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## An Antitrust Exemption for the NCAA: Sound Policy or Letting the Fox Loose in the Henhouse?

Daniel E. Lazaroff

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# An Antitrust Exemption for the NCAA: Sound Policy or Letting the Fox Loose in the Henhouse?

Daniel E. Lazaroff\*

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## I. INTRODUCTION

The National Collegiate Athletic Association (NCAA) is an unincorporated association that governs intercollegiate sports. The NCAA supervises eighty-nine championships in twenty-three sports in which over 400,000 student-athletes participate at more than 1000 colleges and universities.<sup>1</sup> For 2011–2012, the NCAA announced audited revenues of \$871.6 million.<sup>2</sup> It is indisputable that the organization is the dominant force in the presentation and regulation of intercollegiate athletics.<sup>3</sup>

Given its substantial market power, it should not be surprising that the

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\* Leonard Cohen Professor of Law and Economics, Loyola Law School, Los Angeles; Director, Loyola Sports Law Institute.

1. *Who We Are*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are+landing+page> (last visited Oct. 4, 2013).

2. *Revenue*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/finances/revenue> (last updated Feb. 13, 2013). The NCAA disclosed that \$705 million of its total revenue came from a "rights agreement" with CBS Sports and Turner Broadcasting. *Id.* Most of the remaining revenue was received from ticket and merchandise sales at championship events. *Id.* Projected revenue for 2012–2013 is estimated to be \$797 million, with \$702 million attributable to a new rights agreement with CBS Sports and Turner Broadcasting. *Id.*

3. Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 329 (2007).

NCAA is no stranger to federal antitrust litigation.<sup>4</sup> Its rules, regulations, and practices have been challenged as illegal restraints on trade by universities, coaches, student-athletes, and other business entities with mixed results.<sup>5</sup> Some commentators suggest the need for heightened antitrust scrutiny of NCAA business practices, while others argue for the passage of some form of antitrust exemption for NCAA activities.

This Article focuses on the issues presented by the debate over granting the NCAA an exemption from federal antitrust law. Part II briefly describes the history of antitrust litigation involving the NCAA. Part III discusses some of the proposals for affording some type of antitrust immunity to the NCAA. Part IV explains the rationales utilized for some of the numerous antitrust exemptions Congress and the Supreme Court have created for some businesses and forms of commercial activity. Part V addresses the question of whether any of those rationales justifies providing the NCAA with a legislative or judicial antitrust exemption and concludes that the NCAA should not enjoy insulation from federal antitrust law. Alternatively, if the NCAA does receive some sort of antitrust exemption, it should be predicated on the willingness of the member institutions to accept some form of regulatory oversight to ensure that the goals underlying any exemption will be sufficiently addressed.

## II. THE NCAA'S ANTITRUST EXPERIENCE

The NCAA has frequently been the target of federal antitrust claims, with mixed results.<sup>6</sup> After initial success in fighting off antitrust claims, the NCAA suffered major defeats in *NCAA v. Board of Regents of the University of Oklahoma*<sup>7</sup> and *Law v. NCAA*.<sup>8</sup> Other litigation was settled.<sup>9</sup>

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4. See *infra* Part II.

5. *Id.*

6. For a discussion of many of the cases through 2008, see Lazaroff, *supra* note 3, at 329. For a collection of the scholarly commentary on the antitrust issues, see *id.* at 353–54 n.116.

7. 468 U.S. 85 (1984).

8. 134 F.3d 1010 (10th Cir. 1998).

9. See *Metro. Intercollegiate Basketball Ass'n v. NCAA*, 339 F. Supp. 2d 545, 547 (S.D.N.Y. 2004) (denying both parties' motions for summary judgment). This dispute involved NCAA rules that allegedly reduced competition from non-NCAA-sponsored postseason tournaments. *Id.* at 548. The case was settled with an NCAA buyout of the National Invitation Tournament (NIT) for \$56.5 million (including legal fees). Malcolm Moran, *NCAA Buys NIT for \$56.5 Million*, USA TODAY (Aug. 17, 2005), [http://usatoday30.usatoday.com/sports/college/mensbasketball/2005-08-17-ncaa-nit-purchase\\_x.htm](http://usatoday30.usatoday.com/sports/college/mensbasketball/2005-08-17-ncaa-nit-purchase_x.htm).

With respect to alleged anticompetitive restraints on student-athletes, however, courts continued to side with the NCAA when its amateurism rules were challenged.<sup>10</sup> Courts either determined that federal antitrust laws did not apply to NCAA athletes who presumably were not actually involved in a commercial trade or business, or they found that the NCAA's rules served the procompetitive objectives of competitive balance and preserving a clear line of demarcation between amateur and professional sports.<sup>11</sup>

More recently, however, some courts have been increasingly receptive to the idea that NCAA football and basketball players may be sufficiently involved in commercial activity to warrant closer inspection of their antitrust claims. In *In re NCAA I-A Walk-On Football Players Litigation*, non-scholarship, walk-on football players challenged the NCAA's limitations on the number of full grant-in-aid football scholarships.<sup>12</sup> The court denied a motion to dismiss the complaint, recognized that financial aid to college students is commercial activity, and found that the alleged relevant market of "Division I-A football" was sufficient.<sup>13</sup> It also concluded that the plaintiffs had alleged a sufficient "input" market in which NCAA schools compete for skilled amateur football players.<sup>14</sup> While not a ruling on the merits of the controversy, the decision identifies the commercial nature of the relationship between NCAA athletes and the schools they attend.<sup>15</sup>

Similarly, in *White v. NCAA*, a complaint by a plaintiff class of major college football and basketball players in the United States survived a motion to dismiss.<sup>16</sup> The lawsuit challenged the NCAA's grant-in-aid cap on financial awards to student-athletes.<sup>17</sup> The court ruled that the plaintiffs had sufficiently alleged that the NCAA had market power in relevant product

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10. See, e.g., *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999); *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992); *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988); *Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp. 2d 569 (E.D. Pa. 2004); *Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990); *Jones v. NCAA*, 392 F. Supp. 295 (D. Mass. 1975).

11. See *Banks v. NCAA*, 977 F.2d 1081, 1089–90 (7th Cir. 1992); *McCormack v. NCAA*, 845 F.2d 1338, 1345 (5th Cir. 1988); *Justice v. NCAA*, 577 F. Supp. 356, 382 (D. Ariz. 1983).

12. 398 F. Supp. 2d 1144, 1144 (W.D. Wash. 2005).

13. *Id.* at 1147–52.

14. *Id.* at 1150. After a denial of class certification, this case was settled on undisclosed terms. See *Lazaroff*, *supra* note 3, at 351 n.115.

15. *Id.* at 1149.

16. No. CV 06-999-RGK, slip op. at 4 (C.D. Cal. Sept. 21, 2006), available at <http://www.ncaaclassaction.com/deny.pdf>.

17. *Id.*

and geographic markets and that harm to competition was adequately alleged.<sup>18</sup> Class certification was subsequently granted and the NCAA settled for \$10 million, also providing athletes easier access to \$218 million of then-existing funds.<sup>19</sup> While the case is of limited precedential value because of the settlement and the fact that the court merely upheld the claim on the pleadings, it nevertheless demonstrates more serious consideration of antitrust claims brought by NCAA athletes.

More recent antitrust activity also suggests that the NCAA may have to defend more vigorously against claims asserted by student-athletes. In *Agnew v. NCAA*, the Seventh Circuit delivered a mixed message that gave the NCAA a victory, but simultaneously signaled potential antitrust liability.<sup>20</sup> In *Agnew*, the court affirmed the dismissal, with prejudice, of a complaint by former college football players challenging NCAA rules limiting the number of scholarships and prohibiting multi-year scholarship awards.<sup>21</sup> Judge Flaum concluded that the complaint failed to sufficiently identify a relevant commercial market and was therefore fatally flawed.<sup>22</sup> Nevertheless, the opinion suggested that there might be a relevant “labor market for student-athletes.”<sup>23</sup> Judge Flaum noted that:

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18. *Id.* at 3.

19. Jack Carey & Andy Gardiner, *NCAA Agrees to \$10M Settlement in Antitrust Lawsuit*, USA TODAY (Jan. 30, 2008), [http://usatoday.com/sports/college/2008-01-29-ncaa-settlement\\_N.htm](http://usatoday.com/sports/college/2008-01-29-ncaa-settlement_N.htm).

20. 683 F.3d 328, 332, 335–38 (7th Cir. 2012).

21. *Id.* at 332.

22. *Id.* at 332, 345–47. The court felt that the plaintiffs’ references in the complaint to a market for “bachelor’s degrees” and a market for “student-athlete labor” were insufficient because they were unclear and the complaint did not “adequately describe the relevant market on which the Bylaws may have had an anticompetitive effect.” *Id.* at 345.

23. *Id.* at 346. Judge Flaum explained that “labor markets are cognizable under the Sherman Act,” and that “colleges do, in fact, compete for student athletes, though the price they pay involves in-kind benefits as opposed to cash.” *Id.* at 346–47. In an earlier opinion regarding NCAA restrictions on student-athletes, Judge Flaum argued that:

The NCAA would have us believe that intercollegiate athletic contests are about spirit, competition, camaraderie, sportsmanship, hard work (which they certainly are) . . . and nothing else. . . . It is consoling to buy into these myths, for they remind us of a more innocent era—an era where recruiting scandals were virtually unknown, where amateurism was more a reality than an ideal, and where post-season bowl games were named for commodities, not corporations . . . . [I]t is disquieting to think of college football as a business, of colleges as the purchasers of labor, and of athletes as the suppliers.

The NCAA continues to purvey . . . an outmoded image of intercollegiate sports that no longer jibes with reality. The times have changed. College football is a terrific American institution that generates abundant nonpecuniary benefits for players and fans, but it is also a vast commercial venture that yields substantial profits for colleges . . . . An

[C]olleges may compete to hire the coach that will be best able to launch players from the NCAA to the National Football League, an attractive component for a prospective college football player. Colleges also engage in veritable arms races to provide top-of-the-line training facilities which, in turn, are supposed to attract collegiate athletes. Many future student-athletes also look to the strength of a college's academic programs in deciding where to attend. These are all part of the *competitive market to attract student-athletes whose athletic labor can result in many benefits for a college, including economic gain*.<sup>24</sup>

The *Agnew* court's recognition that the relationship between student-athletes and their educational institutions is, at least in part, a commercial one is critical in deciding the applicability of the Sherman Act<sup>25</sup> to some NCAA rules and regulations.<sup>26</sup> Student-athletes promise to utilize their athletic skills on behalf of their schools in exchange for education, room, and board.<sup>27</sup> "Thus, the transactions between NCAA schools and student-athletes are, to some degree, commercial in nature, and therefore take place in a relevant market with respect to the Sherman Act."<sup>28</sup> *Agnew* arguably

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athlete's participation offers all of the rewards that attend vigorous competition in organized sport, but it is also labor, labor for which the athlete is recompensed.

*Banks v. NCAA*, 977 F.2d 1081, 1098–99 (7th Cir. 1992) (Flaum, J., concurring in part and dissenting in part) (citations omitted).

24. *Agnew*, 683 F.3d at 347 (emphasis added).

25. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2012)). The Sherman Act was the federal government's first attempt to "restore competition" through the prohibition of trade-controlling trusts. *Sherman Anti-trust Act (1890)*, OUR DOCUMENTS, <http://www.ourdocuments.gov/doc.php?flash=true&doc=51> (last visited Oct. 10, 2013).

26. See Justin M. Hannan, Comment, *Antitrust Law—Seventh Circuit Sees Through Façade, Exposes NCAA Scholarship Limits to Sherman Antitrust Scrutiny—Agnew v. NCAA*, 18 SUFFOLK J. TRIAL & APP. ADVOC. 345, 350–56 (2013).

27. *Banks*, 977 F.2d at 1095.

28. *Agnew*, 683 F.3d at 341 (citing *White v. NCAA*, CV 06-999-RGK (C.D. Cal. Sept. 20, 2006) (holding that colleges and universities compete for prospective student-athletes in the "Major College Football" market). Interestingly, Judge Flaum does seem to support the notion that the NCAA may prohibit participation by student-athletes who receive cash payments beyond "the costs attendant to receiving an education—a rule that clearly protects amateurism." *Id.* at 343. Frankly, once the court acknowledges that student-athletes exchange their sports participation for an education, it is not clear why capping compensation at the full cost of education is reasonably necessary to preserve some archaic notion of "amateurism." See, e.g., Kemper C. Powell, *A Façade of Amateurism: An Examination of the NCAA Grant-in-Aid System Under the Sherman Act*, 20 SPORTS LAW J. 241, 257–59 (2013). The purity of the amateur ideal is already compromised by

further blurs any clear distinction for antitrust purposes between NCAA restraints in contexts other than student-athlete claims and other commercial transactions.<sup>29</sup> No longer should courts assume that the Sherman Act cannot apply to anticompetitive restrictions on NCAA athletes.<sup>30</sup> Rather, the argument grows stronger that student-athlete antitrust claims deserve consideration on their merits instead of summary disposition in favor of the NCAA.<sup>31</sup> This may pose more antitrust problems for the NCAA in the future despite a victory in *Agnew*.

In early 2013, the NCAA also defended against an *Agnew*-like antitrust claim in *Rock v. NCAA*.<sup>32</sup> In *Rock*, plaintiffs challenged the same restraints that were the subject of the *Agnew* claim and additionally claimed that the NCAA ban on scholarships at Division III institutions constituted another antitrust violation.<sup>33</sup> The court dismissed the complaint with leave to amend and emphasized the antitrust requirement of pleading and proving the existence of a “relevant commercial market” and anticompetitive effects within that properly defined market.<sup>34</sup> The court noted that *Agnew* recognized the existence of “a market of some sort” in the student-athlete–university relationship.<sup>35</sup> It also referred to *Agnew*’s distinction between “eligibility rules” and “financial aid rules,” and explained that *Agnew* concluded that eligibility rules should be entitled to a presumption of reasonableness in preserving “amateurism” while financial-aid rules do not merit such a presumption.<sup>36</sup> Ultimately, the fatal flaw in the plaintiffs’

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“paying” the students to be athletes. *Id.* at 252–53. The cost-of-education cap is arguably just another form of wage-fixing. *Id.*

29. See Lazaroff, *supra* note 3, at 350–52 (discussing the blurring of the dichotomous approach).

30. *Id.* at 362.

31. *Id.*

32. *Rock v. NCAA*, 928 F. Supp. 2d 1010, 1026–27 (S.D. Ind. 2013) (dismissing with prejudice the plaintiff’s allegations regarding the Division III scholarships with leave to file an amended complaint). The court also dismissed *Rock*’s first amended complaint, giving him another opportunity to amend. *Rock v. NCAA*, No. 1:12-CV-1019-JMS-DKL, 2013 WL 2304190, at \*2 (S.D. Ind. May 24, 2013). *Rock*’s second amended complaint finally survived a motion to dismiss—the case is currently pending. *Rock v. NCAA*, No. 1:12-CV-1019-JMS-DKL, 2013 WL 4479815, at \*1 (S.D. Ind. Aug. 16, 2013) (“This is the first time . . . that the [c]ourt concludes that the complaint at issue pleads the rough contours of a relevant market that is plausible on its face and in which anticompetitive effects . . . could be felt.”).

33. *Rock*, 928 F. Supp. 2d at 1014.

34. *Id.* at 1017.

35. *Id.*

36. *Id.* Whether this attempted distinction between eligibility rules and financial aid rules is warranted in a sound antitrust analysis may fairly be questioned. See *Agnew*, 683 F.3d at 345–46.

complaint was their vague and imprecise allegation of a nationwide student-athlete labor market.<sup>37</sup> The court properly noted that “NCAA schools are not necessarily adequate substitutes for each other” because although institutions “offering top-tier Division I football programs may be comparable substitutes, . . . it is implausible to suggest that lower-tier Division I football schools offer the same level of in-kind benefits (premier coaching, facilities, and national publicity).”<sup>38</sup> In other words, “to lump all NCAA schools into the same market regardless of material distinctions in division, sport offered by gender, or athletic success proves that their proposed market is not legally cognizable.”<sup>39</sup>

In *O’Bannon v. NCAA*, another case still pending, the court denied the NCAA’s motion to dismiss antitrust claims challenging a requirement that student-athletes relinquish all rights regarding commercial use of their images even after completion of their intercollegiate sports participation.<sup>40</sup> The complaint further alleged that the NCAA was able to use this requirement to enter into licensing agreements with companies that distribute products containing student-athletes’ images without any compensation to those student-athletes.<sup>41</sup> The district court concluded that the NCAA member institutions’ joint agreement to the release rule was sufficient to satisfy the concerted action requirement of section 1 of the Sherman Act, and also determined that the complaint sufficiently alleged “significant anticompetitive effects” in a “collegiate licensing market.”<sup>42</sup>

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Because financial aid to the student-athlete is a form of “payment” for athletic performance, it is more obviously commercial in nature. *Id.* at 341. However, to the extent eligibility rules focus on limiting income to the student-athlete, they too may be viewed as commercial in nature. In either context, the rules impact the extent to which college players may be compensated for their athletic endeavors.

37. *Rock*, 928 F. Supp. 2d at 1022.

38. *Id.* at 1021–22.

39. *Id.* at 1022. The court cites as an example of the overbreadth of the asserted market definition the obvious fact that the female gymnast and male football player are not in competition for the same scholarship on the same team. *Id.* Despite its conclusions about the inadequacy of the complaint regarding market definition, the court did grant leave to amend. *Id.* at 1026–27.

40. Nos. C 09-1967 CW, C 09-3329 CW, C 09-4882 CW, 2010 WL 445190, at \*3 (N.D. Cal. Feb. 8, 2010).

41. *Id.* at \*4.

42. *Id.* at \*13–14. This case subsequently became a putative class action, *In re NCAA Student-Athlete Name & Likeness Litigation*, No. C 09-1967 CW, 2010 WL 5644656 (N.D. Cal. Dec. 17, 2010). Subsequently, plaintiffs amended their complaint to narrow their proposed class definition, alter their damages theory, and identify two new markets in which competition had allegedly been restrained—“the Division I college education market” and the “market for the acquisition of group



Although the NCAA prevailed in *Agnew* and *Rock* and may ultimately achieve some sort of victory in the *O'Bannon* litigation, these cases do give support to the proposition that NCAA student-athletes are engaged in commercial activities.<sup>43</sup> They are “selling” services to their institutions and “purchasing” an education—as well as athletic training and public exposure of their talents.<sup>44</sup> Once courts acknowledge this reality, the antitrust laws should apply and the rule of reason may be used to determine the overall competitive impact of a particular NCAA rule or regulation.<sup>45</sup> This would require that the plaintiff prove a relevant market and anticompetitive effects within the defined market.<sup>46</sup> The NCAA could then attempt to demonstrate procompetitive virtues resulting from the challenged practice.<sup>47</sup> This would include proving that the restraint in question actually promoted competitive balance or increased the quality of its product by maintaining a clear line of demarcation between professional sports and “amateur” intercollegiate athletics.<sup>48</sup> If the NCAA successfully proffered proof of procompetitive justification, contemporary rule-of-reason principles would then allow plaintiffs to demonstrate that any legitimate goal could be furthered by

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licensing rights for the use of student-athletes’ names, images and likenesses in the broadcasts or rebroadcasts of Division I basketball and football games and in videogames featuring Division I basketball and football.” *In re Student–Athlete Name & Likeness Licensing Litig.*, No. C 09-1967 CW, 2013 WL 5778233 at \*2 (N.D. Cal. Oct. 25, 2013). The Court found these allegations sufficient to state a Sherman Act claim and denied the NCAA’s motion to dismiss the third amended complaint. *Id.* at 6, 10. On November 8, 2013, Judge Wilkens certified a class of plaintiffs seeking injunctive relief but declined to certify a class seeking damages. *In re NCAA Student–Athlete Name & Likeness Litigation*, No. C 09-1967 CW, 2013 WL 5979327 (N.D. Cal. Nov. 8, 2013). This decision leaves the future of the *O'Bannon* case in some doubt, because the NCAA’s monetary exposure is significantly limited by the court’s decision on the damages class. Whether the case proceeds to trial or is settled remains to be seen.

43. Hannan, *supra* note 26, at 335–57.

44. For commentary on treating student-athletes as employees for labor law purposes, see Lazaroff, *supra* note 3, at 354 n.17. See also Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 2012 WIS. L. REV. 1077, 1136 (referring to the NCAA as “an immense monopsony” and proposing a “limited form of player bargaining with the NCAA on subjects that are not inconsistent with NCAA rules and policies”). Whether negotiations on matters that do not conflict with NCAA “rules and policies” will adequately address the concerns about economic exploitation of student-athletes is a question worth asking. It may well be that those very “rules and policies” are at the core of the problem. *Id.*

45. See Hannan, *supra* note 26, at 335–57.

46. Neil Gibson, *NCAA Scholarship Restrictions as Anticompetitive Measures: The One-Year Rule and Scholarship Caps as Avenues for Antitrust Scrutiny*, 3 WM. & MARY BUS. L. REV. 203, 234–37 (2012).

47. *Id.* at 237–40.

48. *Id.*

substantially less restrictive means, thereby making the NCAA rule not reasonably necessary to achieve the stated procompetitive objective.<sup>49</sup> The rule-of-reason journey is an arduous one, and it can generate considerable expense and substantial investment of time and money.<sup>50</sup> The monetary risks are high, which may explain the willingness of the NCAA to settle antitrust cases it confidently predicts it would ultimately win. In any event, in the absence of any legislative or judicial exemption from federal antitrust law, there is no reason to believe that the NCAA will enjoy any respite from continued antitrust challenges to its rules and regulations.

### III. ANTITRUST EXEMPTION PROPOSALS

In 1961, the NCAA passed up a chance “to apply for an exemption . . . believing that was unnecessary because its ties to higher education would shield its rules from antitrust scrutiny.”<sup>51</sup> More recent support for some form of antitrust exemption is attributable to a variety of sources. Brian L. Porto argues for an NCAA antitrust exemption in a proposed “College Sports Legal Reform Act” that would exempt any NCAA commercial activity “as long as at least one principal purpose of any such action is educational.”<sup>52</sup> The statute would require due process for persons accused of violating NCAA rules.<sup>53</sup> In 2008, the Women’s Sports Foundation suggested a limited antitrust exemption to restrain spending growth in the areas of coaches’ salaries and recruiting in men’s football and basketball.<sup>54</sup> This

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49. See *Standard Oil Co. v. United States*, 221 U.S. 1, 58–62 (1910) (holding that under a “rule of reason” analysis restraints of trade that are “unreasonably restrictive of competitive conditions” under the Sherman Act are unacceptable).

50. See Gibson, *supra* note 46, at 240.

51. BRIAN L. PORTO, *THE SUPREME COURT AND THE NCAA* 19 (2012) (citing Welch Suggs, *Football, Television, and the Supreme Court*, CHRON. HIGHER EDUC., July 9, 2004, at A32–A33). In 1991, U.S. Representative Tom McMillen (a former professional basketball player) introduced legislation in Congress to grant the NCAA a five-year antitrust exemption in exchange for NCAA reform regarding revenue sharing and due process for those accused of violations of NCAA rules. *Id.* at 17. The bill, entitled the Collegiate Athletic Reform Act, would have also authorized the payment of a \$300 per month stipend and five-year athletic scholarships for student-athletes in good academic standing. *Id.* The proposal failed to become law. *Id.*

52. *Id.* at 188.

53. *Id.* at 188–90. Currently, the NCAA is free from any requirement of providing due process (except as provided by its own rules) because it is not considered a state actor subject to the U.S. Constitution’s Fifth and Fourteenth Amendments. See *NCAA v. Tarkanian*, 488 U.S. 179, 179–80 (1988).

54. See Erik Brady, *Report: Group Wants Congress to Grant NCAA Anti-trust Exemption*, USA

proposal was designed to free up more funding for women's sports and "minor" men's sports.<sup>55</sup> Andrew Zimbalist, a noted sports economist, advocates a partial antitrust exemption to regulate coaches' salaries, reduce the number of football scholarships, and replace the Bowl Championship Series (BCS) system with a playoff.<sup>56</sup> Len Elmore, a former NBA player, college basketball commentator, lawyer, and member of the Knight Commission on Intercollegiate Athletics, suggests that the NCAA receive a broad antitrust exemption so that it can mandate that revenues be utilized to "benefit the college or university as a whole and not simply the athletic department."<sup>57</sup> In 2012, a group of professors collectively titled "The Coalition On Intercollegiate Athletics" made a five-part recommendation to explore the possibility of an antitrust exemption to enable the NCAA to regulate spending on coaches' salaries and other costs.<sup>58</sup> The coalition recommended: (1) creating an antitrust exemption; (2) supporting a "collegiate model" of sports by lessening commercialism; (3) advocating policies to keep big football conferences inside the NCAA; (4) increasing efforts to respond to "reputational risks" derived from the "market driven model of sports;" and (5) cooperating with the NCAA to effect change while "remaining vigilant about NCAA efforts that place college sports over the academic missions" of higher education.<sup>59</sup> More recently, concerns

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TODAY (Sept. 23, 2008), [http://usatoday.com/sports/college/2008-09-23-foundation-report\\_N.htm](http://usatoday.com/sports/college/2008-09-23-foundation-report_N.htm).

55. *Id.*

56. See Ray Melick, *NCAA Hears Radical Proposal on How to Curb Athletic Spending*, BIRMINGHAM NEWS (Jan. 14, 2010), [http://blog.al.com/ray-melick/2010/01/ncaa\\_hears\\_radical\\_proposal\\_on.html](http://blog.al.com/ray-melick/2010/01/ncaa_hears_radical_proposal_on.html). A playoff system in college football is scheduled to begin in 2014. See Heather Dinich, *Playoff Plan to Run Through 2025*, ESPN (June 27, 2012, 1:12 PM), [http://espn.go.com/college-football/story/\\_id/8099187/ncaa-presidents-approve-four-team](http://espn.go.com/college-football/story/_id/8099187/ncaa-presidents-approve-four-team) (explaining that a four-team playoff for college football was formally approved by a presidential oversight committee for the 2014 through 2025 seasons).

57. See Len Elmore, *Exempt the NCAA from Antitrust*, CHRON. HIGHER EDUC. (Dec. 11, 2011), <http://chronicle.com/article/Exempt-the-NCAA-From-Antitrust/130073/>.

58. See *Profs Consider Backing NCAA Antitrust Exemption*, FOX NEWS (Mar. 8, 2012), <http://www.foxnews.com/sports/2012/03/08/profs-consider-backing-ncaa-antitrust-exemption/>.

59. *Id.* See also BRETT T. SMITH, *SHOULD THE NCAA BE ABOVE THE LAW?: AN EXAMINATION OF THE NCAA'S ANTITRUST STATUS* (2010) (arguing for a limited antitrust exemption to regulate member institutions, but not a total exemption because of commercial aspects of the NCAA); Adam R. Schaefer, *Slam Dunk: The Case for an NCAA Antitrust Exemption*, 83 N.C. L. REV. 555, 567-68 (2005) (concluding that NCAA needs "ample latitude" to fulfill its "critical role" in maintaining "a revered tradition of amateurism in college sports"). Compare Joe Nocera, *Let's Start Paying College Athletes*, N.Y. TIMES (Dec. 30, 2011), <http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html> (decrying "hypocrisy" in college sports and noting that college football and men's basketball generate more than \$6 billion in annual revenue).

regarding significant and ongoing realignment of athletic conferences are triggering calls for discussion of how the NCAA might be able to exert influence or control over the movement of schools from one league to another.<sup>60</sup> Without any form of exemption, the NCAA is rightfully concerned that intervention might generate an antitrust suit reminiscent of *NCAA v. Board of Regents of the University of Oklahoma*, where the Supreme Court invalidated the NCAA college football television plan.<sup>61</sup>

A broadly drafted antitrust exemption for the NCAA could undoubtedly shield it and its members from any real threat of Sherman Act liability.<sup>62</sup> Even a more limited exemption would provide some relief from the steady stream of litigation, which creates expense and uncertainty about the validity of NCAA business practices.<sup>63</sup> The critical question, however, is whether there is some public policy rationale sufficient to justify immunizing the NCAA from the normal application of legal principles designed to protect the competitive process and promote consumer welfare.<sup>64</sup> The NCAA is an organization whose membership collectively controls intercollegiate sports.<sup>65</sup> Together the colleges and universities possess enormous market power in the sale of television rights for NCAA sports, the promotion and operation of tournaments, and a variety of other commercial aspects regarding the NCAA product.<sup>66</sup> As a buyer, the NCAA functions as a “collusive

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60. Jeremy Fowler, *Big 12 Voices NCAA Concerns to Mark Emmert*, CBS SPORTS (May 30, 2013), <http://www.cbssports.com/collegefootball/writer/jeremy-fowler/22328001/big-12-voices-ncaa-concerns-to-mark-emmert>.

61. 468 U.S. 85 (1984). See *NCAA's Emmert Urging Schools to Take Cautious Approach to Realignment*, SPORTS BUSINESS DAILY (Sept. 20, 2011), <http://www.sportsbusinessdaily.com/Daily/Issues/2011/09/20/Colleges/NCAA.aspx> (noting that NCAA president Mark Emmert has concerns about having a meeting regarding conference realignment); see also Michael Marot, *Increase in Court Cases Could Impact NCAA Image*, ASSOCIATED PRESS (Jan. 15, 2013), <http://collegefootball.ap.org/article/increase-court-cases-could-impact-ncaa-image> (commenting on variety of lawsuits against the NCAA and how Emmert “has repeatedly avoided” stepping into the “turbulent whirlwind of conference realignment” because of legal concerns). For an interesting and thorough discussion of the history and potential legal consequences of realignment, see generally Christian Dennie, *Conference Realignment: From Backyard Brawls to Cash Cows*, 1 MISS. SPORTS L. REV. 249 (2012) and Alfred Dennis Mathewson, *The Bowl Championship Series, Conference Realignment and the Major College Football Oligopoly: Revolution Not Reform*, 1 MISS. SPORTS L. REV. 321 (2012).

62. See Lazaroff, *supra* note 3, at 370–71.

63. *Id.*

64. See, e.g., *id.* at 370 n.140.

65. See *Who We Are*, *supra* note 1.

66. As a seller of television rights to broadcast its major events, the NCAA also has considerable market power. See *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 111 (1984)

monopsonist,” since student-athletes, acting as sellers of their athletic talent, really have no reasonable alternatives to participation in an NCAA member’s program.<sup>67</sup> The potential for anticompetitive consequences looms large. Consequently, any antitrust exemption should be persuasively justified by strong countervailing policy arguments.

#### IV. ANTITRUST EXEMPTION RATIONALES

Exemptions from antitrust law may be derived either from congressional action (statutory exemptions) or judicial decisions (non-statutory exemptions).<sup>68</sup> In 2007, the American Bar Association produced a comprehensive and detailed monograph reviewing the history of statutory exemptions from federal antitrust law.<sup>69</sup> The monograph notes that “[m]ore than twenty federal statutory antitrust exemptions currently exist, touching upon widely differing aspects of commerce.”<sup>70</sup> The most important section

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(concluding that the NCAA did have market power in the sale of television rights for college football, even though market power was not necessary in a case where output and price restraints created obvious anticompetitive effects).

67. See *In re NCAA I-A Walk-on Football Players Litigation*, 398 F. Supp. 2d 1144, 1151 (W.D. Wash. 2005); Lazaroff, *supra* note 3, at 351 n.115; LeRoy, *supra* note 44, at 1136.

68. Non-statutory exemptions include the non-statutory labor exemption, designed to allow federal labor law to trump antitrust law and validate restraints contained in a collective bargaining agreement. See *Brown v. Pro Football Inc.*, 518 U.S. 231 (1996). Other examples include the *Noerr-Pennington* doctrine, which protects concerted efforts to petition government and the “state action” doctrine, which recognizes the right of sovereign states to regulate their local economies and authorizes private anticompetitive conduct subject to supervision. For a discussion of the *Noerr-Pennington* doctrine, see *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), and *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). For a discussion of the “state action” doctrine, see *Parker v. Brown*, 317 U.S. 341 (1943). These latter doctrines represent judicial recognition of the need to reconcile federal antitrust statutory interpretation with constitutional principles. This Article focuses only on statutory exemptions. Thus, citations of the numerous Supreme Court and lower federal court decisions, as well as scholarly commentary regarding the *Noerr-Pennington* and state action doctrines, are omitted.

69. See *Federal Statutory Exemptions from Antitrust Law*, 2007 A.B.A. SEC. ANTITRUST L. [hereinafter *Monograph*].

70. *Id.* at 1 (internal citations omitted). Table 1 in Appendix A of the monograph presents a chronological listing of all statutory antitrust exemptions since 1914 and indicates which were still in existence at the time of publication. The table lists forty statutory exemption enacted over a ninety-year period, some of which have been repealed. *Id.* at 319–22. Table 2 lists statutory exemptions by industry, and the list indicates that exemptions have covered insurance, commercial transportation, agriculture, commercial fishing, labor, energy, foreign commerce, defense, *professional* sports, education, mass media and communications, retail or commercial food products, financial services, cooperative activities (research, production, and standard setting), health care, local government, charitable giving, and computer software. *Id.* at 323–25.

of the monograph for purposes of this Article is its discussion of rationales for implementation of statutory antitrust exemptions. Chapter III of the monograph presents an economic analysis of rationales for antitrust exemption or modification of antitrust principles falling “into three main categories: (1) [n]atural monopoly, (2) [m]arket and institutional failures of various kinds, or (3) [s]ubsidy for some socially desired activity or wealth transfer to some socially preferred group.”<sup>71</sup> The natural monopoly rationale applies when only one firm can serve the market efficiently.<sup>72</sup> Market or institutional failures can deal with achieving efficient scale, coordinating among competitors to create an efficient market, avoiding destructive or ruinous competition, balancing asymmetric bargaining power to facilitate efficiency, mitigating prior failures in market regulation, and creating market power to subsidize social goals (including subsidization of a favored activity and wealth transfer to a favored class of market participants).<sup>73</sup>

In professional sports, there are two prominent examples of a statutory antitrust exemption: the 1961 Sports Broadcasting Act<sup>74</sup> and the 1966 Professional Football League Merger Act (amending the 1961 statute).<sup>75</sup> The Sports Broadcasting Act exempted joint television broadcast agreements when rights were sold for sponsored telecasts of the games.<sup>76</sup> The 1966 amendment to the statute authorized the merger between the National Football League (NFL) and the American Football League (AFL).<sup>77</sup> In education, Congress has created antitrust exemptions by enacting the Need-Based Educational Aid Act,<sup>78</sup> which permits colleges and universities to share student financial aid information under certain guidelines.<sup>79</sup> Institutions that admit students on a “need-blind” basis may agree to award

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71. *Id.* at 53.

72. *Id.* at 53–56.

73. *Id.* at 56–81.

74. 15 U.S.C. §§ 1291–95 (2012).

75. *Id.*

76. *Id.* § 1291.

77. *Id.*

78. Need-Based Educational Aid Act of 2008, 15 U.S.C. § 1 (2012). The original enactment contained a sunset provision that terminated the exemption on September 30, 1997. The Need-Based Educational Aid Antitrust Protection Act of 1997, Pub. L. 105-43, § 1, 111 Stat. 1140, extended the exemption to 2001. The Need-Based Educational Aid Act of 2001, Pub. L. 107-72, 115 Stat. 648, subsequently extended the expiration to September 30, 2008, and the Need-Based Educational Aid Act of 2008, Pub. L. 110-327, 122 Stat. 3566, further extended it to September 30, 2015.

79. 15 U.S.C. § 1.

financial aid based only on demonstrated financial need.<sup>80</sup> To do so, these institutions may use common analysis principles to determine need and a common financial aid application form to exchange data about the assets, income, expenses, and related information about the student and the student's family.<sup>81</sup> The statute specifically prohibits "any contract, combination, or conspiracy with respect to the amount or terms of any prospective financial aid award to a specific individual."<sup>82</sup> Further, in 2004, Congress created a specific retroactive exemption for graduate medical-student resident-matching programs.<sup>83</sup> Prior to enactment, antitrust claims alleged that the matching program artificially depressed salaries and benefits for medical residents.<sup>84</sup> The NCAA regulates in an area that involves both education and athletics, so it may be useful to examine the rationales for these exemptions and determine whether they have promoted important policy objectives.

None of these exemptions provide for a complete insulation of the protected parties from antitrust laws. The NFL exemptions are limited to television broadcasting and the merger of the old AFL with the NFL.<sup>85</sup> Antitrust lawsuits against the league and its teams in other areas of commercial activity were litigated after the passage of the Sports Broadcasting Act and the Professional Football League Merger Act.<sup>86</sup> The Need-Based Financial Aid Act is carefully tailored to allow information exchanges but not to endorse any actual tuition or financial aid agreements

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80. *Id.*

81. *Id.* The statute provides that individual financial aid officers at each institution must retain "independent professional judgment" with respect to individual applicants. *Id.* The information exchange is conditioned on institutions being permitted to retrieve data only once with respect to each student. *Id.*

82. *Id.*

83. *See* Confirmation of Antitrust Status of Graduate Medical Resident Matching Programs, 15 U.S.C. § 37b (2012) (permitting use of a "computerized mathematical algorithm . . . to analyze preferences of students and residency programs [to] match students with their highest preferences").

84. *See* *Jung v. Ass'n of Am. Med. Colls.*, 339 F. Supp. 2d 26, 44 (D.D.C. 2004), *aff'd* 184 F. App'x 9 (D.C. Cir. 2006) (quoting 15 U.S.C. § 37b(a)(1)(E)) ("Antitrust lawsuits challenging the matching process, regardless of their merit or lack thereof, have the potential to undermine this highly efficient, pro-competitive, and long-standing process.").

85. *See* 15 U.S.C. § 1291.

86. For a discussion of some of these cases, see Drew D. Krause, Comment, *The National Football League's Ban on Corporate Ownership: Violating Antitrust to Preserve Traditional Ownership—Implications Arising from William H. Sullivan's Antitrust Suit*, 2 SETON HALL J. SPORT L. 175, 186 n.64 (1992).

among schools that would amount to a form of price-fixing.<sup>87</sup> The exemption for medical resident-matching programs is also narrowly limited to the needs of teaching hospitals and specifically excludes agreements between two or more graduate medical education programs to “fix the amount of the stipend or other benefits received by students participating in such programs.”<sup>88</sup>

The NCAA restraints that are often the subject of antitrust claims involve both athletic and educational pursuits.<sup>89</sup> Thus, it is useful to determine whether the rationales underlying the foregoing statutory exemptions lend any support to calls for exempting NCAA activities from federal antitrust law. Some of the calls for granting the NCAA an antitrust exemption suggest that it would enable schools to spend more money on women’s sports and minor men’s sports that do not generate much, if any, revenue.<sup>90</sup> In essence, this would fall within the category of exemption rationales that subsidize or favor a particular group or activity. Arguably, the rationale underlying the financial aid statute is that it will expand educational opportunities to a wider array of applicants.<sup>91</sup> The Sports Broadcasting Act was “rendered largely obsolete by changing economic circumstances and changing judicial application of antitrust law.”<sup>92</sup> When first enacted, it was designed to foster competitive balance and also ensure that viewers of professional football would find it “accessible through the lowest cost means to the general public.”<sup>93</sup> The authorization of the NFL–AFL merger was, in part, justified by the notion that the merger would

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87. See *supra* notes 74–77 and accompanying text.

88. 15 U.S.C. § 37b(b)(3).

89. See Gibson, *supra* note 46, at 220–21.

90. See Brady, *supra* note 54.

91. The statute has been criticized for failing to further the goal of making higher education more affordable. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-963, HIGHER EDUCATION: SCHOOL’S USE OF THE ANTITRUST EXEMPTION HAS NOT SIGNIFICANTLY AFFECTED COLLEGE AFFORDABILITY OR LIKELIHOOD OF STUDENT ENROLLMENT TO DATE 1–2 (2006), available at <http://www.gao.gov/products/GAO-06-963>.

92. *Monograph*, *supra* note 69, at 217. Bundling of league broadcasting rights is more common and “now may well be lawful restraints of competition.” *Id.* at 218. See *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183 (2010) (noting that sports leagues may need to cooperate to promote competitive balance and pursue other procompetitive goals and that a rule-of-reason analysis is appropriate for restraints accompanying the joint venture).

93. *Monograph*, *supra* note 69, at 228–29. Interestingly, in *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 88 (1984), the Supreme Court struck down the NCAA’s television plan for college football, resulting in an increased supply of games and declining revenue based on the forces of renewed competition.



increase the total number of professional football teams.<sup>94</sup>

The statutory exemption in the educational context does not condone or protect any fixing of tuition or financial aid by schools seeking shelter from antitrust liability.<sup>95</sup> The graduate medical school exemption offers no immunity to the actual fixing of salaries and benefits by teaching hospitals.<sup>96</sup> Neither statute would be analogous to the alleged fixing of student-athlete “compensation” for their “labor” as college basketball or football players. If a federal court were to recognize the players as suppliers of services and the NCAA schools as buyers of their labor, the foregoing exemptions would not really provide a good model for antitrust immunity because they steer clear of actually fixing any price or wage. In sum, existing antitrust exemptions in the sports and educational contexts do not afford across-the-board immunity for potential antitrust defendants.

Most of the other statutory antitrust exemptions involve neither academics nor athletics. They cover a broad range of commercial activity.<sup>97</sup> One common thread that runs through much of this legislation is that it protects businesses that lack market power and allows them to act collectively to compete with larger entities or to offset power by businesses with which they deal.<sup>98</sup> In other cases, the exemption is designed to promote and enhance efficient markets. Frequently, the creation of antitrust protection is conditioned on the imposition of governmental regulation to protect the consuming public from economic exploitation.<sup>99</sup> Uncertainty arises regarding the scope of these exemptions and whether they may have

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94. *Monograph, supra* note 69, at 229 n.48. There was also concern that the NFL–AFL rivalry could “imperil the entire industry.” *Id.* at 229–30.

95. *See United States v. Brown Univ.*, 5 F.3d 658, 665–66 (3d Cir. 1993) (“Nonprofit organizations are not beyond the purview of the Sherman Act, because the absence of profit is no guarantee that an entity will act in the best interest of consumers.”)

96. *See Jung v. Ass’n of Am. Med. Colls.*, 339 F. Supp. 2d 26, 35 (D.D.C. 2004), *aff’d* 184 F. App’x 9 (D.C. Cir. 2006).

97. *See supra* notes 69–73 and accompanying text.

98. *See supra* notes 69–73 and accompanying text.

99. *See, e.g.*, Darren Bush, *Mission Creep: Antitrust Exemptions and Immunities as Applied to Deregulated Industries*, 2006 UTAH L. REV. 761, 782–83 (discussing express antitrust immunity for “business of insurance” and noting uncertainty about the degree of regulation required); Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443, 524 nn.285–95 (collecting various statutory antitrust exemptions, some of which include government oversight of private conduct); Christine A. Varney, *The Capper–Volstead Act, Agricultural Cooperatives, and Antitrust Immunity*, ANTITRUST SOURCE 1, 2 (2010) (noting that antitrust exemption for farming cooperatives creates a “countervailing” power for small sellers and promotes efficiency).

outlived their usefulness.<sup>100</sup> These countervailing concerns require an answer to the question of whether any exemption for the NCAA fits within any of these rationales and merits serious consideration.

#### V. ANTITRUST EXEMPTION RATIONALES AND THE NCAA

The \$64,000 question<sup>101</sup> is reduced to this: does any acceptable rationale for a legislative antitrust exemption really further the case for giving one to the NCAA? I think not. The NCAA is not a small operator in a market inhabited by larger entities.<sup>102</sup> It does not lack market power or the ability to negotiate in commercial transactions.<sup>103</sup> The NCAA is the dominant player in intercollegiate athletics, possessing great bargaining power in purchasing the raw ingredients for and selling its athletic product.<sup>104</sup> The only plausible explanation for granting the NCAA and its member institutions an antitrust exemption might be to further the goal of expanding opportunities for student-athletes regardless of whether their sports generate “profit” or “surplus” for their institutions.<sup>105</sup> However, Title IX<sup>106</sup> has been a useful tool for ensuring gender equality in NCAA sports and the NCAA itself requires that schools have a minimum number of men’s and women’s sports to qualify for Division I athletics. Any antitrust exemption that allows colleges and universities to limit coaches’ salaries simply creates a questionable wealth transfer and inhibits competition for skilled teachers of athletic skills

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100. See Bush, *supra* note 99, at 782.

101. This is a reference to the scandal-plagued television quiz show from the 1950s. The term “\$64,000 question” refers to the “big money” question on the show. It may be thought of as the ancestor of the \$1 million question on “Who Wants to be a Millionaire?”

102. See *supra* note 2 and accompanying text.

103. See *supra* note 2 and accompanying text.

104. See *supra* note 2 and accompanying text.

105. See Lazaroff, *supra* note 3, at 370 n.140.

106. Title IX of the Education Amendments of 1972 to the Civil Rights Act of 1964 prohibits sex discrimination in “any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a) (2012). This legislation was strengthened by the Civil Rights Restoration Act of 1987, which legislatively overruled case law limiting Title IX to circumstances where athletic departments at educational institutions directly received federal money. 20 U.S.C. § 1687 (2012). Current regulations promulgated by the Office of Civil Rights in the Department of Education to enforce Title IX are designed to promote equality in financial assistance. See 34 C.F.R. § 106.37 (2007) (discussing financial assistance); *id.* § 106.41(c) (addressing equal opportunity). Section 106.37(a) specifically prohibits providing “different amounts or types of such assistance” based on sex, and section 106.37(c) requires that “reasonable opportunities” be made available for members of each sex to receive scholarships “in proportion to the number of students of each sex participating in [sports].”

and tactics.<sup>107</sup> Arguably, the continued “cap” on economic benefits to student-athletes also suppresses competition for their “labor.”<sup>108</sup> Providing this wealth transfer legal protection from federal antitrust law is unjustifiable, particularly if there is no assurance that the institutions would invest the funds in increased athletic opportunities for those participating in non-revenue sports.<sup>109</sup>

Although the NCAA has generally been successful in repelling antitrust challenges to its amateurism rules, the pending *O’Bannon* class action and language in other cases suggests that tide may turn. An antitrust exemption would perpetuate what many feel is exploitation of college athletes, particularly in football and basketball.<sup>110</sup> In sum, any blanket exemption for the NCAA would allow colleges and universities to keep money that a competitive market would put in the pockets of others.<sup>111</sup> One might call the result a “reverse Robin Hood effect,” where the rich get richer and the have-nots continue to struggle.<sup>112</sup>

One alternative to any across-the-board exemption would be creating immunity subject to independent regulatory oversight. At least in this scenario the NCAA would not be able to act solely in its own economic interest. Rather, a regulator could function as an “honest broker” to ensure equitable treatment of those who deal with NCAA in a commercial context. Some commentators have argued for an exemption conditioned upon the NCAA giving “due process” to those accused of rule violations.<sup>113</sup> While this is a useful contribution, it falls far short of the mark. Protecting individuals and institutions from NCAA overreaching and using questionable investigative tactics is a valid regulatory goal, but it does not address the anticompetitive consequences of NCAA conduct that are alleged to restrain trade. Any antitrust exemption should provide oversight to address the commercial aspects of NCAA activity.

Admittedly, it is difficult to articulate just what agency or oversight body would be capable of taking on the enormous task resulting from my

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107. See *Law v. NCAA*, 134 F.3d 1010, 1021 (10th Cir. 1998)

108. See Lazaroff, *supra* note 3, at 336.

109. See Lazaroff, *supra* note 3, at 336 n.130.

110. See, e.g., Joe Nocera, *The College Sports Cartel*, N.Y. TIMES (Dec. 30, 2011), <http://www.nytimes.com/2011/12/31/opinion/nocera-the-college-sports-cartel.html>.

111. See Joe Nocera, *The Plot to Rule College Sports*, N.Y. TIMES (Aug. 5, 2013), <http://www.nytimes.com/2013/08/06/opinion/nocera-the-plot-to-rule-college-sports.html>.

112. *Id.*

113. See PORTO, *supra* note 51, at 178–96.

alternative proposal. The ABA's monograph on antitrust law exemptions is not optimistic about the prospect of adequate supervision or oversight as a general matter.<sup>114</sup> In the end, however, the monograph's suspicion about the validity of most antitrust exemptions suggests that the optimal approach would be to disallow the exemption.

## VI. CONCLUSION

In sum, the Sherman Act's rule of reason is adequate to consider the procompetitive and anticompetitive effects of NCAA-imposed restraints. Although antitrust litigation is both expensive and time-consuming, it permits a full airing of the competitive consequences of particular trade restraints. The NCAA has been successful in defending some of its commercial practices, and it has also suffered some significant defeats.<sup>115</sup> The debate about the application of substantive antitrust principles to student-athletes' claims is currently front and center. The federal courts should be permitted to hear these cases and make determinations on their merits. Although the players have suffered some setbacks in recent cases, the clamor for treating them more like employees and less like true amateur competitors continues to escalate.

Perhaps student-athletes will be permitted to unionize by the National Labor Relations Board, in which case the non-statutory labor exemption will come into play. Perhaps the matter will be settled in litigation. Courts could conclude that goals like competitive balance or maintaining a clear line of demarcation between professional and amateur sports justify the challenged restrictions. Alternatively, judges might decide that these rationales are not actually furthered by the restraints in question and conclude that the Sherman Act has been violated. Perhaps the NCAA will eliminate or amend some of its rules and regulations to render them less objectionable to potential antitrust plaintiffs and fend off lawsuits.

In any event, granting a blanket antitrust exemption to the NCAA,

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114. See *Monograph, supra* note 69, at 303 (“[W]hen Congress removes antitrust law standards for some particular conduct, the situation will usually call for alternative oversight, usually by a government entity. However, the creation of new agencies and new regulatory roles for existing agencies seems politically infeasible for the time being.”). This monograph was published in 2007, so its skepticism that any new regulatory bodies would be formed in the absence of a genuine crisis might be less justified. Given the gridlock in the federal government, however, the concerns expressed may still be quite valid.

115. See *supra* Part II.

without the farmer watching the henhouse, would be the equivalent of leaving the fox free to devour its prey. Until and unless a sufficient regulatory scheme is devised to ensure that any commercial restraints on coaches' salaries and player "compensation" would serve sound policy goals and expand overall athletic opportunities, application of Sherman Act principles by the courts is a better alternative than blanket immunity. Letting the fowl live is fair!