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A Three-Tiered Circuit Split: Why the Supreme Court Was Right to Hear NCAA v. Alston

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This article provides a retrospective look at the Supreme Court's decision to review the *NCAA v. Alston* antitrust litigation by defining and analyzing a three-tiered circuit split that existed in the courts' application of antitrust law to NCAA amateurism regulations. Using mixed-methods citation network analysis review, this article shows wide disarray within the NCAA amateurism discrete citation network by analyzing the doctrinal differences in how three distinct jurisdictional silos applied antitrust law to four broad categories of NCAA rules. As such, this article argues that the Supreme Court was correct to grant certiorari to the *Alston* petitioners to resolve this circuit split and better define the precedential effect of the much-debated *NCAA v. Board of Regents*.

Keywords: antitrust law, intercollegiate sports, sports law, Supreme Court

Introduction

Based on the Ninth Circuit Court of Appeals' definitive opinion in *Alston v. NCAA*[1]—and the Supreme Court's unanimous adoption of that opinion[2]—a reader unfamiliar with the intricacies and history of the treatment of college sports by the antitrust courts would be justified in thinking that courts have been unanimous in their belief that the treatment of college athletes by the National Collegiate Athletic Association ("NCAA") is violative of §1 of the Sherman Antitrust Act.[3] The Ninth Circuit's almost absolute reliance on *O'Bannon v.*

[1] 958 F.3d 1239 (9th Cir. 2020).

[2] NCAA v. Alston, 594 U.S. ___, 141 S. Ct. 2141 (2021).

[3] 26 Stat. 209, as amended, 15 U.S.C. § 1.

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NCAA[4]—a 2015 antitrust case decided by the Ninth Circuit that had also found NCAA restrictions on college athlete compensation to be anticompetitive—continued a legacy of spearheading a history of tough antitrust treatment of the NCAA's efforts to preserve their brand of amateurism in intercollegiate sports. As such, the Supreme Court's June 2021 decision affirming this holding means the NCAA cannot expect friendly treatment in any court when faced with future antitrust challenges.

It is safe to say that the Ninth Circuit's decision was not an ideal result for the NCAA. But what may irk the NCAA even more about the decision is that the Ninth Circuit's opinion was far from the only lower-court holding upon which the Supreme Court could have relied. Indeed, the NCAA had argued in its petition for Supreme Court review that the Ninth Circuit's unforgiving treatment of the NCAA in *Alston* and *O'Bannon* under the antitrust laws had created inconsistency in how the various circuits applied antitrust law to NCAA amateurism rules, where *Alston* stood in stark contrast to much more forgiving treatment by other circuit courts.[5]

This difference was primarily centered around starkly differing interpretations of *NCAA v. Board of Regents* by the circuit courts.[6] While *Board of Regents*—a case concerning conflicts between the NCAA and its member institutions regarding broadcasting rights—did not concern amateurism-related compensation restrictions, Justice John Paul Stevens wrote in the Court's majority opinion that the NCAA should be given "ample latitude" to play its "critical role in the maintenance of a revered tradition of amateurism in college sports."[7]

But while the NCAA focused its discussion on what it framed as a strictly *bilateral* circuit split—between the Third, Fifth, and Seventh Circuits, which it claimed "properly read this Court's precedent to mean that NCAA rules designed to prevent student-athletes from being paid to play receive deference under the rule of reason"; and the Ninth Circuit, which purportedly does not—the reality was actually more complex than the NCAA admits.[8] In fact, prior to the Supreme Court's *Alston* decision, the application of antitrust law by the courts to NCAA amateurism restrictions was even more fractured than a simple circuit split. Instead, the differences of opinion existing in the courts' application of antitrust law to NCAA amateurism restrictions existed as a three-tiered circuit split between three jurisdictional silos: (i) the Third and Sixth Circuits; (ii) the Seventh

4 802 F.3d 1049 (9th Cir. 2015).

5 Pet. for Writ of Certiorari at *passim*, NCAA v. Alston, No. 20-512 (2020).

6 468 U.S. 85 (1984).

7 *Id*. at 120A.

8 Pet. for Writ of Certiorari at 19, NCAA v. Alston, No. 20-512 (2020).

Circuit; and (iii) the Ninth Circuit. This circuit split is visualized in Figure 1, which shows clear disagreement between the courts by virtue of the multitude of negative citations (i.e., red lines, compared to green lines for positive citations) between NCAA amateurism caselaw.[9]

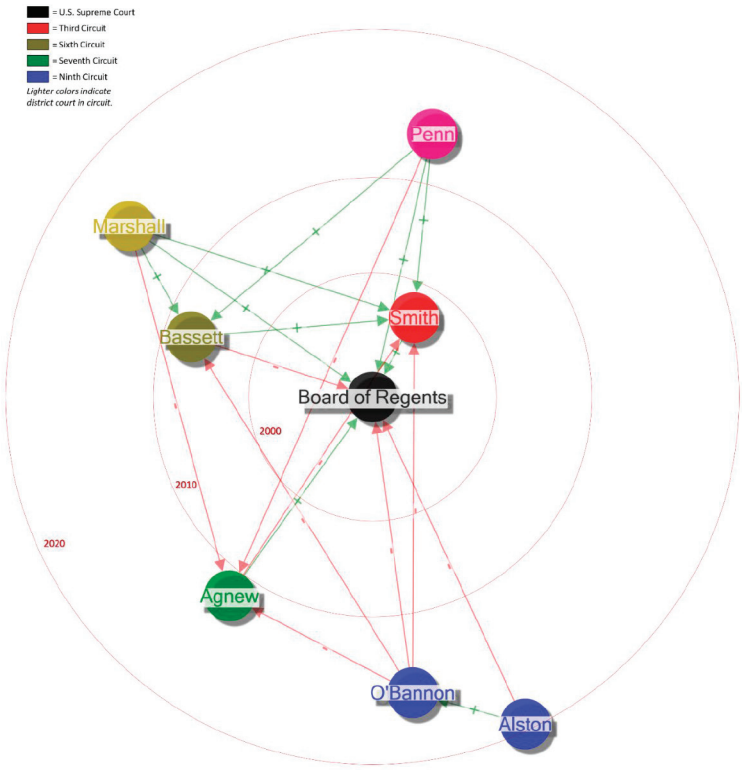

Figure 1. NCAA Amateurism Signed Network Graph Visualization.[10]

Whereas the guiding precedent within the Third, Sixth, and Seventh Circuit granted varying levels of implied antitrust immunity to NCAA activities in furtherance of amateurism, the guiding precedent within the Ninth Circuit—now adopted by the Supreme Court—seemingly did not. This three-tiered circuit split involved radically different conclusions and crafted radically different legal rules

[9] "Positive" and "negative" citations to *Board of Regents* are coded to whether *Board of Regents'* call for 'ample latitude' reflects antitrust immunity in any form.

[10] For an explanation of the methodology employed to create this visualization, see Sam C. Ehrlich & Ryan M. Rodenberg, *Tracking the Evolution of Stare Decisis,* 60 U. Louisville L. Rev. 57, 75-91 (2021).

by three different precedential silos as to the interpretation of Board of Regents and whether, how, and when NCAA rules should be subject to scrutiny under the Sherman Act.

Expanding on an amicus brief filed at the Supreme Court by the author at the certiorari stage of the *Alston* litigation,[11] this article demonstrates why the Court was right to take *Alston* for review through a mixed-methods citation network review of the case law that has created a three-tiered circuit split in antitrust application of NCAA amateurism rules. This article also makes the case of why the Supreme Court was right to affirm *Alston* by demonstrating that the Ninth Circuit's view of the NCAA's antitrust liability—rather than the Third, Sixth, and Seventh Circuit's views—was the correct viewpoint given the Supreme Court's repeated distaste for implicit exemption to the Sherman Act. Through comparison to the long-standing and long-criticized baseball exemption, this article argues that the Supreme Court was correct to sustain its constant disfavor of implicit exemptions to the antitrust laws and create new precedent holding that antitrust immunity can be granted by Congress and Congress alone.

Part I of this article outlines the early history of judicial deference to the NCAA's amateurism activities before and after *Board of Regents* and leading up to *Alston*, including a brief review of literature analyzing the effects of *Board of Regents* on NCAA amateurism. Part II provides a holistic view of the amateurism case law network created by *Board of Regents* through mixed-methods citation network review. Part III then uses that collected data to outline the three-tiered circuit split created by varying approaches to applying antitrust law to the NCAA's various activities, determining and discussing the impact on athletes, institutions, and the NCAA itself. Finally, Part IV provides an argument for why the three-tiered circuit split of NCAA amateurism case law required Supreme Court review, as illustrated by the Supreme Court's previous distaste of implied antitrust exemption and unfavorable comparison to the Supreme Court's much more definitive treatment of another judicially created antitrust exemption in sport: the baseball exemption.

[11] Brief for Professor Sam C. Ehrlich as Amicus Curiae, NCAA & Am. Athletic Conf. v. Alston, Nos. 20-512, 20-520, 2020 WL 6802302 (Nov. 13, 2020).

Part I. Early Antitrust Deference to the NCAA to and Through Board of Regents

A. Justifications for Special Antitrust Treatment of Sports and the NCAA

Antitrust law—the field of law used by plaintiffs and prosecutors to guard against the monopolization of industry —has particular application within sports. Judicial consideration of the unique aspects of the sports industry have resulted in special application of antitrust law and as such has created several exemptions that are wholly unique within sports.

Generally speaking, the purpose of antitrust law is to create efficiency in the economic markets. According to Posner, the legislative framers of the Sherman Act of 1890—the legislation that comprises the foundation of antitrust law—were primarily concerned with the problems of monopolies and trusts and how these entities have the power through control of particular economic markets to set prices so low that smaller competitors would be priced out of the marketplace. To this end, the Sherman Act has two primary sections: Section 1, which forbids "[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations"; and Section 2, which prohibits the monopolization or attempted monopolization of "any part of the trade or commerce among the several states."[12] However, as current Supreme Court justice Samuel Alito noted in a speech to the Supreme Court Historical Society, the Sherman Act was left "deliberately short on detail" to accommodate the conflicting interests of legislators who wanted to focus exclusively on "the cartelization of certain industry" and legislators who wanted to use the act more broadly "to ensure a place in the national economy for smaller, higher-cost producers struggling to compete with more efficient, national concerns."[13]

Within the context of sports, however, antitrust law has realized unique applications unseen in other industries in part due to the nature of 'competition' in the sports industry. Sports is inherently based on a particular concept of competition—the natural heart of sports is that one player and/or team battles another player and/or team for supremacy based on the prescribed rules of the game. But the need for *on-field* competition paradoxically requires *off-field* competition (i.e., the type of competition that antitrust law is designed to protect) to be

[12] 15 U.S.C. §§ 1-2 (1890).

[13] Samuel A. Alito, Jr., *The Origin of the Baseball Antitrust Exemption: Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs,* 34 J. Sup. Ct. Hist. 183, 184 (2009).

lessened or removed as much as possible. Relative equality between the teams in each league is needed to ensure that the on-field product is not only consistent but competitive enough to retain the interest of fans, as "predictable outcomes will reduce fan interest and therefore [the] profitability" of the leagues.[14] As Mehra and Zuercher noted, "[n]o one wants to pay money to see one team appear without an opponent" and "[f]ew want to pay money to see two teams bicker about what the rules of the game out to be."[15]

As a result, courts have routinely found that the preservation of on-field competitive balance between teams requires restraints on off-field competition to ensure that the richer teams are unable to simply buy all of the best players, leaving the poor teams unable to compete.[16] But since that off-field competition

[14] Salil K. Mehra & T. Joel Zuercher, *Striking Out "Competitive Balance" in Sports, Antitrust, and Intellectual Property,* 21 Berkeley Tech. L.J. 1499, 1500 (2006). *See, e.g.,* Brookins v. Int'l Motor Contest Assoc., 219 F.3d 849, 853 (8th Cir. 2000) (rejecting the antitrust challenge of an auto racing association's modified car rules on the basis that courts must give sport rule-makers "considerable discretion to achieve their sporting objectives" so long as there is no demonstrated market foreclosure); M & H Tire Co. v. Hoosier Racing Tire Corp., 733 F.2d 973, 987 (1st Cir. 1984) (refusing to review a rule prescribing a certain tire company as the sole tire company of a racing association); Gunter Harz Sports v. U.S. Tennis Assoc., 511 F.Supp. 1103, 1116-17 (D. Neb. 1981), *aff'd per curiam,* 665 F.2d 222 (8th Cir. 1981) (holding that the U.S. Tennis Association's temporary ban on the use of "double-strung" tennis rackets was not violative of the Sherman Act as a group boycott since "the need for collective action is inherent in organized sports" particularly when that collective action "was intended to accomplish the legitimate goals of preserving the essential character and integrity of the game of tennis as it had always been played, and preserving competition by attempting to conduct the game in an orderly fashion.")

[15] Mehra & Zuercher, *supra* note 14, at 1502-03.

[16] *See* Los Angeles Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1397 (9th Cir. 1984) (discussing the differences between *interbrand* (league vs. league) competition and *intrabrand* (team vs. team) competition and noting that "the antitrust laws are primarily concerned with the promotion of interbrand competition" rather than competition between teams acting collectively to promote a sports product while ruling that "[t]he finder of fact must still balance the gain to interbrand competition against the loss of intrabrand competition.") For discussion of the balance between promoting competition between businesses and on-field competition in sports, *see, e.g.,* NCAA v. Board of Regents, 468 U.S. 85, 117 (1984) (noting their "recognition that a certain degree of cooperation is necessary if the type of competition that [the NCAA and member schools] seek to market is to be preserved"); Mackey v. NFL, 543 F.2d 606, 621 (8th Cir. 1976) ("We do recognize ... that the NFL has a strong and unique interest in maintaining competitive balance among its teams"); Richard C. Levin, George J. Mitchell, Paul A. Volcker, & George F. Will, The Report of the Independent Members of the Commissioner's Blue Ribbon Panel on Baseball Economics 4 (July 2000), available at http://roadsidephotos.sabr.org/baseball/2000blueribbonreport.pdf (finding "a strong correlation between high payrolls and success on the field" for MLB teams and arguing that whole "a high payroll is not always sufficient to produce a club capable of reaching postseason play," spending a lot of money on players "has become an increasingly necessary ingredient of on-field success.") *But see* Michael Lewis, Moneyball: The Science of Winning an Unfair Game 119-20 (1st ed. 2004) (critiquing the Blue Ribbon Panel Report while attempting to explain the success of the Oakland A's, a small market team that had been seen as an aberration due to its on-field success despite a much lower than average payroll.)

is what antitrust law is specifically designed to target, allowing for accommodation of this interest thus requires a loosening of the antitrust laws with the specific context of sports.[17] Indeed, legal scholars have observed that the leagues have employed the competitive balance rationale to attempt to justify several restraints on on-field competition even though they would often be considered *per se* violations of antitrust law outside the sports context.[18] For example, Mehra and Zuercher found the use of the competitive balance argument by leagues in such contexts as joint restrictions on the entry of new investors into leagues, restraints on geographic territories in which sports teams may operate, restraints on the entrance of players into the league, restraints on the movement of players between teams, and restrictions on televised broadcasts.[19]

A major reason why the courts have tended to treat sport organizations differently from traditional organizations when applying antitrust law is due to the sport organizations' need for restraints to maintain competitive balance among the teams in the league.[20] But while Mehra and Zuercher noted a circuit split in the treatment of competitive balance as a procompetitive rationale to moderate the negative effects caused by these restraints, they reasoned that even though the Supreme Court had not at the time "directly considered how antitrust should treat competitive balance" in sports, they gave "at least tacit approval to the competitive balance theory" in one case: *NCAA v. Board of Regents*.[21]

The reason for the difference between *Board of Regents* and other cases is simple: *Board of Regents* involved amateur athletics rather than professional sports.[22] In *Board of Regents,* the Supreme Court wrote in dicta that it "is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics," thereby giving a specifically strong level of credence to the competitive balance argument in the amateur sports context.[23]

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[17] *See* Leah Farzin, *On the Antitrust Exemption for Professional Sports in the United States and Europe,* 22 Jeffrey S. Moorad Sports L.J. 75, 75 (2015) ("Clubs must cooperate on a business level to maintain competitive balance between them. By cooperating economically instead of competing with one another, clubs are apparently violating antitrust laws in both the US and EU.")

[18] Mehra & Zuercher, *supra* note 14, at 1506-08.

[19] *Id*.

[20] *See* Mehra & Zuercher, *supra* note 14; Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect,* 1999 BYU L. Rev. 1265, 1290-92; Thomas A. Piraino Jr., *A Proposal for the Antitrust Regulation of Professional Sports,* 79 B.U. L. REV. 889, 920-21 (1999).

[21] Mehra & Zuercher, *supra* note 14, at 1508.

[22] *Id*.

[23] 468 U.S. 85, 117 (1984). *See* Note, *Sherman Act Invalidation of the NCAA Amateurism Rules,* 105 Harv. L. Rev. 1299, 1300 (1992) (noting *Board of Regents's* discussion of amateurism rules as dicta).

But the Supreme Court's disposition in this case was not out of nowhere. Indeed, the few cases pre-*Board of Regents* that had addressed antitrust enforcement in the context of amateur sports had universally found in favor of the defendants. In *College Athletic Placement Service, Inc. v. NCAA*,[24] the New Jersey district court found that the refusal by the NCAA to deal with a service aimed at linking college athletes with recruiters could not be held to be in violation of antitrust trust, as the NCAA's adoption of rules barring services like the plaintiff's was "for the purpose of furthering the noncommercial objectives of the organization" rather than an illegal commercial boycott.[25] In *Jones v. NCAA*,[26] the Massachusetts district court held that the plaintiff's claim that the NCAA's revocation of his eligibility to play college sports based on his pre-college years receiving payment to play for amateur hockey teams in the United States and Canada could not be sustained, as "[t]he plaintiff is currently a student, not a businessman in the traditional sense, and certainly not a 'competitor' within the contemplation of the antitrust laws."[27] In *Hennessey* v. NCAA,[28] the Fifth Circuit held that while the NCAA was not entitled to a wholesale exemption from the antitrust laws, its ability to sanction coaches—which made them less desirable on the employment market—was a reasonable restriction of trade as "the fundamental objective" of the sanctions were "to preserve and foster competition in intercollegiate athletics—by curtailing, as it were, potentially monopolistic practices by the more powerful—and to reorient the programs into their traditional role as amateur sports operating as part of the educational processes."[29] Finally, one year prior to *Board of Regents,* the Arizona district court found in *Justice v. NCAA*[30] that the college athletes suing over the NCAA's sanctions on their university preventing them from postseason competition could not sustain an antitrust claim because the sanctions were "directly related to the NCAA

[24] No. 74-cv-1144, 1974 WL 998 (D.N.J. 1974).

[25] *Id*. at *6.

[26] 392 F. Supp. 295 (D. Mass. 1975).

[27] *Id*. at 303.

[28] 564 F.2d 1136 (5th Cir. 1977)

[29] *Id*. at 1149-1154.

[30] 577 F.Supp. 356 (D. Ariz. 1983).

objectives of preserving amateurism and promoting fair competition."[31] Each of these cases—which in many ways mirror the (even then) much-criticized 1922 holding by the Supreme Court that professional baseball could not be deemed as commercial activity[32]—were cited favorably by the *Board of Regents* Court.[33]

Interestingly, only *Hennessey* actually addressed an argument based on competitive balance. Instead, most of these cases gave strong weight to amateurism in general, finding that any commercial aspects of college sports were outbalanced by the supposed goodwill created by the NCAA's goals of removing all commercial aspects out of amateur intercollegiate athletics. This more generalized deference to amateurism and the NCAA's goals of removing commercial activity would be substantially echoed both by the Supreme Court in *Board of Regents* and its progeny.

B. *Board of Regents* and its Impact

Despite its strong modern usage by the NCAA in defending the amateurism of intercollegiate sports, *Board of Regents* actually did *not* directly concern restrictions on amateurism.[34] In fact, despite the observations of the irregular

[31] *Id*. at 382. Importantly, the court in *Justice* laid clear "two distinct kinds of rulemaking activity" by the NCAA: one type of rule "rooted in the NCAA's concern for the protection of amateurism" and a second type of rule that "is increasingly accompanied by a discernable economic purpose." *Id*. at 383. That distinction would be mirrored by the Supreme Court in *Board of Regents* and in several later cases addressing NCAA liability under the antitrust laws for amateurism-related restrictions. *See, e.g.,* Smith v. NCAA, 139 F.3d 180, 185-86 (3d Cir. 1998) (distinguishing between eligibility rules and "the NCAA's commercial or business activities" as "[r]ather than intending to provide the NCAA with a commercial advantage, the eligibility rules primarily seek to ensure fair competition in intercollegiate athletics.")

[32] Federal Baseball v. National League, 259 U.S. 200 (1922) (holding that professional baseball games are games of "exhibition," which "although made for money would not be called trade or commerce in the commonly accepted use of those words.")

[33] 468 U.S. at 102 n. 24.

[34] Indeed, a large portion of scholarship discussing the impact of *Board of Regents* is *not* focused on the NCAA, but rather on *Board of Regents's* vast changes to the courts' application of the Rule of Reason in more traditional antitrust circumstances. *See, e.g.,* Note, *Market Power and Rule of Reason Analysis,* 98 Harv. L. Rev. 255 (1984) (discussing how Board of Regents apparently "further relaxed [the] boundaries" between *per se* and Rule of Reason application and signal[ed] a greater willingness on the Court's part to analyze the economic substance of restraints"); Thomas G. Krattenmaker, *Per Se Violations in Antitrust Law: Confusing Offenses with Defenses,* 77 Geo. L.J. 165, 169 (1988) (discussing *Board of Regents's* approach to applying the *per se* test of antitrust analysis); Thomas A. Piraino, *The Antitrust Analysis of Joint Ventures After the Supreme Court's* Dagher *Decision,* 57 Emory L.J. 735, 788 (2008) (applying *Board of Regents's* statement regarding restrictions on price and output to discussion of joint ventures with monopoly power); Alan J. Meese, *In Praise of All or Nothing Dichotomous Categories: Why Antitrust Law Should Reject the Quick Look,* 104 Geo. L.J. 835, 856 n. 104 (2016) (critiquing the quick-look doctrine of antitrust analysis while noting that this doctrine has been attributed to *Board of Regents,* along with *FTC v. Indiana Federation of Dentists,* 476 U.S. 447 (1986)).

strength of credence afforded to the competitive balance rationale in the amateur sports context, the Court in Board of Regents did not allow the NCAA to prevail on this argument—at least in the primary holding of the case. Indeed, rather than concerning amateurism restrictions, Board of Regents was a dispute between the NCAA and a group of member colleges and universities over television rights to college football games.[35] The NCAA had adopted a plan to "reduce . . . the adverse effects of live television upon football game attendance" by limiting the number of times that member colleges and universities to six times in total and no more than four times nationally split equally between two prescribed television carriers.[36] A group of member colleges and universities with major football programs objected to these limitations, feeling that they could gain more money by signing their own unlimited contracts with providers.[37] When the NCAA threatened to impose sanctions on these schools for noncompliance with NCAA regulations, two of these schools—the University of Georgia and the University of Oklahoma—filed suit against the NCAA, claiming that the restrictions on their ability to market and sell their television rights violated the Sherman Act and antitrust law.[38]

As part of its response to the member institution claims, the NCAA offered the procompetitive rationale that its "interest in maintaining a competitive balance among amateur athletic teams is legitimate and important and that it justifies the [television] regulations challenged" by the member schools.[39] But while—as mentioned—the court agreed that many of the NCAA regulations are necessary to foster competition among the teams, the court did not agree that the television restrictions in question were shaped to accomplish that goal.[40] The Court reasoned that since the television plan "[did] not regulate the amount of money that any college may spend on its football program, nor the way in which the colleges may use the revenues that are generated by their football programs," it could not be seen as necessary to maintain competitive balance.[41]

In this regard, the Court found that the television plan was unlike other NCAA regulations, including the "rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture," which "are

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35 *Id*. at 91-94.

36 *Id*.

37 *Id*. at 94-95.

38 *Id*.

39 *Id*. at 117.

40 *Id*. at 117-20A.

41 *Id*. at 119.

much better tailored to the goal of competitive balance" than the television plan.[42] As such, the Court found that "by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life."[43]

As Mehra and Zuercher discussed, this case was important for determining that competitive balance could be a viable procompetitive rationale for would-be antitrust violations in the sports context.[44] However, *Board of Regents* has had a much wider reach than solely giving the weight of precedential authority to the use of competitive balance as a procompetitive justification for a sports league antitrust defendant, as the statement by the Court comparing the television plan in question to NCAA "rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture" has seen broader use than perhaps *Board of Regents* majority opinion author Justice Stevens intended.[45]

The NCAA has a unique structure compared to other sports leagues due in large part to its "critical role in the maintenance of a revered tradition of amateurism in college sports," as Justice Stevens wrote in *Board of Regents*.[46] As Justice

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[42] *Id*. at 117-19. While the focus in this section is mainly on eligibility rules, the Fifth Circuit applied the same language to find a procompetitive presumption in favor of the NCAA for "'rules defining the conditions of the contest' as explained in *Board of Regents*." Marucci Sports v. NCAA, 751 F.3d 368, 376 (5th Cir. 2014) (quoting *Board of Regents,* 468 U.S. at 117) (citation omitted).

[43] *Board of Regents*, 468 U.S. at 120A.

[44] At the same time, the NCAA has not had much success using competitive balance as a procompetitive rationale even beyond *Board of Regents*. *See, e.g.,* Law v. NCAA, 134 F.3d 1010, 1023-24 (10th Cir. 1998) (finding that an NCAA rule limiting the number and salaries of certain basketball assistant coaches could not be rationalized by using competitive balance as a procompetitive virtue as "[t]he undisputed record" revealed that the rule was "nothing more than a cost-cutting measure"); O'Bannon v. NCAA, 802 F.3d 1049, 1059; 1072 (9th Cir. 2015) (accepting the district court's conclusion that the NCAA's rules limiting student-athlete compensation did not promote competitive balance as while they forbade schools from paying student-athletes more than a fixed scholarship, they still "allow[ed] schools to spend as much as they like on other aspects of their athletic programs, such as coaching, facilities, and the like, which 'negate[s] whatever equalizing effect the NCAA's restraints on student-athlete compensation might have once had'") (quoting O'Bannon v. NCAA, 7 F.Supp. 3d 955, 1002 (N.D. Cal. 2014)). *But see Marucci Sports,* 751 F.3d at 376 (granting a procompetitive presumption in favor of the NCAA in the activities regulating the performance of baseball bats in intercollegiate baseball events since the Court in *Board of Regents* "agreed with the NCAA's argument that 'maintaining a competitive balance among amateur athletic teams is legitimate and important'") (quoting *Board of Regents,* 468 U.S. at 117).

[45] *Board of Regents*, 468 U.S. at 120A. *See* Thomas A. Baker III, Marc Edelman, & Nicholas M. Watanabe, *Debunking the NCAA's Myth that Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis,* 85 Tenn. L. Rev. 661, 670-73 (2018) (detailing how "a string of lower court decisions thereafter ran with [*Board of Regents's*] loose dicta instead of its holding in a manner that can best be likened to a bad game of telephone.")

[46] *Board of Regents,* 468 U.S. at 120A.

Stevens commented, the NCAA has, since its inception in 1905, "played an important role in the regulation of amateur collegiate sports" by "adopt[ing] and promulgat[ing] playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staffs" along with sponsoring and conducting national tournaments in many sports.[47]

The idea of amateurism, however, is where the NCAA has been forced to defend itself from attack on several legal fronts. Mitten theorized that the NCAA has three principal objectives in its operations: it seeks to "1) preserve the amateur nature of college sports; 2) as a component part of higher education; and 3) to ensure competitive balance on the playing field."[48] However, Mitten also observed that these three objectives have become difficult to balance over the past few decades "given the economic reality of 'big-time' college athletics, namely an existing 'athletics arms race' fueled by the multi-million dollar economic rewards of winning teams fielded by members operating 'big time' programs."[49] But while NCAA regulations that "directly fix prices for inputs (e.g., coaches' salaries) or the sale of output (e.g., television rights)" have been struck down as illegal market collusion under the Sherman Act,[50] as Nagy observed in 2004, "every antitrust challenge to the NCAA's eligibility rules has failed."[51]

The distinction between NCAA amateurism eligibility rules and other NCAA restrictions can be clearly seen through Law v. NCAA,[52] a case in which the Tenth Circuit Court of Appeals struck down the NCAA's attempts to limit the number of coaches that a college basketball program may hire to one head coach, two full time assistant coaches, and one "restricted earnings" entry-level

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47 *Id*. at 88.

48 Matthew J. Mitten, *Applying Antitrust Law to NCAA Regulation of "Big Time" College Athletics: The Need to Shift from Nostalgic 19th and 20th Century Ideals of Amateurism to the Economic Realities of the 21st Century,* 11 Marq. Sports L. Rev. 1, 2 (2000).

49 *Id*. at 2 (quoting John C. Weistart, *Can Gender Equity Find a Place in Commercialized College Sports?),* 3 Duke J. Gender L. & Pol'y 191, 211-12 (1995)).

50 Mitten, *supra* note 48, at 4.

51 Tibor Nagy, Note, *The "Blind Look" Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amateurism Rules,* 15 Marq. Sports L. Rev. 331, 332 (2005). Of course, since 2004 there have been a few antitrust challenges to NCAA eligibility rules in which the plaintiffs have succeeded. *See* O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015); Alston v. NCAA, 958 F.3d 1239 (9th Cir. 2020).

52 134 F.3d 1010 (10th Cir. 1998).

coach that was limited to a maximum of $16,000 per season (the "REC Rule").[53] In analyzing whether that activity violated antitrust law, the court noted that "the 'product' made available by the NCAA in this case is college basketball" and that there are certain "horizontal restraints necessary to the product to exist in-clud[ing] rules such as those forbidding payments to athletes and those requiring that athletes attend class, etc."[54]

At the same time, however, the Tenth Circuit found that similar restraints on coaches—namely the limitations on the number of coaches and the salaries given to coaches designated under the REC Rule—could not be found to help maintain competitive equity as "it is not clear that the REC Rule will equalize the experience level of such coaches" nor could "the NCAA prove that the salary restrictions enhance competition, level and unequal playing field, or reduce coaching inequalities."[55] On the contrary, the court found that the rule was "nothing more than a cost-cutting measure" and that "the only consideration the NCAA gave to competitive balance was simply to structure the rule so as not to exacerbate competitive imbalance."[56]

The attack by plaintiffs on NCAA eligibility rules through the antitrust laws has led to several scholars—along with the NCAA itself, both pre- and post-*Board of Regents*—to lobby for the imposition of a clearly defined antitrust

[53] *Id*. at 1013-14. Indeed, the Tenth Circuit specifically distanced the issues at hand from the particulars of applying antitrust law to amateurism restrictions, writing in a footnote that "the NCAA cannot be heard to argue that the REC Rule fosters the amateurism that serves as the hallmark of NCAA competition" and as "[w]hile courts should afford the NCAA plenty of room under the antitrust laws to preserve the amateur character of intercollegiate athletics ... courts have only legitimized rules designed to ensure the amateur status of student athletes, not coaches." *Id*. at 1022 n. 14.

[54] *Id*. at 1018.

[55] *Id*. at 1024.

[56] *Id*.

exemption for the NCAA.[57] Schaefer argued that given the NCAA's "growing challenge" of "how to maintain successful athletic programs without compromising institutional integrity," the NCAA would be unable to fulfill its core academic-focused mission "under the existing paradigm of antitrust laws and applicability to NCAA actions."[58] In this regard, Schaefer argued that antitrust application to NCAA rules would prohibit the NCAA from passing and enforcing bylaws that serve legitimately positive effects on college athlete academic success and well-being including, for example, a rule prohibiting games from starting later than 7:30 p.m. on a weeknight.[59]

Similarly, Zimbalist found in 2016 that in the years since *Board of Regents* opened the doors to more widespread and lucrative television rights deals for member institutions, revenue inequality between NCAA member institutions has risen sharply, giving high-revenue teams a substantial competitive advantage over their weaker opponents.[60] Zimbalist saw two possible paths forward to meaningful reform in light of this increasing inequality: "(i) toward marketization and professionalism or (ii) toward educationally centered athletics and

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[57] *See* Robert G. Berger, *After the Strikes: A Reexaminiation of Professional Baseball's Exemption from the Antitrust Laws,* 45 U. Pitt. L. Rev. 209, at 218 n. 38 (1983) (noting that the NCAA had been lobbying Congress for a baseball-like antitrust exemption for its television contracts in response to the then-ongoing *Board of Regents* litigation); *NCAA Wants Antitrust Exemption,* Wash. Post, Jan. 11, 1983, at D4. These lobbying activities have continued into the present where the NCAA, in response to antitrust attack in the less-than-favorable Ninth Circuit and the growing number of legislative efforts by states to force the NCAA into allowing widespread name, image, and likeness exploitation by college athletes, has been able to cajole Congress into holding several hearings—including four in 2020 alone—discussing the need for a bill to legislatively exempt the NCAA from antitrust culpability. *See, e.g., Name, Image, and Likeness: The State of Intercollegiate Athlete Compensation: Hearing Before the Subcomm. On Manufacturing, Trade, and Consumer Protection of the S. Comm. On Commerce, Science, and Transp.,* 116th Cong. (2020); *Exploring a Compensation Framework for Intercollegiate Athletes: Hearing Before the S. Comm. On Commerce, Science, and Transp.,* 116th Cong. (2020); *Protecting the Integrity of College Athletics: Hearing Before the S. Comm. on the Judiciary,* 116th Cong. (2020); *Compensating College Athletes: Examining the Potential Impact on Athletes and Institutions: Hearing Before the S. Comm. On Health, Ed., Labor, and Pensions,* 116th Cong. (2020).

[58] Adam R. Schaefer, Note, *Slam Dunk: The Case for an NCAA Antitrust Exemption,* 83 N.C. L. Rev. 555, 565 (2005). It must be noted that the basis for this note was what the author deemed a "stifling effect on the NCAA in fulfilling its mission" (*Id*. at 555) created by a district court enjoining the NCAA from enforcing its rules prohibiting member basketball programs from competing in more than two certified tournaments every four years in *Worldwide Basketball and Sports Tours v. NCAA,* 273 F.Supp. 2d 933 (S.D. Ohio 2003). However, this so-called "stifling effect" was resolved when the Sixth Circuit later overturned this injunction. *See* Worldwide Basketball and Sports Tours v. NCAA, 388 F.3d 955 (6th Cir. 2004), *cert. denied,* 546 U.S. 813 (2005).

[59] *Id*. at 566.

[60] Andrew Zimbalist, *Reforming College Sports and a Constrained, Conditional Antitrust Exemption,* 38 Manage. Decis. Econ. 634, 634-35 (2016).

amateurism."[61] However, Zimbalist theorized that "introducing a labor market [into college sports] would be a complicated affair," as "[t]he majority of scholarship athletes probably produce a value well inferior to the value of their scholarships."[62] Further, Zimbalist argued that the university system is not set up for such a change, as "once a student is admitted and matriculated into the university, the market mechanism is not used to allocate resources among students."[63] To this end, Zimbalist concluded that the marketization process "would ultimately result in the formation of a professional, minor league in both men's basketball and football," thereby inviting greater scrutiny of the various tax preferences that currently go to college sports and increased academic fraud in the interest of "end[ing] the charade of amateur and educationally centered college athletics."[64]

Instead, Zimbalist argued that the second path—the reinforcement of educationally centered amateur athletics—is the more logical path but requires stakeholders to "confront [the] tendency towards the subordination of academics to athletics."[65] Zimbalist reasoned that the only way to confront this tendency was to "revisit the major source of the post-1984 commercialization juggernaut: the antitrust treatment of college sports."[66] According to Zimbalist:

> A fundamental function of the NCAA is to maintain a clear line of demarcation between college sports as an extracurricular activity secondary to the academic responsibilities of students and professional sports which requires a time and effort priority on athletics excellence and revenue production inappropriate for a non-profit educational institution.[67]

With this in mind, Zimbalist argued that those actions "that should be considered the legitimate functions of a non-profit national intercollegiate athletics governing association"—including controlling the cost of athletics, preventing the operations of varsity sport programs from conflicting with student academic responsibilities, and protecting the health and welfare of college athletes—should be granted a conditional antitrust exemption, so long as the NCAA "enact and implement certain pro-educational reforms."[68]

Further expanding on this line of reasoning, Meyer and Zimbalist argued that a major reason why the courts or Congress should grant the NCAA a clearly

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61 *Id*. at 637.

62 *Id*. at 637-38.

63 *Id*. at 638.

64 *Id*.

65 *Id*. at 639.

66 *Id*.

67 *Id*. at 640.

68 *Id*. at 640-41.

stated conditional antitrust exemption was that *Board of Regents* did not "[i]mpart [c]larity" as to how the NCAA should be treated when challenged by antitrust law.[69] Meyer and Zimbalist noted that the Supreme Court in *Board of Regents* "provided no specific guidance" as to "how to balance the pro and anticompetitive effects" as prescribed by the rule of reason test framework essential to the determination of antitrust violations.[70] This "fuzziness" in applying the antitrust laws to the NCAA, Meyer and Zimbalist argued, makes it difficult for courts to balance cases with "socially desirable justifications but clear anticompetitive impact" like those that the NCAA commonly faces in regards to its eligibility rules.[71]

Neither Congress nor any of the courts definitively declared the NCAA *de facto* exempt from antitrust law. Still, as this article demonstrates, prior to the Supreme Court's holding in *Alston*, some—but not all—courts had generally given great deference to NCAA eligibility rules in ways that have at least resembled an antitrust exemption when these rules have faced antitrust challenge.

Part II. The NCAA Amateurism Citation Network

A. Methodology

This article employs a two-step mixed-methods citation network analysis (CNA) in order to analyze the discrete citation network of antitrust application to NCAA amateurism rules created by multi-degree citation of the Board of Regents dicta.[72] First, the boundary of the discrete citation network must be specified and defined, with some basic quantitative metrics to analyze overall trends of the network. Second, the results of those quantitative network analyses are used in tandem with legal doctrinal analysis, where case citations are qualitatively identified as either positive or negative to produce signed network graphs that show the character of the network and can be used to demonstrate and further define circuit splits.

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[69] Jayma Meyer & Andrew Zimbalist, *Reforming College Sports: The Case for a Limited and Conditional Antitrust Exemption,* 62 Antitrust Bull. 31, 39 (2017).

[70] *Id*. at 40.

[71] *Id*. at 42 *See also* Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?,* 65 Notre Dame L. Rev. 206 (1990) (discussing the anticompetitive effects of NCAA amateurism rules).

[72] *See generally* Ehrlich & Rodenberg, *supra* note 10, 75-91 (outlining the used of mixed methods citation network analysis to explore discrete citation networks created by limited exemptions and applications of law to specific industry sectors). This article removes quantitative network analysis metrics (e.g., centrality metrics) that did not produce meaningful results in favor of the more-fruitful qualitative network analysis findings discussed herein.

B. Results

i. Defining the Network

In sum, 639 cases directly citing to *Board of Regents* were collected from Google Scholar's "How Cited" and LexisNexis's "Shepardizing" tools.[73] This raw total included 106 cases that were superseded by 'stronger' precedent that was more recent and/or at a higher court level and were therefore removed from the study.[74] Removing these superseded cases leaves a working sample of 533 top-level decisions directly citing Board of Regents that were then analyzed to determine whether they are either within or outside the boundary of the defined NCAA amateurism network, meaning that the citations to a prior case were explicitly for the purpose of that prior case's application of antitrust law to the principles of amateurism in intercollegiate sports.

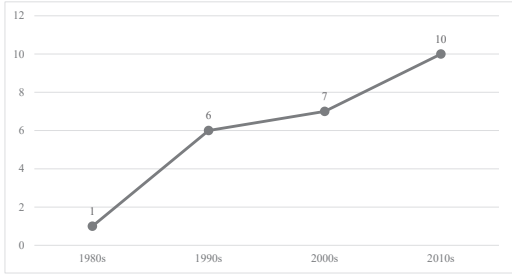

Figure 2. Citations to Board of Regents Related to NCAA Amateurism Rules (by decade).

Of the 533 total cases found citing *Board of Regents,* 24 cases were included as part of the NCAA amateurism citation network as having: (a) cited Board of Regents for the application of antitrust law (b) for the specific purpose of application to NCAA amateurism rules. Interestingly, citations to *Board of Regents* that were included in the network have sharply increased in the most recent decade, jumping from six and seven in-network citations to Board of Regents in the 1990s and 2000s to 10 in-network citations in the 2010s (see Figure 2).

[73] With the exception of the Ninth Circuit decision in *Alston*, the cutoff date for this study was Jan. 1, 2020.

[74] As an example, while both the Ninth Circuit opinion in *O'Bannon v. NCAA,* 802 F.3d 1049 (9th Cir. 2015), and a preceding Northern District of California opinion (In re NCAA Student-Athlete Name & Likeness Licensing Litig., 990 F.Supp. 2d 996 (N.D. Cal. 2013)) are included within the noted 639-case population, only the Ninth Circuit opinion will be considered for analysis moving forward.

Breaking this down further and analyzing the distribution of citations to *Board of Regents* by half-decade (see Figure 3) shows a similar trajectory. While the number of these citations did not increase from the first half of the 2010s to the latter half of the 2010s, both half-decades saw more citations to *Board of Regents* in applying antitrust law to NCAA amateurism rules than any other half-decade since Board of Regents was decided.

Figure 3. Citations to *Board of Regents* Related to NCAA Amateurism Rules (by half-decade).

To arrive at this number, qualitative decisions had to be made whether to include several cases citing *Board of Regents* in cases that involved the NCAA and/or related organizations as defendants in antitrust litigation but with fact patterns not concerning a direct challenge to the NCAA's amateurism apparatus. Since the purpose of this study is to focus on the application of antitrust laws specifically to NCAA amateurism rules, it was determined that cases that involved the NCAA that focused only on NCAA activity not concerning the protection of amateurism should not be included within the network. Instead, this study focuses the threshold issue of whether antitrust laws should apply to NCAA amateurism rules specifically, or, where applicable, whether antitrust law should more generally apply to NCAA actions due to the "ample latitude" afforded to it due to its purported "critical role in the maintenance of a revered tradition of amateurism in college sports."[75]

For example, a Ninth Circuit decision decided just months after *Board of Regents* involving a similar fact pattern as *Board of Regents* (i.e., a challenge to grouped broadcast rights among NCAA institutions) was not included because the opinion did not focus any material part of its analysis on the NCAA and its member institutions' status as amateur organizations and whether that status affected their

[75] *See Board of Regents,* 468 U.S. at 120A.

antitrust exposure.[76] On the other hand, cases that involved challenges to NCAA actions not related to amateurism but still discussed and applied the *Board of Regents* language regarding the "ample latitude" that must be given to the NCAA were included, since they perpetuated and applied this *Board of Regents* language in a way that could later be applied by future cases applying that doctrine to cases more directly implicating amateurism rules.[77] For the same reasons, cases that discuss that special status granted to the NCAA but explicitly decline to apply that special status based on distinguishable facts are also included.[78]

One particularly noteworthy case that ended up being excluded from the final NCAA amateurism network was *Maloney v. T3Media*,[79] a Central District of California case decided in 2015. While the NCAA was not involved as a named party, the suit consisted of a group of members of the 2001 men's basketball Division III NCAA championship game who filed suit against an online reseller of NCAA-licensed photography from various NCAA events, including the championship game in which the plaintiffs participated.[80] The plaintiffs argued that the use of their names, images, and likenesses in reselling those photographs was a violation of their rights under California's right of publicity and unfair

[76] Regents of University of California v. ABC, 747 F.2d 511 (9th Cir. 1984). *See also* Association of Independent Television Stations v. College Football Asso., 637 F.Supp. 1289 (W.D. Okla. 1986) (denying a motion for summary judgment filed by a group of college football programs in another case alleging an attempt to monopolize the market for college football broadcast rights).

[77] *See, e.g.,* Worldwide Basketball & Sports Tours v. NCAA, 388 F.3d 955, 958-59 (6th Cir. 2004) (finding that NCAA rules dictating a limit to the number of tournaments NCAA basketball teams could play was commercial in nature and therefore must be analyzed under the Rule of Reason test). While *Worldwide Basketball* did not facially deal with amateurism restrictions (even though the NCAA argued that the tournament limit was "academically directed"), its determination that "[t]he dispositive inquiry in this regard is whether the rule itself is commercial, not whether the entity promulgating the rule is commercial" would later be cited in a future Sixth Circuit case as support for finding that NCAA eligibility rules are noncommercial, and therefore not subject to Sherman Act scrutiny. *Id. See* Bassett v. NCAA, 528 F.3d 426, 432-34 (6th Cir. 2008). On related grounds, a Southern District of New York case also involving NCAA basketball tournament rules, Metro. Intercollegiate Basketball Ass'n (MIBA) v. NCAA, 337 F.Supp. 2d 563 (S.D.N.Y. 2004), was included because it discussed the *Board of Regents* dicta in noting that the "character and quality" and the "integrity" of the college sports product requires mutual agreement to be preserved. *Id*. at 570-71.

[78] *See* Law v. NCAA, 134 F.3d 1010, 1022 n. 14 (10th Cir. 1998) (noting in a footnote that the NCAA cannot support an argument that its rules capping the number of coaching positions per basketball team and what those coaches could be paid "fosters the amateurism that serves as the hallmark of NCAA competition" because while noting that "courts should afford the NCAA plenty of room under the antitrust laws to preserve the amateur character of intercollegiate athletics" it held that "courts have only legitimized rules designed to ensure the amateur status of student athletes, not coaches.") (citations omitted).

[79] 94 F.Supp. 3d 1128 (C.D. Cal. 2015).

[80] *Id*. at 1131-32.

competition[81] statutes, claiming that "any consent obtained by Defendant from student-athletes while they were still in school is void because NCAA rules prohibit the commercial exploitation of student-athlete images."[82] The court never ruled on the antitrust claim as the case was dismissed under California's strategic lawsuits against public participation (SLAPP) statute, which forbids suits that are only filed to intimidate defendants against exercising free speech and free expression rights in public fora.[83] Citing *Board of Regents* to find that the topic matter of the suit was a matter of public interest (an element of the statute), the court granted the defendants' SLAPP motion and accordingly dismissed the case without ruling on the merits.[84]

An additional question in determining the final NCAA amateurism network was the presence of superseding precedent in four cases that were excluded in favor of lower or earlier decisions in the same case. Upon final review, the Sixth Circuit opinion in *Marshall v. ESPN*[85] was excluded in favor of its district court opinion[86] because the Sixth Circuit opinion affirmed the dismissal the antitrust claim without citing any cases in support. As such, that opinion cannot be considered part of the citation network, as it neither cites nor is cited by any other in-network precedent. A similar but easier decision was made in *Warrior Sports v. NCAA*,[87] in which the Sixth Circuit on appeal discussed only the issue of antitrust injury and not the threshold question of whether the Sherman Act should be applied to the NCAA at the outset.[88]

Along the same lines, a Third Circuit decision in *Bowers v. NCAA*[89] was excluded in favor of an earlier district court opinion[90] because by the time the

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[81] California's unfair competition law is one part of the state's overall antitrust landscape alongside the Cartwright Act and the Unfair Practices Act. *See* Carlton Varner & Thomas D. Nevins, California Antitrust & Unfair Competition Law 1 (3rd ed. 2003) (ebook), available at https://www.sheppardmullin.com/media/article/84_pub209.pdf. Each have different scopes and foci; the UCL, for example, "generally prohibits any unlawful, unfair, or fraudulent business act or practice, as well as deceptive or misleading advertising." *Id*.

[82] *Maloney*, 94 F.Supp. 3d at 1132.

[83] *Id*. at 1132-33.

[84] *Id*. at 1134-35. The district court's decision to dismiss the case based on the SLAPP statute would later be affirmed on appeal by the Ninth Circuit, though the Ninth Circuit did not cite *Board of Regents* in its decision and in fact focused its analysis on the question of whether the plaintiff's purported rights under the California right of publicity statute were preempted by the federal Copyright Act. *See* Maloney v. T3Media, 853 F.3d 1004 (9th Cir. 2017).

[85] 668 Fed. Appx. 155 (6th Cir. 2016)

[86] 111 F.Supp. 3d 815 (M.D. Tenn. 2015).

[87] No. 08-cv-14812, 2009 U.S. Dist. LEXIS 25700 (E.D. Mich. 2009).

[88] *See* Warrior Sports v. NCAA, 623 F.3d 281 (6th Cir. 2010).

[89] 346 F.3d 402 (3d Cir. 2003).

[90] 9 F.Supp. 2d 460 (D.N.J. 1998).

case reached the Third Circuit, the plaintiffs had long since dropped their antitrust claim in favor of the more primary Americans with Disabilities Act and Rehabilitation Act claims alleged by the plaintiffs; the Third Circuit exclusively analyzed those claims and did not discuss the antitrust issues.[91] In fact, the Bowers decision included in the network was not even the most recent district court opinion in that litigation, as several later district court decisions were excluded for the same reason that the Third Circuit decision was excluded, since of the nearly one-dozen district court opinions that resulted from that case, there was only one opinion discussing (and dismissing) the plaintiff's antitrust claim against the NCAA.[92]

Another case, however, presented something of a more difficult choice. *Metropolitan Intercollegiate Basketball Association (MIBA) v. NCAA* had two published decisions decided two weeks apart that each decided summary judgment motions filed by the plaintiff[93] and the NCAA.[94] Ultimately, the decision was made to include the second decision (involving the NCAA's summary judgment motion) and exclude the first decision (involving the plaintiff's summary judgment motion). While both cases cited *Board of Regents* and other network cases in discussion of whether the NCAA rules at issue are challengeable as a threshold matter in different ways, *MIBA II* did supersede *MIBA I* by virtue of being decided later, and thus is the appropriate inclusion for this study. Additionally, *MIBA II* involved the NCAA's motion for summary judgment rather than the plaintiff's motion for summary judgment, meaning that *MIBA II* involved a much more robust discussion of *Board of Regents* as a potential threshold bar to the plaintiffs' claims.[95]

To create the final NCAA amateurism network, a few additional cases were added that only cited *Board of Regents* indirectly through second- or third-level citation.[96] However, given the authoritative power of *Board of Regents* as a touchstone case for antitrust application to the NCAA, these cases were limited in number. In total, just four cases were added to the network that did not cite *Board of Regents* and instead were linked to the network by mere second-level

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[91] *See generally Bowers,* 346 F.3d at *passim*.

[92] *See, e.g.,* Bowers v. NCAA, 118 F.Supp. 2d 494 (D.N.J. 2000) (finding that the NCAA did not provide reasonable accommodations in rejecting the plaintiff's application for a waiver to academic rules that had declared him ineligible to play football).

[93] MIBA v. NCAA ("*MIBA I*"), 337 F.Supp. 2d 563 (S.D.N.Y. 2004).

[94] MIBA v. NCAA ("*MIBA II*"), 339 F.Supp. 2d 545 (S.D.N.Y. 2004).

[95] *See generally MIBA II,* 339 F.Supp. 2d 545.

[96] *See* Ehrlich & Rodenberg, *supra* note 10, at 83.

citation: *Bowers v. NCAA*,[97] *White v. NCAA*,[98] *Bleid Sports v. NCAA*,[99] and *Aloha Sports v. NCAA*.[100] These additions expand the NCAA amateurism network to 29 total cases (including *Board of Regents* itself), with 117 total citations between these 29 cases (see Figure 4).

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[97] 9 F.Supp. 2d 460. *Bowers* would only cite and rely on the then-recent binding authority in *Smith v. NCAA*, 139 F.3d 180, 185 (3d Cir. 1998), in dismissing the plaintiffs' antitrust claims.

[98] No. 06-cv-999, 2006 U.S. Dist. LEXIS 101366 (C.D. Cal. 2006) (involving a challenge to NCAA rules requiring schools to adhere to a grant-in-aid cap in their financial aid awards to student-athletes). Given these facts, it is rather peculiar that this case actually does not discuss any arguments by the NCAA stating that the case should be dismissed as a threshold matter due to the special status afforded to it by *Board of Regents* and its progeny. Instead, the case merely cites two other in-network cases—*In re NCAA I-A Walk-On Football Players Litig.*, 398 F.Supp. 2d 1144, 1147-48 (W.D. Wash. 2005), and *Tanaka v. Univ. of So. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001)—that both got past the threshold issue of Sherman Act applicability to the NCAA that in some regard can implicitly lead one to believe that the court did not see that threshold issue as an issue at all. However, this is still fairly strange considering that it would still be nine years before the Ninth Circuit would affirmatively reject the *Board of Regents* language (at least as applied to NCAA rules like its grant-in-aid caps) in O'Bannon v. NCAA, 802 F.3d 1049, 1063 (9th Cir. 2015).

[99] 976 F.Supp. 2d 911 (E.D. Ky. 2013) (dismissing the plaintiffs' antitrust challenge to the NCAA recruiting rules at issue based on the binding Sixth Circuit authority of *Bassett v. NCAA* and *Worldwide Basketball and Sport Tours*).

[100] Aloha Sports v. NCAA, No. CAAP-15-0000663, 2017 Haw. App. LEXIS 446 (Haw. Ct. App. 2017), *rev'd on other grounds*, Field v. NCAA, 143 Haw. 362 (Haw. 2018) (involving a challenge to the NCAA's refusal to sanction a football bowl game sponsored by the plaintiffs, but citing *Gaines v. NCAA* to hold that "[t]he NCAA has authority to oversee the operation of the bowl games and has broad latitude to make rules that affect the nature of athletic competition and to preserve the nature of intercollegiate athletics").

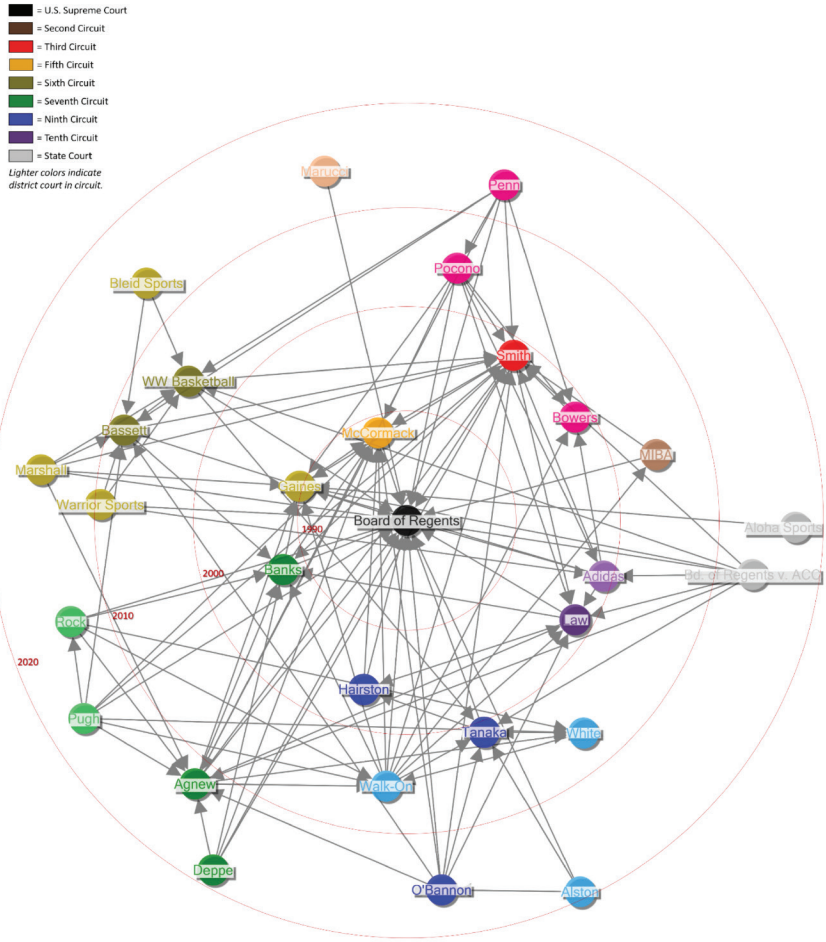

Figure 4. Complete NCAA Amateurism Network Graph Visualization.[101]

[101] The graph is organized through a polar layout, with rotational angle and node color indicating jurisdictional circuit and polar radius indicating the date the case was decided.

ii. Qualitative Network Analysis

The second step of the mixed-methods CNA scheme employed in this study involved a direct content analysis in which each citation between network cases was coded as either "+" (signifying a positive citation) or "-" (signifying a negative citation) into a NodeXL workbook.[102] Using the codes collected in this level, a signed network graph was created that shows the entire NCAA amateurism network while illustrating how each case within the network case cited by future cases (see Figure 5).

For the NCAA amateurism network, some citations between in-network cases were found to be purely for broader antitrust purposes and not for the specific purpose of applying antitrust law to NCAA amateurism rules. The choice to exclude these citations from the overall network analysis was considered, but these citations were ultimately kept in and marked with a "*" indicator instead of a "+" or "-." While these citations do not have any direct bearing on whether NCAA amateurism rules are subject to antitrust scrutiny as a threshold issue, they do show the next steps of the process when the threshold issue of whether antitrust law can be applied to NCAA rules at all is passed. As such, these citations were left in for the earlier quantitative analysis and for inclusion on the network graph visualizations, but were not considered as either positive or negative citations for the purposes of advancing the specific application of antitrust law to NCAA amateurism rules.

Figure 5 shows extensive disagreement among cases within the NCAA citation network, with a large number of the citations collected coded as negative citations. Overall, of the 117 citations found between network cases, 68 (58.1%) of these citations were coded as positive while 36 (30.8%) citations were coded as negative (with 13 citations made for the purpose of general antitrust concepts and thus coded with a "*"). This forecasts extensive disagreement between courts in applying antitrust law to NCAA amateurism issues.

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[102] *See* Ehrlich & Rodenberg, *supra* note 10, at 115-120. NodeXL is a Microsoft Excel plugin maintained by the Social Media Research Foundaton that allows for network data collection and visualization. *See, e.g.*, Brian Britt, *Making Social Network Analysis Accessible: A Review of NodeXL*, Thought Ark (Apr. 7, 2012), http://thoughtark.net/making-social-network-analysis-accessible-a-review-of-nodexl/; Peter Aldhous, *NodeXL for Network Analysis*, 2012 Nat'l Inst. for Computer-Assisted Reporting, available at https://www.peteraldhous.com/CAR/NodeXL_CAR2012.pdf (explaining key features of NodeXL for network analysis).

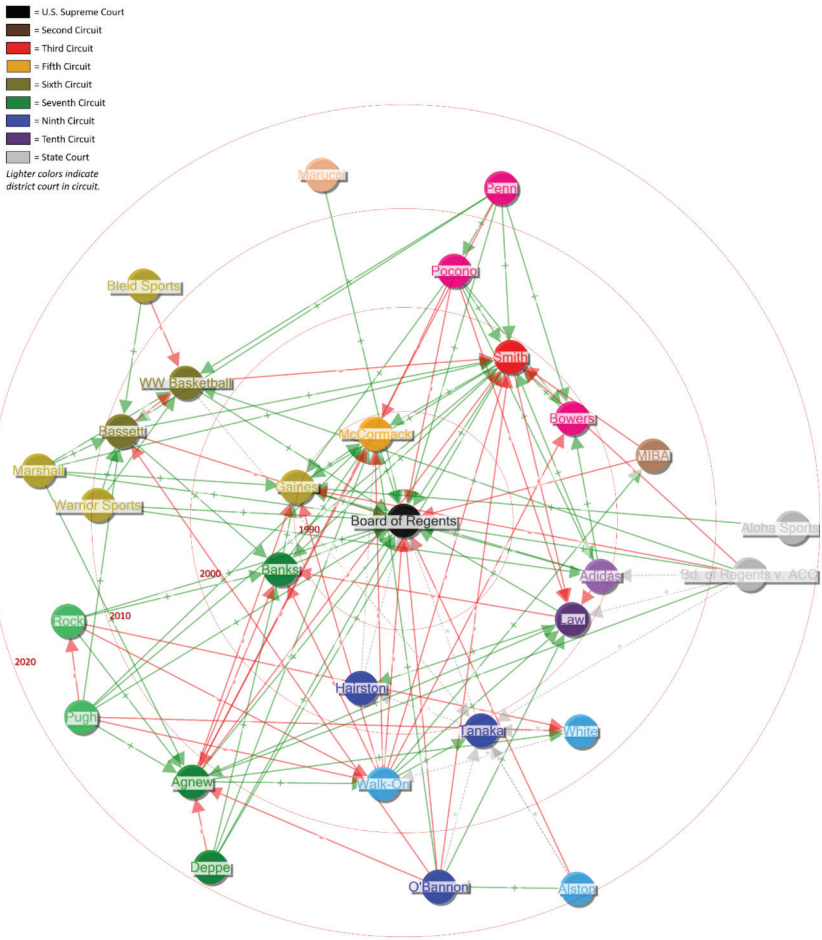

Figure 5. Complete NCAA Amateurism Signed Network Graph Visualization.[103]

[103] *See supra* note 101. Some citations between in-network cases were found to be purely for broader antitrust purposes and not for the specific purpose of applying antitrust law to NCAA amateurism rules. The decision to explicitly exclude these citations was considered, but these citations were ultimately kept in (without a +/- indicator) since they do contribute to the network and the evolution of application of antitrust law to NCAA amateurism rules, as they show the next steps of the process when the threshold issue of whether antitrust law can be applied to NCAA rules at all is passed. These citations are represented in the signed network graph with a "*" and with a gray line, rather than a green or red line.

In this analysis, certain cases at each judicial circuit emerged as benchmark doctrine that defines the three-tiered circuit split highlighted in this article: *Smith* at the Third Circuit, *Worldwide Basketball and Bassett* at the Sixth Circuit, *Agnew* at the Seventh Circuit, and *O'Bannon* at the Ninth Circuit. Given these findings, citations to these earlier citations and the identified "benchmark" cases in each circuit are specifically highlighted to determine how these cases were specifically cited by the cases that followed them, and whether their "benchmark" status is supported by the future application of the legal doctrine contained in those cases.

Leading up through the first benchmark case in the NCAA amateurism network, *Smith v. NCAA*,[104] there was very little disagreement in interpretation of the *Board of Regents* language dictating the manner in which the antitrust courts should handle claims involving NCAA amateurism rules.[105] *Smith*, however, contained an interesting 'split' opinion where Judge Greenberg, writing for a unanimous Third Circuit panel, seemed to take two approaches to dismissing the claim of the plaintiff, a college athlete who challenged the NCAA's bylaws revoking eligibility for college athletes who enrolled in a graduate-level degree program at a school other than their undergraduate institution, claiming that the bylaw violated both antitrust law and Title IX.[106]

Writing for a unanimous Third Circuit panel, Judge Greenberg focused first on the commercial nature of the alleged injury, writing that the plaintiff misinterpreted the scope of the Sherman and Clayton Acts by stating that antitrust scrutiny goes beyond purely commercial interests.[107] Instead, Judge Greenberg stated that the question is "whether antitrust laws apply only to the alleged infringer's commercial activities," meaning that the specific question to be decided first—as a threshold issue—is based on "the character of the NCAA's activities" and whether those activities are commercial in nature.[108]

Framed by that legal question, Judge Greenberg then discussed the Supreme Court's holding in *Board of Regents*, writing:

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104 139 F.3d 180 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999).

105 *See* Gaines v. NCAA, 746 F.Supp. 738, 744-46 (M.D. Tenn. 1990) (finding "a very narrow exemption" to antitrust law for NCAA eligibility rules on the basis that they are not commercial activity); Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992) (holding that the NCAA restrictions revoking eligibility for athletes who have declared for a professional league draft are noncommerical). *But see* McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988) (finding that NCAA eligibility rules are reasonable Rule of Reason analysis while declining to weigh in on whether they affect a commercial market).

106 *Id*. at 182.

107 *Id*. at 184.

108 *Id*. at 185.

Smith v. NCAA's citation of NCAA v. Board of Regents

> The Supreme Court addressed the applicability of the Sherman Act to the NCAA in *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70, holding that the NCAA's plan to restrict television coverage of intercollegiate football games violated section 1. The Court discussed the procompetitive nature of the NCAA's activities such as establishing eligibility requirements as opposed to the anti-competitive nature of the television plan. See id. at 117, 104 S.Ct. at 2969. Yet, while the Court distinguished the NCAA's television plan from its rule making, it did not comment directly on whether the Sherman Act would apply to the latter.[109]

Through that citation, Judge Greenberg used *Board of Regents* to draw a line between two types of NCAA activities: eligibility rules, which per *Board of Regents* are procompetitive in nature; and rules like the television plan, which *Board of Regents* found to be within the Sherman Act's purview. However, Judge Greenberg somewhat acknowledged the nature of *Board of Regents's* statements on eligibility rules as non-binding dicta when he noted that the Supreme Court "did not comment directly on whether the Sherman Act would apply" to the establishment of eligibility requirements.[110]

As such, while Judge Greenberg recognized that previous case law left open the question of whether NCAA rules are blanketly exempt from antitrust laws, he adopted the reasoning of *Gaines*—along with two pre-*Board of Regents* cases—to hold that NCAA eligibility rules were noncommercial and thus not subject to Sherman Act scrutiny.[111] However, Judge Greenberg did not stop there, instead turning to the Rule of Reason test to state that "even if the NCAA's actions in establishing eligibility requirements were subject to the Sherman Act," it would still warrant the court affirming the district court's dismissal of Smith's claim.[112]

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[109] *Id*.

[110] *Id*.

[111] *Id*. *See McCormack*, 845 F.2d 1338 (noting an argument by the NCAA that "its eligibility rules are not subject to the antitrust laws because, unlike the television restrictions in Board of Regents, the eligibility rules have purely or primarily noncommercial objectives" but declining to address it, instead dismissing the case based on a finding that the rules in question are reasonable under Rule of Reason analysis). *See also* Jones v. NCAA, 392 F.Supp. 295 (D. Mass. 1975) (finding that NCAA eligibility rules are noncommercial in nature, as "[t]he plaintiff is currently a student, not a businessman in the traditional sense, and certainly not a "competitor" within the contemplation of the antitrust laws"); College Athletic Placement Service v. NCAA, No. 74-1144, 1974 U.S. Dist. LEXIS 7050, at *14 (D.N.J. 1974), *aff'd mem*., 506 F.2d 1050 (3d Cir. 1974) (finding new NCAA rules outlawing the use of athletic scholarship placement services did not constitute a restraint on commerce, as the rules were adopted "for the purpose of furthering the noncommercial objectives of the [NCAA].")

[112] *Smith*, 139 F.3d at 186.

As such, a split in interpretation of *Board of Regents* was noticeable from as early as the *Smith* decision. As the *Smith* court noted, some of the earlier cases had found the NCAA rules at issue to be non-violative of antitrust law based on the Rule of Reason while others had stopped the case after deciding the threshold issue of commercial activity.[113] To ensure that all grounds were covered, Judge Greenberg, in writing *Smith*, took the interesting step of finding that the NCAA did not violate the antitrust law based on *both* theories. That indecisiveness portended a split on how NCAA rules should be treated under antitrust law, and when (and if) NCAA rules should be dismissed as noncommercial as a threshold issue.

The inconclusiveness created by *Smith* would be exposed through conflicting reasoning (if not holdings) in several district court cases over the next few years. Just a few months after *Smith* was decided by the Third Circuit, a district court within its jurisdiction would cite *Smith* exclusively to dismiss an antitrust challenge to the NCAA's academic eligibility requirements based on the noncommercial theory, citing Smith's language that "eligibility rules are not related to the NCAA's commercial or business activities .... [and that] the Sherman Act does not apply to the NCAA's promulgation of eligibility requirements."[114] One year later, a district court within the Tenth Circuit's jurisdiction picked up the same reasoning in Adidas America v. NCAA,[115] a challenge by an apparel company to NCAA restrictions on the size of a manufacturer logo on teams' uniforms.[116] Judge Vanbebber of the District Court of Kansas found, based on Smith's commercial/noncommercial distinction, that the NCAA logo restrictions were similar enough to eligibility rules as they had "noncommercial purposes and objectives," namely, the protection of amateur sports from commercial influence.[117]

In contrast to *Smith* and its following district court cases, however, the Ninth Circuit signaled shortly after *Smith* that it was not so certain that supposedly 'noncommercial' NCAA rules would not be subject to Sherman Act scrutiny. Indeed, while *Tanaka v. USC*[118] involved a challenge to conference transfer rules

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[113] *Id*. at 185.

[114] Bowers v. NCAA, 9 F.Supp. 2d 460, 497 (D.N.J. 1998) (quoting *Smith*, 139 F.3d at 185-86).

[115] 40 F.Supp. 2d 1275 (D. Kan. 1999).

[116] *Id*. at 1277-78.

[117] *Id*. at 1286. Of note, Judge Vanbebber did acknowledge in a footnote the controlling Tenth Circuit precedent of *Law v. NCAA*, 134 F. 3d 1010 (10th Cir. 1998), which had held NCAA restraints on the salaries and number of positions for coaches to be violative of the Sherman Act. *See id. at passim; Adidas America*, 40 F.Supp. 2d at 1283 n.4. However, Judge Vanbebber wrote that *Law* would not bind the court on this issue in either direction given the difference in facts, noting that the Law court did not "provide any guidance on drawing lines between those agreements properly defined as commercial activities and those considered noncommercial and, therefore, not subject to the antitrust laws." *Id*.

[118] 252 F.3d 1059 (9th Cir. 2001).

that prohibited the plaintiff from transferring in conference, the Ninth Circuit pulled back on the reins somewhat from a district court holding that eligibility rules like the challenged transfer rules were noncommercial and therefore "beyond the reach of the Sherman Act."[119] The Ninth Circuit instead dismissed Tanaka's claim on her failure to identify a relevant market, and wrote of the commercial/noncommercial issue that they "need not reach the difficult issue of whether collegiate athletic association eligibility rules such as the Pac-10 transfer rule do not involve commercial activity and hence are immune from Sherman Act scrutiny" and "assume, without deciding, that the transfer rule is subject to the federal antitrust laws."[120]

The *Smith* commercial/noncommercial distinction became further solidified in 2004 in the Sixth Circuit's decision in *Worldwide Basketball and Sport Tours v. NCAA*,[121] a case involving outside promoters of certified college basketball tournaments. These promoters challenged the so-called "Two in Four Rule," which allowed teams to only participate in "no more than one certified basketball event in one academic year, and not more than two certified basketball events every four years."[122] The NCAA's rationale for such a rule was based on a desire to maintain an equal playing field on the recruiting market, as they had found that "the more 'powerful' basketball schools (i.e., members of the "Big Six" conferences) were disproportionately taking advantage of the certified events," allowing them to travel to exotic locations like Alaska and Hawaii and thereby provide a more desirable experience to their college athletes.[123]

The majority opinion of the Sixth Circuit panel hearing the case (written by Judge Batchelder)[124] first reviewed the commercial nature of the rule as a threshold issue, as "[b]y its plain language, [Section 1 of the Sherman Act] applies to the Two in Four rule only if the rule is commercial in nature" and the NCAA had "maintain[ed] that the rule is academically directed and motivated and its commercial impact is negligible."[125] Importantly, the court here noted its view that "[t]he dispositive inquiry in this regard is whether the rule itself

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[119] *Id*. at 1062. Ironically, part of Tanaka's rationale for wanting to transfer was based on educational considerations since—according to her complaint—USC was allegedly "arranging for athletes to receive fraudulent academic credit through sham classes." *Id*. at 1061.

[120] *Id*. at 1062.

[121] 388 F.3d 955 (6th Cir. 2004).

[122] *Id*. at 957.

[123] *Id*.

[124] Judge Gibbons wrote a concurring opinion, but on antitrust standing grounds rather than those related to the NCAA's exposure to Sherman Act scrutiny as a threshold issue. *See id*. at 964-66 (Gibbons, J., concurring).

[125] *Id*. at 958.

is commercial, not whether the entity promulgating the rule is commercial."[126] Citing *Board of Regents* and *Smith*, Judge Batchelder noted a dichotomy of two different types of NCAA rules, one of which was commercial in nature (and thus subject to Sherman Act scrutiny) and the other is not.[127]

Based on this reasoning, Judge Batchelder and the Sixth Circuit found this individual NCAA rule to be commercial and thus subject to antitrust scrutiny, necessitating application of the Rule of Reason test.[128] But while the Sixth Circuit would reverse the district court's ruling applying a quick-look analysis in favor of the plaintiffs based on the plaintiffs' failure to allege a relevant market, the commercial/noncommercial language—as brief and relatively insignificant as it was within the *Worldwide Basketball* opinion—would become important within the NCAA amateurism citation network. Indeed, *Worldwide Basketball* was cited by every single subsequent case within the Third and Sixth Circuits but was not once cited outside of those two circuits. This gives *Worldwide Basketball* status as a "benchmark" case within those circuits (see Figure 6).

Worldwide Basketball was joined as a "benchmark" case in the Sixth Circuit by *Bassett v. NCAA*,[129] a 2008 case involving a lawsuit by a former assistant football coach at the University of Kentucky who resigned after allegations of NCAA recruiting infractions.[130] These allegations included "improper recruiting inducements provided to prospective student athletes and high school coaches and academic fraud in aiding enrolled student athletes by preparing their papers or having student assistants type papers for enrolled student athletes."[131]

Noting that the district court had, based on *Smith*, found the NCAA recruiting rules at issue to be noncommercial and thus not violative of the Sherman Act,[132] Judge Boyko of the Sixth Circuit noted that under *Worldwide Basketball*, the Sherman Act can only apply "if NCAA's enforcement process and sanctions are commercial in nature."[133] But while *Worldwide Basketball* had found the specific rules at issue to be commercial in nature and thus subject to Sherman Act scrutiny, Judge Boyko felt that the rules at issue here were distinguishable from those in *Worldwide Basketball* and instead more similar to the eligibility rules at issue in *Smith*, and thus noncommercial.[134] To the contrary, in fact, Judge Boyko

126 *Id*. at 959.

127 *Id*.

128 *Id*.

129 528 F.3d 426 (6th Cir. 2008)

130 *Id*. at 429.

131 *Id*.

132 *Id*. at 430.

133 *Id*. at 432 (citing *Worldwide Basketball*, 388 F.3d at 958.)

134 *Id*. at 433-34.

Figure 6. Tracking Citations to Cases by Circuit.

framed these rules as "*anti-commercial*" as "[v]iolation of the applicable NCAA rules gives the violator a decided competitive advantage in recruiting and retaining highly prized student athletes" and "violates the spirit of amateur athletics by providing remuneration to athletes in exchange for their commitments to play for the violator's football program."[135]

Bassett's reasoning would quickly be adopted by other cases within the Sixth Circuit. Indeed, one year following Bassett's holding the Eastern District of Michigan found in *Warrior Sports v. NCAA*[136] that NCAA rules regarding the allowable sizes of lacrosse stick heads in intercollegiate competition were noncommercial, specifically placing these rules on the side of Bassett in the now-created *Worldwide Basketball* vs. *Bassett* commercial vs. noncommercial dichotomy.[137]

But even around the time when *Worldwide Basketball* was decided, courts would begin to split somewhat in their approach to splitting NCAA rules between those 'blessed' by *Board of Regents* and those still subject to the full brunt of the Sherman Act's enforcement power. While *MIBA* and *Worldwide Basketball* established limitations on the NCAA's antitrust immunity in cases involving outside entities like tournaments, the mid-2000s would also see a court declining to extend this immunity to a case directly affecting college athletes for the first time. In *In re NCAA I-A Walk-On Football Players Litigation (NCAA Walk-On)*,[138] a group of walk-on (non-scholarship) football players at Division I-A institutions sued the NCAA, claiming that the NCAA's limit on 85 full grant-in-aid scholarships per school was an artificial restriction on the labor market in intercollegiate football and as such an antitrust violation.[139]

In sharp contrast to a case like *Warrior Sports*—where an NCAA rule allegedly revoking access from the market to specific equipment manufacturers was seen as noncommercial—Judge Coughenour of the Western District of Washington in *NCAA Walk-On* found that limitations on college athlete scholarships did, in fact, invoke a commercial market.[140] However, Judge Coughenour still denied application of the Sherman Act to these rules on a threshold basis. Instead of focusing on whether scholarship limits were activity constituting "trade or commerce"—which he noted "depends on a factual inquiry"—Judge Coughenour observed that the NCAA bylaw limiting scholarships "does not clearly implicate student-athlete eligibility in the same manner as rules requiring

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135 *Id*. at 433.

136 Warrior Sports, Inc. v. NCAA, No. 08-14812, 2009 U.S. Dist. LEXIS 25700 (E.D. Mich. 2009).

137 *Id*. at *9.

138 398 F.Supp. 2d 1144 (W.D. Wash. 2005).

139 *Id*. at 1146-47.

140 *Id*. at 1149.

students to attend class and rules revoking eligibility for entering a professional draft."[141] As such, Judge Coughenour held that "the NCAA's attempt to frame this case as challenging to amateurism of Division I-A football is a mis-characterization of the issues raised by Plaintiffs' Amended Complaint," and that the amended complaint instead "state that the scholarship restrictions were developed to contain costs, not to advance amateurism."[142]

The distinction here is subtle, but important. Rather than framing the threshold issue as commercial or noncommercial, as the NCAA argued, Judge Coughenour instead divided the case law into camps based on whether they directly impacted college athlete eligibility under the "clear" law that athletes may not be "paid to play" and as such directly promoted amateurism in college sports under the language of *Board of Regents*.[143] All other rules—including scholarship limits, which clearly directly impact the amateur college athlete experience and the competitive balance of NCAA sports—would be required to go through Rule of Reason analysis, as was the case in *NCAA Walk-On*.[144] Given this difference, even though *Bassett v. NCAA* did not cite *NCAA Walk-On*, it seems unlikely that court would agree with Judge Coughenour's conclusions.

Given its status as a relatively unknown district court case, *NCAA Walk-On* was found to be surprisingly centralized (and therefore influential) within the network. In fact, *NCAA Walk-On's* relative importance is particularly surprising given that its impact is mainly within the Seventh Circuit, even despite being decided by a district court in the Ninth Circuit. Indeed, as shown previously in Figure 6, all but one of *NCAA Walk-On's* citations within the network were found to be within the Seventh Circuit, with only one citation by a fellow Ninth Circuit court: a citation that was not even based on *NCAA Walk-On's* holding specific to the question of amateurism as a threshold bar to antitrust scrutiny.[145] But when reviewing the qualitative context behind these citations, the astonishing nature of *NCAA Walk-On's* makes sense, as *NCAA Walk-On* provided the framework for the Seventh Circuit's reasoning in its own benchmark case, *Agnew v. NCAA*.[146]

Like *NCAA Walk-On*, the *Agnew* plaintiffs challenged the NCAA's restrictions on the cap on scholarships per team, as well as NCAA prohibitions on

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141 *Id*.

142 *Id*.

143 *Id*. at 1148-49.

144 *See id*. at 1150-52.

145 *See* White v. NCAA, No. 06-cv-999, 2006 WL 8066802 (C.D. Cal. 2006) (citing *NCAA Walk-On* to show that "[i]n order to establish a claim under Section 1 [of the Sherman Act], a plaintiff must show a) participation in an agreement 2) that unreasonably restrains trade in a relevant market.").

146 683 F.3d 328 (7th Cir. 2012).

multi-year scholarships.[147] Understandably, the district court dismissed the *Agnew* complaint based on the binding Seventh Circuit precedent in *Banks v. NCAA*,[148] a prior Seventh Circuit decision that had largely mirrored the reasoning in *Smith* by "foreclose[ing] any possibility that a labor market for student-athletes could be cognizable" in any context.[149]

In *Agnew*, however, Judge Flaum of the Seventh Circuit—the author of a dissenting opinion in *Banks* that his colleagues had deemed "a surprisingly cynical view of college athletics"[150]—was now in the majority, and used the opportunity to walk back *Banks's* broad findings. To this end, Judge Flaum wrote that "[i]t is undeniable that a market of some sort is at play in this case" as "[a] transaction clearly occurs between a student-athlete and a university: the student-athlete uses his athletic abilities on behalf of the university in exchange for an athletic and academic education, room, and board."[151] While acknowledging Supreme Court precedent that the Sherman Act only applies to commercial transactions, Judge Flaum cited legal scholarship in noting that while "[t]here is no clear line as to what constitutes a 'commercial transaction,'" in today's legal landscape, "the term 'commerce' is much broader than it was [in the past]..., including almost every activity from which [an] actor anticipates economic gain."[152]

Rejecting the NCAA's framing of its rules as inherently noncommercial, Judge Flaum then painted a picture of the NCAA recruiting market as a decidedly commercial market, noting that "[d]espite the nonprofit status of NCAA member schools, the transactions those schools make with premier athletes—full scholarships in exchange for athletic services—are not noncommercial, since schools can make millions of dollars as a result of these transactions."[153] Even if schools are not fully focused on economic interests when recruiting players, Judge Flaum argued, a more academic-focused interest "does not prevent many universities, through their football teams, from entering the recruiting market, setting their recruiting budget, and making recruiting decisions with economic

147 *Id*. at 332.

148 977 F.2d 1081 (7th Cir. 1992).

149 *Agnew*, 683 F.3d at 338.

150 *See* Banks, 977 F.2d at 1092. *See also id*. at 1094-1100 (Flaum, J., dissenting) (dissenting on the basis that college athletes' participation in organized intercollegiate sport is "labor, labor for which the athlete is recompensed" and that the idea that NCAA amateurism rules "have no commercial effect on competition in the college football labor market, or that there is no market of that type at all, is chimerical.").

151 *Agnew*, 683 F.3d at 338.

152 *Id*. (quoting Herbert Hovenkamp & Phillip E. Areeda, Antitrust Law 250 (2000).)

153 *Id*. at 340.

interests in mind."[154] Citing *White v. NCAA*[155]—a case that declined to dismiss a challenge to grant-in-aid caps on the basis that "under the Sherman Act, 'Major College Football' is a relevant market in which 'colleges and universities compete to attract prospective student-athletes'"—Judge Flaum found generally that "the transactions between NCAA schools and student-athletes are, to some degree, commercial in nature, and therefore take place in a relevant market with respect to the Sherman Act."[156]

But according to Judge Flaum, the strictly commercial nature of the NCAA recruiting market does not mean that all NCAA bylaws are violative of the Sherman Act.[157] To the contrary, Judge Flaum wrote that the Supreme Court in *Board of Regents* was clear that NCAA bylaws should be presumed procompetitive and thus reasonable under Sherman Act scrutiny so long as they are "a 'justifiable means of fostering competition among amateur athletic teams.'"[158] To support this line of thought, Judge Flaum—invoking *Board of Regents*—found that certain NCAA bylaws that "'fit into the same mold' as those discussed in *Board of*

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154 *Id*. at 341.

155 No. 06-cv-999, 2006 U.S. Dist. LEXIS 101366 (C.D. Cal. 2006). *White*—a challenge to limits on grant-in-aid caps—never questioned whether antitrust law even applies to those NCAA rules as a threshold issue, instead diving straight into relevant market analysis and Rule of Reason application on the NCAA's motion to dismiss the plaintiffs' second amended complaint. Id. at *4-5. Under relevant Ninth Circuit precedent (as cited by *White*) this exclusion makes sense, as *Tanaka v. NCAA*, 252 F3d. 1059 (9th Cir. 2001), also did not discuss that threshold issue. *See supra* notes 118-120 and accompanying text. *White* also cited *NCAA Walk-On*, but only for the purpose of framing three elements of a Section 1 claim. Id. at *3. Based on an analysis of several additional docket entries in *White* it does not appear that the threshold issue of whether the challenged rule is subject to Sherman Act scrutiny was ever considered to be a serious issue by the court. In the court's in-chambers dismissal of the initial complaint—based entirely on a failure to identify a relevant market—the court did note in a footnote that "the issues of whether an agreement implicates trade and commerce or whether it is an unreasonable restraint on trade involve substantial factual questions that generally should not be resolved at a Motion to Dismiss." (In Chambers) Def's Mot. to Dismiss at 2 n. 1, White v. NCAA, No. 06-cv-999, 2006 U.S. Dist. LEXIS 101366 (C.D. Cal. Jun. 15, 2006), ECF No. 32. In doing so, the court compared *NCAA Walk-On*, which the court noted held "that factual questions precluded dismissal where scholarship cap was allegedly adopted only to save costs and not to promote competition or amateur athletics," with *McCormack*, which the court noted "affirm[ed] dismissal of amended complaint where the allegations, taken as true, did not show that a financial aid restriction was unreasonable." *Id*. The court would never address that issue again, as the first amended complaint would be dismissed on stipulation by the parties (*see White*, 2006 U.S. Dist. LEXIS 101366 at *2 n. 1) to allow for the filing of the second amended complaint, which led to the included opinion, in which the NCAA's motion to dismiss was denied. The parties would settle before summary judgment motions filed by both sides could be decided by the court. *See* Amended Order Granting Final Approval of Settlement, White v. NCAA, No. 06-cv-999, 2006 U.S. Dist. LEXIS 101366 (C.D. Cal. Aug. 5, 2008), ECF No. 268.

156 *Id*. (quoting *White*, 2006 U.S. Dist. LEXIS 101366, at *8-9.)

157 *Id*.

158 *Id*.

Regents" have been "blessed by the Supreme Court, making them presumptively procompetitive."[159]

Using *Board of Regents,* Judge Flaum defined "the scope of the procompetitive presumption for certain NCAA regulations" by holding as presumably procompetitive any bylaw that "is clearly meant to help maintain the 'revered tradition of amateurism in college sports' or the 'preservation of the student-athlete in higher education.'"[160] But when a rule "is not, on its face, helping to 'preserve a tradition that might otherwise die,'" a full Rule of Reason analysis is necessary—so long as the rule is not clearly anticompetitive, in which case a quick-look can easily determine that the rule is illegal.[161]

Interestingly, Judge Flaum found that the rules at issue in the instant case—the rules imposing caps on the amount of scholarships that can be given out by each team and restrictions on multi-year scholarships—were not among the rules "blessed" by *Board of Regents*.[162] Citing *NCAA Walk-On*—another case that found the scholarship cap to be non-exempt—Judge Flaum wrote that the scholarship caps in question "are not eligibility rules," nor do they "'fit into the same mold' as eligibility rules."[163] Instead, Judge Flaum noted that these bylaws "are not inherently or obviously necessary for the preservation of amateurism, the student-athlete, or the general product of college football."[164] On that basis, Judge Flaum refused to dismiss the plaintiff's complaint on the basis that the rules were presumably procompetitive, instead dismissing the complaint on a failure to identify a relevant market.[165]

In this way, Judge Flaum and the Seventh Circuit set forth a limitation to the NCAA's procompetitive presumption, at least defining which rules would not be considered presumptively procompetitive. This limitation would be further

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159 *Id*.

160 *Id*.

161 *Id*. at 343.

162 *Id*. at 343-44.

163 *Id*. (citing *NCAA Walk-On*, 398 F.Supp. 2d at 1149.)

164 *Id*.

165 *Id*. at 345-48. Even then, Judge Flaum—clearly taking a page from his dissenting opinion in *Banks*—made clear his feelings that while the plaintiff's complaint did not properly identify a labor market for student-athletes, the findings of the *Banks* majority (which Judge Flaum maintained is dicta) that "the market for scholarship athletes cannot be considered a labor market" is "unconvincing" because "the only reason that colleges do not engage in price competition for student-athletes is that other NCAA bylaws prevent them from doing so" and "colleges do, in fact, compete for student-athletes, though the price they pay involves in-kind benefits as opposed to cash." *Id*. at 346-47. In this regard, Judge Flaum made clear that while he felt that the plaintiffs *did not* properly identify a commercial market for student-athletes' labor, he certainly did not feel that they *could not* do so in an amended complaint or in a future case.

defined in *Deppe v. NCAA*,[166] another Seventh Circuit case that applied *Agnew* to find that the NCAA's year-in-residence transfer rule "is plainly an eligibility rule" and thus is presumptively procompetitive under the *Agnew* precedent.[167]

But through this creation of an alternative line of threshold analysis of the NCAA's exposure to antitrust litigation, Judge Flaum and the Agnew court created some chaos among other NCAA antitrust cases as courts tried to figure out whether to follow this new interpretation of *Board of Regents* or to stick with previous authority. For example, just one year after *Agnew* was decided, the Eastern District of Pennsylvania, in *Pennsylvania v. NCAA*,[168] decidedly rejected *Agnew* in favor of applying *Smith's* commercial/noncommercial standard, writing that *Agnew's* definition of the college athlete labor market as commercial is "not the law in this circuit."[169] Similarly, a district court within the Sixth Circuit cited and discussed *Agnew's* alternative line of reasoning but, after noting *Agnew* as noncontrolling, sided with *Bassett* in holding that amateurism rules are, by rule, noncommercial and thus not subject to Sherman Act scrutiny.[170]

Other courts in other jurisdictions positively cited Agnew's findings to support findings that certain NCAA-related activity could no longer believably be deemed as noncommercial. For example, in the Maryland state court case *Board of Regents v. Atlantic Coast Conference (ACC)*,[171] Judge Davey of the Circuit Court of Maryland, Prince George's County relied on *Agnew* to reject the ACC's argument that it could not be held to be violative of Maryland's Antitrust Act. The ACC's argument in this case was one of the more aggressive interpretations of *Smith* and *Worldwide Basketball's* commercial/noncommercial distinction among all cases within the network: the conference not only argued that it was not engaged in commercial activity while holding the University of Maryland to a withdrawal payment for leaving the conference, but also argued more broadly that "it is a sports league and, therefore, is exempt from regulation under state

166 893 F. 3d 498 (7th Cir. 2018).

167 *Id*. at 502.

168 948 F.Supp. 2d 416 (M.D. Pa. 2013).

169 *Id*. at 426.

170 111 F.Supp. 3d 815, 834 (M.D. Tenn. 2015), *aff'd*, 668 Fed. Appx. 155 (6th Cir. 2016). As discussed while defining the boundary of the network, while the Sixth Circuit opinion in *Marshall* did (briefly) address the antitrust issue, it did so without citing any cases (and has subsequently not been cited by any in-network cases) and is therefore not included within the NCAA amateurism citation network. *See Marshall* (6th Cir.), 668 Fed. Appx. at 157.

171 No. CAL13-02189, 2013 Md. Cir. Ct. LEXIS 4 (Md. Cir. Ct. 2013).

antitrust statutes."[172] However, the Maryland court relied heavily on *Agnew* to determine the applicability of the state antitrust statute to the withdrawal payment at issue, finding that the payment "does not 'fit the same mold' as an eligibility rule, as applied in *Agnew*."[173]

While all of this was going on, however, the NCAA was faced with noteworthy litigation in the Ninth Circuit, centered mostly around compensation for college athlete appearances in NCAA video games and restrictions on college athlete compensation for use of their names, images, and likenesses.[174] In 2015, the antitrust portion of this litigation (deemed *O'Bannon v. NCAA*[175]) was decided by the Ninth Circuit, which, in a monumental decision, found that the NCAA had unlawfully restrained trade through its rules limiting compensation for college athletes.[176]

As shown by its previous holdings in *Hairston v. Pac-10 Conference*[177] and *Tanaka v. USC*,[178] the Ninth Circuit had consistently been careful to avoid the broad threshold issue of whether NCAA rules should be subject to the antitrust laws in general in the years following *Board of Regents*, completely ignoring the commercial/noncommercial issue in *Hairston*[179] and "assum[ing], without deciding, that the transfer rule is subject to the federal antitrust laws" in *Tanaka*.[180] *O'Bannon*, however, would change that, as the Ninth Circuit tackled two NCAA arguments in its attempt to avoid application of the Rule of Reason test (and antitrust scrutiny in general): first, an argument that under *Board of Regents* NCAA rules are "valid as a matter of law" and second, an argument that "the

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172 *See id*. at *4-13. A portion of this argument was based on citation and discussion of *NCAA v. Miller*, 795 F.Supp. 1476 (D. Nev. 1992) *aff'd*, 10 F.3d 633 (9th Cir. 1993), which had declared a state due process statute as violative of the dormant commerce clause as an illegal action by an individual state to unduly influence interstate commerce. *See Bd. of Regents v. ACC,* 2013 Md. Cir. Ct. LEXIS 4, at *6-7. That portion of the ACC's argument was barely discussed in the opinion and, regardless, is not within the scope of discussion in this study.

173 *Id*. at *14.

174 *See, e.g.*, In re NCAA Student-Athlete Name & Likeness Licensing Litig. (Keller v. Electronic Arts), 724 F.3d 1268 (9th Cir. 2013) (finding that claims by student-athletes that Electronic Arts and the NCAA violated their right of publicity by publishing NCAA football and basketball games with their names, images, and likenesses in them were not outweighed by the First Amendment).

175 802 F.3d 1049 (9th Cir. 2015).

176 *Id*. at 1053. Based on the third step of the Rule of Reason test (identification of less restrictive alternative restraints to achieve named procompetitive purposes) the Ninth Circuit affirmed the district court's order forcing the NCAA to allow schools to give scholarships up to the full cost of attendance but reversed the district court's other remedy, which allowed student-athletes to be paid a stipend of up to $5,000 per year. *Id*.

177 101 F.3d 1315 (9th Cir. 1996).

178 252 F.3d 1059 (9th Cir. 2001). *See supra* notes 118-120 and accompanying text.

179 *Hairston*, 101 F.3d at 1319 (noting that none of the parties in the case "dispute that the agreement affects interstate commerce.").

180 Tanaka, 252 F.3d at 1062.

compensation rules at issue here are not covered by the Sherman Act at all because they do not regulate commercial activity."[181]

In considering first the NCAA's argument "that, under Board of Regents, all NCAA amateurism rules are 'valid as a matter of law,'" Judge Bybee, writing for a unanimous panel,[182] first reviewed the context of the Board of Regents language that the NCAA "quot[ed] heavily," but found that this language did not support the broad assumptions that the NCAA assigned to it.[183]

The Ninth Circuit rejected the NCAA's reading of *Board of Regents*—and the argument that *Board of Regents* assigned any special status to NCAA amateurism rules—on two grounds.[184] First, Judge Bybee found that *Board of Regents* only requires courts to analyze NCAA rules under the Rule of Reason test rather than declare them unlawful per se.[185] Second, and most critically, Judge Bybee found that the language in *Board of Regents* regarding NCAA amateurism rules, while "impressive-sounding," was merely dicta.[186] While Judge Bybee noted that they must not "treat considered dicta from the Supreme Court lightly," it does not bound them to the definitive rule argued by the NCAA that *Board of Regents* requires courts "to conclude that every NCAA rule that somehow relates to amateurism is automatically valid."[187]

Regardless of the status of this language, however, Judge Bybee was still not convinced by the argument that *Board of Regents* required such a high level of deference under the antitrust laws to the NCAA's judgment.[188] On this point, Judge Bybee wrote that "even if the language in *Board of Regents* addressing amateurism were not dicta, it would not support the tremendous weight that the NCAA seeks to place upon it," as the NCAA's interpretation would essentially call for the courts "to hold that those rules are essentially exempt from antitrust scrutiny."[189] On this point, Judge Bybee wrote:

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[181] *O'Bannon*, 802 F.3d at 1061. The NCAA also argued as a third threshold manner that the parties lacked standing to challenge compensation limits under the antitrust laws "because they have not suffered 'antitrust injury'"; the Ninth Circuit found that argument unpersuasive as well. Id.

[182] While Chief Judge Thomas wrote a separate opinion dissenting in part with Judge Bybee's majority opinion, he dissented only with the majority's reversal of a portion of the district court's decision that had ordered the NCAA to allow schools to compensate student-athletes with a stipend of up to $5,000. *See id*. at 1079-84 (Thomas, J., dissenting). Chief Judge Thomas agreed with the rest of the majority's conclusions and findings, including all of the conclusions on the threshold issues discussed in this study. *See id*. at 1079 (Thomas, J., dissenting) ("I largely agree with all but one of the majority's conclusions.").

[183] *Id*. at 1062-63.

[184] *Id*.

[185] *Id*.

[186] *Id*.

[187] *Id*. (quoting United States v. Augustine, 712 F.3d 1290, 1295 (9th Cir. 2013).)

[188] *Id*.

[189] *Id*. at 1063-64.

O'Bannon v. NCAA's citation of NCAA v. Board of Regents

> Nothing in *Board of Regents* supports such an exemption. To say that the NCAA's amateurism rules are procompetitive, as *Board of Regents* did, is not to say that they are automatically lawful; a restraint that serves a procompetitive purpose can still be invalid under the Rule of Reason if a substantially less restrictive rule would further the same objectives equally well. See *Bd. of Regents*, 468 U.S. at 101 n. 23, 104 S.Ct. 2948 ("While as the guardian of an important American tradition, the NCAA's motives must be accorded a respectful presumption of validity, it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice.").[190]

Turning from the plain language of *Board of Regents* to the NCAA's arguments based on interpretations of *Board of Regents* in prior cases, Judge Bybee remained unmoved.[191] Analyzing the NCAA's arguments based on the findings of *Smith v. NCAA*, *McCormack v. NCAA*, and *Agnew v. NCAA*, Judge Bybee wrote that only one of those cases, *Agnew*, "comes close to agreeing with the NCAA's interpretation of *Board of Regents*," and was still unpersuasive to the Ninth Circuit panel.[192] *Agnew's* language regarding an alleged procompetitive presumption, Judge Bybee argued, was dicta—just like the *Board of Regents* language it relied upon—as the Seventh Circuit ended up not granting this procompetitive presumption to the rules before them.[193] But Judge Bybee stated that his panel "would not adopt the *Agnew* presumption even if it were not dicta," as the Seventh Circuit's "analysis rested on the dubious proposition that in *Board of Regents*, the Supreme Court 'blessed' NCAA rules that were not before it, and did so to a sufficient degree to virtually exempt those rules from antitrust scrutiny."[194] Judge Bybee doubted that the Supreme Court intended this "aggressive construction," and thus refused to do so himself.[195]

Turning to the NCAA's argument based on *Smith* and *Bassett's* commercial/noncommercial distinction, Judge Bybee actually adopted a portion of *Agnew's* reasoning to reject the NCAA's argument that compensation limits were noncommercial, even while rejecting its procompetitive presumption.[196] Citing *Agnew's* discussion of the breadth of the term 'commerce' in modern society and the lucrative market for college athlete labor, Judge Bybee wrote that the NCAA's

190 *Id*.

191 *Id*. at 1064.

192 *Id*.

193 *Id*.

194 *Id*.

195 *Id*.

196 *Id*. at 1064-65.

argument that its amateurism rules "are mere 'eligibility rules that do not regulate any 'commercial activity'" is "not credible."[197] Per Judge Bybee, the broad modern definition of 'commerce' "surely encompasses the transaction in which an athletic recruit exchanges his labor and name, image, and likeness rights for a scholarship at a Division I school because it is undeniable that both parties to that exchange anticipate economic gain from it."[198] Moreover, Judge Bybee noted that "*Board of Regents*' discussion of the procompetitive justifications for NCAA amateurism rules shows that the Court "presume[d] the applicability of the Sherman Act to NCAA bylaws.'"[199]

According to Judge Bybee, in determining the commercial nature of NCAA rules, it does not matter how the NCAA frames its rules; "the substance of the compensation rules matters far more than how they are styled."[200] And on this point, the compensation rules at issue "clearly regulate the terms of commercial transactions between athletic recruits and their chosen schools" since "a school may not give a recruit compensation beyond a grant-in-aid, and the recruit may not accept compensation beyond that limit, lest the recruit be disqualified and the transaction vitiated."[201] While the NCAA pointed to two cases—*Smith v. NCAA* and *Bassett v. NCAA*—to support its argument that the rules were noncommercial, the fact that "[t]here is real money at issue" with the compensation limits[202] distinguishes those rules from the rules at issue in *Smith* and better fits the rules found to be commercial in *Board of Regents* and *Law v. NCAA*.[203] And on *Bassett's* broad proposition that NCAA amateurism rules are 'anti-commercial,' Judge Bybee was even more direct, writing that *Bassett's* reasoning was "simply wrong."[204]

With the threshold issues out of the way, Judge Bybee moved on to Rule of Reason analysis, ultimately finding the NCAA compensation rules at issue to be violative of antitrust law, even while dialing back some of the holdings of the district court in favor of an approach that grants the NCAA deference to preserve the general ideals of amateurism while remaining unable to cap compensation related to education.[205] This holding would lead to the more recent decision by that

197 *Id*. at 1065.

198 *Id*.

199 *Id*. (alterations in original)

200 *Id*. at 1065.

201 *Id*.

202 *Id*.

203 *Id*. at 1065-66.

204 *Id*. at 1066.

205 *Id*. at 1079 ("In this case, the NCAA's rules have been more restrictive than necessary to maintain its tradition of amateurism in support of the college sports market. The Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes. It does not require more.").

same district court in In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation (Alston v. NCAA),[206] in which Judge Wilken issued an injunction forbidding the NCAA (along with its conferences and member schools) from "agreeing to fix or limit compensation or benefits related to education that may be available from conferences or schools to Division I women's and men's basketball and FBS football student-athletes on top of a grant-in-aid."[207]

While Judge Wilken would adhere to *O'Bannon's* total rejection of the NCAA's arguments regarding any threshold issue precluding Rule of Reason analysis, she briefly cited *O'Bannon* in noting that at summary judgment, the NCAA "did not meaningfully dispute evidence showing that" scholarship transactions are commercial in nature.[208] And on appeal, the Ninth Circuit would not even touch the potential threshold issue of applying any sort of exemption to NCAA amateurism rules, noting only that the Ninth Circuit has previously "refused to exempt 'the NCAA' from antitrust scrutiny" in the now-controlling *O'Bannon* precedent—which ended up being practically the only relevant opinion cited by the *Alston* panel outside of *Board of Regents* itself.[209]

Part III. Defining the Three-Tiered Circuit Split

As shown by the wide variety of differing opinions as to how to interpret and apply the *Board of Regents* language calling for "ample latitude" for NCAA activity, the state of antitrust law as applied to amateurism was leading up to the Supreme Court's *Alston* decision in complete disarray. Rather than showing one clear line of reasoning concerning the threshold issue of whether NCAA amateurism rules are subject to scrutiny under the antitrust laws, this study has pinpointed the existence of a three-tiered circuit split between three jurisdictional silos: (i) the Third and Sixth Circuits; (ii) the Seventh Circuit; and (iii) the Ninth Circuit. This circuit split is visualized in Figure 7, which shows clear disagreement between the courts by virtue of the multitude of negative citations between the identified 'benchmark' cases in the NCAA amateurism network.

This circuit split is defined by three differing approaches by the courts as to how to delineate between exempt and non-exempt NCAA bylaws for the purpose of applying antitrust law:

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206 375 F.Supp. 3d 1058 (N.D. Cal. 2019).

207 Permanent Injunction at 1, *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litigation, 375 F.Supp. 3d 1058 (N.D. Cal. Mar. 8, 2019) (No. 14-md-02541), ECF No. 1163.

208 Alston v. NCAA, 375 F.Supp. 3d at 1092.

209 Alston v. NCAA, 958 F. 3d 1239, 1246 (9th Cir. 2020).

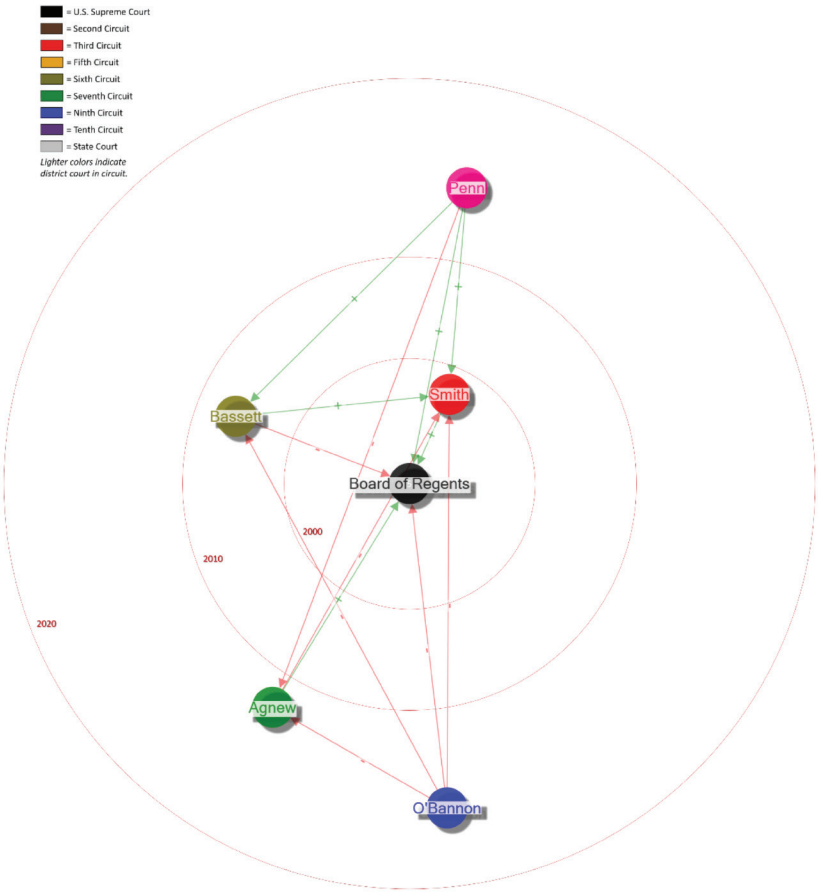

Figure 7. NCAA Amateurism Signed Network Graph Visualization including only the 'benchmark' cases in each jurisdictional silo.

1. By determining whether the rules at issue are commercial or noncommercial (and thus not subject to Sherman Act scrutiny) as a threshold issue (*Smith, Worldwide Basketball*, and *Bassett*);
2. By determining if the rules at issue are within the category of eligibility rules "blessed"[210] by the Supreme Court in *Board of Regents* (Agnew, Deppe); or
3. By refusing entirely to interpret *Board of Regents's* call for "ample latitude"[211] as a call to wholly exempt certain NCAA rules from antitrust law and instead moving straight to Rule of Reason analysis to weigh the procompetitive rationales of the rules against their anticompetitive effects (*Hairston, Tanaka, O'Bannon, Alston*).

In the midst of these differing interpretations of *Board of Regents,* there was clearly disagreement among the different circuits on the treatment of particular rules. While *Agnew*, for example, did not directly cite *Bassett*, it did implicitly reject the idea that NCAA rules limiting college athlete compensation could be considered "anti-commercial"[212] (and therefore not subject to Sherman Act scrutiny) through its extensive discussion of the commercial nature of the college athlete labor market.[213] But this disagreement is often expressly stated. For instance—and in contrast to *Agnew's* more subtle rejection of *Bassett—O'Bannon* directly and forcefully rejected *Bassett*, calling its reasoning "simply wrong," while also explicitly rejecting *Agnew's* articulation of a procompetitive presumption for certain NCAA rules.[214]

When looking at the contextual doctrine of these citations, the differentiated handling of NCAA rules by the various circuits was highly dependent on the framing and positioning of NCAA rules as either eligibility rules—which have been deemed as "blessed" by *Board of Regents*[215]—or as more generalized NCAA business rules like the television rules struck down by *Board of Regents*

[210] Agnew v. NCAA, 683 F.3d 328, 341 (7th Cir. 2012) ("[T]he first—and possibly only—question to be answered when NCAA bylaws are challenged is whether the NCAA regulations at issue are of the type that have been *blessed* by the Supreme Court, making them presumptively procompetitive") (emphasis added).

[211] NCAA v. Board of Regents, 468 U.S. 85, 120A (1984).

[212] *See* Bassett v. NCAA, 528 F.3d 426, 433 (6th Cir. 2008).

[213] *See* Agnew, 683 F.3d at 338-41.

[214] *See* O'Bannon v. NCAA, 802 F.3d 1049, 1064-66 (9th Cir. 2015). *See also supra* notes 191-195 and accompanying text (rejection of *Agnew*); *supra* notes 196-204 and accompanying text (rejection of *Bassett*).

[215] *Agnew*, 683 F.3d at 341.

as violative of the Sherman Act.[216] As such, an important component to the full identification of the circuit split is an identification of the differences in how the different circuits categorize NCAA rules. Based on the reasoning in the NCAA amateurism network cases—with particular focus on the 'benchmark' cases of *Smith, Worldwide Basketball, Bassett, Agnew*, and *O'Bannon*—four categories of NCAA rules can be recognized:

1. "True" eligibility rules (as deemed in O'Bannon) like the transfer rules challenged in *Smith* and *Deppe* along with rules impacting on-field matters like equipment[217] and uniforms[218]
2. Rules impacting scholarships—including restrictions on the number and length of available scholarships—like those challenged in *NCAA Walk-On* and *Agnew*
3. Rules impacting compensation to players outside of scholarships, which includes sanctions on schools who compensate recruits (as challenged in *Bassett*) along with more general restrictions on compensation for player names, images, and likenesses (as challenged in *O'Bannon*) and college athlete grant-in-aid (as challenged in *Alston*)
4. Rules impacting general NCAA operations mostly unrelated to amateurism, including tournament scheduling (as challenged in *Worldwide Basketball* and *MIBA*)

For the so-called "true" eligibility rules, there has never been much disagreement among the circuits. Even while the Ninth Circuit in *O'Bannon* sharply disagreed with *Agnew's* overall pronunciation of a "procompetitive presumption," the Ninth Circuit in that case also distinguished *Smith* and its impact on "true" eligibility rules from the compensation rules at issue rather than rejecting *Smith's* reasoning outright.[219] This treatment of *Smith* signals that perhaps the Ninth Circuit would reject a challenge to one of these "true" eligibility rules on a threshold basis similarly to how the Third and Seventh Circuit treated these cases in *Smith* and *Deppe*, respectively. However, this discussion of *Smith* was merely dicta; the Ninth Circuit has yet to tackle this discussion in a case involving these

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[216] *See generally Board of Regents*, 468 U.S. at *passim*.

[217] *See, e.g,* Warrior Sports, Inc. v. NCAA, No. 08-14812, 2009 U.S. Dist. LEXIS 25700 (E.D. Mich. 2009); Marucci Sports v. NCAA, 751 F.3d 368 (5th Cir. 2014).

[218] *See, e.g.,* Adidas America v. NCAA, 40 F.Supp. 2d 1275 (D. Kan. 1999).

[219] *See O'Bannon*, 802 F.3d at 1065-66. *See also supra* note 203 and accompanying text.

so-called "true" eligibility rules.[220] But even while *O'Bannon* said that it disagreed with *Agnew's* reasoning, a successor to *Agnew* in the Seventh Circuit may not actually disagree with *O'Bannon's* reasoning in this regard. Based on *O'Bannon's* discussion of *Smith*, it appears that both the Ninth Circuit and the Seventh Circuit—based on *O'Bannon* and *Agnew*—seem to agree with an interpretation of *Board of Regents* that even though NCAA rules are clearly commercial in nature, "true" eligibility rules should be given some special deference.

Similarly, all of the courts seemed to agree that the fourth enunciated category involves purely commercial activity that easily passes beyond the threshold 'exempt' question in favor of deciding based on Rule of Reason analysis. Of all of the cases analyzed in this study, just one—the oddly decided and later-overturned *Aloha Sports v. NCAA*[221]—found that NCAA activity with regard to its agreements with outside entities like sports camps and sanctioned tournament managers was noncommercial and therefore not subject to Sherman Act scrutiny. Even the Sixth Circuit, which had clearly favored a much broader interpretation of *Board of Regents's* "ample latitude" language in favor of the NCAA, decisively found such NCAA activity to be commercial in the seminal *Worldwide Basketball v. NCAA*.[222]

The disputed rules were within the second and third categories, which in some respect can be combined into rules involving player compensation. These categories include limitations on athletic scholarships (what, per NCAA rules, college athletes can receive) and restrictions on outside compensation (what college athletes *cannot* receive).

When looking at these categories combined, the Sixth Circuit split from both the Seventh and Ninth Circuits. The Sixth Circuit in *Bassett* found that

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[220] Of course, *Tanaka v. Univ. of S. Cal*., 252 F.3d 1059 (9th Cir. 2001), did concern a challenge to one of these eligibility rules—specifically a similar transfer restriction to the rule challenged in *Deppe*—but the Ninth Circuit punted on the commercial/noncommercial issue, instead finding that the plaintiff did not allege anticompetitive effects in a relevant market. *See id*. at 1062-64. *See supra* notes 118-120 and accompanying text. It is worth noting, however, that the Ninth Circuit in *Tanaka* did not act to overturn the district court's decision in *Tanaka* that "collegiate athletic association eligibility rules such as the Pac-10 transfer rule do not involve commercial activity and hence are immune from Sherman Act scrutiny," instead "assum[ing], without deciding, that the transfer rule is subject to the federal antitrust laws" for the purpose of moving on to relevant market analysis. *Id*. at 1062. As such, it seems more than plausible that a majority of the *Tanaka* court would have agreed with *Smith* (and its district court) in rejecting a plaintiff's challenge to the transfer rule on a threshold basis if it had chosen to decide on it, but instead chose to simply punt on that "difficult issue" of whether the transfer restrictions were commercial in favor of simply rejecting the claim on a deeper antitrust analysis. *Id*.

[221] Aloha Sports v. NCAA, No. CAAP-15-0000663, 2017 Haw. App. LEXIS 446 (Haw. Ct. App. 2017), *rev'd on other grounds*, Field v. NCAA, 143 Haw. 362 (Haw. 2018). *See supra* note 100 and accompanying text.

[222] 388 F.3d 955 (6th Cir. 2004).

rules restricting player compensation are not just noncommercial but "*anti-commercial*," as they "violate[] the spirit of amateur athletics."[223] The Ninth Circuit in *O'Bannon* clearly disagreed with this sentiment, calling *Bassett's* reasoning "simply wrong."[224] And while the Sixth Circuit has not heard a case on NCAA limitations on scholarship like the rules challenged in *Agnew*, Judge Flaum's description of the commercial market created through the transactions of "full scholarships in exchange for athletic services" very clearly contrasts with Judge Boyko's reasoning in *Bassett*. If Judge Boyko thinks that rules removing monetary compensation from amateur sports are "anti-commercial" because they keep the sport free of transactions where schools "provid[e] remuneration to athletes in exchange for their commitments to play for the violator's football program," he would surely have to agree that an athletic scholarship is not "renumeration" and as such the transaction is not commercial in nature.[225]

Buoying this assertion is that in *Pennsylvania v. NCAA*, a district court within the Third Circuit applying *Smith* to scholarship limits found the argument in *Agnew* that "scholarship limits constitute commercial activity" were "unpersuasive."[226] While a district court opinion cannot conclusively be used to show the current opinion of the Third Circuit—let alone the Sixth Circuit—it does show one judge's interpretation of how *Smith v. NCAA's* reasoning applies to restrictions on scholarship limits. Considering how heavily the Sixth Circuit relied on Smith to formulate its interpretation of the commercial/noncommercial rule in both *Worldwide Basketball and Bassett, Pennsylvania* certainly shows that at least one Third Circuit district court has interpreted *Smith* to read that the Third Circuit would not have found that scholarship limits are commercial activity. By virtue, the Sixth Circuit likely would not either.

The split between the Seventh and Ninth Circuits came in the third category—restrictions on outside compensation to college athletes. In *Agnew*, Judge Flaum noted that the NCAA attempted to frame the compensation restrictions at issue in *McCormack v. NCAA* "as a financial rule" and thus analogous to the scholarship restrictions at issue in their case.[227] However, Judge Flaum rejected this characterization, placing *McCormack* within the same category as *Banks v. NCAA* and *Smith v. NCAA* as having discussed challenged rules that are clearly related to eligibility and thus are protected by *Board of Regents*.[228] To this end,

[223] *Bassett*, 528 F.3d at 433.

[224] *O'Bannon*, 802 F.3d at 1066.

[225] *Bassett*, 528 F.3d at 433.

[226] Pennsylvania v. NCAA, 948 F.Supp. 2d 416, 426 (M.D. Pa. 2013). *See supra* notes 168-169 and accompanying text.

[227] Agnew v. NCAA, 683 F.3d, 328, 342 (7th Cir. 2012).

[228] *Id*. at 343.

Judge Flaum wrote that "[t]here may not be such a thing as a student-athlete, for instance, if it was not for the NCAA rules requiring class attendance," and "[t]he same goes for bylaws eliminating the eligibility of players who receive cash payments beyond the costs attendant to receiving an education—a rule that clearly protects amateurism."[229] This language gives a clear picture of Judge Flaum's interpretation of these "cash payments beyond the costs attendant to receiving an education" as eligibility rules contained within *Board of Regents's* "ample latitude" and his court's own reading of *Board of Regents* as to find these rules presumptively procompetitive.[230]

The Ninth Circuit clearly disagreed with the framing of compensation limits as eligibility rules. Indeed, *O'Bannon and Alston*—two cases touching on restrictions to compensation—were both allowed to proceed to Rule of Reason analysis.[231] It must, of course, be noted that the Ninth Circuit still did draw something of a line in regard to compensation limits in rejecting the district court's imposition of a $5,000 per year stipend.[232] Writing that "[t]he difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap," Judge Bybee and the Ninth Circuit made clear that *Board of Regents's* plea for courts to give the NCAA "'ample latitude' to superintend college athletes" does, in their view, allow the NCAA to restrict compensation "untethered to education."[233] However, this distinction was made on Rule of Reason grounds—finding error in the district court's grant of this stipend as "a substantially less restrictive alternative restraint" to the challenged restrictions on name, image, and likeness

[229] *Id*. (citing McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988).)

[230] *Id*.

[231] *See O'Bannon*, 802 F.3d at 1066; Alston v. NCAA, 375 F.Supp. 3d 1058 (N.D. Cal. 2019).

[232] *O'Bannon*, 802 F.3d at 1076-79.

[233] *Id*. at 1078-79. (citing NCAA v. Board of Regents, 468 U.S. 85, 120 (1984).) Judge Wilken in *Alston* held firm to this distinction between compensation tethered to education and compensation that is not tethered to education, only enjoining the NCAA from restricting compensation that is "related to education." *See* Permanent Injunction, *supra* note 207. This injunction language would be at the heart of what the Supreme Court would later affirm in its *Alston* decision. *See* NCAA v. Alston, 594 U.S. ___, 141 S. Ct. 2141, 2166 (2021) (writing in conclusion that while some "will think the district court did not go far enough" by only "permitting colleges and universities to offer enhanced education-related benefits," their task was "simply to review the district court judgment through the appropriate lens of antitrust law" and that "the district court acted within the law's bounds."). Further buoying the remaining confusion as to the attitudes of the Ninth Circuit (and Supreme Court) on compensation outside of education-related benefits was Justice Kavanaugh's concurrence, where he wrote that while "the Court does not address the legality of the NCAA's remaining compensation rules ... there are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny." *Id*. at 2167 (Kavanaugh, J., concurring). For what it is worth, Justice Kavanaugh's concurring opinion was left unsigned by the other eight justices.

rights—rather as a threshold issue.[234]

This article has found a clear lack of uniformity between how circuits interpreted the Sherman Act (through their interpretation of *Board of Regents*) to apply to intercollegiate athletics run by the NCAA. This three-tiered circuit split resulted in the creation of three distinct tests to determine whether NCAA rules are subject to antitrust scrutiny as a threshold issue. These three tests, as applied to the four categories of NCAA activity previously defined, have been shown to yield starkly different results, creating confusion and "public mischief" as to when and how antitrust law should apply to NCAA activities.[235]

The first test, utilized by the Third and Sixth Circuits, measured whether the NCAA activity at issue is commercial in nature with significant deference to the "anti-commercial" goal of NCAA amateurism rules.[236] If the activity in question is not commercial, antitrust law could not apply to it, as the Sherman Act—passed through the Commerce Clause of the Constitution—implicates only activity concerning interstate commerce.[237]

The second test, utilized by the Seventh Circuit, determined whether the NCAA bylaw at issue "'fit into the same mold' as those discussed in *Board of Regents* to be procompetitive 'in the twinkling of an eye'" and are thus "blessed by the Supreme Court, making them presumptively procompetitive."[238] If so, they were deemed presumably procompetitive and thus found to be non-violative

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[234] *O'Bannon*, 802 F.3d at 1079. The full statement by *O'Bannon* to this extent reads: "In light of that, the meager evidence in the record, and the Supreme Court's admonition that we must afford the NCAA 'ample latitude' to superintend college athletics, ... we think it is clear the district court erred in concluding that small payments in deferred compensation are a substantially less restrictive alternative restraint." *Id*. (citation omitted).

[235] *Id*.

[236] *See* Smith v. NCAA, 139 F.3d 180, 185 (3rd Cir. 1998) ("The question which we now face is different; it is whether antitrust laws apply only to the alleged infringer's commercial activities. Thus, rather than focus on Smith's alleged injuries, we consider the character of the NCAA's activities.") (citations omitted); Worldwide Basketball v. NCAA, 388 F.3d 955, 959 (6th Cir. 2004) ("The dispositive inquiry in this regard is whether the rule itself is commercial, not whether the entity promulgating the rule is commercial"); Bassett v. NCAA, 528 F.3d 426, 433 (6th Cir. 2008) ("As we held in Worldwide Basketball, the appropriate inquiry is 'whether the rule itself is commercial, not whether the entity promulgating the rule is commercial' ... the analysis must focus on the enforcement action itself and not NCAA as a commercial entity.")

[237] *Smith*, 139 F.3d at 185 ("Rather than intending to provide the NCAA with a commercial advantage, the eligibility rules primarily seek to ensure fair competition in intercollegiate athletics"); *Bassett*, 528 F.3d at 433 (6th Cir. 2008) ("Similar to the eligibility rules in *Smith*, NCAA's rules on recruiting student athletes, specifically those rules prohibiting improper inducements and academic fraud, are all explicitly noncommercial. In fact, those rules are *anti-commercial* and designed to promote and ensure competitiveness amongst NCAA member schools.").

[238] *Agnew*, 683 F.3d at 341.

of the Sherman Act.[239] If not, the rule would be subjected to Rule of Reason analysis.[240]

The third test, utilized by the Ninth Circuit, is still fairly undefined—even after Supreme Court review and affirmance. But as shown in *O'Bannon*, Judge Bybee's assertion at the beginning of the opinion that he and the rest of the panel "agree with the Supreme Court and our sister circuits that many of the NCAA's amateurism rules are likely to be procompetitive," the scope of rules found to be procompetitive are much more limited.[241]

It must, of course, be noted again that the Ninth Circuit's approach (as articulated in *O'Bannon*) does show some deference to *Board of Regents's* call for the courts to give the NCAA "ample latitude" to govern amateur sports, as even after calling that language dicta the majority of the *O'Bannon* court fell short of allowing for the provision of cash sums untethered to education (i.e., the $5,000 stipend).[242] In fact, Judge Bybee did give some indication that the Ninth Circuit may be deigned to follow *Smith* should a case involving "true" eligibility rules arise in that circuit, as he merely distinguished *Smith* rather than rejecting it entirely (as he did Bassett).[243] But as of this point, the Ninth Circuit has refused to definitively rule on that issue; in the only case that it has heard involving these so-called "true 'eligibility' rules," *Tanaka v. USC*,[244] it punted on the issue

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[239] Deppe v. NCAA, 893 F.3d 498, 502 (7th Cir. 2018) ("We have no difficulty concluding that the year-in-residence bylaw is an eligibility rule" and thus "blessed" under *Board of Regents* and *Agnew*).

[240] *Agnew*, 683 F.3d at 343-44 ("The Bylaws at issue in this case, however, are not eligibility rules, nor do we conclude that they 'fit into the same mold' as eligibility rules.").

[241] *O'Bannon*, 802 F.3d at 1053.

[242] *Id*. at 1066. However, it also must be noted again that this submissiveness to *Board of Regents* was made within the confines of the Rule of Reason rather than as a threshold issue. *See supra* note 234 and accompanying text.

[243] *Id*.

[244] 252 F.3d 1059 (9th Cir. 2001).

and merely "assume[d], without deciding, that the transfer rule is subject to the federal antitrust laws."[245]

Figure 8 provides a tabular illustration of this identified circuit split. While the Ninth Circuit has continually punted on issues of what it has called "true 'eligibility' rules," its decision to merely distinguish Smith from the compensation rules at issue in O'Bannon provides some guidance and shows their likely intention to follow Smith in finding these "true" eligibility rules to be within the "ample latitude" granted by the Supreme Court in Board of Regents. Similarly, while the opinion of the Third Circuit as to all of these categories can be seen as being on somewhat tenuous ground since certainly a lot has changed since Smith was decided in 1998,[246] the Pennsylvania ruling rejecting even Agnew's procompetitive presumption shows that circuit's likely deference toward its own precedent.

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[245] *Id*. at 1062. See supra note 220.

[246] The question of what the Third Circuit—which has not heard an NCAA antitrust case since *Smith* in 1998—would do when faced with a similar case was a particularly important question, as the other half of the consolidated *In re* NCAA Grant-in-Aid Cap Litigation that was consolidated with *Alston* at the Ninth Circuit was *Jenkins v. NCAA*, a case filed within the Third Circuit's jurisdiction. However, the *Jenkins* half of the litigation was dismissed without prejudice by Judge Wilken following the Ninth Circuit's affirmance of *Alston* in 2020. Order Granting Mot. to Dismiss *Jenkins* Without Prejudice, *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litigation, Nos. 14-md-02541, 14-cv-02758 (N.D. Cal. Sep. 10, 2020), ECF No. 1300. Of course, this question became much less interesting once the Supreme Court took and affirmed the Ninth Circuit's *Alston* holding. At the same time, the Third Circuit's overall attitude on NCAA amateurism rules will soon be of import, as this circuit will soon hear an appeal of a lower court decision holding that college athletes can be deemed employees under federal wage and hour law. *See* Johnson v. NCAA, No. 19-5230, 2021 WL 6125095 (E.D. Pa. 2021) (certifying for interlocutory appeal to the Third Circuit the question of "[w]hether NCAA Division I student athletes can be employees of the colleges and universities they attend for purposes of the Fair Labor Standards Act solely by virtue of their participation in interscholastic athletics.")

Third Circuit (Smith) and **Sixth Circuit** (WWBB/Bassett/Marshall)

EXEMPT (Non- or "Anti-" Commercial)			RULE OF REASON
Category 1 "True" Eligibility Rules (e.g. year-in-res. transfer rule & equipment rules)	**Category 2** Rules Impacting Scholarships (e.g. limits on number & length of scholarships)	**Category 3** Rules Impacting Compensation (e.g. sanctions for paying players & NIL restrictions)	**Category 4** General NCAA Operations (e.g. sanctioning of outside tournaments)

Seventh Circuit (Agnew)

EXEMPT (Presm. Procom.)	RULE OF REASON	EXEMPT (Presm. Procom.)	RULE OF REASON
Category 1 "True" Eligibility Rules (e.g. year-in-res. transfer rule & equipment rules)	**Category 2** Rules Impacting Scholarships (e.g. limits on number & length of scholarships)	**Category 3** Rules Impacting Compensation (e.g. sanctions for paying players & NIL restrictions)	**Category 4** General NCAA Operations (e.g. sanctioning of outside tournaments)

Ninth Circuit (O'Bannon)

EXEMPT? (Non-Comm.?)		RULE OF REASON	
Category 1 "True" Eligibility Rules (e.g. year-in-res. transfer rule & equipment rules)	**Category 2** Rules Impacting Scholarships (e.g. limits on number & length of scholarships)	**Category 3** Rules Impacting Compensation (e.g. sanctions for paying players & NIL restrictions)	**Category 4** General NCAA Operations (e.g. sanctioning of outside tournaments)

Figure 8. Illustration of the three-tiered circuit split (by category) in applying antitrust law to NCAA bylaws.[247]

[247] Green boxes in this figure show conduct that the applicable court has deemed as exempted from antitrust law as a threshold issue. Red boxes in this figure show conduct that the applicable court has deemed as needing to be subject to full Rule of Reason analysis. The yellow box in this figure shows that the Ninth Circuit has not definitively ruled on whether it feels that "true" eligibility rules can be dismissed on a threshold basis, but signaled some intent to follow *Smith* in that regard to do so if it were to be faced with such an issue in the future. *See O'Bannon*, 802 F.3d at 1053 (distinguishing the compensation-related NCAA bylaws at issue from the "Postbaccalaureate Bylaw challenged in *Smith*" which "was a true 'eligibility' rule, akin to the rules limiting the number of years that student-athletes may play collegiate sports or requiring student-athletes to complete a certain number of credit hours each semester."). *See supra* notes 217, 219 and accompanying text. *But see also supra* notes 243-245.

Unmistakably, leading up to the Supreme Court's decision in *Alston*, clear splits existed between the circuits in how they approach the application of antitrust law to NCAA amateurism rules. As evinced by the doctrinal differences between the 'benchmark' cases (*Smith, Worldwide Basketball, Bassett, Agnew*, and *O'Bannon*), the circuits were unable to come up with a consistent definition of the "ample latitude" that Justice Stevens imparted to the NCAA in *Board of Regents*. The most recent cases in each circuit—*Pennsylvania v. NCAA* in a Third Circuit district court, *Marshall v. ESPN* in the Sixth Circuit, Deppe v. NCAA in the Seventh Circuit, and *Alston v. NCAA* in the Ninth Circuit—have merely shown that each circuit was entrenched in its ways.

Part IV. Examining the Need for the Supreme Court to Hear (and Affirm) Alston

On Dec. 16, 2020, the Supreme Court made headlines by granting the NCAA's petition for the Court to hear *Alston*,[248] paving the way for the Supreme Court's first examination of a college sports antitrust case since 1984's *NCAA v. Board of Regents*.[249] When the Court eventually issued its holding—a unanimous decision affirming the Ninth Circuit's ruling and reasoning—the decision has had enormous ramifications on the landscape of college sports.[250] The Court in its holding effectively dismantled the NCAA's rules limiting college athlete

[248] NCAA v. Alston, 592 U.S. ___, 2020 WL 7366281 (2020) (granting certiorari). *See, e.g.,* Jessica Gresko, *Supreme Court Agrees to Hear NCAA Athlete Compensation Case*, Associated Press (Dec. 16, 2020), https://apnews.com/article/athlete-compensation-basketball-elena-kagan-football-us-supreme-court-4fa2fc30e1a3f21329f4ec22cc55bb28.

[249] 468 U.S. 85 (1984).

[250] *See, e.g.,* Sam C. Ehrlich & Neal C. Ternes, *Putting the First Amendment in Play: Name, Image, and Likeness Policies and Athlete Freedom of Speech*, 45 Colum. J.L. & Arts 47, 52-54 (2021) (examining the effect of the Supreme Court's Alston decision on NCAA rulemaking on athlete commercial use of name, image, and likeness (NIL), noting that the NCAA was forced to "rapidly chance course on NIL to prevent future litigation … under antitrust laws."). The *Alston* decision has also created something of a cascading effect in other areas of the law; for example, a district court in Pennsylvania and the National Labor Relations Board general counsel have now each issued opinions that college athletes can or should be deemed as employees under federal labor law while citing the Supreme Court's *Alston* decision as central to its analysis. *See* Johnson v. NCAA, No. 19-cv-05230, 2021 WL 3771810, at *5 (E.D. Pa. Aug. 25, 2021) (holding that the Supreme Court in *Alston* "rejected the NCAA's argument that Board of Regents 'expressly approved its limits on student-athlete compensation—and [that] this approval forecloses any meaningful review of those limits today'"); N.L.R.B. Guidance Mem. 21-08, at 5 (Sept. 29, 2021) (writing that the Supreme Court in *Alston* "recognized that amateurism in college sports has changed significantly in recent decades and rejected the notion that NCAA compensation restrictions are 'forevermore' lawful.").

compensation to scholarships and other incidental—but strictly non-cash—benefits.[251] But perhaps more importantly, the Supreme Court's grant of certiorari in *Alston* resolved the long-standing circuit split that has existed with regard to how the various circuits apply antitrust law to NCAA amateurism rules.

As previously argued, the split between the Ninth Circuit and the Third, Sixth, and Seventh Circuits is where the Ninth Circuit has applied Rule of Reason analysis to judge the restrictiveness of NCAA rules against its purported pro-competitive benefits; the Third, Sixth, and Seventh Circuits have read *Board of Regents* to create an implied, wholesale exemption for NCAA amateurism rules from antitrust law—either through a procompetitive presumption (the Seventh Circuit) or through a finding that NCAA amateurism rules are simply noncommercial (the Third and Sixth Circuits). Judging by the Supreme Court's repeated disfavor of implied antitrust exemptions, however, it was correct in finding that the Ninth Circuit's approach was the only interpretation of *Board of Regents* deemed as correct.

In fact, the grant of implied antitrust immunity by the Third, Sixth, and Seventh Circuits was clearly in conflict with a long line of precedent at the Supreme Court. The Supreme Court has repeatedly noted a "heavy presumption against implicit exemptions" to the Sherman Act.[252] Such presumption carries particular weight in the context here, as numerous circuit courts have misread *Board of Regents* to grant implied antitrust immunity to various NCAA activities. As such, petition for *certiorari* should be granted in this case not only to affirm the Ninth Circuit's holding, but to reject the Third, Sixth, and Seventh Circuits' incorrect reading of *Board of Regents* and the disfavored implied antitrust immunity this incorrect reading created.

Indeed, the Supreme Court's holding in *United States v. Philadelphia Nat. Bank*[253] was particularly apt here. In *Philadelphia Nat. Bank*, the Supreme Court rejected the argument that Congress intended to confer an antitrust exemption to the banking industry through a 1950 amendment that had added an assets-acquisition provision to § 7 of the Clayton Act.[254] Reviewing the legislative history of the amendment, the Supreme Court stated that there was "no indication ... that

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[251] *See* Sam C. Ehrlich, *"But They're Already Paid": Payments In-Kind, College Athletes, and the FLSA*, 123 W. Va. L. Rev. 1, 13-17 (2020) (outlining the compensation allowed to college athletes under NCAA rules).

[252] Goldfarb v. Virginia State Bar, 421 U.S. at 777. *See also* California v. FPC, 369 U.S. 482, 485 (1962) ("Immunity from the antitrust laws is not lightly implied"); Group Life & Health Ins. v. Royal Drug, 440 U.S. 205, 231 (1979) ("It is well settled that exemptions from the antitrust laws are to be narrowly construed.").

[253] 374 U.S. 321, 348 (1963).

[254] *Id*. at 340-48.

Congress wished to confer a special dispensation upon the banking industry" and if Congress had wished to grant a wider exemption than the narrow amendment granting exemption solely to asset acquisition, "surely it would have exempted the industry" either at that time or through later legislation.[255]

A similar argument presented itself in *Alston*. In response to the Ninth Circuit's holdings in *O'Bannon* and *Alston*—along with state legislation forcing NCAA member institutions to allow college athletes to profit off of their name, image, and likeness—the NCAA has repeatedly asked Congress to grant them protection from antitrust law as part of a global name, image, and likeness bill.[256] Congress had refused to grant this request. Just as it did with the bankers in *Philadelphia Nat. Bank*, the Supreme Court was right to reject the *Alston* petitioners' efforts to continue to usurp the legislative process by asking the Supreme Court to grant them antitrust protection that Congress had declined to grant to them.

But more critically, the Third, Sixth, and Seventh Circuit's guiding precedent in *Smith, Bassett*, and *Agnew/Deppe* show that such an implied antitrust protection already existed as a result of the Supreme Court's holding in *Board of Regents*. The Third, Sixth, and Seventh Circuits' holdings in those cases were the ultimate examples of the courts creating an implied antitrust exemption where none should be created. As the Ninth Circuit (correctly) argued in *O'Bannon*, Justice Stevens's call for the courts to give 'ample latitude' was nothing more than dicta, as *Board of Regents* was about the schools' ability to sell television broadcasting rights, not about the amateur status of college athletes.[257] Indeed, as the Ninth Circuit pointed out in O'Bannon, Board of Regents was actually about "why NCAA rules should be analyzed under the Rule of Reason, rather than

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255 *Id*. at 348.

256 *See, e.g*., NCAA Board of Governors, Federal and State Legislation Working Group, Final Report and Recommendations at 27 (Apr. 17, 2020), https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG_Report.pdf; Protecting the Integrity of College Athletics: Hearing Before the S. Comm. on the Judiciary, 116th Cong. 4 (2020) (statement of Mark Emmert, President, National Collegiate Athletic Association). In fact, as outlined *supra* note 57, the NCAA received no less than four hearings in 2020 alone to argue its case for antitrust exemption by Congress as a necessary part of legislative efforts to allow college athlete name, image, and likeness rights. *See, e.g., Name, Image, and Likeness: The State of Intercollegiate Athlete Compensation: Hearing Before the Subcomm. On Manufacturing, Trade, and Consumer Protection of the S. Comm. On Commerce, Science, and Transp*., 116th Cong. (2020); *Exploring a Compensation Framework for Intercollegiate Athletes: Hearing Before the S. Comm. On Commerce, Science, and Transp.,* 116th Cong. (2020); *Protecting the Integrity of College Athletics: Hearing Before the S. Comm. on the Judiciary,* 116th Cong. (2020); *Compensating College Athletes: Examining the Potential Impact on Athletes and Institutions: Hearing Before the S. Comm. On Health, Ed., Labor, and Pensions,* 116th Cong. (2020).

257 802 F.3d 1049, 1063 (9th Cir. 2015).

held to be illegal per se."[258] This point presumably also applies to the implied immunity granted to the petitioners by the Third, Sixth, and Seventh Circuits. And based on the Supreme Court's repeated refusal to find implied antitrust exemptions based on creative reading of statutory law,[259] the Third, Sixth, and Seventh Circuits' finding of implied antitrust immunity based on Supreme Court dicta was clearly a mistake that required correction by the Supreme Court.[260]

Furthermore, as the Ninth Circuit also concluded in *O'Bannon*, even if that language were not dicta, "it would not support the tremendous weight" placed upon it by *Smith, Bassett, Agnew*, and the *Alston* petitioners themselves.[261] The granting of 'ample latitude' by the courts to the maintenance of amateurism can simply mean giving the petitioners' offered procompetitive effects additional weight and consideration when balancing them against the anticompetitive effects of the petitioners' activities. This is exactly what the Ninth Circuit did in its *Alston decision*, and the refusal of the Ninth Circuit to read *Board of Regents* as granting a disfavored implied antitrust exemption should be affirmed by the Supreme Court, especially given the conflicting precedent in *Smith, Bassett,* and *Agnew* in which implied antitrust immunity was granted to the petitioners' amateurism-based activities.

Justification for Supreme Court intervention in *Alston* was clearly demonstrated through comparison between the NCAA amateurism network of case law and the Court's historical stream of intervention and correction in a similar circumstance: professional baseball's antitrust exemption. Professional baseball's network of case law—as created by the Supreme Court in *Federal Baseball v. National League*[262] and solidified later in *Toolson v. New York Yankees*[263] and *Flood v. Kuhn*[264]—is much more well-defined and much more lacking in doctrinal split due in large part to early and constant intervention by the Supreme Court.

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[258] *Id*.

[259] *See, e.g., Philadelphia Nat. Bank*, 374 U.S. at 340-48.

[260] And correct this mistake they did. Speaking of *Board of Regents* and the oft-cited "ample latitude" language, the Court in *Alston* noted that "there can be little doubt that the market realities have changed significantly since 1984" and that given "how much has changed" in the market for college athletes, "it would be particularly unwise to treat an aside in *Board of Regents* as more than that." NCAA v. Alston, 141 S. Ct. 2141, 2158 (2021). This was spelled out even clearer by Justice Kavanaugh in his concurrence, as he summarized the Court's majority opinion to read that the *Board of Regents* "stray comments ... were dicta and have no bearing on whether the NCAA's current compensation rules are lawful." *Id*. at 2167 (Kavanaugh, J., concurring).

[261] 802 F.3d at 1063.

[262] 259 U.S. 200 (1922).

[263] 346 U.S. 356 (1953).

[264] 407 U.S. 258 (1972).

Indeed, as soon as lower courts started to question the continued power of *Federal Baseball* in light of the mid-20th century of the Commerce Clause,[265] the Supreme Court acted quickly and decisively to affirm *Federal Baseball* and the baseball exemption's continued precedential power in *Toolson*.[266] It is true that the Supreme Court's most recent ruling on the baseball exemption (*Flood*) has been subject to some creative interpretation by state and lower federal courts in order to narrow the scope of the exemption.[267] But the much more decisive nature of the Supreme Court case law surrounding the baseball exemption that *does* exist has allowed the Supreme Court to make clear its intentions when denying certiorari to four recent cases[268] that each interpreted Congress's efforts to define the scope of the baseball exemption in its broadest possible form even when the Act is much more nebulous as to its intentions.[269]

A common characteristic of the baseball exemption was in correction; whenever a case strayed away from the common path of applying a broad scope

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[265] *See* Gardella v. Chandler, 172 F. 2d 402, 405-406 (2d Cir. 1949) (Frank, J., concurring) (arguing that recent Supreme Court decisions expanding the scope of the Commerce Clause had "completely destroyed the vitality" of *Federal Baseball* and that the court thus had cause to ignore *Federal Baseball* to find that the reserve clause binding players to teams indefinitely should be deemed "within the prohibitions of the Sherman Act"); Martin v. National League, 174 F. 2d 917, 918-19 (2d Cir. 1949) (questioning but following *Federal Baseball* for the purposes of denying injunctive relief, but effectively stating that the lower court could find that baseball's reserve clause violated the antitrust laws at trial).

[266] 346 U.S. at 356-57 (holding, *per curiam*, that the baseball exemption should be left in place because Congress has had ample opportunity to overturn *Federal Baseball* but had not chosen to do so).

[267] *See, e.g.,* Piazza v. Major League Baseball, 831 F. Supp. 420, 436 (E.D. Pa. 1993) (holding that "the Court in *Flood v. Kuhn* stripped from *Federal Baseball* and *Toolson* any precedential value that those cases may have had beyond the particular facts there involved, i.e., the reserve clause" and limiting the scope of the exemption to the reserve clause); Butterworth v. National League, 644 So. 2d 1021 (Fla. 1994) (citing *Piazza* in refusing to extend the scope of the baseball exemption to cover an antitrust investigation by the attorney general of Florida); Minnesota Twins v. State by Humphrey, 1998-1 Trade Cases (CCH) ¶ 72,136 (Minn. Dist. 1998), *rev'd*, Minnesota Twins P'Ship v. State, 592 N.W. 2d 847, 855-56 (Minn. 1999), *cert. denied*, Hatch v. Minn. Twins, 528 U.S. 1013 (1999) (refusing to extend the scope of the baseball exemption to cover an antitrust investigation by the attorney general of Minnesota).

[268] City of San Jose v. Ofc. Of the Comm'r of Baseball, 776 F. 3d 686 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 36 (2015); Miranda v. Selig, 860 F. 3d 1237 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 507 (2017); Wyckoff v. Ofc. of the Comm'r of Baseball, 705 Fed. Appx. 26 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 2621 (2018); Right Field Rooftops v. Chicago Cubs, 870 F. 3d 682 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 2621 (2018).

[269] Curt Flood Act of 1998, 112 Stat. 2824 (1998) (current version at 15 U.S.C. § 26b (2012)). *See* Nathaniel Grow, *The Curiously Confounding Curt Flood Act*, 90 Tul. L. Rev. 859, 880-82 (2016) (noting the Act was seemingly intended to "officially repeal MLB's antitrust exemption in all cases but those specifically identified" rather than only repealing the exemption in the specifically identified circumstance of MLB player-league relations and codifying the exemption in all other cases—as courts have read the Act to do.).

to the baseball exemption, that alternative path would eventually be 'corrected,' either through new Supreme Court jurisprudence that confirmed the exemption and its broad scope (e.g., Toolson) or by the passage of the Curt Flood Act of 1998. In sharp contrast, the alternative paths created in the NCAA amateurism network by pivotal cases like Agnew and O'Bannon had not been corrected or even adopted by other courts. Instead, as this article has observed, courts instead settled for rejection of those alternative doctrines in often decisive terms, for instance by either stating that the reasoning of those cases "is not the law in this Circuit"[270] or even by saying that the prior precedent is "simply wrong."[271] Just as many have attacked the NCAA for its inconsistency in applying its rules,[272] no reasonable observer can find any sort of consistency in the way that the various courts applied antitrust law to NCAA activities prior to the Supreme Court's *Alston* holding, particularly in its enforcement of its various amateurism-related restrictions.

It took 31 years after *Federal Baseball* for the Supreme Court to take another case involving the baseball exemption (*Toolson*). It then took less than 20 years for the Supreme Court to take a third baseball exemption case that further confirmed how the Supreme Court wanted the exemption to be handled by the lower courts (*Flood*). Given that *Board of Regents* had recently (in 2019) celebrated its 35th birthday, by that (oversimplified) logic, the Supreme Court was certainly overdue to take another NCAA amateurism case and clarify Justice Stevens's reasoning regarding what exactly constitutes the "ample latitude" that must be given to the NCAA in order to maintain the "revered tradition of amateurism in college sports."[273] And fortunately—unlike with the much-criticized baseball exemption—the Supreme Court made a correct decision in affirmance of the Ninth

[270] Pennsylvania v. NCAA, 948 F.Supp.2d 416, 426 (M.D. Penn. 2013).

[271] O'Bannon v. NCAA, 802 F.3d 1049, 1066 (9th Cir. 2015).

[272] *See, e.g.,* Stephen A. Miller, *The NCAA Needs to Let Someone Else Enforce Its Rules,* The Atlantic (Oct. 23, 2012), https://www.theatlantic.com/entertainment/archive/2012/10/the-ncaa-needs-to-let-someone-else-enforce-its-rules/264012/; Ken Schreiber, NCAA's *Inconsistency Makes it Hard to Support,* Providence Journal (Oct. 16, 2019), https://www.providencejournal.com/sports/20191016/on-college-football-ncaas-inconsistency-makes-it-hard-to-support; Matt Murschel, *ACC Coaches Concerned About Inconsistent NCAA Rulings on Transfer Waivers,* Orlando Sentinel (May 18, 2019), https://www.orlandosentinel.com/sports/college-gridiron-365/os-sp-ncaa-transfer-waivers-0519-20190519-pnhrssh6cbfotc45m5ypzuhcsm-story.html. *See also* Bradley David Ridpath, Gerald Gurney, & Eric Snyder, *NCAA Academic Fraud Cases and Historical Consistency: A Comparative Content Analysis,* 25 J. Legal Aspects of Sport 75 (2015) (finding significant inconsistencies in the NCAA's sanctioning of institutions for academic fraud violations, including that "the NCAA has been inconsistent in deciding what cases to investigate with regard to academic fraud and what cases they will leave to the institution.").

[273] NCAA v. Board of Regents, 468 U.S. 85, 120A (1984).

Circuit's *Alston* decision that was well in line with its longstanding disfavor of implied, court-made antitrust immunity.

Part V. Conclusion

As demonstrated in this article, it is clear that splits existed between the circuits in how they approach the application of antitrust law to NCAA amateurism rules. Perhaps more critically, it is also clear that the circuits were unable to come up with a consistent definition of the nebulous "ample latitude" that Justice Stevens argued should be granted to the NCAA.[274]

As such, Supreme Court correction was necessary to untangle the mess that is antitrust scrutiny of NCAA activities. Given the three-tiered circuit split shown in this article, the Supreme Court essentially has three options: (1) it can side with the Third and Sixth Circuits in finding broad immunity by declaration that NCAA amateurism rules are noncommercial, and therefore not subject to the Sherman Act at all;[275] (2) it can side with the Seventh Circuit in finding that the intent of *Board of Regents* was indeed to grant a threshold-level procompetitive presumption precluding Rule of Reason analysis of the merits of particular amateurism rules;[276] or (3) it can affirm the Ninth Circuit's approach of applying the Rule of Reason to the decision-making process, allowing courts to judge the merits of the particular rules against the anticompetitive harm that they create.[277]

Prior Supreme Court deference to the legislative branch in making decisions on antitrust immunity was served only through the third of those options.[278] Rule of Reason analysis certainly does not immediately make illegal all NCAA restrictions; in fact, the Supreme Court's recent opinion in *American Needle v. NFL* may very well insulate many NCAA rules—including eligibility rules like amateurism rules—as serving valid procompetitive purposes that outweigh the

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[274] *Id*.

[275] *See generally* Bassett v. NCAA, 528 F. 3d 426, 433 (6th Cir. 2008); *Pennsylvania*, 948 F.Supp.2d at 426.

[276] See generally Agnew v. NCAA, 683 F. 3d 328, 341-43 (7th Cir. 2012); Deppe v. NCAA, 893 F. 3d 498, 501-02 (7th Cir. 2018).

[277] *See generally* Alston v. NCAA, 958 F.3d 1239 (9th Cir. 2020); O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015).

[278] *See, e.g.,* United States v. Philadelphia Nat. Bank, 374 U.S. 321, 348 (1963) (refusing to grant an exemption to antitrust law for the banking industry, for if Congress had wished for the banking industry to be exempt from the Sherman Act, "surely it would have exempted the industry" themselves in later legislation.).

anticompetitive effects.[279] But implementation of a threshold level exemption for amateurism as a concept that forecloses comparative Rule of Reason analysis—as the Third, Sixth, and Seventh Circuits have done to varying degrees—should be left to Congress, not the courts.

Indeed, the NCAA has recently and repeatedly asked Congress to grant it an exemption to antitrust law in its latest legislative lobbying efforts regarding college athlete rights to profit off of their name, image, and likeness in sponsorship and endorsement deals.[280] The Court's decision affirming the Ninth Circuit's *Alston* decision allows Congress to make the ultimate decision as to whether the NCAA is worthy of antitrust exemption for its amateurism-related activities or not.

Regardless, in case those lobbying efforts are unsuccessful, clarity regarding the NCAA's liability under the antitrust laws in promulgating and enforcing amateurism bylaws was needed, given the existence of a three-tiered circuit split. This need for intervention was even more critical given that antitrust lawsuits were filed shortly before the Supreme Court's certiorari grant regarding the NCAA's own efforts to enact name, image, and likeness policy.[281] The Court's decision in Alston impacts the prognosis for those cases greatly, as well as impacts the NCAA's own efforts to enact NIL policy on its own.

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[279] *See* American Needle v. Nat'l Football League, 560 U.S. 183, 202 (2010) ("The fact that [league sports] teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions.").

[280] *See, e.g., NCAA Board of Governors, Federal and State Legislation Working Group, Final Report and Recommendations* at 27 (Apr. 17, 2020), https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG_Report.pdf; *Protecting the Integrity of College Athletics: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 4 (2020) (statement of Mark Emmert, President, National Collegiate Athletic Association).

[281] *See In re* College Athlete NIL Litigation, No. 20-cv-03919 (N.D. Cal.). This litigation—which represents consolidated lawsuits by Arizona State swimmer Grant House, Oregon basketball player Sedona Prince, and former University of Illinois football player Tymer Oliver—is as of this writing in discovery after Judge Wilken denied the bulk of the defendants' motion to dismiss in June 2021. *See* House v. NCAA, Nos. 20-cv-03919, 20-cv-04527, 2021 WL 3578572 (N.D. Cal. 2021). The suit claims that the now-revoked NCAA rules barring college athletes from benefitting financially from endorsements and their personal brands violates antitrust law, including by virtue of preventing NCAA member conferences and schools from sharing a portion of revenue obtained through third-party deals with their athletes. *Id*. at *1-2. Notably—and as observed by Judge Wilken—the specifics of the antitrust claim were based on the legal theory offered by Ninth Circuit Judge Milan Smith concurring in the *Alston* decision, in which he wrote that the Ninth Circuit majority had given the NCAA *too much* deference by giving credit to the NCAA for benefits offered the collateral market for consumer demand for college sports at Step 2 of the Rule of Reason test. *Id*. at *5. While Judge Wilken discussed this concurrence wholly to dispel the defendants' arguments that the plaintiffs' claims were barred by *stare decisis*, adoption of this theory later would continue to erode the NCAA's remaining protection under antitrust law well beyond the degree to which it was already eroded by the Supreme Court in its *Alston* decision. *Id*. at *5-6. *See also* Alston v. NCAA, 958 F.3d 1239, 1266-1271 (9th Cir. 2020) (Smith, J., concurring).

Most critically, the Supreme Court was correct to address whether the oft-cited *Board of Regents* language does, in fact, "bless[]" NCAA eligibility rules and "mak[e] them presumptively procompetitive," as the Seventh Circuit found in *Agnew*,[282] or whether that language is merely nonbinding dicta, as the Ninth Circuit found in *O'Bannon*.[283] The Supreme Court had repeatedly noted a "heavy presumption against implicit exemptions" to the Sherman Act.[284] As such, the Supreme Court was correct to take the opportunity to resolve the repeated confusion and disagreement as to whether *Board of Regents* does, in fact, grant an implied exemption to the Sherman Act for NCAA amateurism rules through its nebulous language regarding the undefined "ample latitude" that should be granted to the NCAA for its amateurism-related activities.[285]

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[282] 683 F.3d at 341.

[283] 802 F.3d at 1063.

[284] Goldfarb v. Virginia State Bar, 421 U.S. 773, 777 (1975). *See also* California v. FPC, 369 U.S. 482, 485 (1962) ("Immunity from the antitrust laws is not lightly implied"); United States v. Philadelphia Nat. Bank, 374 U.S. at 348; Group Life & Health Ins. v. Royal Drug, 440 U.S. 205, 231 (1979) ("It is well settled that exemptions from the antitrust laws are to be narrowly construed.").

[285] *Board of Regents*, 468 U.S. at 120A.