

Temple University

From the Selected Works of N. Jeremi Duru

February 16, 2009

This Field is Our Field: Foreign Players, Domestic Leagues, and the Unlawful Racial Manipulation of American Sport

N. Jeremi Duru



Available at: https://works.bepress.com/n_jeremi_duru/1/

This Field is Our Field:

Foreign Players, Domestic Leagues, and the Unlawful Racial Manipulation of American Sport

N. Jeremi Duru*

INTRODUCTION	2
I. THE MLS POLICY AND ITS ORIGINS.....	5
A. <i>The NASL's Rise and Fall</i>	6
B. <i>American Soccer's International Grounding</i>	8
II. THE EUROPEAN LESSON	11
A. <i>Presaging Bosman: A Movement Toward Inclusion</i>	12
B. <i>The Bosman Case</i>	13
III. BOSMAN'S STATESIDE RELEVANCE: ASSESSING THE MERITS OF A BOSMAN-STYLE CHALLENGE TO THE MLS POLICY	15
A. <i>Title VII, Espinoza, and the MLS Policy</i>	15
B. <i>IRCA and the MLS Policy</i>	17
IV. THE CASE FOR A RACE CLAIM	19
A. <i>The MLS Policy as Disparate Treatment Discrimination</i>	20
1. <i>The Economic Incentive to Discriminate</i>	20
2. <i>Building the Race Discrimination Case: The Individual Action</i>	24
a. <i>The Pretext Inquiry</i>	27
i. <i>Ensuring consistent spectator support</i>	29
ii. <i>Strengthening the National Team</i>	30
iii. <i>Controlling salaries</i>	31
b. <i>The "similarly situated" inquiry and the subjective decision-maker</i>	33
3. <i>Building the Race Discrimination Case: The Class Action</i>	34
B. <i>The MLS Policy as Disparate Impact Discrimination</i>	37
V. THE MLS POLICY, CONTEXTUALIZED – SURVEYING THE AMERICAN SPORTING LANDSCAPE	39
A. <i>The National Football League</i>	40
B. <i>The National Hockey League</i>	41
C. <i>The National Basketball Association</i>	44
1. <i>The NBA's Black Eye: Race, Hip Hop, and Hatred</i>	45
a. <i>Legislating an Image Overhaul</i>	48
b. <i>Pursuing a Personnel Overhaul?</i>	50
2. <i>Lightening the Eye: Internationalization as Cure</i>	51
VI. LESSONS ON LIGHTENING A LEAGUE: WHAT MAJOR LEAGUE BASEBALL STANDS TO LEARN FROM MAJOR LEAGUE SOCCER	56
VII. CONCLUSION	61

INTRODUCTION

During the last several decades, international athletes' presence in professional American sports has reached unprecedented levels. Not all premier professional American sports leagues, however, accommodate internationalization to the same extent. While the National Football League ("NFL"), the National Hockey League ("NHL"), the National Basketball Association ("NBA"), and Major League Baseball ("MLB") do not impose limits on international entrants into their leagues, Major League Soccer ("MLS") does. Under a policy established at the league's founding in 1996 (the "MLS Policy" or the "Policy"), no MLS team may stock its 18-person senior roster with any more than eight international players.¹

From the very beginning, therefore, MLS was designed to exclude. This, in some respects, renders MLS not unlike its sister leagues, all of which have historically discriminated. These other leagues' discriminatory policies, however, precluded based on race rather than citizenship status and have long since lapsed. The NFL, which was founded in 1920,² expurgated blacks in 1934, but reintegrated twelve years later, in 1946.³ The American League and the National League, the two leagues comprising MLB, also included blacks initially and later barred them.⁴ They, however,

* Associate Professor of Law, The James E. Beasley School of Law, Temple University. J.D., Harvard Law School; M.P.P., Harvard University, John F. Kennedy School of Government; B.A., Brown University. I am grateful to Roger Fairfax, Shani King, and ReNika Moore for reviewing drafts of this article and offering their insightful comments. In addition, I am grateful to the Honorable Damon J. Keith for his continuing mentorship and friendship. I also wish to thank my research assistants Clinton Albert and Katie Barber for their valuable assistance. Finally, I wish to thank the Clifford Scott Green Research Fund in Law for supporting this project.

¹ See MAJOR LEAGUE SOCCER, 2008 MLS PLAYER RULES & REGULATIONS, available at <http://web.mlssnet.com/about/league.jsp?section=regulations&content=overview> (last visited Feb. 1, 2009). See text accompanying footnotes 12-14 for discussion of the distinction between MLS' 'international' players and its 'domestic' players.

² The NFL originally operated as the American Professional Football Association, and in 1921 reorganized and changed its name to the American Professional Football League. See PATRICK CLARK, SPORTS FIRSTS 37 (1981). In 1922, it changed its name yet again, this time to the National Football League. See NATIONAL FOOTBALL LEAGUE, HISTORY, available at <http://www.nfl.com/history/chronology/1921-1930#1922> (last visited Feb. 1, 2009).

³ See ARTHUR R. ASHE, JR., A HARD ROAD TO GLORY: A HISTORY OF THE AFRICAN-AMERICAN ATHLETE SINCE 1946 130 (1988).

⁴ See CLARK, *supra* note 2, at 12. Having been excluded from America's premier professional baseball leagues, black baseball players and enthusiasts formed their own leagues. See ARTHUR R. ASHE, JR., A HARD ROAD TO GLORY:

relaxed their bar in 1947, a year after the NFL did so.⁵ In 1950, the NBA admitted its first black player,⁶ and eight years later, the NHL did the same.⁷

So, when MLS began play in 1996, it became the first American sports league in nearly half a century to, as a matter of league-wide policy, openly discriminate in the construction of its teams.⁸ Because, however, MLS' discrimination is ostensibly rooted in citizenship status rather than race, and because the American legal system permits myriad forms of citizenship discrimination, MLS' discrimination has attracted little attention and virtually no criticism. The absence of criticism is, however, unfortunate.

A HISTORY OF THE AFRICAN-AMERICAN ATHLETE 1919-1945 27-30 (1988); SHROPSHIRE, IN BLACK AND WHITE: RACE AND SPORTS IN AMERICA 47 (1996). These leagues, known collectively as the Negro Leagues, "were unique on the American athletic landscape, providing successful alternative outlets for black baseball players to display their talents." N. Jeremi Duru, *Fielding a Team for the Fans: The Societal Consequences and Title VII Implications of Race Considered Roster Construction in Professional Sport*, 84 WASH. U. L. REV. 375, 383 (2006).

⁵ See SHROPSHIRE, *supra* note 4, at 29. Although, Kenny Washington and Woody Strode reintegrated the NFL a year earlier, "[w]hen Jackie Robinson [re]integrated Major League Baseball in 1947, that event was hailed as the biggest civil rights success since the Civil War." *Id.* at 19. Robinson's MLB debut likely received greater attention because professional baseball was at the time substantially more popular among Americans than professional football, *see* ASHE, *supra* note 3, at 128.

⁶ See HOWARD BRYANT, SHUT OUT: A STORY OF RACE AND BASEBALL IN BOSTON 143 (2002); HARVEY ARATON & FILIP BONDY, THE SELLING OF THE GREEN: THE FINANCIAL RISE AND MORAL DECLINE OF THE BOSTON CELTICS 50-51 (1992). The NBA's first black player was Chuck Cooper, drafted by the Boston Celtics out of Duquesne University. *See id.* Later in the 1950 season, the New York Knicks added to their roster Nat "Sweetwater" Clifton and the Washington Capitols added Earl Lloyd. *See* SHROPSHIRE, *supra* note 4, at 31. Notably, although Lloyd joined the NBA after Cooper, Lloyd was the first black player to participate in an NBA game. *See id.*

⁷ *See* CLARK, *supra* note 2, at 69 (1981). The NHL's first black player was the Boston Bruins' Willie O'Ree, who entered the NHL in 1958. *See id.*

⁸ Notably, although decades have passed since teams in the NFL, NHL, NBA, and MLB engaged in overt racial discrimination, covert discrimination continued well after the leagues initially integrated – or in the case of the NFL and MLB, reintegrated. *See* ASHE, *supra* note 3, at 5. Indeed, reflecting on the baseball context, Arthur Ashe, the tennis great and eminent sports historian notes, "The period from Jackie Robinson's debut in April 1947 to 1953 can best be described as one of token integration. In this seven-year stretch, the National League added blacks at the rate of three every two years; the American League just one every two years. Some clubs would just not add any. . . . It took fourteen years for the major leagues to become integrated." *Id.* at 11. Even once the leagues were fully "integrated," as Ashe uses the term, many franchises have persisted in considering race in their personnel hiring processes so as to field teams palatable to the franchises' fan bases. *See generally*, Duru, *supra* note 4.

This article argues that the MLS Policy restricting the numbers of international players on its teams' rosters does, in fact, perpetuate unlawful racial discrimination. While the Policy does not facially discriminate against prospective players on the basis of race, and while its drafters may not have intended racial exclusion, the MLS Policy disproportionately and negatively impacts players of color – particularly blacks and Latinos. In that the MLS Policy serves to racially exclude in violation of federal anti-discrimination law, it demands scrutiny. This article provides that scrutiny, examines the implications the MLS Policy has for America's other premier professional sports leagues, and ultimately argues that MLS should abandon the Policy.

Part I of this article explores the MLS Policy's roots and the circumstances ostensibly motivating its adoption.

Part II examines similar discriminatory policies implemented by other nations' soccer leagues and the ultimate legal invalidation of those policies. This Part focuses principally on the European Court of Justice's groundbreaking disposition of *Union Royale Belge des Societes de Football Association ASBL* ("URBSFA") v. *Jean-Marc Bosman* (the "Bosman case"), which rendered unlawful international player restrictions in European nations' domestic soccer leagues.

Part III considers the form a *Bosman*-style challenge to the MLS Policy would take under American law and assesses such a challenge's likelihood of success, concluding that the MLS Policy would likely pass muster under both the Immigration Reform and Control Act of 1986 ("IRCA") and the national origin discrimination provision embedded in Title VII of the Civil Rights Act of 1964 ("Title VII").

Part IV considers the MLS Policy's racially related consequences and explores the Policy's vulnerability on racial discrimination grounds. Specifically, this Part examines Title VII's racial discrimination provision, and argues the Policy constitutes either disparate treatment or disparate impact racial discrimination in violation of federal anti-discrimination law.

Part V examines the MLS Policy in the context of premier professional American sport, a context in which, as noted above, it stands alone in its overt citizenship discrimination. Specifically, this Part considers the NFL, in which international players are exceedingly rare, the NHL, in which international players predominate, and the NBA, in which the percentage of international players increases year over year, noting that roster internationalization in these leagues' contexts, in contrast with the MLS context, either maintains the leagues' racial status quo or increases the proportion of the leagues' white players. In addition, this Part considers the possibility that these differences in

internationalization's impact explain why roster internationalization is seemingly deemed more palatable in the NFL, the NHL and the NBA, where it is permitted, than in MLS, where it is restricted.

Part VI explores the MLB context, in which internationalization is producing the precise effect the MLS Policy guards against – a “darkening” rather than a “lightening” of the league – and queries whether, in response to internationalization's impact, MLB would or could join MLS in overt citizenship discrimination.

Part VII concludes that the MLS Policy, whether or not intended to do so, artificially suppresses the numbers of MLS' players of color, frustrates the purposes of American anti-discrimination law, and, therefore, merits legal challenge.

I. THE MLS POLICY AND ITS ORIGINS

MLS began play in 1996 as a fledgling league with teams in ten cities around the nation.⁹ During its thirteen year existence, the League has significantly expanded and is now comprised of fourteen teams – thirteen in the United States and one in Toronto, Canada.¹⁰

While MLS shares many characteristics with America's other premier professional sports leagues, its commitment to discriminating along citizenship lines, as noted above, starkly differentiates it.¹¹ MLS categorizes players into two groups – domestic players and international players.¹² MLS defines a “domestic player” as “a U.S. citizen, a permanent resident (green card holder) or the holder of other special status (e.g., has been granted refugee or asylum status).”¹³ MLS defines all other players as “international players.”¹⁴ Since its inception, MLS has

⁹ See Alex Yannis, *Major League Soccer Gets Set for Unveilings*, N.Y. TIMES, Oct. 17, 1995, available at <http://query.nytimes.com/gst/fullpage.html?res=990CEEDD1639F934A25753C1A963958260> (last visited Feb. 1, 2009).

¹⁰ See MAJOR LEAGUE SOCCER: OVERVIEW, <http://web.mlsnet.com/about/> (last visited Feb. 1, 2009).

¹¹ Citizenship restrictions exist at the professional American minor league level as well. See UNITED SOCCER LEAGUES, RULES AND REGULATIONS, 2008 SEASON, available at http://www.uslsoccer.com/aboutus/rules/index_E.html. (last visited Feb. 1, 2009).

¹² See MAJOR LEAGUE SOCCER, 2008 MLS PLAYER RULES & REGULATIONS, *supra* note 1.

¹³ Once MLS placed a team in Toronto, it defined “domestic player” differently in that context: “For Toronto FC, players with the legal right to work in Canada are considered domestic players” *Id.*

¹⁴ See *id.*

restricted the number of international players on a team, but has placed no similar restriction on domestic players' numbers.¹⁵ Initially, MLS prevented each of its teams from employing more than four international players at any given time.¹⁶ Currently, MLS mandates that each team's eighteen person senior roster – the roster of players with guaranteed contracts who are most likely to represent the team in competition – contain no more than eight international players.¹⁷

A. *The NASL's Rise and Fall*

A brief historical exploration of American soccer is necessary to fully understand the MLS Policy, its detriments, and MLS' purported interests in effectuating it. The MLS Policy's origin is largely rooted in the demise of the North American Soccer League ("NASL"). The NASL operated from 1968 through 1984 and stands as the most successful and longest lasting professional soccer league in American history.¹⁸ Ultimately, however, it failed, hurdling from unprecedented success to extinction in just a few years.¹⁹

Almost universally, commentators attribute the league's celeritous decline to its heavy international influence and the financial toll attracting high-caliber international players took on league teams.²⁰ And, almost universally, they identify the onset of the NASL "spending race" with the New York Cosmos' decision to, in 1975, sign Pele, the Brazilian soccer star still regarded as the best player in the sport's history, to a then-unprecedented \$4.5 million dollar, three-year contract.²¹ Pele's impact on the league was immediate as his presence drastically increased the Cosmos'

¹⁵ *See id.*

¹⁶ Alex Yannis, *Soccer Report*, N.Y. Times, July 16, 1996, at D3.

¹⁷ In addition to its senior roster, each team is permitted a "developmental" or "youth" roster of players under twenty-five years old. These rosters, which number ten players, are unregulated as to citizenship status. Developmental or youth players, however, are generally the team's lowest paid players, sign non-guaranteed contracts, and can be waived at any time. MAJOR LEAGUE SOCCER, 2008 MLS PLAYER RULES & REGULATIONS, *supra* note 1. They are clearly each team's second-tier players and are unlikely to represent their clubs in MLS competition, rendering their non-discriminatory treatment minimally meaningful for purposes of this article. *See id.*

¹⁸ WAYNE DOUGLAS RASMUSSEN, HISTORICAL ANALYSIS OF FOUR MAJOR ATTEMPTS TO ESTABLISH PROFESSIONAL SOCCER IN THE UNITED STATES OF AMERICA BETWEEN 1894 AND 1994 (May 18, 1995) (unpublished Ed.D dissertation, Temple University) (on file with Samuel L. Paley Library, Temple University).

¹⁹ ROGER ALLAWAY ET AL, THE ENCYCLOPEDIA OF AMERICAN SOCCER HISTORY 204-05 (David B. Biesel ed., Scarecrow Press, Inc. 2001).

²⁰ *Id.* at 202.

²¹ *Id.* at 229.

popularity.²² Pleased with Pele's contribution, the Cosmos, during the following few years, continued to stock its roster with star players from other countries.²³ Other teams, to the extent they could manage it financially, followed suit.²⁴

The imported players lent the NASL credibility that it had not previously enjoyed and sparked a substantial rise in attendance. Whereas average League attendance per game before Pele's arrival was 7,653 spectators, by 1977 it had nearly doubled to 14,640.²⁵ While the League-wide increase was substantial, the rise in attendance at Cosmos home games was meteoric. Before the 1977 season, the team's attendance record for a home game was 28,436.²⁶ Early in the 1977 season, on June 5, they broke the attendance record with a home crowd of 31,208.²⁷ One week later, they broke the record again with a crowd of 36,826, and a week after that, they shattered the record with 62,394 spectators.²⁸ In August of 1977, they set yet another attendance record, this time hosting 77,691 spectators.²⁹ Many other NASL teams entertained huge crowds as well during 1977,³⁰ and the NASL's popularity had so increased that the American Broadcasting Corporation ("ABC") nationally televised a weekly NASL game.³¹ With soccer spectatorship on the rise throughout the country, NASL teams scrambled to sign players who would attract fan interest and, consequently, "foreign superstars were arriving by the planeload."³²

Not long thereafter, however, the NASL's fortunes precipitously collapsed. Within five years, all of the NASL's original teams had folded and the NASL was reeling.³³ Convinced that the predominance of international players and the salaries international superstars commanded caused the decline, the NASL

²² During the several home games before Pele joined the Cosmos, the team averaged 7,000 spectators, upon his addition, average attendance jumped to 16,000 fans, and after his season-ending injury, attendance dropped back to an average 7,000 spectators. *See Id.* at 200.

²³ *Id.* at 191-92.

²⁴ *Id.* at 230; *see also*, Seth Lubove, *Soccer Socialism* (Major League Soccer Chairman Alan Rothenberg), *FORBES*, Dec. 18, 1995, at 259.

²⁵ *ALLAWAY ET AL.*, *supra* note 19, at 201.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *See RASMUSSEN*, *supra* note 18, at 41.

³⁰ Such crowds included "32,165 in Los Angeles, 45,888 in Minnesota, 32,605 in St. Louis, 56,265 in Seattle, 45,288 in Tampa, 30,277 in Vancouver and 31,283 in Washington." *ALLAWAY ET AL.*, *supra* note 19, at 201.

³¹ *Id.* at 202.

³² *See id* at 201.

³³ *See id* at 203. ("The indications that the NASL was losing ground became unmistakable in 1982. Perhaps the worst was the fact that ABC did not renew its television contract.")

sought to “Americanize” as much as possible in hopes of saving the league.³⁴ Although league rules already mandated that each team’s roster contain at least six Americans,³⁵ the league took the further steps of limiting the number of non-American players permitted in a game at any given time and creating one team, called Team America, on which no foreign citizens were permitted to play.³⁶ The rule alterations, however, did little to revive the NASL, and prior to the start of the 1985 season, the league disbanded.³⁷

Even a cursory examination of the NASL’s ills and the discriminatory actions it took in hopes of curing them reveals the league’s solution to be hopelessly overbroad. While the NASL’s failure lay in teams’ exploding salary structures, and while many of the league’s highest earning players were non-citizens, it was their cost, rather than their citizenship status, that doomed the league. Indeed, the presence of international players had been indispensable to the development of American soccer for nearly a century and, in fact, but for an interest in soccer spurred by international players, the NASL would not have existed.

B. American Soccer’s International Grounding

America’s first soccer league of note, the American Soccer League (“ASL”), operated during the 1920’s and early 1930’s, with teams located in the Mid-Atlantic and Northeastern United States.³⁸ Although founded in 1921, the “heart of [the league’s] tenure” began in 1924 and ran through 1928.³⁹ The defining characteristic of that period, during which the ASL achieved its greatest success, was the league’s inclusion, beginning during the summer of 1924, of substantial numbers of international players.⁴⁰ As foreign players entered the league, bringing with them a

³⁴ DANIEL L. CICCARELLI, A REVIEW OF THE HISTORICAL AND SOCIOLOGICAL PERSPECTIVES INVOLVED IN THE ACCEPTANCE OF SOCCER AS A PROFESSIONAL SPORT IN THE UNITED STATES (Jan. 25, 1984) (unpublished Ed. D dissertation, Temple University) (on file with Samuel Paley Library, Temple University).

³⁵ See KYLE ROTE JR. & BASIL KANE, KYLE ROTE, JR.’S COMPLETE BOOK OF SOCCER 114 (1978).

³⁶ See CICCARELLI, *supra* note 34, at 125-26.

³⁷ See MICHAEL L. LABLANC & RICHARD HENSHAW, THE WORLD ENCYCLOPEDIA OF SOCCER 320 (1994).

³⁸ The level of play in the ASL was, by any standard, exceptional. Indeed, “[s]everal eminent soccer historians concur that some of the best soccer in the world was regularly played in the United States at the time, primarily in the ASL” ANDREI MARKOVITS & STEVEN L. HELLERMAN, OFFSIDE – SOCCER AND AMERICAN EXCEPTIONALISM 111 (2001).

³⁹ ALLAWAY ET AL., *supra* note 19, at 8.

⁴⁰ See *id.* at 9-10.

dynamic style of play theretofore seldom seen in the United States, the league's popularity and prosperity expanded.⁴¹ More popular even than intra-league matches were exhibition matches between ASL teams and teams which had traveled from other nations to play.⁴² The ASL experience reveals that professional American soccer was, from the very beginning, rooted in the international game. Rather than weakening the league, international players strengthened it.⁴³ And, indeed, the league's ultimate demise was a result not of foreign players' predominance or salary demands, but of the stock market crash of 1929 and the ensuing great depression. As it happened, the ASL's teams were disproportionately located in manufacturing towns, such as Bethlehem, Pennsylvania and Fall River, Massachusetts – towns whose economies were particularly ravaged during the depression and rendered incapable of supporting professional soccer teams.⁴⁴ Within a few years of the crash, the ASL folded.⁴⁵

For decades, no American soccer league would achieve the prominence of the ASL, but when one finally did achieve such prominence, it did so as the ASL had, through the use of international players. The International Soccer League ("ISL"), founded in 1960 and existent through 1965, was American in the sense that the league staged its games on American soil, but was distinctly non-American in that the league consisted of between ten and sixteen teams of international players based in other nations – but playing in the ISL during their home leagues' off-seasons – and only one team of American players.⁴⁶ Despite the ISL's scarcity of American players, the league sparked considerable interest, and crowds of over 10,000 spectators – quite large in the American soccer context at the time – routinely attended games.⁴⁷

⁴¹ A May 1, 1926 match between the all-Jewish Viennese Hakoah club and a combination of players from the Indiana Flooring and the New York Giants teams drew a crowd of 46,000 spectators, a record that stood until Pele's career in the NASL. *See* MARKOVITS & HELLERMAN, *supra* note 38, at 111; *See also* ALLAWAY ET AL., *supra* note 19, at 10.

⁴² *See* ALLAWAY ET AL., *supra* note 19, at 10.

⁴³ Like some of the NASL's foreign players, the ASL's international stars commanded high salaries and the cost of employing those players seemed to pay off as "stars chose to immigrate to the United States as the pay was every bit as good, if not better, than other professional leagues around the world." RASMUSSEN *supra* note 18, at 20; *See* ALLAWAY ET AL., *supra* note 19, at 10.

⁴⁴ *See* CICIARELLI, *supra* note 34, at 55.

⁴⁵ The date of the ASL's folding is unclear. *See* ALLAWAY ET AL., *supra* note 19, at 10 ("Exactly when the league came to an end is difficult to pinpoint, because it folded somewhat in stages, making the end either 1931, 1932, or 1933, depending on which stage of its demise is considered the real end.")

⁴⁶ *See* RICHARD HENSHAW, THE ENCYCLOPEDIA OF WORLD SOCCER 372-73 (1979).

⁴⁷ *See* MARKOVITS & HELLERMAN, *supra* note 38, at 119.

By 1966, when *Federation Internationale de Football Association* – soccer’s global governing body better known by its acronym, FIFA – prepared to stage its quadrennial soccer tournament pitting the world’s top national teams against each other, American interest in soccer, sparked largely by the ISL’s success and popularity, had risen to an unprecedented level.⁴⁸ So desirous were American fans of seeing the tournament’s final game between England and West Germany⁴⁹ that the National Broadcasting Corporation (“NBC”) contracted to broadcast it live across North America.⁵⁰ Reaction to the broadcast was overwhelmingly positive, prompting a scramble among United States soccer promoters to capitalize on Americans’ increasing interest in soccer through creation of new professional soccer leagues.⁵¹ Thus, during the following year, two rival professional soccer leagues began play in the United States: the United Soccer Association (“USA”) and the National Professional Soccer League (“NPSL”).⁵²

The USA adopted, but altered, the ISL’s model of professional American soccer. Like the ISL, the USA imported entire teams from other nations to compete in the United States.⁵³ Unlike the ISL, however, the USA affiliated each of the twelve imported teams with an American city.⁵⁴ So, during the two month-long USA season, for example, Italy’s Cagliari soccer club represented Chicago and Ireland’s Glentoran Belfast soccer club represented Detroit.⁵⁵ The NPSL took a more traditional approach to league creation, recruiting players to play for newly formed NPSL teams.⁵⁶

Each league held a substantial advantage over the other. FIFA publicly supported the USA, giving the league instant credibility, and, in fact, FIFA went so far as to outlaw the NPSL and threaten the league’s players with suspension from international competition.⁵⁷ While the NPSL lacked the FIFA support the USA enjoyed, the NPSL managed to establish a television contract with

⁴⁸ See ROTE, JR. & KANE, *supra* note 35, at 88.

⁴⁹ In 1949, Germany was divided into two states, East Germany and West Germany. The country unified in 1990. See Robert M. Berdahl, *German Reunification in Historical Perspective*, 23 BERKLEY J. INT’L L. 496, 499 (2005).

⁵⁰ See Lawrence Casey, *Sports Ledger*, CHICAGO DAILY DEFENDER, Aug. 2, 1966, at 25.

⁵¹ See RASMUSSEN, *supra* note 18, at 28.

⁵² *Id.* at 30; MARKOVITS & HELLERMAN, *supra* note 38, at 164-65.

⁵³ LABLANC & HENSHAW, *supra* note 37, at 314.

⁵⁴ *Id.*

⁵⁵ See *id.*

⁵⁶ See Deane McGowen, *Plans for Nationwide 11-Team Pro Soccer League Formulated Here*, N.Y. TIMES, May 11, 1966, at 83.

⁵⁷ See ALLAWAY ET AL., *supra* note 19, at 197.

the Columbia Broadcasting System (“CBS”), which created a potential revenue stream to which the USA did not have access.⁵⁸

Neither league, however, succeeded in its inaugural year, and in the following year, 1968, the leagues merged to form the NASL.⁵⁹ Standing on the shoulders of the ASL, the ISL, and USA – all of which included, and benefited from, international players – and born of the enthusiasm the 1966 FIFA World Cup engendered among American soccer fans, the NASL was indubitably deeply rooted in the international game. And, indeed, as noted above, the NASL achieved its greatest successes due to non-citizen players’ participation.

So, while a pursuit of high priced international players ultimately seemed to damage the NASL, an international presence did not. Indeed, the histories of American soccer generally, and of the NASL in particular, provide no reason to believe that international players who were not exorbitantly remunerated were detrimental to the league’s success. Rather, excessively high salaries, to whomever they may have been granted, precipitated the NASL’s demise. Consistently regulated salary structures, rather than citizenship discrimination, therefore, could seemingly have been its salvation.⁶⁰ The NASL, however, opted for discrimination, and years later, the MLS, justifying discrimination as necessary to the league’s survival, did the same.

II. THE EUROPEAN LESSON

While the MLS Policy is unique on the American sporting landscape, such policies have long prevailed elsewhere in the world.⁶¹ So, although a rarity at home, the Policy, when conceived, found grounding in the global soccer community context. That context, however, began shifting in recent decades, and on the eve of the MLS’s founding, it shifted mightily. A Belgian soccer player named Jean-Marc Bosman successfully

⁵⁸ *Id.* at 198.

⁵⁹ In 1967, the NPSL filed an \$18 million lawsuit for restraint of trade against FIFA, the United States Soccer Football Association, and the USA, but “by the end of [the first] season, both leagues had run up huge financial losses, made little, if any, impact on the American sports public . . . and decided to merge for the 1968 season after the NPSL agreed to drop its lawsuit against the USA and its organizational allies.” MARKOVITS & HELLERMAN, *supra* note 38, at 165.

⁶⁰ The NASL attempted to implement a salary cap in its final year of existence, but the league’s financial woes were by then beyond remedy. Clive Gammon, *The Nasl: It’s Alive But on Death Row*, SPORTS ILLUSTRATED, May 7, 1984, at 74.

⁶¹ See Martin Greenberg & James Gray, *Citizenship Based Quota Systems in Athletics*, 6 MARQ. SPORTS L.J. 337, 340-41 (1996).

challenged nationality restrictions imposed by the Union of European Football Associations (“UEFA”), the body charged with governing soccer on the European continent, which is home to the world’s most prestigious and competitive soccer leagues.⁶² The *Bosman* decision reverberated throughout the soccer world and, as discussed below, must certainly have sparked MLS analysis as to such a challenge’s prospects under American law.

A. *Presaging Bosman: A Movement Toward Inclusion*

As early as the 1960’s, European nations’ soccer leagues began imposing rules restricting the use of non-citizen players.⁶³ Different nations’ rules have taken different forms, with some restricting the numbers of non-citizen players a club could employ and others placing no restrictions on employment but limiting the number of non-citizens permitted to play during any one game.⁶⁴

Beginning in 1978, however, UEFA sought to regulate, though not eliminate, the nationality discrimination prevailing throughout European soccer. Among the European Union’s member states,⁶⁵ UEFA moved to prohibit “limitations on the number of contracts entered into by each club” with citizens of other nations, but chose not to prohibit restrictions on the number of non-citizen players permitted to participate in any particular match.⁶⁶ Instead, UEFA set a floor on the latter form of discrimination – requiring that no league rule limit the number of non-citizen players appearing in a game to fewer than two.⁶⁷

Just over a decade later, UEFA further narrowed the scope of permissible discrimination through its “three + two rule”.⁶⁸ With this rule, UEFA decreed leagues could not require that teams restrict the numbers of non-citizen players on their lists of players

⁶² See Case C-415/93, *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman, Royal club liegeois SA v. Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v. Jean-Marc Bosman* (“*Bosman*”), 1995 E.C.R. I-4921, para. 129.

⁶³ *Id.* at para. 25.

⁶⁴ See Jesse Gary, Note, *The Demise Of Sport? The Effect of Judicially Mandated Free Agency on European Football and American Baseball*, 38 CORNELL INT’L L.J. 293, 298 (2005).

⁶⁵ Twenty-seven of Europe’s forty-eight nations are members of the European Union. See EUROPA, Member States of the EU, http://europa.eu/abc/european_countries/eu_members/index_en.htm (last visited Feb. 1, 2009).

⁶⁶ See *Bosman*, 1995 E.C.R. I-4921, at para. 26.

⁶⁷ See Amikam Omer Kranz, *The Bosman Case: The Relationship Between European Union Law And The Transfer System in European Football*, 5 COLUM. J. EUR. L. 431, 435 (1999).

⁶⁸ See Rachel B. Arnedt, Comment, *European Union Law And Football Nationality Restrictions: The Economics And Politics Of The Bosman Decision*, 12 EMORY INT’L L. REV. 1091, 1104 (1998).

eligible to play in a particular game (“Team Sheets”) to fewer than three.⁶⁹ The rule also mandated that leagues let teams place on their Team Sheets two additional non-citizens, provided those non-citizens had played in the country in question uninterruptedly for five years.⁷⁰ Leagues were, of course, allowed to permit teams to play more non-citizens than the five described, but not fewer.⁷¹ So, while the rule expanded opportunities for non-citizen players in Europe, it stopped short of eliminating nationality discrimination.

In 1995, four years after UEFA implemented the “three + two rule,” the Court of Justice of the European Communities (“ECJ”)⁷² took the opportunity to assess the legality of such discrimination in deciding the *Bosman* case.⁷³ And despite nationality restrictions’ longevity and wide-ranging acceptance, the Court found them unlawful.⁷⁴

B. *The Bosman Case*

Beginning in 1986, Jean-Marc Bosman played for the Belgian soccer club RC Liege, under a five-year contract.⁷⁵ As the contract term neared its end, RC Liege offered to extend Bosman’s contract for one year if he accepted a salary reduction.⁷⁶ Bosman refused the offer and managed to obtain a contract from a different team, US Dunkerque, based in France rather than Belgium.⁷⁷ Under UEFA rules, a player who leaves a team upon contract expiration is only permitted to join another team if the latter team pays the former a transfer fee.⁷⁸ Although US Dunkerque and RC Liege initially agreed upon transfer compensation, RC Liege, anticipating US Dunkerque’s impending insolvency, essentially voided the deal

⁶⁹ *Id.*

⁷⁰ *Bosman*, 1995 E.C.R. I-4921, at para. 38.

⁷¹ Scotland’s premier professional soccer league, for instance, places no cap on non-citizen players. *Id.* at para. 40.

⁷² The ECJ’s decisions are binding throughout the European Union (“EU”) and its mandate is to ensure “that EU law is interpreted and applied uniformly throughout the member states.” See Arndt, *supra* note 68, at 1095.

⁷³ *Bosman*, 1995 E.C.R. I-4921, at para 132.

⁷⁴ *Id.* at para. 135

⁷⁵ *Id.* at para. 42; See Arndt, *supra* note 68, at 1105

⁷⁶ See Stephan Weatherhill, *Case C-415/93, Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman; Royal Club Liégeois SA v. Jean-Marc Bosman, SA d-Economie Mixte Sportive du Littoral de Dunkerque, Union Royale Belge des Sociétés de Football Association ASBL Union des Associations Européennes de Football; Union des Associations Européennes de Football v. Jean-Marc Bosman. Article 177 reference by Cour d’ Appel, Liège, on the interpretation of Articles 48, 85 and 86 EC. Judgment of the European Court of Justice of 15 December 1995*, 33 COMMON MKT. L. REV. 991, 996 (1996).

⁷⁷ *Id.*

⁷⁸ See *Bosman*, 1995 E.C.R. I-4921, at para. 9

by failing to request that Belgian soccer's governing body, URBSFA, send the French Football Association a certificate clearing the transaction.⁷⁹ Bosman, thusly rendered unemployed, sued RC Liege, URBSFA, and UEFA,⁸⁰ challenging the transfer fee requirement under Article 48 of the Treaty Establishing the European Economic Community (the "Treaty of Rome"), which regards freedom of movement among workers.⁸¹ In addition, Bosman argued that Article 48 rendered unlawful the UEFA rules permitting leagues to impose nationality restrictions.⁸²

Although UEFA asserted that no nationality restriction ever hindered Bosman's career and that his argument bearing on such restrictions was, therefore, not appropriately before the Court, the Court felt otherwise.⁸³ Noting that nationality restrictions "are the foundation of the rules of the various European football associations which reduce [Bosman's] chances of finding employment in other [European Union] member states," the Court found the claim admissible.⁸⁴ Moreover, upon analysis, the Court, as noted above, ruled the nationality restrictions unlawful.

The Court minced no words in rejecting the restrictions, stating, "[n]o deep cognition is required to reach the conclusion that the rules on foreign players are of a discriminatory nature. They represent an absolutely classic case of discrimination The rules on foreign players are therefore incompatible with the prohibition of discrimination under Article 48"⁸⁵ The Court acknowledged that restrictions on numbers of non-citizen players permitted to play in a game were less burdensome than restrictions on numbers of non-citizen players permitted under contract, but the Court nonetheless found restrictions of both sorts inconsistent with Article 48.⁸⁶ Under threat of substantial economic damages, UEFA complied with the Court's decision and abandoned its policy permitting nationality discrimination.⁸⁷

So, although nationality restrictions endured in European soccer for decades, they could not endure direct legal challenge. And, in the end, the question was not a close one. In ultimately dispatching the defendants' argument, the Court explained "[t]he

⁷⁹ *Id.* at para. 33.

⁸⁰ UEFA was not listed as a defendant in the initial complaint, but was later added. *Id.* at para. 39.

⁸¹ Arnedt, *supra* note 68, at 1106.

⁸² See David W. Penn, Note, *From Bosman to Simutenkov: The Application of Non-Discrimination Principles to Non-EU Nationals in European Sports*, SUFFOLK TRANSNAT'L L. REV. 203, 212 (2007).

⁸³ See *Bosman*, 1995 E.C.R. I-4921, at para. 63-67.

⁸⁴ *Id.* at para. 67.

⁸⁵ *Id.* at para. 136.

⁸⁶ *Id.*

⁸⁷ Arnedt, *supra* note 68, at 1107.

rules on foreign players breach [anti-discrimination] principles in such a blatant and serious manner that any reference to national interests . . . must be regarded as inadmissible as against those principles.”⁸⁸

III. *BOSMAN*’S STATESIDE RELEVANCE: ASSESSING THE MERITS OF A *BOSMAN*-STYLE CHALLENGE TO THE MLS POLICY

The *Bosman* decision was groundbreaking, and while of course not binding in the American context, in *Bosman*’s wake, MLS organizers must certainly have analyzed their prospective league’s potential exposure under American law. Any such analysis would have centered then, as it would today, on two statutes. Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Immigration Reform and Control Act of 1986 (“IRCA”). These statutes, and their applicability to MLS international player restrictions, are addressed in turn.

A. Title VII, *Espinoza*, and the MLS Policy

Title VII operates as this nation’s most significant employment discrimination statute.⁸⁹ The statute reads, in relevant part:

“[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”⁹⁰

Title VII’s prohibition applies to both private and public employers with fifteen or more employees,⁹¹ which means the

⁸⁸ *Bosman*, 1995 E.C.R. I-4921, at para. 142. The *Bosman* decision, which prompted some teams to substantially increase their numbers of foreign players, sparked substantial controversy and resistance. Penn, *supra* note 82, at 226-30 (detailing “ongoing attempts to frustrate *Bosman*’s anti-discrimination principles”); Lindsey Briggs, *UEFA v. The European Community: Attempts of the Governing Body of European Soccer to Circumvent EU Freedom of Movement and antidiscrimination Labor Law*, 6 CHI. J. INT’L L. 439, 440-41 (2005). Over a decade later, influential members of the European soccer community continue to actively campaign against the *Bosman* decision and to lament its impact. See *Soccer Roundup: British Minister Favors Quotas on Foreign Players*, N.Y. Times, July 27, 2008, at 1.

⁸⁹ Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB & EMP. L. J. 431, 432-33 (2005).

⁹⁰ Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2007).

⁹¹ See 42 U.S.C. § 2000e(b).

prohibition applies to American professional sports organizations' employment practices.⁹² As such, Title VII applies to the MLS Policy, and the nature of the Policy's exclusion seemingly invites a national origin discrimination claim.⁹³ An analysis of what "national origin" discrimination encompasses, however, reveals the difficulty any such charge would face.

Title VII does not clearly define the term "national origin."⁹⁴ While Title VII defines what "sex" and "religion" mean in the context of the statute, it does not do the same for "race," "color," or "national origin."⁹⁵ The omission, of course, created for courts the opportunity to read into "national origin" what they felt appropriate, and the consequence was a narrower definition than might otherwise apply. After substantial debate in the lower courts as to the meaning of "national origin," the United States Supreme Court, in 1973, addressed the issue in deciding *Espinoza v. Farah Manufacturing Co.*⁹⁶ In that case, Farah Manufacturing Company, pursuant to its policy against hiring non-U.S. citizens, rejected Cecilia Espinoza's application for employment with the company as a seamstress.⁹⁷ Although Espinoza was a Mexican citizen, she was, at the time of her rejection, lawfully residing in the United States.⁹⁸ Espinoza interpreted Farah Manufacturing's hiring policy as privileging individuals of American national origin

⁹² MLS is notably unique among such organizations. Whereas America's other premier sports leagues serve as umbrella organizations for the leagues' various teams, MLS operates as a single entity. The league owns the rights to all of the league's players, owns all of the league's teams, and provides for the allocation of the various players among the different teams. As a single entity, MLS is immune to charges that it seeks to restrain trade through conspiracy. Its single entity status, however, increases its exposure to employment discrimination charges, as it is the direct employer of all the league's players. See *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 53 (2002).

⁹³ It bears noting that Title VII's protections extend beyond citizens to "any individual[s]" who suffer discriminatorily unlawful adverse employment actions and, as such, an international player's non-citizen status will not impede his Title VII challenge. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2007). Indeed, many courts hold that even *undocumented* non-citizens can assert Title VII claims. See David Weissbrodt, *Remedies for Undocumented Noncitizens in the Workplace: Using International Law to Narrow the Holding of Hoffman Plastic Compounds, Inc. v. NLRB*, 92 MINN. L. REV. 1424, 1426 (2008) (detailing the U.S. Supreme Court's *Hoffman Plastic* ruling limiting undocumented non-citizens' ability to challenge adverse employment actions under the National Labor Relations Act and explaining that a plurality of courts refuse to expand the case's holding into the Title VII realm.)

⁹⁴ See *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 89 (1973).

⁹⁵ See Civil Rights Act of 1964, 42 U.S.C. § 2000e-3 (2007).

⁹⁶ *Espinoza*, 414 U.S. 86 (1973).

⁹⁷ *Id.* at 87.

⁹⁸ *Id.*

over individuals of Mexican national origin and, thus, violating Title VII's prohibition against national origin discrimination.⁹⁹

Espinoza prevailed before the United States District Court for the West District of Texas, which found that Farah Manufacturing's refusal to employ non-U.S. citizens amounted to national origin discrimination under the statute.¹⁰⁰ The United States Court of Appeals for the Fifth Circuit, however, reversed, and the United States Supreme Court affirmed the reversal.¹⁰¹ Both the Circuit Court and the Supreme Court refused to apply Title VII as Espinoza urged.

Key to the Supreme Court's ultimate disposition was a distinction between national origin and citizenship. Recognizing that Congress, in crafting Title VII, failed to define the term "national origin," the Court turned, for insight, to various portions of the Act's legislative history, ultimately concluding that the Act's prohibition on national origin discrimination does not "make[] it illegal to discriminate on the basis of citizenship or alienage."¹⁰² *Espinoza*, therefore, teaches that among US citizens, employers may not, under Title VII, discriminate against persons because of their national origins, but that employers *may*, under Title VII, lawfully discriminate against non-US citizens, whatever their national origins, simply because they are not US citizens. MLS' citizenship discrimination, therefore, would seem to pass muster under *Espinoza*. It does not disadvantage US citizens of any particular national origin. Rather, it disadvantages non-citizens *vis a vis* citizens, which is precisely what the *Espinoza* Court deemed lawful.

B. IRCA and the MLS Policy

IRCA's protections, however, reach beyond Title VII's national origin discrimination prohibition to protect individuals *Espinoza* leaves vulnerable.¹⁰³ Congress enacted IRCA primarily to prohibit the employment of unauthorized aliens, but included in IRCA an anti-discrimination provision, which created a theretofore unprecedented cause of action for persons seeking to challenge

⁹⁹ *Id.* at 95.

¹⁰⁰ *Espinoza v. Farah Mfg. Co.*, 343 F. Supp. 1205, 1207 (W.D. Texas 1971).

¹⁰¹ *Espinoza*, 414 U.S. at 88.

¹⁰² *Id.* at 94-95.

¹⁰³ Whereas Title VII applies only to entities with fifteen or more employees, *see* 42 U.S.C. § 2000e(b), IRCA protects employees of entities with three or more employees, *see* 8 U.S.C. 1324b (a)(2) (1996), and thus protects a segment of the workforce Title VII does not protect.

employment-based citizenship discrimination.¹⁰⁴ Under the statute, it is unlawful to discriminate in the hiring or recruitment of, or to discriminatorily discharge, any non-US citizen who is a permanent US resident, an asylee or a refugee.¹⁰⁵ IRCA's anti-discrimination provision received its first significant test in 1987, less than a year after its enactment.

During the previous year, Zeki Yeni Komsu, a Turkish citizen and United States permanent resident, applied to be a pilot with Mesa Airlines.¹⁰⁶ The airline, however, rejected Komsu's application pursuant to its policy of hiring only United States citizens unless such citizens were unavailable for hire.¹⁰⁷ Upon learning of Mesa Airlines' decision and the policy underlying it, Komsu filed a citizenship discrimination action with the U.S. Department of Justice's Office of Special Counsel (OSC), the administrative body responsible for fielding IRCA claims.¹⁰⁸ The Administrative Law Judge (ALJ) hearing the Komsu case found that Mesa's policy flatly violated IRCA's antidiscrimination mandate.¹⁰⁹

While Title VII's national origin prohibition provision poses little threat to a regime of citizenship discrimination, IRCA potentially poses a substantial threat, which MLS organizers may well have recognized. To comport with IRCA, MLS could not have flatly privileged citizens over non-citizens, but rather required a more nuanced form of discrimination, which is what the Policy provides. Closely tracking IRCA's language, the Policy, as noted in Part I, privileges a player who is a U.S. citizen or "a permanent resident (green card holder) or the holder of other special status (e.g., has been granted refugee or asylum status)." The Policy seems, therefore, to permit discrimination only to the extent IRCA does, and thus to avoid IRCA liability. Through crafting the Policy as it did, MLS has averted UEFA's fate.

¹⁰⁴ See Daniel H. Tabak, *Friendship Treaties and Discriminatory Practices*, 28 COLUM.J.L. & SOC. PROBS. 475, 483-85 (1995).

¹⁰⁵ These protected individuals maintain their protection as long as they pursue naturalization within a specified period after qualifying for naturalization. IRCA, 8 U.S.C. 1324b (a)(3) (1996).

¹⁰⁶ *United States v. Mesa Airlines*, 1 O.C.A.H.O. 74, 6-7 (1989).

¹⁰⁷ Eric Trigg, Mesa's director of operations, stated the corporation's policy was "to hire only U.S. citizens if a sufficient number of qualified citizens is available to fill the positions needed." *Id.* at 27. Mesa's general counsel elaborated on the corporation's hiring practices, noting that Mesa first "removes all resumes of pilots who do not have sufficient time according to Mesa's minimum standards to be considered as a pilot" and, second, "once determin[ed] that the number of qualified U.S. citizens exceeds the number of job openings, the Company will remove the non-citizens' resumes from the stack . . ." *Id.* at 27-28.

¹⁰⁸ *Id.* at 13.

¹⁰⁹ *Id.* at 52.

So, while Bosman successfully challenged nationality restrictions in Europe, there appeared little threat, as MLS began operations, that a *Bosman* analogue in the United States could have similar success in challenging the Policy. Indeed, the *Bosman* decision, through highlighting the possibility of legal challenge, may have increased MLS organizers' vigilance in crafting the Policy to comport with applicable American law. Ultimately, in MLS' fourteen-year existence, the Policy has endured no substantial challenge.

IV. THE CASE FOR A RACE CLAIM

A searching examination of the MLS Policy and its consequences, however, reveals the Policy has spawned an additional societal cost – racial discrimination. Whatever one's view of the MLS Policy and MLS's intention in enacting it, the Policy serves to numerically limit the league's players of color. The percentage of MLS' players of color has never risen above 42%.¹¹⁰ And, at the start of the 2006 season, players of color comprised only 39% of the league.¹¹¹

If MLS did not cap the number of international players permitted on its teams, however, the league's complexion would likely be quite different. The international players who join MLS hail primarily from Latin America, the Caribbean, and Africa, and are, unsurprisingly, largely of color.¹¹² The league's domestic players are, in contrast, largely white.¹¹³ While domestic players can compete for all of MLS' roster positions, international players must compete among themselves for a subset of those positions.¹¹⁴ In essence, then, the MLS Policy sets a higher bar for these international players, the majority of whom are of color, than it sets for domestic players, the majority of whom are white.

So, while the Policy may be invulnerable to IRCA challenge and Title VII national origin challenge, this demographic consequence suggests the Policy may be vulnerable to Title VII challenge under race analysis. Such vulnerability exists whatever MLS's intent, as employers are potentially liable for both intentional (disparate treatment) discrimination and unintentional (disparate impact) discrimination. Discussion of these two Title

¹¹⁰ See RICHARD LAPCHICK, DEVOS SPORT BUS. MGMT. PROGRAM, THE 2006 RACIAL AND GENDER REPORT CARD: MAJOR LEAGUE SOCCER (2007), http://www.bus.ucf.edu/sport/public/downloads/2006_RGRC_MLS.pdf at 12. (last visited Feb. 1, 2009).

¹¹¹ *Id.*

¹¹² See MLS PLAYERS, <http://www.mlssoccer.com/players/> (last visited Feb. 1, 2009).

¹¹³ *Id.*

¹¹⁴ See MAJOR LEAGUE SOCCER, 2008 MLS PLAYER RULES & REGULATIONS, *supra* note 1.

VII theories and their potential application in the MLS context follow.

A. The MLS Policy as Disparate Treatment Discrimination

While there exists no dispositive evidence of discriminatory intent, it is certainly possible MLS desired a predominantly white league and believed the Policy to be a lawful means of attaining that outcome. To assume MLS desired a predominantly white league is, of course, not necessarily to assume the League's decision-makers were perniciously racist. Indeed, from the beginning, MLS has actively reached out to Latino fans.¹¹⁵ However, perhaps recognizing that the majority of its league-wide fan base would be white,¹¹⁶ MLS may have made a calculated business decision that the fledgling league would most easily attain success if the majority of its players were white. Such a decision would not have been unprecedented or, necessarily, irrational.

1. The Economic Incentive to Discriminate

Consider, for example, the NBA's Boston Celtics' organizational history. Although the Celtics were the first team

¹¹⁵ See Milt Northrup, *Soccer League Gets Fast Start at the Gate*, BUFFALO NEWS, June 15, 1996, at B1 ("MLS is directing a lot of its marketing at the nation's Spanish-speaking population") MLS has continued, since its founding, to seek a stronger connection with the Latino community. By 2003, nine of the league's then ten teams broadcast their games in Spanish on both radio and television, and the League had begun sponsoring a four-on-four soccer tournament called Futbolito, which it held in ten cities around the nation and which it marketed directly to Latino fans. See Jack Bell, *MLS Woos Hispanic Fans to the Game They Love*, N.Y. TIMES, Nov. 23, 2003, at D1. Further, in 2007, MLS created a Latin American Advisory Board, which according to an MLS press release, consists of "a diverse cross-section of individuals from the Latin American community committed to the growth of MLS and the sport in the United States. . . [and] which represents MLS' continued dedication to the Latin American community." *Major League Soccer Unveils Latin American Advisory Board*, July 17, 2007, http://web.mlsnet.com/news/mls_news.jsp?ymd=20070717&content_id=106089&vkey=pr_mls&fext=.jsp (last visited Feb. 1, 2009).

¹¹⁶ Although MLS had a "potentially huge base of Latin American fans," Latin Americans comprised only a minority of MLS' spectators. Paul Gardner, *Latin American Flair Will Boost MLS Popularity*, N.Y. SUN, Sept. 11, 2007, at 5 (emphasis supplied). In 1998, two years after MLS' inception, Latin Americans comprised 25% of the league's spectators, see David Plotz, *Major League Soccer: America's Un-American Sports League*, SLATE MAGAZINE, March 29, 1998, <http://www.slate.com/id/1858/> (last visited Feb. 1, 2009), and while that number for years steadily grew at a rate of roughly 1% per year, see Bell, *supra* note 115, at D1 (noting that during the 2002 season, 30% of MLS spectators were Latin American), many Latin Americans continue to view the MLS skeptically. See Gardner, *supra* at 5.

in the NBA to employ a black player,¹¹⁷ to put an entirely black team on the court at the same time,¹¹⁸ and to hire a black coach,¹¹⁹ some twenty years after accomplishing these milestones, at a time when almost seventy-five percent of the league's players were black,¹²⁰ "the Celtics were conspicuous as the NBA team employing fewer black players than any other."¹²¹ In fact, during the 1985-86 and 1986-87 seasons, "the Celtics' twelve-man roster consisted of four black players and eight white players and [thus] stood in sharp contrast with the composition of the league."¹²² The team's composition was certainly no accident. Noting the Celtics' disproportionately high number of white players, University of Massachusetts Sociologist Wornie Reed, during the 1986-87 season, launched a statistical analysis of the disproportionality, and concluded the Celtics intentionally considered race in crafting the team's roster.¹²³ So dedicated were the Celtics to this race-considered roster construction, that disproportionate whiteness became central to the organization's identity. Indeed, even years after the Celtics abandoned such blatant discriminatory hiring practices, writes Washington Post and ESPN journalist Michael Wilbon, "the Celtics are synonymous with whiteness"¹²⁴

While Reed did not proceed to explore the reasons underlying the Celtics long-standing discriminatory player personnel hiring practices, the Celtics' historical development as an economic enterprise reveals the team's motivation – they did it to please the fans and, therefore, to maximize fan-generated profits.¹²⁵ The Celtics' transformation from equal opportunity pioneer to stark racial disproportionality was spurred:

¹¹⁷ See ARATON & BONDY, *supra* note 6, at 50-51 (1992); BRYANT, *supra* note 6, at 143.

¹¹⁸ See ARATON & BONDY, *supra* note 6, at 58; BRYANT, *supra* note 6, at 143.

¹¹⁹ See ARATON & BONDY, *supra* note 6, at 51; BRYANT, *supra* note 6, at 143.

¹²⁰ By the 1985-86 NBA season, blacks constituted 72% of the NBA's players. See ARATON & BONDY, *supra* note 6, at 80.

¹²¹ See Duru *supra* note 4, at 395 (citing BRYANT, *supra* note 6, at 143-44).

¹²² *Id.* at 395-96.

¹²³ See Gregory Witcher & Jonathan Kaufman, *Blacks Split on Backing Celtics*, BOSTON GLOBE, June 4, 1987, at 1.

¹²⁴ Michael Wilbon, *A Perceptible Change*, WASH. POST, June 5, 2008, at E01. In light of this organizational identity, Wilbon writes, the Celtics were inescapably conspicuous as they appeared in the 2008 NBA Championship with an almost exclusively black team. See *id.* In fact, the Celtics' transition away from devoted race-considered roster construction began during the 1990's under then-General Manager Dave Gavitt's leadership. See ARATON & BONDY, *supra* note 6, at 243.

¹²⁵ Araton & Bondy, *supra* note 6, at 58.

by professional basketball's, and thus the Celtics's evolution during the 1970's from a little known entertainment source into a substantial economic enterprise reliant on attracting a fan-base to pay admission and fill arena seats. Attracting fans in racially polarized Boston, and thus ensuring economic viability, demanded a largely white team.¹²⁶

Jo Jo White, a Celtic for several years during the 1980's, plainly explains that the city of Boston simply "wouldn't support a majority black team, even if it were successful," and as such, in creating an overwhelmingly white team, Celtics management was "merely responding to the will of the people."¹²⁷ Former Celtics co-owner Alan Cohen expressed the same sentiment in more veiled terms, indicating the importance in the overwhelmingly black NBA of "hav[ing] some balance on the team, in terms of race."¹²⁸

While the Celtics' consideration of race in constructing their roster was particularly obvious, it was certainly not anomalous. Consider former Cleveland Cavaliers owner Ted Stepien's view on considering race in crafting his team's roster: "[H]alf the squad should be white. I think people are afraid to speak out on that subject. White people have to have white heroes. I'll be truthful, I respect [blacks], but I need white people. It's in me."¹²⁹ Utah Jazz leadership has seemingly maintained a similar perspective. In fact, in each season since 1990, "the percentage of white players on the Utah Jazz's roster has outstripped the percentage of white players in the league."¹³⁰

Although such race consideration might initially impress as aberrant, it is not. In a groundbreaking 1991 American Journal of Economics & Sociology study, a study published only a few years after the Celtics fielded their grossly disproportionate teams and only a few years before MLS' founding, scholars Eleanor Brown, Diane Keenan, and Richard Spiro examined the preferences of NBA fans, and concluded, "white fans... have a taste for seeing

¹²⁶ Duru, *supra* note 4, at 396.

¹²⁷ BRYANT, *supra* note 6, at 144; ARATON & BONDY, *supra* note 6, at 58.

¹²⁸ ARATON & BONDY, *supra* note 6, at 123.

¹²⁹ *Id.* at 181.

¹³⁰ Duru, *supra* note 4, at 400 (citing Richard Lapchick, The 2008 Racial and Gender Report Card: National Basketball Association, 2007, http://www.bus.ucf.edu/sport/public/downloads/NBA_Report_Card_2008.pdf (last visited Feb. 1, 2009) (notably, Dr. Lapchick did not compile statistics for the 2002-03 NBA season); http://www.nba.com/jazz/history/history_roster_ah.html?nav=ArticleList (last visited Feb. 1, 2009); www.basket-stats.info/players/abc/f.htm (last visited Feb. 1, 2009).

white players.”¹³¹ This customer discrimination seemingly motivated clubs’ personnel decisions across the NBA.¹³²

Unfortunately, the race-considered roster construction phenomenon has not vanished; it has endured. A 2002 Journal of Sports Economics study, reflecting on the aforementioned 1991 American Journal of Economics & Sociology study, revealed that still, after the century’s turn, “[NBA] teams are responding to customer discrimination.”¹³³ Indeed, as acclaimed New York Times Sports Columnist Bill Rhoden expresses in his 2007 book, *Forty Million Dollar Slaves: The Rise, Fall, and Redemption of the Black Athlete*, “the NBA actively grooms as many non-black players as it can.”¹³⁴ Although perhaps glaring in the NBA, the phenomenon is not restricted to that context, as revealed by a 2001 Texas Hispanic Journal of Law and Policy study concluding that like the market for NBA players, “the market for Major League Baseball players is characterized by customer discrimination.”¹³⁵

¹³¹ Eleanor Brown, Diane Keenan & Richard Spiro, *Wage and Nonwage Discrimination in Professional Basketball: Do Fans Affect it?*, 50 AM. J. OF ECON. & SOC. 333, 343 (1991).

¹³² In a league dominated by black players, race-considered roster construction in the NBA often saw expression among the rarely utilized players. Recognizing that fans seeking to see white players were indifferent as to whether those players actually participated meaningfully in games, *Brown, Keenan & Spiro, supra* note, at 339, NBA teams seemingly sought to maintain a ‘white’ presence on their teams without sacrificing competitiveness through filling their final several roster spots – the spots allocated to reserves – disproportionately with white players. Indeed, “[w]hile, in 1991, 72.4% of the league’s players were black and 27.6% were white, of the [seldom used reserves], only 47.4% were black and 52.6% were white.” Duru, *supra* note 4, at 397 (citing ARATON & BONDY, *supra* note 6, at 124). Again, the trend was most noticeable with regard to the Celtics: “[w]ith the exception of Artis Gilmore for forty-seven games in 1988, the Celtics’ backup center position to Robert Parish was virtually a closed union shop, passed down from Rick Robey to Eric Fernsten to Greg Kite to Bill Walton to Mark Acres to Brad Lohaus to Joe Kleine. If a fading white veteran such as Walton, Pete Maravich, Scott Wedman, or Jim Paxson was available, the Celtics could be counted on to make room.” ARATON & BONDY, *supra* note 6, at 122. And, as one Boston sportswriter, explains, the trend was no secret: “[i]t’s been a running joke for years: white plus height equals a job with the Boston Celtics. The white guy will always find a home in a Boston jersey. If it wasn’t Jerry Sichting, it was Scott Wedman, or Greg Kite, Mark Acres, Jim Paxson, or Fred Roberts.” BRYANT, *supra* note 6, at 144.

¹³³ Richard Burdekin, Richard Hossfeld & Janet Smith, *Are NBA Fans Becoming Indifferent to Race? Evidence from the 1990s*, 6 J. OF SPORTS ECON. 144, 147-48 (2002). Burdekin, Hossfeld, and Smith note that although the NBA, as a whole, does not erect racially discriminatory barriers to entry, “there remains a correlation between a team’s racial composition and the racial composition of the city in which the team is based.” *Id.* at 155.

¹³⁴ WILLIAM C. RHODEN, *FORTY MILLION DOLLAR SLAVES* 67 (2006).

¹³⁵ Ilyana M. Kuziemko & Geoffrey C. Rapp, *Customer Racial Discrimination in Major League Baseball: Is There No Hope For Equal Pay?*, 7

It is conceivable, then, that, recognizing the customer discrimination existent in American sport and thus potentially existent among MLS' prospective fans, and desperate to launch a successful league, the MLS brain trust intended to limit the number of non-white players in the league and to do so by means of the Policy. While MLS has never made any such admission, it has clearly considered, and catered to, perceived fan preferences regarding race and ethnicity through its allocation of players among teams.¹³⁶ While such strategic allocation does not confirm that MLS instituted the Policy as a means of satisfying league-wide race-based customer discrimination, it certainly supports that possibility.

2. *Building the Race Discrimination Case: The Individual Action*

Of course, even if both preceded and perhaps rational, if the MLS intentionally limits the numbers of blacks and Latinos in its ranks, it violates Title VII's prohibition on race-based discrimination.¹³⁷ And while, as noted above, there does not

TEX. HISP. J.L. & POL'Y 119, 142 (2001). It bears noting that scholars are not united on this score. For instance, economists Craig A. Depken II and Jon M. Ford, examining fan selection of MLB All-Star Game participants between the years 1990 and 2000, concluded that there did not exist customer-based discrimination against minority players. See Craig A. Depken II and Jon M. Ford, *Customer-Based Discrimination Against Major League Baseball Players: Additional Evidence from All-Star Ballots*, <http://www.uta.edu/depken/P/cbd.pdf>. (last visited Feb. 1, 2009)

¹³⁶ Stefan Fatsis, *Futbol invades the U.S.—again*, WALL STREET JOURNAL, April 5, 1996, at B9 (detailing MLS' strategic initial player assignments).

¹³⁷ The United States Equal Employment Opportunity Commission ("EEOC"), which Congress created to enforce Title VII, see Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405, 438 (2006), categorizes Latinos/as as a racial group for Title VII purposes and protects them from race-based employment discrimination. See U.S. Equal Employment Opportunity Commission, *Race/Color Discrimination*, <http://eeoc.gov/types/race.html> (last visited Feb. 1, 2009) ("Equal employment opportunity cannot be denied any person because of his/her racial group Title VII's prohibitions apply regardless of whether the discrimination is directed at Whites, Blacks, Asians, Latinos"). Latinos/as are, however, "racially heterogeneous," rendering this racial categorization awkward and problematic. Gloria Sandrino-Glasser, *Los Confundidos: De-Conflating Latinos/As' Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69, 90-94 (1998); Angela P. Harris, *From Color Line to Color Chart?: Racism and Colorism in the New Century*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 52, 57-58 (2008). This reduction of "Latinos/[as] to an American racialized group" ignores "historical differences and diverse experiences" among members of the Latino/a community, Sandrino-Glasser, *supra* note at 94, and has confused judges. See Harris, *supra* note at 57. Nonetheless, because Title VII deems Latinos/as a protected racial group, Title VII would potentially provide a Latino MLS player or prospective player a cause of action for racial employment discrimination.

appear to exist evidence of such intent, no such evidence is necessary for Title VII liability to adhere. Indeed, recognizing the often covert nature of discrimination in America,¹³⁸ the Supreme Court has concluded that plaintiffs need not present direct evidence of discrimination to establish Title VII liability. In fact, through its decisions in *McDonnell Douglas Corp. v. Green*¹³⁹ and *Texas Dept. of Community Affairs v. Burdine*,¹⁴⁰ the Court created a three-stage burden-shifting framework designed to identify veiled intentional discrimination in Title VII cases.¹⁴¹

As an initial matter, under the framework, a plaintiff is required to establish a *prima facie* case of discrimination.¹⁴² To do so, he must show that: (i) he belongs to a class of individuals protected under Title VII; (ii) he was qualified for the position;¹⁴³ (iii) he was

¹³⁸ See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 978 (1988) (“Simply because no inference of discriminatory intent can be drawn . . . it does not follow that these supervisors always act without discriminatory intent. Even if it is assumed that discrimination by individual supervisors can be policed through disparate treatment analysis, that analysis would not solve the problem created by subconscious stereotypes and prejudices that lead to conduct prohibited by Title VII.”).

¹³⁹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

¹⁴⁰ *Tex. Dep’t. of Cmty. v. Burdine*, 450 U.S. 248, 254 (1981).

¹⁴¹ See *McDonnell Douglas Corp.*, 411 U.S. at 802; *Burdine*, 450 U.S. at 254.

¹⁴² See *McDonnell Douglas Corp.*, 411 U.S. at 802; *Burdine*, 450 U.S. at 252-253. While the *prima facie* case is an established element of Title VII disparate treatment actions, many commentators have long viewed it as unhelpful and unnecessary for the disposition of disparate treatment cases. See http://lawprofessors.typepad.com/laborprof_blog/2008/04/whats-so-great.html. (last visited Feb. 1, 2009). The United States Court of Appeals for the D.C. Circuit recently joined these calls for its elimination, asserting the *prima facie* case inquiry is “a largely unnecessary sideshow [which] has not benefited employees or employers; nor has it simplified or expedited court proceedings”. *Brady v. Office of Sergeant at Arms*, No. 06-5362, (D.C. Cir. Mar. 28, 2008). Going forward in the United States District Court for the District of Columbia, the court decreed, when hearing a Title VII disparate treatment action:

“the [] court need not--and should not--decide whether the plaintiff actually made out a *prima facie* case under *McDonnell Douglas* Rather, in considering an employer’s motion for summary judgment or judgment as a matter of law . . . , the district court must resolve one central question: Has the employee produced sufficient evidence for a reasonable jury to find that the employer’s asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee on the basis of race, color, religion, sex, or national origin?” *Id.*

¹⁴³ Importantly, to satisfy this prong of the *prima facie* case, plaintiff need not prove greater qualification than the person ultimately hired, and according to some courts, need not prove equal qualification to the person ultimately hired. See THOMAS R. HAGGARD, UNDERSTANDING EMPLOYMENT DISCRIMINATION 69

rejected despite his qualifications; and (iv) the position remained open for other candidates to pursue.¹⁴⁴

If the plaintiff is successful in establishing a *prima facie* case, the burden shifts to the defendant to provide a legitimate, non-discriminatory explanation for its challenged employment action.¹⁴⁵ Assuming the defendant satisfies this burden, plaintiff may ultimately prevail by proving, again by a preponderance of the evidence, that the defendant's proffered reason is pretext for unlawful discrimination.¹⁴⁶

The first two of the framework's three steps do not require overwhelming showings. Although a plaintiff carries a burden of persuasion in making its *prima facie* case, courts have found the plaintiff need only create a mere inference of discrimination to meet the burden.¹⁴⁷ The defendant's burden in responding to the *prima facie* case is even lower. It need not persuade. It need only produce legitimate, non-discriminatory reasons for its challenged Policy or decision.¹⁴⁸ And whether defendant's reasons be "silly," "implausible," "fantastic," or "superstitious," so long as they are non-discriminatory, courts may deem them sufficient.¹⁴⁹

(2001). Rather, the plaintiff must prove qualification as evidenced by meeting the position's minimum criteria. *Id.*

¹⁴⁴ See Zachary D. Fasman & Barbara L. Johnson, *Evidence Issues and Jury Instructions in Employment Cases*, SM 059 A.L.I. A.B.A. 243, 262. (2007).

¹⁴⁵ See *McDonnell Douglas Corp.*, 411 U.S. at 802. Under traditional disparate treatment analysis, a defendant may, rather than proffer a legitimate non-discriminatory reason for its actions, acknowledge it discriminated and seek shelter under the Bona Fide Occupational Qualification ("BFOQ") doctrine. See Clare Tower Putnam, *When Can a Law Firm Discriminate Against its own Employees to Meet a Client's Request? Reflections on the ACC's Call to Action*, 9 U. PA. J. LAB. & EMP. L. 657, 662-663 (2007).

This narrow doctrine protects discrimination otherwise prohibited under Title VII if the discrimination is "reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. 2000e-2(e)(1). It is, of course, difficult to imagine MLS conceding that its international player restrictions are pretext for racial discrimination and then arguing that being a member of a particular race is a BFOQ for playing in MLS. Assuming, however, that MLS did so, its argument would be unavailing as the BFOQ defense does not apply in cases of race or color discrimination. *Id.*

¹⁴⁶ See *McDonnell Douglas Corp.*, 411 U.S. at 804.

¹⁴⁷ *Burdine*, 450 U.S. at 253 (establishing a *prima facie* case is "not onerous"); see also *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 41 (5th Cir. 1996) (a *prima facie* case requires "a very minimal showing").

¹⁴⁸ See *Burdine*, 450 U.S. at 254.

¹⁴⁹ *Purkett v. Elem*, 514 U.S. 765, 768 (1995). The ease with which defendants meet this burden is legendary. Indeed, the 11th Cir. has gone so far as to hold that an "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as the action is not for a discriminatory reason." *Nix v. WLCY Radio*, 738 F. 2d 1181, 1187 (11th Cir. 1984). (emphasis supplied).

a. *The Pretext Inquiry*

Consequently, an individual plaintiff's challenge to an employment decision based on the Policy would likely turn on the pretext inquiry, as disparate treatment challenges often do – with the plaintiff arguing the citizenship status-based decision not to hire, ostensibly lawful under Title VII, is pretext for Title VII prohibited discrimination.

Plaintiff's argument would, ironically, find support in the Supreme Court's *Espinoza* opinion. Although the *Espinoza* Court, as discussed *supra*, rejected Cecilia Espinoza's national origin claim in distinguishing citizenship discrimination from national origin discrimination and proclaiming the former lawful under Title VII, the Court warned against employers using citizenship discrimination as pretext. The Court recognized that its decision might spur employers to effectuate unlawful Title VII discrimination under the cloak of citizenship discrimination, and made clear that such manipulation would not be tolerated. And while the *Espinoza* court referenced citizenship discrimination as pretext for national origin discrimination, its concern – that citizenship discrimination not crater Title VII's protections – logically applies also in the race-discrimination context, as the United States Court of Appeals for the District of Columbia recognized in *Anderson v. Zubieta*.¹⁵⁰

In that case, the Panama Canal Commission (PCC) implemented a policy advantaging employees who were American citizens as of a date specific over non-citizens and citizens naturalized after the specified date.¹⁵¹ Plaintiffs, who were black and of Panamanian descent and who were naturalized after the specified date, sued on Title VII race discrimination and national origin discrimination grounds, alleging that through the policy the PCC intentionally disadvantaged them.¹⁵² Although the United States District Court for the District of Columbia dismissed plaintiffs' claims as non-actionable under Title VII, the D.C. Circuit Court reversed.¹⁵³ The D.C. Circuit found that the *Espinoza* Court envisioned lower courts granting such plaintiffs the opportunity to prove that a Title VII prohibited purpose – whether discrimination based on race or national origin – underlies an employer's citizenship discrimination.¹⁵⁴

This pretext inquiry, in the MLS context, would necessarily involve scrutinizing MLS' articulated reasons for limiting

¹⁵⁰ 180 F.3d 329, 340 (D.C. Dist. 1999).

¹⁵¹ *See Id.* at 333.

¹⁵² *See Id.* at 334.

¹⁵³ *Id.* at 332.

¹⁵⁴ *Id.* at 340.

international players' presence in the league. While it is, of course, not possible to precisely predict the reasons MLS would articulate, the Policy seems to exist to serve MLS' goals of: (1) ensuring consistent spectator support among American fans;¹⁵⁵ (2) providing a training ground for US citizen players so as to improve the national soccer team's quality;¹⁵⁶ and (3) preventing a fiscally disastrous spending race on international stars.¹⁵⁷

It does not appear, however, that discriminating against international players actually serves these ends; indeed, the *Bosman* Court considered these very justifications for nationality restrictions, and concluded it does not.¹⁵⁸ While the *Bosman* holding is, as discussed *supra*, binding only in the European Community, its reasoning applies with equal strength in the American context.

¹⁵⁵ See David Leonhardt, *Is Major League Soccer Using its Head? It's structure may avoid problems plaguing other sports*, BUS. WK. Jan. 29, 1996, at 52 ("To help build a U.S. market, MLS has also made a commitment to promoting U.S.-born players. Alexi Lalas . . . will play for the New England Revolution, and his face will grace a box of Kellogg's cereal later this year. That's a direct appeal to the 13 million soccer-playing kids in the U.S.")

¹⁵⁶ See Grahame L. Jones, *Time to Deliver the \$22- Million Soccer Goods*, L.A. TIMES, Feb. 6, 1996, at 1 (quoting Alexi Lalas, 1995 U.S. Player of the year, saying of American players: "The experience might not be there because they haven't had the chance. I think what MLS is going to do is showcase that talent. In a very short amount of time I think we're going to get to a level of play that's competing with leagues around the world"); Jerry Langdon, *U.S. Talent Gets a Chance to Play at Home*, USA TODAY, April 5, 1996, at 8C, (reporting on MLS Deputy Commissioner Sunil Gulati's opinion that the MLS provides an opportunity for American players without international experience to compete for a place on the national team); see also Dan Gieson, *Debut is Here for New Soccer League MLS Hopes Top Players are a Big Draw*, SAN FRANCISCO CHRONICLE April 4, 1996, at D1 (quoting MLS Commissioner Doug Logan as saying, "I fully expect us to develop an American style of play. It will probably take a couple of years to develop, but we'll put our own thumbprint on soccer."); see also Gus Martins, *Soccer: The price is tight, cap makes its tougher for MLS to score*, BOSTON HERALD, Feb. 4, 1996. ("The league's contradiction is in simultaneously attempting to be a launching pad for rank-and-file American players while luring players of international status to legitimize the level of play.");

¹⁵⁷ See Northrup, *supra* note 115, at B1 ("The MLS approach is different than the NASL's The NASL tried to attract a following with star power. International soccer legends such as Pele, Giorgio Chinaglia and Franz Beckenbauer were signed. . . . It died in the attempt"); Tomas Toch & Anna Mulrine, *Soccer, American Style*, U.S. NEWS & WORLD REPORT, Oct. 28, 1996, at 64. ("But a more serious threat is labor problems. Stars like Lalas insist that 'the last thing we want to do is shoot ourselves in the foot' by forcing a bidding war for players the fledgling league can't afford.").

¹⁵⁸ See *Bosman*, at para. 142.

i. Ensuring consistent spectator support

The *Bosman* defendants argued, just as MLS Policy proponents have argued, that citizenship discrimination is necessary to consistent spectator support.¹⁵⁹ They asserted, “identification of the spectators with the various teams [in the league] is guaranteed only if those teams consist, at least as regards a majority of the players, of nationals of the relevant Member State.”¹⁶⁰ The ECJ summarily dismissed this justification, explaining there was “no need for extensive discussion to show the weakness of [the] argument.”¹⁶¹ Indeed, it noted that many European nations’ teams’ most popular players were nationals of other nations, and, in fact, in some cases, those foreign players served to establish their teams’ identities.¹⁶² This was the case, the court explained, with the Italian AC Milan team of the early 1990s, among others.¹⁶³ This has certainly been the case in American soccer as well – in the NASL and later in MLS.

The NASL’s New York Cosmos provide perhaps the strongest illustration. With Brazilian great Pele heading the list, the Cosmos regularly fielded numerous foreign players and often fielded more foreign players than American players.¹⁶⁴ Still, they were the NASL’s most popular team drawing larger crowds than had ever previously attended soccer games on American soil.¹⁶⁵

Many of the non-citizen players permitted on MLS teams have also proven extremely popular among fans. Bolivians Marco Etchevary and Jamie Moreno long served as the face of MLS’ DC United.¹⁶⁶ And, during the league’s early years, flamboyant Mexican goalkeeper, Jorge Campos, did the same for the Los

¹⁵⁹ See *Bosman*, at para. 141; Leonhardt, *supra* note 155 at 52.

¹⁶⁰ See *Bosman*, at para. 143.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ ALLAWAY ET AL., *supra* note 19, at 191-92.

¹⁶⁵ *Id.* at 200. While it is true that many of the Cosmos’ foreign players were world-renowned stars who commanded salaries that precipitated the NASL’s financial difficulty, the fact of their non-citizenship certainly did not lead to decreased popularity or to the league’s decline. So, as discussed briefly, *supra*, and as will be discussed in greater detail, *infra*, while the financial toll of escalating salaries may reasonably be blamed for the NASL’s demise, the fact of players’ non-citizenship may not.

¹⁶⁶ See, e.g. Charles Boehm, *United Face Must-Win Situation*, MLSNET.com, Oct. 31, 2007, available at http://www.mlsnet.com/news/team_news.jsp?ymd=20071031&content_id=126969&vkey=news_dcu&fext=.jsp&team=t103 (last visited Feb. 1, 2009) (“the South Americans are sometimes referred to as the ‘magic triangle’ by D.C. fans who first applied the term to Moreno, Raul Diaz Arce and Marco Etcheverry during United’s late-90s glory days.”).

Angeles Galaxy.¹⁶⁷ More recently, Englishman David Beckham served as the Galaxy's, and ultimately the League's, public face.¹⁶⁸

So, in the American context, as well as in the European context, non-citizens have frequently sparked, rather than detracted from, spectator support. To justify citizen discrimination as necessary to maintain observers' interest, therefore, badly misses the mark.

ii. Strengthening the National Team

A second justification asserted by the Bosman defendants in supporting its citizenship status restrictions, and later asserted to justify the MLS policy, is the importance of such restrictions in developing a competitive national soccer team.¹⁶⁹ The ECJ found this argument no more convincing than the previous one.¹⁷⁰ Indeed, rather than enabling national team development, nationality restrictions may hamper it. The ECJ explained, "there is much to support the opinion that the participation of top foreign players promotes the development of [soccer]. Early contact with foreign stars 'can only be of advantage to a young player.'"¹⁷¹ If this is the case in Europe, it must certainly be the case in the United States, where soccer is generally played at a lower level than it is played elsewhere in the world.¹⁷² By limiting the numbers of excellent international players against whom Americans can compete, and from whom they can learn, the MLS policy may have an inverse impact to what the league intended – it may be stagnating, rather than improving, American soccer talent.¹⁷³

¹⁶⁷ See History of the Los Angeles Galaxy 1996 Season Review, <http://web.mlssnet.com/t106/load.jsp?section=about&content=history96> (last visited Feb. 1, 2009).

¹⁶⁸ See Jonah Freedman, *Pele Part Two*, SI.com., July 22, 2007, available at http://sportsillustrated.cnn.com/2007/writers/jonah_freedman/07/22/beckham.pele/index.html. (last visited Feb. 1, 2009).

¹⁶⁹ See *Bosman*, at para. 141; Langdon, *supra* note 156 at 8C.

¹⁷⁰ See *Bosman*, at para. 144.

¹⁷¹ See *id.* at 145 (quoting Christoph Palme, Hermann Hepp-Schwab & Stephan Wilske, *Freizügigkeit im Profisport EG-rechtliche Gewährleistungen und prozessuale Durchsetzbarkeit*, JURISTENZEITUNG 343 (1994)).

¹⁷² See Omar Hafez Ayad, Note, *Take the Training Wheels off the League: Major League Soccer's Dysfunctional Relationship with the International Soccer Transfer System*, 10 VAND. J. ENT. & TECH. L. 413, 440 ("The American league's coaches, players, and critics agree that MLS currently does not possess the means to compete effectively with the European giants.").

¹⁷³ MLS organizers recognized, as the *Bosman* Court did, that foreign players might benefit the development of American MLS players, but nonetheless insisted on firm international restrictions, apparently believing too many foreign players would have a detrimental impact of the league. Alex

It is certainly the case that, if the MLS were to halt its discriminatory Policy and non-citizens were to occupy some of the roster spots currently reserved for citizens, fewer citizen players would be able to compete in the nation's premier soccer league. The competing citizen players, however, would be exposed to a level of play that would likely improve them and thus the national team for which they would be candidates. The status quo produces many citizen players who, by virtue of the competition they face, may not fulfill their potential. Eliminating the discriminatory policy, on the other hand, would result in fewer citizen players who would likely be better than they would otherwise. Perhaps, then, abandoning citizenship discrimination may ultimately be more beneficial than detrimental to the United States' national team's prospects.¹⁷⁴

iii. Controlling salaries

Finally, the Bosman defendants argued nationality restrictions were necessary to maintain rough parity among a given league's clubs.¹⁷⁵ In that foreign stars often command extremely high salaries, the argument goes, the absence of nationality restrictions would permit wealthy clubs to attract top flight foreign players to whom less wealthy clubs would have no access. Taken a step further, this argument mirrors the argument born of the NASL's demise – that demand for foreign players drives up competition for their services, prompting clubs to overspend and eventually precipitate league collapse.¹⁷⁶

Yannis, *M.L.S. is Encouraged, But Remains Cautious*, N.Y. TIMES, October 22, 1996, at 17.

¹⁷⁴ An altered approach to international players' inclusion in MLS as a means of strengthening the United States Men's National Soccer team could not hurt, as the team has proceeded beyond opening round games only once in Olympic tournament play, *see Penalty Kick decisive for Chile which takes bronze medal 2-0*, SOCCERTIMES.COM, Sep. 29, 2000, <http://www.soccertimes.com/usteams/2000/games/sep29.htm> (last visited Feb. 1, 2009), and has done so only once in three World Cup Championship tournament appearances since MLS' origin, *See Sampson out as U.S. soccer coach*, CNN, Oct. 27, 1998, http://sportsillustrated.cnn.com/soccer/world/events/1998/worldcup/news/1998/06/29/sampson_final/ (last visited Feb. 1, 2009); *US exit signals end of era*, FIFA.COM, July 10, 2006, <http://www.fifa.com/worldcup/archive/germany2006/news/newsid=27337.html#us+exit+signals> (last visited Feb. 1, 2009).

¹⁷⁵ *Bosman*, at para. 147.

¹⁷⁶ *See* John Haydon, *MLS Teams designed to have Equal Footing*, WASH. TIMES, Jan. 20, 1996, at D6 (noting that a big factor in the demise of the NASL was financial inequality between teams).

While maintaining parity and preventing excessive spending are legitimate goals,¹⁷⁷ as the *Bosman* Court explained in rejecting Bosman's argument, there exist narrower and less burdensome means of achieving those goals than citizenship discrimination.¹⁷⁸ Indeed, an MLS regime of citizenship discrimination as a means of controlling salaries necessarily presupposes the MLS' highest salaried players are all non-citizens. This presupposition is false. Many non-citizens are modestly salaried and several citizens, to whom the citizenship restrictions purportedly seeking to control salaries obviously do not apply, rank among the league's top earners.¹⁷⁹ In the MLS context, therefore, citizen discrimination falls flat as a rational approach to salary regulation.

An MLS concern about escalating salaries would suggest, as an appropriate remedy, reliance on *salary* – rather than citizenship – restrictions. And, indeed, the MLS has, since its founding, enforced salary restrictions. At its inception, each team had a salary cap of \$1.13 million.¹⁸⁰ By the start of the 2008 season's inception, MLS increased the salary cap to \$2.23 million.¹⁸¹ Any

¹⁷⁷ Regulating salaries to maintain parity among a league's teams would seem, at first blush, to violate anti-competitive principles. Sport, however, presents a unique case with respect to anti-trust issues. As sports law scholar Stephen Ross explains:

Sports leagues present special challenges for those interested in a sound, consumer-oriented approach to antitrust enforcement In addition to the need for joint action to produce a product, sports leagues have perhaps a unique interest in maintaining a significant degree of competitive balance among the teams within their venture. MATTHEW MITTEN, TIMOTHY DAVIS, RODNEY SMITH, ROBERT BERRY, SPORTS LAW AND REGULATION, 418 (2005).

As such, the Supreme Court has recognized that, in the context of sports leagues, "some agreements among competitors – perhaps even all competitors – is necessary for there to be a product at all." *Id.*

Even among sports leagues, however, MLS is uniquely positioned to repel antitrust challenges, because the Supreme Court has deemed it a single-entity, incapable – by definition – of conspiring to restrain trade in violation of the Sherman Antitrust Act. See *Fraser v. Major League Soccer*, L.L.C., 97 F. Supp. 2d 130 (D. Mass. April 19, 2000) (dismissing eight MLS players' complaint alleging MLS artificially suppressed players' salaries).

¹⁷⁸ *Bosman*, at para. 142.

¹⁷⁹ See Major League Soccer Players' Union, Player Salary Information, http://www.mlssplayers.org/files/9_7_08_salary_info_alpha.pdf. (last visited Feb. 1, 2009). Indeed, two of MLS' highest paid players – Landon Donovan and Claudio Lopez – are American. *Id.*

¹⁸⁰ See Barry Wilner, *Will it Fly? New Soccer League Finally Nearing Takeoff Time*, PHILA. INQ., March 31, 1996, at C8.

¹⁸¹ See Tripp Mickle, *Debate Highlights MLS Salary Cap Split among Teams*, WASH. BUS. J. Nov. 30, 2007, available at <http://socccnet.espn.go.com/columns/story?id=376391&root=americansabroad&cc=5901> (last visited Feb. 1, 2009). Notably, each MLS team is permitted one Designated Player, to whom it may pay an unregulated amount, only \$415,000

argument that the Policy is necessary to control salaries, therefore, fails.

It seems clear, then, that the MLS Policy, and the discriminatory personnel decisions made pursuant thereto, do not fulfill the legitimate, non-discriminatory purposes upon which MLS would most likely rely in repelling a disparate treatment challenge. Further, it is possible, perhaps probable, that MLS long ago recognized, by way of the *Bosman* decision or otherwise, the Policy's impotence in satisfying the goals it purportedly existed to satisfy. A showing that the Policy does not serve the purposes for which it was ostensibly enacted and that, despite knowing this, the MLS nonetheless enacted and enforced it, would certainly indicate pretext.

Even if, however, a Court were to conclude: (1) that the Policy serves legitimate non-discriminatory purposes; or (2) that the Policy does not serve legitimate non-discriminatory purposes, but that MLS sincerely believes it does serve such purposes, the Court's conclusion would not necessarily derail a plaintiff's claim. In 1991, the United States Congress amended the Civil Rights Act of 1964 to permit mixed motive disparate treatment claims, which allow plaintiffs to successfully challenge employment decisions that are based on multiple factors. So, under a mixed motive theory, a plaintiff may prevail upon showing that, in addition to considering non-discriminatory factors, the defendant considered the plaintiff's race, color, gender, national origin, or religion, in denying employment opportunities.¹⁸² A mixed motive approach, therefore, would likely expand an international player's prospects for success.¹⁸³

b. The "similarly situated" inquiry and the subjective decision-maker

Whether a plaintiff pursues single motive or mixed motive liability, courts do not, as noted *supra*, require from the plaintiff direct discriminatory evidence.¹⁸⁴ And assuming, as is often the case, that no direct discriminatory evidence exists, courts are left to

of which applies against the salary cap. MAJOR LEAGUE SOCCER, 2008 MLS PLAYER RULES & REGULATIONS, *supra* note 1. Teams are permitted to trade Designated Player slots so long as no team accrues any more than two such slots. *Id.*

¹⁸² See 42 U.S.C. § 2000e-2(m); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101-02 (2003).

¹⁸³ Notably, a mixed motive theory provides limited relief. See 42 U.S.C. § 2000e-5(g)(2)(B). A prevailing mixed-motive plaintiff would be entitled to declaratory and injunctive relief, and attorneys' fees and costs, but not to hiring, reinstatement, or damages.

¹⁸⁴ See *Desert Palace, Inc.*, 539 U.S. at 99-100.

consider the proffered evidence, and based thereupon, draw, or decline to draw, an inference of discrimination.¹⁸⁵ Whatever other evidence comprises the record, the presiding court would focus heavily on a comparison between the plaintiff who was denied MLS employment as a player with a particular team and at least one similarly situated white player who secured such employment, with a favorable comparison suggesting pretext.¹⁸⁶

Conducting a meaningful comparison, however, can be challenging, particularly in the sports employment context.¹⁸⁷ While some indicia of an athlete's success or potential success, such as speed and reaction time, are easily quantifiable, others, such as willingness to sacrifice individual glory for the team's ultimate benefit, are not.¹⁸⁸ And because entirely objective assessment is not always possible, courts generally defer to defendants' subjective assessments.¹⁸⁹ Such deference, of course, impedes plaintiffs' attempts to identify the assessments as unlawfully discriminatory, which consequently hamstring individual plaintiffs' Title VII disparate treatment actions.¹⁹⁰ So, while the *Burdine* burden-shifting framework exists to aid individual plaintiffs in establishing intentional discrimination claims, the deference routinely granted employers' subjective assessments ultimately tarnishes *Burdine*'s promise.

3. *Building the Race Discrimination Case: The Class Action*

Where, however, plaintiffs band together as a class to challenge not just individual adverse employment decisions, but an employer's pattern or practice of organization-wide discrimination, they are spared such defendant deference in attempting to prove

¹⁸⁵ See *Id.* at 101 (Pursuant to Title VII, "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of evidence that . . . [the protected characteristic] was a motivating factor for any employment practice").

¹⁸⁶ See Tricia M. Beckles, *Class of One: Are Employment Discrimination Plaintiffs at an Insurmountable Disadvantage if They Have No "Similarly Situated" Comparators?*, 10 U. PA. J. BUS. & EMP. L. 459, 466 (2008) ("Evidence of . . . pretext may include showing that a similarly situated individual, outside the protected class, was treated more favorably"); Holly A. Williams, *Reaching Across Difference: Extending Equality's Reach to Encompass Governmental Programs that Solely Benefit Women*, 13 UCLA WOMEN'S L. J. 375, 387 (2005) ("[I]n order to succeed on a claim of racial discrimination brought under Title VII of the Civil Rights Act of 1964, the plaintiff must satisfy the similarly situated requirement . . .").

¹⁸⁷ See *Duru*, *supra* note 4, at 378.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 404.

¹⁹⁰ *Id.*

liability. Recognizing the inefficiencies of *Burdine*-style analyses for hundreds or thousands of class members as well as the dangers of defendants prevailing in Title VII actions when discrimination may exist throughout an organization but is not readily apparent on the face of any particular employment decision, the Supreme Court, in its 1977 *Teamsters v. United States* decision, created a model of proof applicable in class cases.¹⁹¹ Rather than require the fact-specific analysis crucial to individual plaintiffs' disparate treatment actions, the *Teamsters* Court called for statistical analysis reflective of discrimination.¹⁹² Under *Teamsters*, plaintiffs can create a presumption of discrimination through showing that the percentage of a particular racial group in a defendant's workforce is smaller than the percentage of that racial group in the broader labor market.¹⁹³

Under *Teamsters*, therefore, international players of color who are denied MLS roster positions and are unable to, or uninterested in, pursuing individual disparate treatment actions by way of the *Burdine* burden-shifting framework, might be advised to sue MLS as a class.¹⁹⁴ To create the presumption of discrimination,

¹⁹¹ Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 337-40 (1977); see also Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 816-818 (2004); United States v. Ironworkers Local 86, 443 F.2d 544, 551 (1971) ("Since the passage of the Civil Rights Act of 1964, the courts have frequently relied upon statistical evidence to prove a violation.... In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved.").

¹⁹² See *Teamsters*, 431 U.S. at 340 n.20 ("Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.").

¹⁹³ *Id.* at 337-40; see also Michelle Adams, *Causation and Responsibility in Tort and Affirmative Action*, 79 TEX. L. REV. 643, 688-690 (2001). The appropriate contours of the relevant labor market used in conducting disparate treatment statistical analysis unfailingly produces significant debate among parties to an action. See Fred W. Alvarez, Michael J. Levy & Shirley C. Wang, *Class Actions and Pattern and Practice Claims: Overview of Theories, Defenses, Settlements and the Government's Activist Role*, 591 PLI/LIT 275, 308 (1998). Such debate would certainly ensue in this case, with the player plaintiffs arguing for a relevant labor market rich in players of color and MLS arguing for the inverse.

¹⁹⁴ Whether players interested in launching a class action and representing their fellow class members would meet the requirements of doing so would depend on the players' circumstances. Pursuant to Federal Rule of Civil Procedure ("FRCP") 23(a), "One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable,
- (2) there are questions of law or fact common to the class,

however, the international players would need to prove a statistically significant disproportionality between the number of players of color in MLS and the number of players of color eligible and qualified to play in MLS.¹⁹⁵ Courts require statistical significance to ensure the disparity's scope is sufficient to suggest intentional discrimination as opposed to coincidence.¹⁹⁶

How to properly derive statistical significance, however, is a matter of seemingly endless debate, and disparate treatment class action cases, therefore, generally feature battling statisticians' testimony on this score.¹⁹⁷ Indeed, MLS would certainly challenge whatever statistical analysis the international players produce "as to the statistical test used, the assumptions employed in conducting the test, and the conclusion the test suggests."¹⁹⁸ If, however, the plaintiffs were to successfully set forth a statistically significant disproportionality together with some accompanying anecdotal evidence, they would likely establish Title VII liability.¹⁹⁹ Doing so would render injunctive relief appropriate,²⁰⁰ meaning a court could enjoin MLS from effectuating the Policy. In addition, doing so would create, in each plaintiff's circumstance, a presumption of discrimination and, therefore, an entitlement to damages, unless MLS is able to show race was irrelevant to the particular player's rejection.²⁰¹

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class."

¹⁹⁵ See *McCleskey v. Kemp*, 481 U.S. 279, 293 (1987).

¹⁹⁶ Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 Harv. C.R.-C.L. Rev. 91, 121 (2003).

¹⁹⁷ See *id.*

¹⁹⁸ Duru, *supra* note 4, at 403.

¹⁹⁹ Although some courts have deemed a statistically significant showing sufficient to establish *Teamsters* Title VII liability, see *Sheet Metal Workers, Local 36 v. United States*, 416 F.2d 123 (8th Cir. 1969), other courts appear to require some corroborative anecdotal evidence as well. See John Cocchi Day, *Retelling the Story of Affirmative Action: Reflections on a Decade of Federal Jurisprudence in the Public Workplace*, 89 CAL. L. REV. 59, 96-98 (2001).

²⁰⁰ See *United States v. Int'l Bhd. of Elec. Workers*, 428 F.2d 144 (6th Cir. 1970); *Rowe v. Gen. Motors Corp.* 457 F.2d 348 (5th Cir. 1972).

²⁰¹ Ellen M. Athas, *Defendant's Burden of Proof in Title VII Class Action Disparate Treatment Suits*, 31 AM. U. L. REV. 755, 778-79 (1982). Once the presumption of discrimination is established, the court would launch a series of mini-trials focusing on the specific facts of each member of the class, during which the employer would carry the burden of showing, with respect to each class member, that it did not discriminate. *Id.* at 779-780.

B. The MLS Policy as Disparate Impact Discrimination

Absent an intentional discrimination showing, whether in the individual or class context, plaintiffs may still prevail under Title VII by way of disparate impact analysis. Recognizing both the difficulty of proving discriminatory intent and discrimination's detrimental impact on society whatever its motivation, courts have established that Title VII relief is potentially appropriate even in cases of *unintentional* discrimination by way of disparate impact claims.²⁰²

Disparate impact analysis, like disparate treatment analysis, features a three-step burden-shifting framework, the first step of which requires that plaintiffs establish a *prima facie* case of discrimination.²⁰³ The nature of the required *prima facie* case in the disparate impact context is, however, quite different than in the disparate treatment context. Rather than proving protected class status, qualification, and rejection under suspicious circumstances, disparate impact plaintiffs' *prima facie* cases generally consist of statistics designed to show that a requirement of employment disproportionately impacts members of a particular protected group.²⁰⁴

For instance, in *Griggs v. Duke Power*, the case in which the Supreme Court first recognized the Title VII disparate impact theory, plaintiffs challenged Duke Power's requirement that employees in several of the company's departments achieve a threshold score on standardized examinations, through showing that the requirement disproportionately disqualified black candidates.²⁰⁵ Courts accept various methodological approaches to this end.²⁰⁶ The *Griggs* plaintiffs presented applicant flow analysis, comparing the proportion of black candidates in the applicant pool who did not achieved the threshold score with the proportion of black candidates who did achieve the score and thus

²⁰² See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) ("good intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability").

²⁰³ See *Connecticut v. Teal*, 457 U.S. 440, 446 (1982).

²⁰⁴ Erik R. Sunde, Casenote, *Civil Rights—Title VII Disparate Impact Theory—Employer's Burden of Rebutting Prima Facie Case Under Disparate Impact Theory is One of Production While Ultimate Burden of Persuasion Remains with Complainant*, 21 ST. MARY'S L.J. 1081, 1087-88 (1990).

²⁰⁵ *Griggs*, 401 U.S. at 431-32. Duke Power also required that the employees in these departments had graduated from high school. *Id.* at 427-28.

²⁰⁶ James P. Ratz, Casenote, *Requiring Discriminatory Intent and Relevant Statistical Evidence in Title VII Cases: Equal Employment Opportunity Commission v. Chicago Miniature Lamp Works*, 16 HAMLINE L. REV. 1003, 1018 (1993).

qualified for employment.²⁰⁷ Another Supreme Court-sanctioned methodological approach to establishing a disparate impact *prima facie* case is external availability analysis, which, like the pattern or practice disparate treatment statistical inquiry discussed above, compares the composition of the employer's workforce with that of a relevant labor market.²⁰⁸

If plaintiffs were to succeed in marshalling data revealing that, as a statistically significant matter, the Policy disproportionately impacts black and Latino players, and if MLS were unable to challenge the statistical model's integrity or otherwise cast doubt upon it, MLS would have the opportunity to show that the Policy is job-related and is consistent with business necessity.²⁰⁹ The idea behind this second step in the three-step disparate impact analysis is that an employment requirement necessary to a business' existence, even if disproportionately impactful, potentially merits preservation.²¹⁰ The job-related / business necessity inquiry is, however, notoriously amorphous, with different courts applying different standards.²¹¹ Whatever the standard, MLS would likely turn to its justifications for implementing the Policy and argue that the league's financial success, as a matter of both salary control and spectator support, necessarily requires international player limits.

Plaintiffs would then have the opportunity to show that MLS could have used a less discriminatory alternative than the international player restriction to meet that necessity;²¹² for instance, stringent league-wide salary restrictions together with marketing campaigns calculated to familiarize American soccer

²⁰⁷ See Griggs, 401 U.S. at 432.

²⁰⁸ Hazelwood School Dist. v. United States, 433 U.S. 299, 309 n.14 (1977).

²⁰⁹ William Gordon, Recent Development, *The Evolution of the Disparate Impact Theory of Title VII: A Hypothetical Case Study*, 44 HARV. J. ON LEGIS. 529, 530-31 (2007).

²¹⁰ See Griggs, 401 U.S. at 433-34; see *Albermarle Paper Company v. Moody*, 422 U.S. 405, 425 (1975).

²¹¹ See, e.g., *Zamlen v. City of Cleveland*, 906 F.2d 209, 218 (6th Cir. 1990) (testing will meet the business necessity burden where using a content validity study demonstrates a direct relationship between the test contents and the job contents.); *Gillespie v. State of Wis.*, 771 F.2d 1035, 1040 n.3 (7th Cir. 1985) (meeting the burden of job necessity requires a construct validity study to prove that the challenged test is "adequately correlated with the applicant's future job performance."); *Ass'n of Mexican-American Educators v. Cal.*, 231 F.3d 572, 585 (9th Cir. 2000) (meeting the burden of production to prove job necessity requires the employer to "first specify the particular trait . . . which the selection advice is being used to identify or measure . . . then determine that the particular trait . . . is an important element of work behavior[, and f]inally, the employer must demonstrate by 'professionally acceptable methods' that the selection device is 'predictive of or significantly correlated' with the element of work behavior identified in the second step.").

²¹² See *Albermarle*, 422 U.S. at 425.

fans with international players. If the Court were to conclude plaintiffs' alternatives adequately serve MLS' business need, liability would become a possibility.²¹³

While the likelihood of success for players challenging the MLS Policy under a disparate impact theory would depend on, among other things, the nature of their proffered statistics, the contours of MLS' response, and the court's view of the business necessity inquiry, the potential for success certainly exists.

At bottom, then, whether or not MLS intended that its Policy discriminatorily erect race-based barriers of entry into the league, the Policy has resulted in such barriers to entry and has, therefore, served to exclude players of color. As such, the MLS Policy is potentially vulnerable to Title VII attack, whether as intentionally discriminatory or as resulting in a discriminatory disparate impact.

V. THE MLS POLICY, CONTEXTUALIZED – SURVEYING THE AMERICAN SPORTING LANDSCAPE

While the MLS Policy's impact and potential illegality must necessarily concern a body politic which has rejected racial discrimination, contextualizing the Policy and its implications on the broader American sporting landscape unearths an even greater concern. Such contextualization reveals that for the majority of premier American sports leagues – particularly the NFL, the NHL, and the NBA – disregard for citizenship status results in a decreased proportion of black and Latino players or in the maintenance of the league's racial status quo, whereas in the MLS, as discussed above, disregard for citizenship status would result in an increased proportion of black and Latino players. That the NFL, NHL, and NBA do not limit international entrants while MLS does, therefore, suggests that, across much of the American professional sporting landscape, a league's decision in this regard may rest to some extent on racial considerations. Analyses of internationalization's racial impact in the NFL, NHL, and NBA follow.

²¹³ *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1122-23 (1993) (finding that the plaintiff's proffered alternatives did not meet the employer's business need of safety, and thus did not fulfill the third prong of the disparate impact burden shifting test). Some courts suggest that for plaintiffs to prevail at this stage of the analysis, they must show the defendant was presented an appropriate alternative and rejected it. Michael J. Zimmer, *Individual Disparate Impact Law: On the Plain Meaning of the 1991 Civil Rights Act*, 30 Loy. U. Chi. L.J. 473, 480-81 (1999).

A. *The National Football League*

The NFL is unique among America's premier sports leagues in that football is a truly American sport. It is scarcely played outside of North America, and although played in Canada, it is minimally popular there.²¹⁴ While the NFL sponsored the now-defunct World League of American Football which operated in Europe for twelve years and has held several exhibition games in other nations, football has not taken hold internationally.²¹⁵ Indeed, throughout most of the world, the word "football" does not describe the NFL's product. Rather, "football" describes the game Americans call soccer.²¹⁶ The NFL's product is more commonly known, outside the United States, as "American football."²¹⁷ Further, with rare, if any, exception, the world's best football players are American and already play in the NFL or at American universities.²¹⁸ NFL teams simply do not mine for talent in other countries – as many teams in America's other premier sports leagues do –²¹⁹ and no other country boasts a football league sufficiently strong to regularly produce promising NFL prospects.²²⁰ As such, any sort of NFL

²¹⁴ Indeed, Canada's Football League, the CFL, "has struggled to define itself over the past 20 years and franchises are happy to break even from year to year." COLIN HOWEL, BLOOD, SWEAT, AND CHEERS: SPORT AND THE MAKING OF MODERN CANADA 79 (Craig Heron ed. University of Toronto Press Inc., 2001).

²¹⁵ Prior to the start of the 1998 season, the World League of American Football changed its name to NFL Europe in an effort to strengthen the link between American football and Europe. NFL Europa History, <http://www.nfl.com/europa/history> (last visited Feb. 1, 2009).

²¹⁶ See David Reisman & Reuel Denney, *Football in America: A study in cultural diffusion*, 3 AMERICAN QUARTERLY 309, 312 (1951).

²¹⁷ See GERHARD FALK, FOOTBALL AND AMERICAN IDENTITY 7 (2005).

²¹⁸ See Kenneth L. Shropshire, *Minority Issues in Contemporary Sports*, 15 STAN. L. & POL'Y REV. 189, 192 (2004).

²¹⁹ For years, MLB, NBA, and NHL teams have actively searched internationally for players. MLB teams generally maintain fully operational baseball training academies in Latin America, see *infra* note 314, and NBA and NHL teams routinely employ scouts to focus on identifying international talent. See *Overseas Players Courted by N.B.A.*, N.Y. TIMES, June 26, 2005, available at <http://www.nytimes.com/2005/06/26/sports/basketball/26flair.html> (last visited Feb. 1, 2009); see Keith Loria, *Boom or Bust?*, HOCKEY DIGEST, Summer 2003, at 62 (highlighting the priority that NHL commissioner Gary Bettman places on acquiring international players).

²²⁰ The CFL has on occasion produced players who went on to successful careers in the NFL. Perhaps chief among them is NFL Hall of Fame quarterback Warren Moon, who played for years with the CFL's Edmonton Eskimos before joining the NFL's Houston Oilers and then, later in his career, the Seattle Seahawks, and Kansas City Chiefs. WILLIAM C. RHODEN, THIRD AND A MILE: THE TRIALS AND TRIUMPHS OF THE BLACK QUARTERBACK: AN ORAL HISTORY 142-43 (2007). Notably, Moon, who was an American collegiate star at the University of Washington displayed the ability to play quarterback on the NFL level, but because of his race was not drafted by any of

citizenship discrimination policy would have, at most, a negligible impact on player entry into the league and would, therefore, not meaningfully alter the league's racial demographics. Thus, NFL citizenship discrimination would ultimately neither increase nor decrease the league's proportion of players of color – it would have no appreciable impact.²²¹

B. The National Hockey League

The NHL presents a far different context than the NFL. Whereas the NFL is overwhelmingly populated by Americans, the NHL is overwhelmingly populated by non-Americans. From its very inception in 1917, Canadians dominated the NHL.²²² And for much of the twentieth century, this remained the case.²²³ During the 1970's, however, European players began trickling into the league, and with the Soviet Union's collapse in 1991 and the Eastern Bloc's consequent dissolution, the trickle became a

the NFL's teams. *Id.* at 130. Moon is African-American, and for decades NFL teams, perhaps saddled with stereotypes of African American intellectual inferiority, seemed to reserve the quarterback spot – “football's thinking and control position” – for whites. See RICHARD LAPCHICK, *SMASHING BARRIERS: RACE AND SPORT IN THE NEW MILLENNIUM* 229 (2001). While equal employment opportunity at the quarterback position has increased since Moon's playing days, black quarterbacks remain disproportionately rare. N. Jeremi Duru, *The Fritz Pollard Alliance, the Rooney Rule, and the Quest to "Level the Playing Field" in the National Football League*, 7 VA. SPORTS & ENT. L.J. 179, 184 (2008). As of the 2007 NFL season, although blacks comprised sixty-seven percent of the league's players, they comprised only twenty percent of the league's quarterbacks. *Id.*

Issues of race aside, successful CFL transplants into the NFL are exceedingly rare, and like Moon, such transplants generally are American citizens and would thus be unimpacted by any NFL citizenship discrimination policy. See 2007 Rogers CFL Player Awards, <http://www.tsn.ca/cfl/feature/?id=10868> (last visited Feb. 21, 2009) (The 2007 CFL Most Outstanding Player, Defensive Player, Offensive Lineman, Rookie, and Special Teams player awards were dominated by the United States with Americans winning four of five awards and finishing runner-up in all five.).

²²¹ This is not to suggest that NFL teams are indifferent to, or ambivalent about, demographic trends. Indeed, one sports columnist argued that NFL teams have recently begun, and will, in the future, continue, to intentionally reduce their numbers of black players. Jason Whitlock, *Buffoons Leaving Terrible Legacy*, Oct. 19, 2007, <http://profootballexperts.scout.com/2/692467.html>. (last visited Feb. 1, 2009).

²²² Terry Wu & Neil Longley, *The Applicability of NAFTA to the Subsidization of U.S.-Based NHL Teams: Legal and Economic Perspectives*, 9 L. & BUS. REV. AM. 571, 574 (2003).

²²³ *Id.*

torrent.²²⁴ By 2002, one-third of the league's players were European.²²⁵ Whether Canadian or European, however, foreign hockey players unquestionably predominate in the NHL.²²⁶ Indeed, although the league is a United States corporation with its headquarters in New York City and with twenty-four of its thirty teams based in American cities,²²⁷ only nineteen percent of NHL players are American.²²⁸

Unlike in the NFL context, therefore, the impact of an NHL policy substantially limiting international players' involvement would be extreme. Scores of NHL players would be expurgated, and the league would present a drastically different brand of hockey. There would certainly exist players to fill the vacated roster spots, as scores of Americans play hockey in competitive university programs.²²⁹ However, in that American players are, on the whole, regarded as less talented than their foreign counterparts,²³⁰ the league's level of play would drop. The NHL would, in essence, become much like MLS – a league presenting an athletic product deemed comparatively inferior by global standards.

Interestingly, such a policy overhaul would produce in the NHL the very benefits the MLS claims motivate its Policy. The NHL and its teams would, of course, no longer labor so strenuously under the weight of their international stars' enormous

²²⁴ See Brian Ward, *The National Hockey League's Collective Bargaining Agreement: Its Inadequacies in Dealing with League Internationalization*, 23 SUFFOLK TRANSNAT'L L. REV. 747, 760 (2000).

²²⁵ Wu & Longley, *supra* note 222, at 574.

²²⁶ ALAIN HACHE, ANALYSIS OF THE NHL PLAYERS BY COUNTRY OF BIRTH 1 (2006), <http://www.thephysicsofhockey.com/documents/country.pdf>. (last visited Feb. 1, 2009).

²²⁷ The remaining six NHL franchises are based in the Canadian cities of Calgary, Edmonton, Ottawa, Montreal, Toronto, and Vancouver. See NHL TEAMS, <http://www.nhl.com/teams/index.html> (last visited Feb. 1, 2009).

²²⁸ HACHE, *supra* note 226.

²²⁹ See *Division I Men's Ice Hockey*, <http://web1.ncaa.org/onlineDir/exec/sponsorship?sortOrder=0&division=1&sport=MIH> (last visited Feb. 1, 2009) (listing 58 NCAA Division I hockey programs); *Division II Men's Ice Hockey*, <http://web1.ncaa.org/onlineDir/exec/sponsorship?sortOrder=0&division=2&sport=MIH> (last visited Feb. 1, 2009) (listing 7 NCAA Division II programs); *Division III Men's Ice Hockey*, <http://web1.ncaa.org/onlineDir/exec/sponsorship?sortOrder=0&division=3&sport=MIH> (last visited Feb. 1, 2009) (listing 83 NCAA Division III programs).

²³⁰ See Terry Frei, *Now more than ever, the American hockey player has options*, Sep. 7, 2007, http://sports.espn.go.com/nhl/columns/story?columnist=frei_terry&id=3008373 (last visited Feb. 1, 2009) (noting that American-born NHL players have historically played in the Canadian major junior leagues before the NHL because the NHL had traditionally been "heavily biased in favor of Canadian major junior products").

salaries.²³¹ In addition, an increased proportion of Americans in the league would, under MLS' reasoning, serve to maintain the interest of spectators desiring to see Americans play. The NHL's financial woes are well-documented,²³² and, as such, potential increases in spectatorship and decreases in salary burdens would appear quite attractive.

Furthermore, securing roster spots for Americans would ensure that the NHL serves as a training ground for a larger group of potential national team players. If, indeed, international player restrictions improve a national team, as MLS suggests they do, the NHL would seem a prime candidate for such restrictions. The NHL, however, takes a different approach to building the national team and has achieved substantial success in doing so. The NHL pursues the precise approach the *Bosman* Court recommended in dismissing the *Bosman* defendants' arguments in favor of nationality restrictions. With no international player restrictions, only the American players good enough to successfully compete with foreign players for roster spots on the NHL's teams play in the league. The result has been an average of four American players per NHL team,²³³ but those players consistently play against the world's best, and the United States National Hockey Team has, not surprisingly, achieved considerable success.²³⁴

Despite these purported potential benefits of restricting international entrants – benefits upon which MLS ostensibly bases its Policy – the NHL does not limit the number of international players permitted in the league or on a particular team, suggesting that other considerations – perhaps considerations of racial proportionality, which have no relevance in the NHL context – motivate international player restrictions in the MLS context.

²³¹ Nine of the ten highest salaries for NHL's 2007-08 season were paid to international players. See Top 25 players, <http://content.usatoday.com/sports/hockey/nhl/salaries/top25.aspx?year=2007-08> (last visited Feb. 1, 2009).

²³² See Al Strachan, *NHL's Financial system is as broken as ever*, FOX SPORTS, July 10, 2008, <http://msn.foxsports.com/nhl/story/8331258> (last visited Feb. 1, 2009); Mike Brehm, *Study backs NHL's claim of major financial losses*, USA TODAY, Feb. 2, 2004, http://www.usatoday.com/sports/hockey/nhl/2004-02-12-finances-study_x.htm (last visited Feb. 1, 2009).

²³³ See Frei, *supra* note 230.

²³⁴ See *World Cup Hockey 1996 Summary*, <http://www.hhof.com/html/GamesSummaryWCUP1996.shtml> (last visited Feb. 1, 2009) (summarizing the United States' gold medal win); *USA Hockey Olympic Men's Teams*, http://www.usahockey.com/Template_Usahockey.aspx?NAV=TU_01_01&ID=21634 (last visited Feb. 1, 2009) (listing US Olympic performance, including a silver medal in 2002); *Ice Hockey World Championship Prague 2004*, <http://www.prague.cz/hockey.asp> (last visited Feb. 1, 2009) (listing the United States as the bronze medal winner of the 2004 World Championships).

While imposing international player restrictions where none previously existed would present a host of logistical challenges, it is certainly possible that the NHL, if faced with a talent pool dominated by international hockey players of color, might view internationalization differently and impose such restrictions. It is similarly possible that were soccer as racially homogeneous a sport as hockey, MLS might view internationalization differently and opt against such restrictions. One can only speculate as to how each league would react in the other's racial context. In light of the aforementioned racial dynamics that continue to pervade American sport, however, to dismiss the possibility that racial considerations might impact those reactions would be a mistake.

C. The National Basketball Association

The NBA presents yet another context, different in meaningful ways from both the NFL and the NHL. For decades after the NBA's founding in 1946, the NBA was much like the NFL: a league of Americans playing a game more popular in America than elsewhere in the world. As addressed in detail below, however, beginning in the early 1990's, NBA teams' rosters have grown increasingly international.²³⁵ So, as in the NHL context, NBA international player restrictions would significantly alter the league. The impact of the alteration on the NBA's racial demographics would, however, be quite different than in the NHL context. Whereas virtually all of the NHL's domestic players as well as its international players are white,²³⁶ the NBA's international players are overwhelmingly white,²³⁷ and its domestic players are overwhelmingly of color.²³⁸ Disregard for citizenship status in the NBA, therefore, results in a substantially larger white presence among NBA players than would otherwise be the case. And, perhaps for this reason, the NBA has enthusiastically embraced internationalization.

²³⁵ See text accompanying footnotes 279-83, *infra*.

²³⁶ Kevin Allen, *Willie O'Ree Still Blazing Way in NHL 50 Years Later*, USA TODAY, Jan. 15, 2008, at 1C (noting the NHL has only twelve black players).

²³⁷ Richard Lapchick, *Money Speaks Louder than Race*, May 10, 2004, <http://sports.espn.go.com/espn/page2/story?page=lapchick/040510> (last visited Feb. 1, 2009) (noting that 68% of the NBA's international players are white)

²³⁸ Professor Lapchick notes that only 20% of the NBA's players are white, and just over half of those players are domestic players, *see id.*, making white domestic players a profound minority in the NBA.

1. The NBA's Black Eye: Race, Hip Hop, and Hatred

As noted in Part IV.A.1. of this article, there has long existed in the NBA, which has a larger percentage of black players than any of the other premier American professional sports leagues, an ugly racial dynamic.²³⁹ Fans and team owners alike have expressed preferences for white players and teams have made player personnel decisions accordingly, particularly with regard to reserve players. In recent years, this documented desire among the NBA's white fans for "seeing white players"²⁴⁰ seems to have merged with a strong distaste for expressions of hip-hop culture and, thus, for the young black athletes who embody it. Hip-hop, a term often simplistically utilized as a synonym for rap music, is in fact a complex multi-faceted phenomenon born in New York City during the late 1970's, which encompasses music, dance, art, style of dress, and perspective.²⁴¹ In the decades since its emergence, hip-hop culture has spread beyond New York City to other American urban areas, throughout middle-America, and ultimately across much of the world.²⁴² Indeed, hip-hop culture has so pervaded American culture that Fortune 500 companies routinely utilize it to market products of all sorts.²⁴³

Still, although various commercial enterprises as well as individuals from various nations, of various races, and representing all walks of life, embrace hip-hop culture, hip-hop culture finds itself monolithized and caricatured as young, black, irreverent in dress and manner, and potentially criminal.²⁴⁴ And, among substantial sectors of the American sports-watching public, there has seemingly developed an intense revulsion to this hip-hop caricature, which applies to athletes viewed – correctly or incorrectly – as reflecting it, whatever the athletes' attributes.

Several years ago, in a Sports Illustrated magazine column, journalist Rick Reilly exposed this revulsion and its prejudicial

²³⁹ See Duru, *supra* note 4, at 395-96.

²⁴⁰ Brown, Keenan & Spiro, *supra* note 131, at 343.

²⁴¹ See Greg Dimitriadis, *Hip Hop: From Live Performance to Mediated Narrative*, 15 POPULAR MUSIC 179, 179-180 (1996). ("Early MCs (or 'rappers') and DJs, graffiti artists and breakdancers, forged a 'scene' entirely dependent upon face-to-face social contact and interaction . . . [and it] was intrinsic to hip hop culture").

²⁴² See IMANI PERRY, PROPHETS OF THE Hood 19, 23 (2004).

²⁴³ See David Kiley, *Hip Hop Gets Down with the Deals*, BUSINESS WEEK ONLINE, May 16, 2005, http://www.businessweek.com/bwdaily/dnflash/may2005/nf20050516_5797_db016.htm (last visited Feb. 1, 2009). Hip-hop culture is an extraordinarily complex phenomenon deserving of far greater attention than this piece can provide. For an in-depth treatment of hip-hop culture, see generally PERRY, *supra* note 242.

²⁴⁴ See PERRY, *supra* note 233, at 109.

danger.²⁴⁵ Reilly begins the column by asking the reader to close his or her eyes while Reilly describes an NBA legend.²⁴⁶ Reilly then launches the description:

Compared with the rest of today's superstars, he's small – mostly heart and scabs – but as tough as a '48 pickup. . . . He could carry an offense, a team, a city by himself. One night he would torch an opponent for 50 points and the next decide to beat the opposition with assists. He was unpredictable, unguardable and unforgettable. . . . He was the idol of millions around the world, one of the three greatest players of his day. . . . He was shy with the press, yet honest as a Sunday confessional. He dressed the same every day and was mocked for it. . . . This guy had the 100,000-watt smile of a lotto winner. He had the joy of the game in his blood, and he knew how to spread it.²⁴⁷

Having described the player, Reilly explains that the player is not Jerry West or Michael Jordan or John Stockton or Magic Johnson – all widely respected and revered NBA stars who, in some respects, fit the description.²⁴⁸ The player, he states, is the much-maligned former Philadelphia 76er, and current Detroit Piston, Allen Iverson.²⁴⁹ “That changes everything, doesn't it?” asks Reilly, “Now you see the cornrows and the tattoos and the pierce-holes dripping gold, and they bug you, right? You think *thug* and *rapper* and *criminal*. . . .”²⁵⁰

Reilly penned his column in reaction to the deluge of hate mail Sports Illustrated received after Iverson appeared shirtless, tattooed, bejeweled, and expressionless on the magazine's cover. Among the readers' complaints:

- “The cover with Allen Iverson made me sick to my stomach . . . ;”
- “Those preening idiots barely belong to the human race . . . ”
- “The stare, the tattoos and pants to the waist showing his jockstrap sum up the reason I have not watched an NBA game in years . . . ”
- “The picture of Allen Iverson is revolting . . . ”
- “I object to this irreverent picture.”²⁵¹

²⁴⁵ Rick Reilly, *Looks Aren't Everything*, SPORTS ILLUSTRATED, May 22, 2001, at 94.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

Notably, the irate readers were objecting neither to the feature story on Iverson, nor to his being on the magazine's cover.²⁵² Nor were they objecting to the sight of a shirtless athlete; indeed, such photographs are commonplace in sports magazines.²⁵³ Readers objected to the particular manner in which Iverson appeared – as he felt most comfortable, in Reilly's words, “hip-hop to his heart.”²⁵⁴

Reilly argued that fans were anxious to enjoy the skill, athleticism, and determination of Iverson, but not his particular expression of hip-hop culture. They desired the basketball prowess, Reilly insisted, but in a more palatable package. The NBA has clearly recognized what Reilly expressed, and, without question, has responded to the fans' desire – initially with regard to Iverson alone and eventually pursuant to league-wide rule. Regarding Iverson, the NBA was so concerned about his appearance that when it featured him on the cover of its *Hoop Magazine*, the league literally stripped him of the potentially offending accoutrements.²⁵⁵ The magazine editors, without

²⁵² Complaints on either ground would have been understandable as Iverson has, during the course of his career, developed a reputation as a “bad boy” as well as “a misogynist, homophobic, violent ego-maniac.” *Same Old Iverson? Look Again* (Associated Press), Nov. 11, 2000, http://sportsillustrated.cnn.com/basketball/nba/news/2000/11/11/iverson_ap/index.html (last visited Feb. 1, 2009); Comments of Michael Wilbon, *The Tony and Mike Show*, <http://www.washingtonpost.com/wp-srv/liveonline/00/sports/tkwilbon/tkwilbon101300.htm> (last visited Feb. 1, 2009).

²⁵³ Indeed, less than two months earlier, *Sports Illustrated* featured MLB player Nomar Garciaparra shirtless on its cover. *SPORTS ILLUSTRATED*, Mar. 5, 2001, cover page.

²⁵⁴ Reilly, *supra* note 245, at 94. Reilly's description of Iverson's appearance as “hip-hop to his heart” should not be taken to suggest Iverson's appearance is any more reflective of hip-hop culture than an entirely dissimilar appearance. For instance, Grammy-award winning hip-hop artist Kanye West famously favors “preppy” designer clothing. *See Kanye West to Launch Clothing Line*, http://www.manhichic.com/manhichic/2005/09/kanye_west_to_1.html (last visited Feb. 1, 2009); Mike Pattenden, *Kanye West's Extraordinary LA Wardrobe*, <http://www.dailymail.co.uk/moslive/article-486092/Kanye-Wests-extraordinary-LA-wardrobe.html> (last visited Feb. 1, 2009) (describing West as a “fashion revolutionary” and detailing aspects of his expansive wardrobe). While West, attired in “preppy” clothing, is no less reflective of hip-hop culture than Iverson at his most comfortable, Iverson's image is reasonably viewed as more reflective of the hip-hop caricature than West's.

²⁵⁵ Rick Reilly, *Still in there Chuckin'*, *SPORTS ILLUSTRATED*, Dec. 18, 2000, at 180. Although NBA Commissioner David Stern reprimanded the *Hoop Magazine* editor-in-chief after the issue's publication, *see* Mike Wise, *Pro Basketball – In the Paint*, *N. Y. TIMES*, June 4, 2003, at D4, the *Hoop Magazine* incident was not the first instance of an NBA publication attempting to decouple Iverson from his tattoos. Indeed, just a year earlier, the NBA's *Inside Stuff*

Iverson's knowledge, airbrushed away his diamond earrings, his necklace and several of his tattoos.²⁵⁶

a. Legislating an Image Overhaul

Unable, of course, to airbrush away the tattoos, jewelry and hip-hop inspired outerwear of an increasing number of players bedecked as Iverson often was, the NBA, in 2005, took a more broad-based approach to re-packaging its players. It instituted a dress code seemingly aimed at, among other things, suppressing hip-hop expression.²⁵⁷

While the NBA's drive to systematically alter its image began years earlier, a dramatic brawl during a game between the league's Detroit Pistons and Indiana Pacers catalyzed its action.²⁵⁸ During the fight, members of the Pacers entered the stands and fought with

Magazine published an Iverson picture with one of his tattoos "strategically cropped out of the photo." Darren Rovell, *Iverson Has Given NBA New Credibility*, February 26, 2003, <http://espn.go.com/nba/s/2003/0226/1514649.html> (last visited Feb. 1, 2009).

²⁵⁶ Reilly, *supra* note 255, at 180. Iverson strongly objected to the NBA's attempt to accept some components of his person which rejecting others, explaining, "[the photo] was an insult, terrible I wish they wouldn't use me at all if they can't accept all of me." Allen Iverson Live, *Tattoos*, <http://www.alleniversonlive.com/modules.php?name=Content&pa=showpage&cid=7&pid=30> (last visited Feb. 1, 2009).

²⁵⁷ Mike Wise, *Opinions on the NBA's Dress Code Are Far From Uniform*, WASH POST, Oct. 23, 2005, at A1; *NBA Dress Code Upsets Black Stars*, Oct. 31, 2005, http://news.bbc.co.uk/sport2/hi/other_sports/basketball/4392182.stm (last visited Feb. 1, 2009) (noting, however, that NBA Commissioner David Stern argues the dress code is not aimed at hip-hop dress, but at "sloppy" dress).

²⁵⁸ HARVEY ARATON, *CRASHING THE BORDERS: HOW BASKETBALL WON THE WORLD AND LOST ITS SOUL AT HOME* 175 (2005). A more recent set of incidents that sullied the NBA's reputation were the activities surrounding the NBA's All-Star Weekend celebration in Las Vegas in February of 2007. Disparagingly dubbed "hip-hop Woodstock," the weekend was derided as a hip-hop criminal romp and a disgrace to the NBA. See Bill Simmons, *Welcome to hip-hop Woodstock*, Feb. 22, 2007, <http://sports.espn.go.com/espn/page2/story?page=simmons/070220> (last visited Feb. 1, 2009). ESPN journalist Scoop Jackson, while acknowledging the existence of hooliganism during the All-Star Weekend celebration, describes the media coverage of the incidents – much like the media coverage of the NBA generally – as racially-infused, unfairly critical of hip-hop culture, and exaggerative. Scoop Jackson, *What Really Happened in Vegas?*, Feb. 28, 2007, <http://sports.espn.go.com/espn/page2/story?page=jackson/070228> (last visited Feb. 1, 2009). Jackson notes that the arrest totals during the weekend were indeed high, but were dwarfed by arrest totals during a similarly festive event just two months earlier – the Las Vegas New Year's Eve celebration. *Id.* Jackson attributes the disparity in concern over the two episodes of lawlessness to racial prejudice and, more particularly, a racially-inspired distaste for NBA culture. *Id.*

some Pistons fans.²⁵⁹ The players were black, the fans were white, and the battle, in many ways, metaphorically symbolized the distance and disassociation between the NBA's overwhelmingly white game-attendees and its overwhelmingly black players.²⁶⁰ NBA Commissioner David Stern, who, in the fight's wake, reportedly expressed significant concern that the league "was experiencing disconnect from red-state America," acted quickly.²⁶¹ He hired Matthew Dowd, "a Texas-based business strategist who had helped shape George W. Bush's [2004 presidential] reelection campaign, to create a blueprint for the league on broadening its appeal."²⁶²

Within a year, the NBA legislated a number of restrictions on player attire while players were "involved in team or league business," which is to say while players were traveling to and from games and practices and, if not in uniform, while they were present at games and practices.²⁶³ Specifically, players were prohibited from, among other things, wearing sleeveless shirts, untucked shirts, shorts and visible medallions.²⁶⁴ Taken together, these restrictions achieved, on a league-wide level, what Hoop Magazine's airbrushing achieved with regard to Iverson alone. The restrictions hid tattoos, covered jewelry, and, in addition, rendered obsolete the oversized throwback athletic jerseys and baggy pants many players favored.

The dress code sparked various reactions. Many observers viewed the code as eminently reasonable.²⁶⁵ Others, including

²⁵⁹ Greg Sandoval, *Charges to be Filed in Pistons-Pacers Brawl: Officials Say Fans, Players Will Be Held Accountable*, WASH. POST, Nov. 23, 2004, at D7.

²⁶⁰ Harvey Araton, *One Year After Pacers-Pistons Fight, Tough Questions of Race and Sports*, NY TIMES, Oct. 30, 2005, at 1. (discussing the Pacers-Pistons brawl and referencing the steadily increasing "gulf" between the NBA's white fans and its black players).

²⁶¹ ARATON, *supra* note 258, at 175.

²⁶² Central to the NBA's strategy was pressing the National Basketball Players Association (NBPA) – the union representing NBA players – to accede to a minimum age requirement for NBA players. *Id.* The NBPA ultimately agreed, and beginning in 2006, the league decreed that a player must be at least nineteen years old and one year removed from high school before he may be eligible for the NBA draft. Brian Shaffer, *The NBA's Age Requirement Shoots and Misses: How the Non-Statutory Exemption Produces Inequitable Results for High School Basketball Stars*, 48 SANTA CLARA L. REV. 681, 682 (2008).

²⁶³ Michael McCann, *The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy*, 8 U. PA. J. LAB. & EMP. L. 819, 827 (2006); *NBA adopts 'business casual' dress code*, Oct. 18, 2005, <http://sports.espn.go.com/nba/news/story?id=2194537> (last visited Feb. 1, 2009).

²⁶⁴ *NBA adopts 'business casual' dress code*, *supra* note 263.

²⁶⁵ McCann, *supra* note 263, at 829 (noting the broad-based support the NBA dress code has engendered); Richard Lapchick, *NBA Diversity Makes for a Pretty Big Picture*,

many NBA players, viewed the code as unduly restrictive and racially motivated.²⁶⁶ Whatever the merits of these arguments and whatever the merits of the code, the code clearly took aim at a form of hip-hop expression and the players embracing it.²⁶⁷

b. Pursuing a Personnel Overhaul?

While the code served to, at least in some respects and for certain time periods, remove the trappings of this form of hip-hop expression from hip-hop influenced players, author Jason Whitlock identifies a more dangerous movement to weaken the hip-hop influence on professional sport: systematic racial employment discrimination. Whitlock suggests some NFL teams, having concluded that athletes embracing hip-hop culture are “[bad] for business” and “don’t contribute to a consistent winning environment,” have, to avoid such players, intentionally “whitened their rosters.”²⁶⁸ What is more, Whitlock predicts that, as a consequence of this movement, within ten years, the proportion of black players in the NFL will drop by twenty percent – from 70 percent to 50 percent.²⁶⁹

http://sports.espn.go.com/nba/columns/story?columnist=lapchick_richard&id=2865144 (last visited Feb. 1, 2009).

²⁶⁶ McCann, *supra* note 263, at 827; Jamie Wilson, *NBA’s “No Bling” Dress Code Prompts Racism Accusation*, THE GUARDIAN, Oct. 31, 2005, available at <http://www.guardian.co.uk/world/2005/oct/31/usa.americansports> (last visited Feb. 1, 2009).

²⁶⁷ McCann, *supra* note 263, at 827-28; Marc Lamont Hill, *The Barbershop Notebooks: Thoughts on the NBA Dress Code*, Dec. 23, 2005, <http://www.popmatters.com/columns/hill/051223.shtml> (last visited Feb. 1, 2009) (“The new NBA dress code . . . is clearly and unapologetically directed toward suppressing hip-hop culture). Although the NBA seeks to suppress hip-hop through the dress code, when marketing its hip-hop image proves monetarily beneficial, the NBA seems anxious to do so. For instance, the NBA has licensed a “a videogame called ‘NBA Ballers,’ which pitches itself as “the exclusive one-on-one basketball videogame highlighting the ‘bling-bling’ lifestyle of NBA superstars.” McCann, *supra* note 263, at 828 (quoting Hoopsvibe.com, NBA Videogames: NBA Ballers, http://www.hoopsvibe.com/nba_video_games/nba_ballers-ar12627.html (last visited Feb. 1, 2009). The NBA’s own head coaches have recognized and assailed the NBA’s hypocrisy regarding hip-hop. *Id.* San Antonio Spurs head coach Gregg Popovich, for example, has said “on one hand, you’re endorsing the culture, and on the other hand, you’re trying to block the culture. It sounds almost duplicitous.” *Id.* (quoting Peter May, *Polishing Reputation is a Fashionable Trend*, BOSTON GLOBE, Nov. 1, 2005, at E1).

²⁶⁸ Whitlock, *supra* note 221. Whitlock points specifically to the Indianapolis Colts and the New England Patriots, which at the start of the 2007 NFL season had, respectively, twenty-five and twenty-three non-black players. *Id.* Whether calculated or not, Whitlock argues, their “whitening” has contributed to their success. *Id.*

²⁶⁹ Distressingly, Whitlock seeks to justify this potential demographic shift. He identifies the negative behaviors of seven black NFL players he believes to

Whether Whitlock's prediction will come to pass in the NFL is untold. However, considering the NBA's history of customer-inspired race-considered roster construction, the last decade's groundswell of opposition among game-attending NBA fans to hip-hop culture's influence, and the NBA's myriad attempts, through technological manipulation and attire restrictions, to quash this culture embraced by many of its black players, the future Whitlock predicts would seem welcome among the NBA brass. This possibility is, however, a frightening one in that it would signal a disregard for one of Title VII's most fundamental premises: individuals should not be denied employment opportunities based on racially-inspired stereotypes.²⁷⁰

Under Title VII, while terminating or refusing to hire players who engage in rule-breaking conduct, whatever their backgrounds or associations, may be justifiable, terminating or refusing to hire players who embrace hip-hop culture *for fear of an increased propensity* to engage in rule-breaking conduct is not. Therefore, if a team terminates or refuses to hire players who are black under the assumption that the players embrace hip-hop culture, the players would clearly have viable Title VII disparate treatment claims against the team. If, on the other hand, the team effectuates a facially race-neutral policy to terminate or refuse to hire players who embrace hip-hop culture because the team assumes the players will be troublemakers, the players would be able to argue under Title VII's disparate impact theory that the facially race-neutral policy has a disproportionate impact on black players. Either way, NBA teams discovered to be doing what Whitlock predicts would face both potential Title VII liability and a public relations disaster.

2. *Lightening the Eye: Internationalization as Cure*

The NBA and its teams, however, may, through internationalization, be progressing toward a future consistent with Whitlock's prediction in a manner unassailable under either disparate treatment or disparate impact analysis.²⁷¹

embrace hip-hop, holds those negative behaviors against all other black NFL players who may embrace hip-hop, monolithizes the entire group as the "hip-hop athletes" and, essentially calls for their expurgation. *Id.*

²⁷⁰ The EEOC's guidelines explain, "Title VII . . . prohibits employment decisions based on stereotypes and assumptions about abilities, traits, or the performance of individuals of certain racial groups." See U.S. Equal Employment Opportunity Commission, *Race/Color Discrimination*, <http://eeoc.gov/types/race.html> (last visited Feb. 1, 2009).

²⁷¹ While the NBA would seemingly be just as pleased, or perhaps more pleased, to increase the numbers of talented white *Americans* in the league, white foreign players are, on the whole, substantially better players than their white American counterparts. Michael Wilbon, *An Issue that Follows the NBA*

In 1992, the United States National Men's Basketball team, stocked with NBA stars and dubbed the "Dream Team," demolished all of its opponents en route to winning the Olympic Gold Medal in Barcelona, Spain.²⁷² Even then, however, astute observers, including the Dream Team's coach Chuck Daly, realized the level of play internationally, and particularly in Europe, was quickly improving.²⁷³ Moreover, armed with the lessons learned from experiencing and watching the "Dream Team's" triumph in Barcelona, players from around the world further improved.²⁷⁴ Within several years of the 1992 Olympics, other nations' basketball teams had reached the Americans' level, and the United States was no longer routinely annihilating international opponents.²⁷⁵

Ultimately, at the 2002 *Fédération Internationale de Basketball* (FIBA) World Championships, the United States suffered its first loss after fifty-eight consecutive victories, and finished the tournament out of medal contention.²⁷⁶ Two years later, at the 2004 Olympic Games, the United States team was again embarrassed, suffering a "three-defeat flameout."²⁷⁷ Over the course of just twelve years, American basketball "supremacy had given way to superiority, then to survival, and, finally, to submission."²⁷⁸

Like a White Shadow, WASH. POST, Feb. 19, 2006, at E06. Washington Post and ESPN journalist Michael Wilbon attributes this disparity to culture and confidence. *Id.* White American children, Wilbon states, are routinely led to believe they cannot compete with black American children on basketball courts and are guided away from the game. *Id.* Wilbon suggests that white children from other nations, unburdened by the assumption of basketball inferiority that so hampers white American children, allow themselves to develop as basketball players in a way white American children do not. *Id.*

²⁷² Araton, *supra* note 258, at 45, 52 ("After a game or two [in the qualifying rounds], it was obvious that only a biblical act could beat the Dream Team[.]"). At the Olympic Games four years earlier, the United States National Basketball team, which then and theretofore was comprised of collegiate, rather than professional, players suffered an embarrassing semi-final loss to the Soviet Union, after which the "American basketball establishment" determined it would field NBA players in international competitions going forward. *Id.*

²⁷³ *Id.* at 48.

²⁷⁴ *Id.* at 136. The Dream Team's Olympic campaign, in addition to inspiring its opponents to improve, is credited with generally "boosting international interest [in basketball] to an entirely new level." Renada Rutmanis, *Foreign Players and the Globalization of Basketball*, in *BASKETBALL IN AMERICA: FROM THE PLAYGROUNDS TO JORDAN'S GAME AND BEYOND* 165, 167 (B. Batchelor ed., 2005).

²⁷⁵ Araton, *supra* note 258, at 133-35 (detailing the United States' narrow win over Lithuania in the 2000 Olympic semi-final round).

²⁷⁶ *Id.* at 145.

²⁷⁷ *Id.* at 170-71

²⁷⁸ *Id.* at 145. In 2006, the United States National Men's Basketball Team again lost in major international competition, this time to Greece in the

Unsurprisingly, as basketball has improved world-wide, foreign players have, in ever-increasing numbers, begun to ply their trade in the NBA, the world's most competitive and potentially lucrative basketball proving ground.²⁷⁹ "What began as a trickle [of international players entering the NBA] has turned into a flood."²⁸⁰ Whereas international players constituted only six percent of the NBA in 1993,²⁸¹ by 2008, their numbers had increased three-fold.²⁸² As noted above, while some of these players are of color, the overwhelming majority of them are white.²⁸³ Notably, these white foreign players are generally not NBA also-rans, but are instead some of the NBA's elites.²⁸⁴

semifinals of the FIBA World Championships. Bruce Wallace, *Greece Takes Air Out of U.S. Basketball*, L.A. TIMES, Sept. 2, 2006, at D10. By the time the team prepared for the 2008 Olympics in Beijing, China, it had performed below expectations in international competition for so long that it adopted the moniker "The Redeem Team." Joe Posnanski, *For U.S. basketball team, a tough task ahead*, MIAMI HERALD, Aug. 9, 2008, at 1.

²⁷⁹ Araton, *supra* note 258, at 137-38 (noting that one-fourth of the 2002 NBA draft picks were used to select foreign players). Interestingly, as other nations' leagues become financially competitive with the NBA, many NBA-caliber American players may begin opting to play overseas rather than in the NBA, in essence "reversing the course of the many international stars who have signed with the NBA." Rachel Cohen, *Childress Leaves Hawks to Sign with Greek Club*, ASSOCIATED PRESS, July 24, 2008, available at http://news.findlaw.com/ap_stories/s/2030/07-24-2008/20080724052009_12.html (last visited Feb. 1, 2009) (discussing the decision of NBA player Josh Childress to leave the Atlanta Hawks and join Greek club Olympiakos); *Ex-Hawk Childress Signs with Greek Club Team*, July 25, 2008, <http://sports.espn.go.com/nba/news/story?id=3501488> (last visited Feb. 1, 2009) (noting that, including Childress, five NBA players left the NBA for European teams during the 2008 offseason).

²⁸⁰ Daniel Eisenberg, *The NBA's Global Game Plan*, TIME, Mar. 17, 2003, at 59. While substantial numbers of foreign players did not enter the NBA until the 1980's, it bears noting that "foreign players have always been a part of the NBA." Rutmanis, *supra* note 274 at 166 (noting that "[i]n the very first game of the [NBA's] 1946-1947 season, an Italian-Canadian named Hank Arcadio Biasatti played for the [NBA's] Toronto Huskies.").

²⁸¹ Eisenberg, *supra* note 280, at 59.

²⁸² See RICHARD LAPCHICK, THE 2008 RACIAL AND GENDER REPORT CARD: NATIONAL BASKETBALL ASSOCIATION 5, (2008), http://www.bus.ucf.edu/sport/public/downloads/2008_NBA_RGRC_PR.pdf (last visited Feb. 1, 2009) (reporting that international players comprised 18% of the NBA's players during the 2007-2008 season).

²⁸³ ARATON, *supra* note 258, at 141. As of the 2004 NBA season, 46 of the 68 international players in the NBA were white. Richard Lapchick, *supra* note 237.

²⁸⁴ Indeed, the NBA's Most Valuable Player ("MVP") during the 2004-2005 and 2005-2006 seasons was Steve Nash, a Canadian. See NBA Postseason Awards: Most Valuable Player, http://www.nba.com/history/awards_mvp.html (last visited Feb. 1, 2009); Pat Hickey, *Canada abandons basketball*, THE [MONTREAL] GAZETTE July 19, 2008, at D2. The following season's MVP was Dirk Nowitzki, a German. See NBA Postseason Awards: Most Valuable Player,

Basketball prowess alone, however, does not explain the NBA's rapid internationalization or the vigor with which the NBA has embraced it over the course of the last decade.²⁸⁵ As Professor Richard Lapchick, Chair of the DeVos Sport Business Management Graduate Program at the University of Central Florida, explains, the NBA's internationalization movement is economically driven.²⁸⁶ For starters, a significant and increasing percentage of NBA merchandise sales, which provide the NBA hundreds of millions of dollars in revenue, now occur abroad.²⁸⁷ In addition, as Professor Lapchick points out, "[f]ans pay to see winning teams and good basketball. If an international player makes a team better, it's good for the team and good for the game."²⁸⁸ While these motivations must surely inspire the NBA's ambition to internationalize, another economically-driven motivation – one tied up in race, racial dynamics, and the NBA's re-imaging campaign – seemingly plays a part as well. New York Times columnist Harvey Araton writes in *Crashing the Borders: How Basketball Won the World and Lost Its Soul at Home*:

Considering [Commissioner] Stern's zest for marketing, given the way many teams during the seventies and eighties stocked the end of their benches with white players to ensure a modicum of racial diversity, it [is not] unreasonable to [hypothesize that] the accelerating internationalization . . . [is] purely dollar-driven with a residual goal of loosening the African-American hold on the league.²⁸⁹

Araton is not alone in his speculation. As noted above, New York Times Columnist Bill Rhoden has asserted "the NBA actively grooms as many non-black players as it can."²⁹⁰ The NBA's increasing inclusion of European players, Rhoden suggests, is a component of that grooming process: "European influence

http://www.nba.com/history/awards_mvp.html (last visited Feb. 1, 2009); Mike Wise, *The Americanization of Dirk Nowitzki*, N.Y. TIMES, Feb. 7, 2001, at D1. Both men are white. See Steve Nash NBA Bio Page, http://www.nba.com/playerfile/steve_nash/bio.html (last visited Feb. 1, 2009) (displaying a Steve Nash photograph); Dirk Nowitzki NBA Bio Page, http://www.nba.com/playerfile/dirk_nowitzki/bio.html (last visited Feb. 1, 2009) (displaying a Dirk Nowitzki photograph).

²⁸⁵ Rex Crum, *NBA Turns to the World for Help: Remedy for Olympic Disgrace? Promote Foreign Players*, MARKET WATCH, Nov. 7, 2004, <http://www.marketwatch.com/News/Story/Story.aspx?guid=%7B497A8574-88AE-4ABD-A825-10632715431B%7D&siteid=mktw&dist=> (last visited Feb. 1, 2009); Eisenberg, *supra* note 280, at 59-60.

²⁸⁶ Lapchick, *supra* note 237.

²⁸⁷ Eisenberg, *supra* note 280, at 59.

²⁸⁸ Lapchick, *supra* note 237.

²⁸⁹ ARATON, *supra* note 258, at 140.

²⁹⁰ RHODEN, *supra* note 134, at 67.

may be on the rise . . . [because] [t]here seems to be a taste for a new flavor.”²⁹¹ Further, many of the NBA’s players agree that race may play into the league’s trend toward internationalization, expressing concern that it reflects, perhaps, the league’s attempt to “get whiter.”²⁹²

Even assuming the NBA does not intend that internationalization spark a racial demographic shift in the league, such a shift is destined to be internationalization’s by-product. Professor Lapchick’s Institute for Diversity in Ethics and Sport reports that 68% of the NBA’s international players are white and only 32% are of color.²⁹³ In that nothing suggests the racial composition of the NBA’s international player population is likely to appreciably change,²⁹⁴ if that population continues to grow, as all indications suggest it will, a racial demographic shift of some sort is inevitable.

As discussed above, were MLS to permit internationalization as the NBA has, it, too, would begin to experience a demographic shift – but in the opposite direction. And just as the NBA vigorously embraces internationalization, MLS staunchly restricts it. Embracing internationalization and the demographic shift naturally born of it, however, does not involve application of any eligibility rule or standard. Rejecting internationalization so as to prevent the demographic shift it portends, on the other hand, does. So while it is difficult to imagine Title VII applying in the context of the NBA’s seeming attempt to “get whiter” through

²⁹¹ William C. Rhoden, *Sports of The Times- European Buildup Is a Put-Down*, N.Y. TIMES, June 29, 2002, at D1.

²⁹² ARATON, *supra* note 258, at 138. It bears noting that internationalization has thus far not substantially altered the NBA’s racial demographics. *See* Lapchick, *supra* note 237. This is attributable, in part, to dynamics stemming from the NBA’s race-consider roster construction phenomenon. As discussed *supra* at footnote 132, many NBA teams have traditionally stocked the bottoms of their rosters with white reserve players so as to satisfy their fans’ racial preferences without replacing players likely to meaningfully contribute to the team’s success. As international players began to “flood” into the league, *see* Daniel Eisenberg, *supra* note 280, at 59, teams accommodated them by jettisoning their least productive reserve players, who, as a consequence of previous race-considered roster construction, were disproportionately white. As such, internationalization has thus far resulted in white international players largely replacing white domestic players, leaving the overall numbers of white players in the league roughly unaltered. John Walters, *Does the NBA have another great white hope?*, NBCSPORTS.COM, Feb. 11, 2009, <http://nbcsports.msnbc.com/id/29116071/> (last visited Feb. 11, 2009).

²⁹³ Lapchick, *supra* note 237.

²⁹⁴ It bears noting that in January of 2008, the NBA launched the NBA China initiative to promote basketball and expand the NBA’s brand to China. *See E:60* (ESPN Television Broadcast, August 19, 2008). So, while there is no indication that the racial composition of the NBA’s international player population will significantly change anytime soon, it is conceivable that Chinese players’ numbers in the NBA may eventually increase.

internationalization, Title VII clearly applies to MLS's international eligibility rules which serve to disproportionately exclude players of color.

VI. LESSONS ON LIGHTENING A LEAGUE: WHAT MAJOR LEAGUE BASEBALL STANDS TO LEARN FROM MAJOR LEAGUE SOCCER

Taken together, the above analyses of the NFL, NHL, NBA, and MLS suggest that the nature of internationalization's demographic impact explains, at least to some degree, the leagues' regard or disregard for citizenship status. Where the disregard for citizenship status is likely to increase the proportionality of white players or preserve the status quo, citizenship status is unregulated. Where such disregard would likely decrease the proportionality of white players, as is the case with MLS, citizenship status is regulated.

This pattern would suggest that MLB restricts the numbers of its teams' international players. After all, as is the case with MLS, the overwhelming majority of MLB's international players are of color and hail primarily from Latin America and the Caribbean.²⁹⁵ While MLB does not currently impose international player restrictions, an analysis of its changing demographics together with the previously discussed racial politics long-existent in American sport suggest, perhaps, it may soon choose to do so. Among the MLS Policy's dangers, therefore, is that it provides MLB a discriminatory mechanism to emulate.

MLB, founded in 1903 through the merger of two previously existent professional baseball leagues,²⁹⁶ openly banned blacks for decades before beginning to desegregate during the middle of the twentieth century.²⁹⁷ As opportunity for black players increased, their numbers in MLB grew, and by 1975, 28% of MLB's players were black.²⁹⁸ Despite its increase in players of color, however, there was little threat that MLB might become – as the NBA and NFL were fast becoming – a league in which players of color outnumbered white players. Indeed, shortly after reaching that peak of 28%, the percentage of black major leaguers began a

²⁹⁵ Almost 60% of MLB's 239 international players hail from either the Dominican Republic or Venezuela. Larry Fine, *International Players Comprise 28 Pct of MLB Rosters*, REUTERS, Apr. 1, 2008, <http://www.reuters.com/article/domesticNews/idUSSP8408520080402> (last visited Feb. 1, 2009). Many others hail from a number of other Latin American and Caribbean nations, including Mexico, Cuba, Colombia, Curacao, Nicaragua, and Panama. *Id.*

²⁹⁶ See THE BASEBALL ENCYCLOPEDIA: THE COMPLETE AND DEFINITIVE RECORD OF MAJOR LEAGUE BASEBALL 6 (Jeanine Bucek ed., 1996).

²⁹⁷ See, *supra*, text accompanying footnotes 3-4.

²⁹⁸ DAVE WINFIELD, *DROPPING THE BALL: BASEBALL'S TROUBLES AND HOW WE CAN SOLVE THEM* 79 (2007).

steady decline, with promising African American athletes opting in greater numbers to play other sports, such as basketball and football.²⁹⁹ As of 2007, the percentage of black baseball players in MLB had plummeted to eight percent.³⁰⁰ Even if, however, when the numbers of MLB players of color were rising precipitously, MLB sought to slow that rise, citizenship discrimination would have been ineffectual, as the great majority of MLB players of color were African-American.³⁰¹

During the 1990's, MLB's players of color once again began to grow in percentage, and the trend has continued through the present.³⁰² This more recent increase, however, is fundamentally different from the first, in that it is fueled by the incorporation into the League of hundreds of foreign-born players.³⁰³ Dominicans, Venezuelans, and nationals of other Latin American and Caribbean countries appear in increasing numbers on MLB rosters.³⁰⁴ Notably, Latinos have played in MLB since the early twentieth century³⁰⁵ and have maintained a presence since.³⁰⁶ In recent

²⁹⁹ *Id.* at 60-61, 79-80. Author and former MLB player Dave Winfield explains that football and basketball "have siphoned away the interest of young African American athletes" because they appear to offer a higher chance of achieving wealth and fame than does baseball, they are more popular on the college level than is baseball, and, at least in the case of basketball, pick-up games require less equipment and fewer participants. *Id.* at 61-63.

³⁰⁰ WINFIELD, *supra* note 298, at 79. MLB has, in recent years, actively sought to increase interest in baseball among black Americans and to, therefore, eventually increase the ranks of black Major Leaguers through a variety of MLB sponsored programs. *Id.* at 74.

³⁰¹ *Id.* at 60-61.

³⁰² See RICHARD LAPCHICK, THE 2008 RACIAL AND GENDER REPORT CARD: MAJOR LEAGUE BASEBALL 16 (2008), http://www.bus.ucf.edu/sport/public/downloads/2008_MLB_RGRC_PR.pdf (last visited Feb. 1, 2009) (Whereas, in 1990, 70% of MLB players were white and 30% were of color, in 2007, just under 60% of MLB players were white and just over 40% were of color.).

³⁰³ Tyler M. Simpson, *Balking at Responsibility: Baseball's Performance Enhancing Drug Problem in Latin America*, 14 L. & BUS. REV. AM. 369, 370-71 (2008); Jessica N. Trotter, *Rooting for the "Home Team": How Major League Baseball and Latin America Can Better Provide For The "Safe"-ty of Their Players*, 13 SW. J. L. & TRADE AM. 445, 445-46 (2007).

³⁰⁴ Simpson, *supra* note 303, at 370-71.

³⁰⁵ The Latinos who played in MLB before it desegregated were, of course, light-skinned Latinos. ADRIAN BURGOS, JR., PLAYING AMERICA'S GAME: BASEBALL, LATINOS, AND THE COLOR LINE 245 (2007). While these pioneering light-skinned Latinos were, unlike dark-skinned Latinos and blacks, permitted to play, it bears noting that they were often disparagingly stereotyped and discriminatorily remunerated. See Timothy Davis, *Racism in Athletics: Subtle Yet Persistent*, 21 U. ARK. LITTLE ROCK L. REV. 881, 890-91 (1999),

³⁰⁶ BURGOS, *supra* note 305, at 245 ("Latino 'invasions' of the big leagues have taken place approximately every generation.").

years, however, numbers of Latin American players have steadily increased and have reached unprecedented levels. Indeed, as of 2007, Latin American players accounted for nearly 30% of all MLB players as compared with only 13% in 1990.³⁰⁷ MLB's Latin American players are not only numerous, they are also increasingly dominant,³⁰⁸ and as such, they are, without question, changing the face of Major League Baseball.³⁰⁹

All indications suggest this demographic shift will continue. As numerous as are Latin American major league players, Latin Americans make up an even greater proportion of MLB's minor league players – the players who will stock MLB rosters as current MLB players become injured, experience declination in skills, or retire.³¹⁰ Indeed, over 40% of minor leaguers are Latin American.³¹¹

This rising proportion of Latin Americans in minor league and major league baseball is no fluke, but rather stems directly from the economics of player recruitment. Put plainly, finding and developing baseball players in Latin America is far cheaper than doing so in the United States. As such, pursuant to what has been dubbed the “boatload mentality,” all MLB teams recruit heavily in Latin America.³¹² Because the manner in which MLB teams scout Latin American prospects and the signing bonuses they give Latin American prospects are far less stringently regulated than they would be were the prospects American-born, “[t]he teams can buy a boatload of players for the same amount of money it costs to sign

³⁰⁷ LAPCHICK, *supra* note 237, at 16.

³⁰⁸ BURGOS, *supra* note 305, at 243. (noting the “prevalence of Latinos among the game’s all-stars and annual award winners . . .”). This is not to suggest Latin American players are somehow inherently better than American players. Rather, many players reared in economically under-resourced Latin American nations pursue baseball excellence, which offers a potential path out of poverty, with a single-minded ferocity rarely seen in players with more affluent backgrounds. *Id.* at 67 (“[i]t is the dream of practically every young man in many Latin American nations to make it as a ballplayer. Indeed, there are few other career options . . .”). While impoverished Americans youngsters, as well as those who are more financially stable, may pursue any of several sports with similar passion, youngsters in many Latin American nations, in which baseball is wildly popular and has long had a cultural “meaning that [goes] beyond athletic competition[.]” focus overwhelmingly on baseball. BURGOS, *supra* note 305, at xiii.

³⁰⁹ WINFIELD, *supra* note 298, at 59-60.

³¹⁰ *Id.* at 74.

³¹¹ *Id.*

³¹² BURGOS, *supra* note 305, at 237. It bears noting that MLB has begun an effort to tap fledgling baseball talent in China as well. *See E:60* (ESPN Television Broadcast, August 19, 2008). MLB pays former MLB manager Jim Lefebvre to manage China’s national baseball team, and in March of 2008, MLB staged an exhibition game in China for the first time. *Id.* In addition, MLB’s New York Yankees have established a Chinese training facility reminiscent of those most MLB teams already have in Latin America. *Id.*

one player born in the United States.”³¹³ This allows MLB teams to evaluate scores of players, most of whom will ultimately be jettisoned, in hopes of identifying a few with the talent for major league success.³¹⁴ This system, although clearly exploitative, persists.³¹⁵ And if it further persists and the current demographic trend continues, it is conceivable that black and brown players whose primary language is Spanish will, within a few decades, dominate the MLB landscape and that white players will become a relative rarity.

If, however, the majority of paying baseball fans remain white,³¹⁶ and if scholars Ilyana Kuziemko and Geoffrey Rapp are correct that “the market for Major League Baseball players is characterized by customer discrimination,”³¹⁷ some MLB teams

³¹³ WINFIELD, *supra* note 298, at 66. For instance, in 2001, MLB’s Cleveland Indians spent \$1.7 million to sign its top draft choice in the American amateur player draft while spending less than half of that amount to sign forty Latin American prospects. BURGOS, *supra* note 305, at 237.

³¹⁴ BURGOS, *supra* note 305, at 237. Few of the players invited to join MLB teams’ Latin American baseball academies are legitimate prospects. WINFIELD, *supra* note 298, at 70. Most are invited, unbeknownst to them, “to fill out rosters, so that the true prospects can have teams of adequate size in order to develop their skills.” *Id.* Of those legitimate prospect who actually “graduate” from the academies, only twenty-five percent make it into the MLB minor league system and fewer still, only five percent, reach the major leagues. BURGOS, *supra* note 305, at 242. MLB teams are, therefore, “sifting through . . . hundreds, even thousands of prospects to find one major league-level player.” WINFIELD, *supra* note 298, at 73. Because these prospects often quit school at a young age to pursue the baseball dream, the consequences for those unable to make a living through baseball are dire, as they are often qualified to do little other than cut sugar cane. *Id.* at 70-71.

³¹⁵ BURGOS, *supra* note 305, at 237. The result of this recruiting system, explains Venezuelan Baseball Players Association President Angel Vargas, is that “Latino children and young men [are treated] as commodities . . . as if these human beings were pieces of exported fruit.” It merits noting that MLB is aware of MLB teams’ exploitative Latin American recruiting practices, and some reforms have been made, “but it would be a gross exaggeration to say that Major League Baseball has solved these problems.” WINFIELD, *supra* note 298, at 69; BURGOS, *supra* note 305, at 241 (noting that average signing bonuses in the Dominican Republic have risen to roughly \$30,000).

³¹⁶ Although Latin American players constitute 29% of all MLB players, Latin American fans constitute only 13% of all MLB in-stadium spectators. Mark Hyman, *The Racial Gap in the Grandstands*, BUSINESS WEEK, Oct. 2, 2006, at 78-79. While Latin American attendance has increased in recent years and some MLB teams are aggressively courting Latin American fans with “Latino Heritage celebrations” and other such promotions, *see id.*, there is no evidence to suggest they will at any time in the near future constitute a majority of MLB game attendees.

³¹⁷ Kuziemko & Rapp, *supra* note 135, at 142. Winfield asserts that fans watching the semi-finals and finals of the 2006 World Baseball Classic, in which Korea, Japan, Cuba, and the Dominican Republic competed and from which the United States was earlier eliminated, “didn’t seem to mind . . . that there was not a single Caucasian baseball player on any team.” Assuming

may, at some point, choose to decelerate their Latin American recruiting mechanisms, so as to maintain a critical mass of white players on their major league teams.³¹⁸ It is also possible that MLB, as a whole, could seek to stem the tide of Latin American entrants into its ranks. Even now, whispers circulate in the baseball community of several MLB teams, being “too Latin.”³¹⁹

If, indeed, MLB leadership chooses to reverse the League’s darkening trend, MLS-like citizenship discrimination would be an ideal means of doing so. Through citizenship discrimination, MLB could limit each team’s number of international players – players who are overwhelmingly of color – to ensure roster positions for domestic players, who are majority white. No matter the skill of the international players, their MLB opportunities would be artificially capped and their numbers would reduce.

While the thought of an American professional sport’s organizing body taking affirmative steps to reduce a racial group’s presence in the sport may, at first blush, seem fantastical, it is well historically precedented. Consider, for instance, the sport of horse racing, in which “African-Americans make up just a fraction of the riding community.”³²⁰ When horse racing was at its most popular, during the nineteenth and early twentieth centuries, the great majority of jockeys were black.³²¹ Over the course of a twenty-year span, however, exclusionary practices served to drastically reduce their numbers.³²² While horse racing without black jockeys was inconceivable at one time, the horse-racing industry’s development of discriminatory licensing requirements together with horse owners’ concerns about blacks dominating the jockey ranks served to systematically alter the horse racing landscape such that horse races involving no black jockeys eventually became the

Winfield is correct that the fans did not mind the absence of Caucasian players, this fact does not ensure, nor even suggest, that these fans would be as accommodating of Caucasian players’ absence from their favorite MLB teams.

³¹⁸ If an MLB team sought to limit the future inclusion of Latin American players, abandoning a “boatload mentality” toward Latin American recruiting processes would provide a convenient means toward that end. Because Latin American recruiting remains intensely exploitative, such a decision would likely garner commendation from many quarters, and the team’s racial motivation might well go undiscovered or overlooked.

³¹⁹ Ken Rosenthal, *Minaya, Other GMs Deserve Blame Too*, FOX SPORTS, May 27, 2008, <http://foxsports.foxnews.com/mlb/story/8180710/Minaya,-other-GMs-deserve-blame-too>. (last visited Feb. 1, 2009).

³²⁰ Neil Schmidt, *5 days until the ... 128th KENTUCKY DERBY: Black Jockey’s Journey Spanned Different Worlds*, CINCINNATI ENQUIRER, April 29, 2002, at 01A. Indeed, Marlon St. Julien, who placed seventh in the 2000 Kentucky Derby, “is the only black jockey to have ridden in a [premier] race in over eighty years.” *Id.*

³²¹ RHODEN, *supra* note 134, at 69-70.

³²² *Id.* at 75-76.

norm.³²³ Indeed, a glance at horse racing in the twenty-first century scarcely reveals that blacks were ever meaningfully involved in the sport.³²⁴

Competitive bicycling has endured a similar phenomenon. During the early twentieth century when cycling was a spectator sport sparking “epidemic” interest among Americans across the nation, blacks were heavily involved and, indeed, were among the sport’s most successful cyclists.³²⁵ Blacks’ opportunities in the sport were, however, discriminatorily limited when, at the height of the sport’s popularity, the League of American Wheelmen, the then-premier national cycling membership association, passed a motion prohibiting the admission of new black members.³²⁶ While blacks already in the organization were not stripped of their memberships, the exclusionary rule sent a clear message as to the value the American cycling community placed on black cyclists, and black cyclists quickly became novelties.³²⁷

The context in which rule changes thwarted the development of black jockeys and cyclists was obviously quite different from the context in which this article suggests MLB could conceivably shrink the ranks of Latino baseball players. Indeed, the former context was characterized by far more virulent and overt racial animus and discrimination than the latter. Still, the two factors enabling systematic exclusion in horse racing and cycling a century ago exist in baseball today: 1) the motive to discriminate; and 2) a means of doing so. Assuming MLB and its teams are sufficiently motivated to decrease the Latin influence on the league, the MLS policy provides an archetype for a Title VII end-around: racial discrimination by way of lawful citizenship discrimination. Title VII cannot tolerate such an end-around. The MLS Policy, therefore, demands scrutiny not only because of its discriminatory impact in the MLS context, but because of its broader implications.

VII. CONCLUSION

Over fifty years ago, during the mid-twentieth century, American sport matured mightily. One by one, America’s premier professional sports leagues abandoned policies excluding players

³²³ *Id.* at 75-76, 78.

³²⁴ Schmidt, *supra* note 320, at 01A. (“[Black jockeys] were ridden out of the sport, and they’ve been sort of written out of the sport, too.”).

³²⁵ RHODEN, *supra* note 134, at 86.

³²⁶ *Id.* at 87.

³²⁷ *Id.* Ironically, black cycling organizer Frederick Scott allegedly supported, and perhaps inspired, the League of American Wheelmen’s segregationist effort, in hopes of strengthening the ranks of his all-black cycling club. *Id.*

of color from participation, and, as time has passed, the numbers of people of color playing sport professionally in the United States has increased significantly.

While some teams in the NBA, the NHL, the NFL, and MLB may continue to subtly discriminate in constructing their rosters,³²⁸ they do so in spite of league mandate. In the MLS context, however, teams may discriminate in constructing their rosters pursuant to league mandate. Because of its demographic dynamics, MLS, through imposing on each of its teams an international player quota, artificially suppresses the numbers of players of color in the League. Whether it does so intentionally or unintentionally, MLS is vulnerable to Title VII challenge and, if sued, would face potential liability.

The MLS Policy is certainly concerning in its own right, but its implications for the broader American professional sporting community spur still greater concern. Internationalization in the NBA, the NHL, and the NFL either increases the proportion of white players in those leagues or maintains the demographic status quo, and, predictably, those leagues allow – and in some cases encourage – international player participation. MLB’s demographic dynamics, however, are similar to MLS’, and as such, MLB’s continued internationalization will decrease, rather than increase, the proportion of white MLB players. The MLS Policy, therefore, provides a convenient template for MLB should MLB seek to halt or reverse its demographic trend. This article argues, however, that the MLS Policy may well contravene Title VII’s racial discrimination prohibition. It therefore demands, rather than emulation, searching scrutiny and, perhaps, invalidation.

³²⁸ See generally, Duru, *supra* note 4.