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Quarterback by Committee:
A Response in Memory of Dan Markel

Andrew A. Schwartz*

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* Associate Professor of Law, University of Colorado Law School. This Response is dedicated to the memory of Dan Markel. Dan and I bonded as co-winners of the 2012 Federalist Society Young Legal Scholars Paper Competition. He presented a powerful paper on criminal law in a democracy that would go on to be published as the lead article in the first volume of the Virginia Journal of Criminal Law, which dedicated its entire inaugural issue to Dan’s article. See Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1 (2012); Josh Bowers, *Blame by Proxy: Political Retributivism & Its Problems, A Response to Dan Markel*, 1 VA. J. CRIM. L. 135 (2012); Michael T. Cahill, *Politics and Punishment: Reactions to Markel’s Political Retributivism*, 1 VA. J. CRIM. L. 167 (2012); R.A. Duff, *Political Retributivism and Legal Moralism*, 1 VA. J. CRIM. L. 179 (2012); Dan Markel, *Response, Making Punishment Safe for Democracy: A Reply to Professors Bowers, Cahill & Duff*, 1 VA. J. CRIM. L. 205 (2012). That was just one of the many impactful articles that Dan published before his life was tragically cut short in 2014. And, as we mourn his passing, Dan’s scholarly record should bring us some solace. While Dan may be lost to us in a physical sense, he will be remembered through his scholarly publications, and his published ideas will endure in perpetuity—to be appreciated, built upon, and challenged by future scholars. See Andrew A. Schwartz, *Corporate Legacy*, 5 HARV. BUS. L. REV. __ (forthcoming 2015) (observing that scholars can achieve a lasting legacy by publishing their work); cf. Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764, 773-77 (2012) (contrasting human mortality with the perpetual nature of the corporate form).

INTRODUCTION

In *Catalyzing Fans*,¹ Dan Markel, Michael McCann and Howard Wasserman propose so-called “Fan Action Committees” (“FACs”), whereby fans would crowdfund a sum of money and then spend it to influence the personnel decisions of their favorite teams.² This novel form of crowdfunding may prove to be a success, but this Response suggests that an effective FAC could upset a team’s overall hiring and compensation system, thereby risking a downturn in team performance to the detriment of all concerned.

Consider the example of the 2012 Denver Broncos’ quarterback controversy when the team had to choose between Tim Tebow and Peyton Manning. Manning, a future Hall-of-Famer, was clearly the superior on-field quarterback, but Tebow was a charismatic young player who had recently become a pop culture icon by engineering a miraculously successful season for the Broncos. If it were up to the fans—or if there had been a sufficiently powerful FAC in place—the Broncos may well have stuck with Tebow. As it happened, the Broncos front office went with Manning, and this was clearly the right call. Manning promptly led the Broncos to the Super Bowl, setting several league records along the way, while Tebow washed out of the league shortly thereafter. As this anecdote suggests, this Response raises the concern that a powerful FAC can inflict significant harm on the team it is trying to help.³

I. CATALYZING FANS

Crowdfunding comes in a variety of types; *Catalyzing Fans* adds a new entry to the list. To crowdfund is to raise funds over the Internet from many people, each of whom only provides a small dollar amount.⁴ The lead-

¹ Dan Markel et al., *Catalyzing Fans*, 6 HARV. J. SPORTS & ENT. L. 1 (2015).

² The terms “team” and “fan” are meant expansively. *Id.* at 3 n.6 (“We say teams because our paradigm for this paper will be contract negotiations between an individual athlete and a professional sports team. But for purposes of the larger idea, the team represents the second party in the bilateral negotiation that controls where talent performs and under what conditions. So the team might be a television network, a law school, a restaurant, a couture house, etc.”).

³ I raised this point with the co-authors while *Catalyzing Fans* was in draft form, and they address my concern in footnote 16 and Part II.B.7. *See id.* at 9 n.16, 29-31 (recognizing that FACs “could disrupt the plans of management vis-à-vis compensation”).

⁴ *Crowdfunding*, OXFORD ENGLISH DICTIONARY (last visited Feb. 28, 2015), http://www.oxforddictionaries.com/us/definition/american_english/crowdfunding, archived at <http://perma.cc/5WWL-U26W>. (“The practice of funding a project or

ing type is probably “reward” crowdfunding, in which the funding participants receive the fruits of the project, such as a book, CD, or video game. Websites such as Indiegogo and Kickstarter have been practicing reward crowdfunding for nearly a decade, during which time more than \$1 billion in projects have been funded.⁵

Other types of crowdfunding are also practiced (or will soon be practiced). In donation-based crowdfunding, people simply make a contribution and receive nothing tangible in return.⁶ Sometimes the contribution funds a charitable project,⁷ while other times it funds a vacation or other personal spending.⁸ In securities crowdfunding, the funding participants receive a bond, a share of stock, or some other security from the crowdfunding company.⁹

Catalyzing Fans posits another sort of crowdfunding where groups of fans can organize themselves into FACs.¹⁰ A FAC is roughly analogous to a Political Action Committee (PAC).¹¹ Whereas a PAC raises and spends money to support (or oppose) a politician or political cause, a FAC raises and spends money in order to “affect the key choices made by stars or teams regarding recruitment and retention.”¹² FACs would raise money via

venture by raising many small amounts of money from a large number of people, typically via the Internet.”).

⁵ Andrew A. Schwartz, *Crowdfunding Securities*, 88 NOTRE DAME L. REV. 1457, 1459-60 (2013). This is a cumulative figure.

⁶ They may receive intangible benefits from making a contribution. Andrew A. Schwartz, *The Nonfinancial Returns of Crowdfunding*, 34 REV. BANKING & FIN. L. — (forthcoming 2015)

⁷ See, e.g., CROWDRISE, www.crowdrise.com (last visited February 20, 2015).

⁸ Charlie Wells, *People Are Using Crowdfunding Sites to Pay for Overseas Travel, Classes*, WALL ST. J., Oct. 22, 2014, at D1, archived at <http://perma.cc/QD9T-SCMS> (“regular people . . . look to crowdfund everything from birthday parties to Italian getaways.”).

⁹ Schwartz, *supra* note 5, at 1460.

¹⁰ Markel et al., *supra* note 1, at 1. The concept of a FAC is new to the literature. *Id.* at 1 n* (“Dan was the driving force behind the idea of FACs and this form of crowdfunding.”).

¹¹ *Id.* at 27 (“FACs merge political action committees (PACs) on the one hand and booster clubs on the other, applying that union to professional sports (as well as other avenues of entertainment.”).

¹² *Id.* at 4 (“Crowdfunding empowers fans to collect and use money to influence the choices talent makes regarding where to perform or for what team. As we see it, groups of fans, what we call Fan Action Committees (“FACs”), would engage in coordinated influence mongering, raising and offering money in an effort to collectively affect the key choices made by stars or teams regarding recruitment and retention.”). The terms “team” and “fan” are meant expansively. *Id.* at 3 n.6 (“We say teams because our paradigm for this paper will be contract negotiations between

crowdfunding and spend it by either paying a star directly or by donating it to a charity favored by the star.¹³

For example, if the fans of the Dallas Cowboys football team wanted to recruit quarterback Andrew Luck once his current contract expires, interested Cowboys fans could set up a crowdfunding website to collect donations with the idea that the amount collected would be paid over to Luck (or his favorite charity) if he joins the Cowboys. The crowdfunded money acts as a “supplemental incentive” for Luck to head to Dallas.¹⁴ If this sum is sufficiently large, it could act as a significant inducement to both Luck, who would receive the bonus, and the Cowboys, who could presumably offer Luck lower compensation due to the supplement.¹⁵

In this scenario, Luck is happy, the Cowboys are happy, and the fans get the star they want. What could be wrong with that? The problem, as the next Part will claim, is that FACs can interfere with the long-term planning and success of the team, which is ultimately what the fans really care about.

II. THE RISK TO TEAM PERFORMANCE

The authors of *Catalyzing Fans* are favorably disposed to FACs,¹⁶ and this new form of crowdfunding may prove to be beneficial, or at least benign. Yet this Part raises the concern that FACs may negatively affect the teams they intend to support by undermining the ability of a team’s centralized management to make core business decisions for the organization—

an individual athlete and a professional sports team. But for purposes of the larger idea, the team represents the second party in the bilateral negotiation that controls where talent performs and under what conditions. So the team might be a television network, a law school, a restaurant, a couture house, etc.”).

¹³ *Id.* at 4-5.

¹⁴ *Id.* at 29.

¹⁵ This would be helpful not only in saving money for the Cowboys, as with any business, but also because it would free up money subject to a team-wide salary cap imposed by the league.

¹⁶ See, e.g., *id.* at 39 (“[Fans] deserve better. . . . By harnessing imagination, resources, and energy, FACs are a catalyst for the realization of fan power. . . . In our view, . . . FACs are permissible and easily created. [W]hen structured under the charitable model, FACs can incidentally lead to improved access to medicine and the arts and the alleviation of other social inequalities, all while helping the local team win. FACs, in brief, lend promise to a vision that empowers fans, greases commerce, directs money to charities, and, in so doing, very likely effectuates positive social change.”). *But cf. id.* at 5 (“[T]his is an ‘idea’ paper, one meant to spur further conversation without attempting to provide the final word on the matter. As such, the recommendations we make are somewhat tentative . . .”).

namely whom to employ and how to compensate them. Without this centralized control, team performance may deteriorate.

This is a lesson from corporate law, which provides as a first principle that corporations are not to be managed by the shareholders, but rather by a small, centralized body, the board of directors.¹⁷ Centralized management is one of the key institutional features that allowed corporations to achieve such a powerful position in the modern economy.¹⁸ Yet FACs would undermine the ability of professional managers to make personnel and compensation decisions for their teams.¹⁹

The authors candidly acknowledge as much, saying that FACs “could disrupt the plans of management vis-à-vis compensation” and potentially “conflict with management’s strategy” in any number of ways.²⁰ Yet they contend that this will not lead to problems because centralized management will retain ultimate control over business decisions: “Importantly, management is independent of the fans and can always resist their efforts if they think the fans are misguided.”²¹

That rationale may not hold up to careful scrutiny, however, as FACs can use their money to directly impact and constrain the choices available to a team. For instance, a FAC that favored star A over star B could offer to pay the lion’s share of star A’s compensation if she joined the team, but

¹⁷ See, e.g., DEL. CODE tit. 8, ch.1 § 141(a) (“The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . .”).

¹⁸ AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS pt. VI, Intro. Note (1994).

¹⁹ The “teams” that *Catalyzing Fans* applies to, whether sports teams, universities or newspapers, see Markel et al., *supra* note 1, at 35, are generally organized as corporations or other business organizations with centralized management.

²⁰ *Id.* at 9 n.16; *id.* at 8 (the presence of FACs “may put teams in a difficult spot at times”).

²¹ *Id.* at 9 n.16; *id.* at 30 (“FACs depend on the choices of the team in question to retain or recruit the talent.”); *id.* at 7 (“[T]he talent and team control the conversation; if the team is not interested in signing or keeping the player, or if the player is utterly uninterested in playing for the team, the fans remain powerless. In most cases, FACs cannot overcome recalcitrant management or its refusal to recognize the value and benefit of signing the fans’ preferred player . . .”). In addition to this primary argument, the authors add two others to buttress it. First, they assert that we live in a “free society with a market-based economy,” so the law ought to allow side payments from FACs to stars. *Id.* at 30. This Response is focused on the wisdom of FACs, not their legality, and therefore does not question that portion of their argument. Second, they suggest that FACs offer fans a way to “monetize” their views. See *id.* at 6. This Response does not intend to challenge or inhibit anyone’s ability to express him or herself. See generally *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

decline to pay a penny toward star B.²² For a team with a finite amount of money to spend, this makes star A more attractive than star B, especially if there is a salary cap involved. If the team had to pay out of pocket, its management might prefer star B, but if star A can be had for a bargain price thanks to the side payment by the FAC, this significantly changes the calculus.

Or a FAC that adamantly favored star A over star B could offer a side payment to star B in exchange for a promise to stay away from the team.²³ While it is true that the team's central management retains formal power over personnel decisions, it is clear that such a maneuver could effectively prevent the team from signing star B.

Consider again the real life example of the 2012 Denver Broncos quarterback controversy between Tim Tebow and Peyton Manning. Free-agent Manning had already won the Super Bowl and four league MVP awards and was destined for the Hall of Fame, whereas Tebow's throwing mechanics were so poor that he had completed fewer than half of his passes.²⁴ But Tebow, a devout Christian,²⁵ had led the Broncos to such an

²² The authors presuppose that "the primary relationship is between the team and the star. . . . FAC-raised funds are not necessary for stars to ply their trade, but act as a supplement to the primary relationship." Markel et al., *supra* note 1, at 7. This is not necessarily the case, however, for a FAC could conceivably raise sufficient funds to make payments that rival or exceed those made by the team in the "primary" relationship.

²³ The authors specifically conceive of this possibility. *Id.* at 9 ("It even is conceivable that a group of anti-fans could use a FAC to express dislike for a player through negative incentives—say, by pledging money to convince a player to go somewhere else or to retire.").

²⁴ Pete Thamel, *After Being a Florida Icon, Tebow Becomes an N.F.L. Question Mark*, N.Y. TIMES, Jan. 1, 2010, at B9, *archived at* <http://perma.cc/QP6D-9U7H> (quoting an anonymous NFL director of player personnel as saying, about Tebow, "[h]is mechanics are flawed and his throwing motion is awkward."); Woody Paige, *Paige: McD says Tebow has the "It" factor*, THE DENVER POST, May 7, 2010, at C1, *archived at* <http://perma.cc/Q462-5YZB> ("NFL scouts, coaches and analysts offered . . . alarming criticisms about Tebow the quarterback."); *Tim Tebow: Career Stats*, NFL.COM, <http://www.nfl.com/player/timtebow/497135/careerstats> (last visited February 28, 2015), *archived at* <http://perma.cc/YUW4-5ETZ> (reporting 47.9% career completion percentage and 46.5% in the 2011 season).

²⁵ E.g., Dan Barry, *He's a Quarterback, He's a Winner, He's a TV Draw, He's a Verb*, N.Y. TIMES, Jan. 13, 2012, at A1, *archived at* <http://perma.cc/VJ7B-995L> (reporting that Tebow is frequently seen thanking his "lord and savior"). Tebow was famously known to kneel in prayer on the football field—a maneuver that came to be known as "Tebow-ing" and sparked a pop-culture moment. *Id.* ("Around the world, people are 'tebowing'—kneeling in prayer, with head resting on one hand, oblivious to surroundings, just as Tebow does after victories.").

inspired 2011 season that it led to a national cultural phenomenon known as “Tebowmania.”²⁶

A second-year player at the time, Tebow took over the role of starting quarterback after the team won only one of its first five games of the season. He then led the Broncos to seven wins in their next eight games, six of which were come-from-behind victories, each more improbable than the last.²⁷ Week after week, Tebow and the Broncos would play poorly for nearly the whole game—and then lead a dramatic comeback to win at the last moment.²⁸ The fourth quarter was rechristened “Tebow Time”²⁹ and, at the end of the season, Tebow and the Broncos won their division and a playoff game. Tebow’s unflagging optimism in the face of almost certain

²⁶ See, e.g., Jason Gay, *Sympathy for the Tebow*, WALL ST. J., Mar. 11, 2012, <http://www.wsj.com/articles/SB10001424052702304537904577275560584626748>, archived at <http://perma.cc/T6VD-686J> (“In the space of a couple months, Tebow became a national frenzy, one that straddled sports, religion and entertainment, and saw a back-up quarterback elevated as an icon of underdogs. . . . He drove football purists bananas, but fans responded. Tebow made an 8-8 club the center of the universe. That mania was genuine, not a marketing scam.”); Vicki Michaelis, *Tebow’s late TD run lifts Broncos over Jets*, USA TODAY, (Nov. 18, 2011, 10:47 AM), <http://usatoday30.usatoday.com/sports/football/nfl/story/2011-11-17/tim-tebow-broncos-stun-jets/51278022/1>, archived at <http://perma.cc/73X9-DGLE> (“Week by week, Tebow is quieting his detractors and turning up the volume on ‘Tebowmania.’”); Lindsay H. Jones, *Marketing TebowMania*, THE DENVER POST (Oct. 23, 2011, 1:00 AM), http://www.denverpost.com/ci_19174688?source=infinite, archived at <http://perma.cc/27SC-U84Z>.

²⁷ Barry, *supra* note 25 (describing Tebow as “the country’s favorite active athlete” and “a cultural touchstone”); Mark Kiszla, *Kiszla: Tim Tebow has the Broncos believing they can’t lose*, THE DENVER POST (Dec. 12, 2011, 1:00 AM), http://www.denverpost.com/ci_19527521, archived at <http://perma.cc/Y8EC-AUHG> (“The magic of Tim Tebow is bigger than football and grows larger with each late-game miracle by the Broncos.”).

²⁸ Arnie Stapleton, *It’s the late show in Denver Broncos rally, then upend Bears in OT*, BOSTON.COM (Dec. 12, 2011), http://www.boston.com/sports/football/articles/2011/12/12/its_the_late_show_in_denver/, archived at <http://perma.cc/8D6A-9REZ> (“Wild wins are becoming routine for Tim Tebow and the Denver Broncos, who flail away through most of four quarters before coming through in the clutch. . . .After failing to score on their first dozen possessions, the Broncos (8-5) erased a 10-0 deficit in the final 2:08 of regulation,” and then won in overtime.); Michaelis, *supra* note 26 (Tebow “once again saved his best for last, leading Denver to a 17-13 victory over the New York Jets with a 95-yard scoring drive capped by his 20-yard touchdown run at the 58-second mark.”).

²⁹ E.g., Stapleton, *supra* note 28.

defeat³⁰ inspired himself, his teammates, his fans, and countless others, many of whom had little previous interest in football.³¹

It therefore looked like Tebow had a bright future with the Broncos. After the 2011 season, however, Peyton Manning became a free-agent, and the Broncos found themselves in position to choose between the two. Despite Manning's obviously superior talent,³² a majority of Broncos fans hoped the team would choose Tebow because of his charisma, his piety, and his exciting and unorthodox playing style; a giant billboard in Denver that called for an Internet poll between Tebow and Manning led to more than 20,000 votes being cast, with Tebow winning convincingly.³³

Broncos senior management, led by legendary ex-Broncos quarterback John Elway, ignored the public outcry for Tebow. In March 2012, the team signed Manning to a multi-year contract and cut Tebow shortly thereafter. Tebow was then picked up by the New York Jets but, after a 2012 season where he saw sporadic action and little success,³⁴ he was released and has not played NFL football since. Manning, by contrast, led the Broncos to the Super Bowl, was named the league MVP, and set important all-time records in passing and touchdowns.

With hindsight, the Broncos management made the right call. Yet if a pro-Tebow FAC had been in place at the time, there is a real chance that

³⁰ Judy Battista, *Tebow Wills Broncos to Win With His Late-Game Play*, N.Y. TIMES, Oct. 24, 2011, at D2, archived at <http://perma.cc/RB25-CZ6U> (reporting on "the ineffable quality Tebow seems to summon when things appear bleakest").

³¹ E.g., Stapleton, *supra* note 28 ("Never say never. . . . That's a great characteristic of this team.") (quoting Broncos wide receiver Eric Decker); *id.* ("I think we're rewriting the book on 'keep fighting.' Our guys never blink. They remain positive. [T]he guy who dropped a couple of passes caught the touchdown. That's kind of the M.O. on this bunch.") (quoting Broncos coach John Fox).

³² Gay, *supra* note 26 ("If Tim Tebow were to be sprinkled with magic Lombardi dust and simultaneously possessed by the spirits of Johnny Unitas, Otto Graham and Popeye the Sailor-Man, he would be lucky to be one-quarter as good as Peyton Manning at his best. Even at 35 and recovering from an injury—actually, even if he drank a 12-pack of Meister Bräu and wore a Big Bird costume—Manning is surely a better passer and game manager than Tebow is after his second year of pro quarterbacking.").

³³ Nate Davis, *Tebow has nearly 60% of votes over Manning in billboard poll*, USA TODAY (Mar. 12, 2012, 1:06 PM), <http://content.usatoday.com/communities/thehuddle/post/2012/03/broncos-qb-tim-tebow-has-nearly-60-of-fan-votes-over-peyton-manning-in-billboard-poll/1#.VPKJrbDF9fY>, archived at <http://perma.cc/58HH-A82M>.

³⁴ In his one season as a Jet, Tebow achieved a total of 39 passing yards and 102 rushing yards, and accounted for no touchdowns. *Tim Tebow: Career Stats*, NFL.COM, <http://www.nfl.com/player/timtebow/497135/careerstats> (last visited February 28, 2015), archived at <http://perma.cc/G4KX-EYYU>.

Tebow would have remained the Broncos quarterback, which almost certainly would have meant less success on the field. Considering the phenomenal level of public support for Tebow, a pro-Tebow FAC could have possibly crowdfunded millions of dollars to keep him in Denver, significantly changing the financial calculus for the Broncos. A FAC could have promised to buy a certain number of Broncos season tickets contingent on the team keeping Tebow. At the most extreme, a pro-Tebow FAC could have paid Manning to sign with another team, directly spoiling the plans of Broncos' senior management.³⁵

The authors set forth essentially two rebuttals to this anticipated critique. First, the fans may make better decisions than expert managers.³⁶ Although this is theoretically possible, the authors pretty quickly acknowledge that expert managers are likely better than fans at putting together a successful team.³⁷ For example, in the Tebow-Manning decision, John Elway, himself a Hall-of-Fame quarterback with multiple Super Bowl rings, demonstrated his superior expertise on quarterback matters.

The authors' other rebuttal is that even if the fans are misguided, they should be allowed to use their own money to express their view of how the team ought to be managed: "If fans believe management is doing a bad job, one solution is to . . . influence (or try to influence) management's decisions [through a FAC], hoping to produce better results."³⁸ To the extent that fans want to express themselves on issues about which they care deeply, they can and should do so. But expressing a view can be accomplished in many ways apart from paying money to or on behalf of stars, and most other techniques would not have the unwelcome effect of directly interfering with central management on key business decisions. For instance, an online poll of the sort that sprung up in the Tebow-Manning controversy was an effective way for fans to make their voices heard, while letting the Broncos management make the final decision unfettered.³⁹

³⁵ See Markel et al., *supra* note 1, at 23.

³⁶ *Id.* at 30 ("who likely better predicts what makes a good team: fans or team management?").

³⁷ *Id.* at 9 n.16 ("In corporate law, shareholders are generally not the managers for various reasons, and perhaps there are similarly valid reasons to deny fans this kind of influence.").

³⁸ *Id.* at 31.

³⁹ One final rebuttal, though not one pressed by the authors, *id.* at 7, ("fans want the talent to join their team only so their team can 'win'"), would be that the fans should get what they want, whether it is a winning team or a losing team populated by their favorite stars. The authors are wise not to press this argument, as it is clear from experience that fans ultimately want their team to succeed and that competitive teams are the most popular. If entertainment were more important than com-

CONCLUSION

The concept presented in *Catalyzing Fans* of using crowdfunding to finance a Fan Action Committee has great potential. Indeed, this Response presented the concern that FACs may become so powerful that they challenge central management for effective control over team personnel decisions. Even so, this respondent looks forward to seeing the first FACs established, knowing that the memory of Dan Markel will live on through this new type of institution.

petition, the Harlem Globetrotters would be more valuable than the New York Knicks; in fact, the value of the Knicks is orders of magnitude more than the Globetrotters.