



Irrevocable but Unenforceable? Collegiate Athletic Conferences' Grant of Rights

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ABSTRACT

This Article examines the Grant of Rights, a legal document that college football conferences currently use to prevent “conference realignment,” or the practice of the colleges and universities that make up the conference moving to another conference. The Grant of Rights has been heralded as the document that will bring an end to conference realignment, but this Article challenges both the legal and practical effectiveness of the Grant of Rights.

Both conferences and member schools can make more informed—or strategic—decisions regarding conference membership by understanding the factors underlying conference realignment and the assumptions essential to the effectiveness of the Grant of Rights. This Article presents those factors and assumptions in detail and suggests modified legal terms and additional mechanisms for preventing conference realignment.

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“The [Grant of Rights]’s strength isn’t that it’s an ironclad complex agreement that doesn’t include any loopholes. Instead, it’s an arrangement that is a triple-dog-dare to schools that want to attempt to challenge it This is proverbial Russian roulette in a practical legal context”¹

I. INTRODUCTION: AN INSTANT CLASSIC

In September 2011, millions watched their televisions as famed sports commentator Brent Musburger narrated one of the final plays of the annual football game between the teams from the University of Michigan and the University of Notre Dame, “Wide open is Gallon! They left him alone! . . . He’s in a footrace!”² The Michigan receiver sprinted down the field in what proved to be one of the most improbable comebacks in Michigan Stadium history.³ In the last two minutes of the game, the teams had combined for three touchdowns and several miracles.⁴ And as the game clock finally expired, Musburger concluded in his usual, reserved cadence, “Folks, you have just seen an instant classic.”⁵

Almost every year since 1978, the two schools had battled on the gridiron for an important early season win and bragging rights.⁶ However, since the University of Michigan was a member of the Big Ten Conference and the University of Notre Dame was a football independent (not a member of any conference), the two schools met as non-conference rivals and were responsible for scheduling and organizing their yearly meeting. Over the years, the rivalry produced iconic moments that have been replayed an un-

¹ *Summertime Conference Realignment Walking Dead: A Look at the Big 12 Grant of Rights Agreement*, FRANKTHETANK.ME (Aug. 8, 2013) [hereinafter *Summertime Conference Realignment*], <http://frankthetank.me/2013/08/08/summertime-conference-realignment-walking-dead-a-look-at-the-big-12-grant-of-rights-agreement/>, {<https://perma.cc/BZR8-ZJ9Q>}.

² See *College Football: Michigan vs. Notre Dame* (ESPN television broadcast Sept. 10, 2011), available at <http://www.youtube.com/watch?v=7DH2R9gXfwE>, {<https://perma.cc/X65H-S9WR>}.

³ *Id.*

⁴ See *Michigan Scores with 2 Seconds Left, Stuns Irish*, ESPN (Sept. 11, 2011), <http://espn.go.com/ncf/recap?gameId=312530130>, {<https://perma.cc/XH9T-DQBB>} (recapping 35-31 Michigan win after Michigan’s touchdown with two seconds remaining in game).

⁵ See *College Football*, *supra* note 2.

⁶ See John U. Bacon, *Notre Dame-Michigan: Touring the Ruins of a Great Rivalry*, WALL ST. J., Sept. 6, 2013, <http://online.wsj.com/news/articles/SB10001424127887323893004579059201860329732>, {<https://perma.cc/FW9E-FU58>} (discussing history of Michigan-Notre Dame rivalry).

countable number of times.⁷ Yet, in September 2012, only one hour before the annual game between Michigan and Notre Dame, Notre Dame's athletic director handed Michigan's athletic director papers effectively ending the rivalry after 2014.⁸ This storied tradition was yet another casualty of conference realignment.⁹

First and foremost, conferences are athletic associations.¹⁰ Schools in a conference meet frequently to discuss current, salient issues in sports. They create rules that govern their conference competitions. And, a conference is responsible for generating an annual schedule for conference members to play one another. A conference, in theory, exists solely for the benefit of the schools that comprise the conference.¹¹ As conference participants, confer-

⁷ See Gregg Found, *5 Notable Notre Dame-Michigan Moments*, ESPN (Sept. 5, 2013, 1:37 PM), http://espn.go.com/blog/statsinfo/post/_id/71894/5-notable-notre-dame-michigan-moments, {<https://perma.cc/4W8V-TB2D>} (listing, briefly, several memorable plays and events from past Michigan-Notre Dame rivalry games).

⁸ See Matt Fortuna, *ND-Michigan to End After 2014*, ESPN (Sept. 26, 2012), http://espn.go.com/college-football/story/_id/8423552/notre-dame-fighting-irish-opts-series-michigan-wolverines, {<https://perma.cc/D4DY-MC8R>} (discussing University of Notre Dame's method of notifying University of Michigan that it was exercising its opt-out clause of scheduling contract).

⁹ See Ivan Maisel, *ND-UM Is Just Realignment Wreckage*, ESPN (Sept. 25, 2012), http://espn.go.com/college-football/story/_page/football-120925Maisel/disappearance-notre-dame-fighting-irish-michigan-wolverines-rivalry-make-college-football-better, {<https://perma.cc/Q35C-4H9V>} (stating that Notre Dame decided to end rivalry with Michigan while committing to new football scheduling agreement with ACC).

¹⁰ Yet, some conferences have expanded from their athletic traditions by forming academic alliances that cooperate along non-athletic lines as well. See, e.g., Nick Anderson, *Big Ten Institutional Cooperation Cited as a Plus for U-Md.*, WASH. POST (Nov. 20, 2012), http://articles.washingtonpost.com/2012-11-20/local/35511758_1_cic-schools-country, {<https://perma.cc/7W7C-ERR9>} (discussing the allure of participating in the Committee on Institutional Cooperation as an incentive for University of Maryland to join Big Ten Conference). The Committee on Institutional Cooperation, the predecessor to the Big Ten Academic Alliance, was "a consortium of the Big Ten member universities plus the University of Chicago . . . [that] have advance[d] their academic missions, generate[d] unique opportunities for students and faculty, and serve[d] the common good by sharing expertise, leveraging campus resources, and collaborating on innovative programs." *Big Ten Academic Alliance Smithsonian Fellowship (formerly CIC)*, SMITHSONIAN OFFICE OF FELLOWSHIPS AND INTERNSHIPS, <http://www.smithsonianofi.com/fellowship-opportunities/committee-on-institutional-cooperation-cic-fellowship/7868-2/>, {<https://perma.cc/KF8P-PR35>} (last visited Sept. 1, 2016).

¹¹ See *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1320 (9th Cir. 1996) (holding that, under Washington law, student-athletes are not third-party benefi-

ence members cede certain rights and powers to the conference.¹² In return, schools are given a range of benefits; many of the major conferences distribute tens of millions of dollars each year to their members.¹³ Further, schools increase their national visibility through their conference association with other athletic programs.

Conferences, in recent history, have not been stable entities.¹⁴ In the past approximately twenty years, there have been several notable waves of schools changing conferences—a phenomenon commonly referred to as conference realignment.¹⁵ As a result, schools have changed alliances and conferences have adjusted to the ever-changing landscape of college athletics. In an era when realignment has become so prevalent, many commentators have attempted to discern the cause behind conference realignment. One

ciaries to the contract between Pac-10 Conference and member schools). The *Hairston* court dismissed the claim despite the Conference's Statement of Purpose that noted the Conference's "goal is 'to enrich and balance the athletic and educational experiences of student-athletes at its member institutions, [and] to enhance athletic and academic integrity among its members.'" *Id.*; see also *Anderson v. Regents of Univ. of Cal.*, 554 N.W.2d 509, 515–16 (Wis. Ct. App. 1996) (holding that potential purchasers of Rose Bowl tickets are not third-party beneficiaries to the Rose Bowl contract between the Big Ten Conference, Pac-10 Conference, and Tournament of Roses Association).

¹² *Regents of Univ. of Cal. v. ABC, Inc.*, 747 F.2d 511, 521–22 (9th Cir. 1984) (upholding an injunction that prohibited schools from "refusing to consent to the broadcast of one of their fall games solely on the basis of the exclusivity terms of [another] contract").

¹³ See, e.g., Edward Aschoff, *SEC to Distribute \$289.4 Million*, ESPN (May 31, 2013, 2:49 PM), http://espn.go.com/college-sports/story/_/id/9329603/sec-schools-receive-207-million-conference, {<http://perma.cc/4W94-W7MM>} (reporting that in 2013, each SEC "school will receive approximately \$20.7 million in revenue distribution"); Brian Bennett, *Big Ten's Revenue Keeps Climbing*, ESPN (May 6, 2013, 2:00 PM), http://espn.go.com/blog/bigten/post/_/id/76205/big-tens-tv-revenue-keeps-climbing, {<http://perma.cc/J7ET-UGUA>} (reporting that Big Ten will distribute approximately \$25.7 million to each school in 2013).

¹⁴ See Andy Staples, *How Television Changed College Football – and How It Will Again*, SPORTS ILLUSTRATED (Aug. 7, 2012, 12:39 PM), <http://www.si.com/college-football/2012/08/06/tv-college-football>, {<http://perma.cc/MZ5H-ZHX6>} (arguing that *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984) is largely responsible for modern conference realignment). For a detailed discussion of *Board of Regents*, see Jerry Garau, *The Effect of NCAA v. Board of Regents on the Power of the NCAA to Impose Television Sanctions*, 18 IND. L. REV. 937 (1985).

¹⁵ See Mike Bostock, Shan Carter & Kevin Quealy, *Tracing the History of N.C.A.A. Conferences*, N.Y. TIMES, Nov. 30, 2013, <http://www.nytimes.com/newsgraphics/2013/11/30/football-conferences/>, {<http://perma.cc/6YXM-AT85>} (providing an infographic tracking collegiate conference membership and changes since 1965).

prominent reason for realignment is the opportunity for schools to increase athletic budgets by cashing in on television and bowl game revenue.

This Article is among the first legal scholarship to discuss and analyze the main measure that conferences have adopted in order to slow and stop realignment: the grant of rights. Part II of this Article begins by detailing the widespread impact of conference realignment, which has necessitated that conferences establish the grant of rights. Part III analyzes the most prominent explanations of the mechanisms causing realignment, including money, university exposure, and the desire to win on the field. Further, Part III advances a new theory for a factor causing conference realignment. This theory applies the well-known $M + 1$ rule employed by political scientists and argues that the way in which college football chooses its annual national champion has created a structural push toward realignment. Conferences must address the mechanisms discussed in Part III when implementing any barrier to conference realignment, including, but not limited to, the grant of rights. Part IV proceeds in two parts. First, it proposes a “Realignment Model,” incorporating the $M + 1$ rule, to understand schools’ decision-making process regarding realignment. This Model serves as the framework from which the rest of the Article proceeds. Second, Part IV undertakes a detailed legal and practical analysis of conferences’ grants of rights, demonstrating and examining potential legal flaws in the grants as they are currently drafted and executed. Part IV further suggests that the current form of the grant of rights is effective as a temporary measure to slow realignment, but it is not the ultimate solution as conferences believe. Finally, in Parts V and VI, this Article suggests methods for conferences to lessen the chance that their members will leave for another conference. Specifically, Part V suggests changes to the texts of the grants of rights in order to make them more enforceable, while Part VI suggests more general changes, outside of the text of the grants of rights, to disincentivize conference realignment.

II. THE IMPACT OF CONFERENCE REALIGNMENT

While most NCAA schools participate in multiple varsity sports, in general, football is the most popular and most visible sport.¹⁶ Unsurprisingly then, football-based decisions are the key driver of conference realign-

¹⁶ See Chris Smith, *The Most Valuable Conferences in College Sports*, FORBES (Jan. 16, 2013, 10:57 AM), <http://www.forbes.com/sites/chris-smith/2013/01/16/the-most-valuable-conferences-in-college-sports/> (detailing revenue streams for NCAA conferences, derived mainly from football participation). The NCAA distributes 60% of its own revenue to conferences, which totaled \$503 million in 2011-2012. See *Dis-*

ment.¹⁷ There are some exceptions, however, as several conferences have opted to forego football—most notably the most recent iteration of the Big East Conference.¹⁸ But still, the impact of realignment is widespread: from tradition, to economics, to litigation spawned from schools exiting their conferences.¹⁹

A. Tradition

College football is well known for its historic rivalries and school affiliations.²⁰ Many fans of any given college football team have close personal connections to the team,²¹ often fans are alumni of their favorite team's college, grew up watching their regional college football team, or simply feel some other personal connection to a school and its football team. Conferences thus routinely form the basis for rivalry games as teams in a conference play meaningful games against the same opponents year after year.

tributions, NCAA, <http://www.ncaa.org/about/resources/finances/distributions>, {<http://perma.cc/NG95-8VYJ>} (last visited Nov. 14, 2016).

¹⁷ See Barry Svrluga, *At Final Four, Football-Driven Realignment Casts a Shadow*, WASH. POST, Apr. 5, 2013, https://www.washingtonpost.com/sports/colleges/at-final-four-football-driven-realignment-casts-a-shadow/2013/04/05/74955bcc-9e1e-11e2-a941-a19bce7af755_story.html, {<http://perma.cc/M4SP-VV3E>}; Gary Santaniello, *Bittersweet Exits from Conferences, this Time in Rinks*, N.Y. TIMES, Mar. 20, 2013, <http://www.nytimes.com/2013/03/21/sports/hockey/collegiate-hockey-conferences-also-realigning.html>, {<http://perma.cc/KD7J-BBCF>} (discussing dismantling of hockey-only conferences due to the recent round of football conference realignment).

¹⁸ One commentator has suggested that schools should create *football only* conferences to address many of the concerns associated with the recent waves of conference realignment. See Justin Campbell, *The Continental Conference: The Argument for Creating Football Only Conferences in FBS College Football*, 1 MISS. SPORTS L. REV. 359, 380–87 (2012).

¹⁹ See generally Malcolm Getz & John Siegfried, *College Sports: The Mystery of the Zero-Sum Game*, 44 CHANGE: THE MAG. OF HIGHER LEARNING 52 (2012).

²⁰ Tracee Hamilton, *Conference Realignment: Who, Really, Is Better Off?*, WASH. POST, Sept. 19, 2011, http://www.washingtonpost.com/sports/colleges/conference-realignment-who-really-is-better-off/2011/09/19/gIQAW4aMfK_story.html, {<http://perma.cc/GB8K-LXCE>} (“We don’t want to spoil the long-established tradition of university presidents determining conference affiliations! If that were to end, who would follow college football? It’s tradition, after all, that makes the sport what it is.”).

²¹ Tracee Hamilton, *College Athletic Conference Realignment: Should We Care?*, WASH. POST, Nov. 30, 2012, http://www.washingtonpost.com/sports/colleges/college-athletic-conference-realignment-should-we-care/2012/11/29/2e6c0908-3a54-11e2-a263-f0ebffed2f15_story.html, {<http://perma.cc/5S7F-AGB4>} (“[I]does realignment really, ultimately, matter? If you have a team moving, or being left behind, it does. If your alma mater will no longer face its biggest rival, it does.”).

The result of these personal connections is a strong feeling of resistance from fans to conference realignment. Not only is a fan's team seemingly changing, but so are the rivalries and experiences that fans have come to expect over the years. In some cases, the impact of realignment on fans and the traditions built over years of competition has been stark. Historic rivalries have been discontinued due to new conference affiliations and the associated inter-conference scheduling commitments.²² Unfortunately, fans unhappy with these decisions are left with little actual recourse. Because realignment decisions are made at high levels within the particular school, fan feelings are usually disregarded as concerns of little consequence. Therefore, fans are ultimately forced to accept realignment and its impacts on tradition as they are told to simply form new traditions.²³

B. Economics

College football generates an incredible amount of revenue annually,²⁴ on both the macro and micro levels. Conference realignment is particularly relevant to local economies that are many times largely dependent on college football games held nearby.²⁵ Often, college football teams provide a tremendous economic boost to their hometowns. In only a handful of home games each season, a single football team can generate tens of millions of dollars of economic activity and potentially a sharp increase in tax revenue.

Generally, when a school changes conferences, it moves "up" conferences. That is, it goes from a relatively less well-known and lucrative conference to a relatively more well-known and lucrative conference. It is no secret that the so-called "Power Five" conferences—the Atlantic Coast Conference ("ACC"), Big 12 Conference, Big Ten Conference, Pacific 12 Con-

²² See Dana O'Neil, *Home-and-Home Rivalries Take a Hit*, ESPN (Aug. 23, 2013), http://www.espn.com/mens-college-basketball/story/_/id/9592340/home-home-rivalries-take-hit, {<http://perma.cc/M8CQ-2PH8>} (reporting on the impact of conference realignment on basketball in-conference rivalry scheduling).

²³ See generally Cody T. Harvard & Terry Eddy, *Qualitative Assessment of Rivalry and Conference Realignment in Intercollegiate Athletics*, 6 J. OF ISSUES IN INTERCOLLEGIATE ATHLETICS 216 (2013) (researching the impact of conference realignment on fan perspective regarding teams, conferences, and tradition).

²⁴ Although not discussed in this Article, the distribution of that wealth among the key stakeholders in college athletics remains a controversial issue.

²⁵ See, e.g., *Home Football Games Bring \$69 Million Impact, 300 Jobs To Region*, VA. TECH NEWS (Apr. 23, 2015), <https://vtnews.vt.edu/articles/2015/04/042315-out-reach-footballstudy.html>, {<https://perma.cc/29P3-NQUF>}. But see Robert A. Baade, Robert W. Baumann & Victor A. Matheson, *Assessing the Economic Impact of College Football Games on Local Economies*, 9 J. SPORTS ECON. 628 (2008).

ference (“Pac-12”), and Southeastern Conference (“SEC”)—take the lead in attendance to football games.²⁶ When attending games, many fans travel great distances, purchasing meals, lodging and various memorabilia from local retailers. Therefore, local municipalities have an incentive to encourage schools to change conferences to bring more fans to town.²⁷ At least one study suggests, however, that schools should not expect an immediate attendance increase at home games from conference realignment.²⁸ Instead, the local economic benefits associated with conference realignment are really deferred benefits. That is, until a school has been fully assimilated into a conference, the local municipality should not expect an influx of economic benefits from the realignment.

C. Litigation

Conferences have an interest in maintaining stability, yet individual schools do not always share in that interest.²⁹ These divergent interests lead to conflict, and, especially during the recent waves of realignment, conference shifts are routinely followed by litigation.³⁰ Unsurprisingly, when

²⁶ See 2014 National College Football Attendance, NCAA, http://fs.ncaa.org/Docs/stats/football_records/Attendance/2014.pdf, {<https://perma.cc/Q4R3-BEKW>}.

²⁷ But see Dennis Coates & Craig A. Depken II, *The Impact of College Football Games on Local Sales Tax Revenue: Evidence from Four Cities in Texas*, 35 E. ECON. J. 531 (2009) (arguing, from a statistical perspective, that schools should not schedule based on maximizing local business profitability).

²⁸ Mark Groza, Conference Call! NCAA Conference Realignment and Football Game Day Attendance 14–15 (2007) (unpublished research paper), http://economics.uakron.edu/Portfolios/Fall2004/226/mdg7/Conferance_Call.pdf, {<https://perma.cc/S7W8-QDMR>} (“By being in a larger conference one would assume attendance would go up. However . . . moving to a different conference does not, in the short run, guarantee more fans.”).

²⁹ At least one commentator has discussed the conflicting fiduciary duties that school administrators owe to both the conference and the school in connection with conference realignment. See Gregg L. Katz, *Conflicting Fiduciary Duties Within Collegiate Athletic Conferences: A Prescription for Leniency*, 47 B.C.L. REV. 345, 368–72 (2006).

³⁰ See, e.g., Rutgers, The State Univ. v. Am. Athletic Conference, Civ. Action No. 12-7898 (MAS)(LHG), 2013 WL 596632 (D.N.J. 2013); Complaint for Declaratory Judgment, Breach of Contract, and Permanent Injunctive Relief, W. Va. Univ. Bd. of Governors v. Big E. Conference, Civ. Action No. 11-C-695 (Cir. Ct. Monongalia Cnty. Oct. 31, 2011), http://espn.go.com/photo/preview/!pdfs/ncaa_westvirginiasuit.pdf, {<https://perma.cc/Z2MU-R9WT>}; Complaint for Breach of Contract, Big E. Conference v. Tex. Christian Univ., 1:12-cv-00953-CKK (D.D.C. June 11, 2012), <http://www.tcu360.com/campus/2012/06/15442.big-east-sues-tcu-5-million-exit-fee>, {<https://perma.cc/GGA6-4GGP>}.

schools seek to leave a conference, that conference and its member institutions routinely attempt to block the move.³¹ Or, at the very least, the former conference and its member institutions seek monetary damages for the loss of the school.³²

Traditionally, conferences have used withdrawal or exit fees as a means to block schools from leaving the conference. The effectiveness of those fees hinges on their legal and practical enforceability. Recently, schools have utilized litigation as a means to decrease the fees associated with changing conferences.³³ Given that schools generally have to pay the exit fee out of their general budget—necessarily decreasing the amount of money left over for the academic portion of the school—courts have been reluctant to enforce excessive exit fees.³⁴ Therein lies the heart of issue. When a school exits a conference, the conference and the remaining schools feel entitled to compensation for their perceived loss, but the exiting school seeks to minimize its loss, to both its athletic and academic budgets.³⁵ This conflict routinely yields litigation that is expensive and time consuming for every party that is involved.

III. EXPLANATIONS FOR CONFERENCE REALIGNMENT

One of the key questions debated during periods of realignment is the reason why a school changes conference alliances.³⁶ Fans want to understand

³¹ See, e.g., Liz Clarke, *Big East Schools Sue Over Defections*, WASH. POST, June 7, 2003, <https://www.washingtonpost.com/archive/sports/2003/06/07/big-east-schools-sue-over-defections/c1742eb0-52fd-4766-932e-eaf661de03e5/>, {<https://perma.cc/2GBB-VJL3>} (discussing suit to keep ACC from poaching two Big East schools, University of Miami and Boston College).

³² See, e.g., *Univ. of Conn. v. Atl. Coast Conference*, 36 Conn. L. Rptr. 62 (Conn. Super. Ct. 2004); *Univ. of Conn. v. Univ. of Miami*, 35 Conn. L. Rptr. 465 (Conn. Super. Ct. 2003).

³³ See, e.g., *Rutgers, The State Univ. v. Am. Athletic Conference*, Civ. Action. No. 12-7898 (MAS)(LHG), 2013 WL 5936632 (D.N.J. Oct. 31, 2013) (deciding motion to dismiss or transfer venue in recent litigation regarding Rutgers' ability to leave AAC and its responsibility for certain withdrawal fees).

³⁴ See, e.g., *Trustees of Boston College v. Big East Conference*, 18 Mass. L. Rptr. 177 (Mass. Dist. Ct. 2004).

³⁵ See *id.* (calling the dispute over an exit fee “a poster child for the dilemma faced by America’s colleges and universities in maintaining the proper balance between their primary mission of academic excellence and the operation of big-time intercollegiate athletic programs”).

³⁶ Cf. Robert H. Frank, *Challenging the Myth: A Review of the Links Among College Athletic Success, Student Quality, and Donations* (2004), http://www.knightcommission.org/images/pdfs/kcia_frank_report_2004.pdf, {<https://perma.cc/9CUR-YNGW>}

why their conference offered an invitation to a school that is otherwise historically and geographically unrelated to their conference, and fans with the opposite perspective want to understand why their school accepted said invitation from the unrelated conference. But as attorneys and administrators attempt to craft agreements and structural solutions that promote conference stability, understanding the underlying causes of realignment will help to guard against it. This section proposes four main motivating factors behind conference realignment: (1) the well-accepted money factor, (2) increased university exposure, (3) a chance to improve on-the-field performance, and (4) strategic behavior based upon the structure of choosing a football national champion.

A. Money

Unquestionably, the most prevalent explanation for conference realignment is the allure of revenue for athletic departments.³⁷ College football generates an estimated \$3.4 billion in revenue annually for participating Football Bowl Subdivision³⁸ (“FBS”) schools.³⁹ As college football has increased in popularity, athletic programs have increased revenues and expenses to keep pace.⁴⁰ Schools have raised their own ticket prices and implemented programs to encourage, if not effectively mandate, donations to athletic programs—usually in exchange for the *privilege* of purchasing tickets with increased prices. In contrast, conferences receive revenue (that

(studying the motivation for collegiate athletics and suggesting a “winner-take-all” model of understanding the dynamics of the system).

³⁷ Joe Nocera, *Show Me the Money*, N.Y. TIMES, Dec. 11, 2012, at A31, available at http://www.nytimes.com/2012/12/11/opinion/nocera-show-me-the-money.html?_r=0, {<https://perma.cc/75YB-5K59>} (“With conference realignment, there isn’t even a pretense that it is about anything but the money.”).

³⁸ The Football Bowl Subdivision is the top division of college football.

³⁹ See Cork Gaines, *College Football Reaches Record \$3.4 Billion in Revenue*, BUSINESS INSIDER (Dec. 17, 2014, 1:30 PM), <http://www.businessinsider.com/college-football-revenue-2014-12>, {<https://perma.cc/FWZ2-LSW9>}.

⁴⁰ See Paula Lavigne, *College Sports Thrive Amid Downturn*, ESPN (May 1, 2014, 11:23 AM), http://espn.go.com/espn/otl/story/_id/10851446/sports-programs-nation-top-public-colleges-thrived-economic-downturn-earning-record-revenues, {<https://perma.cc/3ZL9-9HTM>} (reviewing “figures from six years of revenue and expense reports submitted to NCAA” to document expenses at major athletic programs); see also Andy Schwartz, *How Athletic Departments (and the Media) Fudge the Cost of Scholarships*, DEADSPIN (May 2, 2014, 2:24 PM), <http://regressing.deadspin.com/how-athletic-departments-and-the-media-fudge-the-cost-1570827027/> TMcraggs22, {<https://perma.cc/YN78-REVX>}.

are eventually distributed to the schools in the conference) from two main sources: television contracts and bowl appearances.

Much of college football's popularity stems from the accessibility of nationally televised games. For athletic conferences, television contracts provide incredible sums of money in addition to national coverage.⁴¹ Historically, several major television companies have purchased the rights to broadcast college football games, with ESPN being a dominant voice in the recent negotiations for television rights. In fact, ESPN's influence has been so large that some commentators have specifically suggested that the revenue associated with ESPN's coverage of college football has been the driving force behind conference realignment as each school attempts to receive a piece of ESPN's distributions.⁴²

Conferences and schools have responded by creating relatively independent sources to broadcast athletic content.⁴³ The Big Ten Conference, for example, moved to create its own network that provides coverage and analysis of Big Ten conference members in all sports, not just football.⁴⁴ The

⁴¹ Television revenues alone from the new college football playoff have been reported to average at least \$470 million annually. George Schroeder, *Power Five's College Football Playoff Revenues Will Double What BCS Paid*, USA TODAY, July 16, 2014, <http://www.usatoday.com/story/sports/ncaaf/2014/07/16/college-football-playoff-financial-revenues-money-distribution-bill-hancock/12734897/>, {<https://perma.cc/9VEC-HUX5>}. *But see* Chris Smith, *The ACC's Third Tier Rights and Why They're Killing the Conference*, FORBES (June 4, 2012, 10:27 PM), <http://www.forbes.com/sites/chris-smith/2012/06/04/the-accs-third-tier-rights-and-why-theyre-killing-the-conference/> (describing importance of different "tiers" of television rights for conferences and revenues associated with those tiers).

⁴² *See, e.g.*, Steve Wieberg and Steve Berkowitz, *Is ESPN the Main Force Behind Realignment in College Sports?*, USA TODAY, Nov. 1, 2011, <http://usatoday30.usatoday.com/sports/college/story/2011-10-27/is-espn-the-force-behind-college-conference-realignment/51019966/1>, {<https://perma.cc/25QN-UTSE>} (discussing the influence that ESPN may have had on recent spurts of conference realignment). Some have suggested that ESPN has purposely "obscure[d] its own role" in conference realignment. *E.g.*, Ryan Chittum, *ESPN Obscures Its Own Role in the Conference Realignment Mess*, COLUM. JOURNALISM REV. (Sept. 22, 2011, 6:34 PM), http://www.cjr.org/the_audit/espn_obscurities_its_own_role_in.php?page=all, {<https://perma.cc/2F4S-TPDR>} (explaining ESPN's supposed hesitance to discuss its role in negotiations regarding television deal with University of Texas).

⁴³ *See* Joe Nocera, *The Big Ten Wins . . . Sort of*, N.Y. TIMES, Aug. 27, 2008, <http://executivesuite.blogs.nytimes.com/2008/08/27/the-big-ten-wins-sort-of/>, {<https://perma.cc/CZ3R-4JXD>} (discussing subscriber fees generated by Big Ten Network due to demand for and popularity of network).

⁴⁴ *See* Teddy Greenstein, *ESPN's 'Lowball' Offer Triggered Big Ten Expansion*, CHICAGO TRIBUNE, July 1, 2011, http://articles.chicagotribune.com/2011-07-01/sports/ct-spt-0701-big-ten-nebraska-20110701_1-commissioner-jim-delany-john-wild

University of Texas, in an effort to centralize the television revenue associated with its athletics programs, created its own Longhorn Network, broadcasting only University of Texas-related content.⁴⁵ And the University of Notre Dame has historically established a contractual relationship with NBC for the rights to its football games.⁴⁶

Conferences also receive large bonuses when their teams play in bowl games at the end of the season.⁴⁷ These payouts, however, are not evenly distributed across all football conferences; the Power Five football conferences receive far greater sums than the non-Power Five conferences.⁴⁸ The size of the distribution is strongly correlated with the power, size, and popularity of the conference. Consequently, some believe that a contributing cause of realignment has been schools attempting to increase the financial

hack-espn-officials, {<https://perma.cc/L8FR-7FLS>}; Ben Strauss, *The Big Ten's Bigger Footprint*, N.Y. TIMES, Dec. 1, 2013, at BU1, available at http://www.nytimes.com/2013/12/01/business/the-big-tens-bigger-footprint.html?_r=0&pagewanted=all, {<https://perma.cc/N75L-WB88>} (discussing the addition of Maryland and Rutgers to Big Ten and the addition's potential to increase television revenue from Big Ten Network).

⁴⁵ But see Frank Schwab, *Mack Brown Complains that the Longhorn Network is Negatively Affecting Texas . . . Really, He Did*, YAHOO SPORTS (Oct. 22, 2012, 4:50 PM), <http://sports.yahoo.com/blogs/dr-saturday/mack-brown-complains-longhorn-network-negatively-affecting-texas-205045559-ncaa.html>, {<https://perma.cc/V5QX-KD3U>} (reporting that former University of Texas football coach Mack Brown complained that Longhorn Network discloses too much information to fans and opponents). To date, the Longhorn Network has not been as successful as hoped because broadcasters have generally refused to include the network in their cable packages due to the cost of carrying the network.

⁴⁶ See Paul Wachter, *Notre Dame Football and NBC: BFF Again*, BUSINESSWEEK (Nov. 29, 2012), <http://www.businessweek.com/articles/2012-11-29/notre-dame-football-and-nbc-bff-again>, {<https://perma.cc/6T5C-MY6Z>} (explaining television desirability of Notre Dame football). NBC and Notre Dame began their current television arrangement with the 1991 season. See Bill Carter, *Notre Dame Breaks Ranks on TV Football Rights*, N.Y. TIMES, Feb. 6, 1990, <http://www.nytimes.com/1990/02/06/business/notre-dame-breaks-ranks-on-tv-football-rights.html?pagewanted=all&src=pm>, {<https://perma.cc/99F2-2388>} (speculating on future impact of television contract). NBC and Notre Dame recently signed an extension to this contract that will extend the contract through 2025. See Press Release, Univ. of Notre Dame Athletics, Notre Dame and NBC Extend Football Contract to 2025 (Apr. 18, 2013), <http://www.und.com/sports/m-footbl/spec-rel/041813aaa.html>, {<https://perma.cc/CF3K-VCE9>}.

⁴⁷ See Jon Solomon, *NCAA Audit: Every Football Conference Made Money on 2012-13 Bowls*, AL.COM (Dec. 11, 2013, 5:00 AM), http://www.al.com/sports/index.ssf/2013/12/bowl_money_101_ncaa_audit_show.html, {<https://perma.cc/3LUL-UF76>}.

⁴⁸ See *id.*

stability of their own athletic programs by securing annual conference distributions.⁴⁹

Yet, there is a hidden cost of these bowl games at the individual school level.⁵⁰ Bowl games are generally owned and operated by private, for-profit corporations.⁵¹ These corporations sign contracts with individual schools for the school's appearance in a given game. With over thirty bowl games per season,⁵² at least sixty of the approximately 120 FBS schools annually participate in bowl games. The result is an oversaturation of the bowl market, with many schools forced to take revenue losses on bowl games.⁵³

⁴⁹ See, e.g. Paula Lavigne, *Collegiate Sports: Realigned Revenues*, ESPN (Oct. 8, 2014), http://www.espn.com/college-football/story/_/id/11592735/financial-winners-ncaa-conference-realignments-begin-take-shape, {<https://perma.cc/62F3-QHLX>}.

⁵⁰ See Craig Harris, *Trips to BCS Bowl Games Can Cost Some Schools Big Money*, USA TODAY, Sept. 28, 2011, <http://usatoday30.usatoday.com/sports/college/football/story/2011-09-28/bcs-bowl-games-cost-some-schools/50582512/1>, {<https://perma.cc/PL6V-RYT7>} (discussing how many schools, including schools that play in BCS bowls, lose money on bowl games).

⁵¹ See Craig Harris, *BCS Spending, Gifts Raise Questions and Criticism*, ARIZ. REPUBLIC (Sept. 25, 2011, 12:00 AM), http://www.azcentral.com/news/articles/2011/09/25/20110925bcs-spending-questions-day1.html?nclick_check=1, {<https://perma.cc/6JD8-RC6Y>} (explaining non-profit corporation status of several bowl games); Patrick Rishe, *Do the Economics of Bowl Games Make Sense for Schools, Sponsors?*, FORBES (Jan. 1, 2014, 1:54 PM), <http://www.forbes.com/sites/prishe/2014/01/01/do-the-economics-of-bowl-games-make-sense-for-schools-sponsors> (discussing role of compensated executives in perpetuating bowl system); see also Bill Morris, *Explosion of Brands and Erosion of Soul*, N.Y. TIMES, Dec. 22, 2012, at D1, available at <http://www.nytimes.com/2012/12/22/sports/ncaafootball/putting-the-brand-before-the-football-game.html>, {<https://perma.cc/W37L-5WWY>} (examining expansion of sponsorships of college football bowl games). However, the bowls, while many are non-profit, have questionable expenses and highly compensated executives. See Shaun Assael, *Following the Big Bowls' Big Money*, ESPN (Jan. 3, 2012, 4:23 PM), http://espn.go.com/espn/otl/blog/_/name/assael_shaun/id/7420694/examining-where-bowl-money-goes-file, {<https://perma.cc/VAM8-SJKE>}; Sugar Bowl Form 990 Tax Return (2009), available at <http://espn.go.com/photo/preview!/pdfs/120104/FileDoc1.pdf>, {<https://perma.cc/8HGB-LGU6>}.

⁵² During the 2015-2016 season, there were 42 bowls, sending 84 teams to bowl games. Zach Barnett, *Report: Record 42 Bowls Approved for 2015-16 Season*, NBC SPORTS (May 5, 2015, 9:17 PM), <http://collegefootballdata.nbc.com/2015/05/05/report-record-42-bowls-approved-for-2015-16-season/>, {<https://perma.cc/S8J2-L6E7>}.

⁵³ David Wharton, *Big-Time Bowl Games Can Create Big-Time Financial Issues for Some Schools*, L.A. TIMES, Dec. 20, 2012, <http://articles.latimes.com/2012/dec/30/sports/la-sp-1231-bcs-payouts-20121231>, {<https://perma.cc/6GKL-48FK>} ("This is the BCS paradox: The system pumps tens of millions into college football while rewarding teams that actually play in its games with only a fraction of the total

The current wave of realignment, however, suggests that an attempt to increase individual school revenues is likely not the cause of the realignment. Studies show that in order to maximize revenue, the ideal conference size would be twelve schools.⁵⁴ Nevertheless, several of the major football conferences have increased their membership beyond twelve teams. The SEC and the ACC are comprised of fourteen teams each.⁵⁵ And the Big Ten, contrary to its name, expanded to fourteen teams with the addition of the University of Maryland and Rutgers in 2014.⁵⁶ The widespread expansion of conferences beyond their projected profit-maximizing size suggests that profit-seeking is not the primary objective of conferences.

Further, today there are no examples of schools that have rejected the traditional model of college athletics in favor of a model that derives maximum profit from athletics.⁵⁷ If schools were indeed running athletic programs as pseudo-corporations operating under a university's umbrella, one would expect profit maximization to be a top priority. Instead, "it appears

payout."); *Summary of Postseason Football Institutional Bowl Expenses for 2010-2011*, ARIZ. REPUBLIC, <http://www.azcentral.com/news/bcs/images/teams-losing-money.pdf>, {<https://perma.cc/TW49-TJR5>} (last visited Nov. 14, 2016) (providing bowl income and expense statements from 2010–11 for Virginia Tech, Auburn, Oregon, and Connecticut). *But see* Andy Schwartz, *Teams in the Orange Bowl Don't Make Any Money, and Other Lies*, DEADSPIN (Jan. 4, 2014, 11:00 AM), <http://regressing.deadspin.com/teams-in-the-orange-bowl-dont-make-any-money-and-oth-1494130032>, {<https://perma.cc/VEU3-NGX6>} (arguing that, after analysis, some teams do make money on bowl games, despite their insistence to the contrary).

⁵⁴ See Trevor Abbott, *The Bigger the Better? An Analysis on the Effect of Conference Size on NCAA Football Team and Conference Profit* 23 (Dec. 2012) (unpublished undergraduate honors thesis), <https://www.econ.berkeley.edu/sites/default/files/Trevor%20Abbott%20Honors%20Thesis.pdf>, {<https://perma.cc/G2GF-TGXX>} (estimating profit maximizing size of conference to be between 11.37 and 11.78); Craig A. Depken, II, *Realignment and Profitability in Division IA College Football* 14 (unpublished working paper), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.512.4672&rep=rep1&type=pdf>, {<https://perma.cc/KAR7-5RAM>} (concluding optimal college football conference size to be between ten and twelve teams).

⁵⁵ See NCAA, *supra* note 26.

⁵⁶ *Id.*

⁵⁷ Chad D. McEvoy, Alan L. Morse & Stephen L. Shapiro, *Factors Influencing Collegiate Athletic Department Revenues*, 6 J. OF ISSUES IN INTERCOLLEGIATE ATHLETICS 249, 264 (2013) ("[W]e could not identify any universities . . . that elect to treat their major conference athletic department as a 'cash cow' product within the larger university umbrella and adopt a 'profit-' or surplus-, taking financial strategy where athletic expenditures in non-revenue areas like 'Olympic' sports would be minimized in order to shift a large athletic surplus to counter financial deficiencies throughout the university. . . .").

that college athletic departments focus more on excellence and prestige . . . rather than seeking financial surplus to aid the university's overall financial condition."⁵⁸

Athletic departments across the country currently engage in many practices that lose money,⁵⁹ and consequently, only a handful of NCAA athletic departments even show a budget surplus.⁶⁰ Such widespread lack of profitability suggests that athletic departments are not in fact solely attempting to maximize revenue.⁶¹ Contrary to conventional wisdom then, money can be seen as a factor in the overall realignment decision-making process, but not the sole reason for realignment.

B. University Exposure

Originally at the heart of collegiate athletics was the goal of attracting attention to the academic part of a university through its athletics.⁶² As a school became an athletic power, newspapers across the country would cover its program and student-athletes. Consequently, the school would receive increased attention and applications from more qualified students.⁶³

⁵⁸ *Id.*

⁵⁹ See Frank, *supra* note 36. But see Sally Jenkins, *College Athletic Departments Are Paying Themselves to Lose Money*, WASH. POST, Nov. 25, 2015, https://www.washingtonpost.com/sports/colleges/flagrant-foul-college-sports-bosses-cry-poor-while-spending-lavishly/2015/11/25/f2d6d130-937d-11e5-b5e4-279b4501e8a6_story.html, {<https://perma.cc/Y4UK-E5BU>}.

⁶⁰ See Steve Berkowitz, Jodi Upton & Erik Brady, *Most NCAA Division I Athletic Departments Take Subsidies*, USA TODAY, July 1, 2013, <http://www.usatoday.com/story/sports/college/2013/05/07/ncaa-finances-subsidies/2142443/>, {<https://perma.cc/WC3S-UZJL>} (reporting that only 23 of 228 athletic departments nationwide showed profit in 2012).

⁶¹ RODNEY FORT & JASON WINFREE, 15 SPORTS MYTHS AND WHY THEY'RE WRONG 43 (2013) ("[T]he value of the athletic department is not found only in the department's own bottom line, any more than the value of the English department is found in its own bottom line.").

⁶² See, e.g., John U. Bacon, *How John Hannah Used Football to Transform Moo U into a World Class University*, BACON BLOG (Dec. 13, 2013), <http://johnubacon.com/2013/12/how-john-hannah-used-football-to-transform-moo-u-into-a-world-class-university/>, {<https://perma.cc/C73E-YXH3>} (discussing Michigan State University's ascension to prominence, including through college football).

⁶³ See Harris, *supra* note 50 (quoting University of Oregon spokesman who stated, "[o]bviously, the exposure [from a BCS game] you can't buy . . . [t]hen there are all the other things that go with it . . . in terms of applications from non-athletes going up, and the quality of the applicants is up.").

Studies suggest that collegiate athletics do have this positive impact on a school's reputation.⁶⁴ Many focus on the impact of the NCAA Men's Basketball Tournament as a source of increased applications. In fact, a prime example is Florida Gulf Coast University, which received a substantial increase in the number of its undergraduate applications following a deep basketball tournament run in the spring of 2013.⁶⁵ Other studies show that a school's participation in a high-level bowl game, usually only accessible through conference affiliation, has a similar effect on a school's number of undergraduate applications and the quality of the individual applicants.⁶⁶ And a school's coveted *U.S. News and World Report* ranking, an academic ranking, seems to increase following on-the-field athletic success.⁶⁷

Realignment offers schools a chance for more exposure due to their conference affiliations. If a school's athletic exposure is related to reputation, then it follows that moving from a non-Power Five conference to a Power Five conference should improve a university's reputation. Further, moving between Power Five conferences may increase a school's profile and lead to more qualified students.⁶⁸ This trend is evidenced by studies demonstrating that schools appear to maximize their prestige by joining a new conference.⁶⁹

⁶⁴ See, e.g., Irvin B. Tucker, *Big-time Pigskin Success: Is There an Advertising Effect?*, 6 J. SPORTS. ECON. 222 (2005); Tyler Zoda, *Can Football Buy Smarter Students? The Effect of Athletic Spending on Football Championship Subdivision Academic Institutions*, 21 ISSUES IN POLITICAL ECON. 82 (2012) (finding relationship between university spending on athletics and improved applicant pool).

⁶⁵ See Manuel Navarro, *FGCU Admissions Spikes after March Madness Run*, EAGLE NEWS (Nov. 6, 2013), <http://eaglenews.org/news/fgcu/fgcu-admissions-spikes-march-madness-run/>, {<https://perma.cc/FN9T-HPSN>} (stating that Florida Gulf Coast University is reporting an undergraduate application increase of approximately 27% following their notable NCAA tournament performance earlier in the year).

⁶⁶ See, e.g., Devin G. Pope & Jaren C. Pope, *The Impact of College Sports Success on the Quantity and Quality of Student Applications*, 75 S. ECON. J. 750 (2009).

⁶⁷ See Steven R. Cox & Dianne M. Roden, *Quality Perception and the Championship Effect: Do Collegiate Sports Influence Academic Rankings?*, 6 HIGHER EDUC. J. 4 (2010).

⁶⁸ See Dennis A. Kramer, II & Michael J. Trivette, *On the Move: Is Athletic Conference Realignment an Opportunity For Economic Game* (June 2012) (unpublished research paper), http://chronicle.com/blogs/players/files/2012/06/AIR_realignment.pdf, {<https://perma.cc/T4JJ-5K26>} (“[A]thletic conference realignment—under the assumptions of maximizing prestige and financial resources—appears to enhance an institution's ability to attract and retain new students of high academic quality.”).

⁶⁹ See Brad Weiner, *The 2010 NCAA Division I Conference Realignment: Analyzing the Maximizing-Satisficing Paradox Using Institutional Data* (Apr. 2011) (unpublished research paper), <http://www.law.uh.edu/ihelg/monograph/11-03.pdf>,

C. *Winning on the Field*

As the face of a school's athletic program, the athletic director, along with a university's president or chancellor, has a large say in whether a school changes athletic conferences.⁷⁰ An athletic director may wear many hats: fundraiser, mediator, figurehead of the department, etc.,⁷¹ but his most important role is to oversee a successful athletic program.

Surprisingly, a frequently overlooked explanation for conference realignment is simply a school's desire to find greater success on the field. Athletic directors and, by extension, athletic departments are motivated by the need to win.⁷² The college football national championship selection system—whether polls, Bowl Championship Series, or playoff—plays directly into this idea.⁷³ Schools achieve success by winning games and, in turn, championships.

If the primary goal of conference realignment is to increase athletic revenues, one would expect that individual athletic departments would demonstrate a clear focus on revenue generation. Yet, there are examples that suggest that revenue generation is not the primary purpose of college athletics.⁷⁴ At least one study has shown that athletic directors' performance-based bonuses are not generally tied to their ability to make money, but instead are tied to overseeing a winning sports programs.⁷⁵

{<https://perma.cc/6B9Y-4SDP>} (providing statistical evidence regarding revenue-prestige trade off associated with conference realignment).

⁷⁰ See Robert H. Lattinville & Bennett H. Speyer, *The Modern Athletic Director: Rising Expectations, Risks and Rewards*, 12 VA. SPORTS & ENT. L.J. 232 (2013) (explaining athletic director's responsibilities associated with conference realignment).

⁷¹ See generally *id.* (discussing increasing duties of collegiate athletic directors).

⁷² See MICHAEL ORIARD, *BOWLED OVER: BIG-TIME COLLEGE FOOTBALL FROM THE SIXTIES TO THE BCS ERA* 153 (2009) (“[University] leaders have been wholly committed to whatever it takes to produce winning teams and maximize revenues, if for no other reason than to free the institution from having to subsidize athletics.”).

⁷³ See C. Paul Rogers, III, *The Quest for Number One in College Football: The Revised Bowl Championship Series, Antitrust, and the Winner Take All Syndrome*, 18 MARQ. SPORTS L. REV. 285, 300–07 (2008) (arguing that BCS system and subsequent selection of college football national champion “signifies how competition and our preoccupation with winning not only rule our economy, but indeed our entire society”).

⁷⁴ See *supra* notes 54–61 and accompanying text.

⁷⁵ See Daniel R. Marburger, *How Are Athletic Directors Rewarded in the NCAA Football Bowl Subdivision?*, 14 J. OF SPORT ECON. 1, 7–10 (2013) (proving statistical analysis to determine correlation between athletic director bonuses and various athletic department goals); Randy R. Grant, John C. Leadley & Zenon X. Zygmunt, *Just Win Baby? Determinants of NCAA Football Bowl Subdivision Coaching Compensation*, 8 INT'L J. OF SPORT FIN. 61, 72–73 (2013) (studying compensation determi-

Traditional thinking suggests there is a correlation between athletic department spending and winning on the field: as department spending increases, so does success.⁷⁶ In this way, the impact of money and winning on the field may be intertwined. In the football context, which appears to be driving realignment, empirical research shows “a small positive and statistically significant relationship between greater operating expenditure on football and team success,” with a \$1 million increase in football-related spending estimated to increase winning percentage by 1.8%.⁷⁷ However, the only category of spending that demonstrated a statistically significant effect on performance was “team expenditures,” defined to “include recruiting, travel, equipment, and other game-day expenses.”⁷⁸ But, it is important to question the causality of this relationship as increased success causes an increase in expenditures (i.e., a successful season leads to a bowl game, thus implicating travel, lodging, meals, etc.).⁷⁹ The take-away from this relationship is that even if money is a proxy for or correlated with on-the-field success, that impact may not be as great as conventional wisdom holds. And in fact, the importance of winning on the field to athletic departments and their universities has to be considered separately and distinctly from an analysis of the importance of money in athletics.

Whether conference realignment is actually effective at increasing on-the-field success is unclear. Statistical evidence on the effect of realignment does not necessarily support that proposition,⁸⁰ but it does suggest that

nants of college football coaches and finding significant correlation to winning percentage). *But see* Phillip Mixon, W. Jennings Byrd & Alan Wright, *Does Pay Lead to Performance? Using NCAA Head Football Coaches as a Surrogate for CEOs*, 25 J. OF BUS. & BEHAVIORAL SCIS. 25, 33 (2013) (“This [model] suggests that after controlling for other factors, that [football] coaches with greater pay did not significantly increase the number of wins for their team.”).

⁷⁶ See Emily S. Sparvero & Stacy Warner, *The Price of Winning and the Impact on the NCAA Community*, 6 J. INTERCOLLEGIATE SPORT 120, 126–30 (2013) (finding relationship between athletic department spending and Division I Directors’ Cup ranking).

⁷⁷ Jonathan Orszag & Mark Israel, *The Empirical Effects of Collegiate Athletics: An Update Based on 2004–2007 Data 8* (Feb. 2009) (unpublished, commissioned by the Nat’l Collegiate Athletic Ass’n), [https://www.soe.vt.edu/highered/files/Perspectives_PolicyNews/04-09/TheEmpiricalEffects.pdf](https://www.soe.vt.edu/highered/files/ Perspectives_PolicyNews/04-09/TheEmpiricalEffects.pdf), {<https://perma.cc/27MM-FU> }.

⁷⁸ *See id.*

⁷⁹ *Id.*

⁸⁰ See Ross Benes, *Changing Conferences Doesn’t Affect College Football Success*, DEADSPIN (Oct. 9, 2014, 2:34 PM), <http://regressing.deadspin.com/changing-conferences-doesnt-affect-college-football-suc-1633639546/>; Benes, {<https://perma.cc/AY5X-CWQT>} (“We found teams don’t really play any better or worse after

competitive balance within conferences is increased through realignment.⁸¹ But the importance of this consideration is not whether schools actually win more games after changing conferences, but rather whether decision makers *believe* that schools win more games after changing conferences and are personally incentivized to act to increase on-the-field success.

*D. A New Theory: Taking M + 1 from the Voting Booth
to the Selection Committee*

“With any sports topic, everyone who is a sports fan has an opinion, and that opinion is not required to be rational or supported in the least by salient facts.”⁸²

The ultimate goal for any college football program, although it may be more attainable for some than others, is to reach and win a national championship. This Article proposes that goal of obtaining a national championship can be analogized to winning a popular, political election. Using an election framework, this Article suggests that behaviors studied and documented at length in elections can be applied to conference realignment to understand the motives and structures that conferences must address to stop that realignment.

For decades, political scientists have discussed Duverger’s Law, which suggests that, in popular elections, the maximum number of viable political parties depends on the structure of the electoral system. Based on Duverger’s findings, Gary W. Cox coined the “M + 1 rule,”⁸³ which states that, in multimember electoral systems, “no more than M + 1 candidates . . . or lists . . . can be viable” in a district with M seats.⁸⁴ The maximum number of parties is a result of strategic associations by parties that attempt to build competitive electoral backing and conserve resources.⁸⁵ In other

changing conferences. Overall, there was less than a one-point shift in any of the four seasons after teams joined a new conference, with two seasons being positive and two negative leaving teams in about the same position they were prior to changing leagues.”).

⁸¹ See Martin M. Perline & G. Clayton Stoldt, *Competitive Balance and Conference Realignment: The Case of Big 12 Football*, 4 SMART J. 47 (2007).

⁸² C. Paul Rogers, III, *The Quest for Number One in College Football: The Revised Bowl Championship Series, Antitrust, and the Winner Take All Syndrome*, 18 MARQ. SPORTS. L. REV. 285, 285 (2008).

⁸³ See generally GARY W. COX, MAKING VOTES COUNT: STRATEGIC COORDINATION IN THE WORLD’S ELECTORAL SYSTEMS (1997).

⁸⁴ *Id.* at 99.

⁸⁵ *Id.* at 4, 32 (“Successful electoral coordination reduces the number of electoral competitors.”).

words, parties will strategically combine to maximize the chances that a given party, or maybe a party and its like-minded opponents, will win a given election. These forces go so far as to explain why a third-party candidate in United States presidential elections is only very, very rarely viable.

This section proposes a new factor causing conference realignment: the effects of the $M + 1$ rule. It will apply the $M + 1$ rule to conference realignment as seen through the lens of college football. In doing so, this section demonstrates that the forces driving conference realignment are likely beyond the scope of the causes that are traditionally understood and instead are based upon the structure of *how* a college football national championship is chosen.

1. Electing a College Football National Champion

As an initial matter, conferences attempting to place a member in a position to become a national champion can be analogized to a political party running a member for public office. Throughout this discussion, this Article analogizes athletic and political actors as follows:

<u>Athletic Actor</u>	<i>is analogous to</i>	<u>Political Actor</u>
Conference		Political Party
Member School		Political Candidate
Championship Selection Body		Voters

This Article then recognizes that the behaviors observed in political contests can be translated to shifting allegiances in conference realignment. While there are certainly many different types of electoral systems, conference divisions most closely translate to multimember electoral districts.

A multimember district is an electoral district “in which two or more representatives are elected at large from a single district”⁸⁶ Restated, a multimember district allows a fixed group of voters to select more than one representative to the governing body. For example, State *A* would have multimember districts if the entire state was one district that elected ten representatives to the State House of Representatives. State *A* would also have multimember districts if it had ten districts that each elected two representatives to the State House. However, State *A* would *not* have multimember districts if it had ten districts that each elected one representative to the State House. Therefore, what is important is that more than one

⁸⁶ John F. Banzhaf, *Multi-Member Electoral Districts—Do they Violate the “One Man, One Vote” Principle*, 75 YALE L.J. 1309, 1309 (1966).

representative is elected by the same group of voters to the same elected body. While this system is not well known at the federal level in the United States, it used to be widespread at the state level: “[f]ifty years ago, more than two-thirds of states had multi-member legislative districts for at least some seats.”⁸⁷ As of 2011, only eleven did.⁸⁸

Popularity of election structure aside, the way in which a college football national champion is chosen is a form of an election with a multimember district. First, and key to the political analogy, there is a single electoral body (district) that determines⁸⁹ which teams win, or are eligible to win, a national championship. In terms of college football, that electoral body has changed over time, but it has always been present. For decades, pollsters, who rightly or wrongly were considered experts, directly voted for a national champion. More recently, a selection committee, also considered experts, selects teams for a playoff, with the playoff determining the national champion. What has changed over the years is that the system evolved from a group of people that directly determined the team that *did win* a national championship (their approval being necessary and sufficient) to a group of people that determine which teams *could win* a national championship by participating in the playoff (their approval being necessary but not sufficient). While this shift presents a material change to the procedure of determining a national champion, it does not present a material change to the underlying election process. Schools—and by extension, conferences on behalf of member schools—are actively seeking to impress and influence the body providing the opportunity to either win or compete to win the national championship.

Second, that electing group is allowed to have different preferences regarding their choices. For example, politicians of course have different platforms, in which they hold out their (alleged) ideas about how salient issues should be addressed. In regards to football, X’s and O’s are beyond the scope of this Article. But it suffices to say that football teams have different playing styles: some play a pro-style, some play a spread, and most play a style somewhere in between. Different pollsters or committee members have different preferences and believe that one style is superior to others. Naturally, a team that plays that preferred style *must* be better than a team

⁸⁷ Josh Goodman, *The Disappearance of Multi-Member Constituencies*, GOVERNING (July 7, 2011), <http://www.governing.com/blogs/politics/The-Disappearance-of-Multi-Member-Constituencies.html>, {<https://perma.cc/X8ZM-4TFX>}.

⁸⁸ *Id.*

⁸⁹ The definition of “determines” has changed over time and is discussed in detail below.

that does not, even if that conclusion is not “rational or supported in the least by salient facts.”⁹⁰

Finally, at its most basic, in order for a team to win a national championship, it must secure a certain percentage of the vote from the electing body. While it is not usually compared to an election, the process of *being eligible* for a national championship is nothing short of an election. Teams have to dominate their opponents (win a primary).⁹¹ They must pass the so-called “eye test” (look the part).⁹² And, of course, there is the campaigning.⁹³ By considering these factors, and many more, like in a political election, the voters ultimately decide the winner or potential winners,⁹⁴ subject to the discussion above.

Additionally—and possibly more importantly for $M + 1$ considerations—conferences are analogous to political parties in this “election.” The analogy holds along three characteristics. First, both organizations are made up of a base of members that, on a regular basis, internally compete for the chance to represent the organization. In this factor, the conference’s regular season is akin to the primaries in an election. This initial step of determining the representative is important in both the sports and electoral contexts. In sports, the winner of the conference’s regular season (or championship game, as it may be) largely determines which conference member represents the conference in competition against the other conferences. Likewise, a

⁹⁰ See Rogers, *supra* note 82 and accompanying text.

⁹¹ See *Selection Committee FAQs*, COLLEGE FOOTBALL PLAYOFF, <http://www.collegefootballplayoff.com/selection-committee-faqs>, {<https://perma.cc/9MLW-AVH8>} (last visited Nov. 29, 2016). Unfortunately, removing the margin-of-victory from the minds of pollsters is much more difficult.

⁹² See Matt Hayes, *Just Admit It, CFP Committee: It’s All About the Eye Test*, SPORTING NEWS (Dec. 2, 2014, 9:12 PM), <http://www.sportingnews.com/ncaa-football/story/2014-12-02/college-football-playoff-committee-florida-state-tcu-alabama-oregon-baylor-ohio->, {<https://perma.cc/23FV-N77J>}.

⁹³ One of the most well-known examples of campaigning in college football occurred in 2006, when coach Urban Meyer publically called for his 12-1 Florida Gators to reach the national championship game instead of the 11-1 Michigan Wolverines. See Pat Forde, *Whining, Politics, Voting Reversals Part of BCS System*, ESPN (Dec. 4, 2006), http://sports.espn.go.com/espn/columns/story?columnist=forde_pat&id=2685389, {<https://perma.cc/PCD2-BB6S>} (“Once again, Florida and the ballot box have made for a wildly controversial combination. Six years ago it was hanging chads. This year the voters are hanging Chad (Henne) out to dry outside the Tostitos BCS National Championship Game.”).

⁹⁴ In more recent times, voters determine two teams to play for the national championship game. In this instance, the real election is to play in the actual game, where the championship will be decided on the field, outside of the influence of the electors.

primary election picks a party representative to run against members of other parties.

Second, those initially competing members then come together for a common goal of defeating an opposing organization. While it may be with gritted teeth, schools rally around their conference representatives in post-season play. Success in the postseason by one member of the conference elevates the reputation of the conference as a whole.⁹⁵ In the election context, with this example coming from American elections, the political candidate that wins the primary election must rally support from the entire base. Political commentators have noted that, in the election context, candidates are initially required to shift their perceived ideological positions to an extreme—although not *too* extreme—only to moderate their positions in the general election.⁹⁶ That candidate is then considered to be the face of the political party, at least for the duration of that election.

And third, the success of the individual member then translates to the success of the whole organization.⁹⁷ There are several ways to measure the success of an individual team or a conference, including wins, revenue, or some other metric. Traditionally, and into today, conference members have taken pride in and found benefit from the success of their fellow conference members.⁹⁸ From a winning perspective, teams can claim the success of the conference as their own, either serving as a rallying point around important wins (i.e., “this win is important because the conference is so tough”) or as an excuse for poor performance (i.e., “this loss hurts, but that is what happens when you play in a tough conference”). From a revenue perspective, the further that a team advances in post-season competition, the more

⁹⁵ See Luke Meredith, *Ohio State Could Fuel Impending Big Ten Renaissance*, ASSOCIATED PRESS (Jan. 13, 2015, 2:22 PM), <http://www.collegefootball.ap.org/article/ohio-state-could-fuel-impending-big-ten-renaissance>, {<https://perma.cc/3GZE-Q4MN>}.

⁹⁶ See Marina Agranov, *Flip-Flopping, Intense Primaries and the Selection of Candidates* (Dec. 1, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2030395, {<https://perma.cc/854W-GTXM>}.

⁹⁷ See COX, *supra* note 83, at 4 (“[There are] several general features of electoral coordination: the mixture of common and opposed interests; the possibility of success or failure; and the rapidity with which vote intentions change when coordination takes off.”).

⁹⁸ See Kevin McGuire, *Big Ten Boosted by Ohio State's National Championship*, NBC SPORTS (Jan. 13, 2015, 8:08 AM), <http://collegefootballtalk.nbcsports.com/2015/01/13/big-ten-boosted-by-ohio-states-national-championship/>, {<https://perma.cc/L8NS-3WYZ>} (“Whenever a school in a conference wins a national championship, it is good for the entire conference.”).

money its school receives.⁹⁹ Given that most major conferences have revenue sharing agreements amongst members,¹⁰⁰ one team's success is financially attributable to the entire conference. The entirety of these factors sometimes leads to curious statements, where bitter conference rivals are encouraged or excited by their rival's successes.¹⁰¹

2. Applying $M + 1$ to Changing Methods of Picking a National Champion

With an understanding that there are similarities between choosing a national champion and a political election, the question is then whether the effects that have been researched and documented in politics also play out in practice in the college football context. The sections below demonstrate that applying the $M + 1$ rule to the empirical realities of conference realignment does in fact yield logical, analogous, and predictable results.

i. The Poll Era, Pre-1998

For most of the history of college football, several organizations declared their own college football national champion.¹⁰² Generally, these organizations brought together a group of voters that were responsible for surveying the college football landscape and determining their subjective ranking of college football teams. Unsurprisingly, the results of these polls

⁹⁹ See *Revenue Distribution*, COLLEGE FOOTBALL PLAYOFF, <http://www.collegefootballplayoff.com/revenue-distribution>, {<https://perma.cc/U63K-QGU4>} (last visited Nov. 29, 2016).

¹⁰⁰ See, e.g., Brett McMurphy, *SEC Schools to Each Receive Record \$31.2 Million Payout*, ESPN (May 29, 2015), http://espn.go.com/college-sports/story/_/id/12974161/southeastern-conference-distribute-record-435m-revenue-member-schools, {<https://perma.cc/BZ39-28G8>}.

¹⁰¹ See, e.g., Mark Snyder, *Michigan Coach Jim Harbaugh: I'll Root for Ohio State in Title Game*, USA TODAY, Jan. 8, 2015, <http://www.usatoday.com/story/sports/ncaaf/2015/01/08/jim-harbaugh-ill-root-for-ohio-state-in-title-game/21450849/>, {<https://perma.cc/2VYJ-95EL>}.

¹⁰² See Josephine R. Potuto, *They Take Classes, Don't They? Structuring a College Football Post Season*, 7 J. BUS. & TECH. L. 311, 319 (2012) ("Over time, a football national champion separately was designated by each of two polls: the AP poll, whose voters were media representatives, and the UPI poll, whose voters were head football coaches.").

were routinely contested, and bowl games were an underwhelming method of choosing a national champion.¹⁰³

With several organizations selecting football national champions in any given year, many years these polls would result in “split” championships: different teams being selected as national champion by different polls.¹⁰⁴ Throughout the poll period, the lack of a unified selection process for a college football national champion gave rise to the term “Mythical National Championship.”¹⁰⁵ Further, many of the major bowls had conference tie-ins. Therefore, conferences had no incentive to place teams in particular bowls; the end of season destination of many of its high-performing teams was predetermined.

There are two plausible explanations for why the effects of the $M + 1$ model do not seem to appear in this period. First, in this system, no election-type competition existed. Schools merely competed within the conference for the rights to claim a conference championship and go to their predetermined bowl game. This made the moniker “Mythical National Champion” even more relevant. But more importantly for the $M + 1$ discussion, the election-style, competitive environment that is a prerequisite for $M + 1$ effects was wholly nonexistent.

Second, to the extent that $M + 1$ pressures played a role during this time period, these pressures were more likely to be felt on the bowl tie-in agreements themselves than on schools. As will be discussed further throughout this Article, the transaction costs associated with changing conferences are substantial. In contrast, the transaction costs of changing bowl tie-ins are minimal in comparison.¹⁰⁶ Therefore, $M + 1$ pressures would be more likely observed with a conference changing its annual agreement for its

¹⁰³ Potuto, *supra* note 102 at 319. (“Under the bowl system, bowl boards acted independently in arranging their bowl games. *The bowl system was never designed to crown a football national champion.*” (emphasis added)).

¹⁰⁴ See Potuto, *supra* note 102 at 319.

¹⁰⁵ See Dennis Dodd, *Fringe Benefit of College Football Playoff? No More Mythical Titles*, CBS SPORTS (June 24, 2014, 11:04 AM), <http://www.cbssports.com/collegefootball/writer/dennis-dodd/24596069/fringe-benefit-of-college-football-playoff-no-more-mythical-titles>, {<https://perma.cc/FX4A-WNWW>}.

¹⁰⁶ That is not to say that transaction costs are non-existent in changing these bowl tie-ins, especially when it comes to fans and their appreciation for tradition. See, e.g., Brian Bennett, *In Playoff Era, Will Rose Stay as Sweet?*, ESPN (Aug. 25, 2014), http://espn.go.com/blog/bigten/post/_id/106035/in-playoff-era-will-rose-stay-as-sweet, {<https://perma.cc/VDT5-U8SV>}; Erick Smith, *Big Ten, Pac-12 Happy Playoff Won't Ruin Rose Bowl*, USA TODAY, June 27, 2012, <http://content.usatoday.com/communities/campusrivalry/post/2012/06/big-ten-pac-12-rose-bowl-agreement-college-football-playoff/1#.VU6VtPm6fIU>, {<https://perma.cc/K7HG-JLBQ>}.

champion to play another specified conference's champion in a particular bowl game than with any given school changing conferences.

More importantly, without the need to chase a national championship through realignment, schools did not need to change conferences to maximize their ability to win championships. Instead, schools were able to focus on more traditionally accepted realignment reasons when making decisions. However, as college football garnered more attention and priorities shifted, crowning a single national champion became more and more important.

ii. The Bowl Championship Series, 1998-2014

In response to concerns about split national championships, college football conferences came together and established the Bowl Championship Series (BCS).¹⁰⁷ Starting in 1998, a statistical system would choose an undisputed college football national champion.¹⁰⁸ That system evolved over time, but generally took into account the poll voters along with mathematical formulas that ranked each team based on set criteria. Associated with the BCS national championship were originally four, and eventually five, "BCS bowl games" which hosted qualifying teams. From 1998 to 2014, the selection criteria for BCS games were modified to reflect perceived mistakes in BCS selection.¹⁰⁹ Nevertheless, the teams ultimately selected to BCS games generally represented the top college football teams in the country.

In its final form, the BCS hosted a total of five bowl games: the National Championship Game, the Fiesta Bowl, the Orange Bowl, the Rose Bowl, and the Sugar Bowl. The National Championship Game matched the #1 and #2 ranked teams according to the BCS formula, while the other BCS bowls followed a series of rules to select qualifying schools. In its simplest form, the BCS allowed each of six "BCS conferences" to automatically place

¹⁰⁷ See Greg Bishop, *B.C.S.: 1974-2014*, N.Y. TIMES, Jan. 8, 2014, at B9, available at http://www.nytimes.com/2014/01/08/sports/ncaaf/football/rest-in-peace-bcs-a-maligned-system-that-sometimes-worked.html?_r=0, {<https://perma.cc/95HL-ULRA>}; see generally Thomas Callaghan, Peter J. Mucha & Mason A. Porter, *The Bowl Championship Series: A Mathematical Review*, 51 NOTICES OF THE AMS 887 (2004).

¹⁰⁸ See John Gibeaut, *Illegal Procedure?*, 95-OCT A.B.A. J. 18, 20 (2009).

¹⁰⁹ The BCS was not without its critics. Since its inception, observers had questioned whether the system actually matched the best two teams in the country, with even Congress becoming involved in the issue. See, e.g., *Determining a Champion on the Field: A Comprehensive Review of the BCS and Postseason College Football: Hearing Before the Subcommittee Commerce, Trade, and Consumer Protection of the Comm. on Energy and Commerce*, 109th Cong. (2005).

one team in a BCS game.¹¹⁰ The remaining four bids to the BCS bowls would be filled by at-large selections.¹¹¹ Except in very improbable circumstances, a conference could place a maximum of two teams total into BCS games (presumably one automatic bid and one at-large selection).¹¹²

The result of this selection process was a situation where each conference attempted to maximize the number of its BCS bids at two.¹¹³ Competition was centered on four open positions remaining after automatic qualifiers, with teams and conferences routinely campaigning to secure these coveted bids. If this process were imagined as an election—which is likely not all that difficult to imagine—where four open positions existed (the at large bids), that would be voted on (by pollsters), by applying the $M + 1$ rule, one would expect no more than five different viable political parties (or conferences) to form to create a stable system.

Of course, six viable conferences actually formed. This outcome was the result of a mixed system, combining the old poll system with the transition to a playoff. The old poll system was represented by including each major conference in the major bowl games through automatic bids. The push toward a new playoff-style system was through at large bids, which were selected through a series of complex rules. The basic effect of the at large bid system was to allow each major conference¹¹⁴ to place a second team into the BCS bowls.

In a system without transaction costs, there are two opposing $M + 1$ mechanisms due to the interplay of automatic qualifying bids and at large bids. Assume that the five BCS games remained constant through time and therefore ten teams would qualify for those BCS games. When there were six major conferences, the ten bowl slots were awarded through six auto-

¹¹⁰ See *BCS Selection Procedures*, ESPN (July 25, 2013), <http://www.bcsfootball.org/news/story?id=4819597>, {<https://perma.cc/7L6Y-L233>}. These BCS conferences were the Atlantic Coast Conference (ACC), American Athletic Conference (AAC, or, prior to the 2013-14 season, the Big East Conference), Big 12 Conference, Big Ten Conference, Pacific 12 (Pac-12) Conference, and South Eastern Conference (SEC).

¹¹¹ Wharton, *supra* note 53 (“Bowl committees maintain complex relationships with certain conferences but, given a choice, prefer to choose teams that will bring lots of fans—and discretionary income—to town. The payouts they offer in return do not go directly to the invitees.”).

¹¹² See ESPN, *supra* note 110.

¹¹³ Ted Miller, *It's Time to Part Ways with the BCS*, ESPN (Dec. 17, 2013), http://espn.go.com/college-football/story/_/id/10148986/saying-goodbye-bcs, {<https://perma.cc/DRT7-LAMR>} (“[W]hile some insist the BCS made the postseason all about one championship game, that point can be strongly countered.”).

¹¹⁴ And a conference-less, “independent” University of Notre Dame.

matic bids and four at large bids. The four at large bids represent the positions up for “election.” In other words, in the $M + 1$ formulation, $M = 4$. Therefore, one would expect those six conferences to strategically condense to a maximum of five conferences to maximize each conference’s likelihood of placing a second team in a BCS game though an at large bid (in addition to the automatic bid). If, however, the six BCS conferences had actually condensed into five power conferences, the $M + 1$ effect would have allowed the number of stable major conferences back to six. Of the ten bowl slots, five would be awarded to the new five major conferences, leaving five at large bids remaining; again, with at large bids representing positions up for election, $M = 5$, and one would expect a maximum of $M + 1$, or six, conferences to form.

Admittedly, there must be a reason why the number of viable conferences did not constantly fluctuate between five and six during the BCS period. A compelling explanation is the transaction costs associated with changing conferences. As discussed above, moving from one conference to another—while it may impact the chances for a national championship—does involve an incredible cost on the part of schools. Unlike in an election, where combining relatively similar parties or support bases is not costless, but fairly low-cost,¹¹⁵ schools must deal with unhappy fans and almost certain litigation. These costs or potential costs certainly disincentivize changing conferences, especially if schools would be making that change often.

Therefore, the BCS structure created an inherent structural friction, but it functioned for well over a decade. On one hand, it was pushing the six automatic qualifying conferences to condense to five in order to maximize their chance at an at-large bid. On the other hand, creating six automatic qualifying positions pushed the six power conferences to maintain their then-current number. Ultimately, the two forces created a stalemate like tectonic plates: most of the time they do not move, however, when that movement occurs, it happens rapidly and with devastating consequences. Practically speaking, after decades of relative stability, the BCS format ushered in a pattern of extensive realignment every four to five years.¹¹⁶

¹¹⁵ This combination of similar actors is analogous to partisan candidates in a primary rallying around the party’s selection after the primary election. During the primary, candidates compete, differentiating themselves based on relatively small variances. But once the party’s candidate has been selected, the party as a whole attempts to come together around the candidate to ensure the party’s victory.

¹¹⁶ See generally Bostock, Carter & Quealy, *supra* note 15.

iii. The College Football Playoff, 2015-Present

The new playoff debuted to conclude the 2014-2015 season. The playoff awards four teams the opportunity to be crowned the national champion. It consists of two rounds, with four teams qualifying for the first round and two teams advancing to the second: the national championship game. The four first round teams are selected by the "Playoff Selection Committee," a group of relatively well-known college football personalities that make playoff selections in the same style as the NCAA basketball selection committee.¹¹⁷ The football playoff selection committee is instructed to give weight to the champions of conferences and relative strength of schedule of each team.¹¹⁸ Practically, teams in the Power Five Conferences will have the strongest schedules as their conference scheduling is among other Power Five Conference teams. Therefore, the college football playoff will likely exclude any school from a non-major conference.

Theoretically, the change to a college football playoff provides fewer opportunities for schools to even qualify for the chance to win a national championship. The move also behooved current conferences to ensure that their top teams remain the top teams in the nation. The combination of these factors suggests that non-major conferences should merge with major conferences in a strategic reaction to the new playoff system.

The $M + 1$ framework suggests that conferences would respond to the change by consolidating to five major conferences. Four "elected" positions are available for teams to earn. And compared to the BCS system, there is a relatively stable, well-known electorate: the Playoff Committee. Assuming that conferences are indeed interested in maximizing their chances of winning a national championship, the conferences existing at the time of the change from the BCS to the College Football Playoff would combine to create $M + 1$ conferences. Where $M = 4$, as four teams make the Playoff, a maximum of five major conferences should result.

Unsurprisingly, with the adoption of a new College Football Playoff came a new, vigorous wave of conference realignment. The six major conferences of the BCS did actually consolidate into the current Power Five conferences.¹¹⁹ Major moves included Maryland and Rutgers moving to the Big

¹¹⁷ See generally *Selection Committee Protocol*, COLLEGE FOOTBALL PLAYOFF, (June 20, 2012), <http://www.collegefootballplayoff.com/selection-committee-protocol>, {<https://perma.cc/G74R-SW2Q>} (last visited Nov. 29, 2016).

¹¹⁸ See *id.*

¹¹⁹ See Marc Tracy, *The Survival of the Big 5*, N.Y. TIMES, Oct. 3, 2014, <http://www.nytimes.com/interactive/2014/10/03/sports/ncaafotball/Big-10-realignment.html>, {<https://perma.cc/6HGD-3TSS>}; Pat Forde, *Realignment 101: Getting to Know*

Ten, Colorado and Utah moving to the Pac-10 (making it the Pac-12), Notre Dame entering into a scheduling agreement with the ACC, and the Big East transforming, with the “Catholic Seven” schools leaving the conference in favor of a new basketball-centric conference, but keeping the name Big East. The end result of all of the realignment? Five major conferences realistically capable of sending a team to the national championship game.

IV. CONFERENCES' CURRENT SOLUTION TO REALIGNMENT: THE GRANT OF RIGHTS

As of late, conferences utilize one main solution to slow the exit of schools from their respective conferences: a contractual grant of rights. With the assumption that schools are highly conscious of revenues, especially television revenues, some conferences have secured a grant of television rights from their member institutions.¹²⁰ This grant of rights attempts to assign the television rights of member schools to the conference. With the television rights of individual members secured by the conference, presumably, schools will be less attractive targets for conferences adding member schools.¹²¹ If a school cannot take its television rights to a new conference, it is neither a prudent financial decision for the school to leave the conference nor for a new conference to accept that school.

This section proceeds in three parts. First, it sets out the operative text of several grants of rights, obtained through Freedom of Information Act and Public Records Requests. Second, it will analyze the logical assumptions and underpinnings behind the grant of rights, in order to identify the strengths and weaknesses of the grant as currently constructed. Third, it will evaluate the legal sufficiency and effectiveness of the grant of rights. Through this process, this section will compare the substantive goals of the grant of rights to its both practical and legal effectiveness as currently written. Part V will then address and consider the strategies and deficiencies identified and discussed in this Part IV.

the New Landscape of College Sports, YAHOO SPORTS (July 1, 2013, 3:45 AM), <http://sports.yahoo.com/news/ncaaf—college-sports-conference-realignment-made-simple-074507431.html>, {<https://perma.cc/F2BM-DVVZ>}.

¹²⁰ See generally Benjamin I. Leibovitz, *Avoiding the Sack: How Nebraska's Departure from the Big 12 Changed College Football and What Athletic Conferences Must do to Prevent Defection in the Future*, 22 MARQ. SPORTS L. REV. 675, 691–92 (2012) (discussing mechanics of grant of rights).

¹²¹ See Stewart Mandel, *Rejoice! ACC Grant of Rights Should Halt Realignment*, SPORTS ILLUSTRATED (Apr. 22, 2013, 3:58 PM), <http://www.si.com/college-football/2013/04/22/acc-grant-rights-conference-realignment>, {<https://perma.cc/F99T-5VPC>}.

A. *Text of Grant of Rights*

Currently, four of the Power Five conferences have a grant of rights: the ACC, Big Ten, Big 12, and Pac-12.¹²² The SEC has not adopted a grant of rights.¹²³ Below is the selected text from the grants of rights for three of the four conferences that have the agreement. The texts of these agreements are the product of Freedom of Information Act and Public Records Requests.¹²⁴ Requests to Big Ten schools—including Michigan State University, Ohio State University, the University of Michigan,¹²⁵ and the University of Wisconsin, all of which provided denials for varying reasons¹²⁶—ultimately returned no responsive documents.¹²⁷

¹²² See Brett McMurphy, *Media Deal OK'd to Solidify ACC*, ESPN (Apr. 24, 2013), http://espn.go.com/college-football/story/_/id/9200081/acc-media-rights-deal-lock-schools-okd-presidents, {<https://perma.cc/WPF6-UUF4>}.

¹²³ *Id.*

¹²⁴ The quoted grants of rights are from requests to the following institutions—

- ACC: University of North Carolina; Request Number 150108, <http://publicrecords.unc.edu/150108/>, {<https://perma.cc/YJ8R-8L9R>}.
- Big 12: University of Texas at Austin; Request Number 157950, <https://apps.utsystem.edu/openrecordrequest/>, {<https://perma.cc/G7T2-HEBE>}.
- Pac-12: University of Oregon; Request Number 2015-PRR-057, <https://publicrecords.uoregon.edu/content/grant-rights>, {<https://perma.cc/3LHT-MX5P>}.

¹²⁵ University of Michigan; Request Number WIL 0388-14 (correspondence on file with Harvard Law School Library).

¹²⁶ Michigan State University's denial stated that it possessed the document but that the Big Ten Grant of Rights was a "trade secret" falling under a disclosure exemption pursuant to the State of Michigan's MCL 390.1554(1)(d), as the Grant "contains unique and proprietary information of significant commercial value, in which Michigan State University, as a member of the Big Ten Conference, holds an interest. Michigan State University, its Intercollegiate Athletics Department, and its student athletes, directly benefit from the media rights contracts negotiated by the Big Ten Conference on the University's behalf." Letter from Ellen Armentrout, Freedom of Information Act Office & Assistant General Counsel, Michigan State University, to author (Dec. 10, 2014) (on file with Harvard Law School Library). Ohio State University, the University of Michigan, and the University of Wisconsin all denied having responsive documents after conducting a reasonable search of their respective records.

¹²⁷ It is not clear why Big Ten schools do not provide copies of the grants of their broadcast rights that they have reportedly given to the conference. See, e.g., Alex Prewitt, *ACC Grant of Rights Deal Might Weaken ACC's Exit-Fee Lawsuit Against Maryland*, WASH. POST, April 23, 2013, <http://www.washingtonpost.com/blogs/terrapins-insider/wp/2013/04/23/acc-grant-of-rights-deal-might-weaken-accs-exit-fee-lawsuit-against-maryland/>, {<https://perma.cc/MQ95-9Z6C>} ("*The Big Ten, Pacific-12 and Big 12 also have grant-of-rights agreements*, which give the conferences

1. Atlantic Coast Conference

The recitals included in this Grant of Rights reference the ACC's broadcast agreement with ESPN. As a condition of that agreement, the ACC members must execute a grant of television rights to the conference.¹²⁸

WHEREAS, as a condition of the agreement of ESPN to offer additional consideration to the Conference as part of a further amendment to the Amended ESPN Agreement (the "*Additional Amendment*"; the Additional Amendment, together with the Amended ESPN Agreement, collectively, the "*ESPN Agreement*"), each of the Member Institutions is required to, and desires to, irrevocably grant to the Conference, and the Conference desires to accept from each of the Member Institutions, those rights granted herein¹²⁹

The operative portion of the ACC's Grant of Rights states:

Each of the Member Institutions hereby (a) irrevocably and exclusively grants to the conference during the Term (as defined below) all rights (the "*Rights*") necessary for the Conference to perform the contractual obligations of the Conference expressly set forth in the ESPN Agreement, regardless of whether such Member Institution remains a member of the Conference during the entirety of the Term and (b) agrees to satisfy and perform all contractual obligations of a Member Institution during the Term that are expressly set forth in the ESPN Agreement.¹³⁰

Further, the ACC's Grant of Rights includes the following language:

The Recitals set forth above shall be deemed incorporated by this reference into and specifically made part of this Agreement. Should any provision of this Agreement be determined to be invalid or unenforceable, such shall not invalidate this Agreement, but such provision shall be deemed amended to the extent necessary to make such provision valid and enforce-

control of each school's television rights, even if they choose to leave the conference." (emphasis added)); Pete Thamel, *N.C.A.A. Strife, and How to Ease It*, N.Y. TIMES, Sept. 11, 2011, at SP4, available at <http://www.nytimes.com/2011/09/11/sports/ncaafotball/ncaa-strife-could-be-eased-by-real-revenue-sharing.html>, {<https://perma.cc/EN9L-6WMM>} ("*The Big Ten and Pac-12 members have signed grants of rights*, which basically give all of the television rights from each university's sports to the conference for a specified number of years. If a member switches conferences, the rights cannot be transferred." (emphasis added)).

¹²⁸ ATLANTIC COAST CONFERENCE, ATLANTIC COAST CONFERENCE GRANT OF RIGHTS AGREEMENT (Apr. 19, 2013) (on file with Harvard Law School Library).

¹²⁹ *Id.*

¹³⁰ *Id.*

able and which as closely as possible reflects the original intent of the parties.¹³¹

2. Big 12 Conference

The recitals included in the Big 12's Grant of Rights reference the conference's Telecast Rights Agreements with broadcasting companies ABC, ESPN, and FOX. As a condition of those agreements, the Big 12 members must execute a grant of television rights to the conference.¹³²

NOW, THEREFORE, for and in consideration of the foregoing, the covenants set forth herein and in the Telecast Rights Agreements, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and agreed, and intending to be legally bound hereby, the undersigned each hereby agree with the Conference and with each other as follows¹³³

The operative portion of the Big 12's Grant of Rights, amended September 7, 2012, states:

[E]ach of the Member Institutions hereby (a) irrevocably grants to the Conference during the Term [] all rights [] necessary for the Conference to perform the contractual obligations of the Conference expressly set forth in the Telecast Rights Agreements, regardless of whether such Member Institution remain a member of the Conference during the entirety of the Term and (b) agrees to satisfy and perform all contractual obligations of a Member Institution that are expressly set forth in a Telecast Rights Agreement.¹³⁴

3. Pac-12 Conference

The operative portion of the Pac-12's Grant of Rights states:

Effective July 1, 2012, each member hereby transfers and assigns to the Conference any and all of its rights to the commercial exploitation of all audio and all video transmission or dissemination by any and all means (including without limitation internet transmission or dissemination), now known or hereafter existing, of all member competitions for all Conference sanctioned sports involving member teams as to all intra-Conference events and those inter-Conference events where the participating member controls audio and video rights. The transfer and assignments

¹³¹ *Id.*

¹³² See BIG 12 CONFERENCE, AMENDED AND RESTATED GRANT OF RIGHTS AGREEMENT (Sept. 7, 2012) (on file with Harvard Law School Library).

¹³³ *Id.*

¹³⁴ *Id.*

include all rights in and to the transmissions that exist prior to July 1, 2012, on and after July 1, 2012, and all of the copyrights thereto. . . .

All participating members shall not grant, license, or assign such audio or video rights to other parties and thereby avoid conveying such rights to the Conference. The Conference may grant back, license or assign back any portion or all of the rights to the participating members as may be agreed to by the CEO Group.¹³⁵

B. Considerations Underlying the Effectiveness of the Grant of Rights

1. Modeling the Realignment Decision Factors

The recent flurry of realignment has subsided, although the reasoning for that cessation may be misplaced. This section presents a “Realignment Model” that attempts to more fully explain and present the range of factors, both quantitative and qualitative, that schools consider in their realignment decisions.¹³⁶ Conceptualizing the decision as one of a combination of factors, rather than one sole factor, leads to the conclusion that the grant of rights may not be entirely responsible for, never mind entirely effective at, curbing realignment.

This Model is an illustration of the considerations from Part III above.¹³⁷ The combination of those factors can be expressed in the Realignment Model as:

$$\widehat{R} = \overbrace{b_1(D - C)}^{\text{Money}} + \overbrace{b_2(E + F)}^{\text{Exposure/Fans}} + \overbrace{b_3G}^{\text{Winning on the Field}} + \overbrace{b_4H}^{\text{M+1 Effects}} + \overbrace{\widehat{n}}^{\text{All Else}}$$

General Terms *R* is the decision regarding whether to change conferences. Theoretically, when *R* is sufficiently large, a school will decide to change conferences.

¹³⁵ PACIFIC 12 CONFERENCE, *Media, Sponsorship and Digital Rights*, PACIFIC 12 HANDBOOK CB 3-2 (July 1, 2012) (on file with author).

¹³⁶ While this Model attempts to explain *why* schools change conferences, other models have sought to determine the effectiveness or value of changing conferences. See, e.g., G.K. Nwosu, *The Realignment Rating Index: A New Lens for Assessing NCAA Conference Realignment*, WINTHROP (July 23, 2012), <http://winthropintelligence.com/2012/07/23/rri/>, {<https://perma.cc/76JB-R886>}.

¹³⁷ Admittedly, this Model is an oversimplification of all of the factors that contribute to the decision of whether to change conferences. The Model is simply being used to explain on a theoretical level why the Grant of Rights has such a large, but potentially tenuous, impact on controlling realignment.

b terms are the coefficients representing how important each named term is to the decision of changing conferences. A coefficient represents the impact of one unit of change in the *Money*, *Exposure/Fans*, *Winning on the Field*, or *M + 1 Effects* terms (collectively “predictor terms”) on R . If calculated, the sign of the b terms could be positive or negative and would determine whether a factor weighs for (positive) or against (negative) realignment.

n represents anything else affecting the realignment decision that is not captured in the other terms.

Money Term¹³⁸

D is the monetary gain from changing conferences.

C is the monetary loss from changing conferences. The grants of rights attempt to increase the value of C , making changing conferences much more—if not prohibitively—costly for schools.

Exposure/Fans Term¹³⁹

E is the prestige or recognition gained from changing conferences. It could be negative if a school moved to a less prestigious conference, but it is most likely to be positive.

F is the impact on the current fans. It is likely to be negative, given the above discussion of the impact on fans.

Winning on the Field Term¹⁴⁰

G is the expected gain or loss in wins on the field from changing conferences. This value would likely be negative immediately following the school’s conference change (as most schools change to a more competitive conference than their current conference), but G would move toward zero or even trend positive in the years following the change.

M + 1 Effects Term¹⁴¹

H is the strategic effect associated with the $M + 1$ factors as discussed above. This factor varies with the structure of the method of picking a national champion and related number of conferences realistically capable of producing a national champion.

¹³⁸ For a discussion of money as an important factor in conference realignment, see *supra* notes 37–61 and accompanying text.

¹³⁹ For a discussion of university exposure as an important factor in conference realignment, and fan reaction as a consequence of realignment, see *supra* notes 62–69 and accompanying text and notes 20–23 and accompanying text, respectively.

¹⁴⁰ For a discussion of winning on the field as an important factor in conference realignment, see *supra* notes 70–81 and accompanying text.

¹⁴¹ For a discussion of the $M + 1$ Effect on conference realignment, as it relates to choosing a football national champion, see *supra* notes 82–119.

As a preliminary matter, this Model more fully appreciates the variety of factors that contribute to a school's decision to change conferences than traditional thinking. While other models regarding the causes of realignment have yet to be formally presented, the popular conception is that R is influenced only by the *Money* term (or, in the alternative, influenced so significantly by the *Money* term that any other factors are practically irrelevant). This conclusion seems logical given the current college football environment, but it ignores a host of other important factors captured by the Realignment Model. It is only by understanding and acting upon *all* of the relevant factors that conferences will actually be able to effectively control realignment.

i. Importance of Individualized Coefficients

Coefficients for the above equation, which would provide the relative impact of each factor, could certainly be estimated given sufficient data on realignment and the college football environment. Those coefficients would approximate the mean value of each coefficient for each factor for each school. But the coefficients for any individual school are more important for this analysis. The mean coefficients would show how schools *generally* view the factors for realignment. Individual factors would show how an *individual* school views the factors for realignment.

Coefficients, if calculated individually, would surely vary from school to school. Those coefficients would also likely vary in predictable ways among groups of schools. For example, one would expect that, in general, a school from a non-Power Five conference¹⁴² would be less concerned about winning a national championship (thereby decreasing the relative value of b_3) but would instead be very interested in generating exposure for the school (thereby increasing the relative value of b_2).¹⁴³ On the other hand, a Power Five conference school probably places a relatively higher value on generating revenue (increasing the relative value of b_1) than generating more exposure for the already well-known university (decreasing the relative value of b_3).

¹⁴² This example of course uses the terms and structure of the most current form of national championship selection.

¹⁴³ See, e.g., Ben Strauss & Zach Schonbrun, *It's a Game of Spiraling Costs, So a College Tosses Out Football*, N.Y. TIMES, Dec. 3, 2014, at A1, available at <http://www.nytimes.com/2014/12/03/sports/ncaafotball/uab-cancels-football-program-citing-fiscal-realities.html>, {<https://perma.cc/3F67-UGN3>} (discussing schools that considered ending their football programs due to the rising costs associated with those programs).

The importance of understanding this distinction is recognizing what mechanisms would entice—positively or negatively—teams to stay in their current conference, or move to a new conference. Conferences have seemingly accepted the narrative that generating revenue, mainly through television rights, is the driving factor behind conference realignment. That narrative is short-sighted and ignores other extremely relevant factors.¹⁴⁴ As conceptualized in the Realignment Model, television revenues are only a part of the decision regarding whether to change conferences. The grant of rights implicitly assumes that all schools have an extremely high value for b_1 , the *Money* term coefficient. However, if a school does not place such a high value on money in practice—whether due to internal preferences, external financial conditions, advancing technology, etc.—the grant of rights is not at its peak effectiveness.

Conferences must understand that the impact of the grant of rights varies in this respect. While many schools may be heavily influenced with the financial burden of the grant of rights, there are scenarios in which individual schools have different preferences, as evidenced by the Realignment Model. Therefore, conferences attempting to maintain stability must understand that the effectiveness of the grant of rights is tied to the b_1 coefficient for each school in that school's decision-making.

ii. Variability of Predictor Terms

As variables, the values underlying the predictor terms are open to modification and subject to manipulation. In fact, the grant of rights is explicitly designed to raise the financial cost, represented by C in the equation above, to discourage realignment. C varies across schools and conferences; for example, conferences have differently sized exit fees and possibly different means of applying those fees to schools. Conceivably, conferences could even tier exit fees based upon duration of conference membership, monetary value to the conference, or a variety of other metrics. C could also vary across time for any given school; for example, assume a television contract and accompanying grant of rights that the school has agreed to for a five year term, receiving a payout of \$1 million each year, for a total of \$5 million. The closer that the school comes to fully performing the contract, the lower the cost of a breach. If the contract were breached in Year 1, the

¹⁴⁴ For a further discussion of the assumptions underlying the sustainability of money as the motivating factor behind realignment, see *infra* notes 150–54 and accompanying text.

school would forego \$5 million in revenue, while in Year 4 the cost would only be \$1 million.

Due to the potential variability of each predictor term, schools could find the salience of each term waxing or waning over time. As a result, there are conceivable situations where a predictor term becomes sufficiently small, and a school decides that any negative effects from that particular term are irrelevant or outweighed by other relevant factors. Taking the *Money* term as an example, imagine that new laws are passed due to concussions and the dangerous nature of football. In response, game play is significantly altered and major television networks are no longer interested in broadcasting games. The revenue received from television contracts would decrease substantially. While schools may still place a high value on the monetary aspect of the game (with such value represented by the coefficient), the actual value of the predictor term—the revenue coming to the schools through television contracts—would become near zero, making the entire term near zero. In other words, for a particular term to substantially impact the realignment decision, it has to have the correct combination of a coefficient and predictor term. If one of those values is too low, the impact of the term will be minimized.

iii. Value of Certainty in the Realignment Decision-Making Process

The above Model assumes certainty regarding each of the predictor terms. The reality, however, is that there is incredible uncertainty regarding the true value of each of the terms. With the grant of rights specifically, there is a question regarding whether any individual grant is actually enforceable.¹⁴⁵ But whether the grant is enforceable plays largely in deciding whether realignment is beneficial to a given school. If that school cannot reliably predict the enforceability, it will have difficulty making an informed decision regarding changing conferences.

From the school's perspective, if it must assume the worst case scenario when evaluating the consequence of the *Money* term (in that *C* will be at its maximum), the range of scenarios where realignment will be a viable option are significantly decreased. A conference interested in dampening realignment should therefore introduce as much uncertainty into the decision as possible. Given enough uncertainty, a school will not be willing to assume the risks associated with realignment and will instead be content to maintain its position in the conference. This uncertainty provides much of the

¹⁴⁵ For a discussion of the legal enforceability of the Grant of Rights, see *infra* notes 157–84 and accompanying text.

value of the grant of rights:¹⁴⁶ if a school does not know whether the grant of rights is enforceable, it must make its own determination regarding how enforceable the grant actually is. If the school is relatively risk-averse, the potential harm from breaching the grant of rights will pull the school away from leaving the conference when the school conducts the cost-benefit analysis of a potential exit.

iv. Lack of Independent “Grant of Rights” Term

Despite conferences placing a high value on the impact of the grant of rights, its impact is dependent upon other terms in the Model. Stated differently, there is no “Grant of Rights” term in the Model; instead, conferences rely on the grant of rights to weigh on other factors, particularly the *Money* term and the corresponding value of *C*.

Conferences attempting to influence particular terms in the Model through legal, business, or structural means is not problematic in and of itself. The issue arises when conferences assume that a new influence on a term, in this case the grant of rights, will be determinative to that term simply because that influence is so large. My high school physics teacher¹⁴⁷ described a similar situation during a mousetrap-powered car competition. He urged the class to make cars that were as aerodynamic as possible in order to maximize the effect of the mousetrap powering it. My team had devised a way to modify the mousetrap on our incredibly non-aerodynamic car within the rules of the competition, which led my teacher to remark that my team had functionally “strapped a jet engine to a Mack truck.” With enough brute force (analogous to the grant of rights’ impact on *C* in the Model), our team made the more finesse aerodynamic challenges (analogous to other factors influencing the *Money* term) practically irrelevant. Likewise, by implementing a grant of rights as a means to control conference realignment, conferences are attempting to exercise a great deal of influence over one component of one Model factor: *C* in the *Money* term. But there are situations (admittedly, with varying likelihoods) where the grant of rights is not the end of the inquiry into potential realignment because (1) the *Money* term is also subject to factors outside of and unrelated to the grant of rights,¹⁴⁸ and (2) there are non-*Money* factors that play an important role in the realignment decision.¹⁴⁹

¹⁴⁶ See *infra* notes 176–84 and accompanying text.

¹⁴⁷ Thanks to Lance Bailey at Petoskey High School for his always-engaging physics projects and memorable mid-competition color commentary.

¹⁴⁸ See *infra* notes 149–55 and accompanying text.

¹⁴⁹ See *supra* notes 141–45 and accompanying text.

Conferences then must take care to recognize just *how* the grant of rights influences a school's realignment decision. Understanding that the grant of rights is not its own independent factor in the realignment decision will aid in crafting a stronger grant of rights in the future, as well as necessitate conferences' consideration of more pointed, finesse solutions to realignment that are not solely concentrated on influencing the *Money* term.

2. The *Money* Term Specifically

Isolating the *Money* term from the rest of the Realignment Model, there are two main assumptions underlying the grant of rights and by extension the value of *C* in the Model. First, for the grant of rights to be effective, it requires schools to place a high value on monetary success in athletics, as the grant makes it financially costly for schools to change conferences.¹⁵⁰ Second, the effectiveness of the grants of rights depends on schools' television rights maintaining their already high value. And, if the value of those rights declines, schools may be more willing to change conferences as the proverbial stick does not carry as much weight.

i. Money as the Motivating Factor Behind Athletics Decisions

While college football today is more popular than ever, the demand for and value of college football is in no way guaranteed. Popularity of individual sports has come and gone before, and athletic administrators should understand that realignment decisions should be made with these long-term consequences in mind.

One current threat to the profitability of college football is the ongoing discussion regarding concussions and head trauma. While not the focus of this Article, many other articles have thoroughly reviewed the legal issues and liability arising from football-related brain trauma.¹⁵¹ Mounting evidence suggests that the physical trauma from simply playing football has a

¹⁵⁰ This assumes that the Grant of Rights would be upheld under legal scrutiny and that schools could not negotiate for the return of their rights and subsequently exit the conference.

¹⁵¹ See, e.g., Christopher R. Deubert, et al., *Protecting and Promoting the Health of NFL Players: Legal and Ethical Analysis and Recommendations*, HARV. J. SPORTS. & ENT. LAW (Nov. 2016); Jeremy P. Gove, *Three and out: The NFL's Concussion Liability and How Players Can Tackle the Problem*, 14 VAND. J. ENT. & TECH. L. 649 (2012); Daniel J. Kain, "It's Just a Concussion:" *The National Football League's Denial of a Causal Link Between Multiple Concussions and Later-Life Cognitive Decline*, 40 RUTGERS L.J. 697 (2009).

lifelong impact on former players.¹⁵² The National Football League, college football's professional counterpart, has agreed to pay out nearly \$1 billion in benefits to former players.¹⁵³ As evidence regarding the impact of concussions mounts, the long-term viability of football as a sport—at least as we know it today—remains in question.

Further, the actors making the decisions regarding changing conferences may be removed from the monetary consequences of their decisions. To the extent that economics are considered, they are potentially ancillary to the main motivation: winning, maintaining the culture of the school, pleasing fans, and the like.¹⁵⁴ That is not to say that the economic consequences are not considered at all: if the monetary loss is large enough, no athletic department or school could shoulder the burden of the loss of revenue from the grant of rights. But that monetary consequence is the basis of the grants of rights. The thought is that no school, once having entered into a grant of rights, would revoke or breach the grant and lose tens of millions of dollars annually. However, if the value of the grant of rights decreases sufficiently, it may not be the stringent bar to realignment that conferences imagine it will be.

ii. Maintaining High Value on Broadcast Rights

Of course, by relying on a grant of television broadcast rights to hold a given conference together, conferences are implicitly assuming that television broadcast rights are valuable to schools. It is no secret that the future of broadcast media, especially television, is uncertain. Internet streaming and on-demand broadcast technologies have significantly decreased the traditional broadcast television market and ratings reliability.¹⁵⁵ While there is likely some limited stability in live broadcasting of sporting events—after all, it is much more difficult to imagine a change in consumption in live

¹⁵² See Melissa Locker, *Football Head Impacts Can Cause Brain Changes Even Without Concussion*, TIME (Dec. 1, 2014), <http://time.com/3611146/football-head-impacts-can-cause-brain-changes-even-without-concussion/>, {<https://perma.cc/GN9P-XPNG>}.

¹⁵³ See Ken Belson, *Appeals Court Affirms Landmark N.F.L. Concussion Settlement*, N.Y. TIMES, Apr. 19, 2016, at B9, available at <http://www.nytimes.com/2016/04/19/sports/football/nfl-concussion-lawsuit.html>, {<https://perma.cc/UTM7-AXL4>}; *NFL Concussion Settlement*, <https://www.nflconcussionsettlement.com/Home.aspx>, {<https://perma.cc/J3EE-WLMK>} (last visited Aug. 7, 2016).

¹⁵⁴ See *supra* notes 70–81 and accompanying text.

¹⁵⁵ See Joe Flint & Shalini Ramachandran, *Cord-cutting Weighs on Pay TV*, WALL STREET J. (Aug. 6, 2015, 1:14 PM), <http://www.wsj.com/articles/cord-cutters-weights-on-pay-tv-1438820384>, {<https://perma.cc/R39X-DZV9>}.

sports than in the broadcast of a favorite weekly drama—it would be short-sighted to place all of one’s financial eggs in the proverbial broadcast television basket.

Alternatively, it may be that the manner in which a conference’s grant of rights was drafted, or in which a school’s rights are understood, will not cover new, emerging media revenues.¹⁵⁶ As technology continues to develop, it is entirely possible, if not probable, that the format in which fans view college football will not be broadcast television. It is also possible that the current media stakeholders—ESPN, ABC, CBS, NBC, FOX, etc.—will not remain the same providers of college football content in the future. If and when these situations come to fruition, the value of the grants of rights may decrease significantly. The agreement that is outwardly predicated upon its necessity for broadcast rights may simply have far less meaning.

If the value of broadcast rights were to decrease, the cost to changing conferences necessarily decreases as well. And, if the cost of changing conferences has decreased, the effect of the grant of rights in turn decreases. Because the grant of rights is effectively an exit fee—although its characterization as such may be the source of future litigation—the larger the value of the grant, the more financial pain that an exiting school will face when leaving the conference. Therefore, the grant of rights is necessarily built upon broadcast rights maintaining a high value for its overall effectiveness.

Granted, the reason why the value of broadcast rights decreases is important to this analysis. If college football generally loses its popularity, it may not matter whether schools change conferences: many of the reasons offered for the conference shuffling are dependent on the popularity of college football, and not just as niche popularity. If interest in college football declines, schools may not have as much interest in changing conferences anyway, making the grant of rights wholly unnecessary.

C. *Legal Enforceability of the Grant of Rights*

Despite their implementation, questions remain about the actual enforceability of the grants of rights.¹⁵⁷ While this Article assumes the enforceability of the grants of rights for most of its analysis and discussion, a review of the actual grants suggests that there may be issues with the assign-

¹⁵⁶ See generally Maidie E. Oliveau, *Hot Trends in Sports: The “New Media”*, 24 SUM ENTMT’T & SPORTS LAW 3 (2006).

¹⁵⁷ See Jason Hutzler, *Myth of the Big 12’s Grant of Rights*, FOX SPORTS (Jan. 3, 2013, 5:28 PM), <http://www.foxsports.com/college-football/outkick-the-coverage/myth-of-the-big-12s-grant-of-rights-010313>, {<https://perma.cc/NP98-TSM6>}.

ments on their face, especially in regards to true irrevocability.¹⁵⁸ The impact of a non-irrevocable grant of rights is tremendous. If a given grant is not irrevocable—or in the positive, it is revocable—the grant of rights has no true effect. A school may revoke the assignment and leave its conference while suffering no ill effects related to the grant of rights, rendering the assignment meaningless. That school may simply take its broadcast rights to the new conference as it could prior to the grant of rights. Therefore, the irrevocability of the grants of rights is of paramount importance for conferences attempting to slow or stop realignment.

This section discusses the general legal effectiveness of the grant of rights and examines potential direct and indirect attacks a school wishing to exit its conference may make against the grant. In directly attacking the grant of rights, there may be issues with whether the proper legal steps have been taken to make the grant of rights irrevocable. When indirectly attacking the grant of rights, questions remain whether the grant is actually a measure of liquidated damages and whether specific performance of the grant could actually be achieved. However, the grants' general vagueness may be the ultimate discouragement for schools considering litigating the enforceability of the grant of rights.

1. Irrevocability

The grants of rights are understood to be, and refer to themselves as, assignments. Generally, an assignment is only irrevocable if made for good consideration or if a writing supports its irrevocability.¹⁵⁹ Furthermore, an otherwise revocable assignment may be made irrevocable “to the extent necessary to avoid injustice where the assignor should reasonably expect the assignment to induce action or forbearance by the assignee . . .”¹⁶⁰ Admittedly, arguments against the current formulation of the grants of rights based in a lack of consideration are difficult arguments. Although a school attempting to revoke its grant of rights and leave its conference would almost certainly attempt this challenge to the grant's irrevocability.

¹⁵⁸ Indeed, it may be inappropriate to characterize this grant as an assignment. See Jill Gustafson, *Assignment*, 6 AM. JUR. 2D ASSIGNMENTS § 1 (2d ed. 2014) (“Essentially, an assignment is the *voluntary* act of transferring an interest.” (citing *Cont. Cas. Co. v. Ryan Inc. E.*, 974 So. 2d 368 (Fla. 2008) (emphasis added))).

¹⁵⁹ See *Form and Requisites of Assignment*, 29 WILLISTON ON CONTRACTS § 74:3 (4th ed. 2014); Howard O. Hunter, *Revocability of Assignment*, MODERN L. OF CONTRACTS § 21:6 (2014); Eric C. Surette & Elizabeth Williams, *Revocation*, 6A CORPUS JURIS SECUNDUM ASSIGNMENTS § 70 (2014).

¹⁶⁰ RESTATEMENT (SECOND) OF CONTRACTS § 332 (AM. LAW INST. 1981).

i. Made for Consideration

In regards to the consideration underlying a grant of rights, the various grants of rights depart. While they are all in writing, the way in which they handle the consideration issue varies greatly. As a preliminary matter, some of the grants of rights—for example, the Big 12’s Grant of Rights—place the consideration received in the recitals of the grant. That decision may be problematic for the grant’s enforceability in some circumstances.¹⁶¹ In certain jurisdictions, if consideration is made in the recitals, it is not actually characterized as consideration.¹⁶² Therefore, even if the particular grant of rights has proper consideration, it would not be effective given its placement in the recitals.

Assuming that the recital consideration is not fatal to its validity, the next inquiry turns to whether the consideration is valid, proper, and sufficient to make the grant irrevocable. The bar for adequacy of consideration is not a high one: “a promise, in exchange for which the promisor requests and receives something that would be regarded by most reasonable persons as of minimal or no value will nevertheless be enforced.”¹⁶³ However, while courts will generally not examine the value or adequacy of consideration, they may review transactions where “consideration of one dollar or other small sum is paid or alleged to have been paid in return for a promise to give or do something of considerable value.”¹⁶⁴ This understanding is bolstered by the *Restatement (Second) of Contracts*, which states, “a mere pretense of bargain does not suffice, as where there is a false recital of consideration or where the purported consideration is merely nominal.”¹⁶⁵ In short, for valid consideration to exist, the purported consideration must be meaningful.

The current structure of the grants of rights is problematic in this respect. Take for example the Big 12’s grant of rights, which states the agreement was made “in consideration of the foregoing, the covenants set forth herein and in the Telecast Rights Agreements, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and agreed” That statement is the full extent of the language on the

¹⁶¹ See *Recitals of Consideration—Unsealed Agreements—Modern View*, 3 WILLISTON ON CONTRACTS § 7:23 (4th ed. 2014); John J. Dvorske et al., *Recitals in Contract*, 31 CORPUS JURIS SECUNDUM ESTOPPEL & WAIVER § 73 (2014).

¹⁶² See, e.g., *State by Crow Wing Env’tl. Prot. Ass’n, Inc. v. City of Breezy Point*, 394 N.W.2d 592, 596 (Minn. Ct. App. 1986).

¹⁶³ *Adequacy of Consideration*, 3 WILLISTON ON CONTRACTS § 7:21 (4th ed. 2014).

¹⁶⁴ *Id.*

¹⁶⁵ RESTATEMENT (SECOND) OF CONTRACTS § 72 cmt. b (AM. LAW INST. 1981).

consideration for the grant of rights. While the Big 12 conference would surely point to some act or promise as being implicitly referenced in the agreement, the fact of the matter is that the assignment is not supported by any meaningful consideration. The grant contains language that purports to describe consideration, but phrases such as “other good and valuable consideration” merely parrot general requirements of a contract. Considering recitals and the assignment itself, along with its conditions, as consideration for the assignment is equally as ineffective as consideration. Actually considering the meaning of the language, it amounts to: “The consideration being exchanged for this assignment is the fact that this assignment is being made.” In other words, the benefit the school receives for making the contract is making the contract. That language meets no plausible standard of valid consideration.

The only *real* consideration offered in the agreement is the Telecast Rights Agreement. That simply does not suffice as consideration for the assignment. It is not new consideration. It is value already owed. A distinction may be made that suggests the consideration is contingent upon the grant of rights. As is discussed next, that argument holds no weight in making the grant of rights irrevocable.

ii. Made in Writing

As the grants of rights do not actually include consideration, they must be validly in writing to be irrevocable. Overcoming the made in writing requirement is much more challenging for a school than the consideration requirement. Yet, the writing requirement assumes that the grant is an assignment and not a bilateral contract. Under the formulation of the agreement as an assignment, as it is commonly understood, there is a timing issue. In their current iteration, the grants of rights are almost always executed *after* the respective conference’s broadcast agreement; this is evidenced by the fact that the grant of rights references the previously executed broadcast agreement.

Schools attempting to withhold their obligations under the grant of rights may try to re-characterize the assignment as a bilateral contract. Simply put, if the grant of rights is indeed an assignment, that assignment is unambiguously irrevocable due to its statement in writing. This statement is especially true for the ACC and Big 12’s grants of rights, which *explicitly state* that the grants are irrevocable. A school attempting to characterize the grant as an assignment could point to the fact that the broadcast agreements are contingent upon the assignment. In other words, the broadcaster will enter into the agreement if an individual school binds its broadcast rights

for a given time. The mechanism through which schools bind their rights can be *called* an assignment. But at the heart of the agreement is a mutual exchange, a bilateral agreement: broadcasters provide schools with revenue (albeit through the conference), and schools provide broadcasters with a certain level of contractual security (again, through the conference). The grant of rights is an assignment in name only.

If schools can effectively argue that the assignment is a bilateral contract masquerading as an assignment, then their case more squarely turns on the sufficiency of consideration, an argument that a school may actually win. Recall that the grant of rights is an agreement between the school and the conference, as opposed to between the school and the respective broadcaster. The consideration from the school to the conference is quite obviously the grant of broadcast rights. However, as discussed above, schools do not have any consideration from the conference. And, even if there is consideration, that consideration occurred *before* the school made its grant of rights.

In the bilateral contract formulation, the exchange was the school's share of the conference's revenue for the distribution from the broadcast agreement. However, any money owed to schools under the broadcast agreement is owed independently of the grant of rights. Even if the broadcast agreement includes a condition that conferences secure a grant of rights from each member institution,¹⁶⁶ the fact of the matter is that the conference owes a distribution to the school in exchange for the execution of the grant of rights. After all, the only reason that schools sign the grant of rights is to secure their claim to a broadcast distribution. In this instance, there was no new consideration for the grant of rights. Any consideration that does exist existed prior to the execution of the grant of rights. But in order for that consideration to be valid—to make the bilateral agreement between the school and the conference enforceable—it must not be consideration already owed. Because there was no new consideration, the contract fails on its face to be enforceable.

¹⁶⁶ This formulation would cause collateral issues for the conference. If securing the grant of rights from all member schools is a condition of the broadcast agreement, that condition will almost certainly be breached if those rights are pulled back. However, that may not be an issue for a school attempting to leave the conference. First, the broadcast agreement may not specify whether the grant of rights condition must exist through the life of the broadcast agreement. If the condition does not necessarily need to survive the life of the contract, this concern is a moot point. Second, except to the extent that the conference can produce an actionable legal claim, by leaving the conference, the exiting school is likely unconcerned about the future of the broadcast agreement with its old conference, as the exiting school will no longer be receiving distributions under that agreement.

This whole problem comes from the timing of the execution of the grants of rights. If the grants occurred before the broadcast agreements were executed, the conference would not owe consideration to the schools from that broadcast agreement; if the broadcast agreement were executed *after* the grant of rights was executed, none of these concerns would exist. The formulation of the agreement as a bilateral contract would make little sense—and make the grants of rights that much more enforceable—if the timing of the execution of the agreements were not as it is today.

iii. Avoiding Injustice

The final inquiry under the direct challenge to the grants of rights is whether honoring the grants would avoid some form of injustice. This avoiding injustice analysis does not lend as much support to the irrevocability of the grants of rights. The finding of irrevocability in order to avoid injustice language requires some action on the part of the *assignee* that is the result of the assignment. Put simply, in the context of the grants of rights, that action or inaction is not present on two fronts: the party taking action and being injured is not the conference and the grant of rights did not induce any later action on the part of either party.

The reasonable expectation analysis requires that the *assignee* take action based upon the assignment. With the grants of rights, the assignee (the conference), does not take action based upon the assignment, the television broadcasters do. That action, generally contemplated in the recitals, is the broadcasters' entering into a broadcast agreement with the conference. Of course, broadcasters are interested in effectively insuring their investment in the conference. For example, if a conference folds during a period of realignment—like the former Big East Conference in regards to football—that broadcaster has lost its monetary investment and competitive advantage against other networks with the rights to other conferences games. The grant of rights therefore acts as an insurance policy on networks' investment.

However, in terms of analyzing enforcement of the grant to avoid injustice, a question remains as to which affected party is the correct affected party to make the grant irrevocable. The broadcast company is the entity that is harmed.¹⁶⁷ A strict examination of the avoiding injustice issue suggests the party that is not the recipient of the irrevocable assignment cannot

¹⁶⁷ That is, unless the broadcaster attempts to revoke the broadcast agreement, in which case the conference would be harmed. This harm is only secondary, however. The school revoking the grant of rights did not actually harm the conference. The broadcaster would have taken its own action—revoking the broadcast contract—that would harm the conference.

provide the injustice necessary to enforce the assignment. Therefore, the conference that received the assignment will likely have a difficult time showing the injustice.

Further, as evidenced by the grants of rights themselves, athletic conferences entered into agreements with their broadcast partners *prior to* member institutions' granting their rights to the conference. The timing of this grant may be fatal to its eventual enforcement. Any harm that the conference could find would be related to the broadcast contract signed *before* the grant of rights was signed. The conference cannot argue that it signed a broadcast agreement based on the grant of rights if the grant of rights did not exist when it signed the contract.

2. Characterization as Liquidated Damages

Schools attempting to indirectly challenge the grant of rights may attempt to persuade a court that the grant of rights is an unreasonably large measure of liquidated damages.¹⁶⁸ Such a finding would render the grant of rights unenforceable against a school. As a preliminary matter, it is unclear that the penalties associated with the grant of rights can actually be characterized as liquidated damages. At least one court has punted on the issue of whether a \$1 million withdrawal fee from a conference can be considered liquidated damages, explicitly stating: "In making this declaration this Court makes no ruling on the issue of whether this \$1 million 'withdrawal fee' is a proper amount as liquidated damages or is void and legally unenforceable as a penalty."¹⁶⁹

If the grant of rights is in fact a measure of liquidated damages, a question remains regarding the enforceability of those damages.¹⁷⁰ A detailed discussion of general enforceability of liquidated damages in college athletics has been undertaken elsewhere.¹⁷¹ However, in the context of conference realignment, liquidated damages provisions have a fine line to walk. On one

¹⁶⁸ See generally *Reasonableness of Provision and Stipulated Amount*, 24 WILLISTON ON CONTRACTS § 65:16 (4th ed. 2014).

¹⁶⁹ *Trustees of Boston College*, 18 Mass. L. Rptr. at 177 n.8.

¹⁷⁰ Schools litigating the enforceability of the grant of rights through the lens of liquidated damages could analogize the grant of rights to an exit fee or liquidated damages. The effectiveness of this analogy remains to be seen. However, the argument would almost certainly be more effective if a court found the grant of rights or an exit fee to actually be liquidated damages for leaving the conference, instead of intentionally avoiding the issue.

¹⁷¹ See generally Joe Meyer, *Paying to Play (Somewhere Else): An Examination of the Enforceability of Athletic Conferences' Liquidated Damages Provisions*, 20 JEFFREY S. MOORAD SPORTS L.J. 107 (2013).

hand, they must be large enough to deter schools from leaving the conference. On the other hand, generally, “the amount should provide no more than the protection needed, must approximate the actual loss suffered, and cannot be insufficiently related to the harm involved. If the exit payment is otherwise, it would constitute an unreasonable penalty which would be void and legally unenforceable.”¹⁷²

The above uncertainty—or failure of the courts to resolve the liquidated damages issue—should be concerning to schools attempting to leave their conferences. Naturally, schools looking to leave their current conferences weigh the costs and benefits against one another. But the current state of the law leaves schools with incomplete information upon which to base their decisions. If an exit fee or the grant of rights is actually liquidated damages, schools will have a much easier time leaving the conference; if the grant of rights were considered liquidated damages, a court would likely find it unenforceable purely based on the magnitude of the loss to the school. While far from a certainty based on current precedent, this finding would allow schools to easily move between conferences and destroy the overall importance of the grant of rights.

3. Lack of Specific Performance as a Remedy for Breached Grant of Rights

Generally, specific performance and money damages are mutually exclusive alternatives as remedies for a breach of contract.¹⁷³ But for specific performance to be a viable remedy for a breach, money damages must be “incomplete and inadequate to accomplish substantial justice.”¹⁷⁴ Therefore, specific performance is generally reserved for contracts that relate to specific items that cannot be replicated, such as real property.¹⁷⁵ The corollary to that understanding is that where money damages are easily calculable, and where the contract is not for specific property, specific performance will not usually be a viable remedy.

In the context of the grant of rights, if a school subject to the grant of rights were to revoke that grant, the remedy of specific performance of the assignment for that breach of contract seems inappropriate. Conferences

¹⁷² *Trustees of Boston College*, 18 Mass. L. Rptr. at 177.

¹⁷³ See *Legal and Equitable Relief—Damage or Restitution*, 25 WILLISTON ON CONTRACTS § 67:32 (4th ed. 2014).

¹⁷⁴ *Inadequacy of Legal Remedy*, 25 WILLISTON ON CONTRACTS § 67:8 (4th ed. 2014).

¹⁷⁵ See generally Steven M. Shavell, *Specific Performance Versus Damages for Breach of Contract: An Economic Analysis*, 84 TEX. L. REV. 831 (2006).

bringing a breach of contract cause of action will have a difficult time demonstrating that money damages are inadequate for the breach. At its simplest form, the grant of rights is a contract regarding the distribution of broadcast television revenue. The value of those rights is easily calculable—albeit with some complexities likely requiring the assistance of experts. For each conference that has a grant of rights, the conference also has a broadcast agreement that details the revenue due to the conference from that contract. While there may be disagreement regarding the amount that each school is due, or that each school effectively contributes through viewership, the fact remains that such questions do not make specific performance any more viable as a remedy.

If the appropriate remedy for a breach of the grant of rights is not specific performance, but instead money damages, another question arises regarding the enforceability of such large money damages (with such damages valued in the tens of millions of dollars).¹⁷⁶ Admittedly, there is little judicial guidance on money damages awarded against schools due to their athletic programs. However, an analogy may be drawn between a breach of the grant of rights and the litigation surrounding exit fees as liquidated damages. If there were a concern about the enforceability of the former Big East's \$1 million exit fee due to it being unreasonably large, then an effective penalty of twenty times, thirty times, or an even greater multiple is almost surely unenforceable.

Ironically, the same logic that makes the grant of rights so powerful also makes it potentially unenforceable. Conferences rely on the grant of rights to put extreme financial pressure on schools thinking of exiting the conference. But if the exit fee cases are any indication, such extreme financial pressure cannot actually be used and enforced against schools. The result is a weakened version of the grant of rights: conferences must choose between a heavy punishment that *is not* likely enforceable and a slight punishment that *is* likely enforceable. Neither option is desirable from the perspective of the conference.

4. Generally Vague

Finally, the grant of rights is only as unenforceable as it is challenged. That is, if no party to the agreement challenges it, it is as effectively enforceable as if it was upheld over a litigated challenge. That is why the grant of rights has been colloquially characterized as a “triple-dog-dare to schools

¹⁷⁶ See *supra* notes 31–35 and accompanying text.

that want to attempt to challenge it”¹⁷⁷ The entire texts of the agreements are only several pages long, with the Big 12’s being the longest at a mere five pages.¹⁷⁸ None of the agreements have termination provisions.¹⁷⁹ None have any mention of liquidated damages. None have any process for how the agreement will be enforced.¹⁸⁰ In short, one interpretation is that what the agreements *do not* say is more important than what they *do* say.¹⁸¹

Whether one decides that employing conscious ambiguity is a proper or improper¹⁸² means to draft an agreement, the fact remains that the current grants of rights are ambiguous. It may be that both a school attempting to leave a conference and the conference itself believe that the grant of rights at issue better supports their position regarding the exit.¹⁸³ Given the identity of the parties that have entered into this agreement, and their relative sophistication, bargaining power is not an issue here.¹⁸⁴

Thus, the grant of rights agreement was not vaguely drafted in order to strike a deal. The agreement did not *need* to be made; instead, some majority of the conference *wanted* the agreement to be made. Unlike a corporate acquisition, where the buyer and seller likely cannot agree on a term, the issue here is probably that the schools did not want to enumerate a term.¹⁸⁵ Thus, the “triple-dog-dare” comes into play. Will schools interested in leaving a conference attempt to litigate the vague agreement, especially

¹⁷⁷ *Summertime Conference Realignment*, *supra* note 1.

¹⁷⁸ See Atlantic Coast Conference, Atlantic Coast Conference Grant of Rights Agreement (Apr. 19, 2013) (on file with Harvard Law School Library); Big 12 Conference, Amended and Restated Grant of Rights Agreement (Sept. 7, 2012) (on file with Harvard Law School Library); Pacific 12 Conference, Media, Sponsorship and Digital Rights, Pacific 12 Handbook CB 3-2 (July 1, 2012) (on file with author).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See *Summertime Conference Realignment*, *supra* note 1.

¹⁸² See Gregory M. Duhl, *Conscious Ambiguity: Slaying Cerberus in the Interpretation of Contractual Inconsistencies*, 71 U. PITT. L. REV. 71, 106–10 (2009).

¹⁸³ See George S. Geis, *An Embedded Options Theory of Indefinite Contracts*, 90 MINN. L. REV. 1664, 1668–69 (2006).

¹⁸⁴ See *Trustees of Boston College*, 18 Mass. Rptr. at 182 (“The parties here are colleges and universities, acting through their Presidents and Chancellors. The Court takes notice that at least eight, maybe nine, of the Charter Member universities in the Big East have their own well-respected law schools and many have their own in-house counsel. This Court will presume, therefore, a significant degree of sophistication and familiarity by those Presidents and Chancellors with documents-like the Constitution here-governing non-profit institutions, as well as with the plain meaning of the English language.”).

¹⁸⁵ See generally Gillian K. Hadfield, *Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law*, 82 CAL. L. REV. 541 (1994).

where the legal outcome is so unclear? Or, will they simply acquiesce to the indefinite agreement that would prove to be a costly litigation matter?

A simple cost-benefit analysis likely leads schools to comply with the grant of rights. The chances of success in litigation are uncertain, and the relative value of prevailing is not particularly high—especially if the value is not monetary and therefore difficult to quantify in monetary terms: winning, fan support, etc. Therefore, if the grants of rights prove to be successful at slowing, if not stopping, conference realignment, it is not due to the documents' legal terms. Instead, it is due to its lack of terms, the overwhelming litigation expense, an uncertain outcome, and almost no monetary gain. The grants of rights are silent rather than speaking.

V. PROPOSED CONSIDERATIONS FOR FUTURE GRANTS OF RIGHTS FROM THE CONFERENCE PERSPECTIVE

“[The Grant of Rights is] a chicken-and-egg thing. You do it not to become stable, but you do it because you are stable.”¹⁸⁶

While this Article takes no position on whether the grant of rights is a useful or beneficial document, if conferences and broadcasters insist on continuing to use grants of rights, there are several improvements that they should make to improve the enforceability of those agreements. These improvements reflect solutions to the concerns previously noted in this Article.

A. Process Considerations

For the grant of rights to be most effective, conferences must prepare for schools that intend to act strategically in breaching the grant. While this Article identifies certain circumstances that could make a strategic breach possible at any point in time, these breaches are more likely to occur toward the end of the term of the grant of rights. Conferences should respond to these concerns through forward thinking and advanced planning regarding how to handle the evolving collegiate athletic landscape and re-execution of the grant of rights.

1. Diminishing Effect of Grant of Rights

The primary challenge that conferences face is the diminishing effect of the grant of rights over time. Below is an expanded statement of the *Money*

¹⁸⁶ Thamel, *supra* note 127 (quoting Jim Delany, Big Ten Conference Commissioner).

term from the previously discussed Model. This expanded statement assumes an executed grant of rights securing member schools' television revenue for a fixed period equal to that of the conference's television contract. Recall that D is the revenue a school gains from realignment and C is monetary losses from realignment.

$$\overbrace{b_1(D - C)}^{\text{Money}} = b_1 \left[\overbrace{\tilde{D}}^{\text{Realignment Revenue}} - \left(\overbrace{V \left(\frac{y}{z} \right)}^{\text{Loss on Television Contract}} + \overbrace{\tilde{X}}^{\text{Other Losses}} \right) \right]$$

In this restatement, y is the number of years remaining on the conference's television contract, and z is the total number of years of the contract. V is the total value of the contract. The ratio represented by the entire *Loss on Television Contract* term relates that fractional time to the total value of the contract, providing the proportion of unearned television revenue remaining on the contract at any given time that would be lost if a school left the conference.¹⁸⁷ X is other monetary losses not directly associated with television revenue, including, among other items, losses collateral to television revenue (for example, litigation costs regarding the grant of rights). Recall that so long as C is greater than D , a school will lose money by changing conferences.

This construction of the mechanisms behind television contracts is admittedly an oversimplification. Yet, the importance of this exercise is to show that, at a certain point in time, the value of D *may be* equal to or greater than C . Since V is fixed over the course of the contract, y , the number of years left on the contract, is most important. As time progresses and y decreases, the value of the *Loss on Television Contract* term decreases toward its limit of zero.¹⁸⁸ The term would become zero at the natural expiration of the contract because there would be no penalty for leaving the conference—the grant of rights would no longer be in effect.

The overall impact of this function through time is a smaller C term. Therefore, when C becomes sufficiently small, the value of $(D - C)$ will

¹⁸⁷ This construction assumes that the contract pays fixed revenue equally each year through the term of the contract. It is an oversimplification of the real value of the contract at any given point in time. However, the simplification does not impact the outcome of the analysis, only potential timing considerations that are discussed below.

¹⁸⁸ Because z is the fixed period of the contract, as y decreases, the overall term will approach zero.

change signs, from negative to positive; when that change occurs, a school could—at least in reference to the *Money* term—leave the conference efficiently (stated otherwise, efficiently breach the grant of rights). Given that a grant of rights secures a school’s television revenue with the conference, and that loss of potential television revenue is likely one of the largest monetary losses possible through a change in conferences, when the television revenue loss is at its lowest point is when realignment will occur. Again, that lowest point is where the *Loss on Television Contract* term is at its lowest: when y is at its lowest potential value, by definition, near the end of the current grant of rights. Conferences can manipulate y then by repeatedly extending the grant of rights sufficiently prior to its natural expiration.

2. Collateral Risks of a Time-Diminished Grant of Rights

Understanding the constantly diminishing effectiveness of the grant of rights, conferences must take affirmative steps in order to preserve the value of the grant. The most effective means to protect against this concern is for conferences to push for schools to re-execute grants of rights well in advance of the expiration of the current grants—“well in advance” likely meaning a matter of years rather than months. For those schools that are actually seeking to leave the conference, this advance re-execution lessens the availability of an efficient or relatively low cost breach, in effect maximizing the value of C above.

The challenge for conferences is convincing schools to actually re-execute the grants. Logically, the schools that are not interested in leaving the conference will re-execute the grant immediately; somewhat ironically, the grant is not particularly meaningful when executed by those schools as it is not actually *securing* their place in the conference as much as *evidencing* their place in the conference. The failure of a school to re-execute the grant of rights would, however, be the canary in the coal mine for conferences. It would allow the conference to have an idea of which schools were considering leaving for a different conference. If nothing else, this process would give conferences time to exert pressure on or provide further incentives to schools to stay in their conference.

This solution of mandating a re-execution of the grant of rights would likely shift power within the conference, however. As conferences currently stand, many of the most powerful members of conferences, called “cornerstone members” for this discussion, are those long-time members that have no interest in changing conferences. It is unlikely that those cornerstone members would hold out re-executing the grant of rights. On the other hand, non-cornerstone members would have an incentive to hold out. As a

flight risk to other conferences, they would have the power to demand more during re-execution negotiations, whether in terms of television revenue, voting power, or some other meaningful compensation. The cornerstone members would be forced to provide those incentives or at least call the bluff of the non-cornerstone members.

This challenge is not unique to the advance re-execution strategy. When the grant of rights expires, non-cornerstone members could still employ the same negotiation strategy.¹⁸⁹ The question is only *when* that negotiation occurs: at the expiration of the grant of rights, or in advance of the expiration? Therein lies one of the grant of right's greatest weaknesses. If schools act strategically and in their own best interest—as opposed to the best collective interest or in the best interest of the conference—those schools will use the conference's weapon against the conference. The grant was meant to hold non-cornerstone members in the conference; the cornerstone members would then receive value from non-cornerstone membership by presumably receiving a larger television contract. At the expiration or re-execution of the grant, those non-cornerstone members could use their re-execution of the grant as a negotiating chip against the cornerstone members. After all, without the non-cornerstone members, the cornerstone members could not possibly receive the same value from the television contract. If the non-cornerstone members act strategically, the grant of rights will ironically be a structural mechanism used against the conference and its cornerstone members, while it was originally meant to be a mechanism used against non-cornerstone members to temper their interest in leaving the conference.

¹⁸⁹ In essence, this situation would create a prisoner's dilemma. See generally ANATOL RAPOPORT, PRISONER'S DILEMMA: A STUDY IN CONFLICT AND COOPERATION (1965). Philip Ball, *Physicists Suggest Selfishness Can Pay*, NATURE (Aug. 23, 2012), <http://www.nature.com//physicists-suggest-selfishness-can-pay-1.11254>, {<https://perma.cc/VG68-KTG5>}.

"The prisoner's dilemma is a simple 'game' that captures the fundamental problem faced by a population of organisms competing for limited resources: the temptation to cheat or freeload. You might do better acting together than working alone, but the temptation is to take a share of the spoils while letting others put in the effort and face any risks.

The simplest version of the game pits a pair of players against each other. The players obtain particular pay-offs if they elect to cooperate or 'defect' (act selfishly). In a single bout it always makes sense to defect: that way you're better off whatever your opponent does. But if the game is played again and again—if you have repeated opportunities to cheat on the other player—you both do better to cooperate."

This structural conflict is the problem contemplated in Jim Delaney's statement that begins this section. The grant of rights should not be a means to force conference stability as it simply pushes the threat of short-term instability off into the future. Rather, the grant of rights should be evidence of the cohesion of a conference and schools working together. Unfortunately, regardless of whether the grant was created to force stability or evidence cohesion, the grant itself will take the same form. Conferences should then ask themselves which category their current grant occupies and take other steps to solidify the conference relationship for grants that attempt to force stability.

B. Substantive Changes

If conferences choose to continue with the strategy of a grant of rights, the form of the grant should be changed to make it more enforceable. First, at the very least, the grant of rights should include specific language in the body of the grant—that is, not in the recitals—that demonstrates valid consideration. Schools looking to challenge the grant of rights will likely first attempt to challenge the document based on that omission. At the very least, conferences can add a clause incorporating the otherwise ineffective recitals into the grant, similar to the ACC's grant of rights.¹⁹⁰ This change requires very little effort and negotiation on the part of the conference and would result in the elimination of future arguments regarding the effectiveness of operative language in the recitals made by schools attempting to revoke the grant.

Second, the conference should distinguish the grant of rights from a withdrawal fee.¹⁹¹ As shown above, withdrawal fees come with limited, but negative, legal precedent regarding their enforceability.¹⁹² Unsurprisingly, there is no precedent regarding the grants of rights, due to the short amount of time since their creation. To avoid schools characterizing the grant of rights as a withdrawal fee, conferences should *actually establish* a withdrawal fee in addition to the grant of rights (to the extent that a withdrawal fee does not already exist in the conferences' bylaws). That fee does not have to be burdensome; in fact, the withdrawal fee would not need to be large at all as its importance would not actually be to dissuade schools from leaving the conference. Instead, it would be used for conferences to argue convincingly during litigation that the grant of rights is not a withdrawal fee because

¹⁹⁰ See *supra* note 130 and accompanying text.

¹⁹¹ For the purposes of this Article, a withdrawal fee is the same as an exit fee.

¹⁹² See *supra* notes 167–68 and accompanying text.

there *is* actually a withdrawal fee that is not the grant of rights. This change would avoid the necessity inquiry that comes along with a withdrawal fee.¹⁹³ While a school fighting the enforceability of the grant of rights will almost assuredly analogize the grant of rights to a withdrawal fee, that analogy is weaker if a named withdrawal fee actually exists.

Finally, in what may be seen as an extreme departure from the status quo, the grant of rights assignment could go from the schools to the broadcasters, instead of from the schools to the conference. This change would ensure a more enforceable grant of rights.¹⁹⁴ As shown above, where schools may argue today that their exit is not actually harming the conference—it is harming broadcasters, which may make the grant of rights revocable and effectively unenforceable—that argument would not be available if the grant were actually made to the broadcaster.

However, the challenges created by granting broadcaster television rights may be too great. While the grant will likely be more enforceable, it would be unsurprising for schools, conferences, and fans alike to be upset by this change: it could be seen as schools perpetuating, if not supporting, the commercialization of the sport. Further, given the nature of television broadcasting, it is entirely possible that the grant would be transferred again from the broadcast company to some other entity. In this scenario, the practical complications of securing the grant of rights likely outweigh the legal benefits of having that grant of rights, especially considering that schools are unlikely to challenge the grant of rights in its current form due to the looming legal uncertainty of the challenge.

VI. ALTERNATIVE SOLUTIONS TO CONFERENCE REALIGNMENT

Below are several new proposals for how to address the realignment issue, without making any changes to the grant of rights. These solutions attempt to influence the non-*Money* Realignment Model factors. Specifically, conferences could push a further integration of athletic contests and academic pursuits that would ensure the relevance of conference membership going forward. Under the current form of the Realignment Model, this approach would influence the value of b_2 , the coefficient associated with the *Exposure/Fans* term.¹⁹⁵ Conferences could also recognize the structural factors affecting realignment and either halt changes to how football national cham-

¹⁹³ See, e.g., *Trustees of Boston College*, 18 Mass. L. Rptr. at 177.

¹⁹⁴ See *supra* Part IV.C.1.ii.

¹⁹⁵ Arguably, the change could instead be a new factor entirely or fall into the *n* (All Else) category. In either case, the solutions presented all attempt to manipulate the value of the non-*Money* factors.

pions are picked or make one, final, long-term decision regarding national championship selection. This solution would reduce variability in b_4 , the coefficient associated with the $M + 1$ *Effects* term, meaning that schools would be less likely to change conferences in the hopes of structurally improving their chances at a football national championship.

A. *Integrate Athletics and Academics*

As discussed above, the current solution to the conference realignment issue—the grant of rights—really only addresses one of the key drivers of realignment: money. It ignores the other factors, implicitly assuming either (1) that money is and will always be the most important factor in the decision to change conferences, or (2) that the amount of money that changing conferences would cost would outweigh any of the other considerations. While the grant of rights may be effective today, as also discussed, the grant of rights assumes that the status quo will persist. As college football evolves, if conferences are indeed concerned about maintaining continuity, they should take an additional step to keep member institutions within the conference. The conference should use the carrot instead of the stick, incentivizing schools to remain within the conference rather than punishing those that leave.

For example, conferences could create internal groups similar to the Big Ten Academic Alliance (BTAA), formerly the Committee on Institutional Cooperation.¹⁹⁶ The BTAA is made up of the members of the Big Ten Conference, which “have advanced their academic missions, generated unique opportunities for students and faculty, and served the common good by sharing expertise, leveraging campus resources, and collaborating on innovative programs.”¹⁹⁷ In essence, these schools have merged academic work and collaboration along with athletic affiliations.

In the same way, other conferences could make conference membership about more than just athletic affiliation. The logic would be that the more that schools depend on one another and are academically intertwined, the more difficult it would be for a school to leave the conference in practical terms. Right now, the decision on whether to leave a conference is really made at the athletic level—while the academic side of the school is involved in the decision, there is currently little doubt that athletics drives the change. If academics were more obviously and explicitly implicated in con-

¹⁹⁶ For a discussion of the Committee on Institutional Cooperation, the predecessor of the BTAA, see *supra* note 10.

¹⁹⁷ *About*, BIG TEN ACADEMIC ALLIANCE, <https://www.btaa.org/about>, {<https://perma.cc/DB46-P7HX>} (last visited Sept. 1, 2016).

ference changes, in practical terms that change may be just as effective, or even more effective, at preventing conference realignment.

B. Halt Changes to the College Football Playoff Structure: Reacting to the Interplay of M + 1 and the Realignment Model

Conferences' decisions to rely solely on the grant of rights as an anti-realignment mechanism demonstrate either a misunderstanding of the factors influencing the realignment decisions or an assumption that money outweighs all. As constructed in the framework of this Article, the impact of the *M + 1* discussion is felt in the *M + 1 Effects* term of the Realignment model. As schools look to consolidate their power in a conference that provides the best potential to win a national championship, they act strategically—subject to transaction costs—to meet those ends. The grant of rights certainly increases those transaction costs. And conferences are betting that the explicit penalty associated with the grant and the ambiguity in how or if the grant will be enforced are enough to keep schools from considering changing conferences.

However, as this Article has explained, the grant of rights strategy is subject to a litany of assumptions: the absolute value of television rights, the relative value of television rights over time, the continued viability of college football as a popular sport, the enforceability of the grant of rights, etc. What the existence of a grant of rights therefore demonstrates is that it was created as a short-term solution to a long-term problem. That grant was based on current market conditions, assuming that, for example, television rights tomorrow will be at least as valuable as they are today.

Unfortunately for conferences, circumstances change. And there may come a point where the Realignment Model balance between b_1 and b_4 (the coefficients of the *Money* and *M + 1 Effects* terms, respectively) has sufficiently shifted to make changing conferences more attractive, even over the financial pressure of the grant of rights. This situation is most likely to happen if changes are made to the way in which football national champions are selected, especially in combination with a decrease in the value of television rights. These shifts, and really the more that the number of teams allowed into a playoff changes, the greater that the coefficient for the *M + 1 Effects* term in the Realignment Model will become, signifying an increased importance of the *M + 1 Effects* term. As the salience of the *M + 1 Effects* term increases relative to the *Money* term, it is more likely that the impact of the *M + 1* rule will take hold.

Conferences therefore need to acknowledge and recognize the impact of their consistent waffling on a national championship selection process. To

be sure, many of the changes are political. If an individual conference has had great success under the current national championship selection structure, it would be foolish for that conference to advocate for a change in structure. Conversely, if a conference is struggling under the current structure, it would advocate for a more advantageous one. This mindset is shortsighted. It is sacrificing long-term conference stability for the chance at a national championship in the short term. Conferences must put aside short-term ambitions for long-term stability.¹⁹⁸

That behavior on the part of conferences raises an important question: do conferences—through their constituent members—place a higher value on conference stability or winning on the field? If recent actions are any indication, conferences are much more concerned about the short-term benefits of their decisions. This conclusion reinforces the proposition of the impact of the $M + 1$ rule on realignment. The shorter the view that schools and conferences take in their decision-making, the more like an election selecting a national championship seems.

The ultimate solution to the realignment challenge is to have a meaningful discussion and thought on the future of collegiate athletics. There are certainly many unknowns. Is college football a sustainable enterprise given current health and safety concerns?¹⁹⁹ Is the student-athlete designation on its last leg?²⁰⁰ Is the NCAA as an organization the governing body of collegiate athletics of the future?²⁰¹ For the sake of maintaining viable conferences, the major conferences need to come together and make thought-out, rational decisions that are forward looking. Only then will conferences be addressing the whole picture—being represented by the Realignment Model—underlying conference realignment.

¹⁹⁸ Granted, the coaches actually responsible for attaining that long-term stability and success on the field are given a short timetable when it comes to finding success. See Rachel Bachman, *The Conferences Where Coaches Rent*, WALL STREET J. (Sept. 17, 2012, 9:58 AM), <http://www.wsj.com/articles/SB10000872396390443816804578000344106107644>, {<https://perma.cc/4P48-QG72>}.

¹⁹⁹ See Michael Sokolove, *Down by Law*, N.Y. TIMES MAGAZINE, Nov. 9, 2014, at MM42, available at http://www.nytimes.com/2014/11/09/magazine/how-one-lawyers-crusade-could-change-football-forever.html?_r=0, {<https://perma.cc/YMB2-3H49>}.

²⁰⁰ See Gary Gutting, Opinion, *The Myth of the “Student-Athlete”*, N.Y. TIMES, Mar. 15, 2012, <http://opinionator.blogs.nytimes.com/2012/03/15/the-myth-of-the-student-athlete/>, {<https://perma.cc/3BXQ-8F2W>}.

²⁰¹ See Ben Strauss, *After Ruling in O’Bannon Case, Determining the Future of Amateur Athletics*, N.Y. TIMES, Oct. 22, 2014, at B15, available at <http://www.nytimes.com/2014/10/22/sports/after-obannon-ruling-figuring-out-whats-next.html>, {<https://perma.cc/2DUB-SKWF>}.

VII. CONCLUSION

The grant of rights is a legal band-aid on a business issue. Conferences and cornerstone members of conferences have decided that in order to maintain conference stability—which is in the best interest of each of those groups, although not necessarily in the interest of non-cornerstone members—the conference would wield a large legal stick. In today's collegiate athletic environment, that solution works. However, the grant of rights should only be viewed as temporary stop-gap, as a sort of market-created preliminary injunction. To assume that the grant of rights is a long-term solution to the realignment issue, a permanent injunction to continue the analogy, is misunderstanding the motivating factors behind realignment from a business, and potentially legal, perspective. And the long-term view of the grant of rights could be harmful to the continued existence of conferences, at least in their current power structure.²⁰²

As conferences implement measures to prevent conference realignment, such as the grants of rights, challenges to those measures will almost certainly occur. While the effort put into those challenges may vary, conferences would be well served to critically examine their anti-realignment tools to make those tools as effective as possible. Otherwise, the current measures may be practically and legally unenforceable, and collegiate athletics may be forced to deal with yet another wave of conference realignment, depriving fans of their “instant classics.”

²⁰² For a discussion of how non-cornerstone members of a conference could use the grant of rights as an offensive negotiating tool against cornerstone members, see section IV.B.