



Changing the Game: Remediating the Deficiencies of Baseball's Antitrust Exemption in the Minor Leagues

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Abstract: Minor league baseball players are the invisible men of the sport. As labor reform and increased payrolls sweep across the major leagues, minor leaguers have fallen even further behind, casualties of baseball's broad anti-trust exemption. The results have been troublesome—minor leaguers are forced into exploitative adhesion contracts that offer salaries significantly below the federal poverty line. Pushes for legal and political reform have been largely unsuccessful, stymied by judicial inertia, a disinterested legislature, and collusive collective bargaining. Clearly, the time has come for minor league players to change strategies. Instead of pursuing futile contests against ownership, minor leaguers should recruit major league owners to the reformative cause. By illustrating the competitive advantages major league teams could reap by deploying more capital into minor league salaries and player development, minor leaguers can reshape the current zero-sum game against owners into a new, mutual collaboration that will produce systemic reform.

I. INTRODUCTION

Major League Baseball ("MLB") is a staple of American history. Baseball has a colorful lore, which has been romanticized by fans reminiscing

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about Bobby Thomson's "Shot Heard 'Round the World" or Babe Ruth predicting his home run in the 1932 World Series. More recently, the sport's commercialization has given it a more sensational bent, as superstars like Alex Rodriguez and Clayton Kershaw have captured our imagination with their incredible play and lucrative contracts.

But baseball has a dirty secret. Minor League Baseball ("MiLB"), which employs approximately 6,000 players a year, is the underside of the sport.¹ Athletes play for peanuts, earning less than \$10,000 a year despite working 50 to 70 hours per week during the five-month season.² They also do not receive overtime pay for their participation in promotional events, spring training, instructional winter leagues, and other player development programs they are contractually obligated to attend.³ When factoring in taxes and clubhouse dues, most minor league players' net income is between \$3,000 and \$7,500 a year,⁴ placing them significantly below the 2017 federal poverty line.⁵ Pursuing professional baseball consequently becomes an unsustainable "pay-to-play" system for many players.⁶ Salaries are so low

¹ See Garrett R. Broshius, *Touching Baseball's Untouchables: The Effects of Collective Bargaining on Minor League Baseball Players*, 4 Harv. J. Sports & Ent. L. 51, 62 (2013); Complaint at 16, *Miranda v. Selig*, No. 14-cv-05349-HSG (N.D. Cal. Sept. 14, 2015), 2015 WL5357854 [hereinafter *Miranda Complaint*]; Complaint at 32, *Senne v. Kan. City Royals Baseball Corp.*, 105 F.Supp.3d. 981 (N.D. Cal. 2015) [hereinafter *Senne Complaint*].

² See *Miranda Complaint*, *supra* note 1, at 4–6; *Senne Complaint*, *supra* note 1, at 3–4; Lily Rothman, *Emancipation of the Minors; Hundreds of Pro Baseball Players Make Just \$1,100 per Month. Where is their César Chávez?*, SLATE (Apr. 3, 2012), 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_cesar_chavez_.html, [https://perma.cc/PR5E-U4H3].

³ See *Miranda Complaint*, *supra* note 1, at 5; *Senne v. Kan. City Royals Baseball Corp.*, 105 F.Supp.3d. 981, 991–992 (N.D. Cal. 2015); *The Official Professional Baseball Rules Book*, MAJOR LEAGUE BASEBALL, Attachment 3, Article VI, <https://registration.mlbpa.org/pdf/MajorLeagueRules.pdf>, [https://perma.cc/GDM3-5JMZ] (last visited October 28, 2017).

⁴ See *Miranda Complaint*, *supra* note 1, at 5.

⁵ *Poverty Guidelines*, OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING AND EVALUATION, <https://aspe.hhs.gov/poverty-guidelines>, [https://perma.cc/RU7S-X2JA], (last visited Jan. 29, 2017) (In 2017, the federal poverty line for households of one is \$12,060).

⁶ See Jeff Snider, *Are Healthy, Educated Minor Leaguers the Next Market Inefficiency?*, BASEBALL ESSENTIAL (June 17, 2015), <https://www.baseballessential.com/news/2015/06/17/healthy-educated-minor-leaguers-market-inefficiency/>, [https://perma.cc/4XPK-QTUW].

that dozens of players and their families pile into putrid apartments, subsisting off peanut butter and sharing mattresses on grime-covered floors.⁷

This meager pay is more striking when considering the comparative histories of MLB and MiLB players. Since 1976, major leaguers' average salaries have increased by more than 2,000 percent, while the average salary for minor leagues has only increased by 75 percent.⁸ Dollar inflation has increased by more than 400 percent over this same period.⁹ In more concrete terms, the minimum salary for an MLB player in 2017 was \$535,000 a year,¹⁰ whereas the standard salary for entry-level minor leaguers in 2017 was approximately \$1,100 per month.¹¹ And while some of the top minor league draftees receive multi-million dollar signing bonuses, the majority of players selected in the 40-round draft receive significantly less, with some players drafted in the 10th round receiving as little as a \$1,000 signing bonus.¹²

In light of these striking numbers, it is astonishing that many Americans (and baseball fans) remain unaware of the economic perils MiLB players face. Even on the rare occasions when there has been prominent media coverage of minor leaguers' poverty, the stories failed to gain traction.¹³ Baseball

⁷ See Kent Babb & Jorge Castillo, *Baseball's Minor Leaguers Pursue Their Dreams Below the Poverty Line*, WASHINGTON 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=.49279fa72249, [https://perma.cc/96V5-AJAE].

⁸ See Miranda Complaint, *supra* note 1, at 5.

⁹ See *id.*

¹⁰ See Maury Brown, *Breaking Down MLB's New 2017–21 Collective Bargaining Agreement*, FORBES (Nov. 30, 2016), <http://www.forbes.com/sites/maurybrown/2016/11/30/breaking-down-mlbs-new-2017-21-collective-bargaining-agreement/#47b7464f42a1>.

¹¹ See Broshius, *supra* note 1, at 63; Snider, *supra* note 6; *Senne v. Kan. City Royals Baseball Corp.*, 315 F.R.D. 523, 533 (N.D. Cal. 2016); Ian Gordon, *Minor League Baseball Players Make Poverty-Level Wages*, MOTHER JONES (July/Aug. 2014), <http://www.motherjones.com/politics/2014/06/baseball-broshuis-minor-league-wage-income>, [https://perma.cc/F9NN-5YCA].

¹² E.g., Babb & Castillo, *supra* note 7; Tony Blengino, *MLB Teams Should Pay Minor League Players What They're Worth*, ESPN (Jan. 21, 2016), http://www.espn.com/mlb/story/_/id/14604302/reimagining-baseball-increase-wage-scale-minor-league-players, [https://perma.cc/FK84-BSGS]; Russell Carleton, *Why Are We Playing Hunger Games with Minor Leaguers?*, FOX SPORTS (July 17, 2014), <http://www.foxsports.com/mlb/just-a-bit-outside/story/why-don-t-minor-leaguers-get-paid-enough-071714>, [https://perma.cc/VRZ4-7ZEL].

¹³ See Joseph, Coblitz, *Thousands Now or Millions Later: The Choice an MLB Draft Pick Must Make*, THE OUTSIDE CORNER (June 2, 2015), <http://thecomeback.com/theoutsidecorner/2015-articles/thousands-now-millions-later-choice-mlb-draft->

insiders theorize that this lack of public outcry is caused by a combination of public misperception about player salaries, players' own fear of jeopardizing their major league careers by "rocking the boat," and a widespread indoctrination that the minor league "grind" is part of the sweat equity players must invest to reach the majors.¹⁴ Even more surprising, however, is that judges and legislators have ignored the economic plight of minor league players, despite the fact that MLB's federal antitrust exemption enables this exploitation.¹⁵

II. AN OVERVIEW OF MINOR LEAGUE BASEBALL

Baseball has enjoyed a longstanding history as America's national pastime. Fortunately, the annals of the sport have been nearly as meticulously recorded as the statistics at the heart of the game. As the chronicles of baseball show, the development of MiLB has been largely conjoined with the growth of MLB, and the two have been inextricably linked as far back as the late 19th century.

A. *The Early Years and The Player Development Plan*

The concept behind modern MiLB originated in the late 19th century, at a time when professional baseball was still fragmented across several leagues. Owners began acquiring multiple teams across professional leagues

pick-must-make.html, [https://perma.cc/8VKX-HT9R]; Joshua Kusnick, *An Agent's Take: How the Unseen Post-Draft Process Works*, BASEBALL PROSPECTUS (July 10, 2014), <http://www.baseballprospectus.com/article.php?articleid=24118>, [https://perma.cc/Z467-P2CK].

¹⁴ E.g., Rothman, *supra* note 2; Broshius, *supra* note 1, at 100; Kusnick, *supra* note 13; *A Bill to Require the General Application of the Antitrust Laws to Major League Baseball, And for Other Purposes: Hearing on S.53 Before the Comm. on the Judiciary*, 105th Cong. 1 (June 17, 1997) (statement of Dan Peltier); DIRK HAYHURST, *OUT OF MY LEAGUE: A ROOKIE'S SURVIVAL IN THE BIGS* 302 (2012); 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/6A55-S2NY]; Zachary Zagger, *Minor Leaguers Face Uphill Battle In MLB Pay Suits*, LAW360 (Sept. 15, 2015), <https://www.law360.com/articles/708792/minor-leaguers-face-uphill-battle-in-mlb-pay-suits>, [https://perma.cc/CTW2-7DYC].

¹⁵ E.g., *Senne v. Kan. City Royals Baseball Corp.*, 105 F.Supp.3d. 981, 991 (N.D. Cal. 2015); Broshius, *supra* note 1, at 51–52; George Gmelch, *Minor League Pay: Baseball's Antitrust Exemption Allows for Poverty Wages*, MERCURY NEWS (July 15, 2014), <http://www.mercurynews.com/2014/07/15/minor-league-pay-baseballs-antitrust-exemption-allows-for-poverty-wages/>, [https://perma.cc/6S56-KABM].

and using their umbrella of control to “farm” players.¹⁶ After its inception in 1876, the National League of Professional Baseball Clubs (“National League”) began to consolidate power and ultimately achieved premier status as the “major” baseball league, with owners intensifying their farming and inter-league raiding of players.¹⁷ Dissatisfied with the National League’s assumption of control, the presidents of seven other baseball leagues joined together in 1901 and formed the National Association of Professional Baseball Leagues, which is now known as MiLB.¹⁸

MiLB struggled mightily with financial shortfalls and a lack of profitability over the subsequent decades, which was exacerbated when MLB General Managers such as Branch Rickey began acquiring dozens of minor league teams and treating them as bargain bin repositories for amateur players.¹⁹ As this farm system proliferated, the financial status of MiLB teams became so precarious that MLB teams owning minor league affiliates began to suffer substantial operating losses.²⁰ Fiscal reform of MiLB was sorely needed, and MLB executives ultimately decided to assume direct financial control over the minor leagues when they agreed to the Player Development Plan (“PDP”).²¹

The PDP formally recognized the hierarchical classifications of the minor leagues based on player skill levels and required each MLB team to operate at least five minor league teams.²² MLB owners then memorialized their legal relationships with individual minor league teams by executing player development contracts (“PDCs”).²³ The PDCs stated that the MLB team would cover the expenses for the baseball operations of its affiliated

¹⁶ Broshius, *supra* note 1, at 57–58.

¹⁷ *See id.* at 58.

¹⁸ *Minor League Baseball Timeline: 1901-2001*, MILB.COM, <http://www.milb.com/milb/history/timeline.jsp>, [https://perma.cc/P4EJ-8EAX] (last visited Oct. 31, 2017); *The History & Function of Minor League Baseball*, MILB.COM, http://www.milb.com/milb/history/general_history.jsp, [https://perma.cc/8F3Q-BK23] (last visited Oct. 31, 2017).

¹⁹ Broshius, *supra* note 1, at 59.

²⁰ *See* Broshius, *supra* note 1, at 61; NEIL J. SULLIVAN, *THE MINORS: THE STRUGGLES AND THE TRIUMPH OF BASEBALL’S POOR RELATION FROM 1876 TO THE PRESENT* 235 (1990).

²¹ *See* Senne Complaint, *supra* note 1, at 37.

²² *See* Broshius, *supra* note 1 at 59–61; BOB GOLON, *NO MINOR ACCOMPLISHMENT: THE REVIVAL OF NEW JERSEY PROFESSIONAL BASEBALL* 28 (2008); John Cronin, *Truth in the Minor League Class Structure: The Case for the Reclassification of the Minors*, SOCIETY FOR AMERICAN BASEBALL RESEARCH (2013), <http://sabr.org/research/truth-minor-league-class-structure-case-reclassification-minors>, [https://perma.cc/X7CA-LQNG] (last visited Oct. 31, 2017).

²³ *See* Golon, *supra* note 22.

minor league teams and would also be responsible for paying the salaries of the minor league players, managers, coaches, scouts, and medical staff.²⁴ Consequently, minor league owners were only responsible for marketing, staffing their front office, procuring local broadcasting rights and sponsorships, and maintaining their stadiums.²⁵

B. *Modern Times: An Expansive and Profitable Enterprise*

The current minor league system has broadened alongside the expansion of MLB. Each MLB team retains a comprehensive MiLB network, with every team exceeding their minimum requirements by executing PDCs with at least seven minor league teams across Triple-A, Double-A, A-Advanced, A, Short-Season A, and Rookie classifications.²⁶ Accordingly, each of MLB's 30 teams generally has over 200 minor league players under contract.²⁷

Yet the delineation of operating costs between MLB and MiLB owners has remained fairly constant over the last half-century. MLB organizations continue to pay the salary and *per diem* for the managers, coaches, and players,²⁸ and they remain responsible for "all decisions related to player development."²⁹ Moreover, MiLB franchises still "assembl[e] a front office and staff to manage all business aspects. . . [such as] ticket sales, promotions, and broadcasting."³⁰ This arrangement has removed significant expenses for minor league owners and has resulted in an overall boon for MiLB.³¹ Minor league franchise values continue to appreciate, having risen steadily even during the recent economic recessions.³² In fact, minor league clubs are now valued as high as \$49 million.³³ It is surprising, then, that despite the cur-

²⁴ See *id.*

²⁵ See *id.*

²⁶ See Broshius, *supra* note 1, at 61–62; Cronin, *supra* note 22; *Teams by Classification*, MILB.com, <http://www.milb.com/milb/info/classifications.jsp>, [https://perma.cc/8V5D-FFSF] (last visited Oct. 28, 2017).

²⁷ See Broshius, *supra* note 1, at 62.

²⁸ See *id.*; *The Official Professional Baseball Rules Book*, *supra* note 3, Rule 56(g).

²⁹ *MiLB.com Frequently Asked Questions*, MILB.COM, <http://www.milb.com/milb/info/faq.jsp?mc=business#9>, [https://perma.cc/5LXA-Q28B] (last visited Jan. 28, 2017).

³⁰ *Id.*

³¹ See Michael Ozanian, *Minor Leagues, Major Profits*, FORBES (Aug. 6, 2008), http://www.forbes.com/2008/08/06/baseball-minors-sacramento-biz-sports-cz_mo_0806minors.html.

³² See Broshius, *supra* note 1, at 62.

³³ Sergei Klebnikov, *Minor League Baseball's Most Valuable Teams*, FORBES (July 8, 2016, 11:11 AM), <http://www.forbes.com/sites/sergeiklebnikov/2016/07/08/minor-league-baseballs-most-valuable-teams/#5cfe4c4750a1>.

rent profitability of MiLB, the salaries of minor league players have languished since the 1960s.³⁴

III. BASEBALL'S ANTITRUST EXEMPTION AND THE SUBJUGATION OF MINOR LEAGUE PLAYERS

As MLB ownership gained financial control over MiLB, a number of distortions in the minor league business model became increasingly apparent. These aberrations have largely been to the detriment of minor league players, whose economic and legal positions have been increasingly imperiled over the decades.

A. *The Perverse Business Incentives in Minor League Baseball*

As previously discussed, minor leaguers' monetary interests have been compressed even as MiLB has continued to flourish. This financial stagnation for current minor league players is largely a result of the deficient business relationships enshrined in PDCs. The contractual provision that MLB owners shall pay the salaries of MiLB players has created a perverse business incentive: MLB owners are enticed to keep the salaries of MiLB players low because these players are not directly contributing to the owners' main commercial product.³⁵

MLB owners have clearly capitalized on this distorted inducement, as evidenced by the deplorable working conditions and low wages of minor league players.³⁶ Most notably, MLB owners have exercised their monopoly power over the sport by colluding to force minor league baseball players to sign adhesive Uniform Player Contracts ("UPCs"), which effectively strip players of any freedom of contract and negotiating power within organized baseball.³⁷ Minor league owners, in turn, have no incentive to curtail this exploitation, as they currently enjoy the economic windfall of not paying their own players' salaries.

³⁴ *Miranda Complaint*, *supra* note 1, at 5.

³⁵ See Broshius, *supra* note 1, at 62.

³⁶ See *An Inside Look Into the Harsh Conditions Of Minor League Baseball*, *supra* note 14 (contrasting the major leagues, where players travel in chartered planes and are given over \$1,000 in *per diems* each week, with the minor leagues, where players spend hundreds of hours travelling in buses to games and are given \$120 in weekly allowance).

³⁷ See Broshius, *supra* note 1, at 51–52; *Miranda Complaint*, *supra* note 1, at 4–5.

B. *Major League Baseball's Antitrust Exemption: A License to Collude*

The troubling reality about the exploitation of MiLB players is that it is legally authorized under the broad scope of baseball's federal antitrust exemption, which was crafted by the Supreme Court across three cases in the 20th century. The first case in this judicial trilogy was decided in 1922, when *Federal Baseball Club v. National League* reached the Supreme Court. In that decision, Justice Holmes held that the business of baseball was not interstate commerce and therefore did not implicate federal antitrust law.³⁸ The Court affirmed this position three decades later in *Toolson v. New York Yankees*, though the Court notably did not "re-examin[e] the underlying issues."³⁹ Instead, the Court based its decision on the principles of *stare decisis* and reliance, noting that the antitrust exemption of *Federal Baseball* had developed and been relied upon for over thirty years and Congress, despite having "the ruling under consideration, ha[d] not seen fit to bring [baseball] under [antitrust] laws."⁴⁰ The Court concluded by placing the impetus for change on Congress, stating that the application of antitrust laws to baseball "should be by legislation."⁴¹

The concluding case in this trio, *Flood v. Kuhn*, made it expressly clear that the Supreme Court believed it was the final responsibility of Congress to bring MLB under the purview of federal antitrust law.⁴² The Court conceded that professional baseball was a business engaged in interstate commerce and MLB's federal antitrust exemption was an "aberration" not enjoyed by other professional sports.⁴³ Nevertheless, the Court reaffirmed that its hands were tied by the "positive inaction" of the congressional decision not to overrule *Federal Baseball* and *Toolson*.⁴⁴ The Court ultimately concluded that "the remedy. . . is for congressional, and not judicial, action."⁴⁵ In effect, the Court confirmed MLB owners' ability to exercise monopoly power and conspire against all professional baseball players until Congress said otherwise.

Nearly three more decades passed before Congress finally interceded by passing the Curt Flood Act of 1998 ("Curt Flood Act").⁴⁶ The statute was

³⁸ See *Federal Baseball Club v. National League*, 259 U.S. 200, 208 (1922).

³⁹ *Toolson v. New York Yankees*, 346 U.S. 356, 357 (1953).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Flood v. Kuhn*, 407 U.S. 258, 284 (1972).

⁴³ *Id.* at 282–83.

⁴⁴ *Id.* at 284–85.

⁴⁵ *Id.* at 285.

⁴⁶ 15 U.S.C. § 26b (2012).

seen as a victory for professional baseball players, as it stated that federal antitrust laws *did* apply to labor issues “directly relating to or affecting employment of major league baseball players.”⁴⁷ Nevertheless, minor leaguers did not share in this legislative bounty, as baseball lobbyists were able to narrow the operative effect of the law.⁴⁸ With shocking specificity, Subsection B of the statute states that it does not apply to:

Any conduct, acts, practices, or agreements of persons engaging in, conducting or participating in the business of . . . baseball 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. . . . or any other matter relating to professional baseball’s minor leagues.⁴⁹

Thus, the statute makes it expressly clear that the Curt Flood Act does *not* apply to minor league players.⁵⁰

C. *Uniform Player Contracts: Major League Baseball’s Weapon of Choice*

Armed with judicial authorization and benefitting from legislative indifference towards MiLB, MLB owners have spent the last two decades crafting a system that pushes minor league players inexorably towards adhesive UPCs. First, MLB confines all new United States and Canadian players’ entry into the league to the “Rule 4 Draft.”⁵¹ The Major League Rules (“MLRs”) then require all Rule 4 draftees to sign minor league UPCs with “reserve clauses” that tether the player to the team for seven seasons.⁵² Moreover, any first-year player who avoided the Rule 4 draft requirements because of his foreign nationality is still required to sign a similar UPC.⁵³ A player’s refusal to sign the UPC “shall disqualify the player from playing with the contracting Club or entering the service of any Major or Minor League Club unless the player is released or assigned.”⁵⁴ Because the UPCs are used by all MLB organizations, they strip these minor league players of all negotiating power and freedom of contract within organized baseball.⁵⁵

⁴⁷ *Id.*

⁴⁸ See Broshius, *supra* note 1, at 97; See also John T. Wolohan, *Symposium: The Curt Flood Act: The Curt Flood Act of 1998 and Major League Baseball’s Antitrust Exemption*, 9 MARQ. SPORTS L.J. 347, 367–70 (1998-1999).

⁴⁹ 15 U.S.C. §26b(b)(1)–(2).

⁵⁰ See Wolohan, *supra* note 48, at 370.

⁵¹ *The Official Professional Baseball Rules Book*, *supra* note 3, at Rule 4.

⁵² See *id.* at Rule 3(b)(2).

⁵³ See *id.*

⁵⁴ See *id.* at Rule 3(d).

⁵⁵ See Broshius, *supra* note 1, at 51–52, 63–64.

The terms of the UPCs also unconscionably favor MLB. In addition to “reserving” the minor league player for seven seasons, the UPCs stipulate that the players are “obligate[d]. . .to perform professional services on a calendar year basis, regardless of the fact that salary payments are to be made only during the actual [five-month] championship playing season.”⁵⁶ Accordingly, players are required to participate in the team’s promotional activities, training seasons, exhibition games, and instructional leagues without any salary compensation.⁵⁷ And while a baseball club may trade, promote, demote, or assign a player at will, the UPCs restrict the mobility of minor league players.⁵⁸ Specifically, though a MiLB player may voluntarily retire at any time, he cannot sign with any other domestic, Canadian, or Mexican team for the remaining term of his contract without the written consent of the MLB Commissioner and the baseball club for which he is under contract.⁵⁹ In essence, “the players are free to go, just not free to play elsewhere in organized baseball.”⁶⁰

Major league clubs also collude in constraining the salaries of minor league players. MLB owners collectively set the minimum salary for all MiLB players,⁶¹ and the MLRs require teams to pay all first-year minor league players the same wages.⁶² The MLRs also limit signing bonuses for Rule 4 draftees through a “Signing Bonus Pool.”⁶³ Teams that exceed the signing pool cap are assessed tax penalties and are stripped of future draft picks.⁶⁴ The organization also has no legal obligation to increase the minor league players’ salaries each year. In fact, the UPCs legally entitle MLB owners to *reduce* player salaries by as much as 20% each year:

If the player and club do not reach [a salary] agreement, the player’s monthly salary rate for the next championship playing season shall be set by the club, but shall not be less than eighty percent (80%) of the

⁵⁶ *The Official Professional Baseball Rules Book*, *supra* note 3, at Attachment 3, Article VI.

⁵⁷ *See id.* at 192, 197; *Senne v. Kan. City Royals Baseball Corp.*, 105 F.Supp.3d. 981, 991–992 (N.D. Cal. 2015).

⁵⁸ *See The Official Professional Baseball Rules Book*, *supra* note 3, at Attachment 3, Article XVII.

⁵⁹ *See id.* at Rule 14(b), 88.

⁶⁰ JOHN D. KELLY, *THE AMERICAN GAME: CAPITALISM, DECOLONIZATION, WORLD DOMINATION, AND BASEBALL* 92 (Matthew Engelke ed., 2006).

⁶¹ *See The Official Professional Baseball Rules Book*, *supra* note 3, at Rule 3(b)(2).

⁶² *See id.* at Rule 3(c)(2)(B).

⁶³ *See id.* at Rule 3(c)(4)(A).

⁶⁴ *See id.* at Rule 3(c)(4)(B).

monthly salary rate set out in the most recently executed [salary agreement].⁶⁵

It is evident, then, that the UPCs have created a league where “thousands of minor leaguers[,] most of whom have no freedom of contract, are stuck where they are, do not receive large signing bonuses, [and] work for modest seasonal salaries.”⁶⁶

IV. CONVENTIONAL CHALLENGES AGAINST MAJOR LEAGUE BASEBALL ARE INEFFECTIVE

Despite the widespread neglect of MiLB players by external actors, several baseball insiders have advocated for remedial action. Numerous legal stratagems have been pursued to change the current minor league system, but all have proven unsuccessful thus far.

A. *Class Action Lawsuits Against Major League Baseball*

A common refrain among baseball insiders and journalists is that minor league baseball players should file a class action lawsuit against MLB alleging unfair labor practices and a violation of federal antitrust law.⁶⁷ The practicality of such a suit has been questioned, however, as commentators have asserted that the lawsuit would threaten the economic stability of MiLB.⁶⁸ Most minor leaguers would also be too afraid to attach themselves to a class action suit for fear of retribution by MLB ownership.⁶⁹

In spite of this skepticism, attorney (and former minor league player) Garrett Broshius has recently filed two putative class action lawsuits against MLB on behalf of minor league players. Both suits were filed in the Northern District of California and alleged that MLB illegally suppresses minor league compensation and does not pay MiLB players fair wages.⁷⁰ Each suit

⁶⁵ *Id.* at Attachment 3, Article VII.

⁶⁶ DON WOLLETT, *GETTING ON BASE: UNIONISM IN BASEBALL* xv (2008).

⁶⁷ *See* Snider, *supra* note 6.

⁶⁸ *See* Stanley M. Brand & Andrew J. Giorgione, *Symposium 6-4-3 (Double Play)! Two Teams Out: Contraction in Baseball The Effect of Baseball's Antitrust Exemption and Contraction on its Minor League Baseball System: A Case Study of the Harrisburg Senators*, 10 *VILL. SPORTS & ENT. L.J.* 49, 51–52 (2003).

⁶⁹ *Cf. id.*

⁷⁰ *See* *Senne v. Kan. City Royals Baseball Corp.*, 105 F.Supp.3d 981, 991–92 (N.D. Cal. 2015); *Miranda v. Selig*, No. 14–cv–05349–HSG, 2015 WL5357854 at *1 (N.D. Cal. Sept. 14, 2015).

advances a different legal argument, though both face tremendous legal hardships and are unlikely to succeed.⁷¹

In *Miranda v. Selig*, Broshius revisits baseball's antitrust exemption by challenging the "reserve clause" of the UPC as an unreasonable restraint of trade.⁷² Unsurprisingly, the District Court swiftly dismissed the case, determining that judicial precedent and congressional exclusion of minor leaguers from the Curt Flood Act resolved the matter in favor of MLB.⁷³ An appeal was filed in the Ninth Circuit, which promptly affirmed the lower court's ruling and similarly determined that the federal antitrust exemption precluded the class action.⁷⁴ In reality, the chances of success under *Miranda* have always appeared bleak considering the Ninth Circuit recently upheld baseball's antitrust exemption in a case involving franchise relocation.⁷⁵ Of course, MiLB players may still appeal the Ninth Circuit decision to the Supreme Court, but even if the case were granted certiorari, it is unlikely that the Court would deviate from its pattern of judicial restraint on the issue.⁷⁶

Senne v. Kansas City Royals Baseball Corp. is a more promising case for minor leaguers, since it attacks MLB from a labor law angle.⁷⁷ The plaintiffs argue that MLB collusion denies minor league players a minimum wage and overtime pay in violation of the Fair Labor Standards Act ("FLSA") and analogous state wage laws.⁷⁸ This tactic artfully avoids baseball's seemingly unassailable antitrust exemption, but it still faces a myriad of legal obstacles. From a procedural standpoint, the lawsuit has faced difficulties establishing jurisdiction over MLB teams that are not based in California.⁷⁹ As a consequence, the Northern District of California recently dismissed without prejudice eight of the MLB franchises from the lawsuit for lack of personal jurisdiction.⁸⁰

A more substantive issue in *Senne* is the assertion by MLB that the FLSA and state wage laws do not apply because of the seasonal amusement

⁷¹ See Zagger, *supra* note 14.

⁷² See generally *Miranda Complaint*, *supra* note 1.

⁷³ See *Miranda v. Selig*, 860 F.3d 1237, 1239 (9th Cir. 2017).

⁷⁴ See *id.* at 1239–40.

⁷⁵ See *City of San Jose v. Office of the Comm'r of Baseball*, 766 F.3d 686, 691 (9th Cir. 2015).

⁷⁶ See Zagger, *supra* note 14.

⁷⁷ See *Senne v. Kan. City Royals Baseball Corp.*, 105 F.Supp.3d. 981, 990–92 (N.D. Cal. 2015).

⁷⁸ See Zagger, *supra* note 14.

⁷⁹ See *Senne v. Kan. City Royals*, 105 F.Supp.3d. at 1061.

⁸⁰ See *id.* at 1045; see also Zagger, *supra* note 14.

and recreational establishment defense (“Amusement Defense”).⁸¹ The defense contends that because minor leaguers are only paid during the five months of the “championship season,”⁸² they fall under the statutory language of the Amusement Defense, which states:

[The FLSA does not apply to] any employee employed by an establishment which is an amusement or recreational establishment. . .if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year. . .⁸³

MLB similarly argues that it has an affirmative defense under the FLSA’s creative professional exemption (“Creative Professional Exemption”).⁸⁴ Pursuant to this exemption, the minimum wage and overtime pay requirements of the FLSA do not apply to “creative professionals. . .whose primary duty [is] the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.”⁸⁵ To qualify for the exemption, the employee “must be [c]ompensated on a fee or basis at a rate of not less than \$455 per week.”⁸⁶ MLB has asserted that this exemption applies to minor leaguers, claiming that time spent in MiLB “is not a career but a short-term seasonal apprenticeship in which the player either advances to the Major Leagues or pursues another career.”⁸⁷

The court has yet to rule on the merits of the *Senne* case, and judicial treatment of the issues has been mercurial thus far. The case initially ap-

⁸¹ See *Senne v. Kan. City Royals Baseball Corp.*, 315 F.R.D. 523, 579–80 (N.D. Cal. 2016).

⁸² *The Official Professional Baseball Rules Book*, *supra* note 3, at Attachment 3, Article VI; Miranda Complaint, *supra* note 1; *Senne* Complaint, *supra* note 1.

⁸³ 29 U.S.C. § 213(a)(3) (2012).

⁸⁴ *Senne v. Kan. City Royals*, 315 F.R.D. at 580; Kevin Trahan, *Baseball Would Rather Pretend Minor Leaguers Don’t Have Real Jobs Than Pay Them A Living Wage*, VICE SPORTS (July 12, 2016), https://sports.vice.com/en_us/article/baseball-would-rather-pretend-minor-leaguers-dont-have-real-jobs-than-pay-them-a-living-wage, [<https://perma.cc/BHG9-8ZCG>]; Patrick Redford, *MLB Argues That Minor Leaguers Are Creatives, Like Artists And Musicians*, DEADSPIN (June 30, 2016), <http://deadspin.com/mlb-argues-that-minor-leaguers-are-creatives-like-artist-1782927981>, [<https://perma.cc/4S4E-TKZB>].

⁸⁵ 29 C.F.R. § 541.302 (2004).

⁸⁶ 29 C.F.R. § 541.300 (2004).

⁸⁷ Chris Isidore, *Battle to Keep Minor League Baseball Players’ Pay Below Minimum Wage*, CNN (July 1, 2016, 1:32 PM), <http://money.cnn.com/2016/07/01/news/companies/minor-league-baseball-pay/>, [<https://perma.cc/3ZCR-SQ2U>]; Trahan, *supra* note 84; Redford, *supra* note 84.

peared promising, as nearly 2,000 current and former minor league players signed onto the lawsuit after it was conditionally certified as a class action in October of 2015.⁸⁸ The case was dealt a seemingly fatal blow, however, when the court later decertified the class action in July of 2016 by finding that the circumstances of the plaintiffs were too individualized to warrant class-wide treatment.⁸⁹ This ruling created substantial procedural difficulties for the case, as it meant that each of the 2,000 plaintiffs had to file individual lawsuits.⁹⁰ An appeal on the issue of decertification was subsequently granted,⁹¹ and the court backtracked yet again by recertifying the class action in March of 2017 after the plaintiffs provided a narrower class definition that excluded offseason winter conditioning.⁹²

There is some optimism that this recertification will lead MLB owners to settle the lawsuit, though most remained convinced that MLB will litigate the issue fully based on its larger economic ramifications for organized baseball.⁹³ MLB owners have already been granted an immediate appeal of the recertification ruling, and the totality of the early judicial decisions still seems to forecast another defeat for minor league players.⁹⁴ In particular, the district court has already revealed its favorable disposition towards the Amusement Defense and Creative Professional Exemption, as it referenced

⁸⁸ Zach Spedden, *Plaintiffs Granted Appeal in MiLB Wages Lawsuit*, BALLPARK DIGEST (Sept. 7, 2016), <http://ballparkdigest.com/2016/09/07/plaintiffs-granted-appeal-in-milb-wages-lawsuit/>, [https://perma.cc/KMY2-H5CJ].

⁸⁹ *Senne v. Kan. City Royals Baseball Corp.*, 315 F.R.D. 523, 531 (N.D. Cal. 2016).

⁹⁰ See Spedden, *supra* note 88.

⁹¹ See Spedden, *supra* note 88.

⁹² *Senne v. Kan. City Royals Baseball Corp.*, No. 14-cv-00608-JCS, 2017 WL 897338, at *38–39 (N.D. Cal. Mar. 7, 2017); Kat Greene, *Calif. Minor Leaguers Granted Cert. in Wage Row*, LAW360 (Mar. 8, 2017, 6:26 PM), <https://www.law360.com/articles/899704/calif-minor-league-players-granted-cert-in-wage-row>, [https://perma.cc/G7CF-86P7].

⁹³ Mark Stanton, *JUUUUSST A Bit Outside: A Look At Whether MLB Owners Can Justify Paying Minor Leaguers Below Minimum Wage Without Violating The Fair Labor Standards Act*, 22 JEFFREY S. MOORAD SPORTS L.J. 727, 749–50 (2015); Zachary Zagger, *Judge Breathes New Life Into Minor Leaguers' Wage Suit*, LAW360 (Apr. 3, 2017, 6:49 PM), <https://www.law360.com/articles/908546/judge-breathes-new-life-into-minor-leaguers-wage-suit>, [https://perma.cc/EXQ9-SDNR]; Zagger *supra* note 14.

⁹⁴ Zachary Zagger, *MLB Looks to Appeal Minor Leaguer Class Certification in Wage Row*, LAW360 (Mar. 22, 2017, 5:23 PM), <https://www.law360.com/articles/904871/mlb-looks-to-appeal-minor-leaguer-class-cert-in-wage-row>, [https://perma.cc/4K2L-EZMN]; Adam Rhodes, *9th Circ. OKs MLB Appeal in Minor Leaguer Wage Action*, LAW360 (June 14 2017), <https://www.law360.com/articles/934647/9th-circ-oks-mlb-appeal-in-minor-leaguer-wage-action>, [https://perma.cc/9WKD-XQW8].

and relied upon these doctrines in the reasoning behind its initial class decertification.⁹⁵ A sliver of hope still remains for MiLB players following the class action recertification, but the predilection of the court indicates that *Senne* will likely meet the same fate as *Federal Baseball*, *Toolson*, *Flood*, and *Miranda*.⁹⁶

B. Congressional Protection of Minor League Baseball Players

Another proposed solution is to lobby Congress to completely overrule the *Federal Baseball*, *Toolson*, and *Flood* cases and specify that *all* of baseball, including MiLB, is subject to federal antitrust law. This would allow the Rule 4 Draft and the UPC reserve clause to be challenged as “illegal restraints of trade” under Section 1 of the Sherman Antitrust Act, which prohibits “[e]very contract, combination. . .or conspiracy, in restraint of trade or commerce.”⁹⁷ Based on the prior judicial treatment of the Sherman Antitrust Act, it is likely that such a challenge would prevail.⁹⁸

But while this would be the most seamless resolution, it is also the most unlikely—Congress chose to expressly exclude MiLB from the legislative protection of the Curt Flood Act.⁹⁹ Since then, Congress has shown an unwillingness to amend the statute in any way that would extend federal antitrust coverage to MiLB.¹⁰⁰ In fact, recent congressional action has been taken to try and *reduce* the legislative protection afforded to minor leaguers. A new bill, the “Save America’s Pastime Act,” seeks to amend the FLSA to specifically exclude MiLB players from the statute’s minimum wage and

⁹⁵ See *Senne v. Kan. City Royals Baseball Corp.*, 315 F.R.D. 523, 579–80 (N.D. Cal. 2016).

⁹⁶ See Zagger, *supra* note 14; Stanton, *supra* note 93.

⁹⁷ 15 U.S.C. § 1 (2012); Brand & Giorgione, *supra* note 69 (discussing how minor league baseball’s Rule 4 Draft and reserve clause could be challenged if major league baseball’s federal antitrust exemption were removed). See also *Smith v. Pro Football, Inc.* 593 F.2d 1173, 1183 (D.C. Cir. 1978) (holding that the National Football League draft was an illegal restraint on trade).

⁹⁸ Broshius, *supra* note 1, at 96 (discussing the Supreme Court’s “rule of reason” analysis in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911)); see also Claudia G. Catalano, *Application of Federal Antitrust Laws to Professional Sports*, 79 A.L.R. FED. 2D.1, 118–21 (2013).

⁹⁹ 15 U.S.C. § 26(b) (2012).

¹⁰⁰ See Broshius, *supra* note 1, at 98 (describing how a 2001 bill introduced by Senator Paul Wellstone of Minnesota ultimately failed due to the fear that it “could be read to shed doubt on the [antitrust] exemption’s applicability to. . .Minor League players.”).

overtime compensation requirements.¹⁰¹ The bill was introduced into the House of Representatives in direct response to the *Senne* case,¹⁰² further cementing the reality that Congress is unlikely to take any action to provide statutory relief to MiLB players.

C. *Forming a Minor League Baseball Players Union*

Unionizing minor league baseball players has also been suggested as a pushback against MLB, in large part because of the success of unionization in other sporting contexts. Most notably, unionization has proven to be a powerful tool for major league baseball players, who were similarly beholden to contractual “reserve clauses” for much of the 20th century.¹⁰³ After unsuccessfully challenging the reserve clause before the Supreme Court, MLB players put their hope for reform in the hands of the Major League Baseball Players Association (“MLBPA”) and the head of the union, Marvin Miller.¹⁰⁴ Miller became the head of the MLBPA in 1966, and he formidably shifted the balance of power to major league players by procuring them pension plans, collective bargaining agreements (“CBAs”), an arbitration process for salary grievances, and free agency.¹⁰⁵

Umpires in MiLB have also successfully unionized and have consequently been compensated much more fairly than minor league players.¹⁰⁶ In fact, contrary to MLB where umpires are compensated substantially less than major league players,¹⁰⁷ minor league umpires are actually paid *more* than MiLB players.¹⁰⁸ MiLB umpires also do not have to finance their own

¹⁰¹ See Save America’s Pastime Act, H.R. 5580, 114th Cong. (2015-2016); Ted Berg, *The ‘Save America’s Pastime Act’ in Congress Will Do Nothing of the Sort*, USA TODAY (June 30, 2016), <http://ftw.usatoday.com/2016/06/save-americas-pastime-act-minor-league-minimum-wage-lawsuit-mlb-salaries>, [https://perma.cc/Y7EH-R6L2].

¹⁰² See Trahan, *supra* note 84.

¹⁰³ See generally BRAD SNYDER, A WELL-PAID SLAVE: CURT FLOOD’S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS (2006).

¹⁰⁴ See Broshius, *supra* note 1, at 70–71.

¹⁰⁵ See *id.*

¹⁰⁶ See See Broshius, *supra* note 1, at 101.

¹⁰⁷ Compare Brown, *supra* note 10 (listing the 2017 minimum salary of MLB players as being \$535,000), with Jack O’Connor, *Much Required to Become MLB Umpire*, MLB.com (Aug. 28, 2007), <http://m.mlb.com/news/article/2173765/>, [https://perma.cc/L7CX-SPAL] (listing the salary range of MLB umpires as being from \$120,000 for junior umpires to \$350,000 for senior umpires).

¹⁰⁸ Compare Broshius, *supra* note 1, at 101, and Justin Frazee, *Mind the Gap: The Great Disparity in Minor League Salaries*, PIRATES BREAKDOWN (Mar. 3, 2016), <http://piratesbreakdown.com/2016/03/03/minor-league-baseball-salaries-mind-the->

lodging and accommodations during the season, whereas the minor league players receive no such subsidization.¹⁰⁹

Minor league athletes in other, less financially successful sports leagues have also successfully unionized. Hockey players in the American Hockey League (“AHL”), which is the equivalent of the MiLB for the National Hockey League (“NHL”), have a union,¹¹⁰ despite the fact that the NHL brings in almost six billion dollars less in annual revenue than MLB.¹¹¹ As a result of their union, AHL players are compensated substantially more than MiLB players. Under the 2015–2019 CBA for the AHL, hockey players have a minimum salary of \$42,375 a year and receive a \$65 *per diem*.¹¹² By meager comparison, Triple-A MiLB players are paid approximately \$10,750 per year and only receive a \$25 *per diem*.¹¹³ Considering the greater value and profitability of MLB relative to the NHL, it is likely that a MiLB players union could surpass these AHL benchmarks.

Notwithstanding these other successes, unionizing minor league baseball players currently does not seem to be a viable option. Foremost, incorporating minor league players into the MLBPA is implausible. Ironically, the MLBPA has proven to be one of the chief impediments to the economic gains of MiLB players. The MLBPA, which does not actually represent minor league players, has consistently bargained away the rights of minor leaguers in CBA negotiations with MLB.¹¹⁴ Increasing contractual restrictions on draftees, limiting MiLB signing bonuses, and curtailing the negotiating power of minor league players are just some of the impositions that

gap/, [https://perma.cc/2QGH-4H8Y] (describing the salary range of AA players as \$1,700 per month) *with Umpire Salaries*, MILB.com, http://www.milb.com/milb/info/umpires.jsp?mc=_ump_salaries, [https://perma.cc/EL49-75P8] (last visited Feb. 2, 2017) (“The regular-season salary ranges for each [umpire] classification are as follows. . . Double-A: \$2,500 – \$3,100 per month.”).

¹⁰⁹ See Broshius, *supra* note 1, at 101–02; 2014–2017 *Minor League Umpires*, STEVE THE UMP, http://www.stevetheump.com/minor_league_umpires.htm, [https://perma.cc/4T48-DQLP] (last visited Oct. 30, 2017). (“Hotel lodging is provided free through the league offices for each umpire while on assignment within the league.”).

¹¹⁰ Broshius, *supra* note 1, at 101.

¹¹¹ See Steven Kutz, *NFL took in \$13 billion in revenue last season – see how it stacks up against other pro sports leagues*, MARKETWATCH (July 2, 2016), <http://www.marketwatch.com/story/the-nfl-made-13-billion-last-season-see-how-it-stacks-up-against-other-leagues-2016-07-01>, [https://perma.cc/6XXA-8VHB].

¹¹² Brian MacPherson, *Minor league hockey players benefit from NHL relationship*, PROVIDENCE JOURNAL (Feb. 21, 2015), <http://www.providencejournal.com/article/20150221/NEWS/150229777>, [https://perma.cc/8CF8-4XFJ].

¹¹³ Broshius, *supra* note 1, at 101.

¹¹⁴ See *e.g.*, Broshius, *supra* note 1, at 72–94.

MLBPA concessions have placed on MiLB players.¹¹⁵ Donald Fehr, the former executive director of the MLBPA, epitomized this systematic disregard for MiLB players when he stated that “[t]oo much money is being wasted in the minor leagues.”¹¹⁶ Thus, rather than harboring feelings of empathy and commiseration for their minor league counterparts, most major league players appear to view MiLB players with callous aloofness.¹¹⁷ The unfortunate reality, then, is that the MLBPA would be wholly unwilling to welcome MiLB players into its ranks.

Nevertheless, minor leaguers face no external obstructions to forming their own union. Yet unionization is unlikely to occur based on an equally potent impediment: the players’ own fear. Minor leaguers are in a unique position in that they view themselves as a transient group—every minor leaguer intends to climb the ranks of MiLB until they reach the majors. Players are therefore afraid that their activism in the minors will incense MLB ownership and threaten their ascent through MiLB.¹¹⁸ Accordingly, the few times that a push for MiLB unionization has begun to materialize, it has been stymied by a collective paralysis of fear among active players.¹¹⁹ Until minor league players can overcome this apprehension and inertia, unionization is unlikely to occur.

V. AN UNCONVENTIONAL SOLUTION: COLLABORATION WITH MAJOR LEAGUE OWNERS

The irony of the ongoing contest between minor league players and major league owners is that both parties would actually benefit from an increase in MiLB salaries. Accordingly, the most viable way for minor leaguers to change their current situation is not to challenge owners directly, but to recruit them to the reformative cause.

A. *A Brief Overview of Major League Baseball Economics*

To understand how baseball ownership would benefit by increasing MiLB salaries, it is important to first understand the basic economics of

¹¹⁵ See Broshius, *supra* note 1, at 72–94.

¹¹⁶ Josh Leventhal, MEET STAN BRAND: BASEBALL’S POWER BROKER ON THE HILL, *BASEBALL AMERICA* (Apr. 10, 2015), <http://www.baseballamerica.com/minors/meet-stan-brand-baseballs-anonymous-power-broker/#tsfb1wgYYDPemJo0.97>, [<https://perma.cc/EB2P-7B2F>].

¹¹⁷ See HAYHURST OUT OF MY LEAGUE, *supra* note 14.

¹¹⁸ See Broshius, *supra* note 1, at 100.

¹¹⁹ See Rothman, *supra* note 2.

MLB teams. Modern perspectives on baseball finance were shaped largely by Doug Pappas, a Manhattan lawyer who created an economic measure of how much MLB teams spend for each win. His method first calculates the minimum amount that can be spent on a major league roster, which equals approximately \$7 million.¹²⁰ Based on statistical analysis, it is then projected that this minimum-wage team would win approximately 49 games over the course of the 162-game season.¹²¹ The Pappas measure then compares the amount each MLB team pays in excess of \$7 million against the number of wins that team accrues over the season.¹²² This comparison ultimately determines how much an MLB team pays for each win above the 49-win threshold.¹²³

Data shows that the average major league team pays roughly \$1.5 million for each marginal win after its 49th victory.¹²⁴ However, this number is even higher when considering the costs teams must pay to acquire *new* talent for their rosters. The conventional wisdom of baseball analytics states that, when dealing with new player acquisitions, each marginal win costs approximately \$5 million.¹²⁵ More recent studies have found that the marketplace has further inflated, with a win on the free agent market now costing around \$7 million.¹²⁶ Clearly, MLB teams are paying an exorbitant premium for talent acquisition at the major league level.

B. *Identifying Pervasive Market Inefficiencies*

The enormous price inflation for MLB free agents and the continual undervaluation of MiLB players produce several market inefficiencies throughout professional baseball. Perhaps the most glaring is that the minor league pay structure makes little sense when considering that MiLB's larger

¹²⁰ MICHAEL LEWIS, *MONEYBALL* xiii (2004).

¹²¹ *See id.*

¹²² *See id.*

¹²³ *See id.*

¹²⁴ Cork Gains, *Every Dodgers win this season will cost more than \$3 million in player salaries alone*, BUSINESS INSIDER (Sept. 4, 2015), <http://www.businessinsider.com/chart-2015-mlb-payroll-cost-per-win-2015-9>, [https://perma.cc/PCD9-Y349]; Cory DiBenedetto, *2015 MLB Cost Per Win*, GAMMONS DAILY (Jan. 11, 2016), <http://www.gammonsdaily.com/2015-mlb-cost-per-win/>, [https://perma.cc/NE5H-EXQQ].

¹²⁵ Lewie Pollis, *How Much Does a Win Really Cost?*, BEYOND THE BOX SCORE (Oct. 15, 2013, 9:00 PM), <http://www.beyondtheboxscore.com/2013/10/15/4818740/how-much-does-a-win-really-cost>, [https://perma.cc/T5PS-VWUX].

¹²⁶ *See id.*

purpose is to develop and produce high caliber players for MLB franchises.¹²⁷ It is therefore counterproductive to owners' interests to promote business policies that curtail the development of MiLB players. Yet this is precisely what occurs under the current business model.

The modern MiLB system repudiates the basic principles of human development, clinging instead to the false hope that talent will shine through, irrespective of the circumstances.¹²⁸ In contrast, general medical research shows that human development is best achieved when two basic needs are fulfilled: sleep and sustenance.¹²⁹ Yet most minor league players, because they are paid severely low wages, are placed in economic situations where their food and housing are insecure.¹³⁰ To survive on their meager pay, players usually resort to living in excessively overcrowded apartments and eating cheap and unhealthy fast food.¹³¹

This unhealthy lifestyle has several negative physiological ramifications. Foremost, research shows that poor-nutrition diets cause systemic and cellular inflammation throughout the body that exacerbates the risk of severe baseball injuries, such as elbow ligament damage requiring "Tommy John surgery."¹³² The disquieting home front for players also denies them the ability to sleep properly. Poor sleep derails the development of the prefrontal cortex, which is critical for high-level thinking and learning for young men, and thereby stunts players' capacity for athletic and cognitive improvement.¹³³ Finally, constant worry builds high levels of corticoid chemicals in the bloodstream, which triggers anxiety and fatigue, and stunts physical recovery.¹³⁴ In essence, MLB teams are poisoning the same pools of talent they are trying to develop.

This lack of proper player development leads to another major market inefficiency in professional baseball—talented prospects are forced out of the game prematurely. A common sentiment among MiLB players is that the individuals best suited to endure the "grind" of the minor leagues are not the most talented players, but those with preexisting financial infrastruc-

¹²⁷ See Carleton, *supra* note 12.

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ See *id.*

¹³¹ Babb & Castillo, *supra* note 7; Russell Carleton, *Baseball Therapy: The Proper Care and Feeding of Minor Leaguers*, BASEBALL PROSPECTUS (Oct. 29, 2012), <http://www.baseballprospectus.com/article.php?articleid=18777>, [https://perma.cc/XKU9-G5D4].

¹³² See Snider, *supra* note 6.

¹³³ See Carleton, *supra* note 12.

¹³⁴ See *id.*

tures that can endure years of poverty.¹³⁵ This financial foundation generally comes in two forms: a wealthy family that can subsidize the player, or a substantial signing bonus.¹³⁶ Aggregate data on the socio-economic status of minor leaguers' families is lacking, but there is data categorizing MiLB players according to the amount of their signing bonuses, whether they appeared in an MLB game, and how successful they are as measured by wins above replacement ("WAR").¹³⁷ The following chart summarizes this data:¹³⁸

Signing Bonus (USD)	Percentage of Players Appearing in MLB	One Career WAR	Five or More Career WAR
\$1,000 – \$99,999	15.0%	5.4%	2.4%
\$100,000 – \$249,999	26.1%	7.5%	3.2%
\$250,000 – \$499,999	43.2%	15.4%	7.9%
\$500,000 – \$999,999	53.1%	21.7%	12.0%
\$1,000,000 +	72.0%	42.5%	24.3%

This data supports the supposition that more financially secure MiLB players have a greater chance of reaching MLB. Of course, such a result also appears to be self-evident, since the more lucrative signing bonuses are given to the highest-valued prospects that are considered more likely to reach the major leagues. But when considering newer medical data on the stunted athletic development of most MiLB players, there is now room to question these conventional understandings. Indeed, there is reasonable doubt as to whether the higher paid players truly succeed solely on the basis of their talent, or whether they can merely outlast more talented peers in a financial war of attrition.

This latter point is admittedly speculative, but it reinforces the confounding nature of MLB owners' business practices. If these owners are pouring millions of dollars into scouting and drafting players, why are they then squandering their assets by not deploying capital into the proper development of these players? By failing to equip the majority of their minor league

¹³⁵ See, e.g., Snider, *supra* note 6.

¹³⁶ See *id.*

¹³⁷ See Carleton, *supra* note 12. "Wins above replacement" is a statistical measure that charts how many additional wins per season a player generates for his team.

¹³⁸ See *id.* (data represents draftees selected between the years 2003 and 2008).

players with the means of even *possibly* succeeding, MLB franchises transform most of their investments into junk bonds.

C. *An Opportunity for Competitive Advantage*

The pervasiveness of these market inefficiencies presents a unique opportunity for major league franchises. For owners willing to deviate from conventional MiLB practices, there are ways to mitigate these inefficiencies and gain a competitive advantage. One practical and cost-effective approach would be for an MLB owner to directly subsidize his minor league players' food and lodging.¹³⁹ According to one research study, it would cost an MLB franchise approximately \$1.3 million a year to provide full catering services for lunch and dinner across its seven affiliated minor league teams.¹⁴⁰ Another study projects that, based on the average accommodation costs across minor league market cities, it would cost an MLB franchise \$2.5 million a year to provide each of its minor league teams with furnished apartments for the players.¹⁴¹ Based on these estimates, an MLB owner could forecast annual spending of roughly \$4 million on food and accommodations for its minor league players.¹⁴² When compared against the free agent acquisition cost of "\$7 million per win," this sum actually represents a discount purchase. MLB owners would be paying nearly half the cost of a win on the open market in exchange for developing a vast, internal roster of major league talent.

A second possibility is for MLB owners to discard the widespread "race to the bottom" mentality towards minor league pay and raise their players' minimum salaries. Providing a livable wage of around \$50,000 a year, which approximates the median household income in the United States,¹⁴³ would provide minor league players with the means to adequately meet their basic living and nutritional needs and thus enable them to better develop their baseball skill-sets.¹⁴⁴ If we assume that each major league franchise has 200 active players across its seven minor league affiliates,¹⁴⁵ this elevated base salary would represent a new annual outlay of \$10 mil-

¹³⁹ *See id.*

¹⁴⁰ *See id.*

¹⁴¹ *See id.*

¹⁴² *See id.*

¹⁴³ *Median Household Income in the United States: 2015*, UNITED STATES CENSUS BUREAU (Sept. 15, 2016), https://www.census.gov/library/visualizations/2016/comm/cb16-158_median_hh_income_map.html, [<https://perma.cc/X5DN-W57T>].

¹⁴⁴ *See* Carleton, *supra* note 12.

¹⁴⁵ *See* Broshius, *supra* note 1, at 62.

lion.¹⁴⁶ While this is a substantial amount, a point-of-reference to the \$7 million free agency market standard once more demonstrates that this is a comparatively reasonable sum. Essentially, the franchise would hedge the near monetary equivalent of one-and-a-half wins on the bet that increased development costs will produce new prospects who will yield a greater number of wins over time. Across a 200-player roster, the statistical odds are significant that several such prospects would emerge.¹⁴⁷

The critical issue, however, is convincing a major league owner that deploying his capital in either of these new ways would yield positive returns. For “rich teams” with surplus cash to spend in free agency, this new market model would likely be unappealing. Success in the current system is still largely determined by who has the fattest wallet and spends the most cash, and wealthy teams already possess the market dominance to pull coveted free agents away from cash-strained, smaller-market clubs.¹⁴⁸ The past several decades substantiate this point, demonstrating that postseason success in MLB is usually elusive unless a team has one of the top ten payrolls in the league.¹⁴⁹ Accordingly, the payrolls for two-thirds of major league teams generally amount to nothing more than wasted capital for the owners.¹⁵⁰

Yet this financial reality provides an incentive for middle and small market franchises to pursue these new competitive advantages.¹⁵¹ Many of these franchises are either priced out of the free agency marketplace altogether, or—because of their lack of sustained success in the league—are forced to overpay free agents to compensate for their diminished cachet.¹⁵²

¹⁴⁶ Cf. Carleton, *supra* note 12. This figure does not account for the uniform salary requirements for all first-year minor league players as required by Major League Rule 3(c)(2)(B). However, because of the increased base salary outlay, MLB ownership would have a reasonable negotiating position to reapportion some of its aggregate signing bonus pool to first-year players so that they reach the \$50,000 threshold during their first year.

¹⁴⁷ See generally Carleton, *supra* note 12.

¹⁴⁸ See BOB COSTAS, *FAIR BALL* 16, 56–57 (2000); Cf. LEWIS, *supra* note 120, at 22–23.

¹⁴⁹ Cf. COSTAS, *supra* note 148 at 56–57; Noah Davis & Michael Lopez, *Don't Be Fooled by Baseball's Small-Budget Success: MLB Payrolls Matter More than Ever, FIVETHIRTYEIGHT* (July 8, 2015, 7:55 AM), <https://fivethirtyeight.com/features/dont-be-fooled-by-baseballs-small-budget-success-stories/>, [https://perma.cc/JAY7-DSX4]; *MLB Team Payrolls: 1998–2017*, STEVE THE UMP, http://www.stevetheump.com/Payrolls.htm#salary_stats, [https://perma.cc/KDL5-GCMB] (last visited Oct. 31, 2017).

¹⁵⁰ See COSTAS, *supra* note 148, at 100.

¹⁵¹ See *id.*

¹⁵² See LEWIS, *supra* note 120, at 22–23; cf. COSTAS, *supra* note 148, at 56–57.

These franchises are prisoners of the current system, yet they refuse to contemplate a jailbreak.

Fortunately, the recent successes of cash-strapped franchises such as the Oakland Athletics have demonstrated that the *efficient* use of limited capital can be a potent weapon.¹⁵³ For many MLB franchises, deploying more capital at the minor league level would be the *most efficient* way for them to use their resources. Rather than overpaying to participate in a system that will see them mired in mediocrity, these teams would reallocate their costs towards the development of players that are already under contract. By avoiding the premiums of free agency, organizations would reduce their balance sheet expenses while expediting and improving the development of their minor league players. Owners would then receive a new multi-purpose asset: an expanded pool of players that are viable at the major league level and that could also be leveraged as trade pieces for transactions with other teams. Moreover, because these players remain under their initial seven-year contract, the risk of their imminent departure is also mitigated.

The addition of new and valuable prospects to the teams' rosters would also elevate the teams' competitiveness in MLB, which has been shown to correspond with an increase in fan attendance and media coverage.¹⁵⁴ This, in turn, increases the stadium and broadcasting revenue streams generated by the team, meaning owners would effectively be able to spend less to earn more.¹⁵⁵ Ownership would consequently see a substantial boost in net earnings, and portions of the new capital could be retained in the franchise to enhance other operational elements.

Finally, the minor league players themselves would substantially benefit under this new business model.¹⁵⁶ While their legal position under UPCs would remain unchanged, the unconscionability of that position would be largely ameliorated. In particular, the quality of life would be substantially improved across MiLB, as subsidizing food and board or increasing minor leaguers' base salary would elevate players well above the poverty line and the minimum standards required by the FLSA.¹⁵⁷ This would also enhance psychological wellbeing among the athletes—newfound economic stability

¹⁵³ Despite consistently placing among the five lowest payrolls in the major leagues, the Athletics have made the postseason eight times since 2000 through their "Moneyball" strategy of signing cheap players that possess unique statistical value.

¹⁵⁴ *MLB Attendance Reports: 2001–2017*, ESPN, <http://www.espn.com/mlb/attendance>, [<https://perma.cc/7VSX-Y25H>] (last visited October 31, 2017).

¹⁵⁵ See COSTAS, *supra* note 148, at 54, 63–78.

¹⁵⁶ *Cf.* COSTAS, *supra* note 148, at 100.

¹⁵⁷ See Carleton, *supra* note 12.

would provide assurances that players' successes were produced by a meritocratic system rather than financial attrition. For minor leaguers, then, the most tenable path to reform is not to try and effect change from within, but to incentivize a mutually conducive collaboration with MLB ownership.

D. *Psychological Roadblocks*

Even with these forecasted benefits, it is still likely that psychological inertia and fear will prevent most owners from pursuing this new business model.¹⁵⁸ Yet past successes by pioneering MLB owners have shown that innovation is the lynchpin for success. For example, in 1975 the New York Yankees were mired in a decade-long postseason slump when they signed James "Catfish" Hunter, baseball's first free agent, to a five-year, \$3.5 million deal.¹⁵⁹ George Steinbrenner, the Yankees owner, was heavily criticized for this new cash-laden approach to management, as Hunter's pay dwarfed the average salary of \$44,676 at the time.¹⁶⁰ Yet George Steinbrenner was rewarded for his risk-taking with three trips to the World Series over the next four years and the Yankees winning two championships in 1977 and 1978.

In another instance in the early 2000s, Ken Hofmann and Stephen Schott, the former co-owners of the Oakland Athletics, were maligned after endorsing the novel "sabermetric" strategy of their General Manager, Billy Beane, to sign disregarded players with unique statistical value.¹⁶¹ However, even with a payroll consistently in the bottom rungs of the league, Hofmann and Schott were rewarded with the sustained success of the Athletics, which reached the postseason five times in six years. More recently, John Henry, as the principal owner of the Boston Red Sox, was rewarded for his own extensive endorsement of sabermetrics when he led the Red Sox in ending an 86-year World Series Championship drought in 2004.

In each of these cases, a maverick owner adopted an unorthodox approach to baseball management that ushered in a new era of success for his franchise. Ironically, these innovations ultimately catalyzed paradigm shifts throughout the league, as other teams began to embrace the same novelties

¹⁵⁸ Cf. RICHARD THALER & CASS SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 33–35 (Updated ed. 2009).

¹⁵⁹ See Snyder, *supra* note 103, at 317.

¹⁶⁰ *Average Salaries in Major League Baseball: 1967–2009*, MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, http://hosted.ap.org/specials/interactives/_sports/baseball08/documents/bbo_average_salary2009.pdf, [https://perma.cc/XZZ2-CZA2] (last visited October 31, 2017).

¹⁶¹ See LEWIS, *supra* note 120, at 14–42, 127–28.

they previously repudiated. The current baseball landscape reflects this reality, as other MLB owners have raced to match increased payrolls, and sabermetrics now constitute the prevailing approach within baseball operations.¹⁶² The challenge for minor league players, then, is to find an owner who is willing to champion this novel business model. If the new approach proves successful, history shows that it will very likely herald a systemic change for MiLB.

VI. CONCLUSION

MiLB players are the invisible men of professional baseball. They have been overlooked by the Supreme Court and callously disregarded by Congress and their major league counterparts. They play for poverty wages and have been unconscionably indentured to MLB. Their legal rights are few, and pushes for reform have been unsuccessful. All conventional solutions have failed decidedly.

It is therefore time for minor league players to alter their strategy. Major league owners wield too much power to be overtly dethroned. Thus, instead of revisiting fruitless political and litigious challenges against MLB, players would be better served to collaborate with ownership. By demonstrating to one or more maverick owners the competitive advantages that would be reaped by deploying more capital into proper player development, minor leaguers could initiate a cascade of systemic reform across baseball. By transforming their captors into confederates, minor league players would finally cast off their shackles and reshape the business of organized baseball.

¹⁶² *MLB Payrolls: 1998–2017*, *supra* note 149; David Schoenfield, *Sabermetrics' Impact Grows As Baseball Delves Deeper Into The Numbers*, ESPN (Mar. 18, 2016), http://www.espn.com/blog/sweetspot/post/_id/68862/impact-of-sabermetrics-grows-as-new-technology-expands-whats-possible, [https://perma.cc/BMC5-TQZQ].