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Social Injustice in Minor League Baseball: How Major League Baseball Makes Use of an Antitrust Exemption to Exploit its Employees

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Social Injustice in Minor League Baseball: How Major League Baseball Makes Use of an Antitrust Exemption to Exploit its Employees

Gregg Steinman*

“[It is] very much like the indentured servitude of the 1700’s. When you first sign, you are owned by that team for basically 7 seasons. A team can buy you, sell you, send you to another country, or fire you whenever they want. They can cut you if you get hurt. A player, on the other hand, cannot try to play for someone else. He can [not] try out for his home team. You have to play for the team that drafted you even if they are loaded at your position. . . [T]his obsession with making the majors should not be a justification for the current treatment of minor league players, and I certainly hope it would not be used as an excuse to give major league and minor league owners a legal blank check.”¹

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¹ Major League Baseball Antitrust Reform, Hearing on S. 53 Before the Subcomm.. on the Judiciary, 105th Cong. 13–15 (1997) (Testimony of Dan Peltier, Former Baseball Player) (alteration to original in quoted text).

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INTRODUCTION

The Contracts Clause of the United States Constitution bars any law from impairing the obligations of contracts.² There are minimal restraints, including minimum wage, antidiscrimination, antitrust, and competition laws, to this freedom of contract guaranteed by the constitution. However, Major League Baseball ("MLB") by availing itself of a century-old antitrust exemption has continuously found a way to circumvent even these restraints and create one of the biggest monopolies this country has ever seen.

In the last twenty to thirty years, the industry of professional sports has become one of the biggest businesses in the world. In so doing, the commissioners of the leagues into which most sports are organized have had to become savvy businessmen with one ultimate goal: to maximize profits. The simplest way for professional sports to maximize profits is to decrease the supply of the product, while at the same time increasing the demand for it. MLB has done a sensational job of this. Throughout the last century, reaching the majors has become the ultimate goal of any baseball player with little to no competition from opposing leagues. MLB has become the American dream, so to speak, for any young ballplayer: if you work hard enough you can make millions of dollars by simply playing baseball. But while this is true for some, it is not the case

² U.S. CONST. art. I, § 10, cl. 1.

for most players. Exploiting this pipe dream, MLB has been able to all but eliminate freedom of contract between the league and its players.

This note will study how MLB's antitrust exemption has allowed MLB to violate federal laws and exploit its employees. First, in Part I, this note will examine the history of MLB's antitrust exemption, the history of MLB's rules and bylaws, and how this groundwork affects the payment of Minor League Baseball ("MiLB") players. In Part II, this note will assess the reasons why the antitrust exemption should be lifted through an analysis of how the business of baseball has changed since the granting of the exemption. Part II will then test whether MLB would be in violation of the Sherman Antitrust Act if the exemption were to be lifted. Finally, Part II will conclude with a counter argument in favor of maintaining the exemption.

Next, Part III of this note will provide some of the larger issues that have followed since the granting of the exemption, explaining how MLB has, over time, used the antitrust exemption to create a closed market as well as violate federal minimum wage and overtime laws. Part III will conclude with the effects that MLB's exemption has on its incoming employees. Part IV of this note will compare the National Collegiate Athletics Association ("NCAA") to MiLB in light of *O'Bannon v. NCAA*³ and discuss how the court's analysis can be applied to MLB. Finally, Part V will provide a plausible solution that could potentially be used by MiLB players to combat MLB's rules and restrictions, and conclude with an overall recap followed by what needs to be done to fix the problem.

I. HISTORY AND BACKGROUND

In 2014, Miami Marlins outfielder Giancarlo Stanton ("Stanton") signed a thirteen-year contract worth \$325 million, currently the largest contract in professional sports history.⁴ However, Stanton had to start where all other players start, in MiLB. Like Stanton, each player selected in the draft is forced to work over sixty to seventy hours per week for the five-month season⁵ and over forty hours per week in the offseason, while

³ *O'Bannon v. NCAA*, 7 F.Supp. 3d 955 (N.D. Cal. 2014).

⁴ Bob Nightengale, Marlins, *Giancarlo Stanton Finalize 13-Year, \$325 Million Deal*, USA TODAY (Nov. 17, 2014) <http://www.usatoday.com/story/sports/mlb/2014/11/14/giancarlo-stanton-marlins-contract-extension/19040675/>.

⁵ Second Amended Complaint for Violations of Federal and State Wage and Hour Laws at 35-36, *Aaron Senne v. Office Of The Comm'r Of Baseball*, No. 3:14-cv-00608-JCS (N.D. Cal. filed May 16, 2014)[hereinafter Complaint]

During the roughly five-month championship season, minor league teams play games either six or seven days per week . . . minor

only earning preset yearly salaries.⁶ The players that eventually make it to the Major League level are paid substantially, with contracts ranging from six to as many as nine figures, while those who remain in MiLB, ranging from Single A to Triple A, make an average of four figures.⁷

These salaries force players and their families to live in very harsh and meager conditions.⁸ MLB exploits these players by claiming that it is giving them the opportunity to make money playing a sport they love, and by glorifying the success stories of the small percentage of players who work up through the minor league system to a big pay day. However, the 6,000 other players that do not make it to MLB continue to fuel this beast. How do the owners get away with it? They do so by claiming that the players are developing in the minor league system and that they will make it to the majors once they have become talented enough. But the rules that MLB has implemented force these players to play for very little while they are under contract for approximately seven years; thus, MLB essentially leaves them stranded in the minor leagues without the ability to negotiate or even voluntarily leave.⁹ If they do leave, they are not allowed to play for any other team in MLB nor for any other professional domestic or foreign franchise.¹⁰

leaguers must participate in mandatory pregame activities . . . with games averaging around three hours in length, minor leaguers usually work around eight mandatory hours at the stadium on these days . . . As part of the maintenance of first-class conditioning required . . . players must also regularly perform strength and conditioning workout during the season . . . Additionally, minor leaguers are required to perform protracted travel, usually by a team bus . . . bus rides each lasting several hours . . . The minor leaguer arrives to the home stadium before beginning the trip; packs belongings . . . loads the bus . . . The minor leaguer performs a similar process at the beginning and end of each trip.

Id. at 35 (omissions from original in quoted text).

⁶ See generally *id.* at 29-33.

⁷ Complaint, *supra* note 5, at 33. It is important to note that players selected in the first few rounds of the draft receive high signing bonuses; however, these numbers become skewed as the players selected in the later rounds receive very minimal pay.

⁸ See *id.* at 61 ("Because of these salaries, Mr. Ortiz struggled to live. He often lived with host families during the season, but when host families were not available he had to ask his mom for assistance to help pay for an apartment."); see also *id.* at 62 ("Because of these salaries, Mr. Jimenez struggled to live. At one point during the season, he and several teammates crammed six players into a 2-bedroom apartment to save on rent."); see also *id.* at 63 ("Because of these salaries, Mr. Watts struggled to live . . . he lived with many guys crammed into a small apartment. He often slept on a cheap air mattress during the season.") (omission from original in quoted text).

⁹ *Id.* at 29.

¹⁰ *Id.* (Players that voluntarily leave are "subject to the discipline of the Commissioner").

To fully understand how MLB has not been punished for creating these arrangements, it is important to analyze its rules and history. In the 1920's, MLB created a "farm system" to develop players.¹¹ In 1962, the league implemented a Player Development Plan, which required each MLB franchise to maintain a certain number of minor league teams.¹² In today's league, each franchise has roughly forty players on its major league roster and approximately 150-250 players in its "farm system," generally consisting of four to five teams.¹³ This means that among the thirty teams in MLB, at any given time, it is employing around 6,000 minor league players.¹⁴ 1965 marked the creation of the Rule 4 Draft,¹⁵ which mandates that all amateur players from the United States, Canada, and Puerto Rico participate in the draft in order to sign with a team.¹⁶ The players in this draft are between the ages of eighteen and twenty-two (with some being twenty-three), and once selected, they become the exclusive property of the drafting team without any ability to bargain with another.¹⁷

A. Major League Baseball Rules

The rules of MLB have been formed in a way which preclude freedom of contract. MLB has constantly suppressed signing bonuses to players due to oversight from the Commissioner of Baseball.¹⁸ In the late 90's the commissioner effected a "slotting system" that recommends signing bonuses for high picks in the draft.¹⁹ Furthermore, if a franchise wishes to exceed the recommended slot level, it must receive permission from the commissioner's office directly,²⁰ which is unlikely. In 2012, current commissioner Bud Selig employed an even stricter system that places caps on the total amount a franchise can devote to these bonuses.²¹ Around this time, Selig also imposed a bonus pool for Latin players in order to restrict signing bonuses for individual Latin players.²² Teams are allowed a certain number of signings up to a total amount, for Latin

¹¹ Complaint, *supra* note 5, at 25.

¹² *Id.* at 30.

¹³ *Id.* at 25.

¹⁴ *Id.*

¹⁵ *Id.* at 26.

¹⁶ *Id.* at 27.

¹⁷ Complaint, *supra* note 5, at 27.

¹⁸ *Id.* at 26.

¹⁹ *Id.*

²⁰ Complaint, *supra* note 5, at 26.

²¹ *Id.* at 27.

²² *Id.*

players, which do not count against the teams allotted pools for players drafted.²³

MLB has also implemented a Uniform Player Contract (“UPC”) that must be used by all franchises and approved by the commissioner directly.²⁴ The UPC has removed all negotiating power by athletes that are drafted or signed outside of the draft because by not signing the UPC they will be forbidden from signing with another team.²⁵ The requirements set by the UPC are that the franchise owns the player’s rights for seven years and only the drafting franchise can deal the player’s rights to another team.²⁶ Not only can the player not sign with another team, but also upon signing the UPC, a player signs away his rights to play for another team outside or within MLB or the United States.²⁷ Even those who want to retire during their seven-year term must receive commissioner approval under the UPC.²⁸

The rules also provide what the player’s payments will be and restrictions on these payments. Major League Rule 3(c) provides a requirement that all first-year minor leaguers earn an amount established by MLB, currently around \$1,100 per month, but these numbers are not made public so this is purely an estimate.²⁹ The current salaries

²³ See Ben Badler, *MLB Slashes Money for International Players While Draft Bonus Pools Rise*, BASEBALL AMERICA (April 14, 2014) <http://www.baseballamerica.com/international/mlb-slashes-money-for-international-players-while-draft-bonus-pools-rise/>.

While the bonus pools for draft picks slightly increased for 2014, the amount that teams can spend on international players before facing taxes and other penalties has decreased for the third straight year. Technically, the aggregate bonus pools for international players rose by 1.2 percent, moving from \$78,226,600 to \$79,194,000. In reality, the amount that teams will be able to spend on international players is decreasing for the third straight year. That [is] because, for the first two years of the international bonus pools, teams were allowed six signings of up to \$50,000 that would not count against their pools, giving each team an extra \$300,000 beyond their pool space and \$9 million for the industry as a whole. When the 2014-15 international signing period begins on July 2, per the Collective Bargaining Agreement, those \$50,000 exemptions disappear. It [is] a clever accounting trick, one where Major League Baseball can claim that the international bonus pools are up a nominal amount from the previous year, when really the bar is being lowered. The reduction for international players comes while MLB has simultaneously raised the amount teams can spend on the draft before facing penalties for the last three years.

²⁴ Complaint, *supra* note 5, at 28-29.

²⁵ Complaint, *supra* note 5, at 29.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 29-30.

²⁹ *Id.* at 31.

“recommended” by MLB to be paid during a championship season are as follows: \$1,100 per month for Rookie and Short-Season A, \$1,250 per month for Class-A, \$1,500 per month for Class-AA, and \$2,150 per month for Class-AAA,³⁰ with Rookie being the lowest level and Class-AAA being the highest level of MiLB. It is important to note that these salaries are only paid during the five-month season, not the twelve-month calendar year. Thus, it is estimated that most minor league players earn less than \$7,500 per year, with some earning \$3,000 or less.³¹ Although the UPC allows players to negotiate for more money after the first year, there is a provision that states that if the franchise and player cannot agree to a salary, the franchise can simply set one and the player is forced to agree.³²

The UPC also requires players to “perform professional services on a calendar year basis,” even though they are only paid during the five-month championship playing season.³³ Furthermore, there are required playing times for the players during the year when they will not be paid.³⁴ Lastly, they are subject to fines if they do not stay conditioned throughout the calendar year.³⁵

MLB justifies these off-season requirements by claiming that they are to further hone the player’s skills.³⁶ However, the time-consuming requirements and lack of professional skills in other fields of work leave players at a severe disadvantage. They often work minimum wage jobs in the off-season that leave them no better off financially than during their paid baseball seasons.³⁷

³⁰ *Id.* at 32.

³¹ Complaint, *supra* note 5, at 33-34

³² Complaint, *supra* note 5, at 32.

³³ *Id.* at 33.

³⁴ *Id.* at 33-34. (The UPC “requires the minor leaguer to participate in spring training . . . [and] does not allow for salaries during this period since spring training falls outside the championship season . . . Around 30-50 minor leaguers per MLB Franchise do not earn a roster spot on a minor league team at the end of spring; they instead remain at the Franchise’s spring training site . . . Since they are not participating in a championship season, MLB’s UPC again does not require salaries to be paid . . . At the end of the championship season, around 30-45 . . . are selected [and required] to participate in an instructional league . . . Again, MLB’S UPC . . . requires [players] to perform this work without pay”) (alterations to original in quoted text) (omissions from original in quoted text).

³⁵ *Id.* at 34.

³⁶ *Id.*

³⁷ Andrew Keh, *Chances are Extra Work in Off-Season Involves Baseball, Not a Second Job*, N.Y. TIMES (February 23, 2013) available at <http://www.nytimes.com/2013/02/24/sports/baseball/for-baseball-players-finding-work-in-off-season-is-no-longer-a-necessity.html?pagewanted=all> (“For the fourth straight off-season, McHugh took a part time office job at Boosterthon Fun Run”); see also *id.* (“[Marlon Byrd] delivered kitchen appliances for a company in Boynton Beach, worked as an attendant at

B. The History of Major League Baseball's Antitrust Exemption

MLB has a long history of violating antitrust laws. In fact, MLB has the ability to simply buy out teams in the league that are not producing high profits in order to increase revenue. Furthermore, MLB reserves the right to allow or restrict the introduction of new franchises into the league, thus driving up the demand for the thirty current franchises. Franchises are granted super-majority voting requirements by MLB bylaws that are used to prevent cities that are financially capable of supporting franchises from joining the league.³⁸ As stated by Gov. Jesse Ventura:

Imagine for a minute that the American Association of Cell Phone Manufacturers met in Chicago last week and at the meeting thirty of the largest manufacturers got together for cocktails to identify which of them they could buy out and close down in order to reduce the output of their product and maximize the profitability of the remaining manufacturers But, of course, we all know that eventually their strategy would fail. It would fail because first of all, their conspiracy would very likely be in violation of the Sherman Antitrust Act and, in an act of fairness to all entrepreneurial Americans, the government would remedy the situation Right. Except for baseball.³⁹

The reason that MLB is able to do this is by using the antitrust exemption that was granted to it in 1922.⁴⁰ In *Federal Baseball Club v. National League of Professional Baseball Clubs*, the court held that baseball was not subject to the Sherman Antitrust Act, reasoning that “[t]he business is giving exhibitions of [baseball], which are purely state affairs.”⁴¹ The court acknowledged the fact that in order to hold these “exhibitions,” there must be travel across state lines, but that transport interstate is not the essential thing.⁴²

a golf course in Tarpon Springs and moonlighted as a bouncer at a bar in Clearwater”) (emphasis added).

³⁸ Thomas A. Piaino, Jr., *The Antitrust Rationale for the Expansion of Professional Sports Leagues*, 57 OHIO ST. L.J. 1677 (1996).

³⁹ *Fairness in Antitrust in Nat'l Sports (FANS) Act of 2001: Hearing on H.R. 3288 Before the H. Comm. on the Judiciary*, 107th Cong. 16-17 (2001) (statement of Jesse Ventura, Governor, State of Minnesota).

⁴⁰ *Fed. Baseball Club, Inc. v. Nat'l League of Prof' Baseball Clubs*, 259 U.S. 200, 209 (1922).

⁴¹ *Fed. Baseball Club, Inc.*, 259 U.S. at 208 (alterations to original in quoted text).

⁴² *Id.* at 209.

II. MAJOR LEAGUE BASEBALL AND ITS ANTITRUST EXEMPTION

A. *An Analysis of Why the Exemption Should be Lifted*

While professional athletes play their respective sports because they love them, it is always in the back of their mind that they must perform well in order to get paid well. It is no different for management: owners, general managers, and presidents enter into the professional sports industry because they love sports, but they too are constantly thinking about money, or how they can return the greatest profits. MLB thinks like this for one good reason—teams make a lot of money.⁴³ For this reason alone, there needs to be a change in the laws that govern the industry. In 1922, when MLB received its antitrust exemption, there were a limited number of teams and players and few ways for fans to follow their teams. Today, MLB is an international sports giant, receiving revenue from television contracts, sponsorships, and a number of other sources.⁴⁴ A good example of just how much the game has changed is the case of Stan Musial. Stan Musial was a Hall of Fame MLB player in the 1940s and '50s;⁴⁵ however, in the offseason he sold Christmas trees from a parking lot to make extra money.⁴⁶ In today's league, future Hall of Famers are making millions of dollars and would not need to, nor be able to sell, a Christmas tree without protection from fans looking to take pictures and receive autographs.

Thus, the Supreme Court's ruling in *Federal Baseball Club* needs to be examined.⁴⁷ MLB is using that ruling to further take advantage of its players by restricting their access to playing for teams in other states and forcing them into binding contracts that nullify their negotiating power. In *Toolson v. New York Yankees, Inc.*, a MiLB player, Toolson, was assigned by his franchise to another franchise and upon his refusal to

⁴³ Maury Brown, *MLB Revenues \$7.5B for 2012, Could Approach \$9B by 2014*, BIZ OF BASEBALL (Dec. 10, 2012) http://www.bizofbaseball.com/?catid=30:mlb-news&id=5769:mlb-revenues-75b-for-2012-could-approach-9b-by-2014&Itemid=42&option=com_content&view=article ("In 2012, revenue for MLB and its thirty teams surpassed \$7.5 billion, an increase of 257% since 1995. Annual revenue will continue to climb as new television contracts begin to perform and is expected to reach \$9 billion in 2014").

⁴⁴ *MLB International*, MLB.COM, http://mlb.mlb.com/mlb/international/mlbi_index.jsp ("[MLB] games are broadcast in 233 countries and territories in 17 different languages. During the 2013 season, over 74 million fans paid to attend MLB games") (alteration to original in quoted text).

⁴⁵ Keh, *supra* note 37.

⁴⁶ *See id.* ("[Stan Musial] . . . sold Christmas trees from a parking lot . . . during the late 1940s, when Musial was a three-time World Series winner and three-time National League Most Valuable Player.") (alteration to original in quoted text) (omission from original in quoted text).

⁴⁷ *Fed. Baseball Club*, *supra* note 40 at 209.

play for the new franchise, he was placed on the ineligible list for the assignee team.⁴⁸ Furthermore, when he refused to report to the assignee team, MLB refused to allow him to play professional baseball altogether.⁴⁹ Toolson filed a suit under the Sherman Act,⁵⁰ but to no avail, as the court claimed that baseball was not held to be commerce or trade, but simply sport.⁵¹

Although *Toolson* was handed down sixty years ago, the same issues continue to haunt MiLB players today. There are two interesting points that arose out of this case. The first arose in *Gardella v. Chandler*,⁵² in which the court mentioned that MLB might be viewed as commerce, as the radio and television aspects of the game had changed since the times of telegraphing the game play by play.⁵³ This point is especially significant as in recent times because not only are games transmitted over the radio and television, but there are also live streams through the internet and satellite radio that make the games available to the entire world. If there were arguments made as early as 1951 for this change, it is hard to imagine why nothing has been done in the time since.

The second interesting point follows the first closely. The Court of Appeals has found that it is not its place to disregard a decision made by the Supreme Court only thirty years prior⁵⁴ and held that, if the Supreme Court had made an error in its former opinion, then it was up to the Supreme Court to correct that error.⁵⁵ But nearly a century has passed since that decision was made. For a better perspective, it was only a

⁴⁸ *Toolson v. N.Y. Yankees, Inc.*, 101 F. Supp. 93, 94 (S.D. Cal. 1951).

⁴⁹ *Id.*

⁵⁰ *See id.* at 93 (Plaintiff filed suit under the Sherman Act, alleging that MLB is a monopoly and that he had been deprived of his livelihood by his inability to break his contract).

⁵¹ *Id.* at 94; *See also* ALBERT THEODORE POWERS, *THE BUSINESS OF BASEBALL* 164 (2003).

The Curt Flood Act amends the Clayton Act to provide that practices “directly relating to or affecting major league baseball players” are subject to the federal antitrust laws. The Curt Flood Act specifically excludes from its coverage minor league baseball, the amateur draft, relations between the major and minor leagues, franchise relocations, intellectual property, broadcasting rights, and major league umpires, all of which continue to be exempted from the application of federal antitrust laws.

⁵² *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949).

⁵³ *Toolson*, 101 F. Supp. at 94.

⁵⁴ *Id.*

⁵⁵ *Id.*

couple years prior to the holding in *Federal Baseball Club*⁵⁶ that women were given the right to vote.⁵⁷ It is time for a change.

It is vital here to examine the actual language of the Sherman Antitrust Act (“Act”) to determine if modern day MLB would in fact be violating the law without its exemption. Section 1 of the Act provides a general guideline, stating that any form of contract that places restraints on interstate or foreign trade is prohibited.⁵⁸ Hence, when a player is drafted, he is forced to either sign the UPC or not play professional baseball,⁵⁹ and once signing the UPC, he is no longer allowed to sign a contract to play for any other baseball team in any state or even any foreign country.⁶⁰ MLB is also allowed, due to the exemption, to impose industry-wide salary limits across state lines.⁶¹ Furthermore, Section 1 of the Act forbids conspiracy in restraint of trade.⁶² Conspiracy is an agreement between two or more persons to commit a crime⁶³ and MLB consists of the offices of MLB as well as thirty franchises. This same argument can be made to show MLB’s violation of Section 3 of the Act.⁶⁴

Section 2 of the Act provides a general rule forbidding monopolies from being formed.⁶⁵ MLB’s rules carefully regulate how and when a player can enter into the league and how and when they can reach the higher levels of their respective organization. Additionally, it is in no way illegal for MLB to become the prosperous industry it is today. MLB has thus become the one and only profession of its kind in the United

⁵⁶ *Fed. Baseball Club*, 259 U.S. at 209.

⁵⁷ U.S. CONST. amend. XIX.

⁵⁸ *See* Sherman Antitrust Act, 15 U.S.C. § 1 (1890) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . .”) (omission from original in quoted text).

⁵⁹ Complaint at 28-29, *Aaron Senne v. Office Of The Comm’r Of Baseball*, No. 3:14-cv-00608-JCS (N.D. Cal. filed May 16, 2014).

⁶⁰ *Senne*, No. 3:14-cv-00608-JCS at 28-29.

⁶¹ Keith Bradsher, *Congressmen Pledge to Revoke Baseball’s Antitrust Exemption*, N.Y. TIMES (December 24, 1994) available at <http://www.nytimes.com/1994/12/24/sports/baseball-congressmen-pledge-to-revoke-baseball-s-antitrust-exemption.html>.

⁶² Sherman Antitrust Act, *supra* note 58.

⁶³ 18 U.S.C. § 371 (1994).

⁶⁴ *See* Sherman Antitrust Act, 15 U.S.C. § 3 (“Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another . . . is hereby declared illegal . . .”) (omissions from original in quoted text).

⁶⁵ *See* Sherman Antitrust Act, 15 U.S.C. § 2 (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among several States, or with foreign nations, shall be deemed guilty . . .”) (omissions from original in quoted text).

States, leading to young players having a strong desire to gain entry into the league. Lastly, Section 7 of the Act provides a remedy to any person that is injured by any other person or corporation for violating the Act.⁶⁶ Therefore, without the exemption granted to MLB an argument could be made that any and all MiLB players could bring suit, arguing that they have been injured by the strict contract provided by MLB. This analysis of the Act itself provides a strong argument against the nature of MLB, as well as the merits of its antitrust exemption.

B. Reasons to Fight for the Antitrust Exemption

On the other hand, an argument can be made that MLB's antitrust exemption is the only thing keeping MiLB running. "The repeal of baseball's antitrust exemption would affect the incentive that MLB has to continue its investment in the minor leagues."⁶⁷ Basically, if the exemption was lifted, there would be the risk that all of the above-mentioned rules would be in violation of the Act and thus there would cause a domino effect. This effect would potentially destroy the competitive balance of MLB,⁶⁸ as the franchises that have the most money would be able to pay higher prices for the top prospects.⁶⁹ There would also be ripples affecting the small towns and cities where the teams are located and would potentially leave many prospects with no abilities to work their way up to the major leagues.⁷⁰ Lastly, along with the lower level prospects, employees within MiLB organizations would be left without jobs and because of the very small revenue these teams create, these employees would be unable to afford a legal team to fight for their own rights.⁷¹

⁶⁶ See Sherman Antitrust Act, 15 U.S.C. § 7 ("Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United State . . .") (omissions from original in quoted text).

⁶⁷ Stanley M. Brand and Andrew J. Giorgione, *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, 50 (2003).

⁶⁸ *Id.* at 51.

⁶⁹ See *id.* ("In the event of repeal, the minor league player draft and reserve clause might be challenged as illegal restraints of trade under section 1 of the Sherman Act").

⁷⁰ See *id.* at 52 ("The effect of eliminating the antitrust exemption would be quite severe because it would harm communities, careers, and people associated with baseball at both the major and minor league levels.")

⁷¹ Brand, *supra* note 67, at 52 ("Minor League Baseball has virtually no television revenue, and ticket sales and fence sign advertising do not generate sufficient cash flow to support a legion of lawyers.")

In 1998, Congress passed legislation that affected MLB's antitrust exemption, but it did not affect MiLB in any way.⁷² In response, MiLB made three sound arguments in support of minor league exemption. The first was that, because the MiLB existed, millions of fans were able to watch professional baseball, whereas they would otherwise have no other opportunity to be able do so.⁷³ MiLB also argued that without the support of MLB, the communities that the MiLB teams were located in would be unable to support their local teams.⁷⁴ Lastly, it argued that MLB would have much less incentive to provide the payment of salaries and other costs to MiLB players, management, and staff.⁷⁵

While these arguments seem very strong, MiLB, not MiLB players, made them. MiLB players potentially hold a lot of power within MLB. If all 6,000 MiLB players decided to quit or go on strike because of their working conditions, MLB would likely have to make changes. Without these players, the talent level in MLB would steadily decline, teams would struggle to replace retired or injured players, and fans would likely become weary of paying to watch a less competitive sport. Thus, had there been a MiLB labor union in 1998, it can be argued that there would have been more MiLB arguments in favor of change as opposed to the result that occurred.

III. HOW MAJOR LEAGUE BASEBALL'S ANTITRUST EXEMPTION HAS LED TO LARGER ISSUES

A. *The Destruction of a Free Market*

MLB's antitrust exemption goes further than just exploiting MiLB players. MLB enjoys the ability to control what is supposed to be a free market. Because of the exemption, MLB can not only block franchises from joining the league, but can also block teams from moving their franchise to a different city. Generally, in professional sports the teams in

⁷² Stanley M. Brand, *The Case for the Minor League Baseball Antitrust Exemption*, 14 ANTITRUST 31 (2000).

⁷³ *See id.* at 32 ("Maintaining the exemption thus serves the public good by increasing the availability of minor league baseball.")

⁷⁴ *See id.* ("That purpose is furthered because maintenance of the exemption fosters Major League Baseball's financial support to the minor leagues, without which many smaller or rural communities could not support professional baseball.")

⁷⁵ *See id.* ("The subsidy provided to minor league baseball by MLB in the form of minor league player salaries and other costs, which MLB would have much less incentive to provide if it could not retain control of minor league players through the minor leagues' six-year reserve clause and player draft is critical to preservation of the minor leagues.")

large part succeed due to the amount of revenue they are able to generate. This is because the more money the team produces, the more flexibility it has to maintain expensive players as well as sign high-level players through free agency. This is usually due to teams having better records, bigger fan bases, and being located in larger markets.⁷⁶ This results in a severe disadvantage to those teams that do not have these same benefits, such as the MLB franchise in Oakland.⁷⁷ To illustrate, around 2010, the City of San Jose desired to move the Oakland Athletics to their city, offering a new stadium.⁷⁸ However, using the shield that is their antitrust exemption, MLB was able to block this move.

MLB also has the power to allow or to forbid the creation of new franchises at its discretion. By having this power, the number of teams in the league is kept to a smaller number than what would exist in a free market.⁷⁹ “The owner’s refusals to expand their leagues to meet the demand for additional franchises constitutes exactly the type of conduct that the antitrust laws were designed to prevent.”⁸⁰ The reason that MLB wishes to maintain a low number of franchises is because owners of franchises are in competition with each other to maintain the high value of their respective franchises, thus increasing their own worth.⁸¹ “If the members of a sports league did not compete . . . they would be perfectly willing to expand the number of franchises”⁸²

B. Major League Baseball’s Violation of Federal Minimum Wage and Overtime Laws

Although the federal minimum wage law has not changed since 2009, its \$7.25 per hour⁸³ minimum is still being violated by MLB in the

⁷⁶ See *Chi. Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 754 F. Supp. 1336, 1541-42 (N.D. Ill. 1991) (“[T]he richest teams enjoy competitive advantages [such as] the ability to bid for free agents or to pay to keep their own players”) (alteration to original in quoted text) (omission from original in quoted text).

⁷⁷ Other small market teams include: The Cleveland Indians, The Kansas City Royals, The Cincinnati Reds, The Tampa Bay Rays, etc.

⁷⁸ Justin B. Bryant, *Analyzing the Scope of Major League Baseball’s Antitrust Exemption in Light of San Jose v. Office of the Commissioner of Baseball*, 89 NOTRE DAME L. REV. 1841 (2014).

⁷⁹ Thomas A. Piaino, Jr., *The Antitrust Rationale for the Expansion of Professional Sports Leagues*, 57 OHIO ST. L.J. 1677 (1996) (“The owners have successfully conspired to keep the number of franchises substantially below that which would exist in a free market.”)

⁸⁰ *Id.* at 1678.

⁸¹ See Piaino, *supra* note 79, at 1689 (“ . . . [B]ecause the team owners are in competition with each other in the market for the sale of franchises, they have an incentive to limit the number of teams available”) (alteration to original in quoted text).

⁸² *Id.* (omissions from original in quoted text).

⁸³ Fair Labor Standards Act, 29 U.S.C. § 206 (2009).

pay of MiLB players. Using an average player's salary of \$5,500 per year⁸⁴ would mean that a player is making roughly \$1.76 per hour during a championship season and \$2.65 per hour in the offseason.⁸⁵ One reason for these astonishingly low numbers is that in the last forty years inflation has risen more than 400 percent, while MiLB salaries have risen a mere 75 percent.⁸⁶ The second and equally surprising reason for these incredibly low numbers is MLB's violation of federal overtime pay laws. The \$7.25 minimum wage is based on a forty-hour workweek.⁸⁷ Although MiLB players work more than forty hours per week, they are not receiving overtime pay. If that were the case, these numbers would not seem so skewed. In fact, a court held in 1998 that baseball was not exempt from federal overtime laws.⁸⁸ In *Bridewell v. The Cincinnati Reds*, the Sixth Circuit held that the Cincinnati Reds were not exempt from the federal overtime laws because the organization operates year round with over 100 employees.⁸⁹ Therefore, the defendant's argument that the organization is a seasonal employer was struck down.⁹⁰ Although the plaintiff in *Bridewell* was a maintenance worker rather than a baseball player,⁹¹ a similar argument can be made that because MLB requires players to maintain playing condition, participate in spring

⁸⁴ Complaint at 33, Aaron Senne v. Office Of The Comm'r Of Baseball, No. 3:14-cv-00608-JCS (N.D. Cal. filed May 16, 2014) ("... [M]ost minor leaguers earn less than \$7,500 per calendar year. Some earn \$3,000 or less.") (alteration to original in quoted text).

⁸⁵ A \$5,500 salary divided into fifty-two weeks is roughly \$106 per week. A championship season consists of roughly twenty weeks during which players are working around sixty hours per week, thus earning an hourly wage of around \$1.76. The remainder of the year is roughly thirty-two weeks during which players are working around forty hours per week; thus earning an hourly wage of \$2.65 per hour.

⁸⁶ Howard Megdal, *The Plight of the Minor League Baseball Wage Slave*, VICE SPORTS (November 4, 2014) <https://sports.vice.com/article/the-plight-of-the-minor-league-baseball-wage-slave> ("In other words: When Baltimore Orioles manager Buck Showalter talks about pocketing just \$13,000 for a single season in Sarasota some 30-plus years ago, he was still earning more than three times in relative purchasing power than what he would be making today.")

⁸⁷ Fair Labor Standards Act, *supra* note 83.

⁸⁸ *Bridewell v. Cincinnati Reds*, 155 F.3d 828, 829 (6th Cir. 1998).

⁸⁹ *Id.* at 829.

⁹⁰ *See id.* ("We reversed the district court's judgment, however, and held that the proper focus was not on the duration of the baseball season, but on the fact that the Reds organization operated year-round with no fewer than 120 employees in the 'off-season'").

⁹¹ *See id.* ("... Plaintiffs-Appellees, Robert Bridewell and others, as a part of [The Reds] maintenance staff at Riverfront Stadium...") (alteration to original in quoted text).

training, and execute workout packets,⁹² it follows that they therefore are not simply seasonal employees.⁹³

So, MLB pays wages that are illegal according to federal minimum wage laws, violates overtime wage laws, and does not provide payment for work performed outside of the championship season. However, a common response to these accusations is that there is a long seven-month off-season during which players can secure second jobs to support themselves.⁹⁴ While this may be true, and while players more often than not obtain second jobs during the off-season, there are few employers that will hire someone who can only work for seven months, and the employers that can, do not pay much more than MiLB.

C. The Ramifications of Major League Baseball's Antitrust Exemption on Minor League Baseball Players

Furthermore, MLB's low pay is bad for the public good. As noted, one of MiLB's arguments in 1998 was that it provided a public good by offering fans the ability to watch professional baseball. However, by paying players such low salaries and by forcing them to sign a binding contract for seven years, MLB has taken a young man into adulthood and thrown him into the world with a lack of education and life experience. For example: Player A is a nineteen year-old baseball player drafted and sent to play for MiLB. From that point on, he has seven years to make it to the major league level. If after those seven years he has not made it, then it is likely the team will not want to resign him. Rather, they can simply draft another nineteen year-old that year and try to make it work out better for the new draftee and the franchise. Now Player A is jobless at twenty-six years old, has not received any sort of higher education, has very little if any work experience, and has no money to his name. It is not overly cynical to think that this player will most likely have difficulties succeeding in life. Thus, this system is ultimately bad for the public.

⁹² Complaint, *supra* note 84, at 34 ("It is believed that all Franchises direct the winter work by issuing training packets to all players. Many, and perhaps all, Franchises monitor workouts and punish players for not performing off-season workouts").

⁹³ See Megdal, *supra* note 86 (alteration to original in quoted text).

If anything, a good case can be made that minor leaguers are *more* than full-time employees, at least if they [are] doing their jobs right. Baseball excellence requires practice and repetition, countless hours of fielding grounders and grooving one's swing, all in addition to playing actual games. It requires physical conditioning, too, which means working out and eating well, neither of which is cheap.

⁹⁴ Keh, *supra* note 37.

The age argument is also the perfect response to combat a couple of claims MLB could raise. The first claim is that if players did not want to be subject to such harsh conditions they could use their talents to receive scholarships at colleges and universities and gain an education. The second claim is that by providing such low salaries, MLB is not poisoning college baseball by incentivizing young players to forgo college. However, for the young baseball player, age is everything. For every year that passes, a player's value decreases due to the constantly growing arsenal of newer, younger players with similar skill levels. It is a bit easier to think of this from a business standpoint. More often than not, the owner of a franchise would much rather pay the \$1100 first year price for an eighteen year-old prospect that is almost at the same skill level as a twenty-two year old college athlete. In those four years, the franchise will be able to have complete control over the development of that player, whereas the college athlete will be twenty-six years old by that point.

MLB constantly uses words like "development" and "developmental" to describe its contracts and systems.⁹⁵ This creates the façade that the seven-year exclusivity contract is the exact amount of time it would take to develop a young athlete into a major league baseball player. However, it is interesting to note that this contract was not always for seven years; twenty years ago, it was only six.⁹⁶ So, it seems that quite a bit has changed in MLB's rules and guidelines, but not much has changed regarding the violation of wage laws and their antitrust exemption.

IV. COMPARING THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION TO MINOR LEAGUE BASEBALL

MiLB and the NCAA are very similar in that both train and coach players who may eventually become elite professional players. These two organizations were formed at a time when sports were not seen as a business. "The actual formation of the NCAA dates back to the early-

⁹⁵ Complaint, at 30, Aaron Senne v. Office Of The Comm'r Of Baseball, No. 3:14-cv-00608-JCS (N.D. Cal. filed May 16, 2014) ("The MLB . . . uses a vertically integrated system of development for these minor leaguers. Players begin at the lowest levels of MLB's developmental system, levels known as Rookie and Short-Season A. Ideally they then advance to higher levels: Class-A, Advanced Class-A, Double- A, and Triple-A . . .") (alteration to original in quoted text).

⁹⁶ See *Baseball's Antitrust Exemption: Hearing Before the Subcomm. on Economic and Commercial Law of the H. Comm. on the Judiciary*, 103d Cong. 114, 123 (1994) ("If MLB determines that antitrust laws make it too risky to draft and then reserve players for six years . . .") (omission from original in quoted text).

1900s when President Theodore Roosevelt called a meeting to lay ground rules and regulations for football to ensure the safety of future players.”⁹⁷ At the time, “[i]t was common for schools to settle debates on athletic ability purely through . . . [sport] competitions.”⁹⁸ Additionally, MiLB was formed in 1901,⁹⁹ at a time when professional baseball players were not the international icons they are today and when the business of baseball was not producing the type of income it does today.

NCAA institutions make millions of dollars a year by exploiting their college athletes and hiding behind the idea that it is a fair trade-off for the education provided.¹⁰⁰ The similarities between the exploitation of these athletes and MiLB players are quite obvious. Both organizations require countless hours of work by their athletes both in their championship seasons and in the offseason with little to no compensation. MiLB uses the dream of making it to the major leagues¹⁰¹ and being paid millions much as the NCAA uses the free education ostensibly provided to defend the lack of compensation to the athletes.¹⁰² However, it can be argued that these players are not on scholarship for educational purposes, but rather to provide the university with talented athletes that will increase demand and increase revenue.¹⁰³ In addition, in

⁹⁷ *Formation of the NCAA: An Unexpected Beginning*, NCAA HISTORY GUIDE, (November 21, 2012 9:00 AM), <http://ncaahistoryguide.com/formation-ncaa-unexpected-beginning/>.

⁹⁸ *Id.* (alteration to original in quoted text) (emphasis added).

⁹⁹ *The History & Function of Minor League Baseball*, The Official Site of Minor League Baseball (July 8, 2011) http://www.milb.com/milb/history/general_history.jsp.

¹⁰⁰ See *O'Bannon v. NCAA*, 7 F.Supp. 3d 955, 968 (N.D. Cal. 2014) (“ . . . [N]one of these leagues offers the same opportunity to earn a higher education that FBS football and Division I basketball schools provide”) (omission from original in quoted text) (alteration to original in quoted text).

¹⁰¹ Complaint, *supra* note 95, at 31 (“Given that MLB carefully controls the entryway into the highest levels of baseball, and given the young minor leaguer’s strong desire to enter the industry, MLB and Defendants have exploited minor leaguers”) (omission from original in quoted text).

¹⁰² See *O'Bannon*, 7 F.Supp. 3d at 973 (Dr. Emmert testified that “the rules over the hundred-year history of the NCAA around amateurism have focused on, first of all, making sure that any resources that are provided to a student-athlete are only those that are focused on his or her getting an education.”).

¹⁰³ See Pete Volk, *Richard Sherman on the NCAA: ‘You’re not on scholarship for school’*, SB NATION, (Jan. 30, 2015 11:51 AM), <http://www.sbnation.com/college-football/2015/1/30/7951529/seahawks-richard-sherman-michael-bennett-slam-ncaa> (Richard Sherman on the NCAA: “No, I do [not] think college athletes are given enough time to really take advantage of the free education that they [are] given . . . People think, ‘Oh, you [are] on scholarship.’ They pay for your room and board, they pay for your education, but to their knowledge, you [are] there to play football. You [are] not on scholarship for school and it sounds crazy when a student-athlete says that, but those are the things coaches tell them every day”) (alteration to original in quoted text) (omission from original in quoted text).

both instances the players are the ones that are actually generating the revenue for the organizations by being the product that produces such high demand.

The NCAA provides rules that threaten a loss of eligibility in order to prevent student athletes from being able to negotiate.¹⁰⁴ Student athletes are barred from endorsing any commercial product or service while they are in school, regardless of whether or not they receive any compensation in doing so.¹⁰⁵ However, these same athletes must provide their school with their athletic services and acquiesce in the use of their names, images, and likeness for commercial and promotional purposes.¹⁰⁶

The NCAA's extortion of college athletes in order to gain large revenues is similar to MLB's extortion of MiLB players. Players in both institutions are overworked while receiving minimal remuneration and, at the same time, are providing the entertainment that the institutions need to maintain revenue. If MiLB players did not exist, MLB would lose the funneling of high-level talent to the Major Leagues. This would likely lead to less demand from fans, because quality of the product MLB would be putting on the field would decline.

Although the NCAA provision states that players should be motivated primarily by education, NCAA allows football players to leave for the National Football League (NFL) draft if they are three years removed from high school¹⁰⁷ and allows basketball players to leave for the National Basketball Association (NBA) draft after only one year in college.¹⁰⁸ Thus, unless these athletes graduate at an expedited rate, they

¹⁰⁴ It is important to note that upon losing amateur status student-athletes are no longer eligible to play collegiate sports. *See id.* at 974-75 ("The amateurism provision in the NCAA's current constitution states that student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived.")

¹⁰⁵ *See id.* ("Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.")

¹⁰⁶ *Id.* at 966.

¹⁰⁷ Kevin Clark, *NFL Draft: College Football's NFL Problem*, WALL STREET JOURNAL (March 2, 2014) available at <http://www.wsj.com/articles/SB10001424052702304585004579415241023161788> ("Since the late 1980s, the NFL has allowed players who are three years removed from high school to enter the draft").

¹⁰⁸ Chris Anderson, *Is One-and-Done the Best Policy for College Basketball*, BLEACHER REPORT (April 18, 2012) <http://bleacherreport.com/articles/1150413-college-basketball-is-one-and-done-the-best-policy-for-college-basketball> ("A player shall be eligible for selection in the first NBA Draft with respect to which he has satisfied all applicable requirements of section 1(b)(i) below and one of the requirements of Section 1(b)(ii) below: (i) The player (A) is or will be at least 19 years of age during the calendar

will not be leaving with a degree.¹⁰⁹ As a result, if these student-athletes do not succeed as professionals, they drop into the real world in a similar situation to that of MiLB players after their seven-year exclusivity period. Additionally, while college players are supposed to be motivated by education and MiLB players by the opportunities of the major leagues, both organizations reap the benefits through jersey sales, naming rights, gate and media receipts, etc.¹¹⁰

A. *Laying the Groundwork for Change*

Like MLB, the NCAA can be viewed as an organization that puts restraints on free trade.¹¹¹ This has led to antitrust and labor suits similar to what MLB has dealt with over the years. The difference, recently, is that there has been forward progress in remedying this potentially illegal situation in the NCAA. The most recent case concerning the NCAA involves the payment of student-athletes.¹¹² In *O'Bannon v. NCAA*, the court used a rule of reason test to decide whether plaintiffs can prevail on a violation of the Sherman Act claim.¹¹³ The rule of reason test is a burden-shifting framework¹¹⁴ and in order to be successful, a plaintiff

year in which the Draft is held, and (B) . . . at least one (1) NBA Season has elapsed since the player's graduation from high school.") (omission from original in quoted text).

¹⁰⁹ *Id.* ("From a university perspective, this is a complete hypocrisy of what a university is supposed to stand for. Though athletics are surely a huge industry in the college atmosphere, a university's main goal is to ensure the education and advancement of its own students. These athletes who come in for a year, take minimal credits, and leave the next are making a complete mockery of the system and taking away scholarship money from much more deserving students as well as student-athletes").

¹¹⁰ Darren Rovell, *NCAA President: No Pay for Players on Jersey Sales*, CNBC (December 22, 2011) <http://www.cnbc.com/id/45768248#> ("[The] Adidas contract with Michigan is the largest in the country, an eight-year, \$66.5 million deal signed in 2007. After they won the BCS Championship, Alabama signed an eight-year extension with Nike worth almost \$30 million") (alteration to original in quoted text).

¹¹¹ *See O'Bannon v. NCAA*, 7 F.Supp. 3d at 991 (" . . . [S]chools could alternatively be characterized as buyers in a market for recruits' athletic services and licensing rights. The relevant market would be that for the recruitment of the highest ranked male high school football and basketball players each year") (omission from original in quoted text) (alteration to original in quoted text).

¹¹² *See id.* at 962-63 ("Plaintiffs are a group of current and former college student-athletes. They brought this antitrust class action against the National Collegiate Athletic Association (NCAA) in 2009 to challenge the association's rules restricting compensation for elite men's football and basketball players").

¹¹³ *See id.* at 985 ("When 'restraints on competition are essential if the product is to be available at all,' *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason.") (quoting *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203 (2010)).

¹¹⁴ *See id.* (citing from *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063) (alteration to original in quoted text) (omission of citations in quoted text).

must show that “[t]he restraint’s harm to competition outweighs its procompetitive effects.”¹¹⁵

The court found that the initial burden on the plaintiff was met by holding that FBS football schools and Division I basketball schools provide a distinct market.¹¹⁶ The court further held that because these schools are the only suppliers in that market, they are able to fix the price of their product.¹¹⁷ The burden was then shifted to the NCAA, which claimed four procompetitive justifications¹¹⁸ that were subsequently found to be insufficient.¹¹⁹ The first justification provided by the NCAA was the preservation of amateurism in college sports¹²⁰; however, the Court concluded that the restrictions set by the NCAA played a minor role in the consumer demand for FBS football and Division I basketball.¹²¹ The second justification was the promoting of a competitive balance among FBS football and Division I basketball

[T]he ‘plaintiff bears the initial burden of showing that the restraint produces “significant anticompetitive effects” within a “relevant market.” If the plaintiff satisfies this initial burden, “the defendant must come forward with evidence of the restraint’s procompetitive effects.” Finally, if the defendant meets this burden, the plaintiff must “show that ‘any legitimate objectives can be achieved in a substantially less restrictive manner.’”

¹¹⁵ *Id.* (quoting from *Tanaka*) (alteration to original in quoted text).

¹¹⁶ *See id.* at 987.

¹¹⁷ O’Bannon, 7 F.Supp. 3d at 988 (Holding that the Plaintiff met his initial burden)(“Because FBS football and Division I basketball schools are the only suppliers in the relevant market, they have the power, when acting in concert through the NCAA and its conferences, to fix the price of their product. They have chosen to exercise this power by forming an agreement to charge every recruit the same price for the bundle of educational and athletic opportunities that they offer: to wit, the recruit’s athletic services along with the use of his name, image, and likeness while he is in school. If any school seeks to lower this fixed price—by offering any recruit a cash rebate, deferred payment, or other form of direct compensation—that school may be subject to sanctions by the NCAA”).

¹¹⁸ *See id.* at 999 (“(1) the preservation of amateurism in college sports; (2) promoting competitive balance among FBS football and Division I basketball teams; (3) the integration of academics and athletics; and (4) the ability to generate greater output in the relevant markets”).

¹¹⁹ *See generally id.* at 999-1003.

¹²⁰ *See id.* at 999.

¹²¹ *See id.* at 1001 (rejecting the NCAA’s first procompetitive justification of preserving amateurism in college sports)(“ [T]he NCAA’s restrictions on student-athlete compensation play a limited role in driving consumer demand for FBS football and Division I basketball-related products. Although they might justify a restriction on large payments to student-athletes while in school, they do not justify the rigid prohibition on compensating student-athletes, in the present or in the future, with any share of licensing revenue generated from the use of their names, images, and likenesses”) (alteration to original in quoted text).

teams.¹²² In regards to this, the Court held that the evidence did not show that a particular level of competitive balance was needed in order to maximize consumer demand.¹²³ The third justification was the integration of academics and athletics,¹²⁴ which the Court found unpersuasive, claiming that the NCAA cannot use this goal in order to prohibit any student-athlete compensation.¹²⁵ The last justification provided by the NCAA was the ability to generate greater output in the relevant markets;¹²⁶ however, the Court found that this was unsupported by the record.¹²⁷ The final step in the test is for the plaintiff to show that there are alternatives that are less strict, yet as effective.¹²⁸ However, while the plaintiff provided alternatives,¹²⁹ the court found that these were not necessary as the defendant's failed in its obligation under the

¹²² See *id.* at 999.

¹²³ O'Bannon, 7 F.Supp. 3d at 1002 (Rejecting the NCAA's second procompetitive justification)("Accordingly, the NCAA may not rely on competitive balance here as a justification for the challenged restraint. Its evidence is not sufficient to show that it must create a particular level of competitive balance among FBS football and Division I basketball teams in order to maximize consumer demand for its product. Nor is it sufficient to show that the challenged restraint actually helps it achieve the optimal level of competitive balance").

¹²⁴ See *id.* at 999.

¹²⁵ See *id.* at 1003 (Rejecting the NCAA's third procompetitive justification)("[T]he only way in which the challenged rules might facilitate the integration of academics and athletics is by preventing student-athletes from being cut off from the broader campus community. Limited restrictions on student-athlete compensation may help schools achieve this narrow procompetitive goal. As with the NCAA's amateurism justification, however, the NCAA may not use this goal to justify its sweeping prohibition on any student-athlete compensation, paid now or in the future, from licensing revenue generated from the use of student-athletes' names, images, and likenesses.") (alteration to original in quoted text).

¹²⁶ See *id.* at 999.

¹²⁷ See *id.* at 1004 (Rejecting the NCAA's fourth procompetitive justification)("[T]he NCAA's argument that the current rules enable some schools to participate in Division I that otherwise could not afford to do so is unsupported by the record. Neither the NCAA nor its member conferences require high-revenue schools to subsidize the FBS football or Division I basketball teams at lower-revenue schools") (alteration to original in quoted text).

¹²⁸ O'Bannon, 7 F.Supp. 3d at 985.

¹²⁹ See *id.* at 1005. Court provides the alternatives that the NCAA raised:
 [P]laintiffs have identified two legitimate less restrictive alternatives for achieving these goals. First, the NCAA could permit FBS football and Division I basketball schools to award stipends to student-athletes up to the full cost of attendance, as that term is defined in the NCAA's bylaws, to make up for any shortfall in its grants-in-aid. Second, the NCAA could permit its schools to hold in trust limited and equal shares of its licensing revenue to be distributed to its student-athletes after they leave college or their eligibility expires.

See *id.* (omission from original) (alteration to original).

framework.¹³⁰ The plaintiff's success in this case is going to lead to substantial changes soon for the NCAA and it may lead to even more changes in the future.

*B. Applying the O'Bannon Rationale to a Potential Case
Against Major League Baseball*

O'Bannon can be used to examine the potential ramifications of a lawsuit against MLB. A strong argument can be made that by applying the same burden-shifting framework from *O'Bannon*, MLB may be unsuccessful in maintaining its antitrust exemption. First, the hypothetical plaintiff could raise the same argument to show that MLB's restraint produces significant anticompetitive effects within a relevant market.¹³¹ A court would likely hold that the qualitative differences between MLB and its alternatives provides MLB with a distinct market because MLB is the only supplier in this market and is able to fix prices (i.e., the UPC contract that every player drafted is forced to sign).

The burden would then shift to MLB to provide evidence of the restraint's procompetitive effects.¹³² MLB's strongest argument would likely be that its rules provide a competitive balance amongst all thirty franchises and that, without it, the wealthiest franchises would simply outbid the others for the top prospects. However, a court could well find that the removal of the restrictions forced on draftees by the UPC would not have any effect on the consumer demand for the product because most—if not all—franchises' fan bases continue to support the teams that they have been supporting for years, independent of their performance. It would not be difficult to prove that this is true because, if it were not, then every year the last place team would be unable to provide the financial support to continue to be a franchise in the following year.

Even if MLB were able to provide a procompetitive justification, plaintiffs would likely be able to point to less restrictive alternatives¹³³ that would yield the same results that MLB has seen throughout the years. The alternative that is staring MLB in the face is to pay MiLB players more money. This would provide benefits to both parties as the players would be able to earn a real livelihood,¹³⁴ and MLB would not be

¹³⁰ See *id.* ("A court need not address the availability of less restrictive alternatives for achieving a purported procompetitive goal 'when the defendant fails to meet its own obligation under the rule of reason burden-shifting procedure.'") (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1913b (Aspen Pub., 3d ed. 2006)).

¹³¹ *Id.* at 985.

¹³² *O'Bannon*, 7 F.Supp. 3d at 985.

¹³³ *Id.*

¹³⁴ Howard Megdal, *The Plight of the Minor League Baseball Wage Slave*, VICE SPORTS (Nov. 4, 2014, 8:30 AM), <https://sports.vice.com/article/the-plight-of-the->

risking the potential violation of federal minimum wage and overtime laws. A court would likely find that running in parallel with this solution would be the introduction of a strict cap on individual contracts at the major league level. This would limit the amount of money paid to major leaguers and would thereby allocate more funds to pay minor league players more. For example, if the cap were set to \$150 million, Giancarlo Stanton's contract would leave open an additional \$175 million that could be used to pay MiLB players more. MLB could even go as far as setting low-level, mid-level, and high-level caps based on players performances.

The problem with implementing this alternative however, lies within baseball's collective bargaining agreement between MLB and the MLB Players Association ("MLBPA"), which would require the players to agree to the hard salary cap. However, only one in every six players drafted (roughly 17.2 percent) make it to the major league level;¹³⁵ thus, it does not seem plausible that the MLBPA would agree to lowering salaries. As such, a second alternative is more realistic. If MLB gave draftees the ability to negotiate their contract rights, it would eliminate the exclusivity period and leave MLB free and clear of potential ramifications of blocking free trade.

These less restrictive alternatives would leave MLB in the same financial position it currently holds. Additionally, the concerns that MiLB raised in 1998 would likely not materialize. The fans who are able to watch professional baseball, and who arguably otherwise would not have the opportunity, will retain that ability. Lastly, the fear that MiLB would lose its financial support from MLB, and that MLB would lose its incentive to continue to support MiLB, would become moot.

minor-league-baseball-wage-slave. Howard Megdal on why MLB should be incentivized to pay players more money:

If it sounds like major league teams are being penny-wise and pound-foolish by keeping minor league salaries so low—essentially, starving their own seed corn to save a few bucks—well, there [is] some truth to that. After all, baseball is made up of 30 teams looking for absolutely any competitive edge they can find. More and more of them are aware of the role that nutrition plays in the development and maintenance of athletic performance. Lawsuits and basic fairness aside, those teams have every incentive to pay their future major league workforce well enough to focus on the sport alone.

¹³⁵ See Matt Eddy, *One in Six Picks Will Click on Trek from Draft to Majors*, BASEBALL AMERICA (July 22, 2013) <http://www.baseballamerica.com/draft/one-in-six-draft-picks-will-click/> ("Baseball America arrived at that number by analyzing the 22 drafts from 1987 through 2008, noting the number of signed players who reached the big leagues for at least one game").

V. ALTERNATIVE DISPUTE RESOLUTION: HOW A LABOR UNION
IN MINOR LEAGUE BASEBALL COULD FIGHT FOR CHANGE
AND THE BARRIERS PREVENTING ONE FROM FORMING

“All team sports have unions to represent them in contract negotiations, arbitration hearings, working conditions and do all the things unions do for their members—almost all groups, that is. Minor League baseball players are the lone group of professional athletes not represented by a players’ organization.”¹³⁶ In 1956, MLB players formed a union in order to combat MLB’s rules and restrictions.¹³⁷ This labor union has become one of the strongest in the country.¹³⁸ Unfortunately, it does not include MiLB players, leaving them vulnerable to every restriction set by MLB.

The combination of MLB’s antitrust exemption and the lack of a labor union have ultimately led to the issues raised here. The simple solution would be for MiLB players to form a union to protect their rights; however, there are a number of barriers preventing them from doing so. These barriers include risk, financial consideration, labor market weaknesses, and demographics.¹³⁹

Due to the abundance of young talented baseball players, those who have been signed to a franchise are generally unwilling to risk losing their current situation. For this reason, it is hard to expect a young ballplayer to stick his neck out for not only himself, but also for all other MiLB players, by lobbying for a union. This is yet another instance of U.S. labor laws’ weakness on one-sidedness. The vulnerability of those who attempt to unionize pervades the entire economy.¹⁴⁰ There is a fear

¹³⁶ Harold Uhlman, *Minor League Baseball—Is Financial Emancipation on the Way?*, THINK BLUE LA (March 15, 2014) <http://www.thinkbluel.com/index.php/2014/03/15/minor-league-baseball-is-financial-emancipation-on-the-way/>.

¹³⁷ TONY COLLINS, *SPORT IN A CAPITALIST SOCIETY: A SHORT HISTORY* 113 (2013).

¹³⁸ See Ian Gordon, *Minor League Baseball Players Make Poverty-Level Wages*, MOTHER JONES (July/August 2014) <http://www.motherjones.com/politics/2014/06/baseball-broshuis-minor-league-wage-income> (“The Major League Baseball Players Association is sports’ strongest union, but it does [not] represent minor leaguers and often signs away their rights in collective bargaining agreements struck with team owners”) (alteration to original).

¹³⁹ See generally Uhlman, *supra* note 136.

¹⁴⁰ See Lance Compa, *Slumming in America*, AMERICAN PROSPECT (Nov. 5, 2010) <http://prospect.org/article/slumming-america> (“The most common violations allowed under U.S. law are aggressive, one-sided, fear mongering campaigns that employers launch when workers try to form unions. Managers can haul workers into captive audience meetings, forbidding any talk-back, to hear “predictions” of workplace closure if employees form a union, as long as the predictions are not threats. This prediction-versus-threat distinction pleases judges and lawyers but leaves workers baffled and scared”) (alteration to original).

amongst players that by doing this they will offend their parent team.¹⁴¹ Both Marvin Miller, the Executive Director of the MLBPA from 1966 to 1982, and Gene Orza, a retired MLBPA attorney, have both spoken to this problem:

Marvin Miller: ‘The notion that these very young, inexperienced people were going to defy the owners, when they had stars in their eyes about making it to the major leagues, it [is] just not going to happen’ . . . Gene Orza: “Young players are unlikely to make noise while they [are] trying to get promoted—they do [not] want to tick off [the club] by being the person who forms the union.”¹⁴²

Additionally, former MiLB player Garrett Broshuis has confirmed this, stating that “. . . [e]very single player you talk to, even if they realize [a union] would be a good thing, is also scared to death to talk to another player about it.”¹⁴³

Financial considerations are also a barrier to the formation of a union. A major union is unlikely to come to MiLB in an effort to unionize because the financial rewards for it would be very limited. In order for the major union to be successful in organizing, it would need to provide “. . . [s]taff, office space, attorneys, travel, and other expenses”¹⁴⁴ To be able to provide these things, the union would collect dues; however, because of the lack of finances from MiLB players the dues would not be sufficient to cover the costs.¹⁴⁵ Thus, there is little incentive for a union to take on this challenge without signs of greater readiness on the part of the players themselves.¹⁴⁶ The final barrier results from the fact that MiLB teams are spread out across the country.¹⁴⁷ “The task of organizing a group of employees spread out across North America is a daunting task, as is servicing those employees.”¹⁴⁸

Organizers and leaders like Marvin Miller do not appear on the scene very often. Garrett Broshuis believes that in order for there to be a

¹⁴¹ *Id.*

¹⁴² *See id.* (alterations to original); *see also* Lily Rothman, *Emancipation of the Minors*, SLATE (April 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_cash.html. (“The notion that these very young, inexperienced people were going to defy the owners, when they had stars in their eyes about making it to the major leagues—it [is] just not going to happen,” Miller says)(alteration to original).

¹⁴³ Lance Compa, *Slumming in America*, AMERICAN PROSPECT, (Nov. 5, 2010), <http://prospect.org/article/slumming-america> (alteration to original in quoted text).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

change there needs to be a bold person to take the helm and lead a drive for a labor union into MiLB.¹⁴⁹ Nevertheless, no one has currently taken the initiative. Hence, the most plausible solution would be for a MLBPA to follow the Professional Hockey Players Association's precedent by encompassing its developmental league players. "... [T]he Professional Hockey Players' Association represents approximately 1,600 minor league players across 64 teams throughout the American Hockey League, the East Coast Hockey league and the Central Hockey League which are the premier player development leagues for the National Hockey League."¹⁵⁰ One would think that, because nearly every MLB player had to work their way through MiLB in order to achieve their success, members of the MLBPA would be anxious to include players that are currently going through the same sort of unfortunate situations that they had similarly gone through. But this is not the case. MLB players tend to feel that being in the minor leagues is a rite of passage and that "... minor league players [should] wait their turn."¹⁵¹

The MLBPA even goes as far as to negotiate with MLB regarding the rights of MiLB players. The 2014 season marked the beginning of a new collective bargaining agreement negotiated by MLB and the MLBPA.¹⁵² The agreement not only raised the minimum wage for MLB players to \$500,000, but set new limits on bonuses paid to players drafted.¹⁵³ So, although the MLBPA does not represent the newly drafted players, it retains the right to negotiate their bonuses.¹⁵⁴ The hypocrisy in this is that MLB players, as members of the MLBPA, are negotiating to keep salaries and bonuses for MiLB players low, when they themselves went through the same process. But such is the business of baseball. As sports economist James Lambrinos states, "Collective bargaining does [not] just pit owners against employees, sometimes it pits employees against other employees."¹⁵⁵ In light of the fact that the average MLB

¹⁴⁹ See Lily Rothman, *Emancipation of the Minors*, SLATE (April 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 ("... [U]nless some underpaid minor leaguer takes it upon himself to become the Cesar Chavez of baseball") (omission from original) (alteration to original).

¹⁵⁰ Harold Uhlman, *Minor League Baseball—Is Financial Emancipation on the Way?*, THINK BLUE LA, (March 15, 2014) <http://www.thinkbluela.com/index.php/2014/03/15/minor-league-baseball-is-financial-emancipation-on-the-way/>.

¹⁵¹ DON WOLLET, *GETTING ON BASE: UNIONISM IN BASEBALL* 105 (2008) (alteration to original).

¹⁵² Rothman, *supra* note 149.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ George Gmelch, *Minor League Pay: Baseball's Antitrust Exemption Allows for Poverty Wages*, SAN JOSE MERCURY NEWS, (July 16, 2014), *available at*

player has spent four to six years in the minors,¹⁵⁶ a greater level of solidarity should be expected.

CONCLUSION

In conclusion, the professional sports world has changed since the day baseball was granted an antitrust exemption. It is clear that MLB is no longer simply about the sport, it is about business. However, on the inside, MLB continues to use precedent set nearly 100 years ago to violate rights and laws and abuse its employees. The league was given an iron shield to protect itself from the Sherman Antitrust regime that governs every other industry in the country. Something needs to be done, especially in regards to the exploitative labor relations that characterize MiLB. However, there does not seem to be a light at the end of the tunnel. In order for there to be change, one of three things must happen: (1) Congress would need to strike down MLB's antitrust exemption, (2) a bold MiLB player, backed by a national union, must rally other players into the formation of a union, or (3) the MLBPA must either include all professional baseball players or at least fight for MiLB player rights. Until then, the monopolized industry of baseball will continue to grow in wealth at the expense of its employees.

http://www.mercurynews.com/opinion/ci_26155052/minor-league-pay-baseballs-antitrust-exemption-allows-poverty).

¹⁵⁶ Based on the average age of position players in MLB being 24.4 years old; see Ben Lindbergh, *Overthinking It Promoting Prospects*, BASEBALL PROSPECTUS (Feb. 22, 2011) <http://www.baseballprospectus.com/article.php?articleid=13018>

From 2005-2009, the average player making his major-league debut was 24.4 years old (taking the average of their seasonal ages). The average position player had 2070 minor-league plate appearances under his belt before he first stepped in against a major-league hurler; the average pitcher (without distinguishing between starters and relievers) had thrown 391 minor-league frames before getting his first crack at The Show.