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EIGHTEEN YEARS OLD AND READY FOR DRIVING, CIGARETTES AND WAR, BUT NOT BASKETBALL: WHY THE NBA IS COMMITTING A FOUL ON THE AGE ELIGIBILITY RULE

BRIAN LOVELL

INTRODUCTION

Brandon Jennings grew up near Los Angeles California, “where hoops skills bring girls, hype and carte blanche.”¹ The six foot one inch, 170 pound guard, from Oak Hill Academy High School, was averaging, 32.7 points, 7.4 assists, and 5.1 rebounds for each game. With such an incredible performance as a high school athlete, he received the Naismith Prep Player of the Year award, Gatorade Player of the Year award, and EA Sports Player of the Year award and led his team to a record of forty-one wins and only one loss. In June of 2008, Jennings was listed anywhere from the top prospect in the nation to the fourth ranked prospect. The only obstacle that stood in Brandon Jennings’ way was that he was eighteen years old. Due to the National Basketball Association’s (NBA) collective bargaining agreement (CBA), Brandon Jennings was forced to wait until his nineteenth birthday in order to obtain gainful employment in the NBA, the Mecca of professional basketball.² Thus, instead of following the trend of the “one and done year on campus” Brandon Jennings decided that he would take a different path, possibly changing the landscape of college basketball, and potentially the trend of high school players looking to play in the NBA.³ Brandon Jennings went overseas and signed a 1.65 million

¹ See Chris Broussard, *Exchange Student: The First American to go Prep to Pro by way of Europe, Brandon Jennings getting quite an education overseas*, ESPN (Oct. 5, 2009), <http://sports.espn.go.com/espnmag/story?id=3715746> (“Everything is tiny. The bed looks like it could be palmed by Shaq. The room is the size of a Hummer. The hotel looks like a town house.”).

² See Collective Bargaining Agreement between NBA Representatives and National Basketball Association Players’ Association art. X, § (1)(b)(ii) (2005), <http://www.nbpa.org/sites/default/files/ARTICLE%20X.pdf>; see also CBA 101 Highlights of the Collective Bargaining Agreement between the NBA and NBPA § VI (A)(2) (2010), <http://www.nba.com/element/mp3/2.0/sect/podcastmp3/PDF/CBA101.pdf>.

³ See Dwight Jaynes, *Brandon Jennings may change the landscape of college basketball*, DWIGHT

dollar deal with Virtus Roma, a professional basketball team in Europe.⁴ For a high school legend from Los Angeles, Jennings experienced quite a culture shock, including tiny living quarters.⁵ This would be where Brandon Jennings commenced his basketball career.⁶ The high school all star gained an inordinate amount of experience playing overseas, and was paid doing it as well.⁷ The high school phenom's lackadaisical demeanor he carried throughout his high school days was not accepted in the Euro-league, and his coach made sure of that.⁸ Coach Jasmin Respesa kicked Jennings out of practice and would get in Jennings' face, displaying his disgust.⁹ However, after being kicked out of practice, Brandon Jennings' attitude changed winning him respect in the locker room and pushing him to play harder than ever before.¹⁰ An NBA General Manager explained that "[p]laying in Europe with grown men who are better than him is going to help him mature as a player, and he [is] definitely a lottery pick in '09".¹¹ Even Brandon Jennings noticed the difference, explaining, "[w]hen you're the man in high school, you can do whatever you want; [t]his is something new for me, especially playing for a coach who's real controlling and doesn't take no stuff."¹² Although the NBA currently does not have to worry about losing players to other leagues, such as those in Europe, because the NBA is the most prolific league for basketball in the world, it may have to worry about their role in the lives of these potential NBA stars, and the legal ramifications of the eligibility rule.

This Note will argue against the NBA's draft eligibility rule, which requires an individual to be nineteen years of age to play even though in most states a minor can be employed in other jobs at the age of sixteen.

JAYNES (Nov. 16, 2009), <http://www.dwightjaynes.com/brandon-jennings-may-change-the-landscape-of-college-basketball/>; see also Pete Thamel, *At 19, Plotting New Path to N.B.A., via Europe*, N.Y. TIMES, Oct. 5, 2008, at A1, available at <http://www.nytimes.com/2008/10/05/sports/basketball/05jennings.html?ref=brandonjennings>.

⁴ See Jaynes, *supra* note 3; see also Joel McLean, *Global Economic Crush Forces Players Home From Europe* PASPEN (Jan. 14, 2009), <http://paspen.net/default.asp?p=12&stid=8142757>.

⁵ See Broussard, *supra* note 1; see also Aldo Ciummo, *Jennings, stop for the NBA, "Totti who?"*, WORD PRESS (Oct. 17, 2008), <http://skapegoat.wordpress.com/2008/10/17/sportjennings-fermata-per-la-nba-%C2%ABtotti-who%C2%BB/>.

⁶ See Broussard, *supra* note 1; see also Thamel, *supra* note 3.

⁷ See Broussard, *supra* note 1 (stating "[t]his is great preparation, because it's a big learning experience over here"); see also Thamel, *supra* note 3 (discussing Jennings' improvements as a player).

⁸ See Broussard, *supra* note 1 (explaining that Coach Jasmin Respesa, after watching Jennings during drills, had seen enough, and made it a point to kick Jennings out of practice); see also Thamel, *supra* note 3 (conferring when Jennings' was removed from practice).

⁹ See Broussard, *supra* note 1; see also Thamel, *supra* note 3.

¹⁰ See Broussard, *supra* note 1 (quoting Jennings' mom saying, "I can see that Brandon's learning so much here. He didn't used to play this hard"); see also Thamel, *supra* note 3.

¹¹ Broussard, *supra* note 1.

¹² *Id.*

Meanwhile, children even younger than sixteen can work under certain exceptions in certain states.¹³

Part I of this Note will discuss the prior challenges made against the NBA's age restriction, its collective bargaining process, and introduce the ideas of reverse age discrimination, and equal protection. This part will provide what is included in the collective bargaining agreement and the first challenge against the collective bargaining agreement and how it failed. Part I will additionally discuss a challenge against the NBA, which was successful because there was no collective bargaining agreement (CBA) in place. Furthermore, it will also establish an important aspect of the CBA, in that future employees/players are bound to the agreement, without having a say in the matter. Lastly, it will compare the NBA's eligibility rule to the eligibility rule that the National Football League (NFL) imposes on teenage athletes, as seen through the recent case of *Clarett v. NFL*.¹⁴

Part II will assert the public policy concerns and issues of the NBA's rule requiring individuals to be at least nineteen years of age to be employed as professional basketball players. This Part suggests that when compared to other sports, the NBA's age eligibility requirement is completely arbitrary. Furthermore, due to the rise of dissatisfaction from players, former players and established government figures, the NBA is in need of a new solution.

Part III of this Note will set forth two areas of law which possibly could, and should, give these extraordinarily talented players an opportunity to seek legal remedy for being denied their right to gainful employment. The first area of law involves reverse age discrimination with respect to the Age Discrimination and Employment Act (ADEA). While the ADEA focuses on employment discrimination of those over the age of forty¹⁵, this Note will focus on the relatively new claim of Reverse Age Discrimination.¹⁶ Secondly, this Note will contend that each high school player seeking to play in the NBA is being denied equal protection of the law, making the

¹³ See COLO. REV. STAT. § 8-12-105(1) to (5) (2009) (allowing minors over the age of fourteen to be employed); see also CODE OF ALA. § 25-8-33 (2011) (allowing any person 14 or 15 to be employed outside school hours).

¹⁴ See generally *Clarett v. NFL*, 369 F.3d 124 (2d Cir. 2004).

¹⁵ See 29 U.S.C.S. § 631(a) (2010).

¹⁶ See generally *Bergen v. Sisler*, 157 N.J. 188 (1999); see also Rebecca L. Ennis, *General Dynamics Land Systems, Inc. v. Cline: Shrinking the Realm of Possibility for Reverse Age Discrimination Suits*, 39 U. RICH. L. REV. 753 (2005) (discussing the Supreme Court's ruling with regards to reverse age discrimination under the ADEA).

NBA's draft eligibility rules unconstitutional.¹⁷

Part IV will argue for more rights for the future employees of the NBA in collective bargaining agreements, and will call for a vast change in the NBA's eligibility rules and the NBA draft.

I. THE NBA'S COLLECTIVE BARGAINING AGREEMENT AND DRAFT ELIGIBILITY CHALLENGES

A. *The NBA Collective Bargaining Agreement*

The NBA collective bargaining agreement is the primary instrument that holds teenage basketball players from asserting an anti-trust claim against the NBA, and also sets forth the rules and regulations of the league. "The draft... [is] not, however, the product solely of an agreement among horizontal competitors but [is] embodied in a collective agreement between the employer or employers and a labor organization reached through procedures mandated by federal labor legislation."¹⁸ The NBA collective bargaining agreement is negotiated by NBA representatives, including the Commissioner, various owners, attorneys and financial experts, who attempt to get the best deal possible for the owners. Also included in the process are the player representatives, including the Executive Committee and a negotiating committee, which represent the players in the NBA, and try to obtain the best deal possible for all the players.¹⁹ These collective bargaining agreements are negotiated approximately every six years, and all players are encouraged to participate.²⁰ The NBA likes to see itself as a "democratic organization," soliciting the views of all the players, ultimately allowing all players to vote on the agreement.²¹ This arrangement of the NBA players association first arose in 1964, when players threatened not to

¹⁷ See U.S. CONST. amend. XIV, § 1.

¹⁸ Wood v. NBA, 809 F.2d 954, 959 (2d Cir. 1987).

¹⁹ See David Stern, *Billy Hunter Interview*, INSIDE HOOPS (June 22, 2005), <http://www.insidehoops.com/hunter-interview-062205.shtml>; see also *NBA's collective bargaining agreement finalized and signed*, USA TODAY (July 30, 2005), http://www.usatoday.com/sports/basketball/nba/2005-07-30-cba-finalized_x.htm.

²⁰ See David Stern, *Billy Hunter Interview*, INSIDE HOOPS (June 22, 2005), <http://www.insidehoops.com/hunter-interview-062205.shtml>; see also *NBA's collective bargaining agreement finalized and signed*, USA TODAY (July 30, 2005), http://www.usatoday.com/sports/basketball/nba/2005-07-30-cba-finalized_x.htm.

²¹ *LeBron James and the NBA CBA*, FSK'S GUIDE TO REALITY (June 30, 2010), <http://fskrealityguide.blogspot.com/2010/06/lebron-james-and-nba-cba.html>; see Adonal Foyle, *So What Does NBA Basketball Have to do With Campaign Finance Reform Anyway?* DEMOCRACY MATTERS (2010), http://www.democracymatters.org/index.php?option=com_content&view=article&id=105%3Aso-what-does-nba-basketball-have-to-do-with-campaign-finance-reform-anyway&catid=36&Itemid=66.

play in the first televised NBA All-Star Game.²² The rationale of the CBA is that since the views of both the players' representatives, and the NBA representatives are solicited, then the resulting agreement will be exempt from anti-trust claims.

B. Wood v. NBA

The potential NBA players seeking employment with the NBA have no say in the CBA. *Wood v. NBA* shows that those outside of the agreement are bound to that agreement.²³ There, Leon Wood, a guard from California State University, brought an antitrust action against the NBA and certain provisions of the CBA dealing with the salary cap, the draft, and player corporations.²⁴ Among Wood's many arguments, he asserted that the rules created through the collective bargaining agreement were illegal because it affects those "outside the bargaining unit."²⁵ However, the second circuit held that this is a common consequence of collective agreements in all industries.²⁶ Furthermore, the court noted that the National Labor Relations Act defines employee in a way that includes those working outside the bargaining unit.²⁷ Therefore, the high school athletes who seek employment with the NBA, will have no say in what is agreed upon as to the age eligibility rules, and can only wait and hope that the rules change.

C. Haywood v. National Basketball Assn.

When no CBA is in place, it is possible for a potential NBA player to succeed in asserting an anti-trust action. In 1971, the rules of the NBA required a college player to wait four years after graduating from high

²² *About The NBPA*, NBPA.ORG, <http://www.nbpa.org/about-us> (last visited Sept. 29, 2011); LISA P. MASTERALEXIS, CAROL A. BARR & MARY HUMS, *PRINCIPLES AND PRACTICE OF SPORT MANAGEMENT* 229 (4th ed. 2011).

²³ See *Wood*, 809 F.2d at 960 (stating "[t]he National Labor Relations Act explicitly defines 'employee' in a way that includes workers outside the bargaining unit." (quoting 29 U.S.C. §152[3] [2010])).

²⁴ See *id.* at 956.

²⁵ See *id.* at 960 (noting that Wood believed that both the salary cap and the draft impacted the employees outside the bargaining agreement).

²⁶ See *id.* at 960; see also *Fibreboard Paper Prod. Corp. v. N.L.R.B.* 379 U.S. 203, 210-15 (1964); *Merk v. Jewel* 848 F.2d 761, 764 (7th Cir. 1988) (stating "union and employer therefore may agree that employees hired in the future, who by definition are not yet members of the bargaining unit, will receive lower pay"); *N.L.R.B. v. Laney & Duke Storage Warehouse Co.*, 369 F.2d 859, 866 (5th Cir. 1966) (articulating that "[t]he duty to bargain is a continuing one, and a union may legitimately bargain over wages and conditions of employment which will affect employees who are to be hired in the future.").

²⁷ See 29 U.S.C. §152(3) (2010) (noting that the term employee includes any employee, and not limited to the employees of a particular employer).

school in order to be drafted.²⁸ In *Haywood*, the plaintiff, Spencer Haywood, played with the 1968 Olympic team, then went to college, ultimately landing a contract with the rival American Basketball Association (ABA).²⁹ Haywood repudiated his contract with the ABA, and signed with the Seattle Supersonics at the age of 21.³⁰ However, the signing occurred less than four years after Haywood's high school class had graduated, leaving him ineligible for the draft.³¹ After the NBA threatened to invalidate his contract and threatened the Supersonics with various sanctions, Haywood brought an anti-trust action against the NBA.³²

The Court held that if Haywood is denied the right to play for Seattle, he will "suffer irreparable injury in that a substantial part of his playing career will have been dissipated, his physical condition, skills and coordination will deteriorate from lack of high level competition, his public acceptance as a super star will diminish to the detriment of his career."³³ The Court further stated that the NBA preventing him from playing would cause him "great injustice."³⁴ This ruling paved the way for greats such as Magic Johnson, Michael Jordan, Kobe Bryant, and LeBron James to leave college early, or not attend at all.³⁵

D. The CBA's First Challenge

The CBA prevents players from asserting an anti-trust claim against the NBA. The representatives of both the NBA and the players attempt to get the best deal for their sides, but the ultimate agreement does not always leave each party satisfied. At the expiration of the first Collective

²⁸ See *Haywood v. Nat'l Basketball Assn.*, 401 U.S. 1204, 1204 (1971); see also *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1059 (C.D. Cal. 1971) (referencing the by-laws of the National Basketball Association).

²⁹ See *Haywood*, 401 U.S. at 1204.

³⁰ *Id.* at 1205.

³¹ *Id.*

³² See *id.* (alleging that this is a per se violation of the Sherman Act).

³³ *Id.*; see generally *Denver Rockets v. All-Pro Mgmt.*, 325 F. Supp. 1049 (D. Cal. 1971) (holding that the athlete had demonstrated irreparable harm and a likelihood of success, rendered the NBA's draft an arbitrary and unreasonable restraint on the right of the athlete and other potential NBA players); see also *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315, 1326 (D. Conn. 1977) (finding that the probability of the 19 year old amateur Canadian hockey player's ultimate success was a virtual certainty, and he could not be prohibited from playing professional hockey for any team in the association).

³⁴ See *Haywood*, 401 U.S. at 1205.

³⁵ See Erik Brady, *Haywood Sued NBA, Paving Way for Underclassmen to Enter Draft*, USA TODAY (May 12, 2009), http://www.usatoday.com/sports/basketball/nba/2009-05-12-spencer-haywood_N.htm; see also Brian Shaffer, Comment, *The NBA's Age Requirement Shoots and Misses: How the Non-Statutory Exemption Produces Inequitable Results for High School Basketball Stars*, 48 SANTA CLARA L. REV., 681, 684-685 (2008).

Bargaining Agreement between both the players and the owners, fourteen NBA players filed a class action lawsuit in *Robertson v. NBA*, challenging the NBA's rules pertaining to the college draft, the uniform contract, the reserve clause, boycotts, and asserting that the NBA was prohibiting players from playing in any rival league.³⁶ The claim against the college draft did not focus on age eligibility, but did state that it was "designed to prevent competition among member NBA clubs for what is virtually the exclusive source of basketball talent in the country."³⁷ The United States District Court for the Southern District of New York held that although the practices complained of were per se violations of the Sherman Act,³⁸ the NBA practices were exempt because of collective bargaining.³⁹ It is, therefore, a fundamental principle of federal labor law that employees can eliminate competition among themselves through a "governmentally supervised majority vote selecting an exclusive bargaining representative."⁴⁰ Thus, the legal avenue of suing under anti-trust laws will most likely be unsuccessful when a collective bargaining agreement is present.

E. Clarett v NFL

The most recent case showing that an anti-trust claim against age eligibility will most likely be unsuccessful is *Clarett v NFL*.⁴¹ *Clarett* is most relevant because similar to the NBA, the NFL has a controversial age limitation on who can enter the draft, and likely the NBA's justification for their draft eligibility rules would be similar to that of the NFL's in the *Clarett* case.⁴² Maurice Clarett was a running back for the Ohio State University Buckeyes (OSU).⁴³ Similar to Brandon Jennings, Clarett was a

³⁶ See Ron Flatter, *Oscar Defined the Triple Double*, ESPN, <http://espn.go.com/sportscentury/features/00016428.html> (last visited Sept. 29, 2011); see generally *Robertson v. Nat'l Basketball Ass'n.*, 389 F. Supp. 867, 874 (S.D.N.Y. 1975).

³⁷ *Robertson*, 389 F. Supp. at 874.

³⁸ See 15 U.S.C.S. §1 (2004).

³⁹ See *Robertson*, 399 F. Supp. at 882 (stating that it was Congress' intent to encourage collective bargaining to settle labor disputes); see generally 29 U.S.C.S. §151 (2011).

⁴⁰ *Wood v. NBA*, 809 F.2d 954, 959 (2d Cir. 1987).

⁴¹ See generally *Clarett v. Nat'l Football League*, 369 F.3d 124, 125 (2d Cir. 2004).

⁴² See Ryan M. Rodenberg, *The NBA's Latest Three Point Play: Age Eligibility Rules, Antitrust, and Labor Law*, 25 ENT. & SPORTS LAW 14, 16 (2008) (noting that if and when a prospective NBA player sues the NBA because of its age eligibility rules, the litigation would likely mirror Maurice Clarett's lawsuit); see generally Jack N.E. Pitts, Jr., Notes & Comments, *Why Wait?: An Antitrust Analysis of the National Football League and National Basketball Association's Draft Eligibility Rules*, 51 HOW. L.J. 433, 451 (2008).

⁴³ *Clarett*, 369 F.3d at 125; see *Clarett v. Nat'l Football League*, 306 F.Supp.2d 379, 387 (S.D.N.Y. 2004) (noting the undisputed facts of the trial court, stating Clarett was a running back for

successful player prior to entering the draft, obtaining the Big Ten Freshman of the Year award, and becoming the first college freshman to start at his position at OSU.⁴⁴ Before the start of Clarett's second season, he was suspended for filing a false police report and receiving extra benefits worth thousands of dollars.⁴⁵ Clarett moved his focus from returning to college football to entering the NFL draft. However, Clarett was ineligible to do so because of the rules of eligibility.⁴⁶ Those rules at the time were collectively bargained between the NFL and its players union.⁴⁷

The district court held that the labor exemption sometimes allowed as part of the collective bargaining process should not apply because it fails the three prongs of a test called the *Mackey* Test set forth by the Eighth circuit.⁴⁸ While the *Mackey* test is not relevant to what this Note proposes, the case involved a challenge brought by NFL players against the NFL rule (the Rozelle Rule) requiring an NFL team who signed a player, to compensate his former team.⁴⁹ In *Clarett*, the NFL argued that the eligibility rules prevented those players who were not ready for the NFL, both physically and emotionally, from entering the league.⁵⁰ Furthermore, the NFL believed that it would prevent the sport from losing its value because of an increase in injuries.⁵¹ The district court did not find these

Ohio State University).

⁴⁴ *Clarett*, 369 F.3d at 125–126 (noting the accolades Maurice Clarett achieved during his college football career). See generally Joe Drape, *COLLEGE FOOTBALL; Extra! Extra! It's Ohio State*, N.Y. TIMES, Jan. 04, 2003, at D1 available at <http://www.nytimes.com/2003/01/04/sports/college-football-extra-extra-it-s-ohio-state.htm>.

⁴⁵ Mike Freeman, *FOOTBALL; Buckeyes Suspend Clarett For Year*, N.Y. TIMES, Sept. 11, 2003, at D1, available at <http://www.nytimes.com/2003/09/11/sports/football-buckeyes-suspend-clarett-for-year.html?pagewanted=1>; see also *Clarett caught sleeping during class*, ESPN (Nov. 8, 2003), <http://sports.espn.go.com/nfl/news/story?id=1657021>.

⁴⁶ See *Clarett*, 369 F.3d at 126 (referring to the NFL eligibility rules which state that a player needed to wait three full seasons after the player's high school graduation); see generally *Legal Challenge? Clarett asks NFL to Change Rules, Allow Him to Enter 2004 Draft*, SPORTS ILLUSTRATED (SEPT. 14, 2003) <http://sportsillustrated.cnn.com/2003/football/ncaa/09/14/bc.fbn.clarett.nfl.ap/index.html>.

⁴⁷ See *Clarett*, 369 F.3d at 126–27 (stating The NFL's collective bargaining agreement is effective from 1993-2007); see also Damon Hack, *INSIDE THE N.F.L.; Fitzgerald May Contest N.F.L. Eligibility Rule*, N.Y. TIMES, Nov. 14, 2003, at D1, available at <http://www.nytimes.com/2003/11/14/sports/inside-the-nfl-fitzgerald-may-contest-nfl-eligibility-rule.html?src=pm>.

⁴⁸ See *id.* at 129; see also *Mackey v. Nat'l Football League*, 543 F.2d 606, 614 (8th Cir. 1976) (putting forth a three part test: the restrictions to concern mandatory subjects of collective bargaining, the restrictions only affect the parties to the collective bargaining agreement, and the agreement is part of a bona fide arms-length bargaining process).

⁴⁹ *Clarett*, 369 F.3d at 133 (explaining the NFL's Rozelle Rule, which the NFL argued was exempt from antitrust laws because it was included in the collective bargaining agreement).

⁵⁰ See *id.* at 129.

⁵¹ See *id.*; See *Boris v. United States Football League*, No. 89-4980 U.S. Dist. LEXIS 19061, at *3–4 (Cen. Cal. Feb. 28, 1984) (stating the court's reasons for the rule were to help further competitive balance and maturity, and for players to receive a college education).

arguments adequate, stating that these issues could be addressed through “less restrictive but equally effective means.”⁵²

The United States Court of Appeals reversed the district court ruling, stating that they never believed the Eighth Circuit’s test was not appropriate, and that the CBA itself makes it clear as to how to handle eligibility rules.⁵³ Furthermore, the court expressed a concern about the impact of not having such rules in place would have on the job security of veteran players.⁵⁴ Therefore, the court ruled in favor of the NFL, and Maurice Clarett was denied the right to enter the NFL draft.⁵⁵

This case is similar because it deals with the problem of draft eligibility rules and a collective bargaining agreement. Many people believe that a player may eventually win a suit against a major league association because of the district court ruling in favor of Clarett and because the Second Circuit is the only circuit to have ruled on this issue.⁵⁶ Additionally, some argue that while Clarett would have had to argue a “hypothetical point” that he would succeed in the NFL, a potential NBA player would not. This is because, contrary to an NFL player, an NBA player can point to other players who made the jump from high school straight to the NBA with favorable statistics.⁵⁷ This kind of data is not available in the NFL, because there are no players who made this jump. The NBA, on the other hand, has seven years of experience and data of athletes coming out of high school, and many of them have succeeded.⁵⁸ However, the collective bargaining will be a difficult, if not impossible obstacle to overcome.

F. Reverse Age Discrimination

Since it is so difficult, or nearly impossible to obtain a successful

⁵² *Clarett*, 369 F.3d at 129.

⁵³ *See id.* at 142 (“[T]he collective bargaining agreement itself makes clear that the union and the NFL reached an agreement with respect to how the eligibility rules would be handled.”).

⁵⁴ *See id.* at 140 (noting that the veteran player would fall out of favor more quickly if the leagues allowed for younger, fresher athletes to enter the draft earlier); *see also* *Fibreboard Paper Prod. Corp. v. Nat’l Labor Relations Bd.*, 379 U.S. 203, 211 (1964) (finding that the preservation of jobs for union members is a vital concern).

⁵⁵ *See* *Clarett*, 369 F.3d at 143 (“We, however, follow the Supreme Court’s lead in declining to ‘fashion antitrust exemption so as to give additional advantage to professional football players . . . that transport workers, coal miners, or meat packers would not enjoy.’”) (quoting *Brown v. Pro Football* 518 U.S. 231, 249 (1996)).

⁵⁶ *See* Michael A. McCann & Joseph S. Rosen, *Law, Tech. and the Arts Symposium -- Who is Eligible to Play?: Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. 731, 757 (2006); *see also* Michael McCann, *Legal Issues of NBA Draft Age Floor*, THE SPORTS L. BLOG (July 1, 2005, 10:47 AM), <http://sports-law.blogspot.com/2005/07/legal-issues-of-nba-draft-age-floor.html> [hereinafter *Sports Law Blog*].

⁵⁷ *See* McCann, *supra* note 56; *see also* *Sports Law Blog*, *supra* note 56.

⁵⁸ *See* McCann, *supra* note 56; *see also* *Sports Law Blog*, *supra* note 56.

judgment in an antitrust action because of the labor exemption of CBAs, potential NBA athletes must make other claims. The first possibility for these individuals is that of reverse age discrimination. The second could be an equal protection claim.

Reverse age discrimination is a claim that is rarely made, however both the Seventh and Ninth circuits, both dealing with retirement plans, have heard cases dealing with such a claim. In 1975 Congress passed the Age Discrimination Act (ADA), which prohibits age discrimination in federal programs.⁵⁹ It was suggested in this Act that the young are often discriminated against and therefore deserve protection as well.⁶⁰ However, this logic did not follow when Congress passed the Age Discrimination in Employment Act.⁶¹ The Age Discrimination in Employment Act's general provisions state that it is unlawful for an employer to "fail or refuse to hire or to discharge an individual or otherwise discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."⁶² While this may seem to protect individuals of any age, ADEA Section 621 states that the purpose of this Act is to "promote employment of older persons based on their ability rather than age, to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment."⁶³ More specifically, the ADEA was intended to protect individuals between the ages of 40 and 65, and to prevent having their careers unreasonably taken away from them.⁶⁴ Ultimately, confusion existed as to which individuals the ADEA actually protected, ending with a Supreme Court decision with unfavorable results for potential NBA stars.⁶⁵

In *Hamilton v. Caterpillar*, the Seventh Circuit held that legislative history provides no evidence of intent to protect against age discrimination

⁵⁹ 42 U.S.C. § 6101 (2010); see Jeffrey Paul Fuhrman, *Can Discrimination Affect the Imposition of a Minimum Age Requirement for Employment in the Nat'l Basketball Ass'n?*, 3 U. PA. J. LAB. & EMP. L. 585, 599 (2001) (noting that at the time Congress believed the young warranted protection).

⁶⁰ See 121 CONG. REC. 9212 (1975) (statement of Rep. John Brademas) ("Its provisions are broad and it is the intent of the committee that it apply to age discrimination at all age levels, from the youngest to the oldest."); Fuhrman, *supra* note 59, at 599.

⁶¹ See 29 U.S.C. § 631 (2010); Fuhrman, *supra* note 59, at 599 (noting that Section 631 of the ADEA states it only provides protection for those of at least forty years old).

⁶² 29 U.S.C. § 623(a)(1) (2010).

⁶³ 29 U.S.C. § 621(b) (2010).

⁶⁴ See *Brennan v. Paragon Emp't Agency*, 356 F. Supp. 286, 288 (S.D.N.Y. 1973); see also 29 U.S.C. § 631 (2011).

⁶⁵ See *Ennis*, *supra* note 16, at 753-755; see also *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 584 (2004).

against the young.⁶⁶ Furthermore, the court noted that this circuit had explained in a prior decision that the ADEA “does not protect the young as well as the old, or even, we think, the younger against the older.”⁶⁷ There, a corporation, Caterpillar Incorporated, announced the closing of two separate plants, and implemented early retirement plans for its employees who were fifty years old, and had ten years of service.⁶⁸ Plaintiff Michael Hamilton brought a class action suit against Caterpillar, alleging that Caterpillar had violated the ADEA. Hamilton sued Caterpillar, both for himself, and on behalf of other persons similarly situated, because they were too young to qualify for early retirement benefits.⁶⁹ Therefore, the Seventh Circuit has made it clear that the ADEA does not provide a remedy for reverse age discrimination.⁷⁰ In *Stone v. Travelers*, the Ninth Circuit, however, while not resolving the issue of reverse age discrimination directly, “expressed incredulity at the idea that the petitioner could recover for being discriminated against because he was too young.”⁷¹ There, John Stone filed a complaint against his employer, Travelers Corporation, alleging that the distribution of the severance payments violated the ADEA.⁷² As a result of the split between the circuits, a claim for reverse age discrimination seems hopeful for young talented NBA players. Nonetheless, the Supreme Court’s decision in *General Dynamics v. Cline* could hurt the chances of a successful reverse age discrimination claim.⁷³

G. Equal Protection

The Fourteenth Amendment of the United States Constitution states:

“No State shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁷⁴

⁶⁶ See *Hamilton v. Caterpillar Inc.*, 966 F.2d 1226, 1228 (7th Cir. 1992).

⁶⁷ *Id.* at 1227 (citing *Karlen v. City Colls. of Chi.*, 837 F.2d 314, 318 (7th Cir. 1988), *superseded* by *O’Brien v. Bd. Of Educ.*, 92 F. Supp 110 (E.D.N.Y. 2000).

⁶⁸ *Hamilton*, 966 F.2d at 1226–27.

⁶⁹ See *id.* at 1227.

⁷⁰ See *id.* at 1228.

⁷¹ *Ennis*, *supra* note 16, at 757 (citing *Stone v. Travelers Corp.* 58 F.3d 434, 437 (9th Cir. 1995) (involving a claim that Travelers’ manner of providing for Stone’s early retirement violated ADEA).

⁷² *Stone*, 58 F.3d at 436.

⁷³ See discussion *infra* Part III.

⁷⁴ U.S. CONST. amend. XIV, § 1.

Throughout litigation of Equal Protection claims, the Supreme Court has established three levels of judicial scrutiny; in other words the Court established what standard each side needs to prove in order to assert a successful Equal Protection claim.

The first level is minimum scrutiny, otherwise known as the rational basis standard. Minimum scrutiny requires a classification in a statute to be rationally related to a legitimate government objective, resulting in great deference to the state under this level of scrutiny.⁷⁵ A plaintiff challenging a classification must prove that the classification does not rationally advance a legitimate state objective, or that the state objective is not legitimate.

The highest level of scrutiny is known as strict scrutiny. This level renders a classification presumptively void because of the classification is one of a suspect criteria, such as race, or because it substantially impinges on a fundamental right. In this instance, the burden is on the government to prove that the classification is narrowly tailored to accomplish a compelling state interest.⁷⁶ If the classification impinges on fundamental rights, a suspect class is not necessary. Certain rights that the Supreme Court found to be fundamental throughout years of litigation are interstate migration⁷⁷ and denying or diluting the right to vote.⁷⁸

The last level of scrutiny is intermediate scrutiny established in *Craig v. Boren*,⁷⁹ after both strict scrutiny and minimal scrutiny were introduced. In *Craig v. Boren*, Oklahoma passed a law forbidding the sale of beer to males under twenty-one years old, and females who were under eighteen years old.⁸⁰ The Court held that the law did not satisfy Oklahoma's goal of improving the state's public health and safety, and while not applying strict scrutiny or rational basis scrutiny, the Court adopted a "new, middle level of scrutiny."⁸¹ This level of scrutiny requires the government to prove that

⁷⁵ See generally *Lindsley v. Natural Carbonic Gas Co.* 220 U.S. 61 (1911) (holding that a NY statute prohibiting owners from pumping water, gas and oil on his own land is not a violation of Equal Protection because of the rational relation between the law and the goals of protecting mineral springs and preventing waste); *United States R.R. Ret. Bd. V. Fritz*, 449 U.S. 166, 179 (1980).

⁷⁶ See *Korematsu v. United States*, 323 U.S. 214, 216 (1944); see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

⁷⁷ See *Saenz v. Roe*, 526 U.S. 489, 498–99 (1999) (holding that the proper standard for the right to travel is strict scrutiny); see also *Southold v. Cross Sound Ferry Servs.*, 477 F.3d 38, 53 (2d Cir. 2007).

⁷⁸ See *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (finding that durational residency requirements deprive citizens of the fundamental right to vote); see also *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966) (holding that the requirement of a fee to condition a ballot violates the Equal Protection Clause because it results in invidious discrimination).

⁷⁹ *Craig v. Boren*, 429 U.S. 190 (1976).

⁸⁰ *Id.* at 197.

⁸¹ See *id.* at 200; see also Julie R. Steiner, *Age Classifications and the Fourteenth Amendment: Is*

the statute's classifications are substantially related to an important government interest.⁸² Due to the fact that this test required less than a compelling state interest, but more than a legitimate state interest, the test is intermediate in nature.⁸³ The intermediate standard was established after *Massachusetts Board of Retirement v. Murgia*,⁸⁴ which held that the standard used for age discrimination is the rational basis standard, or minimum scrutiny.⁸⁵

II. POLICY CONCERNS OF THE AGE LIMIT

The current CBA of the NBA requires an individual to be at least nineteen years old in order to be eligible for the NBA draft. In fact, the current Commissioner of the NBA, David Stern, plans to attempt to raise the age eligibility rules from nineteen years of age to twenty, or until the player is two years out of high school.⁸⁶ His rationale is that the NFL's eligibility requirement is three years after high school, so the NBA should follow suit.⁸⁷ There are many reasons why the NFL and the NBA cannot be compared, and rather should be distinguished with regard to the age limit.

A. The Rise of Dissatisfaction

The current age limit, joined with the potential increase of the age limit, has caused an uproar from a Congressman, current and former NBA players, and many interested fans. Education Secretary, Arne Duncan, explained that there is no reason to prevent these players from entering the

the Murgia Standard too Old to Stand?, 6 SETON HALL CONST. L.J. 263, 273 (1995) (discussing the facts of *Craig v. Boren*).

⁸² See *Nguyen v. INS*, 533 U.S. 53, 60 (2001) (stating that gender based classifications must serve important governmental objectives, and must be substantially related to achieve those objectives); see *United States v. Virginia*, 518 U.S. 515, 541–42 (1996) (holding that gender based classifications, based on generalizations and stereotypes about the differing abilities and interests of the different genders, violate the Equal Protection Clause under intermediate scrutiny).

⁸³ See *Craig*, 492 U.S. at 218 (Rehnquist, J., dissenting) (stating that the majority applied an intermediate level of scrutiny); see Steiner, *supra* note 81 (discussing that the test applied in *Craig v. Boren* was a new middle level of scrutiny that was intermediate in nature).

⁸⁴ *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976).

⁸⁵ See discussion *infra* Part III.

⁸⁶ See Howard Beck, *N.B.A. Commissioner Stern Wants to Preserve Age Limit for Players*, N.Y. TIMES, June 5, 2009, at B15, available at <http://www.nytimes.com/2009/06/05/sports/basketball/05stern.html>; see also Stern Wants NBA Age Limit Raised to 20, ESPN (Apr. 13, 2005), <http://sports.espn.go.com/nba/news/story?id=2035132>.

⁸⁷ See Stern Wants NBA Age Limit Raised to 20, *supra* note 86 (quoting David Stern as saying, "I'm optimistic the union will agree to some raise in the minimum age in the current collective bargaining."); see also Steve E. Cavezza, *Can I See Some ID?: An Antitrust Analysis of NBA and NFL Draft Eligibility Rules*, 9 U. DENV. SPORTS & ENT. L. J. 22 (2010) (stating that the NFL requires players to be three years out of high school before joining the league).

NBA when eighteen year olds can enlist to be sent to Afghanistan.⁸⁸ Furthermore, he believes that players who are forced to go to school for one year will barely take enough credits, and cruise through the year not learning anything.⁸⁹ This completely defeats the purpose of the “one and done” rule. LeBron James was quoted as saying “what’s the point if you don’t want to be in school?”⁹⁰ If the purpose of this rule is to force an education on these athletes, and to mature them, this simply is not succeeding.

Additionally, Spencer Haywood, a former NBA star who is known for paving the way for future stars such as LeBron James, spoke out against this rule as well: “How can the players association do that? They represent veterans who pay dues. They don’t represent kids trying to get in early.”⁹¹ Tennessee Congressman Steve Cohen went as far as calling this rule “a vestige of slavery,” although he slightly retracted his statement by saying it was not the same type of slavery as 150 years ago.⁹²

NBA forward Jermaine O’Neal believes that the NBA’s age eligibility rule arose through racism.⁹³ He explains that in the last couple of years the winners of the Rookie of the Year awards were players straight out of high school.⁹⁴ O’Neal expressed concerned that “[a]s a black guy, you kind of think that’s the reason why it’s coming up. You don’t hear about it in baseball or hockey.”⁹⁵ While this Note will not go as far as proposing the NBA’s rule to be a product of racism, it will compare the rule with that of

⁸⁸ George Vecsey, *Arne Duncan Challenges the N.C.A.A.*, N.Y. TIMES (Jan. 15, 2010), available at <http://www.nytimes.com/2010/01/15/sports/ncaabasketball/15vecsey.html>; see Arn Tellem, *Arn on Arne*, HUFFINGTON POST (Jan. 22, 2010, 12:48 PM), available at http://www.huffingtonpost.com/arn-tellem/arn-on-ame_b_433138.html (discussing that the NBA should change the minimum age back to eighteen because eighteen is the age at which men can get married, vote, and fight in foreign wars).

⁸⁹ See Katie Thomas, *Education Chief Criticizes N.B.A. and the N.C.A.A.*, N.Y. TIMES (Jan. 15, 2010) (noting that some players are simply passed through their institutions); see Vecsey, *supra* note 88 (pointing out that players take as few as six credits a semester).

⁹⁰ Vecsey, *supra* note 88; see Tellem, *supra* note 88 (quoting LeBron James discussing the “one-and-done” rule).

⁹¹ Brady, *supra* note 35.

⁹² Pete Thamel, *Congressman Asks N.B.A. and Union to Rescind Age Minimum for Players*, N.Y. TIMES (June 4, 2009), available at <http://www.nytimes.com/2009/06/04/sports/basketball/04webcohen.html>.

⁹³ See *Pacer’s O’Neal Says NBA draft age limit smacks of racism*, NBC SPORTS (Apr. 12, 2005), <http://nbcsports.msnbc.com/id/7469844/> [hereinafter NBCSports.com]; see also *Stern wants NBA age limit raised to 20*, ESPN (Apr. 13, 2005), <http://sports.espn.go.com/nba/news/story?id=2035132>.

⁹⁴ See NBCSports.com, *supra* note 93 (noting that the last two high school players who have won the rookie of the year awards are LeBron James, and Amare Stoudemire); see also *Encyclopedia of World Biography, LeBron James Biography*, NOTABLEBIOGRAPHIES.COM, <http://www.notablebiographies.com/news/Ge-La/James-LeBron.html> (last visited Sept. 28, 2011 9:00 PM); see also *Amar’e Stoudemire Early Life and Career*, <http://amarestoudemire.com/bio/early-life-and-career/> (last visited Sept. 28, 2011 9:04 PM).

⁹⁵ NBCSports.com, *supra* note 93.

other sports, and show that the rule seems quite arbitrary.

B. NBA v. Other Major Sporting Industries

Vast differences exist between the NBA's draft eligibility rules and those of other sports. Other leagues, in which a higher risk of danger exists, such as the National Hockey League (NHL) and National Association for Stock Car Auto Racing (NASCAR), provide no age limits as to those who are eligible to play. The NHL's eligibility rules state that all players age eighteen or older are eligible for claim in the entry draft.⁹⁶ John Tavares, for example, an NHL player, was drafted at the age of fourteen by the Ontario Hockey League (OHL) because he was considered an "exceptional player."⁹⁷ Major League Baseball (MLB) allows players to be drafted if they have graduated from high school and have not yet attended college or junior college. Also eligible are college players who have completed their junior or senior years or are at least 21, and junior college players, regardless of how many years were completed.⁹⁸ In other words, MLB virtually has no age limit, similar to the rules of NASCAR, Boxing, Tennis,⁹⁹ and Golf.¹⁰⁰

Although the idea that the NBA rule is a product of racism may seem farfetched, Jermaine O'Neal has a valid point. What about the other sports? In baseball, a player can risk a 99 mile per hour fastball hitting his head at any age after high school, but he cannot play in the NBA.¹⁰¹ In

⁹⁶ Collective Bargaining Agreement between Nat'l Hockey League Management and Nat'l Hockey League Players' Assoc. Art. VIII § 4(a) (2005), http://www.nhlpa.com/docs/about-us/nhl_nhlpa_2005_cba.pdf.

⁹⁷ See Adam Epstein Esq., *Age and Sports Law*, WISBAR (May 3, 2006), [http://74.125.93.132/search?q=cache:xSe8P3RGLwMJ:www.wisbar.org/AM/Template.cfm%3FSection%3DSports_and_Entertainment_Law_Section%26Template%3D/CM/ContentDisplay.cfm%26ContentID%3D57388+age+and+sports+law&cd=1&hl=en&ct=clnk&gl=us&client=firefox-a;+see+also+Lee+Forman,+Islanders+101+-+John+Tavares,+N.Y.+ISLANDERS+EXAMINER+\(Aug.16,+2009\),+http://www.examiner.com/new-york-islanders-in-long-island/islanders-101-john-tavares](http://74.125.93.132/search?q=cache:xSe8P3RGLwMJ:www.wisbar.org/AM/Template.cfm%3FSection%3DSports_and_Entertainment_Law_Section%26Template%3D/CM/ContentDisplay.cfm%26ContentID%3D57388+age+and+sports+law&cd=1&hl=en&ct=clnk&gl=us&client=firefox-a;+see+also+Lee+Forman,+Islanders+101+-+John+Tavares,+N.Y.+ISLANDERS+EXAMINER+(Aug.16,+2009),+http://www.examiner.com/new-york-islanders-in-long-island/islanders-101-john-tavares).

⁹⁸ See Major League Baseball Official Rules, MLB.COM, <http://mlb.mlb.com/mlb/draftday/rules.jspl> (last visited Jan. 22, 2012); see also Jeff Aberle, *MLB Transactions Part Six: The Rule 4 Draft*, PURPLE ROW.COM (Mar. 12, 2009), <http://www.purplerow.com/2009/3/12/788765/mlb-transactions-part-six>.

⁹⁹ See Epstein, *supra* note 97 (noting that in Tennis an individual can compete in 15 events between the ages of 17 and 18); see also *Nascar Lowers an Age Limit*, ASSOCIATED PRESS, Feb. 12, 2011, available at http://www.nytimes.com/2011/02/13/sports/autoracing/13sportsbriefs-Age.html?_r=2.

¹⁰⁰ See Epstein, *supra* note 97 (discussing that golf allows individuals to play at the age of 18, but those between the ages of 15 and 18 can petition for an exemption); see also Jeff Shain, *Lexi Thompson gets OK to seek LPGA card*, SUN-SENTINEL, July 5, 2011, available at http://articles.sun-sentinel.com/2011-07-05/sports/os-lexi-thompson-q-school-0706-20110705_1_lpga-card-mike-whan-lpga-membership (reporting on the age exemption granted to Lexi Thompson, allowing her to play professionally at age 16).

¹⁰¹ See David Nethers, *Ray Chapman and the Anniversary of a Death That Changed Baseball*

hockey, a player runs the risk of being hit with a hockey stick or hockey puck, or being cut by a skate, yet any player out of high school is eligible to play.¹⁰² In NASCAR an athlete can drive around in circles at extraordinarily fast speeds, where crashes are what fans sometimes look forward to most, yet you still cannot play in the NBA. An individual is mature enough to physically hit someone in the head in boxing, and be hit, but not to dunk a basketball and cash a check at the same time.¹⁰³

The NFL includes a high level of risk, and an age eligibility rule, but is incomparable to the NBA. In contrast to these other sports, the NFL requires three seasons of the NFL to be played after high school graduation before being able to enter the draft.¹⁰⁴ The NFL, in *Clarett*, set forth arguments that some players would not be mature enough, nor be physically able and ready to play in the NFL. The NFL also expressed concern of a decrease in value of the game. The NFL is not the same as the NBA. The point of the game in the NBA is not to knock the other player off his feet. Regarding maturity, it is only necessary to look at players such as Ron Artest and Latrell Sprewell. Ron Artest played two years of college and started the biggest brawl in the history of the NBA.¹⁰⁵ Latrell Sprewell played college basketball for four years and was suspended for choking his coach. Some may argue that there will always be thugs in any sport.¹⁰⁶ While that may be true, how can the NBA argue that the maturity of older players is a reason for its rules? The NFL and the NBA are

Forever, BLEACHER REPORT (Aug. 15, 2008), <http://bleacherreport.com/articles/48003-ray-chapman-and-the-anniversary-of-a-death-that-changed-baseball-forever> (discussing the death of Ray Chapman a day after being hit in the head with a baseball); see also Frederick O. Mueller, *Catastrophic Head Injuries in High School and Collegiate Sports*, 36 J. OF ATHLETIC TRAINING 312, 314 (2001).

¹⁰² See McCleary announces retirement, CBC SPORTS (Nov. 10, 2000), <http://www.cbc.ca/sports/story/2000/09/20/trent000920.html> (referring to Trent McCleary's early retirement due to being hit in the throat with a slap-shot, requiring an emergency tracheotomy); see also Hockey Operation Guidelines, NHL.COM, http://www.nhl.com/nhlhq/hockey_ops.html (last visited Jan. 22, 2012).

¹⁰³ See McCann & Rosen, *supra* note 58, at 748; see also Rules of World Boxing Assoc. Section (G) (11).

¹⁰⁴ See Collective Bargaining Agreement between Nat'l Football League Management and Nat'l Football League Players' Assoc. Art. XVI, Section(2)(b) (2006), static.nfl.com/static/content/public/image/.../nfl-cba-2006-2012.pdf; see also *Clarett v. Nat'l Football League*, 369 F.3d 124, 125 (2d Cir. 2004).

¹⁰⁵ See McCann & Rosen, *supra* note 58, at 761; see also Roy Pickering, *Ron Artest Starts Brawl, David Stern Finishes It*, SUITE 101 (Nov. 22, 2004), <http://www.suite101.com/article.cfm/sports/issues/112305> (discussing how Artest leaped over the scorer's table to attack a fan during a game between the Indiana Pacers and the Detroit Pistons).

¹⁰⁶ See Pickering, *supra* note 105; see also Mike Puma, *The Choke Artist: Signature Event*, ESPN CLASSIC (Dec. 10, 2004), http://espn.go.com/classic/s/add_sprewell_latrell.html (explaining the events that lead up to Sprewell's act of choking his coach, P.J. Carlesimo); see also Michael A. Messner, *When Bodies are Weapons: Masculinity and Violence in Sport*, in, *OUT OF PLAY: CRITICAL ESSAYS ON GENDER AND SPORT*, 95-97 (2007).

different sports, and just because one sport has an age eligibility requirement, does not mean that the other should too.

The NBA is taking a paternalistic role by trying to presume that it knows what is best or proper for a young man.¹⁰⁷ The NBA is trying to assert these arbitrary rules by saying that success in life must run through college.¹⁰⁸ Whether society likes it or not, college is only an option in America and it is wrong to demand that professional caliber athletes do what society says they should do.¹⁰⁹ The NBA prefers this method because there will be no cost to the league, giving the players no option but to develop their skills elsewhere.¹¹⁰ The truth of the matter is that some players who went to college for a year, such as Derrick Rose, who went to Memphis, and O.J. Mayo, who went to U.S.C., never belonged in college.¹¹¹ They were always good enough to be in the NBA straight out of high school, and they were only students because they were forced.¹¹² At first, many believed that this rule would turn NBA players on to receiving an education. While David Stern admitted it was a business decision, it seemed like “genuine altruism on his part when he said that it was time to get NBA scouts and general managers out of high school gyms.”¹¹³ The truth is that Stern raised the age because owners and general managers

¹⁰⁷ See Spencer Morris, *Why the NBA's Rule is a Disgrace*, BLEACHER REPORT (Apr. 8, 2009), <http://bleacherreport.com/articles/153153-the-nbas-eligibility-rule-is-a-disgrace>; see also Susan McAlevey, *Spendthrift Trust: An Alternative to the NBA Age Rule*, 84 ST. JOHN'S L. REV. 279, 280 (2010).

¹⁰⁸ See Morris, *supra* note 107 (“Have we determined that the only path for ‘success’ in life must run through college?”); see also McAlevey, *supra* note 107, at 284.

¹⁰⁹ See Morris, *supra* note 107; see also McAlevey, *supra* note 107, at 286–87.

¹¹⁰ See Fuhrman, *supra* 59, at 588 (explaining why the NBA prefers the age eligibility rules); see also, Scott R. Rosner, *Must Kobe Come Out and Play? An Analysis of the Legality of Preventing High School Athletes and College Underclassmen from Entering Professional Sports Drafts*, 8 SETON HALL J. SPORTS L. 539, 570 (1998) (discussing the justification that maintaining intercollegiate athletics as a developmental system will save the league money).

¹¹¹ See Michael Del Muro, *USC Basketball is Dead, but NBA Rules Share the Blame*, BLEACHER REPORT (June 11, 2009), <http://bleacherreport.com/articles/196977-usc-basketball-is-dead-but-nba-rules-are-to-blame> (noting that the NBA draft eligibility rules have created a system that taints college basketball and future stars. This is because none of these college athletes would have received gifts and money in order to either stay in college or to construct an agreement of future representation in the NBA, if they were allowed to go to the NBA straight from high school); see also Michael A. McCann, *Illegal Defense: The Law and Economics of Banning High School Players from the NBA Draft*, 1 VA. SPORTS & ENT. L.J. 295, 314–21 (2002).

¹¹² See Muro, *supra* note 111 (noting the ‘one and done’ rule requires the athletes to go to school for one year, when they never wanted to be there in the first place); see also McCann, *supra* note 111, at 326–28.

¹¹³ Buzz Bissinger, *Bring Back Basketball's Little Big Men*, N.Y. TIMES, Oct. 27, 2009, at A31, available at <http://www.nytimes.com/2009/10/27/opinion/27bissinger.html>; see Benjamin S. Weisfelner, *Reverse Slam Dunk: Making the Case That the National Basketball Association's Minimum Age Requirement Violates State Discrimination Laws*, 21 SETON HALL J. SPORTS & ENT. L. 203, 211–12 (2011).

resented the amount of time it took to train players out of high school.¹¹⁴ The NBA decided to deal with this issue by acting as decision makers for the potential NBA stars, and sending a message to them that school should come first. This paternalistic role that the NBA is taking on is not what the business of the NBA entails.

While both disaster and success stories of those who have made the jump straight from high school have occurred,¹¹⁵ the Commissioner, requiring an athlete to be nineteen to enter the draft is arbitrarily denying the rights of these athletes to work because of their age. A path for these players must be available in order to rectify the problem that the NBA has caused. Therefore, it is time for the players to start looking at other opportunities and making new arguments, to allow their voices to be heard, and asserting their rights through different applicable laws.

III. THE NEW ROUTE FOR INELIGIBLE ATHLETES

A. The ADEA Should Allow For Reverse Age Discrimination Claims

Potential NBA players received a crushing blow when the Supreme Court made its ruling on reverse age discrimination claims in 1997. The Court held that the ADEA does not cover reverse age discrimination claims.¹¹⁶ In *General Dynamics v. Cline*, the petitioner had a collective bargaining agreement with the United Auto Workers. This agreement eliminated an obligation to provide health benefits to subsequently retired employees, except as to the current workers, who were at least 50 years old.¹¹⁷ Cline and the respondents, who were then between the ages of 40 and 50, were protected by the act, but missed out on the health benefits.¹¹⁸ The Equal Employment Opportunity Commission (EEOC) agreed with Cline that the agreement violated the ADEA, and invited General

¹¹⁴ See Bissinger, *supra* note 113 (noting that Stern did this to appease the owners of NBA teams, who wanted to avoid the possibility of players in their early twenties being free agents, able to choose the team they want to play for); see also Weisfelner, *supra* note 113, at 210.

¹¹⁵ See *NBA Age Limit Pros and Cons*, 21ST CENTURY PALADIN (Apr. 18, 2005), <http://www.21stcenturypaladin.com/2005/04/18/nba-age-limit-pros-and-cons/> (highlighting the successful players who made the jump straight from high school such as LeBron James, who averaged 20.9 points per game at the age of 18, and the unsuccessful, such as Jonathon Bender, averaging 2.7 points per game at the age of 18); see also McCann, *supra* note 111, at 314–21.

¹¹⁶ See *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (“We see the text, structure, purpose, and history of the ADEA, along with its relationship to other federal statutes, as showing that the statute does not mean to stop an employer from favoring an older employee over a younger one.”).

¹¹⁷ *Id.* at 584 (discussing the elements of the collective bargaining agreement).

¹¹⁸ *Id.*

Dynamics to settle with Cline.¹¹⁹ The attempt to settle had failed, and Cline brought action in the district court, which held that no court ever granted relief for reverse age discrimination under the ADEA.¹²⁰ The Sixth Circuit, however, reversed the district court's holding, reasoning that "the prohibition of 623(a)(1) covering discrimination against any individual . . . because of such individual's age,' is so clear on its face" that if Congress intended to protect only the older worker, it would have said so.¹²¹ Unfortunately for the potential NBA players, the trial did not end here.

The Supreme Court reversed the Sixth Circuit's decision for two main reasons: legislative history and the plain meaning of age.¹²² The majority opinion pointed to the legislative history behind the ADEA, noting that the law does not provide for reverse age discrimination.¹²³ It stated that not only was age left out with regards to the different types of discrimination forbidden by Title VII of the Civil Rights Act of 1964,¹²⁴ but in Congress' proposal for the Fair Labor Standards Amendments of 1966, the testimony at both hearings concentrated on assumptions about the effect of age on ability to work.¹²⁵ Thus, the Court stated that all findings and statements produced proof that age discrimination intensified over time, or are "couched in terms that refer to 'older' workers, explicitly or implicitly relative to 'younger' ones."¹²⁶

Secondly, the Court focused on the plain meaning of age. They determined that it is a commonplace conception of American society that its character is "youth culture" and a world where better means younger, and that discrimination because of age is commonly understood as against older individuals.¹²⁷ Furthermore, Cline argued that the meaning of age was uniform throughout the statute, and that specific provisions could not mean to only protect older individuals.¹²⁸ However, the Court counters this

¹¹⁹ See *id.* at 585.

¹²⁰ See *id.* (citing *Gen. Dynamics Land Sys., Inc., v. Cline*, 98 F. Supp. 2d 846, 848 (N.D. Ohio 2000)).

¹²¹ *Id.*

¹²² See Ennis, *supra* note 16, at 759–63 (comparing the arguments of both the majority and dissenting opinion).

¹²³ See *id.* at 759 (citing *Gen. Dynamics*, 540 U.S. at 585).

¹²⁴ See *id.*

¹²⁵ See *Gen. Dynamics*, 540 U.S. at 588; see *Age Discrimination in Employment: Hearing on H.R. 3651, H.R. 3768, H.R. 4221 Before the Subcomm. on Labor*, 90th Cong. 151 (1967) (statement of Rep. Joshua Eilberg) ("[A]t age 40, a worker may find that age restrictions become common . . . by age 45 his employment opportunities are likely to contract sharply, and shrink more severely at age 55 and vanish by age 65 . . .").

¹²⁶ *Gen. Dynamics*, 540 U.S. at 590.

¹²⁷ See *id.* at 591.

¹²⁸ See Ennis, *supra* note 16, at 760 (citing *Gen. Dynamics*, 540 U.S. at 594) (referring to the Age Discrimination Employment Act).

argument by stating that this is an incorrect presumption.¹²⁹ Additionally, the Court added that this presumption will be overcome when there is a variation in the connection in which the words are used as “reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.”¹³⁰

However, this Supreme Court ruling should not apply to claims of reverse age discrimination with regards to the NBA eligibility rule. There is a vast difference between receiving benefits and attempting to obtain gainful employment. These cases often deal with retirement or health benefits, resulting in employees who already have jobs and are being denied extra money, or health insurance. The potential NBA players, the young athletes who are playing hard and training every day, are being denied the right to work at all based on their age.

Moreover, the Supreme Court ruling in *General Dynamics* should be overruled for three reasons; the Civil Rights Act of 1964 allows for reverse discrimination suits, the language of the ADEA, and the legislative history of the statute. First, since the Civil Rights Act of 1964 allows for reverse discrimination suits based upon race and sex, reverse age discrimination claims should be allowed as well.¹³¹ Opponents may argue that the intent of Congress when passing the ADEA was to protect the older employees, and not the young. However, two cases preclude such an argument. The first case is *Oncala v. Sundowner Offshore Services*, where the court found that males were protected under Title VII from sexual harassment.¹³² The second case is *McDonald v. Santa Fe Trail Transportation Co.*, where it was held that Title VII protected whites discriminated against in favor of racial minorities.¹³³ Undoubtedly, Congress was not concerned with male sexual harassment, nor discrimination against whites when it passed these acts, however, both cases show that reverse discrimination still violates an individual's civil rights. Opponents will argue that age is not an immutable characteristic, and therefore does not require the same protection. On the contrary, opponents may argue that allowing for reverse age discrimination will be a slippery slope, eventually leading to younger individuals having a

¹²⁹ See *Gen. Dynamics* 540 U.S. at 595 (2004) (citing *Atl. Cleaners & Dyers Inc. v. U.S.*, 286 U.S. 427, 433 (1932)).

¹³⁰ *Id.*; see *U.S. v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 216 (2001); see also *Robinson v. Shell Oil Co.* 519 U.S. 337, 346 (1997).

¹³¹ See *Ennis*, *supra* note 16, at 763; see also *Gen. Dynamics*, 540 U.S. at 597–98.

¹³² See *Oncala v. Sundowner Offshore Servs.*, 523 U.S. 75, 82 (1998).

¹³³ See *McDonald v. Santa Fe Trail Transp.*, 427 U.S. 273, 295–96 (1976) (noting that Title VII prohibited all racial discrimination in employment, without exception for any group of particular employees).

history of unequal treatment. While it is true that older individuals will have a harder time obtaining a new job when they are fired, as opposed to younger individuals, that does not mean that younger applicants should be denied all of the protection of age discrimination laws.

Second, as Scalia explained, the EEOC's interpretation that the agreement violated the ADEA was "neither foreclosed by the statute [ADEA] nor unreasonable" and that the Court should defer to EEOC, which is charged with administering the statute, and allow for reverse age discrimination.¹³⁴ Third, the plain meaning and language of the ADEA calls for the admissibility of suits brought by the young.¹³⁵ The Court explains that "the starting point for the interpretation of a statute is always its language."¹³⁶ The ADEA clearly states that one must not discriminate against another on the basis of the individual's age.¹³⁷ This phrase does not restrict discrimination to only those of an older age.¹³⁸ As Justice Thomas stated in his dissent:

"If an employer fired a worker for the sole reason that the worker was under 45, it would be entirely natural to say that the worker had been discriminated against because of his age. I struggle to think of what other phrase I would use to describe such behavior. I wonder how the Court would describe such incidents, because the Court apparently considers such usage to be unusual, atypical, or aberrant."¹³⁹

Lastly, legislative history proves that the ADEA should bar discrimination of the young. A statement made by Senator Yarborough, a sponsor of the bill, when discussing this particular issue in question, confirmed that "the text really meant what is said."¹⁴⁰ This is further proof that the primary meaning of "age" as used in the ADEA is an "individual's chronological age."¹⁴¹ While age may have alternative meanings, such as "the state of being old" or "hair white with age," Congress clearly intended

¹³⁴ *Gen. Dynamics*, 540 U.S. at 601 (Scalia, J., dissenting).

¹³⁵ *See id.* at 603 (Thomas J., dissenting); *but see id.* at 598 (majority opinion) (interpreting the plain language in the opposite way).

¹³⁶ *Id.* at 602 (Thomas J., dissenting) (citing *Cnty. for Creative Non-Violence v. Reid* 490 U.S. 730, 739 (1989)).

¹³⁷ *See id.* at 603; *see* 29 U.S.C. §623(a)(1) (2011).

¹³⁸ *See Gen. Dynamics*, 540 U.S. at 603 (Thomas, J., dissenting) (stating that the plain language of the ADEA clearly allows for suits brought by the young when discriminated against in favor of the old); *see also* 29 U.S.C. § 623(a)(1).

¹³⁹ *Gen. Dynamics*, 540 U.S. at 603 (Thomas, J., dissenting).

¹⁴⁰ *Id.* at 606 (explaining that, although the statute is clear and legislative history is unnecessary, the history confirms that the plain reading of the text is the correct reading); *see* 113 CONG. REC. 31, 255 (1967).

¹⁴¹ *Gen. Dynamics*, 540 U.S. at 604 (Thomas, J., dissenting).

to use the primary meaning of the word, given the context of the statute.¹⁴² The statute would be incoherent if the alternate meaning of age was intended for two reasons. ¹⁴³ First, Section 623(f)(1) of the ADEA provides a defense where “age is a bona fide occupational qualification” and if “age” was meant to be limited to older age, then this defense would “provide a defense only where a defense is not needed, since under the Court’s reading, discrimination against the relatively young is always legal under the ADEA.”¹⁴⁴ Second, Section 623(e) of the ADEA bans printing of any notice or advertisement indicating a preference, or discrimination based on age.¹⁴⁵ If “age” was intended to mean “old age” then an employer would be able to advertise asking only for young applicants, and could not advertise for older applicants, even though the ADEA bans this kind of discrimination.¹⁴⁶ If anything, it is not unclear as to whether Congress intended to include the young, or whether they intended to favor the old.¹⁴⁷

It seems that the Supreme Court has settled on the determination that the ADEA is meant to protect older employees, even though the statute says that one cannot be discriminated against because of such individual’s age without specifying the required age to make a claim.

Reverse discrimination claims are not impossible, regardless of the holding in *General Dynamics*.¹⁴⁸ Section 1625 of the ADEA makes it clear that “the ADEA does not preempt State age discrimination in employment laws.”¹⁴⁹ Therefore, it is possible to make a state law claim for age discrimination. Two influential states have determined that reverse age

¹⁴² *Id.* at 603; see 113 CONG. REC. 31, 255 (1967) (stating, in Congressional debate before passing the ADEA, that the law was intended to prevent both age discrimination and reverse age discrimination).

¹⁴³ *Gen. Dynamics*, 540 U.S. at 604 (Thomas, J., dissenting); see 29 U.S.C. § 623(f)(1) (providing a defense for “age” as a bona fide occupational defense, where “age” is not qualified as “older age”).

¹⁴⁴ *Gen. Dynamics*, 540 U.S. at 604 n.1 (Thomas, J., dissenting).

¹⁴⁵ 29 U.S.C. § 623(e).

¹⁴⁶ See *Gen. Dynamics*, 540 U.S. at 604 (Thomas, J., dissenting); see also 29 U.S.C. § 623(e) (prohibiting advertisements expressing preference for age, and failing to limit “age” to “older age”).

¹⁴⁷ See *Gen. Dynamics*, 540 U.S. at 604 (Thomas, J., dissenting) (referring to the fact that the majority believes it is clear that Congress intended to protect the elderly, as opposed to the young); see also 113 CONG. REC. 31255 (1967) (stating, in the only legislative history on point, that the ADEA was intended to protect both young and older employees from age discrimination, contrary to the majority in *General Dynamics*).

¹⁴⁸ See Ennis, *supra* note 16, at 768 (discussing the possibility of state law claims); see e.g., *Bergen Commercial Bank v. Sisler*, 723 A.2d 944, 957 (N.J. 1999) (holding that a reverse age discrimination claim could be brought under New Jersey’s state law).

¹⁴⁹ 29 C.F.R. § 1625.10(g) (2011); see *Hulme v. Barrett*, 449 N.W.2d 629, 631–32 (Iowa 1989) (stating that the Iowa statute makes it unfair to discriminate because of age, and, since the action is brought under the state statute, that is the statute the court applies); see also *Fisher v. Quaker Oats Co.*, 559 A.2d 1, 2 (N.J. Super. Ct. App. Div. 1989) (explaining that the ADEA does not preempt state age discrimination laws).

discrimination can be present under state law: New Jersey and California.¹⁵⁰

First, in the California case, *Lazar v. Hertz*, the plaintiff brought a class action suit alleging age discrimination for himself and on behalf of others between the ages of sixteen and twenty-five.¹⁵¹ The plaintiffs believed that a rental car company's refusal to rent automobiles to persons under the age of 25 resulted in an unreasonable restriction.¹⁵² While the court did not allow for a reverse age discrimination claim, it demonstrated that this area of law could be susceptible to a reverse age discrimination claim had the court not been required to defer to a vehicle regulation.¹⁵³

Secondly, in *Bergen v. Sisler*, plaintiff Michael Sisler lost his job without an opportunity to prove to his employer that he was capable of the job, and was replaced by an older employee.¹⁵⁴ The applicable statute in New Jersey was the New Jersey Law Against Discrimination, (LAD) which provided that "all persons shall have the opportunity to obtain employment . . . without discrimination because of age."¹⁵⁵ New Jersey followed an Oregon court decision holding that when there is a qualified applicant for a position, and he or she is not hired without any legitimate reason, along with age being a per se fact, then it would be an unlawful employment practice.¹⁵⁶ The New Jersey court constructed its own standard, and found that the LAD encompassed Sisler's claim. The New Jersey standard requires the employee to show that age "played a role in the decision making process and that it had a determinative influence on the outcome of that process."¹⁵⁷

The court further distinguished between direct evidence of age discrimination and circumstantial evidence of age discrimination. When there is direct evidence of age discrimination, the burden shifts to the employer to show that it would have made the same decision regardless of

¹⁵⁰ See *Bergen Commercial Bank*, 723 A.2d at 957; see also *Lazar v. Hertz Corp.*, 82 Cal. Rptr. 2d 368, 377-78 (Cal. Ct. App. 1st Dist. 1999); Fuhrman, *supra* note 59, at 605.

¹⁵¹ *Lazar*, 82 Cal. Rptr. 2d at 371.

¹⁵² *Id.*

¹⁵³ See *id.* at 377-38 (denying an age discrimination claim for other reasons, implicitly leaving open the possibility of a reverse age discrimination claim); see also Fuhrman, *supra* note 59, at 605.

¹⁵⁴ *Bergen Commercial Bank v. Sisler*, 157 N.J. 188, 196-67 (1999) (discussing the facts of the case).

¹⁵⁵ *Id.* at 199.

¹⁵⁶ See *id.* at 204; see also *Ogden v. Bureau of Labor*, 299 Or. 98, 100 (explaining the statute that New Jersey based their opinion off of); OR. REV. STAT. § 659.030(1)(a) (2009) (noting that it is an unlawful employment practice to refuse to hire someone based on age if the individual is 18 years or older).

¹⁵⁷ *Bergen*, 157 N.J. at 207 (citing *Malorino v. Schering-Plough Corp.*, 302 N.J. Super. 323, 344 (App. Div. 1997)).

the impermissible consideration.¹⁵⁸ If there is circumstantial evidence, which is more likely to be the case, a three-step process is commenced. The first step in the process requires the plaintiff to prove four separate elements by a preponderance of the evidence.¹⁵⁹ First, that the plaintiff belongs to a protected class; second, that the plaintiff applied and was qualified for a position for which the employer was seeking applicants; third, that the plaintiff was rejected despite having adequate qualifications; and lastly, that the employer continued to seek applications for that job.¹⁶⁰ Next, the employer must show that he/she had legitimate non-discriminatory reasons for rejecting the employee.¹⁶¹ If this evidence is shown, then the presumption of discrimination will disappear.¹⁶² The third and final part of the process requires the employee to prove by a preponderance of the evidence that the legitimate reason given by the defendant was not true, and was “merely a pretext for discrimination.”¹⁶³

In the end, the fact that one influential state accepted a claim for reverse age discrimination, and another did not dismiss it, indicates the potential for state reverse age discrimination claims for NBA athletes.¹⁶⁴ Additionally, age discrimination law is extremely vulnerable to changes in the economy, especially under state law.¹⁶⁵ A standard like the one set forth in *Bergen* should be a standard that the Federal courts should consider when dealing with the age requirement of the NBA. Due to the fact that

¹⁵⁸ *Bergen*, 157 N.J. at 209; see *Price Waterhouse v. Hopkins*, 490 U.S. 228, 230–31 (1989) (explaining the shifting of burdens on proving that age is a substantial factor in an employment decision).

¹⁵⁹ See *Bergen*, 157 N.J. at 209–10 (discussing the McDonnell Douglas standard, which is the test used to determine discrimination through circumstantial evidence, since direct evidence is hard to come by); see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

¹⁶⁰ See *Bergen*, 157 N.J. at 210 (quoting *Erickson v. Marsh & McLennan Co.*, 117 N.J. 539, 550 (1990)); see also *Andersen v. Exxon Co.*, 89 N.J. 483, 492 (1982) (stating the elements that must be satisfied for a *prima facie* case of unlawful discrimination).

¹⁶¹ See *Bergen*, 157 N.J. at 210; see also *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (noting that the plaintiff’s burden is not onerous).

¹⁶² See *Bergen*, 157 N.J. at 211; see also *Burdine*, 450 U.S. at 253 (stating that the defendant’s showing of legitimate non-discriminatory reasons for the plaintiffs rejection rebuts the presumption that the employer unlawfully discriminated against the employee).

¹⁶³ See *Bergen*, 157 N.J. at 211; see also *Murray v. Newark Hous. Auth.*, 311 N.J. Super. 163, 173 (1998) (quoting *Burdine*, 450 U.S. at 256).

¹⁶⁴ See *Fuhrman*, *supra* note 59, at 605–06 (explaining what the two states, California and New Jersey, did in terms of recognizing reverse age discrimination); see also Megan Jordan Strickland, Note, *The Impact of Interpretation: The Age Discrimination in Employment Act as Determined by the Sixth Circuit*, 28 SETON HALL LEGIS. J. 197, 208 (2003) (noting that plaintiffs have succeeded in arguing a reverse age discrimination claim in some states).

¹⁶⁵ See *Fuhrman*, *supra* note 59, at 606 (discussing why younger individuals should maintain hope for protection from age discrimination); see also *Lazar v. Hertz Corp.*, 69 Cal. App. 4th 1494, 1502 (Cal. App. 1st Dist. 1999) (discussing that business retain the right, under state law, to adopt reasonable regulations for their services).

direct evidence of age discrimination will be rare, the test for circumstantial evidence will allow for protection of both those teenage athletes who in fact are being discriminated against, and for teams and owners, who genuinely decided in a non-discriminatory fashion to proceed in another direction, with another player. Therefore, the NBA player should have a much better chance of success if they allege a state law violation of age discrimination.

B. The Age Eligibility Rule is a Violation of the Equal Protection Clause

Denying high school players the right to obtain gainful employment based on their age is unconstitutional and violates the players' equal protection of the laws. Thus, another legal avenue for potential NBA players would be a constitutional claim under the 14th Amendment of the Constitution.¹⁶⁶ "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."¹⁶⁷

There is a difference between the test required to prove age discrimination under the ADEA and that of age discrimination under the Equal Protection Clause. On one hand, the ADEA requires the employer to show that the job classifications that are based on age are necessary for business and that a basis exists to make an employer believe that all those protected by the ADEA would not be able to do the job, or that the protected class' ability to do the job is impossible.¹⁶⁸ The test for Equal Protection, on the other hand, requires the challenger to show that there is no reasonable basis for the classification.¹⁶⁹

The Supreme Court in *Massachusetts Board v. Murgia* is responsible for the formation of this test.¹⁷⁰ In *Murgia*, a police officer was forced to retire on his 50th birthday, resulting in a civil action alleging that he was denied

¹⁶⁶ U.S. CONST. amend. XIV, § 1 (stating that no state shall deprive anyone of life, liberty or property, without due process, nor deny any person within its jurisdiction equal protection of the law).

¹⁶⁷ *Traux v. Raich*, 239 U.S. 33, 41 (1915).

¹⁶⁸ See *Ennis*, *supra* note 16, at 754-755 (explaining the test for proving discrimination under the ADEA); see also Julie R. Steiner, *Age Classifications and the Fourteenth Amendment: Is the Murgia Standard Too Old to Stand?*, 6 SETON HALL CONST. L.J. 263, 289-90 (highlighting the differences between the test for proving discrimination under the ADEA and Equal Protection in the 14th amendment).

¹⁶⁹ See *Steiner*, *supra* note 169, at 290; see also *Klotsche v. N.Y.*, 621 F.Supp. 1113, 1117 (S.D.N.Y. 1985).

¹⁷⁰ See *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (*per curiam*) (holding that the standard for age discrimination is the rational basis standard).

equal protection under the Fourteenth Amendment.¹⁷¹ The Court determined that old age does not fall under the “discrete and insular” group requiring extra protection.¹⁷² Having made this determination, the resulting test for age discrimination was the rational basis standard.¹⁷³ This standard requires that the statute, or law in question, be rationally related to a legitimate government objective. Under rational basis review, the statute requiring early retirement easily met this test.¹⁷⁴

The *Murgia* holding, calling for a rational basis standard with respect to equal protection and age discrimination, received support throughout the years. The Supreme Court had a chance to change the standard in 1979 while hearing another forced retirement case.¹⁷⁵ The Court in this case affirmed *Murgia* reiterating that the rational basis standard was the correct standard for age classification cases. Furthermore, the Court found that forcing retirement at the age of sixty was a legitimate and substantial goal of Congress because it is necessary that the employees be mentally and physically competent.¹⁷⁶ State courts also supported the *Murgia* holding.¹⁷⁷ In *O’Neil*, the Supreme Court of Missouri “blindly followed the Supreme Court of the United States.”¹⁷⁸ While the rational basis standard does not completely bar age discrimination claims under the Fourteenth Amendment’s equal protection provisions, it makes it difficult for one to be successful, and the Courts have made it clear that the rational basis standard is the proper standard.

The current standard for age discrimination set forth by *Murgia* is outdated and should be replaced by the intermediate standard. This will allow not only potential NBA athletes, but also others discriminated against on the basis of age to have more protection. When *Murgia* was decided, a few months passed before a middle level scrutiny was created.¹⁷⁹ At the

¹⁷¹ *Id.* at 309–310.

¹⁷² *See id.* at 313 (quoting *U.S. v. Carolene Prod.*, 304 U.S. 144, 152–53 n.4 (1938)).

¹⁷³ *See id.* at 314 (noting that age discrimination requires a relatively relaxed standard).

¹⁷⁴ *See id.* (“This inquiry employs a relatively relaxed standard reflecting the Court’s awareness that the drawing of lines that create distinctions is a peculiarly a legislative task and an unavoidable one.”); *see also* *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

¹⁷⁵ *See generally*, *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (following the *Murgia* holding and applying rational basis review).

¹⁷⁶ *See* Steiner, *supra* note 81, at 282 (citing *Vance*, 440 U.S. at 97).

¹⁷⁷ *See* *O’Neil v Baine*, 568 S.W.2d 761 (Mo. 1978) (involving a statute that requires one to retire at the age of seventy, with the plaintiff alleging that the statute deprived him of his right to pursue his livelihood); *see also* *Nagle v. Haw. State Teachers Ass’n*, 63 Haw. 389, 394 (1981).

¹⁷⁸ Steiner, *supra* note 81, at 284.

¹⁷⁹ *Id.* at 293 (discussing the reasons why the *Murgia* standard should be re-evaluated and changed); *see generally* Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus*, 44 U.C. DAVIS L. REV. 213 (2010) (discussing courts applications of intermediate scrutiny).

time, the *Murgia* Court had to choose between strict scrutiny requiring proof that the classification is narrowly tailored to accomplish a compelling state interest, or rational basis review. However, *Craig v. Boren* adopted an intermediate scrutiny standard, requiring proof that the classification is substantially related to an important state interest.¹⁸⁰ The level of scrutiny applied to equal protection claims based on age discrimination should be the intermediate level because while under current law employment is not a fundamental right, it still ranks among the most important of one's personal concerns.¹⁸¹ A claim of an equal protection violation of a fundamental right would trigger the strict scrutiny standard. Regardless of whether this right is fundamental, "the right of the individual to engage in any of the common occupations of life" has been asserted by the Supreme Court as a liberty guaranteed by the Fourteenth Amendment.¹⁸² Age is an immutable characteristic, one which cannot be controlled, like gender. Gender, or sex-based classifications trigger the intermediate scrutiny standard, and age should do the same.

In order for these athletes to have a claim against the age limit of the NBA draft rules, the age eligibility requirement would have to be construed as being enforced by the state. In virtually all litigation in which an individual argues that his constitutional rights have been violated, the court can grant relief only if it finds that there has been state action. There are three ways to prove state action. First, if the state delegates its power for one to perform a public function to a private person.¹⁸³ Second, if the state becomes inextricably entangled with the private person in that their separate entities are lost.¹⁸⁴ Third, if the state coerces or strongly encourages the private action in that the private person loses its power of

¹⁸⁰ See Steiner, *supra* note 81, at 273 (citing *Craig*, 429 U.S. at 190) (adopting new middle level of scrutiny); see also *Anonymous v. City of Rochester*, 13 N.Y.3d 35, 48-49 (N.Y. C.A. 2009) (citing *Craig v. Boren*, 429 U.S. 190, 197 (1973)).

¹⁸¹ See *Vance*, 440 U.S. at 113; see generally *Roe v. Wade*, 410 U.S. 113 (1973) (finding fundamental the women's right to choose between giving birth and abortion); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973) (holding that the right of education was not fundamental).

¹⁸² *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 322 (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972)) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

¹⁸³ See generally *Marsh v. Alabama*, 326 U.S. 501 (1945) (finding that the more an owner opens up his property for use by the public, for his own advantage, the more his rights become circumscribed by the state and the constitutional rights of those who use the property); *Amalgamated Food Emp.'s Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308, 325 (1968).

¹⁸⁴ See generally *Burton v. Wilmington Parking*, 365 U.S. 715 (1961) (deciding state action because the financial wherewithal to run the parking facility was dependent on the public); Sheila Suess Kennedy, *When is Private Public? State Action in the Era of Privatization and Public-Private Partnerships* (March 2001) (unpublished law review article, George Mason University) (on file with George Mason Civil Rights Law Review).

voluntary choice.¹⁸⁵

The most relevant of the three with regards to the NBA's age eligibility requirement is the second, where a state becomes entangled with the private person. This prong can be seen in *Burton v. Wilmington Parking*.¹⁸⁶ In *Burton*, the Eagle Coffee Shoppe, a restaurant within a parking building, owned by Wilmington Parking Authority, an agency of Delaware, refused to serve the plaintiff because he was black.¹⁸⁷ The plaintiff alleged that the refusal was a violation of his rights under the Equal Protection Clause of the Fourteenth Amendment.¹⁸⁸ The Supreme Court of Delaware held that this act was "purely private" and that the action was not state action.¹⁸⁹ The Supreme Court ultimately found that the relationship between the restaurant and the parking facility was enough to constitute the Coffee Shoppe's acts as state action. The Court reasoned that because the land and building were publicly owned, upkeep and maintenance of the building were payable out of public funds and because the restaurant is operated as an integral part of a public building devoted to a public parking service, there is a degree of state participation and involvement.¹⁹⁰

The state action requirement necessary to make a claim under equal protection can be met with respect to an NBA franchise.¹⁹¹ State action can be proven through the entanglement prong. The States are intricately involved with each of their teams, allotting tax revenue in order to build stadiums. Similarly to *Burton*, any maintenance or upkeep of the stadiums will be publicly funded. Furthermore, the State provides teams with the venue and money to throw parades when the teams win championships. Additional entanglement between the private entity and the state can be seen through the states taking on the identity of the sports teams as fans and followers of that specific team.¹⁹²

Even if the standard is not changed, *Baccus v. Karger* gives high school

¹⁸⁵ See generally *Shelly v. Kramer*, 334 U.S. 1 (1948) (holding that judicial enforcement of the restrictive covenant in deeds of residential property would constitute state action, and therefore be in violation of the 14th Amendment); *Buchanan v. Warley*, 245 U.S. 60 (1917).

¹⁸⁶ 365 U.S. 715 (1961).

¹⁸⁷ *Burton*, 365 U.S. at 716.

¹⁸⁸ *Id.*

¹⁸⁹ See *id.*

¹⁹⁰ See *id.* at 723–24.

¹⁹¹ See *Fuhrman*, *supra* note 59, at 606–07 (noting the different ways that the NBA can be seen as being involved in state action); see also Karen Martin Dean, *Can The NBA Punish Dennis Rodman? An Analysis of First Amendment Rights in Professional Basketball*, 23 VT. L. REV. 157, 166 (1998).

¹⁹² *Id.*; see Stephen M. McKelvey, *Commercial "Branding": The Final Frontier or False Start for Athletes' Use of Temporary Tattoos as Body Billboards*, 13 J. LEGAL ASPECTS OF SPORT 1, 29–30 (2003).

basketball stars, and others discriminated against on the basis of age, a glimmer of hope that the rational basis standard can be defeated. The plaintiff in *Baccus* was considered a child prodigy and began studying law at the age of fourteen, receiving his Juris Doctor when he was seventeen years old.¹⁹³ Planning to sit for the bar exam, having not yet reached twenty-one years of age, the plaintiff's application to take the exam was denied.¹⁹⁴ The plaintiff claimed undue hardship, arguing that his accelerated studies will now be forever meaningless and that he is in the best position to pass the bar immediately following completion of law school.¹⁹⁵ The defendants argued that in order to sit for the bar, the age requirement is necessary because one must be mature enough to practice law.¹⁹⁶ The defendants also argued that a person under the age of eighteen does not possess enough maturity to "sufficiently appreciate and understand the myriad factors and complexities found in the law and the critical importance of attorneys in practicing law and counseling clients."¹⁹⁷

While the requirement of being twenty one years of age to sit for the bar examination passed the rational basis review, the court found that requiring one to be at least eighteen before beginning law school would not pass rational basis review.¹⁹⁸ The court states that law schools are not in the "maturity business" and that a law school's purpose is to teach its students the principles of the law.¹⁹⁹ The fact that *Baccus* was approved for acceptance by a law school and completed the course of study proves that he is "entitled to the same academic recognition achieved by his older, fellow graduates."²⁰⁰ Ultimately, the court found that this age restriction was arbitrary, which is the only instance in which the court could strike down the criteria.²⁰¹ This case represents a plaintiff overcoming the rational basis standard, which usually calls for great deference to the

¹⁹³ *Baccus v. Karger*, 692 F. Supp. 290, 292 (S.D.N.Y. 1988) (holding that the requirement that the bar applicant be at least 18 years old to begin the study of law does not pass the rational basis standard, and is unconstitutional).

¹⁹⁴ *Id.* at 293.

¹⁹⁵ *See id.* at 292.

¹⁹⁶ *See id.* at 294 (holding that an age threshold can be rationally related to maturity).

¹⁹⁷ *Id.* at 298.

¹⁹⁸ *See id.* at 298 ("Simply put, we are not satisfied that this requirement rationally advances New York's legitimate interest in protecting the public from the pitfalls of professional immaturity.").

¹⁹⁹ *See id.* at 299.

²⁰⁰ *Id.*

²⁰¹ *See id.* at 293 (discussing the only instance in which it would be necessary to strike down a statute).

defendant.²⁰²

This case echoes the same problems with the NBA's age eligibility rules. The NBA is trying to expand its horizons by going into the "maturity business" instead of focusing on basketball, and allowing the teams to make their decisions and assume the risk of whom they choose to represent their teams.²⁰³ It is hard to believe that a twenty year old, "treated like a god in college before deciding to drop out" is more mature "than an [eighteen year old] trying to start his professional career right away."²⁰⁴ This paternalistic role that the NBA is taking is unfair, unreasonable, and completely arbitrary. Protecting younger players from dealing with a difficult adjustment of playing in high school to playing in the NBA may be a concern that is none of the NBA's business. The concern should be that of the individual teams, and the NBA should allow the individual teams to rely on the "natural selection" of the draft. The best players will be chosen and those who are not qualified will not be chosen.²⁰⁵ The NBA should allow these athletes the right to enter the draft, and whether or not they are chosen depends on their skills and the teams drafting strategy.²⁰⁶ If the players are good enough to play in the NBA, as some have proven to be, then this may help invalidate the rule.²⁰⁷ What will happen when the next LeBron James desires to enter the draft but has to wait a year or maybe two in order to play in the NBA? Will the NBA turn their heads at the chance of having a once in a lifetime star enter their business, and let him risk injury at college, or play in Europe?

The NBA's age eligibility requirement is arbitrary. The court in *Baccus* asserted it would only strike down a regulation if it was completely arbitrary. With regards to child labor laws, such laws have withstood scrutiny because they aim to protect children from harm, resulting in a law that is not arbitrary.²⁰⁸ In contrast, the success of players in the NBA who came straight from high school, such as Kobe Bryant and LeBron James,

²⁰² See Fuhrman, *supra* note 59, at 608–09 (noting that there is a possibility of individuals overcoming the relaxed standard of rational basis review).

²⁰³ See *Baccus*, 692 F. Supp. at 299; see also McAleavey, *supra* note 107, at 280 (stating that the NBA Age Rule is paternalistic and based on unfounded views on immaturity).

²⁰⁴ See Muro, *supra* note 111.

²⁰⁵ See Fuhrman, *supra* note 59, at 613 (explaining a possible solution to the NBA age eligibility problem); see also *The Draft Review: 1999 Underclassmen*, THE DRAFT REVIEW.COM, http://thedraftreview.com/index.php?option=com_content&view=article&id=3046:1999-underclassmen&catid=136:early-entry-underclassmen&Itemid=122 (last visited Sept. 24, 2011) (showing how teams will draft players they value regardless of age).

²⁰⁶ See Fuhrman, *supra* note 59, at 613; see also *The Draft Review*, *supra* note 205.

²⁰⁷ See Fuhrman *supra* note 59, at 613 (stating that given the NBA success of those other twenty, a plaintiff could have a legitimate claim); see also *The Draft Review*, *supra* note 205.

²⁰⁸ See Fuhrman, *supra*, note 59, at 613; see also *Baccus*, 692 F. Supp. at 293.

may work against the league's justification of the age requirement, rendering it arbitrary.²⁰⁹ These are two of the most successful and talented players in the game, and neither needed to wait an extra year after graduating high school to enter the draft. If there is proof that those players who skip college do not deteriorate the game of basketball, then the NBA will have a hard time explaining its reasoning for the eligibility requirement. The success of these players makes the classification arbitrary, and proves that the legitimate goal of denying them the right to play will be obsolete.

IV. SOLUTION TO THE PROBLEM

A. The Collective Bargaining Process and Paternalism

Aside from the age eligibility rule itself, there are two basic problems that need to be rectified in order for the NBA to have a fairer draft process. The first is the lack of representatives that the potential college athletes have in the collective bargaining process.²¹⁰ The second is the paternalistic role that the NBA is playing, or attempting to play in the team strategies and risk taking in drafting players for their teams.

It has been determined that it is common for industries to make decisions about potential or future employees in their collective bargaining agreements.²¹¹ However it would behoove the NBA to start a new trend, by including a group of representatives that could speak on behalf of the incoming class of players. The NBA is different than any other industry, aside from other athletic leagues, in that they gain much more publicity than do employers in the regular workplace. The NBA would be sending a message all around the country that they care about potential and future workers, and that they deserve to be heard. Even if this group of representatives had less to say than the group of current players and league owners, it would still be better than having no say in the matter whatsoever.

The second problem the NBA has is that they do not let the teams take the risks and determine their own strategy for drafting players. In all other aspects of the game, the team can decide who they want on their team through free agency, and trades. However when it comes to drafting, the NBA is limiting the pool. The NBA should allow the teams to choose and determine who is and is not ready for the NBA. Let the teams, the general

²⁰⁹ See Fuhrman, *supra*, note 59, at 613; see also Baccus, 692 F. Supp. at 293.

²¹⁰ See discussion *infra* Part I.

²¹¹ See *id.*

managers, and the coaches assume the risk of selecting a player directly out of high school. The NBA should allow the players to play in the NBA depending on their skills and talents, not their age.

One final possible solution would be to create a better developmental league than the one already in place.²¹² The current NBA developmental league drafts players from colleges, and the NBA has scouts attend the games and make determinations as to whether any players are ready to enter the NBA.²¹³ The NBA should create a system like the MLB farm system, where the teams draft the players and if they believe they are not ready for the NBA they can play in the developmental league under contract with their respective team. This would avoid denying these potential stars their right to obtain gainful employment because they would be playing basketball, and making money doing so, before being able to make the jump to the NBA.

CONCLUSION

The NBA has enforced an arbitrary age limit on potential NBA stars, differing from many other sports that do not have age restrictions, such as hockey, boxing, and NASCAR.²¹⁴ The differences between these sports and the NBA are quite apparent in terms of physicality of the sport and the potential risk of injury. Furthermore, the NFL, which enforces an age requirement for players to enter the draft, is one of the most physically dangerous sports in the country, making for a better reason as to why the age limit may be necessary in the NFL, but not in the NBA.

Additionally, disallowing these teenage athletes to work because they are too young should be classified as reverse age discrimination. While the ADEA has been interpreted as applying only to those individuals age forty and over, the statute clearly indicates that discriminating on the basis of age is prohibited.²¹⁵ Regardless of the interpretation of the ADEA, State Law claims of reverse age discrimination can still succeed. The ADEA does not

²¹² See *NBA D-league 101*, NBA NEWS, http://www.nba.com/dleague/news/nbadleague_101.html (last visited Sept. 21, 2011); see also Daniel Reed, *The NBA D-League, Where Amazing Begins*, HUFFINGTON POST (Jan. 21, 2010), http://www.huffingtonpost.com/daniel-reed/the-nba-d-league-where-am_b_432249.html (stating that the NBA D-League is the NBA's minor league, and the most heavily scouted source for basketball talent).

²¹³ See Reed, *supra* note 212 (discussing the basics of how the D-league works); see also Mike Lowe, *With Plenty of Talent, D League Making Plans*, MAINE TODAY, Oct. 9, 2011, at C1, available at http://www.pressherald.com/sports/with-plenty-of-talent-d-league-making-plans_2011-10-09.html (discussing the link between the D-league and NBA recruitment).

²¹⁴ See discussion *infra* Part II.

²¹⁵ See 29 U.S.C. §623(a)(1); see also *Hahn v. Buffalo*, 596 F. Supp. 939, 942 (W.D.N.Y. 1984).

preempt state law, and two very influential states; New Jersey and California have found that reverse age discrimination cases can succeed.²¹⁶

Furthermore, depriving these individuals of their right to obtain gainful employment is a violation of their Fourteenth Amendment equal protection right, and should be deemed unconstitutional. While the standard set forth by *Murgia* seems to make it difficult for one to succeed on an equal protection claim, there are four reasons for the players seeking employment to maintain hope. First, the standard in *Murgia* is old and possibly outdated. Second, the rational basis standard was applied to age discrimination a few months before the intermediate standard was created.²¹⁷ Third, the cases in which age discrimination was decided by applying the rational basis standard dealt with retirement and/or health benefits, employees who already were employed. In the case of the high school athletes, they are being denied the right to work completely. Lastly, the New Jersey Court in *Baccus* showed that this rational basis standard can be overcome when the requirement is arbitrary.²¹⁸

In Brandon's rookie season in the NBA, he scored fifty-five points in one game, becoming the youngest player ever to score over fifty points in his rookie season.²¹⁹ Ultimately, after his season playing overseas had ended, Brandon Jennings was drafted tenth overall in the 2009 NBA draft, and is now an up and coming star in the league.²²⁰ Even though Brandon Jennings got the experience and maturity that he needed from playing overseas, and avoided the issue that stands in the face of many other potential NBA players, many others may not have this opportunity. Some players will choose to go to college for a year, and then make the jump to the NBA. Some players will go to college for more than one year, until they believe they are ready for the NBA.

Others may do neither, contemplating other possibilities such as taking

²¹⁶ See discussion *infra* Part III.

²¹⁷ See *id.*

²¹⁸ See *id.*

²¹⁹ See Ryan Christopher DeVault, *Brandon Jennings' 55 points sets Bucks Rookie Record: Milwaukee Bucks' Guard Brandon Jennings Scored 55 Points in Just his 7th Game*, YAHOO VOICES (Nov. 15, 2009), http://www.associatedcontent.com/article/2393372/brandon_jennings_55_point_game_sets.html; see also Kevin Pelton, *A Special Night: Brandon Jennings' Big Game*, BASKETBALL PROSPECTUS (Nov. 15, 2009), <http://www.basketballprospectus.com/article.php?articleid=780&mode=print&nocache=1316886577>.

²²⁰ See Elias Sports Bureau, *Brandon Jennings Stats*, ESPN, <http://sports.espn.go.com/nba/players/profile?playerId=3997> (last visited Sept. 30, 2011) (finding that Brandon Jennings earned 15.8 points 5.3 assists, and 1.4 steals per game); see also *2009 NBA Draft Results*, MY NBA DRAFT, <http://www.mynbadraft.com/2009-NBA-Draft-Results/> (last visited Sept. 24, 2011).

legal action. Brandon Jennings may or may not have started a trend of high school athletes traveling overseas for a year to play basketball before playing in the NBA. Perhaps another potential NBA all star will start a trend of their own; challenging the NBA's age eligibility rules on new grounds.