

BLUE FIELD OF DREAMS: A BCS ANTITRUST ANALYSIS

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I. INTRODUCTION

Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!

The New Colossus, Emma Lazarus

The morning sun is just peaking over the Boise Mountains and spreading across the world famous blue field of dreams that is home to the winningest football team in America during the past decade.¹ As the scenic Boise River glistens and ripples along the campus, a lone floppy-haired skateboarder with books under his arm makes his way across a footbridge toward the blue field. Growing up in a small town in Prosser, Washington, Heisman Finalist Kellen Moore was overlooked by nearly every college in America. Like so many before him, Boise State spotted something special everyone else discounted. In 2010, Kellen Moore was selected by Sporting News as the 2011 best player in college football.² With a career ending record of 50-3, Moore is the winningest quarterback in NCAA history.³ Like every non-BCS program in Division I-A college football, student-athletes ask for just one thing: the chance to compete.

From generation to generation, amateur sports have become one of this

1. Tim Hyland, *Winningest College Football Programs of the 2000s*, ABOUT.COM, <http://collegefootball.about.com/od/schools/a/Winningest-College-Football-Programs-Of-The-2000s.htm> (last visited May 31, 2011).

2. Chadd Cripe, *Sporting News Declares Boise State QB Kellen Moore the Best Player in College Football*, THE IDAHO STATESMAN, http://voices.idahostatesman.com/2011/03/28/ccripe/sporting_news_declares_boise_state_qb_kellen_moore_best_player_c#ixzz1M0EJ6b6W (last visited Mar. 28, 2011).

3. Jim Corbett and Tom Pedulla, *Prospect Perceptions: Height Still Crucial For QBs in Draft*, USA TODAY (April 21, 2012), <http://www.usatoday.com/sports/football/nfl/story/2012-04-12/kellen-moore-ryan-tannehill-nfl-draft/54419820/1>.

nation's favorite entertainment events. During the college football season, millions of enthusiasts gather in parking lots before the game and are treated during the game to halftime marching bands and inspired play on the field. Millions more tune in to watch their favorite teams on national television. And millions of dollars are spent by advertisers to gain their attention. Despite this commercial component, the persistent myth of amateurism in college football enabled it to run relatively unregulated and immune to antitrust scrutiny up until a few decades ago.

The purpose of this note is to examine antitrust issues with regard to the Bowl Championship Series ["BCS"]. It begins by examining the current state of antitrust law guided by four important cases in the context of this note. It then examines the origins of the National Collegiate Athletic Association ["NCAA"] and the BCS and discusses how antitrust law applies to these institutions. Because it is in the best interests of both sides to avoid antitrust litigation, this note will conclude with alternative remedies to the BCS system, with particular attention given to the recently adopted four-team playoff format. These alternatives are not intended to destroy the BCS, but to remove barriers to competition inherent in its current design.⁴

II. ANTITRUST LEGISLATION

A. 1890 Sherman Antitrust Act

In an effort to defend the American entrepreneurial spirit in the marketplace, the federal government enacted in 1890 the Sherman Antitrust Act,⁵ which stood in opposition to any combination of entities that might oppress and harm competition. Section 1 states that "[e]very 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."⁶ Section 2 states that: "[e]very person who shall

4. Terminology note: the BCS is comprised of "automatic qualifying (AQ)" and "non-automatic qualifying (non-AQ)" teams. However, the media and general public rely mostly on other terms, such as "BCS" and "privileged conferences" for AQ teams; and "non-BCS" or "non-privileged conferences" for non-AQ teams. Except where otherwise appropriate, this note will rely upon the terms "BCS" and "non-BCS."

5. Ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1–7 (2004)). The courts have stated that "[w]hether or not a particular practice violates the antitrust laws is determined by its effect on competition, not its effect on a competitor." *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 825 (6th Cir. 1982). For more on legislative intent, *see* *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 531 (1983) (noting that the legislation upholds basic common law principles); *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972) (interpreting purpose of legislation to be the preservation of fair competition).

6. 15 U.S.C. § 1 (2006). To prevail on a §1 challenge, the plaintiff must

monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony”⁷

The courts appeal to one of three standards in applying this language. *Per se* analysis applies to agreements which “because of their pernicious effect on competition, and lack of any redeeming virtue, are conclusively presumed to be unreasonable, and therefore illegal, without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”⁸ *Rule of reason* analysis emanated from landmark antitrust cases against giant companies like Standard Oil⁹ and American Tobacco.¹⁰ The Supreme Court articulated the rule of reason standard of analysis in *Board of Trade v. United States*¹¹ and based it upon the concept that not every restraint of trade is illegal, but that it becomes illegal if it unreasonably restricts competition in disregard to consumer welfare. Rule of reason analysis places the initial burden on the plaintiff to prove how the alleged antitrust violation creates anticompetitive effects.¹² If this burden is met, the defendant then bears the burden of demonstrating the pro-competitive benefits of the alleged violation.¹³ The final burden rests on the plaintiff to prove how the alleged violation produces unreasonably excessive anti-

demonstrate that the defendant “(1) participated in an agreement that (2) unreasonably restrained trade in the relevant market.” *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998). *See also* *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687–688 (1978) (noting that §1 cannot be applied literally since “restraint is the very essence of every contract”); K. Todd Wallace, Note, *Elite Domination of College Football: An Analysis of the Antitrust Implications of the Bowl Alliance*, 6 *SPORTS LAW. J.* 57, 66 (1999) (stating that antitrust provisions only apply to restraints that trigger the initial purpose of the legislation).

7. 15 U.S.C. § 2 (2006). To prevail on a §2 challenge, the plaintiff must demonstrate that the defendant (1) possesses monopolistic power in a relevant market and (2) willfully acquires or maintains that power by means “distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

8. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). *Per se* analysis only applies when it “relate[s] to conduct that is manifestly anticompetitive.” *DeLong Equip. Co. v. Wash. Mills Abrasive Co.*, 887 F.2d 1499, 1506 (11th Cir. 1989). Two examples of conduct falling under *per se* analysis are horizontal price-fixing and output limitation. *NCAA v. Bd. of Regents*, 468 U.S. 85, 100 (1984) (citing *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.* 441 U.S. 1, 19–20 (1979)).

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

10. *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911).

11. 246 U.S. 231 (1918). “The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. . . . The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.” *Id.* at 238.

12. *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993).

13. *Id.* at 669.

competitive effects or that a less restrictive alternative is available.¹⁴

Quick-look analysis is less strict than per se analysis, but more scrutinizing than rule of reason analysis. The theory is that certain business practices which do not fall within categories that are per se antitrust violations can still be considered clear violations without more than a cursory rule of reason analysis. As Phillip Areeda quipped, “the rule of reason can sometimes be applied in the twinkling of an eye.”¹⁵

B. Case History

1. Standard Oil Co. v. United States¹⁶

During the 1880’s, large-scale businesses entered trusts with the intent of dominating their markets and eliminating competition by controlling product pricing, distribution, and production. One such company was John Rockefeller’s Standard Oil, which devised a plan that enabled stockholders and the company to move from corporate status to the more flexible vehicle of a trust. This legal conveyance allowed the company to consolidate the powers of its corporations into a dominating force, not only in the oil industry, but in railroads and steel as well. Standard Oil became known for its anti-competitive and systemic strategies. For instance, price-fixing was used to starve competitors out of the market or buy them out.¹⁷ By the time Congress passed the Sherman Antitrust Act in 1890, Standard Oil controlled eighty-eight percent of the refined oil flow in the United States.¹⁸

The Department of Justice charged Standard Oil with violating antitrust provisions and the Supreme Court employed rule of reason analysis to evaluate the charge.¹⁹ The Court determined that Congress did not intend all restraints of trade to be illegal, but just those that failed a rule of reason test.²⁰ The Court identified three primary “evils which led to the public outcry against monopolies”: (1) price fixing, (2) limited production, and (3)

14. Mark Hales, Note, *The Antitrust Issues of NCAA College Football Within the Bowl Championship Series*, 10 SPORTS LAW. J. 97, 113–14 (2003).

15. *Bd. of Regents*, 468 U.S. at 110 n.39 (quoting P. Areeda, The “Rule of Reason” in Antitrust Analysis: GENERAL ISSUES 37–38 (Federal Judicial Center, June 1981) available at [http://www.fjc.gov/public/pdf.nsf/lookup/antitrust.pdf/\\$file/antitrust.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/antitrust.pdf/$file/antitrust.pdf)). See also *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999) (applying quick-look analysis when “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets”).

16. 221 U.S. 1 (1911).

17. See generally *Standard Oil Trust*, NETHELPER.COM, http://www.nethelper.com/article/Standard_Oil_Trust (last visited Aug. 28, 2011) (citing DANIEL YERGIN, *THE PRIZE: THE EPIC QUEST FOR OIL, MONEY, AND POWER* (1969)).

18. *Id.*

19. *Standard Oil Co.*, 221 U.S. at 62.

20. *Id.* at 102 (Harlan, J., dissenting).

reduced production quality.²¹ The Court concluded that Standard Oil's monopolistic control over its industry was a violation of antitrust law.²²

2. Hennessey v. NCAA²³

In 1977, an assistant coach challenged an NCAA bylaw limiting schools to a certain number of full-time assistant coaches.²⁴ The court disagreed with several defenses raised by the NCAA. First, the court ruled that an antitrust suit may be brought against only the NCAA (as opposed to both parties to a contract) because "the NCAA Bylaw can be seen as the agreement and concert of action of the various members of the association, as well as that of the association itself, and it is permissible to sue but one of several alleged co-conspirators."²⁵ Next, the court cited language in *Goldfarb v. Virginia State Bar*²⁶, which argues that no exemption can be so broad as to violate the purpose of the Sherman Act.²⁷ Finally, the court ruled that the NCAA's bylaw affected interstate commerce and that the bylaw deserved a complete rule of reason analysis.²⁸ In judging whether the pro-competitive effects of the bylaw outweighed its anti-competitive effects, the court adopted a "wait and see" philosophy and held that the bylaw was valid.²⁹

The plaintiff in this case argued that the bylaw constituted a "group boycott," which the court described as a "concerted refusal to deal with persons or companies because of some characteristic of those persons and companies."³⁰ The court disagreed with the argument since the bylaw did not prevent teams from hiring particular assistant coaches, but merely restricted the number of coaches that the team could employ.³¹ The court stated that this is more analogous to a market division restriction, which would also constitute a per se violation.³² Still, the court was not convinced by its own analogy and dismissed the plaintiff's argument.³³

21. *Id.* at 52.

22. *Id.* at 81–82.

23. 564 F.2d 1136 (5th Cir. 1977).

24. *Id.* at 1141.

25. *Id.* at 1147.

26. 421 U.S. 773 (1975).

27. *Hennessey*, 564 F.2d at 1149.

28. *Id.* at 1154.

29. *Id.*

30. *Id.* at 1151.

31. *Id.*

32. *Id.*

33. *Id.*

3. NCAA v. Board of Regents³⁴

The University of Oklahoma and the University of Georgia challenged a NCAA bylaw designed to protect college football gate attendance by controlling the amount of games a team may broadcast, what networks they could use, and the extent to which they would be allowed to televise their product.³⁵ The Court held that the plan limited price and output in clear violation of antitrust law.³⁶ Though the Court recognized the important role the NCAA plays in college athletics and the need for ample latitude to fulfill its goal of amateurism, it ruled that the bylaw constituted “a restraint upon the operation of a free market, and the district court’s findings established that the plan has operated to raise price and reduce output, both of which are unresponsive to consumer preference.”³⁷

The district court characterized the NCAA control over college football as a “classic cartel” with an “almost absolute control over the supply of college football . . . to the viewing public.”³⁸ The district court reasoned that the NCAA’s threat against its own members “constituted a threatened boycott of potential competitors.”³⁹ If upheld by the Supreme Court, this would seem to guarantee that the bylaw would be reviewed under per se analysis.⁴⁰ The Court instead applied rule of reason analysis, citing (1) the NCAA’s historic role in preserving and encouraging intercollegiate amateur athletics and (2) the necessity of horizontal restraints to enable the NCAA to provide its product to the public.⁴¹

The Court first ruled that the bylaw “on its face constitutes a restraint upon the operation of a free market . . . [which places] a heavy burden [on the defendant] of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market.”⁴² Next, the Court found that the bylaw is not a necessary means to market the NCAA’s product.⁴³ The NCAA also could not justify the bylaw through its desire to shield stadium revenue from the pressure of fair competition.⁴⁴ “[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.”⁴⁵ The Court concluded that the

34. 468 U.S. 85 (1984).

35. *Id.* at 89.

36. *Id.* at 113.

37. *Id.* at 86.

38. Bd. of Regents of Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1300 (W.D. Okla. 1982).

39. NCAA v. Bd. of Regents., 468 U.S. at 96.

40. *See supra* note 8.

41. NCAA v. Bd. of Regents, 468 U.S. at 101.

42. *Id.* at 113.

43. *Id.* at 115.

44. *Id.* at 116.

45. *Id.* at 117 (citing *National Society of Professional Engineers v. United States*,

bylaw restricted output and violated the purpose of the Sherman Act.⁴⁶

4. Law v. NCAA⁴⁷

In 1998, college basketball coaches challenged NCAA efforts to limit compensation for coaches. As in the *Board of Regents* case, the courts disregarded the usual per se analysis for horizontal restraints, opting instead for a quick look analysis, which immediately assigned to the NCAA the burden of refuting the anti-competitive nature of the NCAA's actions.⁴⁸ The court distinguished this case from *Hennessey* stating that the pay restriction was a "naked restriction on price" and that the anticompetitive nature of the pay restriction was clear.⁴⁹

To meet their burden, the NCAA asserted a pro-competitive position founded upon (1) retaining entry-level coaching positions, (2) reducing costs, and (3) maintaining competitive equity between rich and poor schools.⁵⁰ The court dismissed the first as factually inaccurate and irrelevant for having no impact on competition for coaching positions.⁵¹ It dismissed the second as insufficient to justify anticompetitive agreements since this would justify any price-fixing schemes.⁵² The court dismissed the third as not clearly achieved through the bylaw. This argument, the court claimed, was essentially a cover-story for the real purpose of the bylaw as a cost-cutting mechanism.⁵³ The court notably rejected the "wait and see" approach taken in *Hennessey*, stating that the burden of proving pro-competitive effects lies squarely on the defendant's shoulders. Their failure to do so resulted in the court ruling in the plaintiff's favor.⁵⁴

III. ANTITRUST ANALYSIS FOR THE BCS

A. History of the NCAA and the BCS

1. National Collegiate Athletic Association (NCAA)

The NCAA was formed in 1906 with the purpose of safeguarding student athletes "from dangerous and exploitive athletics practices."⁵⁵ A

435 U.S. 679, 696 (1978)).

46. *Id.* at 120.

47. 134 F.3d 1010 (10th Cir. 1998).

48. *Id.* at 1020.

49. *Id.* at 1021.

50. *Id.*

51. *Id.* at 1021–22.

52. *Id.* at 1022.

53. *Id.* at 1023–24.

54. *Id.* at 1024.

55. *History* – *NCAA.org*, *NCAA.ORG*, <http://www.ncaa.org/wps/wcm/>

rule-making body and discussion group was formed to govern national championships and to ensure sportsmanship, player safety, and integrity.⁵⁶ The first NCAA national championship was conducted in 1921; the National Collegiate Track and Field Championships.⁵⁷ After World War II, controversy regarding recruitment and financial aid, unregulated postseason football games, and the impact of television on attendance demonstrated the need for granting the NCAA increased governing authority.⁵⁸ As college athletics grew, the scope of athletics programs forced the NCAA to recognize varying levels of emphasis. In 1973, the NCAA formed three legislative and competitive divisions; I, II and III.⁵⁹ Five years later, Division I also created football subdivisions I-A and I-AA (renamed the Football Bowl Subdivision [“FBS”] and the Football Championship Subdivision [“FCS”] in 2007).⁶⁰

According to its constitution, the NCAA has the “responsibility of promoting the opportunity for competitive equity among its member institutions.”⁶¹ The NCAA’s website outlines its core commitment to:

The collegiate model of athleticism in which students participate as an avocation, balancing their academic, social and athletics experiences; the highest levels of integrity and sportsmanship; the pursuit of excellence in both academics and athletics; the supporting role that intercollegiate athletics plays in the higher education mission and in enhancing the sense of community and strengthening the identity of member institutions; an inclusive culture that fosters equitable participation for student-athletes and career opportunities for coaches and administrators from diverse backgrounds; respect for institutional autonomy and philosophical differences; and presidential leadership of intercollegiate athletics at the campus, conference and national levels.⁶²

Though the NCAA currently oversees eighty-nine championships in twenty-three sports for its collegiate association,⁶³ it is not responsible for

connect/public/ncaa/about+the+ncaa/who+we+are/about+the+ncaa+history (last visited March 25, 2011).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *NCAA v. Miller*, 10 F.3d 633, 635–36 (9th Cir. 1993) (citing NCAA Const. § 2.7).

62. *Core Values – NCAA.org*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/core+values+landing+page> (last visited March 25, 2011) (emphasis in original).

63. *NCAA Sports and Championships*, NCAA.ORG, <http://ncaa.org/wps/wcm/>

selecting Division I-A championship teams or negotiating television contracts. The Division I-A national football championship is the only Division I-A NCAA-sponsored sport that is not managed by the NCAA.⁶⁴ Before the BCS was formed, the title of national football champion was considered by many as “mythical”⁶⁵ since it was assigned, not by tournament, but by the votes of sportswriters and coaches.⁶⁶

2. Bowl Championship Series (“BCS”)

The first intercollegiate football contest was played on November 6, 1869, in New Brunswick, New Jersey.⁶⁷ The first bowl game occurred on New Year’s Day 1894, when the University of Chicago played at the University of Notre Dame.⁶⁸ Just eight years later, Stanford and Michigan met in Pasadena for the first Rose Bowl.⁶⁹ Before there were AP polls and Coaches’ polls, the team that won the Rose Bowl was usually crowned the national champion.⁷⁰ Soon after, other regions decided to host their own bowls⁷¹ and, as of 2010, there were a total of thirty-five bowl games played.⁷² Though each bowl operates as an independent entity apart from the NCAA, the NCAA does assume responsibility for ensuring that the

connect/public/ncaa/championships (last visited November 14, 2012).

64. *College Football National Championships in NCAA Division I FBS*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Collegefootballnationalchampionships> in NCAA Division I FBS (last visited March 25, 2011). See also *NCAA Division I-A National Football Championship at AllExperts*, ALLEXPERTS.COM, <http://www.associatepublisher.com/e/n/nc/ncaadivisioni-anationalfootballchampionship.htm> (last visited March 25, 2011).

65. See Jeff Petersen, *Unicorns Win Football Title*, THE OBSERVER (January 7, 2010), <http://www.lagrandeobserver.com/Columnists/Jeff-Petersen-s-columns/Unicorns-win-football-title> (“I’m declaring Boise State University the national college football champs. It doesn’t matter what happens tonight in the ‘mythical’ national championship game matching Texas and Alabama.”) See also John Margolis, *Bowls Are Good For Football, America*, CHICAGO TRIBUNE, Dec. 28, 1989, at Sports (“Without a playoff system, we have something called ‘the mythical national champion. . .’”).

66. Blake Snow, *Game of Numbers: How the BCS Rules College Football*, WIRED.COM (Dec. 3, 2010, 7:00 AM), <http://www.wired.com/playbook/2010/12/inside-the-bcs/4/>.

67. *College Football Encyclopedia – Introduction*, COLLEGE FOOTBALL ENCYCLOPEDIA, <http://www.footballencyclopedia.com/cfeintro.htm> (last visited March 25, 2011).

68. *Id.*

69. *Tournament of Roses History*, TOURNAMENT OF ROSES ASSOCIATION, <http://www.tournamentofroses.com/pasadena-tournament-of-roses/history/tournament-of-roses-association/gamehistory.asp> (last visited March 25, 2011).

70. KEITH DUNNAVANT, THE FIFTY YEAR SEDUCTION 93 (2004).

71. *Id.* at 94.

72. *College Football Bowls – CBSSports.com*, CBSSPORTS.COM, <http://www.cbssports.com/collegefootball/bowls/predictions> (last visited Aug. 21, 2011).

rules of regular-season play are followed, teams meet a minimum winning threshold, and that the NCAA's member institutions are not exploited.⁷³

In 1976, sixty-three college and university football programs departed from the NCAA format to create their own organization, the College Football Association ["CFA"].⁷⁴ In 1984, the NCAA lost control of regular season football television rights when the United States Supreme Court ruled in *NCAA v. Board of Regents* that the NCAA was in violation of antitrust law.⁷⁵

In 1992, the commissioners of the SEC, Big 8, Southwest, ACC, and Big East conferences met with the bowl committees of the Orange, Sugar, Cotton, Fiesta, Gator and Hancock bowls to form the Bowl Coalition agreement.⁷⁶ The Coalition provided a structure which enabled the champions of the Big East Conference and Atlantic Coast Conference and Notre Dame to meet either the champion of the Big Eight (in the Orange Bowl), Southeastern (Sugar Bowl) or Southwest (Cotton Bowl) conferences.⁷⁷ Five at-large teams would be selected from coalition conference champions. Additionally, five at-large teams would be selected from the five member conferences' runners-up, the runner-up of the Pac-10, the SEC's third-place team, or Notre Dame.⁷⁸ A flaw in the Bowl Coalition, and the subsequent Bowl Alliance, was its inability to include the Big Ten and Pac-10 champions, as both were obligated to play in the Rose Bowl.⁷⁹ With many conference tie-ins with bowls, it was difficult to decide who had won the national title. Rarely did these vertical contracts produce a National Championship game between the two highest ranked teams.⁸⁰

Further complicating matters was the terribly unpredictable nature of the bowl selection process. In 1990, the Sugar Bowl offered a slot to undefeated and top-ranked University of Virginia four games before the end of the regular season.⁸¹ The gamble did not pay off, however, as the

73. *Antitrust Implications of the College Bowl Alliance: Hearings on J-105-21 Before the Subcomm. on Antitrust, Business Rights, and Competition of the Committee on the Judiciary*, 105th Cong., 1st Sess. 43 (1997), (statement of Cedric W. Dempsey, Executive Director of NCAA) [hereinafter Dempsey Testimony] available at <http://www.eric.ed.gov/PDFS/ED461320.pdf>.

74. Jude D. Schmit, *A Fresh Set of Downs? Why Recent Modifications to the Bowl Championship Series Still Draw a Flag Under the Sherman Act*, 14 *SPORTS LAW. J.* 219 (2007).

75. *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984).

76. *BCS Chronology*, BCSFOOTBALL.ORG <http://www.bcsfootball.org/news/story?id=4819366> (last updated January 21, 2010, 3:28 PM).

77. *Id.*

78. *Id.*

79. *Id.*

80. Hales, *supra* note 14, at 102.

81. Dunnivant, *supra* note 70, at 247.

University of Virginia lost three of its final four games and dropped out of the rankings.⁸² ACC Commissioner Gene Corrigan recounted:

We were in a situation where the bowl system was under assault on several fronts The selection process was out of control, which was contributing to the larger problem, which is that we couldn't seem to find a way to have a national championship game. The fans were griping, and the playoff talk was getting louder. Everybody knew we had to do something.⁸³

By 1995, these challenges motivated the conferences and Notre Dame to form the Bowl Alliance, controlled by the most powerful college football institutions.⁸⁴ The new arrangement included two at-large spots which were open to all Division I-A teams (including those from the previously excluded smaller conferences) that won at least eight regular season games or were ranked in the top twelve or no lower than the lowest-ranked conference champion participating in the Alliance.⁸⁵ Conference tie-ins were eliminated to allow flexibility for arranging the best bowl matchups.⁸⁶

On June 26, 2012, a committee of college and university presidents approved a proposal by BCS commissioners to establish a four-team playoff to determine the national champion.⁸⁷ The new format will rotate two semifinal games between six bowl sites and a championship game among neutral sites.⁸⁸ Participants in the playoff will be determined by a selection committee,⁸⁹ which will also rank the top fifteen or twenty teams to guide selections for non-playoff, major bowls.⁹⁰

While this format may be an improvement, Roy Kramer, former commissioner of the SEC, acknowledged that this model simply replaces the controversy regarding which teams should be in the championship game with the controversy regarding which teams should be in the

82. *Id.*

83. *Id.* at 249.

84. *Id.*

85. *BCS Chronology*, *supra* note 76.

86. *Id.*

87. Adam Himmelsbach, *College Football Playoff Approved for 2014 Season*, N.Y. TIMES (June 26, 2012), available at <http://www.nytimes.com/2012/06/27/sports/ncaafotball/four-team-college-football-playoff-approved.html>.

88. *BCS Presidential Oversight Committee Establishes New Postseason Format*, BCSFOOTBALL.ORG (June 26, 2012, 7:43 PM), <http://www.bcsfootball.org/news/story?id=8099512>.

89. *Id.*

90. Stewart Mandel, *Six-Bowl Premium Package Will Turn New Year's Into Nirvana*, SPORTSILLUSTRATED.COM (June 28, 2012), http://sportsillustrated.cnn.com/2012/writers/stewart_mandel/06/28/bcs-bowl-selection/index.html.

playoffs.⁹¹ This solution will not resolve many of the controversies discussed in this note and will likely fail to assuage the public's demand for a true playoff format. Some critics argue this new format might even be more prejudicial to non-elite football programs.⁹²

It should be no surprise when the new four-team playoff format proves inadequate, since it appears motivated by the same profit-protecting mentality that gave rise to the BCS.⁹³ It can be said that the fundamental differences between the NCAA and the BCS missions are directly traceable to their roots. Whereas the NCAA evolved with expressed priority to protect the safe, fair, and sportsmanlike competitions in college athletics, the BCS evolved in 1998 with the intent of the six major college athletic conferences—the Big Ten, ACC, SEC, Big East, Pac-10, and Big 12—to guarantee their place in the BCS National Championship game and four lucrative BCS Bowl games: Tostitos Fiesta Bowl, Discover Orange Bowl, Rose Bowl Game, and Allstate Sugar Bowl.⁹⁴ As Corrigan stated, “[t]he desire to maximize revenue is central” to the purpose of the BCS.⁹⁵

The BCS is managed by conference commissioners, an athletic director's advisory group, and a presidential oversight committee.⁹⁶ Within BCS and NCAA guidance, BCS games are operated by privately owned organizations in each of the host cities.⁹⁷ In addition, there are thirty other postseason bowls, which are managed independently by entities in twenty-

91. *Id.*

92. See Patrick Rishe, *College Football Playoff System a Blessing, But 4-Team Structure Appears Flawed*, FORBES.COM (June 22, 2012), <http://www.forbes.com/sites/prishe/2012/06/22/college-football-playoff-system-a-blessing-but-the-proposed-execution-details-appear-flawed/> (arguing that teams ranked outside the top four will suffer financially and that the proposed method of selecting the teams creates more room for bias); Dennis Dodd, *Playoff System? Get Ready for Your Boise State-Types to Have Less Access*, CBSSPORTS.COM (June 11, 2012, 2:54 PM), <http://www.cbssports.com/collegefootball/story/19332347/playoff-system-get-ready-for-your-boise-statetypes-to-have-less-access> (“The growing realization is that access to the sport's new postseason will be worse for the have-nots.”).

93. See Stewart Mandel, *Selection Committee Helped Bridge Divide, Will Lead To Fan Satisfaction*, SPORTSILLUSTRATED.COM (June 21, 2012), http://sportsillustrated.cnn.com/2012/writers/stewart_mandel/06/21/college-football-playoff-selection-committee/index.html (“According to participants in the room at Wednesday's decisive meeting, the key compromise that finally brought any remaining holdouts on board was the concept of a selection committee charged with emphasizing specific criteria.”) (discussing the BCS's long history of biased ranking, which will likely be exacerbated when entrusted to a smaller group of interested parties).

94. *BCS Background*, BCS FOOTBALL.ORG, <http://www.bcsfootball.org/news/story?id=4809699> (last updated Jan. 16, 2012, 5:06 PM).

95. DUNNAVANT, *supra* note 70, at 251.

96. *BCS Governance*, BCS FOOTBALL.ORG, <http://www.bcsfootball.org/news/story?id=4809846> (last updated Sep. 26, 2012, 1:51 PM).

97. *BCS Background*, *supra* note 94.

eight cities around the nation and in Canada.⁹⁸

3. Legal Intervention

BCS college and university football reflects the best and worst in American culture. At best, it represents hard work, hopes, and dreams in celebrated pageantry. At worst, it replicates aberrant monopolistic behavior in the free market, where powerful economic interests have conspired to guarantee themselves a dominant share of competitive opportunity, prestige, and revenue. As in the past, it is unlikely that smaller competition has the resources to stand up to or survive against overpowering anti-competitive forces in the market without the protection of antitrust law and those sworn to uphold it, such as the Justice Department and Congress.

Though members of Congress do not always share the same political identities, they do share the same responsibility to protect the non-BCS schools in each of their states. Congressional objections to the BCS date back to 1997, when the Senate Judiciary Committee held hearings regarding potential antitrust issues.⁹⁹ In 2003, Tulane President Scott Cowen argued before the U.S. House Judiciary Committee that the BCS creates an ever-increasing financial gap between BCS and non-BCS schools.¹⁰⁰ Grassroots groups such as BCSReform.org¹⁰¹ and Playoff PAC¹⁰² encourage Congress to examine disparities in Division I-A football. In response, the BCS spent \$670,000 between 2003 and 2009 on lobbying.¹⁰³

In 2005, the House Subcommittee on Commerce, Trade and Consumer Protection also weighed in on the BCS issue.¹⁰⁴ In 2009, several groups expressed disdain for the BCS, including Congressman Gary Miller, who introduced H.R. Res. 599,¹⁰⁵ which, had it passed, would have prohibited federal funds to NCAA Division I FBS schools unless the national

98. See *supra* note 72

99. Andrew Zimbalist, *The BCS, Antitrust and Public Policy 2*, (unpublished manuscript) available at <http://www.smith.edu/econ/workingpaper/pdfs/Zimbalist1.pdf> (last visited Mar 26, 2011).

100. *BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field: Hearing Before the S. Comm on the Judiciary*, 108th Cong. 50 (2003) (statement of Scott Cowen, President, Tulane University).

101. *BCS Reform - Time For A Real NCAA Football National Championship Playoff*, BCSREFORM.ORG, <http://www.bcsreform.org> (last visited Mar 26, 2011).

102. Playoff PAC, PLAYOFFPAC.com, <http://www.playoffpac.com> (last visited Mar 26, 2011) (describing itself as a “federal political committee dedicated to establishing a competitive post-season championship for college football.”).

103. Dave Levinthal, *BCS Becomes Political Football as Lobbyists Blitz Congress*, OPENSECRETS.ORG (Dec. 17, 2009, 11:51 AM), <http://www.opensecrets.org/news/2009/12/bcs-becomes-political-football.html>.

104. Zimbalist, *supra* note 99, at 2.

105. 111th Cong. (1st Sess. 2009).

championship was determined by a playoff system.¹⁰⁶

In 2009, after undefeated University of Utah was denied a shot at the national championship for the second time in four years, the Utah State Senate adopted a resolution urging the NCAA to abandon the BCS in favor of a playoff system.¹⁰⁷ Also in 2009, a House Energy and Commerce Subcommittee approved a bill that sought “[t]o prohibit, as an unfair and deceptive act or practice, the promotion, marketing, and advertising of any post-season NCAA Division I football game as a national championship game unless such game is the culmination of a fair and equitable playoff system.”¹⁰⁸ In July of that same year, Senator Orrin Hatch, ranking member of the Senate Antitrust Subcommittee, characterized the BCS as:

[A]n agreement between the preferred conferences and the major bowl games as to how they will compete with one another and, more apparently, how they will compete against the non-preferred conferences. Worse still, under the current BCS regime, each of the six privileged conferences is guaranteed to receive a large share of the BCS revenue to distribute among their member schools. The remaining five conferences, which include nearly half of all the teams in Division I, all share a much smaller portion of the BCS revenue, even if one of their teams is fortunate enough to play their way into a BCS game. Over the lifetime of the BCS, the preferred conferences have received nearly 90 percent of the total revenues. . . . Section 2 of the Sherman Antitrust Act is violated when one is in possession of monopoly power and uses that power in a way not associated with growth or development as a consequence of having a superior product or business acumen.¹⁰⁹

On March 9, 2012, the Utah Attorney General, Mark Shurtleff, posted a bid seeking partnership with a law firm for the purpose of investigating and possibly pursuing antitrust litigation against the BCS.¹¹⁰ Shurtleff lists four primary concerns for the litigation: (1) eliminating the automatic bid system; (2) establishing a transparent ranking system; (3) ensuring fair

106. *Id.*

107. *Utah Lawmakers Call For Football Playoff System*, ESPN.COM, <http://sports.espn.go.com/espn/wire?section=ncf&id=3894958> (last updated Jan. 9, 2009, 4:49 PM).

108. H.R. 390, 111th Cong. (1st Sess. 2009) 1.

109. *Hatch Condemns BCS 'Monopolists'*, UTAHPOLICY.COM (July 7, 2009), http://utahpolicy.com/featured_article/hatch-condemns-bcs-monopolists. (last visited Mar. 26, 2011).

110. Dennis Dodd, *Utah attorney general forges on suing BCS despite expected changes*, CBSSPORTS.COM (Mar. 22, 2012, 12:17 PM), <http://www.cbssports.com/general/blog/dennis-dodd/17971289/utah-attorney-general-forges-on-suing-bcs-despite-expected-changes>.

treatment to all teams and conferences; and (4) proposing competitive bidding to host any BCS bowl or national championship game.¹¹¹ This note echoes the first three concerns.

Because the new four-team format will not be implemented until 2014, it is difficult to state with certainty how effective it will be at addressing these concerns. Therefore, this note focuses on the BCS system as it currently exists and how it has been unfairly manipulated to protect profits for the major conferences. In so doing, this note will demonstrate the need for objective standards for an eight-team playoff that eliminates the opportunity for biased rankings.

B. Anti-Competitive Effects.

The BCS antitrust issue regards the legality of an agreement that overtly restrains non-BCS teams from competing for prestigious BCS bowl games, the national championship, and exorbitant revenues. As in *Law v. NCAA*, where the courts found that the restraint contained “obvious anticompetitive effects”¹¹² that prevented free market competition, this section defines a variety of unreasonable BCS restraint mechanisms that function as systemic barriers to competition for non-BCS conferences.

1. Strength of Schedule

A primary component relied upon by the BCS ranking process is the strength of a team’s schedule, that is, the caliber of opponents the team faces during the season. For non-BCS teams, this has become an anti-competitive instrument used by BCS conferences to perpetuate a stigma that non-BCS teams are competitively inferior to BCS teams, not because of their on-field performances, but because of the level of competition they face within their non-BCS conferences.

The strength of a BCS schedule is bolstered by their membership in a BCS conference. As long as a BCS team defeats weak non-conference opponents, its strength of schedule will be assured by its performance within its conference. It does not matter how weak the BCS conference might be, provided its members defeat the weak non-BCS teams, and often FCS teams, on their schedule. Conversely, the same cannot be said of non-BCS schools.

In order for non-BCS teams to improve the strength of their schedules, they must find BCS teams willing to play them. The problem is that there is very little incentive for BCS teams to place tough non-BCS teams on their schedule. And, even if a top non-BCS team manages to schedule and defeat a BCS team, there is still no guarantee it will not be passed in the rankings

111. *Id.*

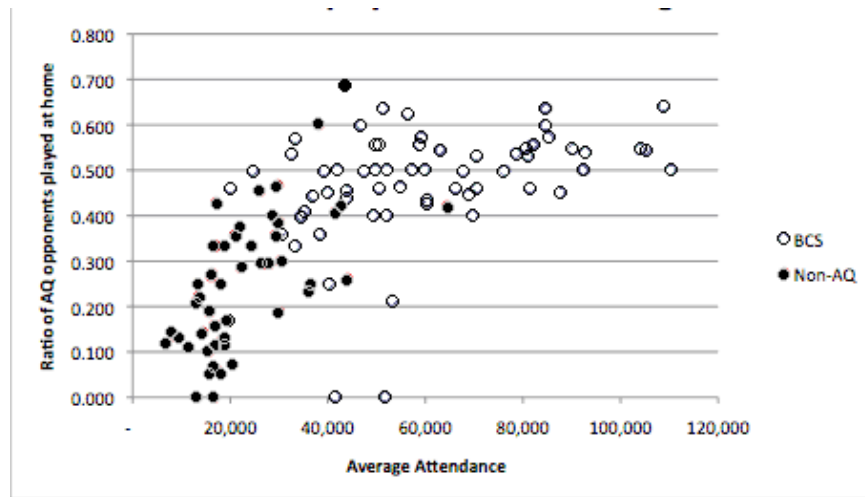
112. 134 F.3d 1010, 1020 (10th Cir. 1998).

by other BCS teams. This was the case in 2010, when Boise State defeated several BCS teams¹¹³ and annihilated most other opponents, while at the same time being passed in the rankings by BCS teams, replacing BCS teams that had lost ahead of the Broncos.¹¹⁴

2. BCS Home Field Advantage

Adding to strength of schedule disparities in the BCS ranking process, BCS teams are rewarded in the polls not only for their membership in a BCS conference, but for playing their non-BCS opponents at home. The graph below demonstrates the disparity between BCS and non-BCS home games.¹¹⁵

Figure 1: BCS Teams Play More Home Games



113. See *Football – 2010 Schedule*, BRONCOSPORTS.COM, http://www.broncosports.com/SportSelect.dbml?SPSID=48555&SPID=4061&DB_OE_M_ID=9900&Q_SEASON=2010. (Virginia Tech (33-30 W) and Oregon State (37-24 W)).

114. Larry Darter, *Boise State Slips in Halloween Edition of BCS Rankings*, SUITE101 (Oct. 31, 2010), <http://www.suite101.com/content/boise-state-slips-in-halloween-edition-of-bcs-rankings-2010-a303099>.

115. *Scheduling Maintains Bias in College Football*, BREAKING BIAS IN COLLEGE FOOTBALL: A GRASSROOTS EFFORT FOR A LEVEL PLAYING FIELD (Mar. 24, 2009), <http://ncaafbsfootball.wordpress.com/2009/03/24/scheduling-maintains-bias-in-college-football/> (last visited Mar 26, 2011). The author, a CPA with experience in statistical analysis, generated this graph from data he obtained from the team schedule/results page at ESPN.com. Note that only two non-AQ teams played a majority of their games against BCS teams at home, while a vast number of BCS teams played BCS opponents at home. Thus, even when non-AQ teams manage to schedule a game against a BCS opponent, they face an away-game disadvantage disproportionate to that which BCS teams face.

The disproportionate number of home games for BCS and non-BCS teams translates into a substantial anti-competitive advantage for BCS teams. From 2004 through 2009, FBS teams faced one another in 3,455 football games.¹¹⁶ Their home winning percentage was 59.3%,¹¹⁷ which verifies the “home-field advantage” concept familiar to any avid sports fan. Effectively, a team playing at home has roughly a fifty percent higher chance of winning than its opponent. And since non-BCS schools are statistically unlikely to face BCS schools on their home-turf, they suffer a significant disadvantage.

3. Refusal to Deal

“We do not play the Little Sisters of the Poor.” - Gordon Gee, Ohio State President¹¹⁸

The recurring argument amongst BCS proponents is that non-BCS teams, by virtue of their non-BCS conference schedules, are inferior to BCS teams and undeserving of national recognition. But, the reality is that schools like Ohio State *do* place “little sisters of the poor” onto their schedules. Furthermore, they require them to play on their home field. For example, during 2010, Ohio State scheduled home games against Ohio (75th), Eastern Michigan (167th), and Marshall (109th).¹¹⁹ What they *did not* schedule were games against top non-BCS teams; namely, the very same non-BCS teams that BCS apologists criticize for weak schedules. Boise State President Bob Kustra stated:

[Gordon Gee] claims that in the SEC, Big Ten and Big 12 it’s murderer’s row every week and there’s absolutely little substance to that claim. . . . The BCS has finally found someone to stand up and defend the indefensible and Gordon Gee proved it—he not just proved that it’s indefensible but he did so with facts that are simply wrong.¹²⁰

There may be a very good reason why BCS teams refuse to schedule top non-BCS teams. The Boise State Broncos, for example, are 7-1 during the past four years against BCS teams, which includes two consecutive victories over 2010 national championship contender, Oregon. Regardless

116. *Id.*

117. *Id.*

118. *Ohio State Prez Disregards TCU, Boise St.*, ESPN.COM (Nov. 25, 2010), <http://sports.espn.go.com/dallas/ncf/news/story?id=5845736>.

119. Andy Gardiner, *BCS Fighting Words: Strength of Schedule*, USA TODAY (Nov. 26, 2010, 4:03 PM), http://www.usatoday.com/sports/college/football/2010-11-25-bcs-strength-of-schedule-debate_N.htm?csp=34sports.

120. Chadd Cripe, *Boise State’s Bob Kustra Says Ohio State President’s Comments ‘Wrong . . . Ridiculous’*, IDAHO STATESMAN (Nov. 24, 2010 4:49 PM), http://voices.idahostatesman.com/2010/11/24/ccripe/boise_states_bob_kustra_says_ohio_state_presidents_comments_wron.

of this accomplishment, BCS pundits continue to degrade the Broncos due solely to their obligated participation in the Western Athletic Conference ["WAC"]. It mattered little that they defeated BCS opponents or dominated their conference. The mere point that they were in the WAC justified moving BCS teams ahead of them in the rankings. To correct the misperception, Boise State's athletic director, Gene Bleymaier, sent invitations to major BCS schools requesting the chance to play. But, the very same BCS schools who complained about the Broncos weak schedules refused to play them. Bleymaier later commented: "It's been surprising how many big schools have not been receptive of us coming to their place . . . [s]ome of those schools that are saying 'let them play our schedule' won't play us."¹²¹

4. Flawed Ranking Process

The BCS ranking system was controversial since its inception.¹²² Non-BCS schools are first confronted with terribly unpredictable preseason rankings,¹²³ which are inordinately influential in the final rankings at the end of the season.¹²⁴ Non-BCS schools must also contend with an inherent bias within the BCS ranking system in favor of schools with large fan-bases.¹²⁵

Rankings were initially determined by the AP and coaches' polls, a strength-of-schedule rating, and three computer polls.¹²⁶ As one commentator put it, this system "was the brainchild of [a] former football coach and career athletic administrator with zero qualification as a mathematician."¹²⁷ The formulas used in the construction of computer rankings are complex and lacking in transparency. In 2010, the BCS relied

121. Dan Wetzel, *Boise BCS Blocked*, YAHOO.COM (Nov. 7, 2009), <http://rivals.yahoo.com/ncaa/football/news?slug=dw-boise110709>.

122. DUNNAVANT, *supra* note 70, at 258.

123. See *A Look Behind the BCS Computer Ratings*, USA TODAY, Oct. 20, 1999, available at <http://www.usatoday.com/sports/comment/jzcol21.htm> (last visited Mar. 26, 2011) ("Preseason rankings are a guess." — Chris Hester of The Seattle Times, who operates one of eight computer ranking systems taken into account by the BCS in 1999).

124. See Nate Silver, *Popularity and Pedigree Matter in the B.C.S.*, N.Y. TIMES (Aug. 27, 2011), http://www.nytimes.com/2011/08/28/sports/ncaaf/football/in-bcs-popularity-and-pedigree-matter.html?_r=2 ("A team that was unanimously ranked first in the preseason poll will be ranked one to two positions higher in the final B.C.S. standings than a team that had been unranked, even if both had the same computer ranking."); STEWART MANDEL, *BOWLS, POLLS AND TATTERED SOULS* 51 (2007) ("And either or both the preseason number 1 or 2 teams have reached the title game every year since the BCS's 1998 inception.")

125. Silver, *supra* note 124.

126. MANDEL, *supra* note 124.

127. *Id.* at 16.

on six computer ranking systems, only one of which published its formulas.¹²⁸ This complexity and lack of transparency raises serious concerns regarding the procedure for ensuring that the rankings are free of miscalculations.

In December of 2010, an obscure error in one of the computer computations was accidentally discovered by Jerry Palm, who runs the web site CollegeBCS.com.¹²⁹ The error was significant enough to improperly drop Boise State out of the top ten, being replaced by a BCS team. Just prior to the discovery of the error, BCS Executive Director Bill Hancock proudly fired off a press release stating, “Once again, the BCS has delivered.”¹³⁰ In reality, though, the BCS delivered an egregious error that benefitted a BCS team while hurting one of the two non-BCS teams in the top ten.¹³¹ Naturally, the error undermined the credibility of the BCS ranking process and did little to quell distrust amongst non-BCS teams.¹³²

“Computers, like automobiles and airplanes, do only what people tell them to do.” – Bill James, Statistical Analyst¹³³

BCS proponents attribute the high ranking of BCS schools to strength of schedule. But the 2010 facts do not support such reasoning, where the Mountain West and the Western Athletic Conferences went a perfect 11 - 0 against BCS conference opponents. It is equally erroneous to claim that non-BCS conferences are categorically less difficult than BCS conferences, as evidenced by at least twenty-nine games in the 2010 season in which non-BCS teams defeated BCS opponents.¹³⁴ Despite accomplishments against BCS teams, climbing the polls or even holding their place against BCS teams was a challenge for non-BCS teams.

Throughout the 2010 season, Boise State was passed in the polls by BCS teams despite a perfect season up until its last game.¹³⁵ To the collective

128. *Id.*

129. Andy Staples, *BCS Math Error Proved Minute; The Larger Problem More Troubling*, SPORTS ILLUSTRATED.COM (Dec. 7, 2010, 12:50 PM), http://sportsillustrated.cnn.com/2010/writers/andy_staples/12/07/bcs-math-error/index.html.

130. *Id.*

131. *Id.*

132. See e.g., *The BCS Formula*, BCSKNOWHOW.COM, <http://www.bcsknowhow.com/bcs-formula> (demonstrating how human bias can skew rankings).

133. Bill James, *Boycott the BCS! A Statistical Analyst Takes A Stand Against College Football's Perverse, Irrational Bowl Championship Series*, SLATE.COM (Jan. 6, 2010, 4:11 PM), http://www.slate.com/articles/news_and_politics/recycled/2010/01/boycott_the_bcs.html.

134. For a list of these games, see *Official 2010 Non-BCS Wins vs. BCS List*, CSNBBS.COM (Jan. 10, 2011, 12:31 AM), <http://csnbbs.com/showthread.php?tid=450519>.

135. See Darter, *supra* note 114.

sigh of relief from BCS proponents, the Broncos lost to nineteenth-ranked Nevada in overtime. The loss dropped the Broncos from third to outside the top ten. It was there, in the hefty drop, that Jerry Palm discovered the error. The miscalculation, which BCS executive director Bill Hancock called “unacceptable,” exposed not only a potential for error but for subjective manipulation¹³⁶ and the need for transparency. Boise State President Bob Kustra objected: “When we cannot see how these decisions are made, it becomes an affront to the concepts of integrity and fair play that we claim to value.”¹³⁷

5. Revenue Discrimination

A restraint that has the effect of manipulating price and degrading the quality of output in a manner that is unresponsive to consumer preferences is not consistent with the fundamental goal of antitrust law.¹³⁸ Even when a non-BCS team overcomes barriers inherent in the BCS system and earns a place in a BCS bowl game, they receive substantially unequal shares of the bowl’s revenues on average [see Figure 2]. This effectively means that non-BCS teams are being forced to sell their products at a lower rate than their BCS opponents, even when both teams provide substantially the same product to the viewing public. There are certainly other factors that affect how money from a bowl is divided between the teams and their respective conferences, but Figure 2 seems to indicate that the factors that should matter the most, factors related to the public’s interest in the team like TV ratings and attendance, are not given nearly enough weight.

136. Staples, *supra* note 129.

137. Chadd Cripe, *Boise State President Bob Kustra Bashes BCS For Computer Error, Lack of Transparency, Rewarding ‘Mediocre’ Seasons*, IDAHO STATESMAN (Dec. 7, 2010, 2:14 PM), http://voices.idahostatesman.com/2010/12/07/ccripe/boise_state_president_bob_kustra_bashes_bcs_computer_error_lack_?page=4.

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

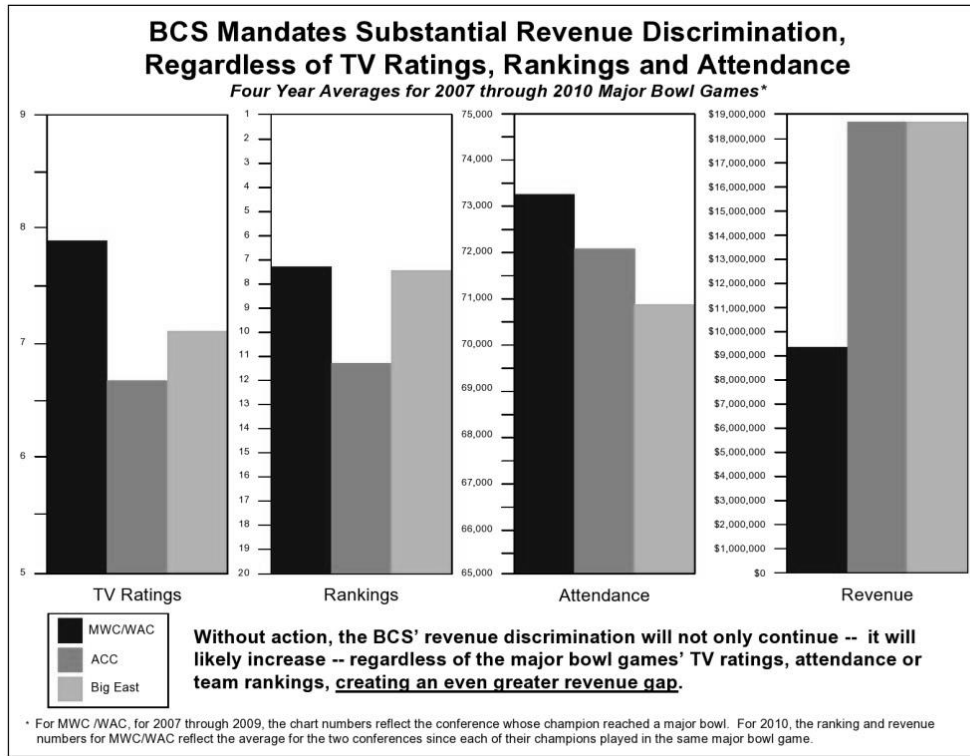


Figure 2: BCS Mandates Substantial Revenue Discrimination¹³⁹

The chart above tells only a slice of the full story of the BCS's discrimination. The revenue discrimination is even greater when deserving teams are excluded from major bowls. The BCS system is designed to make it virtually impossible for teams from outside of the six Automatic Qualifying Conferences or Notre Dame to ever win the national championship. Further, the Automatic Qualifying Conferences are guaranteed 60% of the spots in the major bowls, and barring a highly aberrational situation (such as occurred last year for the first time), those conferences, along with Notre Dame, for all practical purposes will be given at least 90% of the major bowl spots each year.¹⁴⁰

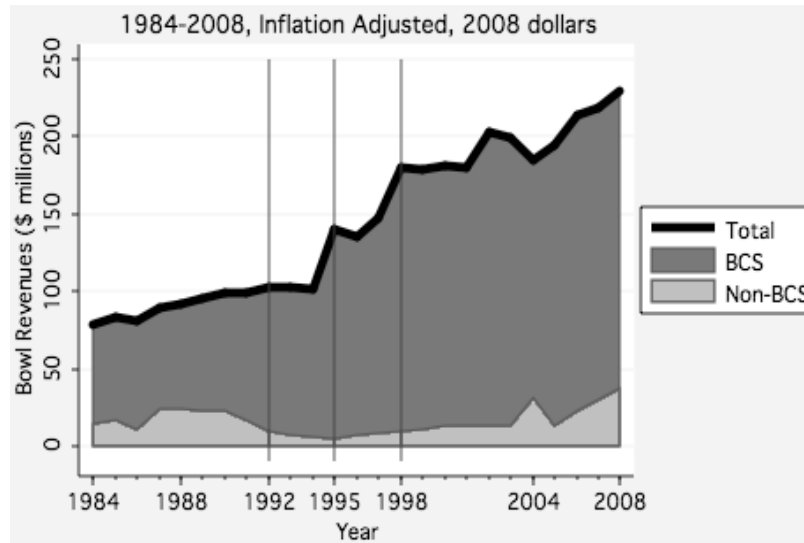
Early this year, the executive director of the BCS, Bill Hancock, argued that “[f]or the second straight year, the non-[BCS] conferences will see a

139. *BCS Mandates Substantial Revenue Discrimination, Regardless of TV Rankings, Ranking and Attendance*, ARENT FOX LLP, <http://www.arentfox.com/email/fishel/BCS%20Revenue%20Discrimination%20Chart.pdf>.

140. Kathleen Tuck, *President Kustra Speaks Out on BCS Revenue Discrimination*, BOISE STATE UNIVERSITY (May 25, 2010, 8:37 AM), <http://news.boisestate.edu/update/2010/05/25/president-kustra-speaks-out-on-bcs-revenue-discrimination/>.

record amount of revenues because of their participation in the BCS, which shows the strength and fairness of the current system.”¹⁴¹ This claim is, at best, enormously misleading.¹⁴² Figure 3 depicts the shameful disparity in revenue between BCS and non-BCS conferences.

Figure 3: Total Annual Bowl Revenue¹⁴³



Because BCS conferences are guaranteed to have at least one team in a BCS bowl game, these conferences are also guaranteed approximately \$21.2 million, while the entire collection of non-BCS conferences is only guaranteed a total of \$12.35 million with an additional \$12.35 million if a non-BCS team makes it to a BCS bowl game.¹⁴⁴ Thus, in 2010, the BCS paid BCS conferences \$145.2 million and the five non-BCS conferences a total of \$24.72 million.¹⁴⁵ The gross revenue disparity made evident by Figure 3 is a direct result of each BCS conference’s guaranteed BCS bowl

141. *Revenue Distribution Data Released*, BCS (Jan. 25, 2011, 2:41 PM), <http://www.bcsfootball.org/news/story?id=6057935>.

142. *SBJ: BCS Payouts Grow Along With Big Shares For Big Six Conferences*, AOL (Jan. 24, 2011, 11:34 AM), <http://aol.sportingnews.com/ncaa-football/story/2011-01-24/sbj-bcs-payouts-grow-along-with-big-shares-for-big-six-conferences#ixzz1IQAOAZJq>.

143. Richard W. Evans, *NCAA Bowl Finance: Something Changed in 1995*, ECONOSSEUR (July 6, 2009, 1:21 PM), <http://www.econosseur.com/2009/07/ncaa-bowl-finance-something-changed-in-1995.html>.

144. BCS 2010-2011 MEDIA GUIDE 6 (2010) available at <http://a.espn.com/i/ncaa/bcs/bcsguide2010b.pdf>.

145. *SBJ: BCS Payouts Grow Along With Big Shares For Big Six Conferences*, *supra* note 145.

game appearances and the skewed payout schedule derived thereof.

Professor McCann posits that, even if a playoff system would produce more money, BCS conferences would oppose it because the revenue would likely be distributed more evenly to non-BCS conferences.¹⁴⁶ He recognizes that the present revenue disparity between BCS and non-BCS conferences “strikes anticompetitive tones.”¹⁴⁷ Professor McCann emphasizes the importance of noting that this disparity harms more than the non-BCS football programs since a substantial portion of these payouts support other athletic programs and student-athlete scholarships.¹⁴⁸ The discriminatory distribution of bowl payouts is even more objectionable when one considers the bowl records of several BCS conferences.

From 2006 until 2011, the Big East and Atlantic Coast BCS conferences compiled a combined 3-7 BCS Bowl record.¹⁴⁹ During that time, the Mountain West Conference and WAC have posted a 4-2 record, one of which included TCU’s Fiesta Bowl loss to Boise State.¹⁵⁰ Also during the past five years, the Big East and Atlantic Coast Conference [“ACC”] champions never finished in the top five of the AP Poll. During that same period, the Mountain West and Western Atlantic champions finished in the top five of the AP Poll four times. It is also noteworthy that the Mountain West and WAC provided some of the most exciting and most watched bowl games between 2006 and 2011. Conversely, the Big East and ACC provided six of the ten worst watched BCS Bowl games. In fact, three of these contests drew less than 70,000 fans.¹⁵¹

In a fair and open competitive market, one would expect the Mountain West and WAC to receive bowl revenues at least equal to or greater than those awarded to the Big East and ACC. Instead, the Big East and ACC were awarded \$188 million from BCS games while the Mountain West and WAC conferences received less than half of that amount, \$72.85 million.¹⁵² Such disproportion is not founded on postseason performance, season performance, poll placement, public interest, or money generated from bowl games. Rather, it is based solely on the oligarchical agreement between BCS conferences that protects their revenue stream from market

146. Michael A. McCann, *Antitrust, Governance, and Postseason Football*, 52 B.C.L. Rev. 517, 547 (2011) available at <http://lawdigitalcommons.bc.edu/bclr/vol52/iss2/6>. Note again that the four-team format was only agreed to after a selection committee was agreed upon, arguably to enable the major conferences to protect their control of the playoff revenue.

147. *Id.* at 528.

148. *Id.* at 522.

149. Chadd Cripe, *Where Is The BCS Money Going?*, IDAHO STATESMAN (Jan. 30, 2011), <http://www.idahostatesman.com/2011/01/30/1508054/where-is-the-bcs-money-going.html>.

150. *Id.*

151. *Id.*

152. *Id.*

forces that might send the money to more deserving conferences.

6. Recruiting Deprivation

“You need good players to win.” – Mike Farrell, national recruiting analyst¹⁵³

Twenty-nine teams from BCS conferences and Notre Dame have recruited in the top fifty every year between 2002 and 2011.¹⁵⁴ Most non-BCS coaches understand firsthand the self-fulfilling prophecy that comes from being unable to recruit competitively with teams from BCS conferences. In 2007, twenty-one Division I-A schools each spent more than \$1 million on recruiting.¹⁵⁵ In comparison, the winningest college football team during the past decade, Boise State, spent just \$228,172 on recruiting.¹⁵⁶ In fact, Boise State and Hawaii (\$190,387) work on two of the smallest men’s recruiting budgets of all Division I-A schools.¹⁵⁷ The sixty-five schools with the highest recruiting budgets totaled more than \$61 million in 2007, an 86% increase since 1997.¹⁵⁸

Participating in prestigious BCS bowls enhances a school’s ability to recruit talent. There are only twenty-five teams that have finished in the AP’s top ten list between 2006 and 2011, with fifteen of those teams appearing on that list more than once.¹⁵⁹ These fifteen teams occupied forty of the fifty top ten spots over this five year period and more than half of the fifty spots have been held by ten teams: Alabama, Auburn, Florida, Georgia, LSU, Michigan, Ohio State, Oklahoma, Texas, and USC.¹⁶⁰ Not coincidentally, all ten schools were also among thirteen schools that have consistently finished at the top of the recruiting rankings.¹⁶¹

Many BCS teams that rarely put good teams on the field receive significantly higher revenues from the current bowl system than highly ranked non-BCS schools simply because of their membership in a BCS

153. Dallas Jackson, *Recruiting vs. Results: Does One Bring The Other?*, RIVALS (Jan. 24, 2011), <http://highschool.rivals.com/content.asp?CID=1179868>.

154. *Id.*

155. Libby Sander, *Have Money, Will Travel: The Quest For Top Athletes*, CHRON. HIGHER EDUC. (Aug. 1, 2008), <http://chronicle.com/article/Have-Money-Will-Travel-the/28750/>.

156. Graham Watson, *Are Big Recruiting Budgets Worth It In Non-BCS?*, ESPN (July 31, 2008, 4:23 PM), http://espn.go.com/blog/ncfnation/post/_/id/251/are-big-recruiting-budgets-worth-it-in-non-bcs.

157. *Id.*

158. Sander, *supra* note 155.

159. Matt Hinton, *Star Power: Recruiting Gurus’ Track Record At The Top Of The Polls, By The Numbers*, RIVALS (Jan. 25, 2012, 2:38 PM), http://rivals.yahoo.com/ncaa/football/blog/dr_saturday/post/Star-Power-Recruiting-gurus-track-record-at-th?urn=ncaaf-312394.

160. *Id.*

161. *Id.*

conference. Highly ranked, yet underfunded non-BCS teams cannot be expected to compete with highly funded BCS schools in the long run. The unfortunate result of the bowl system is a gradual decline in quality of teams in the market. The recruiting disadvantage is made even worse for top non-BCS schools when BCS teams look beyond their own sophisticated recruiting efforts to use their affluence to steal what little the top BCS schools were able to discover and recruit for themselves. For example, in 2011 Boise State lost three verbal recruits just prior to signing day to BCS teams.¹⁶² In fact, up through 2011, Boise State and Texas Christian University [“TCU”] failed to “land a single Rivals.com Top 100 prospect since the Rivals rankings began in 2002.”¹⁶³

One might ask how non-BCS schools have managed to achieve such success considering their low revenues and recruiting rankings. Chris Peterson, Boise State head coach, commented: “It’s amazing out there the lack of homework that’s really done and people will just end up offering guys because everyone else has. ‘If they’ve offered him then he must be a good player.’ We try to stay away from that as much as we can.”¹⁶⁴ Boise State’s current quarterback, Kellen Moore, is an excellent example. Overlooked by all football programs except two WAC teams, Moore was named a Heisman finalist last year.¹⁶⁵

But schools cannot rely on discovering diamonds in the rough to compete in the long run. The inability to recruit quality players makes it difficult to compete on the field, in the market, in the stands, for bowl bids, and for television contracts. Failure in these areas in turn makes recruiting more difficult: a cycle that continually distances the haves from the have-nots.¹⁶⁶ Yes, there are exceptions like Boise State, TCU, and Utah who found ways to consistently go undefeated and win all of their BCS games. But despite these schools’ miraculous successes, the recruiting deprivation imposed on non-BCS programs is yet another anti-competitive mechanism designed to guarantee market power and disproportionate revenues for powerful BCS conferences.

7. Group Boycott

The BCS resembles a group boycott in the way it limits access to non-

162. Dave Southorn, *Boise State Able To Hold Onto Majority Of Large Class*, IDAHO PRESS-TRIB. (Feb. 3, 2011, 12:55 AM), http://www.idahopress.com/sports/boise/bsf-football/article_33a23e6e-2f6c-11e0-9a0c-001cc4c002e0.html.

163. McCann, *supra* note 146, at 530.

164. Tim Booth, *Broncos Buck Trend of Low-Rated Recruiting Classes*, WASH. TIMES (Feb. 1, 2011), <http://abcnews.go.com/Sports/wireStory?id=12813815>.

165. *Id.*

166. See *BCS or Bust*, *supra* note 100, at 19 (BYU head coach testified how BCS schools would lure away possible recruits with statements about how BYU will never play for the Rose Bowl or in a national championship.).

BCS institutions to the top five bowl games because of automatic bids that are guaranteed to members of privileged BCS conferences. This anti-competitive mechanism was created in 1998 as an explicit agreement amongst the six major conferences to guarantee themselves an exclusive right to the nation's most lucrative bowls. The BCS structure assures that the ten teams selected for the five BCS bowls received exorbitant financial windfalls for themselves and their conferences. Because BCS bowl bids are most exclusively awarded to BCS conferences, a perpetuation and growing financial deficit exists between the more powerful BCS conferences and non-BCS conferences.

Before the advent of the BCS, bowl teams were selected via non-competitive bowl tie-ins. The BCS characterizes its bowl selection procedure as an improvement over the old bowl tie-in system. But, the net result for the quality of the teams selected for top bowl bids is not so different than it was before the advent of the BCS. This was evident when the BCS excluded the following teams for BCS bids in favor of lesser ranked BCS teams: 2004 #9 Boise State; 2004 #10 Louisville; 2008 undefeated #9 Boise State; 2009 #11 TCU; 2009 #10 Boise State;¹⁶⁷ and 2010 #11 Boise State.¹⁶⁸

In 2011, the bowl matchups were particularly inequitable. While #7 Boise State cruised to a 56–24 victory over Arizona State in the Maaco Bowl, the Orange Bowl pitted #15 Clemson against #23 West Virginia, the Sugar Bowl pitted #11 Virginia Tech against #13 Michigan, and the Rose Bowl pitted #5 TCU against #10 Wisconsin.¹⁶⁹ In sum, half of the teams playing in BCS bowl games in 2011 were ranked lower than Boise State.

Further complicating the challenge for non-BCS teams in getting into BCS Bowls is a rule limiting them to just one automatic bowl bid. This exclusionary policy has resulted in undefeated non-BCS teams being barred from post-season BCS Bowl games in lieu of teams from automatically qualifying BCS conferences, who needed to accomplish far less.¹⁷⁰ The fact is, poor performance is not the reason undefeated non-BCS teams have been barred from national championship and BCS Bowl opportunities. Instead, they have been barred due to a conspired, biased process designed

167. *BCS Bowl History*, CRASHING THE PARTY (June 27, 2010), <http://crashingthepartyfootball.blogspot.com/2010/06/bcs-bowl-history.html>. For more examples, see notes 160–169.

168. The Fiesta Bowl pitted #7 Oklahoma against unranked University of Connecticut. *Complete 2010 College Football Bowl Game Schedule, Match-Ups*, SBNATION (November 19, 2010), <http://www.sbnation.com/ncaa-football/2010/11/19/1824833/2010-college-football-bowl-game-schedule>.

169. *College Bowl Games – 2011–12*, ESPN, <http://espn.go.com/college-football/bowls>.

170. Tim Hyland, *The Bowl Championship Series: Hits and Misses*, ABOUT.COM, <http://collegefootball.about.com/od/thebcs/a/BCS-success.htm>.

to protect the interests of more powerful programs.

Professor McCann also acknowledges that “the inability of non-BCS-affiliated conferences to affect structural change may be anticompetitive.”¹⁷¹ Professor McCann notes that the BCS Presidential Oversight Committee, which is the BCS’s “ultimate ruling authority,” consists of eight representatives: seven chosen by the six BCS conferences and Notre Dame and one chosen by the five non-BCS conferences.¹⁷² Yet Professor McCann addresses the argument that the BCS maintains monopoly control over the national championship, countering that “FBS teams could, in theory, host [a non-BCS-sponsored national championship game].”¹⁷³ This is a surprising argument, considering that Professor McCann states earlier in his note that “the dominance of the BCS in controlling the production of playoff college football games may, as a practical matter, preclude competition.”¹⁷⁴

C. Anti-Competitive Effects Outweigh Pro-Competitive Arguments.

“The fact of the matter is that the BCS has given access to those [minor] conferences that they never had before.” – Roy Kramer, former SEC Commissioner and godfather of the BCS.¹⁷⁵

In *NCAA v. Board of Regents*,¹⁷⁶ the courts ruled against the NCAA in favor of Oklahoma and Georgia, ushering in an opportunity for major college and university football programs, now known as the BCS, to establish power over the market. Ironically, the same legal arguments used in *NCAA v. Board of Regents* that enabled Oklahoma and Georgia to prevail against the NCAA might now be similarly applied in a BCS antitrust lawsuit. In a rule of reason analysis, the plaintiffs must provide credible evidence of anti-competitive costs upon the market and consumers, as discussed above. The defendant then bears “a heavy burden of establishing an affirmative defense which competitively justifies” these costs.¹⁷⁷ This note considers various defenses for the BCS system and demonstrates why these defenses fail.

1. He Who Sows Shall Reap

Defense. It should not be surprising that BCS schools should feel a sense of entitlement regarding the Division 1-A football bowl structure.

171. McCann, *supra* note 146, at 528.

172. *Id.* at 529.

173. *Id.* at 540.

174. *Id.* at 539.

175. Jeremy, *The BCS: Breaking Down the Facts*, BLEACHER REPORT (July 9, 2009), <http://bleacherreport.com/articles/215003-breaking-down-the-facts-of-the-bcs>.

176. 468 U.S. 85 (1984).

177. *United States v. Brown Univ.*, 5 F.3d 658, 673 (3d Cir. 1997).

After all, it evolved from the investments, sacrifices, and creativity of traditional powers who abandoned lucrative ties to bowls to make the BCS a reality—not just for themselves but for teams who had never before enjoyed such opportunity. It is primarily through the fan bases of these large powers that extraordinary revenues are generated. While many non-BCS schools struggle to fill smaller stadiums, even during the best seasons, most BCS teams fill their mighty stadiums in the worst of times. According to Harvard College Sports Analysis:

The typical (i.e., average) BCS conference school has 25,533 undergrads, one pro sports team in the area, wins 57% of its games and has a ratio of 55 regular citizens to every student in vicinity of campus. The average non-BCS conference school has 20,462 students, one pro sports team in the area, wins 46% of their games and has 59 regular citizens for every student. While those baselines are similar, the difference is reflected in attendance: the average BCS School attracts 61,000 fans to each home game, while the average non-BCS School[] attracts 24,000 fans to each home game. Although BCS schools having bigger stadiums (the same disparity exists as a percentage of capacity: 92% to 66%) and stronger on field performance (11% difference in winning% is significant but not *that* significant), the most likely reason for the disparity is the tradition of BCS schools and their opponents.¹⁷⁸

In capitalizing on the strength of the market, the BCS simply regards its policies as a reflection of the marketplace. It is also fair to note that since its creation in 1998, the BCS selection process has been opened up several times, demonstrating BCS's efforts to reach beyond its sense of entitlement to share revenues more evenly with non-BCS programs.

Response. In other words, those with market control are justified in establishing a system that entrenches their control. But Division 1-A college football belongs to the nation, not elite teams in the BCS. There is a difference between being a proud competitive member in a market and laying claim to ownership. While the BCS system grants a theoretical opportunity to non-BCS to compete in the national championship, it is not a realistic opportunity precisely because of the major conferences' senses of entitlement.

Bill Hancock, BCS Executive Director, argues, "It's not about money. . . . People like to talk about the money, but the fact is the money

178. Alex Koenig, *What Factors Contribute to Attendance in College Football?*, HARVARD C. SPORTS ANALYSIS COLLECTIVE (Jan. 17, 2011), <http://harvardsportsanalysis.wordpress.com/2011/01/17/what-factors-contribute-to-attendance-in-college-football/> (emphasis in original).

goes to the teams that are in the games. What's unfair about that?"¹⁷⁹ The problem is that the selection process for the bowl games is unreasonable. The founding purpose of the BCS was to give the nation a true national championship—to pit the best teams against each other. The automatic bid mechanism cannot be described as anything other than allowing BCS conferences to maintain control over the market. The effect of this mechanism is disproportionate revenue distribution, unequal recruiting opportunities, and a degradation of the quality of bowl games. Until BCS bowl participants are chosen by rankings alone, the system will remain fundamentally antithetical to the spirit of the Sherman Act.

2. Undisputed National Champion

Defense. Herein lies the BCS's most important pro-competitive argument. Unlike the pre-BCS system, when bowl tie-ins required selecting a somewhat ambiguous national champion from biased polls, the BCS structured ranking process has proven its ability to create an uncontested championship game. The title of champion is determined by the result of this single game, rather than by comparisons of different games. Antitrust law does not require businesses to adopt policies that best serve free market principles, but only that businesses act reasonably with respect to those principles.

Response. While the BCS system produces a game that is widely considered the championship game, it does not guarantee the public a clear national champion. Unlike every other NCAA sport that relies on a playoff system to determine a champion, the BCS employs a largely secretive ranking process that denies opportunity to all but two teams to compete for the national title. It is unreasonable to crown the victor of this game the undisputed national champion while other highly ranked teams finish the season and postseason undefeated.¹⁸⁰

In 2005, the University of Utah wedged open the BCS door by becoming the first team outside the BCS alliance to play in a BCS sanctioned bowl game, resulting in a dominating 35-7 victory over Pittsburgh in the Fiesta Bowl.¹⁸¹ On New Year's Day 2007, Boise State University rang in the new year with one of the most stunning upsets and most exciting games in

179. J.P. Giglio, *BCS All About Control And Money*, NEWS & OBSERVER (Aug. 1, 2010, 2:00 AM), <http://www.newsobserver.com/2010/08/01/v-print/607135/bcs-all-about-control-of-money.html>.

180. Professor McCann points out that "in the twelve years since [the inception of the BCS], the teams ranked number one and number two by the BCS have played each other every time in the postseason." McCann, *supra* note 146, at 519. But this does not mean that the teams ranked number one and number two deserved those rankings.

181. *Efficient Smith Leads Dominant Win*, ESPN (January 1, 2005) available at <http://scores.espn.go.com/ncf/recap?gameId=250010221> (last visited November 13, 2012).

college football history, defeating the vaunted Oklahoma Sooners in overtime with three unimaginable plays executed to perfection.¹⁸² Both Boise State and Utah finished the years undefeated and neither were given the opportunity to compete for a national championship.

One of the BCS's favorite mantras is "every game counts" because a team typically must win every regular season game to stay in national title contention.¹⁸³ But the premise that perfect performance in each game will result in a shot at the national title is only true for BCS schools. In 2008, Boise State and Utah posted undefeated records and both finished in the AP's top ten list. Utah soundly defeated Alabama in the Sugar Bowl, but Boise State was not invited to a BCS bowl game. In 2009, Boise State and TCU went undefeated and were ranked #6 and #3, respectively. In an apparent attempt to avoid the potential embarrassment of two non-BCS teams winning BCS bowl games, the two teams were pitted against each other in the Fiesta Bowl. Boise State won and finished yet another year undefeated with no chance at a national championship. Against these examples over the last six years, it is difficult to see how the present BCS system can be considered a reasonable means of establishing an undisputed national champion.

3. Bowl Tradition

Defense. Perhaps the most common criticism of the BCS is its automatic selection of lesser-ranked BCS teams for BCS Bowls. However, it is the pro-competitive value in this agreement that ensures that the most popular products are placed into bowl games. While BCS detractors complain about the "unfair" manner in which BCS selects BCS Bowl teams, they overlook one very important point: the team selection process was never designed to guarantee bowl bids to top ranked teams. Instead, the intent was to honor longstanding conference affiliation agreements while also allowing bowl committees the "flexibility to exercise freedom of selection that would create locally attractive games to enhance ticket sales."¹⁸⁴ Just because some might feel this is unfair, does not make it a violation of antitrust law.

Response. Every year, the NCAA Division I Men's Basketball Championship has delivered exciting tournaments that have produced a competitive spirit that is non-existent in the BCS championship process, where every team in the tournament has a chance at the national title. A

182. *Game History*, FIESTA BOWL, http://www.fiestabowl.org/index.php/tostitos/history_display/36th_annual_tostitos_fiesta_bowl/.

183. See McCann, *supra* note 146, at 520 ("In other words, *every* regular season game counts, a phenomenon that has been credited with increasing attendance, interest, and financial investment in those games.").

184. *BCS Chronology*, *supra* note 76.

classic example is the 2011 NCAA Division I Men's Basketball Championship, where Virginia Commonwealth and Butler beat traditional powers to make the final four.¹⁸⁵ In the few times that the BCS has allowed a non-BCS team to compete in post-season BCS Bowl games, the market has benefited from some of the most exciting games in college football history.

How many other classic BCS games never materialized because the BCS refused to allow undefeated non-BCS teams to compete in lieu of lesser-accomplished BCS teams who brought duds to BCS Bowls in attendance, television ratings, and revenue? The bottom line is the BCS Bowl selection process has proven itself, time and again, as an inferior alternative to the playoff formats used by all other team sports in the NCAA. The argument above assumes that the traditional bowl system will maximize ticket sales and best serve the public's interest, but why would this only be true for Division I-A college football? Arguably, the public wants, and will pay more for, a system that produces the most competitive matches between the best teams.

The BCS characterizes its bowl selection process as an improvement over the old bowl tie-in system. But an improvement does not mean this new process is reasonable. The net result for the quality of the teams selected is not so different than before the advent of the BCS. The opportunities for non-BCS teams to play in BCS bowl games are severely limited by the BCS exclusionary structure that limits them to a single automatic bid. The BCS has, on multiple occasions, excluded top ranked non-BCS schools from bowl games,¹⁸⁶ depriving the public of potential Cinderella-story upsets and increased interest in college football. How many fans will have to turn their sets off in the middle of a boring BCS games¹⁸⁷ because of a system that prefers BCS conference favoritism to non-BCS competitive excellence?

185. Paul J. Weber, *From First 4 to Final 4*, STOCKTON RECORD, Mar. 28, 2011.

186. See *infra* notes 169–178.

187. Adam Spencer from Bleacher Report ranked the 2012 Championship game between LSU and Alabama as the most boring BCS bowl game in history. Despite being the consensus #1 and #2 teams in the country, “the offensive ineptitude displayed by both teams made this game the hardest BCS game to watch.” Adam Spencer, *Alabama vs. LSU and the Most Boring Games in BCS Bowl History*, BLEACHER REPORT (Jan. 10, 2012), available at <http://bleacherreport.com/articles/1017998-alabama-vs-lsu-and-the-most-boring-games-in-bcs-bowl-history/page/6> (last visited March 26, 2012). Caleb Slinkard from The Commerce Journal commented: “A playoff system wouldn't ensure that we wouldn't see anymore boring postseason games, but it would mean that we would see more meaningful and more exciting games.” Caleb Slinkard, *BCS bowl system has become unfortunate joke*, THE COMMERCE JOURNAL (Jan. 12, 2012), available at <http://commercejournal.com/opinion/x1770107997/BCS-bowl-system-has-become-unfortunate-joke> (last visited Mar 26, 2012). In other words, an eight-team playoff would not leave the next six highest ranked teams thinking, “If we were given a chance, we would have crushed the winner.”

In *NCAA v. Board of Regents*, the court cited lack of consumer responsiveness as a sign of antitrust violations.¹⁸⁸ The BCS selection process denies the best possible games to the public, who in large part disapprove of the BCS system.¹⁸⁹ The collusion of the powerful BCS conferences, which is premised on protecting the bowl tradition, is simply a mechanism for retaining market control. This control diminishes the value of BCS Bowls and disserves the public interest in violation of the spirit of the Sherman Antitrust Act.

4. BCS Creates Funding

Defense. There is good reason why college presidents are not eager for a playoff in Division I-A college football. Exorbitant revenues derived from the BCS system are funding athletic programs like never before in college athletics. Professor Michael McCann argues that “[a] playoff system, in contrast, could enable an underperforming regular season team to wait until the playoffs to put forth their best effort and performance.”¹⁹⁰

Response. This speculative fear does not seem to be supported by evidence from other sports. In fact, CBS entered an eleven-year deal with the NCAA in 2000 for exclusive broadcast rights to the March Madness basketball tournament for \$6 billion, while ESPN bought rights to the BCS Championship from 2011 to 2014 for only \$495 million; a difference of roughly \$380.5 million per year.¹⁹¹ Big Ten commissioner Jim Delany states: “An NFL-style football playoff would provide three to four times as many dollars to the Big Ten as the current system There is no doubt in my mind that we are leaving hundreds of millions of dollars on the table.”¹⁹²

“In 2005, TV executives and unidentified college officials estimated that a 16-team playoff would generate around \$750 million annually, dwarfing the \$220 million the current bowl system generates.”¹⁹³ But the more important point is that this increased revenue is disproportionately favoring the powerful BCS conferences over non-BCS conferences.¹⁹⁴ The cost of the BCS system extends far beyond dollar figures though. In examining the growing commercialism in college football, it is easy to see the mounting

188. 468 U.S. 85 (1984).

189. See Zimbalist, *supra* note 99, at 8.

190. *Id.*; MANDEL, *supra* note 124, at 25.

191. Michael A. McCann, *Antitrust, Governance, and Postseason Football*, 52 B.C.L. REV. 517, 544 (2011), available at <http://lawdigitalcommons.bc.edu/bclr/vol52/iss2/6>.

192. Mandel, *supra* note 126, at 19.

193. Brendan Frazier, *BCS Bigotry, Corruption, And Scandal*, SPORTS BUSINESS DIGEST (Jan. 20, 2011), available at <http://sportsbusinessdigest.com/bcs-bigotry-corruption-and-scandal/> (last visited Mar. 26, 2011).

194. Evans, *supra* note 143.

risks to longstanding ideals on amateurism.

Despite rampant commercialization of college athletics, the NCAA still clings to its primary organizational purpose of safeguarding “intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body.”¹⁹⁵ In attempting to maintain a “clear line of demarcation between intercollegiate athletics” and commercialism,¹⁹⁶ the NCAA conducts playoff championships that allow teams to determine champions. However, the same cannot be said about the BCS.

Unlike the NCAA, which defines its primary motive as protecting the sanctity of amateurism, it seems that the primary motive of the BCS is to preserve the sanctity of monopolized commercialism. Its primary goal appears to be guaranteeing BCS bowl bids, the national title, and exorbitant revenues to favored BCS teams. With this profit motive guiding its purpose, it should not be surprising to find a championship process that is fully controlled by the BCS using biased agreements, biased polls, and secret computer formulas.

The hidden costs of the BCS’s underlying profit motive are becoming increasingly apparent through the corruption scandals plaguing BCS Bowls like the Fiesta Bowl,¹⁹⁷ star athletes like Cameron Newton,¹⁹⁸ and elite BCS programs like Ohio State and Auburn.¹⁹⁹ The emphasis is no longer on the welfare of the student body, school, athletes’ education, community or the fans. Instead, the emphasis is on big money interests cashing in on the “amateur” college athletics market.

The commercial aspect of the BCS case also impacts its comparison to NCAA precedents. In *NCAA v. Board of Regents*,²⁰⁰ the Court acknowledged a degree of latitude for NCAA anti-competitive restraints aimed at maintaining amateurism in college sports. The deprivation of opportunity and funding to non-BCS schools has the opposite effect of

195. Letter from Myles Brand, President, NCAA, to William Thomas, Chairman, House Comm. on Ways and Means (Nov. 13, 2006), available at http://www.nacua.org/documents/NCAALetter_TaxExempt_ResponsetoHouseWaysMeansCmte.pdf (last visited Apr. 02, 2011).

196. *Id.*

197. Ginger Rough, *Fiesta Bowl Scandal Prompts Senate Ethics Inquiry*, THE ARIZONA REPUBLIC (Apr. 1, 2011), available at <http://www.azcentral.com/community/scottsdale/articles/2011/04/01/20110401fiesta-bowl-investigation-fallout.html>.

198. Dennis Dodd, *NCAA President: I'd Be 'Happy To Help' Create Playoff*, CBS SPORTS (Mar. 2, 2011), available at <http://www.cbssports.com/collegefootball/story/14761655/ncaa-president-id-be-happy-to-help-create-playoff>, (last visited Apr. 01, 2011).

199. Thomas O'Toole, et al., *Ex-Auburn Players Tell Of Cash Handshakes, Sexual Favors*, USA TODAY (Mar. 31, 2011), available at http://www.usatoday.com/sports/college/football/sec/2011-03-30-auburn-payments-hbo-real-sports_N.htm.

200. 468 U.S. 85 (1984).

encouraging amateurism in college football. It not only imposes a potentially lethal cost upon non-BCS programs, but threatens the functional integrity of the concept of amateurism in college football.

5. Non-BCS Conferences Endorse BCS

Defense. Non-BCS conferences sign agreements that allow them to participate in the BCS system. It would seem odd if one of these conferences alleged an antitrust claim against an organization in which the conference is a member.

Response. This defense, which seems best characterized as an issue of standing, is beyond the scope of this note. But it is worth noting that this defense cuts both ways. Boise State President, Bob Kustra, told the *Idaho Statesman* that he was compelled to sign with the BCS because “[e]verybody understood that there are so many financial ramifications to not signing it.”²⁰¹ While non-BCS conferences receive significantly less revenue than BCS conferences, the little that they receive is an indispensable part of their budget that they would be hard-pressed to earn outside the system, due to the BCS conference’s overwhelming market control. University of Utah President, Michael Young, stated that “[i]f a conference wishes to compete at the highest levels of college football, and the only postseason system in place for that is the BCS, no one conference can afford to drop out and penalize its football programs and student-athletes.”²⁰²

It may be the case that a party to the BCS system could not claim standing to sue, but that is irrelevant to whether the BCS system is unreasonably restraining trade.

On April 12, 2011, a collection of lawyers and professors of law and economics sent a letter to the Antitrust Division of the Department of Justice requesting an investigation of the BCS as “a cartel that controls distribution of competitive opportunities and benefits associated with major college football’s post-season.”²⁰³ The letter cites in support of its claim: the de facto exclusion of non-BCS schools from the national game due to the BCS’s “mathematically dubious rating system,” the discriminatory nature of the automatic bid mechanism, and the requirement that championship contenders not invited to the national championship game “must accept other BCS bowl invitations rather than join a rival post-

201. *Mountain West, WAC Sign BCS Contract*, MOONDOGSPORTS.COM (Jul. 15, 2009), <http://moondogsports.com/2009/07/15/mountain-west-wac-sign-bcs-contract/> (last visited Mar. 26, 2011).

202. *Id.*

203. Letter from Roger Abrams, Professor, Ne. Univ., et al, to Christine Varney, Attorney Gen., Dep’t. of Justice, Antitrust Div. (April 12, 2011), *available at* <http://www.oskr.com/pdf/lettertodoj04122011.pdf> (last visited May 11, 2011).

season system.”²⁰⁴ If the Justice Department agrees with these contentions, it will be no hindrance to antitrust prosecution that non-BCS schools were economically forced to sign BCS agreements.

6. A Chance Where There Once Was None

Defense. Unlike the past, the BCS process has opened opportunities for less affluent programs to compete in two of the four BCS bowls by finishing in the top twelve of the national ranking. In fact, it is solely because of major conferences, which forfeited longstanding traditional bowl agreements that non-BCS teams are able to participate as never before in the national limelight for major bowl games.²⁰⁵

Response. This token opportunity touted by BCS proponents fails to satisfy any reasonable standard of promoting competition. One scholar argues that this opportunity was in response to an inquiry by the United States Justice Department, which was commenced after Louisville posted a 1993 season record of 7-1, achieved a top ranking, but was automatically excluded from BCS bowl games.²⁰⁶ The illusory nature of this opportunity was apparent during the 1996-97 season, when BYU posted a 13-1 record, was ranked fifth, but was not invited to a BCS bowl game.²⁰⁷ To make matters worse, BYU was ranked higher than four teams that competed in BCS bowl games that year.²⁰⁸

Since 2004, there have been more undefeated non-champions than undefeated champions.²⁰⁹ The following is a non-exhaustive list of instances in which the BCS has failed to give an undefeated team an opportunity at the title. Note that, except for TCU's 2009 and 2010 seasons, the undefeated team ended the regular season ranked outside the top-four and, therefore, would not have been invited to a four-team playoff:

1998: The Tulane Green Wave and the Tennessee Volunteers finished the regular season as the only undefeated teams. Tennessee played 11-1 Florida State in the BCS National Championship Game while Tulane did not even get a BCS bowl invite. Instead, they handily defeated BYU in the Liberty Bowl 41-27, to finish the season 12-0 and ranked seventh in the polls behind BCS teams with inferior records.²¹⁰ Tulane ended the regular

204. *Id.*

205. Graham Spanier, *Inclusive BCS Passes Antitrust Test*, NCAA NEWS (Sept. 1, 2003), available at <http://www.ncaa.org/news/2003/20030901/editorial/4018n27.html>.

206. Zimbalist, *supra* note 99, at 8.

207. *Id.* at 9.

208. *Id.*

209. Mike MacConnell, *System Failure: 12 Times the BCS Got it Wrong*, BLEACHER REPORT (Jun. 3, 2010), available at <http://bleacherreport.com/articles/400603-system-failure-12-times-the-bcs-got-it-wrong>.

210. *Id.* at 2.

season ranked #10.²¹¹

1999: The Marshall Thundering Herd finished the regular season 12-0 and was crowned the MAC Champions. But, like Tulane the year before, Marshall would not even receive a BCS bowl bid. Like Tulane, they handily defeated BYU 21-3 in the Motor City Bowl, finishing the season 13-0.²¹² Marshall ended the regular season ranked #12.²¹³

2001: BYU entered its final game undefeated and ranked No. 12, but was informed by the BCS that, regardless if they continued to be undefeated or not, they had been “released” from consideration for a BCS bowl in lieu of defeated BCS teams.²¹⁴ This was because, despite a 12-0 record, BYU was ranked #12.²¹⁵

2004: Utah went undefeated. Though left out of the championship picture, they would be the first non-BCS school to compete in a BCS Bowl game, which resulted in their complete domination of 20th ranked Pittsburgh, 35-7.²¹⁶ Utah ended the regular season ranked #6.²¹⁷

2006: Boise State and Ohio State were the only undefeated teams, but Ohio State got the nod to play in the national championship, losing to 11-1 Florida 41-14. Meanwhile, the Broncos upset powerhouse Oklahoma 43-42 in overtime on the infamous Statue of Liberty play. Boise State was the only team to finish undefeated that year, but was given no chance to compete for the national title.²¹⁸ Boise State finished the regular season ranked #8.²¹⁹

2007: Hawaii went undefeated without any chance of competing for the national title. They would go on to be the only non-BCS team to ever lose a

211. *1998-1999 College Football Season Final BCS Standings*, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/1998_archive_bcs.html (last visited August 25, 2012).

212. MacConnell, *supra* note 209, at 3.

213. *1999-2000 College Football Season Final BCS Standings*, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/1999_archive_bcs.html (last visited August 25, 2012).

214. Pete Misthaufen, *Mountain West Conference: Time For Expansion*, BLEACHER REPORT (Jan. 29, 2010), <http://bleacherreport.com/articles/335401-a-call-for-mountain-west-conference-expansion>.

215. *Bowl Championship Series Standings*, THE NATIONAL FOOTBALL FOUNDATION AND COLLEGE HALL OF FAME, INC. (Dec. 3, 2001), *available at* http://www.bcs guru.com/images/bcs_2001.pdf.

216. MacConnell, *supra* note 209, at 6.

217. *2004-2005 College Football Season Final BCS Standings*, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/2004_archive_bcs.html (last visited August 25, 2012).

218. MacConnell, *supra* note 192, at 7.

219. *2006-2007 College Football Season Final BCS Standings*, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/2006_archive_bcs.html (last visited August 25, 2012).

BCS game.²²⁰ Hawaii finished the regular season ranked #10.²²¹

2008: Undefeated Utah had to watch two 12-1 BCS teams play for the national championship. Instead, the Utes easily defeated the Alabama Crimson Tide 31-17 in the Sugar Bowl, finishing 13-0. The Utes were not the only undefeated team in 2008.²²² Utah finished the regular season ranked #6.²²³

2008: For the second time in three seasons, the Broncos went undefeated. But, despite proving their worth against Oklahoma, they were again denied a chance at the national title. They were even denied a BCS Bowl game bid.²²⁴ Boise State finished the regular season ranked #8.²²⁵

2009: The Broncos and TCU both went undefeated. The two teams were matched against one another in the Fiesta Bowl; a tactic some have called a fail-safe strategy by the BCS to avoid the catastrophic potential of both teams defeating BCS teams. Boise State won the game, becoming the second team in NCAA history to finish 14-0.²²⁶ TCU and Boise State finished the regular season ranked #4 and #6, respectively.²²⁷

2010: TCU went undefeated and was denied any chance to compete for the national title. They did, however, defeat Wisconsin in the Rose Bowl.²²⁸ TCU finished the regular season ranked #3.²²⁹

After TCU's Rose Bowl victory, TCU quarterback, Andy Dalton, commented that he "felt like [they] were playing for all the non-[BCS]s."²³⁰

220. MacConnell, *supra* note 209, at 8.

221. 2007-2008 College Football Season Final BCS Standings, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/2007_archive_bcs.html (last visited August 25, 2012).

222. MacConnell, *supra* note 209, at 9.

223. 2008-2009 College Football Season Final BCS Standings, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/2008_archive_bcs.html (last visited August 25, 2012).

224. MacConnell, *supra* note 209, at 10.

225. 2008-2009 College Football Season Final BCS Standings, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/2008_archive_bcs.html (last visited August 25, 2012).

226. MacConnell, *supra* note 209, at 12; *Fake Punt, TCU's INTs Spark Boise State to 14-0, Fiesta Win*, ASSOCIATED PRESS (January 4, 2010) <http://scores.espn.go.com/nfl/recap?gameId=300042628>.

227. 2009-2010 College Football Season Final BCS Standings, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/2009_archive_bcs.html (last visited August 25, 2012).

228. Gregg Patton, *TCU Hands Another Goliath A Loss*, THE PRESS-ENTERPRISE, available at http://www.pe.com/columns/patton/stories/PE_Sports_Local_D_patton_02.ff6601.html.

229. 2010-2011 College Football Season Final BCS Standings, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/2010_archive_bcs.html (last visited August 25, 2012).

230. *Id.*

This mentality of BCS vs. non-BCS reflects shortcomings of a BCS process that is founded upon policies of exclusion. Hall of Fame coach, Bobby Bowden, was asked whether he thought Boise State deserved consideration for the national championship game. He responded, “If a team has not lost, how can you prove they’re not the best?”²³¹ Strangely, Bowden later supported the BCS system over a playoff system, describing himself as “old school.”²³² But when the old school system constitutes an unreasonable restriction of fair trade, inimical to the competitive ideal underlying Bowden’s comment, then it is time to move on.

Much focus is given to the harm done to non-BCS programs due to the discriminatory BCS selection process, but arguably the primary victims are the student athletes at these programs. While the school can continue to hope for a shot at the national title years, maybe decades in the future, college athletes have only four or five years to play in the big game. America was born on the dreams of the oppressed and antitrust law can be viewed as a legislative effort to make those dreams realizable. One of the best places to observe the aspirant American culture is on college football fields, where thousands of student athletes compete for recognition. Daryn Colledge and Korey Hall, who play for the Green Bay Packers, were leaders on the Boise State team that shocked the football world against the Oklahoma Sooners in the 2007 Fiesta Bowl. But for every Daryn Colledge or Korey Hall, how many great non-BCS players are overlooked, in large part due to the BCS’s maltreatment of non-BCS conferences?

7. Recently Adopted Playoff System

Defense: In 2014, the BCS will implement a four-team playoff system that will address many of the concerns presented in this note.

Response: A four-team playoff might seem like a step in the right direction, but this particular four-team playoff is a step in the *wrong* direction. First, limiting the playoffs to four teams is a fundamental error, as demonstrated in the previous subsection, which lists many instances in which an undefeated team failed to rank in the top four.²³³ Consider also that the regular seasons in 2004-05 and 2009-10 ended with five undefeated teams.²³⁴ In cases like these, a four-team playoff will still leave undefeated

231. Jon Solomon, *Q&A with Bobby Bowden*, AL.COM (Sept. 10, 2010), http://www.al.com/sports/index.ssf/2010/09/qa_with_bobby_bowden.html.

232. *Id.*

233. Note that the discussion in subsection C.6 of this note lists ten controversial seasons and that, of those ten, the four-team playoff would only have addressed one of the controversies fully: TCU’s 2010 season. An eight-team playoff would have addressed six of the most recent seven controversies, the only exception being Hawaii’s 2007 season. This is certainly a substantial enough improvement to warrant one more tier to the playoff format.

234. The following teams were undefeated at the end of the 2004-05 regular

players with the terrible realization that, despite their best efforts on the field, the system had defeated them even before the season began.

Still, it is reasonable to conclude that, even in such cases, the four-team playoff does not prejudice these players any more than if there was no playoff at all. But the second problem with the adopted system is why the system is potentially worse than the present system: the selection method. Under the present BCS model, teams are ranked according to their average scores in the Harris Interactive Poll, the Coaches Poll, and six computer rankings.²³⁵ The Harris Interactive Poll is decided by 115 voting members, the Coaches Poll is decided by 59 voting members, and the computer rankings are supposed to be controlled solely by statistics.²³⁶

Under the adopted system, millions of dollars in revenue and the title hopes of so many teams and players will be in the hands of a single committee. BCS executive director Bill Hancock stated that the committee will resemble the NCAA March Madness selection committee,²³⁷ which is a ten-member committee.²³⁸ Of course, the glaring difference is that March Madness is a sixty-four team playoff, so teams that were not considered strong enough to make the cut could hardly claim to be title contenders. A four-man playoff cannot rely upon the same rationale. Notre Dame athletic director, Jack Swarbrick, explained that the committee will publish weekly top-20 rankings, stating: “We didn’t want the top four teams to just come out of the blue at the end of the season.”²³⁹ While this is a noble effort to eliminate surprise from the selection process, the committee will not escape accusations of bias and corruption for snubbing teams with arguably equal or better records than the “fortunate four”.

season: USC, Oklahoma, Auburn, Utah, and Boise State. *2004-2005 College Football Season Final BCS Standings*, COLLEGEFOOTBALLPOLL.com, http://www.collegefootballpoll.com/2004_archive_bcs.html (last accessed August 25, 2012). The following teams were undefeated at the end of the 2009-10 regular season: Alabama, Texas, Cincinnati, TCU, and Boise State. Though they were the only team to go undefeated in both regular seasons, Boise State was ranked lowest each time.

235. *BCS Explained*, COLLEGEFOOTBALLPOLL.com, http://www.collegefootballpoll.com/bcs_explained.html (last accessed November 12, 2012).

236. *Id.* As noted earlier, the lack of transparency regarding the computer ranking algorithms creates the potential for unchecked bias and error.

237. Dan Wolken, *Playoff Selection Committee Will Resemble Basketball's*, USA TODAY, September 19, 2012, <http://usatoday30.usatoday.com/sports/ncaaf/story/2012/09/19/playoff-selection-committee-will-resemble-basketballs/57808388/1> (November 12, 2012).

238. *Meet the NCAA Men's Division I Selection Committee*, BRACKETOGRAPHY.com, <http://www.bracketography.com/selectioncommittee.htm> (last accessed November 12, 2012).

239. Asher Feldman, *Playoff Selection Committee to Release Top-20 Ranking Starting Midyear*, BCSKNOWHOW.com, June 27, 2012, <http://www.bcsknowhow.com/playoff-selection-committee-to-release-top-20-rankings-starting-midyear> (last accessed November 12, 2012).

IV. LESS RESTRICTIVE ALTERNATIVES

If the courts arrive at a rule of reason judgment that BCS anticompetitive activity outweighs pro-competitive benefits, the plaintiff may demonstrate that the benefits may be achieved through a less restrictive alternative.²⁴⁰ This note favors replacing the anti-competitive restraints that currently favor BCS conferences with a national championship playoff that affords all 120 Division I FBS football teams an equal opportunity to compete. Many top college football minds, such as ex-Florida coach Urban Meyer and Penn State Coach Joe Paterno, believed that the issue could be resolved with a playoff.²⁴¹ Texas coach Mack Brown also voiced disapproval of the BCS system: “To me, if everyone wins out, there is going to be about five one-loss teams, and that’s more reason to look at a different system. Somebody is going to be treated unfairly.”²⁴²

A. Continuity Ranking System

The first step to establishing a fair playoff is to create a more transparent method of ranking teams. As discussed above, the current ranking system employed by the BCS is mostly kept secret from the public. Even despite this secrecy, a dedicated journalist managed to spot a critical error,²⁴³ which illustrates the potential for injustice if one considers how many errors might persist undetected. It is also critical that the ranking system eliminates much of the ambiguity surrounding pre-season rankings.²⁴⁴

One possible method of eliminating ambiguity would be to equate preseason rankings to the final rankings of the previous year. While such a method would entirely eliminate the ambiguity of preseason rankings and preserve continuity between seasons, it does not account for recruiting strength and other changes that occur between seasons. But no system will perfectly rank teams’ preseasons, which is why a ranking system should give great weight to what occurs on the field and be capable of giving a low pre-season ranked team the opportunity to climb the ladder quickly in a single season.

The following is an example of such a system. First, assign each team a certain number of rank points equal to the total number of teams minus the team’s preseason ranking. For example, a team ranked number one out of 120 teams would have 119 rank points. The winner of a game would earn a certain number of points and the loser would lose that same number of points. Division rankings could be determined solely on how many points a

240. *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977)

241. Solomon, *supra* note 231.

242. *Id.*

243. See MANDEL, *supra* note 124.

244. See Staple, *supra* note 129.

team has; higher point teams enjoy higher rankings.

To calculate the points, assign each game a base value of points equal to the square root of the total number of teams (just under eleven in the case of 120 teams). There needs to be an incentive for teams to play difficult games. Thus, a bonus/deduction can be added depending on whether the higher ranked team lost/won. For example, the bonus/deduction could be the difference of the teams' rank points divided by the square root of the total number of teams.²⁴⁵

The bonus/deduction rewards teams who play tough schedules. Clearly, it would be in a team's best interest if its future opponent accumulated as many points as possible before they met, since that would maximize a potential bonus or minimize a potential deduction. But what if team A beats a lower ranked team near the beginning of the season and that opponent goes on to win the rest of its games against high ranked schools? Then it stands to reason that the opponent should have had a higher number of rank points near the beginning of the season and that team A should have gained more from its early season win. Accounting for this "hindsight correction" is quite feasible using techniques from linear algebra.²⁴⁶

There are several benefits to a system such as this. First, it is entirely clear from a series of games what will be each team's point total and, consequently, its ranking. This ranking system is determined solely by results on the field, leaving teams with a clear perspective on where they stand if certain conditions are met. If one knows who will win all the upcoming games, one can use a computer program to state with certainty the next rankings for the entire division.

Second, this system dispenses with categories altogether and treats analogous games equally. If two bottom-ranked teams play each other, the same number of points is on the line as if two top-ranked teams play each other. Every ranking makes a difference in the calculation, thus there is continuity of benefits gained by challenging a team with even a slightly higher points total. If a team continues to win games against similarly

245. The base value of the game and the denominator for the bonus/deduction is more or less arbitrary. I chose the square root of the number of the teams so that a game in which the top ranked team beats the bottom ranked team would yield no point difference for either team. That is, the deduction would entirely counteract the base value. If the bottom ranked team won, the allocated points would be double the base value. I wrote a computer program to analyze a 10-game, 120-team season. It confirmed that, with these values, a team that is ranked worst preseason can still finish the season #1 even if there are top-ten teams that have only a few more losses.

246. This note originally included an appendix mathematically proving the viability of the "Continuity Ranking System" proposed here, along with a computer-generated table listing the results of a hypothetical season of ten games and 120 teams, which demonstrated that even if a team is ranked last preseason, it can climb to first place even when top-twenty-five teams only have a few more losses. But, this note is a bit lengthy as it is.

ranked opponents, it will steadily rise at the same rate as other equally successful teams regardless of their preseason ranking. The system also preserves continuity between seasons, so that no team suddenly rises or falls due to ambiguous standards. The continuity of the calculations is critical to ensuring fair competition.

Third, teams are encouraged to schedule tough competition. The bonus/deduction is carefully formulated so that a top team who plays a last place team gains almost nothing. In a league with 121 teams, for example, the base value for each game would be eleven. If the #1 team beats the #121 team, the deduction would be 10.954, leaving only 0.046 points of the original eleven base value points. This encourages teams to play teams that are at or above their ranking and reduces the prospect that teams will pad their win records by scheduling easy games.

Probably the strongest objection to this system would be that it does not take into account all the fine nuances of ranking teams. How close was a particular game? Was it a fluke? How many star players were injured? Most of these nuances, however, will inevitably include human bias and the politics of college sports that has prejudiced so many non-BCS schools. Such an objection seems to be nothing more than double-speak for a desire to maintain control over which teams deserve preferential treatment. Fair competition requires clear rules that are objectively applied. Unless Division I-A college football implements a playoff system as extensive as other NCAA sports, it must use a fair ranking system to determine which teams will be given a shot at the national title.

B. Eight-Team Playoff

According to a *Sports Illustrated* poll, 90% of college football fans disapproved of the BCS system.²⁴⁷ This note is sympathetic to concerns that a 16-team playoff would increase risks of injury, pose significant logistical challenges, and cut into academic time. An eight-team, formatted properly with objective rankings, would reduce these concerns while still offering undefeated teams a shot at the national championship:

- 1) Begin season the last week of August; play first playoff game during holiday break
 - 2) Allow one week between games (bowl schedules remain unaffected)
 - 3) Limit season to 11 games: 7 in-conference; 4 out-conference
 - 4) Select playoff teams from the eight top-ranked teams
 - 5) Allow rankings to determine home field advantage
- The newly adopted playoff system will rotate semi-final games between

247. Dan Wetzel, *Wetzel's Playoff Plan: Money Talks*, RIVAL.COM (Dec. 7, 2010), <http://rivals.yahoo.com/ncaa/football/news?slug=dw-ncaafplayoff120709> (last visited Mar. 28, 2011).

six bowls, while the national championship will be held at a neutral location. This is precisely the number of bowls required to host an eight-team playoff: four bowls for quarter-final games, two bowls for semi-final games, and one national championship. The six bowls can rotate between quarter- and semi-final games just as they are now scheduled to rotate semi-final games. Thus, each bowl will share in the financial windfall that the playoff system will generate. Bowls would be wise to secure their position as part of the playoff series since, as one commentator has noted, “qualifying for the playoff will be so important that achieving the equivalent of what is currently a BCS bowl berth may no longer hold the same meaning.”²⁴⁸

Critics remark, and this note acknowledges, that even an eight-team playoff has the potential of denying undefeated teams a chance at the national championship. Thus, it is critical to implement a ranking system like the proposed continuity ranking system.

V. CONCLUSION

This note has presented the BCS issue as it might play out in a courtroom. But sometimes the issues can be more plainly expressed by those on the street who are most affected. In an effort to present a complete perspective, this note concludes with what might be called a tailgate discussion between those who favor and those who oppose the BCS.

A. BCS Perspective

The BCS antitrust issue is in the process of blowing away with the hot air it came in on. It is not a violation of antitrust law because the BCS merely created a product where none previously existed. The BCS does not pretend to be anything other than what it was intended to be: a Bowl Championship Series for determining two teams for the “BCS National Championship.” It does not call itself the NCAA National Championship or anything else. By having automatic bid conferences, the BCS is openly stating that it is their right to pick from their favored conferences. And though some might find this unfair, there is nothing that requires any team to be a part of the BCS. Likewise, there is nothing to prevent the NCAA, non-BCS teams, or any other entity from forming their own championship bowl selection process.

Also, a BCS antitrust lawsuit has no legs since teams like Boise State, by virtue of its poor recruiting each year, will come and go. But even if these teams do not fold, the BCS can neutralize non-BCS antitrust threats by

248. Stewart Mandel, Sports Illustrated, September 25, 2012, http://sportsillustrated.cnn.com/2012/writers/stewart_mandel/09/25/bcs-playoff-seventh-bowl/index.html?sct=cf_bf4_a8 (last accessed November 12, 2012).

absorbing the most successful teams into the BCS, like they did with TCU and Utah this last year²⁴⁹ and Boise State this year.²⁵⁰

A BCS antitrust lawsuit certainly cannot be premised on discrimination, oppression, and unfairness. It is simply about supply and demand; market share and revenue generation. Not just for the big programs that made it all possible, it is for the little guys too. As the University of Nebraska Chancellor Harvey Perlman commented at a hearing before the Senate, the BCS “may seem unfair and it may very well be unfair. That’s the way the world is, I’m afraid.”²⁵¹

But, if you really want to make the antitrust issue about “fairness,” BCS teams would tell you that “fairness” is about being justly compensated for being the teams that generate most of the revenue for the market. Television stations and bowls would argue that “fairness” is about whatever maximizes ratings and bowl attendance. This so-called BCS caste system existed long before your Johnny-come-lately non-BCS programs. It does not attend to the few, but instead the multitudes of BCS fans that actually sustain the television ratings, gate receipts, market enthusiasm, and revenues. So, in an antitrust lawsuit, “fairness” would be defined as whatever best serves consumers. In assessing “who gets this done,” one need look no further than game attendance records. In serving the greater needs of the market, what is good for the BCS is good for America. For this reason, non-BCS teams are undeserving of lucrative bowls, which college presidents know.

B. Non-BCS Perspective

The BCS issue will not go away for the same reasons antitrust law brought behemoths like American Tobacco and Standard Oil to their knees. The claim that the BCS created a market where one did not previously exist is flawed. The BCS did not create bowl football, but instead hi-jacked it. It is a single market for which there is no substitute.

The BCS ranking process, proven to be corruptible and flawed, refutes any claim that the BCS has created a process for determining a legitimate national champion. Every other team sport in America has a playoff to determine its champion, not by secret BCS formulas, but by teams competing on the field. As such, the current BCS process can never

249. TCU joined the Big East in late 2010 and Utah joined the Pac-12 in early 2011.

250. Andy Katz, *Big East introduces 5 new schools*, ESPN.COM (Dec. 8, 2011), http://espn.go.com/college-sports/story/_/id/7327683/big-east-conference-introduces-boise-state-broncos-san-diego-state-aztecs-houston-cougars-smu-mustangs-ucf-knights (last visited Mar. 26, 2012).

251. Dana Milbank, *Milbank: ‘Utes Play Huskers In The Orrin Bowl*, UTAHPOLICY.COM (July 9, 2009), http://www.utahpolicy.com/featured_article/milbank-utes-play-huskers-orrin-bowl.

conclusively determine the nation's greatest team.

The disproportionate revenue distribution to BCS schools has nothing to do with market forces. From 2007 through 2010, non-BCS teams have arguably played in more exciting BCS Bowl games with higher television ratings, attendance, and rankings than the Big East and the ACC, yet they received far less. This does not include the many times less qualified BCS teams were selected over higher ranked, more marketable non-BCS teams.

Imagine any other mega-corporation in America conspiring to impose boycotting strategies upon weaker competitors who, by the monopolist's own ranking process, bring arguably superior products to the market. Through 2011, Utah, Boise State, and TCU never lost to a BCS team in a BCS Bowl—ever. And therein lies the greatest argument in favor of an antitrust judgment against the BCS, debunking the non-BCS inferiority myth. The begrudged signing of the BCS/ESPN agreement by college presidents does little to nullify unlawful antitrust elements in the agreement. Rather, the agreement exposes the BCS's monopolistic might over disadvantaged conferences.

If an antitrust lawsuit ever materializes, it will be because the BCS succumbed to its own greed-begets-greed design. The 2011 headlines are inundated with stories about corruption in BCS Bowls and top BCS college football programs. Former BCS college athletes are coming forward. The basic corrupt design of the BCS not only hurts non-BCS teams, but the entire college football market, including student-athletes, colleges and universities, communities, and fans. For this reason, the courts will be compelled to review monopolistic market mechanisms that suppress weaker competition through discriminative anti-competitive subjugation.

As with the *Standard Oil* antitrust case, which resolved the meaning of the Sherman Act two decades after it was passed,²⁵² it might take time for the wheels of antitrust justice to overcome inertia, but it is nonetheless undeterred. As non-BCS programs continue to set their sights on defeating the BCS at its own game on the field, the law will inevitably gain momentum for protecting their right to compete for the American dream.

252. The Sherman Antitrust Act was passed in 1890, but *Standard Oil Co. v. United States* was not decided until 1911.