

2010

Justice Sonia Sotomayor and the Relationship between Leagues and Players: Insights and Implications Essay

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https://opencommons.uconn.edu/law_review/60

CONNECTICUT LAW REVIEW

VOLUME 42

FEBRUARY 2010

NUMBER 3

Essay

Justice Sonia Sotomayor and the Relationship Between Leagues and Players: Insights and Implications

MICHAEL A. MCCANN

This Essay examines U.S. Supreme Court Justice Sonia Sotomayor's important role in shaping U.S. sports law. As a judge on the U.S. District Court for the Southern District of New York and later on the U.S. Court of Appeals for the Second Circuit, Sotomayor authored opinions that resolved two major sports law disputes: whether Major League Baseball owners could unilaterally impose new labor conditions on players during the 1994 baseball strike and whether Ohio State University sophomore Maurice Clarett was obligated to wait three years from the completion of high school to become eligible for the National Football League draft.

Although some critics of Justice Sotomayor charge that she sacrifices traditional legal analysis in order to advance progressive ideals, her views on the relationship between leagues and players appear far more conventional, if not rigid. This conclusion furnishes insight on how she might assess two emerging sports law disputes: whether the National Basketball Association's eligibility restriction violates section 1 of the Sherman Antitrust Act and whether the National Football League comprises a single entity. The latter dispute is the subject of American Needle v. National Football League, oral arguments for which were heard by Justice Sotomayor and other Supreme Court Justices in January 2010.

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Justice Sonia Sotomayor and the Relationship Between Leagues and Players: Insights and Implications

MICHAEL A. MCCANN*

I. INTRODUCTION

When President Barack Obama nominated Sonia Sotomayor to succeed retiring Justice David Souter on the United States Supreme Court, politicians and commentators vigorously debated her judicial philosophy. They poured through Justice Sotomayor's opinions, speeches, and other writings, examining and sometimes cherry-picking her words and expressions. Competing sets of beliefs, ideas, and attitudes have been offered to explain Justice Sotomayor's legal reasoning.

Critics of Justice Sotomayor have championed an alleged weakness: she crafts her opinions to advance progressive agendas, with wavering adherence to actual law.¹ Proponents of this viewpoint cite President Obama's comment that he selected Justice Sotomayor partly because of her "compassion," with the insinuation, in their view, that she bends fixed rules in order to aid disadvantaged litigants.² Still others chastise the

* Associate Professor of Law, Vermont Law School; Legal Analyst and SI.com Columnist, Sports Illustrated; Co-founder, Project on Law and Mind Sciences at Harvard Law School. I thank Vermont Law School for funding this project through a research grant, Patrick Malloy for his excellent research assistance, and terrific comments from Nathaniel Grow and Marc Edelman. As a disclosure, I served as counsel to Maurice Clarett in his lawsuit against the National Football League and its eligibility rule. See *Clarett v. Nat'l Football League*, 369 F.3d 124 (2d Cir. 2004). The U.S. Court of Appeals for the Second Circuit held against Claret, with then-Judge Sotomayor writing the opinion.

¹ See, e.g., George F. Will, *Identity Justice: Obama's Conventional Choice*, WASH. POST, May 27, 2009, at A19 (contending that Justice Sotomayor utilizes "identity politics, including the idea of categorical representation: A person is what his or her race, ethnicity, gender, or sexual preference is, and members of a particular category can be represented—understood, empathized with—only by persons of the same identity."); *Face the Nation* (CBS television broadcast June 7, 2009) (quoting former U.S. Speaker of the House Newt Gingrich as stating, "In article after article and speech after speech, [Sotomayor] has said policy should be made by the court, the court should radically rewrite legislation and modernize the Constitution, judges have to intervene on social policy."); Anthony Dick, *Sotomayor's Empathy: Beyond Race*, NAT'L REV. ONLINE, June 3, 2009, <http://bench.nationalreview.com/post/?q=OGRmYzM5OWNkMzE5MWEzYTE0MTRiOTEzNDhmZDA4NGY=> (questioning Justice Sotomayor's commitment to conventional legal application in *Bartlett v. New York State Board of Law Examiners*, 226 F.3d 69 (2d Cir. 2000), where Sotomayor reasoned that in order to ascertain the "true abilities and knowledge" of a bar applicant who was unable to read well due to a learning disability, she was entitled to twice as much time to take the bar exam).

² See Terry Eastland, *The Problem with Judicial Empathy*, WKLY. STANDARD, June 8, 2009 ("Compassion, as Obama sees it, that will lead the judge to reach the right (which is to say the left) result."); Thomas Sowell, *Sotomayor: "Empathy" in Action*, TOWNHALL.COM, May 27, 2009, http://townhall.com/columnists/ThomasSowell/2009/05/27/sotomayor__empathy_in_action ("Barack Obama's repeated claim that a Supreme Court justice should have 'empathy' with various groups has raised red flags . . .").

quality of her logic as overlooking or obscuring substantive legal issues.³ At their core, these criticisms attempt to impugn Justice Sotomayor as unfit for the Court.

As this Essay explores in Parts II and III, such criticisms are countered by Justice Sotomayor's role in resolving two notable sports law disputes. In assessing whether Major League Baseball ("MLB") owners could unilaterally impose new labor conditions on MLB players during the 1994 baseball strike⁴ and whether Ohio State University sophomore Maurice Clarett was obligated to wait three years from the completion of high school to become eligible for the National Football League ("NFL") draft,⁵ Justice Sotomayor invoked traditional, arguably inflexible, applications of federal labor law. In fact, from the lens of each case's least-advantaged party, her opinions may have seemed bereft of "compassion": economically-disadvantaged MLB teams were denied more equality in competing for high-priced players, and a twenty-year-old who was ineligible to return to college football and who unquestionably attracted the interests of NFL teams was denied the chance to capitalize on his talents.

Part IV examines how Justice Sotomayor's opinions in *Silverman v. Major League Baseball Player Relations Committee* and *Clarett v. NFL* are revealing, not only because they undermine a leading critique of her nomination, but because they also suggest how she, as a Justice, might assess two emerging sports law disputes of relative importance.

First, an amateur basketball player could file a lawsuit against the National Basketball Association ("NBA") claiming that its eligibility requirement, which since 2006 has required that U.S. players be at least nineteen years old and one year removed from high school,⁶ violates section 1 of the Sherman Antitrust Act.⁷ There are persistent rumors of such litigation arising, particularly as the NBA seeks to raise the eligibility rule to twenty years of age and two years removed from high school.⁸

³ See, e.g., Jeffrey Rosen, *The Case Against Sotomayor*, NEW REPUBLIC, May 4, 2009, <http://www.tnr.com/politics/story.html?id=45d56e6f-f497-4b19-9c63-04e10199a085> ("[Sotomayor's] opinions, although competent, are viewed by former prosecutors as not especially clean or tight, and sometimes miss the forest for the trees.").

⁴ *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 880 F. Supp. 246, 250–51 (S.D.N.Y. 1995).

⁵ *Clarett v. Nat'l Football League (Clarett II)*, 369 F.3d 124, 125 (2d Cir. 2004).

⁶ See NBA, Collective Bargaining Agreement, art. X, § 1 (2005). From 1976 to 2005, any amateur player could declare his intention to be eligible for the NBA Draft, provided both his high school class had graduated and he had made his declaration within forty-five days of the NBA Draft. See NBPA Collective Bargaining Agreement, art. X, § 5(a) (1999).

⁷ Sherman Act, 15 U.S.C. § 1 (2006) (providing in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

⁸ Howard Beck, *From Preps to the Pinnacle of the N.B.A.*, N.Y. TIMES, May 28, 2009, at B15; Zach Lowe, *The Jim Calhoun Chronicles: Text Messages, Age Limits, and Misspelling Your Lawyer's Name*, AM. L. DAILY, Mar. 30, 2009, <http://amlawdaily.typepad.com/amlawdaily/2009/03/the-jim-calhoun.html>.

Justice Sotomayor's opinion in *Clarett* would prove consequential, if not determinative, in such a case. Moreover, should a circuit split emerge on age limits in professional sports—a distinct possibility—the Supreme Court would be poised to resolve the matter. Justice Sotomayor could once again influence the legal capacity of eighteen-year-old athletes who seek to play professional sports.

Even more meaningful, Sotomayor could impact how antitrust law regulates professional sports leagues. In its October 2009 term, the U.S. Supreme Court reviewed the U.S. Court of Appeals for the Seventh Circuit's recent decision in *American Needle v. National Football League*.⁹ At its core, *American Needle* concerns whether professional sports leagues are "single entities," a status that would effectively immunize them from constraining requirements of federal antitrust law.¹⁰ As Part IV discusses, Justice Sotomayor's skepticism of unilateral league maneuvers, but pragmatic deference for league operations, present a mixed bag for professional sports leagues and their ambitions to escape antitrust scrutiny.

II. CONCEPTIONS OF LABOR RIGHTS FOR LEAGUES, TEAMS, AND PLAYERS

Justice Sotomayor clearly values the sanctity of collectively-bargained terms between professional sports leagues and their respective players' associations. These terms are agreed upon by both franchise owners and players and are contained in their collective bargaining agreements ("CBAs"), which, inter alia, regulate the so-called "mandatory subjects of bargaining"—players' wages, hours, and other employment conditions.¹¹ The non-statutory labor exemption encourages owners to collectively-bargain, rather than to unilaterally impose rules implicating these mandatory subjects: the exemption furnishes antitrust immunity for bargained terms if those terms concern mandatory subjects and primarily affect the owners and players.¹² There is no such exemption for unilaterally-imposed rules, or those rules that implicate non-mandatory subjects or primarily affect third parties.¹³ The non-statutory labor

⁹ *Am. Needle Inc. v. Nat'l Football League*, 538 F.3d 736 (7th Cir. 2008). On June 29, 2009, the U.S. Supreme Court announced that it granted review of *American Needle*. *Am. Needle Inc. v. Nat'l Football League*, 538 F.3d 736 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2859 (U.S. June 29, 2009) (No. 08-661). On January 13, 2010, the Supreme Court heard oral arguments in this case. See Transcript of Oral Argument, *Am. Needle Inc. v. Nat'l Football League*, No. 08-661 (U.S. argued Jan. 13, 2010).

¹⁰ *Am. Needle Inc.*, 538 F.3d at 740.

¹¹ See *Clarett v. Nat'l Football League (Clarett I)*, 306 F. Supp. 2d 379, 392–93 (S.D.N.Y. 2004).

¹² See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 235–38 (1996) (explaining that it would be difficult and illogical to exclude all "competition-restricting agreements" from collective bargaining).

¹³ Leagues enjoy other limited exemptions from antitrust law, including the Sports Broadcasting Act of 1961, which grants MLB, NFL, NBA, and the NHL an exemption for the negotiation of television contracts. See 15 U.S.C. § 1291 (2006); Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 EMORY L.J. 463, 468–71 (1990). MLB also has a limited exemption from antitrust laws stemming from *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 208 (1922), premised on baseball's historic role

exemption embodies a well-established federal policy that employees are better off negotiating together than individually.¹⁴

In *Silverman*, then-Judge Sotomayor, presiding on the U.S. District Court for the Southern District of New York, effectively rejected a new set of employment terms that MLB had unilaterally imposed.¹⁵ The terms, which would have curbed player salaries, were designed to disproportionately benefit “small market,” revenue-disadvantaged franchises, such as the Pittsburgh Pirates and the Kansas City Royals.¹⁶ In the modern era of high-priced players, these teams usually struggle to compete with the more prosperous clubs, such as the New York Yankees or the Boston Red Sox.¹⁷ Applying a conventional interpretation of labor law, Sotomayor characterized the terms as incompatible with language for which MLB and the Major League Baseball Players’ Association (“MLBPA”) had bargained. Notably, her opinion sidestepped discussion of the plight of small market clubs and their fans or, for that matter, the plight of low-paid players who were set to replace the strikers. Indeed, it stuck firmly to the letter of the law and refrained from the kinds of subjective considerations that rile her contemporary critics.

Silverman occurred after the MLB CBA had expired and while baseball players were on strike from August 1994 to April 1995.¹⁸ During this time, MLB and the MLBPA attempted to negotiate a new CBA, which would have ended the strike. Frustrated by contentious negotiations, MLB

as the U.S. pastime. In 1998, MLB’s limited exemption was substantially narrowed by federal legislation. See Curt Flood Act of 1998, 15 U.S.C. § 26b (2006). Issues between MLB and MLBPA were excluded from the exemption. *Id.*

¹⁴ See 29 U.S.C. § 102 (2006) (indicating that the Norris-LaGuardia Act favors the organization of labor); Nat’l Labor Relations Bd. v. Am. Nat’l Ins. Co., 343 U.S. 395, 402 (1952) (explaining that prior to the National Labor Relations Act, courts obligated employers to negotiate with employee representatives); Michael C. Harper, *Leveling the Road from Borg-Wagner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447, 1478 (1982) (discussing the empowerment of bargaining units to represent individual employees as a collective entity).

¹⁵ *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 880 F. Supp. 246, 261 (S.D.N.Y. 1995).

¹⁶ See Tim Brown, *Bare Markets*, L.A. TIMES, Apr. 1, 2005, at D1.

¹⁷ See RICHARD C. LEVIN ET AL., THE REPORT OF THE INDEPENDENT MEMBERS OF THE COMMISSIONER’S BLUE RIBBON PANEL ON BASEBALL ECONOMICS 4 (2000), available at http://www.mlb.com/mlb/downloads/blue_ribbon.pdf (finding that payrolls are correlated with winning); Bryan Day, *Labor Pains: Why Contraction Is Not the Solution to Major League Baseball’s Competitive Balance Problems*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 521, 536 (2002) (“The correlation between team win percentage and team payroll has been significant at the highest statistical level every year between 1995 and 2001.”); Michael Lewis, *Individual Team Incentives and Managing Competitive Balance in Sports Leagues: An Empirical Analysis of Major League Baseball*, 45 J. MKTG. RES. 535, 543–44 (2008) (identifying empirical support for the proposition that market size exerts a significant effect on team payrolls, with larger market teams being able to afford higher payrolls); Frederick Wiseman & Sangit Chatterjee, *Team Payroll and Team Performance in Major League Baseball: 1985–2002*, 1 ECON. BULL. 1, 3 (2003) (finding that team success is statistically more likely with higher payrolls).

¹⁸ *Silverman*, 880 F. Supp. at 251–52; see also William B. Gould IV, *The 1994–’95 Baseball Strike and the National Labor Relations Board: To the Precipice and Back Again*, 110 W. VA. L. REV. 983, 983 (2008) (supplying a detailed account of *Silverman* and its underlying facts).

unilaterally imposed, and then rescinded, a salary cap on teams' payrolls. MLB then notified the MLBPA that the league, as opposed to individual teams, would negotiate free agent player contracts—meaning that players would be unable to induce multiple teams to compete for their services. MLB also announced that player arbitration rights were eliminated, thereby removing third-party involvement in salary disputes between players and teams.¹⁹ MLB viewed these new conditions as crucial to preserving its long-term viability, particularly the viability of small market clubs.

The MLBPA, however, rejected the conditions on both policy grounds and legal grounds. From a policy standpoint, the conditions would have restrained salaries in future player contracts and diminished the capacity of free agent players to select their employers.²⁰ Legally, the conditions would have altered existing contracts between players and teams, an outcome prohibited by the expired CBA and arguably constitutive of unfair labor practices.²¹

In granting an injunction in favor of the MLBPA, then-Judge Sotomayor prevented baseball owners from unilaterally achieving their goal. She reasoned that since the owners and players continued to bargain in good faith, the expired CBA remained in effect, and its terms remained operative.²² Moreover, Sotomayor declined to embrace MLB's creative characterizations of the unilaterally-imposed conditions as permissive subjects of bargaining. Instead, she applied the traditional meaning of

¹⁹ See Marc Chalpin, *It Ain't Over 'Til It's Over: The Century Long Conflict Between the Owners and the Players in Major League Baseball*, 60 ALB. L. REV. 205, 218 (1996) ("Perhaps the most important victory for the players in the 1973 Basic Agreement was the institution of salary arbitration. If a player met the eligibility requirements, and he could not reach an agreement with his team owner, an outside arbitrator would resolve the dispute.").

²⁰ Through collective bargaining, the MLBPA fought to obtain free agency and to secure the abolition of the "reserve clause" system. Under this system, which dominated baseball from the 1880s to the 1970s, MLB teams could re-sign any player to a one-year contract; a player could only become a free agent if a team let him. As a result, players could not readily move from one team to another in search of higher wages. See J. Gordon Hylton, *Why Baseball's Antitrust Exemption Still Survives*, 9 MARQ. SPORTS L.J. 391, 391–92 (1999) ("It seems quite likely . . . that the players would have eventually have secured significant modifications, if not outright termination, of the reserve system without either the Flood lawsuit . . . or the Curt Flood Act."); Geoffrey Christopher Rapp, *Affirmative Injunctions in Athletic Employment Contracts: Rethinking the Place of the Lumley Rule in American Sports Law*, 16 MARQ. SPORTS L. REV. 261, 278–79 (2006) (discussing efforts by MLB players to challenge the reserve clause).

²¹ See *Silverman*, 880 F. Supp. at 259 ("[Judge Sotomayor found] that returning the parties to the status quo [would] permit them to salvage some of the important bargaining equality that existed before the February 6 unfair labor practices were committed.").

²² *Id.* at 253. Sotomayor's reasoning was based on precedent: the U.S. Supreme Court has held that expired CBAs remain in effect unless the parties reach a new agreement or the parties bargain in good faith to impasse. See, e.g., *Laborers Health & Welfare Trust v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988). Here, the parties continued to negotiate after expiration of the CBA, thus precluding a finding of an impasse, which is "that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless." *Id.* at 543 n.5.

employment conditions.²³ Justice Sotomayor's decision placed the players and owners in the same position they were in before the strike began. With their leverage lost, the owners dropped their ambitious bargaining goals and the strike ended four days later.²⁴

Although fans expressed contempt for both the owners and players, commentators generally regarded the MLBPA as the strike's victor.²⁵ It dodged most of MLB's demands, and though it agreed to a "luxury tax" (which taxed the teams with the highest payrolls and redistributed those funds to small market teams), the tax would have little effect on players' earning power.²⁶ Player salaries, in fact, would increase 8.5% and 14.2%, respectively, in the following two seasons.²⁷ The tax also failed to achieve its progressive purpose, as teams with relatively high payrolls—most notably the Red Sox, Yankees, and Dodgers—continued to lavishly pay players, while those teams with the smallest payrolls remained unlikely suitors for stars.²⁸

Interestingly, Sotomayor was portrayed as most victorious. She received considerable praise from sports fans and journalists for having restored the national pastime, with a *Philadelphia Inquirer* columnist going so far as to place her contributions on par with those of Jackie Robinson, Joe DiMaggio, Ted Williams, and other Hall of Fame players.²⁹

Yet in the aftermath of Justice Sotomayor's decision, the underlying policy implications of a "more level playing field" for MLB franchises would not see their day in court or on the field. Indeed, without significantly changed labor conditions, player salaries and team payroll

²³ See *Silverman*, 880 F. Supp. at 259 ("[T]his strike is about more than just whether the Players and Owners will resolve their differences. It is also about how the principles embodied by federal labor law operate."); Chalpin, *supra* note 19, at 233 (describing MLB's actions as "clearly inconsistent with federal labor laws"); Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. ILL. L. REV. 519, 524–25 n.18 (citing *Silverman* as the paradigmatic case of labor law used to regulate unilateral action by owners).

²⁴ See Murray Chass, *Baseball Owners Quit Fight*, N.Y. TIMES, Apr. 3, 1995, at A1.

²⁵ See, e.g., Jeffrey Simpson, *The Baseball Owners Won Nothing*, GLOBE & MAIL (Can.), Apr. 5, 1995 (opining that the owners were defeated "on all fronts").

²⁶ See Dan Messeloff, *The NBA's Deal with the Devil: The Antitrust Implications of the 1999 NBA-NBPA Collective Bargaining Agreement*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 521, 562–63 (2000) (discussing criticisms of the luxury tax); Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 937–38 n.296 (1999) (explaining the mechanics and significant limitations of the luxury tax); Bob Nightengale, *Peace at Last*, L.A. TIMES, Nov. 27, 1996, at C1 (providing details on the 1996 MLB-MLBPA collective bargaining agreement and the luxury tax).

²⁷ See MARK CONRAD, *THE BUSINESS OF SPORTS* 121 (2006).

²⁸ For commentary on the luxury tax, see LEVIN ET AL., *supra* note 17, at 39; Eric Fisher, *Yankees, Braves Set MLB's Tone*, WASH. TIMES, Oct. 24, 1999, at A5; Bill Madden, *Padres Rebuilding Once Again*, DAILY NEWS (N.Y.), Jan. 17, 1999, at 105.

²⁹ See Bruce Jenkins, *A's, Giants Will Finish Atop Divisions*, S. F. CHRON., Apr. 22, 1995, at B1 (noting that "[s]till the most heroic name in baseball until further notice: Sonia Sotomayor"); Claude Lewis, *Strike Isn't Enough to Sour Fans' Affair with Baseball*, DALLAS MORNING NEWS, Apr. 6, 1995, at 25A.

disparities would only grow.³⁰ Consequently, as some had feared, these disparities would eventually impair small market franchises. The Montreal Expos, in fact, essentially ran out of money in 2002, requiring the league to purchase them.³¹ Montreal no longer has an MLB franchise.

The strike's resolution also emboldened the MLBPA, supplying it with the confidence to repel subsequent attempts by owners to institute a salary cap.³² This confidence may not always have benefited the players or the game itself. In the late 1990s and early 2000s, the MLBPA resisted owners' calls for stricter drug testing policies—policies that may have mitigated the now infamous steroids scandal and dissuaded Congress from holding hearings, which irreparably tarnished several players' careers.³³ To this day, baseball remains under a cloud of suspicion as to which players used steroids.³⁴ Similarly, many of the impressive records achieved over the last ten to fifteen years—most notably Barry Bonds setting the all-time home run record—will be discounted, if not outright ignored, by future generations.

To be clear, Justice Sotomayor should not draw blame for baseball's assorted woes; there are numerous causes and culprits from within and around the game. More importantly, she merely applied the law in *Silverman* as it was conventionally understood. Indeed, far from the radical jurist some now portray her as, Justice Sotomayor, for good or bad, seemed anything but radical.

III. CONCEPTIONS OF LABOR RIGHTS FOR EXISTING PLAYERS AND PROSPECTIVE PLAYERS

Justice Sotomayor's approach to *Clarett v. NFL* offers concurring themes, as she likewise exhibited a preference for unbending applications of labor law over seemingly more "compassionate" ones.

³⁰ See Joe Lemire, *SI Players: Life on and off the Field*, SPORTS ILLUSTRATED, Apr. 20, 2009, at 19 (noting that the total annual payroll of MLB players tripled from 1994 to 2009); Wiseman & Chatterjee, *supra* note 17, at 3 (explaining that the "growing disparity" in team payrolls will hurt the competitive balance of the game); BizOfBaseball.com, Average Salary 1967–2007, http://www.bizofbaseball.com/index.php?option=com_content&task=view&id=563&Itemid=42 (last visited Jan. 8, 2010) (displaying how the average MLB salary increased from \$1.2 million in 1994 to \$2.7 million in 2006).

³¹ See David Schoenfeld, *Still 30 Teams: Contraction Timeline*, ESPN, Feb. 5, 2002, <http://assets.espn.go.com/mlb/s/2002/0205/1323230.html> (detailing MLB's response to the assorted financial issues faced by the Montreal Expos between 2001 and 2002).

³² See Nathaniel Grow, *Reevaluating the Curt Flood Act of 1998*, 87 NEB. L. REV. 747, 753–55 (2009) (discussing MLB's collective bargaining efforts over the last fifteen years).

³³ See David K. Osei, Note, *Doping, Juicing, and Executive Bypass Oversight: A Case Study of Major League Baseball's Steroid Scandal*, 4 VA. SPORTS & ENT. L.J. 155, 168–69 (2004) (discussing the "singular goal" of the MLPBA to prevent enhanced testing for steroids).

³⁴ See Michael McCann, *Will Steroids Report Lead to Perjury Investigation of Sammy Sosa?*, SI.COM, June 16, 2009, http://sportsillustrated.cnn.com/2009/writers/michael_mccann/06/16/sammy.sosa/index.html?eref=sihpT1 (describing a supposedly confidential list of 104 names of MLB players who tested positive for steroids in 2003 and how the list may be publicly revealed over time).

Clarett centered on Maurice Clarett, who in 2004 argued that the NFL's eligibility requirement, which requires that at least three years pass from when an amateur player graduated from high school and the NFL draft, violated section 1 of the Sherman Act.³⁵ Section 1 prohibits unreasonable restraints of trade, which courts have defined to include unilaterally-imposed barriers on entry to professional sports leagues.³⁶ Then-Judge Sotomayor, as a member of a three-judge panel on the U.S. Court of Appeals for the Second Circuit, wrote a much-publicized opinion in favor of the NFL. The decision reversed a similarly noteworthy opinion from Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York.³⁷

Clarett embodied an intriguing and somewhat emblematic plaintiff. Similar to some other star athletes, Clarett experienced challenging life circumstances as a child and young adult.³⁸ His football prowess enabled him to matriculate at Ohio State University, where as a freshman he led the Buckeyes to a national championship, while receiving numerous individual awards.³⁹

Clarett's success was not lost on the Ohio State community, as his jersey became a top selling item.⁴⁰ As a National Collegiate Athletic Association ("NCAA") student-athlete, however, Clarett could not receive compensation from any of the sales, nor could he obtain compensation for the increased ticket revenue and enhanced television ratings for games in which he starred. His "compensation" was instead limited to tuition, room, board, books, and restricted other expenses.⁴¹ Clarett found this arrangement to be particularly disagreeable when he could not afford a plane ticket to fly from California—where he was playing a game for Ohio State—to Ohio to attend a close friend's funeral.⁴²

As a sophomore, Clarett sought to enter the NFL, where he would have been paid millions of dollars for the same football services that he was providing Ohio State. The NFL's eligibility rule, however, prevented him

³⁵ *Clarett II*, 369 F.3d 124, 126 (2d Cir. 2004).

³⁶ See, e.g., *Denver Rockets v. All-Pro Mgmt., Inc.* 325 F. Supp. 1049, 1066 (C.D. Cal. 1971) (invalidating the NBA's unilaterally-imposed age restriction); *Boris v. U.S. Football League*, 1984-1 Trade Cas. (CCH) P 66,012, 68,463 (C.D. Cal. 1984) (invalidating the USFL's unilaterally-imposed age restriction).

³⁷ *Clarett I*, 306 F. Supp. 2d 379, 410-11 (S.D.N.Y. 2004).

³⁸ See Rob Oller, *On the Run and in Control*, COLUMBUS DISPATCH, Oct. 5, 2002, at 1A.

³⁹ See Bruce Lowitt, *Buckeyes Running Back in a Big Hurry*, ST. PETERSBURG TIMES, Dec. 29, 2002, at 1C; Austin Murphy, *Mighty Mo: Precocious Freshman Tailback Maurice Clarett Made His Presence Felt—On and off the Field*, SPORTS ILLUSTRATED, Jan. 15, 2003, at 12.

⁴⁰ See Mike Pramik, *Ohio State Halts Sale of Clarett Jerseys*, COLUMBUS DISPATCH, Sept. 5, 2003, at 1B (noting that Clarett jerseys "were flying off the racks" at on- and off-campus retail stores).

⁴¹ See NYCCA bylaw § 15.1, reprinted in NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA DIVISION I MANUAL (2009).

⁴² See William C. Rhoden, *Paying the Price While Coaches Cash In*, N.Y. TIMES, Jan. 9, 2007, at D2. For additional background and sources on Clarett, see Michael A. McCann & Joseph S. Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731, 740-42 (2006).

from doing so. Per the rule, NFL teams agree to boycott *any* candidate, regardless of his talent, skill, or financial need, solely on the basis of time elapsed from high school.⁴³ Proponents of the rule, including the NFL, highlight safety and maturity concerns about young players;⁴⁴ opponents charge that the rule is inefficiently bright-line and supplies the NFL with a free minor league system: NCAA football.⁴⁵

As a point of context, the NFL was the only major male professional sports league that prohibited players from entrance until a prescribed period after high school graduation.⁴⁶ MLB, the National Hockey League (“NHL”), NASCAR, professional tennis, professional golf, and professional boxing had, and have, no such rules.⁴⁷ Players in those leagues or professional sports are eligible to play immediately after high school, if not well before that point in time—much like professional actors and musicians can hone their craft while being lucratively compensated.⁴⁸ The same was true of NBA players until 2006.⁴⁹

Clarett and the NFL debated whether the rule had been bargained, with Sotomayor concluding that it was.⁵⁰ Even if the rule was bargained, Clarett asserted, bargained terms between the NFL and National Football

⁴³ See NFL Collective Bargaining Agreement 2006–2012, art. XVI, § 2(b) (2006) (“No player shall be . . . eligib[le] for . . . the Draft, until three NFL regular seasons have begun and ended following either his graduation from high school or graduation of the class with which he entered high school, whichever is earlier.”).

⁴⁴ McCann & Rosen, *supra* note 42, at 732 (“The NFL age eligibility rule is premised on . . . core beliefs about *all* players who fail to satisfy it . . . [because] they lack the requisite mental or physical maturity . . . [and] they are uniquely prone to injury . . .”).

⁴⁵ See *id.* at 748.

⁴⁶ Since 1998, the Women’s National Basketball Association (“WNBA”) has required that its players be twenty-two years old and graduates of four-year colleges. Marc Edelman & C. Keith Harrison, *Analyzing the WNBA’s Mandatory Age/Education Policy from a Legal, Cultural, and Ethical Perspective: Women, Men, and the Professional Sports Landscape*, 3 NW. J. L. & SOC. POL’Y 1, 11–12 (2008).

⁴⁷ In MLB, for instance, players can be drafted immediately after completing high school. They can elect to sign with an MLB organization at that time, or attend either a four-year college (in which case they must complete their junior year of college, or be at least twenty-one years old, before they become eligible again for the MLB draft) or a junior college (in which case they are eligible for the MLB draft again after one year). Importantly, they possess the choice to play for an MLB organization right out of high school. See Major League Baseball First-Year Player Draft Official Rules, <http://mlb.mlb.com/mlb/draftday/rules.jsp> (last visited Jan. 8, 2010). Some of the top players drafted out of high school can sign for enormous amounts of money. See, e.g., Richard T. Karcher, *Solving Problems in the Player Representation Business: Unions Should Be the “Exclusive” Representatives of the Players*, 42 WILLAMETTE L. REV. 737, 753 n.66 (2006) (noting that eighteen-year-old Justin Upton, the first overall pick of the 2005 MLB draft, signed a \$6.1 million contract).

⁴⁸ Consider that Amanda Bynes, Dakota Fanning, Daniel Radcliffe, and Mary-Kate and Ashley Olsen all earned millions of dollars in acting before they turned eighteen. *So Young, Yet So Rich*, BOSTON HERALD, Feb. 28, 2007, at 13.

⁴⁹ For a full discussion, see *infra* Part IV.A.

⁵⁰ *Clarett II*, 369 F.3d 124, 142–43 (2d Cir. 2004); see also McCann & Rosen, *supra* note 42, at 743–44 (discussing that the Second Circuit held that the NFL’s eligibility rule “comprised a mandatory bargaining subject” because it governed initial employment, Clarett and similar players would have a “tangible effect” on the salaries of other players, and because “sufficient collective bargaining” had been established when the NFLPA agreed to waive challenges to the NFL bylaws).

League Players' Association ("NFLPA") should not receive protection from the non-statutory labor exemption when they primarily concern persons who cannot, by definition of those terms, be members of the NFL or the NFLPA.⁵¹

After all, as merely a *prospective* NFL player, Clarett had no formal suasion over the eligibility rule. Plus, Clarett's mere presence in the seven-round, 255-person selection draft would seemingly have impacted only other prospective NFL players and most likely the very last player selected (i.e., "Mr. Irrelevant"),⁵² who presumably would not have been drafted. Indeed, whether or not Clarett was eligible, each team would still have drafted and signed the same number of players, who would have competed for jobs with existing NFL players and other prospective ones. Along those lines, Clarett contended, the rule could not have primarily concerned the working conditions of NFL players since it was designed to render a class of potential NFL players unemployable.⁵³

The NFL, however, reasoned that unions and managements in other settings, including in professional sports, routinely bargain rules that deny entrance to prospective members.⁵⁴ According to this logic, eligibility rules are among the bundle of employment rights that unions and management bargain over in pursuit of a CBA. From that vantage point, eligibility rules should not be viewed in isolation, since their modification or elimination might alter assumptions underlying entire agreements.⁵⁵

The league also argued that its eligibility rule affected current players' employment. Namely, Clarett would have replaced the job of another player, presumably one with a different salary, and formulation of the league salary cap depends on aggregate salary.⁵⁶

Writing for the Second Circuit, then-Judge Sotomayor agreed with the NFL, holding—like she did in *Silverman*—that based on precedent, collectively-bargained terms between owners and players should receive the utmost deference. This deference, according to Sotomayor, was premised on a longstanding and expansive judicial interpretation of what

⁵¹ *Clarett I*, 306 F. Supp. 2d 379, 393 (S.D.N.Y. 2004).

⁵² For some background on the dignity and indignity that go along with being named "Mr. Irrelevant," see Gary Swan, *'Irrelevant' Honor for 49er*, SAN FRANCISCO CHRON., June 12, 1996, at B3.

⁵³ *Clarett I*, 306 F. Supp. 2d at 393.

⁵⁴ *Clarett II*, 369 F.3d at 140.

⁵⁵ *Id.*

⁵⁶ *Id.* (citing Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 16 (1971), for the proposition that entry of new players impacts the salary structure of players already in the league); see also Robert Forbes, Note, *Call on the Field Reversed: How the NFL Players Association Won Big on Salary Forfeiture at the Bargaining Table*, 6 VA. SPORTS & ENT. L.J. 333, 335–39 (2007) (explaining the NFL's salary structure).

constitute conditions of employment.⁵⁷ As a consequence, regardless of individual NFL teams desiring to hire Clarett, and regardless of Clarett's desire to work for them, "the NFL and its players union [could] agree that an employee will not be hired or considered for employment for nearly any reason"⁵⁸ That was true, Sotomayor conceded, even when the terms of exclusion unquestionably harm prospective players: "[S]imply because the eligibility rules work a hardship on prospective rather than current employees does not render them impermissible."⁵⁹

Clarett was thus excluded from the 2004 NFL draft. He was also excluded from college football: following Judge Scheindlin's earlier decision to declare him eligible for the 2004 draft, Clarett had signed with an agent, thereby forfeiting his remaining collegiate eligibility under NCAA rules (the NCAA refused to reinstate Clarett and a similarly situated player, Mike Williams of the University of Southern California, after the Second Circuit's reversal).⁶⁰ Clarett, therefore, had no place to play. He elected to train for a year until he was eligible for the 2005 NFL draft, in which he was drafted by the Denver Broncos. He reported to the Broncos' training camp in questionable condition, however, and was subsequently cut.⁶¹ Without work, Clarett returned home to Youngstown, Ohio, where later he would be arrested for robbery and illegal possession of guns. He is currently serving a seven-and-a-half year prison sentence and is eligible to be released from prison in February 2010.⁶²

To the extent "compassion" motivated Justice Sotomayor in her legal reasoning, it did not appear to benefit Clarett and similarly-situated players. Indeed, as Professor Walter Champion observes, Sotomayor arguably seemed unmoved by Clarett's plight while "seriously marginaliz[ing]" his legal arguments.⁶³

A similar deduction might be said of "fairness," an equally subjective and evocative term which, as her critics note, Justice Sotomayor has

⁵⁷ *Clarett II*, 369 F.3d at 139–40; see also Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 104–05 (2008) (opining that then-Judge Sotomayor's opinion in *Clarett II* was "consistent with general labor law principles providing a union with exclusive and plenary authority to negotiate all terms and conditions of its members' employment, including restrictions and limits favoring existing workers").

⁵⁸ *Clarett II*, 369 F.3d at 141.

⁵⁹ *Id.* at 140.

⁶⁰ Clifton Brown, *After Detour, Williams Finally Arrives*, N.Y. TIMES, Apr. 22, 2005, at D7.

⁶¹ Joe Drape, *Gamble on Clarett Reveals Perils of Potential*, N.Y. TIMES, Aug. 31, 2005, at D8.

⁶² See Bruce Cadwallader, *Clarett Asks To Get Out of Prison Early*, COLUMBUS DISPATCH, June 19, 2009, at 1C; see also Jon Hanson & Michael McCann, Opinion, *The Psychopathology of Athlete Worship*, PROVIDENCE J., Aug. 24, 2006, http://www.projo.com/opinion/contributors/content/projo_20060824_24hanso.2d59a11.html (providing details of Clarett's legal woes).

⁶³ Walter T. Champion, Jr., *Looking Back to Mackey v. NFL To Revive the Non-Statutory Labor Exemption in Professional Sports*, 18 SETON HALL J. SPORTS & ENT. L. 85, 103 (2008).

periodically highlighted as crucial in the application of law.⁶⁴ Is fairness promoted by an interpretation of the non-statutory exemption that uniformly excludes otherwise draftable players from the draft? Among others, Alan Milstein, who litigated on behalf of Clarett, believes it does not. Although Milstein believes Sotomayor will make a very good Justice, he describes the Second Circuit's decision as reflecting "almost knee-jerk approval" of the NFL's construal of the non-statutory exemption.⁶⁵ On the other hand, would fairness be jeopardized if players' associations lost the capacity to negotiate eligibility restrictions among their bundle of rights? Some commentators have contemplated such a contention.⁶⁶

Intriguingly, Justice Sotomayor refrained from these types of considerations in *Clarett*. Instead, she applied the law in a way consistent with her belief, and that of some other jurists, that collectively bargained terms can prohibit the entry of prospective employees into an organization. A radical imagination of the law it was not.

IV. IMPLICATIONS FOR PROSPECTIVE LITIGATION

Justice Sotomayor's opinions in *Silverman* and *Clarett*, as well as her putative presence on the Supreme Court, may also prove instructive from a prospective lens. Specifically, they may influence the outcome of two unresolved sports law matters: whether leagues and players' associations can bargain away employment opportunities for otherwise employable eighteen- and nineteen-year-old star athletes, and whether, in certain settings of collusive behavior, leagues and their independently-owned franchises may function as a single entity, thereby obtaining a complete exemption from section 1 of the Sherman Antitrust Act.⁶⁷

A. Eligibility for the NBA Draft

Eligibility rules in professional sports remain controversial post-

⁶⁴ See, e.g., Steve Chapman, *Sotomayor's Aversion to Impartiality*, CHI. TRIB., May 31, 2009, at C28 (discussing Justice Sotomayor's comment that that judges should "aspire to achieve a greater degree of fairness" in their decision making). Fairness has also appeared in her opinions as a principle objective. See, e.g., Jiang v. Bureau of Citizenship & Immigration Servs., 520 F.3d 132, 135 (2d Cir. 2008) ("To further the goals of uniformity and fairness . . ."); Kraham v. Lippman, 478 F.3d 502, 506 (2d Cir. 2007) ("If, however, to ensure fairness . . .").

⁶⁵ Telephone Interview with Alan Milstein (May 26, 2009) (on file with author); see also Brando Simeo Starkey, *The Veil of Fair Representation: Maurice Clarett v. National Football League*, 37 U. BALT. L.F. 17, 28 (2006) (describing the NFL's age limit as "conspicuously unfair").

⁶⁶ See, e.g., Daniel A. Applegate, Comment, *The NBA Gets a College Education: An Antitrust and Labor Analysis of the NBA's Minimum Age Limit*, 56 CASE W. RES. L. REV. 825, 830, 850-51 (2006) (arguing that "[a]llowing antitrust courts to intrude on the collective bargaining relationships 'place[s] in jeopardy' the right of players to bargain). But see Michael Scheinkman, Comment, *Running Out of Bounds: Over-Extending the Labor Antitrust Exemption in Clarett v. National Football League*, 79 ST. JOHN'S L. REV. 733, 767 (2005) (concluding that Sotomayor's opinion in *Clarett II* set a "dangerous precedent" in tipping the scales of law "too far in favor of labor law").

⁶⁷ 15 U.S.C. § 1 (2006).

Clarett.⁶⁸ That is particularly true of the NBA's rule, which the league collectively-bargained with the National Basketball Players' Association ("NBPA") in 2005. The rule requires that U.S. players be at least nineteen years old by December 31 of the year of the draft and that they be one year removed from high school.⁶⁹ More technically, by "one year removed," at least one NBA season must pass from when the players graduated from high school or, if they failed to graduate, would have graduated.⁷⁰ In contrast, international players, defined as those who maintain a permanent residence outside of the United States for at least three years preceding the draft, need only be nineteen years old by December 31 of the year of the draft.⁷¹ Prior to the 2006 draft, U.S. players were eligible for the draft immediately following their high school graduation.⁷²

The NBA's eligibility rule may soon receive legislative and judicial scrutiny, especially as the league seeks to elevate the rule to twenty-years of age and two years removed from high school.⁷³ The first layer of scrutiny appears to be in the halls of Congress. In June 2009, U.S. Representative Steve Cohen formally requested that the NBA and NBPA repeal their eligibility rule.⁷⁴ Observing the rule's disproportionate impact on African Americans,⁷⁵ Representative Cohen threatened to propose legislation that would prohibit professional sports leagues from barring players who have reached eighteen years of age.⁷⁶

There have also been rumblings of a legal challenge.⁷⁷ A potential source of litigation concerns the rule's uncertain application to non-traditional student-athletes. Consider, for instance, North Carolina native John Wall, the nation's top-rated high school basketball prospect in 2009.⁷⁸ During the spring of 2009, Wall, a fifth-year high school student, contemplated declaring for the 2009 draft.⁷⁹ Had he done so, the NBA could have rejected the declaration on grounds that Wall had failed to

⁶⁸ Consider the attention the eligibility rules have attracted in legal scholarship. Since 2005, twenty-one law review publications have contained the word "Clarett" in the title and seventy-six have addressed *Clarett v. NFL*. In that same time span, twenty-one law review publications have discussed the NBA's age eligibility rule. I conducted the relevant searches on June 30, 2009. I used the "US Law Reviews and Journals, Combined" database on Lexis/Nexis.

⁶⁹ NBA, Collective Bargaining Agreement, *supra* note 6, art. X, § 1.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See *supra* note 6 and accompanying text.

⁷³ Beck, *supra* note 8; Pete Thamel, *Few High School Stars Expected To Follow European Detour to NBA*, N.Y. TIMES, July 12, 2009, at SP5.

⁷⁴ Pete Thamel, *N.B.A. Is Asked To End Age Limit*, N.Y. TIMES, June 4, 2009, at B14.

⁷⁵ In the NBA's history, forty-eight players attempted the jump from a U.S. high school to the NBA. Forty-six were African American. Data on file with author.

⁷⁶ Thamel, *N.B.A.*, *supra* note 74.

⁷⁷ See, e.g., Lowe, *supra* note 8 (citing comments by sports litigator Alan Milstein).

⁷⁸ *Calipari Lands Nation's Top Prospect*, TENNESSEAN, May 19, 2009, at Sports 1.

⁷⁹ The draft was held on June 25, 2009. *NBA Key Dates*, DALLAS MORNING NEWS, Mar. 14, 2009, at 11C.

satisfy its eligibility rule. Wall had met the nineteen-year-old age requirement, but due to assorted transfers between high schools, there was confusion as to when he “would have graduated” from high school.⁸⁰ Although some projected that he would have been among the first five players selected in the 2009 draft⁸¹—which would have meant securing a guaranteed contract worth at least \$7.7 million over three years⁸²—Wall instead accepted a scholarship to play at the University of Kentucky.⁸³ His decision removed the possibility of a potential challenge to the eligibility rule, but revealed the type of fact pattern that could induce such a challenge.⁸⁴

Along those lines, and strictly for purposes of illustration, consider seventeen-year-old basketball phenom Jeremy Tyler of California. Tyler’s talents have drawn extraordinary praise, with one retired NBA player musing, “[Tyler] has more upside than any player I’ve seen since LeBron [James]. . . . He’s one of those guys who comes along once in a lifetime.”⁸⁵ Tyler recently announced that he will skip his senior year of high school to play professionally in Israel.⁸⁶ A basketball player turning pro after his junior year of high school is unprecedented—at least among U.S. players,⁸⁷ as many international basketball players turn pro at fourteen or fifteen

⁸⁰ Roger Van Der Horst, *NBA Option for Wall?*, NEWS & OBSERVER (N.C.), Apr. 16, 2009, http://www.newsobserver.com/sports/high_school/story/86503.html.

⁸¹ See *id.* (citing comments by Sonny Vaccaro, a former basketball coach, scout, and marketing executive). Vaccaro is also an advocate for players having the ability to matriculate directly to the NBA out of high school. See Kurt Streeter, *Shoe’s on the Other Foot for Vaccaro*, L.A. TIMES, Jan. 17, 2009, at D1.

⁸² *Id.*

⁸³ Jim Halley & Jeff Zillgitt, *Calipari Puts Together a ‘Remarkable Class,’* USA TODAY, May 20, 2009, at 10C.

⁸⁴ The prospect of such a challenge attracted considerable media coverage. See, e.g., Van Der Horst, *supra* note 80 (noting that Wall’s recruitment has been “followed as closely as a slow dump truck on I-440”); Gary Parrish, *Don’t Eliminate the Wall-to-NBA Talk Just Yet*, CBS SPORTS, Apr. 15, 2009, <http://www.cbssports.com/mcc/blogs/entry/6271764/14538408> (surmising that the ambiguity of the NBA’s age eligibility rule may motivate Wall to seek entrance into the NBA out of high school).

⁸⁵ Pete Thamel, *Going His Own Way on Little-Traveled Route*, N.Y. TIMES, Apr. 26, 2009, at SP1 (citing remarks by Olden Polynice, who played in the NBA for fifteen years).

⁸⁶ Pete Thamel, *Prep Star Signs with Team in Israel’s Top League*, N.Y. TIMES, Aug. 13, 2009, at B16; see also Chris Ballard, *Study Abroad: Hoops Major*, SPORTS ILLUSTRATED, May 4, 2009, at 76 (discussing Tyler’s decisionmaking process).

⁸⁷ Keep in mind that Tyler is not the first U.S. player to take an unconventional path through Europe before entering the NBA. In 2008, Brandon Jennings, whose eligibility for college was uncertain for academic reasons, chose to play professionally in Italy for one year, where he earned \$1.2 million. Pete Thamel, *At 19, Plotting New Path to N.B.A. Via Europe*, N.Y. TIMES, Oct. 5, 2008, at A1. He was drafted tenth overall by the Milwaukee Bucks in the 2009 NBA draft and signed a guaranteed contract worth at least \$3.8 million over two years. *The Day in Sports*, L.A. TIMES, July 29, 2009, at C8. Female players have also pursued professional opportunities in Europe prior to eligibility in the WNBA. Epiphanny Prince, for example, skipped her senior season to play professional basketball in Europe before entering the 2010 WNBA draft. Greg Bishop, *Female Star Leaves U.S. To Turn Pro in Europe*, N.Y. TIMES, June 17, 2009, at B11.

years of age.⁸⁸ It is expected that Tyler will spend two years abroad, after which he will be eligible for the 2011 NBA draft.

One intriguing possibility is if Tyler were to earn his General Equivalency Diploma (“GED”) before the completion of the 2009–10 NBA season and then sought to enter the 2010 NBA draft, at which point he would have satisfied the nineteen-year-old age requirement.⁸⁹ Tyler would be poised to earn considerably more in the NBA than in Israel⁹⁰ and would be one year closer to free agency as an NBA player.⁹¹ In addition, though his previous U.S. high school class would not have graduated yet, Tyler would have already obtained the equivalent of a high school diploma and at least a portion of one NBA season would have passed from his earning of a GED and the 2010 draft.

The NBA’s eligibility rule is silent both on whether a GED would fulfill the requirement that the player have graduated from high school and whether a portion of an NBA season would satisfy the “one year removed” requirement.⁹² If the NBA interpreted the rule to preclude Tyler’s entry—which it would be poised to do, given resulting incentives for other high school players⁹³—Tyler could file a lawsuit challenging the NBA’s application of the rule.

Tyler’s claim, however, would likely encounter a standard of review favorable to the NBA. Courts normally apply the highly deferential “arbitrary and capricious” standard to league interpretation of procedural rules.⁹⁴ Then again, such a standard has concerned disputes involving players in the league; no prospective player has historically challenged a

⁸⁸ See, e.g., Jonathan Abrams, *Rubio Has No Concerns, Even if Some Others Do*, N.Y. TIMES, June 25, 2009, at B13 (noting that Ricky Rubio, whom the Minnesota Timberwolves drafted with the fifth overall pick in the 2009 NBA draft, began his professional basketball career at age fourteen, when he played for Spain’s top professional team); David Waldstein, *Family Ties Have Gallinari Feeling at Ease*, STAR-LEDGER (N.J.), June 28, 2008, at Sports 29 (noting that NBA player Danilo Gallinari began playing professional basketball in Italy as a fifteen-year-old).

⁸⁹ Tyler was born on June 1, 1991, meaning he would be nineteen years old by December 31, 2010. Players: Jeremy Tyler, NBA Draft.net, <http://www.nbadraft.net/players/jeremy-tyler> (last visited Jan. 8, 2010).

⁹⁰ Tyler will earn \$140,000 a year playing in Israel. Thamel, *Prep Star*, *supra* note 86. As a likely top five pick in the NBA draft, Tyler would receive a guaranteed contract worth at least \$7.65 million. Van Der Horst, *supra* note 80.

⁹¹ 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, 169–73 (2004) (discussing the financial benefits for NBA players by accessing free agency as early as possible).

⁹² See NBA, Collective Bargaining Agreement, *supra* note 6, art. X, § 1.

⁹³ Should it allow Tyler to enter the 2010 NBA draft, the NBA might motivate other superstar high school basketball players to drop out of high school prior to their senior year.

⁹⁴ See Craig F. Arcella, *Major League Baseball’s Disempowered Commissioner: Judicial Ramifications of the 1994 Restructuring*, 97 COLUM. L. REV. 2420, 2460 (1997); see also Mélanie Aubut, *When Negotiations Fail: An Analysis of Salary Arbitration and Salary Cap Systems*, 10 SPORTS LAW. J. 189, 198 n.56 (2003) (noting the significance of the arbitrary and capricious standard for arbitration in MLB).

league's application of its CBA to exclude him or her.⁹⁵

Alternatively, Tyler could simply challenge the legality of the NBA's eligibility rule, with the rule then facing a similar core attack to that raised by *Clarett*, namely, that the NBA and NBPA cannot receive protection under the non-statutory labor exemption for rules that exclude prospective players.

The venue of any lawsuit challenging the NBA's eligibility rule would prove crucial. A plaintiff would undoubtedly avoid the Second Circuit, where *Clarett* is controlling. The NBA, in contrast, would attempt to transfer such a case to New York, where the league is headquartered and where the Second Circuit presides. Assuming the NBA was unable to transfer the case, Justice Sotomayor's opinion in *Clarett* would prove influential but not determinative. Indeed, only the Second Circuit has addressed whether collective bargaining can insulate age limits from antitrust scrutiny; it is uncertain how another U.S. Court of Appeals would address the issue.⁹⁶

Wherever the claim is heard, a plaintiff challenging the NBA's eligibility rule would gain a tactical advantage by distinguishing *Clarett*'s facts. Most notably, unlike Maurice Clarett, who had to argue a hypothetical—what the NFL would be like without its eligibility rule—a player contesting the NBA's eligibility rule could cite the generally favorable empirical evidence of players who matriculated to the NBA following their high school graduation. Evidence suggests that this group of players, which includes LeBron James, Kevin Garnett, and other stars,⁹⁷ have performed well both on and off the court.⁹⁸

⁹⁵ Maurice Clarett, in contrast, challenged the legality of the NFL's eligibility rule. For a full discussion, see *supra* Part III.

⁹⁶ There is reason to believe, however, that a court which adopts the "Mackey Test" would be poised to hold in favor of a plaintiff who argues for a limited definition of the non-statutory labor exemption. The Mackey Test, a product of *Mackey v. NFL*, dictates that the non-statutory exemption only applies if an alleged restraint—such as an eligibility restriction—satisfies the following three conditions: (1) it involves mandatory subjects of bargaining; (2) it primarily affects the parties involved; and (3) it is reached through "bona fide, arm's-length bargaining." *Mackey v. Nat'l Football League*, 543 F.2d 606, 614 (8th Cir. 1976). The Mackey Test, which would likely dictate that an eligibility restriction neither involves mandatory subjects of bargaining nor primarily affects the parties, is good law in at least three circuits: the Eighth Circuit, the Sixth Circuit, and the D.C. Circuit. Marc Edelman & Brian Doyle, *Antitrust and "Free Movement" Risks of Expanding U.S. Professional Sports Leagues into Europe*, 29 NW. J. INT'L L. & BUS. 403, 416 n.90 (2009).

⁹⁷ In addition to James and Garnett, Kobe Bryant, Tracy McGrady, Dwight Howard, Jermaine O'Neal, Amare Stoudemire, Rashard Lewis, and Al Jefferson all skipped college and have enjoyed significant success in the NBA. See Tony Mejia, *The Top 100: James, Bryant Remain at the Head of the Class*, PRO BASKETBALL NEWS, Aug. 31, 2009, <http://www.probasketballnews.com/story/?storyid=709> (providing an expert's ranking that includes the aforementioned players who jumped from high school to the NBA).

⁹⁸ See McCann, *Illegal Defense*, *supra* note 91, at 169–73 (noting the increased total earning capacity of players who enter the NBA straight from high school); Morty Ain, *The Spin: Teenage Wasteland*, ESPN MAG., July 18, 2005, at 38 (noting that, as a group, players who skipped college and directly entered the NBA average more points, rebounds, and assists than the average NBA player or the average player of any other age cohort in the NBA); Posting of Michael McCann to Sports Law

Should another circuit hold that the non-statutory labor exemption does not protect the NBA's eligibility rule, the rule would then be subject to antitrust scrutiny under section 1 of the Sherman Act. As various writings detail, the rule would likely fail to satisfy the rigid requirements of section 1.⁹⁹ If so, an apparent "circuit split" between two federal circuits on the legality of leagues' eligibility restrictions would emerge. Such an outcome might attract the attention of the U.S. Supreme Court, and particularly Justice Sotomayor.

B. Antitrust Immunity for Professional Sports Leagues

Justice Sotomayor's writings and presence may also influence whether professional sports leagues are exempt from section 1 of the Sherman Act. Such an exemption lies at the heart of *American Needle*, a recent decision by the Seventh Circuit in which the NFL was granted single entity status for limited purposes. The Supreme Court reviewed *American Needle* in its October 2009 term.¹⁰⁰

Before *American Needle*, independently-owned franchises in a professional sports league had typically been defined as entities engaged in a "joint venture."¹⁰¹ A joint venture refers to an association of independent entities that collaborate in, and carry out, a single business venture for joint profit, for which purpose the entities combine their resources, skill, and knowledge.¹⁰² Teams, of course, necessarily collaborate in various ways (e.g., they agree on rules for games and the order of the draft), but with separate ownership groups and team identities, they remain distinctly independent and usually competitive (e.g., they try to defeat each other on Sundays and try to draft better players than other teams). Crucially, joint

Blog, *NBA Players That Get in Trouble with the Law: Do Age and Education Level Matter?*, http://sports-law.blogspot.com/2005/07/nba-players-that-get-in-trouble-with_20.html (July 20, 2005, 10:00 EST) (supplying empirical data that indicates that among NBA players there is a near inverse correlation between number of years spent in college and propensity to being arrested).

⁹⁹ See, e.g., Edelman & Doyle, *supra* note 96, at 424–28 (analyzing age requirements under the Sherman Act); McCann & Rosen, *supra* note 42, at 734–40 (discussing the applicability of the Sherman Act to NFL and NBA eligibility rules); Nicholas E. Wurth, *The Legality of an Age-Requirement in the National Basketball League After the Second Circuit's Decision in Claret v. NFL*, 3 DEPAUL J. SPORTS L. CONTEMP. PROBS. 103, 134 (2005) (stating that courts could find a basis for an antitrust claim against the NBA's age requirement rule).

¹⁰⁰ See *supra* note 9 and accompanying text. I discuss *American Needle* in detail in a separate piece in the *Yale Law Journal*. See Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726 (2010). For purposes of this Essay, I offer a highly condensed description.

¹⁰¹ See *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 673 (7th Cir. 1992) (characterizing the NBA as a "joint venture"); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1179 (D.C. Cir. 1978) (characterizing the NFL as a "joint venture").

¹⁰² 46 AM. JUR. 2D *Joint Ventures* § 1 (2009); see Stephen Fraidin & Radu Lelutiu, *Strategic Alliances and Corporate Control*, 53 CASE W. RES. L. REV. 865, 867–72 (2003) (discussing the business purposes of joint ventures).

ventures are subject to section 1 and normally “rule of reason” analysis.¹⁰³ Under the rule of reason, courts assess the extent to which a joint venture deprives the marketplace of the independent decision making normally demanded by competition and, conversely, the extent to which the joint venture improves market efficiencies.¹⁰⁴

In *American Needle*, the Seventh Circuit held that in certain settings of collusive behavior,¹⁰⁵ a professional sports league and its independently-owned franchises may function as a single entity instead of as a joint venture.¹⁰⁶ The primary significance of single entity status is that it exempts the league and its franchises from scrutiny under section 1.¹⁰⁷ Here is why: as a single entity, they are thought to share a “corporate consciousness” making them one, as opposed to merely distinct entities engaged in a joint venture.¹⁰⁸ From enhanced autonomy in business operations to mitigation of litigation costs, an exemption from section 1 offers enormous value to professional leagues and their franchises.¹⁰⁹ The Seventh Circuit’s conclusion endorsed a viewpoint rejected by other courts.¹¹⁰

My publication in the *Yale Law Journal*, titled *American Needle v. NFL: An Opportunity to Reshape Sports Law*, assesses the Seventh Circuit’s holding and describes what I consider to be its favorable and

¹⁰³ *Sullivan v. Nat’l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994); *L.A. Mem’l Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381, 1388–90 (9th Cir. 1984).

¹⁰⁴ *See Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 687–91 (1978) (describing the evolution of the rule of reason and explaining its focus on the competitive significance of a restraint); *see also* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price*, 96 *YALE L.J.* 209, 278–80 (1986) (discussing application of the rule of reason to market efficiency claims); Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 *U. ILL. L. REV.* 77, 80 (2003) (applying the rule of reason to price variations among industries).

¹⁰⁵ The specific setting in *American Needle* concerned NFL apparel sales, specifically Reebok receiving an exclusive contract for apparel bearing the NFL’s logos and trademarks. *American Needle*, another apparel company, reasoned that an exclusive contract between teams which are ostensibly competitors and which preserve their individual franchise interests in those same logos and trademarks violates section 1. *Am. Needle Inc. v. Nat’l Football League*, 538 F.3d 736, 738 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2859 (U.S. June 29, 2009) (No. 08-661). The Seventh Circuit exempted the NFL from violating section 1 in its apparel sales, reasoning that teams voluntarily assign the licensing of their logos and trademarks to the league-controlled NFL Properties. Thus, for purposes of selling apparel, teams share corporate consciousness, meaning they cannot be expected to compete. *Id.* at 744.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984).

¹⁰⁹ To illustrate, consider the substantial resources leagues tend to expend when defending section 1 lawsuits. The NFL, for instance, is said to have spent nearly \$50 million in legal fees and settlement costs in its section 1 litigation with the Raiders. Marc D. Oram, *The Stadium Financing and Franchise Relocation Act of 1999*, 2 *VA. J. SPORTS & L.* 184, 190 (2000) (discussing *Los Angeles Memorial Coliseum Commission*).

¹¹⁰ *See, e.g., Sullivan v. Nat’l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994) (finding that NFL teams compete off the field and are thus not a single entity); *L.A. Mem’l Coliseum Comm’n*, 726 F.2d at 1390 (finding that the NFL is not a single entity under section 1); *Shaw v. Dallas Cowboys Football Club, Ltd.*, 1998 WL 419765, at *5 (E.D. Pa. 1998) (declining to recognize the NFL as a single entity).

detrimental qualities.¹¹¹ A principle concern relates to uncertainty as to whether, and when, other leagues and other league activities might enjoy single entity status. Save for implying that labor matters would be inappropriate for single entity treatment,¹¹² the Seventh Circuit, without much guidance, suggested that courts should address the merits of leagues' proposed single entity defenses on an ad hoc basis.¹¹³ This ambiguity opens the door for uncertain applications.

When the Supreme Court reviews *American Needle*, Justice Sotomayor's skepticism of unilateral league maneuvers, as displayed in *Silverman*, may not bode well for the NFL, or, by implication, similarly situated leagues.¹¹⁴ Indeed, in *Silverman*, she repeatedly highlighted the importance of bargaining between the league and its players as crucial for the protection of legal rights.¹¹⁵ Such a viewpoint builds on the Seventh Circuit's suggestion in *American Needle* that single entity status would be unfitting in labor matters.¹¹⁶

Then again, in *Clarett*, Justice Sotomayor highlighted that multi-employer bargaining depends on teams' capacity to "band together to act as a single entity in bargaining with a common union."¹¹⁷ Indeed, such a viewpoint may have contributed to Sotomayor's expansive interpretation of the non-statutory exemption: in order to protect the legal interests of owners, owners need to band together as a unitary entity—even if individual owners might prefer to behave differently (e.g., certain NFL teams desired an opportunity to draft Clarett before he satisfied the NFL's eligibility rule, but those teams, and other NFL teams, agreed that the NFL would be better off with Clarett satisfying the rule).

Furthermore, in other opinions, Justice Sotomayor has recognized single entity status for organizations that bear some similarities to professional sports leagues. In *Greenbaum v. Svenska Handelsbanken*, for

¹¹¹ McCann, *American Needle v. NFL*, *supra* note 100.

¹¹² *American Needle*, 538 F.3d at 741 (“[I]ndividuals seeking employment with any of the league’s teams would view the league as a collection of loosely affiliated companies that all have the independent authority to hire and fire employees.”).

¹¹³ *Id.* at 742.

¹¹⁴ See *supra* Part II (discussing then-Judge Sotomayor’s critique of a new set of employment terms that MLB had unilaterally imposed). Additional insight may be gained from *Major League Baseball Properties v. Salvino*, 542 F.3d 290 (2d Cir. 2008). *Salvino* involved an analogous fact pattern to *American Needle* in that it considered the joint licensing activities of Major League Baseball Properties (“MLBP”) under section 1 of the Sherman Act. Although MLBP did not assert the single entity defense, the opinion seems relevant insofar as then-Judge Sotomayor argued that MLBP should be reviewed as a joint venture under a rule of reason analysis. *Id.* at 338–39. The opinion therefore suggests that Justice Sotomayor may be inclined to reject the characterization of the NFL as a single entity.

¹¹⁵ *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 880 F. Supp. 246, 255–56 (S.D.N.Y. 1995).

¹¹⁶ See *supra* note 109 and accompanying text.

¹¹⁷ *Clarett II*, 369 F.3d 124, 136 (2d Cir. 2004) (quoting *Basketball Ass’n v. Williams*, 45 F.3d 684, 688 (2d Cir. 1995)).

instance, then-Judge Sotomayor characterized a national bank and its branches as a single entity.¹¹⁸ She justified such a status on federal banking law and the “practical realities of branch banking.”¹¹⁹

It is unclear whether the “practical realities” of a professional sports league operation would procure a similar interpretation, though there are crucial differences between operating a professional sports league and engaging in branch banking. Namely, while professional sports leagues typically feature individually-owned franchises, branch banking refers to a multiple-office structure in which one bank owns and operates all of the banking offices.¹²⁰ From another point of view, however, while branches are geographically positioned to avoid competing with one another, they, like professional sports franchises, “compete” in the sense that the bank may close underperforming branches.¹²¹ These and other considerations might provide for engaging fodder when the Supreme Court, with Justice Sotomayor as its newest member, examines the relationship between single entity status and professional sports leagues.

V. CONCLUSION

Silverman and *Clarett* are merely two examples of Justice Sotomayor’s extensive body of jurisprudence. Yet they furnish important insights into her judicial philosophy. Foremost, they belie commentators who disparage Justice Sotomayor’s reasoning as subsumed by subjective considerations. Indeed, they suggest that she embraces a substantive and fairly conventional approach to jurisprudence, even to the detriment of the most disadvantaged or vulnerable party.

Silverman and *Clarett* are also two of the most influential opinions in contemporary sports law. To the chagrin of some, they interpret the non-statutory labor exemption as decidedly protective of league policies borne

¹¹⁸ *Greenbaum v. Handlesbanken*, 26 F. Supp. 2d 649, 654 (S.D.N.Y. 1998). It should be noted that this case did not concern application of the Sherman Act, but rather the availability of punitive damages. *Id.* at 651.

¹¹⁹ *Id.* at 654 (stating that for branches to avoid various forms of liability, a national bank must be able to limit its responsibilities to one bank at a time).

¹²⁰ See Joann Senzel Nestor, *Interstate Branch Banking Reform: Preserving the Policies Underlying the McFadden Act*, 72 B.U. L. REV. 607, 614–16 (1992) (describing the ownership structure of branch banking). A better professional sports league analogy to branch banking would be Major League Soccer, which is organized as one corporation, with the corporation owning the league’s fourteen franchises and centrally planning all broadcasting rights, licensing, and merchandising. See *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 56–58 (1st Cir. 2002) (analyzing whether Major League Soccer is a single entity).

¹²¹ See Ethan W. Johnson, *Reducing Liability of American Banks for Expropriated Foreign Branch Deposits*, 34 EMORY L.J. 201, 223 (1985) (noting that banks close branches for business reasons). *But see* Stacey Stritzel, *The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994: Progress Toward a New Era in Financial Services Regulation*, 46 SYRACUSE L. REV. 161, 187–88 (1995) (describing limitations imposed by federal law on autonomy of banks to close branches in low-income areas).

from collective bargaining. Though such an interpretation supplies bright-line certainty to league-player bargaining, it also invites critique as overly-expansive and rigid.

Lastly, *Silverman* and *Clarett* illuminate how Justice Sotomayor may continue to play a leading role in shaping sports law. In the near future, the NBA eligibility restriction is poised to trigger a “*Clarett*-like” case, which could culminate in a Supreme Court review of professional sports eligibility rules. In *American Needle*, the Supreme Court is already reviewing a more sweeping matter: whether leagues and franchises may define themselves as single entities. Justice Sotomayor’s reasoning in *Silverman* and *Clarett*, along with her viewpoints from other opinions, suggest she will balance her concern for unilateral league behavior with her appreciation for the pragmatic necessities of league operation.