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Standards of Review in Law and Sports:
How Instant Replay's Asymmetric Burdens
Subvert Accuracy and Justice

Steve P. Calandrillo*

Joseph Davison**

ABSTRACT

A fundamental tension exists in both law and sports: on one hand, adjudicators must “get the decision right” in order to provide fairness to the parties involved, but on the other, they must issue speedy and certain rulings to avoid delaying justice. The certainty principle dictates that courts follow *stare decisis* in the law even if they believe that an earlier decision was wrong. However, it is often the case that there is a need to reverse earlier decisions or the law itself in order to make the correct call on appeal. Both law and sports are constantly balancing the goals of accuracy, fairness, certainty, and speed by providing for different standards of proof for initial rulings versus appellate review, as well as different burdens in civil versus criminal cases. While asymmetrical burdens in law might be desirable (e.g., to protect the rights of the innocent or to reflect the fact that juries are in a better position to judge credibility than appellate judges), they do not carry

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the same intuitive appeal in sports. The commonly used indisputable evidence standard employed by professional sports leagues for reviewing and reversing referee decisions only leads to unnecessary inaccuracy and unfairness. It requires an enormously high threshold to be met before an official's decision on the field can be corrected, whereas absolutely no evidence at all is required to allow that same call to stand. Sports would be well-served to borrow the lessons of law in order to further the fundamental goal of fairness without compromising certainty or speed, abandoning the asymmetrical indisputable proof burden in favor of a de novo standard of review.

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I. INTRODUCTION

For centuries, the appellate process has served as an integral part of America's justice system.¹ Parties on the losing end of a court's judgment occasionally claim that the ruling was incorrect in some specific manner. The law usually allows these parties to appeal to a higher court for review of that decision.² The higher court may be able to reverse the decision, affirm it, or remand it back to the lower court for further review.

By comparison, appellate review in the world of professional sports—known ubiquitously to the layman as instant replay review—is a relatively new phenomenon. While fans complained for decades about inaccuracies and injustices created by officiating errors, instant replay review did not truly explode in popularity until the past decade. A fierce debate over the merits of review ensued. On one side, traditionalists feared both the removal of the human element and the imposition of delays in the game. The other side returned fire with myriad arguments in favor of furthering accuracy and justice. Even though it's "just a game," most fans and players agree that the outcome should be determined by the merits of each team and not by mistakes made by referees or umpires.

However, one of the most overlooked aspects of instant replay review in sports is the asymmetric burdens that each league imposes on the officials in charge of the review. While appellate courts often examine legal issues de novo (meaning no deference is given to the lower court), professional sports leagues take a dramatically different approach. In all such leagues, the standard of review comes far closer to requiring "indisputable visual evidence" before a replay official can overturn a call made on the field.³ On the other hand, absolutely no proof at all is required to uphold the decision. As a direct consequence of this asymmetry, relatively few calls are reversed, even when most observers (including experts) agree based on the visual evidence

¹ See David Rossman, "Were There No Appeal": *The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518 (1990).

² In the federal court system, the levels of judicial decision-making include the district courts, the circuit courts of appeal, and the Supreme Court. State courts are usually organized in a similar manner, though some variances exist.

³ MLB requires *clear and convincing evidence* that the original call made on the field of play was incorrect; the NFL demands *indisputable visual evidence* that warrants the change; the NBA requires *clear and conclusive evidence*; and the NHL requires, unofficially, a *clear view on the video of the opposite or different circumstances*.

that the decision made on the field was likely incorrect. Such a draconian standard in sports does have the limited virtue of reducing challenges and delays in the game, but it comes at the expense of accuracy, fairness, and justice to all parties involved. Witness this year's Super Bowl 50: a crucial incomplete pass call against the Carolina Panthers was allowed to stand after instant replay review even though both of the television announcers, as well as NFL officiating expert Mike Carey, agreed that it was a good catch and that the call should have been reversed. Instead of Carolina driving to take the lead, Denver went on to strip Cam Newton of the football two plays later, completely changing the complexion of America's biggest game and contributing to an incredible upset.

This paper examines why American sports leagues support this continued injustice in sports. America's judicial system does not usually require extraordinary thresholds for reversing most lower court decisions,⁴ even though a person's freedom or entire wealth could be at stake. Why should sports insist on creating a non-level playing field when far less is in play?

At base, asymmetric burdens of review essentially assure a higher level of error than would otherwise be the case.⁵ They bias the reviewer in favor of the decision below, whether or not that decision was accurate and whether or not there is a compelling reason for deference. It is deeply ironic that the standard for reviewing decisions in sports is riddled with structural biases favoring inaccuracy when leagues instituted instant replay to remedy that precise problem in the first instance.

This Article explores the policy justifications in favor of a more balanced standard of review in sports, borrowing from the rationale of the American justice system. We examine the reasoning behind appellate courts' use of the abuse of discretion standard and the clearly erroneous standard, as well as the situations that call for the previously mentioned *de novo*

⁴ With that said, U.S. courts do require high thresholds for reversal of factual determinations made in trial; however, a much lower bar is mandated for reviewing questions of law.

⁵ For a compelling discussion of the pitfalls of imposing asymmetrical burdens of review, see *Cruzan v. Dir. Missouri Dpt. of Health*, 497 U.S. 261, 316 (1990). The *Cruzan* case represents one of the seminal decisions on the right of an incompetent patient to remove herself from life support. In an emotionally gripping dissent, Justice Brennan lamented the asymmetrical burdens imposed on the patient's guardian, as he was required to demonstrate "clear and convincing evidence" that the patient would have preferred removal, whereas no evidence at all was required to be shown by the State of Missouri to continue treatment against the patient's wishes. Brennan argued that "*accuracy . . . must be our touchstone*" and that the rule requiring clear and convincing evidence only served as a barrier to achieving that fundamental goal.

review. While there exist persuasive, legitimate reasons why appellate judges might defer to lower courts or jury determinations (e.g., the trial court is often in the best position to judge the credibility of witnesses and find facts), those same arguments are inapplicable to the world of professional sports. Instant replay officials almost always have access to far greater information than the referees on the field (e.g., multiple camera angles and slow motion replay). This reality militates strongly in favor of a zero-deference policy through a de novo standard of review. Such a standard could maintain the benefits of the current instant replay procedures—such as maintaining game-flow and the human element—while promoting greater accuracy and justice in sports.

It is time that our professional sports leagues learn to borrow the rationales and standards utilized in America's legal system. Otherwise, the extant injustice and inaccuracy that plague our leagues will persist far into the future.

II. BACKGROUND

As an initial matter, it should be observed that there are two archetypal categories of litigation: civil and criminal.⁶ Both types of litigation feature a unique standard of proof in order to determine liability. After a ruling, litigants may appeal specific aspects of the result. The availability of such an appeal depends on several factors, including the party wishing to appeal, the subject matter of that appeal, and certain judicial processes and requirements.⁷ The subject matter of the appeal determines the appellate standards of review and controls the level of deference that the appellate court is to give to the initial ruling. Some commonly utilized appellate review standards include abuse of discretion, clearly erroneous, and de novo review.

Similarly, the major American sports leagues each have an appellate process for on-field rulings called Instant Replay Review. The indisputable visual evidence standard and the clear and convincing evidence standard, among others, govern replay processes. These burdens are noticeably higher than those exercised in appellate litigation and result in infrequent reversals.

⁶ Private individuals or corporations seeking some sort of monetary or equitable relief generally bring civil cases. Local, state, or federal government generally bring criminal cases in response to a potential violation of law. *See Frequently Asked Questions*, BROWARD SHERIFF'S OFFICE, <http://sheriff.org/faqs/displayfaq.cfm?id=ba787291-0b05-4ab2-9840-b9697bba4cce>, {<https://perma.cc/R2W9-S6KV>} (last visited Jan. 15, 2016).

⁷ These requirements include jurisdiction, standing, ripeness, and many others that lay well outside the scope of this Article.

A. Burden of Proof in Criminal and Civil Cases

Burden of proof is a casual term typically used to describe the burdens of production and persuasion required in both civil and criminal lawsuits.⁸ Though the two terms are often lumped together, they have distinct meanings.⁹ The burden of production requires the plaintiff to produce sufficient evidence to support all of the essential elements of her claim, allowing the finder of fact to rule in her favor.¹⁰ If the party with this burden produces insufficient evidence, then the judge may rule against her without sending the case to the jury.¹¹ By comparison, the burden of persuasion is typically what a layperson thinks of when considering the burden of proof—and is what this Article will generally refer to when using the latter term.¹² This burden describes “the standard that the finder of fact is required to apply in determining whether it believes that a factual claim is true.”¹³

These burdens are placed on a civil or criminal court prior to the appellate stage. This process is not unlike a referee making the initial call on the field, prior to an instant replay challenge. When making his initial observation of the play, the referee simply makes the call that he believes is most likely correct (similar to the preponderance of the evidence standard described below). This call may be subject to review, just as a trial court’s initial decision made under one of the following burdens may be appealable to a higher court.

1. Criminal: Beyond a Reasonable Doubt

Throughout criminal proceedings a defendant is presumed to be innocent until proven guilty.¹⁴ As such, since the earliest years of the nation, proof beyond a reasonable doubt has been the common law requirement for

⁸ GEOFFREY C. HAZARD, JR., COLIN C. TAIT, WILLIAM A. FLETCHER & STEPHEN MCG. BUNDY, *PLEADING AND PROCEDURE, STATE AND FEDERAL* 642 (10th ed. 2009).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² The Supreme Court explained this in an opinion. “Burden of proof was frequently used [in the past] to refer to what we now call the burden of persuasion—the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose.” *Id.* at 643 (quoting *Dir., Office of Workers’ Comp. Programs v. Greenwich Collieries*, 512 U.S. 267 (1994)) (alterations in original).

¹³ *Id.* at 642. A party is said to bear the burden of persuasion when a fact finder must hold against that party if it fails to meet a specific standard.

¹⁴ *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978); *Coffin v. United States*, 156 U.S. 432, 453 (1895).

establishing guilt in a criminal case.¹⁵ Under this standard, the defendant is not required to prove that he or she is innocent.¹⁶ In fact, the defendant is not required to prove anything at all.¹⁷

In the seminal case, *In re Winship*, the Supreme Court solidified this heightened standard as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt in a criminal case.¹⁸ The Court gave two reasons for this “indispensable” requirement: (1) defendants may face the loss of liberty if convicted and (2) defendants would be stigmatized by the conviction as having committed immoral acts.¹⁹ Therefore, society requires that the prosecution satisfy a stringent “guilt beyond a reasonable doubt” threshold before a person may be locked away.²⁰

But what *is* beyond a reasonable doubt? This is a difficult question to definitively answer and one that the Supreme Court has grappled with since *Winship*. A combination of case law, model jury instructions, and statistical evidence help illuminate—to the furthest extent possible—a basic definition of the standard. In *Victor v. Nebraska*, the Supreme Court affirmed jury instructions that defined reasonable doubt as “not a mere possible doubt; because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt.”²¹ The Court also affirmed definitions requiring proof beyond a “moral certainty” and an “actual and substantial doubt.”²²

The Federal Judicial Center, the primary research and education center of the federal judicial system,²³ has proposed a definition for jury instructions that is also widely accepted.²⁴ It states that “[p]roof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant’s

¹⁵ *In re Winship*, 397 U.S. 358, 361 (1970).

¹⁶ *Patterson v. New York*, 432 U.S. 197, 200 (1977).

¹⁷ *Id.*

¹⁸ *In re Winship*, 397 U.S. at 361.

¹⁹ *Id.* at 363.

²⁰ *Miles v. United States*, 103 U.S. 304, 312 (1880) (“The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt.”).

²¹ *Victor v. Nebraska*, 511 U.S. 1, 14–15 (1994).

²² *Id.* at 12, 20.

²³ FED. JUDICIAL CTR, <http://www.fjc.gov>, {<https://perma.cc/QUN6-2WAJ>} (last visited Jan. 15, 2016).

²⁴ *See Victor*, 511 U.S. at 26 (Ginsberg, J. concurring) (“The Federal Judicial Center has proposed a definition of reasonable doubt that is clear, straightforward, and accurate.”).

guilt.”²⁵ Noting that the law does not require certainty, the Center proposes instructing jury members that if, “based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.”²⁶ Many courts, including the Ninth Circuit, follow a similar model in their definition of beyond a reasonable doubt.²⁷

Additionally, the legal community has consistently attempted to quantitatively define the beyond a reasonable doubt standard—much like how judges frequently define the preponderance of evidence standard.²⁸ For example, in *United States v. Fatico*, a judge polled his colleagues to inquire about what percentage of certainty they believe the reasonable doubt standard represents. He found that the group of judges “quantified” the standard as low as 76% and as high as 95%.²⁹

²⁵ FED. JUDICIAL CTR, PATTERN CRIMINAL JURY INSTRUCTIONS § 21 (1988), http://federalevidence.com/pdf/JuryInst/FJC_Crim_1987.pdf, {<https://perma.cc/B6W6-HCX4>}.

²⁶ *Id.*

²⁷ See Ninth Circuit Jury Instructions Committee, *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit*, § 3.5 (last updated Dec. 2016), http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Instructions_2016_12_0.pdf, {<https://perma.cc/DAY2-K952>} (“Proof beyond a reasonable doubt is proof that leaves you firmly convinced the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt. A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.”); Criminal Pattern Jury Instruction Committee of the U.S. Court of Appeals for the Tenth Circuit, *Criminal Pattern Jury Instructions*, § 1.05 (2011), http://federalevidence.com/pdf/JuryInst/10th_Crim_2011.pdf, {<https://perma.cc/B7L3-TJXY>} (“Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant’s guilt. . . . A reasonable doubt is a doubt based on reason and common sense after careful and impartial consideration of all the evidence in the case. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.”).

²⁸ *Preponderance of the Evidence*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/preponderance_of_the_evidence, {<https://perma.cc/2SHB-TQYB>} (last visited Jan. 15, 2016) (defining preponderance of the evidence as a “requirement that more th[a]n 50% of the evidence points to something”).

²⁹ *United States v. Fatico*, 458 F. Supp. 388, 410 (S.D.N.Y. 1978).

In sum, while descriptions of the beyond a reasonable doubt standard vary, the standard can in broad brush be distilled down to one distinct principle: proof of guilt must be established to a point of very high confidence, after consideration of all reasonable alternatives. Even in this most demanding of legal standards, however, the careful reader will be sure to note that 100% certainty is *not* required, which is unlike the basic threshold for many major review decisions in the world of sports.

2. Civil: Preponderance of the Evidence

In civil litigation, the generally recognized standard of persuasion is by a preponderance of the evidence.³⁰ “[This] standard results in a roughly equal allocation of the risk of error between litigants.”³¹ To understand preponderance of the evidence, one can imagine a balanced scale. To satisfy the standard, a moving party needs to produce the greater weight of evidence, causing the scale to tip in its favor.³² This typically requires establishing that the existence of the contested fact is more probable than not.³³ For example, the Ninth Circuit’s Model Jury Instructions states: “When a party has the burden of proof on any claim [or affirmative defense] by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim [or affirmative defense] is more probably true than not true.”³⁴ Such a standard is frequently enumerated as a 51% certainty.³⁵

³⁰ *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 (1983) (“Where . . . proof is offered in a civil action . . . a preponderance of the evidence will establish the case.”).

³¹ *Grogan v. Garner*, 498 U.S. 279, 286 (1991).

³² Michael S. Greger, *Preliminary Questions of Fact for the Judge: The Standard of Proof for Pretrial Admissibility Problems*, 20 SW. U. L. REV. 453, 461 (1991).

³³ Neil Orloff & Jerry Stedinger, *A Framework for Evaluating the Preponderance-of-the-Evidence Standard*, 131 U. PA. L. REV. 1159, 1159 (1983).

³⁴ Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, § 1.3 (last updated Nov. 2016), http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Civil_Jury_Instructions_2014_6.pdf, {<https://perma.cc/23FX-DCUG>}. See also *General Instructions for Civil Cases*, FED. EVIDENCE REV., http://federevidence.com/pdf/JuryInst/3d_Civ_Ch1-3_2010.pdf, {<https://perma.cc/DA49-BUDR>}. (“[P]reponderance of the evidence . . . means [plaintiff] has to prove to you, in light of all the evidence, that what [plaintiff] claims is more likely so than not so. To say it differently: if you were to put the evidence favorable to [plaintiff] and the evidence favorable to [defendant] on opposite sides of the scales, [plaintiff] would have to make the scales tip somewhat on [his/her/its] side. If [plaintiff] fails to meet this burden, the verdict must be for [defendant].”) See also Committee on Pattern Jury Instructions District Judges Association - Fifth Circuit, *Fifth Circuit Pattern Jury Instructions- Civil*, § 2.20 (2006), <http://www.lb5.uscourts>

Why do courts employ this balanced burden of proof standard in civil cases? Society believes this burden is warranted because there is no fundamental reason why the default rule should unfairly favor either party, privileging one's interests over the other's.³⁶ Because a decision for either side will only result in the assessment of monetary damages,³⁷ there is no risk of the irreparable harm present in a criminal trial, necessitating a lesser degree of certainty.³⁸

B. *The Steps to an Appeal*

If a party appeals a ruling, it generally does so after the conclusion of litigation; certain exceptions, however, exist.³⁹ Under the Federal Rules of Civil Procedure, an appellant need only file⁴⁰ a notice of appeal in a timely manner.⁴¹ In a criminal case, a convicted defendant may appeal a guilty verdict, but the government may *not* appeal if a defendant is found not guilty.⁴² Again, this asymmetric burden is based on the unique considerations of criminal cases: the accused should not be subject to "double jeopardy."⁴³ That being said, both sides in a criminal case may appeal a

.gov/juryinstructions/fifth/2006CIVIL.pdf, {<https://perma.cc/HQD5-9PV2>} ("A preponderance of the evidence simply means evidence that persuades you that the plaintiff's claim is more likely true than not true.")

³⁵ *Preponderance of the Evidence*, *supra* note 28 (defining preponderance of the evidence as "a requirement that more than 50% of the evidence points to something."); *see also* Jean v. Greene, 523 F. App'x 744, 745 (2d Cir. 2013).

³⁶ *Addington v. Texas*, 441 U.S. 418, 423 (1979) (stating that "society has a minimal concern with the outcome of [] private suits" and thus "litigants [] share the risk of error in roughly equal fashion"); *see also* *Herman & MacLean*, 459 U.S. at 387–90.

³⁷ Greger, *supra* note 32, at 461.

³⁸ *See In re Winship*, 397 U.S. at 363.

³⁹ *HAZARD ET AL.*, *supra* note 8, at 1328 (noting the exceptions for interlocutory appeals under 28 U.S.C. §1292(b), and for appeals from a district court's order after appeal from a magistrate judge).

⁴⁰ In civil cases, the notice must be filed within 30 days of the judgment, whereas in criminal cases, the notice must be filed within 60 days. *Id.* at 1329.

⁴¹ *Id.* at 1327. An appellant may still have to take administrative steps after filing, such as paying fees. But "none of these steps are jurisdictional." *Id.* at 1327–28.

⁴² *Appeals*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/types-cases/appeals>, {<https://perma.cc/AJE2-8UND>} (last visited Dec. 26, 2016).

⁴³ The Fifth Amendment to the United States Constitution provides: "[No] person [shall] be subject for the same offence to be twice put in jeopardy of life or limb. . . ." U.S. Const. amend V.

sentence that is imposed after a guilty verdict.⁴⁴ In a civil case either side may appeal the verdict.⁴⁵

C. *The Virtues and Pitfalls of Stare Decisis*

American courts generally adhere to the principle of stare decisis, which binds them to the holdings of earlier courts. Horizontal stare decisis (a court's own precedent) or vertical stare decisis (the precedent of higher courts) may bind a court.⁴⁶ The doctrine, however, is not understood as a "universal, inexorable command" that enshrines the law as it stands for all eternity.⁴⁷ Rather, stare decisis serves as a means of providing stability and certainty for civilians, litigants, and lawyers alike, who can act with the security that the lessons of past decisions will govern future legal conflicts.⁴⁸ Therefore, when a court determines that a particular case exposes a flaw in legal reasoning so gaping that the benefits of rectifying it outweigh the resulting loss of stability and certainty, it may choose not to follow stare decisis and overturn a prior decision.

The doctrine's proponents proffer more than the certainty argument. In particular, stare decisis promotes judicial economy; courts are freed from needing to reevaluate prior courts' reasoning every time they encounter a legal issue that their predecessors have adjudicated—a task that would be exhaustive and repetitive. In the words of Justice Louis Brandeis, the world of law places such a high value on stare decisis because "in most matters it is more important that the applicable rule of law be settled than that it be settled right."⁴⁹

However, stare decisis is not without its faults. While appellate courts will sometimes overturn prior decisions where previous courts got the law wrong or where society's mores have changed, the rate at which they do so may be inappropriately low. When a particular statutory analysis would deprive a man of, say, his freedom or his life, a court should be deeply certain that it is not just regurgitating a garbled, faulty interpretation. And what of the doctrine's effect on the judicial mindset? To value administrative efficiency over well-reasoned justice is to slowly convert judges from

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Stare Decisis*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/stare_decisis, {<https://perma.cc/6YMU-63SK>} (last visited Jan. 18, 2016).

⁴⁷ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 954 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

⁴⁸ *See Stare Decisis*, *supra* note 46.

⁴⁹ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932).

meticulous analysts into mindless civil servants whose purpose is merely to find the law, not critique and reevaluate it when necessary. Likewise, the world of professional sports should be wary about privileging the certainty of referee decisions made on the field over the justice of reaching the right result in the end.

D. Standards of Review in Appellate Cases

Instant replay challenges in the world of sports are in effect “appeals” of the lower officials’ decision on the field, and as such they can be analogized to appellate review in our legal system. It is thus logical to consider the standard of review that the judiciary uses when trial court decisions are challenged and why those standards are appropriate in each context. A standard of review is the measure of deference an appellate court gives to the rulings of the lower court. Sometimes appellate courts will defer to the lower court’s decision and grant great discretion (e.g., reversal only if the trial court ruling was clearly erroneous), whereas at other times appellate jurists offer no such leniency to the initial decision-maker (e.g., de novo review). Let us understand these legal standards and the reasons for their imposition, so we can apply their lessons outside the realm of law as well.

1. The Clearly Erroneous Standard

The clearly erroneous standard is a highly deferential measure used to review findings of fact.⁵⁰ Federal Rule of Civil Procedure 52(a)(6) states that “[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”⁵¹ As the Supreme Court explained in *Anderson v. City of Bessemer City, N.C.*, “[a] finding is ‘clearly erroneous’ when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”⁵² This standard “does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.”⁵³

⁵⁰ See *Ornelas v. United States*, 517 U.S. 690, 694 n. 3 (1996) (“‘Clear error’ is a term of art derived from Rule 52(a) of the Federal Rules of Civil Procedure, and applies when reviewing questions of fact.”).

⁵¹ *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

⁵² *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

⁵³ *Id.*

Even if the appellate court is convinced that it would have weighed the evidence differently, it may not reverse the ruling.⁵⁴

What is the reasoning behind appellate courts' deference to trial courts' findings of fact? The rationale supporting the clearly erroneous standard of review recognizes that trial judges' (and juries') "major role is the determination of fact, and with experience in fulfilling that role comes expertise."⁵⁵ A trial judge is present during the witnesses' questioning and thus has greater access to the testimonial evidence than an appellate court. As such, "due regard [is given] to trial court's opportunity to judge the witnesses' credibility."⁵⁶

2. The De Novo Standard

By comparison, questions of law are reviewed de novo.⁵⁷ Under this standard, the appellate court considers the matter anew—the same as if the matter had never been heard and decided before.⁵⁸ Just as the trial court has a unique institutional role in resolving factual disputes, an appellate court has the institutional role of resolving legal questions.

Immediately noticeable is the stark difference between the deference shown by appellate courts to trial courts on findings of fact versus the lack of any deference on issues of law. As explained by the Supreme Court, "[d]istrict judges preside alone over fast-paced trials: of necessity they devote much of their energy and resources to hearing witnesses and reviewing evidence . . . Thus, trial judges often must resolve complicated legal questions without benefit of extended reflection or extensive information."⁵⁹ In contrast, "[c]ourts of appeals . . . are structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues."⁶⁰

⁵⁴ *Id.*

⁵⁵ *Id.* at 574.

⁵⁶ Fed. R. Civ. P. 52(a).

⁵⁷ *Valley Natural Fuels v. Comm'r of Internal Revenue*, 990 F.2d 1266 (9th Cir. 1993).

⁵⁸ *Ness v. Comm'r of Internal Revenue*, 954 F.2d 1495, 1497 (9th Cir. 1992) (citing *United States v. Silverman*, 861 F.2d 571, 576 (9th Cir. 1988)).

⁵⁹ *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231–32 (1991) (internal quotation marks omitted).

⁶⁰ *Id.*

3. The Abuse of Discretion Standard

Discretionary decisions are reviewed under the abuse of discretion standard. “When a district court is vested with discretion as to a certain matter, it is not required by law to make a *particular* decision. Rather, the district court is empowered to make [its own] decision . . . that falls within a range of permissible decisions.”⁶¹ Primarily, abuse of discretion is used as the yardstick for procedural decisions—such as rulings on motions, objections, sentencing, and admissibility of evidence—rather than substantive rules.⁶² Under this standard, the question is not whether the appellate court “would as an original matter have [acted as the trial court did]; it is whether the [trial court] abused its discretion in so doing.”⁶³ A district court “abuses” its discretion when “(1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions.”⁶⁴ That being said, as Judge Friendly of the Second Circuit notes, the abuse of discretion standard has no single definition.⁶⁵

In sum, a trial is a complicated process involving a variety of moving parts that interact in distinct ways. Thus, for certain issues, accurate judgments require a judge to have been present in person, as this unique interaction cannot be entirely reflected in the written record available on review. In these circumstances, because the trial judge sees more in the courtroom than any trial record can reflect, an appellate court appropriately gives the trial judge’s discretionary decisions substantial deference.⁶⁶

E. Standards of Review in Major American Sports

Each of the four major professional sports leagues in the United States has recently instituted its own appellate review procedures. In order to formulate a fairer and more accurate standard of review for each sport, it is helpful to understand and explore the current standards of review and the

⁶¹ *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 168–69 (2d Cir. 2001) (emphasis in original).

⁶² Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 34 (1994).

⁶³ *Nat’l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976).

⁶⁴ *Zervos*, 252 F.3d at 169.

⁶⁵ Henry J. Friendly, *Indiscretion about Discretion*, 31 EMORY L. J. 747, 783 (1982).

⁶⁶ *Id.*

reasons why instant replay reviews arose to begin with. Only then can we draw analogies to law.

1. National Football League: “Indisputable Visual Evidence”

In 1978, the National Football League (“NFL”) tested instant replay for the first time during seven televised preseason games.⁶⁷ The league and its owners immediately realized that instant replay was too technologically advanced and too costly for immediate use and shelved the idea.⁶⁸ Yet, the benefits of instant replay were now apparent, and support began to build for its implementation.⁶⁹ For example, in the 1979 AFC Championship Game, Houston Oilers’ wide receiver Mike Renfro caught what appeared to be a game-tying touchdown late in the third quarter.⁷⁰ The officials ruled the pass incomplete, but television replays clearly showed that the Oilers had scored a touchdown.⁷¹ This play became the enduring symbol for instant-replay advocates.⁷²

In 1985, the NFL again tested instant replay during the preseason, this time with more success.⁷³ As a result, the owners approved the use of instant replay during the regular season, beginning in the 1986 season.⁷⁴ Only a few seasons after its inception, instant replay made a signature impact. In the 1989 Chicago versus Green Bay rivalry game, the Packers’ quarterback Don Majkowski threw a last-minute touchdown to wide receiver Sterling Sharpe for an apparent victory.⁷⁵ Chicago believed that Majkowski had stepped across the line of scrimmage before throwing the pass, and the game officials initially agreed.⁷⁶ The incomplete-pass call was reviewed and then reversed, resulting in a Packers victory.⁷⁷ The contest

⁶⁷ *History of Instant Replay*, NAT’L FOOTBALL LEAGUE OPERATIONS, <http://operations.nfl.com/the-game/history-of-instant-replay/>, {<https://perma.cc/JL5J-RBH3>} (last visited Jan. 15, 2016).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *A Brief History of—Controversial Calls in the NFL Playoffs*, THE GAME BEFORE THE MONEY (Jan. 9, 2015), <http://www.thegamebeforethemoney.com/calls/>, {<https://perma.cc/7NLW-6TGS>}.

⁷¹ *Id.*

⁷² James Dudko, *The History of Instant Replay in the NFL*, BLEACHER REPORT (June 8, 2013), <http://bleacherreport.com/articles/1666250-the-history-of-instant-replay-in-the-nfl>, {<https://perma.cc/GLP4-S7A9>}.

⁷³ *A Brief History*, *supra* note 70.

⁷⁴ *Id.*

⁷⁵ Dudko, *supra* note 72.

⁷⁶ *Id.*

⁷⁷ *Id.*

was later named “the instant replay game.”⁷⁸ Yet despite these successes, in 1991 the league voted against bringing instant replay back, noting its apparent ineffectiveness—only 13% of the challenged calls had been overturned in the previous five years.⁷⁹

Replay remained absent from the NFL until the late 1990s. In 1998, Detroit Lions owner William Clay voiced a particularly strong opinion about replay after a loss to the New England Patriots, saying, “I’ve never seen a game called like that in my life. I thought it was terrible. I don’t give a (bleep) if the commissioner fines me or not. It’s just terrible. If we don’t get instant replay, I give up.”⁸⁰ Soon after, in 1999, the league approved the current system, subject to frequent modifications aimed at aiding the on-field referees in officiating.⁸¹ In each regular season and playoff football game, both teams are permitted two challenges that will trigger an Instant Replay Review.⁸² A team may challenge a play by throwing a red flag onto the field before the beginning of the next play.⁸³ If a team is successful on both of its initial challenges, a third challenge will be granted as well.⁸⁴ Team challenges are only allowed in relation to certain types of plays, such as complete passes, interceptions, and fumbles.⁸⁵ The league generally prefers to keep “subjective” play calls, such as pass interference and holding penalties, non-reviewable.⁸⁶ All scoring plays trigger an auto-

⁷⁸ *Id.*

⁷⁹ *History of Instant Replay*, *supra* note 67.

⁸⁰ Leonard Shapiro, *Whether Heads or Tails, Steelers Still Lose*, THE WASH. POST, Nov. 28, 1998, https://www.washingtonpost.com/archive/sports/1998/11/28/whether-heads-or-tails-steelers-still-lose/c5523c80-df33-4dc1-9c8b-bea30265b3f4/?utm_term=.4d0395501245, {<https://perma.cc/CH6T-F5RG>}.

⁸¹ *History of Instant Replay*, *supra* note 67.

⁸² 2015 NFL Rulebook, NAT’L FOOTBALL LEAGUE OPERATIONS Rule 15, Section 2, Article 1, <http://operations.nfl.com/the-rules/2015-nfl-rulebook/>, {<https://perma.cc/FZ53-QZA3>} (last visited Jan. 15, 2016).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at Rule 15, Section 2, Article 4.

⁸⁶ Michael David Smith, *Dean Blandino Calls Illegal Bat Calls “Subjective,”* NBC SPORTS PRO FOOTBALL TALK (Oct. 6, 2015, 11:33 AM), <http://profootballtalk.nbc.com/2015/10/06/dean-blandino-calls-illegal-bat-calls-subjective/>, {<https://perma.cc/UC3Q-YKHV>}.

The NFL rulebook does not offer an explanation as to why most penalties and other such subjective calls are not reviewable. Most likely, league officials have chosen this path so as not to open the floodgates to longer and more frequent review delays, which might significantly increase overall game time. That said, if the NFL were to maintain its current number of allowable per-game challenges but make more types of plays reviewable, no such additional delay would result. Alternatively, the main rationale behind the rule might be to limit overall criticism of referee decisions. However, increased opportunities for such criticism

matic Replay Review—one that is distinct from team-initiated challenges.⁸⁷ Additionally, the NFL allows a Replay Official to trigger replay reviews after the two-minute warning of each half and throughout any overtime period.⁸⁸ There is no limit to the number of replays that the Replay Official can initiate.⁸⁹

Once a particular play has been appropriately challenged, the on-field referee conducts a replay review.⁹⁰ All reviewable aspects of the play may be examined and are subject to reversal, even if the aspect in question is not actually specified in a team challenge or the Replay Official's request for review.⁹¹ The on-field referee reviews the play on a sideline monitor for a maximum of sixty seconds,⁹² while officiating experts in the league's New York headquarters consult with him throughout the process.⁹³ A decision will be reversed only when the referee has *indisputable visual evidence*⁹⁴ that warrants the change.⁹⁵ Lacking such indisputable visual evidence, the ruling on the field will stand or be confirmed. To "confirm" the original call means that on replay the referee verified with certainty that the call was correct. If the original call "stands," it means that the evidence on the replay was not sufficient to meet the indisputable evidence standard to over-

might ultimately lead to greater league efficiency at hiring and firing effective referees. Finally, the distinction between penalties and other calls appears to be a distinction without a difference. A team might be equally disadvantaged by an incorrectly assigned penalty as a blown missed catch call.

⁸⁷ 2015 NFL Rulebook, *supra* note 82, at Rule 15, Section 2, Article 2.

⁸⁸ *Id.* at Rule 15, Section 2, Article 2.

⁸⁹ *Id.* at Rule 15, Section 2, Article 2, Note 1.

⁹⁰ *Id.* at Rule 15, Section 2, Article 3.

⁹¹ *Id.* at Rule 15, Section 2, Article 3, Note 2.

⁹² *Id.* at Rule 15, Section 2, Article 3, Note 1.

⁹³ *History of Instant Replay*, *supra* note 67.

⁹⁴ It should be noted that the 2016 NFL Rulebook shifted the pertinent terminology from "indisputable visual evidence" to "clear and obvious visual evidence." 2016 NFL Rulebook, NAT'L FOOTBALL LEAGUE OPERATIONS Rule 15, Section 2, Article 3, <http://operations.nfl.com/media/2224/2016-nfl-rulebook.pdf>, {<https://perma.cc/6K3D-PJWH>} (last visited Jan. 8, 2017). This Article continues to use the term "indisputable visual evidence" to avoid confusion, as it is the most commonly understood phrase and there is no indication that the shift to "clear and obvious visual evidence" is anything more than a modification of title. In addition, the NFL has provided no commentary signaling that "clear and obvious visual evidence" describes a different standard than did "indisputable visual evidence".

⁹⁵ 2015 NFL Rulebook, *supra* note 82, at Rule 15, Section 2, Article 3. For an excellent analysis of the impacts of the NFL's "indisputable visual evidence" standard of review see Mitchell Berman, *Replay*, 99 CAL. L. REV. 1683 (2011).

turn the call, nor could the referee confirm the call.⁹⁶ In fact, a referee might be 95% sure that the call on the field was incorrect after watching the replay, but that would still fall short of satisfying the necessary standard for reversal. Only if there is *indisputable* visual evidence that the call on the field was wrong will the referee overrule the call. In this case, he might make other revisions, such as resetting the clock.

While coaches frequently believe that calls on the field should be overturned, the indisputable visual evidence standard of review has kept the number of reversals well under 50% (as well as drastically limited the number of challenges in the first place).⁹⁷ From 1999–2013, there were 3,816 NFL games.⁹⁸ Over that period of time, there were 4,717 plays reviewed (1.2 per game), 3,096 of them being team challenges.⁹⁹ Of those 3,096 team challenges, 1,702 were reversed, a total of 36%.¹⁰⁰

2. Major League Baseball: Clear and Convincing Evidence

Priding itself on its tradition, Major League Baseball (“MLB”) was the last of the major American sports to introduce replay into its regular-season and post-season games. In 1987, then-Commissioner Peter Ueberroth stated that umpire decisions are “a part of the game and part of the tradition of the game” and that he would rather not see “baseball become plastic with the use of instant replays.”¹⁰¹ Nevertheless, in 2008, under the leadership of Commissioner Bud Selig, the league first instituted replay for disputed home run calls.¹⁰² As then-Cleveland Indians’ General Manager Mark Shapiro said, “[w]e have the technology and ability to get the calls right, so we should.”¹⁰³

⁹⁶ Jarrett Bell, *At NFL’s Command Center, Reviews Must Be Right*, USA TODAY, Nov. 10, 2014, <http://www.usatoday.com/story/sports/nfl/2014/11/10/officiating-command-center-reviews-dean-blandino/18784813/>, {<https://perma.cc/MYU3-8WBN>}.

⁹⁷ *History of Instant Replay*, *supra* note 67.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Marc McFarland, *Baseball Commissioner Peter Ueberroth Said Thursday That Instant Replay . . .*, UNITED PRESS INTERNATIONAL (Oct. 29, 1987), <http://www.upi.com/Archives/1987/10/29/Baseball-Commissioner-Peter-Ueberroth-said-Thursday-that-instant-replay/8240086533250/>, {<https://perma.cc/5F96-TQBQ>}.

¹⁰² Associated Press, *MLB Approves Replay in Series That Start Thursday*, ESPN (Aug. 27, 2008), <http://sports.espn.go.com/mlb/news/story?id=3554357>, {<https://perma.cc/Q3A6-QHA7>}.

¹⁰³ Russ VerSteeg & Kimberley Maruncic, *Instant Replay: A Contemporary Legal Analysis*, 4 MISS. SPORTS L. REV. 153, 191 (2015), <http://mssportslaw.olemiss.edu/>

Yet it was not until the 2014 season that the MLB owners approved an extended use of instant replay. Unfortunately, this came several years too late to rectify some of the league's more infamous missed calls, which could have been corrected through instant replay.¹⁰⁴ For example, on June 2, 2010, Armando Galarraga almost became one of fewer than two-dozen players in MLB history to pitch a perfect game. With two outs in the ninth inning, Galarraga faced Jason Donald, who hit a soft ground ball to first base.¹⁰⁵ First baseman Miguel Cabrera quickly threw Galarraga the ball, who touched first base for the out before Donald could get there.¹⁰⁶ Famously, Umpire Jim Joyce ruled Donald safe, giving him an infield single and ending Galarraga's bid for a perfect game.¹⁰⁷ Video replay showed that Galarraga clearly beat Donald to the bag, but the team and umpires were without the option for replay.¹⁰⁸

Partially as a result of the Galarraga injustice, MLB now uses video replay review in all regular and post-season games to provide timely review of certain disputed calls.¹⁰⁹ Each team receives one Manager Challenge at the start of every regular-season game and two Manager Challenges at the start of every post-season game.¹¹⁰ On the one hand, if the team wins its challenge, the team retains the Manager Challenge.¹¹¹ On the other hand, if the Replay Official does not overturn the challenged call, the team loses its ability to appeal future calls in the game.¹¹² Challenges are only allowed after certain types of plays, such as potential home run calls, force/tag play calls, catch plays in the outfield, base running, collisions at home plate, and

files/2015/09/EIC-VerSteege-Edit-FINAL-Macro-p.-153-273.pdf, {<https://perma.cc/FF23-VZT5>} (quoting Stan McNeal, *Upon Further Review . . . Baseball Replay Didn't Arrive on August—As Was Rumored—But It's Still on the Horizon*, THE SPORTING NEWS 76 (Aug. 2008)).

¹⁰⁴ Paul Hagen, *Expanded Replay Approved, to Begin This Season*, MAJOR LEAGUE BASEBALL (Jan. 16, 2014), <http://m.mlb.com/news/article/66737912/mlb-approves-expanded-instant-replay-beginning-with-2014-season>, {<https://perma.cc/AF44-ABMX>}.

¹⁰⁵ *Joyce Behind Plate Day after Blown Call*, ESPN (June 3, 2010), <http://sports.espn.go.com/mlb/news/story?id=5246454>, {<https://perma.cc/6ZDD-QSBG>}.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Replay Review Official Info*, MAJOR LEAGUE BASEBALL, http://m.mlb.com/official_rules/replay_review, {<https://perma.cc/U8UL-T4S8>} (last visited Jan. 15, 2016).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

tag-ups.¹¹³ Approximately 90% of all potential calls are reviewable.¹¹⁴ Additionally, MLB allows the Replay Official to initiate a video replay review of any potential home run call.¹¹⁵ Furthermore, the crew chief may utilize video replay review for any reviewable call beginning in the seventh inning, at his own behest or upon the request of a manager with no remaining Manager Challenges.¹¹⁶

After a challenge has been made, the Replay Official must determine whether there is *clear and convincing evidence* that the original call made on the field of play was incorrect.¹¹⁷ Similar to the NFL, the original decision of the umpire will stand unless the Replay Official definitively concludes that the call on the field was incorrect.¹¹⁸ Without clear and convincing evidence that the call was incorrect there are two things that could happen. First, if there is an absence of conclusive video, the call will stand. Second, if the video provides conclusive evidence to support the call, that call is confirmed.¹¹⁹ If the video replay review results in a change to a call, the crew chief, if possible, will make the appropriate changes to place both teams in the position they would have been in had the call on the field been correct.¹²⁰ The Replay Official's decision is "final and binding . . . and is not subject to further review or revision."¹²¹

On review, MLB calls have been overturned at a slightly higher rate than those in the NFL. Over the course of the 2015 baseball season, there were 1,360 instant replay challenges¹²² over 2,466 games,¹²³ a total of 0.55

¹¹³ *Id.*

¹¹⁴ Paul Hagen, *Instant Replay Review FAQ*, MAJOR LEAGUE BASEBALL (Mar. 26, 2014), <http://m.mlb.com/news/article/70189582/instant-replay-review-faq>, {<https://perma.cc/C5A9-ZYUU>}.

¹¹⁵ *Replay Review Official Info*, *supra* note 109.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Oliver Roeder, *Has Expanded Replay Worked Well in Baseball? Here's Our Call*, FIVETHIRTYEIGHT (Sept. 12, 2014), <http://fivethirtyeight.com/features/has-expanded-replay-worked-well-in-baseball-heres-our-call/>, {<https://perma.cc/8M29-U98S>}.

¹²⁰ *Replay Review Official Info*, *supra* note 109, at Section (II)(J)(3).

¹²¹ *Id.* at Section (II)(D)(6).

¹²² *MLB Instant Replay Database*, https://baseballsavant.mlb.com/replay?challenge_type=&year=2015&challenger=teamchallenging&team, {<https://perma.cc/4NTD-3S6Z>} (last visited Jan. 15, 2016).

¹²³ See *Which Major League Baseball Teams Had the Best Success with Instant Replay Challenges*, MAKEGAMEDAYEVERYDAY (Oct. 9, 2015), <http://www.makegamedayeveryday.com/newsfeed/2015/10/9/10091/which-major-league-baseball-teams-had-the-best-success-with-instant-replay-challenges>, {<https://perma.cc/EG26-45H7>} (indicating that there are 2,430 regular season MLB games); see also *Postseason 2016*

per game. Of those 1,360 challenges, only 669 of them resulted in a reversal (49%).¹²⁴ That success rate has remained relatively consistent over time, as it was 47% the year prior.¹²⁵

3. National Basketball Association: Clear and Conclusive Evidence

The National Basketball Association (“NBA”) began using instant replay after the 2001–2002 season.¹²⁶ Initially, the system was only used to review last-second shots,¹²⁷ but countless missed calls forced the NBA to expand the availability of review. For example, in 2007, the Los Angeles Clippers trailed the Houston Rockets by three points with 2.5 seconds left in the game.¹²⁸ Clippers player Cuttino Mobley was fouled behind the three-point line, but the referee ruled it a two-point shot.¹²⁹ At the time, this call was not reviewable.¹³⁰ As a result, Mobley was only awarded two foul shots and the Clippers lost the game.¹³¹

Replay has since been expanded to include fifteen total scenarios: among them, reviews of flagrant fouls, determinations of whether a field goal attempt was a 2-pointer or a 3-pointer, reviews of possible 24-second shot clock violations, and determinations of which player last touched the ball before it went out of bounds during the last two minutes of regulation and overtime.¹³² A review is triggered when a referee is not reasonably certain that the call on the floor is correct.¹³³

An on-court referee analyzes each reviewed play from a monitor on the sideline of the court. NBA employees at the Referee Operations and Replay

Game Results, MAJOR LEAGUE BASEBALL, <http://m.mlb.com/postseason-schedule>, {<https://perma.cc/Q7JT-6E22>} (last visited Jan. 15, 2016) (indicating that there were 36 postseason MLB games in 2015).

¹²⁴ *MLB Instant Replay Database*, *supra* note 122.

¹²⁵ *Id.*

¹²⁶ *NBA Referee Instant Replay Trigger Outline*, NAT’L BASKETBALL ASS’N, <http://www.nba.com/official/instant-replay-guidelines.html>, {<https://perma.cc/65FM-XS MV>} (last visited Jan. 15, 2016).

¹²⁷ *Id.*

¹²⁸ Steve Perrin, *Instant Replay in the NBA*, SB NATION (June 9, 2010, 11:55 AM), http://www.clipsnation.com/2010/6/9/1509216/instant-replay-in-the-nba?_ga=1.78793428.1505106454.1442899931, {<https://perma.cc/W5G5-5SPT>}.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *NBA Referee Instant Replay Trigger Outline*, *supra* note 126.

¹³³ *See, e.g., id.*

Center in Secaucus, New Jersey aid the referee.¹³⁴ The referees are able to review the play from multiple angles in video that the replay manager at the Replay Center sends to the referees.¹³⁵ If the referees feel they need a different shot, they can request it from the hub, located at NBA Entertainment headquarters.¹³⁶ The crew chief of the three-person referee crew makes the final decision, only overturning a call if there is *clear and conclusive evidence* that the call on the floor was incorrect.¹³⁷ Explanations of every reviewed call and the best video angle are made available online.¹³⁸

In the NBA it is the referee, not one of the participating teams or coaches, who triggers instant replay. It would appear that, because the referees are neutral as to the game's outcome, the NBA has not limited the amount of plays that can be reviewed per game. Because a referee initiates the review, there is no punishment to either team if a call is overturned. Unsurprisingly, there are significantly more reviews per game in the NBA than in any of the other major US sports. During the 2014–2015 season, the Referee Options and Replay Center reviewed roughly 2,162 plays over the course of 1,225 games, coming to 1.76 replays per game.¹³⁹ Of those 2,162 plays, the crew chiefs only overturned 307 (19.2%), a percentage far lower than any of the other major sports.¹⁴⁰

4. National Hockey League: Clear View of the Opposite or Different Circumstances

The National Hockey League (“NHL”) began using instant replay in 1991.¹⁴¹ At the time, replay was limited to a few scenarios surrounding a

¹³⁴ Jessica Golden, *A Look Inside the NBA's New Instant Replay Center*, CNBC (Dec. 8, 2014, 2:35 PM), <http://www.cnbc.com/2014/12/08/basketball-a-look-inside-nbas-instant-replay-center.html>, {<https://perma.cc/2ZGG-APWH>}.

¹³⁵ Chris Johnson, *NBA's New Replay System a Smart Call*, SPORTS ILLUSTRATED (Oct. 29, 2014), <http://www.si.com/nba/2014/10/29/nba-replay-center-review-referees>, {<https://perma.cc/KXZ6-3YWT>}.

¹³⁶ *Id.*

¹³⁷ *NBA Replay Center Overview: 2015–16*, NAT'L BASKETBALL ASS'N OFFICIAL, <http://official.nba.com/2015-16/updates/>, {<https://perma.cc/7LYN-Y8ZQ>} (last visited Jan. 15, 2016).

¹³⁸ *NBA Referee Instant Replay Trigger Outline*, *supra* note 126.

¹³⁹ *See NBA Replay Center Reduces Review Time To 42 Seconds*, NAT'L BASKETBALL ASS'N OFFICIAL, <http://official.nba.com/nba-replay-center-reduces-review-time-to-42-seconds/>, {<https://perma.cc/D9G8-C8XE>} (last visited Mar. 30, 2016).

¹⁴⁰ *Id.*

¹⁴¹ Joe Delessio, *Quest for Perfection*, SPORTS ON EARTH (Jan. 21, 2014), <http://www.sportsonearth.com/article/66886124/nhl-replay-system-flawed-but-fixable/>, {<https://perma.cc/2TB9-K5R9>}.

potential goal: “whether the puck had crossed the goal line, whether it had been kicked or thrown into the goal, whether it went off an official, whether it crossed the goal line before the net was dislodged, and whether it went in before time expired at the end of a period.”¹⁴² NHL replay has since been expanded to include a determination of whether a player hit the puck with a high stick on a potential goal and “to establish that the official game clock has the right time.”¹⁴³

Originally, an in-stadium referee made all replay decisions, but in 2003 the league created an NHL replay center in Toronto known as the “War Room.”¹⁴⁴ There, NHL staffers watch every game live, review disputed goals, and watch for illegal hits that may warrant a suspension or fine.¹⁴⁵ Similar to the NBA, the on-ice referees initiate replays, rather than the coaches or teams.¹⁴⁶ A Video Goal Judge, located in a secluded area of each NHL arena with an unobstructed view of both goals, may also trigger the replay.¹⁴⁷ The NHL does not specifically define the standard of review that the league applies to Instant Replay. However, Mike Murphy, the league’s senior vice president of hockey operations said that a play would require “a clear view on the video of the opposite or different circumstances” to be overturned.¹⁴⁸

In sum, all four major professional sports leagues require that an extremely high threshold be met before an official reviewer can reverse a call made on the field. An impartial observer must note that these standards lie well beyond even the most stringent requirements that appellate courts place on parties in our legal system. That reality comes despite the fact that one might reasonably argue that the stakes in sports are far lower than they

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Wendy Thurm, *What Baseball Can Learn From Hockey’s Video Review ‘War Room,’* SB NATION (June 3, 2012, 10:00 AM), <http://www.sbnation.com/2012/6/3/3057680/what-baseball-can-learn-from-hockeys-video-review-war-room>, {<https://perma.cc/R2X6-6J7M>}.

¹⁴⁵ See Rich Chere, *NHL’s ‘War Room’ a dreamland for die hard hockey fans*, NEWJERSEY.COM (Nov. 24, 2010, 5:00 AM), http://www.nj.com/devils/index.ssf/2010/11/nhls_war_room_a_dreamland_for.html, {<https://perma.cc/52GB-YNLL>}.

¹⁴⁶ Stu Hackel, *NHL Still Wrestling with Expanded Video Replay*, SPORTS ILLUSTRATED (Aug. 19, 2013), <http://www.si.com/nhl/2013/08/19/nhl-expanded-replay>, {<https://perma.cc/2B2P-NLQH>}.

¹⁴⁷ National Hockey League, *Official Rules 2014-2015*, NAT’L HOCKEY LEAGUE, 60–61 (Jan. 15, 2016) <http://www.nhl.com/nhl/en/v3/ext/rules/2014-2015-rule-book.pdf>, {<https://perma.cc/74J8-BVNK>} (Rules 38.4–5).

¹⁴⁸ Helene Elliott, *Upon Further Review, NHL’s Replay System Is Good*, L.A. TIMES, Dec. 19, 2011, <http://articles.latimes.com/2011/dec/19/sports/la-sp-elliott-nhl-20111220>, {<https://perma.cc/4G8T-4BAD>}.

are in courts of law and accurate evidence as to the “correct call” is far more readily available to reviewing parties.

III. ANALYSIS: WHERE A HEIGHTENED BURDEN MAKES SENSE (THE LAW) AND WHERE IT DOES NOT (SPORTS)

In both criminal and civil litigation, the trier of fact has access to all of the information made available at trial—through both evidence and direct observation. The judge or jury may observe a witness’s demeanor, inspect relevant documents, and listen to the party advocates’ arguments. In contrast, an appellate judge must rely only on the written record, lacking any first-hand observation of the proceedings. As such, a high standard of review is often justified, giving appropriate deference to the fact-finder who was present during the trial.

Additionally, a person’s liberty hangs in the balance in a criminal context; no less of an authority than founding father Benjamin Franklin stated as a policy matter, “it is better a hundred guilty persons should escape than [that] one innocent person should suffer.”¹⁴⁹ Hence, the law requires proof of guilt in a criminal courtroom beyond a reasonable doubt. This asymmetric burden on prosecutors seeks to protect the rights of the innocent.

The world of sports, by comparison, presents no such compelling concerns. The task of instant replay officials, while similar to that of appellate judges, is based on substantially different (and better) information. Unlike appellate judges, who have less information than the triers of fact had at the trial level, replay officials have information unavailable to the officials who made the initial call (such as multiple camera angles). As such, it would seem intuitive that the replay officials should be given substantial deference due to their superior information, not the other way around.

The following analysis will consider the policy arguments for maintaining the current standards of review in sports, as well as those in support of changing such standards. In finding that the benefits for changing the standards of review are substantial, this Article will then consider the three common types of appellate review standards previously discussed, identifying which standard best embodies the relevant policy considerations when it comes to the world of sports.

¹⁴⁹ Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), *in* IX THE COMPLETE WORKS OF BENJAMIN FRANKLIN 80, 82 (John Bigelow comp. & ed., New York, G.P. Putnam’s Sons 1888).

A. *Policy Arguments for Maintaining High Thresholds for Reversal*

A primary justification for the extremely high standard of review called for in professional sports leagues is that it discourages coaches from frequently and frivolously challenging calls. In turn, this reduces the amount of disruption and delay imposed during the middle of a competition.¹⁵⁰ Presumably, this makes games more enjoyable to watch and, as a result, attracts new viewers. Preventing this disruption is also beneficial for the players and coaches. The speed with which coaches and players make decisions and adjust to situations is a reflection of skill and preparation, and significantly affects the outcome of games. The psychological effect of a long delay could prove detrimental to the coaches and players, and therefore, the outcomes of the games.¹⁵¹ The benefits to the coaches and players from the minimal disruption also equates to fan utility. Not only are fans able to watch the games without frequent delays, but they also (arguably) witness better performances from the teams, without the psychological detriments from the delay that affect both the participants and the outcome.

Additionally, the current standards maintain, to a significant extent, the human element of sports, which is deeply rooted in tradition. While supplanting referee-made decisions with ones aided by technological mechanisms increases the accuracy of calls—and by extension each sport's commitment to fairness—fans have come to view the referee's authority as a part of the game. Many fans are reluctant to change a system that has worked for decades, if not centuries.¹⁵² Furthermore, not only would having more replay reviews take many calls out of the referees' hands, but it might also provide reduced impetus for making the initial call properly. If the referees knew that the call can always be corrected on replay, this could lead to perverse incentives to pay less attention to the initial call (or to make calls with an eye towards allowing possible reversal).

Finally, someone might argue that fans garner a certain amount of utility from *incorrect* calls that are not changed by review. Controversy provides entertainment to society and the opportunity for discussion and debate amongst passionate fans. Participation on social media and other news out-

¹⁵⁰ VerSteeg & Maruncic, *supra* note 103, at 255.

¹⁵¹ *See id.* at 161.

¹⁵² *See* Carlton Fletcher, *In Sports, I'll Take the Human Element Over Replay*, ALBANY HERALD, May 12, 2014, <http://www.albanyherald.com/news/2014/may/13/carlton-fletcher-in-sports-ill-take-the-human/>, {<https://perma.cc/QN9S-3MCT>}. (“[T]he human element that [the referees] bring to sport is just as much a part of the games as the human factor of the players.”).

lets often explodes in the wake of a questionable call, reflecting this utility.¹⁵³

B. Policy Arguments for a More Lenient Standard of Review.

As the MLB Official Rules encourage the umpires, “[d]o not allow criticism to keep you from studying out bad situations that may lead to protested games. . . . It is better to consult the rules and hold up the game ten minutes to decide a knotty problem than to have the game thrown out on protest and replayed.”¹⁵⁴ Eminent legal scholars like Mitchell Berman at the University of Pennsylvania have offered compelling policy arguments in favor of changing the replay standards to allow for easier reversals and thus more accurate calls.¹⁵⁵ A more lenient standard would have specific benefits for the sports themselves, the referees, the players, and the fans.

1. Benefits for the Overall Health of Each Sport

While sports serve many goals—providing entertainment and discussion-fodder for fans, and employment for players and referees—part of their appeal rests upon a simple promise: the decisions referees and umpires render during the course of gameplay are fair and accurate. An incorrect call draws the ire of all involved parties—cheated players, livid fans, and embarrassed referees. One need look no further than the aghast national reaction to Armando Galarraga’s would-be perfect game (mentioned above) to get a sense of how deeply fans value fair and accurate decisions in professional sports.¹⁵⁶

¹⁵³ See Susan Miller Degnan, *Controversial UM-Duke Finish is Hot Topic on Talk Radio, Social Media, and even T-shirts*, MIAMI HERALD, Nov. 2, 2015, <http://www.miamiherald.com/sports/college/acc/university-of-miami/article42389436.html>, {<https://perma.cc/DJ9T-X5XN>} (“Within a couple of hours after the game ended [with a controversial call], more than 100,000 tweets had already been posted on Twitter regarding the outcome, and as of Monday it seemed like every talking head in sports had mentioned it in some form.”).

¹⁵⁴ Major League Baseball, *Official Baseball Rules 2015 Edition*, MAJOR LEAGUE BASEBALL (2015), http://mlb.mlb.com/mlb/downloads/y2015/official_baseball_rules.pdf, {<https://perma.cc/VLW9-48X4>} (see the “User’s Guide” that accompanies the Official MLB Rules).

¹⁵⁵ See Berman, *supra* note 95 (offering a thorough examination of the NFL’s “indisputable visual evidence” standard and exploring better alternatives).

¹⁵⁶ See Curt Schilling, *Missed Perfection Hurts Pitcher and Umpire*, ESPN (June 3, 2010, 1:45 AM), <http://www.espn.com/IndexPages/news/story?id=5247117>, {<https://perma.cc/G3EE-ZLJY>} (“I watched in horror Wednesday night as Armando Galarraga lost a perfect game because of the blown call by [the] umpire.”);

The goals of fairness and accuracy, in this way, actually serve more than their own ends; they function as vitamins that bolster a sport's overall health. As technologies permitting more accurate review have emerged, fans expect a higher level of officiating quality than they did before such technology existed.¹⁵⁷ A Seattle Seahawks fan dejected by the multiple missed calls that drastically lowered his team's win expectancy in Super Bowl XL¹⁵⁸ might turn away from the sport. Such a reactionary loss of interest might seem unlikely or rare, but every team's fan-base can point to a critical juncture in an important game in which a blown call made its team worse off. As missed calls pile up, a sport might suffer a tiny exodus of frustrated fans, leading to a decrease in ticket, jersey, and other merchandise sales. When a sport's profitability wanes, so too does its ability to attract the best athletes, causing the overall quality of play to eventually falter. Finally, fans who were willing to live with blown calls might be annoyed by less skilled or less athletic overall play and lose interest as well. Fair and accurate calls, therefore, are more critical to a sport's health and longevity than one would think.

2. Benefits for the Referees

In contradiction to the argument that lowering the replay standard will cause referees to worry less about getting their initial call correct, it could just as easily be argued that replay will cause referees to pay *stricter* attention. In this sense, referees can be compared to judges.¹⁵⁹ As legendary Judge Richard Posner explains: "District judges . . . do not like to be reversed. Even though a reversal has no tangible effect on a judge's career . . . it can imply criticism rather than merely disagreement, and no one likes a public rebuke."¹⁶⁰ Posner adds that the threat of reversal "keeps him working carefully . . ."¹⁶¹ It is likely that referees would have a similar motivation

See also Kenneth Plutnicki, *A Perfect Night Ruined*, N.Y. TIMES, June 3, 2010, http://www.nytimes.com/2010/06/04/sports/04leading.html?_r=0, {<https://perma.cc/7ZJZ-FPYM>} (describing the numerous reactions to the blown call).

¹⁵⁷ Rachel Cohen, *Technology means more correct calls, and more scrutiny*, PRO 32 (Jan. 15, 2015, 5:39 PM), <http://pro32.ap.org/zacharytoday/article/technology-means-more-correct-calls-and-more-scrutiny>, {<https://perma.cc/2VQ5-F7FM>}.

¹⁵⁸ Brian Burke, *How Much Did Super Bowl XL's Officiating Affect The Outcome?*, ADVANCED FOOTBALL ANALYTICS (Aug. 7, 2010), <http://archive.advancedfootballanalytics.com/2010/08/how-much-did-super-bowl-xls-officiating.html>, {<https://perma.cc/3LCY-RZ6L>}.

¹⁵⁹ VerSteeg & Maruncic, *supra* note 103, at 245.

¹⁶⁰ RICHARD A. POSNER, *HOW JUDGES THINK*, 141 (2008).

¹⁶¹ *Id.*

in avoiding reversal under a lowered standard (and the accompanying criticism it would entail).

Referees facing split-second decisions also frequently adjust their decisions in pivotal situations to avoid upsetting the status quo.¹⁶² This avoidance can be termed inertia bias and can have a significant impact on crucial game calls. For example, when faced with split-second, ball/strike decisions, baseball umpires subconsciously adjust their calls in order to avoid options that would “significantly shift the expected outcome.”¹⁶³ A recent study by Green and Daniels shows that referees select the pivotal option only 20% of the time, but the non-pivotal option 80% of the time.¹⁶⁴ Such a status quo bias would be seriously mitigated by a more lenient review standard—either allowing a referee to make the call that he believes is best (knowing that it can be reversed if necessary), or by allowing for the reversal of a call made by a referee showing this detrimental tendency.

3. Benefits for the Players

A more lenient review standard would likely have a positive effect on player performance. Knowing that a correct call will eventually be made if the call on the field is incorrect, an individual player may be more likely to make an additional effort, such as diving for a loose ball. Under the current replay standard, such an effort may cause confusion for the referees, who as we have seen are predisposed to maintain the status quo. If players are more confident that reviewers will get the decision correct in the end, then they will know their extraordinary efforts will be rewarded.

Players will also be more likely to play within the rules of the game under a more lenient review standard, knowing that it is far more likely that there will be consequences if their actions are caught on replay review. For example, close football games occasionally end with one team throwing a series of backwards passes in a last-ditch attempt to score as time is running out. Per NFL rules, once the football has passed the line of scrimmage it can only be thrown laterally or backwards.¹⁶⁵ Whether a pass is laterally thrown or illegally thrown forward is often a very close call and is a reviewable play.¹⁶⁶ Throwing a ball forward can be advantageous to the offensive team, potentially leading players to “toe the line” between a lateral throw and a forward pass. Faced with a less stringent review standard, players would be

¹⁶² VerSteeg & Maruncic, *supra* note 103, at 242.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ 2015 NFL Rulebook, *supra* note 82, at Rule 8, Section 1, Article 2.

¹⁶⁶ *Id.* at Rule 15, Section 2, Article 4.

less likely to take such a risk, knowing that the referee can take an unburdened look at the play and more easily overturn the call on the field.

Additionally, despite the popular refrain that a sporting contest is “just a game,” the reality is that whether one wins or loses does have dramatic ramifications in the world of professional sports. Winners are typically rewarded with lucrative contracts, prize money, endorsements, and the opportunity to continue their career. Losing not only puts a person at risk of making less money, but increases the likelihood that he will lose his job.¹⁶⁷ Simpler yet, players have the right to expect that their hard work and preparation will be properly rewarded and that the outcome of the game will depend on its merits and not on chance.

4. Benefits for the Fans

Finally, in addition to the consequences for participants in the competitions, the result of a game also affects fans. Like players, fans have a right to expect that the result of the game will be dependent on their team’s performance and not on a missed or bad call. Fans invest a great deal of time and energy in the performance of their team. Asymmetric burdens of proof in instant replay that prevent decision-makers from fixing an incorrect call on the field provide a powerful disincentive for fans to continue to invest the same kind of energy in their favorite team.

Moreover, a missed call may have more than a mere social and psychological effect on fans; it can also lead to tangible losses. Individuals who have gambled on the game may be adversely affected, potentially to huge degrees, if their team loses because of a bad call. In 2015, people wagered more than \$119 million dollars on the Super Bowl alone.¹⁶⁸ Additionally, businesses that depend on competitive sports competitions will likely be negatively affected, as will the restaurants and stores connected to the sports facility itself.

Finally, in considering the effect that winning has on a community, one need simply posit the return of NBA great LeBron James to the Cleveland Cavaliers in 2014. His return directly correlated with the team’s championship run, not unlike a game-changing call. The team’s new suc-

¹⁶⁷ VerSteege & Maruncic, *supra* note 103, at 247.

¹⁶⁸ Jason B. Hirschhorn, *Super Bowl Betting 2015: How Much Money Is Wagered on the Game and Prop Bets?*, SB NATION (Jan. 31, 2015, 9:01 AM), <http://www.sbnation.com/nfl/2015/1/31/7923869/super-bowl-2015-betting-prop-bets-gambling-wager-nfl>, {<https://perma.cc/S4AW-GLJZ>}.

cess brought an estimated \$500 million to the Cleveland community.¹⁶⁹ While this estimate is based on an entire season with him on the team, it demonstrates by analogy the impact that a game-changing, or potentially season-changing, call may have. Further yet, this says nothing about the harder-to-quantify psychological benefits of being associated with a winner. Pride surges and communities once divided come together.

C. Sports Should Borrow Standards of Review from the World of Law.

The asymmetric burdens of proof currently utilized in professional sports have the inevitable downside of perpetuating continued inaccuracy and unfairness—ironically, the precise problem for which replay systems were instituted in the first place. The traditional rationale for maintaining these heightened burdens is significantly outweighed by the compelling reasons *contra*. Section III(2), *supra*, highlighted a variety of benefits that would flow from a more lenient standard of instant replay review, most notably:

- (1) less residual frustration from fans that might snowball into decreased interest, declining team and league revenues, a smaller pool of talented players choosing to pursue a professional career in the sport, and an overall worse on-field product league-wide;
- (2) fewer incorrect calls will stand due merely to lack of indisputable proof required for reversal, ensuring greater fairness to players, teams, and fans;
- (3) decreased likelihood of unjust punishment to players and teams due to incorrect calls;
- (4) stricter referee attention to “getting the call correct” in the first instance if it is easier for the calls to be overturned (i.e., greater incentive to avoid facing criticism for making errors); and
- (5) a lower standard mitigates referee tendencies to avoid calls that would “significantly shift the expected outcome” of a game (i.e., overcome referees’ inertia bias).

In considering a new and improved standard of review for the world of sports, the sensible approach would be to analyze and borrow from appellate standards of review in law: the clearly erroneous standard, the abuse of discretion standard, and the *de novo* standard. The following sections will analyze each of these legal appellate standards and consider how effectively they serve the goals of ensuring fairness, accuracy, and justice in sports. Ultimately, *de novo* review makes the most sense for these purposes, despite

¹⁶⁹ Sean Gregory, *Economist: LeBron James Worth Almost \$500 Million to Cleveland*, TIME (July 14, 2014), <http://time.com/2981583/lebron-james-cleveland-cavs-money/>, {<https://perma.cc/5E9Z-Y8SF>}.

the fact that professional sports' instant replay review rules have never even approached such a standard.

1. The Abuse of Discretion Standard

As previously indicated, the abuse of discretion standard is used in reviewing discretionary decisions during the litigation process. Under this standard, the relevant question is not whether the appellate court “would as an original matter have [acted as the trial court did]; it is whether the [trial court] abused its discretion in so doing.”¹⁷⁰ Abuse of discretion is primarily used for procedural matters, such as rulings on sentencing and admissibility of evidence.¹⁷¹

Such a standard would, in large part, be inapplicable to each of the major sports, as nearly all of the discretionary calls made on the field are not reviewable. For example, holding and pass interference calls are not reviewable in the NFL because they are subject to the referee's opinion.¹⁷² This likely constitutes an attempt to maintain the human element in sports. Thus, each major sport would have to make drastic changes to its list of reviewable plays for this standard to be applicable.

Moreover, even if such changes were made, abuse of discretion might prove to be an even stricter standard than the current standard in each of the major sports. Such a standard would allow a replay referee to make a reversal only if no reasonable person would agree with the on-field call. For example, a reversal would be appropriate if a pass was called complete when the ball actually bounced several feet in front of the wide receiver before the catch. While some calls are obviously incorrect, abuse of discretion might make reversals even more infrequent than they currently are, as most obvious calls are correctly called on the field. As such, this standard would be unlikely to result in greater accuracy. With the exception of the most obvious mistakes—which are almost always made correctly on the field—an argument can often be made in favor of either side of a call. That is not a compelling reason to let it stand.

Additionally, an abuse of discretion standard would fail to meet any of the previously identified benefits that could be brought about by a more lenient standard of review. The abuse of discretion standard would not promote fairness and decrease the likelihood of unjust punishment to players and teams, as the number of incorrect calls would be unlikely to decrease

¹⁷⁰ *Metro. Hockey Club, Inc.*, 427 U.S. at 642.

¹⁷¹ Kunsch, *supra* note 62, at 34.

¹⁷² See *2015 NFL Rulebook*, *supra* note 82, at Rule 15, Section 2, Article 5.

(they may in fact increase). The standard would also fail to promote fairness to fans who invest energy and money into sports teams, as the ability to reverse incorrect decisions would be seriously limited. It would not encourage referees to pay stricter attention to the original calls, as only the most obvious mistakes would be reversible—mistakes that the referees would likely be able to call without close attention. For the same reason, the new standard would not mitigate referee tendencies to avoid making calls that would “significantly shift the expected outcome” of a game. Finally, abuse of discretion review would not encourage players to play harder or within the rules, as accuracy is unlikely to increase upon review.

2. The Clearly Erroneous Standard

Similarly, the clearly erroneous standard fails to provide the benefits that justify a lower standard of review in sports. This legal standard, used to review findings of fact, permits a reversal only when “the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”¹⁷³ It “does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.”¹⁷⁴ The rationale supporting this standard recognizes that a trial judge is present during the trial and thus has greater access to the relevant information than does an appellate court.

Such a rationale is not applicable to the review process for any of the major sports. As previously argued, it is the instant replay official, not the referee on the field, who has greater access to information, due to the availability of multiple camera angles and slow motion replays. Yet, despite this noticeable fault in rationale, the clearly erroneous standard appears to be most similar to the review standards currently utilized in professional sports—specifically the indisputable evidence standard of the NFL and the clear and conclusive evidence standard of the MLB and NBA. Such a standard would review rulings of fact, such as whether a player’s knee hit the ground before a fumble or whether a ball was a homerun. In considering those decisions, the replay referee would only be able to reverse if he was certain that the original call was wrong, not unlike the indisputable visual evidence standard and very similar to the clear and conclusive evidence standard.

As previously explained, such a standard has a variety of faults that make it insufficient and unacceptable for the review standard in sports.

¹⁷³ Anderson, 470 U.S. at 573 (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

¹⁷⁴ *Id.*

Such a standard fails to promote accuracy and fairness, as incorrect calls are likely to be left to stand in the end. The standard disincentivizes referees from paying stricter attention to original calls, as the standard makes it unlikely that they will be overturned. Referees are also perversely encouraged to avoid making calls that would significantly shift the expected outcome of a game, knowing that such an inertia bias is likely to go unpunished and unchanged. As a result, players may put forth less effort (and certainly be angrier at unfair outcomes), knowing that a missed call could take the game out of their hands.¹⁷⁵ This could affect the fans as well, potentially wasting the energy and money that is heavily invested in the success of a particular team.

3. The De Novo Standard

Finally, we examine the merits of the de novo standard, used to review questions of law. Under this standard, the appellate court considers the matter anew—the same as if it had never been heard before and no decision had previously been rendered.¹⁷⁶ The reason for the lack of deference to the trial court is that “[c]ourts of appeals . . . are structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues.”¹⁷⁷

i. The De Novo Standard Would Easily Integrate into Major Professional Sports Leagues and Would Provide Benefits that are Unavailable under the Current Standards.

The de novo process would fit seamlessly within the current review process in each of the major sports.¹⁷⁸ Just as appellate judges devote their primary attention to the appellate issues, instant replay review officials are solely concerned with the individual aspect of the play in review. This con-

¹⁷⁵ That said, only a player who has signed a contract worth millions of dollars and effectively secured his finances in the short (or even long) term would reasonably be discouraged from putting forth additional effort. A younger player who has not yet earned a significant paycheck would likely not be dissuaded by mediocre officiating from putting in maximum effort, as even with a bad result, the coaching staff would bear witness to his skill or speed and may even laud him for his effort.

¹⁷⁶ Ness, 954 F.2d at 1497.

¹⁷⁷ *Salve Regina Coll.*, 499 U.S. at 231–32.

¹⁷⁸ For an excellent analysis of the benefits and tradeoffs of a de novo standard of review see standard of review in the NFL in Berman, *supra* note 95, at 1702–06.

trasts starkly with trial judges and on-field referees, who must balance a variety of complicated facets during a trial or game. Additionally, review officials have all of the necessary information regarding the play available to them via video, just as the appellate court needs only the trial record. Indeed, instant replay officials have far greater information at their disposal, having the added benefit of multiple camera angles and slow motion replays.

More importantly, the *de novo* standard would prove markedly superior at serving the desired goals of fairness, accuracy, and justice in sports. Considering a play as if no decision had been previously rendered removes asymmetric burdens and presumptions currently favoring the original ruling on the field. Because review officials have superior information compared to on-field referees, this standard will inevitably lead to greater call accuracy. As accuracy is improved, referees would likely pay stricter attention to calls in the first place in an attempt to avoid being frequently reversed (and thereby subjected to the accompanying criticism reversal would entail). Referees would likewise be discouraged from avoiding calls that would significantly shift the expected outcome of a game. If a player knows that such a play call is more likely to be correctly decided in the end, he may be more willing to put forth a greater effort; perhaps diving for a loose ball or sprinting to stretch a double into a triple. The player will know that if his extraordinary effort and the lightning speed of the game cause confusion for the referee, replay can be utilized to ensure the call on the field was correct. Outcomes will better reflect the skill and preparation of the players (as opposed to the luck of benefitting from a poor call), leading to more just rewards for those players and teams who truly deserve them. Finally, while some fans garner utility from the controversy surrounding missed calls, such utility is considerably outweighed by the social and economic harm that results from erroneous calls. That being said, incorrect calls are inevitable in sports—this new standard would simply make them less frequent. Thus, the emotional charge experienced from controversy would be properly balanced with the utility from an accurate and fluid contest.

ii. Super Bowl 50: An Example of How the De Novo Standard Would Lead to More Accurate Review.

On February 7, 2016, the Carolina Panthers and Denver Broncos faced off in Super Bowl 50—the world’s biggest sporting event. Over 110 million fans were watching live on television.¹⁷⁹ Billions of dollars were wa-

¹⁷⁹ Stephen Battaglio, *SuperBowl 50 Audience Slides 2% from Last Year with 111.9 Million Viewers*, L.A. TIMES, Feb. 8, 2016, <http://www.latimes.com/entertainment/>

gered on the outcome.¹⁸⁰ Midway through the first quarter, underdog Denver jumped out to a 3-0 lead.¹⁸¹ On the ensuing drive, Panthers quarterback Cam Newton drilled a pass over the middle to wide receiver Jericho Cotchery.¹⁸² Cotchery bobbled the ball initially, but caught it while he was falling to the ground, keeping his hand under the ball the entire time.¹⁸³ Carolina would have a first down at the 40-yard line after the 24-yard completion and were driving to even the score or take the lead.

Except for one crucial thing: the referees called the pass incomplete, ruling that the ball had touched the ground as the receiver fell. Cotchery was incensed, yelling to his coaches on the sideline, "I got it!" and imploring them to throw the challenge flag. Coach Ron Rivera obliged.¹⁸⁴

After a commercial break, television announcers Jim Nantz and Phil Simms called on NFL officiating expert Mike Carey, referee of Super Bowl XLII, for his opinion on the Carolina challenge. Carey responded decisively, "*This is a good challenge by Carolina. Receiver goes up, he's going to the ground so he must maintain control of the ball, which he does. If I was in the booth, I would reverse this to a catch.*" Nevertheless, head referee Clete Blakeman walked out onto the field a moment later and declared, "After reviewing the play, the ruling on the field stands as called, an incomplete pass." Nantz responded in disbelief, "I'm trying to look for what they saw here." Simms added, "His hand was definitely under the football." Nantz replied, "Had a hand under it there. Now he rolls over. Does it touch [the ground]? I didn't see it." Simms confirmed, "I didn't see it."¹⁸⁵

Simply put, the indisputable evidence standard required for reversing the call led to a gross injustice that changed the trajectory of America's biggest sporting event. Even though all experts agreed it was a good catch, the replay official believed he had less than the indisputable proof required for reversal. Instead of Carolina driving to take the lead, Denver now had the Panthers pinned back deep in their own end.¹⁸⁶ Two plays later, on third down and long, Denver linebacker Von Miller stripped Cam Newton

envelope/cotown/la-et-ct-super-bowl-ratings-20160208-story.html, {<https://perma.cc/9H6B-AN4H>}.

¹⁸⁰ David Purdum, *SportsBooks See Record Amount of Money Bet on SB 50*, ESPN (Feb. 8, 2016), http://espn.go.com/chalk/story/_/id/14738319/more-money-bet-super-bowl-50-nevada-other-super-bowl-sportsbooks-say, {<https://perma.cc/HD2Q-SQAF>}.

¹⁸¹ *Super Bowl 50* (CBS television broadcast Feb. 7, 2016).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

of the football at the 5-yard line.¹⁸⁷ Miller's teammate Malik Jackson recovered the ball in the end zone for a game-changing touchdown.¹⁸⁸ Denver, which came in as a heavy underdog, was shockingly up 10-0 and went on to secure the improbable upset. Lost in the shuffle was that the failure to reverse the incomplete pass call completely changed the complexion of America's biggest game.¹⁸⁹ Justice was denied. The announcers decried it for a few minutes but it will likely be forgotten by history.

This is but one of hundreds of examples of the ways in which asymmetric burdens of review in sports hinder the ability of referees to make accurate calls in accordance with the rules of the game. Under a *de novo* standard, the replay referee would have been able to review the play unburdened. If Mike Carey is any indication of what the replay referee would have found without such a burden—and it is hard to find a better indicator than a former Super Bowl referee—the play would have been reversed, Carolina would have had the momentum, and the outcome of the Super Bowl may have been vastly different. We will never know. Until the NFL reads this law review Article and reforms its rules, the asymmetric burdens of review will continue to ruin a fair chance at justice.

iii. How to Utilize the De Novo Standard While Mitigating Concerns About Delaying the Game.

Part (III)(1), *supra*, of this Article noted that despite the benefits of a more lenient standard of review in sports, its drawbacks might militate in favor of the current standards. Specifically, the current standards likely discourage coaches from frequently and frivolously challenging calls, reducing the delay imposed during a competition. This is beneficial for the players and the coaches, as their quick adjustments to situations are a reflection of skill and preparation. Finally, and perhaps most importantly, it could be argued that the current standards maintain to a significant extent the human element of sports, which is deeply rooted in tradition.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Interestingly, Panthers Coach Ron Rivera challenged another play around the 12-minute mark of the second quarter (which he won). Because his first challenge on the "incomplete pass" was found to "stand," the Panthers did not receive a third challenge, which they would have received had they been right on the first two. As such, Carolina was unable to challenge any call for the following 40 minutes of the game. We will never know how this influenced the game, but the announcers noted it immediately.

Each of these concerns can be assuaged on a structural level by maintaining the current “challenge” format of the instant replay review system. For example, the NFL and MLB limit the number of challenges that each team is granted. In the NFL, a team is allowed two challenges per game, with the option to be awarded a third if they prevail on their initial ones. The MLB grants a team one challenge per regular season game and two for playoff games, with the option to win an additional challenge as a reward for winning previous ones. Keeping these tight limits in place prevents coaches from frivolously challenging calls and unnecessarily delaying the game. As such, coaches and players will have to continue tirelessly preparing and practicing, unable to rely on constant delays to make crucial decisions. This would maintain the utility that fans garner from a fluid and fast-paced game. Limiting coaches to only a few challenges forces them to be cautious in their use, allowing the human element of the sport to dominate the vast majority of the game. But, when they do take the opportunity, they can be far more assured that accuracy and fairness will be served in the end.

Conversely, in the NBA and NHL, coaches are unable to challenge play calls. As such, the risk of frequent and frivolous review by a coach is eliminated, and instead falls into the hands of the league. In the NBA, a review is triggered when a referee is not reasonably certain that the call on the floor is correct. This same standard for *triggering* the review could be maintained, allowing the de novo standard to provide more accurate rulings of the plays that are reviewed. As such, the *only* thing that the new standard would change is the potential result of the review. There would be no effect on the number of reviews because the standard to trigger a review is maintained. Thus, the speed of the game, fan utility, and the human element of the sport would all be unaffected.

iv. A Final Note Concerning Questions of Law vs. Questions of Fact.

This Article has noted that the de novo standard is used to review questions of law in the legal process. Yet nearly all instant replay challenges would appear to concern questions of fact—a feature that on cursory blush seems to militate against this Article’s argument in favor of utilizing a de novo review standard in sports. As was explained in Section (II)(4)(a), *supra*, findings of fact are typically given significant deference in the litigation process because the fact finder was present during the original trial. Comparatively, the appellate court relies only on the trial documents provided. Such deference is provided not because the lower court made the decision first, but rather because it had superior information when making its decision. This rationale actually supports utilizing the de novo standard in

replay review because, as previously noted, the replay referee has far greater access to the facts than the on-field referee. The ability to consider multiple camera angles and utilize slow motion replay provides the replay reviewer with significantly better information than the on-field referee had when making his split second decision. Thus, because the replay reviewer has access to the superior information, he should be given the deference, not the on-field referee.

IV. CONCLUSION

For centuries, the law has recognized that initial decision-makers, whether trial judges or juries, might make errors in their determinations. Hence, we have developed appellate review systems that attempt to serve the needs of ensuring accuracy, fairness, and justice by righting previous wrongs.

The world of professional sports has similarly instituted instant replay review systems in order to seek the same objectives, but it unfortunately has imposed drastically asymmetric burdens of review that thwart the very purpose they aim to serve. By insisting on indisputable proof or clear and conclusive evidence in order to overturn calls made on the field, sports leagues like the NFL and MLB perpetuate continued inaccuracy and injustice. Instead, if they were to borrow from the world of law and utilize a *de novo* standard of review, there would be no biased presumption that a given call on the field should stand absent indisputable proof to the contrary. Adopting this standard would both further the cause of justice as well as reward players and teams by ensuring that the call ultimately made was the one most likely to be correct. Simply put, if a reviewer is more certain than not that a call made on the sports field is wrong, there is no compelling reason to let it stand.

This stands in stark contrast to our legal system, where society insists on higher thresholds of proof before taking away a person's freedom and where appellate reviewers are often not in as good a position to make factual determinations as a trial judge and jury. No such considerations apply to the realm of sports, where instant replay officials have access to superior information compared to on-field referees. The instant replay officials can use multiple camera angles and slow motion replays. Yet, despite this obvious difference between legal and sports reviews, the standards utilized in professional sports (indisputable proof) are far more draconian than those generally used in the law (most notably, *de novo* review). It is well past time to remedy this inequity. Only when the world of sports learns to borrow lessons from the world of law can we do so.



Freeing Buskers' Free Speech Rights: Impact of Regulations on Buskers' Right to Free Speech and Expression

John Juricich*

ABSTRACT

Buskers are street performers who perform for tips—they are not beggars or panhandlers. Unfortunately, their First Amendment rights are being quelled because they are being treated as such. Cities and municipalities are effectively infringing upon buskers' free speech and expression rights by promulgating vague and inadequate regulations that ban specific conduct often intertwined with busking. Although cities and municipalities have a duty to maintain public spaces, they cannot carry out this duty by arbitrarily violating buskers' constitutional rights. Therefore, the intricate balance between government interests and individual rights is at the heart of this busker dilemma.

Cities and municipalities are doing the courts no favors. The regulations that are being promulgated inevitably result in litigation. Then, the regulations force courts to define indefinable concepts: art and expression. To help alleviate the courts' definitional crisis, cities and municipalities should promulgate regulations aimed directly at advancing the government interests that necessitated the regulation, as opposed to targeting particular types of conduct. This would be a much-needed solution for the courts and would also properly strike a fair balance between government interests and buskers' free speech rights.

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Throughout this Article, the case law directly impacting and shaping buskers' free speech rights is thoroughly dissected, and the argument is made that busking—including the solicitation of tips—is protected under the First Amendment. The proposed “advancing the interest” approach is elucidated to show how it will aid the courts and appropriately strike the balance between government interests and buskers' free speech rights. Last, the proposed solution is applied to the busker case of *Young v. Sarles*, to exemplify the problems of the current approach and illuminate the ease of the proposed “advancing the interest” approach to this busker dilemma.

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I. INTRODUCTION

“Busking”—the time-honored practice of performing in public places for tips—gives birth to competing interests between First Amendment free

speech and expression rights¹ and states' and municipalities' interests in maintaining the public spaces in which buskers perform.² To further the government's interest in maintaining public spaces, cities and municipalities promulgate regulations. A problem arises, however, when those regulations and ordinances are drafted in such a way that they infringe on a person's right to free speech and expression guaranteed under the Constitution—hence, the busker dilemma.³ When litigation arises from constitutional challenges to these regulations, courts are essentially called upon to do the impossible on a case-by-case basis: define the indefinable concepts of “art” and “expression.”

Whether or not it *should* be up to courts to define such a “famously malleable concept”⁴ as “art,” our society and legal system has, time and again, impressed upon them that exact duty. To further add to a court's difficult task of determining which busking conduct *is* protected under the First Amendment and which *is not*, cities and municipalities promulgating regulations to further a particular governmental interest are, in effect, arbitrarily infringing upon buskers' guaranteed free speech and expression rights. As a result, courts are forced to employ an already shaky analysis to an often unconstitutional regulation. This is an ever-evolving issue that was recently in front of yet another court in the busking case of *Young v. Sarles*, which, given the precedent governing this issue, predictably concluded without a definitive directive for lower courts or cities and municipalities.⁵

Part I of this Article fleshes out this busker dilemma: the conflicting interests arising from busking, the myriad approaches that courts have taken when tackling this issue, and why permitting schemes are but another piece of the broken clockwork of case law governing busking. Part II examines the

¹ “Congress shall make no law . . . abridging the freedom of speech, or of the press” U.S. CONST. amend. I.

² See Jason K. Levine, *Defending the Freedom to be Heard: Where Alternate Avenues Intersect Empty Public Spaces*, 36 U. MEM. L. REV. 277, 279 (2006) (“Public space has long been the social center of our communities. It has been the locus of our freedom of speech and assembly”).

³ See Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 624 (1982) (“[A]ny general rule of [F]irst [A]mendment interpretation that chooses not to afford absolute protection to speech because of competing social concerns is, in reality, a form of balancing.”).

⁴ *Mastrovincenzo v. City of New York*, 435 F.3d 78, 90 (2d Cir. 2006).

⁵ See No. 1:14-CV-01203, Entry No. 22 (D.D.C. filed July 16, 2014). After continued negotiations, WMATA conceded to Alex Young's motion for a summary judgment. The court therefore entered summary judgment and a permanent injunction barring WMATA from enforcing the regulation prohibiting Alex Young from busking.

muddled case law currently governing busking and argues that busking is protected free speech and expression under the First Amendment. This argument is only aided by the Supreme Court's public forum and scrutiny analyses.

Against the background of the unsettled, convoluted precedent regarding the regulation of busking, Part III argues for an approach that does not force a court to embark on the impossible task of determining what *art* or *expression* is in a given case: the "advancing the interest" approach. Regulations, including permit requirements, that attempt to curtail the "evils" that supposedly materialize from busking, whether expressly or implicitly, should not be aimed at any particular type of free speech activity, and should instead be directly aimed at advancing the governmental interests at issue. Thus, instead of promulgating a regulation that bans begging in order to further the governmental interest of combatting pedestrian congestion, the promulgated regulation should be directly aimed at the governmental interest—*ban any activity causing pedestrian congestion on that sidewalk*.

This simple approach would force cities and municipalities to promulgate regulations that do not distinguish between certain types of free speech activity. Therefore, rather than a court applying a vague regulation that bans, for example, begging or panhandling to determine whether a person is actually engaging in protected free speech, the court only has to apply a typical "time, place or manner" analysis to determine whether the conduct blocked pedestrian traffic. Utilizing this approach, Part III will also explain what the court's ruling and reasoning should have been in *Young v. Sarles*.

In the recent busker case of *Young v. Sarles*, these two conflicting interests collided once again. Alex Young is a guitarist who performs in public and accepts donations from passersby. Although Young does not *actively* solicit donations, he does set out his open guitar case in order to receive tips from members of the public who enjoy his performance. Among the places where Young performs are the above-ground, "free" areas of Washington Metropolitan Area Transit Authority (WMATA) transit stations. According to regulations promulgated by WMATA's governing authority, persons are allowed to engage in "free speech activities" on WMATA property, so long as the activity is in above-ground areas and is at least 15 feet from a station entrance, escalator or stairway.⁶ According to the complaint, Young was busking at the Ballston Metro station on the sidewalk abutting N. Stuart Street in November 2013 when he was approached by a transit police officer and ordered to cease playing and accepting tips. The officer accused Young

⁶ Regulations Concerning the Use of WMATA Property and Related Board Resolutions § 100.10(b) (2008).

of engaging in “panhandling” and threatened to arrest him if he did not move elsewhere. In a separate instance in October 2013, Young was ordered to cease his public performing at the West Falls Church Metro Station. A transit police officer told Young that because he was accepting donations, he was engaged in “commercial activity” that is prohibited by WMATA regulations.⁷

Here, we have a time, place or manner restriction. The governmental interest cited for this restriction is the “pedestrian traffic flow in the usual egress and ingress to the station.”⁸ However, Young has a guaranteed right under the First Amendment to engage in such free speech activities: a perfect illustration of the collision of interests in this busker dilemma.

This Article will illuminate the busker dilemma at issue and make the argument that busking, and all conduct associated with it, is protected under the First Amendment. This Article will then propose a solution to the previous—and quite unsuccessful, given the continued litigation over this issue—attempts at striking a balance between the two important interests at play, and apply that solution to the case of *Young v. Sarles*.

II. THE BUSKER DILEMMA

A. *Government Interests v. Individual Rights*

The Supreme Court has long recognized the government’s need and authority to regulate and maintain public spaces.⁹ However, people wishing to exercise their First Amendment right to free speech and expression also have a substantial interest at play that is in direct conflict with the government’s interests—a guaranteed right to express themselves.¹⁰ Yet, this right

⁷ See *id.* at § 100.10(d) (“No individual carrying out free speech activities will carry out any commercial activity.”).

⁸ *Id.* at § 100.10(b).

⁹ See *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650–51 (1981) (restricting solicitation to a fixed area to further advance the interest of crowd control); *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 685 (1992) (recognizing city’s interest in ensuring safe streets and sidewalks); *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 760 (1994) (recognizing government’s strong interest in ensuring public safety and order and in promoting the free flow of traffic on public streets and sidewalks); *Horton v. City of St. Augustine, Fla.*, 272 F.3d 1318, 1333 (11th Cir. 2001) (recognizing cities’ power to regulate street performances under certain criteria). *Horton* also indicates that cities may have an authority or responsibility to regulate public spaces for aesthetic purposes.

¹⁰ The First Amendment states, “Congress shall make no law . . . abridging the freedom of speech, . . . or the right of people peaceably to assemble” U.S.

is not “unabridged.” The government may, in most situations, regulate free speech activities with a valid time, place or manner restriction.¹¹ These time, place or manner restrictions, coupled with cities’ and municipalities’ permitting schemes, are the most common regulations implemented to further government interests and combat the alleged “evils”¹² of busking or street performing.

On one hand, the government has an interest—more so a duty—to maintain and regulate the public spaces available for free speech and expression. On the other hand, the same citizens that are subject to those regulations have a constitutionally protected free speech right to express themselves on that public space. The interests of the government, to regulate and maintain the public spaces that “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions”¹³ and the competing interests of the buskers, to freely express themselves on those public spaces, have often resulted in legal and political standoffs.¹⁴ Unfortunately, the culmination of these standoffs has produced a lackluster legal doctrine and anything but relevant municipal experience. Municipalities across the nation are promulgating ordinances regulating street performances, expressive vending, camping, panhandling, and related activities, and those same ordinances and regulations are being

CONST. amend. I; *see also* *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938) (holding that the First Amendment’s prohibitions also apply to state and local government rule-makers).

¹¹ “Despite the broad First Amendment protection accorded expressive activity in public parks, ‘certain restrictions on speech in the public parks are valid. Specifically, a municipality may issue reasonable regulations governing the time, place or manner of speech.’” *Berger v. City of Seattle*, 569 F.3d 1029, 1036 (9th Cir. 2009) (quoting *Grossman v. City of Portland*, 33 F.3d 1200, 1205 (9th Cir. 1994)); *see also* *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

¹² “Evil,” as used in this Article, is a term of art that courts have used while analyzing whether a certain regulation is narrowly tailored to further the governmental interest the regulation is meant to advance. It is not a derogatory term meant to place a moral stamp on any certain behavior. *See* *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (citation omitted) (The regulation must “target[] and eliminate[] no more than the exact source of the ‘evil’ it seeks to remedy.”).

¹³ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

¹⁴ *See* *Berger*, 569 F.3d at 1034–35 (9th Cir. 2009) (busker in a Seattle park challenging a regulation that prohibited him from engaging in several protected free speech activities, including solicitation of tips); *see generally* *Hobbs v. Cty. of Westchester*, 397 F.3d 133 (2d Cir. 2005) (busker challenging a regulation that prohibited him from obtaining a permit to busk in a New York park).

challenged based on their constitutionality. Interests are colliding, and the result is not only monetary loss, but also a forfeiture of guaranteed rights.

B. Courts Defining the Indefinable: New York City's Definition Struggle

Despite the broad definitional scope of conduct that is protected under the First Amendment by the Supreme Court, courts have persistently struggled with deciding whether certain types of conduct—especially expression that involves commercial aspects such as busking—is free speech. New York City and the Second Circuit exemplify this struggle in three particular cases.

1. *Loper v. New York City Police Department.*

In *Loper v. N.Y.C. Police Dep't*, the Second Circuit was confronted with a New York City law that prohibited begging.¹⁵ The court held that in public forums, the government may not prohibit *all* forms of communicative activity.¹⁶ The court had to decide two questions: 1) whether begging was protected free speech; and 2) in what type of forum the City of New York was attempting to prevent begging.¹⁷ Solicitation for money is intertwined with other support-seeking forms of speech such as social, economic, or political issues; without solicitation, many forms of this communication would cease.¹⁸ Relying on this reasoning, the court in *Loper* held that there was little difference between individuals who solicit for charity and individuals who solicit for themselves.¹⁹ After determining that begging is protected free speech, the court then determined that the ordinance at issue attempted to prevent speech in a traditional public forum, and that the ordinance was not content-neutral because it prohibited all speech related to begging, and was therefore content-based.²⁰

¹⁵ 999 F.2d 699, 701 (2d Cir. 1993).

¹⁶ *Id.* at 704–05 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

¹⁷ *Id.*

¹⁸ See *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980).

¹⁹ See *Loper v. N.Y.C. Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993) (stating that there is “little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed. . . . The distinction is not a significant one for First Amendment purposes.”).

²⁰ *Id.* at 703. Courts have not agreed on whether blanket prohibitions of begging are content-based or content-neutral. Compare *Loper*, 999 F.2d at 705 (statute was content-based because it prohibited all speech related to begging), and *ACLU of Nev. v. City of Las Vegas*, 466 F.3d 784, 794 (9th Cir. 2006) (ordinance that

This case also illuminates the glaring issue in this busker dilemma: the court is forced to decide what “expression” is, from whose viewpoint, and under what circumstances. This inquiry is bound to change not only with the conveyor and recipient of any purposed expression or message, but also with the changing society and time period. The need for an approach to properly regulate without arbitrarily infringing upon buskers’ rights is readily apparent, especially given the court’s struggle to define what “expression” and “art” are in a given situation. *Loper* demonstrates the necessity of a solution that takes this inquiry out of a court’s hands.

2. *Bery v. City of New York*

The plaintiffs in *Bery v. City of New York* sought a preliminary injunction to prevent New York City from enforcing a General Vendors Law against them.²¹ They argued that the ordinance violated their First Amendment right to freedom of expression and their rights under the Equal Protection Clause of the Fourteenth Amendment.²² On appeal to the Second Circuit, the court reversed the district court’s decision, and held that the ordinance violated both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.²³ The Second Circuit’s reasoning was that the *sale* of art should receive no less protection than the art itself.²⁴ In the Second Circuit’s view, art such as paintings, photographs, prints and sculptures—as opposed to crafts such as jewelry, pottery and silver mak-

banned any solicitation of money or business in a downtown area was content-based), *with* *Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir. 2000) (parties stipulated that regulation was content-neutral), *and* *Smith v. City of Fort Lauderdale*, 177 F.3d 954, 956 (11th Cir. 1999) (statute was content-neutral); *see also* *Gresham*, 225 F.3d at 905 (“Colorable arguments could be made both for and against the idea that [an] Indianapolis ordinance [targeting panhandling] is a content-neutral . . . restriction.”).

²¹ 97 F.3d 689, 691–92 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 2408 (1997). The plaintiffs in *Bery* were visual artists who sold their artwork on public sidewalks and an artists’ advocacy organization called Artists for Creative Expression on the Sidewalks of New York City. Pursuant to the General Vendors Law, no individual could exhibit, sell, or offer goods for sale in public places in New York City unless the individual first obtained a general vendors license. Because obtaining a license was difficult, if not impossible, for artists who were required to comply with the law, many artists sold their art in the streets without licenses. The result: police arrested the artists and seized their artwork.

²² *Id.* at 693.

²³ *Id.* at 694–96, 699.

²⁴ *Id.* at 695.

ing—always attempts to convey a message to its observer, and therefore should receive First Amendment protection.²⁵

To further illustrate the courts' jumble when facing this issue, in *White v. City of Sparks*, the U.S. District Court for the District of Nevada had to contend with *Bery* and held the exact opposite of the Second Circuit. Declining to adopt the view of the *Bery* court, the *White* court stated that although the plaintiff “would have this court adopt the *Bery* holding and find that all paintings, photographs, prints and sculptures are inherently expressive, thereby eliminating the need for any individualized inquiry into the expressiveness of a particular piece of art or a particular type of artwork, the court declines this invitation.”²⁶ It is not difficult to see the confusion inherent in these decisions.

3. *Mastrovincenzo v. City of New York*

In *Mastrovincenzo*, the Second Circuit was yet again called upon to adjudicate artistic expression: if the plaintiffs' street wares, featuring graffiti style painting, were “pieces of merchandise”—as opposed to works of art—the plaintiffs had to have purchased vendor permits from New York City.²⁷ If the court held that the items being sold were protected art, and therefore forms of expression protected by the First Amendment, the city's ordinance requiring vendors to obtain licenses would be a First Amendment violation.²⁸ The court determined that the plaintiffs' graffiti-decorated items were expressive.²⁹ The court, although holding that graffiti could be considered expressive and therefore subject to some level of First Amendment protection, found New York's ordinance constitutional on other grounds.³⁰

²⁵ *Id.* at 696.

²⁶ 341 F. Supp. 2d 1129, 1138–39 (D. Nev. 2004).

²⁷ *Mastrovincenzo*, 435 F.3d at 81–82 (describing New York City's General Vendors Law, which attempts to limit and regulate streets and sidewalks by requiring individuals who sell merchandise or other non-food items to obtain a vendor's license). The plaintiffs sold hats and other clothing items that they painted and decorated with graffiti according to the individual request of each client. *Id.* at 86.

²⁸ *Id.* at 81–82 (explaining that artists and vendors who sold paintings, photographs, prints, and sculptures had previously challenged this law as a First Amendment violation, and so the law was not enforceable against vendors of “any paintings, photographs, prints and/or sculpture”).

²⁹ *Id.* at 96–97 (holding that plaintiffs' merchandise had a predominantly expressive purpose, and their motivation behind selling goods was primarily for self-expression, rather than for commercial gain).

³⁰ *Id.* at 96–100 (finding plaintiffs' merchandise was subject to First Amendment protection due to its predominantly expressive purpose; however, also concluding that New York City's purpose of keeping sidewalks clear and preventing

These three cases demonstrate the extreme difficulty that courts have in trying to define “art” and “expression”—especially when they are asked to provide a bright line between protected expression and unprotected expression involving commercial aspects. The result has been wide-ranging and inconsistent definitions and analyses. Not only do courts’ vague and inconsistent definitions do nothing to aid the ongoing problem of cities promulgating inadequate regulations, but the precedential value of each decision becomes less and less valuable for lower courts.

C. Pervasive Permitting

Among the different types of regulations that cities and municipalities promulgate to further certain interests in maintaining and regulating public space, one in particular is ever prevalent and increasingly pervasive. A permitting regulation is one that requires a busker or street performer (or anyone wishing to engage in free speech activities) to obtain a permit before legally exercising his or her guaranteed rights under the First Amendment.³¹ Although permitting schemes are rampant, one bedrock principle remains true of them: they are a prior restraint and carry a presumption of unconstitutionality that is egregious in the mind of the Court.³²

sale of stolen goods was a significant government interest sufficiently tailored to achieve the ends sought).

³¹ The issued permits are not limited to buskers. In fact, there is a fairly wide spectrum of permitting schemes that cities and municipalities implement. *See, e.g.*, *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1281–82 (11th Cir. 2006) (Atlanta ordinance requiring ninety-day notice before holding an outdoor festival); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1027 (9th Cir. 2006) (Santa Monica ordinance requiring a permit for three categories of community events: (1) parades, processions, or marches, (2) any activity involving 150 people or more, and (3) any activity or event on public property that requires a tent or canopy); *Paulsen v. Lehman*, 839 F. Supp. 147, 152 (E.D.N.Y. 1993) (New York scheme requiring a permit for the distribution of literature).

³² *See Cox v. City of Charleston*, 416 F.3d 281, 284 (4th Cir. 2005) (“An ordinance that requires individuals or groups to obtain a permit before engaging in protected speech is a prior restraint on speech.”); John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 *YALE L.J.* 409, 421 (1983) (“Of the various things referred to as prior restraint, a system of administrative preclearance is the most plainly objectionable. Under such a system, the lawfulness of speech or publication is made to depend on the prior permission of an executive official.”). *See also* Nathan W. Kellum, *Permit Schemes: Under Current Jurisprudence, What Permits are Permitted*, 56 *DRAKE L. REV.* 381, 382 n.5 (2008) (citing *Cox v. Louisiana*, 379 U.S. 536, 551–52 (1965)) (“A well-recognized concept is that every individual has the right to speak his or her peace in the public square. This right does not fade away just because some may find the message offensive.”).

1. Permitting Schemes Generally

Permitting schemes are rapidly becoming one of the most common regulations promulgated by cities and municipalities to further the governmental interest of maintaining and regulating public spaces. However, these permitting schemes are inevitably challenged on a First Amendment basis. A scheme that regulates access to and use of public places has seemingly legitimate purposes, the most typical of these purposes being the assurance of public safety and order.³³ Contrary to those interests and purposes, however, is the core constitutional guarantee that protected speech in a public forum be shielded from undue governmental infringement. Striking a balance between these conflicting interests should be the ultimate goal of any court evaluating permit schemes.

Unfortunately, as has already been brought to light in this Article, along with the increase in permitting schemes come more unsettled legal doctrines and analyses concerning prior restraints.³⁴ Prior restraints, much like most of the legal doctrine regarding regulation of busking, have been molded by such an inconsistent precedential past that the term itself “has become largely a legal misnomer, and the doctrine a source of confusion and controversy.”³⁵ This is yet another example of the courts needing assistance.

The importance of a permitting scheme that strikes the intricate balance of the legitimate, competing interests at play in this busker dilemma is imperative. A permitting scheme that adequately serves both the governmental interests at play and the First Amendment rights of buskers will allow the courts—when inevitable litigation over the permitting scheme occurs—to begin to set out a valid framework for analyzing such a scheme. In turn, cities and municipalities could promulgate permitting schemes—if

³³ For example, the government may constitutionally regulate speech that takes place during rush hour on busy streets, produces dangerously high levels of sound through loud speakers, or involves duplicate uses of public property. *Grayned v. City of Rockford*, 408 U.S. 104, 115–16 (1972).

³⁴ Prior restraints are “increasingly derided by legal scholars and frequently misunderstood by the Court itself.” Michael I. Meyerson, *Rewriting Near v. Minnesota: Creating a Complete Definition of Prior Restraint*, 52 *MERCER L. REV.* 1087, 1087–88 (2001). Professor Meyerson worries that the current doctrine is ripe for attorneys to abuse. *Id.* at 1089–90.

³⁵ Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 *N.C. L. REV.* 1, 2 (1989). This confusion has even led one legal scholar to conclude that the “[prior restraint] doctrine is so far removed from its historic function, so variously invoked and discrepantly applied, and so often deflative of sound understanding, that it no longer warrants use as an independent category of First Amendment analysis.” Jeffries, *supra* note 32, at 437.

absolutely necessary—that would pass constitutional muster under the courts’ new, consistent framework.

2. Analytical Framework for Permitting Schemes’ Constitutionality

A challenged permitting scheme is subject to an analysis similar to that applied to a normal regulation that either prohibits or requires certain criteria to be met before a person may engage in free speech activity. Permitting schemes are a form of prior restraint and are thus “the most serious and the least tolerable infringement on First Amendment rights.”³⁶

The Supreme Court, in a number of decisions, framed the constitutionality of permitting schemes. In *Freedman v. Maryland*, the Court delineated procedural requirements for prior restraints, aiming to prevent governmental entities from becoming the final decision-makers on the type of speech that enters the public sphere.³⁷ In *Shuttlesworth v. Birmingham*, the Court required permit schemes to contain objective and narrow standards to operate as a guide for the decision-maker in granting or denying permit applications, thereby preventing the exercise of unfettered discretion by government officials.³⁸ The objective standards in *Shuttlesworth* were then applied, in *Forsyth County, Ga. v. Nationalist Movement*, to the assessment of charging permit fees; fees may only be charged on a content-neutral basis, requiring some content analysis in the case of fee-based schemes.³⁹

The issue of content became fully amalgamated into the Supreme Court’s prior restraint precedent in *Thomas v. Chicago Park Dist.*, when the Court excluded content-neutral schemes from *Freedman*’s procedural safeguards requirement, yet found them suitable for content-based schemes.⁴⁰ Finally, additional policy considerations, such as protecting a speaker’s interests in anonymity, the constitutional right to spontaneous speech, and the objective burden placed on religious and political expressions by requiring permits for public speech, were addressed by the Court in *Watchtower Bible and Tract Soc’y of N.Y., Inc. v. Village of Stratton*.⁴¹

Though these decisions provide some firm footing when courts take up a permitting scheme issue, they are not nearly enough to provide the much-needed precedential certainty that this inquiry—and the Constitution—de-

³⁶ *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976).

³⁷ 380 U.S. 51, 58–59 (1965).

³⁸ 394 U.S. 147, 154–55 (1969).

³⁹ *See* 505 U.S. 123, 127 (1992).

⁴⁰ *See generally* 534 U.S. 316 (2002).

⁴¹ 536 U.S. 150, 166–68 (2002). For a thorough discussion on permitting scheme jurisprudence, *see generally* Kellum, *supra* note 32.

mands. As the Court explained in *Watchtower*, “[i]t is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak . . . then obtain a permit to do so.”⁴²

3. Effect on Buskers

A permitting scheme infringes upon a busker’s First Amendment free speech rights in a number of different ways. Furthermore, a court analyzing whether a permitting scheme is constitutionally valid applies a similar—and still ineffective—framework of analysis. The various ways permitting schemes unconstitutionally infringe upon a busker’s First Amendment rights will be discussed in turn.

i. Single Speaker Permit

The Supreme Court has not addressed the issue of single-speaker permitting, and there is currently a circuit split: there are at least seven circuits that have directly criticized permit schemes on the basis of their applicability to small groups and single speakers, and only the Second Circuit has upheld a single-speaker permitting scheme.⁴³ However, it is important to

⁴² *Watchtower Bible and Tract Soc’y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 123, 165–66 (1992).

⁴³ *See, e.g.*, *Santa Monica Food Not Bombs*, 450 F.3d at 1039 (9th Cir. 2006) (describing how a significant governmental interest for purposes of a prior restraint only arises when “large groups of people travel together on streets and sidewalks”); *Cox v. City of Charleston*, 416 F.3d 281, 285 (4th Cir. 2005) (describing how application of a permitting requirement “to groups as small as two or three renders it constitutionally infirm”); *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005) (striking a permitting system that could apply to groups as small as “two or more persons”); *Parks v. Finan*, 385 F.3d 694, 698 (6th Cir. 2004) (“[T]he permitting scheme as it presently exists is invalid with respect to individuals.”); *Burk v. Augusta-Richmond Cty.*, 365 F.3d 1247, 1259 (11th Cir. 2004) (striking an ordinance as overly broad in part because “it applies to small intimate groups that do not create a legitimate threat to the County’s interests”); *Cnty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1392 (D.C. Cir. 1990) (invalidating permit scheme because it could possibly apply to individuals and groups as small as two); *see also Douglas v. Brownell*, 88 F.3d 1511, 1524 (8th Cir. 1996) (describing, in dicta, that an ordinance as applied to groups as small as ten is not narrowly tailored). *But see Hobbs*, 397 F.3d at 151–52 (2d Cir. 2005) (upholding single-speaker permitting requirement only if the performer planned to use “props and/or equipment”).

note that the Second Circuit's decision in *Hobbs* involved a governmental interest quite different from those interests typically involved in permitting schemes. The governmental interest in not allowing Hobbs to obtain a permit was that of child welfare and safety, because Hobbs was a convicted child molester and registered sex offender.⁴⁴ In contrast, the typical governmental interest is merely to regulate free space and maintain order. *Hobbs* further adds to the spiraling complexity of restricting free speech in public spaces because it, troublingly, in essence denied free speech rights by analyzing the speaker's character.

However, if this issue were directly addressed by the Supreme Court, the Court would likely side with the majority of circuit courts and hold that permitting schemes restricting a single-speaker or small group are unconstitutional because they do not further the typical governmental interest in maintaining peace and order. After all, a single speaker—such as a busker—does not necessitate the same planning and police presence as a large group activity does.

ii. Permit for a Fee

Unlike single-speaker permitting schemes, the Supreme Court has directly addressed the imposition of a fee before obtaining a permit. The Court recognizes that fees may be assessed as part of a system of prior restraint, but the system must still be content-neutral and serve a legitimate governmental interest.⁴⁵ So, a city could not impose a permit fee applicable to buskers, but not to religious groups or charities. Furthermore, the government may not impose a permit fee solely for the purpose of generating revenue.⁴⁶

iii. Advance Notice

A regulation that requires a person wishing to engage in free speech and expression to obtain a permit, thus essentially requiring advance notice, hinders spontaneous speech and is therefore unconstitutional. As the Supreme Court specifically acknowledged in *Watchtower*, every citizen not only

⁴⁴ 397 F.3d at 150.

⁴⁵ *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 136–37 (1992).

⁴⁶ *Compare* *Ne. Ohio Coal. for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1110 (6th Cir. 1997) (upholding \$50 fee for peddling permit as appropriate way of covering costs incident to implementation of ordinance), *with* *Turley v. N.Y.C. Police Dep't*, 988 F. Supp. 667, 674 (S.D.N.Y. 1997) (striking down \$45 fee for sound device permit as being greater than proven administrative costs). *See also* *Kellum*, *supra* note 32, at 408–10.

enjoys the right to speech, but also the right to spontaneous speech.⁴⁷ This right is obviously jeopardized by a requirement that forces a speaker to supply notice of the proposed speech in advance.⁴⁸ The Court has noted that “when an event occurs, it is often necessary to have one’s voice heard promptly, if it is to be considered at all.”⁴⁹

In addition to drastically limiting the effectiveness of the speech, the mere imposition of an advance notice requirement could deter people from engaging in their guaranteed First Amendment rights.⁵⁰ Further, the delay inherent in advance-notice permitting schemes chills First Amendment rights. Indeed, “[t]here is not much incentive in uttering a statement that will not gain consideration due to the untimely nature of the utterance.”⁵¹ Thus, permitting schemes are adverse to the very nature of the constitutionally guaranteed right of spontaneous free speech and expression.

iv. Unfettered Discretion

“Unfettered discretion,” with regard to permitting schemes generally, is a fairly settled area of law in free speech jurisprudence. The Supreme Court has reiterated again and again that the government does not enjoy unfettered discretion when deciding who should be able to exercise their First Amendment rights and on what occasions.⁵² Thus, if an administrator

⁴⁷ *Watchtower*, 536 U.S. at 164, 167–68.

⁴⁸ *Santa Monica Food Not Bombs*, 450 F.3d at 1046 (“Advance notice or permitting requirements do, by their very nature, foreclose spontaneous expression Consequently, in any particular forum, true spontaneous expression and the application of an advance notice requirement are mutually exclusive.”).

⁴⁹ *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring); *see also* *Grossman v. City of Portland*, 33 F.3d 1200, 1206 (9th Cir. 1994) (“[B]ecause of the delay caused by complying with the permitting procedures, [i]mmediate speech can no longer respond to immediate issues.”) (quoting *NAACP v. City of Richmond*, 743 F.2d 1346, 1355–56 (9th Cir. 1984)); *City of Richmond*, 743 F.2d at 1355 (“[T]he delay inherent in advance notice requirements inhibits speech. By requiring advance notice, the government outlaws spontaneous expression.”).

⁵⁰ *Grossman*, 33 F.3d at 1206 (“Both the procedural hurdle of filling out and submitting a written application, and the temporal hurdle of waiting for the permit to be granted may discourage potential speakers.”).

⁵¹ *Kellum*, *supra* note 32, at 411.

⁵² *See* *Bd. of Airport Comm’rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987) (“[T]he opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident.”) (quoting *Lewis v. City of New Orleans*, 415 U.S. 130, 136 (1974) (Powell, J., concurring)). Allowing a licensing official to retain unchecked “discretion has the potential for becoming a means of suppressing a particular point of view.” *Forsyth Cty.*, 505 U.S. at 130

has the power to grant, modify, postpone, or waive a permit for expressive activity on the basis of vague or non-existent criteria, the regulation is deemed invalid under the prior restraint doctrine.⁵³

An issue that is not so well-settled, however, is the issue of unfettered discretion in the hands of an official when there is *no specified time* in a regulation within which the official must make a decision on a permit application. The Supreme Court directly addressed this issue in *FW/PBS, Inc. v. City of Dallas*, when it held that “[w]here the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion. A scheme that fails to set reasonable time limits on the decision maker creates the risk of indefinitely suppressing permissible speech.”⁵⁴

However, many appellate courts have used certain language from *Thomas v. Chicago Park Dist.*⁵⁵ to hold that *there is no need* for content-neutral permitting schemes to have a fixed deadline for the licensing official to act on a given request.⁵⁶ The question then becomes whether the Court, through such language in *Thomas*, definitively ruled that deadlines for a decision are no longer required, thus rendering the appellate courts’ interpretation and application correct.

It is more appropriate, however, to conclude that the Court has not ruled on the issue. The Court in *Thomas* was merely stating that the procedural requirements of *Freedman* need not be followed in a content-neutral

(quoting *Heffron*, 452 U.S. at 649 (1981)); *see also* *City of Houston v. Hill*, 482 U.S. 451, 465–67 (1987) (discussing unguarded discretion found in broad regulation of expressive activities). Furthermore, unfettered discretion results in inequity. *See* Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2416 (2003) (“[T]he existence of discretion creates a substantial risk that government actors will contravene equality norms. Left to their own devices, the various entities that exercise discretionary decision-making authority—including police officers, bureaucrats, judges, juries, and even the electorate—may base their decisions on improper considerations.”).

⁵³ In the seminal *Shuttlesworth* decision, the Supreme Court considered, and held invalid, a statute allowing for individual judgment on “public welfare, peace, safety, health, decency, good order, morals or convenience.” 394 U.S. at 150–51 (internal citations omitted).

⁵⁴ 493 U.S. 215, 227 (1990).

⁵⁵ “We have never required that a content-neutral permit scheme regulating speech in a public forum adhere to the procedural requirements set forth in *Freedman*.” *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322 (2002).

⁵⁶ *See* *Granite State Outdoor Adver., Inc. v. City of St. Petersburg*, 348 F.3d 1278, 1283 (11th Cir. 2003); *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1259 (10th Cir. 2004); *S. Or. Barter Fair v. Jackson Cty.*, 372 F.3d 1128, 1138 (9th Cir. 2004).

permitting scheme challenge. Unfettered discretion is still unfettered discretion, and therefore unconstitutional. The Court condemns vague or non-existent standards for awarding a permit;⁵⁷ the Court condemns vague or non-existent standards for imposing a fee for a permit;⁵⁸ the Court undoubtedly also condemns vague or non-existent standards for determining *when* to decide about a permit.

So, this is but another unsettled area of the law relating to buskers' First Amendment free speech rights and the government's interests in regulating and maintaining the free space upon which buskers perform.

III. BUSKING IS PROTECTED UNDER THE FIRST AMENDMENT

A busker's performance can range from playing the guitar to standing in an awkward position for an impressively long time. Given the extremely broad scope of performance-type conduct that the Supreme Court has recognized as free speech under the First Amendment, and a logical analysis of begging and soliciting jurisprudence, busking—in all its aspects—falls under the ambit of protections afforded by the First Amendment.

Beginning with first principles, claims under the Free Speech Clause of the First Amendment are analyzed in three steps: First, the court “must . . . decide whether [the activity at issue] is speech protected by the First Amendment, for, if it is not, [the court is to] go no further.”⁵⁹ Second, assuming the activity “is protected speech, [the court] must identify the nature of the forum, because the extent to which the government may limit access depends on whether the forum is public or nonpublic.”⁶⁰ And third, the court must assess whether the government's justifications for restricting speech in the relevant forum “satisfy the requisite standard.”⁶¹ The answer is clear under this analysis: busking—performance and pay—is protected free speech and expression under the First Amendment.

A. *Entertainment Aspect is Protected*

The Supreme Court has deemed a wide array of conduct, expression, and speech protected under the First Amendment, including entertainment or performance-type conduct intertwined with busking. For example, the

⁵⁷ *Shuttlesworth*, 394 U.S. at 150–51.

⁵⁸ *Forsyth Cty.*, 505 U.S. at 133–34.

⁵⁹ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985).

⁶⁰ *Id.*

⁶¹ *Id.*

Court has held that music without regard to words;⁶² theater;⁶³ film;⁶⁴ topless dancing;⁶⁵ parades;⁶⁶ peaceful protest marches;⁶⁷ wearing black arm bands;⁶⁸ sit-ins;⁶⁹ and refusing to salute the flag⁷⁰ are protected. Given the Court's wide-ranging sweep pertaining to conduct protected by the First Amendment, it is hard to imagine a busker's conduct falling outside of its protections.

B. Begging Aspect is Protected

A more vexing issue is whether the solicitation of tips—the very thing separating mere street performance from busking—is protected under the First Amendment. The Supreme Court has not directly addressed this issue. An interesting nuance to the Court's reasoning in another First Amendment speech and expression case, however, sheds some light on a possible outcome should the Court rule on begging conduct. In *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, the Court stated that “[p]arades are . . . a form of expression, not just motion”⁷¹ This is interesting because the Court is clearly indicating that a movement, so long as it is a movement to “make a point,” falls within the protections of the First Amendment.⁷²

Logically then, an outstretched hand asking for money clearly falls within the ambit of the First Amendment because it is *making a point* to the person who sees the hand: I need or want money; I am a crusader for the poor and helpless; I am meek and humble; or please help me.⁷³ Begging conduct need not hold any particularized message—it must merely be a motion to make a point. In fact, “a narrow, succinctly articulable message is not a condition of constitutional protection,” and if it were, the First

⁶² *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

⁶³ *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557–58 (1975).

⁶⁴ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952).

⁶⁵ *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932–34 (1975).

⁶⁶ *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995).

⁶⁷ *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969).

⁶⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969).

⁶⁹ *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966).

⁷⁰ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34 (1943).

⁷¹ 515 U.S. 557, 568 (1995).

⁷² *Id.* (defining parade “to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way.”).

⁷³ *See, e.g., Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988) (“It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.”).

Amendment “would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.”⁷⁴ An outstretched hand conveys a message to make a point, and is therefore protected under the First Amendment.

Furthermore, as already discussed, the Second Circuit in *Loper v. N.Y.C. Police Dep't* expressly held that begging is protected under the First Amendment because “[there is] little difference between individuals who solicit for charity and individuals who solicit for themselves with regard to the message conveyed . . . The distinction is not a significant one for First Amendment purposes.”⁷⁵ Importantly, the *Loper* court makes it expressly clear that begging conveys a message that is intertwined with other forms of speech that seek support, and any ordinance that effectively bars a type of communicative activity protected as First Amendment speech is content-based and thus unconstitutional. This is crucial for the busker dilemma because a city or municipality that attempts to ban or prohibit begging, and then enforces that ordinance or regulation on a busker, is unconstitutionally infringing on a busker’s free speech rights.

So, although current jurisprudence—both Supreme Court and the Second Circuit—confirms that begging is a form of protected free speech and expression, a vast majority of cities and municipalities are still promulgating regulations that unconstitutionally bar all begging and, as a result, busking.

C. *The Forum and Scrutiny Analysis*

The type of forum where a busker is performing is essentially dispositive of the issue of whether a certain regulation is infringing upon that busker’s First Amendment rights.⁷⁶ A busker is either performing in a “traditional public forum,” “designated public forum” or “nonpublic forum.” A busker’s First Amendment free speech rights are at their apex in a traditional public forum because they have “by long tradition or by government fiat . . . been devoted to assembly and debate.”⁷⁷ A busker’s free speech rights are somewhat limited in a designated public forum because

⁷⁴ Hurley, 515 U.S. at 569.

⁷⁵ 999 F.2d 699, 704 (2d Cir. 1993).

⁷⁶ “Rather, the extent of scrutiny given to a regulation of speech—in effect, how we examine the directness with which it promotes the government’s goals and the degree to which it burdens speech—depends on whether the regulation applies in a *public* or *nonpublic* forum.” Boardley v. U.S. Dep’t. of Interior, 615 F.3d 508, 514 (D.C. Cir. 2010).

⁷⁷ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (quoting *Perry Educ. Ass’n*, 460 U.S. at 45 (1983)).

those forums only exist when “government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose.”⁷⁸ And lastly, a busker’s First Amendment rights can be extremely restricted in a nonpublic forum because that particular forum is “[p]ublic property which is not by tradition or designation a forum for public communication.”⁷⁹

Of particular importance to this busker dilemma, in regard to the determination of what type of forum buskers are performing in, is the case of *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*.⁸⁰ The Port Authority of New York and New Jersey, which owned and operated three major airports in the New York City area and controlled certain terminal areas at the airports, adopted a regulation forbidding the repetitive solicitation of money within the terminals⁸¹—a perfect example of a regulation piercing the heart of this busker dilemma.

Chief Justice Rehnquist, in writing for the majority, pays homage to the oft-quoted language that public forums have “‘immemorially . . . time out of mind’ been held in the public trust and used for purposes of expressive activity.”⁸² Compounding off of the language of this statement, Justice Rehnquist embarks upon an interesting analysis, and intimates that the public forum doctrine is flexible, not rigid.

Justice Rehnquist, in holding the airport terminal at issue was not a public forum, stated that only “[i]n recent years [has it] become a common practice for various religious and non-profit organizations to use commercial airports as a forum for the distribution of literature, the solicitation of funds, the proselytizing of new members, and other similar activities.”⁸³ Justice Rehnquist is indicating here that airport terminals have not “immemorially . . . time out of mind”⁸⁴ been held open for public expression. However, Justice Rehnquist further states that, “[w]hen new methods of transportation develop, new methods for accommodating that transportation are also likely to be needed. And with each new step, it therefore will be a new inquiry whether the transportation necessities are compatible with various kinds of expressive activity.”⁸⁵ Put simply, as society’s technology, culture, and attitude toward free speech change, so should the law. Thus, the public

⁷⁸ *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009).

⁷⁹ *Perry Educ. Ass’n*, 460 U.S. at 46 (1983).

⁸⁰ 505 U.S. 672 (1992).

⁸¹ *Id.* at 675–76.

⁸² *Id.* at 680 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

⁸³ *Id.* (quoting 45 FED. REG. 35314 (May 27, 1980)).

⁸⁴ *Id.* at 680 (quoting *Hague*, 307 U.S. at 515).

⁸⁵ *Id.* at 681.

forum doctrine is not a static doctrine, but an elastic one that changes as society and the law predicate.

This bodes well for the busker dilemma: as cities' interests change as a result of technology and new modes of transportation, so should courts' analyses in applying the public forum doctrine. A more expansive public forum doctrine leads to more public space where buskers' free speech rights are at their apex. As busking increases, and the public's interest in busking increases, so should the public forum doctrine.

After establishing that the speech at issue is protected, and identifying the correct forum, the court must finalize the analysis by applying the correct scrutiny test. For the purposes of this Article, I will focus on a time, place or manner restriction in applying the levels of scrutiny because this is the most common regulation conflicting with buskers' First Amendment interests. So, to pass constitutional muster, a time, place or manner restriction must meet three criteria: (1) it must be content-neutral; (2) it must be "narrowly tailored to serve a significant governmental interest"; and (3) it must "leave open ample alternative channels for communication of the information."⁸⁶ If a regulation is content-based, then strict scrutiny is applied to the regulation, instead of the intermediate scrutiny applied if the regulation is found to be content-neutral.⁸⁷ For a content-based regulation to pass a strict scrutiny analysis, it must "serve[] a 'compelling' governmental interest, '[be] necessary to serve the asserted [compelling] interest,' [be] precisely tailored to serve that interest, and [be] the least restrictive means readily available for that purpose."⁸⁸

The Ninth Circuit in *Berger v. City of Seattle* threw another wrinkle into this particular scrutiny analysis. In *Berger*, the Ninth Circuit struck down a time, place or manner restriction—specifically, an "active solicitation" ban—after a busker brought suit, alleging the regulation was content-based because the regulation treated some forms of protected speech differently than others and an officer enforcing the regulation had to examine the content of a busker's expression in order to enforce the regulation.⁸⁹ In *Berger*,

⁸⁶ Ward, 491 U.S. at 791 (quoting Clark, 468 U.S. at 293 (1984)).

⁸⁷ "Restraints on speech on the basis of its content, except in a few limited categories such as obscenity, defamation, and fighting words, are generally disallowed." Hobbs, 397 F.3d at 148 (2d. Cir. 2005) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992)). Furthermore, this presumption of invalidity may only be overcome if the restriction passes a strict test. See, e.g., *Boos v. Barry*, 485 U.S. 312, 321 (1988) (content-based restrictions on political speech "must be subjected to the most exacting scrutiny").

⁸⁸ Hobbs, 397 F.3d at 149 (internal citation omitted). See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

⁸⁹ 569 F.3d 1029, 1035 (9th Cir. 2009).

the “officer must read it” test was applied to a busking case.⁹⁰ *Berger* is a crucial decision for buskers because it is another weapon in their arsenal to battle the growing number of unconstitutional regulations that infringe upon their First Amendment free speech rights.

Busking—in its entirety—is protected speech and expression under the First Amendment. An argument otherwise cuts against the Supreme Court’s broad definitional scope under the First Amendment, jurisprudence on begging, and forum and scrutiny analyses.

IV. “ADVANCING THE INTEREST” APPROACH

With such an imbalance and unclear framework of analysis for courts, a regulation or permitting scheme aimed directly at advancing the governmental interest at issue—as opposed to a certain type of conduct—is a solution which adequately strikes the intricate balance at play in this busker dilemma. Furthermore, this solution will allow courts to begin to sew up the seams of this bursting legal doctrine. The approach is simple: instead of asking the court to decide whether certain busking conduct is panhandling, begging, or purely free speech and expression, the court need only ask, “does this conduct unreasonably block pedestrian traffic on this street?”

A. *Regulations Should be Aimed Directly at Advancing the Governmental Interests at Play in this Busker Dilemma*

The important, conflicting interests involved in this busker dilemma, coupled with inadequate jurisprudence, have muddled the legal landscape for both governmental entities and private citizens. Lacking an adequate, unified approach to this issue will only lead to more litigation and First Amendment rights falling by the wayside.

A solution to this growing problem is for cities and municipalities to promulgate regulations that are aimed directly at the governmental interests that necessitated the regulation. In doing so, courts will only have to analyze whether the conduct at issue is protected or not, and will not have to try to define what “art” or “expression” *is* in a given case, based upon language in a vague regulation. This solution strikes a much-needed balance between the governmental interests at play and the First Amendment rights of buskers, and provides a framework of precedential value moving forward. A court

⁹⁰ *Id.* at 1052. The “officer must read it test” is satisfied when an officer must evaluate the content of a message to determine whether a regulation applies. If satisfied, the “officer must read it” test supplies evidence that the regulation is content-based. *See also* *Forsyth Cty.*, 505 U.S. at 134.

would simply apply the typical and sturdy constitutional analysis that governs free speech cases.

For example, a regulation that prohibited begging, soliciting, or pan-handling would force the court to determine where the line of protected speech and expression ends (i.e., playing music on a public sidewalk), and purely commercial motive begins (i.e., holding out a tip jar).⁹¹ Under the “advancing the interest” approach, the regulation would not encompass busking merely because an open guitar case or tip jar is present, but be more tailored toward to the governmental interest that the regulation is meant to advance. In this scenario, a court would not have to draw a line between protected expression and a definition set out by a regulation; it would need only decide whether the governmental interest was narrowly tailored and served the particular legitimate government interest claimed, which is the test that *should* be applied.

Another key advantage of the “advancing the interest” approach is its broad scope. Cities wishing to encourage or embrace busking could still utilize this approach to allow it, while still adequately regulating public space. If a regulation prohibited conduct that blocked pedestrian traffic, the city enforcing the regulation could construe it as broadly as it wanted to. Busking in that city would go on as long as the city deemed it prudent.

The “advancing the interest” approach would provide stability in case law on this issue, provide guidance for cities and municipalities looking to promulgate regulations in this area, and free buskers’ free speech rights from arbitrary infringement. Further, courts would no longer have to shoulder the responsibility of delving into philosophical underpinnings of what “art” or “expression” are in a given case.

B. Applying the “Advancing the Interest” Approach to *Young v. Sarles*

Although the busking saga of *Young v. Sarles* recently came to a close, it still serves as a perfect illustration of this busker dilemma and a court shrugging its shoulders as a result of it.⁹² The regulation at issue in *Sarles* prohibited commercial activity.⁹³ WMATA claimed that its compelling interest in

⁹¹ This issue is superfluous if the Supreme Court holds begging as protected expression under the First Amendment. See *supra* Part II(B) and accompanying discussion.

⁹² See *supra* note 5. After continued negotiations, WMATA conceded to Alex Young’s motion for a summary judgment. The court therefore, fortunately, did not have to add to a growing body of muddled case law.

⁹³ According to WMATA’s regulations, a “commercial activity” is defined as “any enterprise or venture by groups or individuals for the purpose of promoting or

prohibiting “commercial activity” was to keep people from “obstructing ingress and egress to the stations by selling their wares and . . . spreading out on the sidewalk . . .” The court had to decide whether Young’s busking was protected speech or commercial activity, as defined in the regulations, and if the regulation’s prohibition on commercial activity served the claimed governmental interest. However, under an “advancing the interest” approach, the court need not partake in this painstaking analysis, and would only have to decide the issue under a traditional time, place or manner analysis.

The regulation at issue in *Sarles*, under the “advancing the interest” approach, would not single out certain content—begging, panhandling, and effectively busking—with its vague prohibition on “commercial activity”; instead, the regulation would prohibit “all conduct that obstructed ingress and egress” into the transit stations. Thus, the court would only need to do a traditional analysis to decide this case, instead of embarking on a metaphysical analysis of what “art” or “expression” is and whether such “art” or “expression” falls within the protections afforded by the First Amendment. Without a new approach—such as the “advancing the interest approach”—continued litigation and a stymied legislature and judicial system will remain at the forefront of busking regulations.

V. CONCLUSION

The intricate balance between two conflicting interests—the government’s interest in maintaining and regulating public space and a busker’s First Amendment free speech interests—shapes the contours of this busker dilemma. If a unified regulatory approach aimed directly at advancing governmental interests instead of singling out conduct is taken, then courts would be able to efficiently analyze these issues and would not be repeatedly forced to define indefinable concepts: “art” and “expression.” This would inevitably lead cities and municipalities to begin to tailor regulations so that litigation is not a certainty. A simple solution to a perplexing issue: cities and municipalities need to facilitate artistic expression and aid the courts by following the “advancing the interest” approach.

selling products or services, except food, drink and tobacco to transit patrons or the public.” Regulations Concerning the Use of WMATA Property § 100.07(d) at 6.



Irrevocable but Unenforceable? Collegiate Athletic Conferences’ Grant of Rights

Mark T. Wilhelm*

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*, FRANKTHE TANK.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]oes 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/Conference_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/>™craggs22, {<https://perma.cc/YN78-REVV>}.

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---ncaaf.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 Rische, *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/ncaafotball/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://collegefootballtalk.nbcsports.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-othe-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://perma.cc/27MM-FU> PU}.

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		Voters
Selection Body		

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://collegefootbaltalk.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/ncaafootball/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 through 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 play-off 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 play-off 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/ncaafootball/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/ncaafootball/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:

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

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-weighs-on-pay-tv-1438820384>, {<https://perma.cc/R39X-DZV9>}.

sports than in the broadcast of a favorite weekly drama—it would be shortsighted 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 & 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 short-sighted. 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.



Valuating a Celebrity’s Right of Publicity for Estate Tax Purposes

A review of different valuation methodologies and the unique difficulties that arise when valuating right of publicity posthumously.

Sara Zerehi*

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I. INTRODUCTION

In recent years, the IRS has begun to challenge deceased celebrities' right of publicity valuation on estate tax forms. Because right of publicity is an abstract intangible asset, it is often overlooked when individuals with a profitable right of publicity plan their estate. Although right of publicity continues to have an increasing presence in celebrities' asset portfolios, much remains untouched in this realm of intellectual property valuation. There is still no consensus on what valuation methodologies are most appropriate when it comes to posthumous right of publicity valuation.

Valuation of an intangible property right like right of publicity is an especially abstract concept with unique difficulties. However, I believe that combining an accounting model with both common sense and expert considerations of the unique riskiness of this asset can create a comprehensive model for valuation. Specifically, I will start my analysis by first considering the three traditional calculations for intangible asset valuation: the market, cost, and income approaches. I will analyze their respective suitability in terms of valuating right of publicity and consider the benefits and drawbacks of each method. Ultimately, I conclude that the income approach is the most applicable and I will focus my discussion on utilizing this methodology for estimating the fair market value of postmortem right of publicity. I will also introduce the appraisal guidelines provided by the Internal Revenue Service (IRS). These guidelines include an important concept of using a discount factor to account for the inherent riskiness of this unique asset. To determine an appropriate discount factor, I will consider certain distinct factors that would increase the risk associated with this asset, which would in turn decrease its ultimate fair market value. Therefore, I suggest establishing a fair market value and then estimating a discount rate to account for risks and uncertainties. This involves considering multiple factors to derive a percentage that will then be deducted from the fair market value.

Lastly, I will reflect on the distinctive difficulties and considerations that arise with posthumous right of publicity valuation for estate tax purposes and how it compares to other intellectual property assets, namely trademarks. I will review the inherent difficulty in separating right of publicity value from trademark value. Oftentimes, trademark values can seem interdependent with right of publicity value. I will discuss various ways to think about how to dissect the two property rights while avoiding double counting these assets on an estate tax filing.

II. DEFINING RIGHT OF PUBLICITY

Modern society has been, and continues to be, fascinated with celebrities. Celebrities have a unique place in our society's pop culture and command a widespread interest from a large audience. From an economic perspective, a celebrity's right of publicity is a profitable asset. This is because celebrities are able to use their publicity to draw attention and interest from the public, facilitating a unique means of selling merchandise, advertising, and publicizing various goods and services. In fact, many celebrities can make more money from exploiting their fame than they can from their talent. Because of the economic and social significance of a celebrity's identity, there are certain legal protections available that allow celebrities to protect and control the commercialization of their personae.

The right of publicity is a state-protected intellectual property right that safeguards the commercial use of an individual's identity, usually identified as a person's name, image, photograph, likeness, voice, or signature.¹ Historically, the right of publicity derived from the state law right of privacy.² The right of publicity is the "inherent right of every human being to control the commercial use of his or her identity."³ Currently, each state in some way recognizes the right of privacy either by statute or by common law.⁴

Thirty-one states recognize the right of publicity. Nineteen of them do so through an explicit statute and twelve do so through common law decisions within their court systems.⁵ Even fewer states protect the right of publicity after the individual in question has died; currently, only about twenty states recognize a postmortem right of publicity.⁶ The law has defined the right of publicity as a type of "property" right.⁷ And like other forms of property, the right of publicity is freely transferable or licensable.⁸ Accordingly, the right of publicity is a descendible property right that is subject to estate taxes.⁹

¹ THOMAS PHILLIP BOGGESS V, CAUSE OF ACTION FOR AN INFRINGEMENT OF THE RIGHT OF PUBLICITY, 31 CAUSES OF ACTION 2D 121 (2006).

² J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 1:2 (2d ed. 2016).

³ *Id.* at § 1:3.

⁴ *Id.* at § 1:2.

⁵ CHRISTOPHER P. CASEY & THOMAS J. HOPE, THE RIGHT OF PUBLICITY: AN OFTEN OVERLOOKED ASSET IN ESTATE PLANNING 69 (2011).

⁶ *Id.* at 72.

⁷ MCCARTHY, *supra* note 2, at § 10:6.

⁸ *Id.* at § 1:26.

⁹ I.R.C. § 1.167(a)-3 (West 2016).

Even when a state lacks an established right of publicity, a celebrity's estate can attempt to get protection through other legal avenues.¹⁰ For example, the music icon Prince died domiciled in Minnesota, a state that currently lacks an established right of publicity statute.¹¹ However, his estate can continue to protect his name, image and likeness through the common law tort of invasion of privacy by appropriation of name or likeness.¹²

Generally, there are two main ways to monetize postmortem the right of publicity. First, the estate can license the use of the celebrity's right of publicity to a licensee. This usually means writing up a licensing agreement that limits the use to specified terms, territory, types of use, and duration of time for a fee. Occasionally, a celebrity's estate will grant gratis use for uses that promote a good cause or memorialize the deceased celebrity in a dignified manner. Licensing a celebrity's right of publicity means that a person or company would ask permission and generally pay a fee to use the celebrity's name, image, likeness, photograph, voice, or signature in a product, service, performance, campaign or advertisement. Secondly, the estate can realize money from policing the right of publicity. This means pursuing infringements and collecting any damages or settlements paid by infringers.

Even when celebrities intend to take advantage of the lucrative qualities of their right of publicity, many celebrities overlook this right when it comes to licensing. It might not seem as intuitive to license someone's right of publicity the way it is traditionally done for other intellectual property rights like copyrights and trademarks. For instance, if a licensee wanted to produce and sell a coffee table book with a quote attributable to Maya Angelou, they would have to license the copyright for the quote as well as Angelou's right of publicity for the use of her name in connection to the sale of a commercial good. Celebrity endorsements have become customary in advertising goods and services.¹³ Accordingly, whether celebrities realize their potential or not, the right of publicity is becoming an increasingly lucrative asset to many celebrities and their estates.¹⁴

¹⁰ THOMAS PHILLIP BOGGESS V, CAUSE OF ACTION FOR AN INFRINGEMENT OF THE RIGHT OF PUBLICITY, 31 CAUSES OF ACTION 2D 121 (2016).

¹¹ Oliver Herzfeld, *Prince's Post-Mortem Publicity Rights*, FORBES (May 16, 2016), <http://www.forbes.com/sites/oliverherzfeld/2016/05/16/princes-post-mortem-publicity-rights/#6ddf4e52d89d>, {<https://perma.cc/WH7L-SFPS>}.

¹² *Id.*

¹³ See *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983) ("The theory of the right [of publicity] is that a celebrity's identity can be valuable in the promotion of products and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity").

¹⁴ See *id.* at 833.

III. RIGHT OF PUBLICITY AND ESTATE PLANNING

When a celebrity dies in a state with postmortem rights, her right of publicity descends to her estate. Therefore, she needs to value it and include it in her 706 filing so it can be taxed appropriately.¹⁵ Form 706 is filed with the Department of the Treasury and is used to determine the estate tax applied by Chapter 11 of the Internal Revenue Code.¹⁶ This tax is imposed on the entire taxable estate, which is referred to as the “gross estate.”¹⁷ A decedent’s gross estate includes the fair market value at the time of death of all property, whether “real or personal, tangible or intangible, wherever situated” in which he or she had an interest.¹⁸ In determining whether the right of publicity counts as “property,” the court in *Haelan Laboratories, Inc. v. Topps Chewing Gum* put it simply: “the tag ‘property’ simply symbolizes the fact that courts enforce a claim which has pecuniary worth.”¹⁹

Moreover, the fair market value is “the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts.”²⁰ The “relevant facts” are what a hypothetical willing buyer and seller could reasonably have been expected to know at the time of death.²¹ Accordingly, events that were not reasonably foreseeable at the date of death are not considered in evaluating a fair market value.²²

The IRS applies a strict standard to property appraisal and requires the estate to value the asset based on its “highest and best use.”²³ The “highest and best use” standard measures the full income-producing potential of the

¹⁵ ROBERT M. BELLATI, *ESTATE PLANNING FOR FARMS & OTHER QUALIFIED FAMILY BUSINESSES* APPENDIX Y (1999).

¹⁶ Internal Revenue Service, *Instructions for Form 706* (2016), <https://www.irs.gov/instructions/i706/ch01.html>, {<https://perma.cc/7UH3-C79Q>}.

¹⁷ *See id.*

¹⁸ I.R.C. § 2031(a) (2014); I.R.C. § 2511(a) (2010). *See also* Estate of Andrews v. United States, 850 F.Supp. 1279 (E.D. Va. 1994) (holding that the right of publicity is intangible, personal property that is descendible, transferable, and under section 2031(a) of the IRS, part of a decedent’s gross estate, thereby making it subject to the federal estate tax).

¹⁹ *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

²⁰ I.R.C. § 20.2031-1(b) (West 2016).

²¹ *First Nat’l Bank of Kenosha v. United States*, 763 F.2d 891, 893–94 (7th Cir. 1985).

²² *Id.* at 894.

²³ 43 C.F.R. § 2201.3-2 (2016).

property regardless of how the estate will actually monetize the asset.²⁴ This means that even if the estate does not actually profit from this intellectual property asset, the estate may still be responsible for paying taxes on its income producing potential.²⁵ This holds regardless of the valuation method utilized.²⁶ Additionally, a beneficiary's decision not to exploit the decedent's right of publicity would not affect the valuation process.²⁷ Accordingly, any attempt the beneficiary may make to place limitations on the use of the right of publicity would not affect its value under the "highest and best use" appraisal standard set by the IRS.²⁸

But what if the decedent is the one that places restrictions on his or her right of publicity? Recently some celebrities have been more cautious of the post-death tax effects on their right of publicity. Probably one of the most recent and publicized examples of this came from the beloved actor and comedian Robin Williams. Williams restricted his estate from exploiting his right of publicity for twenty-five years after his death.²⁹ This might sound strange when you think of how much money could have been produced from the use of Williams' name, image, voice, and likeness. Another *Aladdin* sequel would undoubtedly provide Williams' estate with a hefty paycheck. But on closer inspection, it seems that Williams made a well-thought-out and economically sound decision. In considering this property right in his estate planning, Williams saved his estate from an onerous estate tax burden.

As I will discuss later on in this paper, the profitability of a celebrity's right of publicity has a finite life and the commercialization of Williams' right of publicity would likely not have extended past twenty-five years. Considering this, Williams arguably gave himself a right of publicity valuation of \$0. Furthermore, not only did Williams preempt the use of his publicity commercially, but he also assigned his publicity rights to a charitable foundation, enabling his trust to seek a charitable deduction.³⁰ In light of

²⁴ *Federal Estate Tax and the Right of Publicity: Taxing Estates for Celebrity Value*, 108 HARV. L. REV. 683, 692 (1995).

²⁵ 26 C.F.R. § 20.2031-1 (2016).

²⁶ See Joseph D. Wright, *Skyrocketing Dollars and the Tax Reform Act of 1997: Estate Planning for the Professional Athlete in a New Millennium*, 6 TULANE J. SPORTS LAWYERS 27, 40 (1999).

²⁷ See *Black v. Comm'r of Internal Revenue*, 38 T.C. 673 (1962).

²⁸ *Id.*

²⁹ See Eriq Gardner, *Robin Williams Restricted Exploitation of His Image for 25 Years After Death*, THE HOLLYWOOD REPORTER (March 30, 2015), <http://www.hollywoodreporter.com/thr-esq/robin-williams-restricted-exploitation-his-785292>, {<https://perma.cc/2FHX-NL3S>}.

³⁰ See *id.*

this, it seems Williams' intentions when placing limitations on his right of publicity are even more apparent: he was attempting to extricate his family from a severe tax burden.

Despite the intrigue of this interesting estate planning move, the majority of celebrities do not consider their right of publicity a valuable asset that greatly affects their estate tax burden. Therefore, their estates are left with an arduous task after they die: finding a method to properly estimate their right of publicity so that the IRS will not challenge its value. Financial advisory companies are accustomed to using strictly mathematical calculations, such as running regression models, plugging and chugging numbers into equations, discounting for present value, and applying industry percentages into an accepted accounting model for valuation. However, with the right of publicity, the basis of valuation is not as technical or mathematical. Right of publicity valuers often need more specialized knowledge about the market for image rights. Further, because the right of publicity is such a unique and abstract intellectual property right, a strictly mathematical methodology for valuation does not fit well. Accordingly, valuation strategies should be coupled with expert knowledge on the unique attributes of the entertainment industry in order to produce a justified figure.

IV. METHODOLOGIES FOR RIGHT OF PUBLICITY VALUATION

The fair market value appraisal of intangible property assets, including the right of publicity, involves consideration of three generally accepted valuation approaches: the market, cost, and income approaches.³¹

A. *Market Approach*

The market approach determines the fair market value of an asset by focusing on sales of comparable property.³² At a minimum, this approach assumes that there is an existing market of comparable properties and that a reasonable buyer would pay no more for a similar asset on the open market.³³ Applying this methodology to determining the value of a deceased celebrity's right of publicity would involve making comparisons to right of publicity valuations associated with similarly situated deceased celebrities.³⁴

³¹ See REILLY & ROBERT SCHWEIHS, *VALUING INTANGIBLE ASSETS* 113 (1 ed. 1999).

³² See Dr. Israel Shaked et. al., *Playing the Market (Approach): Going Beyond the DCF Valuation Methodology*, 28 *AM. BANKR. INST. J.* 58 (Dec./Jan. 2010).

³³ See REILLY & SCHWEIHS, *supra* note 31, at 115.

³⁴ See *Federal Estate Tax and the Right of Publicity*, *supra* note 24, at 690.

In determining if a celebrity is adequately comparable, a valuator should consider the subjects' level of fame, age, demographic audience, number of active royalty rates, similarity of licensing fees generated, and whether the celebrities are in a similar field of talent.

Although this method is intuitive, it is extremely difficult to implement because an appropriate comparable for a celebrity's right of publicity is often unavailable. A celebrity's persona is generally very unique; in fact, one reason why a celebrity's publicity is so valuable is because it is one-of-a-kind and is associated with a specific person. Occasionally, an argument can be made for a similarly situated comparable celebrity, but even if one is established, the comparable celebrity's valuation might be unreliable or unavailable. Accordingly, while this approach is generally intuitive, it is usually very difficult to implicate in the context of a celebrity's right of publicity.³⁵

B. Cost Approach

The cost approach determines fair market value of an asset by considering the current costs of replacing the asset in question.³⁶ The idea is that the cost it takes to replace an asset (by building or creating a similar asset from scratch) is reflective of its reasonable value.³⁷ Often, celebrities invest a lot of time, money, and energy into establishing a valuable public image allowing them to utilize their image or persona to realize profits.³⁸ This approach attempts to establish value by calculating the amount invested in building, marketing, and maintaining a celebrity brand. However, because of the virtual impossibility of establishing this figure, this approach is not effective when valuating right of publicity.

C. Income Approach

Lastly, the income approach focuses on the monetization potential of an intangible asset.³⁹ In this approach, the value of the right of publicity is the

³⁵ GORDON V. SMITH, CORPORATE VALUATION: A BUSINESS AND PROFESSIONAL GUIDE 146 (1988).

³⁶ Robert F. Reilly, *Intangible Asset Cost Approach Valuation Procedures*, 31 AM. BANKR. INST. J. 58, 59 (Sept. 2012).

³⁷ See Michael F. Beausang, Jr., *Valuation: General and Real Estate*, 132 3d Tax Mgmt. A-1, A-2 (1984).

³⁸ See generally Erandi Palihakkara, *Why the Kardashian Marketing Strategy is One for the Books*, HUFFINGTON POST (Feb. 4, 2016), http://www.huffingtonpost.com/erandi-palihakkara/why-the-kardashian-market_b_9136006.html, {<https://perma.cc/L3L8-RZQ2>}.

³⁹ See REILLY & SCHWEIHS, *supra* note 31, at 113.

present value of the expected stream of income received by ownership of the asset for the duration of the asset's profitable life.⁴⁰ Specifically, this method appraises the intangible asset by basing its value on historical evidence of yearly cash flows that are then projected over the asset's remaining useful life and subsequently discounted to present value.⁴¹

Determining the fair market value of a person's right of publicity under this approach requires many numerical considerations including estimates of profitability, future earnings potential, the duration of time in which income streams are feasible, and an estimation of the various risks associated with the realization of the forecasted income.⁴² Stated simply, this approach considers the income that the asset is currently producing in an attempt to project the income the property will produce in the future. In general, the income approach considers three main factors: a) the income generating capacity of the intangible asset, b) the expected remaining useful life of the asset, and c) a discount rate reflecting the risk associated with the asset.⁴³

Because the income approach accounts for the riskiness of an asset and establishes estimates by examining the historical income stream of the asset—here, the celebrity—I found it to be the most applicable to evaluating the value of a celebrity's postmortem right of publicity. Below, I will go over each factor and address how I would accommodate this approach to fit the valuation of this unique intellectual property asset. I will also discuss the various risks that should be considered when determining a risk factor to apply to the overall fair market value. In the end, I found that using a percentage to discount a lump sum value determined by the present value of projected future streams of income produced a reliable, comprehensive, and justified estimate.

V. INCOME APPROACH CONSIDERATIONS

A. *Establishing Expected Future Income*

Determining a celebrity's expected future income usually requires evaluating historical revenue attributable to right of publicity. This could mean past endorsement deals the celebrity entered into during life, any royalties for products bearing the celebrity's name or image, and any licensing agree-

⁴⁰ *Id.*

⁴¹ See Beausang, *supra* note 37, at A-5.

⁴² See REILLY & SCHWEIHS, *supra* note 31, at 115.

⁴³ IRS § 5: USPAP, Intangible Property Valuation Guidelines at § 4.48.5.2.4 (July 1, 2006).

ments allowing the use of the celebrity's right of publicity. For heightened accuracy, usually the retrospective valuation does not extend beyond the ten years preceding the celebrity's death.⁴⁴

1. Separating Right of Publicity from Personal Service

Evaluating past right of publicity revenue is by no means a simple calculation. This is mostly because there is one substantial difference between the income produced by a celebrity's right of publicity during her life versus after her death: after she dies, she can no longer provide any personal services. The majority of projects involving a celebrity's right of publicity also involve at least some level of personal assistance.⁴⁵ Let's consider an example to clarify the distinction between personal service and publicity rights. When a celebrity is hired to film a commercial, she is getting paid for her time on set and the labor involved in memorizing lines, acting out scenes, spending time in hair and makeup, and so on. She is also getting paid a premium because the company is using her celebrity status to advertise a product or service – this is the portion of the fee attributable to right of publicity. Accordingly, if you are basing the value of postmortem right of publicity on the stream of revenue acquired during life, the personal service component has to be stripped out from the projects considered in order to have an independent and accurate figure.

So how do we go about calculating this split? This is especially difficult since different levels of personal service often exist for each project a celebrity might be hired for. Therefore, I find it best to think about the level of service and publicity as a spectrum; on one end is right of publicity value and on the other is personal service value. If the ticker is halfway between both ends, that means the fee accounts for 50% personal service and 50% use of the celebrity's right of publicity.

To wrap our heads around this a bit more, consider an easy scenario where there is no personal service complication. When a magazine pays a celebrity for use of a photograph from her wedding day, it is usually paying for full image rights only, with no personal service component. This makes sense, since there was no additional labor required to produce the photograph. The celebrity simply provided an image already in existence and licensed out her right of publicity to the magazine. This would mean that

⁴⁴ See REILLY & SCHWEIHS, *supra* note 31, at 115.

⁴⁵ See *Garcia v. Comm'r of Internal Revenue*, 140 T.C. 141, 161 (2013) (distinguishing between allocating a specified portion of a famous golfer's fees towards compensation for personal service and allocating a different portion of the fee towards royalties).

100% of the fee she receives represents payment for the right of publicity only. This is an ideal scenario when trying to value right of publicity income separate from personal service. It also provides the valuator with a basis fee that she can consider when determining a fee split. Unfortunately, this is a very rare scenario. Even if a valuator is lucky enough to stumble on a project using only the right of publicity, she would still have to consider the duration of the license, the territory in which the image can be used, and a multitude of other factors that might affect the fee value. Nonetheless, this is pretty much as good as it gets. And this fee would be a helpful basis for the valuator to establish a more relevant and clean calculation of future income streams for a right of publicity.

Now let's consider the more complicated scenario where a celebrity is paid to shoot a commercial. Again, it would be inaccurate to attribute the entire fee obtained for this project to the cost of licensing her name and image only, since the celebrity had to provide labor for this project. So how do we account for personal service here? In order to strip out the personal service component and isolate the revenue attributable to right of publicity only, a valuator can consider various factors to determine a percentage of fees that account for the personal service component. One of these factors would be the level of service provided. Intuitively, the personal service component of a three-day commercial shoot would be more than a one-hour red carpet appearance. Likewise, factors like travel time, the opportunity cost of being unable to do other projects, and level of specialized skill involved in the service would all tip the scale towards a higher personal service allocation. Although the intuition behind using a factor consideration is grounded, it is inherently very abstract and hard to account for mathematically. Accordingly, it is important to determine and consider an exhaustive list of pertinent factors that would justify the numerical estimation that is determined.

In *Garcia v. Commissioner of Internal Revenue*, the Tax Court officially recognized the necessity to separate one's "personal service" revenue from one's right of publicity revenue.⁴⁶ In *Garcia*, experts provided testimony that under the general industry standard, personal services are more valuable than use of publicity revenue.⁴⁷ In order to achieve a justified allocation of the split between personal service and right of publicity rights, the parties provided two experts to opine on their methods of attributing this allocation.⁴⁸ The expert witnesses introduced a method to determine the division of right of publicity and personal service based on past royalties in previous

⁴⁶ *Id.* at 161.

⁴⁷ *Id.* at 152.

⁴⁸ *Id.*

contracts when available.⁴⁹ Most probably, the idea behind this proposal was that a celebrity would get a one-time fee for the labor provided, but licensing out their right of publicity would be accounted for by the royalties granted. This makes sense because licensing intellectual property rights oftentimes involves an allocation of a percentage of profits as opposed to a flat fee. Further, determining the right of publicity apportionment to be based on the percentage of royalties due allows valuers to have a numerical value for their split. This means if 10% of the fee a celebrity receives comes from royalties, then his or her right of publicity allocation would be 10% and his personal service would account for 90%. Moreover, this percentage can be applied to fees collected from other projects that do not have a royalty arrangement. Using the royalty method might be preferable to a valuator because it would be more difficult for the IRS to challenge a mathematically-based valuation than one based on various factors that give you an arguably arbitrary number. Furthermore, courts have repeatedly characterized payments for the right to use a celebrity's name and likeness as royalties because the celebrity has an ownership interest in the right that justifies his receiving a portion of sales attributable to his right of publicity.⁵⁰

B. Establishing Remaining Useful Life

The remaining useful life of an intangible asset ceases when it is no longer profitable.⁵¹ Therefore, when we are valuing the right of publicity, we are only concerned with the extent to which a celebrity's persona would continue to have financial appeal after his or her death.⁵² In evaluating the remaining life of an asset, it is important to recognize the difference between "legal life" and "useful life."⁵³ The legal life of the right of publicity is straightforward—legal determinants like statutes, ordinances, or administrative rulings set the duration of an asset's legal life.⁵⁴ In statutes provid-

⁴⁹ *Id.*

⁵⁰ *Goosen v. Comm'r of Internal Revenue*, 136 T.C. 547, 559 (2011) (internal citations omitted). Though, in *Goosen*, the Court further stated that, "The characterization of [a taxpayer's] endorsement fees and bonuses depends on whether the sponsors primarily paid for [the taxpayer's] services, for the use of [the taxpayer's] name and likeness, or for both. . . We must divide the intent of the sponsors and of [the taxpayer] from the entire record, including the terms of the specific endorsement agreement." *Id.* at 560.

⁵¹ REILLY & SCHWEIHS, *supra* note 31, at 213.

⁵² Matthew Savare, *The Price of Celebrity: Valuing the Right of Publicity in Calculating Compensatory Damages*, 11 UCLA ENT. L. REV. 129, 174–175 (2004).

⁵³ REILLY & SCHWEIHS, *supra* note 31, at 180.

⁵⁴ *Id.*

ing for a postmortem right of publicity, the length varies from twenty years to one hundred years after death, with the majority of states looking to federal copyright law for an idea of how to set the duration of the right after the celebrity has died.⁵⁵ For example, the “legal life” of a celebrity’s post-mortem right of publicity in California is seventy years from the date of death,⁵⁶ mirroring the legal life of a copyright.⁵⁷

While legal determinants set the legal life of the asset, economic determinants set the “useful life.”⁵⁸ Because we are only interested in the examining the period of time in which the asset remains profitable,⁵⁹ any value produced beyond the actual life would be considered negligible for purposes of valuation.⁶⁰ This means, instead of projecting a stream of income into the future for seventy years, we would only do so for the duration of time we expect that asset to maintain profitability. Like other intangible assets, the duration of a celebrity’s right of publicity profitability depends on the availability of willing buyers in the market.⁶¹

The market appeal a celebrity maintains after death usually depends on the celebrity’s popularity during life. For instance, iconic celebrities like Muhammad Ali and David Bowie would undoubtedly have a longer useful right of publicity life than most due to their pervasive notoriety during their lifetime. On the other hand, a celebrity with less worldwide appeal and popularity, such as former model and reality TV star Anna Nicole Smith, will have a smaller viable market and thus more difficulty exploiting her right of publicity beyond a few years after her death. Although Smith died domiciled in California and her right of publicity would have a legal life of seventy years,⁶² when valuating her right of publicity under the income ap-

⁵⁵ MCCARTHY, *supra* note 2, at § 9:16.

⁵⁶ CAL. CIVIL CODE § 3344.1 (West 2012).

⁵⁷ 17 U.S.C.A. § 302 (West 1998) (“Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author’s death.”)

⁵⁸ *Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 551–552 (1993).

⁵⁹ Robert F. Reilly, *Intangible Asset Remaining Useful Life Analysis for Bankruptcy Purposes*, 20 AM. BANKR. INST. J. 32 (Mar. 2001).

⁶⁰ See Vince O’Brien & Lynne Klein, Address at the Intellectual Property in State Court Conference: Economic Analysis of Remedies in Right of Publicity Cases (Feb. 15-17, 1991) (predicting that right of publicity suffers a natural decline over time which is measurable because experts can “develop an earnings profile to see the effect of the passage of time” on a celebrity’s stream of income).

⁶¹ See Reilly, *supra* note 59.

⁶² See REILLY & SCHWEIHS, *supra* note 31, at 180.

proach, we will only consider the projection of cash flow over only a few years postmortem which signifies the profitable life of the asset.⁶³

The IRS's standard is to determine fair market value based on what is reasonably foreseeable at the date of death.⁶⁴ One consideration would be to examine the income-producing patterns of the celebrity's right of publicity near the time of death. If the celebrity was not producing much income off of his right of publicity in his last ten years of life, then this is indicative that the market for their postmortem right of publicity is low as well. A valuator should examine the number of endorsements, merchandise, advertisements, media-related events (such as public appearances, interviews, and photo shoots), books, movies, TV-shows, and the like, that the celebrity was involved in at or shortly before the time of death. All of these factors would be helpful considerations in determining the duration of appeal the right of publicity would maintain postmortem.

C. Determining an Appropriate Risk or Discount Rate

Monetizing a deceased celebrity's right of publicity can be an unattractive investment: it is full of uncertainties because there is always some risk of realizing no profits at all, and the market for this asset is hard to gauge.⁶⁵ Accordingly, the value determined from a projected future stream of income based on profits during the celebrity's lifetime needs to be discounted by a percentage to account for the unique risks apparent after death.⁶⁶ In order to determine an appropriate and justified discount rate, I am proposing that factors such as market limitations, tarnished reputations, and potential legal risks ought to be considered.

⁶³ Transcript of Record at 124, *People of the State of California v. Simpson*, available at <http://simpson.walraven.org/feb06-97.html>, {<https://perma.cc/JQZ8-WBSZ>} (where the court found that a celebrity with the fame and stature of O.J. Simpson could arguably exploit his right of publicity for an extended duration of time. In calculating Simpson's publicity value for the civil trial, plaintiff's expert witness, Mark Roesler considered a series of variables in determining that Simpson could exploit his right of publicity for profit for a useful life of 24 years).

⁶⁴ See *First Nat'l Bank of Kenosha*, 763 F.2d at 894.

⁶⁵ See *Estate of Andrews v. United States*, 850 F. Supp. 1279, 1295 (E.D. Va. 1994) (applying a 33% discount factor to account for the uncertainty of profiting off a novel written by a ghost writer after the subject author had died).

⁶⁶ See *id.*; see also Robert F. Reilly, *What Lawyers Need to Know About the Valuation of Intellectual Property*, 57 PRAC. LAW. 41, 56 (Oct. 2011).

1. Limited Market

Perhaps one of the most important considerations in valuating post-mortem right of publicity is the extent of the market appeal of a celebrity's name, image and likeness. Of course, there are certain celebrities that are more profitable than others. For instance, a celebrity like James Dean has high profitability because he appeals to a large audience. His right of publicity is especially lucrative because it can be used in relation to multiple demographics, many generations, and various markets. His name, image, and likeness have been used by high fashion designers like Dolce & Gabbana for men's hair products, on merchandise from cell phone cases to bobbleheads, and even in top songs from pop stars like Taylor Swift.⁶⁷ Because of this, his right of publicity is a highly profitable asset that continues to be valuable for its sixth consecutive decade.

On the other hand, a less popular celebrity does not have as many money-producing capabilities in as many markets. Therefore, it is important to consider the industry the celebrity is in and whether their persona is conducive to a wide range of products, endorsements, or other campaigns that could produce revenue. For the most part, a deceased musician, actor, or athlete is more profitable than a deceased author, artist, or scientist. This is because the former occupations generally entail the use of a person's name and image in connection with their talent, giving them a stronger physical presence in the media. Their identity gains more familiarity with society, causing it to be more profitable.

2. Tarnished Reputation

A celebrity with a tarnished reputation would experience a devaluation in their right of publicity. A prime example of this is Michael Jackson. Jackson's profitability off his music at his time of death is undeniable. But claiming his right of publicity has profitability postmortem is much more uncertain. It is well known that Jackson had a tarnished reputation after multiple child molestation and abuse allegations.⁶⁸ Further, the media

⁶⁷ See, e.g., *Recent Projects*, JAMESDEAN.COM (Dec 14, 2015), <http://www.jamesdean.com/community/recentprojects.html>, {<https://perma.cc/SFA3-QGEG>}; TAYLOR SWIFT, *STYLE* (Big Machine Records 2015).

⁶⁸ See, e.g., Josh Mankiewicz, *New Details About 1993 Jackson Case*, NBC NEWS (Sept. 3, 2004), http://www.nbcnews.com/id/5906855/ns/dateline_nbc-newsmakers/t/new-details-about-jackson-case/, {<https://perma.cc/4X8B-AGXA>}; Steve Knopper, *Michael Jackson's 2005 Child Molestation Trial: Journalists Remember the Public Frenzy, Porn, Hijinks*, BILLBOARD.COM (July 1, 2016), <http://www.billboard.com/>

heightened Jackson's negative reputation by publicizing footage of Jackson dangling his infant son Prince Michael "Blanket" Jackson II off a hotel balcony⁶⁹ and by focusing attention on his cosmetic surgeries.⁷⁰ Although Jackson participated in highly profitable endorsement campaigns with big companies like Pepsi during his lifetime,⁷¹ after his child molestation allegations the exploitation of his right of publicity separate from his music career was virtually non-existent.⁷² Jackson's controversial personal life undoubtedly increased the risk associated with monetizing his right of publicity. Therefore, considerations like reputation are vital to determining an appropriate and accurate value for this asset.

3. Potential Legal Risk

As noted above, the posthumous right of publicity is a state-protected right.⁷³ The existence or non-existence of this right is determined by the law of the state of domicile at the time of death.⁷⁴ Usually to be considered legally domiciled in a state one must: 1) physically reside there, and 2)

articles/columns/pop/7424014/michael-jackson-child-molestation-trial-journalists-remember, {<https://perma.cc/GF2V-C4EN>}; Julia Bruculieri, *Choreographer Wade Robson Claims Michael Jackson Ran Sophisticated Child Abuse Operation*, HUFFINGTON POST (Sept. 15, 2016), http://www.huffingtonpost.com/entry/choreographer-wade-robson-claims-michael-jackson-ran-sophisticated-child-abuse-operation_us_57dab93ee4b0071a6e05aa1f, {<https://perma.cc/NY6T-7DGP>}.

⁶⁹ See *Michael Jackson Dangles His Baby Over a Hotel Balcony*, YOUTUBE (Nov. 25, 2010), <https://www.youtube.com/watch?v=9ElddgJCgyg>, {<https://perma.cc/893K-6UQA>}; see also Jennifer Vineyard, *Michael Jackson Calls Baby Dangling Incident A Terrible Mistake*, MTV NEWS (Nov. 20, 2012), <http://www.mtv.com/news/1458799/michael-jackson-calls-baby-dangling-incident-a-terrible-mistake/>, {<https://perma.cc/C7VL-NE2Q>}.

⁷⁰ See, e.g. *Revealed: Scalpel by Scalpel, How Michael Jackson Destroyed his Looks in 100 Operations. . . and How He'd Have Looked Without Surgery*, DAILY MAIL REPORTER (Feb. 6, 2015), <http://www.dailymail.co.uk/news/article-2943351/Scalpel-scalpel-Michael-Jackson-destroyed-looks-100-operations-d-looked-without-surgery.html>, {<https://perma.cc/5AYN-QBQB>}.

⁷¹ See Monica Herrera, *Michael Jackson, Pepsi Made Marketing History*, BILLBOARD .COM (July 3, 2009), <http://www.billboard.com/articles/news/268213/michael-jackson-pepsi-made-marketing-history>, {<https://perma.cc/E56H-263R>}.

⁷² See generally JONATHAN VANKIN, *THE BIG BOOK OF SCANDAL* (1997) (discussing why Michael Jackson's child molestation allegations, child abuse allegations, and repeated bizarre behavior contributed his tarnished reputation in the media).

⁷³ See MCCARTHY, *supra* note 2, at § 10:6.

⁷⁴ See MCCARTHY, *supra* note 2, at § 11:15.

intend to remain there.⁷⁵ Moreover, a person can only maintain one domicile at a time.⁷⁶ Domicile is often a hotly contested issue with respect to rights of publicity because a celebrity could be granted a valuable postmortem right of publicity in one state, such as California, but have no protections at all if determined to be domiciled in another state, such as New York.⁷⁷ If there is a domicile issue that could potentially lead to a challenge of this intellectual property right altogether, it could lead to prolonged and expensive litigation, which could decrease the value of the asset or leave it nonexistent altogether.⁷⁸ Therefore, it is important to consider the availability of postmortem protection and possibility of a domicile challenge when valuating right of publicity.

VI. DISTINCTIVE CHALLENGES WHEN VALUATING RIGHT OF PUBLICITY: SEPARATING RIGHT OF PUBLICITY FROM TRADEMARK VALUE

Close parallels can be drawn between the origins of trademark law and right of publicity law. Trademark law originated as a protection for producers against others trying to profit from their mark's goodwill;⁷⁹ similarly, right of publicity law "grants a natural person an 'exclusive right to control the commercial value of his name and likeness and to prevent others from

⁷⁵ *Smith v. Smith*, 288 P.2d 497, 499 (Cal.1955) (internal citations omitted); *see also Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001) ("A person's domicile is her permanent home, where she resides with the intention to remain or to which she intends to return.").

⁷⁶ *See Smith*, 288 P. 2d at 499.

⁷⁷ *See Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 996 (9th Cir. 2012) (finding it inconsistent when "in every prior judicial and quasi-judicial proceeding, the Monroe entities took the position that Monroe died domiciled in New York; Monroe LLC now asserts that Monroe died domiciled in California."). The court prevented Monroe's estate from availing themselves of the posthumous right of publicity protections under California law because her will had been probated in New York. Monroe was ultimately determined to be domiciled in New York, a state which does not recognize posthumous right of publicity, at the time of her death.

⁷⁸ *See id.*

⁷⁹ M.P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1841 (2007) ("[T]rademark law was not traditionally intended to protect consumers. Instead, trademark law, like all unfair competition law, sought to protect producers from illegitimate diversions of their trade by competitors . . . American courts protected producers from illegitimately diverted trade by recognizing property rights.").

exploiting that value without permission.’”⁸⁰ Often, celebrities trademark their name as a way to get extra protections on their right of publicity.⁸¹ Besides right of publicity law, celebrities can claim damages from false endorsement and unfair competition under trademark law by registering their name with the United States Patent and Trademark Office.⁸² For example, Humphrey Bogart has a trademark on his name “HUMPHREY BOGART.”⁸³ This allows him protections under right of publicity law as well as trademark law.

Because of the stark intersection between trademark and right of publicity law, celebrities who trademark their names often come across a problem when evaluating their right of publicity. The trademark value of a deceased celebrity’s name is valued and denoted on a separate line on his or her estate tax forms,⁸⁴ but there is an undeniable overlap between a trademark bearing her name and the right of publicity, which also encompasses the protection of the celebrity’s name. Accordingly, there is significant difficulty in attempting to separate trademark and right of publicity value.

One way to combat this issue is to consider a similar analysis as we did above in our discussion of the difficulty and abstract nature of trying to isolate right of publicity value from an often present personal service component. Trademark value has a slight, yet distinct, difference from right of publicity valuation in that it is valuing the premium paid for a product because of the goodwill of the mark attached to it.⁸⁵ Thus, trademark valuation should focus on the goodwill of the celebrity’s name in relation to the specific good or service as opposed to the goodwill of the celebrity herself.

The concept behind valuing trademarks is quite similar to that behind the right of publicity. One way to think about the value of a celebrity’s right of publicity is to think about the premium a licensor is willing to pay for that celebrity because of their public stature. In other words, if you

⁸⁰ See *World Wrestling Fed’n. Entm’t, Inc. v. Big Dog Holdings, Inc.*, 280 F. Supp. 2d 413, 433 (W.D. Pa. 2003) (citing *Brockum Co. v. Blaylock*, 729 F. Supp. 438, 445 (E. D. Pa. 1990)).

⁸¹ See *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003); see also *Cairns v. Franklin Mint Co.*, 24 F. Supp. 2d 1013 (C.D. Cal. 1998); *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407 (9th Cir. 1996); *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

⁸² 15 U.S.C. § 1125(a) (2012).

⁸³ Word Mark TESS Search for “Humphrey Bogart,” UNITED STATES PATENT AND TRADEMARK OFFICE, {<https://perma.cc/YU9S-A7PC>} (December 4, 2016, 3:21 PM).

⁸⁴ See General Instructions, IRS (last visited Dec. 4, 2016), <https://www.irs.gov/instructions/i706/ch01.html>, {<https://perma.cc/Z5XK-ZNLD>}.

⁸⁵ See 26 C.F.R. § 1.197-2 (2013).

needed an actor for your commercial, what is the premium you would pay to hire Meryl Streep over a no-name actor off the street? Similarly, a brand's trademark reflects a seller's ability to obtain a higher selling price and a larger market share for a branded product than would an identical unbranded product.⁸⁶ A price premium approach would simply consider the price difference between two or more comparable commodities: one with a trademark brand, and one without.⁸⁷

Adjusting this trademark valuation concept to the intersection with right of publicity involves considering the value of the product or service separate from the value of the celebrity's right of publicity. Probably the most effective way to determine this distinction mathematically is by valuing the premium paid for the product or service by virtue of the celebrity's name, allocating a percentage of that value to the celebrity's right of publicity valuation, and then allocating the remaining portion to the trademark valuation. This would not only simplify the undertaking needed to determine the figures for a single valuation but it would also avoid double counting on the estate tax filing.

Trademark value can also be determined by considering the cost it takes to build the brand (recall our review of the "cost approach" above). Specifically, brand replacement cost signifies the amount a company spends to build up a brand name (i.e. money spent on advertising, designing logos, creating a loyal consumer base, etc.).⁸⁸ Therefore, trademark value can be estimated by summing up all historical costs of development for the trademark.

However, this concept of trademark value based on cost of brand establishment is generally not applicable when considering a trademark that uses a celebrity's name. When you think about the intersection of trademark and right of publicity value in terms of brand development, it seems the value of the celebrity's name, image and likeness has already done all the hard work. In fact, the appeal of trademarking your name when you are a celebrity is that it usually represents a way to skip the brand establishment step and monetize the existing value of your celebrity. In this case, one way of looking at this is to say trademark value is identical to right of publicity value.

⁸⁶ See *Nestle Holdings, Inc. v. Comm'r of Internal Revenue*, 152 F.3d 83, 84 (2d Cir. 1998).

⁸⁷ See *id.* at 88 (calculating the trademark value as a percentage of sales that would be the same as the difference between its actual economic profits and its hypothetical ones where the profit is considered under unbranded conditions. The percentages of revenues help determine royalty rates; the actual trademark value is the same as the stream of royalties.).

⁸⁸ *Id.*

Thus, establishing the trademark value separate from the right of publicity value would be impossible since they are one in the same.

Another potentially more useful argument could be made using this same concept. The premium value of the trademark would be fully attributable to the right of publicity alone, making the trademark value nonexistent. But if there was any cost invested into the promotion of the celebrity's name in association with the product, above and beyond what existed before the product was introduced, this additional cost would be attributable to the trademark value.

Although the concept of trademark value and right of publicity value in some cases seems inextricable, there are ways to think about these intellectual property rights that allow valuers to distinguish their values. Ultimately, appraisers can separate these values by determining a percentage of the trademark value attributable to the right of publicity. Furthermore, appraisers can consider the cost invested into the promotion of the trademarked good or service that exceeds the existing right of publicity value before the trademark was introduced.

VII. CONCLUSION

Valuating intangible assets is a complicated task, and there is something particularly difficult when it comes to valuing a celebrity's right of publicity postmortem. However, this is an important and lucrative task; there is a lot of value in the future of postmortem right of publicity. Some of the world's most iconic personalities have continued to make money from the grave even decades after their death.⁸⁹ Celebrities like Audrey Hepburn, Elizabeth Taylor, and James Dean have defied the odds and have kept their images relevant even after their death.⁹⁰ With advancements in technology like hologram imaging, famous deceased personas are able to re-appear from the grave.⁹¹ More than ever, postmortem right of publicity is becoming a significant intellectual property right that is in a position to have expanding commercial value. And as the value in this asset is becoming ever more apparent, the IRS is beginning to keep a closer eye on celebrities' estate tax filings. Thus, this paper has shed light on the increasing need for a widely-

⁸⁹ See *Top-Earning Dead Celebrities 2015*, FORBES (Nov. 12, 2015), <http://www.forbes.com/dead-celebrities/>, {<https://perma.cc/63P2-7SDC>}.

⁹⁰ See *id.*

⁹¹ See Andrew Leonard, *Whitney Houston, Buddy Holly Return: Inside the Celebrity Hologram Trend*, ROLLING STONE (Dec. 4, 2015), <http://www.rollingstone.com/music/features/inside-the-celebrity-hologram-trend-20151204>, {<https://perma.cc/8DVW-TTFD>}.

accepted and reasoned methodology for postmortem right of publicity, it has provided insight on preferable methodologies to accomplish this goal, and it has surveyed the distinctive challenges that accompany the valuation of this unique asset.

