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## College Athletic Conferences: The BIG Benefits and Their Future Role in College Sports

Theodore F. Kelly

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## INTRODUCTION

In June 2022, the Big Ten Conference created another seismic shift in college athletics by voting to add the University of Southern California (USC) and University of California, Los Angeles (UCLA) as conference members starting in 2024.<sup>1 2</sup> The news represents a stunning move that will sever nearly 100 years of USC and UCLA membership in a Pacific Coast conference, now the Pac-12.<sup>3</sup> This announcement of course comes one year after the Southeastern Conference (SEC) invited the University of Texas at Austin and the University of Oklahoma to leave the Big 12 Conference and join as conference members.<sup>4</sup> In response, three months later, the Big 12 announced that four new schools would be joining its conference.<sup>5</sup> As the Pac-12 finds itself in a similar situation as the Big 12 did in 2021, it is not unrealistic that a domino effect could precipitate, causing more conference realignment within the next few years.<sup>6</sup>

Conference realignment represents one area of the many ongoing changes of college athletics at the Division I level. In recent years, the landscape of college athletics has become tumultuous, with rapid changes, putting the Nation Collegiate Athletic Association (NCAA) on its heels. Over the past two years alone, the NCAA suffered a loss at the Supreme Court in *NCAA v.*

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<sup>1</sup> Ralph D. Russo & Eric Olsen, *Big Ten Votes to add USC, UCLA as members starting in 2024*, ASSOCIATED PRESS NEWS (Jun. 30, 2022), <https://apnews.com/article/sports-college-california-f81832a258fc3bed53ef86ff0ba25291>.

<sup>2</sup> Despite its name, this move will now make the Big Ten a conference of sixteen member institutions.

<sup>3</sup> Andrea Adelson et al, *Inside the stunning USC-UCLA move to the Big Ten – and the chaos that followed*, ESPN (Jul. 11, 2022, 7:45AM), [https://www.espn.com/college-football/story/\\_/id/34217498/inside-stunning-usc-ucla-move-big-ten-chaos-followed](https://www.espn.com/college-football/story/_/id/34217498/inside-stunning-usc-ucla-move-big-ten-chaos-followed).

<sup>4</sup> Heather Dinich & March Schlabach, *Texas Longhorns, Oklahoma Sooners unanimously accept invitation to SEC*, ESPN (Jul. 30, 2021, 11:08 AM) [https://www.espn.com/college-football/story/\\_/id/31920686/texas-longhorns-oklahoma-sooners-unanimously-accept-invitation-sec](https://www.espn.com/college-football/story/_/id/31920686/texas-longhorns-oklahoma-sooners-unanimously-accept-invitation-sec).

<sup>5</sup> *Big 12 Conference Adds Four New Members*, BIG 12 CONF. (Sept. 10, 2021, 3:40PM) <https://big12sports.com/news/2021/9/10/big-12-conference-adds-four-new-members.aspx> (Announcing Brigham Young University, the University of Central Florida, the University of Cincinnati, and the University of Houston will become members no later than the 2024-25 athletic year).

<sup>6</sup> There has been speculation about what the PAC-12's next move will be. Reports suggest that San Diego State could be joining the conference, *See* Kevin Bora, *San Diego State' AD confirms the school will join Pac-12 or Big 12 eventually*, Sports Illustrated (Apr. 29, 2023, 1:14PM) <https://www.si.com/college/stanford/football/san-diego-state-ad-confirms-the-school-will-join-the-pac-12-or-big-12-eventually>, while others say more teams could be on the horizon. Ultimately, the conference must add more programs soon, otherwise it could face collapse.

*Alston*, solidifying the lack of antitrust protection for the association;<sup>7</sup> there have been massive changes in Name, Image, and Likeness (NIL) policies<sup>8</sup>; head coaching compensation among top NCAA member programs has been criticized<sup>9</sup>; and a major lawsuit regarding whether student-athletes can and should be considered employees is being litigated.<sup>10</sup>

Although all these issues are not necessarily causally related, they are common symptoms of an overarching structural problem with the NCAA. As an organization, the NCAA has governing control over college sports, and historically, the association has utilized this authority to take on multiple roles from acting as a legislative body, to putting on championships, and administering sanctions and punishments. However, this governing power<sup>11</sup> that the NCAA has held, and expects to hold in the future, is not necessarily in line with its capabilities or legal authority.<sup>12</sup> As such, in 2022 the NCAA made major revisions to its rules and adopted a new constitution,<sup>13</sup> but more changes will likely be on the horizon as the multitude of legal issues the association faces continue to play out.

Navigating this changing landscape can seem difficult for any individual college or university to do on its own. Because of this, college athletic conference membership at the Division

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<sup>7</sup> *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

<sup>8</sup> NCAA adopts interim name, image, and likeness policy, NCAA (Jun. 30, 2021 4:20PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>.

<sup>9</sup> Josh Moody, *What Blockbuster Coaching Contracts Mean for Higher Ed*, INSIDE HIGHER ED (Dec. 7, 2021) <https://www.insidehighered.com/news/2021/12/08/huge-coaching-contracts%E2%80%94unjustifiable-or-business-usual>.

<sup>10</sup> *Johnson v. NCAA*, 556 F. Supp. 3d 491 (E.D. Pa. 2021), No. 22-1223 (3d Cir. filed Feb. 08, 2022).

<sup>11</sup> The Court in *Alston* describes the NCAA's authority as a "monopsony of power." 141 S. Ct. at 2151. Monopsony is a "market situation in which one buyer controls the market[.]" and can effectively control prices by limiting output. BLACK'S LAW DICTIONARY 1207 (Bryan A. Garner et al. eds., 11th ed. 2019).

<sup>12</sup> See NCAA *Board of Governors to convene constitutional convention*, NCAA (Jul. 30 2021, 4:00PM) <https://www.ncaa.org/news/2021/7/30/general-ncaa-board-of-governors-to-convene-constitutional-convention.aspx> (Explaining the 2022 NCAA constitutional convention by quoting Dr. Robert M. Gates "Under the current structure, expectations for the Association vastly exceed its capabilities . . . The NCAA has significant responsibility but little authority to fulfill those responsibilities. . . Until we can better align the mission of the Association with its authority, the NCAA will not be able to play the role it should play in governing college sports.").

<sup>13</sup> Corbin McGuire, *NCAA members approve new constitution*, NCAA (Jan. 20, 2022, 6:12PM) <https://www.ncaa.org/news/2022/1/20/media-center-ncaa-members-approve-new-constitution.aspx>.

I level has become a great asset in assisting colleges/universities in reacting to the changes that college sports are currently facing. Historically, these athletic conferences have provided associated benefits to their member institutions. These benefits include increases in revenue from media deals, enhancement of an institution's academic pedigree, help in forming an institution's identity, support for better institutional governance, and improvements to the overall health of an institution. These associated benefits are what drive universities, like UCLA and USC, to switch athletic conferences.<sup>14</sup>

Amid the possibility of more conference realignment in the near future, this paper intends to explore the purpose of the Division I college athletic conferences, the motivations of why institutions join and change conferences, the benefits institutions receive from their conferences, and what role conferences can take in shaping the future of college sports. Specifically, in Part I, this paper will discuss the purpose of college conferences and how they differ from the NCAA. Part II will explore the benefits institutions can receive from joining or changing a conference and will provide a case study of Boston College's joining of the Atlantic Coast Conference (ACC). Part III will consider what role conferences can play in addressing a range of different issues, such as ones that are partially caused by conference realignment, like high compensation rates for head coaches, and those that are fervently debated by the public, like NIL compensation for athletes.

Ultimately, the research presented will lead to several conclusions. First, college athletic conferences have associated benefits relating to revenue, academic pedigree, market exposure, that member institutions enjoy, leading to an improvement in the overall health of their institutions. Second, although conferences may be unable to directly slow the rapidly increasing compensation

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<sup>14</sup> Joe Drape, *COLLEGE FOOTBALL; Boston College to Leave Big East and Join A.C.C.*, N.Y. TIMES (Oct. 13, 2003), <https://www.nytimes.com/2003/10/13/sports/college-football-boston-college-to-leave-big-east-and-join-acc.html>.

rates for head coaches, they might be able to do so indirectly. Third, conferences should consider an opportunity to compensate student-athletes by creating NIL pay structures.

### **PART I. THE PURPOSE OF ATHLETIC CONFERENCES**

Before exploring the benefits of conferences and considering what role they could play in shaping the future of college sports, it is important to understand what they are and how their purpose differs from the NCAA. Understanding this difference will help explain why conferences may be able to shape the future of college sports in ways that the NCAA legally cannot.

As a part of the internal structure of the NCAA, conferences are defined in the NCAA constitution as:

[A] group of colleges and/or universities, created and operated in a manner governed by the policies of its division, that conducts competition among its members, determines a conference champion in one or more sports in which the NCAA conducts a championship, and meets the conference membership requirements established by its division.<sup>15</sup>

This seemingly broad definition gives conferences flexibility as governing bodies, so long as they meet the divisional requirements and determine a conference champion through competition. For Division I, bylaws require at least seven member institutions in order to form a multi-sport conference, and the conference must sponsor at least twelve sports.<sup>16</sup> Of these twelve sports, a conference must sponsor six men's sports, one of which must be men's basketball, and six women's sports, which must include women's basketball.<sup>17</sup> Although there are other NCAA bylaws and regulations that conferences must follow, the preceding requirements demonstrate the basic general structure conferences must maintain in order to be part of college athletics.

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<sup>15</sup> NCAA 2022-2023 DIVISION I MANUAL 5 (NCAA, August 1, 2022).

<sup>16</sup> *Id.* at 381-82, 20.02.8.1-2.

<sup>17</sup> *Id.* See also, *Id.* at 382, 20.02.9, which requires conferences that qualify as a Football Bowl Subdivision (FBS) conference to have at least eight members and have six men's sports (basketball and football mandatory) and eight women's sports (basketball mandatory).

Although the NCAA both defines what conferences are and regulates them, conferences actually pre-date the association. The oldest Division I conference, the Big Ten, was founded over 125 years ago in 1895.<sup>18</sup> At the time, the faculty representatives created rules to regulate their sporting events, such as restricting athlete eligibility to be “bonafide, full-time students who were not delinquent in their studies.”<sup>19</sup> This reflected a major concern among institutions that some athletes competing were not actually students, but outsiders or professionals.<sup>20</sup> These regulations appear to be an effort to keep the competition among institutions fair so as to benefit all member schools, just as college sports, particularly college football, were becoming increasingly popular and lucrative for universities.<sup>21</sup>

These historical motivations for the existence of conferences are still present today. For example, the Big Ten’s self-defined purpose describes that:

The purposes for which the Conference is organized are to control and regulate intercollegiate athletics as institutional activities, to encourage sound academic practices for student-athletes, and to establish harmonious intercollegiate relationships among member institutions.<sup>22</sup>

This purpose of establishing “harmonious intercollegiate relationships” is reflected in other Power 5 conferences purposes/missions as well.<sup>23</sup> However, some conferences clarify that in addition to “build[ing] good will between institutions” they seek to “optimize revenues,”<sup>24</sup> and “encourage

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<sup>18</sup> *Big Ten History*, BIG TEN, <https://bigten.org/sports/2018/6/6/trads-big10-trads-html.aspx>.

<sup>19</sup> *Id.*

<sup>20</sup> Accusations of cheating by using non-student athletes or professionals go back to the first intercollegiate contest, a boat race between Harvard and Yale, where Harvard was later accused of using a coxswain who was not a student; See Richard Johnson, *Even the first college sporting event in the United States involved cheating*, SB NATION, (Feb. 24, 2018, 8:28AM), <https://www.sbnation.com/college-basketball/2018/2/24/17042498/first-ncaa-college-sporting-event-cheating>; See also T. MENDENHALL, *THE HARVARD-YALE BOAT RACE 1852-1924* (1993).

<sup>21</sup> See A. ZIMBALIST, *UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS* 7 (1999) (explaining that by 1880 a Princeton and Yale football game was attracting 40,000 spectators and generating in excess of \$25,000 in gate revenues).

<sup>22</sup> BIG TEN CONFERENCE HANDBOOK 2017-2018 25 (2017).

<sup>23</sup> See PAC-12 CONFERENCE 2021-22 HANDBOOK 6 (2021); 2022-2023 SOUTHEASTERN CONFERENCE CONSTITUTION & BYLAWS 1 (2022).

<sup>24</sup> 2018-2019 CONFERENCE HANDBOOK 2 (Big 12 Conference, 2018).

responsible fiscal management and further fiscal stability[.]”<sup>25</sup> These statements demonstrate that, in addition to promoting member relations, one of the main purposes of conferences is to enhance the commerce of college sports for its members. Critically, this naturally creates competition (not only on the field), but within higher education between the conferences and their member institutions.<sup>26</sup> As a result, no one institution or even conference has a monopsony of power<sup>27</sup> within the market.

By contrast, the NCAA has a much different purpose and role as a governing body from the conferences. Although scholars would most likely agree that the NCAA is also focused on commerce, that is not its main purpose. Rather, the NCAA was originally founded in order to pursue student-athlete safety in the early 1900s.<sup>28</sup> In 1905, after almost two dozen deaths and countless injuries resulting from college football, a crisis emerged which led President Theodore Roosevelt to convene a meeting with college coaches at the White House.<sup>29</sup> This gathering ultimately led to the creation of what is known today as the NCAA.<sup>30</sup>

The Preamble to the NCAA constitution enshrines this legacy by directly stating that the “basic purpose of the Association is to support and promote healthy and safe intercollegiate athletics,

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<sup>25</sup> ACC MANUAL 2020-2021 10 (2020).

<sup>26</sup> Historically, this competition between conferences was regional based because the conferences themselves consisted of schools in a geographic region (e.g., the Southeastern Conference). However, on the Division I level, the geographical proximity of conference members is starting to break down. When USC and UCLA join the Big Ten, the conference will stretch from coast to coast, with events in New Brunswick, NJ to Los Angeles, CA. Today’s conference realignment suggests that the geographic orientation of a conference is less important than the media markets a conference’s members can command.

<sup>27</sup> BLACK’S LAW DICTIONARY, *supra* note 11.

<sup>28</sup> Katie Zzima, *How Teddy Roosevelt helped save football*, WASHINGTON POST (May 29, 2014, 8:00AM) <https://www.washingtonpost.com/news/the-fix/wp/2014/05/29/teddy-roosevelt-helped-save-football-with-a-white-house-meeting-in-1905/>.

<sup>29</sup> *Id.*; See also JOHN J. MILLER, THE BIG SCRIM: HOW TEDDY ROOSEVELT SAVED FOOTBALL (2011).

<sup>30</sup> David Dayen, *How Teddy Roosevelt Saved Football*, POLITICO MAGAZINE (Sept. 20, 2014) <https://www.politico.com/magazine/story/2014/09/teddy-roosevelt-saved-football-111146/>.



including national championships, as an integral part of the education program and the student-athlete as integral part of the student body.”<sup>31</sup>

Ultimately, the NCAA’s purpose as an overarching governing body, is one of player safety and well-being. On the other hand, the main purpose of an athletic conference is to benefit its member schools and generate revenue by commercially promoting the sports it sponsors, while competing against other conferences in the marketplace. As a result of these differences, the conferences in college athletics may be able to take action to address issues that the NCAA as a governing body legally cannot, or, by their virtue, will not voluntarily because of its commitment to an idealistic vision of amateurism.

## **PART II. WHY JOIN A CONFERENCE AND WHAT ARE THE BENEFITS?**

The announcements of UCLA and USC leaving the Pac-12 and joining the Big Ten could trigger another realignment era in college sports. These moves lead to questions such as “why would a school change or join a new conference?” and “what benefits can/should a conference provide its member institutions?” Fundamentally, conferences can better the overall health of a member institution through increases in revenue from broadcasting/media deals, support in institutional governance, and from improvements of the institution’s external image as result of greater media exposure and enhancements of academic pedigree. These benefits, and the prospect of better ones in another conference, may compel school administrators and trustees to make a conference change due to their fiduciary duties to the institution.

### **A. Broadcasting Deals and Revenue**

One of the major benefits of athletic conferences, that gets a significant amount of attention, is the amount of revenue that a conference can generate for its members. College football and

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<sup>31</sup> NCAA 2022-2023 DIVISION I MANUAL 1 (NCAA, August 1, 2022).

basketball, being the most popular sports and greatest potential revenue generators, can drive conference realignment for the prospect of increasing revenue. A large portion of the revenue generated in college sports comes from television and streaming deals to broadcast games.<sup>32</sup> For example, ESPN's broadcasting deal for the College Football Playoff alone is worth roughly \$470 million annually.<sup>33</sup> According to the NCAA's data from 2019, "Media rights; NCAA/Conference Distributions; Bowl Revenues" accounted for 22% of *all* revenue generated across Division I college sports.<sup>34</sup> However, when just looking at FBS Autonomy (Power 5 conference) schools, the amount of revenue in this category jumps to 35%, becoming the largest revenue resource.<sup>35</sup> Furthermore, because this is an aggregated figure, revenue from this media rights category can be larger for some conferences than others.

However, institutions and conferences couldn't always create these large revenue streams from their media rights. It wasn't until 1984, when the Supreme Court decided *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, that institutions were able to control their own television and media rights without major restrictions from the NCAA.<sup>36</sup> Before 1984, the NCAA controlled the parameters in which its member institutions could televise their sporting events, specifically football.<sup>37</sup> The NCAA aimed to limit the number of games that could be televised out of fear that it would have

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<sup>32</sup> This section focuses on generated revenue, as opposed to net revenue. Although net revenue is important, the overall profitability of college athletics is a topic for another paper. College athletics is known to have high expenses because having a robust athletics program is important to many institutions. As a result, although most institutions hope to have a surplus of net revenue, the focus appears to be more on generating revenue to offset expenses rather than necessarily turning a profit.

<sup>33</sup> Ralph Russo, *CFP expansion could increase annual revenue to \$2 billion*, ASSOCIATED PRESS (June 11, 2021) <https://apnews.com/article/college-sports-football-business-entertainment-college-football-e2e2beb24fac0b8782b96e841cfb9b40>.

<sup>34</sup> *15-Year Trends in Division I Athletics Finances*, NCAA RESEARCH, slide 20, [https://ncaaorg.s3.amazonaws.com/research/Finances/2020RES\\_D1-RevExp\\_Report.pdf](https://ncaaorg.s3.amazonaws.com/research/Finances/2020RES_D1-RevExp_Report.pdf) ; *See also Finances of Intercollegiate Athletics Database*, NCAA (Oct. 2022) <https://www.ncaa.org/sports/2019/11/12/finances-of-intercollegiate-athletics-database.aspx>.

<sup>35</sup> *Id.*

<sup>36</sup> *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85 (1984).

<sup>37</sup> *Id.* at 92-93.

an adverse effect on game attendance.<sup>38</sup> For example in 1981, the NCAA made agreements with ABC and CBS for the exclusive right to telecast its members' football games, but limited each network to only fourteen football games per year.<sup>39</sup> In addition, although each network could negotiate directly with member schools for the right to televise their games, both networks had to agree to pay minimum prices for the rights, and were to limit any one member institution to only four nationally televised games over a two year period.<sup>40</sup>

The University of Oklahoma and the University of Georgia, after being sanctioned for trying to strike their own television deals with NBC, challenged the NCAA's authority under the Sherman Antitrust Act.<sup>41</sup> The Supreme Court ultimately sided with the petitioning universities, finding that the NCAA was restraining both the price and output of its members' media rights, creating a "price structure that is unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market."<sup>42</sup> Therefore, the NCAA's rules and agreements posed unreasonable "restraints of trade that the Sherman Act was intended to prohibit."<sup>43</sup>

As a result, institutions have been able to control their media rights for college football since the decision in *Board of Regents*. Initially, prices for television and media deals began to drop, but as institutions pooled their rights together as conference members in the early 1990s, the value of these deals began to rise dramatically.<sup>44</sup> <sup>45</sup> Thus, it is no surprise that when given the chance, an

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<sup>38</sup> *Id.* at 91-92.

<sup>39</sup> *Bd. of Regents*, 468 U.S at 92.

<sup>40</sup> *Id.* at 92-94.

<sup>41</sup> *Id.* at 95.

<sup>42</sup> *Id.* at 105-106.

<sup>43</sup> *Id.* at 107-108.

<sup>44</sup> Andy Staples, *How television changed college football – and how it will again*, SPORTS ILLUSTRATED (Aug. 6, 2012) <https://www.si.com/college/2012/08/06/tv-college-football>.

<sup>45</sup> Schools began to pool their rights as conferences partially because of the deterioration of the College Football Association (CFA). The CFA was the original organization that Oklahoma and Georgia used to strip away the television rights from the NCAA in *Board of Regents*. At its height, the CFA had 63 members and negotiated its members television rights as a bloc. Ironically, the same institutions that used the CFA to defeat the NCAA in court, ultimately broke it up because some conferences' media rights ended up being more valuable than others.

institution may look to change conferences in order to increase the revenue generated from their media rights.

This appears to have been the main driving force behind USC and UCLA leaving the Pac-12 and joining the Big Ten. Since the Big Ten signed its \$2.65 billion TV deal back in 2017, it has dramatically outpaced the Pac-12 in revenue.<sup>46</sup> This has led to a disparity in revenue distribution by each conference, where in 2019, members of the Pac-12 received about \$33.6 million, while members of the Big Ten received an on average share of \$49.2 million (\$54.3 million for full members).<sup>47</sup> <sup>48</sup> This gap in distribution among the conferences is expected to grow following the Big Ten’s new media rights agreement, which is reported to be worth \$1 billion per year (7 years, \$7 billion).<sup>49</sup> Splitting this new revenue among sixteen schools (current Big Ten members plus USC and UCLA), could yield an average share of \$62.5 million per institution.<sup>50</sup>

Table 1. Power 5 Conference Revenue Shares in 2019<sup>51</sup>

Conference	Avg Full Member Revenue Share (in Millions)
Big Ten	\$54.30
SEC	\$45.60
Big 12	\$38.50
Pac-12	\$33.60
ACC	\$32.30

<sup>46</sup> Thuc Nhi Nguyen, *How much money waits for UCLA and USC in the Big Ten Conference?*, L. A. TIMES (July 3, 2022) <https://www.latimes.com/sports/story/2022-07-03/how-much-money-waits-for-ucla-usc-in-the-big-ten>

<sup>47</sup> *Id.*

<sup>48</sup> Note that Rutgers and Maryland were not full members of the Big Ten at this time, so they received smaller shares of revenue. It is indicated that USC and UCLA will be full members upon entering the Big Ten.

<sup>49</sup> Nguyen, *supra* note 45; See also Adam Rittenberg, *Big Ten completes 7-year, \$7 Billion media rights agreement with Fox, CBS, NBC, ESPN* (Aug. 18, 2022, 9:30AM) [https://www.espn.com/college-football/story/\\_/id/34417911/big-ten-completes-7-year-7-billion-media-rights-agreement-fox-cbs-nbc](https://www.espn.com/college-football/story/_/id/34417911/big-ten-completes-7-year-7-billion-media-rights-agreement-fox-cbs-nbc)

<sup>50</sup> Nguyen, *supra* note 45.

<sup>51</sup> See Atlantic Coast Conference, *Form 990 for period ending June 2020*, PROPUBLICA 37 [https://projects.propublica.org/nonprofits/display\\_990/560599082/05\\_2021\\_prefixes\\_54-56%2F560599082\\_202006\\_990\\_2021052618200383](https://projects.propublica.org/nonprofits/display_990/560599082/05_2021_prefixes_54-56%2F560599082_202006_990_2021052618200383); Big Ten Conference, *Form 990 for period ending June 2020*, PROPUBLICA 30 [https://projects.propublica.org/nonprofits/display\\_990/363640583/05\\_2021\\_prefixes\\_35-36%2F363640583\\_202006\\_990\\_2021052618207044](https://projects.propublica.org/nonprofits/display_990/363640583/05_2021_prefixes_35-36%2F363640583_202006_990_2021052618207044); Pac-12 Conference, *Form 990 for period ending June 2020*, PROPUBLICA 21 [https://projects.propublica.org/nonprofits/display\\_990/941459048/05\\_2021\\_prefixes\\_92-94%2F941459048\\_202006\\_990\\_2021051818122150](https://projects.propublica.org/nonprofits/display_990/941459048/05_2021_prefixes_92-94%2F941459048_202006_990_2021051818122150); Big 12 Conference, *Form 990 for period ending June 2020*, PROPUBLICA 38 [https://projects.propublica.org/nonprofits/display\\_990/752604555/05\\_2021\\_prefixes\\_73-75%2F752604555\\_202006\\_990\\_2021052618200039](https://projects.propublica.org/nonprofits/display_990/752604555/05_2021_prefixes_73-75%2F752604555_202006_990_2021052618200039); Southeastern Conference, *Full text of “Full Filing” for fiscal year ending Aug. 2020*, PROPUBLICA 13 <https://projects.propublica.org/nonprofits/organizations/630377461/202120349349300812/full>.

This revenue share not only attracts institutions to certain conferences, but it also helps keep conferences together. Member schools end up doing much better by pooling their media rights together and then marketing a package of rights as a conference. However, to prevent institutions from constantly realigning, conferences have taken steps to keep their members. Traditionally, conferences have used exit fees and the fear of litigation to block schools from leaving for greener pastures.<sup>52</sup> Today, conferences utilize another tool in order to retain membership: contractual grant of rights. These grants of rights assign the television and media rights of member schools to their conference.<sup>53</sup> In theory, this prevents realignment because it makes the member schools less attractive to other conferences looking to expand. Without the ability to take its media and television rights to a new conference, it would neither be financially sound for a member to change conferences nor for a new conference to accept that school.<sup>54</sup> Although some scholars and those in the college sports industry do question the effectiveness and the irrevocability of the grant of rights,<sup>55</sup> they still pose a hurdle that schools/conferences are hesitant to challenge.<sup>56</sup> Ultimately, if a conference revenue share is the “carrot” to retain conferences members, grant of rights can definitely be seen as the “stick.”<sup>57</sup>

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<sup>52</sup> Mark T. Wilhelm, *Irrevocable but Unenforceable? Collegiate Athletic Conferences' Grant of Rights*, 8 HARV. J. OF SPORTS & ENT. LAW 63, 72 (2017).

<sup>53</sup> *Id.* at 92.

<sup>54</sup> Wilhelm, *supra* note 50, at 92.

<sup>55</sup> *Id.*; See 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)*, THE ATHLETIC (July 1, 2022) <https://theathletic.com/3396108/2022/07/01/acc-grant-of-rights-staples/> (Discussing conversation with Mark T. Wilhelm regarding conferences' grants of rights).

<sup>56</sup> Spenser Davis, *Realignment talks: Greg Sankey says SEC won't 'get in the middle of' grant of rights*, SATURDAY ROAD (July 2022) <https://saturdayroad.com/acc/realignment-talks-greg-sankey-says-sec-wont-get-in-the-middle-of-grant-of-rights/#:~:text=Sankey%20said%20on%20the%20SEC,grant%20of%20rights%20contracts.&text=SEC%20Commissioner%20Greg%20Sankey%20on,in%20the%20middle%20of%20those.%22>.

<sup>57</sup> However, as media and broadcasting deals become so lucrative and much bigger “carrots,” it will be interesting to see how effective the grant of rights will be at deterring realignment in the future. For example, Texas and Oklahoma were originally aiming to leave the Big 12 to join the SEC in 2025, when the Big 12's grant of rights expired. Although, it was recently announced that both institutions reached an exit deal with the Big 12 to leave a year early in 2024. See Adam Silverstein, *Texas, Oklahoma leaving Big 12 early, joining SEC in 2024 season after reaching exit agreement*, CBS (Feb. 9, 2023, 9:45AM) <https://www.cbssports.com/college-football/news/texas-oklahoma-leaving-big-12-early-joining-sec-in-2024-season-after-reaching-exit-agreement/>. The deal includes Texas and Oklahoma paying the

One extreme example of a grant of rights is that which is used in the ACC. The ACC's Grant of Rights operative clauses state that:

Each of the Member Institutions hereby (a) irrevocably and exclusively grants to the conference during the Term (as defined below) all rights (the " Rights") necessary for the Conference to perform the contractual obligations of the Conference expressly set forth in the ESPN Agreement, *regardless of whether such Member Institution remains a member of the Conference during the entirety of the Term* and (b) agrees to satisfy and perform all contractual obligations of a Member Institution during the Term that are expressly set forth in the ESPN Agreement.<sup>58</sup>

Although this grant is irrevocable, exclusive, and gives almost all leverage to the conference, it does not differ drastically in language from other grant of rights used in other conferences. Instead, what makes the ACC grant of rights extreme is the term. In 2016, the ACC and its members agreed to extend the grant of rights until the 2035-36 academic year.<sup>59</sup> This extension was part of a twenty year deal that the ACC struck with ESPN, which included the launch of the ACC Network.<sup>60</sup> The extended term is much longer than other conferences' grant of rights, where the PAC-12's deal expires in 2024 (the year USC and UCLA will leave for the Big Ten) and the Big 12's deal expires in 2025.<sup>61</sup>

The ACC's Grant of Rights can be viewed both as a blessing and a curse. On one hand, the extended term is keeping the conference together because if a member school tries to challenge the enforceability of the agreement and fails, the forfeited television revenue would run into the tens millions of dollars.<sup>62</sup> This effectively keeps the conference stable and benefits the members

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conference combined exit fees of \$100 million to leave a year early to get a share of the SEC's revenue distribution: roughly \$55 million per member in 2021 as per the conferences 990 Tax form.

<sup>58</sup> Wilhelm, *supra* note 50, at 95 (quoting, ATLANTIC COAST CONFERENCE, ATLANTIC COAST CONFERENCE GRANT OF RIGHTS AGREEMENT (Apr. 19, 2013)) (emphasis added).

<sup>59</sup> Joe Giglio & Brian Murphy, *Here's a copy of the contract keeping the ACC together for now*, WRAL SPORTS FAN (July 5, 2022, 2:43PM) <https://www.wralsportsfan.com/here-s-a-copy-of-the-contract-keeping-the-acc-together-for-now/20361234/>.

<sup>60</sup> *Id.*

<sup>61</sup> Staples, *supra* note 53.

<sup>62</sup> *Id.*

that are content with the ACC conference. On the other hand, due to the potential costs, the grant of rights prevents a member school from pursuing a change for over a decade, even if it believes it will be better served in another conference.

Ultimately, the revenue generated by conferences is seen as one of the most important benefits an institution can receive. Although these revenue shares can come with strings attached, as demonstrated by the ACC, they do provide stability for the conferences to earn over time, creating a steady revenue stream for the members.

### **B. Institutional Health & External Image**

Following the benefits of revenue from media rights, conferences can also help improve the overall health of an institution and its external image within the broader industry of higher education. Although athletically oriented, conferences do not just facilitate competition among the members' athletic departments. In addition, conferences help facilitate its members to work together as peer institutions in areas such as institutional governance and academic research. Conferences can also provide oversight as a way to regulate all its members when governance policies are agreed upon. Working with a strong peer group can improve the external image of an institution overtime as well. At first, the improvement in image may simply be through a benefit of association. The idea that like-minded institutions congregate, can help lower academically ranked schools create a better image when associated with higher ranked ones. However, overtime, these same institutions can become stronger and healthier by working with and learning from more successful institutions.

In terms of institutional governance and academic research, conferences have created academic consortiums or alliances in order work together as peer institutions.<sup>63</sup> The Big Ten

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<sup>63</sup> See BIG TEN ACADEMIC ALLIANCE, <https://btaa.org/>; *About SEC Academic Initiatives*, SEC, <https://www.theseecu.com/about-secu/>; PAC-12 ACADEMIC LEADERSHIP COALITION, <https://pac12alc.org/>.

Academic Alliance (BTAA) in particular is a robust consortium that provides leadership and professional development to faculty and staff within the conference, leverages resources across all campuses to provide better academic opportunities to students, and also enables collaboration on innovative programs among institutions.<sup>64</sup> The BTAA's model has seemed to be quite successful, leading to billions of dollars in funded research, millions of dollars saved in library licensing and software sharing, and increases in hiring of diverse faculty members.<sup>65</sup>

In addition to providing this collaboration, conferences can also provide oversight to ensure its members are complying with the ideal governance standards that the conference desires. This has become particularly important in the wake of scandals that garner national attention. Because conference members work together as peers and are publicly associated with one another, when one school makes mistakes, all peers can suffer consequences.

One area that conferences can naturally provide governance oversight in is athletics. The Big Ten also provides a good example of this through its adoption of the "Standards for Safeguarding Institutional Governance of Intercollegiate Athletics"(Standards)<sup>66</sup> following the Sandusky scandal at Pennsylvania State University. The Standards begin by recognizing that "[t]he public's trust in a Member Institution and the value of its intercollegiate athletics program are eroded when the Institution fails to implement sound governance principles. . . . All Member Institutions are affected when any Member Institution fails to maintain proper control over its intercollegiate athletics programs."<sup>67</sup> The Standards then compel member institutions to create and adopt written operational/governance standards, submit reports to conference committees,

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<sup>64</sup> *About*, BIG TEN ACADEMIC ALLIANCE, <https://btaa.org/about> (last visited May 4, 2023).

<sup>65</sup> *2017-2018 Annual Report*, BIG TEN ACADEMIC ALLIANCE, [https://btaa.org/docs/default-source/reports/annual-report-2017-2018.pdf?sfvrsn=96c349f3\\_4](https://btaa.org/docs/default-source/reports/annual-report-2017-2018.pdf?sfvrsn=96c349f3_4).

<sup>66</sup> *Standards for Safeguarding Institutional Governance of Intercollegiate Athletics*, BIG TEN CONFERENCE (Dec. 8, 2013), [https://universityethics.psu.edu/assets/uploads/documents/Big10\\_InstitutionalGovernanceStandards.pdf](https://universityethics.psu.edu/assets/uploads/documents/Big10_InstitutionalGovernanceStandards.pdf).

<sup>67</sup> *Id.* at \*1.



cooperate with conference investigations, and comply with conference enforcement actions for violations.<sup>68</sup> These Standards have a two-fold effect. First, they provide a guide and framework for individual members to practice competent institutional governance. Second, these Standards help ensure that all members of the conference are cooperating with the agreed upon goals/procedures, and will hopefully prevent serious scandals from occurring in the future that will hurt the entire conference's image and cause instability.

Overall, the strength of an institution's governance, academic resources, image, and health can be impacted by its peers. As a result, when looking to change athletic conferences, one element that institutions consider is desired peer group.<sup>69</sup> Peer groups can not only provide institutions with performance benchmarks, but also the tools and help to reach those benchmarks overtime. Utilizing the academic alliances and collaboration on institutional governance from conferences can aid institutions in reaching performance benchmarks with regards to tuition and fees, retention and graduation rates, faculty diversity, expenses, staff salaries, fundraising, and even student aid.<sup>70</sup> Better performance in these areas will overtime lead to a healthier institution with a stronger public image.

### **C. Better Benefits, Better Results?**

The increases in revenue, enhancement of an institution's reputation, and collaboration on effective governance for greater stability are all benefits that can improve the overall health of an

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<sup>68</sup> *Id.* at \*3-8.

<sup>69</sup> See Tony Altimore (@TJAltimore), TWITTER (May 5, 2023, 5:22PM), [https://twitter.com/TJAltimore/status/1654597372758966276?ext=HHwWiC-menip\\_YtAAAA](https://twitter.com/TJAltimore/status/1654597372758966276?ext=HHwWiC-menip_YtAAAA) (Explaining one reason Pac-12 members are not interested in joining the Big 12 is because of the Big 12's lack of application growth over the past twelve years as a group; post also displays a graphic, illustrating how the Big 12 has lagged every other Power 5 conference in application growth, including in percent increase of institutions that recently left the Big 12.

<sup>70</sup> See *Institutional Strategy and Analysis*, NORTH CAROLINA STATE UNIVERSITY, <https://isa.ncsu.edu/facts-comparisons/peer-universities/> (last seen May, 10 2023).

institution. In an industry that is saturated with competition, the prospect of improving in these areas can drive institutions to change conferences in hopes of a more secure future.

College athletics has seen this type of movement over the past thirty-five years through numerous eras of conference realignment. Since the early 1990s, college athletics has experienced some form of conference realignment in each proceeding decade. From the early 1990s with the expansion of the Big Ten and SEC, through the 2000s/2010s with the growth and then collapse of the Big East, to the present day with members of the Pac-12 and Big 12 flocking to greener pastures, conference membership has been fluctuating. Although not encompassing of every conference realignment, Table 2 demonstrates some of the major conference changes since the early 1990s, including the reasons that reportedly drove these changes.

Table 2. Instances of conference movement from 1990s to Present

Institution(s)	Old Conference	New Conference	Year of Change	Reported Reasons for Change
Penn State	Independent/Atlantic 10	Big Ten	1990-93	More revenue to support athletic department and budget deficit <sup>71</sup>
Arkansas	Southwest	SEC	1991	More revenue, better recruiting, more engaged fan base, better image <sup>72</sup>
South Carolina	Metro Conference/Independent	SEC	1991	Revenue stream to support other sports in athletic department, football-oriented peers <sup>73</sup>
Miami	Big East	ACC	2004	Better support for football, long-term revenue & financial security, more similarities with new peers <sup>74</sup>
Boston College	Big East	ACC	2005	Better support for football, more stable conference, greater revenue, stronger academic peer group <sup>75</sup>
Syracuse	Big East	ACC	2013	Better conference stability, more revenue to support athletic department, greater exposure <sup>76</sup>
Creighton	Missouri Valley	Big East	2013	Increased national exposure & visibility, better recruitment, like-minded & faith-based peers, TV revenue <sup>77</sup>
Oklahoma & Texas	Big 12	SEC	2024	Greater revenue from media rights, prime-time exposure, improvements in recruiting b/c of association with new peers <sup>78</sup>
UCLA & USC	Pac-12	Big Ten	2024	Increases in revenue from bigger media deals, access to large media markets, improvements in recruiting via exposure/new peers <sup>79</sup>

<sup>71</sup> David Jones, *Welcome to the Big Ten: How Penn State joined the storied conference*, PENN LIVE (Jul. 23, 2013) [https://www.pennlive.com/pennstatefootball/2013/07/welcome\\_big\\_ten\\_penn\\_state\\_20.html](https://www.pennlive.com/pennstatefootball/2013/07/welcome_big_ten_penn_state_20.html).

<sup>72</sup> Gene Wojciechowski, *Arkansas Joins SEC; There May Be More Colleges: Miami, Texas, Florida State, South Carolina, Texas A&M; also might wind up in Southeastern Conference*, L.A. TIMES (Aug. 2, 1990). <https://www.latimes.com/archives/la-xpm-1990-08-02-sp-1412-story.html>

<sup>73</sup> Brad Muller, *Gamecocks join SEC*, SEC (Sept. 25, 1990) <https://www.secsports.com/article/13736977/gamecocks-join-sec#:~:text=We%20really%20didn't%20have,alumni%20than%20anyone%20else%20around>.

<sup>74</sup> Charlie Nobles, *COLLEGES; Miami to Join A.C.C.; Shift of Power Expected*, N.Y. TIMES (Jul. 1, 2003) <https://www.nytimes.com/2003/07/01/sports/colleges-miami-to-join-acc-shift-of-power-expected.html>.

<sup>75</sup> Drape, *supra* note 14.

<sup>76</sup> Pete Thamel, *Syracuse and Pittsburgh Switch Conferences, Sowing Chaos*, N.Y. TIMES (Sept. 18, 2011) <https://www.nytimes.com/2011/09/19/sports/ncaaf-football/congressional-scrutiny-of-conference-realignment-is-said-to-be-likely.html>; Matthew Gutierrez, *Big wins and payout accompany Syracuse's move to the ACC*, THE DAILY ORANGE (2017) <https://dailyorange.com/2017/10/big-wins-payout-accompany-syracuses-move-acc/>.

<sup>77</sup> *Creighton Joins Big East Conference*, CREIGHTON ATHLETICS (Jul. 1, 2013) <https://gocreighton.com/news/2013/7/1/208338261.aspx>; *Creighton Joins Big East Conference*, WHITE & BLUE REVIEW (Mar. 20, 2013) <https://whiteandbluereview.com/creighton-joins-big-east-conference/>.

<sup>78</sup> Jabari Young, *To understand why Texas and Oklahoma want to move to the SEC, follow the money*, CNBC (Jul. 29, 2021) <https://www.cnbc.com/2021/07/29/why-texas-and-oklahoma-want-to-move-to-the-sec-follow-the-money.html>

<sup>79</sup> Matt Bonesteel, *Everything to know about USC and UCLA's move to the Big Ten*, Washington Post (Jul. 1, 2022) <https://www.washingtonpost.com/sports/2022/07/01/usc-ucla-big-ten-expansion/>; Adelson, *supra* note 4.

This data demonstrates that institutions have and continue to change conferences in hopes of taking advantage of the potential increases in revenue, greater conference stability, and the reputational advantages of being associated with a new/different peer group. However, in order to measure how successful these changes have been, one can analyze how the overall health of an institution has improved since the conference change became effective. Of the many statistics that can indicate the health of an institution, three major categories are: 1) Financial Standing; 2) Admission Statistics; and 3) Third Party Rankings.

As with any company, the financial standing and position of any institution is critical to its operation, especially within an industry that is highly competitive. To draw a connection from a conference change to the overall fiscal position of an institution, the revenue share it receives from its new conference should be analyzed, followed by an examination of the institution's general financial statements and endowment size. Although specific to an institution's athletic department and conference, the growth in revenue share it receives from a new conference can indicate if the value of the institution's media rights and the conference's TV markets will continue to grow as a revenue stream. This revenue stream ultimately flows into the institution's overall assets, which are indicated in an institution's financial statements. Further, an institution's endowment size/growth can provide an understanding to how it will be able to finance portions of its operating and capital requirements.<sup>80</sup>

Second, the admission statistics of an institution can indicate how successful it has been in recruiting students to attend. Improvements and success in total applications, acceptance rate, and enrollment or yield rate (accepted students that matriculate) can aid institutions in meeting their

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<sup>80</sup> Albert Phung, *How Do University Endowments Work?*, INVESTOPEDIA <https://www.investopedia.com/ask/answers/how-do-university-endowments-work/> (last visited May 3, 2023).

numerical, talent, and diversity goals year to year. Meeting these goals can translate into stable revenue and help an institution's external image.

This leads into the third category of third-party rankings. One of the most popular and influential rankings is the U.S. News and World Report "Best Colleges" rankings.<sup>81</sup> Universities frequently publish their rankings for clout, and prospective students, current students, and alumni consult the rankings each year.<sup>82</sup> These college rankings, whether justified or not, can bolster an institution's external image, place within the market, and prestigious status. In addition to an institution's individual rank, the ranking of its peer group can also contribute to an institution's external image. As a result, the other universities, or colleges, that an institution is frequently associated with through their athletic conference can impact its external image. Thus, when analyzing a conference change, not only should an institution's rank be considered, but also the median rank of conference members.<sup>83</sup>

#### **D. Case Study: Boston College**

Joining or changing to a different athletic conference can help improve the overall health of an institution. Although this study cannot claim that joining a particular athletic conference will cause an overall improvement in the health of an institution, there are instances where there is at the least a favorable connection. The reality is that institutions of higher education are constantly taking numerous actions to try and improve its overall health. Joining a preferable athletic conference can be seen as one of the major decisions that institutions make to achieve this goal. A good example of this is Boston College.

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<sup>81</sup> Harmeet Kaur, *Why we're still fascinated by college rankings*, CNN (Sept. 20, 2022, 4:21 PM) <https://www.cnn.com/2022/09/20/us/college-rankings-obsession-us-news-cec/index.html>.

<sup>82</sup> *Id.*

<sup>83</sup> The median ranking is a preferable statistic to demonstrate the middle point of each conference's U.S. News rankings more accurately. This can help demonstrate the overall image of a conference and the desire of being associated with certain peer groups over others.

In 2005, Boston College made the decision to leave the Big East for the ACC.<sup>84</sup> At the time, Boston College faced much criticism among other Big East conference members.<sup>85</sup> Boston College's decision, along with the University of Miami and Virginia Tech, to leave the Big East spurred a lawsuit that ultimately led to a reported \$5 million settlement between the ACC, its new members, and the Big East members.<sup>86</sup> However, the College's decision would ultimately prove to be a good one because since joining the ACC, it has seen improvements in its revenue, financial position, endowment size, admission statistics, and median conference ranking.

Tension in the Big East began when the conference added football in the 1990s in order to boost its revenue.<sup>87</sup> This turmoil between football and non-football institutions eventually led to schools leaving the conference.<sup>88</sup> Although the issue of football acted a catalyst, Boston College's President, Rev. Leahy, explained that the "ACC is a strong stable conference," and the move was fueled by athletics, as well as academics and finances where the "move to the ACC will generate greater revenues in the future."<sup>89</sup>

Rev. Leahy was correct in this respect. In terms of revenue, Boston College has received a greater revenue share from the ACC than it would if it was still in the Big East. According to IRS tax filings from the ACC, Boston College received more than \$32 million from the

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<sup>84</sup> *Boston College Officially Joins Atlantic Coast Conference*, BOSTON COLLEGE ATHLETICS (July 1, 2005) [https://bceagles.com/news/2005/7/1/Boston\\_College\\_Officially\\_Joins\\_Atlantic\\_Coast\\_Conference.aspx?path=general](https://bceagles.com/news/2005/7/1/Boston_College_Officially_Joins_Atlantic_Coast_Conference.aspx?path=general).

<sup>85</sup> See Gene Wojciechowski, *Big East hypocrisy: Then and now*, ESPN (Sept. 21, 2011, 3:00AM) [https://www.espn.com/espn/columns/story?columnist=wojciechowski\\_gene&sportCat=nfc&page=wojciechowski-110921](https://www.espn.com/espn/columns/story?columnist=wojciechowski_gene&sportCat=nfc&page=wojciechowski-110921).

<sup>86</sup> *Report: Big East Settles with ACC over departures*, ESPN (May 4, 2005, 6:55PM) <https://www.espn.com/espn/wire?section=nfc&id=2052805>; See *Trs. of Bos. Coll. v. Big E. Conference*, 18 Mass. L. Rep. 177 (2004).

<sup>87</sup> The Daily Campus, *Big East Week: The collapse and how it happened*, THE DAILY CAMPUS (Apr. 18, 2018) <https://dailycampus.com/2018/04/18/2018-4-18-wdcz5x0kigc7s5axlf7j2z2fxj0aug/#:~:text=The%20addition%20of%20football%20caused,for%20the%20ACC%20in%202003.>

<sup>88</sup> *Id.*

<sup>89</sup> Drape, *supra* note 14.

conference in 2019.<sup>90</sup> Meanwhile, in the Big East, members' received shares ranged from only \$4.4 million to \$5.1 million in the same fiscal year.<sup>91</sup> It should also be noted that Boston College's revenue share from the ACC has increased since 2019, for a new total of \$36 million due to the ACC's agreement with ESPN.<sup>92</sup> This would indicate that the media rights and the TV markets of the ACC are more valuable as a long-term asset than those of the Big East.

On a macrolevel scale, Boston College's financial position is strong. In 2022, its financial statements "illustrate[d] a year of continued balance sheet strength and strong financial management, despite market volatility."<sup>93</sup> Assets (\$6.7 billion) grew by 3.6% since the previous year and are about three and a half times larger than the institution's liabilities.<sup>94</sup>

In addition, Boston College's endowment has dramatically increased since it moved to the ACC. Just before the move, the institution's endowment was about \$1.1 billion.<sup>95</sup> Today, it has more than tripled, with a market value of \$3.7 billion.<sup>96</sup> From a financial perspective, Boston College's move to the ACC has been undeniably a success. A success that even the institution's harshest critics cannot deny.

In terms of admission statistics and rankings, Boston College has done significantly well since joining the ACC. Since the change in 2005, Boston College has increased its total

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<sup>90</sup> Atlantic Coast Conference, *Form 990 for period ending June 2020*, PROPUBLICA 37 [https://projects.propublica.org/nonprofits/display\\_990/560599082/05\\_2021\\_prefixes\\_54-56%2F560599082\\_202006\\_990\\_2021052618200383](https://projects.propublica.org/nonprofits/display_990/560599082/05_2021_prefixes_54-56%2F560599082_202006_990_2021052618200383).

<sup>91</sup> Big East Conference Inc, *Form 990: Full Text of "Full Filing" for fiscal year ending June 2020*, PROPUBLICA <https://projects.propublica.org/nonprofits/organizations/900955035/202101339349301500/full>.

<sup>92</sup> Atlantic Coast Conference, *Form 990 for period ending June 2021*, PROPUBLICA 36 [https://projects.propublica.org/nonprofits/display\\_990/560599082/download990pdf\\_07\\_2022\\_prefixes\\_51-62%2F560599082\\_202106\\_990\\_2022071120201147](https://projects.propublica.org/nonprofits/display_990/560599082/download990pdf_07_2022_prefixes_51-62%2F560599082_202106_990_2022071120201147).

<sup>93</sup> OFFICE OF THE CONTROLLER, BOSTON COLLEGE FINANCIAL STATEMENT SUMMARY 2021-2022, BOSTON COLLEGE (2022) <https://www.bc.edu/content/dam/bc1/offices/FVP/BostonCollegefinancialstatementssummary2022.pdf>.

<sup>94</sup> *Id.*

<sup>95</sup> NATIONAL CENTER FOR EDUCATION STATISTICS, *Table 359. Endowment funds of the 120 colleges and universities with the largest amounts by rank order: 2003 and 2004*, [https://nces.ed.gov/programs/digest/d04/tables/dt04\\_359.asp](https://nces.ed.gov/programs/digest/d04/tables/dt04_359.asp)

<sup>96</sup> *Facts & Figures 2020-2021*, BOSTON COLLEGE, <https://www.bc.edu/bc-web/about/bc-facts.html> (last visited May 3, 2023).

applications by almost twice as much, has seen its acceptance rate almost cut in half, and has increased its yield rate by six percentage points.<sup>97</sup> During this period, the college’s US News and World Report ranking remained stable as well.<sup>98</sup> Additionally, from 2005 onward, the ACC member schools have overall ranked higher than those schools in the Big East. Boston College now places close to the median ranking in the ACC, as opposed to when it was in the Big East, when it was near the top of all member rankings.<sup>99</sup> This benefit allows for Boston College to be associated with higher ranked schools more frequently, improving their overall image.

Table 3. Comparing Institutional Statistics for Boston College

Conference/Institutional Variable	2005	2023
Median Conference Ranking (Big East- Full Members)	No Ranking	137
Median Conference Ranking (ACC- Full Members)	41	55
BC - Ranking	37	36
BC - Total Applications	23,823	40,494
BC - Acceptance Rate	31%	17%
BC - Yield Rate	29%	35%

However, there is one area in particular that Boston College has not shown great improvement since joining the ACC: athletic results. Although there have been some great highlights over the past eighteen years (winning the Women’s National Lacrosse Championship in 2021) and its Men’s and Women’s Hockey teams continue to be successful,<sup>100</sup> Boston College has not seen an improvement in many of its sports, particularly in Men’s Football and Basketball. In football, the catalyst for leaving the Big East, Boston College has not won an ACC conference

<sup>97</sup> *Compare The Numbers-The Class of 2009*, BOSTON COLLEGE MAGAZINE (2005) [https://bcm.bc.edu/issues/fall\\_2005/il\\_class2009.html](https://bcm.bc.edu/issues/fall_2005/il_class2009.html) with *Facts At A Glance 2022-2023*, BOSTON COLLEGE (2022) [https://www.bc.edu/content/dam/bc1/offices/irp/ir/factbook/at\\_a\\_glance/22-23-at\\_a\\_glance.pdf](https://www.bc.edu/content/dam/bc1/offices/irp/ir/factbook/at_a_glance/22-23-at_a_glance.pdf).

<sup>98</sup> Andrew G. Reiter, *U.S. News & World Report Historical Liberal Arts College and University Rankings*, <https://andyreiter.com/datasets/> (last visited May 3, 2023).

<sup>99</sup> In 2005, U.S. News did not rank the number of schools it does today because the institutions either fell below a certain ranking or did not participate in the ranking process. As a result, the median ranking for the Big East full members at the time was actually “No ranking.”

<sup>100</sup> *National Championships*, BOSTON COLLEGE ATHLETICS, <https://bceagles.com/sports/2021/9/2/national-championships.aspx>.



championship, and hasn't even played for one since 2008.<sup>101</sup> Similarly, in basketball, the College has not won a conference championship since joining the ACC.<sup>102</sup>

Despite this lack of improvement, it is likely that Boston College will not receive any pressure or repercussions from the conference. Boston College continues to be a highly ranked academic institution, and it continues to maintain its success in graduating student athletes, ranking seventh in the nation in Graduation Success Rate (95%).<sup>103</sup> This benefits the conference as a whole by helping to bolster the external image of the ACC as academically successful.

Ultimately, Boston College has benefited from joining the ACC and has improved its overall success as an institution. The ACC has also benefited from having Boston College in the conference because of its academic pedigree, success as an institution, and lack of any recent athletic scandals. As other institutions look to change conferences in the coming years, they should look to Boston College as a model for a school that successfully completed the endeavor, while increasing its revenue and continuing its academic success.

### **E. Fiduciary Duties**

Trustees, board of governors, college administrators, and other leaders associated with institutions of higher education have fiduciary duties to the institution they serve. One particularly important duty college leaders have to their institution is the duty of loyalty. More specifically for non-profits, a leader/director should discharge his or her duties "in a manner the director reasonably believes to be in the best interests of the corporation."<sup>104</sup> Seeing that college athletic conferences have so many benefits and can help improve the overall health of an institution, it is

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<sup>101</sup> Mark Blaudschun, *Boston College's ACC Footprint is Invisible*, SPORTS ILLUSTRATED (Apr. 2, 2019, 3:45PM) <https://www.si.com/college/tmg/mark-blaudschun/boston-college-s-acc-footprint-is-invisible>.

<sup>102</sup> *Id.*

<sup>103</sup> *Boston College Again Ranks Among Nation's Elite in Graduation Success Rate*, BOSTON COLLEGE ATHLETICS (Nov. 17, 2020) <https://bceagles.com/news/2020/11/17/boston-college-athletics-boston-college-again-ranks-among-nations-elite-in-graduation-success-rate>.

<sup>104</sup> REVISED MODEL NONPROFIT CORP. ACT § 8.30 (1987).

not surprising when campus leaders look to change conferences if they have the chance. This can help explain some institutions' actions in recent years, like Colorado State University:

In response to declining state funding, the University launched a plan in 2013 to raise \$ 200+ million to build a new football stadium, so it could then attract a better football coach, so it could then attract better football players, so it could then win more games, so it could then move up to one of the college football conferences with a lucrative national television contract, so it could then gain more national television exposure for the university, so it could then attract more out-of-state students, who pay significantly more tuition than in-state students.<sup>105</sup>

However, it also should be noted that trustees and university officials, through the university they serve, also have fiduciary duties to the athletic conference their institution belongs to.<sup>106</sup> In normal circumstances, these duties would most likely not conflict, since what is usually best for the conference is best for an individual member. However, as college sports enters a new era with many changes occurring, it is possible that more instances of conflicts could arise.

Under the circumstances of conference realignment, disclosure will be critical and “a key question for a court regarding a claim of breach of fiduciary duty in similar cases [to the Big East] is to determine whether the defecting schools were forthright, honest, and timely. . . regarding their potential interest in moving to another conference.”<sup>107</sup> Other issues such as NIL deals, coaching compensation, and player compensation could also lead to interest divergence and conflicts in the coming years.

### **PART III. THE ROLE CONFERENCES CAN PLAY IN ADDRESSING CURRENT ISSUES**

After discussing the purposes of college athletic conferences at the Division I level, and exploring their benefits in the preceding sections, this paper can now consider what role

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<sup>105</sup> William Devine, *Is Revenue Sport Infatuation Causing Higher Education Trustees to Breach Fiduciary Duties?*, 21 Va. Sports & Ent. L.J. 128, 164; *See also* Allie Grasgreen, *Redemption for Rutgers?*, INSIDE HIGHER ED (Nov. 20, 2012) <https://www.insidehighered.com/news/2012/11/21/struggling-rutgers-follows-maryland-big-ten> (Discussing Rutgers' decisions to subsidize its athletic department and then move to the Big Ten conference).

<sup>106</sup> *See* Gregg L. Katz, Note, *Conflicting Fiduciary Duties Within Collegiate Athletic Conferences: A Prescription for Leniency*, 47 B.C. L. REV. 345, 362-63.

<sup>107</sup> *Id.* at 370.

conferences can play in addressing issues that the NCAA and its Division I members are currently facing. Two such issues are compensation for coaches and compensation for athletes. Both issues have gained broader attention in recent years, coming under public scrutiny.<sup>108</sup> Some critics say that coaching salaries are too high, and coaches should be paid less, while athletes should receive more and be compensated.<sup>109</sup> Although there is a great deal of issues that plague college athletics, compensation for coaches and athletes are two very public issues for which the NCAA and Division I institutions face and receive criticism. If improvements can be made in these areas, the NCAA and its Division I members can improve the image of college athletics and possibly create a clearer future for the industry.

In creating solutions to these issues, conferences can play an important role. Because of the number of conferences, and their power within the market of college athletics, conferences can take actions in hopes of curtailing the growth of compensation for head coaches that the NCAA likely cannot because of antitrust law.<sup>110</sup> Additionally, conferences can also create policies to compensate athletes that individual institutions may not be able to willingly or practically, due to the application of Title IX.

### **A. Compensation Issues and Potential Solutions**

Controversy around coaching salaries and compensation has continued to grow recently as college coaches, particularly football coaches, have signed massive contracts with universities.<sup>111</sup>

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<sup>108</sup> See Dennis Dodd, *Proposed federal law seeks to limit skyrocketing salaries of college coaches*, CBS (Jan. 28, 2020) <https://www.cbssports.com/college-football/news/proposed-federal-law-seeks-to-limit-skyrocketing-salaries-of-college-coaches/>.

<sup>109</sup> See Josh Moody, *What Blockbuster Coaching Contracts Mean for Higher Ed*, INSIDE HIGHER ED (Dec. 07, 2021) <https://www.insidehighered.com/news/2021/12/08/huge-coaching-contracts%E2%80%94unjustifiable-or-business-usual>; Frank Adler, *Are Salaries Too High for College Football Coaches?*, DAILY UTAH CHRONICLE (Jan. 24, 2022) <https://dailyutahchronicle.com/2022/01/24/salaries-college-football-coaches/>.

<sup>110</sup> Assuming that conferences take action without necessarily colluding with one another. Colluding with one another would give rise to similar antitrust violations that the NCAA would be subjected to.

<sup>111</sup> Matthew Lounsberry, *Has Mel Tucker's \$95 million contract created unrealistic expectations for Michigan State?*, SPORTS ILLUSTRATED (Feb. 7, 2023) <https://www.si.com/college/michiganstate/football/michigan-state-spartans->

However, the controversy over coaching salaries is not necessarily new. Compensation for coaches and coaching staff have been a controversy for over fifteen years (at least), going back to the days of Billy Gillespie at Texas A&M.<sup>112</sup> As the arms race continues, there have been many calls to find ways to limit coaching salaries in the future. However, hurdles to this effort are antitrust laws and congressional gridlock. Although direct action to cap coaching salaries may not be possible, there might be other actions that conferences can take in order to address this problem.

Generally speaking, the rise in coaching salaries has been tied to the competitive nature and cycle of Division I college athletics. Fundamentally, colleges/universities feel they need to spend money on better facilities, equipment, and coaches to maintain a competitive advantage, causing other schools to spend money to keep up and remain competitive.<sup>113</sup> This is particularly true when it comes to conferences. As institutions compete for championships, any advantage they can get to beat their rivals will seem necessary. Recruiting the best talent, having the best facilities, and hiring the best coach are all assets that athletic departments will chase.<sup>114</sup> This arms race becomes even more intense when conferences realign and consolidate by adding more schools. For example, now that USC will be joining the Big Ten, conference members will now have to compete against USC in recruiting, facility quality, and against coaches like Lincoln Riley, one of the top-rated coaches in all of college football.<sup>115</sup>

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football-recruiting-mel-tucker-95-million-unrealistic-expectations-josh-pate-msu-020723#:~:text=Michigan%20State%20went%202%2D5,Expectations%20were%20no%20longer%20varied.

<sup>112</sup> Adrian Wojnarowski, *Money for Nothing*, YAHOO! SPORTS (Mar. 31, 2007) <https://sports.yahoo.com/aw-moneyfornothing033007.html>

<sup>113</sup> Blaire Mikesell, Note, *Using the Internal Revenue Code to Limit Coaching Salaries: A Proposal to Bring Amateurism Back into College Football*, 97 IND. L.J. 393, 403

<sup>114</sup> See *How much is too much when it comes to spending on college sports?*, PBS NEWS HOUR (Mar. 30<sup>th</sup> 2015) <https://www.pbs.org/newshour/education/amid-march-madness-americans-express-concern-college-sports-spending> (explaining that from 2008 to 2015 University of Michigan cut academic spending per student by 3% but increased athletic spending per athlete by 36%).

<sup>115</sup> See *College Football: Ranking the top 25 head coaches*, PRO FOOTBALL FOCUS (Apr. 7, 2023) <https://www.pff.com/news/college-football-2023-ranking-25-best-head-coaches-nick-saban-kirby-smart-jim-harbaugh>.

This creates an inflationary cycle where schools feel that to be competitive, they must spend an exorbitant amount of money through their athletic departments. When it comes to hiring and retaining a top head coach, this is no exception. To solve this problem, as it relates to compensation for head coaches, some have called for Congress to act,<sup>116</sup> while others have speculated the NCAA or conferences can issue a salary cap system.<sup>117</sup> Although, it is not clear that either of these proposals would be feasible to solve the issue.

Regarding the call for Congress to intervene, although it could be possible for this to happen, it is unlikely to. Given the gridlock on Capitol Hill, it is unlikely that Congress would work together on a solution, especially one that would grant the NCAA and its members an anti-trust exemption. It is also possible that Congress could impose a salary cap through the Internal Revenue Code, but again this would be unlikely to happen given that taxes and penalties that are currently enacted (such as 26 U.S.C.S. § 4960) could be applied to universities, but they currently are not being enforced in that manner.<sup>118</sup>

Another solution to address the rising compensation of coaches in college sports is to have the NCAA impose either a salary or spending cap.<sup>119</sup> However, this would surely violate Section 1 of the Sherman Antitrust Act.<sup>120</sup> A cap imposed by the NCAA would most likely be a naked horizontal price agreement and per se illegal.<sup>121</sup> Additionally, one big issue that the NCAA has is that it “exercises monopsony power in the relevant market” and would have the power to limit compensation without any significant risk of diminishing its control and dominance in the

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<sup>116</sup> *Id.* at 405.

<sup>117</sup> Kristi Dosh, *Can Athletic Departments Cap Coaching Salaries to Save Money?*, Forbes (Aug. 30, 2022) <https://www.forbes.com/sites/kristidosh/2020/08/30/can-athletic-departments-cap-coaching-salaries-to-save-money/?sh=236ad6d72f4e>.

<sup>118</sup> Mikesell, *supra* note 109 at 407.

<sup>119</sup> Misty B. Soles, *Exploring Alternative Athletic Finance Options in A Post-COVID World*, ATHLETIC DIRECTORU <https://athleticdirector.com/articles/exploring-alternative-athletic-finance-options-in-a-post-covid-world/>.

<sup>120</sup> 15 U.S.C.S. § 1.

<sup>121</sup> Dosh, *supra* note 111.

market.<sup>122</sup> As a result, there is not another league that is competing for the same coaching talent nor is there one that would serve as an alternative for coaches.<sup>123</sup>

A similar issued played out in *Law v. NCAA*, where the NCAA enacted a rule that restricted the salaries of assistant coaches at the Division I level.<sup>124</sup> The NCAA originally created this rule as a strategy to reduce costs of intercollegiate athletics through its Cost Reduction Committee.<sup>125</sup> The coaches argued that the limitation on compensation violated Section 1 of the Sherman Antitrust Act and was a form of wage-fixing.<sup>126</sup> As with any other Section 1 claim, the court did a Rule of Reason analysis and required that Plaintiff show the “NCAA (1) participated in an agreement that (2) unreasonably restrained trade in the relevant market.”<sup>127</sup>

There are two analytical approaches to answering whether an agreement unreasonably restrains trade in the relevant market: the *per se rule* and the *rule of reason*.<sup>128</sup> The *per se rule* “condemns practices that ‘are entirely void of redeeming competitive rationales[,]’” and once a practice is found to be illegal *per se*, the courts analysis does not need to go further.<sup>129</sup> On the other hand, the rule of reason must determine a) the restraint “has a substantially adverse effect on competition[,]” and then b) “the procompetitive virtues of the alleged wrongful conduct justifies the otherwise anticompetitive impacts.”<sup>130</sup>

The Tenth Circuit ultimately found that the NCAA’s rule was a naked horizontal agreement and *per se* illegal because it was an agreement that allowed NCAA members to fix the cost of one

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<sup>122</sup> *NCAA v. Alston*, 141 S. Ct. 2141, 2151 (2021).

<sup>123</sup> *Dosh*, *supra* note 111.

<sup>124</sup> 134 F.3d 1010 (10th Cir. 1998).

<sup>125</sup> *Id.* at 1013.

<sup>126</sup> *Law*, 134 F.3d at 1015.

<sup>127</sup> *Id.* at 1016.

<sup>128</sup> *Id.* (citing *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994)).

<sup>129</sup> *Id.* (quoting *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994)).

<sup>130</sup> *Id.* at 1017.

of the “component items” used to produce the product, Division I college basketball.<sup>131</sup> However, even if the court did not find that the rule was per se illegal, it also would not pass muster under the rule of reason test because the court did determine that “cost-cutting by itself is not a valid procompetitive justification.”<sup>132</sup>

*Law v. NCAA* demonstrates that the NCAA cannot set a cap on coaching salaries for its members. However, one might ask that if the NCAA cannot set a cap, could a conference? Even though a conference like the Big Ten would not be setting a policy for all athletic conferences, it is still likely that a conference also could not set a salary cap. Although any school can unilaterally set a self-imposed cap on the maximum amount it is willing to pay coaches, once there is collaboration with other institutions, this opens antitrust liability.<sup>133</sup> For similar reasons as *Law v. NCAA*, a salary capped imposed by a conference would be a horizontal agreement among the members that would fix the cost of one of the components used to produce the product of the conference and could be per se illegal.

However, following *NCAA v. Alston*, it is not clear if a court would just apply a per se rule analysis, which the Supreme Court describes as rejecting a restraint after only a “quick look”.<sup>134</sup> In his opinion, Justice Gorsuch explains that to reject a rule only after a quick look requires the court to have considerable experience with the industry and the restraint at issue.<sup>135</sup> Further the NCAA “is hardly of the sort that would warrant quick-look approval for all its myriad rules and regulations.”<sup>136</sup> Given that athletic conferences are non-profit organizations with their own rules and regulations operating within the NCAA, it is quite possible the Supreme Court, or a lower

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 1022.

<sup>133</sup> Dosh, *supra* note 111.

<sup>134</sup> *Alston*, 141 S. Ct. at 2156.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

court, would take a similar approach and move to a more thorough analysis under the rule of reason test. Although, under the rule of reason test, a salary cap within a conference would be seen as just a cost-cutting measure and it would likely not provide a procompetitive justification.

As a result, it seems that athletic conferences most likely could not address coaching salaries directly by setting any type of cap. However, this does not leave conferences without any options. Conferences could take actions and create rules that could indirectly affect the market incentives of driving up coaching salaries and creating a game of coaching musical chairs. One option would be to have an internal rule within the conference that member schools cannot “poach” another member’s head coach, unless done during a specific timeframe. This rule would help protect conference members from the internal pressure they might face from others within the conference looking to poach their coach.

Although, this internal rule could be risky because no-poaching agreements between competing employers has drawn the attention of the Justice Department and Federal Trade Commission.<sup>137</sup> For example, in 2019 Duke University and the Duke Health system agreed to pay \$54.5 million to settle a class action lawsuit which accused them and the University of North Carolina at Chapel Hill (UNC) of antitrust collusion.<sup>138</sup> It was alleged that Duke and UNC colluded and created an agreement not to hire each other’s employees.<sup>139</sup> An agreement like this would prevent employees from taking advantage and leveraging job opportunities at competitors to increase their salaries and/or receive promotions in their field.<sup>140</sup>

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<sup>137</sup> Dosh, *supra* note 111.

<sup>138</sup> Jake Statisky, *Duke agrees to pay \$54.5 million to settle class action lawsuit*, THE CHRONICLE (May 25, 2019) <https://www.dukechronicle.com/article/2019/05/duke-university-settles-class-action-lawsuit-for-54-5-million>.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*



Because of this, if a conference was to implement a no poaching rule, it would most likely need to include exceptions to the rule at certain times. This way, the conferences are not necessarily preventing head coaches from the prospect of increasing their salaries, instead they are just slowing the growth process. Additionally, this exception would also allow for head coaches to still pursue the possibility of a promotion in the field. Although not intuitive on its face because “Head Coach” is the highest coaching position, moving from a less successful conference school to a more successful one could be considered a promotion in the field (head coaching job at Vanderbilt vs head coaching job at Alabama).

Another set of rules that conferences could implement to protect its members from the external pressures of schools outside the conference would be interviewing procedures. Conferences could implement a rule like those in the NFL that prevents teams from interviewing coaches until after the team plays its last game of the season. Last year, it was announced that the NFL owners agreed that if a team is interested in interviewing a candidate for a head-coaching job, where the candidate is already a coach (head or assistant) for an NFL team, it must wait until three days after the candidate’s Week 18 game or Wild Card game if the candidate is part of a playoff team.<sup>141</sup> This rule slows down the hiring process, enables coaches to prepare for potential interviews while also completing their current coaching duties, and provides an opportunity for teams to retain talent. A similar rule could be implemented on the conference level as way to slow the carousel of coaches being pursued by different universities and quickly driving up the rate of compensation in the market. Conferences could create a rule that prevents their coaches from interviewing for other head coaching jobs until a certain amount of time elapsed after their season

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<sup>141</sup> Mike Florio, *NFL Tweaks the rules for interviewing head-coaching candidates*, PRO FOOTBALL TALK (May 28, 2022, 10:26AM) <https://profootballtalk.nbcsports.com/2022/05/28/nfl-tweaks-the-rules-for-interviewing-head-coaching-candidates/>.

ended. If a conference was to implement a rule like this, it should create an adequate time-period that would allow its member schools, that currently employ the candidate, to assess the market and give an appropriate extension offer to the coach. This way, the member school would have a better opportunity to make an informed decision and not over inflate the value of their coach and the market.

Without potential new rules or a major change in college athletics, coaching salaries will continue to rise at remarkable rates. However, one such major change that could indirectly affect the coaching salary market would be to compensate athletes. Currently, about nineteen percent of all Division I revenue goes toward coaching compensation (approximately \$3 billion).<sup>142</sup> The percent is the same for FBS Autonomy schools, with other major expense categories including: facilities (nineteen percent); administrative compensation (eighteen percent); student aid (thirteen percent); and game and travel (twelve percent).<sup>143</sup> If players were to be compensated, it would likely need to come out of the revenue stream that the conference generates, creating a new expense category. As a result, schools would need to reduce expenses from other categories, the most glaring probably being coaching expenses/compensation.

But how would this work and how would the conference become involved? One way to compensate players would be for the conferences to utilize NIL. Currently, conferences are in a similar position as individual institutions and cannot provide NIL deals directly to athletes.<sup>144</sup> However, assuming a rule change was made by the NCAA that permitted conferences over individual institutions to offer NIL deals, conferences could help improve the issues around

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<sup>142</sup> *15-Year Trends in Division I Athletics Finances*, *supra* note 33 at slide 16.

<sup>143</sup> *15-Year Trends in Division I Athletics Finances*, *supra* note 33 at slide 16.

<sup>144</sup> *Institutional Involvement in a Student-Athlete's Name, Image and Likeness Activities*, NCAA (October 26, 2022) [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL\\_InstitutionalInvolvementNILActivities.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL_InstitutionalInvolvementNILActivities.pdf); *See* NCAA BYLAW 12.5.1.1.

coaches being compensated too much and athletes not receiving enough of the revenue stream. Conferences could set up a structure where they provide NIL deals to some student-athletes based on a tiered system. The most prominent and successful athletes could garner a “Class I” designation, receiving the most compensation each year, and then conferences could have a descending order of classes that receive less compensation than the previous one. Included in these structures would be policies to prevent the conferences from violating any laws that prevent discrimination and disparate impact.<sup>145</sup>

A conference structure around NIL could have many benefits. First, conferences that would create these deals and structures would have a huge advantage in recruiting. Students would most likely be drawn to schools in the conference for a chance to get an NIL conference deal. Additionally, because it would be the conference offering these deals, and not the individual universities, there would be less of a concern for competing schools to commit recruiting violations by promising false NIL deals or trying to create NIL arms races. As a result, if a rule change by the NCAA to allow conferences and not individual institutions to create NIL deals was challenged in court, it would likely pass a rule of reason analysis because there would be procompetitive justifications, namely preventing one particular institution from obtaining all the top talent due to a concentration of wealth.

One drawback to this model is that at first, the conferences could likely not cover the expense of creating these deals until it found enough outside marketing opportunities. Until then, conferences would likely need to use the revenue generated from the media rights of their sporting events. However, as mentioned before, this could indirectly limit (or decrease) head coaching

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<sup>145</sup> Note however that, unlike educational institutions, conferences are most likely not subjected to Title IX requirements, unless they directly receive federal funds. Title IX was determined not to apply to the NCAA for the same reason in *NCAA v. Smith*, 525 U.S. 459 (1999). This gives conferences greater flexibility in creating pay structures for their athletes.

salaries as schools would receive less shares of revenue to cover their expenses. Although, once the conferences do monetize the NIL deals it creates, to the point where they are at least self-sustaining, coaching salaries may rise or continue to go up. Ultimately, this would not be as big of an issue, at least from the public's viewpoint, because one of the main criticisms of high coaching salaries is that the coaches are making a large amount of money, while the athletes are not seeing any dollars. Utilizing an NIL structure to provide some compensation to athletes could help resolve this critique.

## **B. Future Twists in the Road**

The previous rule suggestions were largely influenced by how college athletics operate today, and the current rules and regulations from the NCAA. However, it should be noted that college athletics could drastically change in the near future pending the outcome of federal litigation, making these rule change suggestions less effective. Currently, *Johnson v. NCAA* is pending on appeal in the United States Court of Appeals for the Third Circuit.<sup>146</sup> In the case, Division I college athletes are fighting to prove they can be considered employees. This stage of the litigation is an appeal from the Eastern District of Pennsylvania where the court denied the NCAA's motion to dismiss and ruled that the college athletes may proceed with their Fair Labor Standards Act claims.<sup>147</sup> During the oral arguments in February, the Third Circuit panel seem unpersuaded by the NCAA's position.<sup>148</sup> At one point, one of the panel judges stated that he was not sure how athletes could *not* be considered employees.<sup>149</sup> Although decisions are not necessarily predictable based on oral arguments, it clear that the NCAA is now on defense.

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<sup>146</sup> See *Johnson v. NCAA*, supra note 10.

<sup>147</sup> Peter Hayes, *NCAA Battling From Behind in Student Athlete Employee Suit*, BLOOMBERG LAW (Jan. 17, 2023) <https://news.bloomberglaw.com/litigation/ncaa-battling-from-behind-to-upend-student-athlete-employee-suit>.

<sup>148</sup> Michael McCann, *NCAA Amateurism Roasted by 'Hot Bench' in Federal Appeals Hearing*, SPORTICO (Feb. 15, 2023) <https://www.sportico.com/law/analysis/2023/federal-appeals-court-rebukes-ncaa-1234710033/>.

<sup>149</sup> Nicole Auerbach, *In Johnson v. NCAA, judges are asking the right questions of the college sports model*, THE ATHLETIC (Feb. 15, 2023) <https://theathletic.com/4208822/2023/02/15/johnson-v-ncaa-case-judges-appeals/>.

If there does come a day when athletes are considered employees, this will drastically change the college sports landscape. Employee status could mean workplace protections, unions and collective bargaining, and revenue sharing.<sup>150</sup> Conferences will be integral in addressing these upcoming issues and could play a role in designating revenue sharing models for their members to use, negotiating with student-athlete collectives, and creating shared governance standards on how to handle this new class of employees.

### CONCLUSION

Overall, college athletic conferences were created to support the member institutions that join them. Today, conferences have continued that tradition and can provide associated benefits to their members. These benefits can improve the overall health of an institution by providing it ways to better its financial, academic, and external success. Ultimately, as more pressing and controversial issues arise in college athletics in the coming years, conferences can and should have a role in shaping the solutions.

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<sup>150</sup> Eric Prisbell, *Johnson v. NCAA: Why college sports fans need to pay attention to this court case*, ON3 (Feb. 21, 2023) <https://www.on3.com/news/johnson-v-ncaa-why-college-sports-fans-need-to-pay-attention-to-this-court-case/>.