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After Further Review: Whether the College Football Playoff Falls Short of the Antitrust Marker

AFTER FURTHER REVIEW: WHETHER THE COLLEGE FOOTBALL PLAYOFF FALLS SHORT OF THE ANTITRUST MARKER

Jude D. Schmit¹

I. COIN-TOSS: THE PROLOGUE

In real time, at full speed, it appeared to be a progressive effort to correct the annual inequity of naming college football's top team: Install a playoff system that took the crowning of the champion out of the hands of a powerful few and into the hands of the teams themselves.² But slow down the action and it's hard to see any meaningful signs of meritocracy at play. Freeze the frame and you have indisputable evidence that the powerful few are still in charge. Boise State President Bob Kustra bluntly categorized the new structure as "subterfuge for fueling the arm's race" and an impetus for "creat[ing] a plutocracy."³

¹ The author dedicates this article to his grandmothers, Dordy Schmit and Marcia Gaertnier. The author would also like to thank his dad and Professor Edmonds for their helpful comments and a special thanks to the Honorable Judge Geoffrey Tenney, Howard Carp, his mom, and Laura. The author wrote this article during the CFP's 2014-2015 inaugural season. And while the four teams chosen for the 2015-16 playoff were considered ideal, the author believes it is the methodology of choosing the teams that is at question versus the teams themselves. That is, the ball shouldn't have to bounce perfectly at the end of any given season to ensure a fair playoff system.

² Terminology Note: Playoffs now exist within all three divisions of college football and the two subdivisions of Division I. Any references to "college football" and "Playoff(s)" in this article, however, are limited to the Football Bowl Subdivision in Division IA. *See generally* NCAA, *Championships*, <http://www.ncaa.org/championships?division=d1> (last visited December 17, 2014).

³ Dennis Dodd, *Boise State President Blasts NCAA Reform in Letter to Media*, CBS SPORTS, <http://www.cbssports.com/collegefootball/writer/dennis-dodd/24569414/boise-state-presidents-blasts-ncaa-reform-in-letter-to-media> (last visited December 15, 2014). Kustra's letter discusses the dangers of granting autonomy to the Power Five conferences with regard to the NCAA govern-

Plutocrats and meritocrats have battled to control college football since the sport's inception in 1869, with embarrassingly lopsided results.⁴ Because although the roster of the powerful has changed over the years, one constant has remained: An elite few run the big business of college football and, along the way, have used the guise of "tradition" to intercept the game and advance their bank-rolls.⁵ In full control of the game, they often bench merit in favor of marketability.⁶ For their benefit, results on the gridiron are secondary to television profits.⁷ A replay of the inaugural season of the new College Football Playoffs ("CFP" or "Playoff(s)") demonstrates the problem and gives reason for Kustra's public criticism. Look at the CFP final rankings and one will notice the conspicuous absence of any team not in a Power Five conference,⁸ an aptly named moniker for the collective of the Atlantic Coast Conference ("ACC"), Big Ten, Big 12, Pacific 12 ("Pac-12"), and Southeastern Conference ("SEC").⁹ Teams in the less powerful Group of Five conferences¹⁰ — including the Mountain West, home of Boise

ing structure. And while he does not identify the playoff model in his criticism, the inference of what will come of schools outside the Power Five is apparent.

⁴ See *infra* Part II(b)(ii) (discussing the pinnacle of the plutocrats' control under the Coalition, Alliance, and the Bowl Championship Series).

⁵ See *infra* notes 144-48 and accompanying text (denoting the rivalries shelved in the name of "tradition").

⁶ See *infra* note 11 and accompanying text (explaining that the Ohio State brand likely played a role in the Buckeye leapfrog of TCU and Baylor for the fourth seed of the inaugural playoff).

⁷ See *infra* Part II(c)(iii) (outlining the CFP's lucrative partnership with ESPN).

⁸ Terminology Note: The conferences within the Power Five are commonly referred to as "equity conferences" or informally the "haves." These conferences have generally remained the same since the realignment shake-up occurring in the early 1990s. During the BCS era, these conferences were referred to as "AQ conferences." See *infra* Part II(b) (recounting the wave of realignments that further consolidated the equity conferences' power). Jude Schmit, *A Fresh Set of Downs? Why Recent Modifications to the Bowl Championship Series Still Draw a Flag Under the Sherman Act*, 14 SPORTS LAW. J. 219, 242 (2007).

⁹ College Football Playoff, *Rankings*, COLLEGE FOOTBALL PLAYOFF, <http://www.collegefootballplayoff.com/view-rankings> (last visited December 15, 2014) [hereinafter *CFP Rankings*].

¹⁰ Terminology Note: The conferences within the Group of Five are commonly referred to as "non-equity conferences" or informally the "have nots." During

State — have reason to feel excluded, if not threatened, when one of the power conferences itself is left out of the final selection.¹¹ Snubbing the likes of Boise State has been ongoing to the point it is expected, but snubbing two worthy Big 12 contenders, Baylor and TCU, in favor of a Big Ten heavyweight Ohio State raises serious concerns about the viability of the new format and begs the following questions. First, did the marketability of the Buckeye brand sway the Playoff committee to authorize Ohio State leapfrogging Baylor and TCU?¹² Before their final games of the season, TCU was ranked No. 4, Baylor No. 5, and Ohio State No. 6. All won their final game in convincing fashion, but the new rankings showed a new order: Ohio State No. 4, Baylor No. 5, and TCU No. 6.¹³ Second, if marketability was not at issue, then why

the BCS era, these conferences were referred to as “non-AQ conferences.” See *infra* note 129; Schmit, *supra* note 8, at 242.

¹¹ Pete Thamel, *The End of Cinderella: Where Do Group of Five Teams Sit in Playoff System?*, SPORTS ILLUSTRATED, <http://www.si.com/college-football/2014/07/28/group-five-cinderella-college-football-playoff#> (last visited December 15, 2014). The Group of Five, in addition to the Mountain West, consists of the American Athletic Conference (“AAC”), Conference USA, the Mid-American Conference (“MAC”), and the Sun Belt Conference.

¹² Mitch Lawrence, *No Upset as Ohio State Makes College Football Playoffs Over Baylor and TCU*, FORBES, <http://www.forbes.com/sites/mitchlawrence/2014/12/07/college-football-playoffs-sees-ohio-state-get-no-4-over-baylor-and-tcu-in-a-non-upset/> (last visited December 16, 2014). Chris Smith, *College Football's Most Valuable Teams 2014*, FORBES, <http://www.forbes.com/pictures/emdm45ekgfg/9-ohio-state-buckeyes-2/> (last accessed January 25, 2015). The Buckeye's were ranked No. 9 of the most valuable college football teams in 2014 with a value of \$87 million. Neither the Bears nor the Horned Frogs broke the top 20 and, of the Big 12, Texas was ranked No. 1 (\$123 million value) while Oklahoma was No. 8 (\$93 million value). The controversy surrounding the inaugural playoff certainly would have been more polemic had the Buckeyes jumped the Longhorns and the Sooners.

¹³ *CFP Rankings*, *supra* note 9. Stewart Mandel, *Ohio State had a Major Playoff Advantage over Baylor and TCU*, FOX SPORTS, <http://www.foxsports.com/college-football/story/ohio-state-buckeyes-baylor-bears-tcu-horned-frogs-playoff-reaction-mandel-120714> (last visited December 16, 2014). TCU defeated unranked Iowa State 55-3 while Baylor beat No. 9

was Baylor compelled to hire a marketing firm in a last-ditch effort to curry favor with the powers that be?¹⁴ And, finally, will the likes of Boise State ever have a place at the table when any merit such teams have achieved on the field has always been undermined and any marketability minimized?¹⁵ Future opportunities for teams outside College Football's power circle appear even less likely when you consider there are five power conferences but only four final spots. Whether this decision was made in spite of math, like 14 teams in the Big Ten,¹⁶ or because of it, perhaps for power-control purposes, is hard to discern, but also provides more evidence of how college football's fortunes are controlled from behind closed doors.

Kansas State 38-27. Ohio State, on the other hand, routed Wisconsin 59-0 in the Big Ten championship game.

¹⁴ Marc Tracy, *Playoff Game Plan: Colleges Turn to Lobbying for a Berth*, N.Y. TIMES, http://www.nytimes.com/2014/12/04/sports/ncaafootball/playoff-game-plan-colleges-turn-to-lobbying-for-a-berth.html?_r=0 (last visited December 15, 2014). Baylor hired Kevin Smith Communications, a public relations firm headed by a cabinet member under President George W. Bush, to create media attention and propel the Bears into the playoffs. Earlier this season, Conference USA hired Brener Zwickel & Associates on behalf of the conference vanguard, Marshall, in an effort to influence the power structure that the Thundering Herd belongs in the playoff discussion.

¹⁵ DAN WETZEL, JOSH PETER, & JEFF PASSAN, *DEATH TO THE BCS: THE DEFINITIVE CASE AGAINST THE BOWL CHAMPIONSHIP SERIES 181-90* (2d. ed. 2011). As for merit, the Broncos won more games than any other team in the 2000s. This era included five undefeated regular seasons and a convincing win against Oklahoma on the big stage at the 2007 Fiesta Bowl (and a 2010 victory against TCU) in what was called the "Separate But Equal Bowl." As for marketability, the 2007 Fiesta Bowl has been dubbed one of the most exciting and famous in college football lore. The game included a hook and ladder as well as a halfback pass while the overtime win came from the Bronco's execution of a Statue of Liberty play to running back Ian Johnson. Like a Hollywood script, Johnson seized the moment and proposed to his cheerleader girlfriend during a postgame interview.

¹⁶ Mike Bostick, Shan Carter, and Kevin Quely, *Tracing the History of N.C.A.A. Conferences*, N.Y. TIMES, <http://www.nytimes.com/newsgraphics/2013/11/30/football-conferences/> (last accessed January 16, 2015) [hereinafter *Conference Realignment Chart*]. The Big Ten added Penn State in 1990; Nebraska in 2011; as well as Maryland and Rutgers in 2014.

This article attempts to answer these questions by examining college football's history of plutocracy and examines whether the CFP solves, or at least alleviates, the continual widening disparity between conferences. Part II summarizes the history of college football's postseason. Part III examines the relevant antitrust jurisprudence. Part IV analyzes how antitrust law applies to collegiate athletics. Part V offers less-restrictive alternatives to the CFP.

In short, this article recognizes that although the new CFP format is a step forward towards inclusiveness, it might not be enough to protect it from future attack under the Sherman Act: There are, simply put, more-inclusive alternatives that would better shield college football from an antitrust suit. This article also acknowledges that such alternatives (i.e., an expanded playoff) will be relegated to a holding pattern while the powers adopt a wait-and-see approach over the next few seasons. In the meantime, however, the equity divide will continue to grow and, thereby, supply ammunition for a Sherman claim if the anticipated modifications fall short. The question, then, is if the powers balk too long, should Congress intervene?

II. FALSE START: DEVELOPMENT OF POSTSEASON COLLEGE FOOTBALL

Controversy has been intertwined with college football's DNA since its inception. In the inaugural year, Rutgers split the two-game season with Princeton.¹⁷ No rubber match was played.¹⁸ Nonetheless, the National Championship Foundation retroactively awarded Princeton the title.¹⁹ To this day Rutgers supporters main-

¹⁷ ESPN COLLEGE FOOTBALL ENCYCOPEDIA 14, 1084 (Michael MacCambridge ed. 2005). On November 06, 1869, Rutgers won the first game 6-4 on its home field. The rematch occurred a week later when Princeton returned the favor with an 8-0 drubbing on its home field. During the first season, Princeton was known as the College of New Jersey.

¹⁸ *Id.* at 14. The third game was canceled because, according to the schools' faculties, "overemphasis" of the game interfered with academics.

¹⁹ College Football Poll, *College Football National Championships*, COLLEGE FOOTBALL POLL, http://www.collegefootballpoll.com/champions_national.html

tain the maiden throne belongs to the Queensmen.²⁰ Though the term “mythical national champion”²¹ was not used until years later, it was born in that first season. Likewise, thereafter the word “disputed” became the oft-repeated disclaimer in annual college-football debates.

The following sections trace the dysfunctional roots of college football’s postseason. The first part examines the evolution of the game’s unique bowl game structure and the ascent from sideshow pageant to main-event cash cows. This section also summarizes the game’s ranking system and its parallel rise with the bowl games. The second part reviews the events that have shaped college football as we know it today and, ultimately, enabled the game’s heightened corruption during the Bowl Championship Series (“BCS”). The third and final part scrutinizes the CFP structure and recounts the final results of the inaugural season.

A. Kickoff: From First Bowls to “Lies, Damned Lies, and Polls”

The University of Chicago pioneered the bowl concept in 1894 when coach Amos “Alonzo” Stagg²² challenged Notre Dame

(last visited December 17, 2014) [hereinafter *College Football Poll*]. From 1869-1882, the National Championship Foundation was considered the preeminent source for determining the national champion.

²⁰ ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17, at 14, 740. Three “services” have bestowed the crown to the Rutgers Queensmen. Rutgers became the Scarlet Knights in 1955.

²¹ Ray McCarthy, *Navy’s Eleven and Syracuse in Title Chase: Two Teams Take Place in Battle for Championship After Fine Showing*, NEW YORK TRIB., Oct. 10, 1921, at pg. 9, col. 4. Perhaps the earliest written reference of a mythical national championship was in the following sentence from the 1921 article: “Two teams took their places well up in the line of the aspirants for the mythical football championship on Saturday.”

²² *History & Awards – Amos Alonzo Stagg*, THE UNIV. OF CHI. ATHLETICS, http://athletics.uchicago.edu/about/history/amos_alonzo_stagg (last visited December 27, 2014). Notre Dame coach Knute Rockne once said, “all football comes from Stagg”; Erik Brady, *Stagg Family Joins Bowl Festivities*, USA TODAY, http://usatoday30.usatoday.com/sports/college/football/2006-12-13-stagg-family_x.htm (last visited December 27, 2014). Not only a pioneer of the

at a neutral playing site — Soldier Field in Chicago.²³ From there, Stagg took his Maroons on a barnstorming tour of the West Coast, again seeking neutral sites and a special essence for each game.²⁴

The first official bowl game occurred 8 years later, on January 1, 1902, when the Tournament East-West football game was played at Tournament Park in Pasadena, California.²⁵ Fielding H. Yost's Michigan Wolverines so thoroughly dominated Stanford that tournament officials shelved future bowl games until January 1, 1916, when State College of Washington (now Washington State University) defeated then-powerhouse Brown University in the first annual East-West football game.²⁶ In 1923, the game moved to a massive new horseshoe stadium to accommodate increased interest and burgeoning crowds.²⁷ The New Year's Day

game, Stagg also was proponent of amateurism in college athletics who held contempt for professional sports. Division III, perhaps the last haven for true amateurism in college athletics, fittingly calls its championship the Stagg Bowl.

²³ *Antitrust Implications of the College Football Alliance: Hearing on Antitrust Business Rights and Competition Before the Subcomm. on the Judiciary*, 105th Cong. 41 (1997) (statement of Cedric W. Dempsey, Exec. Dir., NCAA); DAVID M. NELSON, *THE ANATOMY OF A GAME: FOOTBALL, THE RULES, AND THE MEN WHO MADE THE GAME*, 70-71 (1994).

²⁴ DAVID M. NELSON, *THE ANATOMY OF A GAME: FOOTBALL, THE RULES, AND THE MEN WHO MADE THE GAME*, 70-71 (1994). During this trip, Stagg challenged Stanford, coached by his mentor, Walter Camp, the "Father of American Football," on a neutral site far from either school's campus and for no discernible educational purpose.

²⁵ ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17, at 14.

²⁶ *Id.* at 14, 501. The Wolverines lived up to their "Point a Minute" nickname after trouncing Stanford 49-0. This culminated Michigan's National Championship season in which the Wolverines outscored opponents 501-0. Tournament officials, unimpressed with Michigan's feat, took football off the annual list of events in favor of chariot and ostrich racing; *see also Bowl History*, WASH. STATE UNIV. OFFICIAL ATHLETICS, http://www.wsucougars.com/ViewArticle.dbml?DB_OEM_ID=30400&ATCLID=208260435 (last visited December 21, 2014).

²⁷ *History*, ROSE BOWL STADIUM, <http://www.rosebowlstadium.com/about/history> (last visited December 21, 2014).

game adopted the name of its new home, the Rose Bowl, and the so-called “bowl game” was cemented.²⁸

During the 1930’s, other warm-weather locales followed suit and adopted the Rose Bowl model to lure tourists (and their money) seeking refuge from harsh northern winters.²⁹ Dozens of bowls, in turn, sprouted as communities realized that such events could revitalize local economies devastated by the Great Depression.³⁰ Three of today’s six CFP bowls debuted in that era: the Orange Bowl,³¹ Sugar Bowl,³² and Cotton Bowl.³³ By 1937, this

²⁸ *Northwestern Mutual to Sponsor Rose Bowl*, ROSE BOWL STADIUM, <http://www.rosebowlstadium.com/news/detail/northwestern-mutual-to-sponsor-rose-bowl>. The “Granddaddy of Them All” in the first season under the playoff format, is now referred to as “the Rose Bowl presented by Northwestern Mutual.”

²⁹ *History in the Headlines*, HISTORY, <http://www.history.com/news/a-brief-history-of-college-bowl-games> (last visited December 21, 2014) [hereinafter *History in the Headlines*].

³⁰ *Id.*

³¹ *The Bowls: A Historical Perspective*, ALLSTATE SUGAR BOWL, <http://www.allstatesugarbowl.org/site.php?pageID=19&newsID=706#.VJeMrrhMDJ> (last visited December 21, 2014) [hereinafter *The Bowls: A Historical Perspective*]. The Orange Bowl (originally the Palm Festival Game), created by George E. Hussey and Earnie Seiler to boost a market reeling from the Florida land bust, was first played in 1933 when Miami defeated Manhattan College. The game was renamed the Orange Bowl in 1935 and is now called the Capital One Orange Bowl.

³² *Id.* The Sugar Bowl, though originally devised by Colonel James M. Thomson in 1927, was first played in 1935 when Tulane beat Temple for the game’s unique trophy – an antique single-bottle wine cooler. Today, the trophy is the same and the title of the game remains largely unadulterated, minus, of course, the corporate Allstate designation.

³³ *Goodyear Becomes Title Sponsor for Cotton Bowl Classic*, GOODYEAR COTTON BOWL, <http://www.goodyearcottonbowl.com/news/news-releases/2014/11/goodyear-becomes-title-sponsor-cotton-bowl-classic/> (last visited December 21, 2014). The first game was played on January 01, 1937, matching TCU and Marquette. The bowl is now called the Goodyear Cotton Bowl Classic and is one of six bowls included in the CFP rotation. During the Alliance and BCS eras, the Cotton Bowl Classic was replaced by the Fiesta Bowl. This shift was caused, in part, by the dissolution of the SWC.

sprawling bowl landscape prompted an Associated Press (“AP”) headline to declare: “‘Bowl’ Grid Games Are Here to Stay.”³⁴

As the bowl games evolved into a New Year’s Day mainstay, so, too, did the ranking of college football’s elite.³⁵ In 1936, sports editor Alan Gould invented the AP poll (“Writers”) as the definitive decree for naming a national champion.³⁶ Gould’s formula was straightforward: Poll AP sports writers to rank the top teams in the nation.³⁷ In 1950, AP competitor United Press responded with its own poll (“Coaches”).³⁸ Rather than survey sports writers, this poll looked to coaches to determine the rankings.³⁹

³⁴ *History in the Headlines*, *supra* note 29. This was to the consternation of the NCAA, which had unanimously adopted a report condemning bowls as having no place in college football “because they serve no sound education ends, and such promotions merely trade upon intercollegiate football for commercial purposes.”

³⁵ Christopher Walsh, *Money, Control are Why It Took so Long for College Football to have a Playoff*, SATURDAY DOWN SOUTH, <http://www.saturdaydownsouth.com/sec-football/money-control-took-long-college-football-playoff/> (last visited December 27, 2014). Prior to the polls, there were many organizations and methods that schools looked to when claiming the throne. Frank Dickinson, an economic professor at the University of Illinois, introduced the first official ranking system in 1926. His formula used mathematical indicators (some still used) to weigh a team’s wins against the score and the quality of opponent. Coach Rockne, convinced of the formula’s legitimacy, persuaded Dickinson to retroactively apply his formula and crown the 1924 Fighting Irish as the holders of the first “scientific” national championship.

³⁶ ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17, at 1124. Gould would later admit that the polls were constructed as a marketing ploy: “Newspapers wanted material to fill space between games. That’s all I had in mind, something to keep the pot boiling. Sports then was [sic] living off controversy, opinion, whatever. This was just another exercise in hoopla.”

³⁷ *Id.* The first year of the Writer’s Poll was met with controversy when 44 sportswriters voted the 7-1 Minnesota Gophers No. 1. Minnesota’s loss came to the 7-1 Northwestern Wildcats, who were voted No. 7. The AP ranked 9-0-1 LSU No. 2, but the Williamson Poll, nonetheless, crowned the Tigers as national champs.

³⁸ *Id.* at 1124-25 (United Press merged International News Services to become United Press International in 1958); *College Football Poll*, *supra* note 19.

In 1965, the Writers broke protocol and released its final rankings after the bowl season.⁴⁰ Bowls, up to this point, were played as mere exhibition games, but now carried the weight of national-title implications.⁴¹ The Coaches, however, held firm and the “mythical national championship” quandary further blurred the state of uncertainty in college football.⁴²

The 1970 and 1973 seasons illustrate the incongruity among the pollsters and, together, proved to be the straw that broke the Coaches’ back.⁴³ Following the 1970 regular season, the Coaches prematurely crowned Texas prior to the Longhorns’ loss to Notre Dame in the Cotton Bowl.⁴⁴ The Writers, however, awarded Nebraska the national championship following the Cornhuskers’ Orange Bowl victory over LSU.⁴⁵ Similarly, in 1973, the Coaches granted Alabama the title after the Crimson Tide’s undefeated regular season.⁴⁶ The Writers, true to form, waited to name a champion until the bowl games were complete, and crowned the

CNN/USA Today took over the Coach’s Poll in 1991. ESPN/USA Today took the reigns in 1997 and USA Today became the lone service since 2005.

³⁹ ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17, at 1125.

⁴⁰ *Id.* The post-bowl vote arose from controversy that boiled over from the prior season. In 1964, Alabama and Arkansas were undefeated after the regular season. Nonetheless, the Writers and Coaches voted the Crimson Tide as the national champions even though Arkansas won its bowl game to remain undefeated while Alabama lost its bowl game to finish with one loss. In 1965, there were three undefeated teams (Michigan State, Arkansas, and Nebraska) going into the bowl games. All three lost. The Coaches did not wait for the bowl results and awarded Michigan State the title. The Writers waited and crowned Alabama after the Crimson Tide beat the Cornhuskers in the Orange Bowl.

⁴¹ *Id.*

⁴² *College Football Poll*, *supra* note 19. From the inception of the Rose Bowl until 1965, six national championships were awarded to the loser of a bowl game.

⁴³ ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17 at 1125.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

undefeated Notre Dame squad after the Irish's Sugar Bowl victory over the Tide.⁴⁷

Aside from occasional missteps, the polls seemed to exist in relative harmony.⁴⁸ Controversy, nonetheless, was brewing below the surface and inequity was consistently at play. In 1970, for example, Arizona State and the University of Toledo were both denied national championship consideration despite perfect records.⁴⁹ The Sun Devils capped their season with a decisive Peach Bowl win over North Carolina, yet finished No. 6.⁵⁰ The Toledo Rockets dominated their season with a victory margin of more than 24 points and a statement win over William & Mary in the Tangerine Bowl, but in the final poll still reached only No. 12.⁵¹ Similarly, in 1973, the pollsters ignored the formidable (and undefeated) Penn State and Miami University (Ohio) teams.⁵² The Nittany Lions, which featured a Heisman Trophy winner and an Orange Bowl victory over LSU, ended at No. 5.⁵³ The Miami Redhawks won in impressive fashion on the road at Purdue, South Carolina, and versus Florida in the Tangerine Bowl, but were relegated to No. 15.⁵⁴

⁴⁷ *Id.*

⁴⁸ *Id.* From 1950 to 1990, the Coaches and Writers came to a consensus (as to the national champion) 32 times.

⁴⁹ *Id.* at 1293.

⁵⁰ *Id.*

⁵¹ *Id.* at 877. The Toledo Rockets went undefeated from 1969 to 1971. The 1969 team curiously dropped out of the rankings (the AP ranked the Rockets in the second to last poll) despite a decisive Tangerine Bowl victory. The 1971 team also won the Tangerine Bowl and ended at No. 12.

⁵² *Id.* at 1305.

⁵³ *Id.* at 1293, 1305. Penn State running back, John Cappelletti, won the 1973 Heisman; WETZEL, ET. AL., *supra* note 15, at 4-5. Coach Joe Paterno's Nittany Lions went undefeated four times without winning a national championship. Coach Paterno, a long-time playoff advocate, once tried to bring the cause to Big Ten Commissioner Jim Delaney. Coach Paterno knew Delaney had the power to effectuate change, but, as expected, Delaney did not budge because the then-University presidents were pro-BCS.

⁵⁴ ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17, at 489.

The 1970 and 1973 seasons ultimately suggest that the polls were restrained by college football's bowl structure. The pollsters' hands, during those seasons and others, were inevitably tied if No. 1 and No. 2 did not meet in a bowl.⁵⁵ Matching the top two teams in a bowl was problematic because of the conference tie-in scheme.⁵⁶ Even if the top teams met, other legitimate contenders were regularly left out if pollsters' expectations were not met or the bowls took issue with a team's lack of marketability.⁵⁷ Such snags proved the system was trapped by unpredictability, inconsistency, and bias.

B. Forward Progress? Television Advances the Money Grab

In 1974, the Coaches relented and began conducting their final poll at the close of the bowl season.⁵⁸ At this juncture, dispelling the national champion myth played second fiddle to the National Collegiate Athletic Association's ("NCAA") desire to replace its "stubborn amateurism" roots with the riches of "creeping commercialism."⁵⁹ The advent of live television and NCAA

⁵⁵ *College Football Poll*, *supra* note 19. From 1954 to 1997, the pollsters voted for different champions ten times: 1954 (Ohio State and UCLA); 1957 (Auburn and Ohio State); 1965 (Alabama and Michigan State); 1970 (Nebraska and Texas); 1973 (Notre Dame and Alabama); 1974 (Oklahoma and USC); 1978 (Alabama and USC); 1990 (Colorado and Georgia Tech); 1991 (Miami, Fla. and Washington); and 1997 (Michigan and Nebraska).

⁵⁶ *About the Rose Bowl Game*, TOURNAMENT OF ROSES, <http://www.tournamentofroses.com/rose-bowl> (last visited January 06, 2015). In 1947, the Rose Bowl hosted the first annual conference tie-in game between the Big Ten and Pac-8 (now the Pac-12). In the pre-BCS era, the Rose Bowl featured a No. 1 versus No. 2 match-up two times (1963 and 1969).

⁵⁷ KEITH DUNNAVANT, *THE FIFTY YEAR SEDUCTION: HOW TELEVISION MANIPULATED COLLEGE FOOTBALL, FROM THE BIRTH OF THE MODERN NCAA TO THE CREATION OF THE BCS* 32 (2d. ed. 2004). Television in 1970 or 1973 was not the driving force it is today, but marketability still played a factor.

⁵⁸ ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17, at 1125.

⁵⁹ DUNNAVANT, *supra* note 57, at 32. According to Dunnavant, the NCAA's partnership with television transformed college football into a commodity. Television enabled college football to now reach non-alumni and non-student

President Walter Byers' knack for securing lucrative television contracts enabled this transition.⁶⁰ Byers' spread-the-wealth approach, however, would eventually create friction that triggered a civil war among college football's elite.⁶¹ In two waves (both originating from behind the closed doors of hotel conference rooms), the NCAA gradually ceded any inkling of control and college football, in turn, surrendered to a system that today promotes profit potential often at the expense of on-the-field merit, and in doing so further widens the chasm between a powerful few and a legion of schools on the outside looking in.⁶²

i. Total Rout: CFA Demise and TV Commodity Deregulation

The first and most decisive blow to NCAA control was delivered in 1976 when the major powers of college football convened in a Denver hotel ballroom to hash out the formation of the College Football Association ("CFA").⁶³ This union of 63 college programs, to the chagrin of Byers, ultimately sought freedom from the NCAA's powerful grasp.⁶⁴ In 1981, Byers's fears became reality when the CFA revolted against the NCAA and

audiences and the game separated from its academic mission into a billion dollar industry.

⁶⁰ *Id.* at 26-28, 30. National television coverage had, in fact, been around since the 1952 season. As the audiences increased, however, Byers recognized that television threatened gate receipts and the game's balance of power. During his tenure, he turned the NCAA into a police power by creating order within the postseason. As an example, Byers instituted a system that required bowls to return 75 percent of proceeds to participant schools.

⁶¹ *Id.* at 123-24. The NCAA television deal in the late 1970s employed a "super regional" system: Every week, ABC would televise one important game to a great majority of the country and beam a lesser game to several small markets. Under this arrangement, the wealth was shared evenly between powerhouses like Southern Cal and secondary programs like Appalachian State.

⁶² *Id.* at 121.

⁶³ *Id.*

⁶⁴ *Id.* at 122-23. The Big Ten and Pac-8 were conspicuously absent from the CFA. The commissioners of these conferences were loyal to Byers, who was said to be "deathly afraid" of the CFA.

negotiated a separate television deal.⁶⁵ This skirmish escalated into an all-out legal war that was initially waged in an Oklahoma courtroom before being taken to the highest court of the land.⁶⁶ In *Nat'l Collegiate Athletic Ass'n. v. Bd. of Regents of the Univ. of Okla.*,⁶⁷ the United States Supreme Court sounded the NCAA's death knell by holding that Byers and company violated antitrust law by artificially controlling the number of televised football games.⁶⁸ The NCAA's perceived monopoly was over and its power significantly diminished, but college football's fate was still uncertain, and in the coming years the struggle to control the game would play out in dramatic and uncertain fashion.⁶⁹

In 1990, Notre Dame broke rank with the CFA by separately marketing its Fighting Irish brand to television executives.⁷⁰ This maneuver ultimately revealed the writing on the wall

⁶⁵ *Id.* at 135-42. This maneuver was considered a direct challenge to the power structure and the NCAA, in turn, issued threats of probation, expulsion, and bowl bans to CFA schools. The major bowls and NBC stayed in the CFA's corner, however, and the NCAA's bluff was ultimately called when the television deal went through in 1981.

⁶⁶ *Bd. of Regents of Univ. of Okla. v. Nat'l Collegiate Athletic Ass'n.*, 546 F. Supp. 1276, 1313 (W.D. Okla. 1982).

⁶⁷ *Bd. of Regents of Univ. of Okla. v. Nat'l Collegiate Athletic Ass'n.*, 468 U.S. 85 (1984).

⁶⁸ DUNNAVANT, *supra* note 57, at 120; *see also infra* note 286-87 (suggesting that the far-reaching effects of this ruling are felt today when a viewer tunes into ESPN and is inundated with coverage Thursday through Saturday in the fall).

⁶⁹ SCOTT ROSNER & KENNETH L. SHROPSHIRE, *THE BUSINESS OF SPORTS* 504 (2004). The duopoly of the CFA and Big Ten/Pac-10 filled the void left by the Court's break-up of the NCAA monopoly. The new powers, however, did not enjoy the commodity's fruits right out the gate. The duopoly's contractual value in 1984, for example, was well below the value of the NCAA's in 1983, despite allocating twice the output of televised games. Some economists theorize that such phenomenon is confirmation of a monopoly.

⁷⁰ *Id.* at 504. Notre Dame inked a 5-year deal with NBC for \$38 million; *see also* Bill Carter, *Notre Dame Breaks Rank on TV Football Rights*, N.Y. TIMES, <http://www.nytimes.com/1990/02/06/business/notre-dame-breaks-ranks-on-tv-football-rights.html> (last visited January 12, 2015). Notre Dame officials attributed several reasons for negotiating its contracts with the networks. The University, for instance, said it considered itself a national versus a regional

for the day's college football power brokers: Adjust to the new business environment or face extinction.⁷¹ For the next several years teams and conferences partook in a high-risk game of musical chairs to secure their own front row seats at the revenue bonanza.⁷²

The Big Ten sped up the tempo later in 1990 by making Penn State its eleventh member.⁷³ A year later the ACC followed by adding then-independent Florida State.⁷⁴ The Big East, in turn, landed the University of Miami to secure an important foothold in the Florida market.⁷⁵ The SEC then kicked the shuffle into overdrive by inviting Arkansas and South Carolina to become

institution, based on student enrollment, and wanted to obtain more revenue to increase financial aid for its students. To achieve this, Notre Dame sought national coverage to reach its national audience and propel recruiting. Under the CFA deal, Notre Dame's televised games would be restricted to a regional basis.⁷¹ ROSNER, ET. AL., *supra* note 69, at 504, 509. Television economics dictated that a conference's or school's negotiating powers would be elevated by size of the market brought to the table. Early on, negotiating power was not needed because the networks overbid contracts in an effort to coax the schools from the CFA.

⁷² *Conference Realignment Chart*, *supra* note 16.

⁷³ See *id.* (providing a chronology of the Big Ten's expansion since the Penn State addition in 1990).

⁷⁴ DUNNAVANT, *supra* note 57, at 233-34. The Florida State addition afforded the ACC clout with the networks and bowls because the Seminoles provided both access to millions of Florida homes and a recruiting base rich in talent.

⁷⁵ *Id.* at 234-35. Television fueled the Big East's dominance in basketball during the 1980s, but the conference, to stay competitive, decided to add football. The realignments in the early 1990s enabled this transition. The Hurricanes, who captured three national titles in the seven years prior to joining the conference, leveraged the Big East on the gridiron and at the negotiating table; *Conference Realignment Chart*, *supra* note 16; Brandon Gall, *The History of Big East Conference Realignment*, ATHLON SPORTS, <http://athlonsports.com/college-football/history-big-east-conference-realignment> (last accessed January 16, 2015). In the BCS era, the Hurricanes captured the only Big East's national title in 2001. Three years later, however, the realignment storm struck the Big East when the Hurricanes departed for the ACC. In 2013, the Big East discontinued its sponsorship of football and its six remaining members joined with four other schools to form the AAC.

the eleventh and twelve members in its storied conference.⁷⁶ This even-numbered total would prove significant when SEC Commissioner Roy Kramer exploited a little-known NCAA bylaw to hold a conference championship game at the end of its 1992 season.⁷⁷ Adding this to the SEC's resume, in time, would change the dynamic of the realignment shuffle and prove to be a bellwether event as conferences realized the economic boon accompanying a title game.⁷⁸ The conference championship is not only a linchpin of today's revenue structure, but also an unspoken determinate in

⁷⁶ *Conference Realignment Chart*, *supra* note 16. The 1991 expansion was the first in the conference's storied history dating back to 1933. The next expansion occurred in 2012 when the SEC lured Missouri and Texas A&M from the Big 12. This maneuver put the SEC at 14 members and, in turn, temporarily reduced the Big 12 to eight members.

⁷⁷ Championship Football, SEC SPORTS, <http://www.secsports.com> (last accessed January 13, 2015). Under NCAA regulations, a conference with 12 members may play an additional football game to determine its champion, provided the regular season is played in divisions. The SEC is separated by its east and west divisions. The title match-up is determined by selecting each division's top team in terms of overall SEC winning percentage within the eight-game conference schedule.

⁷⁸ DUNNAVANT, *supra* note 57, at 236-37. In its first five years, the SEC title game generated nearly \$40 million and television right fees tripled. By the late 1990s, the SEC earned more from its title game than it earned from a full season of televised games in the early days following deregulation. CBS Sports Vice President Len DeLuca called the title "one of the smartest ideas in the history of televised sports" and, today, in part, explains SEC domination on the gridiron and ratings; Craig A. Depken II, *Realignment and Profitability in Division I-A College Football*, UTA, <http://www.uta.edu/depken/P/confsize.pdf> (last visited Feb. 16, 2006). Depken indicates that the NCAA accommodated the alignment trend to safeguard the profit-potential of its members. According to Depken, conferences of twelve teams maximize football profits and, perhaps, suggest why the NCAA has not since reduced the 12-member threshold for a title game; Chris Smith, *The Money on the Line College Football 's Championship Game*, FORBES, <http://www.forbes.com/sites/chris-smith/2015/01/12/the-money-on-the-line-in-college-football-championship-game/> (last accessed January 15, 2015). The amount of money at stake today is best exemplified by the exorbitant bonuses given to coaches who merely earn a berth (not win) into their conference's champion game. Ohio State coach Urban Meyer, for example, received a \$250 thousand bonus when the Buckeyes reached the Big Ten Championship in 2014.

naming a national champion. The Big 12 is the only Power Five conference without a championship game⁷⁹ — a structure many believe cost Baylor and TCU an opportunity to be chosen as one of 2014's four semifinalists.

The far-reaching effect of conference realignment is best exemplified by the 1996 season.⁸⁰ At the time, the Southwest Conference ("SWC") was reeling from recruiting scandals (most notably Southern Methodist) that had left the conference adrift in perpetual controversy.⁸¹ With the blood of uncertainty in the water, competing conferences circled like sharks and began picking off the SWC's elite teams.⁸² Kramer, ever the opportunist, drew first blood by claiming Arkansas.⁸³ But it was Big Eight Commissioner

⁷⁹ *College Football Data Warehouse*, ALL-TIME CONFERENCE LISTING, http://www.cfbdatawarehouse.com/data/conference_champs/div_champions.php?divid=47 (last accessed January 16, 2015). The Big 12, interestingly, was the first to follow the SEC and hosted its first conference championship game in 1996, though it discontinued the game after the 2010 season. Late to the game were the ACC in 2005 as well as the Pac-12 and Big Ten in 2011. Three conferences from the Group of Five host a title game: Conference USA, starting in 2005; MAC, starting in 1997; and Mountain West, starting in 2013.

⁸⁰ *Conference Realignment Chart*, *supra* note 16; Chris Dufresne, College Football's Game of Realignment is Finally Ending, L.A. TIMES, <http://www.latimes.com/sports/la-sp-college-football-realignment-20140817-column.html#page=1> (last accessed January 15, 2015). The first wave of realignments in the early 1990's was a trend that dominated offseason college football headlines until the summer leading into the 2015 season. The recent CFP snubs of the Big 12 might re-ignite another round of musical chairs (or, at the very least, an exemption from the NCAA to allow a conference championship game with ten teams).

⁸¹ DUNNAVANT, *supra* note 57, at 229-30. Southern Methodist's pay-for-play conspiracy led to the so-called "death penalty." This undoubtedly contaminated the well and internal strife certainly festered as the elite programs were forced to keep the SWC and its lower-rung teams afloat. Poor timing, more so than a lack of business acumen or self-preservation, ultimately doomed the SWC.

⁸² *Id.*

⁸³ *Id.* at 230-31. Kramer's move to pursue members from a rival conference was seen as a turning point in college athletics and at the time was widely considered audacious. Such maneuvering from one conference had never before endangered the existence of another conference.

Carl C. James who proved to be the most adept predator by grabbing SWC staples Baylor, Texas, Texas A&M, and Texas Tech⁸⁴ and thereby expanding the Big Eight to the Big 12. The remaining SWC remnants Houston, Rice, Southern Methodist, and Texas Christian were scattered across lower-rung conferences and, for the most part, pushed into relative obscurity.⁸⁵ And just like that, the 81-year-old SWC, its seven college football championships, and annual high-spirited rivalries vanished into the annals of college football history.⁸⁶

The realignment shakeup ultimately empowered the revamped conferences to independently leverage their newfound marketability to the television networks.⁸⁷ The first to jump from the CFA ship was the SEC.⁸⁸ Anchored by the lure of a heavily

⁸⁴ *Id.* at 240; *Conference Realignment Chart*, *supra* note 16. These former SWC members merged with Big Eight Conference members (Colorado, Iowa State, Kansas, Kansas State, Missouri, Nebraska, Oklahoma, and Oklahoma State) to form the Big 12.

⁸⁵ *Conference Realignment Chart*, *supra* note 16. Rice, Southern Methodist, and TCU joined the Western Athletic Conference (“WAC”). TCU jumped from the WAC to C-USA, then to the Mountain West Conference (“MWC”), before it returned to its current home with the Big 12 in 2012. In 2005, Rice and Southern Methodist reunited with Houston in C-USA; TCU Athletics, *2014 TCU Football Fact Book*, ISSUU, http://issuu.com/tcu_athletics/docs/2014_fb_fact_book (last accessed January 16, 2015). TCU undoubtedly achieved more gridiron success than the other former SWC members not invited to join the then Big Eight. Since 2005, TCU football has the best record of Texas schools and ranks eighth nationally (as of 2014). Such success certainly swayed the Big 12 to bring the Horned Frogs into the fold. Access to yet another chunk of the Texas market and a \$164 million stadium renovation, however, were likely the deciding factors precipitating the invitation.

⁸⁶ *A Look Back at the Southwest Conference*, TEXAS ALMANAC, <http://www.texasalmanac.com/topics/sports/look-back-southwest-conference> (last accessed January 16, 2015). The SWC also featured five Heisman trophy winners in its storied run. In addition to its former football prowess, the SWC won 47 national championships in other sports and featured three future Olympic track-and-field gold medalists (Randy Matson, Carl Lewis, and Michael Johnson).

⁸⁷ ROSNER, ET. AL., *supra* note 69, at 509.

⁸⁸ DUNNAVANT, *supra* note 57, at 239-40.

promoted televised conference championship game, the SEC negotiated an \$85 million deal with CBS in 1996.⁸⁹ Three days later, the ACC inked a \$54 million deal with ABC.⁹⁰ The day after, the Big East bailed on contract extension negotiations with the CFA and ABC and signed a \$56 million deal with CBS.⁹¹ Three weeks later, the Big 12 contracted with ABC for a \$57.5 million deal that tore open the final hole in the sinking CFA ship.⁹² Crippled by defections,⁹³ the CFA closed its books in 1997.

The CFA dissolution, at best, granted sovereignty to the prominent conferences and schools to explore a flourishing television market.⁹⁴ At worst, it led to the market entrenchment of the traditional powers⁹⁵ and the ongoing exclusion of the less prominent conferences. Without the salability networks craved, the less-esteemed conferences were relegated to unfavorable and low-dollar deals with regional cable networks.⁹⁶ The have-nots were eventually compelled to play powerhouses in non-conference play as a calculated measure to gain exposure and some degree of rele-

⁸⁹ *Id.* at 239-40, 242. The CBS deal more than doubled the SEC's earnings with the CFA and caused the realignment wave that led to the demise of the SWC. The SEC's attractiveness as a commodity is evidenced by the superior terms it received against its competitors.

⁹⁰ *Id.* at 242.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 221-45. The CFA was also in a never-ending fight with the Big Ten and Pac-10. The battles included the typical business posturing and often culminated with expensive lawsuits. In the end, war with the conference heavyweights took its toll and the CFA buckled.

⁹⁴ *Id.* at 242.

⁹⁵ *Id.*

⁹⁶ *Id.* The equity conferences secured cable deals with the Disney ESPN/ESPN2 juggernaut while also compiling millions from regional syndication. The non-equity conferences, such as the WAC, C-USA, and MAC, were left to the scraps of leftover time slots and diminished revenue. Such conferences typically battled to have their best games televised alongside the second- or third-best games from the equity conferences. In retrospect, the ability to compete with a Power Five conference's third-best game would, today, be a feat and welcomed by any Group of Five conference.

vance.⁹⁷ This structural change, which was an outgrowth of the NCAA conditions attached to conference championships,⁹⁸ would eventually spur controversy during the BCS era and, in the end, eviscerate many college football traditions and rivalries while adding yet another behind-the-scenes formula for determining a true national champion.⁹⁹

ii. Building a Dynasty: The Alliance, Coalition, and Ill-Fated BCS

The second blow came to the NCAA in 1994, in a hotel conference room in Florida, when Kramer shot down an NCAA playoff proposal.¹⁰⁰ After Georgia Athletic Director Vince Dooley made his playoff pitch, his SEC brethren let him know they had something else in mind.¹⁰¹ At that time, the NCAA had formed

⁹⁷ *Id.* at 243.

⁹⁸ *Id.* Upon its split, for example, the SEC was compelled to institute an eight-game conference rotation to trigger allowance for a conference-championship game. Such a schedule ultimately proved taxing and the SEC, in turn, was disinclined to schedule difficult games with intersectional foes. Alabama athletic director Cecil “Hootie” Ingram understood why the SEC took this approach, but also recognized it was not good for the health of the game. “It doesn’t make as much sense for us to play people like Penn State and Notre Dame now because we’re already playing eight tough conference games, plus hopefully the conference championship game and a bowl game. That’s a negative for our program, because we should be playing those kinds of teams.” Instead, the equity conferences scheduled games with marginal programs from non-equity conferences. The result was a win-win because the equity schools generally tallied a victory and non-equity schools gained national exposure on top of a large payday. And with the occasional upset, the equity conferences were able to spin the illusion that disparity was not so drastic and, thus, further entrenched their stranglehold on the game’s power structure.

⁹⁹ *See infra* notes 144-48, 80-85 and accompanying text (denoting the rivalries lost during the BCS and spotlighting the demise of the tradition-rich SWC).

¹⁰⁰ WETZEL, ET. AL., *supra* note 15, at 18-19. The plan, like today’s system, called for two semifinal match-ups and a national championship game. The NCAA proposal also set to preserve the bowl system but differed from the current format in that the four teams would be selected following the New Year’s Day bowls.

¹⁰¹ *Id.* at 19. Dooley later recalled Kramer cryptically saying, “I think we’ll have another option.”

a playoff committee in a last-ditch effort to both resolve the faulty bowl-selection process and position itself for access to the postseason's ever increasing profits.¹⁰² The clamor for such a structure even prompted Nike, Disney, and the QVC home-shopping network to submit their own lucrative proposals.¹⁰³ Behind closed doors, however, Kramer had set the wheels in motion for an entirely different postseason system when he colluded with the heads of the other equity conferences (excluding the Big Ten and Pac-10) and the elite bowls (excluding the Rose Bowl).¹⁰⁴ Less than two weeks after Dooley's proposal, Kramer's dealings came to fruition with the unveiling of the Bowl Alliance.¹⁰⁵ A long-time beneficiary of back-room deals, the NCAA was suddenly the powerless outsider.¹⁰⁶

The prototype and catalyst for the Bowl Alliance was formed three years prior in 1992 when a coalition of leading conferences and top-tier bowls joined together in an effort to inject new life and increased revenue into the postseason.¹⁰⁷ Under this

¹⁰² DUNNAVANT, *supra* note 57, at 250.

¹⁰³ *Id.*

¹⁰⁴ WETZEL, ET. AL., *supra* note 15, at 19-20. Kramer's strategy was to play into the bowls' obvious fear of a playoff and, thereby, safeguard the equity conference's 85 percent take of the postseason revenue. Although a playoff would surely generate millions of additional dollars, the equity conferences were determined to not cede any postseason control to the NCAA. Any appeal to fair play was ultimately a threat to the ruling elite and, therefore, the haves were compelled to squash the minority before an improbable insurrection from the have-nots.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ DUNNAVANT, *supra* note 57, at 247-48. The bowls were coming under increased fire when public perception started viewing the structure as a "meaningless, anticlimactic relic." Gasoline was added in November of 1990 when then-undefeated Virginia was chosen by the Sugar Bowl before season's end to face the SEC champion. The Sugar Bowl brass ignored the bid-day rule by prematurely securing the Cavaliers before their final games. At that time, the ACC was without the clout to arrange a contractual tie-in with a bowl. The Cavaliers, nonetheless, had become a hot commodity when rising to the top of the polls after a 7-0 start. This, however, proved to be a cautionary tale when Virginia finished the season 1-4 and lost to Tennessee in the Sugar Bowl. Even

arrangement (collectively known as the “Bowl Coalition”), the Cotton, Fiesta, Orange, and Sugar Bowls contracted with the five major conferences and Notre Dame,¹⁰⁸ predictably excluding the mid-major conferences and lower-tier bowls. The Coalition relentlessly courted the Rose Bowl and its postseason partners, the Big Ten and Pac-10,¹⁰⁹ and not in an appeal to fair play, but rather as a power-grab to maximize profit potential.¹¹⁰ The Coalition was unable to execute an ongoing agreement,¹¹¹ however, and after only three years it dissolved. In 1994, its final year, the Coalition’s futility was made evident when an undefeated Penn State was denied a title matchup with undefeated Nebraska.¹¹² Both teams won their bowl games, but the Cornhuskers were crowned by the major polls despite the Nittany Lions routing Oregon in the Rose Bowl.¹¹³

Even though the short-lived Bowl Coalition was nearly supplanted by a playoff in its final year, its base structure proved resilient and managed to stay intact over the next two decades and despite the bombardment of continuous controver-

after the Coalition was instituted, the bowls were reluctant to relinquish their independence. In 1993, for example, the Cotton Bowl bypassed third-ranked Florida State in favor of fifth-ranked Notre Dame due in large part to the Irish’s television draw.

¹⁰⁸ *Id.* at 249. This arrangement was momentous “because it was the first time a group of bowls and conferences had resolved to work together to try to make the postseason more relevant.”

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* Critics also believe the structure’s reliance on the AP and retention of the automatic-qualifier system contributed to the Coalition’s shaky credibility.

¹¹² *Id.* At the time, the Big 12 played a conference championship game, which allowed the Cornhuskers one more game — and one more victory — than the Nittany Lions.

¹¹³ ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17, at 1389. Nebraska defeated No. 3 Miami and, thereby, regained some redemption after the Cornhusker’s last-minute loss to the Hurricanes in the classic 1984 Orange Bowl game. Penn State’s 38-20 victory over Oregon was not enough to sway the pollsters and, in turn, Coach Paterno was left with yet another undefeated team not wearing the crown.

sy.¹¹⁴ This was due, in part, to its architects' ability to stave off the controversy of the particular day by revamping the system as needed.¹¹⁵

The first tweak occurred in 1995 in year one of the new Bowl Alliance, the Coalition's immediate successor. In one of their first moves, the powers behind the new Bowl Alliance initiated the rotational national championship game.¹¹⁶ This plan also eliminated the tie-in scheme to better enable pitting the top two teams for the national crown.¹¹⁷ On its face, this new structure appeared to be eliminating the "mythical national champion" dilemma.¹¹⁸ But a closer look reveals that the Alliance was, first and foremost, striving toward an increased bottom-line.¹¹⁹ This end-goal was realized immediately and unequivocally when overall bowl revenue jumped 30 percent upon the \$135 million commitment from the Sugar, Orange, and Fiesta Bowls to land the three coveted rotational spots.¹²⁰ Even so, the Alliance left a jackpot on the table by failing to bring the Rose Bowl, Big Ten, and Pac-10 into the fold.¹²¹ This misstep of exclusion, in the end,

¹¹⁴ See generally DUNNAVANT, *supra* note 57, at 249-75 (discussing the controversies endured by the Coalition and Alliance); WETZEL, ET. AL., *supra* note 15 (detailing the many and varied controversies perpetuated by the BCS).

¹¹⁵ See *infra* Part II(a)(ii) (denoting Alliance and BCS adjustments).

¹¹⁶ DUNNAVANT, *supra* note 57, at 251.

¹¹⁷ *Id.* This hinged on neither a Big Ten nor Pac-10 team being in the top two.

¹¹⁸ *Id.* Under this structure, the title game would rotate between the three chosen bowls. Conference champions earned automatic bids while the other two spots were reserved for at-large teams.

¹¹⁹ *Id.* ACC Athletic Director, Gene Corrigan, acknowledged that the Coalition's central purpose was to "maximize revenue" and attain the "best deals."

¹²⁰ *Id.* at 252. The bidding process sent the usual suspects into a fever pitch to secure a spot at the Alliance table. The networks and television sponsors, believing the new format would boost sagging ratings, offered exorbitant money that even surprised the commissioners. CBS Sports, for instance, offered an unprecedented \$300 million bid over six years. Robert Dale Morgan, executive director of the Peach Bowl, complained that such an offer was "nothing more than a TV network trying to buy college football."

¹²¹ Rich Exner, *TV Audience of 33.4 Million Makes Ohio State, Oregon Second Most-Watched College Football Title Game*, CLEVELAND.COM,

would spur yet another controversy in 1997 when the polls awarded a split national title to Nebraska and Michigan.¹²² Still, the Alliance had shown both its financial muscle and marketing preeminence, ultimately forcing the hands of the Big Ten and Pac-10 to abandon their Rose Bowl ties.¹²³

The second tweak occurred in 1998 when the Rose Bowl relented and jumped into the bowl rotation, ending a near forty-year rivalry between its one-time exclusive partners, the Big Ten and Pac-10.¹²⁴ This new structure, rebranded as the BCS, would prove durable by lasting 16 seasons in the face of unremitting controversy and requests for restructuring.¹²⁵ The stated purposes of the BCS were to restore order within the postseason and

http://www.cleveland.com/datacentral/index.ssf/2015/01/ohio_state_oregon_game_joins_1.html (last accessed January 21, 2015). The list on this website includes Nielsen ratings for the Fiesta, Orange, Sugar, and Rose bowls in addition to the national championship game added in 2007 and this year's playoff. The Rose Bowl holds six of the top 14 spots (including number one) and gives credence to the Granddaddy of Them All designation. During the pre-BCS years, the Rose Bowl television audiences hit 28.4 million in 1995 (ranked 12); 30.4 million in 1996 (ranked 4); and 29.0 million in 1998 (ranked 9).

¹²² ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17, at 1393, 1397. In its first two seasons, the Alliance was able to crown champions in 1995 (Nebraska) and 1996 (Florida) without an asterisk.

¹²³ DUNNAVANT, *supra* note 57, at 255. Joining the Alliance had been in discussions by the two conferences since the 1995 Penn State controversy. The rivalry between CBS and ABC surely contributed to the delay. At that time, ABC dominated the ratings war with the Rose Bowl in its lineup. Furthermore, ABC's rights included veto power over any change to the Rose Bowl format. Suffice to say, the ABC executives were reluctant to join in any agreement that might benefit its competition.

¹²⁴ *Id.* at 256-57. ABC persuaded the Rose Bowl to join the four-bowl rotation in an effort to stamp out its CBS competition. To achieve their goal, ABC brass committed more than \$500 million over seven years and in doing so succeeded in winning the rights to the Rose, Orange, Sugar, and Fiesta. This staggering number, in turn, allowed the games to elevate per-team payouts to more than \$12 million per year.

¹²⁵ Greg Bishop, *The End of the Much-Debated B.C.S.*, N.Y. TIMES, http://www.nytimes.com/2014/01/08/sports/ncaafootball/rest-in-peace-bcs-a-maligned-system-that-sometimes-worked.html?_r=0 (last accessed January 27, 2015).

guarantee a national championship game.¹²⁶ Critics maintain that these purposes were marketing subterfuge, cover for yet another device the power brokers could exploit for their economic benefit.¹²⁷ While proponents argued that the BCS system was driven by tradition, opponents saw it driven by the bottom line, beholden to an age where brands trumped rivalries and Nielsen ratings reigned over merit.¹²⁸

Two structural flaws, designed by profit-centered architects, ultimately tarnished the BCS's legacy. First, the arrangement itself created an institutional bias that marginalized the non-automatic qualifying ("non-AQ") conferences, pushing them further into postseason obscurity.¹²⁹ During the BCS's existence, for instance, nine non-AQ conference teams finished the regular season undefeated (Tulane in 1998; Marshall in 1999; Utah in 2004 and 2008; Boise State in 2006 and 2009; Hawaii in 2007; and TCU in 2009 and 2010) yet none were given an opportunity to play in the national championship game.¹³⁰ And not only were non-AQ

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *College Football Poll*, *supra* note 19. BCS proponents argue that the structure preserves "tradition" by upholding the game's bowl-game heritage while also attaching significance to the regular season; *but see infra* note 131 and accompanying text (hinting that Nielsen ratings dip when non-BCS schools are featured in a bowl and, thus, selection not based on a meritocracy).

¹²⁹ *Id.* Under this structure, the champions of the ACC, AAC (formerly Big East), Big Ten, Big 12, Pac-12, and SEC have automatic berths in a BCS bowl game. This is due to the membership bowl's longstanding tie-in with four of the five equity conferences: Fiesta and the Big 12; Orange and the ACC; Rose and the Big Ten/Pac-12; Sugar and the SEC. The five non-AQ conferences, however, only receive one automatic bid and are often relegated to less exposure (and revenue) in a lower-tier bowl game.

¹³⁰ Bill Bender, *Running the Table Likely Not Enough for Group of 5*, SPORTING NEWS, <http://www.sportingnews.com/ncaa-football/story/2014-06-10/power-5-vs-group-of-5-college-football-playoff-scheduling-run-the-table> (last accessed January 28, 2015). The bowl record in these seasons was 7-2 (including five BCS bowl wins). Utah and TCU were able to parlay such success (or, in the Ute's case, the threat of an antitrust lawsuit) with membership into a Power 5 conference.

conferences excluded from championships opportunities, they were also largely denied access to any BCS games.¹³¹ It took 11 years before two non-AQ conference teams were chosen among the eight BCS teams in the same season.¹³² The structure also backfired on the automatic qualifying (“AQ”) conferences thanks to the BCS’s own convoluted methodology: In 2001, No. 2 Oregon was snubbed in favor of No. 3 Nebraska; In 2003, the AP crowned USC national champions despite the Trojans not playing in the title game; and in 2004, the unbeaten SEC champion, Auburn, was denied a title shot.¹³³ The BCS structure, despite its supposed 81-percent-success rate, ultimately proved to be imperfect and biased regardless of conference affiliation.¹³⁴

¹³¹ Darren Everson, *TCU Plays BSU in the BCS? OMG!*, WALL ST. J., <http://www.wsj.com/articles/SB10001424052748703558004574583872339892890> (last accessed January 28, 2015). Prior to 2010, only four non-BCS teams have participated in one of the major bowls. According to Nielsen Co., these four games were among the then 10 lowest-rated BCS bowl games ever televised.

¹³² *Id.* In 2009, the BCS matched Boise State and TCU in the Fiesta Bowl. This decision was to the dismay of BCS critics, who aimed to validate the merit of the so-called BCS busters. The BCS defended this selection as a rematch of unbeaten teams in the prior year’s Poinsettia Bowl; Joe Barton, *BCS Is College Football’s Biggest Problem*, US NEWS, <http://www.usnews.com/opinion/articles/2009/12/31/rep-joe-barton-bcs-is-college-football-biggest-problem> (last accessed January 28, 2015). U.S. Rep. Joe Barton, R-Tex, penned a manifesto for U.S. News & World Report that defended his characterization of the BCS as a “cartel.” His ire, which escalated after the TCU and Boise State snubs, prompted him to sponsor a congressional bill that prevented the BCS from coloring its title game as a “national championship game.”

¹³³ WETZEL, ET. AL., *supra* note 15, at 127-136. The formula counterbalanced the polls with computer rating systems to determine a title matchup. The systems, which varied in number through the BCS lifespan, incorporated various factors such as margin of victory and strength of schedule; Bishop, *supra* note 125. Roy Kramer, who has been called the Father of the BCS, inferred that the controversy surrounding the methodology stems from the press’ inability to comprehend the BCS “phenomenon.”

¹³⁴ Bishop, *supra* note 125. Bill Hancock, executive director of the BCS since 2009, maintained that the structure turned the game into a “national obsession.”

The second structural flaw can be seen in how the BCS's revenue scheme widened the already deep equity gulf between the AQ and non-AQ conferences. This structure, fueled by exorbitant television contracts with the host bowls, ratcheted up the class warfare.¹³⁵ An NCAA audit revealed that BCS totaled \$202.5 million in revenue after institutional expenses for the 2012-2013 bowl season, accounting for 67 percent of all bowl revenue.¹³⁶ Of the 35 total bowls, the AQ conferences generated \$181 million of revenue while the non-AQ conferences generated \$27.1 million.¹³⁷ Another comparison reveals that the SEC's \$37.5 million in revenue was \$10 million more than all non-AQ conferences combined,¹³⁸ including revenue for the Mountain West (\$2.3 million)

Jim Delaney, Big Ten Commissioner, points to the dramatic growth of fan interest in the regular and postseasons under the BCS tenure.

¹³⁵ DUNNAVANT, *supra* note 57, at 256-57. ABC Sports held the televising rights to the BCS for \$500 plus million from 1998 until 2006; Larry Stewart, *Fox Lands BCS Deal for \$330 Million*, L.A. TIMES, <http://articles.latimes.com/2004/nov/23/sports/sp-bcstv23> (last accessed January 29, 2015). When the ABC contract expired, Fox landed a four-year deal (through 2010) of \$330 million to televise the BCS bowl games minus the Rose Bowl and 2010 BCS championship game. ABC Sports, however, maintained its ties to Pasadena by agreeing to \$270 million for an eight-year extension (the duration of the BCS); Richard Sandomir, *As Bowls Migrate to Cable, Viewership is Just a Number*, N.Y. TIMES, <http://www.nytimes.com/2011/01/06/sports/ncaa-football/06sandomir.html> (last accessed January 29, 2015). ESPN outbid Fox by upping the ante to a \$500-plus million deal for the last four years of the BCS. In that time, Walt Disney (owner of ABC Sports and ESPN) shifted Rose Bowl coverage to ESPN.

¹³⁶ Jon Solomon, *NCAA Audit: Every Football Conference Made Money on 2012-2013 Bowls*, AL.COM, http://www.al.com/sports/index.ssf/2013/12/bowl_money_101_ncaa_audit_show.html (last accessed January 31, 2015).

¹³⁷ *Id.* Bowl revenue was calculated from the chart (Bowl Money By Conference, 2012-13) by subtracting Institutional Bowl Expenses from Bowl Payout Received and then totaling based on the AQ versus non-AQ designation.

¹³⁸ *Id.* That year, the SEC received a BCS payout of \$31.7 million by placing two teams. The SEC also placed in 5 of the top 10 highest-paying non-BCS bowls (including the top four).

and C-USA (\$1.6 million).¹³⁹ In the BCS's next and final season, the status quo was clearly upheld when the non-AQ conferences received 7.2 percent of BCS total net revenue,¹⁴⁰ an amount around \$12.6 million and divided equally between the four non-AQ conferences.¹⁴¹

The tilted BCS structure forced conferences into a constant state of flux as schools and bowls jockeyed for greater access to the game's pot of gold.¹⁴² In the BCS era from 1998 to 2013, there were 78 realignments that ultimately led to the dissolution of three conferences (Big West, Western Athletic, and Big East) and the creation of three more (Mountain West, Sun Belt, and American Athletic).¹⁴³ The realignment frenzy even took its toll on the surviving BCS conferences, most notably weakening the Big 12 while fortifying the SEC, Big Ten, and Pac-12.¹⁴⁴ Along the

¹³⁹ Jon Solomon, *NCAA Audit: Every Football Conference Made Money on 2012-2013 Bowls*, AL.COM, http://www.al.com/sports/index.ssf/2013/12/bowl_money_101_ncaa_audit_show.html (last accessed January 31, 2015); see also Sammy Eanes, *The College Football Arms Race: Examining Athletic Department Revenues*, THE KEY PLAY, <http://www.thekeyplay.com/content/2014/january/20/college-football-arms-race-examining-athletic-department-revenues>, (last accessed January 31, 2015). The author, citing The Equity Data Analysis Cutting Tool, highlights bigger-picture disparities by examining athletic departments as a whole. 13 AQ athletic departments had revenues of over \$100 million in 2012-13. The non-AQ conferences had none. At the top of the heap was Texas at \$166 million. At the bottom was the Sun Belt's Louisiana-Monroe at \$9.2 million.

¹⁴⁰ Dennis Dodd, *Sun Belt Finished First (in Non-AQ Revenue) in Last Year of BCS*, CBS SPORTS, <http://www.cbssports.com/collegefootball/writer/dennis-dodd/24418974/sun-belt-finishes-first-in-non-aq-revenue-in-last-year-of-bcs> (last accessed January 27, 2015).

¹⁴¹ *Id.*

¹⁴² *Conference Realignment Chart*, *supra* note 16.

¹⁴³ *Id.* This was an average of nearly five realignments per BCS season. There were only three seasons that did not experience a shuffle. The most active movement occurred during the 2005 season (16 realignments) and the final 2013 season (17 realignments).

¹⁴⁴ *Id.* In June of 2010, for example, the Big 12 lost Colorado to the Pac-10 and Nebraska to the Big Ten. That same month the Pac-10 also poached Utah from the Mountain West to become the Pac-12. Most significantly, the Pac-12 and

way, tradition-rich rivalries were pushed aside in the shuffle,¹⁴⁵ virtually eliminating intra-state showdowns (Texas vs. Texas A&M, Penn State vs. Pittsburgh), border battles (West Virginia vs. Pittsburgh, Kansas vs. Missouri), and powerhouse face-offs (Michigan vs. Notre Dame, Nebraska vs. Oklahoma).¹⁴⁶ The deserted rivalries were also detrimental to other NCAA sports, such as basketball (Kansas vs. Missouri, Georgetown vs. Syracuse, Duke vs. Maryland),¹⁴⁷ baseball (Creighton vs. Wichita State),¹⁴⁸ and hockey (Minnesota vs. North Dakota).¹⁴⁹

Big Ten put themselves in better position to host conference championship games, while the Big 12 was forced to abandon its two-division format. The following June, the Big 12 suffered another setback when losing Texas A&M and Missouri to the SEC.

¹⁴⁵ Mark Schlabach, *Realignment Killed the BCS Rivalry*, ESPN, http://espn.go.com/college-football/story/_/id/9559944/rivalries-lost-bcs-era-college-football (last accessed February 1, 2015); Brian Palmer, *Sports Rivalries: The Economics of Crosstown Hatred*, SLATE, http://www.slate.com/articles/business/rivalries/2013/08/sports_rivalries_the_economics_of_crosstown_hatred.html (last accessed February 1, 2015). Abandoned rivalries also translate into lost revenue for local economies. The Boise State vs. Idaho State match-up, for instance, reportedly brings \$1 million to the Moscow, Idaho economy. Restaurant sales in a local Utah economy reportedly jump to a 65 to 75 percent increase in sales on the day of the Utah-BYU game.

¹⁴⁶ *Id.*

¹⁴⁷ Jon Solomon, *Top 6 College Sports Rivalries Lost by Conference Realignment*, AL.COM, http://www.al.com/sports/index.ssf/2013/02/top_6_college_sports_rivalries.html (last accessed February 1, 2015).

¹⁴⁸ Paul Suellentrop, *Wichita State Losing Its Most Enduring Valley Baseball Rival*, KANSAS.COM, <http://www.kansas.com/sports/college/wichita-state/article1115180.html> (last accessed February 1, 2015).

¹⁴⁹ Chip Scoggins, *One of College Hockey's Best Rivalries Losing Out to Power of Dollar*, STAR TRIB., <http://www.startribune.com/sports/gophers/143021725.html> (last accessed February 1, 2015). Minnesota's departure from the Western Collegiate Hockey Association for the Big Ten's newly formed hockey league meant the end of the Gopher's rivalry with the Fighting Sioux. At the core of this maneuver was the Big Ten Network, which set its sights on expanding the already lucrative brand to the hockey demographic.

The BCS structure endowed the bowls with outrageous amounts of money and power, leading to inflated salaries of bowl directors,¹⁵⁰ bowl kickbacks,¹⁵¹ and exploitation of bowls' non-profit status.¹⁵² The Fiesta Bowl scandal exemplified the lavish spending of bowls and the cronyism that permeated through the BCS.¹⁵³ At the center was Fiesta Bowl Director, John Junker,¹⁵⁴ who a 2011 investigation revealed had thrown himself a \$33,000 birthday party and arranged a \$95,000 round of golf with Jack Nicklaus.¹⁵⁵ These expenses — as with his \$4,856,680 AMEX bill and four country club memberships — were all on the Fiesta Bowl's dime.¹⁵⁶ The most damning revelation, however, focused on Junker's role in a campaign donation kickback scheme where \$46,000 in political contributions made by Fiesta Bowl employees were paid back with Fiesta Bowl money, for which Junker was convicted and sentenced to eight months in federal prison.¹⁵⁷ Although the BCS threatened ouster, the Fiesta Bowl

¹⁵⁰ WETZEL, ET. AL., *supra* note 15, at 61. Over 20 executives pocketed more than \$300,000 to serve as bowl directors in 2009. On the high-end were the salaries of Sugar Bowl CEO Paul Hoolahan (\$645 million), Fiesta Bowl Director John Junker (\$674 million), and Outback Bowl President Jim McVay (\$693 million).

¹⁵¹ *Id.* at 53-54. The Fiesta Bowl, for instance, hosts the annual "Fiesta Frolic" to woo athletic directors over a weekend of golf at an exclusive resort in Arizona. The Orange Bowl courts the same crowd on a four-day Caribbean cruise in the near-annual "Summer Splash."

¹⁵² *Id.* at 23-32. In the 2011-12 season, 11 of the 35 bowls were privately owned. The remaining 24 enjoyed non-profit status. And while such designation typically conjures the image of charity, bowls were anything but charitable: In 2012, tax-exempt bowls combined to donate just 1.7 percent of the \$186 million in revenue. The lion's share of such revenue went to executive pay, lobbying, and other irregularities (i.e., six figure interest-free loans to bowl executives).

¹⁵³ *Id.* at 49-60.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 50.

¹⁵⁶ *Id.* at 49, 55.

¹⁵⁷ Associated Press, *Ex-Fiesta Bowl Chief Headed to Prison*, ESPN, http://espn.go.com/college-football/story/_/id/10604586/former-fiesta-bowl-

was able to hold its position in the championship-game rotation by paying a \$1 million donation to a local charity.¹⁵⁸ Ultimately, this scandal was a critical blow to the structure's already tarnished image and gave credence to John Feinstein's estimation that the BCS "was the worst corporate creation since Enron."¹⁵⁹

C. Disguised Coverage: The Expansion of College Football's Postseason

Throughout 2012, college football's power circle met in hotel rooms across the country to hash out a playoff format to replace the BCS structure.¹⁶⁰ Leading the cabal was BCS Executive Director Bill Hancock, who just two years earlier opined that a playoff would ruin the regular season.¹⁶¹ After abysmal TV bowl ratings in the prior two seasons, however, the powers realized a facelift was needed.¹⁶² The BCS Presidential Oversight Committee agreed and, subsequently, approved the proposal in June of 2012. Soon after, the NCAA offered its blessing.¹⁶³ Finally, nearly two decades removed from Vince Dooley's pitch, college football had

chief-john-junker-gets-8-months-illegal-campaign-contribution-scheme (last accessed February 3, 2015).

¹⁵⁸ WETZEL, ET. AL., *supra* note 15, at 59.

¹⁵⁹ Steve Wieberg, *BCS: Boon or Bust?*, USA TODAY, http://usatoday30.usatoday.com/sports/college/football/2005-09-22-bcs_x.htm (last accessed February 03, 2015).

¹⁶⁰ *Chronology*, COLLEGE FOOTBALL PLAYOFF, <http://www.collegefootballplayoff.com/chronology> (last accessed February 4, 2015) (the BCS four-year term was set to expire after the 2013-14 season).

¹⁶¹ *Id.*; Bill Hancock, *Yet Again, College Football's BCS Works*, USA TODAY, http://usatoday30.usatoday.com/news/opinion/forum/2010-12-09-column09_ST2_N.htm (last accessed February 03, 2015).

¹⁶² Jon Soloman, *College Football's Average Bowl Rating Drops to Lowest During BCS Era*, USA TODAY, http://usatoday30.usatoday.com/news/opinion/forum/2010-12-09-column09_ST2_N.htm (last accessed February 03, 2015). The 2011-12 bowl season was the lowest rated in the then 14-year history of the BCS. It also marked the second straight year in decline and marked a 37 percent ratings drop since the BCS-era's peak in the 1998-99 season.

¹⁶³ *Id.*

a playoff.¹⁶⁴ The inaugural playoff was slated for the 2014-15 season.¹⁶⁵ But, unlike in Dooley's proposed structure, the NCAA's oversight role would be benched while Hancock and company played coach, quarterback, and cheerleader.¹⁶⁶ The CFP departed from the non-profit model and — with its Delaware incorporation status, board, and various committees — more resembles the workings of a Fortune 500 company.¹⁶⁷ The following sections peel back the layers of the CFP structure (format, methodology, and revenue arrangement) and briefly analyze the developments in its inaugural season.

i. Simplifying the Xs and Os: CFP Format

The CFP format is simple: Four teams play two semifinal bowl games for a shot at the title in the College Football National Championship.¹⁶⁸ The two semifinal games rotate among six bowls: Cotton, Fiesta, Orange, Peach, Rose, and Sugar.¹⁶⁹ The

¹⁶⁴ *Id.*

¹⁶⁵ Jon Soloman, *College Football's Average Bowl Rating Drops to Lowest During BCS Era*, USA TODAY, http://usatoday30.usatoday.com/news/opinion/forum/2010-12-09-column09_ST2_N.htm (last accessed February 03, 2015).

¹⁶⁶ *See supra* notes 100-01 and accompanying text (noting that Hancock's de facto predecessor, Roy Kramer, shot down Dooley's NCAA proposal in favor of the Coalition).

¹⁶⁷ *Governance*, COLLEGE FOOTBALL PLAYOFF, <http://www.collegefootballplayoff.com/governance> (last accessed February 10, 2015). CFP Administration, LLC, a limited liability corporation, was formed on March 13, 2013. Its stated purpose: Manage the administrative functions of the College Football Playoff. A Board of Managers, which consists of a university president or chancellor nominated by each member, governs the LLC. A Management Committee of the Football Bowl Subdivision commissioners and the Notre Dame athletics director manages its day-to-day operations. This Committee appoints the Athletics Directors Advisory Group and the Selection Committee.

¹⁶⁸ *About – Overview*, COLLEGE FOOTBALL PLAYOFF, <http://www.collegefootballplayoff.com/overview> (last accessed February 04, 2015) [hereinafter *CFP Overview*].

¹⁶⁹ *Id.* The Orange, Rose, and Sugar Bowls are contracted outside the CFP arrangement (ACC to Orange Bowl against the highest ranked available team

“New Year’s Six,” as this rotation has been dubbed, is played in back-to-back triple-headers on New Year’s Eve and New Year’s Day¹⁷⁰ – with four of the games having no title implications. The championship game, matching the winner of the two semifinal bowls, is then played on the first Monday that is six or more days after the semifinals.¹⁷¹

In the inaugural season, the following teams were chosen by the Playoff committee as the top four seeds: (1) Alabama; (2) Oregon; (3) Florida State; (4) Ohio State.¹⁷² In the semifinal games, the Ohio State Buckeyes outscored the Alabama Crimson Tide 42-35 in the Sugar Bowl, while the Oregon Ducks shellacked the Florida State Seminoles 59-20 in the Rose Bowl.¹⁷³

from the SEC, Big Ten, and Notre Dame; Big Ten and Pac-12 to Rose Bowl; and SEC and Big 12 to Sugar Bowl). If a conference champion qualifies for the playoff, then the bowl chooses a replacement from that conference. When those bowls host the semifinals and their contracted conference champions do not qualify, then the displaced champion(s) will play in the Cotton, Fiesta, or Peach Bowl.

¹⁷⁰ John Ourand and Michael Smith, *ESPN, NFL Lobby for Changes in College Football Playoff Calendar*, SPORTS BUS. DAILY, <http://www.sportsbusinessdaily.com/Journal/Issues/2015/01/26/Events-and-Attractions/CFP.aspx> (last accessed February 03, 2015). In the 2015-16 season, the CFP semifinals are slated to appear on New Year’s Eve. ESPN is pressuring the CFP to move these games to Saturday, January 02, 2016. That night offers little competition and, thus, affords a better chance for stronger ratings and higher advertising rates. The CFP, nonetheless, is holding firm on its commitment to hold triple-header games on consecutive nights over the New Year’s holiday.

¹⁷¹ *Id.* The NFL, which is considering a playoff expansion, is lobbying the CFP to move its title game. The NFL anticipates moving one of its potential new games to the Monday slot, but does not want to engage in a ratings’ war with the CFP.

¹⁷² *College Football Playoff Schedule*, FB SCHEDULES, <http://www.fbschedules.com/ncaa/college-football-playoff-schedule.php> (last accessed February 08, 2015). Rounding out the New Year’s Six were Michigan State versus Baylor in the Cotton; Boise State versus Arizona in the Fiesta; Georgia Tech versus Mississippi State in the Orange; and TCU versus Mississippi in the Peach.

¹⁷³ *Id.* Outside the playoff, the Spartans came back to edge the Bears (42-41) in the Cotton; the perennial outsiders, the Broncos upset the Wildcats (38-30) in

On Monday night, January 12, 2015, Urban Meyer's Buckeyes routed Heisman trophy winner Marcus Mariota's Ducks 42-20 to capture the first CFP title.¹⁷⁴

ii. The Game Plan Behind the Scenes: CFP Methodology

The methodology used by the committee to choose its teams (similar to the one used to choose the participants in college basketball's March Madness tournament) is, on the surface, straightforward: A 13-person selection committee ranks the top 25 teams and then determines match-ups for the New Year's Six.¹⁷⁵ The inaugural committee included one current athletic director from each of the Power Five conferences and an assortment of former coaches, players, athletic directors, administrators, and a retired member of the media.¹⁷⁶ The committee members are to

the Fiesta; the Yellow Jackets handled the Bulldogs (49-34) in the Orange; and the Horned Frogs silenced their critics with a thrashing of the Rebels (42-3) in the Peach.

¹⁷⁴ Stewart Mandel, *Urban Meyer, Nation's Best Coach, is Starting an Ohio State Dynasty*, FOX SPORTS, <http://www.foxsports.com/college-football/story/ohio-state-buckeyes-oregon-ducks-national-title-urban-meyer-osu-dynasty-011315> (last accessed February 4, 2015). Urban Meyer has won three national titles (two with Florida and one with Ohio State).

¹⁷⁵ *Selection Committee*, COLLEGE FOOTBALL PLAYOFF, <http://www.collegefootballplayoff.com/selection-committee-faqs> (last accessed February 04, 2015) [hereinafter *Selection Committee*].

¹⁷⁶ *Id.* Arkansas (SEC) athletic director Jeff Long serves as the chairman. The other Power Five representatives include Barry Alvarez of Wisconsin (Big Ten); Pat Haden of USC (Pac-12); Oliver Luck of West Virginia (Big 12); and Dan Radakovich of Clemson (ACC). The other eight members are as follows: Lieutenant General Michael Gould (former Air Force Academy superintendent); Tom Jernstedt (former NCAA executive vice president); Archie Manning (former NFL and Ole Miss quarterback); Tom Osborne (former Nebraska coach and athletic director); Condoleezza Rice (former U.S. Secretary of State and Stanford professor); Mike Tranchese (former Big East commissioner); Steve Wieberg (former USA Today reporter); Tyrone Willingham (former Notre Dame, Stanford, and Washington coach); AP, *Texas Tech AD Kirby Hocutt Appointed to Playoff Selection Committee*, FOX SPORTS, <http://www.foxsports.com/college-football/story/texas-tech-athletic-director->

serve three-year terms and exclude current conference commissioners, coaches, and media members.¹⁷⁷ The committee (also like the March Madness Selection Committee) employs a recusal policy to endorse transparency and objectivity.¹⁷⁸

The committee is tasked with submitting weekly rounds of selection ballots in the last seven weeks of the regular season.¹⁷⁹ Unlike its predecessor, the CFP does not use independent polls or computer rankings to make the selections.¹⁸⁰ Instead,

[kirby-hocutt-appointed-to-playoff-selection-committee-020915](#) (last accessed February 10, 2015). Long was re-elected as the committee's chairman for the 2015-16 season. Texas Tech AD, Kirby Hocutt, fills the Big 12 void left by Luck's departure for a job with the NCAA. Critics suggest that Hocutt's nomination was in response to Baylor AD's Art Briles' criticism that the committee lacked a Texas connection; *Bobby Johnson to Replace Archie Manning on Playoff Selection Committee*, USA TODAY, <http://www.usatoday.com/story/sports/ncaaf/2015/03/27/bobby-johnson-replaces-archie-manning-college-football-playoff-selection-committee/70548606/> (last accessed August 04, 2015). Manning, who took a medical leave of absence for the inaugural season, was replaced by Bobby Johnson (former college football player and head coach) in the committee's second season.

¹⁷⁷ *Selection Committee*, *supra* note 175. Terms will be staggered to allow for an eventual rotation of members. Until the ideal rotation has been achieved, however, certain terms will vary.

¹⁷⁸ *Id.* The policy, in part, provides: "If a committee member or an immediate family member, e.g., spouse, sibling or a child: (a) is compensated by a school; (b) provides professional services for a school; or (c) is on the coaching staff or administrative staff at a school or is a football student-athlete at a school, that member will be recused."

¹⁷⁹ *Id.* The Playoff committee will reveal weekly rankings on Tuesday and then its final ranking on the Sunday following the regular season. The last ballot will also determine the match-ups for the semifinals and CFP bowls not obligated by contract; Stewart Mandel, *College Football Playoff to Release Polls... But Why?*, SPORTSILLUSTRATED, <http://www.si.com/college-football/2014/04/30/college-football-playoff-top-25-polls> (last accessed February 8, 2015). Mandel opines that the selection committee should stay true to its stated purpose and "replace the simplistic horse-race nature of Top 25 polls — where teams only move up if someone above them loses — with a more deliberative evaluation method."

¹⁸⁰ *Selection Committee*, *supra* note 175.

the CFP asks the committee to consider criteria that favors results from the regular season.¹⁸¹ Chief considerations include a team's strength of schedule, conference championships, team records, and head-to-head results (with no weight on margin of victory).¹⁸² Other gauges look to the tenuous connections between common opponents and opponents' opponents' records, as well as peripheral measures such as key injuries.¹⁸³

iii. To the Chosen Go the Spoils: CFP Revenue Structure

The CFP structure is bankrolled by a \$7.3 billion-deal with ESPN.¹⁸⁴ Inked in 2012, the deal guarantees ESPN exclusive broadcasting rights to the CFP for 12 years at a per-season average of \$608 million.¹⁸⁵ By comparison, the most recent contract with the BCS was valued at \$2 billion over four years for an average of \$500 million per year.¹⁸⁶ In an effort to hedge its gamble, ESPN signed deals with 15 national sponsors and 15 local sponsors.¹⁸⁷ The CFP's mega sponsor, Dr. Pepper, for instance,

¹⁸¹ *Id.*

¹⁸² *Id.*; but see Matt Hayes, *Just Admit It, CFP Committee: It's All About the Eye Test*, SPORTING NEWS, <http://www.sportingnews.com/ncaa-football/story/2014-12-02/college-football-playoff-committee-florida-state-tcu-alabama-oregon-baylor-ohio-> (last accessed February 09, 2015) (arguing that the committee strayed from metrics in favor of "concepts" such as hot teams, good losses, and the so-called eye test).

¹⁸³ *Selection Committee*, *supra* note 175; Mandell, *supra* note 179. The key-injuries factor is seemingly less decisive when considering Ohio State's inclusion after losing two Heisman-caliber quarterbacks to injury. The Buckeye's resilience and continued excellence with third-string quarterback Cardale Jones undoubtedly validated the decision to place less weight on this factor.

¹⁸⁴ ESPN's \$7.3 Billion Bet on College Football Playoff Pays Off, CNNMONEY, <http://money.cnn.com/2015/01/12/media/espn-college-football-playoff-pays-off/> (last accessed February 10, 2015).

¹⁸⁵ *Id.*

¹⁸⁶ See *supra* note 124. BCS contract covered five games while the CFP contract encompasses seven.

¹⁸⁷ *Sponsors*, COLLEGE FOOTBALL PLAYOFF, <http://www.collegefootballplayoff.com/sponsors#game-sponsors> (last accessed February 12, 2015).

will pay \$30-35 million per year as the “presenting sponsorship of the CFP trophy” until 2020.¹⁸⁸

In the first year of the contract, CFP revenue will reach approximately \$500 million after operational expenses.¹⁸⁹ The majority of this money will go to the Power Five conferences: \$250 million base share; \$24 million split among the conferences that place a semifinal team; \$20 million split among the Power Five conferences that place a team or teams in the host bowls (Cotton, Fiesta, and Peach); and \$27.5 million for placement in a contract bowl (Orange).¹⁹⁰ The Group of Five conferences will receive a \$75 million share to distribute in the aggregate.¹⁹¹ As for the independents, Notre Dame will receive \$2.3 million, while BYU, Army, and Navy will split just under \$1 million.¹⁹²

¹⁸⁸ Michael Smith, *How Dr. Pepper Uses Its Conference Ties to Reach Top Shelf of College Football's Postseason*, BIZ J., <http://www.bizjournals.com/dallas/print-edition/2014/12/12/cover-story-how-dr-pepper-used-its-conference-ties.html?page=all> (last accessed February 13, 2015). Dr. Pepper's college football roots date back to the inaugural SEC championship game in 1992. In 2015, Dr. Pepper's portfolio includes contracts with all Power Five conferences in addition to the CFP.

¹⁸⁹ *Revenue Distribution*, COLLEGE FOOTBALL PLAYOFF, <http://www.collegefootballplayoff.com/revenue-distribution> (last accessed February 11, 2015). The CFP notes that the revenues will fluctuate year-to-year depending on the sites of the semifinal and championship games, as well as the gross revenue from all games.

¹⁹⁰ *Id.* These figures do not include revenue from the Rose and Sugar Bowls, which are hosting the semifinals this season. The Big Ten and Pac-12 have an \$80 million contract to split evenly in the years the Rose Bowl does not host a semifinal game. The SEC and Big 12 have a similar contract with the Sugar Bowl for the same amount. Another source of revenue includes the NCAA's Academic Progress Rate (“APR”) allotment: Each Power Five conference will receive \$300,000 for each school's football team that meets APR for participation in a postseason football game. Each independent institution will also receive the \$300,000 allotment when its football team meets that standard.

¹⁹¹ *Id.* This number will be boosted, albeit slightly, by the APR allotment.

¹⁹² *Id.* Notre Dame's share hinges on the Irish meeting the APR standard. The other three independents will share \$922,658.

Under this structure, the entity controlling the money is clearly the Power Five.¹⁹³ In year one, for instance, the ACC and SEC each took in \$83.5 million; the Big Ten and Pac-12 \$60 million; and the Big 12 \$58 million.¹⁹⁴ The Group of Five conferences, on the other hand, took in an average of \$12 million per conference.¹⁹⁵ The remaining \$15 million was reportedly split according to computer rankings.¹⁹⁶

Perhaps the biggest revenue winner in year one is ESPN.¹⁹⁷ The CFP proved to be a rating's jackpot for the network: According to Nielsen, the two semifinals games averaged a 15.0 rating and 28.2 million audience, while the championship had a staggering 18.2 rating with a 33.4 million audience.¹⁹⁸ The inaugural CFP title game represents the largest audience and highest rating in cable television history.¹⁹⁹ And, perhaps most important to ESPN, is the likely increase in future advertising rates.²⁰⁰ In the

¹⁹³ *Id.*

¹⁹⁴ Kristi Dosh, *College Football Playoff: Conference Payouts*, BUS. OF COLLEGE SPORTS, <http://businessofcollegesports.com/2014/12/08/college-football-playoff-conference-payouts/> (last accessed February 11, 2015).

¹⁹⁵ *Id.* The Mountain West received an additional \$4 million for Boise State's placement in the Fiesta Bowl.

¹⁹⁶ *Id.*

¹⁹⁷ Sheldon Spencer, *College Football Playoffs National Championship One of the Top 20 Most-Viewed Programs in Cable TV History*, WALT DISNEY CO., <https://thewaltdisneycompany.com/blog/college-football-playoffs-national-championship-one-top-20-most-viewed-programs-cable-tv-hist-0> (last accessed February 12, 2015); Cork Gaines, *ESPN Won the Lottery With The First-Ever College Football Playoff*, BUS. INSIDER, <http://www.businessinsider.com/espn-college-football-playoff-2015-1> (last accessed February 12, 2015).

¹⁹⁸ Cork Gaines, *ESPN Won the Lottery with The First-Ever College Football Playoff*, BUS. INSIDER, <http://www.businessinsider.com/espn-college-football-playoff-2015-1> (last accessed February 12, 2015).

¹⁹⁹ *Id.* The CFP's rating success helped propel ESPN as 2014's most-watched cable network in primetime. The success also gave ESPN telecasts every spot in cable's all-time Top 20.

²⁰⁰ Christopher Heine, *ESPN Scores Highest Cable TV Rating Ever with College Football's First Playoff Championship*, AD WEEK,

first year, advertisers were reportedly charged \$1 million per 30-second spot in the championship game, a figure almost certain to rise thanks to the historic ratings of the Ohio State-Oregon championship game.²⁰¹

III. BREAKING DOWN THE COMPETITION: ANTITRUST ANALYSIS

College football and the Sherman Act emerged during an era of rapid economic growth known as the Gilded Age.²⁰² Later to become formally known as the Sherman Antitrust Act of 1890,²⁰³ this federal legislation was designed to both curb business activities deemed anticompetitive and authorize the government's investigation and pursuit of trusts.²⁰⁴ Sherman's first meaningful challenge came in *U.S. v. E.C. Knight Company*.²⁰⁵ In this case, the United States Supreme Court reduced Sherman to a paper tiger by restricting its reach to monopolies through a narrow interpretation of interstate commerce.²⁰⁶ This ruling, in turn, encouraged wealthy

<http://www.adweek.com/news/television/its-official-espn-scored-cables-highest-ratings-ever-college-football-championship-162333> (last accessed February 12, 2015).

²⁰¹ *Id.*

²⁰² See JACK BEATTY, *AGE OF BETRAYAL: THE TRIUMPH OF MONEY IN AMERICA 1865-1900* (1st ed. 2007). This book recounts how this age created industrial titans and financiers such as John D. Rockefeller, Andrew Carnegie, and J.P. Morgan, who, according to their critics, accumulated unprecedented wealth at the expense of the working class. Their supporters, however, point to their countering acts of philanthropy); see also MARK TWAIN AND CHARLES DUDLEY WARNER, *THE GILDED AGE: A TALE OF TODAY*. Twain and Warner, who are both credited with coining the term, "The Gilded Age," critique the greed and corruption that plagued America after the Civil War. Per the satirists, a thin layer of gold gilded society's ills.

²⁰³ Sherman Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§1-7 (Westlaw 2012)).

²⁰⁴ *Id.*

²⁰⁵ *U.S. v. E.C. Knight Co.*, 156 U.S. 1, 9 (1895). The monopoly at issue was American Sugar Refining Company, which, as a result of four stock purchases, acquired nearly complete control of the manufacture of refined sugar within the United States.

²⁰⁶ *Id.* at 16-17. The Court held that the manufacturing of sugar is not interstate commerce because such operations occur entirely in one state. In short, the

capitalists to continue their exploitation of the trust device in numerous other industries.²⁰⁷

In 1902 President Theodore Roosevelt sharpened Sherman's teeth when he directed the Justice Department to file suit against Northern Securities Company on the grounds the railroad conglomerate was an illegal restraint of trade.²⁰⁸ The Supreme Court agreed with his estimation in *Northern Securities Co. v. U.S.*²⁰⁹ and verified President Roosevelt's reputation as the "trust buster."²¹⁰ President Roosevelt's groundwork would eventually spur the breakup of Standard Oil²¹¹ and American Tobacco,²¹² while also hastening Congress to close Sherman loopholes.²¹³

Court held that Congress has the power to regulate trade but not manufacturing); *but see* N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937). The Court expanded the federal oversight of the economy by holding that intrastate commercial activities, like manufacturing, may be deemed a part of interstate commerce if such activity has a "close and substantial relationship" to interstate commerce.

²⁰⁷ See BEATTY, *supra* note 202. Some of the largest industries (in addition to sugar) included tobacco, railroads, steel, and meatpacking. Perhaps the most infamous act of exploitation was by the Standard Oil Trust, which was devised by Rockefeller attorney Samuel Dodd in January of 1882. At that time, Standard Oil (and its affiliates) controlled over 90 percent of the oil refining capacity and most of the oil marketing facilities in the United States.

²⁰⁸ *The Northern Securities Case*, THEODORE ROOSEVELT CENTER, <http://www.theodorerooseveltcenter.org/Learn-About-TR/TR-Encyclopedia/Capitalism-and-Labor/The-Northern-Securities-Case.aspx> (last accessed February 16, 2015). The holding company resulted when railroad competitors James J. Hill and Edward H. Harriman joined forces to create the monopoly with J.P. Morgan and Rockefeller.

²⁰⁹ N. Sec. v. U.S., 193 U.S. 197 (1904).

²¹⁰ Theodore Roosevelt Center, *supra* note 206; *see also* Swift & Co. v. U.S., 196 U.S. 375 (1905). President Roosevelt's "trust busting" extended to the meatpacking industry, which, according to the Court, was within the purview of government regulation since it directly impacted interstate commerce.

²¹¹ Standard Oil Co. of N.J. v. U.S., 221 U.S. 1, 52, 62 (1911). The Court identified three consequences (higher prices, reduced output, and reduced quality) in its ruling that Standard Oil "unduly" restrained trade. This case is significant because of the Court's reassertion of the "rule of reason" doctrine.

The following sections initially examine the evolution of antitrust jurisprudence since the trust-busting campaigns; specifically, in the context of Sherman's application to the NCAA. The next section analyzes the relevant market at issue and applies the rule of reason test to determine the CFP's legality. This section also considers less-restrictive alternatives to the CFP's current format. The third and final section considers alternative recourses to antitrust litigation.

A. Momentum Shift: Antitrust Marches into NCAA Territory

The NCAA has been historically shielded from antitrust scrutiny because of its steadfast preservation of the union between amateurism and education.²¹⁴ This general immunity, however, eroded as courts began taking notice of the NCAA's yield to commercialism.²¹⁵

The Supreme Court Justices took notice of the NCAA's philosophical shift in *Board of Regents*.²¹⁶ This watershed case was

²¹² U.S. v. American Tobacco Co., 221 U.S. 106 (1911). American Tobacco employed the same logic as Standard Oil, which had its fate decided on the same day.

²¹³ See, e.g., Clayton Act, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§12-27, 29 U.S.C. §§52-53 (Westlaw 2012)).

²¹⁴ Richard E. Kaye, *Application of Federal Antitrust Laws to Collegiate Sports*, 87 A.L.R. FED. 2d 43, §1 (2014).

²¹⁵ *Id.*; see generally *supra* Part II(b)(i)-(iii) (discussing the NCAA's commercial shift during Byers' tenure and its progression into the billion dollar industry during the BCS era); Richard J. Hunter & Ann M. Mayo, *Issues in Antitrust, the NCAA, and Sports Management*, 10 MARQ. SPORTS L.J. 69, 73-74 (1999).

"[T]he more you commercialize what you do," explained Indiana School of Law Professor Gary Roberts, "the more you make judges think that antitrust laws should apply to you"; *Meet Our Staff*, ROBERT H. MCKINNEY SCHOOL OF LAW, <http://mckinneylaw.iu.edu/faculty-staff/profile.cfm?Id=313> (last accessed February 19, 2015). At the time of this quote, Professor Roberts taught at Tulane University. He now teaches law at Indiana University.

²¹⁶ *Bd. of Regents*, 468 U.S. at 85. Prior to granting certiorari, several lower courts had recognized that the NCAA's commercialism had exposed the non-profit entity to antitrust scrutiny; see, e.g., *Hennessey v. Nat'l Collegiate Athlet-*

not only significant because it ignited college football's television explosion, but also because it provided guidance to those courts later confronted with antitrust issues in the amateur sport context.²¹⁷ Justice John Paul Stevens's majority opinion, specifically, examined whether the NCAA's broadcasting restrictions were per se unlawful under Sherman.²¹⁸ Justice Stevens characterized the NCAA's procompetitive justifications (i.e., protecting gate attendance and maintaining a competitive balance) as essential horizontal restraints "if the [college football] product is to be available at all."²¹⁹ Such necessities made a per se test improper and, therefore, a truncated rule of reason doctrine was utilized to balance the anticompetitive effects against the procompetitive justifications.²²⁰ Justice Stevens ultimately reasoned that the restraints violated Sherman and, in turn, endorsed the rule of reason as the go-to doctrine in similar cases.²²¹

ic Ass'n., 564 F.2d 1136, 1140, 1149 (5th Cir. 1977) (noting that the NCAA's multimillion dollar budget and the \$20,000,000 television contract negotiated for its members demonstrated that the NCAA was a large business venture); Justice vs. Nat'l Collegiate Athletic Ass'n., 577 F.Supp 356, 378 (D. Ariz. 1983) (recognizing that interstate commerce is implicated by the multimillion dollar bids behind the nation-wide television broadcasts).

²¹⁷ See *supra* Part II(b)(i)-(iii) (recounting *Board of Regents'* effect on the college football landscape, namely the money-grab accompanying the multiple realignment shakeups).

²¹⁸ *Bd. of Regents*, 468 U.S. at 85.

²¹⁹ *Id.* at 101.

²²⁰ *Id.* at 109. (quoting *Nat'l Soc'y of Prof'l Eng'rs v. U.S.*, 435 U.S. 679, 692 (1978)). Justice Stevens applied a truncated rule of reason analysis (now known as "quick look") because the significant potential for anticompetitive effects negated the required demonstration that the NCAA had market power: "As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, where there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'"

²²¹ *Id.* at 114-17, 203; but see Tibor Nagy, *The "Blind Look" Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS. L. REV. 331 (2005) (arguing that subsequent courts have misapplied the *Board of Regents'* logic to bypass the first step in the tradition rule of reason inquiry. That is, courts have deferred to the quick look analysis and presumed

Since *Board of Regents*, the Supreme Court has not had occasion to refine or clarify its application of Sherman to the NCAA.²²² Lower courts, on the other hand, have addressed various antitrust issues affecting collegiate sports.²²³ Such litigation ranged from the NCAA's limitations on eligibility²²⁴ to the earnings of coaches.²²⁵ During this time, however, no lawsuit has been filed against the BCS or its two predecessors. And although the BCS endured controversy on an annual basis, the legal challenges it faced did not extend beyond academia,²²⁶ political grandstanding,²²⁷ a political action committee,²²⁸ or congressional hearings.²²⁹

that any challenged NCAA's amateurism rules were lawful and, thus, no factual inquiries into the proffered precompetitive justifications necessary).

²²² Nagy, *supra* note 221, at 339.

²²³ *Id.* at 349-358.

²²⁴ See *Banks v. Nat'l Collegiate Athletic Ass'n*, 977 N.W.2d 1081, (7th Cir. 1992) (applying the rule of reason to hold that the NCAA's eligibility rules preserved amateurism and, thus, outweighed any anticompetitive effects).

²²⁵ See *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010 (10th Cir. 1998) (utilizing the rule of reason to hold that the NCAA could not restrict the earnings of coaches).

²²⁶ See, e.g., Jasen Corns, *Pigskin Paydirt: The Thriving of College Football within the Bowl Championship Series*, 39 TULSA L. REV. 167 (2005) (arguing that the anticompetitive nature of the BCS exposes the arrangement to antitrust scrutiny); Katherine McClelland, *Should College Football's Currency Read "In BCS We Trust" or Is It Just Monopoly Money: Antitrust Implications of the Bowl Championship Series*, 37 TEX. TECH. L. REV. 167, 175 (2004) (claiming that the vast inequality between the BCS and non-BCS schools constitute an antitrust violation); Jodi M. Warmbrod, *Antitrust in Amateur Athletic: Fourth and Long: Why Non-BCS Universities Should Punt Rather Than Go For An Antitrust Challenge to the Bowl Championship Series*, 57 OKLA. L. REV. 333, 379 (2004) (contending that *Sherman* is the improper recourse for achieving reform in college football); Schmit, *supra* note 8, at 246-50 (maintaining that the BCS is rampant with inherent inequality and, thus, within the purview of *Sherman*); Michael A. McCann, *Antitrust, Governance, and Postseason College Football*, 52 B.C.L. REV. 517, 549 (2011) (recognizing the anticompetitive effects of the BCS but noting that its procompetitive virtues would dominate a rule of reason analysis); Nathaniel Grow, *Antitrust & the Bowl Championship Series*, 2 HARV. J. SPORTS & ENT. L. 53, 98 (2011) (indicating that BCS is prone to *Sherman* liability because its precompetitive justifications could be achieved through less restrictive means); David L. Ricci, *The Worst Form of Champion-*

Recently, the United States District Court for the Northern District of California issued a landmark decision in *O'Bannon v. Nat'l Collegiate Athletic Ass'n*.²³⁰ The intricacies of this case go beyond this article's scope, but the ruling is noteworthy in its big-business characterization of the NCAA and application of the "less restrictive alternative" prong in its rule of reason inquiry.²³¹ *O'Bannon*, if it survives appeal, will likely trigger a earthshaking

ship, Except for All of the Others that Have Been Tried: Analyzing the Potential Anti-Trust Vulnerability of the Bowl Championship Series, 19 VILL. SPORTS & ENT. L.J. 542, 601 (2012) (suggesting that replacing the BCS might create even greater inequality within the ranks of college football); Trevor Jack, *Blue Field of Dreams: A BCS Antitrust Analysis*, 39 J.C. & U.L. 165, 210 (2013) (advocating for alternative recourses to antitrust litigation that remove anticompetitive barriers within the BCS structure).

²²⁷ Wetzel, ET. AL., *supra* note 15, at 196-97, 213. Utah Attorney General Mark Shurtleff, for example, threatened to file an antitrust lawsuit against the BCS in 2011. During the 2008 Presidential Campaign, political opponents Barack Obama and John McCain found compromise on their disdain for the BCS.

²²⁸ *Id.* at 197. Playoff PAC, a non-profit committee, was designed to expose the BCS and apply public pressure for reformation.

²²⁹ See, e.g., Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series: Oversight Hearing Before the H. Comm. on the Judiciary, 108th Cong. (2003) available at http://commdocs.house.gov/committees/judiciary/hju89198.000/hju89198_0f.htm; BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field: Hearing Before the S. Judiciary Comm., 108th Cong., available at <https://www.gpo.gov/fdsys/pkg/CHRG-108shrg93795/pdf/CHRG-108shrg93795.pdf> (2003); Review of Selection Process for College Football Bowl Games: Oversight Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce, 109th Cong., available at <https://www.gpo.gov/fdsys/pkg/CRPT-109hrpt751/html/CRPT-109hrpt751.htm> (2005); The Bowl Championship Series: Money and Other Issues of Fairness for Publicly Financed Universities: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce, 111th Cong. available at <https://www.gpo.gov/fdsys/pkg/CRPT-111hrpt706/html/CRPT-111hrpt706.htm> (2009).

²³⁰ See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 1009 (N.D. Cal. 2014) (applying rule of reason test to hold that the NCAA's rules limiting compensation to college athletes unreasonably restrained trade under the Sherman Act).

²³¹ *Id.* at 978-79 and 1004-07.

wave through the collegiate athletic landscape and might serve as an impetus for a legitimate antitrust challenge to the CFP.

B. Opponent's Tendencies: The Antitrust Implications of the CFP

The plaintiff in an antitrust suit against the CFP, whether it is the Department of Justice, a Group of Five conference, a university, or a state attorney general, would center its complaint on Section 1 of Sherman.²³² The court would then be tasked with balancing a plaintiff's claim against the rule of reason test.²³³ This inquiry generally involves a three-step process.²³⁴ The plaintiff must initially prove that the restraint has an adverse effect on competition in a relevant market.²³⁵ If the plaintiff succeeds, the burden then shifts to the defendant to demonstrate that the restraint has procompetitive benefits.²³⁶ And finally, if the plaintiff demonstrates that the challenged conduct has redeeming competitive qualities, the court will then determine whether the asserted procompetitive benefits could be achieved through less restrictive means.²³⁷

²³² 15 U.S.C. at §1. Section 1 prohibits any unreasonable contracts, combinations, and conspiracies in restraint of trade; *see supra* notes 224-25 and accompanying text (applying §1 in the collegiate athletic context); *see also* McCann, *supra* note 226, at 540-41 (dismissing §2 as the less effective route for an actionable claim against the BCS).

²³³ *See* Grow, *supra* note 226, at 73 (recognizing that, under *Board of Regents*, commentators generally utilize the rule of reason doctrine to parse out alleged BCS antitrust violations); *see also* Schmit, *supra* note 8, at 240-42 (arguing that the many moving parts within the college football dynamic warrant rule of reason rather than the per se and quick look tests).

²³⁴ *See* Grow, *supra* note 226, at 72 (outlining the three steps for a rule of reason analysis).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 72-3.

i. Finding a Hole: Threshold Issue

Before advancing into the rule of reason inquiry, a plaintiff must first define the relevant market.²³⁸ Clearing this hurdle is essential and could prove fatal if the definition is imprecise.²³⁹ Market definition considers two facets that, when combined, aid the fact-finder in understanding the competitive effects of a challenged restriction on a particular industry.²⁴⁰

The first facet includes the products and services that make up the relevant market.²⁴¹ In *Board of Regents*, for example, the relevant market was defined as “live college football television.”²⁴² In a CFP lawsuit, the market could be defined as the market for the semifinals and championship game. This would surely be too narrow since there are four other games under the CFP format. The plaintiff could alternatively cast a wide net and define the market as all bowl games. This would undoubtedly be too broad when considering, for example, the vast economic gap between the Rose Bowl and the Famous Idaho Potato Bowl.²⁴³

²³⁸ Kaye, *supra* note 214, at §3.

²³⁹ *Id.* The author cites *Rock v. Nat’l College Athletic Ass’n.*, 2013 WL 4479815 (S.D. Ind. 2013) to illustrate the dangers of either an overly-broad or overly-narrow market definition.

²⁴⁰ Ricci, *supra* note 226, at 567. This article adopts Ricci’s analysis of market definition by supplanting the BCS with the CFP; *see also* Kaye, *supra* note 214, at §3. In *Rock*, the plaintiff’s successfully plead “the rough contours of a relevant market that [was] plausible on its face and in which anticompetitive effects of the challenged regulations could be felt.”

²⁴¹ Ricci, *supra* note 226, at 567.

²⁴² *Bd. of Regents*, 468 U.S. at 84.

²⁴³ Ricci, *supra* note 226, at 568. Ricci argued that an overly broad market definition is problematic “because some bowl games are inherently more valuable than others as measured by broadcast ratings.” Ricci then suggests that such a broad definition is an example of the “cellophane fallacy,” which theorizes that “sometimes demand for the ‘substitutes’ increases because the super-competitive price of the preferred product makes otherwise uncompetitive products appealing”; *College Football Poll*, *supra* note 19. The Rose Bowl, for instance, paid out \$18 million per team and the Idaho Potato Bowl paid out \$325,000 per team.

Therefore, the correct market definition would likely be the market for the “New Year’s Six and the Championship Game.”²⁴⁴

The second facet identifies the interdependent market participants.²⁴⁵ The many moving parts involved within the CFP dynamic is best understood through the following manufacturing analogy:

The [CFP] play[s] the role of a vertically joint venture that produces college football games and markets them to end consumers. It has contracts with the “suppliers” [Power Five, Group of Five, and Independents] to supply its six “factories” [New Year’s Six and Championship Game] with “raw materials” [individual teams], and then sells its “products” [college football games] as a bundled package to [ESPN].²⁴⁶

The NCAA’s role in this chain is limited to the regulation of the “suppliers” so as to ensure that the “raw materials” are produced pursuant to certain guidelines and, thus, interchangeable with other raw materials from other suppliers in the trade

²⁴⁴ Ricci, *supra* note 226, at 570-71. Ricci defined the relevant market for a BCS lawsuit as “high level college football games.” This definition included the BCS games and other rating generators such as the Capital One Bowl. Ricci proposed a compelling argument that analyzed the inverse relationship between the ratings of BCS games and other high-level bowls. In short, the writer surmised that a hypothetical monopolist could institute a profitable non-transitory price increase if the most attractive bowl games were bundled in one package. This, according to Ricci, suggested that the BCS did not, by itself, constitute the entire relevant market. Likewise, the CFP does not make up the entire market. Even so, this article limits its market definition to the “New Year’s Six and the Championship Game” to simplify the rule of reason analysis and avoid the pitfalls of a broad definition.

²⁴⁵ *Id.* at 572.

²⁴⁶ *Id.* at 572-73.

organization.²⁴⁷ The second facet ultimately serves to aid the fact-finder's understanding of the layers within the "New Year's Six and Championship Game" market.

ii. Assessing Weakness: Anticompetitive Effects of the CFP

With the relevant market defined, the plaintiff is now tasked with establishing the anticompetitive effects of the "New Year's Six and Championship Game."²⁴⁸ This demonstration relies on the data from the inaugural CFP season, but also considers figures and trends from past BCS seasons to help forecast how the monopolistic tendencies might alter the college football landscape. In short, the CFP is calculated to avoid dealing with the mid-majors on equivalent terms. That is, the format, methodology, and revenue structures of the CFP combine to exact a group boycott on the Group of Five conferences. Furthermore, the secondary effects that flow from these structures amplifies the anticompetitive effects of the CFP.

1. Restricted Format

The CFP format is anticompetitive in its guarantee of only one spot to the Group of Five in the New Year's Six.²⁴⁹ The only opportunity for another spot hinges on an unlikely berth into the semifinals.²⁵⁰ In the inaugural season, the guaranteed spot was granted to Boise State after the Broncos climbed to No. 20 at the close of the regular season.²⁵¹ No other Group of Five school broke the top 25 in the final week and only two other mid-major teams, in fact, made brief appearances within the CFP week-

²⁴⁷ *Id.* at 570-71 573.

²⁴⁸ *See* Grow, *supra* note 226, at 72.

²⁴⁹ *See Overview of the CFP*, *supra* note 168. Under the CFP, the "top-ranked from a non-contract conference" will gain access to the bowls outside the semifinal rotation.

²⁵⁰ *Id.*

²⁵¹ *CFP Rankings*, *supra* note 9. Boise State's progression in the CFP rankings started at No. 23 in Week 14; No. 22 in Week 15; and No. 20 in the Week 16.

ly rankings.²⁵² There was not, in other words, occasion for a Group of Five school to gain access beyond the guaranteed spot. But what about the atypical season when two Cinderella schools ascend to the top of the rankings? In the BCS era, TCU (then a member of the non-AQ Mountain West) was the lone mid-major school in 16 seasons to manage a final top-four ranking and did so only twice (No. 4 in 2009 and No. 3 in 2010).²⁵³ Such evidence points to the improbability that the CFP format will enable Group of Five access beyond the one-spot guarantee.²⁵⁴

Additionally, the fact that the five major conferences are vying for four spots does not bode well for the mid-majors and spells a continuing trend of future exclusion. As previously stated, the two top teams in the Big 12 (one of which, coincidentally, was TCU) were denied access into the semifinals.²⁵⁵ It stands to reason that the presence of such controversy within the Power Five will, therefore, extinguish the hopes that the Group of Five will be granted anything but the one allotted invite into the New Year's Six. Ultimately, the format is inherently anti-

²⁵² *Id.* Following week 10, East Carolina of the AAC was ranked No. 23 in the first CFP poll. The Pirates lost the following week and were ousted from the top 25. In Week 14, 11-0 Marshall was ranked one behind Boise State at No. 24. Marshall's undefeated run was cut short and the Thundering Herd, like the Pirates, were only able to stay in the CFP rankings for one week. Week 14 was the only week with the presence of more than one Group of Five school. Weeks 11-13 did not include a Group of Five school.

²⁵³ *College Football Poll*, *supra* note 19. During those seasons, Boise State was the next highest-rated non-BCS school at No. 6 in 2009 and No. 10 in 2010. Under the CFP, the Broncos would have been guaranteed a spot in the New Year's Six pending TCU's inclusion in the CFP Playoff.

²⁵⁴ See Schmit, *supra* note 8, at 246 (noting that the BCS allowed for automatic qualification standards, which, in theory, enabled mid-majors to earn an automatic bid). The CFP, however, does not have a mechanism to allow the Group of Five an opportunity for future access.

²⁵⁵ See *supra* notes 11-12 and accompanying text.

competitive and will deprive the Group of Five conferences — already at an economic disadvantage — of significant revenue.²⁵⁶

2. Biased Methodology

The CFP methodology is imbedded with the similar imperfections that plagued the BCS and will, like the prejudice suffered by non-AQ conferences, prove anticompetitive to the Group of Five.²⁵⁷ The CFP eliminated the computer rankings from consideration, for example, yet sustained the weight attached to strength of schedule.²⁵⁸ This measure has potential for creating a negative trickle-down effect. Power Five schools will now be reluctant to schedule Group of Five opponents because of the threat of a weak-schedule branding.²⁵⁹ Group of Five schools, in turn, will be all but banished from the CFP as a result of playing the weaker schedules that are inherent in their conference schedul-

²⁵⁶ Jon Solomon, *UAB Football Isn't Alone in Losing Money for Athletic Departments*, CBS SPORTS, <http://www.cbssports.com/collegefootball/writer/jon-solomon/24839675/uab-football-isnt-alone-in-losing-money-for-athletic-departments> (last accessed March 02, 2015) [hereinafter *Group of Five Deficits*]. The deficits of the 57 public universities within the Group of Five range from \$35.3 million (UNLV) to \$1.8 million (Army). 39 of these schools operate at least \$15 million in the hole and rely on subsidies (student fees, direct and indirect institutional support, and state money) to stay afloat.

²⁵⁷ See *supra* Part II(b)(ii) (providing a brief overview of the anticompetitive effects plaguing the BCS).

²⁵⁸ See *Overview of the CFP*, *supra* note 168.

²⁵⁹ Dan Wolken, *Uncertain Future for Non-“Power 5” Football Scheduling*, USA TODAY, <http://www.usatoday.com/story/sports/ncaaf/2014/05/05/college-football-playoff-power-conference-scheduling-sec-acc-pac-12-big-ten-american-cusa/8698263/> (last accessed February 08, 2015). The SEC, for example, is requiring that beginning in 2016 at least one non-conference game is played against other Power Five conferences; *but see* Pat Forde, *Florida State Could Be Case Study for CFP Committee Moving Forward*, YAHOO SPORTS, <http://sports.yahoo.com/news/florida-state-could-be-case-study-for-cfp-committee-moving-forward-210112950.html> (last accessed February 08, 2015). Forde argues that Florida State's inclusion this season, despite a weak strength of schedule, might trigger a movement away from the SEC model. That is, Power Five schools might now be prompted to schedule their way to undefeated seasons and, thus, bank on the perfect season being enough for a playoff berth.

ing.²⁶⁰ Therefore, a vicious cycle will ensue every time a Power Five school recaptures five of the six automatic bids, as well as the four semifinal spots. Furthermore, the Group of Five teams that are able to secure a regular-season showdown with a Power Five school will likely be leveraged into taking unfavorable deals that do not include a home-and-away scheduling package.²⁶¹

Another imperfection lies in the importance the CFP assigns to the conference championship.²⁶² In the inaugural season, the ranking system came under fire when TCU dropped to No. 6 from No. 3 in the final ranking, despite a 59-3 drubbing of Iowa State in the Horned Frogs' final game.²⁶³ The TCU snub not only highlighted the insignificance of the weekly rankings, but also revealed the considerable influence of a conference title.²⁶⁴ And if history is any indication, the Big 12's next maneuver will be to increase its membership to meet the NCAA's "magic number" of 12 teams per conference.²⁶⁵ To do so, the Big 12 will likely target the few marketable powers left in the mid-major conferences. This, in turn, would deplete the Group of Five's competitiveness and reduce the pilfered conferences below the requisite number for

²⁶⁰ See *infra* Part III(b)(ii)(4) (denoting the trickle down effect of the strength-of-schedule component).

²⁶¹ See Wolken, *supra* note 259.

²⁶² See *Overview of the CFP*, *supra* note 168.

²⁶³ See *supra* notes 11-12 and accompanying text (noting how Ohio State jumped ahead of both Baylor and TCU after the Buckeye's routed Wisconsin 59-0 in the Big Ten Championship).

²⁶⁴ See *supra* notes 11-12 and accompanying text; Heather Dinich, *Sun Belt Czar: Title Games Needed*, ESPN, http://espn.go.com/college-football/story/_/id/12275097/sun-belt-commissioner-says-all-fbs-conferences-need-championship-games (last accessed February 08, 2015); Derek Volner, *Sunday's College Football Playoff Selection Show Garners Strong Rating*, ESPN MEDIA ZONE, <http://espnmediazone.com/us/press-releases/2014/12/sundays-college-football-playoff-selection-show-garners-strong-rating/> (last accessed February 10, 2014). ESPN will, of course, lobby to keep the weekly ratings structure in tact as long as the ratings bring in the dollars.

²⁶⁵ See *supra* notes 141-42 and accompanying text (discussing the realignment trend during the BCS era).

hosting a championship.²⁶⁶ Additionally, Notre Dame would likely be compelled to relinquish its independent status and join a conference for the opportunity to bolster its playoff bid with a conference title.²⁶⁷ The Irish's theoretical breaking-of-rank would further consolidate the supremacy of the Power Five and widen the rift separating it from the Group of Five.

And, finally, the Playoff committee and the weekly rankings do not offset the biases that plagued the BCS. Not only did the membership of the committee exclude a Group of Five athletic director, for example, but the ranking itself also has inherent partiality that blockades access for the have-nots.²⁶⁸ By relying on only the judgment of the committee, the rankings run the risk of generating bias through the so-called poll mentality and through the undue influence from lobbying.²⁶⁹

²⁶⁶ See *supra* note 79 and accompanying text. Presently, three Group of Five conferences (Conference USA, MAC, and Mountain West) host a title game, while two (AAC and Sun Belt) do not.

²⁶⁷ Brent Sobleski, *Big 12 Would Look 'East not West' If League Decides to Expand*, COLLEGE FOOTBALL TALK, <http://collegefootballtalk.nbcsports.com/2014/12/19/big-12-would-look-east-not-west-if-league-decides-to-expand/> (last accessed February 10, 2015).

²⁶⁸ *Selection Committee*, *supra* note 175. The only representation from the Group of Five is from Air Force (Mountain West). Lieutenant General Michael Gould, who commanded under the Air Force branch, is recused if the Falcons are ever in the CFP picture.

²⁶⁹ George Schroeder, *College Football Playoff's Weekly Ranking is a Bad Idea*, USA TODAY, <http://www.usatoday.com/story/sports/ncaaf/2014/10/27/analysis-college-football-playoff-committee-top-25-ranking-bad-idea/18023119/> (last accessed February 08, 2015). Schroeder contends that the rankings will be a pointless exercise resulting in a "poll mentality" and, thereby, hamstringing the Playoff committee from departing the very hierarchy it created from previous rankings; see also Bruce W. Burton and M. Mark Haekin, *Bias in the College Football Selection Process: If the Devil is in the Details, That's Where Salvation May Be Found*, 24 MARQ. SPORTS L. REV. 335, 340-41 (2014) (suggesting that the primary effect created by preseason polls, lobbying, confirmation bias, and jury bias will combine to slant the committee's judgment).

The poll mentality refers to the struggle of voters to reorder rankings after the creation of a personal hierarchy.²⁷⁰ This hierarchy is initially announced in the preseason poll and then locked in by the “primary effect,” which is the phenomenon that information presented first has the most influence.²⁷¹ The first CFP ranking, for instance, had 17 of the same 25 teams that were ranked in the AP’s preseason poll.²⁷² The CFP’s final ranking had the same top three teams, albeit in different order, as the AP’s preseason poll.²⁷³ Furthermore, the CFP and AP had nearly all the same teams in their respective polls from week 10 to week 16.²⁷⁴ And while this could merely indicate the pollster’s consensus when ranking college football’s elite, it might also reflect the lack of upward mobility resulting from the poll mentality. In short, the primary effect entrenches the bias out the gate with the preseason polls. This, in turn, induces the poll mentality of the Playoff committee, which, ultimately, is suggestive as to why only three Group of Five schools broke into the CFP rankings.²⁷⁵

²⁷⁰ George Schroeder, *supra* note 269. The CFP model is similar to the NCAA’s basketball selection committee, but, as Schroeder notes, the latter considers a team’s full body of work and avoids tainting the evaluation by not producing interim rankings.

²⁷¹ See Burton and Hackin, *supra* note 269, at 342 (citing DAVID G. MEYERS, SOCIAL PSYCHOLOGY 239 (9th ed. 2008) (arguing that the publication of preseason rankings will create an impression on the minds of the Playoff committee that will leave a psychological impact)).

²⁷² Compare 2014 NCAA Football Rankings – AP Top 25, ESPN, http://espn.go.com/college-football/rankings/_/poll/1/ (last accessed March 03, 2015) with CFP Rankings, *supra* note 9.

²⁷³ 2014 NCAA Football Rankings – AP Top 25, ESPN, http://espn.go.com/college-football/rankings/_/poll/1/ (last accessed March 03, 2015). The AP preseason rankings were as follows: (1) Florida State, (2) Alabama, (3) Oregon, and (4) Oklahoma. Ohio State was ranked No. 5. The CFP final rankings were as follows: (1) Alabama, (2) Oregon, (3) Florida State, and (4) Ohio State.

²⁷⁴ *Id.* The AP and CFP had 24 of the same 25 teams in weeks 10-11 and 14-16; 23 of 25 in week 12; and 22 of 25 in week 13. The slight variations occurred in the bottom of the top 25, while the polls’ top-ten rankings consistently mirrored each other in those weeks, though not necessarily in the same order.

²⁷⁵ See *supra* note 252 and accompanying text.

The CFP ranking system also creates the potential for undue lobbying influence,²⁷⁶ which was common in the BCS era. Consider, for example, the efforts by then-SEC Commissioner Mike Slive and then-Florida head coach Coach Urban Meyer to openly politick the Gators' way into the 2006 BCS Championship game.²⁷⁷ A year later, LSU's athletic department and head coach Les Miles spin-doctored the Bengal Tigers' resume and enticed voters into an historic first by propelling LSU from No. 7 to No. 2 in the last week of the season.²⁷⁸ This trend continued into the CFP era when marketing firms were retained by Baylor to jockey for a semifinal bid and by Marshall to boost its profile.²⁷⁹ The presence of lobbying not only compromises the integrity of the Playoff committee's purported objectivity, but for mid-major teams like Marshall will prove futile and only add to the Thundering Herd's \$15.2 million deficit.²⁸⁰

3. Revenue Discrimination

The CFP revenue structure creates economic inequality between the Power Five and Group of Five that is blatantly anticompetitive. Using the last BCS season as a reference point, it is evident the Group of Five greatly benefits from the CFP

²⁷⁶ Burton and Haekin, *supra* note 269, at 343-45.

²⁷⁷ WETZEL, ET. AL., *supra* note 15, at 140-41. The SEC went to bat for the Gators when Slive held a press conference during the halftime of the 2006 SEC Championship game where he opined that if the Gators won, they deserved a BCS title-game bid. If not, Slive said he would be "disappointed." At the time, Slive served as the BCS coordinator, which meant that "the official head of the official postseason system officially admitted that he might not agree with the official result"; *SEC Commissioner Mike Slive Announces Retirement Plans, Discusses Health Condition*, SEC SPORTS, <http://www.secsports.com/article/11700734/commissioner-slive-retire> (last accessed March 04, 2015). Slive announced his retirement for July 31, 2015.

²⁷⁸ WETZEL, ET. AL., *supra* note 15, at 137-143. Coach Miles swayed the voters with his "undefeated in regulation" argument and became the first two-loss team to play for the BCS championship.

²⁷⁹ See *supra* note 14 and accompanying text.

²⁸⁰ *Group of Five Deficits*, *supra* note 256.

revenue structure.²⁸¹ As a whole, the have-nots will receive an estimated 376-percent spike in revenue from the final BCS season.²⁸² This increase is deceiving, however, when considering that the Group of Five's \$79 million take is only 16 percent of the CFP revenue.²⁸³ The Power Five's \$349 million take, on the other hand, accounts for 70 percent.²⁸⁴ The SEC and ACC, in fact, each claimed more than the entire Group-of-Five purse, with shares of \$87.5 million and \$83.5 million, respectively.²⁸⁵ Ultimately, the Group of Five's increased revenue does not balance the CFP's enormous tilt toward the Power Five.

4. Secondary Restraints

The anticompetitive effects generated by the CFP format, methodology, and revenue structures fuel the arm's race in college football. The format, for instance, denies equal participation and Power Five conferences, therefore, "know that every year, they will have at least one representative, if not two, in the most prestigious bowl games, playing during the visible times

²⁸¹ See *supra* notes 139 and 140 and accompanying text (denoting the non-AQ's meager take in the final BCS season).

²⁸² This percentage increase was determined by subtracting the \$3.15 million average earned by each of the four non-AQ conferences in the final BCS season by the expected CFP revenue of \$15 million earned by each Group of Five conference. The difference (\$11.85 million) is then divided by the original number (\$3.15 million) and then multiplied by 100.

²⁸³ Dosh, *supra* note 194. The percentage was determined by dividing the \$79 million revenue by the total CFP revenue of \$500 million.

²⁸⁴ *Id.* The percentage was determined by dividing the \$349 million revenue by the total CFP revenue of \$500 million. The remaining 14 percent of the CFP revenue goes primarily to operational expenses while a small sum is allocated to the independents.

²⁸⁵ *Id.* The ACC and the SEC were able to corner this year's market because the Orange Bowl was not part of the semifinal rotation and, thus, the conference tie-in contract of \$54 million was enforced. In years when the Rose and Sugar Bowls are not part of the rotation, the Big Ten, Big 12, Pac-12, and the SEC will receive similar bumps. This season, the Big 12 was at the bottom of the Power Five with \$58 million because of its failure to place a semifinal team. The Big Ten and Pac-12 were not far ahead at \$60 million.

of the holiday season, guaranteeing conference exposure.”²⁸⁶ This, in turn, affords the Power Five schools the requisite leverage to better lure blue-chip recruits and hire the best coaches.²⁸⁷ The methodology, too, furthers this end by providing consistent exposure through the weekly ESPN rankings show, which is amplified by the ensuing wire-to-wire coverage and national debates in the media.²⁸⁸ And, finally, the tilted revenue structure enables Power Five schools to “build a lot more stadiums, create more state-of-the-art practice facilities, purchase more top-of-the-line equipment,

²⁸⁶ See Schmit, *supra* note 8, at 243 (quoting Mark Hales, *The Antitrust Issues of NCAA College Football Within the Bowl Championship Series*, 10 SPORTS LAW J. 97, 120 (2003)).

²⁸⁷ Bud Elliot, *Blue-Chip Ration: Which College Football Teams have Championship-Grade Recruiting?*, SB NATION, <http://www.sbnation.com/college-football-recruiting/2014/2/18/5312840/college-football-recruiting-teams-championships> (last accessed March 06, 2015). This article notes that every BCS champion since 2005 (when recruiting rankings could be accurately tracked) has recruited more blue-chips (four and five-star athletes) than lesser-rated athletes in its previous four signing classes. Under this formula, the mid-majors have reason for concern when considering that only three teams in the Group of Five (Boise State, Marshall, and UCF) signed four-star athletes, and only one each. Of the schools in this year’s semifinals, Alabama had the top-ranked 2014 recruiting class with 73 percent blue chips; Ohio State was No. 2 with 68 percent; Florida State No. 7 with 56 percent; and Oregon No. 15 with 41 percent); Grow, *supra* note 226, at 576 n. 20. Urban Meyer, for example, was recruited to coach Florida after leading Utah to an undefeated season in 2004. A second example is Rich Rodriguez, who was first lured from Tulane to West Virginia to Michigan, each time receiving a significant increase in pay. A third example is Brian Kelly, who ascended from Central Michigan to Cincinnati before landing the coveted Notre Dame job.

²⁸⁸ *CFP Rankings*, *supra* note 9. In the inaugural season, the CFP Selection Show was broadcast every Tuesday evening from October 28 to December 2 on ESPN and ESPN2. The final show, Selection Day, was broadcast on Sunday, December 07; see also Derek Volner, *Sunday’s College Football Playoff Selection Show Garners Strong Rating*, ESPN MEDIA ZONE, <http://espnmediazone.com/us/press-releases/2014/12/sundays-college-football-playoff-selection-show-garners-strong-rating/> (last accessed March 06, 2015). The press release detailed the ratings for the Selection Show and the average ratings for the weekly show and also denoted the strongest markets.

and fund more upgrades to existing facilities.”²⁸⁹ This further boosts advantages in recruiting top players and coaches to the Power Five at the expense of the Group of Five. Recent NCAA legislation sharpens the Power Five’s edge by granting partial autonomy.²⁹⁰ Under this historic enactment, the Power Five conferences will now be free to make their own rules without certain NCAA oversights.²⁹¹ Headlining this legislation was the option to supplement scholarships with a cost-of-attendance stipend.²⁹² This will both entrench the already-rich Power Five conferences and inhibit the deficit-strapped Group of Five.²⁹³ And though the mid-majors now have the option to adopt this legislation, the anticompetitive effects highlighted above will undoubtedly impede any efforts to keep up in the so-called arm’s race.

iii. Assessing Strength: Procompetitive Benefits of the CFP

The anticompetitive effects outlined above shift the burden to the defendant to argue any procompetitive effects of the “New Year’s Six and Championship Game.”²⁹⁴ The defendant is ultimately tasked with demonstrating that the alleged group boy-

²⁸⁹ Schmit, *supra* note 8, at 245 n. 192 (citing *H. Comm. on the Judiciary*, *supra* note 229, at 20 (Statement of Dr. Scott Cowen)).

²⁹⁰ See *supra* note 3 and accompanying text (discussing the legislation’s far-reaching impact on the Group of Five).

²⁹¹ See *supra* note 3 and accompanying text.

²⁹² Eben Novy-Williams, *NCAA Autonomy Gap Not Seem Widening on \$108 Million Vote*, BLOOMBERG, <http://www.bloomberg.com/news/articles/2015-01-19/ncaa-autonomy-gap-not-seen-widening-on-108-million-vote> (last accessed March 06, 2015). According to conservative estimates, the average scholarship falls \$3,000 below cost of attendance. The autonomy will not produce a major gap in the Power Five, which spent an average of \$54 million per school for athletics. The gap will occur in the Group of Five, which spent an average \$20.6 million per school. Despite limited resources, the AAC and Conference USA will follow the Power Five’s lead and offer cost-of-attendance scholarships. The Mountain West and Sun Belt will leave the stipend decision up to each school.

²⁹³ See *Group of Five Deficits*, *supra* note 256.

²⁹⁴ See Grow, *supra* note 226, at 72.

cott is offset by the benefits created by the CFP.²⁹⁵ This demonstration, like the anticompetitive analysis, considers CFP figures and carryover trends from the BCS, as well as data from other sport's institutions. The procompetitive benefits are that the CFP product, itself, created the relevant market for a playoff to determine college football's national champion. Furthermore, the CFP preserves the regular season and increases revenue to the Group of Five.

1. Creation of the CFP Product

Prior to the CFP, the BCS was established to resolve the mythical national championship debate and bring order to the postseason.²⁹⁶ BCS advocates claimed an 81-percent success rate during its 16 seasons.²⁹⁷ In that span, however, the BCS endured annual controversy that blemished these so-called championships.²⁹⁸ Even AQ teams were frequently usurped, while nine non-AQ teams were denied title bids despite flawless records.²⁹⁹ The current structure reduces some of the controversy by opening the door for two more teams.³⁰⁰ Under the format, for example, the 2001 Oregon Ducks, 2003 USC Trojans, and 2004 Auburn Tigers would likely have earned a shot at competing for the national title (and hence raised the success rate to 100%).³⁰¹ As for the undefeated non-AQ's teams, the TCU squads from 2009 and 2010 would have likely earned a semifinal bid.³⁰² Such evidence demonstrates that the CFP is a better and more inclusive alternative than

²⁹⁵ *Id.*

²⁹⁶ See *supra* notes 123-27 and accompanying text (discussing the formation of the BCS as an improvement upon the Coalition and Alliance).

²⁹⁷ Bishop, *supra* note 125.

²⁹⁸ *Id.*

²⁹⁹ *Id.*; Bender, *supra* note 130 and accompanying text.

³⁰⁰ CFP Overview, *supra* note 168.

³⁰¹ *College Football Poll*, *supra* note 19. In 2001, the Ducks finished the regular season ranked No. 4 in the BCS Standings; in 2003, the Trojans finished No. 3; in 2004, the Tigers finished No. 3.

³⁰² *Id.* TCU finished No. 3 in both the 2009 and 2010 final BCS standings. The other seven undefeated teams finished as follows: Tulane No. 10 in 1998; Marshall No. 12 in 1999; Utah No. 6 in both 2004 and 2008; Boise State No. 8 and No. 6 in 2006 and 2009, respectively; and Hawaii No. 10 in 2007.

previous systems for determining a national champion. The defendant would also point to the inaugural season as evidence of its success. Simulated BCS standings, for instance, would have matched No. 1 Alabama versus No. 2 Florida State for the national championship and, thereby, passed over No. 3 Oregon and No. 4 Ohio State.³⁰³ Thanks to the CFP, the Ducks and Buckeyes were given a shot and rose to the occasion by defeating the Seminoles and Crimson Tide in the semifinals.³⁰⁴

The CFP also provides an opportunity for its six member bowls to host the semifinal games every three years, rather than four years as under the BCS.³⁰⁵ The CFP, thus, spreads the wealth by adding two bowls to the structure and shortens the rotation to three years.³⁰⁶ Furthermore, the Power Five schools periodically give up their conference tie-ins when the bowls host the semifinal games.³⁰⁷ In the first season, the conferences tied to the Rose and Sugar Bowls each forewent \$40 million by virtue of the semifinal rotation.³⁰⁸ By eliminating the conference tie-in for at least half the structure, the CFP improves upon the confines of the BCS and is, therefore, procompetitive.

2. Preservation of the Regular Season

College football's elite staved off previous pushes for a playoff under the ruse that an expanded postseason would destroy the bowl tradition and water down the regular sea-

³⁰³ Tony Manfred, *Oregon Shows College Football Playoff is Better than the BCS*, BUS. INSIDER, <http://www.businessinsider.com/oregon-college-football-playoff-bcs-2015-1> (last accessed March 06, 2015).

³⁰⁴ See *supra* notes 172-73 and accompanying text.

³⁰⁵ *CFP Overview*, *supra* note 168.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.* The Orange is the only other bowl in the rotation contracted outside the arrangement. The Orange is tied to the ACC and to the highest-ranked available team from the SEC, Big Ten, or Notre Dame. The Fiesta, Cotton, and Peach Bowls round out the New Year's Six and will host displaced conference champions and the top-ranked champion from the Group of Five. The highest-ranked available teams will fill any other berths.

son, using the NFL and NCAA college basketball as examples of undesirable results.³⁰⁹ The power structure eventually capitulated and, today, proclaims that the CFP “preserves the excitement and significance of college football’s unique regular season where every game counts.”³¹⁰ The defendant would likely follow suit and spin the former pretext into a procompetitive benefit.

This determination could be measured by evaluating attendance figures. Home attendance in the inaugural season, however, was down 4 percent from 2013 and the lowest since 2000.³¹¹ But this decline is not attributed solely to the CFP and is in fact likely a byproduct of soaring ticket prices, more lopsided games, loss of rivalries, and the proliferation of wire-to-wire television coverage.³¹² It is simply too early to determine whether the CFP will buck the trend and improve gate attendance. The Nielsen ratings, therefore, would prove to be the best measure for this procompetitive demonstration. In Week 15, for example, the 2014 version of the annual Iron Bowl became the highest-rated regular-season college game ever on ESPN.³¹³ The storied rivalry

³⁰⁹ See WETZEL, ET. AL., *supra* note 15, at 117-26 (dispelling the myths surrounding bracket creep and dilution of the regular season).

³¹⁰ *CFP Overview*, *supra* note 168.

³¹¹ Jon Solomon, *Home Crowds Drop to Lowest in 14 Years*, CBS SPORTS, <http://www.cbssports.com/collegefootball/writer/jon-solomon/24891415/college-football-attendance-home-crowds-drop-to-lowest-in-14-years> (last accessed March 09, 2015). A breakdown of the numbers show that the 72 percent of the top 25 attendance leaders, all from the Power Five, and Notre Dame, increased or remained the same. 48 percent of the remaining Power Five schools maintained or increased crowd averages. The Group of Five averages, however, dwindled. Crowd averages have been on the decline for six consecutive seasons since peaking in 2008.

³¹² Ben Cohen, *At College Football Games, Student Sections Likely to Have Empty Seats*, WALL ST. J. <http://www.wsj.com/articles/at-college-football-games-student-sections-likely-to-have-empty-seats-1409188244> (last accessed March 10, 2015). The SEC has attempted to improve attendance by catering to the fan’s experience with better cellular reception at Georgia, as well as new stadium video boards and an enhanced sound system at LSU.

³¹³ *Audience Analysis: Iron Bowl Marks New CFB Viewership Record for ESPN*, SPORTS BUS. DAILY,

between Alabama and Auburn, moreover, contributed to ESPN garnering its most-viewed regular-season Saturday on record.³¹⁴ Such evidence, standing alone, strongly indicates that the regular season has been preserved under the CFP. Furthermore, a closer look at the Week 15 figures reveals that the top-six rating winners of the record-breaking Saturday featured match-ups that included a team vying for a semifinal bid.³¹⁵ This correlation further bolsters the CFP's preservation argument, but, also, might backfire as the push for expansion gains steam.

3. Increased Revenue

The BCS was frequently criticized for the bias built into its revenue structure.³¹⁶ This partiality has since persisted under the CFP; but, as the defendant would argue, is an expected and necessary outcome of the complex negotiations

<http://www.sportsbusinessdaily.com/Daily/Issues/2014/12/05/Media/Final-Ratings.aspx> (last accessed March 10, 2015). The game averaged a 7.4 final rating and 13.5 million viewers in primetime. Additionally, the game gained 475,000 unique viewers and an 119,000 average minute audience on the Watch-ESPN app, which were product records for the regular season.

³¹⁴ *Id.*

³¹⁵ Compare CFP Rankings, *supra* note 9, at week 15 with College Football TV Ratings, SPORTS MEDIA WATCH, <http://www.sportsmediawatch.com/college-football-tv-ratings/> (last accessed March 10, 2015). The top ratings/CFP rankings were as follows: Auburn/Alabama, rating of 7.4 with 13.5 million viewers – Alabama was ranked No. 1 in the CFP; Michigan/Ohio State, rating of 4.9 with 8.2 million viewers – Ohio State was ranked No. 5; Florida/FSU, rating of 3.5 with 6 million viewers – Florida State was ranked No. 4; Mississippi St./Mississippi, rating of 3.1 with 5.2 million – Mississippi St. was ranked No. 10; Baylor/Texas Tech or Michigan St./Penn St., rating of 2.4 with 4 million – Baylor and Michigan St. were ranked no. 6 and 8, respectively; and Oregon/Oregon St., rating of 1.9 with 3.30 million – Oregon was ranked No. 2. Kansas State, ranked No. 9, was the only other top-ten CFP team that played on this day (No. 3 TCU and No. 7 Arizona played on the preceding Thursday and Friday nights, respectively). The Arizona game garnered an abysmal rating of .2 with only 270,000 viewers. This uptick in ratings is, at least, partly attributable to Week 15 being rivalry week.

³¹⁶ See *supra* notes 135-40 and accompanying text (discussing the anticompetitive effects of the BCS structure's revenue distribution).

behind the \$7.3 billion ESPN deal.³¹⁷ Specifically, the negotiations behind the CFP necessitated a give and take between the powerful market participants (i.e., the Power Five and New Year's Six) to leverage for reduced transaction costs.³¹⁸ Furthermore, the CFP's packaging of the New Year's Six enabled a more lucrative contract than the bowls could separately negotiate.³¹⁹ That is, the consolidation of the ESPN television rights created synergies that increased the value of the CFP package beyond the aggregate value of the bowl's individual broadcast rights.³²⁰ The Group of Five, simply put, does not have the requisite bargaining power to minimize transaction costs, let alone secure a lucrative deal with ESPN. The CFP's design, therefore, is highly procompetitive in spite of any disparate treatment inflicted against the Power Five.³²¹

iv. New Approach: Less Restrictive Alternatives

The third and final hurdle of the rule-of-reason inquiry would be invoked if a court or jury found the procompetitive benefits outweigh the anticompetitive effects.³²² Under this phase, the court would consider whether the CFP's benefits could

³¹⁷ See *supra* note 184 and accompanying text.

³¹⁸ See *supra* notes 123-24 and accompanying text (recounting the Rose Bowl's historic inflexibility, which exemplifies the type of transaction costs behind the CFP. Without the cooperation of the Big Ten/Pac-12 and the Rose Bowl, for example, the CFP would ultimately be without the necessary components to create the highly profitable market).

³¹⁹ See Ricci, *supra* note 226, at 581 n. 224 (citing Andrew Hampp, *What ESPN's Winning of Bowl Championship Series Means*, ADAGE, <http://adage.com/article/mediaworks/espn-s-winning-bowl-championship-series-means/132714/>) (articulating that "packaging TV rights within multiple platforms for games makes 'multiplatform ad buying all the more appealing to advertisers' and leading to even more profits").

³²⁰ See *id.* at 581 n. 225 (arguing that the primary synergy is stability in television ratings and, therefore, a diversified portfolio of bowls is beneficial to the networks).

³²¹ See *id.* at 580-81 n. 226 (citing *Broad. Music Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 21-4 (1979)) (arguing that the BCS resembles modern blanket license agreements, which, according to the U.S. Supreme Court, are highly precompetitive).

³²² See Grow, *supra* note 226, at 72-73.

lessen the anticompetitive effects with less-burdensome means.³²³ Although the obvious solution is expansion of the CFP, structuring an ideal format to preserve its asserted benefits is not so clear. The difficulties lie in the layered challenges imbedded in the degree of expansion.³²⁴

The first option is a six-team expansion.³²⁵ Under this format, two teams would earn byes and each Power Five conference would receive an automatic spot.³²⁶ The at-large berth would be reserved for schools in the Power Five or Group of Five, or for an Independent.³²⁷ The second option is an eight-team expansion.³²⁸ This structure would allow for three at-large bids.³²⁹ The third and fourth options are either a 12- or 16-team expansion.³³⁰ These two avenues would open up the possibility for the negotiation of automatic berths for the Group of Five, but are

³²³ *Id.*

³²⁴ See Cork Gaines, *Urban Meyer Explains Why an 8-Team College-Football Playoff Won't Work, And He Makes A Good Point*, BUS. INSIDER, <http://www.businessinsider.com/urban-meyer-college-football-playoff-2015-1> (last accessed March 15, 2015) (contending that an expanded playoff would compromise the health of student athletes); see also Josephine R. Potuto, *They Take Classes Don't They?: Structuring a College Football Postseason*, 7 J. BUS. & TECH. L. 331 (2012) (examining the intrusion an expansion would have on an institution's academic performance and the well-being of student-athletes).

³²⁵ Chris Low, *TCU's Gary Patterson Wants Playoff to Expand to Six*, ESPN, http://espn.go.com/blog/big12/post/_id/96108/tcus-gary-patterson-wants-playoff-to-expand-to-six (last accessed March 15, 2015).

³²⁶ *Id.* Facilitating an expansion would require the elimination of the conference championship game to open up December for the extra games and, thereby, avoid extending the season.

³²⁷ *Id.*

³²⁸ Michael Rosenberg, *College Football Playoff Needs Expansion, Automatic Bids to Improve*, SPORTSILLUSTRATED, <http://www.si.com/college-football/2014/12/09/college-football-playoff-nfl-playoffs> (last accessed March 15, 2015).

³²⁹ *Id.*

³³⁰ See WETZEL, ET. AL., *supra* note 15, at 11-17 (exploring the merits of a 16-team playoff by dispelling the myths cited by anti-expansion arguments).

unlikely alternatives at this early stage, if ever.³³¹ The following section, therefore, evaluates whether the first two options are viable alternatives to preserve the CFP's procompetitive benefits. The next section, in turn, determines whether these formats lessen the anticompetitive effects and, thereby, insulate the CFP from Sherman scrutiny.

1. Six-or Eight-Team Playoff

The first two options are the likely alternatives because they deviate less from the current structure and, moreover, uphold the CFP's procompetitive benefits: Determining a national champion, preserving the regular season, and increasing revenue.

First, each format would fortify the crowning of a true national champion. This benefit strengthens with the expansion of a playoff and, in fact, would bring college football closer to resolution of the mythical national championship.³³² Expanding the playoff would ultimately prevent "false negatives," which, in the first CFP season, were the Baylor and TCU snubs.³³³ Even so, an expansion might encourage the inclusion of less-

³³¹ See *id.* at 12; see also Mark Schlabach, *Playoff Expansion is Inevitable*, ESPN, http://espn.go.com/college-football/story/_/id/10969476/not-matter-when-college-football-playoff-expand (last accessed March 16, 2015) (cautioning that such an expansion would mimic that of leagues such as the NBA, NHL, and NFL and incrementally grow from 8 to 12 and then 16); Joe Schad, *Commissioner Craig Thompson Predicts 8-team format; Playoff*, ESPN, http://espn.go.com/college-football/story/_/id/8154799/mwc-commissioner-craig-thompson-predicts-college-football-playoffs-expand-eight-teams (last accessed March 18, 2015). Mountain West Commissioner Craig Thompson noted that the CFP's current 12-year cycle was structured to prevent the so-called "bracket creep."

³³² See generally *supra* Part II(a) and notes 130-33 and accompanying text (denoting the seasons with title snubs and split champions and inferring that an expanded format would have dispelled the myth).

³³³ Nate Silver, *Expand the College Football Playoff*, FIVETHIRTYEIGHT, <http://fivethirtyeight.com/features/expand-the-college-football-playoff/> (last accessed March 16, 2015).

deserving teams.³³⁴ An automatic-bid structure, that is, could generate a “false positive” in a season when one conference has several contenders more worthy than the champion from another conference.³³⁵ Another downside would be the scenario when an at-large team earns a bid based on marketability rather than merit.³³⁶

Second, each format would reinforce the preservation of the regular season. Under the six-team structure, for example, the end of the regular season would likely increase in intensity and interest as the elite teams vie for the first-round bye.³³⁷ The eight-team structure would produce similar drama as teams, otherwise on the periphery, jockey for a playoff berth.³³⁸ Under such expansion, fans from one conference would now have a heightened interest in games from other conferences.³³⁹ This, in turn, would generate an explosion of television ratings and could turn the record ratings of week 15 into the status quo for the end of future regular seasons.³⁴⁰

Third, each format would enrich the revenues of the Power Five, Group of Five, and Independents. Industry experts approximate that the Power Five would increase revenues

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.*; see also *supra* note 11 and accompanying text (discussing the marketability of the Buckeye brand as perhaps a motivating factor behind the exclusions of the Horned Frogs and Bears).

³³⁷ WETZEL, ET. AL., *supra* note 15, at 14. Although the authors do not contemplate the effects of a 6- or 8-team playoff, their evaluation of impact of more expansive formats is comparative. The gist of their arguments is premised on their contention that a playoff would elevate interest at the end of the regular season.

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.*; see also *supra* note 315 and accompanying text (discussing the record-ratings of week 15 in the inaugural season and postulating of the likely increase in advertising).

by \$250 to \$300 million per year under an eight-team format.³⁴¹ The uptick in the annual television contract is estimated to double the revenue and reach the \$1 billion mark.³⁴² These inflated figures are supported by this season's ratings' jackpot and may increase again if next season's playoff games garner an even stronger showing.³⁴³

2. Neutralizing the Anticompetitive Effects

There is no guarantee that a CFP expansion would offset the anticompetitive effects felt by the Group of Five. If a six-team playoff had been used during the BCS era, for example, it is estimated that only six percent of the berths would be filled by mid-majors.³⁴⁴ Under an eight-team playoff, the percentage improves to just seven percent.³⁴⁵ Even when enlarged to a 12- or 16-team playoff, the percentages do not reach ten percent.³⁴⁶ These numbers demonstrate that mere expansion will not improve the Group of Five's access. The proposed CFP structure, therefore, would need to institute measures beyond merely adding games.

³⁴¹ Brian Goff, *College Football Losing Out on \$250 Million With Four-Team Playoff Setup*, FORBES, <http://www.forbes.com/sites/briangoff/2015/01/12/college-football-losing-out-on-250-million-with-4-team-playoff-setup/> (last accessed March 16, 2015).

³⁴² *Id.* Estimates do not include the increased revenue generated from sales at the gate and merchandizing; see also Schlabach, *supra* note 332.

³⁴³ See Goff, *supra* note 341 (noting that the numbers may increase with higher viewership).

³⁴⁴ *College Football Poll*, *supra* note 19. This percentage utilized the AP polls during the BCS era since the latter's rankings were limited in scope during its first few seasons. The percentage was calculated by dividing six (total number of mid-major teams placing in the top 6) from 96 (total number of berths in 16 seasons).

³⁴⁵ *Id.* This percentage was calculated by dividing 9 (total mid-majors) from 128 (total berths).

³⁴⁶ *Id.* These percentages were calculated by dividing 18 (total mid-majors) and 192 (total berths) and 27 (total mid-majors) from 256 (total berths).

Perhaps the biggest obstacle is the inclusion of automatic bids for the Power Five.³⁴⁷ And because the six-game format would only allow for one at-large bid, the likelihood of a Group of Five berth is slim.³⁴⁸ During the BCS era, for example, the Power Five schools that did not win their conference championships would fill the limited slots.³⁴⁹ The 2009 and 2010 TCU Horned Frogs would have been the only mid-major teams to earn a 6-team berth in the BCS era.³⁵⁰ Access, however, improves slightly when the format expands to eight teams: Utah would have earned a bid in 2004; Louisville in 2006; Utah in 2008; TCU and Cincinnati in 2009; and TCU again in 2010.³⁵¹ Such comparisons indicate that the best alternative, at this juncture, is an eight-team playoff.

In the inaugural season, a hypothetical 8-team playoff (with automatic bids) would have matched up as follows: No. 1 Alabama (SEC champ) vs. No. 8 Michigan State (at-large bid); No. 4 Ohio State (Big Ten champ) vs. No. 5 Baylor (Big 12 co-champ); No. 2 Oregon (Pac-12 champ) vs. No. 7 Mississippi State (at-large); and No. 3 Florida State (ACC champ) vs. No. 6 TCU (Big 12 co-champ).³⁵² No Group of Five team would earn a berth since the highest-rated team was Boise State at No.

³⁴⁷ See *supra* notes 318-21 and accompanying text (suggesting that the negotiations behind the CFP structure would grant the Power Five a heightened bargaining position for automatic bids).

³⁴⁸ *College Football Poll*, *supra* note 19.

³⁴⁹ *Id.* In 2004, California was runner-up in the Pac-10, but was ranked higher than Utah. In 2006, Michigan and LSU were runners up in the Big Ten and SEC, respectfully, but were ranked higher than Louisville.

³⁵⁰ *Id.*

³⁵¹ *Id.* In 2009, Cincinnati was part of the Big East (an AQ conference), but today is part of the AAC (Group of Five). In 2011, Boise State was ranked No. 8 in the AP. The Broncos would likely be ousted from consideration since there were four major conference runner-ups (Alabama, Arkansas, Oregon, and USC) competing for the three at-large bids.

³⁵² Mark Schlabach, *Picture an Eight-Team Playoff*, ESPN, http://espn.go.com/college-football/bowls14/story/_/id/12003942/picturing-year-college-football-playoff-eight-teams (last accessed March 18, 2015).

20.³⁵³ This begs the question: Should the proposed eight-team structure include an automatic bid for the highest ranked Group-of-Five team? Without such a measure, the CFP's format will be employing just an expanded format of its current dubious version and the anticompetitive effects flowing from its biased methodology, revenue discrimination, and limited Group of Five exposure would, therefore, remain pervasive in college football.³⁵⁴

C. Reviewing the Playsheet: Alternatives to Litigation

Litigation might not be the ideal route to institute reform within the CFP. At best, a favorable plaintiff's verdict might result in trebled damages and increased leverage to permit greater access for the Group of Five.³⁵⁵ At worst, college football would regress back into the traditional bowl system.³⁵⁶ Although the latter scenario is improbable, a cost-benefit analysis between the two outcomes suggests that an antitrust suit might be best sought as a last resort.³⁵⁷ Instead, CFP opponents could effectuate change through Congressional hearings.³⁵⁸ Much like during the BCS era, this avenue might prove influential in reforming the CFP.³⁵⁹ Further-

³⁵³ See *supra* note 252 and accompanying text (discussing the Group of Five's relative absence in the inaugural CFP rankings).

³⁵⁴ See Ricci, *supra* note 226, at 597 (arguing that a judicially-imposed playoff would be overly intrusive and would run the risk of being overturned on appeal).

³⁵⁵ See *id.* at 567 n. 162 (noting that NFL antitrust litigation is a tactic to obtain leverage in the collective bargaining process); see also 15 U.S.C. §15 (Westlaw 2012). Sherman authorizes damages actions for three times (treble) the amount of injuries sustained as a result of a §1 violation.

³⁵⁶ See 15 U.S.C. §26 (Westlaw 2012) (Sherman authorizes injunctive relief for private parties. A prevailing plaintiff (Justice Department aside) could enjoin the CFP); see also Ricci, *supra* note 226, at 597-98 (discussing the possible outcomes of an injunction and denoting that a complete destruction of the structure could "mean a return to the split national titles and disputed championships so common in the era before the BCS").

³⁵⁷ See *supra* Part III(b)(iii) (examining the strength of the CFP's precompetitive benefits, namely the revenue structure).

³⁵⁸ See *supra* note 229.

³⁵⁹ See *supra* note 229 (noting that the various modifications to the BCS structure were often preceded by Congressional hearings).

more, the growing deficits of the athletic departments outside the Power Five, as well as ever-increasing tuition rates, make this a public concern that is worthy of congressional oversight.³⁶⁰ And finally, CFP opponents could, for good measure, ratchet up the pressure through grassroots campaigns like the Playoff PAC.³⁶¹

IV. THE FINAL WHISTLE: CONCLUSION

A century and a year after that first season in 1869, Boise State debuted in the NCAA and a plane crash wiped out nearly the entire Marshall football team.³⁶² If the revenue disparity had been in entrenched then, as it is today, it is doubtful the Broncos or Thundering Herd would have become conference powerhouses. It would be more likely Boise State would still be fielding junior college teams, and one wonders whether Marshall could even have survived in the wake of the tragedy.

The ensuing years were a time of great change in college football, with all four 2014 CFP semifinalists at the centers of their own dramas. After suffering through season after season of mediocrity, including a .339 winning percentage for the first half of the 1970s, Florida State turned the corner with the hiring of coach Bobby Bowden in 1976.³⁶³ Ohio State, on the other hand, saw the departure of coach Woody Hayes in 1978, ending nearly three decades of dominance, including three national championships.³⁶⁴ Four years later, coach Paul “Bear” Bryant left Alabama after 25 years and six national championships.³⁶⁵ It would take decades for both

³⁶⁰ See *Group of Five Deficits*, *supra* note 256.

³⁶¹ See *supra* note 228.

³⁶² ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17, at 154-55. Boise State officially joined the Big Sky Conference in 1970 and jumped to Division I-A in 1996; WE ARE MARSHALL (Warner Brothers Pictures 2006).

³⁶³ ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17, at 290-95. The Seminoles went 19-37 in the first half of the 1970s).

³⁶⁴ *Id.*, at 655.

³⁶⁵ *Id.* at 77.

programs to rebound to their previous status.³⁶⁶ In Eugene in the mid-1970s, the Oregon football team was losing money and games.³⁶⁷ The school's aspirations for football were simply to be competitive.³⁶⁸ That changed twenty years later when Oregon alumnus and Nike founder Phil Knight stepped in with a vision for excellence and the money to fund it.³⁶⁹

These six schools illustrate what has changed about college football: Not so long ago, teams could rise from obscurity and, with perseverance and a little luck, make it to the national stage. Likewise, even the mighty were susceptible to changes in fortune, with more schools having an opportunity to lure top players and coaches. In sports there are no guarantees, but today it's easier for Ohio State and Alabama to stay at the top than it was after losing those legendary coaches. Then, the playing field was more level for far more teams. Now, the rich get richer, and if you're not already in a position of power, you probably never will be.

Sherman was designed to protect the marketplace from the monopolistic destruction of competition. The CFP strives against this core Sherman principal by empowering the Power Five at the expense of the Group of Five.³⁷⁰ That said, the CFP and its predecessors' roles in enriching the college football product should not be understated: The game has progressed into a national obsession and, in turn, has produced more monetary fruits than ever, translat-

³⁶⁶ *College Football Poll*, *supra* note 19. Since the formation of the BCS, Ohio State has played in four title games (including the CFP championship) and won two (2002 and 2014). Alabama, on the other hand, was three-for-three in BCS title games (2009, 2011, 2012).

³⁶⁷ ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17, at 684-691. In the 1970s, the Ducks' record was 39-75-1 for a winning percentage of .341).

³⁶⁸ Chuck Carlton, *Phil Knight's Dollars, Nike's Marketing Boost Oregon's Appeal and Stature*, DALLAS NEWS, <http://www.dallasnews.com/entertainment/cfp/headlines/20150110-phil-knights-dollars-nikes-marketing-boost-oregons-appeal-and-stature.ece> (last accessed March 22, 2015).

³⁶⁹ *Id.*

³⁷⁰ *See supra* Part III(b)(ii)(3) (discussing the revenue disparity between the Power Five and Group of Five).

ing to more revenue for virtually all football programs, including those in the Group of Five.³⁷¹

With the vast dollars at stake, college football is far removed from its sideshow amateur origins. It is still entertainment, but it is also big, big business — some of it publicly funded — that demands scrutiny.³⁷² The highest paid employee in 41 of 50 states is the state university's football or basketball coach.³⁷³ Those salaries are derived, in part, by tax dollars, revelatory of the market power of college football and demonstrative of the public policy concerns at stake.³⁷⁴ Couple this with the fact that only 20 schools in the CFP arrangement have athletic departments with revenue exceeding expenses, and it is easy to appreciate Boise State President Bob Kustra's concern over the arm's race.³⁷⁵ Every school outside the Power Five should be not only concerned, but also active in trying to change how the CFP unbalances competition. Unfortunately, these are the schools without the funds and power; it would likely take a goodwill effort by the CFP and members of the Power Five to initiate or at least contribute to pushing for necessary change. The history of college football shows this isn't likely to happen, however, for if there is one steadfast tradition, it's that money wins.

³⁷¹ See *supra* Part III(b)(iii)(3) (recognizing the massive uptick in revenue for all parties to the CFP).

³⁷² See *Group of Five Deficits*, *supra* note 256.

³⁷³ Roger Groves, *Should Michigan Or Any Taxpayer Funded College Pay Football Coaches Over \$40 Million?*, FORBES, <http://www.forbes.com/sites/rogergroves/2014/12/31/should-michigan-or-any-taxpayer-funded-college-pay-football-coaches-over-40-million/> (last accessed March 22, 2015).

³⁷⁴ *Id.*

³⁷⁵ Brian Burnsed, *Growth in Division I Athletic Expenses Outpaces Revenue Increases*, NCAA, <http://www.ncaa.org/about/resources/media-center/news/growth-division-i-athletics-expenses-outpaces-revenue-increases> (last accessed March 22, 2015); *supra* note 2 and accompanying text.

With the economic stakes higher than ever and current federal jurisprudence ready to break open the floodgates,³⁷⁶ it's imperative that interested parties, including the Group of Five, act now to prevent what is otherwise likely inevitable: The Power Five consolidates its strength into super conferences that become their own separate NCAA division. If that happens, the likes of Boise State and Marshall will once and for all lose their opportunity to play for a national championship, except in a lesser division. But that may be the least damaging effect: Teams outside the Power Five will no longer be part of "big time college football," no longer part of meaningful TV revenue, no longer part of the top-of-mind competition currently played out on college campuses all across the nation. Some of these schools will likely forfeit their programs. The others will still play college football, but it won't be major college football as it is today. If the CFP and Power Five aren't willing to prevent this, and in fact are likely to pursue it, then it may well be up to Sherman to bring fair competition back to college football.

It shouldn't take the threat of a new anticompetitive empire to create more opportunity and financial equality for more schools. Even if a new super division were never to materialize, the college football landscape is already so unbalanced that it demands an immediate leveling. But it should be noted that if a new super division does come to fruition, any legal recourse might well be too late.

³⁷⁶ See *supra* notes 230-31 and accompanying text (briefly mentioning the potential for monumental changes as a result of *O'Bannon*).