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In Defense of Sports Antitrust Law: A Response to Law Review Articles Calling for the Administrative Regulation of Commercial Sports

Marc Edelman*

In recent years, two law review articles have proposed that the United States regulate commercial sports through a direct federal commission, rather than through traditional antitrust remedies. Nevertheless, the practical realities of commercial sports' power to influence government policy offset the many theoretical advantages to creating a specialized regulatory body to oversee commercial sports. The commercial sports industry already possesses an extraordinarily strong lobbying arm that has successfully lobbied for special legislation, such as the Sports Broadcasting Act of 1961 and the Professional and Amateur Sports Protection Act of 1992. If commercial sports ever were to become administratively regulated, sports leagues would likely be able to use their lobbying power to obtain even greater concessions under U.S. law. Consequently, this Article argues that, albeit imperfect, antitrust law remains the most practical way to regulate commercial sports leagues.

In recent years, two law review articles have proposed that the United States regulate commercial sports through a direct federal commission, rather than through traditional antitrust remedies.¹ In the 2014 *Oregon Law Review* Article *A Regulatory Solution to Better Promote the Educational Values and Economic*

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1. See *infra* notes 2–3 (presenting the two articles).

Sustainability of Intercollegiate Athletics, law professors Matthew Mitten and Stephen F. Ross proposed that Congress grant an antitrust exemption to college sports teams that are willing to submit voluntarily to the authority of “an independent federal regulatory commission, which would provide an inclusive and transparent rule-making process.”² Thereafter, in the 2015 *Washington and Lee Law Review* Article *Regulating Professional Sports Leagues*, University of Georgia law professor Nathaniel Grow suggested that “[b]ecause the U.S. professional sports leagues . . . effectively operate as natural monopolies . . . direct government regulation of the [professional] industry is warranted.”³

Mitten, Ross, and Grow all make the same astute point: the application of antitrust law to commercial sports leagues is an imperfect science based on the unique economic relationship between sports teams and the league overall.⁴ Grow’s article further recognizes that replacing the judicial regulation of sports leagues with “a specialized regulatory body” could theoretically lead to the better alignment of sports law jurisprudence with public welfare by creating a better method for allocating sports teams to markets and curbing abusive practices related to television broadcast rights.⁵

Nevertheless, the practical realities of commercial sports’ power to influence government policy offset the many theoretical advantages to creating a specialized regulatory body to oversee commercial sports.⁶ The commercial sports industry already

2. Matthew Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 OR. L. REV. 837, 844 (2014).

3. Nathaniel Grow, *Regulating Professional Sports Leagues*, 72 WASH. & LEE L. REV. 573, 574 (2015).

4. See generally *id.* (explaining why application of antitrust law to commercial sports leagues is impractical); Mitten & Ross, *supra* note 2 (same).

5. Grow, *supra* note 3, at 574.

6. See, e.g., Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 702–03 (1989) (discussing the advantages and disadvantages of a regulatory body for commercial sports). As Professor Ross astutely explains in a 1989 law review article that was *opposed* to the administrative regulation of college sports:

Regulation is a poor means of addressing the problems monopoly

possesses an extraordinarily strong lobbying arm that has successfully lobbied for special legislation, such as the Sports Broadcasting Act of 1961⁷ and the Professional and Amateur Sports Protection Act of 1992.⁸ If commercial sports ever were to become administratively regulated, sports leagues would likely be able to use their lobbying power to obtain even greater concessions under U.S. law.⁹

By contrast, the application of antitrust law to commercial sports, albeit imperfect, has remained relatively free from political influence. Important labor-antitrust lawsuits have prevented sports leagues from boycotting athletes, restraining player movement, and implementing extensive player drafts in the absence of a collective bargaining relationship.¹⁰ Meanwhile, product-side antitrust lawsuits involving the commercial sports industry have protected free markets for selling college sports broadcast rights and assigning professional sports licensing rights.¹¹

This Article argues that albeit imperfect, antitrust law remains the most practical way to regulate commercial sports leagues. Part I of this Article summarizes the arguments made by

sports leagues cause. One reason is that a regulatory solution is unlikely to be effective. Regulatory decisions have a far more significant impact on the small number of those subject to regulation—in this case the team owners—than on the rest of the American people. Owners therefore have strong incentives to organize and lobby for regulations that serve their interests. As a cohesive and interested group, owners will lobby effectively. The general populace, with less at stake and with divergent interests, will be less able to lobby effectively. Thus, those officials assigned to regulate the sports industry soon may become “captured” by the very owners that they supposedly are regulating.

Id.

7. Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (2012).

8. Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. § 3701 (2012).

9. See Ross, *supra* note 6, at 702–03 (expressing these concerns in the context of professional sports leagues).

10. See *infra* notes 31–42 and accompanying text (discussing labor-side antitrust lawsuits).

11. See *infra* notes 43–47 and accompanying text (explaining product-side antitrust lawsuits).

Mitten, Ross, and Grow in opposition to applying traditional antitrust law to commercial sports leagues. Part II provides numerous examples of how courts have been relatively effective in applying antitrust law to commercial sports for the purposes of benefiting the consumer interest. Part III explores examples of how professional sports leagues have previously used their lobbying power to secure preferential treatment, and how increasing “direct government regulation” of sports might exacerbate the already undeniable inequity in bargaining power between professional sports leagues and the American public. Ultimately, the Article concludes by calling for the maintenance of the status quo—using traditional antitrust law to regulate commercial sports—with the lone caveat that Congress should repeal the few existing antitrust exemptions that provide commercial sports leagues with greater legal protection than other forms of business joint ventures.

I. The Opposition to Applying Antitrust Law to Commercial Sports Leagues

The two recent law review articles that seek to replace antitrust regulation of commercial sports with an administrative solution both come from an ethical place—the desire to align legal outcomes in commercial sports with societal interests across various stakeholder groups.¹² Both articles’ authors are hardened believers that antitrust law currently applies to the commercial sports industry—without certain aspects of baseball—but that

12. See Grow, *supra* note 3, at 578

[D]irect federal regulation of the [professional sports] industry is particularly justified not only insofar as Congress has itself granted the leagues some of their monopoly power through the enactment of various antitrust exemptions but also in light of the fact that the public has repeatedly helped subsidize the industry by providing billions of dollars in stadium funding.

Mitten & Ross, *supra* note 2, at 844 (arguing that the reason for administrative regulation of college sports is “the establishment of an independent federal regulatory commission, which would provide an inclusive and transparent rule-making process readily accessible to all intercollegiate athletics stakeholders and the public”).

certain legal outcomes are suboptimal without implementing special legislation.¹³

The first of these two articles, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, arises from a concern that traditional antitrust law fails to regulate adequately the college sports industry because a proper application of the Sherman Act to the National Collegiate Athletic Association (NCAA) would lead to a free market solution: an outcome benefiting elite college athletes but perhaps not the common college athlete or attendee.¹⁴ Specifically, Mitten and Ross express concerns that if the NCAA's Principle of Amateurism were to fall under antitrust law, elite college athletes would become extraordinarily wealthy, while some economic resources would be shifted away from education.¹⁵ To avoid that result, Professors Mitten and Ross propose that the law should instead grant an antitrust exemption to college sports entities so long as these entities are willing to submit voluntarily to the authority of an independent federal regulatory commission.¹⁶ In the opinions of Mitten and Ross, this would allow colleges and their athletic programs to "use monopoly profits for worthy causes."¹⁷

13. See Mitten & Ross, *supra* note 2, at 869 (recognizing that there is no exemption from antitrust law under the current regime); Nathaniel Grow, *Antitrust and the Bowl Championship Series*, 2 HARV. J. SPORTS & ENT. L. 53, 53 (2011) (concluding that college football's Bowl Championship Series is subject to antitrust law and "remains vulnerable to antitrust attack" on multiple grounds).

14. Mitten & Ross, *supra* note 2, at 865–66.

15. See *id.*

Given the legal barriers and other practical difficulties of unionizing college athletes on a national basis, the likely effect of a purely antitrust remedy will be to correct the economic exploitation of a handful of star players participating in big-time intercollegiate sports at the expense of most other Division I football and men's basketball players, whose economic value would not justify a full athletic scholarship.

16. See *id.* at 844 ("A key component of this law would be the establishment of an independent federal regulatory commission, which would provide an inclusive and transparent rule-making process readily accessible to all intercollegiate athletics stakeholders and the public."); see also *id.* at 861 ("For a variety of reasons, we believe that use of the Sherman Act is an ill-fitting solution to these problems.")

17. *Id.* at 862.

In the second article, *Regulating Professional Sports Leagues*, the author, Nathaniel Grow, reaches much the same conclusion in favor of administrative remedies; Grow's article, however, relies more on the unique business structure of professional sports leagues, rather than the moral superiority of their business goals over business goals in other industries.¹⁸ Ultimately, Grow concludes that "government regulation, ideally in the form of a federal sports regulatory body, represents the only practical means for curbing the anticompetitive behavior of the monopoly sports leagues"¹⁹ and that "the creation of a federal regulatory authority to supervise the professional sports industry is both necessary and warranted to safeguard the public interest."²⁰

In his economic analysis, Grow describes professional sports leagues as "natural monopolies"—recognizing that breaking up the big leagues would not be a desirable solution from a consumer perspective, even though each of the big four U.S. professional sports leagues exercise collective monopoly power.²¹ He also notes that "the U.S. professional sports industry has become a public trust, with sports franchises deeply woven into the fabric of their host communities"²²—a similar "sports is special" argument to the one that Mitten and Ross articulated. But Grow also seems to share a greater concern for the ultimate consumer rather than just other constituent groups.²³

II. Despite Opposition to the Status Quo, Courts Have Been Relatively Effective at Applying Antitrust Law to Commercial

18. See Grow, *supra* note 3, at 581 ("Because individual teams in a league must work closely together to coordinate competitive athletic events, courts have struggled to apply [Section 1 of the Sherman Act] in a consistent and coherent manner to curtail the leagues' anticompetitive practices.").

19. *Id.* at 577.

20. *Id.* at 641.

21. *Id.* at 578.

22. *Id.*

23. *Id.* at 581 (noting that because sports league "enjoy a well-entrenched monopoly status—due to the significant barriers to entry that exist in the industry—the anti-monopolization restrictions in Section 2 of the [Sherman] Act have likewise failed to curb the leagues' abuse of monopoly power").

Sports Enterprises

In some ways, the work of Mitten, Ross, and Grow is not that surprising. It has long been argued that applying antitrust law to the commercial sports industry resembles fitting a square peg into a round hole.²⁴ Indeed, courts have consistently rejected applying antitrust law's *per se* test to joint venture industries.²⁵ And, commercial sports is the truest form of a joint venture because no single sporting event could commence without a contractual relationship between two different teams.²⁶

But what Mitten, Ross, and Grow all seem to recommend—stripping the courts of their antitrust enforcement powers with respect to sports—is a titanic solution, and it should not be adopted lightly. There are very few industries in the United States that are overseen by administrative regulation rather than antitrust law.²⁷ And oftentimes, these special antitrust exemptions have existed for many years: in some cases almost as

24. See, e.g., Daniel A. Lazaroff, *Sports Equipment Standardization: An Antitrust Analysis*, 34 GA. L. REV. 137, 156 (1999) (“In the context of the sports industries this [antitrust] analysis can be especially complicated. . . . One sometimes feels that it is a case of trying to make the proverbial square peg (the antitrust laws) fit into the proverbial round hole (the business of organized sports).”). See generally *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1401 (9th Cir. 1983) (“The [National Football League] is an unique business organization to which it is difficult to apply antitrust rules which were developed in the context of arrangements between actual competitors.”).

25. See *Texaco Inc. v. Dagher*, 547 U.S. 1, 8 (2006) (holding that “the pricing decisions of a legitimate joint venture do not fall within the narrow category of activity that is *per se* unlawful under § 1 of the Sherman Act”).

26. See *Am. Needle v. Nat'l Football League*, 560 U.S. 183, 198 (2010) (“Respondents argue that . . . without their cooperation, there would be no NFL football. It is true that the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival.”) (citation omitted); *Laumann v. Nat'l Hockey League*, 56 F. Supp. 3d 280, 286 (S.D.N.Y. 2014) (acknowledging that “[t]he clubs within each [sports league] are competitors—both on the field and in the contest to broaden their fan bases[; however], the clubs must also coordinate in various ways in order to produce live sporting events, including agreeing upon the game rules and setting a schedule of games for the season”).

27. See E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 77–89 (5th ed. 2009) (discussing interplay between antitrust law and administrative regulation).

long as the Sherman Act itself.²⁸ Furthermore, creating a new exemption from antitrust law for commercial sports would deny the many ways in which sports-antitrust jurisprudence, albeit imperfect, has led to logical and predictable outcomes.²⁹

With respect to the historic application of antitrust law to the collective decision-making by professional sports leagues, courts many times have issued decisions that protect the consumer interest.³⁰ Some of the most important antitrust decisions have emerged in the context of labor-side challenges to the restrictive practices of professional sports leagues.³¹ For example, in *Smith v. Pro Football Inc.*,³² the court held that an extensive, management-implemented draft that assigned players to specific teams violated Section 1 of the Sherman Act as a form of illegal market allocation and group boycott.³³ Similarly, in *Mackey v. National Football League*,³⁴ the court enjoined management-implemented restraints on the movement of free agent football players.³⁵ Meanwhile, famous cases such as *Denver Rockets v. All-Pro Management, Inc.*,³⁶ *Linseman v. World Hockey Association*,³⁷ and *Boris v. U.S. Football League*³⁸ all prevented sports leagues from unilaterally implementing minimum age requirements for competition.³⁹

28. See, e.g., *id.* at 84 (describing antitrust exemption for export associations under the Webb-Pomerene Act, enacted in 1918).

29. See *infra* notes 32–56 and accompanying text (presenting antitrust cases that have yielded positive outcomes).

30. See *infra* notes 32–47 and accompanying text (analyzing decisions that protect consumer interests).

31. See *infra* notes 32–42 and accompanying text (discussing labor-side antitrust cases).

32. 593 F.2d 1173 (D.C. Cir. 1978).

33. See *id.* at 1187 (“[W]e conclude that the draft as it existed in 1968 was an unreasonable restraint of trade.”).

34. 543 F.2d 606 (8th Cir. 1976).

35. See *id.* at 622–23 (concluding that the then-current system for moving free agent football players violated the Sherman Act).

36. 325 F. Supp. 1049 (C.D. Cal. 1971).

37. 439 F. Supp. 1315 (D. Conn. 1977).

38. No. 83-4980, 1984 WL 894 (C.D. Cal. Feb. 28, 1984).

39. See Marc Edelman & Joseph A. Wacker, *Collectively Bargained Age/Education Requirements: A Source of Antitrust Risk for Sports Club-Owners or Labor Risk for Players Unions?* 115 PENN ST. L. REV. 341, 363–64

Of course, today, there is substantially less labor-side antitrust litigation involving professional sports leagues.⁴⁰ Reason being, players have unionized, and thus, the leagues often can avoid labor-side antitrust litigation based on the non-statutory labor exemption.⁴¹ Nevertheless, the threat of players decertifying their union to bring antitrust litigation against their league remains very real—so much so that players are sometimes able to negotiate more favorable collective bargaining agreements based on the threat, in the alternative, of decertifying.⁴²

With respect to product-side antitrust cases, antitrust law, at times, has also been highly effective at protecting the public interest.⁴³ While antitrust law has not succeeded at mandating court-ordered expansion of professional sports leagues,⁴⁴ at times it has invalidated league rules that prevented existing teams

(2010) (addressing the question of whether “the NFL & NBA age/education requirements violate principles of antitrust law”).

40. See MARC EDELMAN & GEOFFREY CHRISTOPHER RAPP, CAREERS IN SPORTS LAW 51–52 (2014) (“[T]he nature of today’s antitrust litigation against professional sports leagues has changed because the players in each of the four major sports leagues have unionized.”).

41. See 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, 415–16 (2009)

The non-statutory labor exemption is a court-created exemption, resulting from judicial decisions to give aspects of collective bargaining agreements further immunity from antitrust law. The non-statutory exemption has an important place in sports law because players’ associations (unions) collectively bargain with teams (employers) to form a league’s collective bargaining agreement.

42. See Marc Edelman, *How to Curb Professional Sports’ Bargaining Power vis-à-vis the American City*, 2 VA. SPORTS & ENT. L.J. 280, 304 (2003) [hereinafter *Sports’ Bargaining Power*] (discussing the threat of antitrust litigation against unions); see also generally *Mid-South Grizzlies v. Nat’l Football League*, 550 F. Supp. 558 (E.D. Pa. 1982), *aff’d* 720 F.2d 772 (3d. Cir. 1983) (rejecting that claim that antitrust law’s “essential facilities doctrine” mandated court-ordered expansion to allow the Grizzlies into the National Football League); *Seattle Totems v. Nat’l Hockey League*, 783 F.2d 1347 (9th Cir. 1986) (rejecting the use of antitrust law as a means to secure the Seattle Totems’ expansion into the National Hockey League).

43. See *infra* notes 44–47 and accompanying text (discussing product-side antitrust cases).

44. See *supra* note 42 and accompanying text (citing cases in which courts refused to use antitrust law as means of mandating expansion).

from moving to untapped markets where consumer demand for pro sports has been highest.⁴⁵ Antitrust law also has called into doubt the legality of sports leagues maintaining exclusive licensing agreements with a single apparel manufacturer⁴⁶ and called into doubt whether sports leagues may blackout the digital availability of certain sporting events in certain markets.⁴⁷

In the area of collegiate sports, antitrust lawsuits have also produced desirable societal incomes in the cases in which courts have applied these laws properly, rather than manufactured a special, imaginary exemption for the collegiate sports industry.⁴⁸ *NCAA v. Board of Regents*⁴⁹ is one of the cases that best epitomizes the potential of antitrust law to yield beneficial results for consumers in the area of college sports. Before the antitrust lawsuit, the NCAA limited the number of times that any given college sports program could appear on national television—thus limiting the opportunity of college sports fans to watch games featuring their favorite teams.⁵⁰ The Supreme Court ultimately struck down the NCAA's restraint, however, producing the result that individual teams may appear on television as frequently as the free market demands.⁵¹ Nowadays, Notre Dame University

45. See, e.g., *L.A. Mem'l Coliseum Inc. v. Nat'l Football League*, 726 F.2d 1381, 1401 (9th Cir. 1983) (affirming, under antitrust law, a judgment enjoining the NFL from preventing the Raiders from relocating from Oakland, California to Los Angeles, California).

46. See generally *Am. Needle v. New Orleans Saints*, No. 04-cv-7806, 2014 WL 1364022 (N.D. Ill. Apr. 7, 2014) (denying the National Football League's motion for summary judgment in an antitrust lawsuit challenging the NFL team's collective and exclusive licensing arrangement for use of team marks on branded apparel).

47. See generally *Laumann v. Nat'l Hockey League*, 56 F. Supp. 3d 280 (S.D.N.Y. 2014) (denying summary judgments to defendants in antitrust lawsuit challenging arrangements in Major League Baseball and the National Hockey League that grant exclusive territorial broadcast rights to particular teams and, in terms, particular cable carriers who contract with those teams).

48. See *infra* notes 49–56 and accompanying text (explaining collegiate antitrust cases).

49. 468 U.S. 85 (1984).

50. See *id.* at 91–94 (describing the NCAA's television plan as was in place beginning during the 1982 college football season).

51. See *id.* at 120 (holding that “the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather

plays all of its football games on national television—a logical marketplace result given the college football program’s huge fan base and the ability of NBC to sell advertising time at a premium during Notre Dame’s football contests.⁵²

Another example in which the application of antitrust law yielded a logical and economically sound result in the context of college sports was *Law v. NCAA*.⁵³ There, the U.S. Court of Appeals for the Tenth Circuit held that the NCAA’s attempt to cap low-level assistant coaches’ salaries at \$16,000 per year was illegal because the restraint did not promote any legitimate antitrust goal related to competition.⁵⁴ In overturning the NCAA’s salary cap on low-level assistant coaches, the court recognized that it was irrelevant whether the NCAA’s salary restraint would cut members’ costs because “cost-cutting by itself is not a valid procompetitive justification.”⁵⁵ Moreover, one could perhaps perceive the NCAA’s salary cap on low-level assistant coaches as simply an attempt at cost-shifting payments away from low-level assistant coaches and to the head coaches and athletic directors that drive much of the organized voting power in college sports.⁵⁶

Finally, the litigations of *O’Bannon v. NCAA*⁵⁷ and *Jenkins v. NCAA*⁵⁸—both of which use antitrust principles to challenge the lack of free market for college athlete compensation—may further

than enhanced the place of intercollegiate athletics in the Nation’s life”).

52. See *NBC’s Notre Dame Deal Extended*, ESPN (Apr. 18, 2013), http://espn.go.com/college-football/story/_/id/9186897/nbc-extends-notre-dame-fighting-irish-football-deal-2025 (last visited Aug. 29, 2015) (discussing Notre Dame University’s television arrangement with NBC) (on file with the Washington and Lee Law Review).

53. 134 F.3d 1010 (10th Cir. 1998).

54. *Id.* at 1014, 1020.

55. *Id.* at 1014, 1022.

56. See Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA’s No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 76–77 (2013) [hereinafter *A Short Treatise*] (comparing the NCAA’s rationale for curbing low-level assistant coaches’ salaries in *Law* with the NCAA’s current efforts to prevent college athlete compensation for their work product).

57. 7 F. Supp. 3d 955 (N.D. Cal. 2014).

58. No. 14-cv-02758-CW, (D.N.J. Mar. 17, 2014).

align the proper antitrust remedy with a result that is fair from a stakeholder management perspective.⁵⁹ If properly decided in favor of the plaintiffs, these cases could end the system of collective restraints that maintains wealth of college sports “in the hands of a select few administrators, athletic directors, and coaches.”⁶⁰ Irrespective of whether the ultimate result is a true free market for college athletes’ services where superstar athletes earn the overwhelming majority of player revenues (as Mitten and Ross fear) or a negotiated settlement where revenues are spread more equally among players (an outcome Mitten and Ross would struggle to oppose), either way the needs of a far broader range of stakeholders becomes protected.

Of course, none of these examples purport that the application of antitrust law to the commercial sports industry operates perfectly, and it ignores the many cases in which the optimal outcome did not emerge.⁶¹ Before removing antitrust law’s oversight from the commercial sports industries, however, one would need to make a compelling case that an administrative remedy would indeed fair better at preserving certain core values. Whether that would be the case is subject to doubt.⁶²

III. The Administrative Solution Risks Making Professional and College Sports Entities Even More Powerful

While applying antitrust law to the commercial sports industries has been an imperfect art, there is strong reason to believe that applying an administrative solution would be a downright disaster. It is axiomatic that both professional sports leagues and the NCAA are incredibly powerful entities that yield

59. See Marc Edelman, *The District Court Decision in O’Bannon v. National Collegiate Athletic Association: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV. 2319 (2014) (discussing both the *O’Bannon* and *Jenkins* litigations).

60. Marc Edelman, Note, *Reevaluating Amateurism Standards in Men’s College Basketball*, 35 U. MICH. J.L. REF. 861, 864 (2002).

61. See *A Short Treatise*, *supra* note 56, at 83–94 (discussing numerous cases in which courts seemed to misapply antitrust law to NCAA conduct and perhaps make the wrong decision of under-enforcement of the antitrust laws).

62. See *infra* Part III (analyzing weaknesses of an administrative remedy).

striking political power.⁶³ This type of political power is likely to affect administrative remedies far more substantially than antitrust ones, which are decided by judges appointed for life.⁶⁴

Indeed, one can already observe the extreme political power exerted by professional and amateur sports leagues based on a wide range of special legislation.⁶⁵ In terms of professional sports, the enactment of the Sports Broadcasting Act is one such example of special legislation designed to insulate sports-league liability.⁶⁶ Before the passing of this act, at least one court held that a sports league's territorial restraints on television and radio broadcasts violated Section 1 of the Sherman Act.⁶⁷ The Sports Broadcasting Act, however, exempted from the purview of antitrust law the pooling and collective sale of television broadcast rights for "the sponsored telecasting of the games of football, baseball, basketball, or hockey."⁶⁸

Another example of such special legislation successfully obtained by the sports leagues is the Professional and Amateur Sports Protection Act (PASPA).⁶⁹ Congress passed this act in 1992, in response to pressure by the U.S. sports leagues to crack down on private and state-sponsored sports gambling.⁷⁰ In

63. See *Sports' Bargaining Power*, *supra* note 42, at 304 (describing the extreme political power of professional sports leagues given the scarcity of teams in each league); see also, e.g., Ross, *supra* note 6, at 702–03, 755 (same); Greg Johnson, *Lawmaker Challenges NCAA on Tax Exemption: Rep. Thomas Questions Athletic Programs' Link to Education, But Group Says IRS Supports Status*, L.A. TIMES, Oct. 6, 2006, at 13 (quoting Professor Gary Roberts, who is one of the seminal figures in the field of sports law, describing the political power of college sports as "unbelievable").

64. See Ross, *supra* note 6, at 702–03 (expressing concerns that administrative regulation of professional sports would ultimately lead to the regulation becoming "captured" by the very owners that they supposedly are regulating").

65. See *infra* notes 66–75 and accompanying text (discussing special legislation).

66. Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (2012).

67. See generally *United States v. Nat'l Football League*, 116 F. Supp. 319 (E.D. Pa. 1953) (discussing the antitrust violations of sports' restraints on media coverage).

68. 15 U.S.C. § 1291.

69. Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. § 3701 (2012).

70. See *A Short Treatise*, *supra* note 56, at 36 (citing Erick S. Lee, *Play*

pertinent part, PASPA makes it illegal for any private person or state to operate “a lottery, sweepstakes, or other betting, gambling, or wagering scheme based directly or indirectly . . . on one or more competitive games in which amateur or professional athletes participate.”⁷¹ Astoundingly, the statute even grants standing to America’s four major professional sports leagues and the NCAA to bring suit against any state or individual that operates such a wagering scheme—placing these commercial sports leagues in shoes akin to the government.⁷²

Meanwhile, in the arena of college sports, the Uniform Athlete Agents Act (UAAA) and the Sports Agents Responsibility and Trust Act (SPARTA) represent two examples of special interest legislation that protects the needs of powerful universities to the detriment of other college sports stakeholder groups.⁷³ Specifically, the UAAA and SPARTA indoctrinate

Ball! Substituting Current Federal Non-Regulation of Fantasy Sports Leagues with Limited Supervision of Hyper-Competitive Leagues, 29 LOY. L.A. ENT. L. REV. 53, 78 (2008)).

71. 28 U.S.C. § 3702. The original language in PASPA further disallows the case with respect to the operation of a lottery, sweepstakes, or other betting, gambling, or wagering scheme based on “one or more performances of such athletes in such games”; that provision, however, was arguably invalidated by Congress when it passed the narrow federal carve-out for certain fantasy sports contests, articulated in the Unlawful Internet Gambling Enforcement Act. *Id.*; see also Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5362(10) (2012); Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. MARSHALL L. REV. 1195, 1215 (2007) (“[A] strong argument can be made that the UIGEA has clarified PASPA and that certain fantasy sports contests are now exempt from federal gambling prohibitions.”); I. Nelson Rose & Rebecca Bolin, *Game On for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 45 CONN. L. REV. 653, 686 (2012) (“PASPA in its modern incarnation now has haphazard exceptions including jai alia from PASPA definitions, likely fantasy sports from UIGEA’s loopholes, and the gray area of some state’s Calcutta pools.”). *But see* 31 U.S.C. § 5361(b) (2006) (explaining that language of the UIGEA was not intended to serve as a defense to any other crime).

72. 28 U.S.C. § 3703 (explaining that “[a] civil action to enjoin a violation of [the PAPSA] may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation” (emphasis added)).

73. See Marc Edelman, *Disarming the Trojan Horse of the UAAA and SPARTA: How America Should Reform Its Sports Agent Laws to Conform with True Agency Principles*, 4 HARV. J. SPORTS & ENT. L. 145, 166–80 (2013)

certain aspects of the NCAA's Principle of Amateurism into law, which, in turn, helps enable NCAA member schools to fix college athletes' wages at zero.⁷⁴ Most astoundingly, "the UAAA provides a private cause of action to NCAA member schools against sports agents [who attempt to compensate college athletes but] fails to provide student-athletes with the same right to seek a civil remedy against agent misconduct."⁷⁵

Given the ease with which amateur and professional sports entities have been able to push forward special legislation, one must reasonably worry about whether the priorities of an administrative body would truly benefit all sports constituencies. It is hard not to imagine the employer side having the upper hand. In professional sports, this would be the team owners. In college sports, it would be the universities, as well as their athletic directors and coaches that often determine college sports' business practices.

IV. Conclusion

In conclusion, Winston Churchill once famously stated that "democracy is the worst form of government, except for all the others."⁷⁶ In that same vein, antitrust law may be the worst form of governance for commercial sports, except for all the others. Applying a set of principles that were first envisioned in the 1890s to deal with collusion and monopolization to true joint venture enterprises, of course, needs to make one at least pause.

[hereinafter *Reforming Sports Agent Laws*] (explaining that Florida State University president Sandy D'Alemberte was a driving force behind the drafting and passing of the UAAA; meanwhile, Tom Osborne, a former head football coach at the University of Nebraska turned Congressperson was instrumental behind the drafting and passing of SPARTA); see also UNIF. ATHLETE AGENTS ACT §§ 1–22 (NAT'L CONF. COMM'R UNIF. STATE LAW 2000) (providing text for the model Uniform Athlete Agents Act); Sports Agent Responsibility and Trust Act, 15 U.S.C. §§ 7801–7807 (2012) (regulating the relationship between athletes and sports agents).

74. *Reforming Sports Agent Laws*, supra note 73, at 172 (citations omitted).

75. *Id.* at 173.

76. *High Life: A Weekly Forum for High School Students*, L.A. TIMES, May 16, 1991, at 3.

Nevertheless, antitrust law's Rule of Reason was specifically designed to address more unusual marketplaces, such as commercial sports.⁷⁷ When compared to the alternatives, antitrust law has done a rather excellent job. The points that Professors Mitten and Ross raise in *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics* and that Professor Grow raises in *Regulating Professional Sports Leagues* are indeed good ones.⁷⁸ Perhaps in a utopian world where administrative oversight of commercial sports was feasible without political pressure substantially swaying the outcome, the esteemed professors would be right in calling for an antitrust exemption coupled with administrative oversight.

There is no basis, however, to presume that the values that Mitten, Ross, or Grow espouse would necessarily be adopted by an administrative body overseeing commercial sports, especially when faced with strong political pressure from sports owners and colleges to adopt policies more favorable to their constituent groups.⁷⁹ Moreover, with respect to the Mitten and Ross Article, one could reasonably question whether the ethical values proposed are even the right ones to govern commercial, collegiate sports. In an overall capitalist society where the principles of supply and demand determine the salaries of everyone, from university administrators to college coaches and professors, it is dubious whether one's vision of the greater good should preempt the "Invisible Hand" solely in the labor market for college-athlete services.

While it is the job—if not the duty—of good academics to ponder legal change, the external governance of commercial sports may be one area in which any change would exacerbate an

77. See *L.A. Mem'l Coliseum Inc. v. Nat'l Football League*, 726 F.2d 1381, 1401 (9th Cir. 1983) (explaining that professional sports is exactly the kind of unique industry where antitrust law's Rule of Reason applies rather than the *per se* test for illegality).

78. Mitten & Ross, *supra* note 2; Grow, *supra* note 3.

79. See Ross, *supra* note 6, at 702–03 (acknowledging that administrative regulation of professional sports would lead to the system of oversight ultimately being "captured" by the very owners that they supposedly are regulating").

already imperfect situation. Although imperfect, the application of antitrust law has long protected consumers against the misallocation of player labor, foreclosure from the market of desirable player labor, and deprivation of the opportunity to view their favorite sporting events.⁸⁰ Although applying antitrust law to commercial sports has its shortcomings, trading away these safeguards in favor of a new bureaucracy poses a far greater risk to most stakeholders.

Thus, albeit imperfect, the best way to regulate commercial sports is simply to maintain the status quo and hold commercial sports leagues fully subject to the requirements of U.S. antitrust law. At least under the current system, there is some precedent for courts overturning commercial sports leagues' anticompetitive practices. There is also less of a risk that the decision-making process would become politicized.

80. See *supra* notes 30–52 and accompanying text (summarizing examples of how antitrust law has protected consumer interests).