

## They Take Classes, Don't They?: Structuring a College Football Post Season

Josephine (Jo) R. Potuto

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/jbtl>



Part of the [Entertainment, Arts, and Sports Law Commons](#)

---

### Recommended Citation

Josephine (Jo) R. Potuto, *They Take Classes, Don't They?: Structuring a College Football Post Season*, 7 J. Bus. & Tech. L. 311 (2012)

Available at: <https://digitalcommons.law.umaryland.edu/jbtl/vol7/iss2/3>

This Articles & Essays is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Journal of Business & Technology Law by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

# They Take Classes, Don't They?: Structuring a College Football Post Season

- I. INTRODUCTION
- II. A LITTLE BOWL HISTORY
  - A. *The Bowl System*
  - B. *The Bowl Championship Series (BCS)*
  - C. *From Whence Cometh The Big Bucks?*
- III. THE FBS POST SEASON, PLAYOFF OR NOT
  - A. *Time, Timing, and Student- Athletes*
    - 1. *Academic Performance*
    - 2. *Health and Safety*
    - 3. *Let Kids Be Kids*
    - 4. *Who's the Daddy?*
      - a. *Spillover Effects*
      - b. *Student-Athletes*
  - B. *The Fans*
  - C. *And Who Would Run It?*
    - 1. *The NCAA*
    - 2. *A New "BCS"*
- IV. SOME CLOSING THOUGHTS
  - A. *Football Games and Student Competitors Per Season, FBS and FCS*

---

© 2012 Josephine (Jo) R. Potuto.

\* Josephine (Jo) R. Potuto is the Richard H. Larson Professor of Constitutional Law at the University of Nebraska College of Law. She also is the university's faculty athletics representative (FAR), a required position at all NCAA member institutions. Potuto served nine years on the NCAA Division I Committee on Infractions (two as vice chair and two as chair). Among other NCAA service, for more than four years Potuto was one of three Big 12 Conference representatives on the Division I Management Council, including service on both its Legislative Review and Administrative Review Subcommittees. Potuto presented at the University of Maryland Law School Fall 2011 Symposium, *The Intersection of Sports and Business in Today's Legal Arena*, co-sponsored by the Journal of Business & Technology Law; the Entertainment, Arts, and Sports Law Association; and the Business Law Program. This article had its genesis in that presentation. The article's title derives from a 1969 movie, "They Shoot Horses, Don't They?" (Policeman: Why did you do it, kid? Robert: She asked me to. Policeman: [*smirking*] Obliging bastard. Is that the only reason you got, kid? Robert: They shoot horses, don't they?). Earlier drafts of this article were reviewed by Connie Dillon, Professor, Education Leadership and Policy Studies, University of Oklahoma; Harvey Perlman, Chancellor, University of Nebraska-Lincoln; and Steve Willborn, Professor, University of Nebraska College of Law. My thanks for the assistance.

B. *Containment*

1. *The Slippery Slope*
2. *Evaluating Change Incrementally*
3. *Less, Not More*
4. *The Law of Unforeseen Consequences*

## I. INTRODUCTION

IT HAS BEEN WELL AND TRULY SAID THAT SPORTS IN THE UNITED STATES are our secular religion.<sup>1</sup> Everyone cares. Everyone has a point of view. This certainly is true of college football played by the major football programs in the NCAA Division I Football Bowl Subdivision (FBS).<sup>2</sup> Televised games seem ever-present.<sup>3</sup> Fan interest is reflected in blogs and message boards, in discussion groups and tweets. College football is a popular subject on talk radio and talk TV. Newspapers include significant and regular coverage of games and coaches and student-athletes. As do sports magazines. Hoopla and pageantry are attendant on, and surround, college games. Merchandise is sold with college football team names and logos. Recruiting news is a year round focus of fan attention.<sup>4</sup>

What gets buried in this avalanche is that college football programs are situated in educational institutions and that student-athletes may compete only because they are enrolled students at the universities for which they play. The poster child example has been the ongoing and seemingly interminable discussion about the Bowl Championship Series (BCS) and a football playoff for FBS teams.

Everyone seems to have an opinion.<sup>5</sup> Conversations revolve around what makes sense in competition generally; how to assure a “true” national champion; what is

1. A. BARTLETT GIAMATTI, TAKE TIME FOR PARADISE 23–25 (1989).

2. The NCAA is a private association that administers college athletics. It is divided into three divisions (I, II, III) and subdivisions within Division I. Teams in the Football Bowl Subdivision, hereafter FBS, compete in post season bowl games. Teams in the Football Championship Subdivision, hereafter FCS, compete in an NCAA playoff. See NCAA, 2011–12 NCAA DIVISION I MANUAL arts. 20.01.2, 17.9.4 (2011), available at <http://www.ncaapublications.com/productdownloads/D112.pdf> [hereinafter NCAA BYLAWS]. The third subdivision does not sponsor football. FBS institutions must sponsor at least 16 varsity sports, of which at least eight must be women’s sports. NCAA BYLAWS art. 20.9.7.1. In general, their football teams must play at least 60 percent of their games against other FBS teams (at least five home games) and must average at least 15,000 in paid attendance computed every two years on a rolling basis. NCAA BYLAWS arts. 20.9.7.2, 20.9.7.3. In general, the other teams sponsored by FBS institutions must be in sports for which the NCAA administers a post season championship, NCAA BYLAWS art. 20.9.4.1, and each team must meet applicable minimum contests requirements. NCAA BYLAWS art. 20.9.4.3. A FBS conference must have at least eight FBS institutions. NCAA BYLAWS art. 20.02.6. The NCAA doesn’t administer post season FBS football and there is no FBS football championship.

3. The proliferation of televised games is the direct result of litigation brought by two FBS universities with prominent football programs, Georgia and Oklahoma. Nat’l Collegiate Athletic Ass’n v. Bd. of Regents, 468 U.S. 85, 88 (1984). They complained about NCAA rules that limited their TV appearances and that also assured TV appearance opportunities to football programs less attractive to viewers. *Id.* at 93–94, 104–07. The Supreme Court’s holding in favor of Georgia and Oklahoma opened the floodgates. *Id.* at 120. Georgia and Oklahoma were proved right. Games between college football powers are the ones fans most want to see. See *infra* note 76 and accompanying text.

4. See, e.g., *Football Recruiting*, RIVALDS.COM, <http://footballrecruiting.rivals.com> (last visited Feb. 17, 2012).

5. When I refer to the BCS in this article, I mean an arrangement among the eleven FBS conferences to manage post season FBS football. See *infra* note 44 and text accompanying notes 44–45. Even the President of the United States has an opinion. See *President-elect Obama Makes Another Play for College Football Playoff*, ESPN (last updated Nov. 15, 2008, 6:08 PM), <http://sports.espn.go.com/ncf/news/story?id=3704864> (“It would add three extra weeks to the season . . . I think it’s about time we had playoffs in college football. I’m fed up with these computer rankings . . .”); see also Chad Seifried & Todd Smith, *Congressional Hearings and the Division I (Football Bowl Subdivision) Postseason Arrangement: A Content Analysis on Letters, Testimonies, and Symposiums*, J. ISSUES INTERCOLLEGIATE ATHLETICS, 2011, at 5–16, available at <http://csri-jiia.org/documents/>

good for the fans; what is good for the sport; what is fair for teams in BCS conferences that have no automatic berth in a BCS bowl (non-AQ conferences);<sup>6</sup> flaws in the metric for deciding which teams make the game;<sup>7</sup> what will make the most money for everyone; and whether the BCS violates the antitrust laws.<sup>8</sup>

When discussion manages to acknowledge that football players are college students, there is a dearth of serious analysis. Rather, commentators discuss the perceived hypocrisy of presidents and chancellors at big football powers that make money off football grounding their playoff opposition in their responsibilities as leaders of higher education and concern for student-athlete well-being.<sup>9</sup> Similarly, commentators are cynical about whether football student-athletes have any interest in classwork<sup>10</sup> independent of meeting a minimum level of performance as precondition to competition eligibility.<sup>11</sup>

---

publications/research\_articles/2011/JIIA\_2011\_4\_1\_1\_23\_Congressional\_Hearings.pdf; BCS COLLEGE FOOTBALL PLAYOFF, <http://www.bcs-playoff.org>; Owen, *Sports Illustrated Talks BCS/Playoff and Why We Continue to Spin Our Wheels*, ROCK CHALK TALK (Nov. 11, 2010, 11:15 AM), <http://www.rockchalktalk.com/2010/11/11/1807701/sports-illustrated-talks-bcs-playoff-and-why-we-continue-to-spin-our>.

6. AQ status meant that six conferences were guaranteed that one of their member teams (typically the conference champion) would compete in a BCS bowl. *See infra* text accompanying notes 43–46. Throughout this article, I refer to these six conferences as AQ conferences even though AQ status is being eliminated. *See infra* text accompanying notes 54–55.

7. *See, e.g.*, Tim Dahlberg, *BCS Big Shots Waking Up to the Idea of Playoff System*, LAS VEGAS REV. J. (Feb. 9, 2012, 2:00 AM), <http://www.lvrj.com/sports/bcs-big-shots-waking-up-to-idea-of-playoff-system-138998119.html> [hereinafter Dahlberg] (“[S]ystem laden with so many flaws that it can’t be trusted. Even when the BCS does get it right, there’s always a school that feels it has been wronged.”).

8. The antitrust laws prohibit unreasonable restraints of trade by entities with sufficient market share when they act in concert, Sherman Act, 15 U.S.C. § 1 (2006), or monopolize, *id.* § 2. The BCS has generated much antitrust analysis. *See, e.g.*, Katherine McClelland, *Should College Football’s Currency Read “In BCS We Trust” or Is It Just Monopoly Money?: Antitrust Implications of the Bowl Championship Series*, 37 TEX. TECH L. REV. 167, 191–214 (2004); Andrew Zimbalist, *The BCS, Antitrust and Public Policy*, 54 ANTITRUST BULL. 823, 844–52 (2009).

9. *See, e.g.*, Adam Stevinson, *The Hypocrisy of the BCS*, GUYSGIRL.COM (Nov. 30, 2011), <http://www.guysgirl.com/blog/college-football-news/the-hypocrisy-of-the-bcs.html>. The cynicism ignores the complex responsibilities of presidents and chancellors, the many constituencies that they serve, and the need for revenue to support the central missions of universities. It also understates the difficulties in striking an appropriate balance among factors of varying weights pointing in different directions.

10. *See generally* WILLIAM G. BOWEN & SARAH A. LEVIN, RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES 158 (2003); WALTER BUYERS & CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETICS 299 (1995); COAL. ON INTERCOLLEGIATE ATHLETICS, A FRAMEWORK FOR COMPREHENSIVE ATHLETICS REFORM, at 2 (2003), *available at* <http://blogs.comm.psu.edu/thecoa/wp-content/uploads/A-Framework-for-Comprehensive-Athletics-Reform-2003.pdf>; COAL. ON INTERCOLLEGIATE ATHLETICS, FRAMING THE FUTURE: REFORMING INTERCOLLEGIATE ATHLETICS, at 3 (2007), *available at* <http://blogs.comm.psu.edu/thecoa/wp-content/uploads/FTF-White-Paper2.pdf>; JAMES J. DUDERSTADT, INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT’S PERSPECTIVE 190–91 (2000); KNIGHT FOUND. ON INTERCOLLEGIATE ATHLETICS, A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION 14–16 (2001); MURRAY SPERBER, BEER AND CIRCUS: HOW BIG TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION 239–47 (2000); RICK TELANDER, THE HUNDRED YARD LIE: THE CORRUPTION OF COLLEGE FOOTBALL AND WHAT WE CAN DO TO STOP IT 66 (1996); JAMES L. SHULMAN & WILLIAM G. BOWEN, THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES 82 (2001); JOHN R. THELIN, GAMES COLLEGES PLAY: SCANDAL AND REFORM IN INTERCOLLEGIATE ATHLETICS 198–202 (1994); Josephine (Jo) R. Potuto, *Academic Misconduct, Athletics Academic Support Services, and the NCAA*, 95 KY. L.J. 447, 449 n.8 (2006–07) [hereinafter *Academic Misconduct*]. Doubts whether athletes can also be students span centuries. *See, e.g.*, Thomas Jefferson (born 1743) “Games played with the ball and others of that nature, are too violent for the body and stamp no character on the mind.” 8 THE PAPERS OF THOMAS JEFFERSON 407 (J.P. Boyd ed. 1950).

None of these advocates for change in the FBS football post season do so with purpose to enhance student-athlete academic performance. None consider the ethos and requisites of the greater campus.<sup>12</sup> Few place prime emphasis on avoiding additional stress on the student part of the life of a football student-athlete.

Those commentators who mention academic and student-life issues minimize the impact of an increased number of games or a longer season.<sup>13</sup> Often they point to the NCAA Division I Men's Basketball Tournament and its Final Four<sup>14</sup> as supposed proof that these concerns are nonexistent or at least overstated.<sup>15</sup> But the Men's Basketball Tournament is neither the best nor even the optimal model to foster student-athlete academic performance and well-being or to strike a reasonable balance between academics and athletics, and no one contends otherwise.

The Men's Basketball Tournament spans nearly three weeks during the academic term.<sup>16</sup> In 2011, for example, competition began on March 17, with the championship game played on Monday night April 4. Sixteen teams played in three games by March 24; eight played in four by March 27.<sup>17</sup> These are competition dates only. They neither include travel time to or from competition sites nor the time on site that teams spend prior to and after competition.<sup>18</sup>

Nowhere in the FBS football post season discussion do playoff advocates mention that men's basketball teams have the lowest academic performance rate (APR) of any NCAA sponsored sport.<sup>19</sup> Also never mentioned is that, even in the

Ambrose Bierce (born 1842) "Academe, *n.* An ancient school where morality and philosophy were taught. Academy, *n.* (from academe). A modern school where football is taught." AMBROSE BIERCE, *THE DEVIL'S DICTIONARY* (1991). Russell Baker (born 1925) "Can't anything be done about calling these guys 'student athletes'? That's like referring to Attila the Hun's cavalry as 'weekend warriors.'" Russell Baker, *OBSERVER; Gosh, Mal' Nothing at All?*, N.Y. TIMES, at A23 (Mar. 19, 1991).

11. NCAA Bylaws arts. 14.1, 14.3, and 14.4 describe the various academic requirements that student-athletes must meet.

12. See *infra* text accompanying notes 167–68, for a discussion of the impact of incremental change on core values.

13. See *supra* notes 5, 9.

14. See, e.g., Brad Sullivan, *2011 Final Four Proves BCS is BS*, SPORTSFANS.ORG (Mar. 31, 2011), <http://sportsfans.org/2011/03/2011-final-four-proves-bcs-is-bs/>; *The Campaign for a College Football Playoff*, PLAYITOFF.ORG, <http://playitoff.org/keyissues.php> (last visited Mar. 4, 2012) (noting that student-athletes compete in the March Madness basketball tournament during midterms and even finals).

15. The other comparison is to the NCAA FCS Football playoff. See *infra* text accompanying notes 98–100, 133–44, for a discussion of the issues with this comparison.

16. See generally *NCAA Tournament Bracket – 2011*, ESPN, [http://a.espn.com/i/ncaa/11mens\\_bracket.pdf](http://a.espn.com/i/ncaa/11mens_bracket.pdf).

17. See *NCAA Tournament Bracket – 2011*, *supra* note 16.

18. While classes are in session, NCAA bylaws permit teams to depart from campus 48 hours before their first competition and to remain at the competition site for up to 36 hours after. NCAA BYLAWS art. 16.8.1.2.1, available at <http://www.ncaapublications.com/productdownloads/D112.pdf>. For bowl trips and NCAA post season completion these limits do not apply. NCAA BYLAWS art. 16.8.1.2.1(d), (e). Football student-athletes may receive up to ten days of incidental expenses for a bowl trip. NCAA BYLAWS art. 16.8.1.6.

19. The APR is a NCAA metric that measures team academic progress. See generally NCAA BYLAWS art. 23 (detailing the contours of the academic performance program); see also *APR Scorecards Show Improvement: Reform Eyes 'Automatic Expectation' of Student-Athlete Success*, NCAA, <http://www.ncaa.com/news/ncaa/2011-05-24/apr-scorecards-show-improvement> (last updated May 24, 2011, 3:47 GMT) [hereinafter *APR Scorecards*],

current BCS system, football players currently fare little better.<sup>20</sup> To say that an FBS football playoff would generate less academic pressure on student-athletes than that produced by the Men's Basketball Tournament may be true, at least with regard to a four-game championship model.<sup>21</sup> To use it as proof that various models of an FBS football playoff would work no academic detriment, however, is to gravitate to the lowest common denominator as comparator.

A couple of years ago, the association of FBS faculty athletics representatives<sup>22</sup> admonished, "Let's get our priorities straight," in evaluating the thrust of the BCS/playoff discussion:<sup>23</sup>

*We hear about the overriding public need to have a "true" national champion (and little about how a national playoff creates one champion at the expense of all the teams that now end their season as winners under the bowl structure). We hear that the BCS cannot guarantee that the best two teams play for the national championship (although we doubt that arguments over which are the best two teams would disappear with a different format). We hear about the "haves" getting fatter at the expense of the "have nots" (and little about how these latter teams fared prior to the BCS and its precursor Bowl Alliance). We hear about the antitrust implications of the BCS.*<sup>24</sup>

---

for the academic performance of men's basketball. The University of Connecticut men's basketball team, for example, has APR so poor that it is excluded from the 2013 Men's Basketball Tournament. *UConn's Final Appeal Turned Down*, NCAA, <http://www.ncaa.com/news/basketball-men/article/2012-04-05/uconn-final-appeal-turned-down> (last updated Apr. 5, 2012, 5:14 GMT).

20. See *APR Scorecards*, *supra* note 19; see also James E. Long & Steven B. Caudill, *The Impact of Participation in Intercollegiate Athletics on Income and Graduation*, 73 REV. OF ECON. & STAT. 525, 525, 529 (1991); Michael T. Maloney & Robert E. McCormick, *An Examination of the Role that Intercollegiate Athletic Participation Plays in Academic Achievement: Athletes' Feats in the Classroom*, 28 J. HUM. RES. 555, 558 tbl. 2, 562 (1993); Tom Dienhart, *Pros & Cons of Latest Playoff Idea*, BIG TEN NETWORK (Feb. 7, 2012, 1:48 PM), <http://btn.com/2012/02/07/dienhart-pros-cons-of-latest-playoff-idea/>; *infra* text accompanying notes 78–94. Commentators know about the low APRs and academic deficiencies in men's basketball and football. They cite to these when they seek to focus on the hypocrisy of college sports. See generally Stevinson, *supra* note 9.

21. See *infra* text accompanying notes 128–44. There are 13 scholarship athletes on a men's basketball team. NCAA BYLAWS art. 15.5.5.1. There are 85 scholarship athletes on a football team, NCAA BYLAWS art. 15.5.6.1, and squads may reach 125 or 130 players. The per student impact of any one post season game, therefore, is quite different in the two sports.

22. Each NCAA member institution must have a faculty athletics representative (FAR). The FAR is "a member of an institution's faculty or administrative staff who is designated by the institution's president or chancellor or other appropriate entity to represent the institution and its faculty in the institution's relationships with the NCAA and its conference(s)." NCAA BYLAWS art. 4.02.2. The FAR also has a role in campus institutional control. See NCAA BYLAWS art. 6.1.3. The 1A Faculty Athletics Representatives (1A FAR) is comprised of FARs at FBS institutions.

23. Press Release, 1A Faculty Athletics Representatives, DIA FARs Position Statement Regarding Post-Season in Div. I FBS Football (Apr. 20, 2009) [hereinafter 1A FAR Statement], available at [http://www.oneafar.org/documents/1AFAR\\_DIFBS\\_Football\\_Postseason\\_Statement.pdf](http://www.oneafar.org/documents/1AFAR_DIFBS_Football_Postseason_Statement.pdf). The author of this article currently is the president of the 1A FAR.

24. It also is far from clear that any particular payoff system would quell the critics. See, e.g., Stewart Mandel, *Would a Four-Team Playoff Really be Less Controversial Than the BCS*, SI.COM, (Feb. 8, 2012, 1:36 PM), [http://sportsillustrated.cnn.com/2012/writers/stewart\\_mandel/02/08/bcs-vs-four-team-playoff/index.html](http://sportsillustrated.cnn.com/2012/writers/stewart_mandel/02/08/bcs-vs-four-team-playoff/index.html)

In this article I look briefly at the history of the bowl system and the current BCS structure as well as the contours and consequences of post season competition. I set forth some of the non-athletics considerations that typically get short shrift in the FBS football post season debate. My perspective is that of a faculty member and member of a university community.

## II. A LITTLE BOWL HISTORY

Football teams at major football institutions – Notre Dame, Texas, Alabama, Oklahoma, Ohio State, Michigan, Penn State, Nebraska, LSU, Southern California, etc. –historically have played in post season bowl games administered by boards<sup>25</sup> in the cities in which the bowl games are located. These boards are adjuncts of their city chambers of commerce.<sup>26</sup> They have always been independent of the NCAA and historically were independent of other bowls and bowl boards.<sup>27</sup>

### A. *The Bowl System*

The first bowl games, and those with the biggest payoffs, were played in the Cotton Bowl,<sup>28</sup> Orange Bowl,<sup>29</sup> Sugar Bowl,<sup>30</sup> and the “granddaddy of all bowls,” the Rose Bowl.<sup>31</sup> They also were known as the New Year’s bowls as they were played on New Year’s Day. These major bowls developed relationships with the major equity conferences by which a bowl and conference agreed that the conference champion would play in that bowl game.<sup>32</sup> The conferences were the Southwestern (SWC),

---

[hereinafter *Four-Team Playoff*]. See KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 2–3 (2d ed. 1951). Arrow discusses his impossibility theorem that says any voting system based on preferences of three (or more) cannot provide a consensus ranking for all voters without unacceptable paradoxes. In other words, any ranking system needed to identify the top two or eight or sixteen or whatever number will not be a consensus choice. If it is not possible to choose the teams in a playoff without controversy it is equally not possible to have a champion without controversy. The only way to avoid this is to have a playoff that includes all teams (and even then there would be issues about which team played which team, and in what order).

25. See, e.g., *Rose Bowl Operating Company: Board of Directors*, ROSE BOWL STADIUM, [http://www.rosebowlstadium.com/RBOC\\_board.php](http://www.rosebowlstadium.com/RBOC_board.php) (last visited Mar. 1, 2012).

26. See, e.g., *History: Fiesta Bowl Block Party*, FIESTA BOWL, <http://www.fiestabowl.org/events/fiesta-bowl-block-party/history.php> (last visited Mar. 1, 2012) (describing the historic relationship the Fiesta Bowl has had with the local chamber of commerce).

27. Post-BCS, bowls have become more intertwined, in particular through ESPN ownership of several. See, e.g., Bill Wagner, *ESPN Buys Texas Bowl*, NAVY SPORTS BLOG (Dec. 31, 2009, 8:27 PM), <http://www.hometownannapolis.com/blogs/post/2843431/ESPN-Buys-Texas-Bowl.html> (reporting that ESPN owns seven college bowls).

28. Beginning in 1937, the Cotton Bowl was played in Dallas, Texas. See *History of Cotton Bowl Stadium*, COTTON BOWL, <http://www.cottonbowlstadium.com/history/index.html> (last visited Mar. 1, 2012).

29. The first Orange Bowl game was played in 1935; its location is Miami. See *Orange Bowl History*, ORANGE BOWL, [http://www.orangebowl.org/orange\\_bowl/history.aspx](http://www.orangebowl.org/orange_bowl/history.aspx) (last visited Mar. 1, 2012).

30. The first Sugar Bowl game was played in 1934; its location is New Orleans. *Bowl Beginning*, ALLSTATE SUGAR BOWL, <http://www.allstatesugarbowl.org/site34.php> (last visited Mar. 1, 2012).

31. The first Rose Bowl game was played in 1902; its location is Pasadena. See *Rose Bowl*, LOVE OF ROSES, <http://www.love-of-roses.com/Rose-Bowl.html> (last visited Mar. 1, 2012); MICHELLE L. TURNER, IMAGES OF AMERICA: THE ROSE BOWL 7 (2010).

32. See *The Bowl Championship Series: Is it Fair and In Compliance With Antitrust Law?: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Right*, 111th Cong. 175 (2009) (statement of William



Southeastern (SEC), Big Eight, Big Ten, and Pacific (PAC) 10. Even though the Big East Conference had no such formal tie to a New Year's bowl, its champion typically was selected to compete in one.<sup>33</sup> In 1991, for example, the Big East champion, Miami, played in the Orange Bowl against Nebraska and was declared national champion in the polls.<sup>34</sup> The Atlantic Coast Conference (ACC) also has a track record of member team appearances in New Year's bowls. Florida State, for example, played in the 1993 Orange Bowl against Nebraska and was declared national champion in the polls.<sup>35</sup> Clemson played in the 1982 Orange Bowl against Nebraska and was declared the national champion in the polls.<sup>36</sup>

Bowl games are economic engines for their communities.<sup>37</sup> While a bowl game may be the high point of what happens during bowl week, it is by no means the exclusive activity. There are parades and block parties and a host of other events.<sup>38</sup> In fact, the Rose Bowl began as just another event held in conjunction with the Tournament of Roses Parade.<sup>39</sup>

Bowl boards select teams not only because they are ranked high in the polls<sup>40</sup> or because they can provide a good and competitive game, but also because they are projected to bring large numbers of fans and, in turn, revenues to bowl cities. It is no coincidence, then, that conference champions from the major equity conferences played in the New Year's bowls as these are the historic, major football powers with passionate fan bases most likely to follow their teams to bowl venues.

L. Monts III, Partner, Hogan and Hartson), available at [http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da14c6156&wit\\_id=e655f9e2809e5476862f735da14c6156-1-4](http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da14c6156&wit_id=e655f9e2809e5476862f735da14c6156-1-4) [hereinafter Monts].

33. See 2011 BIG EAST FOOTBALL MEDIA GUIDE 131–33 (2011), available at <http://www.bigeast.org/Sports/Football/2011FootballMediaGuide.aspx> (noting the different champion teams selected for bowl games).

34. Miami also appeared in the 1988 and 1989 Orange Bowls and in the 1986 and 1990 Sugar Bowls. See *Miami Football History*, MIAMI FOOTBALL, <http://hurricanesports.cstv.com/sports/m-footbl/archive/043002aaa.html> (last visited Feb. 22, 2012); *Miami Hurricanes Football*, Wikipedia, [http://en.wikipedia.org/wiki/Miami\\_Hurricanes\\_football](http://en.wikipedia.org/wiki/Miami_Hurricanes_football) (last updated Apr. 6, 2012). As another example, in 1985 Boston College played in the Cotton Bowl. *Cotton Bowl—1985*, MY FAVORITE BOWLS, [http://www.mmbolding.com/bowls/Cotton\\_1985.htm](http://www.mmbolding.com/bowls/Cotton_1985.htm) (last visited Mar. 1, 2012). In 1993, while a member of the Big East Conference, West Virginia played in the Sugar Bowl.

35. *Florida State Seminoles*, FRODISMAN.COM, <http://frodisman.com/fsu.html> (last visited Mar. 1, 2012). Florida State also appeared in the 1979, 1980, and 1992 Orange Bowls; the 1988 Sugar Bowl, and 1991 Cotton Bowl, and the 1987 and 1998 Fiesta Bowls. *Id.* Beginning with the 1982 Fiesta Bowl, the Fiesta Bowl game was played on New Year's Day. See *11<sup>th</sup> Annual Fiesta Bowl*, FIESTA BOWL, <http://www.fiestabowl.org/tostitos-fiesta-bowl/tostitos-fiesta-bowl-game-history/game-results-recaps/11th-annual-fiesta-bowl.php> (last visited Mar. 1, 2012).

36. *Orange Bowl—1982*, MY FAVORITE BOWLS, [http://www.mmbolding.com/bowls/Orange\\_1982.htm](http://www.mmbolding.com/bowls/Orange_1982.htm) (last visited Mar. 1, 2012).

37. See JOHN SAYLE WATTERSON, *COLLEGE FOOTBALL: HISTORY, SPECTACLE, CONTROVERSY* 182 (2000) (describing the genesis of bowl games as a depression effort of cities in the south and southwest to “revive their economies”).

38. Monts, *supra* note 32, at 175.

39. The first Rose Bowl took place in 1902. The next time a game was held, it was 1916. The game has been held annually since that time. See *generally Rose Bowl Game*, ROSE BOWL HISTORY, <http://www.rosebowlhistory.org/rosebowl-game.php> (last visited Mar. 1, 2012); MICHELLE L. TURNER, *IMAGES OF AMERICA: THE ROSE BOWL* 7 (2010).

40. See *infra* text accompanying note 42.

From 1902, when the first bowl game was played, until 1991,<sup>41</sup> bowl boards had free rein to contract with a conference for its champion to compete in their bowls and in choosing the bowl game opponent. Bowls vied with each other for that opponent from the pool of teams not already tied to a bowl by virtue of being conference champion.

*B. The Bowl Championship Series (BCS)*

Under the bowl system, bowl boards acted independently in arranging their bowl games. The bowl system was never designed to crown a football national champion. With independence in team selection; conference team champions tied to different major bowls; and bowl board interest in selecting teams that would be big draws and cash cows, the bowl system also was poorly situated to do so. Over time, a football national champion separately was designated by each of two polls: the AP poll, whose voters were media representatives, and the UPI poll, whose voters were head football coaches.<sup>42</sup>

In an effort to match in a post season bowl game the teams that were #1 and #2 in the polls at the end of the regular season, the major equity conferences, in conjunction with the major bowls, developed the Bowl Coalition. Then came the Bowl Alliance. We now have the Bowl Championship Series (BCS)<sup>43</sup> that administers bowl selection by the New Year's bowls.<sup>44</sup>

41. *The Bowl Championship Series: Is it Fair and In Compliance with Antitrust Law?: Hearing Before the Subcomm. on Antitrust, Competition Policy, and Consumer Right*, 111th Cong. 186 (2009) (statement of Harvey S. Perlman, C., University of Nebraska-Lincoln), available at [http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da14c6156&wit\\_id=e655f9e2809e5476862f735da14c6156-1-3](http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da14c6156&wit_id=e655f9e2809e5476862f735da14c6156-1-3) [hereinafter Perlman].

42. See *College Football Rankings Archive*, COLL. FOOTBALL CAFETERIA, <http://www.collegefootballcafeteria.com/college-football-rankings/archive/> (last visited Mar. 2, 2012) [hereinafter *Rankings*]. Typically these polls agreed on the #1 team post bowl games, but on occasion there was a “split” national champion. For example, Nebraska and Michigan shared the national title in 1998. Alan Schmadtke, *Divided They Stand: Michigan, Nebraska Split National Title*, ORLANDO SENTINEL, Jan. 4, 1998, at C1, available at [http://articles.orlandosentinel.com/1998-01-04/sports/9801060634\\_1\\_michigan-final-season-nebraska](http://articles.orlandosentinel.com/1998-01-04/sports/9801060634_1_michigan-final-season-nebraska). There now also are several others polls.

43. Monts, *supra* note 32, at 175–76. The BCS post season format now is scheduled to sunset in 2014. Rodger Sherman, BCS Executive Director Bill Hancock: 2014 BCS Format Will Be Different, SB Nation, Apr. 25, 2012, <http://www.sbnation.com/ncaa-football/2012/4/25/2975284/bcs-bill-hancock-college-football-playoffs>.

44. The BCS is an arrangement of five contracts that govern its operations: Big Ten/PAC-12 with Rose Bowl; Rose Bowl with ESPN; the eleven FBS conferences and Notre Dame with ESPN; the eleven FBS conferences and Notre Dame with the Fiesta, Orange and Sugar Bowls; and the eleven FBS conferences and Notre Dame with the Rose Bowl (to host the 2014 BCS National Championship Game). The eleven conference commissioners and Notre Dame athletics director manage day-to-day operations. The BCS Presidential Oversight Committee makes decisions in areas such as format, administration, and revenue distribution. It is comprised of a president or chancellor from all eleven BCS conferences and the president of Notre Dame. All conferences and Notre Dame have equal representation. See *BCS governance*, BCS, <http://www.bcsfootball.org/news/story?id=4809846> (last updated Jan. 25, 2012). The eleven conference commissioners regularly meet to discuss BCS issues and to offer advice and recommendations to the Presidential Oversight Committee. There also is an advisory committee comprised of directors of athletics from the eleven FBS conferences and Notre Dame. Although usually the commissioners attend Presidential Oversight Committee meetings, decisions are made by the presidents/chancellors. The Oversight Committee typically operates by consensus; votes rarely are

Conference tie-in arrangements survive in the BCS: the SEC, Sugar Bowl; Big Ten and PAC-12, Rose Bowl; ACC, Orange Bowl; and Big 12, Fiesta Bowl.<sup>45</sup> The Big East Conference also has a guaranteed berth. These six, automatic qualifier (AQ) conferences, simply maintained what pre-BCS they already had.<sup>46</sup> That teams from these conferences have value is underscored by the team selections made by the non-BCS bowls with the biggest payouts. The top 15 non-BCS bowls in terms of payout had 30 slots for participating teams. In 2012 all those teams were from AQ conferences.<sup>47</sup> In fact, no system to achieve a national champion can succeed without the participation of the major football powers and the AQ conferences of which they are members,<sup>48</sup> and no participation will be forthcoming if these institutions and conferences reap less financially than they could negotiate on their own.<sup>49</sup>

Under BCS rules in effect through 2012, each AQ conference was guaranteed one team in a BCS bowl but could have no more than two.<sup>50</sup> The payout for the second team was substantially less than that for the first team.<sup>51</sup> In 2012 the BCS bowl payout was \$22,300,000; the payout for a second conference team was \$6,100,100.<sup>52</sup>

As I write this, the FBS conferences are considering another round of changes to the BCS and the FBS football post season. A Plus-One (one additional game to be played after the BCS bowls between two of the winning BCS bowl teams) and various four-game playoff proposals are being discussed.<sup>53</sup> AQ status is being

---

taken. It is very unlikely that a proposal will be adopted if opposed by a conference whose participation is necessary for a post season to work (in other words, the AQ conferences), as any conference can withdraw from the BCS if it believes a decision is counter to the best interest of its members.

45. From the bowl system to the BCS, these bowls have provided much larger payouts to participating teams. See Chris Greenberg & Chris Spurlock, *Bowl Game Payouts Map: Money Earned In 2011-2012 BCS and Other Football Bowls* (INFOGRAPHIC), HUFFINGTON POST, Jan. 5, 2012, [http://www.huffingtonpost.com/2011/12/29/bowl-game-payouts-map-2011-2012-bcs\\_n\\_1174808.html](http://www.huffingtonpost.com/2011/12/29/bowl-game-payouts-map-2011-2012-bcs_n_1174808.html) [hereinafter Greenberg & Spurlock]; see also Perlman, *supra* note 41, at 189 (noting that the payout for the 2008 Las Vegas Bowl was \$900,000 per team while the payout for 2008 BCS bowls was \$18.7 million).

46. Brett McMurphy, *Jim Delany Warns Non-AQ Leagues: Don't Expect More Than You're Getting*, AOLNEWS, Dec. 9, 2010, <http://www.aolnews.com/2010/12/09/jim-delany-warns-non-aq-leagues-dont-expect-more-than-youre/>.

47. Greenberg & Spurlock, *supra* note 45.

48. Perlman, *supra* note 41, at 185–86.

49. Perlman, *supra* note 41, at 190–91.

50. The two-team limit has a narrow exception that applies if two non-conference championship teams end up ranked #1 and 2.

51. See *BCS Selection Procedures*, BCS, <http://www.bcsfootball.org/news/story?id=4819597> (last updated July 21, 2011, 1:30 PM), for a full set of the BCS rules.

52. See Greenberg & Spurlock, *supra* note 45. From the time of this publication, there are two years still remaining on the BCS current arrangement.

53. See Matt Murschel, *Arizona State President Pushing for Eight-team Playoff*, ORLANDO SENTINEL (Feb. 10, 2012), [http://articles.orlandosentinel.com/2012-02-10/sports/os-arizona-state-president-playoff-20120210\\_1\\_playoff-fever-conference-commissioners-pac-12](http://articles.orlandosentinel.com/2012-02-10/sports/os-arizona-state-president-playoff-20120210_1_playoff-fever-conference-commissioners-pac-12); Joe Schad & Andrea Adelson, *Big Ten Exploring Four-Team Playoff*, ESPN (Feb. 8, 2012, 6:17 PM), [http://espn.go.com/college-football/story/\\_/id/7552662/big-ten-considering-four-team-playoff-format-amid-bcs-scrutiny](http://espn.go.com/college-football/story/_/id/7552662/big-ten-considering-four-team-playoff-format-amid-bcs-scrutiny); Jerry Hinnen, *Nebraska Chancellor Says Presidents Could Veto Four-Team Playoff for Plus-One*, CBSSPORTS.COM (May 4, 2012, 12:53 PM) <http://www.cbssports.com/collegefootball/blog/eye-on-college-football/18963527/nebraska-chancellor-says-presidents-could-veto-fourteam-playoff-for-plusone>.

eliminated<sup>54</sup> and there is discussion that conferences may have as many BCS bowl teams as the BCS bowl boards choose to select.<sup>55</sup> Eliminating conference AQs is partly a response to the spate of conference realignments that occurred in 2011. These conference moves were motivated by teams in non-AQ conferences seeking to get into AQ conferences,<sup>56</sup> where the money is much more significant<sup>57</sup> and there is enhanced ability to recruit.<sup>58</sup> With AQ conference status eliminated, a likely result is that the BCS bowls will concentrate their selections on historic football powers from AQ conferences. More major BCS bowl berths will go to teams from these conferences for the same reasons that prior to 1992 these teams were the ones that the major bowls selected. Off the performance of SEC teams in the past few years, one might project that the SEC regularly will have two or even three teams in BCS bowls. The Rose Bowl no doubt will revert to form and select its teams from the PAC-12 and Big Ten.

The non-AQ conferences were vocal in attacking what they saw as unfairness in the BCS system.<sup>59</sup> Joined to their voices were members of Congress and state officials led by Senator Orin Hatch, R. Utah,<sup>60</sup> hailing from a state where universities with competitive teams were in non-AQ conferences.<sup>61</sup> It is difficult to project with

54. Andrea Adelson, *Bye Bye, AQ Status*, ESPN.COM, Apr. 27, 2012. Yet other proposals involve playing the national championship earlier in the calendar year and increasing to seven the number of wins needed to qualify for a bowl game. Kevin Lincoln, *A Sudden Path to a College Football Playoff*, WALL ST. J. (Feb. 8, 2012), <http://blogs.wsj.com/dailyfix/2012/02/08/big-ten-college-football-playoff-suddenly-realistic/>.

55. See, e.g., Dennis Dodd, *Delany Makes Postseason Proposal*, CBSSPORTS.COM (Nov. 19, 2011, 9:46 AM), <http://dennis-dodd.blogs.cbssports.com/mcc/blogs/entry/6270202/33374897>.

56. See, e.g., Stewart Mandel, *In Realignment Circus, Desperate Big East Will Likely Lose AQ Status*, SI.COM (Oct. 11, 2011, 1:05 PM), [http://sportsillustrated.cnn.com/2011/writers/stewart\\_mandel/10/10/big.east.automatic.qualifier.status/index.html](http://sportsillustrated.cnn.com/2011/writers/stewart_mandel/10/10/big.east.automatic.qualifier.status/index.html) [hereinafter *In Realignment Circus*]; Iliana Limón, *Conference Expansion: History Shows Many Twists and Turns Likely Before College Football Realignment is Settled*, ORLANDO SENTINEL, June 27, 2010, [http://blogs.orlandosentinel.com/sports\\_college\\_ucf/2010/06/conference-expansion-history-shows-many-twists-and-turns-likely-before-college-football-realignment-is-settled.html](http://blogs.orlandosentinel.com/sports_college_ucf/2010/06/conference-expansion-history-shows-many-twists-and-turns-likely-before-college-football-realignment-is-settled.html); Ryan McGee, *The Rise of NCAA Super Conferences*, ESPN (Nov. 2, 2011), [http://espn.go.com/college-sports/story/\\_/id/7181032/ncaa-rise-superconference-impact-college-athletics-espn-magazine](http://espn.go.com/college-sports/story/_/id/7181032/ncaa-rise-superconference-impact-college-athletics-espn-magazine). Conference realignments continue. Memphis just formally joined the Big East Conference. See Lincoln, *supra* note 54.

57. See, e.g., Matthew McGowan, *History of Conference Realignment Drama Comes Down to Growing TV Money . . . And Not Being Left Out*, LUBBOCK ONLINE (Oct. 2, 2011), <http://lubbockonline.com/local-news/2011-10-01/big-12-presidents-look-for-best-students-institutions-amid-realignment-uncertainty>; Michael Smith & John Ourland, *ACC Expansion Will Pay Off in New TV Deal*, SPORTS BUS. J. DAILY (Feb. 6, 2012), <http://www.sportsbusinessdaily.com/Journal/Issues/2012/02/06/Colleges/ACC-TV.aspx>.

58. See *In Realignment Circus*, *supra* note 56. They also were motivated by schools in AQ conferences perceived to be “buckling” (Big 12, Big East) seeking to find more stable homes. Patrick Rishe, *West Virginia's \$20 Million Settlement is Textbook Case of Coase Theorem*, FORBES (Feb. 10, 2012, 7:51 AM), <http://www.forbes.com/sites/prishe/2012/02/10/west-virginias-20-million-big-east-settlement-is-textbook-example-of-coase-theorem/>.

59. The Mountain West and Boise State University retained an antitrust lawyer to represent their interests. See Craig Harris, *System Faces Legal Showdown*, THE ARIZONA REPUBLIC, Oct. 1, 2011, at A1 [hereinafter *System Faces Legal Shutdown*].

60. Mark Shurtleff, Utah’s attorney general, has threatened to file a lawsuit alleging that the BCS violates the Sherman Act. See, e.g., Craig Harris, *Utah AG: Likely BCS Suit Helped*, THE ARIZONA REPUBLIC, Dec. 6, 2011, at B3, available at <http://www.azcentral.com/arizonarepublic/local/articles/2011/12/05/20111205utah-attorney-general-boise-state-exclusion-bolsters-bcs-lawsuit.html>.

61. See, e.g., Lee Davidson, *Senator Orrin Hatch Launches New Attacks on BCS*, DESERET NEWS, (Mar. 10, 2010, 12:00 AM), <http://www.deseretnews.com/article/700015210/Senator-Orrin-Hatch-launches-new-attacks->

certainty the net effect to non-AQ conferences if conferences may have more than two teams selected for BCS bowls. One predictable result would be that major football powers in the AQ conferences would displace opportunities for non-AQ conference schools. An offsetting possibility, however, is that a ranked non-AQ team might get a berth that otherwise would go to a team from an AQ conference whose team was selected only because BCS rules required it.<sup>62</sup>

### C. *From Whence Cometh the Big Bucks?*

Under BCS rules, an AQ conference got approximately \$22 or \$28 million through member team BCS bowl participation.<sup>63</sup> For a 12 team conference, the payout was around \$2 million per school.<sup>64</sup> Although this is not peanuts – and, in any event, every little peanut helps – it pales in comparison to the difference in revenues from media contracts between BCS and non-BCS conferences.<sup>65</sup>

The latest round of BCS conference media contracts began with the Big 12 Conference (with ten teams) negotiating a deal with Fox Sports reportedly worth about \$90 million annually.<sup>66</sup> Together with its \$65 million ABC/ESPN deal, the Big

on-BCS.html. When Senator Hatch first challenged the operation of the BCS both the University of Utah and BYU were in non-BCS conferences. Since that time Utah, with Colorado, joined the PAC 10, making it the PAC-12.

62. Because of this, there may be pushback to eliminating the two-team limit from AQ conferences such as the Big East and ACC whose members currently may not be as attractive to bowl boards as are several teams in the SEC, Big Ten, and PAC-12. Conference realignment may respond to this.

63. See Greenberg & Spurlock, *supra* note 45.

64. There are costs associated with traveling to a bowl, housing team and official party, and participation in bowl week events. These reduce the payout actually derived. See Matt Baker, *Travel, Unsold Tickets Lead to Many Schools Taking a Loss on Bowl Games*, TULSA WORLD (June 15, 2011 10:24 AM), [http://www.tulsaworld.com/sportsextra/article.aspx?subjectid=231&articleid=20110615\\_231\\_B1\\_CUTLIN831204](http://www.tulsaworld.com/sportsextra/article.aspx?subjectid=231&articleid=20110615_231_B1_CUTLIN831204). In addition, conference payout formulas also do not always divide TV revenues equally among all schools. See *infra* note 75.

65. The Big East media contracts trail the other AQ conferences, so much so that the non-AQ Conference USA distributes more. See *infra* notes 73–75 and accompanying text.

66. Berry Tramel, *Big 12 Expansion: Answering Questions After DeLoss Dodds Speaks*, BERRY TRAMEL'S BLOG (Feb. 9, 2012, 12:15 PM), <http://blog.newsok.com/berrytramel/2012/02/09/big-12-expansion-answering-questions-after-deloss-dodds-speaks/> [hereinafter Tramel]. There are two caveats to the discussion of media contracts. First, the average per school annual take assumes that distributions are made equally to all conference member schools. This is not always the case. See *infra* note 75 (discussing Conference USA distribution). Second, money amounts of conference media deals are frequently confidential. See, e.g., Email from David Flores, Big 12 Assistant Comm'r, forward to Josephine (Jo) R. Potuto, Professor of Law, Univ. of Neb. Coll. of Law (Feb. 10, 2012, 10:52 AM) (on file with author). The numbers reported come from various media estimates. The Big 12 deal, for example, has also been reported as worth \$9 million annually per school, see Dave Curtis, *Big 12 Announces Blockbuster Television Deal with Fox*, SPORTINGNEWS (Apr. 13, 2011), <http://aol.sportingnews.com/ncaa-football/story/2011-04-13/big-12-announces-blockbuster-television-deal-with-fox>; or \$13 million annually per school, see Michael Lorenzen, *San Diego State Takes Calculated Risk Joining Big East*, BUS. COLL. SPORTS (Dec. 15, 2011), <http://businessofcollegesports.com/2011/12/15/san-diego-state-takes-calculated-risk-joining-big-east/> [hereinafter Lorenzen]; or \$17 to \$20 million annually per school, Jonathan Woo, *Big 12, Fox Agree to TV Deal*, THE HORN (Apr. 21, 2011), [http://www.readthehorn.com/sports/4022/big\\_xii\\_fox\\_agree\\_to\\_tv\\_deal](http://www.readthehorn.com/sports/4022/big_xii_fox_agree_to_tv_deal) (reporting that the University of Texas additionally will derive revenues of \$15 million annually from the Longhorn Network). Some of the discrepancy may come from whether the reports focus exclusively on the Fox deal or on the total Big 12 media take.

12 annual media take is \$155 million (or \$15.5 million per school).<sup>67</sup> The ACC's new contract is worth \$155 million annually (more than \$12.5 million for 12 schools).<sup>68</sup> The PAC-12's new deal is worth more than \$3 billion over 12 years (more than \$20 million annually per school).<sup>69</sup> The SEC is set to renegotiate its media contracts, currently paying out at \$19.5 million per school,<sup>70</sup> on the entry of Missouri and Texas A&M.<sup>71</sup> The Big Ten's current media deal is worth \$220 million annually;<sup>72</sup> no doubt it also will increase. The Big East Conference currently has the smallest media deal of the BCS conferences. Yet its payout of approximately \$3.5 million per football school<sup>73</sup> still is more than that of the non-AQ Mountain West<sup>74</sup> and on a par with the non-AQ Conference USA.<sup>75</sup>

Those criticizing the preferred nation status of BCS AQ conferences seem to believe that their status as AQs is what gives them leverage to negotiate huge media contracts (or to form their own networks). This is exactly backwards. The AQ conferences do not derive their media clout from being BCS AQs. Rather, they are BCS AQs because their members include the big, traditional football powers that fans want to watch.<sup>76</sup> Big media contracts follow as naturally as the night the day.<sup>77</sup>

### III. THE FBS POST SEASON, PLAYOFF OR NOT

There are constituencies that favor each post season format—traditional bowl system, the BCS, a Plus-One, or a playoff. Whatever the format, however, post season FBS football should encompass certain features. Prime among them is that no format should increase the number of competitions from the current system.

67. See Tramel, *supra* note 66. The ABC/ESPN deal may be renegotiated before its ends as scheduled in 2016. *Id.*

68. See Lorenzen, *supra* note 66. New members Pittsburg and Syracuse will reduce the per-school take.

69. John Taylor, *Pac-12 Officially Announces 'Landmark Media Deal'*, NBC SPORTS (May 4, 2011, 1:48 PM), <http://collegefootbaltalk.nbcsports.com/2011/05/04/pac-12-officially-announces-landmark-media-deal/>.

70. See Jerry Hinnen, *SEC Paying Out Record \$19.5 Million to Members*, CBSSports.com (Feb. 17, 2012, 2:23 PM), <http://eye-on-collegefootball.blogs.cbssports.com/mcc/blogs/entry/24156338/34876036/2>.

71. Jerry Hinnen, *Can the SEC Renegotiate Its TV Contacts or Not?*, CBSSPORTS.COM (July 20, 2011, 12:39 PM), <http://www.cbssports.com/mcc/blogs/entry/24156338/30738737>.

72. Lorenzen, *supra* note 66.

73. Lorenzen, *supra* note 66.

74. The Mountain West deal reportedly reaps \$12 million annually for the entire conference. mdak06, *Why the End of the AQ May Not Save the MWC and C-USA from the Big East*, MOUNTAIN W. CONNECTION (Nov. 20, 2011, 4:00 PM PST), <http://www.mwconnection.com/2011/11/19/2573957/why-the-end-of-the-aq-may-not-save-the-mwc-c-usa-from-the-big-east>. The Mountain West media deal pays out approximately \$1.9 million per institution annually. Lorenzen, *supra* note 66.

75. Conference USA had media revenues of just under \$50 million in 2010. Distribution ranged from approximately \$2.6 million (Tulane) to \$4.2 million (Eastern Carolina). John E. Hoover, *All About the Money*, TULSA WORLD (Mar. 2, 2012, 10:59 AM), <http://www.tulsaworld.com/articleimages/2011/b4graphictable100211.jpg>.

76. See generally McGee, *supra* note 56 (discussing the negotiating power that the AQ schools and conferences have as a result of their histories); see also Frank Fitzpatrick, *TV Money is Still Driving Force in Collegiate Sports, Panel Finds*, PHILA. INQUIRER, Nov. 2, 2011, [http://articles.philly.com/2011-11-02/sports/30350531\\_1\\_knight-commission-conferences-law-schools](http://articles.philly.com/2011-11-02/sports/30350531_1_knight-commission-conferences-law-schools).

77. WILLIAM SHAKESPEARE, *HAMLET*, act 1, sc 3, line 79. With apologies to Will.

### A. *Time, Timing, and Student-Athletes*

From the perspective of student-athlete well-being, what most matters in post season is the number of games that are played, and when. These impact student-athlete academic performance; their health and overall well-being; and their opportunity to, well, just be students.

#### 1. *Academic Performance*

One critical component of any new iteration of the FBS football post season, certainly from the perspective of the faculty at FBS schools, is that there be no increase in the number of games played.<sup>78</sup> Football student-athletes should have space and time and opportunity to concentrate on their academic work.

No one claims that every football student-athlete goes to college to get an education or that educational interests are a priority for all of them. But most football student-athletes keep up with their classwork; most seek to do more than just get by; and some excel, including the most talented athletically. Four members of the 2012 NFL super bowl teams, for example, were National Football Foundation scholar athletes.<sup>79</sup>

A 2008 study of student-athlete in-season/out-of-season academic performance found that they perform least well academically in season;<sup>80</sup> the Division I component involved 325 universities and a comparison of term by term grades of more than 10,500 football student-athletes over a four year period.<sup>81</sup> Division I sports with the most significant differences were those such as football<sup>82</sup> (football student-athletes performed “significantly less well”<sup>83</sup>) with the greatest time demands in season.<sup>84</sup> The students most affected had the lowest entering GPAs and standardized test scores.<sup>85</sup> The effect of in-season competition on football student-athlete academic performance may be understated, moreover, as they take fewer credits in season.<sup>86</sup>

Although the difference in and out of season in the academic performance of student-athletes is significant for football student-athletes, it still is comparatively

78. See 1A FAR Statement, *supra* text accompanying note 23.

79. *Eli Manning Becomes the First NFF National Scholar-Athlete to Quarterback Two Super Bowl Championship Teams*, NAT'L FOOTBALL FOUND. (Feb. 6, 2012), <http://www.footballfoundation.org/nff/story/4266/mondays-chalktalk-february-6-2012>.

80. Brianna M. Scott et al., *In-Season vs. Out-of-Season Academic Performance of College Student-Athletes*, 1 J. INTERCOLLEGIATE SPORTS 202, 213 (2008) [hereafter *College Student Academic Performance*].

81. *Id.* at 202, 213, 216 T.6.

82. *Id.* at 214 T.6. The study did not break out FBS football student-athletes from those in the Football Championship subdivision.

83. *Id.* at 213.

84. *Id.* at 202, 224. See Tom Paskus, *Study Probes Time Allotments*, CHAMPION, Spring 2008, at 18, available at <http://viewer.zmags.com/publication/948fd7ab#/948fd7ab/20>. Seasonal effects occurred across all three NCAA divisions and spanned most sports.

85. *College Student Academic Performance*, *supra* note 80, at 225.

86. *Id.* at 213.

small.<sup>87</sup> Nonetheless, it occurs in a sport with the second lowest APR of all collegiate sports<sup>88</sup> and with graduation rates that at most institutions trail those of male and male minority students.<sup>89</sup> Male student-athletes recognize the detrimental effect of athletics performance on their overall academic success,<sup>90</sup> and they attribute the required demands of athletic participation as prime reason for not spending more time on their studies.<sup>91</sup> Distribution of effects on academic performance likely falls most severely on those student-athletes who entered their universities with the lowest predictors. Even for high performing FBS football student-athletes, however, an impact on academic performance may take its toll in achieving grades that permit them to go on to graduate school or to pursue professional careers.

Because the detrimental effect of in-season competition on academic performance is due to high in-season athletics demands, an increased number of competitions likely will exaggerate this outcome, particularly if the extra games are championship games played close to or even during exams or when students have paper and group project deadlines. Even were football student-athletes to devote no less time to classwork during football post season, their focus may be adversely affected. It likely is hardest on those student-athletes on whom much attention is heaped because they are considered playmakers or because they play key positions. Schoolwork and class time pale in comparison to the excitement of big games. It is not easy to “come down” from a great win or to adjust to a bad loss. Academic performance predictably may take a hit.

---

87. *Id.*

88. See NCAA, NATIONAL AND SPORT-GROUP APR AVERAGES, TRENDS AND PENALTIES, at 1 (2011), available at <http://www.ncaa.com/content/ncaa-2011-apr-report> (reporting that Division I football has the second lowest APR, just above Men’s Basketball); see also College Student Academic Performance, *supra* note 80, at 224.

89. This is not universally true. At some FBS institutions, the graduation rates of football student-athletes regularly meet those of male students at their institutions and as do the graduation rates of minority football student-athletes compared to minority male students. At the University of Nebraska, in four of the last six years, (for classes of 1994–95 to 1999–2000 reported in 2006 to 2011) African-American football student-athletes graduated at higher rates than African American students nationally and at Nebraska; in another year, the difference in graduation rates at Nebraska was one percent. The graduation rate nationally for all male students sits at around 60 percent. Nebraska football student-athletes met or exceeded 60 percent graduation rates in four of the six years. See University of Nebraska-Lincoln Athletics Department Graduation Rate Statistics Class of 1999–00 to Class 2004–05 (on file with author).

90. Josephine R. Potuto & James O’Hanlon, Study, *National Study of Student Athletes Regarding Their Experiences as College Students* 44 (2006), available at [www.ncaa.org/library/research/student-athlete\\_experiences](http://www.ncaa.org/library/research/student-athlete_experiences) [hereinafter Full National Study]. More than 70 percent of the male respondents believed that their GPA would have been higher had they not participated in athletics; a slightly higher percentage (73 percent) of male athletes in revenue sports felt that way. *Id.* at 73. For more information on student-athlete allocation of time to athletics and academics, see Gary Brown, *Second GOALS Study Emphasizes Coach Influence*, NCAA (Jan. 13, 2011), [http://www.ncaa.org/wps/portal!/ut/p/c4/04\\_SB8K8xLLM9MSSzPy8xBz9CP0os3gjX29XJydDRwP\\_wGBDA08Df3Nzd1dXQwMDA\\_2CbEdFALxFcuk!/?WCM\\_PORTLET=PC\\_7\\_2MKEBB1A0OQS10I0O77GEE10G3000000\\_WCM&WCM\\_GLOBAL\\_CONTEXT=/wps/wcm/connect/public/ncaa/resources/latest+news/2011/january/second+goals+study+emphasizes+coach+influence](http://www.ncaa.org/wps/portal!/ut/p/c4/04_SB8K8xLLM9MSSzPy8xBz9CP0os3gjX29XJydDRwP_wGBDA08Df3Nzd1dXQwMDA_2CbEdFALxFcuk!/?WCM_PORTLET=PC_7_2MKEBB1A0OQS10I0O77GEE10G3000000_WCM&WCM_GLOBAL_CONTEXT=/wps/wcm/connect/public/ncaa/resources/latest+news/2011/january/second+goals+study+emphasizes+coach+influence).

91. Full National Study, *supra* note 90, at 45 (noting that nearly 60 percent spent less time than they wanted; nearly 80 percent of these said required athletics participation was the reason). Male student-athletes in revenue sports were less dissatisfied (55 percent spent less time than they wanted). *Id.* at 73.



The effect is exacerbated if, as reasonable to predict, football student-athletes devote even more time to watching film and strength training in preparation for post season games.<sup>92</sup> Rescheduling exams, class projects, or paper deadlines are not always options as, at most universities, providing these options is in the discretion of the course instructor.<sup>93</sup> In any event, delay in completing coursework may itself have a negative impact on performance.<sup>94</sup>

## 2. Health and Safety

Should there be an increase in games or length of season, and, concomitantly, an increase in practices, then an additional consequence is the increased risk of injury to football student-athletes. No doubt football is a violent sport and injuries are part of the game. But minimizing risk of injury is a critical concern for the institutions at which football student-athletes are matriculated and for whom they compete. This interest arises out of the goals and mission statement of higher education and the responsibility of universities to protect the health and safety of their students. It also is self-protective, to avoid liability.<sup>95</sup>

Football student-athletes by far have the highest competition injury rate among NCAA student-athletes, and they are second only to wrestling in practice injury rate.<sup>96</sup> As a general rule, the major FBS football programs recruit to their institutions the most talented (read faster, bigger, stronger) of each year's cohort of high school and junior college student-athletes. Studies show that the stronger and faster the athlete, the harder the hit and the more likelihood of injury.<sup>97</sup> That being

92. While mandatory play/practice hours are limited to 20 hours per week and 4 hours per day in season, NCAA BYLAWS art. 17.1.6 (2011), student-athletes may choose voluntarily to devote more time. See NCAA BYLAWS arts. 17.02.1–8, 17.02.13.

93. *Academic Misconduct*, *supra* note 10, at 450–51.

94. There are advantages to taking an exam close to the completion of coursework, for example.

95. See, e.g., *Knapp v. Northwestern Univ.*, 101 F.3d 473, 484–85 (7th Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997); *Pahulu v. Univ. of Kansas*, 897 F. Supp. 1387, 1388–90 (D. Kan. 1995). In both cases, the universities believed that risk of injury to student-athletes was unacceptably high, despite the student-athletes' interest in competing and willingness to indemnify the university from liability. In both cases, the universities honored the scholarship commitment, permitting the student-athletes to continue in school.

96. *NCAA Injury Surveillance Program Summary*, NCAA, SPORTS MEDICINE HANDBOOK 2011–12, 117 Fig.1 (2011), available at <http://www.ncaapublications.com/p-4203-2011-2012-sports-medicine-handbook.aspx>. This rate measures the number of injuries against the number of individual athletes participating in a practice or competition.

97. Jennifer M. Hootman et al., *Epidemiology of Collegiate Injuries for 15 Sports: Summary and Recommendations for Injury Prevention Initiatives*, 42 J. ATHLETIC TRAINING 311, 312 (2007). Part of the increase may be due to more accurate reporting. See *id.* at 318 (better awareness and diagnosis of concussions may contribute to the increases in reported concussions). See, e.g., *Two Texas Physicians Discuss the Rewards of Treating Football Athletes*, TEXAS MEDICAL ASSOCIATION INSURANCE TRUST (Feb. 22, 2012, 12:24 PM), [http://www.tmaint.org/articles-and-insights/case-in-point/texas-physicians-treat-football-athletes/?utm\\_source=Newsletter&utm\\_medium=Email&utm\\_term=TopStory&utm\\_content=Football&utm\\_campaign=OctoberNewsletter](http://www.tmaint.org/articles-and-insights/case-in-point/texas-physicians-treat-football-athletes/?utm_source=Newsletter&utm_medium=Email&utm_term=TopStory&utm_content=Football&utm_campaign=OctoberNewsletter) (“One big change in football . . . is the players keep getting bigger and faster. So the types of injuries are evolving. They tend to be slightly increasing to more high-powered injuries as time passes.”); Bob Adams & Frédéric Depiesse, *Chapter 10, Specific Injuries by Anatomic Site*, IAAF MEDICAL MANUAL, <http://www.iaaf.org/medical/manual/index.html> (explaining that athletes return too soon after an ankle injury). But see Sean D. Turbeville et al., *Risk Factors for Injury in High School Football Players*, 31 AM. J. SPORTS MED. 974, 977 (2003).

so, FBS football student-athletes comparatively may be at more risk of injury than FCS football student-athletes.<sup>98</sup>

There are competing data, however, that suggest that playing time and prior injury increase risk of additional injury rather than (more than) size and speed.<sup>99</sup> The developing data on concussions also tends in the direction that that it is not simply the violence or location of the hit that predicts later serious repercussions, but that repetitive hits take their toll and may even be a more direct and better correlation.<sup>100</sup> On this calculus, both FBS and FCS football student-athletes are at increased risk of injury, and long term concussive effects, the more games they play, the longer the season, and the more practices in which they participate. Even were data ultimately to show that size and speed are irrelevant to injury, then, data on playing time still should signal caution in increasing the number of FBS games.<sup>101</sup>

### 3. *Let Kids Be Kids*

Doubtless FBS and FCS football student-athletes share some of the same injury risks and time demands and are subject to some of the same academic scheduling constraints. It is less clear that they are subject to equivalent external pressure to succeed on the field or are subject to equivalent negative scrutiny for subpar performance. Certainly the money and media attention is focused on FBS football. These programs include the biggest spending athletics departments,<sup>102</sup> prime targets of public, media, and government criticism.<sup>103</sup>

---

98. Research is needed to demonstrate this as there may be offsetting considerations that come with being a major football program, such as closer scrutiny to assure compliance with medical and other directives, and better equipment, training regimens, and nutritional guidance that may come with better funding.

99. See Turbeville, *supra* note 97, at 977 (“[I]njured players were significantly older, bigger, stronger, more experienced. . . These differences might simply reflect the fact that stronger and more experienced players had more playing time and thus a greater opportunity for injury. . . . Lineman were at a threefold increase risk of knee injury compared with all other positions.”).

100. See Ross Maloney, *UNC Neuroscientists Tackle Head Trauma Issues in Football Players*, SCIENCE IN THE TRIANGLE (Feb. 17, 2011, 3:05 PM), <http://scienceinthetriangle.org/2011/02/unc-neuroscientists-tackle-head-trauma-issues-in-football-players> (describing the work of Kevin Guskiewicz). Guskiewicz won a 2010 MacArthur Fellowship. Gregory Childress, *UNC Professor Wins Prestigious MacArthur Fellowship*, THE HERALD-SUN (Sept. 20, 2011, 5:00 PM), [http://www.heraldsun.com/view/full\\_story/15594034/article-UNC-professor-wins-prestigious-MacArthur-Fellowship-](http://www.heraldsun.com/view/full_story/15594034/article-UNC-professor-wins-prestigious-MacArthur-Fellowship-).

101. Offsetting this conclusion are that advances in medical knowledge that permit more informed decisions regarding game rules and athlete game practice and performance to minimize risk of injury; better information on nutrition that inures to the same effect; and advances in how to treat injury.

102. The average 2010 athletics revenue for institutions in the FBS is \$48,298,000; in the Football Championship Subdivision (FCS) it is \$13,189,000; in the Non-Football Subdivision (NFS) it is \$11,077,000. See REPORT, 2004–2010 NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT, REVENUES AND EXPENSES, at 17 (2011), available at <http://www.ncaapublications.com/productdownloads/2010RevExp.pdf>. Median 2010 expenses, respectively, are \$46,688,000; \$13,091,000 and \$11,562,000. *Id.* The largest 2010 revenue of any college or university is \$143,555,000 in the FBS; \$40,186,000 in the FCS; and \$32,098,000 in the NFS. *Id.* at 19. See Eric Crawford, ‘A National Breaking Point’: Most Universities Help Pay for Athletics, But as Budgets Tighten It’s Unclear How Long It Will Last, THE COURIER JOURNAL (Dec. 3, 2011).

103. Josephine R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws That Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. LAW 256, 261 (2010).

An additional issue with any new FBS post season format is whether it extends further into the second semester than does the current BCS schedule. There was a time when college football ended on New Year's Day. No longer; the BCS championship game in 2012 was played on January 9. The spring semester also is squeezed from the other side. FBS teams play a spring game; some of them attended by upwards of 75,000 fans.<sup>104</sup> The first 2012 spring games were played on March 31;<sup>105</sup> the last ones on April 28, 2012,<sup>106</sup> with many of the biggest games played on April 14.<sup>107</sup> Football student-athletes participate in 15 spring practice sessions that take place within 34 consecutive calendar days excluding vacations<sup>108</sup> that typically end with the Spring Game.

Football student-athletes at major football powers often stay on campus during the summer, attend summer school, and engage in workouts. Summer school ends around the time fall practice begins. Fall practice permits 40 practice days before the first game.<sup>109</sup>

It is not unusual for a football student-athlete to be on campus virtually year round, with little chance to return home to family and friends. The more that football oozes into the beginning of the semester, squeezes in the spring, and starts up before fall, the less the opportunity for football student-athletes to return home for a weekend or spring break or to participate in the life of the greater campus. All these effects are not attributable to a post season football format. But post season football has an effect.

A full, year round football schedule cabins football student-athlete free time and fences them out from full engagement in campus life.<sup>110</sup> This is a tradeoff that student-athletes make, and, it is one with which they, at least, are well satisfied.<sup>111</sup>

104. Alabama led the way with attendance of more than 92,000. Jason Kirk, *2011 Spring Game Attendance: Alabama, FSU, Auburn, Florida Lead Southeastern Schools*, SBNATION (Apr. 18, 2011, 7:30 AM EDT), <http://atlanta.sbnation.com/georgia-bulldogs/2011/4/18/2117455/2011-spring-game-attendance-alabama-fsu-auburn-florida-lead>. Nebraska sells tickets to its spring game; nearly 78,000 attended in 2011. Tim Griffin, *Cornhuskers Second in Nation in Spring-Game Attendance*, BIG 12 BLOG (Apr. 21, 2009, 5:00 PM), [http://espn.go.com/blog/big12/post/\\_/id/1922/cornhuskers-second-in-nation-in-spring-game-attendance](http://espn.go.com/blog/big12/post/_/id/1922/cornhuskers-second-in-nation-in-spring-game-attendance).

105. LSU, for example. Jason Kirk, *2012 SEC Football Spring Game Schedules: LSU, Alabama Back at it Soon*, SBNATION (Feb. 6, 2012), <http://www.sbnation.com/ncaa-football/2012/2/6/2775598/2012-sec-football-spring-game-schedule-alabama-georgia-auburn> [hereinafter *2012 SEC Football Spring Game Schedules*]. The NCAA permits a spring game at the conclusion of spring practice. NCAA BYLAWS art. 17.9.5.2(a) (2011), available at <http://www.ncaapublications.com/productdownloads/D110.pdf>. The NCAA limits the length of the playing season, NCAA BYLAWS art. 17.9.1, and preseason practice. NCAA BYLAWS art. 17.9.2.

106. Texas A&M, for example. *2012 SEC Football Spring Game Schedules*, *supra* note 105.

107. Auburn, Alabama, and Georgia, for example, played on April 14 while Florida played on April 7. See *2012 SEC Football Spring Game Schedules*, *supra* note 105. Ohio State played on April 21. *Ohio State Buckeyes Tickets*, GOTICKETS.COM, [http://www.gotickets.com/sports/college\\_football/big\\_10/ohio\\_state\\_buckeyes.php](http://www.gotickets.com/sports/college_football/big_10/ohio_state_buckeyes.php) (last visited Feb. 22, 2012).

108. NCAA BYLAWS art. 17.9.6.4(a).

109. *Id.* art. 17.9.2.1.

110. Full National Study, *supra* note 90, at 28.

111. See Full National Study, *supra* note 90, at 46 (75 percent of male student-athletes reported that they achieved a "good balance" between their time and attention to athletics and academics, extracurricular experiences, social, family, and recreational activities). This conclusion, moreover, was unaffected by playing time or athletics scholarship support. *Id.* at 63.

4. *Who's the Daddy?*

Whatever the predilections of football student-athletes, however, universities and their faculties cannot cede their responsibility as the adults in the room. Also, and obviously, president and chancellor responsibility to football student-athletes and the athletics program is simply a subset of their overall responsibility to all matriculated students and the greater campus.

a. *Spillover Effects*

Football is a central part of many of our major universities. It is a unifying force for alumni. For most of us – students, faculty, fans – it is fun to attend a game and fun to follow the team. These benefits cannot and should not be denied. Also undeniable, however, is that football (and varsity athletics more generally) create stresses on campus. Athletics building projects take priority such that a third practice field is built while the ceiling in the computer science lab is falling down. Even if no campus funds are used, nonetheless the “canker g-naws.”<sup>112</sup> Disproportionate salaries, coach to professor; defensive coordinator to chaired research professor; head football coach to university president; may be a response to market forces. They nonetheless signal the wrong message about the values of higher education, and they undeniably are a source of campus friction. Perhaps the biggest issues are campus subsidies to athletics departments when academic departments see substantial cuts and coaches get annual, big raises when there is a wage and salary freeze for everyone else.<sup>113</sup>

But there are other campus stories also to be told. Most faculty strive to accommodate the travel and competition schedules of student-athletes in class assignments, as they do special scheduling needs of all students.<sup>114</sup> Juggling these schedules in a large class, particularly if there are student-athletes from various sports on different schedules, is not easy. And the impact falls on other students in the class, not only the professor.

Class lectures may be conducted out of logical sequence. Grades may be delayed so that a professor may read all papers together. A particular impact relates to graded student group projects. College undergraduate work increasingly includes group projects. Students in groups with student-athletes are all affected when student-athlete schedule accommodations are made or when student-athlete focus on games adversely affects academic work in the group. Indeed, even the academic

---

112. Captain Hook, *Memorable Quotes for Peter Pan*, <http://www.imdb.com/title/tt0054176/quotes> (last visited Nov. 22, 2012).

113. Rutgers may be the clearest current example, but it's not the only one. See, e.g., Curtis Eichelberger & Oliver Staley, *Rutgers Athletics Grow at Expense of Academics Unlike at Texas*, BLOOMBERG (Aug. 16, 2011 2:51 PM), <http://www.bloomberg.com/news/2011-08-16/rutgers-boosting-athletics-at-expense-of-academics-fails-to-emulate-texas.html>; Jarrett Renshaw, *Cash-Strapped Professors at Rutgers Learn to do Without, in World of State Aid Cuts and Bad Economy*, NJ.COM (Dec. 13, 2011, 7:10 AM), [http://www.nj.com/news/index.ssf/2011/12/rutgers\\_professors\\_learn\\_to\\_do.html](http://www.nj.com/news/index.ssf/2011/12/rutgers_professors_learn_to_do.html).

114. Scheduling is a faculty prerogative; not every faculty member will accommodate student schedule issues. See *supra* text accompanying note 93.

performance of non-athletes (at least the men) may be affected adversely by successful football programs.<sup>115</sup>

*b. Football Student-Athletes*

Only a very small percentage of football student-athletes make it to the NFL. It may well be that university efforts to sheppard student-athlete time will not result in their wise use of that reserved time. But so what? It is one thing for students to choose poorly in how they spend free time. It is quite another thing to institutionalize their poor choices by the number and scheduling of games and championships.

Law students are the student cohort with which I am most familiar. They are several years older than undergraduate football student-athletes. They also already have the benefit at least of an undergraduate university degree, and many have graduate degrees. Doubtless some of them feel so certain of their ultimate career path that they would like to avoid required courses in what they perceive to be unrelated substantive areas. They may neither adequately value the importance of contextual background for a lawyer nor appreciate the scope of the legal profession and what is required of professionals. They also may undervalue the elements that go into faculty curricular decisions or the consequences of making exceptions for individual students.<sup>116</sup> Law faculty do not, and should not, substitute student judgment for theirs—any more than a head football coach should or would accede to the predilections of his players regarding offensive/defensive schemes, what plays to run, what should be the practice drills, how to prepare for game day, or even when to schedule practice.

Is all this paternalistic (maternalistic)? Maybe yes. But what it really means is that ultimate decisions run to those charged with the authority to make them.<sup>117</sup>

*B. Fans*

A university has a host of constituencies beyond students and staff. These include alumni, fans, and donors. A university seeks to create a football season and experience that encourages their involvement. Different post season formats may have different impacts on that experience. The less good the fan experience, the more risk of a falloff in home-game attendance, in donations, and in merchandise purchases.

Home games are directed at a home team's fans. Those with the closest association with a school have the most opportunity to attend. Home games

---

115. See Doug Lederman, *As Football Teams Win, Male Students' Grades Lose*, INSIDE HIGHER ED (Dec. 20, 2011, 3:00 AM), <http://www.insidehighered.com/news/2011/12/20/football-teams-win-male-students-grades-lose>.

116. This is a subject both too extraneous to the focus of this article and too multivariated to cover adequately in a few sentences. I therefore simply briefly allude to a few considerations.

117. *Cf. Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (“We are not final because we are infallible, but we are infallible only because we are final.”).

typically entail neither fan travel expenses nor lodging costs. Ticket prices are lower than championships. Seat selection may be better. Football home games currently have competitive interest because each game matters for an end of season bowl game berth, including the BCS national championship game.

Bowl games cost fans more. Game tickets are more expensive. There are travel costs. Hotel costs frequently are bumped up to high levels. Bowl games nonetheless offer a reasonable opportunity for those associated with competing teams to attend the games. They have an offsetting attraction to home games because they typically are held in warm climates and often at sites that are tourist attractions. The range of activities and events fosters a bowl game stay of several days. Bowl games also currently offer 35 teams the opportunity to end the season on a winning note.

Conference champion tie-in bowls give no certainty that a particular team will compete. Under the BCS, there was no guarantee even that a conference champion would play in the conference tie-in bowl game, as at least one conference champion almost certainly would compete in the national championship bowl game. A playoff system can even further exacerbate the opportunity for fans to make plans ahead of time, when airline tickets are less expensive.<sup>118</sup> A playoff also may lead to the lessened significance of regular season games and, in turn, an adverse effect on the home game-day experience.

A particularly negative component of an FBS post season is the likelihood that there will be decreased fan opportunity to attend the championship game:

*A home game at a stadium that seats 75,000 will be attended by 75,000 with a direct connection to the university. The 2008 Fiesta Bowl, played in a stadium that seats 73,400, provided 17,000 tickets to each of the competing universities for sale to their fans. The NCAA 2009 men's basketball national championship, played in a stadium that seated 72,500, provided 19,000 tickets to the teams in the Final Four for sale to their fans (4,750 tickets to each of the two universities whose teams competed in the championship game).<sup>119</sup>*

A Plus-One or FBS playoff system similarly could limit ticket allotments to supporters of the universities whose teams will play in it. Not only that, but the impact of an extended post season will take a financial toll in other ways – several games with a higher ticket cost; travel costs, including last-minute airline ticket purchase; lodging costs, including a guaranteed minimum stay, etc.

Universities properly need be concerned if a post season system boxes out their fans, alumni, boosters, and regular game attendees seeking to attend post season games in favor of a national fan market.<sup>120</sup> Among all post season possibilities,

---

118. The Men's Basketball Tournament is apt illustration. There is no guarantee as to which part of the bracket a team will be in.

119. IA FAR Statement, *supra* note 23 n.1.

120. There may be offsetting benefits for fans. A concrete proposal should identify them.

playoffs may most increase that possibility. Any configuration of post season needs to take that into account.

### *C. And Who Would Run It?*

There are two options here. One is for the eleven FBS conferences to create an arrangement to administer the FBS post season. The other is for the NCAA to take over.

#### *1. The NCAA*

The NCAA obviously has experience running big tournaments. But there are issues with having the NCAA run post season FBS football. Issues can be resolved, of course. But the number and scope of them predict unwillingness to try.

The first issue relates to who would make administrative and other decisions. It is unlikely that all of Division I would vote on matters related to a championship restricted to the FBS. Already the Division I voting structure is widely believed to obstruct legislation in the interests of student-athletes in the major FBS programs. Putting FBS football decisions in this group can only exacerbate the problems.<sup>121</sup> Control of issues related to the FBS championship more likely would vest in the voting control of the 120 or so FBS universities and their conferences.<sup>122</sup> Very few of these universities would have teams with a chance to be in the playoff or even in a conference from which playoff teams likely would come. Their interest might well be to reduce expenses running to the contours of the event in favor of bigger revenue distributions. Conflicts between FBS institutions whose teams might play and all other FBS institutions might be akin to conflicts between holders of life estates in property and the ultimate beneficiaries.

Currently institutions with teams in BCS bowls are relatively free from NCAA restrictions directed in part at leveling the playing field for less well-funded institutions (team size, travel party, field passes, and team activities at a bowl site, for example). The NCAA manages all its championships in similar ways. It is at least unclear whether it would, or could, or, indeed, should, treat an FBS football championship in ways significantly different from all other championships and, most pertinently, the FCS football championship. At the very least the NCAA likely would face more direct gender equity pressure to treat equally with FBS football the post season experiences of women's teams. Either there would be changes in the FBS post season football experience or changes in the administration of all other

---

121. See Shannon J. Owens, *To Avoid a Mutiny, NCAA Reform is Coming—and Fast*, ORLANDO SENTINEL, Jan. 31, 2012, at C1 (possibility of a new division to “curb the threat of a mutiny by elite sports schools?”). Even with separate divisions, there might be pressure to administer the subdivisions in equivalent ways.

122. Division I voting is by conference, not individual institutions. See NCAA, 2011–12 NCAA DIVISION I MANUAL CONST. arts. 4.2, 4.5, 4.6 (2011), available at <http://www.ncaapublications.com/productdownloads/D112.pdf>. [hereinafter NCAA CONST.].

championships.<sup>123</sup> If a playoff system retained bowl games (as would one of the four-game playoff model under discussion),<sup>124</sup> then the former solution would mean the post season experience of football student-athletes on lower finishing teams might be better than those on the four teams in the playoff. The latter solution likely would take a vote of all of Division I, and might be an ongoing issue if the bowl experience changes over time.

The most significant impediment to the NCAA administering an FBS post season, and likely a deal breaker, relates to management and distribution of revenues from an FBS playoff. Revenues from the BCS are managed by the BCS and distributed according to a formula of its creation. The central decision makers are the conferences, and, in practical effect, the AQ conferences.<sup>125</sup> Were the NCAA to manage the tournament, there likely would be a push to share revenues equally among all FBS institutions, or at least to take some revenues off the top for wide distribution. It is difficult to see why AQ conferences would support such a plan. Alternatively, the distribution could continue in a fashion similar to BCS distribution. This solution seems unlikely to generate FBS voting support. While compromise always is a possibility, the more likely result would be impasse, meaning that the NCAA would not run the FBS football championship.<sup>126</sup>

## 2. A New “BCS”

If a new BCS is to administer FBS post season football, there will need to be deep consideration of what that structure will be. There will need to be good drafting to get there. One thing, then, is clear. There will be work for the lawyers.<sup>127</sup>

---

123. Such changes would mean spending money on these other championships, or permitting institutions to spend money (with the inevitable, resulting level playing field arguments). *See supra* text accompanying notes 118, 119.

124. *See infra* text accompanying notes 129–31; David Moulton, *David Moulton: Big Ten’s Delany on Right Track With Football Playoff Proposal*, NAPLESNEWS.COM (May 5, 2012, 3:51 PM) <http://www.naplesnews.com/news/2012/may/05/david-moulton-big-tens-delany-right-track-football/?partner=RSS>.

125. *See supra* note 44. Elimination of AQ conference status by no means presages even distribution of revenues among conferences. *See, e.g.*, Thayer Evans, *Playoff System Battle Far From Over*, FOXSPORTS.COM, Apr. 27, 2012; Andy Staples, *Q&A with Idaho President Duane Nellis*, SI.COM: INSIDE COLLEGE FOOTBALL, Mar. 8, 2012, [http://sportsillustrated.cnn.com/2012/writers/andy\\_staples/03/08/idaho-nellis-playoff/index.html](http://sportsillustrated.cnn.com/2012/writers/andy_staples/03/08/idaho-nellis-playoff/index.html).

126. Even were there to be support in the first instance for some version of distribution to all FBS conferences, another difficulty immediately presents itself. One effect of the Division I Men’s Basketball Tournament has been the migration of institutions from Divisions II and III to Division I in order to get a share of revenues. Migration widens the pool of recipients. It also adds to the diversity in Division I, with the consequence that better funded institutions may be outvoted when advocating student-athlete well-being initiatives that they can afford. There is little reason to believe that under current bylaws an NCAA-managed FBS football tournament would avoid confronting the same phenomenon. Yet another reason to predict impasse.

127. I would say more here, “had we but World enough, and Time,” (and a concrete proposal to evaluate). Andrew Marvel, “*To His Coy Mistress*,” [http://en.wikipedia.org/wiki/To\\_His\\_Coy\\_Mistress](http://en.wikipedia.org/wiki/To_His_Coy_Mistress).



## IV. SOME CLOSING THOUGHTS

At one time BCS stakeholders looked at proposals advocating an FBS post season football playoff for 16 or eight teams;<sup>128</sup> they ultimately settled on a version that includes no more than four teams.<sup>129</sup> One much discussed version is a four-team playoff in which the #1 team hosts the #4 team,<sup>130</sup> the #2 team hosts the #3 team, and the final is played at a neutral site selected on the basis of bids.<sup>131</sup> No matter the particular four-team playoff version that may be adopted, a couple of points need to be made.

## A. Football Games and Student Competitors Per Season, FBS and FCS

NCAA bylaws limit to 12 the annual number of FBS regular season football games<sup>132</sup> plus a conference championship (in a 12-team conference) and a bowl game.<sup>133</sup> NCAA bylaws limit to 11 the annual number of FCS regular season football games<sup>134</sup> plus a conference championship<sup>135</sup> and the NCAA post season tournament.<sup>136</sup>

The scholarship limit at FBS institutions is 85.<sup>137</sup> Seventy FBS teams competed in a 2011 bowl game.<sup>138</sup> The result: 5950 FBS scholarship football student-athletes<sup>139</sup> were involved in 13 games.<sup>140</sup> The FCS football tournament consists of a play-in

128. See Paola Boivin, *Michael Crow Making Bold Moves As ASU President*, ARIZ. REPUBLIC (Feb. 10, 2012, 5:55 PM), <http://www.azcentral.com/sports/asu/articles/2012/02/11/20120211michael-crow-bold-moves-asu-president.html>; see also Matt Murschel, *Arizona State President Pushing for an Eight-Team Playoff*, ORLANDO SENTINEL BLOG (Feb. 10, 2012, 9:57 AM), [http://blogs.orlandosentinel.com/sports\\_college/2012/02/arizona-state-pushing-playoff.html](http://blogs.orlandosentinel.com/sports_college/2012/02/arizona-state-pushing-playoff.html).

129. Teddy Greenstein, *BCS + BIG\ What's the Big Idea? Conference Floating Plan for National Football Playoff -- Including Home Games*, CHI. TRIB., Feb. 7, 2012, at C1, available at [http://articles.chicagotribune.com/2012-02-06/sports/chi-big-ten-idea-a-college-football-playoff-with-home-games-20120206\\_1\\_bcs-title-playoff-proposals-football-playoff](http://articles.chicagotribune.com/2012-02-06/sports/chi-big-ten-idea-a-college-football-playoff-with-home-games-20120206_1_bcs-title-playoff-proposals-football-playoff); see also Lincoln, *supra* note 54.

130. One question is how the rankings would be accomplished – polls (and which ones?); a committee selection process (and how would the committee be chosen?), etc. See Lincoln, *supra* note 54.

131. Dahlberg, *supra* note 7. In 2011, the semifinals would have been LSU at home against Stanford and Alabama at home against Oklahoma State. *Id.*

132. NCAA BYLAWS art. 17.9.5.1.

133. *Id.* art. 17.9.5.2(c), (e).

134. *Id.* art. 17.9.5.1. FCS teams may compete in 12 regular season games in years when there are 14 Saturdays in the football playing season. *Id.*

135. The FCS may substitute a subdivision conference tournament for a championship game so long no team plays more than one game. *Id.* art. 17.9.5.2(d). See also *2011 NCAA Division I Football Championship*, NAT'L COLLEGIATE ATHLETIC ASS'N, [http://www.ncaa.com/sites/default/files/external/gametool/brackets/football\\_fcs\\_2011.pdf](http://www.ncaa.com/sites/default/files/external/gametool/brackets/football_fcs_2011.pdf) (last visited Feb. 22, 2012, 9:58 AM) (portraying FCS bracket for 2011).

136. NCAA BYLAWS art. 17.9.5.2(f)–(g).

137. *Id.* art. 15.5.6.1.

138. This is more than half of the 120 FBS institutions.

139. The total number of student-athletes likely would be higher as several FBS programs have a relatively large number of walk-ons.

140. The number of bowls, and the number of FBS football student-athletes who compete, may change with new NCAA rules governing the administration and financing of bowl games. An NCAA DI Bowl Task Force reviewed bowl game operations and NCAA oversight. Among other things, it recommended that all bowl games be scheduled between the end of first semester exams and the beginning of second semester and that

round, elite eight, quarter-final, and semi-final rounds held over a three week period between the end of November and mid-December.<sup>141</sup> The scholarship limit at FCS institutions is 63, which may be divided among 85 players.<sup>142</sup> Twenty FCS teams competed in the 2011 FCS Tournament. The result: 1700 FCS football student-athletes may have been involved in 13 games, 4000 fewer than FBS student-athletes.

If the semi-final round of a four-game playoff substitutes for a bowl game, and the number of bowl games decreases by two, then the same number of FBS football student-athletes would play 13 games. In this configuration, and also the Plus-One, the only additional impact would be for the approximately 200 or so who would suit up for the championship game. If, however, the semi-final round of a four-game playoff is added to a bowl experience, the impact increases.<sup>143</sup> There are impacts beyond the number of games, however, in a four-game playoff independent of the bowls. First, the football teams and athletes who are the most successful will miss a bowl experience. It is doubtful that the atmosphere and activities at the national championship game, or, more pertinently, a campus semi-final, will measure up. Second, there is a fairly substantial question whether the bowls will survive, at least in their current form and level of importance.<sup>144</sup> It is difficult to calculate the impact on college football were that to happen. Third, all bets are off if the playoff games are added to games already to be played.

### *B. Managing Perceptions*

A question worth considering is why a move to some version of a playoff seems now to have traction. Perhaps it is practical response to a continuing crescendo of critics, and the potential impact that has had on the public perception of the AQ

---

bowl eligible teams must meet an APR. Greg Johnson, *DI Bowl Task Force Recommends Key Changes*, NCAA.ORG (Oct. 20, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/October/DI+Bowl+Task+Force+recommends+key+changes>. The DI Board adopted the recommendations regarding APR and will review Task Force recommendations should an insufficient number of teams be ineligible for post season due to APR problems and the requirement that bowl eligible teams must have at least a 6/6 record. The DI Board adopted in principle a Task Force recommendation that all bowl games be scheduled between the start of finals and the beginning of second semester classes. DI Board consideration of these remaining issues is set for the April Board meeting. Email from Harvey S. Perlman, chair of the DI Bowl Task Force, to Josephine (Jo) R. Potuto, Professor of Law, Univ. of Neb. Coll. of Law (Apr. 22, 2012, 12:44 AM) (on file with author).

141. The 2011 final was played on January 7, 2012. See *supra* note 135.

142. NCAA BYLAWS art. 15.5.6.2. In equivalency sports, scholarships may be awarded as a percentage of a full scholarship. *Id.* art. 15.5.3.2. In head count sports every scholarship counts as a full scholarship even if the full amount is not awarded. *Id.* art. 15.5.9.1.1.1.

143. The per student impact increases in a round of eight playoff, in that most of these students do not now compete in their conference championship game. The additional impact from a round of 16 is harder to calculate, without seeing the concrete contours of a proposal.

144. This issue has the attention of the eleven BCS commissioners. Brett McMurphy, *How Could It Look, How Will It Look? Forecasting the 2014 Playoff*, CBSSPORTS.COM, Apr. 27, 2012. The bowls administrators are concerned. Stewart Mandel, *Potentially Seismic Reform Looms, But Bowl Industry Has Little Say*, SI.COM, Apr. 27, 2012. Independent of an FBS football playoff, moreover, the number of bowl games may decrease.

conferences and the fairness of the national championship.<sup>145</sup> Perhaps it is an assessment of the cost of antitrust litigation, even if the BCS wins, as I would expect. Perhaps it is disgruntlement that the two teams in the 2011 championship game both came from the same conference.<sup>146</sup> Perhaps it is a chase after bigger revenues.<sup>147</sup> Perhaps it is an assessment of the likelihood of congressional intervention<sup>148</sup> through, among others, its interstate commerce power;<sup>149</sup> its authority under the spending power to condition funds provided to higher education institutions;<sup>150</sup> and its power to remove or condition tax exemptions universities currently enjoy.<sup>151</sup>

In any event, a move to a playoff inevitably feeds into cynicism of motives. Bowl attendance is down.<sup>152</sup> Bowl TV viewership is down. In January 2011 four of the five BCS bowl games, including the national championship game, had lower ratings than the year before. For BCS bowl games played in January 2012, ratings were as

145. If so, then it may inadequately account for what may be expected to be fairness arguments related to which is the #4 team; decisions on the margin between #3 and 4; whether, from the perspective of the #1 team, the #3 team would be easier to beat; who is deciding; and whether the correct criteria are employed. A 68-member Men's Basketball Tournament still has not quelled all dissent.

146. *Four-Team Playoff*, *supra* note 24. If so, then it is poor social planning. Rules should not change to respond to rare outlier situations.

147. See Lincoln, *supra* note 54.

148. If so, this concern may be overstated. Every so often Congress holds hearings on the BCS. Senate Subcommittee hearings were held in 2009, for example. See Perlman, *supra* note 41; see also *House Committee Quizzes Swofford*, ASSOCIATED PRESS, May 1, 2009, available at <http://espn.go.com/espn/print?id=4121294&type=story> (reporting that Joe Barton, R. Member of Congress, 6<sup>th</sup> Dist. Texas, introduced legislation to stop "NCAA" from calling game national championship unless outcome of playoff). More often it threatens hearings. See, e.g., Lee Davidson, *Hatch Asks Obama to Have BCS Probed for Antitrust-Law Violations*, DESERET NEWS (Oct. 23, 2009, 12:00 AM), <http://www.deseretnews.com/article/print/705338720/Hatch-asks-Obama-to-have-BCS-probed-for-antitrust-law-violations.html>; Joselyn King, *Manchin Wants Football Inquiry*, WHEELING NEWS-REGISTER (Oct. 27, 2011), <http://www.theintelligencer.net/page/content.detail/id/561095/Manchin-Wants-Football-Inquiry.html?nav=515>; Peter Sullivan, *Amid Ailing Economy, Members of Congress Delve Into Sports Issues*, THE HILL (Nov. 13, 2011, 7:00 AM ET), <http://thehill.com/homenews/house/193231-amid-ailing-economy-members-of-congress-delve-into-sports-issues>; Kelly Whiteside, *Conference Talks Expand to Politics*, USA TODAY, Oct. 27, 2011, at 5C; *Congress to Look into 'Deeply Flawed' BCS System*, ASSOCIATED PRESS, Dec. 2, 2005, available at <http://sports.espn.go.com/ncf/news/story?id=2245440>. So far it has stayed its hand, and with good reason. Discussion of why needs another article.

149. U.S. CONST. art. I § 8, cl. 3. The operative test would be whether the activities, in the aggregate, have a substantial economic impact on interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005).

150. U.S. CONST. art. I § 8, cl. 1. See *New York v. United States*, 505 U.S. 144, 166–67 (1987); *South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987).

151. 26 U.S.C. § 501(c) (2006). See John D. Colombo, *The NCAA, Tax Exemption, and College Athletics*, 2010 U. ILL. L. REV. 109, 113–15 (2010) (detailing NCAA's tax exemption status); William H. Lyons & Josephine (Jo) Potuto, *The Federal Income Tax and Reform of College Athletics: A Response to Professor Colombo and an Independent Critique*, 2 J. OF INTERCOLLEGIATE SPORT 233, 234 (2009).

152. Brett McMurphy, *Slipping Bowl Attendance Has BCS Scrambling for Reasons, Fixes*, CBS SPORTS (Jan. 23, 2012, 10:23 AM), <http://www.cbssports.com/collegefootball/story/16975644>. See also Sean Gregory, *Alabama's BCS Win: A Fitting End to a Subpar Season*, TIME MAGAZINE NEWSFEED (Jan. 10, 2012), <http://newsfeed.time.com/2012/01/10/alabamas-bcs-win-a-fitting-end-to-a-subpar-bowl-season/>; David Haugh, *Football Final Four on the Way \ Big Ten Proposal Creative Solution for Post-BCS Era*, CHI. TRIB., Feb. 9, 2012, at C1, available at <http://www.chicagotribune.com/sports/columnists/ct-spt-0209-haugh-chicago-20120209,0,5744129> (average bowl attendance at 33-year low).

low as at the inception the BCS, dropping six percent from 2011.<sup>153</sup> Skeptics already think they can connect the dots to reach the conclusion that money is the driving impetus.<sup>154</sup>

Skeptics aside, one can certainly argue that there are benefits to a new post season format. Additional revenues are a benefit, particularly if structured to return to the academic side of the campus. The perception of system fairness might be enhanced, and that also is a benefit. Bringing the semifinal to the campuses would respond to fan interests, again a benefit. But there are a couple of significant butts.

### 1. *Less, Not More*

Although decisions are better when supported by data, data is not self-defining. Conclusions drawn from them can be in the eyes of the beholder. The lack of interest in this year's national championship is attributed at least in part to the fact that it was a rematch of two teams.<sup>155</sup> To make policy change based on an outlier situation is bad policy. The decline in BCS bowl attendance and viewership began when a fifth BCS bowl was added.<sup>156</sup> To the extent that some of the playoff push comes from concern over declining bowl attendance and viewership, a better answer might be less, not more; and less, not different.

### 2. *The Slippery Slope*

Some commentators already say that a four-game post season is just the beginning.<sup>157</sup> That suggests that the cacophony of FBS football post season criticism will not stop even if some version of a playoff is implemented.<sup>158</sup> The track record of bowl games and the number of FBS football games played per season gives one pause. Bowl games increased from one to six in the decade of the 1930's<sup>159</sup> to 35 in 2012, with many stops in between.<sup>160</sup> The number of FBS football games, including

153. Jon Solomon, *College Football's Average Bowl Rating Drops to Lowest During BCS Era*, BIRMINGHAM NEWS (Jan. 13, 2012, 8:14 AM), [http://www.al.com/sports/index.ssf/2012/01/college\\_football\\_average\\_bowl.html](http://www.al.com/sports/index.ssf/2012/01/college_football_average_bowl.html) [hereinafter Solomon]. There has been a 37 percent television viewer decline for all bowls from 1998 (highest bowl ratings with 13 fewer bowl games than in 2012). *Id.* See Michael Hiestand, *BCS Title Game TV Ratings Down*, USA TODAY (Jan. 11, 2011, 12:19 PM), <http://content.usatoday.com/communities/gameon/post/2011/01/bcs-title-game-tv-ratings-down/1>; Haugh, *supra* note 152.

154. Dahlberg, *supra* note 7. See McGowan, *supra* note 57.

155. See Dahlberg, *supra* note 7 (2012 BCS championship game between LSU and Alabama a rematch that "no one outside of Alabama wanted").

156. See Solomon, *supra* note 153. The BCS expanded to five games in 2007. *BCS Expanding to Five Games*, ASSOCIATED PRESS (Apr. 9, 2006, 11:33 PM), <http://sports.espn.go.com/nfc/news/story?id=2420529>.

157. See Dahlberg, *supra* note 7.

158. I doubt, for example, that decisions regarding the choice between fourth and fifth teams will be any easier than between the first and second teams, or that the team excluded will stand mute. See *supra* note 24.

159. *College Football Bowl Games - 1930-1939*, NOLEFAN.ORG, <http://nolefan.org/fb193.html> (last visited Feb. 22, 2012, 11:22 AM) [hereinafter *College Football Bowl Games*].

160. See *2011-2012 Bowl Schedule*, ESPN.COM (Dec. 12, 2011) <http://sports.espn.go.com/nfc/news/story?id=6672862>. Bowl games reached as many as 12 during the decade of the 1960's. *College Football Bowl Games*, *supra* note 159. They hit 15 during the decade of the 1970's. *Id.* They ranged from 18 to 23 during the decade of the 1990's. *Id.*

bowl games, stayed at around ten from 1930<sup>161</sup> through 1969.<sup>162</sup> By 1972, the total number of games, including bowl games, was at 12.<sup>163</sup> By 1994, and the addition of conference championships, teams in some years played 13 games.<sup>164</sup> By 2002, 14 games were possible.<sup>165</sup> Even a four-game FBS football playoff means that two teams will play 15 games unless some other change also occurs.

The track record of the Men's Basketball Tournament gives significant pause. The Tournament began modestly in 1939 with eight teams competing. There were 16 teams in the 1950's; 32 in 1975; 40 in 1979; 48 in 1980; 52 in 1983; 53 in 1984; 64 in 1985; and 65 in 2001. In 2011, we moved to 68 games.<sup>166</sup> Talk about a slippery slope.

### 3. *Evaluating Change Incrementally*

The experience of the Men's Basketball Tournament illustrates the danger not of incremental change, but of evaluating change incrementally. What invariably is measured when new proposals are advanced is the most recent past iteration, not the place where we began. This always pushes to more change, as each increment in itself can look harmless when only measured against the one before and evaluated in light of benefits. A change from 65 to 68 men's basketball teams does not look so bad; a change from 8 to 68 has a far, far, far different tone.

The O ring failure that led to the Challenger crisis was due at least in part to a change in safety specifications grounded in the observation that prior failure to

---

161. See UNIVERSITY OF NOTRE DAME ATHLETICS MEDIA RELATIONS DEPARTMENT, 2011 NOTRE DAME FOOTBALL MEDIA GUIDE 156 (2011), available at <http://www.und.com/sports/m-footbl/spec-rel/11-m-footbl-media-guide.html>.

162. See, e.g., *All-Time Results*, TEXAS LONGHORNS FOOTBALL (Dec. 28, 2011), <http://www.texassports.com/sports/m-footbl/spec-rel/all-time-results.html>; see also UNIVERSITY OF NEBRASKA MEDIA RELATIONS, 2011 UNIVERSITY OF NEBRASKA FOOTBALL MEDIA AND RECRUITING GUIDE 176–77 (2011), available at [https://admin.xosn.com/pdf8/778343.pdf?DB\\_OEM\\_ID=100](https://admin.xosn.com/pdf8/778343.pdf?DB_OEM_ID=100); “Bob Devaney,” [http://en.wikipedia.org/wiki/Bob\\_Devaney](http://en.wikipedia.org/wiki/Bob_Devaney) (last updated Apr. 4, 2012).

163. UNIVERSITY OF NEBRASKA MEDIA RELATIONS, 2011 UNIVERSITY OF NEBRASKA FOOTBALL MEDIA AND RECRUITING GUIDE 176–77 (2011), available at [https://admin.xosn.com/pdf8/778343.pdf?DB\\_OEM\\_ID=100](https://admin.xosn.com/pdf8/778343.pdf?DB_OEM_ID=100); see also “Tom Osborne,” [http://en.wikipedia.org/wiki/Tom\\_Osborne#Head\\_coaching\\_record](http://en.wikipedia.org/wiki/Tom_Osborne#Head_coaching_record) (last updated Apr. 4, 2012).

164. *Id.*

165. See “Frank Solich,” [http://en.wikipedia.org/wiki/Frank\\_Solich](http://en.wikipedia.org/wiki/Frank_Solich). [http://en.wikipedia.org/wiki/Frank\\_Solich](http://en.wikipedia.org/wiki/Frank_Solich) See, e.g. THE AUTOMATED SCOREBOOK, NEBRASKA GAME RESULTS (AS OF JAN 02, 2003), ALL GAMES, 2002 NEBRASKA GAME RESULTS, at 1, [http://www.huskersonside.com/pdf1/1384.pdf?SPSID=5&SPID=22&KEY=GAIIRAKROOKFHZI.20030102195753&DB\\_ACCOUNT\\_TYPE=AGENT&DB\\_MENU\\_ID=286&DB\\_LANG=C&DB\\_OEM\\_ID=100](http://www.huskersonside.com/pdf1/1384.pdf?SPSID=5&SPID=22&KEY=GAIIRAKROOKFHZI.20030102195753&DB_ACCOUNT_TYPE=AGENT&DB_MENU_ID=286&DB_LANG=C&DB_OEM_ID=100) (showing the results of Nebraska's 14 games played in 2002); see also NCAA, FOOTBALL BOWL SUBDIVISION RECORDS, at 61 (2011), available at [http://fs.ncaa.org/Docs/stats/football\\_records/2011/FBS.pdf](http://fs.ncaa.org/Docs/stats/football_records/2011/FBS.pdf) (noting that 90 teams in the FBS have played 14 games, including post season, since 1999).

166. Scott Michaux, *Four-Team Playoff is Only Tip of the Iceberg for College Football*, AUGUSTA CHRONICLE (Jan. 17, 2012), <http://chronicle.augusta.com/sports/scott-michaux/2012-01-17/four-team-playoff-only-tip-iceberg-college-football>.

meet more stringent specifications did not lead to failure.<sup>167</sup> The tail of the bell curve became the height of the bell; the Challenger blew up.

The Tower of Pisa leans more each year. If each year's movement is evaluated only against the Tower's lean from the year before, and one could shut one's eyes to the total tilt, no one might predict it would fall.

For the BCS, and for the NCAA, core principles are status quo ante. They are the O ring specifications originally adopted. They are the Tower of Pisa when standing tall. Incremental evaluation of change can understate core principles. In addition, each incremental change may add to a patchwork of exceptions in which core principles are more difficult to defend, or even to find. The reasons currently advanced for an FBS football playoff do not reside in benefits to the academic and wellbeing interests of student-athletes. The benefits are how best to identify an FBS football national champion (solely an athletics interest) and to increase revenues.

More money is good. To make more money doing the same thing may even be the American way.<sup>168</sup> But, it was far easier for university presidents and chancellors to answer skeptics when their articulation of student-athlete well-being and academic interests took place in a regular football season that ended right after Thanksgiving; there were no conference championships; and the bowl season ended on New Year's Day, well before the start of second semester classes.<sup>169</sup> It also was far easier when the football spring game and practices were limited or not existent.

#### 4. *The Law of Unforeseen Consequences*

A university is comprised of many constituencies. At the core are students and faculty. But the interests of alumni, donors, and the communities in which universities reside, also have a place at the table. Money is the predicate for achieving the goals of higher education and meeting its mission. Locating and preserving sources of funding are as important as how it is spent.

A four-team FBS playoff model may be a reasonable accommodation of all the interests at play. It nonetheless is a major departure from the traditions of FBS college football, and in ways the BCS is not. Bowl games doubtless will be affected. It is not possible to estimate the impact on the home game atmosphere.

The one immutable law is the law of unforeseen consequences attendant on change. We do not know what they will be – hence they are unforeseen. But we know that they will be – hence we should proceed with caution.

---

167. R. P. FEYNMAN, PERSONAL OBSERVATIONS ON THE RELIABILITY OF THE SHUTTLE, APPENDIX F TO THE REPORT OF THE PRESIDENTIAL COMMISSION ON THE SPACE SHUTTLE CHALLENGER ACCIDENT (1986), *available at* <http://history.nasa.gov/rogersrep/v2appf.htm>.

168. I aspire for it to be mine.

169. *See supra* text accompanying notes 103–09.