

October 2020

Myth, Manipulation, and Minor League Baseball: How a Capitalist Democracy Engenders Income Inequality

Phillip J. Closius
University of Baltimore School of Law

Joseph S. Stephan

Follow this and additional works at: <https://scholarship.law.uc.edu/uclr>



Part of the [Antitrust and Trade Regulation Commons](#)

Recommended Citation

Phillip J. Closius and Joseph S. Stephan, *Myth, Manipulation, and Minor League Baseball: How a Capitalist Democracy Engenders Income Inequality*, 89 U. Cin. L. Rev. 84 (2020)
Available at: <https://scholarship.law.uc.edu/uclr/vol89/iss1/3>

This Article is brought to you for free and open access by University of Cincinnati College of Law Scholarship and Publications. It has been accepted for inclusion in University of Cincinnati Law Review by an authorized editor of University of Cincinnati College of Law Scholarship and Publications. For more information, please contact ronald.jones@uc.edu.

MYTH, MANIPULATION, AND MINOR LEAGUE BASEBALL: HOW A CAPITALIST DEMOCRACY ENGENDERS INCOME INEQUALITY

Phillip J. Closius*

Joseph S. Stephan**

I. INTRODUCTION

Dreams are the foundation of American culture.¹ Dreams have always been with us: the early religious image of America as a “city upon a hill,”² the immigrant dream that education leads to a better life,³ the ideal that anyone can grow up to be President,⁴ the belief that hard work will always pay off,⁵ America as the land of equal opportunity for all⁶—to name but a few. This Article deals with one of America’s most deep-seated dreams: the wish of a child—and frequently the child’s parents—to play a professional sport. The dream of becoming a professional athlete has engendered an industry of travel teams and specialized coaches catering to the athletic development of grade school children.⁷ As children become adults, their love of the game turns them into fans who support multi-billion dollar sports leagues.⁸

Concepts of capitalism are as enduring as dreams in American culture.⁹ Although the modern American economy contains socialistic programs begun in the Franklin D. Roosevelt administration,¹⁰ the cultural dialogue

* Professor of Law, University of Baltimore School of Law

** University of Baltimore School of Law, J.D. May 2020

1. See Matthew Wills, *James Truslow Adams: Dreaming up the American Dream*, JSTOR DAILY (May 18, 2015), <https://daily.jstor.org/james-truslow-adams-dreaming-american-dream/>.

2. See John Winthrop, *A Modell of Christian Charity* (1630).

3. See Vanessa Vallejos, *Youth Voices: Life, Liberty, and Justice for All*, HARV. EDUC. REV., Fall 2011, available at https://www.hepg.org/her-home/issues/harvard-educational-review-volume-81-number-3/herarticle/_835.

4. See RICHARD K. LAIRD, *THE POLITICS OF KNOWLEDGE: WHEN LOYALTY MINIMIZES LEARNING* 210 (2019).

5. See Scott Horsley, *Obama's Own Story Defines His American Dream*, NPR (May 30, 2012, 4:43 PM), <https://www.npr.org/2012/05/30/153994202/obamas-own-story-defines-his-american-dream>.

6. See JAMES TRUSLOW ADAMS, *THE EPIC OF AMERICA* 214 (1931).

7. See *Survey: Youth Baseball Participation on the Rise*, ESPN (Aug. 23, 2019), https://www.espn.com/mlb/story/_/id/27448703/youth-baseball-participation-rise.

8. See Maury Brown, *MLB Sees Record \$10.7 Billion in Revenues for 2019*, FORBES (Dec. 21, 2019, 7:02 PM), <https://www.forbes.com/sites/maurybrown/2019/12/21/mlb-sees-record-107-billion-in-revenues-for-2019/#172b58195d78>; Robert Kuenster, *Why Fans Love the Game of Baseball*, FORBES (Jan. 18, 2019, 10:11 PM), <https://www.forbes.com/sites/robertkuenster/2019/01/18/why-fans-love-the-game-of-baseball/#ef6115117a1>.

9. See Sven Beckert & Christine Desan, *The New History of American Capitalism*, HARVARD BUS. SCH. (Feb. 22, 2018), <https://hbswk.hbs.edu/item/the-new-history-of-american-capitalism>.

10. See Peter Canellos, *What FDR Understood About Socialism that Today's Democrats Don't*, POLITICO (Aug. 16, 2019), <https://www.politico.com/magazine/story/2019/08/16/democrats-socialism-fdr-roosevelt-227622>.

of today's America remains overwhelmingly capitalistic. Americans are suspicious of handouts and welfare.¹¹ The term "socialism" and the label "socialist" are unpopular with a majority of Americans.¹² Capitalism has earned its place in the cultural lexicon by providing Americans with an efficient free market economy. In recent years, American wealth has grown exponentially as technology has enabled capitalistic practices to be adapted to the global economy.¹³ However, this economic boom has made the deficiencies of capitalism in America increasingly obvious. One of the most glaring deficiencies is growing income inequality.¹⁴

American dreams and values should be reflected in the federal legislature, the most powerful branch of the republic created by the Constitution.¹⁵ The division of Congress into two chambers was intended as a check on this power.¹⁶ The population-based House of Representatives was limited by the state-based Senate.¹⁷ The Framers intended this structure to make Congress a reflection of a rational majoritarian will.¹⁸ This reality is best illustrated by the legislative implementation of The New Deal which transformed America from a libertarian state-dominated republic into a quasi-socialist federal-dominated democracy.¹⁹ An overwhelming majority of the population used Congress to reject a system that was not working and create the foundation for modern America's power and wealth.²⁰ More recently, however, Congress has become increasingly manipulated by wealth generated by capitalism, especially as the cost of running for office soars.²¹ Campaign contributions and political lobbying are two methods by which the wealthy achieve their legislative goals. The political influence of wealth has increased income disparity at a shocking rate.²²

11. See Emily Ekins, *What Americans Think About Poverty, Wealth, and Work*, CATO INSTITUTE (Sept. 24, 2019), <https://www.cato.org/publications/survey-reports/what-americans-think-about-poverty-wealth-work>.

12. See *id.* ("A majority (59%) of Americans have favorable views of the word 'capitalism,' while 39% have an unfavorable view of it. In reverse, 39% of Americans have a favorable view of the word 'socialism,' while 59% view socialism negatively.")

13. See Jerry Harris, *Globalization, Technology and the Transnational Capitalist Class*, 17 FORESIGHT 194 (2015).

14. See Geoffrey M. Hodgson, *How Capitalism Actually Generates More Inequality*, EVONOMICS (Aug. 11, 2016), <https://evonomics.com/how-capitalism-actually-generates-more-inequality/>.

15. See THE FEDERALIST NO. 51 (James Madison).

16. See *id.*

17. See U.S. CONST. art. I, §§ 2–3.

18. See THE FEDERALIST NO. 51 (James Madison).

19. See Louis Menand, *How the Deal Went Down*, THE NEW YORKER (Feb. 25, 2013), <https://www.newyorker.com/magazine/2013/03/04/how-the-deal-went-down>.

20. See *id.*

21. See Soo Rin Kim, *The Price of Winning Just Got Higher, Especially in the Senate*, OPENSECRETS (Nov. 9, 2016), <https://www.opensecrets.org/news/2016/11/the-price-of-winning-just-got-higher-especially-in-the-senate/>; see *supra* Part IV.B.

22. See As Inequality Grows, So Does the Political Influence of the Rich, THE ECONOMIST (July

The wealthy have frequently exploited American dreams as a means of increasing their resources. The manipulation of dreams by wealthy capitalists is clearly illustrated in the context of American professional sports. Professional sports generate billions of dollars for team owners, as well as large incomes and public acclaim for elite professional athletes.²³ However, the path to becoming an elite athlete runs through fierce competition against thousands of other athletes in various age brackets.²⁴ Professional sports are vicious competitions of attrition in which the elite rise above the less talented and injured. As stated by Sara Teristi, a gymnast who was a victim of Michigan State Dr. Larry Nassar: “People don’t understand how many broken girls it takes to produce an elite athlete.”²⁵ Elite athletes cannot be created or identified without the cauldron of travel teams, AAU teams, high school teams, college teams, and minor leagues. Without elite athletes, the enormous revenue generated by professional sports will disappear.

Income inequality is evident in the financial realities of aspiring professional athletes who do not reach the highest level of their sport. As the major sports leagues generate billions of dollars, the economic plight of the athletes who do not “make it,” but who support the developmental system of those who do, is becoming increasingly obvious.²⁶ Wealthy individuals who own major sports leagues increase their resources by exploiting a dream and manipulating the law.²⁷ The plight of minor league baseball (“MiLB”) players best exemplifies this reality.²⁸ The dream of being a professional baseball player has long held a special place in American culture.²⁹ Baseball owners exploit that dream by

21, 2018), <https://www.economist.com/finance-and-economics/2018/07/21/as-inequality-grows-so-does-the-political-influence-of-the-rich>.

23. However, for many elite athletes, even their wealth is an illusion. Despite making millions during their careers, many professional athletes experience financial difficulties shortly after their retirement from sports. See Leigh Steinberg, *5 Reasons Why 80% of Retired NFL Players Go Broke*, FORBES (Feb. 9, 2015, 3:51 PM), <https://www.forbes.com/sites/leighsteinberg/2015/02/09/5-reasons-why-80-of-retired-nfl-players-go-broke/#1e4cb10678cc> (It is “estimated that 80% of retired NFL players go broke in their first three years out of the League.”).

24. See *Estimated Probability of Competing in Professional Athletics*, NCAA, <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> (last visited Feb. 19, 2020).

25. Abigail Pesta, *The Survivor*, TIME, July, 29, 2019, at 48.

26. See Dirk Hayhurst, *An Inside Look into the Harsh Conditions of Minor League Baseball*, BLEACHER REPORT (May 14, 2014), <https://bleacherreport.com/articles/2062307-an-inside-look-into-the-harsh-conditions-of-minor-league-baseball>; see also Jon Solomon, *The History Behind the Debate over Paying NCAA Athletes*, ASPEN INSTITUTE (Apr. 23, 2018), <https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/>.

27. See Hayhurst, *supra* note 26 (“[A]t its lowest levels, professional 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.’”); *infra* Part IV.

28. See *infra* Part III.B.

29. See DAVID LAMB, *THE MINORS*, in *BASEBALL: AN ILLUSTRATED HISTORY* 146, 149 (1st

underpaying MiLB players who have almost no chance of making a Major League team.³⁰ Owners also use their political influence to deny MiLB players many of the rights generally enjoyed by other Americans.³¹

MiLB players dedicate their lives to perfecting their craft and chasing their major league dreams. During the season, most MiLB players work well over forty hours per week at a rate lower than the federal poverty level.³² Furthermore, their work is not limited to the baseball season, and the players are not compensated for their mandatory participation in workouts, spring training, and development leagues.³³ A former player's reflection on his professional baseball career in the minors illustrates the plight of MiLB players:

I wasn't lucky to be there, I earned it. I worked my ass off to get to that point in my career and wouldn't change a second of it. But, I was treated like property. Speaking up now has taught me a lot about this country: I should be grateful for the opportunity and keep my mouth shut about the quality of life they present to me.

My 2017 season lasted seven months, March through September. March was unpaid. April – unpaid. May – unpaid. Sixteen days in June – unpaid. For 8-10 hours a day, six days a week, for sixteen weeks, I made \$0. For my short season (72 games), I was paid \$45 per game, or \$3 an hour for 70 hours a week. I was guaranteed two meals in my contract and rarely got food to eat. I had to purchase my own equipment (bats, cleats, batting gloves, first base mitt, etc.), rent, travel, and \$80 a month for a group of rich high schoolers to clean my jersey. I played in front of 8,000 people a night and went to bed hungry. I made less money that summer than the batboy and after seven months of work, I left with less money than I started, and \$2000 in credit card debt.

I was ultimately released after that season due to a back injury. I couldn't even walk as I received that phone call.³⁴

With wages below the poverty line and no mobility to market their services, MiLB players are stuck in a broken system in which pre-existing economic security is nearing the status of a prerequisite for a successful

ed., 1994).

30. *See infra* Part III.B.

31. *See infra* Part IV.

32. *See infra* notes 79–81 and accompanying text.

33. *See infra* note 108 and accompanying text.

34. Jeremy Wolf, *I've Lived My Dream*, BASEBALL & BUSINESS (June 6, 2018), <https://www.baseballandbusiness.com/ive-lived-my-dream/>. The grind of minor league life, as illustrated by Wolf, is also depicted by social media accounts dedicated to posting anonymous player-submitted content showing horrifying minor league conditions from a humorous angle. *See* Andersen Pickard, *Talking About the Grind of Life as a Minor League Baseball Player with "MinorLeagueGrinders"*, MLB DAILY DISH (Oct. 10, 2018, 11:00 AM), <https://www.mlbailydish.com/2018/10/10/17919590/talking-about-the-grind-of-life-as-a-minor-league-baseball-player-with-minorleaguegrinders>.

baseball career.³⁵ For many players, the financial realities of everyday life turn the pursuit of a dream into a financial nightmare.³⁶ Since the dawn of free agency four decades ago, average Major League Baseball player salaries have grown about 10,000%.³⁷ In the same period, average MiLB pay has not even increased enough to cover inflation.³⁸

This broken system has developed, in part, as a result of Major League Baseball's ability to buy legislative favors that specifically exempt MiLB from the strictures of federal antitrust law and the requirements of the Fair Labor Standards Act (FLSA).³⁹ Although the failures of the courts and collective activity are also to blame, Congressional activity, bought and paid for by Major League Baseball, has deprived MiLB players of the ability to sue for both violations of the antitrust laws and the FLSA.⁴⁰ As Major League Baseball and MiLB set new revenue records each year, major league players share in the riches while their minor league brothers languish in poverty. Baseball is therefore a microcosm of the income inequality that afflicts the nation.

Part II of this Article explains the structure of the minor leagues and the Rule 4 Draft.⁴¹ Part III illustrates the income inequality present in the minor leagues.⁴² Part IV explains how Major League Baseball has used the law to perpetuate the inequity plaguing the overwhelming majority of minor league players.⁴³

II. THE STRUCTURE OF MINOR LEAGUE BASEBALL

MiLB is divided into five classes: Triple A ("AAA"), Double A ("AA"), Class A ("A" or "Single-A"), Class A Short Season, and Rookie.⁴⁴ Furthermore, Class A is split into Class A Advanced ("High A") and Class A.⁴⁵ The Professional Baseball Agreement (PBA) "provides industry stability" and binds Major League Baseball teams and MiLB affiliates through a series of Player Development Contracts

35. *See infra* Part III.

36. *See* Amy Moritz, *Playing America's 'War of Attrition,'* THE BUFFALO NEWS (July 3, 2016), <https://buffalonews.com/2016/07/03/playing-americas-war-of-attrition/>.

37. *See* Ted Berg, *\$12,000 a Year: A Minor Leaguer Takes His Fight for Fair Pay Public,* FTW.USATODAY.COM (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>.

38. *See id.*

39. *See infra* Part IV.

40. *See infra* Part IV.

41. *See infra* Part II.

42. *See infra* Part III.

43. *See infra* Part IV.

44. *Overview of Baseball's Minor League Organization,* THE SPORTS ADVISORY GROUP, <http://www.thesportsadvisorygroup.com/resource-library/business-of-sports/overview-of-baseballs-minor-league-organization/> (last visited Dec. 23, 2018).

45. *Id.*

(PDCs).⁴⁶ Each season, there are approximately 6,500 players throughout the minor league ranks.⁴⁷

The players, managers, coaches, trainers, and other staff throughout the minor leagues are paid by Major League Baseball.⁴⁸ Each year, MiLB teams pay a fee to Major League Baseball.⁴⁹ Under the current PBA, MiLB pays a total of \$20 million each season to Major League Baseball.⁵⁰ In 2018, Major League Baseball saw record gross revenues of \$10.3 billion.⁵¹ In 2019, Major League Baseball revenue increased again to \$10.7 billion.⁵² MiLB is also prospering; merchandising revenue has increased nearly every year over the past decade⁵³ and team valuations have soared over the past few decades.⁵⁴

In the National Football League and the National Basketball Association, most drafted players begin their careers making comfortable salaries on the roster of the organization which drafted them in the next season immediately after being drafted, without spending several years in development leagues.⁵⁵ In contrast, players drafted by Major League

46. Benjamin Hill, *Minors Extend Agreement Through 2020*, MiLB (Mar. 8, 2011), <https://www.milb.com/milb/news/minors-extend-agreement-through-2020/c-16867482>.

47. Maury Brown, *Minor League Ballplayers Would Lose Minimum Wage Rights As Part Of \$1.3 Trillion Spending Bill*, FORBES (Mar. 22, 2018), <https://www.forbes.com/sites/maurybrown/2018/03/22/minor-league-ballplayers-will-lose-minimum-wage-rights-as-part-of-1-3-trillion-spending-bill/#41b0e47337fa>.

48. Maury Brown, *Minimum Wage Exemption is the Culmination of a Battle over MLB and Minor League Baseball Economics*, FORBES (Mar. 26, 2018), <https://www.forbes.com/sites/maurybrown/2018/03/26/the-fragile-economics-between-mlb-the-minors-and-the-minimum-wage-exemption/#47dfa383c219>.

49. *Id.*

50. Eric Stephen, *MLB's Fight with Minor League Baseball is Getting Uglier*, SB NATION (Dec. 17, 2019, 2:36 PM), <https://www.sbnation.com/mlb/2019/12/17/21023144/minor-league-baseball-negotiations-mlb-bernie-sanders-rob-manfred>.

51. Maury Brown, *MLB Sees Record Revenues of \$10.3 Billion for 2018*, FORBES (Jan. 07, 2019, 3:31 PM), <https://www.forbes.com/sites/maurybrown/2019/01/07/mlb-sees-record-revenues-of-10-3-billion-for-2018/#2abb07865bea>.

52. Maury Brown, *MLB Sees Record \$10.7 Billion in Revenues for 2019*, FORBES (Dec. 21, 2019, 7:02 PM), <https://www.forbes.com/sites/maurybrown/2019/12/21/mlb-sees-record-107-billion-in-revenues-for-2019/#172b58195d78>.

53. See David Broughton, *MiLB, Teams Had Record Merchandising Sales in 2018*, SPORTS BUSINESS JOURNAL (July 8, 2019), <https://www.sportsbusinessdaily.com/Journal/Issues/2019/07/08/Research-and-Ratings/MiLB-merchandise.aspx> (“Minor League Baseball and its 160 clubs in the U.S. and Canada combined to a record \$73.9 million in merchandise sales [in 2018] . . . That’s up 4% from 2017’s \$70.9 million and marks the category’s ninth straight annual increase.”).

54. See Ray Glier, *Minor League Baseball is Better Business, Not Bigger Business*, USA TODAY (May 8, 2017, 8:39 PM), <https://www.usatoday.com/story/sports/mlb/2017/05/08/minor-league-baseball-better-business-not-bigger-business/101451572/> (“[T]he valuations of teams in many markets has soared. Class AA teams that 30 years ago were worth \$500,000 are now worth \$16 million to \$25 million in some markets”); Sergei Klebnikov, *Minor League Baseball’s Most Valuable Teams*, FORBES (July 8, 2016, 11:11 AM), <https://www.forbes.com/sites/sergeiklebnikov/2016/07/08/minor-league-baseballs-most-valuable-teams/#6ff4581443b2> (“Minor League Baseball’s 20 most valuable teams are now worth an average \$37.5 million, up almost 35% from 2013 when FORBES last published its MiLB valuations”).

55. See Tophier Doll, *How Long Does the Average Draft Pick Stick Around?*, MILE HIGH

Baseball teams begin their careers in MiLB. The Major League Baseball First-Year Player Draft (known as the “Rule 4 Draft”) is forty rounds long and results in over 1,200 players drafted each year from the United States, Canada and Puerto Rico.⁵⁶ There are more than 240 MiLB teams affiliated with the thirty Major League Baseball clubs.⁵⁷ If a player is selected in the Rule 4 Draft, the Major League Baseball team which drafted him holds the exclusive rights to sign him, and will assign the player to one of the team’s minor league affiliates after signing him to a contract.⁵⁸

If the player chooses to sign with the team who drafted him instead of continuing his amateur career at the college level, or his collegiate eligibility has expired, he is required by the Major League Rules (MLRs) to sign a MiLB Uniform Player Contract (UPC).⁵⁹ If a player refuses to sign the UPC, he is disqualified “from playing with the contracting Club or entering the service of any Major or Minor League Club unless the player is released or assigned.”⁶⁰ The UPC contains a reserve clause that keeps a player under control of the Major League Baseball club for seven seasons—effectively eliminating all of the player’s mobility and bargaining power during that period.⁶¹ This sort of control, paired with the owners’ manipulation of the players’ dreams, breeds income inequality that pervades throughout the minor leagues.

III. INCOME INEQUALITY IN MINOR LEAGUE BASEBALL

As required by the MLRs, all first-year players are compensated equally, regardless of the classification of the MiLB team to which the player is assigned.⁶² There is a mandated maximum salary of \$1,100 per month for all players in their first contract season.⁶³ After the first season,

REPORT (May 13, 2014), <https://www.milehighreport.com/2014/5/13/5713996/how-long-does-the-average-draft-pick-stick-around>.

56. See MAJOR LEAGUE BASEBALL, *The Official Professional Baseball Rules Book* 47 (2019), available at <https://registration.mlbpa.org/pdf/MajorLeagueRules.pdf>, [<https://perma.cc/GDM3-5JMZ>]. Although the Rule 4 draft has historically been 40 rounds, its future length is unclear. MLB and the MLBPA agreed in March of 2020 that the 2020 Rule 4 draft would only be 5 rounds and the 2021 Rule 4 draft would be a minimum of 20 rounds.

57. *Teams by Affiliation*, MiLB, <http://www.milb.com/milb/info/affiliations.jsp> (last visited Dec. 26, 2018).

58. See *First-Year Player Draft Rules*, MLB, <http://mlb.mlb.com/mlb/draftday/rules.jsp> (last visited Dec. 26, 2018).

59. Major League Baseball, *supra* note 56, at 27-28. Foreign first-year players who are not subject to the Rule 4 Draft are required to sign a similar UPC to begin their careers. *Id.*

60. *Id.* at 40.

61. *Id.* at 27-28.

62. *Id.* at 29.

63. Brandon Sneed, *This is What It’s Like to Chase Your Pro Baseball Dreams...For 12 Bucks an Hour*, BLEACHER REPORT (Apr. 3, 2017), <https://bleacherreport.com/articles/2700299-this-is-what-its-like-to-chase-your-pro-baseball-dreamsfor-12-bucks-an-hour>. See also *The Business of*

the UPC empowers the MiLB team to *reduce* the player's compensation by 20% each season.⁶⁴ Salaries beyond the first season are also dictated by the classification of a player's assigned team.⁶⁵ Minimum salaries are low, and the average salaries are not much higher than the minimum.⁶⁶ The weekly minimum salary for players at the rookie ball and Class A levels is \$290.⁶⁷ The weekly minimum increases to \$350 at the Double A level, and \$502 in Triple A.⁶⁸ While on the road, players also receive a \$25 per diem.⁶⁹

Most drafted players will receive a signing bonus when they execute the UPC.⁷⁰ This bonus is in addition to the weekly salaries noted above.⁷¹ The signing bonuses drafted players receive varies drastically due to the draft being forty rounds long.⁷² The signing bonuses are usually, but not always, tied to the round in which a player is drafted.⁷³ The signing bonus can be millions of dollars for first round players but drops precipitously as each round passes.⁷⁴ Signing bonuses also vary greatly within each round.⁷⁵ Players drafted after the first ten rounds may receive signing bonuses up to \$125,000, which can increase if the team is willing to pay the excess from its bonus pool allotment.⁷⁶ By the twentieth round of the 2019 draft, some players received \$125,000, but others signed for as little

MiLB, MiLB, <https://www.milb.com/about/faqs-business> (last visited Feb. 19, 2020).

64. Major League Baseball, *supra* note 56, at 209-10.

65. *See infra* notes 66-68 and accompanying text.

66. The average monthly salaries for minor league players in 2017 was: \$1,300 in Class A, \$1,600 in Class A Advanced, \$3,000 in Double A, and \$10,000 in Triple A. *See* Ronald Blum, *Baseball Players in Minors to Lose Minimum Wage Protection*, AP NEWS (Mar. 23, 2018), <https://www.apnews.com/cb183f59e88948e8b9cd49ad07bde807>. However, the Triple A average is skewed by the few players who earn significantly more because they are on major league 40-man rosters. *See* Sneed, *supra* note 63. The 40-man roster is the pool of players who can be added to the typical 25-man major league active roster. This type of roster move typically occurs when players on the active roster take paternity leave or are forced to miss extended time due to an injury. Those players who are on the 40-man roster but not the 25-man active roster remain in the minors awaiting the call. *See also, infra* note 67 ("For players on 40-man rosters on option to the minors, the minimum is \$46,000" for the 2020 season.). Because this unique situation skews the mean, the median monthly Triple A salary of \$5,000 is a more representative statistic. *See* Sneed, *supra* note 63.

67. Associated Press, *MLB to Raise Minimum Salaries for Minor League Players in 2021*, SPORTS ILLUSTRATED (Feb. 14, 2020), <https://www.si.com/mlb/2020/02/14/mlb-minor-league-player-salary-increases-2021>.

68. *Id.*

69. Blum, *supra* note 66.

70. *See infra* note 72.

71. *See supra* notes 66-69 and accompanying text.

72. *See* Justin Perline, *Amateur Draft Bonus Analysis*, BEYONDTHEBOXSCORE (Dec. 1, 2017, 12:00 PM), <https://www.beyondtheboxscore.com/2017/12/1/16715898/amateur-draft-bonus-analysis-slot-mlb>.

73. *See* Jim Callis, *Here are the 2019 Draft Pools and Bonus Values*, MLB (June 3, 2019), <https://www.mlb.com/news/2019-mlb-draft-pools-and-bonus-values>.

74. *See id.*

75. *See infra* notes 76-78 and accompanying text.

76. *See id.*

as \$1,000, \$5,000, and \$10,000.⁷⁷ By round 30, fewer players received \$125,000 and even more signed for \$10,000 or less.⁷⁸

The cold reality of MiLB life is that the total baseball income, excluding the signing bonus, that most players receive for the entire year is less than \$7,500.⁷⁹ Additionally, most MiLB players live below the federal poverty level.⁸⁰ Of course, these values represent the compensation that the players receive before taxes, rent, food, childcare, clubhouse dues, and other expenses.⁸¹

As a result, many players are forced to rely on their signing bonus to support themselves and their families for years until they make the big leagues (if they ever do). Many Americans (even fans who attend games) assume that because they are professional athletes, MiLB players receive large signing bonuses and annual salaries for their services.⁸² In reality, this assumption is an exception available only to the most coveted prospects.⁸³ MiLB players are therefore divided into two groups — early round draftees with large signing bonuses and a quicker path to Major League Baseball⁸⁴ and the vast majority of the 6,500 minor league players with lesser signing bonuses and even smaller chances of making it to MLB.⁸⁵ This divide is exemplified by the careers of two players, each chasing the same dream.

A. *The Exception: Bryce Harper*

The Washington Nationals selected Bryce Harper with the first overall pick in the 2010 Draft and signed him to a contract that included a \$6.25 million signing bonus.⁸⁶ Harper was one of the most coveted prospects

77. *Round 20, MLB 2019 Draft Tracker*, SPOTRAC, <https://www.sportrac.com/mlb/draft/2019/round-20/> (last visited Feb. 11, 2020).

78. *Round 30, MLB 2019 Draft Tracker*, SPOTRAC, <https://www.sportrac.com/mlb/draft/2019/round-30/> (last visited Feb. 11, 2020).

79. Brown, *supra* note 48.

80. *Id.* Unfortunately, the planned increase in minor league salaries scheduled to take effect for the 2021 season will not change this disturbing reality. See *Federal Poverty Level (FPL)*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/federal-poverty-level-fpl/> (last visited Feb. 19, 2020); see also Associated Press, *supra* note 67.

81. See Sneed, *supra* note 63. Clubhouse dues are “money for the clubhouse managers, known as ‘clubbies,’ who handle player laundry and pre- and postgame food spreads, which are more like cheap sandwiches (peanut butter and jelly, maybe deli meat on a good day or perhaps a sloppy joe) and plain potato chips.” *Id.*

82. See *Id.*

83. See *infra* Part III.A.

84. See *infra* Part III.A.

85. See *infra* Part III.B.

86. Adam Kilgore, *Washington Nationals Sign Bryce Harper to \$9.9 Million Contract*, WASHINGTON POST (Aug. 17, 2010, 2:47 AM), <http://www.washingtonpost.com/wpdyn/content/article/2010/08/16/AR2010081605133.html?noredirect=on>.

in history.⁸⁷ At the age of 16, Harper appeared on the cover of a Sports Illustrated magazine which described him as “the most exciting prodigy since LeBron” and dubbed him “Baseball’s Chosen One.”⁸⁸ Harper’s experience—receiving a large signing bonus and quickly rising through the minor leagues to the big leagues—illustrates an unusual path available to only the most talented top prospects.

Harper began his minor league career in 2011 with the Class A Hagerstown Suns, and was promoted to the Double A Harrisburg Senators by the end of the 2011 season.⁸⁹ Harper then began the 2012 season at the Triple A level, before making his major league debut early in that season and playing in 139 of 162 games for the Nationals that year.⁹⁰ As one of the most highly-regarded prospects of all-time, Harper’s meteoric rise to the big leagues is atypical. A decade after appearing on the cover of Sports Illustrated, Harper fulfilled the cover’s prophecy and signed a record-breaking thirteen-year contract with the Philadelphia Phillies worth \$330 million guaranteed with an additional \$10.4 million in available bonuses.⁹¹ Harper, who advanced to the big leagues quickly and originally received a large signing bonus, did not endure many of the hardships that most minor leaguers face.

B. The Rule: Kyle Johnson

The career of Kyle Johnson, who was drafted by the Los Angeles Angels in the 25th round of the 2012 draft, more accurately illustrates the experience of the majority of MiLB players.⁹² While Bryce Harper was a household name at age 16, most baseball fans have still never heard of Kyle Johnson.⁹³ This phenomenon has led some to refer to minor leaguers as “the invisible men of the sport.”⁹⁴

87. See *infra* note 88 and accompanying text.

88. Tom Verducci, *Baseball’s LeBron*, SPORTS ILLUSTRATED, June 8, 2009, at cover (article at page 62).

89. *Bryce Harper Fall & Minor League Statistics*, BASEBALL-REFERENCE.COM, <https://www.baseballreference.com/register/player.fcgi?id=harper002bry> (last visited Dec. 24, 2018).

90. *Id.*

91. Mike Axisa, *Bryce Harper Contract Details: Breakdown of the Salary, Bonuses, and Perks in His 13-year Deal with the Phillies*, CBS SPORTS (Mar. 1, 2019, 7:34 PM), <https://www.cbssports.com/mlb/news/bryce-harper-contract-details-breakdown-of-the-salary-bonuses-and-perks-in-his-13-year-deal-with-the-phillies/>; see *supra* note 88 and accompanying text. Less than three weeks after Harper inked the record-breaking deal, Mike Trout shattered Harper’s record by signing a 12-year extension with the Angels for \$430 million. See Scott Allen, *Mike Trout Upstages Bryce Harper Again*, WASHINGTON POST (Mar. 19, 2019, 11:47 AM), <https://www.washingtonpost.com/sports/2019/03/19/mike-trout-upstages-bryce-harper-again/>.

92. See Sneed, *supra* note 63; Verducci, *supra* note 88.

93. See Verducci, *supra* note 88.

94. Theodore McDowell, *Changing the Game: Remedying the Deficiencies of Baseball’s Antitrust Exemption in the Minor Leagues*, 9 J. HARV. SPORTS & ENT. L. 1, 1 (2018).

Since only about 10% of MiLB prospects reach the major leagues, the chilling reality for about 90% of minor leaguers resembles Johnson's bleak financial situation.⁹⁵ Johnson received a signing bonus of \$5,000, which came out to about \$3,100 after taxes.⁹⁶ After signing his UPC, Johnson began his professional baseball career in Utah at the Rookie level with the Orem Owlz, where he received about \$420 for his first biweekly paycheck.⁹⁷ Johnson made about \$2,500 in the first year of his professional career, which he calculated to be about \$35 per game.⁹⁸ Johnson spent the next few years of his professional career playing at various levels.⁹⁹ He spent 2013 playing in Class A and Class A Advanced, and played Double A for the entire 2014 season.¹⁰⁰ Johnson split the 2015 season between Triple A, Rookie ball, and Class A Advanced.¹⁰¹ He then played Double A and Triple A during the 2016 season, which would turn out to be the final year of his professional career.¹⁰²

For Johnson, who has a degree in economics and “exists in the top 0.001 percentile of talent in his field,” chasing his dream in the minors meant relying on the roughly \$30,000 his wife earned from multiple jobs to keep their family afloat.¹⁰³ Johnson was also forced to borrow a vehicle from his aunt and uncle for transportation, give baseball lessons for extra income, and even intern at Northwestern Mutual in the offseason when his unpaid offseason baseball obligations did not interfere.¹⁰⁴ Johnson played five seasons in the minors and advanced as high as the Triple A level, but never made more than \$11,500 in a season.¹⁰⁵ During spring training heading in to his sixth season, Johnson felt financial pressures as he pondered his future.¹⁰⁶

95. See Matthew Durham, *Minor League Compensation and the Save America's Pastime Act of 2018*, THE NEV. LAW., Aug. 2018, at 17, 17; see also Nathan Sorensen, *Minor League Ballplayers' Path to the Bigs has Major Obstacles, so Family is No Small Thing*, DESERET NEWS (May 15, 2015, 4:25 PM), <https://www.deseretnews.com/article/865628804/Minor-league-ballplayers-path-to-the-bigs-has-major-obstacles-so-family-is-no-small-thing.html>.

96. Sneed, *supra* note 63.

97. *Id.*

98. *Id.*

99. Kyle Johnson Minor & Winter Leagues Statistics and History, BASEBALL-REFERENCE.COM, <https://www.baseball-reference.com/register/player.fcgi?id=johnso005kyl> (last visited Jan. 3, 2018).

100. *Id.*

101. *Id.*

102. *Id.*

103. Berg, *supra* note 37; see Sneed, *supra* note 63.

104. Sneed, *supra* note 63. Despite baseball obligations, many players must take flexible offseason jobs—such as substitute teaching and waiting tables—to make ends meet. See Tom Goldman, *Fight Against Low, Low Pay In Minor League Baseball Continues Despite New Obstacles*, NPR (Aug. 3, 2018, 5:38 PM), <https://www.npr.org/2018/08/03/635373608/fight-against-low-low-pay-in-minor-league-baseball-continues-despite-new-obstacl>.

105. Sneed, *supra* note 63.

106. See *id.*; see *supra* note 36 and accompanying text.

Before spring training, Johnson became the first active minor league player “to publicly declare his part in an ongoing class-action lawsuit against Major League Baseball over unfair wages and unjust labor practices.”¹⁰⁷ Although the work was mandatory, Johnson was not even being compensated for his work during spring training, as the UPC he signed in 2012 specified that he was “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 championship playing season.”¹⁰⁸ At this time, Johnson was still under the control of the New York Mets for two more years.¹⁰⁹ The Mets rejected his request for a higher salary, leaving Johnson with only three options.¹¹⁰

His first option was to play for the next two seasons until he would become a free agent at the end of his UPC.¹¹¹ Otherwise, Johnson could retire from professional baseball or ask to be released.¹¹² Burdened by the cost of chasing his dream, Johnson asked for his release and the Mets obliged.¹¹³ The trying financial realities of the minor leagues and the difficulty of supporting his wife and two young children led Johnson to end his baseball career.¹¹⁴ Johnson’s story is a familiar tragedy to most minor league players and represents the effects of Major League Baseball’s longstanding manipulation of the law to increase its own profits to the detriment of thousands of MiLB players.¹¹⁵

IV. HOW MLB MANIPULATES THE LAW AND DREAMS TO PERPETUATE THE INEQUALITY OF MINOR LEAGUE BASEBALL

The situation that minor leaguers face has developed as a result of three predominant factors: decisions by the United States Supreme Court, laws passed by Congress, and the lack of collective will to unionize.

A. The Failure of the Supreme Court

Section 1 of the Sherman Antitrust Act prohibits contracts or

107. Sneed, *supra* note 63.

108. *See* Major League Baseball, *supra* note 56, at 207-09. The “actual championship playing season” includes only the schedule of regular-season games; it is five months long and does not include spring training. *See id.* at 205-06.

109. Sneed, *supra* note 63. Minor league players are considered employees of the major league team. Blum, *supra* note 66.

110. Sneed, *supra* note 63.

111. *See* Major League Baseball, *supra* note 56, at 183.

112. Sneed, *supra* note 63.

113. *Id.*

114. *See id.*

115. *See infra* Part IV.

conspiracies in restraint of trade.¹¹⁶ The Supreme Court has interpreted this prohibition to encompass only unreasonable restraints of trade.¹¹⁷ Application of the Sherman Act therefore does not guarantee a plaintiff a win.¹¹⁸ The challenged practice only violates the Act if the precompetitive benefits do not outweigh the anticompetitive effects.¹¹⁹ However, the plaintiff does not have to win such a balancing test if the practice fits into one of four judicially declared per se violations.¹²⁰

One of the most useful, and most disturbing, tools that Major League Baseball uses to pay MiLB players like Johnson such low wages is the antitrust exemption that was manufactured by a trio of twentieth century Supreme Court cases commonly known as “the Supreme Court’s baseball trilogy.”¹²¹ If taken out of the context of professional baseball and implanted into nearly any other American industry, the Rule 4 Draft and required UPCs would violate antitrust law as illegal restraints of trade.¹²² However, in 1922, Justice Holmes, delivering the opinion for the Court in *Federal Baseball Club v. National League*, held that the business, “giving exhibitions of baseball,” was a “purely state affair[.]”¹²³ The Court acknowledged that baseball clubs travelled among the states, but held that the business of baseball did not constitute interstate commerce.¹²⁴ The Court noted that “a firm of lawyers sending out a member to argue a case . . . does not engage in [interstate] commerce because the lawyer . . . goes to another State.”¹²⁵ Thus, professional baseball did not trigger federal antitrust law, and the antitrust exemption was born.¹²⁶ *Federal Baseball*, however, was consistent with the limited interpretation of interstate commerce and federal power that permeated Supreme Court jurisprudence prior to the revolutionary change in perspective in 1937.¹²⁷

Surprisingly, even after the vast expansion of the American understanding of interstate commerce in the FDR era, *Federal Baseball*

116. 15 U.S.C. § 1(2018).

117. *See* Standard Oil Co. v. United States, 221 U.S. 1 (1911).

118. *See id.*

119. Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1386 (2009).

120. *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)(listing price fixing, division of markets, tying arrangements, and group boycotts as per se violations).

121. *Piazza v. Major League Baseball*, 831 F. Supp. 420, 438 (E.D. Pa. 1993). *See infra* notes 123–134 and accompanying text.

122. *See* 15 U.S.C. § 1 (2018); *see also supra* notes 59–64 and accompanying text.

123. *Fed. Baseball Club v. Nat’l League*, 259 U.S. 200, 208 (1922).

124. *Id.* at 209.

125. *Id.*

126. *See id.* at 208.

127. *See* KATHLEEN M. SULLIVAN & NOAH FELDMAN, *CONSTITUTIONAL LAW* 109 (Foundation Press, 18th ed. 2013).

persisted.¹²⁸ In *Toolson v. New York Yankees*, the Court reaffirmed *Federal Baseball* “so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.”¹²⁹ In its 1953 opinion, the Court noted that:

Congress has had [*Federal Baseball*] under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.¹³⁰

The Court, therefore, did not apply its own expansive interpretation of interstate commerce to baseball and decided *Toolson*’s case entirely on the authority of *Federal Baseball*.¹³¹

The Court reaffirmed its belief that legislative, not judicial, action was the proper avenue to apply antitrust laws to professional baseball in *Flood v. Kuhn*.¹³² The Court, describing the antitrust exemption as an established “aberration,” noted that it did not apply to other professional sports and stated that professional baseball is indeed a business engaged in interstate commerce pursuant to post-1937 Supreme Court decisions.¹³³ Nonetheless, the Court stated that it “continue[d] to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and . . . has clearly evinced a desire not to disapprove them legislatively.”¹³⁴ Ironically, the Supreme Court also concluded that state antitrust law did not apply to baseball because it was engaged in interstate commerce.¹³⁵

The *Flood* decision was not well received by the legal community.¹³⁶ Dreams of baseball were of such importance in American culture that the Supreme Court ignored decades of established precedent regarding the definition of interstate commerce to give baseball its own exemption.¹³⁷

128. *See id.*; *see also* *Wickard v. Filburn*, 317 U.S. 111 (1942).

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

130. *Id.* (alterations added).

131. *See id.*

132. *See Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972).

133. *Id.* at 282-83.

134. *Id.* at 283-84.

135. *See id.* at 284-85.

136. *See, e.g.*, Kevin D. McDonald, *There’s No Tying in Baseball: On Illinois Tool and the Presumption of Market Power in Patent Tying Cases*, THE ANTITRUST SOURCE, Sept. 2005, at 10 (“The result is a principle of antitrust law that is (1) indefensible as a matter of fact or policy, and (2) an embarrassment to the Court.”).

137. *See Flood*, 407 U.S. at 282-84.

The tone of the opinion reflected baseball's place in the American dream.¹³⁸ The opinion begins with a discussion of the history of the game as the nation's pastime and an extensive list of baseball's immortals.¹³⁹ The majority also cites with glee the opinion denying Flood's preliminary injunction, in which District Court Judge Cooper stated that "[b]aseball . . . enjoys a unique place in our American heritage. . . . The game is on higher ground; it behooves everyone to keep it there."¹⁴⁰ In *Flood*, the Supreme Court prevented the players from using the antitrust laws as they were intended and preserved the owners' control over the players and their financial interests.¹⁴¹

B. The Failure of Congress

Congress finally acted legislatively in response to the outrageous *Flood* decision—albeit twenty-eight years after the case—by passing the Curt Flood Act of 1998.¹⁴² The Curt Flood Act stated that “the conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level are subject to the antitrust laws.”¹⁴³ Congress effectively overruled the Court and finally granted major league players the same access to the antitrust laws that every American enjoys.¹⁴⁴ Since the passage of the act, compensation packages for major league players have risen even more dramatically.¹⁴⁵

However, the Curt Flood Act, without explanation, expressly states that it does not apply to any actions of those “engaging in, conducting or participating in the business of . . . [Minor League Baseball], any organized professional baseball amateur or first-year player draft . . . any reserve clause as applied to minor league players . . . or any other matter relating to professional baseball's minor leagues.”¹⁴⁶ Congress has therefore decided that MiLB players cannot successfully challenge the Rule 4 Draft and UPC reserve clauses as illegal restraints of trade under

138. *See id.* at 260–64.

139. *See id.*

140. *See id.* at 266–67 (quoting *Flood v. Kuhn*, 309 F. Supp. 793, 797 (S.D.N.Y. 1970)).

141. *See id.* at 282–85.

142. *See* Curt Flood Act of 1998, Pub. L. 105-297, 112 Stat. 2824 (Codified at 15 U.S.C. § 26b (2018)).

143. 15 U.S.C. § 26b(a)(2018).

144. *See supra* notes 141–143 and accompanying text.

145. *See* Cork Gaines & Skye Gould, *The Salaries for Baseball's Highest-paid Players have Skyrocketed over the Past 20 Years*, BUSINESS INSIDER (Apr. 3, 2017, 1:44 PM), <https://www.businessinsider.com/mlb-average-highest-paid-salary-2017-4>.

146. 15 U.S.C. § 26(b)(1) (2018).

Section 1 of the Sherman Antitrust Act.¹⁴⁷ Thus, MiLB players have been, and will continue to be, unable to remedy their situation on antitrust grounds even though Major League Baseball players can do so.

Why would Congress remove the exemption for those players who make the most money and have the most resources while continuing the exemption for those players with the least money and least resources?¹⁴⁸ The legislative history indicates a clear and consistent effort to ensure that the Curt Flood Act would have no impact on the legal status of MiLB.¹⁴⁹ Congress was clearly protecting the economic interests of the Major League Baseball owners by its inconsistent treatment of MiLB.¹⁵⁰ Because minor leaguers lack the star power of their major league counterparts and the lobbying power of the owners, they are in most need of legislative protection. However, the modern democratic process again failed to protect the interests of those least able to defend themselves.¹⁵¹

In light of the seemingly insurmountable hurdles posed by an antitrust challenge, lawsuits challenging minor league compensation in recent years have focused on alleged violations of the FLSA minimum wage and overtime requirements.¹⁵² MLB has traditionally relied on the FLSA exemptions for “employee[s] employed in a bona fide executive, administrative, or professional capacity” and for seasonal amusement or recreational establishments in 29 U.S.C. §§ 213(a)(1) & (3).¹⁵³ Major League Baseball, which has stated that “being a Minor League Baseball player is not a career but a short-term seasonal apprenticeship[,]” determined that a loss in court “would cost it approximately \$110 million, a figure that could double if the court assigned damages, and none of that accounts for additional costs going forward.”¹⁵⁴

After spending \$330,000 on lobbying expenses in 2015, Major League Baseball increased its lobbying efforts by 300%, spending \$1.32 million in each of the next two years in response to class-action suits filed by

147. *See id.*; *see also* McDowell, *supra* note 94, at 15.

148. *See supra* notes 142–147 and accompanying text.

149. *See* S. REP. NO. 105-118, pt. 2, at 4–5 (1997).

150. *See id.*

151. Nearly 28% of minor league players are foreign-born, about 80% of which come from Venezuela and the Dominican Republic. J.J. Cooper, *Numbers Game: Makeup of the Minors*, BASEBALL AMERICA (May 4, 2018), <https://www.baseballamerica.com/stories/numbers-game-makeup-of-the-minors/>. At the major league level, a study by the Society for American Baseball Research revealed that, in 2016, the racial composition of the major leagues was 63.7% White, 6.7% African-American, 27.4% Latino, and 2.1% Asian. Mark Armour & Daniel R. Levitt, *Baseball Demographics, 1947–2016*, SOCIETY FOR AMERICAN BASEBALL RESEARCH, <https://sabr.org/bioproj/topic/baseball-demographics-1947-2012> (last visited Feb. 29, 2020).

152. *See, e.g.*, *Senne v. Kan. City Royals Baseball Corp.*, 105 F.Supp.3d 981 (N.D. Cal. 2015); 29 U.S.C. §§ 206–207 (2018).

153. 29 U.S.C. § 213(a)(1)(2018); 29 U.S.C. § 213(a)(3)(2018); *See Senne v. Kan. City Royals Baseball Corp.*, No. 14-CV-00608-JCS, 2015 WL 6152476, at *9 (N.D. Cal. Oct. 20, 2015).

154. Berg, *supra* note 37; Brown, *supra* note 48.

former minor league players.¹⁵⁵ As a result of this increased lobbying effort, Congress passed legislation expressly exempting MiLB from the requirements of the FLSA.¹⁵⁶

The ironically named “Save America’s Pastime Act,” (SAPA) which was included on page 1,967 of the 2,232-page March 2018 Senate appropriations bill, passed without a single co-sponsor or sufficient time to debate.¹⁵⁷ The SAPA “saved” an eleven-figure industry by preying on its powerless, invisible backbone that actually needs to be saved.¹⁵⁸ The language of the 2018 SAPA nearly mirrors that of a stand-alone version of the bill introduced in 2016.¹⁵⁹ Support for the 2016 SAPA was withdrawn within days of its introduction after a quick and harsh public uproar.¹⁶⁰ Commentators have described the enacted SAPA as “a textbook piece of special-interest legislation[.]”¹⁶¹ The Legislature’s willingness to severely disadvantage a particular group of struggling people at the whim of a \$10 billion industry is alarming, especially when the cost of vastly improving the plight of MiLB players is comparatively small.¹⁶²

The enacted 2018 SAPA keeps MiLB players at the status quo by nearly ensuring that they will be unable to remedy their situations on FLSA grounds.¹⁶³ The impact of this momentous decision to give Major

155. See Senne, 2015 WL 6152476, at *1; Blake Yagman, *Senne v. Royals is the Case that Could Change Major League Baseball*, FANSIDED (Oct. 25, 2017), <https://fansided.com/2017/10/25/senne-v-royals-lawsuit-could-change-mlb/>; Blum, *supra* note 66.

156. See 29 U.S.C. § 213 (a)(19)(2018).

157. H.R. 1625, 115th Cong. §201 (2018) (enacted); see Durham, *supra* note 95, at 18.

158. See 29 U.S.C. § 213 (a)(19)(2018); see *supra* note 51 and accompanying text; see *supra* Part III.B.

159. See Blum, *supra* note 66.

160. See H.R. 5580. See, e.g., Ted Berg, *The ‘Save America’s Pastime Act’ in Congress will do Nothing of the Sort*, USA TODAY (June 30, 2016, 10:30 AM), <https://ftw.usatoday.com/2016/06/save-americas-pastime-act-minor-league-minimum-wage-lawsuit-mlb-salaries>; Aaron Blake, *After Outcry over Minor League Baseball Bill, Congresswoman Can’t Disown it Fast Enough*, THE WASH. POST (June 30, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/06/30/after-outcry-over-bill-on-minor-league-baseball-pay-congresswoman-cant-disown-it-fast-enough/?utm_term=.df099baf8bf1; Ryan Fagan, *Despicable ‘Save America’s Pastime Act’ Aims to Screw Minor Leaguers*, SPORTING NEWS (June 29, 2016), <http://www.sportingnews.com/us/mlb/news/minor-league-save-americas-pastime-act-salaries-antitrust-exemption-broshuis-congress/lj290g1ubcd18af2tjyb1u7l>; Lindsay Gibbs, *The ‘Save America’s Pastime Act’ Aims to Keep Minor League Baseball Players in Poverty*, THINKPROGRESS (June 30, 2016, 5:10 PM), <https://thinkprogress.org/the-save-americas-pastime-act-aims-to-keep-minor-league-baseball-players-in-poverty-2f812a055701/>.

161. Nathaniel Grow, *The Save America’s Pastime Act: Special-Interest Legislation Epitomized*, 90 U. COLO. L. REV. 1013, 1046 (2019).

162. See Mueller, *infra* note 184 (“For an investment of \$7.5 million per year, an MLB organization could adequately pay their minor leaguers, which would allow those players to eat better, get better housing during the season, and train better in the offseason.”); see also Berg, *supra* note 37 (“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.”). But see McDowell, *supra* note 94, at Part V.

163. See Brown, *supra* note 48; Durham, *supra* note 95, at 18.

League Baseball legislative permission to skirt FLSA requirements is already evident. After the passage of SAPA, Major League Baseball proposed eliminating forty-two minor leagues teams in negotiations for the next PBA.¹⁶⁴ News of this proposal quickly drew bipartisan opposition from the very Congress that emboldened major league owners by consistently allowing the league to act as if it is above the law.¹⁶⁵ Perhaps recognizing their own failure, some members of Congress “launched the Save Minor League Baseball Task Force for a simple purpose — to help ensure a level playing field in the negotiations between Major League Baseball and MiLB so that they yield a fair resolution and protect minor league baseball in communities across the country.”¹⁶⁶ This task force is motivated by congressional self-interest, as it is focused on preventing the elimination of teams that could negatively impact local economies, rather than addressing past legislative missteps such as the Curt Flood Act and SAPA, which have allowed the horrific conditions of MiLB to germinate.

In reaction to the Congressional Task Force, the Major League Baseball Commissioner’s Office sent a memo to the teams detailing plans to raise MiLB minimum salaries in 2021.¹⁶⁷ However, this concession was motivated by fear of Congressional action rather than a desire to eliminate the plight of MiLB players. Even after this pay increase takes effect, the majority of MiLB players will still live below the poverty line.¹⁶⁸ Despite mandatory spring training and other offseason obligations that frequently interfere with a player’s ability to maintain stable offseason employment, players are still only paid during the season.¹⁶⁹ Although it is a step in the right direction, this pay increase is far from adequate and would still result in FLSA violations if MLB had not purchased the immunity granted by SAPA.

C. The Failure of Collective Activity

MiLB players also lack union representation as a means of improving

164. Eric Stephen, *MLB’s Fight with Minor League Baseball is Getting Uglier*, SB NATION (Dec. 17, 2019, 2:36 PM), <https://www.sbnation.com/mlb/2019/12/17/21023144/minor-league-baseball-negotiations-mlb-bernie-sanders-rob-manfred>.

165. See Alex Gangitano, *MLB, Congress Play Hardball in Fight over Minor Leagues*, THE HILL (Feb. 6, 2020, 6:00 AM), <https://thehill.com/business-a-lobbying/business-a-lobbying/481755-mlb-congress-play-hardball-in-fight-over-minor-leagues>.

166. *Id.*

167. See Associated Press, *supra* note 67 (“Players at rookie and short-season levels will see their minimum weekly pay raised from \$290 to \$400, and players at Class A will go from \$290 to \$500. Double-A will jump from \$350 to \$600, and Triple-A from \$502 to \$700.”).

168. See *id.*; see also *Federal Poverty Level (FPL)*, *supra* note 80.

169. See *supra* note 108 and accompanying text.

their financial situation.¹⁷⁰ In fact, the Major League Baseball Players Association (MLBPA), which does not represent the minor leagues, has used matters that affect minor leaguers as convenient concessions in their own negotiations and have even made minor league conditions worse.¹⁷¹ Unionization and the resulting ability to bargain collectively could be an effective avenue to remedy the dismal conditions of the minor leagues. However, the transient nature of the players, wide geographic dispersion, and low salaries present major hurdles to unionization.¹⁷² However, the players' fear of potential retaliation or "blackballing" presents perhaps the most formidable obstacle to unionization.¹⁷³ This fear of retaliation is another example of owners manipulating players' baseball dreams. Marvin Miller, the transformational former Executive Director of the MLBPA, has even said that one of the obstacles to unionizing the minor leagues is the "dreamy idealism of the players."¹⁷⁴ In effect, a player is concerned that participation in union activity will cost him his shot at making it to the major leagues one day.¹⁷⁵

A final formidable obstacle to unionization is the split among the minor league players who received large signing bonuses and those who did not. Players with large bonuses not only have more resources but are also often fast-tracked to the major leagues.¹⁷⁶ In the minors, their interests are frequently aligned with major league management. The consistent refusal of these minor league "stars" to join any unionization efforts have also been a significant factor in the failure of all efforts to unionize minor league players.

Collective bargaining would undoubtedly help improve the financial condition of most MiLB players.¹⁷⁷ The potential benefits of a union are illustrated by another group that is crucial to the MiLB ecosystem—the umpires.¹⁷⁸ The minor league umpires, who are unionized, received a myriad of perks under their new collective bargaining agreement, including improved hotels and increased salaries and per diems.¹⁷⁹ The per diems for umpires at every level are higher than the per diems the

170. See Garrett R. Broshuis, *Touching Baseball's Untouchables: The Effects of Collective Bargaining on Minor League Baseball Players*, 4 HARV. J. SPORTS & ENT. L. 51 (2013).

171. *Id.* at 90.

172. *Id.* at 98–100.

173. See *id.* at 100; see also Berg, *supra* note 37.

174. Lily Rothman, *Emancipation of the Minors*, SLATE (Apr. 3, 2012, 11:08 AM), <https://slate.com/culture/2012/04/minor-league-union-thousands-of-pro-baseball-players-make-just-1100-per-month-where-is-their-cesar-chavez.html>.

175. See Broshuis, *supra* note 170, at 100; see also Berg, *supra* note 37.

176. See *supra* Part III.A.

177. See Broshuis, *supra* note 170, at 98–99.

178. See Liz Roscher, *Minor League Umpires are Getting Better Perks in Their New CBA*, YAHOO! SPORTS (Jan. 12, 2017, 10:53 AM), <https://sports.yahoo.com/news/minor-league-umpires-are-getting-better-perks-in-their-new-cba-155352828.html>.

179. See *id.*

players themselves receive, and the umpires' monthly salaries are higher than the salaries of most MiLB players.¹⁸⁰ These perks are made possible partly by the fact that MiLB is generating record levels of merchandising revenue.¹⁸¹

Additionally, the financial success of MiLB allows for teams to offer free concessions to fans for an entire half inning.¹⁸² This promotional “Food Purge”—as it is advertised by the Lansing Lugnuts—ironically juxtaposes the financial ability of the organization to offer fans free concessions while many of the Lugnuts players the fans came to see struggle to adequately feed themselves.¹⁸³

Advocates for minor league unionization point to the Professional Hockey Players Association (PHPA) as evidence of its feasibility.¹⁸⁴ The PHPA is “a 50-year-old union that represents some 1,600 minor league hockey players across the American Hockey League and the East Coast Hockey League. The PHPA has successfully negotiated to guarantee its members reasonable wages, in-season housing, adequate per diems, and revenue sharing, among other benefits.”¹⁸⁵ MiLB teams play more games per season and have higher average attendance per game, but the players only receive about 25% of the minimum salary and 1/3 of the travel per diem compared to their counterparts in the American Hockey League (“AHL”).¹⁸⁶ Additionally, AHL players can earn postseason bonuses, whereas MiLB players cannot.¹⁸⁷ In sharp contrast to MiLB players, “[p]layers in the AHL are unionized and have a minimum salary of \$45,000, get a postseason bonus, and \$72 per diem.”¹⁸⁸

While the need to unionize and bargain collectively is clear, the MiLB players' desperate financial situations, the widespread fear of retaliation, and the reticence of stars to support the collective unit have consistently delivered fatal blows to past unionization efforts.¹⁸⁹ Of these three obstacles, improving the compensation of MiLB players may be the easiest to change. The bleak prospect of unionization is unlikely to

180. *See id.*

181. *See* David Broughton, *Appeal of MiLB Merchandise Continues to Grow; Sales Hit \$70M in 2017*, SPORTS BUS. J., July 23, 2018, available at <https://www.sportsbusinessdaily.com/Journal/Issues/2018/07/23/Research-and-Ratings/MiLB-merchandise.aspx>.

182. *See* Minor League Baseball (@milb), INSTAGRAM (Feb. 5, 2019), https://www.instagram.com/p/Btghc4EFViC/?utm_source=ig_share_sheet&igshid=19qdu20qr0vy

183. *See id.*

184. *See* Bobby Mueller, *MLB and Minor League Salaries: The Ugly Business Side of Baseball*, CALLTOTHEPEN (Mar. 22, 2018), <https://calltothepen.com/2018/03/22/mlb-minor-ugly-business/>; *see also* Berg, *supra* note 37.

185. Berg, *supra* note 37.

186. *Id.*

187. *Id.*

188. Mueller, *supra* note 184.

189. *See supra* notes 173–175 and accompanying text.

improve until the financial situation of the individual players improves. The result is a vicious cycle in which the players' poor financial conditions perpetuate their lack of a union, and their lack of a union worsens their financial conditions. If Congress were to remove both the antitrust and FLSA exemptions, the financial condition of minor league players would improve and collective activity would be more likely.

MiLB players have made some efforts to help themselves short of unionization. In response to the SAPA, Jeremy Wolf founded More Than Baseball, a 501(c)(3) public charity to support MiLB players.¹⁹⁰ Wolf, a 31st round draft pick by the New York Mets in 2016, started the organization “as a way to help minor leaguers receive the housing, equipment, and food they need to survive.”¹⁹¹ More Than Baseball aims to spread awareness to fans and uncover baseball's best kept secret, explaining on its website that “over 4000 minor league ballplayers are in need of financial assistance[,]” and that the players “are subject to poor working conditions and are on the hook for their own housing, equipment, and nutrition.”¹⁹²

More Than Baseball “refuse[s] to allow any ballplayers go to bed hungry and wake up on an air mattress only to play in front of thousands of paying fans per night.”¹⁹³ The organization, which is available to all minor leaguers, helps the players obtain essential baseball equipment in addition to basic living necessities such as proper nutrition and affordable housing.¹⁹⁴ Additionally, More Than Baseball provides career and financial services to prepare players for life after baseball, which is particularly important considering that only a small fraction of minor leaguers advance to the big leagues.¹⁹⁵ While laudable, More Than Baseball does not remedy the financial exploitation of MiLB players just as a soup kitchen does not solve the problem of homelessness.

V. CONCLUSION

In a democracy, the legislature should reflect the concepts of fairness and equality which the nation truly values. As Congress has become increasingly influenced by uber-wealth, the growth of income inequality has reduced the ideals of fairness and equality to their bare minimum. This reality is easily identified in the plight of most MiLB players.

190. *Meet the Staff*, MORE THAN BASEBALL, <https://www.morethanbaseball.org/about-us> (last visited Feb. 17, 2020).

191. *Id.*

192. *Mission*, MORE THAN BASEBALL, <https://www.morethanbaseball.org/mission> (last visited Feb. 17, 2020).

193. *Id.*

194. *Id.*

195. *Id.*; see *supra* note 95 and accompanying text.

Although Supreme Court decisions and the players' own lack of collective will has worsened the situation, it is Congress who has perpetuated the appalling economic reality for the players who support the foundation of Major League Baseball. Neither the House nor the Senate has provided any rationale for explicitly preventing MiLB players from suing Major League Baseball based on the nation's antitrust laws¹⁹⁶ or the FLSA.¹⁹⁷ The only explanation is the influence of wealthy Major League Baseball owners over Congress, as reflected by their increased lobbying expenditures.¹⁹⁸ Given the public outcry against the first attempt by Congress to exempt MiLB players from federal minimum wage laws, Congress' actions can also be characterized as counter majoritarian.

Congress should therefore repeal both the antitrust immunity and the exemption from the FLSA it has given Major League Baseball and the owners. The cost of doing so will not destroy major or minor league baseball. The result will simply lift the majority of minor league players from poverty by reducing the profits of Major League Baseball owners only incidentally. The games will still flourish. In addition, such action by Congress will make collective activity by MiLB players more likely.

As the nation's pastime, the game of baseball "reflects a host of age-old American tensions: between workers and owners, scandal and reform, the individual and the collective."¹⁹⁹ Baseball even had a key role in the beginning of racial equality in America.²⁰⁰ Baseball has been "a sort of Rosetta stone for deciphering our still revolutionary experiment in nationhood[.]" and the game "has realized—through individualized brilliance or teamwork or racial harmony—the highest of our country's ideals."²⁰¹ Baseball has advanced our nation, and the undeniable parallels between the game and the law were acknowledged in the *Federal Baseball* opinion.²⁰² In return, the law has largely turned its back on the game's most vulnerable.²⁰³ By rectifying its past mistakes, Congress can

196. See *supra* notes 143–147 and accompanying text.

197. See *supra* notes 157–163 and accompanying text.

198. See *supra* notes 155–156 and accompanying text. Other sports capitalists understand the value of lobbying congress. Because California passed a statute allowing its collegiate athletes to profit from their name, image, and likeness, the NCAA and some conferences have dramatically increased their lobbying expenditures in an attempt to get Congress to pass a law on the subject favorable to their interests. See Cassandra Negley, *NCAA, ACC, Big 12 Spend Nearly \$1M to Prevent Athletes from Profiting Off Own Likeness*, YAHOO! SPORTS (Feb. 10, 2020, 6:28 PM), <https://sports.yahoo.com/ncaa-acc-big-12-spend-nearly-1-m-to-keep-athletes-from-earning-money-off-marketing-deals-232823064.html>.

199. Ken Burns & Lynn Novick, *Where Memory Gathers*, in *BASEBALL: AN ILLUSTRATED HISTORY* xvii, xvix (1st ed., 1994).

200. See John Thorn, *Why Baseball*, in *BASEBALL: AN ILLUSTRATED HISTORY* 58, 61 (1st ed., 1994).

201. *Id.* at 58.

202. See *id.*; see *supra* note 125 and accompanying text.

203. See *supra* Part IV.

provide a solution to baseball's best kept secret—the treatment of MiLB—and may truly save America's pastime. In so doing, Congress would also be taking a first step in realizing its own responsibility in eliminating income inequality in America.