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Out of Bounds: Commerce Clause Protection from State Antitrust Statutes for Regional Athletic Conferences

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ABSTRACT

Collegiate athletic conferences generate billions of dollars annually. With conferences competing for $300 million plus television contracts, it has become increasingly important that conferences align themselves with the highest quality institutions possible. As a result, individual institutions have shifted from one conference to another with hopes of cashing in on higher revenue opportunities. The regional athletic conferences that govern these individual institutions are different from most commercial actors because their very nature requires that they be regulated on a national/regional level if they are to exist at all. Each member of a conference voluntarily agrees to be bound by the conference's constitution and by-laws. As such, it is imperative that the by-laws and rules be applied uniformly across the conference in order to have any possibility of functioning effectively.

However, subjecting regional athletic conferences to state antitrust laws imposes an excessive burden on the conference without a corresponding local benefit. If regional athletic conferences were subject to state antitrust claims, the member institution's state with the strictest antitrust laws would effectively regulate the activities of the member institutions in other states. In effect, a conference would be stripped of its ability to freely adopt and enforce its own procedural regulations. To avoid these burdens, regional athletic conferences should be able to seek protection by invoking the dormant side of the Commerce Clause in the face of state antitrust claims. The trajectory of case law on the subject suggests that it is logical that regional athletic conferences should enjoy the protection of the dormant Commerce Clause.

INTRODUCTION

As of April 2014, the total annual revenue for National Collegiate Athletic Association (NCAA) affiliated institutions was estimated at approximately $10.6 billion.[1] Of that total figure, the Power 5[2] conferences combined to produce approximately $1.48 billion in total revenue.[3] With increasing revenues and conference realignment at an all-time high,[4] some conferences amended their bylaws to include exit penalty provisions. Most notably, the Atlantic Coast Conference (ACC) amended its constitution to include a withdrawal payment.[5] That provision became the subject of

1. *NCAA College Athletics Statistics*, STAT. BRAIN RES. INST. (Apr. 26, 2015), http://www.statisticbrain.com/ncaa-college-athletics-statistics/ [http://perma.cc/78G6-NKWV].

2. The Power 5 conferences include: Atlantic Coast Conference (ACC); The Big Ten Conference (Big Ten); Big 12 Conference (Big 12); PAC-12 Conference (PAC-12); and the Southeastern Conference (SEC). *See, e.g.*, Ken Bradley, *Week 3 Power 5 Conference Rankings*, SPORTING NEWS (Sept. 15, 2015), http://www.sportingnews.com/ncaa-football-news/4655310-power-5-conference-power-rankings-week-3-sec-big-ten-pac-12-acc-big-12 [http://perma.cc/3XXD-AEP6].

3. The ACC produced $291.7 million in revenue. Andrea Adelson, *Average of $20.8M to Each in ACC*, ESPN (June 6, 2014), http://espn.go.com/college-football/story/_/id/11044060/acc-distributed-record-2917-million-total-revenue-2013-14-fiscal-year [http://perma.cc/9CME-L8Z]. The Big Ten produced $318.4 million in revenue and the SEC produced $314.5 million in revenue. Steve Berkowitz, *Big Ten Still Leads Leagues in College Sports Revenue*, USA TODAY (May 16, 2014, 10:41 PM), http://www.usatoday.com/story/sports/college/2014/05/16/big-ten-conference-highest-revenue-college-sports/9190139/ [http://perma.cc/9EUG-25A2]. The Big 12 produced $221 million in total revenue. Wendell Barnhouse, *Big 12 Announces Record Revenue Distribution*, BIG12SPORTS.COM (May 30, 2014), http://www.big12sports.com/ViewArticle.dbml?ATCLID=209513755 [http://perma.cc/928V-K729]. The PAC-12 produced $334 million in revenue. Dennis Dodd, *Pac-12 Returned Only 68 Percent of its Record Revenues to Schools*, CBSSPORTS.COM (July 17, 2014, 3:28 AM), http://www.cbssports.com/collegefootball/writer/dennis-dodd/24590668/pac-12-returned-only-68-percent-of-its-record-revenues-to-schools [http://perma.cc/M44M-U48X].

4. From the start of 2010 through the date of this article, the Power 5 conferences experienced the following realignment: (1) the ACC added Notre Dame University, Syracuse University, the University of Louisville, and the University of Pittsburgh while losing the University of Maryland as a member; (2) the Big Ten added the University of Nebraska, Rutgers University, and the University of Maryland; (3) the Big 12 added West Virginia University and Texas Christian University while losing the University of Nebraska and the University of Colorado; (4) the PAC-12 added the University of Colorado and the University of Utah; and (5) the SEC added Texas A&M University and the University of Missouri. Matt Peloquin, *Conference Realignment,* CONFERENCESPORTSINFO.COM, http://collegesportsinfo.com/conference-realignment-grid/ [http://perma.cc/Z964-4JRF] (last updated Sept. 1, 2015).

5. Section IV-5 of the current version of the ACC Constitution provides:

> Upon official notice of withdrawal, the [ACC] member will be subject to a withdrawal payment, as liquidated damages, in an amount equal to one and

litigation between the conference and the University of Maryland when the University of Maryland publicly announced that it would leave the ACC in order to join the Big Ten Conference.[6] In response to allegations of a state antitrust violation, the ACC sought dismissal on the grounds that the application of Maryland's antitrust statutes violated the Commerce Clause of the United States Constitution.[7]

Congress is granted the power "[t]o regulate Commerce . . . among the several States . . . ."[8] The Commerce Clause, phrased as an affirmative grant of power, is a limitation on state powers. The clause limits state interference with interstate commerce, even without legislation implemented by Congress.[9] As such, the Commerce Clause can operate to invalidate state statutes where the indirect effects of a piece of legislation on interstate commerce impose a burden on commerce that is "clearly excessive in relation to the putative local benefits."[10] This operation of the Commerce Clause is generally referred to as the "dormant" Commerce Clause. In the context of collegiate athletics, interstate commerce is excessively burdened when the state statute attempts to govern "phases of

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> one-quarter (1¼) times the total operating budget of the Conference . . . which is in effect as of the date of the official notice of withdrawal. The [ACC] may offset the amount of such payment against any distributions otherwise due such member for any Conference year. Any remaining amount due shall be paid by the withdrawing member within 30 days after the effective date of withdrawal.

ATL. COAST CONFERENCE, ACC MANUAL 21 (2012–2013), http://grfx.cstv.com/photos/schools/bc/genrel/auto_pdf/2012-13/misc_non_event/2012_13_ACC.pdf [http://perma.cc/X8ST-NHUQ].

6. Atl. Coast Conference v. Univ. of Md. at Coll. Park, 751 S.E.2d 612, 614 (N.C. Ct. App. 2013). After receiving notice of withdrawal from the University of Maryland, the ACC filed a declaratory judgment action seeking to establish the obligations of each party under the conference constitution. *Id.* at 614–15. On January 18, 2013, the University of Maryland filed a complaint in the Circuit Court for Prince George's County, Maryland asserting that the withdrawal penalty violated Maryland's antitrust statutes. Complaint at 34–38, Bd. of Regents v. Atl. Coast Conference, No. CAL13-02189, 2013 Md. Cir. Ct. LEXIS 4 (June 27, 2013). The case was eventually settled out of court before the ultimate issues could be reached. Steve Berkowitz, *ACC, Maryland Reach Settlement on Exit Fee*, USA TODAY (Aug. 8, 2014, 3:00 PM), http://www.usatoday.com/story/sports/college/2014/08/08/acc-maryland-settle-lawsuits-buyout-big-ten-conference/13781545/ [https://perma.cc/3WN6-TFTU].

7. Defendant Atlantic Coast Conference's Statement of Grounds and Authorities in Support of Its Motion to Dismiss or, Alternatively, to Stay Plaintiffs' Complaint at 6–11, Bd. of Regents v. Atl. Coast Conference, No. CAL13-02189, 2013 Md. Cir. Ct. LEXIS 4 (June 27, 2013).

8. U.S. CONST. art. I, § 8, cl. 3.

9. Nat'l Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476, 1482 (D. Nev. 1992).

10. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citing Huron Cement Co. v. Detroit, 362 U.S. 440, 443 (1959)).

the national commerce which . . . demand that their regulation . . . be prescribed by a single authority."[11]

As a general rule, national collegiate and professional sports leagues are subject to federal antitrust statutes.[12] However, these leagues have faced numerous state antitrust allegations as well.[13] In the face of these state antitrust claims, national collegiate and professional sports leagues have sought protection by invoking the Commerce Clause as a defense.[14] Courts have been willing to apply the "dormant" Commerce Clause when assessing these allegations, declining to extend the reach of state antitrust statutes to national collegiate and professional sports leagues.[15] Operation of the "dormant" Commerce Clause, however, has been applied to national leagues rather than more regionalized leagues like collegiate athletic conferences. This leaves the question of whether regional athletic conferences, like the ACC, will be able to successfully assert the Commerce Clause as a defense or will instead be subject to state antitrust laws.

This Comment answers that question in calling for—no matter the merits of a party's state antitrust claim—the extension of Commerce Clause protection to regional athletic conferences like the Power 5 conferences against state antitrust claims. By tracing the history of state antitrust law, and its relationship with federal antitrust law and the Commerce Clause, this Comment illustrates the reasonableness of extending Commerce Clause protection. Part I traces the history of state antitrust law and its relationship with federal antitrust law. Part II provides an overview of the Commerce Clause and its application to state antitrust laws. Part III analyzes the establishment of the Commerce Clause protection as it pertains to national collegiate and professional sports

11. S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 767 (1945) (quoting Cooley v. Bd. of Wardens, 53 U.S. 299, 319 (1851)).

12. *See generally* O'Bannon v. Nat'l Collegiate Athletics Ass'n, 7 F. Supp. 3d 955 (N.D. Cal. 2014). *But see* Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953); Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922). This trilogy of cases established a professional baseball exemption from federal antitrust law.

13. *See, e.g.*, Partee v. San Diego Chargers Football Co., 668 P.2d 674 (Cal. 1983). In *Partee*, Dennis Partee, a former kicker and punter for the San Diego Chargers, brought suit against the National Football League (NFL) claiming that several of the league's rules violated California's antitrust statute. *Id.* at 676.

14. *Id.* at 677 ("The Chargers contend . . . that application of the Cartwright Act was a violation of the commerce and supremacy clauses of the Constitution.").

15. *Id.* at 676 ("In accordance with other decisions considering the applicability of state antitrust laws to national professional sports leagues, we conclude that the Cartwright Act is not applicable to the interstate activities of professional football.").

leagues. Finally, Part IV advocates for the extension of the Commerce Clause protection to regionalized athletic conferences based on the underlying rationales that are applied to national leagues.

I. THE EMERGENCE OF STATE ANTITRUST LAW

"All fifty states as well as the District of Columbia" have enacted "some type of antitrust statute."[16] Indeed, at least twenty-six states had some sort of antitrust prohibition by 1890, when the Sherman Act was introduced.[17] The underlying forces that drove the passage of the Sherman Act also spurred the development of state antitrust law.[18] In fact, fundamental concepts of federal antitrust law were based in part on principles developed by the judicial gloss of state courts interpreting state antitrust laws.[19]

One of the main purposes of passing the Sherman Act was the supplementation of these state laws.[20] The Sherman Act was to supplement state antitrust law by reaching restraints on interstate trade, while states would retain exclusive jurisdiction over all purely intrastate restraints.[21] Closely following the passage of the Sherman Act, many states adopted new or amended existing state antitrust statutes to mimic the federal statutes.[22] Following these changes, state antitrust law began a "gradual decline" as it was viewed as "superfluous" in light of the federal law.[23] The decline was amplified in the wake of decisions like *Wickard v. Filburn*,[24] which expanded the federal power to reach local activities seen as "affecting" commerce under the Commerce Clause.[25] The rationale in

16. *See* 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 633 (7th ed. 2012) [hereinafter ANTITRUST LAW DEVELOPMENTS].

17. 1 ABA SECTION OF ANTITRUST LAW, STATE ANTITRUST PRACTICE AND STATUTES 1-21 (3d ed. 2004).

18. *Id.*

19. *See, e.g.*, United States v. Trenton Potteries Co., 273 U.S. 392, 400 (1927) (stating that price fixing among competitors is illegal per se based on state case law establishing that principle).

20. 21 Cong. Rec. 2454, 2457 (1890).

21. 14 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2401, at 336 (3d ed. 2012).

22. *Id.* at 336–37.

23. *Id.* at 336.

24. Wickard v. Filburn, 317 U.S. 111 (1942).

25. AREEDA & HOVENKAMP, *supra* note 21, ¶ 2401, at 336; *Wickard*, 317 U.S. at 124 ("The present Chief Justice has said in summary of the present state of the law: 'The commerce power is not confined in its exercise to the regulation of commerce among the

Wickard led courts to apply the Sherman Act to purely intrastate activity, significantly diminishing the role of state antitrust law.[26]

In the 1970s, however, state antitrust law experienced a revival thanks in part to treble-damage class action lawsuits in which states were part of the plaintiff class.[27] Another contributing factor was the United States Supreme Court's decision in *Illinois Brick Co. v. Illinois*.[28] There, the Court denied damages to indirect purchasers under federal law.[29] The decision in *Illinois Brick* left state legislatures feeling pressure to address the apparent gap that now existed in federal antitrust law.[30] As a result, many state legislatures amended their antitrust statutes to allow indirect purchasers to recover damages.[31] This was one of the few instances where state legislatures and state courts deviated from the federal law.[32] Still, however, most state antitrust statutes mimic the federal statutes.[33]

While the antitrust laws of most states track the language of the federal statutes closely, federal case law on substantive issues is not necessarily regarded as precedential.[34] Some state courts regard the federal case law as precedential, while others use the federal case law as a persuasive source of authority when addressing issues of first impression.[35] However, state antitrust law is not preempted simply because of the existence of federal antitrust statutes.[36] Regardless, it is clear that the role

states. It extends to those activities intrastate which so affect interstate commerce . . . .'") (citing United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)).

26. *See, e.g.*, Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219, 229–30 (1948); Parker v. Brown, 317 U.S. 341, 362 (1943).

27. AREEDA & HOVENKAMP, *supra* note 21, ¶ 2401, at 337.

28. Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).

29. *Id.* at 735 ("We thus decline to construe § 4 to permit offensive use of a pass-on theory against an alleged violator that could not use the same theory as a defense in an action by direct purchasers.").

30. AREEDA & HOVENKAMP, *supra* note 21, ¶ 2401, at 338.

31. *Id.*

32. *Id.*

33. *Id.* ¶ 2410, at 350–51. Specifically, most state antitrust statutes mimic the Sherman Act. *Id.* ¶ 2401, at 338. Some states have enacted the equivalent of the Clayton Act, while fewer states have enacted a version of Robinson-Patman Act. *Id.*

34. *Id.* ¶ 2410, at 350–53.

35. *Id.*

36. *Id.* ¶ 2401, at 336 ("Most important, from the outset Congress declared its intention *not* to preempt the antitrust and other competition laws of the several states, but rather to supplement them.").

of state antitrust laws with respect to certain industries has become severely limited.[37]

II. THE COMMERCE CLAUSE AND STATE ANTITRUST LAW

Although state antitrust statutes may be able to reach interstate activity, the Commerce Clause[38] still serves as a protective shield that limits the scope of state antitrust enforcement. Through the Constitution, Congress is granted the power to "regulate Commerce . . . among the several States . . . ."[39] Phrased as an affirmative grant of power, the Commerce Clause also contains a negative or "dormant" command "that 'create[s] an area of trade free from interference by the States'" and "prevents a State from 'jeopardizing the welfare of the Nation as a whole' by 'plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.'"[40] This operation "of the Commerce Clause limits state interference with interstate commerce", even without legislation implemented by Congress.[41]

As a limit on State powers, the Commerce Clause can invalidate state statutes where the statute explicitly discriminates against interstate commerce or where the indirect effects on interstate commerce impose a "burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits[.]'"[42] If a statute facially discriminates against out-of-state activity, it will be struck down unless it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[43] The Supreme Court in *Granholm v.*

37. *Id.* ¶ 2403, at 347–48. Specifically, the role of state antitrust in the regulation of national collegiate and professional sports leagues has become severely limited. *Id.* The development of the diminishing role of state antitrust law with respect to that industry will be discussed and analyzed in detail below.

38. Particularly the "dormant" side of the Commerce Clause may still be able to reach interstate activity.

39. U.S. CONST., art. I, § 8, cl. 3.

40. Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 433 (2005) (quoting Bos. Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 328 (1977) and Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995)).

41. Nat'l Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476, 1482 (D. Nev. 1992).

42. *See* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994) (quoting Pike v. Bruce Church Inc., 397 U.S. 137, 142 (1970)).

43. Granholm v. Heald, 544 U.S. 460, 489 (2005) (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988)); *see also* Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 100–01 (1994); Nat'l Solid Wastes Mgmt. Ass'n v. Daviess Cty., 434 F.3d 898, 903 (6th Cir. 2006).

Heald[44] held that "state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'"[45] However, state antitrust laws are statutes of general application and are not likely facially discriminatory.[46] Thus, state antitrust statutes are more typically challenged as excessively burdensome on interstate commerce.[47]

State courts in the first half of the twentieth century construed their antitrust statutes to exclude interstate commerce from their reach, based largely on an idea of mutually exclusive sovereignties.[48] As federal constitutional law shifted to allow Congress to reach intrastate activity,[49] the notion of mutually exclusive sovereignties began to dissipate and state courts reanalyzed earlier constructions of their antitrust laws.[50] Consequently, state courts began to broaden the scope of their antitrust statutes, holding that their antitrust laws could reach both interstate and intrastate activities.[51]

However, the Commerce Clause does not nullify the application of a state antitrust law simply because the statute can reach and may have effects beyond state lines.[52] Instead, the general rule, discussed in *Pike v. Bruce Church, Inc.*,[53] is "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local

44. *Granholm*, 544 U.S. at 461.

45. *Id.* at 472 (quoting *Or. Waste Sys., Inc.*, 511 U.S. at 99).

46. *See* ANTITRUST LAW DEVELOPMENTS, *supra* note 16, at 639.

47. *Id.*

48. *Id. See also* Abbott Labs. v. Durrett, 746 So. 2d 316, 330–31 (Ala. 1999) (noting that the notion of mutually exclusive sovereignties influenced the interpretation of Alabama's antitrust laws); Olstad v. Microsoft Corp., 700 N.W.2d 139, 150 (Wis. 2005) (noting that early interpretation of Wisconsin antitrust law was based on the notion of mutually exclusive sovereignties). The notion of mutually exclusive sovereignties stood for the idea that Congress could not regulate purely intrastate commerce and states could not regulate interstate commerce. ANTITRUST LAW DEVELOPMENTS, *supra* note 16, at 639.

49. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 124 (1942) (holding that Congress could regulate purely intrastate activity of wheat farming because the activity affected interstate commerce).

50. *See, e.g.*, *Olstad*, 700 N.W.2d at 155–56 (rejecting an interpretation of Wisconsin's antitrust statute as being constrained to intrastate commerce).

51. *See, e.g.*, Younger v. Jensen, 605 P.2d 813, 818–19 (Cal. 1980); Health Consultants v. Precision Instruments, 527 N.W.2d 596, 606–07 (Neb. 1995); State v. Sterling Theatres Co., 394 P.2d 226, 228 (Wash. 1964).

52. *See* ANTITRUST LAW DEVELOPMENTS, *supra* note 16, at 640; *see also* Osborn v. Ozlin, 310 U.S. 53, 62 (1940).

53. Pike v. Bruce Church Inc., 397 U.S. 137 (1970).

benefits."[54] Thus, the court must balance the putative local benefit of a state's antitrust act against the burden it places on interstate commerce.[55]

State antitrust laws have held up against claims that they violate the Commerce Clause.[56] In *United Nuclear Corp. v. General Atomic Co.*,[57] the New Mexico Supreme Court affirmed the trial court's decision that General Atomic Company (GAC) violated New Mexico's antitrust laws despite arguments from GAC that the state's antitrust laws violated the Commerce Clause.[58] In that case, the plaintiff sued GAC alleging that its contract to supply a public utility company with uranium was in violation of New Mexico's state antitrust laws.[59] GAC first contended that the Commerce Clause bars the application of state antitrust law where the activities in question are overwhelmingly in interstate commerce.[60] Citing a long line of cases, the court dismissed that argument, holding that state antitrust laws can "reach up to include the regulation of interstate commerce."[61]

Next, GAC, relying in part on the Supreme Court's decision in *Southern Pacific Co. v. Arizona*,[62] argued that the uranium market was a national market that "must be addressed uniformly by the federal government."[63] The New Mexico Supreme Court, however, rejected GAC's argument,[64] relying on the United States Supreme Court's decision in the similar case of *Exxon Corp. v. Governor of Maryland*.[65] There, the Supreme Court rejected a similar argument posed by Gulf Oil and other oil companies with respect to the national scope of the petroleum market.[66] In response to the argument, the Supreme Court stated that the Commerce Clause would only preempt an entire field when a "lack of national uniformity would impede the flow of interstate goods."[67] In *Exxon*,

54. *Id.* at 142 (citing Huron Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960)).

55. *Id.*

56. *See, e.g.*, United Nuclear Corp. v. Gen. Atomic Co., 629 P.2d 231, 274 (N.M. 1980).

57. *Id.*

58. *Id.* at 329.

59. *Id.* at 238.

60. *Id.* at 270.

61. *Id.* at 271.

62. S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945).

63. *United Nuclear Corp.*, 629 P.2d at 272.

64. *Id.* at 274.

65. Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978).

66. *Id.* at 128.

67. *Id.* at 128–29. Specifically the Supreme Court stated:

> [W]e cannot adopt appellants' novel suggestion that because the economic market for petroleum products is nationwide, no State has the power to regulate the retail marketing of gas. Appellants point out that . . . the cumulative effect of this sort

however, the Supreme Court found that whatever cost the application of state antitrust law would have it did not warrant Commerce Clause preemption.[68]

Relying on that reasoning, the New Mexico Supreme Court in *United Nuclear* held that the Commerce Clause did not foreclose state regulation of the uranium market.[69] More importantly, the court in *United Nuclear* upheld the application of New Mexico's antitrust law against GAC's Commerce Clause attacks.[70] The New Mexico Supreme Court, applying the balancing test from *Pike*, held that GAC's compliance with the New Mexico antitrust statutes involved no "excessive cost of compliance."[71] Commenting specifically on the burden imposed by application of state law, the court declared, "[t]he cost of compliance is nothing more than refraining from the kind of anti-competitive, predatory trade practices which federal law and the laws of virtually all states condemn."[72]

While the court in *United Nuclear* disagreed with the defendant's Commerce Clause argument, the defendants argued an important rule associated with the relationship between the Commerce Clause and state statutes, which has been applied to state antitrust claims.[73] The defendant relied on the general rule from *Southern Pacific* that certain areas of national commerce demand that their regulation be at the national level and any attempt to regulate at the state level should be inapplicable.[74] In *Southern Pacific*, the Supreme Court held that state statutes are inapplicable where the statute has the tendency to "impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need for national uniformity,

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> of legislation may have serious implications for their national marketing operations. While this concern is a significant one, we do not find that the Commerce Clause, by its own force, pre-empts the field of retail gas marketing . . . . [T]his Court has only rarely held that the Commerce Clause itself pre-empts an entire field from state regulation, and then only when a lack of national uniformity would impede the flow of interstate goods . . . . In the absence of a relevant congressional declaration of policy, or a showing of a specific discrimination against, or burdening of, interstate commerce, we cannot conclude that the States are without power to regulate in this area.

Id. (citations and footnote omitted).

68. *Id.* at 133–34.

69. *United Nuclear Corp.*, 629 P.2d at 274.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 272.

74. S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 767 (1945).

demand that their regulation, if any, be prescribed by a single authority."[75] The second part of that rule has been asserted as a justification by many national collegiate and professional sports leagues for the invalidation of state antitrust claims.[76]

Since most state antitrust statutes mirror the language contained in the federal antitrust statutes there are arguably only very small incremental burdens in complying with state antitrust statutes.[77] However, national collegiate and professional sports leagues have been able to overcome this argument by distinguishing the burden they face if forced to comply with state antitrust statutes.[78] One of the strongest arguments for these leagues has been that "[n]o single state has a particularly significant interest in the operation of nationwide professional sports."[79]

III. THE COMMERCE CLAUSE AS A DEFENSE FOR SPORTS LEAGUES

The assertions of state antitrust claims against national collegiate and professional sports leagues necessarily raise Commerce Clause questions.[80]

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75. *Id.* (citing Cooley v. Bd. of Wardens, 53 U.S. 299, 319 (1851)).

76. *See, e.g.*, Partee v. San Diego Chargers Football Co., 668 P.2d 674, 677 (Cal. 1983). The San Diego Chargers, in the face of California state antitrust allegations, set forth the following arguments:

> [P]rofessional football is a unique activity of interstate commerce which requires nationally uniform governance, that only federal antitrust laws apply, that interstate commerce would be unreasonably burdened if state antitrust laws were applied to professional football's interstate activities, and that application of the Cartwright Act was a violation of the commerce and supremacy clauses of the Constitution.

Id.

77. *See, e.g.*, *United Nuclear Corp.*, 629 P.2d at 274 ("[T]here is little likelihood that . . . an excessive cost of compliance will be imposed by piecemeal state [antitrust] regulation. The cost of compliance is nothing more than refraining from the kind of anti-competitive, predatory trade practices which federal law and the laws of virtually all states condemn.").

78. *See, e.g.*, Flood v. Kuhn, 443 F.2d 264, 268 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972) ("[I]f state regulation were permissible, the internal structure of the leagues would require compliance with the strictest state antitrust standard."); *Partee*, 668 P.2d at 678 ("The necessity of a nationwide league structure for the benefit of both teams and players for effective competition is evident as is the need for a nationally uniform set of rules governing the league structure.").

79. *United Nuclear Corp.*, 629 P.2d at 273.

80. These and other constitutional questions are also raised when state antitrust claims are asserted outside of the sports context as well. *See* William L. Reynolds II & James D. Wright, *A Practitioner's Guide to the Maryland Antitrust Act*, 36 MD. L. REV. 323, 340 (1976) ("Because most state antitrust acts, including Maryland's, assert jurisdiction over activities in interstate commerce, there are latent constitutional questions in every state

In addressing those questions, sports leagues have generally been protected from state law claims by the operation of the Commerce Clause.[81]

A. Professional Sports Leagues[82]

Protection for professional sports leagues against state law allegations, and more specifically state antitrust allegations, began with an exemption that was extended to apply to professional baseball.[83] A trilogy of cases established the professional baseball exemption.[84] The exemption was first announced in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.[85] There, the plaintiff, a Baltimore baseball club, was left without competitors after the National League bought out seven of the other Federal League teams.[86] As a result, the Baltimore club sued the National League alleging a violation of the Sherman Antitrust Act.[87] In an opinion written by Justice Holmes, the Court held that the Sherman Act did not apply to baseball because baseball did not involve interstate commerce,[88] establishing an exemption from federal antitrust law for professional baseball.

Thirty years later, the Court revisited the issue of baseball's exemption in *Toolson v. New York Yankees, Inc*.[89] after the interpretation of interstate commerce had significantly changed.[90] In *Toolson*, pitcher George Toolson sued the New York Yankees and Major League Baseball asserting that baseball's reserve system violated federal antitrust law.[91] Toolson signed a contract with the New York Yankees and refused to

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antitrust case . . . . If those state attempts [to regulate professional baseball] had succeeded, professional baseball, and indeed all professional sports, might have been blanketed by a veritable 'crazy quilt of state law.'").

81. *See, e.g.*, *Partee*, 668 P.2d at 697; Nat'l Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476, 1488 (D. Nev. 1992).

82. Major League Baseball (MLB), National Football League (NFL), National Basketball League (NBA).

83. *See* Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 209 (1922).

84. *Id.*; Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953).

85. *Fed. Baseball Club of Balt., Inc.*, 259 U.S. at 208–09.

86. *Id.* at 207.

87. *Id.* at 208.

88. *Id.* at 208–09.

89. *Toolson*, 346 U.S. at 356.

90. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942).

91. *Toolson*, 346 U.S. at 362.

report from one farm team to another.[92] As a result, the Yankees placed Toolson on its ineligible list.[93] However, because of the league's reserve system, no other team wished to sign him.[94] In *Toolson*, the Court upheld the baseball exemption without much explanation.[95] While the Court in *Toolson* declined to overrule the baseball exemption set forth in *Federal Baseball*, it left open questions as to its status.[96] Whatever issues were unsettled after *Toolson*, the Supreme Court addressed and settled in *Flood v. Kuhn*.[97]

Curt Flood, the St. Louis Cardinals' centerfielder, brought suit against the Commissioner after the Commissioner denied Flood's request to become a free agent.[98] Flood asserted both a federal and state antitrust claim against the Commissioner of Baseball.[99] When *Flood* arrived at the United States Supreme Court, the Court upheld professional baseball's exemption from federal antitrust laws and affirmed the trial court's decision extending the exemption to state antitrust laws.[100]

In addition to extending baseball's exemption to state antitrust law, the trial court in *Flood* also held that state antitrust laws were inapplicable based on an unreasonable burden on interstate commerce.[101] The United States Court of Appeals for the Second Circuit, in affirming the trial court's decision, stated:

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92. Jeffrey S. Moorad, *Major League Baseball's Labor Turmoil: The Failure of the Counter-Revolution*, 4 VILL. SPORTS & ENT. L.J. 53, 60 (1997).

93. *Id.*

94. *Id.* at 56–60.

95. *Toolson,* 346 U.S. at 357. The Court gave the following explanation for extending the baseball exemption:

> The business [of baseball] has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. . . . We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation. Without re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, . . . so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.

Id.

96. *See id.*

97. Flood v. Kuhn, 316 F. Supp. 271 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

98. *Flood*, 407 U.S. 258, 284 (1972).

99. *Id.* at 264–65.

100. *Id*. at 284.

101. *Flood*, 316 F. Supp. at 273–75.

> [W]here the nature of an enterprise is such that differing state regulation, although not conflicting, requires the enterprise to comply with the strictest standard of several states in order to continue an interstate business extending over many states, the extra-territorial effect which the application of a particular state law would exact constitutes, absent a strong state interest, an impermissible burden on interstate commerce.[102]

The Second Circuit pointed out that professional baseball's structure makes it unique.[103] Although the league is made up of separate entities, the entities depend on the league "to further the ends of their sports competition."[104] Since the members are dependent upon the league, "it is the league structure at which any state antitrust regulation [is] aimed."[105] Consequently, any league that extends over several states would be required to comply with the strictest state antitrust standard for effective administration.[106] The Second Circuit reasoned that this burden outweighed any one state's interest in regulating baseball's internal structure and held that "the Commerce Clause preclude[d] the application here of state antitrust law."[107] The Supreme Court of the United States affirmed.[108]

The rationale in *Flood* relates back to the rule developed in *Southern Pacific* that the Commerce Clause will invalidate state statutes that attempt to regulate "those phases of national commerce which, because of the need for national uniformity, demand that their regulation, if any, be prescribed by a single authority."[109] This rule has been the primary defense of sports leagues seeking protection from state antitrust violations. The holding in *Flood* and the rule from *Southern Pacific* have also led courts to hold state antitrust regulation inapplicable to professional football[110] and professional basketball.[111]

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102. Flood v. Kuhn, 443 F.2d 264, 267 (2d Cir. 1971) *aff'd*, 407 U.S. 258 (1972) (citing S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 774–75 (1945)).

103. *Id.*

104. *Id.*

105. *Id.* at 267–68.

106. *Id.* at 268.

107. *Id.*

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

109. S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 767 (1945) (citing Cooley v. Bd. of Wardens, 53 U.S. 299, 319 (1851)).

110. *See, e.g.*, Partee v. San Diego Chargers Football Co., 668 P.2d 674, 679 (Cal. 1983) (holding that application of California's antitrust statutes to activity of the professional violated the Commerce Clause); Matuszak v. Houston Oilers, Inc., 515 S.W.2d 725, 729 (Tex. Civ. App. 1974) (holding that the issue of whether a professional football player's contract with his team violated Texas's antitrust laws was not to be decided by the state

Professional sports leagues argue that the structure of the leagues is such that their regulation requires national uniformity because state legislation will have an impact beyond a given team.[112] In each of these leagues, the teams are dependent upon the league for scheduling league play.[113] It is through the schedule of games that the teams are able to further their competitive interests. Moreover, a uniform set of rules and regulations for the league produces more efficient and effective competition throughout the league. These arguments have persuaded courts to find state antitrust laws inapplicable to the activities of professional sports leagues.[114]

B. National Collegiate Athletic Association[115]

While the case law was settled with respect to professional leagues, it is still unclear whether the same protection would apply for amateur leagues, especially since the Supreme Court has declined to extend the "baseball exception" to other industries engaged in similar types of performances.[116] Even so, the NCAA has asserted the Commerce Clause as a defense when faced with state antitrust or other state law claims.[117] Relying on the courts' decisions pertaining to professional sports leagues,

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court, and under *Flood v. Kuhn* professional football was subject to federal antitrust law not state antitrust law).

111. *See, e.g.*, Robertson v. Nat'l Basketball Ass'n, 389 F. Supp. 867, 881 (S.D.N.Y. 1975) (holding that baseball's "unique exception" should extend to basketball, thus dismissing state antitrust claims); HMC Mgmt. Corp. v. New Orleans Basketball Club, 375 So. 2d 700, 706 (La. Ct. App. 1979).

112. *See* Valley Bank of Nev. v. Plus Sys., Inc., 914 F.2d 1186, 1192 (9th Cir. 1990) ("Professional sports leagues have a limited number of teams, with no more than a few and rarely more than two teams in any state. The challenged state legislation in each case would have had significant impact on the whole league fabric, not just on the state's one or two teams.").

113. *See, e.g.*, *Partee*, 668 P.2d at 678.

114. *See, e.g.*, *id.* ("Following *Flood v. Kuhn*, state antitrust regulation has been held inapplicable to professional basketball and professional football. No case has been found applying state antitrust laws to the interstate activities of professional sports." (citations omitted)); *Robertson*, 389 F. Supp. at 881; Flood v. Kuhn, 407 U.S. 258, 284 (1971).

115. Referred heretofore as the NCAA.

116. *See* Hart v. B.F. Keith Vaudeville Exch., 262 U.S. 271, 274 (1923) (declining to extend the baseball exemption to travelling vaudeville performances, which were very popular during the time period when the baseball exemption was fashioned).

117. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476, 1482 (D. Nev. 1992); English v. Nat'l Collegiate Athletic Ass'n, 439 So. 2d 1218, 1224 (La. Ct. App. 1983).

the NCAA has been successful in invoking the Commerce Clause as a defense.[118]

In *National Collegiate Athletic Ass'n v. Miller*,[119] the United States District Court for the District of Nevada extended Commerce Clause protection to the NCAA in the face of state law claims.[120] There, the NCAA sought a declaratory judgment action that a Nevada state statute[121] was void because it excessively burdened interstate commerce in violation of the Commerce Clause.[122] The plaintiffs in *Miller* asserted a claim that the NCAA enforcement procedure for rules violations should be conducted in conformity with sections 398.155 through 398.255 of the Nevada Revised Statutes.[123] The procedural requirements of the Nevada state statutes conflicted with the procedural requirements administered by the NCAA Committee on Infractions for the investigation of rules violations.[124]

The NCAA argued that its similarities to professional sports leagues call for the extension of Commerce Clause protection to its activities.[125] The sheer size of the NCAA alone seems reason enough to extend the rationale underlying the professional sports exception. The NCAA is an unincorporated association made up of more than 1,200 member institutions across all fifty states.[126] At the time *Flood* was decided, professional baseball only had twenty-four member teams and professional basketball had only eighteen-member teams.[127] The NCAA, however, provided other persuasive reasons why the professional sports exception should apply.[128]

In support of its position, the NCAA argued that its "ability to accomplish its goals of scholarship, sportsmanship, and amateurism depends to a substantial degree on the creation of nationally uniform rules under which teams can compete on an equal basis."[129] Furthermore, the NCAA argued that "[i]n order to satisfactorily achieve these goals, the

118. *See Miller*, 795 F. Supp. at 1482; *English*, 439 So. 2d at 1224.

119. *Miller*, 795 F. Supp. at 1476.

120. *Id.* at 1485.

121. NEV. REV. STAT. §§ 398.155–398.255 (1991) (providing several procedural requirements for hearings).

122. *See Miller*, 795 F. Supp. at 1479.

123. *Id.* at 1480.

124. *Id.*

125. *Id.* at 1482.

126. *Membership*, NCAA, http://www.ncaa.org/about/who-we-are/membership [https://perma.cc/QLD8-Y34K] (last visited Jan. 5, 2016).

127. Robertson v. Nat'l Basketball Ass'n, 389 F. Supp. 867, 881 (S.D.N.Y. 1975).

128. *See Miller*, 795 F. Supp. at 1482–86.

129. *Id.* at 1484.

NCAA's enforcement procedures must be applied even-handedly and uniformly on a national basis."[130] In deciding that the Commerce Clause barred the application of the Nevada statute to the NCAA's activities, the court reasoned that "[t]his provision and similar provisions in other states would strip the NCAA of the authority to freely adopt its own procedural regulations."[131] The court further explained "[t]he likely practical effect of the statute would be to compel the NCAA to adopt the procedural rules enacted by the Nevada Legislature, thereby allowing the Nevada Legislature to effectively dictate enforcement proceedings in states other than Nevada."[132] For these reasons, the court held that the Commerce Clause precluded the application of the Nevada statute.[133] While *Miller* did not involve the assertion of a state antitrust claim, the court's reasoning could easily be applied to invalidate the operation of state antitrust statutes against athletic conferences.

In *English v. National Collegiate Athletic Ass'n*, the plaintiff, Jon English, asserted that the NCAA was a monopoly operating in violation of Louisiana antitrust law.[134] The lawsuit stemmed from an NCAA regulation that requires student-athletes who transfer from member institution to member institution to sit out for one full year.[135] The court, following the direction of *Flood*, held that the Louisiana antitrust statute could not be applied to the actions of the NCAA.[136] Thus, the professional sports exception had been extended to encompass national amateur athletics, at least in some jurisdictions.

IV. THE EXTENSION OF COMMERCE CLAUSE PROTECTION TO REGIONAL[137] ATHLETIC CONFERENCES

The next logical extension of Commerce Clause protection should be to smaller, regional collegiate athletic conferences. Regional athletic conferences should be shielded from state antitrust claims which attack

130. *Id.*

131. *Id.*

132. *Id.* at 1484–85.

133. *Id.* at 1485.

134. English v. Nat'l Collegiate Athletic Ass'n, 439 So. 2d 1218, 1222 (La. Ct. App. 1983).

135. *Id.*

136. *Id.* at 1224.

137. Regional athletic conferences refers to non "national" conferences, such as the Power 5 conferences comprising the Atlantic Coast Conference, Big Ten Conference, Big 12 Conference, PAC-12 Conference, and Southeastern Conference. With respect to college athletics, "national" conferences would be the National Collegiate Athletic Association, National Association of Intercollegiate Athletics (NAIA), and others.

league rules that are necessary to the operation of the league. More specifically, the Commerce Clause should shield athletic conferences from state antitrust claims alleging that conference withdrawal penalties are anticompetitive, no matter the actual merits of the claims. As previously stated, it is undisputable that these conferences are subject to federal antitrust regulation and suits.[138] However, since federal antitrust law does not preempt state antitrust law, conferences are currently left exposed to state antitrust allegations.[139] Extension of Commerce Clause protection to these regional conferences would curtail this exposure. Consequently, the conferences will be able to more effectively govern their own leagues and stimulate intercollegiate competition.

Sports leagues like the ACC, and other conferences, are different from most commercial actors because their very nature requires that they be regulated on a national level if they are to exist at all. It is because of this uniqueness that courts across the United States have repeatedly held that burdens of applying any state statute to the activities of a sports league excessively outweigh any putative benefits.[140] As a result, sports leagues have been protected from state antitrust claims by the operation of the Commerce Clause. It follows that extension of this protection should be afforded to collegiate athletic conferences that are viewed as "regional" in nature because of the striking similarities in structure and activities of the leagues.

The historical trajectory of this sports exception suggests that regional athletic conferences are the next to be protected.[141] Because of the similarities between these regional leagues and leagues that have been afforded protection by the Commerce Clause, the arguments and rationales for extending the protection are essentially the same.

Regional athletic conferences share similar common organizational structures with national collegiate and professional sports leagues. For example, the ACC is an unincorporated association sharing the same

138. *See generally* O'Bannon v. Nat'l Collegiate Athletics Ass'n, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

139. *See* AREEDA & HOVENKAMP, *supra* note 21, ¶ 2401, at 336.

140. *See generally supra* Part III.

141. Professional baseball was first afforded protection against state antitrust claims because of the operation of the Commerce Clause. Flood v. Kuhn, 407 U.S. 258 (1971). Protection was then extended to both professional football and professional basketball leagues. Partee v, San Diego Chargers Football Co., 668 P.2d 674 (Cal. 1983); Robertson v. Nat'l Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975). Finally, the protection was extended beyond the scope of professional sports and into amateur athletics when the NCAA was afforded the protection of the Commerce Clause. English v. Nat'l Collegiate Athletic Ass'n, 439 So. 2d 1218 (La. Ct. App. 1983).

structure as the NCAA and NFL, which are both unincorporated associations. More importantly, goals of conferences like the ACC[142] are essentially the same as the goals of the professional and national sports leagues. In essence, the goal of a regional conference is to deal with the athletic and academic relationships between players and universities.[143] Each member of a conference voluntarily agrees to be bound by the conference's constitution and by-laws. It is through its by-laws and rules that a given conference can attain these goals. By that measure, it is imperative that the by-laws and operating rules be applied uniformly across the conference in order to have any possibility of functioning effectively.[144] Furthermore, the members competing within these leagues depend on the conference to establish a uniform set of rules governing the league structure.[145]

Additionally, there is no meaningful difference between the interstate activities of these regional conferences and those of other sports leagues—professional and amateur—whose internal structure calls for insulation from state antitrust scrutiny. Each of these leagues is made up of a number of member institutions located in multiple states. For example, the ACC is comprised of fifteen[146] member institutions from ten different states.[147]

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142. The mission statement of the ACC is:

> The Atlantic Coast Conference, through its member institutions, seeks to maximize the educational and athletic opportunities of its student-athletes while enriching their quality of life. It strives to do so by affording individuals equitable opportunity to pursue academic excellence and compete successfully at the highest level of intercollegiate athletics competition in a broad spectrum of sports and championships. The Conference will provide leadership in attaining these goals, by promoting diversity and mutual trust among its member institutions, in a spirit of fairness for all. It strongly adheres to the principles of integrity and sportsmanship, and supports the total development of the student-athlete and each member institution's athletics departmental staff, with the intent of producing enlightened leadership for tomorrow.

ATL. COAST CONFERENCE, ACC MANUAL 2 (2012–2013), http://grfx.cstv.com/photos/schools/bc/genrel/auto_pdf/2012-13/misc_non_event/2012_13_ACC.pdf [http://perma.cc/X8ST-NHUQ].

143. *Id.* The "essence" of the regional conference is the same as that of the NCAA but on a smaller scale.

144. *See, e.g.*, Flood v. Kuhn, 443 F.2d 264, 267 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

145. Nat'l Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476, 1484 (D. Nev. 1992).

146. *Schools*, ACC, http://www.theacc.com/ (hold mouse over "Schools" tab) [https://perma.cc/68Y9-7VUD] (last updated Jan. 5, 2016). The ACC includes Boston College, Clemson University, Florida State University, Georgia Institute of Technology, University of Maryland at College Park, University of North Carolina, North Carolina State University, University of Notre Dame, University of Pittsburgh, Syracuse University,

Additionally, each league engages in interleague competition, meaning that the reach of any given league is beyond just the territorial limits of its member institutions. Moreover, leagues are in national competition with one another for national television contracts. In fact, several leagues have developed their own television networks that reach a national audience.[148] Thus, whether the footprint of these conferences is regional or national should not be the determinative factor,[149] because it is the structure of these leagues that mandates their regulation be made uniformly.[150]

The relevant question then is whether the application of any given state's antitrust statute to any league policy would unduly burden the conference's activities in each of the other states in which it operates.[151] The league policy in focus here is a withdrawal penalty. In each case where the Commerce Clause has foreclosed the application of state antitrust law to a sports league's activities, the challenged league rule has been essential to the effective functioning of the league.[152] Conference withdrawal penalties are essential to the effective functioning of the conference. The withdrawal penalties protect remaining members from disruption to the organization, the functions of the conference, and its members when a fellow member departs.

Any application of state antitrust law to a conference withdrawal penalty would excessively burden the conference's activities. The application of state antitrust law causes an undue burden because its application would "require[] the enterprise to comply with the strictest standard of several states in order to continue an interstate business

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University of Virginia, Virginia Polytechnic Institute and State University, and Wake Forest University. *Id.*

147. Florida, Georgia, Indiana, Maryland, Massachusetts, New York, North Carolina, Pennsylvania, South Carolina, and Virginia.

148. For example, the Southeastern Conference (SEC) has developed the SEC Network and the Big Ten Conference has established the Big Ten Network. *See About the SEC Network*, SEC, http://secsports.go.com/article/11130708/about-the-sec-network [https://perma.cc/94P3-3FJF] (last visited Jan. 5, 2016); *About Us*, BIG TEN NETWORK, http://btn.com/about/ [https://perma.cc/VH6D-QUDP] (last visited Jan. 5, 2016).

149. Commerce Clause jurisprudence has never required that the burden placed on interstate commerce be national in scope in order to render a state statute unconstitutional. *See, e.g.*, Healy v. Beer Inst., 491 U.S. 324, 336–37 (1989) ("Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." (citing CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 88–89 (1987)).

150. Flood v. Kuhn, 443 F.2d 264, 267–68 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

151. *See* Partee v. San Diego Chargers Football Co., 668 P.2d 674, 678 (Cal. 1983).

152. *See, e.g.*, *id.*; English v. Nat'l Collegiate Athletic Ass'n, 439 So. 2d 1218, 1220, 1223–24 (La. Ct. App. 1983).

extending over many states."[153] Consequently, the state with the strictest antitrust laws would effectively regulate the activities of the conference in all of the conference's other member states. What is more, the application of state antitrust law "would strip the [ACC] of the authority to freely adopt its own procedural regulations."[154] This extraterritorial effect, which the application of a particular state law would exact, constitutes, absent a strong state interest, an impermissible burden on interstate commerce.[155] In the context of sports leagues, there is no corresponding state interest because "[n]o single state has a particularly significant interest in the operation of . . . sports."[156] Thus, the answer to the relevant question of whether application of any given state's antitrust statute to any league policy would unduly burden the conference's activities should unequivocally be yes. As a result, Commerce Clause protection should be extended to smaller "regional" conferences to insulate them from state antitrust attacks.

CONCLUSION

The Commerce Clause can invalidate state statutes where the statute explicitly discriminates against interstate commerce or where the indirect effects on interstate commerce impose a "burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits.'"[157] Courts have considered the burden on commerce vis a vis the putative local benefits of state antitrust laws in the context sports leagues.[158] The result of these cases is that national collegiate and professional sports leagues have been afforded protection from the Commerce Clause in the face of state antitrust attacks.[159] This protection should be extended to regional collegiate athletic conferences to protect them from allegations that a rule which is critical to the operation of the league, especially a conference withdrawal penalty, is in violation of state antitrust law.

The nature of these regional athletic conferences requires that their rules be both adopted and applied uniformly in order to ensure effective operation of the league. Subjecting the conference to state antitrust laws potentially fractures the league structure and operation along state lines.

153. *Flood*, 443 F.2d at 267.

154. Nat'l Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476, 1484 (D. Nev. 1992).

155. *Id.*

156. United Nuclear Corp. v. Gen. Atomic Co., 629 P.2d 231, 273 (N.M. 1980).

157. *See* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994) (quoting Pike v. Bruce Church Inc., 397 U.S. 137, 142 (1940)).

158. *See generally supra* Part III.

159. *Id.*

Extending Commerce Clause protection to regional athletic conferences against state antitrust claims allows the conferences to evenhandedly enforce league policies, which will allow the conferences to operate effectively and efficiently and attain the collective goals of the conference. Furthermore, individual members are not left without recourse for alleged violations. These members can seek redress through federal antitrust laws to which the conferences should indisputably be subject.[160] Thus, the extension of Commerce Clause protection will not compromise the interests of either the conference or its members, as members are not left without a means to check the conference's authority, while the Commerce Clause protection allows the conference to operate uniformly, effectively, and efficiently.

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160. *See* O'Bannon v. Nat'l Collegiate Athletics Ass'n, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

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