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No Penalty on the Play: Why the Bowl Championship Series Stays In-Bounds of the Sherman Act

M. Todd Carroll

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No Penalty on the Play: Why the Bowl Championship Series Stays In-Bounds of the Sherman Act

M. Todd Carroll*

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I. Introduction

Who needs college football?¹ Given the rapidly increasing cost of maintaining a football program, many colleges are asking this question.² Since the late 1980s, the average expenses generated by a Division I-A college football team have nearly doubled to over \$6 million,³ causing several schools

1. This question is posed in an advertisement produced by the University of Tennessee that aired during the 2003–04 college football postseason. The spot portrays a student flutist whose education has been financed with funds generated by the school's football program. *University of Tennessee Promotional Advertisement* (Entertainment & Sports Programming Network (ESPN) television broadcast, Jan. 2, 2004) (on file with the Washington and Lee Law Review). The advertisement further notes that the football program has contributed \$1.5 million to the school's academic sector between 1998 and 2003. *Id.*

2. See DANIEL L. FULKS, REVENUES AND EXPENSES OF DIVISION I AND II INTERCOLLEGIATE ATHLETICS PROGRAMS: FINANCIAL TRENDS AND RELATIONSHIPS–2001, at 22 (2002) (detailing the rise in costs associated with football programs), available at <http://www.ncaa.org> (on file with the Washington and Lee Law Review).

3. *Id.*

to question the viability of their programs.⁴ Revenues created by football, though, can be substantial.⁵ Indeed, a financially successful football program may fund itself and other athletic teams, thereby providing more students with the opportunity to compete at the collegiate level and producing an athletic program of an overall higher quality.⁶ Of more social consequence, profits generated by football can also provide a windfall for funding a university's academic programs.⁷ But not every college or university has the luxury of a program that can stand on its own.⁸

Exponentially rising expenses have forced many schools to support their football programs with funds from the general budget⁹ while others have chosen to terminate football altogether.¹⁰ For those schools that decide to field

4. See, e.g., Scott Cowen, Editorial, *How Division I-A is Selling Its Athletes Short*, N.Y. TIMES, June 15, 2003, at 13 [hereinafter Cowen, *Selling Athletes Short*] (describing the evaluation of the costs related to the Tulane University football program that the school's board undertook when considering whether the program should continue).

5. See FULKS, *supra* note 2, at 22 (noting that the average revenue created by a Division I-A football program in 2001 was \$10.9 million).

6. See, e.g., Vince Dooley, Editorial, *Other Opinion: Athletics Enhance Academics at UGA*, ATLANTA J.-CONST., Dec. 28, 2003, at 7G (explaining the use of football-generated revenue to upgrade athletic facilities for both men's and women's sports).

7. See *id.* (noting that the University of Georgia athletic department, which is financed primarily by the football program, has contributed \$1.5 million in non-athletic scholarships to the school with a commitment for an additional \$500,000 to be paid before 2008).

8. See FULKS, *supra* note 2, at 29 (noting that 79 Division I-A football programs, or 69%, reported a net profit following the 2001 season while 32, or 28%, reported a net deficit); see also Welch Suggs, *In Football, the Have-Nots Clash with the Haves*, CHRON. OF HIGHER EDUC., Sept. 5, 2003, at A48 (juxtaposing the football program at the University of Colorado, which "would still turn a profit" if it had to "carry all of the athletics department's capital debt," against Colorado State University's athletic department, which required nearly \$5 million in student fees and other general funds from the university in order to operate during the 2003-04 academic year). Mr. Suggs's article also noted that the University of Idaho's football program "will spend \$4-million more than it brings in [during the 2003-04 academic year], with the university's general budget making up the shortfall." *Id.*

9. See, e.g., *Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series: Oversight Hearing Before the House Comm. on the Judiciary*, 108th Cong. (2003) (statement of Scott Cowen, President, Tulane Univ.) (Sept. 4, 2003) [hereinafter Cowen, House Statement] (noting that some schools must "scramble within their own limited budgets" to finance football programs), available at <http://www.house.gov/judiciary/cowen090403.htm> (on file with the Washington and Lee Law Review); Suggs, *supra* note 8, at A48 (detailing the use of general funds, student fees, and state appropriations in order to sustain the football programs at the Universities of Colorado State and Idaho).

10. See, e.g., Brian Ertkin, *Siena Sacks its Football Program; Players Say They Were Surprised by Decision*, TIMES UNION (Albany, NY), Jan. 22, 2004, at C1 (noting that the Universities of Siena, Canisius, Fairfield, and St. John's have dropped their football programs since October of 2002 because of the investment needed to maintain a team); Elliot Teaford, *The Big East's Final Fling*, L.A. TIMES, Nov. 23, 2003, at D10 (explaining that financial

football teams dependent on university support, every dollar allocated to an athletic department results in one less dollar available for the academic sector. This dilemma forces administrators to choose between fulfilling the school's academic mission, on the one hand, and satisfying alumni, students, and other supporters who crave success in athletics on the other. Consequently, a frequent problem presented to university decisionmakers is whether scarce resources should be used to build classrooms, upgrade laboratories, and pay professors, or if those resources are better used to buy shoulder pads, improve weight rooms, and hire more coaches.¹¹

Instead of treating the choice between football and academics as a binary one, some schools have approached the problem from a third angle. A group of college presidents currently trapped in this financial vise has banded together to circumvent the problem by blaming their football deficits on antitrust violations committed by other schools. This group, known as the Presidential Coalition for Athletics Reform (Presidential Coalition) and led by Tulane University President Scott Cowen, takes particular issue with the Bowl Championship Series (BCS).¹² The BCS is an agreement among several football-sponsoring conferences, four postseason bowl games, and one television network that decides which eight schools will participate in those four college football games at the conclusion of each season.¹³ The financial rewards that the BCS

reasons required East Tennessee State University to terminate its football program following the 2003–04 season).

11. See Cowen, House Statement, *supra* note 9 (discussing the budgetary decision faced by Tulane University regarding the distribution of funds to its football program); Cowen, *Selling Athletes Short*, *supra* note 4, at 13 (describing the review of Tulane's football program before deciding to continue to "siphon even more resources from the academic mission of [the] university" in order to support the program).

12. See Scott S. Cowen, *Letter to Non-BCS University Presidents*, at http://coalition.tulane.edu/letter_nonbcs.shtml (June 12, 2003) (encouraging schools that are not part of the BCS to "aggressively work to alter the BCS arrangement") (on file with the Washington and Lee Law Review). A comprehensive list of the Presidential Coalition's membership, which consists of approximately fifty Division I-A schools, can be found at Presidential Coalition for Athletics Reform, *Participants: Institutions*, at http://coalition.tulane.edu/members_institutions.shtml (last visited June 19, 2004) (on file with the Washington and Lee Law Review).

13. See DENNIS POPPE, NCAA 2003–04 POSTSEASON FOOTBALL HANDBOOK 8–9 (2003) (describing the agreement that determines which schools will participate in the Rose Bowl, Nokia Sugar Bowl, FedEx Orange Bowl, and Tostitos Fiesta Bowl games at the conclusion of each college football season), available at http://www.ncaa.org/library/handbooks/football/2003/2003-04_d1a_postseason.pdf (on file with the Washington and Lee Law Review). The conferences that are parties to the BCS agreement include the Atlantic Coast Conference, the Big East Conference, the Big Ten Conference, the Big Twelve Conference, the Pacific Ten Conference, and the Southeastern Conference. *Id.* at 8. The television network involved in the BCS is the American Broadcasting Company (ABC). Bowl Championship Series, *BCS Members*, at <http://www.bcsfootball.org/members.shtml> (last visited June 19, 2004) [hereinafter

generates are substantial—over \$100 million from the four bowl games are distributed annually among Division I-A conferences¹⁴—but the schools represented by the Presidential Coalition have not been the primary beneficiaries of its fruits.¹⁵ As a result, the group has threatened to challenge the arrangement as one that unreasonably restrains trade in violation of federal antitrust legislation.¹⁶

In the fall of 2003, the Presidential Coalition took its first steps toward an attempted dissolution of the BCS. The group appeared before the judiciary committees of both the United States Senate and House of Representatives and encouraged each to take a hard stance against the BCS.¹⁷ Arguing that the agreement amounts to little more than an unlawful group boycott by so-called "BCS conferences" against "non-BCS conferences,"¹⁸ the Presidential Coalition claimed that the schools it represents would be placed at an insurmountable competitive disadvantage if the BCS remains unregulated.¹⁹ Though the

BCS, *BCS Members*] (on file with the Washington and Lee Law Review).

14. See Nat'l Collegiate Athletic Ass'n, *2002–03 Distribution of BCS Revenue*, at http://www1.ncaa.org/membership/postseason_football/BCS_revenue.pdf (Apr. 14, 2003) [hereinafter NCAA, *2002–03 BCS Revenue Distribution*] (noting that the BCS distributed nearly \$115 million generated during the 2002–03 postseason among all Division I-A conferences and some Division I-AA conferences) (on file with the Washington and Lee Law Review).

15. See *id.* (listing the BCS-created funds received by each conference). Conferences that are part of the BCS agreement received between \$16.6 million and \$21.5 million for their participation in the 2002–03 postseason, while non-BCS conferences received less than \$1 million each. *Id.*

16. See Liz Clarke, *'Have-Nots' Want a Slice of the BCS Pie; Eleven I-A Presidents to Hear Proposal for Sharing Bowl Spoils With 'Mid-Majors'*, WASH. POST, Nov. 16, 2003, at E15 (noting that the Presidential Coalition has retained counsel in preparation of an antitrust challenge to the BCS).

17. See *id.* (noting that both judiciary committees held hearings "on the fairness of the BCS"). The organization first met with the House of Representatives subcommittee on September 4, 2003. United States H.R., *Full Committee*, at <http://www.house.gov/judiciary/full.htm> (last visited June 19, 2004) (on file with the Washington and Lee Law Review). The hearing before the Senate Judiciary Committee occurred on October 29, 2003. United States Sen., *All Hearings*, at http://judiciary.senate.gov/schedule_all.cfm (last visited June 19, 2004) (on file with the Washington and Lee Law Review).

18. See *BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field: Hearing Before the Sen. Comm. on the Judiciary*, 108th Cong. (2003) (statement of Scott Cowen, President, Tulane Univ.) [hereinafter Cowen, Senate Statement] (expressing a belief that "the BCS is an anticompetitive and highly exclusive system"), available at <http://coalition.tulane.edu/testimony3.pdf> (on file with the Washington and Lee Law Review); Cowen, House Statement, *supra* note 9 (stating that the BCS effectively prohibits non-BCS schools from participating in the four BCS bowl games).

19. See Cowen, House Statement, *supra* note 9 (listing adverse impacts of the BCS on student recruitment, retention of coaches, facility improvement, scheduling, and the public

federal legislators seemed to agree with the position of President Cowen's group,²⁰ the hearings concluded with a general understanding that Congress would not take remedial steps until the Presidential Coalition exhausted its alternatives to legislative intervention, the primary alternative being an antitrust suit.²¹

This Note explains why an antitrust challenge to the BCS would be unsuccessful. Reading the agreement in the context of the industry as a whole, particularly in light of the history of college football's conference and postseason structure, makes it clear that the arrangement does not restrain trade unreasonably.²² On the contrary, the agreement generates a product—a postseason game between the nation's two best college football teams—that was heretofore created only by coincidence.²³ This result was rarely available prior to the BCS despite consumer demand for such a game.²⁴ Moreover, the BCS does not necessarily prevent schools that were not privy to the agreement from participating in the four BCS games.²⁵ A further procompetitive benefit of the BCS is the infusion of an objective measure of each college football team's relative strength into a system that formerly based a team's value solely on the opinions of journalists and coaches.²⁶ This Note argues that the totality of these considerations suffices to relieve the BCS of any liability under the Sherman Act.²⁷

perception of non-member schools).

20. See, e.g., Bruce Alpert, *Bowl-Game System Gets Penalty Flag; Tulane President, Some in Senate Seek to Revise College Football Policy*, TIMES-PICAYUNE (New Orleans, LA), Oct. 30, 2003, at 1 (noting Sen. Joseph Biden's comments that the BCS looks "un-American," "unfair," and "like a rigged deal").

21. See *id.* (explaining that Congress would delay intervening in order to give all parties an opportunity to resolve the situation); see also Clarke, *supra* note 16, at E15 (noting that the Presidential Coalition is preparing itself for possible antitrust litigation concerning the BCS).

22. See *infra* Part IV (analyzing the pro- and anticompetitive effects of the BCS on the industry of college football).

23. See *infra* Part II.D (noting that the nation's two best teams will necessarily play one another after the regular season pursuant to the terms of the BCS agreement).

24. See *infra* Part II.C (explaining the split national championships that accompanied the traditional means of selecting college football's top team).

25. See POPPE, *supra* note 13, at 8–9 (describing how schools from non-BCS conferences may become eligible or automatically qualify for a BCS game). Each season, one-quarter of the BCS slots are available to schools outside of the BCS. *Id.* at 8; see also *infra* Part II.D (discussing how each position in the BCS games is filled).

26. See *infra* Parts II.C–D (explaining the BCS formula and noting that it provides an objective determination of which schools had the most successful college football seasons).

27. See *infra* Parts IV.B–C (describing the impact that procompetitive effects of the BCS have on the antitrust analysis).

To this end, the Note is organized as follows: Part II investigates the industry of college football by describing the organization of Division I-A college football and the difficulties that often prevented ending the season with a competition between its two best teams prior to 1998.²⁸ This Part then details the BCS arrangement, including how teams qualify to participate in a BCS game and the financial rewards that a conference receives from having a BCS participant.²⁹ Part II concludes with a discussion of recent challenges brought against the arrangement by schools whose representation in a BCS bowl game is not guaranteed.³⁰ Part III begins the antitrust analysis and includes a general overview of antitrust jurisprudence.³¹ Selecting the proper standard of review is particularly important to the evaluation, and this Part argues that only a thorough rule of reason analysis is sufficient.³² Part IV then dissects the competitive effects of the BCS by weighing its alleged anticompetitive results against its procompetitive benefits.³³ The Note concludes that the procompetitive benefits of the BCS substantially outweigh any ancillary harm it might inflict upon competition.³⁴ The remainder of the Note discusses why less-restrictive alternatives to the BCS are neither available nor desirable, thereby completing the antitrust analysis and concluding that the agreement complies with applicable antitrust legislation.³⁵

II. College Football: An Overview of the Industry

A. The Landscape of College Football Within the National Collegiate Athletic Association

Nearly every facet of intercollegiate athletic competition is governed by the National Collegiate Athletic Association (NCAA), an organization composed of

28. See *infra* Parts II.A–C (explaining the postseason format of Division I-A college football and inefficiencies present within the system prior to the BCS).

29. See *infra* Part II.D.1 (discussing the formula used by the BCS to determine which teams will play in the four BCS bowl games).

30. See *infra* Part II.D.2 (describing the recent challenges to the BCS pressed by the Presidential Coalition).

31. See *infra* Part III.A (discussing general principles of antitrust analysis).

32. See *infra* Part III.B (selecting the rule of reason as the proper framework for analyzing the BCS).

33. See *infra* Parts IV.A–B (evaluating the effects of the BCS on competition within college football).

34. See *infra* Part IV.B (concluding that the procompetitive effects of the BCS are greater than any harms created by the agreement).

35. See *infra* Part IV.C (discussing the unavailability of less-restrictive alternatives to the BCS in shaping the Division I-A postseason).

over 1200 colleges and universities that sponsors numerous sports and competitions annually.³⁶ The Association divides schools into three tiers with each division reflecting, among other things, the number of sports its members sponsor and the composition of each member's schedule.³⁷ At the core of this delineation, however, is the financial commitment that each tier's members put into their athletic programs.³⁸ The schools that devote the highest allocation of their resources to athletics comprise Division I.³⁹

Not surprisingly, football is the NCAA-regulated sport that is both the most costly for a school to fund and the largest generator of revenue.⁴⁰ In 1978, because of the high costs associated with supporting a football program, the NCAA split football-sponsoring Division I schools further into Division I-A and Division I-AA.⁴¹ There are two primary distinctions between these divisions. The first is a requirement that each Division I-A school must satisfy minimum attendance figures in order to maintain its status

36. See NAT'L COLLEGIATE ATHLETIC ASS'N, 2003-04 NCAA DIVISION I MANUAL § 1.2 (2003) (listing the association's fundamental purposes), available at http://www.ncaa.org/library/membership/division_i_manual/2003-04/2003-04_d1_manual.pdf (on file with the Washington and Lee Law Review). Currently, 1266 institutions are NCAA members. Nat'l Collegiate Athletic Ass'n, *Composition of the NCAA*, at http://www1.ncaa.org/membership/membership_svcs/membership_breakdown.html (Mar. 4, 2004) [hereinafter NCAA, *Composition*] (on file with the Washington and Lee Law Review).

37. See Nat'l Collegiate Athletic Ass'n, *What's the Difference Between Divisions I, II, & III?*, at http://www.ncaa.org/about/div_criteria.html (last visited June 19, 2004) [hereinafter NCAA, *Difference Between Divisions*] (explaining the distinctions among the three NCAA divisions) (on file with the Washington and Lee Law Review). Division I schools must sponsor at least fourteen teams, including seven women's teams, and must play all of their minimum contests against other Division I schools. *Id.* Division II schools must field at least four teams each for men and women athletes, but, unlike Division I, there are no scheduling requirements for sports other than football and basketball. *Id.* Division III is designed for schools that place a primary emphasis on student participation in athletics, and member institutions must therefore sponsor at least ten teams, including five women's teams. *Id.* In contrast to Division II, this elevated requirement is designed to "maximiz[e] the number and variety of athletics opportunities available to students." *Id.*

38. See *id.* (noting differences in how institutions within each division finance their athletic departments). Both Divisions I and II place limits on financial aid awards available to athletes. *Id.* Division III, on the other hand, does not permit schools to award athletic scholarships. *Id.*

39. See *id.* (requiring only Division I schools to maintain minimum financial aid awards for student-athletes).

40. See FULKS, *supra* note 2, at 22 (noting that the average Division I-A football program was responsible for 56% of expenses and 69% of revenues for its school's athletic department).

41. Nat'l Collegiate Athletic Ass'n, *History of the NCAA*, at <http://www.ncaa.org/bout/history.html> (last visited June 19, 2004) (on file with the Washington and Lee Law Review).

in the division.⁴² Membership in I-AA does not impose a similar condition. During the 2003–04 season, 117 schools met Division I-A's eligibility requirements.⁴³ Of these, all but four further distributed themselves into eleven regional athletic conferences.⁴⁴ Schools organize themselves into conferences for efficiency in scheduling, fundraising, and other administrative tasks associated with collegiate athletic programs.⁴⁵ Beyond providing these benefits

42. See NCAA, *Difference Between Divisions*, *supra* note 37 (detailing an elaborate series of attendance requirements in order to retain Division I-A status, including an average attendance of at least 17,000 spectators at all home games or seating capacity of at least 30,000 in the school's home football stadium, among other ways of meeting the requirement).

43. NCAA, *Composition*, *supra* note 36. There are eighty-six Division I schools that do not sponsor football. *Id.*

44. See 2003–2004 NCAA Football, *Division I-A, I-AA Conferences*, at http://ncaafootball.net/0,5717,1_125_0_4585,00.html (last visited June 19, 2004) (listing the eleven conferences in Division I-A) (on file with the Washington and Lee Law Review). The eleven conferences are: the Atlantic Coast Conference, the Big Twelve Conference, the Big East Conference, the Big Ten Conference, Conference USA, the Mid-American Conference, the Mountain West Conference, the Pacific Ten Conference, the Southeastern Conference, the Sun Belt Conference, and the Western Athletic Conference. *Id.*

The Naval Academy, Troy State University, the University of Connecticut, and the University of Notre Dame were not members of a conference for the 2003–04 season. 2003–2004 NCAA Football, *Division I-A Independents*, at http://ncaafootball.net/0,5717,1_125_0_44538,00.html (last visited June 19, 2004) (on file with the Washington and Lee Law Review). This small number of schools is indicative of a trend in collegiate athletics for schools to join these associations. Compare the current distribution to that of the 1990 season. For that season, twenty-five Division I-A schools were not aligned with a conference. See DON HEINRICH'S COLLEGE FOOTBALL ANNUAL 1990, at 33, 41 (Shane O'Neill ed., 1990) (listing all Division I-A schools that were independent of any conference). By 1992, only fifteen schools remained independent. See DON HEINRICH'S COLLEGE FOOTBALL ANNUAL 1992, at 63 (Shane O'Neill ed., 1992) (same). Schools continue to leave the ranks of the independents, as the University of Connecticut will participate as a member of the Big East Conference for the 2004–05 football season. UNIV. OF CONN., *UConn and the Big East Conference*, in 2003 UNIV. OF CONN. MEDIA GUIDE 10, at <http://www.uconnhuskies.com/sports/MFootball/2004/MediaGuide/10-11-BIGEAST.pdf> (last visited June 19, 2004) (on file with the Washington and Lee Law Review). Likewise, Troy State University will compete as a member of the Sun Belt Conference beginning with the 2005–06 football season. See Sun Belt Conference, *Sun Belt Conference History*, at <http://www.sunbeltsports.org/info/history> (last visited June 19, 2004) (noting that Troy State will compete in all league sports beginning with the 2005–06 academic year) (on file with the Washington and Lee Law Review). Further, the University of Notre Dame is a signatory to the BCS agreement despite not having membership in any conference. See BCS, *BCS Members*, *supra* note 13 (noting that Notre Dame is an "independent member" of the BCS). Because of the relatively small number of teams that are not affiliated with a conference or the BCS, this group of schools will not have any distinct impact on the antitrust analysis and, therefore, will not be specifically accounted for in Part IV's discussion.

45. See, e.g., Welch Suggs, *Wave of Indecision: As Tulane U. Struggles with the Cost of Sports, Officials Weigh the Unthinkable*, CHRON. OF HIGHER EDUC., June 13, 2003, at A39 (noting that conferences will contract with television firms for the broadcasting rights to games involving their members); Atlantic Coast Conference, *ACC Properties*, at

to member institutions, a conference independently determines the format in which its respective schools will compete against one another and how its champion will be decided.⁴⁶

In addition to attendance requirements, the divisions also differ as to how each determines its annual national champion. Though the NCAA oversees and administers a playoff format for determining the annual football champions of Divisions I-AA, II, and III,⁴⁷ Division I-A historically decides its champion quite differently. Prior to 1998, two polls determined the national champion for college football's highest division: One poll tallied the votes of selected sportswriters and broadcasters (the Associated Press, or AP, poll), and the other poll counted votes cast by certain Division I-A head coaches (the coaches'

ocsn.com/properties/acc-properties.html (last visited June 19, 2004) (discussing the conference-sponsored agency that oversees marketing and promotional operations for member schools) (on file with the Washington and Lee Law Review); Big East Conference, *The Big East Conference at 25 Years*, at <http://www.bigeast.org/about/> (last visited June 19, 2004) (explaining the conference's infrastructure and the role it plays in coordinating competitions and publicizing the athletic programs of member schools) (on file with the Washington and Lee Law Review); Mountain West Conference, *The Birth of a Conference*, at <http://themwc.ocsn.com/about/mwc-about.html> (last visited June 19, 2004) ("The cornerstone of the conference's formation was the maintenance of long standing athletic rivalries among its member institutions.") (on file with the Washington and Lee Law Review); Southeastern Conference, *History of the SEC*, at http://www.secsports.com/index.php?well_id=2&url_publish_channel_id=19 (last visited June 19, 2004) (describing the preexisting regional connections among southern schools that led to the conference's formation and facilitated scheduling of athletic competitions) (on file with the Washington and Lee Law Review). Being a member of a conference can also impact university programs beyond the athletic arena. See, e.g., Western Athletic Conference Academic Alliance, *About the WAC Academic Alliance*, at <http://www.wacacademics.org/about/> (last visited June 19, 2004) (noting that an academic association among Western Athletic Conference schools will allow each member's respective advantages and strengths to be shared with others within the conference) (on file with the Washington and Lee Law Review).

46. See, e.g., Southeastern Conference, *SEC Milestones*, at http://www.secsports.com/index.php?well_id=2&url_publish_channel_id=19 (last visited June 19, 2004) (noting that the SEC was the first conference to have a postseason football game to determine its champion) (on file with the Washington and Lee Law Review). Conferences are not, however, given absolute discretion about holding a postseason championship game. The NCAA requires that a league have twelve members in order to administer such a game, and efforts by the Atlantic Coast Conference to alter this rule were suppressed by the national organization in January of 2004. See Barry Svrluga, *No BC for ACC Until Next Year; Title Game Aspirations Put on Hold*, WASH. POST, Jan. 14, 2004, at D2 ("NCAA rules require a conference to have 12 members to stage such a [conference championship] game, and an ACC-backed effort to change that rule failed . . .").

47. See Nat'l Collegiate Athletic Ass'n, *NCAA Championships*, at <http://www.ncaa.org/index1.html> (last visited June 19, 2004) (noting that the NCAA regulates a football championship in all divisions except Division I-A) (on file with the Washington and Lee Law Review).

poll).⁴⁸ Each poll proclaimed the team voted number one at the end of the postseason to be the national champion.⁴⁹

This method of selecting a champion traditionally emphasized Division I-A's unique postseason format. Instead of competing for a position in a playoff bracket, Division I-A conferences and teams lobby for invitations to compete in "bowl games,"⁵⁰ postseason football competitions that are held during the Christmas and New Year's holiday seasons⁵¹ and are typically hosted by larger cities.⁵² Nonprofit entities generally organize the contests and several related activities designed to heighten interest in the game,⁵³ such as the Tournament of Roses Parade which accompanies the Rose Bowl.⁵⁴ Although bowl games became an annual tradition in 1916,⁵⁵ the number of these games has boomed

48. See 2004 ESPN SPORTS ALMANAC 153–54 (Gerry Brown & Michael Morrison eds., 2003) [hereinafter SPORTS ALMANAC] (discussing the role that these polls played in determining a national champion between 1936 and 1998).

49. *Id.* at 153. The final AP poll has been released after the conclusion of the bowl season annually since 1968. *Id.* at 156.

50. See POPPE, *supra* note 13, at 7 (explaining that the purpose of a postseason bowl game is to "provid[e] a national contest between deserving winning teams").

51. See *id.* at 5–6 (noting that the 2003–04 bowl season stretched from Dec. 16, 2003, to Jan. 4, 2004).

52. While the focus of bowl games is generally on the participating schools, hosting a bowl game can be lucrative for a state as well. See, e.g., Long v. Napolitano, 53 P.3d 172, 176 (Ariz. Ct. App. 2002) (noting that hosting the Fiesta Bowl in Tempe, Arizona, generated \$133 million for the state's economy in 1999); see also Valerie Bauerlein, *\$700,000 for Football Ignites Budget Furor*, STATE (Columbia, SC), Mar. 4, 2004, at A1 (estimating that the creation of a new bowl game in Charleston, South Carolina, would generate nearly \$50 million for the state's tourism industry); Football Bowl Ass'n, *Bowl Games are College Football*, at <http://www.footballbowlassociation.com/overview.html> (last visited June 19, 2004) [hereinafter Football Bowl Ass'n, *Bowl Games*] ("[In the aggregate,] [b]owl games generate an estimated \$1.1 billion dollars worth of economic impact for their host communities each year.") (on file with the Washington and Lee Law Review).

53. See Football Bowl Ass'n, *College Football Bowl Game Facts*, at <http://www.footballbowlassociation.com/faq.html> (last visited June 19, 2004) ("Almost all Bowl games are non-profit organizations. The more revenue the Bowl brings in through ticket sales, sponsors, etc.[,] the more money can be paid to NCAA schools.") (on file with the Washington and Lee Law Review).

54. See 2004 Tournament of Roses, *Tournament of Roses Special Events*, at <http://www.tournamentofroses.com/current/specialevents.htm> (last visited June 19, 2004) (describing events accompanying the annual Rose Parade and Rose Bowl game hosted by Pasadena, California) (on file with the Washington and Lee Law Review). Each bowl has its own unique bundle of events that supplements the game itself. See, e.g., FedEx Orange Bowl, *Events*, at <http://www.orangebowl.org/events.php> (last visited June 19, 2004) (listing events, such as a collegiate basketball tournament, a collegiate swimming tournament, and a benefit for a scholarship fund, that are organized in conjunction with the Orange Bowl game, played annually in Miami, Florida) (on file with the Washington and Lee Law Review).

55. See SPORTS ALMANAC, *supra* note 48, at 173 (listing the outcomes of every Rose Bowl

since 1990.⁵⁶ The 2003–04 postseason consisted of twenty-eight bowl games, up from only a handful in the 1970s and 1980s.⁵⁷ The tradition of Division I-A bowl games is one of the most celebrated aspects of intercollegiate athletics, and the NCAA and many other institutions vigorously defend it as the most favorable way to conclude each college football season.⁵⁸

Many incentives exist to entice schools to participate in bowl games. In addition to increased exposure for a school and its football program, playing in a postseason game can generate a monetary windfall for both the competing schools and their respective conferences.⁵⁹ The financial rewards that stem from participating in a bowl game range from \$750,000 per school for participating in newly created games⁶⁰ to more than \$8 million per school for participating in the more established ones.⁶¹ Funding received from bowl

competition, with the first game played in 1902 and the game becoming an annual event beginning in 1916).

56. See *id.* at 177–80 (noting that fourteen new bowl games were created between the 1990 and 2003 seasons).

57. For the 2003–04 college football season, fifty-six Division I-A teams participated in twenty-eight bowl games. Football Bowl Ass'n, *Bowl Games*, *supra* note 52.

58. See *BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field: Hearing Before the Sen. Comm. on the Judiciary*, 108th Cong. (2003) (statement of Myles Brand, President, Nat'l Collegiate Athletic Ass'n) [hereinafter Brand, Senate Statement] ("[The bowl games] brought a level of drama and excitement to postseason football and the communities where they took place that continues as a fixture of the American sports culture. . . . Th[e] bowl system] is an exciting feature of Division I-A football worth preserving . . ."), available at <http://judiciary.senate.gov/hearing.cfm?id=973> (on file with the Washington and Lee Law Review); Nat'l Collegiate Athletic Ass'n, *Why Doesn't the NCAA Administer a Division I-A Football Championship?*, at http://www1.ncaa.org/membership/postseason_football/faq (last visited June 19, 2004) [hereinafter NCAA, *NCAA Does Not Administer Division I-A Championship*] (explaining that the universities within the NCAA have collectively rejected proposals for establishing a playoff format to select a Division I-A football champion on three separate occasions since 1976) (on file with the Washington and Lee Law Review).

59. See Football Bowl Ass'n, *Bowl Games*, *supra* note 52 (noting the benefits derived by a school by participating in a bowl, including increased enrollment applications, licensing revenues, and season ticket sales, among others).

60. See Nat'l Collegiate Athletic Ass'n, *Total Non-BCS Distribution to Participating Teams and Conferences* (2003) (listing the payouts offered by each of the bowl games not affiliated with the BCS following the 2002–03 college football season), available at http://www1.ncaa.org/membership/post_season_football/nonBCS_revenue.pdf (on file with the Washington and Lee Law Review). The average payout for non-BCS games for the 2002–03 season was \$1.4 million. Nat'l Collegiate Athletic Ass'n, *Average Payout, Institution Expenses, and Net Receipts* (2003) [hereinafter NCAA, *Average Payout*], available at http://www1.ncaa.org/membership/postseason_football/average_stats.pdf (on file with the Washington and Lee Law Review).

61. See NCAA, *2002–03 BCS Revenue Distribution*, *supra* note 14 (listing the payouts offered by each of the four BCS games). The average payout for BCS games for the 2002–03

participation, therefore, can be a substantial source of revenue for many colleges and universities. Schools often use these funds to upgrade their athletic programs, primarily by financing sports other than football and improving athletic facilities.⁶² More important for many schools, though, is the ability to fund academic programs and facilities through football-created revenue.⁶³

By not administering a playoff system, the NCAA allows the outcomes of these bowl games to determine the Division I-A national champion. As a result, each bowl tries to persuade the best available teams to compete in its game; with premier teams come large revenues from ticket sales, television contracts, and corporate sponsors, among other sources.⁶⁴ This race to establish top-notch match-ups resulted in preseason agreements between bowls and conferences that, ironically, made a game between the two best teams at the conclusion of each season nearly impossible.⁶⁵

B. *The Relationship Between Conferences and the Bowls*

Like conferences, bowl games operate independently of one another. As such, bowls are free to contract with conferences to schedule which schools will participate in each postseason game. For example, between 1946 and 1997, the Rose Bowl game paired the respective champions of the Big Ten and

season was \$14.3 million. NCAA, *Average Payout*, *supra* note 60. Many conferences have adopted revenue-sharing plans, so it is rare for a school to capture the entire bowl payout solely for itself. *See infra* note 70 and accompanying text (explaining the revenue-sharing plans found within most Division I-A conferences).

62. *See, e.g.*, John Maher, *Big Bucks: Football, Finances Separate Entities, But Buckeyes Play Both Games Well*, AUSTIN AM.-STATESMAN (Austin, Tex.), Sept. 24, 2003, at D1 (noting various uses for financial resources generated by football, particularly for upgrades to existing facilities); Michael Yount, *Football: The 800-Pound Gorilla in College Athletics* (pt. 2), SALT LAKE TRIB. (Salt Lake City, Utah), June 15, 2003, at A1 (discussing the role football plays in financing other college sports teams).

63. *See, e.g.*, Dooley, *supra* note 6, at 7G (explaining the relationship between the University of Georgia's athletics program and academic sector while noting that the athletics department contributed "\$1.5 million to the university for non-athletic scholarships with a commitment for another \$500,000 over the next five years").

64. *See* Nat'l Collegiate Athletic Ass'n, *2002-03 Postseason Football 5-Year Summary of Gross Receipts*, at http://www1.ncaa.org/membership/postseason_football/summ_gross_receipts.pdf (Apr. 21, 2003) (detailing the amount of income generated by each source of revenue during the bowl season since the BCS plan was implemented) (on file with the Washington and Lee Law Review).

65. *See infra* Part II.C (describing inefficiencies created by the Division I-A postseason system that predated the BCS).

Pacific Ten conferences.⁶⁶ Likewise, the Southeastern Conference's champion was designated to play in the Sugar Bowl between 1976 and 1994,⁶⁷ and the Holiday Bowl hosted the Western Athletic Conference champion in all but one season between 1978 and 1995.⁶⁸ These arrangements are not limited to conference champions and can determine in which bowl games all of a conference's eligible schools will compete.⁶⁹

Because a parent conference typically is the facilitator for a school's participation in a bowl, many conferences adopted revenue-sharing plans that equally divide all bowl-revenues captured by member schools.⁷⁰ Plans such as these help prevent a school from being placed at a financial disadvantage relative to its peers within a conference. Naturally, when a conference participates in more bowl games, it has more funds to distribute among its members. As a consequence, a rational conference seeks to maximize its representation in bowls. The independence each conference enjoys in this pursuit traditionally resulted in uncoordinated efforts to create postseason

66. See SPORTS ALMANAC, *supra* note 48, at 173 (noting which conferences have been represented in the Rose Bowl through the game's history).

67. See *id.* at 174 (detailing the history of the Sugar Bowl's process for selecting participants). Despite no formal agreement, a team from the Southeastern Conference participated in all but six Sugar Bowls played between 1935 and 1998, the year that the BCS became effective. See *id.* (noting that no SEC team played in the 1939, 1942, 1946, 1949, 1972, and 1995 Sugar Bowl games).

68. See *id.* at 176 (noting the relationship between the Holiday Bowl and the Western Athletic Conference through the game's early history). The 1985 Holiday Bowl did not feature the Western Athletic Conference champion as one of the participants because the conference's championship was split between Brigham Young University and the Air Force Academy. *Id.* at 176, 187.

69. See, e.g., CONFERENCE USA, *Going Bowlin'*, in 2003 CONFERENCE USA FOOTBALL GUIDE 5 (2003) (listing the five bowl games with which the conference had an agreement to send a member team following the 2003–04 football season), available at <http://www.conferenceusa.com/sports/football/mediaday/2003/mediaguide/1-8.pdf> (on file with the Washington and Lee Law Review); SPORTS ALMANAC, *supra* note 48, at 175–80 (noting the bowl games in which teams placing second through seventh in the Southeastern Conference are bound to play pursuant to a contractual agreement); Big East Conference, *The Big East Bowl Lineup*, at <http://www.bigeast.org/sports/football/bowls.asp> (last visited June 19, 2004) (listing the bowl games conference members will participate in while noting that "[f]inish in the conference standings does not determine bowl selection") (on file with the Washington and Lee Law Review).

70. See, e.g., Brian Davis, *BCS Boosts Title Game Support; OU's Sugar Bowl Berth Allays Big 12 Schools' Fears of a Late Loss*, DALLAS MORNING NEWS, Dec. 9, 2003, at 8C ("The Big [Twelve] is a revenue-sharing league."); Dooley, *supra* note 6, at 7G (noting that the Southeastern Conference is a revenue-sharing association); Tim Layden, *Small Change; Going to a Football Bowl Game—Unless It's One of the Biggies—Makes Little Financial Sense for Most Schools*, SPORTS ILLUSTRATED, Jan. 2, 1995, at 56 ("[M]ost major conferences share a large portion of the revenue earned by member schools from bowl games.").

match-ups among conference champions.⁷¹ The same was true of the bowls; each focused on its own game without regard for the choices and agreements made by its peers. This disjointedness often failed to produce the most desirable match-ups at the conclusion of the regular season.

C. Traditional Division I-A Postseason Inefficiencies

As discussed, Division I-A's method of choosing its annual champion is unlike any other NCAA-regulated sport.⁷² Instead of using an objective measure of a team's relative abilities, the determination of which school fielded a superior team was historically left to the subjective opinions of sportswriters and broadcasters in one poll, and college football head coaches in the other.⁷³ The subjectivity of this system was its biggest weakness.⁷⁴ The polls failed to provide a consistently accurate reflection of each school's abilities, and underlying prejudices of the voters, such as regional biases⁷⁵ and groundless favoritism of certain schools,⁷⁶ often skewed the polls' results. As a result, the two polls frequently conflicted with one another, and nearly one-quarter of the Division I-A seasons between 1954 and 1997 ended with "split" championships between two schools.⁷⁷

71. See *supra* Part II.B (explaining how conferences independently seek to contract with bowl games). The Rose Bowl was the only bowl game that paired two conference champions for more than five consecutive seasons. See *SPORTS ALMANAC, supra* note 48, at 173–80 (noting that most bowl games either paired a conference champion and an "at-large" opponent or two schools that had not won a conference championship).

72. See *supra* notes 47–49 and accompanying text (noting that Divisions I-AA, II, and III all incorporate playoff formats to determine their respective annual champions while Division I-A traditionally relied on the subjective viewpoints of voters in two different national polls).

73. See *supra* note 48 and accompanying text (discussing the role of the AP and coaches' polls in Division I-A football).

74. See Tim Layden, *It's Debatable; Is College Football Better Off with Whimsical Polls and Co-Champs Like Michigan and Nebraska than with the Vagaries of a Playoff System?*, *SPORTS ILLUSTRATED*, Jan. 12, 1998, at 34 (noting that polls can be manipulated to a voter's personal benefit while explaining that "[n]either the coaches nor the media are given voting guidelines").

75. See, e.g., Bud Withers, *Weird Science*, in *DON HEINRICH'S COLLEGE FOOTBALL ANNUAL 1991*, at 14, 16 (Shane O'Neill ed., 1991) (explaining that "regionalism is a fact of life in the polls" while criticizing geographic voting tendencies present in the polling system).

76. See *id.* at 14 (noting that the University of Illinois finished the 1962 season ranked as the eighteenth best team in the nation despite losing seven of its nine games).

77. See Josh Dubow, *Divided Crown Has Left Few Happy*, *STATE* (Columbia, SC), Dec. 27, 2003, at C6 (describing problems caused by the polling systems formerly used to decide college football's national champion). Split championships occurred in 1954 (the Ohio State University and the University of California at Los Angeles shared the championship), 1957 (the

There is tremendous significance in winning a national championship. Contention for a national championship can provide much pride for a school; it can be used as a recruiting tool for both student-athletes and non-athletes; and it can generate substantial monetary rewards through alumni donations, increases in ticket sales, and other sources of revenue.⁷⁸ While allowing the two best teams to play one another at the conclusion of each season would have avoided the problem of splitting the national championship, this result occurred only if the conferences with the top two teams at season's end had contracted with the same bowl game before the season.⁷⁹ A few snapshots from Division I-A's postseason during the thirty years that preceded the BCS—that is, between the 1968 and 1997 seasons—further illustrate the inefficiencies that plagued the traditional system, which allowed subjective polls to determine the national champion and all bowl games to operate independently of one another.

The 1969 college football regular season concluded with two schools, the Universities of Texas and Pennsylvania State (Penn State), that had neither lost nor tied a game and were ranked numbers one and two in the polls.⁸⁰ Instead of playing one another to determine a national champion, each of these teams played, and beat, a school that had already been defeated once during the season.⁸¹ This outcome was the direct result of a preseason agreement between Texas's conference and the Cotton Bowl that required Texas, the conference champion, to participate in the Cotton Bowl instead of permitting Texas to bargain for the opportunity to play the other unbeaten and untied team in a different bowl game.⁸² This outcome left voters to decide which team deserved

Universities of Auburn and Ohio State), 1965 (the Universities of Alabama and Michigan State), 1970 (the Universities of Texas and Nebraska), 1973 (the Universities of Notre Dame and Alabama), 1974 (the Universities of Oklahoma and Southern California), 1978 (the Universities of Alabama and Southern California), 1990 (the University of Colorado and the Georgia Institute of Technology), 1991 (the Universities of Miami of Florida and Washington), and 1997 (the Universities of Michigan and Nebraska) under the former polls system. *Id.*

78. See, e.g., Brian Goff, *An Assessment of Path Dependence in Collective Decisions: Evidence From Football Polls*, 28 APPLIED ECON. 291, 291–97 (1996) (analyzing the economic benefits that accompany winning a Division I-A national championship); see also Alan Schmadtke & David Damron, *UCF Takes Risk With Big-Time Athletics; Critics Said a Higher Profile in Sports Won't Help the School's Academic Reputation*, ORLANDO SENTINEL TRIB., Nov. 9, 2003, at A1 (explaining that Virginia Tech saw its endowment nearly triple in the years surrounding its national runner-up finish in 1999).

79. See *supra* notes 64–71 and accompanying text (discussing the preseason practice of conferences and bowls to determine which schools would participate in the postseason games).

80. See SPORTS ALMANAC, *supra* note 48, at 163 (noting that the Universities of Texas and Penn State completed the 1969 regular season undefeated and untied).

81. See *id.* (noting that Texas defeated the University of Notre Dame in the Cotton Bowl while Penn State beat the University of Missouri in the Orange Bowl).

82. See *id.* at 175 (explaining that the champion of the Southwestern Conference, of

the championship without the benefit of a head-to-head match-up. Similar circumstances existed following the 1970, 1979, 1983, 1991, 1994, 1996, and 1997 regular seasons.⁸³ More telling is that, because of predetermined bowl arrangements, only nine of thirty seasons between 1968 and 1997 ended with the polls' number one and number two teams meeting in the postseason.⁸⁴

Even pairing the polls' top two teams in a postseason bowl failed to ensure that a national champion would emerge from the game. Consider the 1973 national championship, for instance, which the University of Notre Dame split with the University of Alabama.⁸⁵ These schools played one another in the Sugar Bowl following the regular season, and Notre Dame won the game by a single point.⁸⁶ The coaches' poll, however, still awarded Alabama its version of the national championship exclusively because of Alabama's regular season performance.⁸⁷

The subjectivity of the polls caused them to be unpredictable, inconsistent, and, in many cases, arbitrary in their selection of a national champion. Compare the poll outcomes of the 1970, 1975, and 1984 seasons. As noted, the 1970 national championship was split between the Universities of Nebraska and Texas.⁸⁸ Neither of these schools completed their seasons unbeaten and untied.⁸⁹ Both Arizona State University and the University of Toledo, on the other hand, ended their respective seasons without any losses or ties.⁹⁰ The AP poll, though, did not consider either of these schools to be among the country's five best at the conclusion of the postseason, ranking Arizona State sixth and

which Texas was a member in 1969, was obligated to play in the Cotton Bowl each season between 1941 and 1991).

83. *See id.* at 164, 166–67, 169–71 (listing seasons during which the AP poll's top two undefeated teams at the conclusion of the regular season were unable to play one another in a bowl game for the national championship due to previously arranged bowl obligations for one or both of the undefeated schools).

84. *See id.* at 155 (listing occasions where the number one and number two teams, according to the AP poll, played one another in a bowl game).

85. *See* Dubow, *supra* note 77, at C6 (noting that the Universities of Alabama and Notre Dame split the 1973 championship).

86. *See* SPORTS ALMANAC, *supra* note 48, at 174 (stating that Notre Dame defeated Alabama in the 1973 Sugar Bowl by a score of 24-23).

87. *See id.* at 154 (noting that Notre Dame won the AP poll's national championship while the coaches' poll awarded its national championship to Alabama).

88. *See* Dubow, *supra* note 77, at C6 (listing Nebraska and Texas as the co-national champions for the 1970 season).

89. *See* SPORTS ALMANAC, *supra* note 48, at 164 (noting that Nebraska tied one game during the 1970 season while Texas lost in the Cotton Bowl).

90. *See id.* (noting that Arizona State won all eleven of its football games and that Toledo won all twelve of its games in 1970).

Toledo twelfth.⁹¹ Arizona State suffered the same fate following the 1975 season, when it was the only school to finish its season without any losses or ties.⁹² Despite beating a team considered the nation's sixth best at the end of the regular season,⁹³ the polls again denied Arizona State a national championship and instead voted that the University of Oklahoma—which lost during the regular season—was the country's best football team.⁹⁴

In 1984, though, the polls took a different attitude when crowning a national champion. That season, only Brigham Young University finished without any losses or ties.⁹⁵ The quality of its competition was unusually low, however, as the polls did not consider a single of Brigham Young's opponents to be among the country's twenty best teams.⁹⁶ Additionally, the school won its bowl game by only seven points against a University of Michigan team that had lost half of its games and finished in the bottom tier of its conference.⁹⁷ Instead of voting for a team that had proven itself against challenging competition, the polls named Brigham Young University the national champion simply because it was the only team to complete its season unbeaten and untied.⁹⁸ Such a stark change in voting patterns cautions against relying solely on the polls to provide an accurate assessment of each football team's relative skills and abilities.

This sampling of inconsistent and irreconcilable outcomes highlights the inefficient procedures used to create the Division I-A postseason prior to the BCS. These problems could have been alleviated if conferences and bowls had

91. *Id.*

92. *See id.* at 165 (noting that Arizona State completed the 1975 season with twelve wins against zero losses or ties).

93. *See id.* (explaining that Arizona State defeated the University of Nebraska, ranked the nation's sixth best team in the AP poll at the time, in the Fiesta Bowl).

94. *See id.* at 154 (stating that Oklahoma was Division I-A's national champion for the 1975 season).

95. *See id.* at 167 (noting that Brigham Young won all thirteen of its games played in 1984).

96. *See* Information Please, *1984 College Football Recap*, at <http://www.infoplease.com/ipa/A0747028.html> (last visited June 19, 2004) [hereinafter *1984 Recap*] (describing Brigham Young University's 1984 schedule as "real weak" while noting that none of its opponents finished ranked among the nation's top twenty teams in the final AP poll) (on file with the Washington and Lee Law Review); *see also* Withers, *supra* note 75, at 14 (criticizing the quality of Brigham Young University's competition during the 1984 season).

97. *See* SPORTS ALMANAC, *supra* note 48, at 167 (noting that Brigham Young won the 1984 Holiday Bowl by a score of twenty-four to seventeen); *1984 Recap*, *supra* note 96 (explaining that Michigan placed sixth in its conference in 1984 and finished that season with six wins and six losses).

98. *See 1984 Recap*, *supra* note 96 ("[T]he [Brigham Young University] Cougars were the only major college team to win all their games, so they were [voted] national champions by default.").

deferred the creation of postseason match-ups until the completion of the regular season, but the rigidity of the traditional bowl system did not permit such a waiting period.⁹⁹ Moreover, an objective mechanism for selecting Division I-A's annual champion could have avoided splitting the national championship and its spoils between two schools. Instead, when the tradition of predetermining bowl participants was teamed with the arbitrary nature of the polls, college football's postseason was left disorganized and inconclusive.¹⁰⁰ In 1998, several conferences and bowls collaborated on a postseason format designed to cure these problems and to produce a postseason of an overall higher quality.¹⁰¹

D. Enriching the Postseason: The Bowl Championship Series

1. The Purposes, Procedures, and Results of the Bowl Championship Series

Six conferences—the Atlantic Coast, Big East, Big Ten, Big Twelve, Pacific Ten, and Southeastern Conferences—and four bowl games—the Fiesta, Orange, Rose, and Sugar Bowls—sought to remedy the inefficiencies generated by the traditional Division I-A postseason format by creating the Bowl Championship Series.¹⁰² Many of the involved conferences traditionally sent

99. See *supra* notes 64–71 and accompanying text (describing how bowls and conferences generally agreed on bowl game participants before each season).

100. See *supra* notes 77, 80–98 and accompanying text (explaining the problems caused by Division I-A's former postseason structure).

101. See *infra* Part II.D (describing the methodology of the BCS in creating postseason contests between high quality teams).

102. See BCS, *BCS Members*, *supra* note 13 (listing the conferences and bowls that were parties to the initial BCS agreement). In addition to these six conferences, Conference USA was an initial signatory to the BCS agreement despite not having automatic representation in any BCS bowl game. *Id.* Likewise, the University of Notre Dame, a school unaffiliated with any conference, and the American Broadcast Company are also parties to the BCS arrangement. *Id.*

Prior to the BCS, a handful of conferences and bowls attempted to create a product similar to that formed by this agreement. See *The Bowl Alliance*, in 1996 INFORMATION PLEASE SPORTS ALMANAC 186 (Mike Meserole ed. 1995) (detailing the 1992 agreement between five conferences and three bowl games designed to produce a national championship game). These arrangements, known as the Bowl Alliance and the Bowl Coalition, failed to remedy the problems of the traditional system and were dissolved in favor of the BCS after the 1997 season. See K. Todd Wallace, *Elite Domination of College Football: An Analysis of the Antitrust Implications of the Bowl Alliance*, 6 SPORTS LAW J. 57, 63 (1999) (noting the termination of the Bowl Alliance in favor of the BCS). For an analysis of the Bowl Alliance, see generally Lafcadio Darling, Note, *The College Bowl Alliance and the Sherman Act*, 21 HASTINGS COMM. & ENT. L.J. 433 (1998–99).

their champions to one of these bowl games.¹⁰³ Instead of prematurely locking participants into less desirable match-ups, the BCS now creates a pool of six conference champions and two other high-quality teams from which the four bowls select their respective competitors.¹⁰⁴ To determine which non-conference champions will participate in a BCS bowl game, the BCS applies a numerical formula to provide an objective gauge of each Division I-A school's relative abilities.¹⁰⁵ Each team's "worth" is determined by tabulating the values of five components, the majority of which purge the calculation of any subjective biases to which the old system was vulnerable.¹⁰⁶ Schools are then ranked based on their respective scores; the formula considers those with lower scores superior to those with higher ones.¹⁰⁷

The first factor in the evaluation accounts for each school's ranking in the two polls that formerly served as the exclusive determinant of a team's relative abilities.¹⁰⁸ A school's average ranking in these polls forms the value of this variable.¹⁰⁹ The second factor is also dependent on a school's ranking, but seven computers generate these polls, which are published by major media outlets.¹¹⁰ As with the first variable, this value is determined by calculating each school's average ranking in these polls.¹¹¹

103. As discussed, the Rose Bowl historically contracted with the champions of the Big Ten and Pacific Ten conferences while the Sugar Bowl hosted the Southeastern Conference's champion. See *supra* notes 66–67 and accompanying text (describing the relationships among the Rose and Sugar Bowls and their respective participants). The Atlantic Coast Conference sent its champion to the Orange Bowl for some time while the Big Twelve champion participated in the Fiesta Bowl prior to the BCS. See SPORTS ALMANAC, *supra* note 48, at 173–74 (noting which conferences were given automatic slots to participate in the Orange and Fiesta Bowls).

104. See POPPE, *supra* note 13, at 8–9 (explaining how each BCS bowl game chooses its participants).

105. See *id.* at 9–11 (explaining the statistical rating system used to determine which teams will participate in the BCS).

106. See *id.* at 9 (noting that only one of the five factors in the formula involves the inherently subjective AP and coaches' polls).

107. *Id.* at 11.

108. *Id.* at 10.

109. *Id.*

110. See *id.* (listing the seven computer polls that are accounted for in the BCS formula, including the Jeff Sagarin-*USA Today*, Dr. Peter Wolfe, Richard Billingsley, Colley Matrix, Kenneth Massey, Anderson and Hester, and *The New York Times* polls). Beginning with the 2004–05 football season, *The New York Times* poll will no longer be part of this component. See Bowl Championship Series, *Bowl Championship Series Announces Changes to Standings Formula*, at <http://www.bcsfootball.org/news.cfm?headline=40> (July 15, 2004) [hereinafter BCS, *Changes to Formula*] (noting that *The New York Times* has withdrawn its poll from the BCS ranking system) (on file with the Washington and Lee Law Review).

111. See POPPE, *supra* note 13, at 10. ("The computer component will be determined by

The remaining variables in the formula attempt to quantify the on-field performance of each school during the course of the season. The first variable assigns a value to the strength of the schedule played by each team.¹¹² This value is derived from the winning percentages of both the instant team's opponents and its opponents' opponents.¹¹³ The next component focuses on the instant team's record, adding one point to a team's total score for each loss prior to the bowl season.¹¹⁴ The final variable rewards "quality wins"¹¹⁵ by deducting points for each victory over a team ranked among the nation's ten best in the BCS standings.¹¹⁶

Once each variable has a value, an overall total is determined by adding these values together.¹¹⁷ The two schools with the lowest cumulative scores—regardless of their conferences' affiliation with the BCS—are then paired to

averaging the seven computer rankings. The lowest (worst) computer ranking will be disregarded.").

112. *Id.*

113. *See id.* (explaining how the strength of schedule component is calculated). The BCS formula first determines the cumulative won-loss records of the instant team's opponents and the cumulative won-loss records of that teams' opponents' opponents. *Id.* These values are then weighted two-thirds for the opponents' record and one-third for the opponents' opponents' record. *Id.* "The team's schedule shall be calculated to determine in which quartile it will rank: 1–25; 26–50; 51–75; 76–100, and shall be further quantified by its ranking within each quartile (divided by 25)." *Id.*

114. *Id.*

115. *See id.* (defining a quality win as one over an "opponent ranked among the top ten in the BCS standings").

116. *See id.* at 10–11 (explaining how the quality win component impacts each team's final position in the BCS standing). A school that defeats the top-ranked team in the BCS standings is rewarded with a deduction of 1.0 points from its BCS calculated value. *Id.* at 11. Likewise, a team that defeats the second-best school deducts 0.9 points from its value. *Id.* This process continues on a descending basis to victories over the remaining teams ranked among the top ten in the BCS standings with a victory over the number ten team resulting in a subtraction of 0.1 points. *Id.*

In July of 2004, the Bowl Championship Series reduced the number of variables in its formula to three: the AP poll, the coaches' poll, and the computer polls. *See BCS, Changes to Formula, supra* note 110 (explaining alterations to the BCS formula). Each component is given equal weight in this updated formula. *Id.* This Note, however, considers how each of the formula's five historical components impacts the antitrust analysis because of the significant role that a restraint's history plays in the analysis. *See State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (explaining that a rule of reason analysis requires an investigation of "a restraint's history, nature, and effect," among several other factors, when considering whether it is a reasonable restraint on competition). Because the BCS formula has traditionally consisted of variables that account for a team's strength of schedule and quality wins, it may be misleading to disregard these components because of the weight a court would likely give them.

117. POPPE, *supra* note 13, at 11.

play, thereby creating a previously unavailable national championship game.¹¹⁸ This championship game rotates through the four bowls, and the three BCS games that are not hosting the national championship game fill their respective positions from a menu of remaining BCS-conference champions and certain at-large teams.¹¹⁹ In order to ensure that only high-caliber teams are chosen to play in a BCS game, the arrangement establishes certain criteria for selecting at-large teams.¹²⁰ Teams from non-BCS conferences, for instance, automatically qualify for a BCS bowl game if they finish ranked in the top six in the BCS standings.¹²¹ The BCS bowls can also select any team that won nine games and is ranked among the top twelve in the final BCS standings for remaining at-large slots.¹²²

Since its inception, the BCS has generated enormous revenues—about \$100 million annually—and distributed them to all Division I-A conferences.¹²³ The portion of this revenue that each conference receives is based on whether it is represented in a BCS bowl game.¹²⁴ Those that send a participant to a BCS game receive a substantially larger sum than those that are not represented.¹²⁵ Indeed, the BCS has distributed nearly ninety-five percent of the revenue it has created among the six BCS-member conferences.¹²⁶ This disparity can be traced directly to the fact that no non-BCS conference has been represented in a BCS bowl game since the arrangement's implementation.¹²⁷ It is this fact, coupled with the large difference in distribution of BCS-generated funds

118. *Id.* at 9.

119. *See id.* at 8–9 (outlining which schools are eligible to participate in a BCS game).

120. *See id.* (explaining the methods used to determine which schools would play in the three nonchampionship BCS bowls).

121. *See id.* at 9 (noting how an at-large team could automatically qualify to play in a BCS bowl game).

122. *Id.* at 8.

123. *See* Bowl Championship Series, *Revenue Distribution*, at <http://www.bcsfootball.org/revenue.shtml> (last visited June 19, 2004) [hereinafter BCS, *Revenue Distribution*] (projecting the amount of funding created by the BCS in the 2004 postseason that each Division I-A conference will receive) (on file with the Washington and Lee Law Review); NCAA, *2002–03 BCS Revenue Distribution*, *supra* note 14 (noting that each Division I-A conference received funds generated by the BCS following the 2002–03 bowl season).

124. *See* BCS, *Revenue Distribution*, *supra* note 123 (explaining how BCS revenue is divided among Division I-A conferences).

125. *See id.* (noting that those conferences that send teams to a BCS bowl game are compensated for their representation to a greater extent than those that do not).

126. *See* NCAA, *2002–03 BCS Revenue Distribution*, *supra* note 14 (listing how much BCS-created funding each conference received following the 2002–03 postseason).

127. *See* Cowen, House Statement, *supra* note 9 (discussing that no BCS game has hosted a school from a non-BCS conference).

between BCS conferences and non-BCS conferences, that has sparked concern among some university presidents and national lawmakers.

2. Recent Challenges to the Bowl Championship Series

In the fall of 2003, the Presidential Coalition began to question the BCS and its impact on both college football and the overall university community.¹²⁸ The group presented its concerns to Congress and now challenges the arrangement on several fronts.¹²⁹ The Presidential Coalition takes primary issue with the fact that six of the eight available BCS bowl game positions are guaranteed to schools within the BCS conferences.¹³⁰ This "limited access" creates a system that, according to the Presidential Coalition, "is unnecessarily causing a widening financial gap between BCS and non-BCS schools that [has] a cumulative negative effect on all college sports, not just football."¹³¹ Moreover, it claims that the BCS adversely affects non-BCS institutions with regard to student recruitment, retention of coaches, facility improvements, and public perception, among other harms.¹³² Instead of the former postseason format or the BCS scheme, the Presidential Coalition advocates a playoff system to decide Division I-A's national championship.¹³³ The desirability of a playoff in Division I-A college football is not universally agreed upon, though, and many involved in the industry seek to maintain the current postseason structure.¹³⁴

Presidents of BCS-affiliated schools have met with Presidential Coalition representatives on three separate occasions to discuss potential changes that could make the postseason more inclusive of schools not privy to the BCS agreement.¹³⁵

128. See *supra* Part I (discussing the Presidential Coalition's grievances with the BCS).

129. See *supra* notes 17–21 and accompanying text (discussing the congressional intervention against the BCS sought by the Presidential Coalition).

130. See Cowen, House Statement, *supra* note 9 (criticizing the BCS as a "system of limited access").

131. *Id.*

132. See *id.* (outlining reasons for the Presidential Coalition's opposition to the BCS).

133. See *id.* (arguing that an eight-team playoff system would "open access to all contenders").

134. See Brand, Senate Statement, *supra* note 58 (explaining opposition to a playoff format in Division I-A football); see also NCAA, *NCAA Does Not Administer Division I-A Championship*, *supra* note 58 (noting that the NCAA's membership rejected proposals that would have established a Division I-A playoff in 1976, 1988, and 1994).

135. See Bowl Championship Series, *BCS/Coalition Press Conference—Opening Statement*, at <http://www.bcsfootball.org/news040229.shtml> (Feb. 29, 2004) [hereinafter *BCS, Opening Statement*] (noting meetings between the BCS and the Presidential Coalition) (on file with the Washington and Lee Law Review). The two groups first met on September 8, 2003, and again on November 16, 2003. See Bowl Championship Series, *BCS/Coalition for Athletics Reform Press Conference—Opening Statement*, at <http://www.bcsfootball.org/news031116>.

The Presidential Coalition consistently used threats of an antitrust suit as leverage in these negotiations.¹³⁶ On February 29, 2004, the two groups conditionally agreed that a fifth bowl game might be added to the BCS postseason structure.¹³⁷ This potential alteration, however, does not cure the underlying problems perceived by the Presidential Coalition. Instead, it simply provides for the inclusion of four, rather than two, at-large teams to play in a BCS game; there is no guarantee that either of these additional slots will be granted to a non-BCS team.¹³⁸ Despite the supposed compromise, the specter of an antitrust challenge still looms. In addition to the Presidential Coalition's threatened challenge and congressional distaste for the BCS,¹³⁹ Utah's attorney general has implored the antitrust committee of the National Association of Attorneys General to investigate the BCS.¹⁴⁰ The Note now addresses such a challenge's likelihood of success.

III. *The Sherman Act and Locating Unreasonable Restraints of Trade*

The Sherman Antitrust Act is the primary legislation used to combat agreements between economic actors that restrict the probable outcome of a competitive and free market.¹⁴¹ In order to establish an antitrust violation under Section 1 of the Act, a plaintiff must demonstrate that an agreement exists, that this agreement unreasonably restrains trade, and that it affects interstate commerce.¹⁴²

.shtml (Nov. 16, 2003) (evaluating the November 16th meeting between representatives of the BCS and Presidential Coalition) (on file with the Washington and Lee Law Review); Bowl Championship Series, *BCS/Coalition Joint Statement*, at <http://www.bcsfootball.org/news030908.shtml> (Sept. 8, 2003) (describing the results of the first meeting between the two groups) (on file with the Washington and Lee Law Review).

136. See Liz Clarke, *Future of BCS Still Faces Major, Mid-Major Issues*, WASH. POST, Feb. 28, 2004, at D4 (explaining the on-going threat of an antitrust challenge to the BCS).

137. See BCS, *Opening Statement*, *supra* note 135 (noting that another bowl game may be added to the BCS "if the market supports it").

138. See Tony Barnhart, *BCS to Add a Fifth Bowl in 2006*, ATLANTA J.-CONST., Mar. 1, 2004, at 1C ("With the addition of an extra game, there will be four at-large spots, thereby [potentially] improving the access for those non-BCS schools that qualify.").

139. See *supra* note 20 and accompanying text (discussing the reactions of congressional leaders to the BCS).

140. See Liz Clarke, *College Presidents Devise BCS Plan*, WASH. POST, Nov. 17, 2003, at D4 (discussing the action taken by the Utah attorney general with regards to the BCS).

141. Sherman Act, 15 U.S.C. §§ 1-7 (2000). Section 1 of the Sherman Act provides, in pertinent part, that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" is illegal. *Id.* § 1.

142. See *Hairston v. Pac. Ten Conference*, 101 F.3d 1315, 1318 (9th Cir. 1996) (outlining the elements of a Sherman Act claim and the respective burdens of proof and production placed on the parties).

When, as in the case of the BCS, the first and third elements are not at issue, the thrust of a Sherman Act analysis focuses on the restraint's effect on competition.¹⁴³

A. Methods of Antitrust Analysis

1. The Traditional Tools: *Per Se* Violations, the Rule of Reason, and the Quick Look

Although the United States Supreme Court has repeatedly acknowledged that only unreasonable restraints of trade violate Section 1,¹⁴⁴ an analytical framework to make such a determination has proven difficult to devise. Over time, the Court has developed three approaches to ascertaining whether conduct is unreasonable: "per se" violations, the "rule of reason," and the "quick look" test.¹⁴⁵ A per se violation occurs when an arrangement "facially appears to be one that would always or almost always tend to restrict competition and decrease output."¹⁴⁶ Put differently, an agreement is per se unlawful when it is "entirely void of redeeming competitive rationales."¹⁴⁷ Certain types of behavior, such as group boycotts,¹⁴⁸ have at times been recognized as per se

143. See, e.g., *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) (requiring the plaintiff to prove harm "to competition itself" rather than to just a single firm); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 (1984) (explaining that the Sherman Act requires a court to determine the reasonableness of a restraint's impact on competition).

144. See, e.g., *Bd. of Regents*, 468 U.S. at 98 (noting that, because "every contract is a restraint of trade," the legislation's recognized purpose is to "prohibit only unreasonable restraints of trade").

145. See *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1016-17, 1020 (10th Cir. 1998) (explaining the three methods of Section 1 analysis).

146. *Id.* at 1017 (quoting *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979)).

147. *Id.* at 1016 (quoting *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994)).

148. See, e.g., *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959) (explaining the traditional rule that group boycotts are forbidden behavior under a per se analysis); *Fashion Originator's Guild of Am. v. Fed. Trade Comm'n*, 312 U.S. 457, 467-68 (1941) (explaining that, in an instance of a group boycott, the court need not inquire into the reasonableness of the restraint because this behavior is per se condemned). In *Klor's*, the Court defined these boycotts as "concerted refusals by traders to deal with other traders." 359 U.S. at 212. *But cf.* *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) (refusing to extend the general rule regarding boycotts to instances where a single buyer decides to buy from one seller instead of another without providing a legitimate business justification for the choice); *Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing*, 472 U.S. 284, 295 (1985) ("[N]ot every cooperative activity involving a restraint or exclusion [has] the likelihood of predominantly anticompetitive consequences.").

violations because they frequently "prove so harmful to competition and so rarely prove justifi[able]."¹⁴⁹ If a group boycott is per se unlawful, courts will not expend judicial resources in examining the alleged procompetitive effects of and justifications for the arrangement prior to condemning it.¹⁵⁰

In cases challenging conduct that does not fall within a per se rule, courts will apply one of two analyses that requires an investigation into the overall impact of an agreement on competition.¹⁵¹ The more thorough of these is the rule of reason, which involves several analytical steps. Initially, a plaintiff must show that an agreement has a significant adverse effect on competition in a relevant market.¹⁵² If this burden is met, the defendant must then demonstrate that the challenged conduct has procompetitive benefits in the same market.¹⁵³ Courts have found increasing output, making a new product available, enhancing quality, and widening consumer choice, among other reasons, to be acceptable procompetitive justifications for seemingly anticompetitive behavior.¹⁵⁴ If the defendant satisfies its burden, the plaintiff must respond by showing that the agreement is not "reasonably necessary" to attain the offered procompetitive objectives or "that those objectives can be achieved in a

149. *NYNEX*, 525 U.S. at 133. The *NYNEX* opinion recognized a handful of other types of per se illegal behavior, including horizontal price-fixing (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940)), vertical price-fixing (citing *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911)), and horizontal market division (citing *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49–50 (1990) (per curiam)). *Id.* at 133–34.

150. The Court has not strictly adhered to these categories, however, and has often carved out exceptions to these general groupings. *See, e.g., NYNEX*, 525 U.S. at 135 (1998) (choosing not to apply a per se analysis to an instance of a group boycott); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 100–01 (1984) (explaining that "this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all" while exempting the instant case from a per se analysis); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979) (acknowledging that some products require horizontal price-fixing in order to exist and, therefore, exempting facially anticompetitive behavior from per se condemnation when these products are at issue).

151. *See Bd. of Regents*, 468 U.S. at 104 (1984) (noting that the primary inquiry under Section 1 of the Sherman Act concerns the restraint's impact on competition itself); *Banks v. Nat'l Collegiate Athletic Ass'n*, 746 F. Supp. 850, 858 (N.D. Ind. 1990) (requiring a plaintiff to show that "the restraint has an adverse impact on the competition in the relevant market" once the inquiry has advanced beyond a per se analysis), *aff'd*, 977 F.2d 1081 (7th Cir. 1992).

152. *See Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998) ("Under this approach, the plaintiff bears the initial burden of showing that an agreement had a substantially adverse effect on competition.").

153. *See id.* ("[T]he burden shifts to the defendant to come forward with evidence of the procompetitive virtues of the alleged wrongful conduct.").

154. *See id.* at 1023 (enumerating acceptable objectives for apparently anticompetitive conduct while declining to add profitability or cost savings to this list).

substantially less restrictive manner."¹⁵⁵ If both parties meet their respective burdens, the factfinder weighs the pro- and anticompetitive effects in the relevant market against each other in order to determine if the agreement is reasonable.¹⁵⁶

The alternate approach to evaluating non-per se antitrust complaints is a condensed version of the rule of reason methodology, called the quick look analysis. The quick look approach, which is applied infrequently, is used when conduct appears to have clear adverse effects in a relevant market, but with some possibility of redeeming procompetitive benefits.¹⁵⁷ The analysis operates similarly to the rule of reason approach, but the burden of the first step—the plaintiff's proof of anticompetitive effects caused by the defendant's conduct—is lessened because of the obviously harmful nature of the conduct.¹⁵⁸ Instead, the analysis essentially focuses on the procompetitive justifications for the agreement and, if any are offered, whether the same goals can be achieved through less restrictive means.¹⁵⁹ Like the rule of reason analysis, the quick look evaluation finds an unreasonable restraint when the anticompetitive effects outweigh their justifications or when the competitive objectives could be realized in a less limiting manner.¹⁶⁰

155. *Id.* at 1019.

156. *Id.*

157. The Court discussed this concept in *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984). It noted that "[t]he fact that a practice is not categorically unlawful in all or most of its manifestations certainly does not mean that it is universally lawful. . . . [T]he rule of reason can sometimes be applied in the twinkling of an eye." *Id.* at 109 n.39 (quoting PHILLIP AREEDA, *THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES* 37–38 (1981)); see also *Cal. Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756, 778 (1999) (explaining that the quick look analysis is appropriate only where an "obvious anticompetitive effect" is present); *Bd. of Regents*, 468 U.S. at 109 (applying a modified rule of reason analysis because of the presence of a "naked restriction" on both price and output that resulted from the challenged conduct); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1020 (10th Cir. 1998) (evaluating conduct with plainly adverse effects on competition under the quick look approach).

158. See, e.g., *Law*, 134 F.3d at 1020 (noting that "the court is justified in proceeding directly to the question of whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects" when the conduct at issue has "obvious anticompetitive effects").

159. See, e.g., *Bd. of Regents*, 468 U.S. at 110 (requiring a "competitive justification" for the challenged activity without conducting a detailed analysis of its anticompetitive effects); *Law*, 134 F.3d at 1021–24 (rejecting each of the procompetitive rationales offered by the defendant and, therefore, refusing to address the question of achieving similar benefits through less anticompetitive means).

160. See *Law*, 134 F.3d at 1021 (noting that a restraint may not violate the Sherman Act under a quick look analysis if the competitive benefits balance the anticompetitive harms).

2. A Recent Trend: California Dental's Practical Approach

Despite the manageable differences among the three analytical categories, the United States Supreme Court recently diluted these traditional distinctions. In *California Dental Ass'n v. Federal Trade Commission*,¹⁶¹ the Court explained that the "categories of analysis of anticompetitive effect are less fixed than terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them appear."¹⁶² Moreover, the opinion acknowledged the absence of a bright line between conduct that merits a rule of reason approach and that which calls for a truncated analysis.¹⁶³ In part, this blurriness is traceable to the Court's previous recognition that, regardless of "[w]hether the ultimate finding [of reasonableness] is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition."¹⁶⁴ Adopting a pragmatic approach, the Court prescribed "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint" when evaluating its impact on competition.¹⁶⁵ The quick look methodology is appropriate only when the experiences of the market have unveiled the challenged conduct's restrictive tendencies so clearly that a court can draw a "confident conclusion" about it.¹⁶⁶ *California Dental's*

161. *Cal. Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756 (1999). In *California Dental*, the Court considered whether a quick look analysis was sufficient to hold a nonprofit professional association in violation of antitrust legislation for imposing restrictions on its members' discount advertising. *Id.* at 759. The Court's first inquiry involved the Federal Trade Commission's jurisdiction to hear the case, which it found pursuant to the agency's enabling statute. *Id.* at 765–69. It then turned to the Ninth Circuit Court of Appeal's application of the quick look analysis when it reviewed the Commission's findings. *Id.* at 769. The Court reversed this decision, opting instead for a rule of reason analysis. *Id.* at 769, 778. In abandoning the lower court's rationale, it noted that the challenged action did not present obvious anticompetitive effects. *Id.* at 771. Quick look analysis, according to the Court, should only be used when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Id.* at 770. As the instant conduct could have produced competitive benefits, such as protecting patients from misleading advertising, the case was remanded to the circuit court for a full rule of reason analysis. *Id.* at 781.

162. *Id.* at 779.

163. *See id.* at 780–81 (recognizing a difficulty in distinguishing between situations that have an obvious anticompetitive effect and those that demand more thorough treatment). For a detailed history of the deterioration of the traditional *per se* and rule of reason classifications, see *In re Polygram Holding, Inc.*, 2003 FTC LEXIS 120, at *32–60 (Fed. Trade Comm'n July 24, 2003).

164. *California Dental*, 526 U.S. at 779–80 (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 (1984)).

165. *Id.* at 781.

remand for a thorough investigation of the restriction's competitive effects may be best understood as an instruction for courts to perform a detailed market analysis whenever the totality of the circumstances surrounding a challenged agreement indicates that it may have competitive benefits.¹⁶⁷ To be sure, the Court has consistently emphasized the need for a scrupulous evaluation when the potential for procompetitive benefits is present.¹⁶⁸ With these guidelines in mind, the analysis turns to dissecting the BCS agreement for a breach of the Sherman Act.

B. Choosing a Framework for Analysis

As noted, certain types of agreements, such as some group boycotts, are categorically condemned as per se unreasonable restraints of trade in violation of Section 1.¹⁶⁹ Consequently, an analysis of the BCS necessarily begins by determining exactly what type of economic behavior the agreement involves in order to ensure that the appropriate antitrust evaluation is applied. Some commentators have argued that the BCS warrants per se treatment,¹⁷⁰ but the difficulty of placing the arrangement into any of the traditional per se categories suggests that a more thorough examination is needed.

166. See *id.* ("The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick . . . look, in place of a more sedulous one.").

167. Lower courts have recognized this directive and have started conducting more detailed evaluations of practices that may have potential competitive benefits. See, e.g., *Cont'l Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 511 (4th Cir. 2002) (explaining that the *California Dental* decision demands an in-depth analysis of the challenged conduct, and that "although the district court demonstrated mastery of many intricacies of antitrust law, it performed too quick an analysis"); *Toscano v. PGA Tour, Inc.*, 201 F. Supp. 2d 1106, 1121 (E.D. Cal. 2002) (applying a rule of reason analysis pursuant to the Court's instructions in *California Dental*); *Viazis v. Am. Ass'n of Orthodontists*, 182 F. Supp. 2d 552, 567-68 (E.D. Tex. 2001) (noting that the *California Dental* decision demands more than a quick look when evaluating conduct that is "not obviously anticompetitive" and when examining regulations of a professional trade association), *aff'd*, 314 F.3d 758 (5th Cir. 2002).

168. See *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 881 (2004) ("Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue.").

169. See *supra* notes 148-49 and accompanying text (noting per se violations of the Sherman Act).

170. See, e.g., Mark Hales, *The Antitrust Issues of NCAA College Football Within the Bowl Championship Series*, 10 SPORTS LAW. J. 97, 115 (2003) (characterizing the BCS as a boycott against nonmember schools to prevent them from participating in the four BCS bowl games while insisting that the agreement warrants per se treatment). *But cf.* Darling, *supra* note 102, at 459 (selecting the rule of reason as the best analytical tool for evaluating a similar agreement between three bowl games and five conferences).

1. Identifying the Challenged Conduct Within the Bowl Championship Series

As described in Parts II.B and II.D, the BCS agreement is the product of the collective efforts of two groups: six conferences, on the one hand, and four bowl games on the other.¹⁷¹ Each group plays a distinct role in the creation of college football's annual postseason. The six conferences generate their respective champions at the conclusion of each season and send them as representatives to compete in the postseason games.¹⁷² The six member conferences, therefore, can be characterized as producers of goods—that is, annual conference champions—that consumers find desirable. The BCS unites the efforts of these competitors in marketing their respective champions at the conclusion of each season. Similarly, bowl games compete for the opportunity to retail these goods to consumers,¹⁷³ and the agreement arguably combines their efforts to produce bowl games of an overall higher quality. Because portions of the BCS involve parties that are at the same level of the competitive process, some aspects of the agreement are horizontal in nature.¹⁷⁴

Sections of the BCS also represent an agreement between the sets of conferences and bowl games,¹⁷⁵ groups which occupy different levels in the production of Division I-A's postseason. Under the BCS, the six conferences agree not to market their respective champions to games beyond the Fiesta, Orange, Rose, and Sugar Bowls, while these bowls must select their respective participants from the menu of eligible teams at the conclusion of each season.¹⁷⁶

171. See *supra* Parts II.B, II.D (describing the relationships among the parties to the BCS agreement). While the BCS also includes a television broadcaster, this portion of the agreement is of little importance to the analysis. This is because only one firm at that level of production, the American Broadcasting Company, is involved. As such, this portion of the arrangement is vertically related to the BCS, and arrangements of this type do not warrant per se termination. See, e.g., *United States Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 594 (1st Cir. 1993) ("[A] purely vertical arrangement, by which . . . a supplier or dealer makes an agreement exclusively to supply or serve a manufacturer, is not a group boycott.").

172. See *supra* note 46 and accompanying text (noting that each conference enjoys a significant measure of independence in determining its annual champion and in which bowl games its members shall compete).

173. See *supra* notes 50–57 and accompanying text (describing the competitive nature of the bowl game market).

174. See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 99 (1984) (defining a horizontal restraint as "an agreement among competitors on the way in which they will compete with one another"); *Double D Spotting Serv. v. Supervalu, Inc.*, 136 F.3d 554, 558 (8th Cir. 1998) (noting that "[h]orizontal restraints of trade result when combinations [occur between] traders at one level of the market structure").

175. See *supra* Part II.C (explaining the membership composition of the BCS).

176. See POPPE, *supra* note 13, at 8 (discussing the interlocking agreements among the

Because of the cooperation required by the conferences at one level of production with the bowl games at another, the BCS also contains vertical agreements.¹⁷⁷

The importance of identifying some parts of the BCS as horizontal and others as vertical should not be underestimated. Courts emphasize the distinction between horizontal and vertical arrangements when choosing which level of Section 1 scrutiny they will apply.¹⁷⁸ While courts typically afford challenged vertical agreements the benefit of a rule of reason analysis, there is a greater likelihood that horizontal conduct limiting competition will be treated as *per se* illegal.¹⁷⁹ For this reason, the remaining analysis in Part III.B.2 is undertaken with an eye toward the horizontal aspects of the BCS—the agreements among the six conferences and among the four bowl games.¹⁸⁰ Part IV's evaluation of the agreement's competitive effects assumes that the vertical aspects of the BCS—the agreement between the group of conferences and the group of bowl games—should be examined under the rule of reason in accordance with the majority of cases that have considered such restraints.¹⁸¹

2. Rejecting *Per Se* Treatment

The argument for automatically voiding the agreement under Section 1 without evaluating its procompetitive benefits brands the BCS as a group boycott.¹⁸² A concerted refusal to deal with competitors, so the argument goes,

conferences and the bowls that produce the ultimate BCS format).

177. See *Smith Mach. Co. v. Hesston Corp.*, 878 F.2d 1290, 1295 (10th Cir. 1989) (noting that vertical restraints involve entities at different levels of production).

178. See *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 348 n.18 (1982) ("[H]orizontal restraints are generally less defensible than vertical restraints."); *United States Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 594 (1st Cir. 1993) (noting that vertical restraints are not condemned as *per se* violations of Section 1 of the Sherman Act because the incentives for such agreements are usually "benign" towards the competitive process, among other reasons); 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 105 n.607 (5th ed. 2002) [hereinafter ANTITRUST LAW DEVELOPMENTS] (explaining that vertical restraints are governed by more forgiving standards of review than horizontal ones).

179. See, e.g., *United States v. Gen. Motors Corp.*, 384 U.S. 127, 145 (1966) (finding that a horizontal agreement among some competitors to "eliminat[e] . . . access to the market" for others was a *per se* violation of Section 1); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (explaining that the Court has "consistently and without deviation" held that horizontal price-fixing arrangements are *per se* illegal).

180. See *infra* Part III.B.2 (arguing that the rule of reason should apply to the horizontal aspects of the BCS arrangement).

181. See *infra* Part IV (analyzing the BCS under the rule of reason framework).

182. See Hales, *supra* note 170, at 115 ("Within the horizontal agreements of the BCS a

is traditionally per se illegal, and the BCS should be struck down as a result.¹⁸³ Such an analysis, though, clings to dated notions of what constitutes a per se illegal group boycott and ignores nearly twenty years of developments in the area.

Prior to 1985, courts terminated agreements among competitors that excluded others from some aspect of the competitive process without any inquiry into their reasonableness or procompetitive benefits.¹⁸⁴ This tradition changed, though, when the Supreme Court pared the applicability of the per se rule in the context of group boycotts in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*¹⁸⁵ In *Northwest Wholesale*, the Court acknowledged the difficulty of maintaining the precedent of striking concerted refusals to deal as per se illegal.¹⁸⁶ Instead of retaining the sweeping proscription against horizontal refusals to deal, it articulated a handful of prerequisite qualifications for triggering per se treatment.¹⁸⁷ Chief among these

boycott . . . has been created."); Cowen, Senate Statement, *supra* note 18 (describing the BCS as "restrictive and exclusionary" while arguing that it "severely limits access to post season play").

183. See Hales, *supra* note 170, at 115 (arguing for per se treatment of the horizontal aspects of the BCS).

184. See, e.g., *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959) (using a per se analysis to dissolve concerted action against a retailer); *Associated Press v. United States*, 326 U.S. 1, 15 (1945) ("The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete."); *Fashion Originator's Guild of Am. v. Fed. Trade Comm'n*, 312 U.S. 457, 468 (1941) (terminating a cooperative agreement among clothing designers).

185. See *Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 294-95 (1985) (explaining that not every instance of a group boycott warrants per se treatment). In *Northwest Wholesale*, the Court considered whether the expulsion of a member from a wholesale purchasing cooperative without any explanation or notice violated Section 1 of the Sherman Act under per se analysis. *Id.* at 285-88. The lower court determined the conduct to be a group boycott and held it per se illegal. *Id.* at 288-89. The Court disagreed, however, and provided guidelines for when a group boycott should be given per se treatment. *Id.* at 289-95. It turned to prior decisions and discovered that previous per se-condemned boycotts "often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete." *Id.* at 294. Moreover, those participating in the boycott frequently held a dominant position in the market. *Id.* The past per se boycotts also lacked procompetitive and efficiency-enhancing justifications. *Id.* The Court recognized that wholesale purchasing cooperatives, like the one presented in the case, often result in more efficient and competitive markets by facilitating the benefit of scale economies in both purchasing and warehousing of wholesale supplies and by ensuring quick access to inventories that might not otherwise be available. *Id.* at 295. As a consequence, the Court vacated the lower court's per se holding and remanded the case for a rule of reason analysis. *Id.* at 298.

186. See *id.* at 294 ("[T]here is more confusion about the scope and operation of the per se rule against group boycotts than in reference to any other aspect of the per se doctrine." (quoting LAWRENCE SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 83, at 229-30 (1977))).

187. See *id.* at 298 (requiring a showing that a group of boycotters possesses certain

is the requirement that the boycotters must possess either "market power or exclusive access to an element essential to effective competition."¹⁸⁸ Absent these qualifications, the probability that the agreement's results will be overwhelmingly anticompetitive is minimal.¹⁸⁹ Because the per se rule affects only agreements with obvious anticompetitive effects, the Court recognized that refusals to deal will often warrant a rule of reason evaluation in order to determine whether challenged conduct contains any procompetitive justifications.¹⁹⁰

This hesitancy in applying per se treatment to concerted action has appeared consistently since *Northwest Wholesale*.¹⁹¹ The following year, the Court explained that "the category of restraints classed as group boycotts is not to be expanded indiscriminately" as it reiterated the per se rule's limitations.¹⁹² The per se rule is now reserved for so-called "classic boycotts."¹⁹³ Under this approach, a concerted refusal to deal does not warrant per se treatment unless the agreement meets *Northwest Wholesale's* preliminary requirements and the experiences of the market allow a decisionmaker to draw a confident conclusion about the agreement's anticompetitive effects.¹⁹⁴ The Court of Appeals for the First Circuit may have best articulated the new status of the group boycott rule when it explained:

[O]ne must [recognize] that per se condemnation is not visited on every arrangement that might, as a matter of language, be called a group boycott or concerted refusal to deal. . . . We doubt that the modern Supreme Court would use the boycott label to describe, or the rubric to condemn, a joint venture among competitors in which participation was allowed to some but

characteristics before a court should consider applying the per se standard).

188. *Id.* at 296.

189. *See id.* at 295 ("Although a concerted refusal to deal need not necessarily possess all of these traits to merit per se treatment, not every cooperative activity involving a restraint or exclusion will share with the per se forbidden boycotts the likelihood of predominantly anticompetitive consequences.")

190. *See id.* at 298 (noting that a rule of reason analysis is appropriate in some boycott cases because "not all concerted refusals to deal are predominantly anticompetitive").

191. *See, e.g.,* ANTITRUST LAW DEVELOPMENTS, *supra* note 178, at 110 n.634 (listing instances when courts refused to apply the per se standard to concerted conduct by competitors).

192. Fed. Trade Comm'n v. Ind. Fed'n of Dentists, 476 U.S. 447, 458 (1986).

193. *See* ANTITRUST LAW DEVELOPMENTS, *supra* note 178, at 111 (noting that refusals to deal are evaluated under the rule of reason unless they amount to a "classic boycott").

194. *See* Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 779-81 (1999) (explaining when the per se, quick look, and rule of reason standards are applicable).

not all, although such a restriction might well fall after a more complete analysis under the rule of reason.¹⁹⁵

The current posture of group boycott jurisprudence, therefore, counsels against summarily rejecting the BCS without considering any procompetitive benefits it might offer consumers and the college football industry. The Supreme Court's development of this issue indicates that a supposed boycott warrants per se treatment only in the clearest of circumstances,¹⁹⁶ but the BCS fails to fit neatly into the classic boycott model.¹⁹⁷ Indeed, a primary advocate for per se condemnation is reduced to referring to the BCS as an "apparent boycott"¹⁹⁸ and to engaging in a series of questionable hypothetical situations to confirm this characterization.¹⁹⁹ Simply calling conduct a boycott does not expose it to per se treatment,²⁰⁰ and the procompetitive justifications of the BCS entitle it to more than categorical rejection by a decisionmaker.

195. *United States Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 593–94 (1st Cir. 1993) (citation omitted).

196. *See* *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998) (explaining that the per se rule is a "demanding standard" that is reserved only for "clear cut cases").

197. As discussed in Part II.D.1, the arrangement does not foreclose the opportunity of a non-BCS conference school to play in one of the four BCS bowl games. *See supra* Part II.D.1 (explaining that two of the eight available BCS slots are available to any Division I-A team).

198. Hales, *supra* note 170, at 115. A modified version of Mr. Hales's paper is available on the Presidential Coalition for Athletics Reform's Internet site. Though the rhetoric in the paper's title condemning the BCS is elevated in the online version, the characterization of the agreement as an "apparent boycott" is consistent between the two drafts. *See* Mark Hales, *Antitrust Issues of the BCS: A Study of the Bowl Championship Series and Other Bowl Associations That Have Led to a Decade of Bamboozle, Corruption, and Sham Within NCAA I-A College Football*, Part III.A, at <http://www.geocities.com/byulawguy/BCSpaper.htm> (last visited June 19, 2004) ("The apparent boycott of non-BCS created by the BCS warrants per se analysis.") (on file with the Washington and Lee Law Review).

199. *See* Hales, *supra* note 170, at 115–16 (speculating that members of non-BCS conferences would be prohibited from qualifying for a BCS game even if they played a statistically competitive schedule). The article further posits that "a team is . . . barred from National Championship consideration" if it is not ranked in the subjective AP or coaches' polls in the preseason, an assumption that the author uses to bolster his argument that the BCS deserves per se condemnation as an unlawful boycott. *See id.* at 117 (arguing for the application of the per se rule against group boycotts to the BCS). As noted in Part II.D.1 above, the BCS accounts for each school's subjective rankings only at the conclusion of the regular season. *See supra* notes 108–09 and accompanying text (describing the "polls" variable in the BCS formula). The preseason polls, therefore, are meaningless to the BCS and have no role in determining which eight schools will participate in the four BCS bowl games.

200. *See* *Mass. Sch. of Law v. Am. Bar Ass'n*, 853 F. Supp. 837, 840 (E.D. Pa.) ("[M]erely naming the practice a 'boycott'—and thus calling it a per se unlawful restraint—does not make it so."), *amended by* 857 F. Supp. 455 (E.D. Pa. 1994), *aff'd*, 107 F.3d 1026 (3d Cir. 1997).

This conclusion is enhanced by the treatment that challenged agreements involving intercollegiate athletics traditionally receive. A frequently cited decision for Sherman Act principles is *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*,²⁰¹ in which the Court evaluated an agreement that governed the football television broadcasting rights of NCAA member schools.²⁰² Though the Court struck down the agreement, it refused to apply a per se analysis because horizontal restraints were necessary in order for intercollegiate athletics to exist.²⁰³ Only a thorough rule of reason examination suffices when evaluating such a situation, the Court explained, and judicial decisionmakers must consider any procompetitive justifications for the restrictions, such as increased efficiency or the creation of a new product.²⁰⁴ Courts considering challenges to

201. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984). In *Board of Regents*, the Court considered whether a plan adopted by the NCAA that limited the number of football games that any one member college could televise violated Section 1 of the Sherman Act. *Id.* at 91–98. The Tenth Circuit terminated the plan as a per se violation of the Sherman Act. *Id.* at 97–98. The Court disagreed with this analysis, however, and felt that per se treatment was not justified in this case. *Id.* at 99–104. Instead, the plan deserved a thorough rule of reason evaluation because it governed part of "an industry in which horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 101. The Court explained that sports leagues, such as intercollegiate athletics under the NCAA, required agreements among competitors in order to create the desired product or service. *Id.* at 101–02. Likewise, prior cases supported abandoning the per se rule when horizontal restraints may enhance overall market efficiency and competition. *Id.* at 103 (citing *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 18–23 (1979); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51–57 (1977)). Application of the rule of reason did not salvage the plan, as it restrained competition by fixing prices for particular telecasts, constituted a potential boycott of competitors, and placed an artificial limit on the production of televised college football. *Id.* at 104–13. The NCAA attempted to justify the plan by explaining that it was designed to assist in the marketing of broadcast rights and to protect live attendance at football games. *Id.* at 113–17. These procompetitive reasons were unpersuasive, though, because they relied on an overly broad definition of the relevant market and were contrary to the findings of the district court that the plan created no competition-enhancing efficiencies. *Id.* at 113–17. The NCAA also argued that the plan was necessary to maintain a competitive balance in college football. *Id.* at 117–18. Again, the Court rejected this procompetitive justification, noting that the plan only restricted one source of football-related revenue available to a school and did not regulate the amount of money a school may invest in its football program. *Id.* at 119. Because the NCAA could not offer any persuasive procompetitive justifications for restricting the broadcasting rights of its members, the plan violated Section 1. *Id.* at 120.

202. *See id.* at 111–20 (finding that NCAA-imposed restrictions on the television broadcasting rights of its member institutions violated Section 1 of the Sherman Act under a rule of reason analysis).

203. *See id.* at 101–03 (explaining that certain industries require agreements among competing firms in order to produce their respective goods and services and, therefore, per se treatment was inappropriate).

204. *See id.* (discussing justifications for horizontal restraints among competitors).

horizontal restraints in intercollegiate athletics since *Board of Regents* have uniformly applied the rule of reason and evaluated the procompetitive benefits such agreements might include.²⁰⁵

When this reluctance to apply per se rules against restrictions in college athletics is coupled with the difficulty of placing the BCS into the prohibited classic boycott model, it is clear that application of a per se standard is inappropriate for evaluating the horizontal aspects of the agreement.²⁰⁶ Instead, they deserve a thorough rule of reason analysis, weighing their competitive benefits against their anticompetitive aspects, in order to determine whether they violate Section 1. The gravamen of this examination is the reasonableness of the BCS restrictions when considered against the historical background in which they were developed.²⁰⁷

IV. Evaluating the Competitive Effects of the Bowl Championship Series

A. Alleged Anticompetitive Effects

The initial step in determining whether the BCS is a reasonable restraint is to determine if it has a substantially adverse effect on competition.²⁰⁸ Those

205. See, e.g., *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062–63 (9th Cir. 2001) (applying a rule of reason analysis to a Section 1 challenge of a rule governing when collegiate athletes may transfer from one school to another); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1018–19 (10th Cir. 1998) (refusing to apply per se treatment when evaluating an NCAA restriction on the annual compensation of certain college basketball coaches); *Hairston v. Pac. Ten Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996) (using the rule of reason to dismiss a Section 1 claim against a Division I-A conference's restrictions concerning the recruitment of student-athletes); *Ass'n of Indep. Television Stations v. Coll. Football Ass'n*, 637 F. Supp. 1289, 1296–99 (W.D. Okla. 1986) (explaining that the rule of reason is the appropriate analytical tool when evaluating an agreement among several college football programs to broadcast their respective games only on certain television networks).

206. The quick look likewise should be dismissed for similar reasons. As explained, this methodology is appropriate only when the anticompetitive effects of an arrangement are clear. See *supra* notes 157–58 and accompanying text (discussing when the quick look should be used). The supposed anticompetitive effects of the BCS, though, are not straightforward. See *infra* Part IV.A (listing the anticompetitive effects of the BCS proffered by the Presidential Coalition). The teachings of *California Dental* and *Board of Regents* also guide the examination of the BCS to the rule of reason. See *supra* notes 161–68, 201–05 and accompanying text (rejecting per se treatment).

207. See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 98 (1984) (“[W]e have repeatedly recognized [that] the Sherman Act was intended to prohibit only unreasonable restraints of trade.”); *United States v. Visa USA, Inc.*, 344 F.3d 229, 237–38 (2d Cir. 2003) (“For over 100 years, the courts have understood the Sherman Act only to prohibit ‘unreasonable’ restraints on trade.”).

208. See *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998)

within the Presidential Coalition argue that the financial distribution scheme of the BCS destroys the competitive process within Division I-A, the relevant market for the antitrust analysis.²⁰⁹ Indeed, the group and its supporters often cite the differences in revenue distribution between BCS and non-BCS conferences alone as proof of an antitrust violation.²¹⁰ The Presidential Coalition claims that this disparity damages its members' football programs to such an extent that they cannot adequately recruit the student-athletes or coaches needed to compete in Division I-A football.²¹¹ It further posits that the BCS scheme to determine a national champion augments these recruiting difficulties because it is "virtually impossible for a non-BCS school to ever qualify . . . for the national championship."²¹² Moreover, according to the Presidential Coalition, the income disparity prevents schools that are not members of a BCS-conference from improving their athletic facilities to the same degree as those within the BCS, creating additional disadvantages in recruiting players and coaches.²¹³

In essence, the Presidential Coalition argues that significant funding and the possibility of winning a championship are required to compete effectively in college football. It contends that the BCS, with its procedures for distributing revenue and determining which schools will participate in a national championship game, forecloses the ability of non-BCS members to compete meaningfully in college football. But President Cowen's testimony before the Judiciary Committee of the House of Representatives suggests otherwise. He explained that schools from BCS conferences competed against those from non-BCS conferences in the postseason sixteen times between 1998 and 2003; each group won eight of these games.²¹⁴ "That sounds competitive to me," he

(explaining that a plaintiff must show that an agreement has a significantly adverse impact on competition under a rule of reason analysis).

209. See Cowen, House Statement, *supra* note 9 (discussing the supposed effect that the BCS has had on schools that are not members of BCS-affiliated conferences).

210. See *id.* ("The financial disparity caused by the BCS can be described by merely stating that the 63 BCS schools earned approximately \$500 million since they began their first contract five years ago, while the 53 Division I-A non-BCS schools shared earnings of \$17 million."); Cowen, Senate Statement, *supra* note 18 (discussing the significance of the disparity in BCS revenue distribution).

211. See Cowen, House Statement, *supra* note 9 (explaining various adverse impacts that the BCS has on the ability of schools that are not members of BCS conferences to compete).

212. *Id.*

213. See *id.* (noting that non-BCS schools are forced to "scramble within their own limited budgets to fund [facility] improvements . . . or allow their facilities to be outpaced and fall behind the competition").

214. See *id.* (describing recent occasions where BCS and non-BCS teams have played one another in the postseason).

boasted to the Committee.²¹⁵ Based on this commentary, it would seem that the Presidential Coalition agrees that the BCS actually does not disrupt the competitive process of Division I-A college football. Harm to competition has always been a necessary prerequisite to finding antitrust liability,²¹⁶ so an antitrust challenge may end without the BCS having to justify its conduct. Assuming *arguendo* that the Presidential Coalition would satisfy its burden of demonstrating that the BCS adversely affects competition, though, its complaints are minor when compared to the procompetitive justifications for the arrangement.

B. Procompetitive Benefits and Justifications of the Bowl Championship Series

When a plaintiff satisfies its initial burden, the rule of reason analysis requires a defendant to present procompetitive benefits and justifications for the challenged conduct.²¹⁷ The BCS represents a significant step by the college football industry toward enhancing its overall quality and harnessing the economic benefits that its unique postseason structure creates. In order to fully appreciate its procompetitive benefits and justifications, they will be discussed in three sections. The first will discuss how the BCS bolsters competition within Division I-A college football.²¹⁸ This section is followed by a discussion of how the BCS provides benefits and opportunities to those conferences that are not BCS members.²¹⁹ The final section describes a further procompetitive justification for the BCS, namely the relatively low fan interest in non-BCS conference teams.²²⁰

215. *Id.* At another point in his testimony, President Cowen asserted that, when non-BCS teams play against BCS teams, "they are quite competitive." *Id.*

216. *See* *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768, 788 (6th Cir. 2002) ("The antitrust laws are intended to protect competition, not competitors.").

217. *See* *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1021 (10th Cir. 1998) (explaining that the rule of reason gives a defendant the opportunity to justify an agreement to restrain trade).

218. *See infra* Part IV.B.1 (discussing benefits the BCS provides the college football industry as a whole).

219. *See infra* Part IV.B.2 (explaining benefits that the BCS creates for non-BCS conferences that were previously unavailable to these conferences).

220. *See infra* Part IV.B.3 (describing the undesirability of having non-BCS conference members participate in a BCS bowl game from both a historical perspective and a fan's perspective).

1. *Competitive Benefits to the Industry of College Football*

Courts have discovered numerous procompetitive justifications for arrangements that are initially determined to harm competition.²²¹ Creating a new product, for instance, can justify an agreement that might otherwise unreasonably restrain trade under Section 1.²²² Generating a new product is the very purpose of the BCS; the arrangement is designed to produce a national championship game between Division I-A's two best teams at the conclusion of each season.²²³ To be sure, the BCS system has successfully created a national championship game in each of the six seasons in which it has been operative. Beginning with the 1998 season, every Division I-A football national champion has been victorious in a postseason game in which it was paired with the nation's other top team.²²⁴ Prior to the inception of the BCS, though, such a championship game occurred merely by coincidence, and these occasions were rare indeed.²²⁵

Those opposed to the BCS argue that the arrangement actually fails to produce a universally accepted national championship game, but this position highlights the former system's incoherent method of selecting a champion. Although the AP poll still crowns a national champion, it is not obligated to select the winner of the BCS championship game for its title.²²⁶ The mischief that the AP poll can cause as a result of its independence became clear during the 2003–04 postseason. Critics claimed that the BCS failed to match up the nation's two best teams for that season's championship game.²²⁷ When the

221. See *Law*, 134 F.3d at 1023 (listing justifications for conduct that restrains trade).

222. See, e.g., *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1157 (9th Cir. 2003) (accepting the creation of a new product as a justification for a restraint of trade); *Law*, 134 F.3d at 1023 (noting that generating a new product justifies a restraint of trade); *Detroit Auto Dealers Ass'n v. Fed. Trade Comm'n*, 955 F.2d 457, 475 (6th Cir. 1992) (considering the creation of a new product as an enhancement to competition).

223. See *supra* Part II.D.1 (discussing the methodology used by the BCS to produce a national championship game).

224. See *SPORTS ALMANAC*, *supra* note 48, at 171–72 (noting the bowl game in which each national champion participated between the 1998 and 2003 seasons).

225. See *supra* Part II.C (explaining the inefficiencies in creating a national championship game that prevailed prior to the BCS).

226. See Rick Alonzo, *Coaches Follow System in Vote for No. 1*, DALLAS MORNING NEWS, Jan. 6, 2004, at 4 (noting that the AP poll may choose a school that did not win the national championship game as its overall champion). The coaches' poll, on the other hand, necessarily elects the winner of the national championship game as the nation's best. See *id.* (explaining that the American Football Coaches Association, the body that votes in the coaches' poll, has agreed to deem the victor of the championship game as the national champion).

227. See Tim Griffin, *LSU, USC Both Celebrate Their Crowning Moments*, SAN ANTONIO EXPRESS-NEWS, Jan. 6, 2004, at 1D (discussing the contention that the University of Southern

regular season concluded, the AP poll ranked the University of Southern California as its number one team, with Louisiana State University second and the University of Oklahoma third.²²⁸ The BCS formula, though, deemed Louisiana State and Oklahoma as the nation's two best teams and paired them to play for the national championship.²²⁹ Instead of agreeing that Louisiana State, victor of the 2003–04 national championship game, was the nation's best team, the AP poll defiantly proclaimed Southern California as its national champion.²³⁰ These voters, as well as those who contend that the 2003–04 championship was split, fail to recognize that the BCS procedure for selecting the country's best football team necessarily accounts for the AP poll.²³¹ The BCS formula absorbs the voters' opinions and limits the effect of their biases and prejudices when determining which school has performed the best over the course of a season.²³² Simply put, there is only one legitimate college football champion at the conclusion of each season, and it is the team that wins the national championship game.

Minimizing the AP poll's importance in selecting a national champion directly relates to a second procompetitive justification for the BCS. Courts have reasoned that an improvement in product or service quality qualifies as a procompetitive defense to an otherwise anticompetitive agreement.²³³ Despite being a staple of Division I-A college football for over sixty years, sole reliance on the polls created a sports league that often had no outright champion.²³⁴ Winning a championship, though, can generate incredible rewards for a school.²³⁵ By purging the biases and inconsistencies that plagued the former

California should have participated in the 2003–04 national championship game).

228. See Bowl Championship Series, *Final 2003 BCS Rankings*, at <http://sports.espn.go.com/ncf/abcsports/BCSRankings?week=8> (Dec. 7, 2003) [hereinafter BCS, *Final Rankings*] (noting the AP poll's top three schools at the conclusion of the 2003–04 regular season) (on file with the Washington and Lee Law Review).

229. *Id.*

230. See Herb Gould, *Split Decision Leaves BCS Reeling*, CHI. SUN-TIMES, Jan. 6, 2004, at 96 (explaining that the AP poll voted Southern California as the nation's best team despite Louisiana State's victory in the national championship game).

231. See *supra* Part II.D.1 (explaining the role that the polls play in the BCS formula).

232. See *supra* Parts II.C, II.D.1 (discussing the prejudices that accompany the poll system and explaining how the BCS formula accounts for the polls).

233. See *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1023 (10th Cir. 1998) (listing procompetitive justifications for conduct that might otherwise be construed as anticompetitive).

234. See *supra* note 77 and accompanying text (explaining the split national championships that occurred prior to the BCS).

235. See *supra* note 78 and accompanying text (describing the economic benefits of winning a Division I-A championship).

polls-only system from the determination of the nation's best teams, consumers of college football—those who attend games and those who view games on television or listen to them on the radio—have an objective and reliable measure of each school's performance.²³⁶ The BCS, in turn, uses this objective evaluation as its primary input in producing the annual national championship game and other BCS bowls.²³⁷ As such, the stability that accompanies the BCS formula presents an upgrade from the arbitrary and inconsistent system formerly used.

The factors used in the BCS formula themselves place a premium on competition within the industry. Consider, for instance, the strength-of-schedule variable. One-fifth of a school's BCS score depends on the quality of its competition throughout the course of a season.²³⁸ Such weight induces schools to play the strongest available opponents and encourages a higher level of competition among all Division I-A participants. Under the BCS system, a school can no longer win a championship by competing only against weaker teams. Other variables generate similar competitive incentives. The BCS punishes a team for losing at any point and rewards it for winning a game against any of the nation's ten best teams.²³⁹ At its core, this formula demands that each team play high-quality opponents and that it be victorious in these games before it will be given the opportunity to capture the season's national championship and the economic benefits that accompany it.²⁴⁰ Such guidelines certainly advance the basic principles of competition within Division I-A college football that the antitrust laws were designed to foster.

2. *Benefits to Schools That Are Not Members of the Bowl Championship Series*

In addition to these industry-wide competitive justifications, the BCS arrangement also generates specific benefits for schools that are not members of

236. See *supra* Part II.D.1 (explaining the calculation used to determine which schools will compete in BCS bowls).

237. See *supra* Part II.D.1 (noting that the two schools with the lowest scores in the BCS formula play one another to determine the national champion while explaining that the formula is used to create the pool of teams eligible to participate in a BCS bowl game).

238. See *supra* notes 112–13 and accompanying text (outlining the strength of schedule component of the BCS formula).

239. See *supra* notes 114–16 and accompanying text (describing the impact that losing a game or defeating any of the top ten teams can have on a school's BCS score).

240. See *supra* Part II.D.1 (explaining the purposes of the BCS formula's variables and how the formula is designed to pair the two best teams at the conclusion of the season).

a BCS conference. For instance, it provides these schools with a high level of access to the BCS bowl games. Indeed, if a non-BCS team finishes the season ranked among the top two in the BCS standings, it will necessarily compete for the national championship.²⁴¹ The BCS structure also requires its bowls to fill available at-large slots with non-BCS teams if they are ranked within the top six in the final BCS standings.²⁴² It provides no such protection for similarly ranked BCS schools. Likewise, the pool of teams eligible for an at-large position is restricted to only the twelve highest ranked schools at season's end.²⁴³ This condition prevents the four bowls from arbitrarily bypassing a highly-qualified team from outside of a BCS conference in favor of a less deserving BCS member. Prior to the BCS arrangement, however, non-BCS conference members rarely had the opportunity to compete in these postseason games.

In the fifty years immediately preceding the BCS, the BCS bowls collectively invited teams from non-BCS conferences to compete in their respective games fewer than ten times.²⁴⁴ In fact, only once in the final twenty years under the former postseason system did a school from a non-BCS conference play in any of these games.²⁴⁵ This lack of inclusion was due in part to the preseason agreements that conferences would enter into with bowls that predetermined postseason match-ups.²⁴⁶ When at-large positions remained available, though, the four BCS bowls clearly were reluctant to include these schools.²⁴⁷ The BCS framework mitigates this reluctance in favor of non-BCS conference members and insists on their inclusion if they satisfy certain conditions.

241. See POPPE, *supra* note 13, at 9 ("Any at-large team ranked No. 1 or No. 2 in the final BCS standings shall play in the BCS national championship game.").

242. See *id.* (discussing how a non-BCS team can automatically qualify for a BCS bowl game).

243. See *id.* at 8 (noting which teams may receive an at-large invitation to play in a BCS game).

244. See SPORTS ALMANAC, *supra* note 48, at 173–74 (listing the participants in the BCS bowls since each game's inception). The Sugar Bowl hosted non-BCS schools on four occasions between 1948 and 1998. *Id.* at 174. The Fiesta Bowl hosted three non-BCS schools, while the Orange Bowl allowed only two non-BCS schools to compete during this same time period. *Id.* at 173–74. The Rose Bowl did not invite a non-BCS team to participate in this time period. *Id.* at 173.

245. This lone occasion occurred when the University of Louisville played in the Fiesta Bowl following the 1990 regular season. *Id.*

246. See *supra* Part II.B (explaining the relationships that conferences typically have with bowl games).

247. See SPORTS ALMANAC, *supra* note 48, at 173–74 (noting times in each BCS bowl's history that one of its slots was available to an at-large participant).

Despite these provisions, the Presidential Coalition contends that it is "virtually impossible for a non-BCS school to ever qualify for a BCS bowl."²⁴⁸ The 2003–04 football season shows the inaccuracy of this statement. For example, the University of Miami of Ohio, which is not a member of a BCS conference, finished that season ranked eleventh in the BCS standings, qualifying it to compete in a BCS game.²⁴⁹ Likewise, Texas Christian University, also a member of a non-BCS conference, spent part of the season ranked among the top six.²⁵⁰ Had the school been able to sustain its success, the arrangement would have guaranteed Texas Christian a position in a BCS game.²⁵¹ No BCS bowl invited either of these schools to compete, but this result was a function of the economic reality of consumer preferences and is not attributable to the BCS structure.²⁵²

Although a non-BCS team has never participated in a BCS game since the arrangement's inception,²⁵³ the opportunity for these schools to be invited certainly exists. Ultimately, it is this opportunity to compete that guides the antitrust analysis. The Sherman Act is concerned with protecting competition itself and not individual competitors.²⁵⁴ The potential for any team to play in a BCS game encourages competition within Division I-A football, and such

248. Cowen, House Statement, *supra* note 9.

249. BCS, *Final Rankings*, *supra* note 228.

250. See Bowl Championship Series, *2003 BCS Rankings, Week Four*, at <http://sports.espn.go.com/ncf/abcsports/BCSRankings?week=4> (Nov. 10, 2003) (ranking Texas Christian University as the nation's sixth best team after completion of the regular season's first two months) (on file with the Washington and Lee Law Review).

251. See Tony Barnhart, *Southern Miss Ends it for TCU*, ATLANTA J.-CONST., Nov. 21, 2003, at 1H (discussing the impact that Texas Christian University's first loss in the 2003–04 regular season had on its eligibility to play in a BCS game). Texas Christian finished the season ranked eighteenth in the BCS standings. BCS, *Final Rankings*, *supra* note 228. Its lower ranking was primarily the result of a weak level of competition, as its strength of schedule was in the lowest quartile. See *id.* (noting that the difficulty of Texas Christian's schedule was ranked 95th out of 117). This low level of competition prompted some commentators to question whether the school deserved to play in a BCS bowl regardless of its position in the BCS rankings. See, e.g., Phil Taylor, *They're Not Princes*, SPORTS ILLUSTRATED, Nov. 3, 2003, at 89 (criticizing the quality of Texas Christian's opposition).

252. See *infra* Part IV.B.3 (explaining that consumers substantially prefer to watch schools from BCS conferences compete than watching teams from non-BCS conferences).

253. See SPORTS ALMANAC, *supra* note 48, at 173–74 (listing the participants in each BCS game since 1998).

254. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) ("It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'" (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962))).

competitive opportunities for all members of an industry are precisely what the antitrust laws prescribe.²⁵⁵

Regardless of whether a non-BCS conference is represented in a BCS bowl, it receives a monetary award from the revenue created by the arrangement.²⁵⁶ This additional procompetitive benefit to non-BCS conferences is straightforward: These conferences necessarily profit from the BCS irrespective of their involvement in the postseason. Despite not being represented in a BCS bowl since the arrangement became effective, non-BCS conferences have received over \$20 million of BCS-generated revenue during this time period.²⁵⁷ Conferences may disperse these funds in any way they choose, but a rational conference would invest this money in a manner that would increase its members' abilities to compete on the football field.²⁵⁸ A higher level of football success, in turn, can lead to substantial economic benefits.²⁵⁹ By presenting financial resources to non-BCS conferences that can be invested in their members' programs, the BCS framework supports this competitive incentive.

3. *Consumer Preferences: An Additional Consideration for the Reasonableness of the Bowl Championship Series*

Beyond these procompetitive benefits, the BCS is also a reasonable arrangement when considered in light of the preferences of college football consumers. Consumer preference is a dominant factor when analyzing the reasonableness of a restraint, and an agreement may be considered unreasonable if it does not adhere to known customer tastes.²⁶⁰ The

255. See *Northwest Wholesale Stationers, Inc. v Pac. Stationery & Printing Co.*, 472 U.S. 284, 294–96 (1985) (explaining that arrangements tend not to be unreasonable if they do not deny competitors access to competitive opportunities).

256. See *supra* notes 123–26 and accompanying text (describing how BCS revenue is distributed among all Division I-A conferences).

257. See Cowen, House Statement, *supra* note 9 (noting that the BCS distributed approximately \$17 million among non-BCS conferences in its first five years); BCS, *Revenue Distribution*, *supra* note 123 (listing the amount of BCS-created revenue that each non-BCS conference received following the 2003–04 postseason). The BCS projects that it will distribute more than \$42 million to non-BCS conferences during the arrangement's first eight years. *Id.*

258. See *supra* note 70 and accompanying text (describing the revenue-sharing plans that many conferences have adopted in order to increase the quality of their respective members' teams).

259. See *supra* note 78 and accompanying text (explaining the financial rewards that accompany successful football seasons).

260. See *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1101 (1st Cir. 1994) (noting that "[t]he Supreme Court has emphasized . . . that overall consumer preferences in setting output

Presidential Coalition asserts that observers of college football would be quite interested in seeing two non-BCS teams compete in the premier postseason games,²⁶¹ but this position is empirically untenable. An examination of each school's live attendance data from the 2003–04 college football season, a reasonable indicator of consumer preferences with regards to college football "consumption,"²⁶² demonstrates the inaccuracy of the Presidential Coalition's hypothesis.²⁶³

During the 2003–04 college football season, members of BCS conferences averaged over 60,000 fans at each regular season game that they hosted.²⁶⁴ Schools that are not members of a BCS conference, though, drew less than 25,000 to each home game. The difference in these averages is clearly substantial.²⁶⁵ The comparison might be a bit unfair, though, given that some

and prices is more important than higher prices and lower output, *per se*, in determining whether there has been an injury to competition" and explaining that a restraint that makes a relevant market unresponsive to these preferences is unreasonable).

261. See Cowen, House Statement, *supra* note 9 (positing that the BCS "might be surprised" at the interest that non-BCS conference football teams could create in the BCS bowl games).

262. Because admission into a college football game is not free, live attendance data indicates in which schools consumers are willing to invest their limited financial resources. A dollar spent to watch one school compete assumes that a rational consumer could not have derived more satisfaction out of spending that same dollar to watch a different school play football. Live attendance data, therefore, is used in this Note to sort the preferences of rational consumers of college football.

263. The figures used for this analysis are published by the NCAA. See Nat'l Collegiate Athletic Ass'n, *2003 NCAA College Football Attendance* 4–6, at <http://www.ncaa.org/stats/football/attendance/2003/2003footballattendance.pdf> (Jan. 30, 2004) [hereinafter *NCAA, 2003 Attendance*] (listing the average attendance for regular season football games at each Division I-A school) (on file with the Washington and Lee Law Review). The sample includes all 117 Division I-A football programs that participated in the 2003–04 season. *Id.* at 4. The mean attendance at a Division I-A game during the 2003–04 regular season was 44,877 spectators. *Id.* at 1.

264. This sample includes all BCS conference members and the University of Notre Dame because of its affiliation with the BCS. See *supra* note 102 (explaining that the University of Notre Dame was an initial signatory to the BCS arrangement). The author calculated this reported average value and all those that follow in the remainder of Part IV.B.3.

265. A t-test was performed on these values to determine if the difference in these averages was statistically significant. This statistical test is used to determine if a simple correlation exists between two variables. A.H. STUDENMUND, *USING ECONOMETRICS: A PRACTICAL GUIDE* 606 (4th ed. 2001). The test provides a t-value that can be compared with critical values of the t-distribution in order to determine whether two variables are highly correlated. *Id.* For a table of these critical values, see RAMU RAMANATHAN, *INTRODUCTORY ECONOMETRICS WITH APPLICATIONS* A-3 (4th ed. 1998). The calculated t-value for this comparison is 11.14 with 115 degrees of freedom, rendering the difference in these averages statistically significant at the .001 level. This indicates that one can be certain, with 99.9% confidence, that the two values are functionally distinct from one another. Put differently, one can be 99.9% certain that there is a

BCS conference members have football stadiums capable of holding 100,000 spectators or more.²⁶⁶ In order to provide an arguably more reasonable comparison, suppose that the data of all BCS schools with stadiums that hold more than 80,000 observers is discarded from the sample.²⁶⁷ The average attendance of this truncated sample still exceeds 50,000, and the difference in this value and the average attendance at games hosted by members of non-BCS conferences remains statistically significant to a high degree.²⁶⁸ The upshot of this is that one can reject, with unqualified certainty, the Presidential Coalition's assertion that consumers equally desire to watch BCS and non-BCS conference members.

Such a conclusion, however, does not require the use of sophisticated statistical tools. Even a cursory inspection of the attendance figures for each conference reveals distinct differences between consumer interest in football programs of schools that are in BCS conferences and consumer interest in those that are not. During the 2003–04 regular season, each of the six BCS conferences surpassed its own prior record for average attendance per game.²⁶⁹ All of these conferences also saw an increase in average attendance from the previous season's figures.²⁷⁰ Conversely, the five non-BCS conferences did not experience similar record-setting attendance rates, and, in fact, two suffered a decline in average attendance.²⁷¹ It is straightforward, therefore, that consumers of college football prefer watching schools that are members of BCS conferences compete during the regular season significantly more than they prefer watching those that are not.

When college football transitions from its regular season into the postseason, fan interest remains overwhelmingly with schools that are members of BCS conferences. Like live attendance figures, television ratings may serve

significant difference between consumer preferences for attending games hosted by BCS teams and for attending those hosted by non-BCS teams.

266. The respective stadiums of the Universities of Michigan, Penn State, Tennessee, and Ohio State all seat over 100,000 spectators. NCAA, *2003 Attendance*, *supra* note 263, at 4.

267. The dataset loses 14 observations when this subset is removed, leaving a sample size of 48 BCS conference schools. The decision to eliminate all observations with an average attendance of 80,000 or more was done to create a sample size that is more closely comparable to the subset of schools that are not in BCS conferences, or 55 schools.

268. The calculated t-value for this comparison is 10.82 with 101 degrees of freedom, also rendering the difference in these averages statistically significant at the .001 level.

269. See NCAA, *2003 Attendance*, *supra* note 263, at 1 (noting which conferences set their respective records in average attendance during the 2003–04 season).

270. *Id.*

271. See *id.* (noting that only Conference USA and the Sun Belt Conference established new conference attendance records while average attendance figures in the Mountain West and Western Athletic Conferences declined from the previous year).

as a reasonable indicator of consumer tastes for consumption of different football teams,²⁷² and an examination of the data from the 2002–03 and 2003–04 postseasons reveals the same preferences as the above discussion.²⁷³ The average television rating for a bowl game that involved participants exclusively from non-BCS conferences is 2.03. Bowl games that included only schools from BCS conferences, on the other hand, enjoy average ratings of 5.66.²⁷⁴ Some might consider such a comparison misleading, however, because the latter value includes two national championship games that can upwardly skew

272. The basis for using television ratings as a proxy for consumer preferences mirrors that of the live attendance data. Time spent watching a particular bowl game on television assumes that a rational consumer would not derive a higher level of satisfaction out of watching a different television program or engaging in a different activity. This Note uses television ratings, like live attendance figures, to sort the preferences of rational college football consumers.

273. The television ratings used for this analysis are published by Nielsen Media Research and are made available by the BCS. See *Bowl Championship Series, 2003–04 BCS Bowl TV Ratings and Attendance*, at <http://www.bcsfootball.org/ratings04.shtml> (last visited June 19, 2004) (listing the television rating for each bowl game during the 2003–04 postseason) (on file with the Washington and Lee Law Review); *Bowl Championship Series, 2002–03 Bowl Game TV Ratings*, at <http://www.bcsfootball.org/ratings.shtml> (last visited June 19, 2004) [hereinafter *BCS, 2002–03 Ratings*] (listing the television rating for each bowl game during the 2002–03 postseason) (on file with the Washington and Lee Law Review). The ratings indicate the percentage of all United States households with television sets that tuned into a particular bowl game. See *BCS, 2002–03 Ratings* (explaining the television rating system). Each rating point equals a percentage point of all households with televisions that watched a particular bowl. *Id.* The sample includes 56 observations. The average rating for all 2002–03 bowl games is 4.24, while the average rating for all 2003–04 bowl games is slightly lower at 4.19.

Television ratings capture more than just consumer preferences for BCS and non-BCS teams. For example, ratings might be a function of the date on which a game occurs, or they may reflect the time of day in which a game aired on television. In order to evaluate the role that the BCS and non-BCS distinction played in the ratings, the author performed an ordinary least squares regression analysis with this dataset. Such an analysis can determine the singular impact that an independent variable can have on a dependent variable. See *STUDENMUND*, *supra* note 265, at 34–62 (explaining uses of an ordinary least squares model). In the regression, the television ratings for a non-BCS bowl game served as the dependent variable. The independent variables accounted for whether only BCS or non-BCS teams played in the bowl, whether the bowl occurred within one day of a holiday (that is, between December 24 and 26 or between December 31 and January 2), and whether the game aired during the prime television viewing hours in the Eastern Standard Time Zone. The results of the analysis indicated that the only independent variable that impacted television ratings to a high level of statistical significance was whether the game consisted of only BCS or non-BCS teams. As such, it is appropriate to use this set of television ratings as a proxy for consumer preferences of games involving BCS teams and of games involving non-BCS teams. For a detailed explanation of the regression model, please contact the author.

274. This comparison contains 44 observations. The difference in these respective means is statistically significant to a level of .01, or 99% confidence, with a t-value of 2.76 and 42 degrees of freedom.

the sample's average.²⁷⁵ Instead, a more appropriate test of the Presidential Coalition's hypothesis may be to compare the average rating of non-BCS bowl games that only consisted of non-BCS conference teams against the average rating of non-BCS bowl games that included only BCS conference teams. The mean rating for all non-BCS bowls that showcased only BCS conference schools remains relatively high, though, at 3.83% of all households with televisions. The difference in these averages is also statistically significant to such an extent that one can reject, again with unqualified certainty, the Presidential Coalition's contention that consumers of postseason college football desire to watch BCS and non-BCS conference members with equal enthusiasm.²⁷⁶

The import of this analysis is that the BCS arrangement guarantees representation in its bowl games to those conferences and schools that consumers prefer to watch compete. The BCS, therefore, not only creates a critical new product within the industry, but it creates a product for which a relatively large amount of demand exists. Moreover, it accomplishes this without foreclosing the opportunity for non-BCS teams to compete in BCS bowl games if consumer preferences change. This consideration, along with those stated above in Parts IV.B.1 and 2, shifts the burden of persuasion back to the Presidential Coalition to prove that all of these objectives can be satisfied through substantially less-restrictive means,²⁷⁷ a burden it will not be able to satisfy.

C. Dismissing Less-Restrictive Alternatives to the Bowl Championship Series

The third prong of a rule of reason analysis investigates whether the objectives sought by a challenged restraint can be met through less restrictive means.²⁷⁸ This evaluation does not require a restraint to be the least restrictive means of achieving its stated objectives but instead turns on whether the conduct is reasonably necessary to accomplish the desired procompetitive

275. The average rating for the eight BCS games in the sample is 11.84.

276. With a t-value of 3.72 and 34 degrees of freedom, the difference in these averages is statistically significant to a level of .001, or 99.9% confidence.

277. See *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998) (explaining that, if a defendant presents procompetitive justifications for its conduct, a plaintiff must show that these justifications can be achieved in a "substantially less restrictive manner" in order to sustain an antitrust challenge).

278. See *id.* (noting that this step is the final one in a rule of reason evaluation prior to weighing the procompetitive benefits against any anticompetitive effects).

benefits.²⁷⁹ Opponents of the BCS suggest that Division I-A football replace the postseason bowls with a playoff system, arguing that this would be more inclusive of non-BCS conference members.²⁸⁰ While a playoff would create a national champion, it would not be able to do so without destroying two primary objectives of the BCS.

A basic tenet of the BCS is that it blends its bundle of procompetitive effects with existing bowl games in an effort both to advance the industry and to remain faithful to its history.²⁸¹ Indeed, the bowl game tradition is a defining characteristic of Division I-A football that many within the industry forcefully defend.²⁸² Rejecting the bowl game system in favor of a playoff format would abolish a feature of college football that the industry wishes to produce and that consumers of football desire.²⁸³

The BCS is also distinguishable from a playoff format in its method of choosing a national champion. A hallmark of the BCS is that it places a premium on success over the course of an entire season.²⁸⁴ The BCS formula accounts for the aggregate quality of a school's opposition as well as whether it defeated a top-notch team or lost a game at any point during the season.²⁸⁵ Under the BCS framework, losing once can be crippling to a team's chances of winning a championship, twice fatal.²⁸⁶ A playoff

279. See *id.* (explaining that a plaintiff must show that the "challenged conduct is not reasonably necessary to achieve the legitimate objectives"); *Nat'l Bancard Corp. v. Visa, U.S.A.*, 596 F. Supp. 1231, 1256–57 (S.D. Fla. 1984) ("It should be stressed . . . that in making this determination, the relevant question is not whether the challenged practice is the *most* competitive device that can be imagined, or the 'least restrictive,' but simply whether it is reasonable."), *aff'd* 779 F.2d 592 (11th Cir. 1986) (emphasis in original).

280. See Cowen, House Statement, *supra* note 9 (advocating either an eight-team or sixteen-team playoff format to replace the bowl system); see also Hales, *supra* note 170, at 126–29 (suggesting a playoff system as well as a new method of ranking Division I-A teams).

281. See *supra* Parts II.A, II.D.1 (explaining the traditional bowl system and how the BCS integrates this system into its structure).

282. See *supra* note 58 and accompanying text (discussing the prevalent desire to maintain the bowl system).

283. Assuming that the market for bowl games has acted rationally, the number of bowls has expanded within the past fifteen years in order to meet consumer demand for the products. See *supra* notes 56–57 and accompanying text (noting that the number of bowl games has increased greatly in recent years). The demand for bowls is so great that some states are planning to create new games despite limited funding for other social programs. See, e.g., Bauerlein, *supra* note 52, at A1 (noting that South Carolina is exploring the formation of a new bowl game despite facing "the tightest state budget in memory").

284. See *supra* Part II.D.1 (explaining the methodology used by the BCS when determining the participants in national championship game).

285. See *supra* Part II.D.1 (discussing the factors that comprise the BCS formula used to establish a national championship game).

286. See SPORTS ALMANAC, *supra* note 48, at 171–72 (noting that no team has played for a

format, on the other hand, would diminish the importance of winning every regular season game. Instead of motivating teams to win as much as possible, this system would create an incentive to win only as many games as necessary to be included in the playoff.²⁸⁷ After a team achieves the minimum number of victories required to ensure its spot in the playoff, it can withhold its competitive resources until the postseason begins. For instance, a team in this position might choose to use only backup players in its remaining regular season games, or it may decide not to develop any new strategies or plays until the regular season concludes. The antitrust laws surely were not intended to strike a system that encourages vigorous competition at all times in favor of one that creates a less competitive atmosphere within an industry.

A final consideration that counsels against a playoff format involves the organization and administration of this system. Such an undertaking almost certainly would require the inclusion of the NCAA, a party that currently has a limited role in the Division I-A postseason,²⁸⁸ because of the vast administrative tasks associated with conducting a playoff, including hiring officials to referee games, providing security, and inspecting game sites. The organization, though, does not oversee a championship for this division,²⁸⁹ nor does it desire to accept such a task.²⁹⁰ It would be imprudent for a court to insist that a nonparty to an antitrust challenge burden itself with overwhelming responsibilities. For these reasons, a plaintiff challenging the BCS would be unable to show that a playoff system could achieve the same procompetitive objectives as the BCS in a less restrictive fashion.

national championship with more than one regular season loss since the BCS became effective).

287. The concept of not maximizing one's potential, but instead only attaining a certain level of success, is known as "satisficing." See Herbert A. Simon, *Theories of Decision-Making in Economics and Behavioral Science*, 49 AM. ECON. REV. 253, 263 (1959) (explaining that a firm "satisfices" when its goals include "attaining a certain level or rate of profit, holding a certain share of the market, or a certain level of sales" instead of profit-maximization).

288. See POPPE, *supra* note 13, at 31-37 (explaining that the NCAA's role in the postseason is primarily to certify bowl games).

289. See *supra* notes 47-49 and accompanying text (explaining that the absence of an NCAA-recognized champion is one of Division I-A's distinguishing characteristics).

290. See *supra* note 58 and accompanying text (noting that the NCAA has rejected proposals to administer a national championship tournament for Division I-A football on three separate occasions); see also Brand, Senate Statement, *supra* note 58 (describing the undesirability of a playoff format for Division I-A's postseason due to the tradition of the bowl system).

D. Weighing the Competitive Effects of the Bowl Championship Series

If a restraint proves to be reasonably necessary to achieve its procompetitive objectives, then a factfinder must balance the pro- and anticompetitive effects against one another.²⁹¹ The Supreme Court has given relatively little guidance as to how this balancing should take place.²⁹² In the case of the BCS, though, this lack of direction is of no consequence. When one considers the procompetitive benefits that the arrangement provides to the industry as a whole and to the non-BCS conferences themselves, it is almost tautological to say that the BCS enhances overall competition. The fact that the BCS is in harmony with consumer preferences furthers its reasonableness. When, as here, an arrangement creates procompetitive effects that are substantial and critical to the quality of a market, it receives the Sherman Act's blessing.²⁹³

This conclusion does not leave members of the Presidential Coalition without recourse. As with a business and its production processes, a school can improve the efficiency of its football program in order to maximize the utility of resources that it devotes to the sport. A school may also shift its NCAA affiliation from Division I-A to a different division that requires a smaller financial commitment to football.²⁹⁴ As a final measure, a school may elect to end its football program altogether in favor of distributing its resources to other parts of the university, such as the academic sector.²⁹⁵ Challenging the BCS as a violation of the Sherman Act, however, would be a fruitless use of these resources.

V. Conclusions

For many universities, football is of paramount importance.²⁹⁶ Alumni may demand a competitive program, students often seek to participate on a football team,

291. See *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998) (noting how the antitrust analysis proceeds if a plaintiff cannot show that a restraint is not reasonably necessary to achieving its procompetitive goals).

292. See ANTITRUST LAW DEVELOPMENTS, *supra* note 178, at 77 (explaining issues that arise in the balancing phase of an antitrust challenge that the Supreme Court has not yet addressed).

293. See *Law*, 134 F.3d at 1019 (explaining that a restraint is permissible if it is shown to be reasonable under the rule of reason).

294. See *supra* notes 39–41 and accompanying text (explaining that Division I-A requires the largest devotion of resources to football).

295. See *supra* note 10 and accompanying text (discussing some schools that ended their football programs in order to conserve financial resources).

296. See Dooley, *supra* note 6, at 7G (noting that athletic teams, such as football, are "probably the single greatest unifying factor among alumni and supporters" at many

and other sports and academic programs rely on revenue created by a successful football program.²⁹⁷ Despite the potential monetary gains football can bring, it can also be a financial burden.²⁹⁸ Participating in a postseason bowl game, especially in one of the premier BCS bowls, can relieve this budgetary strain.²⁹⁹

Schools that attribute their financial difficulties to supposed antitrust violations by the BCS are mistaken. Not only does the BCS distribute funds to all Division I-A conferences regardless of their participation in a BCS game, it also provides every Division I-A school with an opportunity to become the national champion.³⁰⁰ An antitrust challenge of the BCS would likely prove unsuccessful because the arrangement marries the traditions of college football's postseason with an efficiency-enhancing objective measurement of each school's abilities in order to produce a national championship competition that was previously unavailable.³⁰¹ Instead of harming competition, the arrangement provides competitive incentives for all Division I-A teams.³⁰² Schools that do not compete aggressively simply will not be rewarded with the economic benefits that the BCS can provide, and the Sherman Act is neither a crutch to support less efficient and productive football programs nor an arrow in the quiver of university administrators who face budgeting difficulties.³⁰³

universities).

297. See *supra* notes 5–7 and accompanying text (describing the role of a football program in the university setting).

298. See *supra* notes 8–11 and accompanying text (discussing the financial difficulties that supporting a football program can create for a school).

299. See *supra* notes 60–63 and accompanying text (noting the huge revenues created by the BCS that are dispersed to participants).

300. See *supra* Part IV.B.2 (discussing benefits that the BCS provides to non-BCS conference members).

301. See *supra* Parts II.C–D (explaining the inefficiencies of college football, including the absence of a national championship game, cured by the BCS).

302. See *supra* Part IV.B.1 (describing the benefits to competition within college football created by the BCS).

303. See *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1154 (9th Cir. 2003) ("Inefficiency is precisely what the market aims to weed out. The Sherman Act, to put it bluntly, contemplates some roadkill on the turnpike to Efficiencyville.").