, 35 J. LEISURE RES. 213, 213 (2003); LAPCHICK, *supra* note 3, at 18.

⁶ 1992 *Annual Baseball Roundup: What's Behind the Shrinking Number of African-American Players?*, EBONY, June 1992, at 112. The other major professional sports opened to African-Americans at approximately the same time as, or earlier than, baseball. The NFL hired African-Americans such as Paul Robeson in the 1920s, and by 1952, all but two teams had African-American players. Thomas G. Smith, *Civil Rights on the Gridiron: The Kennedy Administration and the Desegregation of the Washington Redskins*, 14 J. SPORT HIST. 189, 192, 194 (1987). Within four years of forming in 1946, the NBA began to hire African-American players. Clifton Brown, *True Trail Blazers*, NBA.COM (2002), http://www.nba.com/history/true_trailblazers_moments.html (last visited June 11, 2011).

⁷ See Harry Edwards, *The End of the "Golden Age" of Black Sports Participation?*, 38 S. TEX. L. REV. 1007, 1024–25 (1997) ("[B]y the year 2000, if [social conditions] persist, 70% of all Black adult males will be either dead, in jail, or otherwise institutionally controlled (in the military, in hospitals, etc.), or hopelessly addicted to alcohol or drugs.").

⁸ 1992 *Annual Baseball Roundup*, *supra* note 6, at 112 (internal quotation marks omitted) (quoting MLB Executive Director Leonard S. Coleman, Jr.); see also Major League Baseball, *Report of the Equal Opportunity Committee*, August 1998, at 12–16 (listing MLB's many programs to recruit African-Americans).

⁹ Alden Gonzalez & Mike Radano, *Philly to Be Home of Next Urban Youth Academy*, MLB.COM (Sept. 22, 2010, 5:47 PM), http://philadelphia.phillies.mlb.com/news/print.jsp?ymd=20100922&content_id=14951816&vkey=news_phi&c_id=phi; see Diane M. Grassi, *Why America's Pastime Is Losing Its Identity* (May 30, 2006, 11:29 PM), http://www.opednews.com/articles/opedne_diane_m_060531_why_america_s_pastim.htm (noting the opening of the first MLB Urban Youth Academy in 2006 in Compton, California).

unintended consequence of causing teams to replace African-Americans and other U.S. players with foreign players. The rules were the player draft and stricter age minimums.

The league imposed the requirements to reduce rich teams' competitive advantage and to reduce the size of players' salaries. However, because both regulations applied only to U.S. players, they created incentives that have caused teams to abandon African-Americans and other U.S. players, and to hire foreigners instead.

As the economic analysis in Part III shows, the draft and stricter age minimums reduced the benefits of signing and developing players from the United States, while increasing the relative benefits of hiring foreign players. Before the draft, a team could be relatively certain of being able to reap the rewards of an investment that it made in developing a U.S. player. A team could invest in finding a talented teenage U.S. player, help him to become excellent, sign him at a young age, and thus be certain of enjoying the fruits of his successful career.

This all changed in 1965 with the draft and age minimums. A team that invested in finding and developing a U.S. player might no longer be able to reap the fruits of its investment. The age minimums prevented teams from contracting with U.S. players when they were still young enough to be trained and developed. Instead, a team would now have to invest in developing a teenage U.S. player without any guarantee that the player would eventually play for the team. The draft made it probable that some other team would hire the U.S. player. That is, regardless of how intensely the player desired to play for the team that helped him develop, the draft entitled some other team to hire him.

In contrast, the draft and age minimums did not apply to foreign players. A team could both contract with a foreign player at a younger age, and because the draft did not apply, be confident that no other team would steal him away.

Our empirical analysis in Part IV uses an extensive new data set that includes every MLB player from 1947 to 2001 to show that, in response, teams have shifted a huge amount of resources to training and hiring players from countries where the regulations do not apply, especially Latin American countries. Since 1965, major league teams have opened approximately sixty baseball academies for young players in Venezuela and the Dominican Republic. A large part of the teams' rosters now comes from these academies. That is, the regulations have caused teams to replace U.S. players with foreign players. This mechanism is especially apparent in Puerto Rico, which saw a swift decline in MLB recruiting after the draft began to apply to it in 1989. Accounts from baseball insiders confirm these lessons, as do comparisons with other professional sports leagues.

Part V, provides evidence that the draft caused not only a decline in the

hiring of U.S. players, but, specifically, a decline in the hiring of African-Americans. Although the reduction in U.S. players after the draft includes both African-American and white players, a disproportionate share has been suffered by African-Americans. Because the draft and age minimums caused teams to lose their incentive to develop teenage U.S. players—because the draft allowed other teams to hire the players once they reached draft age—the only U.S. players whom teams would now hire were players who, by draft age, had somehow managed to develop themselves.

This change especially harmed African-Americans because they disproportionately lack the resources to develop their own baseball skills.¹⁰ Unlike in other sports, such as basketball, development of baseball skills requires expensive training and resources. African-American families suffer from a host of socio-economic disadvantages, from lower average incomes to fewer intact families and fewer involved fathers.¹¹ African-American children disproportionately lack the baseball moms and dads who drive their children to, and pay for, expensive clinics and practices.¹² Because the draft caused the teams to devote their resources to developing children from Venezuela and the Dominican Republic, African-American children's baseball talent withers, undeveloped. Generally, only affluent white U.S. children have the resources to develop the necessary skills on their own.

Part VI, suggests that the draft is illegal under Title VII of the Civil Rights Act of 1964.¹³ Professional baseball would certainly have violated the Civil Rights Act if it had explicitly required its teams to replace thousands of African-Americans and other U.S.-born players with foreign ones. The analysis shows that its indirect accomplishment of the same outcome is also illegal for two reasons. First, the draft and the age minimums constitute unlawful discrimination based on national origin. Both regulations make an explicit distinction based on national origin, applying to U.S. players, but not to foreign players.

Second, MLB has also engaged in unlawful racial discrimination. In contrast to its discrimination based on national origin, the league's racial discrimination has not been intentional; we found no evidence that the league imposed either the draft or age minimums to harm African-Americans. However, the Supreme Court has interpreted Title VII to prohibit not only intentional discrimination, but also practices that have a disparate impact on racial minorities, which MLB's draft and age minimums certainly do.¹⁴

¹⁰ See *infra* notes 116–22 and accompanying text.

¹¹ *Id.*

¹² *Id.*

¹³ 42 U.S.C. §§ 2000e to 2000e-17(2006).

¹⁴ See *infra* Section VI.B.

Nor would the league be able to defend itself by arguing that the regulations are a business necessity, a possible defense to Title VII claims. The draft and age minimums have not succeeded in their goals of achieving greater competitive parity and reducing player salaries. The rich teams continue to have a great advantage. The regulations have simply caused the rich teams to spend their larger development budgets in Venezuela and the Dominican Republic, rather than in the United States.

As for relief, MLB must find an alternative to the draft that achieves its objectives without the harmful impacts on African-Americans and other disadvantaged U.S. players. A worldwide draft, which would extend the draft to players from all countries, would be inadequate. It would merely impose the harms that the current draft inflicts on African-Americans and other disadvantaged U.S. players on disadvantaged players from other countries. Instead, the league should completely eliminate the draft and age minimums. This would return the league to the system that existed before 1965—a system that, for example, currently works well for British professional soccer.¹⁵

II. THE BASEBALL DRAFT AND ITS HISTORY

In the late 1950s and early 1960s, professional baseball faced the following two problems. Teams believed that both problems existed because the teams could contract with any high-school graduate that their scouts identified. First, teams grumbled about the large bonuses that rookie players were receiving, which were eating into the teams' profits. In the 1950s, a leading baseball executive sighed that teams were "frantically knocking each other over to pay out thousands of dollars in bonuses to youngsters we haven't the slightest idea will ever make good in the majors. Few of them do."¹⁶ Baseball executives especially focused on Branch Rickey's signing of Paul Pettit to the first \$100,000 bonus, after which Pettit won only one game in his career in the major leagues.¹⁷ An executive concluded, "[T]he practice of paying millions in bonus money to untried youngsters is a cancer on the body of baseball."¹⁸ Phillip Wrigley, the owner of the Chicago Cubs, predicted that if bonuses increased any

¹⁵ No other paper has addressed these issues. An extensive literature describes the increases in numbers of MLB players from various foreign countries. See, e.g., PETER C. BJARKMAN, *BASEBALL WITH A LATIN BEAT: A HISTORY OF THE LATIN AMERICAN GAME* 4–6 (1994); SAMUEL O. REGALADO, *VIVA BASEBALL! LATIN MAJOR LEAGUERS AND THEIR SPECIAL HUNGER* 57–59 (1998). Commentators have noted in passing the decline in number of African-American players. See, e.g., Ogden & Hilt, *supra* note 5, at 213. This is the first paper to identify the common cause of these two trends.

¹⁶ Edgar Munzel, *Plans to Start With Players in First Year*, *SPORTING NEWS*, Nov. 25, 1953, at 2.

¹⁷ Allan Simpson, *Bonus Concerns Created Draft; Yet Still Exist*, *BASEBALL AM.* (June 4, 2005), <http://www.baseballamerica.com/today/2005draft/050604bonus.html>.

¹⁸ J. Roy Stockton, *'Bonus Here to Stay' – Bing; 'Destroys Incentive' – Lane*, *SPORTING NEWS*, Mar. 22, 1961, at 19.

further, baseball would “go busted.”¹⁹ Bonuses soared further in the early 1960s. Until 1964, teams had informally agreed to limit bonuses to \$100,000. However, in that year, the Angels ignored the agreement, and awarded a player a \$250,000 bonus.²⁰

Professional baseball’s second problem was competitive imbalance. Rich teams from big cities could buy better players than the less prosperous teams from small cities. By 1964, the Yankees had won nine of the previous ten American League titles, and fourteen of the previous sixteen.²¹ The league recognized that it was in all teams’ interest, including the rich teams, that the league be more balanced competitively. A baseball executive noted that, once the Yankees ran away with the league race in July, they were playing in front of empty seats. People would not pay to see games that were merely exhibitions.²²

To solve the problems of both excessive bonuses and competitive imbalance, the league, in 1964, proposed the “Amateur Free-Agent Draft.”²³ The teams would draft players in reverse order of their standings the previous year; the previous year’s worst team would choose first, and the best team last. Once each team had had a pick in the first round, then the second round would begin with the worst team picking again. Only the team that drafted a player could negotiate with and sign the player.²⁴

In addition, there were strict new age minimums. The age minimums ensured both that there would be no bidding wars for young, undeveloped players, and that young players would not be exploited by being coerced to commit to a team too early. Continuing the previous requirement that a team could not sign a player until he was eighteen, a player would be prohibited from entering the draft until he had graduated from high school.²⁵ However, if a player went to college, he could not be drafted until he had finished his sophomore year and, most importantly, had

¹⁹ Ed Prell, *P.K. Says Bidding for Untried Youths Could ‘Bust’ Game*, SPORTING NEWS, Feb. 5, 1958, at 8.

²⁰ Gary Rausch, *Evolution of the Draft*, MLB.COM (May 16, 2002, 5:01 PM), http://mlb.mlb.com/news/article.jsp?ymd=20020516&content_id=26646&vkey=news_mlb&fext=.jsp&c_id=null.

²¹ Simpson, *supra* note 17.

²² Munzel, *supra* note 16, at 2.

²³ Dave Cohen, *The Major League Baseball Draft* (2006), http://baseball.about.com/od/newsnotes/a/draftprimer_p.htmhttp://baseball.about.com/od/newsnotes/a/draftprimer_p.

²⁴ Clifford Kachline, *Path Cleared for Draft of Free Agents*, SPORTING NEWS, Nov. 21 1964, at 4. The club retained negotiation rights until fifteen days before the next year’s draft. *Id.* All players who did not sign were placed in a special draft. *Id.*

²⁵ See MAJOR LEAGUE BASEBALL, MAJOR LEAGUE RULES Rule 3(a)(2) (2008) [“MLB Rules”] (emphasis added), available at http://bizofbaseball.com/index.php?option=com_content&view=article&id=4451:major-league-baseball-rules-2008&catid=7:selection-of-docs&Itemid=25. A player who drops out of high school may nonetheless be signed if the player remains out of high school for a year. *Id.*

reached age twenty-one.²⁶ Colleges, represented by the NCAA, were especially supportive of this provision. They promised to oppose the draft in its entirety unless it guaranteed that professional teams would not steal college players in the midst of their college careers.²⁷

Almost as an afterthought, the proposal excluded from the draft players from outside the United States. The rationale was that eligibility would be difficult to determine for these foreign players, and in any case, many were already under contract to clubs in their own countries.²⁸

The league promoted the proposed draft by claiming that it would save teams millions of dollars in bonuses, and equalize competition by giving the weaker teams the first chance to draft the best prospects.²⁹ Little did anyone recognize that these three modest provisions—the draft, the age minimums, and the exclusion of foreign players—would profoundly transform the face of U.S. professional baseball, leading its teams to replace many of their native players, especially African-Americans, with foreign players.

At first the draft was opposed by two wealthy teams, the New York Yankees and the Los Angeles Dodgers, as well as by several ambitious teams from smaller cities.³⁰ The wealthy teams opposed the draft because it would reduce their financial advantage in attracting the best players. Before the draft, the wealthy teams such as the Yankees could, and did, hire most of the best players. With the draft, the worst teams might hire them first.

In addition, teams were concerned about the draft because the league's top lawyer had warned that the draft might cause the teams to be sued by the justice department for violating antitrust laws, exposing them to treble damages.³¹ After all, the draft would constitute an explicit agreement among all the companies in an industry to lower the wages that they paid their workers. It would restrict the players' freedom to work for whom they wished, and restrict their bargaining power.³²

²⁶ *Id.* This was later tightened even further to requiring that the player have finished his junior year. *Id.*

²⁷ Oscar Kahan, *NCAA Seeking Ban on Pro-Sport Draft of College Students*, SPORTING NEWS, July 18, 1964, at 12.

²⁸ Kachline, *supra* note 24, at 4, 20.

²⁹ Clifford Kachline, *'Rule Slashes \$\$ Tab, May Lead to Free-Agent Draft' – Routzong*, SPORTING NEWS, Aug. 17, 1963, at 2.

³⁰ Clifford Kachline, *Free-Agent Draft Approval Applauded as Key Decision*, SPORTING NEWS, Dec. 19, 1964, at 1; Joseph Durso, *Baseball's Minors Follow Pro Football Pattern in Backing Free-Agent Draft*, N.Y. TIMES, Dec. 3, 1964, at 64.

³¹ Dan Daniel, *Gallagher Criticizes Defeat of Free-Agent Draft*, SPORTING NEWS, Dec. 16, 1959, at 10; J. G. Taylor Spink, *A.L. Backing Grab-Bag as Bonus Curb*, SPORTING NEWS, June 28, 1961, at 1.

³² Simpson, *supra* note 17. An ex-assistant to baseball's commissioner also warned that the draft would be illegal. Edgar Munzel, *O'Connor No. 1 Foe of Free-Agent Draft*, SPORTING NEWS, April 11, 1964, at 24. Under the Sherman Act, successful antitrust plaintiffs receive triple their actual damages. 15 U.S.C. § 15 (2006).

However, the league's general counsel concluded, upon further reflection, that the teams need not worry. He determined that the league's antitrust exemption, which the Supreme Court had established in 1922 and reaffirmed in 1953, would protect the league from antitrust attack.³³ Moreover, even without the exemption, an antitrust suit might have little success because the probable plaintiff would not be very appealing: a seventeen-year-old complaining because he could not receive a huge bonus and purchase a luxury car for his family.³⁴

Eventually all the teams except the St. Louis Cardinals voted for adoption of the draft.³⁵ Even the rich teams recognized that they would benefit both from competitive balance and from smaller bonuses. The draft was approved, and became effective for 1965.³⁶ Thus, after 1965, players from the United States could no longer be signed immediately by the team that first identified them. A team that had first identified and developed a player could now often expect that another team would draft the player.

However, the draft does not apply to players from other countries—although in 1989 and 1991 respectively, MLB expanded the draft to cover players from Canada and the U.S. territories, including Puerto Rico.³⁷ Unlike with U.S. players, MLB teams can sign and develop a foreign player directly with no fear that another team will steal the player away in the draft.

Moreover, for two decades after 1965, no minimum age limits governed the signing of foreign players. Teams could and did sign foreign players as young as twelve or fourteen.³⁸ In 1984, MLB imposed an age minimum for foreigners of sixteen, although this age limit is often ignored.³⁹ Even at sixteen, the age limit is at least two years lower than the age limit for U.S. players, who must be at least eighteen if they do not

³³ In *Federal Baseball Club v. National League*, 259 U.S. 200, 209 (1922), the Supreme Court held that professional baseball was not subject to antitrust liability under the Sherman Act because it was not interstate commerce as required by the Act. The decision was reaffirmed in *Toolson v. New York Yankees*, 346 U.S. 356, 356 (1953) and *Flood v. Kuhn*, 407 U.S. 258, 258 (1972).

³⁴ C. C. Johnson Spink, 'Free-Agent Draft Legal' – *Antitrust Expert*, SPORTING NEWS, Dec. 12, 1964, at 4.

³⁵ Kachline, *supra* note 30, at 1; Durso, *supra* note 30.

³⁶ Cohen, *supra* note 23.

³⁷ Rausch, *supra* note 20.

³⁸ ALAN M. KLEIN, SUGARBALL: THE AMERICAN GAME, THE DOMINICAN DREAM 43 (1991); REGALADO, *supra* note 15, at 17.

³⁹ MLB imposed the rule in response to the signing of Latino, Jim Kelly, at age fourteen. GARE JOYCE, THE ONLY TICKET OFF THE ISLAND 28 (1990). Nonetheless, "MLB teams routinely sign Latino children younger than is permitted by MLB rules." Angel Vargas, *The Globalization of Baseball: A Latin American Perspective*, 8 IND. J. GLOBAL LEGAL STUD. 21, 26 (2000); see Scott M. Cwierny, Comment, *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, 423 n.341 (2000) (describing an instance of the Dodgers signing a fifteen-year-old player from the Dominican Republic as recently as December 1999).

attend college, or twenty-one if they do.

III. THE DRAFT'S UNINTENDED INCENTIVES: HIRE FOREIGN, HIRE WHITE

Teams thought that the draft and minimum age limits would merely reduce their salary costs and restore competitive balance. They failed to realize that the new system created powerful incentives that would lead the teams to abandon the development of U.S. players, to focus on the development and hiring of foreign players instead, and to slash their hiring of African-American players. Using a simple intuitive economic model, we now explain the incentives that the new system created. In a Technical Appendix at the end of the Article, we develop the model with more technical rigor. In later parts, we show how teams responded to the incentives by replacing African-American players with foreign players.

We now show that the draft and age minimums reduced the relative benefits that teams expected to receive from U.S. players in whom they invested scouting and development resources, making foreign players more desirable. Locating and developing skilled baseball players is expensive. To find the talented few, regardless of country, teams must hire scouts and pay their expenses to travel widely and view tens of thousands of players in thousands of high school and little league games.⁴⁰

In addition, excelling in baseball requires large amounts of organized, intensive instruction at an early age, especially in the player's mid-teens. Unlike in some other sports, such as basketball, excellent baseball skills cannot be developed easily through informal pick-up games.⁴¹

Such are the nuances of the game and the subtleties of its requisite hand-eye skills that children rarely come to it naturally and independently—not, say, as jauntily as they learn to fling a ball through a hoop or tuck a football under one arm and feel the wind whistle past their ears as their feet fly over the ground.⁴²

Some players receive the necessary training from high school coaches.

⁴⁰ RED MURFF, *THE SCOUT: SEARCHING FOR THE BEST IN BASEBALL* 15 (1996).

⁴¹ Leading scouts confirm this. *Id.* at 223–26, 304. Denying that any player is a “natural,” a senior scout noted: “No player is born knowing how to play the game at the major-league level. If a player has done something in a game—even if it looks like a miracle play—you can bet he’s done it a thousand times in practice.” JOYCE, *supra* note 39, at 43. Also demonstrating the intense organized training that baseball requires is the four or five years that players spend on average training in the minor leagues before they are ready for the majors. See JESSE W. MARKHAM & PAUL V. TEPLITZ, *BASEBALL ECONOMICS AND PUBLIC POLICY* 48 (1981).

⁴² Tom Verducci, *Blackout: The African-American Baseball Player Is Vanishing. Does He Have a Future?*, *SPORTS ILLUSTRATED*, July 7, 2003, at 56. Football requires less early training than baseball. Many top professional football players played organized football for the first time in late junior high or high school, long after a successful baseball player must begin honing his skills.

Other players receive training in private camps, clinics, and leagues if their families can afford the expense. Players without access to these coaches often can benefit substantially from extensive development from MLB scouts. For example, for several years scout Red Murff attended scores of high school games of future hall-of-fame pitcher Nolan Ryan before signing him. Murff, who had been a professional pitcher himself, served as a main advisor to Ryan during this period, offering detailed help with pitching technique and strategy. Ryan was deeply grateful for Murff's help, expressing his gratitude in a foreword that he wrote for Murff's autobiography.⁴³

Maintaining scouts to provide this scouting and development is expensive for MLB teams; the teams must pay the scouts' salaries and travel expenses. In deciding whether to invest its scouting and development resources in foreign players or U.S. players, a team will tend to invest where the expected returns are highest.

The returns that a team will expect to receive from a player depend on four main factors. First, the returns will depend on the benefits that the team expects to reap from the player each year. These could be direct benefits, such as more wins, hits, or strikeouts. Or the benefits can be indirect, such as higher ticket and TV revenues that a popular, exciting player brings.

Second, a team's return from a player will depend on the salary, bonus, and other costs that the team will have to devote to the player after they sign him.

Third, the team's expected return from a player depends on the number of years that the team expects the player's career with the team to last. Given two players with identical skills, the team will choose the player likely to have a longer career. That player will be more valuable because the team will receive his benefits for more years.

Fourth, the team's expected return from devoting scouting and development resources to a player depends on the probability that the team will actually be able to sign the player after investing these resources in him. If another team learns of the prospect and signs him, then the team's return on its investment in scouting and developing the player will be zero; if another team steals the prospect away, then the team loses its investment completely.

Suppose that we are considering two identical players, except that one is foreign and one is from the United States. Suppose also that the expected benefits and costs per year for each of the two players are equal; that is, the first two factors affecting the players' expected benefits are the same.

⁴³ MURFF, *supra* note 40, at 43–50.

Although the foreign and domestic players have equal talent, the draft and age minimums cause the expected return on the domestic player to be lower, for two reasons. First, the probability that a team will be able actually to sign a domestic player that it scouts and develops is much lower than for a foreign player. Because a team cannot immediately sign a domestic prospect, but instead must wait for the draft, a high probability exists that the team's investment in scouting and developing the prospect will be lost; it is likely that another team will draft the player.

For example, a team that identifies a talented sixteen-year-old will expect that by the time the player becomes eligible for the draft, many other teams will inevitably know of him and seek to draft him. Regardless of how grateful the player feels toward the team that found and developed him, the draft renders him powerless to choose the team that supported him, even if the team is willing to offer more money than the team that actually selects him in the draft. Because the draft forces a team to invest in identifying and developing a domestic player with no property right in the player, it creates a large danger that another team will draft the player and reap the return from the first team's investment.

Second, the draft's stricter age minimums for domestic players further reduces the return on domestic players compared to foreign players, all else being equal. Recall that a domestic player can be signed only after reaching age twenty-one for college players or eighteen for others, compared to sixteen, or younger, for foreigners. The age minimums combine with the draft to reduce the probability that a team that identifies and develops a player will succeed in signing him. Suppose that a team identifies a fourteen-year-old player and helps him to develop. However, the age minimums prevent the team from signing him until he is either eighteen or twenty-one. Because by the draft age of eighteen or twenty-one, players are physically mature with substantial records of performance, many teams will know of the player's talent by then. Accordingly, another team is likely to draft him. In contrast, a team can guarantee itself a foreign player's services before it invests in developing the player, by signing the player young.

Moreover, because the age minimums delay the start of a domestic player's career, his team can reap the benefits of its investment in him for a shorter career. For example, the Atlanta Braves signed center fielder Andruw Jones, born in Curacao in the Caribbean, at age sixteen.⁴⁴ By age eighteen, he had already worked his way to the major leagues through the Braves' farm system, and soon became an all-star. Catcher Ivan Rodriguez, signed in Puerto Rico at age sixteen, was promoted to the major

⁴⁴ Andruw Jones Statistics and History, BASEBALL-REFERENCE, <http://www.baseball-reference.com/players/j/jonesan01.shtml>.

leagues by age nineteen, and was an all-star by age twenty.⁴⁵ In contrast, a domestic player who attended college could not even be signed until age twenty-one.

Because the draft and age minimums increase the relative benefits of foreign players, investment in scouting and developing foreign players will benefit teams more than investing in U.S. players. There is a much lower chance that another team will steal away a foreign player that a team has developed and scouted. And because a foreign player can be signed younger, he will be able to play with the team for more of his productive years.

Teams, then, have an incentive to switch from scouting and developing U.S. players to scouting and developing foreign players. If foreign and U.S. players have similar promise, or even if the domestic players have greater promise than the foreign players, the draft and age minimums will induce the teams nonetheless to switch to scouting and developing the foreign players. Because the mechanism will cause teams to invest less in developing young U.S. players, we label this impact of the draft and age minimums the “investment effect.”

The model developed here predicts that the new rules’ investment effect will lead teams not only to transfer resources from developing U.S. players to developing foreign players. In addition, they will transfer resources from developing young U.S. players to signing U.S. players who require the teams to make little or no investment in development before they reach signing age; a large probability exists that any investment before the team signs the player at age eighteen or twenty-one would be lost. That is, in addition to developing more foreign players, the teams will sign more self-developed U.S. players—such as top high school and college prospects—who have received the necessary intensive development and training during their teen years from sources other than MLB teams.

The self-developed players whom the teams will hire will tend to be disproportionately white. Likewise, the young players whom the teams will no longer choose to develop will be disproportionately African-American. This is because, compared to white families, African-American families disproportionately lack the resources to help their children self-develop their baseball skills.⁴⁶

We expect teams’ response to the draft to be delayed, not immediate, for two reasons. First, firms often innovate slowly in response to a new development. For example, although the first African-American player

⁴⁵ He was signed in 1988, before Puerto Rican players became subject to the draft in 1989. Ivan Rodriguez Statistics and History, BASEBALL-REFERENCE, <http://www.baseball-reference.com/players/r/rodriiv01.shtml>.

⁴⁶ See *infra* notes 116–22 and accompanying text.

joined MLB in 1947, many teams had no African-American players more than a decade later.⁴⁷ Indeed, one team waited until 1971 to hire its first African-American player, twenty-four years after Jackie Robinson broke baseball's color barrier.⁴⁸

Second, any change that teams make in whom they scout, develop, and sign will have an impact on which players are in the major leagues only with a substantial delay. Several years of minor league development usually separate a team's signing of a player and the player's MLB debut. Between 1968 and 1977, the average time spent in the minor leagues after signing until advancement to MLB was 4.8 years.⁴⁹ Therefore, even if the draft had caused teams to begin signing different players immediately in 1965, the new players would not have entered MLB—and the data used for this Article—for several years.

We would expect that the switch to MLB-developed foreign players to be slower than the switch to self-developed U.S. players. To produce foreign players through development, a team must identify a country with promising prospects, send scouts to the country, establish training facilities there, and then train young prospects for several years until they are old enough to be signed and join the team's minor league system. More than a decade would elapse before the new players were even signed. After that, more time would be required for them to make their way through the minor leagues to MLB.

In contrast, a team could switch resources from developing U.S. players to hiring self-developed U.S. players more quickly. Each MLB team maintains a scouting report that lists its various prospects, including both younger undeveloped players, as well as older self-developed players from high schools and colleges.⁵⁰ The model predicts that, relatively soon after the institution of the draft, each team would divert resources from players who require development and instead hire more of the players on its list who were self-developed. These additional self-developed players would begin appearing in the major leagues as soon as they had made their way through the minor leagues, long before the new foreign players.⁵¹

Theory also suggests that the draft, through a different mechanism,

⁴⁷ See Brian L. Goff et al., *Racial Integration as an Innovation: Empirical Evidence from Sports Leagues*, 92 AM. ECON. REV. 16, 17 fig.1 (2002) (depicting the ratios of black players on MLB teams for 1947–1971).

⁴⁸ See *infra* Figure 5 (showing the median, minimum, and maximum percentages of African-American players per MLB team for 1947–2001).

⁴⁹ MARKHAM & TEPLITZ, *supra* note 41, at 48.

⁵⁰ MURFF, *supra* note 40, at 94.

⁵¹ Our data on the performance of individual MLB players support this theory. The average slugging percentage of U.S.-born whites compared to other races was substantially lower in the 1965–1980 period than in the pre-1965 or post-1980 period. This suggests that teams were forced to hire worse self-developed white players after the institution of the draft and before the Latin training academies began producing players.

created forces that pushed in the opposite direction from the investment effect, toward decreasing the relative number of foreign players. As MLB intended, the draft, by giving a team a monopsony⁵² in pay negotiations with its draftees, immediately reduced salaries for U.S. players.⁵³ Because the draft gave a single team the right to negotiate with any given player, the team could offer the player a lower salary, without fear that another team would outbid it. However, because the draft did not apply to foreign players, bidding wars might still exist for them. The draft would make domestic players relatively more desirable than before because they were relatively cheaper than before.

Whether the draft increased or decreased the number of foreign players would depend on the relative sizes of this price effect and the opposite investment effect. If the number of foreign players increased, then we can conclude not only that the draft's investment effect exists, but also that it is large enough to outweigh the draft's price effect.

IV. THE SHIFT TO FOREIGN TRAINING AND HIRING

The following history of MLB player development before and after 1965 demonstrates that teams behaved the way that the theoretical model predicts. Because the draft caused teams to believe that scouting and developing foreign players would provide greater benefits than developing domestic players, teams' behavior changed in three ways. First, teams shifted large fractions of their budgets for scouting and player development to Latin America, with most teams establishing more than one baseball academy there. Second, the empirical analysis shows that the shift in scouting and development resources caused major league teams to hire sharply increasing fractions of Latin-born players. Third, the next part demonstrates that teams reduced their investment in players that required development, especially disadvantaged players such as African-Americans.

A. *Shifting Hiring and Training Resources Overseas*

Before 1965, MLB teams would identify U.S.-born prospects when they were in their mid-teens, devote large resources to observing and developing them for several years, and then sign them at age eighteen. The teams' large investments in developing young players benefited the teams in two ways. First, it created close relationships that increased the probability that a player would choose to sign with the team at eighteen.

⁵² A monopsony exists when there is only one purchaser in a market. Just as a monopolist can charge excessively high prices because it is the lone producer, a monopsonist can insist on excessively low prices because it is the only buyer. WALTER NICHOLSON, *INTERMEDIATE MICROECONOMICS AND ITS APPLICATION* 414 (4th ed. 1987).

⁵³ See Tracy Ringolsby, *Draft Hasn't Exactly Ended the Days of the Bonus Baby*, CHI. TRIB., May 10, 1992, at 14 (describing the effects of the draft on signing bonuses).

Second, it assured that during the critical teen years, the player would gain the necessary skills for later MLB success.⁵⁴

The draft induced large changes. A leading scout has written, “[s]ince the major league draft began in 1965, the scouting profession has changed drastically.”⁵⁵ As with the adoption of any other innovation, impacts occurred gradually in stages.

Insiders had cautioned even before the draft was initiated that it would reduce teams’ incentive to invest in developing players. Opposing adoption of the draft, the Yankees’ general manager, Ralph Houk, indicated that it would cause teams to reduce their programs to train young players: “Why spend a great deal of money . . . to train players who may be drafted by another club?”⁵⁶ He concluded that the draft would be a penalty on good judgment.⁵⁷

Likewise, the Dodgers’ general manager indicated, “[i]t’s the good old American custom for a business to reap the rewards of its efforts. The more you share the rewards, the less incentive there is to do a better job than the next guy. But we’re prepared to go along with the new rule.”⁵⁸

However, after a few years of experience with the draft, teams realized that the draft included a loophole. Although scouting and development resources were no longer well-spent in the United States, the teams could avoid the draft’s difficulties by scouting and developing players in other countries, where the draft did not apply. Teams could scout and develop players just as they had before the draft, as long as they did it in Venezuela and the Dominican Republic, rather than in Texas or Nebraska.

Beginning in the 1970s, teams increasingly moved their scouts from the United States to Latin America, intentionally evading the U.S. draft.⁵⁹ A leading scout, active from 1960–93, confirmed that the draft caused teams to refocus scouting and development on Latin America.⁶⁰ As an extensive study of Latin baseball players noted,

[T]he institution of the draft in 1965 dramatically altered the role of scouting in MLB in the United States. Scouting plays a major role in MLB teams’ hunt for baseball talent in Latin America because Latino players (excluding those in Puerto Rico) are not included in the draft. In fact, scouting has

⁵⁴ MURFF, *supra* note 40, at 45, 48–49.

⁵⁵ MURFF, *supra* note 40, at 43.

⁵⁶ Joe King, ‘*Danger in Unrestricted Draft*’ – Houk, SPORTING NEWS, Mar. 20, 1965, at 1 (internal quotations omitted).

⁵⁷ *Id.* at 2.

⁵⁸ Kachline, *supra* note 29, at 2.

⁵⁹ KLEIN, *supra* note 38, at 42, 62.

⁶⁰ MURFF, *supra* note 40. Likewise, as a top MLB consultant noted in 1997, “[t]eams have many more scouts looking for talent in the Caribbean-Central American region than they did 10 years ago.” Fred A. Bellemore, *Racial and Ethnic Employment Discrimination: Promotion in Major League Baseball*, 2 J. SPORTS ECON. 356, 358 (2001).

developed an importance for MLB in Latin America that echoes the old role of scouting in the United States⁶¹

As one sports reporter noted, “because players outside the U.S. aren’t subject to the amateur draft, clubs willing to scout and spend have an advantage.”⁶²

Pleased with the results of their foreign scouting, teams that hoped to gain competitive advantage began to plan the establishment of academies in Latin America to develop local players. The first, the Toronto Blue Jays’ academy, opened in 1977.⁶³ The Blue Jays, an expansion team in the early 1970s, quickly built a successful team by evading the draft. As a close observer noted, their general manager’s “reliance on Latin American scouting reflects a long-standing policy of the Toronto organization to build quickly by circumventing the traditional amateur draft of U.S. college and high school talent. This normal drafting procedure early proved a major disappointment”⁶⁴

Encouraged by the success of these initial entrepreneurs and worried about competing with them, other teams began a profound shift of scouting and development resources from the United States to Latin America.⁶⁵ Gradually, many teams began to establish academies over the next two decades. By 1990, thirteen teams had academies in the Dominican Republic.⁶⁶ By 2000, twenty-eight of the thirty MLB teams had academies in Venezuela, with similar numbers of academies in the Dominican Republic.⁶⁷ Now all teams have academies in the Dominican Republic.⁶⁸

Often run like regimented military schools, the academies are full-time boarding schools for baseball.⁶⁹ Costing \$8 million to \$12 million each to establish,⁷⁰ many have large budgets and enroll hundreds of prospects per year. They educate the prospects in baseball skills and other subjects, including English. Entering the academies as early as age twelve, students

⁶¹ 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 LEGAL STUD.* 511, 537 (1999).

⁶² *Id.* at 538 (internal quotation marks omitted).

⁶³ BJARKMAN, *supra* note 15, at 117; KLEIN, *supra* note 38, at 64–65.

⁶⁴ BJARKMAN, *supra* note 15, at 117.

⁶⁵ For example, the Los Angeles Dodgers established their training complex because, as their Dominican Republic director noted, “[b]y that time Toronto was ahead of us. They had an academy and a big budget.” KLEIN, *supra* note 38, at 64–65.

⁶⁶ KLEIN, *supra* note 38, at 42.

⁶⁷ Vargas, *supra* note 39, at 28.

⁶⁸ Jesse Sanchez, *Alderson Spearheads DR Efforts*, *MLB.COM* (May 7, 2010, 10:00 AM), http://mlb.mlb.com/news/print.jsp?ymd=20100507&content_id=9864108&vkey=news_mlb&c_id=mlb.

⁶⁹ See KLEIN, *supra* note 38, at 71 (describing the Dodger’s facility at Las Palmas); see also Marcano & Fidler, *supra* note 61, at 544–45 (describing academies in general).

⁷⁰ Jorge Aranguré Jr. & Luke Cyphers, *It’s Not All Sun and Games*, *ESPN MAG.* (March 12, 2009), <http://sports.espn.go.com/espnmag/story?id=3974952>.

sometimes remain in the academies for three or more years, receiving the intensive, organized training that baseball excellence requires.⁷¹ The academies also permit teams to conceal talented youths from other teams until they can be signed at age sixteen or seventeen.⁷² In total, teams spend more than \$60 million each year in development of players in Latin America.⁷³ No such academy existed in the United States until 2006, when MLB opened its Urban Youth Academy in Compton, California, as part of its initiative to increase the number of minorities in baseball.⁷⁴

As MLB executives acknowledge, teams operate Latin academies because the draft does not cover Latin players. “Some executives worry that should MLB fold such players into the draft, teams wouldn’t invest the millions of dollars they currently do on academies because there’s no sense in developing a player to get drafted by another club.”⁷⁵

The teams’ hunt for Latino talent runs wide and deep. A leading baseball writer noted, “[t]here’s not a kid in the Caribbean who reaches his fourteenth birthday without being seen by the major-league teams.”⁷⁶ Even in 1986, a leading commentator noted that “[t]o a large extent, a team’s ability to compete for a pennant today is determined by its scouting organization in Latin America.”⁷⁷

The Latin baseball academies closely resemble the thirty-eight academies operated by each of the top British soccer teams. Enrolling children as early as age nine, the academies train them until they are ready to join professional teams.⁷⁸ The teams’ “Centres of Excellence” train children who are even younger.⁷⁹

The only important difference between the British and MLB academies

⁷¹ Marciano & Fidler *supra*, note 61, at 544; *see also* KLEIN, *supra* note 38, at 72–76 (describing the rigorous life of baseball academy recruits); Vargas, *supra* note 39, at 29 (noting that players between twelve and sixteen are sent to academies and expected to complete workouts designed for those seventeen and older).

⁷² KLEIN, *supra* note 38, at 53–54; REGALADO, *supra* note 15, at 18; Marciano & Fidler, *supra* note 61, at 541; Diana L. Spagnuolo, *Swinging for the Fence: A Call for Institutional Reform as Dominican Boys Risk Their Futures for a Chance in Major League Baseball*, 24 U. PA. J. INT’L ECON. L. 263, 269 (2003).

⁷³ Grassi, *supra* note 9.

⁷⁴ *Id.*; Tom Haudricourt, *Baseball Pitches to African-Americans*, MILWAUKEE J. SENTINEL, Aug. 11, 2003, at 01C. MLB has now opened a total of three such Urban Youth Academies, in California, Florida, and Texas. Gonzalez & Radano, *supra* note 9; *Urban Youth Academy Timeline*, MLB.COM (last visited July 3, 2011), <http://toronto.bluejays.mlb.com/community/uya.jsp?id=timeline>.

⁷⁵ Alan Schwarz, *Warming to Idea of Global Draft*, ESPN.COM (May 2, 2002), http://assets.espn.go.com/mlb/columns/schwarz_alan/1380527.html.

⁷⁶ Vargas, *supra* note 39, at 24 (alteration in original) (internal quotation marks omitted).

⁷⁷ Marciano & Fidler, *supra* note 61, at 519 (alteration in original) (internal quotation marks omitted).

⁷⁸ Jack Wilshere, an English soccer player, joined the Arsenal academy as a nine year old. Michael Botsford, *Why British Basketball Can’t Compete with the NBA and the American Draft System*, BLEACHER REP. (Sept. 4, 2010), <http://bleacherreport.com/articles/450899>.

⁷⁹ *See, e.g.*, Age Groups, THEFA.COM, <http://www.thefa.com/GetIntoFootball/Players/PlayersPages/WomensAndGirls/~media/Files/PDF/Get%20into%20Football/Women%20and%20Girls/AgeGroups.ashx/AgeGroups.pdf> (showing “Under 9” teams).

is that the British academies are located at home in Britain, while MLB academies have been exiled to foreign countries. The British teams are free to locate their academies in Britain, and develop local talent, because British soccer has no player draft; a team need not fear that another team will draft away the star player from its academy.⁸⁰ In contrast, to escape the reach of the draft, MLB teams must locate their academies in foreign countries and develop only foreign youth.

B. *Replacing Domestic Players with Foreigners*

The teams' shift in scouting and development resources away from the United States and toward other countries soon had the expected impact: teams began to hire foreign players rather than domestic ones. We demonstrate this with our new dataset of the demographics and performance of all MLB players from 1947 until 2001.⁸¹ After we investigate the draft's impact by looking at general trends in the data and insiders' explanations of the trends, we test our predictions further with an econometric model. Next, we explore evidence from the more recent addition to the draft of the U.S. Territories. Finally, we briefly compare MLB's experience with that of the National Basketball Association, which has a worldwide draft, and with the experience in the National Football League.

1. *General Trends and Insiders' Explanations*

The predictions from our theoretical model are confirmed by actual experience. The draft is associated with an increase in the number of Latin-born players on major-league teams, and a decrease in U.S.-born players. Likewise, as expected, the draft's impact occurred neither fully nor immediately in 1965. Instead, initial effects occurred with a delay, gaining strength after that.

Figure 1 shows the fraction of U.S.-born and Latin-born starting players on U.S. teams from 1947–2001.⁸² Because desegregation reduced

⁸⁰ Botsford, *supra* note 78.

⁸¹ The data begin in the year that the first MLB team hired an African-American. The data include information on the country of birth for all players. As in other studies, race data came from external observation. Goff et al., *supra*, note 47, at 23–24 figs.3 & 4. For the 1947–1990 race data, we visually inspected baseball cards. FRANK SLOCUM, TOPPS BASEBALL CARDS: THE COMPLETE PICTURE COLLECTION: 1990 EDITION (1990). We purchased more recent cards or used the authors' knowledge augmented by that of several colleagues. In some regressions, we discarded the few players for whom we could not make a determination of race.

⁸² Mirroring the approach in Goff et al., *supra* note 47, at 23 n.15, we focus on starting players throughout our analysis for two reasons. First, starters have a greater impact on the game than part-time players. Second, racial classification of many part-time players is difficult because they lack baseball cards. We include nonpitchers who appear in at least 120 games, or 75% of the games in a given year. We include starting pitchers who pitched in at least twenty games (12.5% of season games) and relief pitchers who started in no games but pitched in at least forty games (25% of season games). For the strike years of 1981 and 1994, we reduce the thresholds for qualifying as a starter

discrimination against Latins, especially black Latins,⁸³ the fraction of Latin players initially increased steadily from near zero when baseball integrated in 1947 to 7% in 1965.

The slowing in the growth of Latin-born players in MLB in the late 1960s and early 1970s was probably caused mainly by reductions in the numbers of new Cuban players due both to the restrictions on emigration that Castro instituted beginning in 1959 and the embargo that was imposed after the 1961 Bay-of-Pigs.⁸⁴ In the 1950s, Cuba was by far MLB's most important source of foreign players, providing thirty-six of the seventy foreign players debuting during this decade.⁸⁵ The initial peak in Latin players was not reached until a few years after the embargo because of the many Cuban players who were already in the minor-league pipeline at the time of restrictions.⁸⁶ Because of Cuba's unique history, Figure 1 also presents data for Latin-born players excluding Cubans. There appears to be no change in the growth rate of non-Cuban Latins in the 1960s and 1970s.

It is possible that also contributing to the slowed growth in Latin players during the late 1960s and early 1970s was the draft's price effect—as the draft suppressed wages of U.S. players, teams hired more of them and fewer Latin players. However, the fact that only the number of Cuban players declined during the period, not the number of players from other Latin countries,⁸⁷ suggests that the Cuban embargo, not the price effect, was the most important cause of the general decline. Or perhaps, absent the price effect, the hiring of players from non-Cuban Latin countries would have increased even more after the Cuban embargo, as teams substituted non-Cuban Latins for the missing Cubans.

proportionately to the strikes' shortening of the seasons. Where possible, we also duplicated our analysis including all players. Results were similar.

⁸³ JULES TYGIEL, *TOTAL BASEBALL: THE OFFICIAL ENCYCLOPEDIA OF MAJOR LEAGUE BASEBALL* 505 (John Thorn et al. eds., 1997) (defining "Black Ball").

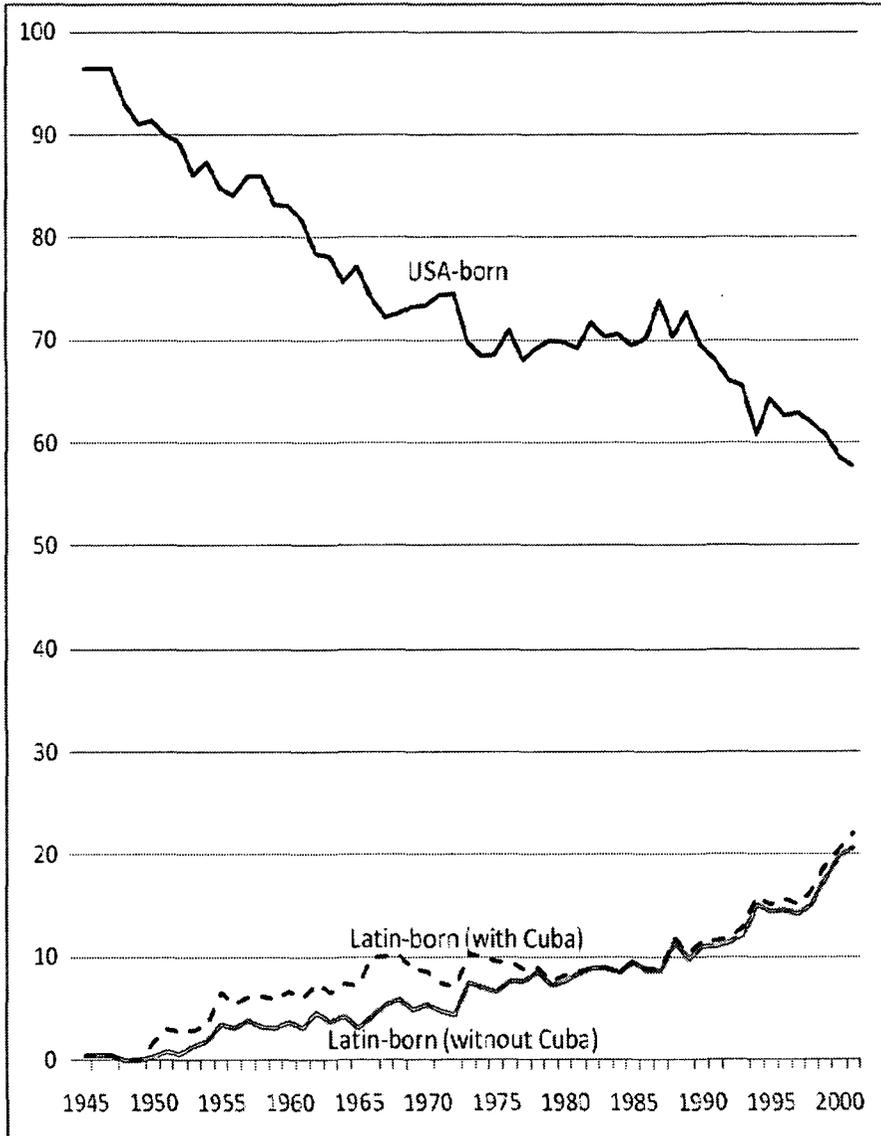
⁸⁴ See RUTH ELLEN WASEM, CONG. RES. SERV., R40566, *CUBAN MIGRATION TO THE UNITED STATES: POLICY AND TRENDS I* (2009) (discussing the restrictions placed on travel between the United States and Cuba when Fidel Castro assumed power in Cuba).

⁸⁵ BJARKMAN, *supra* note 15, at 385–86.

⁸⁶ The number of Cuban players debuting in MLB was seven in 1958, eight in 1960, four in 1964, two in 1966, and averaged zero starting in 1969. *Id.* at 393–94. As seen in Figure 1, because of normal retirement patterns, MLB had no Cuban starters by 1983. A trickle of Cuban defectors began to debut in the late 1980s. *Id.* at 394.

⁸⁷ *Id.* at 385–86.

Figure 1.
Average Percentages of U.S.-Born and Latin-Born
Players per MLB Team, 1947–2001



The impact of teams' shift in scouting and development resources away from the U.S. players toward Latins then began to be felt. In the early 1980s, as major league rosters began to reflect the opening of the first academy in the late 1970s, the percentage of Latin-born players began to

grow more quickly.⁸⁸ As expected, the draft's impact on the number of foreign major-league players was not felt immediately, but only after more than a decade. The opening of additional academies in the 1980s and 1990s has produced even greater acceleration in growth.⁸⁹ By 1993, as shown in Figure 2, all teams had at least one Latin-born starter. Today, the fraction of MLB players from Latin America is twenty-eight percent.⁹⁰

The draft and the accompanying flow of training resources into Latin America have made that area the world's most prolific supplier of MLB players. The Dominican Republic provides more MLB players per capita than any other country, including the United States.⁹¹

As shown in Figure 1, the trend for U.S.-born players was the opposite. Because most foreign MLB players are from Latin America, changes in the percentage of Latin-born players are necessarily associated with opposite changes in the percentage of U.S.-born players. The percentage of U.S.-born players declined until the 1960s, remained steady for a decade when the Cuban embargo eliminated the main source of foreign players and when the draft reduced the relative price of U.S. players, and then declined swiftly after the opening of the Latin academies.

In the end, the draft increased the percentage of Latin-born players even though the draft had increased their relative price. The draft's investment effect outweighed its price effect. But for the Latin-born players' increased relative price, the increase in Latin players would have been even more dramatic.⁹²

Although other important forces were at work during the period—such as the Vietnam War and Great Society Programs—five factors make clear that the MLB draft was responsible for MLB's changing demographics. First, theory predicted that the draft would cause the changes. Second, the changes occurred at the times that would be expected if the draft were the cause. Third, as already discussed, baseball insiders confirm that the draft caused teams to transfer resources for scouting and development from the United States to Latin America.⁹³ Inevitably, the transfer caused

⁸⁸ *Id.* at 385.

⁸⁹ See Vargas, *supra* note 39, at 28–29 (describing the baseball academies that were developed in Venezuela and the Dominican Republic).

⁹⁰ LAPCHICK, *supra* note 3, at 3.

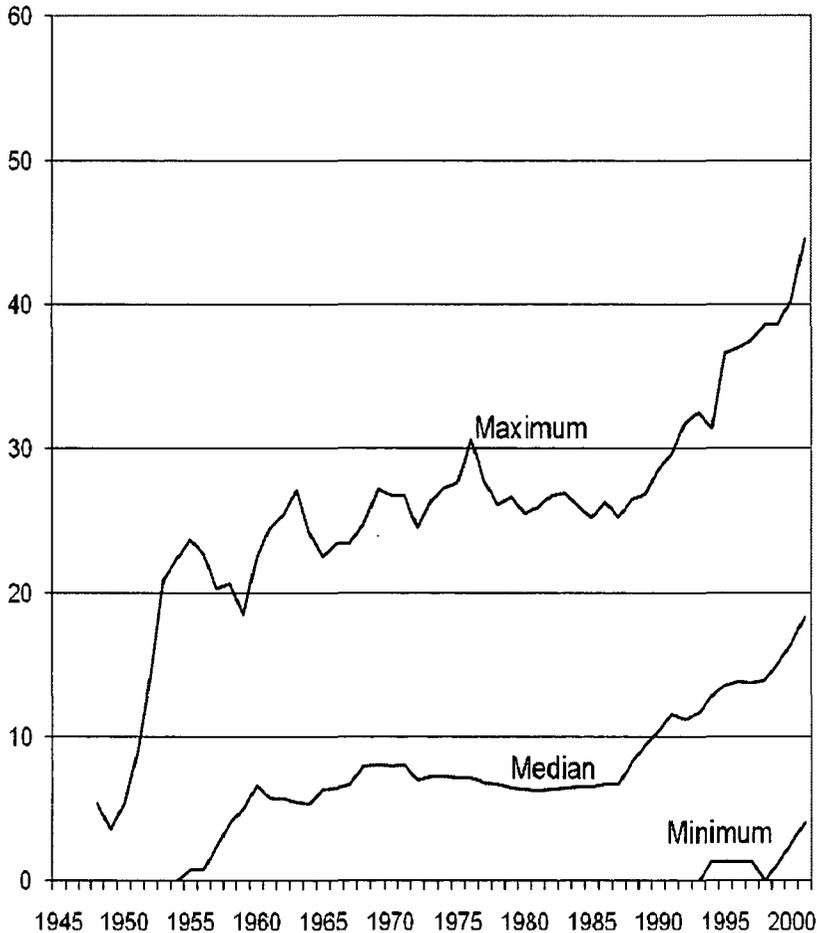
⁹¹ KLEIN, *supra* note 38, at 2.

⁹² In predictable ways, the draft changed the average ages at which U.S. players and Latin players began their major league careers. By two mechanisms, the draft increased the age when U.S. players were ready for the major leagues, and decreased the age for Latins: the draft placed age minimums on hiring U.S. players but not Latins, and it induced teams to move training resources away from young U.S. players toward young Latins. Before the draft in the early 1960s, the average age for debuts of Latin players was higher—23—than for U.S. born players—22.5. After the draft, the pattern reversed. In 2001, the average debut age for Latins was 23 and for U.S. players was 24.3.

⁹³ See, e.g., Mike Klis, *Talent at a Bargain: Pro Scouts Find Gold Mine in Latin American Players*, DENVER POST, May 11, 2003, at A-15 (describing how scouts began to focus heavily on the Latin American region once the cost-effectiveness of doing so became known to baseball's owners).

recruitment of more Latin players and fewer U.S.-born players.

Figure 2.
Median, Maximum, and Minimum Percentages of Latin-Born
Players per MLB Team, 1947–2001



Fourth, accounts from MLB insiders confirm that the draft caused not only the transfer of resources, but also the increased number of foreign players itself. For example, investigative reporters who have interviewed players and league officials focus on the draft. The *Denver Post* noted:

The primary reason for the migration of Latin American talent to the major leagues, however, may be economics. The Dominican Republic, Mexico and Venezuela are not subject to the same age and financial restrictions of baseball's amateur draft. This provides greater flexibility for big-league

teams to sign Latin American prospects.

Prospects from the United States and Puerto Rico must be 18 or finish high school before they are eligible for the draft. Prospects from the Dominican Republic, Mexico and Venezuela can be signed at 16 and develop at a team's baseball academy for two years.⁹⁴

Similarly, the *New York Post* noted: "The dramatic rise of Latin American players has as much to do with economics as it does talent. Players from the United States and Canada are subject to the amateur draft."⁹⁵

Finally, the following econometric model suggests that the draft was the determinative factor. The model controls for various other possible causes of MLB's demographic changes. Even controlling for the other influences, the results suggest that the cause was the draft.

2. An Econometric Model

To test both our theory and the evidence from MLB insiders, we now estimate an empirical model of the influences of various factors on whether teams hire American-born or Latin-born players. The main objective is to test empirically whether teams began to hire more Latin-born players, and fewer American-born players, at the times that we would expect because of the impact of the draft and age minimums. In addition, to correct for other possible influences on a team's hiring practices, we also include the possible other influences as variables.

In symbols and technical detail, the framework of our model is:

$$BIRTHCOUNTRY_{it} = \alpha_i + \psi_t + \beta x_{it} + e_{it} \quad (1)$$

where $BIRTHCOUNTRY_{it}$ is the percentage of American-born and Latin-born players on a given team i in a given year t .⁹⁶ We calculated all of the regressions twice, once where we examined the influences on teams' fraction of U.S.-born players, and a second time where we examined influences on the fraction of Latin-born players.

⁹⁴ *Id.*

⁹⁵ George Willis, *Losing the Race: Decline in Black Players Presents Major League Problem*, N.Y. POST, May 5, 2003, at 56. Likewise, the Chicago Tribune recently noted the cause for the increased numbers of players from the Dominican Republic: "Unlike U.S. players, Dominicans are exempt from the annual amateur draft and can sign with any club." Gary Marx, *Cleanup of a Sorry Mess: Baseball's Latin American Facilities Improving, but Some Franchises Continue to Lag Behind*, CHI. TRIB., June 29, 2003, at 1.

⁹⁶ We estimate the models in percentages of players from each country because changes in the average roster size over time may bias the data on the numbers of players. However, results using the number of players yield similar results. The model includes franchise-level fixed effects, α_i , to account for franchise-specific practices in hiring. For example, certain teams specialized in foreign players: of the thirty-six Cuban players who debuted in MLB during the 1950s, nineteen were with the Washington Senators. BJARKMAN, *supra* note 15, at 385, 393.

The model attempts to test the impact on a team's hiring practices of various factors, represented by the variables ψ_t and x_{it} . The variable that we are interested in most, ψ_t , represents time. Our theoretical model, evidence from MLB insiders, and examination of the raw data all suggest that the draft and establishment of the Latin American training academies may have caused teams' hiring practices to change in certain years. For example, we would expect that, in 1995, after many academies had been established, teams would hire more Latin American players than they would have in 1964, all else equal.

Accordingly, our regressions tested for knots, or thresholds, in the percentages of U.S. players and foreign players in two specific years. First, because of the four or five year lag between drafting a player and his entering the major leagues, we tested for the existence of a knot in 1969, four years after the establishment of the draft. Second, we tested for a knot in 1981, four years after the establishment of the first Latin training academy. That is, we tested whether teams' hiring of U.S. players and Latin American players changed substantially in 1969 and 1981.

Because the draft's investment effect and price effect push in opposite directions, theory offered no firm prediction about whether a knot would exist in 1969. The draft's price effect on U.S.-born and Latin-born players occurred immediately after the draft: because the draft immediately made U.S. players relatively cheaper, this effect would tend to cause the percentage of U.S. players hired to increase, and Latins hired to fall, starting in 1969. However, the draft's investment effect would be expected to work in exactly the opposite direction, increasing Latins and decreasing U.S. players, although perhaps with a longer delay. No knot would exist if the price and investment effects counterbalance each other. In addition, the Cuban emigration restrictions and embargo would be expected to reduce the percentages of players from Latin American during the 1960s and 1970s.

After 1981, we expected the growth rate of foreigners to increase as the Latin American training academies began producing players; after the teams had time to redirect their investment, we expected the investment effect to outweigh the price effect. The percentage of U.S. players should decline after 1981 for the same reason.

The coefficient for this variable represented the change in the growth rate of Latin players or of U.S. players before and after 1969 and before and after 1981. For example, if there was a big change in the growth of the number of Latin players after 1981, then the coefficient for that year will be strongly positive.⁹⁷

⁹⁷ Specifically, the coefficient ψ_t measured changes in the growth rate of the different demographic groups in MLB between the threshold years; the time intervals measured were 1947-

To ensure that other factors were not biasing the results with respect to our primary time variable, we also included in the regression several secondary control variables. The term x_{it} includes several variables that might affect the team's benefits from hiring Latin or U.S. players.⁹⁸ First, it includes a variable that measures relative team performance: *games back* indicates the number of games that a team was out of first place at the end of the previous year. The sign of its coefficient indicates whether successful or unsuccessful teams tended to hire more foreign or U.S. players.

Second, we included *median family income* for each team's city. This allowed us to control for the possibility that teams may choose different players depending on the affluence of the city's fans. For example, the results for this variable might indicate teams' beliefs about whether wealthy fans prefer U.S. players or Latin players. If they believe that wealthier fans prefer U.S. players, then, all else equal, teams from rich cities should have more U.S. players and teams from poor cities should have more Latin players.⁹⁹

Third, we included in x_{it} the percentage of each team's city population that is nonwhite. The *nonwhite* variable represents the possibility that minority populations may prefer foreign players, many of whom are nonwhite.¹⁰⁰

The empirical results support our predictions about the impact of the draft and age minimums.¹⁰¹ Column 1 of Table 1 reports the estimated coefficients of equation (1) for Latin-born players. During 1947–1968, the growth rate of the fraction of Latin players increased, as indicated by the

1968, 1969–1980, and 1981–2001. That is, the coefficients represented the change in the slope of the time trend variable—the change in the growth rate—from the preceding time interval.

⁹⁸ This follows the approach in Goff et al., *supra* note 47, at 20. We thank those authors for games-back data for 1947–1971. The later years of games-back data are from *The Baseball Archive* at Baseball1.com. See also *Standings on Any Date*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/games/standings.shtml>. Demographic and income data are from various issues of the *County and City Data Book* published by the Bureau of the Census of the U.S. Department of Commerce. See, e.g., U.S. CENSUS BUREAU, *COUNTY AND CITY DATA BOOK: 2007* (14th ed. 2007), available at <http://www.census.gov/prod/2008pubs/07ccdb/ccdb-07.pdf>. The median family income data are collected only in census years. The annual values for other years are linear interpolations. The percentage non-white census data are used for the four years preceding and five years after each census year.

⁹⁹ Our inclusion of this variable mirrors the approach in Goff et al., *supra* note 47, at 20.

¹⁰⁰ If foreign nonwhite players replace African-Americans, then the coefficient on the variable may be insignificant, even if nonwhite populations prefer nonwhite players; the shift to foreign players would not change the number of nonwhites.

¹⁰¹ We estimated the model with a spline regression to account for the piecewise relationship between the demographics of each team and the time trend variable. WILLIAM H. GREENE, *ECONOMETRIC ANALYSIS* 237 (2003). Our estimation used ordinary least squares. If the disturbance variances differ across time intervals, pooling the observations can result in a biased estimate of both disturbance variances. *Id.* at 236. The results are similar in magnitude and significance when the model is estimated on the three time intervals separately, which allows for different disturbance variances across the time intervals.

positive and significant coefficients for this period; during this period, discrimination declined and Latin-born players began to replace U.S.-born players.

Table 1.
Spline Regression on Franchise-Level Panel Data:
Latin-Born Players

Variable	Coefficient/t-statistics	
	Percentage of Latin-Born Players per Team	
	(1) With Cuba	(2) Without Cuba
Pre-Draft Annual Growth Rate of Players, 1947–1968	.464 (7.72)*	.360 (6.77)*
Change in the Annual Growth Rate of Players after the Draft, 1969–1980	-.523 (4.02)*	.060 (0.53)
Change in the Annual Growth Rate of Players after the Establishment of Latin Training Academies, 1981–2001	.784 (6.86)*	.299 (2.96)*
Percentage Nonwhite	.043 (1.65) ⁺	-.029 (1.26)
Median Family Income	-.0002 (2.95)*	-.0003 (3.58)*
Games Back in Previous Year	-.039 (1.49)	-.030 (1.31)
Intercept	-901.581 (7.68)*	-698.842 (6.73)*
R-squared	0.3137	0.4091
F-statistic	59.51	91.80

Notes: The dependent variable in Model (1) is the percentage of players born in any Latin American country on each team. The dependent variable in Model (2) is the percentage of players born in any Latin American country except Cuba on each team. Absolute values of t-statistics are in parentheses. “*” and “+” represent significance at the 5% and 10% levels, respectively. The estimated coefficients for the franchise dummies are not shown.

The negative, significant coefficient for 1969–1980 indicates that the growth rate of players from Latin American declined during this period. This reduced growth rate could be the result of the price effect dominating the investment effect or of the emigration restrictions on players from Cuba.

Finally, during 1981–2001, the growth rate of the number of Latin-born players increased, as indicated by the period’s positive and significant

coefficient. As the Latin academies began operation, more Latin-born players were signed each year, increasing the flow and stock of Latin players in MLB.

To explore further the impact of the Cuban embargo, column 2 of Table 1 reports results for Latin-born players excluding Cuban players. As with the regression for all Latin-born players, growth rates increased for the 1947–1968 and 1981–2001 periods. However, during 1969–1980, the insignificant coefficient indicates that the relationship between the time trend and non-Cuban Latin-born players is the same as in the previous period. Despite the Cuban embargo, the stock of non-Cuban Latin-born players on MLB teams continued to increase at the same rate as in the previous period. This result suggests that the decrease in the growth rate of players from all Latin countries that is seen in Column 1 is caused by the Cuban emigration restrictions, not the price effect.¹⁰²

Column 1 in Table 2 reports the estimated coefficients of equation (1) for U.S.-born players. As expected, they are the mirror image of the results for Latin-born players. During 1947–1968, the percentages of U.S. players on MLB teams decreased, as indicated by the negative and significant coefficients for this time period. During this time, increasing numbers of Latin-born players began to replace U.S.-born players.

The coefficient for the 1969–1980 period is positive and significant, indicating that the rate of decline decreased. This could have been caused by the price effect—American players became relatively cheaper after the imposition of the draft—or by the Cuban emigration restrictions.

Starting in 1981, the rate of decline of the number of U.S.-born players increased, as indicated by the negative and significant coefficients. During this period, Latin graduates of the training academies began increasingly to replace U.S. players.

Column 2 of Table 2 reports results of an estimation of equation (1) that controls for the reduction in Cuban players due to the Cuban embargo. It includes as a control variable the percentage of Cuban players per team. In this estimation, as in the first regression, the coefficients for 1947–1968 and 1981–2001 are negative and significant. However, the coefficient for 1969–1980 becomes insignificant. This suggests that, controlling for the reduction in Cuban players, the rate of decline in American-born players continued at the same pace during 1969–1980 as it had in the earlier period. Again, this suggests that the decrease in the rate of decline of American players between 1969 and 1980 was caused by the Cuban

¹⁰² We also estimated equation 5 with a knot at 1963, four years after emigration restrictions were imposed on Cuban players. The results confirm that the Cuban emigration restrictions caused the decline in the growth rate of players from Latin America and the slowing of the decline in American players during the 1960s and 1970s. Other coefficients were similar in sign and significance to those in our reported regressions. For simplicity, we report only the results of the specification with the 1969 and 1981 knots.

emigration restrictions, not the draft's price effect.

Table 2.
Spline Regression on Franchise-Level Panel Data:
U.S.-Born Players

Variable	Coefficient/t-statistics	
	Percentage of American-Born Players per Team	
	(1) No Control for Cuba	(2) Control for Cuba
Pre-Draft Annual Growth Rate of Players, 1947–1968	-.527 (7.89)*	-.421 (6.85)*
Change in the Annual Growth Rate of Players after the Draft, 1969–1980	.536 (3.70)*	-.059 (.43)
Change in the Annual Growth Rate of Players after the Establishment of Latin Training Academies, 1981–2001	-.802 (6.30)*	-.307 (2.55)*
Percentage of Cuban Players per Team		-1.018 (14.99)*
Percentage Nonwhite	-.039 (1.36)	.034 (1.27)
Median Family Income	.0003 (3.33)*	.0003 (3.86)*
Games Back in Previous Year	.029 (1.00)	.020 (.76)
Intercept	1122.683 (8.60)*	916.152 (7.63)*
R-squared	0.2890	0.4080
F-statistic	51.51	85.07

Notes: The dependent variable in both regressions is the percentage of American-born players on each team. Model (2) differs from Model (1) by including a variable measuring the percentage of Cuban players per team. Absolute values of t-statistics are in parentheses. "*" and "+" represent significance at the 5% and 10% levels, respectively. The estimated coefficients for the franchise dummies are not shown.

Our results are robust to moderate changes in the locations of the thresholds. For all of the regressions, the results are generally similar in magnitude and significance when the knots are moved within two years above or below 1969 and 1981. In contrast, as theory would predict, knots further away from 1969 and 1981 produce insignificant coefficients.

Only one of the control variables, the median family income in the teams' cities, had a statistically significant impact on teams' hiring practices. Teams from rich cities tended to hire more whites, while teams

from less affluent cities tended to hire more Latin-born players: the variable is positively related to the percentage of U.S.-born players on each team and negatively related to the percentage of Latin-born players on each team. This is true even controlling for the percentage of non-whites in the area. Perhaps teams judged that less affluent fans would be more accepting of Latin-born players. Coefficients for games back and percentage non-white were generally insignificant.

3. Evidence from the U.S. Territories

To provide further evidence of the impact of the draft on hiring patterns, we examined the effect of the addition of Puerto Rico and the other U.S. territories to the coverage of the draft in 1989.¹⁰³ The large majority of MLB players born in the U.S. territories are from Puerto Rico. Since the early 1990s, Puerto Rico has been the one exception to the increasing number of Latin-born players in MLB. As with U.S.-born players, the number of Puerto Rican players has declined during this period.¹⁰⁴ Figure 3 shows the average percentage of MLB starting players between 1980 and 2001 that were born in the U.S. territories. The percentages of players from U.S. territories increased until 1993, and then began decreasing.

The draft again explains this. Until 1989, because Puerto Rican and other players from the U.S. territories were not subject to the MLB draft, they were more desirable to scouts than U.S.-born players. In 1989, the draft and the U.S. age minimums began to be applied to Puerto Rican players, with supporters arguing that the draft was necessary to protect young players.¹⁰⁵

Teams quickly cut back their scouting and development efforts in Puerto Rico. One sports reporter noted that because of the draft, “[a]s scouts lament, there is no incentive to beat the bushes for players with long-term potential in Puerto Rico as was the case with Sammy Sosa in the Dominican Republic”¹⁰⁶ Another suggested, “[m]ajor league teams have bypassed Puerto Ricans in favour of younger players from the

¹⁰³ Canadian players were added to the draft in 1991. Rausch, *supra* note 20. However, because relatively few Canadian players have ever played in the major leagues, the addition had little effect. Some baseball insiders believe that MLB added Puerto Ricans to the draft to reduce their wages: “Puerto Ricans were not included in the draft until 1989, and Bernazard [a Puerto Rican former MLB player and present MLB official] feels that perhaps the reason for the switch was to reduce bonuses awarded to them. He pointed out that Puerto Ricans were included in the draft shortly after Ivan Rodriguez, Carlos Baerga, Juan Gonzalez and Carlos Delgado received large bonuses.” Rafael HERNANDEZ, *Baseball and Books*, N.Y. TIMES, April 13, 2003, at 1.

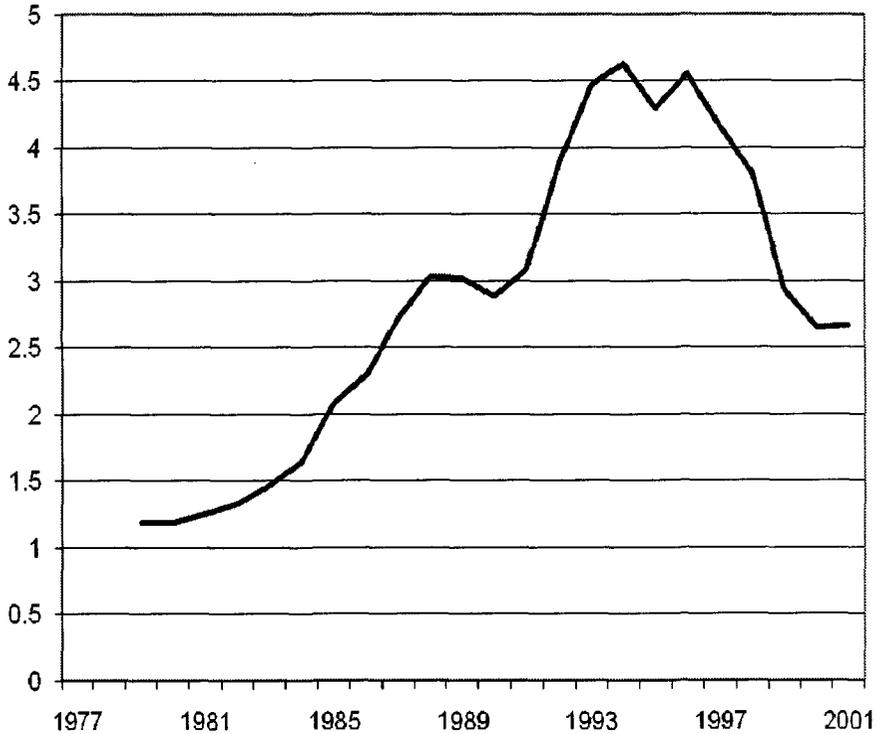
¹⁰⁴ See HERNANDEZ, *supra* note 103 (describing the declining numbers of Puerto Rican players sent to the major leagues since they were subject to the draft in 1989).

¹⁰⁵ Geoff Baker, *Jays Pick a Part Timer*, TORONTO STAR, June 5, 1999. Jorge Rivera, a MLB scout in Puerto Rico, argued that Puerto Rico needed the draft because “they were signing kids who were 14 and 15 years old. They’re not used to being alone that early in life.” *Id.*

¹⁰⁶ Madden, *supra* note 1, at 67.

Dominican Republic and Venezuela who can be developed earlier on.”¹⁰⁷

Figure 3.
Average Percentages of Players from U.S. Territories per MLB Team, 1980–2001



In less than a decade after 1989, the number of Puerto Rican players signed per year had dropped more than forty percent.¹⁰⁸ Figure 3 shows that the reduction in signings led to a decline in the number of Puerto Ricans in MLB beginning in 1993. Once again, the draft began to affect player demographics approximately four years after its institution.

We tested empirically the effect of the draft on hiring in the U.S. territories by estimating equation (1) for players from these countries. The time variable, ψ_t , here includes the following time intervals: 1947–1968, 1969–1980, 1981–1992, and 1993–2001; that is, we have added an additional knot four years after the U.S. territories were added to the draft. Table 3 reports the results from this estimation. For the first three time periods, the results resemble those in Table 1 for other non-Cuban Latin

¹⁰⁷ Baker, *supra* note 105.

¹⁰⁸ Madden, *supra* note 1, at 67.

American countries. The percentages of players from the U.S. territories increased between 1947 and 1968, as indicated by the positive and significant coefficient. Between 1969 and 1980, the growth rate of U.S. territory players remained the same, as evidenced by the insignificant coefficient for this period. The positive and significant coefficient for the 1981–1992 period implies that the growth rate increased during this period; as with other Latin countries, ever more players from the U.S. territories entered the major leagues as MLB hiring resources were transferred to foreign countries.

Table 3.
Spline Regression on Franchise-Level Panel Data:
Players from the U.S. Territories

Variable	Coefficient/t-statistics
Pre-Draft Annual Growth Rate of Players, 1947–1968	.161 (5.02)*
Change in the Annual Growth Rate of Players after the Draft, 1969–1980	-.129 (1.57)
Change in the Annual Growth Rate of Players after the Establishment of Latin Training Academies, 1981–1992	.417 (5.32)*
Change in the Annual Growth Rate of Players after the U.S. Territories are added to the Draft, 1993–2001	-.533 (4.70)*
Percentage Nonwhite	-.014 (1.03)
Median Family Income	-.0002 (3.83)*
Games Back in Previous Year	-.023 (1.66) ⁺
Intercept	-310.835 (4.98)*
R-squared	.2035
F-statistic	11.57

Notes: The dependent variable is the percentage of players from the U.S. Territories on each team. Absolute values of t-statistics are in parentheses. “*” and “+” represent significance at the 5% and 10% levels, respectively. The estimated coefficients for the franchise dummies are not shown.

However, beginning in 1993, the growth rate declined, as indicated by the negative and significant coefficients for the 1993–2001 period. After the U.S. territories were added to the draft, fewer and fewer players from these areas entered the major leagues. The declining flow and normal retirement from the league combined to reduce the stock of players from the U.S. territories.¹⁰⁹

Again, baseball insiders recognize that the recent decline in the number of MLB players from Puerto Rico is due to the new application of the draft. Noting the decline in Puerto Rican players since 1989, the *New York Times* explained:

With a tropical climate, strong financial backing as a United States territory and a higher standard of living than the Dominican Republic, Puerto Rico should be a baseball nirvana. So why has it fallen so far behind its neighbor?

Dominicans are exempt from the draft and can sign with major league organizations as early as age 16, while Puerto Ricans, as United States citizens, must wait until their high school class graduates or they turn 18 to enter the draft.¹¹⁰

Similarly, *National Public Radio* noted:

In the past, the best ballplayers would get training and experience when they signed with major-league teams as sixteen year-olds. But starting in 1989, Puerto Ricans were required to enter baseball through the draft, meaning they had to wait until they were eighteen or until high school graduation.

. . . .

Roughly twice as many Puerto Rican players entered pro baseball before the draft started. According to a published report, thirty-eight players from Puerto Rico were in the major leagues at the start of this season. There were seventy-nine players from the Dominican Republic, Puerto Rico's Latin American rival, a country that still can send its sixteen year-olds to pro ball because it's exempt from the draft.¹¹¹

Recognizing that application of the draft to Puerto Rico had devastated Puerto Rican baseball, the island's Secretary of Sport in 2008 asked MLB

¹⁰⁹ As in the earlier regressions, teams in cities with low-income populations tended to hire more players from the U.S. Territories. Similarly, teams with successful winning records also hired more.

¹¹⁰ Hermoso, *supra* note 104, at 1; *see also* Spagnuolo, *supra* note 72, at 283 n.115 (noting that fewer Puerto Rican players have obtained professional contracts since they entered the MLB draft).

¹¹¹ *Morning Edition: Baseball Academy Hopes to Rekindle Puerto Rican Baseball Glory* (NPR radio broadcast May 27, 2003).

to exempt it from the draft. MLB refused.¹¹²

4. *Comparisons with Professional Basketball and Football*

Perhaps even more than baseball, basketball is popular outside the United States. For example, unlike baseball, basketball enjoys broad popularity in Europe, with successful professional basketball leagues and championships. With so much of the world interested in basketball, one might expect that the percentage of foreign players in the National Basketball Association would be larger than the fraction in MLB. However, the opposite is true. Despite recent high-profile signings of several foreign players, only 18% of NBA players are foreign, less than two-thirds of the percentage in MLB.¹¹³

Differences in the basketball and baseball drafts help to explain this. Unlike the baseball draft, the NBA's worldwide draft applies to all players, from all countries. Thus, NBA teams have no artificial incentive to develop and hire foreign players rather than natives. All players are equally burdened by the draft's requirements.

That the fraction of foreign players in the National Football League is even lower—2%—is explained both by American football's lack of popularity in other countries and by the practical necessity of obtaining training on a U.S. college team to pursue a career in the NFL.¹¹⁴

V. DISPROPORTIONATE HARMS FOR AFRICAN-AMERICANS AND DISADVANTAGED WHITES

A disheartening riddle has been the decline in hiring of African-American MLB players. Figure 4 shows the average percentage of African-Americans and other groups starting on major-league teams between 1947 and 2001. After increasing for many years, the percentage of African-American players peaked in 1979, and, by 2001, had declined substantially, by 40%. Recently, the decline has continued even further to 9.1%, so that in 2010 the fraction of African-American major leaguers was less than half what it was at its peak thirty-one years earlier.¹¹⁵

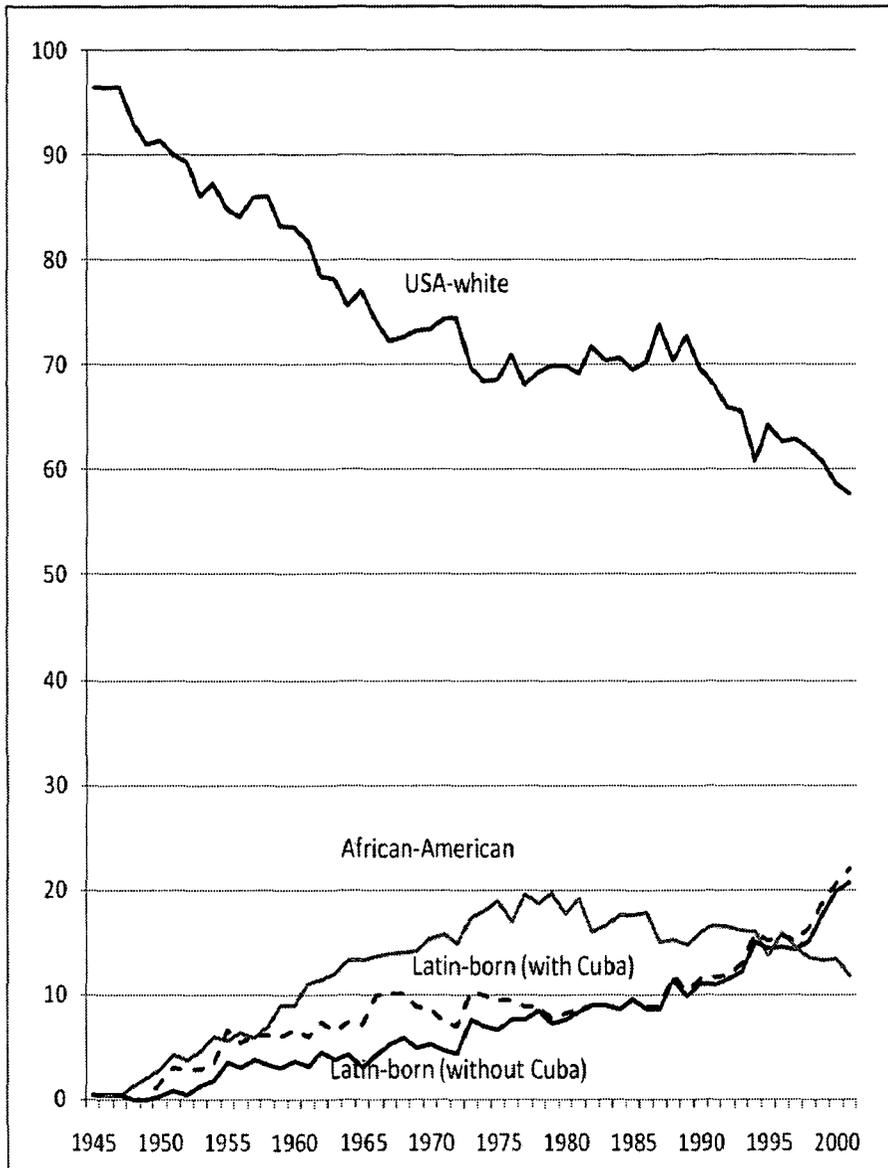
¹¹² Aranguré & Cyphers, *supra* note 70.

¹¹³ Of the NBA's 450 players during the 2009–2010 season, 81 out of 450 players were foreign. RICHARD LAPCHICK, UCF INST. FOR DIVERSITY AND ETHICS IN SPORTS, 2010 RACIAL AND GENDER REPORT CARD: NATIONAL BASKETBALL ASSOCIATION 18 (2010), available at http://www.tidesport.org/RGRC/2010/2010_NBA_RGRC%5B1%5D.pdf.

¹¹⁴ In the 2009–2010 NFL season, 48 out of 2400 players were foreign. RICHARD LAPCHICK, UCF INST. FOR DIVERSITY AND ETHICS IN SPORTS, 2010 RACIAL AND GENDER REPORT CARD: NATIONAL FOOTBALL LEAGUE 15 (2010), available at <http://www.bus.ucf.edu/documents/sport/2010-NFL-Racial-and-Gender-Report-Card.pdf>.

¹¹⁵ LAPCHICK, *supra* note 3, at 3.

Figure 4.
Average Percentages of U.S-White, African-American, and Latin-Born Players per MLB Team, 1947–2001



Although other factors may also have contributed, an important cause of the decline was the draft. The theoretical model predicted that the draft would cause teams relatively swiftly to switch resources from young U.S.-born players who required development by the teams to older, self-

developed U.S. players of signing age who had developed the necessary skills on their own. Then, with a greater lag, teams would switch additional resources from both groups of U.S. players to developing foreign players.

These predictions help to explain the decline in African-American players. Compared to white youths, a disproportionately low percentage of African-American youths enjoy access to baseball training. African-American households have 39% less income on average than U.S. white households¹¹⁶ and suffer a host of other relative socioeconomic advantages. Few discretionary resources remain for families to pay for baseball camps, baseball leagues, and transportation to practices and games. *Sports Illustrated* recently noted,

[T]hose suburban kids who play baseball are saturated with practice and games year-round. Parents are doling out up to \$5,000 to have their sons play on travel teams with multiple sets of fancy uniforms, up to \$500 to attend showcase camps in which they walk away with promotional CD-ROMs of their son and up to \$60 an hour once or twice a week in the off-season to have Johnny take private lessons.¹¹⁷

In contrast, the report concluded, “[t]he young African-American without access to that kind of intensive training is hopelessly behind the learning curve of a game that is difficult to grasp. ‘We’ve lost them by age 13,’ says DeJon Watson, director of professional scouting for the Indians.”¹¹⁸

In addition, compared to white children in the United States, a much higher proportion of African-American children are raised by single mothers or grandmothers, with little male influence.¹¹⁹ Unlike two-parent families, these single parents often lack the time and resources necessary to transport children to practices and games. It is difficult for a single parent to be a “baseball mom.” The absence of males also eliminates a traditional source of early baseball training. A Little League coach in inner-city

¹¹⁶ See U.S. CENSUS BUREAU, 2011 STATISTICAL ABSTRACT OF THE UNITED STATES 456 tbl.696 (2011), available at <http://www.census.gov/compendia/statab/2011/tables/11s0696.pdf> (showing the median income of families by race and Hispanic origin in current and constant (2008) dollars from 1990 to 2008).

¹¹⁷ Verducci, *supra* note 42, at 56.

¹¹⁸ *Id.*

¹¹⁹ In 2007, 71% of births of African-American children were to unmarried mothers, compared to 35% for whites. U.S. CENSUS BUREAU, 2011 STATISTICAL ABSTRACT OF THE UNITED STATES 69 (2011). Only 42% of black U.S. households with children have fathers, compared to 80% for whites. U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, FAMILIES AND LIVING ARRANGEMENTS, tbl.CH-2 & CH-3 (2010).

Chicago noted:

The backbone of Little League baseball is nurturing fathers. Most of our kids wouldn't know their fathers if they walked into the same room. People don't want to talk about it—it's not politically correct—but the facts are obvious. In 1960, 80 percent of urban black families were two-parent households. Now it's 20 percent.¹²⁰

Another baseball insider noted that baseball is a father-son game, and fewer African-American youths have involved fathers.¹²¹ Finally, large proportions of African-Americans dwell in dense urban areas, which contain few baseball fields.¹²²

The sports press has confirmed the importance of African-Americans' relative lack of both training resources and family support to their declining participation in MLB: "Many blacks are encountering economic and instructional gaps—they don't have access to the groomed fields, expert instruction and the pay-for-play mentality associated with suburbia. The demise of the two-parent household and the passionate neighborhood volunteer coach have cut the connection between baseball and young blacks."¹²³ Another commentator noted that youth baseball in the United States has become a "country-club sport," like swimming and tennis, played by upper middle class white kids in the summer.¹²⁴

The positions that African-Americans play on MLB teams also demonstrate the handicaps that young African-American athletes endure because of the absence of training resources. Of the African-Americans who do play in MLB, a disproportionate number play in the outfield, where raw speed is valued, rather than in the infield, where long training is necessary to develop the necessary skills.¹²⁵ Baseball insiders indicate that African-Americans disproportionately play in the outfield because they lack the benefit of superior youth coaching that is necessary to perform at a high level in the infield.¹²⁶

The training that players receive in college does not substantially help

¹²⁰ Verducci, *supra* note 42, at 56.

¹²¹ Gregory Lewis, *Major Slide in Black Players; Fewer Coaches, Other Options Keep Athletes from Diamond*, SUN-SENTINEL, Aug. 22, 2005, at 1A; Ralph Wiley, *Squeeze Play: Baseball's Troubling Issue*, ESPN.COM (July 15, 2003), <http://espn.com/page2/s/wiley/030715.html>.

¹²² Scott J. South & Kyle D. Crowder, *Residential Mobility Between Cities and Suburbs: Race, Suburbanization, and Back-to-the City Moves*, 34 DEMOGRAPHY 525, 525–26 (1997).

¹²³ Verducci, *supra* note 42, at 56.

¹²⁴ Kyle Veazey, *More than the Ball is White*, DECATUR DAILY (July 9, 2005), <http://legacy.decaturdaily.com/decaturdaily/sports/050709/white.shtml>.

¹²⁵ Thomas J. Foley, *Blacks Victims of Baseball Bias, Study Shows*, SPORTING NEWS, June 15, 1974, at 15.

¹²⁶ *Id.* at 15.

African-Americans. By college age, it is too late to develop fundamental skills. Because African-Americans lack training resources when they are youths, they are unable to develop the skills necessary to gain entry to college teams. African-Americans represent less than 3% of college Division I baseball players.¹²⁷ Even historically black colleges, whose students are almost all African-American, have no choice but to recruit many white players for their baseball teams.¹²⁸ In the 2004 MLB draft, only one black college player was chosen in the first 100 picks.¹²⁹

Thus, it is to be expected that the teams' initial switch from developing U.S. players to hiring self-developed U.S. players will have excluded African-American players disproportionately. Although the switch would also exclude disadvantaged whites who lacked their own training resources and family support, a higher percentage of African-Americans would be excluded because a higher percentage of them are disadvantaged. African-Americans may, therefore, serve as a proxy for disadvantaged whites; that is, with regard to the effects of the MLB draft, the experience of African-Americans suggests the experience of disadvantaged people of all races.

In addition, we would expect that teams' later diversion of resources to developing foreign players in foreign baseball academies would disproportionately exclude African-Americans. Developing disadvantaged youths from the Dominican Republic and Venezuela rather than disadvantaged youths from the United States would lead to a decline in the number of U.S.-born MLB players from disadvantaged backgrounds. A disproportionate fraction of these disadvantaged U.S. youths are African-American.

The data are consistent with these expectations. As before, we first examined general trends and insiders' explanations of them, and then used our econometric model to test the predictions more rigorously.

A. General Trends

As shown in Figure 4, the percentage of African-American players initially increased steadily, from none in 1947 just before Jackie Robinson entered the league to more than 14% of the average team's starting lineup in 1969. In the early and mid-1960s, the Cuban embargo may have contributed to the increase; teams hired more U.S.-born players, including African-Americans, because Cubans were no longer available. Similarly, perhaps because of the Cuban embargo, the data show a slowing in the decline of the percent of U.S.-born white players in the mid-1960s.

The draft in 1965 caused teams to switch resources from developing

¹²⁷ Ogden & Hilt, *supra* note 5, at 216.

¹²⁸ Larry Stone, *The Changing Face of Baseball: African-American Players on the Decline*, SEATTLE TIMES, Aug. 28, 2005, at C1.

¹²⁹ *Id.*

U.S.-born youths of any background, to hiring predominantly white, self-developed U.S. players. As *Sports Illustrated* noted, “Many major league clubs, such as the Red Sox, the Oakland A’s and the Toronto Blue Jays, emphasize drafting college players over high school players because the college kids are more developed and their potential is more easily defined.”¹³⁰

Teams’ demographics then began to change once the players reached the majors. By 1969, four years after the imposition of the draft, the growth in the fraction of African-American players began to slow. As teams slowly switched their scouting and development resources to Latin America, the percentage of African-Americans peaked in 1979 and then began its long slide.¹³¹ At the same time, the decline in the percentage of U.S.-born white players stopped, and the percentage even began to increase slightly.

In the early 1980s, as team rosters began to reflect the impact of the 1977 opening of the first Latin training academies and the growing tide of new foreign players, the percentage of African-Americans began to decrease even faster—as Figure 4 shows. The foreign players offered another appealing substitute, in addition to self-developed U.S. players, to investing in disadvantaged U.S.-born youths.

At first, the new foreign players replaced only disadvantaged U.S.-born players; when the percentage of foreign players began to increase after 1981, the percentage of African-Americans swiftly declined, but the percentage of U.S.-born white players remained steady for several years. That is, it appears that, until the late 1980s, the total percentage of white players did not decline because the increased hiring of self-developed white players more than compensated for the reduced hiring of disadvantaged white players.

In the late 1980s and 1990s, as more teams shifted more resources to foreign academies, the rate of decline for African-Americans increased further. As Figure 4 shows, from 1979 to 2001, the average proportion of African-American players declined by about two-fifths, from 19.7% to 11.8%. The decline has struck some teams with special force. As Figure 5 shows, starting in 1993 some teams began to have no African-American players. Recently, the percentage of African-American players has declined still further, to 9.1%.¹³² That is, the percentage of African-American players has now declined by more than half from its peak.

During this period, the percentage of U.S.-born white players also finally began to decline. Starting in the late 1980s, the surge of foreign

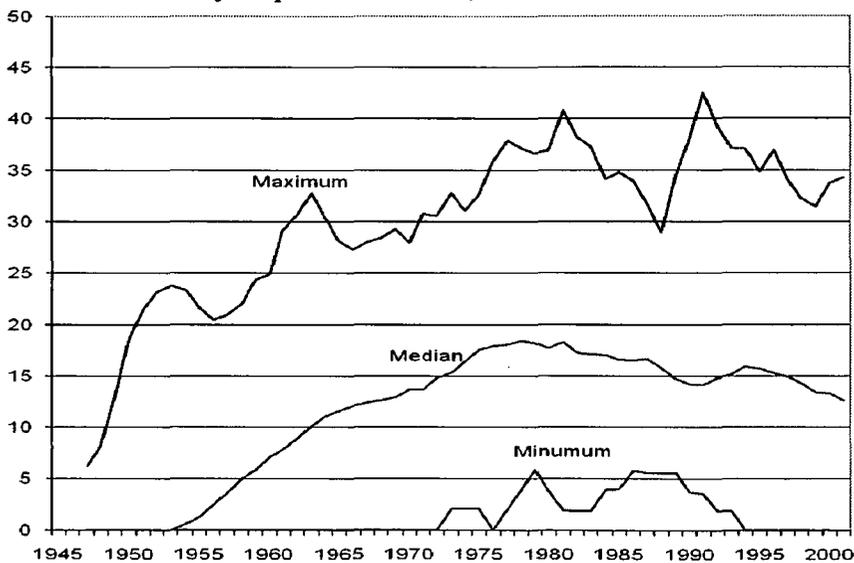
¹³⁰ Verducci, *supra* note 42, at 56.

¹³¹ See *supra* Figure 5. Although the declining rate of increase is apparent by observation, the next section also demonstrates it econometrically.

¹³² LAPCHICK, *supra* note 3, at 18.

players began to replace both African-Americans and whites. However, as expected, African-American players have borne more of the brunt. As shown in Figure 6, from 1979 to 2001, the 40% decline for African-American players compares to a decline of only 17% for U.S.-born white players. The theoretical model predicts that the white players who have been replaced are those who share African-Americans' socioeconomic disadvantages and so cannot self-develop. Indeed, the percentage declines for African-American players and white players mirror the percentages of each group in the general population below the poverty line.¹³³

Figure 5.
Median, Maximum, and Minimum Percentages of African-American Players per MLB Team, 1947–2001



The degree to which Latin players have replaced African-Americans is striking. The numbers of African-Americans swiftly declined and the numbers of foreign-born Latin players rapidly increased during the 1990s. In 1997, Latinos outnumbered African-Americans for the first time. As shown in Figures 2 and 5, 1993 was not only the first year since 1971 that some teams had no African-American starters, it was also the first year that all teams had at least some Latin starters. By 2005, six MLB teams had no African-American players on their rosters, as either starters or

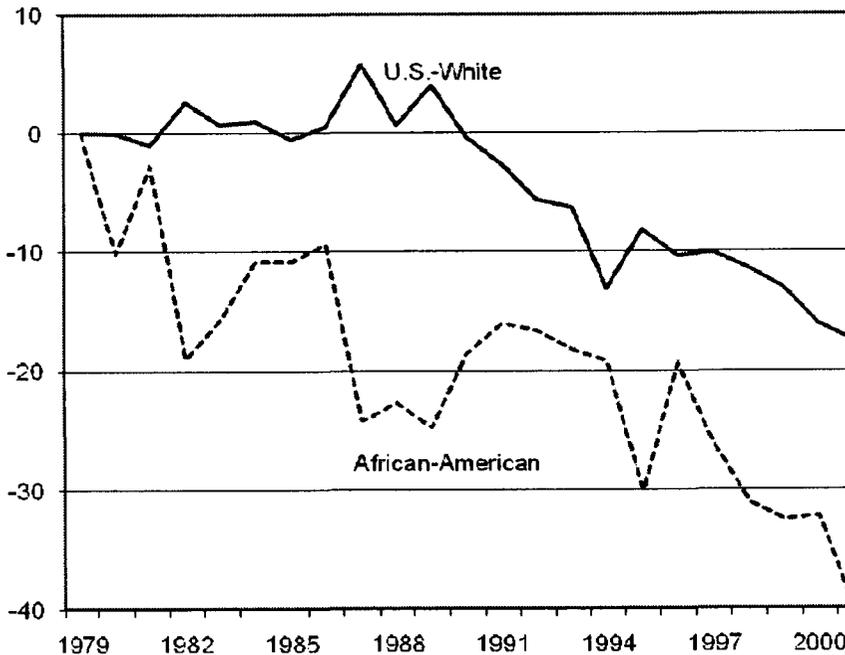
¹³³ During the 1990s, the percentage of African-Americans below the poverty line was approximately 22%, compared to 8% for white non-Hispanics. BERNADETTE D. PROCTOR & JOSEPH DALAKER, U.S. CENSUS BUREAU, *POVERTY IN THE UNITED STATES: 2001 6* (2002), available at <http://www2.census.gov/prod2/popscan/p60-219.pdf>.

substitutes.¹³⁴

In 1979, the percentage of African-Americans was more than double that of Latins: 19% compared to 8%. By 2001, the ratio had reversed, with only 62% as many African-American starters as Latin starters, and only one-half as many African-American players as foreign players, including both Latins and others.¹³⁵ Recently, the ratio has become even more extreme, with the major leagues including 28.3% Latin players and only 9.1% African-Americans.¹³⁶ That is, there are now only 34% as many African-Americans as Latins.

Figure 6.

Percentage Reduction in Percents of African-American and U.S.-White Players per MLB Team, 1979–2001



The ratio promises to tilt against African-Americans even more dramatically. Because most major league players are drawn from the minor leagues after training for several years there, the demographics of the minor leagues provide a rough prediction of the future demographics of the major leagues. In the minor leagues, there are only 4.7% African-Americans, approximately one-half the fraction of African-Americans in the major leagues, and one-tenth of the 48% figure for foreigners in the

¹³⁴ Stone, *supra* note 128.

¹³⁵ Singer, *supra* note 1.

¹³⁶ LAPCHICK, *supra* note 3, at 18.

minor leagues.¹³⁷

That MLB teams have switched to hiring U.S. players who have self-developed is suggested by the backgrounds of some of the remaining African-American U.S. stars. Two recent top African-American players, Barry Bonds and Ken Griffey Jr., developed fully because of the help of their fathers, who were also major-league players.¹³⁸

The sports press has noticed the link between the rise of Latin players, the decline of African-American players, and the draft. *Sports Illustrated* recently noted:

The decline of the black ballplayer has coincided most notably with the rise of the Latino player.

Major league clubs pump \$60 million annually into Latin American scouting and development, which includes club-run academies at which a 16-year-old can stay for up to 30 days while the team decides whether to sign him to a pro contract, usually at a fraction of what a U.S.-born player would cost. By contrast, players born in the U.S. are subject to the major league draft and cannot be signed until they or their high school class graduates.¹³⁹

Baseball insiders confirm this thinking. A 2003 report noted: “Many prominent African-American players and coaches, including Frank Robinson and [Willie] Randolph, said they feel baseball’s pursuit of international talent is coming at the expense of American-born prospects, especially those in inner cities, where much of the past African-American stars were discovered.”¹⁴⁰ As a scout for the Colorado Rockies noted, “What baseball has done is instead of putting more money into the inner city, they’ve put money into Latin America Latin America has become our inner city.”¹⁴¹

B. Econometric Results

To estimate the effects of the draft and Latin training academies on U.S.-born white and African-American players, we estimated our statistical

¹³⁷ Brittany Ghiroli, *Minors Towns, Major Transitions: African-American Players Adjust to Life in Largely White Locales*, MLB.COM (Feb. 15, 2010), http://web.minorleaguebaseball.com/news/article.jsp?ymd=20100210&content_id=8050930&vkey=news_milb&fext=.jsp.

¹³⁸ See, e.g., Barry Bonds Bio, JOCKBIO.COM, http://www.jockbio.com/Bios/Bonds/Bonds_bio.html (noting the constant advice Barry received from his father, Bobby Bonds) (last visited Oct. 2, 2011).

¹³⁹ Verducci, *supra* note 42, at 56.

¹⁴⁰ George Willis, *Losing the Race: Decline in Black Players Presents Major League Problem*, N.Y. POST, May 5, 2003, at 56.

¹⁴¹ Klis, *supra* note 93, at A15.

model as before, except that we investigated influences on players' race rather than on their nationality.¹⁴² In one regression, we examined influences on teams' percentage of African-American players, while in another regression, the percentage of U.S.-born white players was examined. We again expected to see knots in the growth rates of both groups of players in 1969 and 1981, four years after the imposition of the draft and four years after the establishment of Latin training academies.

Like the general trends, the empirical results support our theoretical predictions. Table 4, column 1 reports the estimated ordinary least-squares coefficients of equation (1) for African-Americans. During the pre-draft period, 1947–1968, the percentages of African-Americans on MLB teams increased each year—as indicated by the positive and significant coefficient—as segregation slowly evaporated, the percentage of African-American players grew ever quicker. Before the draft, teams and their scouts often developed and guided talented African-American players, helping to compensate for the players' lack of other resources.

However, starting in 1969 as the draft's effects began to be felt, the growth rate declined each year, as shown by the period's negative and significant coefficient. During this period, teams quickly switched from developing disadvantaged youth, many of whom were African-American, to hiring self-developed players, most of whom were white.

As Figure 4 indicates, by 1979, the growth rate had declined so far that it became negative, and the number of African-Americans began to fall. In Table 4, the negative and significant coefficient for the 1981–2001 period after the opening of the Latin academies signals ever-swifter declines in the number of African-Americans. During this last period, teams shifted most of their scouting and training resources to Latin America. Before the draft, teams helped train underprivileged African-Americans. After, they poured resources into baseball academies to train underprivileged Dominicans and Venezuelans.

Table 4, column 2 presents the results for U.S.-born white MLB players. The negative and significant coefficient for the 1947–1968 period indicates that the percentages of U.S.-born whites on MLB teams decreased each year. However, during 1969–1980, at the same time that growth of African-Americans in the league was ending, the loss of U.S.-born white players was slowing,¹⁴³ that is, during this period, the numbers of African-American and U.S.-born white players were moving in opposite directions. This is consistent with the draft causing teams to switch from developing underprivileged African-American prospects to hiring already-

¹⁴² That is, we replace the *BIRTHCOUNTRY_{it}* variable with two *RACE_{it}* variables.

¹⁴³ The positive and significant coefficients for U.S.-born whites for this period indicate that the slope of the time trend variable became less negative. The decrease in the number of U.S.-born whites moderated these results.

developed U.S.-born white prospects who possessed the resources to develop themselves.

Table 4.
Spline Regression on Franchise-Level Panel Data:
African-American vs. U.S.-White Players

Variable	Coefficient/t-statistics	
	(1) Percentage of African-American Players per Team	(2) Percentage of U.S.- White Players per Team
Pre-Draft Annual Growth Rate of Players, 1947–1968	.807 (12.70)*	-1.147 (13.49)*
Change in the Annual Growth Rate of Players after the Draft, 1969–1980	-.506 (3.68)*	1.047 (5.69)*
Change in the Annual Growth Rate of Players after the Establishment of Latin Training Academies, 1981–2001	-.272 (2.25)*	-.719 (4.44)*
Percentage Nonwhite	-.024 (0.87)	-.036 (0.97)
Median Family Income	-.0002 (2.75)*	.0003 (2.96)*
Games Back in Previous Year	-.084 (3.06)*	.105 (2.88)*
Intercept	-1568.311 (12.63)*	2325.13 (13.99)*
R-squared	0.3364	0.4452
F-statistic	65.70	112.37

Notes: The dependent variable in Model (1) is the percentage of African-American players per team and the dependent variable in Model (2) is the percentage of U.S.-White players on each team. Absolute values of t-statistics are in parentheses. “*” and “+” represent significance at the 5% and 10% levels, respectively. The estimated coefficients for the franchise dummies are not shown.

However, beginning in 1981, the decline in U.S.-born white players again picked up steam, as evidenced by the negative and significant coefficients for the 1981–2001 period.¹⁴⁴ This result is consistent with the prediction that newly-established Latin academies caused teams

¹⁴⁴ As with the earlier regressions, the results were robustly linked to changes in the spline knots forward or back approximately two years.

increasingly to replace both U.S.-born African-American players and U.S.-born white players with foreign players.¹⁴⁵

C. *Testing Alternate Explanations for the Decline of African-American Players*

Three factors other than the draft may also have contributed to the decline in the number of African-Americans in professional baseball. However, the empirical results suggest that these other factors were secondary to the draft.

First, it has been suggested that some talented African-American youth may now focus on basketball rather than baseball, because of the existence of many African-American basketball stars.¹⁴⁶ However, the existence of more African-American superstars in basketball than baseball is likely itself caused by the draft. After losing the necessary training resources for baseball because of the draft, African-Americans have shifted to sports that require less organized training, such as basketball. At the same time that the proportion of professional African-American baseball players has fallen, the African-American proportion of professional basketball players has risen.¹⁴⁷ Unlike with baseball, youths can acquire excellent basketball

¹⁴⁵ Several control variables had significant coefficients. The variable for games back in the previous year is negatively related to the percentage of African-American players and positively related to the percentage of U.S.-white players. These results indicate that bad teams hire fewer African-Americans and more white players.

Median family income is negatively related to the percentage of African-American players, but positively related to the percentage of U.S.-white players. These results indicate that just as they prefer more foreign players, low-income fans prefer to watch more African-Americans.

The coefficient for the percentage non-white group is insignificant in all of the estimations. This is the only variable representing minority populations available over our entire time period. The percentage of the city population that is African-American is available for 1956–2001. When this variable is used instead of the percentage non-white, although the coefficients on the time trend variables do not change, the coefficient on the percentage African-American is positive and significant in both African-American estimations. This suggests that local African-American fans prefer to watch African-American players.

Ideally, we could also include the percentage of the population that is Hispanic. However, prior to 1970, Hispanics were classified as white in all census reports. The data on Hispanic populations in 1970 is questionable because the questionnaire was poorly worded and was not presented to all respondents. See Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States* (U.S. Census Bureau, Population Div., Working Paper Series No. 56, 2002), available at <http://www.census.gov/population/www/documentation/twps0056/twps0056.html>. Nevertheless, including the available data on the Hispanic population did not change our results.

¹⁴⁶ See 1992 Annual Baseball Roundup, *supra* note 6. The other major professional sports opened to African-Americans at approximately the same time as, or earlier than, baseball. The NFL hired African-Americans, such as Paul Robeson, in the 1920s, and by 1952, all but two teams had black players, similar to MLB. Thomas G. Smith, *Civil Rights on the Gridiron: The Kennedy Administration and the Desegregation of the Washington Redskins*, 14 J. SPORT HIST. 189, 192–94 (1987). Within four years of forming in 1946, the NBA began to hire black players. Brown, *supra* note 6.

¹⁴⁷ RICHARD LAPCHICK & KEVIN MATTHEWS, THE 2001 RACIAL AND GENDER REPORT CARD 8, 12 (2001), available at http://www.bus.ucf.edu/documents/sport/2001_racial_and_gender_report_card.pdf.

skills in informal pick-up games on urban playgrounds, with no parents or coach necessary to provide transportation or supervision.

The shift in African-American participation from baseball to basketball because of the draft has led to increasing numbers of black basketball stars, and fewer black baseball stars. For example, Michael Jordan was not the cause of African-Americans' focus on basketball. Instead, he was a symptom of the changes in opportunities for African-Americans that the draft caused. Jordan entered the NBA in 1984, five years after the number of African-American MLB players had already begun to decline.¹⁴⁸ Perhaps if Jordan had been born twenty years earlier, he would have developed his baseball skills rather than his basketball skills, modeling himself on the many African-American baseball stars of the earlier era and aided by a professional team's scouts. He certainly loved baseball, as evidenced by his temporary retirement at the peak of his basketball career to play for a year and a half with a minor league baseball team. Jordan has indicated that he decided to play baseball as a tribute to the dream of his murdered father, who, as a product of an earlier era with many African-American baseball stars, had hoped that Jordan would play baseball rather than basketball.¹⁴⁹

A second argument hypothesizes that the decline in African-American baseball players might be related to the increasing number of African-American men in prison. The results show that this is not a cause.¹⁵⁰ We included in our regressions a variable that indicated the number of African-American men who were confined in U.S. prisons.¹⁵¹ The coefficients for this variable were insignificant, indicating that the number of African-Americans in prison had no significant effect on the number of African-Americans in professional baseball.

Third, improved employment prospects for African-Americans in other fields do not explain the decline in African-American MLB players. Coefficients for several variables that measured these prospects were all

¹⁴⁸ See *supra* Figure 4.

¹⁴⁹ Jason DelSignore, *Michael Jordan and Baseball: Fulfilling a Father's Dream*, THE DUGOUT DOCTORS (Oct. 2, 2011), <http://thedugoutdoctors.com/2009/09/michael-jordan-and-baseball-fulfilling-a-fathers-dream/>; see also Michael Jordan, WIKIPEDIA (last visited Oct. 2, 2011), http://en.wikipedia.org/wiki/Michael_Jordan.

¹⁵⁰ This hypothesis was suggested in Edwards, *supra* note 7, at 1024–25.

¹⁵¹ Our measure of the percentage of African-American men in prison was constructed using data on the number of sentenced prisoners under State and Federal jurisdiction that were African-American, the total prison population, and the percentage of new admissions to State and Federal prison that were African-American. These variables come from *Correctional Populations in the United States* (various years) and *Sourcebook of Criminal Justice Statistics* (various years), published by the Bureau of Justice Statistics, and PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, NCJ-125618, RACE OF PERSONS ADMITTED TO STATE AND FEDERAL INSTITUTIONS, 1926–1986 (1991), available at <http://www.ncjrs.gov/pdffiles1/nij/125618.pdf>.

insignificant.¹⁵² This means that African-Americans were not lured away from baseball by better opportunities elsewhere.

VI. IS THE DRAFT ILLEGAL?

Title VII of the Civil Rights Act of 1964 was enacted by Congress to ensure equal and fair employment opportunities.¹⁵³ Title VII prohibits both explicit acts of discrimination and acts that, although not intended to be discriminatory, have a disproportionately adverse effect on protected groups.¹⁵⁴ We now show that the draft overtly and explicitly discriminates against players from the United States. Thus, it constitutes unlawful national origin discrimination under Title VII. Likewise, because the draft has the focused, harmful impact of reducing African-Americans' participation in professional baseball, it is also unlawful race discrimination under the same statute.

A. National Origin Discrimination

Title VII provides that an employer may not intentionally discriminate based on an individual's race, color, religion, sex, or national origin.¹⁵⁵ Specifically, Title VII prohibits any practice that "would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race, color, religion, sex, or national origin."¹⁵⁶

1. Overt Discrimination

The MLB draft overtly and explicitly discriminates based on national origin. The league explicitly imposes the draft's restrictions only on residents of the U.S., Canada, Puerto Rico, and the other U.S. territories. People from other countries are explicitly exempt from the restrictions. Rule 4(a) of the 2008 Major League Rules provides:

A Major League or Minor League Club may contract with a player *who is a resident of the United States or Canada* and who has not previously contracted with a Major League or Minor League Club, only in accordance with this Rule 4 and the provisions of any applicable High

¹⁵² We included in our regressions, variables that measured the percentage of blacks that were unemployed, the mean income of black men, and the difference between the mean incomes of white men and black men. The black unemployment variables were constructed from data on the number of unemployed blacks and the total black population in U.S. Census Bureau, Statistical Abstract of the United States (various years). The income variables come from the U.S. Census Bureau, Current Population Survey (various years). The coefficients for each of the variables were insignificant.

¹⁵³ See 42 U.S.C. §§ 2000e to 2000e-17 (2006).

¹⁵⁴ *Id.*; Ricci v. DeStefano, 129 S. Ct. 2658, 2672 (2009).

¹⁵⁵ 42 U.S.C. § 2000e-2(a)(1).

¹⁵⁶ *Id.* at § 2000e-2(a)(2).

School, College or Junior College Rules. For purposes of this Rule 4, the term "*United States*" shall mean the 50 states of the United States of America, the District of Columbia, Puerto Rico, and any other Commonwealth, Territory or Possession of the United States of America.¹⁵⁷

Suppose that there are two identical eighteen-year-old players, except that one has grown up in Harlem, New York, and the other was raised in Santo Domingo, Dominican Republic. The player from New York would be subject to the draft; the league's rules would permit him to play only for the team that drafted him, and they would prohibit other teams from negotiating with him and signing him. In contrast, the league's rules would permit the player from the Dominican Republic to play for any team that would have him. The rules would permit any team to approach him and sign him. This explicit distinction caused teams to abandon development of young players in the U.S., transfer scouting and development resources to Latin America, and establish sixty academies there.

Such explicit discrimination based on national origin is illegal regardless of whether the employer has some nondiscriminatory rationale for the policy. Here, for example, the league imposed the draft to increase competitive balance within the sport while lowering bonuses for players. The absence of a malevolent motive does not shield an overtly discriminatory policy, such as this one, from being illegal.¹⁵⁸ The draft is illegal simply because it explicitly treats those of one national origin differently from another. The motive for the policy does not matter.¹⁵⁹

Major League Baseball's discrimination is somewhat unusual because it discriminates against people of U.S. national origin, rather than against people from other countries. Stereotypical discrimination exists where there is discrimination against outsiders, such as signs proclaiming "No Irish Need Apply." Although the Supreme Court has not addressed the question, lower courts have unanimously held that Title VII protects not just people whose national origin is outside the United States, but also people of U.S. national origin.¹⁶⁰

It is not only the letter of Title VII that supports a conclusion that the

¹⁵⁷ MLB Rules, *supra* note 25, Rule 4(a).

¹⁵⁸ Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991).

¹⁵⁹ See Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (*per curiam*) (holding that different treatment among men and women due to family obligations could still be a basis for distinction under Title VII).

¹⁶⁰ See, e.g., Fortino v. Quasar Co., 950 F.2d 389, 392 (7th Cir. 1991) (determining that Title VII protects Americans of non-Japanese origin against discrimination when preference is given to individuals of Japanese origin); Thomas v. Rohner-Gehrig Co., 582 F. Supp. 669, 675 (N.D. Ill. 1984) (holding that allegation of discrimination based on American origin is sufficient to bring suit under Title VII).

league's draft regulations are illegal. In addition, the draft regulations violate Title VII's underlying policy. The policy basis of Title VII is to prevent people from being denied employment opportunities because of various characteristics, including national origin. We have seen that the league's regulations have done exactly that, on a large scale. The regulations have directly caused the replacement of thousands of players from the United States, especially disadvantaged ones, with players from other countries. The regulations are equivalent to the league's erecting a sign proclaiming "No disadvantaged U.S. players need apply."

2. Defenses?

The league is probably not protected by any defenses. First, the league could not argue successfully that the overt discrimination is excused because it is somehow a "business necessity." In *Johnson Controls*, the Supreme Court held that, in cases of intentional discrimination, business necessity is unavailable as a defense.¹⁶¹ Congress ratified this view in the Civil Rights Act of 1991, when it added section 703, which indicates, "[a] demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter."¹⁶²

Second, the league would not be protected by arguing that its overt discrimination is a bona fide occupational qualification ("BFOQ"). This defense is potentially available in cases of discrimination based on national origin.¹⁶³ However, it is defined narrowly.¹⁶⁴ The BFOQ defense can succeed only if the discrimination is "reasonably necessary to the normal operation of [the] particular business."¹⁶⁵ This BFOQ must relate to the essence or to the central mission of the employer's business,¹⁶⁶ and cannot be merely for convenience.¹⁶⁷

For example, in *Dothard v. Rawlinson*, a prison did not allow women to be hired as "correctional counselor[s] in a 'contact' position in an Alabama male maximum-security penitentiary," where the male prisoners were not segregated based on their level of "dangerousness."¹⁶⁸ The Court held that this regulation reflected a BFOQ because "[a] woman's relative

¹⁶¹ *Johnson Controls*, 499 U.S. at 197–200; see also *Garcia v. Gloor*, 618 F.2d 264, 271 (5th Cir. 1980); *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670, 674 (9th Cir. 1980) ("The [bona fide occupational qualification] defense is applicable to employment practices that purposefully discriminate on the basis of sex while the Business Necessity defense is appropriately raised where facially neutral employment practices run afoul of Title VII only because of their disparate impact.").

¹⁶² 42 U.S.C. § 2000e-2(k)(2) (2006).

¹⁶³ It is also available in cases of discrimination based on sex or religion, but not in cases of race, color, or ethnicity discrimination. *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1308 (7th Cir. 1989).

¹⁶⁴ *Johnson Controls*, 499 U.S. at 201; *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

¹⁶⁵ *Johnson Controls*, 499 U.S. at 200 (quoting 42 U.S.C. § 2000e-2(e)(1)).

¹⁶⁶ *Id.* at 203.

¹⁶⁷ *Wynn v. Columbus Mun. Separate Sch. Dist.*, 692 F. Supp. 672, 685 (N.D. Miss. 1988).

¹⁶⁸ *Dothard*, 433 U.S. at 335–37.

ability to maintain order” in that type of penitentiary “could be directly reduced by her womanhood.”¹⁶⁹ Expert testimony indicated that using women as guards in contact positions under the conditions in the maximum-security male penitentiaries would pose significant security problems, including risks to the women, other inmates, and other security personnel.¹⁷⁰

It should be clear, however, that the BFOQ defense is unavailable to MLB. Being Latin American is not a BFOQ for a position as a MLB player. Many players of U.S. national origin play baseball in the MLB quite successfully, despite being disadvantaged by the draft compared to Latin players.

Third, the league would probably not be able to avoid liability based on the statute of limitations. Timely filing is a prerequisite to the maintenance of a Title VII action.¹⁷¹ A claim against the MLB must be a “present violation” within the limitations period of 180 or 300 days.¹⁷² Specifically, a claim based on disparate treatment requires the plaintiff to demonstrate deliberate discrimination within the limitations period, and filing the claim with the Equal Employment Opportunity Commission or equivalent state agency within the period.¹⁷³

Although a claim filed against the initial adoption of the system in 1965 would be barred, a claim would be timely if it alleged that the draft rules prevented the plaintiff from being hired during the most-recent draft. Although the policy of deliberate discrimination was established in 1965, the deliberate discrimination is still practiced at each year’s draft.

Fourth, the league would probably not be able to prevail by arguing that it imposes only lawful discrimination based on citizenship, rather than unlawful discrimination based on national origin. In *Espinoza v. Farah Manufacturing Co.*,¹⁷⁴ the Court held that Title VII prohibits only discrimination based on national origin, not discrimination based on citizenship.¹⁷⁵ For example, an employer may lawfully require applicants for employment to be U.S. citizens.¹⁷⁶

However, the MLB requirements probably constitute discrimination

¹⁶⁹ *Id.* at 335.

¹⁷⁰ *Id.* at 336.

¹⁷¹ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

¹⁷² 42 U.S.C. § 2000e-5(e)(1) (2006); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977).

¹⁷³ *See, e.g., Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 627 (2007) *abrogated on other grounds by Lily Ledbetter Fair Pay Act*, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified in scattered sections of 42 U.S.C.) (“[T]he EEOC charging period ran from the time when the discrete act of alleged intentional discrimination occurred, not from the date when the effects of the practice were felt.”); *Lorance v. AT&T Tech., Inc.*, 490 U.S. 900, 905 (1989); *Del. State Coll. v. Ricks*, 449 U.S. 250, 256–58 (1980); *Evans*, 431 U.S. at 554–55 (determining that plaintiff’s claim is time barred because the discrimination did not occur within the statutory time period).

¹⁷⁴ 414 U.S. 86 (1973).

¹⁷⁵ *Id.* at 88 n.2.

¹⁷⁶ *Id.* at 91.

based on national origin, rather than discrimination based on citizenship. Neither the policy nor its implementation mentions citizenship. Instead, the reach of the requirements is based on players' "residence."¹⁷⁷ A U.S. citizen raised in Venezuela would be treated differently under the draft than the same U.S. citizen raised in Harlem.

3. Remedies

Because MLB's distinctions based on national origin are illegal, any remedy must eliminate these distinctions. Two possibilities exist: the league must make either all players or no players subject to the draft and age minimums.

First, the league could eliminate its distinction based on national origin by extending the draft and age minimums to include players from all countries. This is probably the solution that the league would prefer. A proposal for such a "Worldwide Draft" is already under discussion by the players and league as part of the negotiations for the new collective bargaining agreement that will begin in 2012.¹⁷⁸

Second, the league could eliminate the illegal distinction based on national origin by making the draft and age minimums apply to *no* players. That is, MLB could eliminate the draft and age minimums, returning the league to the system that existed before 1965—a system that, as previously discussed, now governs professional soccer in Britain.¹⁷⁹

Either approach would eliminate the discrimination based on national origin. However, as we now discuss in our discussion of race discrimination, only the second approach would eliminate the draft's disparate impact on African-Americans.

B. Race Discrimination

We have found no evidence that the league, when it adopted the draft and age requirements in 1965, intended to discriminate against African-Americans. That is, we found no evidence that the league expected that its new system would cause a precipitous drop in its hiring of African-Americans.

But intent to discriminate is not the end of the inquiry. In *Griggs v. Duke Power Co.*,¹⁸⁰ the Supreme Court examined Duke Power Company's job requirements, including receipt of a high school diploma and a passing score on written tests.¹⁸¹ The Fourth Circuit dismissed the case, holding

¹⁷⁷ See *supra*, text accompanying note 141.

¹⁷⁸ See *infra*, text accompanying notes 211–12.

¹⁷⁹ See *supra*, text accompanying notes 78–80.

¹⁸⁰ 401 U.S. 424 (1971).

¹⁸¹ *Id.* at 427–28 (1971).

that the company had not intended to discriminate.¹⁸²

Reversing, the Supreme Court held that Title VII not only prohibited intentional discrimination, but also barred practices having a disparate impact on racial minorities, unless the practices were a business necessity.¹⁸³ The disparate impact doctrine prohibits employment practices, adopted without a deliberately discriminatory motive,¹⁸⁴ that “may be the functional equivalent of intentional discrimination.”¹⁸⁵ This doctrine seeks the removal of employment obstacles, not required by business necessity, that create “built-in headwinds” and freeze out protected groups from job opportunities and advancement.¹⁸⁶ The Court reasoned that Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”¹⁸⁷ The purpose of Title VII is directed to the “consequences of employment practices, not simply the motivation.”¹⁸⁸

The disparate impact doctrine seeks to prevent exactly the kind of harm to African-Americans that the draft has caused. Although the league did not intend to harm African-American players, its regulations have done just that—inevitably causing teams to slash their hiring of African-Americans. The regulations are the functional equivalent of intentional discrimination; they have reduced hiring of African-Americans just as surely as rules that explicitly limited their hiring.

A disparate impact claim proceeds in two parts. First, a plaintiff must show that the defendant’s employment regulations harmed African-Americans disproportionately. Second, the employer can rebut by showing that its regulation is a “business necessity.” Otherwise the practice is unlawful. Further, even if the practice is a business necessity, the plaintiff prevails if he or she shows that there were less-discriminatory alternatives that would have served the employer’s objectives.¹⁸⁹

1. *Proving the Draft’s Disparate Impact*

In the first stage of a disparate impact lawsuit, a plaintiff must establish a prima facie case that a “facially neutral employment practice has a significantly discriminatory impact.”¹⁹⁰ Specifically, the “complaining party [must] demonstrate[] that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion,

¹⁸² *Id.* at 428–29.

¹⁸³ *Id.* at 431.

¹⁸⁴ *Id.*

¹⁸⁵ *EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263, 1274 (11th Cir. 2000) (internal quotation marks omitted).

¹⁸⁶ *Griffin v. Carlin*, 755 F.2d 1516, 1524 (11th Cir. 1985) (internal quotation marks omitted).

¹⁸⁷ *Griggs*, 401 U.S. at 431.

¹⁸⁸ *Id.* at 432.

¹⁸⁹ *Joe’s Stone Crab, Inc.*, 220 F.3d at 1275.

¹⁹⁰ *Connecticut v. Teal*, 457 U.S. 440, 446 (1982).

sex, or national origin.”¹⁹¹

To demonstrate the unequal impact, a plaintiff must use statistical evidence. The Supreme Court has noted that a prima facie case of disparate impact must include “statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.”¹⁹² A plaintiff must show that a “sufficiently substantial” statistical disparity exists.¹⁹³ Specifically, the plaintiff must provide “statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities.”¹⁹⁴ The statistics must demonstrate that the defendant has established “hiring and promotion practices disqualifying substantially disproportionate numbers of blacks”¹⁹⁵

The statistical evidence above has amply demonstrated such disparate impact. The MLB draft and age minimums have caused teams to switch their scouting, development, and hiring away from African-American players instead to foreign players—who are not subject to the restrictions—and to affluent, generally white, U.S. players. The regulations create powerful incentives for teams to abandon African-Americans. And they have done just that, transferring resources away from developing young African-American players, and instead opening scores of academies for disadvantaged youths in Venezuela and the Dominican Republic. That is, the draft and age minimums are “hiring and promotion practices disqualifying substantially disproportionate numbers of blacks”¹⁹⁶ The draft and age minimums have caused the percentage of African-Americans in MLB to decline precipitously, by more than 50% to its lowest level in thirty-one years. This is strong “statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities.”¹⁹⁷ Therefore, the regulations represent a facially neutral practice with a statistically disparate impact on African-Americans.¹⁹⁸ By adopting the draft and age minimums, MLB accidentally destroyed much of the progress that Jackie Robinson began in 1947.

¹⁹¹ *In re Emp't Discrimination Litig. Against the State of Ala.*, 198 F.3d 1305, 1311 (11th Cir. 1999) (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006)).

¹⁹² *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988).

¹⁹³ *Id.* at 994–95.

¹⁹⁴ *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 584 (1979).

¹⁹⁵ *Washington v. Davis*, 426 U.S. 229, 246–47 (1976).

¹⁹⁶ *Id.*

¹⁹⁷ *Beazer*, 440 U.S. at 584.

¹⁹⁸ *See, e.g., United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir. 1971); *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245, 247 (10th Cir. 1970).

2. *Absence of Business Necessity, Presence of Less-Discriminatory Alternatives*

In *Griggs*, the Supreme Court held that a facially neutral employment practice that has a disparate impact on African-Americans is unlawful unless the employer can show that the practice is a “business necessity.”¹⁹⁹ The doctrine of business necessity adopted in *Griggs* does not appear in the statutory language or legislative history of the 1964 Civil Rights Act.²⁰⁰ However, in 1991, Congress amended Title VII to codify the requirement that, to survive scrutiny, the challenged practice must be a “business necessity.”²⁰¹ Even if an employer shows that it has a legitimate, non-discriminatory business objective for a practice, a plaintiff still wins by showing that an alternative, non-discriminatory practice would have served the employer’s objective as well.²⁰² For the employer’s practice to survive, “there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.”²⁰³

The draft and age minimums are certainly not a business necessity. They achieve their goals of competitive parity and reducing bonuses imperfectly at best. As to competitive parity, in the period since the Latin-American academies opened, rich teams have reestablished their dynasties. As in the period before 1965, rich teams have dominated in win percentage, if not always in World Series championships.²⁰⁴ For example, from 2001 to 2010, the New York Yankees and Boston Red Sox had the first and second highest win-loss percent in major league baseball.²⁰⁵

Teams with less wealth assert that the draft’s structure unfairly favors rich teams, which have the resources both to scout successfully and to create large academies in Latin America. They argue that, although the draft was intended to even the playing field among rich and poor teams, it has instead merely shifted the uneven field from the United States to Latin

¹⁹⁹ *Griggs*, 401 U.S. at 431.

²⁰⁰ 42 U.S.C. § 2000e-2 (2006).

²⁰¹ Civil Rights Act of 1991, Pub. L. No. 102-166, § 1745, 105 Stat. 1071 (1991).

²⁰² *EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263, 1275 (11th Cir. 2000); *see also* *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971).

²⁰³ *Robinson*, 444 F.2d at 798.

²⁰⁴ *See* ANDREW ZIMBALIST, *BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME* 114 (1994) (noting the reestablishment of the New York Yankees dynasty; Bob Nightengale, *Baseball Parity Hinges on Perception: Small Market Teams Rise Up Occasionally, but Big Spenders are Perennial Powers*, USA TODAY, Apr. 9, 2010, at 1C; *see generally* *Can you Name the MLB Teams in Order Based on their Win-Loss Records for the Past Decade (2001–2010)?* SPORCLE, <http://www.sporcle.com/games/pgrossma/MLBranking> (last visited Oct., 2011).

²⁰⁵ *See generally* <http://www.baseball-reference.com/> (providing winning percentage data by team); *and* *Cot’s Baseball Contracts*, <http://mlbcontracts.blogspot.com/> (providing team-by-team payroll data). SPORCLE, *supra* note 204.

America. Although the draft restrains a rich team from buying the best rookies in the United States, the team can still do just that in Latin America.²⁰⁶

Accordingly, the draft and age minimums have done little to restrain players' salaries. The rich teams have reestablished their dynasties, in great part, by lavishly outspending their competitors. The Yankees and Red Sox not only had the first and second best win-loss percentage from 2001 to 2010, but they also have the first and second highest total payrolls for most of that decade.²⁰⁷ Even with the draft and age minimums, baseball salaries have soared. In 2011, the New York Yankees paid their players an average of more than \$6 million per year, for a total of more than \$201 million.²⁰⁸ Even the lowest-paying team paid its players an average of more than \$1 million per year.²⁰⁹

As the Houston Astros' president, Tal Smith, recently noted,

What we have today is not effective. The draft no longer works the way it was intended to work—to limit bonuses and level the playing field. It was effective for 20 years, but with all the bonus escalation since the late '80s it's become a detriment to some of the small-market clubs.²¹⁰

Alternatives exist that would achieve the league's goals better than the present system, while discriminating against African-Americans less. As with the remedy for discrimination based on national origin, there are two possible remedies for the league's race discrimination. The league could establish a worldwide draft that applies to everyone. Or it could eliminate the draft, such that it applies equally to no one.

A worldwide draft would slow the increase in the numbers of foreign players and perhaps modestly improve prospects for African-Americans. No longer would foreign players enjoy the advantage that the draft and age minimums now create. No longer would teams have an incentive to sign

²⁰⁶ See Singer, *supra* note 1 (reporting that the Yankees spent \$3.7 million on Dominican outfielder Wily Mo Peña in 1999 and the Dodgers spent \$2.25 million on Dominican shortstop Joel Guzman in 2001); see also Andrew Zimbalist, *Competitive Balance in Major League Baseball*, MILKEN INST. REV., 1st Quarter 2001, at 54, 63, available at http://www.milkeninstitute.org/publications/review/2001_3/54-64mr9.pdf (arguing that "changes in baseball's drafting system would likely be constructive. They would promote balance without engendering conflict among the owners").

²⁰⁷ See Steve Orinick, *Baseball Team Payrolls*, STEVETHEUMP.COM, <http://www.stevetheump.com/Payrolls.htm> (last visited Aug. 10, 2011) (showing that the Yankees and Red Sox had the first and second highest payrolls, respectively, in 2007, 2006, 2005, 2004, 2002, and 2001).

²⁰⁸ *MLB Salaries*, CBSSPORTS.COM, <http://www.cbssports.com/mlb/salaries/teams> (last visited Aug. 10, 2011).

²⁰⁹ *Id.*

²¹⁰ Simpson, *supra* note 17.

young disadvantaged players in Latin America rather than African-Americans and other disadvantaged youth in the United States. The same constraints would apply to both foreign and domestic players.

Such relief would not be intrusive. Even without prodding from the courts, the league has been edging toward a worldwide draft. As part of the 2002 MLB labor negotiations, the teams and union tentatively agreed to a worldwide draft.²¹¹ However, after they could not reach final agreement, they delayed consideration of the worldwide draft until negotiations for the new collective bargaining agreement, which takes effect in 2012.²¹²

However, a worldwide draft would provide insufficient relief. Its impact on reversing the decline of African-American participation in MLB would be only modest at best. Although it would reduce teams' incentive to invest in developing young, disadvantaged foreign talent, it would create little new incentive to develop young, disadvantaged U.S. talent, including African-Americans. The draft, wherever it applies, eliminates a team's incentive to scout and develop young, disadvantaged players of any race. Before the draft and age minimums began in 1965, teams had an incentive to scout and develop young, disadvantaged players anywhere, including in the United States. After 1965, they had an incentive to develop such players only in non-draft areas, such as Latin America. If a worldwide draft were established, teams would have an incentive to develop young, disadvantaged players *nowhere*.

The worldwide draft will cause teams to scout and develop fewer young, disadvantaged players from all countries. Instead, they will hire more players whose families could afford to train them themselves, without help from MLB teams. That is, teams would hire middle-class and affluent U.S.-born white players who have the resources to develop themselves. Because the draft and age minimums would apply to all young, disadvantaged players from all countries, the teams would recognize that investing in scouting and training any of them would be fruitless. And just as the institution of the draft and age minimums in 1965 caused teams to cease scouting and developing African-Americans and other disadvantaged U.S. players, a worldwide draft would cause teams to stop scouting and developing *all* young, disadvantaged players—including those from Latin America. There is little incentive for a team to develop young prospects when another team could step in and draft them.

Accordingly, those in the baseball business in the Dominican Republic stridently oppose extension of the draft to their country, asking

²¹¹ Paul D. Staudohar, *Baseball Negotiations: A New Agreement*, MONTHLY LAB. REV., Dec. 2002, at 15, 20, available at <http://www.bls.gov/opub/mlr/2002/12/art2full.pdf>.

²¹² Ronald Blum, *MLB Likely to Defer Worldwide Draft to 2012*, USA TODAY (Sep. 15, 2008), http://www.usatoday.com/sports/baseball/2008-07-15-2471318374_x.htm.

rhetorically, “Where’s the incentive to train the players?”²¹³ They point with great fear to Puerto Rico’s example. “When they put Puerto Rico in the draft, Puerto Rican Baseball fell off.”²¹⁴

A worldwide draft would likely cause the league to become even less diverse. The 1965 draft squeezed out the African-Americans; the draft eliminated teams’ incentive to train them. The worldwide draft will additionally squeeze out the Latin blacks and Hispanics. Many come from humble backgrounds. For these youths, the MLB teams’ training academies provide their only opportunity to gain big-league skills. Baseball executives acknowledge that a worldwide draft would create incentives for teams to close the Latin academies.²¹⁵ The 1965 draft replaced black U.S. players with black and Hispanic players from Venezuela and the Dominican Republic. A worldwide draft would tend to replace all disadvantaged minorities, regardless of nationality, with affluent, self-developed players. Most would probably be from the United States and most would be white.

Baseball would become a sport played professionally only by affluent whites, with the same demographics as “country-club sports” such as swimming or tennis. Top swimmers and tennis players are predominantly white because the sports require large resources for training and development at a young age, resources which often only affluent white parents can provide. If MLB stops providing training resources for disadvantaged youth, whether in the United States or Venezuela, baseball’s demographics would tend toward those of swimming and tennis.

Instead of leveling the playing field between U.S. and foreign players by imposing the draft on both groups, a court could instead require MLB to level the field by eliminating the draft and age minimums altogether, for everyone. Players would be draft-free not only in Latin America, but also in the U.S. This should rekindle teams’ incentive to scout and develop disadvantaged young players from all countries. Young, disadvantaged African-Americans would be able to compete again on a level playing field with youth from foreign countries. No longer would teams have an incentive to scout and develop only foreign youths. For the first time since 1965, teams would have an equal incentive to scout and develop a poor black fourteen-year-old from Los Angeles as a poor black fourteen-year-old from Venezuela. Teams might begin to move some of the scores of academies that they now have in Latin America back to the United States.

This approach would not be radical. It would merely return MLB to its

²¹³ Aranguré & Cyphers, *supra* note 70.

²¹⁴ *Id.*

²¹⁵ See Schwarz, *supra* note 75 (“Some executives worry that should MLB fold such players into the draft, teams wouldn’t invest the millions of dollars they currently do on academies because there’s no sense in developing a player to get drafted by another club.”).

system before 1965. The new system would be identical to the system that the MLB teams now use successfully in Latin America, except extended to the rest of the world.

The baseball system would then resemble the system in British professional soccer. There, with no draft, teams are free to invest in young players with no fear of the players being stolen away by some other team in a draft. Accordingly, teams recruit and train players at young ages, some even pre-teen. British teams have established many training academies for the young players *in Britain*.²¹⁶ Unlike in the U.S., the British teams have no artificial incentive to abandon local players and seek foreign players instead. Accordingly, the teams naturally develop their home-grown players.

VII. CONCLUSION

In 1965, professional baseball instituted two regulations, the draft and age minimums, that explicitly penalized domestic players in favor of foreign players. Because the regulations explicitly applied only to U.S. players, teams soon shifted their scouting and development resources to foreign countries, especially Venezuela and the Dominican Republic. As the data show, the shift led to large growth in the number of foreign MLB players, to a similar decrease in the number of U.S. players, and especially harmed disadvantaged groups such as African-Americans.

The regulations thus violate Title VII of the Civil Rights Act of 1964, in two ways. First, because they explicitly apply only to players from the United States and a few other countries, they constitute intentional discrimination based on national origin. Second, because the regulations' impact falls heavily and disproportionately on African-Americans, the league has engaged in unlawful racial discrimination.

Both to remedy the illegal discrimination and to cease treating African-Americans and other U.S. players unfairly, the draft should be eliminated. The league would then return to the system that existed before 1965—a system that works well for British soccer. Because the draft achieves little of its original twin goals of competitive balance and reducing player salaries, eliminating the draft would require MLB to sacrifice little.

Merely extending the draft worldwide would be unsatisfactory. Although a worldwide draft would cure the league's discrimination based on national origin, it would not eliminate the race discrimination. A worldwide draft would maintain teams' incentives not to develop young disadvantaged players. It would merely cause teams disproportionately to ignore blacks and other disadvantaged players not only in the United States, but now in foreign countries as well.

²¹⁶ See *supra* notes 78–80 and accompanying text.

TECHNICAL APPENDIX

This appendix develops a more formal version of the informal economic model in Part IV. Assume that F is the after-signing return that a MLB team expects from its before-signing investment in scouting and developing a foreign player:

$$F = p_f \sum_{i=1}^{N_f} \left[\frac{B_{fi} - C_{fi}}{(1+r)^i} \right] \quad (2)$$

where $i=1$ is the first year that the team signs the player, the team expects the player to have a career with the team lasting N years, and B_{fi} is the benefits that the team expects from the player each year either directly in more wins or indirectly in higher ticket and TV revenues. Likewise, C_{fi} is the cost to the team each year in salary, bonus, and training costs once it has signed the player, r is the interest rate, and subscript f denotes foreign players. However, even if the team devotes time to scouting and developing a player, only a probability p_f exists that the team will actually succeed in signing the player; a $1 - p_f$ chance exists that some other team will learn of the prospect and sign him before the first team does. In this case, the team's return will be zero; despite the before-signing investment, the team received no after-signing return. Likewise, for a domestic U.S. player, the return on scouting and development investment will be

$$D = p_d \sum_{n=1}^{N_d} \left[\frac{B_{di} - C_{di}}{(1+r)^i} \right] \quad (3)$$

with variables defined similarly.

Even for foreign and domestic players of equal talent (so that $B_{fi} = B_{di}$), the draft causes the expected return on the domestic player to be lower. Most importantly, the draft causes $p_d < p_f$: the probability that a team will be able actually to sign a domestic player that it scouts and develops is much lower than for a foreign player. A high probability exists that the team's investment in scouting and developing the prospect will be lost; it is likely that some other team will draft the player.

In addition, the age minimums reduce the expected benefits from the domestic player compared to the foreign player. Because the team must wait longer to sign the player, an increased probability exists that, as the player matures and creates a record of achievement, other teams will notice the player's skill and seek to sign him. That is, the age minimums will cause $p_d < p_f$ to become even more unequal. Similarly, the age minimums

will mean that $N_f > N_d$, because the team must wait until the player is older to sign the player, the player's career with the team will be shorter.

Equations (2) and (3) show that the draft will cause investment in foreign players to be more attractive than in domestic players. For example, suppose that, conservatively and counterfactually, a team expects a domestic player and a foreign player to have the same career duration and the same yearly costs C .²¹⁷ Manipulation of (2) and (3) indicates that the expected after-signing returns from scouting and developing the domestic player will exceed the returns from the foreign player only if

$$\sum_{i=1}^N \frac{B_{di}}{(1+r)^i} > \frac{p_f}{p_d} \sum_{i=1}^N \frac{B_{fi}}{(1+r)^i} \quad (4)$$

However, we have seen that the draft causes the probability p_d that a team will be able to sign a domestic prospect to decline substantially, so that p_f/p_d will be larger than before the draft. A larger p_f/p_d makes the right-hand-side of equation (4) larger. Less frequently will the expected returns from a domestic player B_{di} sufficiently exceed the returns from the foreign player so as to compensate for the much greater probability that any investment in developing the domestic player will be lost.

The model thus shows that the draft established incentives for teams to switch from scouting and developing U.S. players to scouting and developing foreign players. Equation (4) shows that, if groups of foreign and domestic players have similar promise, or even if the domestic players appear to have substantially more promise, then the draft's investment effect will cause teams nonetheless to choose to scout and develop the foreign players. The teams will invest only in the foreign players as long as

²¹⁷ In reality, foreign players should be more desirable than domestic players on both counts. Foreign players' careers should be longer because the draft permits teams to sign them younger. In addition, teams can generally initially pay foreign players less because players' opportunity costs are lower in Latin America, although salaries are beginning to increase for top Latin players toward levels for U.S.-born free agents. See REGALADO, *supra* note 15, at 59 ("Given the rising cost of white ballplayers, teams scrambled for talented players at a low cost."); Joyce, *supra* note 39, at 39; Ross Newhan & Jason Reid, *The Cuban Controversies*, L.A. TIMES, May 4, 1999, at D1 (reporting that the thirty MLB clubs increasingly turn to foreign markets for players generally less costly to sign). The true difference in starting salaries will be less when adjusted for the younger ages at which players can be signed in Latin America. That an unproven Venezuelan sixteen-year-old, not yet physically mature, may sign for much less than a proven, mature twenty-one-year-old U.S. player does not necessarily mean that wage levels are lower in Venezuela. A much lower probability exists that the Venezuelan will succeed in MLB. Indeed, regardless of the country, only a small percentage of unproven sixteen-year-olds develop into proven twenty-one-year-olds; to obtain one proven Venezuelan twenty-one-year-old, a team must sign many sixteen-year-olds. Even in the U.S., a proven twenty-one-year-old would earn more than a sixteen-year-old because the twenty-one-year-old involves much less risk.

$$\sum_{i=1}^N \frac{B_{fi}}{(1+r)^i} > \frac{p_d}{p_f} \sum_{i=1}^N \frac{B_{di}}{(1+r)^i}, \quad (5)$$

where we know that p_d/p_f will be smaller than before the draft.²¹⁸

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²¹⁸ For simplicity, the analysis assumes that teams are risk neutral. The model's implications do not change if this assumption is relaxed.