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Antitrust Implications Surrounding the Bowl Championship Series: A Theoretical and Empirical Analysis

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Abstract

Using data from National Collegiate Athletic Association (NCAA) sources, notable antitrust law cases, and related articles from academic publications, this article analyzes the antitrust issues surrounding the Bowl Championship Series (BCS) in order to rebut the notion that the BCS is insulated from antitrust attack. It will also test the hypothesis that it attempts to limit competition and monopolize collegiate postseason football through group boycotts, illegal price-fixing, and other federal antitrust violations without providing a product of superior foresight, skill, or industry. Furthermore, this article presents "multivariable regression" charts constructed from a dataset of relevant information and variables to support my hypothesis, as I examine the bowl selection process, comparing bowl match-ups using relative win-loss records, RPI, Associated Press rankings, BCS rankings, and revenue distribution.

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I. Introduction

During the 142-year history of college football, the game has evolved drastically. Originally a blend of soccer and rugby in which forward passes were illegal and leather helmets the norm, football has become a technical game of high-flying offenses and swarming defenses geared with the best safety equipment money can buy. Even so, the simple poll system used to determine a national champion had remained largely unchanged until the implementation of the Bowl Championship Series (BCS) in 1998. The BCS system arose from the demise of the Bowl Alliance and Bowl Coalition, both of which failed to contract the Big Ten and Pac-10 champions into their bowl games. Because of this, Michigan was allowed to be voted number one by the Associated Press Poll despite not playing in a Bowl Alliance Game in 1997, forcing a split national championship.[1] Consequently, the BCS was designed to ensure the pairing of the number one and number two ranked teams in a proverbial national championship game each year.[2] In order to achieve this end, a new ranking system was implemented, doing away with the traditional human poll system that was previously used to decipher the top two teams, and instead using the average rankings of two human polls and a computer poll in order to compile more accurate rankings.[3] Additionally, the six founding BCS conferences of the Bowl Alliance were chosen as automatic qualifiers, meaning the winner of each conference was guaranteed representation in a BCS game.[4] This formula has been scrutinized for its bias against "mid-major" conferences—conferences which are not guaranteed automatic BCS bowl berths for

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[1] *See* BCS, Alliance & Coalition games, year-by-year, BCSFootball.org, http://www.bcsfootball.org/news/story?id=4809942 (accessed Sept. 21, 2011)
[2] *Id.*
[3] BCS background, BCSFootball.org, http://www.bcsfootball.org/news/story?id=4809699 (accessed Sept. 21, 2011)
[4] *See* Selection Process, BCS standings, BCSFootball.org, http://www.bcsfootball.org/news/story?id=4819597 (last accessed Sept. 21, 2011)

winning the conference—due to the lack of mid-major representation in BCS bowl games. This is the result of the initial BCS by-laws, which held that in order for any team from a non-BCS conference to receive an at-large bid to a BCS bowl, they were required finish in the top 6 in the BCS standings, and even then, they were not guaranteed a bid.[5]

That being said, the formula has been revised extensively since 1998, albeit still guaranteeing a BCS bid to each of the six major conferences. The difference today is that champions of the five mid-major conferences earn automatic BCS bowl berths if "A. Such team is ranked in the top 12 of the final BCS standings, *or*, B. Such team is ranked in the top 16 of the final BCS standings and its ranking in the final BCS standings is higher than that of a champion of a conference that has an annual automatic berth in one of the BCS bowls."[6] Still, there is relentless animosity toward the system, and just as relentless is the push for a playoff. Even President Obama advocated the implementation of a playoff system during a 2008 interview on CBS's "60 Minutes," saying, "I think any sensible person would say, if you've got a bunch of teams who play throughout the season . . . and there's no clear decisive winner, that we should be creating a playoff system . . . I think it's the right thing to do."[7] According to the results of a 2007 Gallup poll, the fans agree, as 85 percent voted in favor of a playoff system,[8] inferring that even with the vast BCS overhaul in 2004, fans are not satisfied with the system. According to an

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[5] *See generally* BCS Chronology, BCSFootball.org, http://www.bcsfootball.org/news/story?id=4819366 (accessed Sept 21, 2011).
[6] BCS Media Guide 2004-05, www.sportswriters.net/fwaa/news/2004/bcsguide04.pdf (accessed Sept. 21, 2011).
[7] Obama CFB, *Dailymotion.com*, 17 Nov. 2009, http://www.dailymotion.com/video/k5krPfIDYKH9jaQnlj#from=embed (accessed Sept. 20, 2011).
[8] Brian Schaffner, "Obama's Support for College Football Playoffs is Not Just Right, It is Also Good Politics," 11 Jan. 2009, http://www.pollster.com/blogs/obamas_support_for_college_foo.php?nr=1 (accessed Sept. 21, 2011).

ESPN poll, neither are players. In 2010, ESPN polled 135 Football Bowl Subdivision players, resulting in 62.2 percent of the players voting for the implementation of a playoff.[9]

The primary reasons for this dissatisfaction with the BCS are the financial and competitive disadvantages levied by the system. Since its inception, only four teams from non-BCS conferences have received BCS bowl berths (Boise State, Utah, Texas Christian, and Hawaii), despite the fact these teams have won five of their seven BCS appearances. Additionally, teams from non-BCS conferences receive less money for BCS bowl appearances, regardless of the games outcome, putting their conference at an even greater disadvantage. In 2010, for instance, the Atlantic Coast Conference (ACC) and the Mountain West Conference (MWC) each garnered one BCS bowl berth; however, the ACC received 22.5 million dollars while the MWC received only 12.7 million.[10] Furthermore, the six automatic qualifying BCS conferences collected 154.7 million dollars in 2010, while the non-automatic qualifying members were allotted only 24.8 million.[11] The discrepancy is startling; especially considering the BCS system has been retooled numerous times to ensure competitive cohesion. This massive financial and competitive disparity begs the question as to whether the non-profit organization is even practicing within the realm of the law.

Numerous Senators and state representatives have spoken out against the BCS, including Representative Joe Barton (R-TX) who proposed a bill that, if passed, would "prohibit, as an unfair and deceptive act or practice, the promotion, marketing, and advertising of a post-season

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[9] College football playoff confidential, *ESPN.com*, 11 Aug. 2010, http://sports.espn.go.com/ncf/news/story?id=5452896 (accessed Sept. 20, 2011).
[10] Bowl Championship Series Five Year Summary of Revenue Distribution 2006-07 through 2010-11, *NCAA.org*, http://www.ncaa.org/wps/wcm/connect/public/ncaa/pdfs/postseason+football/2010-11/bowl+championship+series+five+year+summary+of+revenue+distribution+2006-07+through+2010-11 (accessed Sept. 21, 2011)
[11] *See* Bowl Championship Series Five Year Summary of Revenue Distribution, *supra* note 10.

National Collegiate Athletics Association (NCAA) Division I football game as a national championship game unless such game is the culmination of a fair and equitable playoff system."[12] Senator Orrin Hatch (R-UT) has held Senate subcommittee hearings to urge the Justice Department to take action.[13] Mark Shurtleff, Utah's attorney general, has also sought to take action against the BCS by threatening suit.[14] After years of lobbying, their efforts have finally garnered the attention of the Justice Department, and in May 2011, Christine Varney, head of the Department of Justice's antitrust division, stated, "Serious questions continue to arise suggesting that the current Bowl Championship Series system may not be conducted consistent with the competition principles expressed in the federal antitrust laws."[15] This provides even more ammunition for antitrust arguments, but in order to understand these arguments, one must fully understand what the BCS is.

Before outlining the framework of the BCS, however, I would like to explain how this discourse differs from previous literature. First, rather than focusing on the seemingly illegal original format of the BCS system, this article analyzes potential BCS antitrust issues based solely upon the "revamped" 2004 BCS format. Secondly, this article provides statistical evidence—in the form of multivariable regression models, and otherwise—that empirically exhibit the discrepancy in revenue distribution between automatic and non-automatic qualifying conferences. Lastly, the previous two aspects will be juxtaposed with antitrust analysis,

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[12] College Football Playoff Act of 2009, H.R. 390, http://thomas.loc.gov/home/gpoxmlc111/h390_ih.xml (accessed Sept. 21, 2011).
[13] Hatch Calls for BCS Investigation, *ESPN.com*, 8 July 2009. http://sports.espn.go.com/ncf/news/story?id=4311694 (accessed Sept. 21, 2011).
[14] Dennis Romboy, "Mark Shurtleff Seeking to Assemble BCS Busting Legal Team," *Deseret News*, 30 June 2011, http://www.deseretnews.com/article/705375386/Mark-Shurtleff-seeking-to-assemble-BCS-busting-legal-team.html (accessed Sept. 21, 2011).
[15] *See* Dennis Romboy*, supra* note 14.

including a thorough discussion of previous antitrust decisions relevant to the charges levied against the BCS.

Accordingly, using empirical data and antitrust literature, this article concludes that the BCS is undoubtedly vulnerable to suit under federal antitrust law. Specifically, Part II provides all necessary information about what the BCS is and how it functions, namely a review of the structure and conditions of its formula. Part III presents a summary of antitrust law and delineates the ways in which it may be relevant to an antitrust suit against the BCS. Part IV provides thorough analyses of relevant antitrust precedent, asserting possible scenarios under which the BCS could be found in violation of the Sherman Act. Part V provides an overview of my data methods and a data analysis, confirming the disproportionate revenue distribution of BCS money, concluding that the BCS is vulnerable to numerous antitrust challenges. Finally, Part VI concludes the article.

II. BCS Explained

As stated before, the Bowl Championship Series is a non-profit, joint venture created by a coalition of the eleven National Collegiate Athletic Association Division I-A football conferences as well as the Independent programs (Army, Navy, and Notre Dame) to oversee the five major postseason bowls. Because of the massive BCS overhaul completed prior to the 2004-2005 season, I will begin my summary of its evolution there as opposed to 1998, as the original BCS formula is irrelevant to this inquiry.

In February of 2004, just one month after the SEC champion Auburn Tigers (12-0) were snubbed[16] for a national championship bid, chief executive officers from each Division I-A conference and Notre Dame gathered to discuss the future of the BCS.[17] During this meeting, it was decided that the BCS needed a new face, one that would provide both greater opportunities for mid-major programs as well as a definitive national championship game between the top two teams in the nation.[18] As a result, a fifth BCS bowl—the National Championship Game—was born, and it was decided that the bowl's location would rotate between the sites of the Fiesta, Sugar, Orange, and Rose Bowls.[19]

Additionally, a rule guaranteeing at least one at-large bowl bid to a representative of Conference USA (C-USA), the Mid-American Conference (MAC), the Mountain West Conference (MWC), or the Sun Belt Conference (SBC) was implemented.[20] In order to be eligible for this bid, however, the mid-majors must fulfill two requirements: (i) Win their respective conference, and (ii) be ranked among the top twelve teams, or be ranked among the top sixteen teams while also being ranked higher than a champion from an automatic-qualifying conference.[21] It was also decided that Notre Dame would receive an automatic BCS berth if it finished the season ranked eighth or higher.[22] Regardless of on-field performance, however, Notre Dame garners 1/66th of all BCS revenue each year.[23]

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16 Ted Miller, *BCS system leaves long trail of wounded victims*, ESPN.com, http://sports.espn.go.com/ncf/news/story?id=3403882 (accessed Oct. 12, 2011).
17 BCS Chronology 2004, 21 Jan. 2010, http://www.bcsfootball.org/news/story?id=4819366 (accessed Oct. 13, 2011).
18 *Id.*
19 *Id.*
20 *Id.*
21 *See* BCS Chronology 2004, *supra* note 17.
22 *Id.*
23 BCS Selection Procedures, *BCSFootball.org*, 21 July 2011, http://www.bcsfootball.org/news/story?id=4819597 (accessed Sept. 20, 2011).

There were also drastic changes made to the BCS standings formula, as the strength of schedule, team record, and quality-win components were abandoned due to the notion that these components were already included in the computer polls. The New York Times computer rankings were also removed, the highest and lowest computer ranking for each team was discarded in the determination of each team's computer poll average, and teams would begin being evaluated on voting points from the media and coaches polls rather than upon the average weekly ranking of the polls.[24] Thus, the new formula came to existence consisting of two human polls and one computer poll, each of which accounts for one-third of the BCS rankings. The human polls are the Harris Poll and the Coaches' Poll. The computer poll is actually a compilation of six data programs created by Peter Wolfe, Wes Colley, Jeff Sagarin, the Seattle Times, Richard Billingsley, and Kenneth Massey, respectively, each of which uses statistics such as win-loss record, strength of schedule, opponent ranks, date and location of the game, as well as other similar criteria, in order to compile a list of the top twenty-five teams.[25] Beyond the polls, there are contracts guaranteeing the champions of the Southeastern Conference (SEC), Atlantic Coast Conference, Big Ten, Big 12, Pac-12, and Big East Conference automatic BCS bowl berths, while the mid-major conferences and Independents, with the exception of Notre Dame, must rely on at-large berths, or hope to be ranked higher than one automatic-qualifying conference champion in the final BCS rankings.[26]

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[24] *See* BCS Chronology 2004, *supra* note 17.
[25] BCS Media Guide 2009-10, Revenue Distribution pg. 15, *http://www.*collegefootball.procon.org/sourcefiles/mediaguide.pdf (accessed Sept. 21, 2011).
[26] BCS Selection Procedures, *BCSFootball.org*, 21 July 2011, http://www.bcsfootball.org/news/story?id=4819597 (accessed Sept. 20, 2011).

As for at-large eligibility, in order for a team to be eligible it must win at least nine regular season games and be ranked among the top fourteen teams in the final BCS Standings.[27] Furthermore, each conference is permitted to send only two teams to BCS bowls in a given year, regardless of whether additional teams from a conference fulfill the at-large eligibility requirements.[28] Beyond fulfilling eligibility requirements, teams are assigned to particular bowls based on conference affiliation; thus, unless a conference champion qualifies for the national championship game, the team is "contractually committed" to play in a particular bowl.[29] As a result, the ACC Champion plays in the Orange Bowl, the Big Ten Champion in the Rose Bowl, the Big 12 Champion in the Fiesta Bowl, the Pac-12 Champion in the Rose Bowl, and the SEC Champion in the Sugar Bowl.[30] This explicit use of contracts and combinations to guarantee specific bowl bids to particular conferences is one of the many potential antitrust issues surrounding the BCS, which is the next point of discussion.

III. Defining Antitrust Law in Relation to the BCS

Federal antitrust regulation began with the Sherman Antitrust Act, which implemented provisions against anticompetitive conduct for the first time in history. Section 1 states, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."[31] The act was passed in order to prevent contracts and combinations between entities that could lead to anticompetitive practice. Because the act seems to impractically outlaw all contracts,

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[27] *See* BCS Selection Procedures, *supra* note 26.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Sherman Antitrust Act*, *U.S. Code* 15 (2004), § 1.

courts have limited its power by employing a three-pronged test three to determine whether an antitrust claim is justified: (1) parties must have entered into an agreement, (2) the agreement must unreasonably restrain trade, and (3) the agreement must affect interstate commerce.[32] Section 2 deals with monopoly power, stating:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.[33]

There are two elements to determining whether a monopoly claim is justified: "(1) possession of monopoly power in a relevant market, and (2) the willful acquisition or maintenance of that power."[34] These elements are intentionally vague in order to allow the courts to charge enterprises with monopolization for simple intent to monopolize.[35]

Violations of the Sherman Act seem to be reviewed, namely, under two legal precedents: "per se" and "rule of reason." The rule of reason is the traditional framework of antitrust analysis, and simply stated, it means a market restraint must unreasonably restrain trade to be considered a violation of the Sherman Act. The problem is that reasonableness is an ambiguous concept,[36] subjecting rulings from rule of reason analyses to heavy scrutiny. Even with ample case precedent, the meaning of "unreasonable restraint" is unclear. Because of this, the per se doctrine was created. While still ambiguous, the per se doctrine removes the difficulties of

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[32] Nathaniel Grow, *Antitrust & The Bowl Championship Series* (January 24, 2011). Harvard Journal of Sports and Entertainment Law, Vol. 2. harvardjsel.com/wp-content/uploads/2010/02/2.pdf (accessed Oct. 13, 2011).
[33] *See* Sherman Antitrust Act, *supra* note 31.
[34] Richard M. Steuer, *Executive Summary of Antitrust Laws*, http://library.findlaw.com/1999/Jan/1/241454.html (Jan. 1999).
[35] *Id*.
[36] *Id.*

deciding whether certain types of restraint are illegal, and, instead, simply presumes them to be. Therefore, when a per se offense is levied, the government simply has to prove that the defendant engaged, in any capacity, in the alleged practice.[37] Either of these doctrines could be asserted in an antitrust case against the BCS if potential Sherman Act breaches such as monopoly power, group boycotts and illegal price fixing are raised against them.[38]

Accusations of an illegal monopoly have been one of the driving forces behind the movement to disband the BCS.[39] By definition, monopoly power occurs when a person or enterprise obtains "an exclusive possession of a market by a supplier of a product or a service for which there is no substitute. In this situation the supplier is able to determine the price of the product without fear of competition from other sources or through substitute products."[40] As will be discussed later, this argument has surfaced regarding every major sports league, but the "amateur" aspect of the NCAA makes it unclear as to how the courts would rule if a strong case against the BCS were presented. That being said, the fact that the BCS controls a vast majority of the relevant market for revenue producing postseason college football makes a monopoly charge plausible.[41] According to antitrust law, monopoly power is a per se offense, so all the prosecution would have to prove is that the BCS simply engaged, in any capacity, in practices that restrained trade, controlled prices, or excluded competition. While this seems like a simple notion, the erratic judgments rendered in past antitrust cases suggest it would be no easy task.

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[37] *See* Richard M. Steuer, *supra* note 34.
[38] *See* Nathaniel Grow, *supra* note 32.
[39] *See* Mark Shurtleff, comment, *Utah attorney general says he will file antitrust lawsuit against BCS*, USAToday.com, http://www.usatoday.com/sports/college/football/2011-04-20-bcs-anti-trust-lawsuit_N.htm (20 Apr. 2011) (Shurtleff calls the BCS "an illegal monopoly").
[40] Joe S. Bain, "Monopoly and Competition," *Encyclopedia Britannica Online*, http://www.britannica.com/EBchecked/topic/390038/monopoly-and-competition (accessed Oct 12, 2011).
[41] Table 6, Part V of this article.

Another potential BCS antitrust violation is the group boycott. The Federal Trade Commission states that a group boycott is "an agreement among competitors not to offer services at prevailing prices as a means of achieving an agreed-upon, typically higher, price."[42] Additionally, a valid group boycott claim may be made if "competitors have conspired to cut off a rival's 'access to a supply, facility, or market necessary to enable the boycotted firm to compete.'"[43] This is the most asserted allegation against the BCS, and the argument for such is that the current BCS structure shows heavy favoritism towards automatic-qualifying conferences at the expense of non-automatic-qualifying conferences. There is no better example of this than 2004, when, despite boasting two undefeated teams, non-BCS conferences received only 18 million dollars as compared to 102 million received by the six automatic-qualifying conferences.[44] With financial disadvantages come competitive disadvantages including, but not limited to, hiring coaches, improving facilities, and improving marketing.

Perhaps an even more appealing argument, however, is the allegation of illegal price fixing. The Sherman Antitrust Act explicitly states, The Federal Trade Commission defines price-fixing as "an agreement (written, verbal, or inferred from conduct) among competitors that raises, lowers, or stabilizes prices or competitive terms."[45] More specifically, an assertion of illegal price fixing against the BCS may be justified because it enabled "formerly independent, competing conferences and bowl games to collectively establish a common pay scale for participation in all BCS bowls, as well as allowing several of the BCS bowl games to eliminate

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[42] *Dealings with Competitors: Group Boycotts,* FTC.gov, 16 June 2010, http://www.ftc.gov/bc/antitrust/group_boycotts.shtm (accessed Oct 13, 2011).
[43] *See* Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co., 472 U.S. 284, 294 (1985) via Nathaniel Grow, *supra* note 32.
[44] *See* Bowl Championship Series Revenue Distribution, *supra* note 10.
[45] Dealing with Competitors: Price Fixing*, FTC.gov*, 8 July 2008, http://www.ftc.gov/bc/antitrust/price_fixing.shtm (accessed Oct 14, 2011).

pricing competition by collectively selling their broadcast rights to television networks."[46] This argument stems from the fact that the BCS committee determines the payout of each BCS bowl rather than allowing the market to dictate the total. For example, the University of Alabama received over $19 million to appear in the Rose Bowl during the 2009-2010 season, while Boise States and TCU received just over $17.5 million combined for their BCS appearance against each other in the Fiesta Bowl.[47] Thus, it is apparent that the market is set in favor of certain conferences while discriminating against others, though both produce the same product.

Additional statutes under which the BCS could face antitrust scrutiny, albeit more far-fetched, include the Clayton Act (Sections 12, 13, 14-19, 20, 21, 22-27 of Title 15) and Robinson-Patman Act (Sections 13a, 13b, and 21a of Title 15). These acts were amended to the original Sherman Act to further prohibit conduct deemed anticompetitive. The acts focused on three major issues: price discrimination, exclusive dealing and tying, and mergers and acquisitions. The most relevant of these principles appears in the Clayton Act under Section 13, where subsection (a) states, "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality."[48] While one may only guess at the interpretation of this quote in the court of law, it seems to precisely describe the anticompetitive actions of the BCS, which discriminates against non-automatic qualifying conferences in terms of bowl payout. Outside of the "National Championship Game," all BCS games are created equal, or in other words, they are "commodities of like grade and quality;"[49] so, why is it legal for non-automatic qualifying schools that compete in BCS bowls to receive roughly half of what

[46] *See* Nathaniel Grow*, supra* note 32.
[47] *See* Bowl Championship Series Revenue Distribution, *supra* note 10.
[48] *Clayton Act*, *U.S. Code* 15, (2010), § 13.
[49] *See* Clayton Act, *supra* note 47.

automatic qualifiers collect for participating in the same games? Another notion of the illegality of this practice can be found under subsection (f) under Section 13 of the Clayton Act, under which it states, "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."[50]

A breach of these two regulations is exemplified by the 2007 Tostitos Fiesta Bowl, which matched-up the ninth ranked[51] Boise State University Broncos (12-0) against the seventh ranked[52] University of Oklahoma Sooners (11-2). Boise State's appearance marked only the second time in the BCS era that a non-automatic qualifying team was granted a BCS bowl birth, the first coming in the University of Utah's Fiesta Bowl win over the University of Pittsburgh. The 2007 Fiesta Bowl was one of the greatest of all-time, ending in a 42-41 final, after Boise State converted a "Statue of Liberty" two-point conversion in overtime. It was the ultimate Cinderella story, as few gave Boise State a chance, only to watch the Broncos emerge victorious in what was arguably the game of the decade.[53] Yet, Boise State received just over $9 million for their victory, while Oklahoma collected over $18 million.[54] In conjunction with antitrust statutes, revenue disparities such as this present a viable case against the BCS.

All of these things considered, the key issue will likely be the debate over whether the BCS is granted single-entity protection. This protection has become a gray area in antitrust law because courts have been so inconsistent in their rulings. As a result, the definitions for the

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[50] *Id.*
[51] 2006 NCAA Football Rankings – Week 15 (Dec. 3), ESPN.com, http://espn.go.com/college-football/rankings/_/year/2006/week/15 (accessed October 24, 2011).
[52] *Id.*
[53] Arash Markazi, *Behind the scenes with Boise: An up-close look at BSU's amazing Fiesta Bowl win*, SI.com, 2 Jan. 2007, http://sportsillustrated.cnn.com/2007/writers/arash_markazi/01/02/inside.boise/index.html.
[54] *See* Bowl Championship Series, *supra* note 10.

terms "single-entity" and "joint venture" are as enigmatic as the court precedent surrounding them. As will be seen in Part IV of this article, Supreme Court has generally defined single-entity as business ventures that operate within the realm of the law with a "complete unity of interest." That being said, in order to understand this case precedent as administered, one must look more deeply into notion of single-entity.

Dean Williamson of the Department of Justice's Antitrust Division suggests, "[A] defining characteristic of a single entity is that control is concentrated in the hands of a single party."[55] The problem with this assumption is that it conflicts with the provision of single-entity status to any business arrangements without a single, concentrated power. Employing this line of thought, the notion of a joint venture seems vague as well. Generally defined as a relationship between two people or businesses that amalgamate their resources for a single business venture, the term has become obscured by the increasingly vague notion of a single-entity. This is exemplified by the fact that the Supreme Court granted the NFL immunity upon its merger with the AFL in 1970, but failed to provide them with single-entity status in the *American Needle* case.[56] Such inconsistencies beg the question as to how the relationship between the NCAA and the BCS will be defined. Will the BCS be granted immunity like Major League Baseball, or be shunned of complete single-entity status like the National Football League? Some would argue that it is a single-entity based on the fact that "the joint product of 'college football' is not interchangeable with products the universities already produced."[57] The evolution of the game and the drastic changes to postseason play, however, make it very arguable that the modern

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[55] Dean V. Williamson, *Organization, Control and the Single Entity Defense in Antitrust*, Economic Analysis Group, (Jan. 2006).
[56] *American Needle, Inc. v. National Football League* (2010), 130 S.Ct. 2201.
[57] Christopher Pruitt, *Debunking a Popular Antitrust Myth: The Single Entity Rule and Why College Football's Bowl Championship Series Does Not Violate the Sherman Antitrust Act*, 11 Tex. Rev. Ent. & Sports L. 125 (2009).

product of college football is distinctly different from that offered even a decade ago. Regardless, the debate over single-entity versus joint venture status will undoubtedly be a compelling aspect of an antitrust trial against the BCS.

Another interesting point in this debate is the fact that “the BCS does not have a physical office and does not file corporate or legal documents in any jurisdiction. According to the BCS, there really is no it to ‘it.’ Indeed, from the vantage point of this supposed non-entity, the BCS is merely a preferred mechanism for scheduling college football games.” [58] This is an excerpt from Michael McCann’s *Antitrust, Governance, and Postseason College Football*, in which he makes a compelling argument for the BCS’s “non-entity” status. The question is whether the court will accept an argument such as this when the BCS so obviously affects postseason play in college football. The best way to answer this question is to review antitrust precedent relevant to the BCS discussion.

IV. Antitrust Cases From Supreme Court

There is no short list of antitrust case precedent that encompasses every facet of antitrust law; therefore, this article focuses strictly on cases relevant to the current allegations against the BCS, including cases that will assist in the debate as to whether the BCS is a single-entity or joint-entity. The latter will be especially helpful in the discussion of whether the BCS issue falls within the realm of antitrust scrutiny.

In *NCAA v. Oklahoma Board of Regents* (1984), the Supreme Court addressed the NCAA’s plan to limit the total number of televised college football games in order to assure live

[58] Michael A. McCann, *Antitrust, Governance, and Postseason College Football*, 52 B.C. Law Rev. 517 (2011).

television would not adversely affect football game attendance.[59] Schools were only permitted to sell broadcasting rights to the American Broadcasting Company (ABC) and the Columbia Broadcasting Company (CBS), both of which agreed to pay schools a set "minimum aggregate compensation" for their participation.[60] As a defense, the College Football Association (CFA)—another ruling body over collegiate football programs—signed a contract that would extend broadcasting rights to National Broadcasting Company (NBC) in order to increase revenue of CFA members.[61] In turn, the NCAA announced that any university that fulfilled the CFA-NBC agreement would face disciplinary action.[62] This led to the suit brought by the University of Oklahoma Board of Regents, claiming that the NCAA's control over broadcasting rights violated Section 1 of the Sherman Act. In ruling, the Court held that market competition had been restrained by three means:

> (1) The NCAA fixed the price for particular telecasts; (2) its exclusive network contracts were tantamount to a group boycott of all other potential broadcasters and its threat of sanctions against members constituted a threatened boycott of potential competitors; and (3) its plan placed an artificial limit on the production of televised college football.[63]

As a result, the Supreme Court held the NCAA's actions in violation of Section 1 of the Sherman Act.[64]

This case is applicable to the current situation in many respects, as the BCS not only fixes the payout of BCS bowl games, but also allots more money to BCS participants from automatic-qualifying conferences than participants from "mid-major" conferences.[65] Additionally,

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59 *NCAA v. Board of Regents*, 468 U.S. 85 (1984).
60 *See* NCAA v. Board of Regents, *supra* note 58.
61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.*
65 *See* Bowl Championship Series Revenue Distribution, *supra* note 10.

contracts between the BCS and the six automatic-qualifying conferences are seemingly synonymous with a group boycott, as the mid-major schools have no option but to fall in line with the automatic qualifiers, and thus receive less pay for competing in the same games.[66] Furthermore, it can be argued that the BCS places "an artificial limit"[67] on the production of college football programs by unevenly distributing money—especially considering the contractual binds between automatic qualifying conferences and BCS bowl sponsors.[68]

Another case regarding monopoly power is *Federal Baseball Club v. National League* (1922). In this case, the owner of Baltimore's Federal Baseball League club brought suit against the American and National League of Professional Baseball Clubs after the National Commission, comprised of the Presidents of the American and National League as well as one other member, conspired to buy competing baseball clubs from the Federal League and induce them to join their venture, effectively destroying the Federal League.[69] A large component of this case was the determination of interstate commerce, and whether baseball games played in varying states constituted interstate commerce. By definition, interstate commerce means "trade and traffic carried on between different peoples or states and its inhabitants, including not only the purchase, sale, and exchange of commodities but also the instrumentalities, agencies, and means by which business is accomplished,"[70] but in this landmark case, it was decided that inducing "free persons to cross state lines and [arranging to] pay for doing so is not enough to change the character of the business," and that "the exhibition [in this case, baseball games], although it made for money, would not be called trade of commerce in the commonly accepted

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66 *See* Bowl Championship Series Revenue Distribution, *supra* note 10
67 *See* NCAA v. Board of Regents, *supra* note 57.
68 *See* BCS Selection Procedures, *supra* note 25 at 29.
69 *Federal Club v. National League*, 259 U.S. 200 (1922).
70 "Interstate Commerce," *West's Encyclopedia of American Law*, 2nd Ed. (2008).

use of those words."[71] Thus, the Supreme Court established that Major League Baseball would be exempt from the Sherman Antitrust Act.

This is relevant because, after nearly ninety years and numerous lawsuits challenging the ruling, including *Toolson v. Yankees* (1953) and *Flood v. Kuhn* (1972), the ruling stands. This begs the question as to whether this same type of ruling would be applied to college football despite the fact that bowl games are inarguably within the realm of interstate commerce. As mentioned before, part of the three-pronged test to determine whether an antitrust claim is justified includes proof that the agreement affects interstate commerce.[72] Can the courts really continue to insist that travel between states to attend games is "incidental" when BCS bowl games are generally comprised of teams traveling from various geographical regions to compete in a neutral site game?[73] Additionally, the BCS is touted for the economic boosts it provide in host cities[74]—a boost that should be contributed to traveling fans—so how can it be said that travel is incidental and BCS games do not constitute interstate commerce? That is for the judges to debate, but it is no less interesting to note inconsistencies in antitrust law.

Speaking of inconsistencies, *American Needle, Inc. v. National Football League* (NFL) (2010) provides further relevant case law for this discussion. In a unanimous opinion (9-0), Supreme Court ruled that the NFL acted in violation of Section 1 of the Sherman Antitrust Act by exclusively licensing the NFL brand to Reebok, refusing to bestow professional football with the same antitrust exemption as Major League Baseball.[75] In this case, American Needle, Inc., formerly officially licensed retailer of NFL products, brought suit against the league after the

[71] *See* Federal Club v. National League, *supra* note 68.
[72] *See* note 27 in Nathaniel Grow, *supra* note 32.
[73] *See* Federal Club v. National League, *supra* note 68.
[74] U.S. Congress. *Congressional Record*. 2004. 108th Cong., 1st sess. Washington, DC.
[75] *See* American Needle, *supra* note 54.

National Football League Properties, which was created "to develop, license, and market" NFL property, was granted approval to market NFL products exclusively, and in turn, granted exclusive headwear rights to Reebok International Ltd., and failed to renew American Needle's contract.[76] The NFL argued that it was a single entity in terms of product licensing, thus it could not conspire to restrict trade. The court, however, disagreed.

The key to the case's relevance is the notion of a single-entity versus a joint venture. The distinction between the two can be most aptly derived from the Supreme Court Case, *Copperweld v. Independence Tube* (1984). Copperweld Corporation, a steel tubing company, had purchased Regal Tube Company, another steel tubing manufacturer, from Lear Seigler, Inc. under the terms that Lear Seigler could not compete with Regal Tube for five years.[77] During this time, David Grohne, formerly an employee of Regal, had become an agent for Lear Siegler; subsequently, he started a correspondence with Yoder Company, Regal's competitor. After Yoder received a letter from Copperweld that threatened to take legal action against Grohne for competing against Regal, Yoder dropped correspondence and Grohne filed suit, claiming Copperweld was violating Section 1 of the Sherman Act. While the courts initially ruled in favor or Grohne, the decision was quickly appealed and overturned, and the courts held that Copperweld could not conspire with its wholly owned subsidiary, and thus, could not violate Section 1 of the Sherman Act. The idea is that although Copperweld and Regal are two separate entities, they constitute a single entity with "complete unity of interest."[78] This is the same type of protection the NFL sought in the *American Needle* case, and is likely the same type of protection the BCS will seek.

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[76] *See* American Needle, *supra* note 54.
[77] *Copperweld v. Independence Tube*, 467 U.S. 752 (1984).
[78] *See* Copperweld, *supra* note 76.

The final case that should be discussed at length is *International Boxing Club v. United States* (1959). The case involved what the United States believed to be an attempt by the IBC to monopolize championship boxing. In 1949, controllers of boxing at numerous major arenas paid Joe Louis $100,000 for rights to four of his fighters in an agreement that those four fighters would box each other for the heavyweight title, effectively monopolizing heavyweight championship boxing. In the preceding case, *United States v. International Boxing Club* (1955), the courts ruled that the exemption it had provided for Major League Baseball was unique to that sport, and thus, could not be applied to championship boxing.[79] As a result, the IBC appealed, claiming there was no proof of Section 1 and 2 violations, but the Supreme Court upheld their previous ruling, leading to the dissolution of the IBC.

The final opinion stated that championship matches comprise a distinct, separate market from non-championship matches due to the financial discrepancy between them. This may provide insight on what the decision could be in a BCS antitrust case, because of the financial discrepancies involved. Much like this case, the BCS seems to employ contracts and combinations to determine who plays in college football's equivalent to championship boxing matches by delegating particular conferences to play in particular bowls. Moreover, as mentioned before, the BCS allots less money to non-automatic qualifying conferences than automatic qualifiers who play in the same BCS games. This would not stand in boxing, so why should in stand in college football? The answer to this is unclear, but data analysis shows that the disparity in revenue distribution is unmistakable.

[79] *United States v. International Boxing Club of New York*, 348 U.S. 236 (1955).

V. Data Methods and Analysis

To examine the possibility of an anti-trust violation, I assess the nature of total BCS monetary payouts based on a school's conference affiliation, while instituting appropriate control variables. I have constructed an original dataset that captures BCS payouts from 2004 to 2010. Payouts are coded according to individual schools, as well as by conference affiliation. My sources of revenue data include NCAA Revenue Distribution Charts from 2004-05 through 2010-2011. Additionally, I have compiled the statistical data of each Division I-A team's wins and losses, BCS bowl berths, RPI ratings, BCS payouts, AP pre-season and final rankings, as well as final BCS ranking from the years 2004-2010, gathering this information from ESPN.com and Vaporia.com (RPI).[80] I organized this information into an Excel spreadsheet in order to conduct multivariable regression tests to examine statistical differences between conferences based on different variables. The following results were derived:

Table 1: RPI Effects on BCS Bowl Bid

Independent Variables	Dependent Variable = Total BCS Payout (Millions of Dollars)
RPI	-.0160***
School Affiliated with BCS Automatic Qualifier Conference	16.52***
Constant	4.602***
F-Ratio	2616.80***
R-Squared	.863

This table was based on the hypothesis that schools from automatic qualifying conferences fare much better, financially, than non-automatic qualifying conferences. The table

80 Brassler Data Sheet, compiled using BCS Revenue Distribution Chart 2004-2010 retrieved via *NCAA.org*, statistics via *ESPN.com*, and RPI via *Vaporia.com.*

provides empirical support for my hypothesis that BCS schools fare better, financially, than non-BCS schools. Overall, this model has strong explanatory power, as evidenced by the high R-squared value and the significance of the F-ratio. In terms of specific results, on average, each school from BCS conferences has made approximately $16.5 million dollars more than non-BCS schools over the course of my sample—even after controlling for RPI, which is an independent measure of team success. Of course, I must point out that teams with lower RPI scores, which indicate more success, also make more money than those with higher RPI scores. For each one-point increase in RPI (which a lower scored indicates a "better team"), teams lose $16,000; therefore, teams do have the ability to earn BCS money, regardless of their conference affiliation, if they can earn a lower RPI score. This, however, is not as easy as it may seem. The primary component of the RPI is strength of schedule. It is only logical to assume that schools in BCS conferences will inevitably play a more difficult schedule, and thus have a lower RPI. Some non-BCS teams have overcome this obstacle, but ultimately, if a team wins a higher percentage of their games, the RPI will likely be lower—as win-loss percentage is a large component of the RPI.

To assess this possibility, I created Table 2, where RPI is replaced with total losses:

Table 2: Total Losses Effect on Potential BCS Bowl Bid

Independent Variable	Dependent Variables = Total BCS Payout (Millions of Dollars)
Regular Season Losses	-.0623*
School Affiliated with BCS Automatic Qualifier Conference	17.034***
Constant	3.715
F-Ratio	2567.75
R-Squared	.861

Here, once again, teams in BCS conferences are making more money. However, the number of regular season losses is not statistically significant. This is likely a result of the fact that teams in strong conferences can survive one—and in some cases, two—losses, and still reach a BCS game. As a result, it seems that the only way to solve the discriminatory ways of the BCS is for massive conference realignment to occur, evenly distributing the power between each conference. While this seems to be taking place to some extent—noting the moves of the Universities of Missouri and Texas A&M into the SEC, Boise State, Central Florida, Southern Methodist, and others to the Big East, and TCU to the Big 12—this will only open the door for more non-automatic qualifying schools to prove their worth in "weaker" conferences, only to be denied an opportunity to play in the big games. Regardless, as displayed by Table 3, it is clear that something needs to change in order to provide equal opportunity for mid-major conferences.

Table 3: BCS Revenue Distribution by Conference 2004-2005 through 2010-2011

Conferences	Millions of Dollars	Average per Team (Assuming Equal Distribution)
Atlantic Coast Conference	130,230,836	10,983,324.30
Big 10	158,778,450	16,575,597.40
Big 12	143,778,450	14,434,404.50
Big East	130,230,836	11,981,537.50
Pac 10	136,230,855	13,623,085.50
SEC	154,230837	12,852,569.80
All Non-Automatic Qualifying Conferences	130,171,923	2,469,386.11

This table was created by adding the total BCS revenue distributed to each conference as well as by adding the total revenue of all non-automatic qualifying conferences combined. The unequal distribution of revenue shown in Table 1 is another quandary of the Bowl Championship Series. As you can see, each of the six automatic qualifying conferences earned more money than the five non-automatic qualifying conferences combined, creating a massive rift in revenue distribution—a notion which is further highlighted when you consider the "assumed equal distribution." Table 4 provides a conference specific regression model with a control for RPI to further examine the matter:

Table 4: Effects of BCS Conference Affiliation on BCS Payout

Independent Variable	Dependent Variable = Total BCS Payout (Millions of Dollars)
ACC	14.357***
Big 10	18.767***
Big 12	16.507***
Big East	14.707***
Pac 10	15.595***
SEC	17.992***
IA	.162745
RPI	-.0168***
Constant	4.672***
F-Ratio	693.42
R-Squared	.871

This table analyzes conference-by-conference affiliations, with a category included for non-affiliated 'independents.' This table indicates a statistically significant value for each of the six major conferences. The lone variable in this model that is not statistically significant is the "independent" variable. Because I control for RPI, these findings seem to indicate that independent teams are at a disadvantage when it comes to earning BCS payout money, regardless of their respective RPI. While the gap seems significant, as mentioned in Part II, Notre Dame receives an automatic bid if they finish the regular season ranked eighth or better in addition to receiving 1/66th of BCS revenue every year, regardless of on-field performance. Thus, their fellow independents are likely the reason for the unequal distribution shown in this chart.

Moving on, Table 5 was constructed based on the notion that AP preseason rank has an unjustified bearing on where teams end up in the standings. Here is a real example of this hypothesis: If team A is ranked 23rd in preseason AP polls, it would be significantly harder for them to reach the national championship. The theory underlying this idea is that the AP perception of a team may impact human voters in the polls used as components of the BCS formula. Here are the results:

Table 5: Effect of AP Preseason Rank on Potential BCS Bowl Bid

Independent Variables	Dependent Variables = Total BCS Payout (Millions of Dollars)
Affiliated with BCS Automatic Qualifier Conference	13.167
AP Preseason Rank	-.0184
Constant	7.690
F-Ratio	89.56
R-Squared	.519

For those who may fear that the AP pre-season poll might influence subsequent analyses of teams' relative success, this model illustrates that the AP pre-season ranking is not a statistically significant predictor of total BCS payout at the end of a season. What it may suggest, however, is that the initial BCS rankings are much more significant in terms of who will make the championship—though future research should specifically address that matter.

The last table analyzes the total revenue distributed by BCS and Non-BCS bowls from the 2004-2005 season through the 2010-2011 season. This was completed to analyze the hypothesis that the BCS controls a vast majority of the revenue producing postseason market, and is thus vulnerable to an antitrust suit of monopolization.

Table 6: Total Revenue Distributed by BCS and Non-BCS Bowls 2004-2005 through 2010-2011 with BCS Percentage of Total Revenue Distributed

BCS Revenue Distributed: 2004-2005 through 2010-2011	$1,021,673,349
Non-BCS Revenue Distributed: 2004-2005 through 2010-2011	$537,337,593
Total NCAA Revenue Distributed	$1,559,010,942
BCS Revenue as a Percentage of Total Revenue Distributed	65.53%

This appears to be the most telling data analysis of all in terms of antitrust implications. As you can see, BCS revenue accounts for over 65 percent of the total NCAA postseason college football revenue since 2004-2005. While many have stated that charges of a monopoly could not be levied against the BCS,[81] this data suggests otherwise, as an entity controlling 65 percent of

[81] *See* M. Todd Carroll, Note, *No Penalty on the Play: Why the Bowl Championship Series Stays In-Bounds of the Sherman Act*, 61 Wash. & Lee Law Rev. 1235 (2004); Brett P. Fenasci, Comment, *An Antitrust Analysis of College Football's Bowl Championship Series*, 50 Loy. Law Rev. 967 (2004); Timothy Kober, Comment, *Too Many Men on the Field: Why Congress Should Punt on the Antitrust Debate Overshadowing Collegiate Football and the Bowl Championship Series*, 15 Seton Hall J. Sports & Ent. Law 57 (2005); Leslie Bauknight Nixon, *Playoff or Bust: The Bowl Championship Series Debate Hits Congress (Again)*, 21 St. Thomas Law Rev. 365 (2009); *See* Christopher Pruitt, *supra* note 57; C. Paul Rogers III, *The Quest for Number One in College Football: The Revised Bowl Championship Series, Antitrust, and the Winner Take All Syndrome*, 18 Marq. Sports Law Rev. 285 (2008); Jodi M. Warmbrod, Comment, *Antitrust in Amateur Athletics: Fourth and Long: Why Non-BCS Universities Should Punt Rather Than Go For an Antitrust Challenge to the Bowl Championship Series*, 57 Okla. Law Rev. 333 (2004); etc.

any relevant market should raise red flags. The question will become whether the BCS provides a product of superior foresight, skill, or industry, but with all of the controversy swirling, it is hard to imagine that could be proved. While the BCS has successfully matched the number 1 and 2 teams in the national championship each year, its selections have been highly debatable.

VI. Conclusion

This article has analyzed the potential of an antitrust case against the Bowl Championship Series by analyzing relevant antitrust laws, case precedent and revenue distribution data. Although the majority of academic literature suggests the BCS is not vulnerable to antitrust action, this article provides data and argumentation that suggests otherwise. First, a charge of monopolizing postseason college football could surface against the BCS due to the fact that its games control a great majority of the revenue producing postseason college football market, raising the question of restrained trade and exclusion of competition. The data analysis above presents a strong case for this by showing the unabashed discrimination maintained towards non-automatic qualifying conferences. Table 6 introduces facts about bowl revenue distribution, showing that the market is strangled by BCS postseason regulation. Acknowledging the massive disparity in revenue distribution, BCS opponents could also maintain that a group boycott is being levied against them, preventing non-automatic qualifying conferences from competing on an equal playing field as automatic qualifying conferences. Furthermore, a price-fixing arrangement could also be charged against the BCS due to their control of BCS payouts; especially when one considers the payouts allot more money to automatic qualifying conferences than non-automatic qualifiers, even when the conferences play in the same games. Ultimately, the debate over single-entity versus joint venture status will decide which charges the BCS will face, monopolization, group boycott, and illegal price fixing will likely be the charges that are focused upon in BCS antitrust litigation. While there are no guarantees in antitrust cases, this article presents strong evidence—through analysis of case law and relevant statistics—that the BCS is very vulnerable to antitrust attack.