INTERCOLLEGIATE ATHLETICS: COMPETING MODELS AND CONFLICTING REALITIES

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I. INTRODUCTION

Two competing models of intercollegiate athletics emerge from judicial decisions and scholarly discourse. Although these models share common elements, they nevertheless reflect sharply contrasting visions of intercollegiate athletics. One model, the amateur/education model, has assumed a position of prominence. Assumptions underlying this model have historically been invoked to influence judicial decisionmaking on matters ranging from student-athlete\(^1\) entitlements to worker's compensation benefits\(^2\) to antitrust challenges to NCAA regulations.\(^3\) Under the prevailing amateur/education model, college sports are an avocation, engaged in by student-athletes to reap the educational, physical, mental, and social benefits presumably derived from athletic competition.\(^4\)

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The NCAA defines a student-athlete as "a student whose enrollment was solicited by a member of the athletics staff or other representative of athletics interests with a view towards the student's ultimate participation in the intercollegiate athletics program." NCAA OPERATING BYLAW art. 12, § 12.02.6, in NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1993-94 NCAA MANUAL 63 (1993) [hereinafter NCAA MANUAL].

2. See infra parts III.C; IV.

3. See infra part V.A.

4. See John Scanlan, Introduction: Antitrust—The Emerging Legal Issue, 61 IND. L.J. 1, 2 (1985) (quoting NCAA OPERATING BYLAW art. 12, § 12.02.1). Amateurism and
The competing paradigm, the commercial/education model, recognizes the dynamic influence which commercialism exerts over intercollegiate athletics.\(^5\) The commercial/education model, more closely reflective of the modern day economic realities of college sports, can thus be contrasted with the competing amateur/education model, premised on illusory assumptions which fail to acknowledge commercialism as the driving force in college athletics.\(^6\)

Dissonance between the amateur/education conceptualization and the present day realities of college sports casts doubt on the legitimacy of employing the principles and values of the amateur education model in judicial decisionmaking. A reexamination of judicial decisions premised on the amateur/education model, in light of the alternative conceptual scheme, demonstrates the need to restructure the rights and responsibilities of participants in college sports. Understanding the assumptions underlying the commercial/education model also elucidates the true reasons for promotion of the amateurism principle.\(^7\)

This Article argues that the values of the amateur/education model no longer adequately function as a basis for analyzing legal issues arising in college sports. Costs ensue from resort to this model for the parameters of analysis: judicial refusal to explicitly recognize the commercial/education model precludes an honest evaluation of the competing interests at work in disputes between a student-athlete and his university.

At the same time, however, affording wider legitimacy to the commercial/education model tacitly accepts the move toward professionalism in college sports. This, in turn, increases the potential liability exposure of colleges and universities with regard to athletic activities. Therefore, practical, social, and economic concerns demonstrate that wholesale adoption of the commercial/education model is far from a cure-all for the complexities of contemporary intercollegiate athletics.

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5. See infra part II.B.1.
6. See infra part II.A.3.
Nonetheless, meaningful opposition to implementation of the commercial/education model in judicial decisionmaking will require conscious deliberation over what intercollegiate athletics should entail, since this model is a true reflection of the forces which currently influence relationships and choices made in intercollegiate athletics. Because the suitability of this or any other vision of intercollegiate athletics cannot be determined until the prevalent models are identified and evaluated, this Article undertakes such a task in Part II.

Part III outlines principles derived from employment and contract law that typically supply the doctrinal guidance for resolving student-athletes' worker's compensation claims. Upon examination of the decisions which have considered whether student-athletes fall within the scope of worker's compensation statutes, Part III concludes that a court's conceptual vision of intercollegiate athletics substantially influences judicial resolution of these legal controversies. This Article theorizes that the model of intercollegiate athletics chosen in fact provides a concurrent basis for these decisions.

The prevalence of the amateur/education model in worker's compensation cases represents a pattern of judicial resolution detectable among other decisions in the arena of intercollegiate sports. An examination of antitrust challenges to rules and regulations of the National Collegiate Athletic Association (NCAA) in Part V reveals the extent to which courts rely on the values of the amateur/education model to uphold contested rules.

Part V also addresses instances in which the judiciary has departed from this pattern. In this regard, decisions defining the student-athlete's relationship with his university as contractual in nature represent a shift

8. See infra part III.C-D.

9. A recent administrative ruling defining a former student-athlete as an employee of the university for which he played football and awarding him worker's compensation benefits provides a useful vehicle for examining the foregoing proposition. A. Kent Waldrep, Jr., No. 75-123945DN (Tex. Workmen's Comp. Comm'n Mar. 17, 1993). The Waldrep decision is given extensive consideration in Part IV.

10. See infra part III.D.

11. The National Collegiate Athletic Association is a nonprofit voluntary association which consists of approximately 950 four-year colleges and universities. Thomas R. Ostdiek, Comment, LB 69: Need Based Financial Aid for College Athletes, 25 CREIGHTON L. REV. 729, 738 (1992). Its primary purpose "is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports." NCAA CONST. art. I, § 1.3.1, in NCAA MANUAL, supra note 1, at 1.
toward a commercial/education paradigm, yet fall short of a wholesale adoption of this model.\footnote{12} This section also examines a recent judicial decision recognizing the "special relationship" between a student and his university as a basis for imposing tort liability on the latter.\footnote{13} Part V explores the significance of this decision to the potential for broader acceptance of the commercial/education model.

Part VI explores the rationale for selecting one model over the other, and suggests that judicial preference for the amateur/education conceptualization is partly attributable to the idea, which members of the judiciary share with large segments of American society,\footnote{14} that intercollegiate athletics is simply another social activity. It also suggests that the possible legal and practical consequences of defining a student-athlete as an employee for worker's compensation purposes underlies the preference for the amateur/education model.\footnote{15}

Part VII concludes that reticence on the part of courts to adopt the commercial/education scheme is related to more than these conscious or subconscious beliefs. The values implicated by the amateur/education model serve as convenient justifications for avoiding the deleterious effects which will presumably result from adoption of the alternative commercial/education model.\footnote{16}

II. COMPETING MODELS OF INTERCOLLEGIATE ATHLETICS

A. The Amateur/Education Model

1. The Amateur Value

Under the amateur/education model, the student-athlete is viewed as an amateur, and college athletics is considered an integral part of the educational purpose of universities. The NCAA articulates the amateurism principle as follows: "Student-athletes shall be amateurs in an intercollegiate sport. . . . Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."\footnote{17}
The principle of amateurism reflects more than a line of demarcation between professional and amateur sports: the student-athlete under the amateur/education model occupies an idealized status, and embodies altruistic values of selflessness, devotion, sacrifice, and purity. The overinflated importance of college and professional sports in American society and the enormous societal expectations which accompany this position makes this ideal all but unobtainable.

In short, college athletes enjoy unique and celebrated positions in our society. Biologically and sociologically, they are set apart from non-athletes. They assume positions in team hierarchies where the welfare of others comes first. They must maintain their purity, maintain their freedom from the taint of money and the corruption associated with the commercial world. To succeed and meet society’s expectations, athletes come close to surrendering their total selves.

Amateurism in its purest sense means that an athlete is given nothing of pecuniary value in exchange for participating in college


Some describe the near reverence for student-athletes as an adulation tainted with a jealousy of the athlete’s fitness, talent, and glamorous lifestyle. Id. at 560; see also Lee Goldman, Sports and Antitrust: Should College Students Be Paid to Play?, 65 Notre Dame L. Rev. 206, 232 (1990) (noting that the NCAA supports restrictions on payments to college students in order to preserve the “revered” tradition of amateurism).

“The college athlete becomes a vessel for our hopes. He or she symbolizes in bold belief our struggles, and models the qualities of greatness that are part of the American dream—a dream which requires periodic reaffirmation in a cynical world.” DONALD CHU, THE CHARACTER OF AMERICAN HIGHER EDUCATION AND INTERCOLLEGIATE SPORT 10 (1989). Professor Chu also suggests that college sports serve the related function of unifying people of divergent experiences and beliefs. Id. at 55.

Given these attitudes concerning the role of intercollegiate sports in American society, it is not surprising that hints of professionalism threaten society’s expectations concerning the altruistic and social values embodied in the student-athlete. See Rush, supra, at 562; see also Goldman, supra, at 232 (noting that “the public with ‘stubborn innocence’ adheres to the Olympic ideal of amateurism for its own sake”).


20. Rush, supra note 18, at 562; see also Joanna Davenport, From Crew to Commercialism—The Paradox of Sport in Higher Education, in SPORT AND HIGHER EDUCATION 14 (Donald Chu et al. eds., 1985) (noting the significant economic, social and political impact of strong athletic programs on universities).

The content of intercollegiate athletic regulations reinforces the lofty societal expectations of the amateur athlete. Rush, supra note 18, at 564.
In other words, a quid pro quo is absent. Yet, because financial assistance and other tangible benefits accrue to student-athletes, college athletics has spawned a hybrid form of amateurism. Professor Rush refers to this hybrid form of amateurism as "scholarship amateurism." "

2. The Education Value

The education principle provides the other prominent feature of the amateur/education conceptual scheme. The education value embodies the notion that college athletics is an integral part of the educational process. Several arguments have been asserted to support this view of college athletics.

21. Rush, supra note 18, at 581; Smith, supra note 7, at 224 (defining an amateur athlete as one who does not receive anything of economic value for athletic participation); see also NCAA OPERATING BYLAW art. 12, § 12.1, supra note 1, at 67 (specifying that only amateur student-athletes are eligible to participate and that they may not receive "pay").

Intercollegiate athletics presents a hybrid form of amateurism. Nevertheless, the NCAA attempts to promote the amateurism ideal through regulations which prohibit student-athletes from receiving pecuniary benefits, other than financial aid, for their sports participation. Article 12 of the NCAA Bylaws enumerates the requirements for retaining amateur status. For example, one section states: "An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual: (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport . . . ." NCAA OPERATING BYLAW art. 12, § 12.1.1(a), supra note 1, at 64.

22. These benefits include access to academic support programs, and training facilities and personnel. Smith, supra note 7, at 225.

23. Rush, supra note 18, at 581; see also Goldman, supra note 18, at 234 (arguing true amateurism in college sports died some time ago as evidenced by the benefits which accrue to student-athletes for their participation in sports).

24. Professor Rodney Smith notes that the educational value, which focuses on the maintenance of college sports as an integral part of the education program, and the amateurism value which focuses on retaining the line of demarcation between college and professional sports, are reflected in the basic purpose of the NCAA as set forth in its constitution. Smith, supra note 7; see NCAA CONST. art. 1, § 1.3.1, supra note 11, at 1. After examining these values, Professor Smith concludes that while they are often complementary, these values nevertheless represent separate concepts. "For example, an athletic event can be amateur in nature without being an integral part of an educational program, and . . . an athletic program may be commercialized without necessarily compromising its role as an integral part of an educational enterprise." Smith, supra note 7, at 216.

25. This concept is deeply rooted in the history of college athletics. For instance, prior to World War II, engaging in intercollegiate sports competition was perceived as an extension of a student's academic development. Johnson, supra note 1, at 106; see also
Some commentators assert that, like students who participate in performing arts such as orchestra or dance, participants in intercollegiate athletics have an opportunity to define and develop useful skills. Others suggest that because of the physical conditioning and competitiveness inherent in sports, athletics assist in developing the character of student-athletes. Finally, it is thought that college sports provide a sense of community and create healthy diversions for students, and are therefore educational in nature.

The rules and regulations which govern intercollegiate sports also reflect educational values. For example, educational values are protected by Proposition 48 limitations on the number of hours a student-athlete can practice, and minimum academic eligibility requirements. Through its rules and regulations, the "NCAA professes to adhere closely to academic or educational values in the governance of intercollegiate athletics, including big-time, revenue-producing sports at the collegiate level." Indeed, enhancement of the educational value in big-time intercollegiate athletics is the subject of intense debate in, and the goal of, proposed reforms.


26. Smith, supra note 7, at 220.
27. Id. at 221.
28. Id. at 222. Professor Smith, however, challenges the validity of recognizing college athletics as furthering the educational mission of universities simply because athletics may be analogous to other recreational activities with recognized educational value. Id. at 220-22; see also Gregory M. Travalio, Values and Schizophrenia in Intercollegiate Athletics, 20 CAP. U. L. REV. 587 (1991) (questioning whether intercollegiate athletics is an appropriate vehicle for transmitting the values often used to justify the status of college sports).
29. For a discussion of other ways in which the educational principle are reflected in intercollegiate athletics, see infra part II.B.2.
31. NCAA CONST. art. 17.1.5, supra note 11, at 215.
32. NCAA CONST. art. 14.01, supra note 11, at 117.
33. Smith, supra note 7, at 217. It should be noted that this article focuses on "big-time intercollegiate sports" which is typically defined as consisting of Division I-A football and Division I basketball, the primary revenue-producing sports. As noted by Professor Smith, "[i]ntercollegiate athletics at the Division II and III levels rarely pose problems in terms of the furtherance of academic values because the economic pressure to win and to produce an entertaining product is less inherent in athletics at those levels than at the more competitive Division I level." Rodney K. Smith, Little Ado About Something: Playing Games with the Reform of Big-Time Intercollegiate Athletics, 20 CAP. U. L. REV. 567, 569 n.5 (1991).
The NCAA’s 85th annual convention, held in January 1991, is heralded as the “Reform Convention.” Davis, supra, at 599. Major proposals accepted by the body’s members include: (1) Proposals 20 and 21, which limit recruitment contacts with prospective student-athletes; (2) Proposal No. 30, which prohibits athletic dormitories; (3) Proposal No. 31, which limits the training-table meals which Division I institutions can provide; (4) Proposal No. 34, which places restrictions on the size of coaching staffs; (5) Proposal No. 38, which reduces the time which student-athletes can devote to practice; and (6) Proposal No. 40, which reduced by 10% the number of scholarships available in Division I-A football and Division I basketball. Id. at 599-608.

This flurry of reform activity has done little to silence critics of intercollegiate athletics. Professor Robert Davis argues that only two of the proposals passed at the 1991 convention focused specifically on the fundamental issues of enhancing academic values and controlling commercialism. Id. at 600. He maintains that these two proposals—Proposal No. 58, which directs the Academic Requirements Committee to develop legislation to enhance NCAA initial and continuing eligibility requirements, and Proposal No. 81, which directs institutions to develop their own satisfactory progress rules—are not reforms at all, but are merely promises for further review in the future. Id. Davis concludes that “the wall of problems facing collegiate athletics remains standing; it has merely been given a fresh coat of paint. Nonetheless, the fact that the problems have been touched upon represents a degree of progress.” Id. at 599.

Professor Smith has also noted the shortcomings of recent reform efforts. “[R]eform efforts in the past have failed to address the very ‘systematic’ problems that must be dealt with in order for such reform efforts to be meaningful. Reform efforts have failed to focus on the academic values that ought to be associated with intercollegiate athletics." Smith, supra note 33, at 568. Professor Smith offers three systematic reforms to achieve the desired focus on academic values in big-time intercollegiate athletics. Professor Smith would: (1) make intercollegiate athletic programs subject to an institution’s accreditation process; (2) require the NCAA to file an academic impact statement with respect to each legislative proposal it considers; and (3) institute a general planning process at the institutional, conference and national levels to address the academic issues confronting intercollegiate athletics. Id. at 569.

At its 1991 convention, the NCAA also enacted reforms focusing on academics. The most significant is article 14.3.1.1, commonly referred to as Proposition 48, which altered Division I freshman eligibility requirements. Under Proposition 48, freshmen student-athletes are required to have a minimum grade point average (G.P.A.) of 2.00 in at least 11 core academic courses in high school. The new legislation becomes effective August 1, 1995 and increases the number of core courses to 13. This provision also creates an initial eligibility index which requires higher G.P.A.s for high school prospects meeting the minimum SAT and ACT requirements. NCAA OPERATING BYLAW art. 14, §14.3.1.1, supra note 1, at 129-30. NCAA delegates also enacted a provison which will require a student-athlete to have completed at least 25% of his degree requirements in the athlete’s specific degree program by the beginning of his third year, 50% by his fourth year, and 75% by his fifth year. Id. §14.5.2.1, at 129-30.

These legislative enactments represent progress primarily because of their focus on academic values. Nevertheless, they fall short of the type of “systematic” changes which Professors Smith and Davis argue are required to enhance the academic value of intercollegiate athletics.
3. Evaluating the Amateur/Education Model

The amateur/education model of intercollegiate athletics fails to acknowledge the forces and interests at play within modern day college sports. This model’s disregard for a university’s financial motive in promoting the success of its athletes and of its programs generally is simply one illustration.35 Related to this shortcoming is the model’s failure to openly address essential features of the student-athlete’s relationship with his university.36

Moreover, the amateur/education model is premised on values, particularly amateurism, which are themselves anachronistic.37 Tracing the concept of amateurism to its Greek roots, the amateurism value historically reflected social class bias: only members of the upper and middle classes possessed the resources necessary for travel, equipment and other expenses which an amateur athlete incurred.38 “[Amateurism] may be anachronistic, in that it is a throwback to an era when only the leisure classes had the time and wherewithal and were permitted to participate in athletics.”39

35. The evolution of college sports into a commercial enterprise, with the concomitant emphasis on winning and revenue production, runs counter to the amateur principle. Robert N. Davis, Academics and Athletics on a Collision Course, 66 N.D. L. Rev. 239, 254 (1990).
36. Id. at 249 (arguing that the principle of amateurism is false because it assumes that college athletics is not predominantly a commercial endeavor).
Another commentator argues that judicial conformity to idealized conceptions is inappropriate given the “big-business environment” in which college-athletes compete. Daniel Nestel, Note, Athletic Scholarships: An Imbalance of Power Between the University and Student Athlete, 53 Ohio St. L.J. 1401, 1405 (1992).
Professor Smith notes that the sole remaining value of amateurism lies in the extent to which it focuses attention on the imbalance between the commercialism of college athletics and educational matters. Smith, supra note 7, at 226. Only in this regard does amateurism as a principle serve educational and academic values. Id.
38. Rush, supra note 18, at 551-52. Class bias also appeared in America where amateurism was used to exclude athletes of “inferior social credentials.” Id. at 552.
B. The Commercial/Education Model

1. Commercialism in College Sports

The commercial/education model of intercollegiate athletics is the competing model which materializes from a review of cases and scholarly literature. This model assumes that college sports is a commercial enterprise subject to the same economic considerations as any other industry.\(^\text{40}\) Under this model, economics displaces the principle of amateurism as the controlling force in college sports.\(^\text{41}\)

Thus, the commercial/education model envisions college sports as a form of entertainment which derives revenues from gate receipts, radio

\(^{40}\) Koch, supra note 19, at 10.

\(^{41}\) Id. Defining characteristics of this model are aptly described by the following:

A rough, but usable, definition of an industry is that it is a collection of firms, each of which is supplying products that have considerable substitutability to the same potential buyers. The firms in the intercollegiate athletic industry are the individual colleges and universities that field athletic teams. From an economic standpoint, these “university-firms” are primarily involved in the selling of athletic entertainment to potential fans and ticket purchasers. In addition, there exists the belief that the university-firms are supplying, via their athletic teams, intangibles such as pride and identification to alumni, legislators, and friends of the institution who might reward or support the institution. In addition, the university-firms in recent years have also been actively engaged in selling to radio and television networks the rights to broadcast or televise the intercollegiate athletic contests in which their teams compete.

Some of the inputs to this multi-product productive process involve capital: stadiums, equipment, and the like. But the most crucial inputs to the production of intercollegiate athletics are people: the coaches, athletic directors and especially the student-athletes who play on the teams that the university-firms field. The key to understanding the development of modern intercollegiate athletics is an understanding of the competition for, and the use of, inputs such as student-athletes.

Id. at 11 (footnote omitted); see Goldman, supra note 18, at 241 (stating that college sports is big business); Frank W. Carsonie, Comment, Educational Values: A Necessity for Reform of Big-Time Intercollegiate Athletics, 20 CAP. U. L. REV. 661, 669 (1991) (commenting on pecuniary benefits, such as television revenues and alumni donations, which arise from a successful football program).

Another commentator concurs in this modern-day characterization: “Nothing could be more professional than big-time college football and basketball teams: colleges recruit and compensate coaches and athletes, impose admission charges for games, and derive substantial revenue from broadcasting. But the terms ‘professional’ is studiously avoided. Professionalism is inconsistent with the ‘myth of the “student-athlete”’...” Erik M. Jensen, Taxation, the Student Athlete, and the Professionalization of College Athletics, 1987 UTAH L. REV. 35, 35-36 (footnotes omitted).
and television contracts, and alumni contributions.\textsuperscript{42} The visibility, pride, and prestige which a winning team or athlete brings to the institution, though less tangible benefits, are other earmarks of the commercialization of college athletics.\textsuperscript{43} Thus, a predominant characteristic of this model is that college athletics is a commodity: it is marketed, advertised, and sold like any other product in order to capitalize on the potential benefits of a successful athletic program.\textsuperscript{44}

In sum, this model postulates that the desire to enhance revenues and realize other benefits leads to increased pressures on colleges to recruit the best athletes and to field winning teams.\textsuperscript{45} Indeed, commercialism and the concomitant pressure to win results in a compromise of the other feature of this model, the educational value.\textsuperscript{46}

2. The Education Value

Despite the considerable impact of economic factors on college sports under this model, education remains a component of the commercial/education conceptualization of intercollegiate athletics.\textsuperscript{47} The financial aid given to student-athletes provides many educational opportunities that otherwise would not be available.\textsuperscript{48} In addition, the


\textsuperscript{43} Katz, supra note 42, at 614. "Students, alumni, and local residents otherwise unconnected with the institution—everyone wants to associate with a winning program."

\textit{Id.}

\textsuperscript{44} Goldman, supra note 18, at 206.

\textsuperscript{45} Schools compete for student-athletes, a "limited supply of talented labor inputs." \textit{Id.} at 210. The potential financial rewards of a successful program, tournament or bowl revenues and alumni contributions, place enormous pressure on coaches to succeed. \textit{Id.} at 241; see also Katz, supra note 42, at 615-16 (noting that universities and hence the NCAA will focus on the growth and success of their athletic programs so long as there are financial and other advantages of doing so); Smith, supra note 7, at 257-58.

\textsuperscript{46} Goldman, supra note 18, at 241.

\textsuperscript{47} Since new models evolve from older ones, new paradigms will typically retain features of the paradigm it replaces. However, the newly evolved paradigm will not interpret the common elements consistently with the old paradigm. \textit{See Thomas Kuhn, The Structure of Scientific Revolutions} 149 (2d ed. 1970).

\textsuperscript{48} A discussion of whether this is the most effective means of providing educational opportunity to those who have been under-represented on our college campuses, particularly the black athlete, is beyond the scope of this paper. For an examination of this issue, see Timothy Davis, \textit{An Absence of Good Faith: Defining a
desire to retain an academic focus in intercollegiate athletics has precipitated reforms such as Proposition 48’s freshman academic requirements, requiring institutions to publish student-athlete graduation rates, limits on the amount of time student-athletes can devote to practice, and minimum grade point average requirements.\textsuperscript{49} Finally, the educational component of this conceptual scheme appears in the form of a university’s contractual obligation to its student-athlete to provide him with an educational opportunity free from conduct obstructing this pursuit.\textsuperscript{50}

The apparent commonality between the models notwithstanding, the educational component of these models are differently situated.\textsuperscript{51} The underlying values of the amateur/education model, amateurism and education, are compatible. In contrast, under the commercial/education model, the economic and educational components represent the ever-present tension between commercial and academic interests in college sports.

In sum, the commercial/education model emerges as an alternative conceptual scheme for analyzing the legal issues confronting college sports. Indeed, review of the cases reveals that these two competing models provide the conceptual framework for judicial decisionmaking in this arena. Judicial decisions resolving whether student-athletes are properly considered employees for worker’s compensation purposes demonstrate this proposition. As will be seen, legal doctrine and the conceptual model selected converge to dictate the resolution of such issues. This article turns to a discussion of these cases after briefly examining the pertinent aspects of worker’s compensation law.


\textsuperscript{49} NCAA Operating Bylaw art. 14, \textit{supra} note 1, at 117-57.

\textsuperscript{50} See generally Davis, \textit{Good Faith}, \textit{supra} note 48.

\textsuperscript{51} See discussion \textit{supra} note 47.
III. DOCTRINAL PARAMETERS

A. Worker's Compensation Law

Worker's compensation laws provide a simple and inexpensive\(^{52}\) method for workers to obtain compensation and medical expenses for work-related injuries or diseases.\(^{53}\) The theory of these laws is that industries should bear the burden of industrial accidents as a component of the cost of production.\(^{54}\)

Under worker's compensation legislation, benefits are available to injured workers regardless of an employer's common law tort or other statutory liability.\(^{55}\) The removal of such requirements enables injured employees to avoid the impediments\(^{56}\) that left many workers uncompensated under the common law;\(^{57}\) however, these laws also

\(^{52}\) See Joseph H. King, Jr., The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer, 55 Tenn. L. Rev. 405, 412 (1988) (noting that worker's compensation cases do not have transaction costs because they do not depend on fault determinations).


\(^{54}\) King, supra note 52, at 406. Worker's compensation is premised on the idea that industrial accidents are another cost of doing business and therefore should be borne by the enterprise which engendered them. Id. In this sense, worker's compensation is a transfer of economic losses from injured workers to industry and, ultimately, to the public. Employers Mut. Liab. Ins. Co. v. Konvicka, 197 F.2d 691, 693 (5th Cir. 1952).

\(^{55}\) King, supra note 52, at 406; see also Eastern Tex. Elec. Co. v. Woods, 230 S.W. 498, 502-03 (Tex. Civ. App. 1921) (noting that worker's compensation is guaranteed in cases of injury or death, regardless of the employer's liability under the common law or other statutory liability).

\(^{56}\) See W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 80, at 573 (5th ed. 1984) (arguing that because an employer is liable for the injuries arising out of his business, without regard to negligence, worker's compensation is a form of strict liability); King, supra note 52, at 406 & n.3 (noting that common law defenses to tort actions such as contributory negligence, assumption of risk, and the fellow servant rule, are unavailable to employers in worker's compensation actions).

\(^{57}\) Prior to the enactment of worker's compensation laws, between 70% and 94% of industrial accidents went uncompensated. King, supra note 52, at 415.
preclude employee tort actions against employers\textsuperscript{58} and limit the
amount of damages that can be recovered.\textsuperscript{59} Thus, employees waive
tort claims against their employers in exchange for a simplified, but
limited, recovery under worker's compensation laws.\textsuperscript{60}

B. Existence of Employment Agreement

Student-athlete entitlement to worker's compensation typically rests
on the determination of whether students are employees under the
applicable worker's compensation law.\textsuperscript{61} Generally, an injured party is
considered an employee if there is both an express or implied contract to
hire\textsuperscript{62} and employee status.\textsuperscript{63}

A contract of hire is either expressed or implied. It binds an
employer to pay compensation to an employee who performs services,
sets forth the place to perform such services and work to be performed,
and sets the compensation for the performance of the work.\textsuperscript{64} The

\textsuperscript{58} Id. at 407-08.

\textsuperscript{59} Id. at 407. The worker's compensation statutes in most states do not permit
employees to recover for pain and suffering or punitive damages. Id. at 407 & nn.4-5.
Moreover, the available remedies are limited to compensation for disability, medical,
death, and burial expenses. Id. at 407.

\textsuperscript{60} Whitmore, supra note 53, at 770; see also 3 LEE & LINDAHL, supra note 53,
§ 43.15, at 591 (noting that although an employee gets the security of the worker's
compensation benefits, these benefits are generally the exclusive remedy).

For example, in Texas, worker's compensation is generally the exclusive remedy
available to a covered employee. An employee who wishes to retain the common-law right
to recover damages must notify the employer that the employee does not want to be
covered under the Worker's Compensation Act and retains all rights of action under
the common law. TEX. REV. CIV. STAT. ANN. art. 8308-3.08(b) (West Supp. 1993). If a worker
accepts worker's compensation benefits or has successfully prosecuted a worker's
compensation claim, he is barred from bringing a common law action. Wasson v.

\textsuperscript{61} Ray Yasser, Are Scholarship Athletes at Big-Time Programs Really University

\textsuperscript{62} King, supra note 52, at 418; Whitmore, supra note 53, at 772. In addition to the
contract to hire and employee requirements, an employer must be subject to the
compensation statute, and the claimant must not fall within an exclusion from the
worker's compensation coverage. King, supra note 52, at 418.

\textsuperscript{63} A student failing to prove these two elements will not succeed in a worker's
compensation claim. See United States Fidelity & Guar. Co. v. Goodson, 568 S.W.2d 443,
444-46 (Tex. Ct. App. 1978) ("There can be no liability under the worker's compensation
law unless . . . there is a contract for hire, either expressed or implied."). For an
examination of cases applying these concepts of contract law, see infra part III.C.

\textsuperscript{64} See Yasser, supra note 61. The contract of hire requirement emerges from the
distinction between master/servant vicarious liability and the employer/employee
worker's compensation relationship. Under the common law, a master's liability for acts
employer/employee relationship is based on a bargained-for-exchange under which both parties suffer detriments and receive benefits. Because employee status results in a waiver of significant rights, the common law imposed the contract to hire requirement. A contract of hire requirement exists to ensure that employees know of their waiver of tort claims for injuries arising in the course of employment.

Assuming the existence of a contract of hire, the inquiry shifts to whether the contract gives rise to an employer/employee relationship. In the context of intercollegiate athletics, courts have not applied employment law consistently in rendering this determination. To the extent that employment and contract doctrine are followed, determinations of employee status focus on two standards: (1) the relative nature of the work test; and (2) the right to control the details of the work test.

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65. 1B Larson, supra note 64, § 47.10, at 8-304. Thus, a master's liability to third parties is based on policy determinations related to the allocation of risks. See Keeton et al., supra note 56, § 70, at 500. Conversely, the employer/employee relationship for worker's compensation purposes is premised on contract. Yasser, supra note 61, at 66 (noting that worker's compensation laws acknowledge the contractual bargain between employers and employees).

66. One commentator writes:

To thrust upon a worker an employee status to which he has never consented would not ordinarily harm him in a vicarious liability suit by a stranger against his employer, but it might well deprive him of valuable rights under the compensation act, notably the right to sue his own employer for common-law damages.

1B Larson, supra note 64, § 47.10, at 8-304 to 8-307.

67. For a discussion of the contractual nature of the student-athlete/university relationship, see infra part V.B.

68. United States Fidelity & Guar. Co. v. Goodson, 568 S.W.2d 443, 445 (Tex. Ct. App. 1978); King, supra note 52, at 418; Whitmore, supra note 53, at 771-73 (explaining that entitlement to worker's compensation requires a contract of hire which creates an employer/employee relationship).

69. See, e.g., State Compensation Ins. Fund v. Industrial Comm'n, 314 P.2d 288 (Colo. 1957); see also University of Denver v. Nemeth, 257 P.2d 423 (Colo. 1953). The analytical approach of these decisions is discussed infra part III.C.


71. This test will hereinafter be referred to as "the control test" or "the right to control test." For decisions applying the control test, see Candan v. Arkoma Assocs., 494
At common law, determination of employee status involves a fact-specific evaluation of numerous factors like those found in the Restatement (Second) of Agency. The disproportionate weight given to one factor, the right to control the details of the work, rendered the


72. Most worker’s compensation statutes ambiguously define an employee as one in the service of another under an express or implied contract of hire. 1B Larson, supra note 64, § 43.00, at 8-1. Therefore, courts determining employee status for worker’s compensation purposes resort to the common-law distinction between servants and independent contractors, a principle initially conceived for resolving issues of vicarious liability. Id.; see also 3 Lee & Lindahl, supra note 53, § 43.14, at 587 (noting that because compensation statutes omit the definition of “employee,” courts must rely on the common law definitions of employee and servant).

73. A weighing of factors on a case-by-case basis is appropriate given the diverse factual contexts in which the issue of employee status surfaces. The alternative approach, the adoption of a universal rule for determining employee status, is, for the same reasons, inappropriate and unworkable. See 1B Larson, supra note 64, § 43.20, at 8-6.

74. Section 220 of the Restatement (Second) of Agency provides the following guidance in distinguishing servants from independent contractors:

In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Restatement (Second) of Agency § 220(2) (1958).

75. 1B Larson, supra note 64, § 43.30, at 8-10.

Beyond the right of control test no one has attempted to provide any formula for assessing the weight of the other factors; and yet, a court confronted with a set of facts in which four factors point one way and four point the other must necessarily follow some mental weighing process according to some principle; it simply cannot be avoided. The critical question therefore becomes: What, in compensation cases, is the underlying principle that really tips the scales in close situations?
“control” factor dispositive and ultimately led to the evolution of the right to control test itself.\textsuperscript{76} The right of control test involves examining whether the employer possessed the right to control the manner, means, and details of the worker’s performance.\textsuperscript{77} Factors that could possibly evince the right of control include contractual provisions, the exercise of control, the method of payment, the furnishing of equipment, and the right to terminate the worker.\textsuperscript{78}

The alternative standard for determining whether a worker is an employee is the relative nature of the work test.\textsuperscript{79} This test, an offspring

\begin{itemize}
\item \textsuperscript{76} id. § 43.30, at 8-10 to 8-11.
\item \textsuperscript{77} Leo L. Lam, Comment, \textit{Designer Duty: Extending Liability to Manufacturers for Violation of Labor Standard in Garment Industry Sweatshops}, 141 U. PA. L. REV. 623, 624 (1992) (noting that the right to control details of work test slowly emerged from the application of common law factors as set forth in Restatement (Second) of Agency).

The right to control test is specifically based on the notion that “the more control the superior (or ‘master’) has over the work of the subject (or ‘servant’), the more appropriate it is for the superior to assume responsibility for the subject’s actions.” \textit{Id.} at 649. Indicia of the right to control include the furnishing of equipment, payment method, and the right to terminate the arrangement. \textit{Id.} at 657.

\item \textsuperscript{78} See, e.g., Thompson v. Travelers Indem. Co., 789 S.W.2d 277 (Tex. 1990): Examples of the type of control normally exercised by an employer include when and where to begin and stop work, the regularity of hours, the amount of time spent on particular aspects of the work, the tools and appliances used to perform the work, and the physical method or manner of accomplishing the end result. \textit{Id.} at 278-79.

\item \textsuperscript{79} 1B LARSON, supra note 64, § 44.31, at 8-89. When the contract articulates the degree of control, it must be determined: (1) whether that extent of control indicates employment; and (2) whether the agreement is bona fide so that the extent of control so stated accurately represents the agreement. Conversely, where the contract is silent or deficient as to the right of control, evidence of control actually exercised is particularly useful in attempting to satisfy this test. \textit{Id.} § 44.32, at 8-90. This is true in spite of the fact that the test measures the right to control the details of the work performed as opposed to actual control. See Mayo v. Southern Farm Bureau Casualty Ins. Co., 688 S.W.2d 241, 243 (Tex. Ct. App. 1985) (noting that where the written contract is silent on the issue of control, exercise of control is the most compelling evidence of the terms of the contract); Dickerson v. I.N.A., 640 S.W.2d 81, 83 (Tex. Ct. App. 1982) (explaining that evidence of actual control is relevant in determining contract terms absent an express contract of employment); Texas Employers Ins. Ass’n v. Bewley, 560 S.W.2d 147, 149 (Tex. Ct. App. 1977) (noting that actual control is circumstantial evidence of an employer-employee relationship).

\item The principal consideration under the nature of the work test is the relationship between the services provided and the regular business of the alleged employer. \textit{Id.} at 651. Hence, the test measures “the degree of integration between the responsibilities or action of superior and subject; and the degree of the subject’s dependence on the superior.” \textit{Id.}

The underlying premise of the nature of the work tests is related to the cost distribution basis for worker’s compensation legislation. Their common theme is that the
of the economic reality doctrine, states that "employees are those who as a matter of economic reality are dependent upon the business to which they render service." This test is likely to be satisfied where a worker performs tasks integral to the employer's regular business, and does not provide an independent business or professional service vis-a-vis the employer.  

The cost of all industrial accidents should be a component of the product's cost that is ultimately borne by the consumer. See supra note 54 and accompanying text.

It follows that any worker whose services form a regular and continuing part of the cost of that product, and whose method of operation is not such an independent business that it forms in itself a separate route through which his own costs of industrial accident can be channelled, is within the presumptive area of intended protection.

1B Larson, supra note 64, § 43.51, at 8-24 (footnote omitted).

80. Lam, supra note 76, at 651 (citation omitted).

81. 1B Larson, supra note 64, § 45.00, at 8-193. Based on existing jurisprudence, Professor Larson observes that courts group the Restatement (Second) of Agency factors under either the control test or the relative nature of the work test:

Under the control test are considered the subordinate items from which right to control is usually inferred: direct evidence of right of control, of course, and exercise of control; right of termination; method of payment; and who furnishes equipment. Under the relative nature of the work test are considered: whether the work done is an integral part of the employer's regular business; and whether the worker, in relation to the employer's business, is in a business or profession of his own.

Id. § 43.53, at 8-32.

While Professor Larson concedes that the right to control test is the predominant judicial test for determining employee status, he advocates greater acceptance of the nature of work test. He argues that the different purposes behind employee designation for worker's compensation and vicarious liability, respectively, support adoption of the nature of the work test.

The "servant" concept at common law performed one main function: to delimit the scope of a master's vicarious tort liability. This tort liability arose out of detailed activities carried on by the servant, resulting in some kind of harm to a third person. The extent to which the employer had a right to control these detailed activities was thus highly relevant to the question whether the employer ought to be legally liable for them.

Id. § 43.42, at 8-22.

Conversely, the exclusive concern of compensation law is injury to the employee, whether it results from his activities or those of other persons. Larson maintains that because worker's compensation law seeks to protect the employee himself, not third persons, the employer's right to control fails to bear the direct relationship to worker's compensation law that it does to the issue of vicarious liability. Id. § 43.42, at 8-23. Professor Larson also predicts that the superior precision of the nature of the work test will bring consistency to judicial determinations of employee status. Id. § 45.10, at 8-195. Last, Professor Larson argues that adoption of the nature of the work test will thwart
The defining characteristics of the control and of the relative nature of the work tests, respectively, can be summarized as follows:

The control test focuses on whether the employer has a right to control, as opposed to actually controlling, the employee. As one commentator noted, "[i]t is constantly said that the right to control the details of work is the primary test [of employment]." Courts generally include other factors in their control test analysis, such as the method of payment, the right to fire, and the furnishment of equipment. Under the relative nature of work test, courts ask whether the employee's duties are a substantial and recurring part of the employer's business. 82

In summary, the assumptions underlying the competing models of college sports and principles of employment law combine to form the legal basis of the rights and obligations of student-athletes and universities, respectively. An examination of the few decisions to address whether student-athletes fall within the scope of worker’s compensation legislation reveals this hybrid approach to resolving the issue.

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employers' efforts to escape worker's compensation liability by structuring contracts which fail the right of control test. Id. § 45.10, at 8-195.

82. Whitmore, supra note 53, at 775. "Other courts note that no single framework exists to evaluate an individual's status as an employee or independent contractor, and these courts consequently rely on a conglomerate of factors in their decisions." Id. at 775-76 (footnote omitted).

83. For a thorough discussion of the competing conceptual schemes, see supra part II. For a discussion of the impact of model selection on other issues pertaining to intercollegiate athletics, see infra part III.D.


In spite of this sparsity, student-athlete worker’s compensation cases have generated substantial scholarly discourse. See, e.g., Atkinson, supra; Robert C. Rafferty, Rensing v. Indiana State University Board of Trustees: The Status of the College Scholarship Athlete—Employee or Student?, 13 CAP. U. L. REV. 87 (1983); Yasser, supra note 61; Nestel, supra note 36; Whitmore, supra note 53.
C. Worker's Compensation Decisions Concerning the Rights of Student-Athletes

Courts are sharply divided over the question of whether a student-athlete on scholarship falls within the scope of worker's compensation statutes. In the first reported decision to address this issue, *University of Denver v. Nemeth*, a student-athlete sought worker's compensation benefits for a back injury sustained during football practice. Nemeth alleged that he was entitled to receive worker's compensation benefits because he was employed to play football for the university and because his injury arose in the course of his employment. The Colorado Supreme Court agreed with Nemeth, and held that Nemeth was an employee injured in the course of his employment. While the court did not specifically rely on either the control or relative nature of the work standards, its recognition of a contractual relationship between Nemeth and the university nevertheless emerged from a sound application of the principles of employment law.

85. 257 P.2d 423 (Colo. 1953). The student-athlete was paid a monthly wage of $50 for custodial services performed on university owned tennis courts. *Id.* at 424. After sustaining an injury in spring football practice, Nemeth filed a worker's compensation claim asserting that he was an employee of the university. *Id.* at 425. Finding the evidence to clearly establish that Nemeth's custodial job was specially arranged because of his athletic abilities, and was not employment available to the student body at-large, the Colorado Supreme Court concluded that Nemeth was an employee for worker's compensation purposes. Testimony that the student's employment was dependent on participation in football compelled the court to explicitly reject the university's contention that Nemeth's job and meals were offered "exclusively by reason of his being a student." *Id.* at 426.

The court reasoned that the following features manifested an employer/employee relationship between Nemeth and the university: (1) the receipt by Nemeth of financial assistance in the form of employment; and (2) the distinct manner in which Nemeth was compensated. While most students employed by the university were paid an hourly wage, Nemeth received a monthly salary regardless of hours worked. *Id.* at 424-25.

86. *Id.* at 424.
87. *Id.* at 425.
88. *Id.* at 430.
89. In determining that Nemeth's football injury was compensable, the court recited familiar employment law doctrine: ""An injury arises out of the employment if it arises out of the nature, conditions, obligations or incidents of the employment . . . ."" *Id.* at 426 (quoting Caswell's Case, 26 N.E.2d 328, 330 (Mass. 1940) and Souza's Case, 55 N.E.2d 611, 613 (Mass. 1944)); see also Whitmore, *supra* note 53, at 776 (noting that in spite of the court's failure to analyze the issues under either the control or relative nature of work test, the court did not disregard employment law principles).

Shortly after *Nemeth*, the Colorado Supreme Court reached a contrary result in *State Compensation Insurance Fund v. Industrial Accident Commission*, 314 P.2d 288 (Colo. 1957), an action by a widow of a student-athlete for worker's compensation death
In 1963, a California Appellate Court followed Nemeth in recognizing a student-athlete as an employee. Van Horn v. Industrial Accident Commission\(^\text{90}\) was an action for the worker's compensation death benefits of a student-athlete killed in a plane crash which occurred en route from an intercollegiate football game.\(^\text{91}\)

The Van Horn court directly confronted the dispositive issue of whether a student-athlete in receipt of an athletic scholarship was an employee of the institution for worker's compensation purposes.\(^\text{92}\) Applying employment law principles, the court determined that the student-athlete was an employee, and rejected the institution's attempt to characterize the scholarship as a grant-in-aid rather than payment for services.\(^\text{93}\) Simply stated, the court recognized that the essence of the student-athlete/university relationship is a contract of hire in which a scholarship is awarded in exchange for athletic services.\(^\text{94}\)

Contrary to Nemeth and Van Horn, other courts have declined to recognize the existence of a contract of hire between a scholarship student-athlete and his institution.\(^\text{95}\) The court in Rensing v. Indiana

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benefits. The athlete, who sustained fatal head injuries during a football game, had received a partial athletic scholarship and had held part-time university employment to defray expenses not covered by the scholarship. \textit{id.} at 289.

While the court explicitly recognized the existence of a contract of hire between the student-athlete and the university, the court concluded that an employer/employee relationship was absent because the evidence failed to establish the dependence of the contract of hire upon participation in football. \textit{id.} at 289-90. Commentators have aptly criticized this decision as an instance of "judicial disingenuousness" for the court's failure to analyze the issue in terms of an employment agreement, and for its flimsy attempt at distinguishing Nemeth. Yasser, \textit{supra} note 61, at 69-70; Whitmore, \textit{supra} note 53, at 777.

\(^\text{90}\) 33 Cal. Rptr. 169 (Ct. App. 1963).
\(^\text{91}\) \textit{id.} at 170.
\(^\text{92}\) \textit{id.} at 174. The decedent had received a scholarship provided by university boosters. \textit{id.} at 171.
\(^\text{93}\) \textit{id.} at 174. Hence, the student athlete was within the scope of California's worker's compensation statute. \textit{id.} at 171.
\(^\text{94}\) \textit{id.} at 172-73. The court concluded that the evidence supported a single inference: that the student-athlete received a scholarship in exchange for his agreement to employ his athletic ability on behalf of the college. \textit{id.} at 174.

State University Board of Trustees\textsuperscript{96} acknowledged the contractual nature of a student-athlete's relationship with his university,\textsuperscript{97} but nevertheless concluded that the contractual arrangement did not create a contract of hire.\textsuperscript{98} The court reasoned that the absence of an express or implied intent\textsuperscript{99} to enter into an employment agreement negated the existence of an employer-employee relationship.\textsuperscript{100} The court also noted that Rensing had failed to establish another element of an employment agreement, the performance of services for pay.\textsuperscript{101} Siding

California and Hawaii have enacted legislation which specifically excludes student-athletes from the definition of employee for worker's compensation purposes. Conversely, Nevada specifically includes scholarship student-athletes within the scope of coverage of its worker's compensation statute. See Whitmore, supra note 53, at 782-83; see also Tookes v. Florida State Univ., 266-39-0855, Dep't of Labor and Employment Security, Office of the Judge of Industrial Claims (1982), cited in Atkinson, supra note 84, at 201 (holding that a scholarship awarded to a student-athlete was not a quid pro quo for basketball services).

\textsuperscript{96} 444 N.E.2d 1170 (Ind. 1983). Fred Rensing, a scholarship athlete at Indiana State University, became a quadriplegic after sustaining an injury during spring football practice. \textit{Id.} at 1170-71.

The history of the \textit{Rensing} case alone demonstrates the severe divisiveness that characterizes the question of whether intercollegiate athletes should be accorded employee status. The Industrial Board of Indiana initially rejected Rensing's claim for permanent total disability benefits on the ground that neither a contract of hire nor a contract of employment existed between Rensing and the University. \textit{Id.} at 1172. The Indiana Court of Appeals reversed the Board, holding that Rensing was an employee for pay within the meaning of the Worker's Compensation Act. Rensing v. Indiana State University Bd. of Trustees, 437 N.E.2d 78, 84 (Ind. Ct. App. 1982). The Indiana Supreme Court subsequently reversed the appellate court's judgment. \textit{Rensing}, 444 N.E.2d at 1171.

For thorough examinations of the \textit{Rensing} decision, see Atkinson, supra note 84, at 200-01; Rafferty, supra note 84; Yasser, supra note 61, at 71-77; Whitmore, supra note 53, at 779-80.

\textsuperscript{97} \textit{Rensing}, 444 N.E.2d at 1173.

\textsuperscript{98} \textit{Id.} at 1174.

\textsuperscript{99} The court stated: "there must be a mutual belief that an employer-employee relationship did exist." \textit{Id.} at 1173. The \textit{Rensing} court has been criticized for attributing undue weight to the intent factor in analyzing the employment agreement issue. Whitmore, supra note 53, at 780. Whitmore concludes that the court's approach was especially inappropriate in light of Indiana's adherence to the right of control test for determining whether an employment agreement exists. \textit{Id.} at 780; see also Rafferty, supra note 84, at 101 (speculating that the court could have defined Rensing as an employee if it had used the control or economic reality test); Yasser, supra note 61, at 75-77 (criticizing the \textit{Rensing} court's deficient analysis of intent).

\textsuperscript{100} \textit{Rensing}, 444 N.E.2d at 1173.

\textsuperscript{101} \textit{Id.} at 1174.
with the University’s contention, the court characterized the scholarship as a grant-in-aid rather than payment for services rendered.\footnote{102}

The Michigan Court of Appeals in \textit{Coleman v. Western Michigan University}\footnote{103} applied employment law in denying a student-athlete worker’s compensation claim. Unlike \textit{Rensing}, the \textit{Coleman} court applied common law factors of the economic reality test\footnote{104} in declining Coleman’s claim for benefits.

Coleman appealed the Michigan Worker’s Compensation Authority Board’s denial of his claim for compensation benefits for injuries sustained during a football game.\footnote{105} The claimant was the recipient of an annual renewable scholarship which covered tuition, room, board, and books.\footnote{106} He played football and was awarded a scholarship for two years.\footnote{107}

Since the Michigan Compensation Act defines employee broadly, the court resorted to common law principles, specifically the economic reality test, to determine whether the board erred in refusing to define Coleman as an employee for worker’s compensation purposes.\footnote{108} The court focused on two considerations: (1) the extent of the university’s right to control and discipline the activities of the student-athlete; and (2) the extent to which plaintiff’s sports participation was an integral part of the university’s business.\footnote{109} With regard to the school’s right of control over Coleman, the court adopted the compensation commission’s finding that “[p]laintiff’s scholarship did not subject him to any

\footnote{102. The court reasoned that the inability of the university to discharge Rensing on the basis of performance, a liberty that the university would have if it were Rensing’s employer, supported the grant-in-aid characterization. \textit{Id.} For a discussion of whether athletic scholarships are more properly characterized as grants-in-aid or payment for services, \textit{see infra} text accompanying notes 219-22.}

\footnote{103. 336 N.W.2d 224 (Mich. Ct. App. 1983).}

\footnote{104. For a discussion of the economic reality test and the derivative right to control test, see \textit{supra} notes 72-83 and accompanying text.}

\footnote{105. \textit{Coleman}, 336 N.W.2d at 224.}

\footnote{106. \textit{Id.} at 225.}

\footnote{107. \textit{Id.} Plaintiff sustained the debilitating injury during his third year, but continued to receive scholarship benefits for the remainder of that year. The university’s decision to reduce the amount of Coleman’s financial assistance for what would have been his fourth year forced him to leave school. \textit{Id.}}

\footnote{108. Applying the economic reality test, the Board ruled that an employment relationship did not exist between Coleman and the university. \textit{Id.} at 224.}

\footnote{109. These considerations derive from both the right to control test and the nature of the work test. For an examination of these standards, see \textit{supra} notes 72-83 and accompanying text.}
extraordinary degree of control over his academic activities. The degree of defendant's control over this aspect of plaintiff's activities was no greater than that over any other student.\textsuperscript{110} The court emphasized the irrevocability of the scholarship during the football season as additional support for the finding that the university lacked extraordinary control over Coleman.\textsuperscript{111}

The court next addressed the issue of whether the student-athlete's participation in sports constituted an integral part of the university's business.\textsuperscript{112} In finding that it did not, the court noted that the university could effectively carry out its business, education and research, in the absence of an intercollegiate football program.\textsuperscript{113} Significantly, the court so held despite finding that the scholarship conferred a measurable economic gain upon Coleman: the financial aid essentially constituted wages awarded by the university in exchange for Coleman's commitment to participate in sports.\textsuperscript{114}

Therefore, though the \textit{Coleman} court recognized the contractual nature of the relationship between Coleman and the university, it held that, in light of the economic realities, this contract did not give rise to an employer/employee relationship.

\textbf{D. Significance of Model Selection}

The decisions rendered in \textit{Rensing} and \textit{Coleman} on the one hand, and \textit{Van Horn} and \textit{Nemeth} on the other, are significant for their demonstration of how the preconceptions concerning intercollegiate athletics sway the legal determination of the relationship between an athlete and his university.

That the \textit{Rensing} court viewed college sports from the perspective of amateurism and educational values is evident from the court's liberal

\textsuperscript{110} \textit{Coleman}, 336 N.W.2d at 226. The court was constitutionally required to accept this finding as conclusive if it was supported by any evidence in the record absent a showing of fraud. \textit{Id.} at 227.

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} \textit{Id.} at 226-27.

\textsuperscript{113} \textit{Id.} at 227.

\textsuperscript{114} \textit{Id.} at 226. In an attempt to downplay the inherently commercial nature of the contractual relationship between a university and a scholarship athlete, the WCAB explained that Coleman's particular case did not bear the earmarks of commerciality. The Board naively noted that the university was no more transformed into a commercial enterprise by financial benefits derived from its football team than by benefits accruing from other programs in which scholarship students participated. \textit{Id.} at 227-28.
reference to NCAA regulations to "establish . . . that college athletics is a non-business activity and merely an extension of the educational process."\textsuperscript{115} For instance, the court focused on the NCAA's fundamental policy and purpose of maintaining the line of demarcation between college sports and professional sports.\textsuperscript{116} Consistent with the amateur/education model of intercollegiate sports, the court opined that the primary purpose of scholarships is to allow student-athletes to pursue educational opportunities.\textsuperscript{117} Thus, the notion that a student-athlete is "first and foremost a student"\textsuperscript{118} guided the court down a path from which legal recognition of an employer/employee relationship would have seemed illogical and legally unsupported. Without question, invocation of these values compelled the court to characterize financial aid as a gratuity as opposed to compensation for services performed, the bargained-for-exchange elements of the relationship notwithstanding.\textsuperscript{119}

Similarly, the findings in Coleman regarding the University's lack of control over the student-athlete were shaped by the amateur/education

\begin{itemize}
  \item \textsuperscript{115} Rafferty, supra note 84, at 99.
  \item \textsuperscript{116} Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170, 1173 (Ind. 1983).
  \item \textsuperscript{117} Id. at 1174; Nestel, supra note 36, at 1402.
  \item \textsuperscript{118} Rensing, 444 N.E.2d at 1173; see Rafferty, supra note 84, at 101 (concluding that the court's preference for affording the athlete student status as opposed to employee status was an underlying policy reason for its decision).
  \item \textsuperscript{119} The court noted that characterization of financial aid as pay would violate NCAA rules prohibiting pay for athletic participation and would render student-athletes ineligible under NCAA rules. Rensing, 444 N.E.2d at 1173. The court concluded:

The scholarship benefits he received were not given him in lieu of pay for remuneration for his services in playing football any more than academic scholarship benefits were given to other students for their high scores on tests or class assignments. Rather, in both cases, the students received benefits based upon their past demonstrated ability in various areas to enable them to pursue opportunities for higher education as well as to further progress in their own fields of endeavor.

Id. at 1174. This view of the student-athlete/university relationship aptly describes the amateur/education model of intercollegiate athletics. The court's complete disregard of the contractual quid pro quo embodied in the relationship between the student-athlete and his university is indicative of the extremely idealistic view of college sports underlying this model. See Nestel, supra note 36, at 1402 ("The Rensing court based its decision in part on the belief that athletic scholarships are educational grants that primarily benefit students by allowing them to pursue advanced educational opportunities.").
\end{itemize}
conceptualization of intercollegiate athletics. The Coleman court summarized its perception of intercollegiate athletics with the following:

Plaintiff's scholarship did not subject him to any extraordinary degree of control over his academic activities. The degree of defendant's control over this aspect of plaintiff's activities was no greater than that over any other student. Moreover, the record suggests that the parties contemplated a primary role for plaintiff's academic activities and only a secondary role for plaintiff's activities as a football player. Plaintiff recognized that "you are a student first, athlete second." 120

Consistent with the amateur/education model, the Coleman court viewed amateurism and academia as the essence of a student-athlete's relationship with his university. However, the Coleman court's conclusion regarding a lack of control is incompatible with the substantial degree to which universities, through their athletic departments and coaches, actually control the student-athlete's life, particularly the details of his sports participation. 121 "The coach must establish authority over the athlete off the field so that during competition, nothing impedes a top performance by everyone on the

120. Coleman v. Western Mich. Univ., 336 N.W.2d 224, 226 (Mich Ct. App. 1983). Consideration only of the university's inability to terminate a scholarship award during the one-year term results in a myopic view of the university's nearly unbridled discretion to refuse renewal of financial aid at the end of the one year period. Whitmore, supra note 53, at 790. This discretion gives the university considerable control because the student-athlete in fact expects that the relationship will remain intact for at least four years.

This view also overlooks an athletic department's right of control over athletic participation and other aspects of student-athlete's college life for the duration of a student-athlete's career, regardless of whether this is a six-month or four-year period. The control which institutions exercise over their student-athletes is so pervasive that the student-athlete is dependent upon the university for daily existence at his institution. Davis, supra note 1, at 92-94. Researchers observe that this control reaches even the academic aspects of a student-athlete's college career:

Unlike other students, athletes did not look over course descriptions, schedules, or general education requirements. Rather, they were registered into specific colleges (business, engineering, arts and sciences, etc.), majors, and class by . . . the assistant coach in charge of academics. They were usually (although not always) consulted in the selection of their college and major, but rarely asked about which courses they would like to take.


121. Rush, supra note 18, at 563.
team. When the coach tells the quarterback to run a certain play, the quarterback knows that he must run that specific play." 

The Coleman court's conclusion that playing football was not an integral part of the university's business of education also reveals its adoption of the assumptions incorporated in the amateur/education model. The court downplayed the commercial benefits accruing to universities as a result of successful athletic programs, noting the irrelevance of such payments to the successful operation of a university.

Though resting on faulty assumptions embodied in the amateur/education model, it is not surprising that the Coleman and Rensis courts adopted the prevailing societal view of intercollegiate athletics. While this naive view of college sports is partly attributable to an ignorance of the inner workings of college athletics, the amateur/education model also incorporates pragmatic considerations.

Contrary to Coleman and Rensis, the Nemeth and Van Horn courts acknowledged the economic and sociological realities of intercollegiate

122. Id. Control is motivated by a coach's desire to win and is facilitated by the athlete's commitment to the success of his team. Id. Professor Sperber commented on what he perceives as the employer/employee nature of the student-athlete's relationship with his university:

Because program heads recruit and directly offer athletic scholarships to athletes, the result, as in any job recruitment, is that the hiring party—the coach—becomes the employee's—the player's—boss. Not surprisingly, many program heads feel that they can 'fire' an athlete for unsatisfactory athletic performance and they do so by 'yanking' his or her grant. College athletes work under a particularly unfair system because they are asked to make a four-year commitment to a program in return for one-year renewable contracts.


123. Coleman, 336 N.W.2d at 227.
124. Id. at 227.

Whitmore's contrary view of intercollegiate athletics more accurately captures its role within the university:

Undisputedly, a university's main purpose is to educate students. Even universities that generate millions of dollars through their "big-time" athletic programs would continue to exist without their athletic teams. However, athletics play an integral role in the success of a university. A school's academic programs benefit from increases in applications for admissions, publicity, visibility, and alumni donations that stem from winning teams.

Whitmore, supra note 53, at 782.

125. For a discussion of the reasons for selecting one model over another, see infra part VI.
athletics as set out in the commercial/education model. For example, the Van Horn court recognized the educational aspect of this model when it stipulated that not every scholarship athlete is an employee. According to the court, employee status is only achieved where the evidence establishes the existence of a contract of employment. The court reasoned that one who participates for compensation as a member of an athletic team may be an employee for worker’s compensation purposes in spite of the fact that academic credit is also awarded for such participation.

The foregoing reflects the court’s understanding that more than academics is at work in a student-athlete’s participation in sports; the Van Horn court explicitly noted that a student-athlete may operate in the dual capacity of a student and an employee. The dispositive question is whether the student-athlete receives financial assistance in exchange for his sports participation. By rejecting the university’s argument that the student-athlete’s participation in football was voluntary and that the scholarship was a gift, the court refused to assume that amateurism forms the basis of the relationship.

Similarly, the Nemeth court’s reasoning is consistent with the economic realities reflected in the commercial/education model. The court’s conclusion that the student’s job was conditioned on his sports participation recognized the relationship as a bargained-for-exchange in which both parties received benefits and suffer detriments.

126. "This analysis reveals that a contractual quid pro quo existed in these cases: athletic services were exchanged for tuition, housing, meals, etc." Atkinson, supra note 84, at 205. See generally Nancy E. Dowd, Test of Employee Status: Economic Realities of Title VII, 26 WM. & MARY L. REV. 75 (1984) (discussing the absence of a definition of "employee" in Title VII and the injustices resulting from the use of a common law test in these cases).


128. Id.

129. Id. at 173.

130. Id.

131. Id. at 174.

132. Id. at 172.

133. University of Denver v. Nemeth, 257 P.2d 423, 428 (Colo. 1953) (finding that athlete’s remuneration and retention of job were dependent on his contractual obligations to perform work and to play football); see Yasser, supra note 61, at 68-69 (concluding that the Nemeth opinion demonstrates judicial willingness to examine the true nature of the student-athlete/university relationship).

134. Nemeth, 257 P.2d at 430.
Significantly, the *Nemeth* court acknowledged that the provision of services for financial aid is the essence of the student athlete’s relationship with his college.\(^{135}\) Therefore, in accordance with the commercial/education model, the court implicitly recognized that the student-athlete’s true value resides in his ability to successfully compete on behalf of his institution.

In summary, legal doctrine and philosophical visions of college athletics combine to shape the judicial response to a student-athlete’s status as an employee for worker’s compensation purposes. Courts declining to define student-athletes as employees adopt the views of intercollegiate athletics embodied in the amateur/education model of college sports. The judiciary in these cases perceives college sports as serving an academic function where intercollegiate athletics are simply an avocation of the student.

Juxtaposed with these decisions are cases in which the judiciary recognizes the impact of commercialism on college sports and on the student-athlete’s relationship with his university. Here, the duality of the student-athlete’s role, as a student on the one hand and an employee on the other, provides the framework from which the relevant issues are analyzed. Employment status stems from the quid pro quo which earmarks the contractual obligations between a student-athlete and his institution. Nevertheless, these cases recognize that the student-athlete is still a student, hence creating an educational component to college sports.

The student-athlete worker’s compensation decisions also illustrate the significant extent to which a court’s reliance on a particular conceptual model influences the ultimate disposition of the case. Recognizing these judicial tendencies, parties to disputes arising within intercollegiate athletics construct their policy and legal arguments upon these two competing conceptual schemes.

\(^{135}\) *Id.* The dependence of financial aid on the performance of services by student-athletes not only distinguishes them from other students but places them in what has been described as “a unique and increasingly significant relationship with the university.” Nestel, *supra* note 36, at 1401.
IV. WALDREP V. TEXAS WORKERS' COMPENSATION COMMISSION

A. Factual Background

As a high school student, Kent Waldrep was a multi-sport athlete excelling in football, basketball, track, and golf.\textsuperscript{136} Coaches from Texas Christian University (TCU) were among the multitude of college recruiters\textsuperscript{137} who met with Waldrep and his parents in an effort to convince him to play football at TCU.\textsuperscript{138} During the recruitment stage of TCU's relationship with Waldrep, TCU's coaching staff focused on football and on Waldrep's opportunity to excel in the sport.\textsuperscript{139} Waldrep's relationship with TCU was formalized on February 8, 1972, when he signed a Pre-Enrollment Application\textsuperscript{140} and thereby agreed to attend and participate in intercollegiate athletics at TCU.\textsuperscript{141} Shortly after the parties executed the Pre-Enrollment Application, TCU and Waldrep signed the Southwest Conference's Standard Financial Aid Agreement.\textsuperscript{142} This agreement obligated TCU to award financial aid "to the extent of room, board, tuition, fees and $10.00 per month for incidentals" in exchange for his promise to compete in intercollegiate

\textsuperscript{136} Transcript of the Special Appearance, Formal Hearing Before the Workers' Compensation Commission, Austin, Texas, at 24, A. Kent Waldrep, Jr., Bd. No. 75-12394 DN (Mar. 12, 1993) (on file with author) [hereinafter Waldrep Transcript].

\textsuperscript{137} Twenty-six colleges offered Waldrep scholarships in football, track, or golf at the end of his senior year of high school. \textit{Id.}

\textsuperscript{138} \textit{Id.}

\textsuperscript{139} \textit{Id.} at 25. Waldrep also testified that the "whole discussion centered on nothing but football." \textit{Id.} According to Waldrep, TCU's coaches assured him and his parents at the recruiting stage that if he were injured while playing football at TCU, he would be taken care of because TCU was insured. \textit{Id.} at 25.

\textsuperscript{140} \textit{Id.} at 26-27. For a copy of Waldrep's Pre-Enrollment Application, see \textit{id.} Exhibit 1. The Pre-Enrollment Application predated the Letter of Intent and essentially served the same purpose. By signing the Pre-Enrollment Application form, Waldrep and his parents certified that he had not applied to participate in intercollegiate athletics on behalf of another institution. Execution of the form also precluded Waldrep from participating in intercollegiate athletic competition for another university during his freshman year and the first year of varsity competition for which he would have otherwise been eligible. \textit{Id.} Exhibit 1.

\textsuperscript{141} \textit{Id.} at 26.

\textsuperscript{142} \textit{Id.} at 32. For a copy of Waldrep's Financial Aid Agreement, see \textit{id.} Exhibit 2.
athletics for TCU. The scholarship was awarded for the period from August 1972 to May 1976.

B. Conceptualizing Legal Positions

Against this factual background, the parties characterized the dispositive issue as whether Waldrep, with respect to his participation in football, was an employee of TCU at the time he sustained injuries. Both Waldrep and TCU approached this issue on two levels. First, each relied on worker’s compensation precedent, contouring their respective positions to address the issue of whether a contract of hire existed between Waldrep and TCU, and the issue of the extent of TCU’s ability to control Waldrep. However, inextricably intertwined with

143. Id. at 27-28.
144. Id. at 29.
145. Id. at 4. TCU argued that Waldrep’s claim should be barred because he failed to file a claim within the 30-day time period for filing worker’s compensation claims. Waldrep’s counsel argued that, pursuant to 1971 amendments to the Workers’ Compensation Act, the statute of limitations did not toll until one year after the employer filed an E-1 form, a step TCU had failed to take up to the time of the hearing. Id. at 5.
146. A contract of hire, a prerequisite to an employer/employee relationship, has its basis in the common law. See supra text accompanying notes 64-66.
147. The Commission in Waldrep was bound by the law of Texas which, like most jurisdictions, gives prominence to the right of control test in determining employee status:

The test to determine whether a worker is an employee or an independent contractor is whether the employer has the right to control the progress, details, and methods of operations of the employee’s work . . . . This same test applies whether the claim arises at common law or under workers’ compensation . . . . The employer must control not merely the end sought to be accomplished, but also the means and details of its accomplishment as well . . . . Examples of the type of control normally exercised by an employer include when and where to begin and stop work, the regularity of hours, the amount of time spent on particular aspects of the work, the tools and appliance used to perform the work, and the physical method or manner of accomplishing the end result.


The sole issue addressed by the Thompson court was whether the plaintiff jockey was an employee of the race track at which his injury occurred. Id. at 278. Applying the control test as articulated above, the court followed the majority of jurisdictions in holding that jockeys are not employees of race tracks at which they ride. Id. at 279. The court relied on the following evidence in concluding that a horse’s owner or trainer, not a race track, controls the details and methods of a jockey’s work: (1) payment by owners and trainer of the mount fee; (2) owners or trainers provide jockeys with their racing strategy and tactics; (3) tracks do not require jockeys to remain at the track the full day, and
each side's employment law position were contrasting conceptual views of intercollegiate sports.

In addressing the contract of hire requirement, Waldrep maintained that the nature of his relationship with the university was contractual. He argued that the binding commitment represented by the Pre-Enrollment Application underscored the fact of the contractual relationship. Waldrep testified that he understood the signing of the form to be a bargained for quid pro quo. He agreed to compete

jockeys are free to race at other tracks on the same day; (4) tracks do not require jockeys to ride particular horses; and (5) tracks do not withhold taxes or social security from jockeys' pay. Id. at 279.

In Wasson v. Stracener, 786 S.W.2d 414, 420 (Tex. Civ. App. 1990), the court recognized the right to control the details of the work performed as the test for determining whether a worker is an employer or independent contractor. It added, however, that employee versus independent contractor status turns on the evaluation of several factors including:

(1) the independent nature of the worker's business; (2) the worker's obligation to furnish necessary tools, supplies and material to perform; (3) the worker's right to control the progress of the work, except as to final results; (4) the time for which the worker is employed; (5) the method of payment, whether by time or by job.

Id.; see also Mayo v. Southern Farm Bureau Casualty Ins. Co., 688 S.W.2d 241, 243 (Tex. Civ. App. 1985) (recognizing the right to control the details of work as the ultimate test but noting that courts properly consider additional factors such as the right to hire and discharge a worker, the withholding of income tax and social security, and the furnishing of equipment to a worker and payment of wages); United States Fidelity & Guar. Co. v. Goodson, 568 S.W.2d 443, 446 (Tex. Civ. App. 1978) (noting the predominance of the right to control test while citing other relevant factors).

For a general discussion of the right to control test, see supra notes 76-78 and accompanying text. Notwithstanding the dominance of the right of control test, Texas courts have applied a relative nature of the work analysis in limited circumstances. See, e.g., Hardware Dealers Mut. Fire Ins. Co. v. King, 408 S.W.2d 790, 794 (Tex. Ct. App. 1966) (identifying the nature of the work for which the employee was retained as the dispositive issue).


149. Waldrep urged the Commission that liberal construction of the Act in determining employee status best served the remedial goals of the Workers' Compensation Act. Id. at 7. Courts often allude to the legislative purposes of protecting workers and promoting justice to support liberal interpretation of such acts. See, e.g., Texas Employers' Ins. Ass'n v. Thomas, 415 S.W.2d 18, 19-20 (Tex. Ct. App. 1967) (holding that plaintiff, injured while assisting passengers from wrecked car, was within scope of Act).

exclusively for TCU in intercollegiate football, in exchange for compensation from the university in the form of a scholarship.\footnote{151}

TCU attempted to recharacterize the scholarship as a grant-in-aid. In formulating this argument, the university drew upon precepts of the amateur/education model of intercollegiate sports. TCU suggested that the primary purpose of the arrangement between itself and Waldrep was to provide Waldrep a college education.\footnote{152} It argued that in this regard, the traditional quid pro quo of contractual arrangements is absent from the student-athlete/university relationship. Relying on NCAA rules and regulations, TCU focused on what is perceived as the amateur basis of college athletics,\footnote{153} and argued that classifying student-athletes as employees is an unwise departure from the principles of amateurism which undergird college sports.\footnote{154}

When you're trying to draw a clear line in that respect between offering education to individuals and allowing them to continue on as amateur athletes and to try and turn those very understandings into an employer-employee relationship will do nothing more than subvert the entire system of scholarships and universities as we know it.\footnote{155}

\footnote{151}{\textit{Id.} at 27. Waldrep also argued that mandatory relinquishment of any other employment during the school year was an additional detriment to becoming a scholarship athlete. \textit{Id.} at 28.}

\footnote{152}{\textit{Id.} at 11. In support of this position, counsel for TCU stated: \textit{[W]hat [TCU] truly [was] offering him was an opportunity to excel in his education and only offer him, as far as it applied to him as an athlete, a chance of progress in the hobby or avocation that he had shown some distinction in the past. In other words, TCU was then and continues to be, like all other schools within the NCAA gamut, there first and foremost to offer education.}

\textit{Id.}}

\footnote{153}{In its opening argument, TCU stressed that the purpose of NCAA regulations governing scholarship grants is to separate amateur sports from professional sports: \textit{[A]ccording to the very regulations and constitution of those entities that I've mentioned, especially the NCAA, that they are imposing rules and regulations about the very kind of grant and aid that athletes like Mr. Waldrep had received in an effort to draw a very clear line in amateur sports that are conducted in schools like TCU away from professional sports.}

\textit{Id.} at 11.}

\footnote{154}{\textit{Id.} at 12.}

\footnote{155}{\textit{Id.} TCU further warned that redefining the relationship would enhance the liability and financial exposure of universities and potentially limit the amount of revenues available to fund scholarships for needy students. \textit{Id.} at 117.}
In addition to TCU's position that the scholarship constituted a grant-in-aid, it explained the educational nature of intercollegiate sports: "[sports are] an integral part of the educational program and the athlete [is] an integral part of the student body." The amateur/education model and the commercial/education model served as foundations for TCU's and Waldrep's respective positions on the right to control issue. Waldrep testified that the TCU football coaches exercised dominion over his college life. This control was so pervasive that Waldrep perceived the football coach as the master and the players as the servants:

[Coaches] told [players] what to do, when to do it, how to do it, and also controlled them in terms of where they lived, how much money they got, how much money they could earn, what kind of job they could work outside of their employment with the institution, paid for their travel expense, paid for their meals and paid them $10 a month for their laundry.

Waldrep further maintained that the coach's right to control was most pronounced with respect to the performance of services, namely his participation in football. To illustrate this point, Waldrep described the events leading up to his career-ending spinal injury.

156. For the opinion that the grant-in-aid characterization is appropriate in those instances where a scholarship is not given in exchange for a student-athlete's athletic abilities, see infra notes 219-20 and accompanying text.
157. Waldrep Transcript, supra note 136, at 70.
158. Id. at 45-49. Waldrep stated that the TCU coaches told him where to sleep and how to dress and provided transportation and sleeping accommodations when the team travelled to play football games. Id. at 46. TCU also provided any medical assistance Waldrep required. Id. at 47.
159. Id. at 47-49.
160. Id. at 7.
161. He pointed to several items over which the coach possessed complete discretion. Waldrep asserted that the coach dictated the rules and regulations for practicing and playing football and the time when a student-athlete would attend football practice. Id. at 33-34. According to Waldrep, the coach's control over practice times was strengthened by the student athlete's fear that his scholarship would be terminated if he failed to abide by the practice schedule. Id. Waldrep also testified that the coach created the workout schedule to which the student-athlete had to adhere during the period immediately preceding fall practice, and decided which player would perform services for the team on a given day. Id. at 48. The coach also controlled which student-athletes would make the team. Id. at 48-49.
162. Id. at 41-42.
Waldrep testified that he was injured on a running play which had been devised by the press-box coach who had observed a weakness in Alabama's defense. He stated that the coaching staff "sent in a sweep play and specifically told the quarterback to tell me to get outside as quick as I can because they thought that the hole in the Alabama defense was outside rather than inside." In short, Waldrep argued that the coach, whom he described as his boss, controlled the manner in which he carried out his services.

In contrast, TCU asserted that the control exercised over a student-athlete is substantially similar in degree and nature to the dominion over other scholarship students and the general student population. Hence, the amateur/education model of intercollegiate athletics provided the foundation for TCU’s argument against defining Waldrep as an employee of TCU. TCU asserted that the NCAA’s characterization of the educational role of intercollegiate athletics together with the NCAA’s perception of the student-athlete as an integral part of an institution’s educational program demonstrated the need to retain a clear line of demarcation between college and professional sports, a line which would be eroded by ruling in favor of Waldrep.

On March 24, 1993, the Commission ruled that Kent Waldrep was an employee of TCU at the time he sustained his injuries. The

163. Id. at 41.
164. Id. at 41-42.
165. Id. at 45. Waldrep called the coach his "boss" because the coach gave orders which Waldrep obeyed. Id.
166. Id. at 47-49.
167. Id. at 11. During cross-examination, Waldrep admitted that TCU coaches controlled non-scholarship student-athletes in the same manner as they controlled scholarship athletes. Id. at 59-60. Waldrep also conceded that his obligation to maintain his grades was no different than the obligation imposed on non-athlete students at TCU. Id. at 67. Moreover, he admitted that he was under similar constraints when he played high school football in that he could not have challenged the directions of his coaches. Id. at 56-58. He testified that as a high-school athlete, he was subject to the same travel directions as those given to him by his college coaches. Id. at 56.
168. Id.
169. The Commission, composed of three employers and three employees chosen by the Governor, administers the workers’ compensation system. TEX. REV. CIV. STAT. ANN. art. 8308-2.01(b)-(c) (West Supp. 1993). The Commission approves and rejects workers’ compensation claims through hearings. TEX. REV. CIV. STAT. ANN. art. 8308-6.01 to -6.64. The Commission is also required to adopt procedural rules which govern the contested case hearings. TEX. REV. CIV. STAT. ANN. art. 8308-6.31(2).
Commission concluded that Waldrep sustained his injuries within the scope of his employment and was therefore entitled to receive compensation dating back to the day of his injury, October 26, 1974.\(^{171}\) Unfortunately, the Commission’s failure to articulate the basis for its decision leaves commentators speculating as to the grounds of the decision. An analysis of the arguments asserted by Waldrep and TCU aid in reconstructing the rationale which supported the determination that Waldrep was an employee of TCU.

First, the Commission was bound to apply Texas employment law principles which require the existence of a contract of hire to give rise to an employer/employee relationship.\(^{172}\) By logical inference, since the Commission found a contract of hire, it also recognized the contractual nature of Waldrep’s relationship with TCU.\(^{173}\)

If, however, the reasoning in \textit{Van Horn} and \textit{Nemeth} provides any indication of the preconceptions of the Commission in \textit{Waldrep}, it is likely that the Commission adopted a conceptualization of intercollegiate athletics which acknowledges the commercial realities of the student-athlete/university relationship.\(^{174}\)

Reliance on the amateur/education and the commercial/education model as bases for judicial decisionmaking is not limited to student-athletes’ attempts to obtain worker’s compensation benefits. The pattern

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\begin{itemize}
  \item Under the statute in effect when Waldrep was injured, the decision of the Commission (then called the Board) is binding unless the losing party notifies the Board within 20 days that he will not abide by its ruling. \textit{Tex. Rev. Civ. Stat. Ann.} art. 8307, § 5 (1967) (repealed 1991). Furthermore, the losing party must then bring suit to set aside the Board’s ruling in the county where the injury occurred within twenty days of this notice. \textit{Id.}
  \item This court trial is de novo and is conducted without reference to the Board’s original findings. \textit{Id.} On April 21, 1993, TCU appealed the Board’s ruling and sought trial in the District Court, Travis County, Texas.
  \item Texas Workers’ Compensation Commission Award (Mar. 24, 1993).
  \item \textit{Id.} The Commission concluded that TCU paid Waldrep a salary of $115 per week at the time of the injuries, translating into a compensation rate of $70 per week for life. \textit{Id.}
  \item \textit{Travelers Ins. Co. v. Gilliland}, 459 S.W.2d 500 (Tex. 1970); \textit{Rogers v. Trader & Gen. Ins. Co.}, 139 S.W.2d 784 (Tex. 1940).
  \item \textit{Whitmore, supra} note 53, at 772 & n.37 (explaining that a contract of hire is an express or implied agreement pursuant to which a worker provides services in exchange for compensation, and citing cases that stand for this proposition).
  \item This is particularly likely given the nature of the arguments asserted by TCU, such as the grant-in-aid characterization, which cast college sports as premised on principles of amateurism. The Commission apparently declined to adopt this characterization of college sports.
\end{itemize}
of decisional law emerging from intercollegiate sports suggests that courts have applied the amateur/education model in resolving any dispute that originates there. In notable instances, however, courts have shifted toward acceptance of the commercial/education paradigm. Perpetuation of the traditional trend in the context of antitrust challenges with noteworthy deviations is next examined.

V. BASES FOR MODEL SELECTION

A. Antitrust Challenges: Adherence to Pattern?

Student-athlete challenges of NCAA amateurism rules illustrate the extent to which the amateur/education conceptualization of college athletics influences judicial decisionmaking. NCAA amateurism rules impose the sanction of ineligibility on student-athletes who receive compensation beyond tuition and room and board in exchange for participation in a particular sport.\(^\text{175}\) Amateur status, and consequently eligibility to participate in a particular sport, is also sacrificed when a student-athlete either registers to participate in a professional sports league draft or consults with an agent.\(^\text{176}\)

Courts have uniformly rejected student-athletes’ claims that the “no-draft,”\(^\text{177}\) “no agent,”\(^\text{178}\) and “limited compensation”\(^\text{179}\) rules violate

\(^{175}\) NCAA OPERATING BYLAW art. 12, § 12.1.1(a), supra note 1, at 64 (providing that an athlete forfeits amateur status if the athlete “[u]ses his or her athletics skill (directly or indirectly) for pay in any form in that sport”).

\(^{176}\) “An individual loses amateur status in a particular sport when the individual asks to be placed on the draft list or supplemental draft list of a professional league in that sport . . . .” Id. § 12.2.4.2, at 67. Similarly, ineligibility for participation in intercollegiate athletics results when a student-athlete enters into an agreement to be represented by an agent for purposes of marketing his or her athletic abilities. Id. § 12.3.1, at 68.

\(^{177}\) Id. § 12.2.4.2, at 67 (prohibiting entrance into the draft). At its 1994 convention, the NCAA modified the “no draft” rule to carve out an exception for student-athletes competing in intercollegiate basketball. New Rule 12.2.4.2.1 provides:

12.2.4.2.1 Exception—Professional Basketball Draft. A student-athlete in the sport of basketball may enter a professional league’s draft one time during his or her collegiate career without jeopardizing eligibility in that sport, provided the student-athlete declares his or her intention to resume intercollegiate participation within 30 days after the draft. Id. § 12.2.4.2, amended by § 12.2.4.2.1, reprinted in NCAA NEWS, Jan. 24, 1994, at 1-6.

\(^{178}\) NCAA OPERATING BYLAW art. 12, § 12.3.1, supra note 1, at 68.

\(^{179}\) Id. § 12.1.1, at 64 (setting out conduct which terminates amateur status).
the Sherman Antitrust Act.\textsuperscript{180} Some courts reason that the noncommercial nature of NCAA amateurism rules remove them from the purview of antitrust regulation.\textsuperscript{181} Applying a rule of reason analysis, other courts conclude that NCAA amateurism rules are reasonable since they advance and maintain the amateurism value.\textsuperscript{182} Regardless of the particular rationale used in upholding NCAA regulations, the amateur/education model’s conception of intercollegiate athletics provides indispensable support for the validation of these rules.\textsuperscript{183}

The outcome in \textit{Banks v. NCAA}\textsuperscript{184} demonstrates this phenomenon. In \textit{Banks}, a student-athlete playing football for Notre Dame registered for the National Football League draft and consulted with an agent.\textsuperscript{185} The NCAA declared Banks ineligible to play football in his remaining year at Notre Dame.\textsuperscript{186} Banks sought to permanently enjoin the NCAA


\textsuperscript{181} \textit{Sherman Act}, supra note 180, at 1300 (noting that some courts rely on the noncommercial nature of NCAA amateurism rules in concluding that antitrust laws are inapplicable). Similarly, other courts reason that such regulations “have only an incidental impact on trade and should not invite antitrust scrutiny.” McCarthy & Kettle, supra note 180, at 298.

\textsuperscript{182} See \textit{Sherman Act}, supra note 180, at 1302 n.9 (list of cases).

\textsuperscript{183} See McCarthy & Kettle, supra note 180, at 298 (noting that the amateurism value, as articulated by the NCAA, pervades judicial opinions addressing antitrust challenges to amateurism rules); \textit{Sherman Act}, supra note 180, at 1301 (criticizing judicial analysis of this issue as resting on an outdated ideal of amateurism which defies the reality of college sports).

\textsuperscript{184} 977 F.2d 1081 (7th Cir. 1992).

\textsuperscript{185} \textit{Id.} at 1083-84.

\textsuperscript{186} \textit{Id.} at 1084.
and Notre Dame from enforcing the no-draft and no-agent rules, asserting that both rules violated section 1 of the Sherman Act.\textsuperscript{187}

The Seventh Circuit affirmed the district court’s holding that Banks had failed to establish that the no-draft and no-agent rules had an anti-competitive effect on trade.\textsuperscript{188} The language of the court’s opinion, and its allusion to the NCAA’s stated purpose in particular,\textsuperscript{189} revealed the court’s perception of college sports as resting on the amateur ideal:

Because the no-draft rule represents a desirable and legitimate attempt “to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives,” the no-draft rule and other like NCAA regulations preserve the bright line of demarcation between college and “play for pay” football. . . . We consider college football players as student-athletes simultaneously pursuing academic degrees that will prepare them to enter the employment market in non-athletic occupations, and hold that the regulations of the NCAA are designed to preserve the honesty and integrity of intercollegiate athletics and foster fair competition among the participating amateur college students.\textsuperscript{190}

The foregoing vision contrasts sharply with that expressed in the \textit{Banks} dissent, which criticized the majority for adopting an outmoded view of college sports.\textsuperscript{191} The dissent emphasized that college sports are no longer merely about “spirit, competition, camaraderie,

\textsuperscript{187} \textit{Id.} Specifically, Banks alleged that the rules violated the Sherman Act in the following ways: (1) the NCAA impermissibly prohibits its member institutions from offering a player who violates the rules an opportunity to play football; (2) the rules impermissibly restrain member institutions by requiring them to abide by the rules and by forbidding the grant of waivers; and (3) the rules restrain players from marketing their services to the NFL by restricting their opportunities to be drafted by an NFL team. \textit{Id.} at 1088.

\textsuperscript{188} \textit{Id.} at 1084, 1086, 1094. The court concluded that a rule of reason analysis was appropriate because the NCAA amateurism rules did not constitute per se violations of the Sherman Act. A rule of reason analysis requires that the alleged improper conduct have an anticompetitive effect on a discernible market. \textit{Id.} at 1088. The Seventh Circuit defined the relevant market as the college football labor market, and concluded that Banks had failed to demonstrate that the challenged rules restrained trade in this market. \textit{Id.} at 1089.

\textsuperscript{189} \textit{Id.} (quoting Gaines v. NCAA, 746 F. Supp. 738, 744 (M.D. Tenn. 1990)). The NCAA’s stated purpose is to “maintain amateur intercollegiate athletics as an integral part of the education program.” NCAA \textit{Const.} art. 1, §1.3.1, \textit{supra} note 11, at 1.

\textsuperscript{190} \textit{Banks}, 977 F.2d at 1090 (citation omitted).

\textsuperscript{191} \textit{Id.} at 1099 (Flaum, J., concurring in part and dissenting in part).
sportsmanship, [and] hard work,"192 but are instead a commercial enterprise which generates monetary and non-monetary benefits for both student-athletes and their institutions.193 The dissent maintained that only by recognizing these realities could a fair assessment be made of the extent to which the NCAA amateurism rules represent an illegal restraint on trade.194

In contrast to Banks and other decisions focusing on the ideals of amateurism195 are those which demonstrate a shift toward acceptance of the assumptions underlying the commercial/education model of college sports.196 NCAA v. Board of Regents,197 a case which challenged NCAA control over television coverage of football games, manifests this shift. The NCAA’s plan limited the total number of games which could be televised and the number of games which any single member institution could televise.198 Applying a rule of reason analysis, the Supreme Court agreed with the plaintiffs in holding that the NCAA’s television plan violated the Sherman Act.199

In dicta, the Court distinguished between cases challenging NCAA amateurism rules from those regulating NCAA television contracts on the ground that the former regulates noncommercial matters while the latter regulates commercial activity.200 In acknowledging this distinction, the Court conveyed that college sports should be viewed as a business.201 However, it stopped short of fully adopting a commercial/education model of intercollegiate athletics by intimating the applicability of the amateur/education model in all cases arising within intercollegiate athletics except those of a blatantly commercial nature.

192. Id.
193. The majority likewise criticized the dissent for its cynical view of intercollegiate athletics. Id. at 1092.
194. Id. at 1098-99 (Flaum, J., concurring in part and dissenting in part).
195. For citations to decisions similar to that rendered in Banks, see supra notes 180, 182 and accompanying text. See also McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988) (validating NCAA eligibility rules concerning scholarship amounts); Hennessey v. NCAA, 564 F.2d 1136, 1153 (5th Cir. 1977) (upholding NCAA restriction on the number of coaching staff positions on the ground that the rule helps to maintain a line of demarcation between college and professional sports).
196. See Scanlan, supra note 4, at 4-5.
198. Id. at 94.
199. Id. at 120.
200. Id. at 119-20.
201. See Scanlan, supra note 4, at 5.
Thus, courts have recognized two categories of NCAA rules. The first group, rules governing commercial activities such as television rights, are subject to antitrust laws. The second group, rules governing noncommercial activities such as no-draft and no-agent rules, evade scrutiny.\textsuperscript{202} Noting this dichotomy in the context of \textit{Gaines v. NCAA},\textsuperscript{203} where a student-athlete challenged the validity of the no-draft and no-agent regulations, one commentator concluded:

The \textit{[Gaines]} court concludes that the NCAA's regulation of noncommercial activities are exempt from antitrust scrutiny. The court distinguishes rules pursuing economic objectives from those preserving amateurism. The antitrust laws apply to commercial objectives such as the broadcast and promotion of college football. However, the NCAA's second primary goal is preserving amateurism as an integral part of the educational process. The NCAA achieves this goal by preventing the commercialization of the college athlete through the 'no-draft' and 'no-agent' rules. Since the rules have noncommercial objectives, the Sherman Act does not apply to them.\textsuperscript{204}

In summary, courts have relied on principles and values which undergird the amateur/education model of college sports to uphold NCAA rules unless the challenged provisions regulate commercial matters.\textsuperscript{205} Despite the inherently commercial aspect of the 'no-draft' and 'no-agent' rules, courts have deferred to the amateurism principle as articulated in the NCAA rules to conclude that such rules fail to constitute unlawful restraints on trade.\textsuperscript{206} Unfortunately, judicial reliance on principles of amateurism preclude courts from evaluating the true extent to which NCAA amateurism rules are noncommercial.\textsuperscript{207}

\begin{itemize}
  \item 202. McCarthy & Kettle, \textit{supra} note 180, at 301.
  \item 203. 746 F. Supp. 738 (M.D. Tenn. 1990).
  \item 204. McCarthy & Kettle, \textit{supra} note 180, at 302.
  \item 205. Similarly, courts have applied the amateur/education model in resolving complaints that NCAA enforcement actions fail to provide due process and are therefore unconstitutional. \textit{See}, e.g., NCAA v. Tarkanian, 488 U.S. 179, 198 n.18 (1988) (viewing the NCAA as the fosterer of amateur athletics at the collegiate level); Hawkins v. NCAA, 652 F. Supp. 602, 615 (C.D. Ill. 1987) (accepting the proposition that the NCAA's fundamental purpose is to promote educational and athletic values).
  \item 206. "Although courts cannot ignore the fact that the NCAA is doing business and is not exempt from the antitrust laws, they have protected it from almost all liability by stressing the need for its rules and regulations to maintain amateurism and college athletics." McCormack v. NCAA, 845 F.2d 1338, 1344 (5th Cir. 1988).
  \item 207. \textit{See}, e.g., Banks v. NCAA, 977 F.2d 1081, 1099 (7th Cir. 1992) (Flaum, J., concurring in part and dissenting in part). One commentator argues that while many of the
An occasional and limited shift toward recognition of the commercial/education model notwithstanding, the amateur/education model is the dominant influence in the resolution of antitrust challenges arising in the context of college sports.

B. Contractual Nature of Relationship

Courts and commentators overwhelmingly acknowledge that the award of an athletic scholarship\(^{208}\) is an inducement for a student-

amateurism rules seek to promote amateurism and education, they are also designed to maximize revenues for universities. Ethan Lock, *Unreasonable NCAA Eligibility Rules Send Braxton Banks Truckin',* 20 CAP. U. L. REV. 643, 649 (1991). Using the no-draft rule to illustrate this point, he states:

The reason for disqualifying a student-athlete football player for merely requesting entry into the draft has nothing at all to do with preserving amateurism or with providing a distinct product to consumers. It is instead an attempt by the NCAA to discourage underclassmen with professional potential from leaving school before they exhaust their eligibility. It is an attempt to keep the student-athlete eligible for as long as possible. It is not intended to prevent the commercialization of college sports but to do the opposite: to maximize the revenue of its member institutions in a sport that generates enough money to subsidize coaches' salaries and other nonrevenue producing sports. *Id.* at 652.

208. Prior to 1952, the expenses of student-athletes were typically financed through easily obtained university employment, slush funds, or a combination of both. Ostdiek, *supra* note 11, at 740. University of Denver v. Nemeth, 257 P.2d 423 (Colo. 1953), illustrates the typical form of a student athlete's financial assistance prior to 1952. Rather than receiving a scholarship, Nemeth received a $50 per month stipend for cleaning campus tennis courts and received free housing in exchange for tending the dormitory furnace and cleaning the sidewalks. *Id.* at 424.

While full athletic scholarships were created by the NCAA in 1952, the absence of uniform rules governing the award of scholarships, including the number of scholarships which a university or conference could award and the basis on which a scholarship could be awarded, placed some institutions and conferences at a competitive disadvantage. For example, during the mid-1960s, the Big Ten Conference experimented with awarding athletic scholarships on the basis of financial need. Ostdiek, *supra* note 11, at 741. The Conference abandoned this approach because it afforded a competitive advantage to universities offering full scholarships without regard to financial need. *Id.* To redress this inequity, the NCAA revamped its constitution and bylaws in 1973. *Id.*

A significant amendment limits the number of athletic scholarships which universities can award in a designated sport. NCAA OPERATING BYLAW art. 15, § 15.5, *supra* note 1, at 179-87. The NCAA continues to reduce the number of athletic scholarships which institutions may award. For example, recent amendments have established the following limitations on the football scholarships to be awarded by
Division I institutions: 92 during the 1992-93 academic year; 88 during the 1993-94 academic year; and 85 during the 1994-95 academic year. Id. § 15.5.5.1, at 184.

Some critics posit that the recent limitations relate more to reducing the costs associated with college sports than to creating a level playing field. Davis, supra note 34, at 600; Smith, supra note 33, at 571. Cost trimming measures are of questionable utility to the extent that they divert attention from efforts to reform the relationship between intercollegiate athletics and the educational mission of institutions. Davis, supra note 34, at 600; Smith, supra note 33, at 571.

Another significant amendment to the NCAA constitution reduced the periods for which scholarships could be granted from four-year to one-year terms. NCAA OPERATING BYLAW art. 15, § 15.3.3.1, supra note 1, at 174. The NCAA stated that this change was intended to avoid situations where a student-athlete would compete for a brief period, quit playing a sport, but still demand scholarship benefits for the remainder of the four-year period. Sperber, supra note 122, at 207. Professor Sperber challenges the purported rationale, arguing that the more likely impetus behind the one-year term limitation was to facilitate the “running off” of players among coaches, and to enable coaches to more effectively use the threat of scholarship termination in inducing enhanced athletic performance. “[T]he leverage that one-year renewables gives program heads over their players allows coaches to demand obedience not only on the field or in the gym but also in the classroom.” Id. at 209; see also Cozzillio, supra note 42, at 1323 n.185 (noting that some commentators believe that the change to one-year terms makes it easier for coaches to “run a player off” after each year); Smith, supra note 7, at 265 (suggesting reforms to proscribe the “running off” of student-athletes).

As a result of this amendment, a university’s commitment to provide financial assistance amounts to a yearly obligation renewable annually for four or five years. A student-athlete’s failure to remain academically eligible, to compete in intercollegiate sports, or to comply with the rules and regulations of his institution or the conference may result in non-renewal of the athletic scholarship. “The decision to renew or not renew the financial aid is left to the discretion of the institution, to be determined in accordance with its normal practices for students generally.” NCAA OPERATING BYLAW art. 15, §15.3.5.1, supra note 1, at 175.

A recent illustration of an institution’s decision not to renew one-year athletic scholarships involved seven Texas A & M football players declared ineligible by the NCAA for accepting improper payments from a booster. Dan Nixon, Players Lose Grants at A & M, DALLAS MORNING NEWS, July 3, 1993, at A1. The players were employed on a yearly basis and received payment for work they did not actually perform. Id. at A16. Such conduct violated NCAA regulations prohibiting: (1) unauthorized benefits for student-athletes; and (2) holding employment at times other than the summer and other university recesses. Id.; NCAA OPERATING BYLAW art. 16, § 16.01.1, supra note 1, at 191 (providing that the receipt of unauthorized benefits renders student-athlete ineligible); NCAA OPERATING BYLAW art. 12, §12.4.1(a), supra note 1, at 69 (providing that student-athletes can only be paid for work actually performed).

In July 1993, pursuant to NCAA regulations, Texas A & M informed the students of its decision not to renew, and advised the players and their parents of their right to request a hearing before the institutional agency rendering the decision. Nixon, supra, at A16; NCAA OPERATING BYLAW art. 15, §15.3.5.1.1, supra note 1, at 175-76.
athlete's commitment to an institution to compete in intercollegiate athletics. Consequently, a contract between the student and college is formed.\textsuperscript{209} \textit{Ross v. Creighton}\textsuperscript{210} examined the nature of a student-

In contrast with discretion not to renew an athletic scholarship, the discretion of a university to cancel an athletic scholarship within the one-year period is severely limited. Except where the student-athlete becomes ineligible for intercollegiate competition, commits fraud, or engages in equally serious misconduct, an athletic scholarship cannot be gradated or cancelled during the one-year term. NCAA Operating Bylaw art. 15, §15.3.5.1.1, \textit{supra} note 1, § 15.3.4.1 to .2, at 175.


Professor Cozzillo proposes that the nature of the contractual relationship and the respective commitments arising out of the one-year scholarship are subject to varying interpretations. For a discussion of the one-year term limitation, see \textit{supra} note 208. He describes the two most likely scenarios as follows:

Under this scenario, the first academic year is a bilateral contract in which the institution promises to award the student-athlete athletic financial aid for one academic year in exchange for the student-athlete's promise to attend the institution for one academic year. The second academic year would be a unilateral contract, or possibly an option contract, in which the institution promises to renew the student-athlete's athletic financial aid for another academic year . . . in exchange for the student-athlete's performance . . . . Generally, the student-athlete
athlete's relationship with his university when a former student-athlete alleged educational malpractice and breach of contract on the part of Creighton University. The court refused to recognize Ross' breach of contract claim, reasoning that this claim simply restated an action for educational malpractice. The court went on to rule, however, that Ross presented a cognizable contract claim for breach of express promises.

Ross's significance lies in the court's express recognition of the contractual nature of the relationship between the student-athlete and his institution. In this respect, the Seventh Circuit joins a majority of courts which acknowledge that a student's participation in intercollegiate athletics in exchange for a scholarship constitutes a contract. Analysis of the documents creating the student-athlete's relationship with his institution and the parties' respective expectations support the contract characterization.

does not promise to attend the institution for the second academic year; in fact, the student-athlete can leave freely and not breach any of his obligations to the institution. Of course, this conclusion is subject to the argument that partial performance constitutes an implied promise or otherwise compromises the parties' freedom to abandon the relationship.

An alternative interpretation is that the initial scholarship is an offer to a four year contract that calls for a series of one year performances. Many scholarship letters intimate that the one year scholarship is renewable each year up to four years, provided the student meets the university's requirements. Because most students consider their scholarship to be a four year ride, the parties' actions may reflect an intent to be bound for four years.

Cozzillo, supra note 42, at 1321-22 n.181 (citations omitted), 1322 (footnotes omitted).

210. 957 F.2d 410 (7th Cir. 1992).

211. In a case of first impression in the state of Illinois, the Seventh Circuit held that Ross's tort claims alleging educational malpractice, negligent admission and negligent infliction of emotional distress were not cognizable. Id. at 414-15.


212. Ross, 957 F.2d at 416.

213. Id. at 417; see Davis, Limited Judicial Regulation, supra note 48, at 111-14 (noting that the Ross court suggested that a student-athlete may also make out a breach of contract claim for breach of implied promises).

214. See supra note 209.
The Letter of Intent,\(^{215}\) the Statement of Financial Assistance, and various university publications such as bulletins and catalogues, create the express contract from which the student-athlete’s and institution’s respective obligations arise.\(^{216}\) Traditional contract doctrines of offer and acceptance amply describe the relationship:

The typical scholarship proposal tendered by a university to a student constitutes an offer in traditional contract terms . . . . Standard scholarship letters illustrate the university’s overall commitment to provide financial aid to the prospective student-athlete . . . . In virtually all respects, the requisite language and detail satisfies [sic] the requirements of the traditional ‘offer’. Thus at first blush the scholarship proposal, as conveyed to the student-athlete and embraced in the Letter of Intent, invites a response that would seemingly form a contract.

. . . .

The Letter of Intent is the consummation of a binding, executory pact between the university and the student . . . . Therefore, the Letter of Intent is most logically characterized as an acceptance of a bilateral contract offer, manifested through the student-athlete’s promise to attend.\(^{217}\)

Moreover, economic realities support a contractual characterization of the relationship. In the realm of intercollegiate athletics, the student-
athlete's value lies in his ability to compete successfully for a team, and he receives financial aid in exchange for this value. Hence, a quid pro quo is the essence of the relationship between the athlete and his university.

The dependence of financial aid on athletic performance not only distinguishes student athletes from other students but places them in "a unique and increasingly significant relationship with the university."\footnote{Nestel, supra note 36, at 1401.} Thus, a contractual view of the relationship has a two-fold significance. It recognizes the evolution, spawned by the increased commercialism of college sports, of the student-athlete's relationship with his university. In addition, it represents a tacit shift towards adoption of assumptions which underlie the commercial/education model of college sports.

Well reasoned analyses and the modern realities of intercollegiate athletics notwithstanding, the commercial/education model has not been fully embraced. Professors Weistart and Lowell, noteworthy skeptics of the contract characterization, criticize the failure of courts and commentators to characterize the athletic scholarship as an educational grant.\footnote{John C. Weistart & Cym H. Lowell, The Law of Sports 11 (1979); see also Harry M. Cross, The College Athlete and the Institution, 38 Law & Contemp. Probs. 151, 165 (1973) (arguing that grant-in-aid analysis is appropriate when institutions guarantee the primacy of a student-athlete's status as a student).} They posit that if the student-athlete/university relationship is viewed from an academic rather than a contractual premise, the obligations imposed on the student-athlete are nothing more than a condition to the receipt of a gift.\footnote{Weistart & Lowell, supra note 219, at 12.} Under the grant-in-aid conceptualization, Professors Weistart and Lowell analogize scholarship athletes to music students who receive financial aid with the understanding that they will perform in public as a part of their academic program.

These commentators' preference seems partially derived from perceived problems with the alternative conceptual scheme of intercollegiate athletics.\footnote{Though the potential problems envisioned by Weistart and Lowell are realistic, these difficulties cannot be resolved by misconstruing the underlying nature of the relationship. See Wong, supra note 84, at 220 (questioning whether the grant-in-aid analysis accords with actual practices); Cozzillo, supra note 42, at 1283 (rejecting the argument that financial aid awards constitute gentlemen's agreements or gratuitous grants).} Still, Weistart and Lowell concede that where the pertinent documents and a university's policy evidence an exchange...
of financial assistance for athletic participation, a contractual characterization is the only accurate interpretation of the relationship.\footnote{222}  

This skepticism has not persuaded courts to adopt the grant-in-aid characterization of athletic scholarships. Despite judicial caution in defining this relationship as contractual, such a characterization marks a shift away from an idyllic conception of college sports and toward a vision which more closely mirrors reality.

\textbf{C. The Existence of a Special Relationship Between a Student-Athlete and the University: Complete Paradigm Shift?}

Confronted with the alleged wrongful death of a student-athlete, the Third Circuit Court of Appeals in \textit{Kleinknecht v. Gettysburg College}\footnote{223} found that a special relationship exists between an intercollegiate athlete and his college. Gettysburg College\footnote{224} had recruited Kleinknecht, the

\begin{footnotesize}
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\item \text{222. Weistart \& Lowell, supra note 219, at 12; Cozzillio, supra note 42, at 1364 (defining the student-athlete/university relationship as a contractual exchange in which scholarship money is given for athletic participation). The argument in favor of this characterization posits that intercollegiate athletics is a business activity and not an essential part of the educational process. Weistart \& Lowell, supra note 219, at 9-10. "Under this view, a condition requiring that the athlete maintain eligibility would be distinguished from similar conditions placed on grants to other students." Id. at 9.}
\item Professor Sperber argues that the NCAA embraced the term "student-athletes" in the 1970s to deflect charges of the professionalization of college sports. Sperber, supra note 122, at 205. He asserts that terminology such as student-athlete and grant-in-aid unsuccessfully conceal the contractual nature of the student-athlete/university relationship. Id. at 205-06.
\item 989 F.2d 1360 (3d Cir. 1993). This decision marked the first instance in which an American court relied upon the "special relationship" concept as a basis for imposing tort liability on a college for a student-athlete's injuries.
\item Gettysburg College is a private four-year college with an enrollment of approximately 2000 students. Id. at 1363.
\end{itemize}
\end{footnotesize}
deceased student,225 to play on its Division III intercollegiate lacrosse team.226

The Kleinknechts argued that the district court, which granted Gettysburg’s motion for summary judgment,227 erred in (1) holding that Gettysburg owed no duty of care to implement safety measures which would assure prompt assistance if a student-athlete suffered cardiac arrest while playing an intercollegiate sport;228 (2) concluding that Gettysburg exercised reasonable care after Kleinknecht’s collapse;229 and (3) determining that a student trainer and the college itself were immune under Pennsylvania’s Good Samaritan Act.230 Plaintiffs maintained that a duty of care between the student-athlete and the college could be premised on, inter alia, the special relationship between a college and its student-athletes.231

The court held that the Pennsylvania Supreme Court would find that a special relationship existed between Kleinknecht and Gettysburg which imposed a duty of reasonable care on Gettysburg.232 The special relationship existed because Kleinknecht was an intercollegiate athlete involved in a school-sponsored athletic activity.233 The court noted that the lacrosse coach’s active recruitment of Kleinknecht, and the fact that Kleinknecht ultimately chose Gettysburg college because he was  

225. During his sophomore year, the 20-year-old athlete suffered cardiac arrest and collapsed during a fall lacrosse practice at which players typically practice team skills and drills. *Id.* at 1364. Typically, no student trainers are present during fall practices and none were present when Kleinknecht collapsed. *Id.* at 1363. None of the coaches present were certified in CPR. *Id.* at 1363. Kleinknecht could not be revived, and he died shortly after his collapse. Kleinknecht had no prior history of heart problems and no other student at Gettysburg had experienced cardiac arrest while playing or practicing lacrosse. *Id.* at 1365. Kleinknecht’s parents described him as “a healthy, physically active and vigorous young man.” *Id.* at 1363.

226. *Id.* The court defined lacrosse as a contact sport which ranked fourth behind football, basketball, and wrestling in terms of sports-related injuries. *Id.*


228. *Kleinknecht*, 989 F.2d at 1365.

229. *Id.*

230. *Id.*

231. *Id.* at 1366. The Kleinknechts also argued that, pursuant to § 323 of the Restatement (Second) of Torts, a duty existed for one who fails to exercise reasonable care after gratuitously undertaking to render services. The court did not consider this theory because the court found a duty of care based on the Kleinknecht’s special relationship theory.

232. *Id.* at 1369.

233. *Id.*
convinced of the high caliber of its lacrosse program, were significant to the creation of a special relationship. 234

In finding the existence of a special relationship, the court distinguished between private affairs and participation in scheduled, intercollegiate athletic practices: 235

There is a distinction between a student injured while participating as an intercollegiate athlete in a sport for which he was recruited and a student injured at a college while pursuing his private interests, scholastic or otherwise. This distinction serves to limit the class of students to whom a college owes the duty of care that arises here. 236

The enduring significance of Kleinknecht inheres in the court's recognition of the modern realities of the student-athlete/university relationship. Assessing Gettysburg's recruitment of Kleinknecht, the court concluded that the college most probably recruited Kleinknecht in the hope that "his skill at lacrosse would bring favorable attention and so aid the College in attracting other students." 237 The Kleinknecht court's analysis rejected the contention that student-athletes are indistinguishable from the remaining student population, thereby casting aside a fundamental assumption embodied within the amateur/education model.

234. Id. at 1367.
235. In Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979), the Third Circuit held that a college was not liable in negligence when a student sustained injuries while returning from a class picnic. Id. at 137, 143. The court stated that "the modern American college is not an insurer of the safety of its students," and concluded that absent a special relationship between the college and student the university owed the student no duty. Id. at 141-43. Similarly, the Colorado Supreme Court rejected the personal injury claim of a student injured while using a trampoline at a campus fraternity house in University of Denver v. Whitlock, 744 P.2d 54 (Colo. 1987). The court concluded that the student-college relationship alone failed to constitute a special relationship for which liability could be imposed. Id. at 59-61.

Courts have rejected arguments that the principle of in loco parentis or, alternatively, that the concept of a special relationship, gives rise to a duty to students injured on campus or at college-related functions. See generally Cathy J. Jones, College Athletes: Illness or Injury and the Decision to Return to Play, 40 BUFF. L. REV. 113, 130-32 (1992); Tia Miyamoto, Comment, Liability of Colleges and Universities for Injuries During Extracurricular Activities, 15 J.C. & U.L. 149 (1988); Theodore C. Stamatakos, Note, The Doctrine of In Loco Parentis, Tort Liability and the Student-College Relationship, 65 IND. L.J. 471, 486-87 (1990).

236. Kleinknecht, 989 F.2d at 1368.
237. Id.
Kleinknecht also demonstrates that a duty of care premised on a special relationship exposes colleges to potentially devastating liability for students' sports-related injuries.\textsuperscript{238} Moreover, the special relationship conceivably provides a ground on which a student-athlete can assert an educational malpractice claim against his college.\textsuperscript{239}

It is premature to conclude that Kleinknecht represents a complete shift toward adoption of the commercial/education model of college sports. At a minimum, Kleinknecht departs from the illusory assumptions of the amateur/education model. The decision incorporates the modern reality of the student-athlete/university relationship into its reasoning, echoing the values contained within the commercial/education conceptualization of college sports.

VI. MODEL SELECTION

A. Societal Expectations

The prominence of the amateur/education conceptual theme in judicial decisionmaking is based on beliefs associated with the role of college sports in society and pragmatic considerations. A model of intercollegiate athletics which would eradicate the myths of this model threatens the lofty societal expectations of intercollegiate athletics and its

\textsuperscript{238} See Jones, supra note 235, at 212 (noting that absent a special relationship, liability will not be imposed on college for a student-athlete's injuries). But see Barbara J. Lorence, The University's Role Toward Student-Athletes: A Moral or Legal Obligation?, 29 DUQ. L. REV. 343 (1991) (exploring whether the existence of a special relationship between a student-athlete and his university necessarily imposes a duty upon the university).

\textsuperscript{239} See generally Davis, supra note 1 (arguing that the special relationship between a student-athlete and his university provides a duty which predicates an educational malpractice claim). In spite of this ground, educational malpractice claims are oftentimes rejected on the basis of academic abstention. See Davis, Good Faith, supra note 48, at 783; Johnson, supra note 1, at 112-13. The commercial/education model questions the applicability of the academic abstention principle and questions the propriety of deferring to a university's own definition of its obligations to student-athletes. See Johnson, supra note 1, at 112-13 (questioning applicability of the academic abstention doctrine in the context of student-athlete claims against institutions); see also Davis, Good Faith, supra note 48, at 783-84 ("The relationship between the student-athlete and the university . . . is not purely academic . . . . Adherence to the academic abstention doctrine is unwarranted in this context. Indeed, it tends to perpetuate the exploitative nature of this quasi-business relationship.").
participants. The judiciary's adherence to the amateur/education model of college sports evinces its reluctance to make this tradeoff, and reveals the judicial perception that intercollegiate athletics plays a social role within universities.

Judicial affinity for the amateur/education model also stems from concern that abandonment of the amateurism ideal will shatter the image of college sports organizations as establishments dedicated to academic pursuits. The conflict between the professionalism of college sports and educational goals legitimates this apprehension. Hence, NCAA regulations represent "desirable and legitimate attempt[s] to 'keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives.'"

240. See supra notes 18-20 and accompanying text.


243. Rush, supra note 18, at 554 (observing that the criticism of the illusory nature of the amateur model of intercollegiate athletics is consistently met with resistance from educators and the NCAA).

However, ignoring the commercialization of intercollegiate athletics will not enhance the educational experience of its participants. Only honest consideration and recognition of the conflict between commercialism and educational values can preserve the latter.245

In addition to being hypocritical, anachronistic and perhaps even biased, the invocation of amateurism as a value critical to the operation of big-time intercollegiate athletics, may inhibit the necessary focus on the educational value. Indeed, amateurism seems to be of utility only to the extent that it furthers educational or academic values. The values of amateurism as a principle related to the governance of big-time intercollegiate athletics seems to be related to its capacity to focus on exploitation that may result from too much attention to economic and commercial matters and too little attention to educational ones. As such, nothing would be lost by focusing solely on the educational value and jettisoning the amateurism value, as applied to big-time intercollegiate athletics. In fact, much might be gained. In particular, enforcing amateurism values may detract from the educational benefits made available to the student-athlete.246

B. Pragmatic Considerations

Judicial reticence to adopt the commercial/education model also reflects the concern that the commercial/education model would increase a university’s liability exposure for personal injury and educational malpractice claims.247 Consequently, recognition of the realities of the commercial/education model is likely to encourage litigation that will expend scarce judicial resources.248 Adherence to the value of amateurism reflected in the amateur/education model provides a convenient means of forestalling these consequences.

Moreover, the economic aspects of the commercial/education paradigm blur the line of demarcation between college and professional sports. Amateurism and educational values shield institutional interests

245. The state of modern college athletics is aptly summarized as a conflict between the forces of commercialism and educational values. See Smith, supra note 33, at 571; see also Davis, supra note 209, at 187 (explaining that many problems associated with intercollegiate athletics stem from the obfuscation of the educational purpose by the pressure to win).

246. Smith, supra note 7, at 226-27.

247. See supra text accompanying note 239.

248. Generally, federal courts now refrain from hearing claims against the NCAA to curb this expenditure. Szwabowski, supra note 242, at 66-67.
from perceived harms to which the university would fall victim under the alternative scheme. However, recognition of the commercial aspects of college sports would facilitate professional treatment of intercollegiate athletic activities for other legal purposes.

For example, employee characterization of scholarship athletes, indicating a shift to the commercial/education paradigm, increases the likelihood that scholarships will be taxable as gross income. Currently, courts employ a "quid pro quo test" in determining whether a scholarship award is excludable from gross income under section 117 of the Internal Revenue Code. Scholarships given in exchange for services rendered are not excluded from gross income under this test.

249. For a discussion of judicial uncertainty concerning the proper classification of student-athletes for worker's compensation purposes, see supra part III.C.

250. Pursuant to § 117 of the Internal Revenue Code, scholarships and grants are excluded from gross income. I.R.C. § 117 (1986). Subsection (a) of § 117 provides: "Gross income does not include any amount received as a qualified scholarship by an individual who is a candidate for a degree at an educational organization . . . ." § 117(a). Section 117 assumes that scholarships are "relatively disinterested, 'no strings attached' educational grants with no requirement of any substantial quid pro quo from the recipients." Hoenlich, supra note 37, at 581 (quoting Bingler v. Johnson, 394 U.S. 741, 751 (1969)).

251. Hoenlich, supra note 37, at 591; Robert W. Lee, The Taxation of Athletic Scholarships: An Uneasy Tension Between Benevolence and Consistency, 37 U. Fla. L. Rev. 591, 600 (1985) (observing that a contract will generally be found to exist under the prevalent "quid pro quo test"); Nestel, supra note 36, at 1412 (noting that since 1970, the "quid pro quo test" is the test most often applied by courts).

The alternative standard applied by courts, the "primary purpose test," focuses on the relationship between the grantor of a scholarship and the recipient. Under this test, the grantee may not exclude a scholarship from gross income if it was awarded largely to benefit the grantor. See Nestel, supra note 36, at 1411. Commentators are split over the extent to which courts continue to employ the primary purpose test. Hoenlich, supra note 37, at 588-89.

252. Hoenlich, supra note 37, at 589-91; Nestel, supra note 36, at 1412. The advent of one-year, renewable athletic scholarships further supports the notion that defining student-athletes as employees causes noncompliance with the terms of I.R.C. § 117(a). Nestel, supra note 36, at 1412. Many commentators agree that the realities of the modern student-athlete/university relationship are inconsistent with the basis upon which this income exclusion rests. William J. Judge, Student-Athletes as Employees: Income Tax Consequences, 13 J.C. & U.L. 285, 301 (1986); Hoenlich, supra note 37, at 592.

The foregoing considerations also tend to discredit Revenue Ruling 77-263's attempt to develop a test to determine whether a scholarship constitutes gross income. Pursuant to this ruling, athletic scholarships are not taxable when a college: (1) expects but does not require the student's participation in a particular sport; (2) requires no particular activity in
This characterization also has important tax implications for universities which are tax-exempt institutions. Revenue generated by athletic programs are considered attributable to the institution’s educational purpose and therefore are specifically exempt under section 501(a) of the Internal Revenue Code. The NCAA’s definition of the student-athlete is consistent with the Code’s view that participation in athletic competition is predominantly educational.

Adoption of a commercial/education model, in contrast, increases the likelihood that income from intercollegiate sports will be taxable as unrelated business income because this model recognizes the business component of college sports.

It is reasonably clear that all or part of the athletic program today at some institutions rises to the level of a “trade or business,” characterized by a search for profit, and that the constituent parts of a full-fledged lieu of participation if the student-athlete decides not to compete athletically; and (3) does not cancel the scholarship if the student cannot participate. Rev. Rul. 77-263, 1977-2 C.B. 47. Applying these guidelines, the ruling concluded that athletic scholarships are not taxable as gross income because the university does not require that student-athletes render services in exchange for the scholarship. Id. at 47-48.

This revenue ruling is appropriately criticized for ignoring the fact that universities award athletic scholarships fully expecting that the recipients will compete on behalf of the university. Hoeflich, supra note 37, at 596 (“Revenue Ruling 77-263 fails because it reacts to the structure of an imaginary situation rather than the reality of modern college athletics.”); Nestel, supra note 36, at 1413 (commenting that the hypothetical features set forth in Revenue Ruling 77-263 are inconsistent with the big business realities of intercollegiate athletics).

253. Doug Bedell, Rewriting the Rules, DALLAS MORNING NEWS, May 17, 1993, at 1B (noting that some commentators feel the Waldrep decision may hasten the taxation of revenues generated by college sports programs).

254. See I.R.C. § 501(c)(3) (West 1993) (“[c]orporations . . . organized and operated exclusively for . . . educational purposes” are exempt from taxation).

255. Conversely, educational institutions, like other tax-exempt organizations, are taxed on “unrelated business taxable income,” defined generally as “income from (1) a 'trade or business' that is (2) 'regularly carried on,' but that is (3) 'not substantially related' to the institution's exempt purposes—for a college, its educational purposes.” Jensen, supra note 41, at 45 (quoting I.R.C. §§ 511(a), 512(a)(1), 513(a) (West 1982)). Taxing unrelated business income has a two-fold purpose: (1) ensuring that the Treasury is not denied its share of the profits on otherwise taxable income; and (2) preventing tax exempt organizations from exercising a competitive advantage over non-exempt entities engaged in the same activity. Id. at 47.

256. The pertinent regulations define “educational” as related to: “(a) the instruction or training of the individual for the purpose of improving or developing his
athletic program is "regularly carried on." The critical inquiry, therefore, will usually be whether the activity is "substantially related" to the institution's exempt purposes.257

A characterization of college sports which blurs the distinction between amateurism and professionalism also holds consequences for labor law issues.258

A conclusion that the student-athlete is an employee would have significant consequences. For example, if the student-athlete qualified as an employee under the National Labor Relations Act, 29 U.S.C. 151-169 (1982), he theoretically could unionize and engage in protected concerted activity, such as strikes and collective bargaining. The finding of an employer-employee relationship would necessitate a dramatic reevaluation of the university/student-athlete relationship in terms of fair labor standards, occupational safety and health, equal employment, and labor management relations as a whole.259

capabilities; or (b) the instruction of the public on subjects useful to the individual and beneficial to the community." Treas. Reg. § 1.501 (c) (3)-1(d)(3)(i) (West 1986).

257. Jensen, supra note 41, at 48-49 (footnotes omitted).

258. Some people fear that a pseudo-professional status for student-athletes will encourage or at least facilitate unionization of college athletes. See Bedell, supra note 253, at B1; Henry M. Cross, The College Athlete and the Institution, 38 LAW & CONTEMP. PROBS. 151, 162-63 (1973) (arguing that employee status may inadvertently interject external factors and standards which jeopardize a student-athlete's academic role and an institution's legitimate control over that role); Nestel, supra note 36, at 1418 (concluding that demands for employee benefits such as group life and dental insurance could result from the characterization of student-athletes as employees); Michael Hiestand, Case Pushes College Athletes as Employees, USA TODAY, Sept. 22, 1992, at C9; Ivan Maisel, Changing the Definition of Amateur Sports, SPORTING NEWS, Apr. 12, 1993, at 33 (commenting on the potential for contract and employment disputes arising from the definition of student-athletes as employees).

Bryan Fortay, a former football player for the University of Miami (Florida), sued his former school alleging breach of promise to designate him as the starting quarterback. Steve Wieberg, Lawsuit Could Lead to Student-Athletes' Employee-like Rights, USA TODAY, Aug. 13, 1993, at C8. In defining the underlying issue as whether "an athlete can legally be considered an employee and the school his employer, potentially binding the latter to oral agreements," the author quoted one attorney voicing the fear that such a ruling "would cause schools a lot of problems. . . . The next step, if they're employees, is arguing for more pay and things of that nature." Id. (quoting NCAA lawyer Jack Kitchin).

259. Cozzillio, supra note 42, at 1299 n.95 (citation omitted).
It is uncertain whether affording student-athletes employee status will wreak the disastrous consequences some fear. Nevertheless, application of the commercial/education paradigm at least clouds the NCAA’s carefully drawn line between college and professional sports.

VII. CONCLUSION

The values and principles of the amateur/education model have historically shaped the boundaries of judicial determination of the rights and responsibilities within the arena of intercollegiate athletics. These values, illusory and out of step with the contemporary realities of college athletics, do not accurately describe the relationship between a scholarship athlete and his university. Though greater recognition of the commercial/education model is not a magic solution to the many legal and social issues confronting contemporary intercollegiate athletics, this scheme is at least the proper starting point for constructive debate. The commercial/education model will compel educators, administrators, and athletic officials to directly confront the reality of commercialism in college athletics, with an honest balancing of interests and responsibilities replacing the current disingenuous subterfuge. Similarly, it will force us to contemplate what role intercollegiate athletics should play in society if we deem the commercialism that currently exists unacceptable.

The decisions in Waldrep and Kleinknecht, together with the nearly universal recognition of the contractual nature of the student-athlete/university relationship, represent a gradual shift toward the commercial/education model of intercollegiate athletics. Whether this slight shift toward the commercial/education model will gain momentum is questionable since resistance to this change by educators,

260. Professor Goldman maintains, for example, that “[p]ayments to student-athletes would not necessarily require application of labor laws” suggesting that persons who literally are “employees” could be excluded from coverage of the NLRA on policy grounds. Goldman, supra note 18, at 251. Alternatively, Professor Goldman argues that application of labor laws to college athletes would not necessarily impair educational interests. “Eligibility rules requiring students to progress toward a degree should discourage students from striking classes, as opposed to games. Additionally, athletic departments could be maintained separately from academic departments to ensure institutional educational policies did not become a ‘term or condition of employment’ for which bargaining is required.” Id. at 251-52.

261. See Kuhn, supra note 47, at 156 (commenting that new paradigms need not and do not provide definitive solutions).
coaches, the courts, and society at-large reflects deeply rooted societal values and is furthermore driven by self-interest. At present, the hypocrisy resulting from the disregard of commercialism as the reigning force within intercollegiate athletics is not sufficiently offensive to discredit society’s idyllic vision of college sports.

262. See Richard Delgado, The Imperial Scholar Revisited: How to Marginalize Outsider Writing Ten Years Later, 140 U. PA. L. REV. 1349, 1369 (1992) (citation omitted) ("the paradigm changes only when the costs of resisting it becomes [sic] unacceptable compared to the gains of adopting the new ones"); Martinez, supra note 242 ("the transition between competing paradigms is a conversion experience that cannot be forced by logic").