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HOLD THE MAYO: AN ANALYSIS OF THE VALIDITY OF THE NBA'S STERN NO PREPS TO PROS RULE AND THE APPLICATION OF THE NONSTATUTORY EXEMPTION

I. INTRODUCTION

Until the summer of 2005, O.J. Mayo's entry into the exclusive club of talented prep basketball players who go from high school sensation to impact professional player in the National Basketball Association ("NBA") seemed secure.[1] A 6'5" swingman with a lightning-quick first step and an accurate jump shot from long range, Mr. Mayo's skills on the basketball floor generated a buzz even before he started high school.[2] Like many preps to pros stars before him,[3] Mr. Mayo transferred high schools to play in a more competitive basketball environment, moving from his home in Huntington, West Virginia to live with a family friend in Cincinnati.[4] Mr. Mayo thrived in Ohio, leading his team to the state title while averaging 26.7 points per game and becoming only the second sophomore to be named Ohio's Mr. Basketball.[5] Mr. Mayo's talents even have NBA scouts uttering the phrase "can't miss," a rarity for guard prospects.[6] Prognosticators widely anticipated he would be the top pick in the 2007 NBA Draft.[7]

During the fateful summer of 2005, however, Mr. Mayo encountered

1. *See generally* Seth Davis, *The Next One*, SPORTS ILLUSTRATED, June 20, 2005, at 86 (describing O.J. Mayo's talent and maturity and commenting on his desirability to NBA teams).

2. *See id.*

3. *See* Harvey Araton, *Ah, to Be Young, Gifted, and Drafted*, N.Y. TIMES, June 29, 1995, at B9 (noting that Kevin Garnett moved from South Carolina to Chicago to play against superior competition); Mark Heisler, *From Raw to Rare*, L.A. TIMES, May 18, 2005, at D1 (noting that Amare Stoudemire attended high school in both Florida and North Carolina).

4. Davis, *supra* note 1, at 86; *See also* Steve Blackledge, *Mayo-mania Keeps Coach, School on Their Toes*, COLUMBUS DISPATCH (Ohio), Jan. 6, 2006, at D8 (noting that before high school, Mr. Mayo attended school fifteen miles away from Huntington in Ashland, Kentucky, giving him the opportunity to take advantage of the Kentucky rule allowing students to participate in varsity athletics before reaching high school—Mr. Mayo made first team all-state in Kentucky as an eighth grader).

5. Davis, *supra* note 1, at 86 (stating the only other sophomore named Mr. Basketball in Ohio history was current NBA phenom LeBron James, who went from preps to pros).

6. *Id.*

7. Gary Parrish, *Best in Class*, COMMERCIAL APPEAL (Memphis), July 9, 2005, at D1.

an opponent that even his immense talents could neither juke, dribble around, nor elevate over; in fact, Mr. Mayo had no chance against this opponent. What happened to derail Mr. Mayo's otherwise certain stardom? Did he suffer a career-ending injury or turn his attention to another sport? No and no—Mr. Mayo is healthy and still dedicated to basketball.[8] But when NBA Commissioner David Stern became serious about implementing an age minimum for participating in the NBA, Mr. Mayo's dreams of preps to pros stardom all but dissolved.

While the play of preps to pros superstars currently in the NBA such as Kobe Bryant, Tracy McGrady, and LeBron James made such athletes popular with fans,[9] Mr. Stern dwelled on the problems with the high school to pro phenomenon: players that never made it in the NBA, lost out on a free college education, and were out of work in their desired profession by their early twenties.[10] Mr. Stern's solution: set a mandatory age that players must reach in order to be eligible to play in the NBA. The age minimum proposal, commonly referred to as the "age limit," became one of many issues heavily discussed during collective bargaining sessions between the NBA and the National Basketball Players Association ("NBPA").[11] The two parties reached a compromise on the age issue and the most recent collective bargaining agreement ("CBA") went into effect in the summer of 2005.[12]

Draft eligibility is governed by Article X of the new CBA.[13] Article X requires:

> [t]he player (A) is or will be at least 19 years of age during the calendar year in which the Draft is held, and (B) with respect to a player who is not an international player . . . , at least one (1) NBA Season has elapsed since the player's graduation from high school (or, if the player did not graduate from high school, since the graduation of the class with which the player would

8. *See* Jeff Rabjohns, *Scouts Rate Conley Among Elite Prep Point Guards*, INDIANAPOLIS STAR, July 31, 2005, at C4 (noting that in the summer of 2005 Mr. Mayo played a prominent tournament and still is considered the top player in the class of 2007).

9. Greg Sandoval, *Prep-to-Pros Try to Make the Grade*, WASH. POST, Feb. 6, 2004, at D6.

10. *See infra* Part II.B.1.

11. *See* John Manasso, *Stern Warns Union of Lockout Damage*, ATLANTA J.-CONST., June 13, 2005, at C8 (stating that the NBA and players disagree on a variety of issues, including the length of contracts, the minimum age requirement, and drug policy).

12. Childs Walker, *NBA, Union Make Peace With 6-year Deal*, BALT. SUN, June 22, 2005, at 1C.

13. NBA Player's Association, CBA Articles, http://www.nbpa.com/cba_articles/article-X.php (last visited Feb. 21, 2006).

have graduated had he graduated from high school).[14]

In addition to satisfying the age requirement, potential NBA draftees must communicate in writing their express intent to be selected in the NBA draft.[15] The NBA must receive this declaration at least sixty days before the draft.[16]

Article X will not dash Mr. Mayo's hopes of NBA stardom, it will only postpone them. Like many other talented high schoolers, Mr. Mayo is weighing his post-high school options.[17] He could sign a large endorsement deal and sit out a year, play in college for a year, or play professionally in a minor league or overseas for a year.[18] Another option available to Mr. Mayo and those similarly situated would be to challenge Article X in court.

This Comment will focus on the latter of these options. Part II will provide background to this discussion, looking at the recent trend of NBA early entries and documenting the NBA's shifting attitude towards these players, chronicling the collective bargaining process from its start in the 1960s through the most recent 2005 agreement. Part II will also examine how the natural tension between anti-trust law and labor law is reconciled by the judicially created nonstatutory exemption to anti-trust law. Part III will discuss how this tension has played out in the NBA and in other professional sports leagues by examining the different approaches courts have taken in determining whether to apply the nonstatutory exemption, focusing on the split between the Eighth and Second Circuits. Part IV will discuss Article X's validity by applying the various tests and determining that a challenge to Article X brought on traditional anti-trust grounds will likely fail, as the nonstatutory exemption will be applied no matter which circuit's test is used. Part V will consider the expansive interpretations given to the language of the two tests, discuss the difference between the tests the two circuits use and argue that the Second Circuit's test is too expansive. Part VI will note reasons why, despite a low chance of success, a suit challenging Article X might be brought. Part VI will also address other legal potential legal challenges to Article X. Finally, Part VII will conclude that the courts should favor the less expansive language of the Eighth Circuit in determining when to apply the nonstatutory exemption.

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14. *Id.*

15. *Id.*

16. *Id.*

17. *See* Parrish, *supra* note 7, at D1; Pete Thamel, *High School Players Have New Set of Choices*, N.Y. TIMES, July 10, 2005, at 8.

18. *See* Thamel, *supra* note 17, at 8.

II. BACKGROUND

In order to examine the basics of a potential challenge to Article X, it is important to understand how NBA labor relations reached this point. This part will (A) review how the explosion of NBA basketball players leaping from preps to pros in the last ten years led Commissioner Stern to call for an age limit; (B) comprehensively examine the NBA's collective bargaining history; and (C) explore the basic tension between anti-trust law and labor law.

A. The Rise of Preps to Pros Players

High school players have been eligible for the NBA draft for over thirty years. In 1970, Spencer Haywood paved the way for high schoolers when he successfully challenged the NBA's draft eligibility rule requiring that a player's college class graduate before he can sign a contract with a team in the league.[19] In response to the district court's holding that the draft eligibility rule violated anti-trust laws,[20] the NBA developed a "hardship" rule, allowing underclassmen to petition for NBA draft eligibility on the basis of financial hardship.[21] In 1976, the NBA dropped the rule after the meaning of "hardship" eroded.[22] The NBA then adopted a rule opening the draft to any player whose high school class had graduated, provided that he renounced his college eligibility in writing forty-five days before the NBA draft.[23]

Despite longstanding eligibility of high schoolers, it has only been in the past ten years that NBA rosters have exploded with players drafted straight out of high school[24] based on achievements and upside similar to Mr. Mayo's. This revolution began with Kevin Garnett's controversial decision to declare himself eligible for the NBA draft in 1995.[25] Mr.

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19. *See infra* Part III.A.

20. *See infra* Part III.A.

21. Janny Hu, *Debate for the Ages: Some Players Oppose Move to Bar Teenagers*, S.F.GATE, Mar. 6, 2005, at D7.

22. J.A. Adande, *Trailblazers for a Cavalier*, L.A. TIMES, Sept. 25, 2003, at D1 (quoting NBA Commissioner Stern explaining the decision to drop the "hardship" rule: "People who came from wealthy parents were helping to redefine what 'hardship' was.").

23. 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. SPORT L. 539, 553 (1998).

24. *See* Sandoval, *supra* note 9, at D6 (stating that beginning with Kevin Garnett in 1995, high school students have been routinely drafted).

25. Marc Stein, *Potential? This Texas High Schooler has it in . . .* , DALLAS MORNING NEWS, Jan. 7, 2002, at 1B.

Garnett was the first player to attempt the jump straight from high school to the NBA since Daryl Dawkins in 1975.[26] Mr. Garnett's success encouraged dozens of prep stars to forgo college basketball and enter the NBA draft directly.[27] These players had remarkable success, as demonstrated by the 2005 NBA All-Star rosters, in which four of the ten starting spots belonged to preps to pros players.[28]

As soon as high schoolers began declaring themselves eligible for the NBA Draft, critics questioned the logic of allowing them to play.[29] Mr. Stern was one of the first to suggest limiting high schoolers' access to the NBA, floating the idea of an age limit in 1996.[30] However, he was not always adamant that high school players be denied the ability to enter the NBA right out of high school. In 1996, the year after Mr. Garnett declared, Mr. Stern struck back at critics by asking why they did not criticize teenage hockey and tennis stars.[31] Although he expressed a preference for older NBA players, he nevertheless stated "it's for them and their parents to make the decision rather than all of us sanctimoniously and piously making these judgments."[32]

However, by 1999, Mr. Stern changed his tune and began a quest to impose an age limit.[33] While his reasons for imposing an age limit have varied, one recently articulated rationale is to prevent high school gyms from becoming overrun with agents who mislead players by telling them they are ready for the NBA when they really need to practice and gain greater experience at the college level.[34] Mr. Stern also has stated that time spent in college would help season a potential professional basketball player's life skills.[35] In addition, economics also plays a role. Mr. Stern explained, "[I]t affects our business, in terms of our responsibility, the way

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26. Michael Cunningham, *The Fountain of Youth*, SUN-SENTINEL (Fla.), Mar. 10, 2005, at 1C.

27. *Id.*

28. Hu, *supra* note 21, at D7.

29. *See, e.g.*, Mark Heisler, *These Babies Could Use More Time in the Crib*, L.A. TIMES, Apr. 7, 1996, at C8 (criticizing the potential decision by current NBA All-Star Jermaine O'Neal to enter the draft and incorrectly predicting: "If he tries the NBA, his pro career is likely to be over long before it ever should have started.").

30. *See* Selena Roberts, *Stern Questions the Outrage Over Early Entry to N.B.A.*, N.Y. TIMES, May 20, 1996, at C4 (quoting Stern stating "[W]ith the help from the players association, we would raise the age limit a bit higher, I'm sure.").

31. *Id.*

32. *Id.*

33. Jeffrey Denberg, *Stern Wants to Stop High School Players From Entering Draft*, ATLANTA J.-CONST., June 20, 1999, at E12.

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

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

we are viewed, the players' maturity and how they deal with the community."[36]

NBPA Executive Director Billy Hunter initially indicated that he had an open mind with regards to the age limit issue.[37] However, a month after Mr. Stern made his 1999 suggestions, NBA players met and voiced opposition to imposing an age limit.[38] Mr. Hunter's open mind quickly closed, and he began shifting the responsibility of drafting high schoolers to management, stating "[i]f they don't want them in the league, they shouldn't draft them."[39] By the end of that summer, the issue was placed on the proverbial backburner.[40]

Though the age limit remained a nonstarter through the turn of the century, Mr. Stern continued to push for it. While giving his annual State of the League address in 2004, he reiterated his preference for an age limit,[41] expressing his opinion that the district court decided the Maurice Clarett case[42] incorrectly.[43] However, no movement towards actually implementing an age limit occurred.

As Mr. Stern continued to call for an age limit, NBPA Executive Director Billy Hunter continued to resist any such limit.[44] Mr. Hunter had the players' support behind him. In a February 2005 poll of 151 NBA players conducted by the Rocky Mountain News, an overwhelming 71.5 percent favored maintaining the existing standard.[45] In March 2005, Jermaine O'Neal, who joined the league after high school, criticized the idea of an age limit, reasoning that it did not make sense to deny a player an opportunity to gain experience in his chosen profession.[46] Mr. O'Neal

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

37. *Stern Wants Age Limits For Draftees*, TAMPA TRIB., June 22, 1999, at 6.

38. *Players Oppose Age Limit, Rules Changes*, PLAIN DEALER (Cleveland), July 9, 1999, at 3D.

39. Bart Hubbuch, *Age-Old Question*, DALLAS MORNING NEWS, July 21, 1999, at 1B.

40. *NBA Minimum Age on Back Burner*, MILWAUKEE J. SENTINEL, Sept. 26, 1999, at 2.

41. Harvey Fialkov, *Stern Calls For Age Limit of 20*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Feb. 15, 2004, at 7C.

42. Clarett v. NFL, 306 F. Supp. 2d 379 (S.D.N.Y. 2004) [hereinafter *Clarett I*].

43. Greg Sandoval & Steve Wyche, *Age Requirement Being Discussed*, WASH. POST, Feb. 15, 2004, at E9 (quoting Mr. Stern's reaction to the initial Clarett decision, "[t]he Clarett decision is wrongly decided as a matter of law and will likely be reversed on appeal.").

44. *Id.*

45. Chris Tomasson, *Their Two Cents' Worth About A Minimum Age*, ROCKY MTN. NEWS (Colo.), Feb. 18, 2005, at 4N.

46. Liz Robbins, *Age Limit: One Player's Path Is Another Player's Roadblock*, N.Y. TIMES, Mar. 27, 2005, at 7 (quoting Mr. O'Neal, "[w]hat is it that college teaches you? . . . College don't [sic] really teach you to be a great N.B.A. player on and off the court. College teaches you about college. What can better teach you about dealing with the N.B.A. than the

implied that the prospective age limit had racial undertones because it would deny viable opportunity to young black players.[47] However, some players supported the age limit, as four-year college player Grant Hill indicated by commenting,

> I always thought that it was the purpose of the union to protect its members, not potential members . . . . I think if anyone gets left out, it's the older players, guys who put equity into this league, card-carrying members paying their dues to the union. I would hope they would be protected.[48]

Despite the players' strong preference against an age limit, as the summer of 2005 approached, Mr. Stern still had two reasons to be optimistic. First, several cautionary tales of not-yet-ready high schoolers in the pros lent credibility to his call for an age limit. Second, the current CBA was set to expire, requiring a new round of collective bargaining that would require the players to take the age limit proposal into account.

B. The Collective Bargaining Process

1. Cautionary Tales

While high schoolers such as Kobe Bryant and LeBron James have succeeded in the NBA, not every preps to pros player becomes an All-Star. Korleone Young dominated in high school and had the grades to attend college; instead, he chose to declare for the draft, thinking he was a lock for the first round.[49] The Detroit Pistons selected him in the second round and he played one year before getting cut.[50] He has since played in basketball's minor leagues and is hoping for another NBA opportunity.[51]

While some high school players, such as Mr. Young, are not physically prepared to play in the NBA, other players may not be mentally ready for NBA life. Leon Smith, a first round draft pick out of high school, took 200 aspirin pills in a suicide attempt and was arrested for threatening his estranged girlfriend before he ever even took a shot in the NBA.[52] Kwame Brown, the first prep player to be drafted first overall, signed a $11.9 million contract but did not know basic life skills such as how to take

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N.B.A?").

47. *Id.*

48. *Id.*

49. Sachin Shenolikar, *NBA 101*, SPORTS ILLUSTRATED FOR KIDS, Oct. 2001 at 69, 74.

50. *Id.*

51. *Id.*

52. Mark Heisler, *A Troubled Maverick*, L.A. TIMES, Dec. 28, 1999, at D1.

a suit to the dry cleaners, or even that suits needed to be dry cleaned after wearing.[53]

The examples involving Mr. Young, Mr. Smith, and Mr. Brown are just some of the issues faced by prep school players who decide to bypass college. Armed with these cautionary tales, Mr. Stern headed to the collective bargaining table.

2. Coming to the Table: Let's Discuss It

Collective bargaining is the process by which employers and employees determine the terms and conditions of employment.[54] These parameters are summarized in the CBA.[55] While professional basketball has existed in the United States for over eighty years,[56] players have only collectively bargained with management for forty years.[57] The NBA formed in 1949 when the Basketball Association of America merged with the National Basketball League.[58] Although the NBPA formed in 1954, the NBA did not recognize it as "the exclusive collective bargaining representative of all NBA players" until 1964.[59] Bob Cousy founded the NBPA in 1954 and began discussions, but not negotiations, with the NBA in 1957.[60] A breakthrough occurred in 1964 when the NBPA's second president, Tom Heinsohn, decided to play hardball with management.[61]

Upset because they lacked a pension plan, Heinsohn and the NBA players threatened to boycott the first televised NBA All-Star game.[62] Minutes before tip-off, NBA Commissioner Walter Kennedy promised that a pension plan would be adopted at the next owners meeting.[63] The owners made good on Mr. Kennedy's promise and later adopted a pension plan to

53. Sally Jenkins, *Growing Pains*, WASH. POST, Apr. 21, 2002, at 20.

54. Jason R. Marshall, *Fired in the NBA! Terminating Vin Baker's Contract: A Case-Study in Collective Bargaining, Guaranteed Contracts, Arbitration, and Disability Claims in the NBA*, 12 SPORTS LAW. J. 1, 10 (2005).

55. *Id.* at 11 ("[T]he collective bargaining agreement is a remarkable document. It incorporates the party's own rules of conduct and operation, establishes a system of internal self-government, . . . [p]arties formulate collective agreements in response to particular needs.").

56. MICHAEL N. DANIELSON, HOME TEAM, 23 (1997) (noting that the first "broadly based professional league," the American Basketball League, started in 1925).

57. *See* NBA Player's Association, NBPA History, http://www.nbpa.com/history.php (last visited Feb. 22, 2006).

58. DANIELSON, *supra* note 56, at 24.

59. NBA Players Association, NBPA History, *supra* note 57.

60. *Id.*

61. *Id.*

62. *Id.*

63. Robert Bradley, Labor Pains Nothing New to the NBA, History of NBA Labor, http://hometown.aol.com/apbrhoops/labor.html (last visited Mar. 13, 2006).

be equally funded by players and owners.[64]

Despite this success, player and owner harmony did not last long. In 1967, after the NBPA expressed a desire for both a reduced exhibition schedule and payment for play in exhibition games, it announced a plan to meet with representatives from other professional sports leagues to discuss unity among athletes. The owners reacted to these announcements by threatening to cancel the playoffs.[65] The NBPA countered by threatening to apply for certification with the National Labor Relations Board ("NLRB") and to strike during the playoffs for an enhanced pension.[66] The tension finally ended when the two sides signed their first CBA in 1967.[67]

Anti-trust issues, however, soon mounted. Upon the CBA's expiration in 1970, NBPA president Oscar Robertson filed a class action suit against the NBA,[68] seeking to prevent a merger with the newly formed American Basketball Association ("ABA") and to obtain a declaration that certain NBA practices, such as the college draft and the reserve clause, violated the Sherman Anti-Trust Act.[69] In denying the NBA's motion for summary judgment, the court held the exemption only shields unions, not employers, from anti-trust scrutiny.[70] The court also held that the questioned provisions violated the Sherman Anti-Trust Act, but questions of fact remained as to whether they had been collectively bargained for and therefore protected under the nonstatutory exemption.[71]

The two sides settled the case in 1976, memorializing their agreement in the "*Robertson* Settlement."[72] The terms of the *Robertson* Settlement, including modification of the college draft and institution of a right of first refusal,[73] lasted through the 1986–87 season.[74] Additionally in 1976, the

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64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Robertson v. NBA, 389 F. Supp. 867 (S.D.N.Y. 1975).

69. *Id.* at 874 (explaining that the college draft is a system through which each NBA team obtains exclusive rights to negotiate with a college player and that the reserve clause is a part of the Uniform Contract allowing a team to "unilaterally to renew and extend the Uniform Contract for one year on the same terms and conditions including salary" if the player will not sign a contract to play during the next season).

70. *Id.* at 884–85.

71. *Id.* at 895–96.

72. NBA v. Williams, 857 F. Supp 1069, 1072 (S.D.N.Y. 1994) [hereinafter *Williams I*].

73. *Id.* at 1073 (explaining that the right of first refusal allows a player who has played fewer than four years and had less than two contracts to negotiate with any other team in the league when his contract expires, but the incumbent team has the right to match any offer made by another team).

74. *Id.* at 1072.

NBA and the NBPA agreed to a new three-year CBA.[75] When the 1976 agreement ended on June 1, 1979, the two sides adopted a new CBA on October 10, 1980.[76]

The expiration of the 1980 agreement on June 1, 1982, provided the NBA an opportunity to add a new provision into the latest CBA: the salary cap.[77] Claiming imminent financial destruction, the NBA advocated a cap on total player salaries.[78] The NBPA challenged the cap,[79] and under the terms of the *Robertson* Settlement, a special master was appointed to hear the dispute.[80] The special master held that a salary cap would violate the *Robertson* Settlement, thereby requiring the two sides to enter into a Memorandum of Understanding modifying the *Robertson* Settlement to include a cap.[81]

The extended 1980 agreement expired at the end of the 1986–87 season.[82] As the season wound down, the NBA and NBPA signed a moratorium agreement on June 8, 1987, promising to conduct good faith negotiations and postpone any litigation.[83] After the moratorium period expired, the players filed suit, claiming the NBA's continued operation under the terms of the most recent CBA violated anti-trust laws.[84] In *Bridgeman v. NBA*, the New Jersey District Court disagreed with the players' argument,[85] and the two sides eventually settled the lawsuit.[86] The settlement resulted in the 1988 CBA, continuing "the college draft, the right of first refusal and the salary cap"[87] but providing unrestricted free agency for the first time.[88]

The 1988 agreement expired on June 23, 1994.[89] Shortly thereafter, the NBPA filed suit again challenging the college draft, the salary cap, and

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75. *See id.*

76. *Id.*

77. *See* Bridgeman v. NBA, 675 F. Supp. 960, 962 (D.N.J. 1987).

78. *See Williams I, supra* note 72, at 1072.

79. *Id.* (noting that the case challenging the salary cap was Lanier v. NBA, 82 Civ. 4935 (S.D.N.Y.)).

80. *Id.*

81. *Id.*

82. *Bridgeman*, 675 F. Supp. at 963.

83. *Id.*

84. *See id.*

85. *Id.* at 965 (noting players argued the nonstatutory exemption should no longer provide anti-trust protection once the CBA expires).

86. NBA Player's Association, NBPA History, *supra* note 57.

87. *Williams I, supra* note 72, at 1072.

88. NBA Player's Association, NBPA History, *supra* note 57.

89. *Williams I, supra* note 72, at 1072.

right of first refusal on anti-trust grounds.[90] The district court ruled in favor of the owners finding no anti-trust violations.[91] The NBA and NBPA reinitiated collective bargaining pending appeal of *NBA v. Williams* and played the 1994–95 season under a "no strike/no lockout" agreement.[92]

In June 1995, after the Second Circuit affirmed the *Williams* decision,[93] two sides reached a hand-shake deal for a new six-year CBA.[94] But several high profile players, including Michael Jordan and Patrick Ewing, threatened to decertify the union.[95] Lacking a formal, signed agreement on July 1, 1995, the NBA locked out the players.[96] The NBPA instituted an August 8, 1995 deadline for an agreement to be reached or the union would no longer fight decertification.[97] Just ten minutes before midnight, the parties reached an agreement, receiving crucial salary cap concessions,[98] but still faced the decertification challenge.[99] By a vote of 226 to 134, the NBPA members rejected decertification, implicitly approving the new CBA.[100]

The 1995 CBA contained a provision allowing the NBA to opt-out if player salaries exceeded 51.8 percent of basketball-related income.[101] By 1998, player salaries topped fifty-seven percent of basketball-related income.[102] The owners voted to re-open the CBA for negotiation,[103] leading to a lockout which lasted six months[104] and forced the NBA to miss

90. NBA Player's Association, NBPA History, *supra* note 57.

91. *Williams I*, *supra* note 72, at 1079.

92. NBA Player's Association, NBPA History, *supra* note 57.

93. NBA v. Williams, 45 F.3d 684, 693 (2d Cir. 1995) [hereinafter *Williams II*].

94. *See* Scott Howard-Cooper, *NBA Makes Labor Deal at 11th Hour*, L.A. TIMES, Aug. 9, 1995, at C1.

95. *Id.* (noting that decertification strips a CBA of anti-trust protection).

96. NBA Player's Association, NBPA History, *supra* note 57.

97. Howard-Cooper, *supra* note 94; NBA Player's Association, NBPA History, *supra* note 57.

98. Murray Chass, *N.B.A. and Union in Agreement at Midnight Hour*, N.Y. TIMES, Aug. 9, 1995, at B7 (explaining that the NBPA received a one million dollar exception allowing teams over the salary cap to sign free agents, an exception allowing teams to replace injured players at half that player's salary, and a modified Larry Bird exception).

99. *Id.*

100. *See* Mark Asher, *Labor Dispute Ends With No Objections*, WASH. POST, Sept. 20, 1995, at D2.

101. Mike Wise, *It's Their Ball, and N.B.A. Owners Call for Lockout*, N.Y. TIMES, June 30, 1998, at C1.

102. *Id.*

103. *Id.*

104. Murray Chass, *In Final Staredown, Players Take the Hit*, N.Y. TIMES, Jan. 8, 1999, at D5.

games because of a labor problem for the first time in league history.[105] Finally, in January 1999, the NBA and the NBPA reached an agreement which ended the lockout.[106] The key concession the NBA received from the NBPA was an individual salary cap.[107]

In December 2003, the NBA exercised its option to extend the CBA through the 2004–05 season and the two sides agreed to meet consistently to try to develop a new agreement by July 1, 2005.[108] By February 2005, the sides were optimistic but were still weary of a possible lockout.[109]

Both sides had two reasons to avoid a lockout. First, the significant economic damage suffered in the 1999 lockout—players lost $500 million and owners lost $1 billion in revenue[110]—was fresh in their minds. Second, the National Hockey League's ("NHL") season crumbled in 2004–05 due to labor strife, and the NBA took note of the potential implications of failed negotiations.[111]

Despite these concerns, the two sides still had no agreement only two weeks before the existing CBA stood to expire.[112] By that point, the NBA had backed away from the twenty-year old age limit and offered to impose only a nineteen-year-old age limit.[113] The NBA and NBPA went back to the bargaining table and finally came to an agreement on June 21, 2005.[114] The final terms shortened guaranteed contracts, guaranteed the players fifty-seven percent of the NBA's yearly $3 billion in basketball-related income, and instituted a nineteen-year-old age limit.[115] The current CBA lasts through the 2010–11 season, and the NBA has the option to extend the deal an additional year.[116]

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105. *See* Wise, *supra* note 101, at C1.

106. Walker, *supra* note 12, at 1C.

107. *See* Mark Bradley, *Believe It: NBA Better for Lockout*, ATLANTA J.-CONST., Jan. 8, 1999, at C7 (stating the CBA imposed a maximum salary of $14 million per season for players with 10 years experience).

108. *See NBA, Players Union Extend Labor Agreement*, SAN DIEGO UNION-TRIB., Dec. 9, 2003, at D3.

109. *See* John Reid, *NBA Hopes to Avoid Another Labor Mess*, TIMES-PICAYUNE (La.), Feb. 20, 2005, at 2.

110. Lacy J. Banks, *Stern Optimistic About Labor Accord*, CHI. SUN-TIMES, Feb. 20, 2005.

111. *See* Liz Robbins, *N.B.A. Expects Smoother Path To Labor Deal*, N.Y. TIMES, Feb. 18, 2005, at D1 (quoting Mr. Stern's reaction to the NHL canceling its season, "We are keenly aware of the danger of not making a deal.").

112. *See Manasso, supra* note 11, at C8.

113. *Id.*

114. *See* Walker, *supra* note 12, at 1C.

115. *Id.*

116. NBA Players Association, CBA Articles, *supra* note 13.

C. Anti-Trust v. Labor Law

In order to understand the path a high school prep star might take to challenge Article X of the CBA, one requires an understanding of anti-trust and labor law. The Second Circuit noted the difficulty in navigating the tension between the two fields of law when it commented that "[t]he interaction of the Sherman Act and federal labor legislation is an area of law marked more by controversy than by clarity"[117] Nonetheless, this Comment will humbly attempt an explanation. The conflict between anti-trust law and labor law arises from the fact that anti-trust law intends to prevent restraints on trade, whereas labor law prefers and promotes unionization, preventing individuals from contracting, and therefore, restrains trade.[118]

1. Anti-Trust Doctrine: Thou Shalt not Restrain Trade

Before getting into the basics of the Sherman Anti-Trust Act, it should be noted that not all professional sports leagues are created equal when it comes to anti-trust jurisprudence. The national pastime's professional organization, Major League Baseball, has been exempt from anti-trust scrutiny since 1922.[119] The exemption is based on the Supreme Court's finding that baseball games are "purely state affairs" and therefore not interstate commerce subject to scrutiny under the Sherman Anti-Trust Act.[120] Thirty years later, the Court refused to overrule baseball's anti-trust exemption, holding that, due to Congressional inaction after *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, Congress must not have intended to include baseball in anti-trust laws.[121] While the Supreme Court later recognized that baseball is engaged in interstate commerce, it upheld the exemption under the principle of stare decisis.[122] After *Toolson v. New York Yankees*, Congress did act to bring baseball within federal anti-trust laws,[123] but did not hit a

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

118. *See* Jocelyn Sum, Note, Clarett v. Nat'l Football League, 20 BERKELEY TECH. L.J. 807, 810 (2005).

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

120. *Id.* at 208–209.

121. Toolson v. N. Y. Yankees, 346 U.S. 356, 356–357 (1953).

122. Flood v. Kuhn, 407 U.S. 258, 282 (1972).

123. *See id.* at 281 (noting that in between *Toolson* and *Flood*, more than fifty bills regarding anti-trust laws applying to baseball were introduced in Congress).

home run until President Clinton signed the Curt Flood Act of 1998.[124] This Act applied federal anti-trust laws to baseball labor disputes, but left other practices, such as franchise relocation and expansion, outside federal anti-trust laws.[125] Despite criticism of the exemption[126] and congressional threats to revoke it, [127] the exemption remains in place today. The Supreme Court and other courts have refused to extend an anti-trust exemption to other professional sports leagues,[128] holding that *Federal Baseball* is an "aberration confined to baseball."[129]

The authors of the Sherman Anti-Trust Act intended to prohibit all restraints on trade.[130] In practice, however, the Supreme Court has interpreted the Sherman Anti-Trust Act as applicable only to undue restraints on trade.[131] An analysis under the Sherman Anti-Trust Act requires the sitting court to use a "Rule of Reason test" to analyze whether a restraint on trade is reasonable.[132] This test requires a court to undertake a detailed, elaborate analysis of the facts of the business involved, the nature of the restraint, the condition of the business before and after the restraint, and the real and potential effects of the restraint.[133] To save resources and to minimize the number of times a court has to undertake this time consuming analysis,[134] the Supreme Court determined that certain restraints are per se illegal.[135] Examples of practices the Supreme Court at

124. *See* Morgen A. Sullivan, *"A Derelict in the Stream of the Law": Overruling Baseball's Antitrust Exemption*, 48 DUKE L.J. 1265, 1266 (1999).

125. *Id.*

126. *See id.* at 1304.

127. *See* Mark Starr & Eve Conant, *A Major League Mess*, NEWSWEEK, Mar. 28, 2005, at 27 (noting Congress most recently threatened baseball's anti-trust exemption during the steroid scandal).

128. *See* Haywood v. NBA, 401 U.S. 1204, 1205 (1971) (basketball); Radovich v. NFL, 352 U.S. 445, 451 (1957) (football); United States v. Int'l Boxing Club, 348 U.S. 236, 243 (1955) (boxing); N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249 (2d Cir. 1982) (soccer); Gunter Harz Sports, Inc. v. U. S. Tennis Ass'n, 665 F.2d 222, 223 (8th Cir. 1981) (tennis); U. S. Trotting Ass'n v. Chi. Downs Ass'n, 665 F.2d 781, 794 (7th Cir. 1981) (horse racing); Wash. State Bowling Proprietors Ass'n v. Pac. Lanes, Inc., 356 F.2d 371, 376 (9th Cir. 1966) (bowling); Deesen v. Prof'l Golfers' Ass'n, 358 F.2d 165 (9th Cir. 1966) (golf); and Boston Prof'l Hockey Ass'n v. Cheevers, 348 F. Supp. 261, 265 (D. Mass. 1972) (hockey).

129. *Flood*, 407 U.S. at 282 (1972).

130. *See* Standard Oil Co. v. United States, 221 U.S. 1, 59 (1911).

131. *Id.* at 60.

132. *See* Bd. of Trade of City of Chicago v. United States, 246 U.S. 231, 238–39 (1918).

133. *Id.* at 238.

134. *See* Rosner, *supra* note 23, at 543–44.

135. N. Pac. Ry. v. United States, 356 U.S. 1, 5 (1957) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.").

one time has determined to be per se illegal include price fixing,[136] tying arrangements,[137] horizontal market divisions,[138] and group boycotts.[139]

This Comment will focus on group boycotts, the most likely allegation a high schooler challenging Article X will make.[140] A group boycott has alternatively been referred to as a "concerted refusal[] by traders to deal with other traders . . . ." [141] A group boycott technically pertains to competing businesses acting together to block other businesses from entering the market; on the other hand, a concerted refusal relates to competing businesses collectively refusing to engage with an individual, whether for competitive or noncompetitive reasons.[142] The individual targeted in a concerted refusal to deal is not necessarily a competitor.[143] Any challenge to Article X of the NBA's CBA should be an allegation of a concerted refusal to deal, because it involves collusion by NBA franchises not to employ a player, a noncompetitor, based on his status as a high schooler.

After the Supreme Court found group boycotts per se illegal in 1941,[144] it firmly reinforced this holding in 1959.[145] However, just four years later, the Court granted an exception to per se illegal status of group boycotts, or concerted refusals to deal.[146] In *Silver v. New York Stock Exchange*, the Court stated group boycotts would be a per se violation of anti-trust rules "absent any justification derived from the policy of another statute or otherwise . . . ."[147] An exception to per se status is granted if: 1) the collective action is required by the structure of the industry, 2) the restraint is reasonably implemented, and 3) the procedural safeguards exist "to prevent unnecessary and arbitrary application."[148] If this test is

136. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940).

137. *See* Int'l Salt Co. v. United States, 332 U.S. 392, 396 (1947). *But see* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2. 15–16 (1984) (holding that the entity engaging in tying must have sufficient market power to force purchaser into a tying agreement before a per se rule will be applied).

138. *See* United States v. Sealy, 388 U.S. 350, 357 n.5 (1967).

139. *See* Fashion Originator's Guild v. FTC, 312 U.S. 457, 467–68 (1941). *But see infra* note 152.

140. *See* Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players From the NBA Draft*, 3 VA. SPORTS & ENT. L.J. 113, 201 (2004).

141. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959).

142. Rosner, *supra* note 23, at 545 n.34.

143. *Id.*

144. *See Fashion Originator's Guild*, 312 U.S. at 467–68.

145. *Klor's, Inc.*, 359 U.S. at 212.

146. *See* Silver v. N. Y. Stock Exch., 373 U.S. 341, 347–49 (1963).

147. *Id.* at 348–49.

148. Peter Altman, Note, *Stay Out For Three Years After High School Or Play In Canada*

satisfied, the alleged restraint on trade will be subjected to the Rule of Reason analysis.[149]

The Supreme Court further eroded the per se illegal status of group boycotts in the 1980s.[150] In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Company*, the Court refused to apply the per se approach when the plaintiff did not preliminarily allege "that the challenged activity falls into a category likely to have predominantly anti-competitive effects."[151] The Court reaffirmed this limitation on the per se rule during the next term.[152] Thus, if a plaintiff cannot show that the action in question will likely have anti-competitive effects, then the Rule of Reason analysis will apply.[153]

2. Federal Labor Policy: Pro Union, Pro Collective Bargaining

While the federal government disfavors restraints on trade, it also favors unionization of workers.[154] Tension inevitably arises because the purpose of unions is to negotiate the best deal for all employees, but this is an inherent restraint on trade because it reduces competition.[155] To avoid an anti-trust issue, two exemptions exist that allow unionized employers to operate under the law, the so-called statutory and nonstatutory exemptions.[156]

The statutory exemptions began with the Clayton Act of 1914, followed by the Norris-LaGuardia Act of 1932, and the National Labor Relations Act of 1935 ("NLRA").[157] Section 6 of the Clayton Act exempts organized labor from anti-trust scrutiny as long as organized labor does not stray from its normal and legitimate purpose.[158]

The Norris-LaGuardia Act expressed a federal preference for

—*And For Good Reason: An Antitrust Look At* Clarett v. National Football League, 70 BROOK. L. REV. 569, 578 (2004).

149. *Id.* at 578–79.

150. *See* Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 298 (1985) (noting that care is needed when applying the per se rule).

151. *Id.*

152. *See* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458–59 (1986) (noting "the category of restraints classed as group boycotts is not to be expanded indiscriminately" and "we have been slow to . . . extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.").

153. *See id.*

154. *See* Sum, *supra* note 118, at 810.

155. *See* McCann, *supra* note 140, at 196.

156. *See* Rosner, *supra* note 23, at 546–47.

157. McCann, *supra* note 140, at 196.

158. Duplex Printing Press Co. v. Deering, 254 U.S. 443, 469 (1921).

organized labor[159] by, among other devices, stripping federal courts of jurisdiction to hear cases involving labor disputes, including cases alleging an anti-trust violation was alleged.[160] Finally, Congress enacted the NLRA, to promote a federal policy by favoring collective bargaining on wages, hours, and other working conditions.[161] However, despite the expansiveness of the federal statutory exemption from antitrust laws, the statutory exemption does not apply to negotiations or agreements between labor and management.[162] The Supreme Court recognized the necessity for a rule protecting such actions and carved out the "nonstatutory exemption" to the Sherman Anti-Trust Act.[163]

The Supreme Court established the nonstatutory exemption in two 1965 companion cases.[164] In *Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, a local employer challenged an agreement between Chicago area butchers and supermarkets in which meat was only to be sold between nine a.m. and six p.m., Monday through Saturday.[165] The Supreme Court upheld the agreement, reasoning that business hours and days of the week constitute mandatory subjects under the NLRA.[166] In *United Mine Workers of America v. Pennington*, the Supreme Court limited the nonstatutory exemption by holding that a collectively bargained for agreement between a coal-miners union and management that imposes on another group of employers cannot be exempted from anti-trust scrutiny.[167] The Supreme Court further defined the nonstatutory exemption in *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100.*[168] In *Connell*, the Court refused to apply the exemption to an agreement a Dallas union forced upon general contractors, which required the general contractors to use only subcontractors employing members of the union.[169] The Court held that federal labor policy offers no protection when unions conspire with non-

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159. *See* 29 U.S.C. § 102 (2000).

160. Milk Wagon Drivers' Union v. Lake Valley Farm Prod., Inc., 311 U.S. 91, 101–03 (1940).

161. *See* 29 U.S.C. § 151 (2000).

162. *See* Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1965).

163. *See id.*

164. *See generally*, Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co. 381 U.S. 676 (1965); UMWA v. Pennington 381 U.S. 657 (1965).

165. *Jewel Tea*, 381 U.S. at 680.

166. *Id.* at 685.

167. *UMWA*, 381 U.S. at 665.

168. *Connell*, 421 U.S. at 621–26.

169. *See id.* at 618–21.

labor groups to restrain competition.[170] The result of the *Connell* decision is that the nonstatutory exemption only protects actions approved by federal labor laws.[171]

In summary, the nonstatutory exemption creates an exception to federal anti-trust laws by allowing restraints on trade, "so long as such restraints operate primarily in a labor market characterized by collective bargaining."[172] However, if the collective bargaining is not approved or protected by the nonstatutory exemption, anti-trust law will apply. While the nonstatutory exemption has been addressed in the sports league context,[173] the exact scope of the nonstatutory exemption is unclear because it is judicially created. To gauge the outcome of an Article X challenge, it is important to look at how the nonstatutory exemption has been applied in past challenges to CBAs.

III. PAST SPORTS ANTI-TRUST/LABOR LAW DECISIONS

This part will begin in Part A by looking at an instance when the Supreme Court used anti-trust analysis to strike down an NBA draft eligibility provision. Part B will examine the application of the nonstatutory exemption in two parts. The first part will focus on the differing approaches taken by the Second Circuit and the Eighth Circuit. The second part will review the Supreme Court's most recent examination of the nonstatutory exemption in the sporting context by looking at a case involving the unilateral imposition of a provision after the collective bargaining reached an impasse.

A. Spencer Haywood Challenges the System . . . and Wins

The first challenge to the NBA's draft-eligibility rules came in 1971 from a young superstar named Spencer Haywood.[174] The result of Mr. Haywood's successful challenge to the NBA's draft rules was revolutionary, and looking back, even NBA Commissioner Stern can

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170. *Id.* at 622–23.

171. *Id.* at 625.

172. Clarett v. NFL, 369 F.3d 124, 134 n.14 (2d Cir. 2004) [hereinafter *Clarett II*] (quoting Mid-America Reg'l Bargaining Ass'n v. Will County Carpenters Dist. Council, 675 F.2d 881, 893 (7th Cir. 1982)).

173. *See generally*, *id.* at 125.

174. Curtis Bunn, *The Mass Exodus: Cause: Long Before Entering the NBA Draft Early Grew Common, Spencer Haywood Waged a Lonely Fight to Have the Right*, ATLANTA J.-CONST., Nov. 16, 2003, at 2Q.

appreciate Mr. Haywood's contributions.[175]

The NBA's draft eligibility policy at the time of Mr. Haywood's suit prevented any player from being drafted until four years after graduating from high school.[176] The rival ABA had a similar provision, but accommodated players if they plead hardship.[177] Mr. Haywood used the hardship exception to sign with the ABA's Denver franchise.[178] When he turned twenty-one, he rejected the ABA contract by claiming fraudulent inducement.[179] He then signed a contract with the NBA's Seattle Supersonics.[180] However, he signed the NBA deal while still ineligible to be drafted.[181]

Mr. Haywood's attempt to join the NBA was met with opposition from both leagues.[182] The ABA's Denver franchise did not want to lose its rising star, so it filed for a preliminary injunction to prevent him from jumping to the NBA.[183] Mr. Haywood defeated Denver's preliminary injunction, leaving him free to sign a NBA contract.[184] However, under pressure from other franchises that felt Seattle had performed an unfair end run around the draft,[185] then NBA Commissioner Walter Kennedy refused to accept the contract.[186] Mr. Haywood filed suit, alleging that the draft eligibility rule was a group boycott in violation of the Sherman Anti-Trust Act.[187] He asked for and obtained a preliminary injunction allowing him to play for the Supersonics.[188] The Ninth Circuit stayed the preliminary injunction but the Supreme Court reinstated it.[189]

On remand, the district court granted Mr. Haywood summary judgment on his anti-trust claims.[190] The court held that the draft eligibility

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175. *Id.* (quoting Mr. Stern, "Spencer is the trailblazer in that regard. He was the plaintiff in a case that has had important ramifications. It has reformed player eligibility to our league. That's big.").

176. Denver Rockets v. All-Pro Mgmt., 325 F. Supp. 1049, 1059 (C.D. Cal. 1971).

177. *Id.* at 1060.

178. *Id.*

179. Haywood v. NBA, 401 U.S. 1204, 1204–05 (1971).

180. *Id.* at 1205.

181. *Id.*

182. See Rosner, *supra* note 23, at 551.

183. *Id.*

184. *Id.*

185. McCann, *supra* note 140, at 217–18.

186. *Id.*

187. *Haywood*, 401 U.S. at 1205.

188. *Denver Rockets*, 325 F. Supp. at 1060.

189. *Id.*

190. *Id.* at 1066–67.

rule constituted a group boycott and was thus per se illegal.[191] The court refused to apply the Rule of Reason test through the *Silver* exceptions because Mr. Haywood was not allowed a hearing before being excluded from the draft.[192] Implicitly, this meant that if some procedural safeguards did exist, then the Rule of Reason test could have applied.[193]

The *Denver Rockets v. All-Pro Mgmt* decision is important because it shows both the birth of opposition to the NBA's draft eligibility rules and the use of anti-trust doctrine in a sporting context. The *Denver Rockets* decision is not the only professional sports league case that has involved an anti-trust analysis. Courts have performed anti-trust analyses in cases involving professional sports leagues using both the Rule of Reason analysis[194] and declaring certain actions per se illegal.[195]

While *Denver Rockets* is significant, it is important to note that it dealt with a rule that was not the result of collective bargaining.[196] The dawn of the era of collective bargaining in professional sports means that federal labor law, not anti-trust law, will be the primary force governing the validity of labor provisions.[197]

B. The Nonstatutory Exemption in Action

The nonstatutory exemption can be applied in two different scenarios. In the first scenario, it is applied to provisions in an existing CBA. In the second scenario, the nonstatutory exemption is applied when there is no

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191. *Id.* at 1066.

192. *Id.*

193. McCann, *supra* note 140, at 218.

194. *See* Smith v. Pro Football, Inc., 593 F.2d 1173, 1188–89 (D.C. Cir. 1978) (using the Rule of Reason test to hold that the NFL draft was an unreasonable restraint on trade); Neeld v. NHL, 594 F.2d 1297, 1300 (9th Cir. 1979) (holding that a NHL by-law banning a one-eyed player from participating in the league was a reasonable restraint on trade using a Rule of Reason analysis); Deesen v. PGA, 358 F.2d 165, 171 (9th Cir. 1966) (using Rule of Reason analysis to determine that his exclusion from the professional golf tour following a subpar 1958 season was an acceptable restraint on trade).

195. *See* Linseman v. World Hockey Ass'n, 439 F. Supp 1315, 1317, 1323 (D. Conn. 1977) (explaining that a district court issued a preliminary injunction in a nineteen-year old player's challenge to the World Hockey Association's ("WHA") twenty year old age limit. The court reasoned that the WHA's age limit constituted a group boycott and, after finding that the *Silver* exceptions did not apply, declared that the age limit was *per se* illegal); Boris v. U.S. Football League, 1984 U.S. Dist. LEXIS 19061, at *3, *8 (C.D. Cal 1984) (declaring as *per se* illegal the United States Football League's ("USFL") draft eligibility provision that prevented players from being drafted unless players used up all college eligibility, graduated from college, or five years had passed since players entered college).

196. *Denver Rockets*, 325 F. Supp. at 1066.

197. Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L. J. 1, 1 (1971).

CBA. This situation arises when either the current CBA has expired and the parties are still operating under its terms, or management has unilaterally imposed terms after collective bargaining has reached an impasse. Although any challenge to Article X would fall under the first category, it is instructive to look at the application of the nonstatutory exemption when no current CBA exists because the cases collectively show the deference courts are willing to give to federal labor policy.

1. The First Scenario and Eighth Circuit: Exploring *Mackey*

a. *Mackey* Sets the Standard

The first important case to show how the nonstatutory exemption applied to professional sports was a challenge to a component of the NFL's free agency system, called the "Rozelle Rule," named after then NFL Commissioner Pete Rozelle. In *Mackey v. NFL*,[198] players challenged the Rozelle Rule,[199] which required a team signing a free agent to compensate the player's old team.[200] If the teams could not agree on compensation, the commissioner could step in and award the disadvantaged team draft picks or players from the poaching team's roster.[201] The commissioner's discretion embodied in the Rozelle Rule gave teams reason to hesitate before signing a free agent, thus potentially working as a restraint on trade.[202]

The Eighth Circuit crafted a three-part test to determine when the nonstatutory exemption should apply, considering whether: 1) the restrictions affect only the parties to the collective bargaining agreement; 2) the assailed practice concerns a mandatory subject of bargaining; and 3) the restriction is a product of bona fide, arm's length bargaining.[203] The court did not analyze the first prong, stating that it was "clear" that the Rozelle Rule only impacts parties to the CBA.[204] The court next found that, while on its face the Rozelle Rule did not appear to concern a mandatory subject of collective bargaining, the prong was nonetheless satisfied because whether the practice concerns a mandatory subject of bargaining depends

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198. *See* Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976).

199. *Id.* at 609 n.2 (explaining that some players sought an injunction preventing the NFL from using the Rozelle Rule, while others sought an injunction as well as damages).

200. *Id.* at 609 n.1.

201. *Id.*

202. *Id.* at 609.

203. *See id.* at 614.

204. *Mackey* v. NFL, 543 F.2d 606, 615 (8th Cir. 1976).

on practical effect, not form.[205] The court determined that the Rozelle Rule related to wages, and thus concerned a mandatory subject of collective bargaining because the rule restricts a player's movement and thus "depresses player salaries."[206]

The Eighth Circuit found the Rozelle Rule failed the third prong, however.[207] The court held the NFL unilaterally imposed the rule on a weak National Football League Player's Assocation ("NFLPA") in 1963, the rule never changed in subsequent CBAs, and the players received no *quid pro quo* from the NFL in exchange for including the Rozelle rule in the current CBA.[208] Implicitly, the Eighth Circuit held that the parties' failure to discuss the Rozelle Rule more than tangentially[209] meant that the rule violated the test. The court finally used a Rule of Reason analysis to find the Rozelle Rule ran afoul of federal anti-trust law.[210]

b. Everybody Loves *Mackey*

Since the *Mackey* decision, the Eighth Circuit's reasoning has been widely followed by courts deciding whether to apply the nonstatutory exemption in a sports law case.[211] One of the first applications of the *Mackey* test came in a challenge to the NHL reserve rule in *McCourt v. Cal. Sports, Inc.*[212] The reserve rule was a provision in the CBA between the NHL and National Hockey League Players Association ("NHLPA").[213] When a player switched clubs as a free agent, the rule mandated compensation in the form of players, draft choices, or cash, to the player's former team.[214] The rule mirrored a similarly questioned provision in *Mackey* and the Sixth Circuit referred to it as a "modified Rozelle Rule."[215]

The challenge to the NHL's reserve rule came from Dale McCourt, a Detroit Red Wings player selected by an arbitrator to serve as compensation for the Los Angeles Kings when the Red Wings signed

205. *Id.*

206. *Id.*

207. *Id.* at 616.

208. *Id.*

209. *Id.* at 616 n.17.

210. *Mackey*, 543 F.2d 606, 620–22 (8th Cir. 1976).

211. Kieran M. Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption In Professional Sports*, 94 COLUM. L. REV. 1045, 1058 (1994).

212. McCourt v. Cal. Sports, Inc., 600 F.2d 1193, 1194 (6th Cir. 1979).

213. *Id.* at 1195.

214. *Id.*

215. *Id.* at 1194.

Kings goaltender Rogatien Vachon as a free agent.[216] Rather than report to the Kings, Mr. McCourt filed a lawsuit alleging that the reserve rule violated the Sherman Anti-Trust Act.[217]

The Sixth Circuit used the *Mackey* elements to decide if the nonstatutory exemption applied to the NHL's reserve rule.[218] The court found that the first element was satisfied because "the hockey players themselves. . . [were] primarily affected."[219] Next, the court held that the reserve rule concerned a mandatory subject because it restricted player movement between teams, thereby impacting player financial interests.[220]

The case therefore turned on whether the NHL's reserve rule was the subject of bona-fide arm's length bargaining.[221] The Sixth Circuit started by stating that just because one side does not change its position does not mean that collective bargaining has not taken place.[222] The court listed the various attempts by the NHLPA to stop the NHL from including the reserve rule.[223] While the NHLPA's efforts did not succeed in eliminating the reserve rule, the efforts did lead to other concessions.[224] Therefore, the court held that the reserve rule resulted from bona fide negotiations and that the nonstatutory exemption should apply.[225]

Another application of the *Mackey* test came in a challenge to the NFL's supplemental draft.[226] In the early 1980s a rival professional football league, the USFL, signed numerous NFL-caliber players.[227] Some of these USFL players were also drafted by NFL teams in the hopes that they would become available to play for the NFL at a later date.[228] The NFL feared that only the better teams would be able to "invest" in USFL players, so it proposed limiting certain rounds of the existing player draft to selection of players already under contract with the USFL or another

216. *Id.* at 1196.

217. *Id.* at 401.

218. McCourt v. California Sports, Inc., 600 F.2d 1193, 1198 (6th Cir. 1979).

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 1200 n.9 (quoting Section 8(d) of the NLRA, 29 U.S.C. § 158(d) (2000), which defines collective bargaining as meeting and conferring over wages, hours, and other terms and conditions of employment, but not requiring a concession).

223. *Id.* at 1202 (noting the NHLPA tried to develop an alternative reserve rule system, threatened to strike, and threatened to file an anti-trust suit).

224. *See* McCourt v. Cal. Sports, Inc., 600 F.2d 1193, 1202 n.12 (6th Cir. 1979).

225. *Id.* at 1203.

226. *See* Zimmerman v. NFL, 632 F. Supp. 398 (D.D.C. 1986).

227. *Id.* at 401.

228. *Id.*

league, or alternatively developing a supplemental draft for USFL players.[229] The NFL and the NFLPA agreed upon a three-round supplemental draft.[230] Since the NFL's CBA allowed for a fixed number of draft picks each year, the CBA needed to be modified.[231] In exchange for allowing the supplemental draft, the NFL agreed to keep the active player roster at forty-nine during the 1984 season.[232]

The NFL's New York Giants selected Gary Zimmerman in the supplemental draft while Mr. Zimmerman was still employed by the USFL.[233] Upset that he would only be able to negotiate with one team—the Giants—if he chose to jump leagues, Mr. Zimmerman filed a lawsuit alleging that the supplemental draft violated the Sherman Anti-Trust Act.[234]

The court used the *Mackey* test to determine if the nonstatutory exemption should apply to the supplemental draft.[235] Both sides agreed that the supplemental draft concerned a mandatory subject of collective bargaining, therefore satisfying the second *Mackey* prong.[236] Mr. Zimmerman first argued that because it primarily impacts USFL players who are not parties to the CBA, the supplemental draft did not satisfy *Mackey*'s first prong.[237] The court disagreed, noting this prong was intended to deny application of the exemption to agreements mainly impacting competitors of the employer.[238] As a potential NFL player, Mr. Zimmerman was not a competitor, and thus a party to the CBA.[239]

Once again, the key issue became whether the provision in question was the subject of bona fide, arms length negotiations.[240] Mr. Zimmerman argued the NFL's *quid pro quo* was not mentioned in the letter modifying the CBA and that the *quid pro quo* was meaningless and thus was not the subject of good faith negotiations.[241]

The court defeated Mr. Zimmerman's first point by reiterating the holding in *McCourt*, stating that a tangible *quid pro quo* reduced to a single

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229. *Id.*

230. *Id.* at 402.

231. *See id.* at 401.

232. Zimmerman v. NFL, 632 F. Supp. 398, 402 (D.D.C. 1986) (noting that active player rosters could have been reduced to forty-five under the terms of the current CBA).

233. *Id.*

234. *Id.* at 401.

235. *See id.* at 403–08.

236. *Id.* at 404.

237. *Id.* at 405.

238. Zimmerman v. NFL, 632 F. Supp. 398, 405 (D.D.C. 1986).

239. *Id.*

240. *Id.* at 406.

241. *Id.* at 407.

document is unnecessary, as only good faith bargaining is needed.[242] In rejecting Mr. Zimmerman's second argument, the court noted that it was not its duty to determine the adequacy of consideration.[243] Thus, the supplemental draft satisfied the *Mackey* prongs and the nonstatutory exemption applied.[244]

2. The First Scenario and the Second Circuit Test: Rejecting *Mackey*

Despite the wide acceptance of the *Mackey* test, the Second Circuit recently created a new standard in *Clarett v. NFL*.[245] The next part will review the cases that laid the foundation for a circuit split and then examine *Clarett's* more flexible standard for applying the nonstatutory exemption.

a. Seeds of a Circuit Split

Several cases involving challenges to the NBA's collective bargaining set the stage for the current circuit split. In 1984, the Philadelphia 76ers drafted O. Leon Wood in the first round of the NBA draft.[246] The NBA's newly imposed salary cap required teams that exceeded the maximum allowable aggregate team salary to sign new first-round draft picks to one-year contracts for $75,000.[247] The 76ers were over the cap, so they offered Mr. Wood such a contract, but assured his agent that the team would make roster adjustments allowing it to sign Mr. Wood to a long-term deal worth more money.[248] Mr. Wood neither signed the $75,000 contract nor waited for the 76ers to make another offer.[249] Instead, Mr. Wood sued the NBA claiming the salary cap and the draft violated the Sherman Anti-Trust Act.[250]

The district court analyzed the claim using the same considerations as *Mackey* and denied Mr. Wood's request for a temporary injunction.[251] In *Wood v. NBA*, the Second Circuit affirmed the district court's holding, but

242. *Id.*

243. *Id.* at 408.

244. Zimmerman v. NFL, 632 F. Supp. 398, 408 (D.D.C. 1986).

245. *See* Clarett *II*, *supra* note 172, at 133, 140–143.

246. Wood v. NBA, 809 F.2d 954, 958 (2d Cir. 1987).

247. *Id.* at 957.

248. *Id.* at 958.

249. *See id.*

250. *Id.*

251. *See* Wood v. NBA, 602 F. Supp. 525, 528 (S.D.N.Y. 1984) (finding that Mr. Wood's anti-trust claim fails because the college draft and salary cap are mandatory subjects of collective bargaining, affect only the parties to the CBA, and resulted from bona fide arms-length negotiations).

utilized a different analysis.[252] On appeal, Mr. Wood alleged the NBA's policies were illegal because they prevented him from achieving full-market value, disadvantaged new employees, and impacted players outside the bargaining unit.[253] The Second Circuit rejected Mr. Wood's claim that he was prevented from achieving full-market value as contrary to federal labor policy favoring collective bargaining.[254] While acknowledging the downsides of this policy, the court was not persuaded to overturn the explicit federal policy in favor of unionization.[255] The court also rejected Mr. Wood's claim that the policies were illegal because they disadvantaged new employees, holding that it is normal for terms of a collective bargaining agreement to discriminate based on seniority.[256] Finally, the court rejected Mr. Wood's claim that he was outside the bargaining unit by noting that it is commonplace for CBAs to impact workers beyond members of the union signing the CBA.[257] The court also noted that the NLRA defines the term "employee" to include persons outside the bargaining unit.[258] As a result, the Second Circuit concluded that Mr. Wood's claim had to be rejected because it would subvert federal labor policy.[259]

The next Second Circuit case, *Caldwell v. Am. Basketball Ass'n*, involved Joe Caldwell, who played in the ABA and served as president of the ABA's union.[260] In 1974, a player on Mr. Caldwell's team, frustrated by his contract, sat out a game as a negotiating tactic.[261] Team officials asked Mr. Caldwell if he knew the location of the player, but Mr. Caldwell

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252. *See* Wood v. NBA, 809 F.2d 954 (2d Cir. 1987).

253. *Id.* at 959–960.

254. *Id.*

255. *Id.* (noting an individual employee may receive less compensation than he would through individual negotiations and that highly specialized professional athletes differ from industrial workers).

256. *See id.* at 960 ("A collective agreement may thus provide that salaries, layoffs, and promotions be governed by seniority . . . ."); *see also* Ford Motor Co. v. Huffman, 345 U.S. 330, 331 (1953) (upholding a union's decision giving individuals credit towards seniority for pre-employment military service, stating "satisfaction of all who are represented is hardly to be expected.").

257. *See id.* (noting clauses in CBAs can prevent outsiders from bidding on a job or provide for subcontracting work to be limited to certain groups of workers).

258. Wood v. NBA, 809 F.2d 954, 960–61 n.3 (2d Cir. 1987) ("[T]he definition provides . . . that the term 'employee' shall include any employee, *and shall not be limited to the employees of a particular employer*, unless this subchapter explicitly states otherwise." (quoting 29 U.S.C. § 152(3) (2000))) (emphasis in original).

259. *Id.* at 963.

260. Caldwell v. Am. Basketball Ass'n, 66 F.3d 523, 526 (2d Cir. 1995).

261. *Id.* at 525–26.

said that he did not know.[262] The team suspected Mr. Caldwell knew the player's location, and suspended him from the team.[263] After initially appealing the suspension to the union, Mr. Caldwell decided to fight the suspension through litigation and won. However, he never played again in the league.[264] A year later, Mr. Caldwell filed suit, alleging he had been blackballed in violation of the Sherman Anti-Trust Act.[265] The NBA, which had merged with the ABA, defended by arguing that Mr. Caldwell was over-the-hill and injured.[266]

The district court performed an anti-trust analysis and granted summary judgment in favor of the NBA without referring to the nonstatutory exemption.[267] On appeal, however, the Second Circuit applied the nonstatutory exemption.[268] While acknowledging that Mr. Caldwell's claims were not as inconsistent with federal labor policy as the claims of Mr. Wood, the Second Circuit nonetheless held that if his claims proceeded, the fundamental principles of federal labor policy would be subverted.[269] The court noted that Congress decided federal labor policy "required a specialized agency equipped to find facts, to apply the NLRA, and to impose particular remedies": the NLRB.[270] Mr. Caldwell chose to bring his claim under the Sherman Anti-Trust Act, instead of pursuing remedies under the NLRB.[271] In affirming the district court's grant of summary judgment, the Second Circuit acknowledged that previous decisions involving professional sports allowed such suits to proceed, but to do so here would frustrate federal labor policy.[272]

The final Second Circuit case is *NBA v. Williams*.[273] The NBA's 1988 CBA was set to expire in 1994, and the NBPA demanded three provisions—the college draft, the right of first refusal, and salary cap—not be included in a new CBA.[274] When the NBPA refused to negotiate until the 1988 CBA expired, the NBA sought a declaration that continued

262. *Id.* at 526.

263. *Id.*

264. *See id.* (noting that Mr. Caldwell won his entire 1974–75 salary with interest, costs and expenses).

265. *Id.* (explaining that the case was delayed as Mr. Caldwell went through bankruptcy).

266. *See* Caldwell v. Am. Basketball Ass'n, 66 F.3d 523, 526 (2d Cir. 1995).

267. *See* Caldwell v. Am. Basketball Ass'n, 825 F. Supp. 558 (S.D.N.Y. 1993).

268. *Caldwell*, 66 F.3d at 527.

269. *Id.* at 530.

270. *Id.* at 527.

271. *Id.* at 530

272. *See id.* at 530–31.

273. *Williams II*, *supra* note 93, at 684.

274. *Id.* at 686.

operation under the 1988 CBA would not violate anti-trust laws.[275] The players counterclaimed, alleging that continued imposition of the questioned terms violated the Sherman Anti-Trust Act.[276]

The district court dismissed the NBPA's counterclaim, holding that the nonstatutory exemption applied "and antitrust immunity exists as long as a collective bargaining relationship exists."[277] The Second Circuit affirmed.[278] In a stinging rebuke of the players' claim, the Second Circuit commented, "In *Wood* . . . we noted that 'no one seriously contends that the antitrust laws may be used to subvert fundamental principles of our federal labor policy.' The present case appears to have proven us wrong because just such a contention is being seriously made."[279] In affirming the district court's grant of declaratory relief to the NBA, the Second Circuit held that if the players' claim succeeded, federal policy enacted by Congress allowing multi-employer bargaining would be frustrated.[280]

Taken together, these three cases illustrate the Second Circuit's adherence to federal labor policy while avoiding *Mackey*. A true circuit split did not exist, however, until the Second Circuit decided Maurice Clarett's challenge to the NFL's draft eligibility rules.[281]

b. *Clarett*: The Background

After a stellar freshman season at The Ohio State University in 2002, Maurice Clarett ran into some off-the-field troubles that forced him to sit out his sophomore year.[282] As a result, Mr. Clarett decided to try to enter the NFL draft.[283] The NFL, however, only allows college athletes to declare for the draft three years after their high school class graduates.[284] Mr. Clarett graduated high school in December 2001, meaning at the time of the lawsuit he was one year away from NFL draft eligibility.[285] In order to avoid sitting out an entire year of organized football, Mr. Clarett filed

275. *See id.* (The NBA also claimed that the provisions the players wanted removed were lawful even if anti-trust laws applied.).

276. *Id.*

277. *Id.* at 686–87 (internal quotations omitted).

278. *Id.* at 688 (noting that federal labor laws permit multi-employer organizations to collectively bargain with employees).

279. *Williams II*, *supra* note 93, at 690 (citation omitted).

280. *See id.* at 693.

281. *See* Sum, *supra* note 118, at 814.

282. *Clarett II*, *supra* note 172, at 126.

283. *Id.*

284. *Id.*

285. *Id.*

suit, alleging the NFL's draft eligibility rules unreasonably restrain trade and violate the Sherman Anti-Trust Act.[286]

c. District Court Decision: *Mackey* Solidarity

The district court agreed with Mr. Clarett and found that none of the *Mackey* elements were satisfied.[287] Judge Scheindlin found that the draft eligibility provision did not address a mandatory subject of collective bargaining, because the NFL's rule "precludes players from entering the labor market altogether" as opposed to regulating the player once the player enters the labor market.[288] In addition, the agreement did not apply only to parties to the CBA, since it applied to Mr. Clarett;[289] thus, the court held this prong was not satisfied.[290] Finally, the court held the draft eligibility rule was not the subject of bona-fide arm's length negotiations because the NFLPA waived the ability to bargain for it.[291]

d. *Mackey* Sacked For a Loss in the Second Circuit

The NFL appealed to the Second Circuit, which reversed the district court while rejecting the *Mackey* test.[292] The Second Circuit declared it has "never regarded the Eighth Circuit's test in *Mackey* as defining the appropriate limits of the nonstatutory exemption."[293] The court determined that its decisions in *Wood*, *Caldwell*, and *Williams*, which stressed the importance of federal labor policy when applying the nonstatutory exemption, were proper precedents.[294] It further held that the Supreme Court's view of the nonstatutory exemption in *Brown v. Pro Football, Inc.*[295] is not inconsistent with Second Circuit precedent.[296]

The Second Circuit noted that the issue to decide was whether exposing the NFL draft eligibility rules to anti-trust analysis would "subvert fundamental principles of our federal labor policy."[297] In

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286. *Id.*

287. *See Clarett I*, *supra* note 42, at 393–397.

288. *Id.* at 395.

289. *See id.* at 396.

290. *Id.*

291. *Id.*

292. *See Clarett II*, *supra* note 172, at 125.

293. *Id.* at 133.

294. *Id.* at 135.

295. *See* Brown v. Pro Football, Inc., 518 U.S. 231 (1996); *See also* discussion *infra* Part IV.3.C.

296. *See Clarett II*, *supra* note 172, at 135.

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

answering affirmatively, the Second Circuit adopted a unique analytical framework to approach the application of the nonstatutory exemption,[298] but justified its approach using a rationale similar to the *Mackey* factors.[299]

First, in finding the NFL's eligibility rules to be mandatory subjects of collective bargaining,[300] the Second Circuit held that as a "literal condition for initial employment," the eligibility rules are mandatory subjects.[301] The court also noted that, in the professional sports context, rules that do not appear to be mandatory subjects actually are mandatory subjects when examined more critically.[302] Using a critical eye, the Second Circuit noted the eligibility rules are mandatory subjects because they impact wages and working conditions for NFL players, *e.g.*, securing veteran's jobs by keeping younger players out of the NFL.[303]

Second, the court held that the NFL's eligibility rules do not impermissibly affect non-union players.[304] The court stated that eligibility rules are permissible bargaining subjects because they are similar to union demands for hiring hall arrangements, where employment eligibility is set by the entire hiring hall and not a single employer.[305] The Second Circuit held that once a collective bargaining relationship is established, employees can collectively bargain for any bar on prospective employees as long as it does not violate unfair labor or discrimination laws.[306]

Finally, the court rejected Mr. Clarett's protest that the NFL's eligibility rules were not the subject of collective bargaining because the rules were part of the NFL Bylaws and Constitution and that if the NFLPA had wanted to put them on the table, it could have.[307] In addition, the court held that since the NFLPA signed a waiver forgoing rights to challenge any provision in the NFL Bylaws and Constitution and the waiver was in the CBA, the eligibility rules should be enforced for the duration of the CBA.[308] The court further stated that requiring the provision to be

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298. *Recent Case: Antitrust Law – Nonstatutory Labor Exemption – Second Circuit Exempts NFL Eligibility Rules from Antitrust Scrutiny – Clarett v. National Football League*, 369 F.3d 124 (2d. Cir. 2004), 118 HARV. L. REV. 1379, 1381 (Feb. 2005) [hereinafter HARVARD LAW REVIEW].

299. *See* Sum, *supra* note 118, at 821.

300. *Clarett II*, *supra* note 172, at 139.

301. *Id.*

302. *See Id.* at 140.

303. *See id.*

304. *See id.* at 140–41.

305. *Id.*

306. *Clarett II*, *supra* note 172, at 141.

307. *Id.* at 142.

308. *Id.*

contained explicitly in the CBA, or to be the subject of a specific *quid pro quo,* would reduce a union's ability to negotiate and compromise effectively.[309] Thus, in an effort to be consistent with federal labor policy, the court held that it is acceptable to uphold against anti-trust scrutiny a term not explicitly found in a CBA.[310]

In essence, the Second Circuit created a broader test that includes, but is not limited to, the *Mackey* factors, and does not make any single *Mackey* factor dispositive.[311] The difference is the treatment of bona-fide bargaining: the *Mackey* test is satisfied only when the parties explicitly bargain over a provision, whereas the *Clarett* test allows a provision to be valid if the parties could have bargained for it.[312]

3. The Second Scenario: The Nonstatutory Exemption Working Overtime

The second area where the nonstatutory exemption applies is when no CBA exists. Though the facts in these cases differ from a challenge to Article X, they are still instructive as to the importance of federal labor policy's goal of promoting collective bargaining and the scope of the nonstatutory exemption.

a. The Nonstatutory Exemption's Full Court Press: *Bridgeman*

In 1987, the CBA between the NBA and NBPA expired before the parties were able to come to a new agreement.[313] The NBPA stood firmly entrenched against restraints on players such as the salary cap, the college draft, and the right of first refusal.[314] The parties signed a "moratorium agreement" postponing any lawsuit or player signing, but it expired without a renewed CBA and the NBA continued to operate under the terms of the most recent CBA.[315] At the end of the moratorium period, the NBPA filed suit alleging that the protection afforded by the nonstatutory exemption disappeared the moment the CBA expired and that the NBA's current operating scheme violated anti-trust laws.[316]

In *Bridgeman,* the court began by reiterating the rationale for the

309. *Id.* at 142–43.
310. *Id.* at 143.
311. *See* HARVARD LAW REVIEW, *supra* note 298, at 1382.
312. *See* Sum, *supra* note 118, at 821.
313. *See* Bridgeman v. NBA, 675 F. Supp. 960, 963 (D.N.J. 1987).
314. *Id.* at 962–63.
315. *Id.* at 963.
316. *See id.* at 961, 964.

nonstatutory exemption.[317] Recognizing that federal labor policy encourages collective bargaining, the court held that the nonstatutory exemption did not disappear the instant the CBA expired.[318] The court noted that agreements frequently expire without a new deal in place, and if a CBA lost anti-trust protection the moment it expired, management would be reluctant to collectively bargain for anticompetitive restraints out of fear that employees would file suit the moment the agreement expires.[319] However, the court rejected the NBA's assertion that the nonstatutory exemption endures forever, reasoning that the anti-trust exemption only applies as long as the restriction remains unchanged and the employer reasonably believes the restraint will be included in the next CBA.[320]

b. The Nonstatutory Exemption in Overtime: *Powell*

In 1987, the NFL's CBA expired without a new agreement, and the NFL "maintained the status quo on all mandatory subjects of bargaining" under the prior 1982 CBA.[321] In response, NFL players went on strike, but failed to achieve a new agreement.[322] The players then sued, alleging that the First Refusal provision of the 1982 agreement no longer enjoyed the protection of the nonstatutory exemption.[323]

In *Powell v. NFL*, the Eighth Circuit initially noted the "comprehensive array of remedies" available to management and unions after the CBA expires and even after the point of impasse.[324] The Eighth Circuit recognized that federal law was developed to encourage negotiation, not intervention by the courts.[325] Therefore, the Eighth Circuit found no anti-trust violation and held that the nonstatutory exemption still applied to the NFL's 1982 CBA.[326] The Eighth Circuit did not determine how long the nonstatutory exemption lasted, but noted that it should be available through a claim's adjudication before the NLRB.[327]

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317. *Id.* at 965 (noting the need to balance between federal anti-trust and labor laws, and encouraging "good faith bargaining on important issues").

318. *Id.*

319. Bridgeman v. NBA, 675 F. Supp. 960, 965–66 (D.N.J. 1987).

320. *Id.* at 966–67.

321. Powell v. NFL, 930 F.2d 1293, 1296 (8th Cir. 1989).

322. *Id.* (noting the goals of the strike were to change the NFL's stance on veteran free agency and veteran salaries).

323. *See id.*

324. *Id.* at 1302.

325. *See id.*

326. *Id.* at 1304.

327. Powell v. NFL, 930 F.2d 1293, 1303–04 (8th Cir. 1989).

c. The Nonstatutory Exemption's Supreme Test in Overtime: *Brown*

The Supreme Court last reviewed the application of the nonstatutory exemption in the professional sports context nearly ten years ago, in a case involving payment of NFL practice squad players.[328] During negotiations for a new CBA, the NFL proposed that each practice squad player be paid the same salary.[329] The NFLPA rejected this offer and the parties reached an impasse.[330] As a result, the NFL unilaterally imposed the weekly salary.[331] A group of practice squad players filed suit, claiming the salary violated the Sherman Anti-Trust Act.[332]

In *Brown*, the district court held that the nonstatutory exemption ends when the CBA expires, so it denied the NFL the ability to use the nonstatutory exemption as a defense to uphold the NFL's unilateral imposition of practice squad player salaries.[333] The case went to a jury which found that the NFL violated anti-trust laws and awarded treble damages exceeding $30 million.[334] Nevertheless, the Court of Appeals reversed, finding that the nonstatutory exemption applied "so long as such restraints operate primarily in a labor market characterized by collective bargaining."[335] Thus, when appealed, the Supreme Court's task was to determine whether the nonstatutory exemption applied beyond impasse.[336]

The Supreme Court started by assuming that federal labor policy did not prohibit an employer's action of implementing a last, best offer once negotiations reached an impasse.[337] Since the practice in question was supported by federal labor policy, the Court held that the nonstatutory exemption applied.[338] First, the Court reasoned that the action post-impasse would be acceptable under federal labor policy because labor laws allow various actions by employers after impasse.[339] Second, the Court frowned upon using anti-trust law to decide the matter because this would

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328. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 234 (1996) (stating that in the NFL each team is allowed to maintain a practice squad consisting of a limited number of rookie players who practice with the team and stand ready to replace injured players on Sundays).

329. *Id.* at 234–35 (noting proposed salary was $1,000 per week).

330. *Id.*

331. *Id.* at 235.

332. *Id.* at 234-35 (claiming a restraint of trade because it forced each player to play for the same pay rather than allowing each player to negotiate his own contract).

333. *See* Brown v. Pro Football, Inc., 782 F. Supp. 125, 134 (D.D.C. 1991).

334. *Brown*, 518 U.S. at 235.

335. Brown v. Pro Football, Inc., 50 F.3d. 1041, 1056 (D.C. Cir. 1995).

336. *See Brown*, 518 U.S. at 238.

337. *See id.*

338. *Id.*

339. *See id.* at 245.

make courts arbitrators of what is good collective bargaining—something that should be determined by the parties.[340]

The Court rejected arguments made in the briefs by the petitioners and their supporters about where to draw the line for applying the nonstatutory exemption.[341] Notably, the Court explained that the nonstatutory exemption is not limited "only to understandings embodied in a collective bargaining agreement."[342] In addition, the Court reasoned that the nonstatutory exemption is acceptable in this case because impasse is a process that naturally occurs during collective bargaining and is often temporary.[343] Finally, the Court stated that while athletes are "special" because they have special skills, they are indistinguishable from other organized workers when it comes to federal labor law.[344]

In concluding, the Court indicated that the nonstatutory exemption applied because of factors very similar to the three elements announced by the *Mackey* court.[345] The Court did not say that every unilateral imposition by management would be protected.[346] However, the Court declined to establish guidelines regarding situations when a unilateral imposition by management is too attenuated from collective bargaining.[347]

IV. APPLYING THE TESTS

This part will apply both the Eighth and Second Circuit tests to determine whether Article X would survive a challenge by a prep star who wishes to go directly to the NBA from high school. Before moving forward, note that this part proceeds on the assumption that courts will follow the recent trend to avoid an anti-trust analysis in favor of looking to the nonstatutory exemption when examining this problem. Conversely, should the potential reviewing court buck the trend and look to anti-trust law, the analysis should address whether the *Silver* exceptions and the

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340. *See id.* at 240-41.

341. *Id.* at 243.

342. Brown v. Pro Football, Inc., 518 U.S. 231, 243 (1996).

343. *Id.* at 245.

344. *Id.* at 248–50.

345. *See id.* at 250 (While not specifically mentioning *Mackey* by name, the Court noted that the employer "conduct took place during and immediately after a collective-bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collective-bargaining relationship.").

346. *See id.* (mentioning that "an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting anti-trust intervention would not significantly interfere with that process.").

347. *See id.*

Northwest Stationers pleading requirements are met before subjecting the alleged group boycott or concerted refusal to deal to a Rule of Reason Analysis. However, it is likely federal labor policy will be the focus of any court's discussion.

A. The Article X Restrictions Impact Only Those Parties to the CBA

At first glance, it would seem that this prong is not satisfied, but precedent dictates that potential NBA players are parties to the CBA.[348] Logically, parties that are not a part of the union and thus not represented at the bargaining table are not parties to the CBA, but for legal purposes, however, these parties are included under the CBA.[349]

In *Wood,* the Second Circuit held that a new draftee is subject to the League's eligibility rules, even though Wood was playing amateur basketball at the time the NBA and the NBPA consummated the deal.[350] This decision remains on solid footing. The Fifth Circuit clearly enunciated the principle that not only are the individuals signing the CBA impacted by its terms, but "[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."[351] In addition to judicial decisions, the NLRA provides a statutory reminder, defining the term "employee" to include certain other persons in addition to workers within the bargaining unit.[352]

Both judicial and statutory precedent indicate that the term "parties to the CBA" should be interpreted expansively. As a potential employee, a high schooler is considered a party to the NBA's CBA, thereby satisfying this part of the test. Furthermore, as *Clarett's* first prong is identical to the test developed in *Mackey*, the outcome will be the same under both tests.

B. Article X Concerns a Mandatory Subject of Collective Bargaining

The next issue is whether the term in question is a mandatory subject of collective bargaining. According to the NLRA, mandatory subjects of collective bargaining include wages, hours, and working conditions.[353]

Determining whether a provision relates to a mandatory subject

348. *See* Wood v. NBA, 809 F.2d 954 (2d Cir. 1987).

349. *See id.*

350. *See id.* at 957 (noting Mr. Wood was drafted in 1984 and the CBA was agreed upon in 1983).

351. NLRB v. Laney & Duke Storage Warehouse Co., 369 F.2d 859, 866 (5th Cir. 1966).

352. *See Wood*, 809 U.S. at 960-61 n.3.

353. *See* 29 U.S.C. § 158(d) (2000).

"depends not on its form but on its practical effect."[354] In *Mackey*, the Eighth Circuit determined that while the "Rozelle Rule" dealt only with inter-team compensation on its face, in practice, it "restrict[ed] a player's ability to move from one team to another and depresse[d] player salaries."[355] Similarly, the Second Circuit in *Clarett* held that the NFL's eligibility rules are tied to the NFL salary cap, creating mandatory entry-level salaries for all rookies.[356]

Based on these precedents, Article X is a mandatory subject of collective bargaining. Article X, like the eligibility rule in *Clarett*, is tied to the NBA salary cap, which also provides mandatory salaries for the first three years of an entry-level player's career based on the player's draft position. The fact that a player's salary is tied to his draft position potentially depresses his salary, as in *Mackey*. Thus, the eligibility rules are a mandatory subject. Since *Clarett* kept this second prong identical to the test developed in *Mackey*, the outcome will be the same under both tests.

C. Article X Is the Subject of Bona-Fide Negotiations

The final question is whether Article X is the subject of bona-fide collective bargaining negotiations. This analysis created a split among the Second and Eighth Circuits. In *Mackey*, the Eighth Circuit found no bona-fide collective bargaining when a provision was included unilaterally in a CBA that, notwithstanding the provision was bargained for as a whole.[357] By contrast, in *Clarett*, despite the fact that the NFL eligibility rules were not expressly bargained for, the Second Circuit applied the nonstatutory exemption.[358]

Here, from all appearances, the eligibility rule was one of the more prominent features of the new CBA. While intimate details of the negotiations are a mystery, what is known is that NBA Commissioner Stern had been calling for a twenty-year-old age limit for years leading up to the most recent collective bargaining session.[359] But in order to facilitate the deal and avoid a lockout, the Commissioner had to reduce the request to nineteen.[360] If Article X is litigated, evidence uncovered in discovery will

354. Mackey v. NFL, 543 F.2d 606, 615 (8th Cir. 1976).

355. *Id.*

356. *See Clarett II*, *supra* note 172, at139-140.

357. *See Mackey*, 543 F.2d at 615–16.

358. *See Clarett II*, *supra* note 172, at 142–43.

359. *See* Denberg, *supra* note 33, at E12.

360. *See* Manasso, *supra* note 11, at C8.

likely reveal that Mr. Stern's concession matched a concession by the NBPA.[361] Even if there is no specific *quid pro quo* for Mr. Stern's change in position, it seems beyond question that the age limit was discussed in collective bargaining based on the numerous references Mr. Stern made to his desire to make this change over the past five years. Therefore, the *Mackey* test's requirement of collective bargaining is satisfied. Since the *Clarett* test is more permissive than the *Mackey* test—because it simply requires that the provision be part of an agreement which is collectively bargained for on the whole—there is no problem satisfying this test, either.

In sum, no matter which test is used to analyze a potential challenge to Article X, the nonstatutory exemption will apply and Article X will be upheld. Nevertheless, the Circuit split endures and thus the question remains: which test is superior?

V. CIRCUIT SPLIT: A CASE OF NO HARM, NO FOUL? NO WAY

Any potential challenge to the NBA's CBA will fail if analyzed under either existing test. Does that mean that there is no difference between the Eighth Circuit and Second Circuit tests? The answer is no. This part will look at the policies behind the respective tests and analyze the logic behind them. Specifically, this part will examine the expansive definition of the terms of the first two prongs of each test, then discuss the split in the third prong, and conclude that the Eighth Circuit's test for applying the nonstatutory exemption is superior.

A. The First Prong

As previously discussed, the definition by which a party is considered within the bargaining unit is very expansive.[362] While this definition means that an industry newcomer—like an NBA draft pick—might be frustrated and struggle through his first couple of years, such an expansive definition is still necessary to support federal labor policy.

Federal labor policy supports collective bargaining.[363] Collective bargaining is efficient in that it allows management and workers to make decisions impacting their entire workforce. The necessity of collective

361. *See* Nicholas Wurth, Article, *The Legality of an Age-Requirement in the National Basketball League After the Second Circuit's Decision in Clarett v. NFL*, 3 DEPAUL J. SPORTS L. CONTEMP. PROBS. 103, 127 (2005) (stating a proposed age limit rule "will be presumed to have been the product of bona fide arm's-length bargaining.").

362. *See supra* Part IV.A.

363. *See* Sum, *supra* note 118, at 810.

bargaining was recognized by the Second Circuit in *Wood*.[364] In rejecting Mr. Wood's claim, the court noted that to agree with Mr. Wood would mean "hardly a collective agreement in the nation would survive."[365] The point is that if each new employee to an industry made his own rules, collective bargaining would be worthless. Thus, while the definition of a bargaining unit is expansive, it is necessary to support federal labor policy.

B. The Second Prong

The second prong deals with mandatory subjects of collective bargaining, which include wages, hours, and conditions of employment.[366] While on the surface it would appear that the NBA's eligibility rule does not relate to wages, courts have held that the substance, not the form, is key in these circumstances.[367] Thus, the prevailing view is that this concept of what impacts wages is also interpreted expansively.[368]

There are two ways to interpret this issue. The first interpretation holds that when a person is ineligible for a job, the eligibility requirement does not impact that person's wages at all.[369] Under this line of thinking, Article X, which makes high schoolers ineligible for the draft, is not a mandatory subject. In the second interpretation, an examination of inferences and natural results of an eligibility rule could be tied to other wage conditions.[370] Thus, under this line of thinking, Article X is a mandatory subject of collective bargaining.

While expansive, the latter interpretation makes more sense. The impact on player wages can come from various factors such as the size of the market where the team is located, price of tickets, and concessions. In looking at "conditions" of employment, the Ninth Circuit has held that "the phrase 'terms and conditions of employment' is to be interpreted in a limited sense. . . . In order for a matter to be subject to mandatory collective bargaining it must *materially* or *significantly* affect the terms or conditions of employment."[371] Similarly, it is no stretch to think that a relation to wages must not be too attenuated. It does not require too many logical steps to understand that an eligibility rule limits the number of players

364. *See* Wood v. NBA, 809 F.2d 954, 960 (2d Cir. 1987).

365. *Id.*

366. *See* Mackey v. NFL, 543 F.2d 606, 615 (8th Cir. 1976).

367. *See id.*

368. *See id.*

369. *See Clarett I*, *supra* note 42, at 393.

370. *See Clarett II*, *supra* note 172, at 140.

371. Seattle First Nat'l Bank v. NLRB, 444 F.2d 30, 32–33 (9th Cir. 1971) (emphasis in original).

available to play in the NBA, and therefore keeps veterans employed and their wages high. Additionally, eligibility rules are connected to wages because they limit the number of rookies entering the NBA each year. Moreover, first year players are subject to a rookie salary scale, which in turn impacts the salary cap. The salary cap is perhaps the ultimate controller of wages, as it limits the total salary that a team can pay to its players. The expansive interpretation of wages draws a connection between eligibility rules and a player's paycheck. Therefore, these interpretations comfortably satisfy the Ninth Circuit's standard because these types of considerations are not too attenuated to place eligibility rules outside what is considered a mandatory subject of collective bargaining.

C. The Third Prong

As previously stated, the third prong is where the Second and Eighth Circuits disagree. The Eighth Circuit provides that a provision must be collectively bargained for. However, the Second Circuit applies the nonstatutory exemption as long as a provision is contained in an agreement, which as a whole was collectively bargained for. While the expansive language of the first two prongs is permissible,[372] the Second Circuit's approach here goes too far because it exempts issues never collectively bargained for.

1. The Power of the Prongs

The Second Circuit's expansive language is inappropriate due to the power given to the parties of the CBA by the first two prongs. In the first prong, parties to the collective bargaining agreement have the power to determine the fate not just of union members, but also of people who do not have a seat at the bargaining table.[373] Second, the expansive nature of what relates to "wages" in collective bargaining means that as long as something can be rationally related to the bottom line during a collective bargaining session, it can be deemed to be a mandatory subject of collective bargaining.[374]

With this expansive power, union representatives would be required to know what they are giving away when they sign an agreement. If a term that is part of a CBA is not articulated in the CBA, it needs to be discussed explicitly during bargaining or needs to be included unambiguously in a

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372. *See supra* Part V.A–B.

373. *See* Mackey v. NFL, 543 F.2d 606, 615 (8th Cir. 1976).

374. *See* Wood v. NBA, 809 F.2d 954, 960 (2d Cir. 1987).

waiver[375] or stipulation. Critics of this policy object on the grounds that this makes collective bargaining "self-defeating."[376] They rationalize that such a policy will discourage concessions and require a party to put up mock opposition to the other side's proposals to create a detailed record of *quid pro quo*.[377] The critics further assert that unions would try to bargain for as little as possible, hoping that what is not mentioned at a collective bargaining session would therefore automatically be unavailable for protection under the nonstatutory exemption.[378]

These arguments miss the point. The next two parts of this section show that the *Mackey* test is superior because it will not slow down the bargaining process by forcing detailed negotiations over immaterial provisions in a CBA, and it is more consistent with federal labor policy.

2. The *Mackey* Test Does Not Require Collective Bargaining Over Insignificant Details

A bona-fide collective bargaining requirement under the *Mackey* test does not require fictitious opposition or concessions to impose terms that are undisputed between the two parties. The requirement simply necessitates that parties address the agreement during bargaining.

While the Rozelle Rule failed the third prong in *Mackey* because the Eighth Circuit could not find a *quid pro quo*, a closer examination of the court's rationale shows that what was important was the discussion of the term.[379] In *Mackey*, the Eighth Circuit held that there was no *quid pro quo* because the discussion of the Rozelle Rule was tangential to other potential concessions being made.[380] The importance of a discussion, rather than a specific *quid pro quo*, was made clearer in *McCourt*, as the Sixth Circuit found bona-fide collective bargaining even though the NHL did not budge from its original position on the Reserve Rule.[381] The Supreme Court concurred in this rationale in *Brown*, when it found that bona-fide collective bargaining took place, even though the parties never reached an agreement on a weekly salary for practice squad players.[382] Thus, the

375. *See Clarett II*, *supra* note 172, at 127 (an example of a waiver appears in *Clarett*, but this particular waiver should have been invalid because it waived a provision never bargained for).

376. HARVARD LAW REVIEW, *supra* note 298, at 1386.

377. *See id.*

378. *See id.*

379. *See* Mackey v. NFL, 543 F.2d 606, 616 n.17 (8th Cir. 1976).

380. *See id.*

381. *See* McCourt v. Cal. Sports, Inc., 600 F.2d 1193, 1203 (6th Cir. 1979).

382. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 238 (1996).

parties will not have to go to great lengths to create imagined *quid pro quo* because an actual concession is unnecessary, only a discussion is required.

Parties need not increase the length of a CBA to ensure that it contains each bargained-for provision. The Supreme Court in *Brown* noted that the nonstatutory exemption was not limited "only to understandings embodied in a collective bargaining agreement."[383] The district court decision in *Clarett* took this position to heart, as it looked outside the collective bargaining sessions between the NFL and NFLPA and analyzed the entire history of collective bargaining in the NFL when trying to determine if the draft eligibility provision was the subject of bona-fide negotiations.[384] The ability to apply the nonstatutory exemption using evidence outside the text of the agreement demonstrates that the discussion itself is significant, not an articulated *quid pro quo.*

Finally, while discussion is key to *Mackey*'s third prong, collective bargaining sessions will not needlessly be extended by requiring people to verbally acknowledge every element of a CBA. Parties to a CBA will be able to stipulate to, or otherwise waive, agreed-upon provisions, provided that a discussion has occurred over those provisions in the past. The Eighth Circuit noted that the NFL initially imposed the Rozelle Rule unilaterally upon a weak NFLPA, and that the Rozelle Rule never changed in subsequent CBAs.[385] The Eighth Circuit held that accepting the status quo when the provision had never been collectively bargained for did not constitute bona-fide collective bargaining.[386] Implicitly, this means that a court could uphold a provision that had once been collectively bargained for if it is adopted into a new agreement to maintain the status quo. The decisions in both *Bridgeman* and *Powell* conform to this understanding, as both courts applied the nonstatutory exemption to collectively bargained-for provisions past the expiration of the CBA.[387] In essence, the courts in *Bridgeman* and *Powell* upheld previously bargained-for provisions by maintaining the status quo. Following this lead, any stipulation agreed to by two parties should be upheld, provided that they have previously discussed the stipulation in collective bargaining.

In sum, the *Mackey* test will not stall collective bargaining by requiring needless discussions in order to secure terms already agreed upon. To satisfy the third prong of the *Mackey* test, parties must discuss

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383. *See id.* at 243.

384. *See Clarett I, supra* note 42, at 396.

385. *See Mackey*, 543 F.2d at 615–16.

386. *Id.*

387. *See* Bridgeman v. NBA, 675 F. Supp. 960, 965 (D.N.J. 1987); Powell v. NFL, 930 F.2d 1293, 1296 (8th Cir. 1989).

the provision at some point during the process. Discussions do not need to lead to a specific *quid pro quo*, be memorialized in writing, nor be discussed anew at each collective bargaining session to be protected from anti-trust scrutiny by the nonstatutory exemption.

3. The Second Circuit's Test Potentially Leads to the Breakdown of the Collective Bargaining Process

The Second Circuit's test for applying the nonstatutory exemption grew out of *Wood*, *Caldwell*, and *Williams*, and came into its own in *Clarett*.[388] Each of these cases stressed the importance of federal labor policy and inquired whether exposing the challenged provision to anti-trust scrutiny would subvert federal labor policy.[389] Unfortunately, the Second Circuit's *Clarett* opinion created exactly what it hoped to avoid: it provided incentives for the parties to the CBA to disregard the collective bargaining process. By broadly accepting any term that is in an agreement collectively bargained for as a whole, the Second Circuit's test encourages a union to decertify, thus opening the door to federal labor policy destruction.[390]

Under the Second Circuit's test, terms never collectively bargained for by the union can make it into an agreement as long as the agreement is collectively bargained for as a whole. The result of this permissive view of collective bargaining is that a party could unilaterally impose stealth or hidden terms.[391] Such terms could appear via a vague waiver, as in *Clarett*,[392] or under the guise of continuing the status quo, as in *Mackey*.[393]

Players who are burdened by hidden or surprise terms in a CBA have two options. The first option is to wait until the CBA expires,[394] which could be several years, and then fix the problem by refusing to implement the provision again. The second option—assuming that the employees will not want to wait until the next collective bargaining session—is to decertify the players' union, thereby voiding any anti-trust protection that the disfavored provision enjoys.[395] Indeed, a group within the NBPA discussed this option in 1995.[396] With most CBAs in professional sports leagues

388. *Clarett II*, *supra* note 172, at 134–35; *see also supra* Part III.B.2.

389. *See, e.g.*, *Clarett II*, *supra* note 172, at 141; *see also supra* Part III.B.2.

390. *See* Sum, *supra* note 118, at 825–26.

391. *See id.* 824–25.

392. *See Clarett II*, *supra* note 172, at 142.

393. *See* Mackey v. NFL, 543 F.2d 606, 616 (8th Cir. 1976).

394. *See* Sum, *supra* note 118, at 825–26.

395. *See id.*

396. *See* Howard-Cooper, *supra* note 94, at C1.

lasting multiple years, the latter option of decertification is the only real option for players seeking to immediately get rid of an unfavorable hidden term.

Although decertifying the players union may be the most expedient method for players to change the unwanted terms in the CBA,[397] it subverts federal labor policy by actively encouraging the destruction of the collective bargaining process[398] and forcing courts to choose sides, rather than allowing employers and unions to compromise. In short, the Second Circuit's expansive application of the nonstatutory exemption, which protects terms not bargained for, will encourage decertification and destroy federal labor policy's preference for collective bargaining.[399]

VI. WHAT'S NEXT?

What's next for a prep phenom? Though some commentators predict a challenge to the age limit[400] regardless of the suit's likelihood of success,[401] an immediate lawsuit is not guaranteed.[402] Currently, high

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397. Sum, *supra* note 118, at 826; *see e.g.*, Richard Sandomir, *Free Agency: Fighting the Good Fight*, N.Y. TIMES, Jan. 7, 1993, at A1 (noting NFL players decertified their union in 1987, leading to free agency).

398. *See* Sum, *supra* note 118, at 826.

399. The imposition of terms never collectively bargained for differs from the situation in *Brown*. In *Brown*, the NFL imposed, after impasse, a term not agreed upon by the parties. Brown v. Pro Football, Inc., 518 U.S. at 238 (1996). Impasse is a term of art and the court pointed out that impasse is not the end of negotiations. *Id.* at 245. Therefore, a term imposed at impasse can be refined to mutual satisfaction when discussions continue anew. By contrast, a term never collectively bargained for that becomes part of a CBA is valid until the CBA expires. Under *Brown*, players have no incentive to decertify because negotiations can continue, but under the Second Circuit's policy the stealth term's permanent nature encourages decertification.

400. *See* Blair Clarkson, *NBA's Minimum Age Likely Will Face Lawsuits*, L.A. DAILY J., June 30, 2005, at 1 (quoting Mississippi College School of Law professor Michael McCann predicting that there will be a legal challenge); Wurth, *supra* note 361, at 105 (predicting that if an age limit is imposed it will be almost immediately challenged).

401. *See supra* Part IV (predicting that under either the Second Circuit or Eighth Circuit test a court will apply the nonstatutory exemption and uphold the NBA's CBA). *But see* Michael A. McCann & Joseph S. Rosen, Legality of Age Restrictions in the NBA and the NFL, 56 CASE W. RES. L. REV. (forthcoming 2006) (manuscript at 27–28, on file with author) (predicting that a challenge to Article X brought in the Sixth Circuit could win and stating that a challenge should not be filed in the Second Circuit; also noting that despite the numerous documented successes of preps to pros players in the ten years, the issue of whether it was prudent to bargain for a preps to pros ban will not be addressed by a court in the Second Circuit when determining if the nonstatutory exemption applies).

402. *See* Eric Prisbell, *Coaches Say New NCAA Academic Plan Is Flawed*, WASH. POST, July 20, 2005, at E1 (noting that Greg Oden, the projected first pick in the 2006 NBA draft before the age limit was imposed, made a commitment to attend The Ohio State University, implying he will not challenge Article X in court).

school stars only have to wait a year after graduation to enter the NBA, and they have numerous ways to spend their time during the wait.[403] However, because these alternatives may not always be available or may become less attractive, an Article X challenge may be more appealing. In addition, high schoolers could pursue other legal remedies.

A. Inferior Opportunities

High School players may challenge Article X because other options available to them seem inferior. This part examines two of those options.

1. NCAA Basketball Academic Crackdown

Assuming that a high schooler satisfies the academic prerequisites for college,[404] one opportunity is for up-and-coming players to play temporarily in the NCAA.[405] In the past it has been common for players to leave college early[406] after they gained maturity both on and off the court in college.[407] However, the NCAA has begun cracking down on programs that do not graduate players, as demonstrated by the adoption of academic reforms—known as Academic Progress Rates—that provide for escalating penalties for poor graduation rates.[408] While some coaches are unfazed by the rule change,[409] others say they are no longer interested in "one and done" players.[410] If the new NCAA rules make it difficult for coaches that do not graduate players to coach effectively, these same coaches may think twice about accepting one-year players. The inability to play for a major

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403. *See* Thamel *supra* note 18, at 8.

404. Mark Heisler, *Pros Prepping For Youth Movement*, L.A. TIMES, Jan. 14, 1996, at C4 (noting that Kevin Garnett's academic ineligibility motivated him to declare for the NBA Draft). If a high schooler does not meet NCAA entrance requirements, thus taking away the option of playing college basketball, it could influence the decision to challenge Article X.

405. *See* Thamel, *supra* note 18, at 8.

406. Chris Tomasson, *Haywood's Message to NBA: Grow Up*, ROCKY MTN. NEWS (Colo.), Feb. 18, 2005, at 19N (noting that for twenty years after the Haywood decision most players stayed in college for at least two years).

407. *See* Rick Sadowski, *Pioneer Haywood Pleased With Limit*, ROCKY MTN. NEWS (Colo.), June 23, 2005, at 16C.

408. *See* Tim Griffin, *NCAA Academic Reforms*, SAN ANTONIO EXPRESS-NEWS, Feb. 27, 2005, at 1C (noting that penalties such as stripping scholarships and banning teams from post-season play); see, e.g., ESPN.com, *Few Big Names to Lose Scholarships Based on APR*, http://sports.espn.go.com/ncaa/news/story?id=2349787 (last visited Mar. 6, 2006).

409. *See* Prisbell, *supra* note 402, at E1 (noting five of the last seven coaches to lead a team to the NCAA title did not express concern about recruiting a player who might leave early).

410. *See* Jeff Rabjohns, *Players' Motivation Comes Into Question*, INDIANAPOLIS STAR, July 10, 2005, at 4C (paraphrasing University of Louisville coach Rick Pitino).

college program may influence a high schoolers' decision to challenge Article X.

2. NBDL Salary Disparity

Another option is the NBDL, which NBA commissioner Stern has tried to make more accessible as a minor league and act as an alternative for high schoolers by lowering the minimum age from twenty to eighteen.[411] However, the average yearly salary for a player unaffiliated with an NBA team, which a high school player would be, is between $12,000 and $24,000.[412] In contrast, former preps to pros player Dorell Wright makes $12,500 per game while playing for the NBDL, because he is affiliated with an NBA team.[413] The significant disparity between salary levels could motivate a high schooler to sue.

B. Other Legal Theories

Another potential reason Article X could be challenged is that it can be combined with a related challenge to the CBA. This part looks at two potential challenges.

1. Right of Fair Representation

The first legal theory rests upon the fact that members of the collective bargaining unit are owed a right of fair representation by the union.[414] Since high schoolers are considered members of the bargaining unit,[415] and the NBPA serves as an exclusive bargaining representative, the NBPA owes them a right of fair representation. Case law indicates that the duty of fair representation is breached when the union's conduct towards a portion of the bargaining unit is arbitrary, discriminatory, or is in bad faith.[416]

From the Second Circuit's opinion it appears that *Clarett* made the arbitrariness argument, but was rejected.[417] The standard to prove

411. Thamel, *supra* note 18, at 8.

412. Ethan J. Skolnick, *D-League*, SUN-SENTINEL (Fla.), Jan. 11, 2006, at 1C.

413. *Id.*

414. *See* Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953).

415. *See Clarett I*, *supra* note 42, at 393.

416. *See* Vaca v. Sipes, 386 U.S. 171, 177 (1967).

417. *Clarett II*, *supra* note 172, at 141 ("Clarett, however, stresses that the eligibility rules are arbitrary and that requiring him to wait another football season has nothing to do with whether he is in fact qualified for professional play. But Clarett is in this respect no different from the typical worker who is confident that he or she has the skills to fill a job vacancy but does not

arbitrariness or the second option, bad faith, is difficult to meet, as "substantial evidence of fraud, deceitful action[,] or dishonest conduct" is required.[418] However, a high schooler still has the option to allege discrimination. A claim could be made alleging, as Jermaine O'Neal does,[419] that the age limit is based on race discrimination. While it is a breach of the duty of fair representation to discriminate on the basis of race,[420] this claim could be difficult to make because the age limit impacts players of all races. However the union also has a duty to represent non-union members fairly,[421] and thus high schoolers might be able to make analogies based on past case law, make a claim for violation of the duty of fair representation, and request reinstatement of eligibility as a remedy.

For example, in *Branch 6000, National Association of Letter Carriers v. National Labor Relations Board*, local unions were asked to determine how vacation days should be allocated for mail carriers.[422] The local union let the employees, whether union or non-union, decide by having all the employees vote.[423] After that vote, union members protested, and the vote was taken again, this time with only union members voting. This ultimately led the non-union members to file suit.[424] The court stated that a representative must represent all of the employees in the bargaining unit, and that the duty of fair representation prevents the representative from acting based on self-interest, thereby preventing a group of employee decision-makers from acting for personal reasons.[425] The court held that delegating the vote to the bargaining unit and then taking stock only of the union votes violated the duty of fair representation because the interests of the non-union members were not considered.[426]

Additionally, in *Bowman v. Tennessee Valley Authority*, a CBA provision gave preference to union members by favoring the transfer of

possess the qualifications or meet the requisite criteria that have been set.").

418. Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 299 (1971) (internal quotations and cites omitted).

419. *See* Robbins, *supra* note 46, at 7.

420. *See* Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 203 (1944) (discussing a case involving allegations made by black firefighters of discriminatory treatment by the union and staing, "The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action.").

421. *Id.* at 204.

422. Branch 6000, Nat'l Ass'n of Letter Carriers v. NLRB, 595 F.2d 808, 810 (D.C. Cir. 1979).

423. *Id.*

424. *Id.*

425. *Id.* at 811–12.

426. *Id.* at 813.

non-union members over union members.[427] The court first held that the fact that the provision was collectively bargained for did not insulate it from the duty of fair representation.[428] It then held that the union preference provision unlawfully discriminated against non-union members.[429] The court characterized the duty of fair representation as "prohibit[ing] the unions from bargaining for or agreeing to any provision which singles out the employees in the unit who are not union members for disparate treatment."[430]

Under these precedents, a high schooler might have a workable claim. Following the logic of *Branch 6000*, if high school plaintiffs can prove that Billy Hunter and the NBPA did not take into account their interests, it could be argued that the representatives were acting only in their self-interest, in violation of the duty of fair representation. Also, following *Bowman*, the players could argue that Article X has a disparate impact, in violation of the duty of fair representation, on non-union members because it bans some of them from playing in the league. There are differences between these precedents and a high schoolers' claim—Article X was not put to a vote like the vacation days in *Branch 6000*, and high schoolers are not employees—but the claim could still be made.

2. Clarifying Language in the CBA

Another potential question to ask is what is considered a high school player's "high school class" for purposes of the NBA's age limit provision in Article X?[431] Prep basketball players are increasingly taking a post-graduate year at a prep school to improve academic standing[432] or simply to hone their athletic skills.[433] In addition, some prominent high school athletes are held back a grade during high school.[434]

The language of Article X is not clear as to whether the "high school class" of high schoolers who do a post-graduate year is their original high

427. Bowman v. Tenn. Valley Auth., 744 F.2d 1207, 1210 (6th Cir. 1984).

428. *Id.* at 1214.

429. *Id.*

430. *Id.*

431. *See* Peter May, *No Limit to Potential Problems*, BOSTON GLOBE, July 10, 2005, at C4 (showing the difficulty of this determination based on situations of specific high school players).

432. Josh Barr, *Athletes Make the Grade Sooner by Failing First*, WASH. POST, July 28, 2004, at A1.

433. *See* Tim MacMahon, *Houston Academy Offers Education in Basketball*, DALLAS MORNING NEWS, Feb. 14, 2005 at 1A (featuring the Gulf Shores Academy where high school players not satisfied with their scholarship offers transfer to gain more time to showcase their game to recruiters).

434. May, *supra* note 431, at C4 (noting 2005 Boston Celtics draftee Gerald Green).

school class or their prep school class. Also, it is not clear whether "the high school class" of students who are held back is their original class or the class they actually graduate with. These issues may have to be litigated to be resolved.

VII. CONCLUSION

David Stern's longstanding desire to impose an age limit is finally a reality—O.J. Mayo and other talented high school basketball stars will have to wait to get a shot at the NBA. While high schoolers have a myriad of options to consider while waiting, a challenge to Article X is still probable. A high schooler will lose that challenge under either the Eighth Circuit or Second Circuit's analysis. However, the fact that the result comes out the same under both tests does not mean there are no fundamental differences between the two. The Eighth Circuit's test is more appropriate than the Second Circuit's test because it forces union representatives to know what, if anything, they are bargaining away, and it captures the spirit of federal labor policy's preference for collective bargaining. Accordingly, courts should adopt the Eighth Circuit's test as the standard.

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