The BCS, Antitrust and Public Policy

By

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Abstract.

This paper examines the history and the economics of the Bowl Championship Series, in the context of all college bowl games. The evidence suggests that the BCS restricts entry to the FBS conferences that are outside the BCS cartel and that the revenue distribution from the bowl games is highly skewed in favor of the six BCS conferences. The resulting revenue advantage enables the BCS conferences to perpetuate their historical predominance. The BCS selection process is based on a conceptually confused and biased system. The paper discusses the rationale proffered by the BCS for its system and then considers the antitrust arguments against the BCS. It concludes that the outcome of any antitrust claim would be uncertain, which together with the involved expense and time render problematic any antitrust strategy to break up the BCS cartel. Instead, the paper concludes with a call for a legislative solution that would open up the national championship to all FBS conferences, increase output, redistribute revenues more evenly throughout Division I and the rest of the NCAA, and provide more opportunities to college athletes.

Introduction

It seems that every year the Bowl Championship Series (or BCS) comes under fire. In 2008-09, Florida (13-1) beat Oklahoma (12-2) to win the putative national championship. No one disputes that Florida and Oklahoma were among the nation's best teams, but Utah (13-0), USC (12-1) and Texas (12-1) all feel they deserved a shot at the title. Indeed, Texas even beat Oklahoma in a regular season game.

In place since 1998, the BCS purports to determine the national champion in college football, while preserving the century-old system of postseason bowl games. To make its determination of which teams go to the championship game, the BCS employs the *USA Today* Coaches Poll, the Harris Interactive College Football Poll and an average of six computer

rankings. Without fail, the annual selection invites strident criticism. Invariably, many fans and colleges feel cheated.

This year, the president of the United States is also weighing in. President Obama stated: "If I'm Utah, or if I'm USC or if I'm Texas, I might still have some quibbles. That's why we need a playoff." As in the past, many politicians are ready to take up the cause. Representative Joe Barton, R-Texas, introduced a bill that would prohibit the BCS from marketing its title game as the national championship unless it was the culmination of an equitable playoff system. The Utah Attorney General is investigating the BCS for possible antitrust violations and on February 9,2009 the Utah State Senate unanimously passed a resolution (SJR11) calling for a national football playoff. Rep. Neil Abercrombie, D-Hawaii and other House members have asked the Justice Department to investigate the BCS and possible antitrust violations.

The Senate Judiciary Committee held hearings on the possibility that the bowl system violated the country's antitrust laws back in May 1997 and again in October 2003. The House Subcommittee on Commerce, Trade and Consumer Protection held similar hearings in December 2005 and the incoming chairman of the House Committee on Oversight and Government Reform, Edolphus Towns, D-NY, stated that he will call hearings later in 2009.

In fact, out of nearly 80 other collegiate varsity championships, Division IA football[1] is the only one in which a winner is not determined through some kind of playoff-bracket system.

Historical Background

The Rose Bowl became the first college bowl game in 1902. It became a regular annual event in 1916. Most major bowl games have been in place since the 1930s.

College bowl games generally are organized and controlled by local chambers of commerce, convention and tourist bureaus and assorted businesses. The bowl games' understood purpose is to generate business for the local economy, which they usually do to some extent because the majority of attendees come from out of town.[2] The bowls have contracts

[1] DIA has been unfelicitously renamed Football Bowl Subdivision (FBS) and DIAA is now Football Championship Subdivision (FCS), leaving the linguistical puzzle: why does the championship game occur in the FBS, and not the FCS?

[2] Interestingly, early on the bowl organizing committees claimed their purpose was to raise money for charity. Sperber describes the situation in the late 1940s: "In reality, the bowls ran a huge financial shell game. The top

with individual conferences that provide for conference champions, runner-ups or other designated teams to participate in the bowl each year. On behalf of the conference, the participating school gets a share of the bowl revenue and, in turn, is obligated to purchase a substantial block of tickets for the game which it attempts to resell to its alumni, students, boosters and others.

Under this system, historically each bowl did not know the quality of the teams it would be getting until the end of the season. The conference champion associated with a particular bowl may have had a relatively low national ranking and the opposing team may have been no better. TV networks found themselves in the uncomfortable position of reserving a prime spot for a bowl and paying top rights fees, yet facing the possible prospect of two teams ranked below the top ten going against each other. David Downs, senior vice president of ABC Sports, explained: "All of the

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tier – Rose, Sugar, Orange and Cotton – paid well, but almost all of the others kept most of the revenue or never made any. Furthermore, according to a *Collier's* investigation, even though all of the bowls claimed that they 'are conducted for the benefit of local charities … the [bowl] contributions to charities are inconsequential.' Figures revealed that only $5,000, or .003 per cent of the gross receipts had been donated to charity by 16 bowls in 1947." MURRAY SPERBER, ONWARD TO VICTORY: THE CRISES THAT SHAPED COLLEGE SPORTS 179 (1998). The charitable claim remains on the BCS website today *BCS Chronology*, BOWL CHAMPIONSHIP SERIES, http://www.bcsfootball.org/bcsfb/history.

networks were souring on the bowl business. We couldn't go one more cycle where we wake up on the 1st of December and find out that we have a bad matchup and that we were going to get hammered in the ratings."[3] Under the circumstance, selling ad spots for top dollar was next to impossible.

The other significant consequence of these arrangements was that it was next to impossible to structure a national championship. Between 1935 and 1991, the top-two ranked teams met each other in a bowl game only eight times.[4] It would have had to have been a coincidence that the top two teams were in the two conferences playing in a given bowl game.

The first step to rectifying this commercially-threatening situation was taken in 1991 when the Atlantic Coast (ACC), Big East, Big Eight, Southeastern (SEC) and Southwestern conferences, along with Notre Dame, formed a bowl coalition with the prestigious college bowl committees of the IBM Fiesta Bowl, the Mobil Cotton Bowl, the USF&G Sugar Bowl, and the Federal Express Orange Bowl. Under the agreement, the Orange, Sugar and Cotton Bowls continued to be hosted by their affiliated conference champions, while the Fiesta Bowl had two open slots.

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[3] Cited in Jim Naughton, *Debate over the Championship Game in Football Reflects Larger Tensions in College Sports*, CHRONICLE OF HIGHER EDUCATION, September 19, 1997, at A46.

[4] *BCS Chronology*, BOWL CHAMPIONSHIP SERIES, http://www.bcsfootball.org/bcsfb/history.

Although this coalition improved the chances of top, competitive match-ups, it precluded contests between the number one and two ranked teams if they came from the Big East (champion obligated to play in the Orange Bowl), the SEC (obligated to play in the Sugar Bowl) or the Southwest (obligated to play in the Cotton Bowl). Nonetheless, this arrangement did manage to produce "national championships" between the numbers one and two ranked teams in both 1992 and 1993. The other problem from the networks' point of view was that there was no guarantee that any of the individual bowls would be host to the top matchup. Selling advertising under these conditions remained problematic.

The next step was taken in 1994 with the formation of the Bowl Alliance. The Big East, ACC, Big 12 (a merger of the Big 8 with 4 teams from the Southwest), the SEC and Notre Dame agreed to the following terms with the Orange, Sugar and Fiesta Bowls: the champions of the four conferences plus Notre Dame (unless the team had a losing season) and one other top-ranked school either from within or without the alliance would play in these three bowls; the traditional conference/ bowl ties would be severed in the interest of maximizing the possibility of having a national championship;[5] and, the highest ranked game each year would rotate among the Orange, Sugar and Fiesta Bowls. Since the bowls would share the championship

[5] Several long-term agreements between major bowls and conferences expired at this time, enabling the adjustment. Regional affiliation was restored to the major bowl games in 1998.

game, advertisers were assured of the top matchup at least one out of every three years.

From the perspective of the Bowl Alliance conferences, there was still one missing piece. The champions of the Big 10 and Pac-10 conferences had been matched in the Rose Bowl for over 50 years. Moreover, teams from these conferences were often ranked either first or second in the nation. Without the Big 10 and Pac-10, the Alliance goal to offer a national championship game every year was elusive.

In June 1996, the Alliance struck a deal with the Big 10, the Pac-10, the Rose Bowl and ABC (which had broadcasting rights to the Rose Bowl.) Beginning with the 1998-99 season, the national championship game would rotate among the four bowls and ABC would have broadcast rights for all four games over a seven-year period (for which the network paid the estimated modest sum of $700 million, or $25 million per game which was roughly 2.5 times the average 1996 rights fees for the four games).[6] The teams for the national championship initially were picked on the basis of the *USAToday*/ESPN coaches' poll and the AP media poll, the average of three computer rankings (*Seattle Times*, *New York Times*, and Jeff Sagarin), team records and a strength-of-schedule index. The new scheme was initially known as the Super Alliance, but eventually came to be called the Bowl Championship Series.

[6] Naughton, *supra* note 3, at A46.

What was good news for the Bowl Championship Series was bad news for virtually all the other bowl games and the non-BCS conferences in Division IA. As the four BCS bowl games came increasingly to be associated with a national championship, interest in the other bowls waned. Accordingly, TV ratings and attendance for the other bowl games have suffered.

Although many fans welcomed the heightened prospect of a national championship game in college football, the Super Alliance came under sharp attack and close scrutiny from many observers. Senator Mitch McConnell of Kentucky, for instance, was concerned that his home state school, the University of Louisville, was being excluded from a reasonable opportunity to participate in the most prestigious and lucrative bowl games. The University of Louisville belonged to the Conference USA (C-USA) which, along with three other Division IA conferences[7] and eleven independents at the time, were not invited to join the Bowl Alliance. Senator McConnell first raised the issue in 1993 when Louisville had a 7-1 record and a top ranking, but was automatically excluded from the leading bowls. The U.S. Justice Department commenced an inquiry and the Alliance agreed to open up for consideration two of the six Alliance bowl slots "to any team in the country

[7] These three conferences are: Big West, Western Athletic (WAC), and Mid-American. Today, the University of Louisville belongs to the Big East, a BCS Conference, and Senator McConnell's interest in an antitrust investigation seems to have waned.

with a minimum of eight wins *or* ranked higher than the lowest-ranked conference champion from among the champions of the ACC, Big East, Big 12 and SEC."

This new, "more open" policy was put to the test in 1996-97. Brigham Young University's football team, from the Western Athletic Conference (WAC), met *both* of the Alliance criteria, compiling a 13-1 record and earning a No. 5 ranking nationally, yet was not invited to any of the Alliance bowls. BYU's record and ranking were superior to nearly every Alliance team that went to an Alliance bowl that year, including Penn State, 11-2 record and No. 7 ranking, Texas, 8-5 and No. 20 ranking, Virginia Tech, 10-2 and No. 13 ranking, and Nebraska, 11-2 and No. 6 ranking.[8]

The BCS, instead of promoting the highest level of postseason competition, seemed to be promoting the economic fortunes of its members and the college bowls, to the exclusion and detriment of other Division IA schools. The bowl committees continued to prefer to host universities with large, spendthrift student bodies and alumni. BYU is from the sparsely populated state of Utah (bad for TV ratings), and its students and alumni have the reputation of frugality and sobriety. Utah Senator Bob Bennett stated before the May 1997 U.S. Senate hearing on the Bowl Alliance: "BYU does not travel well. I'll be very blunt. There is a perception out there, and it may

[8] Another WAC team, Wyoming, finished with an impressive 10-2 record and No. 22 ranking, and was also not afforded an opportunity to play in an Alliance bowl. One of Wyoming's two losses was to BYU in overtime.

be true, that [BYU fans] do not drink and party the way the host city would prefer. Our football coach has been quoted as saying that BYU fans travel with a $50 bill and the Ten Commandments in their pocket, and they leave without breaking either one." Bowl host committees preferred teams from larger, wealthier, and wilder states.

As the ongoing inequities in the system were revealed and challenged politically, the BCS administrators modified the plan. Between 1998 and 2008, the BCS selection process has become incrementally more open and the revenue distribution marginally less unequal. Thus, the system to date has avoided legal challenges or congressional action. Nevertheless, the BCS system remains fundamentally closed and acutely unequal, as will be detailed in the ensuing discussion.

The Functioning of the Bowl System

Beyond the BCS, of course, there is a plethora of post-season bowl games. Indeed, there has been a steady proliferation of bowl games since the 1930s, as the table below shows.

Number of Post-Season Bowl Games

Year	Number
1930	1
1940	4
1950	8

1960	8
1970	11
1980	15
1990	19
2000	25
2009	34

Thirty-four games means that 68 out of the 119 Division IA (FBS) teams, or 57.1 percent, play in a post-season bowl game. It is not a very selective club.

Outside of the BCS bowls, schools usually lose money by playing in a bowl game. Participating teams receive as little as $180,000 before expenses for some lesser bowls.[9] Including travel and per diem for the team, marching band, cheerleaders, administrators, boosters, guaranteed seat purchases (which can rise to 10,000 -15,000 tickets), schools can quickly drop a million dollars to play in a bowl game.[10] With this kind of potential financial loss, it

[9] For instance, in 2007, the New Mexico Bowl paid $180,000 to each team. Paul Rogers, *The Quest for Number One in College Football*, 18 MARQUETTE SPORTS LAW REVIEW, 285 (2008).

[10] The experience of Rutgers University in the 2008-09 in the Papajohns.com Bowl is illustrative. Rutgers received $1.188 million for its participation. It incurred the following costs: $282,610 for transportation for 205 players and

is sensible to ask: Why do colleges accept invitations to the lesser bowls? The explanation may lie along the following lines. First, there is the perception that bowl participation and national television coverage will help the football coach recruit future players. Whether this is true for top-rated talent is an empirical question, but it seems unlikely to be true for any but the BCS games. It may, though, aid in the recruitment of the second tier of high school players. Given the low television ratings of the non-BCS bowls, any such advantage derived may be due more to avoiding the dishonor of not going to a post-season bowl game, than the purported glory of going. Second, there may be a perception that the exposure of a bowl game helps to recruit

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staff (average cost $1,379); $165,799 for transportation for 187 marching band members and cheerleaders (average cost $887); $28,950 for transportation for 21 executives and administrators (average cost $1,379); $168,424 for 6 days meals and lodging for team and staff ($137 per person per day); $34,724 for 3 days meals and lodging for band and cheerleaders ($62 per person per day); $60,186 for 6 days for executives and administrators ($478 per person per day!); $217,651 for entertainment, promotion and miscellaneous; $214,000 outlay for ticket guarantees (the school had to guarantee 10,000 ticket sales, of which 5,350 the school had to pay for); and $268,365 for bonuses for football coaches and staff for making to a bowl game. Thus, the net cost to Rutgers from playing in this bowl game was $251,909. And Rutgers scaled back in 2008-09 because a public scandal erupted about athletic department excesses the previous year.

prospective students. There is some evidence that football success can increase applications to a school, but any such increase does not lead to an increase in the SAT scores or class rank of the entering class. This is because students who apply to a school because it has a good football team do not tend to score high on entrance exams or rank high in their high school class. Further, it is not clear that being in a non-BCS bowl game qualifies as perceived success. Third, for some bowl games, the college may have an historical relationship with the local bowl organizing committee that is important to the college. Participating in the bowl game may be seen as helping to preserve this relationship. This is particularly true at the conference level. Fourth, when a conference team goes to a bowl game, it produces revenue for the conference, which is then distributed to the conference schools. These schools experience no direct cost from the bowl, so they experience a (modest) net revenue gain. Many conferences, therefore, require their schools to accept bowl invitations. Fifth, going to a bowl game is a reward to the players on the team. Sixth, NCAA rules limit practice time for teams. Participating in a bowl game gives the coach extra practice time to work with his players, most of whom will return the next year. Finally, the top administrators and governors of the school may enjoy the weather, the parties, the ambience and the competition of the bowl games, and there's always the hope that the wining and dining will induce some boosters or state legislators to reach deeper into their pockets or the state's coffers.

The Skewed Economics of the BCS

While the BCS has edged toward more inclusiveness since 1998, the selection criteria of the elite bowl system today remain significantly skewed. Beginning with the 2006-07 season, a fifth BCS bowl was added -- the self-proclaimed national championship, which would be played between the No. 1 and No. 2 ranked teams, according to a BCS-established formula. The venue for this game would be rotated among the existing four BCS bowls. The existing BCS bowls would continue on the same basis; that is, the champions of the six BCS conferences (ACC, Big East, Big Ten, Big 12, Pac-10 and SEC) would have automatic berths. The teams from the five non-BCS conferences in the FBS (Conference USA, the Mid-American Conference, the Mountain West Conference, the Sun Belt Conference, and the Western Athletic Conference) can earn an automatic berth if either: (a) the team ranks in the top 12 of the final BCS standings, or (b) the team ranks in the top 16 of the final BCS standings and its ranking is higher than that of the champion of one of the BCS conferences. However, no more than one team from a non-BCS conference can earn an automatic berth in any given year. That is, there is no automatic berth for a second non-BCS team.[11]

[11] If two or more non-BCS teams satisfy the "automatic berth" provisions, then the team with the highest BCS rank will receive the automatic berth, and the remaining teams will be considered for an at-large selection (i.e., chosen at the discretion of the host bowl committee). As always, Notre Dame gets

The BCS bowls are not only the most prestigious, but they are the most lucrative. Teams that appear in one of the five BCS games in 2008-09 took home $18 million to their conference. Since the six BCS conferences are guaranteed at least one participant in the series, they are guaranteed this sum of money (on average this comes to $1.57 million per school guaranteed).[12] If one of the six BCS conferences has a second team in a BCS

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special treatment as an independent: it receives an automatic berth if it finishes in the top 8 in the BCS standings. In 2009, the BCS is working with another tweak in its selection formula. As explained on its site, *Bowl Championship Series FAQ*, BOWL CHAMPIONSHIP SERIES, http://www.bcsfootball.org/cfb/story/5900394/Bowl-Championship-Series-FAQ: "Each conference will be evaluated over a four-year period based on the [sic] three elements: the average rank of the highest ranked team; the average rank of all conference teams; and the number of teams in the top 25." As explained in the text, there are a number of factors that rigidify the status of automatic berth conferences. In the extremely improbable event that during the course of a four-year cycle one of the automatic berth conferences is threatened, the BCS conferences can always modify the procedures again, as it is the BCS conferences that govern the system.

[12] Under the BCS Agreement, Notre Dame gets an automatic $1.3 million payout each year, whether it makes it to a BCS bowl game or not. See, for instance, Nicholas Bakalar, *In BCS, Dollars Are the Only Relevant Numbers*, NEW YORK TIMES, January 4, 2009, at SP8. If Notre Dame participates in a

game, then it receives $4.5 million for the second team. Overall, during the first 11 years of the BCS system, there have been 90 appearances by BCS conference teams and only 4 appearances by non-BCS conference teams, three of which occurred during the last three years. Over the last three seasons, total payouts from the BCS bowls have amounted to $410.1 million, of which $355.1 million (or 86.6 percent) has gone to BCS conferences.[13,14]

BCS game, its take rises to $4.5 million – a sum that it does not have to share with any schools, as it operates as an independent in football. *BCS Chronology, Supra* note 4. Notre Dame's guaranteed take roughly equaled Utah's net take in 2008-09. Utah had an undefeated season, 13-0, including a sound defeat of Alabama in a BCS bowl. After sharing with the other non-BCS conferences, Utah received gross revenues of approximately $3.1 million for its BCS bowl appearance, which, after expenses, came to a net of $1.5 million.

[13] BCS conferences actually earn additional revenue. Under BCS rules, BCS conferences are required to purchase 50 percent of the seats at BCS bowls, but they pay only 60 percent of each ticket's face value. Schools apparently sell discounted tickets to students, but sell full price tickets to alumni, to boosters and to other fans. Of course, for some matchups, such as the 2008-09 contest between Cincinnati and Virginia Tech, the BCS schools will have to sell most of their tickets at the discounted price and their revenue gain will be more modest.

In addition to the BCS payouts, the BCS conferences have numerous tie-ins (guaranteed appearances) with other bowls: the SEC has a total of 9 bowl ties, as do the ACC and Big 12, while the Big 10 and Pac10 each have 7 tie-ins. Overall, in 2008-09, 44 BCS teams (including Notre Dame) and 24 non-BCS teams played in postseason bowl games.[15] Significantly, the total

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[14] In addition, each year the BCS makes a total $1.8 million payout to the FCS conferences. (*2008-09 BCS Media Guide,* 10 (2008), *available at* http://msn.foxsports.com/id/8765284_37_1.pdf.) According to Tulane University President Scott Cowen, during the first five years of the BCS, 63 BCS schools earned approximately $500 million, while 52 non-BCS in DIA earned $17 million. (Testimony of Scott S. Cowen, President of Tulane University, before the U.S. House of Representatives, Committee on the Judiciary, Oversight Hearing on "Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series," September 4, 2003.) Part of the payouts to non-BCS schools now come in the form of a *de minimus* payment to a school for "making itself available to participate in a BCS bowl." Thus, Temple University, Army and Navy were each granted a $100,000 participation fee in 2005 and 2006. *BCS Chronology*, *Supra* note 4. Temple is no longer independent and, hence, no longer receives the separate fee.

[15] The ratio in 2007-08 was a bit more unequal, with 44 BCS teams and 20 non-BCS teams. In 2006-07, it was 43 BCS to 21 non-BCS; in 2005-06, it was 39 to 17; in 2004-05, 36 to 20; and, in 2003-04, 40 to 16.

payout from the 29 non-BCS bowl in 2008-09 was $82.6 million (an average of $2.8 million per game or $1.4 million per participating team), while the total payout from the five BCS bowls was $142 million (an average of $28.4 million per game or $14.2 million per team). The total payout from all bowl games in 2008-09 was $224.6 million, of which $187.7 million (or 83.6 percent) went to the BCS schools.[16]

While the incremental reforms to the BCS selection process have allowed the BCS conferences to allege that their system is open to all, the

[16] The BCS conferences use somewhat different formulas in dividing the bowl revenues among the schools in the conference. The most common system is to provide a travel budget for the participating school and then divide the balance equally among the schools in the conference. This practice is followed in Big Ten, the ACC, and the Pac10. The Big East pays schools that make a BCS bowl game $2.4 million, with decreasing amounts for lesser bowls. In 2007, West Virginia received the most total revenue from the Big East conference (from all sources, including conference media deals and March Madness) at $4.66 million and Syracuse received the least at $2.53 million; in the Big 12, the top recipient was Texas at $9.5 million and the bottom was Oklahoma State at $6.6 million; in the SEC, the top recipient was Alabama at $13.2 million and the bottom recipients were Auburn and Mississippi each at $10.6 million. This data are from 990 Forms obtained from *GuideStar Non-Profit Reports and Forms 990 for Donors, Grantmakers, and Businesses*, GUIDESTAR, http://www.guidestar.org/index.jsp.

outcomes in participation and in revenue bear no resemblance to an open system. Given the fact that the BCS conferences with 54.6 percent of the FBS teams receive approximately 87 percent of the BCS revenues, it is hardly surprising that the BCS teams are able to maintain their competitive superiority. The revenues are used to build the biggest and best facilities, provide the best academic support networks, hire the most renowned coaches and conduct the most extensive and expensive recruitment drives.

The postseason revenue advantage for the BCS schools is thereby extended to a regular season revenue advantage. Among other things, the BCS schools play in larger stadiums; this, together with their greater prestige, enables them to make the case that when they play non-BCS schools during the regular season, they should not play home and home schedules. Rather, they play disproportionately at the BCS team's home field. The non-BCS team receives a modest guarantee fee and the BCS team retains the lion's share of the gate, concessions, catering, signage and parking revenue from the game. In fact, between the 2002-03 and 2008-09 seasons, 80.7 percent of the 751 games between BCS and non-BCS teams were played on the BCS field.[17]

[17] This pattern has been in place at least since the beginning of the BCS. According to Tulane President Cowen's 2003 Congressional testimony, during 1999-2002, the top 10 BCS teams played 65 home games against non-BCS schools, but only 11 road games.

The inequality is further aggravated by the presence of a clear home field advantage. In the 570 regular season matchups between BCS and non-BCS teams from 2002-03 to 2008-09 that were played at the BCS home field, the BCS won 493 for a .865 winning percentage. In the 181 matchups played at the non-BCS home field during this period, the BCS won 113 for a .624 winning percentage.[18] Thus, despite the occasional superlative performance of a standout team (e.g., the regular season records of Tulane, 11-0 in 1998, Boise State, 12-0 in 2006, Hawaii, 12-0 in 2007, Utah, 12-0 in 2008, plus a decisive BCS bowl victory against Alabama), the prejudicial selection and revenue rules of the BCS appear to be bifurcating the FBS subdivision of Division 1 and engendering a caste system.

[18] In the 45 bowl matchups between BCS and non-BCS schools over the 2002-03 to 2008-09 period, the BCS schools won 30 games for a .667 winning percentage. During the period 1998-99 to 2002-03, BCS and non-BCS schools met in 16 postseason bowl games and the record was an even 8 and 8. Thus, despite the occasional standout performance, the non-BCS schools appear to have become less competitive with the BCS schools on the gridiron – again, reinforcing the notion that the BCS is maintaining a caste system in FBS football.

The BCS Defense of Its System

SEC commissioner Mike Slive was asked about the possibility of a playoff system replacing the BCS. As published on Fox's BCS website, Slive's response was as follows: "There really is no interest exhibited presently by our presidents or chancellors or many others in having a playoff. I try to think about it in terms of, 'what is in the best interest of college football?' I think three principles need to be applied. One is that college football is part of higher education, part of the academic mission of our institutions and that's an important piece of the puzzle that's always going to be there. Two, football has a wonderful regular season, an exciting regular season that's maybe the best regular season of all sports. Three, we've had a wonderful 100-year relationship with the bowl system. So the postseason has to meld those three systems into something that is good for college football."[19]

Slive's three-part explanation is the standard defense. The first point is that if the FBS went to a playoff system, then it would interfere with the integrity of the educational process. Presumably, the substance behind this point is that if there were an 8-team playoff, then some schools would have to play two additional games in January beyond what they play in the current arrangement; or three additional games if there were a 16-game playoff.

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[19] *Bowl Championship Series FAQ*, BOWL CHAMPIONSHIP SERIES, http://www.bcsfootball.org/cfb/story/5900394/Bowl-Championship-Series-FAQ.

Adding more games to the season would require more time away from classes for the football student-athletes.

The second point is that introducing a playoff system would undermine the integrity of the regular season. Here the substance is less apparent, but the reasoning goes something like this: in a playoff system, a school might qualify for a berth before it completed its season; in the present bowl system, qualification for the national championship game depends on a school's performance in all of its games, via the BCS rating system. In the case of qualification for the playoffs occurring before the season's end, the qualifying team may not make an all-out effort to win in its last game. It is asserted that this would be less likely to happen under the BCS arrangement.

The third point is that there is unique tradition and historical value to the bowl system. A bowl culture has emerged around this system that works commercially as well as emotionally, and it would be risky to tinker with it.

Response to the BCS Rationale

The first point is frequently met with derision by BCS detractors. If the BCS conferences are concerned with the length of the playing season why have they steadily added games over the past two decades? Most recently, a twelfth regular season game was added by the NCAA in 2005 and many conferences have introduced conference championship games. Further, any additional games likely would be played during the Christmas and interterm break. If the BCS conferences are willing to let their basketball teams top off

the hoops season with 65-team playoff in March, during the academic semester, how can they credibly argue that they are holding back the further commercialization of football in order to preserve academic integrity? Finally, the FCS (Division IAA), Division II and Division III football all have postseason playoffs, some with 16 teams, as do all other NCAA championship sports. It is nonsensical to pretend that the FBS (Division IA) should be any different, particularly when the national championship is at stake.

The integrity of the regular season argument may contain a grain of truth; that is, over time it may, in fact, turn out that there will be a few more games at the end of the season where one of the teams is not making a full effort under a playoff system. It may also not be true. Among other things, it would depend on the playoff selection process. For instance, if the winners of the 11 FBS conferences with the 8 best records were chosen (against FBS schools), then there would be no reason for such an effect. Additionally, if the playoff seeding system depended on the entire regular season, the probability of any slacking off during the last game would be minimized.

A corollary to this argument is that the BCS would never produce significant postseason anomalies, such as that which occurred in the NFL in 2008-09 when the Arizona Cardinals, with 9 wins and 7 losses, made it all the way to the Super Bowl. Doubtless, this is true. No 9-and-7 team would ever make it to a BCS bowl. Yet, one must recall that the philosophy of postseason competition in the NFL is cast differently. The NFL wants there

to be as much excitement to the regular season for as long as possible, so it takes both division winners and wild cards into the playoffs. In all, the NFL admits 12 of its 32 teams (37.5 percent) in the postseason chase to the championship. NFL fans do not complain that the regular season loses integrity. In fact, as we shall see, a different kind of integrity emerges. The BCS currently accepts 10 of the 119 FBS teams (8.4 percent). Further, the NFL postseason deliberately seeks a geographical spread in its team selection; something that is not an explicit concern nor necessary outcome of the BCS process.

Either way, the response to this concern is clear and compelling: the same problem inheres to all U.S. professional and college team sports, and in all other cases the leagues and the fans have shown a clear preference for the playoff system. One does not hear NFL fans calling for a one-game championship, with team selection based on a numerical ranking system, to replace the current multi-tiered playoff system, so that the possibility that a first place team would not make a full effort during its last game could be avoided.

The argument about the tradition of bowl games is rarely fleshed out. The most persuasive explanation I have heard goes something like this. Under the current bowl system there is a one-week, one-venue postseason. This enables students, boosters and other fans to make one trip to one southern city during the Christmas and interterm break. They usually make a several day or week-long vacation out of the trip and hang out with their

fellow students and fans. It is a bonding and fun experience. The host city of the bowl game, in turn, fills its hotel rooms, bars and restaurants, and it is thought to provide a significant economic benefit to local businesses. The business community returns the favor by providing perquisites and comforts to conference and college administrators.[20] College presidents, trustees and their families all have a grand time in the warm climate. Such is the unique tradition of college bowl games. Why would any beneficiary school or conference want to share this privilege?

The explanation continues that if your team is successful in round one, then there is a second game in a new venue the next week. One cannot reasonably expect the entourage of students, boosters, fans and administrators to repeat their spending spree from the first week. And the logic extends *a fortiori* to the third and possible fourth (in a 16-team playoff) week. The

[20] In a rather odd twist to the normally stringent strictures of NCAA amateurism, gifts are also provided to players at the bowl games. For instance, players participating in the 2008-09 national championship game in Miami were able to go to a suite at either the Westin Diplomat or the Fountainbleu to pick out $300 of Sony Electronics products of their choice. The players left an address and the goods were shipped for them. Lesser bounties were provided to players in the other BCS and non-BCS bowl games. See, for instance, Danielle Oliver, *2008 Bowl Gifts to Participants*, 31 SPORTS BUSINESS JOURNAL, 25 (2008).

host cities do not reap the same bonanza and the special quality of week one is diluted.

The reasoning here appears sound – the culture of the bowl games probably would change somewhat. Detractors, though, see little reason to hold a playoff system hostage to this peculiar cultural tradition. Under a playoff system, students, boosters, fans and administrators could choose how many and which games to attend. They could still plan a festive vacation at the site of the first-round game. Bowl cities could remain the hosts of the first-round games, and possibly subsequent round games as well.

If the three proffered defenses are unavailing, then the question remains: why do the BCS conferences cling to the system? The answer is simple: money. The BCS functions largely as a de facto CFA[21], the short-lived organization of the equity conferences in the late 1970s and early 1980s that threatened to withdraw from the NCAA and strike its own national television deal. The CFA did not want to share its revenue-generating potential with the other Division IA conferences, much less the rest of the

[21] College Football Association. For a concise explanation on the facts surround the CFA and its antitrust problems, see John Siegfried and Molly Gardner Burba, *The College Football Association Television Broadcast Cartel*, 49 THE ANTITRUST BULLETIN, 799 (2004). The CFA schools do not overlap perfectly with the current BCS schools. For instance, the Big 10 and Pac-10 did not join the CFA, and several schools were in the CFA that are not in the BCS.

NCAA. The BCS provides a structure that guarantees top bowl appearances, guarantees $18 million per BCS conference and guarantees the privileged relationship with host cities. The BCS conferences share roughly 13 percent of BCS revenue with non-BCS schools.[22] The rest is theirs. If the NCAA organized a playoff for the national championship, as it does with its other championship sports, the generated revenue, in all likelihood, would be shared equally within Division IA (FBS), more fully within the rest of Division I and with a standard share going to Division II (4.37 percent) and Division III (3.18 percent). More on this below.

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[22] The *2008-09 BCS Media Guide* on page 10 explains that the non-BCS schools receive a guaranteed 9 percent of BCS *net* revenue and an additional 9 percent of *net* revenue if one of the non-BCS schools plays in a BCS bowl. It also states that 9 percent of net revenue in 2008-09 was equal to approximately $9.5 million. Net revenue is not defined in the *BCS Media Guide* and I inquired of several ADs at non-BCS schools, but none knew how net revenue was reckoned. Bill Hancock, the BCS Administrator, emailed me, stating that the actual net revenue figures were confidential, but that the formula was gross revenue (excluding the Rose Bowl revenue) less annual budgeted expenses (approximately $4.5million), less than annual payments to FCS conferences (total of $1.8 million), less the annual payments to Army and Navy (total of $0.2 million). Thus, without the $22.5 million payout from the Rose Bowl, the BCS net revenue in 2008-09 was $105.8 million.

Critique of the BCS Ranking System

When the BCS ranking system was first introduced in 1997, it contained four distinct elements which were then averaged to produce the overall rankings. Since that time the system has been changed in one way or another at least seven times.[23] The BCS likes the public to believe that these tweaks are part of perfecting the system. The reality appears to be rather different. The changes seem to respond to political pressure, mostly from

[23] Some of these changes include the following. In 1999, 5 computer rankings were added, making the total 8, with the policy to average the top 7 ratings for each team. In 2001, 2 computer rankings were dropped and 2 new ones were added with the BCS taking an average of the middle 6. Also in 2001, a fifth element was added – quality wins. This element added extra ratings points for victories against teams ranked in the top 15. In 2002, the margin of victory was dropped as an element in the ranking formula; there was also an adjustment, adding and subtracting computer ratings. In 2004, it was decided to remove the elements of strength of schedule, team record and quality wins because they were already reflected in the computer rankings – essentially admitting that these elements had been double counted in the past. The team rankings were now a product of the average of three elements: the average of the computer rankings, the AP media poll and the *USA Today* coaches' poll. In 2005, the AP announced that it would no longer allow its poll to be used in the BCS rankings; it was replaced by the newly created Harris Interactive Poll.

BCS coaches, and to have done nothing to make the rankings more statistically robust.

The use of computer rankings gives the appearance of a scientific selection process. The reality is that the computer rankings are only as good as the human instructions that are inputted into the computer. In this sense, computers are like transportation vehicles: if I am driving from New York to Boston, and I end up in Middlebury, Vermont, I could not persuasively blame my car.

The BCS computer rankings lack conceptual clarity. The BCS has never made it clear what it is that they want the computer rankings to do. Do they want them to: (a) measure each team's accomplishments (e.g., whom they played and whom they beat), (b) predict the probability of each team winning going forward, (c) weight equally early season and late season victories, (d) give greater weight to recent performance of the team, (e) award teams for their consistency, (f) give greater recognition to a team's dominance, etc.? The BCS has never publicly discussed nor identified these possible desiderata. In economists' jargon, if an objective function isn't specified, then maximization makes no sense.

The lack of conceptual clarity is then aggravated by the periodic shifts in the formula. Notably, in 2000, as in many years, the first choice for the national championship game was obvious; the second choice was ambiguous and hotly disputed. Oklahoma got the first nod. The BCS system selected once-beaten Florida State, even though Florida State had lost to once-beaten

Miami during the season. Miami, in turn, had lost to once-beaten Washington. Had the quality win bonus been in effect in 2000, then Miami, which won out in the coaches' poll, would have been selected over Florida State. Not surprisingly, the quality win bonus was introduced in 2001 – and has since been dropped. A similar conundrum presented itself in 2001; this time between selecting Nebraska or Oregon to play the manifest choice, Miami. Once-beaten Nebraska was chosen over once-beaten Oregon, even though Nebraska was solidly defeated in its last regular season game and was not even the Big 12 champion. The popular perception was that the computer rankings gave too much weight to Nebraska's large margin of victory in its early-season games. The BCS commissioners decided to expunge margin of victory as an element in the formula from 2002 forward.[24]

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[24] These examples and much of this argument was first developed by Hal Stern in *Statistics and the College Football Championship*, 58 THE AMERICAN STATISTICIAN 179 (2004) and Hal Stern, *In Favor of a Quantitative Boycott of the Bowl Championship Series*, 2 JOURNAL OF QUANTITATIVE ANALYSIS IN SPORTS 4 (2006). Also see, Bill James, *Boycott the BCS!*, SLATE, January 7, 2009, http://www.slate.com/id/2208108/. In 2001, Nebraska was trounced by Miami 37-14, while Oregon went on to dismantle the BCS No. 3 ranked Colorado. The anomalies did not stop there. In 2003, Oklahoma, LSU and USC finished with one loss each. Oklahoma lost in the Big 12 Championship game, but remained No. 1 in the BCS ranking. LSU edged out USC for a shot at the "title" and went on to beat

We have here an arbitrary decision and a statistical curiosity. To be sure, there is an issue of good sportsmanship and no one wants to encourage teams to run up the score when facing weak opponents. However, the BCS has mandated that margin of victory cannot enter the equation at all, so that at 20-17 win has to be treated as identical to a 30-10 win. This is throwing away valuable information. It would make more sense to truncate the margin of victory at, say, 20 points, so a 49-10 win was treated the same as a 30-10 win, but not to consider it a matter of irrelevance whether a team wins by 20 or 3 points?

Similarly, the BCS has decided that the site of a game cannot enter into the formula. This stricture appears to be little more than intellectual stubbornness, at best, and obscurantism, at worst. There is clear evidence, some of it presented above, that there is a decided home team advantage in college football. Statistician David Harville has estimated this advantage to

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Oklahoma. USC beat Michigan in the Rose Bowl and finished No. 1 in both of the human polls. The 2004 season ended with five undefeated teams. USC and Oklahoma were selected for the title game and USC humiliated Oklahoma, 55-19. Meanwhile, Auburn, the undefeated champions of the powerhouse SEC, was not given a shot at the title. In 2006, Florida, Michigan, Louisville and Wisconsin had one loss apiece and undefeated Boise State waited to see who would face No. 1 Ohio State. Florida was chosen and pounded the Buckeyes 41-14.

be approximately 4 points per game.[25] If college football fans are to be stuck with the BCS system to determine the national championship, the least the BCS could do is devise a less politically-driven and more statistically robust ranking system.

Finally, the coaches' poll itself has been subjected to sharp criticism. The fundamental concern is that coaches have a potential conflict of interest when they cast their votes. They also see a small number of the eligible schools in action, so there are questions about the empirical basis upon which coaches' form their evaluations. There is also evidence of a bias toward teams that coaches have observed first hand.

Antitrust Considerations

Does the BCS violate U.S. antitrust laws and is it vulnerable to an antitrust challenge? As anyone familiar with the record of antitrust litigation in this country knows, there is always substantial uncertainty in such matters. Part of the uncertainty results from the merits of the case, but a significant part of it results from the venue of the challenge, the judge and the jury

[25]David Harville, *A Penalized Maximum Likelihood Approach for the Ranking of College Football Teams Independent of Victory Margin*, 57 THE AMERICAN STATISTICIAN 241 (2003), and, David Harville & Michael Smith, *The Home Court Advantage: How Large Is It, and Does It Vary from Team to Team?*, 48 THE AMERICAN STATISTICIAN 22 (1994).

selected, and the skills of the lawyers bringing the case. It seems that these subjective elements become particularly prominent in antitrust matters.[26]

A good place to begin in order to assess the antitrust substance involved is with the 1984 Supreme Court decision in Board of Trustees of the University of Oklahoma v. NCAA. In this landmark case, the University of Oklahoma sued the NCAA over its national TV contract, in which the NCAA limited the number of appearances on national television to a maximum of three for any team and arranged for each participant to receive the same payment, whether it was a popular game such as Oklahoma playing Michigan or an obscure game such as Appalachian State playing Temple. The decision in this case against the NCAA established much of the relevant jurisprudence for understanding the antitrust treatment of college sports.

First, the Supreme Court made clear that horizontal restraints on output (and price) are condemned. Second, the Court found that "The NCAA creates a price structure that is unresponsive to viewer demand."[27] The Court further stipulated that: "A restraint that has the effect of reducing the

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[26] What follows in the text is not meant as a complete antitrust analysis. To do such an analysis would require a careful discussion of market definition, as well as a consideration of each of the different markets impacted by the BCS cartel. These markets include the bowls, the television networks, and the advertisers, each are potentially negatively affected by the BCS monopoly. My discussion concentrates on the final consumers.

[27] NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 107 (1984).

importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law."[28] The Court concluded: "Today we hold only that the record supports the District Court's conclusion that, *by curtailing output and blunting the ability of member institutions to respond to consumer preference***,** the NCAA has restricted, rather than enhanced, the place of intercollegiate athletics in the Nation's life."[29] (emphasis mine).

As it pertains to the BCS, these are the key precepts from the 1984 decision. They lead to the following fundamental question. Can it be shown that there is a horizontal combination that restricts output, distorts prices, and drives resource allocation away from maximizing consumer welfare?

That there is a horizontal combination among the 65 BCS schools is not in question. The only question is whether this combination is incidental and necessary to developing a national championship; and, if it is, whether it

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[28] NCAA 468 U.S. at 108. Notably, in another part of the decision, the Court gets its economic analysis wrong. "The television plan protects ticket sales by limiting output – just as any monopolist increases revenues by reducing output." NCAA 468 U.S. at 117. Monopolists operate on the elastic portion of their demand curves, so when they reduce output and raise price, their revenue declines. The trick is that costs decline more rapidly than revenue, enabling profit maximization.

[29] NCAA 468 U.S. at 120.

is the least restrictive form this combination can take. Let us consider these various elements in turn.

Does the BCS create a reduction in output? The answer here depends on to what the BCS is compared. If it is compared to an 8- or 16-team playoff system, it seems manifest that there is a reduction in output. The only issues here are: (a) whether the extension of the postseason into January for a minority of teams would compel a reduction of regular season games by one and (b) whether the total eyeballs watching and the total revenue generated by the postseason would increase. The first issue would become irrelevant either if there were no regular season reduction in the number of games or if the market was defined to include only competition for the national championship. The latter appears plausible given the 1959 Supreme Court decision in International Boxing v. United States, that championship fights are a separate market from non-championship fights because of the huge payout differential.

The second issue is empirical, but *a priori* does not appear to be a serious concern. Many television industry mavens have estimated substantial growth in rights fees by a move to either an 8-game or 16-game playoff from the current BCS arrangement. Depending on the playoff system, a doubling or more of television revenue is often estimated.[30]

[30] Darren Rovell estimates that rights fee would go up 2.5 times initially, and even more after the Rose Bowl is collapsed into the mix. (Darren Rovell, *College Football Playoffs: I'll Say They're Worth $160 Million a Year,*

If the playoff were effectively organized, it seems that the only practical issue would not be whether it attracted more eyeballs and created more revenue, but whether, given the diminished share of the overall take going to the BCS schools, it generated more net revenue for the BCS schools.

The BCS response to this argument would probably be that the wrong standard is being applied. The BCS should not be compared to some future hypothetical playoff system, but rather to the system that prevailed prior to the organization of the BCS. Prior to 1992, there was no national championship game, and the top two ranked teams rarely played each other at

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CNBC, January 9, 2008, http://www.cnbc.com/id/22570730.) Cowen (2003 testimony) cites Neil Pilson who estimates that there would be a big boost in TV rights fees from a playoff structure. DeLoss Dodds, AD at the University of Texas, believes that a playoff system would be so popular that it would add at least an extra $1 million in revenue for every team playing Division IA football. Others have offered similar estimates. See, for instance, KEITH DUNNAVANT, THE FORTY-YEAR SEDUCTION: HOW TELEVISION MANIPULATED COLLEGE FOOTBALL'S EVOLUTION FROM SPORT TO BIG BUSINESS, 187 (1997). who cites estimates of television revenues from a 16-team playoff of $200 million a year or more. More generally, it would be of interest to essay an estimate of the anticompetitive harm from the BCS arrangement, but such an effort would take me too far afield from my present purpose.

season's end. The BCS precursors (the Bowl Coalition and the Bowl Alliance) improved on this situation and the BCS added the Pac-10 and Big 10 into the mix, giving still greater legitimacy to the national championship. Since that time, the BCS has made it marginally easier for non-BCS schools to play in a BCS bowl. Hence, the BCS can argue that each step it has taken has been toward opening competition, rather than shutting it down. From this perspective, the BCS is procompetitive.

This is a substantial argument. Yet, the previous system was itself a network of exclusive dealing contracts that also probably violated the antitrust laws, so going from one anticompetitive system to another does not make the latter procompetitive.

The question remains whether the BCS is engaging in ongoing exclusionary acts to curtail greater competition. At least four antitrust claims might be advanced against the BCS in this regard. The first is a Section One claim of unlawful boycott or concerted refusal to deal, i.e., a collective action by a group of competitors for the purpose of excluding or otherwise interfering with a potential competitors' access to the market in which they compete. For such a claim to prevail, the plaintiff must prove harm to competition and consumer welfare, not just harm to an individual competitor. The second is a Section Two, or attempt to monopolize, claim. Given the Supreme Court's finding in International Boxing v. United States, the case could be made that the BCS is attempting to monopolize the market of college championship football. Here, the argument could be that the BCS

conferences are allowing access to the market, but they are not doing it in an objective, non-discriminatory manner. As such, they have the specific intent to exercise monopoly control over this market. The third claim is related and usually represents a more problematic legal path to pursue. It could be argued that the BCS is an essential facility and without fair access to the facility, it is impossible for potential competitors to enter the market.[31] The fourth claim might be challenging the rule that limits the non-BCS conferences to one automatic appearance in a BCS bowl as a restraint of trade. Such a rule will produce inferior BCS matchups if the second non-BCS school is stronger than one of the selected BCS teams

The BCS may also be vulnerable to claims of price fixing. Each of the 5 BCS bowl games, including the national championship, carry the same payout to the participating teams. This is so despite the fact that the national championship game regularly has the strongest ratings by a healthy margin and some of the remaining BCS games have considerably higher ratings than others, yet the payout is identical to all bowls regardless of ratings or attendance.[32]

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[31] The essential facility doctrine suffers from a lack of intellectual clarity and was dealt a blow by the Supreme Court in its 2004 Trinko decision (Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004).

[32] Gary Roberts in his 1997 testimony before the Senate Judiciary Committee argues that the formation of the Bowl Alliance was simply another form of

One sometimes hears the claim that that there is nothing that stops the NCAA or the Non-BCS conferences from organizing their own championship. Unlike in the MIBA v. NCAA case, where the NIT blamed its inability to attract top teams to its postseason tournament at Madison Square Garden on an NCAA rule which obligated member colleges to play in the Association's March Madness tournament if selected, Division I teams are

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restricting output. That is, it moved the postseason from a world where there were a dozen or so high profile postseason games to one where four games were singled out as the only significant ones. Roberts states: "Payouts by the three Alliance bowls (the Fiesta, the Sugar, and the Orange) after the 1994 season were less than half the $8.5 million payout they were forced to make after the 1996 season. These bowls, however, are merely the conduit, with the ultimate 'victims' of the monopoly pricing being the fans who had to pay dramatically higher prices for game tickets (Sugar Bowl ticket prices doubled from $50 to $100 in 1995, the first year of the Alliance), corporate sponsors like Nokia (Sugar Bowl), and the networks had to pay dramatically greater rights fees (which are then passed on to advertisers and eventually to consumers.)" (Gary Roberts, "On the Legal and Public Policy Effects of the College Football Bowl Super Alliance," testimony before the U.S. Senate Judiciary Committee, May 22, 1997.) Of course, such a claim would need to provide empirical evidence that the dozen or so high profile bowls were really at the same level of interest in the public's mind. Roberts does not provide this evidence.

not required by the NCAA to play in the BCS if selected.[33] Similarly, there was coercion involved in the Board of Regents v. NCAA case, because the NCAA threatened CFA schools with retaliation if they went ahead with their own TV contract. The NCAA further stipulated that any retaliation would not be limited to the schools' football programs.[34]

Yet, this defense of the BCS is unavailing. In fact, the BCS does require its schools to participate in the bowl games for which they are selected, making it next to impossible for a competing competition for the national championship to be established.

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[33] In 1953, the NCAA passed a rule that schools could only participate in one postseason tourney. In 1961, it passed another rule that schools were "expected to participate" in the NCAA tournament. And, in 1981, NCAA passed a "commitment to participate rule," obligating chosen schools to play in its March tournament. The NCAA settled the MIBA suit by buying out the NIT tournament for $40.5 million, plus $16 million to settle the suit.

[34] Thieme argues that if the NCAA were to organize its own postseason playoffs among the FBS schools, it would need to impose the "commitment to participate" rule or the top football teams would not participate. (Eric Thieme, *You Can't Win 'Em All*, 40 INDIANA LAW REVIEW 453 (2007). If this were true, the NCAA could presumably appeal to Congress for an antitrust exemption for this explicit purpose. There are, however, several other scenarios that seem plausible to avoid this problem.

There remains the question of whether there are less restrictive alternatives available to the current BCS system. It seems there are several compelling, less restrictive alternatives. The most obvious is to have the NCAA run a national championship tournament, as it does in basketball and in Division IAA (FCS), Division II and Division III football, among playoffs in all its other championship sports.[35] The Division III championship, for

[35] Such a solution raises the question: isn't one monopoly (the BCS) being substituted by another (the NCAA). The answer is yes, but in the case of the NCAA it would be a more inclusive monopoly that would enable an increase in output and a more legitimate process for determining the national champion. It would also enable a more equitable sharing of the postseason football revenue across the FBS conferences, the rest of Division I, and Division II and III. This more equal distribution would, in turn, reduce the incentive to a school to produce the national champion and may assist in controlling runaway program costs. Another less restrictive alternative would be to end the BCS system and throw the process open to the market, wherein particular bowl committees may be motivated to set up their own playoff system. The bowl committees would have to induce schools to choose their bowl system over another, which they would presumably do via higher rewards. The television networks may benefit from such competition among the bowls via lower rights fees (though there may also be disproportionately lower ratings). In such an arrangement, it is far from clear

instance, began in 1973 as a single elimination tournament with four teams. It became an eight-team single elimination tournament in 1975 and the current format has 16 teams. Division IAA also has a 16-team playoff. Another option would be to reform the BCS into an 8-team playoff that opened more automatic berths to today's non-BCS conferences, along the lines proposed by the Mountain West Conference (MWC) in early March 2009. The MWC proposal, *inter alia*, calls for any of the non-BCS conferences that maintain a .400 or better win percentage in inter-conference games against schools from the current BCS conferences to receive an automatic berth.[36]

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that consumers would benefit, as the determination of a national champion would be left largely unresolved.

[36] There are time periods specified and multiple other provisions in this proposal. The details of the proposal raise a host of questions. First, the plan presently favors the MWC over the other non-BCS conferences. Second, the plan's ranking system still involves deliberation by a committee of interested parties, thereby, extending the conflict of interest problem that inheres now to the coaches' poll. Third, the plan would require the NCAA to vote to lengthen the football season in the FBS, though this should be possible to do given that some FCS schools now play a 15-game season. Thus, while the details of the MWC plan may need to be reworked, it does suggest yet another alternative strategy: to keep the BCS but develop more inclusive rules and a playoff structure.

The foregoing discussion makes clear that there are substantial antitrust concerns, but there is also the basis for a viable legal defense by the BCS. The outcome of a rule of reason case would be far from certain. There are also valid questions about whether it is likely that a legitimate plaintiff will emerge. The non-BCS conferences and schools have shown no inclination to jump into the fray. Any antitrust battle would be protracted, risky and expensive. Because past damages may be difficult to establish, even a legal victory might result in an injunction, rather than a payment of triple damages. Moreover, there is a high degree of mobility among coaches and administrators, so any high level actor would be reluctant to promote a legal challenge when it might restrict his future career opportunities.

Certainly, state attorneys general can threaten to sue, as the Utah attorney general is now doing, but such efforts have not proceeded to court and are more likely public relations displays of frustration, holding out for the possibility that the BCS will throw a few more crumbs in its direction. The Federal Trade Commission has no jurisdiction over the non-profit sector which leaves the Antitrust Division of the Justice Department as the only hope at the national level. While the Antitrust Division has looked into this matter in the past, it has never decided to prosecute. Gary Roberts suggested that there have been strong political pressures on the Department of Justice not to tinker with the elite bowl system.[37] It is possible, however, with the

[37] Gary Roberts, *supra* note 32.

critical attitude toward the BCS of President Obama that this dynamic might shift.

Pursuing Legislation, Not Litigation

The evolving jurisprudence on antitrust has made the pursuit of litigation increasingly difficult and enormously costly. The problematic antitrust landscape is compounded by the schizophrenic existence of college sports. The NCAA and its members have been successful in being legal chameleons – depending on the exigencies at hand, either purveyors of an extracurricular educational activity or sellers of big-time sports entertainment. With this confusion, the law has often given college sports a pass, no doubt because big-time college sports is so popular with the public, making radical change of the status quo politically unacceptable to most courts. Until now, attacking the BCS has also been too politically perilous for most legislators, but the new administration may embolden a few key members of Congress to awaken from their slumber.

It seems apparent that the NCAA will not be motivated to initiate a plan for a postseason playoff. Indeed, the NCAA President, Myles Brand, has stated that the NCAA has no interest in a postseason FBS playoff. The BCS conferences dominate the Association's governing structure. For instance, even though the 65 BCS schools represent less than 7 percent of the NCAA's membership, they occupy 5 of the 18 seats (28 percent) of the seats on the Association-wide Executive Committee and even though the BCS

schools comprise less than 20 percent of the Division I membership, they hold 6 of the 18 (33 percent) seats on the Division I Board of Directors.[38] Beyond this, the BCS schools represent the commercial and revenue-generating might of the NCAA. If the NCAA attempts to compete with the BCS conferences via a postseason football playoff for the national title, the expectation is that the BCS conferences would withdraw from the NCAA. This would effectively undermine the NCAA's power in intercollegiate sports. Therefore, the NCAA would need exhortation, guidance and support from the courts or congress before it would organize a football playoff system.

There are multiple ways that Congress could address legislation to promote a football playoff. Perhaps the most direct would be to introduce legislation that withdraws the tax preferences for intercollegiate athletics,[39] if the NCAA does not initiate a championship playoff.

It might be helpful if such legislation also gave the NCAA a limited antitrust exemption so that it could require member schools, if selected, to participate in its playoff structure. The BCS conferences now require their schools to participate in bowls when selected. To be sure, mandatory

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[38] Of course, the 65 BCS schools also represent a majority of schools within Division IA (FBS) and are unlikely to vote away their privileged status.

[39] These preferences are discussed in ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS. Ch. 6 (2001).

participation requirements are problematic as they restrict potential competition. If one concludes, however, that the college football championship system constitutes a natural monopoly, then such a participation requirement would not be problematic.

Alternatively, the legislation could bypass the NCAA and set up a National Sports Commission. The commission could establish its own college football championship, and perhaps fulfill other oversight functions in the sports world as well, including drug testing. After all, if sports leagues are natural monopolies, economic theory teaches us that it is more efficient to regulate them than to break them up.

The legislative details would be easy enough to work out, if Congress has the will to act. The central argument in this piece is that a true national championship in college football has been held hostage by a football cartel of the six equity conferences in the BCS. Breaking apart this cartel is too important to leave to the caprices of our legal system and antitrust practice. A national football playoff would increase output, redirect output to be more responsive to college football fans across the country, give broader opportunity to football players throughout the FBS, and assert a commitment to the basic principles of fairness that inhere to the ideals of democratic governance.

Today, all FBS teams do not start out on a level playing field. They cannot have the experience of the Rice University baseball team, from the

smallest FBS school in the country, which rose to win 2003 College World Series.

Bernie Machen has been the president of the University of Florida, a SEC/BCS school, since January 2004. Prior to this, he was president at the University of Utah, so he has seen the BCS debate up close from both perspectives. In February 2009, President Machen commented: "When I was at Utah, our athletics budget was around $20-22 million per year. Our budget here is $84.5 million … and the major difference is the bowl revenue and TV revenue …. I don't think most people begrudge what we got because of being in the championship game, but all SEC schools got the same amount of money that we got. And Utah could beat a lot of SEC schools. That's the unfairness. I think that's got to be fixed one way or the other. One way to fix it would have been a playoff."[40]

Scott Cowen, the President of Tulane University, put it well in this testimony before the House Judiciary Committee in September 2003: "Our country is based on the idea of equal opportunity for all, and our educational institutions are dedicated today to the principles of access, inclusiveness, fairness, and consistency. It goes against everything we hold dear to allow – even encourage – a system that showers financial and reputational rewards on

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[40] Mike Bianchi, *UF President Bernie Machen Talks Typical BCS Baloney*, ORLANDO SENTINEL, February 23, 2009, *available at* http://blogs.orlandosentinel.com/sports_bianchi/2009/02/uf-president-bernie-machen-displays-typical-bcs-hypocrisy.html.

one member while unnecessarily denying or limiting the opportunity for another member to earn the same rewards."