# Comments

# CAN DISCRIMINATION LAW AFFECT THE IMPOSITION OF A MINIMUM AGE REQUIREMENT FOR EMPLOYMENT IN THE NATIONAL BASKETBALL ASSOCIATION?

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## I. INTRODUCTION

### *A. The Phenomenon of Early Entry*

In the spring of 1999, twenty-seven underclassmen declared themselves eligible for the National Basketball Association ("NBA") player draft.[1] The list of underclassmen included twelve college freshmen and sophomores, as well as one high school senior.[2] A total of 100 players declared their eligibility between the 1997 and 1999 drafts.[3] Considering that the draft consists of two rounds in which each team in the league is allotted one selection,[4] a striking percentage of draft selections in the late 1990's involved underclassmen. As a result of the developments of recent years, "early entry" into the NBA is a stark reality in the twenty-first century.

Even prestigious Duke University has lost players due to early entry.

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1. *1999 NBA Draft Underclassmen, at* http://www.sports.excite.com/nba/news/unders.html (last modified June 30, 1999).

2. Jonathan Bender went straight from Mississippi's Picayune High School to the NBA. *Id.*

3. *Id.*

4. There were twenty-nine teams in the NBA and there were fifty-eight selections in the two round 2000 NBA draft. *See* http://nbadraft.net/1999.html.

Prior to 1999, Duke was famous for its ability to retain players with NBA skills for the duration of the players' collegiate eligibility.[5] In the 1999 draft, Duke lost the following players to the NBA draft: William Avery, a sophomore; Elton Brand, a sophomore; and Corey Maggette, a freshman.[6] When Duke lost its three most talented players to the lure of the NBA that year, it became clear that no institution, no matter how esteemed its athletic history, is immune from early entry. In fact, the trend of talented players leaving college or high school before their eligibility expires is so pronounced that it is extraordinary when an All-American player continues to play at the college level through graduation.[7] Nowadays, senior year, or even college itself, is primarily for those who need more time to develop their NBA skills. Tim Duncan and Keith Van Horn are two current NBA players who opted to forgo the 1996 draft and remain in school for their senior year. Both players would have easily been high picks in the 1996 draft.[8] However, they both elected to stay in college and both were eventual lottery picks, having been drafted first and second[9] in the 1997 draft.[10] The surprise surrounding their respective decisions to stay in school illuminates what is most alarming about the early entry trend. Staying in school has now become the exception, rather than the rule.

Young athletes are more likely to leave school as a result of the astonishing success of Kobe Bryant and Kevin Garnett. These two players decided to opt out of college in order to play in the NBA, and both have beaten the odds, becoming legitimate NBA stars. When players such as Kobe Bryant and Kevin Garnett succeed in becoming NBA superstars, they have an enormous impact on younger players with similar dreams.[11] A problem with the lure of NBA super-stardom is that for every Kobe Bryant, there are many more examples like Taj (Red) McDavid and Scotty

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5. *Issue of Minimum Age Debated on First Day of NBPA Meeting*, *at* http://www.sports.excite.com/news/990706.html (last modified July 6, 1999).

6. *1999 NBA Draft Underclassmen*, *supra* note 1.

7. Tim Crothers, *Making the Jump: The Odds of Making It in the NBA Are Daunting for Anyone. So How Does a Young College Star Know When the Time is Right to Step up to the Pros?*, SPORTS ILLUSTRATED, Nov. 15, 1996, at 24 (discussing the phenomenon of early entry in the NBA that began with the institution of the "hardship rule" in 1971 and has increased dramatically in the 1980s and 1990s), *available at* LEXIS, News Group File, All.

8. *Id.*

9. *Id.*

10. John Rowe, *'97—The Year in Sports*, THE RECORD (Bergen County, NJ), Dec. 28, 1997, at S10 (reporting that in the 1997 players draft, Tim Duncan was selected first by San Antonio and Keith Van Horn was selected second by Philadelphia), *available at* LEXIS, News Group File, All.

11. Big East Conference Commissioner Mike Tranghese describes the success of Kobe Bryant and Kevin Garnett as having an "incredible influence" on kids. Lenn Robbins, *School Daze: Keeping Stars From NBA Bait Is No Easy Task*, THE RECORD, (Bergen County, NJ), Nov. 17, 1996, at S01, *available at* LEXIS, News Group File, All.

Thurman. Red McDavid was a high school player from Williamston, South Carolina who declared himself eligible for the 1997 draft; however, he did not get drafted and has since vanished into obscurity.[12] McDavid certainly would have benefited from attending college and receiving an education, while perhaps honing his skills until he reached NBA caliber. Another example of the dangerous allure of early entry is Scotty Thurman's decision to enter the NBA draft. Thurman was a University of Arkansas star who left after his junior year in order to seek a professional NBA career.[13] Thurman was not drafted and was subsequently released by the New Jersey Nets after being signed as a free agent.[14] He has since been languishing in the Continental Basketball Association and has become a classic example of early entry miscalculation.[15]

Early entry lures players for a number of reasons. Many of the players who enter early are young adults who need money to support their families and who may not be interested in an education. If jobs are hard to come by, it would appear illogical to forsake millions of dollars for an education that will, at best, deliver a fraction of the salary offered by the NBA.[16] Although the players can ultimately hurt themselves with early entry, there is an undeniably clear incentive that motivates this trend.

However, early entry has severe costs, not only for the players who do not succeed in the NBA, but also for the National Collegiate Athletic Association ("NCAA"). With early entry, the NCAA loses out on the wealth of talent a star player can bring to a school. For universities with top basketball programs, star players can carry teams far into the final stages of the NCAA tournament. For the university, this will result in an immeasurable promotion in reputation, which can affect everything from licensing deals to higher student matriculation. As a result of early entry, college teams "no longer stay together long enough to gel and capture the imagination of fans."[17] In reality, the harm to the NCAA caused by early entry may only affect its wallet. Despite this harm, any NCAA coach would undoubtedly still want a Bryant or Garnett in his program, even if it

12. Alexander Wolff, *Impossible Dream: A Record 47 Early Entrants Applied for the NBA Draft, Many Harboring Quixotic Visions of Starring on Basketball's Brightest Stage*, SPORTS ILLUSTRATED, June 2, 1997, at 80.

13. Crothers, *supra* note 7, at 26.

14. *Id.*

15. *Id.*

16. Nolan Richardson, Arkansas head coach points out how early entry may be an obvious decision: "The pros may be a kid's only meal ticket. I've done some research, and I found that one million people got their college degrees last year and there were only 500,000 jobs out there. I don't know of any job better than the NBA." *Id.*

17. Jack McCallum, *Going, Going, Gone: The Growing Exodus of Underclassmen to the NBA Is Ripping the Heart Out of the College Game*, SPORTS ILLUSTRATED, May 20, 1996, at 52.

was only for one year.[18] Nonetheless, if the NBA was altogether enjoying the early entry phenomenon, then there would not be an issue regarding early entry.

The NBA also suffers from early entry, suggesting that it too might be interested in a minimum age requirement. First, the NBA prefers to have players attend or stay in college because it gives the players more time to develop their skills at no cost to the league.[19] Second, early entry forces the NBA to invest in something analogous to child care, holding players' hands as they enter the league to ensure that they do not implode from the sudden and dramatic change of lifestyle.[20] The NBA can be a rigorous environment, and while some players can handle the adjustment to the NBA lifestyle, many cannot. Furthermore, older veterans, who came to the league in a different era, may not want to nurture rookies. Third, some believe that the quality of play in the NBA has suffered because players are now coming into the league unprepared for basketball at such a high level.[21] In addition, by foregoing college or even high school, these players may not be equipped with the adequate skills necessary to cope with life after the NBA, especially if they do not reach superstar status while playing professionally. Although the NBA does have a program to help rookies, it may not be enough.[22] In the fall of 1999, the NBA suffered a public relations nightmare when Leon Smith, a straight-from-high-school draftee and twenty-first pick in the first round, made headlines for throwing a temper tantrum at the first Dallas Mavericks practice.[23] As a result of all these factors, there has been a movement within the NBA to aggressively attack this dilemma.[24]

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18. Robbins, *supra* note 11, at S01 (suggesting that college basketball coaches want the best players and heavily recruit even those who they know may only stay for one year).

19. Joe Gilmartin, *Early Entry Isn't Crisis NCAA, NBA Say It Is*, PHOENIX GAZETTE, May 21, 1996, at D1 (suggesting that the NBA's real concern regarding early entry is not the welfare of athletes, but rather its preference for athletes who gain more basketball experience in college).

20. Bob Herzog, *Sunday Special/ Caught in the Draft/ Stay in School? Not when Dollars Rule. Wisdom of Isiah*, NEWSDAY (New York), June 27, 1999, at C20 (discussing the NBA's transition program, which helps rookies make the social transition from college or high school to the NBA).

21. *The Commish's Wish, Stern Wants Limit to Deter Underclassmen, at* http://www.cnnsi.com/basketball/nba/1999/draft/news.html (last modified June 24, 1999).

22. Even Isiah Thomas, one of the fifty greatest NBA players of all time who left college early in order to play in the NBA, but later returned to earn his degree, has spoken frequently of the need to ensure adequate education for early entry players. *See* Robbins, *supra* note 11, at S01.

23. Sonja Steptoe, *Minimum Age, What Can the NBA Do About Early Entry, if Anything?, at* http://www.cnnsi.com/basketball/nba/news/1999.html (last modified July 15, 1999).

24. This comment will not discuss the efforts made by the NCAA to address this issue, but instead will focus on the NBA's efforts with respect to early entry. In addition, this

### *B. The Minimum Age Requirement*

In the summer of 1999, NBA Commissioner David Stern urged the players union to consider a minimum age requirement that would prohibit qualified athletes under a certain age from playing in the NBA.[25] The purpose of this threshold would be to eradicate, or at least lessen, the association between the NBA and early entry athletes.[26] Commissioner Stern recommended that the NBA adopt a threshold age of twenty for draft eligibility.[27] Even though this limit would not absolutely prohibit players from leaving school early, since most students turn twenty in their sophomore or junior year, it would ensure that a prospective NBA player has received some college experience and sharpened his skills. If adopted, the proposed rule would resemble the National Football League's ("NFL") age requirement that prohibits players from becoming eligible until they have completed their junior year in college.[28] In effect, this rule turns college football into a minor league for players to develop their skills.[29] While both Stern and Deputy Commissioner Russell Granik have promoted an age threshold, the league needs approval from the players union to implement this rule. To date, there has been little acceptance of the threshold. During the summer of 1999, Brent Barry, a member of the six-person player's committee appointed to discuss the issue, stated that the players union would not endorse a minimum age requirement.[30] Without the acceptance of the players union, such a rule cannot legally be imposed in the NBA because of antitrust implications.[31]

### *C. The Issue: The Legal Implications of a Minimum Age Requirement*

In 1971, *Haywood v. National Basketball Ass'n*[32] invalidated the former NBA minimum age requirement as a violation of section 1 of the

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comment will discuss only the potential legal implications of a minimum age requirement on the NBA.

25. *The Commish's Wish, Stern Wants Limit to Deter Underclassmen, supra* note 21.

26. David Stern commented that he did not want the draft system to be an incentive for players to leave school early. *Id.*

27. *Id.*

28. Robert A. McCormick & Matthew C. McKinnon, *Backtalk: Young Athletes Are Being Unlawfully Locked Out of the Money*, N.Y. TIMES, Nov. 23, 1997, at SP15.

29. *Id.*

30. *Age-old Question, Players Union Vehemently Opposed to Age Limit, formerly posted at* http://www.cnnsi.com/basketball/nba/news/1999.html (last modified July 9, 1999) (on file with author).

31. Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204, 1204-06 (1971) (holding that a minimum age requirement in the NBA constituted a group boycott and, therefore, violated section 1 of the Sherman Act).

32. 401 U.S. 1204 (1971).

Sherman Act.[33] The Court held that in the absence of an antitrust exemption for basketball, a unilateral minimum age requirement, when enforced by the league, would constitute a group boycott and therefore would violate the Sherman Act.[34] Historically, basketball warrants a different antitrust scrutiny than does baseball, a sport that once enjoyed a blanket antitrust exemption.[35] In order to avoid antitrust scrutiny, in the absence of a specific antitrust exemption, a collective bargaining agreement ("CBA") must contain a provision specifically permitting what would otherwise constitute illegal antitrust activity.[36] This type of provision qualifies for the non-statutory labor exemption ("NSLE").[37] Therefore, in order for the NBA to successfully introduce a minimum age requirement, and avoid antitrust scrutiny, this kind of provision must be a part of a CBA.

While it is clear that a minimum age requirement within a CBA is protected from antitrust scrutiny, there has been very little discussion of other possible legal implications. The purpose of this comment is to consider whether employment discrimination law will affect the legal status of a minimum age requirement. In other words, even if a minimum age requirement withstands antitrust scrutiny, the question is whether such a requirement will be invalidated under employment discrimination law. A minimum age requirement implicates specific federal and state age discrimination laws.[38] Under federal law, the relevant statute is the Age Discrimination in Employment Act ("ADEA").[39] This law affords age discrimination relief only to persons over age forty.[40]

The goal of this comment is to illustrate the potential vulnerability of the legality of a minimum age requirement in the NBA. While it currently appears that age discrimination does not offer a real remedy for NBA players, reverse age discrimination claims have the potential to protect

33. *Id.* at 1206.

34. *Id.* at 1205.

35. Fed. Baseball Club of Balt. v. Nat'l League, 259 U.S. 200, 209 (1922) (upholding a complete antitrust exemption for professional baseball); *see also* Toolson v. N.Y. Yankees, 346 U.S. 356, 357 (1953) (upholding the same exemption). These exemptions were subsequently limited by the Curt Flood Act of 1998, 15 U.S.C. § 27a (2000).

36. *See* McCourt v. Cal. Sports, Inc., 600 F.2d 1193, 1203 (6th Cir. 1979) (declaring that when the provision is embedded in a CBA, antitrust liability does not attach).

37. *Id.*

38. There are many federal and state provisions that prohibit age discrimination. When there is a regulation based upon age, it is necessary to look at the relevant provisions in order to determine whether the regulation violates governing law. The primary provision in federal law is the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-34 (1994).

39. *Id.*

40. *Id.* § 631(a) (stating that "[t]he prohibitions in this chapter shall be limited to individuals who are at least 40 years of age").

younger players seeking entry into the league.[41]

Reverse age discrimination claims, while relatively unsuccessful, are increasing in number and could eventually change the face of employer/employee relations.[42] In 1999, the New Jersey Supreme Court permitted a twenty-five year old to bring an age discrimination claim under the New Jersey Law Against Discrimination.[43] Clearly, if reverse age discrimination claims were more prevalent, the effects would be felt beyond the NBA. However, consideration of reverse age discrimination in conjunction with the NBA illustrates how sports employment law can involve substantial legal issues that challenge courtrooms on a daily basis. Despite the special treatment major professional sports receive in regulating their employees, the NBA, as an employer, is still subject to United States employment regulations. In the end, perhaps employment law will be able to erode some of the ironclad protection that the NSLE affords professional sports. Thus, it is necessary to first analyze sports law and then employment discrimination law in an effort to ultimately tie them together. This would then allow an analysis of whether a potential NBA rookie would be able to bring a reverse age discrimination claim.

## II. ANTITRUST AND PROFESSIONAL SPORTS

### A. *The Historical Doctrine: The Baseball Exemption*

The formation of a professional sports league presents major legal questions because of the internal measures leagues take in order to enhance the quality of play. Many of these measures challenge the basic tenets of pro-competitive United States law. While professional sports leagues appear to encourage competitive achievements, they are, in fact, ripe with restrictive measures which limit access to competition. For example, sports leagues restrict the number of teams in their league, the cities that may field teams, the amount of players who can compete, and most controversial, the compensation players receive for their services.

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41. In recent years litigation of reverse age discrimination claims has increased. Despite the lack of a clear indication that a claim exists under the law, a significant number of plaintiffs have brought reverse age discrimination claims. *See, e.g.*, Edwards v. Bd. of Regents, 2 F.3d 382, 382 (11th Cir. 1993) (involving a professor who claimed that a university gave preferential treatment to an older teacher who was closer to retirement); Hamilton v. Caterpillar Inc., 966 F.2d. 1226, 1227 (7th Cir. 1992) (alleging that an early retirement program constituted unlawful reverse age discrimination under the ADEA).

42. If reverse age discrimination claims succeed, then employers will be forced to reconsider job qualifications and promotion requirements for younger employees.

43. Bergen Commercial Bank v. Sisler, 723 A.2d 944, 957 (N.J. 1999) (allowing a reverse age discrimination claim).

The anti-competitive measures of professional sports leagues exemplify the very reason that antitrust law exists. Antitrust law is meant to ensure a level playing field in all business enterprises. However, sports leagues have survived, and even flourished, due to the protection of legislative and judicial measures that withhold antitrust scrutiny. Antitrust exemption allows professional leagues to institute measures, such as the NFL salary cap, without the threat of paralyzing litigation.

There is a tension between antitrust and labor law, as the aim of antitrust law is to promote competition and discourage collective behavior, while the aim of labor law is to utilize collective activity to protect workers' rights. A series of judicial decisions has interpreted the legislation to alleviate this tension by providing a clear governing structure for determining how to protect both labor and competition.

The Sherman Act, specifically sections 1 and 2, is the primary legislation that prohibits anti-competitive measures.[44] Section 1 of the Sherman Act declares that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is hereby declared to be illegal."[45] Section 2 of the Sherman Act asserts that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a felony . . . ."[46] Sections 1 and 2 of the Sherman Act have provided the basis for numerous challenges to the provisions governing professional sports leagues. The result is a long series of cases that protect certain measures taken by these leagues.

This series begins with several cases that consider the effect of antitrust law on professional baseball. In 1914, a New York court in *American League Baseball Club of Chicago v. Chase*[47] suggested that baseball does not qualify as interstate commerce and, therefore, antitrust law does not apply.[48] Following the logic of *Chase*, the Supreme Court in *Federal Baseball Club of Baltimore v. National League*[49] held that baseball was neither interstate nor commerce.[50] As in *Chase*, this ruling had the effect of exempting baseball from antitrust scrutiny.[51] In 1949, the holdings of *Chase* and *Federal Baseball* were challenged by *Gardella v. Chandler*.[52] The Second Circuit held that baseball is interstate and could be

44. Sherman Act sections 1,2, 15.U.S.C. §§ 1-7 (1994).
45. *Id.* at § 1.
46. *Id.* at § 2.
47. 149 N.Y.S. 6 (N.Y. App. Div. 1914).
48. *Id.* at 17.
49. 259 U.S. 200 (1922).
50. *Id.* at 209.
51. *Id.*
52. 172 F.2d 402 (2d Cir. 1949).

interpreted to include services.[53] While this case was ultimately settled, the court was the first to allow an antitrust challenge by professional baseball players against the reserve system instituted by Major League Baseball.[54] In *Toolson v. New York Yankees*,[55] the next major case to consider professional baseball in an antitrust context, the Supreme Court mentioned the exemption for baseball.[56] On the authority of *Federal Baseball*, the Court held that Congress did not intend to include baseball within federal antitrust laws.[57] Finally, in *Flood v. Kuhn*,[58] the Supreme Court held that even though baseball is considered interstate commerce, the exemption carved out was an "established aberration."[59] Here, the Supreme Court rested on the doctrine of stare decisis to hold that baseball deserves antitrust protection and thus left it up to Congress to alter the situation.[60]

The historic protection given to baseball has changed through recent case law and legislation. In *Piazza v. Major League Baseball*[61] the Eastern District of Pennsylvania held that baseball does not warrant a blanket antitrust exemption.[62] The court determined that while *Federal Baseball*, *Toolson*, and *Flood* served to protect the reserve system from antitrust scrutiny, they did not protect other aspects of baseball.[63] Congress closed the door on baseball's antitrust exemption with the Curt Flood Act of 1998.[64] This legislation ended the blanket antitrust exemption for baseball. Section 27(a) of the Act eliminates baseball's special status by adjusting the antitrust treatment of baseball to match other major professional sports.[65]

### *B. The Non-statutory Labor Exemption*

Although baseball did historically enjoy certain antitrust exemptions, other major professional sports have not enjoyed such protection. The antitrust protection that most professional sports leagues receive is derived from the construction of a doctrine called the non-statutory labor

53. *Id.* at 409-10.
54. A reserve system is a system in professional sports leagues that allows teams to reserve the right to particular players, thereby restricting the players' ability to seek employment elsewhere.
55. 346 U.S. 356 (1953).
56. *Id.* at 357.
57. *Id.*
58. 407 U.S. 258 (1972).
59. *Id.*
60. *Id.* at 276.
61. 831 F. Supp. 420 (E.D.P.A. 1993).
62. *Id.* at 421.
63. *Id.*
64. 15 U.S.C. § 27(a) (1998).
65. *Id.*

exemption ("NSLE"). The NSLE, which applies to labor-management bargaining situations, developed after the statutory labor exemption.[66] The statutory labor exemption refers to doctrines such as the Clayton Act and the Norris-LaGuardia Act. Collectively, those acts protect labor organizations from antitrust scrutiny.[67]

Without an antitrust exemption, professional sports leagues have been forced to confront antitrust challenges. *Mackey v. National Football League*[68] is a famous case that demonstrates the level of scrutiny required for antitrust challenges. In *Mackey*, the court considered the validity of the Rozelle rule.[69] The rule, imposed by former league commissioner Pete Rozelle, restricted player movement between teams.[70] After a league strike, the NFL players commenced an antitrust suit against the implementation of the Rozelle rule, claiming that it constituted a group boycott.[71] In response to this challenge, the court constructed a method of analysis within the rule of reason scrutiny that classically governed antitrust matters.[72] In *Mackey*, the court held that a league provision fails rule of reason scrutiny and, therefore, violates antitrust law if it does not satisfy a three-part test. The test asks: 1) does the assailed practice affect only the parties to the agreement; 2) is the provision a mandatory subject of collective bargaining; and 3) is the provision a result of good faith, arms-length bargaining?[73] After applying this test, the *Mackey* court determined that the Rozelle rule was a violation of antitrust law.[74] Subsequently, this test was modified by *National Society of Professional Engineers v. United States*,[75] which directed courts to determine whether such provisions have pro-competitive effects.[76] After *Mackey* and *National Society of Professional Engineers*, the general standard was set for determining whether a league measure violated antitrust law. This new standard was tested in *Smith v. Pro Football, Inc.*,[77] where the Court of Appeals for the

66. Connell Constr., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 621-22 (1975) (explaining the development of the non-statutory labor exemption).

67. *See* Clayton Antitrust Act, 15 U.S.C. §§ 12-27 (1999) (allowing labor unions to escape antitrust scrutiny); Norris-LaGuardia Labor Act, 29 U.S.C. §§ 101-15 (1999) (denying courts the right to issue restraining orders or injunctions in labor dispute cases).

68. 543 F.2d 606 (8th Cir. 1976).

69. *Id.* at 609.

70. *Id.*

71. *Id.*

72. Rule of reason analysis is a method for determining whether a provision or an act constitutes an "unreasonable restraint of trade" in violation of section 1 of the Sherman Act. *Id.* at 618.

73. *Id.* at 623.

74. *Id.* at 618.

75. 435 U.S. 679 (1978).

76. *Id.* at 691-92.

77. 593 F.2d 1173 (D.C. Cir. 1978).

District of Columbia Circuit held that a draft's anti-competitive effects outweighed its pro-competitive effects, thereby violating antitrust law.[78]

Thus, the case law history suggests that players often have flexibility to pursue causes of action for antitrust violations. With such a precedent, it appears that a potential NBA rookie seeking entry into the league would certainly have a cause of action under antitrust law. However, as mentioned above, courts have constructed a doctrine that protects labor-management relations in specific situations. Cases such as *Mackey*[79] and *Smith*[80] present viable antitrust challenges because the provisions in question existed outside a CBA. Courts have traditionally protected provisions that are part of CBAs in an attempt to address the tension between labor and antitrust law.

Under the NSLE, a union-management agreement that is negotiated in good faith will receive protection. While this doctrine applies to all labor-management situations, in terms of sports law, it protects provisions within CBAs. In *McCourt v. California Sports, Inc.*,[81] the Sixth Circuit upheld a reserve system in the National Hockey League because it was part of a CBA negotiated in good faith.[82] Since the entire CBA was bargained in good faith, the court held that even if the particular provision was harsh, it was deserving of antitrust protection.[83]

In an even greater leap, the Second Circuit held that the CBA applied to those who are not yet members of a professional sports league. In *Wood v. National Basketball Ass'n*,[84] the court held that Leon Wood, a rookie drafted by the Philadelphia 76ers, could not sue to invalidate the league salary cap even though he was not yet a member of the NBA player's union when the cap was established.[85] The court's decision implied that CBAs are negotiated on behalf of current and future players.[86] Therefore, if a valid CBA exists, under the NSLE there is no remedy in antitrust law for a party. This decision implies that all potential NBA rookies are bound by those CBAs now in place. In addition, if the players agree to incorporate a minimum age requirement into a current CBA, this case suggests that early entry candidates could not pursue a remedy under antitrust law.

The protection of CBA terms from antitrust scrutiny has even extended past the expiration of the agreement itself. In 1996, the Supreme

78. *Id.* at 1183-84.
79. 543 F.2d at 612.
80. 593 F.2d at 1175.
81. 600 F.2d 1193 (6th Cir. 1979).
82. *Id.* at 1203.
83. *Id.*
84. 809 F.2d 954 (2d Cir. 1987).
85. *Id.* at 959-60.
86. *Id.*

Court, in *Brown v. Pro Football*,[87] held that the NSLE does not expire until the parties are sufficiently distant in time and circumstance from the collective bargaining process.[88] This decision illustrates that the terms of a CBA receive extensive protection and remain in force long after the CBA expires. In order to meet the standard in *Brown*, the complete dissolution of the bargaining relationship would be required.[89] The *Brown* standard, in conjunction with *McCourt* and *Wood*, indicates that if a minimum age requirement were incorporated in a CBA, it would receive firm protection from an antitrust challenge until the players' union ended its bargaining relationship with team owners.

The significance of this exemption from antitrust scrutiny is that if NBA players were to agree to a minimum age requirement, potential NBA rookies would have little recourse under antitrust law. *Haywood v. National Basketball Ass'n*[90] has previously demonstrated that a minimum age requirement has serious antitrust implications.[91] In *Haywood*, the Supreme Court invalidated a NBA draft regulation that prohibited a collegiate basketball player from being drafted until four years after high school graduation.[92] Also, in *Linseman v. World Hockey Ass'n*,[93] a Connecticut District Court stated that a regulation prohibiting persons under the age of twenty from playing professional hockey would be a classic case of a per se illegal concerted boycott.[94] Based on their findings, the court in *Linseman* granted a nineteen year-old amateur a preliminary injunction allowing him to play in the league.[95] Because of the results in *Haywood* and *Linseman*, a court would probably invalidate a minimum age requirement if an antitrust challenge were available. However, if a collective bargaining relationship exists, the ability to bring an antitrust challenge disappears. If a minimum age requirement is incorporated into a CBA, those who wish to challenge it would not have a viable antitrust claim due to the NSLE. In the absence of the NSLE, a potential NBA rookie could probably contest a minimum age requirement under antitrust law, and given the *Haywood* and *Linseman* precedent, would likely succeed. With the NSLE in operation, it is important to consider what rights potential early entry candidates have outside antitrust law. The goal here is to consider whether a NBA rookie has a cause of action under federal or state discrimination law. Despite the antitrust exemption, if

87. 518 U.S. 231 (1996).
88. *Id.* at 250.
89. *Id.*
90. 401 U.S. 1204 (1971).
91. *Id.* at 1204-06.
92. *Id.* at 1206.
93. 439 F. Supp. 1315 (D. Conn. 1977).
94. *Id.* at 1320-23.
95. *Id.* at 1326.

federal or state rights are violated, early entry candidates may be able to invalidate a minimum age requirement.

Another hurdle for potential NBA rookies is that a binding arbitration clause, which is common in professional sports league CBAs, may force the claim to be decided by an arbitrator, rather than a court. Collective bargaining agreements often include arbitration clauses which dictate that certain causes of action must be heard by an independent arbitrator rather than by a jury.[96] However, there are instances where an employee's right to a jury trial outweighs the league's preference for arbitration. In *Alexander v. Gardner-Denver Co.*,[97] the Supreme Court held that an employee's statutory right to trial under the Equal Employment provisions of the Civil Rights Act is not foreclosed by the prior submission of a claim to final arbitration under a CBA's nondiscrimination clause.[98] The court held that an employee's civil rights were important enough to allow the employee to pursue his/her rights independently under the Civil Rights Act and other applicable state and federal statutes.[99] Fearing that arbitration might not adequately address the violation of these rights, the court elected to afford plaintiffs the right to bypass arbitration.[100] The court suggested that "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII."[101] While this decision involved a Title VII claim, the court in *Alexander* held that when a plaintiff deems arbitration an inadequate forum for the grievance, he/she can pursue his/her claim in court.[102] Therefore, despite the existence of an arbitration clause within a CBA, if the right is deemed important enough, a CBA will not keep the issue outside of court. Bypassing an arbitration clause is an important first step for potential NBA rookies attempting to claim reverse age discrimination.

96. United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 568 (1960) (determining that when a CBA has an arbitration clause, a dispute must go to an arbitrator).

97. 415 U.S. 36 (1974).

98. *Id.* at 60.

99. *Id.* at 48.

100. *Id.* at 49.

101. *Id.* at 59-60.

102. *Id.* at 60.

## III. AGE DISCRIMINATION LAW

### A. *The ADEA*

Before determining whether discrimination law affords potential NBA rookies protection from the imposition of a minimum age requirement, it is necessary to understand the current state of age discrimination law. The primary provision of federal age discrimination law is the ADEA.[103] This Act supplements Title VII, which affirmatively grants an employee the right to be free from several forms of discrimination.[104] The purpose of the act is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment."[105] Section 623(a) of the Act specifically makes age discrimination in employment illegal.[106] The section mandates that:

> [i]t shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunitiesor otherwise adversely affect his status as an employee, because of such individual's age; or (3) to reduce the wage rate of any employee in order to comply with this chapter.[107]

Age discrimination is a unique form of discrimination that creates an unusual dilemma. It is not based on a fixed factor like other forms of discrimination. Age discrimination "is seldom a matter of blind, arbitrary prejudice which often exists for reasons of race, creed, color, national origin, or sex. Age discrimination is a more subtle series of problems based upon a combination of institutional factors and stereotyped thinking."[108]

Section 631 of the ADEA clearly states that it only provides an age

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103. 29 U.S.C. §§ 621-34 (1999).

104. 42 U.S.C. § 2000e-2 (1994) (outlawing discrimination on the basis of race, sex, and religious belief).

105. 29 U.S.C. § 621(b) (1994).

106. 29 U.S.C. § 623(a) (1994).

107. *Id.*

108. Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution*, 72 N.Y.U. L. REV. 780, 786 (1997).

discrimination claim to persons who are at least forty years of age.[109] As a consequence, there is no cause of action for individuals under forty. In its initial form, the ADEA also included an age limit of sixty-five years in order to receive protection.[110] Congress later amended the ADEA to eradicate this age limit.[111] By setting the minimum at age forty, Congress attempted to ensure that the ADEA protects older workers.[112]

However, in the past Congress has recognized that age discrimination can affect the young, as well as the old. In 1975, it passed the Age Discrimination Act ("ADA") which prohibits age discrimination in federal programs.[113] By not setting a minimum age for protection under the ADA, Congress suggested that the young are often subject to discrimination and, therefore, warrant protection as well.[114] Strangely, this logic did not apply when Congress passed the ADEA. If Congress had lowered the minimum age for ADEA protection, they would still have achieved their goal of protecting the elderly from discrimination. However, as it stands, in order to challenge a minimum age requirement, a plaintiff under the age of forty has to argue that the requirement violates a right other than the right to be free from age discrimination.[115]

In order to prove a prima facie case of age discrimination, the employee, who bears the burden of proof, must show that: (1) he/she was a member of the protected age group; (2) his/her performance met the employer's legitimate expectation; (3) he/she was subject to materially adverse employment action; and (4) younger employees were treated more favorably.[116] The first prong requires that the employee was a member of the protected age group, and since the ADEA only protects those over forty, it eliminates younger employees claims. The fourth prong specifically requires that older workers were slighted, thereby acting with

109. 29 U.S.C. § 631(a) (1994).

110. Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. No. 90-202, 81 Stat. 602, 607 (1967) (codified as amended at 29 U.S.C. § 631 (1994)).

111. Bryan B. Woodruff, Note, *Unprotected Until Forty: The Limited Scope of the Age Discrimination in Employment Act of 1967*, 73 IND. L.J. 1295, 1295 (1998).

112. *Id.* at 1298.

113. 42 U.S.C. §§ 6101-07 (1994).

114. "[I]ts provisions are broad and it is the intent of the committee that it apply to age discrimination at all age levels, from the youngest to the oldest." 121 CONG. REC. 9212 (Apr. 8, 1975) (statement of Rep. Brademas).

115. Plaintiffs have frequently brought equal protection claims in order to invalidate minimum age requirements. *See, e.g.*, City of Dallas v. Stanglin, 490 U.S. 19, 20-21 (1989) (involving a challenge to the minimum age requirement for a dance hall on the grounds that it violates the right of association guaranteed by the First Amendment); Stiles v. Blunt, 912 F.2d 260, 261 (8th Cir. 1990) (discussing a potential political candidate's attempt to invalidate an age requirement for candidacy under the Fourteenth Amendment); Mason v. Edwards, 482 F.2d 1076, 1076-77 (6th Cir. 1973) (involving an equal protection challenge to a political office age requirement).

116. Elguindy v. Commonwealth Edison Co., 903 F. Supp. 1260, 1266 (N.D. Ill. 1995).

the first prong to ensure that older workers are not discriminated against in the workforce. This test for a prima facie case does not afford an opportunity for reverse discrimination claims.

However, the ADEA does not preempt state age discrimination laws.[117] This lack of preemption indicates that state law can supplement the protection afforded under the ADEA. This paves the way for influential state legislation on age discrimination, such as New Jersey's Law Against Discrimination, which prohibits age discrimination without targeting a specific age group.[118] When interpreting their own laws, states have the opportunity to allow reverse age discrimination claims. A lack of preemption allows a litany of age discrimination claims outside of the ADEA. Therefore, the prima facie test for age discrimination claims does not necessarily need to be applied to state law claims of age discrimination. If the state expands its protection against age discrimination, then the test may be altered. Even though there has been some controversy concerning whether the ADEA allows reverse age discrimination claims to those over forty, it is this lack of preemption that allowed the New Jersey Supreme Court in *Bergen Commercial Bank v. Sisler*[119] to construe its own statute to permit these claims.[120]

### *B. Reverse Age Discrimination*

In order for NBA rookies to have a viable claim to contest the implementation of a minimum age requirement, they will likely turn to reverse age discrimination. Reverse age discrimination claims are based on the notion that one was discriminated against because he/she was too young, rather than too old.[121] The word 'reverse' indicates that typical age discrimination claims assert that the plaintiff suffered discrimination because he/she was too old. In general, reverse age discrimination claims derive from the successful attempts of plaintiffs claiming reverse discrimination under the Civil Rights Act.[122] For example, under Title VII, "a plaintiff who is not a member of a racial minority may state a cause of action for discrimination on the basis of race."[123] These types of claims

117. Hulme v. Barrett, 449 N.W.2d 629, 631 (Iowa 1989) (stating that "[t]he federal Act does not preempt state age discrimination laws").

118. N.J. STAT. ANN. § 10:5-12(a) (West 1993).

119. 723 A.2d 944 (N.J. 1999).

120. *Id.* at 957.

121. Maxine H. Neuhauser & Mark D. Lurie, *Extending the Scope of the Law Against Discrimination*, 156 N.J.L.J. 868, 868 (1999) (discussing *Bergen*).

122. John P. Furfaro & Maury B. Josephson, *Reverse Age Discrimination*, N.Y.L.J., Oct. 1, 1993, at 3.

123. *Id.*

have been utilized in the past to invalidate affirmative action programs.[124] Despite the general success of reverse discrimination claims, these claims have been rare.[125]

The primary explanation for the limited success of reverse age discrimination claims is that the ADEA has not been interpreted to allow them.[126] In order to have a valid age discrimination claim under the ADEA, a plaintiff over the age of forty must allege that he/she suffered discrimination because he/she was too old. Since most minimum age requirements set limits at ages far younger than forty, it is difficult to establish a prima facie case. Nonetheless, the issue has been presented to a court before. The critical case that considered reverse age discrimination was *Hamilton v. Caterpillar, Inc.*[127] In *Hamilton*, the Seventh Circuit held that the ADEA does not provide a remedy for reverse age discrimination.[128] In its decision, the Seventh Circuit relied on two earlier cases[129] and held that although the ADEA does not prohibit reverse age discrimination claims for those under forty, it also does not authorize them.[130] After *Hamilton*, there may be little room for reverse discrimination claims under the ADEA, not to mention room for an eighteen year-old (an age far below the ADEA threshold) to claim age discrimination. Despite the *Hamilton* decision there have been continuous attempts to challenge the ADEA's stance on reverse age discrimination.[131]

Even though the ADEA does not yet allow reverse age discrimination claims, there is a movement against the ADEA that could open the door to such claims. The goal of the anti-ADEA movement is not necessarily to promote reverse discrimination claims, but to attempt to address the disparate impact of the Act.[132] If this concern is eventually addressed, it would help open the door for reverse age discrimination claims. The crux

124. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (involving a white plaintiff who succeeded in invalidating a medical school's affirmative action program under Title VII).

125. Furfaro & Josephson, *supra* note 122, at 3.

126. Hamilton v. Caterpillar, Inc., 966 F.2d 1226, 1228 (7th Cir. 1992) (determining that the ADEA does not permit reverse discrimination claims).

127. 966 F.2d 1226 (7th Cir. 1992).

128. *Id.* at 1228.

129. Karlen v. City Coll., 837 F.2d 314, 318 (7th Cir. 1988) (holding that early retirement plans that favor older employees are not suspect); Schuler v. Polaroid Corp., 848 F.2d 276, 278 (1st Cir. 1988) (holding that the ADEA does not prohibit employers from treating older persons more generously than others).

130. *Hamilton*, 966 F.2d at 1228.

131. *See, e.g.*, Dittman v. Gen. Motors Corp., 116 F.3d 465 (2d Cir. 1997) (declining to reach the question of whether the ADEA provides a remedy for reverse age discrimination); Stone v. Travelers Corp., 58 F.3d 434 (9th Cir. 1995) (dismissing a reverse discrimination claim under the ADEA made by a plaintiff who was too young to receive severance benefits from a pension plan).

132. Issacharoff & Harris, *supra* note 108, at 793-97.

of this movement is the premise that the ADEA is itself an example of reverse discrimination.[133] The argument is that by setting the age threshold at forty, the ADEA transforms federal law "into a mandate for preferential treatment for workers over forty."[134] In addition, because older workers tend to be white males, the Act has the unintended effect of discriminating against minorities and women.[135] However, the solution to the problem may not be to lower the age threshold. Some argue that the ADEA is altogether unnecessary.[136] Whether or not the ADEA is necessary, there is evidence that it has shifted wealth towards older Americans.[137] Professor Samuel Issacharoff states that, "[t]hrough a carefully orchestrated assault on mandatory retirement and targeted employee retirement incentive programs, the AARP [(American Association of Retired Persons)] -inspired amendments of the ADEA provoked a significant one-time transfer of resources to the generation whose members are currently drawing to the close of their working careers."[138] As a result, the ADEA is the most far reaching discrimination statute and continues to offer benefits to the most-advantaged group of people.[139]

The impact of the enforcement of the ADEA may eventually result in a change in current law. One ADEA amendment that Congress may eventually consider is an extension of protection to those under age forty. Discrimination against the young is certainly evident in everyday life. Certain restrictions are unquestionably valid because of their intent to protect children from harm.[140] However, discrimination against the young is often purposefully predicated on stereotypes that are without merit when applied to individual cases. For example, a shopkeeper may wish to restrict the age of his/her employees because he/she thinks that young employees

133. Clint Bolick, *The Age Discrimination in Employment Act: Equal Opportunity or Reverse Discrimination?*, POLICY ANALYSIS, NO. 82, *at* http://www.cato.org/pub/pas/pa082.html (last modified Feb. 10, 1987).

134. *Id.*

135. *Id.*

136. *Id.* Bolick argues that the ADEA confers artificial advantages and, therefore, contributes to the erosion of free enterprise. He advocates a positive civil rights agenda, which he considers to be a defensive strategy. *Id.*

137. Issacharoff & Harris, *supra* note 108, at 782-83.

138. *Id.*

139. *Id.* at 836-37.

140. Since minimum age requirements are meant to protect children, they would not likely be classified as arbitrary, as discrimination claims require. The employment of minors under age fourteen has been statutorily prohibited in any occupation since 1938. Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 212(c) (2000). The physical and psychological dangers to working children have always been of utmost congressional and administrative concern. *See, e.g.*, 81 CONG. REC. 7930-31 (July 31, 1937) (statement of Sen. Wheeler); Employment of Minors Between 14 and 16 Years of Age, 15 Fed. Reg. 395 (Jan. 25, 1950) (to be codified at 4 C.F.R. 1983); Child Labor Regulations, 29 C.F.R. §§ 570.2, 570.33(f)(4) and 570.119 (2000).

are more likely to steal from the store. Regardless of the merit of the shopkeeper's rationale, this type of restriction is predicated upon a stereotype and should be covered under the ADEA. Currently, there is no mechanism to prevent this form of discrimination in employment. To address this form of discrimination, the ADEA should not restrict its protection to the elderly, but rather extend its protection to the young. Making this positive adjustment will not alter the original congressional intent of protecting the elderly from discrimination because it would still command the same protection for them. In addition, employers could still base their employment decisions on experience or maturity.[141] They could not, however, base their employment decisions on stereotypes. If Congress were to institute this change, they would more appropriately address the original goal of preventing discrimination on the basis of age.[142] At the very least, this issue illustrates a gaping hole in the ADEA. The fact that there is no protection against blatant discrimination for young employees may prompt an amendment in the future. This demonstrates that the provisions of the ADEA are vulnerable to change.

### *C. State Law Claims*

As mentioned above, the ADEA does not preempt state law regarding age discrimination. This fact has afforded states the opportunity to develop their own laws governing age discrimination. While most states have remained within the scope of the ADEA, one significant variation occurred in New Jersey.[143] This variation demonstrates that age discrimination law is highly volatile and may ultimately result in greater protection for younger employees. New Jersey's governing discrimination law is titled the Law Against Discrimination ("LAD").[144] The LAD prohibits age discrimination in two sections. Section 10:5-4 provides that "[a]ll persons shall have the opportunity to obtain employment . . . without discrimination because of . . . age, . . . subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right."[145] Section 10:5-12 makes the practice of age discrimination unlawful:

> It shall be unlawful employment practice, or, as the case may be, an unlawful discrimination. . .[f]or an employer, because of the. . .age. . .of any individual. . .to refuse to hire or employ or to

141. Woodruff, *supra* note 111, at 1310.

142. *Id.*

143. Bergen Commercial Bank v. Sisler, 723 A.2d 944, 960 (N.J. 1999) (holding that under New Jersey law, an individual may sue for reverse age discrimination).

144. N.J. STAT. ANN. §§ 10:5-1 – 10:5-42 (West 1999).

145. *Id.* § 10:5-4.

> bar or to discharge or require to retire. . .from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.[146]

In the landmark case of *Bergen Commercial Bank v. Sisler*,[147] the Supreme Court of New Jersey held that, unlike the ADEA, the LAD allows young workers to make reverse age discrimination claims.[148] The court determined that since the language in the LAD did not explicitly limit the Act's application to those over forty (as the ADEA did), and since prohibiting reverse age discrimination claims would render certain portions of the LAD "inoperative," the statute must permit reverse age discrimination claims.[149] The court based its interpretation of the LAD on its express language, which it construed as clear and unambiguous.[150] The fact that the court utilized a literal interpretation of the statute demonstrates the New Jersey legislature's intention to prohibit all age discrimination. However, the court does indicate that the plaintiff bears a heavy burden in proving a reverse age discrimination claim.[151] The plaintiff still must establish a prima facie case of discrimination.[152] The court reconfigured the standard test and created a "heightened 'reverse-discrimination' formulation."[153] Under the *Bergen Commercial Bank* test, the plaintiff must demonstrate by a preponderance of the evidence:

> (1) background circumstances supporting the suspicion that the defendant is the unusual employer who discriminates against the majority; (2) that he was performing at a level that met his employer's legitimate expectations; (3) that he was nevertheless fired; and (4) that he was replaced with a candidate sufficiently older to permit an inference of age discrimination.[154]

Even though this test was specifically adapted to Sisler's situation, this case suggests that in New Jersey, a NBA rookie over age eighteen, who is refused admittance into the NBA despite qualifications, may have a valid age discrimination claim.

New Jersey is not the only state where a plaintiff has attempted to

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146. *Id.* § 10:5-12.

147. 723 A.2d 944 (N.J. 1999).

148. *Id.* at 960.

149. Construing the LAD to allow age discrimination claims only to those over forty would render section 2.1 of the LAD inoperative. This section outlines the only exceptions to the age discrimination provisions in the LAD. The section indicates a clear desire to protect workers over the age of eighteen. *Id.* at 952.

150. *Id.* at 950, 957.

151. *Id.* at 960.

152. *Id.* at 958.

153. *Id.* at 959.

154. *Id.*

bring a reverse age discrimination claim based on a statute.[155] While no advance has been as significant as New Jersey's, the proliferation of claims may indicate that the frequent consideration of this right may eventually lead more legislatures and/or courts to recognize it. In California, a prospective automobile lessee challenged a minimum age requirement for car rentals as a violation of the Unruh Civil Rights Act.[156] In *Lazar v. Hertz Corp.*,[157] the plaintiff brought a class action suit pleading age discrimination on his behalf, and on behalf of others between the ages of sixteen and twenty-five.[158] The court held that the statute governing vehicle rental agreements barred application of the Unruh Act and was therefore determinative.[159] On this basis, the court did not allow the plaintiff a cause of action.[160] Because the Unruh Act states that it cannot be construed to confer any rights or privileges that are conditioned or limited by law, the court held that the Act must defer to the vehicle regulation statute.[161] Construing the Unruh Act in this manner, the court concluded that the Act does not afford an age discrimination claim for refusing to rent vehicles to those under age twenty-five.[162] Although this case barred a reverse age discrimination claim, the manner in which the court handled it demonstrates that this area of law is vulnerable to a successful finding of reverse age discrimination. The court was forced to defer to a vehicle regulation in order to bar the claim.[163] The court did not explicitly bar the claim under the Unruh Civil Rights Act. This decision indicates that in the absence of another determinative regulation, there may be room to challenge reverse age discrimination under the Unruh Act.

The *Lazar* and *Bergen Commercial Bank* decisions demonstrate that under state law, reverse age discrimination claims can be successful. The fact that the *Lazar* court did not immediately dismiss the claim under the Unruh Civil Rights Act indicates that reverse age discrimination claims have the potential to succeed in California. The court did not take issue with reverse age discrimination claims generally. Instead, it determined that the vehicle regulation prohibited the claim.[164] Although they are progressive, New Jersey and California are very influential states. The fact

155. Lazar v. Hertz Corp., 69 Cal. App. 4th 1494, 1509 (Cal. Ct. App. 1999) (holding that there was no cause of action under the Unruh Civil Rights Act).

156. *Id.*; *see also* Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 1999) (declaring that all persons are free and entitled to equal accommodations in business establishments).

157. 69 Cal. App. 4th 1494 (Cal. Ct. App. 1999).

158. *Id.* at 1500.

159. *Id.* at 1508-10.

160. *Id.*

161. *Id.* at 1504.

162. *Id.* at 1509.

163. *Id.*

164. *Id.*

that reverse age discrimination is accepted in one, and not completely dismissed in the other, indicates the potential for viable reverse age discrimination claims. Age discrimination law is extremely vulnerable to change, especially through state statutes. Although this change is far from definite, it is important to remember that it is possible. If such a change occurs, potential NBA rookies may have state age discrimination claims.

### *D. Equal Protection and State Law*

While the downfall—or the adaptation—of the ADEA is by no means a reality, reverse age discrimination claims may persist either directly through state law or indirectly through constitutional challenges.[165] The success, if any, of these alternative methods for challenging discrimination could eventually help legitimize reverse age discrimination claims.

Another area of vulnerability for minimum age requirements concerns equal protection. Equal protection under the law is guaranteed by the Fourteenth Amendment to the Constitution.[166] This amendment ensures that federal and state governments apply their laws equally. The Equal Protection Clause only applies to government action and not to actions of private citizens. The Equal Protection Clause is implicated whenever the government classifies citizens. If it is proven that the government action purposefully treats similarly situated people differently, a classification will violate equal protection facially or in its implementation.[167]

In the case of the NBA, if a minimum age requirement is construed as being enforced by the state (a form of "state action"), then a potential rookie may have the authority to bring an equal protection claim. In order to challenge a restriction as a violation of the Constitution the state action doctrine requires government involvement. There are two strands of state action. There is the public function doctrine that allows a constitutional challenge if a private individual or group is authorized by the state to perform functions that are traditionally viewed as governmental in nature.[168] This doctrine relates to the type of activity carried out by the

165. The extent of current state law claims are discussed above. Constitutional challenges to reverse age discrimination are based on the Fourteenth Amendment, which grants equal protection under the law. U.S. CONST. amend. XIV, § 1.

166. *Id.*

167. Washington v. Davis, 426 U.S. 229, 251-52 (1976) (denying recourse to black applicants to a police force who claimed that the written test disproportionately hurt black applicants, because there was no proof of purpose).

168. Marsh v. Alabama, 326 U.S. 501, 509 (1946) (holding that the Gulf Shipbuilding Corporation could not forbid the distribution of religious literature in a town completely owned by the corporation); *see also* Evans v. Newton, 382 U.S. 296, 311 (1996) (determining that a park left in trust could not discriminate on the basis of race since it served the community and thus, had a public function).

actor. There is also the state involvement doctrine that transforms a private individual's conduct into state action if the state is heavily involved in those activities.[169] If the government benefits from a private party's activities, then those acts will be deemed state action. Applying the state involvement strand, courts will often find state action if there is joint participation between the private actor and the government.[170] Given the success of previous arguments alleging state action, it is reasonable to suggest that a NBA player could bring a claim under the Equal Protection Clause of the Fourteenth Amendment. In *Stevens v. New York Racing Ass'n*,[171] the Eastern District of New York held that a plaintiff should be able to demonstrate state action because the defendant was a racing association that received considerable funds from the state.[172] While a racing association may have stronger ties to the state than a sports franchise, this case demonstrates that state action can be invoked when there is a significant level of government involvement. This case suggests that if the "[s]tate has so far insinuated itself into a position of interdependence with [the regulated entity]. . . it must be recognized as a joint participant in the challenged activity."[173] Under this standard, if a player can demonstrate a significant level of government involvement with his NBA franchise, he may allege an equal protection violation.

Once a player invokes the equal protection clause, proving actionable discrimination will be an even bigger hill to climb. There are three levels of review that courts will utilize for equal protection claims. Strict scrutiny review invokes the highest level of court inspection. Courts will apply strict scrutiny review to any statute which is based upon a suspect classification or which impairs a fundamental right. Race is the typical example of a suspect class, while the right to vote typifies a fundamental right.[174] When strict scrutiny is utilized, a classification will be upheld only if it is necessary to promote a compelling government interest.[175] The

169. Shelly v. Kraemer, 334 U.S. 1, 22-23 (1948) (demonstrating the classic example of state action and holding that judicial enforcement of a racially restrictive covenant would constitute state action); *see also* Reitman v. Mulkey, 387 U.S. 369, 394 (1967) (invalidating an amendment to the California Constitution that forbade the state from limiting an individual's right to discriminate in real estate transactions because it constituted "state action").

170. Lugar v. Edmondson Oil Co., 457 U.S. 922, 941-42 (1982) (holding that when a private party and a state official act together, the resulting joint participation constitutes state action).

171. 665 F. Supp. 164 (E.D.N.Y. 1987).

172. *Id.* at 171.

173. *Id.* (quoting Burton v. Wilmington Parking Auth. 365 U.S. 715, 725 (1961)).

174. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500-01 (1989) (declaring that race is always a suspect classification); *see also* Harper v. Va. Bd. of Elections, 383 U.S. 663, 686 (1966) (striking down a poll tax as a violation of the fundamental right to vote).

175. *J.A Croson Co.*, 488 U.S. at 472-73.

"middle-level" standard of review requires intermediate scrutiny by the court. Here, the classification must be substantially related to an important government objective.[176] This standard of review has been applied to classifications based upon gender.[177] While courts have not directly addressed the issue, the elderly, who are already protected in the workplace under the ADEA, may eventually receive constitutional protection from age discrimination with an intermediate level of scrutiny. Increasingly, unpopular groups who do not qualify as suspect classes are protected under this standard of review.[178] The least intense level of scrutiny is "mere-rationality" review. Mere-rationality review applies to statutes that are not based on a suspect class, that do not involve quasi-suspect categories, and that do not impair a fundamental right. This level of review is typically applied to economic regulations. Under this level of scrutiny, a law will be unconstitutional only if it is purely arbitrary.[179] Age discrimination, as it applies to the young, warrants mere rationality review.[180] As the ADEA does not extend protection to the young, the case law resulting from equal protection claims implies that discrimination against younger employees would involve mere-rationality review, if state action is found.

One example of an equal protection claim that challenged a minimum age requirement is *Baccus v. Karger*.[181] In *Baccus*, the plaintiff challenged the New York Board of Law Examiner's requirements for taking the bar examination.[182] The requirements were that the applicant: (1) was over twenty-one years of age; and (2) commenced the study of law after his/her eighteenth birthday.[183] While the court upheld the first requirement, they found that the second requirement violated the United States Constitution.[184] The first requirement was upheld under the State's power to protect the public.[185] The court found that the state had an interest in

176. *Id.* at 535.

177. Craig v. Boren, 429 U.S. 190, 210 (1976) (holding that an alcohol restriction that differentiates between genders violates equal protection).

178. In *Romer v. Evans*, 517 U.S. 620, 635-36 (1996), the Supreme Court struck down a Colorado constitutional amendment that would have stopped the state, or any of its citizens, from giving the same protections to homosexuals that other groups receive. While the court formally used a "mere-rationality" standard, *Romer* provided more heightened protection for gays and lesbians than the typical mere rationality standard requires. *Id.* at 632-35.

179. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 82-83 (1911) (applying the "mere-rationality" standard of review).

180. Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 311-12 (1976) (holding that the statute setting the mandatory retirement age for police officers was subject to rational relationship review rather than strict scrutiny under the equal protection clause).

181. 692 F. Supp. 290 (S.D.N.Y. 1988).

182. *Id.* at 291.

183. *Id.*

184. *Id.* at 300.

185. *Id.* at 297.

establishing a general fitness/maturity requirement as a precondition for admission to the bar.[186] The court emphasized that such arbitrary line drawing is acceptable, unless the plaintiff can demonstrate that the required age was "very wide of any reasonable mark."[187] However, the court was not satisfied that the second requirement "rationally advanced New York's legitimate interest in protecting the public from the pitfalls of professional immaturity."[188] Thus, the court held that the eighteen year-old age requirement was not rationally related to its purpose.[189] The court determined that it was unfair to strip an individual of his/her academic achievement because of age (this requirement would have forced the plaintiff to start law school over).[190] The opinion states that, "[a]lthough their practice in the profession may legitimately and temporarily be delayed, their academic achievements should not be stripped of their substantive meaning simply because they, by virtue of their precociousness, were able to pursue those rigors at an early age."[191] The significance of this decision is that it represents a plaintiff's triumph over the "rationally related" standard, which usually provides great deference to the defendant in equal protection cases. Here, the court held that the regulation failed to meet a standard that affords great deference to the discriminating institution, demonstrating that age discrimination is an area where courts would be willing to extend protection.

The success of this equal protection challenge demonstrates that, in theory, reverse age discrimination claims are valid. Here, a plaintiff proved that an incident of reverse age discrimination violated his constitutional rights. The decision in *Baccus* prohibits a form of arbitrary discrimination based on youth.[192] This validation suggests that there is merit in protecting the right to equal opportunity for the young. While constructing the exact same claim for a NBA player might be difficult, recognition of such a right in this area of constitutional law suggests that it is not far-fetched to recognize a similar right in employment discrimination law.

## IV. THE SIGNIFICANCE: THE NEXUS, AGE DISCRIMINATION MEETS SPORTS LAW

Traditional sports law suggests that if players agree to a minimum age

186. *Id.* at 296.
187. *Id.* at 300 (quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting)).
188. *Id.* at 298.
189. *Id.* at 300.
190. *Id.* at 298-300.
191. *Id.* at 300.
192. *Id.* at 300.

requirement in a CBA, then it must be legal.[193] In addition to the fact that acceptance of such a requirement is unlikely given the players union's distaste for such a measure, there are several other problems with this rationale.[194] If such a requirement is part of a CBA, then the CBA will be exempted from antitrust scrutiny.[195] If the antitrust exemption does not apply, *Haywood* suggests that a unilaterally imposed minimum age requirement would violate antitrust law.[196] Yet, if a minimum age requirement is embedded in a CBA, *Wood* suggests that the provision would even apply to rookies who are not yet part of the league.[197] Despite the above analysis, even if a minimum age requirement can escape antitrust scrutiny, it is not necessarily valid.

Even though antitrust law minimizes players' ability to bring successful claims in court, it is important to explore all areas of relief for potential NBA players who want to join the NBA. Antitrust law does not necessarily provide the only remedy for professional athletes. In order to discover alternative remedies, it is necessary to probe the legal implications of a minimum age requirement. Antitrust law looks at the effects of the imposition of such a requirement. In other words, antitrust law prevents collusive efforts that are in restraint of trade.[198] However, antitrust law only examines the commercial effects of the regulation; it does not analyze the content of the actual provision. In order to fully probe the legality of a minimum age requirement, it is also necessary to explore the legality of the substance of the provision. In order to be legal, the regulation, in addition to its resulting effect, must comport with federal and state law. Despite the protection afforded to a CBA, it can not protect a restriction that is substantively illegal. Therefore, it is necessary to explore not only the collusive efforts of the league under the scope of antitrust, but also the content of the potential rule.

I have examined age discrimination protection in two different contexts in order to determine whether the content of a minimum age requirement violates federal or state rights. I have examined the requirement under the ADEA and relevant state law. I have also considered the impact of potential equal protection claims. The ultimate questions I ask are: 1) what remedy do NBA rookies have; and 2) under

193. McCourt v. Cal. Sports, Inc., 600 F.2d 1193, 1203 (6th Cir. 1979) (holding that provisions in fairly bargained CBAs receive antitrust protection).

194. *Age Old Question, Players Union Vehemently Opposed to Age Limit*, *supra* note 30.

195. *McCourt*, 600 F.2d at 1203.

196. Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204, 1207 (1971) (enjoining the enforcement of a rule that required NBA players to be out of high school for four years).

197. Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 959-64 (2d Cir. 1987) (establishing that CBAs apply to all current and future players).

198. 15 U.S.C. § 1 (1999) (stating that "every . . . combination . . . in restraint of trade . . . is hereby declared to be illegal").

what authority do they have a claim? A NBA rookie would not have a claim under the ADEA because a potential minimum age requirement would be set around age twenty, which is far below the forty year age requirement necessary for the ADEA. However, as mentioned above, there have been challenges to the ADEA. Some believe that the ADEA represents reverse age discrimination and should be eliminated altogether. Others argue that Congress should eliminate the age requirement in the ADEA. Regardless of the viewpoint, it is evident that the ADEA is a viable candidate for some type of future reform. If Congress wishes to end the controversy surrounding the ADEA, it may ultimately decide to eliminate the age requirement. If it does so, then the test for reverse age discrimination would most likely resemble the New Jersey LAD, since that is the only current example of what is necessary for a successful claim.

Construing the ADEA to protect NBA rookies is a difficult task. The ADEA typically protects against isolated events of discrimination rather than discriminatory regulations. Discriminatory regulations fit more comfortably under an equal protection analysis. However, given the prohibition in section 623(a), it seems that the ADEA does in fact apply to regulations.[199] Section 623(a)(1) makes it unlawful for an employer "to fail or refuse to hire . . . any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ."[200] If the NBA, or the team that enforces the rule, is viewed as the employer, this section of the ADEA would allow a cause of action for a NBA rookie if he was denied employment because of his age (assuming that the age requirement no longer existed).

If the age threshold in the ADEA were eliminated, the analysis would be comparable to that utilized under the LAD, which suggests that a potential NBA rookie would have a cause of action.[201] Most definitely, reverse age discrimination claims would, if allowed, warrant a more heightened scrutiny similar to the one utilized in *Bergen Commercial Bank.*[202] The burden on the plaintiff would be much harder to meet. However, the primary consideration is not whether the NBA rookie would succeed in his claim, but whether the rookie even has a right to bring a claim.

Using *Bergen Commercial Bank's* literal interpretation of the LAD, and assuming that the ADEA is amended to change or abolish the age threshold, the potential NBA rookie subjected to a minimum age

199. 29 U.S.C. § 623(a) (1994).

200. *Id.*

201. *Bergen Commercial Bank v. Sisler,* 723 A.2d 944, 958 (N.J. 1999) establishes a test that places a heavy burden on the plaintiff to prove discrimination. This is the only current test for reverse age discrimination claims.

202. *Id.* at 959.

requirement might have state and federal law claims. At the very least, if a potential NBA rookie brings a claim in New Jersey, the court would not preliminarily dismiss the case. This is an essential development worth noting. There is a path of vulnerability in age discrimination law that, if treaded upon more, may ultimately lead to the elimination of minimum age requirements, such as those proposed by David Stern. The NBA, and every other employer, should be aware of a potential change because it may ultimately challenge the institution of a minimum age requirement.

Certainly, if reverse age discrimination claims are allowed, plaintiffs may have a very hard time proving them. Even the court in *Bergen Commercial Bank* acknowledged that such claims command a higher burden of proof.[203] While meeting this burden of proof is highly fact specific, there is one thing that will fall in favor of the potential NBA rookie in every case. Past experience has shown that eighteen and nineteen year-old players can compete in the league. Although this may have more implications for the equal protection analysis[204] (mere rationality requires that a rule cannot be arbitrary) than the reverse age discrimination analysis, it will at least help illustrate that an eighteen year-old can perform at a level that not only meets, but exceeds, employer expectations. Both Kobe Bryant and Kevin Garnett came to the NBA straight from high school and both had an immediate impact on the league. By the age of twenty—the age where the threshold will be set— they were both legitimate stars. The success of Bryant and Garnett casts doubt on the logic of a twenty year minimum age requirement.

At the very least, their success demonstrates that age is not an occupational qualification and therefore, such a provision would not be exempt under either δ 623(f)(1) of the ADEA or section 10:5-2.1 of the LAD.[205] Section 623(f)(1) permits an employer to discriminate based upon age "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . . ."[206] The LAD also contains a bona fide occupational qualification exception which is set forth in section 10:5-2.1.[207] If the NBA could demonstrate that age is an occupational qualification for performance in the league, then it would

203. *Id.*

204. In terms of equal protection analysis, the past success of young NBA players will help demonstrate that a minimum age requirement distinguishes between similarly situated groups of people (in terms of their ability to play basketball). This could help prove purposeful discrimination, a form of discrimination that is prohibited under the disproportionate impact theory. Washington v. Davis, 426 U.S. 229, 252 (1976) (denying a claim that an application which included a written test disproportionately hurt black applicants because there was no proof of purpose).

205. 29 U.S.C. § 623(f)(1) (1994); N.J. STAT. ANN. § 10:5-2.1 (1999).

206. 29 U.S.C § 623(f)(1).

207. N.J. STAT. ANN. § 10:5-2.1.

be able to establish rules that optimize the quality of league play. However, the success of Bryant and Garnett demonstrates that a player does not have to be over the age of twenty in order to bring skills to the league that will increase the quality of play, as well as increase the popularity of the league.

A restriction that is justified under the occupational qualification exception could withstand a challenge. An employer is allowed to choose his/her employees with some discretion. Minimum age requirements that prevent child labor have withstood scrutiny because they protect children from harm, but the success of Bryant and Garnett will work against the league's justification of such a requirement. In fact, their success makes any such regulation look arbitrary—exactly the type of provision that would succumb even to the rational basis review illustrated in *Baccus*.[208] In addition, the bona fide occupational qualification exception requires that a rule be "reasonably necessary to the normal operation of the particular business."[209] If Bryant and Garnett can compete below the age of twenty, then an age limit does not appear justified as "reasonably necessary," particularly in light of the NBA's reliance on both of them to promote their own success.[210]

Even though protecting its younger players from a difficult adjustment is a legitimate goal of the NBA, this concern may not be within their territory. The law may eventually mandate that the responsibility of determining preparedness for the NBA will fall on the players themselves, on the natural selection of the draft, and on the free agency process. In addition, the fact that teams continually draft players under the age of twenty illustrates the inappropriateness of such a requirement. If teams continue to draft these players despite the problems their movement into the NBA creates for the league, as well as the NCAA, then common sense suggests that the problem is not worth addressing. It is obvious from this trend that the problems are not so overwhelming that they are forcing teams to alter their drafting strategies. If the cost of the problem presented was greater than the value of drafting a player early, then teams would be inclined to change their drafting strategies. However, as the statistics indicate, early entry is on the rise, rather than the decline.[211] Therefore, given the NBA success of those under twenty and the natural selection process already in place, a potential plaintiff could have a legitimate

208. Baccus v. Karger, 692 F. Supp. 290, 300 (S.D.N.Y. 1988) (invalidating a minimum age requirement for the study of law in New York State).

209. 29 U.S.C. § 623(f)(1) (1994).

210. *Id.* In 1998, the NBA All-Star game promotional campaigns heralded Kobe Bryant, then nineteen, as the successor to Michael Jordan. Michael Hiestand, *Few Highlights from Long NBA Weekend*, USA TODAY, May 24, 1998, at 2C.

211. *1999 NBA Draft Underclassmen*, *supra* note 1.

argument to invalidate a minimum age requirement, despite the occupational qualification exception in § 623(f).

Finally, there is the issue of challenging a minimum age requirement on equal protection grounds. The right to equal protection under the law is a constitutional right.[212] The problem is, the NBA minimum age requirement would not be a federal or state law, in fact it would not even be a law. It would merely be an organizational regulation. The question is, could a NBA player make a valid equal protection claim? Since the government cannot interfere with private regulations, in order to test the constitutionality of a minimum age requirement, a litigant needs to invoke the state action doctrine.[213] State action necessitates sufficient participation by a governmental entity in order to invoke constitutional protection.[214] While the NBA is an established, private organization, it may not be far-fetched to parallel a NBA franchise to a state government. States are intricately involved with their teams. They allot tax revenue in order to build stadiums. They throw parades for teams that win. Teams often play into a state's identity and consciousness. For example, government officials are often intricately involved with their teams. New York City Mayor Rudolph Guiliani often appears at New York Yankees games and is famous for his friendly wagers with other city mayors. Former President Bill Clinton often attends Arkansas basketball games. In fact, states are so intricately involved with their teams that location issues frequently appear as referendums on ballots.[215] In recent years, several cities floated referendums considering whether to allocate tax dollars to the construction of new stadiums and arenas.[216] Given the connection between city and franchise, it may not be difficult to prove that NBA teams are involved with their state.

If state involvement can be proved, with the precedent of *Shelley*, it may be unconstitutional for a court to enforce a minimum age requirement

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212. U.S. CONST. amend. XIV, § 1.

213. Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (refusing to enforce a private racially-restrictive covenant because it would constitute state action and, therefore, violate the Fourteenth Amendment).

214. *Id.* at 2.

215. Joe Donatelli, *Election '98: Voters Play on Stadium Referendums, at* http://www.naplesnews.comtoday/elect/a11144p.htm (last modified Nov. 4, 1998) (noting that stadium referendums were approved by voters in Denver and San Diego in 1998, while voters in the 1997 election defeated similar referendums in various other cities including Pittsburgh, Seattle, Milwaukee, Minneapolis, and Columbus).

216. *Home Sweet Home: Tim Duncan Can Probably Stop Worrying About Relocating, at* http://www.cnnsi.com/basketball/nba/news/1999/11/02/spurs_arena_ap/html (last modified Nov. 3, 1999) (describing the effort to keep the 1999 World Champion Spurs in San Antonio); *Packers Ask For Help From Taxpayers, at* http://www.espn.go.com/nfl/news/2000/0122/307173.html (last modified Jan. 23, 2000) (discussing the Green Bay Packer's attempt to solicit tax money in order to renovate Lambeau field).

in the NBA.[217] In *Shelley*, the Supreme Court refused to enforce a private restrictive covenant that denied property to African-Americans.[218] Although *Shelley* concerned a racial restriction, it demonstrated the Supreme Court's reluctance to enforce a discriminatory regulation. Even though age discrimination is clearly different, *Shelley* suggests a general distaste for enforcing discriminatory regulations.

If a potential player does have the right to challenge the law under an equal protection claim, since the regulation is not based on a suspect classification, does not involve a "quasi-suspect" classification, and does not impair a fundamental right, the NBA needs only to demonstrate that the minimum age requirement is rationally related to its objective. When rational basis is applied, the plaintiff will most likely fail; however, the plaintiff does not always fail, as demonstrated in *Baccus*.[219] Obviously the argument here involves delicate construction along with a group of assumptions. The leaps required in order for a NBA player to have a reverse age discrimination claim are unprecedented. However, it is important to open the window to afford a plaintiff an opportunity to possess a claim. If the window of protection from age discrimination in employment expands, there could be a dramatic ripple effect, extending into professional sports. If the opportunity for reverse age discrimination claims expands, the control that sports leagues maintain over their own restrictions will undoubtedly shrink.

## V. CONCLUSION

Antitrust law is absolutely clear on the legality of a potential minimum age requirement in the NBA. As long as the requirement is part of a CBA, then, according to current case law, the minimum age requirement is valid. Despite the volumes of scholarly writings that consider minimum age requirements in CBAs, there are very few writings that consider the legality of a minimum age requirement in a major professional sport outside the scope of antitrust law. In terms of the legality of the content of such a requirement, it is necessary to turn to employment discrimination law. Employment discrimination law justifies minimum age requirements in a context outside antitrust law. In short, federal age discrimination law does not offer any protection against minimum age requirements because the applicable law, the ADEA, only applies to those over age forty. The purpose of this comment is to suggest that the law governing minimum age requirements is not as clear as it looks. The ADEA may be subject to

217. *Shelley*, 334 U.S. at 21-23.

218. *Id.*

219. *Baccus v. Karger*, 692 F. Supp. 290, 300 (S.D.N.Y. 1988 (invalidating a minimum age requirement for the study of law in New York State).

change. It has been challenged on multiple occasions for its age thresholds and may eventually be amended. In addition, an aggressive New Jersey law prohibiting age discrimination may have implications regarding the validity of minimum age requirements. The *Bergen Commercial Bank* case in New Jersey, and other challenges to the restraints of reverse age discrimination claims, may eventually open the floodgates to claims that could ultimately spell the downfall of minimum age requirements. In addition, constitutional law, through careful construction, could challenge arbitrary minimum age requirements imposed by private organizations, such as the NBA. If the vulnerabilities develop further, then the cumulative effect may be that the first hurdle, the right to make the claim, will be overcome in reverse age discrimination cases. If this happens, antitrust violations will not be the only claims that NBA lawyers will have to worry about. Although right now a potential NBA rookie does not have much legal ground to stand on, if the trend of reverse age discrimination claims continues, the NBA, like every other private employer, should take notice. The ripple effect of allowing reverse age discrimination claims could eventually mean that the league must keep its doors open, despite its honest intention of protecting younger players who are at a greater risk of failing. Ultimately, potential NBA players will have no one to look after them but themselves. A result that, one could argue, should be the standard today.