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EDITOR'S NOTE

The Sports and Entertainment Law Journal is proud to complete its ninth year of publication. Over the past nine years, the Journal has strived to contribute to the academic discourse surrounding legal issues in the sports and entertainment industry by publishing articles by students and established scholars.

As editor-in-chief, I wanted to create a new identity for the Sports and Entertainment Law Journal. Volume XVI has six articles discussing issues and proposing solutions for hot topics we face in the sports and entertainment industry.

The first article is written by Connor Bush, a 2015 J.D. candidate of the University of Mississippi School of Law. The article takes an in-depth look at the five college athletic conferences and argues that it should separate from the NCAA and form independent athletic associations.

Michelle Gonzalez, a 2014 graduate of St. Thomas School of Law, writes the second article, which examines how the media popularizes criminal trials featuring female defendants, most infamously Casey Anthony, Amanda Knox and Jodi Arias.

The third article, written by Gregory Huckabee, Professor of Business Law at the University of South Dakota, and Aaron Fox, research assistant and J.D. graduate of the University of South Dakota, looks at ethics of scheduling FBS v. FCS games and an analysis of intercollegiate sport and its purpose.

At the 2014 World Cup in Brazil, Germany scored the winning goal while fans across the United States watched, raking in over 24 million American viewers. The fourth article, written by Joseph Lennarz, a graduate of UCLA School of Law and a managing partner at Ascension Athlete Management, explains why the upcoming Collective Bargaining Agreement renewal will likely

bring structural changes to the Major League Soccer. The article then advocates for two structural changes that address the issues discussed within.

Continuing with the discussion of sports, Mathew Mills, a 2014 graduate of the University of Mississippi School of Law, exposes the constitutional issues raised by the Professional and Amateur Sports Protection Act in the fifth article.

In the sixth article, Geoffrey Palachuk, a graduate of University of Notre Dame Law School and intellectual property and corporate litigation associate at Paine Hamblen, LLP, analyzes the most effective method for courts to guarantee First Amendment protections while also serving the right of publicity.

We are truly pleased with Volume XVI's publication and would like to thank the authors for all of their hard work. We would also like to thank our wonderful faculty advisors, Professor John Soma and Professor Stacey Bowers. Professor Bowers, thank you for your guidance and support in making our journal possible. To the editorial board and staff editors, I appreciate the endless effort and hard work that has perfected the Journal.

Last, we would like to thank everyone in our lives that help us keep our sanity during law school.

NADIN SAID
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THE LEGAL SHIFT OF THE NCAA'S "BIG 5" MEMBER CONFERENCES TO INDEPENDENT ATHLETIC ASSOCIATIONS: COMBINING NFL AND CONFERENCE GOVERNANCE PRINCIPLES TO MAINTAIN THE UNIQUE PRODUCT OF COLLEGE ATHLETICS

Connor J. Bush[*]

ABSTRACT

The National Collegiate Athletic Association (NCAA) can no longer effectively govern big-time intercollegiate athletics. Since the 1984 Board of Regents *decision, college athletics has grown exponentially, yet the NCAA still attempts to govern over 1,000 colleges and universities under a single organization. The "Big 5" college athletic conferences (ACC, Big Ten, Big 12, Pac-12, and SEC) have become more autonomous in recent years, independently negotiating lucrative media rights and post-season bowl agreements. Each conference has also adopted its own constitution and bylaws to effectively manage its unique product.*

This Comment argues that the "Big 5" conferences should separate from the NCAA and form independent athletic associations. Each association should contract with other associations and third party entities for inter-association and post-season competitions, similar to the current FBS post-season system. Organizing as independent associations would provide each entity the ability to: (1) effectively adopt association-specific legislation

*J.D. Candidate 2015, The University of Mississippi School of Law; B.S. 2011, Michigan State University. Connor would like to dedicate this Article to his father, Daniel Bush. He would also like to thank his family for their incredible support, and Professors Jack Nowlin, William Berry, Ron Rychlak, and Mercer Bullard for their advice and guidance. Connor would especially like to thank the entire Compliance staff at the Ole Miss Athletics Department and Ole Miss Director of Athletics, Ross Bjork, for their practical insight and for providing him the opportunity to pursue this topic. Finally, Connor would like to thank his Academic Legal Writing classmates and the Mississippi Law Journal Notes and Comments Membership Development Program.

and policies; (2) efficiently and consistently enforce rules; and (3) manage revenue commensurate with its market value.

This Article examines the current governance structures of the NCAA, the Big 5 conferences, and the NFL, finding that the Big 5 and the NFL adopt similar structures. The Article then formulates a proposed model, combining and modifying aspects from the current Big 5 and NFL systems, which any Big 5 association could adopt after separating from the NCAA.

INTRODUCTION

Big-time college athletics has become a way of life in America. During the fall, a Michigan State football fan can roll out of bed at 9:00 AM, turn on his television, and futilely argue with Desmond Howard and Lee Corso's two-dimensional representations on ESPN's College GameDay program. Following the show's conclusion, the Spartan will pass the time flipping back-and-forth between the three important games on ESPN, ESPN 2, and the new Fox Sports 1 channels, mentally preparing for the 3:30 match-up between State and Nebraska. Once, the clock strikes 3:30 PM, the MSU fan will focus almost exclusively on the ABC broadcast. However, during the multiple television time-outs and stagnant Big Ten offensive drives, Johnny Spirit will check ESPN 2, Fox, and CBS to see how the biggest games of the day are playing out. Following either triumph or heartbreak, the Michigan State fan will spend the rest of the night analyzing West Coast football on ABC and ESPN 2. Every Saturday, Sparty could spend nearly 16 hours watching college football on 13 different channels.[1]

Once March arrives, sports fans are absorbed in college basketball coverage. They will devote the better part of multiple weeks scouting various conference tournaments, watching the

[1] *See 2013 Division 1-A Football Schedule – Week 12, ESPN*, http://espn.go.com/college-football/schedule (accessed Nov. 14, 2013). Example of the typical weekly television broadcast schedule for FBS football.

NCAA Selection Show, and filling out "winning" brackets. On the penultimate week in March, four Turner/CBS-Sports affiliated channels will air 16 college basketball games lasting 12 hours on Thursday and Friday, and will broadcast 8 games spanning 12 hours on Saturday and Sunday.[2]

College sports' popularity has increased continuously since the advent of television. In the monumental 1984 Supreme Court decision, *NCAA v. Board of Regents*, the National Collegiate Athletic Association (NCAA) created an unreasonable horizontal restraint in trade[3] when it negotiated a television plan applicable for all college football programs with ABC and CBS.[4] The Court held that this agreement restricted competition and violated the Sherman Act.[5] Since the *Board of Regents* decision, the five major athletic conferences (ACC, Big 10, Big XII, Pac-12, and SEC)[6], as part of the Bowl Championship Series (BCS), independently contract for television rights and share the resulting revenue among their member institutions.[7] These television contracts are extremely lucrative. Experts estimate that the recent 20-year television deal between ESPN and the SEC is worth $300 million annually.[8]

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[2] *See 2013 March Madness TV Schedule*, SPORTS MEDIA WATCH, http://www.sportsmediawatch.com/2013-march-madness-tv-schedule/#sked (accessed Nov. 14, 2013).

[3] NCAA v. Bd. of Regents, 468 U.S. 85, 98-99 (1984).

[4] *Id.* at 92-93.

[5] *Id.* at 120.

[6] The five major athletic conferences will hereinafter be referred as the "Big 5."

[7] Each Big 5 Conference adopts a bylaw that specifically relates to revenue distribution. *See, e.g.,* Southeastern Conference, *SEC Constitution and Bylaws 2013-2014*, art. 17 (2013), *available at* http://secdigitalnetwork.com/Portals/3/SEC%20Website/compliance/Constitution.pdf [hereinafter *SEC Constitution and Bylaws*]. *See also* Benjamin I. Leibovitz, *Avoiding the Sack: How Nebraska's Departure from the Big 12 Changed College Football and what the Conferences Must do to Prevent Defection in the Future*, 22 MARQ. L. REV. 675, 2012.

[8] Mike Ozanian, *Deal Between ESPN and SEC Likely the Richest Ever*, FORBES (May 31, 2013), http://www.forbes.com/sites/mikeozanian/2013/05/31/deal-between-espn-and-sec-conference-likely-the-richest-ever/ (business analyst estimated worth on accompanying video).

Individual athletic programs also take advantage of their product's popularity by selling licensing rights, merchandise, and event tickets, among other things.[9]

The NCAA is a voluntary unincorporated association composed of 450,000 student athletes attending over 1,000 universities.[10] Generally, member institutions join conferences with other regional, similarly situated institutions. The Big 5 conferences are primarily organized as private associations, and each conference adopts independent bylaws based on NCAA requirements. Conference bylaws are specifically tailored to effectuate their member institutions' goals. Conferences implement schedules among member institutions, manage conference championships, and negotiate on behalf of its member institutions for television deals and bowl invitations.[11]

The NCAA has taken affirmative steps to adapt to the growth of college athletics[12] and has attempted to regulate major programs

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[9] Some major athletics programs have even hired successful businessmen to operate multimillion-dollar athletic department budgets. For example, the University of Michigan hired former Domino's Pizza, Inc. CEO Dave Brandon in March 2010. Brandon had never worked within an athletic department, coached college athletics, or taught university courses; however, the board of regents valued the CEO's business, financial, and managerial experiences. Katie Thomas, *Experience in Sports Optional for New Leaders*, NY TIMES (Feb. 1, 2010), http://www.nytimes.com/2010/02/02/sports/02athletics.html?_r=0. For decades, athletic directors were primarily former coaches who oversaw the daily operations of the athletic department. Today, major athletic departments negotiate multi-billion dollar television contracts, manage multi-million dollar budgets, develop successful marketing strategies, and protect valuable licensing interests. Universities are recruiting prominent business executives to manage their most successful asset, college sports. *Id.*

[10] *About - Who We Are*, NCAA, http://www.ncaa.org/about/who-we-are.

[11] Peter Kreher, *Antitrust Theory, College Sports, and Interleague Rulemaking: A New Critique of the NCAA's Amateurism Rules*, 6 VA. SPORTS & ENT. L.J 51, 71-72 (2006).

[12] The NCAA allows members to access the NCAA Student Opportunity Fund, which allows student-athletes to receive money, in addition to their financial aid, that will cover clothing, emergency travel, or health related expenses, among

with astronomical revenues while maintaining an ideal of amateurism. However, the NCAA's current centralized governance structure cannot effectively control the unique product that is big-time college athletics. The NCAA has become overextended and attempts to govern University of Texas football and University of New Orleans golf under the same set of rules. This has created a lengthy, complicated rulebook full of exceptions. Student-athletes, coaches, and staff members must consult the institution's compliance officers for NCAA rule interpretations. Sometimes these compliance officers must request an official interpretation from their respective conference or the NCAA office in Indianapolis. This archaic rulebook is anything but predictable and fosters many of the highly publicized violations reported in the media today.

This Article proposes that the Big 5 separate from the NCAA and form independent athletic associations in order to effectively adapt to the changing landscape of college athletics. These new associations should then contract with one other or with third party organizations for inter-association and post-season competitions, similar to the current FBS post-season system.[13] No longer will a centralized, national authority wield supreme legislative, investigative, and disciplinary power. Instead, authority will reside at the appropriate, "regional" level.

The Article's proposed Big 5 Association model would allow each association to: (1) effectively develop legislation and policy, (2) efficiently enforce rules, and (3) implement specific plans to manage revenue commensurate with its market value. Conferences are already self-sustaining organizations: they are composed of regional, similarly situated universities; they have adopted their own specific bylaws; and they have contracted for lucrative television contracts. Severing ties with the NCAA would allow each

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other things. In theory, it is a possible solution; however, schools may only use the fund for enumerated purposes, which will rarely cover the full cost of attendance.

[13] *See infra*, note 35 and accompanying text.

Big 5 association to focus specifically on its member institutions' goals and devise a unique plan to achieve them.

Part I of this Article will examine the current NCAA governance structure and the problems it facilitates. Part II will analyze the current NFL and SEC governance structures and argue that a Big 5 association should adopt a similar model. Part III will argue that decentralization and subsidarity principles should be applied to big-time intercollegiate athletics. Part IV will offer a proposed model that a Big 5 association should adopt after separating from the NCAA. Part V will highlight some benefits derived from the proposed model. Part VI will address the costs associated with the Big 5 separating from the NCAA, ultimately finding that they are outweighed by the benefits.

II. TODAY'S NCAA: CURRENT GOVERNANCE STRUCTURE AND ITS INHERENT PROBLEMS

A. WHAT IS THE NCAA?

The National Collegiate Athletic Association (NCAA) is a voluntary, unincorporated association of four-year colleges and universities, conferences, and other affiliated associations.[14] Over 1,000 colleges and universities ("member institutions") consisting of over 450,000 student-athletes make up the NCAA.[15] The Association is divided into three divisions: Divisions I, II, and III. Each division has a separate Manual that contains division-specific

[14] WALTER T. CHAMPION JR., FUNDAMENTALS OF SPORTS LAW 340 (2nd ed. 2013).

[15] Gary Brown, *NCAA Student-Athlete Participation Hits 450,000*, NCAA (Sep. 19, 2012), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/September/NCAA+student-athlete+participation+hits+450000 (last accessed Nov. 22, 2013).

legislation.[16] 347 schools are classified as Division I member institutions.[17] These schools are further divided into three subdivisions. The Football Bowl Subdivision (FBS) comprises the 120 members that compete in post-season bowl games.[18] The Football Championship Subdivision (FCS) comprises the 127 schools[19] that compete in an NCAA-sponsored football championship.[20] There are also 100 Division I schools that do not field football programs.[21]

The NCAA Manual - the Association's Constitution and Bylaws - operates as a contract between a member institution and the NCAA. "By joining the NCAA, each member agrees to abide by and to enforce [NCAA legislation]."[22] The purpose of the NCAA, in return, "is to maintain intercollegiate athletics as an integral part of the educational program," and "retain a clear line of demarcation between intercollegiate athletics and professional sports."[23] Generally, the NCAA formulates, oversees, and enforces the policies, rules, and regulations that govern all aspects of intercollegiate athletics.[24] The NCAA also sponsors national

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[16] NCAA, *2013-2014 NCAA Division I Manual* viii (2013), *available at* http://www.ncaapublications.com/productdownloads/D114.pdf [hereinafter *NCAA Manual*].

[17] *Division I Facts and Figures*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/ncaa/divisioni/di+facts+and+figures (last update May 2, 2013) [hereinafter *Division I Facts*].

[18] *Id*. The FBS itself is comprised of 10 athletic conferences. The five major athletic conferences (the "Big 5") are comprised of 63 member institutions. *The BCS is ... ,* BOWL CHAMPIONSHIP SERIES, http://www.bcsfootball.org/news/story?id=4809716 (last updated Oct. 1, 2013).

[19] *Division I Facts*, *supra* note 17.

[20] *About Division I*, NCAA.org, http://www.ncaa.org/wps/wcm/connect/public/ncaa/divisioni/about+division+I (last updated May 2, 2013).

[21] *Division I Facts*, *supra* note 17.

[22] NCAA v. Tarkanian, 488 U.S. 179, 183 (1988).

[23] *NCAA Manual*, *supra* note 16 at art. 1.3. *See also* NCAA v. Bd. of Regents, 468 U.S. 85, n.60 at 120 (1984) (emphasizing the "unique product" of both collegiate and professional sports).

[24] *NCAA Manual*, *supra* note 16 at art. 1.2.

championships for all of its sports except FBS football. Additionally, the Association devises a formula for distributing revenue to every member institution.[25]

The NCAA has modified its governance structure several times in order to effectively adapt to intercollegiate athletics.[26] Most notably, "[i]n 1973-74, the NCAA divided into three divisions."[27] On September 9, 2013, FBS Faculty Athletic Representatives (FARs) advocated that the FBS subdivision become a fourth NCAA division so larger schools could have adequate voting control.[28] Two notable FARs, Professors Jo Potuto and Brian D. Shannon, summarized that "the simpler the governance structure [is,] the better."[29] There is no question that each NCAA division and subdivision has unique characteristics,[30] but there comes a

[25] The NCAA does not receive revenue produced from post-season bowl games. The FBS conferences contract with bowl organizers and directly receive the revenue resulting from these agreements. *Cf.* NCAA, *2013-14 Division I Revenue Distribution Plan* (2013), *available at* http://www.ncaa.org/about/resources/finances?division=d1.

[26] *See Principles and Model for New Governance Structure: As Developed by the 1A FAR Board*, NCAA 3-4 (Sept. 11, 2013), http://oneafar.org/Governance_Proposal.pdf [hereinafter *1A FAR Proposal*].

[27] *Id.* at 4.

[28] Rachel Axon, *Faculty Group Lobbies for NCAA Changes*, USA TODAY (Sept. 11, 2013), http://www.usatoday.com/story/sports/college/2013/09/11/far-recommendation-ncaa-governance/2802173/

[29] Presentation from Brian D. Shannon & Jo Potuto during September Division I-A Faculty Athletics Representative Board Meeting, *NCAA Governance: Now and in the Future* (Sept. 11, 2013), *available at* www.cbssports.com/images/collegefootball/NCAA-Governance-FAR.pdf.

[30] For example, the average "Division II program with football costs about $4.5 million" compared to $13.1 million for a Division I program. David Pickle, *The Daily Knocks of DII and III Opportunity*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/ncaa/divisionii/the+daily+knocks+of+dii+and+iii+opportunity (last updated Aug. 15, 2012). Also, less than "50 percent of Division II student-athletes receive some amount athletically related financial aid." *Why Division II?*, NCAA (Oct. 5, 2012), http://www.ncaa.org/wps/wcm/connect/public/ncaa/pdfs/2013/whyd2. Very few Division II student-athletes receive full athletics scholarships. Dr. Pat O'Brien, *About Division II*, NCAA,

point when member institutions' policies and goals become so different that a single organization can no longer adequately administer every members' needs.

B. NCAA Governance Structure

The current NCAA governance structure does not provide Big 5 member institutions the ability to pass applicable legislation. Their interest is outweighed by the collective voices of dissimilar NCAA members with substantially smaller operating budgets. The NCAA Executive Committee generally oversees the Association and is "comprised of institutional presidents or chancellors" that "ensure that each division operates with the basic purposes, fundamental policies and general principals of the Association . . . ."[31] Each division, itself, has an "administrative structure," similar to a corporation's board of directors, comprised of institutional presidents and chancellors that "set forth the policies, rules, and regulations for operating the division."[32] Within each division, athletics administrators and FARs handle delegated responsibilities and make recommendations to the division's board of directors.[33]

The composition of each administrative group fails to provide Big 5 member schools appropriate control. Of the 16 voting university presidents and chancellors on the Executive Committee, only eight represent FBS institutions.[34] Furthermore, since the FBS subdivision is comprised of ten conferences, at most, only five of the 16 executives represent the Big 5 members' interests. Similarly, the Division I Board of Directors is composed of 18

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http://www.ncaa.org/wps/wcm/connect/public/ncaa/divisionii/about+dii (last updated Apr. 19, 2013). DIII members are typically smaller liberal arts colleges that do not offer athletically related scholarships. Jack Ohle, *The Division III Experience*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/ncaa/division+iii/the+division+iii+antidote (last updated Jan. 23, 2013).

[31] *NCAA Manual*, *supra* note 16 at art. 4.01.1

[32] *Id.*

[33] *Id.*

[34] *Id.* at art. 4.1.

voting members, all of who are university presidents or chancellors.[35] The Big 5 only retain five representatives, or 27.8% of the vote necessary to implement divisional policies and legislation. Likewise, the Big 5 only retain 15 of the 54 votes (27.8%) allocated to each of the Division I Leadership and Legislative Councils.[36] Although the Big 5 conference schools are most represented at each level of administration, they fail to obtain the majority control necessary to effectuate their interests. Moreover, the Big 5 even fail to obtain working control since the remaining "shareholders"[37] are similarly situated against the interests of the larger conferences. These smaller FBS conferences are by no means diffuse shareholders. Instead, they often have a unified interest against specific Big 5 policies.[38]

C. NCAA Revenue Distribution

The NCAA has contracted with Turner/CBS Sports for a 14-year media rights agreement worth $10.8 billion.[39] This contract accounts for approximately "81 percent of all NCAA revenue."[40] The remaining revenue is attributed to NCAA championships, investments, and other miscellaneous sources.[41] Only 62 percent of the generated revenue is distributed directly to the Division I

[35] *Id.* at art. 4.2.
[36] The Division I Leadership Council is comprised of athletics administrators and FARs. They make recommendations and suggest policies to the Division I board, and they help manage the division substructure. *NCAA Manual*, *supra* note 16 at art. 4.5; *Id.* at 26, Fig. 4-2. The Division I Legislative Council is comprised of athletic administrators and FARs and is the "primary legislative authority" for the division. *Id.* at art. 4.6.
[37] The Article substitutes the term "shareholder" for "member institution" to further compare NCAA governance and voting procedures to that of corporate law.
[38] *See infra*, note 55.
[39] *NCAA Finances: Revenue*, NCAA, http://www.ncaa.org/wps/wcm/myconnect/public/NCAA/Finances/Revenue. [hereinafter *NCAA Revenue*]. Projected annual income for 2012-2013 is $797 million. *Id.*
[40] *Id.*
[41] *Id.*

Conferences.[42] The remaining 38 percent is distributed to Divisions I, II, and III championships and programs, Association-wide programs, and covered general and administrative costs and other miscellaneous expenses.[43]

The NCAA provides a Division I Revenue Distribution Plan that mandates how the 62 percent of generated television revenue is distributed to the conferences. The revenue "is allocated among five funds: Academic Enhancement, Basketball, Grant-in-Aid, Student Assistance, and Sports Scholarship."[44] The NCAA determines the percentage of revenue allocated to each fund. Some funds, such as the Academic Enhancement Fund, provide a base amount to all Division I members.[45] Other funds indiscriminately provide prorated revenue to Division I members.[46] The only fund that considers actual post-season performance is the Basketball Fund where, based on a six-year average, "[v]alues are assigned to units that are awarded for each stage of the championship to which a conference's teams advance."[47]

D. The "Miscellaneous Expense Allowance" Proposal Illustrates the Divide Between 'Haves' and 'Have-Nots'

A substantial division separates the haves and have-nots in Division I intercollegiate athletics. The NCAA can no longer apply one set of rules to govern 347 diverse Division I member

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[42] *NCAA Finances: Distribution*, NCAA, http://www.ncaa.org/wps/wcm/myconnect/public/NCAA/Finances/Finances+Distributions (last updated Feb. 13, 2013) [hereinafter *NCAA Distribution*].
[43] *NCAA Finances: Expenses*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/NCAA/Finances/Finances+Expenses (last updated Feb. 13, 2013) [hereinafter *NCAA Expenses*].
[44] *NCAA Distribution*, *supra* note 42.
[45] *Id.*
[46] Examples include Grant-in-Aid Fund, Student Assistance, Fund, and Sports Sponsorship Fund. Revenue is distributed based on the number of grant-in-aids and sports sponsorships. *Id.*
[47] *Id.*

institutions.[48] Athletic department revenues range from $163 million at the University of Texas to $3.1 million at the University of New Orleans.[49] Although the major athletic programs from the Big 5 conferences most directly cultivate the college athletics brand, they do not "control [their] legislative destin[ies]."[50] Member institutions from the Big 5 cannot effectively manage their unique product of big-time college athletics since they are subject to the overwhelming collective voice of smaller institutions.

These smaller member institutions outvoted major athletics programs during the 2011 Miscellaneous Expense Allowance Proposal proceedings.[51] According to the history of Proposal 2011-96, the Division I Board of Directors sponsored a provision that would provide up to $2,000 in miscellaneous expenses to Division I scholarship athletes.[52] These additional expenses would make up the difference between full grant-in-aid and actual cost of attendance for "counter sport" student-athletes.[53] However, alt-

[48] *Division I Facts*, *supra* note 17.
[49] *See NCAA Finances*, USA Today, http://www.usatoday.com/sports/college/schools/finances/.
[50] Dennis Dodd, *Big Ten's Delany: Let Pros Start Minor Leagues if Athletes Want Pay*, CBSSPORTS, http://www.cbssports.com/collegefootball/writer/dennis-dodd/23847226/big-tens-delany-let-pros-start-minor-leagues-if-athletes-want-pay.
[51] *NCAA Division I Proposal: 2011-96 - Financial Aid – Minimum Limits on Financial Aid – Individual and Team Limits*, NCAA, http://www.ncaa.org/sites/default/files/Board%20Financial%20Aid%20Q%20and%20A%20Vol%204.pdf (last updated Jan. 23, 2012).
[52] *Id.*
[53] *Id.* "Counter Sports" award a specified number of student athletes full-grant-in-aid. These sports include Football, Men's and Women's Basketball, Women's Gymnastics, Women's Tennis, and Women's Volleyball. "Full-Grant-in-Aid" merely covers tuition and fees, room and board, and costs of course-required books. *NCAA Manual*, *supra* note 16 at art. 15.02.5. Although the full grant-in-aid covers most of a student-athlete's expenses, it does not fully account for the actual cost of attendance, which additionally includes "supplies, transportation, and other expenses related to attendance at the institution." *Id.* at 15.02.2. The NCAA caps financial aid awarded to students at the full cost of attendance. *Id.* at 15.1. In recent years, the NCAA has attempted to close this

hough 61 of the 63 Big 5 schools supported this proposal, [54] 160 member institutions voted to override it.[55]

The proposed stipend plan would cost each institution, on average, an additional $400,000 in expenses.[56] Currently, the majority of athletic departments are struggling to stay in the black. In 2011, the NCAA reported that 97 FBS members reported negative net generated revenue, while only 23 FBS members reported positive net generated revenue.[57] Most schools do not have enough

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gap by providing the Student Opportunity Fund. In practice, however, a substantial gap still exists.

[54] *See* NCAA, *Override Period (October 2011 Meetings)*, 5-13, www.bgsfirm.com/images/stories/2k_overrides.pdf (last visited Oct. 12, 2013). Only Rutgers and Wake Forest voted to override the Miscellaneous Expense Proposal. *See also supra* note 51.

[55] *See October 2011 NCAA Override*, *supra* note 54.

[56] Jeremy Fowler, *NCAA President Mark Emmert Hopes to Reveal New Stipend Plan in April*, CBS SPORTS (Jan. 1, 2013, 1:26 PM), http://www.cbssports.com/collegefootball/writer/jeremy-fowler/21483211/ncaa-president-mark-emmert-hopes-to-unveil-new-stipend-plan-in-april.

[57] NCAA, *Revenues and Expenses: 2004-2012*, NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 12-13 (2013), *available at* http://www.ncaapublications.com/DownloadPublication.aspx?download=2012RevExp.pdf. Note that "generated revenue" means revenue produced solely by the athletics department (i.e. ticket sales, radio/television receipts, contributions, royalties, etc.). *Id.* at 9. The amount of members reporting positive net generated revenue can be misleading since the report does not account for revenue attributed to athletic success, but distributed outside of the athletics department. *See also*, Richard T. Karcher, Symposium, *The Battle Outside the Courtroom: Principles of "Amateurism" vs. Principles of Supply and Demand*, 3 MISS. SPORTS L. REV. 47, 65-67 (2013). Some examples of unaccounted benefits attributed to athletics programs include: alumni donations outside the athletics department, increased publicity of institution, and overall increase in number and quality of institutional applicants. *See, e.g.*, Sam Khan Jr., *Texas A&M Raises $740 million*, ESPN (Sept. 18, 2013, 4:19 PM), http://espn.go.com/college-football/story/_/id/9690028/texas-raises-record-740-million-donations-fiscal-year (explaining that Texas A&M University raised a record $740 million - exceeding past record by over $300 million - in the 2012-2013 fiscal year; the fundraising includes gifts to, among other things, the university, research division, alumni programs, university foundation with more than half going outside the athletic department; Texas A&M Foundation Presi-

money in their budget to account for the additional miscellaneous expenses. Former NCAA Committee of Infractions Chair, Gene Marsh, empathized with smaller member institutions, "Why would you vote in favor of a proposal that would further hemorrhage your athletic budget and try to compete with the revenue surplus Alabama has?"[58] Approving the Miscellaneous Expense allowance proposal would further separate the haves from the have-nots. Merely examining the athletic departments' revenues and expenses demonstrates that the Big 5 schools are substantially different from other Division I schools.

II. THE "BIG 5" CONFERENCES AND THE NFL ALREADY ADOPT SIMILAR, ACCOMPLISHED MODELS

The NFL is the most successful professional sports league in America.[59] Both the NFL's and the Big 5 conferences' most valuable asset is their unique product of football, and both derive the majority of their revenue through lucrative media rights agree-

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dent recognized that having a high-profile athletic program in modern-era college athletics contributes to successful fundraising); *TCU's Football Success Rakes in More than Victories*, STAR-TELEGRAM (Aug. 29, 2013), http://www.star-telegram.com/2013/08/29/5119806/tcus-football-success-rakes-in.html (providing data displaying economic benefits Texas Christian University's football program has provided to Dallas-Fort Worth area, and how over five years, in coordination with the success of its football program, TCU's student body, once three-quarters Texas residents now comprises 55% out-of-state residents); Chris Van Horne, *TCU Applicants at Record Number*, NBC DALLAS-FORT WORTH (last updated Jun. 27, 2011, 6:00 PM), http://www.nbcdfw.com/news/local/TCU-Applicants-at-Record-Number-124620824.html (explaining that with success of football and baseball programs, number of applicants has tripled over the past ten years and "all quantitative indicators, grade, test, scores, class rank are running at far record levels").

[58] Fowler, *supra* note 56.

[59] Chris Isidore, *Why Football is Still a Money Machine*, CNN-MONEY (Feb. 1, 2013, 10:00 AM), http://money.cnn.com/2013/02/01/news/companies/nfl-money-super-bowl/.

ments.[60] New college athletic associations should not re-invent an already successful wheel. This Article will use the Southeastern Conference (SEC) as its representative for the typical Big 5 conference.[61]

Both the NFL and SEC organize as voluntary associations in order to receive significant judicial deference.[62] The NFL is a non-profit[63] association composed of 32 independent "member" professional football clubs.[64] Likewise, the SEC is a non-profit association composed of independent colleges and universities primarily located in the Southeast United States.[65] The purpose of the conference is "educational" within the meaning provided by the Internal Revenue Service.[66]

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[60] *See generally*, Isidore, *supra* note 5; *see generally* Ozanian, *supra* note 8.

[61] There are some differences in the way that each Big 5 conference is organized. *See infra* note 94 (providing a brief overview of the structure of each Big 5 conference). These differences further aid the argument that the Big 5 conferences should operate independently and should establish their own, specific policies.

[62] "Courts are reluctant to intervene, except on the most limited grounds in the internal affairs of voluntary associations." Bloom v. NCAA, 93 P.3d 621, 624 (Colo. App. 2004). *See also* Hous. Oilers v. Harris Cnty,, TX., 960 F. Supp. 1202, 1207 (S.D. Texas 1997) (explaining that private associations, like the NFL, can serve a variety of interests, and although courts have the ability to make association-specific decisions, they should not intervene unless practices are corrupt since parties have consensually agreed to abide by association regulations and policies.)

[63] NFL, *Constitution and Bylaws of the National Football League*, art. 2.2 (2006), *available at* http://static.nfl.com/content/public/static/html/careers/pdf/co_.pdf [herinafter *NFL Constitution and Bylaws*].

[64] *Id.* at art. 1.1.

[65] *SEC Constitution and Bylaws* at art. 1.1.

[66] *Id.* at art. 1.2.

A. Members Are Represented Equally Through a Board of Directors

Uniform adoption of an association's constitution and bylaws must provide each member equal representation on the association's supreme administrative body, the board of directors. Each member's representative must be an individual who considers the member's best interest. The NFL's Executive Committee is "composed of one representative from each member club."[67] Each representative must be the owner of the club, [68] and is allocated one vote.[69] The SEC's Chief Executive Officers are composed of the President or Chancellor of each member institution and are each afforded one vote.[70] Both of these administrative groups share similar responsibilities for their respective organization and are comparable to a corporation's board of directors. First, the vote of each administrative group constitutes official action for their respective organization at annual and special meetings.[71] Second, both the Executive Committee and the Chief Executive Officers have the power to punish any member institution that violates the association's rules, regulations, or policies.[72]

B. An Independent Commissioner Facilitates Effective Enforcement

The NFL's and SEC's board of directors elect an independent commissioner to generally administer the association, and each board grants the commissioner broad authority.[73] The NFL, how-

[67] *NFL Constitution and Bylaws* at art. 6.1.
[68] *Id.* at art. 6.3.
[69] *Id.* at art. 6.2.
[70] *SEC Constitution and Bylaws* at art. 4.1.
[71] *NFL Constitution and Bylaws* at art. 5.6; *SEC Constitution and Bylaws* at art. 5.1.
[72] *Compare NFL Constitution and Bylaws* at art. 6.5 *with SEC Constitution and Bylaws* at art 4.1.2.
[73] *Cf. SEC Constitution and Bylaws* at art. 4.4.1 ("The Commissioner shall be elected by a majority vote of the Chief Executive Officers . . . for a term not to

ever, affords more authority to its independent commissioner than conferences typically do. The NFL Commissioner has "full, complete, and final jurisdiction and authority to arbitrate" disputes between league members, players, coaches, and employees,[74] can incur any expense at his sole discretion that "is necessary to conduct and transact ordinary business of the League,"[75] is the "principal executive officer of the League,"[76] can interpret, establish, and enforce any League policy and procedure,[77] can arrange for and negotiate League and media rights contracts,[78] and, most importantly, has "complete authority" to discipline member owners, players, coaches, or employees that violate the League's Constitution and Bylaws or exhibit "conduct detrimental to the welfare of the League."[79] The SEC Commissioner is responsible for the "administration and operations of the Conference," has the duty of administering and enforcing Conference rules and regulations, has broad discretionary disciplinary authority, is the official interpreter of Conference rules, regulations, and policies, and "may enter into contracts . . . on behalf of the Conference." [80]

Even though conference commissioners and member institutions effectuate their disciplinary authority, all violations of NCAA bylaws must be reported to the centralized Association. The NCAA then analyzes the conference's or member institution's imposed sanctions and makes the final determination whether such discipline is appropriate. The NCAA enforcement process can take years to resolve and is subject to inconsistency since each case

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exceed six years."). NFL at Art. 8 (the Commissioner's election requires a two-thirds vote, and the term is set by the Board).

[74] *NFL Constitution and Bylaws* at art. 8.3.

[75] *Id.* at art. 8.4.

[76] *Id.* (the Commissioner generally supervises the League's business and affairs).

[77] *Id.* at art. 8.5.

[78] *Id.* at art. 8.9, 8.10

[79] *Id.* at art. 8.13 (this ambiguous language affords the Commissioner a substantial amount of discretion).

[80] *SEC Constitution and Bylaws* at art. 4.4.2.

is reviewed *de novo*.[81] The NFL, on the other hand, acts swiftly in its enforcement of League rules and regulations. It does not answer to any higher authority, and, having established its league as an association, courts are less likely to interfere with internal operations absent "mistake, fraud, collusion, or arbitrariness."[82] Those most familiar with league policies, member owners and the independent Commissioner, are able to efficiently weigh considerations and hand down an appropriate ruling.

C. Each Organization's Economic Success Is Attributed to Public Demand and Contracting Ability

Both the NFL and the SEC have experienced incredible economic success through strong brand management and successful contracting. Collectively, the 32 NFL member clubs are worth $37.4 billion.[83] Each Big 5 conference receives between $200 and $300 million annually just from television contracts.[84] There is a high demand for NFL football and big-time intercollegiate athletics. Not only do major networks extensively cover these organizations, but there are now television networks dedicated specifically to the NFL or certain conferences. Both the NFL and the Big 5 conferences have considered their advantageous position and have allowed their members to collectively negotiate lucrative media rights contracts. Furthermore, the NFL and the Big 5 conferences adopt a similar revenue sharing system since each member of the NFL or conference contributes to the overall success of the association as a whole.[85]

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[81] *See infra* notes 146-148, 150-151 and accompanying text.
[82] CHAMPION, *supra* note 14, at 335.
[83] Tom Van Ripper, *The NFL Settles Concussion Lawsuit for Peanuts: Just Over 2% of League's Value*, FORBES (Aug. 29, 2013) http://www.forbes.com/sites/tomvanriper/2013/08/29/the-nfl-settles-concussion-lawsuit-for-peanuts/.
[84] *See* Ozanian, *supra* note 8.
[85] *Compare NFL Constitution and Bylaws* at art. 8.3 ("All regular season . . . television income will be divided equally among all member clubs of the League . . . .") *with SEC Constitution and Bylaws* at art. 31.20, 31.21, 31.23 (generally,

The SEC Manual provides an explicit provision that each member's media agreements are "subject and subordinate to all past, present, and future media . . . agreements to which the conference is . . . a party."[86] Since this provision is included in the SEC Manual, there is no conflicting NCAA provision.[87] The NCAA Manual only specifically provides that it owns all rights to NCAA championships and their associated media rights.[88] This further supports the fact that the Big 5 conferences control their own media agreements and have done so successfully.

The typical Big 5 conference structure is similar to the NFL's governance structure. The NFL has applied this structure to develop the most successful entity in sports. It is not far-fetched to imagine that the Big 5 conferences, as they exist today, could flourish as entities independent of the NCAA. A new Big 5 association should follow the NFL's example and grant more authority to an independent commissioner. This would facilitate effective enforcement of association rules and policies. It is important, however, to maintain the unique product of college athletics,[89] so Big 5 conferences must primarily consider their student-athletes' well being when establishing independent associations.[90] These

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revenue received by SEC office is "divided into 15 equal shares with one share being retained by the Conference office and one share being distributed to each member institution," with additional revenue allocated to member institutions participating in certain post-season competitions).

[86] *SEC Constitution and Bylaws* at art. 22.1.1.

[87] *See id.* at Foreword ("In those instances where the NCAA does not have a provision comparable to the SEC, the subparagraph is numbered *considerably higher* than the highest numbered subparagraph in the appropriate section of the NCAA manual.") (emphasis added).

[88] *NCAA Manual* at art. 31.6.4.

[89] *See* NCAA v. Board of Regents, 468 U.S. 85, 101-02 (1984) ("The NCAA seeks to market a particular brand of football . . . this 'product' with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable . . .").

[90] Interview with Ross Bjork, Ole Miss Director of Athletics, in Oxford, Miss. (Nov. 12, 2013) (emphasized that any governance structure should be student-athlete focused; an association's primary objective should promote student-athlete welfare rather than maximize revenue). *See, e.g.* Dan Wetzel, *Athletic*

new entities should continue to follow traditional guidelines, rooted in NCAA policy, that establish basic recruiting, eligibility, and academic requirements.

III. THE NCAA'S DIVISION I IS COMPOSED OF DISSIMILAR SCHOOLS AND SHOULD BE DECENTRALIZED

A. Policy: The Principle of Decentralization and the Doctrine of Subsidarity

The policy underlying decentralization and the doctrine of subsidiarity promote a Big 5 association's ability to adopt specific policies and legislation, efficiently enforce association rules and regulations, and effectively manage economic growth. At the heart of decentralization, power is held by local organizations.[91] Granting decision-making authority to "regional" associations, as opposed to a centralized NCAA, would allow big-time intercollegiate athletics operations to run more effectively since entity-specific issues would be handled at the appropriate "regional" level.[92] The doctrine of subsidiarity "teaches that . . . problems are best addressed at the level closest to the problem," so the NCAA should never intervene when conferences have the ability "to handle matters that are within their capabilities."[93]

Directors Lobbying NCAA for More Control of College Sports, YAHOOSPORTS (Oct. 29, 2013, 10:48 PM), http://sports.yahoo.com/news/athletic-directors-lobbying-ncaa-for-more-control-of-college-sports-024802663.html; *1A FAR Proposal* at 7.

[91] *See, e.g.*, Food and Agric. Org. of the U.N., *A History of Decentralization*, CENTER FOR INTERNATIONAL EARTH SCIENCE INFORMATION NETWORK, http://www.ciesin.org/decentralization/English/General/history_fao.html (last visited Nov. 1, 2013) (applying decentralization to rural development).

[92] *See, e.g., id. See also* Ronald J. Rychlak & John M. Czarnetzky, *The International Criminal Court and the Question of Subsidiarity*, THIRD WORLD LEGAL STUDIES-2000-2003, at 115.

[93] *Id.* at 115-16.

The college athletic conference was originally established through an agreement between similar member institutions. These members should have the ability to develop and implement legislation and policies most relevant toward accomplishing their particular conference's goals. Today, however, everything must go through the NCAA. This single national entity controls legislative, investigative, and enforcement procedures for all of its over 1,000 diverse member institutions. For example, the adoption of a miscellaneous expense would benefit Big 5 student-athletes but it could cripple Sun Belt institutions. Also, the SEC might unanimously approve legislation to effectuate policy, but the Big 10 or Pac 12 might reject that same proposal.[94] In order for these "re-

[94] Although all Big 5 conferences adopt a similar, general governance structure comprised of a Board of Directors and Conference Chancellor, there are notable differences among each conferences' manual or handbook. This Article does not attempt to fully analyze the differences between Big 5 conference compositions, but includes this comparison to further show that even the Big 5 conferences have different goals and policies. Creating independent athletic associations would allow each Big 5 conference to implement specific policies. Compare the following general differences amongst the Big 5 Conferences. (1) The ACC Board of Directors relies on committees chosen by FARs for recommendations and places a high priority on academics. *See* Atlantic Coast Conference, *ACC Manual 2012-2013*, Committees art.I § I.1 (2012), *available at* http://grfx.cstv.com/photos/schools/bc/genrel/...pdf/.../2012_13_ACC.pdf. Each committee is composed of individuals best suited to handle specific issues. *See id.* at Committees art. III. The "'Council of Presidents' has complete responsibility over the conference." *Id.* at Bylaws art. IV-2. Yet, Presidents, ADs, FARs, and Senior Women Administrators (SWAs) are all awarded voting power within their respective governance group. *Id.* at Bylaws art.IV-1. (2) The Big 10 is structured similarly to the SEC. It grants the "Council of Presidents and Chancellors" (COP/C) holding "ultimate authority and responsibility for Big Ten Conference governance" significant authority. *Big Ten Council of Presidents and Chancellors*, BIG TEN CONFERENCE, http://www.bigten.org/genrel/071311aaa.html (last visited Nov. 17, 2013). The Big 10 COP/C elects a powerful conference commissioner who manages broadcast events, "provides legislative and compliance services," and manages championships, among other things. *About the Conference*, BIG TEN CONFERENCE, http://www.bigten.org/school-bio/big10-school-bio.html (last visited Nov. 17, 2013). (3) The Big XII Conference is the only Big 5 conference organized as Delaware corporation. Big XII Conference, *Big 12 Conference*

gional" conferences to effectively control their shared vision of college athletics, they must have the ability to implement their decisions.

B. Working Examples of Federated Non-Profit Associations: The Consumers Federation of America and the United States Public Interest Research Group

The Consumer's Federation of America (CFA) and the United States Public Interest Research Group (U.S. PIRG) are two examples of non-profit associations[95] that have adopted a federalized structure in order to best pursue their organization's mission. Both organizations' goals and policies are strengthened through their regional members.[96] The CFA, a federation of over 300 non-profit organizations, advances "consumer interest through research, advocacy, and education."[97] The U.S. PIRG, active in 47 states, "is a federation of independent, state-based organizations that advocate for the public interest."[98]

2012-2013 Handbook, § 1.1 (2012), *available at* www.big12sports.com/fls/.../handbook/Bylaws.pdf. University Presidents and Chancellors have "authority over all actions and functions of the Conference" and receive recommendations, in a tiered structure, from SWAs and ADs who report to FARs. *Id.* at § 5.1. (4) The Pac 12 members' Presidents and Chancellors also act as CEOs and act as the conference's governing body and manages the conference's businesses and affairs. Pac-12 Conference, *Pac-12 2013-14 Handbook*, Constitution and Bylaws ch. 5 (2013), *available at* http://compliance.pac-12.org/pac-12-handbook/. The Pac 12 also grants authority to a "Council" comprised of each member's FAR, AD, and SWA. The FARs submit the official vote on academic, eligibility, sports management, rules, and legislative issues. *Id.* at Constitution and Bylaws ch. 8.

[95] *See About CFA: Overview*, CONSUMER FEDERATION OF AMERICA, http://www.consumerfed.org/about-cfa/overview (last visited Nov. 17, 2013); *About Us*, U.S. P.I.R.G., http://www.uspirg.org/page/usp/about-us (last visited Nov. 17, 2013).

[96] *See About CFA: Overview*, *supra* note 95; *About Us*, U.S. PIRG, *supra* note 95.

[97] *About CFA: Overview*, *supra* note 95.

[98] *About Us*, U.S. PIRG, *supra* note 95.

A federated structure allows regionally situated members to most effectively manage their specific concerns. It is a CFA priority to strengthen the consumer movement "through the development of state and local organizations."[99] These 'regional' organizations encounter unique problems on a regular basis. They are best able to handle these problems, and, if necessary, they can make recommendations to the national organization. Member control and participation is an essential aspect for CFA Consumer Cooperatives.[100] Regional CFA members establish policy and elect directors.[101] The board then elects managers to carry out the cooperative's day-to-day functions.[102] The regional members, therefore, have a substantial voice in cooperative operations. Big 5 association members would share a similar ability to influence policy and pursue goals through the independent election of a commissioner. University presidents and chancellors would wield paramount influence over the association's policies and goals since they collectively elect an independent conference Commissioner who would administer general association operations.

IV. A PROPOSED MODEL THAT BIG 5 ASSOCIATIONS SHOULD ADOPT

Bureaucratic, centralized governance can no longer effectively manage modern intercollegiate athletics. Each of the Big 5 Conferences should separate from the NCAA and form independent athletic associations. Each new entity, for example the SEC, would become the sole athletic association responsible for govern-

[99] *About CFA's State and Local Program*, CONSUMER FEDERATION OF AMERICA, http://www.consumerfed.org/about-cfa/7 (last visited Nov. 17, 2013).
[100] *Consumer Cooperatives*, CONSUMER FEDERATION OF AMERICA, http://www.consumerfed.org/about-cfa/consumer-cooperatives (last visited Nov. 17, 2013).
[101] *Id.*
[102] *Id.*

ance of its member institutions. These new associations would have the authority to adopt association-specific bylaws, policies, and procedures as long as they reasonably promote their particular brand of college athletics[103] and do not violate law or public policy.[104] A Big 5 association should continue to apply established conference-specific structures and policies and should integrate successful aspects from the NFL governance model. In order to facilitate inter-association competitions and national championships, the new associations should contract for "national" events, similar to today's Bowl Championship Series (BCS) and the College Football Playoff.

A. The Importance of Organizing as a Voluntary Association

"Freedom of association is a fundamental liberty guaranteed and protected by the First Amendment."[105] Currently, the NCAA and professional sports leagues receive significant judicial deference by organizing as an association.[106] An association cannot properly function if every decision were subject to judicial scrutiny.[107] Courts find that an association's adopted constitution and bylaws effectively act as a contract between the association and its members.[108] For efficiency and policy reasons, courts are reluctant to interfere with contractual agreements.[109] An association's constitu-

[103] *See* NCAA v. Bd. of Regents, 468 U.S. 85, 101-02 (1984).
[104] CHAMPION, *supra* note 14 at 335-36.
[105] 16A AM. JUR. 2D *Constitutional Law* §578 (2014). *See also* Gregor Lentze, *The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternative Approach from a Corporate Perspective*, 6 MARQ. SPORTS L.J. 65, 76-77 (1995).
[106] *See* CHAMPION, *supra* note 14 at 335-336; Lentze, *supra* note 105 at 76-77.
[107] *See* CHAMPION, *supra* note 14 at 335-336; Lentze, *supra* note 105 at 76-77.
[108] Lentze, *supra* note 105 at 76-77 n.70. *See also*, CHAMPION, *supra* note 14 at 340.
[109] Lentze, *supra* note 105 at 76-77.

tion and bylaws must not violate law or public policy, and its method of control must not be arbitrary, fraudulent, or collusive.[110]

A Big 5 conference should organize its new entity as a private, voluntary association. Currently, most Big 5 conferences are already organized as voluntary associations, established through an agreement between colleges and universities embodied in the conference manual.[111] Each conference's rules and regulations are based on NCAA requirements.[112] Some conference provisions "are more restrictive than those of the NCAA," but there are no provisions less restrictive than an NCAA provision.[113] Conferences have already effectively established entity-specific rules, policies, and procedures, and each Big 5 conference has successfully contracted for lucrative media rights agreements. Separating from the NCAA's totalitarian control would allow new associations to pass bylaws specific to that entity's unique product of college athletics.[114]

The five new college sports entities should continue to enjoy the freedom provided to associations since courts already grant judicial deference to an overextended NCAA and a moneymaking machine in the NFL.[115] Independent college athletic associations

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[110] CHAMPION, *supra* note 14 at 335-36. Lentze, *supra* note 105 at 77. *See also* Bloom v. NCAA, 93 P.3d 621, 627 (Colo. App. 2004) (quoting Cole v. NCAA, 120 F. Supp. 2d 1060, 1071-72 (N.D. Ga. 2000); NCAA v. Lasege, 53 S.W. 3d 77, 83 (Ky. 2001)).

[111] Leibovitz, *supra* note 7 at 678-79. *See supra* note 94 (indicating that the Big 12 is organized as a Deleware corporation).

[112] *SEC Constitution and Bylaws* at Foreword.

[113] *Id.*

[114] *See supra* note 94 and accompanying text (for example, an association could define "amateur" in the most applicable way to its student-athletes; "amateur" is a flexible term, and is defined by a particular organization). CHAMPION, *supra* note 14 at 335 (the meaning of "amateur" varies from one organization to another). *See, e.g. Bloom*, 93 P.3d at 626-27 (explaining that although Jeremy Bloom was eligible to compete in the Olympics as an amateur, even though he received sports-related endorsements, he did not qualify as an amateur under the NCAA Bylaws).

[115] *See supra* note 62 and accompanying text.

would be comprised of similarly situated member institutions that share specific membership requirements and goals.[116] Since these entities would qualify as "sports leagues"[117] and could more effectively control intra-association competition, championships, and rules enforcement, courts should logically extend judicial deference to these new, efficiently managed associations.

1. Board of Directors

Each association should institute a Board of Directors, which shall establish and direct general association policy, implement the association's strategic plan, and vote for the association's independent commissioner. The Board shall have the power to impose penalties on any member that violates any provision of the association's constitution, bylaws or other rules and regulations. The Board of Directors shall be comprised of each member institution's President or Chancellor. Each director is afforded one vote, and all Board actions must be approved by a two-thirds affirmative vote.

Presidents or Chancellors establish and oversee general university policy and strategy. As leaders of their respective member institution, university presidents best represent both their school's academic and athletic interests. The captain of the institution ultimately determines how much emphasis he will allocate to athletics. These leaders' votes should represent their member's interest in establishing association policy and strategic plans for college athletics.

The purpose of the Board is to provide equal representation to all member institutions. Each member institution, and its associat-

[116] *Cf.* Liebovitz, *supra* note 7 at 678 (applying conference principles to that of new Big 5 association).

[117] Language obtained from *NCAA v. Board of Regents* majority opinion, when Justice Stevens quotes Judge Robert Bork's book, THE ANTITRUST PARADOX. *See also*, Kreher, *supra* note 11 at 57-58 ("A traditional sports league creates rules for on-field play, sets members' regular season schedules, crowns an on-field champion, and creates some system of distributing the revenue it generates . . . . leagues create a new product: league competition itself.").

ed fan base, is an essential asset to the overall brand of the new athletic association and should be afforded equal representation on the Board. These schools originally organized as a Big 5 conference in order to establish policies and pursue goals common to all members. These colleges and universities were, and still are, similarly situated. They enroll top-quality athletes, build world-class athletic facilities, operate under comparable, multi-million dollar budgets, produce a desirable product for consumers, and contract for incredible media rights agreements.

2. Management Council

Each association should establish a "Management Council" that shall make recommendations and suggest policies to the Board of Directors after examining issues within the association and college athletics in general. The Council shall also serve as the association's primary legislative authority, subject to review by the Board of Directors and Commissioner. The Management Council shall consist of two sub-groups with identical duties and powers, one composed of each member's athletic director (AD), and the other composed of each member's faculty athletic representative (FAR).[118] The association's Board of Directors and Commissioner should extensively rely on the Management Council's expert suggestions since they are often far-removed from specific athletic and academic issues.

ADs are the ultimate leaders of athletics programs and handle a broad range of athletics-related issues daily.[119] An athletics

[118] The idea for a proposed Management Council developed as a combination of new governance systems proposed by Division I Athletic Directors, the 1A Faculty Athletic Representative Board, and through a conversation with the Ole Miss Director of Athletics, Ross Bjork. *See* Wetzel, *supra* note 90; *see also supra note* 36. *Cf. 1A FAR Proposal* (this Article's proposed structure is similar to the 1A FAR Proposal; however, this Article advocates complete separation from NCAA, and the FAR proposal does not create equivalent subgroups for FARs and ADs).

[119] *1A FAR Proposal* at 2-3 ("Athletics administrators have overall responsibility to administer athletics programs. They daily deal with the stresses and requi-

director, as head of the college athletics department, provides invaluable input since he oversees all athletics operations. He personally interacts with student-athletes, coaches, and athletics staff on a daily basis, and his department communicates extensively with the university's academic, admissions, and financial aid staff. FARs are members of an "institution's faculty or administrative staff who [are] designated by the institution's president or chancellor . . . to represent the institution and its faulty in the institution's relationships with the NCAA and its conference(s)."[120] FARs represent the member's "faculty voice" and understand the nature of "the campus environment" and its interplay with athletics and NCAA rules.[121] Dividing the Management Council into two subgroups represents the new association's athletic and academic interests. Each institution's AD and FAR should meet at least twice per year and present recommendations to the Board.

3. Independent Commissioner

The Board of Directors shall elect, by a two-thirds majority vote, a Commissioner to a term designated by the Board. The Commissioner must be an impartial individual.[122] He is responsible for the administration and operation of the new college athletic association and shall be granted broad discretionary power. The Commissioner is the official interpreter of the association's consti-

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sites of the competitive environment, including student-athletes, coaches, boosters, and agents, and they also have end-line responsibility to manage finances and increase resources.") *See also* Wetzel, *supra* note 90 ("Experienced AD's should be essential leaders of the new governance system and should be represented at all levels. The ADs', who were selected by their Presidents, are in the position of leadership, responsibility and accountability for Intercollegiate Athletics and the well-being/welfare of student-athletes on their campus.").

[120] *NCAA Manual* at art. 4.02.2.

[121] *1A FAR Proposal* at 3.

[122] *See* Lentze, *supra* note 105, at 80 ("[S]ports leagues are regarded as monopolistic business associations," so employing an independent authority to review internal issues would protect "participants from the owners' monopoly power.") (Lentz also notes that an independent commissioner would serve as an efficient decision-maker.)

tution, bylaws, and other rules and regulations, and he has the authority to arbitrate any disputes arising amongst association members. The Commissioner may also enter into contracts on behalf of the association.

New athletic associations should grant their commissioners authority similar to the NFL's Commissioner. The NFL has successfully operated a profitable model under the guidance of an independent commissioner, although without criticism. Decision-making consistency and efficiency is the most valuable asset an independent commissioner provides. Ideally, the commissioner should be an impartial supervisor of the association.[123]

Although the commissioner would be responsible for overseeing the association's business, his primary responsibilities should be enforcement of association rules and regulations and arbiter of intra-association disputes. Unlike the NFL, whose main purpose is to "promote and foster the primary business of League members,"[124] Big 5 associations should be primarily concerned with maintaining their unique product of college athletics, in whichever form a Big 5 association may adopt. Rather than merely considering an association's business interests, the Commissioner, as elected by university representatives, should make timely decisions based

[123] *Id.* at 81. In reality; however, commissioners have conflicting interests. (1) As "employee[s] of the league," they must promote the league's business. *Id.* (2) They must use *independent* discretion "to resolve disputes and to enforce the disciplinary process . . . . to maintain the integrity of the game. . ." *Id.* at 79. (emphasis added)

[124] *NFL Constitution and Bylaws* at art. 2.1(A).

B. Big 5 Associations Should Expand on the Current FBS Post-Season Model and Use Their Contracting Power to Arrange Inter-Association and Post-Season Competitions

Big 5 associations should no longer subject themselves to the sole authority of the NCAA to control lucrative collegiate tournaments and national championships. Instead, new Big 5 associations should contract with each other and third-party organizations for inter-association regular and post-season competitions, similar to the current Bowl Championship Series and the future College Football Playoff System. Establishing agreements through mutual contracts between similarly situated entities would eliminate the need for a centralized organization with broad legislative, investigative, and disciplinary authority to also negotiate for its over 1,000 diverse members.

"The BCS is not an entity," but is "instead an event managed by the NCAA FBS conferences and the University of Notre Dame."[125] Bowl game organizers, television providers, and FBS institutions use contracts to create interesting, profitable competitions.[126] The conference commissioners and the Notre Dame Athletics Director represent their member institutions, and "make decisions regarding all BCS matters."[127] The 27 non-BCS bowl games are also "are managed independently by [business] enti-

[125] *The BCS is...*, BOWL CHAMPIONSHIP SERIES, http://www.bcsfootball.org/news/story?id=4809716 (last updated Oct. 1, 2013 at 4:22 PM). *See also* Christopher Pruitt, *Debunking a Popular Antitrust Myth: The Single Entity Rule and Why College Football's Bowl Championship Series does not Violate the Sherman Antitrust Act*, 11 TEX. REV. ENT. & SPORTS L. 125 (2009).

[126] *See generally* Dylan Williams & Chad Seifried, *The Taxing Postseason: The Potential Impact of Unrelated Business Income Taxation on College Football Bowl Organizers*, 23 J. LEGAL ASPECTS SPORT 72 (Aug. 2013).

[127] *The BCS is...*, *supra* note 125. The conference commissioners sand the Notre Dame AD consult with the Athletic Director Advisory Board, and all decisions are subject to the Board of Managers. *BCS Governance,* BOWL CHAMPIONSHIP SERIES, http://www.bcsfootball.org/news/story?id=4809846 (last updated Oct. 29, 2013 at 8:50 PM).

ties."[128] The College Football Playoff will succeed the BCS for the 2014 FBS football post-season. The Playoff will implement a structure similar to the current BCS system, but it will include two semifinal games and a championship game.[129] Corporate sponsors will still receive similar benefits previously associated with bowl games.

Conferences have successfully contracted with event management for big-time college football since the 1998 season.[130] It should not seem unreasonable for this type of agreement to continue if Big 5 conferences become separate associations. Furthermore, other sports, most notably men's basketball, could adopt the College Football Playoff model for other national championships.

The NCAA has successfully cultivated and managed its championship trademarks. Similar to the BCS and the proposed College Football Playoffs, the NCAA currently relies on committees comprised of conference commissioners and athletic directors[131] to determine which colleges and universities will compete in NCAA championships.[132] Rather than permitting the NCAA to be the sole negotiator for national championships, Big 5 associations would have a seat at the table.

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[128] *The BCS is...*, *supra* note 125.
[129] Stewart Mandel, *Breaking Down the New College Football Playoff System*, SI.COM (Apr. 24, 2013), http://sportsillustrated.cnn.com/college-football/news/20130424/breaking-down-the-new-college-football-playoff-system/.
[130] *See BCS Selections History*, BOWL CHAMPIONSHIP SERIES, http://www.bcsfootball.org/news/story?id=5528971 (last updated Oct. 7, 2013).
[131] CNN Library, *NCAA Men's Basketball Tournament Fast Facts*, CNN (Sept. 6, 2013), http://www.cnn.com/2013/09/06/us/ncaa-mens-basketball-tournament-fast-facts/.
[132] *See, e.g.* Rachel Bachman, *College Football Playoff Unveils Selection Panel*, WALL ST. J. (Oct. 16, 2013, 6:24 PM), http://online.wsj.com/news/articles/SB10001424052702304864504579139693856771348. *See also* NCAA, *Sports Committees* (May 9, 2012), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Championships/Sports+Committees/ (noting that all NCAA Championships are overseen by respective sports committees).

V. ESSENTIAL BENEFITS DERIVED FROM THE MODEL BIG 5 ASSOCIATION

A. Each Big 5 Association Could Effectively Develop Specific Legislation and Policy

The most important effect of the Article's proposal is that each Big 5 association will be able to control its legislative destiny.[133] Rather than controlling less than one-third of the NCAA Division I Board's votes, Big 5 members will comprise the entirety of each association's board. Therefore, member schools, through their university president or chancellor, can directly affect association policy, rules, and regulations. FARs and ADs, in their capacities as Management Council, will promote association-specific legislation, policies, and strategies for the board's consideration. The Board of Directors will then, through equal member representation, consider these recommendations. It is important to remember that each conference was originally established in order to pursue its unique members' goals.

According to the principle of decentralization and doctrine of subsidiarity, power should reside with local organizations, which are best able to handle their specific issues.[134] The 63 Big 5 schools are substantially different from the other 284 Division I programs, and the Big 5's success is evidenced by their enormous operating budgets. Notable schools have considered different purposes for their athletics programs as intercollegiate athletics has changed from its foundation in 1905, through the advent of television, and, most significantly, since the 1984 *Board of Regents* decision.[135] Although education has always been a top priority,

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[133] *See* Dodd, *supra* note 50.

[134] *See* Food and Agric. Org. of the U.N., *supra* note 91; *see also* Rychlak & Czarnetzky, *supra* note 92.

[135] *Prospective Student Athlete Information*, THE IVY LEAGUE, http://www.ivyleaguesports.com/information/psa/index (last visited) (noting that Ivy League schools do not award academic or athletic scholarships).. *See supra* note 30 and accompanying text.

some institutions have used athletics as a vehicle to obtain additional revenue through marketing.[136] Programs that do not share the same interests and concerns as the 63 Big 5 schools should not represent the product of 'big-time' college athletics. Providing actual voting power to the Big 5 schools would allow the new conference-turned-association to function as the members initially intended.

B. Independent Associations Would Facilitate More Consistent and Efficient Rule Enforcement than the Current NCAA

Seemingly everyday, the media reports new instances of NCAA violations within major athletics departments.[137] Two major problems attributed to the current NCAA system are inconsistent rules enforcement and prolonged investigations. Under the current NCAA structure, major programs may consider whether the benefits derived from potential rules violations outweigh the risk of NCAA punishment.[138] The NCAA would be severely harmed if it excessively punished certain hallmark programs. Therefore, some schools may be considered "too big to fail" and are essentially exempt from appropriate punishment.[139] In order to maintain its authoritative perception, the NCAA imposes proportionally harsher penalties on less essential schools.[140]

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[136] *See supra* note 57.

[137] At the time this Article was written, the NCAA issued rulings regarding Johnny Manziel and the University of Miami, Sports Illustrated exposed the Oklahoma State football program, and Yahoo Sports reported that five high-profile SEC student-athletes received extra benefits.

[138] Jason P. Rudderman, *Major Violation for the NCAA: How the NCAA Can Apply the Dodd-Frank Act to Reform its Own Corporate Governance Scheme*. 23 MARQ. SPORTS L. REV 103, 113 (2012).

[139] *Id.* at 116-18.

[140] *See id.* at 118. *See also* Bill N., *Auburn's Cam Newton Got a Day and USC Trojans' Football Got Bush-Whacked by NCAA*, BLEACHER REPORT (Dec. 1, 2010), http://bleacherreport.com/articles/532046-usc-football-auburns-cam-newton-got-a-day-and-the-trojans-got-bushwhacked (Cam Newton and Reggie Bush had factually similar amateurism violation cases, yet Cam Newton received a nominal penalty while USC had to vacate 15 wins, lost 30 scholarships,

1. Inconsistent NCAA Rule Enforcement

In November 2009, the University of Miami began investigating potential NCAA violations committed by its Men's Basketball and Football programs.[141] There were 18 reported allegations, consisting of 79 issues that spanned over a decade, which involved a booster providing multiple student-athletes with free meals and clothing, and hosting house, yacht, and strip club parties.[142] Compare these violations with the 2010 University of Southern California investigation, which only involved two high profile student-athletes who violated NCAA rules by receiving impermissible benefits.[143] The NCAA made an example out of USC by vacating 15 football wins, along with their 2004 National Championship, imposing a reduction of 30 scholarships, a two-year bowl ban, four years probation, and limiting the number of incoming recruits by 10 under the normal limit.[144] Miami, on the other hand, was placed on two years probation and lost a total of nine scholarships.[145]

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and was deemed inactive for two post-season bowl games). Also consider the excitement surrounding returning Heisman winner Johnny Manziel in the summer of 2013. "Johnny Football" was one of the biggest s in college football and was extremely valuable to the NCAA. Just prior to the beginning of the 2013 football season, the NCAA investigated reports of a widespread autograph ring involving Manziel. However, the NCAA only suspended Manziel for one-half of a game.

[141] Andrea Adelson, *No Bowl Ban for Miami Hurricanes*, ESPN (Oct. 23, 2013), http://espn.go.com/college-sports/story/_/id/9861775/miami-hurricanes-avoid-bowl-ban-lose-nine-scholarships-part-ncaa-sanctions

[142] *Id.*

[143] Brent Schrotenboer, *Haden: NCAA Decision on Miami Only 'Bolsters' USC's Gripe,* USA TODAY (Oct. 22, 2013), http://www.usatoday.com/story/sports/ncaaf/2013/10/22/miami-hurricanes-usc-trojans-pat-haden/3151145/.

[144] *Id.*

[145] *Id.* (USC's Athletic Director feels that the Miami decision only supports his opinion that USC was unfairly punished); Adelson, *supra* note 141 (experts speculate that Miami's cooperation with the NCAA and its imposition of "'un-

A glaring problem with NCAA enforcement is that each case is investigated *de novo*. Although the NCAA's research database is replete with prior cases and interpretations that explain the reasoning behind final decisions, the current chairman of the NCAA infractions committee admits that "[e]ach case is unique,"[146] and that the NCAA doesn't "do a great deal of comparative analysis."[147] The fact that "different cases are decided by different infractions committees"[148] and that each committee is composed of a unique set of people most attributes to the inconsistency of NCAA enforcement.

2. Prolonged NCAA Investigations

The current NCAA investigative process is unnecessarily lengthy. By the time some NCAA investigations conclude, the responsible offenders no longer attend the institution, and, thus, cannot be punished deservedly. For example, youth and high school athletes who had dreams of following in Reggie Bush and O.J. Mayo's footsteps at Southern California were subjected to the brunt of the NCAA hammer years later when they pulled on their USC Cardinal and Gold uniforms.[149] Innocent student-athletes, coaches, students, and employees are subjected to the delayed NCAA response. Prospective student-athletes sign their National Letter of Intent uncertain of their new school's fate.

The University of Miami reported institutional investigation of potential violations to the NCAA in November 2009.[150] Almost four years later, the NCAA released its judgment on October 22, 2013.[151] During this four-year span, the University of Miami

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precedented' self-imposed sanctions" during the investigative process, which included a two-year bowl ban, minimized additional penalties).

[146] Adelson, *supra* note 141.

[147] Schroetenboer, *supra* note 143.

[148] *Id.*

[149] *See* Pat Forde, *USC's Punishment Sends Shockwaves*, ESPN (June 10, 2010), http://sports.espn.go.com/ncf/columns/story?id=5273422.

[150] Adelson, *supra* note 141.

[151] *See id.*

football and men's basketball programs were shrouded in a "cloud of uncertainty." Coaches could not accurately predict the future state of their programs, and therefore had a difficult time recruiting highly touted student-athletes. The university's image was damaged exceedingly due in part to the prolonged investigation.

Following the investigative stage, the NCAA typically attempts to issue decisions in six to eight weeks.[152] Due to the complexity of the Miami case, however, the committee on infractions handed down its decision after four months of consideration.[153] The NCAA also received a black eye when it improperly obtained evidence during the investigative proceedings.

Subjecting fourteen member institutions to the authority of an individual athletic association, headed by an independent commissioner would promote rule enforcement efficiency. It is important that these independent associations appoint an "impartial and fair authority to resolve disputes and to enforce the disciplinary process . . . to provide basic due process in order to avoid judicial interference with [association] affairs."[154] A Big 5 association could enact specific bylaws for enforcement and investigative procedures. This would establish predictability and force members to conform to tailored regulations. Intuitively, it is far easier for each commissioner, intimately familiar with his association's policies, rules, and procedures, to evaluate potential violations and administer consistent and fair judgments. Additionally, efficient enforcement would enhance the association's product as a valid intercollegiate athletic association in the eyes of the public.[155] Following principles of decentralization and subsidiarity, authority should be divested to local associations and "problems are best addressed at the

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[152] *Id.*
[153] *Id.*
[154] Lentze, *supra* note 105, at 79-80.
[155] *Cf. 1A FAR Proposal* at 7 ("[T]he 1A FAR Board supports a new, separate, FBS Division as the best alternative to achieve confidence and buy-in in NCAA Division I governance, something widely acknowledged as missing in the current structure.")

level closest to the problem."[156] A Big 5 association, in establishing its own specific rules and regulations is best able to handle enforcement issues. A centralized body that is far removed from the situation and considers multiple schools' interests should not intervene with these regional associations' procedures.

C. Revenue Produced by Each Association Would Be Managed According to the Association's Specific Policies

Big 5 conferences have become more autonomous in recent years due to its members' success on the field and focused conference marketing campaigns, which in turn, increased the public demand for the unique conference product. Previously, the NCAA seal of approval was necessary to validate a collegiate athletics program. Yet today, because of the Big 5 conferences' success, independent intercollegiate athletic associations could survive without the NCAA brand. In 2013, the Southeastern Conference (SEC) extended its contract with ESPN for an additional 20 years, and established a conference-specific channel.[157] Experts predict that the newly created SEC Network will provide the conference an additional $300 million in annual revenue.[158] Other conferences have negotiated valuable television deals as well.[159] The Big 10 Network, for example, has broadcasted conference competitions and programs for the past six years.[160]

Although the Big 5 conferences are in sole control of revenue earned from conference negotiated television contracts and post-

[156] *See* Rychlak & Czarnetzky supra note 92, at 115.
[157] Ozanian, *supra* note 8.
[158] Ozanian, *supra* note 8. *SEC Constitution and Bylaws* at art. 31.20-31.23 (revenue is split into 15 equal shares; one share is retained by the conference and the other shares are distributed to each member institution).
[159] Ozanian, *supra* note 8 (each of the Big 5 conferences currently contracts with major television networks for deals ranging from $200-$250 million annually).
[160] Jeff Smith, *Big Ten Network Celebrates Anniversary of Launch*, BIGTEN.ORG (Aug. 29, 2008), http://www.bigten.org/genrel/082908aal.html. Pac 12, Big XII, and Longhorn Network are other examples of conference or institutional television contracts.

season football games, they are still subject to the NCAA's Distribution Plan for the Division I Men's Basketball Championship earnings. The NCAA presumably has the best intentions in distributing almost 40% of the revenue across the entire Association; however, the programs that directly contribute to these astronomical proceeds are not able to manage the revenue as they see fit. It is the NCAA's duty to look after all 1,000 plus member programs, but it is managing money earned primarily by its most valuable members.

Separating from the NCAA would allow each Big 5 association to contract for additional revenue and have the authority to manage it as each association desires. According to principles of decentralization and subsidiarity, management of revenue produced by Big 5 associations should be determined by those local associations best able to consider the association's interests.[161] A centralized authority should not take the contributing members' due revenue and re-distribute it as the central body sees fit.[162] As mentioned previously, the vast majority of the NCAA does not share the same interests as the 63 Big 5 schools.

New Big 5 associations should separate from the NCAA and expand the BCS/College Football Playoff model by independently contracting with third-party entities for intercollegiate competitions and post-season championships. Independent associations could use their bargaining power to receive a larger share of earned revenues. Although part of March Madness' appeal comes from the opportunity for unheralded "Cinderella" programs to upset traditional powerhouses, the tournament could not survive without Big 5 programs. The NCAA, Turner/CBS Sports, and the Big 5 conferences recognize this leverage. Rather than allowing the NCAA to determine the best use for the retained revenue among all of its member institutions, the schools that contribute most to these lucrative deals should be able to manage revenue represent-

[161] *See supra* notes 91 and 92.
[162] *See supra* note 42.

ing their actual value according to association-specific policies. This does not necessarily mean a death-knell for March Madness, the Women's Final Four, the College World Series, or other popular NCAA championships and their opportunistic images. The NCAA would continue to benefit from these valuable and established championships; however, Big 5 associations would receive revenue commensurate with their market value.

VI. COSTS ASSOCIATED WITH BIG 5 INDEPENDENCE ARE NOMINAL AND WOULD BE OUTWEIGHED BY THE BENEFITS OF THE PROPOSED INDEPENDENT ASSOCIATION MODEL

A. The Unique Product of College Athletics Would Not be Diluted if the Big 5 Separated from the NCAA

In order to operate an economically successful college athletics program in previous years, it was necessary to join the NCAA. However, due in part to the increased amount of television packages containing conference-specific networks and college-athletic specific programs, the Big 5 brands have strengthened considerably. Some might argue that certain conferences have stronger brands than the NCAA. Although Big 5 chancellors, presidents, and commissioners should strongly consider whether their brand would lose value after separating from the NCAA, ultimately, any resulting harm should be offset by increased control and revenue.

New "Big 5" associations would still be motivated to distinguish college athletics from professional sports.[163] Some sports fans prefer college athletics or Olympic sports to professional sports because of the ideal of amateurism. "Amateurism," however, is a flexible term that means whatever the particular sports governing body decides.[164] For example, in *Bloom v. NCAA*, United States Olympic skier, Jeremy Bloom "was offered various

[163] *Cf. supra* note 23 and accompanying text.
[164] CHAMPION, supra note 14, at 335.

paid entertainment opportunities" and commercial endorsement deals for ski equipment and Tommy Hilfiger clothing due to his participation in the Olympics.[165] Under, United States Olympic Committee (USOC) rules, Bloom could compete for the United States as an "amateur."[166]

Bloom, however, "discontinued his endorsement, modeling and media activities" [167] when he enrolled at the University of Colorado-Boulder and competed on the university's football team since "NCAA bylaws prohibit every student-athlete from receiving money for advertisements and endorsements."[168] The NCAA denied the University of Colorado's requests for waivers of NCAA rules and a favorable rule interpretation.[169] Bloom then sought declaratory and injunctive relief, arguing that the "NCAA's restrictions on endorsements and media appearances were arbitrary and capricious; and . . . constituted improper and unconscionable restraints of trade."[170] The Colorado Court of Appeals, providing "considerable deference" to the Association,[171] upheld the NCAA bylaws and administrative review process as reasonable.[172]

Individual conferences have the ability to establish applicable amateurism rules.[173] It is important for the Big 5 associations to maintain some form of amateurism so their product is distinguished from professional sports. Each association could independently adopt a specific form of amateurism. Some could

[165] Bloom v. NCAA, 93 P.3d 621, 622 (Colo. App. 2004).
[166] CHAMPION, *supra* note 14, at 334-45 (categorizing Olympic competition as "unrestricted competition," and as one form of amateur sports; recognizing that the definition of amateur is flexible in "that an individual can be viewed as an amateur under the rules of the USOC but not . . . under the NCAA rules.").
[167] *Bloom*, 93 P.3d at 622.
[168] *Id.* at 626 (citing *NCAA Manual* at art. 12.5.2.1, 12.5.1.3, 12.4.1.1).
[169] *Id.* at 622.
[170] *Id.*
[171] *See id.* at 627 (quoting Cole v. NCAA, 120 F. Supp. 2d 1060, 1071-72 (N.D. Ga. 2000)).
[172] *Id.* at 628.
[173] *See* Kreher, *supra* note 11, at 83.

continue to adopt the NCAA's definition of amateurism. Others could, however, could expand their definition of amateurism, allowing student athletes to retain revenue earned from their images.[174] Separating into separate associations allows member institutions to determine which form of intercollegiate athletics it should adopt in today's market.

B. Administrative Costs Would Be Nominal Since Big 5 Conferences Are Already Staffed Appropriately

Although new Big 5 associations would incur some administrative costs in establishing a new entity, these costs should be nominal. The Big 5 conferences have already established offices staffed with appropriate personnel,[175] and major athletic departments employ a substantial number of individuals within specialized athletic-specific departments (i.e. Academics, Compliance, Business, Development, Marketing, Facilities, Ticketing, etc.).[176] Rather than reporting to the NCAA, member institutions would report directly to their respective Big 5 association.

Currently, the NCAA is primarily responsible for investigative and enforcement procedures for over 1,000 member intuitions. Each new association would have to create new positions in order

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[174] *See generally* In re Student-Athlete Name & Likeness Licensing Litigation, 724 F.3d 1268 (9th Cir. 2013) (holding that EA Sports' use of college athletes' likenesses is not protected by the First Amendment). *See also*, Andy Staples, *Online Jersey Sales Highlight NCAA's Hypocrisy on Amateurism*, SI.COM (Aug. 7, 2013), http://sportsillustrated.cnn.com/college-football/news/20130807/jersey-ncaa-sales-manziel-clowney/ (The NCAA prohibits student-athletes from profiting off of their name or likeness; however, fans can type the names of famous student-athletes, such as Johnny Manziel and Jadeveon Clowney, into the "NCAA Shop" where they are directed to a web page where they can purchase the student-athlete's replica jersey.).

[175] *See, e.g.*, *Staff Directory*, PAC-12, http://pac-12.com/content/staff-directory (last visited Nov. 17, 2013) (providing list of Pac-12 Conference employees and their positions).

[176] *See*, *e.g.*, *Staff Directory*, OLE MISS ATHLETICS DEPARTMENT, http://www.olemisssports.com/school-bio/ole-staff-directory.html (last visited Nov. 17, 2013).

to take on enforcement responsibilities. However, these costs should be nominal since each association would only need to employ an investigative and enforcement staff that would oversee 12-14 member institutions. Furthermore, any costs incurred should be outweighed by increased revenue and association control.

C. Litigation Concerns Are Limited: Courts Should Grant Independent Associations Judicial Deference, Reducing the Number of Meritorious Lawsuits Filed Against Intercollegiate Athletic Associations

Establishing new association operating rules would create a contract between each Big 5 association and its members.[177] Students would have third-party beneficiary standing to sue the new association rather than the NCAA.[178] It might seem counterintuitive for the Big 5 conferences to take on the high-profile litigation currently being filed against the NCAA,[179] but the Big 5, as independent associations, would collectively take on fewer lawsuits since intercollegiate athletics would operate more efficiently. The Big 5 associations should receive even more judicial deference than is currently awarded to the NCAA.[180] Courts would more likely abstain from interfering with contractual agreements between similarly situated member schools and a Big 5 association since each association would specifically tailor their constitution and bylaws to unique association policies and goals. Additionally, the new association's application of its rules and regulations would not be arbitrary or capricious since an independent commissioner and a closely held board of directors could effectuate consistent and fair procedures that apply to 12-16 members.

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[177] *See supra* notes 108 and 111 and accompanying text. *See generally* Bloom v. NCAA, 93 P. 3d 621 (Colo. App. 2004).
[178] *See supra* note 111 and accompanying text. *See generally* Bloom v. NCAA, 93 P. 3d 621 (Colo. App. 2004).
[179] *See generally* In re Student-Athlete Name & Likeness Litigation, 724 F.3d 1268 (9th Cir. 2013).
[180] *See supra* note 110.

D. The Formation of Big 5 Associations Would Not Violate Antitrust Laws

Antitrust issues should not dissuade Big 5 conferences from organizing as independent athletic associations since new associations would qualify as "sports leagues"[181] and would pass antitrust review.[182] The sports industry presents a unique case for antitrust review because, "in order to preserve the character and quality of the 'product,'"[183] members must mutually adopt rules that "restrain the manner in which institutions compete."[184] Each new association would create a new product that would compete at a system level with other associations, the remaining NCAA, and professional sports leagues.[185] Furthermore, intra-association agreements for regular season and post-season competitions should not violate antitrust laws since they are necessary to promote the unique product of big-time college athletics.[186] College sports are clearly distinguishable from professional sports. Many fans are current students or alumni of their favored member institution. College sports fandom elicits more personal sentiments since many supporters have actually attended the university.

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[181] *See supra* note 117 and accompanying text. *See also* Kreher, *supra* note 11, at 81 ("Unlike the NCAA, the conferences are sports leagues . . . because they create an interrelated set of games that culminates in a championship. [T]he conferences allow[ing] members to compete in non-league games means that they are structured as open leagues; it does not strip the conferences of sports league status.").

[182] Kreher, *supra* note 11, at 52 (referencing Myron C. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model,* 82 MICH. L. REV. 1 (1983)). CHAMPION, *supra* note 14, at 529 (Major League Baseball is the only sports organization that is exempt from antitrust review.).

[183] NCAA v. Bd. of Regents, 468 U.S. 85, 102 (1984).

[184] *Id.* at 101. *See also* Kreher, *supra* note 11, at 54.

[185] *See* Kreher, *supra* note 11, at 59.

[186] *Id.* ("[C]ourts have properly sought to protect system-level competition by closely scrutinizing agreements between them.").

Independent associations would compete amongst each other for college sports fans. Each association would form a distinct brand through adoption of unique policies and regulations. Similar to CFA Cooperatives, formation of new associations would enhance market competition "by providing consumers with an alternative source of products."[187] Rivalries between members have distinctive histories. Neighbors can have contrasting loyalties spanning generations. Considering the close proximity amongst member institutions, fans of Alabama athletics, for example, can be found in the states of Mississippi, Georgia, or Tennessee. This regional similarity enhances the identity of the conference-turned-association's brand and fosters competition amongst the member institutions.

In contracting for inter-association competitions, Big 5 associations would adopt comparable bylaws regarding academic eligibility, recruiting, and benefits so one entity does not enjoy unfair advantage over its competitors.[188] These unofficial agreements, approved through mutual contracts, would parallel the current BCS system and "would be justified as necessary to create a new product, just like two competing automakers can form a joint venture to create a new car."[189]

CONCLUSION

Big-time intercollegiate athletics' popularity has ballooned in recent years. In accordance with decentralization principles and the doctrine of subsidarity, the NCAA should no longer be the primary governing body for over 1,000 member institutions. Each Big 5 conference should separate from the NCAA and form independent associations, so the 63 outliers could effectuate and en-

[187] *Consumer Cooperatives*, *supra* note 100.
[188] *Cf.* Kreher, *supra* note 11, at 82-83 (arguing that "the NCAA is an inter-league agreement designed to limit system-level competition" and its requirement of "specific form of amateurism" has an anticompetitive effect; but conferences "could create amateur football through intraconference rules.").
[189] Kreher, *supra* note 11, at 88.

force specific policies and legislation and manage their deserved revenue.

Ultimately each Big 5 conference must determine whether the benefits of separating from the NCAA outweigh the costs. Realistically, in order for this Article's proposal to work, all Big 5 conferences must separate from the NCAA. The Association would not be willing to let its most important members leave since these 63 schools are essentially responsible for the NCAA's entire operating budget. However, the NCAA could continue to operate through management of its valuable championships. It could distribute earned revenue to the remaining Division I conferences that would not survive independent from the NCAA[190] as well as all Division II and III programs. The NCAA would return to its fundamental purpose of maintaining "intercollegiate athletics as an integral part of the education program" for schools that still require NCAA administration.

[190] Some examples of conferences that might not survive include: Conference USA, the Mid-American Conference, the Mountain West Conference, and the Sunbelt Conference. The American Athletic Conference ("AAC") could potentially separate from the NCAA if it decided that the benefits outweighed the costs. *See 1A FAR Proposal* at 1 (alluding to the similarity of the AAC with the Big 5 conferences).

THE FAILURE OF THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT

Matthew D Mills*

ABSTRACT

For the last fifty years, the federal government has been aggressively battling illegal gambling by enacting legislation. The most recent act, The Professional and Amateur Sports Protection Act (PASPA), prohibits states from authorizing and licensing sports gambling. New Jersey recently challenged the constitutionality of PASPA, in *NCAA v. Governor of N.J.,* where the Third Circuit held that nothing in PASPA offends the United States Constitution. Though New Jersey has appealed the Third Circuit's ruling to the United States Supreme Court, there has been no indication whether the Supreme Court will grant a writ of certiorari.

This Comment will explore the likelihood of the United States Supreme Court granting New Jersey a writ of certiorari. It will take a detailed look into the flawed legal reasoning relied upon by the Third Circuit in *NCAA v. Governor of N.J.*, while explaining how PASPA is unconstitutional. After exposing PASPA's inefficiencies and the harms it poses, this Comment will conclude with a suggested beneficial structure to control and capitalize on sports gambling.

INTRODUCTION

The Professional and Amateur Sports Protection Act ("PASPA") [1] is unconstitutional, ineffective, and counter-

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productive. Enacted in 1992, PASPA makes it a federal crime for states to license sports gambling.[2] Congress passed PASPA with the intent of prohibiting state authorized sports gambling.[3] Rather than being concerned with the moral issues of gambling or the potential detriment gambling poses to society, Congress' concern was "the integrity of, and public confidence in, amateur and professional sports."[4] Congress believed that the legalization of sports gambling would increase the number of people who engage in sports betting and, in turn, lead to suspicion over controversial plays causing fans to believe games were being influenced by outside sources.[5] While PASPA may have been passed with admirable intentions, it nevertheless offends the Constitution, is redundant, and is detrimental to state economies, while being economically beneficial to criminals.

Part I of this Comment will examine how PASPA violates the Constitution by analyzing commandeering and equal sovereignty principles. Part II focuses on the inefficiency of PASPA through inspecting both the lack of impact the act has had on sports betting, as well as identifying the devices already preserving the integrity of sports. Part III highlights the harms caused as a result of PASPA. Finally, Part IV suggests a viable alternative to PASPA.

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[1] 28 U.S.C. § 3701 et seq. (1992). The main provision in PASPA essentially states neither a state nor an individual may "sponsor, operate, advertise, or promote . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games." NCAA v. Governor of N.J., 730 F.3d 208, 215-16 (3d Cir. 2013) (citing 28 U.S.C. § 3702).

[2] *Governor of N.J.*, 730 F.3d at 214-15.

[3] *Id*. at 216 (citing S. REP. NO. 102-286, at 4 (1991) *reprinted in* 1992 U.S.C.C.A.N. 3553, 3555).

[4] *Id*.

[5] *Id*.

I. PASPA IS UNCONSTITUTIONAL

A. Background

The case, *NCAA v. Governor of N.J.*,[6] was recently brought before the Third Circuit of the United States. Here, New Jersey passed its own sports wagering law.[7] The major professional sports leagues immediately brought a lawsuit, claiming New Jersey is prohibited, by PASPA, from allowing legal sports wagers.[8] In the suit, New Jersey attacked the constitutionality of PASPA.[9] Specifically, New Jersey contended that PASPA's ban on the authorization of sports betting commandeers states, and that "equal sovereignty" is violated by PASPA's allowance of four states to license sports gambling while banning forty-six from doing so.[10]

The Third Circuit found PASPA does not commandeer state legislatures because it does not affirmatively force states to enact a law.[11] While emphasizing the "choices" PASPA offers, the court explained PASPA simply forces states to choose between

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[6] *Id*. at 214

[7] Jordan Hollander, Recent Development, *Ball's in the Supreme Court's Court: Update of New Jersey's Sports Betting Lawsuit*, RUTGERS J.L.& PUB. POL'Y., Mar. 20, 2014, http://www.rutgerspolicyjournal.org/balls-supreme-courts-court-update-new-jersey's-sports-betting-lawsuit (citing *New Jersey Election Results - Other*, STAR-LEDGER (Nov. 9, 2011, 3:55 PM), http://www.nj.com/starledger/results-ballot/). Like many states, New Jersey was looking to enhance state revenue. Prior to New Jersey's attempt to legalize sports gambling, the New Jersey Legislature heard testimony that sports gambling would not only suppress the illegal sports-wagering market but also greatly enhance state revenue. *Governor of N.J.*, 730 F.3d at 217.

[8] *Governor of New Jersey,* 730 F.3d at 214.

[9] *Id.* New Jersey also challenged the League's standing and injury. *Id.* To establish standing, a plaintiff must show (1) "injury in fact," (2) causation, and (3) redressability of the injury. Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009). The Third Circuit unanimously found the Leagues have standing because the legalization of sports betting will cause the Leagues reputational harm, which may be remedied in court. 730 F.3d at 220.

[10] *Id.* at 214.

[11] *Id.* at 227.

having unauthorized sports gambling or banning sports gambling.[12] The court stated that "equal sovereignty" is not offended because the Commerce Clause is aimed at finding national solutions that may affect states differently.[13] It held in a 2-1 ruling that, "nothing in PASPA violates the U.S. Constitution."[14]

On February 12, 2014, New Jersey filed a petition for certiorari to the United States Supreme Court.[15] To date, there has been no indication whether the Supreme Court will hear the case. However, only four of nine Supreme Court Justices votes are needed to grant certiorari, [16] and the Court's recent anti-commandeering rulings in *New York v. United States*,[17] coupled with Justice Ginsberg's recent dissent in *Shelby County v. Holder*,[18] suggest there may be an increased likelihood in the United States Supreme Court hearing the case.[19] If the Supreme Court does decide to hear *NCAA v. Governor of N.J.*,[20] it will likely find PASPA unconstitutional.

[12] *Id.* at 233.
[13] *Id.* at 238.
[14] *Id.* at 240-41. The court expanded explaining PASPA "neither exceeds Congress' enumerated powers nor violates any principle of federalism implicit in the Tenth Amendment." *Id.* at 240.
[15] Hollander, *supra* note 7 (citing Ryan Hutchins, *NJ Appeals Sports Betting Case to U.S. Supreme Court*, STAR-LEDGER (Feb. 18, 2014, 1:17 PM), http://www.nj.com/politics/index.ssf/2014/02/nj_appeals_sports_betting_case_to_us_supreme_court.html; *see also* Petition for a Writ of Certiorari, *Governor of N.J.*, F.3d 208 (No. 13-967)).
[16] *Id.* (citing Donnelly v. DeChristoforo, 416 U.S. 637, 648 (1974) (Stewart, J., concurring) ("We are bound here, however, by the 'rule of four.' That rule ordains that the votes of four Justices are enough to grant certiorari and bring a case before the Court for decision on the merits.").
[17] *Id.* (citing New York v. United States, 505 U.S. 144 (1992)).
[18] 133 S. Ct. 2612, 2649 (2013) (Ginsburg, J. dissenting).
[19] *See* Hollander, *supra* note 7 (citing Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (Ginsburg, J. dissenting)).
[20] 730 F.3d 208, 214 (3rd Cir. 2013).

B. Congress is Not Authorized to Regulate How States Regulate Sports Gambling

When the Third Circuit heard *Governor of N.J.*, Judge Vanaskie stated in his dissent that PASPA is an "unconstitutional exercise of congressional authority."[21] Rather than being a federal statute that directly regulates interstate commerce, as permitted by the Commerce Clause, PASPA does not allow states to authorize sports gambling.[22] Not allowing a state to authorize an activity is the equivalent of controlling how a state treats that activity.[23]

In *New York v. United States,* the United States Supreme Court held a federal law unconstitutional because "the Act commandeer[ed] the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program."[24] The Framers of the Constitution gave "Congress the power to regulate individuals, not States."[25] This does not mean Congress cannot encourage a state to regulate in a certain way, but the Commerce Clause only authorizes Congress to regulate interstate commerce directly, it does not authorize Congress to regulate the "state governments' regulation of interstate commerce."[26] Further, nothing in *New York* limited federalist principles to instances where Congress required an affirmative act to be done by the states.[27] Rather, the Court in *New York* stated "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel

[21] *Id.* at 241 (Vanaskie, J., dissenting).
[22] *Id.*
[23] *Id.*
[24] *New York*, 505 U.S. 144, 176 (1992) (citing Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288) (1981) (emphasis original)).
[25] *Id.* at 166.
[26] *Id.*
[27] *Governor of New Jersey*, 730 F.3d at 245 (Vanaskie, J., dissenting) (citing *New York*, 505 U.S. at 166).

the States to require or prohibit those acts."[28] Acts are commandeering when it directly compel states to enforce a federal regulatory program.[29]

PASPA controls how states are forced to regulate interstate commerce,[30] which goes against the finding in *New York* that the federal government cannot regulate the state governments' regulation of the state's interstate commerce.[31] The fact that PASPA does not affirmatively direct states to regulate, technically the prohibited states can continue to have unregulated gambling,[32] is not fatal to New Jersey's "commandeering" argument. PASPA "dictates how [states] must regulate sports gambling"[33] by requiring "federal policy . . . telling the states that they may not regulate an otherwise unregulated activity"[34] and that is enough to be unconstitutional when analyzed under the proper authority.

There is no distinction between the federal government compelling state governments to create or enforce laws, and the federal government restricting state governments from creating or enforcing laws,[35] as the federal government is doing with PASPA. In both instances, the federal government is overstepping its boundaries and violating states' rights. Allowing the federal government to force states to decide between allowing unregulated sports gambling and prohibiting all sports gambling is in violation of the Constitution.[36]

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[28] *New York*, 505 U.S. at 166 (citing FERC v. Mississippi, 456 U.S. 742-66 (1982); Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288-89 (1981); Lane County v. Oregon, 74 U.S. 71, 76 (1868)).
[29] *Hodel*, 452 U.S. at 288 (1981) (internal citations omitted).
[30] *Governor of New Jersey*, 730 F.3d at 245 (Vanaskie, J., dissenting) (citing *New York*, 505 U.S. at 166).
[31] *New York*, 505 U.S. at 166.
[32] *Governor of New Jersey*, 730 F.3d at 233.
[33] *Id.* at 249 (Vanaskie, J., dissenting) (emphasis original).
[34] *Id*.
[35] *Id*. at 251.
[36] *Id*.

C. "Equal Sovereignty" is Offended When Four States are Permitted to License Sports Gambling While Forty-Six are Not

Shelby County v. Holder[37] was heard before the United States Supreme Court just months prior to the Third Circuit hearing *Governor of N.J.*[38] In *Shelby County*, the Supreme Court held a key part of the United States Voting Rights Act of 1965 unconstitutional because it forced some, but not all, states to obtain federal permission before enacting or changing any voting law.[39] The Court made their ruling on the grounds that the 1965 law offended well-established principles of equal sovereignty.[40] One factor mentioned in the opinion, was that there was much more parity in both voter turnout and minorities in state offices in the South.[41] Further, there was considerable federal legislation already protecting the same issue; therefore, the United States Supreme Court found federal legislation easier to overturn.[42] Essentially, the federal voting requirement in question was redundant and outdated. The Supreme Court noted, "If Congress had started from scratch [presently], it plainly could not have enacted the present [federal law]."[43] The Court continued to emphasize this point by stating there is no reason to preserve legislation merely because it was previously necessary.[44]

In *Governor of N.J.,*[45] the Third Circuit utilized the equal sovereignty analysis from *Shelby County*.[46] It's interpretation of the

[37] 133 S.Ct. 2612 (2013).
[38] 730 F.3d. 208 (2013).
[39] 133 S.Ct. at 2630, 2631.
[40] *Id*. at 2630.
[41] *Id*. at 2618, 2626.
[42] *See id*. (Thomas, J., concurring).
[43] *Id.* at 2630 (alteration in original). Evidenced by the actions of the New Jersey Legislature, if Congress were to attempt to enact PASPA now, it is not likely they would be as successful.
[44] *Id*. PASPA is not only unnecessary, it is unwanted. I believe that if PASPA were to be held unconstitutional, New Jersey would be one of many states to legalize sports gambling.
[45] *Governor of N.J.*, 730 F.3d 208.

voting rights in *Shelby County*[47] is crucial to New Jersey's argument that PASPA analogously violates states' right to equal sovereignty.[48] The Third Circuit distinguished the two cases, finding the regulation of gambling through the Commerce Clause distinguishable from the regulation of elections under the Reconstruction Amendments, stating, voting rights are "fundamentally different from PASPA,"[49] in that, "the Framers of the Constitution intended the States to keep from themselves . . . the power to regulate elections."[50] The Third Circuit continued their broad interpretation of the Commerce Clause, by explaining that there are multiple scenarios outside of correcting local evils where departure from equal sovereignty is allowed.[51]

The Court, in *Governor of N.J.*,[52] misinterpreted the reasoning behind the holding of *Shelby County*.[53] In *Shelby County*, the legislation in question forced some, *but not all*, states to enforce a federal law[54] similar to the requirements of PASPA.[55] Gambling may have been prohibited in forty-six states at the time of the enactment of PASPA,[56] but much has since changed regarding the amount of money wagered each year,[57] as well as the economic situations of most states. As in *Shelby County*,[58] there is already

[46] 133 S.Ct. 2612 (2013).
[47] *Id*.
[48] *Governor of N.J.*, 730 F.3d at 237 (citing Shelby County v. Holder, 133 S. Ct. 2612 (2013)).
[49] *Id*. at 238.
[50] *Id*. (citing *Shelby Cnty.* 133 S.Ct. at 2623, 2624).
[51] *Id.* at 239.
[52] NCAA v. Governor of N.J., 730 F.3d 208 (3d Cir. 2013)
[53] Shelby County v. Holder, 133 S. Ct. 2612 (2013).
[54] *Id.* at 2618 (emphasis added).
[55] *Governor of N.J.* 730 F.3d at 214-16.
[56] *Id*. at 215.
[57] *Sports Wagering*, AM. GAMING ASS'N, http://www.americangaming.org/industry-resources/research/fact-sheets/sports-wagering (last visited Apr. 9, 2014). The American Gaming Association is the leading voice in the casino industry. *Id.* (follow hyperlink "About" and then "Membership").
[58] Shelby County v. Holder, 133 S. Ct. 2612 (2013).

federal legislation that accomplishes the purpose of PASPA. "Section 1084 of Title 18 of the United States Code makes it a federal crime to use wire communications to transmit sports bets in interstate commerce unless the transmission is form and to a state where sports betting is legal."[59] Additionally, there is a federal law that makes it a crime to influence or attempt to influence any sporting contest.[60] As such, it is not necessary to continue to enforce PASPA.

Justice Ginsburg, in her *Shelby County* dissent, has essentially explained the holding means PASPA is a law that discriminates between states.[61] If the Supreme Court were to hear *NCAA v. Governor of N.J.*,[62] it would likely analyze equal sovereignty principles differently than the Third Circuit, as it did in *Shelby County*, and rule that PASPA violates both equal sovereignty and commandeering principles.

II. PASPA IS INEFFECTIVE

The Judiciary Committee's report supporting PASPA states that the Act's purpose is to prohibit sports gambling and to maintain the integrity of sports.[63] The PASPA legislation has been futile in accomplishing Congress' goal.[64] If the United States Supreme Court does not rule PASPA unconstitutional, Congress should enact legislation repealing PASPA because it is inefficient and redundant.

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[59] *Governor of N.J.*, 730 F.3d at 247 (Vanaskie, J., dissenting).
[60] *Id*.
[61] Hollander, *supra* note 7 (citing *Shelby Cnty.*, 133 S. Ct. at 2649 (Ginsburg, J. dissenting).
[62] 730 F.3d 208 (2013)
[63] *Id.* at 216 (citing S. REP. NO. 102-248, at 4 (1991) *reprinted in* 1992 U.S.C.C.A.N. 3553).
[64] *Sports Wagering*, AM. GAMING ASS'N, http://www.americangaming.org/industry-resources/research/fact-sheets/sports-wagering (last visited Nov. 15, 2014). The sports bets placed legally in Nevada represent less than one-percent of all sports bets nationwide. *Id.*

A. PASPA Has Not Significantly Reduced Sports Gambling

Despite the widespread ban on sports gambling, the overwhelming majority of sports bets are illegal.[65] In a study conducted in 2012 by the American Gaming Association, it was found that "Nevada's legal sport wagering represents less than one percent of all sports betting nationwide."[66] The same study found that $3.5 billion dollars were legally wagered in Nevada, while the "National Gambling Impact Study Commission estimated illegal sport wagers amount to as much as $380 billion annually."[67] About twenty years after the enactment of PASPA, there still remains a large number of bets and an incredible amount of money being wagered illegally. This is conclusive evidence that PASPA has not proved to be a useful deterrent in Congress' war against sports gambling.

B. PASPA is Redundant

PASPA does not provide sports leagues with any meaningful protection that was not already in place when it was enacted.[68] During the 1950's, organized crime became the major operator of sports gambling.[69] The mob was able to connect bookies from the East Coast to the West Coast, which greatly expanded the organized crimes' monopoly on sports gambling.[70] After intense pressure from the Justice Department in the early 1960's, Congress began to pass legislation with the intent to hinder sports gambling.[71] Prior to PASPA, the federal government enacted the Wire

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[65] *Id*.
[66] *Id*.
[67] *Id*.
[68] *See* Brian Tuohy, *Why Sports Gambling Should be Legal*, SPORTS ON EARTH, http://www.sportsonearth.com/article/62954908/ (last visited Apr. 21, 2014).
[69] *Id*.
[70] *Id.* ("The mob set up a national lay-off system in the 1950s, connecting bookies in major cities. It smoothed out the process, while maximizing the financial return."). *Id*. This system continues today, allowing organized crime to maximize gambling profits. *Id*.
[71] *Id*.

Act[72] in 1961, which outlawed the use of wire communications in gambling, unless the transmission was between states where sports betting was legal, and the Sports Bribery Act[73] in 1964, which made it a federal crime to bribe a player, coach, or referee to influence a game.[74] In 1970 during the Nixon Administration, Congress enacted the Organized Crime Control Act[75], making a violation of state gambling law a federal crime, while adding gambling to the crimes that could authorize a wiretap.[76] These are a few of the many federal acts that provide the same essential protections in preserving the integrity of sports as PASPA.

Even without legislation, individual sports leagues have an enormous incentive to prevent outside influence of games.[77] Leagues stay in business because they capture the interest of fans and fans are interested because their desire to see competitive gamesmanship. If a league had a game fixed, the harm would be extremely detrimental.[78] If a league consistently had games fixed, the harm may be fatal. If leagues were unable to provide untarnished, pure games, the league would lose its legitimacy and in turn, lose its fans. Leagues recognize this and utilize their resources to self-regulate without direction from the federal government.[79]

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[72] 18 U.S.C.A. §§ 1081-1084 (West 2014).
[73] 18 U.S.C.A. § 224 (West 2014).
[74] Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, 247 (3d Cir. 2013).
[75] 18 U.S.C.A. § 1961 *et seq.* (West 2013).
[76] Nelson Rose, *Anti-Sports Betting Law*, GAMBLING AND THE LAW, http://www.gamblingandthelaw.com/index.php/columns/57-146antisportsbettinglaw (last visited Apr. 9, 2014). Professor Nelson I. Rose is a Distinguished Senior Professor at Whittier Law School. He is a leading authority on gambling law with more than 1,500 published works. *Id.*
[77] BRIAN TUOHY, LARCENY GAMES: SPORTS GAMBLING, GAME FIXING AND THE FBI 68 (2013).
[78] *Id*. at 70.
[79] Tuohy, *supra* note 68.

Every player in Major League Baseball, the National Football League, the National Basketball Association, and the National Hockey League is required to sign a Collective Bargaining Agreement, which prevents the members of each respective league from gambling on their own sport.[80] The language and punishment utilized in each league vary but they all aim at deterring players from gambling.[81] Also, the above named leagues all employ a Security Division to monitor individuals and teams to ensure the players and coaches do not partake in conduct that is detrimental to the league.[82] These Security Divisions have been more than effective, as they are often staffed with former members of the FBI, CIA, DEA, and Secrete Service.[83] Major League Baseball has not admitted a fixed game since 1919, no National Hockey League player is known to have thrown a game since the 1940s, the National Basketball Association states it has not had points shaved since 1954, and the National Football League claims not a single game has been influenced.[84]

There is a direct correlation between the legalization of sports gambling and the level of integrity within sports. If more states were to legalize gambling, there would causally be more integrity in sports.[85] The legalization of sports gambling would also result in an increase of oversight on the sports leagues.[86] Not only would the leagues be under more scrutiny, but they would also have an increase in the reliability of one of their most useful

[80] *Id*.
[81] *Id*.
[82] TUOHY, LARCENY GAMES: SPORTS GAMBLING, GAME FIXING AND THE FBI, *supra* note 77, at 62.
[83] *Id*.
[84] Tuohy, *supra* note 68. Tuohy reminds his readers that infamous basketball referee, Donaghy, "was not arrested or convicted of fixing a game" referring to the National Basketball Association's claim about points shaving. *Id*.
[85] *Id*.
[86] *Id*.

instruments in detecting outside influence within a game, the Las Vegas odds.[87]

The Security Division of each league monitors the odds set, legally, in Las Vegas.[88] They look for unnatural changes in the odds, as these changes often indicate the presence of an outside influence.[89] The problem the league Security Divisions face is that the Las Vegas odds are solely influenced by money that is bet legally, which is minimal compared to the money that is being bet illegally.[90] If the odds were a representation of all the bets placed on a given event, rather than just the small fraction of legal bets that they are based off, the Security Divisions would be more effective identifying an influenced game. That being said, it is indisputable that increasing the amount of wagers placed legally would only aid the leagues in detecting a potential outside influence.[91]

III. PASPA IS COUNTERPRODUCTIVE

PASPA forbids states from authorizing and licensing sports gambling.[92] This reduces potential state revenue[93] and allows criminals to capitalize on the same revenue opportunity.[94] If the

[87] Tuohy, *supra* note 77 at 58.
[88] *Id*. at 62.
[89] *Id*. at 58-62.
[90] *Sports Wagering*, AMERICAN GAMING ASSOCIATION, http://www.americangaming.org/industry-resources/research/fact-sheets/sports-wagering. Brian Tuohy has spoken to Las Vegas sports book employees, all of which agreed that the last place a fixer would be betting is Las Vegas considering they can easily hide their bet among the hundreds of billions of dollars being bet illegally, Tuohy, *supra* note 78 at 60. The result is monitoring the Las Vegas odds are not nearly as beneficial to a given league as it would be if gambling were legal. *Id.*
[91] Tuohy, *supra* note 68.
[92] NCAA v. Governor of N.J. 730 F.3d. 208, 214 (3d Cir. 2013) (citing 28 U.S.C. §3701).
[93] Michael Levinson, Comment, *A Sure Bet: Why New Jersey Would Benefit from Legalized Sports Wagering*, 13 MARQ. SPORTS L. REV. 143, 152 (2006).
[94] Tuohy, *supra* note 77 at 42-45.

United States Supreme Court does not rule PASPA unconstitutional, Congress should enact legislation repealing PASPA because it is counter productive.

A. The Elimination of PASPA Would Give States the Opportunity to Enhance Their Revenue

States would benefit if they were able to tax the money wagered on sports games. For example, New Jersey has an eight percent tax on all gross casino revenue.[95] A recent study shows that legalizing sports wagering in Atlantic City casinos would enhance tax revenue by five to eight million dollars annually.[96] The numbers, related to New Jersey here, are not limited to New Jersey. States without casinos could capitalize on the revenue, by allowing and taxing legal gambling at other gambling establishments. It is difficult, if not impossible, to argue against the fact that the legalization of gambling in any given state would greatly enhance state revenue.

States would also generate income indirectly.[97] Gambling establishments not only profit from traditional casino games, they often include restaurants, shops, and hotels.[98] The legalization of sports gambling would attract an entirely new consumer group to casinos. The increase in customers would likely result in the creation of jobs within the casinos. Casinos along with their in-house, ancillary services would undoubtedly benefit economically from the increase in consumers, which would indirectly benefit the state.

[95] Levinson, *supra* note 93 at 152 (citing N.J STAT. ANN. 5:12-144 (West 2005)).
[96] *Id*. (citing N.J. Assembly 3493, 211th Leg., 2004-2005 Leg. Sess. (Jan. 10, 2005)).
[97] *Id.* at 152-53.
[98] *Id*.

B. PASPA Promotes Criminal's Interests

Evidenced by the evolution in federal gambling legislation,[99] gambling is a giant, underground industry that is incredibly difficult to detect and prosecute. The total revenue of Nevada's sports books in 2012 was $170 million, which was generated by $3.45 billion in wagers.[100] The remaining 2012 wagers, an estimated $380 billion, provide criminals revenue at a similar ratio.[101] History shows that the prohibition of victimless vices lead to underground markets where criminals, who are willing to break the law, are able to capitalize. By outlawing sports gambling, the federal government is giving money to criminals.[102] The increase in criminal revenue gives criminals better leverage to convince coaches, players, and referees to influence games.

IV. SOLUTION: LEGALIZE AND PRIVATIZE

If the Supreme Court or Congress determines that sports gambling should be legalized at the discretion of individual states, the next question would be whether the public or private sector should control it.

A. The Public Sector Should Not Risk It

When taking bets, the bookie's job is to set the odds so that an equal amount of money is bet on each team.[103] When the money is even, the bookie benefits because the winners are paid the losers' money and the bookie profits from taking their percentage called

[99] Nelson Rose, *Anti-Sports Betting Laws*, GAMBLING AND THE LAW, http://www.gamblingandthelaw.com/index.php/columns/57-146antisportsbettinglaw. (last visited Apr. 9, 2014).
[100] *Sports Wagering*, AMERICAN GAMING ASSOCIATION, http://www.americangaming.org/industry-resources/research/fact-sheets/sports-wagering
[101] If the illegal wagers placed in Nevada were placed legally, Nevada would have generated an additional $18.72 billion in revenue. *Sports Wagering*, *supra* note 57.
[102] *See generally* Touhy, *supra* note 77, at 42-45.
[103] Touhy, *supra* note 77, at 26.

the "vig."[104] However, when the money is unbalanced, the bookies are at risk.[105] They may get lucky and have the team with the lesser amount of money wagered on them win, giving them a surplus of money to distribute amongst few winners. Yet, they could just as easily find themselves in the opposite scenario, without enough money to distribute amongst a large amount of winners. When the money is unbalanced the bookies are unable to transfer the bettor's money amongst the bettors, which results in the bookie being responsible for paying off the debts with their own funds.

If a state were to take the place of the bookie the state would then be susceptible to losing a large amount of money on a continual basis.[106] A potential headline in the Wall Street Journal could read, "The State of New York Loses 200 Million Dollars on the Jets Game."[107] This danger would be present during every sporting event and the public sector should not take that risk.

B. The Private Sector is Equipped to Control Sports Gambling

If a state were able to legalize gambling, private companies should be allowed to risk their own money in the gambling market. After all, it is much less detrimental to society to have a private company go bankrupt compared to a state. Despite the potential risks, it is likely that many private entrepreneurs would be willing to enter this industry, as they have been in Las Vegas for quite some time.

Allowing privatized sports betting and enhancing the public sector's revenue are not mutually exclusive. No state would legalize gambling without being able to increase its revenue. States

[104] The "vig" or "juice" is the fee bookies charge on every wager. Originally the fee was around twenty percent of the total bet (a $6 wager has a chance to win $5). Today, the standard is ten percent (an $11 wager has a chance to win $10). Touhy, *supra* note 77, at 26.
[105] Touhy, *supra* note 77, at 26.
[106] Touhy, *supra* note 77, at 351 (quoting Schettler).
[107] Touhy, *supra* note 77, at 351 (quoting Schettler).

would likely tax each and every bet and do so at a high rate.[108] A high state tax rate on sports gambling would be a viable concession made in the process of legalizing sports gambling. Also, as discussed, the states would benefit indirectly as well.[109]

CONCLUSION

PASPA is unconstitutional as it violates commandeering and equal sovereignty principles. Despite recent case law[110] and Justice Ginsberg's mention of the potential demise of the Act,[111] there is no guarantee that the United States Supreme Court will grant a writ of certiorari to *Governor of N.J.* And even if the Supreme Court does decide to hear the case, it may uphold the Third Circuit's ruling. If this happens, Congress should pass legislation repealing PASPA.

PASPA has yet to prove itself effective. The purpose of PASPA is to limit gambling and protect the integrity of sports.[112] However, it has been twenty years since PASPA's enactment and legal gambling is still dwarfed by illegal gambling.[113] Prior to PASPA, there was already federal legislation[114] and league Security Divisions, each have been successful in preventing the outside influence of games.[115]

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[108] Levinson, *supra* note 93, at 152 (citing N.J. Stat. Ann. 5:12-144 (West 2005)).
[109] Levinson, *supra* note 93, at 152-153.
[110] *See generally* New York v. United States, 505 U.S. 144 (1992); *See generally* Shelby Cnty. v. Holder, 133 S.Ct. 2612 (2013).
[111] *See generally Shelby Cnty.*, at 2632 (Ginsburg, J., dissent).
[112] Nat'l Collegiate Athletic Assoc. v. Governor of N.J., 703 F.3d 208, 216 (2013) (citing S. REP. NO. 102-286, at 4 (1991)) (*reprinted in* 1992 U.S.C.C.A.N. 3553).
[113] *Sports Wagering*, *supra* note 57.
[114] Nelson Rose, *Anti-Sports Betting Laws*, GAMBLING AND THE LAW, http://www.gamblingandthelaw.com/index.php/columns/57-146antisportsbettinglaw (last visited Apr. 9, 2014).
[115] Touhy, *supra* note 77, at 62.

PASPA is counter-productive. It prevents states from enhancing revenue,[116] while enabling criminals.[117] Under PASPA, organized crime has a monopoly on the highly lucrative sports gambling trade. The increase in criminal revenue allows criminals to gain greater leverage to motivate coaches, players, and referees to influence a game.

Deciding whether or not to legalize gambling is a decision best left to each individual state. And where gambling is legalized, it is a business best run by the private sector. By legalizing and privatizing sports gambling both the integrity in sports, and the revenue of the public sector will increase directly and indirectly.

[116] *See* Levinson, *supra* note 93, at 152.
[117] Touhy, *supra* note 77, at 42-25.