

ARTICLES

RESPONDING TO THE PERVERSION OF *IN LOCO PARENTIS*: USING A NONPROFIT ORGANIZATION TO SUPPORT STUDENT-ATHLETES

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INTRODUCTION

In the early 1920s, Alice Tanton, an eighteen-year-old college student, took a few wrong turns. She jumped into a young man's car and rode around on the streets of Ypsilanti, Michigan, sitting on his lap and smoking a cigarette. An onlooker, who knew that Alice attended Michigan State Normal College ("MSNC"), reported her behavior to its Dean of Women, Mrs. Bessie Leach Priddy. After affording Alice the opportunity to explain herself, Mrs. Priddy expelled Alice from the college and MSNC's president affirmed that decision. Alice (by her next friend) sued for reinstatement, but the courts would hear none of it. Indeed, the Supreme Court of Michigan stated flatly: "Instead of condemning Mrs. Priddy, she should be commended for upholding some old-fashioned ideals of young womanhood."¹

In affirming the college's action, the *Tanton* court was merely embracing an ages-old rule that had governed relations between students and their schools since the very beginning of American colleges and universities. These institutions acted "*in loco parentis*," or, in the position of parents vis-a-vis their students.² By law, the institution had full authority to control the student's

1. *Tanton v. McKenney*, 197 N.W. 510, 513 (Mich. 1924). The trial court found that Alice was guilty of the act described as well as "other acts of indiscretion" and that "she aired her grievances . . . in the public press," which in turn tended to prevent her return to the institution and the maintenance of discipline there. *Id.* at 511. The Supreme Court of Michigan also considered very important the fact that the Normal School prepared students for the teaching profession. *See id.*

2. Literally, the doctrine means "in the place of a parent." BLACK'S LAW DICTIONARY 791

behavior, including the power to regulate social conduct it deemed undesirable. It did not matter that in the 1920s women were gaining increasing social liberties.³ Those challenging a college or university's regulations had to overcome a strong legal presumption that the regulations were both reasonable and fair.

This Article uses the *in loco parentis* doctrine to offer a revised history of intercollegiate athletics regulation and to critique, as well, the modern regulation of intercollegiate athletics. It posits that, in the Nineteenth Century, when institutions first began to give serious consideration to the regulation of campus athletics, the *in loco parentis* doctrine provided the social and legal basis for exercising broad controls over student-athletes. The Article further argues that while the *in loco parentis* doctrine long ago met its demise in the larger college and university context, in the field of intercollegiate athletics regulation, a perverse version of that doctrine continues to survive. Under this mutation of the doctrine, the alleged parent (the institution) continues to exercise broad controls over the alleged child (the student-athlete) and yet the parent is unable to fulfill its responsibilities in protecting the welfare of the alleged child because the parent has an overwhelming financial interest in exploiting the child's talents. Indeed, like the greedy parents of a financially-valuable child actor, institutions have consistently pushed their charges onto more and more national stages in pursuit of greater and greater financial returns, all the while insisting that their charges cannot handle greater independence. And like many former child stars arriving at adulthood, many student-athletes have begun to question their alleged parents' motives.

Of course, student-athletes are not small children, and the very emergence of the perverted *in loco parentis* doctrine in athletics regulation demonstrates how far institutional athletics regulation has deviated from the educational high road. This strange strain of the doctrine also demonstrates why unquestioning judicial deference to institutions in matters relating to athletic policies cannot be justified, particularly when student-athlete rights are at issue.

But beyond deference, what is also needed is a model for removing the conflicted parent as final arbiter of student-athlete rights and welfare. I propose that an independent nonprofit organization, or several, should have the status to identify and, where appropriate, assert student-athlete rights and interests. A number of nonprofits currently exist in amateur sport, however, regulations and interpretations of the National Collegiate Athletic Association ("NCAA"), prevent them from playing the role discussed here. These barriers, I will argue, arise out of a perverted form of the *in loco parentis* doctrine and are now ripe for legal challenge.

This Article is a continuation of a project first begun in an earlier work entitled *Student-Athlete Welfare in a Restructured NCAA*.⁴ In that work, I

(7th ed. 1999).

3. In 1920, the Constitution was amended to give women the right to vote. See U.S. CONST. amend. XIX.

4. See W. Burlette Carter, *Student-Athlete Welfare in a Restructured NCAA*, 2 VA. J.

examined the history of the NCAA structure and the impact of the recent restructuring, which essentially decentralized the NCAA. As does this piece, *Student-Athlete Welfare* argued for reduced judicial deference in the review of athletic policies as they affect student-athletes. It also took the unusual step of questioning prevailing wisdoms regarding intercollegiate athletics history and reviewed original NCAA documents, including NCAA proceedings.⁵ The attempted contribution was not only a proposal—that courts should give less deference to the NCAA and member institutions on matters affecting student-athletes—but also the bringing to light of factual information from documents that are even now largely unavailable to the public.⁶ This Article takes that earlier project a step further, reviewing these and other early documents to determine what they tell about the considerations that drove early intercollegiate athletics policy, where the policy now stands, and where it should be headed.

This Article has four parts. Part I investigates the role of the *in loco parentis* doctrine in early college and university life. It posits that the doctrine had three “legs”: (1) a “control leg” allowed the institution to exercise broad controls over students’ lives; (2) a “welfare leg” tempered these controls by requiring that they

SPORTS & L. 1 (2000).

5. While there are many publications criticizing the modern NCAA and intercollegiate athletics, there is no reliable detailed history focusing primarily upon the early days of intercollegiate athletics. An exception is the NCAA’s own commissioned history, written by sports reporter Jack Falla. Falla’s book is a useful resource, but its celebratory approach too often glosses over the very difficult policy issues that have confronted the body and its members. Moreover, it provides very few direct citations to guide serious researchers. See JACK FALLA, *NCAA: THE VOICE OF COLLEGE SPORTS: A DIAMOND ANNIVERSARY HISTORY 1906-1981* (1981). The famous 1929 Carnegie Foundation study on intercollegiate athletics provides some historical insight, but its empirical information primarily relates to the 1920s era. Moreover, the Carnegie study’s perspective is primarily academic; thus, it seeks to tie the problems with sport to perceived academic deterioration overall—such as the rise of research as a focus of educational institutions and the growth of the elective system. See HOWARD SAVAGE, *AMERICAN COLLEGE ATHLETICS, REPORT OF THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING* (1929). Other sports histories spend very few pages on the history of intercollegiate sport. Of these general histories, the better ones are JOHN RICKARDS BETTS, *AMERICA’S SPORTING HERITAGE: 1850-1950* (1974); ELLIOTT GORN & WARREN GOLDSTEIN, *A BRIEF HISTORY OF AMERICAN SPORTS* (Eric Foner ed., 1993); STEVEN A. RIESS, *SPORT IN INDUSTRIAL AMERICA: 1850-1920* (1995).

6. The only place that this author has found a complete set of the proceedings, from 1906 to the present, is in the NCAA library itself, now located in Indianapolis. They are not available in the Library of Congress and even the libraries of the institutions that were instrumental in shaping early intercollegiate athletics have only scattered copies, if any. While NCAA Publishing has some earlier documents for sale, practically all are post 1967, and they informed me that they do not replace these volumes once the supply has run out. Given the difficulty of access, it is little wonder that modern researchers have largely ignored these documents in discussing intercollegiate athletics. On the other hand, the lack of access may be a direct result of a lack of interest among research faculty, itself caused by the bifurcation of athletic and nonathletic institutional realms. See *infra* discussion Part II.C.

be justified as necessary to protect the student's welfare or a larger public good; and (3) a "deference leg" justified a strong presumption in favor of the institutional decisionmaking, even against parental dissent. Part I then applies this analysis to the history of intercollegiate athletics by looking at original historical materials such as early convention proceedings of the NCAA.

Part II discusses the general demise of the *in loco parentis* doctrine in the 1960s and 1970s and the resulting expansion of freedoms that came to college and university students. It seeks to demonstrate that student-athletes did not experience the same broad expansion of rights as did nonathlete students and that, indeed, during this period, control over student-athletes' behavior increased dramatically even as institutional action to protect their welfare decreased. I offer many reasons for this differing treatment of student-athletes and nonathlete students, including the bifurcation of the university into athletic and nonathletic fiefdoms and increased financial investments in athletics. I argue that institutions' strong interest in athletics poses a conflict of interest between the alleged "parent" and the alleged "child." The result is a perversion of the *in loco parentis* doctrine, one in which control takes center stage and welfare is shuttled to the background. The courts protected this perversion because of a longstanding deference to institutions on matters deemed merely "educational," and a judicial willingness to assume that intercollegiate athletics programs were just that.

By focusing upon NCAA legislative approaches in two subject areas, the handling of student-athletes' rights to free speech and the handling of student-athletes' financial aid issues, including the rights of student-athletes who receive athletic aid to work, Part III demonstrates how the *in loco parentis* doctrine continues to be reflected in modern NCAA policy.

Finally, Part IV renews the argument for reduced judicial deference made in *Student-Athlete Welfare* and investigates the option of using the vehicle of a nonprofit organization—or possibly several nonprofit organizations—to provide support to student-athletes involved in intercollegiate athletics. It argues that such vehicles may present the best way to provide student-athletes with the support that they need, support neither the NCAA nor its institutions can provide in-house. The nonprofit organization need not be the only route pursued but could complement other proposed avenues of student-athlete empowerment not addressed here, such as unionization or proposals for payment of stipends to student-athletes.

I. THE EARLY RELATIONSHIPS BETWEEN COLLEGES AND UNIVERSITIES AND THEIR STUDENTS

A. "In the Place of a Parent"

Today we are quite accustomed to college students acting as young adults and exercising a broad spectrum of individual rights. Upon reaching the age of majority, they may smoke and drink; they may vote; and they may associate with friends of their choosing and spend their own money as they please. But such was not always the case in the early days of American education, and it was

certainly not the case when colleges first began to notice their students' growing interest in sports.

Nine colleges made up the first colonial colleges in America.⁷ Many of the early colleges were created to train men who could carry out religious aims.⁸ The colonial college served the aristocracy of the times; its cost and the impractical nature of its curriculum (e.g., the focus upon subjects such as Latin) made college an unreasonable option for the average farmer's son.⁹ Soon colleges would begin to grow in number, and the idea that a college education should be more widely available, at least to white males, began to catch on, again often at the instigation of religious institutions.¹⁰

The colleges of these early centuries considered themselves *in loco parentis*—acting much like a parent with respect to their students. Indeed, Bledstein notes of the Eighteenth Century:

[T]he stage of behavioral development called "young manhood" did not exist as a notable epoch, a distinct period or era in human time characterized by specific events, unique problems, and a distinct culture. College officials did not think of students as a special social group. Students were children, being prepared for a calling, who needed to be confined to a college or boarding school in order to survive the awful temptation of worldly vice during the "midpassage" to adulthood. In the self-contained college community, a student was housed under one roof with his instructors, and all proceeded together through the uniform daily routine of prayers, meals, recitations, and study.¹¹

This lack of distinction between college students and students of more tender years is also reflected in the *Tanton* decision, wherein the court compared the powers of college administrators in that case as much like those of "school boards in our country schools and boards of education in our cities."¹² Indeed,

7. See FREDERICK RUDOLPH, *THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY* 3 (Univ. of Ga. Press 1990) (1962). These colleges were "Harvard, William and Mary, Yale, New Jersey, King's, Philadelphia, Rhode Island, Queen's, [and] Dartmouth." *Id.*

8. See *id.* at 5-11 (discussing religious influence in founding of schools); *id.* at 16-18 (discussing lessening influence of particular denominations in favor of religious diversity at some colonial colleges).

9. See *id.* at 18-22; see also BURTON J. BLEDSTEIN, *THE CULTURE OF PROFESSIONALISM: THE MIDDLE CLASS AND THE DEVELOPMENT OF HIGHER EDUCATION IN AMERICA* 209 (1976) (noting that colonial colleges together graduated fewer than fifty students per year from 1701 to 1750, primarily from elite families).

10. See generally RUDOLPH, *supra* note 7, at 44-67 (discussing the growth of access to colleges in the Nineteenth Century); *id.* at 307-28 (discussing the development of women's colleges and coeducational education).

11. BLEDSTEIN, *supra* note 9, at 208; see also GEORGE P. SCHMIDT, *THE LIBERAL ARTS COLLEGE* 78-86 (1957) (discussing strict codes of conduct and disciplinary sanctions at early institutions).

12. *Tanton v. McKenney*, 197 N.W. 510, 511 (Mich. 1924).

in upholding the college's action, the court relied almost entirely upon case law involving secondary or elementary schools regulating students of a much younger age. In so doing, the *Tanton* court demonstrated the extent to which it and other courts believed that the traditional *in loco parentis* doctrine also operated in full measure on college campuses.¹³

As demonstrated by Alice's case, the parental authority schools exercised under the *in loco parentis* doctrine included the authority to mold the moral character of the student.¹⁴ Thus, like many other institutions of its day, Nineteenth Century Harvard College required each student, on pain of expulsion, to attend church every Sunday.¹⁵

As Alice's case also demonstrates, the right of the institution extended beyond the campus. Berea College was not unusual when, in its 1911 "Students Manual," it prohibited its students from entering certain "[f]orbidden [p]laces" including "any 'place of ill repute, liquor saloons, gambling houses' etc."¹⁶ Berea's rules further stated:

Eating houses and places of amusement in Berea, not controlled by the college, must not be entered by students on pain of immediate dismissal. The institution provides for the recreation of its students, and ample accommodation for meals and refreshment, and cannot permit outside parties to solicit student patronage for gain.¹⁷

The *in loco parentis* doctrine was not merely local school policy, it was legal policy and courts adhered to it well into the Twentieth Century. The doctrine

13. Without distinction, in discussing this college student's case, the *Tanton* court quoted extensively from *Ruling Case Law's* description of the relationship between public schools and their students and its description of the court's obligation to defer to the judgments of boards of education. *Id.* at 512-13 (citing 24 R.C.L. 574-75, 646 (1929)). It also cited numerous cases dealing with elementary and secondary schools.

14. For a brief history of the doctrine, see Robert D. Bickel & Peter F. Lake, *The Emergence of New Paradigms in Student-University Relations: From "In Loco Parentis" to Bystander to Facilitator*, 23 J.C. & U. L. 755 (1997); Philip M. Hirshberg, *The College's Emerging Duty to Supervise Students: In Loco Parentis in the 1990s*, 46 WASH. U. J. URB. & CONTEMP. L. 189 (1994); Theodore C. Stamatakos, Note, *The Doctrine of In Loco Parentis, Tort Liability and the Student-College Relationship*, 65 IND. L.J. 471 (1990).

15. See, e.g., ANNUAL REPORTS OF THE PRESIDENT AND TREASURER 1881-82, at 20 (1882) [hereinafter HARVARD ANNUAL REPORT 1881-82] (noting that the faculty thought prayers should be made voluntary, but the board insisted upon compulsory prayers); BULLETIN OF THE UNIVERSITY OF SOUTH CAROLINA 76 (1908) (noting requirement of morning prayers and Sunday service attendance absent a parental excuse provided to the President); see also RUDOLPH, *supra* note 7, at 75-76 (discussing compulsory daily prayers and church services). Bledstein notes that apart from expulsion, a school's powers included "corporal punishment, fines, and deprivation." BLEDESTAIN, *supra* note 9, at 209. Rudolph refers to the trend as "paternalism." See RUDOLPH, *supra* note 7, at 103-09 (generally discussing college efforts to control student behavior).

16. See *Gott v. Berea Coll.*, 161 S.W. 204, 205 (Ky. 1913).

17. *Id.*

was such an important a part of the common law that it was rarely challenged in the courts before the 1900s, and challenges after that time, before the 1960s, were largely unsuccessful. Thus, when a restaurant owner whose business depended heavily upon student patronage sued Berea College to challenge its prohibition of students eating at an establishment not owned by the College, the Court of Appeals of Kentucky justified Berea's action under the *in loco parentis* doctrine. The court stated:

College authorities stand *in loco parentis* concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents, as the case may be, and, in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy.¹⁸

The court noted that the power extended beyond the school grounds "to all acts of pupils which are detrimental to the good order and best interest of the school, whether committed in school hours, or while the pupil is on his way to or from school, or after he has returned home."¹⁹

As the aforementioned case involving privately-supported Berea College²⁰ indicates, private and public institutions alike took advantage of the *in loco parentis* doctrine. While courts of earlier times regularly described the relationship between privately-funded schools and their students as "solely contractual," they regularly resorted to the *in loco parentis* doctrine to approve institutional action, declaring the doctrine to form a part of the "common law" of all contracts between private educational institutions and their students.²¹ And while theoretically, institutions supported by the state faced greater restraints

18. *Id.* at 206.

19. *Id.* (citation omitted).

20. *Id.* at 205-06 (noting private status).

21. See, e.g., *John B. Stetson Univ. v. Hunt*, 102 So. 637, 640 (Fla. 1924) (noting that "[t]he relation between a student and an institution of learning privately conducted, and which receives no aid from the public treasury, is solely contractual" and upholding school's right to expel disorderly students under the *in loco parentis* doctrine and the "common law of the school" (quoting *Vermillion v. State ex rel. Englehardt*, 110 N.W. 736, 737 (Neb. 1907)). The student's conduct in *Stetson*, if properly described, was probably sanctionable even under modern standards, but the point is that the court embraced a broad view of the college's powers of acting as a parent, rather than relying solely upon contract theory. Courts also backed private institutions that sought contractual assurances of morality from students. See, e.g., *Anthony v. Syracuse Univ.*, 231 N.Y.S. 435 (App. Div. 1928) (affirming institution's right to dismiss student on rumors that she was not "a typical Syracuse girl" and citing express morality provisions in catalog, the referencing of those regulations on student's signed registration card and the "wide discretion" afforded institutions to determine when dismissal is appropriate under their rules).

under the federal and state constitutions, the rights of students were not thought of as broadly as they are today, as poor Alice herself learned.

B. *The Three-Legged Stool*

This author proposes that we may describe the original *in loco parentis* doctrine as having three key legs: (1) a *control* leg; (2) a *welfare* leg; and (3) a *deference* leg. The control leg permitted the institution to place broad controls on student behavior, such as forbidding a female student to ride in a car in public while sitting on a man's lap or requiring a student to eat at college facilities only. Balancing the control leg was the welfare leg. It provided justification for the controls by positing that the controls were needed to protect the student's welfare and for societal good. Of course, conceptions of student welfare were controlled by the assumption that students were infants with no independent rights. Thus, *student* welfare was difficult to distinguish from *institutional* welfare, except in the most unusual cases. Finally, the deference leg gave the doctrine its teeth, transforming the doctrine from a mere social rejection of student rights into a legal vesting of power and authority in educational institutions. Indeed, courts often backed institutional decisionmaking regarding students even when parents took a different view.²² The doctrine represented a governmental view that educators were uniquely situated (unlike employers, for example) to shape the character of those with whom they dealt on a daily basis and that institutions could be presumed to perform this task of socialization to the community's full satisfaction. I contend that each of these three legs—control, welfare, and deference—were essential to a delicate balance that supported the *in loco parentis* doctrine.

C. *Using the In Loco Parentis Doctrine to Understand the Emergence of Campus Athletics Regulation*

Commentators who have assessed institutional involvement in amateur athletics regulation have failed to take note of the fact that it arose in the shadow of the *in loco parentis* doctrine. Indeed, I would argue that without the support of such a doctrine, modern institutional control of amateur intercollegiate athletics could never have evolved as it has.

Campus athletics began as unsupervised student games. Savage notes that in the Eighteenth Century, athletics "were characterized by an almost complete absence of anything approaching organization, rules, or what we now regard as team games as distinguished from contests between sides."²³ In those days, schools had little involvement in the administration of regular athletics. More often, their "involvement" was in the form of prohibitions. The religious and Victorian heritages of many of the early institutions rejected recreational physical

22. Alice Tanton's mother, for example, joined in her petition as next friend to no avail. See *Tanton v. McKenney*, 197 N.W. 510 (Mich. 1924).

23. See SAVAGE, *supra* note 5, at 15.

activity as contrary to sound discipline,²⁴ and, thus, many colleges of the colonial era frowned upon sporting activities. In 1787, Princeton forbade its students to play “shinny,” a game similar to hockey, decrying that it was “low and unbecoming gentlemen and scholars, and is attended with great danger to the health.”²⁵ Other institutions imposed similar restrictions.

Campus sport, like the institutions in which it occurred, began to take off in the early to mid-1800s. The growth of sport was fed by, among other things, the growth of the colleges and universities themselves, the growth of towns and cities,²⁶ the emergence of city athletic clubs and American YMCA and YWCAs,²⁷ the influx of immigrants who introduced the German gymnasium movement,²⁸ and new ideologies of manhood that embraced vigorous physical recreational activity.²⁹ So too, the growth of professional baseball with its traveling teams had an impact, offering students summer opportunities to play the game.³⁰

Sport posed a difficulty for early college administrators. It was not, in the traditional liberal arts sense, an academic endeavor. Some viewed it as downright frivolous, even a socially dangerous activity to be discouraged. Over time, however, a few college and university leaders began to believe that, properly supervised, education in physical fitness (of which sport could be a part) could add value to one’s education. Institutions began to build facilities to

24. Savage attributes the view to the English and religious heritage of these institutions. *See, e.g., id.* at 14; *see also* BLEDSTEIN, *supra* note 9, at 255-56 (stating that early colleges “frowned upon games and sports as carnal and frivolous diversions, amusements both harmful to the mind of a gentleman and subversive of the duties of a Christian . . .”); GORN & GOLDSTEIN, *supra* note 5, at 58-64 (discussing religious and Victorian objections to sports).

25. *See* RUDOLPH, *supra* note 7, at 150-51. Rudolph also discusses Rensselaer Polytechnic Institute’s similar ban on “running, jumping, and climbing” as undignified to the deportment that “becomes a man of science.” *Id.* at 151.

26. This historical growth is chronicled in a number of scholarly books. *See supra* note 5.

27. *See, e.g.,* BETTS, *supra* note 5, at 98-101, 107-08. The YMCA was founded in England but spread throughout the United States in the 1850s as a predominantly Protestant Christian movement. *Id.* at 107-08.

28. *Id.* at 105-06 (discussing the German-inspired “Turner Movement” which promoted physical education training in schools and in the community); *see also* RUDOLPH, *supra* note 7, at 152-53 (describing immigrant contribution to growth of the German gymnasium movement in the United States).

29. Darwin’s theories and the emphasis on the survival of the fittest formed an important backdrop for this movement. *See* CHARLES DARWIN, *THE ORIGIN OF SPECIES* (1859); *see also* BETTS, *supra* note 5, at 91 (noting how ideologies of manhood affected evolution of sport). By the start of the 1900s, moved by this trend, President Theodore Roosevelt was a strong supporter of sport. *See* discussion *infra* Part I.C.1.

30. *See* BETTS, *supra* note 5, at 92-93 (noting that by 1860 there were fifty-four clubs in the National Association of Base Ball Players and by 1867 there were 237 teams). The Cincinnati Red Stockings set the standard for traveling professional teams with their tour in 1869. *Id.* at 95. For more on student participation in these leagues, *see* summer baseball discussion *infra* Part I.C.1.

support this "education," and to add personnel who could serve as educators. Thus, Harvard built "the first American college gymnasium" in 1826.³¹ Amherst initiated a professorship in physical education and hygiene in 1860.³² The University of Chicago created a department of physical education and appointed Alonzo Stagg as its director with faculty status.³³ Betts reports that by 1890, virtually every established college had gained or "campaign[ed] for adequate gymnasium facilities."³⁴

On their own, students soon took campus athletics beyond intramural games as they initiated intercollegiate contests. Credit for inaugurating intercollegiate athletics is traditionally given to students at Harvard and Yale who organized a crew competition between the schools in 1852.³⁵ In 1859, Williams and Amherst students arranged the first intercollegiate baseball game.³⁶ In 1869, students at Rutgers and Princeton organized the first intercollegiate football game (then a game "more akin to soccer" than football today).³⁷ Also, in 1895 the first intercollegiate basketball game took place between Minnesota State School of Agriculture and Hamline College.³⁸

In those early days students ran athletic programs and teams, not coaches or athletic directors.³⁹ On some campuses, voluntary student-run athletic associations exercised jurisdiction over many different sports and communicated with similar associations on other campuses. In some cases, the complexity of these organizations was substantial, with team captains scheduling trainings, practices, and game schedules.⁴⁰ At some schools, these groups financed their work through membership fees, gate receipts, and fund raisers.⁴¹

But as college administrators observed their students' increased voluntary participation in sports, fears arose that sporting endeavors challenged many

31. BETTS, *supra* note 5, at 105.

32. BLEDSSTEIN, *supra* note 9, at 257 (speaking of Amherst and of this general movement in the 1800s).

33. Hal A. Lawson & Alan G. Ingham, *Conflicting Ideologies Concerning the University and Intercollegiate Athletics: Harper and Hutchins at Chicago, 1892-1940*, 7 J. SPORT HIST. 37, 38-39, 41 (1980).

34. BETTS, *supra* note 5, at 101.

35. See, e.g., Joana Davenport, *From Crew to Commercialism, The Paradox of Sport in Higher Education*, in SPORT & HIGHER ED. 5, 6-7 (Donald Chu et al. eds., 1985); Gregory S. Sojka, *The Evolution of the Student-Athlete in America: From the Divinity to the Divine*, in *id.* at 19; see also SAVAGE, *supra* note 5, at 19.

36. FALLA, *supra* note 5, at 26.

37. *Id.* at 6 (noting similarity to soccer); SAVAGE, *supra* note 5, at 19.

38. FALLA, *supra* note 5, at 28.

39. See Clarence A. Waldo, *The Proper Control of College Athletic Sports*, in PROCEEDINGS OF THE THIRD ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES 40, 40 (1909) [hereinafter 1908 IAAUS PROCEEDINGS] (noting that the coach or trainer, if there was one, served as an assistant to the captain).

40. RIESS, *supra* note 5, at 122-23.

41. *Id.*

established value systems favored by their institutions. At the same time, it was apparent to many institutional actors that sporting events offered valuable fundraising and advertising opportunities that, if properly tapped, could be of great service to the institution.

1. *Raising up Gentlemen Amateurs.*—Foremost among the concerns of elite institutions was the tradition of the gentleman-amateur. In the Eighteenth Century, American educational institutions saw their mission as raising gentlemen, and to these institutions, the very essence of gentlemanly behavior in athletics was “amateurism.” This approach was also likely grounded in America’s English heritage. According to one writer, the term “amateur” was used to enforce the term “gentleman” in Nineteenth Century England. Indeed, in that century the terms “gentleman” and “amateur” were used synonymously.⁴² Another writer similarly points out that in earlier times an amateur player of sport and music was referred to as a “gentleman” and that “[i]n some fields amateurism was an honorable tradition, where attempts at full-time employment, to say nothing of professionalization, were met with derision.”⁴³ Indeed, it was considered “despicable to make money in this way.”⁴⁴ Thus, for those institutions that shaped America’s earliest athletic policies, “amateurism” was the key ingredient that linked education to athletics. Amateurism meant many things, but first and foremost it meant that students could not receive pay in any form, including financial aid for play, and students had to be kept far apart from those who were paid to participate in sports.

The problem of ensuring amateurism was a real one for the colleges and universities that first encountered campus athletics. Seeking to better their chances of success, college students sometimes permitted nonstudents, and sometimes professional players, to participate on their teams. In cities and towns, students often intermingled with such nonstudents in sporting activities. During the summers, some of the better college student players traveled and played with the emerging professional leagues, receiving, of course, pay for their “work.”⁴⁵ Under the *in loco parentis* doctrine, these on and off campus frolickings were every bit the college or university’s concern. In 1882, Harvard’s

42. See P.C. MCINTOSH, *SPORT IN SOCIETY* 178 (1963). McIntosh notes that the professional athlete was considered one who had fallen away from the ideals of the ruling class. The 1803 Oxford English Dictionary’s definition of “amateurism” as it related to artists linked the term to “polite” artistic undertakings “without any regard to pecuniary advantage.” *Id.*

43. ROBERT A. STEBBINS, *AMATEURS: ON THE MARGIN BETWEEN WORK AND LEISURE* 20-21 (1979).

44. *Id.* at 21.

45. According to one report in 1870, a Harvard student baseball team toured New York, the South, and the West, playing forty-four baseball games (both during summer vacation and during the academic terms). In 1882, the student team played games with professional teams. J.H. McCurdy, *The Essential Factors in the Control of Intercollegiate Athletics*, in *PROCEEDINGS OF THE FOURTH ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES* 55, 58 (1909) [hereinafter 1909 IAAUS PROCEEDINGS]; see also *HARVARD ANNUAL REPORT 1881-82*, *supra* note 15, at 16-17.

President Charles Eliot, noting the baseball games students played on Harvard yard, emphasized in his Annual Report the need to keep college baseball players “amateurs,” separate and apart from professional players.⁴⁶ Thus President Eliot concluded:

It is also agreed that athletic competitions, though necessary to the maintenance of a proper interest in the general subject, may easily run into excess, and on that account need to be kept within discreet limits; and that the whole spirit of College sports and contests should be that of amateurs who are amusing themselves, and not that of professional players who are earning a living, and seeking a reputation for its pecuniary value.⁴⁷

Those opposing professionalism were from society’s upper crust, and they brought to the debate their own stereotypes about the professional athlete and sporting endeavors in general. Thus, in the 1880s, Harvard’s President Eliot stated that “[m]any people take it for granted that the students who are conspicuous in athletic sports are capable of nothing better . . . [t]his is by no means the case.”⁴⁸ Others argued that it was the professional environment that made the professional a bad seed. The view was that the student-athlete needed to be protected from the professional, lest the student be enticed by professionalism and miss the point of play for its own sake. In a 1908 debate E.J. Bartlett put the case this way:

[T]he athlete who plays the game for pay in vacation is not an aid but a hindrance to the best in sport. He associates with and is managed by men whose living comes from their success in sport. There are professional athletes of high moral and ethical standards, but to hold to them they must be of resistance superior to that of most men. The professional athlete is the admiration of the sensual woman, the coveted prize of the false sport who wants to buy him, the very implement and object of enormous gambling operations, a golden sandwich man to the cigarette maker, a sojourner in strange places where his warmest welcome is in the bar and pool rooms. Naturally he is always looking for his price. He must win to maintain his popularity. His livelihood is at stake and his temptation is a little greater than others’ to forget to be generous in sport

Now the college athlete who has been breathing this air comes back a little harder to lift to the rarer level of sport-with-nothing-in-it, a little less ready for the chimerical standard of “a game well lost is better than

46. See HARVARD ANNUAL REPORT 1881-82, *supra* note 15, at 17-19.

47. *Id.* at 19. See generally Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 RUTGERS L.J. 269 (1994) (discussing how, by defining student participation in intercollegiate athletics as an avocation, the NCAA and the elite institutions that initially comprised it embraced only one of two possible models of student-athlete participation).

48. HARVARD ANNUAL REPORT 1881-82, *supra* note 15, at 18.

a game badly won." He makes the college team his means of advertising for another lucrative position⁴⁹

Thus amateurism also exemplified a kind of sportsmanship and an approach to the game that many believed professionals could not sustain.

Some believed that professionals were behaviorally of a lower class than those who received no pay for play.⁵⁰ Chicago's Alonzo Stagg argued that, while professionalism was not ethically wrong, most professionals celebrated the individual, not the team, and would not swear off tobacco or alcohol or adhere to a strict diet for the benefit of a team.⁵¹

Surely, providing some support to the anti-professional bias was a bias against the class of persons who engaged in, or even worse, made their living from physical activity. The early leaders of the American college and university were from elite social classes in which men inherited wealth through family membership, and their students were largely from the same elite classes. Indeed, by the mid-1800s more than seventy percent of Harvard College's enrolled students had received their secondary education in private schools or been privately tutored.⁵² Of course, even the most intellectually dense of the wealthy's children inherited the appearance of success and the support mechanisms to sustain it. Perhaps an assumption that others were simply not the best and the brightest was a necessary rationalization. This view would be consistent with the emerging social Darwinism of the mid- to late 1800s sometimes used to justify class stratification.⁵³ It may also have been true that the uppercrust saw athletics as a form of "service" unworthy of their lot, and that this factor led the elite to believe that the proper place of their children, if they must be associated with athletics, was in the stands and not on the ball field. Whatever the case, those who were not heirs to wealth faced the practical problem of earning money. For males at least, athletics was one available venue to accomplish this.

The assumption that amateurism is inherently superior to professionalism appears later in the leading literature on the subject of athletics. Most notably, it was embraced by Howard Savage in his 1929 report on athletics done for the Carnegie Foundation. Savage acknowledged that amateurism was a "social convention"⁵⁴ that relied upon the assumption that "the man who plays a game for fun, or for the love of it, or for sport's sake, is in some way advantaged over

49. J.P. Welsh et al., *Debate: Should Any Student in Good Collegiate Standing Be Permitted to Play in Intercollegiate Baseball Contests?*, in 1908 IAAUS PROCEEDINGS, *supra* note 39, at 53, 59-60.

50. *See id.* at 72 (comments of Chase) (acknowledging that others hold this view, but rejecting it).

51. *Id.* at 64 (comments of Stagg).

52. HARVARD COLL., PRESIDENT'S REPORT FOR 1873-74, at 8 (1873-74) (chart noting public school representation in student body as hovering between twenty-four percent to thirty-eight percent from 1867 to 1874).

53. Darwin's *Origin of Species* was published in 1859. *See* DARWIN, *supra* note 29.

54. SAVAGE, *supra* note 5, at 301.

the man who makes a living at it.”⁵⁵ Thus, Savage argued that “society” maintains the convention of amateurism for its own good.

Savage also accepted the social bias that long haunted athletics and those who played it. In response to those who pointed out that students with talents in other fields such as music, writing, and art were permitted to pursue professional interests (and so, why not athletes?), Savage responded that the “skills” needed for music, writing, or art are “primarily mental or emotional” and that physical skill enters only as a part of the mechanics of expression.⁵⁶ By contrast, he argued:

Sport involves the larger muscles of the human body and their coordination, almost always in violent exertion. Its “skills” are primarily physical; mental and emotional “skills” are present, but they vary between sports. Sport in general implies the overcoming of opposition of an obstacle—physical, mental, moral—which is immediate. The resulting contest is carried on under certain conventions. Through the relation of these conventions to the desire to excel, sport tests the good temper and chivalry of its participants.⁵⁷

Thus, Savage and the Carnegie Foundation embraced the concept of sport as requiring relatively few intellectual skills.⁵⁸ It followed then that men who had the option of “higher” pursuits should be directed away from significant attention to athletics.

2. *Preserving the Institution as a Place of Education.*—As they watched their charges’ increasing interest in sports, many institutional leaders believed that students were simply spending too much time on athletics and not enough time on study. Observing what he considered to be excessive time spent on athletics, Harvard’s President Eliot convened a committee to study athletics on that campus and later argued that two hours a day of athletic involvement during the school year should be the absolute maximum limit.⁵⁹

55. *Id.*

56. *Id.* at 303. “These pursuits, in their more competitive development, afford tests of even temper and self-control, but such tests are in general not sudden or violent; in other words, they offer opportunity for a degree of reflection which may considerably delay and modify the reaction of any stimulus.” *Id.*

57. *Id.* at 304.

58. Many argue that these stereotypes remain in existence today in varying forms. Arguably the stereotype of black athletes as slothful and obtuse that Timothy Davis has attributed to conscious and unconscious racism can be traced, in addition, to stereotypes about the class of persons who engage in athletics. See Timothy Davis, *The Myth of the Superspace: The Persistence of Racism in College Athletics*, 22 *FORDHAM URB. L.J.* 615, 643-52 (1995). The disproportionate representation of African-Americans in sports at all levels, and particularly group sports that don’t have economic hurdles to participation, may be traceable to racism’s dramatic effect in reducing blacks’ other economic options.

59. See *HARVARD ANNUAL REPORT 1881-82*, *supra* note 15, at 16-17 (noting that “the elaborateness of the arrangements for match games of base-ball, and the frequency of those contests

There was, however, another problem. Institutions found it increasingly difficult to control their own institutional actors—faculty, administrators, or those purporting to act on the institution's behalf, specifically alumni.

To appreciate fully these concerns, one must understand the vision of athletics that the amateur purists embraced. For purists, amateurism placed restraints not only upon students, but also upon the institutions themselves. Thus, they believed that institutions that held to the amateurism approach should not use athletic events for advertising or recruiting purposes.⁶⁰ The institution's obligation was to use athletics for its students' benefit, not its own. Thus, the original model for campus athletics to which many of those desiring to regulate athletics aspired was athletics available to all students, not athletics restricted to only the best players. Harvard's President Eliot argued:

When games are made a business, they lose a large part of their charm; and college sports cannot approach the professional standard of excellence without claiming the almost exclusive attention of the players, and becoming too severe, monotonous, and exacting to be thoroughly enjoyable. . . . Moreover, a high standard of excellence tends to make the number of persons who actually take part in athletic sports very small, the considerable number of tolerably good players being driven from the field, and reduced to the unprofitable position of mere lookers-on.⁶¹

For this very reason, purists favored restricting college and university involvement to intramural games, believing that the high level of competition that intercollegiate play required simply made it inconsistent with a purely amateur approach. This view would find its way into policy by 1906 when the NCAA, then a loosely-aligned organization of some thirty institutions,⁶² adopted a resolution stating as an ultimate goal the decrease in intercollegiate play and increase in intramural play.⁶³

The 1929 Savage report also harkened back to these two themes: that athletics should be available to all and that the intramural model was the best for educational institutions. Savage argued that adhering to the principles of amateurism was justified by the intellectual mission of the college.⁶⁴ He argued

in April, May and June . . . prompted this action," but that the inquiry took a comprehensive look at all sports).

60. See James Roscoe Day, *The Function of College Athletics*, in 1909 IAAUS PROCEEDINGS, *supra* note 45, at 34, 35 (calling the fact that schools use athletics for advertising purposes a "notorious fact"); Waldo, *supra* note 39, at 46 (critical of "faculties and institutions who seek prominent [athletic] alliances for the sake of advertising and gate receipts").

61. HARVARD ANNUAL REPORT 1881-82, *supra* note 15, at 18.

62. See *infra* notes 100-01 and accompanying text.

63. PROCEEDINGS OF THE FIRST ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASS'N OF THE UNITED STATES 25-26 (1906) [hereinafter 1906 IAAUS PROCEEDINGS].

64. Savage wrote:

The presence of a man whose prime interest in college is dependent upon payment for

that the American college is a socializing agency and that rejecting professionalism was essential to "educational democracy," i.e., giving *all* students a chance to play athletics, not simply a select few.⁶⁵ (Of course, this reference to educational democracy as an American ideal was particularly ironic, given the widespread acceptance of undemocratic approaches when it came to the education of racial minorities and women.) Thus, Savage's report supported the vision of the university as a place where athletics did not stand apart from other university endeavors with unique significance, but was integrated into the complete education and made available to all.

Amateurism purists also believed that specialized recruiting for athletes was a violation of the amateur spirit. But on this subject in particular, institutions had great difficulty controlling their own actors, including alumni acting on their behalf. Often with support from institutional actors, alumni provided preferences, payments, and other gifts to outstanding athletes to recruit them or to lure them away from other institutions they might choose to attend.⁶⁶ Taking advantage of such an environment, some students transferred multiple times in order to take advantage of financial opportunities, thus earning the famous

his athletic services delays and reduces academic instruction to his intellectual level and speed, both in the classroom and in every other phase of college work. It invokes concessions at entrance and at every point at which an academic requirement is set. It leads in the direction of special privilege in tests and examinations, the relaxation of standards of grading in class and in written work, the granting of special opportunities to repair academic standing when it is injured by the close attention to athletic practice that subsidies entail, and much excusing from the obligation to meet academic appointments promptly and sincerely. It disunifies the student body and soon brings other undergraduates to feel that efforts to fulfill the intellectual purposes of the institution avail nothing if men are to be supported merely for the sake of winning games. No other force so completely vitiates the intellectual aims of an institution and each of its members.

Savage, *supra* note 5, at 302.

65. Savage described "educational democracy" as "that characteristic of our educational process which vouchsafes to each and sundry equal opportunity to develop his habits and powers of the mind, the body or the spirit, in accordance with his capacities." Thus, he continued:

The effect of importing subsidized or professional athletes into any institution seriously impairs not alone the incentive, but also the privilege of every other student to develop to the full his interests and powers, intellectual, spiritual or physical. If college athletics have the socializing values that are attributed to them, then the infraction of the amateur convention usually gives to the man who possesses athletic talent, that he develops with a view to financial return, an advantage over his less skillful fellows which, because of the desirability of victory, destroys at one blow that democracy of the playing field and the river which is rightly numbered among the most precious merits of college sport.

Id. at 304.

66. *Id.* at 22-23; see also Myron T. Scudder, *The Influence of Collegiate Athletics on Preparatory Schools*, in PROCEEDINGS OF THE SIXTH ANNUAL CONVENTION OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 57, 58 (1911) [hereinafter 1911 NCAA PROCEEDINGS].

appellation “tramp” athletes.⁶⁷ Faculty and administrators sometimes acted to admit those with athletic prowess, even when they did not meet the academic standards for admission.⁶⁸

Fearing that athletics would defeat both amateurism and academics, institutional leaders concluded that one way to control athletics was take control of it away from students and to give that control to educators who could monitor the situation. The initial approach was to use faculty volunteers as coaches. When this obligation became too burdensome, some schools opted for alumni coaches with allegiance to the institution’s principles. But soon, many institutions began to hire paid coaches. Although a few schools hired athletic directors with faculty status, more commonly institutions employed contract coaches for only the relevant season with renewal possibilities and offered them no additional faculty rights.⁶⁹ The more successful of these non-faculty status coaches were able to command significant salaries as institutions competed for their talents.⁷⁰

Some pure amateurs viewed the very presence of paid “coaches” as itself a step toward professionalizing college athletics.⁷¹ Moreover, the idea of hiring coaches as faculty suggested they must be “athletics teachers,” an oxymoron in the minds of many academics. Even some of the institutions appointing full-time athletics teachers denied them faculty security through tenure, thus hindering any

67. See, e.g., Welsh et al., *supra* note 49, at 54-55 (referring to the “athletic tramp”).

68. Savage proclaims, “Admissions requirements were cut as the railroad cut rates.” See SAVAGE, *supra* note 5, at xvii; see also Waldo, *supra* note 39, at 45 (speaking of the “sporty professor” who does not care for ethical ideals).

69. See SAVAGE, *supra* note 5, at 22 (speaking of the 1880s and early 1900s). For more on the evolution of coaching, see BETTS, *supra* note 5, at 125; RIESS, *supra* note 5, at 124-26. In the 1920s, some colleges claimed that they had successfully integrated coaches into the fabric of the university. See PROCEEDINGS OF THE TWENTY-THIRD ANNUAL CONVENTION OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 20 (1928) [hereinafter 1928 NCAA PROCEEDINGS] (noting that coaches at Trinity College are assistant professors or instructors and “are paid by the college, and not by the athletic association”); *id.* at 21 (noting that all but one member of University of New Hampshire Athletic Department are regularly appointed faculty members and that all funding is handled through the business office of the college). By that time, some institutions had already established the position of athletic director. See *id.* at 19 (discussing Harvard’s establishment of position and his membership in the faculty of arts and sciences); *id.* at 42 (discussing a regional association for athletic directors.)

70. See James R. Angell, *Faculty Control of Athletics*, in 1923 NCAA PROCEEDINGS 74, 77 (referring to “expensive coaching staffs” in football and attempts to reduce coaching costs at Yale by making coaches faculty members paid on the same salary as regular faculty).

71. Thus, even as coaches seemed inevitable, opponents of “professionalism” tried to limit their involvement by insisting that coaches could only actively coach before and after games and could not direct players from the sidelines during a game. See, e.g., *College Baseball*, in 1911 NCAA PROCEEDINGS, *supra* note 66, at 8, 11 (noting that fifty-five colleges agreed with coaching limits, while thirty-five disagreed); *Report of Basketball Rules Committee*, in *id.* at 31 (noting that “coaching from the side lines has been almost entirely abolished from our college games . . .”).

possible integration of them into the fabric of the institution.⁷² Within the NCAA, conferences with sympathy to the pure amateurist's position sought to encourage their institutions to abandon the practice of affording coaches only seasonal contracts. In 1907, the First District of the NCAA reported that the New England colleges were very much opposed to the so called "professional coaches"—persons who offered their services to institutions for pay—and that Dartmouth had taken the lead hiring only alumni coaches.⁷³ By 1911, the University of Virginia had followed suit.⁷⁴

This writer believes that one can only truly appreciate this debate over coaching and athletics if one sees it as part of a larger multifaceted debate about the role of specialized training in educational institutions. Certainly, as noted earlier, there was unique resistance to recognizing athletics as a legitimate part of any educational program. That resistance had its own permutations, but it was also part of a larger debate over the legitimacy of formal training for *any* specialized trade or professional activity, including, for example, special training in law. In the late 1800s, the term "college" referred to the free standing liberal arts college while the term "university" encompassed many so-called practical training schools, like law schools, that undergraduates could attend *instead of college*.⁷⁵ Defenders of the colleges and the liberal arts tradition were noting an emerging pressure to offer professional training, an approach that they believed would dilute the very "learning-for-learning's-sake" approach that was considered to be the lifeblood of the liberal arts college.⁷⁶ Thus, amateurism

72. 1928 NCAA PROCEEDINGS, *supra* note 69, at 20 (Trinity College representative expressing doubt that coaches could be tenured there given the dependence on winning and losing); *see also* Thomas F. Moran, *Courtesy and Sportsmanship in Intercollegiate Athletics*, in 1909 IAAUS PROCEEDINGS, *supra* note 45, at 64-66 (discussing different hiring approaches for coaches then used—professional coaches for the season, alumni coaches and coaches hired under short-term faculty contracts).

73. PROCEEDINGS OF THE SECOND ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES 7-8 (1907) [hereinafter 1907 IAAUS PROCEEDINGS].

74. *See* 1911 NCAA PROCEEDINGS, *supra* note 66, at 15.

75. *See, e.g.*, SCHMIDT, *supra* note 11, at 160; *see also* RUDOLPH, *supra* note 7, at 329-54. *See generally* SCHMIDT, *supra* note 11, at 146-67 (discussing the university movement); W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1, 73 (1997) (discussing law schools as undergraduate programs and the college/university dichotomy of the late 1800s).

76. The bias against professionalism helped create the separation of law from other undergraduate studies and its elevation to the status of a graduate program. Speaking of this opposition to the teaching of law, Christopher Columbus Langdell, a leader in the early law schools' movement, complained that American colleges held the view that liberal arts training served a greater public good, but professional training was pursued for selfish reasons and had no larger value and that a liberal arts degree prepared a man to pursue any course, while professional learning "is a thing to be 'picked up' by degrees, and acquired by experience and practice. . . ." *See* HARVARD COLL. ANNUAL REPORTS OF PRESIDENT AND TREASURER 79 (1880-81). These views, he argued, "have been inherited by American colleges, and have been as assiduously cultivated by

purists were also holding onto the historical liberal arts tradition when they asserted that a student should study athletics as an avocation, for its own sake, and not for money.

It is also important to note that the ability to press the position that one should pursue athletics without pay was closely tied to an institution's financial stability. Private institutions with substantial endowments or strong alumni bases had less need for the advertising and financial possibilities that athletics presented. Those targeting an elite and well-off student body did not have to consider seriously the financial impact of restricting pay for play upon students in need. On the other hand, state-supported schools, and others that lacked endowments, and those that catered to a more diverse student base, had reason to be more supportive of some financial assistance that would permit those athletes who were not in a position to earn academic scholarships to play sports without having also to take on a job to meet their financial needs. Thus, while most schools agreed that pay from outsiders for play should be prohibited, they disagreed on other aspects of amateurism, such as whether institutional athletic financial aid should be prohibited.

These political battles among institutions had a profound effect upon the institution's obligation to protect the welfare of the student under the *in loco parentis* doctrine, even as their control over athletics and student-athletes increased. As modern onlookers know, the theory that perceived abuses could be ended through institutional control of athletics proved flawed.

3. *Concerns for Student Safety?*—Student safety concerns also led institutional actors to consider intervention into athletics. In modern times, writers have suggested that football safety was a primary reason for the creation of the NCAA.⁷⁷ Football injuries certainly created the controversies that spurred educational institutions to national cooperation, but they were not the reason control of intercollegiate athletics was wrested from the students. Rather, the complete exercise of control over athletics was spurred by perceived threats to the gentleman amateur mission and the belief that greater control over athletics would allow an institution greater control over its actors.

However, it is true that in the formative years of campus football, student-run

them as by their English prototypes." *Id.* Thus, he complained, "[I]t is a common notion that the callings of professional men are of a commonplace, humdrum nature." *Id.* at 83; *see also* Carter, *supra* note 75, at 74.

Howard Savage, author of the 1929 Carnegie Commission report, opined that the yoking of the college with the graduate university resulted in the subordination of teaching to research, and the resulting "university" began to perceive of itself not merely as an agency for students to think hard and clearly, but also a place where one could, "without fundamental education," receive training in "all the vocations practiced in the modern state." SAVAGE, *supra* note 5, at viii-x. "It is under this regime," says Savage, "that college sports has been developed from games played by boys for pleasure into systematic professionalized athletics contests for the glory and, too often, for the financial profit of the college." *Id.*

77. *See, e.g.,* FALLA, *supra* note 5, at 13-15; *see also* NCAA Online, *History*, available at <http://www.ncaa.org>.

play was not above reproach and safety was a growing concern. Harvard students, for example, sponsored the annual "Bloody Monday" football game in which freshmen were sometimes violently pitted against sophomores. Under pressure from the townspeople, Harvard ultimately stepped in to ban the Bloody Monday activities in 1860.⁷⁸ In his 1893-1894 annual report, Harvard's President Eliot, a strong supporter of institutional control of athletics, observed generally of football that "[s]everal fatal accidents have happened this year to school boys and college students on the foot-ball field; and in every strenuous game now played, whether for practice or in an intercollegiate or other competition, there is the ever present liability to death on the field."⁷⁹ Fan behavior was also a concern for those events occurring on campus. As is the case today, athletic events were also occasionally marked by fan rowdiness, violence, and even gambling activity.⁸⁰

In fact, institutional involvement in intercollegiate athletics did not reduce injuries; instead, it expanded the fan base and the commercial value of the sport exponentially. By increasing game frequency and increasing the need to deliver spirited play, it also increased the potential for injury.⁸¹ In 1902, twelve deaths from football were reported across the nation.⁸² In 1905, football matches resulted in additional significant deaths and injuries.⁸³ These incidents were so disturbing that, in 1905, President Theodore Roosevelt called school athletics administrators together for consideration of what might be done to save lives and to save the game.⁸⁴ Still, the 1909-1910 season brought thirty-two deaths that newspapers claimed to be football-related, including the high-profile death of a West Point cadet in a game against Harvard.⁸⁵ In truth, not all of these matches were on college campuses nor did all involve college students, but many of the incidents involved educational institutions and thus, institutions suffered dearly in the press.⁸⁶

78. FALLA, *supra* note 5, at 5-6.

79. HARVARD COLL., ANNUAL REPORTS OF THE PRESIDENT & TREASURER 17 (1893-1894) [hereinafter HARVARD ANNUAL REPORT 1893-94].

80. See BETTS, *supra* note 5, at 220-24.

81. See Arthur G. Smith, *Conference Direction and Control of Athletics in the Middle West*, in NAT'L COLLEGIATE ATHLETIC ASS'N, PROCEEDINGS OF THE FIFTH ANNUAL CONVENTION OF THE NCAA 55, 56 (1910) (noting that when students controlled games, life was simpler and the introduction of the institution commercialized intercollegiate athletics).

82. See BETTS, *supra* note 5, at 127.

83. *Id.*

84. *Id.* at 127.

85. See *Report of the Football Rules Committee*, in 1909 IAAUS PROCEEDINGS, *supra* note 45, at 18, 19. Some legislatures were apparently considering making football a crime. See *Football Reform*, in 1909 IAAUS PROCEEDINGS, *supra* note 45, at 24, 25.

86. See, e.g., *Football Reform*, *supra* note 85, at 27 (asserting that of those killed in 1909, not all were college students and not all deaths could fairly be attributed to football and also charging the press with sensationalizing football death and injury stories).

D. Countervailing Concerns: The Perceived Financial Value of Athletics

Despite their discomfort with sport, many institutions also recognized that affiliating themselves with sporting events had tremendous value in an ever-competitive and increasingly expensive world. To those willing to take advantage, such events offered free advertising (and, consequently, increased tuition yields), strong alumni and community loyalties, and favorable press attention.

Retreating from athletics was not easy even for those institutions most committed to the intramural model and amateurism ideals. Indeed, the public fervor supporting athletics was tremendous and widespread, and interfering with that fervor was not to make the institution a popular actor. Thus, in 1895 Harvard's Eliot unhappily observed that student participants could not be blamed for the problems with sport, for they were "swayed by a tyrannical public opinion—partly ignorant, and partly barbarous—to the formation of which graduates and undergraduates, fathers, mothers, and sisters, leaders of society, and the veriest gamblers and rowdies all contribute."⁸⁷ By the early 1900s, editors at newspapers across the nation had already begun the practice of selecting the "national champion" from among the best college teams.⁸⁸

Football became by far the most popular sport among the public and a significant moneymaker for its sponsors. Riess reports that between 1888 and the 1890s, gate receipts at Yale football games jumped from a mere \$2800 to \$50,000, surpassing all other sports.⁸⁹ One 1915 NCAA district report found that in that district, comprised of Ivy League schools, football admissions were three times that of baseball and eight times that of track and field and that football made up more than seventy percent of all gate receipts.⁹⁰ The prospect of charging the public for witnessing such events increased its value to educational institutions which, much like today, were always in need of more funds.⁹¹ Powerful alumni also supported football programs and tied their dollars to its

87. HARVARD ANNUAL REPORT 1893-94, *supra* note 79, at 16-17.

88. 1908 IAAUS PROCEEDINGS, *supra* note 39, at 13 (decrying the media's practice of having editors across the nation vote on a national champion in intercollegiate athletics and "flaunting [the selection] before the college world"); *see also* 1907 IAAUS PROCEEDINGS, *supra* note 73, at 11-13 (noting earlier media critiques of institutions that used games for advertising and gambling purposes, but complaining of sympathy toward professionalism on the part of many "metropolitan papers"); Smith, *supra* note 81, at 57 (regarding press attention to individual student-athletes, noting that publicity is a "windy diet for a young colt").

89. RIESS, *supra* note 5, at 121.

90. NAT'L COLLEGIATE ATHLETIC ASS'N, PROCEEDINGS OF THE TENTH ANNUAL CONVENTION OF THE NCAA 11-12 (1915). The report notes that for all sixteen colleges in the conference, including Harvard, Yale, and Dartmouth, total receipts were \$544,000 and football brought in \$395,000 of that amount. *Id.*

91. *See* FALLA, *supra* note 5, at 9 (mentioning gate receipts in the 1880s); SAVAGE, *supra* note 5, at xxi (noting that for several schools in the 1920s the annual income from gate receipts exceeded \$100,000).

continuance.⁹² Opportunities to participate in or observe sport were likely also marvelous student recruiting tools. However, athletics were also expensive. Betts reports that in 1914, Harvard reported spending \$160,000 on varsity athletics, Cornell reported \$75,000, and Wisconsin \$45,000. Most of these expenditures went to football.⁹³

In these earliest days, football, more than any game, underscored the conflict of interest that the alleged parent (the institution) had in fulfilling its obligations to the alleged child (the student). The safety of students was severely jeopardized by a game growing increasingly violent, even as institutional involvement increased with a charge to make it less so. Negative press attention to football deaths—often in the context of institutional involvement—put extreme pressure on institutions because it threatened their public relations. At the same time, positive sports press attention on the game made it difficult to withdraw entirely.

Considered in light of the *in loco parentis* doctrine, the decision to regulate student activity in the sporting arena was different from other decisions a school might make affecting student lives. Athletics pitted institutional obligations to protect student welfare against an emerging institutional interest in financial gain and publicity through athletics. This conflict of interest, arguably, created the environment that inevitably led to a perversion of the *in loco parentis* doctrine.

E. Exercising "Control"

The story of institutional involvement in control of athletics, particularly intercollegiate athletics, is a story of varied approaches ultimately reaching a crescendo of institutions in a national organization, the NCAA.⁹⁴ Before the NCAA's creation, institutions tried to take control through creating campus faculty committees with jurisdiction over athletics. Sometimes these committees would have alumni and student representation as well.⁹⁵ Support emerged for the

92. See, e.g., 1907 IAAUS PROCEEDINGS, *supra* note 73, at 9 (speaking of "conspiracy" of "some alumni of one institution to run in four or five football players"); Luther H. Gulick, *Amateurism*, in *id.* at 40, 41-42 (speaking of alumni willingness to finance student-athlete studies in order to have them play for the favored institution); Waldo, *supra* note 39, at 40-41 (referring to alumni who "oppose and thwart college faculties in their control of students and student activities" and noting that "[w]hen the rich and influential alumnus happens to be a sporting man, . . . his control is often decisive and usually malign").

93. BETTS, *supra* note 5, at 130.

94. Practically all four-year institutions belong to the NCAA. Two-year institutions have their own organization, the National Association of Intercollegiate Athletics (NAIA). See www.naia.org.

95. See, e.g., CATALOGUE OF THE UNIVERSITY OF SOUTH CAROLINA: 1907-1908, at 86 (noting that "[i]n 1896 the Board of Trustees adopted a resolution" giving faculty express power to determine the rules under which students of the University were to "be permitted to engage in athletic games"). South Carolina opted for an advisory committee consisting of two faculty, two alumni and two students. *Id.*; see also HARVARD COLL., REPORT, 1888, REPORT OF SPECIAL

creation of leagues or associations in which schools met to jointly set rules for themselves and their competitors.⁹⁶ From such groups emerged the "conferences" first formed in the 1890s.⁹⁷ These conferences served as rulemaking bodies for their members and soon became the primary rulemaking bodies for intercollegiate activity, essentially replacing local faculty control in that arena.

A national movement to regulate amateur athletics first began outside the colleges with the formation of groups by city athletic clubs. Among these, one of the most viable organizations was the Amateur Athletic Union ("AAU"), formed in 1888 by the New York Athletic Club.⁹⁸

Then, in the bloody football season of 1905, the same year that President Roosevelt sounded the alarm,⁹⁹ Chancellor Henry McCracken of New York University issued a call to college presidents after a student was killed in a football game involving his institution. At its first official meeting in 1906, the group adopted the name the Intercollegiate Athletic Association of the United States (IAAUS). In 1910, it changed its name to the NCAA.¹⁰⁰

McCracken's group of thirty institutions agreed "severally" to take control

COMMITTEE ON ATHLETICS, ANNUAL REPORT (1888) (report of faculty committee on athletics issues). *See generally* Waldo, *supra* note 39 (regarding the need for faculty control).

96. For example, Harvard convinced Brown, Dartmouth, and Princeton to join with them in prohibiting baseball games with professional clubs. Yale reportedly declined to join in the proposed alliance at that time. HARVARD ANNUAL REPORT 1881-82, *supra* note 15, at 17; *see also* Agreement with Yale, Eligibility for Athletic Teams Fixed By New Set of Rules, Harvard Bulletin, Mar. 18, 1903. A group containing many of these same schools and a few others formed the football rules committee in 1905. *See* 1906 IAAUS PROCEEDINGS, *supra* note 63, at 22. The NCAA formed its own football rules committee without these schools in 1906. *Id.* The two groups were merged in 1909. 1909 IAAUS PROCEEDINGS, *supra* note 45, at 18.; *see also* 1907 IAAUS PROCEEDINGS, *supra* note 73, at 18 (discussing NCAA measures toward amalgamation).

97. *See* RIESS, *supra* note 5, at 124 (noting the establishment of the Southern Inter-Collegiate Association in 1894, and later the Inter-Collegiate Conference of Faculty Representatives and other conferences). Attending at the first intercollegiate conference meeting were representatives from Chicago, Illinois, Michigan, Minnesota, Northwestern, Purdue and Wisconsin. This conference was known at various times as the "Big Nine," Chicago Conference, and later, as the "Big Ten." Occasionally, its founding date has been reported as 1896. The conferences preceded the NCAA and in that latter organization's infancy, they in fact possessed the key regulatory power, not the national organization. The reports of the various NCAA divisions reflect their impact. *See* 1907 IAAUS PROCEEDINGS, *supra* note 73, at 9-10 (noting that a number of Southern colleges have joined and agreed to conduct their activities according to the Southern Intercollegiate Athletic Association's rules).

98. *See* BETTS, *supra*, note 5, at 110.

99. *See supra* note 84 and accompanying text.

100. Palmer E. Pierce, *The Intercollegiate Athletic Association of the United States*, in PROCEEDINGS OF THE FIFTH ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES 38 (noting the change to "NCAA" was to "secure a more distinctive name" reflecting its national character).

over the intercollegiate athletics movement.¹⁰¹ Article VII of the IAAUS Constitution stated: "The Colleges and Universities enrolled in this Association *severally agree to take control of student athletic sports*, as far as may be necessary, to maintain in them a high standard of personal honor, eligibility, and fair play, and to remedy whatever abuses may exist."¹⁰² The group's insistence that the agreement was "several" underscores that these institutions were not yet prepared to cede their sovereignty to a central organization. It would be nearly five more decades before the newly-created NCAA gained the power to enforce legislation against members and even more years before it would become the powerful central organization so well known to those who monitored amateur athletics issues between the 1950s and 1990s.¹⁰³ A decision was also made to limit the NCAA's primary membership to academic institutions. Indeed, invitations from the AAU to affiliate were rebuffed.¹⁰⁴

As noted earlier, schools claiming to embrace pure amateurism initially wanted no part of intercollegiate athletics. After realizing that other institutions were marching into that world without them, they joined the march. The fellow institutional travelers who made up the college and universities of this era were a diverse group. The Midwest had experienced a substantial growth in new educational institutions, and Southern institutions were still recovering from the financial and structural devastation of the Civil War. The student-athletes that the infant NCAA had to consider were not merely the sons of the wealthy. This diversity, which would increase as NCAA membership grew, would eventually yield a splintering of the NCAA into subdivisions representing different intercollegiate athletics philosophies.¹⁰⁵ Still, the institutions of this era had one thing in common: none seriously questioned the institution's right to control student-athlete behavior under the *in loco parentis* banner.

101. Thirty institutions listed themselves as original NCAA members that had ratified the organization's constitution: Allegheny, Amherst, Bucknell, Colgate, Dartmouth, Denison, Dickinson, Franklin and Marshall, George Washington, Grove City, Haverford, Lehigh, Miami University, New York University, Niagara, Oberlin, Ohio Wesleyan, Rutgers, Seton Hall, Swarthmore, Syracuse, Tufts, Union, University of Colorado, University of Minnesota, University of Missouri, University of Nebraska, University of North Carolina, University of Pennsylvania, University of Rochester, University of Wooster, West Point, Vanderbilt, Washington and Jefferson, Wesleyan, Westminster, Williams, and Wittenberg. 1906 IAAUS PROCEEDINGS, *supra* note 63, at 11. Several other colleges were also in attendance as observers.

102. IAAUS CONST. art VIII, *reprinted in* 1906 IAAUS PROCEEDINGS, *supra* note 63, at 31 (emphasis added).

103. For a discussion of this evolution, see Carter, *supra* note 4, at 39-59.

104. See 1906 IAAUS PROCEEDINGS, *supra* note 63, at 24-25 (noting correspondence from the AAU proposing a national intercollegiate association that is allied with the AAU); 1907 IAAUS PROCEEDINGS, *supra* note 73, at 14 (recommending that NCAA not play with any classes of teams operating under AAU rules and asserting the rules were inappropriate for college players).

105. See *infra* notes 176-81 and accompanying discussion.

F. The Means: Institutional Control and Eligibility

A key question that these early founders considered was how control over athletics might best be exercised. To answer the question, the NCAA and other regulators certainly embraced principles of institutional control, that is, the idea that the institution through its faculty or president, and not students, should be in charge of intercollegiate athletics.

However, institutions were also aware that taking a hard stance against institutional actors, including alumni acting on the behalf of institutions, could yield financial and political repercussions. Thus, this writer believes that this fact presented a practical dilemma for regulators, one that led NCAA founders to conclude that controlling the student participant was also necessary path of least resistance. Of course, students did not sit on faculties, nor were they college presidents or alumni. They did not determine financial aid or admissions policies. Students did not control the institutional actors who jeopardized institutional values. Still, student control was the path of least resistance and consequently, an effective way to monitor athletics programs even when administrators and faculty could not be controlled. The *in loco parentis* doctrine provided a perfect springboard for broad controls over student athletic involvement. Using this doctrine, schools sought to dictate to their students that if they wished to play intercollegiate athletics, they must, at every level prior to and including college, pursue it as “gentlemen amusing themselves” and not as professionals seeking to earn payment or to gain a reputation.

The NCAA adopted this approach in 1906 setting forth aspirational rules for its members. Article VI contained “Principles of Amateur Sport” in which the NCAA rejected, among other things, specialized recruiting and athletically-based financial aid. Specifically, article VI read:

Principles of Amateur Sport

Each institution that is a member of this Association agrees to enact and enforce such measures as may be necessary to prevent violations of the principles of amateur sports such as

- a. Proselyting [sic]
 1. The offering of inducements to players to enter Colleges or Universities because of their athletic abilities, and of supporting or maintaining players while students on account of their athletic abilities, either by athletic organizations, individual alumni, or otherwise, directly or indirectly.
 2. The singling out of prominent athletic students of preparatory schools and endeavoring to influence them to enter a particular College or University.
- b. The playing of those ineligible as amateurs.
- c. The playing of those who are not bona-fide students in good and regular standing.
- d. Improper and unsportsmanlike conduct of any sort whatsoever, either on the part of the contestants, the coaches,

their assistants, or the student body.¹⁰⁶

While reserving the right of institutions to determine the specific methods of prevention of violations for the principles set forth in Article VI, Article VII suggested "eligibility" rules to affirm the principles. These rules:

1. Required full time enrollment for student participation;
2. Limited transfers by student athletes from school to school by requiring, *inter alia*, that they have been in residence at least one year before participation;
3. Prohibited anyone who had received pay for play from playing on a team or offering services as a "trainer" or "instructor";
4. Prohibited anyone who had received pay for play from participation in intercollegiate competition;¹⁰⁷
5. Essentially denied participation to graduate students by limiting eligibility to four years;
6. Barred freshmen from play;
7. In football only, specifically requiring class attendance by declaring that "[a]ny football player who has participated . . . and leaves without having been in attendance two-thirds of the college year in which he played shall not be allowed to play as a member of the team during the next year's attendance at the same institution."

The principles further provided that "[c]andidates for positions on athletic teams shall be required to fill out cards, which shall be placed on file, giving a full statement of their previous athletic records . . ."¹⁰⁸ The NCAA provided a list of questions and the student was required to swear to his answers as follows: "On my honor, as a gentleman, I state that the above answers contain the whole truth, without any mental reservation."¹⁰⁹

Institutions also took steps to attempt to swell the tide of injuries. The NCAA established a football rules committee to standardize the game and to work with other existing rules committees toward the passage of rules prohibiting dangerous play.¹¹⁰ They sought to spur a professional corps of officials to

106. IAAUSBY-LAWS art. VI, *reprinted in* 1906 IAAUS PROCEEDINGS, *supra* note 63, at 33.

107. Ironically, this bylaw presumed that payment of training table expenses (special board provisions for student-athletes) could be allowed, but limited them to not more than the regular board of a player. *See* 1906 IAAUS PROCEEDINGS, *supra* note 63, at 34.

108. IAAUS BY-LAWS art. VII, *reprinted in* 1906 IAAUS PROCEEDINGS, *supra* note 63, at 35; *see also* FALLA, *supra* note 5, at 25.

109. IAAUS BY-LAWS, art. VII, *reprinted in* 1906 IAAUS PROCEEDINGS, *supra* note 63, at 36.

110. IAAUS BY-LAWS art. V, *reprinted in* 1906 IAAUS PROCEEDINGS, *supra* note 63, at 33. Institutions other than the NCAA also tried to curb football injury. *See, e.g., id.* at 25-26; Ronald A. Smith, *Harvard and Columbia and a Reconsideration of the 1905-06 Football Crisis*, 8 *J. Sports History* 5 (1981); James S. Watterson, III, *The Football Crisis of 1909-10: The Response of the Eastern "Big Three"*, 8 *J. SPORT HIST.* 33 (1981).

enforce those rules.¹¹¹

Because the NCAA had no power to enforce its own rules and was not yet even recognized as a national legislative power, it was careful not to promulgate too many rules. However, the conferences were legislative bodies and, by this time, had already begun rulemaking. Changes instituted by some in these early days included: local or regional prohibitions on intercollegiate play by freshmen, one-year residence rules limiting transfers, rules limiting intercollegiate play to undergraduates only, limitations on practice periods, and an end to training tables, which separated athletes from other students for eating but provided meals.¹¹²

Thus, institutions concluded that the best means for gaining control over intercollegiate athletics was to assume institutional control over athletics. This was done by claiming intercollegiate athletics as a kind of institutional property to which students could have access or "eligibility" only if they abided by certain rules. The *in loco parentis* doctrine played a key role in these institutional efforts. It provided the social and legal grounds for exercising broad controls over students in the name of preserving their charges as gentleman amateurs. At the same time, this traditional model of amateurism also imposed an obligation upon the institution to avoid commercialization of athletics and to operate athletics programs for student-athlete welfare.

The *in loco parentis* doctrine continued thereafter to affect the way that athletic institutions viewed the rights of student-athletes. A romantic version of the college or university as superparent, with the ability to even outthink the natural parent, is expressed in following comments at the 1935 NCAA convention.

Our primary interest is in the boy. When his parent turns him over to the school, or to the college, it represents, in my mind, one of the greatest acts of trust and faith that a man can make, because, however incoherent the parent may be, however incapable he may be of putting into precise words in his talks with us what it is that he wishes us to do for the boy, we know what he wishes. We are not dependent upon his statement. He wishes us to take that boy and to give him, on every side of his life, the kind of training that will fit him for intelligent, disciplined, generous manhood and strong citizenship in this country. That is what he wishes. He wishes us to realize for him all his hopes in the boy who bears his name and who is to follow in his footsteps.

There can be no greater act of faith, no greater act of trust, gentlemen, than that¹¹³

111. *But cf.* HARVARD ANNUAL REPORT 1893-94, *supra* note 79, at 17 (rejecting view "often said" that by "employing more men to watch the players, with authority to punish instantly infractions of the rules, foul and vicious playing could be stopped").

112. *E.g.*, 1906 IAAUS PROCEEDINGS, *supra* note 63, at 18-19 (discussing various rules relating to these points in the Western and Ohio Conferences).

113. NAT'L COLLEGIATE ATHLETIC ASS'N, PROCEEDINGS OF THE THIRTEENTH ANNUAL

However, there was a darker side to control. The financial interests of institutions in athletics challenged the trust inherent in the *in loco parentis* doctrine and undercut its welfare leg. The conflict between the institution's financial interest in perpetuating sport and its interest in protecting the welfare of the athlete continued to drive a wedge between parent and child as the commercial value of athletics and the pressure to grow athletics programs continued to rise.

II. THE DEATH KNELL FOR *IN LOCO PARENTIS*

Ironically, even as educational institutions were exercising more and more control over student-athletes, the application of the *in loco parentis* doctrine was waning as it applied to the larger student body.

A. *The General Student Body*

As the decades progressed, courts began to cut back on all three legs of the *in loco parentis* doctrine as it applied generally to colleges and universities. The student led campus protests of the 1960s and other instances of student rebellion against authority forced a new conception of the relationship between the student and the university. A number of court decisions confirmed that students of all ages were entitled to First Amendment protections, including freedom of speech and associational rights.¹¹⁴ Indeed, the U.S. Supreme Court called the university classroom "peculiarly the 'marketplace of ideas.'"¹¹⁵ The courts also declared

CONVENTION OF THE NCAA, at 10 (1935) [hereinafter 1935 PROCEEDINGS].

114. In 1969, the Supreme Court determined in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), that high school students had a right in the First Amendment to the U.S. Constitution to wear black armbands in quiet protest of the Vietnam war. *Id.* at 514; see also *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982) (finding that public school board may have violated First Amendment by barring library books approved by teachers and parents); *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667 (1973) (holding that university expulsion of student after she distributed campus publication allegedly containing indecent words was improper because it constituted the dissemination of ideas, though perhaps not in good taste).

Although the courts have recognized that narrowly tailored limitations on speech may be appropriate in some cases, in the educational context these limited instances tend to be where the need for discipline is important, where there is fear that the speech will interfere with the educational mission (as with pre-college students), or where there are significant concerns that the speech may jeopardize public order and safety.

The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. This amendment applies to the states under the Due Process Clause of the Fourteenth Amendment. See, e.g., *Pico*, 457 U.S. at 855 n.1.

115. *Keyishian v. Bd of Regents*, 385 U.S. 589, 603 (1967); see also *Pickering v. Bd. of*

that publicly-funded universities could not expel students without affording them some measure of due process¹¹⁶ or subject them to unreasonable searches and seizures.¹¹⁷

These court decisions also reflected an emerging distinction between college and university students on the one hand and younger students on the other—a distinction not present at the time of Alice's error and the *Tanton* decision. The Supreme Court explicitly recognized that college students are, generally speaking, "young adults" and thus "less impressionable than younger students" and not in need of shielding.¹¹⁸ While holding on to the doctrine with regard to young children, the courts jettisoned the *in loco parentis* doctrine as applied to college and university students, replacing it instead with a vision of the relationship based upon contract.¹¹⁹

While these constitutional pronouncements related to publicly-funded institutions, private institutions were not untouched by the revolution. In the wake of campus crackdowns on student protests, the Carnegie Commission on Higher Education published in 1971 a report and recommendations urging colleges and universities, both private and public, to take steps to protect student and faculty speech rights as essential to an academic community.¹²⁰ As a result, educational institutions across the country adopted a statement of student rights, which recognized for students at private institutions the same student freedoms that were at issue in litigation involving publicly funded ones. Accrediting agencies began to require similar institutional protections of academic freedom and some form of due process for faculty and students before affixing their

Educ., 391 U.S. 563 (1968) (upholding First Amendment free speech right of public high school teacher to criticize school board and superintendent).

116. *E.g.*, *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961) (requiring due process in expulsion cases); *Soglin v. Kauffman*, 295 F. Supp. 978 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969); *cf.* *Buttony v. Smiley*, 281 F. Supp. 280, 286 (D. Colo. 1968) (rejecting *in loco parentis* doctrine in university setting); *Goldberg v. Regents of the Univ. of Cal.*, 57 Cal. Rptr. 463, 470 (App. 1967) (also rejecting *in loco parentis* doctrine in university setting).

117. *Morale v. Grigel*, 422 F. Supp. 988, 997 (D. N.H. 1976) (regarding unauthorized and involuntary search of student's dormitory room, the court held that "[a] college cannot, in this day and age, protect students under the aegis of *in loco parentis* authority from the rigors of society's rules and laws, just as it cannot, under the same aegis, deprive students of their constitutional rights").

118. *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981). *Widmar* involved religious speech, but the Court was rejecting the idea that if religious speech took place within the university, students might misinterpret the message's content as in fact approved of by the university, and that students needed to be protected from that misimpression.

119. *See, e.g.*, *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 554 (3d Cir. 1984) ("Unlike a university, where it is generally understood that a student is, with reason, responsible for the conduct of his or her own affairs, the behavior of a high school student is subject to the constant regulation and affirmative supervision of adult school authorities."), *cert. granted*, 469 U.S. 1206 (1985), *vacated*, 475 U.S. 534 (1986).

120. *See* CARNEGIE COMM'N ON HIGHER EDUC., DISSENT AND DISRUPTION (1971).

stamps of approval.¹²¹ Federal law also had an impact on public and private colleges, as many were made vulnerable to federal laws affecting student rights by virtue of their receipt of federally-funded student financial aid.¹²²

Ironically, institutions too played a key role in curbing the doctrine's applicability to the larger student body. As they faced unprecedented litigation over liability for student injuries, institutions themselves began to call for a reduction of their responsibilities under the *in loco parentis* doctrine, particularly in the area of tort law. Courts responded by rejecting tort claims by parents alleging that institutions had breached a duty to monitor their children or others who had harmed them.¹²³

121. See, e.g., COMM'N ON COLLS., S. ASS'N OF COLLS. & SCH., CRITERIA FOR ACCREDITATION, Standard 5.4.3.3, at 61 (1996) [hereinafter S. ASS'N] (requiring institutions to publish and make available "a statement of student rights and responsibilities" and to outline clearly the disciplinary procedures), available at www.sacscoc.org (Principles of Accreditation); W. ASS'N OF SCH. & COLLS., HANDBOOK ON ACCREDITATION 18, 127 [hereinafter W. ASS'N] (imposing similar requirement), available at www.msache.org/pubs.html. Moreover, accrediting criteria also anticipate a community that tolerates free speech. See, e.g., MIDDLE STATES COMM'N ON HIGHER EDUCATION, CHARACTERISTICS OF EXCELLENCE IN HIGHER EDUCATION: STANDARDS FOR ACCREDITATION 4-6 (requiring "integrity in the institution's conduct of all its activities through humane and equitable policies dealing with students, faculty, [and] staff and defining integrity as presupposing academic freedom and intellectual freedom"); S. ASS'N, *supra*, Standard 4.8.6, at 50 (requiring that faculty and students "be free to examine all pertinent data, question assumptions, be guided by the evidence of scholarly research and teach and study the substance of a given discipline"); W. ASS'N, *supra*, at 18 (dictating that institution must publicly state commitment to academic freedom).

122. See, e.g., *Grove City Coll. v. Bell*, 465 U.S. 555 (1984) (affirming lower court holding that private educational institution that received no direct federal funding was subject to Title IX, including its athletic programs, because its students received federal financial aid that eventually reached the institution).

123. See, e.g., *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979) (finding college not liable to student passenger where student driver became intoxicated at campus picnic and later had car accident); *Lloyd v. Alpha Phi Alpha Fraternity*, No. 96-CV-348, 97-CV-565, 1999 WL 47153 (N.D.N.Y. Jan. 26, 1999) (finding university not liable for pledge's injuries because it had no duty to control university sanctioned fraternity and no knowledge of its activities); *Albano v. Colby Coll.*, 822 F. Supp. 840 (D. Me. 1993) (holding that college had no duty to prevent twenty-year-old student from becoming intoxicated and causing harm to himself); *Hartman v. Bethany Coll.*, 778 F. Supp. 286 (N.D. W. Va. 1991) (stating that college had no duty under *in loco parentis* doctrine and had not been negligent in case in which seventeen-year-old female student was attacked by two male associates she met at a bar); *Nero v. Kan. State Univ.*, 861 P.2d 768 (Kan. 1993) (holding that university-student relationship did not alone impose a duty to protect sexually assaulted student from acts of fellow students or third parties, although landlord-tenant relationship could do so); see also *Stamatakos*, *supra* note 14, at 474; Robert D. Bickel, *A Brief Comment About the Law's Unique Relationship to Postsecondary Education*, 27 STETSON L. REV. 115, 115-16 (1997).

Still, the courts have recognized that colleges have some obligation to provide a safe campus, but again the activities in question are those that could cause actual physical harm, not simply moral

Instead of the higher duty found in *in loco parentis*—the duty inherent in the welfare arm—the courts found instead that schools would be judged by ordinary negligence standards. The courts rejected the doctrine even in cases in which the student whose behavior or safety was at issue was under the age of majority.¹²⁴ It has been argued that at least where student safety is concerned the doctrine has met with a recent revival.¹²⁵ However, these cases may reflect only a moderate retreat; it is clear that in all other areas—except for athletics of course—the doctrine is essentially dead.

B. Student-Athletes: On the Fringes of the Revolution

Student-athletes were often involved in the student-led campus protests that led to the general expansion of rights for students and of civil rights in general. Their efforts helped to end segregation in both athletic and nonathletic aspects of college and university life.¹²⁶ For many purposes, the athletic departments of colleges and universities continued to treat student-athletes the way they had always treated them. Thus, while receiving benefits designed to make them beholden to athletics, student-athletes did not gain all of the new, broader rights that the revolution brought to other students, or gained them far more slowly. Before considering the divergence of student-athlete rights from the larger student body's rights, it is useful to consider the "why" of this phenomenon. The reason for the divergence, I argue, was institutional bifurcation.

C. Institutional Bifurcation as the Reason Why Student-Athletes Did Not Gain an Expansion of Rights

The reason that student-athletes did not gain the broad expansion of rights that non-athlete students gained in the 1960s and 1970s is that, by that time, athletics had been separated out from the larger life of institutions and was operating under its own set of rules. Many educational institutions with intercollegiate athletic programs had become, in effect, bifurcated institutions.

behavior. See Hirshberg, *supra* note 14 (claiming a partial re-emergence of the *in loco parentis* doctrine); see also *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360 (3d Cir. 1993) (finding jury question as to whether college had proper safety precautions in place to aid student-athlete suffering cardiac arrest when engaging in athletics for which he was recruited). The notion of such responsibility is also embraced in the Student Right-to-Know and Campus Security Act, Pub. L. No. 101-542, 204, 104 Stat. 2381, 2385-87 (1990) (codified as amended at 20 U.S.C. § 1092 (2000)).

124. See, e.g., *Booker v. Lehigh Univ.*, 800 F. Supp. 234 (E.D. Pa. 1992) (finding that college not liable when underage student injured herself through alcohol self-indulgence), *aff'd*, 995 F.2d 215 (3d Cir. 1993); *Hartman*, 778 F. Supp. at 294 ("A College does not stand *in loco parentis* to its seventeen year old college freshmen.").

125. See Hirshberg, *supra* note 14, at 190-91.

126. This activism of black athletes in particular has been chronicled. See, e.g., HARRY EDWARDS, *THE REVOLT OF THE BLACK ATHLETE* (1969); see also JACK SCOTT, *THE ATHLETIC REVOLUTION* (1971).

This trend began very early on when institutions hired professional coaches but declined to integrate them into the faculty. Out of this environment emerged the "training tables" where athletes dined separately from other students, as well as, on some campuses, separate living quarters for athletes.¹²⁷ By the mid-1900s it was common for institutions not to include athletics income and expenditures in the overall college or university budget reports, but rather to account for it separately and even privately to avoid scrutiny.¹²⁸ The need for such creative accounting grew greater as institutions strained under the pressure to expand their athletic programs through new stadia that were beyond the institutions' means.¹²⁹ The financial strain on institutions was heightened by the effect of the Great Depression in the 1930s and the military draft, which siphoned away many of the ablest student-athletes for military service. Thus, in the 1970s the Raiborn report would conclude that contrary to the public image of athletics as a self-sustaining institutional program, even one that made non-revenue programs possible, the majority of institutions with athletic programs were operating their athletic departments in the red due to rising coaches salaries and athletics program costs.¹³⁰ The passage of Title IX in the 1970s added to this pressure. Under Title IX, educational institutions receiving federal funds had to ensure gender equity in men's and women's athletics programs. Not surprisingly, many educational institutions resisted the application of Title IX to their athletic programs, then predominantly serving males, although they conceded that other educational programs were subject to it.¹³¹ In 1985, the NCAA passed a constitutional

127. 1906 IAAUS PROCEEDINGS, *supra* note 63, at 18-19 (noting that training tables were forbidden in the Western and Ohio Conferences); 1907 IAAUS PROCEEDINGS, *supra* note 73, at 8 (suggesting that training table concept may soon lose appeal among New England colleges); *id.* at 16 (training table done away with in Missouri Valley Conference).

128. In 1997, the NCAA passed Bylaws 6.2.1. and 6.2.2 requiring that athletic department budgets "be controlled by the institution and be subject to its" normal budgeting procedures or be approved by the CEO of the institution. 1996-97 NCAA MANUAL.

129. *See, e.g.*, PROCEEDINGS OF THE TWENTY-NINTH ANNUAL CONVENTION OF THE NCAA 32 (1934) [hereinafter 1934 NCAA PROCEEDINGS] (stating that some schools in Sixth District were "financially embarrassed" because of efforts to maintain athletics beyond their means); *id.* at 42 (noting that Eighth District schools most frequently listed finances as major problem in athletics). In 1928, Brown University reported building a \$750,000 gymnasium; the Third District reported that its schools were "imitating" others in "building stadia within their means." *See* 1928 NCAA PROCEEDINGS, *supra* note 69, at 18, 28.

130. MITCHELL H. RAIBORN, REVENUES AND EXPENSES OF INTERCOLLEGIATE ATHLETIC PROGRAMS: ANALYSIS OF TRENDS AND RELATIONSHIPS, 1970-77 (1978).

131. *See, e.g.*, *Grove City Coll. v. Bell*, 687 F.2d 684, 696-700 (3d Cir. 1982) (noting that educational institutions are treated as single entities under Title IX, including their athletic programs, and citing congressional hearing testimony noting that objections to the inclusion of athletics are directly against the spirit of Title IX), *cert. granted*, 459 U.S. 1199 (1983), *aff'd*, 465 U.S. 555 (1984); *see also* U.S.C.A. §§ 1681-1688 (West 1999 & Supp. 2002). So far the NCAA itself has been held to be not subject to Title IX. *E.g.*, Thomas M. Rowland, *Level the Playing Field: The NCAA Should Be Subject to Title IX*, 7 SPORTS LAW. J. 143, 144 (2000).

amendment requiring that athletic department budgets be controlled by the institution and be subject to normal budgeting processes,¹³² but years of special treatment of athletics had already created a bifurcation of interests between the athletic department on the one hand, and the rest of the institution on the other.

The failure of educational institutions either to embrace or reject intercollegiate athletics as an academic endeavor created an environment that was ripe for bifurcation. This writer believes that six additional factors also contributed to it

1. *The Insecure Career Status of Coaches.*—The battle between adherents to the liberal arts tradition and those who favored practical training led to the insecure and segregated status of coaches in institutions, which, in turn, helped to make bifurcation possible. Any institutional allegiance that could have been fostered among coaches was stymied, because not only did institutions generally not offer coaches tenure, they fired coaches who failed to deliver a winning record. At the same time, institutions refused to reject coaching and intercollegiate athletics outright. The precarious status of coaches forced those with the primary responsibility for ensuring student welfare to consider their own job security and, contrary to the *in loco parentis* doctrine, to choose actions which increased that security through winning, even when such actions were contrary to student welfare. Moreover, the insecure status of coaches encouraged them to seek out avenues for promotion that were outside of the university structure.

2. *The End of General Faculty Involvement in Athletics.*—At the first NCAA meeting in 1906, the role of attendees was dominated by faculty not specializing in athletics and general administrators.¹³³ However, by the 1930s, presidents, administrators, and faculty in traditional disciplines had virtually disappeared, replaced by those whose work was teaching and training in athletics.¹³⁴

The reduction of CEO and non-athletic faculty involvement and specialization in coaching may have been inevitable given the growth of athletics and, perhaps, was even a good thing if institutionally-run intercollegiate athletics was to survive. Certainly, the emergence of professional associations among coaches helped to provide some standards, albeit voluntary ones.¹³⁵ But the distancing of mainstream faculty and the lack of job security of athletics personnel also resulted in a conflict of interest because those with a direct

132. See 1988-89 NCAA MANUAL 18. This language was subsequently translated into Bylaw 6.2.1 in the 1989-1990 manual.

133. 1906 IAAUS PROCEEDINGS, *supra* note 63, at 7-9 (displaying list of delegates; most delegates bear the title of "Professor," a title not given to coaches or athletics directors at that time). In contrast, Alonzo Stagg, athletic director at the University of Chicago and a visiting delegate, is listed as "Director" Stagg. *Id.*

134. See also 1935 PROCEEDINGS, *supra* note 113, at 103 (lamenting the small number of presidents and deans at the meetings).

135. Early on, the conferences initiated annual coaches meetings. See, e.g., 1911 PROCEEDINGS, *supra* note 66, at 21, 32 (referring to meetings regarding sportsmanship and eliminating distrust among coaches).

financial interest in perpetuating intercollegiate athletics and in growing programs larger also had the primary responsibility for overseeing student-athlete welfare.

3. *Radio, Television, and Media Attention.*—As noted earlier, college athletics generated enormous public attention from the earliest days of its arrival on campus.¹³⁶ In the 1950s, television completely rewrote the rules of intercollegiate athletics by contributing exponentially to its growth and money-making potential. Television allowed institutions to contract for coverage of games and to offer events as advertising venues, available for a price. These contributions created enormous difficulties for the alleged parent under the *in loco parentis* doctrine. The NCAA awarded its first television contract to NBC in 1952 for football coverage of member games for \$1.1 million.¹³⁷ By the late 1990s, the NCAA was receiving more than eighty percent of its revenue from television, and the schools and conferences with largest programs were receiving a cut of that money through “revenue sharing.”¹³⁸ The most recently negotiated television network contract is an eleven-year, \$6 billion agreement for NCAA championship coverage and marketing beginning this year.¹³⁹ The televising of sporting events also provided tremendous advertising for institutions themselves, which theoretically increased their admissions yields generally. The revenue that athletics controlled, both in terms of profits, losses, and intangibles, made athletics the tail that wagged the institutional dog.

4. *The Ceding of Power over Athletics to National and Regional Bodies.*—Ironically, the NCAA and conference control also created an environment ripe for bifurcation. As the NCAA and conferences began to create specialized legislation, the institutions began to surrender the right to affect athletics through internal policies.

This separation of governance had a significant impact upon student-athletes’ right to be heard in the bodies that affected their lives. Because traditional campus committees no longer dealt with intercollegiate athletics, students had no on-campus representation. Also, because students were not members of the NCAA, and for a substantial period of time there was no representative body within the NCAA charged with ensuring that student-athlete concerns and interests were protected, students essentially had no representation within that body. Indeed, student representation within the NCAA did not come until 1989 through a non-voting Student-athlete Advisory Committee (“SAAC”) selected by NCAA members. Moreover, it was not until the late 1990s that the NCAA required both campus and conference SAACs. After NCAA restructuring in 1996, a national SAAC was scrapped in favor of three separate divisional ones, which reduced the ability of student-athletes to band together to affect those

136. See discussion *supra* Part I.D.

137. FALLA, *supra* note 5, at 106. General Motors was a corporate sponsor.

138. See Carter, *supra* note 4, at 23-24.

139. *Id.* at 23 (citing *NCAA, CBS Reach 11-Year 6 Billion Agreement*, NCAA NEWS, Dec. 6, 1999, at 1).

student-athletes outside of their particular division.¹⁴⁰

5. *The Marginal Societal Status of Many Student-Athletes and Their Natural Supporters.*—Another fact that facilitated bifurcation was that those participants subject to the rules were the students least able to contest them. It could be argued that by focusing early concerns on preparatory schools, colleges and universities discouraged students from economically stable backgrounds from participation in sports.¹⁴¹ Racial minorities suffered a double dose of discrimination as racial discrimination also created economic disadvantages regardless of background. By the 1990s black students would make up more than sixty percent of all male Division I basketball players and twenty-two percent of all scholarship athletes at predominantly-white institutions.¹⁴² In addition, throughout the 1990s, black males, consistently made up more than twenty-five percent of all Division I male student-athletes, including those in nonrevenue producing sports.¹⁴³ These figures held true even though black males and, indeed, blacks in general, made up far less of these institutions' entire student population, athletics staff, or faculty.¹⁴⁴

Discrimination and disadvantage also affected the natural advocates for these marginal groups—their parents and leaders in their communities. Rightly or not, facing discrimination in other areas of employment and education, many blacks came to see athletics as one of the few available avenues for education and economic advancement.

These facts also explain why very few student-athletes brought lawsuits against their schools and why those who did were largely unsuccessful, particularly when the institutions began to mobilize their own legal resources to

140. *Id.* at 33-35.

141. See discussion *supra* notes 52-53 and accompanying text (discouraging preparatory school recruitment).

142. Paul Anderson, *Racism in Sports: A Question of Ethics*, MARQ. SPORTS L.J. 357, 367-68 (1996). For various articles assessing the impact of racism in college sports, see RACISM IN COLLEGE ATHLETICS (Dana Brooks & Ronald Althouse eds. 1993) and Davis, *supra* note 58.

143. Chart, *Student-Athlete Participation by Race*, NCAA NEWS, Jan. 15, 2001. Unfortunately, this latest chart does not provide separate figures for the high-yield/high expense sports of mens' football and basketball. Black women's participation in womens' athletics is not as disproportionate as black male representation in male athletics. *Id.* It is clear that males, not females, were the group whose athletic talents were exploited in the early search for athletic dollars. By contrast, women were denied the opportunity to compete at many institutions up until the implementation of Title IX. The reduced professional opportunities in womens' sport and possibly a shorter projected lifespan for women's professional careers due to perceived family obligations may also explain why black women are not as significantly overrepresented as black men, although they do show some overrepresentation.

144. The point is an obvious one but statistics also support it. Anderson, *supra* note 142, at 367-68 (noting that only ten percent of all athletic positions were filled by African-Americans from 1991-94; that African-Americans are only 3.6% of college athletic directors; 4.9% of associate athletic directors; fourteen percent of Division I head coaches; and six percent of all students at Division I colleges).

defend such suits.¹⁴⁵ At the same time, the marginal situation of these athletes, including the discrimination they faced, may have added to the view that student-athletes were incapable of making decisions for themselves and therefore must be paternalistically treated or that they were somehow undeserving of or could not handle the freedoms assured to non-athlete students.¹⁴⁶

D. The Results of Institutional Bifurcation

The result of bifurcation was, ultimately, an inability of colleges and universities to control their intercollegiate athletic programs and an inability to adhere to the much-heralded principles of amateurism. Intercollegiate sports essentially became a lucrative and expensive professional training arm for educational institutions. This lack of control manifested itself in numerous ways.

1. *Proliferation of Practices and Postseason Games.*—Among these manifestations were a proliferation of post-season games and a lengthening of practice times. By the 1940s, many of the modern “bowl” games that now pepper school “vacation” times and holidays were well established. These games occurred during student vacations or holiday times.¹⁴⁷ To study the proliferation of bowl games, the NCAA created a “Bowl Games Committee” in 1947.¹⁴⁸ Bowl games threatened the pure amateur model because they increased the amount of time spent on sport, emphasized commercialism, and often took place at venues and under conditions outside of the institution’s control. The overwhelming number of the bowls were sponsored by noncollegiate institutions, usually business groups or chambers of commerce that desired to attract business.¹⁴⁹

145. The NCAA set up a satellite office in Washington, D.C., in 1996 in order to be in close contact with those who could affect athletics policy. See Carter, *supra* note 4, at 24-25.

146. See Davis, *supra* note 58.

147. See NCAA, 1947 NCAA YEARBOOK 183 [hereinafter 1947 YEARBOOK]; NCAA, 1948 NCAA YEARBOOK 167; see also, e.g., *id.* at 100-01 (noting alarm at large number of Bowls being founded and expressing happiness that NCAA has determined to regulate postseason football). That committee’s 1949 report identified some fifty bowls that had taken place in recent years. See also *id.* at 167-74. The list included bowls well known to modern day football fans, such as the Cotton Bowl, East-West (Shrine) Bowl, Rose Bowl, Sugar Bowl, and Sun Bowl. Likewise, it included names not as recognizable today, including the Junior Rose Bowl, Glass Bowl, Raisin Bowl, and Burley Bowl. *Id.* at 168. While only seventeen of these responded to a questionnaire mailed by the committee to their sponsor’s anticipated address, the committee gleaned some basic knowledge of the structure of bowls or lack thereof from that information. See *id.* at 168-69. All of the bowls were postseason events.

Such reports on bowl games continued to be offered. See, e.g., NCAA, 1955-56 NCAA YEARBOOK 259 (noting ten postseason “bowl” events “for the 1955 season were certified by NCAA Extra Events Committee”: Corn (Nov. 24, 1955), Cotton (Jan. 2, 1956), Gator (Dec. 31, 1955), Orange (Jan. 2, 1956), Prairie View (Jan. 2, 1956), Refrigerator (Dec. 4, 1955), Rose (Jan. 2, 1956), Sugar (Jan. 2, 1956), Sun (Jan. 2, 1956), and Tangerine (Jan. 2, 1956)).

148. 1947 YEARBOOK, *supra* note 147.

149. Though not controlled by collegiate institutions directly, many of these bowls reported

However, institutions received compensation for their teams' participation in these events, often in the form of a substantial portion of the gate receipts.¹⁵⁰ A few bowls, among them the Rose Bowl and Cotton Bowl, were sponsored by the competing institutions themselves or their conferences.¹⁵¹ Traveling distances to games also increased as intercollegiate athletics expanded from a regional to the national scope. Even before the arrival of the airplane, under institutional control, students traveled hundreds of miles and missed days or weeks of classes.¹⁵²

The bifurcation of institutions into athletic and nonathletic venues lessened their power to control these inroads into student-athlete time. Of course, as the financial incentives of such events increased, the willingness of institutions to control bowl game proliferation was also tested, particularly when other institutions seemed to be taking advantage of such games.

2. *The Distancing of the Intercollegiate Athletics Coach.*—Another result of bifurcation was the growing separation between the intercollegiate athletics coach and his or her school. It would not be until 1955 that the NCAA secured a national regulation to require inter alia that coaches be given the same career advancement rights and security as others hired to the faculty. However, it would be longer before a majority of schools actually took action to make this happen.¹⁵³

Successful coaches thus became easy targets for those who would offer compensation and incentives from sources outside the institution's regular budgetary structure. During the 1980s, the avenues for outside supplementation of coaches' salary took a dramatic turn. The Nike Corporation altered the face of coaches compensation by initiating lucrative contracts that compensated coaches for requiring their student-athletes to wear the manufacturer's apparel

distributing a substantial portion of their receipts to participating institutions.

150. 1948 NCAA YEARBOOK, *supra* note 147, at 169. Today football bowl games remain lucrative.

151. The "Glass Bowl" was also in this group of institutionally-sponsored post-season games. *Id.* at 170. The committee concluded that the NCAA should take some action "to control its member institutions in the acceptance of bowl game bids" given the bowls' post-season character. *Id.* at 171.

152. In 1928, the NCAA's Eighth District, comprised largely of western schools, defended their contests against eastern and midwestern schools, complaining that when teams from the northwest and southwest travel 1400 to 1700 miles in competition, there is no contact. While noting the increase in such contests, the reporter stated that it was inevitable that the airplane would soon be used to transport teams, thus resolving the problem of missed classes. *See* 1928 NCAA PROCEEDINGS, *supra* note 69, at 45-46.

153. *See* 1955-56 NCAA YEARBOOK, *supra* note 147, at 36. There it was detailed that [a]n institution should enter into a contractual agreement with a coach similar to those entered into with other members of the faculty and such a contract should include the assignment of faculty rank, benefits of tenure and retirement and such other rights and privileges as are enjoyed by other members of the contracting institution's faculty.

Id.

or for otherwise promoting the manufacturer's products.¹⁵⁴ Today such contracts are a common element of coaches' compensation packages.

3. *The Failure of a Scholarly and Research-Oriented Approach to the Resolution of Issues Relating to Athletics and Education.*—Those looking at early NCAA proceedings may be surprised to see the number of formal papers that were presented. This approach to the convention was surrendered once athletic specialists began to take over the proceedings and once television came into the horizon. Later proceedings took the form of simple discussions focusing upon new rulemaking, with very few prepared remarks. Perhaps this evolution was necessary given the evolving nature of the NCAA's business. As it moved from an organization which simply talked about policy to one that actually implemented and enforced it, participants likely had little time for pipedreams. But the tradeoff was that those who had the time and mission to write and think about the relationship between athletics policy and the larger world, did not spend their research energies on that topic. Thus, generally speaking, athletics, both inside and outside of the university, did not benefit from the broader contributions generated in the research arms of universities.¹⁵⁵

E. Outside Pressures Lead to Increasing Controls

Noting the proliferation of post-season events and what they perceived as abuses in intercollegiate athletics, commentators outside of the NCAA chastened schools to take "control" of their athletic programs. The press had constantly criticized institutional administration of intercollegiate sports, even as they helped to perpetuate many of the problems of which they complained.¹⁵⁶ Among academic types, the "faculty control," and later "presidential control" banners began to wave furiously, advocating greater control over athletics. In 1929, the Savage report by the Carnegie Foundation for the Advancement of Teaching argued that "[t]he defense of the intellectual integrity of the college and of the university lies with the president and faculty."¹⁵⁷ In the 1950s, the American

154. Sonny Vaccaro, a former Nike employee and sports agent, initiated the practice of entering into these types of contracts with coaches. The contracts that originally began as "gentlemen's agreements" eventually became common in the industry as a part of a coach's compensation package. See, e.g., Bill Brubaker, *The Most Influential Man in the World of High School Basketball*, WASH. POST, Feb. 8, 1988, at C5 (noting Vaccaro's "open line" to high school and college coaches); Bill Brubaker, *Sonny Vaccaro Peddling Shoe, Influence in Basketball Circles*, L.A. TIMES, Feb. 14, 1988, at 2; Mike Stanton, *No Business, Like Shoe Biz*, NEWSDAY, Mar. 7, 1989, at 99.

155. W. Burlette Carter, *Introduction: What Makes a "Field" a Field?*, 1 VA. J. SPORTS & LAW 235, 236 (2000).

156. See *supra* note 86 and accompanying text.

157. SAVAGE, *supra* note 5, at xxi. The report went on:

With [the president and faculty] also lies the authority. The educational governance of the university has always been in their hands. . . . The president and faculty have in their power the decision touching matters affecting the educational policy and

Council on Education issued the first of many reports that called for control over athletics programs.¹⁵⁸ In addition, in the 1990s, the Knight Commission on Intercollegiate Athletics took the lead and urged the NCAA to exercise control.¹⁵⁹

Eventually, the NCAA heard and responded to calls for increased control. In 1952, the central NCAA finally entered the business of enforcing rules against members, creating the first infractions committee.¹⁶⁰ The NCAA attempted to quell the rising tide of post-season games.¹⁶¹ The NCAA also passed legislation to prevent students from participating in non-collegiate sponsored events without prior permission.¹⁶² Further, the NCAA passed legislation requiring a coach to include any supplementary income in his/her contracts and requiring the institution to enforce these contracts.¹⁶³ The NCAA also passed academic integrity legislation setting minimum academic standards for student-athletes.¹⁶⁴

Even as the NCAA became more and more involved with the perpetuation and enforcement of national standards, athletics became more lucrative and expensive for the participants. The stakes of winning grew higher for institutions. The growth in the complexity of athletics is obvious from the growth of NCAA documentation. The first volume of NCAA proceedings totaled thirty-seven pages, including the convention reports, constitution and bylaws.¹⁶⁵ By 1996, when the NCAA underwent a dramatic restructuring, the

intellectual interests of their institution. If commercialized athletics do not affect the educational quality of an institution nothing does. The responsibility to bring athletics into a sincere relation to the intellectual life of the college rests squarely on the shoulders of the president and faculty.

Id. at xx-xxi.

158. See Carter, *supra* note 4, at 41-44.

159. See *id.* at 45-48.

160. A constitutional compliance committee, was the first such attempt, but punitive action for violations required a supporting vote of the membership. That committee was later disbanded. The NCAA reentered legislation enforcement in 1952 with an infractions committee, apparently a subcommittee of the membership committee. See NCAA, 1953 NCAA YEARBOOK 243; see also NCAA, 1955-56 NCAA YEARBOOK, *supra* note 147, at 159 (reporting history of NCAA enforcement and 1952 creation of infractions committee). In 1956-1957 the NCAA Council established public, written committee procedures for the infractions committee. NCAA, 1956-57 NCAA YEARBOOK, Appendix (Recommended Policies and Practices for Intercollegiate Athletics) 39 (setting forth "official" procedures).

161. A "Principle Governing Post-season Games" first appears in the constitution adopted at the 1954 proceedings.

162. The "Principle Governing Competition in Post-season [sic] and Non-Collegiate Sponsored Contests" first appeared in the 1951 constitution. It required that such competition conform to NCAA rules. NCAA, 1950 NCAA YEARBOOK 254.

163. See NCAA, 1955-56 NCAA YEARBOOK, *supra* note 147, at 36 (providing that "special concessions to a coach . . . should be set forth in detail in the contract and accepted as legal and binding in the same manner as the other provisions of the contractual agreement").

164. The most well known of these efforts was proposition 48 and proposition 16.

165. See 1906 IAAUS PROCEEDINGS, *supra* note 63.

proceedings and the manual (separately bound) were nearly 600 pages each.¹⁶⁶

This movement toward greater central control between the 1950s and the 1990s was not without its hitches. In the 1970s, some institutions, believing that the NCAA had gone too far in investigating infractions on their campuses, sought the assistance of Congress.¹⁶⁷ Others filed lawsuits against the NCAA.¹⁶⁸

During this period as well, competitive parity became a central focus of NCAA enforcement and legislative efforts. The result was not always fair for the student-athlete for the association's focus shifted from concern on educational matters to ensuring competitive athletic equity among NCAA institutional members. Parity principles required that an offending institution be punished in such a way as to restore competitive equity to others who did not have the same advantage, even if that punishment meant that an innocent group of student-athletes might suffer. For example, if an institution were found to be in violation of NCAA regulations, those athletes involved in the violation, or the entire team, whether or not those athletes were at fault, could be declared ineligible.¹⁶⁹ At the same time, the NCAA transfer rules prohibited those same innocent athletes from transferring to other non-offending schools and playing immediately there.¹⁷⁰ Parity principles and commercial concerns ensured that institutions would not act to better the lives of their charges if so acting would affect the delicate balance among the institutions or the commercial investment in the athlete.¹⁷¹ And

166. NAT'L COLLEGIATE ATHLETIC ASS'N, 1996 CONVENTION PROCEEDINGS; 1996-97 NCAA MANUAL, *supra* note 128.

167. NCAA Enforcement Program: Hearing Before the Subcomm. on Oversight and Investigations for the House Comm. on Interstate and Foreign Commerce, 95th Cong., 2nd Sess. (1978).

168. *See, e.g.*, NCAA v. Bd. of Regents, 468 U.S. 85 (1984) (rejecting the NCAA's attempt to regulate televising of member football games in the name of competitive parity); Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998) (challenging attempts to regulate coaching salaries in the name of parity).

169. 1989-90 NCAA MANUAL 267-71 [hereinafter 1989-90 NCAA MANUAL] (setting forth penalties for secondary and major infractions). A secondary infraction was defined as one that provided only a limited recruiting or competitive advantage and that was isolated or inadvertent in nature. *Id.* at 265-66.

170. *Id.* at 119. Transfer rules date back to the first NCAA rules adopted in 1906. *See supra* notes 106-08 and accompanying text (rule requiring one-year residence before transfers could participate).

171. Although concerns of competitive parity were always present, the parity principle was formally stated in the 1989-90 manual through the "Principle of Competitive Equity" as follows: "The structure and programs of the Association 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." 1989-90 NCAA MANUAL, *supra* note 169, at 4. *Compare* NCAA 2001-02 DIVISION I NCAA MANUAL 5 (same language). In his 1995 State of the Association Address, NCAA CEO Cedric Dempsey acknowledged that the focus upon the parity principle had led some to believe that competition mattered more than the rights and needs of student athletes. Cedric Dempsey, *State*

although courts pulled back on their embrace of *in loco parentis* where the ordinary student body was concerned, they seemed to give the institutions free reign to manage athletics when student-athletes were at issue.

Declaring that participation in athletics was a *privilege*, not a right, courts found that the denial of participation by a public institution did not amount to a violation of any constitutional right.¹⁷² This characterization was particularly ironic because outside of student athletics, by the late 1960s, the right/privilege distinction in constitutional law was reportedly meeting its demise.¹⁷³ In more recent years, at least one court has suggested that athletics “eligibility” rules are subject to *greater* deference than other types of NCAA rules such as those affecting institutional rights.¹⁷⁴ The basis for such a conclusion seems to be rooted in the idea that the perpetuation of amateur athletics has some sacred status or an archaic view of student rights.

It is true that as controls over student-athletes increased, many of them gained the right to receive substantial athletic scholarships. However, not all student-athletes subject to controls received scholarships or full scholarships. As I discuss below, the legal validity of a “rights for scholarship” tradeoff is questionable when publicly-funded institutions are involved.¹⁷⁵ Moreover, the tradeoff was arguably an inappropriate proposal for institutions purportedly concerned about education and wielding such tremendous power.

In the end, however one views the situation, movements that transformed student rights in other parts of educational institutions did not cut so deeply into athletic programs. I contend that this period of institutional bifurcation and athletics isolation saw in intercollegiate athletics administration a reinforcement of the control leg of *in loco parentis* and a corresponding weakening of the welfare leg.

As might be expected with such a diverse group, over time the allegiance began to splinter, requiring different legislation for different groups.¹⁷⁶

of the Association Address, 1995 NCAA PROCEEDINGS 74-75.

172. See Carter, *supra* note 4, at 72 (citing *Graham v. Tenn. Secondary Sch. Athletic Ass’n*, 1995 U.S. Dist. Lexis 3211 (E.D. Tenn. 1995) and *Karmanos v. Baker*, 617 F. Supp. 809, 815 (E.D. Mich. 1985); see also *Veronia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (rejecting a Fourth Amendment challenge to drug testing for public school athletes, holding that participants in athletics should expect reasonable intrusions upon their rights and privileges and that manner of testing was not unreasonable). However, the court also noted that the testing followed findings that student-athletes were leaders in the local drug culture and institutional concern that drug abuse could lead to athletics injuries.

173. See, e.g., William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) (arguing that demise taking place in the 1960s).

174. See, e.g., *Smith v. NCAA*, 139 F.3d 180, 185-86 (3d Cir. 1998) (opining that “eligibility” rules are not commercial and thus are not subject to antitrust challenge), *cert. granted*, 524 U.S. 982 (1998), *vacated on other grounds*, 525 U.S. 459 (1999). For a questioning of this blanket view case, see Carter, *supra* note 4, at 75-77.

175. See discussion *infra* Part III.B.

176. See Carter, *supra* note 4, at 27-38 (discussing restructuring). As early as the 1950s, the

Ultimately, the NCAA divided into three different “divisions” representing clear political and financial differences in their approach to athletics. Division I schools comprised institutions with the largest athletic programs and the most to gain from television revenues. They embraced the concept of both athletic scholarships and wide media coverage and imposed the greatest restrictions on student-athletes.¹⁷⁷ Division II schools were smaller schools that offered athletic scholarships, but placed less emphasis on athletics.¹⁷⁸ Division III schools were those that rejected the notion that athletics should be uniquely considered in awarding a scholarship.¹⁷⁹ Then, in 1996 and 1997, the NCAA passed dramatic restructuring legislation. As a result, the three NCAA divisions, I, II, and III, each went their own ways legislatively and a single NCAA Manual became three manuals.¹⁸⁰ Division I schools began to handle most of their legislative business outside of the convention context; thus, the size of the proceedings decreased because there was less that was publicly available to report, but certainly the amount of business done dramatically increased.¹⁸¹ Each of these divisions would continue to assert adherence to the principle of amateurism, but each defined amateurism in its own way. Thus, as the NCAA entered the year 2000, it reversed its trend toward strong central governance.

While the form of governance has changed dramatically, the absolute control exercised by the Divisions, particularly Division I, over student-athletes’ lives has not.

This writer sees three troubling trends that characterize NCAA legislation under the perversion of *in loco parentis*. First, the central regulatory structure rarely considered the student anything but athlete *first*. Any other rights the student had outside of the athletic context were subrogated or merged into athlete rights. Second, as the central regulatory structure grew more complex, the rules were commonly interpreted to assume that action not permitted under NCAA rules was forbidden until an exception was granted. Lastly, even after the clear death of traditional *in loco parentis*, student-athletes’ interests were recognized only to the extent that they converged with institutional rights. In the case of a conflict, the student-athlete always lost. The next section examines these trends.

smaller colleges held separate “roundtable” meetings at the annual convention. *See, e.g.*, NCAA, 1949 YEARBOOK at 101-65. A separate NCAA small college committee also reflected the interests of this group. *Id.* at 230.

177. NCAA, 2000-01 DIVISION I MANUAL, at 321-38 [hereinafter 2000-01 DIVISION I MANUAL].

178. *See* NCAA, 2000-01 DIVISION II NCAA MANUAL, at 267-79.

179. *See, e.g.*, NCAA, 2001-02 DIVISION III NCAA MANUAL, at 227-37 [hereinafter 2000-01 DIVISION III MANUAL] (setting forth divisional membership requirements) and 107-08 (requiring that student-athletes meet the same institutional regulations applicable to the general student body in order to receive financial aid).

180. *See* Carter, *supra* note 4, at 35-36.

181. *Id.* at 64.

III. CONTROL, WELFARE, AND DEFERENCE TODAY

I have argued so far that to understand the degree of control exercised over student-athletes in intercollegiate athletics, one must appreciate the role of the *in loco parentis* doctrine. I have attempted to illustrate that the doctrine provided the legal and social basis for institutions to exercise broad controls over the lives of student-athletes in the name of protecting their welfare. I have further attempted to show that although the doctrine met its demise in the 1960s and 1970s, it remained a force in intercollegiate athletics administration. A distorted version of that doctrine emerged, one that emphasized control and deemphasized welfare. Below are two examples of how this altered *in loco parentis* doctrine continues to be manifested in contemporary intercollegiate athletics policy.

A. Student Free Speech Rights

In 1996, *Sports Illustrated* invited a student-athlete to write for the magazine after the magazine discovered the student's work on his own website. The student-athlete's school denied him permission to write the article on the grounds that it would violate the NCAA's amateurism principle. The school reasoned that the student-athlete's writing would be used (either directly or indirectly) to promote the magazine and, therefore, *Sports Illustrated* would be exploiting his athletic ability.¹⁸²

The relevant NCAA rule was Bylaw 12.5.2.1, which prohibited a student-athlete from using his or her name or picture to directly advertise or promote the sale or use of commercial products or services.¹⁸³ NCAA regulations *did* permit uncompensated and nonpromotional *radio and TV* appearances (with restrictions), but the rules said nothing about *writing*.¹⁸⁴ The interpreters concluded that because the activity was not permitted, it was prohibited. The student did not write the column or challenge either the NCAA or his school in court.¹⁸⁵

Concerned about the irony of educational institutions preventing students from taking advantage of such experiences, some institutions led an effort to amend the rules to expand student writing opportunities.¹⁸⁶ However, as a result of a vote to restructure the NCAA at the 1996 and 1997 conventions, each of the three NCAA divisions had the right to develop its own rules regarding student writing opportunities. The differences in the legislative approaches that emerged among the divisions illustrate how institutional financial considerations create conflicts of interest that make it difficult for institutions to give student-athletes

182. See Greg Belinfanti, *Athletes Need a Way to Get the Word Out*, NCAA NEWS, Mar. 25, 1996, at 4. Students were permitted to publish in the *NCAA News*, the official NCAA newspaper. Thus, Belinfanti, a different student, wrote an opinion piece challenging the outcome.

183. 1996-97 NCAA MANUAL, *supra* note 128, at 105-06.

184. See *id.* at 106.

185. See Belinfanti, *supra* note 182.

186. The original proposals for amendments came up at the 1997 convention. See NCAA, 1997 NCAA CONVENTION PROCEEDINGS A125-A127 [hereinafter 1997 NCAA PROCEEDINGS].

their full due. In other words, the *Sports Illustrated* case and the legislation that flowed from it demonstrate the perversion of *in loco parentis* that now guides intercollegiate athletics regulatory policy.

Significantly, the *Sports Illustrated* matter raised the rights of all student-athletes to communicate in various media, not just the rights of one. As noted above, the then-existing rule allowed uncompensated and unpromotional radio and television appearances only.¹⁸⁷ It said nothing about writing opportunities. Perhaps the reason for the silence was because the drafters didn't think of the possibility that student-athletes would wish to write in this manner. It seems that regulators were only thinking of the student-athlete as an *athlete* playing for a team, and the key media for athletes in that role were sports radio and television. Such broad legislation also probably resulted from the assumption that the NCAA and institutions had the *power* to broadly circumscribe student conduct in the name of athletics, as institutions had so for so long under the *in loco parentis* doctrine.

How then did each division resolve the *Sports Illustrated* dilemma? In short, those divisions with larger financial investments in athletics granted fewer rights; those with a smaller investment granted greater rights. Thus, Division III, which tends to have significantly smaller athletic programs, does not depend on athletics for income and does not offer athletically based scholarships, imposed no restrictions on its student-athletes writing, either during season or out of season. It declared that Division III students may participate at any time in all media activities, including those for compensation.¹⁸⁸

187. See 1996-97 NCAA MANUAL, *supra* note 128, at 105-06 (generally prohibiting students from receiving pay for athletic ability and from engaging in promotion). Section 12.5.3 stated:

Radio and Television Appearances. If a student-athlete's appearance on radio or television is related in any way to athletics ability or prestige, the student-athlete shall not receive any remuneration for that appearance; nor shall the student-athlete make any endorsement, expressed or implied, of any commercial product or service. The student-athlete may, however, receive legitimate and normal expenses directly related to such an appearance, provided it occurs within a 30-mile radius of the institution's main campus. The institution may provide such expenses for such an appearance in the general locale of an institution's away-from-home competition. . . .

188. NCAA, 1997-98 NCAA DIVISION III MANUAL 67 (1998).

12.5.3 Media Activities—Division III. A student-athlete may participate in media activities (e.g., appearance on radio, television, in films or stage productions, or participate in writing projects) when the student-athlete's appearance or participation is related in any way to athletics ability or prestige. A student-athlete may receive legitimate and normal expenses directly related to such an appearance or participation. The student-athlete may engage in such activities at any time and may receive compensation at a rate commensurate with the going rate in that locale for similar services. Further, the student-athlete's name may be used to advertise his or her participation in such activity, provided the student-athlete's status as a student-athlete is not used for promotional purposes.

By contrast, Divisions I and II followed a single approach. They divided student rights into two categories: (1) those "During the Playing Season" and (2) those "Outside the Playing Season."¹⁸⁹ First, during the season, a student-athlete can appear on radio or television programs or engage in writing projects at any time, so long as the student's participation was uncompensated and the student is not "promoting a commercial product or service."¹⁹⁰ The language adopted expressly permits coaches to have students appear on their television shows,¹⁹¹ an express assurance not previously in the rules. Of course, while this new rule allowed "writing" during the season, it said nothing about appearances in film and stage productions during the season, even those held on campus.¹⁹² Given the focus on the various types of media appearances in the rules, and the mention of film and stage in the off-season provision, this omission was no accident.¹⁹³

These two divisions took a slightly different view as to student expression when the playing season was over. After the season, student-athletes may appear on radio and television shows, and may also appear in film and stage productions on an uncompensated and nonpromotional basis. As a caveat, however, the student must be in good academic standing in order to take advantage of these new "privileges."¹⁹⁴

189. 1997 NCAA PROCEEDINGS, *supra* note 186, at A-125 to A-126.

190. *Id.*

191. *Id.* at A-125.

192. *Id.* at A-125 to A-126.

193. See NCAA, 1997-98 NCAA DIVISION I MANUAL 81 (1998).

(a) During the Playing Season. *During the playing season*, a student-athlete may appear on local radio and television programs (e.g., *coaches shows*) or engage in writing projects when the student-athlete's appearance or participation is related in any way to athletics ability or prestige, provided the student-athlete does not receive any remuneration for the appearance or participation in the activity. The student-athlete shall not make any endorsement, express or implied, of any commercial product or service.

Id. (emphasis added). The provision also permitted the student-athlete to "receive legitimate and normal expenses directly related to the appearance." *Id.* Thus, this provision aided schools because it permitted schools or coaches to finance such appearances when they were made on the school's behalf or on the coaches' shows, without violating financial aid rules. See generally *infra* Part III.B (discussion of financial aid rules).

194.

(b) Outside the Playing Season. Outside the playing season, a student-athlete may participate in media activities (e.g., appearance on radio, television, in films or stage productions or participation in writing projects) when such appearance or participation is related in any way to athletics ability or prestige, provided the student-athlete is *eligible academically to represent the institution* and does not receive any remuneration for such appearance or participation. *The student-athlete may not make any endorsement, expressed or implied, of any commercial product or service.*

1997-98 NCAA DIVISION I MANUAL, *supra* note 193, at 81 (emphasis added). Note that the second provision mentions stage productions while the first does not.

Members of the Student-Athlete Advisory Committee (“SAAC”) and their institutional supporters urged support of these changes, arguing that student-athletes need some relief from existing restrictions in order to have a broad educational experience and that student-athletes should be treated as other students on these matters.¹⁹⁵ But indeed, these provisions do not treat student-athletes like other students.

Indeed, although many publicly-supported institutions belong to the NCAA, not once in the discussions at the convention did anyone mention the First Amendment or “free speech.” No one seemed to realize, or seemed willing to say—not even the student representatives—that “rights” might actually be at issue, rather than mere privileges.¹⁹⁶ No one surmised that academically *ineligible* students may be the ones most interested in speaking about athletic issues, yet, in Divisions I and II, they are barred from doing so without express permission in the offseason. Perhaps substantial discussions took place at the NCAA Council, which in fact sponsored the legislation, but the outcome does not suggest it.¹⁹⁷ With respect to all three pieces of legislation, the NCAA’s 1997 convention notes stated that the proposals were “designed specifically as a student-athlete welfare issue” and were “a step toward enhancing the student-athlete’s overall experience, thereby encouraging more student-athletes to take full advantage of the *educational opportunities related to participation in intercollegiate competition.*”¹⁹⁸ Certainly, broader rights than those related to participation in intercollegiate athletics were at issue.

The now defunct *in loco parentis* doctrine certainly offers support to the approaches of Divisions I and II. One argument is that the legislation uses media and other appearances as “carrots” to ensure that students keep up their grades. Another is that the rules during the playing season represent an assessment by the institution that students simply cannot judge for themselves how much time plays and productions will take. Finally, it can be argued that the legislation protects

195. NCAA, 1997 NCAA CONVENTION PROCEEDINGS, *supra* note 186, at A-126 to A-127. The statement added that “in the spirit of federation, each division has proposed standards regarding a student-athlete’s participation in media-related activities that it believes is appropriate for that division.” *Id.* at A-127.

196. Later, the SAAC members called the legislation “the most far-reaching change made at [the 1997] Convention” and stated that “[u]nder the new regulation, student-athletes are free to express themselves both as students and as athletes, without endangering their eligibility.” Karrie Farrell et al., *Student-Athlete View—Convention Listended [sic] to Concerns of Athletes*, NCAA NEWS, Jan. 27, 1997, <http://www.ncaa.org/news/1997/970127/comment.html>. The 1995-96 annual report for that committee notes that “the NCAA Communications Committee requested input from the SAAC regarding student-athletes’ right to write for commercial publications,” and that after discussing the issue, “the SAAC agreed that student-athletes should be permitted to write for commercial publications” and “agreed to support a legislative proposal that will give student-athletes this opportunity.” *Student-Athlete Advisory Committee, in 1995-96 NCAA ANNUAL REPORT* 146, 146.

197. NCAA, 1997 NCAA CONVENTION PROCEEDINGS, *supra* note 186, at A-126 to A-127.

198. *Id.* (emphasis supplied).

amateurism, an institutional interest, by ensuring that students don't use their "athletic ability" for notoriety (thus, it would be argued, achieving "pay"). It could also be argued, of course, and seems clear to this writer, that the primary reason that the Division I and II legislation did not go further (but did protect coaches) is that the financial interests of the institutions drove the legislation and not student-athlete welfare. At the very least, the debate and the outcome demonstrates that the present NCAA regulatory scheme poorly protects student interests.

As discussed above, publicly-funded institutions are obligated to respect student speech rights, and there is no exception for student-athlete speech.¹⁹⁹ As also noted earlier, private institutions have adopted statements of rights and responsibilities that provide for similar student speech protections.²⁰⁰ Thus, it seems that the NCAA's members cannot simply assume that it may limit the speech a la *in loco parentis*; they should have grappled with the question of rights, not merely with question of privileges. That the convention discussions did not raise the issue indicates again how the bifurcated nature of modern institutions with significant athletic programs negatively impacts student-athlete interests.²⁰¹

But let us consider the legal questions further. Can publicly funded institutions escape criticism by classifying student-athlete speech as "commercial speech?" Indeed, the courts have shown some willingness to tolerate greater restrictions on commercial speech,²⁰² but this tolerance does not save the NCAA's approaches.²⁰³ Traditionally, commercial speech is speech that proposes a transaction.²⁰⁴ The Division I and II legislation at issue here clearly reaches far beyond commercial speech to include noncommercial speech. But

199. See *supra* notes 196-98 and accompanying text.

200. See *supra* notes 186-95 and accompanying text.

201. See *supra* notes 189-94 and accompanying text.

202. See, e.g., *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980) (acknowledging limitations on protections of commercial speech but rejecting state ban on promotional speech by public utility as not sufficiently linked to compelling state interest). Speech may be commercial even if the proposition includes speech about noncommercial issues. *Bd. of Trs. v. Fox*, 492 U.S. 469, 474-75 (1989) (remanding for consideration of whether banned presentations of commercial products within student dorm room constituted commercial speech; case later dismissed as moot).

203. Division I and II legislation is *not* on its face limited only to speech that proposes a commercial transaction. This fact that Division I and II legislation was intentionally broad is made even clearer by comparing it to that adopted by Division III during the same time period and within the same legislative package.

204. See *Cent. Hudson*, 447 U.S. at 562. In *Central Hudson* the court used a four-part analysis to determine whether a regulation of commercial speech would survive First Amendment scrutiny. *Id.* at 566. First, protected speech must at least involve "lawful activity and not be misleading." *Id.* Second, the "asserted governmental interest" must be "substantial." *Id.* If both of these conditions are met, then the courts must consider "whether the regulation directly advances the governmental interest asserted" and "whether it is narrowly tailored to serve that interest." *Id.*

even if one construes the legislation regulation more narrowly, as affecting only speech about sports to sports media (and that interpretation is not consistent with the partial prohibition on films and plays), the regulation still falls flat when measured against First Amendment doctrine. Commercial speech regulation traditionally is concerned with ensuring *accuracy* so that the public may make informed choices based upon truthful information.²⁰⁵ If the restrictions reach beyond this concern, the Supreme Court has said that “there is far less reason to depart from the rigorous review that the First Amendment generally demands.”²⁰⁶ None of the restrictions on expression discussed above appear to vindicate an accuracy concern. Finally, regulations of commercial speech must be narrowly tailored to satisfy a substantial governmental interest.²⁰⁷ As the *Sports Illustrated* matter demonstrates, the NCAA’s restrictions were, and they are, far-reaching. Is the promulgation of amateur sports so substantial a governmental interest that such broad restrictions on speech and other fundamental rights would be considered justified? Such an outcome would herald a sad day indeed.²⁰⁸ And

205. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996). “It is the State’s interest in protecting consumers from ‘commercial harms’ that provides ‘the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.’” *Id.* at 502 (plurality opinion) (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993)). “Yet bans that target truthful, nonmisleading commercial messages rarely protect consumers from such harms.” *Id.* at 502-03. Thus, the Court stated that bans that are broader than this traditional interest “not only hinder consumer choice, but also impede debate over central issues of public policy . . . [and] usually rest solely on the offensive assumption that the public will respond ‘irrationally’ to the truth.” *Id.* at 503 (quoting *Linmark Assocs. Inc. v. Willingbow Township*, 431 U.S. 85, 96 (1977)).

206. *Id.* at 501. Two recent Supreme Court cases reflect a possible expansion in the Courts’ view of commercial speech rights. In *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), a unanimous Court struck down a federal law prohibiting the disclosure of the alcohol content of beer on labels or in advertising. *Id.* at 478. The federal government claimed an interest in both facilitating state efforts to regulate alcohol and preventing “strength wars” among beer brewers, which would result in consumers buying beer based upon alcohol content. *Id.* at 483-85. The Court did not find the former interest sufficiently substantial and concluded that the overall legislation did not “directly and materially advance” the other asserted interest because of inconsistencies in its regulatory scheme. *Id.* at 486-88. In another case, the Court struck down a state statute prohibiting the advertising of retail prices for alcohol. *44 Liquormart*, 517 U.S. at 589. Justice Stevens, writing for a plurality, distinguished restrictions that are designed to ensure accuracy from restrictions that “entirely prohibit[] the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process.” *Id.* at 501. In both cases, the Court emphasized that the statutes went beyond the historical concern of ensuring the accuracy of commercial speech so that the public can make informed decisions based upon reliable information. See *id.* at 504; *Rubin*, 514 U.S. at 483.

207. See *Cent. Hudson*, 447 U.S. at 566.

208. The passage of statutes prohibiting sports agents from providing benefits to student-athletes and limiting their contact with them suggests at least an *asserted* governmental interest in protecting amateurism. On the other hand, arguably, these statutes are aimed at protecting the

once again, it may be argued that given their breadth, these restrictions are designed to protect commercialism, not amateurism.

What of an argument that students have contracted away these rights in exchange for the right to play intercollegiate athletics at their institution? Such an argument must also fail. Although courts have held that playing athletics is a privilege, not a right,²⁰⁹ in other contexts they have rejected claims that a waiver of constitutional rights—particularly First Amendment rights—is an appropriate condition for states to impose upon the granting of such “privileges.”

Significantly, in this debate, as in so many others about intercollegiate athletics regulations, students received only that which was consistent with the financial interests of the NCAA as a whole or the particular educational institution affected. Sadly, the presumption of a right to restrict student-athlete speech and associational rights cuts across the entire legislative scheme of NCAA amateurism rules. Consider, for example, the NCAA limitations on students’ participation in events and on teams not sponsored by member institutions. These restrictions are riddled with so many exceptions that one cannot reasonably explain them as a function of educational decisions about what is best for students or even best for intercollegiate athletics as a whole. Instead, many of them appear to result from political compromises designed to protect commercial interests. For example, basketball student-athletes in Division I are declared ineligible if they participate in organized *amateur* competitions not sponsored by their member institutions or excepted by the NCAA.²¹⁰ Division I students in sports *other than* basketball may practice with outside teams but may not compete with them.²¹¹ A few cases have considered student-athletes’ First Amendment rights, but they have all focused narrowly on whether enforced eligibility rules improperly affect the freedom to associate with other amateur or professional athletes. The answer to that much easier question has been “no.”²¹²

commercial interests of the institutions involved, many of which are state entities. *See, e.g.*, CAL. BUS. & PROF. CODE 18895-18897.97 (West 1997). And as noted earlier, in the antitrust context, some judges have indicated that the protection of amateur sports may be sufficient to grant favored treatment because some restrictions are necessary to enable the product of intercollegiate athletics to exist. *See supra* note 174 and accompanying text. On the other hand, to this author’s knowledge, none of the cases to date have pitted rights as fundamental as those protected under the First Amendment against amateurism or parity concerns. Moreover, this author believes that only when the essential purpose of the action is to promote athletics’ educational nature, should institutions be allowed to use the argument that a regulation is needed to protect amateurism. *See Carter, supra* note 4, at 90-95 (courts must distinguish varying goals of NCAA policies and give deference only when education is the central goal).

209. *See supra* note 172 and accompanying text.

210. 1997-98 NCAA DIVISION I MANUAL, *supra* note 193, at 238.

211. *Id.* at 158.

212. For example, in *Karmanos v. Baker*, 816 F.2d 258 (6th Cir. 1987), a Canadian student-athlete desiring to play at an American university unsuccessfully challenged a declaration of ineligibility. The NCAA issued the declaration because the athlete had played on an uncompensated basis for a professional Canadian team. *Id.* at 260. The student brought an action

Overall, the legislation emerging from what we may call this "student-athlete free speech debate" demonstrates the distance that has divided institutions into athletic fiefdoms and other fiefdoms. The legislation considered the student-athlete solely as "athlete." It is difficult to imagine such a rule being promulgated in some other department of the institution without serious questions of the First Amendment and/or academic freedom and general student speech rights being raised.

B. *Financial Aid and the Right to Work*

NCAA regulation of student-athlete employment and financial aid issues also provide clear examples demonstrating the presumption of absolute control over student-athletes and the financial interests that often lead regulators to ignore student-athlete rights. The conflict is particularly prevalent in Division I, and thus its approaches will be the focus of this section.

In earlier times, the question of whether institutions should provide financial aid to student-athletes on the basis of their athletic ability was hotly-debated. In 1948, opponents of athletically-based financial aid were successful in altering the NCAA's constitution to expressly prohibit any such aid. Article III of the constitution set forth five "principles": (a) "Amateurism"; (b) "Institutional Control and Responsibility"; (c) "Sound Academic Standards"; (d) "Financial Aid to Athletes"; and (e) "Recruiting."²¹³ These principles later became known as the "Sanity Code."²¹⁴ The first three principles found their roots in the old constitution,²¹⁵ and the last two were new public statements.

The "Principles Governing Financial Aid to Athletes" flatly banned all athletically-related financial aid, but provided that a member institution could award aid to athletes if it based the award on non-athletic qualifications, such as

under 42 U.S.C. § 1983 (Supp. V 1999), claiming that the disqualification penalized him for exercising his First Amendment right to associate with others. *Karmanos*, 816 F.2d at 260. The court found no violation of the student's associational rights. *Id.* The court reasoned that the rule did not prohibit him from association per se, but that if he did play for a professional team, then the NCAA could declare him ineligible. *See id.* The court's explanation merely restates the rule; it fails to illuminate the logic for the outcome.

However, even if *Karmanos* is followed, it can be distinguished from the current debate on the grounds that (1) there was no question that the athlete in *Karmanos* played with *professional* athletes, and (2) athletes like the one in *Karmanos* would gain an unfair competitive benefit against other amateurs by competing with professionals. In contrast, the NCAA regulations discussed above apply to play for concededly amateur organizations. Moreover, the athlete in *Karmanos* actually *did* play on a professional team, and although the facts are unclear, he may have had reason to know that his amateur status might be affected. *Id.* Ironically, as this article went to press, Divisions I and II were revisiting the rules on professional play prior to college. *See infra* notes 248-50 and accompanying text.

213. 1947 NCAA YEARBOOK, *supra* note 147, at 212-13; *see also id.* at 188-92.

214. FALLA, *supra* note 5, at 132-35; *see also* NCAA, 1946 NCAA YEARBOOK 172-73.

215. *See* 1946 YEARBOOK, *supra* note 214, at 172-73.

academics or need.²¹⁶ The code further required that “[a]ny scholarship or other aid” to student-athletes had to be awarded through an institution-approved agency.²¹⁷ The “Principle Governing Recruiting” prohibited athletics staff or other officials from soliciting prospective athletes with the promise of financial aid.²¹⁸

In order to enforce these principles, the NCAA established a constitutional compliance committee to interpret the code in instances of charged non-compliance.²¹⁹ If an institution was found to have violated the code, then its membership was to be terminated.²²⁰

In the end the approach was a disaster. There are indications that the NCAA leadership may have railroaded the legislation through in response to negative press reporting alleging improper institutional financial support of athletes. Indeed, the NCAA’s executive committee took the unusual step of approving the establishment of the compliance committee even before the membership had voted to adopt the rules and limit the ability of members to make amendments.²²¹ The lack of membership consensus on the aid question created difficulties later. In the following year, seven institutions—The Citadel, Boston College, University of Maryland, Villanova, Virginia Military Institute, Virginia Polytechnic Institute, and University of Virginia—were found in violation of the code, and the compliance committee moved for their expulsion from the NCAA.²²² Among other charges, the committee claimed that at least some of the institutions provided free room and board to football players.²²³ Sensing wider support among NCAA members, the accused institutions unified themselves and the membership against the compliance committee charges.²²⁴ Led by their own Presidents, these seven colleges and universities put the compliance committee and the NCAA itself on trial—and the compliance committee failed to obtain the necessary two-thirds majority for expulsion.²²⁵

216. 1947 NCAA YEARBOOK, *supra* note 147, at 213.

217. *Id.*

218. *Id.*

219. *Id.* at 198-99 (discussing adopted executive regulation establishing the committee).

220. FALLA, *supra* note 5, at 134.

221. *See generally* 1947 NCAA YEARBOOK, *supra* note 147, at 185-96, 198-99. NCAA President Lieb noted that unusual action was taken because the NCAA was “under very close scrutiny” and “many eyes throughout the country [were on the] convention.” *Id.* at 186-87. Lieb noted that amendments at the convention would violate the NCAA rule requiring two weeks notice of any constitutional changes and urged members to leave interpretational issues to the compliance committee. *Id.* at 187. This put voters in the position of voting either in favor of, or against, the entire package. Indeed, when a member proposed an amendment to permit some athletic subsidies, Lieb suggested that the speaker was out of order in light of the earlier comments. *See id.* at 189.

222. 1949 NCAA YEARBOOK, *supra* note 176, 191-207 (noting charges against the institutions).

223. *See id.* at 191-92.

224. *See id.* at 206.

225. The vote was 111 to 93. *See id.* at 205-07.

The NCAA's official history describes the harshness of the action as the defining issue in the "Sanity Code" debate.²²⁶ However, the convention transcript suggests that just as important was the division over the question of student financial aid itself and whether or not schools should provide it. Those who desired to build athletic programs knew that if athletes were not provided athletics-based scholarships, many would be forced to take off-campus jobs, allowing them less time for athletics. These individuals viewed the attempts to limit institutional aid as an attempt to undercut athletic programs.²²⁷ On the other hand, some felt that athletic scholarships were against everything an academic institution stood for and that this concession would mean the end of amateurism and academic integrity.

Although no students or student representatives participated in any of these debates, some of the speakers did address student welfare and rights, both when the legislation was first considered and later when the termination question was brought to the floor. One speaker argued that the rule penalized student-athletes who wanted to play on teams. This speaker considered it wiser to give an athlete two meals a day, rather than require him to practice for two hours a day and then work to earn his meal.²²⁸ The Citadel, a South Carolina military institution, argued that military men, with their rigorous training schedule, could not find work with hours reasonable enough to permit them to earn their expenses.²²⁹ Others also argued that the subsidy rules were far too strict and did not allow schools who invited athletics participation and required training as a prerequisite to provide for the legitimate needs of student-athletes.²³⁰

As most readers know, in the years following these debates, scholarships based at least in part on athletic ability, became quite common in what ultimately became the Division I and Division II schools.²³¹ But once it became clear that athletic scholarships were inevitable there arose fears, particularly in Division I, that some institutions would use the promise of student aid to gain competitive advantages or would permit an institution to completely undercut remaining pay-for-play restrictions under the guise of giving a student institutional financial aid. Driven by these concerns, the NCAA restricted a full- or partial-scholarship student-athlete's ability to obtain financial aid from other sources including employment during the school term. First, beginning in the early 1950s, the NCAA started to control the *sources* of aid, requiring all financial aid, except

226. See FALLA, *supra* note 5, at 132-35.

227. For discussion of efforts to restrict aid through the adoption of the Sanity Code at the 1948 convention, see, for example, Carter, *supra* note 4, at 41 n.31 (citing NCAA, 1948 NCAA YEARBOOK 190-207). Many argued that the rules which controlled *needs*-based financial aid were far too strict and did not allow institutions room to provide for the legitimate financial needs of student-athletes. See also 1949 NCAA YEARBOOK, *supra* note 176, at 190-205.

228. 1948 NCAA YEARBOOK, *supra* note 227, at 99-100 (comments of Harvey J. Harman, President, American Football Coaches Association).

229. 1949 NCAA YEARBOOK, *supra* note 176, at 197.

230. See, e.g., *id.* at 199.

231. See *supra* notes 176-80 and accompanying text.

that provided by a parent or legal guardian, to be administered by the institution unless otherwise specifically excepted by regulation.²³² Second, it began to control the *amount* of aid. Starting in the mid-1950s, it provided that such aid could not exceed the commonly-accepted costs of education.²³³ In the years that followed, these aid limits became quite complex in Division I as the NCAA sought to preserve parity among Division I institutions by regulating the actual number of scholarships per sport that could be provided and the maximum amount of financial aid that any student-athlete could receive.²³⁴

In addition, the NCAA also limited a scholarship student-athlete's ability to get a job to meet his or her financial need. In earlier times, students in need and without other scholarships *had* to work because institutions declined to provide financial aid based on athletic ability.²³⁵ But because many of the jobs student-athletes were suited for arguably involved use of their athletic abilities (such as lifeguarding or playground camp supervisor), and because the NCAA's definition of amateurism was so broad, NCAA regulators began to issue specific regulations dealing with such jobs and the extent to which student-athletes could take them for pay.²³⁶ Eventually, the NCAA expressly included employment income in the calculation of the cap on *total* financial aid any Division I student-athlete could receive thus limiting the amount of employment a student-athlete could undertake.²³⁷ This approach, combined with the aforementioned total financial aid limits, meant that a student-athlete who had financial needs above the established cap for financial aid could not work to fill that need, and thus had

232. See NCAA, 1951 NCAA YEARBOOK 217-18, 254. See generally FALLA, *supra* note 5, at 135 (noting NCAA Council's adoption of twelve-point plan that included recommendations proposing that institutions limit amount of financial aid to student-athletes). Compare 1996-97, NCAA MANUAL, *supra* note 128, at 205-06 (requiring that all aid received by the student-athlete be administered by the institution unless from a parent or guardian or unless the aid source is specifically exempted by NCAA rule).

233. Throughout 1955 and 1956, the NCAA Council, then a body charged with issuing interim decisions between conventions, issued an interpretation of the amateurism rules stating that institutional financial aid should not exceed "commonly accepted educational expenses and that additional aid would be considered pay for play." This was apparently the beginning of NCAA's attempts to set maximum limits for student-athlete financial aid. This approach would broaden until the NCAA set maximum per athlete guidelines for particular sports as well as total scholarship number guidelines for particular sports. See 2000-01 DIVISION I NCAA MANUAL, *supra* note 177, at 178, 188-96.

234. See *id.*

235. See *supra* notes 64-68 and accompanying text (resistance to aid based upon athletic ability).

236. See 1955-56 YEARBOOK, *supra* note 147, at 5 (special exceptions under "Principle of Amateurism" allowing student-athletes to serve as playground supervisors, lifeguards, and other roles).

237. E.g., 1996-97 NCAA MANUAL, *supra* note 128, at 212 (requiring institution to consider Division I student employment in determining whether permissible aid limits reached, that is, a full grant-in-aid).

to secure student loans to cover the balance.

Perhaps one would justify at least some of these work limits on a theory that a student-athlete could not reasonably practice, play sports, and also hold down an outside job. However, to find the basis for work limits upon that theory, one would need the help of the *in loco parentis* doctrine which, again, had been abandoned as to nonathlete students. Moreover, if time commitments of needy student-athletes was the primary consideration, institutions could have cut back on athletic programs to allow more time for work or, alternatively, eliminated the need for work by meeting a student-athlete's full, true need. However, it is more likely that work limits that left a need gap found a basis in the obsession with amateurism and the battle among institutions for competitive parity. On the amateurism side, concern may have existed that institutions would actually use alleged work arrangements to funnel additional monies to student-athletes. On the parity side, there were likely concerns that a promise to arrange work for a student—or work that was really not work at all but a means of funneling additional money to the student—could be a powerful recruiting tool. Thus, institutional distrust within the NCAA led to rules that dramatically reduced student freedoms and opportunities and significantly. Moreover, the rules often affected athletes in revenue-producing as well as non-revenue-producing sports alike. The results were some rather odd permutations on student work and financial aid rights. For example, in the 1980s and early 1990s, NCAA rules allowed a Division I scholarship student-athlete to work and not count the income as financial aid, so long as the employer deposited all of the student-athlete's earnings with the institution, which then could use the money as it saw fit.²³⁸ Initially, the NCAA even restricted student-athlete access to *federal* financial aid grants by counting money received thereby against NCAA aid caps, irrespective of the student's financial need. In 1984, after much controversy, it modified that position.²³⁹

In January 1997, the NCAA restructuring vote allowed each division more freedom to make its own rules. As part of the restructuring legislation, the NCAA revisited the right to work issue. Consequently, legislation was passed

238. 1989-90 NCAA MANUAL, *supra* note 169, at 140. In 1988-89, the NCAA Council permitted this arrangement because the student-athlete never received the money, thereby emphasizing that the primary NCAA concerns were competitive parity and adherence to amateurism. *See* NCAA, 1988-89 NCAA MANUAL 418.

239. *See* NCAA, 1984 NCAA PROCEEDINGS 152-53. In 1984, members moved to amend the NCAA rules so that student-athletes would be legally entitled to Pell Grants based upon demonstrated need. *See id.* To accomplish this, Pell Grants would be removed from the aid figured into the "cap" imposed by divisions. *See id.* at 152. Members who supported the amendment argued that to deny students in need was unfair and possibly illegal, particularly when NCAA rules also prohibited students from working. *Id.* at 152-53. With a two thirds majority required, the proposal was first voted down by a vote of 374 to 226. *Id.* The supporters then moved to reconsider and after discussion it eventually passed. *Id.* These discussions demonstrate the precarious nature of student-athlete rights in a representative body where institutional financial interests are at stake.

expressly permitting Division I student-athletes to earn the *difference* between their scholarship and the cost of attendance, provided that the student remained academically eligible to compete for the institution.²⁴⁰

But there was significant opposition to the change. Opponents argued that athletic departments would have to get involved in setting up student employment and raised the difficulties of monitoring student financial receipts.²⁴¹ That opposition was so significant that in August 1997, the governing board for Division I voted to suspend the rule loosening work limits for one year.²⁴² By January 1998, a compromise agreement was reached. Essentially, the emerging Division I rule capped the amount the student-athlete could earn in legitimate off-campus employment by allowing the student-athlete to work up to the amount of the grant-in-aid—that is, books, tuition, fees, room and board (but not other expenses)—plus \$2000.²⁴³ The revised rule requires the student to file information about that employment with the athletic department.²⁴⁴ This rule was certainly an improvement from complete limitations on work. Still, it continued limitations on student work in all cases. Moreover, the \$2000 cap on earnings for students on a full-grant-in-aid limited the pool of employers.

The final bell on these contentious financial aid issues in Division I has yet to ring. Only weeks before this article went to press, Division I's Management Council voted to lift the \$2000 cap on work restrictions for its student-athletes. At press time, that decision awaits final approval by the Division I board.²⁴⁵

Significantly, none of these convention discussions of legislation limiting

240. 1997-98 NCAA DIVISION I MANUAL, *supra* note 193, at 180.; *see also id.* at 176 (full grant-in-aid consists of tuition, course-required books, fees, room and board).

241. *E.g.*, 1997 NCAA PROCEEDINGS, *supra* note 186, at 315 (commenter raising monitoring concerns, noting students can work during vacations and summers and that some student-athletes are better off financially than nonathlete students under existing financial aid rules). *See also id.* at A-128-A134 (original 1997 proposals).

242. *See, e.g.*, *Management Councils Start with New Structure*, NCAA NEWS, Aug. 18, 1997, at 10 (noting that Division I Management Council expressed support for theory of Proposition 62, but voted in favor of one-year delay before implementation); *see also Division I Board Seeks Reaction to Earnings Issue*, NCAA NEWS, July 7, 1997, at 1 (noting Big Ten Conference's request for a one-year moratorium).

243. *See* 2000-01 DIVISION I Manual, *supra* note 177 (defining Division I full grant-in-aid as "tuition and fees, room and board, and required course-related books"); *id.* at 182-83 (allowing a student to earn up to a full grant-in-aid plus \$2000 while working at legitimate off-campus employment so long as the student is academically eligible to compete for the institution, has spent a year at the institution, and files information on the employment with the athletic department of institution); *id.* at 176-78 (outlining permissible financial aid, including institutionally-arranged work rules, and declaring that the student-athlete may not participate in athletics if he or she receives financial aid that exceeds a full grant-in-aid); *id.* at 178 (noting that employment during school year except that expressly permitted, is counted as financial aid).

244. *Id.* at 182-83.

245. *See Management Councils Take Mountain-Sized Steps at Denver Session*, NCAA NEWS, Apr. 15, 2002.

student employment considered whether students facing need gaps might have an independent “right to work” under the U.S. Constitution at publicly-supported institutions. Although the issue is rarely litigated today, the Supreme Court has found a “right to work” in the Fourteenth Amendment to the U.S. Constitution, stating that “the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.”²⁴⁶ Where the limitations are applied to a suspect class (a point not at issue here), restrictions are subject to the strictest scrutiny.²⁴⁷ But even where the class is not one traditionally treated as suspect, the states must offer some rational basis to support the restriction and demonstrate that it is narrowly tailored to serve a legitimate purpose. Work restrictions were born of distrust among Division I schools. But in depriving student-athletes of work opportunities, institutions deprived students not only of money, but of the opportunity to learn of the educational value of work experience that does not involve athletics. Students in non-revenue producing sports and those who do not seek careers as professional athletes (including many women) often need to show experience other than athletics participation on their resumes. For some athletes, “I played sports” alone is simply not enough, and for others, it simply *should* not be enough.

As this Article is being published dramatic changes are taking place as all three Divisions rethink their regulation of amateur athletics. In 2001, Division II adopted sweeping revisions to its amateurism rules allowing students to accept some pay for play prior to entering college full time.²⁴⁸ Division III has stayed

246. *Truax v. Raich*, 239 U.S. 33, 41 (1915); *see also* *Application of Griffiths*, 413 U.S. 717 (1973) (holding that Fourteenth Amendment prohibited state from requiring U.S. citizenship as a prerequisite to bar admission).

247. Historically, most of the right to work restrictions that have been challenged in the courts have been directed at aliens, a suspect class subject to strict scrutiny. *See, e.g., Griffiths*, 413 U.S. at 718 (finding U.S. citizenship limitation on admission to state bar a denial of equal protection); *Graham v. Richardson*, 403 U.S. 365 (1971) (holding that a state’s fifteen-year residency requirements for welfare recipients and that a state’s conditioning receipt of benefits upon citizenship violated the Equal Protection Clause); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410 (1948) (finding unconstitutional state law that prohibited issuance of commercial fishing licenses to persons ineligible for citizenship and was specifically intended to affect Japanese); *Truax*, 239 U.S. at 40-43 (holding state labor law requiring eighty percent of hired workers to be “qualified electors or native-born citizens” of the United States violated the Equal Protection Clause); *cf. Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (*per curiam*) (applying rational basis test under equal protection to uphold statute requiring mandatory retirement at age fifty from state police force); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999) (granting summary judgment to plaintiff, a braider of African-American natural hair who claimed that as applied to her situation, the state’s cosmetology rules were unconstitutional).

248. At its 2001 convention, Division II voted to discount certain low level professional experience for pre-college students. It is worth noting however, that much of the support for this approach came from those who desired to make it easier to recruit and play foreign student-athletes,

the course in rejecting pay for play and standing against special consideration of athletic ability in the financial aid process.²⁴⁹ And in the same meeting in which the Division I Management Council voted to lift the employment cap for student-athletes, it also excepted some pay for play prior to full time college admission from its amateurism regulations, but did not go as far as Division II.²⁵⁰

Whether the new changes are good for student-athletes remains to be seen. It remains true, however, that changes to recognize and redress legitimate student-athlete concerns have come slowly in the NCAA, complicated by competing financial and parity concerns, particularly at the big time athletic programs. These examples of regulatory debates concerning free speech and the right to work demonstrate the presumption of NCAA control that pervades its legislative approaches and the fact that the perversion of *in loco parentis* remains a key concern for student-athletes.

IV. RESPONDING TO THE PERVERSION OF *IN LOCO PARENTIS*: USING NONPROFIT ORGANIZATIONS TO SUPPORT STUDENT-ATHLETES

I have argued that an enormous difference exists between the controls that colleges and universities exercise over their student-athletes and those that they exercise over non-athlete students. I have further argued that a perversion of *in loco parentis* doctrine in intercollegiate athletics regulation, as well as the bifurcation of educational institutions into athletic and nonathletic venues, has led to this difference in treatment of athletes and nonathletes. While some differences in treatment are justified, too many are driven by institutional interests, financial and otherwise, that operate contrary to student welfare or student rights.

This writer believes that the NCAA and its member institutions can never protect student-athletes adequately. This observation is particularly true in the case of Division I student-athletes, but also applies to a lesser extent to Divisions II and III.²⁵¹ At this point in history, the reasons why have little to do with good

who often have experience playing with teams that receive minimal pay. The new rule bans payment "after initial full-time collegiate enrollment," suggesting that pay before that time is acceptable. See 2001-02 Division II NCAA Manual, *supra* note 178, at 58, 59, 60. It continued some amateurism restrictions on pre-college students including the restriction on preferential treatment based upon athletic ability. *Id.* at 59.

249. See *Division III Charts New Path for Financial Compliance*, NCAA NEWS, Jan. 15, 2001 (Division adopted new compliance provisions and reaffirmed that aid must be consistent with that given to nonathlete students); see also 2001-02 DIVISION III NCAA MANUAL, *supra* note 179 (Division III Manual provisions regarding aid).

250. Division I excepted pay up to the point that it does not exceed expenses. It declined to remove the prohibition against playing with professional players prior to enrollment. See NCAA NEWS, *supra* note 242.

251. While financial interests in athletics may not be as prevalent in the latter two divisions, it remains true that student-athlete interests and institutional interests are not the same as in the days of *in loco parentis*.

or bad intentions. First, the NCAA, the athletic conferences and the other organizations that work together to regulate intercollegiate athletics have as their mission the protection of the interests of their membership. That membership is comprised of educational institutions, not student-athletes. And as the *in loco parentis* doctrine has yielded to a broader conception of student rights, it can no longer be presumed that student interests and institutional interests are the same. When student-athlete and member institution interests conflict, then, appropriately, these organizations must choose to advocate their member interests. Given the diversity of those interests, the NCAA's policy almost always reflects political compromise. The need for compromise may be less significant after restructuring, but it remains. Second, because the NCAA and its conferences are political actors that must balance competing interests among the diverse institutions that are their members, they are inefficient vehicles for student-athlete protection. Student-athlete issues must always be merged into some membership interest in order to be heard. Even when these bodies reach decisions that benefit student-athletes, and sometimes they do, the process that led to those decisions is often a long and arduous one and the relief tends to come in bits and pieces of scattered legislation rather than comprehensive approaches. The tortured road student-athlete issues must take is demonstrated by the aforementioned debates over student-athlete speech rights²⁵² and student-athlete financial aid.²⁵³ Third, as history demonstrates and as I have discussed in this Article, the pressures from media, alumni, and even students, to grow sports programs and to win make it difficult for educational institutions to take the steps needed to ensure student-athlete welfare, even when they know they should. A balancing of student-athlete interests and institutional interests may be the only way to run intercollegiate athletic programs. The problem is that institutional interests are powerfully represented, but there is currently minimal representation of student-athlete interests. Currently, there is no entity that can offer an effective counterbalance to institutional perspectives. Such an entity is needed. Student-athletes need unfettered access to an organization independent of intercollegiate-athletics regulators, but one that values the essentials of a system that attempts to integrate athletics and education. The law has a structure for such an organization, specifically 26 U.S.C. §501(c)(3) which allows the formation of nonprofit organizations for charitable and other purposes.²⁵⁴

252. See discussion *supra*, Part III.A.

253. See discussion *supra*, Part III.B.

254. 26 U.S.C. § 501(c)(3) (1994). The statute provides tax exemption for contributions to entities "operated exclusively for" *inter alia*, "religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment)" Other uses for nonprofits have been proposed before. In 1993, Professor Leroy D. Clark proposed that civil rights organizations (usually nonprofits) be enlisted to file lawsuits and otherwise advocate on behalf of black student-athletes. Clark argued that black athletes were suffering exploitation that rises to the level of a civil rights violation. See Leroy D. Clark, *New Directions for the Civil Rights Movement: College Athletics as a Civil Rights Issue*, 36 HOW. L.J.

Currently, several 501(c)(3)s designed to support amateur athletics exist. However, most include amateur athletics concerns along with a hodgepodge of other concerns (including, for example, support of professional athletes). As I will discuss below, NCAA regulatory restrictions limit the impact of these organizations by limiting the ways in which they can support and communicate with student-athletes. Because of these NCAA limitations, some of these organization have organized around serving both professional and amateur interests in order to remain viable. The most ambitious project to date has been the recently-formed College Athletes Coalition, a movement to form local associations of Division I college football athletes on campuses across the country.²⁵⁵ The nonprofit model proposed in this piece goes further than existing models to take on NCAA restrictions. If student-athlete welfare is truly an interest of the NCAA and its members, the NCAA and member institutions should give their blessings to the project.

A. *Why a Nonprofit?*

Several scholars have recognized the overall unfairness of institutional athletics policies as they relate to student-athletes.²⁵⁶ I have tried to contribute

259, 274 (1993). The focus of the proposed nonprofit mentioned in this Article is not on race-based discrimination, but rather on economic and political empowerment. However, I do agree with Professor Clark that some of the exploitation of black student-athletes does rise to the level of a civil rights concern. In 1997, Melvin Braziel argued that student-athletes should themselves organize into an association. Melvin L. Braziel, Jr., *United We Stand: Organizing Student-Athletes for Educational Reform*, 4 SPORTS LAW. J. 81, 84 (1997). This Article does not assume the formation of an "association" organized by student-athletes themselves. For discussion of unionization proposals, see *infra* notes 257-60 and accompanying text. Finally, in 2001, the Knight Commission suggested the establishment of an independent "Institute for Intercollegiate Athletics" that could monitor intercollegiate athletics and sustain public pressure to maintain amateurism and academic integrity and other values. See KNIGHT FOUND. COMM'N ON INTERCOLLEGIATE ATHLETICS, A CALL TO ACTION 30 (2001).

255. One key issue for this group is year-round medical coverage for athletes to buffer injury during so-called voluntary workouts. See, e.g., Transcript, ESPN, *Outside the Lines: Campus Activists*, Apr. 29, 2001. Whether this group will evolve into a union or remain a non-union association is unclear. Sam Ross, Jr., *Group Gives Unionization the Old College Try*, TRIBUNE-REV., Apr. 7, 2002 at www.pittsburghlive.com/x/tribune-review/sports/l_s_65201.html.

256. See, e.g., Kevin Broyles, *NCAA Regulation of Intercollegiate Athletics, Time for a New Game Plan*, 46 ALA. L. REV. 487 (1995); Timothy Davis, *A Model of Institutional Governance for Intercollegiate Athletics*, 1995 WIS. L. REV. 599; Davis, *supra* note 58 (regarding unfairness to minority athletes); C. Peter Goplerud III, *Pay for Play for College Athletes: Now, More Than Ever*, 38 S. TEX. L. REV. 1081, 1089 (1997) (arguing for some form of stipends or other pay for student-athletes); Alfred Dennis Mathewson, Symposium, *The Eligibility Paradox*, 7 VILL. SPORTS & ENT. L.J. 83 (2000) (challenging view that educational concerns drive NCAA policy); Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631 (1996) (suggesting antitrust treatment of NCAA by courts is too lenient).

to this debate by putting that unfairness in its historical context and offering an explanation for why it has occurred and why it has been sustained. An independent nonprofit, particularly an entity organized under 26 U.S.C. § 501(c)(3), is needed to do what the NCAA and members simply cannot do. Such an organization—or several—with a focus on welfare issues, would provide a counterbalance for analysis of those policies heavily affected by institutional financial and parity considerations.

Such a nonprofit should be organized on the assumption that keeping a strong link between education and campus athletics is highly desirable. The link is important for several reasons. The first and foremost is the lifelong value of education itself and the unique value of education within the collegiate setting. Most student-athletes are young people with only limited timespace in which to pursue education within that setting. A commitment to collegiate education is needed to counter the forces that would sacrifice this experience—an experience which has long-term financial and intangible values—for short-term payoffs that may ultimately undercut the financial and personal futures of student-athletes. Without this link between education and athletics, this writer believes that term “amateur” is meaningless in the collegiate setting. Indeed, more exploitation could follow if educational institutions were permitted to shuttle student-athletes off into “campus minor leagues” from which the institutions draw profits with no corresponding obligation to provide a total educational experience. At the same time, a nonprofit must define education broadly to include life skills and other training and it must seek to rethink what aspects of the pure amateurs’ model are worth preserving and which are outdated or never had significant value.

The nonprofit option has advantages over unionization, an option suggested by some.²⁵⁷ Only “employees” may form unions, but institutions have long resisted the characterization of student-athletes as employees because that may result in other obligations as well, such as the obligation to pay workers’ compensation.²⁵⁸ A nonprofit is also easier to set up than a union, the latter

257. In the 1980s, Dick DeVenzio, a former basketball player at Duke University, and head of the Major College Players Association, unsuccessfully argued for a union of college athletes. *Sidelines*, CHRON. HIGHER EDUC., Dec. 3, 1986, at 34; see also Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 251 & nn.309-19 (1990) (considering unionization option).

258. Several courts have held that a student-athlete attending a college or university on an athletic scholarship is not an “employee” of the institution for the purpose of entitlement to workers’ compensation benefits for injury or death sustained during the course of the athletic activity. See *Graczyk v Workers’ Comp. Appeals Bd.*, 229 Cal. Rptr. 494 (Ct. App. 1986); *Rensing v. Ind. State Univ. Bd. of Trs.*, 444 N.E.2d 1170 (Ind. 1983); *State Comp. Ins. Fund v. Indus. Comm’n*, 314 P.2d 288 (Colo. 1957); *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224 (Mich. Ct. App. 1983). But see *Univ. of Denver v. Nemeth*, 257 P.2d 423, 426 (Colo. 1953) (rejecting university’s contention that student-athlete’s campus job and meal plan were offered exclusively by reason of his being a student; court referred to testimony in the record, including that of the football coach, showing that the student’s employment was dependent on his playing football); *Van Horn v. Indus. Accident Comm’n*, 33 Cal. Rptr. 169, 172-73 (Ct. App. 1963) (finding prima facie

requiring the identification of bargaining units and elections to select an exclusive bargaining agent.²⁵⁹ At the same time, the nonprofit structure can recognize the differences among student-athletes; several nonprofits could be formed or one could be split into divisions. The structure even leaves ample room for student-athletes who may conclude that their own interests are well served by the present structure of strong institutional control and thus choose to remain unaided by a nonprofit. Nonprofits also have broader access to the courts than unions. Union procedures for resolution of grievances are often circumscribed by the collective bargaining agreement with the employer. In seeking substantial legal redress, unions may be required to file their grievances first with the National Labor Relations Board and may be limited in the first instance in their judicial access.²⁶⁰ The formation of a nonprofit does not exclude the potential for future classification of student-athletes as employees and their organization into unions, but the idea offers a middle ground that provides representation without the objections that can be raised against unionization.

The nonprofit option makes sense because the nonprofit structure already exists in abundance in amateur athletics and by granting tax exemption status, the law has recognized the positive role of such organizations. The Black Coaches Association is, for example, a 501(c)(3) organization primarily made up of African American coaches.²⁶¹ Similarly, the Women's Sports Foundation is a 501(c)(3) dedicated to enhancing the sports experience of girls and women. It invites anyone to be a member, including, presumably student-athletes.²⁶² The NCAA itself is a nonprofit.

Moreover, the NCAA has already demonstrated a willingness to work with other nonprofit organizations on matters related to athletics. Indeed, each year the NCAA Foundation provides substantial financial assistance to athletic-oriented, independent, nonprofit organizations. For example, in the fall of 1995, the NCAA approved grants of \$50,000 and \$35,000 respectively to the National

showing of an employment contract where there was evidence that the student had received "scholarship" money, as well as money directly from the football coach where record did not show any denial by the football coach that he had made a contract with the student).

Media references to this issue include Bill Minutaglio, *Former TCU Football Player Loses Bid for Workers' Comp: Waldrep Says He Was an Employee When Paralyzed in '74*, DALLAS MORNING NEWS, Oct. 21, 1997, at 24D, 1997 WL 11529554 (reporting that a Texas jury ruled that, contrary to the finding of the Texas Worker's Compensation Commission, a TCU football player was not employee when he was injured in 1974); see also John Bacon et al., *Jury: Injured College Athlete Ineligible for Workers' Comp*, USA TODAY, Oct. 21, 1997, at 3A, 1997 WL 7017328.

259. See National Labor Relations Act (NLRA), 29 U.S.C. § 159(a) (1994).

260. E.g., 29 U.S.C. § 160(a) (granting jurisdiction over certain labor matters in the first instance to National Labor Relations Board).

261. See also http://www.bcasports.org/about_1.asp (history and 501(c)(3) status).

262. See generally <http://www.womenssportsfoundation.org>; see also <http://www.womenssportsfoundation.org/cgi-bin/iowa/about/more.html> (founding and (501(c)(3) status); <http://www.womenssportsfoundation.org/cgi-bin/iowa/about/article.html?record=28> (membership open to anyone).

Association of Basketball Coaches and the Women's Basketball Coaches Association; a "\$6,000 grant in 1995-96 to the U.S. Women's Lacrosse Coaches Association for officiating-improvement activities," and a \$2000 grant "to the National Association of Collegiate Gymnastics Coaches (Men) to assist with the compilation of statistical information."²⁶³ The NCAA has also formed cooperative relationships with a number of foundations that have as their purpose the promotion of women's sports' issues. For example, the NCAA's Gender-Equity Task Force received consulting assistance from organizations such as the National Women's Law Center, the Office for Civil Rights, and the Women's Sports Foundation.²⁶⁴ And of course, the NCAA has cooperated with professional sports unions on numerous projects.

The NCAA constitution also has long recognized the value of its relationships with nonprofits and other groups through a category of "affiliated members." These affiliated members are permitted to send a single delegate to the NCAA convention, but are not permitted to vote.²⁶⁵ The affiliated member list has included a broad group of associations concerned with matters relating to athletics and representing the interests of persons affiliated with athletics such as registrars, financial aid officers, and coaches.²⁶⁶ It is not obvious that a proposed nonprofit concerned with student-athlete issues should seek affiliated status. Because affiliated members must align themselves with NCAA principles, such status could compromise the organization's independence as a constructive commentator and critic of intercollegiate athletics policy.²⁶⁷ However, the presence of the affiliated member category demonstrates the NCAA's past cooperation with nonprofit organizations. The NCAA has also

263. *Executive Committee Minutes*, NCAA REG., Aug. 30, 1995, at 1.

264. FINAL REPORT OF THE NCAA GENDER-EQUITY TASK FORCE 16 (1993).

265. 1996-97 NCAA MANUAL, *supra* note 128, at 15 (describing the rights and privileges of affiliated membership); *see also* 2001-02 DIVISION III NCAA MANUAL, *supra* note 179, at 14-15 (same).

266. The 1995 NCAA Convention Proceedings lists twenty-four affiliated members. These include: (1) groups representing particular sports or sports events (e.g., Amateur Softball Association, Basketball Hall of Fame Tip-Off Classic, U.S. Olympic Committee, USA Basketball, USA Volleyball, and Metropolitan Intercollegiate Basketball Association); (2) groups representing coaches (e.g., American Baseball Coaches Association, American Football Coaches Association, American Volleyball Coaches Association, College Swimming Coaches Association of America, Inc., National Association of Basketball Coaches, National Association of Collegiate Gymnastics Coaches, National Softball Coaches Association, U.S. Track Coaches Association, and Women's Basketball Coaches Association); and (3) groups representing administrative personnel concerned with the issues that the NCAA addresses (e.g., American Association of Collegiate Registrars and Admissions Officers, Division I-A Athletics Directors Association, National Strength and Conditioning Association, National Association of Academic Advisors for Athletics, and National Association of Collegiate Women Athletic Administrators). NCAA, 1995 NCAA CONVENTION PROCEEDINGS 58 (1995). Some of the later proceedings include similar lists.

267. Affiliated members must observe the bylaws and principles set forth in the NCAA constitution and bylaws. *See, e.g.*, 2000-01 NCAA DIVISION I MANUAL, *supra* note 177, at 15.

regularly permitted nonmember visitors, including press groups and associations, to attend its convention and observe proceedings.²⁶⁸

These facts demonstrate that the NCAA has had experience with nonprofits and has even, on occasion, welcomed cooperation with them. They also demonstrate that just about everyone directly involved in intercollegiate athletics has some organizational voice that can uniquely represent the concerns of their groups and that they can call upon to affect athletics policy—schools, coaches, financial aid representatives, officials—that is, everyone except student-athletes.

B. *What Would a Nonprofit Do?*

As previously stated, nonprofits already perform a host of work in the amateur athletics world. But eliminating the perversion of *in loco parentis* is a key starting point for nonprofit expansion to assist student-athletes in a real way. In this writer's view, the primary need for a nonprofit organization rests among those facing the most restrictions. These appear to be athletes in revenue-producing sports and those in nonrevenue-producing sports who are tied to rules *designed with* revenue-producing athletes in mind.

The possibilities for nonprofit involvement in assisting these student-athletes are endless. A nonprofit could, in fact, do the same things for student-athletes that the nonprofits that assist other groups involved in athletics do. For example, it could preliminarily review NCAA proposed policies and serve as a thinktank for new proposals to better the student-athletes' situation. It could identify problems and advocate—and agitate for—changes. A nonprofit could monitor educational and medical support at institutions to ensure that it is both of high quality and consistent for student-athletes, rather than dependent upon the institution that the student-athlete attends. It could provide educational information, including leadership training.²⁶⁹ Such programs should be seen not as “pay for play,” but as *restitutional* and *compensatory* programs, that is, programs to provide for needs created by athletics involvement or to restore experiences, opportunities and benefits that student-athletes must forgo because of that involvement.

Should the NCAA or member schools ever decide to approve stipends to student-athletes or to offer some other additional financial aid to them, a nonprofit could serve as an independent vehicle for the distribution of those funds, and even as a trustee. This writer has suggested, for example, that instead of direct stipends, which might be at very low levels, or perhaps in addition to stipends, student-athletes should be entitled to contributions from member institutions similar to the contributions an employer would make to individual

268. See 1996-97 NCAA MANUAL, *supra* note 128, at 32-33 (allowing members or nonmember institutions and organizations to send visiting delegates who lack voting privileges and are denied the right to participate).

269. While NCAA institutions have in recent years offered “life skills” programs, a nonprofit could offer such programs in an environment untainted by clear conflicts of interest. See generally Carter, *supra* note 4.

retirement accounts. Such a plan would encourage student-athletes to save for the future while teaching them financial planning and investment principles.²⁷⁰ Whatever the approach, removing the power over any such assets from NCAA and institutional jurisdiction would better serve interests of student-athletes, the institutions, and athletics in general.

While nonprofit organizations are restricted from political lobbying activity, as the NCAA itself has demonstrated, nonprofits can engage in much information-providing activity on legislative matters without violating lobbying laws.²⁷¹ For example, a nonprofit could provide information to Congress and governmental entities on public issues relevant to student-athlete interests in athletics. Additionally, a nonprofit could review or propose governmental legislation to provide alternative perspectives on the impact on student-athletes. A nonprofit could support the student-athlete organization with their own voices on issues and conduct the research necessary to assess and monitor whether those voices are being heard and, indeed, what they are saying.

Certainly, while student-athletes have many interests in common, there are conflicts that raise the question of whether a single nonprofit is workable. From the institutional perspective a single nonprofit might be best because there would be only one institution to deal with and that institution would be required to compromise among competing student-athlete interests. But this writer sees no reason why one should reasonably insist on monopoly control over student-athlete issues. Indeed, there are several coaches associations asserting the interests of various subgroups of coaches, for example, black coaches and female coaches and tennis coaches. Why then should student-athletes be more limited in their options? One could make an excellent argument that some groups need an organization more than others. For example, for some, football players or African American athletes might fall into the category of those suffering most under the perversion of *in loco parentis*. On the other hand, existing structures that target the interests of specific groups, like the Women's Sports Foundation, can continue to support those groups. The financial support for such an enterprise in the market and the needs of student-athletes will be sufficient to determine whether one nonprofit or more than one emerges. Moreover, multiple nonprofits can be involved in the enterprise at different levels.

C. Funding

There are numerous sources of funding for such a nonprofit. One very obvious source is former student-athletes who desire to offer support. Another is contributions from both for-profit and not-for-profit organizations. Governmental grants and general public support are other options. Finally, of course, the NCAA and member institutions themselves have means of granting some support to such an organization. It would be best, of course, if such an

270. See *id.* at 96-97.

271. The NCAA has a Washington D.C. office that regularly communicates with Congress on key issues relevant to athletics. See *id.* at 24-25.

organization were broadly-supported. Broad support would avoid concerns that the group answers to only a small group of donors and also would achieve the preferred IRS exemption classification of a "public charity."²⁷²

D. NCAA Regulatory Barriers: In Loco Parentis—Again!

There are definite regulatory barriers to what I propose here. At the heart of the difficulty are two broadly-defined NCAA principles: the principle of amateurism and the principle of institutional control.²⁷³ Let us discuss them in turn.

As the *Sports Illustrated* matter indicated, the definition of amateurism embraced in the NCAA rules is exceedingly broad. The rules provide that amateurs may not receive compensation for their athletic ability.²⁷⁴ By providing educational or other services at no charge to student-athletes only, might my nonprofit be charged with providing a benefit based upon their athletic ability? Of course, one can only reach an affirmative conclusion if one embraces the NCAA's very broad definition of what it means to "use" one's athletic ability.²⁷⁵

For illustration, consider the following example. Suppose a nonprofit initiated a lawsuit charging institutions and the NCAA with violations of student-athlete rights. Suppose that, because these students lacked money, the nonprofit arranged to cover the cost of the representation or hired a lawyer who would take the case free of charge, perhaps relying upon the hope of a statutory fee award for payment. Could this assistance be considered "compensation" for athletic skills, a violation of NCAA rules on amateurism?²⁷⁶

What of the principle of institutional control? Would an institution be penalized if it "permitted" its student-athletes to be involved with a nonprofit (assuming the nonprofit's activities with student-athletes are not specifically exempted by existing rules)? NCAA rules require member educational institutions to assert control over their athletic programs. For example, when any booster of the institution violates NCAA rules, the institution has violated the principle of institutional control by failing to prevent the act.

Indeed, a person can become a booster—or more properly, a representative of institutional interests—without being an employee of the institution, without

272. Public charities are broadly-supported entities under the Internal Revenue Code. 26 U.S.C. § 509(a)(2) (1994). By contrast, private foundations, while exempt, are not broadly supported and, thus, are subject to more taxation, restrictions and reporting requirements than public charities. 26 U.S.C. § 507-509.

273. See, e.g., 2001-02 DIVISION I MANUAL, *supra* note 177, at 3 (principle of institutional control); *id.* at 5 (principle of amateurism). A "general" principle sets out that the legislation shall be designed to vindicate the specific principles. The specific principles follow. For the other principles, see also *id.* at 3-5; Carter, *supra* note 4, at 13-14.

274. 2000-01 NCAA DIVISION I MANUAL, *supra* note 177, at 72-74.

275. See *id.* at 72 (stating the rule covers both "direct[]" and "indirect[]" use). Consider also the *Sports Illustrated* case discussed *supra* Part III.A.

276. See 2001-02 NCAA DIVISION I MANUAL, *supra* note 177, at 72.

the institution's formal permission and without actually recognizing that he or she has become so. The person need only act to benefit the institution's athletic program in a way that violates the rules. The rationale behind this rule is not so much amateurism, but parity. The theory is that when an institution's athletic interests are so advanced, that institution gains a competitive advantage over other institutions.²⁷⁷ In response to some resistance, institutions have retreated somewhat from these broad interpretations. For example, when it could be shown that the athlete had a preexisting personal relationship with the person providing the benefits and that the benefits were thus not athletically-related, the

277. This was the approach in the case involving Dan Calloway, a Florida youth sports director who provided money to student-athletes. Calloway was not a formal member of a booster club and claimed that he provided the money solely because he had an interest in helping minority student-athletes. See, e.g., Matt Winkeljohn, *Georgia's NCAA Probation*, ATLANTA J. CONST., Mar. 6, 1997, at 4G (mentioning Calloway by name). However, in an investigation, the NCAA infractions committee alleged that the unnamed Calloway had in fact become a booster in November 1993 when he obtained high-school transcripts of prospects and provided them to Georgia football coaches.

The individual later paid for and helped several prospects with official visits to Georgia and attendance at Georgia's football camps. The committee received no evidence that the Georgia coaching staff knew about the funds the booster provided to the prospects. However, Georgia did receive a recruiting advantage from the efforts of the booster.

News Release, NCAA, *University of Georgia Receives Two Years Probation for NCAA Violations* (Mar. 5, 1997), <http://www.ncaa.org/releases/makepage.cgi/infractions/1997030501in.htm>. Having found that Calloway had acted as a booster with respect to five athletes, the NCAA then determined that all of his actions with respect to student-athletes, even those as to whom he did not specifically engage in "recruiting," were violations. Among the support that Calloway was found to have provided was the following:

He obtained high school transcripts of five prospects for Georgia's football coaches. He provided cash to nine prospects on a number of occasions. He purchased meals for five prospects on two occasions. He paid for five prospects to attend the university's football camp and paid for three prospects to visit the Georgia campus.

From August 1994 to January 1995, the booster paid at least \$7,000 for tuition, room, board and spending money to a walk-on football player.

Id. In addition to being placed on two years probation, the Georgia football program suffered a reduction in the number of athletic scholarships it could offer. *Id.*

Calloway was also implicated in another investigation involving Michigan State University. News Release, NCAA, *Michigan State University Receives Four Years Probation for NCAA Violations* (Sept. 16, 1996) (noting that Calloway did not intend to become an institutional representative but that coaches sought him out because of his prominence in community and used him to a recruiting advantage), <http://www.ncaa.org/releases/makepage.cgi/infractions/1996091602IN.htm>. Michigan State also suffered a reduction in scholarships. *Id.* Calloway has consistently claimed that he was not representing any university's interests, that he was helping minority student-athletes in general, and that if a student asked his opinion about a particular school he was and is free to give it. See, e.g., Winkeljohn, *supra*.

NCAA has suggested no penalty would be warranted. Generally, however, such relationship can only be proven by the student-athlete taking the risk and then suffering an investigation.²⁷⁸

Nevertheless, the institutional control rule could be a problem for my nonprofit if its activities conflict with NCAA rules. For example, could this organization be characterized as a "booster" if it identified a particular college's assistance to athletes as inadequate and provided academic support to those athletes?

Consider yet another quandary. Could student-athletes affiliate with an organization that obtains a substantial part of its support from contributions by professional players (most of whom used to be student-athletes) without running afoul of NCAA amateurism rules or without subjecting their institutions to institutional control objections? Would substantial financial support from professional players cause the NCAA to categorize the group as a "professional sports organization?" Student-athletes are prohibited from receiving support from professional sports organizations unless expressly allowed by the NCAA.²⁷⁹ Certainly, it is in the nonprofit's interest to receive broad financial support and not be beholden to a small group of donors.²⁸⁰ But some of its donors might very well be classes of persons to whom the NCAA and its members might object if these persons had direct relationships with student-athletes. On the other hand,

278. Compare the Calloway cases, *supra* note 277, to the case involving Ed Martin's contacts with University of Michigan players. As reported in the Detroit News, an internal report by the University of Michigan prior to the infractions committee action found that Martin, in all likelihood, gave some players or their families rent for apartments, party rooms in hotels, free transportation, basketball shoes, and other goods. Jeff Taylor, *Michigan Still Searching for Answers*, DETROIT FREE PRESS, July 25, 1997. On the other hand, the university's internal investigation report indicated that Martin knew the players for years before they went to Michigan and did not help Michigan recruit them. Thus, it argued that Martin was not technically a representative of the university's athletic interests. Fred Girard, *U-M's Fate Tied to Martin: NCAA Will Study Probe Results, Interpret His Status with University*, DETROIT NEWS, Oct. 10, 1997. It did, however, find other violations of NCAA rules and responded by dismissing Michigan's head coach. Nicholas J. Cotsonika, *Ex-Michigan Coach Responds to Firing; Fisher: "I Will Not Apologize for Who I Am"*, WASH. POST, Oct. 14, 1997. In 2000, Martin was prosecuted for alleged gambling operations and alleged money laundering. The basis for the charges included the 1997 incidents involving Michigan student athletes. Ben Schmitt et al., *U.S. Charges Martin Ran a Gambling Ring*, DETROIT NEWS, Mar. 22, 2002.

279. 2000-01 DIVISION I NCAA MANUAL, *supra* note 177, at 69. *But see* NCAA Rule 12.1.1.4.7, *id.* at 72 (allowing charities that receive funding from professional sports organizations to pay for low-income, at-risk student-athletes' attendance at a "camp or clinic" (but not to pay for prospective student-athletes) and allowing payment only for reasonable expenses, apparel and equipment). Note that the rule seems to assume that the camp would be an athletic one. Note also that the rule refers to charities *paying for* camps; it is not targeted toward camps that are *run by* the charities. The reader is reminded that institutions and coaches often sponsor their own athletic camps. All such camps, of course, are subject to NCAA limitations on "outside activities."

280. 26 U.S.C. § 501(c)(3) (1994).

institutions, with the NCAA's blessing, have worked closely with professional sports organizations and permitted students to have contact with professional sports organizations when it promoted, or at least, did not jeopardize, the NCAA's own interests.

One can argue convincingly that there are individuals and organizations with bad intentions who should be kept away from student-athletes. Furthermore, it is fair to say that schools have a legitimate interest in the "amateur" game and, therefore, have the right to set reasonable terms for participation in it.²⁸¹ On the other hand, as I have stated, historically amateurism had two sides: both student and the institution had responsibilities. Chief among the institution's responsibilities was to provide athletics for all and to avoid commercialization of athletics and student-athletes. It is undeniable that NCAA institutions have abandoned this earlier strong commitment to amateurism,²⁸² and, that commercialism and control of athletics (with various ends) has become a key concern. Therefore, in this new environment, it is time to consider what parts of amateurism regulations applied to student-athletes can still be justified, not as an afterthought tagged on to discussions about institutional rights, but as a central question.²⁸³ It is also time to acknowledge that in the search for "control," the NCAA and its members have swept far too broadly.²⁸⁴

When we speak of the potential of nonprofits, a key concern for NCAA members who are publicly-funded institutions should lie the free speech area. The Supreme Court has recognized that the First Amendment assures not only the freedom to speak but also the freedom to associate and that the freedom to associate in an organization for the advancement of a point of view is a fundamental right.²⁸⁵ Because of this freedom, the government and its entities cannot forbid membership in a group. Generally, it also cannot require that the organization reveal the names of the members of such a group.²⁸⁶ Such required revelations are barred because the fear of reprisal will have a chilling effect upon membership and upon individual association rights. The courts have also long recognized that the First Amendment includes the right to receive information as well as provide it. Thus, in *Lamont v. Postmaster General of the United States*,

281. See discussion of the right/privilege distinction *supra* note 172 and accompanying text.

282. It may be a little more than ironic that the principle of amateurism used to be the very first of the "specific" principles; see discussion *supra*, Part III.B, but today the principle of institutional control is the first "specific" principle, while the principle of amateurism is number nine on a list of sixteen. 2001-02, DIVISION I NCAA MANUAL, *supra* note 177, at 3-5. See also *supra* notes 231-34 and accompanying text (concession to consider athletic ability in awarding scholarships).

283. See discussion *supra*, Part III.B (obligation of institutions under amateurism).

284. See generally Carter, *supra* note 4, for a survey of the battle for constitutional control of athletics.

285. *E.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976) (regarding freedom to contribute money to promote common beliefs), *motion granted by* 424 U.S. 936 (1976); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

286. *Patterson*, 357 U.S. at 462.

the Court struck down a federal law permitting the postmaster to pull and hold mail appearing to be communist propaganda until the addressee specifically returned a reply card asking that it be delivered.²⁸⁷ *Lamont* held that the requirement of returning the card imposed an undue burden on the individual's right to receive information.²⁸⁸ The Court has made it clear that the "right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom."²⁸⁹ Indeed, in a concurring opinion in *Lamont*, Justice Brennan observed the link between the right of free speech and the right to receive information stating that "[i]t would be a barren marketplace of ideas that had only sellers and no buyers."²⁹⁰

As I have noted earlier,²⁹¹ these First Amendment rights apply to students as well.²⁹² Indeed, the Supreme Court has recognized the role of free speech on campuses as central to the educational mission.²⁹³ Thus, educational institutions will have difficulty justifying broad restrictions on speech and association as serving some kind of "educational" purpose. The courts have been particularly suspicious of prior restraints on speech that require that speakers receive license to speak before speaking. Thus, any requirement that the student check with the institution first before speaking or associating could operate as a presumptively invalid prior restraint on speech.²⁹⁴

Certainly, where the speech is greatly disruptive courts have been willing to permit restrictions on access.²⁹⁵ However, there is no legitimate reason for assuming that student-athlete involvement with a nonprofit would be disruptive in the sense of these cases.

It must further be remembered that the association and speech rights belong not only to the athlete but also to the nonprofit. It has a right to provide information as much as student-athletes have the right to receive it.²⁹⁶

287. 381 U.S. 301 (1965).

288. *Id.* at 307.

289. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982).

290. *Lamont*, 381 U.S. at 308 (Brennan, J., concurring).

291. See discussion *supra* Part III.A.

292. See, e.g., *Pico*, 457 U.S. at 870-71 (finding that board of education may not remove books from school library approved by parent-teacher group merely because board disagrees with views expressed in them).

293. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

294. See, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

295. See, e.g., *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3d Cir. 1992) (holding that public library could bar person from library for failure to observe rules of conduct while inside library); *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972) (upholding university action against teacher who belittled colleagues and initiated frequent disputes).

296. Reaffirming this view, the Supreme Court decided at press time *Watchtower Bible & Tract Society of New York v. Village of Stratton*, 122 S. Ct. 2080 (2002) (upholding society of Jehovah's Witnesses challenge to prohibitions and limitations on pamphleting and soliciting at

Of course, only state actors can be sued for constitutional violations. The NCAA has successfully argued that it is not itself a state actor and has won dismissal from many cases brought against it.²⁹⁷ As a result, in the past, publicly-funded institutions were likely to find themselves the sole defendants in lawsuits based on constitutional grounds. However, as I have argued in *Student-Athlete Welfare*, this greater delegation of legislating power in Division I after restructuring and other factors now make the NCAA's assertion of non-state-actor status vulnerable.²⁹⁸

Privately-funded institutions also may not be exempt from concerns discussed here. As noted above, after the student protests of the 1960s, many private colleges adopted statements of student rights and responsibilities that essentially protected student freedom of speech and association.²⁹⁹ Arguably, these protections are a part of the student's contract with the college or university.³⁰⁰ Indeed, as also noted earlier, accrediting agencies often seek assurances of an environment that welcomes free speech and association as a prerequisite to accreditation.

All of these considerations support a view that students should not be prohibited from voluntarily joining such an organization (if it is a membership organization), or, alternatively, taking advantage of its benefits. They should be permitted to join regardless of who the other members are, so long as all members support its purposes. Also, student-athletes should not be required to inform their institutions of their membership, and the organization should not reveal its membership lists to these institutions. The schools should not be permitted to condition student-athlete eligibility on a requirement that the student provide information about the organization's activities or other members. Students should be able to receive from such an organization any benefits directed at remedying perceived abuses in athletics, free of institutional meddling. The First Amendment supports this view, but also there may be justification for defense of such associations and interactions of other legal fields.³⁰¹

private homes); *see also* NAACP v. Button, 371 U.S. 415 (1961) (rejecting on First Amendment grounds state of Alabama's refusal to grant business license to NAACP and its ban on NAACP activities in that state).

297. *See* NCAA v. Tarkanian, 488 U.S. 179, 182 (1988).

298. *See* Carter, *supra* note 4, at 81-89 (arguing for a narrow reading of *Tarkanian* and suggesting that the new legislative structure under restructuring may make NCAA vulnerable to claims requiring state action).

299. *See supra* notes 114-26 and accompanying text.

300. *See supra* notes 118-19 and accompanying text.

301. The legal possibilities are too numerous and too complicated to explore here. However, it may briefly be said that interference with an organization's attempts to reach student-athletes may have an effect on the marketplace that would have antitrust implications. Despite its special status in the law, the NCAA has been the subject of successful antitrust challenges. *See* Carter *supra* note 4 (discussing *Law v. NCAA* and *NCCA v. Board of Regents*). State and Federal Civil Rights statutes and conspiracy law may also be implicated.

Perhaps institutions could argue that unfettered associational opportunities with nonprofits could jeopardize student welfare and amateurism because, absent institutional monitoring, student-athletes will fall prey to jackals. Perhaps it would be argued that the "product" that is intercollegiate amateur athletics cannot exist without such far reaching restraints on student conduct, and that competitive parity principles would be jeopardized as institutions sought to take advantage of this brave new world.³⁰² But the historical failure of member institutions to protect student-athlete welfare arouse suspicions about institutional supervision of student-athletes. Some would compare it to the proverbial wolf guarding the henhouse. NCAA position changes on amateurism over the years challenge assumptions about amateurism's unchangeable nature and its sacred status. Moreover, while the NCAA may be free, as a private entity, to determine through its divisions what it believes amateurism is, it should not be free to determine the fundamental rights of student-athletes in the regimes it establishes. It should also not have the special aid of the courts in upholding overly-broad standards that are driven primarily by commercial interests.

As I have argued elsewhere in *Student-Athlete Welfare*, the rationale for strong deference to educational institutions in intercollegiate athletics is suspect where student-athlete controls are concerned.³⁰³

Perhaps one solution to preserving NCAA values and interests is for the NCAA to enter into agreements with other nonprofits. And even if some measure of control is truly essential to preserving amateurism in intercollegiate athletics, (and if having reached that conclusion, we decide that we still wish to preserve it), the perverted form of *in loco parentis* must be replaced with a new conception of student-athlete/institution rights. Perhaps that conception will be a modified *in loco parentis doctrine* more akin to contract and duty and more closely resembling the legal relationships that exists between institutions and their non-athlete students. Perhaps in a system that is supposed to be tied to education, we really do not wish student-athletes to have to fend for themselves in the way that professional-athletes must do, particularly on matters of safety.³⁰⁴ But if *in loco parentis* to any degree remains, the new conception must also recognize that with any degree of control, comes a duty to protect. And the new conception must have teeth, affording student-athletes a real remedy, legal or otherwise, if the institution fails in its duty. Better yet, the new conception must allow outside groups to provide assistance to the student-athlete and the NCAA to avoid situations which would lead to litigation. Nonprofits can play a vital role in this mission.

302. The argument has been made in the antitrust context. As I have noted elsewhere, the majority in *NCAA v. Board of Regents*, 468 U.S. 120 (1984), while rejecting NCAA restraints on its members in that case, opined that some horizontal restraints on commercial activity are necessary if the "product" of intercollegiate athletics is to be available at all. However, as I also indicated, whether restraints, antitrust or otherwise, are necessary in a given case, turns on how one defines "the product" to be preserved. See Carter, *supra* note 4, at 72-73.

303. See generally *id.* at 69-95 (discussing judicial deference).

304. Taking such an approach has broad implications for other doctrines such as assumption of risk.

CONCLUSION

I have claimed that the original *in loco parentis* doctrine had three legs: a control leg, a welfare leg, and a deference leg. As athletics grew in importance at educational institutions, the control leg was strengthened and the welfare leg weakened. With continued judicial deference to institutions, this phenomenon resulted in a distorted *in loco parentis* doctrine and an imbalance in the relationship between institutions and their student-athletes. This trend was contrary to the larger national trend toward reduced control of students and less judicial deference to exercises of that control.

Intercollegiate athletics continues to operate in distorted *in loco parentis* space. Arguably financial concerns have always played a role in the *in loco parentis* doctrine. For example, when Berea College, discussed above, forbade students to have their meals off campus, one of the concerns was that financially, Berea could not continue to provide a meal plan if students were not required to participate in it.³⁰⁵ However, difference between the world of 1930 and the world of today is that the *in loco parentis* doctrine has long been abandoned with respect to the larger student population. It is unlikely today that any educational institution could successfully defend in court what Berea did either against student challenge or against litigation. Another big difference between Berea's control and that of institutions controlling intercollegiate athletics is that it does not appear that Berea continued a meals program purely because of its financial value to the university. Instead, Berea likely viewed the policy of group meals as intricately tied to its mission of providing students with an education in a collegiate setting.

It is possible to argue that, in the name of keeping intercollegiate athletics an integral part of education, institutions should be permitted to exercise broader controls over student-athletes than over nonathletes. Evidence suggests that without some controls intercollegiate athletics can get out of hand. It is also possible to argue that amateurism has value. But to sustain these arguments lawyers and the courts must not only define what they mean by "amateurism," they must also redefine the relationship between the student-athlete and his or her institution. If intercollegiate athletics is to remain under the control of institutions, the welfare leg of *in loco parentis* must be rebuilt or replaced with some suitable modern substitute—and the control and deference legs of the doctrine must be shortened to restore its balance. Whatever happens, as long as commercialism plays a major role in intercollegiate athletics, student-athletes will need and have a right to access to information and assistance outside of their institutions. A nonprofit, or perhaps a group of several nonprofits, is the most viable option for providing that information and assistance.

305. See *Gott v. Berea Coll.*, 161 S.W. 204, 207 (Ky. 1913).

