

BASEBALL'S CONFLICT OF LAWS

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There is a conflict of laws in Major League Baseball, resulting from the National League's refusal to adopt the Designated Hitter Rule, and the American League's refusal to abandon it. As is often the case when rules of two jurisdictions diverge, the conflict reflects a difference in priorities and philosophies between the two leagues. By adopting and maintaining the Designated Hitter Rule, the American League demonstrates its preference for offensive output at the expense of baseball tradition. The National League preserves tradition by adhering to the natural law of baseball. At the risk of overstatement, it might be said that the National League's traditional rule is favored by baseball purists who appreciate the game's nuance and strategy, while the American League's Designated Hitter Rule appeals to casual viewers whose attention spans grow short unless runs are being scored.

The existence of differing models is not necessarily a bad thing. In fact, overall fan interest is likely greater than it would be if both leagues followed the same rule. Professors Buehler and Calandrillo suggest that "this may be an instance in which fans should agree to disagree."¹ Whatever the possible advantages of having two distinct brands of Major League Baseball, the divergence in rules means that a choice-of-law decision is required when American League teams face National League teams. Such interleague matchups were once limited to the World Series and the All-Star game, but they have become a season long phenomenon with the advent and recent expansion of regular season interleague play. The current schedule includes three-hundred interleague games spread over the course of the regular season, and each of those games requires a choice between the two leagues' competing rules.

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¹ Dustin E. Buehler and Steve P. Calandrillo, *Baseball's Moral Hazard: Law, Economics, and the Designated Hitter Rule*, 90 BOSTON UNIV. L. REV. 2083, 2119 (2010).

This article will describe the current approach to that choice, the unfairness inherent in that approach, and possible alternatives that would mitigate that unfairness. By way of background, we will begin with a brief discussion of the origins of the Designated Hitter Rule and the advent of regular season interleague play.

THE DESIGNATED HITTER RULE

Traditional baseball rules require that each player take a turn at bat, and players must bat in the order submitted by the manager at the beginning of the game.² A batter who bats out of turn will be ruled out upon appeal by the opposing team, and a player must leave the game in order to be replaced in the batting order by a “pinch hitter.”³ By contrast, the Designated Hitter Rule provides that the pitcher does not bat.⁴ Instead, his turn in the batting order is taken by a Designated Hitter, who does not play a position in the field. Thus, under the Designated Hitter Rule, the lineup includes ten players: nine position players plus a Designated Hitter. In contradistinction to the Designated Hitter Rule, the traditional rule is sometimes referred to as “nine-man baseball.”⁵

The idea of designating a player to bat in place of the pitcher was first suggested more than 100 years ago, but the Designated Hitter did not become a part of Major League Baseball until 1969.⁶ That year, the American League began using an “experimental” Designated Hitter rule in spring training games.⁷ American League owners were acting in response to falling attendance, which they

² Major League Baseball Rule 5.04(a).

³ Major League Baseball Rule 6.03(b). Because batting out of turn does not result in sanctions unless it is called to the umpire’s attention, Rule 6.03(b) and its Comments address a delightfully complex series of contingencies that might occur before a protest is lodged.

⁴ Major League Baseball Rule 5.11(a). The Rule states, in pertinent part, that
A hitter may be designated to bat for the starting pitcher and all
subsequent pitchers in any game without otherwise affecting the
status of the pitcher(s) in the game.

⁵ See, e.g., G. RICHARD MCKELVEY, *ALL BAT, NO GLOVE: A HISTORY OF THE DESIGNATED HITTER* 135 (2004).

⁶ MCKELVEY, *supra* note 5 at 23, indicating that Connie Mack, manager of the Philadelphia Athletics, suggested the idea of a designated hitter as early as 1906.

⁷ MCKELVEY, *supra* note 5 at 14. Unless otherwise indicated, McKelvey’s well-researched monograph is the source for the historical information described in the remainder of this essay.

attributed to declining offensive output.⁸ At the Major League winter meetings in 1972, the Major League Baseball Rules Committee rejected the American League owners' request to fully implement the Designated Hitter Rule in both leagues.⁹ Undeterred, the owners adopted the Rule for regular season American League games as a three-year experiment beginning in 1973.¹⁰ Apparently the experiment was deemed successful, as the Rule became permanent in 1976.¹¹ National League owners declined to participate in the experiment and have voted against adopting the Designated Hitter Rule every time the issue has been considered.¹²

The World Series presented the initial clash between the two leagues over the Designated Hitter Rule. The traditional nine-man rule was followed during the "experimental" phase, but once American League owners made the Designated Hitter Rule permanent in 1976, Commissioner Bowie Kuhn authored a compromise under which the Designated Hitter would be used in World Series games in even numbered years.¹³ Pursuant to a change engineered by Commissioner Peter Ueberroth, the alternating year approach was replaced by a "rule of the park" approach in 1986.¹⁴ Since then, the home team's rule has applied in all World Series games.

The Designated Hitter was not used in the All-Star game until 1989, when Commissioner Ueberroth decreed that the "rule of the park" approach would be followed.¹⁵ In 2010, Major League Baseball announced that the Designated Hitter would be used in

⁸ MCKELVEY, *supra* note 5 at 18.

⁹ MCKELVEY, *supra* note 5 at 22.

¹⁰ MCKELVEY, *supra* note 5 at 24.

¹¹ Leonard Koppett, *Koppett's Concise History of Major League Baseball* 355 (1998).

¹² MCKELVEY, *supra* note 5 at 43, 54, 65.

¹³ Oddly enough, a proposal for an alternating year approach can be found in the Conflict of Laws literature. Professor Brainerd Currie suggested that in certain situations, such as where the forum is a disinterested third state, a choice between conflicting state laws might be based on which state's name comes first in the alphabet, with reverse alphabetical order used for transactions occurring in odd numbered years. Brainerd Currie, *The Verdict of the Quiescent Years*, 28 U. CHICAGO L. REV. 258 at 279 (1961), reprinted in BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

¹⁴ MCKELVEY, *supra* note 5 at 53.

¹⁵ MCKELVEY, *supra* note 5 at 100.

every All-Star game, regardless of venue.¹⁶ The issue was largely academic, as pitchers were almost always replaced by pinch hitters in All-Star games played under the traditional rule.

REGULAR SEASON INTERLEAGUE PLAY

Like the Designated Hitter Rule, regular season interleague games were introduced as a way of boosting attendance and fan interest, which had suffered on account of a players' strike that shortened the 1994 and 1995 seasons and resulted in the cancellation of the 1994 World Series.¹⁷ Major League owners had previously rejected proposals for interleague play, but in 1996, the owners and the Major League Baseball Players' Association agreed to a limited schedule of regular season interleague games beginning in 1997.¹⁸

Initially, interleague games were scheduled only during a few weeks each season, usually before the All-Star break in July. Interleague play could be confined to brief periods because each league had an even number of teams, meaning that a full slate of intra-league games could be scheduled on any given day. This ceased to be the case in 2013, when the Houston Astros moved from the National League to the American League, giving each league 15 teams.¹⁹ With an odd number of teams in each league, it is numerically impossible to schedule a full slate of intra-league games on a single day. Since 2013, each team has played 20 regular season interleague games, spread throughout the season.²⁰ Season-long interleague play likely will continue at least until each league

¹⁶ JOHN SCHLEGEL, MODIFICATIONS IN PLACE FOR ALL-STAR GAME, APRIL 29, 2010, MLB.COM, [HTTP://M.MLB.COM/NEWS/ARTICLE/9645460/](http://m.mlb.com/news/article/9645460/) (RETRIEVED NOVEMBER 8, 2017).

¹⁷ MCKELVEY, *supra* note 5 at 140.

¹⁸ At least one proponent of regular season interleague play suggested that it presented an opportunity to eliminate the Designated Hitter altogether, but the Major League Baseball Players' Association conditioned its approval of interleague play on retaining the Designated Hitter. MCKELVEY, *supra* note 5, 135.

¹⁹ Barry M. Bloom, *Astros sale to Crane, Move to AL approved*, November 17, 2011, MLB.com. <http://m.mlb.com/news/article/25992120/> (retrieved May 18, 2017).

²⁰ Mark Newman, *MLB Releases 2013 Schedule with New Wrinkles*, September 12, 2012, mlb.com, <http://m.mlb.com/news/article/38287660/> (retrieved May 18, 2017).

has an even number of teams, whether through expansion, contraction, or realignment.²¹

THE DESIGNATED HITTER RULE IN INTERLEAGUE PLAY

When regular season interleague games began in 1997, the “rule of the park” was already well-established in the World Series, and it provided the obvious model for choosing the applicable rule in interleague play. Under this approach, which echoes the territorial rules of the first Restatement of Conflicts,²² the Designated Hitter Rule applies in American League parks but not in National League parks. Interleague games pose a particular challenge for the visiting team because it must play under conditions for which its roster was not designed. American League pitchers unaccustomed to batting are called upon to do so in road games against National League opponents. The bigger disadvantage in such games is that American League teams must forego the services of their Designated Hitter (or have him play in place of a regular position player). For their part, National League managers must choose a Designated Hitter for games played in American League parks. Unlike American League teams, National League teams do not carry a full time Designated Hitter. This means that National League managers must use a bench player as their ninth batter for interleague road games.

THE AMERICAN LEAGUE’S ADVANTAGE

It might appear that the disadvantage of playing under an unfamiliar rule falls evenly on each league so long as the interleague schedule allocates home games equally between the leagues. This overlooks the fact that American League teams, which employ a Designated Hitter for the entire season, enjoy a larger advantage from using the Designated Hitter than any advantage National League teams might enjoy when the Designated Hitter is not used. An American League roster includes

²¹ However, even with an odd number of teams in each league, a more abbreviated interleague schedule would be possible. Only 162 interleague games would be required over the course of a 162 game season, which works out to roughly 11 games per team.

²² RESTATEMENT OF CONFLICT OF LAWS (Am. Law. Inst. 1934). Section 378, for example, provides that “(t)he law of the place of wrong determines whether a person has sustained a legal injury.”

nine hitters who bat in every game. On a National League roster, only eight starters bat on a regular basis. Thus, a National League team will be at a competitive disadvantage even when it is allowed to use a Designated Hitter because the role will not be filled by a power hitting specialist accustomed to batting in almost every game of the season. In contrast, when an American League team plays under National League rules, it must forego the services of one of its nine regular hitters. Playing without the Designated Hitter puts the American League and National League teams on more or less equal footing, except that the American League team has a powerful pinch hitter at its disposal.

The record confirms the American League's advantage in interleague play. From 1997 through 2013, American League teams won 57.5 percent of interleague games played in American League parks.²³ National League teams won only 52.7 percent of interleague games played in National League parks.²⁴ From the beginning of the 2013 season through late August of 2016, the disparity was even greater with the American League winning 58.2 percent of home interleague games compared with the National League's 50.2 percent.²⁵ The Designated Hitter rule provides the most logical explanation for the American League's outsized advantage in home games. American League rosters are built to have more offensive firepower than National League rosters, and American League teams are bound to enjoy an advantage when they are able to deploy that firepower against National League opponents.

LEVELING THE INTERLEAGUE PLAYING FIELD

The data quoted above suggest that interleague games are more competitive when the Designated Hitter Rule does not apply. This militates in favor of returning to traditional rules in interleague play. With a nod to Professor Leflar, enthusiasts of the

²³ Jo Craven McGinty, *Why the AL Batters the NL at Home: The DH*, WALL STREET JOURNAL, (July 28, 2014), <https://www.wsj.com/articles/why-the-al-batters-the-nl-at-home-the-dh-1405704990>.

²⁴ *Id.*

²⁵ *Hypothesis: AL Has Unfair Advantage in Interleague Play*, REDDIT, (August 24, 2016), https://www.reddit.com/r/baseball/comments/4zecaa/hypothesis_al_has_unfair_advantage_in_interleague/.

nine-man lineup might describe this approach as resolving the conflict by choosing the “Better Rule of Baseball.”²⁶ American League teams and their fans would respond that the Designated Hitter is the “better rule.” Moreover, the Major League Baseball Players’ Association likely would oppose the change.²⁷

The technique of combining rules from different jurisdictions – known as *dépeçage* in the conflict-of-laws literature.²⁸ offers another possibility for making interleague games more competitive. The American League rule and the National League rule could be combined to create a hybrid rule under which pitchers would not bat, but there would be no Designated Hitter. This “eight-man-batting-order” likely would result in a modest increase in offensive output while offering a unique format for interleague games, different from both the high-scoring American League model and the traditional National League model. This novel format should generate added interest in and curiosity about interleague games.

A more modest proposal would be to apply the visiting team’s rule instead of the home team’s rule in interleague games, with the Designated Hitter being used only in interleague games played in National League parks. American League teams would continue to enjoy a roster advantage in half their interleague games, but that advantage would be offset somewhat by the National League team’s home field advantage. For games played in American League parks, American League teams would enjoy only the usual home field advantage, without the additional roster advantage resulting from the Designated Hitter.

This “visiting team rule” approach would give fans in each league a chance to attend games played under the other league’s rule, and it should not be objectionable to proponents of the Designated Hitter Rule since it does not decrease the number of games in which the Rule is used. The “visiting team rule” approach has been employed since 2014 in interleague games between the

²⁶ See generally Robert Lefflar, *Choice Influencing Considerations*, 41 N.Y.U. L. Rev. 267 (1966). The most frequently quoted and controversial of Professor Lefflar’s Considerations is the suggestion that a court faced with a choice-of-law problem should seek to apply “the better rule of law.”

²⁷ See MCKELVEY, *supra* note 5, 147, describing the Players’ Association’s rejection of a 1997 proposal to phase out the Designated Hitter rule.

²⁸ For an insightful and entertaining example of *dépeçage*, see DAVID F. CAVERS, *THE CHOICE OF LAW PROCESS* 34 – 43 (1965).

two Japanese major leagues, only one of which uses the Designated Hitter in intra-league games.²⁹ For the U.S. Major Leagues, it would represent a small step toward offsetting the American League's roster advantage.³⁰

A PUSH TOWARD UNIFORMITY

Uniform laws offer an effective solution to choice-of-law problems: If the disparity between potentially applicable laws is eliminated, there is no longer a need to choose. With that in mind, it is not surprising that the expansion of regular season interleague play has resulted in calls for uniformity between the American and National Leagues. Most of these calls implore the National League to adopt the Designated Hitter Rule.³¹ Calls for the American League to abandon the Designated Hitter are less common, but they do exist.³² Given that such a change would eliminate high paying jobs, the Players' Association almost surely would object.³³ Moreover, by all appearances, American League fans are happy with the Designated Hitter.³⁴

To the great relief of baseball purists, National League owners have thus far shown no interest in adopting the Designated Hitter rule.³⁵ Even fans who prefer the higher scoring style of the

²⁹ *NPB to Shake Up Designated Hitters*, THE JAPAN TIMES, (April 16, 2014), <http://www.japantimes.co.jp/sports/2014/04/16/baseball/japanese-baseball/npb-to-shake-up-designated-hitters/#.WR3joFfeTdl>.

³⁰ Commissioner Bud Selig endorsed the idea of flipping the Designated Hitter Rule in interleague games in a question and answer session with baseball writers in July 2012. Stan McNeal, *State of the game address: Bud Selig, Michael Weiner speak*, SPORTING NEWS, (July 10, 2012), <http://www.sportingnews.com/mlb/news/3881586-mlb-all-star-game-2012-bud-selig-michael-weiner-replay-dh-interleague>.

³¹ See, e.g., Christina Kahl, *It's time for NL to adopt the DH*, ESPN.COM, (April 4, 2013), http://www.espn.com/blog/sweetspot/post/_id/34389/its-time-for-nl-to-adopt-the-dh. But see Bill Shaikin, *There's no need for a designated hitter in the National League – Ever*, LOS ANGELES TIMES (April 6, 2013), <http://articles.latimes.com/2013/apr/06/sports/la-sp-0407-shaikin-baseball-dh-20130407>, recounting the thrill of Los Angeles Dodgers' pitcher Clayton Kershaw hitting a home run to break a scoreless tie in the Dodgers' first game of the 2013 season.

³² Evan Karmazyn, *Top 10 Reasons MLB Should Ban the Designated Hitter*, SPORTSTER, (February 1, 2015), <http://www.thesportster.com/baseball/top-10-reasons-mlb-should-ban-the-designated-hitter/>.

³³ See note 9, *supra*.

³⁴ Buehler and Calandrillo, *supra* note 5, at 2111.

³⁵ Jerry Crasnick, *Rob Manfred: No foreseeable change to DH rule coming*, ESPN.COM, (January 25, 2016), http://www.espn.com/mlb/story/_id/14643947/mlb-

American League should be willing to acknowledge that the demise of traditional nine-man baseball would be a tremendous cultural loss. So long as National League owners hold firm, both styles of baseball likely will continue despite the challenges presented by interleague play.

After more than forty years, players, management, and fans have grown accustomed to the differing brands of baseball played in the respective leagues, with each brand having its own audience. The challenge of dealing with conflicting rules in interleague play is a necessary cost of providing fans with a choice between brands. That challenge might even be viewed as a positive feature of a game that owes no small part of its enduring appeal to notoriously complex rules.³⁶ Citing Justice Brandeis, Professors Buehler and Calandrillo suggest that allowing the leagues to experiment with differing rules is in line with the tradition of allowing states to serve as laboratories for legal innovation.³⁷ For America's Pastime, the analogy seems especially apt.

commissioner-rob-manfred-says-no-foreseeable-change-designated-hitter-rule-coming. Commissioner Manfred told ESPN that "the vast majority of clubs in the National League want to stay where they are" with regard to the Designated Hitter Rule. *See also* Shaikin, *supra* note 21.

³⁶ *See generally* PETER E. MELTZER, SO YOU THINK YOU KNOW BASEBALL?: A FAN'S GUIDE TO THE OFFICIAL RULES (2013). *See also* JASON TURBOW AND MICHAEL DUCA, THE BASEBALL CODES: BEANBALLS, SIGN STEALING, AND BENCH-CLEARING BRAWLS: THE UNWRITTEN RULES OF AMERICA'S PASTIME (2011).

³⁷ Buehler and Calandrillo, *supra* note 5, at 2119, citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310 – 311 (Brandeis, J., dissenting).