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Student Athlete Welfare in a Restructured NCAA

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STUDENT-ATHLETE WELFARE IN A RESTRUCTURED NCAA

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TABLE OF CONTENTS

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INTRODUCTION**

In the fall of 1997, the National Collegiate Athletic Association (NCAA)— the most powerful regulatory body in intercollegiate athletics— enacted a revolutionary "Restructuring" plan. One delegate called it, "the most important vote in the history of this association."[1] That plan drastically reduced the powers and duties of the NCAA as a national body in favor of a "federated" approach that shifted key powers into the hands of the three NCAA "divisions," and, theoretically, into the hands of the colleges and universities that comprise them.[2] In his opening speech to the Restructuring convention in 1996, NCAA President Cedric Dempsey proclaimed Restructuring to be "based on two simple and powerful principles: presidential control and federated governance."[3]

To date, no law review article has taken an in-depth look at what Restructuring accomplished or its likely impact on intercollegiate athletics. This article begins that discussion, focusing most particularly on how Restructuring will affect the welfare of student-athletes. Section I provides a brief introductory history of NCAA beginnings, describes NCAA work

** A note on sources: Many of the sources cited in this article have changed their names and forms over time. NCAA convention reports and transcripts were produced in volumes entitled "NCAA Proceedings" or alternatively, "NCAA Yearbooks." Proceedings are cited "19xx Proc." Yearbooks are cited "19xx Yearbook" with the convention year in parenthesis. Prior to Restructuring, the NCAA had a central NCAA manual, but starting in 1997-98, the central manual was replaced by three separate manuals, one for each of the NCAA "divisions." In discussing legislation prior to Restructuring, the author cites the 1995-96 manual (as opposed to the 1996-97 manual) because the former was the last central manual to reflect the regulations exactly as they stood before Restructuring was passed ("NCAA Manual"). In citations of recent convention proceedings, the names of speakers have been intentionally omitted.

1. See General Business Session, Monday, Jan. 8, 1996, 1996 Proc. at 266, 271.

2. The NCAA voted on the general governance structure in January of 1996. See Prop. 7, 1996 Proc. at 266. It put additional legislative touches on Restructuring at the January 1997 convention and the plan took effect in the following fall. See generally, 1997 Proceedings.

3. Cedric Dempsey, State of the Association Address, 1996 Proc. 69, 72. Dempsey's comments are quoted to a fuller extent, infra note 164.

and governance prior to Restructuring and discusses the changes wrought by Restructuring. The goal here is to provide a public source for this information, as well as to set the stage for later discussion. Section II puts the Restructuring movement in its historical and political contexts, highlighting aspects of Restructuring that have received little or no attention in either popular media reports or scholarly writings. Finally, Section III discusses the likely future of amateur athletics and student-athlete welfare in a restructured NCAA, including some legal implications of Restructuring and what steps the presidents of colleges and universities can take to preserve the issue of student-athlete welfare as a serious one in intercollegiate athletics policy.

In summary, the article argues that Restructuring was largely a political compromise designed to avoid a threatened secession from the union by NCAA Division I schools, those with the largest and most lucrative athletic programs. These schools desired greater decision-making autonomy from other divisions. Because Restructuring legislation focused almost exclusively upon *who* decides, and very little upon *what* is decided, it failed to deal with the fundamental differences among its three divisions, differences that have strained NCAA member relationships and generated public criticism that its programs are unfair to student-athletes. In particular, Restructuring legislation gave little attention to how the welfare of student-athletes would be protected under the new structure. Instead, Restructuring was couched as a return to local college and university decision-making or "presidential control," and the proposition was that this move, if good for NCAA members, was necessarily good for student-athletes.

In truth, Restructuring has not advanced "presidential control" at most NCAA schools, and, at some, it has lessened it. Under it, more than ever before, Division I institutions have delegated decision-making power over athletics to NCAA bodies. Moreover, the notion that "presidential control" necessarily assures student-athlete welfare is based upon the erroneous assumption that the interests of student-athletes and their institutions are the same. This assumption hearkens back to the long abandoned *in loco parentis* model for

student-institutional relations.[4] The truth is that in athletics, perhaps more than in any other "educational" endeavor, student-athlete rights and interests may be in stark conflict with those of the institution for which the student-athlete plays.

In addition to ignoring this conflict, the architects of Restructuring dramatically reduced the public's access to information about the NCAA and member activities. This, in turn, has cut back on the public visibility of decision-making that has, in the past, served in some small measure to protect student-athletes when their interests conflicted with those of athletics policymakers.

Restructuring is a clarion call to the courts to reconsider the broad judicial deference the NCAA has historically been afforded in legal actions challenging its regulations. In no situation is this reconsideration more desperately needed than in cases in which the fairness of intercollegiate athletics policy to student-athletes is a central concern, but curtailment of deference may be appropriate in other cases as well.

Deference need not be completely abandoned. Indeed, courts could legitimately continue to extend deference in cases in which athletics policy regulations deal with issues that fit the traditional mold of *academic* policies that have historically received deferential treatment in non-athletics contexts. This approach would be consistent with both longstanding judicial deference to educational decision-making by such institutions and the claim of the NCAA and members that keeping athletics and education integrated is the fundamental policy of that body. But where the challenged regulations concern themselves to any significant degree with non-academic motivations, such as (1) preserving parity among institutions or (2) the commercial rights of NCAA members as against each other or as against outsiders, the courts should abandon automatic deference in favor of a model that balances the

4. *"In loco parentis"* means, literally, "in the place of a parent." The college or university was deemed to have the same wide-ranging authority to make decisions for a student as a parent would for a child, whether the student was on or off campus. See, e.g., Gott v. Berea College, 156 Ky. 376, 379, 161 S.W.2d 204, 205 (1913).

interests of the particular parties involved and considers the public's varied interests. Crucially, in identifying the motivation behind challenged athletics policies, the courts should not defer to NCAA or institutional characterizations of that legislation, for these characterizations often do not tell the whole story. Instead, they should thoughtfully consider whether the legislative history supports the publicly-claimed motivation and grant discovery to plaintiffs on the issue where requested. The above-described deference approach continues to respect the goal of keeping athletics policy and educational policy integrated, but also acknowledges the modern role of the NCAA as not only a body of educational institutions, but also a commercial actor and political advocate for its members.

I. NCAA RESTRUCTURING: AN OVERVIEW

A. *From Federated to Strong Central Control*

The NCAA is an unincorporated, tax-exempt, not-for-profit, voluntary membership organization. As the Supreme Court has noted, today virtually all public and private universities and four year colleges conducting major athletic programs in the United States belong to the NCAA and have agreed to conduct their programs consistent with its rules and regulations.[5] Its membership exceeds 1,200, including some 1,000 universities and colleges as well as numerous other sports and educational organizations.[6] The educational institutions that belong to the NCAA are divided into three "divisions," numbered I, II and III. In the sport of football only, Division I is further divided into Divisions I-A, I-AA, and I-AAA.[7] Schools with the most financially lucrative athletic

5. See NCAA v. Tarkanian, 488 U.S. 179, 183 (1988); NCAA v. Smith, 525 U.S. 459 (1999). The Restructuring amendments define the NCAA as "a diverse, voluntary, unincorporated, association of four-year colleges and universities, conferences, affiliated associations and other educational institutions." See Prop. 7, H, § 4.02.1, 1996 Proc. at A9.

6. See Membership Distribution, 1996-97 NCAA Ann. Rep. at 27, 43. See also, Membership Total Hits Record High of 1,203, NCAA News, Sept. 16, 1996, at 1.

7. See 1995-96 NCAA Manual, Bylaws, art. 20, § 20.01.2, at 353. Generally speaking, membership in a division is determined by various "criteria" including a

programs, including, of course, the major basketball and football powerhouses, are found in Division I.

Student-athletes themselves are not— and never have been— members of the NCAA. However, NCAA member schools agree to require the student-athletes who represent their institutions in intercollegiate competition to abide by NCAA rules. The impact of that agreement is substantial. In 1996-97, more than 328,000 student-athletes— including more than 128,000 women athletes— competed in athletic events at NCAA-member institutions.[8]

Modern followers of intercollegiate athletics are familiar with a strong central NCAA. But in fact, the organization has not always been so organized. Indeed, when one examines the institution's history one sees movement back and forth between two poles— federation on the one hand and strong central governance on the other. It is useful to remind ourselves that the NCAA began as a "federated" group and its transformation into a strong central body was a direct response to calls by members that schools needed to "control" college athletics to curb perceived abuses. It is to that history that we briefly turn here.

Long before the NCAA or any athletics associations existed, sports on college campuses consisted of undergraduate students engaging in voluntary games. The idea that this voluntary activity should be "controlled" by colleges emerged out of a complex web of concerns. They included (1) the inability of institutions to take the action necessary to prevent their own agents from engaging in conduct that they believed was undesirable (such as specialized athlete recruiting or granting of institutional favors to students based upon athletics alone); (2) concern that outside actors such as alumni and community members were interacting with student-athletes and, in the view of those concerned, introducing "professionalism" into collegiate games; (3) concerns that

minimum number of sports, sponsorship requirements, minimum scheduling requirements and minimum game-attendance requirements. See id. §§ 20.9-20.11, at 361-77.

8. See Study Shows Another Participation Increase, NCAA News, April 27, 1998, at 1.

uncontrolled athletics was providing an avenue by which the "gentlemen" of the elite institutions were mixing with undesirable classes; (4) a belief that schools could make athletics more beneficial (and even financially lucrative) by taking them over and standardizing rules of play among schools; (5) concern that football was becoming too violent and student safety was at risk; and (6) concern that too much emphasis on athletics would mar the academic reputation and emphasis of educational institutions.[9] One can only appreciate such concerns today by appreciating the starkly different social context in which they then arose. Generally speaking, the classes that controlled America's educational institutions simply did not believe in athletics as a legitimate career, and "professionalism" in athletics was considered beneath a gentleman. Barring professionalism meant not only barring any and all compensation for athletics participation, but it also meant barring specialized recruiting, specialized coaching, and even specialized training for athletics. These notions about athletics— coupled with the assumption that the institution stood *in loco parentis* with respect to the student with full power to control his conduct as would a parent, whether on or off campus— led to the view that the college or university could and should control student involvement in athletics.

However, an early problem with athletics regulation was that not everyone agreed *all* professionalism was bad, and, even if they agreed in theory, for some institutions, athletics provided the potential for much needed new revenue streams. Thus, the history of NCAA regulation has been marked by repeated efforts to find compromise among educational

9. The NCAA's own histories have focused upon the second and fifth reasons, but my review of historical materials suggests the others as well. Compare Jack Falla, The Voice of College Sports: A Diamond Anniversary History ix, 13-14 (1981) (official NCAA history) and NCAA website at www.ncaa.org. Some of these concerns are evidenced in the first principles adopted, discussed infra at 10. See also Howard Savage, American College Athletics (Carnegie Foundation Bulletin #23) (1929) (sponsored by the Carnegie Foundation for the Advancement of Teaching and providing a brief history of the unsavory involvement of college and university agents in campus athletics). I intend to address these matters in more detail in an upcoming companion article to this piece.

institutions for which athletics played very different institutional roles.

The earliest forms of joint institutional regulation were in the form of rules committees and the formation of conferences among groups of schools.[10] These non-NCAA groups were legislative bodies, but their approaches varied. Some focused primarily upon establishing playing rules; others focused on protecting amateurism; and others had a mixed approach. The bloody football season of 1905 (in which collegiate and non-collegiate athletes died) led President Theodore Roosevelt to call a meeting of college and university representatives to discuss regulation of the game. After a student died in a football game between Union College and New York University that same year, Chancellor Henry McCracken sent out a call to schools to meet in New York to discuss how institutions might form a national organization to gain "control" over intercollegiate athletics.[11] The following year the first "convention" of the new group, the Intercollegiate Athletic Association of the United States (IAAUS), was held in New York City where constitution and bylaws begun by the 1905 working group were modified and adopted. The 1906 Proceedings list 39 members on the roll, 28 of which were represented by "accredited delegates" at the convention. Nearly all of those attending were faculty, not Presidents.[12]

The first members of the IAAUS did not view a strong central organization as their cause. Indeed, in their organizing documents they took care to stress their independence and the "several" nature of their agreement.[13] Article VII of the 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,

10. See, e.g., K. L. Wilson and J. Brondfield, The Big Ten (1967) (discussing inter alia the history of the Big Ten Conference).

11. See Falla, supra note 9, at 14.

12. See Proceedings of the First Annual Meeting, The Intercollegiate Athletic Association of the United States (IAAUS), 4-9 (1906).

13. IAAUS Const. & Bylaws, 1906 IAAUS Proc. at 29-37.

> eligibility, and fair play, and to remedy whatever abuses may exist.[14]

The resistance to ceding power to any national body would later be reflected in efforts to recruit new members and the necessity of including assurances that the institutions would not lose their autonomy through membership.[15] At the same time, some schools desired a strong central structure because they believed it necessary to protect their vision of the role of athletics in educational institutions as educational.

Consistent with the view that they remained independent actors, the association's ideals were placed in the bylaws, not in the constitution. There one will find the earliest NCAA principles, designated the "Principles of Amateur Sport." Article VI reads:

> 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.

14. IAAUS Const., art. VIII, 1906 Proc. at 31 (emphasis added). At the 1907 Convention, IAAUS President Palmer Pierce also stated the case for his organization in terms of colleges assuming "control" over collegiate athletics, essentially repeating the constitutional mandate in Article VIII. See Excerpt from Address to Convention of Palmer Pierce in Falla, supra note 9, at 32.

15. See e.g., Rep. of the Committee on Membership, 1907 Proc. at 16.

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.[16]

Thus, while football violence spurred organizational action, the schools had broader goals: to impose a set of athletic values for their gentlemen amateurs.

In 1910 the IAAUS changed its name to the NCAA. For the next 45 years of its existence, the NCAA would struggle with the tensions among those who felt that a strong central body would be best and those who desired greater federation. For some time, the conferences operated as freestanding legislative bodies with no formal link to the NCAA and with significant power to shape the policies of member schools. The NCAA, in turn, sought to affect conference legislation through the perpetuation of ideals and aspirations, but initially, it had no significant legislative or enforcement authority of its own.[17]

As many readers know, over the years this fledgling group grew and moved slowly but deliberately toward the strong central NCAA with which we are familiar. To appreciate how Restructuring brings the NCAA full circle, it is helpful to contrast this loose federation of schools with the NCAA that preceded Restructuring and with the post-Restructuring NCAA. It is to the situation prior to Restructuring that we now turn.

16. See Bylaws, art. VI, 1906 Proc. at 33.

17. In this era, the NCAA divided the country into eight "districts." Conferences existed both within and across districts. The role of the conferences as the primary legislative bodies in these early days of the NCAA is reflected in the "district reports" which appear in all of the early NCAA convention proceedings.

B. *NCAA Governance Just Prior to Restructuring*

To understand NCAA Restructuring, one must understand the NCAA's organization, just prior to that event. This section provides an overview.

1. *Administration and Organization*

Prior to Restructuring, the NCAA's national structure consisted of five constitutionally-dictated administrative groups: the Administrative Committee, the President's Council, the NCAA Council, the Executive Committee and the Joint Policy Board.[18] Below these, existed a steering committee for each division and approximately 90 national committees with responsibility for everything from organization of the convention, setting the rules of specific sports and administering NCAA championships on the one hand to investigating charges of NCAA violations, proposing eligibility requirements and overseeing peer reviews and certifications of institutional programs on the other.[19] The structure also

18. The NCAA Administrative Committee (the NCAA President, Secretary-Treasurer, a Vice-President for each Division and an Executive Director) "transact[ed] necessary items of business" in the interim between meetings. See 1995-96 NCAA Manual, Const., art. IV, § 4.3, at 25. The President's Council or President's Commission, was comprised of 44 chief executive officers of member institutions and, among other responsibilities, it was responsible for reviewing NCAA activity, commissioning studies of intercollegiate athletics issues, and also had the authority to propose legislation. Id., §§ 4.5.1 - 4.5.3, at 26. The NCAA Council was comprised of 44 members elected by the annual convention of the association plus the president and secretary as ex-officio members. Id., § 4.1.1, at 21-22. Its responsibilities included appointing necessary committees, adopting non-controversial legislative amendments and administrative regulations, and acting in the interim between conventions to offer interpretations of the constitution and bylaws. Id., § 4.1.3, at 22. The NCAA Executive Committee was comprised of 14 representatives, with the division vice presidents and the NCAA President, as well as the Secretary-Treasurer serving as ex-officio members. Id., § 4.2.1, at 23. The Executive Committee hired the Executive Director, handled membership dues, adopted the budget, prescribed requirements, standards and conditions governing the conduct of NCAA championships, including the distribution of revenues to participating institutions. Id., § 4.2.3, at 24. The NCAA Joint Policy Board, organized in 1993 and consisting of the officers of the Association and the officers of the President's Commission, coordinated the efforts of these two groups. Id., § 4.6, at 27-28.

19. See id., Bylaws, § 21.01, art. 21, at 439-41.

included a 31-member student-athlete advisory committee (SAAC).[20] Below these administrative structures were the individual divisions, conferences and members.

Though originally not part of the NCAA, by the time of Restructuring each conference had a membership status, independent of the college or university members that comprised the conference.[21] As of 1996, there were more than 100 member-conferences in the NCAA.[22] Conferences have all of the privileges of active members— including a vote— except, of course, the right to compete as a conference in NCAA championships.[23] They also have the authority to legislate for conference members consistent with NCAA rules and to sponsor intraconference competition.[24] More importantly, pre-Restructuring, both the divisions and conferences tended to address NCAA legislative issues as blocks, a practice that has traditionally made each conference a powerful voice within the larger NCAA.[25]

The number of NCAA "principles" had also grown dramatically. Shifted from the Bylaws where they first appeared, they had been moved to the Constitution. Theoretically, each principle represented an important NCAA policy against which proposed regulations should be measured. If one includes the diversity in governance principle (#7 below) added as a part of Restructuring legislation, the NCAA principles, in their present order are:

(1) the principle of institutional control and responsibility;

20. See id., § 21.3.28, at 390-91 (28 of the 31 were student members).

21. See id., Const., art. III, § 3.3, at 13-14.

22. See Membership Chart, 1996-97 NCAA Ann. Rep. at 27-29. The most well-known of these conferences are the football powerhouses within Division I-A. These include the Western Athletic Conference, the Big Ten, the Pacific (Pac) Ten, the Big 12, The Mid-American Conference, the Atlantic Coast Conference, the Big East, the Big West, and the Southeastern Conference. In recent years, the number of conferences has fluctuated as conferences have realigned themselves for financial reasons.

23. See 1995-96 NCAA Manual, Const., art III, § 3.3.2.1, at 13.

24. Id., § 3.2.2.1, at 9.

25. Id., § 3.3, at 13-14.

(2) the principle of student-athlete welfare;

(3) the principle of gender equity;

(4) the principle of sportsmanship and ethical conduct;

(5) the principle of sound academic standards;

(6) the principle of nondiscrimination;

(7) the principle of diversity within governance structures;

(8) the principle of rules compliance;

(9) the principle of amateurism;

(10) the principle of competitive equity;

(11) the principle governing recruiting;

(12) the principle governing eligibility;

(13) the principle governing financial aid;

(14) the principle governing playing and practice seasons;

(15) the principle governing post-season competition and contests sponsored by non-collegiate organizations;

(16) the principle governing the economy of athletics program operation.[26]

26. See, e.g., 1995-96 NCAA Manual, Const., art. II, at 3-5. Most of these principles are self-explanatory but a few may be worthy of comment. The principle of sportsmanship & ethical conduct and the principle governing financial aid were both amended at the 1996 Restructuring Convention. Props. 10 & 11, 1996 Proc. at 285 & A51-A52. The Principle of institutional control requires that educational institutions exercise control over their athletic programs and not relinquish that control to outside groups, such as booster clubs or alumni groups. In some cases, action in violation of the principle can result in an institution being held responsible for the conduct of such outside groups. The principle of non-discrimination was added in 1993 and amended again in January 2000. Originally, it simply stated that the organization will respect the dignity of every person and "refrain from discrimination." As amended, it now makes reference to specific categories of discrimination. See NCAA's First Association-Wide Vote Gets Unanimous Reception, Jan. 17, 2000, at 1. A more specific gender equity principle was added in 1994. The principle of amateurism requires that student-athletes participating in

2. *Modern NCAA Roles*

a. *Rules Promulgator*

The Adoption of Regulations: Contrary to their agreement in 1906 to simply meet and confer, in the modern NCAA, members agree to conduct their athletic programs in ways consistent with NCAA rules and regulations. In the decades prior to Restructuring, NCAA regulations were reported annually in a single *NCAA Manual.* Generally speaking, all significant legislation was to be adopted *by the membership as a body,* annually, in an assembled convention.[27] The 1970's brought some variances in rules treatment among divisions; thus, the NCAA began publishing "Divisional Manuals," a subset of regulations for each division, in addition to the master manual. But despite these variances, the subgroups affected by them still had only limited discretion to amend or adopt legislation without the consent of the entire body.[28]

Legislation was divided into four categories: *dominant* (important enough to require an association-wide vote); *general* (requiring a simple majority vote of all divisions, voting jointly); *common* (requiring a majority vote of each division voting separately); and *federated* (division specific, not of consequence to the entire body and therefore requiring the consent only of the affected divisions).[29] The large majority of NCAA legislation prior to Restructuring required the vote of all divisions in one way or another.[30]

athletics at NCAA-sponsored schools be amateurs, that is, they must not receive "compensation" in any form for play. The principles of eligibility and of financial aid buttress the amateurism principle by tightly regulating what financial support student-athletes can receive not only from schools but from outside sources and by imposing amateurism and other eligibility criteria on student-athletes.

27. 1995-96 NCAA Manual, Const., art. V, § 5.01.1, at 31.

28. See id., § 5.01.2, at 31 (recognizing the fact of division specific legislation); id., § 5.02.1.4, at 31; and id., § 5.1.4.3.4, at 34 (providing for "federated" legislation with exceptions and defining division federated legislation or separate voting on division specific).

29. See id., § 5.02.1, at 31.

30. One can appreciate this fact by merely scanning the large number of provisions marked as "dominant" (indicated with an asterisk) in the 1995-96 NCAA Manual.

Determining Prospective Student-athlete Eligibility: NCAA rules also affected prospective students who desired to enroll in NCAA schools. Under its guidelines, any person desiring to play intercollegiate athletics at an NCAA member school had to be "eligible" to do so. The NCAA operated a national "clearinghouse" procedure which confirmed the eligibility or ineligibility of prospective student-athletes at Division I and II schools by applying standards which members adopted as part of the Association. In recent years, these standards have included, but not been limited to, achieving a minimum index of grades and test scores, taking certain NCAA-approved core courses, and consent to periodic drug testing.[31]

"Outside" Event Limitations: NCAA rules required members to limit student-athlete participation in events that are outside regular NCAA competition and not sponsored by affiliated colleges and universities.[32] Such events include "all-star" and "bowl" games that are not a part of NCAA championships, as well as lesser known outside competition. The extent of permissible outside participation differed from division to division and even sport to sport. It could be argued that the process was designed to protect amateurism by ensuring that such outside activities were not "professional" in nature. A less honorable interpretation is that the process was designed to control the institution's financial investment in the student-athlete as property, without respect to the student-athlete's own rights and interests.

31. See Clearing the Air on the Clearinghouse, NCAA News 1, Sept. 16, 1996, at 1 (noting that the clearinghouse procedure adopted at the 1993 convention, which processes the academic records of student-athletes was adopted in response to concerns raised by the Knight Commission). High schools desiring to place student-athletes with NCAA schools were required to submit courses for "core course approval" by the NCAA. See also Packet Offers Help With Core Course Process, NCAA News, Feb. 17, 1997, at 1. The possible discriminatory impact of the NCAA's reliance on standardized testing in eligibility requirements has been the subject of the recent litigation. NCAA v. Cureton, 37 F. Supp. 2d 687 (E.D.Pa. 1999), rev'd 198 F.3d 107 (3rd Cir. 1999).

32. See, e.g., 1995-96 NCAA Manual, Bylaws, art. 14, §§ 14.6-7, at 161-69; id., Admin. Bylaws, art. 30, § 30.2, at 467-79; id., art. 30, §§ 30.13-15, at 407, 422-26.

b. *Rules Enforcer*

Institutional Certification and Peer Review: Pre-Restructuring, all institutions were required by NCAA rule to conduct a self-study report of their athletic programs every five years.[33] Division I institutions were required to have their institutional self study "verified and evaluated through external peer review."[34] Through these procedures, the NCAA "certified" that institutional athletic programs were operating in accordance with NCAA guidelines.

Infractions: The Pre-Restructuring NCAA handled violations of its rules through a national Committee on Infractions which, backed by the national office's enforcement staff, had investigatory and sanctioning power. The goal of sanctions was not only to punish past and prohibit future misconduct, but also to restore "parity," i.e., to take away any competitive benefit deemed gained by way of the infraction.[35] In theory, the NCAA only has the power to punish members, but because it can require members to declare student-athletes ineligible or to take other action with respect to student-athletes, NCAA regulations can directly affect student-athletes. A controversial aspect of the sanctioning process is that a student-athlete or prospective student-athlete can be declared ineligible to play athletics at any NCAA school if a member institution violates NCAA rules with respect to that student, (for example, by making phone calls to a prospective student-athlete during a period not allowed under the recruiting rules), even if the student is completely innocent of fault. Only the school, as a member (and not the student-athlete), has the official standing to seek reinstatement of eligibility. Other sanction options include suspension of institutions from play in NCAA-sanctioned athletics, revocation of awards, suspension of rights to televised games, reduction in athletically-related scholarships that institutions could award to student-athletes and other measures. Infractions are generally classified as secondary or major. Pre-Restructuring,

33. See 1995-96 NCAA Manual, Const., art. VI, § 6.3.1, at 47.
34. Id., § 6.3.1.1, at 47 and Bylaws, art. 23, at 401-04.
35. Id., Bylaws, art. 19, at 343-51 & Admin. Bylaws, art. 32, at 455-67.

findings on major infractions were appealable to a national Infractions Appeals Committee that could reverse or modify sanctions. Infraction decisions were reported in the *NCAA News* or the *NCAA Register*, a monthly *News* supplement.

c. *Sponsoring National Championships*

On behalf of its member-schools, and through its championship committees, the Pre-Restructuring NCAA supervised national championships in various sports under its jurisdiction. In 1996-97, more than 13,800 men and 10,600 women competed in NCAA-sponsored championships.[36] These championships offered member institutions and conferences opportunities for generating substantial financial revenue and members considered access to them a valuable commodity.

d. *Research, Education and Charitable Work*

Before 1988, the NCAA's involvement in charitable matters and student-athlete support was relatively limited, particularly when compared with the vast sums that passed through it. Scholarships for student-athletes came directly from the institutions and those institutions also generally provided whatever additional support the student-athlete received. Perhaps its most longstanding effort of direct charitable assistance to students (unrelated to specific NCAA interests) was its *post*-graduate scholarship programs.[37] As charges of neglect of the educational mission and profit-mongering increased, the NCAA stepped up efforts to publicly assert its educational and charitable aspects. In 1988, the NCAA established the NCAA Foundation, which make grants to member and nonmember organizations concerned with intercollegiate sports.[38] Through the Foundation and otherwise, it has funded (or worked with corporate partners to

36. See 1996-97 Statistical Review, 1996-97 NCAA Ann. Rep. at 24.

37. See infra note 40.

38. The Foundation is a separate legal entity. As stated in the NCAA's own 1995-96 annual report, the Foundation's mission is "to generate and award funds in support of programs that enable student-athletes to participate fully in the college community and to achieve successful academic and athletic experiences, and to be effective citizens and productive contributors to society." See, e.g., Notes to Consolidated Financial Statements ("Notes"), 1996-97 NCAA Ann. Rep. at 44.

fund) drug education and "life skills" programs for student-athletes, established a special assistance program for emergency student-athlete expenses, offered scholarships to encourage an increase in the number of minorities and women in athletics administration, offered degree completion scholarships to former student-athletes, sponsored NCAA internships and taken other steps.[39]

In 1997, the NCAA claimed that it spent $35 million on student-athlete/youth benefits over the prior academic year.[40] But a closer look at what the NCAA included supports caution in placing too much emphasis on that figure. Youth benefits (6%), while admirable, are directed at elementary school aged-children, not student-athletes at member schools.[41] While the

39. See, e.g. Changes Enhance Life Skills Program Orientation Session, NCAA News, June 28, 1995, at 7; NCAA Interns for 1996-97, NCAA News, Sept. 23, 1996, at 9; Ethnic Minority Grants Awarded to Ten Through Enhancement Program, NCAA News, Aug. 2, 1995, at 5; Athlete Grateful for Degree-completion Grant, NCAA News, April 8, 1996, at 4 (letter); Image, Concerns Focus of Leadership Program, NCAA News, April 21, 1997, at 1 (NCAA annual student leadership conference); Basketball Post-Graduate Scholarships Winners Announced, NCAA News, April 21, 1997, at 8; Choices Programs Involve Student-athletes, NCAA News, May 26, 1997, at 8 (re alcohol education programs funded by NCAA grants); NCAA Awards 12 Women's Post Graduate Scholarships, NCAA News, Aug. 18, 1997, at 6. See, e.g., Agents Committee Proposes Three-part Initiative, NCAA News, Aug. 5, 1996, at 1.

40. See Chart and Insert, 1995-96 Athlete Benefits, NCAA News, March 10, 1997, at 2. Included in this amount were (a) contributions to the special assistance fund (28%); (b) academic enhancement programs (43%); (c) catastrophic insurance (10%); (d) Drug Testing Education (8%); (e) Youth Programs (6%) and Scholarship, Life Skills Awards (3%). It is not apparent whether the NCAA is counting direct monetary contributions only or the value of indirect contributions as well such as portions of salaries of persons working with a program.

41. The NCAA has supported the Federal National Youth in Sports Program and Math/Science Educational Program which targets elementary and secondary school students for largely summer programs conducted at member schools. The government provides the money specifically for the program and the NCAA and member institutions provide the supporting superstructure. In 1996-97, the NCAA itself donated money or in-kind assistance that it valued at about $1.1 million. The U.S. Department of Heath and Human Services and the U.S. Department of Agriculture contributed some $15 million through grants or direct contributions. NCAA member institutions provided additional assistance valued by the NCAA at $23 million. Corporate partners also make substantial contributions. See Notes, 1996-97 NCAA Ann. Rep. at 48-49. The block grant is received by a freestanding fund and separate nonprofit entity set up by the NCAA.

catastrophic insurance program (10%) (recently increased significantly) provides funds for student-athletes who need surgeries or other serious care, the injury would have to arise directly out of student-athlete participation and the student-athlete would likely be able to recover some of these costs anyway by lawsuit or otherwise. Until recently, the "special assistance fund" (28%) gave assistance only for narrowly-tailored emergency needs, such as money needed to travel in cases of family death or illness. In 1996, its uses were extended, but only to include emergency money for necessities. It is not a scholarship fund.[42] Moreover, before 1995, the NCAA's annual contribution to the special assistance fund was $3 million a year. Just prior to Restructuring, the NCAA increased the annual contribution to $10 million a year, and at press time greater increases were contemplated.[43] But most importantly, the key figure is not how much the NCAA contributes to the fund, but rather, how much actually *reaches* student-athletes in a given year and whether the purposes supported meet student-athletes' true needs. Money spent by the NCAA, on academic enhancement programs (43%), is admirable, though what the NCAA has included in that category is unclear. Still, these expenditures, arguably, are necessitated by the NCAA's occupation of student-athlete's time and the hectic schedule of intercollegiate athletics.

Such efforts as these are vast improvements over prior years, but despite its increased efforts, the NCAA remains the target of criticism by those who argue that its steps to benefit student-athletes are small ones. They also argue that, in many other ways, the NCAA and its members have acted directly against the interests of both student-athletes as a whole, and particular subgroups of student-athletes, such as minority and female student-athletes.[44]

42. See Athletes Gain Greater Access to Assistance Fund, NCAA News, May 13, 1996, at 1.

43. See, e.g., Special Assistance Fund Grows to 10 Million, NCAA News, Dec. 18, 1995, at 1.

44. See, e.g., Timothy Davis, African-American Student-athletes: Marginalizing the NCAA Regulatory Structure, 6 Marq. Sports L. J. 199 (1996); Kenneth Shropshire, Agents of Opportunity: Sports Agents and Corruption in College Sports (1990) (arguing that NCAA rules facilitate student vulnerability to unscrupulous agents).

Prior to Restructuring, the NCAA also performed a public information function, providing information to secondary schools and to other members of the public on its requirements for play at member schools, and other information about its activities. Its publications included the *NCAA Annual Convention Proceedings*, the *NCAA Manual*, the *NCAA Annual Reports*, NCAA rule books for specific sports, educational pamphlets on issues such as tobacco and drug use and gender equity compliance, and an annual Division I "Graduation Report," in which it provided graduation statistics as to Division I football.[45] Another publication, *The NCAA Register*, appearing as a monthly insert to the *NCAA News*, provided the full text of every major infraction decision decided by the NCAA and abbreviated reports on secondary infraction determinations. The Research Department also conducted studies on various issues for the body.[46] The NCAA's publications have for some time been available to the public for a reasonable fee.[47]

e. *Business Promoter, Business Agent and Revenue Distributor*

Through wholly-owned subsidiaries, the NCAA owned, marketed, sold and licensed all NCAA properties including trademarked and copyrighted property.[48] Of course, the most

See also Cureton, supra note 31 (minority student-athletes asserting that NCAA reliance upon standardized testing in fashioning academic requirements for student-athletes violates 42 U.S.C. § 1983).

45. The NCAA began making graduation reports for Division I football in 1990, in the face of threats of legislation-mandated reports. Nevertheless, in 1991 Congress passed the Student Right to Know Act requiring schools to publish certain graduation rates and other information. Student Right to Know Act of 1990, Pub. L. No. 101-542, 101-105, 104 Stat. 2381-84 codified at 20 U.S.C.A. 100, 192 (West Supp. 1991). Ironically, the lead sponsor of the bill was Senator Bill Bradley, a former professional and NCAA basketball star.

46. See, e.g., Report of the Research Committee, 1996-97 NCAA Ann. Rep. at 136 (listing studies conducted in 1996-97).

47. Publications available to the public are noted in a pamphlet, The NCAA Sports Library, available from the NCAA.

48. The NCAA holds these properties through National Collegiate Realty, a nonprofit wholly-owned subsidiary corporation organized solely for holding title. See Notes, 1996-97 NCAA Ann. Rep. at 43. Through a for-profit wholly-owned subsidiary, NCAA Marketing Corporation, the NCAA generates revenue through

lucrative "property" that the NCAA has to market is the intercollegiate athletic competitions that it sponsors, particularly the NCAA championships.[49] Concerned with maintaining parity, the NCAA has in the past taken steps to prevent the more powerful members from taking too large a share of the pie and excluding less powerful schools from the benefits of athletic sponsorship and competition. Beginning in the 1950's, again signaling the trend in the direction of strong central authority, NCAA institutions entered into agreements to limit television coverage of football games in the fear that such coverage would negatively affect gate receipts for some schools.[50] These plans continued into the 1980's when the U.S. Supreme Court in *NCAA v. Board of Regents* declared that in fact they were agreements restraints of trade in violation of federal antitrust laws.[51] Despite NCAA efforts to encourage "voluntary" television plans among members,[52] *Board of Regents* led to a trend of schools and conferences negotiating television deals on their own behalves.[53] However, *NCAA v.*

advertising, sale of merchandise carrying NCAA trademarks and those of any or all member institutions. The NCAA also protects these interests by asserting claims before the Copyright and Royalty tribunal on behalf of its membership and acting as the collection agent for cable television fees "that relate directly to NCAA members or the NCAA." Id. at 45.

49. A list of recent NCAA-sponsored championships can be found at Dates & Sites of NCAA Championships, NCAA News [unpaginated insert], Sept. 29, 1997. The NCAA's role in national championships will be altered and possibly be reduced somewhat under the Restructuring program, although the championships will still take place under the NCAA banner.

50. The subject of television dominated discussions at the conventions of the early 1950's. See, e.g., 1952-53 Yearbook at 41 (television will cripple colleges not fortunate enough to have outstanding teams); id. at 167-99 (discussions at general roundtable meeting in favor of and against television restrictions); and id. at 227-34 (report of the "Television Committee").

51. NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984). See also Thomas Scully, NCAA v. Board of Regents of the University of Oklahoma: The NCAA's Television Plan is Sacked by the Sherman Act, 34 Cath. U. L. Rev. 857 (1985). At issue in *Board of Regents* was the 1977 formation of the College Football Association ("CFA"). The CFA negotiated lucrative contracts for televising NCAA football. The NCAA prohibited schools from negotiating separate contracts for CFA games.

52. See 1995-96 NCAA Manual, Bylaws, art. 22, at 399-400.

53. See, e.g., Steve Nidetz, CBS, SEC, Big East Pacts More Than Move To Fill Space, Chicago Tribune, February 16, 1994, Sports at 4 (announcing that the

Board of Regents did not leave the NCAA itself high and dry. An eight-year television contract with CBS Sports, Inc. (CBS) accomplished in 1994 brings it more than $1.72 billion over a period of eight years, an average of more than $215,000,000 per year.[54] In 1996-97, that contract alone provided 80% of the NCAA's annual operating revenue.[55] In the fall of 1999, the NCAA and CBS reached an eleven-year, $6 billion agreement respecting NCAA championship coverage and marketing beginning in 2002.[56] A contract with the ESPN network assures another $18.7 million or $2.67 million per year in exchange for rights to cover women's basketball into the year 2002.[57] In addition to licensing and entering into television contracts, the NCAA also operates a "corporate partner" program through which it solicits, accepts and coordinates support from corporate sponsors for its various projects.[58] In 1996, the NCAA granted Host Communications exclusive rights to market certain of the NCAA's events

Southeastern Conference and the Big East had signed separate football coverage deals with the CBS network). This in turn led to a trend of schools switching conferences or forming new ones to advance their television interests. See Randy Holtz, Conference Expansion Is Official; League Enlarged to 16 Members in 2 Divisions; New Composition Will Be Determined This Summer, Rocky Mountain News, April 22, 1994, at 7B (reporting the expansion of the Western Athletic Conference to 16 schools and the signing of a five-year contract with ESPN and the American Broadcasting Company (ABC) to televise WAC games for $25 million). After efforts at encouraging voluntary cooperation failed, the remaining members decided to disband the CFA as of June of 1997. See C.F.A. Calls It Quits, NCAA News, June 10, 1996, at 1.

54. NCAA, CBS Agree on $1.725 Billion Contract; Agreement Also Signed With ESPN, NCAA News, Dec. 5, 1994, at 1.

55. The CBS contract gave that network exclusive rights to cover Division I men's basketball, Division I men's and women's outdoor track and field championships, Division II men's basketball championships, the National Collegiate Women's Gymnastics Championships and two games of the College World Series. See Report of the Executive Committee, 1996-97 NCAA Ann. Rep. at 37 and id., Notes, n.12, at 47-8.

56. NCAA, CBS Reach 11-year $6 Billion Agreement, NCAA News, Dec. 6, 1999, at 1.

57. Report of the Executive Committee, 1996-97 NCAA Ann. Rep. at 37.

58. A current list of corporate partners appears on the NCAA's website at www.ncaa.org.

through 2002. Under that contract, the NCAA is assured a minimum of $75 million in royalties over five years.[59]

Of course, NCAA operations generate substantial revenue, more than $232 million in 1996, more than $247.7 million in 1997, and nearly $276 million in 1998.[60] After expenses, the pre-Restructuring NCAA distributed the larger part of the remainder to the NCAA members pursuant to a revenue-distribution plan.[61] In 1996, more than $142.3 million went to members. The majority of this annual distribution has always gone to the biggest money-makers, Division I schools.[62] Revenue sharing related, of course, only to NCAA-generated revenues. It did not include income from individual school trademarks and other properties, conference contracts, gate receipts from non-championship-level contests, fees from locally-controlled school or conference licensing programs, coach's contracts with athletic apparel companies, local advertising income or other non-Association-wide activities.

f. *Lobbyist and Litigation Strategist*

Through in-house counsel, a branch office in Washington, DC established in 1996, and outside legal counsel, the NCAA protects its interests in both federal and state fora.[63] For example, the NCAA has lobbied to defeat state initiatives designed to require the NCAA to provide due process in its

59. Notes, n.12, 1996-97 NCAA Ann. Rep. at 47-8. See also NCAA Agrees to $75 Million Marketing Pact, NCAA News, Dec. 23, 1996, at 1.

60. NCAA Consolidated Statements of Operations and Changes in Unrestricted Net Assets, 1995-96 NCAA Ann. Rep. at 45; id., 1997-98 NCAA Ann. Rep. at 17. As of August 1996, the NCAA's net worth was estimated at $59.4 million. Id., 1995-96 NCAA Ann. Rep. at 45.

61. This revenue distribution plan was adopted in 1990. See Notes, 1996-97 NCAA Ann. Rep. at 45-6.

62. See, e.g., 1997 NCAA Division I Revenue Distribution, NCAA News, Sept. 6, 1997, at 6 (charts showing distributions by Division I conferences and also indicating the funds for which distributions were designated to be used); 1996 NCAA Division I Revenue Distribution, NCAA News, Sept. 23, 1996, at 10 (same); and 1995 NCAA Division I Revenue Distribution, NCAA News, Sept. 25, 1995, at 10 (same).

63. See A Capital Idea: NCAA's D.C. Office has served Association Well in its First Year, NCAA News, June 17, 1996, at 1.

investigations of member rules infractions.[64] To ward off potential litigation, it actively negotiated with government agencies over how its members may comply with legal requirements and has even sued to contest legislation it deemed undesirable.[65] To keep members abreast of developments, the *NCAA News* regularly ran a column reporting on significant government action affecting NCAA and member athletic operations.[66]

g. *Amateur Sports and Educational Association or Business Cartel?*

With the increased financial potential of intercollegiate athletics, as well as its increased costs, the NCAA has struggled with a longstanding tension between its role as an association of educational institutions and its role as a lobbying group/agent whose job it is to advance the interests (financial and otherwise) of its members. The explosion in the monetary value and costs of collegiate sports since the advent of televised games in the 1950's has accelerated complaints

64. The NCAA has argued, inter alia, that such legislation constitutes an impermissible burden on interstate commerce in violation of the U.S. Constitution and that such legislation is unnecessary to assure fairness to the members being investigated. See, e.g., Brief in Opposition to Petition for Writ of Certiorari, Tarkanian v. NCAA, No. 93-1369 (urging Supreme Court not to review favorable Ninth Circuit holding invalidating Nevada due process statute). In 1993, NCAA President Richard Schultz stated, "[A] year ago, 11 states had on the docket some type of due process legislation aimed at restricting or eliminating the NCAA's ability to process infractions cases in those states," and that he was "pleased to report that through the efforts of many, including many of you in the membership, we have been able to stop or eliminate legislation in all of those states." See Richard D. Schultz, State of the Association Address, 1993 Proc. 64, 68. Schultz also noted that the NCAA had been able to ward off threats of "some very far-reaching national legislation that would have greatly affected your ability to govern your individual athletics programs," and that "that legislation did not go forward." Id.

65. See Council to Sponsor Learning Disability Legislation, NCAA News, April 29, 1999, at 1 (noting action in partial response to communications with U.S. Dept. of Justice); NCAA Sues, Challenges Florida Law, NCAA News, Aug. 31. 1994, at 1 (discussing NCAA commerce and contract clause challenges to so-called due process laws in Florida and other states). See also NCAA v. Miller, 10 F.3d 633 (9th Cir. 1993), cert. denied, Tarkanian v. NCAA, 511 U.S. 1033 (1994) (declaring Nevada due process legislation unconstitutional).

66. See, e.g., State Regulation of College Athletics, NCAA News, June 28, 1995, at 7. See also Governmental Affairs Report, NCAA Register, Oct. 6, 1997, at 11.

that student-athletes have been shortchanged as schools have put financial gain and institutional protection from negative exposure first. In response, the NCAA has taken steps to put on a new public face.[67] It deliberately located its Washington branch office near the offices of educational groups such as the American Council on Education.[68] It has attempted to cast itself as similar to educational accrediting agencies by encouraging a trend under which NCAA institution certification visits take place along with the accreditation visits conducted by independent accrediting agencies.[69] As noted earlier, it has strengthened its educational and charitable initiatives. But the criticism did not cease. A biting six-part series on the NCAA in the *Kansas City Star* in October of 1997 echoed many of the old concerns.[70] Abandoning its usual policy of non-response, the NCAA issued a public statement insisting that the *Star* had ignored its educational mission.[71]

67. The point was conceded by NCAA President Cedric Dempsey at the 1997 Convention. Dempsey stated:

> The irony is that after years of working to improve the welfare of student-athletes, the NCAA is perceived as acting against the interests of those same student-athletes. And that's our fault.

Cedric Dempsey, State of the Association Address, 1997 Proc. 64, 67. He further stated that because a student-athlete must be declared ineligible whenever there is a violation of NCAA rules "the media and the public can easily jump to the conclusion that the student-athlete is a victim of injustice." He suggested that "[t]he problem lies in the way we handle and communicate how that process works." Dempsey also argued that another problem was that the NCAA "tended to assign incorrect priority to its principles when they conflict." He argued that the association had given more priority to the principles of the level playing field (among members) and amateurism than to the principle of student welfare. See State of the Association Address, Cedric Dempsey, reprinted in NCAA News, January 20, 1997, at 6, 17.

68. See supra note 63 (noting reasoning behind site location).

69. In the 1995-96 NCAA Annual Report, the Committee on Certification noted that it "oversaw 13 joint certification/regional accreditation visits conducted in conjunction with the Southern Association of Colleges and Schools' Commission on Colleges." See Athletics Certification Committee, 1995-96 NCAA Ann. Rep. at 105.

70. See, e.g., Mark Zieman, A Note from the Editor: Examining an Influential Group, Kansas City Star, October 5, 1997, at A22. The entire group of articles is also available on the Kansas City Star's website at www.kcstar.com/ncaa/about/html. The series ran from October 5 to October 10, 1997.

71. See NCAA Provides Response to Kansas City Star Series, NCAA News, October

C. *The "Restructured" NCAA*

As previously noted, in its infancy in 1906, the NCAA was a loose federation of schools, careful to protect individual member autonomy. By contrast, ninety years later, just prior to Restructuring, it had grown into an organization with strong central authority. Five groups buttressed and assisted by some 90 national committees determined policy and operations. As discussed in greater detail in section II, the movement back toward federation began earlier, but in 1996, Restructuring lurched that process forward light years, shifting power from the central structure downward to the various divisions and conferences.

1. *The National Body*

The basic Restructuring legislation, Proposition 7, was adopted at the 1996 NCAA convention and later expanded upon at the 1997 convention. Under Proposition 7, the NCAA's five central policymaking bodies are replaced with *one* central body: an Executive Committee comprised of approximately 20 university presidents from the member schools in each of the three divisions, but heavily weighted toward Division I, and particularly, I-A.[72]

2. *The "Federated" Divisions Under Restructuring*

After Restructuring, *each division* has a management structure consisting of two bodies: (1) a representative body of presidents of member institutions called either a "*Board of Directors*" (Division I) or a "*President's Council*" (Divisions II and III) and (2) a body of athletic administrators and faculty

20 1997, at 1. The response also appeared in the Oct. 15, 1997 issue of the Star and appears on the NCAA's website. See www.ncaa.org/kcstar. Although the Star claimed that it had been working on the article long before, some charged that the NCAA's decision to move its national office from a Kansas City suburb to Indianapolis affected the Star's objectivity.

72. The Executive Committee contains 20 members from the divisions as follows: I-A (8); I-AA (2); I-AAA (2); II (2); III (2). The remaining members are an Executive Director (now called a "President") elected by the former group, who would be an ex-officio member and would vote in the case of a tie, and the chairs of each of the divisional Management Councils, who would be ex-officio nonvoting members. See Prop. 7, J, § 4.1, 1996 Proc. at A10.

athletic representatives and other administrators referred to as "*Management Councils.*"[73] There are significant variations in governance between the divisions. Since Restructuring, the shape of these structures has been fluid, but, at the time this article went to press, the following was the governance organization of the NCAA Divisions. As in the past, the national office continues to have an enforcement and eligibility appeals staff (for infractions-related investigations) as well as staff handling marketing, education services, public relations and other areas.[74]

Division I: Division I is governed by a Board of Directors and a Management Counsel. The Board is comprised of approximately 15 CEOs selected from among the various conferences within Division I, again, with heavy representation from Division I-A.[75] Division I's Management Council includes approximately 34 athletic administrators and faculty athletic representatives.[76] Within Division I are "cabinets" designed to devote specific attention to legislative issues.[77]

The Division I Board is unique among the divisional boards. It has the power to adopt legislation that will govern Division I institutions, without seeking specific approval from Division I members. Thus, Division I has a representative form of government, rather than a form based upon "one institution, one vote." The Board can delegate responsibilities (including the power to legislate) as it deems appropriate to the

73. See Prop. 7, F, § 4.01.1, 1996 Proc. at A8.

74. See, e.g., id., Appendix at 336-337.

75. Eight powerhouse conferences are assured direct representation by their CEOs: the Atlantic Coast, the Big East, the Big Twelve (formerly the Big Eight), the Big Ten, the Pacific Ten, the Southeastern, the Western Athletic and Conference USA. See Prop. 7, K, § 4.2.1 1996 Proc. at A11-A12.

76. See id., N, § 4.5.1, at A18-A19.

77. Originally there were four cabinets: (1) Academics/Eligibility/Compliance, (2) Business/Finance, (3) Championships and (4) Strategic Planning. See Prop. 28, N, § 21.8.6 1997 Proc. at A46-A50. Later, Division I eliminated its Strategic Business and Planning/Finance cabinets and reallocated their responsibilities. See Council Approves New Look to Division I Governance Structure, NCAA News, Aug. 16, 1999, at 9. For more discussion of this issue, see Decisions Near on Future of Two Division I Cabinets, NCAA News, July 5, 1999, at 1; Council Ready to Review Alternative Cabinet Structure, NCAA News, July 19, 1999, at 9.

Management Council, as well as rescind or amend the actions of that Council.[78] Subdivisions I-A and I-AA have the power respectively to vote separately on matters identified as relating only to football in their subdivisions.[79]

Division II: Division II is governed by a panel of CEOs called a "President's Council" and by a Management Council.[80] Unlike the Board of Directors in Division I, the President's Council of Division II can only adopt "noncontroversial" legislation on its own.[81] More significant legislation must be recommended and adopted by the larger body of Division II institutions. The Presidents Council can, of course, amend and rescind the work of the Management Council.[82]

Division III: Division III also adopted a "President's Council" structure. Its Council is comprised of approximately eleven Division III CEOs, with at least two from each geographical region. Division III also included three at-large members and the most specific diversity provisions of any of the three divisions. Like Division II, Division III adheres to the principle of "one institution, one vote," giving its President's Council power to adopt only noncontroversial legislation and requiring it to propose more significant legislation for consideration by

78. See Prop. 7, K, § 4.2.2(a-f), 1996 Proc. at A13.

79. See id., Prop. 7.9, § 5.3.2.2.3, 1996 Proc. at A45 (eliminating power of I-A and I-AA to vote separately on non-football matters given their dominance in governance under Restructuring); 1998-99 Div. I Manual, Const., art iv, § 5.1.4.3.4, at 35 ("A member institution shall be entitled to vote on legislative issues pertaining only to football in the division in which it is classified in that sport"). Compare 1995-96 NCAA Manual, Bylaws, § 5.1.4.3.4 at 34 (allowing I-A and all others in Division I to "vote separately on any federated provisions") and id., § 5.1.4.3.5 at 34 (entitling members to vote on legislative issues pertaining only to football in the division in which it is classified and allowing separate voting for I-A and I-AA.).

80. As originally designed, the President's Council was based on a weighted regional representation with one CEO per region for every 22 institutions in that region. In addition, two at-large positions exist "to enhance efforts to achieve diversity of representation and to accommodate independent institutions." See Prop. 7, L, § 4.3, 1996 Proc. at A14-A16. See also Prop. 22, 1997 Proc. at A27-A29 and related discussion at 87 (amending structure to more clearly define duties, terms, offices, etc.).

81. See Prop. 7, L, § 4.3.2(d), 1996 Proc. at A15.

82. Id., § 4.3.2(i).

the larger body.[83] Division III's Management Council consists of approximately 16 members, including Division III CEOs, faculty athletic administrators and directors and conference representatives.[84]

3. *The Committees*

Proposition 7 left unaddressed the question of what committees would remain association-wide. The omission was an important one because the very existence of national committees indicated what issues the national body deemed to be of sufficient importance to require focused attention. It was only after the vote to restructure was taken in 1996, that the NCAA addressed, as a body, the appropriate national and divisional committee structures. At the January 1997 convention, the Restructured NCAA recognized three kinds of committees: *Association-wide* committees (to deal with matters considered to be of association-wide interest), *Common* committees, (to deal with issues applicable to more than one division but not all divisions) and *Federated* committees (to deal with matters only relating to a single division).

a. *Association-wide Committees*

Instead of 90 national committees, the national NCAA now has only 18 association-wide committees. Eleven of these are "general" committees and the other seven deal only with the playing rules of specific sports. For our purposes, these general committees are most important. Ten of the general committees existed under the old structure. A new eleventh general committee on Sportsmanship and Ethical Conduct was created as a result of Restructuring.[85] With the arguable exception of two— The Minority Opportunities and Interests Committee and the Committee on Women's Athletics— the association-wide general committees now deal with ceremonial and other relatively noncontroversial issues.[86] Because, as

83. Id., M, § 4.4, at A16-A18.

84. Id., P, § 4.7.1, at A22-A23.

85. Prop. 28, E, § 21.3.10, 1997 Proc. at A39; 1998-99 Div. I Manual, Bylaws, art. 21, § 21.1-2, at 355-359.

86. The other continuing general committees are Honors, Memorial Resolutions, Competitive Safeguards and Medical Aspects of Sports, National Youth Sports

mentioned below, the enforcement structure is now federated, the power of all committees at the national level to affect divisional or conference decision-making is significantly reduced and indeed, though association-wide, some actually report, for all practical purposes, to the divisional boards. Of course, the NCAA remains active in public relations and lobbying efforts on behalf of its members.

b. *Common & Federated Committees*

Because each NCAA division now has its own committee structure, as one might imagine, the work and organization of committees differ from division to division.[87] The easiest way to discuss the new structures may be to trace how key areas of responsibilities undertaken by national committees within the old NCAA are now handled in the Restructured NCAA.

Rules Infractions and Student-athlete Eligibility: After Restructuring the work of considering infractions allegations is now "federated," handled by different committees within each of the three divisions. All three divisions are supported by the national enforcement staff, which continues to have the primary responsibility for investigations.

Division I has both an Infractions Committee and an Infractions Appeals Committee.[88] Its Academics/Eligibility and Compliance Cabinet handles matters related to student-athlete eligibility.[89] "Clearing" prospective student-athletes to play at Division I and II NCAA schools is now handled by a "common" committee reporting to that same cabinet.[90]

Division II has an Infractions Committee, but appeals of findings of "major" infractions must be made to the structure within the Management Council.[91] Division II also has a

Program, Olympic Sports Liaison, Post-graduate Scholarship, Research, and the Walter Byers Scholarship Committee. Id., C-M, §§ 21.02-21.7, at A37-A44. See also Convention Focuses on Restructuring Details, NCAA News, Nov. 25, 1996, at 1.

87. See 1998-99 Div. I Manual, Bylaws, art. 21, at 355-74.

88. See Prop. 28, N, § 21.8.7, 1997 Proc. at A64-A66.

89. See 1998-99 Div. I Manual, Bylaws, art. 21, § 21.6.6.2.2(h), at 365.

90. Id., § 21.6.6.2.3.3, at 366.

91. See Prop. 28, § 21.9.6.3, 1997 Proc. at A64. It will have five members, including one member of the Management Council and one from the general public unassociated with college or professional athletics.

separate Student-athlete Reinstatement Committee, to consider petitions relating to student-athletes declared ineligible.[92]

Division III combines eligibility and infractions in a single committee with subcommittees handling each of these issues.[93] In Division III, appeals from a subcommittee finding of "major" infractions are to be taken to the structure within the Division III Management Council.[94]

Putting aside the obvious structural differences, what does this new regime for eligibility and infractions mean? Certainly, in all divisions, the committees reviewing infractions and considering appeals will be more closely related to the schools being reviewed. Although Division I schools dominated the national infractions committee prior to Restructuring, there still remained, under the old structure, the potential for oversight from other divisions. Now all divisions have their own independent structures and less interest in and less time to monitor the others' infractions matters.[95]

Athletics Program Certification: As previously discussed, pre-Restructuring, all institutions were required to conduct a self-study report every five years in a form prescribed by the NCAA. In addition, Division I institutions had to verify their self-studies through external peer review.[96] At the 1997 convention, those arguing that certification procedures were too burdensome were able to alter the requirement of full certification every five years schools to a requirement of filing a five-year "interim status report" and full certification only once every ten years. In response, those supporting strong certification were able to achieve legislation requiring that,

92. See 1998-99 Div. II Manual, Bylaws, § 21.7.6.4, at 317-18.

93. See id., § 21.10.6.3, at A76-A80. The combined committee will be ten members with five for each subcommittee and five persons of each gender. The subcommittees will include one member of the Management Council and one member from the general public. At least one ethnic minority must be included. Id.

94. Id., § 21.10.6.3.2.7, at A80.

95. See, e.g., 1995-96 NCAA Directory at 28 (listing committee members and divisional representation).

96. See, e.g., 1995-96 NCAA Manual, Const., art. III, § 3.2.4.7, at 11 & Bylaws, art. 23, at 401-404.

although the five-year reports are "interim," the Division I Committee on Athletic Certification is required to "act" on them when evidence warrants.[97]

Current legislation requires Divisions II and III to continue to do their required self-study reports. A proposal to require external peer review in Division II as a part of Restructuring was rejected by a more than two-to-one margin.[98] Supporters argued that external review and formal certification was important to preserving integrity. Opponents claimed that the costs of these processes outweighed the benefits, and alleged that the most serious abuses in intercollegiate athletics occurred in Division I schools.

Student-athlete Representation: At the time the NCAA voted to adopt Restructuring, it made no specific provisions for student-athlete representation. Noting this, students lobbied assiduously for an association-wide SAAC, as well as for student representation on the divisional governing bodies, and the Restructuring planning committees.[99] Ultimately, efforts to gain an association-wide SAAC were unsuccessful.[100]

97. See Props. 58 & 58-1, §§ 3.2.4.7-3.2.4.7.1, 1997 Proc. at A123-A125. As originally drafted, the proposal was that the interim report would "require no action on the part of the certification committee" and would be limited to discussing "how the institution is complying with those elements of initial certification that required correction or modification." See Prop. 58 in 1997 Proc., at A122-A124. The stated goal of the extension of the time between certification was "to lower institutional operating costs and time commitment for certification." Id. at 123. The Committee on Certification originally asked proponents of Proposition 58 to withdraw it in order to permit it to complete its own study of whether or not alterations to certification should be required. Later, a compromise was reached. See id. at 262-63.

98. See Prop. 16, 1996 Proc. at A55-A71. The vote was 73-176-3. Id. at 100-08.

99. Student-athletes lobbied for such assurances at the 1996 convention to no avail causing one SAAC member to state that while strides were made toward student-desired goals, "we were very disappointed in the overall outcome of this year's Convention." See A Mixed Bag of Results from the Convention, NCAA News, Jan. 22, 1996, at 4. Indeed, it was a while before students were informed of what their representational privileges would be. See Athletes Representation is Nothing to be Feared, NCAA News, April 22, 1996, at 4 (noting SAAC members still had not received specifics of their representation in the new structure, despite several requests).

100. The National Student-athlete Advisory Committee had 31 members, which included 28 student-athletes from among the various divisions and one NCAA

Students did secure a SAAC in each division, but their powers vary.[101] In addition, students also succeeded in having some input on divisional Management Councils. However, here again, the powers of the student participants will vary from division to division. In Division III, two student members from the SAAC will serve on the Management Council and will have full participation rights, including voting rights.[102] The Division II SAAC has no power to attend Management Council or Board meetings. Instead, Division II holds an annual "summit" in which the Division II SAAC meets once a year with the Management Council.[103] Division I follows Division III's approach of having two students from SAAC to "participate in each meeting of the Management Council," however, unlike Division III, they are to be nonvoting members and they may

Council member from each of the three divisions. Nine spaces were allocated to male athletes and nine to females. There were no specific minority student allocations. Its duties were to "receive information and explanation of NCAA activities and legislation and, in consultation with former NCAA officers, [to] review and react to topics referred to it by other Association committees and by the Council." SAAC's student members had no legislative power and no vote. Student-athletes served a minimum of two and a maximum of four years. All members of the SAAC were selected by the NCAA. See 1995-96 NCAA Manual, Bylaws, art. 21, § 21.3.28, at 390-91.

101. Division I's SAAC is composed of one student-athlete from each of the selected conferences from whom the Board of Directors is chosen. See id., § 21.6.7.5.6, at 371-72. Each of those conferences will nominate three students and the Management Council will make the final decision. Id. Division II and III's SAACs will similarly be pulled from the body of institutions comprising the divisions. See Prop. 21.9.6.8, 1997 Proc. at A68-A69 (specifying Division II selection) & Prop. 21.10.6.8, 1997 Proc. at A81-A82 (specifying a 24-member group for Division III). See also Student-athlete Advisory Committee Focuses on Planning and Communication, NCAA News, Aug. 18, 1997, at 15 (reporting last meeting of national SAAC and committee's attempts to plan for interdivisional communication between SAACs).

102. See Prop. 28, P, § 21.10.6.8.3, 1997 Proc. at A82.

103. See id., § 21.9.6.8.4, at A69. Students can still participate in the Division II legislative process through involvement at the annual convention. Id. At the January 1998 convention, Division II voted to require every conference to have a SAAC as a condition of membership, but did not address whether conferences without them would be suspended. See Conference Student-athlete Advisory Committees, 1998 Proc. at 82-83; Division II Vote Strengthens Student-athlete Involvement, NCAA News, January 19, 1998, at 1. See also Prop. 1, § 3.3.4.5, 1998 Proc. at A2.

be present only with respect to those matters determined by the Council to concern student-athletes.[104] In 1998, in recognition of the increase in conference power under the new structure, the divisions voted to require each conference to establish a SAAC. But conferences are not required to pay student representative expenses for travel to meetings and compliance in setting up the SAACs as well as administrative support for them within conferences has varied widely from conference to conference.

Other Issues: Each division now has the authority to set its own rules with respect to other matters once handled on a national basis. These include amateurism rules, the participation of student-athletes in outside competition or non-NCAA competitions and the allocation of national championships within the divisions. Much of the NCAA's charitable work is likely to continue to be monitored through association-wide committees,[105] however, each division has the right to issue legislation to the extent that such work uniquely affects their division. While the association-wide committees handle some limited marketing, the divisions were initially primarily responsible for directing their own marketing. However, it now appears that the divisions are discussing ways in which to enhance their marketing efforts through a committee serving all three divisions.[106] Consistent with federation, the once consolidated NCAA budget is now broken down by divisions.[107]

104. See Prop. 28, N, § 21.8.7.5.4, 1997 Proc. at A59-A60 (noting that students can participate in those parts of meetings determined by the Management Council to concern them).

105. See discussion supra at 16.

106. See, e.g., Council Approves New Look, supra note 77, at 9 (Division I discussion); Other Highlights, supra note 72, at 18 (Division III discussion of issue).

107. See 1996-97 Division Budgets found at NCAA website, <http://www.ncaa.org>. See also Budget Supports New NCAA Structure, NCAA News, Sept. 1, 1997, at 1 (noting Division I to receive $181 million of $265 million budget); Revenue Distribution Level for Division I Members, NCAA News, Aug. 31, 1998, at 1 (discussing 1998-99 budget); and 1996-97 NCAA Budget Approval Process the Last of Its Kind, NCAA News, Aug. 5, 1996, at 1.

4. *The Legislative Process*

After Restructuring, the large majority of NCAA legislation is now *federated*, including portions of its constitution. A smaller amount remains *dominant* (requiring a two-thirds majority vote of the total membership for amendment) or *common* (requiring a majority vote of each division affected by the legislation voting separately).[108] As did the master manual, the new Divisional Manuals designate in the margin, next to each regulation, the legislative classification of that section.[109] Federation affects some of the most controversial areas of NCAA legislation— enforcement, certification, eligibility, recruiting and financial aid and academic requirements. The master NCAA manual has been eliminated, in favor of three Divisional manuals.[110]

Divisions II and III both retained the one-institution one-vote principle. Thus, federated legislation proposed by its governing bodies must be voted upon by the member-institutions of that division at the annual NCAA convention.

But Division I is very different. Because there is no longer any need for a vote of the entire Division I body, legislative sessions in Division I occur outside the context of the convention. Legislation is proposed by the Management Council, by Board members or a conference. The Management Council reviews the legislation and votes upon it. If it approves the legislation, it sends notice to the membership invoking a 60-day period during which members comment in writing. If, after these comments, the Management Council does not significantly alter the proposal and approves it, it then goes on to the Board of Directors (Significant alteration could result in another notice and comment period). If the Board approves the proposal without significant alteration, then it becomes Division I legislation.[111]

108. Prop. 7, S, § 5.01, 1996 Proc. at A25.

109. See, e.g., 1998-99 NCAA Divisions I-III Manuals, Const., arts. II, IV, & V (NCAA principles, various provisions identified as dominant and organization).

110. See NCAA Manual To Undergo Significant Changes, NCAA News, Mar. 10, 1997, at 3.

111. See Prop. 7, GG, § 5.3.2, 1996 Proc. at A32-A35. See generally 1998-1990 Div. I Manual, Const., art V, § 5.3, at 37-43 (amendment process).

Both the Management Council and the Board may alter a proposal and then adopt it, so long as the alteration, "does not increase the modification of the current legislation beyond that of the [member-distributed or Management Council-approved] proposal."[112] The Board may also remand it to the Management Council with significant suggested changes. If appropriate such changes could trigger another notice and comment period.[113]

For the first two years of Restructuring, Division I held four legislative periods a year (i.e., four notice and comment periods). In response to concerns from members that this schedule was too chaotic and too frequent, it reduced its "legislative" sessions to two, one in April and one in October.[114]

5. *Restraints on Divisional Action*

There are mechanisms to act as restraints on maverick divisional action. First, the NCAA principles are designated as "dominant;" in theory at least, then, any new legislative action taken by the federated divisions must be consistent with those principles. Second, the national Executive Committee is empowered to call for a vote of the entire membership if any division adopts legislation that it determines to be contrary to the basic purposes or fundamental policies set forth as dominant in the constitution. A two-thirds majority of those institutions voting may override individual division action.[115] Third, institutions within Division I may override (i.e., rescind) action by the Board or Management Council. But to rescind such action, at least 30 institutions must, in writing and within 60 days after official publication of the action, call for a

112. Id., § 5.3.2.2.1, at A32 & § 5.3.2.2.1.1, at A33.

113. Id., § 5.3.2.2.2.1, at A33. Presumably, the Management Council and Board collectively determine whether another notice and comment period is required after a change in the original proposed legislation. See also Council Approves New Look, supra note 77, at 9 (discussing later changes in comment and override period that follows Board action).

114. See Changes in Legislative Cycle Top Governance Actions, NCAA News, April 26, 1999, at 10; Division I Legislative Cycle to Undergo Modifications, NCAA News, Jan. 18, 1999, at 1; and Management Council Minutes, NCAA News, June 21, 1999, at 13 (reporting on action at April meeting).

115. See Prop. 7, L, 4.1.2(j), 1996 Proc. at A11.

vote. If not made by a conference on behalf of members,[116] each request must also be signed by the institutional CEO or his or her designated representative. If the Board or Management Council still does not alter its action, there will be a vote of Division I institutions at the next annual convention of the association. A five-eighth's majority vote is needed to override the action.[117] But legislation adopted by the Management Council and Board continues to be in force unless a call for a vote is made by 100 or more institutions.[118] Different override provisions govern Division I-AA football-specific regulations. No such override provisions appear for football-specific legislation passed only by Division I-A.[119]

6. *The New NCAA*

Thus, after Restructuring, when we speak of NCAA "rules" or NCAA "action" we must be very specific in what we mean. After Restructuring, it is more likely than ever that NCAA regulations for one school in a given division will be quite different from its regulations for another in a different division. While the NCAA still sponsors championships, when, where and how those championships take place are determined at the divisional level. Now the national body's powers, as a body, are largely dedicated to the areas of marketing,[120] education and research, ministerial matters such as honors and awards, and advocating its diversity concerns.

116. Id., Prop. 7.12, § 5.3.1, at A48.

117. Id., Prop. 7, GG, § 5.3.2.3.3, at A35.

118. Id., Prop. 7.13, § 5.2.3.1, at A48-A49.

119. See 1998-99 Div. I Manual, Const., art. V, § 5.3.2.3.1.1, at 39.

120. In 1998, for example, the NCAA signed a five-year agreement giving Trans World International exclusive rights to televise certain NCAA championships in all markets outside the United States. See NCAA Signs Agreement for International TV Rights, NCAA News, Aug. 31, 1998, at 2.

II. "CONTROL" AND RESTRUCTING IN A HISTORICAL PERSPECTIVE

The reader will recall that the NCAA's founders viewed their mission as gaining "control" over intercollegiate athletics. From a federated group of schools in 1906, the NCAA moved toward a strong central body with significant national regulatory and enforcement authority. The starting point toward central governance was probably the establishment of a national infractions committee in the 1950s. But by the late 1970s, this strong central core began to crack and with Restructuring, federation returned. The story of what preceded Restructuring is important to understanding what the latest movement to gain control means for intercollegiate athletics today. This section provides a brief historical and political perspective on the meaning of "control"— and its relationship to the NCAA's various structural manifestations.

A. *A Historical Look at the "Control" Theme*

As discussed earlier, the NCAA's founders saw the cure to what ailed amateur athletics in terms of "control": if schools could assume "control" over athletics, all would be fine.[121] But in fact, "control" meant different things to different institutions.

Indeed, despite the new spirit of collective efforts evidenced by the formation of the IAAUS, and later the NCAA, members struggled with federation versus centralized governance models from the beginning. In 1908, members attempted to bind themselves to the rules of the organization unless a "proper athletic authority" of an objecting institution made that objection in writing.[122] By 1916, however, this language was dropped.[123] In the 1920's, article V of the constitution, then designated "conditions of membership," provided that the "self-government of the constituent members shall not be interfered with or questioned."[124] In 1929 the now famous Savage report

121. See discussion supra at 7-8.

122. NCAA Const., art. VIII, § 2, 1908 Proc. at 75.

123. NCAA Const., art. VIII, 1916 Proc. at 116.

124. NCAA Const., art. V, 1923 Proc. at 123.

by the Carnegie Foundation for the Advancement of Teaching delivered a strong indictment against the colleges involved in intercollegiate athletics.[125] Alleging numerous abuses, it called for presidents and faculty to exercise control over collegiate athletics:

> [T]here can be no doubt as to where lies the responsibility to correct this situation. The defense of the intellectual integrity of the college and of the university lies with the president and faculty. With them also lies the authority . . .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.[126]

At its 1939 convention, the NCAA incorporated the "control" theme into its constitution. In a "Declaration of Sound Principles and Practices for Intercollegiate Athletics," it declared that, "[t]he control and responsibility for the conduct of both intercollegiate and intramural athletics shall in the last analysis be exercised by the institution itself." This provision was a precursor to the modern principle of institutional control & responsibility.[127]

But before the 1950's, the NCAA lacked a central mechanism for enforcement of its aspirations. Moreover, very few schools were willing to put themselves at a competitive disadvantage by voluntarily embracing restrictions to which other schools riding the athletics wave would not also agree. The question of surrendering power to the NCAA was complicated by the desire of some for strong conference control, indeed, the constitution provided in the 1950s that control over athletics would be asserted by schools *and* their conferences.[128] Thus, while many agreed with and lamented

125. See Savage, supra note 9.

126. Id., Preface at xx.

127. See NCAA Const., art. III, § 2, 1939 Proc. at 118-19.

128. See, e.g., 1951-52 Yearbook (1952 Convention), Const., art. III, § 2, at 253.

the Savage report's conclusions, talk of reform was not followed by much action.[129]

At the 1948 convention the NCAA attempted to go further, amending article III of the constitution and adopting what was then dubbed the "Sanity Code." The code provided for termination of membership of any school that violated the principles set forth there. The NCAA also established a Constitutional Compliance Committee charged with interpreting the code and identifying violators.[130] But a year later when the committee charged five schools with violations of the code by providing meals and other "financial aid" to football players— actions then considered a violation of the pure amateurism ideal— the NCAA could not muster enough votes for expulsion of any of them.[131]

In the 1950's, advocates of "control" began to focus upon increased central governance as the answer. The American Council on Education argued as early as the 1950's for the imposition of central "standards."[132] At the 1952 convention, a

129. The NCAA invited Savage to address the convention and created a special committee to study the report. See Special Committee Report, Report of the Committee to Study Carnegie Foundation Bulletin 23, 1930 Proc. at 79; id., Address of Howard J. Savage, Elimination of Recruiting and Subsidizing: A Report of Experience at 122. In 1935, it adopted a resolution reaffirming its commitment to amateurism. See 1935 Proc. at 19.

130. 1947 NCAA Yearbook (1948 Convention), Const., art III, at 212-213.

131. 1948 NCAA Yearbook (1949 Convention) at 207 (vote failing 93 to 11). The issue was more complicated than would first appear. Proponents of meals to student-athletes argued that it was unfair and unsafe to require rigorous practice and play and not to assure student football players a meal. Opponents argued that free meals violated the pure amateurism principle. The reader must understand that in these days, there were no restrictions on student-athletes taking part-time jobs and the concept of financial aid to students on any basis other than academic performance (such as need or, even worse, athletics) was a controversial one. At the same time, supporters of meals understood that a requirement that students find jobs in order to eat threatened their programs because it meant less time for practice and competition. Id. at 190-207.

132. See, e.g., Report of the Special Committee on Athletics Policy, American Council on Education, 33 Educ. Rec. 246-55 (April 1952); George Hanford, An Inquiry Into the Need for and Feasibility of a National Study of Intercollegiate Athletics (1974) (prepared for the ACE); and Responsibilities in the Conduct of Collegiate Athletics Programs: American Council on Education Policy Statements, 60 Educ. Rec. 345, 345-46 (Fall 1979).

Constitutional Revision Committee successfully recommended that the NCAA's "purpose" be amended to specifically vest in the national organization the power to legislate, effectively eliminating the two-thirds majority previously assumed necessary for policymaking. This action met complaints that it trampled the autonomy of members.[133] In 1952, the Constitutional Compliance Committee was scrapped in favor of a Membership Committee with powers to investigate member conduct. Finally, in 1952, the NCAA established its first Committee on Infractions.[134]

Still, the complaints that control was needed did not cease. In 1974, another ACE report claimed that presidents lacked control of their athletics programs. In 1979, the ACE and its Commission on Athletics published three policy statements on the responsibilities in the conduct of collegiate athletics programs calling inter alia for more presidential control.[135] Others made similar claims that control was lacking.[136]

133. See, e.g., 1951-52 NCAA Yearbook at 200. See also id., Comments of V. F. Spathelf, Wayne Univ. at 200 (amendment raises question of whether NCAA "can so reserve for itself the kind of authority which would impinge upon authorities within the institution"); id., Comments of Rev. Theodore Hesburgh, Vice President, Notre Dame at 201(amendment goes contrary to the first purpose of the constitution which is institutional control and responsibility and substantially changes the nature of the organization); and id., Comments of Ralph Aigler, Univ. of Michigan at 202 (attendees should face that proposal amounts to allowing NCAA legislation to be enacted by a majority vote rather than by a two-thirds vote as would otherwise be required by the constitution).

134. Walter Byers, Unsportsmanlike Conduct: Exploiting Colleges Athletes 57 (1995) (Byers was the first executive director of the NCAA).

135. See Responsibilities in the Conduct of Collegiate Athletics Programs: American Council on Education Policy Statements, 60 Educ. Rec. 345, 345-46 (Fall 1979). The three policy statements were addressed to (1) members of collegiate boards of trustees, (2) presidents and (3) athletic directors. The statement addressed presidential duties, noted the persistence of charges of presidential inattention, and called for more presidential involvement. Id. The report also demonstrated that in the mind of the ACE, the concept of "control" was not merely quantitative but also had qualitative aspects, that is, the ACE was speaking of a particular type of control. For example, in both its policy statements for presidents and athletic directors it stated that the CEO should make it clear that the "prime function of the athletics program is to provide for as wide a student participation as possible and to enhance personal development through competition." Id. at 348. It further stated that athletics should be an integrated part of the institution's total educational program. To athletic directors, it stressed that the intercollegiate competition, while

After yet another outbreak of reported abuses and infractions in 1982 and 1983, the theme of "returning" control of athletic programs to college presidents picked up steam. One important bellwether was a 1983 article by Derek Bok, the president of Harvard University urging the 1984 NCAA convention participants to adopt the stronger of two proposals for a panel of presidents, a "President's Council," within the NCAA structure.[137] The ACE served as an ad hoc meeting place for the presidents of elite institutions to meet and discuss their concerns.[138] At the 1984 NCAA convention, the ACE lobbied delegates assiduously in favor of Bok's view, much to the ire of some delegates.[139] A President's Council did indeed emerge from the 1984 convention.

important, is not the most important part of educational involvement in sport and that breadth of participation should be placed ahead of winning. Id. at 348-49.

136. See, e.g., George Hanford, Intercollegiate Athletics Today and Tomorrow: The President's Challenge, 57 Educ. Rec. 232 (Spring 1977) (discussing examples of presidential inattention and calling for more attention); Harold Howe, "On Sports," 58 Educ. Rec. 218, 220 (Spring 1977) (stating that while the NCAA is a creature of the colleges designed to help deal with problems, it has become a captive of the system that it was supposed to reform and suggesting that leaders of education must seek to determine what they can accomplish through it).

137. The model favored by Bok was one in which presidents would be selected by other presidents and could initiate rules to, as Bok put it, "protect academic standards, financial integrity, or reputation of member institutions." The other model, then favored by the NCAA, created a President's Commission appointed in the first instance by an NCAA board not comprised wholly of presidents. Under this model, the commission's role was only advisory. See Derek Bok, Presidents Need Power Within the NCAA to Preserve American Standards and Institutional Integrity," 27 Chronicle of Higher Education 33 (Dec. 14, 1983), reprinted in Sport and Higher Education 207, 209 (Donald Chu, Jeffrey Segrave, Beverly Becker, eds. 1985). Bok's article was clearly timed to affect the upcoming vote at the NCAA convention. For a review of the large body of literature discussing the subject of abuse and unethical conduct by institutions and student-athletes up to and during the 1980s, see Donald Chu, The Character of American Higher Education & Intercollegiate Sport (1989) (generally and bibliography at 217) & James Frey, The Governance of Intercollegiate Athletics (1982).

138. Before the 1983 convention, college presidents, most of elite institutions, used the ACE as an "ad hoc" meeting place. See Bok, supra note 137 (referring to presidential meetings); Cedric Dempsey, State of the Association Address, 1995 Proc. at 77 (mentioning both Bok's article and the ACE's work as instrumental in the NCAA's move toward greater presidential power).

139. See Comments, 1984 Proc. at 96 (expressing "amaze[ment]" at the number of

This period was marked not only by the creation of a board of college and university presidents within the NCAA but also by more and more regulation that increased the power of the central NCAA. Among legislation that was spearheaded by the ACE group was the controversial "Proposal 48," imposing minimum academic standards for the initial (freshman) eligibility of Division I and II student-athletes and relying substantially upon standardized testing. These standards were later modified in 1992 through Proposition 16.[140]

At the same time, proponents of a strong central control regime were encountering friction. Uniform treatment of schools was becoming increasingly difficult. In the mid-1970's, the strong central core began to crack as the NCAA began to accept the idea of limited division-specific, or "federated," legislation, with divisions arguing that their problems were unique and required unique treatment. Instances of different treatment among different sports on the same issues also began to increase as particular sports began to become of greater significance to particular groups of schools. Members began to rebel against the strong central authority, charging that the NCAA had grown too unwieldy and too authoritarian. In the late 1970's a group of institutions that had felt the weight of NCAA enforcement efforts, brought their complaints to Congress, prompting 1978 hearings questioning the fairness of the NCAA's enforcement procedures toward member-schools.[141] In 1981, some schools began to rebel against NCAA rules that required central negotiation of television contracts for football coverage. This dissension led the NCAA to call a special convention to "restructure" the

professional staff members from the ACE working the convention).

140. The history of Propositions 16 and 48 are briefly discussed in Cureton v. NCAA, supra note 31. See also 1998-99 Div. I Manual, Bylaws, art. 14, § 14.3, at 143-49. The plaintiffs in *Cureton* argued that Proposition 16's standards discriminate against African-American student-athletes in violation of Title VI of the Civil Rights Act of 1964. 37 F. Supp. 2d at 692-701.

141. See NCAA Enforcement Program, Hearings Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 95th Cong., 2d Sess. (1978). Student-athlete fairness was not a prime focus of these hearings. For a general discussion of critiques of NCAA enforcement proceedings, see Kenneth Broyles, NCAA Regulation of Athletics: Time for A New Game Plan, 46 Ala. L. Rev. 487 (1995).

membership. As a result, schools with smaller programs were shifted out of Division I-A (thus preventing them from voting on some matters affecting larger programs).[142] But many of their complaints of the larger programs were left unresolved by that convention. Subsequently, two disgruntled schools joined together in *Board of Regents* to challenge the NCAA's television controls under the antitrust laws.[143] A few years later, a coach found by the NCAA to have acted contrary to its rules sued that body and his school after the school dismissed him.[144] While the NCAA ultimately prevailed in that case, *Tarkanian* was expensive litigation, and it would not be the last of cases challenging NCAA power.[145] In all of these cases the NCAA argued that its exercise of that power was essential to preserving the amateur character of athletics.

In October of 1989, another outside entity, the Knight Foundation, created a Commission on Intercollegiate Athletics (the Knight Commission) to further investigate the University's role in intercollegiate athletics.[146] The commission's charge was to create a proposal for reform.[147] In March of 1991 the

142. See discussion in district court opinion in Board of Regents of the Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1287 (W.D. Ok. 1982), aff'd with mod., 707 F.2d 1147 (10th Cir. 1983), aff'd 468 U.S. 85 (1983).

143. Id.

144. NCAA v. Tarkanian, 488 U.S. 179 (1988).

145. See also NCAA v. Miller, 10 F.3d 633 (9th Cir. 1993), cert. den. 511 U.S. 1033 (1994) (striking down under the Commerce Clause a Nevada law requiring the NCAA to use due process in its proceedings). In a post-Restructuring case challenging NCAA powers, NCAA restrictions on the hiring of paid assistant coaches were struck down as antitrust violations. See Law v. NCAA, 134 F.2d 1025 (10th Cir. 1998), cert. den. 67 U.S.L.W. 3230 (1998). After a $67 million dollar judgment was rendered against the NCAA, it settled the lawsuit for $54 million. See Restricted Earnings Case Settled for $54 million, NCAA News, March 15, 1999, at 1. The coaches legislation was purportedly designed to advance parity among institutions, preventing those with rich athletic budgets from outdistancing those with more limited budgets.

146. See Reports of the Knight Foundation Commission on Intercollegiate Athletics, March 1991-March 1993, Introduction, (1993) (bound copy available from John S. and James L. Knight Foundation) (hereinafter "Knight Foundation Reports"). Individual reports contained there are separately paginated and will be cited as such.

147. Among the concerns the Knight Commission lists in the introduction to its reports are the following: (1) In the 1980s, 109 colleges or universities were

commission published "Keeping Faith With the Student-athlete," in which it argued that college athletics had gone astray and urged, as the chief remedy, a return to "presidential control" at the institutional level.[148] The commission also argued for academic integrity (an end to academic exceptions to students based solely upon athletic prowess and a five-year maximum on the number of years for student-athlete matriculation), financial integrity (specifically a greater accountability for outside income of coaches and athletic administrators, including contracts with shoe companies), and certification by independent examiners for all NCAA institutions in matters relating to athletics.

In response to criticisms from the Knight Commission and other sources, at its January 1992 convention, the NCAA passed a number of additional proposals. These included additional satisfactory progress standards for student-athletes, prospective student-athletes and transfer students, as well as requiring that all coaches' outside income (such as that from contracts with athletic shoe and apparel companies) be approved by university presidents and included in the coaches compensation for NCAA reporting purposes.[149] In March of 1992, the Knight Commission issued *A Solid Start: Report on Reform of Intercollegiate Athletics* in which it praised the NCAA's progress, but suggested more was needed.[150]

The following year, 1993, the NCAA adopted its athletics program certification program procedures.[151] It adopted the

censured, sanctioned or put on probation by the NCAA, (2) that 109 number included more than half of the universities playing at the NCAA's top competitive level, (3) nearly one-third of the present and former professional football players responding to a survey near the end of that decade stated that they had accepted illicit payments while in college and more than half said that they saw nothing wrong with the practice, and (4) another survey showed that among the 100 schools with the largest programs, 35 had graduation rates under 20 percent for their basketball players and 14 had the same low rate for their football players. See Knight Foundation Reports, Introduction, supra note 146, at ii.

148. See Keeping Faith with the Student-athlete: A New Model for College Athletics (March 1991), reprinted in Knight Foundation Reports, supra note 146.

149. See, e.g., 1995-96 NCAA Manual, Bylaws, art. 11, § 11.2.2, at 55.

150. See A Solid Start, A Report on Reform of Intercollegiate Athletics (March 1992), reprinted in Knight Foundation Reports, supra note 146.

151. See Props. 15 to 15-5 & Resolution 16, 1993 Proc. at A13-A32.

"clearinghouse" procedure for declaring the initial eligibility of Division I and II student-athletes.[152] It established the Infractions Appeals Committee for review of major infractions.[153] It adopted new academic standards for Division I students.[154]

In March of 1993, the Knight Commission issued what it termed its "final report," *A New Beginning for a New Century, Intercollegiate Athletics in the United States.*[155] While the commission noted that the problems of college athletics were not completely resolved, it was satisfied that much of its original agenda had been accomplished and that sufficient momentum existed for future positive moves.[156] One might think that the Knight Commission's designation of that report as "final" was a sign that the NCAA had finally found a structure that would ensure control. But, less than a year after the Knight Commission had issued its final report, at the January 1994 convention, the NCAA's president stated that he intended to recommend, "Restructuring for review and possible action at the 1995 convention with final action no later than the 1996 convention."[157] In the fall, the Joint Policy Board appointed an oversight committee and three divisional task forces to begin work on Restructuring plans.[158] In June of

152. Id.

153. Id., Prop. 55, at A75-A76.

154. Id., Prop. 19, at A34-A36.

155. See A New Beginning for a New Century: Intercollegiate Athletics in the United States (March 1993), reprinted in Knight Foundation Reports, supra note 146.

156. Id. at 8-10. The commission actually reconvened in October of 1994, 19 months after issuing its final report, but its new concerns related primarily to efforts to alter eligibility standards in Division I. Proposed alterations sought to allow student-athletes who met grade point average requirements but not standardized testing score requirements access to athletic scholarships and practice while still barring them from competition. See Knight Panel to Reconvene, NCAA News, Oct. 17, 1994, at 1. See also Council Backs Presidents on Eligibility Standards, NCAA News, Oct. 17, 1994, at 1; Presidents Take New Approach for Partial Qualifiers, NCAA News, Oct. 3, 1994, at 1 (discussing Prop. 16, Prop. 48 and proposed modifications.) Eventually, after modifications were made, the commission backed the NCAA's approach. See Knight Commission Supports Presidents, NCAA News, Oct. 31, 1994, at 1.

157. Cedric Dempsey, State of the Association Address, 1994 Proc. at 68, 70.

158. See, e.g., Three Task Forces to Develop Restructuring Ideas, NCAA News, Aug. 31, 1994, at 1; Restructuring Talks Center First on Governance Issues, NCAA News,

1995, the President's Commission formally agreed to recommend a revolutionary Restructuring of the NCAA.[159] On November 20, 1995, two months before the 1996 convention, the NCAA announced that it had secured the Knight Commission's support for Restructuring.[160] Two months after that announcement, the NCAA's top brass announced that it had obtained support from other higher education associations.[161] But exactly *what* these parties had agreed upon was unclear — except that the divisions had to be federated. In January of 1996, the NCAA adopted a plan for Restructuring outlining the two-tier structures of the divisions and the basic legislative process.[162] A year later, in January of 1997, it identified and defined the work of the association-wide and divisional committees and provided other details. In the fall of 1997, Restructuring took effect.

Thus, Restructuring, in a sense, brought the NCAA full circle. When the body was founded, the members were reluctant to surrender their autonomy. For them, "control" meant local control in the context of federation. From the 1950s to the 1970s, the term "control" took on a new meaning. It became a catchphrase for the view that a stronger, central NCAA was needed. But then, the scene shifted again. Around the 1970s, the advocates of federation employed the term "control" to argue that the NCAA had become too large and unwieldy and that local control over athletic programs had

Oct. 31, 1994, at 1 (discussing Division I Task Force); and Division II Group Focuses on CEO Control, More Federation, NCAA News, Nov. 7, 1994, at 1.

159. See, e.g., Restructuring Gains Support of Presidents, NCAA News, June 28, 1995, at 1 (reporting on June 19-20, 1995 President's Council meeting).

160. See Knight Commission Endorses Restructuring, NCAA News, Nov. 20, 1995, at 1 (stating commission endorsed Restructuring as "necessary to complete college sports reform"); Proposed NCAA Governance Structure, NCAA News, Oct. 9, 1995, at 2.

161. See Higher Education Groups on Board for Restructuring, NCAA News, Jan. 8, 1996, at 1 (reporting that several groups have "lined up in support of the proposed Restructuring of the NCAA" including the Association of Community Colleges, the American Association of State Colleges and Universities, the American Council on Education, the Association of American Universities, the Association of Governing Boards of Universities and Colleges, and the National Association of State Universities and Land Grant Colleges).

162. See supra note 1.

been lost. Though perhaps he was unaware of it, when, in 1996, NCAA President Cedric Dempsey proclaimed Restructuring to be "based on two simple and powerful principles: presidential control and federated governance," he was trumpeting a theme that dated back to the NCAA's beginnings.[163]

B. *The Political Context of the Most Recent Restructuring*

Dempsey's description of the Restructuring movement does not, however, tell the entire story of NCAA Restructuring. In fact, the powerhouse-Division I had become disgruntled over the increasing regulation at the central NCAA level, a centralization that, ironically, had resulted from reforms designed to respond to external criticisms of abuse. Division I schools, and particularly those in I-A, were threatening to sever their relationship with the NCAA if indeed they did not receive substantially greater control over their athletic programs. Thus, more than a few convention participants acknowledged that, despite all of the talk about presidential control and institutional integrity, money and power concerns, reflected in dissension between the Division I schools and the

163. Cedric Dempsey, State of the Association Address, 1996 Proc. at 72. Dempsey stated:

> The credibility gap between administrators and the coaches they hire and fire is real. So too is the cynicism among many student-athletes and the public as they observe the differences between the speeches we give and the decisions we make. To successfully meet these challenges, we will need the will to address them, which requires overcoming the mistrust that is present in such a competitive environment. We also need an organizational structure that facilitates rather than frustrates that change. This brings me back to the Restructuring proposal before this convention. This legislation is based on two simple and powerful principles: presidential control and federated governance.

See also Comments of William H. Harris, Division I-AA Business Session, Jan. 8, 1996, 1996 Proc. at 81 (noting "if this Restructuring plan goes through, presidents and chancellors accept responsibility. When the time comes to serve that responsibility, we must be prepared to take it"). Several last ditch efforts to delay the effective date and to require more study failed. See, e.g., Props. 7B-I, 1997 Proc. at A7-A8.

rest of the membership, played a primary role in driving Restructuring.[164]

Other evidence offers reason to support the view that arguments over money and power drove the Restructuring movement. Most conspicuous is the fact that what committees would exist— either at the national or divisional level— and what they would do was not addressed in Proposition 7 when the body voted to Restructure.[165] Given the fact that the very existence of national committees themselves represented commitments to policies at the national level, and the fact that the yeoman's work of developing policy positions was traditionally done at the committee level, the failure to address the committee question was a very significant one. The

164. One Division II commentator stated, "I think all of us are very suspicious that the power, money and control . . . are driving this process." See, e.g., Remarks, Division II Business Meeting, 1995 Proc. at 176. Another argued:

> One of the things you have to note is that this direction has been driven largely by some of our friends in Division I. We have responded to the challenge. I think we are trying to put a positive turn on a series of events that at least initially were negative. There are some things to be gained through further federation. But I want you to know that I share with you the concern that if this is to be an association of institutions committed to higher education and to athletics in the context of higher education, then this federation, this association, cannot be divided too far.

Id. at 176-77 (responding to first speaker's remarks). Similar sentiments were discussed within Division III. One commentator stated:

> I think that many of us are concerned with the slip in values, from educational values to corporate economic values. I think that in this Restructuring plan it makes that shift. It formalizes that shift. If we are ready to do that as an organization, I think we need to say that publicly. We should be honest with ourselves, as well as our constituencies, that we have moved from basic educational values to basic economic values. . .I just urge us, if we pass this Restructuring plan, to recognize that significant shift in values.

Remarks, General Business Session, 1996 Proc. at 277-78. See also Remarks, Division III Business Meeting, 1995 Proc. at 204-05 (stating that Division I had expressed its desire for greater autonomy from other divisions and had threatened to leave the NCAA if they did not get that autonomy and expressing the view that instead of going into Restructuring kicking and screaming, it is best to see it as an opportunity to bargain for the best interests of Division III).

165. Indeed, even after the January 1997 convention, at which Restructuring was further defined, the exact approaches of these committees was still unclear.

Restructuring legislation upon which the delegates voted at the 1996 convention was bare bones, the meat a mystery to be served up at a later date.

So too, the abdication of the principle of "one-institution one-vote" in Division I was another signal that "presidential control" was not at the heart of Restructuring. It could be argued that a true emphasis on control by college and university presidents would have retained that principle. Instead, a "compromise" emerged, apparently triggered by Division I-A's threatened refusal to agree to a "one-institution one-vote" process and by some delegates' fears that I-A would challenge the agreed-upon formulas for sharing revenue if the Division I Board of Directors— dominated, of course, by I-A— were not given broad powers to legislate without the vote of the whole.[166]

Apart from the lack of focus on committee work, there were also other signals to indicate that power and money played a very significant, if not the primary, role in the Restructuring movement. One was provided by the convention's approach to how to ensure that the new governance structure had diversity. Proposition 7 included an amendment adding a new "diversity" principle to the constitution.[167] It also provided that the Board of Directors or President's Council of each division has the responsibility to "assure that there is gender and ethnic diversity among its membership, the membership of

166. See, e.g., Comments, Division I-AA Business Session, Monday Morning, Jan. 8, 1996, 1996 Proc. at 80 (noting "I think all of us would have preferred to have 'one-institution one-vote' retained" but noting that had the other divisions not approved of the representative structure, Division I-A might have challenged revenue distribution guarantees); id., Comments, Convention Discussion at 88 (stating "the cornerstone of the Restructuring legislation is the compromise that was reached by the subdivisions of Division I, regarding the establishment of a representative system of governance" and expressing the view that such a system would make the legislative process more efficient and allow for a more immediate response to changing conditions in Division I).

167. See Prop. 7, A, § 2.7, 1996 Proc. at A7-A8. It stated:

2.7 The Principle of Diversity Within Governance Structures

The Association shall promote diversity of representation within its various divisional governance structures and substructures. Each divisional governing body must assure gender and ethnic diversity among the membership of the bodies in the division's administrative structure.

their respective Management Councils and the membership of each of the other bodies in the division's administrative structure.[168] The diversity language that Divisions I and II used in their proposed Restructuring legislation at the 1996 convention was very general: the phrase "giving due weight to gender and ethnic diversity" appeared at the beginning of the provision relating to selection and composition of the Board of Directors and the companion provision regarding the Management Council.[169] Moreover, Division II's proposed legislation provided for only five women on a Board of sixteen, when under the old regime both divisions had committed to 50% targets for female representation on key governance structures.[170] In contrast to the legislative approach to diversity in Divisions I and II, Division III, the most diverse group of colleges in terms of size, focus, and racial makeup of the student body— and the group with the least financially invested in athletics of the three divisions— specifically defined the types of diversity desired.[171]

168. Id., K, § 4.2.2 at A13. For Division II, see Prop. 7, I, § 4.3.2(j), 1996 Proc. at A15; for Division III, see Prop. 7, M, § 4.4.2(i), 1996 Proc. at A17.

169. See Prop. 7-5, 1996 Proc. at A41-A42. With respect to Division I's general approach, Kenneth Shaw, co-chair of the Division I Task Force stated that "with regard to diversity, the men and women on the Division I task force decided against guaranteeing specific numbers of positions for genders, ethnicities or staff positions in this representative system of governance." He noted that the position had the "support" of the President's Commission and the Council who were "confident that the new structure will provide minorities with greater opportunities to participate in our division management." See Comments of Kenneth Shaw, Division I Business Session, Jan. 8, 1996, 1996 Proc. at 206. Women and minorities were clearly not convinced. In August of 1995, the NCAA Minority Interests and Opportunities Committee noted the absence of goals in Divisions I and II's proposed legislation and supported greater specificity. See Committee Seeks More Minorities in Governance, NCAA News, Aug. 16, 1995, at 6. Divisions I and II did not accept the recommendation.

170. See Prop. 7, A, § 2.7, 1996 Proc. at A7-A8.

171. Its legislation provided that at least three institutional CEOs must be women, at least two must be members of ethnic minorities, and even distinguished between large and small universities. The Division III rules further provide that "appropriate consideration shall be given to appointing Division III CEOs from historically black colleges and universities." See Prop. 7, M, § 4.4.1, 1996 Proc. at A16 (discussing need to have CEOs from historically black colleges and to require diversity of CEOs).

The lukewarm commitments of Divisions I and II were deemed insufficient by women, minorities and their supporters. As a result, these groups spent much of their time trying to achieve more specific commitments. Groups representing the interests of female women athletic administrators were the most numerous and the most powerful.[172] Drafters identified Division II's low female board membership as an oversight arising out of an increase in size of the entire council and a failure to increase the proportion of women. Without much protest, they agreed to adjust the representation of women to make it equal to that of men.[173] A task force representative also assured that the task force had given "attention to ethnicity as well as gender."[174] However, there was no explanation as to how an issue viewed as so important to minorities and women was not sufficiently recognized in the drafting process. Divisions I and II ultimately agreed to more specific language that set goals for diversity in their governance structures.[175]

There was another significant omission. The legislation did little to specifically address how the welfare of student-athletes would be protected in the new structure. Some expressed concern that student-athletes would not be benefited by the

172. See Committee Wants Guaranteed Representation Defined, NCAA News, Oct. 2, 1995, at 5 (noting pressure from NCAA Committee on Women's Athletics); NACWWAA Focuses On Women's Role in Restructuring, NCAA News, Oct. 9, 1995, at 3 (reporting that the National Association of College Women Athletic Administrators had formed a "legislative review" committee to consider the effect of Restructuring proposals on women administrators). A group of institutions proposed Prop. 9, a resolution that expressly recognized that in 1982, Division I had committed to having 30% women on its committees and that resolved that a "specific written plan for achieving the stated goals of diversity of representation" would be presented at the 1997 convention. When it was later pointed out that the group had omitted minorities from this language, a spokesperson stated that the concern of the sponsors was with both gender and ethnic diversity. See Resolution: NCAA Membership Restructuring, 1996 Proc. at 213-215.

173. See Comments, 1996 Proc. at 148.

174. See 1996 Division I Business Session, Jan. 8, 1996, 1996 Proc. at 148. See generally id. at 213-15 (discussions on gender and minority representation equity).

175. See, e.g., Prop. 8, 1997 Proc. at A9-A12. (Division I legislation setting gender and minority goals for governance structures). Provisions relating to diversity were also removed from the section on administrative regulations and placed within the constitution. Id., Prop. 8.1, at A12-A14.

new structure and that student-athlete concerns and problems would take longer to be addressed.[176] Another noted that no protections had been put in place to ensure that student-athletes did not receive different treatment on key issues, and that this omission would create an environment for more exploitation.[177] Indeed, at the 1996 convention there was frighteningly little convention floor discussion of legislation to safeguard student-athlete interests within the new structure.

The omission was particularly glaring because, in the conventions leading up to Restructuring, the NCAA had trumpeted student welfare as an important theme. In 1992, it created a Special Committee to Review Student-athlete Welfare, Access and Equity and charged that committee with the work of offering recommendations.[178] Several positive moves came out of that committee's work and the work of the national SAAC and other groups supporting student-athlete concerns. For example, in 1995 the NCAA adopted as its convention theme "Student-athlete, welfare, access, equity."[179] It altered its preexisting principle of student-athlete welfare set forth in the constitution to spell out six elements of the principle.[180] It adopted legislation requiring each member

176. One Division II delegate stated, "I am very much afraid that there will be harm done to student-athletes with more layers and more autonomy. Mistakes will take longer to get corrected." See, e.g., Remarks, Division II Business Meeting, 1995 Proc. at 176.

177. Id. at 175. Still another commented,

> I haven't heard an awful lot about Restructuring and how the students will be affected. I want to know what type of mechanism will be put into place that will assure that the student-athlete will not be treated differently among the divisions. One division might want to offer certain types of perks that other divisions might not. What types of mechanisms will be put into place to make sure that does not happen, that the student-athlete will not be exploited anymore than they already are?

Id.

178. See Prop. 29, 1995 Proc. at A29 (referring the committee's creation in 1992).

179. Dempsey, State of the Association Address, 1995 Proc. 74, 76. Dempsey also noted that one of the association's goals was the "elimination of the exploitation of student-athletes." Id. at 75.

180. The principle of student welfare states, "Intercollegiate athletic programs shall be conducted in a manner designed to protect and enhance the physical and educational welfare of student-athletes." 1995-96 NCAA Manual, Const., art. II, §

institution to establish an on-campus student-athlete advisory committee.[181] It passed legislation creating two "advisory" (nonvoting) slots for student-athletes to several key NCAA committees.[182] The convention adopted two resolutions relevant to student welfare. One called for the Special Committee to conduct a study of student-athlete concerns for presentation to the NCAA Councilor President's Commission no later than January of 1997.[183] Another called upon the

2.2, at 3. The elaboration of the general principle is as follows:

> 2.2.1 Overall Educational Experience. It is the responsibility of each member-institution to establish and maintain an environment in which a student-athlete's activities are conducted as an integral part of the student-athlete's educational experience.
>
> 2.2.2 Cultural Diversity and Gender Equity. It is the responsibility of each member-institution to establish and maintain an environment that values cultural diversity and gender equity among its student-athletes and intercollegiate athletics department staff.
>
> 2.2.3 Health and Safety. It is the responsibility of each member-institution to protect the health of and provide a safe environment for each of its participating student-athletes.
>
> 2.2.4 Student-athlete/Coach Relationship. It is the responsibility of each member-institution to establish and maintain an environment that fosters a positive relationship between the student-athlete and coach.
>
> 2.2.5 Fairness, Openness and Honesty. It is the responsibility of each member-institution to ensure that coaches and administrators exhibit fairness, openness and honesty in their relationships with student-athletes.
>
> 2.2.6 Student-athlete Involvement. It is the responsibility of each member-institution to involve student-athletes in matters that affect their lives.

Id. See also Prop. 12, 1995 Proc. at A10 & related discussion at 336-37.

181. See Prop. 13, 1995 Proc. at A11.

182. These included the Committees on Academic Requirements, Financial Aid and Amateurism, Minority Opportunities and Interests, Recruiting, and Women's Athletics. Id., Prop 27, at A27-A28. See also 1995-96 NCAA Manual, Bylaws, art. 21, § 21.3.2.1.1, § 21.3.13.1.1, § 21.3.19.1, § 21.3.24.1.1, § 21.3.31.1.1, at 384-85, 388-391.

183. See Resolution: Student-athlete Welfare, Access and Equity, 1995 Proc. at 340-41 & Prop. 29, 1995 Proc. at A29-A30. The resolution provided inter alia that "the Special Committee believes that in order to understand the collegiate experience of today's student-athletes another comprehensive study should be conducted related to the effects of recent reform legislation on student-athletes in Divisions I and II and that the study should explore student-athletes' feelings of isolation and factors that affect student-athletes' choices of academic majors." Id.

Committee on Certification to "consider" including in certification procedures, the question of whether or not a system for responding to student-athlete grievances was in place.[184]

While these proclamations may sound substantial, a closer look advises caution in issuing praise. For example, the resolutions were not legislation and the difference was clear in the method of execution. The Special Committee apparently did do an informal study on student-athletes concerns, but the results were presented to the NCAA Council internally and were not publicly reported. The resolution concerning certification apparently fell through the cracks, for the Annual Report for the Certification Committee the following year indicated no consideration of that issue.[185] The legislation regarding campus committees left up to each institution the responsibility for establishing the "composition and duties of the committee," despite SAAC's concerns that without NCAA guidelines the committees would either not be set up or would not be useful.[186] As was feared, many institutions still have not set up SAACs on their campuses.[187]

One other piece of proposed legislation at the 1995 convention is worth mentioning. The NCAA Council proposed an association-wide standing committee on student welfare, but it proposed that that committee be merged with the SAAC, thus eliminating the latter as a freestanding body.[188] SAAC opposed the merger, and, seeing no way to achieve two separate committees, ultimately urged the council to appoint members of the special committee as "consultants" to SAAC.

at A29-A30.

184. See id., Prop. 30, at A30 & Resolution: Student-athlete Grievance Procedures at 341.

185. See Athletics Certification Committee, 1995-96 NCAA Ann. Rep. at 103-05. The report does indicate consideration of a number of other issues. Thus, if the question of grievances was considered, it was not significant enough to place in the committee's report.

186. See Institutional Student-athlete Advisory Committees, 1995 Proc. at 337 & Prop. 13, 1995 Proc. at A11. See also 1998-99 Div. I Manual, Bylaws, § 6.1.4, at 50.

187. See Student-athletes Retraining Their Voices; Restructuring has Brought About Need for Change, NCAA News, March 23, 1998, at 1.

188. See 1995 Proc. at A28-A29.

In response, the council reported to the convention that it was withdrawing the request at the students' urging and complying with its request for consultants.[189]

But the biggest reason for caution in casting too much praise on the NCAA and its members for these actions is that all of these moves were in the wake of the anticipated Restructuring. Indeed, as noted earlier, the NCAA's president announced the intent to restructure at the January 1994 convention. Thus, in voting on them, NCAA members understood that what these initiatives gave to student-athletes, Restructuring could later take away.

Even more ironically, the NCAA did consider "student-athlete welfare" legislation at the 1997 convention, but the divisions could not agree in all respects. Most notably, two very different provisions relating to student-athlete freedom of expression rights emerged, one from Divisions I and II and the other from Division III. Not surprisingly, the Division III provision gave student-athletes the greatest latitude.[190] Though the issue is too complex to discuss in detail here, this writer believes that the Division I and II legislation raises serious First Amendment concerns for publicly-funded institutions. But progress was made in expanding Division I student-athlete rights to take on limited employment during the academic year to close the gap between their athletic scholarships and their actual institutionally-estimated cost of attendance. Previously, Division I student-athletes receiving scholarships had no such right under NCAA rules.[191]

189. See Report of the NCAA Council at Kansas City, Mo., October 10-12, Committee Reports, 1994-95 NCAA Ann. Rep. at 172-73 (noting three consultants from special committee appointed for SAAC); Report of the President's Commission at Kansas City, Mo., Sept., 27-28, Executive Committee, 1994-94 NCAA Ann. Rep. at 158-59 (noting council's intent to withdraw at SAAC's request).

190. Compare, e.g., 1998-99 Div. I Manual, Bylaws, § 12.5.3, at 83 to 1998-99 Div. III Manual, Bylaws, § 12.5.4, at 67. Under previous rules, student-athletes could not write even without pay for publications (even campus publications) without specific approval for fear that they would be charged with using their athletic status for promotional purposes, a clear NCAA rules violation. The NCAA couched these rules as access to media legislation.

191. See, e.g., 1998-99 Div. I Manual, Bylaws, § 15.2.6, at 187 (allowing compensation up to full grant-in-aid plus $2000). The matter was of particular importance to students in non-revenue producing sports (whose scholarships

Of course, as important as the omissions, were the inclusions. Proposition 7 did address two points with great specificity: how revenue would be distributed in the future among the divisions and who would have access to the financially lucrative NCAA championships.[192]

It would be all too easy to characterize the powerful schools in these debates as bad and the less powerful ones as good. In fact, abuses (a term not necessarily synonymous with infractions) occur at every level and the pressure to sustain athletic programs can cloud institutional judgment in both large and small programs. Moreover, the story of alignments within the NCAA is far more complex than that. It is a story about competing visions of the proper role of educational institutions and competing visions of the proper role of amateur athletics within them. It is a story punctuated with public pressure, media critiques, conflicts of interest, and the tremendous gains and the tremendous losses institutions have experienced through their involvement in intercollegiate athletics. Against this complex backdrop, the primary focus of Restructuring was not substantive; it was procedural. It was how to pull this group apart while still keeping it together. Perhaps it could only have been so. But as such, Restructuring was a political compromise that barely touched

tended to be smaller) and for those student-athletes not pursuing a professional career who believed that having "real life" employment on their resumes was essential to finding a job after graduation.

192. Naturally, the larger portion of revenue distribution was to go to Division I. However, Proposition 7 guaranteed that under any new Restructuring provisions adopted, Divisions II and III would continue to receive at least 4.37% and 3.18% respectively of the general operating revenue. See Prop. 7, § 4.01.2.1, 1996 Proc. at A8. The subdivisions within Division I will continue to divide the Division I share as decided under preexisting formulas. Id., § 4.01.1 at A9. The revenue and championship guarantees were further defined in amendments to the original proposal. Id., Prop. 7-1, at A38-A39 (defining general operating revenue); id., Prop. 7-2, § 4.01.1, at A40 (specifying the formulas); and id., Prop. 7-3, § 4.01.2, at A40. (explaining that access to national championships includes various specified aspects of championship planning such as size of fields and number and ratio of automatic-qualifying conferences).

The legislation further provided that the subdivisions in Division I (particularly Divisions I-AA and I-AAA) would be guaranteed "access to national championships at least at the level provided at the time of the adoption of this legislation." See Prop. 7, § 4.01.2, 1996 Proc. at A9.

the surface of conflicts that date back to the NCAA's founding and that continue today to deeply divide its members.

III. ASSESSING RESTRUCTURING'S IMPACT

What then will be the impact of this most recent NCAA Restructuring? In fact, the new structure is so new that we have only a little evidence of what is to come. The divisions have followed a fairly conservative path where new legislation is concerned, and they have been largely occupied by the need to resolve organizational matters not anticipated, or at least, not dealt with, when the restructuring vote was first taken. But from the evidence we have, it appears that Restructuring offers a mixed bag of good and bad news for the future of amateur athletics and for student-athlete welfare. It also has implications for litigation involving intercollegiate athletics. This section provides an analysis of these issues.

A. *Practical Impact Upon Intercollegiate Athletics*

1. *Less Presidential Control?*

While "presidential control" was the battle cry of those favoring Restructuring, in fact, in some ways, Restructuring lessons local presidential control, at least, within Division I. Because the principle of one institution-one vote has been abandoned in Division I, the individual president's ability to affect NCAA policy has arguably been weakened. Some may say that any loss resulting from the abandonment of one institution-one vote is minimal because the Division I board is completely comprised of a board of university presidents and CEOs. This argument, of course, rests on several assumptions. First, it assumes that the presidents who are members of the board will have interests similar to those who are not on the board. But if that is to be so, diversity on the boards and Presidents Councils — not only racial and gender diversity but also in program size and outlook — is crucial.

Second, the argument that a board of presidents increases presidential control assumes that the boards will not merely "rubber stamp" the actions of the Management Council. But at every level, today's university presidents have more

responsibilities than ever before. For this reason, the Division I Board and the Presidents' Councils in Divisions II and III will likely still defer except in the most obvious of cases to the Management Councils, comprised of athletics representatives and, certainly, they will depend upon the management's council's framing of the issues.[193] Arguably, there was such deference to individual athletics representatives in the past, but because the Management Councils are representative and because, in Division I, the opportunities for discussion and debate are reduced significantly, there is less oversight. Presidents who are not on the governing boards will not likely be encouraged to become more involved generally in the complicated aspects of athletics regulation, absent a very specific threat to their schools' interests.

It is true that individual presidents who object to proposed policies may initiate a process to override leadership decisions, but as discussed earlier, the hurdles to recission are substantial and time-consuming. Because the override process is burdensome, legislation with negative effects for a minority of schools can survive because its harm reaches only a small group. Though intellectually sympathetic, other institutions may simply not desire to invest the time or political capital to launch or even support a challenge. Moreover, the dominance of Division I-A on both the Division I Board and on the national Executive Committee provides an additional hurdle against overturning legislation that is supported by that group.

Another reason that presidential control in the local sense is reduced is the loss of opportunities for debate under the new Division I legislative process. In the old days, before legislation was adopted, every institution had the opportunity to have a representative step to the microphone and, in that way, to have its voice heard and recorded publicly in convention proceedings. There is little doubt that, on occasions, such

193. See, e.g., Comments, Division II Business Meeting, Mon., Jan 8, 1996, 1996 Proc. at 95 (noting that the proposed change does not necessarily increase the time commitment but merely makes presidents accountable by vesting them with ultimate and direct authority and that, while there will be new responsibilities, "many of the tasks and assignments will be rightfully delegated to athletics administrators on the Management Council").

debates changed the otherwise certain course of legislative initiatives. But now, with the new Division I legislative cycle, the dominant form of pre-legislative commentary is writing and, because schools don't usually get to hear what other schools have said, there is very little interchange among schools. At press time, steps were being taken to facilitate communication among members about legislation; for example, by utilizing the World Wide Web and by having Division I institute convention panel discussions concerning key issues. But these are insufficient substitutes for the legislation specific interpersonal discussion previously afforded at a convention at which the very matters being discussed are also to be voted upon.

2. *The End of Divisional Interdependence*

The official spin of Restructuring is that the divisions now have greater flexibility and that this is good news. Certainly, experience has revealed that, in some cases, national standards were inadequate to deal with specific circumstances unique to particular regions or groups of schools. For example, students at Division I schools, where athletics is of major significance in university life, may have different needs than students at schools where athletics plays a less prominent role. And in some cases, applying legislation designed for Division I athletics to programs at Divisions II and III may be the equivalent of killing a gnat with a hammer. Now, each division has the ability to shape amateur athletics in a way that is responsive to the needs of both schools and student-athletes in that division. There is no doubt that student-athletes, particularly those in non-revenue producing sports but others as well, could reap some benefits from this new structure.

But the sweeping divisional autonomy that resulted from Restructuring also has a darker side. The very divisional interdependence that was viewed as a disadvantage in the old structure also served positive purposes. First, the national nature of the former structure at least offered some safeguards that encouraged individual schools to adhere to basic principles that should be common to all divisions — such as student-athlete safety or respect for student-athlete legal

rights. Previously, the knowledge that other divisions would be commenting upon one's actions — and possibly in the context of a national convention covered by national media — provided at least some safeguard against divisional action that placed winning and monetary gain above everything else. Now, with each division able to legislate for itself, there is less interdependence and fewer assurances that legislation emerging from the divisions will promote student-athlete welfare when that welfare conflicts with institutional financial interests. Restructuring has also dramatically reduced the powers of the national bodies, essentially making them merely advisory groups with few enforcement options. Finally divisional autonomy also means that, as time passes, each division will formulate its own language, thus ensuring even less cross-fertilization and meaningful cooperation.

We have already seen evidence of these changes. In the two years following Restructuring, Division I's convention attendance immediately decreased, including attendance by Division I CEOs.[194] While Division I's convention business sessions were previously devoted to legislative-specific debate, now its discussions are largely policy oriented because the "business" is conducted throughout the year.[195] By contrast, numeric participation by Divisions II and III has increased, consistent with their preservation of one institution one vote and the tie that remains between their legislative process and the annual convention.[196] The scheduling of panel discussions and encouragement of attendance seems to have helped

194. See NCAA Strays from the Conventional Way, NCAA News, Jan. 4, 1999, at 1 (noting that 340 Division I members, a record number attended in 1996, 339 in 1997, 310 in 1998 and predicting from pre-registration that fewer would attend in 1999). See also Media Passes on Convention, NCAA News, Jan. 19, 1998, at 3 (noting absence of Division I CEOs).

195. In 1998, the Division Business Session was replaced with a set of discussion sessions, including a speech by Secretary of Health and Human Services Donna Shalala. See Shalala Asks Association to Reduce Binge Drinking, Create Opportunities for Women, NCAA News, Jan. 19, 1998, at 8. Actually, Shalala only addressed Division I, a fact that led a delegate from another Division to express regret that other Divisions weren't invited by Division I to hear her. See Convention Should Bond the Membership, NCAA News, Feb. 23, 1998, at 2.

196. See NCAA Strays from the Conventional Way, supra note 194 (noting rise in Division II and III attendance).

Division I numbers in the 2000 Convention, but such panels are not tied to the legislative process.[197]

In the first few years following Restructuring, the divisions were legislatively conservative, essentially trying to refine their new structure. In the 1999-2000 academic year, however, we have begun to see hints of the kind of substantive legislation that will define the heart of the new NCAA. For example, at press time, all divisions had under consideration some revision of their "amateurism" rules.[198] But if the past is prologue, one can expect that student-athlete concerns will weigh lightly in the balance against any contrary interests of members.

3. *A Narrowing of Public Access to Information about NCAA Action*

Brandeis once said that sunlight is the best disinfectant; electric light the most efficient policeman.[199] If he was correct, then the new NCAA structure is a structure ripe for the growth of undesirable elements. Restructuring has brought about a significant dimming of the light that previously shined on NCAA action. Prior to Restructuring, because major decisions were made through a legislative process that stressed national policy, NCAA publications shed light not only on the outcome but also on the processes that led to them. The NCAA convention proceedings contained verbatim transcripts of convention proceedings including Division Business Sessions. The NCAA annual reports included the minutes of the national committees. The *NCAA Manual* reported all legislation in a single volume. Months in advance, the *Official Notice* announced all legislation to be decided at the convention. The *NCAA News* and the NCAA Register regularly reported on

197. See Division II Convention Notes, NCAA News, Jan. 17, 2000, at C9 [separately paginated insert] (noting 400 attendees from Division I, including 20 Presidents; 598 from Division II, including 66 Presidents; 582 from Division II, including 41 presidents; and 17 media personnel at 2000 Convention).

198. See Division I Basketball Debate Heats Up at Convention Forum, NCAA News, Jan. 17, 2000, at 1 (mentioning discussion of amateurism proposals); id., 2000 NCAA Convention Supplement, Divisions II, III Discuss Top Issues in Open Forum, Experienced-Based Amateurism Model Presented to Division III Membership at C1 [separately paginated insert].

199. See L. Brandeis, Other People's Money 62 (1933).

specific infractions decisions made.[200] All of these documents and others were available not only to the membership, but also to the public for a reasonable fee. Indeed, this article could not have been written without them.

The various documents produced at the national level— the annual report, the convention proceedings and the like— are still produced, but they are far less helpful to one interested in the process, for many key decisions are no longer made at that level. While they still reveal much about Division II and III's legislative processes, they reveal little about Division I, which does none of its real business at the convention.[201] Moreover, correspondence produced during the notice and comment period is not published and those outside Division I generally must rely upon the *NCAA News* or a revised *NCAA Manual* to find out what has been adopted.

The *NCAA News* and the *NCAA Register* have taken up some of the slack. Infractions decisions still appear in both, as do the minutes of divisional Board, Presidents Council and Management Council meetings. Recent unpaginated "online versions" of the *NCAA News* have been placed on the NCAA's website for easy access, and there is talk of archiving more of them in this way. But these are not sufficient. To date, minutes have not been produced in a single publicly available volume, thus, to view them as a whole for a given time period, one has to look at every *NCAA News* or *Register* for that period. Second, no doubt because of its publication schedule, the *NCAA News* normally reports events after or only shortly before they have occurred and in only rare cases gives significant advance notice of proposed action. Also, having pursued a weekly publication schedule for years, the *NCAA News* has now reduced its publication schedule to twice a month. The action suggests that some of the "news" that used to be reported is no longer being reported because matters are now decided at a local level. Fourth, the *News* and the NCAA's

200. As was the case before Restructuring, divisional rules provide that once an NCAA investigation has been completed, the report "shall be made available" to national wire services and other media outlets. See, e.g., 1998-99 Div. I Manual, Bylaws, § 32.9.2, at 443.

201. New Division I System Brings New Challenges, NCAA News, Jan. 12, 1998, at 1.

website are organs of the NCAA which are, ultimately, a group charged with protecting the interests of its member institutions.[202] Thus, particularly in matters where the interests of member institutions conflict with other parties (such as student-athletes) the *News* simply cannot be counted upon as the sole source of information for one seeking an objective view of the facts.

The national and local media have also shown a marked reduction in interest in the national convention, with attendance at the 1998 convention down 20%. Major newspapers and national writers from wire services were notably absent.[203] The decline continued in 1999.[204] Again, this is no great surprise. The sports and entertainment media's greatest interest has been in Division I sports, a direct function of the money they generate. If Division I's most important legislative initiatives are not to be decided or at least seriously debated at the convention, many of the major media will have no interest. At the same time, the media no longer has the opportunity to sit in on the Division I legislative process. While certainly one can question the seriousness

202. For example, in this author's opinion, over recent years the *NCAA News* has made a visible and concerted effort to downplay controversy and to cast national and divisional initiatives in a "student welfare" light, even when the conclusion that students are helped by the proposals or outcome is debatable. Its treatment of the 1997 national convention is but one example. The lead headline of the issue that followed the convention was "Delegates OK Key Athlete-welfare Legislation." On the front page of following issue (Jan. 27, 1997) was a sizeable photograph of student-athlete advisory committee member Bridget Niland. The *News* trumpeted the students' involvement in the convention claiming that they "wowed" the convention. It ran an article written by the various student-athlete advisory committee members with the heading "Convention Listened to the Concerns of Athletes." The students concluded in the article, "Anyway you choose to look at it, the 1997 NCAA Convention brought about a huge change in the way the Association views and treats its student-athletes." See Karrie Farrell, Julie Fernandez and Briget Niland, Convention Listened to Concerns of Student-athletes, NCAA News, Jan. 27, 1997, at 4-5. In fact, when one reads the text and the proceedings themselves, the students' story is not as positive as the headline suggests and one wonders what role *News* editors played in the final production. As discussed above, the strides for student-athletes at the 1997 convention were minimal responses to an abysmal situation.

203. See Media Passes on Convention, supra note 194.

204. See NCAA Strays from Conventional Way, supra note 194 (noting significant reduction in pre-registration for 1999 convention).

with which some sports and entertainment writers approach the coverage of sports news issues, there are excellent examples of investigative reporting in the field, and it is not unreasonable to conclude that any reduction in media coverage of the legislative process will necessarily lessen public access to information.

4. *Removal of Safety Nets That Protect Student-athletes*

Despite its faults, it can also be said that the old structure had two other advantages for student-athlete welfare. First, it limited the opportunities for inappropriate distinctions among student-athletes in different divisions. Second, through published convention debates among differently situated institutions, it brought some of the key student-athlete issues to the surface.

a. *The Potential for Unnecessarily Inconsistent Treatment of Student-athletes Across Divisions*

Because Restructuring itself addressed very few substantive issues, preexisting national legislation was simply dumped into the Divisional Manuals; so too any problems that existed with that legislation flowed into the Divisional Manuals. Now, it is possible to have three different resolutions to the same problem, even in cases in which there is no legitimate reason for the distinction. Certainly, the concern that student-athletes will be differently treated among the divisions— on issues as to which they should be treated the same— will inevitably become a reality. For example, as noted earlier, at the 1997 convention, Divisions adopted very different rules on the subject of student-athlete free speech.[205] Yet, while the legislation clearly protects Division I and II's interests, no defensible reason for the difference is obvious to this writer, particularly where publicly funded institutions are concerned. After Restructuring, there is now no mechanism in place to ensure that examples of such consistent treatment do not increase many times over.

205. See discussion supra at note 194.

b. *Delayed Response Time to Correct Mistakes*

Although some argue that Restructuring will result in more efficiency, it will also make the reversal of bad legislation affecting student-athletes more difficult. Certainly, it can be argued that because significant legislation could be considered only once a year under the prior structure, a structure like that in Division I that permits more frequent consideration is desirable. But the difficulty lies in the failure of the new structure to value give and take during the legislative process. Since students are not members of the NCAA, they must speak either through institutions who take up their concerns or through the small number of students on the SAACs. As for the latter, divisional SAACs have widely varying degrees of influence and access to information.[206] The absence of convention debate in Division I has eliminated for all practical purposes opportunities for institutional representatives or student-athletes in Division I to take up the microphone and convince others in power that proposed initiatives should be abandoned or amended— and for outsiders to know the students' views. The new system also provides less opportunity for cooperation among the SAACs nationally, across divisions. One can even question the entire theory of using a SAAC as the sole institutional mechanism at the divisional level for focused attention upon student-athlete needs and concerns. SAAC members are full time students who usually have no independent resources or support for investigation or research, no access to much of the information needed to assess the impact on a larger scale, no specialized training which may be needed in some cases. They serve at the grace of the division in which they sit and, in most cases, have limited life experience or expertise to call upon in critiquing NCAA policies, although they may have a sense that something is amiss. Their struggle through the years to gain the most basic powers is an indication of the degree to which the SAAC mechanism, while a valuable addition, is inadequate

206. See, e.g. Student-athlete Panel Examines Structure, NCAA News, Aug. 31, 1998, at 9 (noting SAAC request for student representation on Divisional Committee on Infractions and Student-athlete Reinstatement and for more attention to be directed to the lack of campus committees on some campuses).

as a sole way of giving focused attention to student-athlete welfare issues.[207]

B. *The Legal Impact Upon Intercollegiate Athletics*

Well prior to Restructuring, scholars claimed that the NCAA has increased its emphasis on commercialism and reduced its emphasis on education and amateurism. According to these critics, this trend could (and some argue should) lead to greater legal exposure for the NCAA and member schools.[208] Specifically with respect to Restructuring, Professor Gary Roberts urged the NCAA in a letter to consider its litigation implications suggesting that allowing the "big time" programs more autonomy from "purely amateur" programs would "increase the likelihood that judges, legislators and others would impose a wide range of laws on major athletics programs that colleges have heretofore avoided."[209]

To date, courts and commentators have ignored Restructuring's impact. This section moves to a discussion of how Restructuring affects the traditional deference that courts have shown to the NCAA and whether that deference is still appropriate. First, it reviews traditional deference approaches,

207. Jay Jordan, Reform from a Student-athlete's Perspective: A Move Toward Inclusion, 14 U. Miami Ent. & Sports L. Rev. 57 (1996) (discussing student-athlete exclusion and SAAC members' disappointment with Restructuring's approach to student-athlete interests and needs).

208. See, e.g., Paul Cartensen & Paul Olszowka, Symposium, Antitrust Law: Student-athletes and the NCAA: Limiting the Scope and Conduct of Private Economic Regulation, 1995 Wis. L. Rev. 545 (1995) (noting that repeated adjustments in regulations to promote economic interests at expense of student-athletes could result in increased antitrust liability); C. Peter Goplerud III, Pay for Play for College Athletics: Now More Than Ever, 38 S. Tex. L. Rev. 1081 (1997); and C. Peter Goplerud III, Stipends for College Athletes: A Philosophical Spin on a Controversial Proposal, 5 Kans. J. L. & Pub. Pol'y 125 (1996) (the Goplerud articles comparing student-athletes to workers in sweatshops and suggesting that financial aid restraints violate the Sherman Act).

209. Roberts' letter to the NCAA was reprinted as a Guest Editorial in the NCAA News. See Gary Roberts, Consider Everything Before Restructuring, NCAA News, Sept. 19, 1994, at 4-5. See also Gary Roberts, The NCAA, Antitrust & Consumer Welfare, 70 Tul. L. Rev. 2631, 2632-33 (1996) (predicting that decisions finding the NCAA in violation of antitrust laws would cause the NCAA to consider the legal implications of an upcoming restructuring that appeared to place greater emphasis on commercialism and less on preserving amateurism).

using judicial consideration of NCAA antitrust liability and allegations that the NCAA has acted as a state actor as two examples. It then considers how Restructuring alters the arguments supporting such deference. Third, it argues that, because NCAA policy is a function of a political process that weighs competing interests, a *general* policy of deference is not appropriate and that the argument for abandoning the approach is strongest in cases in which student-athlete rights and interests are pitted against the rights and interests of the NCAA and member institutions. Instead, the courts should investigate the facts that gave rise to the challenged NCAA acts, allowing discovery on this question. Only after it has matched the motives with the results can the courts reach a sound decision on whether public policy supports deference in that case.

1. *Effect Upon Traditional Judicial Deference to NCAA Action*

Where challenges to policies that touch athletics are concerned, the NCAA and its member institutions have historically benefited from tremendous judicial deference and goodwill. This writer believes that the deference comes from at least three different theories. First, historically, the courts have deferred to the leaders of educational institutions on matters of educational policy on the view that they are experts at making such judgments.[210] Second, courts have long recognized a right of private associations to set their own rules

210. E.g., Regents of the University of Michigan v. Ewing, 474 U.S. 214, 225 (1985) (on academic matters, courts should show great deference to the faculty's professional judgment). In the context of athletics, see, e.g., Ross v. Creighton Univ., 957 F.2d 410 (7th Cir. 1992) (affirming dismissal on pleadings of student-athlete's claims that school committed educational malpractice and breached their contract with him by admitting him while knowing that he was academically unqualified, declining to provide sufficient tutoring, and placing him in the hands of university agents who encouraged him to allow others to do his work for him). Where federal courts are concerned, deference to institutional decision-making on educational matters also arises out of the long held characterization of education as primarily a "local" matter as to which deference to local actors is appropriate. Ewing, 474 U.S. at 226 (noting reluctance to "trench on the prerogatives of state and local educational institutions and the responsibility to safeguard their academic freedom").

of conduct for members.[211] Both the NCAA and private institutions among its membership benefit to some degree from this presumption. Finally, as I will demonstrate below, the cases also demonstrate a judicial deference unique to the NCAA to its member schools as the recognized regulators of amateur athletics policy. In few other contexts can regulators, public or private, boast such tremendous judicial goodwill.[212]

These three deference themes are intertwined in case law involving challenges to NCAA regulation. Courts at the highest levels regularly cite to the NCAA's own statement in its constitution that its "fundamental purpose" is "maintain[ing] intercollegiate athletics as an integral part of its members' educational programs." In both *Tarkanian* and *Smith* the U.S. Supreme Court embraced this language and indeed, in *Smith*, it appears without citation as if the goal is common knowledge not needing a citation.[213] In *Board of Regents*, the Court stated further that "The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports . . ."[214]

The courts are also quick to assume NCAA compliance with its own stated goals and mission when they examine challenges to NCAA regulations. In both *Smith* and *Tarkanian*, the U.S. Supreme Court cited the NCAA Constitution's references to keeping athletics educational, not as the NCAA's claimed fundamental purpose, but as its fundamental purpose in fact. And yet, the error of such a literal approach is easy to demonstrate. In 1969, the NCAA's constitution described the

211. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) (under the First Amendment, state cannot require private organization sponsoring parade to include those that the association would otherwise choose not to include); Schultz v. U.S. Boxing Assoc., 105 F.3d 127 (3rd Cir. 1997) (affirming right of private association to set rules but approving of preliminary injunction where organization violated its own rules).

212. Other writers, particularly those in the antitrust context, speak of judicial deference as a deference to "amateurism." See, e.g., Carstensen & Olszowka, supra note 208. For reasons discussed below, I think that when all the cases are considered, the deference is more properly described as a tripartite deference.

213. NCAA v. Tarkanian, 488 U.S. 179, 183 (1988); NCAA v. Smith, 525 U.S. 459, 462 (1999).

214. NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984); see also Tarkanian, 488 U.S. at 197, 198, n.18 (noting its *Board of Regents* description of the NCAA's role as "critical).

NCAA's "fundamental policy" as compliance and rules enforcement. Educational goals were mentioned with other goals in a separate section entitled simply "purposes."[215] The other "purposes" mentioned in § 1 included the keeping of athletic records and the upholding of institutional control.[216] The "fundamental policy" that is now so often cited by the courts first appeared with the 1970 manual. The point is not that the NCAA did not before 1970 view education as an important part of athletics programs. This would not be a fair characterization. Rather, the point is that the mere appearance of language in the NCAA's constitution does not itself prove that educational concerns are the NCAA's central focus when it legislates. Still, the U.S. Supreme Court has gone out of its way to affirm that a general presumption operates in favor of the NCAA's legislative initiatives. In *Board of Regents*, reviewing an antitrust challenge to NCAA television restrictions, the High Court stated that "as the guardian of an important American tradition, the NCAA's motives must be accorded a respectful presumption of validity," even though, it added, "good motives would not save an otherwise anti-competitive practice." Elsewhere, the *Board of Regents* Court stated that "it is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur teams and are therefore pro-competitive."[217] In *Tarkanian* the Supreme Court also made it clear that, at least on those facts, the NCAA was entitled to the deference due a private organization, finding that it was not a state actor.

Student-athletes have faced a miserable time challenging NCAA action, regardless of the causes of action asserted.

215. 1969 NCAA Manual, Const., § 2, at 3. The Constitution read in relevant part:
Section 2: Fundamental Policy. It is the fundamental policy of this Association that legislation governing the conduct of the intercollegiate athletic programs of member institutions shall apply to basic athletic issues such as admissions, financial aid, eligibility and recruiting; that the member institutions shall be obliged to apply and enforce this legislation and the enforcement program of the Association shall be applied to an institution when it fails to fulfill this obligation.

216. Id. at § 1.

217. 468 U.S. at 117.

Apart from the serious practical hurdles that students face in finding representation for such lawsuits, courts have seemed reluctant to take claims of student participation rights seriously. A host of cases have defined participation in athletics as a privilege, not a right. Even though the right / privilege distinction has been whittled away in other cases raising issues of constitutional law, that recognition has yet to find its way into cases dealing with amateur athletics policy.[218] Whether the cases reveal a fascination with sports that clouds judicial judgment,[219] a continuance of the old *in loco parentis* doctrine of student-university relations, or missed opportunities by counsel representing student-athletes, the result seems to be the same.

The import of these deference themes is significant in litigation involving the NCAA. In *Board of Regents*, for example, collegiate institutions challenged under the Sherman Antitrust Act NCAA restraints on their ability to contract individually, separate and apart from the NCAA, for the television coverage of collegiate football games. The NCAA argued that this policy was necessary to preserve parity among the various athletic programs, lest the moneyed programs would shut out smaller ones from television contracts with their market power.

Ultimately, the court determined that the NCAA had in fact violated the Sherman Act. But the Court's approach to the question was clearly shaped by their favorable disposition toward the NCAA. Justice Stevens, writing for the majority,

218. See, e.g., Graham v. Tennessee Secondary Sch. Athletic Ass'n, 1995 U.S. Dist. Lexis 3211 (E.D. Tenn. 1995); Karmanos v. Baker, 617 F. Supp. 809, 815 (E.D. Mich. 1985). For one view of the demise of the right / privilege distinction, see William W. Van Alstyne, The Demise of the Right / Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968). The reason that there is little sophisticated discussion of the right / privilege issue in such cases may well be in part because the issue is regularly narrowly framed in terms of "participation" as the right itself, and not in terms of other rights, the surrender of which, are conditions to participation.

219. In a recent article, for example, I noted that U.S. Supreme Court Justice Oliver Wendell Holmes' assumption that baseball could not be a "business" led to 75 years of a special antitrust exemption for that sport, an exemption which held long after the social assumption that supported it had failed. See W. Burlette Carter, "What Makes a Field a Field?," 1 Va. J. Sports & L. 235, 241-42 (1999).

declined to apply a per se analysis.[220] Significantly, the Court stated that its decision to reject a per se analysis was not based upon the fact that the NCAA is organized as a nonprofit nor on "our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics."[221] Instead, the Court justified its rejection of a per se analysis on the ground that the case "involve[d] an industry in which horizontal restraints on competition are essential if the product is to be available at all."[222] The product, the Court argued, was intercollegiate football, that is, football within an *academic* context. The Court concluded that "[i]n order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like," and it concluded that the product could not be preserved without some cooperation.[223]

Of course, the statement that the product would otherwise be unavailable is dependent upon assumptions about what the product *is* and whether all elements that define the product as determined by NCAA are truly essential to its nature. While

220. A "per se" restraint violates the Sherman Act and is facially invalid. No inquiry into the anticompetitive effects in the particular context is required. By contrast, under the "rule of reason," a court must look into the particular facts of the restraint and consider whether, given that context, the restraint violates the law. See, e.g., NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 103-04 (1984).

221. Id. at 100-101.

222. Id. at 101.

223. Id. at 101-02 (emphasis in original). Whether nonprofit activity should be sheltered from antitrust scrutiny because it is socially beneficial is a matter of much scholarly discussion. See, e.g., Lee Goldman, The Politically Correct Corporation and The Antitrust Laws: The Proper Treatment of Noneconomic or Social Welfare Justifications Under Section 1 of the Sherman Act, 13 Yale L. & Pub. Pol'y Rev. 137 (1995) (rejecting social welfare as an antitrust exception); Jonathan Seib, Antitrust and Non-market Goods: The Supreme Court Fumbles Again, 60 Wash. L. Rev. 721 (1985). For articles dealing specifically with whether amateur sports should be specially treated, see Srikanth Srinvanan, College Financial Aid and Antitrust: Applying the Sherman Act to Collaborative Nonprofit Activity, 46 Stan. L. Rev. 919 (1994); Peter Chin, Illegal Procedures, the NCAA's Unlawful Restraint of the Student-athlete, 26 Loy. La. L. Rev. 213 (1993); Note, Sherman Act Invalidation of the NCAA Amateurism Rules, 105 Harv. L. Rev. 1299 (1992); and Wendy Kirby and T. Clarke Weymouth, Antitrust and Amateur Sports: The Role of Noneconomic Values, 61 Ind. L. J. 31 (1985).

many would likely agree that student-athletes should attend classes, the assumption that "pay for play" would result in a disappearance of the product depends upon one's acceptance of the NCAA's conception of the product.[224] It is hard to escape a conclusion that, despite the majority's assertions to the contrary, its choice of analysis was very much dependent upon the fact that the defendant was the NCAA.[225]

The dissent in *Board of Regents* took deference even further. Justice White, a former athlete, himself,[226] joined by Justice Rehnquist, explicitly argued that the NCAA was entitled to special treatment under the antitrust laws *because of its assumed unique role.* They too cited the NCAA constitution to support claims that the NCAA has designed athletic programs to be "a vital part of the educational system" and that its fundamental policy is to maintain intercollegiate athletics as a part of the educational program and maintain a clear line of demarcation between college and professional sports.[227] Thus, based upon this unique role, they would have upheld the NCAA's restraint against a Sherman Act Challenge.

224. For example, consider Peter Goplerud's view on pay for play, supra note 208. As discussed later, the very idea of what constitutes "pay" has changed over the years.

225. This language has caught the attention of scholars. Gary Roberts noted that the Supreme Court had identified no particular rule or set of rules that it determined to promote amateurism or academic values and that the "majority apparently must have considered that conclusion to be obvious or at least likely." Roberts opined that "[p]resumably, in a future case in which this defense is raised by the NCAA or by any of its members, this factual question would be rebuttable and ultimately determined by the trier of fact— the jury, if there was one." Gary Roberts, The NCAA, Antitrust and Consumer Welfare, 70 Tul. L. Rev. 2631, 2635 n.12 (1996). In fact, however, as I argue below, the presumption has resulted in cases being dismissed before they even reach the trial stage.

226. White earned nine varsity letters at the University of Colorado and played professional football with the Pittsburgh Steelers and the Detroit Lions. Later he was inducted into the Pro Football Hall of Fame. See Rex A. Lee and Richard G. Wilkins, On Greatness and Constitutional Vision: Justice Byron R. White, 1994 BYU L. Rev. 291, 295-96 n.23 (1994) (citing William Rehnquist, The Supreme Court: How it Was, How it Is 257 (1987)).

227. Board of Regents of Univ. of Okla., 468 U.S. at 121-22 (White, J., dissenting) (also noting that the NCAA exists primarily to enhance the contribution athletics makes to higher education as distinguished from realizing the maximum return on it as an entertainment commodity).

As noted, ultimately, the *Board of Regents* majority determined that good intentions could not salvage the NCAA's television plan even under the rule of reason. But the fact that *Board of Regents* overturned the plan does not disprove deference theory. That case involved an internal dispute between members of the NCAA— schools that desired the restraints versus those who did not. This context may have resulted in a "deference-split" of sorts, with two sets of entities claiming to preserve amateurism and academic values pitted against each other. Would *Board of Regents* have turned out differently had the plaintiffs been purely for-profit actors— such as the television networks harmed by the arrangement— pitted against the collective wisdom of NCAA and member schools that the restraint was needed to preserve amateurism?

For student-athletes, more danger lies in the fact that the broad presumption dicta of *Board of Regents* reached beyond the situation at hand to other types of NCAA rules: from restrictions on member commercial contract rights, to regulations on pay for play and class attendance. The broadest interpretation is that the presumption should apply to *any* type of NCAA regulations. Though dicta, this expansive view of deference was not lost on later courts. In the intermediate opinion in *Smith v. NCAA*, the Third Circuit, after consulting this language in *Board of Regents* and considering a few lower court opinions, determined that the Sherman Act did not apply *at all* to the NCAA's promulgation of eligibility requirements. The plaintiff had been barred from playing intercollegiate athletics because of the NCAA's post-baccalaureate Bylaw, which allowed a post-baccalaureate student to participate in intercollegiate athletics only at the institution awarding her degree. Plaintiff desired to play for a different school. The plaintiff did not challenge the validity of the bylaw, but rather claimed that the NCAA granted more waivers under it to male athletes than to female athletes. She argued, *inter alia*, that this tendency represented an agreement to restrain trade in violation of the Sherman Act.[228]

228. Smith v. NCAA, 139 F.3d 180 (3rd Cir. 1998), cert. denied, 525 U.S. 872 (1998), vacated on other grounds, 525 U.S. 459 (1999).

Rather than rejecting the specific claim made, the Third Circuit held that NCAA eligibility rules are simply exempt from the Sherman Act. "[R]ather than focus upon Smith's alleged injuries," the court decided instead to "consider the character of the NCAA's activities."[229] It determined that rules like the post-baccalaureate rule promoted amateurism and were not commercial; thus, the court determined such rules were not challengeable under the Sherman Act.[230]

In its approach to the plaintiff's claim, the *Smith* court strayed away from the usual question of whether the alleged injury was one that the antitrust laws were designed to guard against and focused instead upon the "character" of the NCAA's own work.[231] Perhaps more importantly, in considering the character of that work, the *Smith* circuit court deferred to the NCAA's description of its character as noncommercial. By affirming the 12(b)(6) dismissal of plaintiff's claim, it did not permit the plaintiff the opportunity to meet its new standard for NCAA antitrust exposure by offering evidence to prove that the specific rules challenged, though labeled "eligibility rules" by the NCAA, were sufficiently commercial in nature.

The Third Circuit's *Smith* holding is difficult to square with the Supreme Court's statement in *Board of Regents* that "good motives would not save an otherwise anti-competitive practice."[232] Indeed, the reach of the Third Circuit *Smith* opinion and cases following its logic could be breathtaking, affecting virtually all cases that involve restrictions on student-athlete rights, for in a sense *every* rule that regulates student-

229. Smith, 139 F.3d at 185.

230. Id.

231. Compare Brunswick Corp. v. Pueblo Bowl-o-mat, Inc., 429 U.S. 477 (1977); Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) (discussing the concept of "antitrust injury" and the fact that the antitrust laws protect competition, not competitors).

232. See discussion supra at 73-4. The Court did not explain how it defined the rule at issue as an "eligibility rule." One obvious possibility is that it took that label from the fact that the rule appeared within the "eligibility" section of the NCAA manual. On the other hand, in discussing other cases, the court seemed to suggest that "no agent" and "no draft" rules were also "eligibility rules," although these rules appear under the "amateurism" section of the manual. Smith, 139 F.3d at 185. Thus, the court seemed to interpret "eligibility" quite broadly.

athlete conduct is an "eligibility" rule. I do not suggest that the plaintiff in *Smith* presented a solid antitrust claim, but if she did not, the reason is certainly not because she challenged a particular *classification* of NCAA rules or because the NCAA had good motives in promoting the rule. The Supreme Court denied certiorari on the Sherman Act issue, deciding, instead, an alternative question relating to NCAA exposure under Title IX.[233]

Additional insight into this judicial deference theme is found in the debate over whether or not the NCAA is merely a "private actor" or whether it operates with sufficient authority from the state such that it should face claims that its actions violate individual constitutional rights. Often, the claimant brings such claims under the Fourteenth Amendment to the U.S. Constitution or 42 U.S.C. § 1983.[234] The Supreme Court has held that there is no distinction between the state action requirement and the color of state law requirement for purposes of § 1983.[235] Moreover, it has held that when a private party willingly agrees to jointly participate in conduct that deprives an individual of constitutionally protected rights and does so that private party also acts under color of state law.[236]

233. Smith v. NCAA, 525 U.S. 872 (1998) (denying certiorari); Smith, 525 U.S. 459 (1999) (vacating the Third Circuit finding that the NCAA was not a recipient of federal funds within the meaning of Title IX and thus not subject to suit under that statute). See discussion supra at 80. As usual, we can only speculate as to whether denial of certiorari signaled agreement with the Third Circuit's approach. Other lower courts have taken similar approaches. See, e.g., Bowers v. NCAA, 9 F. Supp. 2d 460, 497 (D.N.J. 1998); Jones v. NCAA, 392 F. Supp. 295 (D. Mass. 1975).

234. That section provides in part:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42. U.S.C. § 1983 (1994).

235. See, e.g., Lugar v. Edmondson Oil, 457 U.S. 922, 928 (1982).

236. Id. at 942.

NCAA v. Tarkanian is the essential case.[237] After an investigation, the NCAA determined that the men's basketball program of the University of Nevada Las Vegas ("UNLV") was in violation of NCAA rules. That body, in turn, demanded that UNLV sever relationships with its men's basketball coach, Jerry Tarkanian. After its own comprehensive investigation and a vigorous denial of the charges, UNLV did in fact suspend Tarkanian rather than face NCAA sanctions. Tarkanian sued both his institution and the NCAA, which promulgated the rules that led to the suspension, claiming a violation of his Fourteenth Amendment right to due process and of 42 U.S.C. § 1983.[238]

UNLV, as a publicly funded institution, was clearly a state actor. But the NCAA challenged Coach Tarkanian's claim that it too was a state actor or acted under color of state law. The U.S. Supreme Court agreed with the NCAA. In so doing, it rejected Tarkanian's claim that UNLV had delegated state powers to the NCAA. It found that the NCAA did not perform a traditional state function, although, in clear deference, it described the NCAA's function as "critical."[239] It opined that UNLV had the power to withdraw from the NCAA and that this right negated a state action claim. It considered the fact that the ultimate act of suspending Tarkanian could be taken by the university alone a demonstration of reserved plenary power.[240] And it concluded that the source of the policy was not *Nevada* state action, as Tarkanian alleged, but "a collective membership, speaking through an organization that is independent of any particular state."[241]

The *Tarkanian* court also rejected on the facts Coach Tarkanian's claim that the NCAA and UNLV were "joint actors."

237. 488 U.S. 179 (1988).

238. Initially, Coach Tarkanian sued only his institution, the University of Nevada at Las Vegas. Later, after the NCAA filed an *amicus* brief claiming that it was an indispensable party to any action seeking to invalidate its regulations, Tarkanian amended his complaint and added the NCAA as a defendant. Tarkanian, 488 U.S. at 190.

239. See discussion supra at 72.

240. Tarkanian, 488 U.S. at 195-96.

241. Id. at 193. The court also considered the large number of private universities that participated in NCAA decision making. Id. at 193 n.13.

It noted that the school and the Nevada attorney general vigorously challenged the NCAA's procedures.[242] It concluded that the UNLV and NCAA interests did not coincide, indeed, "they have clashed."[243] Thus, it held that they could not be joint participants.[244]

As with the broad deference language in *Board of Regents*, lower courts have taken a broad view of the *Tarkanian* holding that the NCAA is not a state actor. In *Cureton v. NCAA*,[245] freshmen student-athletes challenged NCAA academic regulations for freshmen in Division I schools. Because they could not meet the minimum test score requirements at Division I schools, they were not permitted to play there. They alleged that the NCAA regulations' reliance upon standardized tests resulted in race discrimination and violated Title VI.[246] They argued, *inter alia*, that the member institutions receiving federal funds had ceded "controlling authority" over institutional athletic programs to the NCAA, thus, making the NCAA liable as a recipient under Title VI.[247]

242. Id. at 199 (referring to a "protracted adversary proceeding")

243. Id. at 196 n.16.

244. How the court distinguished key joint participant precedents is revealing. In Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), joint action was found as to a private restaurant that discriminated against blacks. The private entity operated out of a publicly owned parking structure. The *Tarkanian* majority said that the lease relationship in *Burton* entailed mutual benefits, whereas in *Tarkanian* the interests of the key actors did not coincide. 488 U.S. at 196 n.16. It distinguished Dennis v. Sparks, 449 U.S. 24 (1980) (involving judicial bribery) and Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) (involving joint action between private restaurant and police to deprive plaintiff of constitutional rights), on the ground that plaintiff in *Tarkanian* did not allege that the agreement between UNLV and the NCAA was in any way unlawful or inappropriate and on the ground that the conspiracy in *Adickes* and *Dennis* continued until the end in both cases. Id. at 197 n.17.

245. 198 F.3d 107 (3rd Cir. 1999), rev'g 37 F. Supp. 2d 687 (E.D. Pa. 1999).

246. 42 U.S.C. § 2000(d) (1994). That section states, "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

247. In addition, they argued that NCAA control over the NYSP program made the NCAA a federal funds recipient. The Third Circuit rejected this argument as well. Cureton, 198 F.3d at 113-116.

The district court agreed, but the Third Circuit reversed. In disposing of the "controlling authority" issue, the Third Circuit relied upon *Tarkanian*, even though *Tarkanian* involved a due process challenge while *Cureton* involved a substantive challenge. The key issue in the Third Circuit's view was that the ultimate decision as to whether to enforce the rule lay at the university level.[248]

Thus, it appears that lower courts are interpreting the amateurism dicta that appears in both *Board of Regents* and *Tarkanian* quite broadly. *Board of Regents* has been interpreted to support the view that NCAA regulation of eligibility matters is exempt from the antitrust laws. *Tarkanian* has been interpreted as holding that the NCAA, by definition, could *never* be a state actor or be deemed to have been delegated authority over matters within the responsibility of its members. Such categorical interpretations sweep large segments of NCAA activity out of the path of judicial scrutiny, even as Restructuring has narrowed member involvement in Division I and public access to information about the NCAA. In short, the High Court's factual assumptions about the NCAA's operations have been interpreted by the lower courts as law itself.

2. *Restructuring and Deference*

How does Restructuring change the traditional assumptions that have supported these deference arguments? Several issues seem relevant.

First, it is likely that "amateurism" rules (including those related to eligibility) will undergo substantial changes now that the Divisions are permitted to make their own rules.[249] The NCAA has altered its approach to "amateurism" many times before. However, Restructuring allows broader deviations than ever before and if the changes are dramatic, they could raise serious questions about how we define the tradition or values we seek to protect through deference and, whether or not the

248. Of *Tarkanian*, the court stated, "That case makes clear that the NCAA does not 'control' its members." 198 F.3d at 107.

249. Indeed, as this article goes to press, the NCAA's three divisions are reviewing their amateurism rules.

NCAA should continue to have judicial deference as the protector of that tradition and those values.

Second, in the past, the NCAA has argued that uniform rules were needed to protect amateur sports. But as we have seen, even prior to Restructuring, rules had begun to vary from division to division and sport to sport. Now, as this divergence increases, the "uniformity" argument will no longer be as useful. Defenders might say that, though different approaches exist, all new NCAA legislation still will be connected by a common thread found in amateurism and other NCAA principles.[250] But given the abandonment of one institution, one vote in Division I, the dominance of key conferences on governing boards, and the growing conflicts of interests posed by parity concerns and commercialism, there is no reason for the courts to assume, without evidence, that that thread does indeed provide the needed consistency. In short, the NCAA and member schools will find it more difficult to defend challenged policies— and, I believe, particularly restrictions on student-athletes— as necessary in order to sustain the tradition and policies the courts seem most willing to support. The mere fact that Division III has been able to handle a matter one way should raise questions about why Division I has chosen to handle it another. In some cases, amateurism and academics may explain the divergence, but in others, parity or commercial interests may explain it. Indeed, variations between Divisions might even be used by opponents to argue that important public policies that support deference have been abandoned by one or more divisions.

Third, Restructuring may have its most wide-ranging effect on the state action debate. The Division I schools have explicitly delegated their rulemaking authority as a convention body to the Division I board. One school one vote no longer exists. This delegation was voluntarily accepted by the NCAA, indeed, that body encouraged it, and it occurred through the NCAA rulemaking process. Absent a further extension of deference, this delegation could dramatically change the discussion regarding state action and the NCAA.

250. See discussion supra at 35-7.

For example, in rejecting Coach Tarkanian's argument that the state had delegated legislative power to the NCAA, the Supreme Court relied upon certain assumptions about how the NCAA operated. The Court observed, "Basic policies of the NCAA are determined by the members at annual conventions."[251] While it conceded that Nevada has some impact on the NCAA's policy determinations, it noted that "several hundred other public and private member institutions" also each helped to shape policies.[252] But in fact, after Restructuring, Division I legislative business is no longer decided by "several hundred" voters at the national convention. The Division I Board of Directors, which legislates, consists of 15 members; the Management Council, which reviews, approves and advises, has 34 members.[253]

Where rules affecting student-athletes are concerned, the delegation argument is assisted by two other rarely cited rules that discourage member institutions from advocating student-athlete interests outside of the NCAA administrative process when those rules conflict with NCAA policy. First, there is the Bylaw in article 19 which states, "If a student-athlete who is ineligible" under NCAA rules "is permitted to participate" because of a restraining order or court injunction against the institution or the NCAA, and if that injunction is later vacated, stayed, reversed or it is finally determined that injunctive relief was not warranted, the institution must provide restitution to the NCAA. That restitution can range from individual and team records being stricken, the invalidation of victories, a determination of ineligibility for NCAA championships and a loss of television coverage by the school.[254] This rule effectively warns a school that if it seeks preliminary injunctive relief against the NCAA in court, even on behalf of a student-athlete who feels has been wronged, it will pay a hefty penalty if that court does not ultimately uphold the underlying challenge. This rule is not driven by academic or amateurism concerns.

251. Tarkanian, 488 U.S. at 183, 193.

252. Id. at 193-94.

253. See, e.g., 1998-99 NCAA Div. I Manual, Const., art. IV, § 4.2.1, at 23 & § 4.5.1, at 26.

254. See, e.g., id., Bylaws, § 19.8, at 333.

It is driven by concerns over parity— i.e., a school that is permitted to continue playing a player later found to be ineligible has gained a competition advantage— and possibly concerns over litigation costs. Thus, the rule appears under the title "Restitution."[255] This rule was irrelevant to *Tarkanian* because the plaintiff was a coach and not a student-athlete. Also, UNLV did not seek an injunction and, indeed, no injunction rule exists as to challenges *not* bearing upon the eligibility of student-athletes.

An Administrative Bylaw in article 32, requires that all members agree that once an NCAA investigation is completed and the NCAA appeals process has been exhausted, the NCAA's action will not be reviewable "by any other authority," including, by implication, the courts. This rule was applicable in *Tarkanian*, but it was mentioned only by the dissent.[256]

In addition, it is well known that NCAA rules also impose a duty upon member schools to cooperate in NCAA investigations. The violation of the duty to cooperate constitutes a separate infraction of NCAA Rules.[257] That duty, standing alone, is not necessarily objectionable, but taken along with the other two and the new delegation in Division I, it is difficult to defend the position that, post-Restructuring, *Tarkanian* does not even permit thoughtful consideration of a delegation argument. The argument to revisit delegation seems strongest in cases in which student-athlete claimed rights are arguably at odds with those of the regulators because, to be defensible as public policy, NCAA deference *must* be supported by an assumption that the member state institution— indeed all members— will, at some point along the process, act to protect student-athletes when necessary. Cases involving student-athlete interests have ignored the

255. 1998-99 NCAA Div. I Manual, Bylaws, § 19.7.4, at 333. A subsection of that rule states that once the appeals committee finds that there has been a violation, the university must act promptly or it will be cited with an order to show cause. Id., § 19.7.4.1. Enforcement Procedures Rule 32.10.3 suggests that an employee can file an appeal on his or her own behalf. Id., § 32.103, at 443-44.

256. See, e.g., id, § 32.11.5, at 445; Tarkanian, 488 U.S. at 201 (White, J., dissenting).

257. See, e.g., 1998-99 NCAA Div. I Manual, Bylaws, § 19.01.3, at 325 & § 32.3.11, at 437.

implications of these two rules.

Finally, one should not ignore the growing trend of states adopting NCAA rules as legislation and providing for criminal and/or civil causes of action for breach of that law.[258] A positive interpretation of these rules is that they protect a general state interest in "amateurism." But injuries suffered by student-athletes (the loss of eligibility and competition experience, the injury to reputation, and, in some cases, the damage to career possibilities) are not recognized under the statute, even in cases in which the student is not at fault. Typically, such statutes give the cause of action to the college or university and to the athletic association whose adopted rules were violated. The driving force behind such legislation appears to have been the desire to protect the financial interests of these groups in the recruited student-athletes. Many of these rules are broad enough to reach not only sports agents, but also student-athletes and their families if they are complicit in rules violations.

In *Tarkanian*, the Supreme Court compared the public institutions' embrace of NCAA rules to a state's adoption of bar association rules. In such cases, it argued, there is no state action.[259] But such cases differ significantly from the situation presented in intercollegiate athletics, particularly post-Restructuring. In such cases (1) the state was not a member of the voting group that created the legislation and thus had not publicly assumed an obligation to monitor the regulatory content; thus, there was less reason to presume that the rules were already consistent with the state's interests and responsibilities and more reason for the legislature to closely review them before adoption; (2) the adopted regulations normally relate to professional requirements and breach of them do not in and of themselves create civil or criminal liability; (3) such rules were adopted after *active* independent consideration by the state legislatures, a process that is

258. See, e.g, Tex. Civ. Prac. & Rem. Code, Tit. 6, §§ 131.002-005 (1999); Cal. Code, Tit. 3, ch. 15, §§ 67360-61 (1999).

259. See, e.g., Tarkanian, 488 U.S. at 194 (discussing the holding in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), that a state supreme court's enforcement of disciplinary rules transgressed by its own bar did not constitute state action, though rules were adopted from American Bar Association formulation).

threatened by the Division I legislative process and the aforementioned legislative presumption that public institutions have already reviewed and approved of the rules; and (4) such rules are normally adopted after thorough consultation with the community of affected and interested persons which is not the case with NCAA regulation. Unlike the American Bar Association, the NCAA does not regularly seek out the opinions of nonmember interested persons before promulgating legislation, nor does the NCAA promulgate legislation with the primary purpose that it be used as a model by others.[260] Also, the degree of student-athlete input has been significantly reduced in both Divisions I and II, and there is no group with member standing within the NCAA that has the specific responsibility of considering student-athlete impact. Finally, with the reduction in available public information that has resulted from Restructuring, public scrutiny is also reduced.

Thus, when these facts are taken into account, there now seems a very good argument that state power *has* been delegated by public institutions to the NCAA, at least in the case of Division I. The argument is even stronger in those cases in which a school simply rubber-stamps Divisional action without an active consideration of its impact. In Division III, the "no delegation" findings of *Tarkanian* are least vulnerable. This is no accident, of course, for Division III schools are the least financially dependent upon athletics. As to these schools, plaintiffs would need to develop facts not previously considered and applicable to their particular context to defeat the conventional judicial wisdom that NCAA operations always promote the public good.

What of the "joint action" side of the state action argument? Certainly, some of the facts supporting delegation can also lend support to a joint action claim. But some questions that may be relevant to joint action even prior to Restructuring seem to have escaped the lawyers and the courts where

260. Rather than promoting its work as a model, the NCAA actively seeks *adherence* by outside groups such as high schools, professional sports agents and other entities and individuals that deal with student-athletes. Its power to compel adherence comes not from mere respect of it as an organization but from the virtual monopoly it enjoys over inter-collegiate athletics competition, a monopoly that exists by virtue of the consent of state actors.

substantive challenges to NCAA regulation are concerned. Was an institution among the sponsors of particular legislation? Did any school vote in favor of it? Did any school aggressively lobby for it? This information has long been available in NCAA proceedings, but the proceedings themselves, for all practical purposes, are not widely available on the country's library shelves. They also are not catalogued or indexed.

Restructuring does not make the task of tracing the legislative history of a particular regulation any easier because, as discussed earlier, it closes off much of the public information that was previously available. Moreover, in Division I, the question of how an individual institution voted is made irrelevant by the elimination of one school one vote. But on the other hand, the new decision-making process in Division I also raises additional joint action questions. Did the public institution have representation among the 34 members of the Management Council that approved the legislation or among the 15 presidents serving on the Board of Directors that actually passed it?[261] It seems reasonable that, without disturbing *Tarkanian*, which presented very different facts, a court could find that joint action in such a case. Restructuring aside, in defending against antitrust lawsuits, the NCAA has described the collaboration among members as "joint ventureships," and, indeed, in antitrust conspiracy cases, the necessary agreement is virtually assumed.[262]

261. As of this writing, a majority of the Division I Board presidents come from publicly funded institutions. State institutions are less well represented on the Management Council, which also includes conference representatives and private institutions. Finally, there are publicly funded institutions that have representation on both the Board and the Management Council. The divisional administrative organization appears at the end of the Divisional Manuals. See, e.g., Administrative Organization, 1999-00 NCAA Div. I Manual at 465-68.

262. See, e.g., Board of Regents of Univ. of Okla., 468 U.S. at 113; NCAA v. Law, 134 F.3d 1010, 1018-1019 n.10 (10th Cir. 1998) (agreements to restrict salaries of certain assistant coaches). One might reasonably ask why the facts that establish agreement in Sherman Act cases should not be sufficient for establishing the joint action needed for state action in the federal constitutional sense. Perhaps it can be argued that the concepts in each context serve different policies. In the antitrust case, the significance of the conspiracy is that it represents an ability to exert a power on the marketplace that one could not have acting alone. In the state action

The NCAA may argue that its members then will be caught between a rock and a hard place where delegation and joint action are concerned. Their failure to participate actively would be viewed as delegation; their active participation in the Board would be viewed as joint action. But in the case of Division I, this cry assumes the necessity of that division's legislative structure, a case that would be difficult to prove after some 90 years of one institution, one vote. Also, one important purpose served by a rule that declares private actors can be state actors is to ensure that the responsibility for "governmental-like" decisions remains in the hands of the state. If NCAA procedures operate to reduce significantly governmental involvement in athletics policymaking at public institutions, then the protections due to affected individuals and entities may also be reduced. It must be the case that deference assumes a minimum degree of participation by the state in the decision-making process. Where that is lacking state action should be found, just as when the state actively collaborates with a private actor to accomplish a wrong. Moreover, a finding of state action does not prove a substantive claim; it merely allows the allegation to progress past preliminary stages. Arguably, since Restructuring has limited the amount of information publicly available about the legislative process, a public good can be served by allowing a plaintiff to proceed past the pleadings stage, on to discovery and to an attempt to prove the substantive case. Thus, only a structure that promotes broad-based decision-making and the opportunity for truly independent consideration by the state actors involved is consistent with *Tarkanian*. Finally, active participation in legislation that promotes the public good should not be feared. The essence of a successful joint action

context, because the state already has significant powers, the joint action is more akin to an abdication by the state of its role, but indeed, there is also the sense that, as a result of that abdication, a private actor has a power that it would not otherwise possess and should not possess. Of course, it could be argued that the same policies that support favored treatment of joint ventures under the antitrust laws, would argue against a delegation of state action finding, even where some joint action is found. Ultimately, the answer may turn upon the public policies being served through the collaborative conduct and the sufficiency of continued state involvement in the process as a safeguard.

claim (or a delegation claim) will still have to be that the NCAA acted against that public good and in violation of the law.

A few final points from *Tarkanian* are worth discussing. First, the Court found it important that, at least technically speaking, the institution took the final act of suspending the student-athlete.[263] The NCAA required that suspension as a condition of continued membership. This still is true. But, where rubber stamping of NCAA action occurs, then the final act of suspension is merely the mindless execution of a state agent's recommendation. The mere fact that the state executed the edict does not in and of itself prove the reservation of plenary power. *How* the edict was executed is also important. In *Tarkanian*, a full and extensive hearing was held and the school vigorously fought the charges. Blind adherence— or a hearing that is really no hearing (and not independent of NCAA procedures)— does not suffice. Moreover, an act may occur in many stages, and there is no reason why a state cannot be found to have delegated sufficient authority when it has delegated key stages of that act to a willing outside organization. Key stages would depend upon the context, but they might include the development of the essential guiding rules and regulations, the investigation of the key facts, or the establishment of the key investigative and enforcement structure.[264]

Of course, "who" takes the final act is irrelevant to the issue of joint action. The fact that a joint actor does not participate in the final act of robbery, but rather provides the gun and stands outside and watches from the getaway car does not

263. Tarkanian, 488 U.S. at 192, 195-96.

264. For example, few student-athletes receive the benefit of the kind of extensive independent investigation that UNLV gave to Coach Tarkanian. His perceived value was indicated by his salary arrangement. As the Tarkanian Court noted, his annual salary as a tenured professor who was a coach was $125,000 plus 10% of net proceeds received by UNLV for participation in NCAA championships, fees from basketball camps and clinics, fees from product endorsements, income realized from writing a newspaper column, income from his radio program, and income from his television program. This pay was in lieu of the salary of $53,000 per year that he could have received as an ordinary tenured professor. Id. at 181 n.1. Of course, though not all coaches benefit so well financially, these decade old figures are dwarfed by many of today's coaching salaries at institutions with large athletic programs.

rebut the fact of joint action. And indeed, where student-athlete rights are a concern (as opposed to the rights of coaches and other institutional agents), member schools and the NCAA often have intersecting interests that place both of them in conflict with the student-athletes who would be at the center of an infractions case. While it is true that the school may desire that the student continue to play, the school also desires to continue to be a member of the NCAA and to receive that membership's many benefits. This fact is clear from the growing number of states adopting NCAA rules and from the significant penalty structure that schools have agreed to impose upon themselves to discourage violations by others.

The *Tarkanian* Court's finding that UNLV retained the right to withdraw also remains a true fact.[265] But where delegation is concerned, this fact seems only to state the obvious principle that one who delegates authority always has the power to withdraw it. Thus, a mere withdrawal right alone cannot be *Tarkanian's* defining point. Indeed, it seems that the *failure* to withdraw, if withdrawal is truly an option, could support a finding of continued joint action where other evidence also supported that finding.

Finally, the information vacuum that results from Restructuring also requires that the courts take a new view toward discovery. Before Restructuring, information about NCAA action was not widely available through public sources to those outside of the educational community, particularly if one were seeking the legislative history of a particular rule. Part of the difficulty is that scholars at member institutions have largely ignored these original sources, preferring secondary ones or eschewing amateur sports altogether in favor of coverage of issues affecting professionals. Thus, very few law review articles or other scholarly writings address these documents. As a private association, the NCAA is not required to make its internal records public. Also, it appears that persons outside of athletic representatives of institutions and sports reporters have traditionally shown very little interest in these matters. Thus, there has been no "demand" for NCAA legislative history materials. Even the Library of

265. Id. at 198-99.

Congress has no significant holdings. At member institutions, there has been no regular process of placing these materials in libraries. NCAA Proceedings sit on athletic department shelves until they become dated and, then, they are discarded, if not before. Thus, it cannot be said that the lack of available public information just prior to Restructuring was a nefarious attempt by the NCAA to keep its operations a secret. Such action was not needed. The public— and the non-athletic departments of colleges and universities— simply did not care, perhaps because they did not desire that outside meddling interfere with their beloved games, perhaps because they trusted the NCAA, perhaps because they perceived the issues involved— sports and student rights— to be undeserving of serious consideration.[266]

C. *What Deference is Due?*

The courts have erred by attempting to shoehorn NCAA legislation into categories such as "amateurism" or "eligibility." The approach is understandable given virtual absence of public discussion and information about the intricacies of the NCAA legislative process or its historical evolution. But in fact, each regulation is an attempt by an organization with competing and ever more complex interests to balance those competing concerns. Education and amateurism are among these interests, but one must also include preserving competitive parity among members and promoting and protecting the commercial interests of members. Indeed, there are other interests, such as promoting safety and institutional financial responsibility as well.

Only the first two of these themes— education and amateurism— captures the kind of concerns that courts seem to be most willing to embrace when they speak of deference. Thus, rather than presuming that deference is due, the courts must begin to examine what motivations drive the challenged

266. As noted earlier, in recent years the NCAA has opted to make its printed proceedings and other documents available to the public because it has seen widely available public information about its policies as advantageous. This new openness was, in part, a response to public criticism of the NCAA's process of investigating member schools. See, e.g., supra note 141. For a discussion of the emergence of sports as a subject of legal scholarship see, e.g., Carter, supra note 219.

NCAA action, rather than relying upon that institution's own categorization of its policies. Like any litigant and like any organization with a vested interest in its public persona, the NCAA will cast its actions in the best possible light. But to really reach the heart of the matter, courts must consider these questions independently of NCAA characterizations, allowing plaintiffs discovery on these questions.

Where deference is concerned, the courts must also distinguish NCAA goals effectively and determine which of the varied goals that drive NCAA legislation best serve public policy. If courts wish to preserve some vestige of *Tarkanian*, they can most easily give deference when they find that the primary purpose of legislation was academic. Taking this approach would be consistent with the traditional "educational deference" discussed at the outset of this section; it would not be a great diversion from other cases in non-sports contexts which grant deference on academic matters. But the court should be careful not to stretch the meaning of "academic" too far, to embrace nontraditional definitions of that term. Moreover, academic regulations should be subject to the same legal attacks to which they would be subject if in the nonacademic context.

The second favored policy category reflected in the cases is rules that promote "amateurism." Amateurism, as used here, does not include academic rules. Essentially, it should be narrowly conceived as those rules (other than academic rules) that are designed to distinguish amateurs from professionals and the amateur game from the professional game. In particular, amateurism must be distinguished from *parity*, which is a principle of competitive equality applicable to either professional or amateur sports.

There are those who believe that the courts should simply abandon their support of amateurism. I do not hold to this view. But certainly, their embrace should be tempered. There is no one definition of amateurism for all time. When the NCAA was first founded, most of its members opposed athletics scholarships, for that was considered pay for play. For this reason, in the early days, student-athletes faced no restrictions on their ability to work. Indeed, the decision of some schools to give free room and board to football players—

rather than requiring football players low on money to take on a part-time job— was at the center of the debate over the Sanity Code that nearly caused the dissolution of the NCAA.[267] So too, the first NCAA convention unanimously adopted a resolution that member schools would discourage intercollegiate athletics and encourage intramural athletics because the amateur spirit suggested that college athletics should be preserved for the widest participation possible.[268] So much for that idea as a pillar of amateurism. One could cite many more examples of the public's evolving views on what is essential to amateurism. These facts support the view that when NCAA rules are substantively challenged, no automatic deference should be given to rules whose primary purpose is preserving amateurism, but instead, amateurism, as defined by the defenders of the challenged policy, should be placed on the scales as a value and balanced as against other interests that, when vindicated, also serve the public good.[269] Following this approach, amateurism could tip the scales in a close case, but it could also be offset by concerns of greater public significance, such as individual constitutional rights or educational concerns. Using this analysis in the antitrust context, one could continue to justify the outcome of cases like *Board of Regents* but on far sounder ground than mere folklore about the NCAA's work or its product.

Two other interests that weigh heavily in the NCAA's balancing have been mentioned: preserving parity and promoting the commercial interests of members. These aims should not be afforded any special treatment as against student-athlete rights. One could, perhaps, justify some deference on the parity question as against the interests of commercial actors, but the favored policies would need to be

267. See discussion supra at 39.

268. See Resolution, 1906 Proc. at 25-6 (resolution that "the number of intercollegiate match games in all branches of athletic [sic] sports should be strictly limited by faculty vote" and that "interclass games and inter-mural athletics in general should be fostered, to the end that a larger number of students may receive the benefits, and that intercollegiate competitions be made rather an incident than the main end of college and university athletic sports").

269. Obviously, I do not agree with those who argue that amateurism concerns should not be considered at all in assessing the legal validity of NCAA rules.

clearly necessary in order to preserve some essential aspect of amateur athletics. Other concerns driving NCAA legislation can be similarly balanced with no special deference.

Certainly, a given piece of legislation may be driven by many different concerns. But when academics does not emerge as the *primary concern* driving NCAA regulations, the courts must assess the NCAA's own balancing act in light of a public policy that stands apart from that body, not one that is synonymous with its decision-making. The NCAA cannot complain of this approach. The view is consistent with the NCAA's embrace of education as a fundamental purpose, with its embrace of the principle of student-athlete welfare in its constitution and with traditional judicial deference on academic matters. It is also consistent with the recognition that the NCAA is not merely a body of academic institutions; it is a commercial actor whose job it is to promote the interests of its members against the world.

What of deference and the state action dilemma? The courts must now assess *Tarkanian* through new eyes, aware of the new post-Restructuring facts that could establish both delegation and conspiracy. In Division I those facts include the delegation of legislative authority to the Board and the new legislative process that limits individual institutional input. But as to all divisions, Restructuring has brought and promises to continue to bring tremendous changes in the process that brings us what is still collectively called "NCAA legislation." As to all three divisions, then, limited discovery should be allowed on the state action question, prior to dismissal. A new approach to deference is needed if the courts are to truly do justice in cases involving intercollegiate athletics. But a second look at deference is especially needed in cases raising claims on behalf of student-athletes. The lack of member status for student-athletes in that body certainly can be defended as a matter of private body structure, but it essentially means that their interests are often underweighed in the NCAA's own balancing process.

Unlike member schools, student-athletes are not members of the NCAA. Lacking member status, they have virtually no ability to directly shape the regulatory environment that so directly affects them.

Unlike employees, student-athletes are not instrumentalities of members. They lack a negotiated contractual relationship with their institutions. Indeed, student-athletes cannot have professionals "negotiate" their scholarships with educational institutions for such person would be considered an "agent . . . marketing the individual's athletic ability or reputation" under NCAA rules.[270] Unlike employees, student-athletes do not represent their institutions at NCAA conventions and cast the votes. They do not shape internal athletic policy. They do not dominate the NCAA management councils. They have no direct representation in the NCAA through NCAA affiliates (such as coaches' organizations).[271] They have no independent appeal rights in NCAA proceedings.[272] Generally speaking, they lack the same type of direct access to the administration of their Universities that athletics personnel possess. In the world of the NCAA, university employees are both regulators and the regulated; student-athletes are *always* the regulated.

Unlike employees and unlike outside commercial actors, student-athletes lack the financial clout or the independence from the process to bring challenges to vindicate their rights. It is no coincidence that the *Smith* case was brought *pro se*. Indeed, there is a always risk that, unless pre-approved, free legal assistance to a student-athlete would be construed by the NCAA as "compensation" for athletic ability, in violation of NCAA amateurism rules. This potential to lose one's eligibility must have a chilling effect, though again, resulting from a questionable exercise of power.

Whether or not increased student involvement or representation is wise is ultimately a decision for the NCAA and member institutions to make. But courts must take that decision into account in deciding what deference is due. A

270. See, e.g., 1998-99 NCAA Div. I Manual, Bylaws, § 12.3.3, at 77.

271. See, e.g, List of Affiliated Members Attending Convention, 1997 NCAA Convention Proc. at 54. See also supra note 5.

272. Lacking NCAA member status, student-athletes do not have the right to file independent appeals; the rules assume that the school will file the appeal for them. Interestingly enough, the rules do suggest that an employee can file an appeal on his or her own behalf, but there is no comparable rule for student-athletes. See 1998-99 Div. I Manual, Admin. Bylaws, § 32.103, at 443-44.

general policy of deference to the NCAA and member schools on athletics issues when student-athlete rights are at the center of the debate ignores the political horse-trading that gives rise to NCAA policies— horse-trading in which education sometimes takes a back seat to parity and to commercialism.

D. *What College and University Presidents Can Do Now*

If a federated NCAA is inevitable, then what changes can be made within the context of Restructuring to make it better? It seems that the following are needed at a minimum.

1. *Creating Viable Institutional Mechanisms for Assessing the Impact of Future Legislation Upon Student-athletes*

Across the divisions, institutional mechanisms are needed to assess the impact of legislation *upon student-athlete welfare* before that legislation is well on its way to adoption and to provide that assessment to those voting on that legislation. The NCAA's reliance upon the SAACS as the primary and sole focus of this investigation is misplaced, for reasons already stated. Certainly, the various SAACs have to be consulted on such matters and their input is crucial, but as their current troubles with funding, communication and resources reflect, they fall far short of what is needed. Moreover, institutions must abandon the assumption that student interests are synonymous with institutional interests. If the "educational" goal of athletics is to mean anything, mechanisms within the divisional governance structures to consider student-athlete needs and rights as balanced against institutional and collective NCAA needs and rights are needed.

2. *A Review of Existing Legislation and Decision-making Models for Infringement on Student-athlete Rights and Fairness Issues*

As noted, as far as substantive legislation is concerned, Restructuring simply dumped many of the old NCAA rules into the new Divisional Manuals. Thus, many of the problems that existed under the old rules remain. The NCAA should view the matter of student impact of this existing legislation as seriously as it views matters that directly affect its

membership. For example, in 1999, the NCAA's CEO directed its legal counsel to do a complete assessment of existing NCAA legislation to determine whether that legislation raises antitrust issues.[273] The call to review legislation from the antitrust perspective came as a result of numerous antitrust lawsuits against the NCAA as to which, in some occasions, the body has paid a dear financial price.[274] Similar attention is needed as to student-athlete issues. Areas that deserve particular focus are student rights in infractions cases, student rights to work (as opposed to "financial aid" issues), academic concerns and student-athlete freedom of expression. While not all institutions within the NCAA are publicly funded, all have no doubt embraced a campus policy of free expression and student rights and responsibilities. Moreover, all as educational institutions have an obligation to ensure that their actions do not curtail important student rights in the name of perpetuating institutional athletics.

But apart from the question of "rights," there are also questions of fairness. Such fairness issues include procedures schools should use for termination of student-athlete scholarships and the handling of student-athlete grievances against athletics personnel. Then, of course, there is the question of "pay for play," affording student-athletes some part of the huge financial return of intercollegiate athletics apart from scholarships. Perhaps institutions are correct to reject the "pay for play" model for student-athletes. Indeed, minimum wage models seem woefully inadequate, but models viewing students as "employees" entitled to compensation don't seem to fit either. However, there may be other solutions that can advance fairness concerns where they relate to student-athletes and assistance beyond scholarships. For example, institutions might consider establishing a kind of student-athlete savings plan through a trust or other vehicle funded solely by money contributed by the NCAA (i.e., member schools). Perhaps student-athlete rights to such money should not fully vest until the student-athlete has graduated. Such a

273. See Dempsey Speech Chronicles Changing Face of College Sports, NCAA News, Jan. 18, 1999, at 9.

274. See supra note 51.

plan could serve as an incentive for students to complete their education and could teach them about the value of investing and saving. Moreover, such plans could compensate for the lack of time student-athletes have to learn about such issues and, frankly, operate to keep money intended for the student out of others' hands until the student is in a position to make decisions for himself or herself. Member schools could lobby for favorable tax treatment for such arrangements, such as treatment that would encourage student-athletes to leave the money invested for longer periods, possibly even offering the option of rolling the money over into an individual retirement account once they are employed. Such innovative approaches would require special legislative action, but the NCAA has never been hesitant to lobby for necessary legislative action. Of course, there are many other fairness questions to consider, and SAACs can be helpful in identifying these concerns.

3. *Assuring Public Access to Information About Divisional Action*

Institutions must make a *public* commitment to public access to information about Divisional legislation and policies before these policies are adopted. In this regard, the restoration of the national convention as the place where key Division I legislative initiatives will be specifically discussed would be a good first step. Any approach should restore participation by the SAACS and also make discussions matters of record and part of the legislative history of particular legislation.

Four considerations make the need for objective data and broad access to information on NCAA operations (or more accurately, and that of member schools through that organization) particularly vital. First, the sports media is relatively a small group that must be concerned with entertainment as well as news— and sometimes the former more than the latter. The recent controversy over sports reporter Jim Gray's interview with Pete Rose at the 1999 World Series provides a fine example of this trend.[275] Even in

275. Rose, banned for life from baseball as a result of Major League Baseball's findings that he gambled on the game, was recently selected as one of the century's

investigative reporting, the media's work is often hamstrung by its need to maintain close relationships with the very teams and personalities upon whom they report and their own direct involvement in the promotion of the sporting events they are covering. The incentive is strong to ignore negative information in order to maintain a good relationship and the access it affords. Moreover, as discussed earlier, after Restructuring, the media has given less and less attention to the legislative process; indeed, much of it is now underground as to outsiders.

Second, ready availability of information is important because monitoring of NCAA/Divisional action is now more difficult, given the likelihood of differences between the divisions' approaches. Instead of one NCAA manual, there are now three, each reporting divisional legislation, and that tripling effect will be apparent at every level of institutional information, from divisional to committee reports.

Third, a broad approach to public information is compelled by the unique situation of student-athletes. As antitrust litigation demonstrates, while litigation is expensive, it is one of the factors that keeps an institution focused on handling matters consistent with law. But generally speaking, student-athletes lack the financial and informational resources to litigate claims they may have and, given their short collegiate eligibility terms and dependence upon their institutions, they face strong disincentives to litigation, including the NCAA's power to require their institutions to declare them ineligible for activities falling within the purview of NCAA prohibited conduct. At the same time, they are not themselves NCAA members and they lack an affiliated advocacy group within that organization.

Fourth, the world in which student-athletes and their schools could be assumed to have the same interests is long

greatest players and invited to appear at the 1999 World Series in recognition of the honor. At a live interview during the game, Sportscaster Jim Gray dared to asked Rose whether he was willing to acknowledge that he had indeed bet on baseball. Rose appeared surprised at the inquiry. Subsequently, Gray was attacked by fans and commentators who claimed that he ruined a celebratory day and that his questions to Rose were inappropriate. See, e.g., USA Today, Nov. 8 1999, at 26A (letter to the editor).

gone if, indeed, it ever existed. The process of legislating very much affects the rights of student-athletes. Given that student-athletes have no membership status in this powerful organization, the NCAA and its constituent members have an obligation to proceed openly and to subject their work to public scrutiny before they can claim any rights to favored treatment in the courts. Indeed, *if* education remains a primary goal of intercollegiate athletics, then such an open approach is, presumably, in their interest.

The divisions themselves may best be able to decide what practical steps can be taken to fill the public information gap. Suffice it to say that second hand interpretations of NCAA processes filtered through public relations channels are not what is needed. Moreover, the information needs to be available in such a way that it is not impractical for observers to view divisional action over a period of time. Finally, as to all policies, divisions need to ensure that they are put *in writing* and not made the subject of secret common law known only to insiders. The public, the student-athletes, the member institutions and the NCAA cannot afford a governing organization that conducts its business behind closed doors.

E. *Restoring the Deliberative Process in Division I For Legislation Affecting Student-athlete Welfare/Restoring Student Welfare as a Significant Convention Issue*

Division I, in particular, needs to restore in some measure the principle of one institution, one vote, particularly when legislation may have a negative effect on student-athletes or any discernable group of them. There are many ways to accomplish this short of dismantling the Board and requiring a vote on all issues, and ultimately, Division I must come up with proposals tailored to its unique needs. However, some ideas come to mind.

There are some issues that only indirectly affect student-athlete welfare. Access to championships, television contracts and revenue sharing among schools are three of them. While student-athletes certainly have an interest in these topics, it is not as significant as their interest in financial aid rules, student-athlete eligibility or rights to free expression. The

divisions need to identify legislation that possibly has a significant impact on student-athletes and adopt different procedures for this legislation. Ideally, these issues should be restored to the status of issues that are subject to debate and adoption at the national convention. Short of this, though not as acceptable, the Division may make the procedures for overriding votes more lenient in such cases by reducing the number of schools needed for a convention vote, where significant student-athlete impact is identified. Additionally the notice and comment periods could be extended for such legislation so identified, particularly since the legislative cycle is now reduced to two sessions and procedures may be implemented for members to identify legislation as having a significant student-athlete impact when the Division I governing structures do not. Objections should be shared with the larger membership, which may then decide if it desires to join in on them. The down side of such an approach, one might argue, is that members would try to block positive legislation as well by such a procedure. And yet, this could happen under any procedure. Thus, if it is to happen, it is best to require members to take their stances on the record.

It will be said, certainly, that the NCAA is a private organization and that it need not open its doors to public scrutiny. In fact, however, as we have seen, the NCAA has not historically offered itself as a private organization concerned only with private matters. Indeed, while clinging to its private status, it has also argued in the courts that it serves the public good and, as a result, as argued above, it has been the beneficiary of a great deal of judicial goodwill. Moreover, by choosing to benefit from nonprofit status, it certainly has invited the public scrutiny of its operations. The large number of public institutions involved in the NCAA, and the fact that its operations very much affect the lives of students, further justifies public scrutiny of its work.

F. *Re-examining the Premise of "Presidential Control"*

Finally, presidents need to reexamine the premise of "presidential control." When we consider the history of the NCAA, we see repeated over and over again the theme that the reason that college sports has run aground is that presidents

(or in earlier days faculty) have not been in control. The historical resilience of the theme is significant. It suggests that "presidential control" may mean different things to different colleges and universities. It also suggests that "presidential control" is not the real problem at hand nor is it necessarily the driving force behind NCAA legislation whenever the term is invoked.

It must be conceded that the theme serves an important political purpose for those who invoke it. If indeed presidents *have* been in control in the past, then they bear a heavy responsibility for the problems of amateur athletics. This concession might, in turn, suggest that educational institutions should forfeit their rights to control of amateur athletics. Thus, a claim that what is lacking is "presidential control" assures us, without much history to back it up, that if presidents are permitted to be in control, things will be better.

Second, the theme of presidential control also helps to perpetuate the notion of the university as a proper guardian of all the student-athlete's interests. It presumes a *oneness* of interest between the athlete and the institution. Student welfare thus becomes the same as institutional welfare. But presidents must accept that the *in loco parentis* assumption is not always proper. Presidential control alone cannot be the solution to every ill.

Third, the theme erroneously embraces a conception of the university as a neutral, non-biased, and non-economically driven actor. This concept, in turn, argues against a need for an opposing voice or external critic. And yet, the truth is that university decision-making is value-laden and that, history has demonstrated that in the case of athletics, a strong pressure exists to counter even the most fervent interest in protecting student-athlete welfare. Thus, presidents must concede the need for external review of institutional and NCAA conduct of athletics.

The fallacy of the claim that a lack of "presidential control" is the cause of ills and that procedural changes is the cure was not lost on those who challenged an earlier kind of "Restructuring," the creation of the president's commission at the 1984 NCAA convention. Of that effort, one college president stated:

> Almost implicit in [this legislation] is the assumption that the presidents have not been effective in the past in the NCAA because some impediment existed there and we can sweep this aside now and create a new thing that will make their effectiveness possible. I simply do not believe that that is true.
>
> This is not a popular message with my presidential colleagues, and I am as much involved and as guilty as any of them in what I am about to say. But the hard fact is that presidents have generally been neglectful of their interests and concerns for the things that are dealt with in this body. They have not only not attended over the years, they have not even bothered in many cases to instruct the very persons they have certified as delegates to this body. What that tells me very simply is that probably the most dramatic change that needs to be made, and one that will produce considerable effect, is the change in attitude and in actions of those of us who are presidents and who, in fact, do bear considerable responsibility for this matter.[276]

The truth is that in the face of stinging and, yes, sometimes unfair criticism from the outside, the NCAA has adopted a disingenuous approach to describing its role in the regulation of intercollegiate athletics where student-athletes are concerned, relying upon the political-speak that is favored by business organizations rather than the plain talk that is more worthy of their members' mission as educational institutions. The result is sad because NCAA proceedings, carefully examined, reveal a number of outstanding instances of individual delegates and institutions speaking out on behalf of student-athlete interests and, as well, putting education first. One sees in such debates both those who view their goal as simply the production of income and winning teams and those who view themselves as educators. By returning to its cocoon through Restructuring, the NCAA has created a risk that the

276. Comments, 1984 Proc. at 106-07.

first group will tighten its control over intercollegiate athletics and over the futures of student-athletes.

Given that fact, courts should now take a careful look at the new NCAA and its member institutions. The judicial deference that has for so long surrounded athletics programs and the great degree of goodwill that the NCAA has had in the courts should now be questioned. This reassessment is necessary across the board, but it is particularly urgent in cases that bring to the forefront the rights of student-athletes.

It is not clear that one would want to turn back the clock to the pre-Restructured NCAA. Complaints that the former NCAA had become too bureaucratic are not wholly unfounded and, indeed, the divergent interests of the various divisions may make such a turn back impossible. It is similarly true that in many instances that bureaucracy worked to disadvantage the student-athlete. But the suggestion that structural changes alone will create dramatic, positive changes in student-athlete welfare should be viewed with caution. The best evidence of the future of Restructuring is its past. That past tells us that both parity and commercialism have historically played a major role in NCAA structural changes. It may also tell us that we can no longer look to the NCAA alone to protect student-athlete interests— but that discussion is for another day. Whatever the case, because so much was left unsaid in debates over the NCAA's most recent incarnation, it is inevitable that we will, at some point, arrive back to where we started. Certainly, absent some bold initiative, we will hear once again, in the distance, college and university presidents chanting that same old, sad, "presidential control" song.