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The Bowl Championship Series, Conference Realignment and the Major College Football Oligopoly: Revolution Not Reform

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**THE BOWL CHAMPIONSHIP SERIES,
CONFERENCE REALIGNMENT AND THE
MAJOR COLLEGE FOOTBALL
OLIGOPOLY: REVOLUTION NOT REFORM**

*Alfred Dennis Mathewson**

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ABSTRACT

The legality of the Bowl Championship Series under the federal antitrust laws has been the subject of much scholarly commentary and Congressional inquiry. The results have been mixed but the majority view seems to be that the BCS passes muster under the Sherman Act. Most of the commentary has examined the application of Section 1 with only passing attention to Section 2. This article makes three points. First, it argues that the focus on the BCS has obscured the attention to a broader set of economic issues relating to the structure of the major college

* Henry Weihofen Chair in Law, and Acting Director, Africana Studies Program, University of New Mexico, 2011. This article is dedicated to my brother Frank who supported my education in high school, college and law school and to my niece Nicole and nephew Mark, both of whom I was supposed to acknowledge at my law school graduation and my sister-in-law Diane.

football industry. The Bowl Championship Series and its relationship to the Football Bowl Subdivision of the NCAA has obscured focus on the development of major college football as an oligopoly in which the firms are athletic conferences. The industry is dominated by the BCS automatic qualifying conferences which have engaged in conference expansion and realignments to strengthen their dominance over the industry. Second, the article acknowledges that the regulation of oligopolies has been problematic under the antitrust laws but explores whether the major college football oligopoly may present an appropriate case for regulation as a cartel under section 1 or perhaps as a shared monopoly under section 2. In exploring the application of the Sherman Act to the major football conference oligopoly, this article draws upon themes and analyses in European Community competition law. Unlike the traditional oligopoly, the industry conference members not only engage in parallel conduct but are linked by explicit agreements such as the BCS and NCAA Bylaws on conference structure and amateurism rules. Finally, assuming a strong case can be made for the application of the Sherman Act to the oligopoly, this article discusses whether traditional antitrust remedies are feasible. Accordingly, this article reluctantly considers the propriety of granting the NCAA a limited exemption from the antitrust laws to permit it to regulate the economic structure of intercollegiate athletics while concomitantly subjecting it to oversight by the Department of Education. This article thus calls for revolution not reform.

I. INTRODUCTION

The Bowl Championship Series has been the subject of controversy since its inception. The BCS is a collaboration among the organizers of four major bowls and the eleven Football Bowl Subdivision (FBS) conferences ostensibly designed to produce a national championship game in major college football.¹ Unable to produce a play-off, the BCS comes only close enough to produce a match-up between the top two ranked college football teams and

¹ 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, 142 (2009).

four highly quality matchups. Six conferences automatically qualify for at least one berth in the lucrative bowl games. Colleges and universities from five additional conferences, while not fully excluded from participating, have a limited probability of obtaining one of the remaining four slots.² Those universities, their congressional delegations and fans have complained about the unfairness of their exclusion from BCS games.³ The fairness questions relates not just to an opportunity for their teams to have a chance to compete on the playing field in a BCS bowl game or “national championship” game, but, to fundamental economic issues. Universities that get to play in a BCS bowl game are assured a substantial payday.

Individual universities, however, are only a part of the equation. Conference membership is the key to the economic payday. The BCS divides conferences into automatic qualifiers and non-automatic qualifiers. A team that is a member of an automatic qualifying conference playing in a BCS bowl shares the payday with its conference and the other members of the conference.⁴ Six conferences are assured that a member school will participate in the payday. . All other conferences are on the outside looking in competing for a chance at not more than two BCS bowl slots.⁵ However, they share any BCS payday with all of the other non-automatic qualifying conferences, although the participating conference will receive a substantial portion of the payout.⁶ The arrangement means that automatic qualifying conferences receive a revenue stream that enables them to

² Non-automatic qualifying conferences may not obtain more than two of the remaining four slots.

³ Michael McCann, *Antitrust, Governance and Postseason College Football*, 52 B.C. L. REV. 517, 521 (2011).

⁴ Jude D. Schmit, *A Fresh Set of Downs? Why Recent Modifications to the Bowl Championship Series Still Draw A Flag Under the Sherman Act*, 14 SPORTS LAW. J. 219, 232 (2007); M. Todd Carroll, Note, *No Penalty on the Play: Why the Bowl Championship Series Stays In-Bounds of the Sherman Act*, 61 WASH. & LEE L. REV. 1235, 1248 (2004).

⁵ Eric Blevins, *College Football's BCS (Bowl Cartel System?): An Examination of the Bowl Championship Series Agreement Under The Sherman Act*, 18 SPORTS LAW. J. 153, 155-56 (2011)(post-2007 amendments); Katherine McClelland, Comment, *Should College Football's Currency Read "In BCS We Trust" or Is It Just Monopoly Money?: Antitrust Implications of the Bowl Championship Series*, 37 TEX. TECH L. REV. 167, 184-5 (2004)(rules prior to 2007 amendments).

⁶ Blevins, *supra* note 5, at 156.

improve their programs and render them more competitive in the market for top-tier coaches and athletes. The focus on the antitrust laws is thus understandable. There are many other bowls with significantly smaller paydays.⁷

The development and growth of the BCS has coincided with the occurrence of a parallel development in major college football that has routinely generated litigation but not the reprobation afforded the BCS. Conference affiliations have fluctuated historically but the 1990s ushered in an era of cataclysmic shifts. A major shift occurred in 1996 with the demise of the Southwest Conference.⁸ Other conferences absorbed its member schools. The Western Athletic Conference of which the University of New Mexico was a member expanded to sixteen teams in 1999.⁹ The arrangement was unwieldy and eight members left to form the Mountain West Conference.¹⁰ Neither the Mountain West Conference nor the Western Athletic Conference has ascended to the status of an automatic qualifier, although both have had one or more teams qualify for a BCS berth.¹¹

⁷ McClelland, *supra* note 5, at 176-77, 189-90; *see also* Amy Christian McCormick and Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 513-14 (2008) (total revenue from all bowls in 2006 exceed \$200 million).

⁸ The Southwest Conference never recovered from the imposition of the NCAA's death penalty on Southern Methodist University. *See* Maureen Weston, *NCAA Sanctions: Assigning Blame Where It Belongs*, 52 B.C. L. REV. 551, n.83 (2011); Glenn Wong, Kyle Skillman, Chris Deubert, *The NCAA's Infractions Appeals Committee: Recent Case History, Analysis and the Beginning of A New Chapter*, 9 VA. SPORTS & ENT. L.J. 47, n. 240 (2009). The University of Arkansas moved to the Southeast Conference in 1990. *See* <http://www.secsportsfan.com/sec-football-history.html>. Baylor University, Texas A&M University, Texas Tech University and the University of Texas moved to the Big Eight Conference resulting in the Big Twelve Conference in 1996. Mark Hales, *The Antitrust Issues of NCAA College Football within the Bowl Championship Series*, 10 SPORTS LAW. J. 97, n. 41. (2003). Rice University, Southern Methodist University, and Texas Christian University then joined the Western Athletic Conference and the University of Houston moved to Conference USA. *Id.*

⁹ History of the Wac, WACSPORTS.COM, July 15, 2011 http://www.wacsports.com/ViewArticle.dbml?DB_OEM_ID=10100&ATCLID=537066.

¹⁰ About the Mountain West, THEMWC.COM, <http://www.themwc.com/about/mwc-about.html>.

¹¹ BCS selections history, BCSFOOTBALL.ORG, <http://www.bcsfootball.org/news/story?id=5528971>. (The Mountain West Conference has had two teams earn a BCS berth: University of Utah in 2005 and 2009, and Texas Christian University in 2010 and 2011. The Western Athletic Conference has had two

The next wave began in 2003 as conferences increased in size in order to comply with NCAA rules to stage a conference championship. The NCAA required a minimum of twelve teams to hold a conference championship game.¹² To obtain the requisite twelve, conferences began raiding other conferences. The Big East became a major football conference in 1991 with the addition of Rutgers, Miami, Temple, Virginia Tech, and West Virginia.¹³ In 2003, however, the Atlantic Coast Conference lured Boston College, the University of Miami and Virginia Tech away from the Big East.¹⁴ The Big East then added Louisville, Cincinnati, South Florida, Marquette, and DePaul from Conference USA.¹⁵

Another wave of expansion began in 2010 as the automatic qualifying conferences began trying to strengthen their dominance of the market for major college football by adding members to increase the quality of their product and concomitantly the value of television rights. The expansion has gone further than the first wave as strong automatic qualifying conferences have raided weaker conferences. The Big Twelve conference has barely survived. The Big East is in danger of losing its automatic qualifying conferences after the Atlantic Coast Conference raided it and West Virginia University took a lifeboat to the Big 12. The Mountain West has been greatly damaged. First, Utah left in 2011 to join the PAC-12 and BYU left to operate as an independent after negotiations to join the Big 12 failed. Then TCU bolted to join the Big East, which it left for the Big 12. Finally, Boise State, which joined in 2011, is moving to the Big East in 2013.¹⁶

teams earn a BCS berth: University of Hawaii in 2008, and Boise State University in 2007 and 2010).

¹² National Collegiate Athletic Association, 2011-12 NCAA Manual, Bylaw 17.9.5.2 (2011).

¹³ Big East Conference, http://en.wikipedia.org/wiki/Big_East_Conference#cite_ref-7.

¹⁴ See Brian Favat, *Why It Will Take More Than Money To Lure Boston College Back To The Big East, BC Interruption* (Aug. 9, 2011), <http://www.bcinterruption.com/2011/8/9/2348582/big-east-expansion-rumors-boston-college-to-big-east>.

¹⁵ *Id.*

¹⁶ Erik Smith, *Boise State staying in Mountain West in 2012 before Big East move*, USA TODAY (Feb. 22, 2012), <http://content.usatoday.com/communities/campusrivalry/post/2012/02/boise-state-staying-mountain-west-2012-big-east/1#.T4jVvVFPvFI>.

Participation in the BCS by a Mountain West Conference institution has a significant economic impact on the fortunes of the University of New Mexico, where I am a faculty member, even though its participation in a BCS bowl in the near future is a theoretical proposition regardless of the legality of the BCS. When Texas Christian University (TCU) made it to the BCS in 2010, UNM's share of the payday put the athletic program in the black for the year.¹⁷ Similar economic fortunes occurred when Utah was selected for BCS bowls in 2005 and 2009. When TCU upset Boise State in the 2011-12 season, the latter lost its mandatory eligibility for a BCS slot and the loss of a significant financial windfall for the University of New Mexico.

Both waves frequently generated litigation as expanding conferences acquired members from other conferences. Both the exiting schools and the acquiring conferences have faced lawsuits by the jilted conferences and its remaining members.¹⁸ Notwithstanding the litigation, conference realignment has been entertaining but has not generated the level of controversy of the BCS.

Scholars and commentators have joined the fray examining the legality of the BCS under the antitrust laws.¹⁹ Congress has

¹⁷ James Monteleone, UNM Athletics Finishes In Black, ALBUQUERQUE JOURNAL, Mon., Aug. 8, 2011, <http://www.abqjournal.com/main/2011/08/08/news/unm-athletics-finishes-in-black.html>.

¹⁸ Greg Katz, Note, *Conflicting Fiduciary Duties Within Collegiate Athletic Conferences: A Prescription for Leniency*, 47 B.C. L. REV. 345, 356-60 (2006) (exiting schools have had to defend claims of breach of covenant of good faith, breach of fiduciary duty, promissory and equitable estoppel and unjust enrichment; the acquiring conferences have faced claims for inducement to breach fiduciary duties, aiding and abetting, breach of the implied duty of good faith as well as unjust enrichment); See also Complaint, *The Big East Conference v. West Virginia University*, R.I.Sup. Ct., available at <http://www.cbssports.com/images/collegefootball/bigeastcomplaint11042011.pdf> (Big East sues for injunctive relief for damages in what is essentially a breach of contract action.) See also Complaint for Declaratory Judgment, Breach of Contract and Permanent Injunctive Relief, Civ. Act. 11-C-695, West.Va. Cir. Ct, <http://www.jdsupra.com/post/documentViewer.aspx?fid=84048b47-c82b-4392-b5ed-b38d68c133eb>. (West Virginia University filed an action seeking a declaratory judgment in West Virginia).

¹⁹ Nathaniel Grow, *Antitrust and the Bowl Championship Series*, 2 HARV. J. SPORTS & ENT. L. 53 (2011); Jodi Warmbrod, Comment, *Antitrust in Amateur Athletics: Why Non-BCS Universities Should Punt Rather Than Go for an Antitrust Challenge to the Bowl Championship Series*, 57 OKLA. L. REV. 333 (2004); Carroll, *supra* note 4;

held hearings and bills have been introduced into Congress.²⁰ The obsession with the BCS has obscured focus on a broader set of legal and economic issues pertaining to the structure of the major college football industry. This article charts the transformation of major college football into an oligopoly in which the firms primarily consist of the eleven Football Bowl Subdivision conferences rather than its 120 member institutions. It will argue that the major college football industry is dominated by the six BCS automatic qualifying conferences. It will show that the transformation begins with the victory of major college football powers in *NCAA v. Board of Regents*.²¹ Unconstrained by the NCAA, the major college football programs continued their drive to attain dominance. Because unfettered competition among individual institutions meant lower television revenues, the major college programs sought to strengthen conferences as economic units. The automatic qualifying conferences have used their economic strength to negotiate television contracts, stage championship games, obtain bowl tie-in agreements, divide geographic markets and influence the shape of NCAA economic rules. They have sought to buttress their economic power through parallel actions to raid other conferences and expand. Moreover, that dominance is cemented through two sets of explicit agreements: the BCS and NCAA rules on amateurism, post-season eligibility and conference championship... This article thus will explore whether the automatic qualifying conferences, not the BCS, have liability as oligopolists under section 2.

This article acknowledges that the regulation of oligopolies has been problematic under the antitrust laws but explores whether the major college football oligopoly may present an appropriate case for regulation as a cartel under section 1 or perhaps as a shared monopoly under section 2. In exploring the application of the Sherman Act to the major football conference oligopoly, the article draws upon themes and analyses in

Hales, *supra* note 8; McClelland, *supra* note 5; Pruitt, *supra* note 1; Schmit, *supra* note 4, at 232.

²⁰ Leslie Bauknight Nixon, *Playoff or Bust: The Bowl Championship Series Debate Hits Congress (Again)*, 21 ST. THOMAS L. REV. 365 (2009); Schmit, *supra* note 4, at 221.

²¹ *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma and University of Georgia Athletic Association*, 468 U.S. 85 (1984).

European Community competition law. Unlike the traditional oligopoly, the industry conference members not only engage in parallel conduct but also are linked by explicit agreements such as the BCS and NCAA Bylaws on conference structure and amateurism rules.

Finally, assuming a strong case can be made for the application of the Sherman Act to the oligopoly, the article discusses whether traditional antitrust remedies are feasible. Accordingly, this article reluctantly considers the propriety of granting the NCAA a limited exemption from the antitrust laws to permit it to regulate the economic structure of intercollegiate athletics while concomitantly subjecting it to oversight by the Department of Education. This article thus calls for revolution not reform.

II. THE FOCUS ON THE BCS AND CONVENTIONAL ANTITRUST ANALYSES

Many commentators have explored an antitrust challenge to the BCS under Sections 1 and 2 of the Sherman Act. Most attention in antitrust analyses has focused on Section 1 reflecting a view that a claim based on that section is the most likely source of a challenge.²² The general consensus has been that the BCS probably passes muster under a rule of reason analysis under section 1²³ and that a section 2 challenge faces substantial obstacles.²⁴ The basic criticism is that the major conferences²⁵ have created a post-season bowl system that excludes universities in other mid-major conferences²⁶ from participating in the major bowls and from equitably sharing in the revenues.²⁷ The

²² McCann, *supra* note 3, at 540.

²³ *Id.*, at 525.

²⁴ *Id.*, at 526.

²⁵ The term "major conferences" refers to the six automatic qualifying conferences in the BCS structure, but major conferences particularly when referring to the major college football industry or oligopoly refers to the eleven conference members of the NCAA's Football Bowl Subdivision.

²⁶ Those other conferences refers to the five non-automatic qualifying conferences in the BCS structure. They are sometimes referred to herein as the mid-majors.

²⁷ See Brad Taconi, *Third and Extremely Long: Why the Elimination of the BCS Seems All But Impossible*, 4 J. BUS. ENTREPRENEURSHIP & L. 181, 205-06 (2010); Paul Rogers, *The Quest for Number 1 in College Football: The Revised Bowl Championship Series, Antitrust and the Winner Take-All Syndrome*, 18 MARQ. SPORTS L. REV. 285,

arguments have been that the usurpation of the major bowls and their revenue streams by the automatic qualifying conferences and the lack of influence in the BCS structure by non-automatic qualifying conferences are anticompetitive.²⁸ The mere existence of inequities, however, is not anticompetitive in the antitrust sense. Some commentators have argued that the BCS constitutes a group boycott or price-fixing resulting in harm to consumers by reducing the quantity and quality of competitive bowls.²⁹

Commentators generally agree that the BCS would be evaluated under the Rule of Reason because cooperation among competing universities is necessary to offer any sort of national championship play-off system. The BCS, while imperfect, at a minimum guarantees the match-up of the two top-ranked teams, a product that did not exist before its creation and that requires cooperation among competitors to offer it. Universities from the non-automatic qualifying conferences and elected officials in their states have led the public outcry.³⁰ They do not necessarily oppose a national championship but they oppose the BCS system, which greatly restricts the opportunity for the outsider universities to compete for the national championship and the big paydays. Consequently, the vulnerability of the BCS system to an antitrust challenge under section 1 probably depends upon whether there are less restrictive alternatives.³¹ The BCS system has been revised to add a fifth bowl and two additional bowl slot chances for non-automatic qualifying conferences due to this test.³² The BCS is considering additional changes as the criticism has continued unabated.³³

288-90 (2008); David Scott Moreland, Note, *The Antitrust Implications of the Bowl Championship Series: Analysis Through Analogous Reasoning*, 21 GA. ST. U. L. REV. 721,741-42 (2005); McCann, *supra* note 3.

²⁸ McCann, *supra* note 3, at 527-28; McClelland, *supra* note 5, at 1271.

²⁹ K. Todd Wallace, *Elite Domination of College Football: An Analysis of the Antitrust Implications of the Bowl Alliance*, 6 SPORTS LAW. J. 57, 75-76 (1999); Grow, *supra* note 19.

³⁰ Pruitt, *supra* note 1, at 126-27; Taconi, *supra* note 27, at 203-06.

³¹ Blevins, *supra* note 5, at 174-79; McClelland, *supra* note 5, at 1282-84.

³² Grow, *supra* note 19, at 77-80 (commentator asserts that recent changes do not negate group boycott or price-fixing claims).

³³ Gene Wojciechowski, *Sources: BCS proposes radical changes*, http://espn.go.com/college-football/story/_/id/7248953/bcs-proposes-only-handling-national-championship-game-sources-say (Nov. 19, 2011); *BCS officials to discuss*

At least one commentator has argued that section 1 is inapplicable because the BCS system constitutes a single entity for the purposes of Section 1 negating the duality requirement.³⁴ He argues that separate universities join to produce the BCS, that such cooperation is necessary and that accordingly the BCS system should be per se legal under this section. The Supreme Court has repeatedly rejected the essence of his argument but the commentator relied upon the appellate court decision in *American Needle v. NFL*, a decision subsequently rejected by the Supreme Court.³⁵ The single entity defense is worth noting because if the BCS were so recognized, it is still not out of the antitrust woods. Section 2, the antimonopoly provisions, looms large.

Less attention has been given to potential Section 2 claims in the commentary even though popular critiques have characterized the BCS system as a monopoly.³⁶ Again, the perceived unfairness does not easily translate into antitrust claims. One section 2 argument is that the automatic qualifying conferences have conspired to give themselves the market power to reduce the output of post-season bowl games and dictate the price of broadcast rights and consumer ticket prices for those bowls.³⁷ The assertion of market power means that you have to identify a relevant product and geographic market. Here the argument is that the automatic qualifying conferences have illegally obtained monopoly power in the market for a national major college football championship game or the major bowls.³⁸

One reason commentators do not dwell on Section 2 are the perceived difficulties in making a case under the requirements of that section. Professor Michael McCann has provided a brief treatment of a section 2 claim.³⁹ First, the section primarily applies to the conduct of a single firm and the BCS system

changes, http://espn.go.com/college-football/story/_/id/7442352/bowl-championship-series-officials-discuss-possible-format-changes (Jan. 10, 2012).

³⁴ Pruitt, *supra* note 1, at 146-51.

³⁵ *American Needle Inc. v. National Football League*, 538 F.3d 736 (7th Cir. 2009), *reversed*, 130 S.Ct. 2201 (2010).

³⁶ *Supra* note 27.

³⁷ *See* Rogers, *supra* note 27, at 299-300; *see also* Blevins, *supra* note 5, at 169 (argument that BCS has monopoly on major college national championship game).

³⁸ McClelland, *supra*, note 5, at 188; Rogers, *supra* note 27, at 299.

³⁹ McCann, *supra* note 3, at 540-41.

involves conferences, bowl organizations, the NCAA and its member institutions.⁴⁰ The heart of a section 1 claim is the existence of an agreement to restrain trade. Accordingly, most commentators have devoted some effort to describing the structure and agreements of the BCS. For example, Professor McCann drawing upon the self-description on the BCS website alludes to a “five-game showcase” to match the top two rated college football teams and four additionally highly competitive bowl games.⁴¹ He then refers to colleges and universities that are members of the Football Bowl Subdivision of the NCAA and also the six BCS-affiliated conferences and five non-BCS affiliated conferences.⁴²

Secondly, a plaintiff must show that the defendant possesses monopoly power in a relevant market.⁴³ A section 1 violation merely requires the possession of market power. The distinction may be of little conceptual significance in this instance whether the relevant market is the market for a national major college football championship game, or the BCS bowl games or the televising of BCS bowl games.⁴⁴ The BCS possesses market power in all three of those markets and moreover it has sufficient power to constitute monopoly power.⁴⁵ Thirdly, even if a firm possesses monopoly power, it does not necessarily violate Section 2. It must have acquired the monopoly power in an illegal manner or used its monopoly power to maintain its monopoly.⁴⁶ It is permissible if the monopoly was thrust upon it or resulted from superior skill or knowledge.⁴⁷

Virtually all of the commentary views the BCS in isolation when evaluating the potential antitrust claims. By limiting the focus to the BCS, the commentators have spent little time examining the dominance of the automatic qualifying conferences over major college football. Early examination of cartel behavior in intercollegiate athletics was directed at the NCAA. In fact, many

⁴⁰ McClelland, *supra* note 5 at 195.

⁴¹ McCann, *supra* note 3, at pp. 517-18.

⁴² *Id.* at 518.

⁴³ McCann *supra* note 3, at 540.

⁴⁴ McCann, *supra* note 3, at 535, 540.

⁴⁵ *Id.*, at 540-41.

⁴⁶ *Id.*

⁴⁷ *Id.*

of the articles examining the BCS refer to the role of the NCAA but do not target it as the culprit. Such analysis today would be misplaced. Major college intercollegiate athletics is driven by the economics of football⁴⁸ and the NCAA has been unable to regulate the emergence of an oligopoly that controls or strongly influences it. In any case, the attention given to the BCS has obscured the development of an oligopoly dominated by its half-dozen automatic qualifying conferences. The scant attention to Section 2 or rather the emphasis on section 1 has meant very little analysis of the industry structure and its regulation under the antitrust laws or otherwise. There have been calls for legislative responses to address the perceived inequities of the BCS⁴⁹ but not the larger problem of industry structure.

Neither modifications to the BCS format or the adoption of an NCAA championship playoff will alleviate the industry structure concerns. The problem is not that the BCS constitutes a cartel but that the NCAA Football Bowl Subdivision, formerly Division I, is an oligopoly dominated by a small number of elite university programs, but dominated by a small number of conferences.⁵⁰

III. EMERGENCE OF THE MAJOR CONFERENCE OLIGOPOLY

The oligopoly story begins when five major conferences and several major independents formed the College Football Association in 1977.⁵¹ Prior to the Supreme Court decision in

⁴⁸ The Second Century Imperatives, Presidential Leadership-Institutional Accountability, A Report from the Presidential Task Force on the Future of Division I Intercollegiate Athletics 2-024 (2006), available at http://facsen.wsu.edu/items_of_interest/athletics/NCAA/NCAAPresidentialTaskForcefinalreportOct06.pdf.

⁴⁹ Nixon, *supra* note 20; Schmit, *supra* note 4; for a contrary view, see Timothy Kober, *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. L. 57 (2005).

⁵⁰ The Football Bowl Subdivision consists of eleven conferences: Atlantic Coast Conference, Big East Conference, Big Ten Conference, Big Twelve Conference, Big Sky Conference, Conference USA, Missouri Valley Conference, Mountain West Conference, Pac-12 Conference, Southeastern Conference, and Western Athletic Conference. <http://www.usatoday.com/sports/college/football/teamindex.htm>.

⁵¹ The College Football Association membership consisted of the Atlantic Coast, Big 8, Southeastern, Southwestern and Western Athletic Conferences and the independents, University of Notre Dame, Pennsylvania State University, University of Pittsburgh and the military academies. Board of Regents, University of Oklahoma v.

NCAA v. Board of Regents, the NCAA controlled television rights to NCAA Division I football.⁵² Under its contracts with the American Broadcasting Company (ABC) and the Columbia Broadcasting Systems (CBS), member schools were limited in the number of television appearances over a two-year period and revenues were governed by a price scale.⁵³ Thus, the NCAA television controls provided for revenue sharing of television revenues among NCAA members. The more popular major university programs capable of generating high revenues because of high demand but bearing high costs were in essence sharing revenue with less popular university programs with lower revenues, demand and costs. Desiring a better revenue sharing arrangement that permitted them to keep more of the revenue, the College Football Association members sought control over their television rights and attempted to negotiate their own contract with the National Broadcasting Company.⁵⁴ When the NCAA threatened to expel them from membership, two universities that were members of the College Football Association challenged the NCAA contract on antitrust grounds. The Supreme Court ruled that the contract constituted an unreasonable restraint against trade.⁵⁵

NCAA v. Board of Regents was a monumental ruling. The courts at each level of *NCAA v. Board of Regents* inartfully tried to articulate a distinction between the commercial activities of the NCAA and its educational and athletics governance activities.⁵⁶ The courts suggested, albeit for different reasons, that its educational functions did not shield the NCAA from antitrust

National Collegiate Athletic Association, 546 F.Supp. 1276, 1285 (W.D. Okla. 1982); 468 U.S. 89; Alfred Dennis Mathewson, *By Education or Commerce: The Legal Basis for the Federal Regulation of the Economic Structure of Intercollegiate Athletics*, 76 UMKC L.REV. 597, 617-18 (2008). The members of those conferences and the independents were upset with the NCAA revenue sharing structure.

⁵² The NCAA had controlled football television rights since the 1950's but did not clearly assert its authority to do so until 1981 after the College Football Association questioned that authority. *Board of Regents v. NCAA*, 546 F. Supp. 1283-85.

⁵³ *NCAA v. Board of Regents*, at 468 U.S. 91-94.

⁵⁴ *Id.* at 94-95.

⁵⁵ *Id.* at 468 U.S.120.

⁵⁶ Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 RUTGERS L.J. 269 (1994).

scrutiny.⁵⁷ The Supreme Court touched the issue in passing by dismissing an exemption due to the nonprofit status of the NCAA or the educational nexus.⁵⁸ While the Court sanctioned its role in regulating amateur intercollegiate athletics, it also nixed the NCAA's control of television rights and also effectively precluded the NCAA from regulating the economic structure of intercollegiate athletics.⁵⁹ The members of the College Football Association were given the green light to promote their economic self-interest, as the NCAA could not regulate their economic activity without violating the antitrust laws.⁶⁰ The Court expressed its approval in of the NCAA's governance in *NCAA v. Tarkanian*, a case with claims of procedural overreaching and unfairness by the NCAA.⁶¹

A glut of college football programming resulted after *NCAA v. Board of Regents* as individual universities were free to compete against each other in selling television rights.⁶² Universities thus recognized that some restraints on the competition were desirable if prices were to stabilize. The solution was conference contracts. Conferences presented a significantly smaller number of firms selling television rights than the then nearly 200 universities operating Division I football programs. The question was whether conference contracts would violate the antitrust laws in the same manner as the NCAA contract. The courts ruled differently. In *Regents of the University of California v. American Broadcasting Co.*, the PAC-10 TV contract was the subject of an antitrust

⁵⁷ Board of Regents v. NCAA, 707 F.2d. 1147, 1153-55 (10th Cir. 1983); Board of Regents v. NCAA, 546 F.Supp. 1288-89.

⁵⁸ NCAA v. Board of Regents, 468 U.S. 100-02.

⁵⁹ The result was seconded in Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998); *cert. denied*, NCAA v. Law, 525U.S. 822 (1998).

⁶⁰ Although the Supreme Court construed the antitrust laws to preclude regulation of the commercial activities of member institutions, it has allowed the NCAA to regulate the economic relationship between universities and student athletes. NCAA v. Board of Regents, at 468 U.S. 102. The Department of Justice has not taken that the position with respect to the economic relationship between universities and faculty members, *see infra* note 164, or universities and non-student athletes, *see infra* note 164.

⁶¹ NCAA v. Tarkanian, 488 U.S. 179 (1988).

⁶² D. Kent Meyers and Ira Horowitz, *Private Enforcement of the Antitrust Laws Works Occasionally: Board of Regents of the University of Oklahoma v. NCAA, A Case In Point*, 48 OKLA. L. REV. 669, 699-708 (1995).

challenge based on Board of Regents.⁶³ The conferences presented smaller economic joint arrangements competing against each other rather than the monopolistic NCAA control.⁶⁴ When the court upheld the PAC-10 contract, it paved the way for conferences to engage in competition for TV contracts. As competitors, the conferences naturally had the objective of strengthening their position in the market place.⁶⁵

The demise of the Southwestern Conference led to a further development. The Southeastern Conference and the Big Eight were the first conferences to benefit upon the collapse of the Southwest Conference after the NCAA imposed the death penalty on Southern Methodist University and other scandals occurred in the conference.⁶⁶ The SEC added Arkansas in 1991 along with South Carolina. With twelve members, it successfully requested permission from the NCAA to stage a championship game.⁶⁷ A championship game meant additional television revenue for a conference. As other conferences were interested in following the SEC, the NCAA subsequently amended its bylaws to permit a conference to hold a championship game provided that it had at least 12 members.⁶⁸ The Big 8 rose to twelve members when it added Texas, Texas Tech, Baylor and Texas A&M to become the Big 12. Like the SEC, it divided into two divisions, staged a championship under the NCAA bylaw, and increased the value of its television rights in the process. The WAC tried to follow suit by adding eight teams in 1996 but it did not achieve the desired success and eight teams seceded and formed the Mountain West Conference in 1999.⁶⁹

⁶³ 747 F.2d 511 (1984); *Ass'n Independ. Telev. Stations, Inc. v. College Football Ass'n*, 637 F. Supp 1289 (W.D. Okla. 1986). *See also* Stephen Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 *Emory L.J.* 463, 475-82 (1990) (package sales of broadcast rights should be evaluated under the rule of reason).

⁶⁴ Meyers and Horowitz, *supra* note 62, at 698-99.

⁶⁵ Christian Dennie, *Changing the Game: The Litigation That May Be the Catalyst for Change in Intercollegiate Athletics*, 62 *SYRACUSE L. REV.* 15, 17 (2012). (example of SEC television contract with ESPN).

⁶⁶ Weston, *supra* note 8, at n.83.

⁶⁷ *About the Mountain West*, <http://www.themwc.com/about/mwc-about.html>.

⁶⁸ NCAA MANUAL, *supra* note 12.

⁶⁹ *See text supra* at 10 and accompanying notes.

Other conferences were interested in adding the championship game. The Atlantic Coast Conference was one such conference but it needed twelve members. By 2003, it decided to act. With only eight members and no conference collapse on the horizon, it needed to raid an existing conference and it targeted the Big East. However, it was initially only able to get to 11 schools during the first wave of conference realignment because of litigation over the addition of Boston College.⁷⁰ The litigation was resolved and it staged its first championship game in 2005.⁷¹ The Big East began as a basketball conference but strengthened its claim as football conference with strong programs at BC, Miami, Pittsburgh, Syracuse and VT. Its configuration has always made it vulnerable to raiding. Conference USA emerged as a mid-major. The first wave of expansion was complete.⁷² The Big Ten added Penn State in its march toward 12 schools.⁷³

In the second wave of conference realignment beginning in 2010, the Big Ten and Pac-10 sought to increase its competitiveness. In 2010, the Big Ten raided the Big 12 by luring Nebraska to give it 12 schools—it had added Penn State in 1990. It held its inaugural championship game in 2011. The PAC-10 raided the Big 12 and the Mountain West to add Colorado and Utah giving it the magic 12 and a conference championship game. In 2011, the ACC followed less than a year later by announcing that Pittsburgh and Syracuse would leave the Big East, apparently in a march toward sixteen members. The SEC countered with the additions of Missouri and Texas A&M from the Big 12.⁷⁴ There were rumors that Oklahoma, Oklahoma State, Texas and Texas Tech would abandon the Big 12 and move to the Pac-12 creating a 16 team conference. However, the Pac-12 presidents announced that they had no interest in expanding at

⁷⁰ Katz, *supra* note 18, at 352.

⁷¹ *Id.*, at 358.

⁷² Schmit, *supra* note 4 ; Beth Rosenberg, Division I-A conference realignment has had emotional, structural impact (Dec. 8, 2003), <http://fs.ncaa.org/Docs/NCAANewsArchive/2003/Division+I/domino+effect+-+12-8-03.html>.

⁷³ Meyers and Horowitz, *supra* note 62, at 704.

⁷⁴ Texas A&M's move to the Southeastern Conference was placed on hold. Texas A&M had to make the move.

this time.⁷⁵ TCU, whom previously had agreed to join the Big East, decided to join the Big 12 or what was left of it. Amid the uncertainty, West Virginia defected from the Big East to join the Big 12.⁷⁶ The Big East, reeling from the loss of Pittsburgh and Syracuse, responded by raiding the Mountain West and Conference USA.⁷⁷

All of the BCS automatic qualifying conferences, except the Big East have the required twelve members and hold championship games. As the BCS automatic qualifying conferences have matched each other with the recent expansion moves, they have had to raid other conferences. It is raiding because the added schools have primarily been members of existing conferences with contractual obligations. Most conferences now have some form of exit fee if a member breaches its contractual obligations by leaving to join another conference. While there may be negotiations and litigation over the amount of the fee, the exiting school generally anticipates that the gains from the new conference will cover the fee. Nevertheless, an expanding conference necessarily must induce a new member to breach its contractual obligations or be willing to accept a new member that will breach its obligations.⁷⁸

Notwithstanding the exit fees, the non-automatic qualifying conferences will necessarily suffer losses and must take some action in order to survive. They may be expected to raid the Football Championship Subdivision conferences or merge. The Mountain West has been hit by the expansion of two conferences, the PAC-12 and the Big East. Conference USA has been raided

⁷⁵ Chris Dufresne, Pac-12 says no to further expansion: Texas and Oklahoma won't bolt Big 12 for superconference—for now, CHICAGO TRIBUNE, Sept. 20, 2011, http://articles.chicagotribune.com/2011-09-20/sports/chi-pac12-officials-say-they-wont-expand-20110920_1_pac-12-commissioner-larry-scott-super-conference.

⁷⁶ However, the move did not come without litigation from the Big East Conference. *The Big East Conference v. West Virginia University*, Complaint, PB-11-6391 (R.I. Super. Ct. 2011).

⁷⁷ The Big East added Boise State University and San Diego State University from the Mountain West and University of Houston and Southern Methodist University from Conference USA. It has also added the U.S. Naval Academy, the University of Memphis and Temple University. Mark Peloquin, Conference Realignment, COLLEGE SPORTS INFO.COM. <http://collegesportsinfo.com/conference-realignment-grid/#BigEast>.

⁷⁸ Conference realignment is not new. Universities have changed conferences with some frequency. Katz, *supra* note 18, at 349-50.

twice by the Big East, the latter which has been raided twice by the Atlantic Coast Conference and faces the specter of additional losses as the ACC contemplates a sixteen member conference. The magic number for the Big East, however, is eight, the minimum needed to maintain its BCS-automatic qualifying status.

Conference realignment is but one aspect of the development of conference economic power after *NCAA v. Board of Regents*. In 1984, there were four major post-season bowls held on New Year's Day: Cotton, Orange, Rose and Sugar.⁷⁹ Historically, the Rose Bowl had a tie-in agreement to match the champion of the Big Ten against the PAC-10 champion.⁸⁰ The pollsters selected a national champion after the New Year's Day Bowls. The arrangement generated frequent controversy and ongoing calls for a playoff in major college football. The Sugar Bowl had a similar tie-in agreement with the SEC. Less than a decade after *NCAA v. Board of Regents*, a movement began to use the bowls to produce a national championship game. The first effort was the Bowl Coalition in 1991.⁸¹ It was followed by the Bowl Alliance in 1995. However, both efforts failed because of the unwillingness of the Big Ten and PAC-10 to give up the Rose Bowl tie-in. By the late 1990s, those two conferences agreed to join the BCS. What the collective membership of the College Football Association failed to achieve in 1984 had now come to fruition. The major conferences, the automatic qualifying conferences, have achieved market dominance in the major college football industry.

IV. TACKLING THE BCS OLIGOPOLY PROBLEM

Major college football has all the ingredients of an oligopolistic industry. An oligopoly is highly concentrated with a small number of sellers controlling most of the sales in a homogenous product in the market.⁸² Oligopoly theory predicts that competing firms are interdependent because each firm

⁷⁹ Schmit, *supra* note 4, at 222-228.

⁸⁰ McClelland, *supra* note 5, at 176.

⁸¹ Jasen R. Corns, Comment, *Pigskin Paydirt: The Thriving of College Football's Bowl Championship Series in the Face of Antitrust Law*, 39 TULSA L. REV. 167 (2003).

⁸² Thomas Piraino, *Regulating Oligopoly Conduct Under the Antitrust Laws*, 89 MINN. L. REV. 9 (2004) citing ROGER D. BLAIR & DAVID L. KASERMAN, ANTITRUST ECONOMICS 192 (1985).

recognizes that it is able to affect the profits of its competitors and so thus must contemplate the reaction of competitors to measures taken by them.⁸³ As a result, firms may engage in parallel conduct in the natural course of the industry. Accordingly, industry structure allows competing firms to coordinate their behavior without express agreements among them.⁸⁴ Major college football has a small number of firms. It currently consists of the 11 conferences comprising NCAA's Football Bowl Subdivision.⁸⁵ If the merger of Conference USA and the Mountain West is consummated,⁸⁶ that number will be reduced to ten. The conferences produce a regular season of college football and post-season bowl games that are televised regionally and nationally among NCAA Division 1 caliber programs. The industry is dominated by six major firms, the BCS-automatic qualifying conferences. The structure of the market enables the conferences to extract higher bowl payouts than would be generated in a competitive market.

All eleven conferences have engaged in ongoing parallel conduct. First, the conferences have bowl tie-in agreements, a practice that predates the BCS, with at least one bowl.⁸⁷ There are thirty non-BCS bowls.⁸⁸ The automatic qualifying conferences have arrangements with the stronger bowls. The non-automatic qualifying conferences have adopted the practice, even with recently established bowls. Second, the major conferences have expanded to add schools and the other conferences have responded. Third, each FBS conference has a television contract although individual schools may have local radio and television contracts.⁸⁹ Some schools have their own cable networks.⁹⁰ The

⁸³ Donald F. Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 659-66 (1962).

⁸⁴ Piraino, *supra* note 82, at 9.

⁸⁵ Taconi, *supra* note 27, at 185.

⁸⁶ *See infra* note 94.

⁸⁷ Brett P. Fenasci, *An Antitrust Analysis of College Football's Bowl Championship Series*, 50 LOY. L. REV. 967, 973-74 (2004); Grow, *supra* note 15, at 61-62; Hales, *supra* note 10, at 101; Automatic bids to college bowl games, http://en.wikipedia.org/wiki/Automatic_bids_to_college_bowl_games (list of bowls and tie-ins).

⁸⁸ Automatic bids to college bowl games, http://en.wikipedia.org/wiki/Automatic_bids_to_college_bowl_games.

⁸⁹ McCormick, *supra* note 7, at 511-13.

automatic qualifying conferences have satellite radio channels as well. Fourth, each conference has some form of revenue sharing arrangement.⁹¹ As noted above, conferences are adding championship games provided they can expand to the minimum twelve. The SEC and ACC are eyeing expansion to sixteen.⁹² Others may follow even though the PAC-12 has declined for now.⁹³ Conference USA and the Mountain West, in an effort to survive, had agreed to merge to create a conference of at least sixteen teams, but the merger is now doubtful.⁹⁴ Finally, expansion means raiding existing conferences; that is an expanding conference must lure or accept a school that is contractually a member of an existing conference. The automatic qualifying conferences have led these moves. .

Regulating the major football conference oligopoly, however, under the antitrust laws does not appear promising. Any plaintiff faces the “oligopoly problem.”⁹⁵ One commentator asserts the problem consists of two components: the oligopoly gap⁹⁶ and the

⁹⁰ Gary Dinges, Longhorn Network to Launch Aug. 26; First Slate of Shows Announced, AMERICAN-STATESMAN, June 15, 2011, <http://www.statesman.com/sports/longhorns/longhorn-network-to-launch-aug-26-first-slate-1542246.html> ; Ty Duffy, Longhorn Network Contract Between Texas and ESPN Revealed, Big 12 Future Not Bright, Aug. 8, 2011, <http://thebiglead.com/index.php/2011/08/08/longhorn-network-contract-between-texas-and-espn-revealed-big-12-future-not-bright/>; Val Sikahema, Jealousy Abounds over BYU, Texas network deals, Deseret News, Aug. 5, 2011, <http://www.deseretnews.com/article/705388736/Jealousy-abounds-over-BYU-Texas-network-deals.html> .

⁹¹ Carroll, *supra* note 4, at n.61.

⁹² Syracuse, Pitt to the ACC: Will conference’s expansion continue to 16 teams?, Associated Press, http://blog.syracuse.com/sports/2011/09/syracuse_pitt_to_the_acc_will.html .

⁹³ *Supra* note 80.

⁹⁴ Matt Peloquin, CUSA and Mountain West to Form New Conference, COLLEGE SPORTS INFO.COM. (Feb. 8, 2012), <http://collegesportsinfo.com/2012/02/08/cusa-mountain-west-merger-progresses/> ; Matt Peloquin, CUSA/Mountain West Merger on Hold, COLLEGE SPORTS INFO.COM., (Mar. 26, 2012), <http://collegesportsinfo.com/2012/03/26/no-all-sports-merger-for-cusamountain/> .

⁹⁵ Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969); Piraino, *supra* note 82.

⁹⁶ Barry E. Hawk, *Oligopolies and Collective Dominance: A Solution in Search of a Problem*, Treviso Conference on Antitrust Between EC Law and National Law at p. 62-63, Eighth Edition, Fordham Law Legal Studies Research Paper No. 1301693 (2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1301693 .

unproved cartel gap.⁹⁷ First, the language of the Sherman Act does not neatly fit oligopolies. Section 1 requires an agreement and firms in oligopolies by their nature act in parallel without necessarily entering into an agreement. Section 2 on the other hand attacks the monopolization of a market by a single firm and an oligopoly involves dominance by a group of firms. Second, proving the existence of an agreement to act as a cartel is difficult given that the firms may reach tacit agreements that are masked by their tendency to take parallel action without having to reach an agreement. The conscious parallelism doctrine has been used to describe this phenomenon.⁹⁸ It is well settled that parallel conduct by firms in an oligopoly does not establish an agreement under Section 1.⁹⁹ The courts have adopted the “plus factors” test requiring a plaintiff to establish additional circumstances or facilitating devices from which an agreement may be inferred.¹⁰⁰ Those factors usually must show conduct by firms that are inconsistent with their independent economic self-interest.¹⁰¹

a. Case for Cartel

Lawyers have primarily sought to apply section 1 to oligopolistic conduct because it regulates monopolistic in an oligopolistic industry where no single firm will have attained monopoly status to trigger section 2. It is that group of dominant firms in the industry that engage in conduct that attains, maintains or tends toward monopoly. The issue is the existence of the agreement.¹⁰²

The conscious parallelism doctrine and its plus factors complement need only be resorted to in the absence of an explicit conspiracy. An explicit agreement to cartelize an industry clearly violates section 1. Cartels are groups of competing firms that join

⁹⁷ *Id.*

⁹⁸ Reza Dibadj, *Conscious Parallelism Revisited*, 47 SAN DIEGO L. REV. 589 (2010).

⁹⁹ Piraino, *supra* note 82, at n. 72.

¹⁰⁰ Louis Kaplow, *On the Meaning of Horizontal Agreements in Competition Law*, 99 CAL. L. REV. 683, 749-52(2011).

¹⁰¹ *Id.* at 750.

¹⁰² *Interstate Circuit v. U.S.*, 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939); *Theatre Enterprises v. Paramount Film Distributing Corp.*, 346 U.S. 537, 74 S.Ct. 257, 98 L.Ed. 273 (1954).

to monopolize a market.¹⁰³ Long before the BCS, critics characterized the NCAA as a cartel.¹⁰⁴ The case for cartel is even stronger in the case for today's major college football industry. Focus on the BCS arrangement does not capture and is insufficient to address the full extent of that cartel. The argument is that BCS automatic qualifying conferences have formed a cartel to dominate the market for major college football including television and post-season bowls.

The case for this cartel begins with explicit agreements. Collaboration among rival universities and conferences is needed in order to produce regular season, post-season bowl competition or a national championship system. As a result, the major college conferences, including the BCS-automatic qualifying conferences are or have been parties to at least three sets of agreements. First, the conferences in the major college football industry are members of the NCAA and its Football Bowl Subdivision. They must cooperate on game rules, eligibility, amateurism, officiating, and scheduling. Second, sixty-four university program members, a number too large to render it an effective cartel, entered into the College Football Association agreements with the specific purpose of obtaining more influence in the promulgation of NCAA rules affecting major college programs. Third, the FBS conferences are parties to the BCS agreements.¹⁰⁵ The BCS-automatic qualifying conferences are the successors to the College Football Association. However, the cooperation among the major conferences goes well beyond that needed to produce major college football or a playoff system.

The NCAA has adopted several bylaw provisions that favor the BCS-automatic qualifying conferences. As noted above, the NCAA authorizes conferences to stage a conference championship

¹⁰³ See *infra* note 109.

¹⁰⁴ James v. Koch, *The Economic Realities of Amateur Sports Organizations*, 61 IND. L.J. 9 (1986) (commentator argues that intercollegiate athletics is an industry whose firms are colleges and universities). However, Cartels are more likely to effective with relatively few numbers because members have incentives to cheat. A large numbers makes cheating more difficult to prevent or contain.

¹⁰⁵ Originally, only the BCS-automatic qualifying conferences were parties. The agreements were amended in 2004 to include the remaining FBS conferences. See, Pruitt, *supra* note 1, at 142.(author describes four sets of agreements establishing BCS),.

game provided the conference had twelve members.¹⁰⁶ The NCAA amended its rules to permit Division 1 institutions to play twelve regular season games.¹⁰⁷ Additional regular season games mean more gate receipts and television revenues. As members of the FBS, they have been able to participate in the maintenance of amateurism standards and the promulgation of rules that specifically apply to conferences. The amateurism rules, which prohibit universities from paying student athletes, preclude universities in the non-automatic qualifying conferences from competing for talent with price.

There are also barriers to entry. First, competing at the major college level requires substantial investment and annual expenditures.¹⁰⁸ Commentators have described an arms race in intercollegiate athletics in which wealthier institutions continually spend more and thereby driving up the costs that other institutions must spend.¹⁰⁹ Second, financial barriers to entry are also imposed by NCAA rules. To be eligible for FBS membership, a university must carry a minimum number of male and female athletic teams, offer specified levels of athletic scholarships and meet minimum attendance levels.¹¹⁰

The major college football oligopoly comprised of the FBS conferences is different from the prototypical oligopoly in that the members must cooperate in producing the product. That cooperation is reflected in the NCAA bylaws. Cooperation is also needed to produce a national championship or a bowl game matching the top two ranked teams against each other. This

¹⁰⁶ Peter Kreher, *Antitrust Theory, College Sports, and Interleague Rulemaking: A New Critique of the NCAA's Amateurism Rules*, 6 VA. SPORTS & ENT. L.J. 51, n. 108 (2006); McCormick, *supra* note 7, at 512.

¹⁰⁷ Nathaniel Grow, *Louisville v. Duke and Its Implications for Breached College Football Scheduling Agreements*, 37 J.C. & U.L. 239, n.20 (2011), citing, Liz Clarke, *College Football Gets 12th Game: NCAA Approves Move for 2006*, Wash. Post, April 29, 2005, at D01; NCAA MANUAL Bylaw, § 17.9.5.1.

¹⁰⁸ John R. Maney, *Train Wreck (of the I-AA)*, 14 VAND. J. ENT. & TECH. L. 279 (2012).

¹⁰⁹ Matthew J. Mitten, James L. Mussleman, Bruce W. Burton, *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 SAN DIEGO L. REV. 779, 801-02 (2010); Rodney K. Smith, *Increasing Presidential Accountability in Big-Time Intercollegiate Athletics*, 10 VILL. SPORTS & ENT. L.J. 297, 298-99 (2003); Mathewson, *supra* note 51, at 615.

¹¹⁰ Nixon, *supra* note 20, at 386.

cooperation, however, guarantees a matchup that virtually assures that at least one team from an automatic qualifying conference will play in the championship, which serves to foster and maintain the dominance of the automatic qualifying conferences over the market.

Each automatic qualifying conference has independent economic reasons to belong to the FBS as well as the BCS. A conference could seek to start a rival bowl alliance but the history of the Bowl Coalition and Bowl Alliance showed that the guarantee of a unified national championship game will generate more television and bowl revenue than competing bowl systems.¹¹¹ That was the case when the Big Ten and the PAC-10 maintained their tie-ins with the Rose Bowl under the Bowl Alliance.¹¹² The BCS-automatic qualifying conferences also have independent reasons to agree to a bowl system that favors their conferences over the non-automatic qualifying conferences.

Conferences, both automatic qualifiers and non-automatic qualifiers, have independent reasons to expand, and to raid other conferences. The larger the conference, the larger the television market, or footprint, for the conference, not taking into account the post-season bowl revenue. A large number of conference teams, however, does not automatically assure a large television contract. The Western Athletic Conference, for example, expanded to sixteen teams in the mid-nineties.¹¹³ The conference primarily consisted of mid-major schools. The geographic area was spread across the western United States and extended to Hawaii. Most of the schools did not have natural rivalries within the conference nor large followings at home. After a few years, the larger schools, most of them original members of the WAC, defected to form the Mountain West Conference.¹¹⁴ Nevertheless, the creation of the

¹¹¹ Corns, *supra* note 81 (history of Bowl Coalition, Bowl Alliance and Bowl Championship Series); Carroll, *supra* note 4, at 1247-49 (2004); Schmit, *supra* note 4, at 230-31.

¹¹² *Id.*

¹¹³ http://www.wacsports.com/ViewArticle.dbml?DB_OEM_ID=10100&ATCLID=

¹¹⁴ Since 1962, several changes have occurred. UTEP and Colorado State became members in September 1967, while Arizona and Arizona State withdrew on June 30, 1978. The WAC then added San Diego State (1978), Hawai'i (1979) and Air Force (1980). Before 1990, the WAC sponsored championships only in men's sports. However, a merger with the High Country Athletic Conference formed a single conference under one administrative structure, and the 1990-91 athletic year was the first in which both

BCS and the conference expansion moves indicate actions initiated by the BCS-automatic qualifying conferences to maintain dominance in an oligopoly.

Intercollegiate athletics are supposed to constitute an integral part of the educational programs of the NCAA's member institutions.¹¹⁵ The traditional university rivalries are something that general student bodies thrive on and savor as a part of the educational experience. When Texas A&M fled to the SEC, it turned its back on the century old rivalry with the University of Texas. The annual game was a major event on the campuses in Austin and College Station. Texas A&M moved for purely economic reasons. As a member of the Big Twelve, Texas A&M was already a member of a BCS conference. However, the Big Twelve television rights were not as lucrative.¹¹⁶ Moreover, the University of Texas established the very successful Longhorn Network whose revenues it did not share.¹¹⁷ The mid-majors likewise belong to the BCS out of economic necessity. With smaller conference television contracts and perhaps smaller stadia, their only hope to share in the BCS payday is to join even on inequitable terms. Universities, like the University of Utah, in the mid-major conferences flee those conferences for BCS-automatic qualifying conferences primarily for economic reasons. Likewise, mid-major conferences like Conference USA, the Mountain West and the Sunbelt may seek to merge or expand in response to raiding by the BCS automatic qualifying conferences.

men and women competed under the WAC name. Fresno State was added in 1992, and then in 1996, the women's programs from Air Force and Hawai'i along with six new schools (UNLV, Rice, San Jose State, SMU, TCU and Tulsa) came into the WAC. Air Force, Brigham Young, Colorado State, UNLV, New Mexico, San Diego State, Utah and Wyoming withdrew on June 30, 1999, http://www.wacsports.com/ViewArticle.dbml?DB_OEM_ID=10100&ATCLID=537066.

¹¹⁵ NCAA MANUAL, Art. 2.5 ("Intercollegiate athletics programs shall be maintained as a vital component of the educational program, and student-athletics shall be an integral part of the student body.").

¹¹⁶ Michael A. Corgan, Comments, *Permitting Student-Athletes to Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created by Unethical Sports Agents and the NCAA's Revenue-Generating Scheme*, 19 VILL. SPORTS & ENT. L.J. 371, 391-92 (2012); Taconi, *supra* note 27, at n.284.

¹¹⁷ Andy Staples, *Texas' Longhorn Network sparking another Big 12 Missile Crisis*, SPORTS ILLUSTRATED.COM July 21, 2011, http://sportsillustrated.cnn.com/2011/writers/andy_staples/07/21/longhorn-network-big-12/index.html

Those moves, however, may conflict with the educational missions of member institutions and the NCAA mission to support intercollegiate athletics. For example, traditional rivalries between state and regional universities transcend the playing arenas. The annual rivalry games between Harvard and Yale, Alabama and Auburn, Southern Cal and UCLA, Texas and Texas A&M, Texas and Oklahoma, Oklahoma and Nebraska, Oklahoma and Oklahoma State, Duke and North Carolina, Utah and BYU, New Mexico and Utah, Ole Miss and Mississippi State, New Mexico and BYU, New Mexico and New Mexico State, Notre Dame and Michigan, Oregon and Oregon State, Arizona and Arizona State are far more than athletic events. They constitute vital parts of the social environment for college students. Intercollegiate athletics should also serve the social and educational development of student athletics apart from their classroom work. Conventional antitrust law only considers economic self-interest but in applying that law to the major college football oligopoly, perhaps, the educational missions of individual conference members should be taken into account. Advancing their educational programs and reputation is in the economic self-interest of those institutions.

b. Purposed Based Oligopoly

Professor Thomas Piraino has advocated a purpose based approach to applying section 1 to oligopolies.¹¹⁸ He joins the criticism that the Sherman Act leads to an emphasis on finding an agreement to engage in anticompetitive conduct in order to find illegality.¹¹⁹ Under his argument, the test of whether the major

¹¹⁸ Piraino, *supra* note 82, at 33-43.

¹¹⁹ *Id.* at 12. Economically, there is no distinction between a meeting to fix prices and “a situation in which two firms are sitting at their computer terminals rapidly changing prices in response to the others’ actions.” Indeed, tacit coordinated conduct among oligopolists may be more harmful to consumers than an overt price-fixing cartel. Cartels are often undermined by cheating. In those few cases where they do persist, cartels can be detected easily and punished by antitrust regulators. By contrast, tacit coordination among a group of oligopolists is difficult to discover, and such conduct is likely to be sustained for a longer period. Yet, according to many courts and commentators, the Sherman Act would preclude the cartel and let the oligopolists proceed with their tacit coordination. As a result, “some critics maintain that the antitrust authorities are most successful against those conspiracies that are least likely to succeed.” Commentators have referred to this gap in the antitrust laws as the ‘oligopoly problem.

college football oligopoly has violated the antitrust laws should be the purpose of the parallel conduct rather than whether members of the oligopoly agreed. The raiding of conferences, the inequitable revenue sharing in the BCS, and bowl tie-in agreements have real economic effects regardless of whether the conferences agreed to do them. Clearly, the conferences have undertaken these actions to improve their competitive position and claim a larger share of the market.

Professor Piraino argues that conduct against legitimate self-interest by all firms in an oligopoly after having obtained monopoly or oligopoly power should serve as a proxy for anticompetitive conduct or harm to consumers.¹²⁰ Courts should infer anticompetitive conduct whenever all of the firms in an oligopoly engage in parallel conduct contrary to their independent self-interest.¹²¹ Under his purposed based approach, the focus on the purpose for firms engaging in conduct would be the “touchstone of illegality.”¹²² “Oligopoly firms should not be permitted to engage in conduct that is contrary to “their legitimate self-interest . . . and has no rational basis other than to perpetuate or extend their monopoly power.”¹²³ He would ask courts to focus on the plus factors to determine the real motivations of the firms engaged in parallel conduct.¹²⁴ Courts would focus on evidence related to purpose rather than economics.¹²⁵

In examining the self-interest of the conferences, courts would have to take into account the self-interests of conference member institutions. The test should thus take into account the commercial interests of conferences and the educational interests of its members. Individual conferences have economic motives for

¹²⁰ *Id.*, at 43.

¹²¹ *Id.*, at 37.

¹²² *Id.*, at 35.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 42. Rather than complex economic factors such as concentration levels and entry characteristics, fact finders should be discerning a defendant’s motives for its actions by determining the credibility of its witnesses, its explanation for its conduct, and the relevance and significance of memoranda, minutes, handwritten notes, e-mails and other documents that it has produced. Judges and juries are called upon daily to use such means to determine the purpose of defendants’ behavior in contract, tort, employment, and criminal disputes.

expansion. As noted above, larger conferences have the potential for producing additional revenue through larger television contracts and conference championship games. The major conferences have the gravitational pull to draw in economically strong universities from weaker conferences. The raiding strengthens the major conference and weakens the mid-major. The universities act out of their economic self-interest. Joining the major conference will increase revenue from the conference television share and the BCS revenues. Revenue enhancement may not be in the overall economic self-interest of member institutions either. Such institutions generally seek to maximize revenues but not profits.¹²⁶ Actions to enhance revenues that require additional expenditures that render the activity unprofitable should be viewed as contrary to the self-interest of member institutions, although not necessarily the conferences of which they are members. Accordingly, not only may conference expansion be inconsistent with educational values of individual institutions, it may also conflict with the economic self-interest of the overall institution.

Professor Piraino acknowledges that it is permissible for oligopolies to obtain monopoly or oligopoly power through superior efficiency,¹²⁷ but he argues that they should be subject to closer scrutiny once they have obtained monopoly or oligopoly power. Under this analysis, the conference expansion moves and BCS agreements advantaging the current automatic qualifying conferences should be scrutinized in the same way as a single firm having achieved monopoly power.

c. Section 2 and the Case for Shared Monopoly

The major college football cartel could be challenged under section 2 which also has a duality based offense.¹²⁸ Although primarily directed toward the conduct of a single firm, Section 2 also reaches conspiracies to monopolize, the essence of a cartel.

¹²⁶ See Mathewson, *supra* note 51, at 606, 615.

¹²⁷ See *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945).

¹²⁸ "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." 15 U.S.C. §2 (2007).

However, such claims have received scant attention in case law and legal scholarship. The elements of such an offense are concerted action with the specific intent to monopolize and an overt act in the furtherance of the conspiracy.¹²⁹ In the case of the major college football cartel, there are several sets of overt acts: the formation and structuring of the BCS to favor the BCS-automatic qualifying conferences, conference realignment resulting in the formation of superconferences, the restructuring of the Football Bowl Subdivision, and the various bowl tie-in agreements.

The probability of success for a Section 2 claim increases if a showing of market power is not required. The courts are split over whether the cartels must have market power.¹³⁰ At least one commentator has argued that a showing of market power should not be required, particularly in the context of sports leagues.¹³¹ A market power analysis would involve the control output and price in the market for major college football, particularly the market for televising major college football, and the market for post-seasons bowls. Even if the BCS-automatic qualifying conferences have sufficient market power to amount to monopoly power, it does not mean a violation of section 2 if such power devolved upon them through a superior product or skill. In fact, the eleven FBS conferences necessarily control one hundred percent of the major college football industry but the formation of the FBS in and of itself would not violate section 2.

The weaknesses in potential Section 2 claims lead to further inquiry about the application of the antitrust laws to major college football industry as an oligopoly. The ability of the antitrust laws to regulate oligopolistic behavior has been the subject of ongoing debate in antitrust jurisprudence and scholarship.¹³² In the early 1960's, substantial attention was given to tackling the "oligopoly problem."¹³³ The solution building on *American Tobacco Co. v.*

¹²⁹ David Woods, Note, Hybrid Single Entities and the Market Power Requirement for Conspiracies to Monopolize Following *Fraser*: Are Courts Putting Form Over Substance?, 2004 U. Ill. L. Rev. 1261, 1267-68.

¹³⁰ *Id.*, at 1262-63.

¹³¹ *Id.*

¹³² Piraino, *supra* note 82, at 9.

¹³³ *See, for example*, Turner *supra*, note 83.

*United States*¹³⁴ was the “shared monopoly” doctrine. The shared monopoly theory targeted the structure of oligopolies rather than agreement or conduct. Market structure rather than agreement was the key. The theory never gained traction in law or the courts.¹³⁵ Critics maintain that the theory failed because it would have treated firms in an oligopoly more harshly than a single firm having obtained monopoly power.¹³⁶ The doctrine is still a topic of scholarly discussion as other commentators have observed a paradox resulting from the oligopoly problem. The agreement requirement in the Sherman Act thus condemns conspiracies that are least anticompetitive and permits practices that are most anticompetitive.¹³⁷

The major college football oligopoly presents an instance in which collusive practices are indeed likely to succeed and an appropriate case for the application of the shared monopoly doctrine. In *American Tobacco*, three companies dominated the market by engaging in practices that had the effect of fixing prices. The Court found the power to exclude others a significant issue even in the absence of proof of actual exclusion. In the major college oligopoly, the BCS-automatic qualifying conferences dominate the major college football market, including the television for regular season and post-season broadcasts, the BCS and other post-season bowls. They have shown the power to exclude in the BCS agreements in which the non-automatic qualifying conferences have a substantially smaller probability of participation. They have participated in the promulgation and maintenance of NCAA bylaws that either excludes colleges and universities from participating in or serve as barriers to entry in the FBS.¹³⁸

¹³⁴ 328 U.S. 721 (1946) (three major tobacco manufacturing companies were held liable under section 2 even no one company held monopoly power without proof an agreement because they were capable jointly acting to raise prices).

¹³⁵ Hawk, *supra* note 96, at 63.

¹³⁶ A single firm with monopoly power does not violate section unless it unlawfully acquired or maintained its monopoly power. The shared monopoly doctrine would have imposed liability on firms in oligopoly based on their possession of monopoly power.

¹³⁷ Piraino, *supra* note 82, at 13.

¹³⁸ Christopher B. Norris, Comment, *Trick Play: Are The NCAA's New Division I-A Requirements An Illegal Boycott?*, 56 SMU L. REV. 2355 (2003).

Borrowing concepts from European competition law with statutory parallels to Sections 1 and 2 of the Sherman Act may frame an even stronger case.¹³⁹ The shared monopoly concept is alive and well in the European competition law under the rubric of collective dominance.¹⁴⁰ The collective dominance doctrine arises out of different statutory language, particularly under article 82, which expressly applies to “one or more undertakings of a dominant position.”¹⁴¹ One commentator argues that an analysis of the European Commission case law evinces a three part test for determining collective dominance under article 82. Collective dominance exists where the undertakings, a group of firms, constitute a collective entity in a relevant market, the collective entity holds a dominant position, and the collective entity engages in conduct constituting an unreasonable restraint of trade.¹⁴²

He argues that the collective entity prong, an idea somewhat similar but not identical to the single entity concept in the Sherman Act jurisprudence, has been the most important element of the doctrine.¹⁴³ To fall within the element, the multiple firms must hold themselves out as an entity.¹⁴⁴ There are two instances in which this collective entity standard with its holding out requirement may fit the major college football oligopoly.

The first is the Football Bowl Subdivision. The eleven conferences hold themselves out as presenting a different class or category of college football. They collectively influence and develop the rules governing the subdivision. Second, the BCS may not have legal status as an entity but it certainly has entity status in the economic sense. Again the eleven affiliated conferences,

¹³⁹ The counterparts are Art. 81 of the Treaty establishing the European Community (“Treaty”) (akin to Section 1) “The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade . . . and which have as their object or effect the prevention, restriction or distortion of competition . . .”; Art. 82 of the Treaty (akin to Section 2) “Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited. . .”

¹⁴⁰ Hawk, *supra* note 96, at 75; Barry Rodger, *The Oligopoly Problem and the Concept of Collective Dominance: EC Developments in the Light of U.S. Trends in Antitrust Law And Policy*, 2 COLUM. J. EUR. L. 25 (1996).

¹⁴¹ Art. 82 of the Treaty.

¹⁴² Hawk, *supra* note 96 at 76.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

automatic qualifying and non-automatic qualifying conferences, hold the arrangement out as producing a match-up in a BCS of the top two ranked teams and four additional highly competitive bowl games.

Another commentator reviewing the decision in *Re Italian Flat Glass: Industria Vebraria Alfonso Cabelli v. Societa Italiano Vetro-SIV SpA and Others*,¹⁴⁵ argues that it is possible for multiple separate legal entities to constitute a collective entity where there are sufficient economic links.¹⁴⁶ He points out that the European Commission has construed the “one or more undertakings” language in article 82 to mean it can reach firms that are independent economic units if there is economic linkage between them.¹⁴⁷ The linkage is not limited to the parent/subsidiary context. Again, the eleven FBS conferences have economic links in the organization of the FBS. Moreover, the BCS clearly provides economic linkage among the BCS-automatic qualifying conferences and to a lesser extent including the non-automatic qualifying conference. The economic linkage notion is consistent with *American Tobacco*.

There is also section five of the Federal Trade Commission Act and its prohibition of unfair methods of competition.¹⁴⁸ The shared monopoly doctrine did not gain traction under the FTC Act either.¹⁴⁹ The attractiveness of the application of the FTC Act in the case of the major college football oligopoly is the potential for a regulatory solution given the failure of self-regulation.

V. ALTERNATIVES TO ANTITRUST

The shared monopoly of the automatic qualifying conferences cries out for regulation but the antitrust regime is lacking. Assuming the major college football oligopoly is actionable under the antitrust laws, there remains the issue of remedies. Traditional antitrust remedies such as breaking up the oligopoly

¹⁴⁵ 1989 O.J. (L 33) 44, 1990 C.M.L.R. 535.

¹⁴⁶ Rodger, *supra* note 129, at 44-46.

¹⁴⁷ *Id.*

¹⁴⁸ 15 U.S.C. 45(a) (2007); see George A. Hay, *Oligopoly, Shared Monopoly and the Antitrust Law*, 67 CORNELL L. REV. 439 (1982).

¹⁴⁹ See Lee Goldman, *Oligopoly Policy and the Ethyl Corp. Case*, 65 OR. L. REV. 73 (1986).

would be unwieldy and probably unfeasible. The specter of conferences paying treble damages to other conferences or to universities would only add to the economic stress of major college athletics.¹⁵⁰ Injunctive relief would have to be circumscribed but it may have the effect of courts replacing the NCAA as the primary regulator of intercollegiate athletics with a federal judge. A very recent student note stakes out ground applying the competition law provisions in the Treaty of Rome to the BCS.¹⁵¹ She suggests borrowing the relegation system from the English Premier Soccer Leagues pursuant to which conferences would be realigned annually based upon performance.¹⁵² Recent modifications to the BCS provide a framework similar to the relegation system under which a mid-major conference may attain automatic qualifying status through a performance evaluation over four-year periods.¹⁵³ This remedy, however, only applies to the BCS and does not address other anticompetitive practices of the oligopoly.

The antitrust regime does apply to intercollegiate athletics but commerce-based antitrust principles have limited puissance to regulate the dominance of the automatic qualifying conferences. The BCS, for example, was founded in 1998 and there continues to be lively scholarly and public debate but not litigation over whether it violates the antitrust laws. The current oligopoly rose after the Supreme Court opened the door in applying the antitrust laws to the NCAA's television contract. Moreover, antitrust principles are not well-equipped to address the educational nexus of the major college football industry. In many ways, critics of the BCS have looked to the antitrust laws to resolve an issue with which educational policy is indelibly intertwined.

¹⁵⁰ However, there is precedent for a court ordering a league to pay damages to a league member. *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 105 S.Ct. 397, 83 L.Ed.2d 331 (1984).

¹⁵¹ Deanna Brock, *BCS Europa: An Analysis of the Bowl Championship Series under the European Commission White Paper on Sport*, 39 GA. J. INT'L & COMP. L. 303, 335-39 (2011).

¹⁵² *Id.*

¹⁵³ *Id.*, at 309. The BCS framework provides for the possibility for the addition of a seventh automatic qualifier to the current six automatic qualifying conferences. See <http://www.bcsfootball.org/news/story?id=4819597>. The latest wave of conference expansion raiding Conference USA and the Mountain West Conference have reduced the probability of a seventh conference.

If the antitrust laws do not contain an appropriate regulatory solution then perhaps the answer lies in self-regulation, although it has failed to prevent the economic crisis now confronting intercollegiate athletics. To be fair, as noted in a previous section, the NCAA has been constrained by the Supreme Court in addressing the regulation of economic issues. The legal framework has led to a further divide between the intercollegiate athletics as an integral part of the educational programs of universities and commercial character of intercollegiate athletics. *NCAA v. Board of Regents* is not the only case contributing to the regulatory debacle. In *NCAA v. Tarkanian*, the Supreme Court held that the NCAA was not a state actor even though its member institutions may be.¹⁵⁴ The decision in *Tarkanian* was buttressed by *NCAA v. Miller* with its holding that state regulation of the internal affairs of the NCAA violated the commerce clause.¹⁵⁵ As a result, it limited the power of states to regulate the NCAA. Then in *NCAA v. Smith*,¹⁵⁶ it held that the NCAA was not an education institution within the meaning of Title IX, even though its university and college members are. So, the NCAA may not regulate the economic structure of intercollegiate athletics and its arms race in major college football; states may not regulate the NCAA; and even the federal government is limited in its ability to regulate the NCAA. . It is no wonder the major college football oligopoly has arisen.

Add to this mess, the Supreme Court's condoning of an economic system in which it is an antitrust violation to fix prices in all areas of intercollegiate athletics except the compensation of student athletes.¹⁵⁷ As noted above, the NCAA may not fix the price of television broadcasts of intercollegiate athletics by its member institutions. It also may not fix the price of coaches' compensation.¹⁵⁸ Nor may universities collude to fix the

¹⁵⁴ 488 U.S. 179 (1988).

¹⁵⁵ 10 F.3d 633 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1543 (1994).

¹⁵⁶ 525 U.S. 459 (1999)(receipt of federal funds by member institutions does not subject NCAA to Title IX).

¹⁵⁷ Dennie, *supra* note 65, at (arguing that current litigation may transform the amateurism of intercollegiate athletics).

¹⁵⁸ *Supra* note 63.

compensation of law professors.¹⁵⁹ And there is a question as to whether universities may collude to fix the amount of non-athletics related financial aid awards to common applicants.¹⁶⁰ It is not an unreasonable conclusion that every category of person in the university setting is protected against price-fixing except student athletes.¹⁶¹ The major college football oligopoly is in no hurry to change this legal order. It is far too late for reform; the time has come for a revolution.

There are two legal regimes under which intercollegiate athletics may be primarily regulated; one based on commerce and one based on education.¹⁶² I favor educational primacy. Intercollegiate athletics should be an integral part of the educational programs of institutions of higher education.¹⁶³ However, intercollegiate athletics, especially basketball and football, have substantial commercial value. Because the institutions that produce the commercial activity are educational in value, educational primacy should be the driving principle of any regulatory scheme. Accordingly, I am reluctantly proposing to sanction self-regulation by the NCAA with a limited exemption from the antitrust laws so that it may regulate the economic structure of intercollegiate athletics, but at a price.¹⁶⁴ Any such

¹⁵⁹ Press Release, Justice Department and American Bar Association Resolve Charges That the ABA's Process for Accrediting Law Schools Was Misused, Department of Justice, June 27, 1995; U.S. v. American Bar Ass'n, Complaint, Civ. Action, (filed June 27, 1995), <http://www.justice.gov/atr/cases/f0200/0254.pdf>; Final Judgment, Civ. Action 95-1211, <http://www.justice.gov/atr/cases/f1000/1037.htm>.

¹⁶⁰ U.S. v. Brown University, 5 F.3d 658 (3d Cir. 1993) (court declines to hold that Overlap Group formed by Ivy League institutions to equalize need based financial aid awards to common applicants is illegal under the antitrust laws but justification while understandable is questionable).

¹⁶¹ Stephen Ukeily, *No Salary, No Union, No Collective Bargaining: Scholarship Athletes Are an Employer's Dream Come True*, 6 SETON HALL J. SPORT L. 167 (1996).

¹⁶² See generally, Mathewson, *supra* note 51; for comparisons of amateur/education and commercial/education models of intercollegiate athletics; Michael P. Acain, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 LOY. L.A. ENT. L.J. 307, 311-13 (1998).

¹⁶³ See *supra* note 159.

¹⁶⁴ Various constituent groups within the governing apparatus of the NCAA have considered applying for an exemption but have deemed it unlikely to succeed and have not pushed it. The Second Century Imperatives, Presidential Leadership-Institutional Accountability, A Report from the Presidential Task Force on the Future of Division I Intercollegiate Athletics 21 (2006), available at

exemption would necessarily have to address the compensation and publicity rights of student athletes. Because the NCAA has shown that it is susceptible to abusing its monopoly control of intercollegiate athletics, it should itself be subject to regulation. I would acknowledge educational primacy in intercollegiate athletics by subjecting the NCAA to oversight by the Department of Education.¹⁶⁵ The constitution of the NCAA provides that intercollegiate athletics is an integral part of the educational programs of its member universities.¹⁶⁶ Conferences, just like the NCAA, are athletic governing organizations for which the educational missions of member institutions are secondary to the conference mission to regulate intercollegiate athletics. While the Department of Education is not an education organization, its primary mission is the regulation of education.

CONCLUSION

The economic problems of intercollegiate athletics have become intractable. The Bowl Championship Series and the considerable attention to its financial largesse has led to supporters of the non-automatic qualifying conferences almost exclusively focusing on its legality to the exclusion of other equally significant aspects of the economic structure of the major college football industry. While the industry is subject to regulation by the antitrust laws, those laws may not provide the answer. The decision in *NCAA v. Board of Regents* opened the door for the evolution of the industry into an oligopoly. The excesses of the

http://facsen.wsu.edu/items_of_interest/athletics/NCAA/NCAAPresidentialTaskForcefinalreportOct06.pdf

¹⁶⁵ I hesitate to recommend governmental regulation of athletics but something different—a revolution—is now required.

¹⁶⁶ NCAA MANUAL, art. 1.3.1. Integral part of an educational programs should mean more than whether a university graduates its student athletes. Traditional rivalries between state and regional universities transcend the playing arenas. The annual Harvard and Yale, Southern Cal and UCLA, Texas and Texas A&M, Texas and Oklahoma, Alabama and Auburn, Oklahoma and Nebraska, Oklahoma and Oklahoma State, Duke and North Carolina, Utah and BYU, New Mexico and Utah, Ole Miss and Mississippi State, New Mexico and BYU, New Mexico and New Mexico State, Notre Dame and Michigan, Oregon and Oregon State, Arizona and Arizona State are far more than athletic events. They constitute vital parts of the social environment for college students. Intercollegiate athletics should also serve the social and educational development of student athletics apart from their classroom work.

oligopoly may prove to be no more illegal thereunder than the Bowl Championship Series which has been tweaked from time to time to enhance its legality. Nevertheless, this article has outlined the framework for examining the industry under an antitrust lens. Even if oligopolistic practices may be successfully challenged, an appropriate remedy is illusive. This article therefore proposes to address the problem by enhancing self-regulation by the NCAA through a limited exemption from the antitrust laws and buttressing it with oversight by the Department of Education. It is time for revolution, not reform.

