

REALIGNMENT RIFTS: NAVIGATING ANTITRUST IN THE NEW ERA OF COLLEGE SPORTS

*Reece Tack**

ABSTRACT

This article examines the antitrust implications of recent college athletics conference realignments, focusing on the collapse of the Pac-12 and the emergence of the “Power Four.” Section 7 of the Clayton Act is ill-suited to challenge such moves, but the Sherman Act’s Rule of Reason framework offers a more viable path. Drawing on *NCAA v. Board of Regents* and *NCAA v. Alston*, this article highlights anticompetitive effects and proposes less restrictive alternatives to preserve competitive balance, market access, and fairness in collegiate sports.

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* Reece Tack earned his J.D., *cum laude*, from the Sandra Day O’Connor College of Law at Arizona State University and will join Kirkland & Ellis LLP as a corporate associate. Special thanks to Professors Susan McMahon and Joseph Garagiola for their guidance on this article.

INTRODUCTION

The resounding cheers of enthusiastic crowds and the epic showdowns between the world's top athletes command unparalleled viewership; attracting dedicated fans to stadiums and television screens every Saturday. Behind the scenes, and soon to be on the legal forefront, are antitrust battles between the new mega conferences and the schools that have been left behind for greener fields.¹ Highlighting the immense popularity of college football, consider the 2023 regular season game between Michigan and Ohio State, which captivated over 19 million viewers, setting a record as the most-watched regular season college football game on any network since 2011.² This figure starkly contrasts with the 2023 World Series, where games drew just above 9 million viewers.³ Such a comparison not only illustrates college football's dominant position in the American sports landscape but also emphasizes the increasing draw over professional sports.

In recent months, college sports have undergone seismic shifts in their competitive landscape.⁴ While this article touches upon the broader phenomenon of conference realignment, it specifically addresses the collapse of the Pac-12 Conference as a focal point for antitrust analysis.

¹ Mark Salah Morgan & Michael Fialkoff, *College 'Super Conferences' May Wind up on Defense with Antitrust Law*, SPORTS BUSINESS JOURNAL (Sept. 7, 2022), <https://www.sportsbusinessjournal.com/SB-Blogs/COVID19-OpEds/2022/09/07-MorganFialkoff.aspx> [PERMA MISSING]. Jack Dwyer, *How Conference Realignment Could Pose Antitrust and Tax Issues*, FRIESER LEGAL (Oct. 23, 2023), <https://frieserlegal.com/how-conference-realignment-could-pose-antitrust-and-tax-issues/> [https://perma.cc/PC3C-5JL8].

² FOX Sports, *'The Game' is Most-watched Regular Season CFB Game Since 2011*, FOX SPORTS (Nov. 29, 2023), <https://www.foxsports.com/presspass/blog/2023/11/29/the-game-is-most-watched-regular-season-cfb-game-since-2011/> [https://perma.cc/37LW-V35E].

³ Josh Sim, *MLB World Series 2023 is Least Watched on Record*, SPORTS MEDIA (Nov. 3, 2023), <https://www.sportspromedia.com/news/mlb-world-series-2023-tv-ratings-viewership-fox-texas-rangers/#:~:text=Confirmed%3A,million%20viewers%20for%20game%20five> [https://perma.cc/CC3M-N5P7].

⁴ See Dennis Dodd, *The Pac-12 Is Dead as We Know It, Just Don't Expect the Big Ten, Big 12 or Anyone Else to Take the Blame*, CBS (Aug. 4, 2023, 10:43 PM), <https://www.cbssports.com/college-football/news/the-pac-12-is-dead-as-we-know-it-just-dont-expect-the-big-ten-big-12-or-anyone-else-to-take-the-blame/> [https://perma.cc/84L4-EYTM].

What was typically thought of as the unshakeable power five conferences (1) Atlantic Coast Conference (“ACC”); (2) Big Ten Conference; (3) Big 12 Conference; (4) Pac-12 Conference; and (5) Southeastern Conference (“SEC”) are now the de facto “Power Four”.⁵ Unable to receive a massive media rights deal, the Pac-12, a 108-year-old conference, crumbled (losing 10 of its 12 teams) in less than a year.⁶ The former members of the Pac-12 all left to join forces with other perennial conferences.⁷ USC, UCLA, Oregon, and Washington all joined the Big Ten.⁸ Arizona, Arizona State, Utah, and Colorado joined the Big 12.⁹ Meanwhile, California (Berkeley) and Stanford left for the ACC.¹⁰

For Washington State (“WSU”) and Oregon State (“OSU”), the two remaining schools, massive repercussions are imminent which could severely lessen competition.¹¹ The president of WSU stated that “Washington State might lose 40 percent of its athletic funding because of the demise of the Pac-12.”¹² One area where a decrease in athletic budget hurts a program most is a coaching staff’s

⁵ Ralph D. Russo, *Analysis: Conference Realignment has Mangled the College Sports Map, But to What Benefit?*, ASSOCIATED PRESS (Sept. 1, 2023), <https://apnews.com/article/acc-pac12-conference-realignment-sec-big-ten-big-12-009aa5779eee91e99cb837dc95dbd7f2> [https://perma.cc/862T-WZBF].

⁶ J. Brady McCollough, *Inside the Pac-12 Collapse: Four Surprising Moments that Crushed the Conference*, LOS ANGELES TIMES (Aug. 16, 2023), <https://www.latimes.com/sports/story/2023-08-16/pac-12-collapse-decisions-realignment-ucla-oregon#:~:text=As%20the%20calendar%20turned%20to,new%20TV%20deal%20in%20place> [https://perma.cc/FG4C-PM85].

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Pete Thamel, *ACC Adding Stanford, Cal, SMU as New Members in 2024*, ESPN (Sept. 1, 2023), https://www.espn.com/college-sports/story/_/id/38304694/sources-acc-votes-invite-stanford-cal-smu [https://perma.cc/6E2T-ST9C].

¹¹ Nicholas K. Geranios, *How the PAC-12 Scramble Will Impact WSU’s Athletics*, CASCADE PBS (Aug. 11, 2023), <https://www.cascadepbs.org/news/2023/08/how-pac-12-scramble-will-impact-wsus-athletics#:~:text=Schulz%20told%20ESPN%20that%20Washington,will%20not%20cut%20sports%20programs> [https://perma.cc/JU5J-V6PZ]; Susan M. Shaw, *The Human Cost of Conference Realignment*, FORBES (Oct. 3, 2023), <https://www.forbes.com/sites/susanmshaw/2023/10/03/the-human-cost-of-conference-realignment/?sh=67858e9c1e09> (“OSU, for example, is now facing a possible \$40 million shortfall in 2024–25 because of lost conference revenues”) [https://perma.cc/2HZM-KH64].

¹² Geranios, *supra* note 11.

ability to recruit players.¹³ Without being able to recruit top athletes, competition among Division I schools consolidates to those that can afford them, which will inevitably be Power Four schools.¹⁴

By increasing the number of teams in a Power Four conference, each member school will be required to play more games within the said conference, which limits the number of games teams can play against nonconference opponents.¹⁵ This article argues that recent conference realignment is anti-competitive behavior that may allow antitrust claims to be brought against either the NCAA for allowing such realignment with its policies and rules, or the individual schools that have the indirect effect of inhibiting competition in the collegiate athletic space. These practices unfairly (1) decrease the number of rivalries, (2) geographically inhibit student-athletes' ability to play at their highest level, and (3) increase the financial disparity between the Power Four conferences and the rest of the Division I schools, which in turn consolidates the best athletes to these mega conferences. This article argues that each of these three findings collectively supports a claim of anticompetitive behavior under the Sherman Act's Rule of Reason test, but it is improbable that potential plaintiffs would achieve success under Section 7 of the Clayton Act.

Part I provides an in-depth examination of the origins and evolution of antitrust laws in the United States, with a particular focus on the Clayton and Sherman Acts. This section delves into the historical context that necessitated these laws, their fundamental principles, and their relevance to the regulation of competitive practices within the collegiate sports arena. Additionally, the article will explore

¹³ Andy Wittry, *An Analysis of College Football Recruiting Costs*, ATHLETIC DIRECTOR U, <https://athleticdirector.u.com/articles/an-analysis-of-football-recruiting-costs/> (last visited Sept. 10, 2023) [<https://perma.cc/GWX9-A9C7>].

¹⁴ *Id.* ("The SEC has used the tagline, 'It just means more,' and that's true – at least in terms of how much the conferences member schools spend on football recruiting. The top three spenders last year play in the SEC, as do four of the top five and five of the top seven").

¹⁵ Eric Lynch, *Breaking Down the NCAA Realignment*, JOHNS HOPKINS NEWS-LETTER, (Sept. 10, 2021), <https://www.jhunewsletter.com/article/2021/09/breaking-down-the-ncaa-realignment> [<https://perma.cc/SQ3P-FMQR>].

the unique challenges posed by the current climate of college athletics, setting the stage for a nuanced discussion on the intersection of antitrust law and sports.

Part II transitions from theoretical foundations to practical application, scrutinizing the potential for legal challenges under antitrust theory in the wake of conference realignments. The section evaluates the conditions under which institutions left out of the new mega-conference alignments might successfully bring forth antitrust claims. This analysis is informed by precedent-setting cases and the application of the Sherman Act's Rule of Reason, Per Se, and Quick Look tests, offering insights into the likelihood of plaintiffs' success in asserting their claims.

Part III summarizes the article's findings, emphasizing the practical implications for schools excluded from conference realignment. The section assesses the broader impacts of these antitrust considerations on the future landscape of collegiate athletics, advocating for a balanced approach that aligns with antitrust law's objectives to maintain fair competition and prevent monopolistic practices. The final section not only addresses the theoretical outcomes of potential litigation but also reflects on the public policy justifications for antitrust enforcement, underscoring the critical role of legal frameworks in sustaining the integrity and competitiveness of college sports.

I. ANTITRUST FOUNDATIONS AND IMPLICATIONS IN COLLEGE ATHLETICS

This section will first examine the principles of antitrust law and the background behind the adoption of the Clayton and Sherman Act. Then, the section will explain the Clayton and Sherman Acts and their primacy as tools that plaintiffs may use to quash anticompetitive behavior in the United States.

A. *The Rise of Antitrust Law*

Competition policy, also referred to as antitrust law, emerged in the United States towards the end of the 19th century.¹⁶ Antitrust law was a reaction to the

¹⁶ See generally Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective*, HARV. BUS. SCHOOL (2019), https://www.hbs.edu/ris/Publication%20Files/19-110_e21447ad-d98a-451f-8ef0-ba42209018e6.pdf [https://perma.cc/Z29H-K822].

increasing power of large corporations, often referred to as “trusts.”¹⁷ Essentially, a trust is a legal arrangement that allows multiple property owners to manage their assets under one organization.¹⁸ Business owners would merge their interests into a singular legal entity known as the trust.¹⁹ These owners then appoint trustees who manage the trust for the benefit of all owners, who in turn hold dividend shares.²⁰

Trusts can exist within a single company, known as a voting trust, to unify major shareholders for guiding management decisions.²¹ Alternatively, one can form trusts to manage several independent companies, which function like cartels.²² In 1882, S. C. T. Dodd, a lawyer for John Rockefeller’s Standard Oil Company, established a trust to tightly control oil refining companies.²³ This enabled them to influence prices and supply while evading state taxes and corporate regulations.²⁴ The proliferation of such trusts in the 1880s led to various state and federal antitrust laws.²⁵ These laws aimed to regulate competition in business, focusing on how firms coordinated and tactics used to monopolize markets.²⁶

In the late 1800s, competition policy evolved as a response to growing concerns about the potential misuse of economic power by large corporations.²⁷ Reformers were worried that such power could influence political decisions or

¹⁷ *Id.* at 1.

¹⁸ *Id.* at 2.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Voting Trust, CORP. FIN. INST.* <https://corporatefinanceinstitute.com/resources/valuation/voting-trust/> (last visited Mar. 24, 2024) [<https://perma.cc/2L4W-KDC9>].

²² James Chen, *What is a Cartel? Definition, Examples and Legality*, INVESTOPEDIA (May 19, 2023), <https://www.investopedia.com/terms/c/cartel.asp> [<https://perma.cc/6NLS-8P4Y>].

²³ *Standard Oil Established*, LIBRARY OF CONGRESS, <https://guides.loc.gov/this-month-in-business-history/january/standard-oil-established> (last visited Mar. 24, 2024) [<https://perma.cc/KH8K-VMJE>].

²⁴ Sawyer, *supra* note 16, at 2.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *The Rise and Fall of Monopolies in the 19th Century: A Historical Analysis*, 19TH CENTURY EVENTS AND DEVS., <https://19thcentury.us/monopolies-in-the-19th-century/> (last visited Mar. 24, 2024) [<https://perma.cc/UN3E-CF85>].

unfairly suppress small business owners.²⁸ Traditionally, market competition was maintained by judges enforcing common law rules against trade restrictions and state laws regulating corporate behavior and governance.²⁹ However, advancements in communication and transport technologies led to business mergers that crossed state boundaries, rendering state laws less effective.³⁰

To address this, the federal government stepped in with the Sherman Antitrust Act of 1890, aiming to control the power of trusts through federal legal action.³¹ Despite this, throughout the next hundred years, many believed that the Sherman Act was insufficient in curbing anti-competitive practices.³²

One key issue was that the Act's vague language and lack of clear definitions left too much room for interpretation.³³ The Sherman Act did not explicitly define what constituted "monopolization" or "restraint of trade," nor did it outline what practices were considered anti-competitive.³⁴ This ambiguity led to a wide range of judicial interpretations, making consistent enforcement difficult.³⁵

The Act's enforcement was initially weak and sporadic.³⁶ For more than a decade after its passage, the Sherman Act was rarely used against industrial

²⁸ Sawyer, *supra* note 16, at 2.

²⁹ *Id.*

³⁰ Isil Erel, Yeejin Jang, Michael S. Weisbach, *Cross-Border Mergers and Acquisitions*, NBER WORKING PAPER SERIES (Oct. 2022), https://www.nber.org/system/files/working_papers/w30597/w30597.pdf [<https://perma.cc/NDB5-BDDY>].

³¹ F.T.C., *Guide to Antitrust Laws*, F.T.C., <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws#:~:text=These%20laws%20promote%20vigorous%20competition,anticompetitive%20mergers%20and%20business%20practices> (last visited Nov. 25, 2023) [<https://perma.cc/MDU6-ZYC2>].

³² Britannica, *Sherman Antitrust Act*, BRITANNICA, <https://www.britannica.com/event/Sherman-Antitrust-Act> (last visited Nov. 25, 2023) [<https://perma.cc/38KE-2Y LX>].

³³ See generally Matthew G. Sipe, *The Sherman Act and Avoiding Void-for-Vagueness*, 45 FLA. ST. U. L. REV. 709 (2018).

³⁴ *Id.* at 710 n.2 "[t]he Sherman Act broadly covers restraints of trade or commerce, monopolization, and attempts to monopolize" (quoting 15 U.S.C. §§ 1–2) (internal quotations and alterations omitted).

³⁵ *Id.* "More than a century of judicial gloss has failed to repair the defect latent in the Sherman Act since its conception: unconstitutional vagueness."

³⁶ Britannica, *supra* note 32.

monopolies, and when it was, it often was not successful.³⁷ Instead, the Act was more frequently applied to trade unions under narrow judicial interpretations, which saw the unions as illegal combinations that restrained trade.³⁸ This use against labor rather than monopolies was not the intent of the legislation and highlighted its shortcomings.³⁹

The primary touchstone for analysis under the Sherman Act stems from the seminal case *Standard Oil Co. of New Jersey v. United States*. In *Standard Oil*, the Supreme Court ruled that Standard Oil had monopolized the petroleum industry and the court ordered the breakup of the company.⁴⁰ This breakup led to the creation of companies that would become Exxon, Mobil, and Chevron among others.⁴¹ This case's reasoning is important because it established the Rule of Reason doctrine, which is the analytical framework courts use in the vast majority of antitrust cases today.⁴²

This case led to further amendments to antitrust laws.⁴³ The early 20th century's Progressive Era was marked by significant governmental reforms aimed at curbing the power of large corporations and ensuring fair competition in the marketplace.⁴⁴ This period saw the enactment of pivotal legislation such as the Federal Trade Commission Act of 1914, which established the Federal Trade Commission (FTC) to prevent unfair business practices, and the Clayton Antitrust Act of 1914, designed to complement the Sherman Antitrust Act by providing more specific prohibitions against anti-competitive behaviors.⁴⁵

³⁷ *Id.* ("For more than a decade after its passage, the Sherman Act was invoked only rarely against industrial monopolies, and then not successfully, chiefly because of *narrow judicial interpretations* of what constitutes trade or commerce among states.") (emphasis added).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

⁴¹ *Standard Oil*, BRITANNICA, <https://www.britannica.com/topic/Standard-Oil> (Feb. 7, 2025) [<https://perma.cc/AD8M-3UQP>].

⁴² 221 U.S. at 66.

⁴³ Sawyer, *supra* note 16, at 2.

⁴⁴ See, e.g., Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L. J. 1, 2 (2003).

⁴⁵ *Id.*

The establishment of the FTC was a direct response to the limitations of the Sherman Act in effectively regulating and preventing monopolistic practices.⁴⁶ The FTC was granted the authority to investigate companies and enforce unfair trade practices that could harm competition, thus addressing the need for a dedicated body to oversee and maintain fair business practices.⁴⁷

Similarly, the Clayton Antitrust Act was enacted to address specific practices not adequately covered by the Sherman Act.⁴⁸ It aimed to prevent anti-competitive practices in their incipiency, outlawing actions such as exclusive dealings, mergers, and acquisitions that could substantially lessen competition or tend to create a monopoly, price discrimination that could harm competition and the use of tying agreements.⁴⁹ These provisions were deemed necessary as the economic landscape had evolved, and new forms of anti-competitive behavior had emerged that were not explicitly addressed by the Sherman Act.⁵⁰

These reforms were not only a response to the growing complexity of the economy and the sophisticated ways in which firms could engage in anti-competitive conduct but also reflected a broader societal call for greater equity and fairness in business practices.⁵¹ They underscored the government's commitment to ensuring a level playing field for all market participants and preventing the concentration of market power that could lead to monopolistic control.⁵²

B. What Can Plaintiffs and Courts Rely on to Quash Monopolies or Activities that Raise Antitrust Concerns?

In today's legal landscape, two critical acts serve as the backbone for regulating monopolies and ensuring fair competition in the United States marketplace: the Sherman Antitrust Act of 1890 and the Clayton Antitrust Act of

⁴⁶ *Id.* at 4.

⁴⁷ *Id.*

⁴⁸ See generally A. D. NEALE & D. G. GOYDER, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA: A STUDY OF COMPETITION ENFORCED BY LAW (Nat'l Inst. of Econ. & Soc. Rsch. Econ. & Soc. Stud. ed., 2d ed. 1967).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

1914.⁵³ The Sherman Act, as the first significant federal measure against monopolies, set the stage for addressing competitive practices in business.⁵⁴ However, to remedy some of its shortcomings and to provide more specific guidelines, Congress later introduced the Clayton Act.⁵⁵

In legal arguments, determining which act—Sherman or Clayton—is more applicable depends on the specifics of the case, and sometimes the industry implicated. For issues related to mergers and acquisitions, the Clayton Act, particularly Section 7, is often the primary tool.⁵⁶ In contrast, for broader claims of anti-competitive practices, the Sherman Act’s tests—Per Se, Quick Look, and Rule of Reason—provide a framework for analysis.⁵⁷ Each case’s particularities guide the choice of statute and the applicable test, shaping the legal strategies employed by plaintiffs in antitrust litigation.

A key provision of the Clayton Act is Section 7, which specifically targets mergers and acquisitions.⁵⁸ It prohibits mergers that may substantially lessen competition or tend towards creating a monopoly in any line of commerce or activity affecting commerce in any part of the country.⁵⁹ For a successful challenge under Section 7, the plaintiff must demonstrate that a merger is likely to significantly impede competition in a foreseeable manner.⁶⁰

While Section 7 of the Clayton Act addresses the specific concerns related to mergers and acquisitions, it is crucial to also understand how broader anti-competitive practices are assessed under Section 1 of the Sherman Act. This dual focus lays the groundwork for a comprehensive analysis of competition law, as

⁵³ R. Preston McAfee & Nicholas V. Vakkur, *The Strategic Abuse of the Antitrust Laws*, U.S. DEP’T OF JUST.: ARCHIVES, <https://www.justice.gov/archives/atr/strategic-abuse-antitrust-laws> (Jan. 3, 2024) [<https://perma.cc/4JGQ-DUNZ>].

⁵⁴ Britannica, *supra* note 32.

⁵⁵ *The Antitrust Laws*, FED. TRADE COMM’N, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Feb. 16, 2025) [<https://perma.cc/J3Y4-S2TQ>].

⁵⁶ 15 U.S.C. § 18 (1914).

⁵⁷ *See* National Collegiate Athletic Association Ass’n v. Alston, 594 U.S. 69, 70–89 (2021).

⁵⁸ 15 U.S.C. § 18 (1914).

⁵⁹ *Id.*

⁶⁰ *Id.*

both provisions play pivotal roles in preserving market integrity.⁶¹ When evaluating claims of unreasonable restraints on trade under Section 1 of the Sherman Act, courts have three analytical frameworks at their disposal: (1) the Per Se Test,⁶² (2) the Quick Look Test,⁶³ and (3) the Rule of Reason Test.⁶⁴ This set of tests evaluates whether a particular business practice unreasonably restrains trade by considering its actual or potential impact on competition.⁶⁵

In examining antitrust issues within collegiate sports, such as football, the Rule of Reason test emerges as the most pertinent analytical framework.⁶⁶ This is because the unique nature of sports competitions, which inherently require a certain degree of cooperation and standard-setting among teams and governing bodies, does not fit neatly into the categories of per se illegal restraints.⁶⁷ The Rule of Reason test allows for a nuanced analysis that considers both the potential anti-competitive effects and the pro-competitive justifications within this distinct context.⁶⁸ To apply the Rule of Reason test, first, the plaintiff must prove that there is a substantial anti-competitive effect stemming from the challenged restraint.⁶⁹ If this burden is met, then the defendant must prove a pro-competitive rationale for the challenged restraint.⁷⁰ If the defendant meets this burden, then the plaintiff

⁶¹ NEALE & GOYDER, *supra* note 48.

⁶² *See infra* Part II.

⁶³ *Id.*

⁶⁴ *See* National Collegiate Athletic Association Ass’n v. Alston, 594 U.S. 69, 70 (2021); Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006); Standard Oil Co. of N. J. v. United States, 221 U.S. 1, 60–62 (1911).

⁶⁵ *Alston*, 594 U.S. at 81.

⁶⁶ *Id.*

⁶⁷ *Id.* at 81. “[t]he goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.”; *see also* California Dental Ass’n v. F.T.C., 526 U.S. 756, 781 (1999) (discussing the purpose of the rule of reason is to furnish “‘an enquiry meet for the case’, and that the object is a ‘confident conclusion about the principal tendency of a restriction.’”)

⁶⁸ *Alston*, 594 U.S. at 81.

⁶⁹ *Id.* at 96.

⁷⁰ *Id.* at 98. A defendant need not employ the *least* restrictive means of its legitimate business purpose. “To the contrary, courts should not second-guess ‘degrees of reasonable necessity’ so that ‘the lawfulness of conduct turn[s] upon judgments of degrees of efficiency.’” (quoting *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 227 (1986)).

must demonstrate that there are reasonably achievable, less restrictive means for achieving the pro-competitive benefits of the challenged restraint.⁷¹

In the debate surrounding collegiate sports conference realignment and its antitrust implications, defendants might posit that plaintiffs' challenges are fundamentally driven by a desire to secure their own slice of an anticompetitive pie.⁷² This argument implies that plaintiffs' motives are not rooted in a genuine concern for preserving competition but rather in a bid to partake in the benefits of the existing anti-competitive structure. However, this stance overlooks the essence of antitrust law and the broader implications of such realignments on the competitive balance within collegiate sports.

To counter this argument, it is instructive to draw upon the Third Circuit decision in *Mid-South Grizzlies v. NFL*, where the plaintiff, an aspiring NFL team, challenged the league's expansion policies.⁷³ The Grizzlies argued the NFL's refusal to admit them as a new team was anticompetitive.⁷⁴ While the NFL might have defended its actions on various grounds, the crux of the matter—and what's relevant to our discussion—centers on the principle that antitrust laws are designed to foster competition and protect consumers, specifically fans and the sporting community at large, from monopolistic practices.⁷⁵

Applying this principle to the context of college sports conference realignment, the argument that plaintiffs are merely seeking their share of an anti-competitive arrangement fails to acknowledge the detrimental impact such consolidation has on the sport's competitive landscape. Unlike seeking admission to a closed league, as the plaintiffs did in *Mid-South Grizzlies*, challenging

⁷¹ *Id.* "These three steps do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis. As we have seen, what is required to assess whether a challenged restraint harms competition can vary depending on the circumstances."

⁷² *See infra*, note 73.

⁷³ *See generally* *Mid-South Grizzlies v. NFL*, 720 F.2d 772 (3d Cir. 1983).

⁷⁴ *Id.* at 776 "The Grizzlies' complaint . . . does not charge that the provisions of the NFL's Constitution and By-Laws reserving to its members franchise exclusivity for designated home territories violates the antitrust laws. Indeed, the Grizzlies sought such an exclusive franchise for themselves. Thus this case does not present any issue of possible antitrust violation from the exclusion of potential competitors in the designated exclusive home territories."

⁷⁵ *Id.*

conference realignment addresses the broader concern of ensuring equitable opportunities for *all* institutions. It underscores a commitment to preserving the diversity and competitiveness that define collegiate athletics, not a quest for inclusion in an exclusionary arrangement.

Thus, dismissing plaintiffs' challenges as mere attempts to enter an anticompetitive league overlooks the fundamental aim of antitrust litigation: to correct market imbalances and promote a competitive environment.⁷⁶ In the context of collegiate sports, this translates into advocating for policies that sustain the competitive balance, enhance student-athlete opportunities, and ensure the continued vibrancy and integrity of intercollegiate competitions.

C. Current State of College Athletics

The current landscape of college athletics is often described as the "Wild West."⁷⁷ This characterization stems from recent developments, such as the introduction of Name, Image, and Likeness ("NIL") rights and the shifting of schools between athletic conferences.⁷⁸ Both of these trends are financially

⁷⁶ *Id.*

⁷⁷ Khristopher J. Brooks, *It's the "wild, Wild West" for Companies Hoping to Monetize College Athletes*, CBS NEWS (July 30, 2021, 12:21 PM), <https://www.cbsnews.com/news/nil-college-athletes-collegiate-sports-ncaa/> [https://perma.cc/3EPU-WPPE].

⁷⁸ *Id.* "Name, image, and likeness . . . are the three elements that makeup 'right of publicity', a legal concept used to prevent or allow the use of an individual to promote a product or service. For example, if an athlete's photograph is taken while wearing an athletic brand, and that brand uses the photo to promote their products without the athlete's consent, that athlete could claim the brand is in violation of the right of publicity." Historically, the NCAA has been criticized for taking advantage of student-athletes by using their NIL for profit, but not allowing athletes to profit. Athletes are now able to profit from their NIL following the June 2021 interim policy. See *NCAA Name, Image, Likeness Rule*, NCSA College Recruiting (2021), <https://www.ncsasports.org/name-image-likeness> [https://perma.cc/8SG7-PSHR].

Schuyler Callihan, *Conference Realignment Spells Doom for Future of College Athletics*, MOUNTAINEERS NOW (July 5, 2022, 11:01 AM), <https://www.si.com/college/westvirginia/big-12/conference-realignment-spells-doom-for-future-of-college-athletics> [https://perma.cc/W3QJ-DYVP].

motivated.⁷⁹ Such changes raise concerns about the potential anticompetitive effects these movements might have on other colleges and athletic conferences.

The Pac-12 was the fourth-largest athletic conference in annual revenue, earning approximately six hundred million in the fiscal year 2021-2022.⁸⁰ The conference's stability was compromised when it failed to finalize a media rights deal worth one billion dollars.⁸¹ This financial shortfall led its member schools to seek more lucrative opportunities.⁸² Consequently, USC, UCLA, Oregon, and Washington joined the Big Ten Conference.⁸³ Arizona, Arizona State, Utah, and Colorado switched to the Big 12 Conference.⁸⁴ Additionally, the University of California, Berkeley, and Stanford University shifted to the ACC.⁸⁵

For WSU and OSU, the reshuffling of athletic conferences and the introduction of NIL laws have significantly impacted their athletic departments.⁸⁶ These changes have led to substantial reductions in their athletic budgets and hindered their ability to attract top talent.⁸⁷ Additionally, both schools' remote locations (Pullman and Corvallis) make them less attractive to potential new conferences and prospective student-athletes simply because of travel time and expense.⁸⁸ Similarly, proximity to lucrative markets offers numerous advantages.⁸⁹ In today's

⁷⁹ Ralph D. Russo, *Analysis: Conference Realignment has Mangled the College Sports Map, but to What Benefit?*, AP News (Sept. 1, 2023, 3:09 PM), <https://apnews.com/article/acc-pac12-conference-realignment-sec-big-ten-big-12-009aa5779e91e99cb837dc95dbd7f2> [https://perma.cc/474Y-QWJN].

⁸⁰ *Pac-12 announces record 2021-2022 financial results*, PAC-12 CONF. (May 19, 2023), <https://pac-12.com/article/2023/05/19/pac-12-announces-record-2021-22-financial-results> [https://perma.cc/QN3B-65FM].

⁸¹ Tim Baysinger, *Pac-12 sacked by College Sports' lust for TV Dollars*, AXIOS PRO (Aug. 7, 2023), <https://www.axios.com/pro/media-deals/2023/08/07/pac-12-tv-deal-apple> (last visited Feb. 6, 2025) [https://perma.cc/GX7K-AVBJ].

⁸² *Id.*

⁸³ McCollough, *supra* note 6.

⁸⁴ *Id.*

⁸⁵ Thamel, *supra* note 10.

⁸⁶ Shaw, *supra* note 11.

⁸⁷ *Id.*

⁸⁸ Susan M. Shaw, *The Human Cost of Conference Realignment*, FORBES (Oct. 3, 2023), <https://www.forbes.com/sites/susanmshaw/2023/10/03/the-human-cost-of-conference-realignment/?sh=371907ed1e09> [https://perma.cc/3UPF-KF48].

⁸⁹ Kyle Bonagura, *Pac-12 leftovers – What Will Be Washington State's and Oregon State's Ultimate Fate?*, ESPN (Sept. 26, 2023, 7:00 AM), <https://www.espn.com/college->

recruiting strategies, universities often highlight the NIL opportunities available to their student-athletes. This is considerably more straightforward for institutions situated in major cities due to the abundance of opportunities.⁹⁰ With athletes now able to receive compensation, it is highly likely that top talent will be drawn to locations where the financial opportunities are most abundant, and these opportunities tend to cluster around major cities.⁹¹ Thus, conference realignment and NIL laws limit WSU and OSU's ability to compete in the new college athletic environment. Ironically, this shift towards prioritizing financial gains by other institutions contrasts with the NCAA's stated mission of maintaining "amateurism" in college sports.⁹² The consolidation of conferences compounds these challenges by centralizing resources and visibility within a select group of schools, further exacerbating the divide between institutions with access to major markets and those in less advantageous locations. This Comment seeks to highlight that the concentration of power raises antitrust concerns, as it may limit competition and restrict the market for college athletics, underscoring the complex interplay between conference realignment and NIL laws in reshaping the landscape of collegiate sports.

II. ANALYSIS

The critical inquiry, then, is whether institutions left out of the newly established mega conferences (like WSU or OSU) can effectively satisfy a test under the Sherman Act, or whether they have a viable claim under the Clayton Act. Additionally, it's important to consider whether ruling against these mega (Power Four) conferences would align with the underlying policy objectives that antitrust laws are designed to uphold.

football/story/_/id/38473796/pac-12-leftovers-washington-state-oregon-state-ultimate-fate [https://perma.cc/LU6T-ZX8E].

⁹⁰ Lauren McQuade, *College Student-Athlete Health and Well-being*, TIMELY CARE (Aug. 30, 2021), <https://timelycare.com/blog/student-athlete-mental-health/> [https://perma.cc/J4LP-UUSL].

⁹¹ See Olafimihan Oshin, *Saban Accuses Texas A&M of Buying Players Through NIL Deals*, THE HILL (May 19, 2022) <https://thehill.com/homenews/state-watch/3494192-saban-accuses-texas-am-of-buying-players-through-name-image-and-likeness-deals/> [https://perma.cc/BZE5-QQNK].

⁹² See Alston, *supra* note 65, at 2152.

A. Could plaintiffs succeed under the Clayton Antitrust Act of 1914?

It is unlikely that schools left out of the new conference realignments will be able to succeed on an antitrust claim under the Clayton Antitrust Act of 1914. Section 7 of the Clayton Act prohibits a merger or acquisition when the effect of said merger “may be substantially to lessen competition, or tend to create a monopoly.”⁹³ The primary concern for the Federal Trade Commission in evaluating such mergers is determining whether they are likely to increase or strengthen market power.⁹⁴ The most significant antitrust issues arise from proposed mergers between direct competitors, known as horizontal mergers.⁹⁵

Aligning these teams within the same conference can be seen as a strategy to enhance market power. For instance, WSU and OSU might claim that a key reason for the exit of other Pac-12 members was the conference’s failure to secure a lucrative TV contract.⁹⁶ By moving to a conference with a substantial existing contract, these schools sought to increase their market power. This strategy, involving alignment among direct competitors, aligns with the concerns outlined by the Federal Trade Commission (FTC) regarding potential antitrust issues, as it could be perceived as an action that lessens competition among collegiate football programs.⁹⁷

The challenge with this argument is that the teams are not merging into a single entity; they are simply joining another conference to compete against each other, so a traditional “merger” where two entities merge into one entity never actually occurs. If the “relevant market”—what Section 18 of the Clayton Act refers to as “any section of the country”⁹⁸—exists, as “live football television” as it was

⁹³ 15 U.S.C. § 18 (1914).

⁹⁴ *Mergers*, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers> (last visited Mar. 13, 2025) [<https://perma.cc/25JA-LCPP>].

⁹⁵ *Id.*

⁹⁶ Baysinger, *supra* note 82.

⁹⁷ *See, e.g.,* United States v. Trenton Potteries Co., 273 U.S. 392 (1927); Sugar Institute, Inc. v. United States, 297 U.S. 553 (1936); United States v. Paramount Pictures, 334 U.S. 131 (1948); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

⁹⁸ *See* Clayton Act 15 U.S.C. § 18 (1914) “No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade

referred to in *Board of Regents*, the competition would be materially distinct from the pre-merger competition because “merging” schools could argue the quality of matchups is stronger, not the same.⁹⁹ For example, the opportunity to watch the University of Washington play against Ohio State University post-transition presents a fundamentally different product than what was available before the University of Washington joined the Big Ten Conference.

Consequently, for several reasons, it seems unlikely that a team asserting that conference realignment breaches antitrust laws would prevail under the Clayton Act.

B. Could Plaintiffs Succeed Under the Sherman Act?

Schools left out of new conference realignments like OSU and WSU have the best chance of success on an antitrust claim under the Sherman Act. At first glance, the plain language seems to suggest plaintiffs could easily succeed, given that § 1 of the Sherman Act states “every contract that restrains trade is unlawful.”¹⁰⁰ But as Justice Brandeis noted, “restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law. Yet it is that body of law that established the enforceability of commercial agreements and enables competitive markets—indeed, a competitive economy—to function effectively.”¹⁰¹ Thus, a full analysis is warranted.

Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”

⁹⁹ Drew Thornley, *College Football: Proposals for Structural Reform and Antitrust Implications*, 32 MARQ. SPORTS L. REV. 471, 512 (2022).

¹⁰⁰ Section 1 of the Sherman Act, as set forth in 15 U.S.C. § 1 (1976 ed.), provides: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal”

¹⁰¹ Nat’l Soc’y. of Pro. Eng’r v. U.S., 435 U.S. 679, 687–88 (1978) (explaining “Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition. The Rule of Reason, with its origins in common-law precedents long antedating the Sherman Act, has served that purpose. It has been used to give the [Sherman] Act both flexibility and definition, and its central principle of antitrust analysis has remained constant.”).

Based on the United States Supreme Court's decisions in *NCAA v. Board of Regents* and *NCAA v. Alston*, only the Rule of Reason Test is relevant in situations involving scrutinizing NCAA rules or other agreements among schools to join a new conference.¹⁰²

In *NCAA v. Board of Regents*, the NCAA had established a plan that restricted the number of televised games for each college and the number of times any college could appear on television.¹⁰³ The plan was intended to reduce the impact of television on live game attendance and to spread television exposure among various NCAA member institutions.¹⁰⁴

The University of Oklahoma and Georgia filed a lawsuit against the NCAA, arguing the NCAA's television plan violated antitrust laws by restricting the number of televised college football games.¹⁰⁵ The Supreme Court, in a landmark decision, agreed with the universities.¹⁰⁶ It ruled that the NCAA's television plan did indeed violate antitrust laws because it restricted the output of televised football games and fixed the price of those broadcasts, thus harming competition.¹⁰⁷ The Court applied the Rule of Reason approach to analyze the antitrust claim, acknowledging that some collaborative actions are necessary in sports but that the NCAA's specific plan went too far in restricting competition.¹⁰⁸

Here, the Per Se and Quick Look tests are inapplicable. In antitrust law, the Per Se rule is applied to business practices that are considered so harmful to competition that they are automatically deemed illegal, without the need for a

¹⁰² See generally *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85 (1984); *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021).

¹⁰³ *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. at 86.

¹⁰⁴ *Id.* at 87.

¹⁰⁵ *Nat'l Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 88 (1984) ("The University of Oklahoma and the University of Georgia contend that the National Collegiate Athletic Association has unreasonably restrained trade in the televising of college football games. After an extended trial, the District Court found that the NCAA had violated § 1 of the Sherman Act and granted injunctive relief. 546 F. Supp. 1276 (WD Okla.1982). The Court of Appeals agreed that the statute had been violated but modified the remedy in some respects. 707 F.2d 1147 (CA10 1983). We granted certiorari, 464 U.S. 913, 104 S.Ct. 272, 78 L.Ed.2d 253 (1983), and now affirm.")

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 93.

¹⁰⁸ *Id.* at 86.

detailed examination of their effects on the market.¹⁰⁹ Examples include price fixing, market division, and output restriction agreements among competitors.¹¹⁰ *NCAA v. Board of Regents* further clarified the inapplicability of the Per Se test as it pertains to the collegiate athletic space. The court reasoned “Per Se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.”¹¹¹ Although there could be a seemingly viable argument in the college sports world for this with conference realignment, the court noted that college [sports] is an industry in which horizontal restraints on competition are essential if the product is to be available at all, thus, a Per Se analysis is not appropriate.¹¹² This reasoning underscores that certain industry-specific characteristics can exempt otherwise scrutinized practices from Per se condemnation, necessitating a more nuanced approach to legality.

The Quick Look test, on the other hand, is a streamlined version of the Rule of Reason analysis, applied when the nature of the practice suggests it could be anti-competitive but does not warrant outright condemnation without further examination.¹¹³ It is used when an observer with a basic understanding of the industry can spot a restriction’s potential to harm competition but needs some factual context to assess its actual impact.¹¹⁴ In *NCAA v. Alston*, the Court determined that the Quick Look Test was unsuitable because it is not immediately

¹⁰⁹ *White Motor Co. v. U.S.*, 372 U.S. 253, 265 (1963) (explaining “the per se rule of prohibition has been applied to price-fixing agreements, group boycotts, tying arrangements, and horizontal divisions of markets. As to each of these practices, experience and analysis have established the utter lack of justification to excuse its inherent threat to competition. To gauge the appropriateness of a per se test for the forms of restraint involved [the court] must determine whether experience warrants, at this stage, a conclusion that inquiry into effect upon competition and economic justification would be similarly irrelevant”).

¹¹⁰ *Id.*

¹¹¹ *Board of Regents*, *supra* note 107, at 102–103.

¹¹² *Id.* at 87.

¹¹³ David C. Kurlander, *Rebalancing Pay-For-Delay: Why No-Authorized Generic Agreements Should be Subject to Higher Antitrust Scrutiny*, 32 CARDOZO ARTS & ENT. L. J. 683, 708–09 (2014) (explaining “the quick-look test is appropriate ‘when an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets.’”).

¹¹⁴ *See id.*

evident that the behavior in question—restricting education-related benefits—is inherently anti-competitive.¹¹⁵ Similarly, in the context of schools switching conferences, the action in itself does not overtly suggest anti-competitive behavior; there are equally compelling reasons for the decision to move conferences. However, when multiple schools collectively shift conferences, the cumulative effect may be anticompetitive. This scenario necessitates a thorough examination, which is feasible only through the Rule of Reason test, as it allows for an in-depth analysis of the overall impact on competition by considering facts pertaining to the business practice in question, its context, and its actual market effects, thereby providing a comprehensive framework for antitrust evaluation.

C. The Antitrust 3-Stage Framework

Under the Rule of Reason framework set by the Supreme Court for analyzing antitrust claims, the process unfolds in stages.¹¹⁶ At step 1, the plaintiff must prove that the action in question—such as the consolidation of athletic conferences—has significant anticompetitive effects.¹¹⁷ This involves demonstrating a tangible impact on competition within the relevant market.¹¹⁸ Moving to Step 2, if the plaintiff successfully meets this burden, the responsibility shifts to the defendant to justify the action by presenting pro-competitive reasons for their conduct.¹¹⁹ This step requires the defendant to articulate how the conduct in question enhances competition, benefits consumers, or otherwise serves a legitimate business purpose.¹²⁰ At Step 3, should the defendant provide a valid pro-competitive rationale, the onus returns to the plaintiff to propose less restrictive means of

¹¹⁵ Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2156-57 (2021).

¹¹⁶ *Id.* at 2160.

¹¹⁷ *Id.* at 2160-61.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 2161 (“[A]ntitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes. To the contrary, courts should not second-guess ‘degrees of reasonable necessity’ so that ‘the lawfulness of conduct turns upon judgments of degrees of efficiency.’” (quoting *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 227 (1986)) (alterations omitted).

¹²⁰ *Id.*

achieving the same pro-competitive benefits.¹²¹ This step emphasizes the exploration of alternative actions that could preserve the pro-competitive effects without imposing the same level of harm on competition.¹²² Finally, the evaluation of alternative means involves a critical assessment of these proposed alternatives, examining their practicality, effectiveness, and whether they indeed offer a less restrictive method to achieve the pro-competitive goals stated by the defendant, while giving due consideration to the defendants' business judgments.¹²³

1. Step 1: The Anticompetitive Effects of Conference Realignment

To meet the step 1 burden, an excluded school from the consolidated conferences might argue that its exclusion has significant anticompetitive effects. Being unable to participate in a new, more prominent conference could lead to reduced athletic funding and a lesser ability to attract top talent, as elite athletes might prefer schools in the Power Four conferences, where a greater personal financial gain is feasible.¹²⁴ Additionally, the lack of opportunities to compete against teams in these major conferences diminishes player exposure and limits the school's potential to generate substantial television revenue.¹²⁵ Therefore, not being part of the Power Four conference translates into substantial competitive disadvantages for the excluded school.

¹²¹ *Id.* at 2162 (“[T]he [district] court’s judgment ultimately turned on the key question at the third step: whether the student-athletes could prove that ‘substantially less restrictive alternative rules’ existed to achieve the same procompetitive benefits the NCAA had proven at the second step...anticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits.”).

¹²² *Id.*

¹²³ *Id.* at 2163.

¹²⁴ *See* Oshin, *supra* note 92.

¹²⁵ *See* David Rumsey, *How TV Deals Changed College Sports*, FRONT OFF. SPORTS (Dec. 2, 2023), [https://frontofficesports.com/newsletter/how-tv-deals-changed-college-sports/\[https://perma.cc/GH78-3FQX\]](https://frontofficesports.com/newsletter/how-tv-deals-changed-college-sports/[https://perma.cc/GH78-3FQX]). “Saturday will mark the last SEC championship game broadcast on CBS Sports. Next year, Disney will start paying more than \$700 million annually to be the SEC’s exclusive broadcast partner, with most of its top games headed to ABC.”

To satisfy the first step of the Rule of Reason Test, substantial evidence is required.¹²⁶ WSU, remaining in the diminished Pac-12, illustrates the financial impact of exclusion from realigned conferences.¹²⁷ WSU President Kirk Schulz highlighted the severity, noting “40% of the school’s athletic revenue [will be] disappearing.”¹²⁸ This situation forces WSU to contend with an estimated \$11.5 million budget shortfall, primarily due to reduced Pac-12 revenue distributions.¹²⁹ Consequently, budget constraints limit coaches’ travel and recruitment abilities.¹³⁰ This disadvantage is amplified for schools like WSU and OSU, located in smaller towns, compared to those near major markets.

The introduction of NIL policies exacerbates the challenges for schools like WSU and OSU.¹³¹ These policies disadvantage smaller schools in attracting top recruits, as they cannot promise the same level of exposure that larger Power Four conference schools can.¹³² With the latter’s substantial TV and media rights deals, companies are more inclined to sponsor student-athletes who enjoy national TV exposure, unlike student-athletes from smaller schools with limited regional reach.¹³³ Consequently, top talent gravitates towards the Power Four universities, further consolidating talent there and placing schools like WSU and OSU at a significant recruiting disadvantage—an outcome that is clearly anticompetitive. This anticompetitive outcome refers to the larger market dynamics where resources, visibility, and opportunities become increasingly

¹²⁶ *Alston*, 141 S.Ct. at 2160 (“As we have described it, the ‘plaintiff has the initial burden to prove that the challenged restraint has a *substantial* anticompetitive effect.’”) (citation omitted) (emphasis added).

¹²⁷ Pete Thamel, *WSU President Preparing Realignment Moves from ‘Bad Spot’* ESPN (Aug. 9, 2023), https://www.espn.com/college-sports/story/_/id/38162254/wsus-president-preparing-realignment-moves-bad-spot[<https://perma.cc/EA3J-FS2Q>].

¹²⁸ *Id.*

¹²⁹ Washington State University Communications Staff, *WSU Athletics Addresses \$11.5 Million Budget Deficit*, WSU INSIDER (June 2, 2023), <https://news.wsu.edu/news/2023/06/02/wsus-athletics-addresses-11-5-million-budget-deficit/>[<https://perma.cc/N6LA-99ET>].

¹³⁰ *Id.*

¹³¹ Shaw, *supra* note 89.

¹³² *Id.*

¹³³ Chase Garrett, *How NIL Will Affect the Future of NCAA Broadcasters*, ICON SOURCE <https://iconsource.com/blog/how-nil-will-affect-the-future-of-ncaa-broadcasters/> (last visited Feb. 10, 2025) [<https://perma.cc/R4LF-ACN7>].

concentrated among the few, leading to a less competitive environment for smaller schools in terms of both attracting talent and competing in the market.

Another aspect where conference realignment may prove anticompetitive relates to the extensive travel times necessitated by the expanded geographic scope of each mega-conference, potentially leading to a decline in athletic performance. Consider the Big 12's span from Arizona to Florida, and the Big Ten's reach from California to New Jersey.¹³⁴ Increased travel is known to adversely impact student-athletes' performance due to the physical and mental fatigue it causes.¹³⁵ This fatigue disrupts their training, recovery schedules, and academic commitments—increasing stress and reducing focus. Furthermore, travel irregularities can negatively impact sleep and overall health.¹³⁶ Thus, the heightened travel demands may significantly impair student-athletes' performance levels, further contributing to the anticompetitive effects of conference realignment. It might seem that increased fatigue would level the playing field, but in reality it undermines the overall quality and fairness of competition by disproportionately affecting teams based on geographic distribution, rather than on-field merit, reinforcing structural imbalances that are anticompetitive.

The exclusion of schools like WSU and OSU from new conference alignments could also diminish competition from a fan engagement perspective. In-state rivalry games, like the Apple Cup (WSU v. University of Washington) or Civil War (OSU v. University of Oregon), are often highlights of the college sports

¹³⁴ See Nick Selbe, *SEC Commissioner Takes Apparent Dig at Big Ten, Big 12 Expansion*, SPORTS ILLUSTRATED (Aug. 8, 2023), <https://www.si.com/college/2023/08/08/sec-commissioner-greg-sankey-takes-dig-big-ten-big-12-expansion-pac-12> [perma.cc/G8PT-A3S3].

¹³⁵ Dina C. Janse van Rensburg, Audrey Jansen van Rensburg, Peter M. Fowler, Amy M. Bender, David Stevens, Kieran O. Sullivan, Hugh H. K. Fullagar, Juan-Manuel Alonso, Michelle Biggins, Amanda Claassen-Smithers, Rob Collins, Michiko Dohi, Matthew W. Driller, Ian C. Dunican, Luke Gupta, Shona L. Halson, Michele Lastella, Kathleen H. Miles, Mathieu Nedelec, Tony Page, Greg Roach, Charli Sargent, Meeta Singh, Grace E. Vincent, Jacopo A. Vitale & Tanita Botha, *Managing Travel Fatigue and Jet Lag in Athletes: A Review and Consensus Statement*, NATIONAL LIBRARY OF MEDICINE (July 14, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8279034/> [perma.cc/SJJ3-BMH6].

¹³⁶ *Id.*

season, drawing significant fan interest and enthusiasm.¹³⁷ These games foster a spirited competitive environment not only among the teams but also within the fan bases.¹³⁸ While it's conceivable that such rivalry games could continue as non-conference matchups, there are several hurdles to this approach. Firstly, non-conference schedules are often determined years in advance, limiting flexibility.¹³⁹ Additionally, the significance of these games could diminish outside the context of conference standings, potentially affecting fan interest and media coverage. Furthermore, with conference realignments prioritizing television deals and revenue generation, schools may be incentivized to schedule non-conference games that maximize these aspects rather than uphold traditional rivalries. The absence of rivalry games could lead to a decline in fan engagement and local community interest, which are integral to the collegiate sports experience.¹⁴⁰ This reduction in traditional rivalries and the corresponding decrease in fan involvement further underscore the potential anticompetitive effects of conference realignment.

These findings, in conjunction, are likely enough to establish that the conference realignment has a substantial effect on diminishing competition. This is the most difficult hurdle for plaintiffs to get past in Rule of Reason antitrust cases. The *Alston* court notes that “courts have disposed of nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to show a substantial anticompetitive effect.”¹⁴¹ A common pitfall in these cases has been the inability

¹³⁷ Cody T. Havard, *The Impact of the Phenomenon of Sport Rivalry on Fans*, UNIV. OF MEMPHIS (Sept. 15, 2018), <https://journal.transformativeworks.org/index.php/twc/article/view/1607/1963> [perma.cc/X69Q-7KSB].

¹³⁸ Gavin J. Kilduff, Hillary Anger Elfenbein & Barry M. Staw, *The Psychology of Rivalry: A Relationally-dependent Analysis of Competition*, ACADEMY OF MANAGEMENT JOURNAL (last visited Feb. 10, 2025), https://apps.olin.wustl.edu/faculty/elfenbeinh/amj-2008-0744_final.pdf [https://perma.cc/Z47D-QKY2].

¹³⁹ Brett Weisband, ‘See You in 10 Years’: SEC Schools Scheduling Far into the Future, SATURDAY DOWN S. (Apr. 24, 2015, 8:51 PM EDT), <https://www.saturdaydownsouth.com/sec-football/see-you-10-years-sec-scheduling-football/> [perma.cc/9G9Y-5WA8].

¹⁴⁰ *Id.*

¹⁴¹ Nat’l Collegiate Athletic Ass’n v. Alston, 141 S.Ct. 2141, 2160-61 (2021). Brief for 65 Professors of Law, Business, Economics, and Sports Management as Amici Curiae 21, n. 9 (‘Since 1977, courts decided 90% (809 of 897) on this ground’).

of plaintiffs to link the challenged conduct directly to a specific, measurable harm to competition, such as increased prices, reduced output, or decreased quality.¹⁴²

However, the case at hand presents a stronger argument for a substantial anticompetitive effect for several reasons. First, unlike many prior cases, the effects of conference realignment are direct and quantifiable, including diminished fan engagement due to the loss of traditional rivalries and a demonstrable recruiting disadvantage for certain schools that undermines competitive balance.¹⁴³ Furthermore, the consolidation of talent and resources among a few Power Four conference schools creates barriers to entry and reduces overall market competitiveness in college sports. This situation is exacerbated by the NIL policies that further entrench these disparities.

Second, the specific and unique context of collegiate athletics, where competition is not solely defined by economic metrics but also includes elements like access to competition, fan engagement, and the preservation of traditional rivalries, provides a clearer backdrop against which anticompetitive effects can be assessed.¹⁴⁴ This broader conceptualization of competition, particularly relevant in the sports industry, supports the assertion that conference realignment significantly harms the competitive landscape beyond what has been seen in previously dismissed Rule of Reason cases.

By drawing these distinctions, it presents a compelling case for a substantial anticompetitive effect under the Rule of Reason analysis.

2. Step 2: The School's Pro-Competitive Justification for Conference Realignment

After showing the negative competitive impact of moving from a traditional conference to a larger mega-conference, the onus then moves to the departing

¹⁴² See, e.g., *Ohio v. Am. Express Co.*, 585 U.S. 529, 542–43 (2018); *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965); *Eastman Kodak Co. v. Image Tech. Serv.'s, Inc.*, 504 U.S. 451, 466–67 (1992).

¹⁴³ *Id.*

¹⁴⁴ easySportz, *Fan Engagement: How Rivalries Fuel Fan Passion*, EASYSPORTZ (Oct. 6, 2023), <https://easysportz.com/2023/10/fan-engagement-how-rivalries-fuel-fan-passion/> [https://perma.cc/TJE5-TB3N].

institution.¹⁴⁵ The departing institution must provide a pro-competitive justification for their decision to leave their original conference and join one of the Power Four conferences, a task that appears feasible.¹⁴⁶

Defendant schools transitioning to expanded conferences can present a compelling pro-competitive rationale. They may argue that by moving to a conference with a wider geographical footprint, stretching from the West Coast to the East Coast, these schools not only broaden their market reach but also enhance their national appeal and competitiveness.¹⁴⁷ This expansion also allows athletes to potentially increase their earning potential through NIL deals due to increased exposure across a more diverse market.

Additionally, aligning with the best teams in these mega-conferences means more high-stakes games where top athletes compete against each other.¹⁴⁸ This enhances the level of competition and offers athletes a stage to display their talents to professional scouts.¹⁴⁹ It also simplifies the evaluation process for scouts, as they can observe the best athletes competing directly against each other, rather than speculating on an athlete's performance in the Pac-12 relative to the standard of competition in the SEC (which is commonly viewed as the premier conference in football).¹⁵⁰ Also, the increased revenue from heightened viewership of top-tier matchups enables programs to reinvest in their athletic budgets, fostering a more competitive environment. Collectively, these factors contribute to a robust pro-competitive argument, demonstrating that the move to larger conferences benefits not just the departing schools, but also the athletes, fans, and the sport as a whole.

¹⁴⁵ *Id.*

¹⁴⁶ *See id.*

¹⁴⁷ *See Why do Conferences Expand?*, NAVIGATE (Jan. 21, 2015), <https://nvgt.com/blog/why-do-conferences-expand/> [<https://perma.cc/44WE-HM9N>].

¹⁴⁸ *What Does the Future of Realignment Look Like in College Football?*, ESPN STAFF (Mar. 13, 2023, 8:00 AM ET), https://www.espn.com/college-football/story/_/id/35753158/what-does-future-realignment-look-college-football [perma.cc/7M2L-VZMX].

¹⁴⁹ Greg Gabriel, *An Insider's Guide into the NFL Scouting Process*, BLEACHER REP. (Feb. 6, 2014), <https://bleacherreport.com/articles/1950498-an-insiders-guide-into-the-nfl-scouting-process> [perma.cc/B7UA-5ACZ].

¹⁵⁰ John Reeves, *College Football: Why is the SEC the Best Conference?*, BLEACHER REP. (Aug. 17, 2010), <https://bleacherreport.com/articles/438091-why-is-the-sec-the-best-conference> [perma.cc/96J2-B55T].

3. Step 3: A Less Restrictive Means for Achieving the Pro-competitive Benefits Exists

Since a defendant school could likely establish a pro-competitive rationale for conference realignment, the burden then shifts back to the plaintiff.¹⁵¹ The plaintiff must show that there are reasonably achievable, less restrictive alternatives available to accomplish the same pro-competitive objectives if they wish to succeed in their argument.¹⁵² The court in *Epic Games v. Apple* reasoned: When evaluating proposed alternative means, courts “must give wide berth to [defendants’] business judgments” and must resist the temptation to require that enterprises employ the least restrictive means of achieving their legitimate business objectives.¹⁵³

Defendant schools will contend that they do not have to demonstrate that their business judgment to leave and join a “Power Four” conference is the least restrictive means to achieve their pro-competitive objective. This stance aligns with the broad discretion typically afforded to business judgment by the courts. However, if the restrictions imposed are “patently and inexplicably stricter than is necessary,”¹⁵⁴ it supports the plaintiff’s argument that the defendants are engaging in anticompetitive behavior in violation of the Sherman Act.

While there is no singular solution to address the challenges faced by schools excluded from major conferences, a combination of various proposals, such as improved revenue-sharing agreements, greater scheduling flexibility, and the NCAA’s adoption of NIL legislation that is consistent across state lines, could

¹⁵¹ Nat’l Collegiate Athletic Ass’n v. Alston, 594 U.S. 69, 96 (2021).

¹⁵² *Id.*

¹⁵³ *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 1040-41 (N.D. Cal. 2021), *aff’d in part, rev’d in part and remanded*, 67 F.4th 946 (9th Cir. 2023).

¹⁵⁴ *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1075 (2015) (“[S]etting the grant-in-aid cap at student-athletes’ full cost of attendance is a substantially less restrictive alternative under the Rule of Reason, we are not declaring that courts are free to micromanage organizational rules or to strike down largely beneficial market restraints with impunity. Rather, our affirmance of this aspect of the district court’s decision should be taken to establish only that where, as here, a restraint is patently and inexplicably stricter than is necessary to accomplish all of its procompetitive objectives, an antitrust court can and should invalidate it and order it [be] replaced with a less restrictive alternative.”).

collectively serve as less restrictive alternatives. These measures, when combined, might provide a viable path to achieving the same pro-competitive benefits as conference realignment.

If West Coast schools, including those who exited the Pac-12, were to form alliances for negotiating joint media rights agreements, and a system was established to allocate revenue based on viewership or performance metrics, this approach could generate sufficient funding to keep schools from consolidating into fewer conferences. Such a strategy might enable these schools to remain competitive within the Pac-12, instead of feeling compelled to join other conferences offering higher financial incentives.

Top FBS (Football Bowl Subdivision) schools need more scheduling flexibility because there is no less restrictive alternative to prevent top teams from facing each other. To maintain a high level of competition and offer athletes the best possible exposure, these schools should have the liberty to schedule games outside their conference play. Such flexibility would enable them to seek out challenging opponents, fostering a dynamic and competitive environment. This approach not only benefits the participating schools by potentially increasing viewership and revenue, but it also enhances the overall quality of college football by showcasing top-tier matchups, which is beneficial for athletes, fans, and the sport. By setting a limit on the number of non-conference games, a balance can be maintained, ensuring that intra-conference play remains a vital and competitive aspect of the season, and allows the pro-competitive benefit afforded to professional scouts to remain in place.¹⁵⁵

Enacting consistent NIL legislation is crucial for creating a less restrictive environment to achieve the same pro-competitive objectives. Currently, varying state NIL laws in large conference areas provide differing levels of flexibility, enticing student-athletes to choose schools that offer greater advantages in the marketplace.¹⁵⁶

¹⁵⁵ Greg Gabriel, *supra* note 151.

¹⁵⁶ Dan Murphy, *Senators Offer Latest Bill Aimed at College Sports, NIL Reform*, ESPN (July 20, 2023, 7:00 AM), https://www.espn.com/college-sports/story/_/id/38039799/senators-offer-latest-bill-aimed-college-sports-nil-reform [perma.cc/V8WX-7WJF].

NIL laws offer an opportunity for lawmakers to give their state's schools a competitive advantage in fundraising for athletes. Professor Anthony Martinez at Arizona State University Sandra Day O'Connor College of Law emphasized that "many governors and lawmakers in each state have strong affiliations with Power 5 universities in their respective states."¹⁵⁷ Unfortunately, this affiliation often influences the nature of NIL laws passed in each state, with more favorable laws leading to the recruitment of better talent by the legislature's alma mater.¹⁵⁸ For example, Louisiana State Representative John Stefanski presented an amended NIL bill on the statehouse floor, and explicitly stated, "If we want LSU [(Louisiana State University)] or any other of our universities to be able to compete [in recruiting] with Texas A&M and with Alabama and see Nick Saban upset on a regular basis on the sideline, we have to be competitive."¹⁵⁹ Unsurprisingly, Stefanski attended LSU.¹⁶⁰

NCAA President Charlie Baker has referred to this state-by-state competition as "a race to the bottom," and Tim Buckley, NCAA's Senior Vice President of External Affairs, has noted that these laws primarily aim to gain competitive edges rather than improving outcomes for student-athletes.¹⁶¹

To address this "race to the bottom," it is essential to implement equitable legislation that establishes a consistent legal framework for NIL across all schools. This would legally ensure a level playing field for all institutions and prevent schools from feeling compelled to join conferences based on a particular state's interpretation of NIL laws just to stay competitive.

¹⁵⁷ Professor Anthony Martinez, Name Image and Likeness Presentation in NCAA Compliance Course (Sept. 13, 2023).

¹⁵⁸ Richard Johnson, *Year 1 of NIL Brought Curveballs, Collectives and Chaos. Now What?*, SPORTS ILLUSTRATED (July 12, 2022), <https://www.si.com/college/2022/07/12/nil-name-image-likeness-collectives-one-year> [perma.cc/GN8B-6PKJ].

¹⁵⁹ *Id.*

¹⁶⁰ LOUISIANA HOUSE OF REPRESENTATIVES, https://house.louisiana.gov/h_reps/members?ID=42 [perma.cc/2WGV-ALUU].

¹⁶¹ Dan Murphy, *Universities, NCAA See Pros and Cons of New State NIL Laws*, ESPN (July 1, 2023, 7:00 AM), https://www.espn.com/college-sports/story/_/id/37940566/universities-ncaa-nil-laws-texas-texas-am [https://perma.cc/67CC-KG8Q].

While defendant schools in the conference realignment scenario argue that their actions are pro-competitive and not bound to employ the least restrictive means, plaintiffs face the challenge of presenting viable, less restrictive alternatives. These alternatives include improved revenue-sharing agreements, enhanced scheduling flexibility, and the need for equitable NIL legislation to mitigate state-by-state disparities. Such measures collectively could provide the same pro-competitive benefits as realignment. Thus, plaintiff schools may be able to succeed on an antitrust claim against schools for leaving, or conferences from denying their admission to join a Power Four conference following the Sherman Act's Rule of Reason test.

D. Does the Decision Support the Public Policy Justifications for Antitrust Law?

Courts have highlighted various public policy reasons underscoring the importance of antitrust law and its application. Firstly, antitrust law is fundamentally designed to promote, rather than inhibit, competition in markets.¹⁶² By preventing monopolies and anti-competitive practices, these laws ensure that no single entity can dominate a market to the detriment of others.¹⁶³ This preservation of competition encourages a dynamic marketplace where businesses must continually innovate and improve to succeed, ultimately benefiting consumers through better products and services at competitive prices.

Secondly, antitrust law plays a crucial role in increasing market access.¹⁶⁴ By breaking down barriers to entry, such as those created by dominant firms, antitrust laws create opportunities for new players to enter the market.¹⁶⁵ This increased

¹⁶² *White Motor Co. v. United States*, 372 U.S. 253, 261 (1963).

¹⁶³ True Tamplin, *Antitrust Laws*, FIN. STRATEGISTS (July 12, 2023), <https://www.financestrategists.com/financial-advisor/business-ethics/antitrust-laws/> [https://perma.cc/X47Z-P7P2]. “The primary goal of antitrust laws is to protect consumer welfare and ensure a level playing field for businesses, fostering healthy market dynamics and promoting economic efficiency.”

¹⁶⁴ *In re Air Passenger Comput. Rsrvs. Sys. Antitrust Litig.*, 694 F. Supp. 1443, 1451 (C.D. Cal. 1988), *aff'd sub nom. Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991).

¹⁶⁵ *See id.*

access not only diversifies the market but also fosters healthy competition, offering consumers more choices and stimulating economic growth.¹⁶⁶

Thirdly, antitrust law incentivizes fair play in the business environment.¹⁶⁷ It establishes a level playing field where success is based on merit rather than market manipulation or unfair advantages.¹⁶⁸ This framework compels businesses to compete based on the quality, innovation, and efficiency of their products or services rather than resorting to anti-competitive tactics.¹⁶⁹ This commitment to fair play not only upholds the integrity of the market but also promotes trust among consumers and businesses alike, contributing to a more robust and resilient economy.¹⁷⁰

In line with the principles of antitrust policy, this article's findings endorse the notion of fostering fair and competitive practices in collegiate sports. Antitrust policy fundamentally aims to prevent monopolistic behaviors and maintain a competitive market.¹⁷¹ Examining the potentially anticompetitive nature of major conference realignments and exploring less restrictive alternatives resonate with these principles. By advocating for measures such as equitable revenue-sharing, equitable NIL legislation, and scheduling flexibility, the findings support the policy's objective of preserving competition, ensuring that no single group of institutions disproportionately dominates the collegiate sports market, and upholding the integrity and fairness of athletic competition.

CONCLUSION

Plaintiffs challenging conference realignments stand on firmer ground under the Sherman Act's Rule of Reason due to the outlined anticompetitive effects and the availability of less restrictive alternatives. Conversely, their pathways to success under the Clayton Act seem unlikely. This distinction is pivotal, resonating

¹⁶⁶ *See id.*

¹⁶⁷ James Chen, *Understanding Antitrust Laws*, INVESTOPEDIA (July 23, 2024), <https://www.investopedia.com/ask/answers/09/antitrust-law.asp> [perma.cc/KG7N-BSSW].

¹⁶⁸ *See id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *White Motor Co. v. United States*, 372 U.S. 253, 261 (1963).

deeply with antitrust law's foundational goals of fostering fair competition and curbing monopolistic tendencies. These insights attempt to do more than merely dissect legal technicalities; they aim to highlight the critical role of antitrust law in safeguarding the competitive balance and integrity crucial to the essence of collegiate sports. The stakes of this discourse extend beyond the legal arena, touching on the very heart of collegiate athletics—its capacity to maintain a level playing field, uphold the traditions and vibrancy of intercollegiate competition, and ensure the equitable development of student-athletes across a wide array of institutions. These complexities not only reinforce the significance of antitrust scrutiny in this context but also underscore the urgent need for a balanced, forward-looking approach to conference realignment that honors the dual objectives of competition and integrity within collegiate sports.