

Major League Baseball's Indentured Class: Why the Major League Baseball Players Association Should Include Minor League Players

By DAVID WILLIAMS*

"[P]rofessional baseball is exploitation. It has been for years—decades. So long, in fact, that it has become a victim of its own belief system: that a player must sacrifice and succumb to unfair treatment as part of 'chasing the dream.'"¹

Introduction

MAJOR LEAGUE BASEBALL is currently running a \$46 billion empire.² Empires are fueled by labor, and the cheaper the labor the better.³ Former executive director of the Major League Baseball Players Association ("MLBPA"), Marvin Miller, once described Major League Baseball players as "the most exploited group of workers I [have] ever seen."⁴ Yet, despite this dynamic, Major League Baseball's most valuable commodity is its employees—the players—without whom there is no national pastime⁵ and no empire. To ensure players' continued

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1. Dirk Hayhurst, *An Inside Look into the Harsh Conditions of Minor League Baseball*, BLEACHER REPORT (May 14, 2014), <http://bleacherreport.com/articles/2062307-an-inside-look-into-the-harsh-conditions-of-minor-league-baseball> [https://perma.cc/FAG8-P2MX].

2. Levi Weaver, *On minor-league pay, MLB's stance doesn't line up with the facts*, ATHLETIC (Apr. 4, 2018), <https://theathletic.com/293189/2018/04/04/on-minor-league-pay-mlbs-stance-doesnt-line-up-with-the-facts/> [On File with USF Law Review].

3. *Id.*

4. Zachary Moser, *The history of the MLBPA, part one: The rise of sports' strongest union*, BEYOND THE BOXSCORE (Feb. 16, 2017, 1:00 PM), <https://www.beyondtheboxscore.com/2017/2/16/14151448/mlbpa-history-rise-curt-flood-bowie-kuhn-marvin-miller> [https://perma.cc/QR2V-4G68].

5. JULES TYGIEL, PAST TIME: BASEBALL AS HISTORY 7 (2000).

participation in a system historically rigged by unfair labor practices,⁶ Major League Baseball has put a stranglehold on the business of playing baseball professionally.⁷

“In 1922, the Supreme Court ruled that Major League Baseball was exempt from antitrust laws.”⁸ No other sports league in the United States has been granted that exemption.⁹ Exempting Major League Baseball from U.S. antitrust laws essentially ended all other rival professional baseball leagues—“if you wanted to play baseball professionally, you had to work for MLB.”¹⁰ It’s a unique dynamic. To make a living playing our nation’s pastime, a player’s only option is to play under the umbrella of Major League Baseball. It is also important to emphasize that Major League Baseball is completely reliant on its players to churn its profits. Despite the appearance of a mutually beneficial relationship between employer and employee, baseball players have fought diligently over the last century to secure their employment rights.¹¹ However, not all players have benefitted from this hard-fought struggle.¹² While the current collective bargaining agreement (“CBA”) between Major League Baseball and the MLBPA sets the 2018 minimum salary for a Major League baseball player at \$545,000,¹³ minor league players remain unrepresented by the

6. See KRISTER SWANSON, *BASEBALL’S POWER SHIFT: HOW THE PLAYERS UNION, THE FANS, AND THE MEDIA CHANGED AMERICAN SPORTS CULTURE* 1–11 (2016).

7. See *id.* at 64.

8. Anna Hiatt, *Why we should applaud baseball’s all-powerful players union*, WEEK (Dec. 4, 2012), <http://theweek.com/articles/469877/why-should-applaud-baseballs-all-powerful-players-union> [<https://perma.cc/8KG5-GN4H>].

9. *Id.*

10. *Id.* The anti-trust exemption destroyed the ability of rival leagues to compete with MLB, “like the Federal League, which had competed against MLB in the mid-1910s.” *Id.*

11. See *id.*

12. See D’Bria Bradshaw, *Minor League Baseball Players FLSA Litigation: Are Players Entitled to Greater Rights?*, SPORTS AGENT BLOG (June 13, 2017), <http://sportsagentblog.com/2017/06/13/minor-league-baseball-players-flsa-litigation-are-players-entitled-to-greater-rights/> [<https://perma.cc/R69V-3GYR>].

13. 2017-2021 *Basic Agreement*, MAJOR LEAGUE BASEBALL PLAYERS ASS’N 12 (Dec. 1, 2016), <http://www.mlbplayers.com/pdf9/5450407.pdf> [<https://perma.cc/EQ95-A46V>] [hereinafter *MLB, Basic Agreement*]. When a minor league player is promoted to the major league, they receive a prorated amount of the minimum major league salary, meaning the minimum salary is divided by a player’s service time (the number of days they are on the major league roster for that given year). See *id.* at 285–86.

MLBPA and make as little as \$1,100 a month¹⁴ over the course of a five and a half month season.¹⁵

Except in unique cases involving foreign or highly skilled players,¹⁶ baseball players enter the professional divisions of baseball through the Major League Baseball first-year player draft.¹⁷ Once drafted by one of Major League Baseball's thirty teams, a player's contract binds them to that team for as long as seven years.¹⁸ A minor league player's employment rights are limited.¹⁹ While revenues and player salaries at the major league level have grown exponentially,²⁰ so has the political and economic imbalance. Major League Baseball has the power to demote, promote, and manipulate the service time of its employee players.²¹ No matter the professional level, major and minor

14. Josh Norris, *Bill Could Exempt Minor Leaguers From Labor Law*, BASEBALL AM. (Mar. 19, 2018), <https://www.baseballamerica.com/stories/government-spending-bill-could-exempt-minor-leaguers-from-labor-law/> [<https://perma.cc/Z5RK-ZUBX>]; see also Weaver, *supra* note 2 (minor league pay differs based on a number of factors including service time and the level at which a minor league player is playing (i.e., high-A, AA, or AAA)).

15. Weaver, *supra* note 2.

16. See, e.g., Wendy Thurm, *Straight To The Majors: The Players Who Skipped The Minors On Their Way to Pro Careers, Part I*, SBNATION (Feb. 2, 2012, 11:37 AM), <https://www.sbnation.com/2012/2/2/2761586/straight-to-the-majors-players-who-skipped-the-minors-on-their> [<https://perma.cc/4FGW-WUGN>]; see also Wendy Thurm, *Straight To The Majors: The Players Who Skipped The Minors On Their Way to Pro Careers, Part II*, SBNATION (Feb. 4, 2012, 9:38 AM), <https://www.sbnation.com/2012/2/4/2769203/straight-to-the-majors-the-players-who-skipped-the-minors-on-their> [<https://perma.cc/XT5Z-2G38>].

17. See *First-Year Player Draft*, MLB, <http://mlb.mlb.com/mlb/draftday/rules.jsp> [<https://perma.cc/X5NJ-KYL4>].

18. Weaver, *supra* note 2.

19. See Jeremy Venook, *Minor Leagues, Minimal Wages*, THE ATLANTIC (Sep. 21, 2016), <https://www.theatlantic.com/business/archive/2016/09/minor-leagues-minimum-wage-lawsuit/500216/> [<https://perma.cc/CW83-BASG>] ("Legal technicalities dating back to 1922 have kept many players' pay below poverty level.").

20. See Maury Brown, *MLB Sets Record For Revenues In 2017, Increasing More Than \$500 Million Since 2015*, FORBES (Nov. 22, 2017, 12:49 PM), <https://www.forbes.com/sites/maurybrown/2017/11/22/mlb-sets-record-for-revenues-in-2017-increasing-more-than-500-million-since-2015/#4aa721827880> [<https://perma.cc/6K3N-TK6T>]; see also Kurt Badenhausen, *Average Baseball Salary Up 20,700% Since First CBA in 1968*, FORBES (Apr. 7, 2016, 11:48 AM), <https://www.forbes.com/sites/kurtbadenhausen/2016/04/07/average-baseball-salary-up-20700-since-first-cba-in-1968/#4a7a479c3e48> [<https://perma.cc/PDD4-RYVD>].

21. See Patrick Kessock, Note, *Out of Service: Does Service Time Manipulation Violate Major League Baseball's Collective Bargaining Agreement?*, 57 B. C. L. REV. 1367, 1367 (2016); see also Bryan Kilpatrick, *Explaining MLB's service time rules*, PURPLE ROW (Mar. 31, 2015, 5:38 PM), <https://www.purplerow.com/2015/3/31/8323263/kris-bryant-service-time-cubs-mlb-roc-kies-jon-gray> [<https://perma.cc/TG8P-FYJR>] ("Often, clubs will come up with a pretty good excuse for demoting a player or otherwise holding him back from reaching certain service time milestones."); see also Jeff Passan, *Sources: Kris Bryant, Maikel Franco filed grievances over manipulation of service time*, YAHOO SPORTS (Dec. 7, 2015), <https://us-sports-yahoo.partner.tumblr.com/post/134748645657/sources-kris-bryant-maikel-franco-filed> [<https://perma.cc/8Q3K-8Q3K>].

league players are under the employ of Major League Baseball.²² Although lauded as one of the strongest unions in the United States, the current and past collective bargaining agreements negotiated between Major League Baseball and the MLBPA have weakened the political and economic power of Major League Baseball's workers—the players—by not including and supporting the rights of minor leaguers. And as a result, minor league players struggle to make minimum wage.²³ Minor league players understand the hard lesson, “when you are unorganized you are at the mercy of the company, and [] as a rule, despite pronouncements to the contrary, the company [does] not show much mercy.”²⁴ The MLBPA should expand its union protections to minor league players to preserve the strength and enhance the stability of its players union.

This comment is divided into four sections. Part I gives a general overview of labor law in the United States and how labor relations work in Major League Baseball. Part II provides an overview of Major League Baseball's minor league system. Part III discusses how Major League Baseball has exploited minor league players through its use of an antitrust exemption and legislation to exclude minor league players from Fair Labor Standards Act protections. Part IV offers the argument that minor league players should be included in the MLBPA for the health and future stability of Major League Baseball's most valuable commodity—its players.

I. Labor Law in the United States and Major League Baseball

Subsection A briefly details the development of labor law in the United States, and subsection B discusses the creation of the MLBPA and how it operates under the labor law umbrella.

A. Labor Law in the United States

The United States operates under a capitalist economic system that ultimately divides society into two groups: “those who own the

perma.cc/55CJ-8STH] (“The question of service-time manipulation long predates Bryant and Franco and is an inherent product of a system that bases free agency—as well as the extra year of arbitration known as Super 2 status—on days in the major leagues.”).

22. See Norris, *supra* note 14.

23. Ted Berg, *\$12,000 a year: A minor leaguer takes his fight for fair pay public*, USA TODAY (Jan. 31, 2017, 9:18 AM), <https://ftw.usatoday.com/2017/01/minor-league-baseball-pay-fair-labor-standards-act-minimum-wage-lawsuit-kyle-johnson> [https://perma.cc/BHB6-3A5P].

24. MICHAEL D. YATES, *WHY UNIONS MATTER* 2 (1998).

workplaces and those who work for [the owners]”²⁵ (i.e., employers and employees). There are three primary areas of workplace law that regulate the employer-employee relationship: employment law, employment discrimination, and labor law.²⁶

Labor law focuses on the relationship between “various legally defined entities” such as “an employer, a union, and a bargaining unit.”²⁷ From a more humane perspective, labor law is really about people; more specifically—“people at work.”²⁸ On one side are employees, acting together for mutual benefit, and on the other side is the employer.²⁹

The “bargaining unit” is the labor organization—a union—chosen by the employees to represent them collectively.³⁰ Employees can engage in collective action without the representation provided by a union,³¹ but there is consensus among economists that union-represented employees experience greater success in negotiating for higher pay and benefits.³² Research has found that the earnings of unionized workers “exceed those of comparable nonunion workers by about 15%, a phenomenon known as the ‘union wage premium.’”³³ In the context of Major League Baseball, although many factors are at play, major league player salaries have grown by 2,832% since the first collective bargaining agreement in professional sports was signed under union protection in 1968.³⁴ Minor league player salaries (without union representation) have only grown 75% in the same time frame.³⁵

Labor law in the United States was born amidst the uncertainty of the Great Depression.³⁶ In 1935, Congress enacted the Wagner Act,

25. *Id.* at 5.

26. SAMUEL ESTREICHER & MATTHEW T. BODIE, LABOR LAW 1 (2016).

27. *Id.* at 187.

28. *Id.* at 1.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 4 (“Instead of individuals relying on their own economic leverage . . . a union collectivizes the bargaining power of the employees it represents. The employer now has to negotiate with the employees as a group usually assisted by experienced union bargaining agents.”).

33. Matthew Walters & Lawrence Mishel, *How unions help all workers*, ECON. POL’Y INST. (Aug. 26, 2003), https://www.epi.org/publication/briefingpapers_bp143/ [<https://perma.cc/WA2P-5VBX>].

34. Badenhausen, *supra* note 20 (percentage calculation adjusted for inflation).

35. Ted Berg, *Most minor league ballplayers earn less than half as much money as fast-food workers*, USA Today (Mar. 6, 2014, 3:25 PM), <https://ftw.usatoday.com/2014/03/minor-leaguers-working-poor-lawsuit-mlb-bud-selig> [<https://perma.cc/E7SM-ESSP>] (minor league salary increase percentage calculated from 1976).

36. See Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 13–14 (2016).

also known as the National Labor Relations Act (“NLRA”).³⁷ The NLRA was an attempt to level the balance of power between employer and employee by recognizing an employee’s right to “to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities, for the purpose of collective bargaining or other mutual aid or protection.”³⁸ Collective bargaining is defined as the obligation between employer and the employees’ representative (the union) to negotiate in good faith with respect to the conditions of employment, the terms of which are generally set out in contract.³⁹

The NLRA is “perhaps the most radical legislation ever enacted by the U.S. Congress.”⁴⁰ Its protections have “shaped both federal and state legislation and decisions dealing with the workplace.”⁴¹ When the NLRA was enacted, it signaled “an affirmative national policy in favor of collective bargaining and economic redistribution.”⁴² It created a “fundamental change in the common-law employment relationship” and “promised a system of nationwide industrial democracy.”⁴³

The NLRA revolutionized the ability for workers to collectively bargain for their rights.⁴⁴ It was hailed as “the next step in the logical unfolding of man’s eternal quest for freedom.”⁴⁵ “Most employees in the private sector are covered by the NLRA.”⁴⁶ However, the NLRA’s protections are only afforded to those employees who can effectively collaborate, or as the NLRA defines it, “engage in concerted action for mutual aid or protection.”⁴⁷ The NLRA grants employees the right

37. *Id.*; 29 U.S.C. §§ 151–169 (2012).

38. 29 U.S.C. § 157 (1947).

39. *See* § 158(d).

40. Andrias, *supra* note 36, at 16.

41. ESTREICHER & BODIE, *supra* note 26, at 1.

42. Andrias, *supra* note 36, at 16.

43. *Id.*

44. *See id.*

45. *Id.* at 17.

46. *Your Rights to Unionize*, AFL-CIO, <https://aflcio.org/formaunion/rights-unionize> [<https://perma.cc/UAZ7-HQPF>]; 29 U.S.C. § 152(3) (2012) (While most employees in the private sector are covered by the NLRA, the act excludes individuals who are employed: (1) by federal, state or local government, (2) as agricultural laborers, (3) in the domestic service of any person or family in a home, (4) by a parent or spouse, (5) as an independent contractor, (6) as a supervisor (supervisors who have been discriminated against for refusing to violate the NLRA may be covered), (7) by an employer subject to the Railway Labor Act, such as railroads and airlines, and (8) by any other person who is not an employer as defined in the NLRA).

47. Andrias, *supra* note 36, at 16.

to engage in unionization with the goal of furthering their demands for more leverage in the employer-employee relationship.⁴⁸

Employees seeking to form a union follow the same basic procedures that employees followed at the NLRA's inception in 1935 in the wake of the Great Depression.⁴⁹ Many of the benefits that employees seek in the workplace, such as improved working conditions, better healthcare coverage, and paid leave represent a collective benefit for employees and a collective cost to the employer.⁵⁰ "This is also true of improvement in wages for, as a practical matter, the employer will have to extend the improvement to all workers who do the same or similar work."⁵¹ Discussions of fair or increased benefits are unlikely to be the subject of negotiations with individual workers outside of management or executive positions that would denote greater bargaining power.⁵²

The process for forming a union is simple enough in principle. If a majority of employees want to form a union they have two options: (1) employee initiation or (2) employer initiation on behalf of employees.⁵³ Seasonal or part-time workers also have rights to join unions under the NLRA.⁵⁴ When seasonal or part-time employees possess sufficient interest in their employment conditions to warrant inclusion in a bargaining unit, they have the right to join a union.⁵⁵ Generally speaking, "sufficient interest" is achieved by showing that the seasonal or part-time workers can reasonably expect to be employed on a year-to-year basis.⁵⁶ If at least thirty percent of the workforce indicates a preliminary interest in forming a union (usually by signing authoriza-

48. See Kyle Edwards & Sarah Robinson, *Labor and Employment Law: A Career Guide*, BERNARD KOTEEN OFF. OF PUB. INT. ADVISING HARV. L. SCH. 4 (2012), <http://hls.harvard.edu/content/uploads/2008/06/laboremployment2012.pdf> [<https://perma.cc/SJW5-U8EP>].

49. ESTREICHER & BODIE, *supra* note 26, at 1.

50. *Id.* at 3.

51. *Id.*

52. See *id.*

53. See *Your Right to Form a Union*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/rights-we-protect/whats-law/employees/i-am-not-represented-union/your-right-form-union> [<https://perma.cc/E7XH-BYM8>].

54. See Matt Austin, *Are Seasonal Employees Eligible to Vote in Union Elections?*, AUSTIN LEGAL (Feb. 19, 2014), <https://mattastinlaborlaw.com/2014/02/19/are-seasonal-employees-eligible-to-vote-in-union-elections/> [<https://perma.cc/8CCJ-CRRJ>]; David Biderman, *NLRB Rules Temp Workers Can Join Unions*, WASTE360 (Dec. 1, 2000), https://www.waste360.com/mag/waste_nlr_rules_temp [<https://perma.cc/D3DS-VD5F>].

55. See *Baumer Foods, Inc.*, 190 N.L.R.B. 690 (1971); Biderman, *supra* note 54.

56. See *id.*; see also Austin, *supra* note 54 ("[S]easonal employees who have a reasonable expectation of reemployment are eligible to vote in an election.").

tion cards⁵⁷), the National Labor Relations Board (“NLRB”) (the agency responsible for enforcing the NLRA) will conduct an election.⁵⁸ If a majority⁵⁹ of the workers elect to form a union, the NLRB will certify the union as the exclusive bargain representative for those employees.⁶⁰

Once the NLRB has certified the union, the union and employer have a duty to meet and engage in “good faith” bargaining.⁶¹ Bargaining between the parties is limited to “wages, hours, and other terms and conditions of employment.”⁶² The purpose of bargaining between a union and employer is to enter into a collective bargaining agreement that will dictate the terms of the employment relationship between employer and employees.⁶³ If the parties reach an impasse during the bargaining process, the employer has the right to lock the employees out of the workplace or issue notice of a final offer to the union.⁶⁴ The union also has leverage during an impasse, including its strongest tool—the right to strike.⁶⁵ For context, when Major League Baseball and the MLBPA attempted to renegotiate their collective bargaining agreement in 1994, the parties reached an impasse that resulted in the longest strike in all of American professional sports.⁶⁶

57. *Authorization Card Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/a/authorization-card/> [<https://perma.cc/G287-87F8>] (“An authorization card is a form signed by an employee to designate a union as his or her bargaining agent. The union authorization card is legally binding on the employee, despite any claims the union may make to the contrary. Union authorization cards legally authorize a union to represent an employee for the purposes of collective bargaining with an employer.”).

58. *See id.* (“If the union gets cards signed by 30% of the employees in an appropriate voting unit (i.e., within a store), it can petition the NLRB for an election.”); *see also Your Right to Form a Union*, *supra* note 53 (“If a majority of workers wants to form a union, they can select a union in one of two ways: If at least 30% of workers sign cards or a petition saying they want a union, the NLRB will conduct an election.”).

59. Rick Bales, *Resurrecting Labor*, 77 MD. L. REV. 1, 43 (2017) (“The union must win fifty percent of the votes plus one to become certified as the workers’ bargaining representative—a tie goes to the employer.”).

60. ESTREICHER & BODIE, *supra* note 26, at 12.

61. *Id.* at 13.

62. *Id.* (quoting *N.L.R.B. v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958)).

63. *See Employer/Union Rights and Obligations*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/rights-we-protect/employerunion-rights-and-obligations> [<https://perma.cc/6YB2-MZXH>].

64. ESTREICHER & BODIE, *supra* note 26, at 13.

65. *Id.*

66. Cliff Corcoran, *The Strike: Who was right, who was wrong and how it helped baseball*, SPORTS ILLUSTRATED (Aug. 12, 2014), <https://www.si.com/mlb/2014/08/12/1994-strike-bud-selig-orel-hershiser> [<https://perma.cc/E79E-BYL5>] (“On Aug. 12, 1994, the Major League Baseball Players Association went on strike, initiating what became, at the time, the longest work stoppage in American professional sports.”).

During any impasse that results in a lockout or strike, the employer is limited in its rights to replace its employees.⁶⁷ An employer may not discharge its employees but can hire permanent replacements to maintain operations.⁶⁸ Striking employees remain “employees” and retain preferential rights to any job openings that occur once the impasse is resolved.⁶⁹ However, if the strike is in protest over unfair labor practices the employer cannot hire permanent replacements and striking employees who offer to return to work may displace any replacement worker.⁷⁰

The NLRA does not require that workers become members of labor unions that represent their co-workers.⁷¹ In fact, the law prohibits what are called “closed shops” or agreements that require “workers to become union members as a condition of being hired for a position.”⁷² In a recent blow to public unionization funding, the Supreme Court ruled 5-to-4 that employees who opt not to join public employee unions are not required to pay union dues that would cover their share of the costs of collective representation⁷³—despite the fact that such opt-out employees generally benefit from union involvement.⁷⁴

Although unions once helped bargain for the rights of more than a third of all American workers, those numbers have crumbled under economic restructuring, the desire for increased efficiency, and drastic cost cutting measures.⁷⁵ And since the 1970s, union membership in the United States has been in decline.⁷⁶ Faced with increasing competition, “[a]voiding unionization became a primary goal for many businesses.”⁷⁷ To do this, businesses reshaped themselves shedding activities and practices that were deemed peripheral to core business models.⁷⁸ Work was outsourced to other countries where it was

67. See ESTREICHER & BODIE, *supra* note 26, at 13.

68. *Id.*

69. *Id.*

70. *Id.* at 13–14.

71. *Id.* at 17.

72. *Id.*

73. Robert Barnes & Ann E. Marimow, *Supreme Court rules against public unions collecting fees from nonmembers*, WASH. POST (June 27, 2018), https://www.washingtonpost.com/politics/courts_law/supreme-court-rules-against-public-unions-collecting-fees-for-nonmembers/2018/06/27/ccdf6bf4-7a0c-11e8-80be-6d32e182a3bc_story.html?noredirect=ON&utm_term=.4010d7bc2fc1 [https://perma.cc/5GDT-4KVG].

74. See ESTREICHER & BODIE, *supra* note 26, at 14.

75. Andrias, *supra* note 36, at 21–22.

76. *Id.* at 23–24.

77. *Id.* at 22.

78. *Id.* at 21.

cheaper and employment practices were less restrictive.⁷⁹ Businesses reorganized their labor structure to require less full-time employees vastly increasing the use of contingent or part-time workers⁸⁰—individuals who were less likely to collectively organize and/or qualify for union membership. And as a result, today, union membership has collapsed to around a tenth of the entire U.S. labor market.⁸¹

The courts largely permitted these employer tactics,⁸² and “federal employment laws designed to prohibit employment discrimination, establish safe and healthy work environments, provide workers with family and medical leave, and give workers notice of plant closings” largely supplanted the role of a union; thereby, contributing to the perception that unions were unnecessary.⁸³ Nonunion, lower-wage companies, “particularly in industries like transportation and telecommunication,” entered the market and increased competition, further contributing to the decline of union membership as employers increased campaigns to stop workers from organizing in an attempt to compete with those unbound by the NLRA’s protections.⁸⁴

Union leaders blame the erosion of union membership on anti-union attitudes by employers and weaknesses in the National Labor Relations Act. Those in management, on the other hand, point to unions’ lack of support among workers, high dues, and publicized scandals within unions. “They assert that employees have weighed the options and determined that unions are unnecessary.”⁸⁵

Though unionized labor has struggled over the past fifty years, the MLBPA has defied the trend. However, while professional baseball players (with the help of the MLBPA) have the potential to earn astronomical salaries today, it wasn’t always the case. All baseball players used to struggle financially—even the biggest stars.⁸⁶

79. *Id.*; see also William John Bux & Miranda Tolar, *Houston Janitors and the Evolution of Union Organizing*, 70 TEX. B.J. 426, 426 (2007).

80. Andrias, *supra* note 36, at 21–22.

81. *Id.* at 5.

82. *See id.* at 22.

83. Bux & Tolar, *supra* note 79, at 426.

84. *See* Andrias, *supra* note 36, at 22–23.

85. Bux & Tolar, *supra* note 79, at 426.

86. Hiatt, *supra* note 8.

B. MLBPA History

For roughly the first seventy years, team owners controlled almost every aspect of Major League Baseball players' careers.⁸⁷ Professional baseball players unionized several times with mixed results, first in 1885 as the Brotherhood of Professional Base Ball Players, then in 1900 as the Players' Protective Association, after that in 1912 as the Fraternity of Professional Baseball Players of America and finally in 1946 as the American Baseball Guild.⁸⁸ None of these attempts sufficiently balanced the power between owners and players or successfully ended Major League Baseball's reserve clause—the most powerful tool owners had over players.⁸⁹

The reserve clause was developed during a secret owners meeting in 1879 and was subsequently inserted into the uniform player's contract that each professional baseball player signed with his respective team.⁹⁰ The reserve clause stated: “[i]t is further understood and agreed upon that the party of the first part [the team] shall have the right to ‘reserve’ the said party of the second part [the player] for the season next.”⁹¹ In effect, the reserve clause bound each player to the team that initially signed him for the entire length of his major league career, if the team so desired.⁹² Under this reserve system, each team held the exclusive contract rights to a player for as long as the team liked, including inactive players.⁹³ “This eliminated the possibility of a player choosing not to play [for a year] in the hope of being freed from his contract and negotiating a better salary from another club.”⁹⁴ Thus, the team that he had played for last, regardless of how long it had been, held his reservation rights.

The reserve clause was the owner's solution to increasing player salaries, as “owners found it maddening that some players made as much as twelve dollars a game, when the same men would be lucky to

87. See Peter Dreier, *The Fascinating Story of Major League Baseball's Players Union Stimulated by the Death of Jim Bunning*, ALTERNET (May 31, 2017), <https://www.alternet.org/culture/media-ignore-jim-bunnings-militant-union-days> [https://perma.cc/ARZ2-KXUD].

88. *Our History*, MAJOR LEAGUE BASEBALL PLAYERS ASS'N (June 29, 2016), <http://www.mlbplayers.com/ViewArticle.dbml?ATCLID=211042995> [https://perma.cc/ETH8-8EE9].

89. *Id.*

90. SWANSON, *supra* note 6, at 8.

91. *Id.* (quoting Albert G. Spalding, President, Chicago White Stockings, Address to the Magnates (Nov. 12, 1889)).

92. *Id.*

93. *Id.*

94. *Id.*

make ten dollars a week in the world of industry.”⁹⁵ Players were viewed by management at this time in the same light as common laborers, “not as an elite group with a rare and valuable skill set.”⁹⁶ Limiting players’ freedom of movement stymied a player’s ability to bargain for higher salaries: “[O]pen bidding would cease and salaries would be greatly reduced.”⁹⁷ The reserve clause placed every player in a one-bidder system when it came to negotiating the following year’s salary.⁹⁸ Following the implementation of the reserve clause, player salaries dropped ten percent.⁹⁹

Owners defended the reserve clause for many reasons but gained public support by arguing that the clause prevented the fan’s favorite players from jumping ship and playing for rival teams.¹⁰⁰ Owners argued the reserve clause allowed teams to build unity and continuity making teams more marketable in their communities as fans developed long-term attachments to their favorite players.¹⁰¹ These arguments were supported publicly to such a degree that sportswriters and even Supreme Court justices “accepted the idea that baseball was unique among sports, as well as the absolute necessity of the reserve clause for the preservation of the national game.”¹⁰²

There was a need for player unionization in baseball to subvert the growing power of ownership.¹⁰³ However, baseball players were not a group well suited for industrial-style unionism because of their relatively small numbers and the highly specialized nature of their work.¹⁰⁴ Furthermore, unions generally thrive in industries that have standardized wage scales. In baseball, players command a wide variety of salaries and it is not uncommon for star players to make ten to even one hundred times as much as lesser-paid teammates.¹⁰⁵ Pay disparity breeds jealousy and makes it difficult to collectively work toward a common cause.¹⁰⁶ By the very nature of their work, professional baseball players are in competition with one another.¹⁰⁷ The nature of the

95. *Id.* at 7.

96. *Id.*

97. *Id.*

98. *Id.* at 8.

99. *Id.*

100. *Id.* at 9.

101. *Id.*

102. *Id.* at 9–10.

103. *See id.* at 11.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

industry puts players in constant competition with one another by pitting players against player on the same team and teams competing against other teams.¹⁰⁸ The reserve clause may have further disrupted union efforts by fostering animosity among players on the same team because a player's employment on the team was most directly threatened by teammates within the organization rather than outside hires. Therefore, ending the reserve clause presented a common goal for players to unite and spearheaded a movement towards unionization in Major League Baseball.¹⁰⁹

In 1953, while the MLB "owners held their winter meetings in Atlanta, the players gathered there as well . . . and formed the Major League Baseball Players Association."¹¹⁰ The newly founded MLBPA was able to convince owners to commit sixty percent of the revenues from the burgeoning television broadcasts of the World Series and All-Star games to the players' pension fund established in 1946.¹¹¹ The MLBPA was in some ways a response to postwar prosperity in the United States.¹¹² While workers in other industries were experiencing improvement in their pay and benefits, professional baseball player salaries were flat lining.¹¹³ Despite the presence of a players' union and a win for the players' pension fund, player salaries remained stagnant between 1950 and 1965¹¹⁴: "[A] period in which the average player salary increased a mere \$2,500. Players making the minimum bore the brunt; the minimum player salary was set at \$6,000 in 1954 and was just \$7,000 well into the late 1960s."¹¹⁵

As television revenues increased in the 1960s, ownership began seeking ways to avoid costly contributions to the players' pension fund by staging weekly broadcasts that fell outside of the requirements of the player pension agreement.¹¹⁶ With revenues pouring in to ownership and the player pension agreement soon to expire,¹¹⁷ the MLBPA regrouped in 1965 and sought help from Marvin Miller, "a highly respected economist for the United Steelworkers of America [union]

108. *Id.*

109. *See id.* at 10–11.

110. Michael Hauptert, *Marvin Miller and the Birth of the MLBPA*, SOCIETY FOR AMERICAN BASEBALL RESEARCH, <https://sabr.org/research/marvin-miller-and-birth-mlbpa> [<https://perma.cc/D9UD-HU7L>].

111. SWANSON, *supra* note 6, at 98.

112. *Id.* at 95.

113. *See id.* at 98.

114. *Id.*

115. *Id.*

116. *See id.* at 100–01.

117. *See id.* at 100–01, 103.

who immediately began to mold the players into a bona fide labor union.”¹¹⁸ Miller recognized the inherent difficulty that baseball players faced in organizing:

[A]lmost all [baseball players] lacked real-life experience in any job outside of baseball . . . they had not been exposed to “real world hard knocks,” or the kinds of experiences that most commonly push workers to organize. . . . [T]his lack of workplace experience was one of the primary factors that made players so susceptible to management paternalism.¹¹⁹

Players at this time were primarily concerned with salaries,¹²⁰ and the MLBPA opened negotiations by requesting that the minimum salary be raised to \$12,000.¹²¹ Major League Baseball countered with \$8,500.¹²² Displeased with the counteroffer and wanting to show players that union representation could do more than negotiate salaries and pensions, Miller decided to open the scope of negotiations to every conceivable issue including improving the condition of the playing field and installing operable hair dryers in clubhouses.¹²³ However, Miller’s long term ambitions were to establish the MLBPA as the sole collective bargaining representative of the players, modify the reserve clause, and create arbitration for salary grievances.¹²⁴

By 1968, the MLBPA had negotiated the first collective bargaining agreement between Major League Baseball’s ownership and players—the first-ever in any professional sport.¹²⁵ The agreement raised the players’ minimum salary to \$10,000.¹²⁶ Then, in 1970, Miller successfully negotiated the right to use arbitration to resolve grievances between players and ownership—an achievement that Miller considered the most significant in the MLBPA’s early years.¹²⁷ The right to use arbitration as a grievance mechanism paved the way for players Andy Messersmith and Dave McNally to challenge Major League Baseball’s reserve clause in 1975.¹²⁸ In arbitrating Messersmith and McNally’s grievances, arbitrator Peter Seitz ruled that the reserve clause should not be a perpetual renewal right and that teams would only be

118. *Our History*, *supra* note 88.

119. SWANSON, *supra* note 6, at 110.

120. *Id.* at 119.

121. *Id.* at 121.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Our History*, *supra* note 88.

126. *Id.*

127. *Id.*

128. *See id.*

granted one additional year of service from a player in connection with such a clause.¹²⁹ This ruling opened the doors to free agency for players—a process by which players could negotiate contracts with each team in Major League Baseball.¹³⁰

“The successful founding of the MLBPA changed the landscape of professional sports forever, serving notice that highly skilled athletes would seek the same basic employment rights that people in other professions had long taken for granted.”¹³¹ The MLBPA helped professional baseball players at the major league level flourish. However, the union has neglected a large segment of the professional baseball player pool. Minor league baseball players are expressly stricken from the protections of any CBA negotiated between Major League Baseball and the MLBPA.¹³² The main reason minor league players were not included in the protections provided by the Curt Flood Act “is that they lacked a union to represent them.”¹³³

II. Major League Baseball’s Minor League

Major League Baseball’s minor league system, the National Association of Professional Baseball Leagues, known today as Minor League Baseball, began in 1901.¹³⁴ At its start, the minor leagues were a hodgepodge of teams scattered across the United States with no cognizable structure.¹³⁵ In 1921, the St. Louis Cardinals were the first major league team to purchase the rights to own a minor league team.¹³⁶ The advantage of owning a minor league team was that the owner could sign, develop, and control “players at different classifications of Minor League Baseball” exclusively for their major league team—a framework referred to as a “farm system.”¹³⁷ Today, Minor League Baseball is a collective of 160 teams in “10 full-season leagues (from Class A to Triple-A), four short-season leagues (the Rookie and Class A Short Season Levels) and team complex-based leagues playing short

129. *Id.*

130. *See id.*

131. *Id.*

132. *See id.*

133. Venook, *supra* note 19.

134. *General History*, MiLB, http://www.milb.com/milb/history/general_history.jsp [<https://perma.cc/4LWX-FS5H>]; *see also Timeline*, MiLB, <http://www.milb.com/milb/history/timeline.jsp> [<https://perma.cc/MF3Z-ZBEX>].

135. *See* John Parker, *The long, strange history of Minor League Baseball*, MiLB PROSPECTIVE (Jan. 11, 2017), <https://milbprospective.mlblogs.com/long-strange-history-of-minor-league-baseball-15ff7f0bca80> [<https://perma.cc/J6Q5-WKUK>].

136. *Timeline*, *supra* note 134.

137. *Id.*

seasons in Arizona, Florida and the Dominican Republic.”¹³⁸ Each team within Minor League Baseball is affiliated with a major league team, meaning minor league teams are controlled by and connected to a specific major league team.¹³⁹ The minor league affiliate pays the operating costs of running the minor league team such as paying “game-day staff like concession workers, ushers, ticket-takers,” but the major league team pays the salaries of minor league players.¹⁴⁰ However, whereas major league player salaries have reached an average of \$4.47 million,¹⁴¹ minor league players pursue their dreams in squalor, with salaries that dip below the federally recognized poverty line.¹⁴²

Each of Major League Baseball’s thirty teams have around 200 minor league players under contract each year.¹⁴³ The majority of baseball players enter the minor leagues through the Major League Baseball First-Year Player Draft.¹⁴⁴ Amateur baseball players from the United States, Canada, and Puerto Rico who have: (1) completed high school, (2) completed their junior or senior years of college, or (3) are in junior college regardless of how many years completed, are eligible for the draft.¹⁴⁵ In 2017, there were forty-two rounds in the amateur draft with two supplemental rounds¹⁴⁶ that awarded draft picks to teams that had lost qualifying major league players whose contracts

138. Parker, *supra* note 135.

139. *Id.*

140. Norris, *supra* note 14; see also Kate Morrison, *Prospectus Feature: The 7,500 Apprentices*, *BASEBALL PROSPECTUS* (July 1, 2016), <https://www.baseballprospectus.com/news/article/29704/prospectus-feature-the-7500-apprentices/> [<https://perma.cc/MK8G-MU3P>] (minor league clubs have not been responsible for player salaries since the 1920s).

141. Ronnie Gordon, *Average MLB Salary in 2018 – How Much Do MLB Players Make?*, *GAZETTE REV.* (Jan. 3, 2018), <https://gazetterevue.com/2017/06/average-mlb-salary-much-mlb-players-make/> [<https://perma.cc/9RZ3-985Z>].

142. See Kent Babb & Jorge Castillo, *Baseball’s minor leaguers pursue their dreams below the poverty line*, *WASH. POST* (Aug. 26, 2016), https://www.washingtonpost.com/sports/nationals/the-minor-leagues-life-in-pro-baseballs-shadowy-corner/2016/08/26/96ab542e-6a07-11e6-ba32-5a4bf5aad4fa_story.html?utm_term=.Ad978fd3e7f7 [<https://perma.cc/N9ML-AUTD>].

143. Theodore McDowell, *Changing the Game: Remediating the Deficiencies of Baseball’s Anti-trust Exemption in the Minor Leagues*, 9 *HARV. J. SPORTS & ENT. L.* 1, 6 (2018).

144. See *First-Year Player Draft*, *supra* note 17.

145. *Id.*

146. Jonathan Mayo, *Complete breakdown of the 2017 MLB Draft*, *MLB.COM* (June 14, 2017), <https://www.mlb.com/news/mlb-draft-recap-and-breakdown-c236510396> [<https://perma.cc/XF27-BQT3>].

had ended.¹⁴⁷ There were 1215 players drafted in the amateur draft.¹⁴⁸

After a Major League Baseball team drafts an amateur player, the player is placed on the team's exclusive negotiating list.¹⁴⁹ Only the team that drafted the player can attempt to sign him to a professional contract for the next year.¹⁵⁰ Meaning that, from the moment an amateur player is drafted, their employment choices are restricted. If the player chooses not to sign a contract with the team that drafted him, then no other team can touch him until the next year's draft.¹⁵¹ The player may choose to return to college for the following year (if they're still eligible), play baseball in an independent league, or wait until next year's draft for another team to select them.¹⁵²

However, there is a direct correlation between a player's age and their chances of making it to the major leagues.¹⁵³ With each passing year the chances that a player will make it to the major leagues decreases.¹⁵⁴ Given that less than ten percent of drafted players will ever make the major leagues¹⁵⁵ and those that do will spend an average of

147. Teams may extend a qualifying offer to players who (A) have never received a qualifying offer in their career, and (B) have spent the entire season on that team's roster (in-season acquisitions are ineligible.) See Anthony Castrovince, *The qualifying offer rules, explained*, MLB.COM (Oct. 18, 2018), <https://www.mlb.com/news/mlb-qualifying-offer-rules-explained/c-259650658> [<https://perma.cc/8TYP-LCQ2>] ("The amount of the qualifying offer is the mean salary of the league's 125 highest-paid players. It was \$17.4 million last offseason and will be \$17.9 million this time around.").

148. Mayo, *supra* note 146.

149. James T. Masteralexis & Lisa P. Masteralexis, *If You're Hurt, Where is Home? Recently Drafted Minor League Baseball Players Are Compelled to Bring Workers' Compensation Action in Team's Home State or in Jurisdiction More Favorable to Employers*, 21 MARQ. SPORTS L. REV. 575, 587 (2011).

150. *Id.*

151. *First-Year Player Draft*, *supra* note 17 ("A player who is drafted and does not sign with the Club that selected him may be drafted again at a future year's Draft, so long as the player is eligible for that year's Draft.").

152. See Masteralexis & Masteralexis, *supra* note 149, at 587.

153. See Sam Roberts, *Just How Long Does the Average Baseball Career Last?*, N.Y. TIMES (July 15, 2007), <https://www.nytimes.com/2007/07/15/sports/baseball/15careers.html> [<https://perma.cc/RT3D-DEXP>]; see also Ian York, *The Aging Curve in Major League Baseball*, SOSH (May 14, 2016), <http://sonsofsamhorn.com/baseball/hitting/hitting-statistical-analysis/the-aging-curve-in-major-league-baseball/> [<https://perma.cc/K5MM-J8QH>] ("[A]ge at debut correlates with longevity in the major leagues.").

154. Roberts, *supra* note 153.

155. See *Estimated probability of competing in professional athletics*, NCAA, <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> [<https://perma.cc/44PX-FMJ2>].

four years in the minor leagues,¹⁵⁶ few players drafted in the early rounds decline to sign. Naturally, the players drafted in the earlier rounds are perceived as having more potential and retain greater bargaining power to negotiate with the team that selected them.¹⁵⁷ Players drafted in the first round usually receive a hefty signing bonus.¹⁵⁸ In 2017, Major League Baseball spent \$242 million on player signing bonuses.¹⁵⁹ Of that total, nearly \$116.4 million (or around 48%) went to the 30 players drafted in the first round.¹⁶⁰ However, few players have enough leverage at the outset of their career to demand a major league contract. Examples include Stephen Strasburg, the first overall pick of the 2009 draft,¹⁶¹ or Mike Leake, also drafted in 2009, who bypassed the minor leagues entirely.¹⁶² Players that sign major league contracts are afforded the protections of the MLBPA, which provides far superior benefits.¹⁶³

Unfortunately, the overwhelming majority of players drafted each year will sign the Minor League Uniform Player Contract (“MLUPC”), which restricts a player’s right to play in the minor or major leagues for the next seven years,¹⁶⁴ by virtue of Major League Baseball’s anti-trust exemption (discussed in Part III).¹⁶⁵ The MLUPC is not negotiated with the input or representation from MLBPA or any other union.¹⁶⁶ Although a player could attempt to negotiate better terms than those provided by the MLUPC, the reality is that unless a player has immense leverage, a “team will simply refuse to sign the player and turn its attention to its [surplus of] other drafted players.”¹⁶⁷ And

156. Scotty Smalls, *MiLB LIFE: How Long Until You’re in the Bigs?*, MINOR LEAGUE UNIV. (Feb. 14, 2011), <http://minorleagueuniversity.blogspot.com/2011/02/milb-life-how-long-until-youre-in-bigs.html> [<https://perma.cc/N68K-JDDC>].

157. Masteralexis & Masteralexis, *supra* note 149, at 588.

158. *Id.*

159. Justin Perline, *Amateur draft bonus analysis*, BEYOND THE BOXSCORE (Dec. 1, 2017), <https://www.beyondtheboxscore.com/2017/12/1/16715898/amateur-draft-bonus-analysis-slot-mlb> [<https://perma.cc/C4HL-XP8A>].

160. Mayo, *supra* note 146; Chris Cotillo, *2017 MLB Draft Signings Tracker*, MLB DAILY DISH, <https://www.mlbailydish.com/2017/6/15/15812484/2017-mlb-draft-signings-tracker> [<https://perma.cc/N7LX-6Q9Z>] (last updated July 7, 2017, 8:07 PM).

161. Masteralexis & Masteralexis, *supra* note 149, at 588.

162. Mark Saxon, *Mike Leake has mixed memories from his draft day*, ESPN (June 9, 2016), http://www.espn.com/blog/st-louis-cardinals/post/_/id/1618/mike-leake-has-mixed-memories-from-his-draft-day [<https://perma.cc/M3K4-JXW3>].

163. See Masteralexis & Masteralexis, *supra* note 149, at 589.

164. Minor League Uniform Player Contract, ¶ VI, A [On File with USF Law Review].

165. Masteralexis & Masteralexis, *supra* note 149, at 596.

166. *Id.* at 588.

167. *Id.*

if a player refuses to sign they will have to wait an entire year for another team to draft them.

Refusing to sign is an incredible risk. It may signal to the other teams that he may be a “difficult” player in a sport that covets a player’s “makeup” as an important attribute.¹⁶⁸ Furthermore, a lot can happen in a year. A player who cannot go back to college to play consistently may lose skill and their stock may drop causing them to lose bonus money. The player could get injured and be neglected entirely the next year.

For example, the first overall pick in the 2014 draft, Brady Aiken, declined to sign with the Houston Astros when they took millions of dollars off of his signing bonus because a medical exam indicated that the ulnar collateral ligament (“UCL”) in his throwing arm was undersized.¹⁶⁹ The smaller than average UCL did not affect his throwing at the time, he was reportedly still throwing a consistent ninety-seven miles per hour, but the undersized UCL “could lead to issues down the road.”¹⁷⁰ Sure enough, the following year Aiken’s UCL tore requiring ligament-transfer surgery.¹⁷¹ This situation illustrates the risks associated with choosing not to sign and demonstrates that few players have a choice when drafted other than signing the MLUPC. A contract that gives the team that drafts them ownership over their right to play professional baseball for nearly the next decade and locks them into what is potentially a less than minimum wage job for years to come.¹⁷²

While minor league salaries vary depending on service time, signing-bonus, and whether a player has been assigned to a team’s 40-man roster,¹⁷³ the basic minor league pay structure is such:¹⁷⁴

168. See Bryan Grosnick, *Breaking down ‘makeup’ for MLB players*, SB NATION (Feb. 21, 2013, 10:00 AM), <https://www.beyondtheboxscore.com/2013/2/21/4005150/lets-talk-about-makeup> [<https://perma.cc/H4AS-5YNS>].

169. David Coleman, *What failing to sign top-pick Brady Aiken means for the Astros*, SB NATION (July 18, 2014, 10:11 PM), <https://www.sbnation.com/mlb/2014/7/18/5917355/as-tros-brady-aiken-2014-mlb-draft-jacob-nix> [<https://perma.cc/F6QN-4Y2Y>].

170. *Id.*

171. Scott Miller, *Brady Aiken Rejected \$5M and Got Hurt; Now Past No. 1 Pick Fights for MLB Future*, BLEACHER REPORT (Mar. 30, 2017), <http://bleacherreport.com/articles/2699686-brady-aiken-rejected-5m-and-got-hurt-now-past-no-1-pick-fights-for-mlb-future> [<https://perma.cc/7LYU-SH8B>].

172. See Berg, *supra* note 35.

173. *40-man Roster*, MLB, <http://m.mlb.com/glossary/transactions/40-man-roster> [<https://perma.cc/J5SA-LYES>].

The 40-man roster includes a combination of players on the 25-man roster, the 7- and 10-day disabled lists, the bereavement/family medical emergency list and the paternity leave list, as well as some Minor Leaguers. Under the 2017-21 Collective

Table 1: Basic Minor League Baseball Pay Structure

Minor League Level	First Year's Pay	Additional Year's Pay	Total
Triple-A ("AAA")	\$2,150/month	+\$250-\$300/month each additional year	~\$11,825-\$14,850 per year
Double-A ("AA")	\$1,700/month	+\$100/month each additional year	~9,350+ per year
High-A/Low-A	\$1,100 - \$1,500/month	+\$50/month each additional year	~\$6,050-\$8400 per year

Thus, workers paid the federal minimum wage of \$7.25 per hour make more than most minor league baseball players each year.¹⁷⁵ In fact, "many players take jobs during the offseason to help make ends meet."¹⁷⁶ Former professional baseball player Dirk Hayhurst has written extensively on his experience in the minor leagues,¹⁷⁷ describing his time in the minor league as a "brutal experience."¹⁷⁸ The public perception of professional baseball players is that they should be grateful, despite the low pay, travel, and hardship, because they have "baseball, the dream, the game, the joy, the crack of the bat and the roar of the crowd."¹⁷⁹ Hayhurst writes, minor league baseball "is not a fantasy. It's a profession."¹⁸⁰ Compared to a similar

Bargaining Agreement, the 10-day DL replaced the 15-day DL as the shortest DL option for non-concussion injuries. In order for a club to add a player to the 25-man roster, the player must be on the 40-man roster. If a club with a full 40-man roster wishes to promote a Minor League player that is not on the 40-man roster, it must first remove a player from the 40-man roster—either by designating a player's contract for assignment, trading a player, releasing a player or transferring a player to the 60-day disabled list. A player who is on the 40-man roster but does not open the season on the 25-man roster must be optioned to the Minor Leagues. Only one Minor League option is used per season, regardless of how many times a player is optioned to and from the Minors over the course of a given season. Players typically have three option years, although a fourth may be granted in certain cases (usually due to injuries). Out-of-options players must be designated for assignment—which removes them from the 40-man roster—and passed through outright waivers before being eligible to be sent to the Minors.

174. Weaver, *supra* note 2.

175. Zachary D. Rymer, *MLB Must Finally Answer for Exploitation in the Minor Leagues*, BLEACHER REPORT (Feb. 12, 2014), <http://bleacherreport.com/articles/1957838-mlb-must-finally-answer-for-exploitation-in-the-minor-leagues> [https://perma.cc/GZW4-PVD3].

176. *Id.*

177. See Dirk Hayhurst, *THE BULLPEN GOSPELS: A NON-PROSPECT'S PURSUIT OF THE MAJOR LEAGUES AND THE MEANING OF LIFE* (2010); see also Hayhurst, *supra* note 1.

178. Hayhurst, *supra* note 1.

179. *Id.*

180. *Id.*

professional minor league system, the National Hockey League, minor league baseball players are bringing home paltry levels of pay:¹⁸¹

Table 2: Salary and Workload Comparison Between Minor League Professional Baseball and Hockey

	Minor League Baseball (AAA level)	AHL Hockey (division of minor league hockey)
Minimum Salary	~\$11,825–\$14,850 per year	~\$45,000 per year
Games per Season	144	76
Average Game Attendance	6,394	5,486
Travel per Diem	\$25	\$72
Postseason Bonuses	No	Yes

Minor league baseball can be a brutal existence for the more than seven thousand players hoping to reach the major leagues.¹⁸² How is it that a sport with annual revenues of more than \$10 billion¹⁸³ can get away with treating its most valuable asset so poorly? Major League Baseball has gone to great lengths to ensure the exploitation of its most vulnerable workers.¹⁸⁴ Baseball has never been burdened by minor league salaries, “[t]hey’re doing this because they can.”¹⁸⁵

III. The Exploitation of Minor League Baseball Players

Minor league players are not afforded the same employment protections as their major league counterparts.¹⁸⁶ Minor league players without a major league contract or not on the protected 40-man roster are not represented by the MLBPA.¹⁸⁷ Section III(A) shows that their employment rights are limited by Major League Baseball’s anti-trust exemption¹⁸⁸ and the Minor League Uniform Players Contract,¹⁸⁹ which restricts minor league players’ freedom to contract at

181. See Berg, *supra* note 35; Weaver, *supra* note 2.

182. See Norris, *supra* note 14.

183. Michael Baumann, *The Disgrace of Minor League Baseball*, THE RINGER (Apr. 20, 2018, 5:50 AM), <https://www.theringer.com/mlb/2018/4/20/17259846/minor-league-baseball-anti-labor-ronald-acuna-scott-kingery> [<https://perma.cc/N54E-4GYF>].

184. See *id.*

185. *Id.*

186. See Berg, *supra* note 35 (minor league players are not represented by the MLBPA and thus have no negotiating leverage to lobby for higher pay).

187. Berg, *supra* note 35.

188. Masteralexis & Masteralexis, *supra* note 149, at 590.

189. See *The full meaning of signing a minor-league deal*, FOX SPORTS (Feb. 13, 2015, 2:59 PM), <https://www.foxsports.com/mlb/just-a-bit-outside/story/the-full-meaning-of-signing-a-minor-league-deal-021315> [<https://perma.cc/NS5G-XG4M>].

the outset of their professional baseball careers.¹⁹⁰ In addition, section III(B) demonstrates that minor league players have been exploited by Major League Baseball through the use of legal advantages that limit minor league player protections under the Fair Labor Standards Act.¹⁹¹

A. Antitrust Exemption

The biggest hurdle minor league players face in achieving a livable wage and greater employment rights is that Major League Baseball is legally authorized to exploit them.¹⁹² Major League Baseball is exempt from U.S. antitrust laws, which are “competition laws” that “protect consumers from predatory business practices . . . [by] ensur[ing] that fair competition exists in an open-market economy.”¹⁹³

In the late nineteenth century, legislators grew concerned with the concentrated dominance of businesses, the acquisition of monopoly power by U.S. companies, and the links between economic and political power.¹⁹⁴ In response to these populist concerns and to encourage competition and lower prices for consumers, Congress passed the Sherman Antitrust Act in 1890 (“Sherman Act”).¹⁹⁵ Professional sports, like no other workplace, rely heavily “on restrictive employment practices (e.g., drafts, salary caps, wage scales, free agency restraints)” making the professional sports workplace “a hotbed for

190. Weaver, *supra* note 2.

191. Ronald Blum, *Baseball players in minors to lose minimum wage protection*, ASSOCIATED PRESS (Mar. 23, 2018), <https://apnews.com/cb183f59e88948e8b9cd49ad07bde807/Baseball-players-in-minors-to-lose-minimum-wage-protection> [<https://perma.cc/7JRT-39RE>].

192. McDowell, *supra* note 143, at 8; *see also* Greg Steinman, Comment, *Social Injustice in Minor League Baseball: How Major League Baseball Makes Use of an Antitrust Exemption to Exploit its Employees*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 139, 140 (2015).

193. Justin Bynum, *What are Antitrust Laws?*, INVESTOPEDIA, <https://www.investopedia.com/ask/answers/09/antitrust-law.asp> [<https://perma.cc/LML4-RZJC>] (last updated Feb. 19, 2019).

194. Ryan Mabry, *Antitrust Law and the Minor League Reserve System*, 6 KALEIDOSCOPE 39, 39 (Sept. 2015), <https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1256&context=kaleidoscope> [On File with USF Law Review].

195. *Id.*; 15 U.S.C. § 1 et seq. (2012).

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. § 1.

antitrust challenges by players.”¹⁹⁶ In an effort to close perceived gaps in the Sherman Act, Congress passed the Clayton Antitrust Act (the “Clayton Act”) in 1914.¹⁹⁷ The Clayton Act provides in part:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.¹⁹⁸

This section allows labor unions to exist and operate without running afoul of antitrust laws.¹⁹⁹ Given the Clayton Act’s exemption for labor unions and the Supreme Court’s deference to the NLRA, “courts have held that terms agreed upon during collective bargaining are exempt from antitrust law, no matter how uncompetitive the terms are.”²⁰⁰

Despite attempts, professional baseball has proven to be exempt from nearly all antitrust suits stemming from the 1922 U.S. Supreme Court decision in *Federal Baseball Club of Baltimore v. National League of*

196. *Masteralexis & Masteralexis*, *supra* note 149, at 591; *see also* *Flood v. Kuhn*, 407 U.S. 258, 265 (1972) (challenging MLB’s reserve system on antitrust grounds); *Radovich v. Nat’l Football League*, 352 U.S. 445, 446–47 (1957) (challenging NFL’s rule blacklisting a player on antitrust grounds); *Toolson v. N.Y. Yankees*, 346 U.S. 356, 357 (1953) (challenging MLB’s reserve system on antitrust grounds); *Clarett v. Nat’l Football League*, 369 F.3d 124, 125 (2d Cir. 2004) (challenging NFL’s draft eligibility restrictions on antitrust grounds); *Powell v. Nat’l Football League*, 930 F.2d 1293, 1295 (8th Cir. 1989) (challenging NFL’s right of first refusal-free agent compensation system on antitrust grounds); *Wood v. Nat’l Basketball Ass’n*, 809 F.2d 954, 956–57 (2d Cir. 1987) (challenging NBA’s draft, rookie salary cap, and player restraints on antitrust grounds); *McCourt v. Cal. Sports, Inc.*, 600 F.2d 1193, 1196 (6th Cir. 1979) (challenging NHL’s free agent compensation system on antitrust grounds); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1174 (D.C. Cir. 1978) (challenging NFL’s draft on antitrust grounds); *Mackey v. Nat’l Football League*, 543 F.2d 606, 609 (8th Cir. 1976) (challenging NFL’s Rozelle Rule restraints on free agency on antitrust grounds); *Fraser v. Major League Soccer*, 97 F. Supp. 2d 130, 131 (D. Mass. 2000) (challenging MLS’s single entity structure on antitrust grounds); *McNeil v. Nat’l Football League*, 790 F. Supp. 871, 875–76 (D. Minn. 1992) (challenging NFL’s Plan B free agency restraints on antitrust grounds); *Bridgeman v. Nat’l Basketball Ass’n*, 675 F. Supp. 960, 961 (D.N.J. 1987) (challenging the NBA’s college player draft, salary cap, and right of first refusal on antitrust grounds).

197. *Mabry*, *supra* note 194, at 40; 15 U.S.C. §§ 12–27 (2012).

198. 15 U.S.C. § 17.

199. *Mabry*, *supra* note 194, at 40.

200. *Id.*

Professional Base Ball Clubs (“*Federal Baseball*”).²⁰¹ In *Federal Baseball*, a Baltimore team from the Federal League (Major League Baseball’s last legitimate rival league) sued Major League Baseball claiming that they had conspired to prevent Baltimore’s Federal League team from negotiating with major league players through use of the reserve clause.²⁰² The U.S. Supreme Court ruled in favor of Major League Baseball with Justice Oliver Wendell Holmes, Jr. proclaiming:

The business is giving exhibitions of baseball, which are purely state affairs. It is true that, in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business.²⁰³

Justice Holmes addressed a key requirement of antitrust law, that a defendant must be involved in interstate commerce for prosecution under federal law.²⁰⁴ Having determined that Major League Baseball did not involve interstate commerce, Justice Holmes concluded that the plaintiff’s case could go no further.²⁰⁵ The decision did more than quash rival league’s hopes of luring major league players—it exempted Major League Baseball from antitrust law.²⁰⁶

Major League Baseball’s antitrust exemption was challenged again in the 1953 case *Toolson v. New York Yankees*²⁰⁷ when George Toolson challenged the reserve clause of his contract after he was effectively blacklisted from all major league teams for refusing to be demoted from the New York Yankees.²⁰⁸ The Court reaffirmed its position that Major League Baseball was exempt from antitrust laws and expressed a position that “legislation should be the means by which this exemption is overturned in order to follow the doctrine of stare decisis, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.”²⁰⁹

The next challenge to Major League Baseball’s reserve clause and antitrust exemption came in 1972 when Curt Flood opposed a trade

201. *Federal Baseball Club of Baltimore v. National League of Professional Base Ball Clubs*, 259 U.S. 200, 208 (1922).

202. *Mabry*, *supra* note 194, at 40.

203. *Fed. Baseball Club*, 259 U.S. at 208–09.

204. *Mabry*, *supra* note 194, at 40.

205. *Id.*

206. *See id.*

207. *Toolson v. N.Y. Yankees*, 346 U.S. 356, 357 (1953).

208. *Mabry*, *supra* note 194, at 40.

209. *Id.*; *see also Toolson*, 346 U.S. at 357.

from the St. Louis Cardinals to the Philadelphia Phillies in the U.S. Supreme Court case *Flood v. Kuhn*.²¹⁰ Major League Baseball's antitrust exemption was upheld again, and Justice Harry Blackmun reiterated that the proper setting for a challenge to Major League Baseball's antitrust exemption was with legislation and Congress.²¹¹

As previously indicated in Part I(B), Major League Baseball's reserve system was struck down in 1975 through arbitration; then, following a protracted strike on the part of major league players in 1994, Congress interceded, codifying minor league baseball's antitrust exemption in the Curt Flood Act of 1998.²¹² The Curt Flood Act lifted the antitrust exemption blanketing Major League Baseball; thereby, allowing major league players to more freely contract and negotiate with major league teams.²¹³ It took nearly a century of work and negotiation, but the reserve clause was put to rest and antitrust exemption was lifted in the major leagues.²¹⁴ However, due in part to the lobbying of Major League Baseball,²¹⁵ the Curt Flood Act explicitly states that antitrust laws apply to matters "directly relating to or affecting employment of major league baseball players,"²¹⁶ a pronouncement that by omission excludes minor league players. Furthermore, subsection (b)(1) states that the Curt Flood Act does not apply to "any conduct, acts, practices, or agreements of persons . . . at the minor league level, any organized professional baseball amateur or first-year player draft, or any reserve clause as applied to minor league players."²¹⁷ Therefore, the minor leagues are still subject to a reserve system and antitrust exemption.

B. Fair Labor Standards Act Does Not Apply

In addition to the use of antitrust law to restrict minor league players' freedom of movement (i.e., ability to contract with other teams), Major League Baseball has been able to further exploit minor

210. *Mabry*, *supra* note 194, at 40–41; *Flood v. Kuhn*, 407 U.S. 258, 265 (1972).

211. *Mabry*, *supra* note 194, at 41; *Flood*, 407 U.S. at 284 ("Accordingly, we adhere . . . to *Federal Baseball* and *Toolson* and to their application to professional baseball. . . . If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court.").

212. *See* 15 U.S.C. § 26b (2012).

213. *See Mabry*, *supra* note 194, at 41.

214. *Id.*

215. *See id.* at 45.

216. 15 U.S.C. § 26b(a).

217. 15 U.S.C. § 26b(b)(1).

leaguers by suppressing wages using a clause in the 1938 Fair Labor Standards Act (“FLSA”).²¹⁸

There are two approaches to regulating labor markets in the United States: (1) collective bargaining (discussed in Part I(A)), and (2) setting minimum terms that employers must obey when hiring and retaining employees.²¹⁹ The FLSA “is an example of a minimum-terms law that attempts to change the wages and hours obtained” by employees.²²⁰ The FLSA sets a minimum wage, below which workers cannot offer their services “in hope of encouraging the spreading of work opportunities among workers.”²²¹ The FLSA also requires that employees who work more than forty hours per week be paid at an overtime premium rate of 150% of their basic wage.²²² However, the FLSA does not apply to all employees. Exempt from the protections of the FLSA are any employees “employed by an establishment which is an amusement or recreational establishment . . . [that] does not operate for more than seven months in any calendar year.”²²³

There have been legal challenges to Major League Baseball’s interpretation of the working relationship between minor league players and Major League Baseball. In *Senne v. Kansas City Royals Baseball Corp.*²²⁴ a group of minor league players attempted (but recently failed²²⁵) to get certification to sue Major League Baseball as a class to enforce their right to a livable wage and overtime pay.²²⁶ The plaintiffs’ complaint begins by describing Major League Baseball as a collective of members governing a cartel.²²⁷ Challenges to Major League Baseball’s wage and overtime practices in the minor leagues generally espouse what the *Senne* plaintiffs describe in their complaint:

Through [the] collective exercise of power, [Major League Baseball] has suppressed minor leaguers’ wages in violation of federal and state law. Most minor leaguers earn between around \$3,000 and \$7,500 for *the entire year* despite routinely working over 50 hours per week (and sometimes 70 hours per week) during the roughly five-month championship season. They receive no over-

218. See Venook, *supra* note 19.

219. ESTREICHER & BODIE, *supra* note 26, at 3.

220. *Id.*

221. *Id.*

222. *Id.*

223. 29 U.S.C. § 213(a)(3) (2018).

224. *Senne v. Kan. City Royals Baseball Corp.*, 105 F. Supp. 3d 981 (N.D. Cal. 2015).

225. See *Senne v. Kan. City Royals Baseball Corp.*, No. 14-cv-00608-JCS, 2017 WL 897338 at *29 (N.D. Cal. Mar. 7, 2017).

226. *Senne*, 105 F. Supp. 3d, at 992.

227. Complaint at 1, *Senne v. Kan. City Royals Baseball Corp.*, 105 F. Supp. 3d 981 (N.D. Cal. 2015) (No. 3:14-cv-00608), 2014 WL 545501.

time pay, and instead routinely receive less than minimum wage during the championship season.

Worse still, the Defendants have conspired to pay no wages at all for significant periods of minor leaguers' work. Consistent with MLB's rules, the Defendants do not pay minor leaguers their salaries during spring training, even though the Defendants require minor leaguers to often work over fifty hours per week during spring training. Similarly, the Defendants do not pay salaries during other training periods such as instructional leagues and winter training.²²⁸

In general, Major League Baseball combats FLSA claims like *Senne* by defining the employment status of minor league baseball players as a "seasonal apprenticeship"²²⁹ and maintains that federal minimum wage laws should not apply to minor league baseball players because the minor league season runs roughly five months, which falls within the seven month threshold exemption for FLSA coverage.²³⁰ This is a complete farce, given that while the season may only run roughly five months, minor leagues are expected to play during spring and winter training seasons,²³¹ which pushes their "seasonal" employment over the seven month threshold.

Unfortunately, further examination of the viability of the *Senne* case would be unproductive. Major League Baseball took the Supreme Court's advice and ended minor league players' attempts at recognition under the FLSA by taking the fight to Congress.²³² On March 23, 2018, Congress passed a \$1.3 trillion spending bill to avert a government shutdown.²³³ Buried on page 1967 of the spending bill is Major League Baseball's major lobbying achievement—the Save America's Pastime Act—that amends the FLSA by adding an exemption explicitly for those playing minor league baseball:

The provisions of [the FLSA] . . . shall not apply with respect to . . . any employee employed to play baseball who is compensated pursuant to a contract that provides for a weekly salary for services

228. *Id.* at 9–10.

229. Berg, *supra* note 35.

230. See 29 U.S.C. § 213(a)(3) (2018).

231. See Complaint, *supra* note 227, at 9–10.

232. See Whitney McIntoch, *How Congress screwed over Minor League Baseball players, explained*, SBINATION (Mar. 23, 2018, 7:30 AM), <https://www.sbnation.com/mlb/2018/3/23/17152778/spending-bill-minor-league-baseball-explained-save-americas-pastime> [https://perma.cc/EQ98-A2Y5].

233. Lauren Fox & Phil Mattingly, *Congress passes \$1.3 Trillion Spending Bill, Funds Government Through September*, CNN (Mar. 23, 2018, 4:27 PM), <https://www.cnn.com/2018/03/22/politics/house-vote-spending-bill-omnibus-shutdown/index.html> [https://perma.cc/33AL-S7GP].

performed during the league's championship season (but not on spring training or the off season) at a rate that is not less than a weekly salary equal to the minimum wage under section 6(a) for a workweek of 40 hours, irrespective of the number of hours the employee devotes to baseball related activities.²³⁴

The passage of the Save America's Pastime Act and the exemption it adds to the FLSA destroys cases like *Senne* by explicitly disqualifying minor league players from pursuing claims under the FLSA. Minor league baseball players' efforts to overcome exploitation by Major League Baseball have been shut down by legislative action and numerous court decisions. They have little hope of achieving greater employment rights other than through the protections that a collective bargaining unit can provide. Minor league baseball players' best chance is to either form their own union—unlikely, given the derision and fear rampant in minor league baseball—or for the MLBPA to extend its representation and protections to minor league players.

IV. Minor League Baseball Unionization

As minor league players fight for their rights in ways that may eventually alter their employment relationship with Major League Baseball,²³⁵ labor unions remain the primary defender of workers' rights in the United States.²³⁶ In a capitalist economic society it is almost impossible for employees to safeguard their economic position on their own.²³⁷ To level the playing field and counter Major League Baseball's leverage, minor league players will either have to unify, or the MLBPA will have to be incentivized to include minor leaguers in its union.

A. Minor League Players Unionizing on Their Own

Seasonal employees—as minor league players are recognized—who have a reasonable expectation of recurring employment with the

234. H.R. 1625, 115th Cong. at 1967 (2018) (enacted), <https://docs.house.gov/bills-s/20180319/BILLS-115SAHR1625-RCP115-66.pdf> [<https://perma.cc/6R9W-QBUF>] [hereinafter Save America's Pastime Act]; 29 U.S.C. § 213(a) (19).

235. See *Senne v. Kan. City Royals Baseball Corp.*, No. 14-cv-00608-JCS, 2017 WL 897338 at *1–2 (N.D. Cal. Mar. 7, 2017); see also Lucas J. Carney, Note, *Major League Baseball's 'Foul Ball': Why Minor League Baseball Players Are Not Exempt Employees Under the Fair Labor Standards Act*, 41 J. CORP. L. 283, 310–12 (2016) (the *Senne* case may result in further discussion of minor league union protections).

236. See YATES, *supra* note 24, at 6.

237. *Id.*

same employer from year to year are eligible to join a union.²³⁸ By requiring minor league players to sign contracts that restrict their right to play professional baseball to only one team for seven years, Major League Baseball has given minor league players the right to claim that their employment is expected to be recurring year to year. This gives minor league players the legal eligibility to form a union.

While forming their own union is a possibility for minor league players, it is an unrealistic goal. All employees have the right, under labor law, to engage in collective action for mutual gain.²³⁹ However, minor league baseball players face an uphill battle from the moment they are drafted. Described as baseball's "only true paupers,"²⁴⁰ minor league players "sacrifice and succumb to unfair treatment as part of 'chasing the dream.'"²⁴¹ Minor league players steer clear of rocking the boat in their pursuit of the dream; "[t]he biggest challenge is that guys are very reluctant to upset the status quo."²⁴² Former minor league player turned attorney Garret Broshuis states:

[In] [m]y final year of playing, I talked to a number of guys about the possibility of unionizing. It was something we frequently talked about in the clubhouse. But guys were very reluctant to take that step, because they're trying to reach the big leagues and they're afraid of the repercussions.²⁴³

The reserve system that major league players and the MLBPA fought so diligently to abolish is still at work in the minor leagues.²⁴⁴ Players have little time to take advantage of their youth and health in order to make it to the major leagues.²⁴⁵ Every year each major league team replenishes its minor league system with young players through the amateur draft. Former minor league player Dirk Hayhurst states: "When unionization talks begin [in the minors] . . . players worry that, 'if you bitch . . . and you're not that good, they will release you and then somebody will take your spot.'"²⁴⁶ While minor league players

238. *Baumer Foods, Inc.*, 190 N.L.R.B. 690, 690 (1971) ("[W]e find that the seasonal employees [of the employer] have a reasonable expectation of substantial seasonal employment from year to year. We find therefore that they possess sufficient interest in employment conditions to warrant their inclusion in the unit."); *Biderman*, *supra* note 54.

239. *ESTREICHER & BODIE*, *supra* note 26, at 1.

240. Ben Lindbergh, *Baseball's Economics Aren't As Skewed As They Seem*, THE RINGER (Feb. 21, 2018, 10:17 AM), <https://www.theringer.com/mlb/2018/2/21/17035624/mlb-revenue-sharing-owners-players-free-agency-rob-manfred> [<https://perma.cc/6SMB-RZ5E>].

241. Hayhurst, *supra* note 1.

242. Berg, *supra* note 35.

243. *Id.*

244. Mabry, *supra* note 194, at 43.

245. *See id.*

246. Venook, *supra* note 19.

are rostered on a “team,” they are in competition with every single player to make it to the major leagues. Baseball is an adversarial sport. The purpose of a union is to collectively bargain for the mutual aid and protection of your fellow employees. Thus, it is difficult for minor league players to find common ground to unionize when the goal is to defeat everyone around you, your opponent and your teammates, in order to make it to the majors. Furthermore, minor league players are spread across the country, with little to no ability to communicate with one another on the scale necessary to take collective action; “[i]t’s really hard for guys making that little, who don’t know each other, who have no method of communicating with one another, to somehow pull enough numbers together to threaten Major League Baseball with their demands.”²⁴⁷

Furthermore, the NLRA provides “weak enforcement mechanisms, slight penalties, and lengthy delays—all of which are routinely exploited by employers resisting unionization [and] fail to protect workers’ ability to organize and bargain collectively with their employers.”²⁴⁸ When it comes to the minor leagues, Major League Baseball has utilized a key employer tactic in working with minor leagues by organizing the workplace so that employees cannot exert control over their actions.²⁴⁹ Unionizing in the minor leagues is more challenging to achieve due to:

[T]he extreme leverage and disincentive for unionization afforded to management by baseball’s [antitrust] exemption, the high rate of turnover of players, the vast geographic area of the minor league teams, the disparity in levels of talent between low A ball and AAA, and the fact that, by their nature and in the working environment they are in, the players are competing with each other rather than cooperating with one another.²⁵⁰

Thus, the likelihood that minor league players could organize on their own and on the scale necessary to form a union is unlikely. If a player in the minor leagues has a realistic shot of making the major leagues, they won’t rock the boat. And even if a player realizes they may never make the major leagues they are still unlikely to fight for better employment rights in the minor leagues, as it is simply more prudent to end their pursuit of the “dream” and seek employment elsewhere.

247. *Id.*

248. Andrias, *supra* note 36, at 6.

249. See YATES, *supra* note 24, at 8 (“If our employer decides to shut down the business, move it, or introduce labor-saving machinery, [employees] acting alone can do nothing about it.”).

250. See Masteralexis & Masteralexis, *supra* note 149, at 591.

B. Including Minor Leaguers in the MLBPA

Given the difficulty minor league players face in building consensus, union protections may have to come from above, in the form of inclusion in the MLBPA. There are potentially two routes to achieving minor league inclusion in the MLBPA: (1) a minor league player could conceivably file a grievance against the MLBPA on the grounds that the MLBPA has failed in its duty of fair representation and that its protections should cover minor league players, or (2) more realistically, the MLBPA could choose to include minor league players in its union.

1. A Duty of Fair Representation Grievance

Under the NLRA, a labor union has a duty of fair representation for all employees who fall under the protections of its bargaining unit, members and nonmembers of the union alike; the “union has the duty to represent all employees—whether members of the union or not—fairly, in good faith, and without discrimination.”²⁵¹ A union violates its duty of fair representation when its conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.²⁵² At the moment, the MLBPA only represents major league players and makes this clear at the outset of their collective bargaining agreements with Major League Baseball: “In making this Agreement the [MLBPA] represents that it contracts for and on behalf of the Major League Baseball Players and individuals who may become Major League Baseball Players during the term of this Agreement”²⁵³ A brief argument in semantics could be made over the use of the word “may” leading one to interpret the current collective bargaining agreement (“CBA”) between Major League Baseball and the MLBPA to include all current minor league players, given that those players could conceivably become major league players.²⁵⁴ Naturally the MLBPA has taken the opposite stance, following the CBA signed in 2007, MLBPA lawyer Gene Orza was asked about terms that negatively affected minor league players: “[w]e don’t represent them . . .

251. *Right to Fair Representation*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/rights-we-protect/whats-law/employees/i-am-represented-union/right-fair-representation> [<https://perma.cc/8RGZ-USSY>].

252. See 29 U.S.C. § 158(b) (2012).

253. See *MLB, Basic Agreement*, *supra* note 13, at 1.

254. *But see FAQs*, MAJOR LEAGUE BASEBALL PLAYERS ASS’N, <https://www.mlbpa.org/faq.aspx> [<https://perma.cc/HK3N-XFBX>] (“In collective bargaining, the Association represents around 1,200 players, or the number of players on each club’s 40-man roster, in addition to any players on the disabled list.”).

and have no obligation.”²⁵⁵ Notwithstanding the MLBPA’s position, it’s possible that a minor league player could argue that the MLBPA’s protections should include bargaining on behalf of minor leaguers because they are a part of the MLBPA bargaining unit.

A union is responsible for negotiating on behalf of a bargaining unit.²⁵⁶ A bargaining unit is defined as “a group of two or more employees who share a community of interest and may reasonably be grouped together for purposes of collective bargaining.”²⁵⁷ The only inquiry the NLRB makes in determining whether a bargaining unit is appropriate is whether the employees share a “community interest” with each other.²⁵⁸ The NLRB uses a test that is context-specific to determine whether “employees share a common interest in the aspects of their employment that would be subject to collective bargaining.”²⁵⁹ To determine if employees have a common interest the NLRB uses the following factors:

Whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.²⁶⁰

Minor leaguers have similar “distinct skills and training”²⁶¹ as major league players. Minor leaguers “overlap” and “have frequent contact” with major leaguers who are often sent down to the minors or get injured and rehabilitate in the minor leagues.²⁶² Additionally, the MLBPA negotiates over issues that affect minor league players includ-

255. Lily Rothman, *Emancipation of the Minors*, SLATE (Apr. 3, 2012, 11:08 AM), http://www.slate.com/articles/sports/sports_nut/2012/04/minor_league_union_thousands_of_pro_baseball_players_make_just_1_100_per_month_where_is_their_c_sar_ch_vez_single.html [<https://perma.cc/PX3D-CYWF>] (“The only obligation the MLBPA has is to its actual members.”).

256. ESTREICHER & BODIE, *supra* note 26, at 95–97.

257. *General Principles of Law Under the Statute and Procedures of the National Labor Relations Board*, BASIC GUIDE TO THE NAT’L LABOR REL. ACT 12 (1997), available at <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf> [<https://perma.cc/P8GE-B6X9>].

258. ESTREICHER & BODIE, *supra* note 26, at 97.

259. *Id.*

260. *Id.* at 97–98 (quoting *United Operations, Inc.* 338 N.L.R.B. 123, 123 (2002)).

261. *Id.*

262. *Id.*; See Mabry, *supra* note 194, at 42–43.

ing the amateur draft.²⁶³ Thus, an argument could be made that the MLBPA has an obligation—a duty—to fairly represent minor league players.

However, courts have generally given unions broad authority to bargain as they see fit.²⁶⁴ More importantly, the NLRB has found that part-time seasonal employees (such as minor league players²⁶⁵ who are now statutorily designated as seasonal employees within FLSA following passage of the Save America's Pastime Act and who do not receive the benefits enjoyed by full-time employees (major league players)), have sufficient common interest with full-time employees to be included in the same bargaining unit.²⁶⁶

In addition to the fear of reprisal for attempting to form a union, minor leaguers have little to gain from challenging the MLBPA with a grievance for failure of their duty of fair representation.

2. The MLBPA Could Include Minor League Players

The MLBPA's current position consists of looking the other way at Major League Baseball's exploitation of minor league players in order to secure greater rights for major league players. For the MLBPA to include minor league players in their collective bargaining there must be an incentive that outweighs this position. One incentive that might benefit both the MLBPA and Major League Baseball involves the end of the reserve system in minor league baseball. In other words, it would be the end of Major League Baseball's antitrust exemption in the minor leagues.

There are few avenues left to challenge Major League Baseball's continued exploitation of minor league players. As such, there could

263. See *MLB, Basic Agreement*, *supra* note 13, at 96, 159, 191 (The Basic Agreement includes terms on signing bonus pool money, which by design caps each team's ability to spend during the draft. Because of this cap, amateur players selected in the draft who will be sent to the minor leagues have reduced bargaining rights. Players drafted in the Rule 4 draft can't negotiate for higher salaries/bonus money because teams now (under the Basic Agreement) only have a certain amount of money that they are even allowed to spend. If a player is drafted by a team that has less money slotted for the position they were drafted in, that player basically has no choice, either accept what money is allocated for the slot in which they are drafted or they can sit out an entire year and re-enter the draft the following year.).

264. D.R., *Labour Relations in baseball: Not so fast*, *ECONOMIST* (Dec. 3, 2012), <https://www.economist.com/blogs/gametheory/2012/12/labour-relations-baseball> [<https://perma.cc/J32B-KUDT>].

265. Save America's Pastime Act, *supra* note 234, at 1967 (minor league players are now statutorily designated as seasonal employees within FLSA following the passage of the Save America's Pastime Act); 29 U.S.C. § 213(a)(19) (2018).

266. Knapp-Sherrill Co., 196 N.L.R.B. 1072, 1072 n.2 (1972).

conceivably be an uptick in legal suits directed at bringing down Major League Baseball's antitrust exemption in the minor leagues. Although no attempt has ever been made,²⁶⁷ it is conceivable that a more contemporary court could lift the exemption, which was given at a time when baseball was seen merely as a recreational amusement and not the burgeoning commercial empire it has become.²⁶⁸

Baseball's antitrust exemption has become viewed as flawed, "as the Constitution's 'commerce clause' was increasingly used as grounds for the government to regulate a range of dealings that had once been deemed off-limits to the [federal government]."²⁶⁹ In other contexts, the Court declared that exhibitions or other "amusements" that crossed state lines, as Major League Baseball does nightly, were subject to federal control.²⁷⁰ However, Justice Blackmun admitted in *Flood* that no other sport enjoyed the benefit of an antitrust exemption.²⁷¹ Yet, the Court has stated its position several times "that if there are evils in this field which now warrant application of it to the antitrust laws, it should be by legislation."²⁷²

Admittedly, there is little chance of legislation being successfully brought on behalf of minor league players in relation to Major League Baseball's antitrust exemption. However, public sentiment is turning a compassionate eye toward the plight of minor league players.²⁷³ Should a minor league player challenge Major League Baseball's antitrust exemption it is not out of the question that, given the interstate economics of baseball and the lack of an exemption for any

267. Mabry, *supra* note 194, at 43.

268. David Greenberg, *Baseball's Con Game*, SLATE (July 19, 2002, 10:36 AM), http://www.slate.com/articles/news_and_politics/history_lesson/2002/07/baseballs_con_game.html [<https://perma.cc/4G3N-GDEK>].

269. *Id.*

270. *Id.*

271. *Flood v. Kuhn*, 407 U.S. 258, 283 (1972) ("Even though others might regard this as 'unrealistic, inconsistent, or illogical,' . . . the aberration is an established one . . . that has been recognized not only in *Federal Baseball* and *Toolson*, but in *Shubert*, *International Boxing*, and *Radovich*. . . . It is an aberration that has been with us now for half a century . . . fully entitled to the benefit of stare decisis. . . . It rests on a recognition and an acceptance of baseball's unique characteristics and needs.").

272. *Toolson v. N.Y. Yankees*, 346 U.S. 356, 357 (1953).

273. See, e.g., Maury Brown, *Major League Baseball's Biggest Problems*, FORBES (Dec. 29, 2015, 8:00 AM), <https://www.forbes.com/sites/maurybrown/2015/12/29/major-league-baseballs-biggest-problems/#4e2ffc233b57> [<https://perma.cc/QS9Y-3JM5>]; see also Rothman, *supra* note 255; see also Venook, *supra* note 19; see also Baumann, *supra* note 183; see also Joel Mendelson, *Major League Wage Theft: How Baseball Owners and Congress Exploit Minor League Players*, UNITED STEELWORKERS (Apr. 10, 2018), <https://www.usw.org/blog/2018/major-league-wage-theft-how-baseball-owners-and-congress-exploit-minor-league-players> [<https://perma.cc/X7V6-8G5A>].

other professional sport, courts could finally lift the exemption. Soon after the reserve clause was abolished in the major leagues salaries ballooned.²⁷⁴ There is no reason to expect a different result as players could pit teams against each other for the right to their services in an industry where salaries have been suppressed for decades.²⁷⁵ “[M]arket forces imply that increases in compensation would be inevitable in a system of minor league free agency.”²⁷⁶ Major League Baseball teams covet the ability to retain minor league players through the course of their development at a low cost.²⁷⁷ If the player does not develop over the course of the seven years of his minor league contract, the team has invested very little. In fact, it benefits the team just to have the player on the roster competing against other teammates, pushing other teammates for positions, and serving as a tool to help other players develop. If Major League Baseball lost its antitrust exemption in the minor leagues it would inevitably lead to free agency (as it did in the major leagues), allowing players to freely choose where and for which teams to play.

It would behoove Major League Baseball to get in front of the curve and for the MLBPA to take advantage of an entire industry of workers to represent and maintain equal footing with Major League Baseball. Major League Baseball could negotiate with an MLBPA that represents minor league players. The MLBPA could allow Major League Baseball to keep its ability to reserve players under a similar contract to the current minor league uniform contract in exchange for a livable salary. We know Major League Baseball can afford it: “A major league organization with 250 players in its minor league system could give every single one of them a \$30,000 annual pay spike for a total of \$7.5 million, or roughly the cost of a decent fourth outfielder on the free-agent market.”²⁷⁸

For the MLBPA, including minor league players as members of its bargaining unit would ensure that it has greater ability to negotiate terms that affect both minor league players and current major league player members. The MLBPA would not want Major League Baseball to dictate terms that affect minor league players without the MLBPA’s input given the thin line that separates the minor and the majors and the way the divisions affect the lives of players on either side.

274. Mabry, *supra* note 194, at 43.

275. *See id.*

276. *Id.*

277. *See id.*

278. Berg, *supra* note 35.

The MLBPA should extend its protections to minor league players to negotiate on their behalf a livable salary in exchange for the continuation of a minor league reserve system, which would be a beneficial outcome for all involved.

Conclusion

The tide may be shifting toward lifting the antitrust exemption that has long interfered with minor leaguers' ability to earn a livable wage, allowing for more freedom of contract for minor leaguers—a threat that Major League Baseball would be wise to get ahead of. In order to maintain control over minor league players—in the event that antitrust exemptions are lifted—Major League Baseball would be best served negotiating with a union to ensure control over players (using the method they prefer—uniform contracts). Including minor league players in the MLBPA could benefit both Major League Baseball and the MLBPA. Minor league players, through MLBPA representation, could negotiate for a livable salary²⁷⁹ in exchange for contract control over a given duration.²⁸⁰

279. *See id.* (“A major league organization with 250 players in its minor league system could give every single one of them a \$30,000 annual pay spike for a total of \$7.5 million, or roughly the cost of a decent fourth outfielder on the free-agent market.”).

280. Mabry, *supra* note 194, at 43.