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Stephen F. Ross  
*Penn State Law*

Michael James Jr.

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A STRATEGIC LEGAL CHALLENGE TO THE UNFORESEEN  
ANTICOMPETITIVE AND RACIALLY DISCRIMINATORY  
EFFECTS OF BASEBALL’S NORTH AMERICAN DRAFT

*Stephen F. Ross\* and Michael James, Jr.\*\**

INTRODUCTION

Major League Baseball (MLB) has honored a single player by retiring his number for every club. Absent special commemorations, no player will wear the number “42” in honor of the man who broke the color barrier to become the first African American to play major league baseball in the modern era: Jackie Robinson.<sup>1</sup> MLB has also honored a single player—chosen from nominees from each individual club—by presenting an annual award for humanitarian service in his name; that honoree is Roberto Clemente.<sup>2</sup> However, the sad reality is that if a fifteen-year-old Jackie Robinson were growing up today in South Pasadena, California, or if a fifteen-year-old Roberto Clemente were growing up today in Carolina, Puerto Rico, there is little chance that either would ever become a professional baseball player.

Prior to entering the segregated ranks of professional baseball, Robinson and his American-born peers of all races generally developed their skills along similar paths. In high school and in college, Robinson was an exceptional athlete and played four sports: football, basketball, track, and baseball.<sup>3</sup> Similarly, his white Kentuckian teammate on the Brooklyn Dodgers, Pee Wee Reese, developed his skills in his church’s

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\* Professor of Law and Director, Institute for Sports Law, Policy and Research, The Pennsylvania State University.

\*\* Member of the New York Bar, formerly Research Fellow, Penn State Institute for Sports Law, Policy and Research.

1. See Hal Bodley, Retiring No. 42 One of Baseball’s Greatest Moments, MLB.com (Apr. 11, 2013), <http://m.mlb.com/news/article/44514982/retiring-no-42-one-of-baseballs-greatest-moments> [<http://perma.cc/8F7V-6BVS>] (discussing permanent MLB-wide 1997 retirement of Jackie Robinson’s number).

2. See About the Award, MLB Community, [http://web.mlbcommunity.org/programs/roberto\\_clemente\\_award.jsp?content=about](http://web.mlbcommunity.org/programs/roberto_clemente_award.jsp?content=about) [<http://perma.cc/2DR7-34MN>] (last visited Sept. 9, 2015) (noting Roberto Clemente Award “recognizes those individuals who truly understand the value of helping others,” and that recipient is selected from pool of thirty, one from each MLB club).

3. Arnold Rampersad, Jackie Robinson: A Biography 36–55 (1997) (describing Robinson’s high-school and junior college career, including winning region’s Most Valuable Player in baseball in 1938).

amateur league.<sup>4</sup> Likewise, Clemente honed his talents in a well-organized Puerto Rican amateur league and then by signing professionally with a club in the island's professional winter league.<sup>5</sup>

Today's infrastructure for the development of elite baseball talent has radically changed. In the United States, high-school baseball is no longer a viable route to pro baseball. Over the years, player development in North American baseball has become increasingly privatized. Expensive traveling baseball teams have become an essential part of youth skill development and the route to pro baseball.<sup>6</sup> The result has been predictable: a decline in participation among poor young men, disproportionately racial minorities. Today, African American participation in MLB has dropped to 8.05%.<sup>7</sup>

The lack of external resources to develop young baseball players whose families cannot afford privatized development is not simply another aspect of social inequality. The willingness of MLB clubs to invest substantial private resources in developing young players in the Dominican Republic, Venezuela, and other countries is strong evidence that private markets would work in North America as well. MLB clubs make this investment because they can sign young prospects developed in team-run Latin American academies to standard minor league contracts, which can be renewed for up to seven years.<sup>8</sup> Conversely, the Rule 4 draft prohibits any club from signing North American amateurs to a professional contract unless the player is eighteen-years old and has been drafted by the club or remains unsigned after a multiple-round

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4. Gerald E. Brennan, Harold "Pee Wee" Reese, *Notable Sports Figures* (2004), <http://www.encyclopedia.com/doc/1G2-3407900449.html> [<http://perma.cc/XSL8-QLFX>].

5. Paul Robert Walker, *Pride of Puerto Rico: The Life of Roberto Clemente* 25–32 (1988).

6. See Tom Verducci, *Blackout: The African-American Baseball Player Is Vanishing. Does He Have a Future?*, *Sports Illustrated* (July 7, 2003), <http://www.si.com/vault/2003/07/07/345871/blackout-the-african-american-baseball-player-is-vanishing-does-he-have-a-future> [<http://perma.cc/3NJQ-ZBRY>] (noting existence of "instructional chasm" between young players who can obtain privatized training and those who cannot).

7. Bob Nightengale, *African Americans in MLB: 8%, Lowest Since Integration Era*, *USA Today: Daily Pitch* (Apr. 15, 2012, 7:44 PM), <http://content.usatoday.com/communities/dailypitch/post/2012/04/mlb-jackie-robinson-day-african-american-players/1#VPTOU8b7oz4> [<http://perma.cc/N6B7-FSKQ>] ("The African-American percentage in baseball this season has dropped to 8.05%, which is less than half the percentage of 17.25% in 1959 when the Boston Red Sox became the last team to integrate their roster:").

8. The structure of the minor leagues and agreements that require minor league players to sign uniform contracts is discussed in David M. Szuchman, Note, *Step Up to the Bargaining Table: A Call for the Unionization of Minor League Baseball*, 14 *Hofstra Lab. & Emp. L.J.* 265, 280–83 (1996); see also *Minor League Uniform Player Contract* (last updated Oct. 8, 2015) (on file with the *Columbia Law Review*) (depicting current sample version of contract).

draft.<sup>9</sup> This explains why the Los Angeles Dodgers, New York Yankees, and Chicago Cubs invest in, respectively, academies at Campo Las Palmas, Boca Chica, and La Piedra in the Dominican Republic, but not in their own backyards in South Central, Harlem, or Englewood.<sup>10</sup>

The racially discriminatory effects of the Rule 4 draft have been previously demonstrated in an important article by two distinguished Emory Law professors with sophisticated economic training: Joanna Shepherd Bailey and George Shepherd.<sup>11</sup> They explain how the MLB rule significantly distorts clubs' incentives.<sup>12</sup> Clubs can recoup their investments in identifying and developing young players outside the United States, Canada, and Puerto Rico; however, by selecting a player in the Rule 4 draft, a club can obtain exclusive rights to sign a North American high school graduate or college junior, regardless of how much time and effort some other club might have put into developing that player.<sup>13</sup> Professors Bailey and Shepherd document how, as a result of the draft, clubs significantly reduced scouting and development in North America and shifted development to Latin America.<sup>14</sup> For affluent, predominantly white suburbanites, parental support for private development replaced the traditional ways in which Jackie Robinson, Pee Wee Reese, and Roberto Clemente developed their skills.<sup>15</sup> Those in the inner city, predominantly African Americans, have been left out.<sup>16</sup>

Professors Bailey and Shepherd conclude that the MLB rules constitute a discriminatory employment practice that violates Title VII of the Civil Rights Act of 1964.<sup>17</sup> Their solution is to eliminate the draft and

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9. First-Year Player Draft FAQ, MLB.com, <http://mlb.mlb.com/mlb/draftday/faq.jsp> [<http://perma.cc/P4BR-MXBU>] (last visited Sept. 9, 2015) (identifying draft eligibility rules for North American amateurs).

10. Cf. Academies, MLB.com Academies, MLB.com <http://mlb.mlb.com/dr/academies.jsp> [<http://perma.cc/V5AD-PTCD>] (last visited Oct. 1, 2015) (“[E]ach MLB Club has founded an academy for promising prospects in the Dominican Republic.”).

11. Joanna Shepherd Bailey & George B. Shepherd, *Baseball's Accidental Racism: The Draft, African-American Players, and the Law*, 44 *Conn. L. Rev.* 197, 216–21 (2011) (discussing relationship between draft rules, teams' investment in foreign player development, and change in racial composition of MLB teams).

12. See *id.* at 207–12 (“[T]he new [draft] 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.”).

13. See *id.* at 210 (“Because [of] the draft and age minimums [for domestic players] . . . [t]here is a much lower chance that another team will steal away a foreign player that a team has developed and scouted.”).

14. See *id.* at 218 fig.1 (depicting reduction in percentages of U.S.-born players on MLB teams while percentages of Latin-born players rose, from 1947 to 2001).

15. See *id.* at 231–35 (describing expensive private development including traveling teams, showcase camps, and private lessons).

16. See *id.* at 239 (discussing statements by “baseball insiders” who see reduced investment in scouting and development in inner cities).

17. 42 U.S.C. §§ 2000e to 2000e-17 (2012).

return baseball player development to a system of free competition for the services of amateur players, akin to that which now exists in English professional soccer.<sup>18</sup>

Although the legal and economic analysis supporting a Title VII claim is strong, this Essay offers another basis by which the Rule 4 draft could be challenged and a more modest remedy that has a number of strategic and legal benefits. It suggests that the Rule 4 draft constitutes an unreasonable restraint of trade under the Sherman Act and the Federal Trade Commission Act. The remedy for these antitrust violations could be narrower than complete abolition of the Rule 4 draft: a tailored exemption from the draft for players whose economic circumstances make them unlikely to receive privatized development and who have been trained and developed by MLB clubs. With such an exemption, MLB clubs would have the incentive to create domestic academies to identify and develop prospects who currently have no resources available for their own development.

There are a number of advantages to a two-pronged strategy seeking to modify the Rule 4 draft under both civil rights and antitrust legislation. First, those who believe that a draft is an essential tool in avoiding severe competitive imbalance between rich and poor teams will resist the draft's wholesale abolition with far greater strength than they would resist the modest exemption this Essay proposes. Second, the threat of successful private antitrust litigation, with its consequent risk of treble damage liability, may secure a more favorable settlement than if the Rule 4 draft were challenged only under the Civil Rights Act. Third, the prospect of an investigation by the Federal Trade Commission (FTC) could overcome the claim that the draft is protected by the judicially created baseball antitrust exemption, and the FTC's procedures are more amenable to settlement along the lines of this Essay's proposal.

This Essay articulates the arguments that can be marshaled to potentially persuade the Equal Employment Opportunity Commission, the FTC, or the courts to find the Rule 4 draft illegal, or at least to raise sufficient doubts to motivate MLB clubs to alter their anticompetitive and antisocial rules. Part I expands upon prior work in demonstrating how the Rule 4 draft, as applied, discriminates against poor, young would-be baseball players, particularly inner-city racial minorities. Part II explains why the Rule 4 draft is an unreasonable restraint of trade. Finally, Part III rejects arguments as to why the antitrust laws should not apply to the Rule 4 draft.

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18. Bailey & Shepherd, *supra* note 11, at 203.

I. HOW THE RULE 4 DRAFT UNFAIRLY DISCRIMINATES  
AGAINST AFRICAN AMERICAN YOUTH

Professors Bailey and Shepherd argue that the shift to the Rule 4 draft in 1964 was prompted by two main concerns: a fear that large bonuses to sign untested rookies were threatening the clubs' financial security, and the expectation that rich teams from big cities would systematically sign better players than less prosperous teams from smaller markets, thus hurting competition.<sup>19</sup> At a time when amateur players faced a Reserve Clause binding them in perpetuity to the team that signed them,<sup>20</sup> and when clubs were almost entirely dependent on revenues from stadium gate and local television and radio broadcasts,<sup>21</sup> most baseball officials perceived that unfettered competition for amateur players was a significant factor in the competitive imbalance that had plagued MLB in the post-war era.<sup>22</sup>

Relying on thoughtful insights by a veteran MLB scout and a leading baseball journalist, Professors Bailey and Shepherd explain how external assistance is essential for elite athletes to hone their skills sufficient to warrant a professional contract.<sup>23</sup> Because the chances that another team can steal away a foreign player that an MLB club has developed and scouted are limited, and because a foreign player can be signed younger, the return on investment in scouting and developing foreign players is far greater than the return on investing similar effort in young American ballplayers.<sup>24</sup> Predictably, MLB clubs have shifted a huge amount of resources from scouting and assisting American teens to training and hiring players not subject to the Rule 4 draft.<sup>25</sup> While the draft reduces the incentive for MLB clubs to invest in scouting and development at

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19. *Id.* at 203–04.

20. The Reserve Clause was challenged under the Sherman Act, but the Supreme Court held that the claim was precluded by the antitrust exemption for baseball originally declared by the Court in 1922. See *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208–09 (1922) (describing baseball games as “purely state affairs” not subject to federal laws). The National League of Professional Baseball Clubs, known as the National League, and the American League comprise MLB. See generally, American League (AL), *Encyclopedia Britannica*, <http://www.britannica.com/topic/American-League> [<http://perma.cc/6NQS-UCDZ>] (last visited Sept. 26, 2015) (explaining history of American League and its partnership with National League).

21. See Michael J. Hauptert, *The Economic History of Major League Baseball*, *Econ. History Ass'n* (Dec. 3, 2007), <http://eh.net/encyclopedia/the-economic-history-of-major-league-baseball/> [<http://perma.cc/Q6EY-GJUF>] (discussing evolution of business of professional baseball and revenue sources).

22. Indeed, of the twenty-six pennants contested between 1949 and 1963, all but six were won by the Yankees, Giants, and Dodgers. See *World Series Winners and Postseason History*, *Baseball-Reference.com*, <http://www.baseball-reference.com/postseason/> [<http://perma.cc/3P34-JQCU>] (last visited Oct. 14, 2015) (listing historical playoff results).

23. Bailey & Shepherd, *supra* note 11, at 207. Indeed, Professors Bailey and Shepherd entitle this part of their article *The Draft's Unintended Incentives: Hire Foreign, Hire White*. *Id.*

24. *Id.* at 210.

25. *Id.* at 212.

home, the teams retain a strong incentive to draft and sign “self-developed U.S. players . . . who have received the necessary intensive development and training during their teen years from sources other than MLB teams.”<sup>26</sup> MLB investment now consists largely of scouts attending elite competitions that showcase talent for both professional scouts and college coaches.<sup>27</sup>

These self-developed players are rarely African American; Professors Bailey and Shepherd argue that this is because African American families are more likely to lack the time and resources to participate in the new privatized development infrastructure.<sup>28</sup> African Americans disproportionately reside in “dense urban areas” that “contain few baseball fields.”<sup>29</sup> As the noted journalist Tom Verducci concluded, African Americans “encounter[] economic and instructional gaps—they don’t have access to the groomed fields, expert instruction and the pay-for-play mentality associated with suburbia.”<sup>30</sup> With young black players receiving less access to what has become the only viable development option, black participation in MLB has plummeted.<sup>31</sup>

The effect of the Rule 4 draft is starkly illustrated by the case of Puerto Rico, Clemente’s home. Professors Bailey and Shepherd document the sharp drop (more than forty percent) in MLB players from Puerto Rico, along with explicit observations from baseball insiders attributing the change to the 1989 decision to extend the Rule 4 draft to players from that U.S. commonwealth.<sup>32</sup> This effect was recognized by the Puerto Rican government, whose request for an exemption from the draft was refused by MLB.<sup>33</sup>

When MLB owners agreed to the amateur draft in 1964, a viable infrastructure for the development of young baseball players still existed in the United States. Players developed through competitions organized by high schools, the American Legion, and other organizations that were widely available to different socioeconomic groups.<sup>34</sup> While private traveling

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26. *Id.* at 210.

27. Interview with Robert Cooper, Head Baseball Coach, Pa. State Univ., in State College, Pa. (Nov. 20, 2013).

28. Bailey & Shepherd, *supra* note 11, at 233.

29. *Id.* at 234.

30. Verducci, *supra* note 6.

31. See Nightengale, *supra* note 7 (discussing dramatic decline in African American player percentage).

32. Bailey & Shepherd, *supra* note 11, at 230.

33. *Id.* at 230–31.

34. See History of American Legion Baseball, The Am. Legion, <http://www.legion.org/baseball/history> [<http://perma.cc/LWL5-WPDM>] (last visited Sept. 9, 2015) (describing history of American Legion Baseball); see also John Manuel, The History and Future of the Amateur Draft, Soc’y for Am. Baseball Research, <http://sabr.org/research/history-and-future-amateur-draft> [<http://perma.cc/B2EE-UJS7>] (last visited Sept. 9, 2015) (“Scouts scoured the country, going to games, getting to know players’ families and

clubs and personal instructors have worked well for many affluent youngsters and their families, poorer kids have fallen through the cracks. This is where Rule 4 becomes relevant, by removing the market incentives that would otherwise exist for MLB clubs to make the kind of investments at home they routinely make in Latin America.

Like the inner cities and poor rural areas of the United States, there is no effective infrastructure in Latin American countries such as the Dominican Republic or Venezuela for schools or other public organizations to train and develop elite young baseball players. However, MLB clubs have a strong incentive to fill this void and invest in training programs because they can sign a foreign player whom they have helped develop. Since the adoption of the Rule 4 draft, major league clubs have opened roughly sixty baseball academies in Venezuela and the Dominican Republic.<sup>35</sup>

MLB owners have recognized the problem, creating a centrally administered program, Reviving Baseball in Inner Cities (RBI).<sup>36</sup> According to its website, MLB and its clubs have devoted \$30 million to the program, which is designed to increase participation and interest in baseball and softball among underserved youth, encourage academic participation and achievement, increase the number of talented athletes prepared to play in college and the minor leagues, promote greater inclusion of minorities into the mainstream of the game, and teach the value of teamwork.<sup>37</sup> At the same time, MLB clubs have invested \$60 million per year in Latin American academies,<sup>38</sup> whose *sole* purpose is to develop major league talent. It is no surprise, of course, that an MLB club would be more willing to make an investment in an academy where it can reap the rewards of its own development efforts than to make an investment in a collective academy.

Where a developmental infrastructure exists outside the United States, MLB clubs do not invest in academies. There are no MLB academies in Mexico, Japan, Taiwan, China, or South Korea, for example. This is because it is more efficient for clubs to allow professional leagues and clubs in those countries to develop their own players, and then reach agreements with the clubs or leagues if Mexican,

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competing with each other to cultivate the best relationship, make the best offer, and sell their organization as the most attractive one for an up-and-coming ballplayer.”).

35. Bailey & Shepherd, *supra* note 11, at 201.

36. See Max Ferregur, For the Love of Baseball: The MLB RBI Program, *SI Kids: Blogs* (Aug. 18, 2014, 12:56 PM), <http://www.sikids.com/blogs/2014/08/18/for-the-love-of-baseball-the-mlb-rbi-program> [<http://perma.cc/V2K5-88FU>] (discussing RBI program and its goals).

37. About Reviving Baseball in Inner Cities, MLB.com, [http://mlb.mlb.com/mlb/official\\_info/community/rbi\\_facts.jsp](http://mlb.mlb.com/mlb/official_info/community/rbi_facts.jsp) [<http://perma.cc/NA4H-K9SX>] (last visited Oct. 17, 2015).

38. Bailey & Shepard, *supra* note 11, at 215.



Japanese, Taiwanese, Chinese, or Korean players demonstrate skills sufficient to play at the MLB level.<sup>39</sup>

For aspiring baseball players from affluent families, private commercial entities have filled the vacuum created by the decline of the infrastructure of American baseball development. A recent news article detailed the \$8,000 batting cage installed in the backyard of a 12-year-old so he could make a top traveling team.<sup>40</sup> Some families can spend up to \$24,000 annually on tournaments, lessons, and equipment.<sup>41</sup>

The confluence of the disappearance of traditional American player development infrastructure, the rise of expensive privatized player development, and the differing rules governing North American and Latin American prospects has had a discriminatory effect on North Americans without access to either expensive private player development or well-funded MLB academies. Antitrust law presents a potential solution to the problem.

## II. ANALYZING THE RULE 4 DRAFT UNDER ANTITRUST LAW'S RULE OF REASON

The Sherman Act prohibits agreements that unreasonably restrain trade. The Rule 4 draft is appropriately characterized as an agreement among the thirty MLB clubs not to sign an amateur player in North America unless they have selected the player in an annual draft (or unless the player is not selected by any team at all). The antitrust question is thus whether this restriction is unreasonable. Part III discusses whether a judicially created exemption for baseball would preclude antitrust scrutiny of the Rule 4 draft. Because that question cannot be answered without an understanding of how the antitrust laws apply to sports, this Part presents an antitrust analysis before the subsequent Part takes up the exemption question.

### A. *Rule of Reason Applies*

In *NCAA v. Board of Regents*,<sup>42</sup> the Supreme Court set forth the standard that governs sports-league trade restraints. The Rule 4 draft, like the television restrictions adopted by the National Collegiate Athletic Association (NCAA) that were challenged in *Board of Regents*, is an

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39. See Anthony Witrado, *MLB International Signing Rules Must Be Altered with Improved US-Cuba Relations*, Bleacher Rep. (Dec. 22, 2014), <http://bleacherreport.com/articles/2307450-mlb-international-signing-rules-must-be-altered-with-improved-us-cuba-relations> [<http://perma.cc/EU5C-WEXC>] (discussing Mexican and Asian player development systems as options for Cuba).

40. Amy Shipley, *Moneyball Jr.: Baseball for Minors Looks a Lot Like the Majors*, Sun Sentinel (Mar. 16, 2013), [http://articles.sun-sentinel.com/2013-03-16/news/fl-moneyball-jr-20130317\\_1\\_bidding-wars-travel-ball-team-south-florida-stealth](http://articles.sun-sentinel.com/2013-03-16/news/fl-moneyball-jr-20130317_1_bidding-wars-travel-ball-team-south-florida-stealth) [<http://perma.cc/GV6E-FY5K>].

41. *Id.*

42. 468 U.S. 85, 110 (1984) (holding NCAA television plan “is inconsistent with the Sherman Act’s command that price and supply be responsive to consumer preference”).

agreement among entities that would otherwise compete with each other: what antitrust law calls “horizontal agreements.”<sup>43</sup> The Court noted that the antitrust laws have traditionally presumed that certain types of agreements among competitors are unreasonable, yet have recognized that competing sports teams must agree among themselves on certain issues that are essential for the product to be available at all.<sup>44</sup> Thus, sports-league rules that restrain trade are not “illegal *per se*,” but are subject to antitrust scrutiny under a “rule of reason.”<sup>45</sup> According to *Board of Regents*, the “essential inquiry” is “whether or not the challenged restraint enhances competition.”<sup>46</sup> *Board of Regents* requires that, once a plaintiff has demonstrated a significant anticompetitive effect from a sports league’s rule, the league must present a procompetitive justification for its owners’ agreements.<sup>47</sup> If the league satisfies this burden, the plaintiff can show that the restraint is not reasonably necessary or that the defendant’s objectives could be achieved by less restrictive alternatives.<sup>48</sup>

The lower courts have consistently recognized that labor-market restraints are within the reach of the antitrust laws without any proof of a direct effect on some downstream-product market.<sup>49</sup> Thus, there is no basis

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43. See *id.* at 99 (defining horizontal restraint as “agreement among competitors on the way in which they will compete with one another”).

44. *Id.* at 101. Although Justice John Paul Stevens’s empirical statement is not required to justify the Court’s conclusion, and Rule of Reason treatment is accepted as binding law for purposes of this Essay, his statement is not technically accurate. Horizontal agreement among MLB clubs would not be necessary were the sport organized like NASCAR with an independent competition organizer setting rules that MLB clubs would follow in a vertical relationship with MLB, Inc. See Stephen F. Ross & Stefan Szymanski, Antitrust and Inefficient Joint Ventures: Why Sports Leagues Should Look More Like McDonald’s and Less Like the United Nations, 16 Marq. Sports L. Rev. 213, 216 (2006) (suggesting “[e]ntertainment in the form of competitive sports leagues can be produced through a structure in which coordination of the particulars . . . is provided by a separate entity that is distinct from the clubs participating in the competition”).

45. *Bd. of Regents*, 468 U.S. at 100–04.

46. *Id.* at 104.

47. *Id.* at 113 (“Under the Rule of Reason, these hallmarks of anticompetitive behavior place upon petitioner a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market.”).

48. See *id.* at 119 (discussing alternatives to NCAA television plan and finding plan was “not . . . tailored to serve” league’s interest in competitive balance).

49. See, e.g., *Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 544 (10th Cir. 1995) (“Just as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services.” (quoting 2 Phillip Areeda & Herbert Hoencamp, *Antitrust Law* ¶ 377c (rev. ed. 1995))); *Powell v. NFL*, 930 F.2d 1293, 1298 & n.4 (8th Cir. 1989) (recognizing league rule restraining competition within player services market is subject to antitrust law); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1183–89 (D.C. Cir. 1978) (holding NFL draft is “undeniably anticompetitive in both its purpose and in its effect”); *Mackey v. NFL*, 543 F.2d 606, 616–18 (8th Cir. 1976) (holding “restraints on competition within the market for players’ services fall within the ambit of the Sherman Act”); *Gardella v. Chandler*, 172 F.2d 402, 407–08 (2d Cir. 1949) (L. Hand, J., concurring) (finding Anti-Trust Acts prohibit restraint that “unreasonably forbids any one to practice his calling”); see also *Law v. NCAA*, 902 F.

to exclude labor markets from the “Magna Carta of free enterprise.”<sup>50</sup> Indeed, in light of the social policy expressed in the National Labor Relations Act (NLRA), which acknowledges the unequal distribution of bargaining power between workers and employers, it can hardly be thought that federal policy should permit employer conspiracies that restrain competition and exacerbate this disadvantage.<sup>51</sup> In sum, there is no basis for failing to apply the general rule for sports leagues established in *Board of Regents* to the specific labor-market restraints implicated by a league’s adoption of a blanket restraint like that imposed by the Rule 4 draft.

B. *The Rule 4 Draft Constitutes a Restraint of Trade*

From a practical perspective, firms can restrain trade only when consumers cannot turn to providers of reasonable substitutes. Where firms do not possess “market power,” any would-be conspirators cannot exploit consumers or suppliers by adopting anticompetitive restrictions; if they attempt to, “market retribution will be swift.”<sup>52</sup> With regard to the market for player development, there are no reasonable substitutes and market retribution will not be swift. There are no businesses, other than MLB clubs, with a financial incentive to develop low-income players for free in return for the possibility of signing players to pro contracts. In addition, the Rule 4 draft results in fewer poor athletes playing baseball than would otherwise be the case, resulting in unfulfilled potential and a lower quality of baseball. Were there a rival baseball league, it might have an incentive to develop inner-city players to compete for the patronage of baseball fans. However, there is no alternative for MLB consumers to substitute.<sup>53</sup>

C. *The Only Legitimate Antitrust Justification Is Competitive Balance*

In *Board of Regents*, the Supreme Court set out the analytical framework for sports-league agreements, establishing a two-part test to examine a league’s justifications once a plaintiff had established the

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Supp. 1394, 1402, 1405 & n.11 (D. Kan. 1995) (holding collegiate athletic association rule fixing salaries for coaches violates section 1 of Sherman Act).

50. *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972) (“Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise.”).

51. Lee Goldman, *The Labor Exemption to the Antitrust Laws as Applied to Employers’ Labor Market Restraints in Sports and Non-sports Markets*, 1989 *Utah L. Rev.* 617, 625–26 n.33 (citing NLRA to demonstrate Congress acknowledged disparate bargaining power). For related arguments as to why the common law should treat employer conspiracies to restrain trade more harshly than worker restraints in the labor market, see generally Stephen F. Ross, *The Evolving Tort of Conspiracy to Restrain Trade Under Canadian Common Law*, 75 *Can. Bar Rev.* 193 (1996).

52. *Valley Liquors, Inc. v. Renfield Imps., Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982) (Posner, J.).

53. See *Laumann v. NHL*, 56 F. Supp. 3d 280, 291–94 (S.D.N.Y. 2014) (discussing baseball’s historical exemption from antitrust law).

existence of a significant restraint on competition.<sup>54</sup> The Court's test inquires, first, whether a league's purported justifications are legitimate and, second, whether the restraint is reasonably necessary to achieve that league's goals.<sup>55</sup> The Court concluded that the NCAA's imposition of significant restrictions on the sale of television rights was not reasonably tailored to promote equalized competition.<sup>56</sup> Thus, a competitive-balance justification was inapplicable in that case.

The Court's opinion correctly suggests, however, that the rule of reason would allow owners to enter into agreements having the effect of significantly restricting competition in the player market, *if* the result was a promotion of competitive balance that resulted in an overall increase in the output of the "product."<sup>57</sup> In context, this means an increase in fan appeal as reflected in greater attendance, more television viewers or digital subscribers, and so forth.<sup>58</sup> In a similar vein, in *McNeil v. NFL*, District Judge David Doty instructed the jurors that, if they found that the free agency restraints at issue substantially harmed competition in the bidding for player services, the burden would then shift to the league to show that the restraints were "reasonably necessary" to achieve competitive balance.<sup>59</sup>

*McNeil* illustrates the key requirement of reasonable tailoring. In that case, the jury found that National Football League (NFL) labor market restraints did promote competitive balance, but they were impermissibly overbroad.<sup>60</sup> Similarly, the Rule 4 draft was initiated to counteract the superior ability of wealthier clubs to attract and acquire superior players. This disparity in player acquisition was a detriment to the competitive balance throughout the league.<sup>61</sup> The draft order is determined based on the previous season's standings, with the team possessing the worst record

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54. *NCAA v. Bd. of Regents*, 468 U.S. 85, 113–17.

55. *Id.* In applying that test to the facts of the case, the Court wrote: "Petitioner argues that the interest in maintaining a competitive balance among amateur athletic teams is legitimate and important and that it justifies the regulations challenged in this case. We agree with the first part of the argument but not the second." *Id.* at 117.

56. *Id.* at 119.

57. See *id.* at 117 (contrasting challenged rule with permissible procompetitive rules, which contain some amount of cooperation necessary to preserve public interest in intercollegiate athletics).

58. See *Powell v. NFL*, 690 F. Supp. 812, 818 (D. Minn. 1988) (Doty, J.) (concluding "danger that destruction of the competitive balance could ultimately lead to diminished spectator interest and franchise failures itself constitutes a sufficient basis" for denying preliminary relief that would have created complete free agency in football).

59. No. 4-90-476, 1992 WL 315292, at \*4 (D. Minn. Sept. 10, 1992).

60. *Id.* at \*1.

61. Although cause and effect are hard to determine, in the fifteen years prior to the Rule 4 draft, the New York Yankees were American League champions for thirteen years, while in the fifteen years following the draft the New York Yankees have won only three American League championships. See New York Yankees Team History and Encyclopedia, Baseball-Reference.com, <http://www.baseball-reference.com/teams/NYY/> [<http://perma.cc/RHV8-ADTM>] (last visited Sept. 10, 2015) (listing historical playoff results).

receiving the first pick.<sup>62</sup> This structure is designed to aid low-performing teams in acquiring better talent. However, because many superior players are often farmed from overseas academies, the effect of the draft is significantly diminished. As no justification other than enhancing competition has been seriously asserted for the Rule 4 draft, and no court has recognized another justification for labor market restraints,<sup>63</sup> the legality of the Rule 4 draft under the antitrust law will turn on its necessity to promote competitive balance.

D. *The Rule 4 Draft Is Unnecessarily Restrictive in Applying to Economically Disadvantaged Amateurs Who Are Unable to Provide for Their Own Professional Development*

Although the Rule 4 draft is supposed to aid low-performing teams in acquiring better players through the draft, the fact that it is limited to North American players substantially mitigates any procompetitive effects. Rule 4 has no effect on the ability of teams with superior capital resources to acquire better talent overseas. MLB rules do not meaningfully limit investment in player development overseas, so the Rule 4 draft places a disproportionate burden on the American labor market. Moreover, since the draft's adoption in 1966, MLB has adopted extensive revenue-sharing programs to promote competitive balance between clubs with vastly different revenues; were domestic training academies encouraged, additional limits on club investment could be adopted to minimize any appeal-reducing effect on competitive balance. On two occasions, the NFL's amateur draft has been found illegal because "it went beyond the level of restraint reasonably necessary to accomplish whatever legitimate business purposes might be asserted for it."<sup>64</sup> Likewise, the Rule 4 draft's application to underprivileged players developed by clubs in domestic academies would appear to be overly restrictive.

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62. First-Year Player Draft Rules, MLB.com, <http://mlb.mlb.com/mlb/draftday/rules.jsp> [<http://perma.cc/B3YL-SZRG>] (last visited Sept. 10, 2015).

63. See Stephen F. Ross, *The NHL Labour Dispute and the Common Law, The Competition Act, and Public Policy*, 37 U.B.C. L. Rev. 343, 359-68 (2004) (considering and rejecting other theoretically plausible policy justifications for restraining competition in labor markets).

64. *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1183 (D.C. Cir. 1978); see also *Kapp v. NFL*, 390 F. Supp. 73, 82 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978) (using basic antitrust reasonableness test to hold NFL draft rule "patently unreasonable"). In the decision below, the district court had similarly held that it "need not fully evaluate the league's claims of necessity for a college draft because, even conceding the need for some such system, the current structure is significantly more restrictive than necessary." *Smith v. Pro-Football*, 420 F. Supp. 738, 746 (D.D.C. 1976), *rev'd* 593 F.2d 1173 (1988). For the NFL draft to be found lawful under the rule of reason, the judge said he would have to find that the draft "is a reasonable way of pursuing legitimate business interests, and that it does not have the purpose or effect of unreasonably restraining competition." *Id.* at 745.

In *Smith v. Pro Football, Inc.*, the D.C. Circuit first questioned the degree to which the draft accomplished the goal of competitive balance at all.<sup>65</sup> The court expressed the view that the key to competitive balance in the NFL was not the amateur draft but the equal sharing of network television revenues.<sup>66</sup> The court also suggested that the effect of the amateur draft paled in comparison to the impact of the head coach on the success or failure of the team, noting that over a three-year period the same nine teams occupied twenty-two of the available twenty-four playoff spots, and at least six of them included successful veteran coaches.<sup>67</sup> Thus, “the player draft does not have an equalizing effect to the extent of knocking out the top teams, if the top teams have good coaches.”<sup>68</sup> The court concluded that “the effects of fine coaching swamp whatever effect the draft may have on team performance.”<sup>69</sup> Turning to overbreadth, the court noted that the league justified the draft “primarily by the need to disperse the best players,” but the restraint “applied to all graduating seniors, including average players who were, in a sense, fungible commodities.”<sup>70</sup> The court suggested several less restrictive alternatives to allocate amateur talent among NFL clubs.<sup>71</sup> Most significantly, the court noted that the “least restrictive alternative” would be the elimination of the draft and the use of revenue sharing to equalize teams’ financial resources.<sup>72</sup>

As a whole, players benefit if reasonable restrictions result in a better product that produces more revenue, especially where the labor market is sufficiently unrestrained so that owners will devote much of the increased revenue to higher salaries. Fans benefit because overly broad restrictions diminish the quality of the product. Overly restrictive labor market rules frustrate supporters of teams with inferior talent, who want

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65. 593 F.2d at 1183 n.46 (finding NFL’s theory of competitive balance to be “legally wide of the mark in a rule of reason inquiry”).

66. See *id.* at 1184 n.46 (“[T]wo other factors contribute at least as much as the player draft to producing and maintaining a competitive balance in the league—television revenues and coaching changes.”).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 1187 (emphasis omitted).

71. See *id.* at 1187–88. These alternatives included a scheme that would permit several teams to draft a player and limit the number of players any one team might sign; league rules that set minimum acceptable terms that a team must offer to a drafted player lest they lose their exclusive rights; a second draft if a player did not come to terms with the team initially drafting him; or a sharply limited draft that would cover only the top players. *Id.* See generally, Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. Ill. L. Rev. 519, 555–80 (discussing less restrictive means of promoting competitive balance, including revenue sharing and progressive salary caps).

72. *Smith*, 593 F.2d at 1188. The court in *Kapp v. NFL*, 390 F. Supp. 73, 82 (N.D. Cal. 1974), *aff’d*, 586 F.2d 644 (9th Cir. 1978), concluded without elaboration that the perpetual allocation to one team of exclusive negotiating rights to a drafted player was overbroad.

their teams to improve quickly, and sports fans generally respond more favorably to exciting seasons where teams are competitively balanced.<sup>73</sup>

As illustrated by *Board of Regents*, those who would justify an agreement that substantially restrains trade, as the Rule 4 draft does, must bear a “heavy burden” to justify the arrangement.<sup>74</sup> The question is not on the viability of the Rule 4 draft itself, but specifically on the possibility that clubs that invest in the training and development of poor teenage players receive an exemption from the draft for those players. It may be difficult for MLB owners to demonstrate that any amateur draft is necessary to maintain a level of competitive balance preferred by fans, but it seems particularly far-fetched to suggest that—with adequate revenue sharing or other alternatives—competitive imbalance would significantly increase if MLB gave its clubs a modest exemption for poor players whose skills they develop in domestic academies. Indeed, small-market teams might well be more likely to take advantage of this exemption than large-market clubs that can afford to simply acquire high-priced free agents. This suggests that the application of the restrictions of the Rule 4 draft to a domestic “academy” would be found to be an unreasonable restraint of trade in violation of the Sherman Act.

### III. THE APPLICABILITY OF ANTITRUST LAW TO THE RULE 4 DRAFT

The analysis in Part II demonstrates that if the Rule 4 draft were subjected to typical antitrust scrutiny, courts would likely find that it constitutes an unreasonable restraint of trade, at least to the extent that it precludes MLB clubs from signing products of domestic academies who otherwise would be unlikely to receive elite baseball development. However, defenders of the unmodified, anticompetitive, and discriminatory Rule 4 draft can raise substantial claims that the draft is not subject to typical antitrust scrutiny. First, because the claim relates to restraints in a labor market, and is referenced in the collective bargaining agreement between MLB clubs and the MLB Players Association (MLBPA), they will claim that the “nonstatutory labor

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73. Economists Henry Demmert and Roger Noll have independently demonstrated empirically that attendance increases when teams are equally matched and game outcomes are uncertain. See Henry G. Demmert, *The Economics of Professional Team Sports* 10–11 (1973) (dividing teams into “Good” and “Poor” teams based on record and comparing attendance); Roger G. Noll, *Attendance and Price Setting*, in *Government and the Sports Business* 115, 156–57 (Roger G. Noll ed., 1974) (finding leagues benefit from decreasing variance in team quality). Others have correctly pointed out that competitive balance is only one feature that makes a professional sports league attractive to fans. For example, minor leagues with high rates of player turnover enjoy more long-term competitive balance than the major leagues but have less spectator appeal. Michael J. Trebilcock, *The Common Law of Restraint of Trade* 226 (1986). Amenities, ease of access to stadiums, availability of substitute forms of sporting or other entertainment, weather, and income also affect attendance. See Noll, at 115–20 (describing factors influencing demand for games).

74. *NCAA v. Bd. of Regents*, 468 U.S. 85, 113 (1984).

exemption” precludes antitrust review. Second, they will claim that the judicially created “baseball exemption” still applies to preclude judicial review of trade-restraining agreements in our national pastime. This Part demonstrates that neither exemption precludes review.

The nonstatutory labor exemption applies only to labor market restraints that are mandatory subjects of bargaining under federal labor law.<sup>75</sup> As we detail below, the Rule 4 draft is not a mandatory subject of bargaining with major-league players, and minor-league players are not organized and engaged in collective bargaining. Moreover, the baseball exemption should no longer be construed to preclude antitrust scrutiny. Even if it were not overruled, the reasoning behind its most recent affirmance in 1972 does not preclude a challenge to the Rule 4 draft by the FTC, which is authorized to issue prospective-only cease and desist orders.

#### A. *Labor Exemption*

The Sherman Act was designed to protect individuals “from the evils of accumulated corporate wealth and power in all markets,” including labor markets.<sup>76</sup> In 1926, the Supreme Court recognized the validity of an antitrust complaint from a seaman challenging the cartel system of registration for employment agreed to by virtually all Pacific Coast ship owners.<sup>77</sup>

In 1935, Congress enacted the NLRA as an alternative means of allowing workers to fairly bargain in the face of the corporate power of employers.<sup>78</sup> The NLRA encouraged workers’ chosen unions and employers to agree collectively on wages, hours, and working conditions of employment.<sup>79</sup> The Supreme Court has recognized that to effectuate the NLRA requires an “accommodation” of antitrust and labor law.<sup>80</sup> In *Mackey v. NFL*, the Eighth Circuit held that a trade restraint embodied in collective bargaining agreements was exempt from antitrust challenge when its principal effect was on the labor market and when it concerned a “mandatory subject of bargaining” under federal labor law.<sup>81</sup>

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75. *Mackey v. NFL*, 543 F.2d 606, 625 (8th Cir. 1976).

76. Lee Goldman, *The Labor Exemption to the Antitrust Laws as Applied to Employers’ Labor Market Restraints in Sports and Non-Sports Markets*, 1989 Utah L. Rev. 617, 623 (recounting legislative history of Sherman Act).

77. See *Anderson v. Shipowners Ass’n*, 272 U.S. 359, 365 (1926) (holding cartel system “in violation of the Anti-Trust Act”).

78. See 29 U.S.C. § 151 (2012) (“The inequality of bargaining power between employees . . . and employers . . . substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions . . .”).

79. See *id.* § 158(d) (listing “wages, hours, and other terms and conditions of employment” as mandatory subjects of negotiation).

80. See *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965) (discussing process of “accommodating the coverage of the Sherman Act to the policy of the labor laws”).

81. 543 F.2d 606, 614–15 (8th Cir. 1976) (“The labor exemption presupposes a violation of the antitrust laws. To hold that a subject relating to wages, hours and working



The Eighth Circuit's principle was extended in *Brown v. Pro Football, Inc.*, when a class of 235 "developmental squad" players brought an antitrust suit against an agreement among the NFL clubs to pay them a uniform \$1,000 weekly salary.<sup>82</sup> The NFL argued that this agreement, unilaterally implemented after an admitted impasse in bargaining with the NFLPA, was protected by the nonstatutory labor exemption.<sup>83</sup> Labor law precedents require a multi-employer bargaining group (like NFL clubs) to refrain from instituting new policies relating to mandatory subjects of bargaining, even if necessary to conform to antitrust law, without bargaining in good faith with the union; only at impasse did the employer's duty to bargain temporarily cease, and only then could an employer unilaterally make changes comprehended within its most recent proposal.<sup>84</sup> The Supreme Court held that "the postimpasse imposition of a proposed employment term concerning a mandatory subject of bargaining" is shielded from the antitrust laws by the nonstatutory labor exemption.<sup>85</sup> Under this standard, the NFL's agreement was protected by the nonstatutory labor exemption. The Court explained that the "conduct took place during and immediately after a collective-bargaining negotiation . . . [and] [i]t involved a matter that the parties were required to negotiate collectively."<sup>86</sup>

The judicially created exemption's accommodation of labor and antitrust law is grounded in the potential conflict between an employer's labor law duty to bargain in good faith regarding mandatory subjects and their potential antitrust law duty to avoid unreasonable agreements restraining competition in labor markets.<sup>87</sup> This conflict does not arise with regard to employer agreements that are not mandatory subjects of bargaining, so there is no reason for employers not to conform their conduct to the antitrust laws with regard to these topics. The Rule 4 draft is not a mandatory subject of bargaining between MLB clubs and the MLBPA.

In several decisions, labor arbitrators have held that MLB must negotiate with the MLBPA over the terms of the Rule 4 draft. However, these arbitral precedents make clear that the basis of the obligation is not the NLRA's requirement to bargain over mandatory subjects, but the specific language of baseball's collective bargaining agreement. In *Grievance 92-3*, MLB sought to alter the draft by extending the time in

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conditions becomes nonmandatory by virtue of its illegality under the antitrust laws obviates the labor exemption."). What constitutes a mandatory subject of bargaining is a major issue in labor law, involving judicial and National Labor Relations Board precedents in determining what falls under the statutory definition of "wages, hours, and working conditions." National Labor Relations Act, 5 U.S.C. § 71 (1978). See generally N. Peter Lareau, Labor and Employment Law § 12.05(3)(b) (2008).

82. 518 U.S. 231, 235 (1996).

83. Brief for Respondents at 9, *Brown*, 518 U.S. 231 (No. 95-388), 1996 WL 71820.

84. See *Brown*, 518 U.S. at 235-38 (explaining history and logic behind rule).

85. *Id.* at 238.

86. *Id.* at 250.

87. *Id.* at 234.

which a club had exclusive rights to drafted players.<sup>88</sup> The Arbitrator expressly noted that, although extensive testimony “questioned the fairness of these amendments to amateur players” and “witnesses debated the effect the amendments might have on college baseball programs,” the issue “did not turn on those considerations but was contractual, i.e., whether the amendments violated the Basic Agreement.”<sup>89</sup> The Arbitrator found a breach of the agreement, because an MLB club that signed a major league player ranked in the top 30% of his position group was liable, under the agreement, to compensate the player’s former team with a draft pick.<sup>90</sup> The Arbitrator reasoned that a change in the Rule 4 draft that made draft picks more valuable (by extending their duration) would therefore affect the bargained-for ability of veteran MLB players in the ensuing competition for their services.<sup>91</sup> Because the Basic Agreement expressly required MLB to negotiate with the MLBPA over changes that would result in “a change in a Player benefit under an existing rule,” MLB could not implement a change in the Rule 4 draft that increased the value of a draft choice.<sup>92</sup> The Arbitrator expressly declined to rule on the labor law question of whether Rule 4 draft changes were mandatory subjects of bargaining, relying on the contract language for the result.<sup>93</sup> In a subsequent decision, the same arbitrator specifically addressed this point:

[I]t makes no difference, of course, whether the draft rules are a mandatory or only a permissive subject of bargaining. Whatever Board law may be with respect to the basis for finding an unfair labor practice, the Clubs . . . have no “contractual” right to change a subject of bargaining by amendment of the Major League Rules, even if that subject is permissive. The reason is that they surrendered any such right when they agreed . . . not to enact changes “inconsistent” with agreements already made.<sup>94</sup>

The principles enunciated in *Brown v. Pro Football Inc.* should not extend to the Rule 4 draft, for several reasons. By eliminating competition for the services of amateur players, Rule 4 has a direct and substantial impact on the wages and working conditions of those players; the draft would clearly be a mandatory subject of bargaining between

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88. In re Major League Baseball Players Ass’n and the 28 Major League Clubs, Grievance 92-3; Amateur Draft (Aug. 19, 1992). Rule 4 had provided that if a player drafted upon high school graduation enrolled in college, the club would lose their draft rights. MLB clubs sought to change the rule to extend exclusive rights for five years.

89. *Id.* at 4.

90. *Id.*

91. *Id.* at 15 (“What cannot be seriously disputed is that those free agents subject to compensation will carry a greater burden in negotiations by virtue of the change.”).

92. *Id.* at 5.

93. *Id.* at 18.

94. See In re the Major League Baseball Player’s Ass’n and the Thirty Major League Clubs, Grievance 97-21, 21 (May 18, 1998) (quoting Decision No. 96 (Amateur Draft II) (Nicolau, C.)).

MLB clubs and minor league players if they voted to collectively bargain.<sup>95</sup> Would the National Labor Relations Board really tolerate a refusal by MLB to bargain with minor league players without the MLBPA, who owes no duty to represent minor league players, present at the table? If the agreement with the MLBPA did not have a specific reference to rookie draft picks as compensation, it is difficult to envision the argument that major league players would have a statutory right to bargain about it. Returning the focus to the principal issue here—whether the labor exemption should extend to the Rule 4 draft—the argument would seemingly permit a union and management to extend significantly the scope of immunity, simply by including terms in a collective bargaining agreement that reference some other labor market. There is no indication that *Brown* permits any such thing.

Even where a subject is a mandatory subject of bargaining under the labor law, the nonstatutory exemption does not apply to restraints where the primary effect is not in the labor market. To illustrate, consider the provision in a 1970s National Hockey League (NHL) collective bargaining agreement that precluded NHL players from providing their services to another league for three years after the expiration of their NHL contract. Surely, this provision is a mandatory subject of bargaining with NHL players under labor law. However, the district court struck down the provision, holding that the labor exemption did not apply because the principal effect was to impair interleague competition between the NHL and the rival World Hockey Association.<sup>96</sup> The nonstatutory exemption should therefore not preclude a challenge by the government or plaintiffs who are not parties to the Basic Agreement: The primary effect of the Rule 4 draft—and, in particular, the refusal of MLB clubs to exempt players trained in domestic academies from the draft—is not in the labor market that is organized, MLB players, but in another discrete labor market—non-MLB players.

#### B. *Baseball Exemption*

On three occasions since 1922, the Supreme Court has held baseball exempt from private treble damage actions under the Sherman Act. The first of those occasions occurred when the Baltimore Terrapins, a member of the Federal League that operated as a major league from 1914 to 1915, sued the National and American Leagues, claiming that the established leagues had conspired to unlawfully impair the rival Federal League's

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95. See *Mackey v. NFL*, 543 F.2d 606, 615 (8th Cir. 1976) (stating “mandatory subjects of bargaining pertain to ‘wages, hours, and other terms and conditions of employment’” (quoting National Labor Relations Act, 29 U.S.C. § 158(d) (2012))); see also, *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) (“[I]t is lawful [to] insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without . . .”).

96. *Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462, 500 (E.D. Pa. 1972).

ability to sign players.<sup>97</sup> In *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, the Court held that games were intrastate events since the travel from one state to another was “not the essential thing,” although there was scheduling of games across state lines.<sup>98</sup> Thus, under the contemporary, narrow definition of the scope of Congress’s power to regulate interstate commerce, the Sherman Act did not apply.<sup>99</sup> This decision was reaffirmed again in 1953,<sup>100</sup> and 1972<sup>101</sup>, with the Court emphasizing the principle of stare decisis.

An extensive debate about whether the Court should overrule these later decisions, and overturn *Federal Baseball*, which the Court itself has admitted is an “exception and an anomaly,”<sup>102</sup> exists within judicial decisions<sup>103</sup> and the academic literature.<sup>104</sup> The arguments in favor of

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97. *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200, 207 (1922) (noting plaintiff alleged defendants “conspired to monopolize the baseball business”).

98. *Id.* at 209.

99. *Id.* (affirming lower court’s holding that defendants were not within Sherman Act because conduct was “not an interference with commerce among the States”).

100. See *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953) (affirming lower court’s judgments on basis of *Federal Baseball*’s authority).

101. See *Flood v. Kuhn*, 407 U.S. 258, 283–85 (1972) (affirming lower court’s judgments on basis of *Federal Baseball*’s and *Toolson*’s authority).

102. *Flood*, 407 U.S. at 282.

103. Compare *McCoy v. MLB*, 911 F. Supp. 454, 456–58 (W.D. Wash. 1995) (holding exemption applies to business as a whole due to Congress’s inaction to eliminate antitrust exemption), with *Piazza v. MLB*, 831 F. Supp. 420, 437 (E.D. Pa. 1993) (noting baseball exemption only applies to Reserve Clause limiting competition for players). For other cases limiting the exemption, see, e.g., *Butterworth v. Nat’l League of Prof’l Baseball Clubs*, 644 So. 2d 1021, 1025 (Fla. 1994) (same). For cases applying the exemption more broadly, see, for example., *MLB v. Crist*, 331 F.3d 1177, 1183 (11th Cir. 2003) (arguing exemption applies to “business of baseball” and not just reserve system); *Prof’l Baseball Sch. & Clubs, Inc. v. Kuhn*, 693 F.2d 1085, 1085–86 (11th Cir. 1982) (finding variety of matters beyond reserve system “integral” to baseball business and thus exempt). Most recently, the exemption was reaffirmed in the context of franchise relocation in *City of San Jose v. Office of the Commissioner of Baseball*, 776 F.3d 686, 692 (9th Cir. 2015). In part, the Ninth Circuit found itself bound by a prior circuit precedent applying the exemption beyond the Reserve Clause. *Id.* at 689 (“Under the baseball exemption, we have rejected an antitrust claim that was wholly unrelated to the reserve clause.” (citing *Portland Baseball Club, Inc. v. Kuhn*, 491 F.2d 1101, 1103 (9th Cir. 1974))).

104. See, e.g., Robert G. Berger, *After the Strikes: A Reexamination of Professional Baseball’s Exemption from the Antitrust Laws*, 45 U. Pitt. L. Rev. 209, 226 (1983) (characterizing exemption as “aberration in antitrust interpretation”); Nathaniel Grow, *Defining the “Business of Baseball”: A Proposed Framework for Determining the Scope of Professional Baseball’s Antitrust Exemption*, 44 U.C. Davis L. Rev. 557, 591 (2010) (arguing future courts should reject prior lower court approaches to scope of exemption); Gary R. Roberts, *Sports League Restraints on the Labor Market: The Failure of Stare Decisis*, 47 U. Pitt. L. Rev. 337, 340 n.7 (1986) (“[I]t is doubtful that the Court would reaffirm the exemption or, if it did, that Congress would not legislate the exemption out of existence.”); Stephen F. Ross, *Reconsidering Flood v. Kuhn*, 12 U. Miami Ent. & Sports L. Rev. 169, 171–72 (2004) (arguing for antitrust scrutiny of baseball business)[hereinafter Ross, *Reconsidering Flood*].

overturning it are persuasive. Furthermore, the Curt Flood Act of 1998,<sup>105</sup> which partially overruled the exemption for major league players, does not signal that courts should maintain the exemption. More importantly, even accepting the Court's reasoning, the FTC should declare the Rule 4 draft to be illegal as an unfair method of competition.<sup>106</sup>

When the Supreme Court considered *Toolson v. New York Yankees* in 1953, it was clear that under any application of settled doctrine, the business of baseball constituted interstate commerce subject to congressional regulation.<sup>107</sup> As the Court acknowledged in *Flood v. Kuhn*, *Toolson* identified four new reasons that, in the Court's view, justified reaffirming baseball's special exemption: (a) Congress's "positive inaction"<sup>108</sup>; (b) MLB's reliance on the exemption; (c) a concern with the retroactive effect of Sherman Act (treble damage) liability; and (d) a "professed desire that any needed remedy be provided by legislation rather than by court decree."<sup>109</sup> In the end, Justice Blackmun described his judgment as part of a line of cases where "it was concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which at best was of dubious validity."<sup>110</sup>

The case for overruling *Flood* is strong. A precedent can justifiably be overturned when it becomes outdated and after being "tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare."<sup>111</sup> One reason for overruling a precedent is that "the intervening development of the law has 'removed or weakened the

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105. Curt Flood Act of 1998, 15 U.S.C. § 26b (2012); see also *infra* text accompanying notes 124–129.

106. Section 5 of the FTC Act, 15 U.S.C. § 45, makes unfair methods of competition unlawful. Although the scope of section 5 is broader than the Sherman Act, 15 U.S.C. §§ 1–7, conduct which is an unreasonable restraint of trade is a fortiori an unfair method of competition.

107. See 346 U.S. 356, 357–58 (1953) (Burton, J., dissenting) (noting majority's opinion following *Federal Baseball* is contrary to any reasonable understanding of contemporary facts and law). *Federal Baseball* was decided during the so-called *Lochner* era where the Supreme Court sharply limited the scope of Congress's power to regulate interstate commerce. Most relevant was the decision in *United States v. E.C. Knight Co.* holding the Sherman Act inapplicable to the acquisition of virtually all the sugar refineries in Philadelphia because "manufacturing" was not "commerce." 156 U.S. 1, 12 (1895). *Federal Baseball's* view that the playing of baseball games was intra-state commerce was consistent with this holding. After the New Deal, the Supreme Court overruled this doctrine, holding that Congress's power included the ability to regulate intrastate activities with a substantial effect on interstate commerce. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (upholding regulation of home-grown wheat). Consistent with the modern approach, the Court later explicitly concluded that it would not "return[] to the *Knight* approach." *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948).

108. 407 U.S. 258, 283 (1972).

109. *Id.* at 274; see also *id.* at 279 (claiming legislation rather than court decision is "more likely to protect the industry and the public alike" (quoting *Radovich v. NFL*, 352 U.S. 445, 452 (1957))).

110. *Id.* at 278 (quoting *Radovich*, 352 U.S. at 450).

111. *Runyon v. McCrary*, 427 U.S. 160, 191 (1976) (Stevens, J., concurring) (quoting Benjamin Cardozo, *The Nature of the Judicial Process* 150–52 (1921)).

conceptual underpinnings from the prior decision.”<sup>112</sup> When it decided *Flood*, the Court believed that requiring clubs to compete under the antitrust laws could damage the sport.<sup>113</sup> In 1972, no professional sports league had succeeded while allowing vigorous competition for players’ services. Three years after *Flood*, a grievance arbitration interpreting the standard player contract gave players the same relief that Curt Flood had sought under the Sherman Act.<sup>114</sup> The owners and the players’ union responded by reaching a collective bargaining agreement.<sup>115</sup> Under this agreement, the Reserve Clause was substantially modified.<sup>116</sup>

The years since *Flood* have demonstrated that the Court’s concerns there were unfounded. The competition for players resulting from developments in labor law has improved the sport: Attendance at baseball games rose significantly from 1975 to 1985,<sup>117</sup> and the value of baseball franchises has skyrocketed.<sup>118</sup> Moreover, the excessive restrictions on competition that have been allowed to escape antitrust scrutiny have increased labor strife: Eight collective bargaining agreements were negotiated only after a strike or a lockout.<sup>119</sup> Finally, the methodology set forth in *NCAA v. Board of Regents* would both preserve the desirable practices

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112. *Neal v. United States*, 516 U.S. 284, 295 (1996) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989)).

113. Cf. *Flood*, 407 U.S. at 283 (expressing “concern about the confusion and the retroactivity problems that inevitably would result with a judicial overturning of *Federal Baseball*”).

114. *Twelve Clubs Comprising Nat’l League of Prof’l Baseball Clubs & Twelve Clubs Comprising Am. League of Prof’l Baseball Clubs, L.A. & Montreal Clubs v. Major League Baseball Players Ass’n*, 66 Lab. Arb. Rep. (BNA) 101 (1975) (Seitz, Arb.) (noting standard player contract permitted club to unilaterally renew contract for one year only and after one year, player was free agent eligible to be signed by any club).

115. Paul C. Weiler et al., *Sports and the Law* 284 (4th ed. 2011). Were baseball subject to the Sherman Act, this agreement would be exempt from antitrust scrutiny under the labor exemption. See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 234 (1996) (noting “implicit antitrust exemption that applies where needed to make the collective-bargaining process work”).

116. Players with six years of major league service became “free agents,” able to sell their services to the highest bidder; players with two years of experience could submit salary disputes to an independent arbitrator. See Timothy R. Hylan, Maureen J. Lage & Michael Treglia, *The Coase Theorem, Free Agency, and Major League Baseball: A Panel Study of Pitcher Mobility from 1961 to 1992*, 62 S. Econ. J. 1029, 1029–30, 1037 n.24 (1996) (discussing shift from Reserve Clause to free agency and arbitration eligibility).

117. See Stephen F. Ross, *Monopoly Sports Leagues*, 73 Minn. L. Rev. 643, 676 (1989) (noting 57% increase in attendance in years following elimination of Reserve Clause that limited competition for players).

118. Anthony Baldo, *Secrets of the Front Office: What America’s Pro Teams Are Worth*, *Fin. World*, July 9, 1991, at 25, 30 (quoting consultant reporting 1970s and 1980s saw baseball, football, and basketball franchise values enjoy annual compounded increase of twenty percent to twenty-five percent). Granted, television revenues may have been the primary cause of increased franchise revenues, but this franchise-value increase nevertheless casts doubt on claims that competition for players hurts baseball.

119. See Ross, *Reconsidering Flood*, *supra* note 104, at 170–71 (discussing developments since *Flood*).

now employed by MLB and promote consumer–fan interests by barring anticompetitive agreements in a workable manner.

Beyond the *stare decisis* rationale, *Flood* based its decision not to abolish baseball’s exemption on Congress’s awareness of the exemption and its refusal to act.<sup>120</sup> The Court regarded Congress’s refusal to repeal the exemption as tacit approval of the Reserve Clause that Curt Flood was challenging.<sup>121</sup> Indeed, on two separate occasions, each congressional chamber passed legislation that would have effectively legalized the Reserve Clause and other anticompetitive practices, only to have the bills die in the Judiciary Committee of the other House.<sup>122</sup> *Flood* was clear that attaching weight to legislative inaction demanded “something more than mere congressional silence and passivity.”<sup>123</sup> The legislative record since *Flood* reveals more than silence and passivity: Congress considered affirming the exemption and decided not to.

If principles the Court uses to reconsider outmoded precedents suggest that the baseball exemption should be overruled, nothing in the Curt Flood Act of 1998 reflects Congress’s desire to shield MLB from a narrow antitrust claim against the application of the Rule 4 draft to underprivileged youth. The Curt Flood Act repealed baseball’s antitrust exemption in a limited respect, allowing current major league players to file antitrust suits against MLB.<sup>124</sup> Specifically, 15 U.S.C. § 26b(a) of the Act permits players to file antitrust suits “to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business,” but only so long as the lawsuits related to or “affect[ed] employment of major league baseball players.”<sup>125</sup> Further, § 26b expressly limits the Act, providing that “[n]o court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws to” a variety of matters, including litigation initiated by amateur or minor league players or “any other matter relating to organized professional baseball’s minor leagues.”<sup>126</sup>

Indeed, the Curt Flood Act’s legislative history reveals that Congress did not intend for the statute to adopt or reject any of the conflicting

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120. See *Flood v. Kuhn*, 407 U.S. 258, 273–74 (1972) (discussing congressional inaction).

121. *Id.* at 283 (citing Congress’s “positive inaction” that was “something other than mere congressional silence and passivity”).

122. Stephen F. Ross, *The Story of Flood v. Kuhn: Dynamic Statutory Interpretation, At the Time*, in *Statutory Interpretation Stories* 36, 47–51 (William N. Eskridge, Jr. et al., eds. 2011).

123. *Flood*, 407 U.S. at 283.

124. Curt Flood Act of 1988, 15 U.S.C. § 26b(c) (2012).

125. *Id.* § 26b(a).

126. *Id.* § 26b(b).

interpretations of the exemption's scope post-*Flood*.<sup>127</sup> Specifically, during the Senate's deliberation over the bill, Senator Paul Wellstone noted that some courts had recently narrowed the scope of the baseball exemption and asked for confirmation that the Curt Flood Act would not affect these precedents.<sup>128</sup> In response, the bill's cosponsors, Senators Orrin Hatch and Patrick Leahy, confirmed that the Act was "intended to have no effect other than to clarify the status of major league players under the antitrust laws. With regard to all other context or other persons or entities, the law will be the same after passage of the Act as it is today."<sup>129</sup> Although strong political support for minor league baseball played a role in congressional consideration, minor league baseball would in no way be jeopardized by allowing MLB clubs to sign under-privileged youth trained in a domestic academy to a standard minor league contract.

Recently, the Ninth Circuit grievously misinterpreted legislative intent in its reasoning in concluding that *Flood* remained applicable to franchise relocation issues. In *City of San Jose v. Office of the Commissioner of Baseball*,<sup>130</sup> the court ignored this clear legislative history and reasoned that Congress's decision in the 1998 Curt Flood Act to partially override *Flood v. Kuhn* with regard to major league players<sup>131</sup> signaled congressional intent that the Supreme Court should adhere to *Flood* with regard to other aspects of the baseball exemption.<sup>132</sup> The Flood Act itself states that it does not create an antitrust claim regarding franchise relocation,<sup>133</sup> and further that courts shall not "rely on the enactment of this section as a basis for changing the application of the antitrust laws to any conduct, acts, practices, or agreements other than those" relating to major league baseball players.<sup>134</sup> As noted in the legislative history, the clear legislative intent was to overrule *Flood v. Kuhn* partially, while leaving the rest of the exemption subject to

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127. See 144 Cong. Rec. S9621 (daily ed. July 31, 1998) (statements of Sens. Wellstone, Hatch, and Leahy).

128. See *id.* (statement of Sen. Wellstone).

129. See *id.* (statements of Sens. Hatch and Leahy); see also J. Philip Calabrese, Recent Legislation, Antitrust and Baseball, 36 Harv. J. on Legis. 531, 537 n.46 (1999) (summarizing same); Stephen F. Ross, Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues, 52 Case W. Res. L. Rev. 133, 161 n.90 (2001) (same). The quoted statements made on the Senate floor are consistent with the Senate Judiciary Committee report, which stated that the bill was drafted so it "would not implicate issues or actions other than those specified in [§ 26b(a)]. Thus, [§ 26b(b)] makes explicit the Committee's intent that the passage of this bill does not affect the applicability or nonapplicability of the antitrust laws in any other context beyond that specified in [subsection (a)]." S. Rep. No. 105-118, at 6 (1997).

130. 776 F.3d 686 (9th Cir. 2015).

131. Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824 (codified as amended at 15 U.S.C. § 26b).

132. *City of San Jose*, 776 F.3d at 691.

133. 15 U.S.C. § 26b(b)(3).

134. *Id.* § 26b(b).



the same standards of stare decisis that courts regularly use.<sup>135</sup> If the Ninth Circuit's approach were widely followed, it would severely impair Congress's ability to respond in a nuanced fashion to judicial precedents; the Ninth Circuit's approach makes it much more difficult for Congress to partially respond to judicial decisions, while allowing other precedents to be evaluated by later courts as they would be without any congressional intervention.

As noted previously, *Flood* expressed a preference for prospective legislative abrogation of the exemption.<sup>136</sup> Perceiving its choices as limited to overruling *Toolson* and subjecting MLB to full Sherman Act liability or allowing Congress to pass prospective-only legislation, the majority explained its preference for its chosen course by noting that legislation would avoid issues of retroactivity, procedurally could be more inclusive than adversarial antitrust litigation, and substantively might be more flexible than Sherman Act scrutiny.<sup>137</sup> Even if today's Justices were to reject the claim that developments in the past five decades justify overruling *Flood* and were to embrace Justice Blackmun's preference for an alternative to judicial removal of the antitrust shield, another way to serve the public interest would be to subject baseball's practices to the Federal Trade Commission Act.

Both *Radovich* and *Flood* expressed a concern that Sherman Act scrutiny would involve only litigants, while any legislation dealing with anticompetitive practices in baseball should feature hearings including all stakeholders. In the words of Justice Blackmun:

We, therefore, conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision. Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike. The whole scope of congressional action would be known long in advance and effective dates for the legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action.<sup>138</sup>

The FTC has the statutory authority to investigate the business and consumer effects of the Rule 4 draft by conducting hearings that could resemble congressional hearings. The Commission may prosecute any inquiry necessary to its duties in any part of the United States and may "investigate . . . the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce."<sup>139</sup> Although the "business of baseball" enjoys antitrust immunity, *Flood* expressly recognized that baseball was

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135. See *supra* note 127 and accompanying text (noting Act's legislative history).

136. *Flood v. Kuhn*, 407 U.S. 258, 283–84 (1972).

137. *Id.* at 279 (citing *Radovich v. NFL*, 352 U.S. 445, 450–52 (1957)).

138. *Radovich*, 352 U.S. at 450–52.

139. 15 U.S.C. § 46(a).

interstate commerce,<sup>140</sup> which allows the FTC to exercise jurisdiction over its business practices.

Commission hearings could precede any formal law enforcement proceeding against MLB for commission of an unfair method of competition under the FTC Act. These hearings would not only provide the sort of inclusive participation that Justice Blackmun envisioned but would also allow Congress ample time to act on its own to legislate with regard to baseball practices, if it so chose.

Both *Flood* and *Toolson* also expressed concerns about the retroactive effect of a judicial decision and its resultant harm.<sup>141</sup> Unlike the Sherman Act, which permits treble damage liability to those injured by antitrust violations, the FTC would almost certainly tailor its remedial power to a cease and desist order requiring MLB to modify the Rule 4 draft to permit clubs to develop underprivileged players.

There are a number of reasons why courts should no longer preserve the anomalous antitrust exemption for baseball. However, even if the judiciary sees fit to leave *Flood* undisturbed, its reasoning fully permits antitrust scrutiny by the FTC.

#### CONCLUSION

The Rule 4 draft was adopted in the 1960s as a means to address baseball owners' perceptions that unfettered competition in signing amateur players was contributing to competitive imbalance in baseball, and resulting in unduly high wages for unproven young players.<sup>142</sup> At the time, the infrastructure of youth sports allowed most American teenagers with athletic skills—rich, poor, black, or white—to develop baseball skills and, if their talent warranted, secure selection in the draft. Today, that infrastructure has disappeared. Like Dominicans, underprivileged North Americans cannot rely on public or generally available sources to develop baseball skills. Unlike Dominicans, underprivileged North Americans cannot rely on investment by MLB clubs in training elite players.

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140. See 407 U.S. at 258, 269, 273, 275, 279, 285 (discussing “business of baseball”). Another investigative tool, available in both competition and consumer protection matters, empowers the Commission to require the filing of “annual or special” reports or “answers in writing to specific questions” for the purpose of obtaining information about the “organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals” of the entities to whom the inquiry is addressed. 15 U.S.C. § 46(b). The Commission’s § 6(b) authority further enables it to conduct “wide-ranging economic studies that do not have a specific law enforcement purpose” and to “obtain answers to specific questions as part of an antitrust law enforcement investigation.” Fed. Trade Comm’n, A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority (July 2008), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority#N1> [<http://perma.cc/A865-TM5K>]. The Commission’s authority would allow it to investigate the business of baseball proactively. *Id.*

141. See *Flood*, 407 U.S. at 283–84 (adhering to *Toolson*’s reasoning).

142. Bailey & Shepherd, *supra* note 11, at 216–21.

The discriminatory and anticompetitive effects of the Rule 4 draft on poor North American youth can be addressed by a modification that would exempt from the draft those young players unable to provide their own privatized development, where an MLB club steps in to train and develop the player. The failure of MLB clubs to modify the Rule 4 draft constitutes discrimination on the basis of national origin in violation of Title VII of the Civil Rights Act, and an unreasonable restraint of trade under the antitrust laws. To the extent that courts may reject private litigation under the Sherman Act attacking the unmodified draft, the FTC should use its unique practices and issue a prospective cease and desist order requiring the Rule 4 draft's modification.

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