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ARTICLES

RETHINKING COLLEGE FOOTBALL GRANT OF RIGHTS AGREEMENTS

DREW THORNLEY* & JOHN T. HOLDEN**

INTRODUCTION

In late July 2021, The University of Oklahoma and The University of Texas at Austin announced via a joint statement that their football programs would leave the Big XII Conference, of which each has been a member since the conference's first season in 1996.¹ Though neither school stated which conference they planned to join, it was widely agreed that the schools' destination was the Southeastern Conference. That the two most storied and valuable programs in a major football conference were planning to leave their conference to join another was huge news in the world of college football. After the announcement, USA Today's Paul Myerberg wrote that "the decision made by Oklahoma and Texas to leave the Big XII upends the Football Bowl Subdivision and carries the potential to dramatically alter the landscape of college sports."²

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¹ See *Joint Statement from The University of Texas at Austin and The University of Oklahoma*, UT NEWS (July 26, 2021), <https://news.utexas.edu/2021/07/26/joint-statement-from-the-university-of-texas-at-austin-and-the-university-of-oklahoma/>; Bryan Clinton, *Big 12 Football History: 1996 Season*, HEARTLAND COLL. SPORTS (Apr. 19, 2022), <https://www.heartlandcollegesports.com/2022/04/19/big-12-football-history-1996-season/>.

² Paul Myerberg, *Texas, Oklahoma Leaving Big 12 Conference as College Football Shake-up Begins*, USA TODAY (July 27, 2021), <https://www.usatoday.com/story/sports/ncaaf/2021/07/26/big-12-texas-oklahoma-leaving-conference-football/8070337002/>.

Yet despite their signaled intention to leave the Big XII, neither school would leave the conference immediately.³ Indeed, when the next college-football season started just over a month later, each school would still be members of the Big XII.⁴ So, if each school wanted to leave their conference and their projected new conference was willing to accept them, which they were, why the delay? The answer: contract law.

Specifically, each school had previously contractually granted all of their respective media rights to the Big XII Conference until June 30, 2025.⁵ Four full football seasons would occur before this date.⁶ If the schools unilaterally left the Big XII before then, the revenues they would earn from football broadcasts would not go with them. Instead, they would stay with the Big XII.⁷ This would be ideal for the Big XII but not for Oklahoma, Texas, or their new conference. When it was announced in early February 2023 that Oklahoma and Texas had struck an agreement with the Big XII to depart the Big XII a year early (after the 2023-24 season), Greg Sankey, the commissioner of the Southeastern Conference, explained during a podcast interview that the timing of welcoming Oklahoma and Texas to the Southeastern Conference was entirely about the schools' current media-rights deal with the Big XII. Sankey said, "We knew we had to honor those existing agreements. We're not going to interfere with those. That...really is the first key. It's all about those contracts between the Big XII and its members."⁸

Nearly all major collegiate athletics conferences have a "Grant of Rights" (GOR) agreement with their respective football-member institutions by which the latter grants the former exclusive media rights to televised game broadcasts. As used in this Article, a GOR is an agreement whereby an athletic conference bargains with its members for the conference's exclusive media rights to their game broadcasts. Stated more succinctly, a GOR is "an agreement in which

³ Dave Wilson, *The History of College Football Conference lame Ducks, and what it Means for Texas and Oklahoma*, ESPN (Sep. 29, 2021, 7:15 AM), https://www.espn.com/college-football/story/_/id/32291339/the-history-college-football-conference-lame-ducks-means-texas-oklahoma.

⁴ *Id.*

⁵ See Dennis Dodd, *Inside the Big 12's 'Ironclad' Grant of Rights Contract that Helped Keep the ACC Together Amid Turbulence*, CBS SPORTS (May 25, 2023, 11:07 AM), <https://www.cbssports.com/college-football/news/inside-the-big-12s-ironclad-grant-of-rights-contract-that-helped-keep-the-acc-together-amid-turbulence/>; *Big 12 Announces Agreement for Withdrawal of Texas and Oklahoma*, UT NEWS (Feb. 9, 2023), <https://news.utexas.edu/2023/02/09/big-12-announces-agreement-for-withdrawal-of-oklahoma-and-texas/>.

⁶ *Id.*

⁷ *Id.*

⁸ *McElroy and Cubelic in the Morning*, OMNY STUDIO (Feb. 10, 2023, 8:51 AM), <https://omny.fm/shows/mcelroy-and-cubelic-in-the-morning/greg-sankey-talks-texas-oklahoma-joining-the-sec-i>.

schools agree to transfer their media rights to their conference for a set period of time.”⁹

Central features of a GOR are (1) exclusivity: a conference is granted full and exclusive broadcast rights from its members; and (2) fixed, long-term duration.¹⁰ The GOR generally states that the agreement will be effective for a set period of time that is customarily for a number of years.¹¹ In addition, though not a feature that speaks to the essence of what a GOR is, GOR contracts often lack a choice-of-law provision, meaning no agreement is made with respect to the state law that governs disputes over its provisions. Indeed, none of the GOR agreements in NCAA Division I Football Bowl Subdivision conferences contains a choice-of-law provision.¹² These GOR agreements last for a period of years; and should a conference member leave its conference prior to the expiration of its conference’s GOR, that member’s media rights remain with the conference until the end of the GOR period.¹³ As a result, leaving a conference before the end of a GOR period significantly reduces the value of a potentially departing conference member to any other conference that wishes to add that institution to its conference.

Given the conference-realignment moves that are underway in NCAA Division I FBS Power Five conferences,¹⁴ GOR agreements are, perhaps, more important than ever before. The reason: They potentially stand in the way of a school that wishes to join another conference immediately, or at least before the expiration of the GOR for that school’s conference. Thus, these departing schools, along with any school that plans to leave its GOR-restricted conference,

⁹ Andy Staples, *How Would a School Challenge a Grant of Rights? We Asked a Lawyer (Who Happens to Have ACC, Big 12, Pac-12 Copies)*, ATHLETIC (July 1, 2022), <https://theathletic.com/3396108/2022/07/01/acc-grant-of-rights-staples/>.

¹⁰ See Mark T. Wilhelm, *Irrevocable but Unenforceable? Collegiate Athletic Conferences’ Grant of Rights*, 8 HARV. J. SPORTS & ENT. L. 63, 93-97 (2017) (describing the contents of various GOR agreements).

¹¹ *Id.*

¹² Staples, *supra* note 9, writes,

One key question: Which state’s law governs the deal? If I look at my employment agreement with *The Athletic*, it tells me that it is governed by the laws of the state of California. There is no such clause in any of these deals. This, to Wilhelm, is a feature rather than a bug. It adds another layer of complexity for any entity wishing to challenge the deal. ‘So before we even get to the arguing about ‘Is this a contract’ or ‘Is this enforceable,’ we have to first figure out what court we’re supposed to be in,’ Wilhelm said. ‘And lawyers will spend months arguing about what court you’re going to be in and — even when you’re in the court — what law applies.’ *Id.*

¹³ *Id.*

¹⁴ The Power Five conferences are the Atlantic Coast Conference, the Big Ten Conference, the Big XII Conference, the Pac-12 Conference, and the Southeastern Conference. John T. Holden et al., *A Short Treatise on College-Athlete Name, Image, and Likeness Rights: How America Regulates College Sports’ New Economic Frontier*, 57 GA. L. REV. 1, 31 (2022).

will have to: (1) wait to leave until their respective GOR agreements expire; (2) leave before their GOR agreements expire and pay a penalty to their current conference; or (3) find a legal basis for getting out of their GOR agreements without paying the full penalty. In terms of lessening the value of a program that joins a conference while still under a GOR, GOR is not just an issue for a program that wants to switch conferences. The major case in point is that of the FBS Independent (not a member of a football conference) University of Notre Dame (Notre Dame), explored below.

This Article examines GOR agreements and their impacts on future conference realignment. Part I explores the current set-up of college football with respect to media rights. Part II explains GOR contracts, generally, and highlights the GOR contracts currently in use for Power Five conferences, specifically. Part III discusses the options for a program that wishes to leave a conference that has an active GOR agreement. Part IV offers recommendations for how best to structure GOR agreements, moving forward.

I. COLLEGE FOOTBALL AS A BUSINESS

The birth of commercialized collegiate sports in the United States began with the rise of football on college campuses.¹⁵ It was football that led President Theodore Roosevelt to summon the leaders of various New England colleges and universities to the White House and instruct them that football needed stricter rules and protections for the athletes.¹⁶ By the first decade of the twentieth century, college athletics became prominent as football grew in popularity.¹⁷ Following the White House Summit of university leaders, a national governing body was created, which would eventually become the National Collegiate Athletic Association (NCAA).¹⁸ The organization's early mandate, however, focused primarily on the health and safety of athletes and to

¹⁵ The first college football game was played on November 6, 1869, between what are now Rutgers University and Princeton University. Rutgers was victorious, winning 6-4. See Sam Richmond, *1st College Football Game Ever was New Jersey vs. Rutgers in 1869*, NCAA (Nov. 6, 2023), <https://www.ncaa.com/news/football/article/2017-11-06/college-football-history-heres-when-1st-game-was-played>.

¹⁶ Thomas A. Baker III et al., *College Football in the Time of Covid-19*, WIS. L. REV. FORWARD 101, 108 n.34 (2020).

¹⁷ See generally John T. Holden et al., *Reimagining the Governance of College Sports After Alston*, 74 FLA L. REV. 427, 430-32 (2022) (describing the emergence and growth of college football and college sports more broadly).

¹⁸ *Id.*

prevent exploitation.¹⁹ By the 1920s, college athletics, with football a major component, became the target of groups like the Carnegie Foundation that criticized the rising commercialization across the industry.²⁰ In a 1929 study titled *American College Athletics*, Howard J. Savage of the Carnegie Foundation wrote:

the football contest that so astonishes the foreign visitor is not a student's game, as it once was. It is a highly organized commercial enterprise. The athletes who take part in it have come up through years of training; they are commanded by professional coaches; little if any personal initiative of ordinary play is left to the player. The great matches are highly profitable enterprises. Sometimes the profits go to finance college sports, sometimes to pay the cost of the sports amphitheater, in some cases the college authorities take a slice of the profits for college buildings.²¹

The report cited “commercialism” as the top defect in college athletics and criticized administrators for looking the other way to the exploitation of athletes in order to justify new construction on campuses.²² The 1929 report served as an early criticism to the college sports industrial complex that remains a target for criticism today.²³ Shortly after the release of the Carnegie Foundation's report, the NCAA attempted to rein in the commercialism in college sports through the Graham Plan, named for the then-President of the University of North Carolina.²⁴ The Graham Plan sought to reduce the emphasis on college sports, and one of its more prominent recommendations banned compensation tied to athletic ability.²⁵ The Graham plan was ill-timed, however, as simultaneously other collegiate athletic conferences, including the Southeastern

¹⁹ Matthew Lynch, *What is the Purpose of the NCAA? Everything You Need to Know*, EDADVOCATE (Apr. 15, 2021), <https://www.theedadvocate.org/what-is-the-purpose-of-the-ncaa-everything-you-need-to-know/>; JOSEPH N. CROWLEY, *THE NCAA'S FIRST CENTURY* 26 (2006).

²⁰ Holden et al., *supra* note 17, at 432.

²¹ Howard J. Savage et al., *American College Athletics*, CARNEGIE FOUND. ¶ VII (1929), <http://www.thecoia.org/wp-content/uploads/2014/09/Carnegie-Commission-1929-excerpts-1.pdf>.

²² *Id.*

²³ Jeffrey Mann, *Killing the Casual Fan: The Over-Commercialization of American Sports*, BLEACHER REP. (Aug. 24, 2008), <https://bleacherreport.com/articles/50550-killing-the-casual-fan-the-over-commercialization-of-american-sports>.

²⁴ Holden et al., *supra* note 17, at 432.

²⁵ *Id.*

Conference (SEC), voted to provide athletes with full packages of aid covering the entire cost of attendance.²⁶

The Graham plan, which threatened to bifurcate college athletics into a professional side and an amateur side, was replaced following World War II with the *Sanity Code*.²⁷ The NCAA introduced the *Sanity Code* in 1948 and stipulated that athletes could receive aid, though aid could only be used for tuition and fees.²⁸ The *Code* did not permit athletes to be compensated for room and board.²⁹ When the NCAA hired young journalist Walter Byers—its first full-time employee—in 1951, he replaced the *Code*.³⁰ Byers led the NCAA for thirty-six years, creating an enforcement system despite an apparent lack of explicit authority to do so.³¹ Byers was also a visionary when it came to the commercialization of college sports. While the NCAA cracked down on athletes earning compensation,³² the organization also monetized the broadcast rights to college sports under the same umbrella.³³ This section explores the history of sports broadcasting in four parts beginning with a brief history of the commercialization of sports through broadcasting.

A. A Brief History of Sports Broadcasting Commercialization

Ownership of sports data has long been the subject of debate and contention.³⁴ Sports information distribution can be traced to early telegraph

²⁶ *Id.*

²⁷ *Id.* at 432-33.

²⁸ Lee VanHorn, *When the Sanity Code Becomes the Insanity Code: Following O'Bannon's Lead is the Key to Solving Group Licensing for NCAA Student-Athletes*, 74 ARK. L. REV. 117, 124 (2021).

²⁹ *Id.* at 124-25.

³⁰ Marc Edelman et al., *The Collegiate Employee-Athlete*, 2023 U. ILL. L. REV. 7 (forthcoming 2024).

³¹ *Id.* at 8; see also William C. Rhoden, *The Vision of Walter Byers, a Flawed Leader, Still Shapes the NCAA*, N.Y. TIMES (May 30, 2015), <https://www.nytimes.com/2015/05/31/sports/the-vision-of-walter-byers-a-flawed-leader-still-shapes-the-ncaa.html>.

³² After his time leading the NCAA, Byers would express regret about what the NCAA had become with respect to its rules governing compensation for athletes. See Rick Eckstein, *The Man Responsible for Making March Madness the Moneymaking Bonanza it is Today*, CONVERSATION (Mar. 14, 2018, 6:49 AM), <https://theconversation.com/the-man-responsible-for-making-march-madness-the-moneymaking-bonanza-it-is-today-91732>.

³³ Greg Echlin, *Walter Byers Legacy Virtually Ignored at NCAA Office*, NPR (Aug. 28, 2012, 8:45 AM), <https://www.kcur.org/sports/2012-08-28/walter-byers-legacy-virtually-ignored-at-ncaa-office>.

³⁴ See Marc Edelman & John T. Holden, *Monopolizing Sports Data*, 63 WM. & MARY L. REV. 69, 77–83 (2021) (describing the evolution of the distribution of sports data).

companies that transmitted game updates around the country.³⁵ Within years of professional baseball establishing itself as an American pastime, leagues sought to commodify the broadcast rights, long before television was invented.³⁶ Indeed, the first sale of telegraph broadcast rights for a baseball league occurred in 1897, when each team in the league received \$300³⁷ for the broadcast of information during the season.³⁸ The Western Union company paid each team \$17,000 for those same rights in 1913.³⁹ The American public even showed significant interest in recordings, with Hollywood executives paying for the rights to show highlights of the 1910 World Series.⁴⁰ By the next year, baseball executives had seen the value of those highlights increase seven-fold.⁴¹ Americans have long had an interest in consuming sports away from the fields of play through whatever mediums are available at the time.⁴² While baseball rights were gaining commercial popularity, mediums of mass communication also distributed college sports, though before radio broadcasts and even ticker transmissions, there were re-enactments of some college football games.⁴³ Receiving game details by telegraph, approximately 1,000 people gathered in 1911 to listen to a recreation of the homecoming game played between the University of Kansas and the University of Missouri.⁴⁴ College football transitioned to radio broadcasts in 1921, though there appears to be some dispute as to which game was the first with a play-by-play broadcast over the radio. Sources claim the first was Texas versus Texas A&M, which played to a 0–0

³⁵ See Michael J. Hauptert, *The Economic History of Major League Baseball*, ECON. HIST. (Dec. 3, 2007), <https://eh.net/encyclopedia/the-economic-history-of-major-league-baseball/> (noting that newspapers began covering baseball games in the 1860s and saloons would subscribe to telegraph transcriptions of games during the 1890s).

³⁶ See *id.*

³⁷ Note \$300 in 1897 has the same purchasing power as roughly \$11,100 in 2024. See *CPI Inflation Calculator*, OFF. DATA, <https://www.officialdata.org/us/inflation/1897?amount=300> (last visited Feb. 27, 2024).

³⁸ Hauptert, *supra* note 35.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See *id.*

⁴² See generally Nicholas Mah, *The Evolution of Sports Broadcasting in North America from Television to Streaming*, YOAIR BLOG (Jan. 20, 2023), <https://www.yoair.com/blog/the-evolution-of-sports-broadcasting-in-north-america-from-television-to-streaming/> (detailing a brief history of sports broadcasting in North America).

⁴³ *The History of Sports Broadcasting*, BE ON AIR, <https://beonair.com/history-of-sports-broadcasting> (Sept. 2023).

⁴⁴ *Id.*

draw,⁴⁵ while others claim a game broadcasted a few weeks earlier between the University of Pittsburgh and West Virginia University marks the first ever live radio broadcast.⁴⁶

The early years of radio often saw multiple networks broadcast the same events.⁴⁷ By 1929, radio broadcasts had become a focal point of Major League Baseball team owners. Owners proposed to ban radio broadcasts of games after they became upset that owners were not compensated by broadcasting companies.⁴⁸ By the mid-1930s, radio broadcasting of sports had become a staple of the era, and not only were stations broadcasting games with play-by-play, but new sports news services like United Press and International News Service began selling sports news to broadcasters.⁴⁹ By the 1930s, sports leagues and team owners put increasing pressure on broadcasters to pay for broadcasting rights. Some radio stations, however, attempted to circumvent demands for payment for the right to broadcast by viewing sports broadcasting as newsworthy, to which sports leagues asserted legal ownership.⁵⁰

Beginning in 1921, with the first radio broadcast of the World Series, baseball had contracted with broadcasters for the right to air the championship series.⁵¹ In 1934, Major League Baseball's interests sought to assert ownership in broadcasting rights by suing a Jamestown, New York resident named A. E. Newton, who summarized and repurposed authorized broadcasts for his own listeners.⁵² The league challenged the renewal of Newton's broadcasting license, with the Federal Communications Commission handing harsh criticism for Newton's actions, finding it "dishonest."⁵³ The agency ultimately found the rebroadcast to be an isolated incident and granted his license renewal.⁵⁴ In 1938, the Pittsburgh Athletic Company, the legal name of the Pittsburgh Pirates

⁴⁵ Brad Johnson, *Thanksgiving Throwback: 1921 A&M v. UT game Launched College Football Radio Broadcasting*, TEXAN (Nov. 26, 2020), <https://thetexan.news/thanksgiving-throwback-1921-am-v-ut-game-launched-college-football-radio-broadcasting/>.

⁴⁶ *October 8, 1921: WVU vs. Pitt Marks First Live Football Radio Broadcast*, W. VA. PUB. BROAD. (Oct. 8, 2019, 11:00 AM), <https://wvpublic.org/october-8-1921-wvu-vs-pitt-marks-first-live-football-radio-broadcast/#stream/0>. It is likely that the dispute over the first broadcast centers on the interpretation of the phrase play-by-play. The Pitt versus West Virginia broadcast came only two months after the first airing of a live World Series baseball game.

⁴⁷ JOHN R. CATSIS, *SPORTS BROADCASTING* 10 (Rachel Schick ed. 1996).

⁴⁸ *Id.* at 10–11.

⁴⁹ *Id.* at 15.

⁵⁰ *Id.* at 16.

⁵¹ Robert Alan Garrett & Philip R. Hochberg, *Sports Broadcasting and the Law*, 59 IND. L.J. 155, 157 (1984).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* See also In re A.E. Newton, 2 F.C.C. 281, 284, 1936 WL 69755 (1936).

baseball team, brought suit seeking a preliminary injunction against KQV Broadcasting Company, blocking the defendant from providing play-by-play descriptions of Pirates' home games.⁵⁵ The Western District of Pennsylvania Court held that:

The right, title and interest in and to the baseball games played within the parks of members of the National League, including Pittsburgh, including the property right in, and the sole right of, disseminating or publishing or selling, or licensing the right to disseminate, news, reports, descriptions, or accounts of games played in such parks, during the playing thereof, is vested exclusively in such members.⁵⁶

The decision significantly boosted sports teams looking to monetize all associated aspects of games, and the District Court further held that the broadcasts constituted unfair competition with the rights of the team owners.⁵⁷ The 1930s also saw the origination of a myth that perpetuated for decades; that allowing broadcasts of sporting events would somehow result in decreased attendance.⁵⁸ By the end of the decade, every Major League Baseball team had a radio broadcasting contract.⁵⁹ While live radio broadcasting of sporting events grew in popularity through the 1940s and beyond, recreations for broadcasting purposes continued throughout the 1970s.⁶⁰ The battle over who controlled the content originating from sporting events continued through the 1950s.⁶¹

In 1939, the first television signal was transmitted, and within weeks the first sporting event was televised, a baseball game between Princeton University and Columbia University.⁶² At the time, only about 400 television sets existed within the broadcast range of the game.⁶³ While baseball and games encompassing large fields of play were a challenge to cover in the early years

⁵⁵ Pittsburgh Athletic Co. v. KQV Broad. Co., 24 F. Supp. 490, 491 (W.D. Pa. 1938).

⁵⁶ *Id.* at 493-94.

⁵⁷ *Id.* at 494.

⁵⁸ CATSIS, *supra* note 47, at 16. The NCAA would go on to make a similar argument in the 1984 *Board of Regents v. NCAA* case arguing in favor of capping the number of college football broadcasts was necessary to keep live attendance steady, though the organization never produced any evidence that increased television broadcasts would result in a decrease of attendance. See Thomas A. Baker III & Natasha T. Brison, *From Board of Regents to O'Bannon: How Antitrust and Media Rights Have Influenced College Football*, 26 MARQ. SPORTS L. REV. 331, 335 (2016).

⁵⁹ CATSIS, *supra* note 47, at 17.

⁶⁰ *Id.* at 20-22.

⁶¹ Garrett & Hochberg, *supra* note 51, at 159.

⁶² CATSIS, *supra* note 47, at 27.

⁶³ *Id.*

of television broadcasting, sports like boxing proved much more suited for early television broadcasting technology.⁶⁴ In 1946, approximately 100,000 viewers tuned in to watch a heavyweight fight featuring boxer Joe Louis versus Billy Conn on NBC.⁶⁵ By the late 1940s, a reported thirty percent of content being broadcast on television was sports.⁶⁶ It was not until 1951 that technology became sufficiently sophisticated for broadcasts to go from coast-to-coast.⁶⁷ Even though television technology was improving and the number of households with television sets was increasing, in the early-1950s, radio broadcasting rights were still three times higher than television rights.⁶⁸

College football was first televised on September 30, 1939, a game between Fordham and Waynesburg Universities.⁶⁹ The NCAA estimates that the game had between 500 and 5,000 viewers, though technology for tracking viewership was far less advanced than in contemporary times.⁷⁰ During the World War II era, colleges mass-marketed football. Broadcasters distributed the annual Army–Navy game through pay-per-view locations where spectators would pay up to two dollars to view the game,⁷¹ in addition to the nearly 100,000 fans that would take in the game in person.⁷² Following the War, the Pacific Coast Conference and the Big Ten Conference collaborated on one of the seminal events in the commercialization of college football; the announcement that the two conferences would participate in a game on New Year’s Day at the Rose Bowl in Pasadena, California.⁷³ In 1951, the NCAA named Walter Byers, who served as the organization’s first executive director, a position he held until 1988.⁷⁴ While Byers would leave a complicated legacy, his vision for the

⁶⁴ *Id.* at 29.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 30-31 (1996).

⁶⁸ *Id.* at 31.

⁶⁹ Eric Vander Voort, *The First Televised Football Game Was Played Sept. 30, 1939*, NCAA (Oct. 1, 2020), <https://www.ncaa.com/news/football/article/2019-09-27/first-televised-football-game-was-played-sept-30-1939>.

⁷⁰ *Id.*

⁷¹ KURT EDWARD KEMPER, *COLLEGE FOOTBALL AND AMERICAN CULTURE IN THE COLD WAR ERA* 7 (2009). Note \$2 in 1941 had the equivalent buying power of \$41.96 in 2024. See *CPI Inflation Calculator*, *supra* note 29.

⁷² KEMPER, *supra* note 71.

⁷³ *Id.* at 17.

⁷⁴ Karen Given, *Walter Byers: The Man Who Built the NCAA, then Tried to Tear It Down*, WBUR (Oct. 13, 2017), <https://www.wbur.org/onlyagame/2017/10/13/walter-byers-ncaa>.

commercialization of the organization set forth the groundwork for the multi-billion-dollar entity that is college athletics today.⁷⁵

Walter Byers took over the NCAA when the organization faced tremendous scrutiny stemming from a widespread game-fixing scandal involving some of the organization's most powerful institutions, including the University of Kentucky.⁷⁶ Under Byers' leadership, college sports became increasingly popular with the general public and schools saw sports as a means to attract students.⁷⁷ Included in Byers' early accomplishments at the NCAA was his navigation around a ban on broadcasting college sports in order to secure an exception for specially licensed games.⁷⁸ Initially, both the University of Pennsylvania and the University of Notre Dame objected to the collective specialty licensing as each had its own independent agreement with broadcasters; Byers, however, worked with the schools to convince them that there was a better path forward as a collective.⁷⁹ The first agreement that Byers negotiated was in 1952 for a reported \$1.14 million from NBC.⁸⁰ During Byers' initial push for commercial revenue, the NCAA leader wanted the organization to keep sixty percent of the television revenue, eventually agreeing to take only twelve percent of the initial contract, an amount that would drop to five percent on later contracts.⁸¹

During the late 1950s and early 1960s, the commercialization of sports was becoming big business. Organizations had substantial interest in collectivizing the broadcast rights of a league to sell them as a package.⁸² While the Sports Broadcasting Act of 1961 provided antitrust immunity for professional leagues to package television broadcast rights, it did not apply to college sports.⁸³ During hearings on the then-proposed Sports Broadcasting Act, representatives from the NCAA and college athletic conference commissioners stated:

⁷⁵ William C. Rhoden, *The Vision of Walter Byers, A Flawed Leader, Still Shapes the N.C.A.A.*, N.Y. TIMES (May 30, 2015), <https://www.nytimes.com/2015/05/31/sports/the-vision-of-walter-byers-a-flawed-leader-still-shapes-the-ncaa.html>.

⁷⁶ Edelman et al., *supra* note 30, at 7-8.

⁷⁷ *Id.* at 5-6.

⁷⁸ *Id.* at 8.

⁷⁹ *Id.*

⁸⁰ Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.

⁸¹ *Id.*

⁸² See Matthew J. Mitten & Aaron Hernandez, *The Sports Broadcasting Act of 1961: A Comparative Analysis of Its Effects on Competitive Balance in the NFL and NCAA Division I FBS Football*, 39 OHIO N.U. L. REV. 745, 745 (2013) (noting that the Sports Broadcasting Act of 1961 enabled the collective sale of leagues' broadcast rights).

⁸³ See 15 U.S.C. §§ 1291–1295 (1961).

Because H.R. 8757 relates to practices of professional sports organizations with which the NCAA has no direct concern, we are not here in opposition to the basic concept of the proposed legislation. We are concerned, however, with potential effects upon the intercollegiate sports program. We appear to ask that the broad license for the televising of professional football contests contained in this bill be limited so as to preclude the televising of such events in direct opposition to the conduct of an intercollegiate football contest on any day other than Sunday, which by custom has become identified as a day for professional football events just as Saturdays traditionally have been college football days.⁸⁴

The lobbying by the NCAA proved successful, and while the professional leagues received an antitrust carve-out, college football was given Saturday as a day of its own.⁸⁵ The establishment of Sundays for professional football and Saturdays for college football would be significant for college sports as they could limit any potential commercial competition.⁸⁶ Indeed, Byers was able to parlay the Saturday monopoly into a \$3.1 million broadcast deal, a figure that surpassed the NFL's broadcasting deal at the time.⁸⁷

During the 1960s, the NCAA solidified itself as a television behemoth, with the Rose Bowl playing no small part as NBC paid \$200,000 for both the radio and television rights, making the game the New Year's Day tradition it is today.⁸⁸ By 1960, the NCAA saw that television broadcasts were not hurting in-person attendance: there seemed to be the opposite effect as more people attended games in-person.⁸⁹ Television networks also took notice and thus competitively bid for the rights to NCAA games.⁹⁰ By the early 1970s, sports and sports-related programming, like ABC's Wide World of Sports, had

⁸⁴ *Telecasting of Professional Sports Contests. Hearing Before the Antitrust Subcommittee (Subcommittee No. 5) of the Committee on the Judiciary, H.R. 8757, 87th Cong. (1961)* (statement of Comm'r William It. Reed, Big Ten Conference and Legislative Committee, chairman of the National Collegiate Athletic Association; accompanied by Asa S. Bushnell, commissioner of the Eastern College Athletic Conference and director of the NCAA television program and Kenneth E. Midgley, counsel for the executive offices of the NCAA).

⁸⁵ 15 U.S.C. § 1293 (1961).

⁸⁶ Branch, *supra* note 80.

⁸⁷ *Id.*

⁸⁸ WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 84-85 (1995).

⁸⁹ *Id.* at 84.

⁹⁰ *Id.* at 86.

become some of the major broadcast networks' most watched content.⁹¹ Football was a popular television program across the networks, although the NCAA's men's basketball tournament far exceeded the revenue that the NCAA would receive from other sports.⁹²

During the 1970s, the NCAA saw revenues continue to increase, seemingly exponentially in the case of basketball broadcasting.⁹³ The NCAA approved eleven football bowl games by 1975, which generated a gross income of more than \$10.5 million.⁹⁴ The 1970s saw another significant moment for colleges and universities; the release of the film *Animal House*, which created an aura around Greek life on campuses, likely contributed to the near-doubling of members of Greek life over the decade.⁹⁵ As college sports continued to grow in revenue, there remained questions about the status of athletes within the system, particularly after high-profile incidents like Oklahoma State University football player Dexter Manley stated that he left college still illiterate.⁹⁶ The NCAA also wrestled with star players in a system of amateurism, such as University of Oklahoma star Brian Bosworth. The university kicked Bosworth off the team after he was suspended for testing positive for performance-enhancing substances and after he showed up to the 1987 Orange Bowl wearing a shirt with an acrostic poem that read vertically NCAA and horizontally, National Communists Against Athletes.⁹⁷

B. College Sports Comes of Age

The NCAA had become a financial powerhouse by the 1980s and many of the organization's athletes had become stars. The rise of money and fame created something of an awkward marriage, as the NCAA continued to maintain that it existed to serve the best interests of student-athletes, while simultaneously suppressing their earning capacity.⁹⁸ Former-professor Murray

⁹¹ *Id.* at 87.

⁹² *Id.* at 90.

⁹³ *Id.* at 92.

⁹⁴ *Id.* at 93.

⁹⁵ MURRAY SPERBER, BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION 15-16 (2000).

⁹⁶ *Id.* at 26.

⁹⁷ Jeremy Muck, *Bosworth: '87 Orange Bowl act 'Selfish,'* ARK. DEMOCRAT GAZETTE (Sep. 27, 2016, 2:08 AM), <https://www.arkansasonline.com/news/2016/sep/27/bosworth-87-orange-bowl-act-selfish-201/>.

⁹⁸ The principle of amateurism, or the idea that athletes cannot be paid, is something that the NCAA has pushed since near its inception. While originally there were likely health and safety concerns with ensuring that teams were not using professional athletes in competition against truly amateur students, the concept

Sperber named the 1970s and '80s the era of "College Sports Inc.," characterized by continued spending in athletic departments as increasing revenues came flooding in from seemingly ever-increasing broadcast contracts.⁹⁹ The rise of money funneling from the NCAA to colleges largely returned to athletic departments during this era, which funded ever-expanding athletic departments and facility upgrades.¹⁰⁰ The NCAA continued to generate increasing revenue figures, yet costs continued to exceed revenue throughout the seventies.¹⁰¹

While football costs exceeded revenue throughout the 1970s, the NCAA saw a fortuitous event happen during the 1978–79 men's basketball season, when two once-in-a-generation talented players competed head-on; Ervin "Magic" Johnson of Michigan State University and Larry Bird of Indiana State University.¹⁰² The 1979 season culminated in a made-for-television moment of Johnson versus Bird in the national championship.¹⁰³ The game itself was not particularly memorable with Johnson's Michigan State Spartans dominating most of the game. The two stars in a showdown on prime time, however, saw the game draw a 24.1 television rating, which is approximately twenty million viewers.¹⁰⁴ The success of the game directly translated into bigger broadcasting deals for the men's college basketball tournament down the road.¹⁰⁵

The men's basketball tournament generated tens of millions of dollars per year as part of a broadcast deal with CBS during the 1980s.¹⁰⁶ In 1985, the NCAA men's basketball tournament expanded from fifty-three teams to sixty-

would serve as a shield for the organization and a justification for denying athletes compensation. See Marc Edelman et al., *Exploring College Sports in the Time of COVID-19: A Legal, Medical, and Ethical Analysis*, 2021 MICH. ST. L. REV. 469, 494–99 (2021) (describing the historical foundations of the NCAA). See also Holden et al., *supra* note 17, at 433–35 (discussing the emergence of the NCAA as a financial juggernaut and the emergence of star athletes).

⁹⁹ SPERBER, *supra* note 95, at 33.

¹⁰⁰ *Id.* at 34.

¹⁰¹ *Id.* at 35.

¹⁰² *Id.* at 36.

¹⁰³ Michael Weinreb, *The Legacy of Magic Johnson and Larry Bird's NCAA Championship Showdown*, 40 *Years Later*, THE RINGER (Apr. 8, 2019, 6:00 AM), <https://www.theringer.com/march-madness/2019/4/8/18297315/40th-anniversary-magic-johnson-larry-bird-1979-ncaa-tournament-championship>.

¹⁰⁴ *Id.* For context, the 24.1 ratings would rank the broadcast first if it were compared to the all-time most watched NBA games. See Gus Martin, *Top 10 Most Watched NBA Games of All Time*, FADEAWAY WORLD (Aug. 1, 2020), <https://fadeawayworld.net/nba/top-10-most-watched-nba-games-of-all-time>.

¹⁰⁵ SPERBER, *supra* note 95, at 36.

¹⁰⁶ *Id.* at 37.

four.¹⁰⁷ The expansion to sixty-four teams, perhaps inadvertently, led to an annual event that transcended sports fandom. The expansion to sixty-four teams introduced the bracket and the phrase “March Madness,” inextricably linked and trademarked¹⁰⁸ to the NCAA men’s basketball tournament.¹⁰⁹ The year after the tournament’s expansion, CBS doubled its payment to the NCAA and before the end of the decade, CBS struck a one-billion-dollar deal for exclusive broadcasting rights to March Madness.¹¹⁰

While CBS gained a monopoly over the NCAA men’s tournament, in 1979 another network launched that would forever change sports broadcasting, ESPN.¹¹¹ Bill Rasmussen launched ESPN as a twenty-four-hour-a-day television network dedicated only to sports.¹¹² As the world’s first twenty-four-hour sports network, ESPN needed to create programming, effectively creating a television spectacle around the NCAA basketball tournament with its selection show, where the selected teams are announced.¹¹³ ESPN aired taped college football games between 1979 and 1981, with the first college football game airing on the network on September 8, 1979, between the University of Colorado and the University of Oregon.¹¹⁴ It would not be until three years later that ESPN would broadcast its first live football game, the Independence Bowl,

¹⁰⁷ *NCAA Tournament Committee Hands Out Bids Today: 64 Teams Will Make the Expanded Field, but Picking the Last 14 Can Be Difficult*, L.A. TIMES (Mar. 10, 1985, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1985-03-10-sp-25834-story.html>.

¹⁰⁸ See Mitchell Stabbe, *March Madness and Advertising: Use of NCAA Trademarks (2023 Update – Part 1)*, BROAD. L. BLOG (Mar. 9, 2023), <https://www.broadcastlawblog.com/2023/03/articles/march-madness-and-advertising-use-of-ncaa-trademarks-2023-update-part-1/> (detailing the many protected marks that the NCAA maintains surrounding the college basketball tournaments that it coordinates).

¹⁰⁹ Mike DeCourcy, *Building the Bracket: How the NCAA 1985 NCAA Tournament Turned March into Madness*, THE SPORTING NEWS (Mar. 19, 2020), <https://www.sportingnews.com/us/ncaa-basketball/news/building-the-bracket-how-the-1985-ncaa-tournament-expansion-turned-march-into-madness/lzp5hjncbsk1vlqitu3nx855>.

¹¹⁰ SPERBER, *supra* note 95, at 37.

¹¹¹ *Id.* at 41; *ESPN, Inc. Fact Sheet*, ESPN PRESS ROOM, <https://espnpressroom.com/us/espn-inc-fact-sheet/> (last visited Feb. 21, 2024).

¹¹² Dan Schawbel, *How Bill Rasmussen Started ESPN and His Entrepreneurship Advice*, FORBES (Sep. 13, 2012, 2:45 PM), <https://www.forbes.com/sites/danschawbel/2012/09/13/how-bill-rasmussen-started-espn-and-his-entrepreneurship-advice/?sh=c97d5e3714e5>.

¹¹³ Sheldon Spencer, *#TBT: ESPN Founder Bill Rasmussen on Steps to 1980 NCAA Tournament Field Announcement*, ESPN FRONT ROW (Mar. 9, 2023), <https://www.espnfrontrow.com/2023/03/tbt-espn-founder-bill-rasmussen-on-steps-to-1980-ncaa-tournament-field-announcement/>.

¹¹⁴ *Colorado, Oregon Were the First Football Game Televised By ESPN*, UNIV. COLO. ATHLETICS (Oct. 6, 2016), <https://cubuffs.com/news/2016/10/6/colorado-oregon-were-the-first-football-game-televise-by-espn>.

between the University of Wisconsin and Kansas State University.¹¹⁵ ESPN played a pivotal role in growing college sports as a whole, but the network's impact has been most arguably felt by college football. Not only does ESPN broadcast hundreds of games annually, but it also creates content around the games, like the College GameDay pre-game show, which visits a different campus each week and serves as a roaming site for all things college football each Saturday.¹¹⁶ While ESPN played a pivotal role in growing the popularity and commercial value of college football, it was almost not possible because of the NCAA's own policy.¹¹⁷

C. NCAA v. Board of Regents

In 1977, sixty-two college football programs from the most powerful conferences—as well as a number of independent schools—became frustrated with the NCAA and joined forces, forming the College Football Association (CFA).¹¹⁸ In 1981, tensions between the CFA and the NCAA came to a head when the CFA was frustrated by low payouts to teams that commanded a national audience when teams with alumni or a regional following only received the same money.¹¹⁹ The CFA went to NBC, which did not have a broadcast deal, and so made an offer to the CFA; the NCAA issued a stern rebuke, threatening sanctions against any school that went forward with the NBC deal.¹²⁰ This decision was likely as consequential for the commercialization of college sports as any.

Beginning in 1951, the NCAA implemented several restrictions on the number of college football games that could be broadcasted on television and formed a three-person Television Committee.¹²¹ In 1981, the NCAA created a new method of determining which teams would get broadcast time on

¹¹⁵ Jesse Temple, *Wisconsin's First Bowl Win, 40 Years Ago: How an Independence Bowl Left a Legacy*, ATHLETIC (Dec. 13, 2022), <https://theathletic.com/3995707/2022/12/13/wisconsin-football-1982-independence-bowl/>.

¹¹⁶ Dave Holcomb, *Watch: 25 Years Ago, 'College GameDay' Went on the Road for the First Time*, SATURDAY DOWN SOUTH, <https://www.saturdaydownsouth.com/sec-football/watch-25-years-ago-college-gameday-went-on-the-road-for-the-first-time/> (last visited Feb. 21, 2024).

¹¹⁷ NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 119-20 (1984).

¹¹⁸ JAMES ANDREW MILLER & TOM SHALES, *THOSE GUYS HAVE ALL THE FUN: INSIDE THE WORLD OF ESPN* 124 (2011).

¹¹⁹ *Id.* at 124–25.

¹²⁰ *Id.* at 125.

¹²¹ Mary H. Tolbert & D. Kent Meyers, *The Lasting Impact of NCAA v. Bd. of Regents of the University of Oklahoma: The Football Fan Wins*, 89 OKLA. BAR J. 22, 23 (Oct. 2018); *Bd. of Regents*, 468 U.S. at 89.

television.¹²² The Television Committee was responsible for negotiating with ABC and CBS to carry NCAA football games.¹²³ As part of the negotiations, the NCAA would grant each network the right to broadcast a limited number of games each season in exchange for payment to the NCAA, which would then be distributed to member institutions.¹²⁴ The television networks, however, were confined by NCAA restrictions which prohibited any school's team from appearing more than six times over the four-year contract, and no more than four times in nationally broadcast games.¹²⁵ The NCAA imposed these caps, believing it necessary to maintain ticket sales and in-person attendance.¹²⁶

As part of the agreement, the networks negotiated directly with schools to broadcast games, provided the schools broadcast time did not exceed the stipulated guidelines.¹²⁷ The agreement included a recommended fee to be paid to schools on a sliding scale, based on the value of the broadcast with a national broadcast being the most valuable.¹²⁸ The aggregate of the payments would equal, at minimum, \$131,750,000, over the length of the agreement.¹²⁹ A problem for the NCAA emerged because schools with powerful football programs felt that they should have a greater role in the television policy.¹³⁰ As a result, the CFA investigated a separate deal with NBC.¹³¹ The deal would have granted more autonomy to schools and placed fewer restrictions on the number of appearances.¹³² The NCAA threatened CFA members with sanctions if they went forward with the NBC contract.¹³³ The Board of Regents for the Universities of Oklahoma and Georgia filed suit against the NCAA in Federal Court in the Western District of Oklahoma, arguing that the NCAA's restrictions on college football television broadcasts violated the Sherman Antitrust Act.¹³⁴

The District Court held that the NCAA was in violation of the Sherman Act and defined the relevant market as encapsulating live college football television

¹²² Tolbert & Meyers, *supra* note 121, at 23.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *See Bd. of Regents*, 468 U.S. at 90.

¹²⁷ *Id.* at 92–93.

¹²⁸ *Id.* at 93.

¹²⁹ *Id.*

¹³⁰ *Id.* at 94.

¹³¹ *Id.* at 94–95.

¹³² *Id.* at 95.

¹³³ *Id.*

¹³⁴ *Id.*

broadcasts.¹³⁵ The District Court declared that the NCAA behaved as a cartel and worked to suppress the supply of college football.¹³⁶ The court found that the NCAA had fixed the price of football broadcasts, engaged in an illegal group boycott of other broadcasters, and placed “an artificial limit on the production of televised college football.”¹³⁷ The NCAA’s two justifications for the policy, that increased broadcasts would result in decreased in-person attendance, and that the restrictions were necessary to preserve amateurism and competitive balance, were both rejected by the court and were deemed to lack a necessary balance to their anticompetitive effect.¹³⁸

The Court of Appeals affirmed, but held that the NCAA’s television restrictions constituted a *per se*¹³⁹ illegal price-fixing scheme under antitrust law.¹⁴⁰ The NCAA’s three arguments that the policy served a pro-competitive justification were all rejected by the Court of Appeals.¹⁴¹ Though the court found the television plan was a *per se* violation of the Sherman Act, the appellate court still analyzed the question of whether there was a pro-competitive justification which could outweigh the anti-competitive effect of the policy.¹⁴² The Tenth Circuit concluded that there could be no justification for allowing the policy to remain under the Sherman Act analysis.¹⁴³ The NCAA thus appealed to the Supreme Court.¹⁴⁴

The Supreme Court’s opinion, authored by Justice John Paul Stevens, begins its analysis by stating: “There can be no doubt that the challenged practices of the NCAA constitute a “restraint of trade” in the sense that they limit members’ freedom to negotiate and enter into their own television contracts.”¹⁴⁵ Justice Stevens noted that not every restraint is unreasonable and thereby offensive to the Sherman Antitrust Act, prefacing the Court’s foregoing analysis.¹⁴⁶ Despite Justice Stevens acknowledging that the type of restraint

¹³⁵ *Id.*

¹³⁶ *Id.* at 95-96.

¹³⁷ *Id.* at 96.

¹³⁸ *Id.*

¹³⁹ Former Supreme Court nominee Robert Bork argued that horizontal price-fixing schemes, like that of the NCAA’s television scheme, are *per se* illegal. See Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 778 (1965).

¹⁴⁰ *Bd. of Regents of Univ. Okla. v. NCAA*, 707 F.2d 1147, 1156 (10th Cir. 1983).

¹⁴¹ *Id.* at 1153-56.

¹⁴² *Id.* at 1157.

¹⁴³ *Id.* at 1160.

¹⁴⁴ *NCAA v. Bd of Regents of Univ. Okla.*, 468 U.S. 85, 88 (1984).

¹⁴⁵ *Id.* at 98.

¹⁴⁶ *Id.*

imposed by the NCAA would ordinarily constitute a *per se* violation of antitrust laws and not merit further inquiry, the Court determined that the Tenth Circuit's *per se* analysis was not appropriate and the case before them merited a full analysis of market context.¹⁴⁷ Justice Stevens prefaced the full analysis on the fact that "this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."¹⁴⁸ Justice Stevens cited famed-antitrust jurist Judge Robert Bork in noting that the uniqueness of some industries necessitates collaboration and coordination, and sports leagues might be the industry best suited to make the point.¹⁴⁹ The uniqueness of sports, and college sports in this case, is that the product is sports competition and it requires two (or more) institutions to contract on agreed-upon terms, or else the sports competition can simply not exist.¹⁵⁰ What the Court ultimately concludes in *Board of Regents* is that, while there may be justifications for some of the NCAA's restraints of trade regarding competition, those justifications do not extend to the ancillary television market.¹⁵¹ The legacy of the *Board of Regents* case is one that arguably stretched Justice Stevens' "stray comments"¹⁵² regarding the unique nature of college sports to extend to virtually all restrictions placed on athletes.¹⁵³

The Supreme Court's *Board of Regents* decision marked a turning point for the NCAA's views on the marketability of college sports.¹⁵⁴ The case is marked by a tremendous irony, however; had the NCAA prevailed, it is unlikely that the growth of college sports would have happened as quickly as it did. In fact, there is a possibility that, had the Supreme Court found the NCAA's arguments about allowing greater access to college football games from the television studios

¹⁴⁷ *Id.* at 100.

¹⁴⁸ *Id.* at 101.

¹⁴⁹ *Id.*

¹⁵⁰ *NCAA v. Bd of Regents of Univ. Okla.*, 468 U.S. 85, 101 (1984).

¹⁵¹ *Id.* at 120.

¹⁵² Justice Kavanaugh referenced the special connection between college sports and the concept of amateurism in his 2021 concurrence, which seemingly invited future challenges to NCAA regulations, while striking down caps on academically related aid paid to athletes by NCAA member institutions. *NCAA v. Alston*, 594 U.S. 69, 2166-67 (2021) (Kavanaugh, J. concurring).

¹⁵³ See Holden et al., *supra* note 14, at 28–29 (discussing the NCAA's reliance on the *Board of Regents* dicta in order to push through decades of restraints on athletes earning capacity).

¹⁵⁴ See Sally Jenkins, *NCAA Lost Its Teeth in Court in 1984, and No One's Been in Charge Since*, WASH. POST (Sept. 23, 2011), https://www.washingtonpost.com/sports/colleges/ncaa-lost-its-teeth-in-court-in-1984-and-no-ones-been-in-charge-since/2011/09/23/gIQAVDyoqK_story.html?tid=usw_passupdatepg (describing the legacy of the *Board of Regents* decision).

would result in decreased attendance,¹⁵⁵ thus justifying the NCAA's restrictions even if they were restraints on trade, it is unlikely college football would be as commercially successful as it is today.¹⁵⁶ There is also some irony in the fact that the NCAA was the one who pushed back against expanded television offerings but has benefited tremendously from the growth of expanded interest in college sports, driven, at least in part, by the expanded access to college football. The *Board of Regents* decision, effectively allowing unlimited broadcasts of college football, was also not likely an insignificant factor in the growth and continued survival of ESPN, as football broadcasts and related content would provide hours of programming.¹⁵⁷

Indeed, ESPN's very survival was in question during the early 1980s.¹⁵⁸ Following the *Board of Regents* decision, schools and conferences were unshackled from the NCAA and could negotiate their own broadcast contracts.¹⁵⁹ In 1984, ESPN secured the rights to forty-eight college football games and, for the first time, broadcast an entire season of games live.¹⁶⁰ The availability of twenty-four-hour-a-day sports content on television meant that there was always a focus on colleges and universities' athletic programs. Media

¹⁵⁵ See *NCAA v. Bd. of Regents of Univ. Okla.*, 468 U.S. 85, 115–16 (1984)

(Although the NORC studies in the 1950's provided some support for the thesis that live attendance would suffer if unlimited television were permitted, the District Court found that there was no evidence to support that theory in today's market. Moreover, as the District Court found, the television plan has evolved in a manner inconsistent with its original design to protect gate attendance. Under the current plan, games are shown on television during all hours that college football games are played. The plan simply does not protect live attendance by ensuring that games will not be shown on television at the same time as live events.)

¹⁵⁶ See, e.g., Andy Stapes & Seth Emerson, *SEC vs. Big Ten Enters a New Chapter as TV Deals Collide with More Than Theme Songs at Stake*, ATHLETIC (Aug. 18, 2022), https://theathletic.com/3520031/2022/08/18/sec-big-ten-conference-media-deals/?access_token=5322379&redirected=1 (noting that the Big Ten's most recent television deal is worth a rumored \$8 billion.).

¹⁵⁷ In addition to its over-the-air broadcasts, ESPN streamed more than 500 college football games in 2022, extending coverage beyond the Conferences that are traditionally broadcast on major networks to allow coverage of smaller conferences like the Big Sky and SWAC. See Christine Calcagno, *ESPN+ to Stream More than 500 College Football Games This Fall*, ESPN PRESS ROOM (Aug. 31, 2022), <https://espnpressroom.com/us/press-releases/2022/08/espn-to-stream-more-than-500-college-football-games-this-fall-2/>.

¹⁵⁸ See generally JAMES ANDREW MILLER & TOM SHALES, *ESPN: THOSE GUYS HAVE ALL THE FUN: INSIDE THE WORLD OF ESPN* 63–65 (2011) (describing the challenges facing ESPN during its foundational years).

¹⁵⁹ *Id.* at 125.

¹⁶⁰ *Id.*

entities needed content, and schools saw an opportunity to use athletics as the front porch to everything else that takes place on a college campus.¹⁶¹

D. The Modern Era of Billion Dollar College Football

By the late 1980s, sports broadcasting became the preferred television program of college-age males.¹⁶² For colleges and universities, athletics had become a marketing wing.¹⁶³ After Boston College received a twenty-five percent increase in applications the year after its then-quarterback, Doug Flutie, won the Heisman Trophy as the top player in college football, the phenomenon was dubbed the “Flutie Factor.”¹⁶⁴ The applications spike permitted schools to justify increased spending, “pumping millions of dollars into their intercollegiate athletics programs;” they willingly cover large athletic department deficits, all in the hopes of having a future Flutie moment.¹⁶⁵ College sports has become a mega-industry with television deals, and multi-million-dollar coaching salaries built on the backs of athletes who are primarily compensated with scholarships including room and board, which, even in generous estimates, is likely valued at less than \$100,000 per year at most public institutions.¹⁶⁶ By the late 1990s, the Bowl Championship Series (BCS) made annual payments of approximately \$100 million.¹⁶⁷

The BCS system used to determine which college football teams would get to play in the most premier bowl games.¹⁶⁸ The BCS consisted of the four most-prestigious bowl games (the Orange Bowl, the Rose Bowl, the Sugar Bowl, and

¹⁶¹ See Ted Mitchell, *Higher Education Must Clean Out Its ‘Front Porch,’* WASH. POST (Apr. 25, 2018), <https://www.washingtonpost.com/news/grade-point/wp/2018/04/25/higher-education-must-clean-out-its-front-porch/> (noting “intercollegiate athletics, and particularly the major revenue-producing sports of football and basketball, has often been called an institution’s ‘front porch.’”).

¹⁶² SPERBER, *supra* note 95, at 41.

¹⁶³ *Id.* at 60.

¹⁶⁴ *Id.* at 60-61.

¹⁶⁵ *Id.* at 61.

¹⁶⁶ See generally, SPERBER, *supra* note 95, at 216–29 (explaining the operating model of modern college sports). In recent years, college athletes have been able to earn revenue from non-university sources through licensing or contracting for the use of their name, image, or likeness. See John T. Holden et. al, *The Collective Conundrum*, 76 OKLA. L. REV. 113, 117, 126, 143-44 (2023).

¹⁶⁷ SPERBER, *supra* note 95, at 218-19. Money from college bowl games is typically split amongst the members of each team’s conference. The exception is Notre Dame, which remains independent. See, e.g., Kristi Dosh, *College Football Playoff Payouts 2022-2023*, BUS. COLL. SPORTS, <https://businessofcollegesports.com/college-football-playoff-payouts/#:~:text=Each%20conference%20receives%20%246%20million,Game%2C%20only%20additional%20expenses%20covered> (Mar. 21, 2024) (explaining the distributions of revenue from the College Football Playoff games in the 2022 season).

¹⁶⁸ *Bowl Championship Series Fact Facts*, CNN (Apr. 17, 2017, 6:31 PM), <https://www.cnn.com/2013/08/11/us/bowl-championship-series-fast-facts/index.html>.

the Fiesta Bowl), and a national championship played at one of the four sites rotating on an annual basis.¹⁶⁹ The BCS launched in 1998 as a new step forward in the commercialization of college sports, which created a spectacle of television programming around the announcements of which teams would be going to which bowl.¹⁷⁰ The BCS employed computers that used other rankings to put out a weekly ranking, beginning late in the season.¹⁷¹ The computer system was supposed to be an improvement over the previous systems which relied on polls, either of the press or coaches, for rankings. The system was criticized over its sixteen-year lifespan.¹⁷² The criticism occasionally led to tweaks in the formula, which would thereby lead to hundreds of hours of commentary breaking down how changes to the formula might favor or disfavor different teams.¹⁷³ By 2009, however, the BCS had a lower favorability ranking than Congress itself, and a mere fifteen percent of college football fans thought the computer ranking system was worth maintaining.¹⁷⁴ The BCS was so detested that it brought bipartisan efforts, including one effort between the Obama administration and conservative Senator from Utah Orrin Hatch, to investigate whether the method for selecting which two teams would play for the national championship was compatible with antitrust law.¹⁷⁵ While despised by many, the BCS made lots of money, which kept it alive for sixteen years.¹⁷⁶

The BCS eventually gave way to a playoff system, which aimed to be even more profitable than the existing model. In return, the leadership at the BCS filed for a trademark for “College Football Playoff.”¹⁷⁷ In 2012, the BCS oversight committee, composed of various university presidents, voted to approve a playoff system to begin two years later.¹⁷⁸ ESPN won the rights to broadcast the College Football Playoff for twelve years for a rumored \$5.64

¹⁶⁹ *Id.*

¹⁷⁰ Rodger Sherman, *OK Computers: A Formal Apology to College Football's Biggest Scapegoat*, THE RINGER (Dec. 3, 2021, 9:24 AM), <https://www.theringer.com/2021/12/3/22815192/college-football-playoff-bcs-computer-formulas-ranking-system>.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Andy Staples, *With Political Involvement Afoot, Prepare for BCS Change*, SPORTS ILLUSTRATED (Feb. 1, 2010), <https://www.si.com/more-sports/2010/02/01/bcs-justice>.

¹⁷⁶ *Id.*

¹⁷⁷ *See generally id.* (noting few people realize that the College Football Playoff is run by the very same people who were responsible for administering the BCS system).

¹⁷⁸ *College Football Playoff Fast Facts*, CNN (Jan. 10, 2023, 12:13 PM), <https://www.cnn.com/2014/08/14/us/college-football-playoff-fast-facts/index.html>.

billion.¹⁷⁹ In addition to the creation of the College Football Playoff, there was the addition, or elevation, of two additional bowl games to the status of the four BCS bowls.¹⁸⁰ The additional bowl games were accompanied by a committee, which the NCAA tasked with ranking the top college football teams beginning in week ten of the college football season.¹⁸¹ The thirteen-member committee, is comprised primarily of people within college athletics or university administration, but also includes some notable names like former-Secretary of State Condoleezza Rice.¹⁸²

Ultimately, the NCAA moved to a playoff system because it would allow for greater revenue. The move to a playoff model has been so successful from a revenue perspective that there are plans to expand the playoff to twelve teams.¹⁸³ The twelve-team playoff expansion accompanies an increasing the value of broadcasting rights deals between television networks and athletic conferences, or in the case of the University of Notre Dame, the school itself.¹⁸⁴ The Power Five conferences command multi-billion-dollar deals; however, even smaller conferences like the American Athletic Conference (AAC), which includes mid-size schools like Wichita State University, have a GOR agreement that pays the conference \$1 billion over twelve years.¹⁸⁵ The revenue that schools receive

¹⁷⁹ Jerry Hinnen, *ESPN Reaches 12-Year Deal to Air College Football Playoffs*, CBS SPORTS (Nov. 21, 2012, 2:03 PM), <https://www.cbssports.com/college-football/news/espn-reaches-12-year-deal-to-air-college-football-playoffs/>.

¹⁸⁰ The Peach Bowl, which at the time was named the Chick-Fil-A Bowl, and the Cotton Bowl were added to the slate of premier bowls. See Tim Tucker, *Chick-Fil-A Bowl will Restore 'Peach' to Its Name*, ATLANTA J. CONST. (Apr. 18, 2014), <https://www.ajc.com/sports/college-football/chick-fil-bowl-will-restore-peach-its-name/jMJAXqgiJudgciKIWEtBRO/>.

¹⁸¹ See, e.g., Wayne Staats, *College Football Playoff Rankings: Tennessee, Ohio State, Georgia, Clemson Lead First Top 25*, NCAA (Nov. 1, 2022) (illustrating the release of the College Football Playoff rankings), <https://www.ncaa.com/news/football/article/2022-11-01/college-football-playoff-rankings-tennessee-ohio-state-georgia-clemson-lead-first-top>.

¹⁸² Daniel Uthman, *Meet the College Football Playoff Selection Committee*, USA TODAY SPORTS (Oct. 16, 2013, 3:35 PM), <https://www.usatoday.com/story/sports/ncaaf/2013/10/16/meet-the-faces-behind-the-college-football-playoff-selection-committee/2993911/>.

¹⁸³ See Zac Al-Khateeb, *College Football's 12-team Playoff, Explained: Start Date, How It Will Work & More to Know About New CFP Format*, THE SPORTING NEWS (May 2, 2023), <https://www.sportingnews.com/us/ncaa-football/news/college-football-12-team-playoff-explained-date-more-to-know-cfp-format/gmkdzivaikrn4xba7c6p0ksl> (noting the expansion of the College Football Playoff).

¹⁸⁴ Joshua Vowles, *Big 12 Expansion, Notre Dame, and ACC Grant of Rights*, ONE FOOT DOWN (July 29, 2016, 12:36 AM), <https://www.onefootdown.com/2016/7/29/12317808/big-12-expansion-notre-dame-and-acc-grant-of-rights>. For an illustration of the value of grant-of-right deals, see *Here's a Look at All the Current Conference TV Deals*, ON3 (Aug. 2, 2021), <https://www.on3.com/news/conference-tv-deals-current-status-college-football/>.

¹⁸⁵ Michael Smith & John Ourand, *AAC, ESPN Agree to 12-Year Media Rights Deal Worth \$1B*, SPORTS BUS. J. (Mar. 19, 2019), <https://www.sportsbusinessjournal.com/Daily/Closing-Bell/2019/03/19/AAC.aspx>.

from GOR payments has led to significant realignment in college sports, as schools chase the greenest pastures.¹⁸⁶ A key component of many GOR deals is that they typically hook teams in for long periods, ranging up to twenty years.¹⁸⁷ The length of the deal and league contracts can serve as a significant deterrent to schools looking to depart a conference early. The difference in payments, however, can still justify the move for some institutions.¹⁸⁸

Two monumental events created a need to revisit GOR agreements.¹⁸⁹ The announcements that the University of Oklahoma and The University of Texas were leaving the Big XII for the Southeastern Conference and that UCLA and the University of Southern California were departing the Pac-12 for the Big Ten was a shock to many, including the Regents of the University of California.¹⁹⁰ Perhaps less surprising, the Big Ten announced a new grant-of-rights deal, with estimated payment to the conference of \$1 billion annually for seven years.¹⁹¹ By contrast, the Big XII, which is losing Oklahoma and Texas but gaining BYU, Cincinnati, Houston, and the University of Central Florida, recently negotiated a new six-year media-rights deal with ESPN and Fox Sports, set to begin with the 2025-26 regular season, that will pay the conference an annual average of \$380 million.¹⁹² That amount will be shared evenly among the conference's twelve members, while the conference's current deal for \$220 million per year

¹⁸⁶ Ray Katz, *The Increasing Pace of Conference Realignment: Impact of Media Brand Fit and the Enrollment Cliff*, SPORTS BUS. J. (Mar. 16, 2023), <https://www.sportsbusinessjournal.com/SB-Blogs/OpEds/2023/03/16-Katz.aspx>.

¹⁸⁷ Trent Wood, *The ACC's Grant of Rights Keeps Being Brought Up in Conference Realignment Discussions. Here's Why*, DESERET NEWS (July 8, 2022, 7:10 PM), <https://www.deseret.com/2022/7/8/23200963/the-accs-grant-of-rights-keeps-being-brought-up-in-conference-realignment-discussions-heres-why>.

¹⁸⁸ For example, the University of Oklahoma and the University of Texas agreed to pay the Big XII Conference \$100 million when the schools departed for the Southeastern Conference. See Adam Silverstein, *Texas, Oklahoma Leaving Big 12 Early, Joining SEC in 2024 Season After Reaching Exit Agreement*, CBS (Feb. 9, 2023, 9:54 PM), <https://www.cbssports.com/college-football/news/texas-oklahoma-leaving-big-12-early-joining-sec-in-2024-season-after-reaching-exit-agreement/>.

¹⁸⁹ See Eric Blum, *The SEC Gaining Texas and Oklahoma a Year Early Only Makes It Stronger*, DEADSPIN (Feb. 10, 2023), <https://deadspin.com/sec-ncaa-football-texas-longhorns-oklahoma-sooners-1850101255>.

¹⁹⁰ Tom Fornelli, *UCLA to Big Ten: University of California Regents OK Conference Switch, Will Tax Bruins for Leaving*, CBS (Dec. 14, 2022, 9:10 PM), <https://www.cbssports.com/college-football/news/ucla-to-big-ten-university-of-california-regents-ok-conference-switch-will-tax-bruins-for-leaving/>.

¹⁹¹ Adam Rittenberg, *Big Ten Completes 7-Year, \$7 Billion Media Rights Agreement with Fox, CBS, NBC, ESPN* (Aug. 18, 2022, 9:30 AM), https://www.espn.com/college-football/story/_/id/34417911/big-ten-completes-7-year-7-billion-media-rights-agreement-fox-cbs-nbc.

¹⁹² Brett Gibbons, *Big 12 Conference Inks \$2.3 Billion Media Rights Deal with ESPN, Fox Sports*, SPORTS ILLUSTRATED (Oct. 31, 2022, 4:53 PM), <https://www.si.com/college/tcu/football/big-12-conference-inks-2-3-billion-media-rights-deal-with-espn-fox-sports>.

is shared among the conference's current ten members.¹⁹³ As a result, the Big XII's new deal will result in "an average increase in media-only revenue per school from \$22 million to \$31.7 million."¹⁹⁴

As a GOR deal approaches its end date, it becomes more palatable for many institutions to consider leaving their conferences. The agreements with institutions, and subsequent breakup fees, compared to the increased value of college football broadcasting rights, put increased focus on these long-term contracts and necessitates drafting better agreements to minimize costs.¹⁹⁵ In the following section, this Article discusses the core components of GOR agreements.

II. GOR CONTRACTS

The emergence of GOR contracts has fundamentally changed college sports. Television broadcasting has played a significant role in transitioning college football to a weekly spectacle that rivals any other sports league in the world. The GOR agreements are the link that connects schools, athletic conferences, and television broadcasters. This Section discusses why GORs matter, before examining the GOR agreements among the Power Five conferences.

A. Why do they matter?

Conference realignment and the prospect of conference consolidation are current realities of college football. Since little more than one year ago, a number of conferences have added members from other conferences.¹⁹⁶

¹⁹³ Sam Cooper, *Reports: Big 12 Reaches new Media Rights deal with ESPN, Fox Worth more than \$2 Billion*, YAHOO!SPORTS (Oct. 30, 2022), <https://sports.yahoo.com/reports-big-12-reaches-new-media-rights-deal-with-ESPN-fox-worth-23-b-153415193.html>.

¹⁹⁴ Pete Thamel, *Big 12 Nears Six-Year, \$2.28B TV Extension Deal with ESPN, Fox*, ESPN (Oct. 30, 2022, 11:15 AM), https://www.espn.com/college-football/story/_/id/34910144/big-12-nears-six-year-228b-tv-extension-deal-ESPN-fox.

¹⁹⁵ *Id.* Controversy over schools departing conferences is not new; in 2014, the University of Maryland sued the Atlantic Coast Conference over the conference withholding payment of the school's revenue share after Maryland announced it would be joining the Big Ten. The Conference and school would agree to a \$31.4 million departure fee. Steve Berkowitz, *ACC, Maryland Reach Settlement on Exit Fee: \$31.4M, Not \$52.2M*, USA TODAY (Aug. 8, 2014, 3:00 PM), <https://www.usatoday.com/story/sports/college/2014/08/08/acc-maryland-settle-lawsuits-buyout-big-ten-conference/13781545/>.

¹⁹⁶ On July 1, 2022, four schools joined the Sun Belt Conference: James Madison (which arrived from the Football Championship Subdivision, the level below the FBS) and Marshall, Old Dominion, and Southern Miss (each of which came from Conference USA). A number of schools will be joining Power 5 and Group of 5 conferences in 2023. See Zach Miller, *Conference Realignment: All the Moves Coming in 2022–25*,

Meanwhile, as detailed above, four FBS Power 5 programs (Oklahoma, Texas, UCLA, and USC) have announced their upcoming moves to other Power 5 conferences.¹⁹⁷ None of these four programs, however, has yet to change conferences, because these schools still have time remaining on their current GOR agreements. After agreeing to departure terms with Texas and Oklahoma, the Big XII Conference announced these two programs will leave the Big XII following the 2023-24 athletic season.¹⁹⁸ Meanwhile, unlike Oklahoma and Texas, UCLA and USC will remain in the Pac-12 through the expiration of its current GOR, meaning each school will leave the Pac-12 Conference and join the Big Ten Conference for the 2024-25 college-football season.¹⁹⁹

Alternatively, if one of these programs left its respective conference while still under their respective GOR agreements, their media rights would not move with them to their new conferences. Rather, such rights would remain with the program's current conference, meaning the program's new conference would not be able to earn revenue from the broadcasts of its games, despite the fact that this program would be a member of the new conference. Obviously, then, GOR is a significant hurdle to the timing of conference realignment.

In terms of lessening the value of a program that joins a conference while still under a GOR, GOR is not just an issue for a program that wants to switch conferences. The major case in point is that of University of Notre Dame (Notre Dame). Notre Dame is not affiliated with an athletics conference for football. Instead, it is classified as an FBS Independent. Yet Notre Dame has an exclusive media-rights deal with NBC that "runs through the 2024 season."²⁰⁰ So, the same timing hurdles that exist(ed) for schools like Texas, Oklahoma, UCLA,

MEDIUM (Feb. 16, 2022), <https://medium.com/run-it-back-with-zach/conference-realignment-all-the-moves-coming-in-2022-25-130ef706da55#:~:text=Conference%20USA%20will%20experience%20the,expected%20to%20join%20in%202023.>

¹⁹⁷ *Joint Statement from The University of Texas at Austin and The University of Oklahoma*, *supra* note 1; Fornelli, *supra* note 190.

¹⁹⁸ *See generally Big 12 Announces Agreement for Withdrawal of Oklahoma and Texas*, BIG 12 CONF. (Feb. 9, 2023, 6:36 PM), <https://big12sports.com/news/2023/2/9/conference-big-12-announces-agreement-for-withdrawal-of-oklahoma-and-texas.aspx>.

¹⁹⁹ *See generally* Pete Thamel & Heather Dinich, *USC, UCLA Moving from Pac-12 to Big Ten in 2024*, ESPN (June 30, 2022, 2:05 PM), https://www.espn.com/college-sports/story/_/id/34173688/source-usc-ucla-considering-move-pac-12-big-ten ("USC and UCLA, two of the Pac-12's flagship programs, were notified Thursday night that their application to join the Big Ten has been accepted. The schools will begin play in the conference in 2024.")

²⁰⁰ Bryan Driskell, *Report: Notre Dame Expected to Land Big TV Deal, Remain Independent*, SPORTS ILLUSTRATED (Aug. 16, 2022, 4:05 PM), <https://www.si.com/college/notredame/football/notre-dame-football-report-to-get-big-tv-deal-remain-independent#:~:text=Notre%20Dame%20currently%20makes%20around,its%20partnership%20with%20the%20ACC.>

and USC exist for Notre Dame, should Notre Dame desire to affiliate with a conference. Whether Notre Dame will remain as an FBS Independent or choose to affiliate with a football conference remains to be seen; and whether the former option would yield more annual revenue for Notre Dame than would the latter option is an open question.²⁰¹ According to CBS Sports, “Notre Dame would remain independent if it can earn at least \$75 million annually in media rights revenue from current broadcast partner NBC.”²⁰²

B. Current GOR contracts for NCAA Division 1 FBS Power 5 conferences

The ACC’s GOR (Atlantic Coast Conference Grant of Rights Agreement) with ESPN,²⁰³ which expires in 2036,²⁰⁴ is only three-and-a-half pages. The ACC’s GOR details that schools provide the conference with a number of different commitments. The first is that ACC member schools agree to grant the conference irrevocable and exclusive access to all rights necessary to fulfill the terms of the Conference’s television broadcasting agreement with ESPN.²⁰⁵ The ACC’s GOR further commits schools to the agreement for the entirety of the contract even if the school were to depart from the Conference.²⁰⁶ Additionally,

²⁰¹ Trent Moore, *Why is Notre Dame Independent and not in a College Football Conference?*, NBC (Oct. 6, 2023, 1:11 PM), <https://www.nbc.com/nbc-insider/why-is-notre-dame-independent-and-not-in-a-football-conference> (describing the history of Notre Dame as an independent entity in college football).

²⁰² Dennis Dodd, *Notre Dame Targeting \$75 Million Annual Media Rights Payout in Quest to Remain Independent*, CBS SPORTS (July 18, 2022, 3:23 PM), <https://www.cbssports.com/college-football/news/notre-dame-targeting-75-million-annual-media-rights-payout-in-quest-to-remain-independent/>.

²⁰³ See ATLANTIC COAST CONFERENCE GRANT OF RIGHTS AGREEMENT, ¶ 1 (2012), <https://cdn.theathletic.com/app/uploads/2022/07/01185531/ACC-Grant-of-Rights-1.pdf> (uploaded to *The Atlantic* July 1, 2022).

²⁰⁴ See Joe Giglio & Brian Murphy, *Here's a Copy of the Contract Keeping the ACC Together for Now*, WRAL SPORTS (July 6, 2022, 11:38 AM), <https://www.wralsportsfan.com/here-s-a-copy-of-the-contract-keeping-the-acc-together-for-now/20361234/> (“In 2016, the ACC extended its grant of rights through the 2035-36 academic year as part of a 20-year agreement with ESPN that included the launch of the ACC Network.”). See also ACC, *ESPN Partner for New Conference Channel*, ESPN (July 21, 2016, 3:44 PM), https://www.espn.com/college-sports/story/_/id/17102933/acc-espn-agree-20-year-rights-deal-lead-2019-launch-acc-network (“The long-awaited ACC Network will launch by August 2019, with the Atlantic Coast Conference and ESPN agreeing to a 20-year deal and rights extension through the 2035-36 academic year in an announcement made Thursday. The ACC also extended its conference rights deal nine years through 2035-36. The conference's grant of rights makes it financially untenable for a school to leave, guaranteeing in the 20 years of the deal that a school's media rights, including revenue, for all home games would remain with the ACC regardless of the school's affiliation.”).

²⁰⁵ ATLANTIC COAST CONFERENCE GRANT OF RIGHTS AGREEMENT, *supra* note 203, at ¶ 1.

²⁰⁶ *Id.*

member schools agree to perform all contractual obligations established within the Conference's agreement with ESPN.²⁰⁷

The Big XII Conference's past GOR ("Amended and Restated Grant of Rights Agreement")²⁰⁸, which was due to expire on June 30, 2025²⁰⁹, was just over four pages. The Big XII Conference Bylaws state that each Conference member agrees that the withdrawal of a conference member, even if they pay an agreed to buyout it does not end all the obligations of the member under the GOR.²¹⁰ The Bylaws state that even after withdrawal a then-past member school remains obligated to fulfill the remainder of the GOR, but without entitlement to continued payments.²¹¹

The Pac-12 Conference's GOR ("Media, Sponsorship and Digital Rights"),²¹² which expires August 1, 2024,²¹³ is just over one page. It begins:

²⁰⁷ *Id.* On the history and reach of the ACC's GOR agreement, Trent Wood wrote:

Back in 2016, the ACC and ESPN agreed to a 20-year media rights deal through 2035-36, a deal that brought about the birth of the ACC Network — owned and operated by ESPN — which launched in 2019. At the same time, the ACC extended its grant of rights deal nine additional years, taking that through 2035-36. That deal, per Steve Wiseman of *The News and Observer*, based out of Raleigh, North Carolina, 'irrevocably and exclusively grants to the conference during the term all rights necessary for the conference to perform the contractual obligations of the conference expressly set forth in the ESPN agreement.' In layman's terms, as explained by Wiseman, 'any TV revenue a school is due from the ACC's contract with ESPN is conference property through June 30, 2036, regardless of whether the school remains an ACC member or leaves for another conference.' Explained further by Wiseman, the ACC's grant of rights means that were a school to leave the conference for another, 'the ACC would get any media revenue generated from athletic events on its campus through summer 2036.' Which in essence would mean, as ESPN's Andrea Adelson explained it, 'Any departing school would ... forfeit its media rights and the ability to have home games and some non-conference games air on TV. In all sports. Through 2036.'

Wood, *supra* note 187.

²⁰⁸ See BIG TWELVE CONFERENCE, AMENDED AND RESTATEMENT GRANT OF RIGHTS AGREEMENT, (Sept. 6, 2012), <https://cdn.theathletic.com/app/uploads/2022/07/01185303/Big-12-Grant-of-Rights-1.pdf>.

²⁰⁹ *See id.* at ¶ 7.

²¹⁰ BIG XII CONFERENCE, BYLAWS § 3.1, <https://static.big12sports.com/custompages/pdfs/handbook/bylaws.pdf> (last visited Feb. 26, 2024).

²¹¹ *Id.*

²¹² See PAC-12 CONFERENCE, CONST. & BYLAWS, ch. 3, § 2 (2021), <https://pac-12compliance.org/wp-content/uploads/2021/08/2021-22-P12-Handbook.V1.pdf>.

²¹³ *See id.* at ch. 2, § 3

(No member shall deliver a notice of withdrawal to the Conference in the period beginning on July 24, 2011, and ending on August 1, 2024; provided, that if any member does deliver a notice of withdrawal prior to August 1, 2024, in violation of this chapter, the Conference shall be entitled to an injunction and other equitable relief to prevent such breach, and if a court of competent jurisdiction shall deny the Conference such injunctive relief, the

Effective July 1, 2012, each member hereby transfers and assigns to the Conference any and all of its rights to the commercial exploitation of all audio and all video transmission or dissemination by any and all means (including without limitation internet transmission or dissemination), now known or hereafter existing, of all member competitions for all Conference sanctioned sports involving member teams as to all intra-Conference events and those inter-Conference events where the participating member controls audio and video rights. The transfer and assignments include all rights in and to the transmissions that exist prior to July 1, 2012, on and after July 1, 2012, and all of the copyrights thereto.²¹⁴

For its part, the Big Ten Conference entered into a 7-year, 7-billion-dollar contract with Fox, CBS, and NBC.²¹⁵ While the Big Ten Conference's latest media contract, is the largest to date, details about the content of the league's GOR remain shrouded in secrecy even after the Conference added both UCLA and the University of Southern California.²¹⁶ Meanwhile, according to the SEC, the SEC does not have a GOR.²¹⁷

While many of the GOR agreements are surprisingly brief, they convey remarkably valuable rights to collegiate conferences and serve as a ligature on schools limiting—at least in theory—movement until its expiration. While GORs have become a staple of the contemporary college sports landscape, in recent years, departures from conferences, which naturally have consequences for media contracts, has become a significant area of concern. Despite their brevity, GORs can pose significant monetary obstacles for schools seeking to depart before the termination of the agreement. The following section discusses the paths for schools seeking to depart early from a GOR.

Conference shall be entitled to retain all the media and sponsorship rights in the multi-player video distribution (MPVD) and telecommunications/wireless categories of the member purporting to withdraw through August 1, 2024, even if the member is then a member of another conference or an independent school for some or all intercollegiate sports competitions.).

²¹⁴ *Id.* at ch. 3, § 2.

²¹⁵ Rittenberg, *supra* note 191.

²¹⁶ *Id.*

²¹⁷ E-mail from Herb Vincent, Assoc. Comm'r, Se. Conf. (Sept. 9, 2022, 1:14 PM) (on file with author).

III. GETTING OUT OF A GOR

So, how might a university leave its conference before the expiration of the conference's GOR? Several options potentially exist. Before exploring them, it should be noted that, for a variety of reasons including expense, likelihood of success, maintaining industry relationships, and others, a university that desires to leave its conference might simply choose to do so only upon expiration of its conference's GOR. Consider that UCLA and USC have chosen to stay through the term of their GOR, with respect to their decision to leave the Pac-12 for the Big Ten. That said, at least six potential routes to getting out of a GOR might exist.

A. Unilateral Early Departure

One obvious option for any school that desires to leave its conference while still under that conference's GOR is simply to leave the conference before the term expires, pay the required exit fee (if any), and forfeit its broadcast rights for the remainder of the conference's GOR. Though this is a fairly straightforward option, from a logistical standpoint, it is an unlikely one, given that the exit fee might be too high to justify a unilateral early departure and that the departing university's broadcast rights would remain with their previous conference through the end of that conference's GOR. The market value of the departing university to its new conference would be dramatically diminished. As such, a conference would be unlikely to add a new member if they would not receive the new member's broadcast rights until the expiration of that member's previous conference's GOR. Even so, unilateral early departure and subsequent forfeiture of broadcast rights is a viable option; and the shorter the remaining duration of a given conference's GOR, the more likely this option is for a member that wishes to pursue this option.

For example, though they are not pursuing this option, UCLA and USC could reasonably opt for unilateral early departures, given that they have just one year left under the Pac-12's GOR.²¹⁸ Moreover, this option could be more palatable from UCLA and USC's perspective, given that the Pac-12 does not have an exit fee.²¹⁹ Unilateral early departure would, of course, mean UCLA

²¹⁸ J. Brady McCollough, *Inside the Pac-12 Collapse: Four Surprising Moments that Crushed the Conference*, L.A. TIMES (Aug. 16, 2023, 4:42 PM), <https://www.latimes.com/sports/story/2023-08-16/pac-12-collapse-decisions-realignment-ucla-oregon> (describing the departures of UCLA and USC from the Pac-12).

²¹⁹ See Chris Smith, *ACC's New Exit Fee: Punitive Or Par For The Course?*, FORBES (Sept. 19, 2012, 9:55 AM), <https://www.forbes.com/sites/chris-smith/2012/09/19/accs-new-exit-fee-punitive-or-par-for-the>

and USC would forgo their respective shares of the conference's broadcast revenue. But given how much more each of the two schools would make per year as part of the Big Ten, the lost Pac-12 revenue surely loses a bit of its sting. According to the *Los Angeles Times*, the Pac-12 awarded schools roughly \$33.5 million each in 2019-2020.²²⁰ The Big Ten, by contrast, paid schools a little more than \$49 million over the same time period, with the twelve longest-tenured conference members actually receiving slightly more than \$54 million each.²²¹ Both conferences were impacted by declining revenue as a result of the COVID-19 pandemic, however, the Pac-12's revenue drop of 35.7 percent, was significantly higher than the Big Ten's 11.6 percent.²²² The Big Ten's latest agreement, which begins in 2024 could be worth up to \$1 billion per year, which would see schools receive roughly \$62.5 million per year, before counting additional revenue from things like the NCAA men's basketball tournament and college football bowl payouts.²²³

To draw a general business analogy, the lost Pac-12 revenues that would result from an early, unilateral departure can be considered "loss leaders" for UCLA and USC, which would more than make up for the loss by the far-greater Big Ten revenues once each school emerges from the Pac-12's GOR.²²⁴ From the Big Ten's perspective, perhaps the diminished market value of these two schools for the year that their broadcast rights remain with the Pac-12 is worth it, given the added value that these national-brand schools will bring to the Big Ten after the expiration of the Pac-12's GOR.

B. Mutual Early Departure

Another option for an early departure is one that is agreed upon by both parties, meaning the departing university and the conference it intends to leave. Specifically, the conference would allow the departing school to be released from its GOR before the agreement's expiration. Were a conference to agree to

course/?sh=50fcef0a40b. According to the article, the Big Ten and SEC also do not have exit fees. *See also generally* PAC-12 CONFERENCE, *supra* note 201.

²²⁰ Thuc Nhi Nguyen, *How Much Money Waits for UCLA and USC in the Big Ten Conference?*, L.A. TIMES (July 3, 2022, 5:00 AM), <https://www.latimes.com/sports/story/2022-07-03/how-much-money-waits-for-ucla-usc-in-the-big-ten>.

²²¹ "Maryland and Rutgers, which were not full members at that time, took home \$27.6 million and \$11.4 million, respectively." *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ According to Investopedia, "A loss leader strategy involves selling a product or service at a price that is not profitable but is sold to attract new customers or to sell additional products and services to those customers." Caroline Banton, *Loss Leader Strategy: Definition and how it Works in Retail*, INVESTOPEDIA, <https://www.investopedia.com/terms/l/lossleader.asp> (last updated May 27, 2021).

an early departure by a member university, the parties could negotiate an exit fee. The fee would likely be greater than the regular exit fee, however, to compensate the conference for giving up the remaining value of the departing university's GOR.

This is precisely what happened with respect to Oklahoma and Texas. On February 9, 2023, the Big XII announced that the two universities had reached an early-exit agreement with the conference, clearing the way for the schools to join the SEC a year early.²²⁵ Collectively, Oklahoma and Texas will pay \$100 million to the Big XII for their early departures.²²⁶ Later that day, SEC Commissioner Greg Sankey released a statement that unanimously welcomed the two schools beginning July 1, 2024, rather than July 1, 2025, as originally planned.²²⁷

This is also what transpired regarding the departures of Cincinnati, Houston, and UCF from the AAC to the Big XII.²²⁸ In September 2021, the AAC signaled that a mutual early departure with a higher exit fee was an option. It was announced that the AAC would be willing to allow the UCF, the University of Cincinnati, and Houston to depart early for the Big XII, if the schools were willing to pay an increased exit fee.²²⁹ Under the Conference's bylaws schools are typically required to provide twenty-seven months' notice and pay \$10

²²⁵ See generally *Big 12 Announces Agreement for Withdrawal of Oklahoma and Texas*, *supra* note 188.

²²⁶ *Id.*

(The Big 12 announces that the Conference has agreed in principle to terms with the University of Oklahoma and The University of Texas at Austin to leave the Conference following the 2023-24 athletic year, one year earlier than originally announced, subject to final approval from the OU and UT governing Boards. Compensation to the Conference for the early withdrawals of the two schools totals \$100 million in foregone distributable revenues, which OU and UT will be able to partially offset with future revenues.)

²²⁷ Press Release, SEC Conf. Comm'r Greg Sankey, *Statement from SEC Commissioner on Oklahoma, Texas* (Feb. 9, 2023), <https://www.secsports.com/article/35625656/statement-sec-commissioner-oklahoma-texas>

(The Southeastern Conference learned today of the decision by the Big 12 Conference to alter the membership exit date for the University of Oklahoma and the University of Texas. We are continuing our preparation for this membership transition, and we look forward to welcoming the Conference's new members and moving into our future as a 16-team league. The Presidents and Chancellors of the SEC previously voted with unanimous approval to accept the application of Oklahoma and Texas to join the Conference on July 1, 2025, and have now authorized the Conference Office to proceed with facilitating the transition of Oklahoma and Texas to become full members of the Southeastern Conference on July 1, 2024.)

²²⁸ Heather Dinich, *American Athletic Conference Willing to Let Departing Teams Go Before 2024 for Higher Exit Fee*, ESPN (Sept. 10, 2021, 6:04 PM), https://www.espn.com/college-football/story/_/id/32184336/american-athletic-conference-willing-let-departing-teams-go-2024-higher-exit-fee.

²²⁹ *Id.*

million to depart early, however, the Conference commissioner has made known that those terms are open to some negotiation.²³⁰

Indeed, the mutual early departure of Cincinnati, Houston, and UCF from the AAC, effective July 31, 2023, was agreed to in June 2022. According to the AAC, the member institutions voted to release the three schools effective July 1, 2023.²³¹ Commissioner Mike Aresco said the agreement was “a sensible resolution to the three schools’ departure from the conference.”²³² It was reported that each school’s buyout will be \$18 million spread out over 14 years.²³³ Once these three schools and BYU join the Big XII, the conference will be composed of 12 member institutions “for the first time since realignment in 2011.”²³⁴

C. Argue GOR is not a Valid Contract

A conference member that wishes to depart for greener pastures might argue that the GOR it is under is not a valid contract in the first place, on the grounds that it lacks a basic common-law requirement of bilateral-contract validity: mutual consideration. With very limited exceptions (e.g., promissory estoppel), mutual consideration must be present, in order for an agreement to be legally enforceable. In layman’s terms, mutual consideration means that each side gives up something of value, in return for what the other party gives up. In essence, mutual consideration means that the agreement is not a gift. Rather, it is a bargained-for exchange of value.²³⁵

It is possible that this is a valid argument. Andy Staples, a columnist for *The Athletic* argued that grant of rights agreements entail the schools providing conferences with something of value in the form of media rights.²³⁶ The question is what does the Conference provide to schools, because it is not the Conference

²³⁰ *Id.*

²³¹ *American Announces Agreements With UCF, Cincinnati and Houston on Departure*, AM. ATHLETIC CONF. (June 10, 2022), <http://theamerican.org/news/2022/6/10/general-american-announces-agreements-with-ucf-cincinnati-and-houston-on-departure.aspx>.

²³² *Id.*

²³³ See Sam Khan, Jr. (@skhanjr), X (June 10, 2022, 10:26 AM), <https://twitter.com/skhanjr/status/1535282208004575233>.

²³⁴ Shehan Jeyarajah, *Cincinnati, Houston, UCF to Join Big 12 in 2023 as AAC Paves Way for Conference USA Additions*, CBS SPORTS (June 10, 2022, 11:57 AM), <https://www.cbssports.com/college-football/news/cincinnati-houston-ucf-to-join-big-12-in-2023-as-aac-paves-way-for-conference-usa-additions/>.

²³⁵ See generally RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. L. INST. 1981).

²³⁶ Staples, *supra* note 9.

providing money, the money comes from the broadcast networks.²³⁷ According to Staples “the attorneys for the conference and the remaining schools could argue that the consideration the school received was stability in an unstable time.”²³⁸

Certainly, conference membership is not a prerequisite for stability or broadcast revenue, as best proved by the fact that Notre Dame is not a football member of a conference, but it is also certainly true that conferences offer (varying degrees of) stability and that, for the vast majority of schools, membership in a conference yields more broadcast revenue than such schools would earn on their own.

That said, conference members might find support for the argument that their respective GOR is not supported by mutual consideration from the fact that their agreement does not specifically list consideration that they receive from their respective conference, in exchange for granting their broadcast rights to their conference.

The ACC and Big XII Conferences mention consideration, albeit briefly. The first recital of the ACC’s GOR states, “WHEREAS, the execution and delivery of this Agreement enhances the stability of Conference membership, confirms the commitment by each Member Institution to the other Member Institutions of the Conference, and thereby provides valuable benefits to each Member Institution of the Conference.”²³⁹ Following its recitals, the ACC’s GOR states, “NOW, THEREFORE, for and in consideration of the foregoing, the covenants set forth herein and in the ESPN Agreement, and other good and valuable consideration. . . .”²⁴⁰ The GOR does not list any other consideration, general or specific, that the ACC offers its members in return for their grant of their respective broadcast rights. And while the first recital states that the GOR enhances conference membership, an attorney could argue that such enhanced stability is merely an effect of the GOR, not a specific piece of consideration

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ ATLANTIC COAST CONFERENCE GRANT OF RIGHTS AGREEMENT, *supra* note 203. However, Mark T. Wilhelm writes,

As a preliminary matter, some of the grants of rights—for example, the Big 12’s Grant of Rights—place the consideration received in the recitals of the grant. That decision may be problematic for the grant’s enforceability in some circumstances. In certain jurisdictions, if consideration is made in the recitals, it is not actually characterized as consideration. Therefore, even if the particular grant of rights has proper consideration, it would not be effective given its placement in the recitals.

Wilhelm, *supra* note 10, at 107.

²⁴⁰ ATLANTIC COAST CONFERENCE GRANT OF RIGHTS AGREEMENT, *supra* note 203.

that the conference is passing to its members, as part of a bargained-for exchange. Meanwhile, the Big XII's GOR speaks of consideration less than the ACC's GOR. The Big XII's GOR simply states, "NOW, THEREFORE, for and in consideration of the foregoing, the covenants set forth herein and in the Telecast Rights Agreements, and other good and valuable consideration..."²⁴¹ Finally, there is no mention of consideration in the Pac 12's GOR.²⁴²

Facially, then, it can reasonably be argued that these three GOR's do not sufficiently show that mutual consideration is present in any one of them. Rather, these GOR's are essentially gifts from conference members to their respective conferences, with valid consideration flowing only from the former to the latter. This argument has, indeed, been offered, though not by a conference member. Attorney Mark T. Wilhelm writes that "the grants of rights do not actually include consideration."²⁴³ According to Wilhelm, then, conferences would need to argue that their GOR's are valid not as bilateral contracts but, rather, as irrevocable grants. "Generally, an assignment is only irrevocable if made for good consideration or if a writing supports its irrevocability."²⁴⁴ Wilhelm explores the categorization of the GOR's as assignments²⁴⁵ but then argues that the GOR's are, instead, bilateral agreements. He writes, validity as follows about a mutual exchange: "broadcasters provide schools with revenue (albeit through the conference), and schools provide broadcasters with a certain level of contractual security (again, through the conference). The grant of rights is an assignment in name only."²⁴⁶

²⁴¹ BIG TWELVE CONFERENCE, *supra* note 208.

²⁴² See PAC-12 CONFERENCE, *supra* note 212.

²⁴³ Wilhelm, *supra* note 10, at 108. Of the Big 12's GOR, Wilhelm writes, "The only real consideration offered in the agreement is the Telecast Rights Agreement. That simply does not suffice as consideration for the assignment. It is not new consideration. It is value already owed." *Id.*

²⁴⁴ *Id.* at 106.

²⁴⁵ See *id.* at 108–09.

²⁴⁶ *Id.* at 109

(If schools can effectively argue that the assignment is a bilateral contract masquerading as an assignment, then their case more squarely turns on the sufficiency of consideration, an argument that a school may actually win. Recall that the grant of rights is an agreement between the school and the conference, as opposed to between the school and the respective broadcaster. The consideration from the school to the conference is quite obviously the grant of broadcast rights. However, as discussed above, schools do not have any consideration from the conference. And, even if there is consideration, that consideration occurred before the school made its grant of rights. In the bilateral contract formulation, the exchange was the school's share of the conference's revenue for the distribution from the broadcast agreement. However, any money owed to schools under the broadcast agreement is owed independently of the grant of rights. Even if the broadcast agreement includes a

D. Argue for Discharge from the Contract

The common-law doctrine of frustration of purpose provides an excuse for contractual performance when an event that was not envisioned at the time of contract formation occurs following contract formation, and such event goes against the party seeking contract discharge's reason for entering the contract in the first place.²⁴⁷ As applied to GORs, the gist of the argument based on this doctrine is that the reality of college football today is vastly different than when GORs were signed. If conference members knew that the situation would evolve as it has, they never would have signed a GOR, at least an agreement with such a long term.

But what might count as an event that “substantially frustrated” a party's principal purpose, such that said party seeks excuse from contractual performance? Perhaps a conference member could argue that, had it known it would be precluded during its GOR period from reaping significantly greater revenues in another conference than it would earn in its own conference, it never would have agreed to a long-term GOR. Schools that remain in a conference, which its most powerful members depart before the conference's GOR expires (e.g., Oklahoma and Texas) might also have unique arguments. Remaining members could contend that the losses of its two strongest members leave the conference in a state that significantly impairs the conference's brand, to the point that the remaining schools they would not have agreed to a long-term GOR had they known such a situation might arise. Given how rarely parties are excused from contracts on grounds of frustration of purpose, it is highly unlikely courts would be persuaded by these arguments, but such arguments could, at least, be made.

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

²⁴⁷ See RESTATEMENT (SECOND) OF CONTRACTS § 265 (2023)

(Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.).

E. GOR Expiration

Though certainly not the quickest route to being freed from a GOR, but certainly one of the easiest, is simply waiting for the terms to expire. Every GOR lasts for a fixed period of time. Once this time period expires, and assuming a conference member has not already agreed to a new/successor GOR, said conference member would no longer be bound. Thus, it would possess its future media rights and could choose to accept an offer to join another conference, no longer encumbered by a GOR with its previous conference.

F. Conference Dissolution

Finally, none of the above options would be necessary if a conference dissolves before the end of its GOR period, because such dissolution would terminate a conference's GOR. The last time an NCAA Division 1 conference dissolved its football operations was after the 2012 season, when the Big East and Western Athletic Conferences each shuttered.²⁴⁸ But given the recent movements resulting from conference realignment and the prospect for even more movement by universities, release from a GOR via conference dissolution is certainly a possibility, at least for some Power 5 conferences.²⁴⁹ As things currently stand, however, the authors do not see conference dissolution as a

²⁴⁸ See *List of Defunct College Football Conferences*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_defunct_college_football_conferences (last visited Feb. 26, 2024); see also generally *BIG EAST Conference History*, BIG E. CONF., <https://www.bigeast.com/sports/2015/6/10/History.aspx> (last visited Feb. 26, 2024)

(In December of 2012, DePaul, Georgetown, Marquette, Providence, St. John's, Seton Hall and Villanova announced their intention to separate from the conference's FBS football-playing schools and form an independent association. The seven schools reached an agreement to retain the BIG EAST name and assume the conference's long-term pact with Madison Square Garden to host the BIG EAST Men's Basketball Tournament.);

History of the WAC, W. ATHLETIC CONF., <https://wacsports.com/sports/2023/4/28/about-history-wachistory.aspx> (last visited Feb. 26, 2024) ("On January 14, 2021, the WAC announced the addition of Abilene Christian University, Lamar University, Sam Houston State University, Stephen F. Austin State University and Southern Utah University. The conference also announced the return of football at the FCS level."); see also Jake Bullinger, *How Conference Realignment Wiped WAC Football Off the Map*, SPORTS ILLUSTRATED (Aug. 21, 2012), <https://www.si.com/college/2012/08/21/wac-football-demise>

(After more than a decade of membership changes, the Western Athletic Conference will not play football in 2013, barring a miraculous wave of schools joining the ailing conference. Interim commissioner Jeff Hurd denied previous reports that the league had officially abandoned football, but conceded that all signs point to no football after this season and said the conference is not pursuing football-playing schools for membership in 2013.).

²⁴⁹ See, e.g., Steve Doyle, *Could the ACC Dissolve? Here are 6 Factors About College Conference Shifts*, FOX 8, <https://myfox8.com/sports/could-the-acc-dissolve-here-are-6-factors-about-college-conference-shifts/> (last updated July 11, 2022).

realistic possibility for the Big Ten or the SEC, at least not in the near or medium term. The reason is that the vast majority of commentators believe these are already the two strongest football conferences, and each will soon be adding two new members from other Power 5 conferences (UCLA and USC from the Pac-12 to the Big Ten and Oklahoma and Texas from the Big XII to the SEC). And these schools are generally regarded as very valuable brands. According to a 2019 Forbes article ranking the 25 most valuable college football programs, USC was ranked as the 18th-most valuable team, while Oklahoma and Texas landed at #6 and #2, respectively.²⁵⁰

By contrast, conference dissolution could be a realistic possibility for some other conferences, most notably the ACC, which has a GOR that is valid through 2036.²⁵¹ Because the ACC's members are locked into a GOR for so many more years, it is understandable that some of them might be interested in exploring their options. Indeed, some are. According to Sports Illustrated, the ACC has seven members that have met in private and discussed dissolution.²⁵² The conglomeration of Clemson, Florida State, North Carolina, the University of Miami, North Carolina State University, Virginia, and Virginia Tech are rumored to have coalesced around a possible dissolution of the Conference in the hope of finding greener pastures elsewhere.²⁵³

Obviously, from the ACC's perspective, conference dissolution is a disastrous option; so, the conference would likely be amenable to finding a way to restructure its media-rights deal, in order to retain its members. Especially given the value to the conference of the seven teams that have met privately to discuss their options, the conference might not be able to offer these schools, or at least the strongest of them, a deal that would keep them from leaving the conference.²⁵⁴ If the conference's powerhouses, such as Clemson, Florida State, and Miami, are desired by the Big Ten or the SEC, these schools have the leverage against the ACC. If these and/or other members leave the ACC, then the question will be whether the ACC will sufficiently add to its membership roster to stay viable or whether the collective value of what is left behind will be enough to keep the conference alive. Arguably, the system has failed some

²⁵⁰ See Chris Smith, *College Football's Most Valuable Teams: Reigning Champion Clemson Tigers Claw into Top 25*, FORBES (Sept. 12, 2019, 6:00 AM), <https://www.forbes.com/sites/chris-smith/2019/09/12/college-football-most-valuable-clemson-texas-am/?sh=49b69c04a2e7>.

²⁵¹ James Parks, *College Football Expansion Update: 7 More ACC Teams Now Exploring Options*, SPORTS ILLUSTRATED (May 16, 2023, 11:03 AM), <https://www.si.com/fannation/college/cfb-hq/ncaa-football/college-football-expansion-realignment-acc-teams-exploring-future-clemson-florida-state>.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

conference members and some conferences themselves. To fix the way GORs burden both groups, the next section explores the terms of the burdens themselves.

IV. FIXING A BROKEN SYSTEM

The question of how to fix the problem created by the GOR agreements is likely dependent on what one believes is wrong with these agreements. According to Professor Stewart Macaulay, in his influential 1963 article *Non-Contractual Relations in Business*; a contract likely serves one of two roles; to promote a planning of future exchanges, or to provide some legal consequence for non-compliance.²⁵⁵ Macaulay argues the likely solution is to increase the sanctions to a level which no one could afford if they were to depart.²⁵⁶ GOR agreements are the highways on which revenue flows to collegiate athletic departments via the tunnel of collegiate conferences. There is presently a log jam created in some conferences, leading schools to seek exits as they believe there is greater value on an alternate route.²⁵⁷ The challenge for schools, and perhaps in some cases conferences, is that GOR agreements typically have no off ramps, only the end of the road. So instead of waiting until the end of the road, many schools are simply making a left turn and driving through the guardrail, choosing to deal with the consequences later.²⁵⁸

²⁵⁵ Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 1, 56 (1963).

²⁵⁶ *Id.* at 57; see also Lewis A. Kornhauser, *Reliance, Reputation, and Breach of Contract*, 26 J. L. & ECON. 691 (1983) (discussing the influence of Macaulay's 1963 article).

²⁵⁷ For instance, Florida State University and Clemson University, as well as the University of Miami and the University of North Carolina, are brands that are arguably more national, and on an open market command a higher fee than if each school were to individually seek its own broadcast deal. However, all these schools are part of the Atlantic Coast Conference, which signed a lengthy grant-of-rights agreement that sees the league locked into a contract until 2036. While the deal granted guaranteed security when signed in 2016, schools have now fallen up to \$30 million behind schools in the Big Ten and Southeastern Conference. See Dennis Dodd, *Does Florida State or Any ACC Power Actually Have Options? Revenue Gap Concerns Threaten to Split League*, CBS (Mar. 2, 2023, 3:22 PM), <https://www.cbssports.com/college-football/news/does-florida-state-or-any-acc-power-actually-have-options-revenue-gap-concerns-threaten-to-split-league/>.

²⁵⁸ See Ryan Aber, *The Key Questions Surrounding Oklahoma and Texas Setting Departure Date from Big 12 to SEC*, USA TODAY (Feb. 10, 2023, 11:48 AM), <https://www.usatoday.com/story/sports/ncaaf/big12/2023/02/10/357klahoma-texas-big-12-departure-sec-what-to-know/11228468002/> (noting that the departure of the University of Oklahoma and the University of Texas will result in the schools paying the eight remaining Big 12 schools \$100 million); see also Adam Wells, *Maryland Reportedly Leaving ACC to Join Big Ten*, BLEACHER REP. (Nov. 19, 2012), <https://bleacherreport.com/articles/1414653-maryland-reportedly-leaves-acc-to-join-big-ten> (noting that the Atlantic Coast Conference had a \$50 million exit fee that the University of Maryland was reportedly expected to pay); Maryland and the Conference would settle for \$31.4 million. See Berkowitz, *supra* note 186.

The current system is built around long-term contracts that, in many cases, have failed to keep up with the financial realities of college football.²⁵⁹ While the contracts are between conferences and broadcasters, both parties enter on a joint understanding of all the parties involved in the transaction, including the teams composing the conference. A material change to the composition of the conference may not only be bad for conference value and morale, but it could also be negative for the broadcasting side of the contract.²⁶⁰ Though, the opposite may also be true in some cases, as one anonymous athletic director argued that it was, in fact, some of the media networks that were driving the conference realignment.²⁶¹ While some situations may present themselves as an opportunity for efficient breach, both sides are effectively engaged in an economic game tasking them with predicting the other side's next move.²⁶² The advantage is premised on the idea that the non-breaching parties do not seek to litigate, as was the case with the University of Maryland's departure from the ACC.²⁶³ There are a number of potential approaches on the road to making GOR agreements, but the most obvious is to craft better agreements.²⁶⁴

²⁵⁹ See Andy Wittry, *College Athletics Spending and the Movement Towards Revenue Sharing*, ATHLETIC DIR. U, <https://athleticdirector.uconn.edu/articles/student-athlete-revenue-sharing/> (last visited Feb. 26, 2024) (noting the increased revenue in college sports).

²⁶⁰ Indeed, after the University of Texas and Oklahoma University announced that they would be departing from the Big 12, the Southeastern Conference entered into new negotiations, and a new deal with broadcasters was successfully agreed to, heading off any potential litigation. Dennis Dodd, *Big 12 Opens Media Rights Negotiations Ahead of Schedule; Early Exit for Oklahoma, Texas Being Considered*, CBS (Aug. 31, 2022, 12:54 PM), <https://www.cbssports.com/college-football/news/big-12-opens-media-rights-negotiations-ahead-of-schedule-early-exit-for-oklahoma-texas-being-considered/>.

²⁶¹ Andrew Bucholtz, *FBS AD Says Fox and ESPN are "Quietly" Driving Realignment by Relaying Valuations: "We're Not Picking Random Schools."*, AWFUL ANNOUNCING (July 2, 2022), <https://awfulannouncing.com/ncaa/fbs-ad-fox-espn-realignment-valuations.html#:~:text=FBS%20AD%20says%20Fox%20and%20ESPN%20are%20%20quietly%20driving%20realignment,are%20they%20going%20to%20bring%3F> (quoting an anonymous athletic director: "Even if ESPN and Fox don't directly say 'Add this team,' they make it clear who they'll pay more money for and who they won't. Those conversations happen all the time. It's basic business.").

²⁶² Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 7 (1989).

²⁶³ There is an argument to be made that the University of Maryland's breach was still efficient, as they paid less than the \$50 million break-up fee that the Conference believed they were owed, though there was an added cost of years of litigation and uncertainty. Alex Kirshner, *ACC-Maryland Lawsuit Settlement: What Happened and What It Means*, TESTUDO TIMES (Aug. 11, 2014, 12:46 PM), <https://www.testudotimes.com/maryland-terrapins-basketball/2014/8/11/5991045/maryland-acc-lawsuit-settlement/>; The settlement came after a North Carolina appellate court ruled that the University had not waived its sovereign immunity. *Atlantic Coast Conf. v. Univ. Md.*, 751 S.E.2d 612, 618 (N.C. App. 2013). The case is a fairly good example of the years of acrimony, which can follow non-consensual conference departures.

²⁶⁴ See Ira Schoffel, *Ira Schoffel: Just How Seriously Should the ACC Take Florida State's Frustrations?*, ON 3: WARCHANT (Feb. 27, 2023), <https://www.on3.com/teams/florida-state-seminoles/news/ira-schoffel-just->

A. Drafting Better Contracts

There are numerous ways to improve GOR agreements. The prospect of dissolving the entire model and starting from scratch is likely going to be more of a challenge than sitting down to improve the current model. Modifying existing GOR agreements, or modifying the standardized approach to GOR agreements, is likely the easiest and most utilitarian solution.

One of the key issues with contemporary contracts is their duration.²⁶⁵ A move towards shorter durations may be afoot, with the Big Ten agreeing to a seven-year split between Fox, CBS, and NBC. There may be greater flexibility if schools and networks agreed to shorter deals.²⁶⁶ While each side would have less certainty, a shorter deal may ultimately work to give each side a more certain value, as there will be less variability in the value of the rights packages over a shorter length of time.²⁶⁷ While shorter agreements may see schools taking less money in the immediate term, the option may ultimately be worthwhile, if it provides for greater flexibility.

A second step to improving the GOR agreements would be to include an alternative dispute resolution clause. It is possible that some choice-of-law provisions within the terms of the agreements could ultimately see disputes in a court-ordered mediation process. Stipulating that the parties proceed through mandatory arbitration is likely to lead to a preferred route over the existing process. The process of the University of Maryland departing from the ACC to the Big Ten was a messy affair, tied up in litigation and ultimately ending in a settlement. Under mandatory arbitration, however, the entire saga could have been resolved more quickly, in a shorter period, and out of the public eye.²⁶⁸

how-seriously-should-the-acc-take-florida-states-frustrations/ (explaining the challenges departing from a grant-of-right agreement). Cf., Shawn Spencer, *Clemson Football: Why ACC Grant of Rights Might Not Mean as Much as We Think*, RUBBING THE ROCK (Aug. 2, 2018), <https://rubbingtherock.com/2021/08/02/clemson-football-acc-grant-rights-mean/> (arguing that breaking from the Atlantic Coast Conference's grant-of-right agreement would be that difficult).

²⁶⁵ See, e.g., Wood, *supra* note 187 (noting that the Atlantic Coast Conference's deal lasts for twenty years).

²⁶⁶ See generally Rittenberg, *supra* note 191.

²⁶⁷ At the time that Florida State University agreed to a renewal of the Atlantic Coast Conference's grant-of-rights deal, it is likely that school's board of trustees believed that the deal was a solid commitment to guaranteed payments over the next twenty years; however, less than ten years into the agreement, the school is receiving approximately \$30 million less per year than competitor schools in the Big Ten and Southeastern Conference. Brad Crawford, *FSU, Clemson Unhappy with ACC Revenue Distribution Sparks Reaction*, 247 SPORTS (Feb. 27, 2023, 7:08 AM), https://247sports.com/LongFormArticle/FSU-Clemson-unhappy-with-ACC-revenue-distribution-sparks-reaction-205402644/#205402644_1.

²⁶⁸ See generally Jeff Barker, *Maryland Gives Up \$31 Million to End Exit Fee Spat with ACC*, BALTIMORE SUN (Aug. 19, 2019, 10:18 AM), <https://www.baltimoresun.com/business/bs-bz-maryland-acc-settlement-20140808-story.html>.

Many business-to-business relationships still prefer to utilize the court system to adjudicate disputes, although the flexibility of arbitration may be better suited to GOR disputes.²⁶⁹ The secretive nature of GOR agreements is best suited to a private process, such as arbitration, as the risk of not being able to secure a seal of the agreements would be significant to the media partners.²⁷⁰ Another advantage of arbitration clauses is that they may serve to avoid state claims of sovereign immunity.²⁷¹

A third possibility for improvement would be to solidify the certainty of the agreements. GOR agreements have been kept as closely guarded secrets. In fact, in many cases, schools do not even maintain copies of the agreements on their own campuses. Making decisions about paths forward is much more difficult if an agreement cannot be examined. Along this same line, parties could create a desirable certainty by adding specific liquidated damages for early leaving. While breaking up is hard to do, adding certainty to contracts may actually promote greater stability, as the cost for departing would be known to all parties. For instance, it is rumored that if Florida State University were to leave the ACC it could cost more than \$100 million.²⁷² Given that there is always a cost number associated with teams that wish to depart, it makes sense to stipulate a break-up price for teams seeking to leave. The liquidated damages provision, or breakup fee, could also be used as a type of transfer fee, which is commonly used in international soccer where one team pays another for a player. In this case, the exchange would be for teams between conferences; however, the principle remains the same.²⁷³ Related to improving certainty, conferences can stipulate that with the departure of a certain number of teams, a GOR agreement is dissolved automatically. While this may seem to punish the rights holder, the

²⁶⁹ Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. DISP. RESOL. 433, 434 (2010).

²⁷⁰ While a number of these agreements were provided to a law student in 2013, more recent attempts to secure copies have not been successful. *See Staples*, *supra* note 9.

²⁷¹ Faizah Badmus-Busari, *Sovereign Immunity and Enforcement of Awards in International Commercial Arbitration* (Oct. 15, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336664 (unpublished).

²⁷² Ashwini Jayaratnam, *Florida State's way out of ACC? Exist Penalties Could be Ruled Unenforceable*, JD SUPRA (Dec. 29, 2023), <https://www.jdsupra.com/legalnews/florida-state-s-way-out-of-acc-exit-9854036/>.

²⁷³ While the transfer-fee system has a fluctuating price, given the desire to add certainty to grant-of-right agreements, it likely makes greatest sense to impose a predetermined fee, which if combined with shortened contract length should increase certainty. For greater discussion of the transfer fee system in international soccer, *see* Omar H. Ayad, *Take the Training Wheels Off the League: Major League Soccer's Dysfunctional Relationship with the International Soccer Transfer System*, 10 VAND. J. ENT. & TECH. L. 413, 417–19 (2008).

reality is that the teams departing are often the teams that comprise the most value and may result in the renegotiation of an agreement anyway.²⁷⁴

The path forward for drafting better contracts, or contracts that are better suited to the realities of a seemingly ever-changing college football landscape, is straightforward. There are other options that may potentially function even better than the current system. While some are contractual in nature, they represent a fundamental departure from the one-for-all and all-for-one model being employed by conferences.

B. Unequal Distributions

There is perhaps no aspect of the GOR model as controversial for schools with bigger brands, compared to their conference counterparts, than the equal distribution of revenue amongst all conference members.²⁷⁵ In fact, the brand value of the University of Notre Dame, which is an anomaly in the modern system with its own broadcast arrangement with NBC and seems unlikely to join a conference in football, is able to command a premium without the need to partner with other teams.²⁷⁶ Clemson University's athletic director spoke of the need to reevaluate the way that the ACC distributes money, or else the conference risks being left behind.²⁷⁷ Clemson's athletic director advocated for a payment based on the value returned to the conference.²⁷⁸ Though, under one model, one-third of the revenue pie would be guaranteed evenly across the conference with an additional one-third allocated based on the success of teams, thus, rewarding teams for performing well. The final consideration would be which teams generate the highest television ratings.²⁷⁹ The criticisms of this plan are quite evident. The schools with the largest fan- or alumni bases will likely do quite well, whereas smaller schools are unlikely to do as well. As Florida State University's athletic Director Michael Alford articulated, however, the

²⁷⁴ See, e.g., Dodd, *supra* note 260 (noting the early renegotiation of the Big 12 grant-of-right agreement that was prompted when Oklahoma and Texas announced they were leaving for the Southeastern Conference).

²⁷⁵ See John E. Hoover, *Big 12 Revenue 'Still Third' Among Power 5 Conferences But 'Not Light Years' Behind*, SPORTS ILLUSTRATED (June 4, 2022, 12:00 PM), <https://www.si.com/college/oklahoma/football/big-12-revenue-still-third-among-power-5-conferences-but-not-light-years-behind>.

²⁷⁶ Dodd, *supra* note 202.

²⁷⁷ Ryan Kantor, *Uneven ACC Revenue Distribution is a Start, Move to Big 12 Should Be the Finish*, SHAKIN' THE SOUTHLAND (Mar. 3, 2023, 2:10 PM), <https://www.shakinthesouthland.com/2023/3/3/23623963/uneven-acc-revenue-distribution-is-a-start-move-to-big-12-clemson-florida-state-fsu-acc>.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

school generates seventy percent more viewers than the average ACC team.²⁸⁰ The unequal revenue distribution would be a significant departure from the historical practice, but it may be necessary if college football is to continue to exist with the Power 5 conference model without consolidating into conferences that rate well on television and those that do not.

C. Less Conference Commitment

One of the staples of college football is that each season fans have optimism leading up to the first game. After all, every team is undefeated until the first game is played. The reality is that even though every team could theoretically win the national championship, the chances of certain teams doing so are so exceedingly small that it is unlikely to happen.²⁸¹ As each season is a fresh start, so could be a system of conference realignment. Indeed, a standardized interval at which college conferences reorganize, either strictly with regards to football, or for all sports, may better allow schools to prepare for the current realities facing schools. This model would also not likely affect future scheduled nonconference games, as those games can be scheduled years in advance. The exception is if two schools scheduled to play a game in the future realigned to the same conference. In that case, conference schedulers could simply ensure those two schools do not meet again during the season.²⁸² The more frequent realignment of conferences, for example at three-year or five-year intervals, would allow schools greater flexibility and may be better suited for the financial realities of modern college sports. Some schools may opt not to expend the money necessary to compete at the top levels of college football each year. The more frequent opportunity for wholesale realignment may also present a more

²⁸⁰ Dustin Lewis, *FSU Athletic Director Michael Alford Makes a Strong Case for the Seminoles to Leave the ACC*, SPORTS ILLUSTRATED (Feb. 24, 2023, 8:51 PM), <https://www.si.com/college/fsu/football/fsu-athletic-michael-alford-makes-a-strong-case-for-the-seminoles-to-leave-the-acc>.

²⁸¹ In fact, factors largely beyond a team's control, such as strength of schedule, are often considerations of the College Football Playoff committee. Many schools likely never play strong enough competition, even with an undefeated season, to get into the college football playoffs. In 2014, both Baylor University and Texas Christian University finished the season 11-1; it was believed that both teams were punished because while other conferences had a championship game, giving teams a thirteenth game, the Big 12 did not, meaning the teams played one less game, and they were ultimately not included in the inaugural College Football Playoff. See Adam Stites, *Big 12's Baylor and TCU Miss Playoff: Lack of One True Champion to Blame?*, SB NATION (Dec. 7, 2014, 12:56 PM), <https://www.sbnation.com/college-football/2014/12/7/7347577/tcu-baylor-college-football-playoff-big-12-expansion>.

²⁸² For example, Clemson University has a game scheduled against the University of Notre Dame in 2037. At the time the game was scheduled in 2017, many of the players that will play in the game had not been born. *Clemson to Face Notre Dame Eight Times By 2037*, CLEMSON TIGERS (May 11, 2017), <https://clemonsitigers.com/clemson-to-face-notre-dame-eight-times-by-2037/>.

compelling television product, as there may be the equivalent of a college football champions league for one interval. It could also present a compelling storyline for teams in perceived less-elite conferences to develop a following, as schools that typically do not compete for the top of the college football rankings are allowed to compete in a conference more conducive to its school level.²⁸³

D. Create More Money

An additional alternative is to continue expanding the College Football Playoff, with or without unequal distribution of revenue. The College Football Playoff is already slated to expand to twelve teams from four beginning in 2024.²⁸⁴ There is a belief that the expanded College Football Playoffs could be worth as much as \$2.2 billion per year, which would be a significant raise from the \$470 million per year that ESPN currently pays.²⁸⁵ Further expansion to sixteen, or even thirty-two teams could increase the pot of money significantly more than what the current plans handles. While the expansion would not necessarily result in changes to the system, lessening the incentives for teams to realign would increase the injection of revenue and present more opportunities for teams from less well-off conferences to share the College Football Playoff revenues. There would also be the opportunity for conferences, like the ACC, to make an enticing offer to schools, such as Florida State University, who feel

²⁸³ The Champions League is a European soccer league that is composed of the top teams from each of the national leagues, who then compete in an international competition to be regarded as the top European club team. Haris Kruskic, *UEFA Champions League Explained: How the Tournament Works*, BLEACHER REP. (Feb. 12, 2019), <https://bleacherreport.com/articles/2819840-uefa-champions-league-explained-how-the-tournament-works>. One potential side effect of adopting such a model could be the dissolution of long-term rivalries. While this is a possibility, such an issue could be overcome by reserving a game for each school to schedule with a rival. It is also worth noting that such a scenario is to some degree already happening with schools choosing money over rivalries. See, e.g., Scott Wright, *OU, OSU Will End Bedlam Football Series When Sooners Join SEC. 'We're Moving On.'* THE OKLAHOMAN (Sept. 20, 2022, 8:19 PM), <https://www.oklahoman.com/story/sports/college/big-12/2022/09/20/bedlam-football-ou-oklahoma-state-to-end-when-sooners-join-sec/69506634007/> (explaining that the University of Oklahoma's departure for the SEC will spell the end for the Bedlam Series games against Oklahoma State University, a game which has been played every year since 1904).

²⁸⁴ Barrett Sallee, *College Football Playoff Schedule, Dates Set for 2024, 2025 Seasons with Field Expanding to 12 Teams*, CBS (May 2, 2023, 3:46 PM), <https://www.cbssports.com/college-football/news/college-football-playoff-schedule-dates-set-for-2024-2025-seasons-with-field-expanding-to-12-teams/>.

²⁸⁵ Justin Byers, *Bowl Games Could Bring in \$450M With Expanded Playoffs*, FRONT OFF. SPORTS (Dec. 19, 2022, 5:33 PM), <https://frontofficesports.com/bowl-games-could-bring-in-450m-with-expanded-playoffs/#:~:text=The%20CFP%20currently%20has%20an,than%20double%20the%20current%20payout.>

they contribute disproportionate value to its Conference.²⁸⁶ This option would allow the school to keep the additional revenue it creates through being successful, when ordinarily the College Football Playoff revenue, like the regular season revenue, runs back through the conference and is equally distributed.²⁸⁷

E. A Market-Based Solution

Perhaps the most extreme path forward in the modern era of college football would be to see every school become the University of Notre Dame and negotiate its own broadcast deal.²⁸⁸ Notre Dame has negotiated its own television rights deal for home football games since the 1991 season.²⁸⁹ While the school has joined the ACC to participate in many sports, the football program has stayed independent, negotiating its own broadcast agreements.²⁹⁰ All schools could move to a market-based approach for the distribution of broadcast rights, eliminating the challenges the conference structure poses for maximizing revenue. Under a market-based system, each school would be able to negotiate its own contracts, which would create an economically efficient system and distribute revenue in a manner more reflective of actual value. While this could result in a dissolution of conferences, a more moderate approach might see conferences serve as a matchmaker and regulatory body. Conferences could also facilitate a revenue-sharing model amongst conference members whereby schools receive a guaranteed minimum distribution but amounts above that are retained by individual schools who negotiate broadcast rights agreements as determined by market rates.

There are many possible fixes to the challenges posed by the current GOR agreements model. It may be desirable for some to exact piecemeal changes to the system, as opposed to a more extreme alternative for revising the system. The current model of consolidation around two conferences risks diminishing

²⁸⁶ Bill Bender, *Florida State vs. ACC: Answering Legal Questions on 'Dueling Lawsuits,' Grant of Rights*, SPORTING NEWS (Dec. 29, 2023), <https://www.sportingnews.com/us/ncaa-football/news/florida-state-vs-acc-legal-questions-lawsuits-grant-rights/3392d4c092828686411e4dca>.

²⁸⁷ See Paul Rudder, *How Much Does the Winner of the College Football Playoff National Championship Earn?*, AS (Jan. 8, 2024, 7:26 AM), <https://en.as.com/ncaa/how-much-does-the-winner-of-the-college-football-playoff-national-championship-earn-n-2/> (explaining the revenue distribution of the College Football Playoff).

²⁸⁸ Bill Carter, *Notre Dame Breaks Ranks on TV Football Rights*, N.Y. TIMES (Feb. 6, 1990), <https://www.nytimes.com/1990/02/06/business/notre-dame-breaks-ranks-on-tv-football-rights.html>.

²⁸⁹ *Id.*

²⁹⁰ James Parks, *College Football Realignment: Notre Dame Names Its Price to Stay Independent, per Report*, SPORTS ILLUSTRATED (July 19, 2022, 7:05 AM), <https://www.si.com/fannation/college/cfb-hq/ncaa-football/college-football-realignment-notre-dame-price-independence>.

the value of rights for other conferences as the most competitive and schools with the broadest appeal are poached by the Southeastern and the Big Ten Conferences.²⁹¹ Schools left out of the move to the wealthiest conferences may elect to charter their own paths to garner deals closer to the schools' perceived value.

CONCLUSION

College football is a massive business that has continued to move in the direction of professional sports leagues looking for ways to maximize profits.²⁹² While there have been historically many critiques surrounding the professionalization of college sports, the reality is that the commercialization that surrounds college football cannot be taken away at this point.²⁹³ In the modern era of grant-of-right agreements, twenty-year agreements appear certain to vastly undervalue schools brands before the contract is even halfway through its term. Schools locked into agreements that bring outsized value to contracts are seeking early departures to greener pastures with compensation more in line with perceived value. The departures themselves are costly,²⁹⁴ conferences are then left with the responsibility of figuring out how to move forward with a less desirable product. The trend has been for conferences to then go and poach schools from other conferences, creating something of a ripple effect across college football.²⁹⁵ The realignment may not necessarily be bad, but the result of early departures is a disruption in expectations. Improving GOR agreements could serve to provide more certain expectations for schools and leave schools with less incentive to leave conferences early, creating instability within the system.

²⁹¹ See Brandon Marcello, *College Football on Fire: The Power 2 is Here and Conference Realignment is Not Finished*, 247 SPORTS (June 30, 2022, 3:16 PM), <https://247sports.com/Article/Big-Ten-SEC-Pac-12-ACC-Big-12-conference-realignment-189465687/>.

²⁹² Fred Bowen, *College Football is More and More About the Money*, WASH. POST (July 7, 2022, 8:00 AM), <https://www.washingtonpost.com/kidspost/2022/07/07/college-football-is-more-more-about-money/>.

²⁹³ See Holden et al., *supra* note 10, at 430-38 (describing the evolution of the NCAA's governance mantras).

²⁹⁴ Heather Dinich, *Oklahoma, Texas Agree to Exit Big 12 Conference After 2023-24 Season*, ESPN (Feb. 9, 2023, 8:22 PM), https://www.espn.com/college-sports/story/_/id/35625879/oklahoma-texas-exit-big-12-conference-2023-24-season.

²⁹⁵ See, e.g., Dave Skretta, *Big 12 Plan to Ditch Divisions as 14-Team Conference in 2023-24*, NBC DFW (Oct. 21, 2022, 2:48 PM), <https://www.nbcdfw.com/news/sports/big-12-plan-to-ditch-divisions-as-14-team-conference-in-2023-24/3103086/> (noting the expansion of the Big 12 following the departure of the University of Oklahoma and the University of Texas).