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Antitrust, Governance, and Postseason College Football

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ANTITRUST, GOVERNANCE, AND POSTSEASON COLLEGE FOOTBALL

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Abstract: This Article examines the compatibility of the Bowl Championship Series (BCS) with federal antitrust law and the appropriateness of the federal government using its formal and informal powers to encourage a new format for postseason college football. The Article begins by examining the legality of the BCS under sections 1 and 2 of the Sherman Antitrust Act. While the BCS suffers from blatantly anticompetitive features, its procompetitive virtues would likely prove dominant in a rule of reason analysis. The BCS also benefits by virtue of myriad obstacles associated with instituting a college football playoff system. The Article then discusses the appropriateness of government actors concerning themselves with, and expending taxpayer dollars on, the scheduling of college football games. The Article concludes by offering possible changes to the scheduling structure of postseason college football, with an emphasis on voluntary, efficiency-promoting changes by the colleges, universities, and conferences currently associated with the BCS.

INTRODUCTION

This Article examines the compatibility of the Bowl Championship Series (BCS) with federal antitrust law and the appropriateness of the federal government using its formal and informal powers to encourage a new format for postseason college football.

Since 1998, the BCS has served as a self-described "five-game showcase of college football . . . designed to ensure that the two top-rated teams in the country meet in the national championship game, and to create exciting and competitive matchups among eight other highly re-

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garded teams in four other bowl games."[1] The teams that comprise this "showcase" are from colleges and universities in the National Collegiate Athletic Association (NCAA) Division I Football Bowl Subdivision (FBS), specifically the champions of six BCS-affiliated football conferences, and four other teams; the four other teams are from BCS-affiliated conferences, a pool of five non-BCS-affiliated football conferences, and the University of Notre Dame, which is not a member of any conference.[2] Of the ten selected teams, the top two compete in the BCS National Championship Game, while the other eight play in one of four bowl games: the Fiesta Bowl, the Orange Bowl, the Rose Bowl, and the Sugar Bowl. Although there are over thirty other bowl games every year, the four BCS-sponsored bowls are undoubtedly the most popular and lucrative.[3]

Particularly given both the absence of other national championship games (or playoffs) for Division 1 football teams and the contractual obligation of coaches participating in the ranking of teams (i.e., the *USA Today* Coaches Poll) to recognize the winner of the BCS national championship game as its automatic national champion,[4] the winner of the BCS national championship game is usually regarded by fans and media as "the national champion."[5] This conferral is routinely made even

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[1] *BCS Background*, BCS, http://www.bcsfootball.org/news/story?id=4809699 (last updated Sept. 22, 2010). Although the BCS was created in 1998, bowl games between college football teams have been played since 1916. *See* M. Todd Carroll, Note, *No Penalty on the Play: Why the Bowl Championship Series Stays In-Bounds of the Sherman Act*, 61 Wash. & Lee L. Rev. 1235, 1245 (2004). Since that time, the number of bowl games has increased due to their popularity. *Id.* at 1245–46.

[2] *See* Carroll, *supra* note 1, at 1253–57. The six conferences that have received automatic bids through the 2013 college football season are the Big East, Big Ten, ACC, Big 12, SEC, and PAC-10. *The Business of Bowl Games: It's All About Money*, Business Pundit (Jan. 7, 2009), http://www.businesspundit.com/the-business-of-bowl-games-its-all-about-money/ [hereinafter *The Business of Bowl Games*]. Football teams from two colleges and universities in five other conferences—Mountain West, Western Athletic, Conference USA, Mid-American, and Sun Belt—may receive bids. *Id.*

[3] *See The Business of Bowl Games*, *supra* note 2. The most recent iterations of these bowl games were titled: the Tostitos BCS National Championship Game, the Tostitos Fiesta Bowl, the Discover Orange Bowl, the Rose Bowl presented by Vizio, and the Allstate Sugar Bowl. *BCS Concludes Selections with Pairings*, BCS (Dec. 5, 2010), http://www.bcsfootball.org/news/story?id=5889328.

[4] Dave Sittler, *Bob Boycotts Coaches' Poll*, Tulsa World, Aug. 6, 2008, at B1 ("The [*USA Today*] coaches' poll has an agreement with the BCS that the winner of the BCS title game is its automatic champion.").

[5] *See* Stan Caldwell, *Could Playoff System Work for Division 1?*, Hattiesburg Am., Dec. 10, 2009, *available at* 2009 WLNR 26373419; *see also* Press Release, Orrin G. Hatch, U.S. Sen. for Utah, Hatch, Kohl Announce Antitrust Subcommittee Agenda for the 111th Congress (Mar. 25, 2009), *available at* http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.List (follow "view by month or year" hyperlink; then search "March 2009"; then

though other college teams could, in theory, host their own national championship game or concoct their own playoff system and, if provided with the opportunity, perhaps defeat the "national champion."[6]

In furtherance of its scheduling objectives, the BCS employs a sophisticated or, as some have charged, confounding,[7] methodology of ranking teams. Each team's BCS ranking is a composite of three equally weighted components—the *USA Today* Coaches Poll, the Harris Interactive College Football Poll, and an average of six computer-based rankings, created and operated by private sports statisticians who employ proprietary formulas.[8] Proponents of this complex system insist that it ensures the best teams match up in the college football postseason.[9] Their claim enjoys historical support—at least support from the history as penned by the BCS: in the fifty-six years before the BCS formed in 1998, the teams ranked number one and number two by the Associated Press only played each other eight times in the postseason; in the twelve years since, the teams ranked number one and number two by the BCS have played each other every time in the postseason.[10]

BCS enthusiasts also maintain the system amplifies the value of regular season games: to earn a shot at a BCS-sponsored national title, a college football team normally has to win each and every week of the

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follow hyperlink bearing press release name) (highlighting the BCS's self-characterization of the winner of BCS Championship Game as the "National Champion").

[6] *See* Jodi M. Warmbrod, Comment, *Antitrust in Amateur Athletics: Fourth 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, 373 (2004) (noting the lack of an exclusive right to a "national championship" for the BCS).

[7] *See, e.g.*, C. Paul Rogers, 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, 291 (2008); Parker Allred, Note, *From the BCS to the BS: Why "Championship" Must Be Removed from the Bowl Championship Series*, 2010 Utah L. Rev. 183, 185 ("This methodology—arduous to understand at best . . . .").

[8] *See* Mark Alesia, *Calculating the BCS*, Indianapolis Star, Nov. 8, 2002, at D3 (discussing the difficulty in obtaining information on the methodologies of the computer rankings); Dan Hinxman, *WAC Football Notebook: Vandals Within One Win of Bowl Eligibility*, Reno-Gazette J., Oct. 13, 2009 (noting the basic structure of the computation of rankings); Jerry P. Palm, *What Do You Know About the Different Computer Rankings?*, CollegeBCS.com, http://www.collegebcs.com/bcsfaq.html#Puter (last visited Feb. 20, 2011) (discussing the proprietary nature of the computer rankings).

[9] *See* Rich Thomaselli, *If You're Wondering What Not to Do When It Comes to Social Media, Learn from BCS*, Advertising Age, Nov. 30, 2009, at 3, 22 (discussing proponents of the BCS format).

[10] *See* Chris Dufresne, *Not Everyone Is Hoping to Make Playoffs: BCS Is Making Its Case to Maintain Status Quo*, Chi. Trib., Jan. 5, 2010, at C8.

regular season, be it against top opponents or weak opponents.[11] In other words, *every* regular season game counts, a phenomenon that has been credited with increasing attendance, interest, and financial investment in those games.[12] A playoff system, in contrast, could enable an underperforming regular season team to wait until the playoffs to put forth their best effort and performance.[13]

Although the ostensible purpose, if not the selection methodology, of the BCS is clear, the BCS itself evades traditional conceptions. To wit, although it is managed by an executive director, Bill Hancock, promoted by public relations expert and former White House press secretary Ari Fleischer, organized by the commissioners of the eleven NCAA FBS conferences and the director of athletics at the University of Notre Dame, and features an interactive website, http://www.bcsfootball.org, the BCS does not "exist" in a corporate or temporal sense. The BCS does not have a physical office and does not file corporate or legal documents in any jurisdiction.[14] According to the BCS, there really is no it to "it."[15] Indeed, from the vantage point of this supposed non-entity, the BCS is merely a preferred mechanism for scheduling college football games.[16]

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[11] *See* Bill Hancock, *A Whole Season of Playoffs on the Gridiron*, Tampa Trib., Jan. 7, 2010, at 15.

[12] *See The Bowl Championship Series: Money & Other Issues of Fairness for Publicly Financed Universities; Hearing Before Subcomm. on Commerce, Trade & Consumer Protection, Comm. on H. Energy & Commerce*, 111th Cong. (2009) (statement of John D. Swofford, Comm'r of Atlantic Coast Conference) (noting the positive impact of the BCS on regular season attendance). The statement itself is available at http://democrats.energycommerce.house.gov/Press_111/20090501/testimony_swofford.pdf.

[13] *See id.*

[14] *See The Bowl Championship Series: Is It Fair and in Compliance with Antitrust Law?: Hearing Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Judiciary Comm.*, 111th Cong. (2009) (testimony of Barry J. Brett). The testimony itself is available at http://judiciary.senate.gov/pdf/09-07-07BrettTestimony.pdf.

> The BCS is not a corporation or other entity formalized by filing in any jurisdiction. It is not a party to the proposed ESPN television agreement . . . . The ESPN agreement states that the BCS is not a joint venture (i.e. "ESPN recognizes that there is no Bowl Championship Series entity or BCS entity").

Id.

[15] *See* Jay C. Upchurch, *Bill Hancock Takes Your Questions: The Controversial BCS Has Found the Ideal Spokesman, but Can This Genial Sooner Win Over Critics of the System to Put the Nation's Top Two Football Teams in a Postseason Bowl?*, Sooner Mag., Winter 2010, http://www.oufoundation.org/sm/winter2010/story.asp?ID=361.

[16] *See id.* (quoting BCS spokesman Bill Hancock: "[T]he fact is the BCS is not an entity. It's just a series of five games, and people try to make it out to be more than it is.").

The BCS's innocuous-seeming self-characterization appears to be belied by the intense controversy it evokes. Critics of the BCS include U.S. President Barack Obama[17] as well as myriad constituencies of influence and power. Members of Congress, most notably U.S. Senator Orin Hatch[18] (R-UT) and U.S. Representative Neil Abercrombie[19] (D-HI), a nonpartisan political action committee, Playoff PAC,[20] and legions of disenchanted fans and media are fiercely opposed to the BCS.[21] Their core criticism, generally speaking, is that the BCS selection process simply does *not* ensure that the "best" college football team competes for a national title, and that a playoff system, such as that used in college basketball, should be required for determination of a national champion.[22] A related gripe is that the BCS unfairly minimizes opportunities for teams from non-BCS-affiliated conferences to compete for a national title.[23] These concerns underscore the labyrinthine and arguably inequitable process in which only two teams from non-BCS-affiliated conferences are invited to compete in a BCS-affiliated bowl game and in which one, albeit very marketable, school—the University of Notre Dame—is accorded preferential treatment when compared to other non-BCS-affiliated colleges and universities.[24]

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[17] *See* Steve Schrader, *Subcommittee Passes Anti-BCS Measure*, DETROIT FREE PRESS, Dec. 10, 2009, at C4 (describing President Obama as a "BCS critic").

[18] *See* Press Release, Orrin G. Hatch, U.S. Sen. for Utah, Hatch Requests DOJ Investigation into BCS (Oct. 21, 2009), *available at* http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.List (follow "view by month or year" hyperlink; then search "October 2009"; then follow hyperlink bearing press release name).

[19] *See* Stephen Tsai, *Jones Will Give His Assistants Donation*, HONOLULU ADVERTISER, Dec. 11, 2007, at D1.

[20] *See* Jordan Fabian, *Anti-BCS Group Launches New Ad Targeting Fiesta Bowl*, THE HILL (Jan. 4, 2010, 04:03 PM), http://thehill.com/blogs/blog-briefing-room/news/74227-playoffpac-launches-new-ad-targeting-fiesta-bowl. The symposium that gave rise to this Article featured a debate between the executive director of the Playoff PAC, Matthew Sanderson, and Roy Kramer, founder of the BCS, video of which is available at http://www.bc.edu/schools/law/newsevents/events/conferences/ncaa_symp_video.html.

[21] *See generally* DAN WETZEL ET AL., DEATH TO THE BCS: THE DEFINITIVE CASE AGAINST THE BOWL CHAMPIONSHIP SERIES (2010).

[22] *See, e.g.*, Frederic J. Frommer, *House Panel Passes College Football Playoff Bill: House Subcommittee OKs Bill Aimed at Forcing College Football to Set Up New Playoff System*, ABC NEWS, Dec. 9, 2009, http://abcnews.go.com/print?id=9292801 (discussing the House Energy and Commerce Committee's Subcommittee on Commerce, Trade, and Consumer Protection passing a resolution in December 2009 that would prevent the promotion of a game as a national title game unless it were accompanied by a playoff).

[23] *See* Andy Staples, *Butler Nearly Toppled Goliath; Now Boise State Can Finish the Job*, SI.COM (Apr. 6, 2010), http://sportsillustrated.cnn.com/2010/writers/andy_staples/04/06/butler-boise/index.html#ixzz0zFSbSXMy.

[24] If it is ranked eighth or higher in the final BCS standings, the University of Notre Dame is guaranteed an invitation to a bowl game. *See* Gregory L. Curtner et al., *The BCS:*

These and related objections carry economic importance. Consider that in 2010, the BCS distributed nearly $143 million in revenue from its five bowl games, with 81% of it going to the six BCS-affiliated conferences, which in turn distributed the revenue to member colleges and universities.[25] Typically, in fact, the affiliated conferences receive an even higher share of revenue; from 2005 to 2009, affiliated conferences received $492 million, or 87% of the revenue pool, while other conferences, whose membership consists of nearly half of Division 1 football schools, received just $62 million (13%).[26] Unsurprisingly, the teams selected to participate in BCS bowl games are the BCS's most fortunate beneficiaries: they each receive, on average, an $18 million payout.[27] Keep in mind the context of these payouts. Colleges and universities frequently use them to finance their other sports teams—which are generally unprofitable and which usually rely on the proceeds generated by the football and men's basketball teams[28]—and to furnish student-athlete scholarships.[29]

The benefits of participation in BCS bowl games extend far beyond direct financial receipts. Such participation normally generates considerable attention for the chosen schools and, not surprisingly, is often associated with increased fundraising opportunities and improved quality of applicants.[30] Access to the resources and exposure of BCS-sponsored bowls can be viewed with even greater importance in the midst of this recessionary era, as many colleges and universities are

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Antitrust Goes Bowling?, Global Competition Pol'y, May 2009, at 1, 4, *available at* http://www.bestlawyers.com/marketing/articles/4546_36.pdf.

[25] *See* Michael Smith, *The BCS' Big Split*, Sports Bus. J., Jan. 25, 2010, at 1.

[26] *See* Kristi Dosh, *Is the College Football BCS Fixed?*, Forbes.com (Sept. 2, 2010, 7:03 PM), http://blogs.forbes.com/sportsmoney/2010/09/02/is-the-college-football-bcs-fixed/ (noting that the affiliated conferences, along with Notre Dame (which is not a member of a conference), typically receive 86% to 91% of the BCS revenue); *see also* Press Release, Sen. Orrin G. Hatch, *supra* note 18 (providing other data).

[27] *See* Thomaselli, *supra* note 9.

[28] *See* Eric Dexheimer, *UT Athletics Officials Wary of Sharing Profits*, Austin Am.-Statesman, Sept. 30, 2007, at A7. Although it varies by college and university, ninety percent of revenue generated by a given school's sports program typically comes from the football and men's basketball teams. *See* Kevin Tresolini, *Many Say Wrestling Pinned by Title IX*, News J. (Wilmington), June 23, 2002, at 1A. Some experts posit an even higher percentage. *See* Loren Tate, *Despite Economy, Guenther Has Act Together*, Illinihq.com (Mar. 4, 2010), http://www.illinihq.com/news/2010/03/04/despite_economy_guenther_has_act_together (citing remarks by Ron Guenther, athletic director of the University of Illinois, who estimates that ninety-eight percent of his university's revenue comes from the football and men's basketball teams).

[29] *See* Press Release, Sen. Orrin G. Hatch, *supra* note 18.

[30] *See* Melissa Ezarik, *Admissions Score: Sports Success and College Applications*, Univ. Bus., May 2008, at 22 (discussing the correlation between college football and basketball success and an increase in student applications the following year).

struggling financially, particularly in regards to reduced endowments and middling capital campaigns.[31]

Opposition to the BCS may also compel legal and legislative rebuke, an outcome of particular interest to government actors that make and enforce the law and to those universities and colleges denied equal access to postseason bowl games. Specifically, the alleged anticompetitiveness of the BCS has invited discussion as to whether the BCS violates sections 1 and 2 of the Sherman Act, a leading source of federal antitrust law.[32] As explained in greater detail below, section 1 prohibits collusive activity among competitors while section 2 prohibits monopolistic behavior by one entity; both sections are arguably applicable to the amorphous BCS and its member schools.[33] The essential charge is as follows: the BCS and its member conferences act as a cartel to prevent other conferences from competing for a national title and other bowl games, and the riches that go along with them.

Unfortunately for the BCS, allegations of it behaving in a cartel-like and antitrust-violative manner are not merely for academic scrutiny. Such allegations have drawn the contemplation of law enforcement authorities and legislators, who pose a legitimate threat to the BCS's very existence. Most notably, the U.S. Department of Justice has signaled interest in examining the legality of the BCS, though the agency has not commenced a formal investigation.[34]

In addition, Utah Attorney General Mark Shurtleff—who, like many Utahans, was disappointed that the undefeated University of Utah Utes were denied an opportunity to compete for a national title in 2009 because they played in the Mountain West Conference, a non-BCS-affiliated conference—has more critically associated the BCS with anti-

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[31] *See* Eliza Krigman, *Schools of Hard Knocks*, NAT'L J. (D.C.), Jan. 23, 2010 (discussing financial challenges for colleges and universities in the recession).

[32] 15 U.S.C. §§ 1–2 (2006); *see* Michael P. Kenny & William H. Jordan, United States v. Microsoft*: Into the Antitrust Regulatory Vacuum Missteps the Department of Justice*, 47 EMORY L.J. 1351, 1361 (1998) (describing the Sherman Act as the "primary federal antitrust statute"). Other leading federal antitrust statutes include: the Clayton Act, 15 U.S.C. §§ 12–14, 19–22, 27 (2006); the Robinson-Patman Act, 15 U.S.C. §§ 13–13(b), 21(a) (2006); and the Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2006). *See generally* Nathaniel Grow, *Antitrust & The Bowl Championship Series*, 2 HARV. J. SPORTS & ENT. L. 53 (2011) (analyzing potential antitrust liability for the BCS); Janet L. McDavid, *Antitrust Issues in Health Care Reform*, 43 DEPAUL L. REV. 1045, 1049 & n.30 (1994) (discussing the role of antitrust enforcement in health care).

[33] *See infra* notes 43–145 and accompanying text.

[34] *See* Brent Schrotenboer, *Can MWC 'Trust' in the BCS System?: Criteria Sharpen the Fairness Issue*, SAN DIEGO UNION-TRIB., May 8, 2010, at D1; Dick Weiss, *Boise Out to Crash BCS Again*, DAILY NEWS (N.Y.), Sept. 7, 2010, at 59 (noting advocacy by law firms in Washington D.C. to encourage the Justice Department to open a formal investigation).

trust violations.[35] Indeed, Shurtleff has repeatedly warned that his office is investigating the compatibility of the BCS with antitrust law, though a lawsuit had neither been filed nor specifically threatened.[36] The absence of a filed lawsuit may be predictable; despite the many controversies generated by the BCS, its legality has never been challenged in court.[37]

Perhaps of greatest concern to the BCS are the members of Congress who, by filing a bevy of bills openly hostile to the BCS, signal their own skepticism of the BCS's legality. Although none of their bills—one of which expressly characterizes the BCS as an illegal restraint of trade under federal antitrust law and compels the creation of a college football playoff system[38]—are poised to become law, the bills reaffirm the presence of BCS critics in Congress and, just as important, the willingness of those critics to expend time and resources on the BCS.[39]

This Article begins in Part I by examining the legality of the BCS under federal antitrust law.[40] Part II then discusses the appropriateness of government actors concerning themselves with, and expending taxpayer dollars on, the scheduling of college football games.[41] The Article concludes in Part III by offering possible changes to the scheduling structure of postseason college football.[42]

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[35] *See Utah Given Invitation to Join the Pac-10*, Associated Press, June 17, 2010.

[36] *Id.*

[37] *See* Christopher Pruitt, *Debunking a Popular Antitrust Myth: The Single Entity Rule and Why College Football's Bowl Championship Series Does Not Violate the Sherman Antitrust Act*, 11 Tex. Rev. Ent. & Sports L. 125, 144 (2009).

[38] H.R. Res. 68, 111th Cong. (2009) (introduced by U.S. Rep. Neil Abercrombie on Jan. 15, 2009).

[39] Two bills similar to House Resolution 68 were also introduced in the House of Representatives. The College Football Playoff Act of 2009, H.R. Res. 390, 111th Cong. (2009), was introduced by U.S. Representative Joe Barton on Jan. 9, 2009. If it had become law, House Resolution 390 would have "prohibit[ed], as an unfair and deceptive act or practice, the promotion, marketing, and advertising of any post-season NCAA Division I football game as a national championship game unless such game [was] the culmination of a fair and equitable playoff system." *See* H.R. Res. 390. About a week later, Championship Fairness Act of 2009, H.R. Res. 599, 111th Cong. (2009), was introduced by U.S. Representative Gary Miller on Jan. 16, 2009. If it had become law, House Resolution 599 would have "prohibit[ed] the receipt of Federal funds by any institution of higher education with a football team that participate[d] in the NCAA Division I Football Bowl Subdivision, unless the national championship game of such subdivision [was] the culmination of a playoff system." *See* H.R. Res. 599.

[40] *See infra* notes 43–145 and accompanying text.

[41] *See infra* notes 146–158 and accompanying text.

[42] *See infra* notes 159–170 and accompanying text.

I. The Legality of the BCS

The legal argument against the BCS primarily invokes the Sherman Act, which became law in 1890 and, broadly conceived, is designed to safeguard democratic institutions from undue consolidations of economic power.[43] As interpreted by courts, the Sherman Act's primary purpose is the protection of consumers.[44] There is longstanding debate, however, over the appropriate meaning of "consumer protection" in the context of the Sherman Act.[45] To some, it constitutes maximization of economic efficiency; to others, additional goals that sound in distributive justice, such as the fairness of wealth concentration and means of wealth allocation, should also be considered.[46] As detailed below, conceptual tensions over the Sherman Act's underlying meaning impact how a court may scrutinize the BCS.

The Sherman Act contains seven sections, the first two of which are the most relevant to potential claims against the BCS. Section 1 is arguably the leading source federal antitrust law, particularly in sports litigation, and is the most relevant source of law for determining the legality of the BCS.[47] Section 1 is regarded as governing "any coordinated behavior" by market actors, meaning it enjoys a broad scope over economic activity in the United States.[48] Section 1 claims are designed to

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[43] *See* David Millon, *The Sherman Act and the Balance of Power*, 61 S. Cal. L. Rev. 1219, 1287–92 (1988).

[44] *See e.g.*, Citizen Publ'g Co. v. United States, 394 U.S. 131, 134 (1969); Posner v. Lankenau Hosp., 645 F. Supp. 1102, 1118 (E.D. Pa. 1986).

[45] *See* Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. Chi. L. Rev. 1, 46 (2001).

[46] *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L.J. 65, 83–106 (1982) (discussing the dynamics of the debate over how the Sherman Act should protect consumers). Senator John Sherman alluded to this debate in comments before Congress:

> It is sometimes said of these combinations that they reduce prices to the consumer by better methods of production, but all experience shows that this saving of cost goes into the pockets of the producer. The price to the consumer depends upon the supply, which can be reduced at pleasure by the combination. . . . The aim is always for the highest price that will not check the demand.

21 Cong. Rec. 2460 (1890) (statement of Sen. John Sherman).

[47] *See* Ross C. Paolino, *Upon Further Review: How NFL Network Is Violating the Sherman Act*, 16 Sports Law. J. 1, 12 (2009).

[48] *See* William K. Jones, Book Note, *Concerted Behavior Under the Antitrust Laws*, 99 Harv. L. Rev. 1986, 2000 (1986) (reviewing Phillip E. Areeda, Antitrust Law: An Analysis of Antitrust Principles and Their Application (1986)). As an illustration, see, for example, the 2005 decision by the U.S. Court of Appeals for the Third Circuit in *Gordon v. Lewis-*

prevent competitors from combining their economic power in ways that are considered economically harmful.[49] Examples of such harm include increased prices, diminished quality, limited choices, and impaired technological progress.[50] To its critics, the BCS constitutes an agreement among competing teams and conferences to limit competition in ways that unduly benefit those BCS-affiliated teams and conferences.[51]

Though less likely, a plausible claim against the BCS may also be brought under section 2 of the Sherman Act.[52] Section 2 claims are designed to prevent monopolistic behavior, and attempted monopolistic behavior, by a single entity.[53] Section 2 claims are often considered more difficult to prevail upon than section 1 claims because of the requirement that plaintiffs prove monopoly power, the appropriate definition of which has confounded courts and scholars alike.[54] Other significant limitations to section 2 include judicial tolerance of monopolists that behave without either a general duty to prospective customers or an obligation to compete with their competitors.[55] Critics of the BCS have

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town Hospital. 423 F.3d 184, 207 (3d Cir. 2005) (citing Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1229 (3d Cir. 1993)).

[49] *See* Michael A. McCann, American Needle v. NFL*: An Opportunity to Reshape Sports Law*, 119 Yale L.J. 726, 735–36 (2010).

[50] *See, e.g.*, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 (1984); Bd. of Trade of Chicago v. United States, 246 U.S. 231, 238–39 (1918); Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1050 (9th Cir. 1983); *see also* Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 50–61 (1978) (outlining economic implications of the primary goals of antitrust laws); Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 Yale L.J. 1, 21–29 (1971) (discussing the relationship between the goals of antitrust law and professional sports).

[51] *See, e.g.*, Press Release, Sen. Orrin G. Hatch, *supra* note 18.

[52] 15 U.S.C. § 2 (2006). Section 2 stipulates that monopolization is a felony under federal law. *See id.*

[53] *See generally* Mark R. Patterson, *The Market Power Requirement in Antitrust Rule of Reason Cases: A Rhetorical History*, 37 San Diego L. Rev. 1, 10–12 (2000); *see also* United States v. Grinnell Corp., 384 U.S. 563, 570–72 (1966) (discussing the application of section 2 to prohibit monopolies); Cal. Computer Prods. v. IBM, 613 F.2d 727, 736 (9th Cir. 1979) (discussing application of section 2 to prohibit attempted monopolies).

[54] *See* Frank H. Easterbrook, Case Comment, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 Colum. Bus. L. Rev. 345, 345–58; Edward Mathias, *Big League Perestroika? The Implications of* Fraser v. Major League Soccer, 148 U. Pa. L. Rev. 203, 206 (2000).

[55] *See* Thomas R. Hurst & Jeffrey M. McFarland, *The Effect of Repeal of the Baseball Antitrust Exemption on Franchise Relocations*, 8 DePaul-LCA J. Art & Ent. L. 263, 295 (1998) (discussing the relationship between section 2 and customers); John Thorne, *A Categorical Rule Limiting Section 2 of the Sherman Act:* Verizon v Trinko, 72 U. Chi. L. Rev. 289, 292 n.16 (2005) (noting the absence of competitive obligation for monopolists).

nonetheless portrayed the entity in a light consistent with that of an illegal monopoly.[56]

The following Sections examine the BCS under both section 1 and section 2.

A. *Section 1 and the BCS*

To some detractors of the BCS, the postseason scheduling agreement between the BCS, its six sponsored conferences, and the University of Notre Dame is so anticompetitive that it unreasonably restrains interstate trade and causes harm to consumers.[57] Because the BCS-sponsored conferences and their member colleges and universities are competitors on the playing field and in many ways off the field, their agreement to collaborate on scheduling and revenue sharing, the argument goes, may constitute a violation of section 1.

Before assessing the legal merits of such a critique, it is important to canvass the purported evidence of anticompetitive behavior. Although "anticompetitive" is an admittedly imprecise adjective, section 1 of the Sherman Act is thought to regulate an expansive scope of business practices that may be labeled anticompetitive under basic understandings of neoclassical economics.[58] They include naked cartels of competitors and other coordinated arrangements between two or more economic actors.[59] These arrangements normally pose an adverse consequence to consumer prices and market output.[60]

The anticompetitive aspects of the BCS agreement are fairly transparent, though not necessarily indicative of a section 1 violation. For starters, although the champions of the six BCS-affiliated conferences receive automatic bids to play in either the BCS National Championship Game or one of the four BCS-sponsored bowl games—and thereby

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[56] *See generally* Katherine McClelland, Comment, *Should College Football's Currency Read "In BCS We Trust" or Is It Just Monopoly Money?: Antitrust Implications of the Bowl Championship Series*, 37 Tex. Tech L. Rev. 167 (2004).

[57] *See, e.g.*, 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, 221 (2007); Press Release, Sen. Orrin G. Hatch, *supra* note 18.

[58] *See* Herbert Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 Fla. L. Rev. 871, 874 (2009); *see also* Malcolm B. Coate, *Efficiencies in Merger Analysis: An Institutionalist View*, 13 S. Ct. Econ. Rev. 189, 191 (2005) (discussing anticompetitive effects in the context of neoclassical theory).

[59] *See* Hovenkamp, *supra* note 58, at 874.

[60] *See, e.g.*, Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1181 (2001) (illustrating the role of price and output effects in the application of section 1).

obtain the accompanying revenue and visibility from participation in those games—the champions from the five non-affiliated conferences only earn bids under highly limited, exclusionary conditions. Namely, a champion from a non-affiliated conference must either be ranked by the BCS among its top twelve teams or, if ranked higher than a champion from a BCS-affiliated conference, among the BCS's top sixteen teams.[61] Even then, such a non-affiliated team lacks a guaranteed appearance in a BCS bowl: if more than one such team meets the aforementioned criteria, the BCS is only obligated to invite one of those teams to a sponsored bowl game.[62] Indeed, "for all practical purposes, nine of the ten slots are ultimately reserved for the privileged conferences due to the selection criteria utilized by the BCS."[63]

The unbalanced distribution of BCS revenue to its six affiliated conferences also strikes anticompetitive tones. By agreement, each BCS-affiliated conference receives an equal share of BCS revenue, unless such a conference sends more than one team to a BCS-sponsored bowl game, in which case it is guaranteed a higher amount.[64] Colleges and universities that are members of one of the six BCS-affiliated conferences are guaranteed a share of the revenue allocated to their conferences, meaning that even when a team underperforms, its academic institution financially benefits simply by virtue of the team's membership in a BCS-affiliated conference.[65] With their revenue advantage, these colleges and universities can more readily finance substantial upgrades to their training facilities and stadiums and obtain superior equipment, among other competitive benefits.[66] In contrast, the five non-BCS-affiliated conferences and their member institutions (which furnish almost half of FBS teams) divide a considerably smaller share—typically just thirteen percent of BCS revenue—among themselves.[67]

Similarly the inability of non-BCS-affiliated conferences to affect structural change may be anticompetitive. Although all of the eleven

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[61] *See* Press Release, Sen. Orrin G. Hatch, *supra* note 18.

[62] *See id.* Such a scenario is not a mere hypothetical. In 2009, two teams from non-BCS-affiliated conferences—the University of Utah and Boise State University—went undefeated and met the criteria for an invitation. *See* Emily Heil & Elizabeth Brotherton, *No Holder-ing Back*, Roll Call (D.C.), Dec. 9, 2008, http://www.rollcall.com/issues/54_63/-30665-1.html. Only the University of Utah received a BCS invitation. *Id.*

[63] Press Release, Sen. Orrin G. Hatch, *supra* note 18.

[64] *See id.*

[65] *See id.*

[66] *See* Chad McEvoy, *Predicting Fund Raising Revenues in NCAA Division I-A Intercollegiate Athletics*, Sport J., Winter 2005, http://www.thesportjournal.org/article/predicting-fund-raising-revenues-ncaa-division-i-intercollegiate-athletics.

[67] *See supra* note 26 and accompanying text.

NCAA FBS conference commissioners and the director of athletics at the University of Notre Dame are nominally regarded as "managers" of the BCS,[68] the more selective BCS Presidential Oversight Committee (the "Oversight Committee") is the organization's "ultimate ruling authority."[69] Consider the membership selection process for the Oversight Committee. The committee comprises eight representatives, seven of whom are selected by the six BCS-sponsored conferences and the University of Notre Dame, while the lone remaining vote is determined by the five non-BCS-sponsored conferences.[70] To BCS critics, this vote stacking in favor of BCS-affiliated conferences "all but ensur[es]" that non-BCS-affiliated conferences "will have little influence on proposed changes or reforms."[71]

Lastly, the mere fact of division between BCS-sponsored conferences and non-BCS-sponsored conferences—the "haves" and the "have nots"—along with the profound difficulty that teams from non-sponsored conferences have gaining an invitation to play in the BCS National Championship Game, may cause subjective, but nonetheless real and cyclical, harm to the "have nots." Critics portray this division as unfairly stigmatizing the non-BCS-sponsored conferences and their member institutions as inferior.[72] Possible reputational costs include impaired recruitment of top high school football players and top coaches, undermined marketing strategies, and diminished alumni bases.[73] In essence, a "self-fulfilling prophecy" emerges: because colleges and universities from non-BCS-affiliated conferences are perceived as worse, they become worse.[74]

Certain aspects of the purported self-fulfilling prophecy may prove corroborative. Consider, for instance, that two highly successful non-BCS conference schools—Boise State University and Texas Christian University—have been unable to land a single Rivals.com Top 100 pro-

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[68] *BCS Governance*, BCSFOOTBALL.ORG, http://www.bcsfootball.org/news/story?id=4809846 (last updated Jan. 20, 2011).

[69] *See* Ted Lewis, *Gridiron Gridlock; Once Again, the Powers That Be in College Football Will Explore Ways to Improve the BCS System, Hoping to Eventually Crown a Champion That Every One Can Live With*, TIMES-PICAYUNE (New Orleans), Jan. 5, 2008, at 24; *see also House Energy & Commerce Committee Hearing*, *supra* note 12 (statement of Craig Thompson, Comm'r of Mountain West Conference) (describing the BCS Presidential Oversight Committee as "the body that runs the BCS").

[70] *See* Press Release, Sen. Orrin G. Hatch, *supra* note 18.

[71] *Id.*

[72] *See House Energy & Commerce Committee Hearing*, *supra* note 12 (statement of Craig Thompson, Comm'r of Mountain West Conference).

[73] *See id.*

[74] *See* Press Release, Sen. Orrin G. Hatch, *supra* note 18.

spect since the Rivals rankings began in 2002.[75] More generally, top prospects are often attracted to colleges and universities that play in BCS-sponsored conferences. The perception, and possible reality, that the BCS bowl selection system favors teams from BCS-affiliated conferences probably has influenced the college choices of top recruits and consolidated talent in BCS-sponsored conferences.[76]

Although it is fairly easy to highlight the anticompetitive aspects of a scheduling system that expressly favors some conferences and their member institutions at the expense of others, Section C below illustrates how the BCS could nonetheless prevail in a Sherman Act examination of its scheduling system.

B. *The Sherman Act's Applicability to the BCS*

As a foundational argument, the BCS could insist that the Sherman Act simply does not apply to its scheduling agreements. The Sherman Act, after all, primarily, and some would argue exclusively, applies to commercial activities,[77] and the BCS is—at least in its own view—merely a device for scheduling postseason football games among amateur athletes and their academic institutions.[78] Moreover, courts have refrained from applying the Sherman Act to rules that define a sports activity and that lack commercial qualities.[79] Consider the U.S. Court of Appeals for the Third Circuit's 1998 opinion in *Smith v. NCAA*,[80] where the court deemed an NCAA rule that constrained eligi-

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[75] *See, e.g.*, *The Rivals 100*, RIVALS.COM (Jan. 14, 2010), http://rivals.yahoo.com/ncaa/football/recruiting/rankings/rank-2369 (ranking top high school prospects and identifying what school they will attend).

[76] If true, economic consequences would follow. According to one study, top college football players can bring into their schools over $500,000 annually and premium athletes—those drafted into the NFL—can bring in over $1 million annually. *See* Robert Brown, *Estimates of College Football Player Rents*, 12 J. SPORTS ECON. (forthcoming 2011), *available at* http://jse.sagepub.com/content/early/2010/06/14/1527002510378333 (using economic extrapolation to argue that the marginal revenue product derived from having top and premium college student-athletes far outstrips the expenses incurred in complying with NCAA scholarship restrictions).

[77] *See* Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 263, 348 (1986); Stephanie M. Greene, *Regulating the NCAA: Making the Calls Under the Sherman Antitrust Act and Title IX*, 52 ME. L. REV. 81, 84 n.22 (2000) (discussing the commercial requirement in the context of the NCAA).

[78] *See supra* note 16 and accompanying text.

[79] *See, e.g.*, Brookins v. Int'l Motor Contest Ass'n, 219 F.3d 849, 853–55 (8th Cir. 2000); M & H Tire Co. v. Hoosier Racing Tire Corp., 733 F.2d 973, 987 (1st Cir. 1984); Gunter Harz Sports, Inc. v. U.S. Tennis Ass'n, Inc., 511 F. Supp. 1103, 1113–21, 1124 (D. Neb. 1981).

[80] 139 F.3d 180 (3d Cir. 1998), *vacated on other grounds by* 525 U.S. 459 (1999).

bility for involvement in college sports to be noncommercial and thus outside the scope of the Sherman Act.[81]

To be sure, BCS-sponsored bowl games invariably impact commercial activity because they are worth hundreds of millions of dollars and lead to contracting between varied commercial actors. BCS scheduling policies could nonetheless be construed as fundamentally noncommercial: a device for scheduling bowl games is essential to the playing of those bowl games. Put more conceptually, the scheduling of games is a necessary prerequisite to the playing of those games, at least in an organized league. A league, self-evidently, cannot function without a schedule.[82] From that vantage point, BCS scheduling agreements seem ill-suited for Sherman Act scrutiny.

This putative argument seems unlikely to prevail. For one, although the wording of the Sherman Act suggests a limitation of its purview to commercial activity,[83] the U.S. Supreme Court has interpreted those words to prohibit a broad range of anticompetitive activities.[84] Generally, an activity that evades a commercial label can nevertheless find itself subject to the Sherman Act "if it is undertaken with a commercial purpose or with the knowledge that it would have anticompetitive effects."[85]

The 1984 U.S. Supreme Court decision in *NCAA v. Board of Regents of the University of Oklahoma*[86] only amplifies the vulnerability of BCS scheduling to Sherman Act scrutiny. In that case, the Court reasoned that when amateur sports and purportedly noncommercial sports associations engage in a type of rulemaking that poses commercial conse-

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[81] *Id.* at 184–85.

[82] *See* Marc Edelman, *How to Curb Professional Sports' Bargaining Power Vis-À-Vis the American City*, 2 VA. SPORTS & ENT. L.J. 280, 291 (2003) (noting that scheduling is essential for league play).

[83] *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 n.7 (1959) (stating that the Sherman Act is "aimed primarily at combinations having commercial objectives and is applied to only a very limited extent to organizations, like labor unions, which normally have other objectives").

[84] *See, e.g.*, Goldfarb v. Va. State Bar, 421 U.S. 773, 786–88 (1975) (stating that the solicitation and servicing of legal representation qualifies as commercial activity); *see also* Thomas Scully, Note, NCAA v. Board of Regents of the University of Oklahoma*: The NCAA's Television Plan is Sacked by the Sherman Act*, 34 CATH. U. L. REV. 857, 857–58 (1985) (discussing expansion of the Supreme Court's view of commercial activity).

[85] *See* Tara Norgard, Note, *How Charitable Is the Sherman Act?*, 83 MINN. L. REV. 1515, 1523–24 (1999). *But see* John Vanderstar, *Liability of Municipalities Under the Antitrust Laws: Litigation Strategies*, 32 CATH. U. L. REV. 395, 397–98 ("The Court has been reluctant to apply the antitrust laws to the conduct of those who are not engaged in commercial activities.").

[86] 468 U.S. 85 (1984).

quences, resulting rules may be subject to Sherman Act scrutiny.[87] Subsequent case law indicates that scheduling of college athletics games is one such form of rulemaking. Namely, in *Worldwide Basketball & Sport Tours, Inc. v. NCAA*,[88] the U.S. Court of Appeals for the Sixth Circuit in 2004 examined an NCAA rule that limited the scheduling of college basketball games to a certain group of teams. Perhaps discouragingly for the BCS, the Sixth Circuit found that the rule had exhibited sufficient "commercial impact insofar as it regulate[d] games that constitue[d] sources of revenue for both the member schools and the Promoters."[89] BCS policies on scheduling appear to embody similar qualities, particularly as they relate to the sourcing and uneven distribution of revenue among member and non-member institutions.

C. *Rule of Reason Analysis for the BCS*

On balance, the Sherman Act appears to regulate BCS scheduling agreements. The BCS, however, could still establish that those agreements satisfy the Act's scrutiny under section 1. A section 1 claim against the BCS would trigger one of two standards of review: per se analysis or rule of reason analysis. A trial judge hearing such a claim would be obligated to select a standard of review.[90]

The selection of per se analysis, which presumes that a challenged agreement violates section 1, and which imposes liability irrespective of procompetitive effects or motive,[91] is unlikely. For one, per se analysis has attracted disfavor by courts in recent years.[92] Its rigidity and inflexibility, in particular, have drawn critique.[93] In addition, per se analysis is normally reserved for certain types of agreements—most notably price-

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[87] *Id.* at 111–12.

[88] 388 F.3d 955 (6th Cir. 2004).

[89] *Id.* at 959.

[90] *See* Lawrence A. Sullivan, *The Viability of the Current Law on Horizontal Restraints*, 75 CALIF. L. REV. 835, 891 (1987) (noting the importance and implications of a judge's decision in determining the standard of review in antitrust cases).

[91] *See* Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 351 (1982); *see also* State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (noting that per se analysis is used to determine if a restraint shows a "predictable and pernicious anticompetitive effect").

[92] *See* Thomas Chen, Note, *Authorized Generics: A Prescription for Hatch-Waxman Reform*, 93 VA. L. REV. 459, 489 (2007). This disfavor relates to a general trend in antitrust scrutiny toward reasonableness analysis and away from per se findings. *See* Keith N. Hylton, *Fee Shifting and Predictability of Law*, 71 CHI.-KENT L. REV. 427, 458 (1995); Glen O. Robinson, *Explaining Vertical Agreements: The* Colgate *Puzzle and Antitrust Method*, 80 VA. L. REV. 577, 605 (1994) (discussing the history of the application of rule of reason and per se analyses).

[93] *See* Thomas A. Piraino, Jr., *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 82 IND. L.J. 345, 355 (2007).

fixing schemes[94] and group boycotts[95]—that are distinct from the sorts of scheduling agreements entered into by the BCS.[96]

A court is far more likely to utilize rule of reason analysis when scrutinizing BCS scheduling agreements under section 1. Rule of reason analysis, which, unlike per se analysis, tends to advantage defendants,[97] constitutes an inquiry grounded in fact, empirical data, and objective context.[98] Under rule of reason review, an agreement is only prohibited if it produces an anticompetitive injury that outweighs procompetitive effects.[99]

Courts normally apply rule of reason analysis to joint ventures,[100] which refer to associations of "two or more persons designed to carry out a single business enterprise for profit for which purpose they combine their property, money, effects, skill, and knowledge."[101] Courts have described a diverse set of associations as joint ventures, with the label affixed to professional sports leagues and their franchises, credit card networks, and stock exchanges.[102] These and other types of joint ventures may enhance efficiency and generate goods that, in the absence of the joint venture, would prove less economical or outright unprofitable.[103]

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[94] *See, e.g.*, *In re* Baby Food Antitrust Litig., 166 F.3d 112, 118 (3d Cir. 1999) (holding that a price-fixing agreement is a per se violation of section 1).

[95] *See, e.g.*, Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co., 472 U.S. 284, 290–91 (1985) (stating that a group boycott is a per se violation of section 1).

[96] Fee schedule agreements, however, have been subject to per se analysis. *See, e.g.*, *Maricopa Cnty. Med. Soc'y*, 457 U.S. at 355–57 (using per se analysis to scrutinize a preferred provider organization's fee-scheduling agreement).

[97] *See* Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 Tul. L. Rev. 777, 825–29 (1987) (discussing how per se analysis advantages plaintiffs); Recent Case, Khan v. State Oil Co., *93 F.3d 1358 (7th Cir. 1996)*, 110 Harv. L. Rev. 523, 527 (1996) ("[R]ule of reason analysis heavily favors defendants.").

[98] *See* Five Smiths, Inc. v. NFL, 788 F. Supp. 1042, 1045 (D. Minn. 1992).

[99] *See* Gordon H. Copland & Pamela E. Hepp, *Government Antitrust Enforcement in the Health Care Markets: The Regulators Need an Update*, 99 W. Va. L. Rev. 101, 107–08 (1996).

[100] *See* Michael A. McCann, *Justice Sonia Sotomayor and the Relationship Between Leagues and Players: Insights and Implications*, 42 Conn. L. Rev. 901, 919–20 (2010); *see, e.g.*, Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 338 (2d Cir. 2008).

[101] *See* Christopher L. Peterson, *Predatory Structured Finance*, 28 Cardozo L. Rev. 2185, 2252 (2007).

[102] *See* Piraino, *supra* note 60, at 1173–74.

[103] *See* Derek Devgun, *Crossborder Joint Ventures: A Survey of International Antitrust Considerations*, 21 Wm. Mitchell L. Rev. 681, 690–91 (1996); F. Scott Kieff & Troy A. Paredes, *Engineering a Deal: Toward a Private Ordering Solution to the Anticommons Problem*, 48 B.C. L. Rev. 111, 135 (2007) (noting the success of joint ventures under the rule of reason).

As an association, the BCS seems most aptly described as a joint venture.[104] The BCS consists of representatives from conferences and other academic entities who determine rules for the ranking of FBS teams and the production of a national championship game and four bowl games. The BCS may not be essential to the production of these goods—after all, the conferences and their members could develop a different system for production of a national championship game or bowl games[105]—but it has been found to promote production efficiencies.[106]

Analyzing the BCS and its contracts as a joint venture subject to rule of reason analysis would require determining the relevant market.[107] Identification of the relevant market for the BCS and its purportedly anticompetitive contracts may pose a challenging task. In many cases, identification of a relevant market is "inextricably related to the question of whether the defendant's competitors have been or will be foreclosed from the market by virtue of the challenged acts."[108] To facilitate identifying the relevant market, a court would likely define the BCS market in two components: the product market and the geographic market.[109]

The product market for BCS-sponsored football would capture its unique identities and whether there are "reasonably interchangeable"

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[104] A characterization of the BCS as a joint venture has been reached in other legal scholarship. *See, e.g.*, Warmbrod, *supra* note 6, at 356. Single entity status, however, has also been ascribed to the BCS. *See, e.g.*, Pruitt, *supra* note 37, at 128.

[105] *See, e.g.*, Bernie Lincicome, *The BCS Is All About Politicking. Urban Meyer Gets That and Now Florida, Not Michigan, Is Playing in the Title*, Pittsburgh Post-Gazette, Dec. 7, 2006, at C2 ("[T]he BCS is entirely unnecessary . . . . No. 1 and No. 2 can be determined by vote, and unless there are only two undefeated teams to rank, as they were last year with Texas and USC, disagreements are as inevitable then as now.").

[106] *See* Warmbrod, *supra* note 6, at 356 ("Without the agreement among the conferences, a national championship game would probably not occur because of the historically and contractually established conference relationships with various bowls.").

[107] It is possible, though unlikely, that a court could adopt a "quick look" rule of reason analysis that would not compel determination of a relevant market. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 769–71 (1999). Instead, competitive harm is presumed and the defendant has the burden of justifying the restraint on trade. *See id.* Quick look analysis is used in cases where extensive empirical analysis under regular rule of reason is not required and where per se analysis is ill suited due to the lack of obvious anticompetitive effects. *See id.* Analysis of the BCS, however, would likely compel substantial empirical analysis and determination of the relevant market. For a cogent discussion of the forms of analysis used in sports-related antitrust cases, see Michael A. Cokely, *In the Fast Lane to Big Bucks: The Growth of NASCAR*, 8 Sports Law. J. 67, 91 (2001).

[108] 1 Louis Altman & Malla Pollack, Callmann on Unfair Competition, Trademarks and Monopolies § 4:31 (4th ed. 2009).

[109] *See* Daniel E. Lazaroff, *Entry Barriers and Contemporary Antitrust Litigation*, 7 U.C. Davis Bus. L. J. 1, 28 (2006) (noting the usual importance of product and geographic markets in rule of reason analysis).

substitutes.[110] In antitrust litigation concerning the broadcasting of NCAA-sponsored football games, the relevant market has been identified quite narrowly as the broadcasting of NCAA-sponsored college football games, as opposed to the broadcasting of any college football games, any football games, any sporting events, or any other type of entertainment.[111] The idiosyncratic characteristics of such programming are thought to attract a distinctive class of audience, and one that commands a compact, non-commutable product market.[112] Antitrust litigation relating to the playing of NFL games has yielded similarly constricted interpretations of the appropriate product market.[113] It is therefore plausible, if not likely, that an appropriate product market for BCS-sponsored football would be construed restrictedly. Such a market could constitute the deliverance, playing, and marketing of elite, postseason college football games.

The geographic market for the BCS is more predictable. Normally, a geographic market refers to the locations where consumers seek a particular product.[114] For BCS-sponsored football, the market seems undeniably a national one. The BCS sponsors a "national" championship game that is broadcast across the United States (indeed, the world) and that attracts the interest of consumers from all parts of the country.[115]

With a relevant market established for the BCS, rule of reason analysis would likely then require a determination of market power, an often costly and uncertain task for plaintiffs.[116] Conceptually, market power for a joint venture refers to the venture's ability to raise prices "above the competitive level without losing so many sales so rapidly that

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[110] *See* United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377, 393–95 (1956).

[111] *See Bd. of Regents of Univ. of Okla.*, 468 U.S. at 95, 116–20.

[112] *Id.*

[113] *See, e.g.*, L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1393 (9th Cir. 1984) (reasoning that the type of audience attracted to watching NFL football games is unique and thus that there are "limited substitutes" for consumers of NFL games); *see also* Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 403–04 (advocating that the unique qualities of NFL football games lends themselves to an absence of substitute products).

[114] *See Grinnell Corp.*, 384 U.S. at 576 (discussing the presence of a national geographic market); *see also* Ilene Knable Gotts & Daniel E. Hemli, *Just the Facts: The Role of Customer and Economic Evidence in M&A Analysis*, 13 GEO. MASON L. REV. 1217, 1219 (2006) (furnishing insight on the configuration of geographic markets).

[115] The BCS National Championship Game is now even broadcast nationally in 3-D. *See* Walt Belcher, *John Tesh Shares Tips, Music with 'Daytime,'* TAMPA TRIB., Dec. 8, 2008, at 2 (noting that Fox Sports broadcasts the game nationally in 3-D).

[116] *See* Thomas A. Piraino, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. CAL. L. REV. 685, 689–91 (1991).

the price increase is unprofitable and must be rescinded."[117] As a practical matter, a joint venture with market power dominates a market in such a way that prices can be maintained at artificially high levels.[118] George Hay, one of the foremost antitrust authorities in the United States, characterizes potential consumer harm as a foundational concern of market power assessment: "If the structure of the market is such that there is little potential for consumers to be harmed, we need not be especially concerned with how firms behave because the presence of effective competition will provide a powerful antidote to any effort to exploit consumers."[119]

When examining the market power of a joint venture, courts normally scrutinize the extent to which the venture robs the marketplace of competition that would occur in its absence.[120] More positively, courts also highlight whether a joint venture improves market efficiencies or delivers enhanced goods to consumers.[121] Joint ventures usually satisfy rule of reason analysis.[122] Courts often find they promote market efficiencies and provide consumers with a superior marketplace.[123] At the same time, courts are wary of joint ventures that restrain the marketplace "broader than necessary."[124]

The BCS as a joint venture, when judged in a narrowly defined, national market, can offer a variety of arguments that are both consistent with efficiency-promoting and unreflective of consumer harm.

For one, the BCS provides consumers with a national championship game and four prominent bowl games that may otherwise prove unavailable. After all, until the BCS came into existence, there was "no procedure for attempting to match the top two ranked teams against

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[117] *See* William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937 (1981). Proof of market power is not always required in rule of reason analysis, but often is. *See* Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1309–10 (1992).

[118] *See, e.g.*, Peter J. Howe, *Role of Power Firms in N.E. Scrutinized*, BOS. GLOBE, May 12, 2001, at A1 (discussing market power in the context of the energy industry).

[119] George A. Hay, *Market Power in Antitrust*, 60 ANTITRUST L.J. 807, 808 (1992).

[120] Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 686–92 (1978) (describing the evolution of the rule of reason and explaining the rule's focus on the competitive significance of a restraint). *See generally* Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77 (applying the rule of reason to price variations among industries).

[121] *See, e.g.*, Kieff & Paredes, *supra* note 103, at 135.

[122] *See id.*

[123] *See* Thomas (Tim) Greaney, *Competition Policy and Organizational Fragmentation in Health Care*, 71 U. PITT. L. REV. 217, 225 (2009).

[124] *See* Thomas A. Piraino, Jr., *The Antitrust Analysis of Network Joint Ventures*, 47 HASTINGS L.J. 5, 32 (1995).

each other."[125] History suggests that without the BCS, organizers of college football would be ill equipped to schedule postseason matchups between the two best teams: in the fifty-six years prior to the BCS, the number one and number two ranked teams only played each other eight times, or, on average, once every seven years.[126]

Along those lines, although a sixteen-team playoff system, as advocated by many, would provide a different type of excitement for college football fans and greater opportunities for non-BCS-sponsored conferences to attract the limelight, it would not ensure that the top two FBS teams played each other.[127] Such a playoff system might also lengthen the playing season for student-athletes or, to avoid that outcome, eliminate regular season games that, for some colleges and universities, are of tremendous economic value.[128] In that same vein, remember that the BCS raises the value of regular season games.[129] Empirical data is corroborative: "For the 15 years before the BCS, attendance at all regular season college football games remained flat. . . . Since the formation of the BCS, that number has grown each year" because "the regular season games matter so much."[130]

In furtherance of appealing to the maximum number of college football fans, the BCS also financially rewards those conferences that generate the most fan interest—and revenue production—while treating as inferior the smaller and less financially contributing conferences. Although a bottom-up perspective might direct the BCS to assist the latter type of conferences, creating a legal obligation for such an outcome seems unfounded and potentially self-destructive.[131] After all, if the six BCS-sponsored conferences were no longer provided with automatic bids, membership in the BCS would seemingly lose much of its appeal.

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[125] *See* Pruitt, *supra* note 37, at 140.

[126] *See supra* note 10 and accompanying text.

[127] *See Senate Judiciary Committee Hearing*, *supra* note 14 (testimony of Barry J. Brett) (describing the advantages of a sixteen-team playoff system). The statement itself is available at http://judiciary.senate.gov/pdf/09-07-07BrettTestimony.pdf.

[128] For a compelling case against college football playoffs, see PLAYOFF PROBLEM, http://www.playoffproblem.com/ (last visited Feb. 20, 2011). *But see Senate Judiciary Committee Hearing*, *supra* note 14 (testimony of Barry J. Brett) (claiming that disadvantages to a playoff format are exaggerated by BCS supporters).

[129] *See supra* note 12 and accompanying text.

[130] *House Energy & Commerce Committee Hearing*, *supra* note 12 (statement of John D. Swofford, Comm'r of Atlantic Coast Conference). The statement itself is available at http://democrats.energycommerce.house.gov/Press_111/20090501/testimony_swofford.pdf.

[131] *See* Celia R. Taylor, *Microcredit as Model: A Critique of State/NGO Relations*, 29 SYRACUSE J. INT'L L. & COM. 303, 315 (2002) (describing basic concepts of a bottom-up approach to law and policy).

The BCS can also attempt to repel adverse findings in a rule of reason analysis by highlighting its use of empirically driven rankings. As discussed earlier, the BCS furnishes a sophisticated ranking methodology that blends together—albeit in a somewhat mysterious manner—empirical data, statistical insights, and traditional human impressions.[132] Although two-thirds of this methodology are contingent upon human impressions, which have sometimes elicited rebuke,[133] it has nonetheless drawn praise for its incorporation of objective measurements.[134] The use of objective criterion to rank—and reward—teams would likely benefit the BCS in antitrust scrutiny, as such scrutiny tends to favor empirically driven approaches.[135]

Finally, the BCS could assert an absence of discernable consumer injury caused by BCS scheduling. For starters, the BCS may not raise consumer prices for goods related to postseason college football, or at least not in a disconcerting way. For instance, although ticket prices to attend the BCS National Championship Game and BCS-sponsored bowl games are surely exorbitant for most consumers—especially when two popular college football teams are scheduled to play one another in a bowl game—those prices appear to reflect consumer demand for the product and the finite supply of stadium seats to watch the game live.[136] Then again, for many schools, ticket prices for regular season games against opponents from BCS-sponsored conferences are higher than for those against non-BCS-opponents. Perhaps that reveals BCS conference sponsorships as raising prices for consumers. That finding, however, presents a "chicken-and-egg" problem: are the ticket prices higher because teams in BCS-sponsored conferences are themselves

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[132] *See* Martin Manley, *5 Things Right with the BCS*, UPON FURTHER REVIEW (Jan. 9, 2009, 5:57 PM), http://uponfurtherreview.kansascity.com/?q=node/380; *see also supra* note 8 and accompanying text (noting aspects of BCS ranking that are not publicly revealed).

[133] *See* Rob Oller, *After 75 Years, Polls Still Stir Up Football Fans*, COLUMBUS DISPATCH, Aug. 20, 2010, at 1C.

[134] *See, e.g.*, Kevin Modesti, *BCS Poll Is as Good as Any in the Nation*, L.A. DAILY NEWS, Dec. 11, 2001, at S1.

[135] *See* Christopher S. Kelly, Note, Leegin Creative Leather Products, Inc. v. PSKS, Inc.: *The Final Blow to the Use of Per Se Rules in Judging Vertical Restraints—Why the Court Got It Wrong*, 28 N. ILL. U. L. REV. 593, 621–22, 634, 646 (2008); *see also* Joshua D. Wright, *Overshot the Mark? A Simple Explanation of the Chicago School's Influence on Antitrust*, 5 COMPETITION POL'Y INT'L J. 189, 199–205 (2009) (discussing the role of empirical studies in influencing antitrust policy).

[136] *See TicketCity Reveals the Top 10 Hottest College Bowl Games and Presents the 2009 Bowl Challenge: Bowl Prices Fluctuate as Fans Gamble Which Game Will Feature Their Favorite Team*, BUS. WIRE, Nov. 30, 2009 (quoting Randy Cohen, CEO of TicketCity: "With the SEC Championship determining who will play in the BCS Championship, the average price for the BCS will increase depending on which team makes it.").

more marketable, or because membership in a BCS-sponsored conference makes them more marketable?[137]

Consumer harm may also not be provable through an output-oriented argument. To be sure, the BCS may reduce an *ideal* output of games for consumers to enjoy, since a sixteen-team playoff would involve more teams and thus more games. On the other hand, the BCS did not replace a playoff system—in fact, in the more than five decades of organized college football that preceded the BCS, there was no playoff system. A future possibility of such a playoff system also carries a variety of real-world obstacles, including concern that it would harm the overall product of postseason college football.[138] From those vantage points, the BCS seemingly does not "reduce" a previous or certain output of games that would otherwise exist in its absence. Perhaps the opposite, in fact: the BCS might increase the output of postseason games or at least elevate their quality.

The BCS and a college football playoff system, moreover, would not comprise mutually exclusive entities; both could exist simultaneously and compete against one another. Of course, the dominance of the BCS in controlling the production of playoff college football games may, as a practical matter, preclude competition.[139] That would seem especially true in light of the aforementioned inequities among institutions in BCS-sponsored conferences and those in non-BCS-sponsored conferences—inequities caused by, or at least consequences of, the BCS.[140] In light of the popularity of the BCS National Championship Game and the four BCS-sponsored bowl games, along with the BCS-enhanced value of regular season games, however, the unique qualities

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[137] *See, e.g.*, Brett Dawson, *UK Raises Prices of Football Tickets*, COURIER-J. (Louisville), Apr. 13, 2010, at C3 (noting higher ticket prices for University of Kentucky football games against opponents from BCS-sponsored conferences). Chicken-and-egg problems are apparent across industries. *See, e.g.*, Judith A. McMorrow, *Professional Responsibility in an Uncertain Profession: Legal Ethics in China*, 43 AKRON L. REV. 1081, 1082–83 (2010) (describing chicken-and-egg problems in legal academia).

[138] *See* Steve Yanda, *BCS Is Decried During Hearings: Subcommittee Warns of Potential Action*, WASH. POST, May 3, 2009, at D01 (describing how implementation of a playoff system might endanger the system and success of bowl games).

[139] If non-BCS schools attempted to form a rival ranking system/tournament and failed because the barrier to entry proved insurmountable, it would strengthen an antitrust attack of the BCS, especially in terms of establishing BCS's market power. *Cf.* Nelson v. Monroe Reg'l Med. Ctr., 925 F.2d 1555, 1573 (7th Cir. 1991) ("It is fundamental that in order to establish market power, the plaintiffs must show a barrier to entry that prevents competition.").

[140] *See supra* notes 22–31 and accompanying text.

of the BCS appear to have procompetitive qualities that may outweigh their anticompetitive effects.

D. *Section 2 and the BCS*

Although criticisms of the BCS most commonly raise section 1 concerns, section 2 supplies an additional source of examination. Section 2 bars an entity from intentionally behaving as an illegal monopoly in a relevant market.[141] Various politicians and commentators have characterized the BCS as an illegal monopoly.[142] Senator Hatch, for instance, contends that the BCS enjoys monopoly power because it has purportedly eliminated actual and potential competition for elite postseason college football.[143]

For purposes of section 2, the relevant market of the BCS would likely constitute either the national championship game or the four BCS-sponsored bowl games.[144] A court assessing the BCS in those markets would necessarily weigh the possible, albeit meager and highly restricted, opportunities for teams from non-BCS-sponsored conferences to participate in either the national championship game or in one of the four BCS-sponsored bowl games.

The BCS may appear monopolistic if one highlights its system of automatic bids. Indeed, because of the six automatic bids for the six BCS-sponsored conferences, at least two of the BCS-sponsored bowl games are played only by teams from BCS-sponsored conferences. Then again, the BCS does not "own" the concept of a national championship game between FBS teams; other FBS teams could, in theory, host one. The same is true of bowl games. Dozens of non-BCS-sponsored bowl games are played each year, albeit typically with less fanfare and smaller economic benefit.

Perhaps further strengthening a BCS defense to a section 2 claim is the requirement that monopolistic power arise through nonmeritorious means. In 1966, the U.S. Supreme Court enunciated such a point in *United States v. Grinnell Corp.*: an illegal monopoly under section 2 must reflect a "willful acquisition or maintenance of that power as dis-

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[141] 15 U.S.C. § 2 (2006); *see Grinnell Corp.*, 384 U.S. at 570–71 (showing the importance of intentional behavior with Section 2 claims).

[142] *See* Mark Wiedmer, *Obama Not Too Busy to Push His BCS Concerns*, Chattanooga Times Free Press, Jan. 18, 2009, http://www.timesfreepress.com/news/2009/jan/18/obama- not-too-busy-push-his-bcs-concerns/ (noting various politicians that have proposed legislation in response to the BCS).

[143] *See* Press Release, Sen. Orrin Hatch, *supra* note 18.

[144] *See* Rogers, *supra* note 7, at 299.

tinguished from growth or development as a consequence of a superior product, business acumen or historic accident."[145] Although BCS critics may establish the practical inability of entities to rival the BCS, the BCS can respond, with some persuasion, by characterizing its dominance as merely reflective of a superior product and an optimal venue for consumer interests.

II. The Appropriateness of the Government Investigating the BCS

A reader of this Article might rightfully wonder: Why does the government care about this topic? To be sure, the list of serious problems facing the United States is long and frightening, and although the author does not profess to have the list, surely the plight of postseason college football is not listed anywhere near the top.[146] It may thus seem dubious for federal and state governmental bodies to expend tax dollars, time, and other assets investigating the "fairness" and possible illegality of college football scheduling. Resources are, after all, finite and opportunity costs arise when the government investigates the BCS at the expense of other topics.

So why is the BCS—and, for that matter, other "crisis"-causing sports entities—in the cross-hairs of Congress and the Justice Department? Undoubtedly, government, and particularly elected officials, are partly motivated by the media attention generated by such investigations.[147] Granted, some of the attention can prove quite negative. For instance, after the chairman and ranking member of the House Government Reform Committee issued subpoenas to investigate steroid

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[145] 384 U.S. at 570–71.

[146] *See, e.g.*, Paul Krugman, Op-Ed., *The Phantom Menace*, N.Y. Times, Nov. 23, 2009, at A27 (outlining the economic troubles confronting many U.S. citizens).

[147] Even members of Congress agree that desire to attract headlines influences Congress's interest in sports investigations. *See, e.g.*, *Source: Mitchell Investigation Now Has Key Documentation*, Capital, Nov. 16, 2007, at C3 (citing comments by U.S. Senator John McCain, who characterized a possible congressional hearing on steroids in baseball as being for "a little headline grabbing"). What might be deemed congressional dog-and-pony shows are not limited to sports investigations. Consider that during the financial crisis, critics accused some government actors of issuing an inordinate amount of subpoenas to investigate hedge funds to solicit media attention. *See* Craig S. Warkol & Robert E. Hauberg Jr., Aspatore Special Report: Assisting Clients in Government Investigations During a Financial Crisis; An Immediate Look at the Attorney's Role in Resolving the Key Legal Issues Surrounding Government Investigations (2008) (noting sensational news stories during the "financial crisis" motivated government actors to conduct "overbroad" investigations).

use in baseball in 2005, they were derided as ego-obsessed.[148] Still, those same congressmen appeared on newscasts all over the country.

The notion that political actors gravitate toward media-friendly investigations, such as those concerning sports, is verifiable through more than common sense. It is also consistent with basic theories of human behavior. Communication theory scholars, for instance, find that because many political actors presume that news media influences public perceptions, they are motivated to be in the news.[149]

Simple enough, perhaps, but politicians' enthusiasm to be in the news for sports investigations still draws the ire of many. This strain of criticism is neither new nor unique to college football. Over the last decade, Congress has attracted scorn for actively investigating steroid use in professional baseball, with particular rebuke reserved for high-profile congressional hearings that feature Major League Baseball stars.[150] Critics have lampooned these investigations as ridiculous and have derisively parodied the associated hearings.[151] Some have gone a step further, contending that policies affecting professional athletes ought to be left to the collectively bargained discretion of leagues and their respective players' associations and far from the halls of Congress.[152] An analogous deduction might be raised of postseason college football: let the conferences and their member colleges and universities determine their own system of games. At worst, some colleges and universities will be economically disadvantaged and some of their fans and

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[148] *See* Spencer S. Hsu & Michael D. Shear, *The Fan with Subpoena Power: Hearings on Steroid Use in Baseball Put Political Spotlight on Davis*, Wash. Post, March 11, 2005, at B01.

[149] *See* Jonathan Cohen et al., *The Influence of Presumed Media Influence in Politics: Do Politicians' Perceptions of Media Power Matter?*, 72 Pub. Opinion Q. 331, 331–43 (2008) (noting the political actor that perceives a greater degree of media influence on the public is more likely to solicit the media to generate coverage and promote his or her agenda).

[150] *See* Michael McCann, *Fehr and Selig in D.C.: What Will Happen When Bud and Don Face Congress?*, Sports Illustrated, Jan. 15, 2008, http://sportsillustrated.cnn.com/2008/writers/michael_mccann/01/14/mccann.congress/index.html (predicting the outcome of testimony by Donald Fehr and Bud Selig before Congress about steroid use in baseball).

[151] *See, e.g.*, Mark McGuire, *Hold the Work, Time for a Hearing*, Times Union (Albany), June 13, 2008, at B2; Will Leitch, *Impotent 'Roid Rage': Why Rocket Hearings Didn't Take Off*, N.Y. Mag., Feb. 25, 2008, at 32; Howard Mortman, *Congress: The Ball's in Their Court*, Politico (Sept. 3, 2007), http://www.politico.com/news/stories/0907/5613.html.

[152] *See, e.g.*, Brent D. Showalter, Comment, *Steroid Testing Policies in Professional Sports: Regulated by Congress or the Responsibility of the Leagues?*, 17 Marq. Sports L. Rev. 651, 677–78 (2007) (discussing professional sports leagues' drug testing policies and proposing that Congress should not mandate drug testing policies for all leagues); *Journal Editorial Report: Panel Discusses News of the Week* (Fox News Network television broadcast Feb. 17, 2008) (quoting Steve Moore of the *Wall Street Journal*: "I don't think this is something Congress should get involved in, in the first place.").

student-athletes will be disappointed, but no one's life will be lost, no one's health will be hurt, and no one will lose his or her home or well-being.

The charge that the BCS and the scheduling of postseason college football teams are not worthy of government investigation may nonetheless be misplaced. It might also signal a form of prejudice against an otherwise legitimate topic merely because that topic *is* sports related.

Keep in mind, college football is a major commercial enterprise which generates significant viewership and substantial business activity. The collective revenues gathered from bowl games in 2009–2010 alone topped $237 million and provided profits of over $157 million for participating schools.[153] Not only are these totals impressive, they are growing.[154]

These revenues only form the tip of the iceberg. As noted earlier, universities with successful college football programs enjoy an increased profile among prospective students and recruits.[155] Similarly, countless businesses and alumni are closely affiliated, in an economic sense, with college programs.[156] Empirical evidence has shown that alumni and boosters respond positively to football bowl participation in the form of financial contributions.[157] Consequently, any unfairness in the ability to participate in BCS bowl games poses an impact not only on immediate bowl revenue streams but also on the retention and attraction of other major college sponsorship and donor opportunities.[158]

Organizational decisions of the BCS have profound effects on the economic prospects of individual schools and on the competitive landscape of college football as a whole. Why, then, does the prospect of congressional oversight arouse such skepticism? Does congressional oversight of other media-friendly industries such as the entertainment industry and the video game industry not strike commentators as similarly frivolous?

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[153] *See Bowl Excess Revenue Expenses by Conference 2009–10*, NCAA (Feb. 2, 2010), http://www.ncaa.org/wps/wcm/connect/public/ncaa/pdfs/postseason+football/bowl+excess+revenue+expenses+by+conference+2009+10.

[154] For instance, revenue grew 4% and profitability increased by an impressive 6% from 2008–2009 to 2009–2010. *Id.* Taking a slightly longer view, the NCAA's own literature reveals that revenues have grown approximately 31% and that profits have grown approximately 29% since 2002–2003. *Id.*

[155] *See supra* notes 30–31 and accompanying text.

[156] *See* Thomas A. Rhoads & Shelby Gerking, *Educational Contributions, Academic Quality and Athletic Success*, 18 CONTEMP. ECON. POL'Y 248, 248–57 (2000).

[157] *See id.*

[158] *See id.*

Perhaps criticism ought to be levied against the political actors who are interested in the BCS not so much for the merits of their pursuit, but rather for their inability to persuade Americans of their legitimate investigatory rationales. By framing their dissatisfaction of the BCS as a question of sporting fairness rather than as a potentially illegal form of economic manipulation, political actors have likely undersold the topic.

III. Alternative Approaches

The prospect of an antitrust case against the BCS should not tempt BCS critics to count down the days to a college football playoff system—at least not a system compelled by a court order. As analyzed in this Article, such a case presents, at best, a mixed bag, and one that on balance seems tilted in favor of the putative defendant.

Improving the competitiveness of postseason college football, however, may still be accomplished through changes to the BCS.

One possible reform would be dramatic: using economic rationales—as opposed to legal compulsion—to persuade BCS members to dismantle the BCS and to adopt a playoff system. Such a system might be akin to the "March Madness" NCAA Division I Basketball Championship for men's college basketball. It would pose certain advantages and certain disadvantages.

The potential for enhanced profits, particularly from enlarged television broadcasting revenue, suggests one leading rationale for BCS schools to adopt a playoff system. Compare the primary television contract of postseason college basketball with that of BCS-sponsored postseason college football. In 2000, CBS reached an eleven-year agreement with the NCAA to carry the men's NCAA Basketball Tournament for $6 billion.[159] In 2008, ESPN acquired the BCS Championship series from 2011 to 2014 for $495 million—about $380.5 million less per year than the basketball tournament.[160] Even when taking into consideration differences in contract length and the presence of a greater number of postseason basketball games than postseason football games, there remains a notable disparity in television revenue between the two prime sporting events. Whereas the former constitutes a beloved and billion-dollar playoff system, the latter resembles a smaller and disputatious sequence of ranking-inspired games.

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[159] *See* Sarah M. Konsky, Comment, *An Antitrust Challenge to the NCAA Transfer Rules*, 70 U. Chi. L. Rev. 1581, 1584 (2003).

[160] *See* Tracee Hamilton, *An Idea That Is Pure Madness*, Wash. Post, Jan. 21, 2010, at D1.

A college football playoff system might also increase merchandise sales. Instead of a consumption framework in which fans purchase team merchandise for one bowl game, a playoff format would furnish opportunities for waves of sales, at least for those teams that progress in a playoff system. Indeed, each playoff level could be associated with new merchandise sales, such as is found in the NFL, with different styles of t-shirts, caps, and other team items sold for the Wild Card Round, Divisional Round, Conference Round, and the Super Bowl.[161]

Aside from opportunities for improved revenue, broader notions of legitimacy may also motivate a shift to a playoff system. Myriad critics of the BCS posit that a playoff system would produce a more "legitimate" champion.[162] Legitimacy, more generally, is associated with improved business functioning and success in the marketplace.[163] For financial reasons, therefore, BCS schools may covet a system of games perceived as more rightful.

Playoffs might also appeal to BCS schools because they comport with the American narrative of the underdog who, no matter the odds, always possesses a chance to succeed through hard work and talent. Indeed, one of the more prominent ideologies in the United States is the "meritocratic ideology," defined by social psychologists John Jost and Orsolya Hunyady as belief in a system that "rewards individual ability and motivation, so success is an indicator of personal deservingness."[164] This ideology leads Americans to view "the underdog" story in any context as particularly appealing—and marketable.[165] With the BCS and its system of ranking and automatic bids, the underdog—definable as a team from a non-BCS-sponsored conference—essentially has no chance at a national title or appearing in a bowl game.[166]

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[161] *See* Jamie Herzlich, *Jets Sale Ahead: AFC East Champs' Items Outperform Wild-Card Giants*, NEWSDAY (Long Island, N.Y.), Jan. 4, 2003, at A05 (discussing various levels of sales for NFL playoff games).

[162] *See, e.g.*, Dan K. Thomasson, *The BCS: Bunch of College Sellouts; Greed and Venality Have Come to Characterize the College Football Post-Season*, PITTSBURGH POST-GAZETTE, Jan. 6, 2010, at B7.

[163] *See* Royston Greenwood & David Deephouse, *Legitimacy Seen as Key: Firms Ignore This Strategy at Own Peril*, GLOBE & MAIL (Toronto), Dec. 26, 2001, at B7.

[164] *See* John T. Jost & Orsolya Hunyady, *Antecedents and Consequences of System-Justifying Ideologies*, 14 CURRENT DIRECTIONS IN PSYCHOL. SCI. 260, 261 (2005).

[165] *See* Michael McCann, *Jack Bauer and Growing Up Rich*, SITUATIONIST, Jan. 28, 2007, http://thesituationist.wordpress.com/2007/01/28/jack-bauer-and-growing-up-rich/. The "Horatio Alger" story is viewed by many as a myth. *See, e.g.*, Martin J. McMahon, Jr., *The Matthew Effect and Federal Taxation*, 45 B.C. L. REV. 993, 1010–12 (2004).

[166] *See* Hubert Mizell, *Good, But Could Be Better*, ST. PETERSBURG TIMES, Jan. 5, 2000, at 1X.

The meritocratic ideology appears to contribute to the more considerable fan interest in the NCAA Men's Basketball Championship than in the BCS National Championship Game. To illustrate, while the first seed Duke University and fifth seed Butler University NCAA Basketball Championship game in March 2010 attracted 48.1 million viewers, the BCS first-ranked University of Alabama and second-ranked University of Texas BCS Championship Game in January 2010 generated 30.8 million viewers—a 14.9% increase from the previous year, but still considerably less than the number of viewers of the NCAA Men's Basketball Championship.[167] It should be noted, moreover, that basketball is not necessarily an intrinsically more popular sport than football in the United States. Indeed, the most recent Super Bowl attracted 106.5 million U.S. viewers.[168]

There are, however, disadvantages to adopting a playoff system. A leading disadvantage would concern contract law and the contractual obligations inherent in broadcasting agreements between BCS member institutions and various networks and entertainment providers. ESPN, for instance, has a contract to broadcast the BCS Championship Series Games through 2014.[169] If BCS schools sought a change of format prior to the expiration of the contract, it would either require a renegotiation with ESPN or a contractual breach, the latter of which might risk a lawsuit with ESPN.

Although waiting for the expiration of existing contracts to adopt a playoff system would remove the possibility of breach of contract claims, it would not eliminate other types of obstacles. Determination of playoff eligibility would constitute one such concern. The resolution of that determination, furthermore, would only beget other issues, such as whether to preserve school rivalry games and whether to preserve the importance of strength of schedule in determining which teams are invited to participate in postseason football.

The value of regular-season games and their appeal to fans might also be damaged by shifting to a playoff format; once a school is assured of a playoff spot, it may adopt a less competitive and aggressive approach in the remainder of its games.

Team redistribution would pose still another hurdle to a playoff system. The emergence of such a system would likely cause a reshuf-

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[167] *See* Paul Doyle, *On the Fly*, Hartford Courant, Apr. 7, 2010, at C1 (mentioning TV ratings for the Duke-Butler game); Bob Wolfley, *Is It Dome Sweet Dome?*, Milwaukee J. Sentinel, Jan. 17, 2010, at C2 (mentioning TV ratings for the Alabama-Texas game).

[168] *See* Jon Weinbach, *Football's Total Blitz on TV*, L.A. Times, Sept. 25, 2010, at D1.

[169] *See* Hamilton, *supra* note 160.

fling of teams and conferences. Teams in the Southeastern Conference (SEC), for instance, reveal why. Consider that ten of twelve teams in the SEC received bowl bids in 2010. If a playoff system were in a place, perhaps only one of those twelve teams would be able to earn an invitation. As a result, several, if not most, SEC teams might attempt to flee the conference. Historic rivalries could therefore be eliminated, which in turn would trigger backlash from fans. None of this is to say that a playoff system could not be created without sacrificing rivalries. Perhaps such a goal could be accomplished by inserting certain non-conference games into the schedule—but it would necessitate an arduous task.

It should be emphasized that whether a playoff change occurs would be influenced by which schools receive the spoils of the BCS system. Under the current system, six conferences have received at least $100 million and Notre Dame received $23 million from the BCS since 2004.[170] Under a playoff system, these monies may be increased in the aggregate but also may be redistributed to a wider scope of colleges and universities. This highlights the difficulty of BCS reform: the schools in BCS conferences risk a new economic system that may prove more prosperous for all FBS teams, but not necessarily for BCS teams.

A less dramatic, though still significant BCS reform, would be to ensure that all twelve conferences are treated the same for purposes of participating in BCS-sponsored bowl games. This assurance could be obtained simply by expanding the number of BCS-sponsored bowl games. Doing so would mitigate any antitrust injury caused by the current BCS system, as all conferences would be able to participate in BCS-sponsored bowl games. Indeed, by including all twelve FBS conferences in the selection of bowl games and thereby assuring that every conference appears in a BCS-sponsored bowl game, antitrust worries would recede. To be sure, some bowl games would prove of higher financial and media value than others, meaning economic and reputational disparities between bowl games would remain. Still, in this more egalitarian arrangement, less prominent conferences such as the Mid-American Conference and the Sun Belt Conference would obtain improved media exposure and, in time, would likely be viewed as "equals" to the six conferences currently affiliated with the BCS.

A hybrid of the BCS and a playoff system would constitute still another voluntary reform. A hybrid could preserve the BCS while poten-

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[170] *See* Tony Barnhart, *Is the BCS Supposed To Be Fair?*, ATLANTA J.-CONST. (May 27, 2010, 8:34 AM), http://blogs.ajc.com/barnhart-college-football/2010/05/27/is-the-bcs-supposed-to-be-fair/.

tially offering key benefits commonly associated with a playoff format, including increased viewership and spiked merchandizing revenue.

A possible first step in a hybrid model would entail the shortening of the regular season by one or two games. Although some colleges and universities would likely object to such a move because of concerns over lost revenue, a regular-season reduction would ensure that playoff games do not elongate the calendar of college football. Preserving the existing length of the college football season would sidestep concerns about both student-athletes missing additional classes and the increased risk of injury and bodily wear-and-tear that go along with the playing of additional football games.

The structuring of the playoff format would comprise the next step in a hybrid model. A sensible approach might include the first place team of each conference being automatically invited to the playoffs. Such a design would ensure that the team that dominates its conference rightly ascends to the collegiate playoffs. As it stands now, a team that dominates its conference may miss out on the top bowl games because it plays in a non-BCS sponsored conference. Also, by redistributing the top conference teams to play against one another, advancement would require defeating top teams from other conferences. To illustrate, a Mountain West Conference team, such as Texas Christian University, could play a team from the SEC, such as Auburn University.

Next, eight wild card teams could enter the playoffs based on strength of schedule and record. An arrangement of this sort would discourage a conference with important historic rivalries, such as the SEC, from voluntarily dissolving because their teams tend to be among the best. A BCS-style calculation, moreover, could be incorporated to assess which teams should qualify for a wild card. Like the current BCS ranking methodology, a playoff methodology could place statistical value in strength of opponents. Therefore, a competitive conference like the SEC might receive multiple wild-card selections. At the same time, the calculation should not factor in the historic prestige of a particular team or its conference; past strength of the current year opponents would frustrate a renewed emphasis on merit.

A blended approach is similar to how "bubble teams" make the NCAA tournament for men's basketball. Although the teams with the best records in conferences normally earn positions in the tournament, those on the bubble are scrutinized based on the strength of schedule. Such a system has proven widely popular.

Although none of these potential changes to the BCS may emerge, they are likely more appealing "fixes" to the current controversial, but probably legal, system of postseason college football. And a fix to the

collegiate postseason is what fans and members of Congress are clamoring for.

Conclusion

While the BCS is unpopular and exhibits a bevy of anticompetitive qualities, this Article asserts that it is likely compatible with sections 1 of 2 of the Sherman Act. This conclusion is reached primarily because the deferential rule of reason analysis would be applied in a legal challenge to the BCS and because the BCS offers procompetitive characteristics that may not be obtainable through other arrangements and that were not shown in the fifty-six years prior to the BCS coming into existence. The BCS could nonetheless benefit from voluntary, economically maximizing improvements that would redesign postseason college football to better comport with social, political and commercial expectations.