

THE WORST FORM OF CHAMPIONSHIP, EXCEPT FOR ALL
OF THE OTHERS THAT HAVE BEEN TRIED:
ANALYZING THE POTENTIAL ANTI-TRUST
VULNERABILITY OF THE BOWL
CHAMPIONSHIP SERIES

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I. INTRODUCTION

Winston Churchill once remarked that democracy is the worst form of government, besides for all of the others that have been tried.¹ College football fans could express a similar sentiment with regards to the Bowl Championship Series (“BCS”). While far from a perfect system, it nevertheless has worked more effectively than any previously employed system for the purpose of crowing a national champion for high-level college football.²

The BCS does not lack critics.³ Some are playoff proponents, who lament that high-level college football is the only sport administered by the National Collegiate Athletic Association (“NCAA”) without a playoff system.⁴ Others are supporters of non-BCS conference universities who desire a chance to compete for a national

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1. See Sir Winston Churchill, QUOTATIONS PAGE, <http://www.quotationspage.com/quote/24926.html> (last visited Apr. 10, 2011) (“Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time.”).

2. For a discussion of the difficulties in naming a national champion in college football prior to the BCS, see *infra* notes 28-39 and accompanying text.

3. See, e.g., *Lawmakers Rally Against the BCS*, ESPN, <http://sports.espn.go.com/nfc/news/story?id=3854081> (last updated Jan. 23, 2009) (reviewing criticism of BCS following 2008 college football season); *Subcommittee Oks College Playoff Bill*, ESPN (Dec. 10, 2009), <http://sports.espn.go.com/nfc/news/story?id=4727426> (outlining a proposed political response to the BCS). For a further discussion of congressional criticism of the BCS, see *infra* note 5 and accompanying text.

4. See *History*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/About%20the+NCAA/Who+We+Are/About%20the+NCAA/history> (last updated Nov. 10, 2010) (reviewing history of NCAA). The NCAA is the governing body for college athletics in the United States. See *id.* (identifying purpose of NCAA). The NCAA organizes championships for lower levels of college football, but not for high-level college football. See Katherine McClelland, *Should College Football’s Currency Read “In BCS We Trust” or Is It Just Monopoly Money: Anti-Trust Implications of the Bowl Championship Series*, 37 TEX. TECH L. REV. 167, 175 (2004) (noting that the

title and a greater share of the financial pie associated with college bowl games.⁵ While the debate surrounding the BCS has largely been waged in the arena of public relations, several antitrust lawsuits have been threatened.⁶ Most recently, the Justice Department has indicated it is in the preliminary stages of preparing an antitrust case against the BCS.⁷ The commentary on the potential success of such challenges has been mixed.⁸

NCAA defers to independent polls instead of sponsoring national championship game for highest level of college football).

5. See, e.g., McClelland, *supra* note 4, at 210-11 (noting congressional hearings about BCS); Leslie Bauknight Nixon, *Playoff or Bust: The Bowl Championship Debate Hits Congress (Again)*, 21 ST. THOMAS L. REV. 365, 365-66 (2009) (noting support of executive and legislative branches of government for reform of college football championships); H.R. 1120, 111th Cong. (2009) (exemplifying congressional bill to eliminate BCS); Championship Fairness Act of 2009, H.R. 599, 111th Congress (2009) (exemplifying congressional bill to establish college football playoff).

6. See, e.g., *Utah AG: BCS May Violate Anti-Trust Laws*, ESPN, <http://sports.espn.go.com/nfc/news/story?id=3814472> (last updated Jan. 7, 2009) (commenting on Utah attorney general's anti-trust investigation of BCS); Steve Wieburg & Kelly Whiteside, *Utah AG Says He Will File Antitrust Lawsuit Against BCS*, USA TODAY, http://www.usatoday.com/sports/college/football/2011-04-20-bcs-anti-trust-lawsuit_N.htm (last updated Apr. 20, 2011, 8:05 PM) (noting pending lawsuit).

7. See Andy Schwartz, *BCS: Antitrust Storm Clouds Gather*, ESPN (May 11, 2011), <http://sports.espn.go.com/espn/commentary/news/story?page=schwarz/110510> (noting ongoing DOJ investigation of BCS). Ultimately these threats of lawsuits may be more smoke than fire, but their prevalence over the years suggests that sooner or later the BCS will come under antitrust scrutiny. See *id.* (reviewing potential legal issues of BCS).

8. See, e.g., McClelland, *supra* note 4, at 213 (finding that unequal playing field between BCS and non-BCS universities constitutes anti-trust violation); Nathaniel Grow, *Antitrust & The Bowl Championship Series*, 2 HARV. J. SPORTS & ENT. L. 53, 98 (2011) (claiming BCS is susceptible to group boycott or price fixing claims in part because pro competitive benefits of BCS can be achieved through less restrictive means); Jodi M. Warmbrod, *Antitrust in Amateur Athletics: Forth and Long: Why Non-BCS Universities Should Punt Rather Than Go For An Antitrust Challenge to the Bowl Championship Series*, 57 OKLA. L. REV. 333, 379 (2004) (finding that Sherman Act will not provide legal remedy to non-BCS universities and suggesting alternative methods to pursue reform); 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, 254 (2007) (determining that inherent inequalities of BCS which deprive non-BCS teams an equal chance to compete constitute antitrust violation); Jasen R. Corns, *Pigskin Paydirt: The Thriving of College Football's Bowl Championship Series in the Face of Antitrust Law*, 39 TULSA L. REV. 167, 205 (2003) (claiming BCS is inherently anticompetitive agreement of perpetual nature); Mark Hales, *The Antitrust Issues of NCAA College Football Within the Bowl Championship Series*, 10 SPORTS LAW. J. 97, 132 (2003) (finding BCS violates antitrust laws under both *per se* approach and rule of reason analysis); David Scott Moreland, *The Antitrust Implications of the Bowl Championship Series: Analysis Through Analogous Reasoning*, 21 GA. ST. U. L. REV. 721, 748-49 (2005) (finding BCS narrowly tailored to goal of matching up best teams and therefore in violation of antitrust law); C. Paul Rodgers III, *The Quest for Number One in College Football: The Revised Bowl Championship Series, Antitrust, and the Winner Take All Syndrome*, 18 MARQ. SPORTS L. REV. 285, 299 (2008)

Framed in the era of John D. Rockefeller, Andrew Carnegie, and JP Morgan, the Sherman Anti-Trust Act is aimed at businesses acting in an anti-competitive manner, with the idea that society will benefit from fully competitive markets.⁹ While directed primarily at business, it has also been used creatively in the athletic context. For example, the National Football League Players Association decertified as a union and pursued anti-trust litigation against the National Football League to secure true free agency for its members.¹⁰ In the college context, member institutions have successfully challenged the NCAA using antitrust law to eliminate television broadcast restrictions.¹¹ The BCS may be the next target of such an unusual Sherman Act suit.¹² The success of such a suit will depend on the goal of the party bringing it.¹³

At first glance, the antitrust laws may seem ill suited to change a system to facilitate athletic competition for the national title in FBS college football. But, bowl games and their associated television rights are big businesses.¹⁴ For all the talk about ensuring fair-

[hereinafter Rodgers] (indicating BCS may be liable under section 2 of Sherman Act due to prior conduct).

9. See McClelland, *supra* note 4, at 191-92 (purpose of Sherman Act is to “provide a ‘federal enactment of the common law’ of restraints of trade and monopolies, with courts having wide discretion in framing its rules and guidelines”); Apex Hosiery Co. v. Leader, 310 U.S. 469, 492-93 (1940) (Sherman Act “was enacted in the era of ‘trusts’ and of ‘combinations’ of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.”).

10. See, e.g., Brown v. Pro Football Inc., 518 U.S. 231 (1996) (exemplifying NFL anti-trust lawsuit litigated up to United States Supreme Court); White v. Nat’l Football League, 836 F. Supp. 1458 (D. Minn. 1993) (holding that NFL had committed an anti-trust violation); McNeil v. Nat’l Football League, 790 F. Supp. 871 (D. Minn. 1992) (invalidating “Plan B” free agency as an anti-trust violation). These cases were followed by settlement negotiations resulting in the National Football League Collective Bargaining Agreement of 1993, which after several renewals terminated in early 2011. See Mike Florio, *Batterman Addresses Current Issues in CBA Fight*, PRO FOOTBALL TALK (Feb. 17, 2011, 10:08 AM), <http://profootballtalk.nbcsports.com/2011/02/17/batterman-addresses-current-issues-in-cba-fight/> (reviewing path from NFL CBA of 1993 to present CBC negotiations).

11. See Nat’l Collegiate Athletic Ass’n v. Board of Regents, 468 U.S. 85 (1984) (invalidating restrictions on broadcast of college football games).

12. See *supra* note 6 (emphasizing typical threatened antitrust lawsuit against the BCS).

13. For a discussion of what constitutes a “win” for a BCS challenger, see *infra* notes 312-339 and accompanying text.

14. See Chas Rich, *Money Says the BCS Will Not Be Going Away*, AOL NEWS (Nov. 5, 2008, 11:25 PM), <http://www.aolnews.com/2008/11/05/money-says-the->

ness and access to opportunities to compete for a championship, the reality is that the controversy over the college bowl system is really about the money.¹⁵ Because of the scale of the business aspects of the bowl system, the use of the anti-trust law is quite understandable. Accordingly, this comment will focus on analyzing the BCS from a business perspective.¹⁶

This comment will first review the historical background of the college bowl system, college football championships, and the development and refinement of the BCS.¹⁷ It will then outline the BCS and its operation as currently constituted.¹⁸ After establishing a factual background, the comment provides an overview of the relevant anti-trust law.¹⁹ Finally, the comment will evaluate the BCS under various theories under the Sherman Act.²⁰

II. HISTORY AND BACKGROUND

The college bowl system and the system for crowning a football national champion developed in parallel, and became more incompatible as time passed. As dissatisfaction increased, high-level bowl games and major conferences began working together to improve the system, culminating in the creation of the BCS in 1998.²¹ Since

bcs-will-not-be-going-away/ (noting that negotiations for BCS television rights began with discussions of annual rights fees averaging \$132 million).

15. For a discussion of the revenue imbalances inherent in the BCS system, see *infra* note 193.

16. See Warmbrod, *supra* note 8, at 363-69 (reviewing reasoning of Supreme Court in applying rule of reason in case involving collegiate athletics). This is the correct approach for an anti-trust inquiry into the BCS. See *id.* at 369-70 (identifying rule of reason as most appropriate analytical framework for antitrust analysis of BCS). Courts have distinguished on several occasions that there is a difference between athletic and economic competition. See, e.g., *Tuscano v. PGA Tour Inc.*, 201 F. Supp. 2d 1106, 1121 (E.D. Cal 2002) (“In producing an entertainment product, the [PGA] Tour incorporates an element of competition as part of the product but the [participants] are not in economic competition with one another any more than the celebrity participants in a game show or the runners in a track meet. The presence of obvious procompetitive justifications for the . . . rules, in the sense that they help to create the product, and the corresponding absence of clear anticompetitive effect, require application of full rule of reason analysis.”).

17. For a discussion of the history and evolution of college football and the BCS, see *infra* notes 21-49 and accompanying text.

18. For a discussion of BCS outline and operation, see *infra* notes 50-96 and accompanying text.

19. For an outline of the relevant anti-trust law, see *infra* notes 111-159 and accompanying text.

20. For an analysis of the BCS under Sherman Act theories, see *infra* notes 160-339 and accompanying text.

21. For a discussion of the creation of the BCS, see *infra* notes 33-39 and accompanying text.

then, the BCS has undergone numerous revisions, and has often been at the center of controversy.²²

A. Development of the Bowl System

At first, there was no postseason college football. The history of what would become the BCS began in 1902, with the first East-West game, the predecessor to the Rose Bowl.²³ Since then, the number of bowl games has exploded, and as of 2010 there are thirty-five college bowl games.²⁴ Bowls are now so numerous that if more bowls are added, there may not be enough bowl-eligible college football teams to play in them.²⁵

In its initial state, contractual ties and relationships between the NCAA conferences and the bowl sponsors dominated the bowl system.²⁶ The Rose Bowl is a well known example of this trend, having held long-running contracts ensuring that the Big Ten and Pac Ten champion would play each other every year on New Year's Day.²⁷ These contracts benefitted the bowls by ensuring a supply of

22. For a discussion of various BCS controversies, see *infra* notes 97-110 and accompanying text.

23. See *Rose Bowl Game*, ROSE BOWL HISTORY, <http://web.archive.org/web/20090301053552/http://www.rosebowlhistory.org/rosebowl-game.php> (last visited Apr. 10, 2012) (reviewing history of Rose Bowl game); see also McClelland, *supra* note 4, at 176 (describing creation of Rose Bowl).

24. See *College Bowls 2010-2011*, ESPN, <http://espn.go.com/college-football/bowls> (last visited Apr. 10, 2012) (listing 2010-2011 bowl games, participants, and outcomes). The NCAA sets standards for bowl games and bowl participants. See Corns, *supra* note 8, at 178 (reviewing requirements for bowl games). Participants must have at least six victories against FBS opponents and at least as many wins as losses. See *id.* (identifying minimum requirements of BCS participant). The bowls themselves must also meet minimum standards set forth by the NCAA. See *id.* (describing requirements of bowl hosts).

25. See Brett McMurphy, Bowl Predictions: Still Waiting on Enough Teams to Earn Eligibility, AOL NEWS (Nov. 19, 2010, 8:44 AM), <http://www.aolnews.com/2010/11/19/bowl-projections-still-waiting-on-enough-teams-to-earn-eligibil/> (noting that as of November 19, 2010 only fifty-four of 120 FBS teams were bowl eligible). With thirty-five bowl games, there is a requirement for seventy bowl eligible teams. See *id.* (indicating that additional twenty six bowl eligible teams were needed).

26. See *Rose Bowl*, *supra* note 23 (acknowledging history of the Rose Bowl); see also McClelland, *supra* note 4, at 176 (noting long running historical ties of Rose Bowl, Pac Ten, and Big Ten). The Rose Bowl is the best example of a bowl game with strong historical conference tie-ins that survived through several predecessors of the BCS. See *id.* (reviewing history of Rose Bowl). However, many bowls have contractual ties to specific conferences. See *2010-2011 College Football Season Bowl Results*, COLLEGE FOOTBALL POLL, http://www.collegefootballpoll.com/2010_archive_bowls.html (last visited Apr. 10, 2012) (listing conference ties, dates, scores, and payouts of bowl games following 2010 season).

27. See McClelland, *supra* note 4, at 176 (noting long running historical ties of Rose Bowl, Pac Ten, and Big Ten).

high quality teams, while providing the conferences with guaranteed access to a prestigious bowl game.

The national championship system for high level college football had a similar ad hoc development. At first, the Associated Press (“AP”) poll and the Coaches’ Poll selected the college football champions.²⁸ Initially, these two polls selected a champion at the end of the regular season, before the bowl games were even played.²⁹ This could lead to unusual occurrences, such as Richard Nixon declaring that the University of Texas (“Texas”) had won the 1969 national championship before the team had even won its bowl game.³⁰ The Pennsylvania State University’s (“Penn State”) head coach Joe Paterno famously remarked “I wonder how Nixon knew so little about Watergate in 1973 but so much about college football in 1969.”³¹

Such controversy was commonplace until the 1990s. From 1968 to 1992 the number one team played the number two team only eight times.³² In an effort to improve the process for deter-

28. See *Associated Press Poll*, DATABASE FOOTBALL, <http://www.databasefootball.com/College/polls/pollist.htm> (last visited Apr. 10, 2012) (archiving AP poll data from 1936 to 2008). The AP poll was the first poll used to select a college football champion, dating to 1936. See *id.* (listing AP national champions). The poll ceased to be part of the BCS formula in 2004. See *BCS Replaces AP Poll With New Harris Ranking*, NBC SPORTS, <http://nbcsports.msnbc.com/id/8543965/> (last updated July 12, 2005, 8:13 AM) (noting Harris poll replaced AP poll as BCS component). The Coaches’ Poll is newer, and remains a part of the BCS formula. See *USA Today Football Bowl Subdivision Coaches Poll*, AFCA.COM, http://www.afca.com/article/article.php?id=USAPOLL_INTRO (last visited Apr. 10, 2012) (outlining origins and history of USA Today Coaches’ Poll).

29. See *College Football National Champions*, COLLEGE FOOTBALL POLL, http://www.collegefootballpoll.com/champions_national.html (last visited Apr. 10, 2012) (noting that during some periods of history champions were selected before bowls were played).

30. See, e.g., *National Championship Moments: 1969 Football*, TEXAS SPORTS, <http://www.texassports.com/genrel/103006aaa.html> (last visited Apr. 10, 2012) (noting President Nixon awarded national championship prior to bowl victory). In the late 1960s, unlike today, the national championship was awarded before the bowl games were played. See *id.* (exemplifying previous practice).

31. See Shelly Anderson, *Research Shows Nixon Hurt 69 Lions*, PITTSBURGH POST-GAZETTE (Nov. 17, 2006), <http://www.post-gazette.com/pg/06321/739083-198.stm> (revisiting circumstances of 1969 football season); see also Nicholas Evan Sarantakas, *Nixon Versus Paterno: College Football and Presidential Politics*, 73 PENNSYLVANIA HISTORY 236-60 (2006) (providing thorough account of Nixon-Paterno feud) available at <https://www.usnwc.edu/Academics/Faculty/Nicholas-Sarantakas/Publications/Articles/PAH-Article.aspx> (last visited Apr. 11, 2012). Joe Paterno’s Penn State team was also undefeated in 1969 but was denied an opportunity to play Texas for a national title. See *id.* (describing circumstances behind 1969 national title decision).

32. See *BCS Chronology*, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=4819366> (last updated Jan. 21, 2010, 3:28 PM) (noting there were only eight matchups between top two teams in fifty-six years prior to creation of Bowl

mining a champion, a group of the leading conferences and bowls came together to create the Bowl Coalition, an agreement where member conferences would relinquish their contractual ties to bowls where necessary to create a matchup between the two top ranked teams.³³

The Bowl Coalition still did not include the Rose Bowl, Big Ten, or Pac 10, leaving open the possibility of a split national championship in some circumstances.³⁴ The University of Washington (“Washington”) and the University of Miami (“Miami”), ranked number one and two in 1992, could not play for the title because Washington was obligated to play in the Rose Bowl as the Pac 10 Champion, and accordingly split the national title.³⁵ The same situ-

Coalition). It should be noted that prior to the creation of the BCS there was no single set of college rankings that was “official” and that the rankings of the different polls were not always in agreement, resulting in numerous split national championships, most recently in 2004. *See College Football National Champions*, http://www.collegefootballpoll.com/champions_national.html (last updated Jan. 8, 2011) (noting split national titles in 1992 and 1997); *see also* Schmit, *supra* note 8, at 228-29 (describing Bowl Coalition and Bowl Alliance era of college football). *Cf College Football National Champions*, HICKOK SPORTS, <http://www.hickoksports.com/history/cfchamps.shtml> (last visited Apr. 11, 2012) (exemplifying how many different organizations have ranked college football teams and declared national champions).

33. *See* Schmit, *supra* note 8, at 228-29 (describing creation of the Bowl Coalition). When the Bowl Coalition was created, the organization of college football conferences was somewhat different than it was today. At the time, the Big Twelve was the Big Eight, and the Southwestern Conference was still in existence and was a major power with contractual ties to the Cotton Bowl. *See id.* (reviewing evolution of conferences).

34. *See id.* (describing Bowl Coalition operation and noting absence of Big Ten, Pac Ten, and Rose Bowl from initial Bowl Coalition). In the Bowl Coalition, the champions of the Big East Conference and Atlantic Coast Conference and Notre Dame met either the champion of the Big Eight (in the Orange Bowl), Southeastern (Sugar Bowl) or Southwest (Cotton Bowl) conferences. *See id.* (reviewing Bowl Coalition matchmaking process). If the champions of the Big East or ACC or Notre Dame had been ranked No. 1 or 2 at the end of the regular season, they would have met in the Fiesta Bowl for the national championship. *See id.* (describing creation of potential title games). Their vacated spots in either the Orange, Sugar or Cotton Bowls would have been filled from a pool of at-large teams made up of the number two teams from the Atlantic Coast, Big East, Big Eight, Pac Ten and Southwest conferences. *See id.* (reviewing replacement team selection procedures). To guarantee those at-large teams a post-season home, the conferences contracted with the Gator Bowl and John Hancock Bowl to ensure slots for these number two teams. *See id.* (noting creation of additional matchups for second place teams).

35. *See College Football National Champions*, COLLEGE FOOTBALL POLL, http://www.collegefootballpoll.com/champions_national.html (last updated Jan. 8, 2011) (noting split national titles in 1991 and 1997). On two occasions under the Bowl Coalition and Bowl Alliance the unavailability of a Big Ten or Pac Ten team for a title game resulted in a split national championship. *See id.* (identifying split national titles). In 1992, the University of Miami (“Miami”) and the University of Washington (“Washington”) were denied a chance to play each other because of

ation repeated in 1994, where an undefeated Penn State team was denied a matchup with an undefeated University of Nebraska (“Nebraska”) team, which was ultimately awarded the title.³⁶

The Bowl Coalition was refined following these controversies, becoming the Bowl Alliance.³⁷ The Bowl Alliance introduced the concept of the rotational national championship game, in which the right to host the title game would rotate among the member bowls.³⁸ As negotiations continued, the Big Ten, Pac Ten, and Rose Bowl eventually joined and the Bowl Championship Series was born, beginning with the 1998 season.³⁹

For several years, the BCS functioned effectively under its original formulation. However, the 2003 season brought controversy when the top two teams in the human polls, the University of Southern California (“USC”) and the University of Oklahoma

Washington’s obligation to the Rose Bowl, resulting in a split national championship. *See id.* (noting split national title in 1992). Penn State, after going undefeated in 1994, was also obligated to appear in the Rose Bowl. *See supra* note 34 (noting Big Ten was not part of Bowl Coalition due to Rose Bowl ties). Despite soundly defeating Oregon in the Rose Bowl, the championship was awarded to an undefeated Nebraska team which Penn State was unable to play due to the structure of the Bowl Coalition. *See College Football National Champions*, COLLEGE FOOTBALL POLL, http://www.collegefootballpoll.com/champions_national.html (last updated Jan. 8, 2011) (proclaiming Nebraska as 1994 champion). This same issue appeared again in 1997, when a split national championship resulted from the University of Michigan (“Michigan”) being obligated to appear in the Rose Bowl, preventing a matchup with Nebraska in a Bowl Alliance game. *See id.* (noting existence of split national championship in 1997); *see also* Schmit, *supra* note 8, at 228-29 (describing the Bowl Coalition and Bowl Alliance era of college football).

36. *See 1994 Penn State Nittany Lions*, TOTAL FOOTBALL STATS, http://www.totalfootballstats.com/Team_College.asp?id=123&Season=1994 (last visited Apr. 11, 2012) (noting undefeated record of Penn State including Rose Bowl victory). Because of the structure of the Bowl Coalition, an undefeated Big Ten team was denied a chance to play for the national title. *See supra* note 34 (noting Big Ten was not part of Bowl Coalition due to Rose Bowl ties). This was likely a factor which encouraged the Big Ten and Rose Bowl to join the BCS four years later, as discussed *infra* note 39.

37. For a discussion of the evolution of the Bowl Coalition into the Bowl Alliance and the BCS, *see supra* note 32; *see also* Schmit, *supra* note 8, at 229 (describing creation of Bowl Alliance). It should not be overlooked that this was a time of great competitive pressure on the bowl games themselves. *See* Corns, *supra* note 8, at 172 (noting difficult competitive environment for bowl games in early 1990s).

38. *See* Corns, *supra* note 8, at 172-73 (describing development of BCS). Even though the National Championship game is separate from the other BCS games today, the rotating site remains a feature of the modern BCS. *See id.* (acknowledging continual rotation of BCS title game sit). At this time the Fiesta Bowl replaced the Cotton Bowl, and in 1996 the Big Eight Conference became the Big Twelve with the addition of elements of the Southwest Conference, which would be dissolved. *See id.* (noting change of membership during the period of the Bowl Alliance).

39. *See id.* at 173-74 (detailing events leading up to formation of Bowl Championship Series).

(“Oklahoma”), were denied a title game matchup because the computer rankings favored Louisiana State University (“LSU”).⁴⁰ For the first and only time in the BCS era, a split national championship resulted, as the AP elected to name USC the national title winner, and not LSU, which defeated Oklahoma in the Sugar Bowl championship game.⁴¹

Following this undesirable outcome, the rules were changed for the 2004 season.⁴² These changes de-emphasized the computer rankings and were designed to ensure that the top two teams in the human polls would play each other.⁴³ The 2004 BCS formula is essentially the same system used for ranking teams that is used today.⁴⁴ This additional BCS bowl provided a dedicated national championship that was separate from the other BCS bowls.⁴⁵ The site at which it is played rotates, which is a carryover from the prior arrangement where each BCS bowl took a turn hosting the title

40. *See id.* (noting which polls were BCS components). The term “human polls” as used in this comment refers to the AP poll, the Coaches Poll, and the Harris Poll. The Harris Poll later superseded the AP poll in the BCS formula. *See id.* (identifying Harris Poll as BCS component).

41. For a list of national champions, see *supra* note 35. For a discussion of the changes made to the BCS in response to the controversy of the 2003 season, see *infra* notes 42-43 and accompanying text.

42. *See BCS Chronology*, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=4819366> (last updated Jan. 21, 2010, 3:28 PM) (noting there were only eight matchups between the top two teams in the fifty-six years prior to the creation of the Bowl Coalition).

43. *See id.* (reviewing evolution of BCS formula). Many modifications were made to the BCS ranking procedures following the 2003 season. The strength-of-schedule, team-record, and quality-win components were removed from consideration. *See id.* (describing changes to BCS selection formula). The standings formula was adjusted to include the average of the computer rankings, the AP Media Poll (later replaced by the Harris Poll), and the USA Today Coaches Poll, each weighted one-third. *See id.* (exemplifying increased importance of human polls in revised BCS formula). The computer rankings component would be the average of six computer rankings. *Id.* A team’s highest and lowest computer rankings would be discarded when figuring a team’s computer poll average. *See id.* (describing computer ranking process). Points would be assigned in inverse order of ranking from one through twenty-five; the four remaining computer scores would be averaged and the total would be calculated as a percentage of one hundred. *See id.* (identifying how rankings are quantified in BCS). The standings formula would no longer average the weekly rank of each team in the media and coaches’ polls. *See id.* (reviewing changes to BCS formula over time). Instead, a team would be evaluated based on the voting points it received in each poll—a team’s AP score would be its points in the poll divided by a possible 1,800 (1,500 in the coaches’ poll) voting points. *See id.* (describing process for calculating poll component values).

44. For a discussion of the current structure of the BCS, see *infra* notes 50-80 and accompanying text.

45. For a discussion of the creation of the separate bowl game for the BCS national title, see *supra* note 23-41 and accompanying text.

game.⁴⁶ The new arrangement has two principal advantages. First, it creates an additional game as well as two additional BCS slots for teams to play, while minimizing disruption to “traditional” bowl matchups.⁴⁷ The championship game generates more income and involves more teams.⁴⁸ Second, it allows the national title game to be played after all other bowls are finished, allowing for greater buildup and excitement for the game.⁴⁹

B. Operation of the BCS

While many of the input elements that go into selecting which teams play for the national title are inherently unpredictable due to their intangible nature, the mechanics of the BCS are mostly straightforward and transparent.⁵⁰ Although critics may argue that the human polls are inherently flawed and biased, once the inputs are determined, the BCS operates with mathematical precision until the point where at-large berths are selected, which is where the human element re-asserts itself.⁵¹

1. *Selecting the Participants*

The participants in the BCS games are determined primarily by the rankings under the BCS formula.⁵² The BCS formula is used

46. See *BCS Chronology*, *supra* note 42 (noting site of title game continues to rotate).

47. See *id.* (acknowledging additional BCS game creates additional slots in BCS games for more teams).

48. See *id.* (referencing additional at-large bids created).

49. See *id.* (explaining benefits of separate championship game). The BCS title game is played a week after the other BCS games. See *id.* (discussing timing of championship game).

50. For a discussion of how the BCS discloses the process for selecting which teams play in BCS games, see *infra* notes 52-96 and accompanying text.

51. See, e.g., *Top 25 Final Coaches' Ballots*, USA TODAY (Dec. 8, 2008, 10:40 AM), http://www.usatoday.com/sports/college/football/2008-12-08-final-coaches-ballots_N.htm (recording votes in Coaches' Poll for top twenty-five teams at conclusion of regular season for purposes of BCS). The disclosure of the voting biases evidenced in the Coaches' Poll is a reminder that human beings are inherently imperfect. See *id.* (displaying coaches' votes). Coaches' voting patterns may be reflecting of personal or conference biases. See *id.* (containing numerous questionable rankings suggestive of bias). In part due to the controversy these disclosures can create, the Coaches' Poll is electing to return to the secret ballot. See Kelly Whiteside, *Football Coaches to Keep Poll Ballots Secret, Starting in 2010*, USA TODAY (May 28, 2009, 3:45 PM), http://www.usatoday.com/sports/college/football/2009-05-27-coaches-poll-votes_N.htm (noting end of ballot disclosures for Coaches' Poll). With regards to at-large selections, business considerations can influence the decisions of the bowl committees. See *infra* notes 73 and 243-245 and accompanying text.

52. For a discussion of the at-large selection process, see *infra* notes 73-75 and accompanying text.

to rank the teams and determine which teams are eligible to play in BCS games.⁵³ Then, once the automatic berths are distributed, any teams ranked fourteen or higher with at least nine wins are eligible for selection as an at-large participant.⁵⁴

a. The BCS Rankings

As currently constructed, the BCS ranking of a team is composed of three equally weighted components. The first two are human polls: the Harris Interactive Poll (the “Harris Poll”) and the USA Today Coaches Poll (the “Coaches’ Poll”).⁵⁵ Each of these polls is equally weighted.⁵⁶

The third element is the “computer ranking.” This is a compilation of six different computer rankings that are designed to measure empirically the performance of college football teams.⁵⁷ The highest and lowest scores for each team are eliminated, and the remaining scores are averaged to comprise the third ranking for all

53. For an overview of the BCS formula, see *infra* notes 55-60 and accompanying text.

54. For a review of at-large criteria, see *infra* note 74 and accompanying text. There are two types of teams in the BCS. See *BCS Selection Procedures*, BCS FOOTBALL (July 21, 2011, 1:30 PM), <http://www.bcsfootball.org/news/story?id=4819597> (describing duel tier structure of FBS college football). The first type includes automatic qualifier (“AQ”) teams from the Big Ten, Pac Ten, Southeastern Conference (“SEC”), Big Twelve, Big East, and Atlantic Coast Conference (“ACC”). See *id.* (listing applicable conferences). The champions of these conferences automatically receive BCS berths. See *id.* (explaining hierarchy in selection for bowl games). The remaining conferences include Conference USA, the Mid-American Conference (“MAC”), the Mountain West Conference (“Mountain West”), the Sun Belt Conference, and Western Athletic Conference (“WAC”), which lack guaranteed berths in BCS games and are referred to as non-automatic qualifying teams or non-AQ teams. See *id.* (comparing AQ teams to non-AQ teams).

55. See *id.* (reviewing BCS selection criteria and process which strongly respects the outcome of human polls). At present, the two “human polls” are the dominant influences on the BCS rankings. See *id.* (referencing process to determine BCS standings). The Harris Poll replaced the AP poll starting in the 2005 football season as a BCS component. See *id.* (explaining history of Harris Poll use for BCS). The process goes as follows:

Harris Interactive randomly selected ten panelists from among the names submitted by each Conference. Notre Dame submitted a list of six qualified individuals, from which Harris randomly selected three. Army and Navy together submitted a list of three qualified individuals from which Harris selected one. When a person leaves the panel, the conference that originally nominated the individual nominates three others to take the spot. Harris Interactive then randomly selects the replacement.

Id. (detailing use of Harris Poll).

56. See *id.* (“The Harris Interactive College Football Poll, USA Today Coaches Poll and computer rankings each comprise one-third of the BCS Standings.”). Each human poll is worth one-third of the final BCS ranking. See *id.* (discussing ranking calculations).

57. See *id.* (analyzing purposes of computer rankings).

teams.⁵⁸ The three components are then averaged to create the BCS rankings.⁵⁹ The BCS rankings are what drive the BCS system. Although the process is obviously subject to imperfect factors such as voter bias and uneven scheduling, it is open and understandable, if not always defensible.⁶⁰

b. The Bowl Games

The top two teams automatically receive berths in the national championship game.⁶¹ This provision overrides any other conference tie-ins.⁶² For example, the Rose Bowl automatically receives the Big Ten and Pac Ten champions.⁶³ However, if one of these conference champions is selected to play in the title game and one non-AQ team receives an automatic BCS bid, the Rose Bowl is required to accept this team provided that this situation has not occurred in the past four years.⁶⁴

The Orange Bowl automatically receives the Atlantic Coast Conference (“ACC”) champion.⁶⁵ The Sugar Bowl automatically receives the Southeastern Conference (“SEC”) champion.⁶⁶ The Fiesta Bowl automatically receives the Big Twelve champion.⁶⁷ The

58. *See id.* (describing procedures for calculating computer ranking element of BCS). This is to ensure that any particular computer ranking formulation which unfairly advantages or disadvantages a team compared to other teams does not unduly affect the BCS rankings. *See id.* (proposing explanation for computer system).

59. *See id.* (examining calculation scheme). The BCS Average is calculated by averaging the percentage totals of the Harris Interactive Poll, USA Today Poll, and computer rankings. *See id.* (providing ranking methodology). The teams’ BCS Averages are ranked to produce the BCS Standings. *See id.* (expressing outcome of process).

60. For a discussion of the human elements of the BCS rankings and their contribution to controversy, see *supra* note 51 and accompanying text.

61. *See BCS Selection Procedures*, BCS FOOTBALL (July 21, 2011, 1:30 PM), <http://www.bcsfootball.org/news/story?id=4819597> (reviewing BCS selection criteria and process). This is an essential element of the BCS, in that bowl games must relinquish their conference tie-ins to make the matchup between the top two teams possible; because before the BCS, this was a significant area of difficulty. *See* Schmit, *supra* note 8, at 228-29 (describing difficulties of pre-BCS era and their origins); *supra* notes 26-39 and accompanying text.

62. *See BCS Selection Procedures*, BCS FOOTBALL (July 21, 2011, 1:30 PM), <http://www.bcsfootball.org/news/story?id=4819597> (reviewing BCS selection criteria and process).

63. *See id.* (presenting Rose Bowl participants).

64. *See id.* (discussing alternate selection procedures). The provision requiring the selection of a non-AQ team was invoked in 2010 to force the Rose Bowl to select TCU.

65. *See id.* (recounting Orange Bowl participating teams).

66. *See id.* (outlining terms of agreement for Fiesta Bowl participants).

67. *See id.* (specifying Big East bowl bid for conference champion).

Big East champion receives an automatic berth but is not assigned to any specific bowl game.⁶⁸

The highest ranked non-BCS conference champion is granted an automatic berth provided they are ranked in the top twelve in the BCS standings, or if they are ranked in the top sixteen and higher than at least one BCS champion.⁶⁹ Only one non-BCS team may receive an automatic berth, but a second non-BCS team may be selected if it meets the at-large qualifications.⁷⁰ The University of Notre Dame (“Notre Dame”) receives an automatic berth if they are in the top eight of the BCS standings.⁷¹

The number three team is a mandatory at large selection if it is a member of an AQ conference, provided that selecting them would not run afoul of the limits of two teams per conference playing in BCS bowl games.⁷² If the number three team receives an automatic berth, the number four team may also receive an automatic at-large selection provided it can meet the same standard. Any remaining BCS bowl slots are filled from the available pool of at large teams.⁷³ Any team with at least nine wins that is ranked in the top fourteen is eligible for at large selection.⁷⁴ Again, no conference may have more than two teams playing in the BCS.⁷⁵

68. *See id.* (clarifying status of non-power conference schools in BCS bowl selection).

69. *See id.* (outlining non-AQ conference at large automatic qualification process). This provision is the primary path for non-AQ teams into the BCS. *See id.* (identifying requirements for non-AQ team to receive automatic berth).

70. *See id.* (clarifying status of non-power conference schools in BCS bowl selection).

71. *See id.* (highlighting Notre Dame’s separate treatment for its status as a non-conference program).

72. *See id.* (qualifying entry to BCS bowl for overall number three ranking in BCS standings).

73. *See id.* (identifying requirements for at-large teams). It should be noted that the at-large selection considers far more than just the competitive merit of the teams. Marketability also can be a driving factor, such as when the University of Notre Dame received an at large berth in a 2006 BCS bowl over the University of Oregon, which was ranked higher. *See 2005-2006 College Football Season Final BCS Standings*, COLLEGE FOOTBALL POLL, http://www.collegefootballpoll.com/2005_archive_bcs.html (last visited Apr. 11, 2012) (ranking Oregon higher than Notre Dame); *BCS, Alliance, and Coalition Games Year by Year*, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=4809942> (last visited Apr. 11, 2012) (noting Notre Dame and not Oregon played in BCS after 2005 season). Sometimes teams simply do not have enough supporters to make even smaller bowl games successful. *See Hales, supra* note 8, at 120 (noting that BYU was only able to sell 5,500 tickets to 2001 Liberty Bowl, far short of 8,751 required to break even).

74. *See BCS Selection Procedures*, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=4819597> (last visited Apr. 11, 2012) (reviewing BCS selection criteria and process).

75. *See id.* (noting that no conference may have more than two BCS participants). This limitation, if ever challenged, may not survive anti-trust scrutiny. For

With regards to determining which teams play where, teams automatically obligated to play in certain bowls are awarded to those bowls.⁷⁶ Following this process, if a bowl loses a team to the national title game it gets to pick its replacement.⁷⁷ Once the replacements for the title game teams have been selected, the bowls select the remaining teams from the pool of automatic qualifiers and available at large teams until all slots are filled.⁷⁸ The order for these selections rotates.⁷⁹ Finally, the conferences and bowl games may, but are not required to, adjust the pairings in bowl games provided that the Big Ten or Pac 10 champion is not removed from the Rose Bowl.⁸⁰

2. *Selecting BCS Conferences*

Membership in a BCS AQ conference is a major advantage on the road to a BCS bowl game, because of the automatic berth.⁸¹ Accordingly, many top-level non-BCS teams are finding their way into AQ conferences.⁸² Notably, the University of Utah (“Utah”) has left the Mountain West Conference for the Pac Ten, which with the addition of the University of Colorado from the Big Twelve is soon to become the Pac Twelve.⁸³ At the same time, Texas Chris-

an anti-trust analysis of appearance restrictions, see *infra* notes 294-305 and accompanying text.

76. See *BCS Selection Procedures*, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=4819597> (last visited Apr. 11, 2012) (reviewing BCS selection criteria and process).

77. See *id.* (outlining process for replacing title game teams). The bowl losing the number one team picks first and the bowl losing the number two team picks second. See *id.* (indicating selection order).

78. See *id.* (reviewing selection order for BCS bids).

79. *Id.*

80. See *id.* (identifying provision allowing for matchup adjustment at option of BCS).

81. See *id.* (noting AQ conferences have guaranteed access to BCS). By winning the conference, a team from an automatic qualifying (“AQ”) conference is guaranteed a slot in the BCS. *Id.* This places their postseason destiny in their own hands. See *id.* (identifying conference championship as guarantee of access to BCS bowl game in AQ conference). If they keep winning games, they will play in the BCS. See *id.* (describing system of automatic berths). That does not mean that non-AQ teams never receive bids to BCS games; non-AQ teams such as Utah (twice), TCU (twice), Boise State (twice), and Hawaii (once) have all appeared in BCS games. See *BCS, Alliance, and Coalition Games Year by Year*, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=4809942> (last visited Apr. 11, 2012) (reviewing BCS participants).

82. For examples of teams joining AQ conferences, see *infra* notes 83-84 and accompanying text.

83. See Ralph D. Russo, *Pac-10 Expansion: Conference Will Be Called Pac-12 Once Utah, Colorado Join*, HUFFINGTON POST (Jul. 27, 2010, 7:46 PM), http://www.huffingtonpost.com/2010/07/27/pac10-expansion-lew-leagu_n_661402.html (noting Utah and Colorado will be joining Pac 10).

tian University (“TCU”), after flirting with the Big East, ultimately agreed to leave the Mountain West to join the Big 12.⁸⁴ The Big East, hoping to remain relevant as a football conference after the departure of the University of Pittsburgh and Syracuse for the ACC has added several prominent football schools from non-AQ conferences in an effort to remain eligible as an AQ conference.⁸⁵

The irony of this trend is that the Mountain West was attempting to challenge for an automatic qualifying conference with the addition of Boise State from the Western Athletic Conference.⁸⁶ With the departure of teams such as Utah and TCU for current AQ conferences this is now unlikely to happen.⁸⁷ Although it is theoretically possible for a conference to attain AQ status, the pattern of defection of stronger non-AQ schools for AQ conferences makes this unlikely in practice.⁸⁸

The BCS periodically re-evaluates which conferences are automatic qualifier conferences, and will do so again after the 2011 season.⁸⁹ The conference looks at three factors to determine which conferences are the automatic qualifiers.⁹⁰ The first element is the

84. See Pete Thamel, *With Eye on Football, Big East Adds TCU*, N.Y. TIMES, Nov. 30, 2010, at B11, available at <http://www.nytimes.com/2010/11/30/sports/ncaafootball/30tcu.html> (reviewing implications of TCU joining Big East).

85. See Andy Katz, *Big East Introduces Five New Schools*, ESPN (Dec. 8, 2011, 8:28 AM), 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 (discussing effect of conference realignment on the Big East). In search of more revenue, Pittsburgh and Syracuse agreed to leave the Big East for the ACC, while West Virginia will be leaving to join the Big 12. *Id.* In addition, with Texas A&M and Missouri leaving the Big 12 for the SEC, there was room in the Big 12 for TCU to join as well. See *id.* (describing circumstances of conference realignment).

86. See *Boise State Moves to Mountain West*, ESPN, <http://sports.espn.go.com/ncaa/news/story?id=5276064> (last updated Jun. 11, 2010, 9:03 PM) (noting that Mountain West added Boise State in an effort to become AQ conference). Boise State would ultimately join the Big East for football, beginning in 2013. See Katz, *supra* note 85 (noting addition of Boise State and San Diego State for football only with the addition of Southern Methodist University, University of Houston, and University of Central Florida for all sports).

87. See Ray Brewer, *Reports: TCU Football Leaving Mountain West for Big East*, LAS VEGAS SUN (Nov. 29, 2010), <http://www.lasvegassun.com/news/2010/nov/29/reports-tcu-football-leaving-mountain-west-big-eas/> (noting that departure of TCU and Utah from Mountain West Conference is significant blow to conferences quest for automatic qualifier status).

88. See, e.g., *supra* note 86 (identifying recent defections to AQ conferences).

89. See *BCS Selection Procedures*, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=4819597> (last updated July 21, 2011, 1:30 PM) (reviewing BCS selection criteria and process).

90. See *AQ Evaluation Data*, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=5548401> (last updated Sept. 8, 2010) (listing data from last evaluation for AQ status).

average ranking of the highest ranked team in the conference.⁹¹ The second element is the average conference ranking according to the BCS computer rankings.⁹² The final element is the number of conference members ranked in the top twenty-five in the BCS standings at the end of the year.⁹³ All these rankings are adjusted for conference size.⁹⁴

A non-AQ conference can become an AQ conference if it finishes in the top seven conferences in either the first or second factor and is at least in the top seven of the other, provided their ranking according for factor three is at least fifty percent of the leader.⁹⁵ There is also an exemption application provision.⁹⁶

91. See *BCS Selection Procedures*, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=4819597> (last updated July 21, 2011, 1:30 PM) (reviewing BCS selection criteria and process). For the last period of review from 2004-2007, the top seven conferences are Pac Ten, SEC, Big Ten, Big Twelve, ACC, Big East, and Mountain West. See *AQ Evaluation Data*, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=5548401> (last updated July 21, 2011) (reviewing data from last evaluation for AQ status).

92. See *BCS Selection Procedures*, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=4819597> (last updated July 21, 2011, 1:30 PM) (reviewing BCS selection criteria and process). For the last period of review from 2004-2007, the top seven conferences are Pac Ten, SEC, Big Twelve, ACC, Big Ten, Big East, and Mountain West. See *AQ Evaluation Data*, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=5548401> (last updated July 21, 2011) (reviewing data from last evaluation for AQ status).

93. See *BCS Selection Procedures*, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=4819597> (last updated July 21, 2011, 1:30 PM) (reviewing BCS selection criteria and process). For the last period of review from 2004-2007, the top six conferences are all BCS conferences. See *AQ Evaluation Data*, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=5548401> (last updated July 21, 2011) (reviewing data from last evaluation for AQ status). The Western Athletic Conference is next, but only reaches the 22% threshold. See *id.* (reviewing AQ qualification data).

94. See *BCS Selection Procedures*, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=4819597> (last updated July 21, 2011, 1:30 PM) (reviewing BCS selection criteria and process). The Mountain West Conference was in the process of attempting to use these provisions to become an automatic qualifying conference, when several of its members elected to join BCS conferences. See *supra* note 86 (noting attempt to strengthen conference by addition of Boise State to increase chances to become AQ conference).

95. See *BCS Selection Procedures*, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=4819597> (last updated July 21, 2011, 1:30 PM) (reviewing BCS selection criteria and process).

96. See *id.* (reviewing appeals process). A conference can apply to the Presidential Oversight Committee for an exemption if it finishes among the top six in both the first two factors and if its ranking in the third is equal to or greater than 33.3% of the conference with the highest ranking in the third factor, or if it finishes among the top seven in either of the first two factors and among the top five in the other and if its ranking in the third is equal to or greater than 33.3% of the conference with the highest ranking in the third. See *id.* (stating threshold requirements for appeal).

C. The Controversy

The BCS generated controversy on many fronts. Sometimes the controversy was related to the formula used to calculate who plays for the title, as was the case in 2003.⁹⁷ The BCS responded to this controversy by decreasing the importance of the computer rankings.⁹⁸

Other times controversy arises from questionable sections of at large teams and of the supposed snubs which result.⁹⁹ Others allege that some universities are “gaming the system” when selecting nonconference opponents.¹⁰⁰ The public release of ballots from

97. For a discussion of the 2003 BCS controversy and its outcome, see *supra* notes 40-44 and accompanying text.

98. See *id.* (reviewing BCS modifications made in response to 2003 split national title). However, the changes did not prevent controversy from sticking again the next year, when an undefeated Auburn team was denied a chance to play for the national title despite playing in the highly competitive SEC, in favor of undefeated USC and Oklahoma teams which were felt by some to have played a less challenging schedule but which were ranked higher the entire season. See Chris Low, *2004 Auburn Team Deserved Better*, ESPN (June 11, 2010, 2:15 PM), http://espn.go.com/blog/sec/post/_/id/11345/2004-auburn-team-deserved-better (noting renewed controversy surrounding 2004 football championship). Even amongst the BCS universities, the BCS is known to generate controversy. See Grow, *supra* note 8, at 65 (noting 2004 controversy).

99. See Grow, *supra* note 8, at 66 (reviewing BCS “snubs” prior to 2004). Controversy has followed the BCS throughout its existence. See *id.* (exemplifying typical BCS controversy). In 1998, an undefeated Tulane team was ranked number eleven in the nation, but was denied an at-large bid to a BCS Bowl. See Ted Miller, *BCS System Leaves Long Trail of Wounded Victims*, ESPN (May 20, 2008, 3:13 PM), <http://sports.espn.go.com/ncf/news/story?id=3403882> (listing numerous BCS controversies). In 2001, Brigham Young University (“BYU”) entered its final game of the season undefeated, but even before the game was played BCS officials indicated that regardless of the outcome of the game BYU would not be considered for a BCS game. See Grow, *supra* note 8, at 66 (reviewing BCS “snubs” prior to 2004). In 2003, Boise State, Miami of Ohio, and TCU were also all denied opportunities to play in the BCS despite on field success. See *id.* (identifying non-AQ teams denied BCS berths despite successful seasons). The addition of additional at-large bids starting with the 2006 season have alleviated this problem somewhat, but invariably teams will sometimes feel slighted the BCS. See Miller, *supra* (typifying criticism of BCS title game selections). At this point, the major criticism relates to undefeated non-BCS conference teams being denied an appearance in the national title game in favor of BCS conference teams which had been defeated, like in 2008 with the University of Utah and Boise State and TCU in 2009. See Grow, *supra* note 8, at 68 (describing championship game “snubs” of 2008 and 2009 seasons).

100. The AQ conferences historically have a stronger schedule of conferences opponents, as Ohio State’s president has recently and controversially proclaimed. See *Ohio State Prez Disregards TCU, Boise State*, ESPN (Nov. 25, 2010, 2:05 AM), <http://sports.espn.go.com/ncf/news/story?id=5845736> (alleging that AQ universities do not play “little sisters of the poor” every week). Ironically, BCS universities, particularly in the Big Ten and SEC, are frequently accused of maximizing chances at titles and BCS appearances by playing weak nonconference schedules and by refusing to play the stronger non-BCS teams. See *id.* (noting that due to weak noncon-

the Coaches Poll generated so much controversy that the poll has decided to end the practice.¹⁰¹

Much of the controversy is related to the fact that the BCS system makes it difficult if not impossible for non-AQ universities to play for the national title.¹⁰² This criticism typically arises in seasons like in 2007, where a two-loss LSU team played for the national title instead of an undefeated Hawaii team.¹⁰³ The fact that LSU won the title while Hawaii was soundly defeated by the University of Georgia (“Georgia”) did quiet this criticism somewhat, at least with respect to that season.¹⁰⁴ However, non-AQ universities such as Boise State University (“Boise State”), Utah, and TCU have generally been successful in the BCS bowls they have appeared in.¹⁰⁵ Their success on the field continues to provide support for those who want a playoff system which would ensure these teams a chance to play for a title.¹⁰⁶

ference schedule Ohio State’s strength is 59th most difficult in country, while TCUs is 68th most difficult and Boise State is 73rd most difficult), *see also* Eddie Dzurilla, *Ohio State Football Schedule: Sisters of the Poor at Your Door*, BLEACHER REPORT (Nov. 28, 2010), <http://bleacherreport.com/articles/528867-ohio-state-football-schedule-sisters-of-the-poor-at-your-door> (noting AQ universities are not eager to play stronger non-AQ opponents in non-conference schedule). These scheduling practices have led to charges that BCS universities are “gaming the system.” *See* Ray Glier, *The BCS Formula: Cupcakes and Home Fields*, AJC.COM (Nov. 18, 2010), <http://www.ajc.com/sports/the-bcs-formula-cupcakes-745859.html> (noting that AQ teams have identified an optimum scheduling pattern for BCS success). TCU would ultimately have the last laugh, defeating Big Ten representative Wisconsin in the 2011 Rose Bowl. *See* Andrea Adelson, *Little Sisters of the Poor No More*, ESPN (Jan. 3, 2011, 10 AM), http://espn.go.com/blog/ncfnation/post/_/id/37061/little-sisters-of-the-poor-no-more (noting increased credibility gained by non-AQ universities following TCU’s come from behind victory over Wisconsin).

101. *See supra* note 51 (noting end of coaches poll disclosures).

102. *See* Frank Deford, *Broncos Get Raw Deal in NCAA’s Unfair Bowl Championship Series*, SPORTS ILLUSTRATED (Oct. 14, 2009, 2:29 PM), http://sportsillustrated.cnn.com/2009/writers/frank_deford/10/14/boise.state.bcs/index.html (expressing displeasure with competitive realities of BCS system).

103. *See* Lass Thompson, *Why Deny the Perfect Hawaii Warriors a Crack at College Football’s Greatest Prize*, FANFIX.COM (Dec. 6, 2007), <http://www.fanfix.com/why-deny-perfect-hawaii-warriors/> (arguing that Hawaii deserved chance to play for national title in 2007).

104. *See* BCS, *Alliance, and Coalition Games Year by Year*, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=4809942> (last updated Feb. 10, 2011, 5:01 PM) (noting Hawaii lost to University of Georgia 41-10).

105. *See id.* (acknowledging non-AQ conference teams have winning record in BCS bowl games). High level college football is the only NCAA sport without a playoff system to determine a champion. *See* Grow, *supra* note 8, at 60-61 (noting unique championship structure of high level college football).

106. *See* BCS, *Alliance, and Coalition Games Year by Year*, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=4809942> (last updated Feb. 10, 2011, 5:01 PM) (noting trend of on-field success for non-AQ teams in BCS bowls). As more and more non-BCS conference teams play well in bowl games, it becomes harder and

The most relevant controversy from a legal point of view is related to access to BCS bowl games.¹⁰⁷ There are very real financial consequences to the greater difficulties that non-BCS universities face in getting invitations to BCS bowl games, even before considering the unequal distribution of BCS revenue.¹⁰⁸ Non-BCS universities and conferences would obviously like greater access to the riches generated by the BCS, but are prevented from doing so by the structure of the BCS.¹⁰⁹ This controversy spurs the threat of lawsuits.¹¹⁰

III. APPLICABLE ANTI-TRUST LAWS

The anti-trust laws, specifically the Sherman Anti-Trust Act, provide a framework for analyzing the BCS from a business perspective.¹¹¹ However, the law does acknowledge that college sports in-

harder to claim that all non-BCS teams are greatly inferior to BCS conference teams. *See id.* (listing non-AQ BCS victories).

107. The access issue is strongly tied to the financial issues which underlie the BCS dispute. *See id.* (exemplifying prevelance of AQ teams in BCS bowls). For a discussion of the financial implications of diminished access and uneven revenue distribution see *infra* notes 193-198 and accompanying text.

108. *See 2010-2011 College Bowl Game Schedule*, COLLEGE FOOTBALL POLL, http://www.collegefootballpoll.com/bowl_games_bowl_schedule.html (last visited Apr. 11, 2012) (listing conference ties, dates, scores, and payouts of bowl games following 2010 season). BCS bowl games pay out \$17,000,000 to their participants. *See id.* (reviewing bowl payments to participants). For the sake of comparison, the Liberty Bowl pays out 1/10th this amount. *Id.* Historically, college bowl games determine the financial payout to participating teams. *See Grow, supra* note 8, at 88 (describing historical practice for setting bowl game financial rewards for participants). The BCS, by bundling the rights to all BCS games together, have effectively set a uniform price scale for member bowl games. *See id.* (noting uniformity of BCS payouts).

109. *See supra* note 86-88 and accompanying text (explaining how one way conferences try to gain access to these riches is by attempting to become automatic qualifier conferences, as discussed. For an overview of the process of becoming an automatic qualifier conference); *supra* notes 81-96 and accompanying text (discussing BCS eligibility).

110. *See Grow, supra* note 8, at 68 (noting both Department of Justice and Utah Attorney General are considering anti-trust lawsuits).

111. *See* 15 U.S.C. § 1 (2004) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”); *see also* 15 U.S.C. § 2 (2004) (“Every person who shall 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, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000,

volve unique considerations that courts may consider.¹¹² The anti-trust laws in the college context were analyzed in the landmark case of *NCAA v. Board of Regents of the University of Oklahoma*,¹¹³ a case that provides important clues as to how a court might analyze an anti-trust challenge to the BCS.¹¹⁴

A. General Anti-Trust Principals

The Sherman Anti-Trust Act is the principal anti-trust law at issue with potential challenges to the BCS. It prohibits any unreasonable contracts, combinations, and conspiracies in restraint of trade.¹¹⁵ When analyzing restraints on trade courts following “rule of reason” analysis principles, first look to see if there are anti-competitive effects arising out of the challenged practice.¹¹⁶ Once this is established, the defendant must provide a pro-competitive justification for his or her conduct.¹¹⁷ Then, the court must engage in a balancing test. If the pro-competitive benefits of the challenged practice outweigh its anti-competitive effects and cannot be accomplished through a less restrictive alternative, it will be permitted.¹¹⁸

The Sherman Anti-Trust Act also prohibits monopolization.¹¹⁹ The mere possession of monopoly power is not a violation of the Sherman Act.¹²⁰ However, if the monopoly power is used in an

or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”).

112. *See* *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 86 (1984) (applying Sherman Act in college sports case). For an example of a collegiate application of the Sherman Act, see *infra* notes 141-148 and accompanying text.

113. 468 U.S. 85 (1984).

114. *See id.* (holding the NCAA violated Sherman Act).

115. *See* *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911) (establishing rule of reason for anti-trust cases); *see also* *Grow*, *supra* note 8, at 72-73 (“The rule of reason . . . generally involves a three-step process. First, the court will require the plaintiff to prove that the challenged restraint has an adverse effect on competition in a relevant market. Second, should the plaintiff succeed, the burden shifts to the defendant to demonstrate that the restraint possesses procompetitive benefits. Finally, if the defendant successfully establishes that that the restraint has significant redeeming competitive qualities, the court will finally consider whether the asserted procompetitive benefits could be achieved through less restrictive means.”).

116. *See* *Grow*, *supra* note 8, at 72 (stating three-step process for section 1 Sherman Act cases).

117. *See id.* (stating second step for analysis of Sherman Act cases).

118. *See id.* at 72-73 (stating third step for analysis of Sherman Act cases).

119. *See* 15 U.S.C. § 1 (2004) (laying out Sherman Act prohibition against monopolization).

120. *See* *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945) (stating that possession of monopoly power alone is not offense under Sherman Act).

anti-competitive manner or if the monopoly was acquired using anti-competitive practices, there is a Sherman Act violation.¹²¹ Monopolists generally do not have a duty to deal with competitors.¹²² However, there are some exceptional factual situations where a monopolist, by refusing to deal with a competitor, is committing an anti-trust violation.¹²³

Market definition is a key first step in any monopolization analysis. The recent Department of Justice Merger Guidelines (“DOJ Merger Guidelines”) provide a methodology for defining a market for anti-trust analysis.¹²⁴ First, take a product and ask if a hypothetical monopolist in that product can profitably institute a small, non-transitory price increase, or a small permanent increase in price.¹²⁵ If yes, then this product is the market.¹²⁶ If not, add the next closest substitute for the product to the “market” and repeat the process.¹²⁷

In general, contracts combinations or conspiracies needed to create new products or services which would otherwise be unavailable are generally held to be permissible.¹²⁸ The Chicago Board of Trade fixes the price of certain commodities when the exchange is not operating, and this is permissible because of the strong pro-

121. See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 574 (1986) (exemplifying case where alleged exclusionary conduct took form of artificially low prices).

122. See *Verizon v. Trinko*, 540 U.S. 398, 399 (2004) (noting monopolists generally have no obligation to cooperate with competitors). There are also the five elements of the essential facilities doctrine to consider which are: (1) whenever competitors jointly create a useful facility, (2) that is essential to the competitive vitality of rivals, (3) and (perhaps) essential to the competitive vitality of the market, (4) and admission of rivals is consistent with the legitimate purposes of the venture, then (5) the collaborators must admit rivals on relatively equal terms. See *id.* at 411 (“It suffices for present purposes to note that the indispensable requirement for invoking the doctrine is the unavailability of access to the “essential facilities”; where access exists, the doctrine serves no purpose.”). While it might seem on one hand that this applies to the BCS, the availability of access of non-BCS teams to the games, as discussed *supra* note 69, defeats this analysis. See *BCS Selection Procedures*, *supra* note 69 (discussing non-BCS teams).

123. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 586 (1985) (holding that conduct of dominant player in Aspen Skiing market constituted anti-trust violation). *Aspen Skiing*, discussed *infra* notes 208-209, is an example of an exception to the rule.

124. See *Horizontal Merger Guidelines*, U.S. DEP’T OF JUSTICE, Aug. 19, 2010, available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf> [hereinafter *Merger Guidelines*] (establishing guidelines for review of Mergers).

125. See *id.* (describing first step of “hypothetical monopolist” test).

126. See *id.* (identifying second step of “hypothetical monopolist” test).

127. See *id.* (outlining third step of “hypothetical monopolist” test).

128. See *infra* notes 129-130 (providing examples of permissible contracts combinations or conspiracies).

competitive benefits of the exchange and the necessity of these arrangements for the exchange to operate.¹²⁹ Blanket licensing agreements for music rights are also permissible because, while they do “fix” the price of the right to use certain subsets of intellectual property, the massive reductions in transaction costs that such agreements provide are very pro-competitive.¹³⁰

B. *NCAA v. Board of Regents of University of Oklahoma*

College football has previously been the subject of a major anti-trust lawsuit.¹³¹ Unhappy with NCAA restrictions on broadcasts of their games, the Universities of Oklahoma and Georgia brought suit under the Sherman Act to eliminate these restrictions.¹³² The Supreme Court held in a seven to two decision that the broadcast restrictions were an unreasonable restraint on trade and were therefore impermissible under the Sherman Act.¹³³ This case features many parallels to the deeper issues underlying the controversy of the BCS and provides guidance for how a court may view such a lawsuit.¹³⁴

1. *Background*

In the early 1980s, NCAA television broadcasts were subject to appearance restrictions.¹³⁵ Only a limited number of broadcasts were allowed on a given weekend, and teams could only appear on television a certain number of times.¹³⁶ Unhappy with these restric-

129. *See* *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 239 (1918) (holding that overnight price fixing as necessary condition of establishing exchange was permissible under Sherman Act because of precompetitive benefit).

130. *See* *Broad. Music v. Columbia Broad. Sys.*, 441 U.S. 1, 1-2 (1979) [hereinafter *BMI*] (upholding blanket music license agreements as reasonable restraints of trade under Sherman Act). For further discussion of the *BMI* case as it relates to the BCS, see *infra* notes 219-221 and accompanying text.

131. *See* *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 136 (1984) [hereinafter *NCAA v. Board of Regents*] (invalidating restrictions on broadcast of college football games).

132. *See id.* at 85-86 (stating facts of case).

133. *See id.* (ruling in favor of plaintiff-appellee).

134. For an application of the lessons of *NCAA v. Board of Regents* to the BCS, see *infra* notes 155-159 and accompanying text.

135. *See* *NCAA*, 468 U.S. at 89-90 (describing appearance restrictions). The television plan first appeared in 1951, and was modified several times subsequently. *Id.* The incarnation challenged in 1981 among other things required that at least eighty-two different member institutions must appear, and no team may appear on television more than six times or more than four times nationally in one year. *See id.* at 94 (describing challenged version of NCAA rights plan at issue in Supreme Court case).

136. *See id.* (discussing broadcasting of games before suit).

tions, a group of major college football teams, including the University of Georgia and the University of Oklahoma, formed the College Football Association (“CFA”) to collectively negotiate television rights for broadcasting their games.¹³⁷ The NCAA threatened to issue sanctions on these universities in response, not just in football but in all sports.¹³⁸ Georgia and Oklahoma responded by suing under the antitrust laws, arguing that the restrictions were unreasonable restraints of trade.¹³⁹ The case ultimately reached the Supreme Court.¹⁴⁰

2. *Analysis and Outcome*

Justice Stevens, writing for the majority, held that the challenged broadcast restraints were unreasonable output restrictions.¹⁴¹ Stevens acknowledged that a league governing body was necessary to allow college football games to take place.¹⁴² However, he refused to extend this body enough power to support an output restriction of this scale.¹⁴³ Protecting the live gate was rejected as a pro competitive justification, because one cannot suppress competition in one area to make another product more competitive.¹⁴⁴

Stevens acknowledged that maintenance of competitive balance is a valid issue in the context of college football.¹⁴⁵ His rejection of this defense here was because the challenged restrictions

137. *See id.* at 94-95 (noting formation of CFA for collective bargaining purposes).

138. *See id.* at 95 (detailing NCAA’s response to formation of CFA).

139. *See id.* at 96 (reviewing district court’s findings in favor of plaintiff). At the time, this case was much more adventurous than it may appear in hindsight, because on two occasions NCAA restrictions intended to preserve competitive balance survived anti-trust challenges. *See Hennessey v. NCAA*, 564 F.2d 1136, 1154 (5th Cir. 1977) (upholding restriction on size of coaching staffs as reasonable restraint of trade); *Justice v. NCAA*, 577 F. Supp. 356, 384 (D. Ariz. 1983) (holding that preventing colleges from paying student athletes was a reasonable restraint of trade in light of goals of NCAA).

140. *NCAA*, 468 U.S. at 96.

141. *See id.* at 120 (ruling against the NCAA). The BCS may be vulnerable under the same theory. For an evaluation of the BCS as an unreasonable output restriction, see *infra* notes 294-311 and accompanying text.

142. *See NCAA*, 468 U.S. at 101 (“Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.”).

143. *See id.* at 115 (“[T]here is no need for collective action in order to enable the product to compete against its nonexistent competitors.”).

144. *See id.* at 117 (“By seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to consumers, petitioner forwards a justification that is inconsistent with the basic policy of the Sherman Act.”).

145. *See id.* (“Petitioner argues that the interest in maintaining a competitive balance among amateur athletic teams is legitimate and important and that it justi-

were not properly tailored to support that interest.¹⁴⁶ He specifically noted that the challenged restrictions were not spending restrictions on coaching salaries or facilities expenditures, suggesting that some restraints on trade necessary to preserve a competitive balance might be permissible.¹⁴⁷ Following this case the NCAA could no longer control the broadcast of college football to the degree it had previously. This case meant an end to appearance restrictions, leading to an explosion of college football on television.¹⁴⁸

3. *Importance to Future Rulings on the BCS*

While the composition of the court has changed since the early 1980s, the pattern of analysis used in this case is still a useful guide for courts presented with a challenge to the BCS. Most notably, *NCAA v. Board of Regents of University of Oklahoma* established the rule of reason as the standard of review in the context of collegiate athletics.¹⁴⁹

fies the regulations challenged in this case. We agree with the first part of the argument but not the second.”).

146. *See id.* (noting restrictions lacked appropriate connection with maintaining a competitive balance).

147. *See id.* at 119 (“The television plan is not even arguably tailored to serve such an interest. It does not regulate the amount of money that any college may spend on its football program, nor the way in which the colleges may use the revenues that are generated by their football programs”). Restrictions in these areas have an interesting legal history under the anti-trust laws. Restrictions on the size of coaching staff have been upheld in the past. *See supra* note 139 (reviewing *Hennessey* ruling). But restrictions on coaching salaries were later found to be unreasonable restraints of trade. *See Law v. NCAA*, 134 F.3d 1010, 1024 (10th Cir. 1998) (holding that college coaching salary restrictions were an unreasonable restraint of trade).

148. *See 2011 College Football TV Schedule, PREMIER COLLEGE FOOTBALL* (Jan.22, 2011), http://www.premiercollegefootball.com/index.php?option=com_content&view=article&id=85&Itemid=111 (listing scheduled college football broadcasts for 2011 season). As of February 24, 2011, a total of 594 college football games were scheduled to be broadcast in the 2011 college football season. *See id.* (exemplifying prevalence of televised college football since *NCAA*).

149. *See NCAA*, 468 U.S. at 100-01 (noting decision to apply rule of reason “is not based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA’s historic role in the preservation and encouragement of intercollegiate amateur athletics. Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.”). The court identified the rule of reason as applicable because of the unique nature of league sports, which requires some cooperation amongst competitors to ensure the availability of the product. *See id.* (reviewing antitrust conundrum posed by league sports). In the context of an NCAA case, the rule of reason analysis requires that a court only recognizes justifications “necessary to produce competitive intercollegiate sports” as legitimate rationales for practices with anti-competitive effects. *See Warmbrod, supra* note 8, at 367 (noting additional consid-

This standard is more lenient than others which might be employed, and gives the NCAA and accordingly the BCS more leeway in imposing restrictions.¹⁵⁰ Although a court might choose to employ a different standard of review, courts since the late 1970s have moved towards a more pervasive use of the rule of reason to better account for the possibility that practices which in the past have been deemed *per se* illegal may in fact have substantial pro competitive benefits upon further inquiry.¹⁵¹

The Supreme Court's acknowledgement of the protection of competitive balance as a legitimate interest is significant.¹⁵² A future litigant can frame an argument that the BCS skews competitive balance by making it harder for teams from non-AQ conferences to reach the major bowl games.¹⁵³ The economic disparity between BCS bowls and other bowls is significant and increases the difficulties non-BCS universities face in competing with BCS universities.¹⁵⁴

erations in rule of reason analysis in collegiate context). Accordingly, a case can still be made that a *per se* approach, or a prohibition of conduct without further inquiry, might be the appropriate standard in the aftermath of the *NCAA v Board of Regents* decision and the ensuing expansion of the business aspects of college football. See *Nw. Wholesale Stationers Inc., v. Pac. Stationary & Printing Co.*, 427 U.S. 284, 294 (1985) (discussing appropriateness of *per se* approach). In a business context, the Supreme Court has indicated that in group boycott cases, a *per se* rule was appropriate where a firm was cutting off access to supplies or inputs necessary for a boycotted firm to compete. See *id.* (noting when *per se* rule is appropriate). While this argument could certainly be made about the BCS, the Supreme Court also indicated that plausible pro competitive justifications, like the creation of a national championship game, could rebut the rationale for application of *per se* review. See *id.* (reviewing circumstances when *per se* rule analysis is appropriate). Furthermore, it can be argued by the BCS that the maximization of revenue from revenue sports like college football and men's college basketball is essential not only to support these sports but all NCAA sports. See Matthew Peaslee, *Nonrevenue Sports Hanging on Despite Conference Changes*, DAILY ATHENAEUM (June 22, 2010), <http://www.thedaonline.com/sports/non-revenue-sports-hanging-on-despite-conference-changes-1.1493874> (describing relationships between revenue and non-revenue sports at West Virginia University ("WVU") and acknowledging role of football and men's basketball in financing WVU athletic department).

150. See *NCAA*, 468 U.S. at 101-02 (noting some restrictions are required to ensure the unique product of college football is available at all).

151. See *infra* note 188 (reviewing case law on vertical restraints of trade). The gradual application of the rule of reason as opposed to restrictive *per se* rules in cases involving vertical restraints in a supply chain is emblematic of this trend. See *id.* (exemplifying evolution of antitrust law over time to reflect new views of underlying economics of challenged restraints on trade).

152. See *supra* note 145 (acknowledging importance of protecting competitive balance).

153. For a review of the BCS selection procedures and the difficulties a non-AQ team has in being selected, see *supra* notes 61-80 and accompanying text.

154. See Schmit, *supra* note 8, at 244-245 (noting the importance of facilities to recruiting efforts). Since college football players cannot be paid, teams compete for hiring top coaching talents and by building lavish facilities to entice recruits to attend. See Leon Stafford, *College Sports Arms Race Not Sustainable*, *Say*

Although Justice Stevens emphasized that none of the challenged restrictions related to expenditures on college football, it is clear that he was open to restraints protecting the competitive balance in college football.¹⁵⁵ The explosion in television revenue which followed the decision in *NCAA* has substantially changed the nature of college football in some ways which arguably vindicate the arguments made by the NCAA in the early 1980s.¹⁵⁶ While one reading of *NCAA* is that any NCAA restrictions on income generation are not related to protection of competitive balance, this stance could be re-evaluated in light of new evidence of the effect of increased revenue on college athletics.¹⁵⁷ *NCAA v. Board of Regents of the University of Oklahoma* serves as a reminder that college football is a business, and is not beyond the reach of the antitrust laws.¹⁵⁸ This proposition is now truer than ever, considering the massive amounts of revenue generated by the BCS and other bowl games.¹⁵⁹

IV. ANTI-TRUST ANALYSIS

Generally, the BCS in its current incarnation is likely to survive challenge under the anti-trust laws.¹⁶⁰ Even if a violation is found,

University Presidents, ATLANTA J. CONST. (Jan. 12, 2010, 7:56 PM), <http://www.ajc.com/sports/college-sports-arms-race-273700.html> (noting increase in coach pay to keep programs competitive). A small scale arms race in these areas has ensued amongst major college football programs. *See id.* (noting strain that college football arms race is placing on university budgets).

155. *See NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 119-20 (1984) (noting television plan did not restrict spending by universities on football programs).

156. *See id.* at 118-19 (1984) (“The interest in maintaining a competitive balance that is asserted by the NCAA as a justification for regulating all television of intercollegiate football is not related to any neutral standard or to any readily identifiable group of competitors.”). The NCAA advanced the argument in 1984 that the television rights plan was essential to ensuring that competitive balance was not unduly upset by allowing more popular teams to rapidly expand their revenue sources to the point where it deprives other teams of an opportunity to compete. *See id.* at 119 (reviewing NCAA’s competitive balance argument).

157. *See Stafford*, *supra* note 154 (noting effects of uneven revenue distribution on collegiate athletics arms race). *See also Peaslee*, *supra* note 149 (describing impact and importance of football revenue on entire athletic department).

158. *See NCAA*, 468 U.S. at 120 (finding that college football is not outside purview of Sherman Antitrust Act).

159. *See 2010-2011 College Bowl Game Schedule*, *supra* note 108 (reviewing bowl payouts).

160. For a discussion of a potential group boycott claim, see *infra* notes 189-265 and accompanying text. For a review of a potential monopolization claim, see *infra* notes 266-277 and accompanying text. For an analysis of a potential illegal tying claim, see *infra* notes 278-291 and accompanying text. The strongest claim against the BCS may be brought from within the BCS itself, by BCS teams and conferences looking to expand their own power by eliminating the BCS confer-

it is difficult to imagine exactly what remedy a successful plaintiff could obtain, or if such a remedy would actually benefit college football.¹⁶¹ Any such lawsuit would likely be meant to strengthen the negotiating position of the party which brought the suit.¹⁶²

A. Threshold Questions

In every anti-trust action, definition of the market is critical. How a market is defined could mean the difference between winning and losing an anti-trust case.¹⁶³ Market definition has two aspects. The first is determining what products and services constitute the relevant market for the purposes of monopolization claims.¹⁶⁴ The second is identifying the players in the market, both horizontally and vertically, to understand the competitive effects of challenged restrictions in the context of the industry.¹⁶⁵

1. *Defining the Market*

There are several potential ways to define the market for the purposes of a BCS anti-trust lawsuit. The market could be defined as the market for a national championship game, but this is likely too narrow a market as there are four non-championship BCS

ence appearance restrictions. See Chris Smith, *The Business Implications of Proposed BCS Playoff Changes*, FORBES (Apr. 5, 2012 9:18 AM), <http://www.forbes.com/sites/chris-smith/2012/04/05/the-business-implications-of-proposed-bcs-playoff-changes/> (reviewing potential upcoming changes to BCS). For an evaluation of this proposition as an anticompetitive restriction on output, see *infra* notes 294-307 and accompanying text.

161. For a review of the difficulties in obtaining a satisfactory remedy in a BCS antitrust suit, see *infra* notes 312-339 and accompanying text.

162. See Florio, *supra* note 10 (reviewing history of NFL antitrust litigation as a tactic for obtaining leverage in negotiations). This is how antitrust litigation is used in the collective bargaining process. See *id.* (describing relationship between antitrust lawsuit outcomes and bargaining leverage in history of NFL labor relations). The NFLPA has successfully decertified as a union and won major antitrust case victories in the courts, giving them the leverage necessary to negotiate favorable labor agreements as a settlement to the antitrust litigation. See, e.g., *Brown v. Pro Football Inc.*, 518 U.S. 231 (1996) (exemplifying NFL anti-trust lawsuit litigated up to United States Supreme Court); *White v. Nat'l Football League*, 836 F. Supp. 1458 (D. Minn. 1993) (holding that NFL had committed an anti-trust violation); *McNeil v. Nat'l Football League*, 790 F. Supp. 871 (D. Minn. 1992) (invalidating "Plan B" free agency as an anti-trust violation).

163. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424-25 (2d Cir. 1945) (attempting to define market for aluminum and recognizing importance of defining market in antitrust suit).

164. See *infra* notes 166-183 and accompanying text for BCS market definition analysis.

165. For a helpful analogy of the upstream and downstream participants in the college football "industry" as a vertically integrated joint venture, see *infra* notes 184-188 and accompanying text.

bowls.¹⁶⁶ The market could also be defined as all bowl games, but this is likely too broad because some bowl games are inherently more valuable than others as measured by broadcast ratings.¹⁶⁷ Such a definition would be an excellent present day example of what commentators call the “cellophane fallacy.”¹⁶⁸ Neither an

166. *See infra* note 167 (listing BCS Bowl Games’ television ratings). Based on the television ratings, these four bowls might, by themselves, constitute a separate market. *See id.* (noting general superiority of BCS game ratings). Market segmentation is an inherently difficult exercise and is often the subject of intense disputes in litigation. *See, e.g., Aluminum Co. of America*, 148 F.2d at 422-27 (exemplifying controversy over market definition in case involving aluminum ingots and noting defeat in case because defendant failed to convince court to adopt its proposed market definition).

167. The following table summarizes ratings of the BCS bowls and the highest rated non-BCS bowl from 2006-2010:

Ratings of BCS Bowls and Highest Non-BCS Bowl by Year

	2010	2009	2008	2007	2006	Avg	Max	Min	Var	Sdev
Championship	15.29	17.17	15.80	14.40	17.40	16.01	17.40	14.40	1.61	1.27
Rose Bowl	11.26	13.18	11.70	7.40	6.98	10.10	13.18	6.98	7.60	2.76
Fiesta Bowl	6.15	8.23	10.40	11.11	13.94	9.97	13.94	6.15	8.72	2.95
Sugar Bowl	8.20	8.50	7.80	7.00	9.29	8.16	9.29	7.00	0.72	0.85
Orange Bowl	6.75	6.80	5.40	7.70	8.40	7.01	8.40	5.40	1.28	1.13
Non-BCS Bowl High	7.05	6.83	6.40	9.13	5.99	7.08	9.13	5.99	1.48	1.22

See TV Ratings: 2010-2011 Bowl Game TV Ratings, BCS FOOTBALL (Feb. 28, 2011, 5:47 PM), <http://www.bcsfootball.org/news/story?id=4819384> (providing source data for above chart).

Prominent Non-BCS Bowl Ratings by Year

	2010	2009	2008	2007	2006	Avg	Max	Min	Var	Sdev
Capital One	3.69	6.83	6.4	9.13	5.81	6.372	9.13	3.69	3.83	1.96
Outback	7.05	4.06	3.1	3.37	4.36	4.388	7.05	3.1	2.47	1.57
Cotton	5.81	4.54	4.4	3.5	3.7	4.39	5.81	3.5	0.83	0.91
Chick-fil-a	5.02	4.9	3.9	5.09	4.78	4.738	5.09	3.9	0.23	0.48
Holliday	4.04	4.31	4.6	4.38	4.11	4.288	4.6	4.04	0.05	0.22

Id. “Variance” is a measure of the unpredictability of a variable, with a higher value indicating unpredictability. *See Glossary of Statistical Terms*, STATISTICS BERKELEY, <http://statistics.berkeley.edu/~stark/SticiGui/Text/gloss.htm> (last visited Apr. 12, 2012) (defining relevant statistical terms, notably “variance”). “Standard deviation” is a measure of how far from the mean a variable can be expected to stray, with lower standard deviations indicating less predictability. *See id.* (defining “standard deviation”).

168. *See United States v. E.I. Dupont de Nemours & Co.*, 351 U.S. 377, 400 (1956) [hereinafter *Cellophane*] (concluding that where increase in price in one product increased demand for another substitute product, products were a part of same market). The “cellophane paradox” is that sometimes demand for the “substitutes” increases because the super-competitive price of the preferred product makes otherwise uncompetitive products appealing. *See also* George W. Stocking & Willard F. Mueller, *The Cellophane Case and the New Competition*, AM. ECON. REV. (PAPERS & PROC.) 1, at 29 (1955), available at http://hubcap.clemson.edu/~sauerr/classes/899/readings/stocking_cellophane.pdf (setting forth “cellophane fallacy” in landmark study).

economist nor a college football fan would claim that the Meineke Car Care Bowl is really a substitute for the Rose Bowl.¹⁶⁹

The correct market definition is likely the market for high-level college football bowl games.¹⁷⁰ This market would include not only the BCS games but also other high-level bowl games.¹⁷¹ There are several bowl games, most notably the Capital One Bowl, which routinely draw television ratings comparable to BCS games.¹⁷² On the formation of the BCS, bowl games competed to become a part of the new organization, with those holding the most lucrative conference tie-ins ultimately joining.¹⁷³ Those bowl games not selected to

169. See *2010-2011 College Bowl Game Schedule*, *supra* note 108 (reviewing bowl payouts). The difference in payouts between the two is \$15.4MM. *Id.*

170. See *Nielson Television Measurement*, NIELSON, <http://www.nielsen.com/us/en/measurement/television-measurement.html> (last visited Apr. 12, 2012) (describing process for compiling television ratings). For the purpose of defining the market for this article, television ratings are used as a proxy for business value of the bowl games because a higher television rating indicates a higher percentage of the television viewing public is watching a program at a given time. See *id.* (identifying underlying meaning of television ratings).

171. See *TV Ratings*, *supra* note 167 (reviewing bowl ratings). The Capital One Bowl and to a lesser extent the Outback Bowl periodically challenge and surpass individual BCS games in television ratings. See *id.* (displaying tendency of some bowl game ratings to periodically outperform BCS bowl game ratings). The Capital One Bowl is arguably the one non-BCS bowl that is truly competitive with the BCS bowls in television ratings. See *id.* (demonstrating strong performance of Capital One Bowl). It should be noted that the Sugar Bowl, which receives the SEC champion, is the most consistent in the ratings of the BCS games, and that the addition of Big Ten Teams such as Ohio State, Michigan, or Penn State seem to draw additional viewership for bowls which feature them. See *id.* (reviewing bowl ratings); see also *2010-2011 College Bowl Game Schedule* *infra* note 174 (reviewing conference ties to bowls). As in all anti-trust cases, especially monopolization cases, market definition is important. See *Aluminum Co. of America*, 148 F.2d at 422-27 (exemplifying importance of market definition). If the court chooses to define the market more narrowly, with just the four BCS games, the failure of the BCS to include non-BCS teams when selecting at-large berths could make it more difficult to argue that there was no exclusionary conduct. See *Rodgers*, *supra* note 8, at 299-300 (noting that past conduct could be probative of antitrust violation by BCS bowls).

172. See *TV Ratings: 2010-2011 Bowl Game TV Ratings*, BCS FOOTBALL (Feb. 28, 2011, 5:47 PM), <http://www.bcsfootball.org/news/story?id=4819384> (reviewing TV ratings for college football bowl games from 2002-present). For example in 2010 the Capital One Bowl had a higher TV rating than the Orange Bowl that year. *Id.*

173. See *BCS Chronology*, BCS FOOTBALL, (Jan. 21, 2010, 3:28 PM), <http://www.bcsfootball.org/news/story?id=4819366> (describing process of creation of BCS including negotiations to determine member bowl games). The bowls with the conference tie-ins, who were the most powerful football conferences at the time, became the Bowl Coalition. See *id.* (recounting history of Bowl Coalition). At one point, the Cotton Bowl was a member of the Bowl Coalition before being replaced by the Fiesta Bowl. See *id.* (describing changing membership of BCS predecessor).

be a part of the BCS continued under the old system of contractual ties to certain conferences.¹⁷⁴

As noted earlier, television ratings are a useful approximation of the relative value of bowl game broadcasting rights, the chief source of revenue for the BCS.¹⁷⁵ An analysis of these ratings provides a view into the relationships between the market participants. In general, the ratings of BCS bowl games and bowl games in general are strongly correlated.¹⁷⁶ However, there is an inverse rela-

174. See *2010-2011 College Bowl Schedule*, ESPN, <http://sports.espn.go.com/nfc/news/story?id=5168379> (last visited Apr. 12, 2012) (listing conference ties, dates, scores, and payouts of bowl games following 2011 season). Even outside of the BCS, conference tie-ins to bowl games are an important part of college football. See *id.* (reviewing automatic paths to bowl games based on conference membership and record). For example, the Capital One Bowl uses its ties to the SEC and Big Ten to secure matchups which often surpass BCS games in television ratings performance. See *id.* (noting Capital One Bowl receives 2nd place teams from SEC and Big Ten); see also *TV Ratings*, *supra* note 167 (documenting ratings success of Capital One Bowl). In 2007, only the Fiesta Bowl and National Title game were more heavily watched than the Capital One Bowl. *Id.* That year, the Capital One Bowl featured the University of Michigan and the University of Florida in the final game of Michigan coach Lloyd Carr. See Mike Mitchell, *Michigan Gives Carr a Winning Sendoff*, COLLEGE FOOTBALL POLL (Jan. 1, 2008), http://www.collegefootballpoll.com/bowl_recap_2007_capital%20one.html (reviewing Capital One Bowl game between University of Florida and University of Michigan).

175. See Hampp, *infra* note 182 (reviewing recent broadcasting deal).

176. See *TV Ratings: 2010-2011 Bowl Game TV Ratings*, BCS FOOTBALL (Feb. 28, 2011, 5:47 PM), <http://www.bcsfootball.org/news/story?id=4819384> (providing raw data for statistical analysis). The following table sets forth the correlations between BCS and non-BCS broadcast ratings. Correlation is a statistical measure which indicates how two variables interact in relation to one another. See *Basic Statistics: Correlations*, STAT SOFT, <http://www.statsoft.com/textbook/basic-statistics/#Correlations> (last visited Apr. 12, 2012) (explaining statistical concept of correlation). A correlation factor of negative one indicates an inverse relationship between the two variables. *Id.* Conversely, a correlation factor of zero suggests the variables are not related. *Id.*

Correlations	
BCS Ratings Avg/Bowl Ratings Avg	0.87
BCS High/Bowl Ratings Avg	0.93
Non-BCS Avg/Bowl Ratings Avg	0.75
Non-BCS High/Bowl Ratings Avg	-0.63
BCS Ratings/Non-BCS Ratings	0.35
BCS High/Non-BCS High	-0.80
Non-BCS High/BCS Ratings Avg	-0.72

TV Ratings: 2010-2011 Bowl Game TV Ratings, BCS FOOTBALL (Feb. 28, 2011, 5:47 PM), <http://www.bcsfootball.org/news/story?id=4819384> (providing raw data for statistical analysis). Of particular note is that while there is a strong positive correlation between the BCS ratings and the bowl ratings in general, there is an inverse relationship between the BCS ratings and the ratings for the highest rated non-BCS games. See *id.* (demonstrating correlations between bowl game ratings). This strongly suggests that should the BCS fail to create the most compelling matchups for the television audience, then viewers will choose to watch non-BCS bowls. See *id.* (demonstrating relationships in television ratings between different bowls).

tionship between the performance of BCS bowl games and the highest rated non-BCS games, meaning when BCS ratings are lower, premier non-BCS games receive higher ratings.¹⁷⁷

Such a relationship suggests that the primary drivers of television ratings for college football are the participating teams.¹⁷⁸ Teams with large devoted fan bases such as Penn State, the University of Florida (“Florida”), and Michigan will draw substantial interest to bowl games they are participants in, BCS or otherwise.¹⁷⁹ Returning to the DOJ guidelines, could a hypothetical monopolist who owns all the rights to the top-level bowl games, including not just the BCS but also the Capital One Bowl, profitably institute a small, non-transitory price increase?¹⁸⁰ The answer to this question is most likely yes.

The market for broadcast rights to college football bowl games is a vibrant one, but experience with the BCS shows that if the rights to all the most attractive bowl games were bundled together then networks will pay a premium for the package.¹⁸¹ This effect would only be more pronounced if more bowl games were added to the BCS package.¹⁸² Based upon the relative success of the Capital One Bowl in particular, it appears that while the BCS dominates the relevant market it does not by itself constitute it.¹⁸³

177. *See id.* (reviewing relationships between bowl game ratings from year to year).

178. *See supra* note 176 and accompanying text (suggesting that college football fans watch most compelling matchups regardless of which bowl possesses them).

179. *See TV Ratings: 2010-2011 Bowl Game TV Ratings*, BCS FOOTBALL (Feb. 28, 2011, 5:47 PM), <http://www.bcsfootball.org/news/story?id=4819384> (reviewing television ratings and matchups). The 2010 Capital One Bowl, featuring Penn State and LSU, had higher ratings than the Orange Bowl that year. *See id.* (comparing ratings of 2010 Orange Bowl with 2010 Capital One Bowl). The 2009 Capital One Bowl, featuring Georgia and Michigan State, had higher ratings than the Orange Bowl that year. *See id.* (comparing ratings of 2009 Orange Bowl with 2010 Capital One Bowl). The 2008 Capital One Bowl, featuring Florida and Michigan, had higher ratings than all bowl games except for the Rose Bowl and National Championship game. *See id.* (Exemplifying tendency of popular teams, usually from Big Ten and SEC, bringing higher broadcast ratings).

180. For a more detailed discussion on the merger guidelines, see *supra* notes 124-127 and accompanying text.

181. For a more detailed discussion of the attractiveness of the BCS package to television networks, see *infra* notes 224-233 and accompanying text.

182. *See* Andrew Hampp, *What ESPN's Winning of Bowl Championship Series Means*, ADAGE.COM (Nov. 19, 2008), <http://adage.com/article/mediaworks/espn-winning-bowl-championship-series-means/132714/> (noting ESPN bid \$500 million for exclusive rights to broadcast BCS games starting in 2011).

183. *See supra* note 167 and accompanying text (reviewing bowl game ratings from 2006-2010). Several bowl games, most notably the Capital One Bowl but also the Outback Bowl, periodically surpass less popular BCS games in ratings. *See id.*

2. *Market Participants*

The high-level college bowl game market has many interdependent participants. It is helpful to think of these relationships in terms of upstream and downstream manufacturing of a product, high-level college football bowl games. The “suppliers” of this football factory are the various NCAA football conferences as well as college football independents.¹⁸⁴ These conferences supply “raw materials” in the form of individual college football teams. The “factories” are the individual bowl games. Their products—college football games—are then sold to the “end consumers,” of which the television networks who purchase broadcast rights are the most important.¹⁸⁵

The BCS plays the role of a vertically integrated joint venture that produces college football games and markets them to end consumers.¹⁸⁶ It has contracts with the “suppliers” to supply its five “factories” with “raw materials”, and then sells its “products” as a bundled package to television networks.¹⁸⁷ The NCAA functions

(explaining that lesser known bowl games have been posting higher television ratings than popular BCS bowl games).

184. *See NCAA FBS (Division I-A) Football Standings - 2011*, ESPN, <http://espn.go.com/college-football/standings> (last visited Apr. 12, 2012) (reviewing standings of all FBS conferences and records of independent programs at conclusion of 2010 season). It should be noted that not all NCAA college football teams are members of conferences. *See id.* (explaining existence independent college football programs). Notre Dame is the most well-known independent, but there are others as well. *See id.* (noting there are multiple independent college football programs). Recently, BYU also elected to become an independent for football. *See id.* (exemplifying BYU as independent program); *see also BYU Football Program Ready for Its Role As Independent*, USA TODAY (Aug. 17, 2011, 8:46 PM), http://www.usatoday.com/sports/college/football/2011-08-17-byu-football-ready-to-go-independent_n.htm (noting BYU is planning to become independent in football).

185. *See infra* note 218 and accompanying text (exemplifying preference for popular teams with enthusiastic fan bases). For the purposes of this article the live attendance at games will not be exhaustively analyzed, because the television contracts are the most valuable for the bowls and their impact is more quantifiable and more easily compared from bowl to bowl. However, the live gate and the associated boost to the local economy, are not factors to be underestimated. Teams which “travel well” are often preferred in selection of at-large participants in the BCS.

186. *See State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997) (holding vertical maximum retain price maintenance agreements are analyzed under rule of reason). Vertical restraints between upstream and downstream parties in a supply chain are also governed by the rule of reason for the purposes of Sherman Act analysis. *See id.* (identifying rule of reason applicable for analyzing vertical maximum price maintenance); *see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 887 (2007) (holding vertical minimum retain price maintenance agreements are analyzed under rule of reason); *Cont'l Television v. GTE Sylvania*, 433 U.S. 36, 59 (1977) (holding nonprice vertical restraints are analyzed under rule of reason).

187. *See Warmbrod, supra* note 8, at 373 (describing role of BCS as middleman). Even apart from the business context, the BCS can also be described as an

largely as a standards-setting organization. The role of the NCAA is to govern those member suppliers to make sure their “raw materials” are produced according to specified guidelines to maintain interchangeability with other “raw materials” from other suppliers in the trade organization.¹⁸⁸

B. BCS as a Concerted Refusal to Deal

A group boycott, or a concerted refusal to deal, can be an anti-trust violation.¹⁸⁹ Assuming the rule of reason governs an antitrust challenge to the BCS, the plaintiff must show an anti-competitive

organization “buying” college football from six historically successful football conferences and “selling” it football fans.

188. *See, e.g.*, *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 411-12 (1921) (holding sharing of price information by trade association was facilitating practice of anticompetitive price fixing scheme). Standards setting organizations can be a facilitating practice for a price fixing scheme. *See id.* (examplifying how an industry group can engage in anticompetitive behavior). However, the NCAA, in so far as it acts as a standards setting organization, does not act in a way likely to draw anti-trust scrutiny. *See id.* (contrasting with historical role of NCAA); *see also* *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101-02 (1984) (discussing NCAA competitive standards). This was explained in *NCAA v Board of Regents*:

What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of football—college football. The identification of this ‘product’ with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the ‘product,’ athletes must not be paid, must be required to attend class, and the like. And the integrity of the ‘product’ cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.

Id.

189. *See, e.g.*, *Klor’s v. Boradway-Hale Stores*, 359 U.S. 207, 212-14 (1959) (holding that contract restricting sale of goods to competitors was an antitrust violation); *see also* *Fashion Originators’ Guild of Am. v. Fed. Trade Comm’n*, 312 U.S. 457, 457-68 (1941) (holding that organization cannot use a boycott to punish those who sold competing goods based off members designs); *supra* note 186 and accompanying text (noting that these cases predate the revolution in antitrust law brought about by law and economics analysis, epitomized by the court’s reversal of

effect.¹⁹⁰ The burden then shifts to the defendant to rebut the anti-competitive effect with a pro competitive justification that outweighs these effects.¹⁹¹

1. *Anti-Competitive Effects*

In the context of the BCS, a plaintiff such as a non-AQ university or conference can argue that the system is designed to avoid dealing with non-AQ teams on equivalent terms. Plaintiffs can claim that by granting certain conferences automatic berths but not others, they are discriminating against non-AQ teams and conferences without a pro-competitive justification. They can characterize appearances by non-AQ universities such as Utah, TCU, Boise State, and Hawaii as “compliant competition.”¹⁹²

The plaintiffs likely would focus on the substantial economic inequalities in the BCS system.¹⁹³ AQ conferences dominate the share of revenue from the BCS games, and they dominate the lineups in BCS bowls.¹⁹⁴ The revenues from the BCS are not shared

its positions on vertical restraints and the rule of reason and that they might be decided differently today although they have never been directly overruled).

190. See *NCAA*, 468 U.S. at 101-03 (identifying rule of reason as proper form of analysis for antitrust analysis in college athletics). For a review of rule of reason analysis, see *supra* notes 115-118 and accompanying text. But see *supra* note 149 and accompanying text (acknowledging alternative arguments for *per se* analysis).

191. See *supra* note 115 and accompanying text (outlining rule of reason analysis).

192. See Steve Lohr & James Kanter, *AMD-Intel Settlement Won't End Their Woes*, N.Y. TIMES, Nov. 13, 2009, at B1, available at <http://www.nytimes.com/2009/11/13/technology/companies/13chip.html> (describing relationship between Intel and AMD including roughly consistent market shares). The microprocessor industry is an excellent example of the idea of compliant competition, in that AMD can be considered a compliant competitor of the market leader Intel, which dominates the market with an 80% market share. See *id.* (reporting on AMD-Intel settlement). While AMD and Intel have longstanding anti-trust disputes, the relative market relationship between the two has not changed. See *id.* (discussing competitive relationship between AMD and Intel).

193. See *2009-2010 Revenue Distribution Data*, BCS FOOTBALL (Jan. 25, 2010), <http://www.bcsfootball.org/news/story?id=4856975> (reviewing revenue distribution from BCS system as disclosed by BCS). For example, all the non-AQ conferences combined receive \$24 million while the SEC alone receives \$22.2 million. *Id.* The BCS guarantees all AQ conferences an annual payment of at least \$19 million. See Grow, *supra* note 8, at 57 (noting argument of BCS critics that BCS allows AQ universities to maintain significant advantages over non-AQ universities, preserving competitive advantage of AQ universities on football field). However, at at least a certain level membership in a AQ conference is also prestige issue, which while valuable may be harder to quantify. See Rodgers, *supra* note 8, at 288 (acknowledging prestige of BCS conference membership).

194. See *2009-2010 Revenue Distribution Data*, *supra* note 193 (reviewing revenue distribution from BCS system as disclosed by BCS); see also BCS, *Alliance, and Coalition Games Year by Year*, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=4809942> (last updated Feb. 10, 2011, 5:01 PM) (noting domination of AQ

equally amongst the AQ and non-AQ conferences, or even equally amongst the AQ conferences.¹⁹⁵ For example, the Big East receives a smaller payout from the BCS than the other AQ conferences.¹⁹⁶ The treatment of the various independents, especially Notre Dame, is even more difficult to rationalize.¹⁹⁷ Based on this pattern of discrimination against non-AQ universities, plaintiffs can characterize the BCS as a conspiracy to help the rich in college football get richer at the expense of the “little guy.”¹⁹⁸

Despite the fact that college football is a game played by amateur athletes, money is an essential part of the competition.¹⁹⁹ At

universities in BCS appearances). Even though after the 2009 season both Boise State and TCU participated in BCS games, their conferences received far less revenue when compared to BCS automatic qualifier conferences. *See supra* note 167 and accompanying text (reviewing bowl ratings). The Mountain West received \$9.8 million for TCU’s appearance and the Western Athletic Conference received only \$7.8 million, while each AQ conference received at least \$19.7 million and the SEC and Big Ten each received \$24.2 million. An AQ conference university can expect at least \$1 million and has a legitimate chance of seeing revenues exceeding \$7 million, while a non-AQ conference university could receive as little as \$180,000 for Bowl game participation before expenses. *See Rodgers, supra* note 8, at 288-89 (noting revenue disparities between AQ and non-AQ universities).

195. *See 2009-2010 Revenue Distribution Data, supra* note 193 (highlighting lack of even spread of college football proceeds); *see also supra* note 193 and accompanying text (examining specifics of revenue inequality).

196. *See 2009-2010 Revenue Distribution Data, supra* note 193 (outlining gap in proceeds received by several power conferences). The Big East receives approximately \$19 million, while the SEC receives over \$22 million. *See id.* (showing differences in BCS payouts to several difference athletic conferences).

197. *See Schmit, supra* note 8, at 249 (noting differential treatment of Notre Dame); *see also infra* note 217 and accompanying text (reviewing disparate treatment of Notre Dame compared to AQ teams, non AQ teams, and other independents).

198. *See Rodgers, supra* note 8, at 290 (reviewing revenue distribution of 2004 bowl season). This is particularly apparent when reviewing the distribution of revenues from the 2004 bowl season. *See id.* (noting uneven revenue distribution). The twenty-first ranked University of Pittsburg Panthers were paid \$14 million for being blown out in the Fiesta Bowl, while undefeated Boise State was paid \$1.35 million to play number seven ranked Louisville in the Liberty Bowl. *Id.* Louisville was ranked number seven at the time, and was also paid \$1.35 million. *Id.* The end result is that the BCS can distribute revenue in ways not truly reflective of on field performance. *See id.* (reviewing Bowl payouts not necessarily consistent with on field performance). This was not a problem unique to the 2004 season, as in 1998 an undefeated Tulane team received \$1.1 million from its bowl while 8-3 Syracuse received \$12.5 million for winning the Big East automatic BCS bid. *See id.* at 290-91 (highlighting disparity in amounts received for BCS bowls versus non-BCS bowls).

199. *See, e.g.,* Chris Isidore, *College Sports’ Fuzzy Math*, CNN MONEY (Nov. 10, 2006, 3:26 PM), <http://money.cnn.com/2006/11/10/commentary/sportsbiz/index.htm> (noting scale of business aspects of college athletics). College football revenue often supports the rest of a university’s athletic department. *See id.* (showing university competition for big budget college football programs). However, it is also a major source of revenue for the universities as a whole. *See id.* (highlighting amounts of money attributable to college football programs).

present, there is what can be called an “arms race” amongst major conference football programs as they compete to hire the best coaches, the best assistant coaches, and to build the biggest and most extravagant facilities.²⁰⁰ Successful coaches are often lured away to more prominent programs with promises of more money or other benefits, leaving shattered football programs in their wake.²⁰¹ Recruits are often lured by spectacular facilities and the chance of playing on national television in prestigious bowl games such as the national title game or the Rose Bowl.²⁰² One need look no further than the various services rating college recruiting classes to see the

200. For a more detailed discussion of the college football arms race, see *supra* note 154 and accompanying text (outlining college football arms race to obtain recruits and larger football budgets). The importance of this arms race and of victory in college football extends even beyond the athletic department. *See id.* (noting correlation between large budgets and NCAA victories); *see also* Corns, *supra* note 8, at 85-86 (describing effect of BCS revenue inequalities on nonrevenue sports). Because football finances many of a universities sports, BCS football proceeds can serve to enhance the competitiveness of a university’s other teams. *See id.* (stating importance to large budgets in order to compete on national scale); *Penn State Sees Enrollment Growth, Minority Enrollment, Applications Reach Record Levels*, Penn State Live (Nov. 17, 2006), <http://live.psu.edu/story/20889> (noting record enrollment for 2006-2007 academic year). Following its successful 2005 football season culminating in an Orange Bowl appearance, Penn State featured unexpectedly large student enrollment for the 2006-2007 university year, indicating that a successful football program is useful for attracting students. *See id.* (highlighting attractiveness to incoming students of competitive football programs); *Penn State Kicks Florida State in 3 OTs*, NBC SPORTS (Jan. 4, 2006), <http://nbcsports.msnbc.com/id/10699114/> (recounting Penn State victory in 2006 Orange Bowl).

201. *See, e.g., Urban Meyer*, GATOR ZONE, <http://www.gatorzone.com/football/bios.php?year=2009&staff=meyer> (last visited Mar. 25, 2011) [hereinafter *Meyer*] (reviewing career of Meyer including coaching tenures at Bowling Green, Utah, and Florida). Urban Meyer is perhaps the best known example of this phenomenon. *See id.* (chronicling winding career path of Meyer). After leading the University of Utah to an undefeated season in 2004, he was hired as the head coach at Florida, where he coached two championship teams. *See id.* (describing ascent of Meyer from small school coach to two time national title winner). Rich Rodriguez is another example. He moved from Tulane to West Virginia to Michigan, each time receiving a substantial increase in compensation. *See* Dan Feldman, *Rich Rodriguez: The Man Behind the Myth*, MICH. DAILY (Sept. 4, 2008), <http://www.michigandaily.com/content/rich-rodriguez-man-behind-myth> (providing career track of Rodriguez). A third example is Notre Dame coach Brian Kelly, who moved from Central Michigan to Cincinnati to Notre Dame. *See Brian Kelly Profile*, UNIV. OF NOTRE DAME, http://www.und.com/sports/m-footbl/mtt/kelly_brian00.html (last visited Apr. 12, 2012) (displaying Kelly’s career track).

202. *See 2011 Team Rankings*, RIVALS, <http://rivals.yahoo.com/ncaa/football/recruiting/teamrank/2011/all/all> (last updated Feb. 14, 2011, 11:56 AM) [hereinafter *2011 Team Rankings*] (ranking incoming recruiting classes of NCAA Division I Football Bowl Subdivision, or FBS, programs). The advantages in recruiting which arise out of BCS conference membership manifest themselves in the annual recruiting rankings. *See id.* (indicating superiority of BCS membership based on most prestigious recruiting classes). As of March 24, 2011, no non-AQ conference university was ranked in the top twenty-five of the Rivals.com 2011 recruiting rankings. *See id.* (showing superiority of AQ teams in attracting top recruits).

effect of these trends on college recruiting, as these lists are dominated by Automatic Qualifying, or AQ universities.²⁰³

BCS games channel more money to the six AQ conferences, which allows AQ conference teams to develop an increasingly greater monetary edge over non-AQ teams and conferences.²⁰⁴ These advantages help feed these programs more top recruits, which in turn fosters more winning by AQ conference teams, leading to more BCS appearances and a continuation of the cycle.²⁰⁵ Non-BCS teams are forced to compete athletically with a lower quality of recruit, and successful coaches who are able to make the most of this inferior talent pool are often hired away by AQ universities.²⁰⁶

The BCS opponents can also draw an analogy to *Aspen Skiing*.²⁰⁷ In that case, a group of three ski resorts actively refused to cooperate with a fourth ski resort to offer a combined lift ticket for

203. See *id.* (listing universities from AQ conferences in majority of ranking slots). As of March 24, 2011, the top ten teams in the rivals.com recruiting rankings were Alabama, Florida State, Texas, USC, Georgia, LSU, Auburn, Clemson, Oregon, and Notre Dame. *Id.* All of these teams have won a BCS national championship except for Georgia, Clemson, Oregon, and Notre Dame; LSU and Alabama have won two. See *BCS, Alliance, and Coalition Games Year by Year*, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=4809942> (last updated Feb. 10, 2011, 5:01 PM) (recording national champions of BCS era).

204. See Craig Harris, *BCS: The Money. The Games. An Arizona Republic Investigative Series*, AZCENTRAL.COM <http://www.azcentral.com/news/bcs/?content=bcs-payouts> (last visited Apr. 12, 2012) (“The majority of the money, which has come from the four BCS bowls, TV networks and corporate sponsors, goes to universities at six major conferences.”). The danger of this uneven distribution of revenues is the creation of a caste system within college football, beyond what would exist absent the BCS. See McClelland, *supra* note 4, at 213 (“The BCS creates an imbalance, negatively affecting recruiting, facilities, and overall university athletic programs for non-BCS members. The BCS greatly exacerbates and perpetuates a caste system that cannot be broken. The disparities between BCS members and non-BCS members extend beyond the football field, into the athletic programs of every Division I university because of unbalanced opportunities to compete for a national championship and the disproportionate payout of revenues from the BCS games.”); Schmit, *supra* note 8, at 244-45 (noting that as time passes and resource inequality grows it becomes harder and harder for non-BCS universities to compete with BCS universities).

205. See McClelland, *supra* note 4, at 213 (explaining how BCS creates imbalance in NCAA athletics programs). For a further discussion of how the BCS perpetuates a biased system, see *supra* notes 202-204 and accompanying text.

206. See *2011 Team Rankings*, *supra* note 202 (noting that as of March 24, 2011 TCU has highest ranked recruiting class of non-AQ conference team during 2011 season, ranked number twenty-six nationally); see also Meyer, *supra* note 201 (noting successful coaches such as Urban Meyer move on to more prestigious AQ programs over time).

207. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

all four resorts.²⁰⁸ The Supreme Court held this pattern of conduct to be impermissible exercise of monopoly power.²⁰⁹ Applying this rationale to college football, opponents of the BCS system could claim that the BCS is refusing to cooperate with non-AQ conferences to produce a product that the “customers” would like, namely a more inclusive bowl system or a college football playoff.²¹⁰

2. *Pro Competitive Justifications*

In the defense of the BCS, the defendants will have numerous pro competitive justifications for the BCS. First, the BCS was created for the explicit purpose of creating a new product, namely a national championship game.²¹¹ Without the BCS, it would be difficult to reliably create a competition between the top two teams within the realm of the bowl system, as evidenced by the pre-BCS state of affairs.²¹² The BCS provides an opportunity for all member bowls to host national title games every four years; in exchange, member schools must periodically give up their conference tie-ins where necessary to the title game.²¹³

The rotation of the site of the national championship game likely was a necessary condition of the creation of the BCS, as evidenced by the seven-year holdout of the Rose Bowl, Big Ten, and

208. *See id.* at 604, 610 (holding that conduct of dominant player in Aspen Skiing market constituted anti-trust violation). At the time of the case there were four major ski resorts in the Aspen area. *See id.* at 589 (reviewing conditions of Aspen ski resort market in early 1980s). Three of them were owned by one corporation, and had in prior years cooperated with the fourth to offer an all-mountain lift ticket. *See id.* at 589-91 (describing ownership situation of ski resorts in Aspen area in early 1980s). Eventually, cooperation ceased, and the three mountains refused to deal with the fourth, leaving it to create a pass on its own. *See id.* at 593-94 (recounting circumstances of deterioration of cooperative relationship between resorts).

209. *See id.* at 604 (finding refusal to cooperate to provide product demanded by customers and offered in past was anti-trust violation under certain factual circumstances).

210. *See, e.g.,* Hales, *supra* note 8 at 126 (citing purported advantage of playoff system compared to BCS). The one constant in the college football universe is that nobody is ever happy with the status quo. *See id.* (proposing two less restrictive playoff formats).

211. *See* Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1 (1979), 441 U.S. 1, 21-24 (1979) [hereinafter *BMI*] (noting creation of new product previously unavailable due to transaction cost burden is precompetitive). For a further discussion of the holding in *BMI*, see *supra* note 130 and accompanying text. For a review of the development of the BCS and the process of creating a national championship game, see *supra* notes 32-38 and accompanying text.

212. For a review of the problems that existed before the BCS, see *supra* notes 30-33 and accompanying text.

213. For a review of the development of the BCS and the process of creating a national championship game, see *supra* notes 32-38 and accompanying text.

Pac Ten.²¹⁴ The details of the BCS suggest that the arrangement between all the parties was carefully negotiated.²¹⁵ For example, Rose Bowl receives preferential treatment in several ways, including its own television deal.²¹⁶

Notre Dame is also treated differently from all AQ universities, non-AQ universities, and the other independents.²¹⁷ No doubt this is reflective of the strength of Notre Dame in the marketing of its “product,” emphasized by the fact that it has a separate television broadcast deal for its regular season games and has often been the subject of controversial at-large selections to BCS games.²¹⁸

214. See Schmit, *supra* note 8 at 228-29 (noting hold out of Pac Ten, Big Ten, and Rose Bowl from BCS predecessors). The Big Ten, Pac Ten, and Rose Bowl initially held out of the predecessors of the BCS, the Bowl Coalition and the Bowl Alliance, until repeated denials at chances for undisputed national championships and an opportunity to host national championship games induced them to join the Bowl Alliance and create the BCS. See *id.* (reviewing evolution of BCS).

215. For a review of rule of reason analysis and the importance of the availability of less restrictive means of achieving the same pro competitive benefits, see *supra* notes 116-118 and accompanying text. This would suggest that a less restrictive means of creating a guaranteed matchup between the top two teams is not possible, which is highly relevant for rule of reason analysis. See *id.* (acknowledging the availability of less restrictive means of achieving same pro competitive benefits undercuts pro competitive justification for restraints with anticompetitive effects). If there is no less restrictive means to obtain the pro-competitive benefits of the BCS, then if the pro competitive benefits outweigh the anti-competitive effects of the BCS than the BCS will survive an antitrust challenge. See *id.* (describing process of rule of reason analysis). While it can be claimed that a matchup between the top teams does not require uneven revenue distribution, this does ignore the business reality that some teams are inherently more marketable than others. See Corns, *supra* note 8, at 189 (noting BYU was denied bid to BCS game because they were not as “marketable” as other teams). But see Grow, *supra* note 8, at 82-83 (arguing that it would be “easy” to have national championship game without uneven revenue distribution). For a further discussion of why a matchup between the top teams does not require uneven revenue distribution, see *supra* note 194 and accompanying text.

216. See Larry Stewart, *ABC, Rose Bowl Extend Television Contract to 2014*, LA TIMES, Aug. 5, 2004, at 3, available at <http://articles.latimes.com/2004/aug/05/sports/sp-rosebowl5> (noting separate broadcast rights within BCS package for Rose Bowl). The Rose Bowl also has unique privileges and responsibilities regarding protection of its matchups. See, e.g., *BCS Chronology*, *supra* note 42 (noting that Rose Bowl must accept non-AQ automatic berth team if team leaves Rose Bowl for title game).

217. See *Selection Procedures*, *supra* note 71 (noting automatic qualification requirements of Notre Dame, which differ from other independents and non-AQ teams). In order to automatically qualify for a BCS game, Notre Dame must finish ranked number 8 or higher in the BCS standings. See *id.* (identifying requirements for independent Notre Dame to receive automatic BCS berth).

218. See *BCS, Alliance, and Coalition Games Year by Year*, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=4809942> (last updated Feb. 10, 2011, 5:01 PM) (noting numerous Notre Dame BCS appearances). Notre Dame has historically been a favorite at large participant of the BCS. See *id.* (listing numerous BCS appearances by Notre Dame as at-large selection). However, their performance in these games has often fallen short of expectations. See *id.* (chronicling numerous

The BCS can look to *BMI* for support of its position.²¹⁹ The *BMI* case legitimized blanket licensee agreements for music in large part because such agreements dramatically reduced transaction costs, which is seen as highly pro-competitive.²²⁰ Much as blanket licensing provides those desiring use of a portfolio of intellectual property a low-transaction cost method to obtain the rights to that portfolio, the BCS allows the creation of a national championship game by minimizing the transaction costs associated with setting up the game.²²¹

This elimination of transaction costs occurred in the complex negotiations that created the BCS system, and involved give and take from many parties, largely dictated by the strength of their bargaining positions.²²² The resulting product, favoring the strong

on-field failures of Notre Dame in BCS bowls); *see also Notre Dame Agrees to Five Year Extension With NBC, ESPN*, <http://sports.espn.go.com/ncf/news/story?id=3452161> (last updated Jun. 19, 2008, 3:52 PM) (demonstrating marketability of Notre Dame “brand” as evidenced by lucrative broadcast rights contract worth in excess of \$9 million annually).

219. *See Broad. Music Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 21-24 (1979) (holding that blanket fixed price license agreements were legal under anti-trust laws). A blanket license agreement for intellectual property, in this case music, is a contract where a user pays a flat fee to use all compositions in a given portfolio for a flat fee. *See id.* at 5 (stating blanket license agreements for music “give the licensees the right to perform any and all of the compositions owned by the members or affiliates as often as the licensees desire for a stated term”). Without blanket license agreements, those who wish to use intellectual property must negotiate with each property holder separately, resulting in a huge increase in transaction costs. *See id.* at 20 (“Indeed, as both the Court of Appeals and CBS recognize, the costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants . . . and it was in that milieu that the blanket license arose.”).

220. *See id.* (“A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided. Also, individual fees for the use of individual compositions would presuppose an intricate schedule of fees and uses, as well as a difficult and expensive reporting problem for the user and policing task for the copyright owner.”).

221. For a discussion of potential sources of transaction costs avoided through BCS, *see supra* notes 212-218 and accompanying text.

222. *See Schmit, supra* note 8 at 223 (using Rose Bowl example to show negotiations that took place in formation of BCS). The Rose Bowl’s stronger position in comparison to the other BCS Bowls from its pre-existing ties to the powerful Pac Ten and Big Ten conferences likely gave it the leverage it required to secure preferential treatment in a number of ways. *See id.* at 223 n.15 (referring to prestigious Rose Bowl as “Granddaddy of Them All”). Indeed, the Rose Bowl only joined the BCS after both Big Ten and Pac Ten teams were denied chances to compete in national championships due to the contractual ties to the Rose Bowl. *See id.* at 229 (describing Big Ten and Pac Ten decision to join BCS). The BCS conferences, as the homes of the traditional powers of college football, invariably had greater market power than the non-BCS conferences. *See id.* at 243-44 (remarking upon “trickle down effect” of system, which prefers BCS teams to non-BCS teams). Notre Dame has a great deal of market power even by itself. *See id.* at 249 (analyzing deferential treatment given to Notre Dame). For a review of the history of the

over the weak, is not surprising. The same pattern is also reflected in modern blanket license agreements.²²³

The BCS can also note that by packaging the TV rights to four of five BCS bowl games together, they can collectively negotiate a more lucrative TV package than the four bowls could negotiate separately.²²⁴ From the point of view of a television network, consolidation of television rights for multiple bowls games in a participant-driven market creates synergies which increase the value of the whole package above the aggregate value of each individual bowl's broadcast rights.²²⁵

creation of the BCS including the "holdouts" of the Big Ten, Pac Ten, and Rose Bowl, see *supra* notes 23-49 and accompanying text.

223. See, e.g., *BMI*, 441 U.S. at 5 (condoning blanket license agreements for intellectual property on basis of pro-competitive effects). A well-known consumer-facing side of a modern blanket license agreement is the Apple iTunes store, which charges different prices for downloading items of greater or lesser popularity. See *Changes Coming to iTunes Store*, APPLE (Jan. 6, 2009), <http://www.apple.com/pr/library/2009/01/06itunes.html> (describing tiered pricing approach as part of new agreement with major record labels). The iTunes store is so effective at reducing transaction costs that it successfully competes with free illegal downloading. See Jim Dalrymple, *Report: iTunes More Popular Than Illegal Downloading*, MAC WORLD (Feb. 14, 2008, 4:33 PM), <http://www.macworld.com/article/132116/2008/02/filesharing.html> (remarking that iTunes effectively competes with free illegal downloads).

224. See Hampp, *supra* note 182 (stating that packaging TV rights within multiple platforms for games makes "multiplatform ad buying all the more appealing to advertisers" and leading to even more profits). Since the BCS has been around through several re-negotiations of television rights, it is difficult, if not impossible, to estimate what the bowls could individually negotiate. See *id.* ("Forecasting where ad dollars and sports marketing are going to be in three-plus years is pretty tough . . ."). However, considering the current extremely lucrative multi-bowl deal with ESPN, it remains unlikely that the individual bowls, with a weaker product, could aggregate a comparable deal. See *id.* (describing ESPN's \$500 million bid for exclusive rights to broadcast BCS games beginning in 2011). There are, of course, issues of monopolization, but outside of these concerns, if the end goal is maximizing revenue for NCAA athletic programs, the BCS is very pro-competitive because it produces a product for which television networks will pay a premium price. For a further discussion of television antitrust issues, see *infra* notes 267-277 and accompanying text. The initial television rights for the four BCS games were sold to ABC sports for an estimated \$780 million over eight years, while more recently ESPN has agreed to pay \$125 million per year to broadcast BCS games for a period of four years. See Grow, *supra* note 8, at 89-90 (noting increase in price paid for BCS broadcast rights following creation of BCS).

225. See *supra* note 167 and accompanying tables (illustrating greater ratings stability of BCS games compared with lower-level bowls). The primary synergy is more stability in television ratings. See *id.* (showing importance of television ratings for BCS bowl games). Bowl game ratings are matchup driven, so owning a portfolio which delivers most if not all of the most compelling matchups is beneficial for television networks. See *supra* note 179 (noting how compelling non-BCS matchups between popular teams can outdraw BCS games). These advantages of stability become even more pronounced when aggregated. The average expected rating of a BCS game based on data from 2006 to 2010 is 10.25, varying between 11.2 and 9.5 with a variance of 0.56 and a standard deviation of .75. See *supra* note

The BCS package in the aggregate features lower ratings volatility than each individual bowl game, which is important in a market driven by bowl participants.²²⁶ By packaging together most if not all of the most compelling games of the year, the BCS effectively captures a diversification premium which might otherwise be lost.²²⁷ Without the BCS, it would be more difficult for a network to capture these efficiencies because there would be less certainty on the value of each bowl.²²⁸ If each bowl had to sell its broadcast rights separately, the networks would face greater uncertainty in determining the proper price for bowl game television rights and might be inclined to be more conservative when bidding for these rights, ultimately resulting in less revenue for nonprofit NCAA members.²²⁹

The BCS agreement reduces uncertainty for television executives, who ultimately care mostly about the television ratings, because these drive advertising prices.²³⁰ From the point of view of

167 (providing source data for calculations showing diversified portfolio of BCS games produces lower ratings volatility in the aggregate than individual BCS games). Judging by the value the market places on BCS rights and the lack of antitrust lawsuits from broadcasters, these efficiencies, monopoly aspects aside, are of great value to television networks. *See infra* note 284 (discussing network valuation of BCS bowl game broadcast rights).

226. *See supra* note 225 and accompanying text (noting greater stability in broadcast ratings for tied BCS package).

227. *See infra* note 278 (explaining advantage network can obtain by acquiring near monopoly for bowl game broadcast rights). A mutual fund is a helpful analogy to what the BCS does for broadcast networks, in that it captures the benefits of diversification. *See Invest Wisely: An Introduction to Mutual Funds*, SEC. & EXCHANGE COMM'N, <http://www.sec.gov/investor/pubs/inwsmf.htm> (last modified July 2, 2008) (identifying mutual fund as risk reducing amalgamation of securities).

228. For a review of the history of the creation of the BCS, see *supra* notes 23-49 and accompanying text. If the BCS bowls could not host the national championship game every four years, they might refuse to release their conference tie-ins to create the championship game, as the Rose Bowl did for several years. *See id.* (recounting difficulties in achieving agreement between major football conferences and bowl games to create national title game).

229. *See supra* note 172 (reviewing bowl television ratings). When looking at the television ratings of the bowl games, the general pattern is that television ratings are highest for the most compelling matchups between teams with large active fan bases, such as LSU, Michigan, Penn State, Alabama, Florida, Ohio State, and Notre Dame. *See id.* (displaying tendency of these teams to draw strong ratings). In addition, there is considerable volatility in bowl game ratings from year to year, which can make it hard to predict the value of the bowl broadcast rights to networks. *See id.* (noting considerable volatility from year to year in bowl ratings).

230. *See* Jim Edwards, *Rise in Super Bowl Ad Prices Threatens Raw Deal for Advertisers*, CBS NEWS (Feb. 7, 2010, 10:27 AM), <http://www.bnet.com/blog/advertising-business/rise-in-super-bowl-ad-prices-threatens-raw-deal-for-advertisers/4222> (noting high expense and high exposure inherent in Super Bowl ads). The Super Bowl is the most watched television event in the United States, and accordingly

these consumers, higher average ratings and more consistent ratings are important attributes.²³¹ The process for bidding for BCS broadcast rights is also a competitive one. Ultimately, ESPN secured the right to broadcast the BCS games in the latest series of contracts because other bidders, such as Fox, felt their money was better invested elsewhere.²³² The latest BCS television broadcast deal merely represents what the market feels the fair price of this property is worth.²³³

Another strong argument in favor of the BCS is that the BCS itself was founded on the principles of competition, both athletic and otherwise. Teams must ultimately play their way into BCS bowl games by meeting certain criteria for wins and team ranking.²³⁴ There is a path to an automatic berth or a championship berth for non-AQ participants if they can impress poll voters, ensuring that a quality product is delivered to the BCS bowl games.²³⁵

commands some of the highest advertising rates of any broadcast event. *See id.* (tracing rise in cost of thirty second long commercial along with rise in Super Bowl ratings).

231. For discussion of a potential illegal monopolization claim, see *infra* notes 266-277 and accompanying text. The fact that networks will pay a premium price for the bundled product this does not mean that this is the competitive price or that there is not an illicit monopoly at play. *See id.* (analyzing BCS as potential illegal monopoly). *See also supra* note 225 (acknowledging BCS as tied product produces ratings stability which may demand premium price).

232. *See ESPN Officially Signs Deal for BCS Games Beginning in 2011*, SPORTS BUSINESS DAILY (Nov. 18, 2008), <http://www.sportsbusinessdaily.com/Daily/Issues/2008/11/Issue-46/Sports-Media/ESPN-Officially-Signs-Deal-For-BCS-Games-Beginning-In-2011.aspx> (reviewing most recent round of BCS broadcast rights sale negotiations).

233. *See id.* (noting competitive bidding process). No network is being forced to purchase the BCS broadcast rights, but multiple networks are engaged in competitive bidding. *See id.* (noting networks compete). While ESPN may currently dominate the cable sports market, other networks may attempt to challenge this position in the future by bidding on the BCS or other premier sports packages. *See, e.g.,* Clair Atkinson, *NBC Sports Networks' Ratings Take Biggest Drop in Eight Years After Overhaul*, N.Y. POST (Mar. 31, 2012 2:15 AM), http://www.nypost.com/p/news/business/what_the_puck_wn2b9Gi99p6hpCmcEp3CdP (noting creation of potential future rival to ESPN).

234. For a discussion of the BCS selection process, see *supra* notes 52-80 and accompanying text. The objective nature of this process, once the inputs are determined, is the type of nondiscriminatory restraint looked upon with favor in *NCAA v. Board of Regents*. *See* *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 118 (1984) (holding "The interest in maintaining a competitive balance that is asserted by the NCAA as a justification for regulating all television of intercollegiate football is not related to any neutral standard or to any readily identifiable group of competitors.").

235. In the context of at-large bids, there is no difference between the treatment of AQ and non-AQ teams, as discussed *supra* notes 73-75 and in accompanying text.

While this path is undeniably difficult, the BCS bowl games are well within their rights to demand a certain level of quality for their bowl participants.²³⁶ As far as the bowl games themselves, membership in the BCS was the end result of decades of competition for the most lucrative conference tie-ins, with the most successful bowl games forming the BCS.²³⁷

Additionally, the BCS has not in fact foreclosed competition from other non-AQ universities or conferences.²³⁸ Boise State, Utah, and TCU have all played in two BCS games each, while the University of Hawaii (“Hawaii”) appeared in one.²³⁹ While some may claim that a non-AQ team may never have a chance at the national title game, non-AQ teams such as Boise State have at times come close.²⁴⁰ Because of the present structure of the BCS, in which the human voters in the Harris Poll and the Coaches Poll control two thirds of the selection criteria, if enough people truly believe a non-AQ team deserves to play for the title then that team should have the opportunity.²⁴¹

Calling appearances by non-AQ universities compliant competition is a disservice to those universities on two levels. First, the BCS criteria in terms of selecting automatic berths is objective, in that

236. See, e.g., *Int'l Salt Co. v. United States*, 332 U.S. 392, 398 (1947) (noting that vertical restraints intended to set “reasonable standards” which all suppliers may meet are reasonable so long as they are not disguised restraints on free competition). Anti-trust law does not suggest that a manufacturer is not free to set standards for its own “inputs.” See *id.* (reserving right of manufacturers to set quality standards for raw materials).

237. For a discussion of the conference tie-ins at the time of the creation of the Bowl Coalition, see *supra* note 33. The bowl games which initially partnered with the Bowl Coalition had tie-ins with the dominant conferences of the time. See *id.* (noting most premier conferences joined Bowl Coalition). See also Grow, *supra* note 8, at 83-84 (noting availability of argument that BCS revenue distributions are not anti-competitive but in fact are reflective of current market power and value).

238. See Warmbrod, *supra* note 8, at 373 (noting options available to non-BCS universities within existing system and acknowledging general vitality of competition within current system). There is nothing in the BCS which prevents non-BCS teams from creating their own bowl games or their own alternative system for determining a championship. See *id.* (indicating absence of noncompete provisions).

239. See *supra* note 194 (reviewing BCS game participants).

240. See Erick Smith, *Boise State Must Pick Up Pieces After Loss to Nevada*, USA TODAY (Nov. 27, 2010, 11:57 AM), <http://content.usatoday.com/communities/campusrivalry/post/2010/11/boise-state-must-pick-up-pieces-after-loss-to-nevada/1> (noting that because of loss Boise State was unlikely to play for national championship). If Boise State had defeated Nevada in 2010, there was a very real possibility that the voters would have granted Boise State a chance to play for the national title. See *id.* (noting that Boise State likely lost chance to play for title due to missed field goal).

241. For a review of the 2003 BCS controversy and the changes that arose out of it, see *supra* notes 40-43 and accompanying text.

the non-AQ teams which qualified for automatic berths did so by played within the system.²⁴² Second, it assumes that the bowls would never select a non-AQ team as an at-large bid. But after the 2009 season, Boise State received an at-large bid to play in the Fiesta Bowl.²⁴³ The Fiesta Bowl could have chosen traditional BCS conference powers Penn State or Virginia Tech, but instead chose Boise State.²⁴⁴ So on this occasion, Boise State out-competed Penn State and Virginia Tech, from a business perspective at least.²⁴⁵

The fact that the BCS bowls do periodically select non-AQ universities also defeats the *Aspen Skiing* analogy.²⁴⁶ The BCS is in fact dealing with entities outside the AQ conferences.²⁴⁷ In *Aspen Skiing*, the product at issue had been offered in the past and was popular with customers.²⁴⁸ Here, there is no history to suggest that customers were previously offered a product that they would now like to see offered again.²⁴⁹

With regards to the dangers of uneven revenue distribution unfairly upsetting the competitive balance of college football, the Su-

242. See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 118 (1984) (noting importance of neutral generally applicable standards when analyzing NCAA restrictions under anti-trust laws). See also *supra* note 194 (reviewing BCS game participants).

243. See *infra* note 244 (describing circumstances of Boise State's selection).

244. See *BCS Selections History*, BCS FOOTBALL (Dec. 6, 2011, 5:35 PM), <http://www.bcsfootball.org/news/story?id=5528971> (stating 2009 at-large selection of Boise State). It should be noted that there is nothing in the BCS selection procedures that control exactly how decisions regarding at-large bids are made, and it is entirely possible that the BCS pressured the Fiesta Bowl to select Boise State to prevent a BCS conference team from losing or to create favorable evidence for an anti-trust lawsuit defense. See Jeremy Mauss, *First Impression of Bowl Matchups . . . Really BCS TCU v. Boise State*, MOUNTAIN W. CONNECTION (Dec. 6, 2009, 8:39 PM), <http://www.mwconnection.com/2009/12/6/1188723/first-impressions-of-bowl-matchups> (calling 2009 Fiesta Bowl matchup "slap in the face" to both universities and questioning motivation for at-large selection of Boise State).

245. See *supra* note 167 (summarizing broadcast ratings for BCS bowl games in 2009). This matchup managed to create enough interest to allow the Fiesta Bowl to attract a higher television rating than the Orange Bowl in 2009. See *id.* (indicating potential appeal of compelling non-AQ matchups in BCS games).

246. For a review of the *Aspen Skiing* analogy to the BCS, see *supra* notes 208-209 and accompanying text.

247. See *supra* note 194 (acknowledging participation by non-AQ universities).

248. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 595 (1985) (noting prior availability of collaborative product and detrimental effect on plaintiff's business following elimination of collaborative product).

249. See *id.* (recognizing importance of previously offering of collaborative product in refusal to deal analysis under certain factual conditions). The true analogy to *Aspen Skiing* would be if the Bowl Alliance sued the Rose Bowl, Big Ten, and Pac Ten, for refusing to cooperate to offer a product which customers presumably preferred over an alternative scenario during the period prior to the creation of the BCS. See *id.* (reviewing competitive environment at issue in *Aspen Skiing*).

preme Court previously rejected such an argument in *NCAA v. Board of Regents*.²⁵⁰ The court explicitly noted that the restrictions challenged in that case were not related to expenditures on coaching salaries or facilities, where any such advantage would likely arise.²⁵¹ This pronouncement leaves open the door for restrictions such as a salary cap for coaching staffs or limitations on total football expenditures, but that issue is unrelated to the BCS.²⁵²

The fact is that the universities in the AQ conferences and the BCS game participants receive a greater share of the revenue and correspondingly greater resources for the college football arms race can be characterized as the result of these universities being more competitive than the competition, as evidenced by the sharing of power in the BCS.²⁵³ AQ teams gained access to these resources by out competing other teams.²⁵⁴ The rich in college football do get richer, but they earned that position through competition, both

250. See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 109 (1984) (dismissing legal argument put forth by petitioner). It should be noted that many of the concerns brought out in that case have been vindicated by subsequent developments, and that a court may re-evaluate this position in light of new evidence. See *supra* note 154 (acknowledging ongoing collegiate athletics arms race). For a discussion of how *NCAA v. Board of Regents* relates to this case, see *supra* notes 141-159 and accompanying text.

251. For a discussion on television rights that did not affect areas of non-economic competition, see *supra* note 145 and accompanying text (discussing importance of television rights to national sports broadcasts).

252. See *Law v. NCAA*, 134 F.3d 1010, 1024 (10th Cir. 1998) (holding that college coaching salary restrictions were an unreasonable restraint of trade). See also *Corns*, *supra* note 8, at 180 (reviewing application of *NCAA v. Board of Regents* in the *Law* case and NCAA's failure to show that pro-competitive benefits of restriction on coaching salaries outweighed anticompetitive effects).

253. See *Schmit*, *supra* note 8, at 220 (admitting that matchups between non-BCS universities and between BCS and non-BCS universities may provide lower level of public interest). Even critics of the BCS acknowledge that public interest and the associated economic effects of those interests may be best served by discriminating against non-BCS teams, because the public may be more interested in traditional football powers than in the exploits of lower profile universities. See *id.* at 247 (identifying types of games that draw biggest fan base). For a discussion of the importance of bargaining power in creation of BCS, see *supra* note 222 and accompanying text.

254. See *Rodgers*, *supra* note 8, at 288 (noting costly requirements of participation in Division IA football in 2008). The NCAA does have a minimum standard to establish a FBS football program. See *id.* (reviewing NCAA minimum requirements in 2008). If a university cannot meet this standard, the university could conceivably opt to play in a lower division, or to not play football at all. NCAA universities are not required to play FBS football. See *id.* (acknowledging minimum requirements for participation). A great majority of universities athletic departments operate at a deficit as a result of sustaining a program. See *Rodgers*, *supra* note 8, at 288 (expressing concern over fact that only football and men's basketball generate large amounts of revenue).

athletic and otherwise.²⁵⁵ The goal of American anti-trust law is to protect competition, not competitors.²⁵⁶ The sad reality for supporters of non-AQ conferences and universities is that they often are the “small dealers and worthy men,” which anti-trust law is not intended to defend.²⁵⁷

Finally, there is the one argument that ultimately hangs over any discussion of the BCS and championships in college football, both from a legal perspective and the perspective of a college football fan. Ultimately, participation in the national championship game is decided on the field.²⁵⁸ If a team wants a chance at the national title, they need to have a successful undefeated or at the most one loss season against top quality competition.²⁵⁹ Achieving this is difficult, but history has shown this to be a requirement for a chance at the national title. It takes years to build up reputations of football excellence, and anti-trust lawsuits are not truly effective mechanisms for penetrating the glass ceiling of perceptions in the eyes of poll voters.²⁶⁰

3. *Balancing the Issues*

Considering all these factors, from a business perspective, it is arguably true that the pro competitive justifications for the BCS

255. For a discussion of AQ teams that are financially successful, see *infra* note 307. For a discussion of the domination of AQ universities in major bowls, see *infra* note 295.

256. For a discussion of goals of U.S. antitrust law, see *infra* note 320.

257. See Nixon, *supra* note 5, at 375 (noting that U.S. antitrust laws protect competition rather than competitors); see also *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 323 (1897) (using phrase “small dealers and worthy men” to identify those left unprotected by law).

258. For a discussion of the winning records of BCS title game participants, see *supra* note 194 and accompanying text. The polls and the computer rankings are re-evaluated each week as a result of each week’s games. See *id.* (noting weekly adjustments of BCS rankings). If a team keeps winning and defeats quality opponents, an appearance in the national championship game is likely. See *id.* (listing numerous undefeated teams which played in title game).

259. See Rodgers, *supra* note 8, at 291 (explaining that teams must be extremely successful to play in championship game).

260. The rise of Penn State to college football prominence is an example of a university building its reputation on the field. For a discussion of Penn State being denied a chance to play for a championship as an up and coming independent in 1969, see *supra* note 31. Later, Penn State joined the Big Ten and has since played in two BCS bowl games. See *supra* note 194 (reviewing BCS game participants). Virginia Tech is another team that went from an average program to a national powerhouse, thanks in part to hiring and retaining coach Frank Beamer. See *Frank Beamer: Head Football Coach*, HOKIE SPORTS <http://www.hokiesports.com/staff/beamer.html> (last visited Apr. 12, 2012) (noting role of head coach in building successful AQ football program).

outweigh the anti-competitive effects of the BCS system.²⁶¹ The BCS allows for a competition between the top two teams every year, as measured by regular season performance, for a chance to win a national title.²⁶² The BCS also creates and markets a product which television networks will pay a premium price for.²⁶³ The BCS system allows members from non-AQ conferences to participate in BCS bowl games, including the national championship, if they can meet the objective criteria of the BCS system.²⁶⁴ While the competition to get to the summit of college football is intense, competition is what the anti-trust laws are designed to protect.²⁶⁵

C. BCS as Monopolization

While market definition is always an important element in anti-trust analysis, it is particularly important in monopolization cases. In general, if a monopolist controls 75% or more of the relevant market, it is established that they have a monopoly.²⁶⁶ The BCS almost certainly satisfies the first requirement of section 2 of the Sherman Act.²⁶⁷ However, monopoly itself is not a crime, only the anti-competitive use of monopoly power.²⁶⁸

261. For a discussion of BCS antitrust vulnerability, see *supra* note 8 and accompanying text. This is of course a decision to be made by the courts. This author is of the opinion that an anti-trust claim on the theory of a group boycott would fail, but other commentators do not universally share this view. See *id.* (highlighting several points of view regarding viability of group boycott).

262. See *National Championship Moments: 1969 Football*, *supra* note 30 (providing one example of pre-BCS controversy). Dispute over who are the two best teams in the rankings should be set aside, this problem predates the BCS. See *id.* (exemplifying typical ranking controversy from pre-BCS area).

263. See *ESPN Officially Signs Deal for BCS Games Beginning in 2011*, *supra* note 232 (describing broadcast rights negotiation process with ESPN outbidding Fox).

264. For a review of the BCS selection procedures, see *supra* notes 61-80 and accompanying text.

265. See Thomas O. Barnett, Assistant Attorney General, Anti-Trust Division, U.S. Department of Justice, Presentation to the Lisbon Conference on Competition Law and Economics: *Competition Law and Policy Modernization: Lessons from the U.S. Common Law Experience*, Nov. 16, 2007, <http://www.justice.gov/atr/public/speeches/227755.htm> (noting that U.S. anti-trust law focuses on protection of competition rather than individual competitors).

266. See Sherman Act, *supra* note 111 (noting that possession of high degree of market power in excess of 75% constitutes monopoly power).

267. For a review of section 2 of the Sherman Act, see *supra* notes 111-121 and accompanying text. Even if the BCS has monopoly power, if the operation of the monopoly provides objectively non-discriminatory access it would not be subject to anti-trust liability section 2 of the Sherman Act. See Rodgers, *supra* note 8, at 299-300 (noting that monopoly power by itself is not enough to establish antitrust violation).

268. See generally *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) (stating that possession of monopoly power alone is not an offense under the Sherman Act).

Measured in terms of the television ratings, the BCS bowl games dominate the listings of the most successful bowl games.²⁶⁹ While sometimes non-BCS games will attract higher ratings than a BCS game, this largely depends on the game's participants.²⁷⁰ In college football, team selections are a driving factor in ensuring high television ratings.²⁷¹ The BCS bowls have market power by virtue of their conference ties and their prestige.²⁷² The bowls use their market power and the associated monopoly profits to attract the best "supply" for their bowl games.²⁷³ This, however, does not mean the other bowl games can never compete; moreover it does not mean that the BCS has used this market power in an exclusionary fashion.²⁷⁴

Unless the plaintiff can prove that the BCS engaged in coercion during negotiations or some other exclusionary tactics where it used its market power as a weapon against its competitors, they will not likely suffer liability under section 2 of the Sherman act.²⁷⁵ Section two criminalizes monopolization, not monopoly.²⁷⁶ The BCS has arguably created a superior product consumers will pay a premium price for, and should therefore be allowed to enjoy the resulting monopoly profits so long as the monopoly is not retained through anti-competitive means.²⁷⁷

D. BCS as Illegal Tying

Generally, the rule governing illegal tying arrangements prohibits forcing buyers to accept to take a tied product they neither

269. For a discussion reviewing BCS game participants, see *supra* note 194.

270. For a discussion of television ratings for bowl games, see *supra* notes 224-233 and accompanying text.

271. For a discussion of television ratings for bowl games, see *supra* note 229.

272. See Rodgers, *supra* note 193 (acknowledging role of prestige in generating market power of BCS bowls). The market power is no doubt connected on at least some level to the prestige of these bowls. See *id.* (describing how more prestigious bowls such as the Rose Bowl have greater market power).

273. See *id.* (noting stronger bowls attract stronger teams and conferences).

274. See *supra* note 69 (identifying provision for automatic qualification of non-AQ champion). To the contrary, the current incarnation of the BCS explicitly provides a path for non-AQ teams to participate in the BCS. See *id.* (describing automatic path to BCS games for non-AQ teams).

275. See Rodgers, *supra* note 8, at 299 (noting BCS history may constitute prior exclusionary conduct creating illegally obtained monopoly). While there is no evidence of ongoing Sherman Act section 2 violations, prior "bad acts" may create the possibility for a monopolization case. See *id.* (noting potential liability for past conduct).

276. See *id.* (describing general approach of courts to monopolization claims).

277. See *supra* note 232 (noting premium price paid by ESPN for BCS broadcast rights).

need nor want as a condition of purchasing a product they do want.²⁷⁸ They also cannot be forced via contract to purchase a tied product they would rather purchase separately and elsewhere.²⁷⁹ In the context of the BCS, the operative question is whether it is legal under the anti-trust laws for the BCS to tie together four BCS bowl games for the purposes of broadcast rights negotiations.²⁸⁰

Furthermore, there are substantial differences in the TV ratings, even amongst BCS bowl games.²⁸¹ The Rose Bowl and the national championship game generally attract the highest ratings.²⁸² This should conceivably lead to broadcasters paying a premium price for the right to broadcast these two particular games when compared to other BCS games.²⁸³ Perhaps as a reflection of this reality, the Rose Bowl has a separate television deal.²⁸⁴

278. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984) (“[T]he essential characteristic of an invalid tying arrangement lies in the seller’s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms When such ‘forcing’ is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.”). In general, there are four elements for an illegal tying claim: two or more separate products grouped together, the seller conditioning the sale of one product on the sale of the other, the seller having enough economic power to force the buyer to purchase both products, and the seller actually coerces the buyer to purchase both products. See *Grow*, *supra* note 8, at 71-72 (reviewing four elements of illegal tying claim). The plaintiff must show that they were forced to buy a product that she does not want. *Id.*

279. See, e.g., *Int’l Salt Co. v. United States*, 332 U.S. 392 (1947) (holding seller with legal monopoly cannot use this power to sell product in which it lacks such power). In this case, the specific issue was the requirement of the defendant that those who leased its salt processing machines purchase salt from the company as well, regardless of whether or not they wanted to. See *id.* at 395-96 (“Patents confer no right to restrain use of, or trade in, unpatented salt.”).

280. See *id.* (comparing *International Salt* to current issue).

281. For a discussion of television ratings for bowl games, see *supra* note 229 and accompanying text (outlining importance of television ratings to BCS bowl games).

282. See *id.* (displaying tendency of Rose Bowl and title game to attract highest television viewership).

283. See *id.* (noting some BCS bowl games are inherently more valuable by consistently attracting greater viewership than others).

284. See Bob Wolfley, *Rose Bowl Telecast on ESPN and Only ESPN*, J. SENTINEL (Dec. 15, 2010), <http://www.jsonline.com/blogs/sports/111956529.html> (noting existence of separate television broadcast contracts for Rose Bowl prior to 2011 game). ESPN has steadily been monopolizing the market for bowl game broadcast rights, although this is largely the result of the higher value this network places on bowl game broadcasting. See *id.* (noting that by controlling more bowl game broadcast rights ESPN parent Disney can extract higher fees from cable providers by strengthening brand). ESPN inherited the Rose Bowl contract from its sister network, ABC, which owned the rights through 2014. See Rudy Martzke, *ABC Bundles Up Rose Bowl Through 2014*, USA TODAY (Aug. 4, 2004, 4:42 PM), <http://www>

Notwithstanding the above, this argument ignores the strong pro competitive rationales behind the BCS.²⁸⁵ First of all, the BCS arrangement creates the national title game, something that did not exist prior to the BCS.²⁸⁶ Nevertheless, it is doubtful every bowl game would jointly agree to release conference automatic bids, creating title games without sharing of broadcast rights and revenue.²⁸⁷

Second, by packaging the BCS bowl games together there is less uncertainty in their value for a potential bidder.²⁸⁸ The process of tying the games together increases the game's value by decreasing participant-related ratings volatility.²⁸⁹ Third, the BCS itself was the result of complex negotiations, and the tying aspects of the BCS may have been a key requirement to secure the agreement to create the product of a national championship game.²⁹⁰ Without the tying arrangement, products such as a national title game may not be available at all.²⁹¹ Considering the strength of the pro-competitive

usatoday.com/sports/college/football/bowls/2004-08-04-abc-rose_x.htm (noting ABC rights ownership).

285. For a review of the pro competitive benefits of the BCS, see *supra* notes 212-260 and accompanying text.

286. See *supra* note 32 (noting relative rarity of matchup between top two teams prior to BCS era).

287. For a review of the history of the creation of the BCS, see *supra* notes 23-49 and accompanying text. The process of creating the BCS was long and arduous, and the result of almost a decade of negotiation. See *id.* (describing long road to creation of national title game involving all major college football conferences).

288. For a discussion of television ratings for bowl games, see *supra* note 176 (reviewing ratings volatility). The BCS essentially performs the same function as a diversified stock portfolio, where by increasing the number of stocks held, one can decrease risk. See *supra* note 227 (reviewing benefits of diversification). From the point of view of a television network, owning the broadcast rights to more major bowl games reduces the volatility of the whole portfolio, in that if one game underperforms it might be counterbalanced by another game outperforming expectations. See *id.* (comparing ratings volatility to stock volatility).

289. For a discussion of the relationship between bowl participants, bowl ratings, and the competitive relationships of various bowls as measured by television ratings, see *supra* notes 224-233 and accompanying text.

290. See Corns, *supra* note 8, at 198 (exemplifying that one commentator has remarked that the same benefits of the BCS, if defined as a matchup between the top two teams, can be achieved by merely allowing the top two ranked teams to meet in the national championship game and letting conference tie-ins and the free market determine the rest of the bowl matchups). However, this overlooks the difficulty of getting conferences and Bowl games to relinquish their contractual rights, as evidenced by the development of the BCS where it took years to secure the agreement of the Big Ten, Pac Ten, and Rose Bowl, as discussed *supra* notes 32-39 and accompanying text.

291. For a review of the long and arduous history of creating a national championship game, see *supra* notes 23-49 and accompanying text. History suggests that without something like the BCS it would be difficult, if not impossible, to reliably stage a national championship game on an annual basis between the top two teams

benefits of the BCS and the potential beneficial aspects of the tying arrangement for television networks, the BCS is unlikely to be held to be an illegal tying arrangement.²⁹²

E. BCS as Output Restriction

One interesting area of potential anti-trust vulnerability in the BCS is the conference appearance limitations.²⁹³ Under current rules, no conference may have more than two teams in the BCS.²⁹⁴ This provision was likely instituted as a part of the negotiations which created the BCS, to ensure that no single conference could completely dominate the BCS system.²⁹⁵

But from a strictly legal perspective, this provision might be suspect under the anti-trust laws as an impermissible restriction on output.²⁹⁶ Theoretically, the appearance restriction prevents a conference that produces a superior “product” from exploiting that superiority in the name of propping up a less competitive cartel member.²⁹⁷ Such a restriction is unlikely to survive anti-trust

in the nation due to the large number of conflicting interests. *See id.* (noting years of difficulty in creating matchup between top two teams in era before BCS).

292. For a review of the anticompetitive effects of the BCS as balanced against the pro competitive justification of the BCS, see *supra* notes 192-291 and accompanying text.

293. *See supra* note 75 (noting that no conference may have more than two teams playing in BCS games).

294. *Id.*

295. For a review of the history of the creation of the BCS, see *supra* notes 23-49 and accompanying text. *See supra* notes 214-223 and accompanying text for explanation of argument that BCS is a carefully negotiated agreement which makes the BCS and its pro competitive effects possible. It is not publically known exactly that was discussed during the negotiations which created the BCS, but the appearance restriction may have been necessary to ensure agreement amongst the conferences. *See id.* (describing long road to creation of title game which is suggestive of difficulty of reaching agreement).

296. Output restrictions have long been frowned upon under the anti-trust laws. *See, e.g.,* *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (invalidating plan by competitors to collectively remove excess production from the market for refined gasoline); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933) (invalidating use of group selling agent as method to limit output).

297. The behavior of OPEC over the years is a good example of how cartel members can interact and sometimes feud. *See* Albert L. Danielson, *Organization of Petroleum Exporting Countries*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/454413/OPEC/233528/History> (last visited Apr. 13, 2012) (reviewing structure, purpose, history, and operation of oil exporting cartel). In the context of college football, it may not be defensible that BCS participants are paid the same amount regardless of the quality of the team or the marketability of the team. *See* Corns, *supra* note 8, at 89 (noting that quality and marketability of BCS participants is not tied to financial rewards of BCS participation).

scrutiny without a strong pro-competitive justification.²⁹⁸

While the anti-competitive effects are clear, the pro competitive justifications are less so. The strongest argument for the BCS is the appearance restriction was likely a part of the deal which created the BCS in the first place, and may have been necessary to secure the agreement which facilitated a national title game.²⁹⁹ The BCS can also make competitive balance arguments, although these arguments are directly analogous to what was rejected in *NCAA v Board of Regents of the University of Oklahoma*.³⁰⁰ A court would have to decide, although it appears this might be a closer case than some other areas of attack on the BCS.³⁰¹

Many observers of college football would undoubtedly wonder who would ever challenge these restrictions. It would likely be an AQ university or an AQ conference, but why would one of the great powers of college football bite the hand that feeds it millions of dollars every season? It seems inconceivable, but it happened before and it could happen again.³⁰²

In the early 1980s, the Universities of Georgia and Oklahoma directly challenged the NCAA in an effort to generate more revenue for their football programs, despite the threat of sanctions in all sports, not just football.³⁰³ They gambled, and they won.³⁰⁴ The climate of college football over the past few years is so intensely

298. See *supra* note 296 (noting courts have long disfavored output restrictions).

299. For a review of the history of the creation of the BCS, see *supra* notes 23-49 and accompanying text.

300. For a review of these aspects of *NCAA v. Board of Regents* see *supra* notes 152-155 and accompanying text. There is arguably no difference between the television appearance restrictions rejected in *NCAA v. Board of Regents* and the appearance restrictions in the BCS, and they would not likely survive anti-trust scrutiny—assuming the court follows the same line of reasoning—because of the similarity of the likely justifications to those rejected in *NCAA v. Board of Regents*. See *id.* (reviewing Supreme Court’s rejection of proposed justifications for NCAA television rights plan).

301. For a review of the pro-competitive aspects and defenses of the BCS, see *supra* notes 211-260 and accompanying text. There are so many strong pro competitive justifications to the rest of the BCS that if a judge decided to invalidate the appearance restrictions of the BCS the BCS members may decide not to radically change a system which is generating a great deal of revenue. See *id.* (listing many positive pro competitive aspects of BCS which could survive on their merits if appearance limitation is struck down by court).

302. While it at first appears to be unlikely that a BCS participant may sue the BCS, it was also likely undreamed of in the early 1980s that member universities would ever sue the NCAA under the anti-trust laws, as discussed *supra* notes 131-148 and accompanying text.

303. See *supra* note 138 (noting threat of sanctions).

304. See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984) (resolving case in favor of plaintiff universities).

competitive that it is not inconceivable that a BCS university would challenge the BCS.

For example, the University of Texas recently threatened to leave the Big Twelve for the Pac Ten to leverage the right to establish its own television network.³⁰⁵ Ultimately, Texas was able to leverage this market power to obtain a favorable revenue sharing deal within the Big Twelve.³⁰⁶ Some “brands” in college football are so powerful that they may feel that if they challenge the system they might be better off attacking it and hoping, through their greater market power, to create a more lucrative system for themselves.³⁰⁷

This process may already be happening, as the organizers of the BCS are re-evaluating certain aspects of the BCS system.³⁰⁸ Most notably, there have been proposals to eliminate automatic

305. See, e.g., *Expansion Talk Swirls for Conferences*, ESPN, <http://sports.espn.com/ncaa/news/story?id=5251329> (last updated Jun. 6, 2010, 10:38 AM) (reviewing rumors of conference expansion and contraction); see also *Would Horns of Plenty Exit Big Twelve? Maybe, if Eyes of Texas See More*, DALLAS NEWS (Feb. 19, 2010, 1:12 AM), <http://www.dallasnews.com/sports/college-sports/texas-longhorns/20100218-Would-Horns-of-plenty-exit-Big-6392.ece> (noting economics could encourage Texas to leave Big Twelve). Texas was ultimately able to negotiate with the Big Twelve to gain right to create its own TV network, and proceeded to sign a \$300 million contract with ESPN. See Michael Rosenberg, *University of Texas' TV Network is a Lucrative Web of Conflicts*, SPORTS ILLUSTRATED., http://sportsillustrated.cnn.com/2011/writers/michael_rosenberg/01/20/texas.tv/index.html (last updated Jan. 20, 2011, 4:44 PM) (commenting on implications of Texas cable network). Not to be outdone, the University of Oklahoma is considering a similar move. See *Sooners Considering Feasibility of Own TV Network*, USA TODAY (Jun. 15, 2010, 9:24 PM), http://www.usatoday.com/sports/college/football/big12/2010-06-15-sooners-tv-network_N.htm (noting Oklahoma is considering creating its own cable network).

306. See *Big 12 Sets up Restrictions on Longhorn Network*, USA TODAY (Aug. 1, 2011, 10:38 PM), http://www.usatoday.com/sports/college/2011-08-01-big-12-longhorn-network-restrictions_n.htm (discussing creation of Longhorn Network). Ultimately the Big 12 granted Texas the right to create its own television network, with conditions. After evaluating the possibility of moving to another conference, Texas ultimately agreed to stay in the Big 12 after the Big 12 offered substantial concessions in the area of revenue sharing. See *id.* (describing financial benefits to Texas of continued Big 12 membership).

307. See Peter J. Schwartz, *The Most Valuable College Football Teams*, FORBES (Nov. 20, 2007, 10:00 AM), http://www.forbes.com/2007/11/20/notre-dame-football-biz-sports-cx_ps_1120collegeball.html (reviewing twenty most valuable college football franchises as measured by Forbes). The top ten most valuable college football teams in 2007 were Notre Dame, Texas, Georgia, Michigan, Florida, LSU, Tennessee, Auburn, Alabama, and Ohio State. *Id.* There were no Big East or ACC teams in the top ten, but two Big Ten, one Big Twelve, and six SEC teams in addition to Notre Dame. *Id.* It is perhaps ominous that most of the most valuable football programs reside in the SEC, indicating that this conference, known for its depth of quality football programs and enthusiastic fan base, would be the most likely to challenge the appearance restriction in court. See *id.* (exemplifying economic power of SEC).

308. See *BCS Football Officials to Discuss Changes?*, ESPN (Jan. 10, 2012, 11:23 AM), http://espn.go.com/college-football/story/_/id/7442352/bowl-champion-

berths in BCS bowl games.³⁰⁹ If a powerful team, dissatisfied with the results of negotiations, decided it could get more by “blowing up” the system, an antitrust challenge might result.³¹⁰ Should such an antitrust challenge to the BCS prove successful, it would place the BCS members in the difficult position of having to consider eliminate what may have been a key element holding the BCS agreement together in order to save the other aspects of the system.³¹¹

F. Remedies

Another difficult aspect of the anti-trust analysis for the BCS is exactly what remedy could arise out of a lawsuit. Courts ordering anti-trust remedies certainly have broad equitable powers to force certain conduct on parties guilty of anti-trust violations.³¹² But eliminating the BCS may actually make things worse, not better, for those who sought its destruction.³¹³

Playoff proponents would likely argue for a judicially imposed playoff system. While this may be beyond the realm of judicial competency, a court could still give high-level guidance of what such a

ship-series-officials-discuss-possible-format-changes (describing possible upcoming changes to BCS).

309. *See id.* (discussing proposal to eliminate automatic berths in BCS games).

310. *See id.* (noting importance of relative conference strength in negotiations). Any changes in the BCS will undoubtedly be carefully negotiated and will likely reflect the balance of power amongst the member conferences. *See id.* (describing competing interests at play when discussing possible changes to BCS).

311. For a review of the evidence that the BCS was a carefully negotiated agreement which might not survive if modified, see *supra* notes 214-218 and accompanying text. Eliminating certain aspects of the BCS will change the terms of the deal which the BCS participants agreed to, and not all parties may be agreeable to such changes. *See id.* (describing long development process of BCS which is suggestive of difficult negeotation process).

312. *See Ford Motor Co. v. United States*, 405 U.S. 562, 577-78 (1972) (“Antitrust relief should unfetter a market from anticompetitive conduct and ‘pry open to competition a market that has been closed by defendants’ illegal restraints.”).

313. *See Warmbrod, supra* note 8, at 350 (acknowledging absence of non-BCS teams from prestigious bowl games prior to BCS). Without the BCS, major college bowl games would be free to ignore universities such as Boise State in favor of universities with larger followings. *See id.* (noting BCS is required to grant bowl game appearances to non-AQ teams which meet specified criteria). In the twenty years prior to the formation of the BCS, 159 of the 160 participants in the four BCS non-championship bowls (Rose, Orange, Sugar, and Fiesta) were from BCS AQ conferences. *See id.* (exemplifying historical dominance of AQ conferences). The one exception to this pattern, Louisville, would later join the Big East, a BCS AQ conference. *See id.* at 351 (noting Louisville’s eventual admission to Big East). In reality, the BCS alters little from historical practice from the point of view of non-BCS universities, as all six BCS conferences were in possession of the contractual conference tie-ins to the most prestigious bowl games. *See id.* (noting most prestigious bowl games historically have been played between BCS AQ schools).

system must look like in order to survive anti-trust scrutiny. Courts have generated similar orders before. In *United States v. United Shoe Machine Co.*,³¹⁴ the court not only enjoined certain practices found to be anti-competitive but it also mandated specific business conduct on the part of the guilty defendant.³¹⁵ Along those lines, a judge could order the implementation of a playoff system which would guarantee every conference champion a chance at the national title and a more equitable share of the revenues.

But this outcome is unlikely. First of all, imposing a college football playoff would have massive implications for all teams which play college football.³¹⁶ These repercussions would extend not only to college athletic departments, but also to student athletes who might be forced to miss class time in order to partake in a playoff system.³¹⁷ It should also not be forgotten that football is a contact sport, and that injuries could result in additional games.³¹⁸ A

314. 110 F. Supp. 295 (D. Mass. 1953).

315. See *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953) (exemplifying broad remedial power of courts under anti-trust laws) *aff'd per curiam*, 347 U.S. 521 (1954). In *United Shoe*, the defendant controlled ninety-five percent of the relevant market for shoe manufacturing machinery in the United States. See *id.* at 297 (describing dominant market position of defendant). The defendant engaged in several practices which were found to be anti-trust violations, notably that they refused to sell machines for making shoes and would only lease them. See *id.* (identifying anticompetitive conduct at issue). The court, among other things, ordered that at a minimum the defendant must sell their machines at a price which made them economically competitive with leasing. See *id.* (reviewing ordered remedies).

316. See Warmbrod, *supra* note 8, at 343-44 (reviewing common sources of opposition to college football playoff). Commonly cited reasons to retain the existing bowl system are the abundance of postseason opportunities, interference with the academic mission of universities, harm to communities hosting bowl games, and a devaluation of the regular season. See *id.* (reviewing pro-bowl arguments). See also Butch Henry, *Football Playoff a Mistake?*, AIKEN STANDARD (Jan. 4, 2011, 11:45 PM), <http://www.aikenstandard.com/localsports/0105butch-henry-column> (discussing disruption college playoff would have on exams). Also, if the NCAA basketball tournament is any indication, controversy over the college football postseason will not end. See, e.g., Andy Glockner, *Six Biggest Tournament Snubs*, SPORTS ILLUSTRATED (Mar. 13, 2011, 7:01 PM), http://sportsillustrated.cnn.com/2011/writers/andy_glockner/03/13/ncaa.tournament.biggest.snubs/index.html (reviewing questionable participant selections for 2011 NCAA basketball tournament). The selection of at-large bids for the college basketball tournament are often controversial, and there is no indication that the same controversies would not occur in a football playoff. See *id.* (typifying controversies created by NCAA selection committees).

317. See Butch Henry, *supra* note 316 (exemplifying argument that playoff would disrupt academics). Disruption to exams and academics are an often cited example of a disruption a playoff would cause. See also Nixon, *supra* note 5, at 388 (suggesting that if bowl season extended further it would disrupt life of student athletes).

318. See, e.g., *Florida WR Paul Wilson Suffers Career-Ending Foot Injury*, USA TODAY (Aug. 14, 2009, 2:13 PM), <http://www.usatoday.com/sports/college/football/>

player with dreams of professional stardom may have those dreams die due to a catastrophic injury.³¹⁹ At the same time, bowl games are vital components of many local economies, and elimination of these games or a reduction in their importance or appeal could have adverse economic consequences.³²⁰

A judicially imposed playoff would also be far more intrusive than the order in *United Shoe*.³²¹ An order breaking up the BCS and mandating the creation of a playoff system would be directly analogous to the breakup order later overturned in the Microsoft anti-trust case.³²² Like the BCS, breaking up Microsoft would ultimately create more problems arguably far worse than those posed by the alleged anticompetitive conduct.³²³

The typical remedy in anti-trust law is to enjoin the anti-competitive practice.³²⁴ If the court finds elements of the BCS to be

sec/2009-08-14-florida-wilson-injury_N.htm (describing career ending injury to injury plagued college football player). The threat of injury is ever present in a contact sport such as football. See *id.* (typifying career ending football injury to college football player).

319. See, e.g., Darren Rovell, *Bush is Covered Against Career-Ending Injury*, ESPN (Jan. 4, 2006), <http://sports.espn.go.com/nfl/bowls05/news/story?id=2280160> (reviewing insurance purchased by star running back Reggie Bush prior to 2006 Rose Bowl game).

320. See Nixon, *supra* note 5, at 389 (analyzing economic consequences of substantial changes to existing bowl system). While such policy goals are outside the realm of anti-trust law, they are very relevant if a political solution to the BCS controversy was attempted. Eliminating the BCS would also have a tremendous effect on the budgets of athletic departments across the country. See *id.* (noting importance of BCS revenue to universities).

321. See *supra* note 315 (giving overview of *United Shoe*).

322. See *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59, 64-65 (D.D.C. 2000) (outlining divestiture plan ordered subsequent to finding of Microsoft anti-trust violation). After years of litigation, Microsoft was found guilty of various anti-trust violations and the district court ultimately determined the proper resolution was a breakup of Microsoft. *Id.* (outlining divestiture plan ordered subsequent to finding of Microsoft antitrust violation). However, after further appeals encouraged reconsideration of issues related to remedies and the underlying case against the defendant, this extreme measure was overturned on appeal. See *United States v. Microsoft Corp.*, 253 F.3d 34, 104 (D.C. Cir. 2001) (reversing district court judgment due to inadequate evidentiary inquiry into possible remedies, insufficient explanation of factual justifications for ordered remedy, and subsequent reevaluations of scope of liability).

323. For a discussion of the college football national championship prior to the era of the BCS, see *supra* notes 34-36 and accompanying text. Few college football fans would welcome a return to the days of split national titles. See *id.* (discussing problems with pre-BCS status quo).

324. See *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1952) (exemplifying practice of enjoining specific anti-competitive practices) *aff'd per curiam*, 347 U.S. 521 (1954). The BCS, if found liable under the anti-trust laws, could simply modify its operation in such a way as to escape further scrutiny without fundamentally altering the nature of the deal. See *id.* (typifying case where breakup order was not found to constitute appropriate remedy). This has been

anti-competitive, these elements might be stripped away while leaving the basic structure in place. Alternatively, in the face of adverse judgment the BCS might revise its procedures to eliminate the anti-competitive practice without fundamentally altering the balance of power which prompted the antitrust lawsuit.³²⁵ For those who wish to see the end of the BCS, this would accomplish nothing. But if the challenge came from within the BCS, the lawsuit might accomplish the aims of furthering the economic interest of some of the more powerful programs.³²⁶

Destroying the BCS completely could have far reaching consequences, for both AQ and non-AQ universities and conferences. It would mean a return to the split national titles and disputed championships so common in the era before the BCS.³²⁷ It would also make it even harder for the non-AQ teams to compete in the ever-growing collegiate arms race.³²⁸ By eliminating the BCS selection

identified as an advantage of the BCS system. See Schmit, *supra* note 8, at 245-46 (identifying adaptability of BCS to changing realities on field and in marketplace as strength of BCS). Indeed, the BCS has changed in response to both controversy and market demands in the past. In 2004, the system was changed to increase the importance of the human polls in response to criticism. See *supra* note 97 (reviewing changes to BCS following 2003 split national championship). In 2006, a national title game was added, increasing the number of available at-large bids and expanding access for all teams, including deserving non BCS teams. See *supra* note 46 (noting creating of fifth BCS game for dedicated national title game). For a discussion of the evolution of the BCS from 1998 to present, see *supra* notes 39-49 and accompanying text.

325. See *supra* note 10 (reviewing key cases of national football league anti-trust litigation and subsequent history). The settlement negotiations following the NFLPA anti-trust litigation ultimately resulted in the NFL CBA of 1993. See *id.* (reviewing eventual outcome of late 1980s and early 1990s professional football antitrust litigation).

326. See *supra* note 306 (outlining concessions obtained for Texas from Big 12). The University of Texas was able to use the threat of leaving the Big 12 to obtain substantial concessions from the Big 12. See *id.* (noting stronger position of Texas after threatening to leave). Another university could possibly use the threat of an antitrust lawsuit to demand changes in the BCS favoring itself or its conference. See *id.* (exemplifying the usefulness of leverage in college athletics business negotiations).

327. For a discussion of the chaos of the pre-BCS era championships, see *supra* notes 23-33 and accompanying text.

328. See Peter J. Schwartz, *The Most Valuable College Football Teams*, FORBES (Nov. 20, 2007, 10:00 AM), http://www.forbes.com/2007/11/20/notre-dame-football-biz-sports-cx_ps_1120collegeball.html (reviewing twenty most valuable college football franchises as measured by Forbes). Aside from Notre Dame, all of the twenty most valuable college football teams are from BCS conferences. See *id.* (listing most valuable college football programs). These economic disparities are only exacerbated by the fact that BCS conferences have very lucrative conference level television deals which are not shared with non-BCS conferences. See Grow, *supra* note 8, at 84 (noting that Big Ten collected \$242 million annually for its broadcast rights, while the least valuable BCS conference broadcast rights, those of the Big East, are worth \$33 million per year).

guidelines, no major bowls could be forced to take the small conference teams of college football.³²⁹ These revenue streams would be closed to them.³³⁰

From a certain point of view, a return to the “bad old days” might not be seen as a bad thing.³³¹ Ironically, as non-AQ teams become successful they are often invited to join AQ conferences.³³² Most notably this happened with Utah, TCU and Boise State, who will be joining BCS AQ conferences in the near future.³³³ Once outsiders, their play on the field has earned them a place at the table. As the number of college football programs expands, invariably the number of top-level teams would likely expand as well.³³⁴ With or without the BCS system in place, successful teams will likely find their way into AQ conferences.

The history of the Fiesta Bowl itself is instructive to how non-AQ teams, in an environment with or without the BCS, could respond to the perceived injustice forced upon them by the system.³³⁵

329. *See supra* note 99 (addressing issues of marketability and at large berths in BCS bowls). These teams are generally less attractive to bowl games and are often “snubbed” in favor of teams which may arguably be less deserving athletically but which were more marketable. *See id.* (reviewing importance of marketability in at-large team selection).

330. *See supra* note 194 (acknowledging uneven revenue distribution still distributes large amounts of revenue to non-AQ conferences). The BCS revenue distribution, while inequitable, could be construed as better than no revenue at all. *See id.* (noting non-AQ schools and conferences still receive BCS revenue).

331. *See* McClelland, *supra* note 4, at 213 (claiming BCS creates and perpetuates caste system in college football). Cutthroat competition may be more desirable for a rising college football power than the “two tier” system perpetuated by the BCS. *See id.* (setting forth argument that increased competition would improve college football).

332. Utah and TCU are excellent examples of this trend. *See supra* notes 82-84 (noting Utah and TCU will join BCS conferences in near future).

333. *See id.* (exemplifying move of successful non-AQ programs to AQ conferences).

334. *See supra* note 25 (noting increase in number of bowl games). FBS College Football, as evidenced by the increase in the number of bowl games, is a growing market. *See id.* (noting growth in number of bowl games is exceeding supply of bowl-worthy teams).

335. *See Fiesta Bowl History*, TICKET CITY, <http://www.ticketcity.com/bowl-game-tickets/fiesta-bowl-tickets/fiesta-bowl-history.html> (last visited Apr. 13, 2012) (recounting history of Fiesta Bowl). The Fiesta Bowl, first played in 1971, has a colorful history, one which is instructive of the politics that often are behind the bowl system and the selection of teams for the bowl games. *See id.* (recounting history and development of Fiesta Bowl). The Western Athletic Conference (“WAC”) was growing frustrated with its members being left out of existing major bowl games. *See id.* (describing circumstances of WAC at time of creation of Fiesta Bowl). As a result, it helped create the Fiesta Bowl to provide its members with an automatic berth in a bowl game. *See id.* (identifying initial purpose of Fiesta Bowl). The Fiesta Bowl was a great success, so much so that in time the bowl’s tie in with the WAC disappeared in favor of creating more lucrative matchups, such as

The Fiesta Bowl was born out of the frustrations of a conference with members who were denied chances to play in a major bowl game.³³⁶ Rather than accept the status quo, the slighted conference instead found a partner to create a premier bowl game of its own.³³⁷ Even within the confines of the BCS, the Mountain West Conference was making a play to become a seventh AQ conference.³³⁸ While this attempt failed, these approaches are perhaps the best way for universities to build the foundations to one day compete for a national title under the BCS system.³³⁹

V. CONCLUSION

The BCS truly is the best form of college football championship system that has been tried so far. While many sports fans would undoubtedly prefer a playoff, the anti-trust laws are unlikely to offer a remedy which would produce one.³⁴⁰ While anti-trust attacks on the BCS from non AQ conferences, non AQ universities or state attorney generals are unlikely to be successful, even if they were they would likely only succeed in destroying or modifying the

the 1986 "national title game" between Penn State and Miami. *See id.* (exemplifying success of new bowl game).

336. *See id.* (outlining history of Fiesta Bowl dating back to 1970s).

337. *See id.* (diagraming method in which teams were chosen to play in Fiesta Bowl).

338. *See supra* notes 81-96 (outlining path to conference AQ status). This attempt was a failure, but it does indicate that there is a viable path for non-AQ universities and conferences to compete. *See id.* (reviewing theoretical path for conference to gain AQ status). The path to become an AQ conference remains open for all non-AQ conferences. *Id.* For a discussion of the Mountain West's quest to become an AQ conference, see *supra* notes 86-88 and accompanying text.

339. *See* Corns, *supra* note 8, at 172 (describing early 1990s conference realignment). Conferences rise and fall with the times. *See id.* (using Southwest Conference as example of trend of shifting power in college football). At one point, the Southwestern Conference was dismembered with the four strongest members joining the Big Twelve and the four weakest being forced to join less prestigious conferences without AQ status for the BCS or its predecessors. *See id.* (describing end of Southwest Conference).

340. *See, e.g.,* United States v. Microsoft Corp., 253 F.3d 34, 104 (D.C. Cir. 2001) (reversing district court judgment due to inadequate evidentiary inquiry into possible remedies, insufficient explanation of factual justifications for ordered remedy, and subsequent re-evaluations of scope of liability). Judicial imposition of a playoff system in college football presents the same difficulties encountered when the judiciary attempted to force the breakup of the software giant Microsoft in the late 1990s. *See id.* (reviewing problems with Microsoft breakup order). Although the district court which tried the Microsoft case found that Microsoft had violated the anti-trust laws and ordered the breakup of the company to foster increased competition, this order was reversed on appeal once it became apparent that the nature of the relevant market a breakup of Microsoft would do more harm than good. *See id.* (exemplifying case where ordered remedy would not help consumers).

current system without building something new and better to replace it.³⁴¹ A challenge from within the BCS, aimed at eliminating automatic berths or appearance restrictions is more likely to be successful, and would likely come from a powerful team or conference looking to enhance its bargaining position within the cartel.³⁴²

Eliminating the BCS would produce an even more lop-sided playing field between the haves and have-nots in college football compared with what now exists.³⁴³ Without the objective requirements of the BCS guaranteeing non-AQ teams a seat at the table, these teams can be shut out of the major bowl games.³⁴⁴ This would only serve to exacerbate the revenue differential between these universities and more established football programs, creating greater competitive imbalance. For teams in the position of a Boise State, getting rid of the BCS would make things worse, not better.³⁴⁵

Coming full circle, as the BCS is the best form of championship except all others which have been tried perhaps it is best for playoff proponents to resort to the best form of government except for all that have been tried and bring about a playoff system through lobbying and public relations efforts.³⁴⁶ The antitrust laws

341. For a discussion of the difficulties of remedies in the case of a successful anti-trust challenge to the BCS, see *supra* notes 312-340 and accompanying text. Antitrust laws are far more adept at destroying than they are at creating. See, e.g., *Microsoft*, 253 F.3d at 104 (providing example case of antitrust outcome which would reduce economic utility for all). Merely sweeping aside the BCS will not necessarily create conditions conducive to the creation of a playoff system or a more inclusive bowl system, as evidenced by the difficulty in creating the BCS in the first place, as discussed *supra* notes 21-49 and accompanying text.

342. See *supra* note 326 (noting use of leverage by major college football program to obtain favorable treatment from conference).

343. See *supra* note 313 (noting that 159 of 160 participants in four BCS bowls prior to the formation of BCS were from AQ conferences). Before the BCS, bowl games were free to ignore what today are non-AQ teams when awarding bowl bids, as was the case before the BCS. See *id.* (noting dominance of current AQ schools in number BCS bowl game appearances). The BCS system at least allows non-AQ teams to receive some of the riches which might otherwise only go to established college football powers who are presently in AQ conferences. See *id.* (exemplifying historical exclusion of non-AQ schools from premier bowl games).

344. For a review of how non-AQ teams have an objective road to BCS appearances, see *supra* notes 69-70 and accompanying text.

345. See *BCS, Alliance, & Coalition Games Year by Year*, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=4809942> (last updated Feb. 10, 2011, 5:01 PM) (reviewing Boise State appearances in BCS games). Boise State has played in two BCS games, once as an automatic qualifier and once as an at-large bid. See *id.* (noting BCS has greatly benefitted Boise State in terms of number of major bowl appearances). The system is working for them about as well as it can for a non-AQ team. See *id.* (noting Boise State has consistently appeared in BCS games).

346. See *Grow*, *supra* note 8, at 66-67 (describing formation, efforts, and partial success of Presidential Coalition). In previous years a group of non-AQ confer-

are not likely to bring the type of change that BCS critics would like to see.³⁴⁷ Things may not be perfect, but the system, as it stands now, works out fairly well for all involved. Why mess up a good thing?

ences banded together to form the Presidential Coalition for Athletics Reform ("Presidential Coalition"), seeking to compel the BCS to modify its selection procedures. *See id.* (describing efforts of the Presidential Coalition). The Presidential Coalition ultimately persuaded Congress to become involved, with both the House and Senate Judiciary Committees holding hearings in 2003. *See id.* (identifying results of efforts of Presidential Coalition). Shortly thereafter, the BCS instituted reforms including formally including non-BCS conferences in the BCS organization and providing an easier path to an automatic berth for non AQ teams. *See id.* (referring to reforms which ultimately resulted). Some BCS critics continue to pursue this avenue for reform. *See, e.g., Our Purpose*, PLAYOFF PAC, <http://www.playoffpac.com/about/Default.aspx> (last visited Apr. 13, 2012) (typifying effort at political reform of BCS).

347. For a discussion of the difficulties of determining the appropriate remedy in a successful anti-trust challenge to the BCS, see *supra* notes 312-339 and accompanying text.