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Drew Thornley

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COLLEGE FOOTBALL: PROPOSALS FOR STRUCTURAL REFORM AND ANTITRUST IMPLICATIONS

DREW THORNLEY*

INTRODUCTION

Fresh on the heels of the United States Supreme Court's unanimous *NCAA v. Alston*¹ ruling that the National Collegiate Athletic Association's (NCAA) limiting education-related benefits violates federal antitrust law and the commencement (beginning July 1, 2021) of players' abilities in many states to earn revenue from their names, images, and likenesses², Texas and Oklahoma (the two most powerful, wealthy members of the Big 12 Conference) have begun their departure from the Big 12 to the Southeastern Conference,³ and four schools—Brigham Young University (BYU), University of Central Florida (UCF), University of Houston, and University of Cincinnati—have accepted subsequent invitations to join the Big 12.⁴ Additional conference-realignment

* Drew Thornley is a tenured Associate Professor of Legal Studies at Stephen F. Austin State University. He earned a B.A. from The University of Alabama and a J.D. from Harvard Law School.

1. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

2. See *Tracker: Name, Image and Likeness Legislation by State*, BUS. OF COLL. SPORTS, <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/> (Mar. 12, 2022).

3. See Heather Dinich & Mark Schlabach, *Texas Longhorns, Oklahoma Sooners Unanimously Accept Invitation to SEC*, ESPN (July 30, 2021), https://www.espn.com/college-football/story/_/id/31920686/texas-longhorns-oklahoma-sooners-unanimously-accept-invitation-sec.

4. See *Big 12 Conference Adds Four New Members*, BIG 12 CONF. (Sept. 10, 2021, 3:40 PM), <https://big12sports.com/news/2021/9/10/big-12-conference-adds-four-new-members.aspx>. These departures and additions will ultimately increase the number of teams in the Big 12 conference from ten to twelve. *Id.*

movements have begun, as a result.⁵ Suffice to say that college football is undergoing major changes, with even more surely to come.⁶

This is good news, as college football needs to evolve, if it wants to achieve its full competitive and economic potential. The reasons for this are fairly straightforward: there are simply too many teams in the top conferences, while there are so few “top” teams. Of the sixty-five schools in the NCAA Division I Football Bowl Subdivision (FBS) Power Five conferences⁷ (explained below), only ten schools have won (or shared) the FBS National Championship in the past twenty seasons (2002-21).⁸ Meanwhile, of the sixty-five schools in the NCAA Division I Football Bowl Subdivision Group of Five conferences⁹ (explained below), zero have won (or shared) the FBS national championship during the same span. In the eight years that the current four-team College Football Playoff (CFP)¹⁰ has existed, thirteen teams have made the playoffs and five (of the thirteen) teams have won the national championship.¹¹ USA Today’s Dan Woken writes that:

5. See Sam Cooper, *American Athletic Conference Officially Adds 6 New Members*, YAHOO SPORTS (Oct. 21, 2021), <https://sports.yahoo.com/american-athletic-conference-officially-adds-6-new-members-142744710.html#:~:text=The%20American%20Athletic%20Conference%20has,%2C%20Rice%2C%20UAB%20and%20UTSA>. Chris Chavez, *Conference USA Officially Adds Four Schools*, SPORTS ILLUSTRATED (Nov. 5, 2021), <https://www.si.com/college/2021/11/05/conference-usa-adds-liberty-new-mexico-state-jacksonville-state-sam-houston>.

6. See Dan Wolken, *From Top to Bottom, Conference Realignment is Gripping College Sports. Here’s What’s Next.*, YAHOO SPORTS (Sept. 29, 2021), <https://sports.yahoo.com/top-bottom-conference-realignment-gripping-100149648.html> (“But the landscape of college football, and all of college sports, isn’t even close to settled. The Texas/Oklahoma move didn’t just shake up the SEC’s peer leagues; the effect is being felt all the way through the Football Bowl Subdivision down to the lower levels of Division I. Beyond an expected reorganization of schools in the so-called Group of Five conferences, there is a renewed urgency among smaller schools with big football ambitions to position themselves in the best possible way for whatever the next iteration of the NCAA looks like. With the NCAA announcing a constitutional convention to dramatically overhaul the organization’s governance structure — and, ultimately, hand the major football-playing schools more power — administrators and school presidents are concerned that the last ship for any potential upward mobility from FCS to FBS, or from Division II to Division I, may be about to set sail.”).

7. Atlantic Coast Conference, Big Ten Conference, Big 12 Conference, Pac-12 Conference, and Southeastern Conference.

8. See *FBS Championship History*, NCAA, <https://www.ncaa.com/history/football/fbs> (last visited Apr. 1, 2022).

9. American Athletic Conference, Conference USA, Mid-American Conference, Mountain West Conference, and Sun Belt Conference.

10. See *Overview*, COLL. FOOTBALL PLAYOFF, <https://collegefootballplayoff.com/sports/2016/9/30/overview.aspx> (last visited Apr. 1, 2022).

11. See *All-Time Results from Playoff Semifinals and National Championship Game*, COLL. FOOTBALL PLAYOFF, <https://collegefootballplayoff.com/sports/2019/5/22/history.aspx> (last visited Apr. 1, 2022).

the reality for the 130 teams in the Football Bowl Subdivision is that only the 65 who are affiliated with the power conferences have a legitimate opportunity to win the national championship under the current system. And even within that group of 65, well over half of those teams are not going to realistically compete for a championship under any circumstances.¹²

Given that each Division I school is allowed eighty-five scholarship players,¹³ the talent gap among the powerhouse schools and the rest is enormous, since the top players disproportionately join the best teams. And with the richest schools only getting richer, relative to the rest of the schools, college football is, like it or not, a world of the *haves* v. the *have nots*.¹⁴ Moreover, in terms of popularity and revenues, big-time college football (meaning that which occurs within the NCAA's Division I FBS Power Five conferences) bears little resemblance to all other collegiate athletic programs¹⁵ (football and non-football), and being yoked with those programs under the governance of the NCAA is an albatross around college football's neck.

Far from bemoaning the recent changes to the college-football landscape, it's time to embrace them, not least because of the increasing legal/financial rights of players and the precarious financial situation of athletics departments and universities in general. Andy Staples, who covers college football for *The Athletic*, writes, "College sports is about to undergo a paradigm shift, so there's

12. See Dan Wolken, *Opinion: A College Football Super League Would be Very Lucrative . . . For the Very Few*, USA TODAY, <https://www.usatoday.com/story/sports/college/columnist/dan-wolken/2021/04/20/super-league-why-college-football-version-would-very-lucrative/7292480002/> (Apr. 20, 2021, 7:12 AM).

13. See NCAA, 2021-22 NCAA DIVISION I MANUAL 211-212 (2021), <https://web3.ncaa.org/lstdbi/reports/getReport/90008>. Due to the COVID-19 pandemic's impact on the 2020 football season, the NCAA waived the scholarship limit for the 2021 football season. See Michelle Brutlag Hosick, *DI Council Approves One-Year Waiver of Football Scholarship Limits*, NCAA (Oct. 6, 2021), <https://www.ncaa.com/news/football/article/2021-10-06/di-council-approves-one-year-waiver-football-scholarship-limits>.

14. See Wolken, *supra* note 6. Wolken writes, ("But as Division I gets more members and the disparities grow bigger between the rich schools, the middle class and those at the bottom, the voices calling for change will get louder. 'One thing everybody agrees with is that Division I is too big,' one athletics director said. 'At some point, there has to be a line.'").

15. See Katlyn Andrews, *Knight Commission Report – Key Implications of a FBS and NCAA Split*, BAKER TILLY (Dec. 17, 2020), <https://www.bakertilly.com/insights/knight-commission-report-key-implications-of-a-fbs-ncaa-separation> (stating that "Even prior to the COVID-19 pandemic, the large majority of intercollegiate athletic programs had been operating at a financial deficit. In 2018-2019, only 25 Division I athletic departments out of nearly 350 generated revenue that exceeded their expenses. (All 25 of those programs participate in football at the FBS level and are members of a Power 5 conference.").

no better time to make structural changes. It's time to press the reset button on college football"¹⁶

Moreover, the current NCAA-governance structure is woefully inadequate to balance the needs of so many college-football programs, particularly given the enormous differences in their financial situations and in their relative success on the field. In terms of overall athletics revenues and expenses, Division I schools dwarf Division II and Division III schools; and within Division I, Power Five schools dwarf Group of Five schools. A financial report published by the NCAA in 2020 includes the following findings:

- Division I schools accounted for 96% of generated revenues across the NCAA, while Division II and Division III schools accounted for 3% and 1% respectively.
- FBS autonomy schools¹⁷ accounted for approximately 72% of all generated revenues.
- The median FBS school is approximately 72% self-sufficient. In the autonomy conferences though, the median school is almost 100% self-sufficient versus about 40% at the median in the nonautonomy conferences.
- The median FCS school is approximately 27% self-sufficient.¹⁸

Clearly, from a financial perspective, there are huge disparities between Division I and non-Division I, between Division I FBS and Division I FCS schools, and between Power Five and Group of Five schools within Division I FBS. The take-home lesson is that FBS Power Five schools are truly in a league of their own. In simple terms, the author believes it is fair to characterize non-Power Five leagues as “football” leagues, while Power Five leagues are “super football” leagues. But regardless of how one feels about these characterizations,

16. Andy Staples, *How Major College Football Teams Could (and Should) Break from the NCAA*, ATHLETIC, (Jan. 19, 2021), <https://theathletic.com/2322152/2021/01/19/college-football-realignment-reboot-ncaa/>.

17. *15-Year Trends in Division I Athletics Finances*, NCAA RSCH., https://ncaaorg.s3.amazonaws.com/research/Finances/2020RES_D1-RevExp_Report.pdf. (last visited Apr. 1, 2022). FBS autonomy schools are schools in the Power Five. According to the report, “generated revenues” come from the following revenue sources: ticket sales; NCAA and conference contributions; contributions from alumni and others; guarantees and options; third-party support; concessions; broadcast rights; royalties, advertising, and sponsorships; sports camps; and endowment and investment income.

18. *See id.*; *See generally Finances of Intercollegiate Athletics*, NCAA, <https://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics> (last visited Apr. 1, 2022).

the author believes the competitive and financial chasms between Power Five and non-Power Five leagues warrant the separation of the two, from a governance perspective.¹⁹

So, what should be done? In addition to the macro possibilities of the NCAA's transferring more power to Division I FBS schools or of separating major college football programs from the NCAA, a number of micro-options for the restructuring of college football conferences could improve on its current configuration. Each option is feasible, from a legal standpoint, and each would be good for college football as a whole, both in terms of finances and in terms of competition.

Part I of this article examines the NCAA's current governance of college football and opposition thereto. Part II proposes a number of possible ways to restructure college football that would, in the author's view, improve both the competitiveness of college football in general and the finances of its participant teams. Part III explores various antitrust questions and issues that would be present, should any of the author's proposals be pursued. Appendix A gives the author's hypothetical configurations for each of the author's proposed restructuring options, while Appendix B lists NCAA Division I FBS conferences and their respective member institutions.

19. Writes The Athletic's Stewart Mandel, "Last month, the Supreme Court took the NCAA to the woodshed. This month, some of its own most prominent constituents are attempting to distance themselves from the flailing organization. Including the president of the NCAA himself. Mark Emmert, he of the \$2.9 million salary and recently extended four-year contract, raised eyebrows last week by essentially begging his members to take away most of his organization's powers. 'We need to reconsider delegation of a lot of things that are now done at the national level,' Emmert told a group of reporters. '(The SCOTUS decision) forces us to think more about what constraints should be put in place on college athletics — and it should be the bare minimum.' ... That's quite the about-face for a man who spent more than a decade in court (and \$68 million in legal fees last year) fighting to prevent said athletes from receiving even a dollar more than their scholarship and stipend allow. But, for once, the man has read the room. He knows that ship has sailed. The name, image and likeness (NIL) era is here to stay. ... Now, football media days season is upon us, and with it, an opportunity for each conference's commissioner to weigh in on current events. On Monday, the SEC's Greg Sankey addressed myriad subjects, but there was one recurring theme: The NCAA governance model needs changing. ... 'Most recognize that the expectations, demands and pressures that are present on the campuses of (the SEC) are not uniform across all of Division I,' he said. 'Expecting every conference to come together to debate, discuss and produce effective decisions for everyone is not our modern reality. We must begin to adapt.' ... In other words, the time seems ripe for a seismic change to the way college sports is governed. The commissioner of the most successful conference says the old way of doing things is inefficient and outdated. The NCAA's own president says it's time for conferences to solve more problems for themselves." Stewart Mandel, *Mandel: It's Time for Major College Football Programs to Devise Their Own Solutions as the NCAA's Power Dissolves*, ATHLETIC (July 20, 2021), <https://theathletic.com/2716539/2021/07/20/mandel-its-time-for-major-college-football-teams-to-devise-their-own-solutions-as-the-ncaas-power-dissolves/>.

I. CURRENT COLLEGE FOOTBALL GOVERNANCE AND OPPOSITION THERETO

A. Current College Football Governance

At present, other than the College Football Playoff (CFP), which determines the NCAA Division I FBS college football national champion, the NCAA is in charge of all facets of college football. Thus, the NCAA governs such aspects of college football as eligibility, recruiting, game rules, infractions, and health and safety.²⁰

NCAA college football teams are organized by divisions, each of which has multiple conferences that are composed of multiple teams. There are currently three NCAA divisions: Division I, Division II, and Division III.²¹ To be eligible to be a member of any particular division, a school must meet certain requirements regarding matters like financial aid, the number of sports offered respectively for men and for women, game attendance, and number of games against opponents in certain divisions.²²

Division I, the largest division, is subdivided into the FBS and the smaller FCS.²³ The FBS has ten conferences: five Power Five conferences and five Group of Five conferences. The Power Five conferences constitute the highest level of college football. To date, thirty-one of the thirty-two CFP participants (four participants for each of the eight years of the CFP) have come from Power

20. See generally *Governance*, NCAA, <https://www.ncaa.org/governance> (last visited Apr. 1, 2022); NCAA, 2021-22 NCAA DIVISION I MANUAL (2021) <https://web3.ncaa.org/lstdbi/reports/getReport/90008>.

21. See *Our Three Divisions*, NCAA, <https://www.ncaa.org/about/resources/media-center/ncaa-101/our-three-divisions> (last visited Apr. 1, 2022).

22. See *Divisional Differences and the History of Multidivision Classification*, NCAA, <https://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification> (last visited Apr. 1, 2022). For example, summarizing Division I requirements, the NCAA writes, “Division I member institutions have to sponsor at least seven sports for men and seven for women (or six for men and eight for women) with two team sports for each gender. Each playing season has to be represented by each gender as well. There are contest and participant minimums for each sport, as well as scheduling criteria. For sports other than football and basketball, Division I schools must play 100 percent of the minimum number of contests against Division I opponents—anything over the minimum number of games has to be 50 percent Division I. Men’s and women’s basketball teams have to play all but two games against Division I teams; for men, they must play one-third of all their contests in the home arena. Schools that have football are classified as Football Bowl Subdivision (formerly Division I-A) or NCAA Football Championship Subdivision (formerly Division I-AA). Football Bowl Subdivision schools are usually fairly elaborate programs. Football Bowl Subdivision teams have to meet minimum attendance requirements (average 15,000 people in actual or paid attendance per home game), which must be met once in a rolling two-year period. NCAA Football Championship Subdivision teams do not need to meet minimum attendance requirements. Division I schools must meet minimum financial aid awards for their athletics program, and there are maximum financial aid awards for each sport that a Division I school cannot exceed.” *Id.*

23. See *Our Division I Members*, NCAA, <https://www.ncaa.org/our-division-i-members> (last visited Apr. 1, 2022).

Five conferences.²⁴ There are also seven independent FBS teams.²⁵ The FCS is composed of fifteen conferences.²⁶ The NCAA is the overseer of the playoffs that determine the national champions for Division I FCS, Division II, and Division III.²⁷ The number of football members in each NCAA division is as follows:

- Division I: 258
 - FBS²⁸: 130²⁹
 - Power Five: 64
 - Group of Five: 59
 - Independent: 7
 - FCS: 128³⁰
- Division II: 167³¹
- Division III: 239³²

24. *All-Time Results From Playoff Semifinals and National Championship Game*, COLLEGE FOOTBALL PLAYOFFS, <https://collegefootballplayoff.com/sports/2019/5/22/history.aspx> (last visited Apr. 1, 2022). Though Notre Dame is an independent team, when it made the CFP in the 2020 season, it was a one-season member of the ACC. See *ACC Announces Plans for Football and Fall Olympic Sports*, ATLANTIC COAST CONF. (July 29, 2020), <https://theacc.com/news/2020/7/29/general-acc-announces-plans-for-football-and-fall-olympic-sports.asp>. See also generally Bryan Driskell, *Notre Dame and ACC To Join Forces In 2020*, SPORTS ILLUSTRATED (July 29, 2020), <https://www.si.com/college/notredame/football/notre-dame-football-to-join-acc-2020>. The one non-Power Five team to make the CFP was Cincinnati this past season (2021).

25. See *FBS Independent*, NCAA, <https://www.ncaa.com/standings/football/fbs/fbs-independent> (last visited Apr. 1, 2022).

26. See *NCAA College Football FCS Standings*, NCAA, <https://www.ncaa.com/standings/football/fcs> (last visited Apr. 1, 2022).

27. See *Division I Championships*, NCAA, <https://www.ncaa.org/division-i-championships> (last visited Apr. 1, 2022).

28. See NCAA, 2021 NCAA CONST. (2021), https://ncaaorg.s3.amazonaws.com/governance/ncaa/constitution/NCAAGov_Constitution121421.pdf. (Appendix B for a full list of Division I FBS conferences and conference members, as well as a full list of FBS independents.)

29. See *Division I-FBS Football Insts.*, NCAA, <https://web3.ncaa.org/directory/memberList?type=12&division=I-FBS&sportCode=MFB> (last visited Apr. 1, 2022).

30. See *Division I-FCS Football Insts.*, NCAA, <https://web3.ncaa.org/directory/memberList?type=12&division=I-FCS&sportCode=MFB> (last visited Apr. 1, 2022).

31. See *Division II Football Insts.*, NCAA, <https://web3.ncaa.org/directory/memberList?type=12&division=II&sportCode=MFB> (last visited Apr. 1, 2022).

32. See *Division III Football Insts.*, NCAA, <https://web3.ncaa.org/directory/memberList?type=12&division=III&sportCode=MFB> (last visited Apr. 1, 2022).

B. Opposition to Current NCAA Governance

The chief claims advanced by those opposed to keeping Division I FBS college football under the governance of the NCAA spring from the belief that FBS college football is so dissimilar to the rest of college football and all other NCAA sports that its inclusion with these other sports under the same governing body is not justified. About FBS college football, Staples writes that “because it is a multibillion-dollar business, it is effectively a different sport than the football for which the NCAA sponsors championships (FCS, Division II, Division III).”³³

Indeed, the process of macro structural reform within the NCAA has already begun. On July 30, 2021, just a few weeks after the Supreme Court’s *Alston* ruling, President Emmert tasked the organization’s Constitution Committee³⁴ with drafting a revised constitution that gives more power to member institutions.³⁵ On November 8, the committee released a draft of a revised NCAA constitution that did just that.³⁶ The new constitution was approved during the 2022 NCAA Convention in January by more than the required two-thirds of NCAA Member Institutions.³⁷ About the new (and significantly shortened³⁸) constitution, the NCAA says:

33. Staples, *supra* note 16. See also Mandel, *supra* note 19 (“This sure feels like an optimal moment in time for the likes of Ohio State and Alabama, with their massive \$200 million-a-year enterprises and the clout that comes with them, to step up and do something dramatic. The fact is, athletic departments like theirs hold almost nothing in common with the \$5 million-a-year operations at Chicago State and New Orleans. And yet, for some reason they belong to the same association, beholden to one another whenever a major issue arises.” Quoting NCAA president Mark Emmert, Mandel continues, “I think,” Emmert said, “this is a really, really propitious moment to sit back and look at a lot of the core assumptions and say, ‘You know, if we were going to build college sports again, and in 2020 instead of 1920, what would that look like?’” At this point, it’s easier to say what it would NOT look like. It would not have 1,200 schools with vastly different missions and finances all operating under the same umbrella. It wouldn’t have schools that don’t offer athletic scholarships dictating what schools that fund hundreds a year can or can’t provide their athletes. And it wouldn’t have sports that generate billions in annual revenue governed within the same structure as those that produce no revenue at all.)

34. See *NCAA Const. Comm.*, NCAA, <https://www.ncaa.org/sports/2021/8/16/ncaa-constitution-committee.aspx> (last visited Apr. 1, 2022).

35. See Meghan Durham, *NCAA Board of Governors to Convene Const. Convention*, NCAA (July 30, 2021, 4:00 PM), <https://www.ncaa.org/about/resources/media-center/news/general-ncaa-board-of-governors-to-convene-constitutional-convention>.

36. See Robert M. Gates, *NCAA Memorandum: Draft of The New NCAA Const.*, NCAA (Nov. 8, 2021), https://ncaaorg.s3.amazonaws.com/governance/ncaa/constitution/NCAAGov_DraftConstitution.pdf.

37. See Corbin McGuire, *NCAA Members Approve New Const.*, NCAA MEDIA CENTER, (Jan. 20, 2022, 6:12 PM), <https://www.ncaa.org/news/2022/1/20/media-center-ncaa-members-approve-new-constitution.aspx>.

38. See NCAA CONST. COMM., 2021 NCAA CONST. (2021), https://ncaaorg.s3.amazonaws.com/governance/ncaa/constitution/NCAAGov_Constitution121421.pdf. (The previous NCAA Constitution was 43 pages, while the new one is just over 19.)

The new constitution, effective Aug. 1, ensures student-athlete voting representation on each division's presidential body (Division I Board of Directors, Division II Presidents Council and Division III Presidents Council) and the NCAA Board of Governors. The Board of Governors will reduce its number of members from 21 to nine: six members from the three divisions (four from Division I and one each from Divisions II and III), two independent members and one graduated student-athlete. Another student-athlete will serve as a nonvoting member on the board. The constitution also includes some existing priorities and principles for the first time. It prohibits pay-for-play but embraces providing additional educational and other benefits, including those for name, image and likeness. It maintains existing revenue allocations and championship opportunities for each division, and each division will have oversight of its own budget, expenditures and financial distribution to its members. The constitution also underscores the importance of both physical and mental health and emphasizes diversity, inclusion and gender equity.³⁹

The provisions giving authority to the respective divisions⁴⁰ include the following:

- Each division shall have independent authority to organize itself, consistent with the principles of the Association. Each division is authorized to structure itself as it deems necessary, including creation of sub-divisions or creation of a new division and determination of membership eligibility for these new organizations, including the role of conferences. New divisions or sub-divisions must be self-funded by the originating division.⁴¹
- Each division shall determine its own governing structure and membership.⁴²

39. McGuire, *supra* note 37.

40. NCAA CONST. COMM., *supra* note 38, at 9.

41. *Id.* at 10

42. *Id.*

- Each division shall determine the sports in which they conduct a national championship and the access criteria for participation.⁴³
- Each division shall determine the policies under which conferences are formed and operated.⁴⁴

If changes like the ones in the draft are enacted, it will remain to be seen whether NCAA member institutions are satisfied to the point that no further change is desired. Some believe more drastic change is needed. Regarding the current structure of the NCAA, with its three divisions (Division I, Division II, Division III), the Knight Commission on Intercollegiate Athletics⁴⁵ “believes this tripartite organizational structure no longer provides effective governance or accountability in Division I sports, most notably because of the oversized impact of FBS football.”⁴⁶ In a December 2020 report by the Knight Commission that calls for FBS programs to break away from the NCAA and be governed by a new, private organization, the Knight Commission goes into detail about how college football is effectively controlled by FBS Power Five programs, thus widening the financial and competitive gaps between Power Five programs and all other programs.⁴⁷

43. *Id.*

44. *Id.* at 11.

45. KNIGHT COMM’N, <https://www.knightcommission.org/> (last visited Apr. 1, 2022).

46. See KNIGHT COMM’N ON INTERCOLLEGIATE ATHLETICS, TRANSFORMING THE NCAA D-1 MODEL 9, (2021), <https://www.knightcommission.org/wp-content/uploads/2021/02/transforming-the-ncaa-d-i-model-recommendations-for-change-1220-022221-update-01.pdf> [hereinafter KNIGHT COMM’N].

47. See *id.* at 9-12 (“Over the course of the NCAA’s 114 years, its history is marked by a slow but persistent pattern of major college football programs seeking greater autonomy from NCAA control. Football programs sought and won control of television rights, football postseason championships and events, revenue distributions, and general regulations ... Notably, the NCAA has never operated a national championship for college football at the most competitive level, even though operating national championships for all other sports is a core function of the NCAA and is a requirement for all other sports to be considered ‘NCAA sports.’ ... A fourteen-year span from 1984 to 1998 set in motion both an evolution of the FBS football postseason and an NCAA governance reorganization—elevating the independence and decision-making authority of schools with FBS football to effectively manage all of Division I college sports. ... The modern era for FBS football began with the 1984 U. S. Supreme Court decision in the landmark antitrust case *NCAA v. Board of Regents of University of Oklahoma*, which stripped the NCAA of its control over television rights for regular-season football games. That decision opened the door for lucrative conference-driven media deals that reshaped competitive alliances for FBS college football and, in turn, for all other collegiate sports programs at these FBS institutions. ... Sweeping NCAA governance changes in 1996 formally recognized the growing power of schools with FBS football. Division I governance moved from an equal representation method of rules-making (one institution-one vote) to conference-based representative governance, with weighted votes and representation for FBS football conferences. The net effect was a governance system organized around FBS football, rather than one organized around basketball, the sole sport sponsored by every

Highlighting its position that FBS programs control college football, the Knight Commission's co-chairman (and former U.S. Secretary of Education) Arne Duncan stated that the NCAA is "overwhelmed" and "irrelevant".⁴⁸ Many others feel the same way, including university officials and media members.⁴⁹ "I don't think it's imminent, but I think [it will happen] at some point,' one Power Five athletic director said regarding those conferences breaking away from the NCAA", writes CBS sports reporter Dennis Dodd.⁵⁰

school in Division I. ... The financial supremacy of the Power Five was formally recognized in a 2014 NCAA Division I governance restructuring that granted legislative autonomy to this group of conferences. Now formally known as the 'Autonomy 5' conferences, these conferences have legislative authority to make changes to some Division I bylaws that other schools are not required to adopt. Most of the changes made to date through legislative autonomy expand benefits to college athletes at these schools, and in a number of cases, carry significant budgetary implications. ... The Power Five schools sought autonomy to allow them the flexibility to support athletes in ways the rules then prohibited and the majority of Division I schools could not afford. They also sought a streamlined process that would move more quickly than the bureaucratic and slow-moving NCAA legislative process. ... The College Football Playoff (CFP) is managed independently of the NCAA and controlled primarily by the Power Five conferences. In 2019, CFP revenues exceeded \$460 million, nearly 80 percent of which was received by Power Five conferences and their member institutions. All revenues received from the CFP may be used at the discretion of the institution without regard to education, health, safety, and success of football players, unlike the NCAA distribution to schools that does require some dedicated uses for educational purposes. ... The NCAA does not control or benefit financially from the CFP, or from any other FBS football revenue, yet the NCAA absorbs all national expenses for FBS football, including eligibility, rules enforcement, catastrophic insurance, legal services, health and safety administration, and injury research.... The separate administration of the lucrative and independent CFP means that no single entity is responsible or accountable for the sport of FBS football. ... The shortcomings of fragmented governance of FBS Football and a separate CFP became glaringly evident in 2020 when the NCAA cancelled all of its fall championships for health and safety reasons due to the COVID-19 pandemic, including its FCS football championship. By contrast, the CFP schedule, as well as the independent postseason bowl games, remained largely on schedule. That juxtaposition demonstrated the financial power of FBS football, its importance to the identity of its campuses, and FBS football's separate and splintered governance.").

48. Jeremy Mauss, *What Would College Football Look Like If It Broke Away From The NCAA?*, KSL SPORTS (Dec. 27, 2019, 12:22 AM), <https://kslsports.com/425321/what-would-college-football-look-like-if-it-broke-away-from-the-ncaa/>.

49. Staples, *supra* note 16 (Writes Staples, "other than certifying new bowl games, the only authority the NCAA has over the FBS now is rule creation (voted on by the schools) and rule enforcement (handled by NCAA staff and adjudicated by people from the schools). This is much different from basketball, where the television contract for the men's tournament essentially funds the NCAA's entire operation and where the NCAA office's control over the tournament creates significant power. ... What's in it for the employees at the NCAA, anyway? Football doesn't make their organization any money. ... This organization would finally put someone in charge of major college football.").

50. Dennis Dodd, *Majority of Power Five Schools Favor Breaking Away to Form Own Division Within NCAA, Survey Shows*, CBS SPORTS (Oct. 13, 2020, 3:47 AM), <https://www.cbssports.com/college-football/news/majority-of-power-five-schools-favor-breaking-away-to-form-own-division-within-ncaa-survey-shows/>. Said ESPN college football analyst and SEC Network host Paul Finebaum, "I think this is the moment that a lot of people are looking around saying, why do we need the NCAA? I know the basketball tournament is important. I know all these other sports are important, but the people that sit at that table, the five Power 5 commissioners plus (University of Notre Dame athletics director) Jack Swarbrick, plus a few

In preparation for its December 2020 report, the Knight Commission “conducted a groundbreaking survey of NCAA Division I leaders, including presidents, athletics directors, and conference commissioners, to assess their views about the governance and organizational structure of Division I college sports.”⁵¹ Summarizing the report, the Knight Commission writes:

Overwhelmingly, respondents favor reform in NCAA Division I governance and organizational/ competitive structures, prefer “big solutions” to incremental change, and believe the crisis created by the COVID-19 pandemic presents the perfect time to address these issues. The survey responses revealed widespread discontent in NCAA Division I, including: a) a lack of common values about what athletic programs should be at educational institutions, b) a broken financial model, c) inequity in national revenue distributions from marquee championships; and d) dissatisfaction with national governance, with limited consensus about how governance should be changed.⁵²

Some specific survey findings are worth noting here:

Resource disparities exist and contribute to overspending. Nearly 80 percent of survey respondents believe the current Division I structure has resource differences that are too great across institutions. In addition, nearly 60 percent of FBS respondents say they overspend in football to keep up with higher-resourced teams...Outside the Power 5 conferences, more than half of *all* respondents say that their athletics programs rely too much on student fees and institutional funds to support the athletics budget. ... Overall, just one-third of Division I leaders expressed satisfaction with the governance of Division I college sports. Leaders from the FCS conferences

other people, run college football. The NCAA does not run college football, they lost that a long time ago, and I think they're seeing the ineptitude of the NCAA especially of the leadership that currently exists. And I think we're moving slowly, when I mean slowly, maybe a couple of years you can't do this overnight, but I think ultimately you are going to see a break.” Michael Wayne Bratton, *Paul Finebaum Explains Why the Power 5 Could Break Away from the NCAA, Why that Would be Good for College Football*, SATURDAY DOWN SOUTH, <https://www.saturdaydownsouth.com/sec-football/paul-finebaum-power-5-ncaa-break-away-espn-get-up/> (last visited Apr. 1, 2022).

51. KNIGHT COMM'N, *supra* note 46, at 14.

52. *Id.*

and Division I basketball-centric institutions without football strongly support governance reform, with more than 80 percent saying that the current weighted voting arrangement in Division I governance is “inappropriate.” ... The survey also asked college athletics leaders to evaluate major Division I reorganization models, including the new structure recommended in this report. The survey found openness to alternative structures, with support differing by subdivision. Among all survey respondents, creating a new, non-NCAA entity to govern and manage the sport of FBS football was preferred to an alternative structure that would create a new NCAA Division for all Power 5 sports other than basketball. However, 42 percent of FBS survey respondents indicated they would be unlikely to support a separate structure for FBS football only.⁵³

Though Staples writes, “[t]hrough the years, the Knight Commission on Intercollegiate sports has introduced some pie-in-the-sky ideas that don’t mesh with the reality on the ground in college sport,” he believes that the Knight Commission’s December 2020 proposal is “a fantastic recommendation.”⁵⁴ About the possibility of a new, private governing body, Staples offers, “It would be exactly like the NCAA, except it would have actual power over major college football.”⁵⁵

A more recent survey provides further evidence for the position that the NCAA is not where the uppermost echelon of college football should be housed. On September 23, 2021, the NCAA released findings from a survey (conducted from August 23 to September 1 of the same year) of, among others, “campus leaders and conference and coaches association executive directors/commissioners.”⁵⁶ Key findings include the following:

- Approximately one-third of Division II and Division III leaders surveyed agreed that the current divisional structure needs to change. This was

53. *Id.* at 15-16.

54. Staples, *supra* note 16.

55. *Id.*

56. NCAA, NCAA CONST. COMM. SURVEY COMPREHENSIVE FINDINGS 2 (2021), https://ncaaorg.s3.amazonaws.com/committees/ncaa/const/Sep2021ConCom_ComprehensiveSurveyFindings.pdf.

higher in Division I, with a slight majority of respondents endorsing such a change.⁵⁷

- Those who somewhat too strongly agreed that there was a need to change the current divisional structure, were given an open-ended prompt asking them to describe their vision. Comments included:
 - Increase the number of divisions — often calling for an expansion of Division I, or in some cases Division III. My visions would be two parts: (1) Give the Power 5 their own division, separate from the rest of DI while keeping DII as it is; and (2) divide up DIII into two divisions based on enrollment or public/private. —Division III director of athletics, Coast-To-Coast Athletic Conference
 - Break the autonomy conferences out of Division I and permit self-governance. The autonomy five conferences should be an organization unto itself — leaving the NCAA to manage everyone else. —Division I president, Southeastern Conference
 - Reconsider Division I subdivisions by extracting FBS Football from NCAA oversight. I think FBS football needs to be its own entity and has become disconnected from the rest of the NCAA. ... Football now feels like an outlier and NCAA Division I has lost control of it. Division I basketball is also concerning but there is more parity there. —Division III director of athletics, Centennial Conference⁵⁸

Dissatisfaction with the NCAA is nothing new, but it seems to be gaining traction, as more and more people believe that big-time college football is increasingly ill-suited to be housed under the governance of the NCAA.

II. PROPOSALS FOR CHANGE

From a macro perspective, arguably the chief question related to restructuring college football is whether, regardless of any future restructuring within the NCAA, certain football programs should break away from the NCAA and join a new private organization that governs them. The author favors this. This Part will first explore this option.

From a micro perspective, whether the NCAA remains the governing body for all of college football or whether certain programs break away from the

57. *Id.* at 18 (stating the number was higher for respondents from Division I Power Five institutions than for respondents from non-Power Five Division I institutions—*see* chart).

58. *Id.* at 19.

NCAA, arguably the chief issue is how to restructure conferences so as to make the game more competitive overall. Thus, this Part will explore several of the author's proposals for such conference realignment.

For each of these micro proposals, two principles are crucial in order for these proposals to increase significantly the competitiveness of college football and the revenue for the sport overall: (1) The number of teams in top-tier conferences (currently, the FBS Power Five conferences) must decrease from its current number of 65. There is simply no compelling justification for having 65 teams be a part of the uppermost echelon of college football. Indeed, having 65 teams comprise the highest tier reveals the flawed nature of the current tiers. (2) Teams in top-tier conferences should play only teams from their own conference and teams from other top-tier conferences. Says Greg McElroy, a college football analyst for ESPN and the SEC Network, "Hopefully, we get to a point someday where it's only Power 5 versus Power 5."⁵⁹ The author asserts that this needs to happen as soon as possible; but at the very least, FBS programs should play games solely against other FBS opponents. The current model, which includes matchups between FBS and FCS teams, is, on balance, detrimental to the sport of college football because it significantly harms the overall competitiveness of the football season. As such, these two principles are facets of each of the author's proposals.

A. Macro Reform

Recognizing the enormous gap between the popularity and, thus, revenues produced by college football relative to the popularity of, and revenues produced by, all other NCAA sports, FBS college football programs (or at least the most powerful ones) could break away from the NCAA altogether.⁶⁰ Such a move would not affect non-FBS football programs or all other college sports, all of which would remain under the governance of the NCAA.

Currently, the NCAA does not control the CFP, so, in addition to controlling the CFP, the new entity would govern all of the other aspects of college football, including eligibility rules, competitive rules, and health-and-safety standards.

59. *McElroy & Cubelic in the Morning* (WJOX-FM radio broadcast Nov. 11, 2021).

60. See KNIGHT COMM'N, *supra* note 46, at 17. ("While the revenue distribution changes that we recommend to improve college sports can be made under the existing Division I governance structure, the Knight Commission has concluded that more sweeping governance changes are necessary. The governance of NCAA Division I has not kept pace with the rapid commercial growth of college athletics, particularly FBS football, and now is the time for fundamental and far-reaching structural and governance change in keeping with the "big solutions" that college leaders themselves seek."). *Id.*

And because the new entity would be charged with governing major college football only, it could craft rules that are better suited for the sport.⁶¹

Notably, such outside-of-the-NCAA governing bodies already exist for a number of sports, including sailing (Inter-Collegiate Sailing Association⁶²), water skiing (National Collegiate Water Ski Association⁶³), rowing (Intercollegiate Rowing Association⁶⁴), boxing (National Collegiate Boxing Association⁶⁵), rugby (USA Rugby⁶⁶), and roller hockey (National Collegiate Roller Hockey Association⁶⁷), so the concept is not unheard of or untested.

The new entity could be funded from the revenue produced by the CFP, while the teams could continue to earn revenue from (increasingly) lucrative television rights. If college football's goal is to reach its competitive and financial potential, this option should be pursued. This Part will explore this possibility and, as above, will comment on the logistics of accomplishing this option and will recommend what this option could look like in practice.

Some have already proposed and advocated for such a break.⁶⁸ As mentioned above, the Knight Commission made such a proposal in December 2020.⁶⁹ Among other recommendations, the Knight Commission recommended the following: "Create a new entity, completely independent of the NCAA and funded by the College Football Playoff revenues, to govern the sport of football in the Football Bowl Subdivision (FBS). The new governing entity would oversee all FBS football operations, including its national championship, and manage all issues related to FBS football athlete education, health, safety, revenue distribution, litigation, eligibility, and enforcement."⁷⁰ The Knight

61. See Staples, *supra* note 16 ("The new organization would follow a rulebook created by its members just like the NCAA does, but those members could shape the rules differently. Yes, FBS members can make their own rules within the NCAA now, but those tend to revolve more around playing rules or different recruiting calendars. Schools are loath to make big-picture rules for only one sport. That wouldn't be as thorny of an issue anymore because the FBS schools would be creating rules for their own organization."). *Id.*

62. *Overview*, INTERCOLLEGIATE SAILING ASS'N, <https://collegesailing.org/about/overview>, (last visited, Apr. 1, 2022).

63. *Resources and Documents*, NAT'L COLLEGIATE WATER SKI ASS'N, <http://www.ncwsa.com/resources-and-documents> (last visited Apr. 1, 2022).

64. *IRA National Championship Regatta*, INTERCOLLEGIATE ROWING ASS'N NAT'L CHAMPIONSHIP, <http://irarowing.com/> (last visited Apr. 1, 2022).

65. *History & Philosophy*, NAT'L COLLEGIATE BOXING ASS'N, <https://www.ncbaboxing.org/about> (last visited Apr. 1, 2022).

66. *About USA Rugby*, USA RUGBY, <https://www.usa.rugby/about-usa-rugby/> (last visited Apr. 1, 2022).

67. *About the NCRHA*, NAT'L COLLEGIATE ROLLER HOCKEY, <https://ncrha.org/page/about> (last visited Apr. 1, 2022).

68. See generally Staples, *supra* note 16.

69. See KNIGHT COMM'N, *supra* note 46, at 17.

70. *Id.* at 4.

Commission argues that myriad benefits would flow from such an FBS break from the NCAA (both for the NCAA and for FBS programs that break away under the governance of what the Knight Commission calls the *National College Football Association*), including the following:

- The Knight Commission believes that a new, governing entity for the sport of FBS football, the National College Football Association (NCFA),³ will help not only FBS football but all other NCAA sports to endure and thrive, while keeping college sports tethered to core principles of higher education. Each entity will benefit from being an independent, unified governance structure for the sports that it oversees, replacing the current fragmented system, enabling their respective governing bodies to make decisions that consistently advance the educational, health, and safety needs of the athletes whom they serve.
- Both new structures will be better situated to simplify cumbersome legislative processes and streamline arcane and prolific rules.
- (S)eparating governance of FBS football is the essential first step that opens the door for tailored solutions that can address the unique needs of each new governance structure and division. For example, the governance entities may determine it is necessary to seek antitrust protection to cap coaching salaries.
- The Commission also believes that athletes' voices and representation matter, and that athletes in FBS Football and Division I basketball, particularly athletes of color, are often underrepresented in the NCAA's current structure. Separating FBS football governance could and should increase the opportunity for athlete representation, especially among Black college athletes, who make up more than half of all FBS football players.
- The NCAA would restore a system of democratic governance that equally represents the interests of each institution through their conferences
- NCAA governance would once again be organized around the sport sponsored by every Division I school and responsible for the vast majority of its revenues—basketball—and can more intentionally address significant and on-going challenges to the integrity of the sport.
- The reorganized NCAA governance would more effectively serve the vast majority of Division I college athletes: more than 185,000

college athletes participate in Division I sports, but only 8 percent participate in the sport of FBS football.

- Elimination of the sport of FBS football from NCAA revenue distribution calculations would reestablish the expectation that revenue distribution be determined only by sports that have its championship sponsored by the NCAA
- The NCAA would reduce expenses and reallocate revenues by removing national operating costs to support FBS football, consistent with the application of NCAA bylaws. These changes would create opportunities for new or expanded revenue distribution incentives totaling than (sic) \$60 million a year to support broad-based sports programming and other desired educational outcomes.
- The new NCAA structure would allow greater scheduling flexibility and geographic cohesion by untethering competitive affiliations for other sports that are now tied primarily to football interests—providing cost efficiencies, reducing excessive athletic travel, and encouraging regional rivalries.
- The NCAA and member institutions that do not offer FBS football would reduce their legal liabilities and risks from costly legal settlements related to FBS football.
- The new NCFA can provide a reset opportunity for FBS football programs, particularly in the Group of 5 conferences, to assess whether they wish to continue to fund the expenses associated with the highest competitive level of football. Some FBS programs may conclude that they have overleveraged institutional funding and student fees to compete with higher-resourced programs, and that it would be best for the institution to affiliate with NCAA Division I FCS football. Other FBS institutions will conclude that they want to compete in the NCFA.
- No single entity is currently responsible for all aspects of FBS football, diluting public accountability. Creating the NCFA would clarify accountability for the operation of FBS football and boost transparency about the sport.⁷¹

71. *Id.* at 22.

1. Logistics

Though FBS institutions' breaking away from the NCAA is a major step, it is not a particularly difficult one. The Knight Commission agrees, arguing, "Unlike some governance reforms, the establishment of the NCFA and simultaneous NCAA structural changes can be implemented without delay by Division I schools and conferences, without legislation, governmental approval, or navigating extensive reorganization within the NCAA."⁷² To break away, presidents of FBS schools could simply vote to extricate themselves from the NCAA and create a new body that would govern college football only. Obviously, forming such a body would require working through myriad logistical issues and making numerous other decisions about regulating the sport⁷³, but, again, doing so should not be overly burdensome for leaders at such high-level institutions. No FBS programs should be forced to leave the NCAA, but those that wish to should have the opportunity to do so. As proposed by the Knight Commission, the new body could (and should) be funded by CFP revenues.

Even if FBS schools do not break away from the NCAA, opportunities for reform(s) within the NCAA that will better suit FBS programs exist.⁷⁴ The new

72. *Id.* at 21.

73. *Id.* at 26 ("A special task force, with representatives from NCAA FBS institutions would likely need to draft an organizational plan for the NCFA, supported by independent experts who would be appointed to prioritize the long-term interests of college sports. An organizational plan for the NCFA would, at a minimum, specify a mission statement, and create a constitution and association bylaws. NCFA criteria would determine whether an institution's football program would be: a) eligible for membership and governed by the NCFA, or b) affiliated with NCAA Division I football. The NCFA will need to design its organization to address the following functions: staffing, administration, operations, expenses and funding; championship structure and media rights (currently handled through the CFP Administration LLC); athlete eligibility, benefits and rules compliance; health and safety initiatives; and cost controls and other financial arrangements").

74. See Mandel, *supra* note 19 ("A potential Power 5 breakaway, while headline-grabbing, is probably not realistic, given how frequently those schools compete against other Division I programs in a wide variety of sports. But some sort of Major College Football confederation, composed of the 130 FBS schools, is entirely plausible. And as Andy Staples wrote in January, an umbrella organization for just such a thing already exists: It's called the College Football Playoff. . . . [SEC Commissioner Greg] Sankey recently told Sports Illustrated the CFP's management structure is 'productive and constructive' and 'ought to be a model for the NCAA to follow.' . . . Rather than hopelessly trying to fix the NCAA to their liking, why not broaden the CFP management's scope to include governance of all issues pertaining to those schools? . . . Maybe this all seems too radical. It certainly does to Sankey, who appears to be pushing more modestly for the Power Five to be granted wider autonomy than they have now while still living under the NCAA/Division I roof. And yet, he himself is opening the door to something more imaginative with comments like these: . . . 'We're not going to be able to solve every problem and be able to legislate college athletics programs through the NCAA manual,' he said Monday. 'We can govern some aspects, but 450 pages seems less relevant today than it ever has before.' . . . The history of college sports has mostly been a testament to snail-paced change, but the pandemic provided an unwanted lesson in nimble decision-making. It also became a microcosm of the NCAA membership's vast divide. The schools (mostly FBS) that could throw money at the problem forged

NCAA Constitution is a step in that direction. Whether FBS programs take more control of themselves within the structure of the NCAA or whether certain FBS programs break completely from the NCAA (as the author proposes), the author maintains that FBS football, particularly FBS Power Five football, is so fundamentally different than the rest of college football and the rest of college athletics that they need their own system of governance, one that can more effectively and more efficiently address their unique needs and craft solutions that give them more benefits than they would realize under the current governing structure of the NCAA.

B. Micro Reform

Several options for improving the current structure of college football come to mind. Obviously, the author's proposals are not an exhaustive list. Indeed, many other options have been proposed.⁷⁵ However, in this part, the author focuses on three proposals for micro reform of college football.

Each of these options ultimately reduces the total number of teams in top-tier conferences. Each of these options could theoretically be effectuated within the NCAA. However, doing so would require voting to amend the NCAA Division I Manual⁷⁶, which would be no small task, given the impact that the author's proposals would have on certain teams and conferences, most notably those not in the upper echelon of college football. Undoubtedly, conferences would need to form alliances in order to get the votes necessary to enact any rule that would put another peer conference (meaning one in the same tier, such as FBS Power Five) in a lower relative position. Wolken writes, "Ultimately, the 57 schools in the SEC, Big Ten, Pac 12 and ACC plus Notre Dame hold all the cards in the next iteration of the NCAA. The only question is whether they form their own division or whether all 130 schools in FBS are broken out into a separate structure of self-governance."⁷⁷

In the author's view, forming such voting alliances within the NCAA is much more difficult than choosing to band together with other universities and depart from the NCAA, for which no vote within the NCAA would be required.

on with a football season while the others could not. Now, they're facing another set of rapidly evolving challenges with NIL, the transfer landscape, and soon, CFP expansion. ... It's clearer than ever that the earth beneath them is crumbling. Major College Football programs can take matters into their own hands and devise their own solutions or spend another decade complaining and grumbling to reporters on their way to more legal defeats.").

75. See, e.g., Stewart Mandel, *Five Scenarios for the Future of College Conference Realignment*, ATHLETIC (July 25, 2019), <https://theathletic.com/1090554/2019/07/25/five-scenarios-for-the-future-of-college-conference-realignment/>.

76. See NCAA, *supra* note 20.

77. Wolken, *supra* note 6.

Moreover, regardless of what might transpire with respect to the number of conferences at each tier/level, some conferences might want to adjust their memberships, so as to strengthen their conference overall. In such cases, whether conferences would have to add members or could add and drop members is an open question (and one that is touched on below). As such, the author believes the smoother and better route to effectuating any of these proposals is via schools' breaking away from the NCAA and forming a new governing body that regulates all aspects of college football for the teams that break from the NCAA.

Appendix A lists the author's hypothetical conference configurations for each of the author's proposed micro reforms (meaning which teams could end up in certain conferences under each proposed scenario). The author expects no less than for fans of many teams to disagree wholeheartedly with any such team-specific hypotheticals, for under any of these options, not every team will make the cut. That is the harsh reality, yet it is one the author believes is good for the sport as a whole. That said, the author's recommended hypothetical scenarios for each option, presented in Appendix A, are objectively not meant to be taken as the exclusive, or even the best possible, scenarios. Rather, the author aims to advance the conversation and foster lively, productive debate.

1. Reduce the Number of Top-Tier Conferences and Top-Tier Teams

The future will likely see more schools leaving their conference for greener pastures.⁷⁸ Overall, this is great news for college football, as it will bring the strongest teams closer together. Big 10 Commissioner Kevin Warren has stated that conference expansion and realignment is "an opportunity for us to get stronger."⁷⁹

That said, any conference that loses its strongest members will likely try to add schools from other conferences, including from the lower (i.e., Group of Five) conferences. This is exactly what has transpired with the Big 12 Conference, which, as previously mentioned, extended membership offers to FBS independent BYU and three FBS Group of Five schools from the American Athletic Conference (AAC), following the news that Oklahoma and Texas will be moving to the Southeastern Conference (SEC). In response, the AAC is

78. See generally Steven Lassin, *College Football Conference Realignment Rumors and SEC Expansion News*, ATHLON SPORTS (Aug. 3, 2021), <https://athlonsports.com/college-football/conference-realignment-sec-expansion-rumors-updates-oklahoma-texas-big-12>.

79. Will Backus, *Big Ten Football: Commissioner Kevin Warren Opens Up on Conference Realignment, Playoff Expansion*, 247 SPORTS (Oct. 2, 2021), <https://247sports.com/Article/Big-Ten-football-Commissioner-Kevin-Warren-opens-up-on-conference-realignment-playoff-expansion-172176694/>. Warren stated this during an on-air, live booth interview during the second quarter of the Iowa-Wisconsin football game (broadcast on FS1) on Friday, October 1, 2021.

adding six Group of Five teams (University of Alabama at Birmingham, Florida Atlantic University, University of North Carolina at Charlotte, University of North Texas, Rice University, and University of Texas at San Antonio) from Conference USA.⁸⁰ From both the Big 12's and the AAC's perspectives, this is undoubtedly the right thing to do, but the fact is that their new lineups of members will be weaker overall than their current lineups, regardless of any claim(s) to the contrary made by these conferences.⁸¹ The same will be true for any other conference that loses its top member(s), unless they then nab the strongest teams from other conferences, a highly unlikely scenario, since the top teams from a given Power Five conference would not leave their conference to join a weaker Power Five conference.

In the author's view, weaker top-tier conferences are the opposite of what is needed. As such, in order to strengthen the competitiveness of top-tier conferences and to improve the finances of teams in the top-tier conferences, the author proposes: consolidation of the best teams into fewer FBS Power Five

80. See *American Athletic Conference Announces the Addition of Six Universities*, AM. ATHLETIC CONF. (Oct. 21, 2021), <http://theamerican.org/news/2021/10/21/general-american-athletic-conference-announces-the-addition-of-six-universities.aspx>. Three other Conference USA teams (Marshall, Old Dominion, and Southern Mississippi) have decided to move to the Sun Belt Conference, meaning nine of the fourteen teams in Conference USA will be departing. See generally Dennis Dodd, *Conference USA Looking to Add Three or Four Teams in Expansion with Marshall Deciding to Join Sun Belt*, CBS SPORTS (Oct. 29, 2021, 1:00 PM), <https://www.cbssports.com/college-football/news/conference-usa-looking-to-add-three-or-four-teams-in-expansion-with-marshall-deciding-to-join-sun-belt/>. This would leave the conference with just five members, three short of the minimum of eight that is required, in order to be an FBS conference. See NCAA, 2020–21 NCAA DIV. I MANUAL 395 (2020), <http://www.ncaapublications.com/productdownloads/D121.pdf> (stating a conference classified as a Football Bowl Subdivision conference shall be comprised of at least eight full Football Bowl Subdivision members that satisfy all bowl subdivision requirements). As such, Conference USA has extended membership offers to four schools, two of which (Liberty and New Mexico State) are FBS independents and two of which are FCS schools (Jacksonville State and Sam Houston State). See Dennis Dodd, *Conference USA Extends Invites to Four Teams but Seeking One More After Being Gutted During Realignment*, CBS SPORTS (Nov. 3, 2021, 5:23 PM), <https://www.cbssports.com/college-football/news/conference-usa-extends-invites-to-four-teams-but-seeking-one-more-after-being-gutted-during-realignment/>.

81. Commenting on the AAC's addition of the six Conference USA teams, AAC Commissioner Mike Aresco stated, "Our Power 6 campaign is going to be energized . . . [i]t's not going away, and I want that to be really clear." See Jason Munz, *AAC Officially Expands, Adding Six C-USA Schools: 'Our Power 6 Campaign is Going to be Energized'*, MEMPHIS COMMERCIAL APPEAL (Oct. 21, 2021, 11:54 AM), <https://www.commercialappeal.com/story/sports/college/2021/10/21/aac-expands-conference-usa-uab-north-texas-rice-utsa-fau-charlotte/6117237001/>. On the October 27, 2021, episode of his podcast with Bruce Feldman (*The Audible with Stew and Bruce: A Show About College Football*), Mandell stated the following about the AAC, which is regarded as the strongest of the Group of Five conferences: "The AAC has become a very good conference. They are not a power conference, no matter what logo patch they put on their jersey . . . I definitely rolled my eyes when, in the press conference to announce the new schools, he (Aresco) said they were gonna continue with the Power Six branding 'cause nobody with any perspective believes that a conference that is basically, like . . . you're taking half of Conference USA and dumping it into your conference is going to remain anywhere close to the Power Five leagues." *The Audible with Stew & Bruce: A Show About College Football, Coaching Carousel, Paul Bunyan Trophy & Mailbag!*, ATHLETIC, at 25:45 (Oct. 27, 2021), <https://theathletic.com/podcast/97-the-audible-with-bruce-and-stew/?episode=348>.

conferences, with the dismissal of the weakest teams from each conference (football membership only).

The former component of this proposal is not remotely drastic or unfeasible, as such consolidation has already begun, with the impending move of Oklahoma and Texas to the SEC. More of this needs to happen, and the process for doing so is relatively straightforward. Teams can currently leave their respective conferences and/or join another, provided they meet certain requirements, including paying a buyout fee. Conference realignment is nothing new. Indeed, such realignment has occurred for decades.⁸² A withdrawing team would still be subject to its conference's Grant of Rights (GOR), which includes the conference's exclusive television rights, for the remainder of the GOR term and would receive no benefit from said GOR for the duration of said term (assuming the conference still exists).⁸³

The bylaws of each conference lay out the requirements for adding members, so the procedures for conference expansion are already in place. Conference realignment has occurred at various points in the past and should continue to occur in the future to the extent that at least one conference falls out of the "Power" conferences. Once this happens, teams in the remaining "Power" conferences should play games only against teams within their respective conference and teams from the other "Power" conferences. The result: more competitive games among the most powerful teams.

By contrast, the latter aspect of this proposal—the dismissal of certain teams from football conference membership—will surely be seen by many (perhaps most) as drastic. Even so, to make this option the strongest it can be, in terms of overall competitiveness on the field and in terms of revenues, the weakest teams from the top-tier conferences should be dismissed as football members of their respective conferences. Doing so would pit the best teams against each other more often, thus strengthening their overall strengths of schedule. Assuming it is even possible, eliminating members would be extremely controversial and would certainly be met with fierce resistance, especially from the at-risk schools. The author is sensitive to the harsh reality of expelling certain members of top-tier conferences, but with all due respect to these institutions, there are quite simply a number of schools that do not belong in the uppermost echelon of college football. On the contrary, their inclusion weakens it.

82. See Shiloh Carder, *Looking Back at 50 Years of College Football Conference Realignment*, YARDBARKER (Jan. 29, 2022), https://www.yardbarker.com/college_football/articles/looking_back_at_50_years_of_college_football_conference_realignment/s1_35741384#slide_3.

83. See Joshua Rogers, *What is Big 12's 'Grant of Rights'? Term Explained as Texas and Oklahoma Inquire About Joining SEC*, FOCUS, <https://www.thefocus.news/sports/big-12s-grant-of-rights/> (last visited Apr. 1, 2022).

a. Logistics

Logistically speaking, this option is fairly straightforward, as it requires no more than for the strongest top-tier conferences to add the strongest members of other top-tier conferences. In the author's opinion, the SEC and Big 10 are the strongest of the Power Five conferences. Each currently has fourteen member schools, but once Oklahoma and Texas join the SEC, the SEC will have sixteen. (If expelling conference members is an option, these numbers could obviously decrease.) Either/each conference could simply add more teams from any/all of the other three Power Five conferences, resulting in two "super" conferences (explored more fully in Option 2, below). Alternatively, the other three Power Five conferences could consolidate, either as one conference (an unlikely path, considering how many members the resulting single conference would have) or via adding the strongest teams from two of the conferences into the third. Either way, in terms of having the strongest teams, the result would be three top-tier conferences. As another option, two of the other three could merge into one, resulting in four conferences in the top-tier. In the author's perspective, the fewer the top-tier conferences, the better, but even four conferences would be preferable to the current five.

Obviously, the logistics are less straightforward when it comes to dismissing members from conferences. Is expelling conference members even possible? It is impossible to answer definitively for all of the FBS Power Five conferences, given that the SEC is the only Power Five conference that makes its bylaws publicly available.⁸⁴ But it appears that, at least in the SEC, terminating a member is possible. In relevant part, the 2021–2022 Southeastern Conference Constitution and Bylaws state: "Membership of a member may be terminated involuntarily at a meeting of the Chief Executive Officers. A vote of at least two-thirds of all the Chief Executive Officers is required to terminate membership. Any motion to terminate membership shall specify the effective date of the proposed termination."⁸⁵ Until Oklahoma and Texas join the SEC, the conference has fourteen members. Thus, in order to terminate a member, at least ten of the fourteen (via their respective Chief Executive Officers) must vote to terminate. So, in theory, if the same ten schools wanted to terminate the membership of the other four schools, those ten would be able to do so. If and

84. See SEC, SOUTHEASTERN CONF. CONST. AND BYLAWS 2021–2022 1 (2020), <https://a.espncdn.com/sec/media/2021/2021-22%20SEC%20Bylaws.pdf>. A Power Five conference official told the author that terminating membership (in the absence of violation of conference rules) is certainly possible. Interview with Power Five Official. The other four Power Five conferences did not respond to the author's inquiries.

85. SEC, *supra* note 84 at 3.

when the SEC's roster increases to sixteen teams, the number needed to terminate would be eleven.

If a conference's current bylaws do not explicitly allow for termination of a member without good cause, then the author recommends amending conference rules to allow for such action. Dismissing each conference's weakest schools from football conference membership is good for each conference and good for college football overall.

2. Two Top-Tier Conferences (Akin to the NFL's American Football Conference (AFC) and National Football Conference (NFC)⁸⁶ with Lower Tiers of Other Conferences

Unlike the first proposal, under which certain Power Five conferences simply add the strongest members from other conferences (and potentially dismiss their respective weakest members), this option would involve a front-end structural change to conferences. What this means is that, whether it occurs within the NCAA or outside of the NCAA, college football would reorganize into two top-tier conferences, thus eliminating the Power Five.⁸⁷ These two conferences would have their own national-championship format, meaning they would hold a CFP involving only teams from the two conferences. Underneath the two top-tier conferences would be lower conferences, which would hold their own national championships.

Under this model, each of the two top-tier conferences would have the ability to adjust its membership in the future, just as conferences can now. Membership would be capped, resulting in far fewer teams in the top-tiers. As such, the level of competition and parity would be far greater than under the first option.

The most obvious issue with this option is the number of teams in each of the two conferences. Before addressing this, the author believes that each of the conferences should have the same number of teams. But how many? Should the number be twenty per conference, totaling forty teams, well above the number of teams that can legitimately contend for a national championship? Should it be sixteen per conference, totaling thirty-two, as is the case in the NFL? Should it be fewer than thirteen or fewer per conference to ensure that each team can

86. See *Teams*, NFL, <https://www.nfl.com/teams/> (last visited Apr. 1, 2022).

87. Some commentators believe the demise of the Power Five is inevitable. According to Staples, "The concept of the Power Five as a construct is gonna go away." The Andy Staples Show & Friends, *Playoff Expansion Talks Stall, but Is That So Bad? + SEC vs. All Y'all Resolution*, ATHLETIC, at 27:40 (Feb. 21, 2022), <https://theathletic.com/podcast/83-the-andy-staples-show/?episode=527>. During the same podcast episode, Staples claimed, "The conferences are not equal. There will be two power conferences in three years." *Id.* at 28:39.

play every other team in its respective conference under a twelve-game schedule? If the number is more than thirteen, then for a twelve-game schedule, additional scheduling decisions will have to be made since playing every other team in a team's conference would not be feasible. For example, in such a scenario, would each conference be broken down into divisions, members of which play all other members of the same division (as is the case in the NFL)? Reasonable arguments can be made for a range of numbers, so for purposes of the hypothetical configurations proposed in Appendix A, the author presents thirteen-, sixteen-, and twenty-team conference options. The author acknowledges that reasonable minds can disagree about which teams make the cut under each numerical option. That said, the author believes that, among these three specific options, thirteen would be the most ideal, as it would allow for each team to play a twelve-game, regular-season schedule against all other teams in its respective conference. In the author's view, such a scenario would lead to the best possible outcome, both in terms of team finances and in terms of competition on the field.

Another issue is how to apportion teams between the two conferences. Would it be random? Would it be based on geography? Should traditional rivalries be preserved? Perhaps a combination of these? For purposes of the hypothetical configurations proposed in Appendix A, the author chooses to separate the two conferences geographically, with the Mississippi River as the border between the conferences. As such, in Appendix A, the author names these conferences *East Conference* and *West Conference*.

a. Logistics

Though the author firmly believes the best way to effectuate this option is outside of the NCAA, such an option could still be realized within the current NCAA structure. The author envisions a couple of ways this could happen.

Firstly, the NCAA could simply restructure conferences. But, again, doing so would require NCAA member institutions' voting for such restructuring. Admittedly, this might be unfeasible, politically. Secondly, two FBS conferences could add to their memberships the strongest teams from the other conferences. Alternatively, the strongest teams from each FBS Power Five conference could leave their respective conferences and create two new ones. Either way, because the best teams would be in just two conferences and because these teams would not compete against teams outside of these two conferences, teams not in these two conferences would effectively be relegated to non-Power-Five status. The result would be that such Power Five teams not in one of the top two conferences would face a far more difficult path to the

CFP, at least under the current CFP selection criteria, since their respective strengths of schedule would be vastly diminished.

Presently, “the four best teams” are selected for the CFP.⁸⁸ In the author’s view, if the best teams are in just two conferences and do not play teams outside of said conferences, the chance that a team not in one of the top two conferences will be chosen as one of the four best teams is virtually zero. Expanding the CFP from four teams to twelve teams has been proposed.⁸⁹ Under this proposal, the twelve teams would consist of six conference champions and six at-large teams. If this proposal comes to fruition, then at least four teams not in the top two conferences would make the playoff. In the author’s view, all six at-large bids would be granted to teams in the top two conferences. However, if the best teams group themselves into two conferences, the criteria for this twelve-team proposal would not be justified, and, as such, the author believes that in such a case, such a proposal would either be scrapped (if it’s not already in effect) or would be abandoned (if it’s already in effect) and replaced by selection criteria that better reflect the reality of two conferences with the best teams.

3. One Top-Tier Conference, with Lower Tiers of Other Conferences (with Annual Promotion and Relegation)

Under this configuration, conferences would be tiered, with the “super” conference at the top, the next strongest conference below, and so forth and so on. Each tier would hold its own national-championship format and contract for its own television deals, whose revenues would be distributed equally among the respective tier’s members. Each year (or every other year maybe, to ensure that each team has played every other team in the league at least once, assuming the membership is capped low enough), a set number of the lowest-ranked teams in each conference above the lowest tier would be relegated to the tier below, while an equivalent number of the top teams in each tier below the top-tier would be promoted to the tier above. This model gives every team not in the top-tier a legitimate opportunity to work its way up while giving each team in a tier above the lowest tier motivation to avoid relegation. From competitive and economic standpoints, this option is the strongest of the three and is the author’s preferred option because, in the author’s view, a sports league with no

88. *CFP Selection Committee Protocol*, COLLEGE FOOTBALL PLAYOFF, <https://collegefootballplayoff.com/sports/2016/10/24/selection-committee-protocol.aspx> (last visited Apr. 1, 2022).

89. See Dennis Dodd, *College Football Playoff Expansion: CFP Board Pushes 12-Team Field Closer to Approval with Summer Study*, CBS SPORTS (June 22, 2021 1:14 PM), <https://www.cbssports.com/college-football/news/college-football-playoff-expansion-cfp-board-pushes-12-team-field-closer-to-approval-with-summer-study/>.

promotion and relegation does not come close to fostering the competition that a league with annual promotion and relegation would.

SIDEBAR: The author wholeheartedly agrees with the description of U.S. professional soccer, which does not employ promotion and relegation, offered during an episode of the Emmy-winning television show *Ted Lasso*. When asked by one of his players what happens to the worst teams in the league (in this case, MLS), since they are not in danger of being relegated, Coach Lasso replies as follows:

You know, they play out the rest of the schedule, go on through the motions in meaningless games contested in lifeless, half-empty stadiums, and, and everyone's pretty much fine with that. That sound about right, Coach (Beard)?

Coach Beard: *Yeah. It's dumb.*⁹⁰

This option would follow the model of top-flight club football (soccer) outside of the United States.⁹¹ Think England's Premier League (PL or EPL)⁹², which is the top-tier of club football in England. The PL is governed by the Premier League, "a private company wholly owned by its twenty Member Clubs who make up the League at any one time,"⁹³ meaning each of the twenty teams in the PL is a shareholder of the PL. Though the exact details of the pyramid structure of English club football are not necessary for purposes of this article, examining the structure of the upper levels of the pyramid is instructive. Below the EPL are three tiers governed by the English Football League (EFL)⁹⁴:

90. *Ted Lasso: The Hope That Kills You* (Apple TV broadcast Oct. 2, 2020).

91. Professional soccer in the U.S. follows a franchise model that does not include automatic promotion and relegation, with Major League Soccer (MLS) as the top level of U.S. professional soccer. *See generally* *MLS Homepage*, MAJOR LEAGUE SOCCER, <https://www.mlssoccer.com/> (last visited Apr. 1, 2022).

92. *See generally* PREMIER LEAGUE, <https://www.premierleague.com/> (last visited Apr. 1, 2022).

93. *About the Premier League*, PREMIER LEAGUE, <https://www.premierleague.com/about> (last visited Apr. 1, 2022).

94. *See generally* ENGLISH FOOTBALL LEAGUE, <https://www.efl.com/> (last visited Apr. 1, 2022).

Championship⁹⁵, League One⁹⁶, and League Two⁹⁷ So, starting with the top of the pyramid, the top four tiers of English club football are as follows: (1) EPL, (2) Championship, (3) League One, and (4) League Two. As noted above, the EPL is composed of twenty teams, while each of the next three tiers is composed of twenty-four teams each. Thus, there are ninety-two teams in the top four tiers of English club football.

At the conclusion of each season, the bottom three teams in the PL are relegated to Championship, while the top three teams in Championship are promoted to the PL. Thus, each year, there is a fifteen percent turnover in the makeup of teams in the EPL. Meanwhile, the bottom three teams in Championship are relegated to League One, while the top three teams in League One are promoted to Championship; the bottom four teams of League One are relegated to League Two, while the top four teams in League Two are promoted to League One; the bottom two teams in League Two are relegated to the league below, the National League (the fifth-highest tier in the pyramid), while the top two teams in the National League are promoted to League Two. Thus, the respective annual turnovers in the lineup of teams are as follows: 25% (6/24) in the Championship, 29.16% (7/24) in League One, and 25% (6/24) in League Two.

Similar turnover levels in college football would be hugely beneficial for purposes of competition in each tier of conferences. There are multiple ways a tiered conference system with automatic promotion and relegation could be structured. To ensure that each team plays every other team in its respective tier each season, so that annual (as opposed to bi-annual) promotion and relegation are justified, the author maintains that each tier should be composed of thirteen teams, with each team playing a twelve-game regular season schedule against all other teams in its respective tier. Additionally, the author proposes that each tier above the bottom tier would relegate three teams to the tier immediately below, while each tier below the top-tier would promote three teams to the tier immediately above (resulting in an annual tier-turnover rate of just over twenty-three percent). Under this framework, each tier would hold its own playoff, to determine its champion. Alternatively, each tier could simply hold one championship game between the top-two ranked teams in the tier (provided that a sufficient tiebreak system is in place, should more than two teams have the

95. See generally *Sky Bet Championship*, ENGLISH FOOTBALL LEAGUE, <https://www.efl.com/clubs-and-competitions/sky-bet-championship/> (last visited Apr. 1, 2022).

96. See generally *Sky Bet League One*, ENGLISH FOOTBALL LEAGUE, <https://www.efl.com/clubs-and-competitions/sky-bet-league-one/> (last visited Apr. 1, 2022).

97. See generally *Sky Bet League Two*, ENGLISH FOOTBALL LEAGUE, <https://www.efl.com/clubs-and-competitions/sky-bet-league-two/> (last visited Apr. 1, 2022).

best records for the regular season). Likewise, each tier could set rules for determining the bottom three, should more than three teams be tied for the worst three records.

The number of tiers would depend on whether this option is pursued within the NCAA or whether teams break away from the NCAA. If the former, the FBS and FCS could have their own tiered system, or all Division I teams (FBS and FCS) could be part of the same tiered system so that all Division I teams have a path to the top-tier. If the latter, the number of tiers would obviously depend on how many teams break away from the NCAA.

Others have proposed a college football “Premier League” as a possible option, including Mandel, who writes, “From a purely business standpoint, the most profitable move the biggest brand-name programs could make is to divorce themselves from the lower-tier brands in their own conferences that they are essentially subsidizing. Break off from the NCAA—in football only—and form a Premier League of sorts with the bluebloods from the other power conferences.”⁹⁸ However, a distinction between the author’s “Premier League” proposal and Mandel’s is that Mandel’s does not include promotion and relegation. Rather, Mandell proposes “an exclusive league of the 24–32 most recognizable programs . . . competing only against each other in what would unquestionably become the most valuable U.S. sports property outside of the NFL.”⁹⁹ Under Mandel’s proposal, “this new league would become the exclusive feeder league” to the CFP.¹⁰⁰ In the author’s view, Mandel’s “Premier League” proposal is closer to the author’s second proposal (two top-tier conferences), explored above, but like the author’s “Premier League” proposal, Mandel’s proposal is an exclusive top-tier of teams from which the entire CFP lineup is formed.

Its prospects for being realized (discussed below) notwithstanding, if the goal is to make college football the most competitive and most financially successful it can be, an exclusive “Premier League” with annual promotion and relegation is far and away the strongest of the options proposed by the author.

98. Mandel, *supra* note 19. Under Mandel’s proposal, twenty-eight teams would be equally divided among four divisions (South, East, West, and Midwest), with the top two teams in each division earning a spot in an eight-team playoff.

99. *Id.* Mandel continues, “To be clear, if schools ever went this route, they would be forming a de facto professional league only loosely connected to the universities themselves. Without the NCAA affiliation, there would be no way to justify treating the athletes as amateurs. And that would come with its own set of complications.”

100. *Id.*

a. Logistics

Effectuating this option within the current NCAA structure would obviously require a vote by NCAA member institutions, and the author firmly believes that, of all the options proposed by the author, this option would be, by far, the least likely to occur within the confines of the NCAA. Would member institutions ever be able to agree on which teams are in the initial groupings of tiers? Politically, this option is highly unlikely within the NCAA. As such, the author maintains that this option's best chance for success lies outside of the governance of the NCAA, so a break from the NCAA would likely be necessary.

Even so, this option is likely to face fierce resistance from many, if not most, teams, for even if it is accomplished outside of the NCAA, agreeing on which teams start in each tier would be a tall task. Says David Carter, executive director of the University of Southern California (USC) Sports Business Institute, "It sounds interesting to look at . . . but then you start to peel back the layers, and while still possibly attainable, there would be a lot of pushback."¹⁰¹ According to Tom Stephenson, "It sounds like a reasonable idea on paper. But it's not happening."¹⁰² Staples writes, "That's fun to talk about in June, but it's also never going to happen."¹⁰³

This may be true, not least because a sufficient number of the top teams might not get on board with the idea of becoming part of a system they could fall out of, but this does not impact the author's belief that this option would produce far greater overall competition on the field and would vastly increase the amount of revenues that FBS teams would earn. For the sport of college football overall, the best path forward is for the top teams to play against each other every single year, and not just in the CFP, and this is precisely the effect that a tiered structure with promotion and relegation would have.

A simple way to avoid the problems associated with agreeing on the initial groupings of teams, by tier, would be to tier initially according to the final CFP rankings from the year before the onset of the tiered league. Whether the total number of teams in each tier is thirteen, or any other number, using the prior year's final CFP rankings would at least have some semblance of fairness. And, again, after the first year, on-field performance would determine where a given team lands the following year.

101. *Id.*

102. Tom Stephenson, *No, the College Football Premier League Isn't Going to Happen*, ANCHOR OF GOLD (July 25, 2019, 11:40 AM), <https://www.anchorofgold.com/2019/7/25/8930094/no-the-college-football-premier-league-isnt-going-to-happen>.

103. Staples, *supra* note 16.

To make this option more palatable for more teams, the author posits that for the first year of the arrangement, a greater number of teams could be included than will be included in later years. For example, if the ultimate goal is to have thirteen teams in the top tier, then during the first year, the top tier could include, say, twenty-eight teams, as Mandel has proposed. The top thirteen teams after the first year would constitute the thirteen teams in the top tier the following year. Alternatively (and though the author does not favor this), to make the arrangement even more acceptable, a two-year qualifying period could be employed. Under this scenario, twenty-five teams could be included in the top tier. In the first year, each team would play twelve other teams in the tier, while in the second year, each team would play the twelve teams not played in the first year. This way, during the two-year period, every team will play each of the other twenty-four teams in the top tier. At the conclusion of the second year, the top thirteen teams (or whatever other number is chosen for the top tier in the third year) would constitute the teams in the top tier the following year.

C. Proposals Conclusion

Perhaps one of these options will materialize. Perhaps some other structure will emerge. Regardless of the form it takes, far fewer teams should have the ability to win the top-level national championship. To some, this may seem anti-competitive, but the opposite is actually the case. If fewer teams are in the running (the NFL has 32 teams, for example), then the best players will be spread more evenly among the contenders. The result would be much greater parity than currently exists. The football season will be vastly more competitive, and television ratings and advertising revenues will rise accordingly. Moreover, separating the most powerful college football programs from all the other programs will better equip each group to govern itself in ways that are better suited than the current NCAA model. Obviously, any reconfiguration will produce myriad logistical challenges and legal issues involving teams, conferences, television networks, and other parties, but there is no reason to think any of these would prove insurmountable. For the betterment of college football, at least one of these options (or a similar one) should be effectuated.

III. ANTITRUST ANALYSIS

Before addressing potential antitrust concerns about the above proposals, the author maintains that some of these proposals should not be problematic from an antitrust perspective. Firstly, the author does not believe that any departure of a school from one conference to another is problematic, as there is no doubt that each school has the freedom to affiliate with any conference that is willing to grant it membership. Secondly, the author does not find any

antitrust problem with a conference's members' voting out another member of the conference, not least because expelling a member from a given conference does not expel that member from college football. That team is free to join another conference in the same tier if another conference will admit it. Finally, the author has no antitrust concern regarding teams' breaking away from the NCAA and organizing under another governing body, since, just as teams willingly chose to join the NCAA, they can willingly choose to leave it.

By contrast, the author believes the case for antitrust concern is stronger with respect to either of the following actions: (1) a conference's deciding that its members can play games solely against other teams within said conference and/or solely against teams from other conferences in their tier (e.g., Power Five-only schedules) and (2) the decision by FBS schools to restructure under a tiered-conference format with promotion and relegation.¹⁰⁴ In the author's view, either of these actions might be challenged as an unreasonable restraint of trade (specifically, an unlawful group boycott), in violation of Section 1 of the Sherman Antitrust Act and potentially as an unlawful merger, in violation of Section 7 of the Clayton Antitrust Act. Even so, as detailed below, the author believes neither of these actions should be considered an antitrust violation, particularly if executed outside of the governance of the NCAA. As noted below, antitrust claims would be stronger if either of these actions is taken by schools within the confines of NCAA governance. As such, in order to avoid this, the author maintains that schools should pursue any of the author's proposals after breaking away from the NCAA.

104. These positions are in line with those of antitrust expert Robert Litan, who writes the following in *The Athletic*: "To get things started, here's a brief summary of Mandel's possible new conference (or independent) arrangements, and their justifications, solely for football, at some point:— The Big 12 (currently only 10)/Pac-12 expand (to enlarge geographic footprint and TV audience)— Blue bloods (such as USC, Oklahoma and Texas) go independent (to keep more TV revenue for themselves)— Power Five conference schools (65) sell their TV rights package (assuming existing conference contracts can be synched) and possibly scheduling only games against each other (to strengthen their schedules and attractiveness of the TV package)— A Premier League of the Top 28 (or some other similar number) teams, in four regional divisions, and division champions competing in a national playoff, analogous to the NFL (proposed before by Mandel). Neither of the first two options – conference enlargement or blue blood independency – raise any significant antitrust concerns, under either Board of Regents or Clayton Act merger law. Participating schools are free under the law, with rare exceptions, to decide where they want to belong. The Power Five or the Premier League realignments – or what might be called the 'concentrating realignments' — would constitute a major restructuring of competition in college football along with the way their TV rights are sold. The latter, more so than the former, could raise at least some questions under both the Sherman and Clayton Acts." Robert Litan, *The Antitrust Risks to Some College Football Conference Realignment Scenarios*, *ATHLETIC* (Sept. 10, 2019), <https://theathletic.com/1191540/2019/09/10/the-antitrust-risks-to-some-college-football-conference-realignment-scenarios/>.

A. Unlawful Restraint of Trade

The most likely claim advanced by a party challenging either of the proposals at issue here is that either action constitutes an unlawful group boycott, in violation of Section 1 of the Sherman Act. Three tests are available for a court to analyze a restraint of trade that is challenged under Section 1 of the Sherman Act: *Per Se*, *Quick Look*, and *Rule of Reason*, with *Per Se* and *Quick Look* at opposite ends of the analyses spectrum and *Rule of Reason* between them. The Supreme Court's holdings in *NCAA v. Board of Regents* and *NCAA v. Alston* indicate that *Rule of Reason* is the appropriate test for scrutinizing NCAA rules or other agreements among college football teams.

NCAA v. Board of Regents established that NCAA rules are to be scrutinized under the *Rule of Reason* antitrust analysis, as *Per Se* analysis is inappropriate in this context. The Court held, "Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."¹⁰⁵ As is true for either of the two proposals at issue here, any agreement among college football competitors necessarily limits competition to some degree. However, as the Court noted, college football is "an industry in which horizontal restraints on competition are essential if the product is to be available at all."¹⁰⁶ As such, *Per Se* analysis is not appropriate here. The same is true for *Quick Look* analysis, per the Court's holding in *NCAA v. Alston*. There, the Court held that:

sometimes we can determine the competitive effects of a challenged restraint in the " 'twinkling of an eye.' Board of Regents, 468 U.S. at 110, n. 39, 104 S.Ct. 2948 (quoting P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37–38 (Federal Judicial Center, June 1981)); American Needle, Inc. v. National Football League, 560 U.S. 183, 203, 130 S.Ct. 2201, 176 L.Ed.2d 947 (2010). That is true, though, only for restraints at opposite ends of the competitive spectrum. For those sorts of restraints—rather than restraints in the great in-between—a quick look is sufficient for approval or condemnation. At one end of the spectrum, some restraints may be so obviously incapable of harming competition that they require little scrutiny.¹⁰⁷ ... At the other end, some agreements among competitors so obviously threaten to reduce output and

105. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 103–04 (1984).

106. *Id.* at 100–01.

107. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S.Ct. 2141, 2142 (2021).

raise prices that they might be condemned as unlawful *per se* or rejected after only a quick look.¹⁰⁸

In the author’s view, a court would not place either of the two proposals at issue at either end of this spectrum but would rather place them between the spectrum’s ends. As such, *Rule of Reason* is the appropriate test for scrutinizing these proposals. So, how might these two proposals play out under a *Rule of Reason* analysis? The *Rule of Reason* is a three-step, burden-shifting analysis.¹⁰⁹ The Supreme Court explains the *Rule of Reason* as follows:

When describing the rule of reason, this Court has sometimes spoken of “a three-step, burden-shifting framework” as a means for “distinguish[ing] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.” *American Express Co.*, 585 U. S., at —, 138 S.Ct., at 2284. As we have described it, “the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect.” *Ibid.* Should the plaintiff carry that burden, the burden then “shifts to the defendant to show a procompetitive rationale for the restraint.” *Ibid.* If the defendant can make that showing, “the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.” *Id.*, at — - —, 138 S.Ct., at 2284).¹¹⁰

The author’s opinion regarding how the *Rule of Reason* should play out with respect to either of the author’s two proposals follows.

108. *Id.* at 2156.

109. Michael A. Carrier argues that the *Rule of Reason* is a four-step analysis. See Michael A. Carrier, *The Four-Step Rule of Reason*, 33 ANTITRUST 50, 50 (2019).

110. *Alston*, 141 S.Ct. at 2160. The Court continued, “These three steps do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis. As we have seen, what is required to assess whether a challenged restraint harms competition can vary depending on the circumstances. See *supra*, at — - —. The whole point of the rule of reason is to furnish ‘an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint’ to ensure that it unduly harms competition before a court declares it unlawful. *California Dental*, 526 U.S. at 781, 119 S.Ct. 1604; see also, e.g., *Leegin Creative*, 551 U.S. at 885, 127 S.Ct. 2705 (“‘[T]he factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition’”); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984); 7 Areeda & Hovenkamp ¶1507a, at 442–444 (slightly different “decisional model” using sequential questions).”

1. Plaintiff Must Prove There is a Substantial Anti-Competitive Effect
Stemming from the Challenged Restraint.

The vast majority of restraints of trade that are analyzed under the *Rule of Reason* do not meet this initial burden. In other words, most claims fail at this juncture. In *Alston*, the Supreme Court noted:

According to one *amicus*, courts have disposed of nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to show a substantial anticompetitive effect. Brief for 65 Professors of Law, Business, Economics, and Sports Management as *Amici Curiae* 21, n. 9 (“Since 1977, courts decided 90% (809 of 897) on this ground”).¹¹¹

The author maintains that, with respect to claims filed against either of the author’s proposals, the plaintiff should not be able to meet this initial burden.

Technically speaking, any contract (including the common conference realignment) restrains trade and, thus, restricts competition to some degree¹¹², so the author has no doubt that a challenger (which, most likely, would be a team that is left out of the top tier(s) of the author’s proposals) would offer a plausible argument that the author’s proposals hurt competition. For example, if teams from top-tier conferences did not play games against teams outside of the top tier(s), a team from the latter could argue that its inability to play a team from the former hurts its ability to compete at the highest level, even if only for one game. As a result, it would miss out on the opportunity to expose its program to a bigger audience and to recruits and would miss out on the large game payouts that it otherwise would earn, thus hurting its budget and, in turn, its ability to pay for things that could improve its facilities, which are a factor in a recruit’s decision about where to play.¹¹³ The author takes no issue with this argument yet does not believe that such an argument is enough to prove a

111. *Alston*, 141 S.Ct. at 2160-61.

112. See Jean Murray, *Restraint of Trade Is an Issue in Non-Compete Agreements*, BALANCE SMALL BUS. (June 3, 2020), <https://www.thebalancesmb.com/what-is-restraint-of-trade-398439>. This is why the law does not strike down restraints of trade but rather only *unreasonable* restraints of trade. See *Nat’l Soc’y of Pro. Engineers v. United States*, 435 U.S. 679, 687–88 (1978) (stating that a “problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. The statute says that ‘every’ contract that restrains trade is unlawful. But, as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law.”).

113. Alicia Jessop, *The Surprising Factors Driving College Football Recruits’ College Decision*, FORBES (Dec. 14, 2012, 1:31 PM), <https://www.forbes.com/sites/aliciajessop/2012/12/14/the-surprising-factors-driving-college-football-recruits-decision/?sh=41f53daf411a>.

substantial anticompetitive effect for the game of college football overall. For two chief reasons (the first focusing on on-the-field evidence and the second focusing on off-the-field evidence), the author believes that such a substantial anticompetitive effect would be lacking.

Firstly, under the author's proposals, teams are grouped with, and play only against, teams of similar caliber. As such, far from being substantially anti-competitive, the author believes that each college football season would see more competitive matchups. "Cupcake games," which are games between unevenly matched teams (for example, a game between a strong Power Five team and an FCS team) that typically result in a lopsided victory for the stronger opponent and which typically see reduced attendance, would be no more.¹¹⁴ From a competitive standpoint, such matchups are not good for the sport of college football, especially when the matchups occur late in the season.¹¹⁵ Particularly since the CFP Committee is charged with selecting for the CFP the "four best teams,"¹¹⁶ games against inferior opponents offer very little value in assessing the top teams, and playing against inferior teams lessens the top teams' respective strengths of schedule. To best assess which teams are the "best," the top teams need to play as many games as possible against other top teams.

Secondly, because, under the author's proposals, the college football season would consist of top-tier teams' playing solely against each other, broadcasters will pay substantially more for the rights to televise games. These prices that broadcasters pay are a direct reflection of the value of the matchups, and paying more necessarily means the on-field products that broadcasters are paying to televise are more valuable. As such, the author argues that a college football season that costs substantially more to televise is inherently more competitive than one for which broadcast rights are substantially lower. As such, a plaintiff should not be able to meet its burden that the author's proposals are substantially anti-competitive.

114. See Alex Kirshner, *Why Your Power 5 Football Team Is Playing at Some Mid-Major Stadium This Fall*, SBATION (Sept. 22, 2018, 7:34 PM), <https://www.sbnation.com/college-football/2018/8/30/17431764/college-football-scheduling-cupcake-games-why>.

115. Commenting on the November 13, 2021, matchup between Alabama and New Mexico State, Greg McElroy, who won a national championship as the starting quarterback for Alabama and who now serves as a college football analyst for ESPN and the SEC Network, said, "It's bad for the sport. It's bad for the product. . . . I just hate games like this so much. Boring. . . they are. Worthless. . . . It's the worst. It's just bad. . . . These games are the absolute worst thing that college football does." *McElroy and Cubelic in the Morning* (WJOX-FM radio broadcast Nov. 10, 2021).

116. Ralph D. Russo, *College Football Playoff Selection Committee Criteria*, NCAA (Sept. 11, 2014), <https://www.ncaa.com/news/football/article/2014-08-11/college-football-playoff-selection-committee-criteria>.

2. Defendant Must Prove Pro-Competitive Rationale for the Challenged Restraint.

Though the author does not believe that a claim against one of the author's proposals should make it to this second step of *Rule of Reason* analysis, for argument's sake, the author will concede the first step to the plaintiff and discuss the second step.

The crux of the defendant's argument here should be that each of the author's proposals produces a different product than existed before, one that is significantly more competitive, both on and off the field. As mentioned above, because the top tier(s) would consist of the best teams' playing only against the other best teams and because each lower-tier would consist of teams of roughly the same caliber, every tier would hold matchups that are much more competitive than many of today's games, which pit teams of markedly different strengths against one another. As a result, the author has no doubt that the overall quality of football would increase for each tier, as would the competitive balance within each.¹¹⁷

Moreover, the value of the broadcast rights would be vastly higher, most certainly at the highest level, but also, in the author's opinion, at each of the lower levels. The reason for this is that, with respect to the lower levels, each team's chances of winning a game against a similarly situated opponent is greater than the team's chances of winning games against much stronger opponents. Such parity should make the matchups much more appealing to broadcasters since the likelihood of a lopsided victory is so much lower. Fans of these teams would also likely be more interested in the games.

To bolster their argument, the defendant will want to gather data supporting the notion that the author's proposals would result in games that are much more compelling. To that end, the defendant would be wise to, for example, conduct broad consumer surveys showing that fans would be more interested in these matchups. Retrospective surveys could be used, but new/current ones are ideal. If such surveys were conducted, the author believes their results would indicate (1) that fans believe games between teams of roughly the same caliber/strength would be more competitive, (2) that more fans are likely to attend said games, (3) that fans are more likely to pay more to attend said games, and (4) that fans

117. Wolken, *supra* note 12 (According to *USA Today's* Dan Woken, "Unless the entire structure of the sport changes, no more than 10 teams in any given year have a shot to win the title. So in a weird way, a College Football Super League of 30 or so teams might actually make the sport more competitive. ... On a week-to-week basis, every game would feature two opponents with similar resources and rosters. There would be no schedule manipulation or subjective committees choosing who gets to go to a playoff. You'd get the best against the best every single week without the mythos of conference supremacy, leaving only a team's record to determine whether they qualify for a postseason tournament.").

are more likely to watch said games on television. The defendant should also round up testimonies from media analysts and from networks that carry the games, saying they (broadcasters) would bid far more for these games. As an example, Mandel writes, “One media analyst suggested that a property where Ohio State played all 12 of its games against similarly high-profile programs, rather than a schedule that this year includes FAU, Cincinnati, Miami (Ohio), Northwestern, Maryland and Rutgers, the Buckeyes’ games alone would be worth exponentially more than they are when folded into the Big Ten’s package.”¹¹⁸ Fox Sports’ Max Laughton writes, “A *USA Today* report cited one analyst who predicted a 32-team college football super league would give the top schools two and a half times as much TV revenue as they earn now - in the \$US100 million a year range.”¹¹⁹

The defendant could also benefit should the television deals that will be struck for the rights to broadcast games of expanded Power Five conferences be higher than their current packages, a definite possibility.¹²⁰ Strategically, the defendant should produce all such evidence in advance so that they are ready for litigation. Even better, they could publish their evidence before any claim is filed, in order to help ward off a lawsuit.

118. Mandel, *supra* note 75.

119. See Max Laughton, *The \$3B Betrayal that May Tear College Football Apart and Create a Super League*, FOX SPORTS (Aug. 13, 2021, 11:16 PM), <https://www.foxsports.com.au/nfl/college-football-2021-texas-and-oklahoma-to-the-sec-analysis-leaving-big-12-3-billion-betrayal-conference-realignment-news/news-story/b330e32417afc02ca28df11a3eba71bb>. The analyst cited is Jeff Nelson, President of Navigate, a consulting firm. See *Our Team: Jeff Nelson*, NAVIGATE, <https://nvg.com/team/jeff-nelson/> (last visited Apr. 1, 2022). Wolken (quoting Jeff Nelson) writes that “the basic idea of building a season around the richest, most elite, most watched clubs playing each other makes perfect sense as a college football product. What’s more attractive for television? A Southern Cal schedule of Arizona, Oregon State, Utah and Stanford or Oklahoma, Penn State, LSU and Florida State?” Wolken further stated that, “Nelson estimated that the viewership of the Michigan-Ohio State [game] every year drives between \$10 billion to \$15 million in value to the Big Ten television contract, while other games might be worth (sic) around \$1 to \$2 million. ... ‘So in theory, if Ohio State was able to play a full slate of games that drew the kind of viewership that Michigan-Ohio State has, its total TV revenue would increase substantially,’ Nelson said. ‘It’s fairly intuitive that if Ohio State got to play Clemson one week and Alabama the next and LSU the next and maybe USC the next, those are going to be much more valuable games than if they’re playing some of the lesser high-profile programs.’” Wolken, *supra* note 12.

120. For example, Laughton writes, “Having expanded from a 12 to a 14-team conference a decade ago, the SEC schools currently enjoy \$US45 million a year each, but a new TV deal with ESPN starting in 2024 worth around \$US3 billion will bump that up to something like \$US68 million a year.” Laughton continued, explaining “that [the] looming \$US3 billion TV deal with ESPN may get even bigger once the schools [Oklahoma and Texas] officially join.” See Laughton, *supra* note 119.

3. Plaintiff Must Show That There Are Reasonably Achievable Less-Restrictive Means for Achieving the Pro-Competitive Benefits of the Challenged Restraint.

Because the author does not believe a claim against any of the author's proposals should make it to the second stage of *Rule of Reason* analysis, the author obviously believes that no claim should make it to the third. However, in the unlikely event that it does, the third step should prove fatal to the claim.

The third step focuses on whether the restraint at issue is the least restrictive means of achieving the restraint's pro-competitive benefits. As for what "least restrictive" means, the Supreme Court's *Alston* ruling offers insight. There, the Court stated:

We agree with the NCAA's premise that antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes. To the contrary, courts should not second-guess "degrees of reasonable necessity" so that "the lawfulness of conduct turn[s] upon judgments of degrees of efficiency." *Rothery Storage*, 792 F.2d at 227; *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58, n. 29, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). That would be a recipe for disaster, for a "skilled lawyer" will "have little difficulty imagining possible less restrictive alternatives to most joint arrangements." 11 *Areeda & Hovenkamp* ¶1913b, p. 398 (2018). And judicial acceptance of such imaginings would risk interfering "with the legitimate objectives at issue" without "adding that much to competition." 7 *id.*, ¶1505b, at 435–436. Even worse, "[r]ules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counterproductive, undercutting the very economic ends they seek to serve." *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (CA1 1983) (BREYER, J.). After all, even "[u]nder the best of circumstances," applying the antitrust laws " 'can be difficult' "–and mistaken condemnations of legitimate business arrangements " 'are especially costly, because they chill the very' " procompetitive conduct " 'the antitrust laws are designed to protect.' " *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004). Indeed, static judicial decrees in ever-evolving markets may themselves facilitate collusion or

frustrate entry and competition. *Ibid.* To know that the Sherman Act prohibits only unreasonable restraints of trade is thus to know that attempts to “ ‘[m]ete[r]’ small deviations is not an appropriate antitrust function.” Hovenkamp, *Antitrust Balancing*, 12 N. Y. U. J. L. & Bus. 369, 377 (2016).¹²¹

Using this as a guide, in the author’s view, if the goal for college football is to be as competitive as it can be, there are simply no less restrictive means for achieving this goal than to group the best teams together and have them play only against each other. The bulk of any conference team’s schedule consists of a certain number of games that it has to play against conference opponents, so there are only a handful of games each season that a conference team can play against a non-conference opponent. If any of these games is against an inferior opponent from a lower league, not only is the level of on-field competition diminished, but there is one less-valuable data point for the CFP Committee to use when attempting to determine the best teams for the CFP.

The author asserts that, so long as a reform does not foreclose the possibility for a Division I FBS team to advance to a higher tier—either via promotion or via invitation from a higher-tier conference—the reform should be viewed as the least restrictive means of achieving the pro-competitive benefits of the reform. Indeed, none of the author’s proposed reforms involves such a foreclosure. On the contrary, under each of the author’s proposals, conferences are either free to invite and admit any team from a lower-tier conference or, in the case of a promotion/relegation format, teams have the ability to win their way to a higher tier. As such, plaintiffs should not be able to prove that any of the author’s proposals is not the least-restrictive means to achieving the reform’s pro-competitive benefits.

B. Unlawful Merger

Though the author does not believe that any of the author’s proposals run the risk of being found by a court to be an unlawful merger, a quick word about this is in order, since it is entirely possible that a party might allege that one or more of the proposals is an unlawful merger.

Section 7 of the Clayton Act prohibits a merger or acquisition when the effect of said merger or acquisition “may be substantially to lessen competition,

121. *Nat’l Collegiate Athletic Ass’n v. Alston*, 141 S.Ct. 2141, 2161 (2021).

or to tend to create a monopoly.”¹²² According to the Federal Trade Commission, “The key question the agency asks is whether the proposed merger is likely to create or enhance market power or facilitate its exercise. The greatest antitrust concern arises with proposed mergers between direct competitors (horizontal mergers).”¹²³

To be sure, college football teams are direct competitors, and surely a purpose of any aligning between or among teams is to enhance their market power. However, the problem for any party claiming that any of the author’s proposed reforms lead to an unlawful merger is that, under any of the author’s proposals, no merger occurs. None of the proposals results in multiple teams’ merging into a single team. In other words, no single entity is created. Rather, the author’s proposals are effectuated merely via a contractual relationship akin to a joint venture.¹²⁴ In the author’s view, this ends the inquiry.

But, for argument’s sake, even if any of the author’s proposals are found to be a merger (rather than simply a contractual relationship), the author maintains that the merger would not violate antitrust law, as the merger would create an entirely different product. Far from enhancing market power, the merger would create an entirely different market by creating an entirely different product than existed before the merger. If the “relevant market” (which is what Section 7 of the Clayton Act refers to as “any section of the country”¹²⁵) is found to be, as it was in *Board of Regents*, “live college football television”¹²⁶, the author contends that the telecasts of the competitions between the merged teams would be materially different than the telecasts of the pre-merger competitions, since the quality of the matchups would be markedly stronger. In essence, the new

122. See Clayton Act 15 U.S.C. § 18 (“No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”).

123. *Mergers*, FTC, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers> (last visited Apr. 1, 2022).

124. See Litan, *supra* note 104 (“Of course, a court might not get to the merger analysis if it were to decide that any conference agreement amounts only to a contractual relationship, rather than a single entity.”).

125. See *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957) (“Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition ‘within the area of effective competition.’ Substantiality can be determined only in terms of the market affected.” (quoting *Standard Oil Co. of California v. United States*, 337 U.S. 293, 299 n.5 (1949))).

126. See Litan, *supra* note 104 (“Given the NCAA’s Board of Regents definition of the “relevant market” as being competition in ‘live sports (or college football) television market,’ that probably (but not necessarily) would be the same market courts would use to assess the impact of any future conference alignment, driven by the schools’ desire for more TV revenues, if it were challenged under the Clayton Act.”).

entity created by the merger would be a new market, and one that is far more valuable to the market's teams and broadcasters.¹²⁷

CONCLUSION

With the commencement of college athletes' abilities to profit off of their names, images, and likenesses and with the NCAA's amateurism exception to federal antitrust law taking a hit, the reality of today's college football is vastly different than ever before. As a result, the college football models we have all known to this point are changing and rightfully so. The trajectory of college football is that it will become increasingly like professional football and less like the purely amateur sport of the past. College football should welcome these changes if it wants to improve both its competitiveness and its bottom line.

All of the structural changes proposed by the author in this article are ones the author believes will help the sport of college football reach more of its competitive and financial potential, as each of these proposals will increase the overall strength of on-field matchups and will increase the amount that broadcasters will pay for the broadcast rights to these matchups. And though these proposals might be contested on antitrust grounds, the author believes none of these proposals should be held to violate antitrust law, since the procompetitive effects that will result from these proposals outweigh any anticompetitive effects. To be sure, some individual schools will argue that these proposals will leave them worse off than they were before, but the sport of college football overall will undoubtedly be better off.

127. *Id.* (“Any court considering such a challenge to a merger – if the court decides that such a realignment is functionally equivalent to a merger – would first define the ‘relevant market.’ In *Board of Regents* the market was ‘live college football telecasts’ broadly. ... If that definition were applied to any assessment of a conference realignment, then government challengers might argue that the concentration of broadcast rights for effectively a new super conference or league would require the broadcasters to pay more for telecast rights than they do now, since the ‘David-Goliath’ games would be removed from the national package. But that argument implicitly concedes that the broadcasters would be bidding for a more valuable, and arguably, different product than the individual conference television packages that are now sold. Such an argument seems plausible, and thus would make any challenge based on impact to broadcasters difficult to win. ... The same outcome also seems likely if a court, in a future challenge, finds that the concentrated realignments effectively would have created two different televised college football products and thus two different relevant markets: one for those games involving schools inside the new exclusive clubs and the other for games involving schools outside those clubs. The buyers of telecasts in those two different markets thus would be getting different products, at different prices, than existed before the realignments, presenting a court with a novel fact situation. My educated guess is that courts would be unlikely to interfere with this rearrangement and hold that competition has been lessened when the markets themselves have been redefined.”).

APPENDIX A: HYPOTHETICAL CONFIGURATIONS FOR RESTRUCTURING
COLLEGE FOOTBALL

This appendix offers hypothetical conference/team configurations for each of the author's three micro proposals listed above. For each of these proposals, the author acknowledges that there are many possibilities regarding the number of teams in each conference. As such, for each proposal, the author offers two possible configurations that differ with respect to the number of teams included in each conference. Moreover, the author acknowledges that, under each proposal, there are a number of options regarding the scheduling of opponents.

For example, would teams within a given conference have games each season against a certain number of the same opponents or would opponents be entirely different from season to season? Also, for the proposals that include more one top-tier conference, would teams play conference opponents only or would they also play teams from another conference (and, if so, how many)? Though these are fascinating questions that would have to be answered should any of these proposals materialize, the author does not explore such scheduling issues here. Finally, as mentioned above, each of the following hypothetical configurations includes two crucial components: (1) The number of teams in top-tier conferences decreases from its current number of sixty-five. (2) Teams in top-tier conferences play only teams from their own conference and teams from other top-tier conferences.

A. Reduce the Number of Top-Tier Conferences and Top-Tier Teams.

1. Hypothetical Configuration (Fewer top-tier conferences with reductions in number of teams in each remaining top-tier conference)

For this option, the author contends that, based on their current (or in the case of the SEC, soon-to-be) membership roster, two Power Five conferences are safe from elimination: the Big Ten and the SEC. For the remaining three Power Five conferences (ACC, Big 12, and Pac 12), any one or more of them could justifiably be eliminated, with the strongest members of any eliminated conference(s) moving to a surviving conference. Solely for purposes of a hypothetical configuration, since the members of the ACC are so far geographically from most of the members of the Big 12 and Pac 12, the author chooses to keep the ACC as a conference and combine the Big 12 and Pac 12, resulting in a total of four top-tier conferences.

The following is a list of the teams that the author believes could reasonably be assigned to each of these four conferences, as well as a list of the teams that would not make the cut or that join another conference (based primarily on the strength of their program and their geographic proximity to their new

conference). Again, the author acknowledges that reasonable minds can and will disagree regarding any of these decisions and acknowledges that the author could make strong arguments for different elimination/reassignment choices.

The author lists these four conferences as Conference 1, Conference 2, Conference 3, and Conference 4, while parenthetically listing the conference(s) that is/are the foundation for each of the four conferences. Moreover, since the Big 12 is set to lose Oklahoma and Texas to the SEC and gain BYU, Cincinnati, Houston, and UCF, these impending changes are included in the configurations for the Big 12 and the SEC. Finally, for purposes of consistency, each of the conferences is composed of the same number of teams (ten). At the very least, a ten-team conference would allow each conference to play a nine-game conference schedule, so that each conference member would play every other conference member each season. As such, there is no need to divide each conference into two divisions, as is the current reality for all Power Five conferences other than the Big 12. The remaining three games for the current twelve-game schedule would be scheduled against teams from one of the other three top-tier conferences, ideally with one game against a team from each of the other three conferences. Obviously, the following configurations would differ if each conference were composed of more than ten teams.

Conference 1 (Big Ten)

- Members
 - Arkansas
 - Cincinnati
 - Iowa
 - Iowa State
 - Kentucky
 - Michigan
 - Michigan State
 - Ohio State
 - Penn State
 - Wisconsin
- Eliminated
 - Illinois, Indiana, Northwestern, Maryland, Minnesota, Nebraska, Purdue, Rutgers
- Reassigned
 - None

Conference 2 (SEC)

- Members
 - Alabama
 - Auburn
 - Florida
 - Georgia
 - Louisiana State University (LSU)
 - Mississippi (Ole Miss)
 - Mississippi State
 - Oklahoma
 - Texas
 - Texas A&M
- Eliminated
 - Missouri, South Carolina, Vanderbilt
- Reassigned:
 - Arkansas, Kentucky, and Tennessee

Conference 3 (ACC)

- Members
 - Central Florida (UCF)
 - Clemson
 - Florida State
 - North Carolina
 - Miami
 - Notre Dame
 - Tennessee
 - West Virginia
 - Virginia Tech
- Eliminated
 - Boston College, Duke, Georgia Tech, Louisville, North Carolina State, Pittsburgh, Syracuse, Virginia, Wake Forest
- Reassigned
 - None

Conference 4 (Big 12 and Pac 12)

- Members
 - Baylor
 - BYU

- California-Los Angeles (UCLA)
- Oklahoma State
- Oregon
- Southern California (USC)
- Stanford
- Texas Christian University (TCU)
- Utah
- Washington
- Eliminated
 - Arizona, Arizona State, California, Colorado, Houston, Kansas, Kansas State, Oregon State, Texas Tech, Washington State
- Reassigned
 - Iowa State, Central Florida (UCF), Cincinnati, West Virginia

2. Alternative/Modified Hypothetical Configuration (No reduction in number of top-tier conferences but reductions in number of teams in each conference)

For this option, each Power Five conference would remain, but each would see a reduction in its number of members. Ideally, the number of teams in each conference would be equal. The author chooses to set the number of teams in each conference at ten. As was true for the option above, this would allow each team to play a twelve-game schedule, with a game against each of its nine conference opponents and three non-conference games (against other Power Five conference teams and/or against FBS independent teams).

One obvious issue with this option is what to do with independent teams. One option would be to leave them as independents. Another option would be for each Power Five conference to have the option to replace a member with an independent. Since the author employed this option in the hypothetical for Option A above, the author chooses in this hypothetical to leave the independents as independents.

Another issue is what to do with teams that are eliminated from their respective conferences. One option would be for these teams to join lower-tier conferences, while another option would be for Power Five conferences to have the option to replace a member with any of these eliminated teams. For this hypothetical, the author simply chooses to reduce the number of teams in each conference to ten teams that are currently (or, in the case of the SEC and the Big 12, will be) members.

ACC

- Members
 - Boston College
 - Clemson
 - Florida State
 - Louisville
 - North Carolina
 - North Carolina State
 - Miami
 - North Carolina
 - Pittsburgh
 - Virginia Tech
- Eliminated
 - Duke, Georgia Tech, Maryland, Syracuse, Virginia, Wake Forest, Louisville

Big Ten

- Members
 - Indiana
 - Iowa
 - Michigan
 - Michigan State
 - Minnesota
 - Nebraska
 - Northwestern
 - Ohio State
 - Penn State
 - Wisconsin
- Eliminated
 - Illinois, Maryland, Purdue, Rutgers

Big 12

- Members
 - Baylor
 - BYU
 - Central Florida (UCF)
 - Cincinnati
 - Houston
 - Iowa State

- Kansas State
- Oklahoma State
- TCU
- West Virginia
- Eliminated
 - Kansas, Texas Tech

Pac 12

- Members
 - Arizona
 - Arizona State
 - California
 - California-Los Angeles (UCLA)
 - Colorado
 - Oregon
 - Southern California (USC)
 - Stanford
 - Utah
 - Washington
- Eliminated
 - Oregon State, Washington State

SEC

- Members
 - Alabama
 - Auburn
 - Florida
 - Georgia
 - LSU
 - Mississippi (Ole Miss)
 - Oklahoma
 - Tennessee
 - Texas
 - Texas A&M
- Eliminated
 - Arkansas, Kentucky, Mississippi State, Missouri, South Carolina, Vanderbilt

B. Two Top-Tier Conferences (Akin to the NFL's AFC and NFC), with Lower Tiers of Other Conferences.

The author proposes the following hypothetical configurations (listed alphabetically) for two top-tier conferences, each with groupings of thirteen, sixteen, and twenty teams.

East Conference

- Alabama
- Auburn
- Cincinnati
- Clemson
- Florida
- Georgia
- Michigan
- Michigan State
- Mississippi (Ole Miss)
- Notre Dame
- Ohio State
- Penn State
- Wisconsin

-
- Tennessee
 - West Virginia
 - Virginia Tech

-
- Central Florida (UCF)
 - Florida State
 - Miami
 - North Carolina

West Conference

- BYU
- California-Los Angeles (UCLA)
- LSU
- Iowa
- Iowa State
- Oklahoma
- Oklahoma State

- Oregon
- Texas
- Texas A&M
- Southern California (USC)
- Stanford
- Utah

-
- Arizona State
 - Kansas State
 - Minnesota

-
- California
 - Colorado
 - Nebraska
 - Washington

C. One Top-Tier Conference, with Lower Tiers of Other Conferences (with Automatic Promotion and Relegation).

The author proposes the following as the top five tiers, which include current FBS Power Five and FBS Group of Five (teams listed alphabetically within each tier):

Tier 1

- Alabama
- Clemson
- Florida
- Georgia
- LSU
- Michigan
- Notre Dame
- Oklahoma
- Ohio State
- Oregon
- Penn State
- Southern California (USC)
- Texas A&M

Tier 2

- Auburn
- BYU
- Cincinnati
- Iowa
- Iowa State
- Michigan State
- Mississippi (Ole Miss)
- North Carolina
- Oklahoma State
- Tennessee
- Texas
- UCLA
- West Virginia
- Wisconsin

Tier 3

- Arizona State
- Baylor
- Central Florida (UCF)
- Florida State
- Kansas State
- Kentucky
- Miami
- Minnesota
- Mississippi State
- North Carolina
- Stanford
- Utah
- Virginia Tech
- Washington

Tier 4

- Arkansas
- Boise State
- Boston College
- Indiana
- Louisville

- Minnesota
- Missouri
- Nebraska
- North Carolina State
- Northwestern
- Pittsburgh
- Texas Christian (TCU)
- Wake Forest

Tier 5

- California
- Colorado
- Duke
- Houston
- Fresno State
- Maryland
- Memphis
- Oregon State
- Purdue
- San Diego State
- South Carolina
- Southern Methodist University (SMU)
- Washington State

APPENDIX B: NCAA DIVISION I FBS FOOTBALL PROGRAMS (2021 SEASON)

A. FBS Power Five Conferences & Member Institutions

- Atlantic Coast Conference¹²⁸
 - Boston College
 - Clemson University
 - Duke University
 - Georgia Institute of Technology
 - Florida State University
 - North Carolina State University
 - Syracuse University
 - University of Louisville
 - University of Miami
 - University of North Carolina at Chapel Hill
 - University of Pittsburgh
 - University of Virginia
 - Virginia Polytechnic Institute and State University
 - Wake Forest University

- Big Ten Conference¹²⁹
 - University of Illinois
 - Indiana University
 - University of Iowa
 - University of Maryland
 - University of Michigan
 - Michigan State University
 - University of Minnesota
 - University of Nebraska
 - Northwestern University
 - Ohio State University
 - Pennsylvania State University
 - Purdue University

128. *2021 Football Standings*, ATL. COAST CONF., <https://theacc.com/standings.aspx?standings=58> (last visited Apr. 1, 2022).

129. *2021 Football Standings*, BIG TEN CONF., <https://bigten.org/standings.aspx?path=football> (last visited Apr. 1, 2022).

- Rutgers University
- University of Wisconsin

- Big 12 Conference¹³⁰
 - Baylor University
 - Iowa State University
 - University of Kansas
 - Kansas State University
 - University of Oklahoma
 - Oklahoma State University
 - Texas Christian University
 - University of Texas
 - Texas Tech University
 - West Virginia University

- Pac 12 Conference¹³¹
 - University of Arizona
 - Arizona State University
 - University of California
 - University of California, Los Angeles
 - University of Colorado
 - University of Oregon
 - Oregon State University
 - University of Southern California
 - Stanford University
 - University of Utah
 - University of Washington
 - Washington State University

- Southeastern Conference¹³²
 - University of Alabama
 - University of Arkansas

130. *2021 Football Standings*, BIG 12 CONF., <https://big12sports.com/standings.aspx?standings=171> (last visited Apr. 1, 2022).

131. *2021-22 Football Standings*, PAC 12 CONF., <https://pac-12.com/football/standings> (last visited Apr. 1, 2022).

132. *2021 Standings*, SOUTHEASTERN CONF. FOOTBALL, <https://www.secsports.com/standings/football> (last visited Apr. 1, 2022).

- Auburn University
- University of Florida
- University of Georgia
- University of Kentucky
- Louisiana State University
- Mississippi State University
- University of Mississippi
- University of Missouri
- University of South Carolina
- University of Tennessee
- Texas A&M University
- Vanderbilt University

B. FBS Group of Five Conferences & Member Institutions

- American Athletic Conference¹³³
 - University of Central Florida
 - University of Cincinnati
 - East Carolina University
 - University of Houston
 - University of Memphis
 - University of South Florida
 - Southern Methodist University
 - Temple University
 - Tulane University
 - University of Tulsa
 - Wichita State University
- Conference USA¹³⁴
 - University of Alabama at Birmingham
 - Florida Atlantic University
 - Florida International University

133. 2021 *Football Standings*, AMERICAN ATHLETIC CONF., <https://theamerican.org/standings.aspx?path=football> (last visited Apr. 1, 2022).

134. 2021 *Football Standings*, CONF. USA, <https://conferenceusa.com/standings.aspx?standings=108> (last visited Apr. 1, 2022).

- Louisiana Tech University
 - Marshall University
 - Middle Tennessee State University
 - University of North Carolina at Charlotte
 - University of North Texas
 - Old Dominion University
 - Rice University
 - University of Southern Mississippi
 - University of Texas at El Paso
 - University of Texas at San Antonio
 - Western Kentucky University
- Mid-American Conference¹³⁵
 - University of Akron
 - Bowling Green State University
 - University at Buffalo
 - Kent State University
 - Miami University
 - Ohio University
 - Ball State University
 - Central Michigan University
 - Eastern Michigan University
 - Northern Illinois University
 - University of Toledo
 - Western Michigan University
- Mountain West Conference¹³⁶
 - United States Air Force Academy
 - Boise State University
 - California State University, Fresno
 - Colorado State University
 - University of Nevada, Reno
 - University of Nevada, Las Vegas
 - University of New Mexico

135. *2021 Football Standings*, MID-AMERICAN CONF., <https://getsomemaction.com/standings.aspx?standings=164> (last visited Apr. 1, 2022).

136. *2021 Football Standings*, MOUNTAIN WEST CONF., [https://themw.com/standings.aspx? path=fball](https://themw.com/standings.aspx?path=fball) (last visited Apr. 1, 2022).

- San Diego State University
- San Jose State University
- Utah State University
- University of Wyoming

- Sun Belt Conference¹³⁷
 - Appalachian State University
 - Arkansas State University
 - Coastal Carolina University
 - Georgia Southern University
 - Georgia State University
 - University of Arkansas at Little Rock
 - University of Louisiana at Lafayette
 - University of Louisiana at Monroe
 - University of South Alabama
 - Texas State University
 - University of Texas at Arlington
 - Troy University

*C. FBS Independent Institutions*¹³⁸

- Army
- Brigham Young University
- Liberty University
- New Mexico State University
- University of Connecticut
- University of Massachusetts (Amherst)
- University of Notre Dame

137. *2021 Football Standings*, SUN BELT CONF., <https://sunbeltsports.org/standings.aspx?path=football> (last visited Apr. 1, 2022).

138. *NCAAF Teams, FBS Independents*, ESPN, https://www.espn.com/college-football/teams/_/group/18 (last visited Apr. 1, 2022).