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Tremendous Upside Potential: How a High-School Basketball Player Might Challenge the National Basketball Association's Eligibility Requirements

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TREMENDOUS UPSIDE POTENTIAL: HOW A HIGH-SCHOOL BASKETBALL PLAYER MIGHT CHALLENGE THE NATIONAL BASKETBALL ASSOCIATION'S ELIGIBILITY REQUIREMENTS

INTRODUCTION

In 1995, the Minnesota Timberwolves, a franchise in the National Basketball Association (NBA, or "the League"), selected Kevin Garnett with the fifth pick of the NBA Draft.[1] Garnett was a prodigious basketball player who had just graduated from high school.[2] Still playing in the NBA today, Garnett has won the Most Valuable Player award and the Defensive Player of the Year award, and he has been selected for the NBA All-Star Game thirteen times.[3] Garnett has appeared on one of the All-NBA teams nine times, a yearly honor bestowed upon the best fifteen players in the League by journalists who cover the NBA.[4] He also has won an NBA championship[5] and is all but assured of enshrinement in the Basketball Hall of Fame when he retires.[6]

Garnett is one of several current players who entered the NBA straight from high school, eschewing the traditional path of enrolling in college, developing stronger basketball skills as an amateur, and then seeking to join the League.[7] Though just a plurality, this group counts several prominent stars among its members, and entering the NBA immediately following high-school graduation is no longer a curiosity.[8] Many NBA

1. Draft results are available at *1995 NBA Draft*, BASKETBALL-REFERENCE.COM, http://www.basketball-reference.com/draft/NBA_1995.html (last visited Aug. 23, 2010). Basketball-Reference is a website that compiles official NBA statistics and facts, including year-by-year draft results. The site is regarded as a reliable database by authorities including *The Wall Street Journal*. *See* David Biderman, *The Count: Fire Up the Simulator—It's NBA Prediction Time*, WALL ST. J., Oct. 24, 2009, at W4.

2. Harvey Araton, *Sports of the Times: Ah, to Be Young, Gifted and Drafted*, N.Y. TIMES, June 29, 1995, at B9.

3. Garnett's player biography, including honors received and awards won, is available at *Kevin Garnett*, BASKETBALL-REFERENCE.COM, http://www.basketballreference.com/players/g/garneke01.html (last visited Aug. 23, 2010).

4. *Best on Offense (Durant), Defense (Howard) Pace All-NBA Team*, NBA NEWS, http://www.nba.com/2010/news/05/06/all.nba/ (last visited Sept. 6, 2010).

5. *2007–08 Boston Celtics Roster and Statistics*, BASKETBALL-REFERENCE.COM, http://www.basketball-reference.com/teams/BOS/2008.html (last visited Aug. 23, 2010).

6. Chris Tomasson, *Hall of Fame Door Assessed*, ROCKY MTN. NEWS, Feb. 29, 2008, http://www.rockymountainnews.com/news/2008/feb/29/tomasson-hall-fame-door-assessed/.

7. Pete Thamel, *At 19, Plotting New Path to N.B.A., via Europe*, N.Y. TIMES, Oct. 5, 2008, at A1.

8. Other prominent current players who have pursued this career path include Kobe Bryant of

players who entered the League immediately following high school have earned the highest honors and ascended to preeminence.[9] For example, Kobe Bryant and LeBron James, NBA icons, have both won the Most Valuable Player award.[10] Last season, James, Bryant, and another star who came straight from high school, Dwight Howard, were three of the five players selected for the All-NBA First Team.[11] Using these metrics, commonly regarded as the currency required for basketball immortality,[12] so-called "prep-to-pros" players have demonstrated that they not only can compete in the NBA, but also that they can stand among the best players in the League.[13]

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the Los Angeles Lakers, *see Kobe* Bryant, NBA.COM, http://www.nba.com/playerfile/kobe_bryant/index.html (last visited Aug. 23, 2010), LeBron James of the Miami Heat, *see LeBron James*, NBA.COM, http://www.nba.com/playerfile/lebron_james/index.html (last visited Aug. 23, 2010), Dwight Howard of the Orlando Magic, *see Dwight Howard*, NBA.COM, http://www.nba.com/playerfile/dwight_howard/index.html (last visited Aug. 23, 2010), Amar'e Stoudemire of the New York Knicks, *see Amar'e Stoudemire*, NBA.COM, http://www.nba.com/playerfile/amare_stoudemire/index.html (last visited Aug. 23, 2010), Tracy McGrady of the Detroit Pistons, *see Tracy McGrady*, NBA.COM, http://www.nba.com/playerfile/tracy_mcgrady/index.html (last visited Aug. 23, 2010), and Jermaine O'Neal of the Boston Celtics, *see Jermaine O'Neal*, NBA.COM, http://www.nba.com/playerfile/jermaine_oneal/index.html (last visited Aug. 23, 2010).

9. Each of the players mentioned in note 8 has been selected for multiple all-star games. Bryant has appeared in twelve all-star games, *see Kobe Bryant NBA & ABA Statistics*, BASKETBALL-REFERENCE.COM, http://www.basketball-reference.com/players/b/bryanko01.html (last visited Aug. 23, 2010); James has appeared in six all-star games, *see Lebron James NBA & ABA Statistics*, BASKETBALL-REFERENCE.COM, http://www.basketball-reference.com/players/j/jamesle01.html (last visited Aug. 23, 2010); Howard has appeared in four all-star games, *see Dwight Howard NBA & ABA Statistics*, BASKETBALL-REFERENCE.COM, http://www.basketball-reference.com/players/h/howardw01.html (last visited Aug. 23, 2010); Stoudemire has appeared in five all-star games, *see Amar's Stoudemire NBA & ABA Statistics*, BASKETBALL-REFERENCE.COM, http://www.basketball-reference.com/players/s/ stoudam01.html (last visited Aug. 23, 2010); McGrady has appeared in seven all-star games, *see Tracy McGrady NBA & ABA Statistics*, BASKETBALL-REFERENCE.COM, http://www.basketball-reference.com/players/m/mcgratr01.html (last visited Aug. 23, 2010); and O'Neal has appeared in six all-star games, *see Jermaine O'Neal NBA & ABA Statistics*, BASKETBALL-REFERENCE.COM, http://www.basketball-reference.com/players/o/onealje01.html (last visited Aug. 23, 2010). Each player also has received at least one maximum-value contract, a common recognition of a player's exceptional ability. *See* Sean Deveney, Op-Ed., *Roy Will Be Worth Every Penny to Blazers*, NBC SPORTS, Aug. 6, 2009, http://nbcsports.msnbc.com/id/32322396/ns/sports-nba/; Stan McNeal, *With Gasol, Lakers Now Have NBA's Best Lineup*, SPORTING NEWS, Feb. 1, 2008, http://www.sportingnews.com/nba/article/2008-02-01/with-gasol-lakers-now-have-nbas-best-lineup. Larry Coon provides an explanation of the NBA salary cap and the maximum-compensation structure. *See* Larry Coon, *Larry Coon's NBA Salary Cap FAQ*, CBAFAQ.COM, http://members.cox.net/lmcoon/salarycap.htm (last visited Aug. 23, 2010).

10. *See Kobe Bryant*, BASKETBALL-REFERENCE.COM, http://www.basketball-reference.com/players/b/bryanko01.html (last visited Aug. 23, 2010); *LeBron James*, BASKETBALL-REFERENCE.COM, http://www.basketball-reference.com/players/j/jamesle01.html (last visited Aug. 23, 2010).

11. *See supra* note 4.

12. *See* Tomasson, *supra* note 6.

13. *See supra* note 4.

A preternaturally gifted high-school basketball player no longer can plan to follow this career model, though. Adopted in advance of the 2006 NBA Draft, the NBA implemented new eligibility rules in 2005.[14] These rules, commonly known as the "age requirement," stipulate that no player is eligible to participate in the League unless he will be nineteen years old during the calendar year of the draft and at least one NBA season will have been completed since his high-school class graduated.[15]

Upon enactment, the NBA's age limitation joined the age requirement of the National Football League (NFL) as one of the only two rules of this kind among American professional sports leagues.[16] No other American sport so severely restricts who can participate and when they are eligible to do so.[17] For the NBA, the newest age rules were merely the latest iteration of an ongoing effort to closely regulate how players enter the League.[18]

Since its adoption in 2005, the NBA's age requirement has created controversy among seemingly all of the League's most notable constituencies—current players, aspiring players, team management, college coaches, fans.[19] An expansive discussion of its efficacy remains ongoing.[20] The inextricable links among the social, educational, and

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14. Jack N.E. Pitts, Jr., Comment, *Why Wait?: An Antitrust Analysis of the National Football League and National Basketball Association's Draft Eligibility Rules*, 51 HOW. L.J. 433, 435 (2008).

15. The age requirement is codified in the collective bargaining agreement negotiated between the NBA and the National Basketball Players Association. *See* NBA COLLECTIVE BARGAINING AGREEMENT, ARTICLE X (2005), *available at* http://www.nbpa.org/sites/default/files/ARTICLE%20X.pdf [hereinafter ARTICLE X]. It reads in pertinent part:

> A player shall be eligible for selection in the . . . NBA Draft . . . [if]: (i) The player (A) is or will be at least 19 years of age during the calendar 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 (or, if the player did not graduate from high school, since the graduation of the class with which the player would have graduated had he graduated from high school) . . . .

Id.

16. Michael A. McCann & Joseph S. Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731, 731 (2006).

17. *Id.*

18. For a discussion of the NBA's history regulating player eligibility, see *id.* at 732–33; *see also* Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L.J. 113, 129–34 (2004).

19. *See, e.g.*, Oscar Robertson, Op-Ed., *The N.B.A.'s Dropouts*, N.Y. TIMES, June 28, 2007, at A21 (former player discussing the age requirement); Michael Rothstein, *Izzo Issues Call for Change*, JOURNAL GAZETTE (Fort Wayne, Ind.), May 29, 2008, http://www.journalgazette.net/apps/pbcs.dll/article?AID=/20080529/SPORTS/805290307 (Michigan State University men's basketball coach Tom Izzo objects to the rule); Thamel, *supra* note 7 (discussing options available to high-school players who do not want to attend college).

20. A representative forum for this discussion can be found online at the prominent basketball blog FreeDarko. *See Celebrate the New Dark Age*, FREEDARKO.COM (Nov. 8, 2009), http://freedarko.blogspot.com/2009/11/celebrate-new-dark-age.html. FreeDarko is a website that examines the events of the NBA in a context that focuses its inquiries upon styles of play; social and cultural factors

commercial elements implicated by the policy, along with the fervor connected to these subjects, have sustained the intense scrutiny focused on an age restriction.[21] The issue retains particular salience because high-school basketball players who do not wish to attend college are now regularly introducing novel solutions to the problem created for them by the rule.[22]

Remaining unresolved amid this impassioned dialogue is an important legal question that this Note will address: could a prospective prep-to-pros player find the legal footing required to challenge the rule successfully?

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expressed through these styles; and the intermingling of social and cultural elements connected to the NBA as expressed through League rules and customs. FreeDarko's staff recently published a well-received book about basketball style. *See* BETHLEHEM SHOALS ET AL., THE MACROPHENOMENAL PRO BASKETBALL ALMANAC (2008). For a discussion of this book, see, for example, Fred Bierman & Benjamin Hoffman, *Q & A: The Voices of FreeDarko Speak Out*, N.Y. TIMES, Nov. 19, 2008, http://www.nytimes.com/2008/11/20/sports/basketball/20dribble.html. In addition, one can see that the objections remain unabated. In the summer of 2009, U.S. Congressman Steve Cohen (D-Tenn.) sent a letter to the NBA, asking Commissioner David Stern to repeal the rule. Cohen has called the rule a "vestige of slavery." Pete Thamel, *Congressman Asks N.B.A. and Union to Rescind Age Minimum for Players*, N.Y. TIMES, June 3, 2009, http://www.nytimes.com/2009/06/04/sports/basketball/04web cohen.html; *see also* Tom Ziller, *NBA Age Limit Isn't Fair, Doesn't Work*, NBA FANHOUSE BLOG, July 22, 2009, http://nba.fanhouse.com/2009/07/22/nba-age-limit-isnt-fair-doesnt-work/.

21. The focus of this Note is the legal framework in which an aspiring prep-to-pros basketball player could mount a challenge to the NBA age requirement. The discussion examines antitrust law and the corresponding legal precedents that a court would have to consider. There are additional questions that one might ask about the NBA age requirement, though. These include whether it creates a disparate racial impact upon those most likely to incur its effects; whether the league engages in a form of paternalism by effectively encouraging basketball players to attend college as a compulsory measure; and whether the NBA should be a monolithic arbiter of how basketball players of exceptional ability can contract for their services. Addressing these and other questions in the thorough fashion each deserves is beyond the ambit of this Note. For some discussion of these questions, see generally McCann, *supra* note 18; Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71 (2008); Jordan Michael Rossen, *The NBA's Age Minimum and its Effect on High School Phenoms*, 8 VA. SPORTS & ENT. L.J. 173 (2008).

22. As a result of the age requirement, highly touted high-school point guard Brandon Jennings chose to play professional basketball in Italy for a year following his graduation from high school in 2008. *See* Thamel, *supra* note 7. He chose this route as an alternative to attending college, the most obvious domestic option and a previously de facto compulsory requirement. *Id*. He returned to the United States for the 2009 NBA Draft and was selected in the first round by the Milwaukee Bucks. *See 2009 NBA Draft*, BASKETBALL-REFERENCE.COM, http://www.basketball-reference.com/draft/NBA_2009.html (last visited Aug. 23, 2010). Following a similar path, prep player Jeremy Tyler chose to leave high school after his junior year and play professional basketball in Israel. Pete Thamel, *Young, Talented and Unsettled Playing Overseas*, N.Y. TIMES, Nov. 8, 2009, at SP1. Tyler intends to return for the 2011 NBA Draft. *Id.*; *see also* Pete Thamel, *U.S. Basketball Prodigy Quits Israeli Pro Team*, N.Y. TIMES, Mar. 19, 2010, at D5, *available at* http://www.nytimes.com/2010/03/20/sports/basketball/20tyler.html. In November 2009, a former high-school phenom, Latavious Williams, chose to play in the National Basketball Development League, an NBA minor league, in lieu of attending college. Dan Shanoff, *Making History Today: Latavious Williams*, ESPN, Nov. 5, 2009, http://espn.go.com/blog/truehoop/post/_/id/10386/making-history-today-latavious-williams. No player had ever before done so. *Id.*

This Note will attempt to answer that question by ultimately arguing that a player could mount a winning legal argument against the NBA's age requirement.

In Part I, this Note will briefly explain the history of the NBA's age rules and general attempts to regulate player eligibility. In Part II, the Note will chronicle previous attempts to challenge various eligibility requirements of the NBA and the partially analogous NFL by relying upon antitrust law. Highlighting the pertinent cases from the NBA and NFL arenas will provide a useful summary of the general legal doctrine governing this niche. Part III of the Note will examine the legal consensus regarding the likelihood of a successful challenge that has emerged since the NBA implemented its latest age requirement. This portion also will take up important questions of whether the litigation process would be so protracted that the petitioner would lose his standing, and why no one has yet sought to challenge the NBA if a legal remedy is available. Finally, Part IV of the Note will propose the avenue along which a prospective NBA draftee might likely pursue a successful contest.

I. A BRIEF HISTORY OF THE NBA DRAFT AND LEAGUE ELIGIBILITY RULES

Over the years, the NBA has relied upon a number of methods[23] to regulate how amateurs join the League.[24] In its early years, the Draft was protracted—teams would select tens of college players at a time, with selection order loosely determined by regular-season record.[25] Seeking to grow its sport's popularity during the League's formative stages, the NBA also allowed for territorial picks from 1947[26] through 1965.[27] To make a

23. A draft has been a common framework, but rules for participation in the process have evolved over time. Most basically, drafts that distribute players across teams entail creating a pool of players from which franchises then take turns selecting. As the ensuing discussion will demonstrate, a draft can serve as a bottleneck through which all prospective new players must pass by imposing specific requirements upon those wishing to qualify for eligibility in the NBA and requiring participation in the draft pool. Similarly, draft rules can mandate that teams participating in the NBA adhere to prescribed procedures for acquiring talent. Given this schematic, a draft becomes the critical venue as a market where sellers (the players) and buyers (teams seeking talent) are united. It might also be thought of as a market where the teams are the sellers (of employment opportunity) and the players are the buyers. But as this Note will explore, the unique talent possessed by those with realistic desires to play in the NBA renders the former characterization a more accurate depiction.

24. McCann, *supra* note 18, at 129.

25. *Id.*

26. The NBA's first season spanned across 1946 and 1947, with the first draft held afterward. *See generally Evolution of the Draft and Lottery*, NBA.COM, http://www.nba.com/history/draft_evolution.html (last visited Aug. 23, 2010); *Fulks' Warriors Star in League's First Season*, NBA ENCYCLOPEDIA PLAYOFF EDITION, http://www.nba.com/history/season/19461947.html (last visited Aug. 23, 2010).

territorial pick was to exchange a first-round draft choice for a player from an NBA team's "immediate area."[28] The NBA viewed this territoriality system as a means for cultivating a fan base by allowing member teams to populate their respective rosters with college players already prominent in their respective markets.[29]

In 1966, the League revised its system, shifting its emphasis from regional-driven commercial growth to greater competition.[30] Hoping to foster some modicum of parity, the NBA abolished territorial picks, distributed the first two picks in the Draft by asking the last-place finishers in each of the two League conferences to flip a coin,[31] and allocated one pick per round to the remaining teams, which picked in an order inverse to their records.[32]

A peril of the coin-flip system was that it provided an incentive for bad teams to lose as many games as possible with the hope of securing, at worst, the second pick in the Draft.[33] To eradicate this practice and the attendant perception that the integrity of the competition was compromised,[34] the NBA Draft switched to a lottery system before the 1985 Draft.[35] In this lottery system, all seven of the NBA teams that did not qualify for the playoffs were given an equal chance to secure the first pick of the Draft and have access to the best amateur talent.[36] The NBA

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27. *Evolution of the Draft and Lottery*, NBA.COM, http://www.nba.com/history/draft_evolution.html (last visited Aug. 23, 2010).

28. *Id*. The "immediate area" concept was meant to capture teams selecting players who played for colleges in the same city or the same media market. For instance, the Boston Celtics used a 1956 territorial draft pick to select Tom Heinsohn, who attended college at Holy Cross in Worcester, MA. *Tom Heinsohn NBA & ABA Statistics*, BASKETBALL-REFERENCE.COM, http://www.basketball-reference.com/players/h/heinsto01.html (last visited Aug. 23, 2010). Heinsohn was inducted into the Basketball Hall of Fame in 1986. *Id*.

29. *See Evolution of the Draft and Lottery*, *supra* note 27.

30. McCann, *supra* note 18, at 128–30. At the time, the Boston Celtics had emerged as a dynastic presence. The Celtics won eight consecutive NBA championships from 1959–1966. *Celtics Win Eighth Straight as Auerbach Retires*, NBA.COM, http://www.nba.com/history/season/19651966.html (last visited Aug. 23, 2010). Not only had a Celtics territorial pick, Tom Heinsohn, become an integral part of Boston's reign, but the NBA generally sought a means through which it could promote greater equality. It sought to foster a more competitive product and believed that changing the draft structure to better distribute talent was a means of accomplishing this goal. McCann, *supra* note 18, at 130.

31. The NBA divides teams into two conferences, the Eastern Conference and the Western Conference. *See generally Team Index*, NBA.COM, http://www.nba.com/teams/ (last visited Aug. 23, 2010).

32. McCann, *supra* note 18, at 129; *Evolution of the NBA Draft and Lottery*, NBA.COM, http://www.nba.com/history /draft_evolution.html (last visited Aug. 23, 2010).

33. McCann, *supra* note 18, at 130.

34. *Id.*

35. *Evolution of the NBA Draft and Lottery*, NBA.COM, http://www.nba.com/history/draft_evolution.html (last visited Aug. 23, 2010).

36. *Id.* The initial lottery format provided for the NBA commissioner to open seven

has reimagined the lottery system in several subsequent iterations as the League has continued to refine the manner through which it can systematically promote equal competition.[37] A constant amid this change, though, has been the Draft's primacy as the threshold that the best players must cross in order to join the NBA.[38]

A series of collective bargaining agreements consummated among the NBA and the National Basketball Players Association (NBPA) since 1964 has preserved the Draft as the exclusive mechanism upon which an amateur of any real value must rely for entrance.[39] An illustrative example is Article X of the current collective bargaining agreement (CBA), which clearly articulates that "no player may sign a Contract or play in the NBA" unless he has been Draft eligible.[40] Teams are free to sign undrafted players to contracts; however, these players enjoy little bargaining leverage because they are only available after having initially been judged to be inferior and unworthy of a draft pick.[41]

Draft eligibility, like the Draft itself, has changed over the years.[42] In accordance with the NBA's initial scheme for fan-base development, the first CBAs stipulated that no player was eligible for the NBA Draft until his college class graduated.[43] The Supreme Court suspended this rule, pursuant to an antitrust challenge, in 1971.[44] From 1971–2005, high-school graduates were immediately eligible for the Draft.[45] Then, the 2005 CBA implemented the latest age requirement.[46] As noted above, current American players[47] are only draft eligible if they will turn nineteen during

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independently sealed envelopes, each filled with a different non-playoff-team's logo. Opening them in reverse order, the commissioner revealed a randomly selected draft order for the first seven picks of the first round. In subsequent rounds, teams picked in inverse relation to their respective records (which is also how playoff teams chose first-round selections). McCann, *supra* note 18, at 130–31.

37. *See Evolution of the NBA Draft and Lottery*, NBA.COM, http://www.nba.com/history/draft_evolution.html (last visited Aug. 23, 2010). *See generally* McCann, *supra* note 18, at 131–34.

38. McCann, *supra* note 18, at 134.

39. *Id.* at 117, 134.

40. ARTICLE X, *supra* note 15, § 1(a).

41. McCann, *supra* note 18, at 134.

42. Andrew M. Jones, *Hold the Mayo: An Analysis of the Validity of the NBA's Stern No Preps to Pros Rule and the Application of the Nonstatutory Exemption*, 26 LOY. L.A. ENT. L. REV. 475, 478 (2006).

43. *Id*.

44. Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204 (1971). This case will be discussed with greater detail in Part II of this Note. *See infra* notes 87–96.

45. *See generally Evolution of the Draft and Lottery*, NBA.COM, http://www.nba.com/history/draft_evolution.html (last visited Aug. 23, 2010).

46. *See generally* McCann, *supra* note 18.

47. There are additional rules for international players who seek to join the NBA but have not gone through the American education system. An international player is Draft eligible if: (a) he will be at least twenty-two-years-old during the calendar year of the Draft; or (b) he will be nineteen-years-old

the calendar year of the Draft and if one year has elapsed since their high-school class's graduation.[48] Irrespective of their competency or preparation, the most-talented amateur basketball players—those like Garnett, Bryant, and James—seeking to maximize their ability and earning potential must play by the NBA's Draft rules.[49]

NBA Commissioner David Stern was the most prominent advocate for the current age restrictions.[50] When the latest eligibility regime was put in place, Stern argued that an age minimum helped to protect impressionable high-school talents from player agents and other third parties who may generally seek to exploit athletes for their own gain.[51] Stern said that a year, or more, in college would help basketball players develop stronger skills on and off the court.[52] Furthermore, he professed that the NBA was concerned with how it was viewed by fans who wanted players who could engage their local communities and comport themselves in a mature, responsible fashion that reflected positively upon the League.[53]

Criticism of the NBA's latest age requirement has been wide ranging.[54] Under the auspices of protecting lesser high-school talents from a misguided decision to forgo college, the rule appears to wholly neglect the countervailing experiences of Garnett, Howard, and other prep-to-pros NBA players who have thrived.[55] Far from an altruistic gesture, the minimum one-year eligibility interregnum appears to force college education upon a population that may not otherwise choose to pursue that path.[56] Yet college is not compulsory for other groups of people.[57] Similarly, the age requirement arguably elevates the economic interests of universities and their corporate partners over those of the athletes by

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during the calendar year of the Draft and has signed a contract with a non-NBA professional team in the United States; or (c) he will be nineteen-years-old during the calendar year of the Draft and has expressed his desire to be selected in the Draft in writing at least sixty days prior to the Draft. *See* ARTICLE X, *supra* note 15, § 1 (b)(ii)(G).

48. *Supra* note 15.

49. McCann, *supra* note 18, at 134.

50. Jones, *supra* note 42, at 479.

51. Desmond Conner, *Bynum Has a Test Left*, HARTFORD COURANT, May 29, 2005, at E5.

52. Marc J. Spears, *NBA Leaders: Q&A NBA*, DENVER POST, Feb. 11, 2005, at D1.

53. Harvey Araton, *There Are Different Ways to Season Raw Talent*, N.Y. TIMES, Feb. 21, 2005, at D1.

54. *See infra* notes 55–58 and accompanying text.

55. Robertson, *supra* note 19.

56. William C. Rhoden, *Growing to Appreciate the N.B.A.'s Age Limit*, N.Y. TIMES, Mar. 20, 2007, at D3.

57. *Supra* notes 7, 22. Though playing abroad or in the NBA's developmental minor league are options that some players have embraced, these are still largely uncommon choices. Instead, most high-school players who want to continue playing basketball and maintain their skills are forced to attend college, where there is guaranteed competition and opportunity to play.

providing a strong incentive for prep stars to enroll in college for at least a season.[58] Rather than earning a wage as professionals, players are forced into amateurism, forgoing income but nonetheless generating revenue for the colleges and universities whose basketball games are valuable commodities among broadcasters and merchandisers.[59]

For an aspiring professional basketball player who would seek to challenge the 2005 eligibility rules and go straight from high school to the NBA, choosing among these far-reaching, varied criticisms is an important process. That is, it would be incumbent upon a qualified high-school basketball talent to mount the appropriate challenge to the rule, incorporating these arguments into an adequate legal framework. History is instructive in attempting to identify the appropriate legal path forward.

II. PREVIOUS ANTITRUST CHALLENGES TO ELIGIBILITY RULES IN THE NBA AND NFL

The only other American sports league with a stringent age standard akin to the NBA's is the NFL.[60] NBA and NFL requirements governing draft and participation eligibility have long, heavily litigious histories.[61] Examining the legal issues that fueled these cases helps to clarify what legal options remain available today.

A. Antitrust and Collective Bargaining: An Overview

Historically, those attempting to challenge NBA and NFL eligibility restrictions have alleged that the rules violate the antitrust law first enacted as the Sherman Act.[62] The Sherman Act sought to eradicate restraints of trade[63] and unlawful restrictions on freedom to contract.[64] Analyzing

58. McCann & Rosen, *supra* note 16, at 732–33.
59. *Id.*
60. *See supra* note 16 and accompanying text.
61. *See* Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204 (1971) (invalidating NBA's age requirement and prohibiting NBA from taking action against team that signed Spencer Haywood, who did not meet previous age requirement); Clarett v. Nat'l Football League, 369 F.3d 124 (2d Cir. 2004) (overturning lower court and upholding NFL age requirement for draft eligibility); Wood v. Nat'l Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987) (upholding collectively bargained provisions that implemented a seniority system, reinforced draft process, limited salaries, and applied rules to prospective union members); Mackey v. Nat'l Football League, 543 F.2d 606 (8th Cir. 1976) (striking down unilateral rule established outside of collective bargaining, which limited player movement and salary); Clarett v. Nat'l Football League, 306 F. Supp. 2d 379 (S.D.N.Y. 2004) (holding that NFL age-eligibility rules were illegal restraint of trade); Denver Rockets v. All-Pro Mgmt., 325 F. Supp. 1049 (C.D. Cal. 1971) (invalidating age-based NBA draft eligibility rules).
62. Sherman Act of 1890, 15 U.S.C. § 1 (2006).
63. *See* Standard Oil Co. v. United States, 221 U.S. 1, 59 (1911).

whether the Sherman Act has been violated requires that a court apply a "rule of reason" test when considering if a restraint is reasonable.[65] The test inquires into whether the "restraint imposed" promotes or destroys competition by weighing factors that include the details of the industry, the impact of a regulation on a specific party, the expected impact on the industry as a whole, and the circumstances that motivated the alleged restraint.[66] Certain restraints, including group boycotts, may be deemed per se unreasonable, independent of any balancing.[67] The majority of legal challenges against the NBA and NFL pursuant to antitrust claims have argued that league eligibility policies, such as age requirements, are tantamount to group boycotts.[68]

Although finding group boycotts to be per se illegal, the Supreme Court nonetheless created an exception to the rule in 1963.[69] Upon reaffirming that group boycotts are a per se violation of antitrust rules "absent any justification derived from the policy of another statute or otherwise,"[70] it went on to carve out a safe harbor for such concerted action.[71] A group boycott will be permitted if: "1) the collective action is required by the structure of the industry, 2) the restraint is reasonably implemented, and 3) the procedural safeguards exist 'to prevent unnecessary and arbitrary application.'"[72] An alleged restraint that passes this test will then be considered under rule-of-reason analysis.[73] Later, in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*,[74] the Court further limited findings of per se illegality if a petitioner failed to "allege 'that the challenged activity falls into a category likely to have predominantly anticompetitive effects.'"[75] The circumscribed manner in which the Court now will apply its per se analysis means that a

64. McCann, *supra* note 18, at 141.
65. Bd. of Trade v. United States, 246 U.S. 231, 238–39 (1918).
66. *Id*.
67. Fashion Originators' Guild v. FTC, 312 U.S. 457, 467–68 (1941).
68. *See supra* note 56; *see also* Jones, supra note 42, at 491.
69. Silver v. N.Y. Stock Exch., 373 U.S. 341, 347–49 (1963).
70. Jones, *supra* note 42, at 489.
71. *Silver*, 373 U.S. at 347–50.
72. Jones, *supra* note 42, at 489 (quoting Peter Altman, Note, *Stay Out for Three Years After High School or Play in Canada—And for Good Reason: An Antitrust Look at* Clarett v. National Football League, 70 BROOK. L. REV. 569, 578 (2004)).
73. Jones, *supra* note 42, at 489–90.
74. 472 U.S. 284, 298 (1985).
75. Jones, *supra* note 42, at 490 (quoting *Nw. Wholesale Stationers*, 472 U.S. at 298); *see also* Jones, *supra* note 42, at 490 n.152 (quoting FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 458–59 (1986) ("[T]he category of restraints classed as group boycotts is not to be expanded indiscriminately," and "we have been slow to . . . extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.").

petitioner must demonstrate an anticompetitive effect, or else the alleged group boycott will be judged under rule-of-reason analysis.[76] As noted, that analysis is an inexact calculus, which weighs multiple factors while assessing a specific economic sector.[77]

The federal preference for collective bargaining has served as a countervailing weight in this area of jurisprudence; courts must honor both the Sherman Act's interest in protecting commerce and the policy benefits promoted by collective bargaining. When confronted by player allegations of illegal group boycotts, courts have had to balance the relative merits of the Sherman Act's free-commerce predisposition with the efficiency and harmony promoted by the latitude afforded collective bargaining.[78] This public-policy deference toward collective bargaining can be seen in both the National Labor Relations Act[79] and the Norris-LaGuardia Act,[80] which, in tandem, help to insulate collectively bargained agreements from judicial antitrust scrutiny.[81] However, these federal statutes did not cover CBAs struck through negotiation between unions and nonemployer third parties—such as sports leagues—as opposed to sports teams.[82] To protect these compacts, the Supreme Court created what is commonly known as the "nonstatutory exemption" to the Sherman Act.[83]

Under the nonstatutory exemption, courts will allow restraints on trade "so long as such restraints operate primarily in a labor market characterized by collective bargaining."[84] However, if the collective bargaining is not approved or protected by the nonstatutory exemption—if it is found to be a restraint on the business market, not specifically the labor market—antitrust law will apply.[85] While the nonstatutory exemption has been addressed in the sports context, the exact scope of the rule is still unclear.[86]

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76. Jones, *supra* note 42, at 490.
77. *See supra* note 63.
78. Jocelyn Sum, Note, Clarett v. Nat'l Football League, 20 BERKELEY TECH. L.J. 807, 810 (2005).
79. 29 U.S.C. §§ 151–169 (2006).
80. 29 U.S.C. §§ 101–115 (2006).
81. Milk Wagon Drivers' Union v. Lake Valley Farm Prod., Inc., 311 U.S. 91, 101–03 (1940).
82. Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975).
83. *Id.*
84. Clarett v. Nat'l Football League, 369 F.3d 124, 134 n.14 (2d Cir. 2004) (*Clarett II*) (quoting Brown v. Pro Football, Inc., 50 F.3d 1041, 1056 (D.C. Cir. 1995)), *aff'd*, 518 U.S. 231 (1996).
85. *Clarett II*, 369 F.3d at 125.
86. *See* Rhoden, *supra* note 56.

B. An Early Understanding of the Nonstatutory Labor Exemption in Sports

Haywood v. National Basketball Association, decided in 1971, was the earliest of the prominent cases to challenge a court's application of these competing legal policies.[87] Spencer Haywood was a high-school basketball star who played in college for two years before signing to play for the Denver Rockets of the American Basketball Association (ABA).[88] Haywood went on to shine in the ABA.[89] When he turned twenty-one years old, still before his high-school class would have graduated from college, he claimed fraudulent inducement to break his Denver contract and accept one with the NBA's Seattle SuperSonics.[90] Ultimately, the NBA threatened to void Haywood's contract with Seattle, claiming that he was ineligible to play in the NBA at the time he signed the contract because League rules stipulated that players were only eligible after their respective high-school classes had graduated from college.[91] Haywood sued the League, claiming that its draft rules constituted a group boycott that violated the Sherman Act.[92]

The Court issued an injunction that suspended the NBA's age requirement.[93] Justice Douglas endorsed the district court's reasoning—the age requirement deprived players like Haywood of a chance to maximize their skills and earning potential by unduly restricting them during their athletic primacy.[94] The case introduced the concept of challenging an age requirement.[95] There is an important distinction to note, however: though the NBA had begun collectively bargaining with the players' union at the time that Haywood brought suit, the applicable age requirement in the case had not been originally adopted through the CBA.[96] This Note will return to this critical detail in Part II.C below.

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87. 401 U.S. 1204 (1971).
88. Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1059 (C.D. Cal. 1971).
89. *Id.*
90. *Haywood*, 401 U.S. at 1204–05.
91. *Id.*
92. *Id.*
93. *Id.* The age requirement was later ruled per se illegal by a lower court. *Denver Rockets*, 325 F. Supp. at 1067.
94. *Haywood*, 401 U.S. at 1205–06.
95. *McCann*, *supra* note 18, at 131.
96. Jones, *supra* note 42, at 494 ("While *Denver Rockets* is significant, it is important to note that it dealt with a rule that was not the result of collective bargaining.").

C. *The* Mackey *Test: A Framework for Applying the Nonstatutory Exemption*

Not long after *Haywood*, there was a critical NFL case that ran along a parallel legal track and set precedent for applying the nonstatutory exemption to sports. In *Mackey v. National Football League*,[97] NFL players challenged the league's "Rozelle Rule,"[98] which required a team signing a free agent to compensate the player's former team.[99] "If the teams could not agree on compensation, the commissioner could step in and award the disadvantaged team draft picks or players from the poaching team's roster."[100] The players alleged that the commissioner's discretion embodied in the "Rozelle Rule"[101] made teams hesitant to sign free agents.[102] Persuaded by the players, the district court reasoned that fear of potentially surrendering too much compensation upon the commissioner's review of a free-agent signing would discourage owners, impeding the free movement of labor and resources.[103] This was deemed an illegal restraint of trade.[104]

In response to the players' position and the district court's ruling, the Eighth Circuit created a three-prong test to determine when the nonstatutory exemption could be invoked.[105] The court inquired into whether: (1) the restriction "primarily affect[ed] only the parties to the collective bargaining relationship"; (2) federal labor policy was implicated only to exempt "mandatory subject[s] of collective bargaining"; and (3) the bargaining was conducted at arm's length.[106] Using this analytical framework, the Eighth Circuit found that the Rozelle Rule failed the third prong because the commissioner had unilaterally implemented the rule.[107] Despite imposing "significant restrictions on players," the Rozelle Rule

97. 543 F.2d 606 (8th Cir. 1976).
98. *Id.* at 609. The rule was named for former NFL Commissioner Pete Rozelle.
99. *Id.* at 609 n.1.
100. Jones, *supra* note 42, at 495.
101. *Id.*
102. *Id*.
103. *Mackey*, 543 F.2d at 618 ("The district court found that the Rozelle Rule operates to significantly deter clubs from negotiating with and signing free agents. By virtue of the Rozelle Rule, a club will sign a free agent only where it is able to reach an agreement with the player's former team as to compensation, or where it is willing to risk the awarding of unknown compensation by the Commissioner. The court concluded that the Rozelle Rule, as enforced, thus constituted a group boycott and a concerted refusal to deal, and was a *per se* violation of the Sherman Act.").
104. *Id*.
105. *Id.* at 614.
106. *Id.*
107. *Id.* at 615–16.

was adopted and perpetuated without the scrutiny of bargaining among the affected parties.[108] Rozelle's action improperly deprived the players of a quid-pro-quo relationship.[109] Failing the test, the NFL lost the protection of the nonstatutory exemption, and the Rozelle Rule was found to be a violation of the Sherman Act.[110] Reaching this decision, the court noted that *Mackey* was taking its place alongside other sports-focused and non-sports-focused litigation that had been judged as antitrust violations for similar reasons.[111]

In *Wood v. National Basketball Association*,[112] the *Mackey* test was invoked when the court had to confront related questions in a basketball context.[113] The NBA's Philadelphia 76ers drafted Leon Wood in 1984.[114] Due to League salary cap requirements, Philadelphia could only offer Wood a one-year contract for $75,000.[115] However, it assured Wood that the team would ultimately enter into a long-term agreement with him for more money.[116] Wood rejected this tender offer and the accompanying long-term promise, opting instead to sue the NBA.[117] Wood claimed that the salary cap and draft structure ran afoul of the Sherman Act.[118]

The Second Circuit ultimately heard Wood's case.[119] Wood alleged that the NBA's college-draft system and rigid salary structure violated the Sherman Act.[120] He argued that the governing strictures prevented him from achieving full market value, in violation of antitrust jurisprudence.[121] He also said that the NBA's policies unfairly disadvantaged new

108. *Id.* at 616. The court did not explicitly draw a connection to the Spencer Haywood cases, *see supra* notes 87–96; however, an obvious similarity among the circumstances in *Mackey* and those surrounding *Haywood* was that the age requirement that Haywood challenged had been implemented by the NBA outside of a collective bargaining agreement.

109. *Mackey*, 543 F.2d at 616.

110. *Id.*

111. *Id*. at 617–18 (citing cases).

112. Wood v. Nat'l Basketball Ass'n, 602 F. Supp. 525 (S.D.N.Y. 1984).

113. *Id*.

114. *Id.* at 526.

115. *Id*. at 526–27. At the time, the NBA had just implemented a salary cap, which provided that teams exceeding the cap could sign first-round draft picks to one-year contracts for a maximum of only $75,000. Philadelphia's salary obligations put it over the cap, so it offered Wood the deal prescribed by league rules, while attempting to preserve the ability to engage in the transactions necessary to enter into a long-term deal. *Id.* at 527 ("Williams asserts that Philadelphia was prepared to seek a way around the salary cap in order to negotiate a multi-year contract with Wood but could not get Slaughter to work out the terms.").

116. *Id*. at 527.

117. *Id.*

118. *Id.* at 526.

119. Wood v. Nat'l Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987).

120. *Id*. at 956.

121. *Id*. at 959.

employees and were tantamount to an illegal seniority system.[122] The Second Circuit rejected Wood's claims.[123] It acknowledged the balancing demanded by antitrust and collective-bargaining considerations while upholding the federal policy preference for collective organization and the terms stipulated in the NBA's CBA.[124] Disagreeing that the policies were illegal because they disadvantaged new employees, the Second Circuit held that seniority systems[125] are the occasional legal results of various elements codified in collectively bargained agreements.[126] Significantly, the court also rejected Wood's claim that, as a draftee, he was outside of the bargaining unit and, therefore, exempt from the terms of its CBA.[127] The court noted that it is commonplace for CBAs to impact workers beyond present members of the union[128] at the time when a CBA is adopted.[129] The Second Circuit concluded that Wood's claims had to be rejected because finding in his favor would subvert federal labor policy.[130] It acknowledged the *Mackey* case as one whose decision had a similar outcome.[131]

D. The Evolution of Mackey *Analysis in Recent Years*

Since *Mackey*, the Eighth Circuit's three-pronged nonstatutory test has become a common standard across circuits, and it has been applied in sports labor contexts akin to that presented in the *Wood* case.[132] A notable

122. *Id*. at 960.
123. *Id*. at 962.
124. *Id.* at 961–62.
125. *Id*. at 960. The Second Circuit drew a parallel to industrial contexts, such as the automotive industry, where CBAs are common, while finding that collectively bargained terms of employment that tie promotions, layoffs, and salaries to seniority are legal. *Id.*
126. *Id*.
127. *Id*. at 960–61.
128. *Id*. at 960. Similar to its reasoning about seniority systems, *see supra* note 125, the Second Circuit ruled that in industrial contexts, legal CBAs are contemplated to apply to both those in the bargaining unit and future "employees" who might later join the union. *Wood*, 809 F.2d at 960 ("[N]ewcomers in the industrial context routinely find themselves disadvantaged vis-a-vis those already hired. A collective agreement may thus provide that salaries, layoffs, and promotions be governed by seniority . . . even though some individuals with less seniority would fare better if allowed to negotiate individually."). The court also reasoned that the National Labor Relations Act defines "employee" in a manner that allows for this interpretation. *Id*.
129. Jones, *supra* note 42, at 500 ("Finally, the court rejected Mr. Wood's claim that he was outside the bargaining unit by noting that it is commonplace for CBAs to impact workers beyond members of the union signing the CBA.").
130. *Id.*
131. *Wood*, 809 F.2d at 962 n.6.
132. Kieran M. Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption In Professional Sports*, 94 COLUM. L. REV. 1045, 1058 (1994); *see also* McCourt v. Cal. Sports, Inc., 600 F.2d 1193 (6th Cir. 1979) (applying *Mackey* in a hockey context).

development arose in the Second Circuit, though, as it arguably turned away from *Mackey* in a recent decision.[133] Former Ohio State University running back Maurice Clarett sought to have the NFL's eligibility regime overturned as violative of the Sherman Act. He wanted to enter the draft earlier than allowed under the NFL's age requirement.[134] After winning in district court,[135] Clarett lost in front of the Second Circuit.[136] Declining Clarett's request for relief, the circuit court reversed the district court, while rejecting the *Mackey* test.[137] The Second Circuit declared that it has "never regarded the Eighth Circuit's test in *Mackey* as defining the appropriate limits of the nonstatutory exemption."[138] The Circuit noted that the issue to decide was whether exposing the NFL draft eligibility rules to antitrust analysis would "'subvert fundamental principles of our federal labor policy.'"[139] It answered affirmatively, invoking *Mackey* factors and broadening their scope, while nonetheless rejecting the formal test.[140]

In effect, the Second Circuit deemed the conventional *Mackey* test too narrow and argued against the manner in which the test was applied commonly, while still considering its basic elements.[141] Doing more to accommodate the federal preference for collective bargaining, the Second Circuit construed the idea of mandatory CBA subjects broadly,[142] capturing not only employment terms that are explicitly negotiated, but also those that implicate the negotiation of standard agreements.[143] For example, the circuit dismissed Clarett's argument that the NFL's mandatory three-year waiting period between high school and draft eligibility was arbitrary and beyond the scope of a CBA by reasoning that draft eligibility implicates labor supply and job availability, drawing such a rule into the purview of a concerned bargaining unit.[144] Cumulatively, the Second Circuit adopted a broader understanding of the *Mackey* factors

133. Jones, *supra* note 42, at 503.
134. Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 382 (S.D.N.Y. 2004) (*Clarett I*). NFL rules stipulate that a player is only eligible for the Draft three years after his high-school class has graduated. *Id.*
135. *Id.*
136. Clarett v. Nat'l Football League, 369 F.3d 124 (2d Cir. 2004) (*Clarett II*).
137. *Id.* at 125.
138. *Id.* at 133.
139. *Id.* at 138 (quoting Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 959 (2d Cir. 1987)).
140. Jones, *supra* note 42, at 504–05.
141. *Id*.
142. *Id*.
143. *Clarett II*, 369 F.3d at 141–43.
144. *Id*.

when assessing professional sports.[145] The court reasoned that critical analysis of the unique working conditions in the NFL, and in other sports leagues, expanded the parameters of the nonstatutory labor exemption.[146] As such, it rejected a rigid adherence to *Mackey* and instead adopted a more capacious reading of the elements that must be considered when determining if antitrust violations have been committed.[147]

III. SHOULD HIGH-SCHOOL PLAYERS ABANDON HOPE? EXISTING LEGAL CONSENSUS

The Second Circuit's *Clarett* decision ("*Clarett II*")[148] is the most recent and most prominent case from the line of antitrust challenges brought against the NBA and NFL. The Second Circuit was critical of the *Mackey* test,[149] and its broad opinion has led several commentators to question whether an aspiring basketball player could reasonably hope to win an age-requirement case.[150] Some legal observers who think a successful challenge is unlikely cite the *Clarett II* decision's unique legal analysis as their reason.[151] Others believe that the case expanded the application of the nonstatutory exemption under *Mackey*, regardless of the Second Circuit's language challenging the test's preeminence.[152] Those who disagree and believe that challenging the NBA's age requirement remains a viable prospect have argued that the NBA and NFL are not fully analogous,[153] primarily because there is a growing body of evidence that supports the efficacy of high-school players entering the NBA upon graduation.[154] Both sides of this discussion are explored below. So, too, are questions about why no one has yet to challenge the NBA, and how the landscape might change should a court ever return to the recently decided

145. *See supra* note 140.
146. *Id*.
147. *Id*.
148. *Clarett II*, 369 F.3d at 124.
149. *Id.* at 133.
150. Jones, *supra* note 42, at 510.
151. *Id*. at 511.
152. *Id*. at 511–13
153. McCann & Rosen, *supra* note 16, at 757. This symposium piece suggests several reasons why there may be optimism on behalf of prospective early entrants into the NBA who would seek to challenge the rules. The article is half scholarly research and half author dialogue captured at the symposium. This is notable because several ideas shared at the discussion are supported by the accompanying research; however, it is an admittedly attenuated connection in the context of the paper. *Id.* at 745.
154. *Id*. at 754.

antitrust question about whether a sports league and its member teams can be regarded as a single entity.

For those who believe that *Clarett II* foreclosed or significantly impaired the possibility of successfully challenging the NBA age requirement,[155] the Second Circuit's decisions to not only reject the *Mackey* analysis of the lower court (*"Clarett I"*),[156] but also to defend vigorously the federal labor policy protected by application of the nonstatutory exemption, are compelling reasons.[157] *Clarett II* rejected the district court's opinion that draft-eligibility rules are not covered by any of the three *Mackey* prongs.[158] Instead, the circuit court found traditional *Mackey* analysis to yield a certain myopia that it discarded in lieu of considering how the facts of the case could be reconciled with standing federal policy.[159] The circuit concluded that draft-eligibility rules can be considered a part of the collective-bargaining process.[160] It also noted that to find such rules to be unlawful concerted action would undermine the preference for bargaining, the freedom of bargaining units to contract, and "the widespread use of multi-employer bargaining units."[161] *Clarett II* provided a strong, direct statement that CBAs governing professional sports advance the federal government's preference for that form of labor relations.[162] According to this Second Circuit reasoning, a challenge to the NBA's Article X would be a difficult case to win.[163]

Others who regard challenging the NBA's age requirement as a losing proposition point to *Clarett II* precisely *because* of how it treats *Mackey*.[164] Rather than focusing on the court's criticism, a careful reading of the opinion yields that the Second Circuit nonetheless cleaved to the general categories that the *Mackey* test considers.[165] In doing so, the

155. Jones, *supra* note 42, at 510.

156. Christian Dennie, *From Clarett to Mayo: The Antitrust Labor Exemption Argument Continues*, 8 TEX. REV. ENT. & SPORTS L. 63, 77 (2007).

157. *See* Jones, *supra* note 42, at 513; Pitts, *supra* note 14, at 443.

158. Clarett v. Nat'l Football League, 369 F.3d 124, 133 (2d Cir. 2004) (noting that the district court had relied upon the Eighth Circuit's *Mackey* analysis to find an age requirement beyond collective bargaining before reprimanding: "We, however, have never regarded the Eighth Circuit's test in *Mackey* as defining the appropriate limits of the non-statutory exemption.").

159. *Id.* at 134–36.

160. *Id*. at 134–35.

161. *Id*. at 135.

162. Jones, *supra* note 42, at 506; McCann & Rosen, *supra* note 16, at 762. Additionally, it is worthwhile to consider the Second Circuit's own reasoning—it identified other cases in which a strong preference for collective bargaining was upheld to grant greater latitude to such agreements. *See Clarett II*, 369 F.3d at 134 n.14 (citing cases).

163. Jones, *supra* note 42, at 510.

164. *Id.* at 503.

165. *Id.*

Second Circuit may have broadened the scope of permissible conduct that would pass *Mackey* scrutiny and allow for the lawful application of the nonstatutory exemption.[166] Specifically, the court said that prospective employees (amateur players) were contemplated as part of the bargaining unit when the CBA was consummated;[167] that draft eligibility can be connected to wages and job availability, bringing eligibility requirements into the range of issues that are the typical subjects of collective bargaining;[168] and that even rules incorporated implicitly were considered to be appropriately negotiated when they accompanied an otherwise lawful arm's-length agreement.[169] By criticizing *Mackey* but nonetheless fitting more permissible conduct into its framework, the court may have allowed for a broader application of the test that more widely protects concerted activity undertaken while collectively bargaining.[170]

Despite the law's strong preference for collective bargaining and the latitude under the nonstatutory exemption that draft-eligibility rules are afforded, not all observers approach a potential age-requirement contest with the same wariness.[171] Proponents of challenging the NBA's age requirement believe that the substantial success enjoyed by high-school prodigies upon arriving in the League provides tangible evidence that was absent when the *Clarett II* court contemplated the impact of overturning the NFL's age requirement.[172] They argue that the athletic and commercial success enjoyed by Garnett, James, Bryant, and players of that ilk is distinct;[173] that the absence of an adequate substitute unfairly impairs their earning potential;[174] and that the primacy of the NBA as the premier basketball venue makes these players uniquely situated.[175] Similarly, while federal labor policy may generally encourage collective bargaining, and while it may prefer a liberal construal of the nonstatutory exemption, there is a material difference between labor negotiations in a field of equally situated competitors (such as the automotive industry) and a field in which there is only one de facto employer (as in basketball and the NBA).[176]

166. *Id.* at 516.
167. *Clarett II*, 369 F.3d at 140–41.
168. *Id.*
169. *Id.* at 141–43.
170. Jones, *supra* note 42, at 516.
171. McCann & Rosen, *supra* note 16, at 756–58.
172. *Id*.
173. Michael McCann, *Legal Aftermath of the New NBA Age Limit*, SPORTS LAW BLOG, Jan. 4, 2006, http://sports-law.blogspot.com/2006/01/legal-aftermath-of-new-nba-age-limit.html.
174. McCann & Rosen, *supra* note 16, at 757.
175. *See generally* McCann, *supra* note 18.
176. McCann, *supra* note 173.

Proponents of challenging the NBA's Article X believe that some circuits may be more amenable to a challenge than others,[177] and that despite the Second Circuit's ruling in *Clarett II*, an aspiring NBA player might argue that the age requirement purposely and exclusively addresses individuals who are not members of the bargaining unit.[178]

Amid these mixed opinions about the legal efficacy of challenging the NBA's Article X, the rule has been free of formal contest since it was ratified in 2005.[179] Some likely impediments are readily apparent. Where a case brought in the Second Circuit—which has already protected the nonstatutory exemption with a forceful and broad decision—or another circuit inclined to adopt that reasoning, a court might easily cleave to precedent and rule against the challenge.[180] In such a jurisdiction, the court might adopt the *Clarett II* reasoning and find that whichever elements of the challenge were argued to be differentiating did not properly demonstrate any sort of illegal concerted activity.[181] For instance, a court following the Second Circuit would likely find that age eligibility primarily affected parties to the collective bargaining agreement because eligibility for a fixed number of jobs is directly tied to working conditions of the extant workforce; that eligibility to work is a threshold question that makes it a mandatory subject of employment; and that any CBA consummated by a union and a multiemployer unit, like a sports league, would be achieved at arm's length. Similarly, there may not yet have been a high-school player both talented enough to harbor realistic aspirations[182]

177. McCann & Rosen, *supra* note 16, at 756–57. In particular, the Sixth Circuit has been cited as a jurisdiction in which Article X might fail to earn the nonstatutory exemption. *Id.* There is no clearly articulated reason why the Sixth Circuit appears particularly amenable, though. *Id.*

178. *Id.* at 757. *See also* McCann, *supra* note 173.

179. There is no recognized case of a player challenging the NBA age requirement since it was adopted in 2005.

180. Pitts, *supra* note 14, at 446–51.

181. *Id*.

182. No literature definitively argues which evidence a petitioner would have to adduce to prove his basketball competency or the likelihood of his success. However, several pieces of scholarship have discussed the higher success rate and earning potential of gifted high-school players, relative to those who enroll in college and take a more traditional path to the NBA. *See generally* McCann, *supra* note 18, at 143–73; Pitts, *supra* note 14, at 573–74; Nicholas E. Wurth, *The Legality of an Age-Requirement in the National Basketball League After the Second Circuit's Decision in* Clarett v. NFL, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 103 (2005). Oft-cited statistics meant to demonstrate the unique position of prep phenoms include the average earnings of players such as LeBron James and Kobe Bryant, and the on-court success that players have achieved. *See supra* notes 4, 9. In McCann's *Illegal Defense*, he also produced data that demonstrated the markedly increased earning power of high-school players. McCann, *supra* note 18, at 164–73. His data showed that even when players who went straight from high school to the NBA and then failed were included in averages for high-school players, the average salary of prep-to-pros players was nearly identical to those of players who often had five- and six-year head starts. *Id.* at 165. He argued for the competency of the high-school players

of replicating the success enjoyed by Garnett and his cohorts, and also situated in a forum or jurisdiction that would allow for fresh consideration of the issues entailed in challenging the age requirement.[183] Trepidation engendered by the cost of litigation and a presumption of likely defeat also may have dissuaded such a situated player in the first place.[184]

Another issue for consideration is that perhaps no one has challenged the rule because the legal procedure entailed in doing so would be sufficiently protracted to render the ultimate judgment moot. Due to concerns about standing and ripeness, a prospective prep-to-pros basketball player would likely not file a lawsuit challenging the age requirement until he had completed his junior year of high school.[185] From the time of filing until a final, post-appeal decision,[186] the case could take months or years. When Maurice Clarett sought to challenge the NFL's decision, he filed his case in September, preceding the draft in which he sought to participate.[187] His case was not finally decided by the Second Circuit until the end of May in the following year, roughly a month after the NFL held the draft on which Clarett had set his sights.[188]

Maurice Clarett was a celebrated and decorated college athlete.[189] When he left high school and enrolled at Ohio State University, he was touted as an elite football prospect.[190] In his first season, he helped lead his team to an undefeated campaign and a national championship.[191] Despite his notoriety and the general time sensitivity of his request, Clarett's case did not receive special treatment. Though just conjecture, it seems

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and also for the premium that is placed on joining the NBA as soon as possible. *Id.* at 224. Removing from the average high-school wages those players who were not in the NBA for a meaningful amount of time placed the high-school-player's average well above a normal player's. *Id.* at 165–66.

183. McCann & Rosen, *supra* note 16, at 767.

184. *Id.*

185. *Id.*

186. Clarett initially filed his challenge on September 23, 2003. Complaint, Clarett v. Nat'l Football League, 306 F. Supp. 2d 379 (S.D.N.Y. 2004) (No. 03 Civ. 7441). The Second Circuit decision in his case was issued on May 24, 2004. Clarett v. Nat'l Football League, 369 F.3d 124, 124 (2d Cir. 2004) (*Clarett II*). The 2004 NFL Draft was held on April 24–25, 2004. Judy Battista, *Rebuilding, Jets Fill Lineup with Youth*, N.Y. TIMES, Apr. 26, 2004, at D4; Lynn Zinser, *Manning's Day Gets Miles Better After a Trade to the Giants*, N.Y. TIMES, Apr. 25, 2004, at 8–1.

187. Complaint, Clarett v. Nat'l Football League, 306 F. Supp. 2d 379 (S.D.N.Y. 2004) (No. 03 Civ. 7441).

188. *Clarett II*, 369 F.3d at 124.

189. *See* McCann & Rosen, *supra* note 16, at 740; *see also Buckeyes Upset Miami in Double-OT, Fiesta Bowl Thriller*, CNN SPORTS ILLUSTRATED, Jan. 4, 2003, http://sportsillustrated.cnn.com/football/college/2002/bowls/news/2003/01/03/fiesta_bowl_ap/.

190. Gary Housteau, *Clarett Enrolled, Raring to Go at OSU*, RIVALS.COM, Jan. 14, 2002, http://footballrecruiting.rivals.com/content.asp?CID=75085.

191. McCann & Rosen, *supra* note 16, at 740.

reasonably fair to assume that a high-school basketball player's petition to enter the NBA Draft before meeting its eligibility requirements would be treated similarly to Clarett's case.[192] Were a petition filed in July, the *Clarett* case suggests that a final determination might not be made until January, at the earliest. The NBA Draft, annually held in late June, requires entrants to formally declare their desire for inclusion by the middle of May in the same calendar year.[193] This would leave a four-month window for a prospect to receive a judgment and, potentially, prepare for the draft. Were there delays during the litigation process, that window would begin to close.

If a decision were delayed until after the targeted draft, the challenge would be moot, both practically and legally. At that point, the prospective player would not be eligible to join the NBA until the following year, when he would have first become eligible had he not challenged the age requirement.[194]

Recently, a variable that could affect any analysis of a challenge to sports-league age requirements[195] was introduced by *American Needle v. National Football League*.[196] Arguing before the Supreme Court, clothing manufacturer American Needle asserted that the NFL is a collection of thirty-two individual teams, and that the league's exclusive merchandise contract with the rival manufacturer Reebok was tantamount to an illegal group boycott under the Sherman Act.[197] The NFL countered that it was actually a single entity and, therefore, did not fall under Sherman Act scrutiny because a single entity cannot collude with itself.[198] The Court rejected the NFL's single-entity argument[199] and found that the exclusive merchandise contract was illegal concerted activity.[200]

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192. *Id*. A prospective early draft entrant would have to argue that he was ready to play, and he might claim that the rules unfairly discriminated against someone outside of the bargaining unit. Clarett, though a football player, might provide a useful template because his arguments were wide-reaching and his case prominently implicated the larger questions of sports-league eligibility. *Id*.

193. ARTICLE X, *supra* note 15.

194. *Id*.

195. *See* Order Granting Motion for Oral Argument, Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 1036 (Dec. 14, 2009) (No. 08-661); *see also* Gabriel A. Feldman, *American Needle and the NFL's Single Entity Argument*, HUFFINGTON POST, Jan 2, 2010, http://www.huffingtonpost.com/gabriel-a-feldman/american-needle-and-the-n_b_409532.html.

196. Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201 (2010).

197. *Id*. at 2207.

198. *Id*.

199. *Id*. at 2214–15.

200. *Id*. at 2215.

Legal commentators did not expect the Court to issue a broad ruling that granted the NFL absolute status as a single entity;[201] however, such a ruling was a possibility.[202] Had the NFL been deemed a single entity, it would have been exempt from antitrust scrutiny under the Sherman Act, and this would have had far-reaching implications beyond merchandise.[203] Particularly pertinent, deeming the NFL—or another sports league, such as the NBA—to be a single entity would functionally preclude antitrust challenges to eligibility rules, free-agency rules, and any other regulations that might constitute anticompetitive violations within the existing legal framework.[204] The NBA, Major League Baseball, and several other interested parties filed amici curiae briefs in support of a broad single-entity ruling.[205] If the Supreme Court had determined that the NFL were a single entity, the league was not likely to have subsequently alienated its players and fans by unreasonably wielding its power to slash salaries, end free agency, and impose undue requirements.[206] However, the possibility would have existed, due to the exemption from antitrust scrutiny.[207] Given the argument that the NBA might be more deserving of single-entity status, this issue may arise again in the future.[208]

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201. Gabriel A. Feldman, *What We Learned from the Supreme Court about American Needle v. NFL*, HUFFINGTON POST, Jan. 14, 2010, http://www.huffingtonpost.com/gabriel-a-feldman/what-we-learned-about-ame_b_424106.html.

202. *Id*.

203. Michael McCann, *Why American Needle-NFL Is Most Important Case in Sports History*, SI.COM, Jan. 12, 2010, http://sportsillustrated.cnn.com/2010/writers/michael_mccann/01/12/Americanneedlev.nfl/index.html.

204. Feldman, *supra* note 201; McCann, *supra* note 203; Andrew Ross Sorkin, *Antitrust Case Has Implications Far Beyond N.F.L.*, N.Y. TIMES, Jan. 7, 2010, http://dealbook.blogs.nytimes.com/2010/01/07/antitrust-case-has-implications-far-beyond-nfl/.

205. McCann, *supra* note 203. For additional discussion of single-entity status, the NBA's specific interest, and whether it would have a stronger case for the designation than the NFL, see Michael A. McCann, American Needle v. NFL*: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726 (2010); Michael A. McCann, *The NBA and the Single Entity Defense: A Better Case?*, 1 HARV. J. SPORTS & ENT. L. 40 (2010).

206. McCann, *supra* note 203.

207. *Id*. This piece provides a helpful overview of the intersecting legal issues that were captured by the case, as they were far reaching and sometimes subtle. A pertinent excerpt illustrated the point:

> Depending upon the ruling, leagues may be able to avoid the threat of Section 1 scrutiny when they sign exclusive contracts with sponsors and licensees . . . , when they utilize league-owned television channels to remove games from free television . . . , and when they limit the autonomy of individual franchises . . . .
>
> Most dramatically . . . the Supreme Court could affirm the Seventh Circuit and extend single entity recognition to matters that include those normally subject to collective bargaining, such as players' salaries, free agency rights, and age eligibility restrictions. Leagues could therefore unilaterally restrain players' employment . . . ."

Id.

208. McCann, *supra* note 205.

IV. HOW TO BRING A SUCCESSFUL CHALLENGE

There appears to be a limited opportunity for a prospective prep-to-pros basketball player to challenge Article X of the NBA's collective bargaining agreement. First, the right player would have to emerge. Gauging the future success of any prospective draftee is difficult and inherently speculative.[209] However, the United States has an entrenched basketball infrastructure that unites the high-school, college, and professional ranks[210] in a manner such that truly elite players are identified and well known.[211] The right player would then need to file suit in the right circuit. As discussed above, the Second Circuit would be an inhospitable venue for challenging the NBA's age requirement, given its jurisprudence in *Clarett II*.[212] However, a challenge could be brought in a circuit that uses the *Mackey* analysis to judge when to apply the nonstatutory exemption.[213]

To successfully win in front of a court applying the *Mackey* test, the petitioner would be best served by showing that Article X is a discriminatory rule that purposely targets individuals who are outside of the NBPA bargaining unit.[214] This is the most likely avenue of success. Though *Clarett II* and other authority have permitted CBAs to reinforce seniority systems,[215] the NBA's rule may be a particularly unfair

209. *See, e.g.*, Ian Thomsen, *Weekly Countdown: 2010 Draft Class Looks Weak Beyond Big Three*, SI.COM, Jan. 22, 2010, http://sportsillustrated.cnn.com/2010/writers/ian_thomsen/01/22/countdown.top.draft.prospects/index.html.

210. For a general overview of the relationship among organized high-school, college, and professional basketball, see Laurie A. Richter & Gail Kearns, PUT ME IN, COACH: A PARENTS' GUIDE to WINNING the GAME of COLLEGE RECRUITING (Right Fit Press 2009). Additionally, it should be noted that there is a vast, year-round secondary system for prep basketball called Amateur Athletic Union (AAU). *See* AMATEUR ATHLETIC UNION, http://www.aausports.org/ (last visited Aug. 23, 2010). AAU events are open to member teams, and member teams are created independently of schools. The importance of AAU events in basketball has grown exponentially in recent years. *See, e.g.*, Tommy Craggs, *The Next Big Thing*, N.Y. TIMES, Oct. 31, 2008, http://www.nytimes.com/2008/11/02/sports/playmagazine/112sidney.html; Ray Fittipaldo, *AAU Basketball: They Start as Early as Age 8 and Meet the Nation's Best*, PITTSBURGH POST-GAZETTE, May 14, 2006, http://www.post-gazette.com/pg/06134/690009-175.stm; Michelle Kaufman, *College Basketball Recruiting Enters Halls of Middle School*, MIAMI HERALD, Feb. 3, 2009, http://www.miamiherald.com/news/southflorida/v-fullstory/story/884969.html. It is common for the best high-school players to travel around the country participating in AAU tournaments against other elite players. Fittipaldo, *supra*. This process aids scouts and enhances the information that is exchanged across the different levels of basketball. Fittipaldo, *supra*.

211. *See, e.g.*, *supra* note 202.

212. *See supra* notes 147–61 and accompanying text.

213. McCann & Rosen, *supra* note 16, at 756–57.

214. *Id*. at 757.

215. *Supra* note 108.

imposition. It mandates a one-year gap between high-school graduation and draft eligibility, so it is arguably a much weaker protection for incumbent players in the bargaining unit than that offered by the three-year buffer in the NFL.[216]

Demonstrating the difference between the NBA and NFL's respective waiting periods may undermine the logic that the Second Circuit used when arguing that the collective-bargaining system is permitted to protect the incumbent labor force, because Article X offers little protection. Further, unlike the NFL, the NBA is populated by stars who have already directly transitioned from high school to professional basketball.[217] This highlights the discriminatory nature of the age requirement: there is a class of individuals who can otherwise succeed in the NBA that is barred from doing so and forced into a series of inferior options,[218] including compulsory education or overseas migration.[219] The record of success established by prep-to-pros basketball players—such as Garnett, Bryant, and James—suggests that basketball players are less like NFL players and more analogous to tennis players and golfers, professionals who are unimpeded by such rigid age restrictions.[220] Persuasively arguing these points could lead a properly selected court to find that Article X violates the first prong of the *Mackey* test, as the age requirement primarily affects those who are not parties to the bargaining unit.[221]

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216. McCann & Rosen, *supra* note 16, at 755–57.

217. *Id*. at 757.

218. Jeremy Tyler returned early from Israel, before completing one full season. Thamel, *supra* note 22. Tyler was dissatisfied with his playing time and found the transition to living abroad difficult. *Tyler Quits Maccabi with Five Weeks Left*, ESPN.COM, Mar. 20, 2010, http://sports.espn.go.com/nba/news/story?id=5008825. If Tyler can continue working out and playing basketball in some capacity, his draft status is unlikely to be affected. *Id*. The NBA age requirement forecloses his best option, which would be attempting to join an NBA team. *Id*.

219. *Supra* note 22. While attending college may offer actual benefits to individual players—education, job skills, and a commonly recognized credential—it is an inferior option when assessed in a purely basketball-focused scheme. College offers a lower level of competition and does not allow for economic compensation.

220. *See supra* note 6. A useful follow-up inquiry would be to compare the earning potential of professional golfers and tennis players outside of the professional organizations that they can join freely after high school. Like the NBA, the Professional Golfers Association and the Association of Tennis Professionals are the premier and preeminent venues for their respective sports. No other league or organizing entity can offer the same exposure, popularity, or compensation. Accordingly, if this "comparable worth" study were undertaken scientifically, it might be a persuasive, dispositive piece of evidence. In other fields, these sorts of comparative-worth studies have been conducted to build cases for bias and discrimination in the workplace. *See, e.g.*, Wilson v. Sw. Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981). Depending on the findings of this sort of study, perhaps there would be a demographic slant to the results that might argue for some kind of unintended discrimination, as well.

221. McCann & Rosen, *supra* note 16, at 757.

An aspiring NBA player also might attempt to challenge Article X as an unlawful group boycott, pursuant to the reasoning in the *Denver Rocket*s case.[222] In *Denver Rockets*, the court assessed the prevailing NBA rule that a player had to be out of high school for four years before earning draft eligibility.[223] Issuing an injunction that allowed Spencer Haywood to play for the NBA's Seattle SuperSonics, the court held that the eligibility requirement was a group boycott and per se illegal.[224] The court reasoned that the League-wide rule was absolute and inflexible.[225] To challenge the current rule, a player might attempt to argue something similar—Article X is rigid in its requirements and does not provide for any adequate relief.

The *Denver Rockets* decision said that because the NBA eligibility regime did not make exceptions for players who could demonstrate economic hardship to a persuasive enough degree, it was unlawfully inflexible.[226] The court found that there was no realistic economic alternative to the NBA, and that proving sufficient hardship would allow someone with unique skills to pursue the career path which would best reward that talent.[227] There is an analogous argument to be made today.[228] As noted,[229] the alternatives available to gifted basketball players barred from entering the NBA Draft are markedly inferior and do not offer the same compensation.[230] The decreased earning potential of a player who must delay his NBA career is striking.[231] A player challenging Article X would likely want to present the compelling economic evidence[232] and buttress his argument by returning to some of the data that would be employed to challenge Article X as violative of the *Mackey* test's first prong.[233]

As discussed earlier,[234] the barrier over which a petitioner must pass to earn a designation of per se illegality is now greater than when Spencer Haywood first challenged the NBA's age requirement.[235] Pursuant to the

222. Wurth, *supra* note 182, at 124.
223. Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1059 (C.D. Cal. 1971).
224. *Id*. at 1066.
225. *Id*.
226. *Id.*
227. *Id.*
228. *See generally* McCann, *supra* note 18.
229. *See supra* notes 116–43.
230. *See generally* McCann, *supra* note 18, at 214–15.
231. *Id*. at 115.
232. *Id*. at 164–69.
233. Wurth, *supra* note 182, at 124.
234. *See supra* notes 64–71.
235. *See supra* notes 62–86.

Supreme Court's decision in *Northwest Wholesale Stationers*[236] and subsequent jurisprudence, a petitioning high-school player would have to show that: (1) Article X is a collective action *not* required by the structure of the basketball industry, (2) Article X is a restraint unreasonably implemented, and (3) there are no procedural safeguards preventing unnecessary and arbitrary application.[237] To attack these prongs, a petitioner might rely upon reasoning from the *Denver Rockets* case, despite the since-elevated per se threshold. In that case, the court noted that the rule-of-reason analysis that replaces per se designation is a complicated process when assessing basketball.[238] That court feared such a balancing act would require "lengthy factual inquiries and very subjective policy decisions," which exceed judicial capacity.[239] Given the strong economic argument a high-school player can make,[240] and given the detailed nature of assessing the quality of alternative options necessitated by Article X,[241] a basketball prodigy might argue that, as in *Denver Rockets*, rule-of-reason balancing is a "lengthy factual inquir[y]"[242] ill suited for courts.

Investigating whether the public-policy preference for collective bargaining and against per se findings, which might be the NBA's ultimate legal bulwark,[243] outweighs the economic injury incurred by high-school players would likely require "a complex economic inquiry" that a court may not welcome.[244] The court "would be required to determine a standard which could be used to weigh the various public policy goals which might be alleged as justification by the NBA. The court would further be forced to determine whether the boycott was genuinely motivated by the purposes given, or by other reasons."[245] The value of a basketball career shortened by Article X and the options available to those barred from participating in the NBA immediately upon graduation are heavily debated subjects.[246] So, too, are the motivations behind Article X.[247] A court could assess all of these variables, consider the history of per se analysis, and determine that

236. 472 U.S. 284, 298 (1985).
237. 472 U.S. 284; Jones, *supra* note 42, at 489
238. Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1063 (C.D. Cal. 1971).
239. *Id*.
240. *See generally* McCann, *supra* note 18, at 115, 214–15.
241. *See supra* notes 116–43.
242. *Denver Rockets*, 325 F. Supp. at 1063.
243. *See generally* Jones, *supra* note 42; McCann & Rosen, *supra* note 16; Wurth, *supra* note 182.
244. *Denver Rockets*, 325 F. Supp. at 1063.
245. *Id.*
246. *See supra* note 22.
247. *See supra* note 21.

the substantial debate over Article X and its disputed efficacy may strongly argue for a finding of group boycott.

CONCLUSION

A talented high-school basketball player with a desire to continue in the line of prep-to-pros athletes should challenge Article X of the NBA's collective bargaining agreement. By pursuing a case in the proper jurisdiction, a prospective NBA sensation could argue that neither a *Mackey* analysis nor a policy in favor of collective bargaining can reasonably foreclose the unique opportunity now denied due to the age requirement. Admittedly, victory would not be assured, but there is a credible legal case to be made. And no prodigious basketball talent has ever shied away from a crucial shot, no matter how long.

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* J.D. Candidate (2011), Washington University School of Law; B.A. (2003), Political Science, University of Michigan. This Note represents a culmination of influences that have informed my choices and shaped my life. I must thank my parents, my sister, and my friends; my teachers, from all stages of my education; the people with whom I worked while learning about the many ways in which practicing law can be rewarding; my Notes Editors, whose feedback was invaluable; Nathaniel Friedman and other writers with whom I have collaborated when considering basketball, the law, and their intersection; and NBA Commissioner David Stern, whose stewardship of the NBA—age requirement or not—has been inspirational.