

## *NCAA vs. Regents of the University of Oklahoma: History, aftermath, implications (and where we go from here)*

**Anthony Lee**

When approximately 22 million viewers tuned in to FOX to watch the LSU Tigers become the first two-loss team in the modern BCS era to become crowned college football's national champions when they defeated the Ohio State Buckeyes, 38-24, in the Sugar Bowl (now known as the "BCS title game" with the addition of a fifth bowl to placate the conference commissioners from the non-BCS conferences), these viewers were watching the final act in a remarkable season-long drama or reality television series that has become college football.<sup>1</sup> If two things were clear after the 2007-2008 college football season, it was that the college football machine, from its Thursday night telecasts to signature shows like College GameDay, has become fully greased, and the BCS will always be mired in controversy. Leading up to the game, critics of the current BCS system, which combines the USA TODAY and Harris "human" polls with a set of computer averages to spit out its top two teams, had a valid argument against both LSU and Ohio State being in the championship game. These critics argued that Ohio State played in a watered-down Big Ten conference and had a weak non-conference schedule and that its lone home loss to Illinois should have been treated like a loss by a non-BCS team like Boise State, disqualifying Ohio State from playing in the title game. Others argued that while LSU did not lose in regulation and that its opponents (Kentucky and Arkansas) needed a combined 6 overtimes to slay the Tigers, their two losses should have opened the door to perhaps an undefeated team from a non-BCS conference, such as Hawaii. Others argued that the Georgia Bulldogs, due to their late-season surge, should have received a spot in the final two; in the end, Bulldog partisans, though, would have trouble justifying a team that would have played in the title game without having even won their conference championship. Others wondered why USC was not given a chance to play in the title game, but even the most die-hard Trojan fans had to admit that a shocking mid-season collapse to the Stanford Cardinal, a program that has struggled so badly since Tyrone Willingham left its sidelines that many outside of Northern California would question whether it belonged in college football's premiere division, was a sure black-eye that would be a near automatic disqualifier for the title game.

At the center of the 2007-2008 drama stood LSU, whose struggles and triumphs were broadcast across all four corners of the nation. On October 6, 2007, #1 ranked LSU and its go-for-broke coach Les Miles converted one risky fourth down attempt after another to defeat the Florida Gators, the defending national champions, in Death Valley. The drama-filled contest delighted executives at CBS, which broadcast this Southeastern Conference showdown in its primetime slot across the nation. The next Saturday, LSU lost a riveting triple overtime game at Kentucky after the Tigers ran the ball four straight times in the third overtime and failed to convert a first down. This thriller was broadcast nationally on CBS. The next Saturday evening in primetime on ESPN, LSU used a last-

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<sup>1</sup> Nellie Andreeva, "BCS championship a boon for FOX," *The Hollywood Reporter*, January 9, 2007, [http://www.hollywoodreporter.com/hr/content\\_display/news/e3i55fc7e691345ad015ac800dd509cd7c0](http://www.hollywoodreporter.com/hr/content_display/news/e3i55fc7e691345ad015ac800dd509cd7c0).

second touchdown pass to defeat Auburn. The following Saturday, again on ESPN in primetime, LSU traveled to Tuscaloosa and defeated the author's beloved Alabama Crimson Tide, now coached by former LSU coach Nick Saban. In its regular season finale, LSU lost a triple overtime thriller to Arkansas. The agony of this defeat could be seen nationwide on CBS. The following week, in the SEC conference championship game on CBS, much maligned phenom and backup quarterback Ryan Perilloux replaced injured starting quarterback Matt Flynn as the Tigers captured the SEC championship over the Tennessee Volunteers and waited for some improbable finishes—such as the Pittsburgh Panthers' stunning defeat of the West Virginia Mountaineers in Morgantown in the annual "Backyard Brawl"—to dramatically make it back into the top-2 of the final BCS standings, which allowed them to face Ohio State in the title game.

Amidst the on-field soap opera, rumors abounded, fanned and flamed to white hot intensity by the 24-hour cable sports shows, that its passionate head coach Les Miles would go back to his alma mater Michigan and take over for Lloyd Carr, who had retired as coach of the Maize and Blue. LSU put an end to these swirling rumors by signing Miles to an extension in the weeks before the SEC championship game. Further adding to the drama of its season, its beloved defensive coach Bo Pelini was tapped by football legend Tom Osborne to become Nebraska's head coach, and many wondered whether Pelini would successfully be able to game-plan for the championship game if he were spending most of his days on the recruiting trail, trying to resurrect Nebraska's 'Blackshirts.'

After LSU's coaches and players were finished hoisting the national championship trophy, sponsored, of course, by ADT Security Services, next season's storylines were already being discussed. Will Ryan Perilloux stay out of trouble in the off-season? How good will the Tiger defense be after the Bo Pelini's departure? If Nick Saban stockpiles talent at Alabama and succeeds there the way he did in Baton Rouge, will one championship be enough for Les Miles to gain security at LSU?

In many respects, college football has become a never-ending soap opera, much like Vince McMahon's professional wrestling enterprise, World Wrestling Entertainment. Soon after its seminal events, greased by pomp and all the bells and whistles imaginable and promoted incessantly by 24-hour sports stations, the hype-machine gears up for the next seminal event. And this cycle repeats itself year in and year out.

Due to cable television and a college football industry, composed primarily of six super conferences that have grown into mega-industries, LSU's season could be followed by fans from even the remotest regions of the United States as if they were watching a weekly television drama like CSI, Friday Night Lights, or Grey's Anatomy.

This was not always the case, and this paper examines how college football became such a mega-industry that seems to continually and annually expand, generating billions of dollars in revenue while blurring the line that supposedly separates amateur athletics from professional sports.

Nearly a quarter century ago, in an era where the number of times a football team could appear on national television was strictly limited, none of the pomp and circumstance and the drama surrounding college football today could have been possible. Not only were those outside a team's region hard-pressed to follow their team or teams of choice on Saturday afternoons, but the nation itself would have been deprived of intriguing story lines and even more compelling clashes on the gridiron because

meaningful and momentous games played at the end of the season would often be preempted by pre-selected games that turned out to be meaningless if either one of those teams in the relevant game had already exceeded the number of times that they were allowed to be on national television. Under such a regime, while the jury is still out as to whether the universities or the NCAA could have been winners, the college football fans were clearly the losers, deprived of the opportunity to watch the games that mattered most to them while being at the mercy of the NCAA and network executives who determined what games the national audience would watch on any given Saturday.

The Supreme Court's 1984 ruling in *Board of Regents of the University of Oklahoma vs. NCAA*, which effectively deregulated the broadcasting of college football by determining that the NCAA was in violation of the Sherman Antitrust Act when it forbade its individual member institutions from being able to separately negotiate the television contracts of its football teams, was perhaps the most seminal legal decision concerning college football, as it opened the door for the college football industry to become the all-encompassing behemoth that it is today. This paper will explain how this decision planted the seeds that have germinated into the college football industry of today.

This paper will also examine the *Regents* decision and the confrontations and the conflicts that led up to the litigation. In a sense, it will tell the back story leading up to the case, including profiling some of the seminal personalities in the litigation. It will then examine some of the immediate legal precedents that were established in the wake of the *Regents* decision while also telling the story of how the *Regents* decision paved the way for the current state of college football to take form over a two decade period. Lastly, it will examine the current BCS system and whether the BCS system is vulnerable to an antitrust suit. The paper will also argue that while the BCS is strongly protected against a potential antitrust suit succeeding against it because all of the parties involved in a potential suit, even if the BCS were vulnerable to an antitrust challenge, have shown clear signs of settling the matter outside of the courts. This paper posits that these parties have shown strong inclinations toward working out their potential differences outside the courts because they have learned from the mistakes of their elders, whose egos, stubbornness and internecine conflicts often got in the way of practical compromises and led them to clash in the courts in the seminal *Regents case*. Lastly, it will offer a solution to the BCS solution that can satisfy the network executives, college presidents, and the fans.

### ***History: The NCAA sees television as a threat***

Keith Dunnavant, in *The 50 Year Seduction*, writes that NCAA officials behind the television plans that would be at the center of controversy viewed television not as an ally but an enemy of college football from the outset: "In their eyes, the medium represented a threat to college football attendance and the game's balance of power. They wanted to protect the sport. They assumed they could."<sup>2</sup>

Such a view toward television was institutional and was ingrained in the minds of the NCAA brass since television began to compete with and later replace radio as the

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<sup>2</sup> Keith Dunnavant, *The 50 Year Seduction: How Television Manipulated College Football, from the Birth of the Modern NCAA to the Creation of the BCS* (New York: St. Martin's Press, 2004), 27.

nation's dominant broadcast medium. In 1950, the NCAA commissioned the National Opinion Research Company (NORC) to study the effects of television on live attendance at college football events. According to the study, while overall college football attendance between 1949 and 1950 in markets where televisions were present declined by 6 percent, attendance at college football games in the Middle Atlantic region, which at that time was home to the largest saturation of TV sets, declined by 15.5% while attendance at college football games in the New England market dropped by a 28.7%.<sup>3</sup> The study perturbed NCAA officials, and the NCAA decided that it needed to put restrictions on universities from airing football games that were not approved by the NCAA.

As Dunnavant illustrates, the NCAA targeted the University of Pennsylvania, which had a long tradition of televising its own games by partnering with network television channels, during the 1951 season by proposing and approving, by a vote of 161-7, a plan that imposed a nationwide ban on unrestricted television broadcasts of college football games.<sup>4</sup> Incensed by this plan, Penn President Harold Stessen and Athletic Director Francis Murray defied the NCAA and their plan by negotiating a \$180,000 contract with ABC to rebroadcast their games during the 1951 season.<sup>5</sup> Immediately after Penn announced its deal, the NCAA took initial steps towards potentially preventing Penn from participating in other NCAA-sanctioned events by branding the university a "member not of good standing."<sup>6</sup>

Further, the NCAA pressured other members of the Ivy League to cancel their scheduled games against Penn, and four schools complied. Cornell, Columbia, Dartmouth, and Princeton said that they would cancel their scheduled games against Penn during the 1951 season unless Penn canceled its contract with ABC.<sup>7</sup> As Dunnavant observes, when these four schools came to the aid of the NCAA, "a supposedly voluntary organization—a largely impotent confederation with no precedent for enforcing such sweeping power," they "infused it, unwittingly and irrevocably, with new authority."<sup>8</sup>

As the NCAA was targeting Penn, Notre Dame, which felt it would be next on the NCAA's target list since it also had a history of contracting with independent and local broadcast stations, was incensed. Father John Cavanaugh, President of the University of Touchdown Jesus, issued a statement stating that while they had the "firm intention of supporting the unity of the NCAA," they did "not see this good promoted by blindly acquiescing to very dubious principles and procedures simply because such policies and procedures are forced into unfair threat of a boycott."<sup>9</sup> Cavanaugh further commented that if the NCAA gained this power to restrict the broadcast of college football games, "what would prevent some future committee from telling a school how many games it might play or where it might play them or to levy a 60 percent tax on the proceeds from ticket sales?"<sup>10</sup>

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<sup>3</sup> *Id.* at 67.

<sup>4</sup> Dunnavant, 9.

<sup>5</sup> Dunnavant, 10.

<sup>6</sup> Dunnavant, 11.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Dunnavant, 12.

<sup>10</sup> *Id.*

Despite Notre Dame's uneasiness with the NCAA's actions, it failed to mount a strong defense of Penn. No other NCAA program publicly came to Penn's defense, and, as a result, Penn faced a daunting choice, and it faced it alone. Penn could "challenge the ban in court, defy the restriction and risk losing at least four games and possibly others once the college sports leadership started applying pressure, or relent on the television issue and make peace."<sup>11</sup> In this game of high stakes poker, the NCAA was bluffing and Penn was falling victim to this bluff even though the NCAA did not have the best of hands. According to Dunnavant, "even though the entire college sports landscape was lined up against Penn, the NCAA plan was built on a shaky legal foundation; the association did not have the legal authority to seize Penn's television rights even with a majority vote of the membership; the body did not have the constitutional power to punish Penn to encourage compliance; and the Ivy boycott looked suspiciously like an antitrust violation."<sup>12</sup> Though Murray would later admit that "we dropped the ball by not taking the thing to court," Penn and Notre Dame caved in and agreed to abide by the NCAA's restrictive television plan.<sup>13</sup> They did not call the NCAA's bluff, and, in so not doing, they "fundamentally altered the relationship between the NCAA and its members, setting the state for a new age NCAA built on the authority of majority rule. The fear created by television became the catalyst in the transformation of the NCAA into the most dominant force in college athletics."<sup>14</sup> After this crisis, the "NCAA emerged more powerful, like a bully with a reputation. To the rest of college athletics, Penn was a reminder, a warning: Don't challenge the majority."<sup>15</sup>

One man would come to use the NCAA's newfound strength and reputation and consolidate that power even more and become the most pivotal player in forming the NCAA's television policies that would become so controversial and infuriate the traditional college football powerhouses. His name was Walter Byers.

### ***Principal Players***

#### *Walter Byers*

In 1952, the NCAA Council hired Byers to be its first executive director. Under Byers, the NCAA's headquarters moved to Kansas City, and he would end up turning an organization that basically consisted of a couple of offices and multiple boxes of documents into the almost all encompassing and powerful organization it is today. He did so largely by consolidating power to himself, using the majority-rule system of voting to his advantage. This system allowed the majority of the small colleges and non-powerhouses of college football to gang up on and outvote the minority of the traditional football powerhouses on various pieces of legislation. The frustrations of the big time football powers would culminate in the *Regents* cases, but it is worth examining the events that led to the ultimate tipping point before examining the *Regents* case.

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<sup>11</sup> Dunnavant, 13.

<sup>12</sup> Dunnavant, 14.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

### *Byers Consolidates Power*

Initially, the football powerhouse felt that Byers's record towards them was mixed. What was clear, though, was that Byers, in leading the effort to change academic standards and limit the number of scholarships that schools could award, was consolidating power through the NCAA's bylaws and voting rules and becoming the most powerful administrator in college football.

In 1973, the NCAA decided to drop its academic standards from the 1.6 rule to the 2.0 high school minimum rule. The 1.6 rule for athletic admissions was used to "predict whether high school athletes would make a 1.6 out of 4 points as college students, which was only the equivalent of a D+ average."<sup>16</sup> The 2.0 high school minimum rule replaced this already lax standard, in essence opening the floodgates to admitting students from poor high schools—this standard would allow many "non-white players who had been segregated in poverty-stricken, academically inferior high schools."<sup>17</sup> While the 2.0 rule created many temptations for high schools to alter transcripts for their star athletes, thereby preventing them from being able to academically compete in college, it allowed the football powerhouses to expand their recruiting reach even further, strengthening these super programs in the long run.

In 1974, Byers spearheaded a successful effort to limit the number of scholarships a school could give for football to 105; further, each team would only be allowed to give a maximum of thirty new scholarships a year.<sup>18</sup> The scholarships limits infuriated the coaches of the traditional powerhouses, who often stockpiled athletes by giving unlimited numbers of scholarships, for two reasons. First, these coaches, especially those in the SEC, were upset because they knew that college football could have more parity because they could no longer hoard the best talent, if for no other reason than to keep those players from playing at other schools. Second, these coaches, such as Texas's Darrell Royal, were incensed because schools from the smaller conferences who were not traditional football powerhouses once again ganged up to pass legislation that directly influenced the big football programs. As Royal commented, "I don't want Hofstra telling Texas how to play football."<sup>19</sup>

To Byers, though, limiting scholarships enhanced the competitive balance in college football, making the sport, in his eyes, healthier, and that was all the research he needed to go ahead with the program. Indeed, the scholarship limitations "forever altered college football, creating a measure of unparalleled parity. With the powerful teams no longer able to sign a virtually unlimited number of players, lesser programs suddenly found themselves able to compete more effectively in the recruiting wars—and on the field."<sup>20</sup> According to Walter Duke, "the limitation on grants was the single most important piece of legislation I saw in my forty years of college athletics. You can't legislate equality but you can legislate an opportunity for kids to line up across from each other knowing that they have a fighting chance."<sup>21</sup>

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<sup>16</sup> John Sayle Watterson, *College Football: History, Spectacle, Controversy* (Baltimore: 2000, Johns Hopkins Press), 305.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Dunnivant, 113.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

Byers ruled the NCAA with an iron fist, and he was often the behind the scenes force behind all of the television contracts and legislation; his vision of a powerful NCAA would be carried forth by two of his top disciples, Walter Duke and Chuck Neinas. If only Byers could have known that their rivalry would later play a role in undermining the clout that Byers had carefully, strategically, and painstakingly amassed throughout the years.

#### *Wayne Duke and Chuck Neinas*

Byers's first hire while he was seeking to expand the NCAA's organizational power was Duke. He served as his chief deputy and was responsible for formulating many of the initiatives that broadened the scope of the NCAA. Always by Byers's side as the NCAA took on new projects, Duke, though Byers probably did not know it then, would stay loyal to Byers to the end.<sup>22</sup>

Another important hire by Byers was that of Chuck Neinas. Byers took a chance on Neinas, who had previously been a sports announcer, by hiring him to a top post in the NCAA's administration. In fact, he would initially be Duke's deputy, and Neinas would later say that "Walter Byers gave me a terrific education because the place was expanding and he kept throwing me out on different projects."<sup>23</sup> Little did Byers know at the time that by giving Neinas so much hands-on responsibility, he was training the man that would be well-equipped to exploit many of the NCAA's vulnerabilities in subsequent years.

In the irony of all ironies, one of Neinas's first assignments for Byers was to lobby Congress, at the same time that the NFL was lobbying members of Congress for an antitrust exemption, and convince members of Congress that "any new law should prevent the pros from infringing on the colleges' Saturday territory."<sup>24</sup> Neinas succeeded in his lobbying; the resulting antitrust exemption that Congress granted the NFL "protected the high schools and colleges from competition on Fridays and Saturdays, respectively but otherwise gave the pro league carte blanche in marketing their television rights."<sup>25</sup>

While the NFL was successfully getting an antitrust exemption, the NCAA stood by on the sidelines, mistakenly believing that it would be immune from those laws. As Dunnavant observes, "The NCAA mistakenly believed the television plan was safe" because they "presumed the series was legal because its stated intentions were to protect football attendance and prevent the rides of a small group of dominant powers."<sup>26</sup> There was no way, of course, that Byers could have known that the man he sent to Washington, Neinas, "would one day lead an uprising against him and the incredibly vulnerable television plan."<sup>27</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> Dunnavant, 72.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

These two men, who had been best of friends while being groomed by Byers to carry on his legacy, would start to drift when both were up for the vacant job of Big Ten Commissioner. Neinas and Duke were the finalists for the prestigious post, and Duke secured the job, which began to put a strain on his friendship with Neinas. When the Big Ten chose Duke over Neinas, Neinas was rumored to have said that “he would one day show those Big Ten People.”<sup>28</sup>

Neinas would later become the Commissioner of the Big 8 conference while another Byers disciple, Tom Hansen, would later become Commissioner of the Pac-10 conference. The Pac-10 and the Big Ten were conferences that were perceived as being loyal to Byers and the NCAA while the other conferences often felt frustrated by the idiosyncratic or iconoclastic tendencies of these two conferences. Decades later, the sentiment among many institutions towards those two conferences remains the same.

### *The CFA*

In 1974, Stephen Hood, the President of Long Beach State who would later be elected to Congress, formulated a proposal that called for the big time football powerhouses to share their revenues with the smaller and less successful universities such as the one he led. Already outvoted by the smaller schools on scholarship restrictions and other provisions, the minority of institutions that composed college football’s elite were rightfully scared by what they labeled the “Robin Hood” plan, which they believed had a realistic chance of passing. These football powers had had enough and they formed the College Football Alliance (CFA), a loose organization composed of the schools of the major football playing conferences besides the Pac-10 and the Big Ten and the major independent schools such as Penn State, Notre Dame and Florida State.<sup>29</sup>

Ironically, it was Duke who suggested that the CFA form, but he would soon be convinced that the organization that he helped spring was a threat to the NCAA. Father Joyce of Notre Dame, who was on the CFA board, said that Byers pressured Duke to pull back from the CFA and that “Duke was ‘always in bed with Walter’ on all kinds of matters, and Byers was deathly afraid of the CFA.”<sup>30</sup> According to Neinas, “there was no doubt in my mind that Walter was instrumental in keeping the Big Ten and the Pac-8” out of the CFA.<sup>31</sup> Duke would later comment that that while it was not his intention to form a different organization, “the presidents heard about my involvement [in the creation of the CFA] and got mad as hell at me, ‘cause they didn’t want to see another structure,” especially one that threatened to undermine the NCAA and the power over college football that it had spent decades consolidating.<sup>32</sup>

The CFA needed a leader who was well respected and knew how to navigate through college football’s bureaucracy, and it chose Neinas to be their leader. Neinas agreed to lead the CFA, and his decision enraged Byers, who saw him as an insurgent threatening to undermine the established order. Byers described Neinas’s actions as a

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<sup>28</sup> Watterson, 338.

<sup>29</sup> *Id.*

<sup>30</sup> Dunnivant, 122.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*



“betrayal.”<sup>33</sup> When Neinas accepted the post, he cemented his loyalty to the CFA while Duke remained loyal to his mentor, Byers, and worked to ensure that the Big Ten and the Pac-10 would not join the insurgent organization. Duke’s decision to help keep the Big Ten and the Pac-10 out of the CFA devalued the CFA and many felt it was a battle line that was being drawn. As Dunnivant writes, “without two of the most important conferences, the CFA would never be able to achieve its foremost goal: to become a unifying force for schools playing football at the highest level.”<sup>34</sup>

The CFA schools and the unofficial coalition of the Big Ten, the Pac-10 and the non-traditional football powers “grew increasingly distrustful of each other; some CFA members painted their counterparts as arrogant and hypocritical elites who were determined to use the cumbersome NCAA structure against them,” aligning with the “smaller schools against their own kind to thwart the CFA’s big time agenda” while the Big Ten and Pac-10 “considered the CFA a radical outfit intent on seceding from the NCAA and destroying college athletics.”<sup>35</sup>

While Neinas would later be characterized as having initiated the fight against the NCAA, others also had old scores that they wanted to settle against the NCAA and Byers. One such person on the CFA board was Father Joyce of Notre Dame, who decades earlier had been strong-armed by the NCAA into burying its more lucrative television contacts when Penn did not call the NCAA’s bluff. As these old tensions between the football powers and the NCAA simmered and came to life, the NCAA’s new football contract with ABC and CBS, which again limited the number of times each institution could appear on national television and prohibited these institutions or their respective conferences from negotiating separate broadcast deals, would give more than enough reason for these two sides to take arms and go to battle.

### ***The Controversy: The NCAA and CFA Engage in a Civil War Over Broadcast Rights***

In 1982, the NCAA negotiated contracts with ABC and CBS that limited the number of times a school could be on television and the income that the big powerhouses would make on their telecasts. This was consistent with the past television contracts that the NCAA negotiated on behalf of its member institutions. Per the terms of the contract, a school could not appear more than five times combined over the course of two seasons on both networks. While a school could televise on local stations other than ABC, they could only do so under the “exception telecasts” provision. These “exception telecasts” not only would be seen by a very limited number of households and bring in far less revenue than the traditional regional and national telecasts, they would also have to have pre-approved by the NCAA. Further, a school could only get an “exception telecast” broadcast if all of the tickets for the game had been sold, or if the game was to be played more than 400 miles from the school and not shown in an area where another college football game was being played.<sup>36</sup> In other words, not only was it very difficult for a school to use the “exception telecast” provision to increase the number of times it would be on television, doing so would also not be profitable enough to be worth it in the long run.

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Dunnivant, 123.

<sup>36</sup> 546 F. Supp. 1276, 1290

One major problem that the traditional football powerhouses had with the pending NCAA contract with ABC and CBS was that the traditional powerhouses believed that the rights fees paid to them did not respond to market forces. One glaring example of the inequity felt by the powerhouses occurred in the fall of 1981. In one weekend of that year Oklahoma played USC in a highly touted match up that pitted two teams that were ranked in the top five in the polls. ABC televised this game on over 200 of its stations. On the other hand, a game between Citadel and Appalachian State was carried on four of ABC's local stations that same weekend. Yet, because the NCAA established the price that ABC would have to pay to the schools that would be on television that weekend in advance, ABC paid all four of these schools the same amount of money to have the right to broadcast their games on that weekend.<sup>37</sup>

The summer before the Oklahoma-USC contest, the CFA negotiated a preliminary and separate television arrangement with NBC because it was already well aware that such inequities and non-market based payouts would occur during the college football season, as had occurred in the previous seasons, when the "high profile" teams would have to share revenues with teams that most of America was hardly interested in viewing. The CFA contract "would return more money to a smaller number" of CFA member institutions and those institutions "would not worry about low-profile teams appearing on a regular basis."<sup>38</sup>

Byers and the NCAA were incensed at the CFA's contract with NBC. Byers let it be known that the NCAA's retaliation would be swift. He stated that the "NCAA administration would seek expedited disciplinary procedures against offending CFA schools" and that the sanctions would affect not only the football programs of CFA member institutions, but others sports as well.<sup>39</sup> In other words, the NCAA threatened to boot those institutions who signed onto the CFA-NBC deal out of the NCAA, which meant that those schools would not be able to compete in other NCAA sanctioned sports such as basketball and baseball.

When push came to shove, powerful CFA institutions such as Notre Dame and Alabama, showing perhaps that they loved their football teams and athletic programs more than they hated Byers and the NCAA, did not officially commit to the CFA contract with ABC. Fearful of the NCAA's potential sanctions against them, these schools did not allow the CFA to ratify its contract with NBC, and the deal was dead.

To some of the most powerful members of the CFA who insisted on getting rid of the constraints that the NCAA contract imposed on them, there was only one choice left: sue. These leaders decided that going to the courts and charging the NCAA with violating the nation's antitrust laws was the last and only option they had left. Oklahoma and Georgia, two of college football's traditional powerhouses, led the charge, and, fortunately, these two schools were led by presidents who ardently supported their respective football programs. These presidents were instrumental in getting the legal challenge against the NCAA off the ground.

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<sup>37</sup> *Id.* at 1291

<sup>38</sup> Watterson, 344.

<sup>39</sup> *Id.*

The University of Oklahoma was led by William Banowsky, who pledged to fight the NCAA.<sup>40</sup> One observer wrote that Banowsky “showed a righteous determination” for the lawsuit and Oklahoma football “akin to the Christian fundamentalism he displayed as a member of the Church of Christ.”<sup>41</sup>

Fred Davison had been the head of the University of Georgia since 1967. He was adamant about Bulldog Football and once proclaimed that “athletics and primarily football at the University is the one focal point that gives cohesion to all of our members, both students and alumni; it brings them back home; it’s a kind of celebration in which we all have a common cause. So psychologically it has great impact, and it’s not just on the alums; it creates a sense of pride on the part of the people of the state of Georgia.”<sup>42</sup>

While the two presidents gave institutional and moral support, the NCAA still had a huge financial advantage over the two schools, an advantage the NCAA tried to use to bully the CFA out of court. Neinas knew the NCAA would try these tactics because he was once a part of that brass. He believed that “the NCAA was attempting to increase legal costs so the other side simply cannot afford to maintain its struggle because it had worked for them in the past.”<sup>43</sup> Aware of the CFA’s financial disadvantage, Neinas started a CFA legal defense fund and asked some of the CFA’s biggest members such as Notre Dame and Penn State to pitch-in hefty sums to keep the challenge in court. Fully funded and assured that their legal bills would be paid, the lawyers representing Oklahoma and Georgia pressed on with their case. One of those attorneys, Andy Coats, who was also set to run for mayor of Oklahoma City, thought that the longer he worked on the case, the better the odds were that the NCAA would settle and not risk going to court: “by the time we got to the trial...I thought the antitrust aspects were awfully strong in our favor. I really expected the NCAA to cut a deal.”<sup>44</sup>

Coats was wrong. The NCAA and Byers did not want to compromise, and the case went to trial. It is remarkable that only a few years before the case went to trial, attorney Stan Ward and Dan Gibbens, Oklahoma’s faculty representative on the Big 8 and the CFA committees, met at a steakhouse to discuss potentially challenging the NCAA juggernaut in court. Ward reportedly bet Gibbens a porterhouse steak that the suit against the NCAA could succeed. Fully intent on losing this bet, Gibbens then suggested to Banowsky that a lawsuit should be in the cards. Ward eventually would get his steak, but college football fans and television viewers across the nation would be the true beneficiaries of this wager.

## **The Trials:**

### *Regents I*

At issue at trial would be whether the NCAA was in violation of the nation’s antitrust laws and whether those laws applied to an organization that was supposedly

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<sup>40</sup> Ronald A. Smith, *Play by Play: Radio, Television, and Big-Time College Sport* (Baltimore: Johns Hopkins Press, 2001), 163.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Dunnavant, 154.

formed to further “nonprofit” and “egalitarian” aims?<sup>45</sup> Also at issue at the trial stage was whether the NCAA constituted a monopoly in violation of section two of the Sherman Act. Further, Oklahoma and Georgia chose not to seek monetary damages or treble damages under the Sherman Act because they thought pursuing such damages would only hurt the ability of CFA schools to make money on the potential contracts that they would negotiate later; further, they did not want to bankrupt the NCAA as the NCAA needed to exist to manage other sports, such as basketball and baseball, in which the CFA members schools participated. Instead, Oklahoma and Georgia sought only injunctive relief against the NCAA and its television contract.

Before these questions of law and fact could be decided, though, the parties first had to find a judge that could answer them. Oklahoma and Georgia first filed their complaint in the federal court of Judge Luther Eubanks; Eubanks, a Sooner alum and avid fan of his alma mater, recused himself. Furthermore, none of the judges in the Western District of Oklahoma wanted to take the case, so the Tenth Circuit appointed New Mexico’s Judge Juan Burciaga to hear the case.<sup>46</sup> Because the Supreme Court and the Appellate Court would later rely heavily on Burciaga’s findings of fact and his decision, it is worth examining Burciaga’s reasoning behind his determining that the NCAA was in violation of the Sherman Act.

#### *Oklahoma and Georgia Suffered Antitrust Injury and Had Standing*

At trial, the NCAA first tried to argue that the plaintiffs “lacked standing because they have suffered no antitrust injury as required” by the Clayton Act, and that because a set of television contracts were in effect for the 1982 season through the 1985 season, that any injuries claimed by the plaintiffs are speculative, and, thus, there is no present case or controversy.<sup>47</sup>

Burciaga rejected these arguments and stated that the plaintiffs had suffered an antitrust injury because “there can be no doubt that both of these plaintiffs would have realized increased revenues from football television but for the NCAA controls.”<sup>48</sup> Burciaga further explained that “the fact that ABC paid the same fee for the plaintiffs’ games as it did for less attractive games leads readily to the inference that if the networks were allowed to choose games for broadcast free from the strictures of the NCAA controls, schools such as the plaintiffs would receive larger fees for their games.”<sup>49</sup> In addition, since the plaintiffs would “realize more revenue from local and regional broadcasts were it not for the NCAA controls,” Burciaga determined that the “plaintiffs have suffered injury directly flowing from the NCAA’s football television controls.”<sup>50</sup>

#### *The Sherman Act*

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<sup>45</sup> *Id.*

<sup>46</sup> Dunnivant, 154

<sup>47</sup> I, 66

<sup>48</sup> 546 F. Supp. 1276, 1301.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

The Sherman Act was “designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade,” and the Act prohibits “every contract, combination...or conspiracy, in restraint of trade or commerce” with its basic premise being that “economic competition be unrestrained.”<sup>51</sup>

One such violation of Section 1 of the Sherman Act is price fixing. Since price fixing is a *per se* violation of the Sherman Act, the courts will not “inquire into the reasonableness of the price which has been established.”<sup>52</sup> In other words, if a court determines that a complained of violation is a *per se* violation of the antitrust law, the court will not consider arguments that such a practice increases competition. Rather, the court will condemn the practice since the purpose of the *per se* rule is to avoid time-consuming and expensive litigation in areas which the chances of succeeding are minimal at best. Courts often use the *per se* rule in cases involving horizontal price fixing.

Burciaga determined, based on witness testimony and the evidence presented before him, that the “minimum aggregate fee” that the networks pay for every broadcast is the “minimum, maximum, and actual price.”<sup>53</sup> Burciaga determined that because the “minimum aggregate fee” did not “increase efficiency” and render the market more competitive, but, rather facially appeared to “restrict competition and decrease output,” it constituted *per se* price fixing. According to Burciaga, the “the essence of the NCAA controls—indeed their *raison d’être*—is to restrict competition; the controls distort the prices paid by the networks for the right to broadcast any given college football game.”<sup>54</sup> Furthermore, the “NCAA forces the networks to broadcast many games which the networks would not broadcast in the absence of the NCAA’s controls,” and, as a result, its controls “are a repeal of the laws of supply and demand” because “competition is eliminated, and the pernicious effects of non-competition are present in abundance in the market of college football.”<sup>55</sup>

Burciaga next addressed the question of whether the *per se* rule applied to the NCAA. The NCAA argued that it did not apply to their organization because it is a “voluntary association and the television controls were developed through a democratic process.”<sup>56</sup> Addressing the NCAA’s argument, Burciaga reasoned that the facts showed that “membership in CAA is not voluntary in any meaningful way” and that whatever may be its peculiar characteristics, the “Sherman Act, so far as price-fixing arrangements are concerned, establishes one uniform rule applicable to all industries alike” and so it applies to the NCAA as well.<sup>57</sup>

After determining that the facts indicated the NCAA’s contract failed under the *per se* test, Burciaga also applied the rule of reason test to the case. By employing both the *per se* and rule of reason tests, Burciaga ensured that his findings of fact and determinations of law would carry much weight if the case were appealed.

Using the rule of reason analysis, which balances the pro-competitive and anticompetitive justifications for a particular market restraint while keeping in mind its overall effect on competition, Burciaga determined that “it is clear that the NCAA

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<sup>51</sup> 546 F. Supp. 1276, 1304.

<sup>52</sup> *Id.*

<sup>53</sup> 546 F. Supp. 1276, 1306.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> 546 F. Supp. 1276, 1308.

<sup>57</sup> *Id.*

controls have a devastating effect on competition” because “by their very nature, they inevitably result in price manipulation, restriction of output, and severe limitations on the options of both buyers and sellers.”<sup>58</sup> After concluding that the “NCAA controls affect every single college football game shown on television,” he added that he came to the conclusion that “its most pernicious aspects is that under the controls, the market is not responsive to viewer preference.”<sup>59</sup> In fact, Burciaga stated that he came to such a conclusion because “every witness who testified on the matter confirmed that the consumers, the viewers of college football television receive absolutely no benefit from the control” for “many games for which there is a large viewer demand are kept from the viewers, and many games for which there is little if any demand are nonetheless televised.”<sup>60</sup>

In weighing the anticompetitive aspects with the pro-competitive aspects of the plan, Burciaga determined that there were not any redeeming pro-competitive benefits. He stated that the “controls have not been shown to protect live gate attendance, nor do they preserve a competitive balance among the schools; the only benefits from the plan go to the NCAA itself, and the less prominent schools whose games would not appear on network television in the absence of the controls.”<sup>61</sup> He further added that “consumer demand and the free market are sacrificed to the interests of the NCAA administration and its allies among the membership,” and, as a result, the “NCAA controls are unreasonable naked restraints on competition, both by their nature and by virtue of surrounding circumstances which compel the inference that they were intended to retrain competition.”<sup>62</sup> As a consequence, Burciaga determined that the NCAA contract did not pass the rule of reason test and violated Section 1 of the Sherman Act.

### *Group Boycott and Monopolization*

Burciaga also ruled that the NCAA had engaged in a group boycott and that the NCAA had monopolized the market of college football television. After acknowledging that “group boycotts, or concerted refusals by traders to deal with other traders, have long been forbidden in the *per se* category,” Burciaga found no “difficulty in concluding that NCAA has organized a group boycott.”<sup>63</sup> He found that “there is an absolute refusal to deal with all of the major competitors of ABC, CBS, and TBS. Broadcasters like NBC...cannot buy NCAA football for cablecast. There are no exceptions. The producers of college football have horizontally agreed that they will refuse to deal with these buyers. The existence of a group boycott could not be more clear.”<sup>64</sup>

Burciaga determined that a group boycott also existed against horizontal competitors of NCAA members. He found that the “non-member which wishes to sell its football games for television is subjected to a boycott” for “the NCAA members are in a more powerful position than” any member who chooses to deviate from the contract or go on its own because “NCAA members will not play televised games against non-

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<sup>58</sup> 546 F. Supp. 1276, 1318.

<sup>59</sup> *Id.*

<sup>60</sup> 546 F. Supp. 1276, 1319.

<sup>61</sup> *Id.*

<sup>62</sup> 546 F. Supp. 1276, 1312.

<sup>63</sup> 546 F. Supp. 1276, 1313.

<sup>64</sup> *Id.*

members” for “they have the power to without from their competitors a key ingredient of the product.”<sup>65</sup> These facts led Burciaga to determine that “there is no doubt that the NCAA has organized a group boycott, enforced the rules of that boycott, and employed threats and coercion to maintain the boycott.”<sup>66</sup>

As for the issue of monopolization, Burciaga concluded that “in the case of NCAA and college football television, the market has always been monopolized.”<sup>67</sup> He then added that “the current output of televised college football remains far less than that which would occur in a free market” and “once a firm has achieved a monopoly position in an industry, reduced output and raised prices, it maintains its monopoly price by marginally increasing output and prices,” and Burciaga determined that that was consistent with what the NCAA was doing with its television contract.

Addressing the NCAA’s argument that live college football was not a unique market in it of itself but just akin to a sitcom in the general market of television programs which includes news, other sports, and other programs, and, as a result, the NCAA could not have a monopoly over a unique market that did not exist, Burciaga determined that the NCAA provided evidence that was insufficient to prove this contention that live college football was not a separate market. He reasoned that the plaintiffs have “proved that live college football television is a unique product for which there is no ready substance;” and while “it is difficult to understand the tremendous appeal of college football to the networks and their advertisers,” it is clear “that there is no substitute in the minds of the networks or advertisers” because “they pay an enormous cost to reach an audience which is small relative to prime time programming.”<sup>68</sup> According to the evidence presented at trial, it was “clear that college football does not compete with other television programming in any real sense, that it is a market unto itself, and that is the relevant market for determining whether NCAA exercises monopoly power,” which Burciaga determined it did based on the evidence presented to him.<sup>69</sup>

Burciaga granted the plaintiffs the injunction that they were seeking and stated that it was the “court’s fond hope and genuine belief that the result of this litigation will be an open and competitive market which will ultimately serve the best interests of the football-playing colleges, the telecasters, television advertisers and, most importantly, the viewers of college football television.”<sup>70</sup>

### *Regents III*

After the Court of Appeals affirmed the District Court’s ruling that the NCAA was in violation of the Sherman Act, the NCAA appealed, and, after its agents tracked Supreme Court Justice Byron White on vacation to receive a stay on the injunction so that the NCAA could go forth with its television contract for the 1984 season, the Supreme Court finally took the case. The High Court took the case to determine (1) whether the per se approach or the rule of reason approach was the proper standard of review for college athletics under federal antitrust law, and (2) whether the NCAA’s

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> 546 F. Supp. 1276, 1320.

<sup>68</sup> I, 141

<sup>69</sup> 546 F. Supp. 1276, 1323.

<sup>70</sup> I, 158

college football television plan violated the Sherman Act.<sup>71</sup> By a 7-2 vote, the Supreme Court determined that, using the rule of reason standard, the NCAA television plan violated the nation's antitrust laws.

*The Supreme Court Adopts the Rule of Reason Approach for Amateur Athletics*

The Supreme Court, in an opinion authored by noted antitrust expert Justice John Paul Stevens, conceded that, in most cases, “horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an “illegal *per se*” approach because the probability that such practices are anticompetitive are very high.<sup>72</sup> As a result, such cases would normally be judged under the *per se* rule, especially when the practice, on its face, “appears to be one that would always or almost always tend to restrict competition and decrease output.”<sup>73</sup> In such circumstances, the Court would presume that the restraint at issue is “unreasonable without inquiry into the particular market context in which it is found.”<sup>74</sup>

Nevertheless, in cases involving amateur athletics, the Court decided that it would be “inappropriate” to apply the *per se* test and opted to use the rule of reason standard in its stead. The Court’s decision was “not based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA’s historic role in the preservation and encouragement of intercollegiate amateur athletics,” but, rather, based on the fact that the case at hand involved an “industry in which horizontal restraints on competition are essential if the product is to be available at all.”<sup>75</sup> The Court reasoned that college football could only be marketed effectively if there were horizontal restraints on competition because the NCAA is unique in the sense that the NCAA and its member institutions market competition, and there would not be a competition-based product if competing teams, their conferences, and all of the other necessary entities did not abide by some sort of cooperative agreement. As Robert Bork noted, “some activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams.”<sup>76</sup>

*The Rule of Reason Standard*

When the effects of an industry’s or organization’s actions on free and full competition are not readily apparent, the courts will use the rule of reason analysis to examine the “facts peculiar to the business, the history of the restraint, and the reasons

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<sup>71</sup> Jodi M. Warmbrod, “Antitrust in Amateur Athletics: Fourth and Long: Why Non-BCS Universities Should Punt Rather Than Go For an Antitrust Challenge to the Bowl Championship Series,” 57 Okla. L. Rev. 333, 356.

<sup>72</sup> 468 U.S. 85, 100.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> 468 U.S. 85, 101.



why it was imposed.”<sup>77</sup> The rule of reason analysis is a balancing test that uses a three-part burden-shifting test.<sup>78</sup> First, in order to establish a prima facie case, the plaintiff has the burden to “prove the anticompetitive effects of the restraint on trade” by showing that the restraint has a “substantially adverse effect on competition.”<sup>79</sup> The plaintiff can demonstrate such adverse effects by showing a “reduction of output, increase in price, deterioration in the quality of goods and services, or proof of the defendant’s ‘market power.’”<sup>80</sup>

Second, should the plaintiff meet its burden, the “burden then shifts to the defendant to present evidence that the pro-competitive benefits outweigh the anticompetitive effects of the restraint.”<sup>81</sup> This is a substantial burden that the defendant bears. In cases involving the NCAA, “courts will only recognize those justifications ‘necessary to produce competitive intercollegiate sports’ as legitimate rationales” for the anticompetitive effects.<sup>82</sup>

Third, if the defendant meets the burden of convincing the court of the pro-competitive benefits of its actions, the burden then shifts to the plaintiff to show that the pro-competitive effects could be achieved “in a less restrictive manner or that the restraint fails to promote the defendant’s stated objective,” which essentially requires the plaintiff to prove that the restraint was not “reasonably necessary to achieve the stated objective.”<sup>83</sup> The court will then decide whether the pro-competitive aspects of an action or a plan justify the anticompetitive aspects that are associated with such an action or plan while keeping in mind the spirit of the rule of reason analysis, which is “[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition. The true test of legality 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.”<sup>84</sup>

#### *The Court Applies the Rule of Reason Analysis to the NCAA’s Television Plan*

Using the rule of reason analysis, the court affirmed the prior decisions by the lower courts—that the NCAA’s television plan violated the Sherman Act.

The Supreme Court affirmed Burciaga’s reasoning and found that the “NCAA television plan on its face constitutes a restraint upon the operation of a free market, and the findings of the District Court establish that it has operated to raise prices and reduce output; under the rule of reason, these hallmarks of anticompetitive behavior place upon petitioner a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market.”<sup>85</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> 57 Okla. L. Rev. 333, 366.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> 57 Okla. L. Rev. 333, 367.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> 468 U.S. 85, 91.

The Court ruled that Burciaga’s reasoning regarding the NCAA’s lack of evidence for its pro-competitive arguments was correct. The Court ruled that the NCAA’s plan did not increase competition among its member institutions. Regarding the NCAA’s second argument—that, consistent with *Broadcast Music*, where the Court held that a joint venture which protected the product passed the rule of reason standard, the television plan was a joint venture to protect the live audience at football games and assist in the collective marketing of broadcast rights.<sup>86</sup> The Court differentiated the NCAA’s argument from that proffered in *Broadcast Music* because, unlike in the plan that came to light in that case where individual artists were free to sell their own music without restraint, the individual NCAA schools were not free to contract the broadcast rights to their games without restraint or threatened sanctions.

Because the Court deemed that the NCAA did not meet its burden of convincing the Court that its pro-competitive justifications for its television plan outweighed the anticompetitive effects of its television plan that placed restraints on the ability of its member institutions to enter into their own television contracts, the Court did not need to examine whether the pro-competitive aspects could be pursued in a less restrictive manner.

In his dissent, Justice White wrote that the “NCAA’s television plan seems eminently reasonable” because it “fosters the goal of amateurism by spreading revenues among the various schools and reducing the financial incentives toward professionalism.”<sup>87</sup> He wrote that the NCAA needed to impose such restrictions to limit the potential abuses that would push the NCAA towards professionalism and commercialism and the television plan, “designed to limit the rewards of professionalism” are consistent with the NCAA’s objectives because by putting restraints upon schools such as Oklahoma and Georgia, the television plan insures that all programs are confined “within the principles of amateurism so that intercollegiate athletics supplement, rather than inhibit, educational achievement.”<sup>88</sup> White believed that the “collateral consequences of the spreading of regional and national appearances among a number of schools are many: the television plan, like the ban on compensating student-athletes, may well encourage students to choose their schools, at least in part, on the basis of educational quality by reducing the perceived economic element of the choice” and such considerations are “sufficient to offset any minimal anticompetitive effects of the television plan.”<sup>89</sup>

### ***Legal Landscape After Regents: The CFA Gets Put on the Defensive***

The fierce battle between the Byers’s and Neinas’s factions spilled over soon after the Supreme Court’s landmark ruling in *Regents* that held that the NCAA’s role as the exclusive bargaining agent for the college football television rights of its member institutions violated the Sherman Act. The Pac-10 and the Big Ten, whose conference commissioners had been disciples of Byers and stood loyal to him, did not join the CFA. The Pac-10 and the Big Ten’s refusal to join the CFA obviously precluded them from

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<sup>86</sup> 57 Okla. L. Rev. 333, 368.

<sup>87</sup> 135

<sup>88</sup> Id.

<sup>89</sup> 747 F.2d 511.

being included in the television contracts that the CFA would negotiate with ABC immediately after the *Regents* decision deregulated college football's television broadcasts.<sup>90</sup>

In the months following the Supreme Court's ruling, powerhouse college conferences such as the Big 8 and independent superpowers such as Notre Dame, under the banner of the CFA, entered into a contract with ABC. Likewise, the Pac-10 and Big Ten Conferences, furthering the civil war in college football, refused to join the CFA and entered into their own television contracts with CBS. Under the terms of the CFA contract with ABC, a "crossover restriction" clause barred the broadcast of CFA member games on other networks even when the opposing team was not a member of the CFA.<sup>91</sup> This "crossover restriction" was in direct confrontation with a provision in the CBS contract with the Pac-10 and the Big Ten, which while giving CBS rights to broadcast Saturday games of the network's choosing between Pac-10 and Big-Ten teams also "claimed rights to the crossover games between Pac-10 and Big Ten teams" and those who were not members of those two conferences.<sup>92</sup>

Because the Pac-10 and the Big Ten had rich football traditions and traditional national powerhouses that rivaled any of those in the newly formed CFA, it was inevitable that the provisions of these two televisions contracts would clash. Not surprisingly, two confrontations that would put the "crossover" provisions of both contracts in play were scheduled for the 1984 season as Nebraska was scheduled to play at UCLA and Notre Dame was scheduled to visit USC. As Dunnivant observes, even though, as part of its deal with the CFA, ABC insisted that no CFA teams appear on its rival station, CBS, even games in which CFA teams were on the road, CBS believed its contract with the Big Ten and Pac-10 allowed them to telecast any game in which a Big Ten or Pac-10 team was the home team, even if those games involved CFA schools, because of a long standing tradition of home rule, which gave deference to the home team's broadcast contract. According to Dunnivant though, "home rule" had never been more than a gentleman's agreement," and "gentlemen were in short supply that summer."<sup>93</sup>

Unable to reach a settlement or an agreement, the Regents of the University of California, the University of Southern California, the Pac-10 Conference, and the Big Ten Conference filed an antitrust suit against ABC, the CFA, and Notre Dame and Nebraska, which were both members of the CFA, and succeeding in obtaining a preliminary injunction against Nebraska and Notre Dame, prohibiting these schools from refusing "to consent to the broadcast of one of their fall games solely on the basis of the exclusivity terms of their contract" with UCLA and USC.<sup>94</sup> After the district court denied the CFA's application for a stay of the preliminary injunction, which would have prevented the Nebraska-UCLA and Notre Dame-USC games from being shown on live national television, the CFA appealed and lost its appeal when the Ninth Circuit affirmed the district court's granting of the injunction.<sup>95</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> 747 F.2d 511.

<sup>93</sup> Dunnivant, 175.

<sup>94</sup> 747 F.2d 511, 513.

<sup>95</sup> *Id.*

At trial, the Pac-10 and the Big Ten alleged that the actions of the CFA violated section 1 of the Sherman Act in two different ways. First, the Pac-10 and Big Ten argued that the CFA's crossover restriction was akin to a group boycott. Second, the Pac-10 and Big Ten argued that the CFA had formed a "cartel restricting the output of televised games so as to raise artificially the value of the ABC-CFA contract."<sup>96</sup> In essence, the Pac-10 and Big Ten argued that the CFA contract represented the antitrust violations of group boycott and price-fixing. Ironically, the Pac-10 and Big Ten's arguments against the CFA and its television contract were essentially the same arguments that the CFA members schools brought forth against the NCAA and its television contract leading up to the Supreme Court's decision in *Regents*.

In analyzing the arguments before the court, the majority in the Ninth Circuit noted that the "college football industry must collectively adopt and enforce uniform rules; the integrity of the industry must be preserved through mutual agreement and enforceable standards; and, the quality of the common industrial products is inexorably linked to the vitality of the industry itself."<sup>97</sup> Per the Supreme Court's ruling in *Regents*, the Ninth Circuit noted that since the NCAA performed these vital functions, the attendant horizontal restraints should be examined under the Rule of Reason analysis should another case be brought against the NCAA.

According to the Ninth Circuit though, the vital relationship between the NCAA and the success of the college football industry "is not equally transferable to the CFA" because, by any account, "the purpose and effect of the horizontal restraints imposed by the CFA and the ABC-CFA contract have little, if any, bearing on the operative rules of college football."<sup>98</sup> Since the "essential ingredients of uniformity and product integrity are still being furnished by the same entity—the NCAA," the Ninth Circuit noted that because "logic suggests that there can be only one such entity per industry," the "CFA and the ABC-CFA contract appear to constitute horizontal restraints unadorned by any organic relationship to the character and quality of the product."<sup>99</sup> Just as the NCAA television plan that fell months before the pending litigation, the CFA contract, the Ninth Circuit determined, shared the "dual infirmities of an intentional reduction in output along with the imposition of sharp restraints on individual school competition."<sup>100</sup>

Furthermore, the Ninth Circuit determined that even if the CFA could win the argument, which in its view it could not, that the CFA "is not a mutual arrangement for the imposition of essential horizontal restraints but rather the CFA simply imposes non-price vertical restrictions on the ultimate distributors of its product," the market share analysis of vertical restraints adopted by the Ninth Circuit would "significantly diminish the defendants' chances under the Rule of Reason."<sup>101</sup> Thus, the Ninth Circuit agreed with the district court that the "case presents serious questions raised by plaintiffs indicating that they have a fair chance of succeeding on the merits of the underlying antitrust litigation," and that was reason enough to grant a preliminary injunction against the defendants.<sup>102</sup>

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<sup>96</sup> 747 F.2d 511, 524.

<sup>97</sup> *Id.*

<sup>98</sup> 747 F.2d 511, 528.

<sup>99</sup> 747 F.2d 511, 529.

<sup>100</sup> *Id.*

<sup>101</sup> 747 F.2d 511, 533.

<sup>102</sup> 747 F.2d 511, 545.

Furthermore, in upholding the injunction, the Ninth Circuit determined that the plaintiffs would suffer much more injury than the defendants if the injunction were lifted and the plaintiffs were denied a chance to showcase their teams' talents on national television. According to the Ninth Circuit, such injuries included "the impairment of their ongoing recruitment programs; the dissipation of alumni and community goodwill and support garnered over the years; placement of plaintiffs' teams at a significant disadvantage for purposes of national ranking; the deprivation of the opportunity to showcase rivalries of unique tradition and moment in the industry; and a reduction in the attractiveness of the Pac-10-Big Ten Conference 'product' which would doom the Pac-10-Big Ten's efforts to compete in the market."<sup>103</sup> In contrast, the Ninth Circuit noted that "the record fails to reveal any significant injury to the defendants stemming from the issuance of the preliminary injunction."<sup>104</sup> ABC argued that permitting a contest between a CFA school and a non-CFA school would diminish ABC's ability to market CFA football as a distinct brand. The Ninth Circuit deemed that this argument had "little weight" because "national exposure by either network would advance the goals of their college football programs."<sup>105</sup>

Lastly, the Ninth Circuit agreed with the district court that "the public interest also favored the issuance of the preliminary injunction" because it "accomplishes the salutary objective," established by the Supreme Court, "of preserving the competitive influence of consumer preference in the college broadcast market."<sup>106</sup> Without the injunction, "the consumer has no influence on the broadcast decision and the ABC-CFA crossover restriction will prevent a nationwide broadcast based on competitive considerations unrelated to consumer demand for the particular game."<sup>107</sup> Because the issuance of the preliminary injunction allows the "economic voice of the consumer" to be heard, the Ninth Circuit deemed that the district court had not abused its discretion in taking into account the public interest in granting the injunction.

Noting the irony in the Ninth Circuit's decision, Pac-10 Commissioner Hansen remarked that "after going all the way to the Supreme Court to win their property rights, the CFA tried to tell us we didn't have the right to televise our home games. I always found that terribly ironic."<sup>108</sup>

### *Law, Banks and SMU*

In subsequent years, the courts ruled on a variety of issues that drew clearer lines on when the NCAA could, as Justice White had written in his dissent, engage in practices that promoted "fair competition" and other objectives consistent with their athletes deserving the term "student-athlete," which the courts described as "promoting educational objectives."

In *Law*, the NCAA's restriction that capped the salary of entry-level coaches to \$16,000 per year was challenged. The Appellate Court determined that "nowhere does

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<sup>103</sup> 747 F.2d 511, 539.

<sup>104</sup> *Id.*

<sup>105</sup> 747 F.2d 511, 542.

<sup>106</sup> 747 F.2d 511, 534

<sup>107</sup> *Id.*

<sup>108</sup> *Dunnavant*, 176.

the NCAA prove that the salary restrictions enhance competition, level an uneven playing field, or reduce coaching inequities.”<sup>109</sup> Applying the rule of reason standard to the case, the court found that “the undisputed evidence supports a finding of anticompetitive effect. The NCAA adopted the REC Rule to reduce the high cost of part-time coaches’ salaries, over \$ 60,000 annually in some cases, by limiting compensation to entry-level coaches to \$ 16,000 per year” and “artificially lowered the price of coaching services.”<sup>110</sup> As a result, the antitrust challenge succeeded the NCAA was forced to abandon its rule.

In *Banks*, a Notre Dame football player challenged the NCAA’s “no-agent” rule, which forbade athletes who had signed with agents from coming back to college and playing, alleging that its anti-competitive effects violated the Sherman Act. The Seventh Circuit dismissed Banks’s case because of Banks’s “inability to explain how the no-draft rule restrains trade in the college football labor market.”<sup>111</sup> The Seventh Circuit agreed with the NCAA that this rule seeks to “promote fair competition, encourage the educational pursuits of student-athletes and prevent commercialism” and is necessary to preserve and promote the “unique” product that the NCAA provides, which is that of amateur athletics.<sup>112</sup> In ruling against Banks, the Seventh Circuit determined that Banks did not prove that the no-agent rule had sufficient anti-competitive effects and stated that “the absence of such allegations is ordinarily fatal to the existence of a cause of action.”<sup>113</sup>

Similarly, in *McCormack v. NCAA*, plaintiff McCormack sued the NCAA, alleging the NCAA of violating the antitrust laws when it gave the death penalty to the SMU football team in 1987, suspending the program for the season after the NCAA discovered that SMU, members of its board of directors, along with its boosters, had been engaging a deliberate scheme to pay its football players for well over a decade. The complaint alleged that “that (1) the restrictions on compensation to football players constitute illegal price-fixing in violation of the Sherman Act and (2) the suspension of SMU constitutes a group boycott by other NCAA members.”<sup>114</sup> McCormack, on behalf of the SMU alumni and cheerleaders, alleged that the suspension of the program “destroyed the football players’ careers and caused the cheerleaders considerable emotional anguish and distress by depriving them of the opportunity to conduct their cheerleading activities at games.”<sup>115</sup>

The District Court ruled that in order for this suit to succeed, the plaintiffs had “show ‘antitrust injury,’ that is, injury of the type the antitrust laws were designed to prevent and that flows from that which makes defendants’ acts unlawful.”<sup>116</sup> The court found that “neither McCormack nor any of the cheerleaders satisfies these requirements” because “the cheerleaders assert only the loss of the opportunity to lead cheers, which clearly does not qualify as an injury to business or property” and “the only injuries McCormack alleges “are the devaluation of his degree, the loss of the opportunity to see football games, and the damage to his contact and association with current and

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<sup>109</sup> 134 F.1010, 1024.

<sup>110</sup> 134 F.1010, 1020.

<sup>111</sup> *Id* at 1088.

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prospective student athletes derived from his membership in the Mustang Club,” which also are not injuries to give him standing in an antitrust case.<sup>117</sup> The court determined that the “NCAA’s eligibility rules are reasonable” because the “NCAA markets college football as a product distinct from and that the plaintiffs have failed to allege any fact to the contrary from professional football and the eligibility rules create the product and allow its survival in the face of commercializing pressures,” consistent with the goal of the NCAA to integrate athletics with academics, and “the plaintiffs have failed to allege any facts to the contrary.”<sup>118</sup>

### *Did the Right Parties Sue in Regents?*

With the benefit of hindsight, it is worth briefly examining whether the television and broadcast networks would have been the better, or more proper, plaintiffs than the universities. It is worth doing so because the outcome in the *Regents* case ultimately benefited the broadcast networks, by allowing more networks to broadcast television games and make a profit on advertising even if the revenue for the main networks may have decreased.

The networks would have had just as strong a case as the universities had this hypothetical suit occurred. The networks could have established a *prime facie* case by proving that, per Judge Burciaga’s analysis, the NCAA’s market power led them to reduce output and increase the price of the games to prove the anticompetitive effects of this particular restraint on trade. The networks on the outside of the negotiations could have charged the NCAA did not allow them to make side deals with these networks. The court would have used the rule of reason analysis and come down on the side of the networks, if Judge Burciaga’s lengthy reasoning could be applied to the networks.

Further, while some have posited that the networks did not dare to challenge Walter Byers and the NCAA because (1) they were intimidated by Byers and (2) convinced that the NCAA would always prevail in court, had the networks decided to sue the NCAA, another strategy they could have used was to use the universities as a proxy to be a means to their ends of opening up the distribution of college football television broadcasts. In either scenario, the networks could have been successful had they decided to sue; in the end, though, the networks, most notably the fledgling cable networks and the established local and regional stations, became the ultimate winners because they were now able to contract with the various universities without any regard for any of Walter Byers’s mandates.

### *A Brave New World*

At the start of the 1983 college football season, the NCAA licensed 35 games each to ABC and CBS and an additional 19 games to WTBS.<sup>119</sup> Months after the 1984 Supreme Court decision, the television landscape changed drastically. Now, there were ten networks that had contracts to televise games from various conferences. The CFA had

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<sup>119</sup> House Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, Televised College Football, Hearing, 98<sup>th</sup> Cong., 2d sess., 31 July 1984.

licensed 20 games to ABC and licensed another 15 games to ESPN.<sup>120</sup> The Big Ten and the PAC-10 had licensed 15 games to CBS.<sup>121</sup> Jefferson Productions and Katz Communications were slated to broadcast games from the ACC and the Big 8, respectively.<sup>122</sup> Further, companies such as Raycom (SWC), SportsTime (Missouri Valley Conference), PBS (Ivy League), TCS/Metro Sports (Big Ten, Notre Dame, Penn State, Pac-10), and WTBS (SEC and Mid-American Conference) had significant contracts with many of college football's top programs and conferences.<sup>123</sup>

While many teams negotiated their own contracts in the wake of the *Regents* decision, most of the teams, as Dunnivant explains, "wanted to put the genie back in the bottle."<sup>124</sup> This was so because "six seasons after the Supreme Court ruling, college football's combined broadcast network revenue of about \$32 million" was about "50 percent below the final season of the monopoly."<sup>125</sup> Deregulation was, in the short-term, disastrous.

It was disastrous for two reasons. First, Byers was a master negotiator, who knew how to play the networks to his, and the NCAA's, advantage. Nobody was in the position to negotiate as skillfully as Byers did, and the teams and the conferences in the deregulation era learned they had a lot of catching up to do in terms of knowing how to effectively negotiate with the network bosses. Second, as more games popped up on various channels, advertisers had more channels and games to place their advertisements to get the attention of the eyeballs that they desired. Advertising space was now not at a premium, and this lowered the price that advertisers were willing to pay to place their ads on Saturdays.

#### *A quarter Century After Regents: College Football Today*

In need of revenue, the schools and conferences ultimately determined that they needed to make more regular season games meaningful, and one way to do this was to expand the various conferences into Super Conferences. Throughout these two decades, the SEC expanded, with two divisions and a conference championship. The Big 8 added schools like Texas and Texas A&M and the Big Ten added Penn State. The Big East became a power conference when they landed Miami and the ACC became a power conference when they landed previously independent Florida State. In the 2000 season, the ACC, further expanding its brand, added Miami, Virginia Tech, and Boston College to their conference, split into two divisions and added a glamorous conference championship game. In 1990, Notre Dame negotiated a separate contract with NBC, thereby able to keep all of its broadcast revenues. Notre Dame's contract with NBC effectively began the end of the formal CFA organization, which closed its doors 7 years later.

As conferences became super conferences and television executives established a foothold on the college football industry, the NCAA, as President Myles Brand conceded,

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Dunnivant, 203.

<sup>125</sup> *Id.*



stood on the sidelines, in large part due to *Regents* decision. The establishment of the Bowl Championship Series system represented the ultimate victory of the television executives and the super powers over the NCAA. The BCS system, while it has gone through many evolutions over the years, guarantees a position for the conference champions of the six power conferences in the most lucrative Bowl games (Fiesta, Sugar, Rose, Orange) that are played on or after New Years Day. Notre Dame is guaranteed a slot if it is in the final 6 of the BCS standings. Non-BCS schools can also be considered for a spot if they meet certain eligibility thresholds (top-2, top-6, and top-12 rankings in the final standings).

In 2006, the BCS system generated \$125.9 million in revenue. The six conferences and Notre Dame pocketed \$118.9 million.<sup>126</sup> The other 5 conferences received \$5.2 million and the bowl subdivision schools (formerly known as Division I-AA) received \$1.8 million.<sup>127</sup> Because of this disparity, many non-BCS schools and Congress have been thinking about ways in which they could make the system more equitable, even if it involves an antitrust lawsuit by the have-nots against the haves.

In 2003, Congress actually held hearings regarding the potential antitrust implications of the BCS deal. Tulane President Scott Cowen testified and told the Congressional Committee that he represented “coalition of more than 50 universities, and the 5,000-plus student-athletes involved in their Division I-A football programs, who are not part of the BCS agreement.”<sup>128</sup> Cowen told Congress that the “Bowl Championship Series is an unnecessarily restrictive and exclusionary system that results in financial and competitive harm to the 54 Division I-A schools—and their student-athletes—who are not part of the arrangement, even though all Division I-A schools must meet the same division membership requirements.”<sup>129</sup>

Should a coalition of non-BCS schools mount an antitrust challenge against the BCS, they would have to clear 3 significant and nearly insurmountable legal roadblocks. First, the non-BCS schools must show that they have suffered some sort of tangible injury; if not, just as in the SMU and Banks cases, a lack of injury is often fatal to antitrust cases. Second, the non-BCS schools must show, under the rule of reason standard, that the BCS’s anti-competitive aspects outweigh its pro-competitive aspects. Third, the non-BCS schools would have to show that the BCS system has actually diminished economic competition, which is what the Sherman Act protects.

Before we examine the antitrust implications of the BCS, it is important to take a step back before the litigants in *Regents* ultimately went to court and look again at the potential compromises which could have been hammered out so that the NCAA retained control over the television agreements while the powerhouse schools would have had their financial appetites satiated. One compromise that could have been hammered out would have been to (1) increase the number of times a school could appear on television over the course of two years from 6 to perhaps 10 or 12, (2) set up a formula (perhaps if both teams are in the top 10 in the rankings) that would automatically allow teams to exceed their quota and (3) have a revenue sharing plan that pooled half of the revenue to

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Testimony to Senate Judiciary Committee, Scott Cowan. (Coalition.Tulane.Edu).

<sup>129</sup> *Id.*

be split among all the teams appearing on television on a given weekend and the other half to be distributed to the teams which attracted the most number of viewers.

Regardless of whether it was intentional, the current BCS system has evolved into a natural compromise of sorts, preventing the non-BCS schools from successfully mounting a legal challenge against the system.

First, non-BCS schools will have a hard time showing that they have suffered a tangible injury since, in theory, all of these schools have a chance at reaping the financial awards if they meet certain thresholds. It would be different if these non-BCS schools were outright banned from playing in college football's premiere bowl games.

Second, while the non-BCS teams will argue that the agreement is anticompetitive because (1) the revenues given to the super conferences by guaranteeing their conference champions a slot in the most lucrative games not only allows these teams to self-perpetuate continually by being able to hire better coaches and build facilities than the non-BCS schools; (2) this disparity in income also trickles down to other aspects of these schools' athletic programs; (3) non-BCS schools who go undefeated have virtually no chance at playing in the title game.

Yet, a strong argument can be made that the pro-competitive aspects of the BCS are likely to outweigh the purported anti-competitive aspects of the contracts under the rule of reason standard. First, the BCS creates a new product, "a national championship game" that courts could justify even if a restraint of trade could be proven. Further, the non-BCS schools cannot argue that they are barred from the national championship game (they are technically not barred) and nothing in the BCS contract prevents the non-BCS schools from forming their own organizations to create their national champion. In addition, the non-BCS schools cannot argue that the BCS monopolizes the national championship system because, as in 2004, the AP selected USC as its national champion and the BCS system produced LSU, and both teams were justified in the public conscience as being a "national champion."

Second, the current system is a step forward from the old system as it at least, no matter how flawed its methodology, gives more a sense of finality to the college football season than in seasons past.

Third, even though the thresholds they have to meet are nearly impossible, non-BCS schools have more of a chance in the current system of playing in college football's premiere bowl games than under the old system. Under the old system, the Rose Bowl or the Orange Bowl, even if a non-BCS team like Boise State were ranked no.2 in the polls, these teams would never have selected such a team to play in their game. Under the current system, should such a scenario occur, the non-BCS team is guaranteed a spot in the championship game or in another BCS game (if they are ranked in the final 6 in the BCS standings).

Fourth, it would be hard to make a case that the BCS limits output (it does not as the number of bowl games has increased since the BCS's inception) and reduces the quality of the product (while the regular season games between non-BCS conference teams may be diluted, a strong argument can be made that, because of the BCS, the regular season games mean more than they ever did and that every week in college football is a playoff).

A quarter century after *Regents*, college football's landscape looks remarkably different in some ways and eerily similar in other ways. The power conferences and the

television stations have dominated college football. This new order will be harder to challenge because unlike in the past, where the powerhouses were the outsiders and the minority, the minority of the powerhouses are now in the majority. And just as Walter Byers did not want to cede his power, those in control now neither want to give up control or risk potentially less revenue. An example of this occurred when an outside firm once offered a \$1 billion package to create a 16 or 8 team college football tournament; when this offer was made, the Big Ten led the charge against such a system, arguing behind the scenes that it would be unwise for those in power to lose control over how the revenues would be shared. Just like in the past, the old NCAA-CFA split still exists as the Big-Ten and the Pac-10 are the roadblocks for any type of playoff system forming, as they have an exclusive contract with the prestige Rose Bowl. Yet, if the current order has learned one thing from *Regents*, it is to never trust what can happen in the courts. This was evidenced when the members of the ruling BCS brass added a fifth BCS bowl game. During the last two college football seasons, non-BCS schools Boise State and Hawaii made these “add-on” bowl games. Yet, the dismal ratings that these two teams drew most likely convinced the BCS brass that a potential playoff system could be disastrous to their coffers, and they would rather preserve the cash-cow that is the status quo than risking losing some revenue, even if it contrary to what the college football consumer wants.

For these reasons, the status quo is likely to be in place, and any lawsuit that may be on the horizon to force a playoff system will most likely be fruitless—in large measures due to the compromises the BCS leaders have already undertaken to even. The small schools—or the schools that are perceived to be holding the short end of the stick, unlike in the *Regents* case, are schools that are not considered football powerhouses. Further, their potential argument that the BCS shuts them out would not have that much merit because, for all its fault, the current BCS system gives these schools an opportunity to be a part of the club, an opportunity, no matter how difficult it is, was nearly absent in the old system. Further, the broadcast networks, another entity that could potentially sue, have no incentive to do so as they have been the unintentional beneficiaries of college football’s deregulation. The frustrating system is most likely going to be in place, to the chagrin of many fans. At most, there is going to be a system that allows one more playoff game, at the conclusion of the series of profitable BCS bowl games. If a true playoff system is to ever have a chance of getting on the docket, three potential and currently highly unlikely situations will likely have to happen (1) a group of major football powers, going counter to their financial interests, would have to demand a playoff system; (2) the NCAA would somehow gain control of football like it controls basketball; or (3) the viewing public would have to file an antitrust lawsuit against the NCAA since this paper has established that any such suit by the smaller schools would be flimsy. The odds of these events happening are not great, and so the current BCS system will continue to be in place, frustrating fans and filling the coffers of college football’s elite and further blurring the line between student and athlete.

**Aftermath: the 2008 season and beyond—why the “Plus one” system is the answer for the BCS**

With each passing season, cries for a true college playoff system get louder. Even President-elect Barack Obama, in a halftime interview with Chris Berman during Monday Night Football, proposed an 8 team playoff. Yet, anything that involves more than a “plus one” system would be impractical and detrimental to college football.

The argument for a playoff is self-evident and simple: a playoff will bring a sense of finality to the college football season and a true national champion would be crowned on the field, as it is in every other sport.

The arguments against a playoff system, contrary to what many believe, are sound and practical as well. Opponents to the playoff system argue that a playoff system would be detrimental to the student athlete and would extend the season. While these arguments are often made with a straight face, there are other arguments against a playoff system that have much more merit. First, having a playoff system would destroy the tradition and the pageantry that comes along with the bowls. The bowl season defines college football and there is no doubt that anything more than a “plus-one” system would most likely destroy the bowl system. Second, having a true 8 or 16 team playoff would greatly diminish the cash cow that is the college football regular season, where analysts and coaches have rightfully have stated that “every week is a playoff.” Financially, a playoff system would most likely lead to financial losses during the regular season for the universities as the rivalries and regular season showdowns would matter a lot less in the long run.

Taking into account the concerns of both sides, the only system that can pass muster would be a “plus-one” model where one extra game is played a week after the completion of all of the bowls. Such a model will not take away from the regular season; in fact, with more teams possibly in the mix, it may make games that would otherwise not be blockbusters (such as Utah versus TCU or Utah versus BYU during the 2008 season) into national must-see events. And a plus-one system would be a system that will give the college football the closest sense of finality that the sport can have. There are many ways to devise the “plus-one” model, but these three are the most practical and will most likely get the most support.

*Use the BCS to seed the top 4 teams at the end of the season*

The first “plus-one” scenario would use the BCS formula to rank the top four teams at the end of regular season. The top four teams would be matched up in the bowl games, with the winner of two games meeting one week later for the national championship. Such a system would not diminish the regular season because even a conference championship game involving two unbeaten teams would mean something because the loser of that game would not be guaranteed a spot among the four; this, it goes without saying, would make for compelling television.

*Seed the four highest rated conference champions*

This proposal, while a bit more controversial than the above model, has some fans because it ensures that no team that does not win its conference championship is eligible for the title game. This system would pit the four highest ranking conference champions in the final four, match them up in the best bowls, and play a title game the week after the

bowl season is over. Obviously, there has to be a concession to independent schools like Notre Dame and non-BCS conference teams (i.e. if any of those teams are in the top 6 at the end of the regular season, they get a spot among the 4 teams eligible for the “plus one” system). Critics of this proposal would argue that a string of upsets in the conference championship games would dilute the quality of deserving teams that are eligible for the championship.

*Use the BCS system to keep 8 teams in play, and select the top two at the end of the bowl season*

This model would use the BCS system to determine the top 8 teams at the end of the college football season. These teams then would be matched up in the traditional bowl games. After these teams have played, there would be one last set of human and computer polls that would be entered to spit out the final two teams that would play the week after in the national championship game.

It goes without saying that all of these “plus one” models would enhance and not diminish the regular season, which is the strongest argument that opponents of the plus-one system can make, while giving sports fans a greater sense of finality to the college football season, which, because of better talent, national television exposure and reduce scholarships, will experience even more parity with each year.