

# THE BOWL CHAMPIONSHIP SERIES AND BIG-TIME COLLEGE FOOTBALL: A CONSTITUTIONAL CRISIS OF TRUST

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“Nothing short of a revolution will stop what has become a crisis of conscience and integrity for colleges and universities in this country.”<sup>1</sup>

## INTRODUCTION

Despite significant economic success,<sup>2</sup> the Bowl Championship Series (hereinafter “the BCS”), the university

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<sup>1</sup> “Vanderbilt announces athletics program restructuring,” News from Vanderbilt University, September 9, 2003. In that announcement then Chancellor E. Gordon Gee, who now serves as President of The Ohio State University, stated further that;

There are many who say that the entrenched interests – television, alumni, legislators, among others – will never truly accept anything less than a continuation of the status quo. But that simply is unacceptable – as educators, we have an obligation to try to make things better. I love college sports. However, institutions of higher learning are in danger of being torn apart by the ‘win at all costs’ culture we have created for ourselves.

<sup>2</sup> In 2010, the BCS distributed nearly \$143 million in revenue from its five bowl games. See Michael Smith, *The BCS’ Big Spilt*, SPORTS BUS. J., (2010) <http://www.sportsbusinessdaily.com/Journal/Issues/2010/01/20100125/This-Weeks->

leaders who run it, and the National Collegiate Athletic Association (hereinafter “NCAA”) must address a crisis of trust that threatens the BCS and the version of highly commercialized intercollegiate football that it has helped create. In supporting the growth of the BCS, the NCAA has acted in a manner that has undercut trust and is in clear derogation of its own Constitution.<sup>3</sup> To deal with the crisis university presidents, the NCAA and the BCS must work together to implement meaningful reforms designed to restore confidence in three areas: academic values, student-welfare, and confidence in process of determining a “national champion” in big-time football. If university presidents, the NCAA, and the BCS fail to act, the President or Congress should intervene.<sup>4</sup>

In an address to college presidents attending the annual meeting of the Southern Association of Schools-Commission on Colleges (SACS, the regional accrediting body for colleges and universities in a region that spans from Texas to Virginia) in December of 2010, David Gergen, senior political analyst for CNN,

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[News/The-BCS-Big-Split.aspx?hl=michael%20smith%20the%20BCS%20Big%20Split&sc=0](http://www.espn.com/News/The-BCS-Big-Split.aspx?hl=michael%20smith%20the%20BCS%20Big%20Split&sc=0).

<sup>3</sup> The BCS, as currently operated, arguably violates the letter and surely violates the spirit of the multiple articles of the Constitution of the NCAA, as will be shown in this essay. The BCS as we know it violates the NCAA’s fundamental policy articulated in 1.3.1 which provides that:

The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.

The BCS also violates multiple principles included in the heart of the NCAA’s Constitution – Article 2 – including the principle of student-athlete well-being (Art. 2.2), the principle of sportsmanship and ethical conduct (Art. 2.4), the principle of amateurism (Art. 2.9), the principle of competitive equity (Art. 2.10), the principle governing playing and practice seasons (Art. 2.14), the principle governing postseason competition and contests sponsored by non-collegiate organizations (Art. 2.15), and the principle governing the economy of athletics program operation (Art. 2.15)

<sup>4</sup> See, *BCS Under Scrutiny from Capitol Hill* ESPN news service, January 30, 2010, stating that, “The Obama Administration is considering several steps that would review the legality of the controversial Bowl Championship Series, the Justice Department said in a letter Friday to a senator who had asked for an antitrust review.” It is clear, that the President and members of Congress have some inclination to look into the excesses of the current BCS system. They should do just that if the NCAA and the BCS continue to fail to act in a manner consistent with the letter and the spirit of the NCAA Constitution, as argued in this essay.

adviser to four presidents of the United States, and a professor of public service and director of the Center for Public Leadership at the Harvard Kennedy School, talked about leadership and its relationship to trust.<sup>5</sup> In that address, Gergen emphasized the importance of transparency and authenticity as traits of leadership that engender trust.

The university presidents who guide the NCAA and the BCS, must exercise leadership and regain trust if they are to implement the kinds of reforms, or to use President Gee's term "revolution," that will save major college football as we know it. These leaders who ultimately control both the BCS and the NCAA have lacked transparency and authenticity in governing big-time intercollegiate football and have ignored the clear principles of the NCAA Constitution in doing so, which has given rise to a crisis of trust. If university leaders associated with the NCAA and the BCS fail to address this crisis of trust, Congress should hold hearings and the Justice Department should stand ready to intervene to renew public trust in college football.<sup>6</sup>

The challenge of diminished trust extends well beyond the BCS, because the BCS is merely symptomatic of a systemic problem in major college football. The quest to obtain and maintain power, "winning at all costs"<sup>7</sup> in the parlance of

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<sup>5</sup> The author was then serving as President of Southern Virginia University and was in attendance at the meeting. This summary of Mr. Gergen's remarks is based on the author's notes from that meeting. Rebecca R. Merrill and Stephen M.R. Covey in their book, *The Speed of Trust: The One Thing That Changes Everything* (2008) reinforce these themes and argue that trust does more than anything else to speed the process of meaningful change.

<sup>6</sup> It is not surprising that the BCS spent over \$350,000 lobbying Congress. When asked about these lobbying efforts, Bill Hancock, Executive Director of the BCS said, "We go to Congress because Congress is interested in [the fairness of the BCS], and we're achieving our goal of helping educate people on the benefits of the BCS System . . . The decisions about college football are best made by the universities, the education system, and not Congress." Dan Weil, "Football Groups Using Lobbyists to Score on Capitol Hill," NEWSMAX, February 6, 2012. Mr. Hancock is clearly right that educators, the leaders of the NCAA and BCS, should act to restore trust, not just to spend hundreds of thousands of dollars lobbying Congress to leave them alone.

<sup>7</sup> See Gordon Gee's reference to the "winning at all costs culture" that is threatening to tear apart our big-time intercollegiate athletic programs.

athletics, has its roots in our culture and plays itself out in our 21<sup>st</sup> century coliseums.<sup>8</sup>

The recent tragic scandal involving a highly regarded university, Penn State University, and its iconic and recently deceased coach, Joe Paterno,<sup>9</sup> is illustrative of the deep-rooted systemic problems that will have to be addressed to regain trust in big-time intercollegiate football. Ironically, last fall before the breaking of the scandal, I started my amateur sports law class by asking my students if they knew the name of the football coach at Penn State. Every member of the class knew of Joe Paterno. I then asked how many of my students knew the name of the president at Penn State. No student knew the name of the president. Coach Paterno was clearly better known and more powerful than the president or any other university official. Indeed, he may well have been one of the best-known and most powerful individuals in all of Pennsylvania.<sup>10</sup> As will be argued in this essay, coaches and the football programs they govern have too much power, and that power has caused big-time college football to lose its academic moorings, while presidents and other university leaders have either been unwilling or unable because of their comparative weakness to intervene to make football a part of a larger academic mission.

It should not be surprising that there was a failure to respond in a timely and appropriate manner to the allegedly predatory acts of a member of the coaching family at Penn State. By any account, whether intentionally or otherwise, coaches and administrators alike were complicit in this cover-up. Arguably,

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<sup>8</sup> Sadly, our student-athletes playing big-time football increasingly seem to be little more than gladiators performing before masses in stadiums and in the media, which brings the opportunity to observe our contemporary gladiators into every corner of our lives, including our living rooms.

<sup>9</sup> See, e.g., Rodney K. Smith, "After Penn State: Fix Big-Time College Football – or End it," SAN DIEGO UNION TRIBUNE, November 18, 2011, for a discussion of the Penn State scandal.

<sup>10</sup> This phenomenon exists at every institution with a successful men's football or basketball team – the coach is better known and more powerful than the president. Even at Ohio State University, which is led by perhaps the best-known college president in the country, E. Gordon Gee, it is likely that Coach Tressel was better known than President Gee. Coach Tressel, like Coach Paterno, emboldened perhaps by his sense that he was untouchable, engaged in a cover-up to maintain his power, to win.

fans (the consumers of the highly commercialized version of college football that characterizes the BCS), with their seemingly insatiable appetite for the spectacle that big-time college football has become, are also accomplices. In the Penn State case, the initial response of fans was to join administrators in flocking to support the football program and its venerated coach in hopes that the problem could be overwhelmed by public support rather than responding in a transparent manner in dealing with a major problem.<sup>11</sup> In time, however, as facts finally began to be disclosed, the tide turned and demands for Coach Paterno's immediate resignation were reluctantly accepted.

This lack of transparency on the part of Penn State was driven primarily by a desire to maintain the power base of a winning and respected program. Disclosing or dealing directly and publicly with such information would have momentarily weakened the reputation of the university and its football program, harming recruiting and distracting the coaches from their task of winning at virtually any cost.<sup>12</sup> Failure to deal directly with the very disquieting evidence of predatory acts, in an effort to maintain the power of the football program, eventually exacerbated the problem, diminishing not just respect for but also trust in the program and in big-time football generally.

For his part, just days before his death, Coach Paterno offered the following explanation for his failure to aggressively address this problem:

I didn't know exactly how to handle [the matter] and I was afraid to do something that might jeopardize what the university process was, so I backed away and turned it over to some other people, people I thought would have a little more expertise than I did. It didn't work out that way.<sup>13</sup>

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<sup>11</sup> See Brian Bennett, *Coach Joe Paterno Receives Students Support*, ESPN (November 9, 2011), [http://espn.go.com/college-football/story/\\_id/7210030/penn-state-nittany-lions-coach-joe-paterno-receives-students-support](http://espn.go.com/college-football/story/_id/7210030/penn-state-nittany-lions-coach-joe-paterno-receives-students-support).

<sup>12</sup> Covering up a potential child predator is a very high cost to pay, a cost much higher than failing to execute on some facet of a gameplan.

<sup>13</sup> Sally Jenkins, "Joe Paterno's First Interview Since the Penn State-Sandusky Scandal," *Post Sports*, THE WASHINGTON POST, January 14, 2012. It is not my intent to disparage Coach Paterno, because he was himself, as are many fine coaches, a pawn in the game of big-time football. He was captive of the very win at all costs culture he had

If Coach Paterno would have made it as clear that he expected action to be taken, as he would in developing the game plan for a major game, there can be little doubt that more definitive action would have been taken. He chose instead to pass it up to administrators, who in turn were surely sensitive of the need not to do anything to harm a powerful football program and thereby tarnish the university and jeopardize their own positions. A cover up was almost inevitable. Ultimately, the failure to deal transparently and directly with the matter led to a serious scandal that affected many lives and damaged the reputation of the University, its leaders, and intercollegiate football as a whole.

The underlying problem at Penn State is systemic in big-time football programs. The problem is one of power, a sense that coaches and the programs they run are untouchable and that big-time football programs need to be protected, portraying a pristine image even when the truth below the surface is not so appealing. Coaches and university leaders, including the NCAA, avoid transparency in an effort to increase or at least maintain the power associated with dominant intercollegiate football programs.

The BCS is reflective of this lack of transparency. It may not be a cartel,<sup>14</sup> but it certainly operates like a cabal, with its closed-door meetings and undisclosed objectives, creating an environment like that which gave rise to the problems at Penn State—a desire to maintain the pristine image of their postseason football programs and thereby maintain their power in directing those programs even when the values of intercollegiate athletics, as set forth in the Constitution of the NCAA are disregarded.

The BCS and major intercollegiate athletics generally lack transparency, undercutting trust. Division I football, led as it is by the BCS, lacks authenticity as well. Perhaps unwittingly, the same university leaders who control the BCS have also failed to

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become a part of. Indeed, it is deeply saddening to me that Coach Paterno faced this crisis during the final days of his life. It is clear that he wished that he had done more, sooner. My hope is that using Coach Paterno may help awaken other coaches and university leaders to the plight of big-time football in time to save it from itself.

<sup>14</sup> There is a significant debate regarding whether the BCS is a cartel for antitrust purposes. See Eric Blevins, *College Footballs' BCS (Bowl Cartel System?): An Examination of the Bowl Championship Series agreement under the Sherman Act*, 18 SPLAWN 153 (2011).

adhere to two of the pillars of higher education—student welfare<sup>15</sup> and academic values<sup>16</sup> – in the operation of their big-time college football programs. Without a clear commitment to these two pillars, leaders of the BCS and major college football lack authenticity – they are not being true to the integral purposes of higher education and are acting in a manner that violates the spirit of the NCAA Constitution to which they profess to be parties. University leaders and the NCAA are also failing to fulfill their responsibility to provide an even playing field—a system that supports fair competition,<sup>17</sup> which also violates the spirit of the NCAA Constitution. These failures have given rise to a crisis of trust.

Over a century ago, intercollegiate football faced a similar crisis of trust. Many student-athletes suffered fatal injuries while

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<sup>15</sup> The principle of student-athlete well-being is set forth in the NCAA Constitution, Article 2.2, which provides in pertinent part in Art. 2.2.3 that, “It is the responsibility of each member institution to protect the health of, and provide a safe environment for, each of its participating student-athletes.” Art. 2.2.5, in turn, provides that “It is the responsibility of each member institution to ensure that coaches and administrators exhibit fairness, openness and honesty in their relationships with student-athletes.”

<sup>16</sup> Academic values are purportedly protected throughout the NCAA Constitution. For example, Art. 1.3.1 sets forth the basic purpose of the NCAA and its participating members, “to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the students body . . .” This value is repeated in Art. 2.5, “The Principle of Sound Academic Standards.” Art. 2.2.1 also states that, “It is the responsibility of each member institution to establish and maintain an environment in which a student-athlete’s activities are conducted as an integral part of the student-athlete’s educational experience.” Another strong articulation of the importance of academic values can be found in Art. 2.9, The Principle of Amateurism,” which states that, “Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.” Arguably, the BCS is just such an enterprise. Art. 2.1.1 makes it clear, as well, that institutions are responsible for the “actions of any other individual or organization [the BCS in the case of this essay] engaged in promoting the athletics interests of the institution.”

<sup>17</sup> NCAA Constitution Art. 2.10 provides that, “The structure and programs of the Association and the activities of its members shall promote the opportunity for equity in competition to assure that individual student-athletes and institutions will not be prevented unfairly from achieving the benefits inherent in intercollegiate athletics.” As argued in this essay, this principle is violated by the BCS’s creation of an unlevelled playing field, thereby disadvantaging institutions and their student-athletes who are not members of the BCS.

playing intercollegiate football.<sup>18</sup> These injuries became a matter of public concern and President Theodore Roosevelt intervened by gathering college leaders together in a summit, in an effort to either rebuild trust and redeem football or shut it down.<sup>19</sup> College presidents accepted the responsibility of leadership and took collective steps to deal with the problem, by implementing new safety rules and setting the stage to work together to deal with issues of concern in the future.<sup>20</sup> The public sensed sincerity and intercollegiate football averted the crisis. Without rebuilding that trust, intercollegiate football might well have been eliminated or severely restricted. The collective efforts on the part of college leaders to address these issues in a manner that evidenced accountability laid the groundwork that ultimately provided the foundation upon which the National Collegiate Athletic Association was formed.<sup>21</sup>

Today university leaders face another major crisis in big-time football that is reflected in what happened at Penn State and in the current lack of public trust in the BCS. The natural inclination on the part of the NCAA and the BCS is to persuade the public and lobby increasingly skeptical political leaders to look the other way by arguing that all is well in major college football, that it is thriving and serves the university community and its fans well.<sup>22</sup> Failure on the part of the university leaders to be transparent and authentic, however, has undercut trust in their leadership and is contributing to a 21<sup>st</sup> century crisis of trust in Division I major college football.

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<sup>18</sup> See discussion in MATTHEW J. MITTEN, TIMOTHY DAVIS, RODNEY K. SMITH, ROBERT C. BERRY, SPORTS LAW AND REGULATION 101 (Vicki Been et. al. eds., 2nd ed. 2009 at 100-101).

<sup>19</sup> *Id.*

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

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

<sup>22</sup> Bill Hancock, Director of the BCS, made just such an argument when he told Evan Maisel on ESPN's college football podcast that: "I think the consensus [among college presidents] is that they want to continue with the bowl system, which is such a great experience for the athletes, and also the tradition of the Bowls; and also the regular season is so important in college football and I don't think anyone wants to take away from that." Danny Hobrock, "Bill Hancock Defends Amid NCAA President's Comments Regarding Playoff," RotoExperts, March 17, 2011.



In his recent landmark article in the *Atlantic*, Taylor Branch captured concerns with big-time college football and the NCAA's failure to initiate meaningful reform:

Efforts to reform [the NCAA and big-time college football] . . . have, while making changes around the edges, been largely fruitless. The time has come for a major overhaul. And whether the powers that be like it or not, big changes are coming. Threats loom on multiple fronts: in Congress, the courts, breakaway athletic conferences, student rebellion, and public disgust. Swaddled in gauzy clichés, the NCAA presides over a vast teetering, glory.<sup>23</sup>

The commercialization of major college football with a concomitant increase in the power of those who direct it has given rise to the kind of skepticism reflected in Branch's essay.<sup>24</sup> This skepticism is based on a sense that big-time college football as we know it in the 21<sup>st</sup> century is more about money and power than it is about academic values, student-welfare, or fair competition.

The focus on money and power has given life to serious questions of trust regarding the fairness of the current process of selecting a national champion in Division I major college football. Year after year questions linger as to which university should be named as national champion. Part I of this article will address that issue and will offer a process designed to address these issues of trust.

Parts II and III of this article, in turn, address even more significant issues of trust, issues that are often missed in the cacophony created by emphasis on issues related to which university is the real national champion. Part II examines how the current system with its focus on revenue and power has caused universities and their leaders to disregard concerns regarding class time missed and very serious injuries, the latter being the very issue that gave rise to the crisis football faced in the early

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<sup>23</sup> Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (October 2011), <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/8643/2/>.

<sup>24</sup> "Big-time college sports are fully commercialized. Billions of dollars flow through them each year. The NCAA makes money, and enables universities and corporations to make money, from the unpaid labor of young athletes." *id.*

20<sup>th</sup> century. Part III focuses on academic values—time away from class and low graduation rates—which must be addressed if football at the collegiate level is to be deemed trustworthy and authentic.

Part IV, in turn, addresses the systemic problem of unchecked power in big-time football. By leading collectively, through transparency and authenticity, the presidents and university leaders can restore trust not just in the BCS but in high-profile intercollegiate athletics as a whole. In doing so, they will also free themselves from their current state as captives in the “win at all costs” culture of big-time football fostered by the current BCS system.

In each part, the refusal to adhere to the NCAA’s own constitutional values will be noted. This refusal to follow the NCAA’s constitution makes it clear that big-time college football is being operated in a manner that derogates the very values that are at the core of intercollegiate athletics.

#### I. TRUST AND THE BCS SELECTION PROCESS

There is a section of *Wikipedia* devoted solely to “BCS Controversies,” which summarizes the sentiment that the BCS is controversial on a variety of grounds:

The Bowl Championship Series (BCS) is a selection system designed to force a “national championship game” between the two top ranking teams (in the BCS rankings), in American college football’s top division, the NCAA Football Subdivision (FBS, formerly known as Division 1-A). This championship is intended as a surrogate for a playoff system since the NCAA does not formerly determine a national championship in this category. There has often been controversy as to which two teams should be able to play for the national championship and which teams should play in the four other BCS bowl games (Fiesta Bowl, Orange Bowl, Rose Bowl, and Sugar Bowl). The BCS is also often criticized for its inequality of access to the “Big 5” bowl games for teams in non-Automatic Qualifying (non-AQ) conferences, the inequitable distribution of revenues from those games, and for the BCS’s apparent assumptions that teams from [non-AQ] conferences are by definition inferior to [AQ] conferences without arguing any rational explanations

or reasons for those assumptions. Congress has explored the possibility on more than one occasion of holding hearings to determine the legality of the BCS under the terms of the Sherman Anti-Trust Act, and the United States Justice Department, has also periodically announced interest in investigating the BCS for similar reasons.<sup>25</sup>

These “controversies” have been raised annually and have seemingly become a part of the very drama that attends the so-called national championship game. It may make for interesting marketing, but it is hardly trustworthy as a system of selecting a national championship.

Utah Attorney General Mark Shurtleff, who has indicated that he intends to file an antitrust suit against the BCS,<sup>26</sup> recently summarized opposition to the BCS on the ground that its selection process is unfair and untrustworthy:

[Big-time college football] has devolved into an unsportsmanlike system dominated by lucre and favoritism. In a letter to the Department of Justice, 21 economists called the BCS a “mathematically dubious rating system,” that shields major-conference schools from competition. It systematically denies thousands of athletes a fair chance to prove themselves in the “Best of the Nation.”

The BCS gives unfair competitive advantage to teams in six Automatic Qualifying (AQ) Conferences so that they can get richer at the expense of the rest. Since 1998, the non-AQ teams have been allowed to play only seven times in the 114 slots open in the 57 BCS Bowl games – receiving only 14% of the \$1 billion payout.<sup>27</sup>

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<sup>25</sup> While as a scholar, I am generally disinclined to cite to *Wikipedia*, this entry is an accurate portrayal of a state of affairs that is well known. In fact, the manner in which *Wikipedia* can be amended or changed by a broad spectrum of individuals interested in the subject supports the credibility of this quote, which is intended to evidence the “sentiment” of persons interested in the BCS, not the views of the BCS itself.

<sup>26</sup> At a conference regarding the BCS hosted at the Thomas Jefferson School of Law on November 17-18, 2011, Attorney General Shurtleff reiterated his intention to file an antitrust suit against the BCS.

<sup>27</sup> Mark L. Shurtleff, “BCS Has Devolved College Football Into Unfairness, Greed,” *The Arizona Republic*, Oct. 1, 2011. Danny Holbrock, the college football editor for *rotoexperts.com*, echoes Shurtleff’s sense that the BCS is unfair when he notes that, “In

Individual universities generate athletic revenues exceeding \$100-million per year,<sup>28</sup> conferences generate over \$1-billion in revenues annually,<sup>29</sup> and coaches are often paid significantly more than any other individuals associated with a university.<sup>30</sup> It is not surprising, therefore, that the BCS has sought vigilantly, if not openly, to maintain the revenue stream and the power base of its members.<sup>31</sup>

The BCS largely determines the manner in which revenues generated in the bowl series are distributed. By doing so, it maintains the powerbase of its members, as much by excluding

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the end it comes down to fairness. Teams not a part of the automatic qualifying conferences currently have a much steeper climb to a national championship game or to a BCS bowl game than those in one of the six automatic qualifying conferences.” Holbrock, *supra* note 23.

<sup>28</sup> University of Alabama’s athletic revenue for the 2010-2011 season was \$71,884,525. Krisi Dosh, *Which Football and Basketball Programs Produce the Largest Profits*, THE BUSINESS OF COLLEGE SPORTS (December 29, 2011), <http://businessofcollegesports.com/2011/06/20/which-football-and-basketball-programs-produce-the-largest-profits/>.

<sup>29</sup> The SEC brought in over one billion dollars from its lucrative television contracts during the 2009-2010 fiscal year, an eleven percent increase from the previous year and a nearly seventy-seven percent increase from six years ago. Brad Wolverton, *Southeastern Conference Passes \$1 Billion in Revenues*, THE CHRONICLE (December 8, 2010), <http://chronicle.com/blogs/players/southeastern-conference-passes-1-billion-in-revenues/27891>.

<sup>30</sup> Les Miles, Head Coach at LSU brings in an annual base salary of 3.86 Million with the possibility of \$700,000 in bonuses. Nick Saban, Head Coach of Alabama receives an annual base salary of \$4.83 million and \$700,000 in bonuses. Bob Stoops, Head Coach of Oklahoma receives \$4.0 million yearly and a possible \$819,000 in bonuses and Mack Brown, Head Coach of Texas receives \$5.19 million with a possibility of an additional \$850,000 in performance bonuses. USA Today College Football Database, <http://www.usatoday.com/sports/college/football/story/2011-12-19/college-assistant-salaries-package/52123650/1>.

<sup>31</sup> Rodney K. Smith, *Guest Column: Big-time football about power, not money*, THE COMMERCIAL APPEAL, (Dec. 10, 2011) <http://www.commercialappeal.com/news/2011/dec/10/guest-column-big-time-football-about-power-not/>. BCS is more about power than it is about dollars, because a national championship could generate far more dollars than the current bowl system. It must be conceded, however, that the BCS wants to maintain the power base of its members so that they can continue to control the distribution of revenues in a manner that maintains the significant edge over their competitors in the market of big-time intercollegiate football. BCS schools in smaller markets need to maintain control over revenues in order to maintain their powerbase. For example, the University of Mississippi needs the SEC to ensure that schools in larger regional markets, such as the University of Memphis and the University of Houston, are not able to gain full advantage of their location in the recruitment process.

some institutions and conferences from sharing in the revenue as by funneling revenue to its own members. In order to consolidate their power, university leaders acting through the BCS have created a system that is patently unfair to institutions that are not members of the BCS, thereby diminishing trust in the BCS specifically and Division I major college football generally.

The crowning of the University of Alabama as the BCS national champion after a convincing win over Louisiana State University in 2012 may be the most definitive case the BCS has made in the last decade for its assertion that the winner of its championship game is in fact the best team in major college football. Even in this banner year for the BCS, however, questions linger.

Boise State, with a single loss to a top-20 team and a significant victory over the University of Georgia, and a decisive bowl victory over a BCS member institution, ended the year ranked 7<sup>th</sup> in the BCS. Boise State was not given an opportunity to compete for the national championship. In fact, the BCS snubbed Boise State in a very public way by selecting a clearly less competitive BCS member school to participate in the BCS sanctioned bowls, resulting in a significant loss of revenue and media attention to Boise State that would have been theirs had they been selected to participate in a BCS bowl. The net result was that the BCS further consolidated the power of its members at the expense of Boise State,<sup>32</sup> in a manner that was patently unfair. The unfairness of the BCS stretches beyond the questionable manner in which it selects the two teams that will play in the national championship. The BCS's naming of the teams that will be permitted to compete in the other major bowls is also patently unfair as demonstrated by their snubbing of Boise State University.

Tracee Hamilton, writing in the Washington Post, recently acknowledged that the selection by the BCS of Virginia Tech, a mediocre team, over Boise State, to play in the Sugar Bowl, a BCS sanctioned bowl, was suspect, and placed the blame squarely on the BCS and its unfair selection process:

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<sup>32</sup> Josh Martin, 2011 Bowl Schedule: Boise State and Non-AQ Teams That Got Shafted, *Bleacher Report*, December 5, 2011.

So let's put the blame where the blame is due—right on the good ol' BCS and the good ol' boy bowl system, which is still run by the good ol' boys. The BCS was supposed to deal with the inequities of that system, in which the teams seem to be picked willy-nilly for the best of the big bowl games (with the biggest payoffs of course). That does not seem to be working.<sup>33</sup>

Oklahoma State University, another powerful one loss team, ranked third in the final AP poll, with four first place votes, ended its season with a signature win over a strong one-loss team, Stanford, leaving many wondering if they might have been able to compete against another one-loss team, the University of Alabama, if they were permitted to play in a championship game. It is clear, therefore, that even in this year when the BCS can make a solid case for its process as a means of declaring a national champion in Division I major college football, doubts linger, doubts that could be resolved by a system that is more transparent, inclusive, and fair.

Sadly, the best defense the BCS has been able to muster in support of its system as a means of selecting the national champion is that it is better than the previous system. At a recent conference regarding the BCS, hosted by the Center for Sports Law and Policy at Thomas Jefferson School of Law, when pressed to defend the current system, Roy Kramer, former commissioner of the Southeastern Athletic Conference (SEC), who is considered to be the “father of the BCS,” defended the BCS on the ground that it was better than the Bowl System that preceded it. The Bowl System was certainly no more effective in terms of being able to name a definitive national champion in big-time college football than the BCS, nor did it do much to provide universities from nonparticipating conferences with a chance to compete; but this argument is insufficient, little more than a straw man. The question is not whether the former bowl system with all its flaws was worse than the current system – it is, rather, whether there is a better system.

The NCAA Constitution demands more of its members, including those who run the BCS. It requires that they comply

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<sup>33</sup> Tracee Hamilton, “Sugar Bowl 2012: Virginia Tech Should Not Apologize for the BCS Embarrassment,” *THE WASHINGTON POST*, December 1, 2011.

with the principle of competitive equity in Article 2.10 of its constitution. Article 2.10 requires that,

The structure and programs of the [NCAA] and the activities of its members shall promote opportunity for equity in competition to assure that individual student-athletes and institutions will not be prevented unfairly from achieving the benefits inherent in participation in intercollegiate athletics.

The BCS selection process also clearly violates Article 2.15 (The Principle Governing Postseason Competition and Contests Sponsored by Non-collegiate Organizations] which mandates that;

The conditions under which postseason competition occurs shall be controlled to assure that the benefits inherent in such competition flow fairly to all participants, to . . . protect student-athletes from exploitation by professional and commercial enterprises.

NCAA-sanctioned national championships in other major sports are far more trustworthy means of selecting a national champion and of assuring fairness in competition than is the BCS. It is not surprising, therefore, that they have been subjected to far less criticism. There may be complaints by teams on the “bubble” for having failed to be invited to participate in the playoffs in men’s basketball, for example; but there is not the chatter about the legitimacy or trustworthiness of the final results in men’s basketball with its playoff system that exists on an annual basis with regard to the BCS’s selection system. It is not surprising, therefore, that fans favor a playoff, and such a move would therefore clearly help rebuild trust.<sup>34</sup>

A national championship system can easily be developed. Many models have been suggested and some are apparently being considered as the BCS approaches the end the current contract with ESPN.<sup>35</sup> Larry Scott, PAC-12 Commissioner, in reference to

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<sup>34</sup> See Eric Blevins, *College Football’s BCS (Bowl Cartel System?): An Examination of the Bowl Championship Series Agreement Under the Sherman Act*, THE SPORTS LAWYERS JOURNAL, 18 SPORTS LAW. J.153, 167-68 (2011).

<sup>35</sup> See, e.g., Steve Wieberg, *BCS Adjustment Coming, But to What Degree?* USA TODAY, January 8, 2012. Wieberg references the BCS meeting held in January of 2012 and explores some of the options that will no doubt be discussed in that meeting.

private BCS meetings held in January 2012 stated, in reference to whether the BCS might adopt a new format for selecting the national champion in big-time football, that, “There’ll be a very open and robust discussion about a variety of options.”<sup>36</sup>

Perhaps, the most conservative recommendation is a 4-team (2-game) playoff that can be incorporated into the current bowl system, a concept which has been supported by NCAA President Mark Emmert,<sup>37</sup> and which may well be the BCS’s favorite. Proponents of that 4-game system argue that it would create more fairness, and clarity in terms of the naming of an accepted national champion, and would also address legitimate educational concerns regarding time away from class on the part of student-athletes and related academic values, issues that will be discussed in the following parts of this essay.

Representatives of the WAC, a non-AQ conference, have expressed concerns that a 4-team playoff could well be even more unfair to non-AQ conferences in terms of competitive equity, however, because it is likely that the powers that control the BCS and its selection process would implement a system that could effectively close the doors on teams from non-AQ conferences, resulting in more competitive inequity but shoring up the powerbase of the BCS. As previously noted, in 2012, Boise State with one loss was completely closed out of the BCS bowl system in favor of lesser teams, which evidences the likelihood that a 4-team BCS orchestrated bowl will not address the BCS’s significant trust deficit and will, if implemented, only marginally restore confidence in big-time football.

An 8-team (7 game) or 16-team (15 game) playoff is also a possibility. The Mountain West Conference has developed a plan for a 16-team, 15-game national championship.<sup>38</sup> A 16-team playoff could easily involve both AQ and non-AQ conferences, resulting in more competitive equity and increased revenues

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<sup>36</sup> *Id.*

<sup>37</sup> NCAA President Mark Emmert recently stated that, “The notion of having a Final Four approach is probably a sound one.” Zachary D. Rymer, *Plus One Playoffs: NCAA President Comes Out in Favor of Proposed Format*, Bleacher Report (January 12, 2012), <http://bleacherreport.com/articles/1022610-plus-one-playoff-ncaa-president-comes-out-in-favor-of-proposed-format>.

<sup>38</sup> See, e.g., Craig Harris, *Mountain West Conference Proposes 16-team College Football Playoff*, ARIZONA REPUBLIC, October 19, 2011.



which could be shared more broadly, as is the case with “March Madness” the NCAA’s playoff in men’s Division I college basketball. A “Holiday Madness”<sup>39</sup> 8- or 16-team playoff would also clearly provide more equity and parity, thereby increasing public trust.

One non-academic objection to such a playoff system is that it would disrupt the current bowl system and the bowl and television contracts underlying that system. Since the ESPN contract expires in 2013, the problem with the television contracts can be easily addressed. Indeed, it is likely that the television contract will be far more marketable. Of course, given the intransigence on the part of the NCAA and the BCS, it is sadly likely that this window of opportunity may come and go. The NCAA needs to act now.

An additional contractual obstacle remains, however. Individual contracts between the BCS, conferences and individual bowls remain. Those contractual issues will have to be dealt with on a case-by-case basis, but it is clear that for the most part, in the short term, as the terms of the contracts draw to a close, that the bowls can largely be incorporated into the national championship competition, which would strengthen the bowls during the remaining term of existing contracts. In the long-term, the NCAA could also work with cities that have historically participated in the bowl system to allow them to host games, which will provide increased economic development dollars to participating cities. Such a system would circumvent bowl officials—the highly paid middle-man—but would provide a more competitive game and increased development dollars for cities sponsoring playoff games along the road to the national championship.

The bowl system has some historical merit, but its debits outweigh its credits and bowl contracts should not be renewed when they expire in the future. The bowl system results in a diversion of funds generated by the participating universities and their student-athletes to non-university local groups with highly paid executives, who enjoy significant expense accounts, which translates into high costs of doing business.

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<sup>39</sup> “Holiday Madness” is a term that I have developed that would also emphasize that the playoffs would be held over the holiday season, thereby doing little to disrupt the academic schedules of participants.

Peter Kotz goes a step further and asserts that “insiders use the bowl system to loot American universities.”<sup>40</sup> Kotz asserts that:

The scheme plays out on the ostensibly pristine fields of amateur athletics. Bowl executives grant themselves breathtaking salaries. The games meanwhile provide coaches, athletic directors and the suits who nominally supervise them with an unending stream of bonuses. . . .

College football is the only sport that gives away its post-season revenues. Its business model is akin to Wal-Mart keeping its profits for the first ten months of the year and then letting Value World host its holiday sales.

This is an especially hazardous form of capitalism for the nation’s universities, which have been bloodied by ever-diving state funding combined with double-digit tuition hikes.<sup>41</sup>

While there may be some exaggeration in Kotz’s arguments, it is clear that it is economically imprudent to maintain the bowl series, which essentially outsources the national championship, because the bowl system generates less revenue than would be generated by a playoff system. It is not surprising that this anachronistic form of outsourcing through an inefficient and ethically suspect, in some instances, bowl system does not exist in any other NCAA sponsored sport. A failure to examine a questionable outsourcing arrangement in any other context in these trying economic times would surely be considered either malfeasance or misfeasance. The fiscal irresponsibility inherent in the bowl system also violates Article 2.16 (The Principle Governing the Economy of Athletics Program Operation) which requires that,

Intercollegiate athletics programs shall be administered in keeping with prudent management and fiscal practices to assure the financial stability necessary for providing student-athletes with adequate opportunities for athletics competition as an integral part of a quality educational experience.

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<sup>40</sup> Peter Kotz, *Bowling for Chumps*, HOUSTON PRESS NEWS, December 14, 2011.

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

There are other areas in which economic issues should be openly considered. Writing for *Sports Illustrated*, Andy Staples, notes that:

In football, four bowls form a cartel called the Bowl Championship Series to negotiate a television contract worth \$125-million a year. That money is redistributed by conference, with the six most powerful getting a guaranteed share and the five least powerful ones getting significantly less. If the presidents permitted the NCAA to run an FBS football tournament, conservative estimates put the television contract at three times what the BCS makes.<sup>42</sup>

With a playoff, universities would also share in larger game-day revenues, from an 8-team, 7-game, or 16-team, 15-game playoff. Each game would matter, not just to the universities and their student-athletes but also to the viewing public. Selling tickets and filling stadiums would be far different than the current non-BCS model, under which participating universities struggle to sell the required number of tickets to a lackluster game of little significance and often lose money because of travel expenses.<sup>43</sup>

It is clear that the refusal to move from a bowl system, dominated by an unfair BCS selection process, is less about money than power. More money will be generated by a playoff system; but BCS member institutions recognize that those funds would be distributed more broadly, resulting in increased parity. BCS members are more fearful of the impact of parity on their programs—of losing their unfair competitive advantage—than they are with raising more revenue.

In his thoughtful article, Staples also notes that such creating a playoff need not end the bowls in the short or long-term:

[A play-off] would not kill the existing bowls because they are far too valuable as television inventory. (In fact, ESPN owns

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<sup>42</sup> Andy Staples, *Fiesta Bowl Saga Strong Reminder that BCS System Invites Corruption*, SPORTS ILLUSTRATED, March 30, 2011.

<sup>43</sup> Craig Harris, *Trips to BCS Bowl Games can Cost Some Schools big Money*, USA TODAY (September 28, 2011), <http://www.usatoday.com/sports/college/football/story/2011-09-28/bcs-bowl-games-cost-some-schools/50582512/1>.

and operates some of the worst bowls simply because they make excellent late-December programming.) A move to an NCAA tournament would, however, reduce the possibility of corruption by reducing the financial stakes of those who run bowls.<sup>44</sup>

Staples is right – bowls have had their share of corruption. Alleged corruption has even given rise to indictments, as was the case recently with the Fiesta Bowl.<sup>45</sup> Certainly, not all bowls are corrupt and some do their share of good in the communities they serve; but they are at best superfluous.

It is clear, from a financial perspective and in terms of trustworthiness that universities would do well to end their questionable relationship with the bowl system. Ending the current bowl system, however, raises certain problems that must be addressed.

Frankly, under a playoff system, the BCS will also become superfluous. The NCAA does not need another entity to run a major championship. That may be a subtext in the apparent disagreement between Mark Emmert, who directs the NCAA (and is open to a playoff), and Bill Hancock, who directs the BCS.<sup>46</sup> This would be welcome, since the BCS middle-man has acted independently and, as noted in this essay, in a manner that openly disregards the constitutional values that are at the core of the NCAA. This disregard undercuts public trust in the NCAA. The BCS, like its bedfellow, the Bowls, should be eliminated as superfluous.

It is clear, as previously noted, that there will be individual contract issues to sort out with existing bowls, but that can be done in a number of ways. In the long term, the bowls (but not necessarily their communities) that have historically hosted those games should be terminated as costly outsourcing, the contractual interests can be met. One way, in the short term, will be to make each of the fifteen games played in a 16-team playoff, on the way

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<sup>44</sup> *Id.*

<sup>45</sup> See, e.g., Craig Harris and Dennis Wagner, *Former Fiesta Bowl Executive Officer Indicted*, ARIZONA REPUBLIC, November 17, 2011.

<sup>46</sup> See Holbrock, *supra* note 22, noting Emmert's openness to a play-off and Hancock's general opposition to a playoff, which effectively would render the BCS superfluous.

to the national championship game, a “bowl” game. That would satisfy 15 bowl participants. Those 15 participants should be thrilled, because the games would be more significant. Given that each game will lead on to the next step in the playoffs for the winning team, big-time football can develop its version of “holiday madness,” filling stadiums and drawing luster to some of the lesser bowls that are selected to host playoff games. If necessary in the short-term, while contracts expire, bowl sites not selected to participate in the 15-game playoffs, could still host bowl games for teams left out of the playoffs, much as the NIT has done in basketball.

It is clear, however, that a number of conferences are concerned that an expanded playoff would “render what is now a healthy and profitable regular season less meaningful.”<sup>47</sup> These revenue concerns may be legitimate for some universities. A 16-team playoff would necessarily result in a shortening of the regular season, in the interests of student-welfare and in furtherance of academic values, as noted in the following parts of this essay. This would, however, take away regular season revenue generated by individual games that many successful programs have come to depend upon to fund their ever-burgeoning athletic programs. Net revenues raised from a highly marketable playoff system may, however, exceed revenues lost in the regular season. Playoff games will be highly valued in the marketplace. In turn, given that an increased number of schools will be competing for the opportunity to participate in the playoffs, regular season games may draw more fans during season, enhancing the revenue generating capacity of fewer but more noteworthy games during the regular season. With conference expansion, and smaller divisions, conferences could also maintain their conference championships, which generate significant revenue. Revenues generated by the national championship could be shared, as is the case with “March Madness,” the NCAA’s D-I men’s basketball playoff. At any rate, one may not simply assume that there will be an overall loss in revenues by shortening regular seasons and developing a legitimate playoff.

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<sup>47</sup> *Supra*, note 35.

Nevertheless, it remains conceivable that some of the more powerful schools that pack stadiums week after week and command significant media dollars for each game played may suffer some short-term revenue loss. It is likely, however, that their greater concern is that a more open playoff system will have the effect of creating more parity and thereby limit the powerbase of BCS institutions, which are preferred in the current system. Therefore, while in the long run a 16-team playoff may be helpful financially for most universities, many BCS members recognize that such a playoff may result in some diminution of power of their member institutions. Once again it appears without a more persuasive accounting or analysis of net income generated by a playoff and a shortened season, this argument may be mere subterfuge. Once again, we need more transparency—more open analysis of economic claims—on the part of school's that argue against a more open playoff that it is really about maintaining power not just revenue.

There is another major argument against a 16-team playoff. Legitimate concerns can be raised regarding the impact of an extended playoff season on participating student-athletes. President Emmert succinctly states this argument, when he asserts that, “moving toward a 16-team playoff is highly problematic because I think that is too much to ask a young man's body to do. It's too many games, it intrudes into the school year.”<sup>48</sup>

Essentially, President Emmert is arguing that expanding the number of games played in a season to provide for a playoff system would be harmful to student-athletes and would undercut academic values. This argument assumes that the season would have to be lengthened in order to facilitate a playoff. In fact, if a 16-team playoff was implemented and seasons were shortened, such concerns would have little merit. The remaining issue is again one of economics or revenues. It is not clear that net revenues would be affected in significant ways. Such a conclusion requires an accounting that has not been made. There may or may not be a significant drop in net revenues, given that existing games will be more significant.

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<sup>48</sup> *Supra*, note 37.

Even if there is a drop in revenue for some schools in the short term, the very values—student welfare and academics asserted by President Emmert and others—could be served with a playoff. As argued in Parts II and III of this essay,<sup>49</sup> if the season were shortened to 9 or at most 10 games for conferences with a playoff, only two teams would play 13 or 14 games and the remainder would play fewer games, and have fewer practices, translating into fewer injuries thereby enhancing student welfare.

Students would also have more time for classes, because the games could be played during holiday weeks (“Holiday Madness”) when students are not in class. Playing fewer games in a shortened season would also result in fewer missed classes for the vast majority of student-athletes playing Division I major college football. Missing less class time should also increase the likelihood that the student-athletes will graduate, meeting academic values.

More will be said regarding these issues in Parts II and III, which addresses student welfare and academic values issues directly, but it should be emphasized that arguments opposing a playoff system on student welfare and academic grounds, even by well intended educators like President Emmert, are at best diversionary, little more than an effort to “hide the ball.” If there is real concern about student welfare issues of the kind raised by educators supporting the status quo or a mildly reformed version thereof, then seasons should be shortened or at a minimum the slow move toward lengthier seasons that we have experienced in major college football since the BCS was formed<sup>50</sup> should have been opposed and the use of a playoff could provide a rather paradoxical means for doing just that. Indeed, as we have moved toward larger conferences, with divisions, if university leaders are genuinely concerned about the issue of the length of a season, they have a wonderful opportunity to shorten seasons, while provide a system that will increase postseason revenues dramatically as an offset to lost regular season revenues.

Sadly, however, with their focus on the goal of maintaining a system that maximizes power, and secondarily revenue, university

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<sup>50</sup> LSU, for example, played 11 games in 1998, when the BCS was formed, and 14 in 2012. Had they played in a bowl, they would have played in a total of 12 games in 1998.

leaders associated with the BCS have slowly added additional games and have taken their eye off issues related to student-welfare and academic values. As the following discussion makes clear, the current BCS system does not fare well when analyzed from the perspective of student-welfare and academic values.

## II. STUDENT-WELFARE CONCERNS

One can hope that university leaders may be trying to balance the pressures they feel as a result of the powerbase of coaches and the public reification of big-time football<sup>51</sup> when they compromise student-welfare concerns. Sadly, however, they may be willing participants in the effort to solidify the powerbase of major college football at the expense of their so-called student-athletes. How they deal with the current crisis will determine whether they are unwitting or witting accomplices in “win at all costs” culture of big-time college football.

Many coaches, including no doubt Coach Paterno, consider themselves in some measure to be teachers of young men. They nevertheless are caught up in the culture of winning and maintaining their powerbase to give them a competitive edge. Despite the fact that some schools provide small bonuses for graduation rates in their contracts with their coaches,<sup>52</sup> it is clear that coaches in major college football are hired to win. This focus on winning – building and maintaining a *powerful* winning program often at the cost of student welfare – permeates football at the highest collegiate level.

Issues related to the failure to address student welfare concerns in BCS driven college football have been discussed in

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<sup>51</sup> One can imagine an anthropologist finding tapes of football games at some time in the future, which would result in a vigorous disagreement between those latter-day anthropologists who surmise that it is an early 21<sup>st</sup> century version of gladiators at work and those who believe that it is some kind of primitive religious gathering.

<sup>52</sup> Urban Meyer, newly appointed Head Football Coach for Ohio State University receives a base salary of \$4 million with additional \$700,000 possible in performance incentives and graduation rates. Greg Bishop, *For New Football Coach at Ohio State, its First Down and 4 Million*, THE NEW YORK TIMES (November 28, 2011), <http://www.nytimes.com/2011/11/29/sports/ncaafotball/for-new-coach-at-ohio-state-its-first-down-and-4-million.html?pagewanted=all>.



detail elsewhere.<sup>53</sup> Two major issues related to student welfare are protecting student-athletes from injuries and insuring that they have ample time to be a student and obtain the academic benefits they are promised in exchange for their participation in the highly commercialized world of big-time college football. On both of these fronts, the BCS and big-time football receive a failing grade.<sup>54</sup>

Since 2006, the number of classes missed by student-athletes has increased 40%.<sup>55</sup> Student-athletes are being removed from the classroom and campus to play more games, many of which are now held during the week in order to satisfy fan and therefore media demands.<sup>56</sup> This is why comments like those made by President Emmert opposing a playoff on the ground that it would harm students by taking them out of class are received with skepticism.

Student welfare concerns regarding injuries have also been exacerbated by lengthy seasons. Much attention has been given to concussions and other head injuries that are suffered by student-athletes playing football.<sup>57</sup> The Brain Injury Research Institute reports that 10% of college and 20% of high school football players sustain brain injuries in a given season.<sup>58</sup> In testimony offered on January 4, 2010 before the House Judiciary Committee at a field hearing in Detroit, Michigan, Dr. Bennet Omalu, who is generally credited with having discovered the first case of dementia related to football in 2002, testified that

The concept of permanent brain damage and dementia following repeated blows to the head is a very well established and generally accepted principle in medicine. . .

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<sup>53</sup> Smith and Milhiser, *The BCS and Big-Time Intercollegiate Football Receive an F: Reforming a Failed System*, 2 WAKE FOREST JOURNAL OF LAW AND POLICY (forthcoming 2012).

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

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

<sup>56</sup> With ESPN's marketing of major college football on Thursday nights, traveling student-athletes are virtually assured of missing class on two or three days during the middle of the week when travel will necessarily occur. The institutions and their coaches want to be on television and ESPN wants to expand its market, without considering the academic needs of student-athletes.

<sup>57</sup> Smith and Milhiser, *supra* note 53.

<sup>58</sup> Trauma on a non-adult brain is more significant – more likely to lead to serious complications – than a blow to the head of an adult. See THE BRAIN INJURY RESEARCH INSTITUTE, <http://brainresearchinstitute.org/index.html>.

The current issue at stake is not the debate whether CTE [brain injury from blows to the head] exists, but what we can all do together to help protect athletes . . .

The current focus has been on concussions, while we are not yet paying enough attention to sub-concussions. There is a broad spectrum of acceleration-deceleration injuries to the head; unfortunately, a concussion may represent one end of the spectrum. Sub-concussions or blows to the head which may not manifest with immediately incapacitating symptoms and signs are equally as important in the patho-etiology of CTE.<sup>59</sup>

Based on his and related research, Dr. Omalu added that, “One may question the basis for keeping a concussed player out of play for any time shorter than three months.”<sup>60</sup> Dr. Omalu closed his testimony with a call to action on the part of those who sponsor contact sports like football:

Understanding traumatic brain injuries is a complex endeavor, which requires multi-faceted and multi-disciplinary efforts that cannot be provided by only a committee of doctors and other professionals. [Organizers] of contact sports, at all levels, should finance studies and reports by different, unrelated independent research groups and individuals across the United States . . . No single group can provide all the innovative ideas, novel methodologies, original thought and intuition, which would be needed.<sup>61</sup>

Surely, if university leaders are committed to student welfare, given that on an annual basis 10% of their students playing football for the university are likely to suffer brain injuries,<sup>62</sup> with others subject to possible latent brain injury, they should heed Dr. Omalu’s call to provide funding and support for research. If there were a playoff, then a portion of the revenues generated by student-athletes participating in those games could be dedicated to supporting research and university leaders would

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

<sup>60</sup> *Id.*

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

<sup>62</sup> If 10% of college football players are believed to suffer head injuries in a given season, a student-athlete takes a major risk every time he steps on the field and over the course of a collegiate career that often spans 5 active years – 4 years of eligibility with 1 year as a redshirt.

thereby accept a portion of their responsibility to ensure that the safety of their players is paramount.

Given the vigorous contact in big-time college football, other serious injuries occur with regularity. Sport Safety International, a group of doctors and other professionals concerned with safety in sport, addresses the breadth of safety issues related to college football:

Over the past year, a lot of attention has been placed on the importance of long-lasting and potentially catastrophic conditions related to heat illness, concussion, and sudden cardiac death [in football]. . . .

Football is a collision sport whereby injuries are bound to happen. The majority of serious injuries are related to some form of contact, yet other musculoskeletal injuries [e.g., torn ACL injuries] that have a significant impact can also occur from non-contact movements.<sup>63</sup>

Knee and other injuries are common in big-time football.<sup>64</sup> Indeed, many college athletes will discover that debilitating injuries later in life are often a hidden price of their participation in intercollegiate athletics.

In addition to providing more support for research regarding head injuries, there are two major ways in which University leaders can deal with student welfare issues related to injuries: 1. by creating stronger safety rules; and 2. by shortening the number of games and practices, thereby decreasing the likelihood of injury.

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<sup>63</sup> See FOOTBALL KNEE INJURIES, <http://sportsafetyinternational.org/content/football-knee-injuries>.

<sup>64</sup> The current system exposes athletes to the risk of serious and debilitating injuries. The Cleveland clinic said that a college football player has a 16% chance of tearing his ACL during a 4 year career. Smith and Milhiser, *supra* note 53( citing Jeb Williamson, *Give and Let Give: Curbing the Rise of ACL Injuries in College Football*, BLEACHER REPORT (Apr. 5, 2010), <http://bleacherreport.com/articles/373615-give-and-let-give-curbing-the-rise-of-acl-injuries-in-college-football>). 278 cervical cord injuries arose from playing football between 1997-2007 and 38% of football players injure themselves simply by tackling another player. Head Injuries are also a grave concern. See also, Michael Craig Miller, MD, *Concussions in Football*, HARVARD HEALTH BLOG (Aug. 14, 2010), <http://www.health.harvard.edu/blog/concussions-in-football-20100814260>.

While there have been some efforts to increase safety on the part of student-athletes,<sup>65</sup> there is much yet to be done,<sup>66</sup> as is evidenced by the fact that concerns of medical professionals often are ignored. It is unlikely, for example, that Dr. Omalu's recommendation that football players suffering a concussion not be permitted to play for three months will be put in the NCAA rule book to ensure the safety of student-athletes.

There is a culture in football that applauds an athlete for "playing through" an injury.<sup>67</sup> Often, coaches praise them for doing so. This culture makes it difficult for university leaders to adopt significant safety rules that in any way might be construed as impeding the game.

Kyle Meinke, a reporter who covers University of Michigan football, a major BCS program, praised a Michigan player for "learn[ing] to play through injury by shutting up, growing up."<sup>68</sup> Meinke's article, written in the midst of a highly competitive season, captures the cultural phenomenon of playing hurt or playing through an injury:

Taylor Lewan was wearing a walking boot. He had a cast on his right wrist. His elbow was bothering him.

And he was complaining.

The Michigan football team's star left tackle has been lauded by teammates for playing through a growing number of injuries, especially considering the tenuous depth up front if he goes down.

But his pain reached a climax during the week off following the physical – and in his case, violent – Michigan State loss.

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<sup>65</sup> The NCAA passed legislation in Aug. 2010 that requires each member institution to develop its own concussion management plan for reducing the risks and safely treating the injuries. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Health+and+Safety/Concussion+homepage/Concussion+Landing+Page>.

<sup>66</sup> Smith and Milhiser, *supra* note 53.

<sup>67</sup> See, e.g., Michael Florek, *Van Bergen Plays Through Injury, Finishes Storybook Career*, THE MICHIGAN DAILY, January 14, 2012.

<sup>68</sup> Kyle Meinke, *Michigan's Taylor Lewan Learns to Play Through Injury By Shutting Up, Growing Up*, ANNARBOR.COM, November 10, 2011. <http://www.annarbor.com/sports/um-football/michigans-taylor-lewan-learns-to-play-through-injury-by-shutting-up-growing-up/>

He couldn't practice, but was riding a bike during workouts. And running his mouth.

That's when senior center David Molk told the gregarious Lewan to shut up.

Lewan said that is the best injury advice he's ever received. . .

"If you don't talk about pain, it will go away. That's one thing David Molk taught me."

That helps to explain how Lewan's been able to stay in the lineup despite his mounting injuries.

Coach Brady Hoke said that kind of courage has given No. 22 Michigan a lift – one it will need as it prepares to face the good defensive line of Illinois on Saturday (3:30 p.m. ABC). . .

"People keep talking about staying healthy and fighting through injuries and stuff, and I don't know why everyone is making a big deal out of it," [Lewan] said. "I'm playing football. I'm an offensive lineman, that's what I'm supposed to do."<sup>69</sup>

As the case of Taylor Lewan illustrates, injuries are common in major college football and student-athletes are simply expected to ignore or play through them for the team and for their coaches and fans who, in Lewan's case, were expecting to see him on the field on the following Saturday in a game televised by a major network, ABC.

This cultural phenomenon is related to the power issue. University leaders are hard-pressed to deal with such student-welfare issues, because they pervade not just our universities with big-time football programs but are also a part of our broader culture. As educators, however, university leaders must collectively exercise the courage and ingenuity to find ways to address these cultural issues, by educating the broader public.

The NCAA Constitution demands as much from its institutions and leaders. Article 2.2 (The Principle of Student-Athlete Well-Being) requires that,

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<sup>69</sup> *Id.*

Intercollegiate athletics programs shall be conducted in a manner designed to protect and enhance the physical and educational well-being of student-athletes.

Article 2.2.3 (Health and Safety), in turn, mandates that, “It is the responsibility of each member institution to protect the health of, and provide a safe environment for, each of its participating student-athletes.” To continue to ignore, or address these student-welfare concerns in a minimalist manner, clearly violates the NCAA Constitution.

If university leaders are to regain trust, they must address student-welfare issues in meaningful ways. They must reduce the number of games and practices with contact, which will reduce injuries and will provide student-athletes with more time to address their academic needs. The NCAA and its member institutions must adopt and enforce more stringent rules designed to increase the safety of their student-athletes. And, finally, they must address the underlying cultural issue of winning at virtually any cost that gives rise to expectations that student-athletes, like gladiators of old, fight through their injuries, even though the result of doing so may be debilitating injuries now or in the future. Anything short of sincere efforts to deal with these issues will be insufficient to regain trust.

Dealing with cultural issues—fighting through or ignoring injuries in the interests of the team—will require a commitment to education based on genuine concern for the health and safety of student-athletes. Football at the BCS level is by its very nature a threat to the health and safety of student-athletes. If the NCAA and leaders of the institutional members playing at this level fail to address safety issues in an optimal manner, by being willing to shorten seasons and limit the number of contact practices, they may simply be putting off a crisis that may one day threaten big-time college football itself. One can imagine a season filled with serious injuries and even deaths giving rise to cries that all of college football be eliminated. If there is any chance that such a result might ensue, academic leaders who support major college football must take stronger and clearly visible action to deal with injuries through rules designed to increase safety and through education to deal with the “win at all costs—play through injuries”

culture that dominates big-time college football and begets or exacerbates many injuries.

It is acknowledged that the recommendation in Part II of this article supporting a 16-game playoff be adopted, as a means of insuring competitive equity, would run counter to safety and student-welfare issues. That is why it is also recommended that the season be limited to 9 or at most 10 games, which would have a significant net impact of limiting contact for the vast majority of student-athletes participating in FBS intercollegiate football. Most teams would not make the playoffs, resulting in a shortened and safer season for thousands of student-athletes involved in big-time college football. In such a system, 16 teams would play no more than 11 games, 8 would play no more than 12 games, 4 would play not more than 13 games, and only 2 would play as many as 14 games. The net result would be a dramatic reduction in the number of games played, a shortened season (the playoff, "Holiday Madness," would extend from the end of finals in the fall semester to the beginning of the spring semester in January), and would benefit thousands of student-athletes.

As previously noted, a playoff system could also provide dollars for research, for workers compensation, and other forms of insurance for players.<sup>70</sup> It would, in short, fulfill both the letter and spirit of the NCAA Constitution and would do much to renew trust in the NCAA and major college football.

### III. ACADEMIC VALUES

The adverse impact of the BCS and big-time college football on academic values has been explored in depth elsewhere.<sup>71</sup> The

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<sup>70</sup> Smith and Milhiser addressed this issue in greater detail, recommending that: "more revenue generated from games needs to be put towards supporting student-athletes and institutions that serve them well, academically and in terms of student welfare needs. This support could be generated from a national championship game or a series of bowl games and could be awarded in the form of extra scholarship positions, increased scholarship funding, and monetary contributions to successful institutions (institutions that graduate their students and provide for their welfare). Other student-athlete-centered benefits could also be considered, such as classes that teach student-athletes valuable skills such as financial health, interviewing, and time-management. Bowl-generated revenue should go directly to the schools instead of the organizations running the bowls." Smith and Milhiser, *supra* note 53.

<sup>71</sup> *Id.*

BCS criteria for playing in the national championship game have nothing to do with academic values. It has been argued that the BCS and NCAA should consider graduation rates as a part of their selection process.<sup>72</sup> As previously noted,<sup>73</sup> they also should try to schedule games to limit class time missed during the post-season.

Perhaps based on its purpose of merely providing for a postseason designed to benefit its members in monetary and power-enhancing ways, the BCS has done little to promote commitment on the part of its membership as academic leaders to keep their academic promises to (contract with) student-athletes who participate in the BCS bowl games. The best evidence of the fulfillment of their academic promise to their student-athletes is the rate at which student-athletes involved in the BCS graduate. If universities are going to “pay” their athletes with education, as they should,<sup>74</sup> then the best evidence that they are keeping their promise, in exchange for the student-athlete’s promise to play, is graduation rates. Successful students generally graduate.

The BCS was completely indifferent, perhaps oblivious, to the fact that their 2011 national championship game pitted two teams with poor records of keeping their academic promises to their football players, as evidenced in their comparatively weak graduation rates:

Auburn University and the University of Oregon had some of the poorest graduation rates in college football, particularly for athletes of color. Auburn actually had the greatest disparity in graduation rates for its football team of any of the schools participating in the Bowl Championship Series (BCS) [40% of their players of color and 100% of their white players graduated]. Oregon had less of a disparity between graduation rates for athletes of color and other athletes, but its graduation rate [of 54 percent] for athletes generally and athletes of color [41 percent as opposed to 77 percent of their white players graduating] was near the bottom of all participants.<sup>75</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> *See discussion supra* at notes 53 - 56 and accompanying text.

<sup>74</sup> *See* Smith and Milhiser, *supra* note 53.

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



Despite continuing indifference in terms of academic criteria applied to determine who will play in the national championship, on the part of the BCS, the 2012 national championship game fortuitously fared better in terms of pitting two teams with more acceptable graduation rates against each other. Richard Lapchick, who has studied this area for many years, concluded that

Alabama and LSU . . . both had fine academic records. They had APR rates of 963 and 966, respectively. They graduated 69 percent and 77 percent of all of their football student-athletes, 62 percent and 69 percent of their African-American and 89 and 91 percent of their white football student-athletes, respectively. They beat the bowl national average for both teams in each category.<sup>76</sup>

Cody Warsham also reports that when you walk into the LSU Football Operations Office “one of the first signs you will see reads: ‘The full measure of success is to graduate and win championships.’”<sup>77</sup> LSU deserves accolades for its commitment to graduating its student-athletes, although their graduation rate of 69 percent for their African-American players remains 22 percent below their graduation rate for their white players and for their student-athletes generally.<sup>78</sup>

It is worth noting that the University of Alabama had a single-year graduation rate of 69 percent for its football students, which is slightly above the national average for football but is well below Alabama’s 82 percent graduation rates for its students generally, which is at the national average for student-athletes generally.<sup>79</sup> An athlete of color at Alabama is 27 percent less likely to graduate than a white football player at Alabama.<sup>80</sup>

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<sup>76</sup> Cody Warsham, “Making the Grade: Tigers Come in Strong According to Study, But Nationwide Racial Gaps Persist,” DIG, Baton Rouge Uncovered, December 14, 2011.

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

<sup>78</sup> The seeming disregard of poor graduation rates for student-athletes of color in big-time college football may also violate the spirit of the NCAA Constitution Article 2.6 (The Principle of Nondiscrimination) which calls for promoting “an atmosphere of respect for and sensitivity to the dignity of every person. It is the policy of the Association to refrain from discrimination with respect to its . . . educational programs . . . on the basis of color . . . or race.”

<sup>79</sup> “Alabama Football and Men’s Basketball Graduation Success Rates,” Roll Alabama Roll, October 25, 2011. *See also* note 78, indicating that such results may

While LSU and to some extent Alabama are to be applauded for their increasing commitment to keeping their academic promise to their football players, the job is hardly finished, particularly with regard to their athletes of color. It was fortuity as far as the BCS was concerned, given that they do not consider graduation rates or academic performance in their ranking criteria that LSU and Alabama have evidenced a commitment to graduating their football players, as compared to the fairly abysmal record of Oregon and Auburn which played in the BCS championship game in 2011.

To reinforce academic values, the NCAA and the BCS should require that graduation rates be considered in the BCS polling and seeding process or in the NCAA selection process if a playoff is adopted. This would send a signal to all coaches that keeping academic promises to their football players is important and must be considered in running a successful program that maximizes its opportunity to participate in the national championship.

As previously noted, the BCS and the leaders of its member institutions, together with the NCAA, must also address issues related classes missed by their football players. Playing games midweek, taking students out of the classroom, and lengthening seasons and practice sessions, in the pursuit of profit and power, exacerbates academic concerns, making it more difficult for football players to be successful in the classroom.<sup>81</sup>

It has also been argued that the NCAA, with support from BCS members, should deal directly with the inequity associated with letters of intent, which provide football players with only a single year of scholarship in exchange for a binding agreement to play at that institution.<sup>82</sup> Equity demands that letters of intent bind institutions to keep their academic promises to recruits by providing for a commitment on the part of the university for up to six years (the time period graduation rates are based on) or graduation, whichever shall first occur.<sup>83</sup>

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violate the spirit of Art. 2.6 (The Principle of Nondiscrimination) in the NCAA Constitution.

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

<sup>81</sup> This argument is made in greater depth at Smith and Milhiser, *supra*, note 53

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

<sup>83</sup> Smith and Milhiser made this argument, as well. *id.*

Article 2.9 (The Principle of Amateurism) of the NCAA Constitution is implicated, as well. It provides that,

Student-athletes shall be amateurs in [big-time college football], and their participation should be motivated primarily by education . . . and student-athletes should be protected from exploitation by professional and commercial enterprises.

If sub-par academic values and the imbalance in the letter of intent persist, in the highly commercialized world of big-time college football, the trust deficit will continue to plague the NCAA and the BCS. If such inequities remain unattended to, it is doubtful that the BCS and big-time college football—and the NCAA itself—can effectively deal with its trust deficit.

Additionally, the BCS payout, or the payout from a national championship if one is adopted, should include funds to help ensure that the academic promises to players participating in the bowl series are met. Funds for a sixth year scholarship would help immeasurably in this process and would offer strong evidence of a commitment on the part of the BCS, the NCAA and its members and leaders to meet the needs of their student-athletes whose participation generates the funds in the first place.

Today, in challenging economic times for universities, major men's athletic programs—highly commercialized men's football and basketball—are expected to carry all or the vast majority of the cost of operations for the entire athletics program. Universities that operate major football programs, including members of the BCS, face a tension—coaches in major income producing sports want more dollars to be used to build those sports but the university demands that funds be used to cover the cost of non-income producing sports. Dollars are therefore diverted from those who produce them—the coaches and student-athletes playing income producing sports—to other student-athletes and sports. This is further evidence of a measure of hypocrisy on the part of universities that participate at the BCS level and their leaders. If athletics really have academic value, then it warrants funding by the university at some level or at least it warrants being freed from the constant pressure of having to win to produce revenue to maintain the bulk of the athletics program. Demanding

that revenue producing men's athletic programs (major football and basketball generally) provide funding for the entire athletics program surely puts a questionable burden on the student-athletes, many of whom are athletes of color from poorer backgrounds. This seems to violate the spirit of the NCAA's commitment to nondiscrimination, amateurism, and avoiding exploitation of their student athletes.

In short, the BCS, the NCAA and university leaders must put their "money where their mouth is." They continue to assert that they are committed to student-welfare and academic values, but their dollars and attention are too often directed to other areas. This diversion is due, perhaps in significant measure, to a weak economy in which universities are receiving less support, but there are also significant cultural issues.

#### IV. FACING THE GORILLA IN THE ROOM: THE POWER ISSUE

The BCS is unlikely to be a catalyst for the kinds of reforms that will restore trust in big-time college football, given that its objective is to increase revenue and maintain or augment the power base of its members. The BCS, however, is nothing more than an amalgam of its members, represented by their respective university leaders. Those leaders must first recognize and then fight against their apparent short-term interest—maximizing revenue and power—in order to institute reform within the BCS. It will be difficult for them to do so, because they are beneficiaries both economically and in a reputational sense of the status quo.

When there are powerful constituencies or cultural currents that favor the status quo, presidents are inclined to act, as we saw in the case of Penn State, only during a major crisis that demands action. Presidents and athletic directors understand the power of the coaches on their campuses, the demands of graduates and friends of the university for winning teams, and a win-at-any cost culture. Even at the best universities, graduates and friends seldom wear university garb celebrating a Nobel Laureate on campus, high academic achievement on the part of students, or even a national championship in debate. They wear with pride the colors of their winning athletic teams, and they pressure the president's office from all sides when a coach is losing. They also revel in the spectacle of big-time football.

This powerful and intransigent culture has outlasted many an academic leader. Reining in a powerful coach or program can be the death knell for a university president. This translates into making it very difficult for presidents to act, even when they understand the importance of doing so.

Additionally, presidents are often little more than crisis managers and cheerleaders for the university among graduates, donors and friends of the institution. Given countervailing pressures, unless university leaders begin to see this as a crisis of trust that must be dealt with, as was the case at Penn State, it is unlikely that they will act. Furthermore, it may be too much to ask that any university leader act alone. They need the security of numbers.

The BCS is led by many of the most accomplished academic leaders in the United States. If they will put aside short-term institutional and even BCS interests, they can collectively change the culture of big-time college football in ways that will benefit their student-athletes, institutions and higher education for decades to come. They are committed educators and must muster all their educational capacity and moral courage to make the case for the kinds of changes outlined in this article that can restore trust and meet the needs of students. If, however, the leadership of the BCS does not act, then the NCAA must.

President Emmert has assumed his new responsibilities with a vigor that is encouraging to those who hope for reform. He is a strong leader, a former influential force in the BCS, and has evidenced, in word if not deed at this early juncture, some willingness to take on difficult issues.<sup>84</sup>

Article 4.01 of the NCAA Constitution makes it clear that university presidents and chancellors are central to their governance process and provides that:

The [NCAA's] administrative structure shall include an Executive Committee composed of institutional presidents or chancellors that oversee Association-wide issues and shall ensure that each division operates consistent with the basic

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<sup>84</sup> Mark Emmert and NCAA pushing for increased \$2,000 assistance to student-athletes. *NCAA Weighing 2,000 Payments to Student-Athletes*, ESPN (October 25, 2011), [http://espn.go.com/college-sports/story/\\_/id/7143961/ncaa-weighing-2000-payments-student-athletes](http://espn.go.com/college-sports/story/_/id/7143961/ncaa-weighing-2000-payments-student-athletes).

purposes, fundamental policies and general principles of the Association.

As previously noted,<sup>85</sup> the basic purpose of the NCAA, in turn, is set forth in Art. 1.3.1 of the NCAA Constitution:

The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear demarcation between intercollegiate athletics and professional sports.

The NCAA Executive Committee, with guidance from the presidents, together with the leadership of the BCS must act in a definitive manner to address the crisis of trust faced by major college football. They are experiencing a deficit of trust precisely because they have failed to live up to the spirit of their own basic purposes and constitutional principles.

This article joins Taylor Branch<sup>86</sup> and others in issuing a hue and cry—a public outcry against corruption or lawfulness—against the current state of affairs in big-time intercollegiate athletics, of which the BCS is but a symptom. This hue and cry is unlikely to be deafened by meager responses, responses that do not address the underlying issues discussed in this essay that have given rise to what we can hope will be soon be viewed as the serious crisis of trust that it is.

Penn State's respected academic leaders and Coach Paterno failed to act when they had a significant problem that demanded a transparent and authentic response. Had they acted, lives potentially could have been spared and a venerable institution and program would have been the better for it.

The BCS and the NCAA are in the same position—if they act now, with transparency and authenticity, they will avert a more significant crisis down the road. If they fail to do so, they will one day be held responsible for having harmed many student-athletes and tarnished the programs they were called to serve. That ordeal

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<sup>85</sup> See *supra*, note 3.

<sup>86</sup> Branch, *supra* note 23.

will be much more difficult to weather, both institutionally and individually, than acting in a trustworthy manner now.

If the BCS and the NCAA lack the courage or capacity to do what is right and act, if they fail to recognize that they are facing a crisis that demands their attention now, then it is time for intervention at the national level, by the President and Congress. Those desiring to save major college football must respond as they did at the turn of the 20<sup>th</sup> century, under the leadership of President Roosevelt, when college football faced a similar crisis.

Serious Congressional hearings could provide precisely the spur that could help academic leaders act with the courage and capacity necessary to deal with the crisis of trust that they currently face. Such hearings will also educate the public, if university leaders refuse to perform that educative function that rightfully belongs to them as leaders and educators.

When there is a crisis of trust, sometimes greatness surfaces. May university leaders through the NCAA step forward and accept that mantle that is rightfully theirs to bear. They can do so by implementing a strategy consistent with their constitutional values that would shorten the regular season, by adopting a fair playoff system, which would ultimately eliminate the need to outsource the championship to bowls and the BCS, and by focusing on academic values and student-welfare. Taking steps to execute on such a plan would be considered authentic to educational values and would restore public trust in big-time college football and the universities that have given it life.

