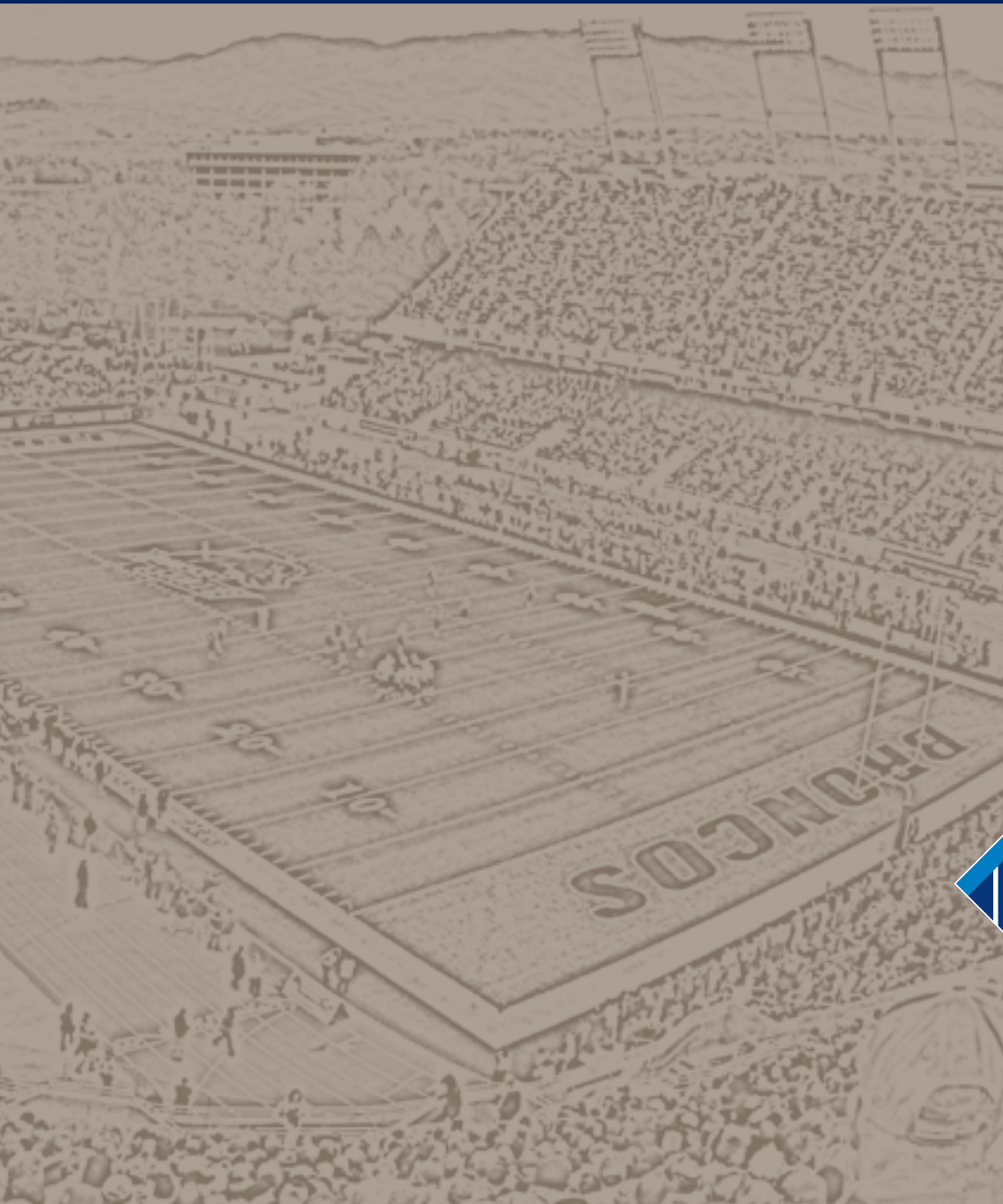


CONTEMPORARY ISSUES

IN HIGHER EDUCATION

PRESENTED BY BOISE STATE UNIVERSITY

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CONTEMPORARY ISSUES IN HIGHER EDUCATION

is a new publication presented by Boise State University that highlights topics of particular relevance to higher education.

This inaugural edition features an article adapted from a letter written by U.S. Sen. Orrin Hatch to President Obama that addresses the Bowl Championship Series and the crowning of a national champion in college football. Sen. Hatch conducted a congressional hearing last July to examine the antitrust implications of the BCS. The U.S. Justice Department responded in a letter to Sen. Hatch last month saying that it was considering a probe into the legality of the BCS.

An antitrust inquiry is one possible avenue for addressing this issue, but it also could be solved by the BCS itself and the presidents who created and preside over it. It would require nothing more than for the BCS presidents to apply the values of fairness, access and equity for all Football Bowl Subdivision teams in reconfiguring the system. This commentary of Sen. Hatch explains both the flaws of the current BCS structure and the rationale for correcting the errors of its ways.

We at Boise State are fortunate to benefit from our two glorious moments at the BCS Tostitos Fiesta Bowl, but college football and its fans deserve a process less dependent on the overwhelming odds that it took for us to get to a BCS bowl and more dependent on a level playing field as the NCAA provides leading up to the Final Four basketball championship.

Even with a BCS bowl victory, universities and conferences from the non-automatic qualifying conferences are subjected to a revenue distribution formula that favors only the six automatic qualifying conferences. Bowl revenues accrue to the benefit of the entire university, not just to the athletic department. To deprive some of the revenue that others enjoy is to create a second-class citizenship for some universities that speaks volumes about how the nation's flagship universities that govern the BCS treat their colleagues and collaborators.

Sincerely,

Bob Kustra
President, Boise State University

REFORMING THE BOWL CHAMPIONSHIP SERIES

Adapted from a letter written by Senator Orrin Hatch to President Obama

Our nation's obsession with college football reaches its yearly climax in late December and early January with the playing of the college bowl games. While literally dozens of such bowl games are played every year, the most prestigious and lucrative bowl games are those taken under the Bowl Championship Series ("BCS") banner, consisting of the Rose, Sugar, Fiesta, and Orange Bowls, as well as the so-called "National Championship Game." Only teams from the Football Bowl Subdivision ("FBS"), formerly known as Division I-A, may qualify to play in the BCS bowl games, from which the participants receive national visibility and significant revenue derived from media broadcast rights.

While the BCS, which was established in 1998, has undergone changes over the past decade, it continues to separate the FBS's eleven conferences into two separate categories. The first category consists of the Atlantic Coast Conference (ACC), Southeastern Conference (SEC), Big East, Big 12, and Pacific 10, along with Notre Dame. The champions of these six privileged conferences receive automatic bids to play in BCS games, regardless of their overall performance. Uniquely, Notre Dame receives the seventh slot if it places eighth or better in the BCS rankings.¹ The second category consists of the five remaining conferences. The champions from these non-privileged conferences must earn an invitation to play in a BCS bowl game.²

The most apparent result of this construct is that, of the ten available opportunities to participate in the BCS bowls, six have already been allotted to privileged conferences before the season even begins. However, for all practical purposes, nine of the ten slots are ultimately reserved for the privileged conferences due to the selection criteria utilized by the BCS. In order to automatically qualify for a BCS game, the champion of a non-privileged conference must either be ranked among the top twelve in the final BCS standings, or be ranked in the top sixteen in the final BCS standings while being ranked higher than a champion from a privileged conference. Yet, if multiple teams from non-privileged conferences meet these qualifications, the BCS arrangement only requires that one receive a BCS bid. This happened just last season wherein both the University of Utah and Boise State University completed their seasons undefeated and, according to the rules, eligible to play in a BCS bowl. However, only Utah received such an opportunity, while multiple teams from privileged conferences with records and rankings inferior to Boise State's participated in BCS bowls.

In addition to the competitive disadvantages inherent in the BCS structure, the BCS distributes its revenues in an inequitable manner. Every privileged conference receives an equal share of the BCS revenue to distribute among its teams, with the potential for increases if it sends more than one team to a BCS game. As a result, each school which is a member of a privileged conference is guaranteed to receive a sizable share of the BCS's revenues, even if they fail to win a single game. This contrasts with the five non-privileged conferences which

¹ According to the BCS, their standings "include three components: USA Today Coaches Poll, Harris Interactive College Football Poll and an average of six computer rankings. Each component will count one-third toward a team's overall BCS score"

² The five non-privileged conferences include the following: Mountain West, Conference USA, Sun Belt, Western Athletic and Mid-American.

receive a single share to divide among themselves.³ The actual distribution is quite astounding. During the past four seasons, privileged conferences received more than \$492 million, or 87.4 percent, of the total BCS revenue, whereas the non-privileged conferences, whose collective membership consists of nearly half of all the schools in the FBS, received less than \$62 million or 12.6 percent. These are hardly trivial sums, particularly considering that many, if not most, FBS schools rely upon football revenues to do such things as fund other athletic programs, provide scholarships, and meet the requirements of Title IX.

The BCS's governance system also ensures that non-privileged conferences remain at a disadvantage. Under the current structure, the BCS Presidential Oversight Committee is composed of eight representatives. Each of the privileged conferences and Notre Dame select one board member. The five non-privileged conferences share a single, collective vote, all but ensuring that they will have little influence on proposed changes or reforms.

The inequities of this system also affect competition on the field by creating a false perception that there are two classes of college teams in FBS football. For example, though all FBS teams are members of the BCS, many in the media typically, and incorrectly, refer to the privileged and non-privileged conferences as being "BCS" and "non-BCS", respectively. It has been argued this false impression influences the decision of pollsters, television networks and sponsors, ensuring inequitable treatment. In addition, since the BCS utilizes subjective polling systems⁴ to determine participation in its bowl games, some evidence suggests that this false impression has led to a self-fulfilling prophecy that non-privileged teams do not perform at the same level as privileged conference teams.

Furthermore, teams ranked number one and number two in the BCS standings qualify for the so-called "National Championship Game." Ostensibly, this suggests that participation in this game, and the prestige, revenues, and visibility that come with it, are open to all schools regardless of conference membership. However, as noted above, due to the nature of the polling system, the systemic division between the privileged and non-privileged conferences limits the ability of non-privileged teams to attain sufficient ranking to play in the "National Championship Game." As recent seasons demonstrate, it is virtually impossible for a team from a non-privileged conference to qualify for the "National Championship Game."⁵

The Legal Argument

Applicability of the Sherman Antitrust Act

The immediate question arises whether our nation's antitrust laws apply to intercollegiate athletics. In 1984, the Supreme Court ruled on this issue in *Nation Collegiate Athletic Assoc v Board of Regents of the University of Oklahoma*, where it found that antitrust laws do apply to inter-collegiate athletics.⁶ In light of the Court's disposition on this issue, the BCS's organization and operations must meet the requirements of the Sherman Antitrust Act.

³ As an example, in 2008, the Mountain West Conference had one team in a BCS game, as did three privileged conferences. Yet, the three privileged conferences each received nearly \$19 million in BCS revenues, while the Mountain West received roughly half that amount.

⁴ See *infra* FN1.

⁵ For example, over the past five seasons, four teams from non-privileged conferences have received bids to play in BCS games (University of Utah in 2004 and 2008, Boise State in 2006, and University of Hawaii in 2007.) Each of these teams finished their regular season undefeated, but none of them finished the regular season ranked higher than number five in the BCS standings. In fact, in 2008 the Mountain West had a better inter-conference record against privileged conference teams than any of the other ten conferences, and Utah had a better record than any of the 65 privileged conference teams. Yet, Utah was nevertheless denied an opportunity to compete for the title.

⁶ 468 U.S. 85, 120 (1984).

Section 1 of the Sherman Antitrust Act

The BCS arrangement likely violates Section 1 of the Sherman Act because it constitutes a “contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce...”⁷ To establish violations of Section 1, the Court has utilized two separate analyses, the *per se* analysis and the “rule of reason.” With regard to the BCS, a violation can be found utilizing either test.

The *per se* Rule

The Supreme Court has determined that a *per se* violation of Section 1 exists when the conduct in question is so anticompetitive as to be conclusively unreasonable.⁸ In *Board of Regents*, the Court stated:

Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an ‘illegal *per se*’ approach because the probability that these practices are anticompetitive is so high....In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found.⁹

The Court’s conclusions with regard to horizontal price fixing, output limitation, and concerted refusals to deal are particularly relevant to this analysis.

At its most basic level, the BCS is “an agreement among competitors on the way in which they will compete with one another”¹⁰ and how they will compete with schools outside their elite circle. As stated above, the BCS system ensures an inequitable distribution of revenue between the privileged and non-privileged conferences. In recent years, champions from the privileged conferences have been outperformed both on the field and in television ratings by one or more of their counterparts from non-privileged conferences. Yet, under the BCS system, such developments are irrelevant as the privileged conferences enjoy far greater shares of the revenues.¹¹ These inequities are systemic and set in advance by the BCS arrangement. Therefore, the BCS arrangement likely constitutes a horizontal restriction, which is a *per se* violation of Section 1.

Furthermore, the BCS system effectively limits the number of non-privileged teams that will play in BCS bowl games to at most one in any given year. In addition, the arrangement artificially limits the number of nationally-relevant bowl games to five, and the number of participants in such games to ten. The result is reduced access to revenues and visibility which creates disadvantages to schools in the non-privileged conferences. In this way, an argument can be made that the BCS is a horizontal restriction, not only on price but also on output and the quality of the output, which would substantiate a *per se* violation of Section 1.

Finally, the BCS appears to constitute a concerted refusal on the part of the privileged conferences to deal with the schools from the non-privileged conferences. Though, once again, all FBS schools are part of the BCS agreement, the system has been designed to limit the number of teams from non-privileged conferences that will play in BCS games. This is demonstrated by the fact that the champions from non-privileged conferences must meet higher performance

⁷ 15 U.S.C. ss 1

⁸ See, e.g., *U S v Socony-Vacuum Oil Co*, 310 U.S. 150 (1940)

⁹ 468 U.S. at 100.

¹⁰ *Id.* At 99.

¹¹ In 2008, for example, the Mountain West champion was ranked far higher than the champions of two privileged conferences, and the BCS bowl game in which the Mountain West played received higher TV ratings than the game played by those other two privileged conference champions. Yet, each of those privileged conferences received almost \$9 million more than the Mountain West from the BCS that year.

standards than their counterparts in the privileged conferences just to be invited to a BCS bowl. And, once again, even if multiple non-privileged teams meet these heightened standards, the system limits the number of automatic bids that can be awarded to such teams to, at most, one per year.

The Supreme Court has, on a number of occasions, stated that concerted refusals to deal and group boycotts are often *per se* violations of Section 1.¹² This is even the case in those instances, such as the BCS, in which there is not a complete refusal to deal, but the defendants have ensured that competition takes place under terms that are discriminatory or unfavorable toward specific competitors.¹³ Both the disparate qualification standards for participation in BCS bowl games and the inequitable distribution of revenue appear to fall in this category, once again suggesting a *per se* violation of Section 1.

Though the Court applied the rule of reason in *Board of Regents*¹⁴, the circumstances with regard to the BCS are different. In the aforementioned case, the decision to apply the rule of reason was the result of the Court's recognition of the NCAA's essential role in creating certain constraints within college football.¹⁵ The BCS holds no special status, as it is not a governing body for all of college football, and therefore is not essential, in contrast to the NCAA, which was the defendant in *Board of Regents*. Instead, it is a group of schools and conferences acting in concert to control an important aspect of college football. As a result, *Board of Regents* does not provide an escape for the BCS from the *per se* analysis.¹⁶

Rule of Reason

Under the rule of reason, only those contracts and combinations that unreasonably restrain trade violate Section 1.¹⁷ Specifically, the Court in *Chicago Board of Trade v U.S.*, determined the test under this approach is "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."¹⁸ Under this test, a violation will be found if a plaintiff can demonstrate the agreement in question has an anti-competitive effect and if the defendant cannot demonstrate such effects are outweighed by pro-competitive benefits. A plaintiff making such a claim must also demonstrate that there is a less restrictive alternative available.

As has been shown, the anticompetitive effects of the BCS are numerous. Most obvious, it has eliminated the competition that once existed between the major bowl games by making almost all of them subject to the same agreement. In addition, it explicitly limits the ability of non-privileged teams to compete in these lucrative games. In addition, it creates a so-called "National Championship Game," the limited eligibility for which is effectively determined before the season even begins.¹⁹

The BCS argues that the current system creates a number of pro-competitive benefits including the playing of a so-called "National Championship Game." However, to date, no arguments have been advanced to justify why it is necessary to severely limit the participation of non-privileged teams in either the "National Championship Game" or the BCS bowls or to reward equal

¹² See, e.g., *Fashion Originators Guild of America v FTC*, 312 U.S. 457 (1941).

¹³ See *Klor's, Inc v Broadway-Hales Stores, Inc*, 359 U.S. 207, 209 (1959).

¹⁴ 468 U.S. at 117

¹⁵ *Id.* At 120

¹⁶ See *Regents of University of California v ABC*, 747 F.2d 511, 517 (9th Cir. 1984) (finding that the "NCAA's vital relationship to the college football 'industry' is not equally transferable" to the College Football Association, a large group of schools joining together to enter into a television contract)

¹⁷ See *Standard Oil Co of New Jersey v United States*, 221 U.S. 1 (1911), 58.

¹⁸ *Chicago Board of Trade v United States*, 246 U.S. 231 (1918), 238.

¹⁹ Indeed, the Chairman of the BCS Presidential Oversight Committee, Chancellor Harvey Perlman of the University of Nebraska, stated as much during the Antitrust Subcommittee's July 7 hearing. Since the University of Utah was the only FBS team to be undefeated last season, Chancellor Perlman was asked what more Utah could have done to play in a national championship game. Chancellor Perlman responded simply that Utah could have played a tougher schedule. Of course, college football schedules are set years in advance and are, for the most part, dictated by the schools' conferences. In short, the Chancellor was reaffirming the argument that teams begin the season ineligible for the national championship.

performance with unequal revenues.²⁰ In addition, a multitude of less-restrictive alternatives have been proposed. In the end, the BCS's justifications for the current system are designed, not to preserve competition in the national football market, but to preserve the elevated status of its privileged members. Such justifications find no safe-haven in antitrust law.

Section 2 of the Sherman Antitrust Act

Section 2 of the Sherman Antitrust Act prohibits monopolies, attempted monopolies and conspiracies to monopolize.²¹ The Supreme Court in *United States v Grinnell Corp.*, articulated a two-prong test for establishing a Section 2 violation. First, "possession of monopoly power in the relevant market" must exist. Second, there must be a "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident."²²

Regarding the first prong, the Court has stated that a party has monopoly power when it has the "the power to control prices or exclude competition."²³ The relevant market, according to the Court, is that which contains a product and other reasonably interchangeable products that are used by consumers for the same purposes.²⁴ With regard to sporting events for a national market, the Court has determined that separate markets exist for championship and non-championship events.²⁵

In this case, there are two markets in question. First, the four BCS bowls exist in a market of their own. They enjoy far more revenues and visibility to be considered interchangeable with lesser bowls. The games also enjoy their own

²⁰ In his statement before the Subcommittee, William Monts, counsel for the BCS, advanced four separate pro-competitive benefits: 1) creation of a national championship game; 2) improved quality of the other BCS bowls; 3) strengthening the overall bowl system; and 4) enhancement of the regular season. Similar arguments and pro-competitive justifications have been advanced by the BCS in the past. However, under scrutiny, each of these justifications is found wanting.

Mr. Monts argues the creation of a national championship game is pro-competitive since it creates a new opportunity for competing teams that did not exist before. Prior to the BCS, however, teams that were not then in privileged conferences were able to win national championships, including 7 out of 10 years between 1982 and 1991. That opportunity is now effectively foreclosed to teams that are now in non-privileged conferences. Participation in the "National Championship" game is limited by a system designed to favor certain teams over others. Furthermore, the existence of the game itself, as currently constituted, furthers the division between privileged and non-privileged conferences since it is highly improbable a non-privileged team will be able to obtain the recognition that comes with being the "National Champion." Finally, this benefit could be achieved through alternative means, including a playoff, that would likely result in more games and broader participation without the BCS's restrictions on competition. In any event, the creation of a national championship game provides no justification for restricting access to the other four BCS bowl games and revenues and visibility that come with it.

The BCS has argued the remaining BCS bowl games are enhanced under the current system because the bowls are now able to wait until the end of the regular season to invite competitors. The argument fails, first of all, because it is not clear whether such

coordination is allowable under antitrust law, let alone a competitive justification. In addition, this goal could be reached by a simple agreement to delay the selection of competitors instead of the current agreement which, in many respects, determines the selection before the season even starts. Finally, it is not clear that the BCS system accomplishes this goal of enhancing the quality of team in the BCS games. Once again, eligibility for these invitations is strictly limited and all but one of the reserved slots is effectively reserved for privileged teams, even when their performance is far exceeded by non-privileged teams. Because the system of extending invitations is severely limited, this justification is more in favor of protecting specific competitors and not competition generally.

With regard to the preservation of the overall bowl system, as will be argued below, the BCS bowl games exist in a market all their own, with the remaining lesser bowls constituting a different market entirely. That being the case, the BCS appears to be arguing that its restrictions on competition in one market are justified by the preservation of competition in another. In the end, this pro-competitive justification is irrelevant to the question at hand. In any event, it strains credulity to argue that, if the BCS were altered to more inclusive and incorporated elements of a playoff that those teams that do not qualify will no longer choose to play in bowl games.

As for the regular season, far more games would have national championship implication under a playoff than under the current system, under which the vast majority of teams are eliminated from consideration when they suffer a single loss. Accordingly, maintaining the excitement of the regular season does provide a pro-competitive justification for the current system, as the regular season would actually be far more exciting where a playoff was utilized in the postseason.

stage because, as a result of the BCS agreement, they are played in the days after New Year's Day after the vast majority of the other bowls have been played.

The second relevant market is the "National Championship Game," the creation of which is the stated purpose of the BCS. The Supreme Court has determined that championship events exist in separate markets from other sporting events. Indeed, the BCS has gone to great lengths to distinguish the "National Championship Game" as a completely separate endeavor from the other BCS games. By its very exclusive nature, a game billed as a national championship is not interchangeable with any other set of games.

As has been demonstrated, the BCS has market power in both these markets. The BCS is the only entity governing access to its games. Membership in the BCS is required for any team to qualify for either the "National Championship Game" or any of the other four BCS bowls. The Court has stated, "when a product is controlled by one interest, without substitutes available in the market, there is monopoly power."²⁶ Indeed, the BCS is the very definition of monopoly power.

The second prong of the *Grinnell* test, the willful acquisition or maintenance of monopoly power, revolves around whether a monopolist has used its power to "foreclose competition, gain advantage, or to destroy a competitor."²⁷ Put simply, Section 2 prohibits business enterprises from expanding their monopoly by reducing competition.

The BCS arrangement clearly violates the second prong of the *Grinnell* test in both relevant markets. The privileged conferences, who are also the BCS system's architects, do not enjoy their unequivocal market dominance due to superior performance, but to the barriers they've imposed on competition. Once again, the BCS is governed by a panel of representatives, the composition of which is severely weighted in favor of the privileged conferences. This makes any proposals for change in favor of the non-privileged conferences difficult, in not impossible, even if the non-privileged conferences outperform their counterparts in the college football broadcast market or on the field of play. These barriers are not justified by a legitimate business purpose. In fact, the systemic exclusion of outside competitors by privileged conferences on the basis of pre-existing arrangements likely violates the law. Specifically, given the BCS's power in the relevant market, such exclusionary practices seem to run afoul of Section 2.²⁸

Conclusion

The BCS system is in dire need of reform. Some may argue that the college football postseason is too trivial a matter to warrant government involvement. However, given the amount of money involved in the BCS endeavor and its close relationship to the nation's institutions of higher education, it is clear that the unfairness of the current system extends well beyond the football field. The standards of legal and ethical behavior should not be lowered simply because a case involves collegiate sports. If anything, the nation should hold colleges and universities to a higher standard than a purely commercial enterprise.

²¹ 15 USC 2 "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.."

²² 384 U.S. 563, 570-71 (1966)

²³ *United States v E I du Pont Nemours and Co.*, 351 U.S. 377, 391-92 (1956)

²⁴ *Id* at 394

²⁵ *International Boxing Club of New York, Inc v United States*, 358 U.S. 242 (1959); see also *Board of Regents* 486 U.S. at 111.

²⁶ *du Pont*, 351 U.S. at 394

²⁷ *United States v Dentsply*, 399 F 3d 181, 186 (3d Cir. 2005)

²⁸ *Aspen Skiing Co v Aspen Highland Skiing Corp.*, 472 U.S. 585 (1985) (finding that the absence of a duty to transact business with a competitor does not allow a monopolist to engage in anticompetitive behavior)

BOISE STATE UNIVERSITY

With record student enrollment, new academic buildings, additional degree programs and an expanding research portfolio, Boise State University is the New U Rising. Growth in all these areas has been the defining characteristic in recent years for the largest institution of higher learning in Idaho, culminating in Boise State's 2009 ranking by U.S. News & World Report among the nation's "top up-and-coming schools."

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ABOUT THE AUTHOR



Sen. Orrin G. Hatch proudly shows everyone who visits him a painting of his great-grandfather, Jeremiah Hatch, entering Utah's Uintah Basin on horseback. Jeremiah founded what is now Vernal in 1878, and left a great legacy.

Hatch has carried the torch of his great-grandfather's frontiersman spirit all his life, from his working-class upbringing in Pittsburgh to a successful Utah law practice, and eventually to representing the Beehive State in Washington.

As a young man, Hatch learned the value of hard work as a metal lather and a card-carrying member of the AFL-CIO. As a student, he struggled to provide for a growing family as a janitor, lather, and all-night desk attendant in a dormitory. He earned a bachelor's in history from Brigham Young University and a law degree from the University of Pittsburgh.

In 1976, Orrin Hatch ignored a mountain of conventional wisdom when he decided to run against Sen. Frank Moss – a powerful incumbent Democrat in a time when Utah was a very blue state. The novice Republican underdog campaigned tirelessly across Utah, won an endorsement from then California Gov. Ronald Reagan, and eventually beat Moss with 54 percent of the vote.

As a statesman, Hatch is perhaps best known for his chairmanship of the Judiciary Committee, a position in which he served from 1995 to 2001 and again from 2003 to 2005. Still the senior Republican on the committee, Hatch has participated in the confirmation hearings of eight of the nine current Supreme Court justices and countless federal judges.

Hatch has also been chairman of the Labor and Human Resources Committee (now called the Health, Education, Labor and Pensions committee), serving from 1981-1987. Among his many accomplishments on this committee, Hatch has helped create the modern industries of generic drugs and nutritional supplements.

Hatch is the fifth-most senior member of the U.S. Senate, and the most senior Republican.



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