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Antitrust Precedent & Anti-Fraternity Sentiment: Revisiting Hamilton College

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Antitrust Precedent & Anti-Fraternity Sentiment: Revisiting Hamilton College

JARED S. SUNSHINE*

ABSTRACT

Over a decade ago, Prof. Mark Bauer wrote an article exploring the antitrust implications of a small college’s decision to forbid fraternities from competing in the student housing market and the ensuing litigation. Expanding this line of research, several key holdings—despite contrary antitrust doctrine elsewhere—have granted universities broad authority to control the residential choices of their students qua consumers, bespeaking a unique relationship between university and student to which the fraternity is an interloper. These core cases casually allude to the ostensibly defunct doctrine of in loco parentis, under which colleges were once seen as proxy parents to their pupils, implying that in housing matters the paradigm of the custodial university retains the force to overcome competitive concerns. Given both costs and benefits to that view, this Article calls for more judicial scrutiny of the relations amongst colleges, students, and fraternities.

INTRODUCTION	61
I. THE EVOLUTION OF GREEK-GOWN RELATIONS	64
II. ANTITRUST PRECEDENT AND THE COLLEGIATE RESIDENTIAL MARKET	68
A. The College in Commerce: Competition Law on Campus.....	71
B. Rivals for Residential Students: Revisiting Hamilton College.....	73

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1. <i>Mu Theta of Tau Kappa Epsilon v. Lycoming College</i>	75
2. <i>Hamilton Chapter of Alpha Delta Phi v. Hamilton College</i>	77
3. <i>Eastman Kodak Co. v. Image Technical Services</i>	81
4. <i>Hack v. President & Fellows of Yale College</i>	83
5. <i>Delta Kappa Epsilon Alumni Corp. v. Colgate University</i>	87
C. Collegiate Embargos on Fraternities	91
1. Greek Nonrecognition as an Antitrust Issue	92
2. Legal Precedent on Systemic Interdiction of Fraternities	95
III. LESSONS FOR GREEK-GOWN RELATIONS FROM PARENTAL AND PARIETAL RIGHTS	100
A. The Decline and Fall of <i>In Loco Parentis</i>	102
1. Blackstone and the Presumption of Paternalism.....	102
2. Paternalism in Institutes of Higher Education	104
3. The End of Traditional <i>In Loco Parentis</i> at Universities...	107
B. Paternalism Meets Fraternalism: <i>In Loco Parentis</i> and Greeks.....	111
1. Arguments for a Particular Focus on Greek Society	111
2. Judicial Rejection of <i>In Loco Parentis</i> Duties Anent Fraternities	114
C. Blackstone's Legacy: Parietal Rights and Responsibilities.....	117
IV. STRANGE BEDFELLOWS: RUMINATIONS ON THE UNIVERSITY AND FRATERNITY AS RIVALS.....	121
A. Twenty-First-Century Colleges and Competition	122
B. Fraternities Themselves as the Targets of Anticompetitive Action	128
CONCLUSION.....	132

[A]t various times for various reasons, fraternities have stood directly in the way of college efforts to define and refine residential living. For that reason, small colleges have often taken action to weaken the influence of fraternities. The colleges that have actually eliminated fraternities are those that believe that they can fully control their environment.

In that respect, colleges are no different than any other monopolist; they are simply trying to control their environment and anyone or anything that gets in their way.¹

INTRODUCTION

Universities² and their fraternities³ have always made strange bedfellows.⁴ In their origins, college fraternities were conceived as secret societies precisely because faculties saw their institution as direct threats to academic prerogatives and generally suppressed them vigorously.⁵ As time passed, however, colleges came to depend heavily upon emerging fraternities to house their students and began to consider them as vital adjuncts to the collegiate experience.⁶ But of late, universities—particularly private colleges in New England—have once

1. Mark D. Bauer, *Small Liberal Arts Colleges, Fraternities, and Antitrust: Rethinking Hamilton College*, 53 CATH. U. L. REV. 347, 411 (2004) (footnotes omitted).

2. “University” and “college” are used interchangeably to refer to institutes of higher education. E.g., Mark D. Bauer, *Freedom of Association for College Fraternities After Christian Legal Society and Citizens United*, 39 J.C. & U.L. 247, 248 n.1 (2013); Note, *Mandatory Housing Requirements: The Constitutionality of Parietal Rules*, 60 IOWA L. REV. 992, 992 n.3 (1975) [hereinafter *Mandatory Housing Requirements*].

3. For the sake of concision, this Article uses “fraternity” and “fraternal” throughout to refer to both men’s and women’s fraternal organizations. E.g., Jared S. Sunshine, *The Fraternity as Franchise: A Conceptual Framework*, 42 J.C. & U.L. 375, 376 n.2 (2016) [hereinafter *Sunshine, Fraternity as Franchise*]; Jared S. Sunshine, *A Lazarus Taxon in South Carolina: A Natural History of National Fraternities’ Respondeat Superior Liability for Hazing*, 5 CHARLOTTE L. REV. 79, 79 n.4 (2014) [hereinafter *Sunshine, Lazarus Taxon*]; Bauer, *supra* note 2, at 248 n.2; Bauer, *supra* note 1, at 347 n.1; Shane Kimzey, Note, *The Role of Insurance in Fraternity Litigation*, 16 REV. LITIG. 459, 460 n.2 (1997); Eric A. Paine, *Recent Trends in Fraternity-Related Liability*, 23 J.L. & EDUC. 191, 191 n.1 (1994); Susan J. Curry, Note, *Hazing and the “Rush” Toward Reform: Responses from Universities, Fraternities, State Legislatures, and the Courts*, 16 J.C. & U.L. 93, 93 n.1 (1989); see C. Sidney Neuhoff, Note, *The Legal Status of Fraternities*, 11 ST. LOUIS L. REV. 30, 30 (1925) (“No distinction is made in the cases between fraternities and sororities. The word ‘fraternity,’ in its generic sense includes organizations of either or both sexes.”).

4. See WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 2, 1.39 (The Floating Press 2008) (1623).

5. See *infra* notes 21–25 and accompanying text.

6. See *infra* notes 27–31 and accompanying text.

again asserted their purported supervisory rights more robustly to severely curtail or even eradicate Greek⁷ life from campus.⁸

Much scholarly literature has emerged on the often-fraught relationships between civic municipalities and the universities that dominate their social and economic livelihood: so-called town-gown relations,⁹ named after the academic gown once characteristic of the scholarly set.¹⁰ On issues from property to violent affrays to civil authority, city councilors and university deans have clashed over the priorities and prerogatives of students and residents for centuries.¹¹ But what of the even more fraught relationship between Greek and gown?¹² If relations between a city and its local college are complicated by intertwined interests, a fraternity captive to, but distinctively differentiated from, university overseers presents yet more difficult problems.¹³

7. Although some might object to “Greek” as an overly informal reference to fraternity issues, scholarship is replete with its use and its monosyllabic brevity has much to recommend it. E.g., Dara Aquila Govan, Note, “Hazing Out” the Membership Intake Process in Sororities and Fraternities: Preserving the Integrity of the Pledge Process Versus Addressing Hazing Liability, 53 RUTGERS L. REV. 679, 681 (2001); Gregory E. Rutledge, *Hell Night Hath No Fury Like a Pledge Scorned . . . and Injured: Hazing Litigation in U.S. Colleges and Universities*, 25 J.C. & U.L. 361, 362–63 (1998).

8. See Bauer, *supra* note 1; Zach Schonfeld, *Inside the Colleges That Killed Frats for Good*, NEWSWEEK (Mar. 10, 2014, 12:24 PM), <http://www.newsweek.com/inside-colleges-killed-frats-good-231346> [<https://perma.cc/8GNH-HEMJ>] (discussing eradication of Greek life at Middlebury College, Colby College, Bowdoin College, and Williams College); Michael W. Gosk, Comment, *From Animal House to No House: Legal Rights of the Banned Fraternity*, 28 CONN. L. REV. 167, 168 (1995) (discussing restrictions and bans placed on Bowdoin, Dickinson, Middlebury, Trinity, Colby, Amherst, and Franklin & Marshall); *infra* note 255 and accompanying text.

9. See, e.g., TOWN AND GOWN RELATIONS: A HANDBOOK OF BEST PRACTICES (Roger L. Kemp ed. 2013); Stephen D. Bruning, Shea McGrew & Mark Cooper, *Town-Gown Relationships: Exploring University-Community Engagement from the Perspective of Community Members*, 32 PUB. REL. REV. 125 (2006); Loomis Mayfield, *Town and Gown in America: Some Historical and Institutional Issues of the Engaged University*, 14 EDUC. FOR HEALTH 231 (2001); Laurence Brockliss, *Gown and Town: The University and the City in Europe, 1200-2000*, 38 MINERVA 147 (2000).

10. See Mayfield, *supra* note 9, at 237.

11. See Alexandra Shepard, *Contesting Communities? ‘Town’ and ‘Gown’ in Cambridge, c.1560-1640*, in COMMUNITIES IN EARLY MODERN ENGLAND 216 (Alexandra Shepard & Phil Withington eds., 2000).

12. Lacking the opportunity for rhyming portmanteau, alliteration must needs suffice.

13. See, e.g., Curry, *supra* note 3, at 93 (“The relationship between fraternities and institutions of higher education has spawned a series of complex legal issues, ranging from zoning disputes to fraternity bannings.” (footnotes omitted)); Sunshine, *Fraternity as Franchise*, *supra* note 3, at 376–77 & nn.4–6.

Well over a decade ago, Professor Mark D. Bauer penned an article about a seemingly small case in upstate New York, *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College*,¹⁴ in which a fraternity protested its expulsion from campus based on antitrust theory.¹⁵ The essay, *Small Liberal Arts Colleges, Fraternities, and Antitrust: Rethinking Hamilton College*, traced the history of Greek-gown relations and then turned to the perplexingly uniform phenomenon of antagonism towards fraternities in small New England liberal arts colleges.¹⁶ Using *Hamilton College* as a lens, Bauer was able to pinpoint the sources of conflict and validate the persuasive arguments made by plaintiffs that the college's actions were highly suspect at best under antitrust law.¹⁷ Although ostensibly rooted in a single case and the rather esoteric niche of collegiate residential housing markets, Bauer's discussion raised provocative questions regarding the power of universities *qua* competitors in a commercial market.¹⁸

This Article seeks to draw on legal precedent to situate and analyze the frequent antagonism that colleges have displayed toward their captive fraternities.¹⁹ Part I offers the briefest of summaries of the synergetic evolution of early universities and fraternities and traces the structural changes over time that have led to today's collegiate market for services and sometimes virulently anti-Greek sentiment. In light of this evolution, Part II revisits some of the questions raised in Bauer's *Rethinking Hamilton College*: to what extent are universities and their fraternities in competition, and what does antitrust precedent have to contribute? Given more recent developments on campus, in legal scholarship, and in judicial opinion, Bauer's prescriptions regarding antitrust analysis seem all the more prescient. Part III focuses on a differentiating factor mentioned in the Greek-gown antitrust cases: the *sui generis* role of the university in overseeing its students, variously referred to as parietal rights or *in loco parentis*, casting the college as a proxy parent to its students. In conclusion, Part IV asks whether the frequent rivalry between fraternities

14. *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59 (2d Cir. 1997).

15. Bauer, *supra* note 1; see Robert E. Manley, *Antitrust Implications of Fraternity Mistreatment by Colleges*, FRATERNAL L., Nov. 2004, at 1, 1–2 (discussing Bauer's article).

16. Bauer, *supra* note 1, at 351–58; see also Schonfeld, *supra* note 8 (discussing several other liberal arts colleges' antagonism).

17. Bauer, *supra* note 1, at 368–410.

18. Bauer, *supra* note 1, at 410–12; see also Jeffrey C. Sun & Philip T.K. Daniel, *The Sherman Act Antitrust Provisions and Collegiate Action: Should There Be a Continued Exception for the Business of the University?*, 25 J.C. & U.L. 451, 493–95 (1999).

19. Besides the considerable debt owed to Professor Bauer, this Article also serves to follow up on some of the questions about colleges and competition law raised previously by this author elsewhere. See Sunshine, *Fraternity as Franchise*, *supra* note 3, at 405–06.

and their host institutions is as inevitable as it sometimes seems, given the long-standing and unique relationships amongst them and the student body.

This last issue is the animating force of this Article. Bauer's canny identification of the antitrust regime as an analytical framework provides legal grounding, but the underlying challenge is explaining the persistent animus between many colleges and chapters. Commercial competition between the two provides one explanation, but the unique relationship of the university and its students must also be a factor: a relationship to which the fraternity is an interloper. Although courts have ostensibly rejected colleges' onetime dictatorial power over their students, appearances suggest such tendencies are philosophically alive and well at some small liberal arts colleges, if not also at larger institutions. As with many multigenerational feuds, resolving age-old differences between hoary institutions like universities and fraternities will not be easy. Antitrust precedent, perhaps, provides a distinctive and unexpected perspective in considering whether a lasting *détente* will ever prove possible.

I. THE EVOLUTION OF GREEK-GOWN RELATIONS

Fraternalism has been a uniquely North American institution, at least for most of its history; many authors have catalogued it well.²⁰ From the start, however, fraternities and the universities at which they arose found themselves fiercely at odds.²¹ Faculties demanded the eradication of any secret society, the taking of oaths abjuring membership, and the expulsion of any student persisting in association.²² The reasoning was generally that such societies split the atom of student loyalty, preventing the faculty from exercising proper discipline over their charges, particularly in the regimented era of academia preceding the Civil War.²³ Those early

20. The doyen of fraternal historians will always remain the author of the eponymous manual, *see* WM. RAIMOND BAIRD, BAIRD'S MANUAL OF AMERICAN COLLEGE FRATERNITIES (6th ed. 1905), but many others have followed in his footsteps, not the least of which is Bauer himself. *See* Bauer, *supra* note 1, at 351–58; *see also* NICHOLAS L. SYRETT, THE COMPANY HE KEEPS: A HISTORY OF WHITE COLLEGE FRATERNITIES (2009).

21. *See* SYRETT, *supra* note 20, at 35–37; JOHN S. BRUBACHER & WILLIS RUDY, HIGHER EDUCATION IN TRANSITION 127 (Transaction Publishers 4th ed. 1997) (1958) (“The rise of fraternities did not come without strife. On many campuses, both faculty and students were bitterly opposed to them . . .”).

22. *E.g.*, *People ex rel. Pratt v. Wheaton Coll.*, 40 Ill. 186, 186 (1866); *see* SYRETT, *supra* note 20, at 35–37; BRUBACHER & RUDY, *supra* note 21, at 127.

23. *See* *Wheaton Coll.*, 40 Ill. at 187 (explaining faculty rationale for challenging societies); SYRETT, *supra* note 20, at 15–16 (discussing the regimented schedule of pre-Civil War college students); Bauer, *supra* note 1, at 351 (discussing the regimented nature of universities).

colleges typically regulated their charges minutely, including the employment of corporal punishment.²⁴ Such scrutiny and hostility made it expedient, indeed vital, for early fraternities to function under the strictest secrecy, as any breach thereof risked annihilation.²⁵

Antagonism began to ebb in part because of the necessities of housing. The earliest colleges had provided housing for their small student populations, but burgeoning universities now found it increasingly difficult to accommodate students economically, leading them to relax residency rules.²⁶ Fraternities, once largely social groups, were able to come out of the shadows to provide room and board.²⁷ Indeed, rivalries quickly sprang up between societies vying for what amounted to lucrative business opportunities to secure a lessee for a long-term contract.²⁸ Such competition gave rise to a residential arms race: ever more ornate and commodious chapterhouses, the better to lure students *qua* consumers to their doors.²⁹ Universities acquiesced in or even encouraged this development, as the magnificence of such residences reflected admirably on colleges as well as fraternities and attracted better applicants without

24. Brian Jackson, Note, *The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1140 & n.30 (1991). See also SYRETT, *supra* note 20, at 15–17.

25. See Bauer, *supra* note 1, at 352; SYRETT, *supra* note 20, at 36–37; BRUBACHER & RUDY, *supra* note 21, at 127 (“In many places, the fraternity movement was driven underground, but it was by no means extirpated completely. The attempts by college faculties to wipe out fraternities ultimately failed because it was impossible to achieve a common front on this matter.”).

26. See BRUBACHER & RUDY, *supra* note 21, at 121–22 (“[Colleges] found themselves without the funds to provide dormitory facilities for their constantly enlarging enrollment. It was all they could do to find enough money for instruction, salaries, and classroom buildings. Thus the dormitory system fell into disuse for financial as well as ideological reasons.”).

27. BRUBACHER & RUDY, *supra* note 21, at 122, 128; Bauer, *supra* note 1, at 355; see also 3 THOMAS D. CLARK, INDIANA UNIVERSITY: MIDWESTERN PIONEER 239–40 (1977) (“Historically, Greek letter fraternities had been a part of Indiana University since 1845. In earlier years the organizations had made material contributions in solving a part of the student housing problems.”); Anne Willson Bartels, *Anti Fraternity Agitation*, 51 ANCHORA DELTA GAMMA, 1934, at 22, 25; H.I. Brock, *Reappraising the College Fraternity*, N.Y. TIMES, Feb. 19, 1933, at 9 (“[I]t was noted that the fraternities had served a useful purpose for many years by taking over the job of housing and feeding undergraduates which the university had neglected to assume.”), reprinted in 21 RATTLE THETA CHI, Feb. 1933, at 7; BAIRD, *supra* note 20, at 32–33.

28. See, e.g., BAIRD, *supra* note 20, at 32–33 (describing the trend towards “senseless rivalry” amongst fraternities in the construction of ever more expensive housing); SYRETT, *supra* note 20, at 163–64.

29. BAIRD, *supra* note 20, at 32–33.

costing the college a dime.³⁰ Fraternal assets accordingly grew rapidly: in 1905, the value of fraternities' residential property was estimated within \$3 million;³¹ by 1920, it had risen to over \$17 million, and by 1927, \$64 million.³²

Yet doubts about the salutary influence of fraternities persisted, particularly among faculties. Following World War II, colleges began to focus more firmly on programs constructing dormitories under their own control, which naturally brought them into competition with the very institutions they had once fostered to address their deficiencies.³³ Mandatory residency requirements were often reasserted to finance this construction.³⁴ Moreover, perceptions of student-body moral dissolution in the post-war era often settled on the more tangible targets fraternities provided, leading universities and society at large to view Greek life as a threat to student scruples.³⁵ And, of course, housing was increasingly a big business, and colleges no less than any other enterprise are always seeking new revenue streams to fund their operations.³⁶ As the twentieth century progressed towards its end, a notable minority of colleges began to promulgate policies that severely restricted or banned fraternities.³⁷ Often, these interdictions were pronounced for the express purpose of monopolizing student housing under the college's control.³⁸

30. See Bauer, *supra* note 1, at 355–56; BAIRD, *supra* note 20, at 32–33 (“All of this has resulted in direct benefit to the colleges, and the wiser among college officials are encouraging the development of this feature of fraternity life in every way possible. The advantages of the chapter-house system are not altogether on the side of the student. They relieve the colleges from the necessity of increasing the dormitory accommodations . . .”); BRUBACHER & RUDY, *supra* note 21, at 129.

31. BAIRD, *supra* note 20, at 33.

32. BRUBACHER & RUDY, *supra* note 21, at 129; see also *infra* note 460 and accompanying text (estimating modern value of fraternal property at \$3 billion).

33. Bauer, *supra* note 1, at 356; *Mandatory Housing Requirements*, *supra* note 2, at 994–95.

34. See *Mandatory Housing Requirements*, *supra* note 2, at 995–96; Paul Jerald Ward, *Parietal Regulations and the University: Required Residence in Campus Dormitories*, 5 HUM. RTS. 215, 231–34 (1976).

35. See LAURIE A. WILKIE, *THE LOST BOYS OF ZETA PSI: A HISTORICAL ARCHAEOLOGY OF MASCULINITY AT A UNIVERSITY FRATERNITY* 231–34 (2010); Gosk, *supra* note 8, at 168–69.

36. See Ward, *supra* note 34, at 231–34; *Mandatory Housing Requirements*, *supra* note 2, at 995–96; *infra* notes 460–64 and accompanying text.

37. See *Mandatory Housing Requirements*, *supra* note 2, at 997–99; Schonfeld, *supra* note 8.

38. See Bauer, *supra* note 1, at 349–50; see also *Mandatory Housing Requirements*, *supra* note 2, at 998–1000.

Throughout the evolution of fraternities and universities, the lodestar of Greek-gown relations has remained remarkably fixed: colleges have been viewed as entitled by right to enforce absolute control over their students and to allow external influences only at their sufferance.³⁹ Thus, while universities might have permitted fraternity operations in eras of housing shortages,⁴⁰ they remained putatively free to withdraw that consent should their interests in student discipline so demand.⁴¹ It is revealing to peruse the opinions of three different courts separated by half-century intervals, each reviewing college interdictions of fraternities. First, from the Illinois Supreme Court in 1866:

We perceive nothing unreasonable in the rule itself, since all persons familiar with college life know that the tendency of secret societies is to withdraw students from the control of the faculty, and impair to some extent the discipline of the institution. Such may not always be their effect, but such is their general tendency. But whether the rule be judicious or not, it violates neither good morals nor the law of the land, and is therefore clearly within the power of the college authorities to make and enforce.⁴²

Next, from the United States Supreme Court in 1915:

It is said that the fraternity to which complainant belongs is a moral and of itself a disciplinary force. This need not be denied. But whether such membership makes against discipline was for the State of Mississippi to determine. It is to be remembered that the University was established by the State and is under the control of the State, and the enactment of the statute may have been induced by the opinion that membership in the prohibited societies divided the attention of the students and distracted from that singleness of purpose which the State desired to exist in its public educational institutions. It is not for us to entertain conjectures in opposition to the views of the State and annul its regulations upon disputable considerations of their wisdom or necessity.⁴³

And finally, from a New York trial court in 1965:

The university must always be in a position to exercise sufficient supervision over students and their social organizations to assure compliance with university policies. So long as such organizations are local in nature, the situation is manageable. But when they involve ties outside the university over which the university can exercise no control, serious conflicts may arise. This is something a university cannot tolerate.

39. See, e.g., *infra* notes 42–44 and accompanying text.

40. See, e.g., Brock, *supra* note 27.

41. See, e.g., *infra* notes 42–44 and accompanying text; see also *infra* Sections II.B.1, II.B.2, II.B.5, II.C.2.

42. People *ex rel.* Pratt v. Wheaton Coll., 40 Ill. 186, 187 (1866).

43. Waugh v. Bd. of Trs. of the Univ. of Miss., 237 U.S. 589, 596–97 (1915).

It cannot allow itself to be placed in the position of sanctioning student social organizations which are governed by, and responsible to, non-university authority.

The existence of national fraternities and sororities at a university presents just such an anomaly.⁴⁴

Is it not striking how similar these sentiments have remained over time? The judiciary seems quite willing to accept that the very existence of fraternities somehow detracts from the proper discipline and order that a college and its faculty have the right to enforce at any cost. Another half century after the last of these rulings, it is far from clear that a court today would rule any differently.⁴⁵ Whether modern antitrust law suggests otherwise is the subject of the next Part.

II. ANTITRUST PRECEDENT AND THE COLLEGIATE RESIDENTIAL MARKET

At common law, anticompetitive action was generally limited to practices that could be classified as such *per se*, such as overt monopolization, price fixing, or agreements not to compete.⁴⁶ This sufficed well enough for the more provincial markets of the Victorian Era, but the tremendous expansion of commercial scope during the Second Industrial Revolution gave rise to new problems.⁴⁷ In particular, groups of American industrialists began to combine their interests into cooperative trusts whose purpose was to corner an entire sector of the market, thus allowing the trust to effectively set prices.⁴⁸ Such compacts overwhelmed the limited scope of the common law and were ultimately met with

44. *Beta Sigma Rho, Inc. v. Moore*, 261 N.Y.S.2d 658, 662 (N.Y. Sup. Ct. 1965) (quoting report entitled “The University and its Student Social Organizations,” prepared by the President of the State University of New York in 1953, pursuant to an order from the University’s Board of Trustees).

45. *See, e.g., infra* Section II.B.5 (discussing a 2007 case).

46. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 497 (1940) (“The common law doctrines relating to contracts and combinations in restraint of trade were well understood long before the enactment of the Sherman law. They were contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market.” (footnote omitted)); *see* KEITH N. HYLTON, *ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION* 35–37 (2003); Sun & Daniel, *supra* note 18, at 453–54.

47. *See* 1 EARL W. KINTNER, *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES*, 8–15 (1978); HYLTON, *supra* note 46, at 38.

48. *See* HYLTON, *supra* note 46, at 37–40; KINTNER, *supra* note 47; Sun & Daniel, *supra* note 18, at 453–54.

legislation in the late 1800s⁴⁹: the Sherman Antitrust Act, which contained two provisions protecting vigorous competition that remain in force to this day.⁵⁰

The first prescribes that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal;”⁵¹ the second that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony”⁵² Despite the sweeping language, the courts quickly concluded that only unreasonable restraints on trade were illegal, lest the most picayune (or procompetitive) agreement give rise to liability.⁵³ The provision against monopolization, however, needed no such limiting gloss and has been rightly read broadly to prevent oligopolies as well as strict monopolies—the concentration of power in any market in too few hands.⁵⁴

For alleged restraints of trade that resembled the early common law infractions and were nigh invariably harmful—bid rigging, tying, price fixing, and the like—the courts continued to follow what is aptly known as the *per se* rule.⁵⁵ This doctrine conserves judicial resources by declaring that certain practices are automatically unreasonable and therefore illegal under the Sherman Act, and can have no saving justification or countervailing benefit.⁵⁶ Given that companies are wary of such transparent illegality, however, many antitrust cases involve more nuanced theories of how the defendants’ conduct frustrates free competition.⁵⁷

49. See KINTNER, *supra* note 47; HYLTON, *supra* note 46, at 37–40; William L. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 235 (1956); Sun & Daniel, *supra* note 18, at 453–55.

50. Sherman Antitrust Act, 15 U.S.C. §§ 1–2 (2012).

51. *Id.* § 1.

52. *Id.* § 2.

53. See, e.g., *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 58 (1911); *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

54. See, e.g., *Am. Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946).

55. See, e.g., *N. Pac. Ry. v. United States*, 356 U.S. 1, 5–6 (1958) (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210 (1940); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, *aff’d*, 175 U.S. 211 (1899); *Fashion Originators’ Guild v. Federal Trade Comm’n*, 312 U.S. 457 (1941); *Int’l Salt Co. v. United States*, 332 U.S. 392 (1947)) (tying); *Addyston Pipe & Steel Co.*, 85 F. at 283–84 (bid rigging), *aff’d*, 175 U.S. 211 (1899).

56. E.g., *N. Pac. Ry.*, 356 U.S. at 5; *United States v. Masonite Corp.*, 316 U.S. 265, 282–83 (1942).

57. E.g., *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 332–34 (1990).

These more difficult cases are analyzed under the “rule of reason,” which asks whether the demonstrated anticompetitive aspects of the conduct at issue are outweighed by procompetitive aspects, considering all the circumstances.⁵⁸ As the name suggests, the answer reflects whether the conduct is reasonable or not.⁵⁹

Similarly, to intelligibly accuse someone of monopolizing “any part of the trade or commerce among the several States,” a discernible part—a relevant product and geographic market—must be pled.⁶⁰ The courts have settled on the criterion of substitutability to define this relevant market,⁶¹ generally setting its boundaries to include those products that a consumer would view as reasonably interchangeable given a small but significant non-transitory increase in price in one, because only such products are truly in competition with one another.⁶² For example, the Supreme Court found that many flexible wrapping materials were interchangeable, and thus one company’s supremacy in cellophane manufacture could not give rise to liability, as it had only a small share of the properly defined market for all wrapping materials.⁶³ By contrast, a district court enjoined a merger between sellers of loose leaf tobacco after finding that other tobacco products would not be viewed by consumers as substitutable in the event of monopolistic price increases in loose leaf.⁶⁴ This emphasizes the point that to improperly dominate the relevant market, the alleged monopolist must be able to exert market power, *viz.*, to profitably set prices above those which would be imposed by healthy competition.⁶⁵

58. *See, e.g., Bd. of Trade of Chi.*, 246 U.S. at 238. There is arguably a third standard, known as “quick look” review under the rule of reason, which seeks to gain the efficiencies of expeditious review without imposing the onerous automatic liability of the *per se* rule. *See, e.g., NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 100–04 (1984).

59. *See Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 58 (1911); *Bd. of Trade of Chi.*, 246 U.S. at 238–39.

60. *See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 173 n.1 (1965) (quoting 15 U.S.C. § 2 (1970) (amended 1974)); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 268–69 (2d Cir. 1979).

61. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

62. *See id.*; *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 396–404 (1956); *Queen City Pizza, Inc. v. Domino’s Pizza, Inc.*, 124 F.3d 430, 438 (3d Cir. 1997); *see also U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES* § 4.1 (2010).

63. *E.I. du Pont*, 351 U.S. at 403–04. This classic antitrust holding, widely known as the “Cellophane Case,” has garnered much criticism, beginning nearly immediately after its announcement. *E.g., Donald F. Turner, Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281 (1956).

64. *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 173 (D.D.C. 2000).

65. *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27 n.46 (1984); George A. Hay, *Market Power in Antitrust*, 60 ANTITRUST L.J. 807, 812–13 (1992).

A. *The College in Commerce: Competition Law on Campus*

Foundationally, the Sherman Act addresses only commercial conduct.⁶⁶ This seemingly tautological requirement is relevant to universities because, for much of their existence, their role was viewed as scholastic and insusceptible to economic concerns such as restraint of trade.⁶⁷ Ironically, despite enormous trusts inuring to their benefit,⁶⁸ colleges went effectively untouched by antitrust law.⁶⁹ This began to change with the Supreme Court's 1975 recognition in *Goldfarb v. Virginia State Bar*⁷⁰ that when they engaged in commercial behavior, non-profit organizations were just as susceptible to antitrust law as their for-profit counterparts.⁷¹ Concurrently, courts were increasingly concluding that the modern university often acts as a business rather than a cloistered ivory tower.⁷² Nowadays, only when the university is acting as non-profit educator rather than commercial competitor might anticompetitive activities be exempted from scrutiny.⁷³

Most obviously, colleges compete strenuously with one another to attract and enroll students because those students are their core consumers.⁷⁴ Thus when a council of colleges agreed to regulate financial aid grants and concomitant tuitions that colleges would offer to their applicants, a district court concluded their actions amounted to nothing

66. *E.g.*, *Missouri v. Nat'l Org. for Women, Inc.*, 620 F.2d 1301, 1319 (8th Cir. 1980) (holding economic boycott undertaken as an act of political expression was non-commercial in nature and thus not subject to the Sherman Act); *see Sun & Daniel, supra* note 18, at 451.

67. *See Sun & Daniel, supra* note 18, at 452; DEREK BOK, *BEYOND THE IVORY TOWER: SOCIAL RESPONSIBILITIES OF THE MODERN UNIVERSITY* 2–5 (1982).

68. *See, e.g.*, James B. Stewart, *In College Endowment Returns, Davids Beat the Goliaths*, N.Y. TIMES (Feb. 25, 2016), <http://www.nytimes.com/2016/02/26/business/in-college-endowment-returns-davids-beat-the-goliaths.html> [<https://perma.cc/RBH6-CWPU>].

69. *See Sun & Daniel, supra* note 18, at 451.

70. *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

71. *Id.* at 787 (citing *United States v. Nat'l Ass'n of Real Estate Boards*, 339 U.S. 485, 489 (1950)); *see Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 694–96 (1978); *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 463 (1986).

72. *See, e.g.*, *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 111 (1984); *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59, 65 (2d Cir. 1997) (“The case law thus recognizes that institutions of higher learning engage in a wide spectrum of conduct, ranging from the distinctly noncommercial to the purely proprietary.”); *infra* notes 74, 79 and accompanying text.

73. *See Goldfarb*, 421 U.S. at 787; *Selman v. Harvard Med. Sch.*, 494 F. Supp. 603, 620–21 (S.D.N.Y. 1980); *compare NCAA*, 468 U.S. at 100 n.22 (discussing the licensing of college sports on television within scope of the Sherman Act), *with Marjorie Webster Junior Coll., Inc. v. Middle States Ass'n of Colls. and Secondary Schs., Inc.*, 432 F.2d 650, 654 (D.C. Cir. 1970) (discussing the accreditation of schools not commercial in nature).

74. *See, e.g., infra* Sections II.B.2, II.B.4, II.B.5.

more than a conspiracy to fix prices in violation of the Sherman Act, in *United States v. Brown University*.⁷⁵ On appeal, the Third Circuit was persuaded that the situation of colleges was sufficiently complex to demand a full rule of reason analysis and remanded the case for that review in the first instance.⁷⁶ But the appellate court left scant doubt of its leanings: financial aid was not charity but rather “part and parcel of the process of setting tuition and thus a commercial transaction.”⁷⁷ The court made short work of the colleges’ arguments to the contrary, finding that the avowed purpose of the council was “to eliminate price competition for talented students among member institutions,” whilst expressing some skepticism as to MIT’s arguments about the countervailing social goods occasioned by such “a price fixing mechanism.”⁷⁸ Ultimately, Congress was obliged to pass a temporary amendment to the Sherman Act to allow universities to collaborate in issuing need-blind financial aid.⁷⁹

Similarly, when educational institutions operate stores selling goods such as books to its students, they are engaging in commercial behavior and cannot escape scrutiny. In *Sunshine Books, Ltd. v. Temple University*,⁸⁰ the Third Circuit found that a college bookstore was capable of engaging in predatory pricing: that is, temporarily setting prices below costs to drive rivals out of business and thus monopolize the market.⁸¹ The fact that book sales may be tangentially related to an educational mission was not an issue, given that the sale of “textbook titles used each semester in Temple’s undergraduate and graduate courses . . . [along with] clothing, gifts, greeting cards, newspapers, magazines, and other publications of general interest” placed the university in direct competition with generic booksellers.⁸² Rather, the court’s analysis focused on the microeconomics of whether the university’s pricing was merely discounted or actually predatory, ultimately remanding to the trial court for that determination.⁸³

Finally, state schools are generally exempt from antitrust scrutiny under what has come to be called *Parker* immunity, after the leading case,

75. *United States v. Brown Univ.*, 805 F. Supp. 288, 302 (E.D. Pa. 1992), *rev’d*, 5 F.3d 658 (3d Cir. 1993).

76. *Id.* at 670–72, 678.

77. *Id.* at 668.

78. *Id.* at 673–75.

79. Application of Antitrust Laws to Award of Need-Based Educational Aid, Pub. L. No. 103-382, § 568(a)-(d), 108 Stat. 4060 (1994); see Sun & Daniel, *supra* note 18, at 491–92.

80. *Sunshine Books, Ltd. v. Temple Univ.*, 697 F.2d 90 (3d Cir. 1982).

81. *Id.* at 91.

82. See *id.* at 91–92.

83. *Id.* at 92–93.

Parker v. Brown.⁸⁴ There, the Court held that when a state enacts a clear policy of anticompetitive restraint, the Sherman Act will not curtail its enactment.⁸⁵ As discussed already, a private college might be held liable for engaging in pricing conduct that steers students to its own bookstore instead of a competitor.⁸⁶ A public institution, however, cannot: in *Cowboy Book v. Board of Regents for Agricultural & Mechanical Colleges ex rel. Oklahoma State University of Agriculture & Applied Science*,⁸⁷ a federal court allowed Oklahoma State University to subsidize purchases at its own proprietary bookstore, viewing the measures as financial aid to students within the ambit of protected state action.⁸⁸ No less than any other arm of state government, public schools enjoy antitrust immunity.

B. Rivals for Residential Students: Revisiting Hamilton College

In so holding, the *Cowboy Book* court offered an observation that leads naturally to *Hamilton College* and its siblings, concerning the residential life of the student population:

Extension of credit to students for rental of dormitory rooms could well be attacked by rental businesses in the university town. Along the same lines, extensions of credit for room and board costs may include payments for food prepared in the school cafeteria. These extensions of credit could be subject to attack by local restaurants and fast food businesses.⁸⁹

Such concerns had been touched on four years earlier in *American National Bank & Trust Company of Chicago v. Board of Regents for Regency Universities*.⁹⁰ A state school, Northern Illinois University, required that freshmen under the age of twenty-one reside in university residence halls so long as space was available.⁹¹ The owner of a private rental dormitory sued under the antitrust laws, claiming that even when space was unavailable, the university assigned freshmen to temporary housing and kept them there “until so shortly before the commencement of the school year as to preclude plaintiffs from a realistic entry into the market,” thus monopolizing the collegiate housing market.⁹² The court,

84. *Parker v. Brown*, 317 U.S. 341 (1943).

85. *Id.* at 350–52.

86. *See supra* notes 80–83 and accompanying text.

87. *Cowboy Book, Ltd. v. Bd. of Regents for Agric. & Mech. Colls. ex rel. Okla. State Univ. of Agric. & Applied Sci.*, 728 F. Supp. 1518 (W.D. Okla. 1989).

88. *Id.* at 1523.

89. *Id.*

90. *Am. Nat'l Bank & Tr. Co. of Chi. v. Bd. of Regents for Regency Univs.*, 607 F. Supp. 845 (N.D. Ill. 1984).

91. *Id.* at 846.

92. *Id.* at 846–47 (quoting the plaintiff's memorandum).

however, easily found that the university's rule on freshman residency was state policy and would be immune under *Parker*.⁹³

The plaintiff, however, had cleverly argued that the university was violating its own policy for the purpose of shutting out competitors and cornering student fees, even when it had no dormitory space left to offer students.⁹⁴ As the court had emphasized in *Brown*, the intent of the college is germane to evaluating the competitive character of its conduct: a school acting for pecuniary motivations may be liable whilst one following a genuine academic policy is exempted.⁹⁵ The court in *American National Bank* could not assess on the record presented whether the college's goal was to reinforce its residential program or to eke out fees for non-existent rooms, and thus the court declined to dismiss and allowed for further discovery.⁹⁶ Shortly thereafter, the parties settled.⁹⁷

The residential requirement promulgated by Northern Illinois was a species of what are called parietal rules. Such rules typically oblige some subset (or indeed, the entirety) of a collegiate population to reside under certain conditions and follow certain policies; typically the conditions involve on-campus dormitory housing, and the policies, at least traditionally, concern visitation hours and fraternization between male and female students.⁹⁸ These rules cannot be readily challenged as anticompetitive when they form the pedagogical program of a *state* school under *Parker* antitrust immunity.⁹⁹ The central question raised by Bauer is whether a *private* university can promulgate rules regarding residency that have the intended consequence of ousting competing residential services, such as those offered by fraternities, from the market.¹⁰⁰ As Bauer concluded, the answer would seem to be in the negative based on antitrust principles,¹⁰¹ but the actual cases—both in *Hamilton College* and subsequently—contort themselves ingeniously to avoid reaching that result.¹⁰²

93. *Id.* at 850.

94. *Id.* at 850–51.

95. *See* United States v. Brown Univ., 5 F.3d 658, 667, 672–73 (3d Cir. 1993).

96. *Am. Nat'l Bank*, 607 F. Supp. at 851.

97. *See* Sun & Daniel, *supra* note 18, at 494 n.366.

98. *See, e.g.,* Ward, *supra* note 34; *Mandatory Housing Requirements*, *supra* note 2; *infra* Part III.

99. *See Am. Nat'l Bank*, 607 F. Supp. at 850.

100. *See, e.g.,* Bauer, *supra* note 1; Manley, *supra* note 15, at 2.

101. *See* Bauer, *supra* note 1, at 410–12.

102. *See infra* Sections II.B.2, II.B.4, II.B.5.

1. *Mu Theta of Tau Kappa Epsilon v. Lycoming College*

If *Hamilton College* is a relatively small case,¹⁰³ then *Mu Theta of Tau Kappa Epsilon v. Lycoming College*¹⁰⁴ must be called a minuscule one, occupying only three pages of the Pennsylvania reporter. Lycoming College is a small liberal arts institution in rural Williamsport, Pennsylvania, and has been home to fraternities since the turn of the twentieth century,¹⁰⁵ including the Mu Theta chapter of Tau Kappa Epsilon established in the 1968–69 term.¹⁰⁶ Given the nature of small town life, Greek-gown relations had historically been rather cooperative, with fraternities working with the university to manage residential and communal offerings.¹⁰⁷ Indeed, in 2001 the school’s official magazine put forth a retrospective on fifty years of Greek life that painted fraternities as an essential social outlet for the university throughout their existence.¹⁰⁸

The reality was not quite so harmonious, however: change had come in 1975 when the college notified fraternities that “effective with the 1976–1977 academic year, the College’s residents’ policy will permit students to live off campus in private housing or in fraternity houses only to the extent that the number of resident students exceeds the capacity of the residence halls.”¹⁰⁹ In short, Lycoming instituted the same policy as had Northern Illinois: students would only be permitted to patronize competing residential providers if Lycoming ran short of space.¹¹⁰ The difference, of course, was that Northern Illinois was a state school, immune from antitrust scrutiny, whilst Lycoming was a private concern.

103. See *supra* text accompanying note 15.

104. *Mu Theta of Tau Kappa Epsilon v. Lycoming Coll.*, 75 Pa. D. & C. 2d 420 (Pa. Ct. C.P. 1976).

105. *50 Years of Fraternity Life at Lycoming College*, LYCOMING C. MAG., Spring 2001, at 1, 1–7. In explaining the genesis of Greek life at Lycoming College, the author of the article wrote:

Fraternities arrived at Lycoming College at about the same time as the institution became a four-year college. Theta Pi Pi was already there. Originally a literary society, it was a local social organization dating back to 1905. But it wasn’t the kind of national fraternity other colleges had.

Lambda Phi, organized itself in 1949 as a local fraternity, then petitioned to become affiliated with Lambda Chi Alpha.

Id. at 1.

106. Compare *50 Years*, *supra* note 105, at 2 (giving foundation as 1968), with *Lycoming Coll.*, 75 Pa. D. & C. 2d at 421 (giving foundation as 1969).

107. *50 Years*, *supra* note 105, at 1–3; see *Lycoming Coll.*, 75 Pa. D. & C. 2d at 421.

108. *50 Years*, *supra* note 105, at 1–7.

109. *Lycoming Coll.*, 75 Pa. D. & C. 2d at 422.

110. See *Am. Nat’l Bank & Tr. Co. of Chi. v. Bd. of Regents for Regency Univs.*, 607 F. Supp. 845, 846 (N.D. Ill. 1984).

Lycoming provided “several reasons in justification of this decision: a reduction in enrollment precluding the possibility of keeping the college’s residence halls filled; an alleged illegality under Federal law in permitting members of the fraternity to reside off campus; and general philosophic considerations and attitudes of various members of the administration.”¹¹¹ Setting aside the dubious reference to illegality¹¹² and to individual sentiments, the college thus advanced one overriding reason for its action: it had costly residence halls going unused as matriculations fell and students opted for other options, and sought to regain the revenues from the space it had.¹¹³ The court suggested in *American National Bank* that such a commercial motive might expose even a public school to antitrust liability for lack of a basis in public policy.¹¹⁴ Other authorities have echoed that parietal regulations will be struck down on other grounds if their sole rationale is financial, as opposed to a legitimate educational aim.¹¹⁵

The difficulty for Lycoming was that the college’s own handbook stated in no uncertain terms that providing students the option of living in independently owned fraternity housing was an integral part of its educational aims:

It is the purpose of Lycoming College to provide varied opportunities for differing kinds of living experiences for its students, to the extent possible. (a) The principal means by which Lycoming College attempts to meet this obligation is by providing residence halls on its campus that are owned, governed and supervised by the College . . . (b) The second means by which Lycoming College provides varied living experiences is through the opportunity for organized fraternal groups to purchase and operate their own independent house off campus . . .¹¹⁶

111. *Lycoming Coll.*, 75 Pa. D. & C. 2d at 422.

112. If allowing fraternity members to reside off-campus were actually illegal under federal law, that illegality has apparently escaped the notice of the thousands of colleges and millions of college students who have engaged in just such practices around the nation. *But cf.* text quoted *infra* note 439 (making the same sort of argument).

113. *See also* Ward, *supra* note 34, at 231–34 (evaluating commercial motivations generally for requiring residency given falling occupancy in residence halls); *Mandatory Housing Requirements*, *supra* note 2, at 955.

114. *Am. Nat’l Bank*, 607 F. Supp. at 851.

115. *See* Prostrullo v. Univ. of S.D., 369 F. Supp. 778 (D.S.D.), *rev’d*, 507 F.2d 775 (8th Cir. 1974); Pratz v. La. Polytechnic Inst., 316 F. Supp. 872 (W.D. La. 1970), *appeal dismissed*, 401 U.S. 951, *aff’d per curiam*, 401 U.S. 1004 (1971); Ward, *supra* note 34, at 232–34 (discussing *Mollere v. S.E. La. Coll.*, 304 F. Supp. 826 (E.D. La. 1969)); Schick v. Kent State Univ., Civil No. 74-646 (N.D. Ohio Jan. 19, 1975); *see also Mandatory Housing Requirements*, *supra* note 2.

116. *Lycoming Coll.*, 75 Pa. D. & C. 2d at 422 (quoting Lycoming College’s student handbook, *The Guidepost*).

By its own account, not only was Lycoming failing to advance a legitimate aim, it was actively thwarting one. When the Tau Kappa Epsilon chapter sued over the college's change in policy, it made much of the college's own emphasis on fraternities as an adjunct to its mission.¹¹⁷ Such a sacrifice of purported pedagogical benefit on the altar of pecuniary gain should have at least piqued the court's skepticism—had only the plaintiff thought to plead violations of antitrust law.¹¹⁸ As the chapter did not, however, the court made short work of dismissing its claims of constitutional violations and equitable estoppel.¹¹⁹ The question of the antitrust implications of plans like Lycoming's would have to wait another quarter century.¹²⁰

2. *Hamilton Chapter of Alpha Delta Phi v. Hamilton College*

It would be redundant (and impossible) to duplicate the lavish detail that Bauer brought to the practical and legal disputes between Hamilton College and its fraternities; a summary treatment will suffice.¹²¹ Hamilton has occupied a small rural town in upstate New York since its foundation in 1812, making it one of the oldest colleges in the United States.¹²² For most of its existence, Hamilton had not prescribed any particular room and board arrangements for its students other than freshmen, who were required to live on campus.¹²³ Upperclassmen had thus been free to patronize fraternities for 150 years,¹²⁴ and as of 1993 the university and fraternities were splitting the housing market for students, albeit rather asymmetrically: the university was grossing roughly \$7 million per year for housing, while fraternities together took in about \$1 million.¹²⁵ In the spring of 1995, however, Hamilton abruptly promulgated a new policy, announcing that all students in its small town would be required to purchase housing and

117. *Id.*

118. *See id.* at 422–23.

119. *Id.*

120. Numerous other lawsuits have been lodged challenging parietal rules on Fourteenth Amendment grounds with varying degrees of success, but review of these would depart overfar from the focus on the antitrust lens. *See Mandatory Housing Requirements, supra* note 2.

121. *See, e.g.,* Manley, *supra* note 15, at 1–2 (summarizing Bauer's "thorough" treatment of *Hamilton College*).

122. *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59, 61 (2d Cir. 1997); *see also* *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 106 F. Supp. 2d 406, 407 (N.D.N.Y. 2000).

123. *Hamilton Coll.*, 128 F.3d at 61; *see also* *Hamilton Coll.*, 106 F. Supp. 2d at 407, 409.

124. *See* Bauer, *supra* note 1, at 368–69.

125. *Hamilton Coll.*, 128 F.3d at 61.

dining services from the college as of the autumn term.¹²⁶ In service of the new policy, Hamilton offered to purchase the chapterhouses of fraternities that could no longer use them to house students.¹²⁷ Claiming violations of the Sherman Act, four fraternities sued under the theory that the college was attempting to monopolize the housing market, exact supracompetitive rental prices, and extort their valuable real estate at below-market prices.¹²⁸

Hamilton moved to dismiss, arguing that the alteration to its residential policy was noncommercial, or at least unrelated to interstate commerce, and thus beyond the scope of the Sherman Act.¹²⁹ The college introduced evidence to show that its purpose was pedagogical, seeking to curb the power of a male-dominated Greek system that it believed was making the campus less desirable to female applicants, as well as cultivating a reputation for providing an environment more focused on social than academic pursuits.¹³⁰ Other evidence, however, indicated that Hamilton's aim, like Lycoming's, was to fill empty dormitories and pay down debt incurred from their renovation.¹³¹ The district court, however, disregarded the materials submitted by both sides, instead finding that the court lacked subject matter jurisdiction under the Act by the nature of the college as an educational institution.¹³² The fraternities appealed.

The Second Circuit first recited the generous standards afforded plaintiffs in a motion to dismiss, including the benefit of all reasonable inferences and the assumption that properly pled allegations are true.¹³³ The court then conducted a concise but exhaustive survey of competition law in the college context, ranging from early cases applying antitrust doctrine to non-profits to holdings like *Brown University* and *Temple University*, making due note of *American National Bank* as "the only reported case involving an antitrust challenge to a university housing policy

126. *Id.*; *Hamilton Coll.*, 106 F. Supp. 2d at 407–08; see Robert E. Manley, *Antitrust Claim Reinstated at Hamilton College*, FRATERNAL L., Nov. 1997, at 3.

127. *Hamilton Coll.*, 128 F.3d at 61.

128. *Id.* at 61–62; *id.* at 66 ("They allege that Hamilton adopted the residential policy for the commercial purpose of raising revenues by (1) forcing all Hamilton students to purchase residential services from Hamilton; (2) allowing Hamilton to raise its prices for such services; and (3) attempting to purchase the fraternity houses at below-market prices."); *Hamilton Coll.*, 106 F. Supp. 2d at 407; Manley, *supra* note 126, at 3.

129. *Hamilton Coll.*, 128 F.3d at 62; *Hamilton Coll.*, 106 F. Supp. 2d at 407.

130. *Hamilton Coll.*, 128 F.3d at 61; see also *Hamilton Coll.*, 106 F. Supp. 2d at 407.

131. See *Hamilton Coll.*, 128 F.3d at 61; Bauer, *supra* note 1, at 371; Manley, *supra* note 126, at 3.

132. *Hamilton Coll.*, 128 F.3d at 62; *Hamilton Coll.*, 106 F. Supp. 2d at 407.

133. *Hamilton Coll.*, 128 F.3d at 62–63.

requiring certain students to live in university residence halls.”¹³⁴ Taking as true the fraternities’ allegations of competitive exploitation and that the college’s proffered rationale was merely a pretext,¹³⁵ the Second Circuit straightforwardly reversed and remanded to the district court.¹³⁶

On remand, the judge *sua sponte* bifurcated the case, directing the parties to conduct circumscribed discovery only on the proper definition of the relevant market, opining that “there appear to exist serious questions as to whether plaintiffs have adequately plead the relevant product and geographic markets in the first instance.”¹³⁷ As intimated by this invitation, the court went on to grant summary judgment to the college.¹³⁸ Hamilton successfully argued that the correct market encompassed all colleges that were “reasonably interchangeable” with Hamilton itself, not the market for residential housing in Clinton, New York.¹³⁹ According to the court, this was because “[p]rospective students who do not find Hamilton’s housing policy attractive are free to choose to attend a different college.”¹⁴⁰ And there was no dispute that Hamilton possessed no market power in competing for students with other schools.¹⁴¹

The court justified its holding by observing rather tautologically that “[s]tudents do not—indeed cannot—shop separately for individual college services or characteristics, but rather must select one college which offers a group of services and qualities.”¹⁴² True, under Hamilton’s new policy, students could not, but that begs the central question of the case: whether the new policy disallowing students the option of choosing a Hamilton education without Hamilton housing was anticompetitive.¹⁴³ There was certainly no infeasibility from a logistical perspective; before Hamilton’s change of heart, students had shopped for these services separately,¹⁴⁴ and

134. *Id.* at 64–65 (citing *Am. Nat’l Bank & Tr. Co. of Chi. v. Bd. of Regents for Regency Univs.*, 607 F. Supp. 845 (N.D. Ill. 1984)); *see also* Manley, *supra* note 126, at 3 (discussing the Second Circuit’s analysis).

135. *Id.* at 66.

136. *Id.* at 67–68. The court expressed no view on the merits of the alleged Sherman Act violation. *Id.* at 67 n.3.

137. *Hamilton Coll.*, 106 F. Supp. 2d at 408.

138. *Id.* at 413–14.

139. *Id.* at 413.

140. *Id.* at 412.

141. *Id.* at 413.

142. *Id.* at 412.

143. *See* *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59, 60–61 (2d Cir. 1997) (detailing plaintiffs’ allegations).

144. *Hamilton Coll.*, 106 F. Supp. 2d at 408 (“Until September 1995, residential services were provided to Hamilton students by a number of fraternities and private landlords in the Clinton, New York area, as well as by Hamilton. Thereafter, all students have been required

to the extent they selected Hamilton as their landlord, they were billed for residential services independently from educational tuition.¹⁴⁵ The court's unblinking acceptance that a practice that the market had followed for hundreds of years had suddenly become impossible defies the standard for summary judgment that there be no genuine issue for trial, resolving all ambiguities in the non-moving party's favor.¹⁴⁶

The court's prescription that prospective students opted for Hamilton's mandatory residential policies with eyes wide open also ignored the plight of current students at the time the policy was announced, who most certainly had not. Unfortunately, the plaintiffs had pled their market as "residential services for students matriculating at Hamilton College,"¹⁴⁷ which the court interpreted as referring only to prospective students.¹⁴⁸ The court thus discounted as immaterial the plaintiffs' cogent argument that "after completing their first year at Hamilton, students have a substantial investment in continuing to attend Hamilton, such that they would not transfer to other colleges as a result of an increase in housing costs or a decrease in housing quality."¹⁴⁹ From the perspective of prospective students, Hamilton had changed the product it was offering, but the court was convinced that those choosing amongst colleges would consider Hamilton's new policy and make an educated choice.¹⁵⁰ The idea of existing students (or, for that matter, existing fraternities) being locked into Hamilton College went largely undeveloped.

to live in college-owned facilities and to purchase college-sponsored meal plans."); see *Hamilton Coll.*, 128 F.3d at 61.

145. *Hamilton Coll.*, 106 F. Supp. 2d at 408 ("The expense of residential services has always been a separate charge from tuition.").

146. *Id.* at 410–11.

147. *Id.* at 412.

148. *See id.* at 412 n.6 ("Although plaintiffs submit evidence that, after completing their first year at Hamilton, students have a substantial financial incentive to remain there to complete their college education, the Court does not consider this a relevant factor in defining the relevant market. Hamilton announced its new residential policy in Spring 1995. Since that time, all prospective students have been able to consider Hamilton's residential policy and its economic impact in deciding which college to attend."); *e.g., id.* at 412 ("Plaintiffs' proposed market definition, which is too narrow to take into account the ability of prospective students to choose to enroll elsewhere, fails to include all reasonably interchangeable or substitutable products.").

149. *Id.* at 413 ("[A]ll prospective students have been able to consider Hamilton's policy in deciding which college to attend.").

150. *Id.* at 412.

3. *Eastman Kodak Co. v. Image Technical Services*

Before turning to the next college case, consider a brief diversion by way of a thought experiment: suppose a consumer is considering investing in one of the expensive optical SLR cameras favored by some photography enthusiasts. There have undoubtedly been many competitors in that market over the years: Canon, Nikon, Panasonic, Sony, Fujifilm, and Kodak have all offered distinct products that afforded consumers different price points and features. Once that choice is made, however, the consumer has a substantial cost sunk into that device's ecosystem, also known as an aftermarket. That is, if one has purchased a Kodak camera, one must now buy lenses compatible with the Kodak, replace broken parts with Kodak equipment, and contract with repairmen who can service Kodak products. The lifetime costs of all of these secondary services are not trivial.¹⁵¹

Given the aftermarket for demonstrably wealthy consumers who possess Kodak cameras, there should be robust rivalry to provide these services. But what if Kodak could keep anyone but its own agents from participating in this market for camera-specific services? That could provide a lucrative monopoly for Kodak, since eliminating competition might allow Kodak to charge higher prices for the necessary lenses, parts, and services. Even if it did not raise prices, Kodak would presumably earn more with one hundred percent of the aftermarket than just a portion. But would Kodak's aftermarket monopoly be bad for consumers? Perhaps consumers would evaluate the whole ecosystem when purchasing the camera in the first place, and thus any competitive effects would be incorporated in the original choice amongst robustly competing options. Or, perhaps, enforcing a Kodak-only ecosystem would prove beneficial in the balance, by providing a well-curated and more attractive deal for consumers. Or, perhaps, the sales of cameras, parts, and repairs are all so closely interlinked that they cannot be separated into discrete markets.¹⁵²

151. See generally Jiaxuan Li, Gateway Products in the DSLR Camera Market: Dynamic Demand, Consumer Learning and Switching Costs (Jan. 7, 2016) (unpublished Ph.D. dissertation, Boston University), <http://people.bu.edu/jxli/files/jiaxuanli-dslr.pdf> [<https://perma.cc/96RB-DJ8G>]; e.g., Eric Pfanner, *Fujifilm Finds Niche With Old-Style Cameras That Mask a High-Tech Core*, N.Y. TIMES (Nov. 19, 2013), <http://www.nytimes.com/2013/11/20/business/international/as-digital-camera-sales-sputter-fujifilm-finds-its-niche.html?> [<https://perma.cc/TT23-PRN2>]; Daisuke Wakabayashi, *A New Focus for Camera Makers*, WALL ST. J. (Apr. 15, 2012, 7:04 PM), <http://www.wsj.com/articles/SB10001424052702304444604577342094118995830> [<https://perma.cc/2B9C-YH2V>].

152. See Li, *supra* note 151.

Such was the dilemma in *Eastman Kodak Co. v. Image Technical Services, Inc.*, decided by the Supreme Court in 1992.¹⁵³ There, Kodak had successfully sought to dominate the aftermarket for servicing its photocopiers by refusing to sell replacement parts to competing independent service organizations—which some customers had favored as being of higher quality than Kodak’s in-house services.¹⁵⁴ These organizations brought suit under both clauses of the Sherman Act, alleging that Kodak had illegally tied the sales of machine parts to servicing in order to monopolize the aftermarket for Kodak photocopier servicing.¹⁵⁵ Yet Kodak enjoyed no dominant power in the primary market for photocopiers itself. If consumers did not like Kodak’s control of the aftermarket, they could always decline to patronize Kodak in the first place, or so the district court must have reasoned in granting summary judgment in favor of Kodak.¹⁵⁶ The Ninth Circuit reversed, finding that competition in the primary market for copying equipment might not restrain anticompetitive behavior in the aftermarket for replacement parts and service, and that “sufficient evidence existed to support a finding that Kodak’s implementation of its parts policy was ‘anticompetitive’ and ‘exclusionary’ and ‘involved a specific intent to monopolize.’”¹⁵⁷

The Supreme Court affirmed by a 7–2 majority. As far as the “tying” of the two items—that is, tethering Kodak’s near-monopoly on replacement parts for Kodak machines to the market for servicing Kodak machines—the Court held that to plead an antitrust violation, the tied markets must be distinct enough that it was reasonable for participants to operate in each market discretely, and yet the two had nonetheless been tied.¹⁵⁸ This the Court easily found on the alleged facts.¹⁵⁹ The question then became whether the primary market for the photocopiers necessarily prevented Kodak from exercising dominant power in the aftermarket, which proved a knotty question but one answered in the negative: even robust primary market competition may still allow for domination of an aftermarket.¹⁶⁰ The Court reasoned that it is costly (and sometimes impossible) for

153. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992).

154. *Id.* at 456–58.

155. *Id.* at 459.

156. *Id.* at 459. That was the reasoning adopted by the dissent at the Ninth Circuit in favor of affirming the district court, in any event. *Id.* at 461; see *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 621–24 (9th Cir. 1990) (Wallace, J., dissenting), *aff’d*, 504 U.S. 451 (1992).

157. *Eastman Kodak*, 504 U.S. at 461 (quoting *Eastman Kodak*, 903 F.2d at 620).

158. *Eastman Kodak*, 504 U.S. at 462.

159. *Id.* at 463.

160. *Id.* at 465–74.

consumers to fully educate themselves about the lifetime costs of a product *a priori*, and those less sophisticated may be particularly unable to do so.¹⁶¹

As for monopolization, the Court rejected out-of-hand Kodak's claim that sales of aftermarket services particular to a single brand *per se* could "never be a relevant market under the Sherman Act."¹⁶² Distinguishing earlier precedent that found a single brand ecosystem is not *necessarily* its own market, the Court stressed that the issue remained substitutability and that plaintiffs had adequately alleged that there were no suitable substitutes for Kodak parts and service, since no other parts or services would fit Kodak devices.¹⁶³ Indeed, the Court could cite a litany of lower court decisions defining a market limited to a single brand ecosystem.¹⁶⁴ The result turned on whether Kodak had a legitimate reason for monopolizing the market, or whether it acted "to foreclose competition, to gain a competitive advantage, or to destroy a competitor," presenting an eminently triable issue.¹⁶⁵ Plaintiffs were thus entitled to proceed with their claims that Kodak was illegally shutting them out of the aftermarket,¹⁶⁶ eventually obtaining a \$71.7 million verdict against Kodak after proving to a jury their allegations of anticompetitive behavior.¹⁶⁷

4. *Hack v. President & Fellows of Yale College*

Eastman Kodak's views of tying and aftermarket monopolization have not been without their detractors,¹⁶⁸ including on the Supreme Court itself,¹⁶⁹ but as one judge recently reminded, the opinion remains the "law

161. *Id.* at 474–77; *see also* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15 n.24 (1984) ("Especially where market imperfections exist, purchasers may not be fully sensitive to the price or quality implications of a tying arrangement, and hence it may impede competition on the merits (citing Richard Craswell, *Tying Requirements in Competitive Markets: The Consumer Protection Issues*, 62 B.U. L. REV. 661, 675–79 (1982))).

162. *Eastman Kodak*, 504 U.S. at 481.

163. *Id.* at 482–83.

164. *See id.* at 482 n.31.

165. *Id.* at 483–85 (quoting *United States v. Griffith*, 334 U.S. 100, 107 (1948)).

166. *Id.* at 485–86.

167. *See* *Image Tech. Serv., Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1356 (9th Cir. 1998) ("More than two years later, on September 19, 1995, a unanimous jury returned a verdict in favor of Image Tech and the other ISO plaintiffs, and awarded \$23,948,300 in damages. After the trebling mandated by the Clayton Act, 15 U.S.C. § 15, the damages award was \$71.7 million.").

168. *See, e.g.*, Michael S. Jacobs, *Market Power Through Imperfect Information: The Staggering Implications of Eastman Kodak Co. v. Image Technical Services and a Modest Proposal for Limiting Them*, 52 MD. L. REV. 336 (1993).

169. *See Eastman Kodak*, 504 U.S. at 486 (Scalia, J., dissenting).

of the land” and the leading case on point.¹⁷⁰ Indeed, it would not be much exaggeration to call it one of the more eminent antitrust decisions of recent times.¹⁷¹ It was thus less than a decade before the first attempted application of its tying and aftermarket logic to college residential cases appeared in *Hack v. President & Fellows of Yale College*.¹⁷² Yale imposed a familiar parietal rule on its enrollees: all freshmen and sophomores were required to live in college housing, except for those married or over twenty-one years of age.¹⁷³ Plaintiffs, for religious reasons, refused to live in coeducational housing and therefore sought a waiver, which was denied.¹⁷⁴ They were therefore obliged to pay for rooms they could not occupy even as they sought off-campus, single-sex housing arrangements, and filed suit.¹⁷⁵

Plaintiffs alleged two antitrust violations analogous to *Eastman Kodak*. First, the plaintiffs claimed that Yale had illegally tied provision of a Yale education to housing in the New Haven market.¹⁷⁶ In sum, they argued that a Yale education was so unique that it formed a relevant market of its own and therefore that forcing unwanted housing on those who wished to obtain a Yale degree was an unlawful exercise of market power in violation of antitrust precedent.¹⁷⁷ The court was unswayed by plaintiff’s appeal that “a Yale degree is of incomparable value to potential employers and to graduate schools and that only a Yale degree provides unique lifetime advantages, including access to the worldwide network of Yale alumni,”¹⁷⁸ instead looking to precedent holding that the proper market was

170. Oracle Am., Inc. v. Terix Comp. Co., No. 5:13-cv-03385-PSG, 2014 U.S. Dist. LEXIS 158060, at *15 (N.D. Cal. Nov. 7, 2014).

171. See, e.g., *id.* at *14 (“seminal tying case”); *Harrison Aire, Inc. v. Aerostar Int’l, Inc.*, 316 F. Supp. 2d 186, 214 (E.D. Pa. 2004) (“leading Supreme Court decision”); *Delta Kappa Epsilon Alumni Corp. v. Colgate Univ.*, 492 F. Supp. 2d 106, 115 (N.D.N.Y. 2007) (“landmark case”); Josh Baskin, Note, *Competitive Regulation of Mobile Software Systems: Promoting Innovation Through Reform of Antitrust and Patent Laws*, 64 HASTINGS L.J. 1727, 1734 (2013) (“seminal tying case”).

172. *Hack v. President & Fellows of Yale Coll.*, 16 F. Supp. 2d 183 (D. Conn. 1998), *aff’d*, 237 F.3d 81 (2d Cir. 2000).

173. *Id.* at 186.

174. *Id.* at 186–87.

175. *Id.* at 187. In addition to the antitrust claims discussed herein, plaintiffs also alleged violation of the First, Fourth, and Fourteenth Amendments, violation of the Fair Housing Act, breach of contract, and unjust enrichment. *Id.* at 186.

176. *Id.* at 195 (“The amended complaint alleges that ‘by conditioning the provision of a Yale education on the purchase of unrelated housing services, the defendants are engaged in an illegal restraint of trade’, which is in violation of Section One of the Sherman Antitrust Act.”).

177. *Id.* at 194.

178. *Id.*

the set of all elite universities to which excellent students might aspire.¹⁷⁹ Absent market power in a primary market for higher education, reasoned the court, Yale could not be guilty of illegal tying.¹⁸⁰

Plaintiffs also claimed that Yale had monopolized the aftermarket for “Yale student housing,” which they claimed was an adequate definition given that no other housing was reasonably interchangeable with Yale’s provided dormitories in light of the school’s parietal rule.¹⁸¹ The court was again unswayed, citing the analogous *Rohlfing v. Manor Care, Inc.*,¹⁸² in which the plaintiffs had claimed a nursing home’s rule requiring residents to use a specified medication provider monopolized that aftermarket.¹⁸³ The *Rohlfing* court dismissed because “if the residents were not satisfied with the pharmaceutical services or prices they could have selected a different nursing home.”¹⁸⁴ Similarly, the *Yale College* court dismissed because “plaintiffs could have opted to attend a different college or university if they were not satisfied with Yale’s housing policy,” given the court’s prior ruling that Yale did not comprise a unique market of its own.¹⁸⁵

The failure of *Yale College*’s plaintiffs to escape dismissal likely lies in the facts. It is intuitive to picture Kodak using its monopoly over replacement parts to eliminate competition from independent servicers; imagining Yale as wielding a monopoly in more intangible educational services is more challenging. Beyond inartful pleading, however, the tying and aftermarket claims are much the same. Yale competed with other purveyors of education, and consumers made their choices. Once the choice was made, however, Yale had locked-in consumers who could only use Yale-supplied educational offerings, just as Kodak had locked-in consumers who could only use Kodak-supplied parts.¹⁸⁶ In an open aftermarket for dormitory services, both Yale and private lessors would presumably offer options. By using its power over its already-enrolled

179. *Id.* at 195.

180. *Id.*

181. *Id.* at 196.

182. *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 347 & n.23 (N.D. Ill. 1997).

183. *Id.* at 333–34.

184. *Yale Coll.*, 16 F. Supp. 2d at 196 (citing *Rohlfing*, 172 F.R.D. at 346).

185. *Id.* at 197.

186. Of course, a student at Yale could theoretically abandon his commitment to Yale and undertake the costly process of adopting a new university, just as the owner of a Kodak device could abandon the use of that device and instead pay the cost of a new competing device. But the presence of these so-called “switching costs” are precisely what being “locked-in” means. See *Eastman Kodak Co. v. Image Tech. Serv., Inc.*, 504 U.S. 451, 473–477 (1992).

students, however, Yale was able to enforce rules on the supply of its educational services—they would only be given to those who use Yale housing—that forced students to buy their housing. This is indistinguishable in principle from Kodak enforcing rules on the supply of its replacement parts—they would only be given to those who used Kodak repair services—that forced consumers to buy their repair services. Advising Yale students that they should choose a different college would be like telling Kodak owners they should choose a different photocopier: the very argument the Supreme Court had thoroughly rejected at the summary judgment stage.¹⁸⁷

On appeal, the Second Circuit reiterated skepticism of the antitrust claims but illuminated the reason further.¹⁸⁸ The court again waved away the argument that Yale was unique, repeating that if plaintiffs “were dissatisfied with the Yale parietal rules, they could matriculate elsewhere.”¹⁸⁹ The court then offered a telling observation:

Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College, supra, is not to the contrary. The court there never reached the relevant market issue, and, if it had, the considerations would have been quite different. Plaintiffs in *Hamilton* were “locked in” by their investment in housing which they could no longer use because of an abrupt change in policy. That might have raised the concerns voiced in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), but those concerns are not present here. Yale’s housing policies were fully disclosed long before plaintiffs applied for admission. They had no “lock-in” costs.¹⁹⁰

In reality, the court of appeals explained, Yale students were not unfairly locked in at all.¹⁹¹ In *Eastman Kodak*, the Supreme Court expressed concern that consumers, particularly unsophisticated ones, would be unable or unwilling to analyze the long-term costs of the Kodak ecosystem they were adopting and thereby become locked in unwittingly.¹⁹² Disregarding this concern, the *Yale College* court implicitly found the opposite: the adolescents deciding amongst colleges were sophisticated enough to factor in the “fully disclosed” conditions of housing prior to matriculating.¹⁹³ At least, however, in distinguishing *Hamilton College*, the *Yale College* rule discriminates between consumers who notionally make a decision *a priori* as to their alma mater (warts,

187. *See id.* at 464–77.

188. *See Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81 (2d Cir. 2000).

189. *Id.* at 86–87.

190. *Id.* at 87.

191. *Id.*

192. *Eastman Kodak*, 504 U.S. at 474–77.

193. *Yale Coll.*, 237 F.3d at 86–87.

parietal rules, and all) and a fraternity locked into a residential market long ago that is only now being excluded by a dominant market power wielding monopolistic parietal rules.

It is ironic, however, that the Second Circuit referenced *Hamilton College*'s failure to reach the relevant market issue.¹⁹⁴ In fact, by the time the appellate decision in *Yale College* was released, the *Hamilton College* district court had already ruled (six months earlier) that its plaintiffs had failed to properly define a relevant market for exactly the same reasons enunciated in *Yale College*: namely, that other colleges were interchangeable with Hamilton, with no intimation of any *Eastman Kodak* analysis.¹⁹⁵ Had only the *Hamilton College* district court the benefit of the Second Circuit's wisdom in *Yale College*, "the considerations"—and perhaps the result—"would have been quite different."¹⁹⁶

5. *Delta Kappa Epsilon Alumni Corp. v. Colgate University*

When Bauer published his article in 2004, he could comment that *Hamilton College* "is the only case ever to consider the issues discussed in this article."¹⁹⁷ That is no longer true, and whilst it is fitting that the sequel case should arise at Colgate University, which Bauer described as Hamilton's "chief rival,"¹⁹⁸ it is unfortunate that the sequel should fall into the same ruts of confusion as its predecessor. This is particularly so in light of the Second Circuit's guidance in the interim from *Yale College* that fraternities with locked-in interests in residential property may well obtain protections under the Supreme Court's *Eastman Kodak* holding in the face of an "abrupt change in policy."¹⁹⁹ Given direction from authority at the appellate level and the Supreme Court, it is difficult to see where a district court might go awry.

Yet *Delta Kappa Epsilon Alumni Corp. v. Colgate University* did just that, to all appearances.²⁰⁰ Following an automobile accident in 2000, Colgate University undertook a systematic reappraisal of its residential

194. *Id.* at 87.

195. *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 106 F. Supp. 2d 406, 412–13 (N.D.N.Y. 2000).

196. *Yale Coll.*, 237 F.3d at 87.

197. Bauer, *supra* note 1, at 350.

198. Bauer, *supra* note 1, at 381. It is wryly amusing to note that *Hamilton College* is located in Clinton, New York, while its archrival *Colgate University* is located in Hamilton, New York.

199. *Yale Coll.*, 237 F.3d at 87.

200. *Delta Kappa Epsilon Alumni Corp. v. Colgate Univ.*, 492 F. Supp. 2d 106 (N.D.N.Y. 2007).

programs.²⁰¹ As part of the resulting scheme, Colgate resolved to require every student to live in college-owned housing; to accomplish this, Colgate would derecognize any fraternity that refused to sell its property to Colgate, thus allowing Colgate to become the sole provider of residential services.²⁰² Colgate implemented its program, and most fraternities capitulated in exchange for continued recognition, but when Delta Kappa Epsilon refused, Colgate derecognized it, which had the effect of prohibiting the fraternity from enrolling new members from the student body on penalty of those members' expulsion from the university.²⁰³ The Delta Kappa Epsilon alumni association, which owned the fraternity house, filed suit under the Sherman Act, alleging monopolization of the market for residential housing around Colgate.²⁰⁴

The district court decided the case for Colgate on a motion for summary judgment, after taking evidence from two experts.²⁰⁵ The court appeared to accept that under the *Eastman Kodak* analysis, there could be multiple markets: a competitive primary market for tertiary education in which Colgate vied against other liberal arts institutions and a potentially non-competitive aftermarket for residential housing.²⁰⁶ The question, as in *Eastman Kodak*, was whether the competition in the primary market restrained Colgate from exercising dominant power in the associated housing aftermarket once students were locked into its educational forum.²⁰⁷ There, the Supreme Court discerned strong evidence of aftermarket power, such as supracompetitive pricing, dominant share, and

201. *Id.* at 107; Michelle York, *Colgate Gains Ground in Legal Battle with Fraternities*, N.Y. TIMES (Dec. 13, 2005), <http://www.nytimes.com/2005/12/13/education/colgate-gains-ground-in-legal-battle-with-fraternities.html> [<https://perma.cc/3QML-8VQ7>].

202. *Colgate Univ.*, 492 F. Supp. 2d at 108; Robert E. Manley, *Delta Kappa Epsilon Sues Colgate*, FRATERNAL L., Mar. 2005, at 1; York, *supra* note 201.

203. *Colgate Univ.*, 492 F. Supp. 2d at 108; York, *supra* note 201 (“All but one of the Greek-letter organizations turned over their property by this summer. Nearly all of the university’s 2,750 students now live in buildings where campus officials can provide some oversight. A sole Greek-letter organization, Delta Kappa Epsilon, did not sell. It was derecognized. Colgate students are not permitted to live there or to participate in that fraternity’s activities. If they do, they face disciplinary action, including expulsion.”).

204. *Colgate Univ.*, 492 F. Supp. 2d at 107.

205. *Id.*

206. *Id.* at 114–16.

207. *See id.* at 116 (“Kodak does not transform every possessor of a dominant share in the relevant aftermarket into a monopolist. Indeed, “[t]o create a triable question of aftermarket monopoly power, the plaintiff must produce “hard evidence dissociating the competitive situation in the aftermarket from activities occurring in the primary market.”” (citation omitted) (quoting *Harrison Aire, Inc. v. Aerostar Int’l, Inc.*, 423 F.3d 374, 383 (3d Cir. 2005))).

“switching costs”;²⁰⁸ such evidence carried the day in the eventual verdict.²⁰⁹ Equally clearly, Colgate had not been restrained by decreased enrollment from the complete eradication of every competitor: even starker evidence of power.²¹⁰ And such an eradication is powerful *prima facie* evidence that Colgate’s aim was “to destroy a competitor” under § 2 of the Sherman Act.²¹¹ Such considerations should have convinced the court that summary judgment was inappropriate, whatever the ultimate merits of the case.²¹²

The court strayed further, however, in its analysis of Delta Kappa Epsilon’s strongest argument: the abrupt shift in residential policy specifically victimized locked-in participants in the local housing market.²¹³ Citing *Hamilton College*, the court found the abrupt change in policy irrelevant and existing students’ inability to readily transfer out immaterial.²¹⁴ This astonishing result purportedly followed because students matriculating at the college entered into an implied contract to abide by Colgate’s parietal rules, whatever they might be in the future.²¹⁵ Even if Colgate’s New Residential Program was unforeseeable *a priori*, and students were compelled to accept it in light of onerous costs in switching out of Colgate, they were evidently contractually bound to

208. See *Eastman Kodak Co. v. Image Tech. Serv., Inc.*, 504 U.S. 451, 465–74 (1992); *Colgate Univ.*, 492 F. Supp. 2d at 115–16 (discussing *Eastman Kodak’s* findings).

209. See *supra* note 167 and accompanying text.

210. See *Colgate Univ.*, 492 F. Supp. 2d at 110 (noting increased applications for enrollment correlated to elimination of residential competitors). There were differing theories for what the burgeoning enrollment meant: one expert declared it an indication that Colgate’s offering was a pro-competitive improved product, *id.* at 110, whilst the other expert explained it was because high school students were unable to discern the lifetime costs of their education. *Id.* at 111. Such disputed questions of fact are precisely why summary judgment was inappropriate. See *Eastern Kodak*, 504 U.S. at 486.

211. *Eastman Kodak*, 504 U.S. at 483 (quoting *United States v. Griffith*, 334 U.S. 100, 107 (1948)).

212. See *Eastman Kodak*, 504 U.S. at 486 (“[W]e cannot reach these conclusions as a matter of law on a record this sparse. Accordingly, the judgment of the Court of Appeals denying summary judgment is affirmed.”).

213. See *Colgate Univ.*, 492 F. Supp. 2d at 116–17.

214. *Id.* at 116 (“As the *Hamilton* court remarked in regard to this very argument, this assertion, ‘even if true . . . is not material.’” (quoting *Hamilton Coll.*, 106 F. Supp. 2d at 413)).

215. See *id.* (“Any housing constraints experienced by students who have chosen to enroll despite the residential policy flow from their implied contract [with Colgate] to comply with its rules, including the residential policy.” (quoting *Hamilton Coll.*, 106 F. Supp. 2d at 413)).

accede to Colgate's every whim, however exploitative.²¹⁶ Such an unconscionable outcome cannot be reconciled with *Eastman Kodak's* healthy acceptance of the realities of competition in an aftermarket, which even *Colgate University* professed to acknowledge.²¹⁷ Indeed, the rule that *Colgate University* recited specifically counseled solicitude to the fraternities' position: "the decision in *Kodak* clarifies the relationship between an appropriately alleged market and aftermarket, holding that 'primary market competition does not necessarily preclude monopoly power in the relevant aftermarket where a unilateral policy change targets "locked-in" customers.'"²¹⁸

The court's rationale for jettisoning *Eastman Kodak* and effectively indenturing Colgate's students to the college, however, became apparent as it expanded on its reasoning:

Here, Colgate and its students enter into a unique contractual arrangement which governs both parties' conduct during the tenure of their relationship. . . .

Once a student decides to enroll in a particular college, a unique and distinctive relationship commences between school and student that governs that student's four-year tenure. Over the next four years, an undergraduate student lives and studies in a "quasi-parented" environment, where the school, *in loco parentis*, creates and enforces policies for the protection and welfare of its students. Here, Colgate has exercised these rights, namely, its "parietal" rights, in creating a residential policy that is part of a Colgate education. As such, the court holds, as a matter of law, that Colgate's residential policy is an effect of the exercise of its lawful and appropriate parietal rights.²¹⁹

Perplexingly, the court claimed that *Yale College* supported its position, explaining that "[t]he Second Circuit has previously visited this very issue."²²⁰ Indeed it had: *Yale College*, it may be remembered, had written that plaintiffs like those at Hamilton (or Colgate) subjected to an abrupt change in policy that negated their investments in residential property may well have a claim under the logic of *Eastman Kodak*.²²¹ Needless to say, the *Colgate University* court did not cite that insight.

216. Without being overly flippant, such an unreasonable "contract" would quite literally be "in restraint of trade." See Sherman Antitrust Act, 15 U.S.C. § 1 (2012).

217. See *Colgate Univ.*, 492 F. Supp. 2d at 116 ("In broad terms, *Kodak* stands for the proposition that market reality is the touchstone of antitrust analysis." (quoting *Harrison Aire, Inc.*, 423 F.3d at 383)).

218. *Id.* (quoting *Harrison Aire, Inc.*, 423 F.3d at 383).

219. *Colgate Univ.*, 492 F. Supp. 2d at 117 (citations omitted).

220. *Id.* at 116.

221. *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 87 (2d Cir. 2000).

Instead, it repeated the observation that if prospective students did not approve of parietal rules, they could matriculate elsewhere.²²² But as *Yale College* recognized, that holding would have no bearing on the existing students who had already matriculated at Colgate when the policy was implemented who were in a “quite different” posture.²²³ All the more so, the option to matriculate elsewhere was of no use at all to the *Colgate University* plaintiff itself, which as a local fraternity chapter had been “locked-in” to Colgate since its foundation and literally could not move anywhere else. Fraternities themselves, captive to their host institutions, are the most defenseless targets of colleges’ attempts at complete control.²²⁴

C. Collegiate Embargos on Fraternities

The core leverage the university wielded against the fraternity system in the residential antitrust cases was recognition.²²⁵ By withholding that recognition and forbidding its students from associating with unrecognized groups, the university could starve rogue chapters into submission.²²⁶ The alternative, presumably adopted by at least some ostensibly extinct chapters, is to go “underground”²²⁷: to return to the strict secrecy that characterized their earliest days, where colleges similarly threatened students with expulsion for affiliation.²²⁸ Even the mere threat of derecognition has been widely successful in coercing most fraternities into selling their most valuable resources, their chapterhouses, in hopes of simply being allowed to continue existing, albeit in a diminished and noncompetitive state.²²⁹

222. *Colgate Univ.*, 492 F. Supp. 2d at 117.

223. *Yale Coll.*, 237 F.3d at 87.

224. See *infra* Section IV.B; Bauer, *supra* note 1, at 510–12.

225. See, e.g., *Colgate Univ.*, 492 F. Supp. 2d at 108.

226. See York, *supra* note 201 (“As part of the plan, [Colgate] told its Greek-letter organizations that if they did not turn over their houses to the college, the fraternities and sororities would not be recognized—meaning the end of all their activities.”); *Fraternities Go Underground to Defy College Ban*, N.Y. TIMES (Aug. 29, 1994), <http://www.nytimes.com/1994/08/29/us/fraternities-go-underground-to-defy-college-ban.html> [https://perma.cc/P5GM-68B2].

227. See, e.g., *Fraternities Go Underground*, *supra* note 226; *Phelps v. President & Trs. of Colby Coll.*, 595 A.2d 403, 403–04 (Me. 1991); Gosk, *supra* note 8, at 167–68 (detailing Colby College’s attempts to root out “underground fraternities” after the school officially banned such organizations).

228. See *supra* notes 21–25 and accompanying text; see, e.g., *People ex rel. Pratt v. Wheaton Coll.*, 40 Ill. 186 (Ill. 1866) (student expelled for joining secret society).

229. See *supra* Section II.B; e.g., York, *supra* note 201 (“If they sold or donated their houses, students could still belong to the [fraternal] organizations and still live in the houses, though the college would essentially supervise them.”).

1. Greek Nonrecognition as an Antitrust Issue

But universities brandish the stick of nonrecognition more broadly than simply to stifle robust residential housing markets.²³⁰ The university's purported control of its student population would allow it to act as a unilateral gatekeeper to its market, refusing to allow *any* particular new group access to students in order to compete with incumbents.²³¹ Suggestions that a fraternity chapter could simply operate elsewhere defy the basic definition of a fraternity vis-à-vis undergraduates.²³² Universities may simply be favoring those groups who conform to the college's expectations of academic rigor and extracurricular probity,²³³ or more actively manipulating the supply conditions for other services fraternities provide.²³⁴ The motivation for manipulation can be self-evident: a college desirous of providing dining facilities in exchange for additional fees from students, for example, would benefit from eliminating fraternity competitors who might seek to offer competing dining options of higher quality or at lower prices.²³⁵

230. See Robert E. Manley, *Antitrust Laws Affect the Campus*, FRATERNAL L., Nov. 1995, at 3 (“Any arrangement that excludes access of a particular fraternity to a particular campus without approval of the campus IFC or the campus Panhellenic probably violates the antitrust laws.”).

231. See Sunshine, *Fraternity as Franchise*, *supra* note 3, at 405–06; Manley, *supra* note 230, at 3 (“Policies of colleges to exclude particular fraternities unless they have campus IFC or campus Panhellenic approval probably violate antitrust laws.”); Robert E. Manley, *New Risks Facing Campus IFCs and Panhellenic Conferences*, FRATERNAL L., Jan. 1992, at 4–5 (“When a campus IFC or Panhellenic votes to recommend that the university not recognize a colony of a new group, it may be engaging in a conspiracy with the university to . . . violate the antitrust laws by restricting access to the campus market by a new group.”).

232. See, e.g., *Psi Upsilon of Phila. v. Univ. of Pa.*, 591 A.2d 755, 761 (Pa. Super. 1991) (“The Recognition Policy to which appellant was signatory establishes the responsibility of the fraternity as an entity for acts of its members which have been determined to be improper. The result of such a conclusion is not appellants’ inability to function as the social organization it, in fact, is, but only its inability to function under the auspices of that institution whose rules its members have broken. No limitations have been placed upon its continued operation outside the University.”).

233. See, e.g., *Beta Sigma Rho, Inc. v. Moore*, 46 Misc. 2d 1030, 1033–34 (N.Y. Sup. Ct. 1965).

234. See Sunshine, *Fraternity as Franchise*, *supra* note 3, at 405.

235. See, e.g., *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 106 F. Supp. 2d 406, 407 (N.D.N.Y. 2000) (“Until September 1995, residential services were provided to Hamilton students by a number of fraternities and private landlords in the Clinton, New York area, as well as by Hamilton. Thereafter, all students have been required to . . . purchase college-sponsored meal plans.”); *Cowboy Book Ltd. v. Bd. of Regents for Agric. & Mech. Colls. ex rel. Okla. State Univ. of Agric. & Applied Sci.*, 728 F. Supp. 1518, 1523 (W.D. Okla. 1989) (quoted *supra* text accompanying note 89).

In their regulation of fraternities, universities often recite pieties about improving the lot of students generally by reducing social stratification, eliminating dangerous or disruptive influences, or creating a living environment consistent with the college's ideological message.²³⁶ Surely, goes the argument, the university is *bettering* the competitive market by protecting consumers of educational services from social exclusion and psychic injury, eliminating participants who might harm consumers, or simply providing consumers with what the university thinks is best.²³⁷ Colgate, indeed, argued strenuously that denying students the choice to patronize fraternities and unifying the provision of residential services under its control improved the educational experience,²³⁸ and the *Colgate University* court agreed that the school could act unilaterally “for the protection and welfare of its students.”²³⁹ But judges have heard similar reasoning from colleges before and should not be fooled:

“The argument is, in essence, that an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices. Such an argument amounts to ‘nothing less than a frontal assault on the basic policy of the Sherman Act.’”

Both the public safety justification rejected by the Supreme Court in *Professional Engineers* and the public health justification rejected by the Court in *Indiana Dentists* were based on the defendants' faulty premise that consumer choices made under competitive market conditions are “unwise” or “dangerous.”²⁴⁰

What rationale, in short, could justify completely removing the choice of where they reside from consumers themselves? Colgate characterized its purportedly protecting students' safety and health (apparently, from their own bad decisions) as “pro-competitive,”²⁴¹ but that brand of lofty

236. See, e.g., *Beta Sigma Rho*, 46 Misc. 2d at 1033–34 (discussing report of the State University of New York explaining why national fraternities were deleterious to the campus population on each of these axes); see also Manley, *supra* note 230, at 3 (“Any arrangement that gives quotas to individual chapters on an individual campus probably violates the antitrust law. The fact that these arrangements are designed to encourage a wholesome Greek system or good educational opportunities is no defense.”).

237. See, e.g., *Beta Sigma Rho*, 46 Misc. 2d at 1033–34; *Delta Kappa Epsilon Alumni Corp. v. Colgate Univ.*, 492 F. Supp. 2d 106, 116–17 (N.D.N.Y. 2007).

238. *Colgate Univ.*, 492 F. Supp. 2d at 110.

239. *Id.* at 117.

240. *United States v. Brown Univ.*, 5 F.3d 658, 676–77 (3d Cir. 1993) (citation omitted) (quoting *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 463 (1986)).

241. *Colgate Univ.*, 492 F. Supp. 2d at 110.

paternalism infantilizes and disenfranchises students *qua* market participants, making them effective wards of the university.²⁴²

Indeed, incumbents can often lodge self-serving arguments about safety and traditional wisdom in support of their actions barring rivals from a market.²⁴³ Particularly where access to the market is highly regulated, barriers to entry may be raised so high as to prevent effective competition from interlopers.²⁴⁴ Such behavior is widely known as a form of rent-seeking:²⁴⁵ the practice by which organized incumbents importune lawmakers to hinder competition from others through licensure, board regulation, or quotas.²⁴⁶ To avoid unseemly appearances, the pretext for this legislation or regulation is often given as promoting public health and welfare.²⁴⁷ Yet even such obvious favoritism is problematic to challenge legally due to state-action *Parker* immunity;²⁴⁸ *Parker* itself condoned a sort of rent-seeking in allowing California to regulate the market for raisins

242. See *supra* note 219 and accompanying text.

243. E.g., *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978).

244. See, e.g., John S. Elson, *The Governmental Maintenance of the Privileges of Legal Academia: A Case Study in Classic Rent-Seeking and a Challenge to Our Democratic Ideology*, 15 ST. JOHN'S J. LEGAL COMMENT. 269 (2001).

245. See *id.* at 270 (“Here, I define rent-seeking in a conventional, but very restricted sense, as the phenomenon by which a cartel obtains governmentally imposed restrictions on entry to the market in which the cartel members sell their goods or services in order that they can obtain higher profits than they otherwise would in open market competition.”); see also George F. Will, Op-Ed., *Supreme Court has a chance to bring liberty to teeth whitening*, WASH. POST (Oct. 10, 2014), https://www.washingtonpost.com/opinions/george-will-supreme-court-has-a-chance-to-promote-cleaner-competition/2014/10/10/13a3a2c0-4fd8-11e4-babe-e91da079cb8a_story.html [<https://perma.cc/52YH-DGKQ>] (defining rent-seeking as the “unseemly yet uninhibited scramble of private interests to bend government power for their benefit”).

246. Elson, *supra* note 244, at 269–72; Will, *supra* note 245 (“Today, factions enrich themselves through occupational licensure laws unrelated to public safety. Such laws are growth-inhibiting and job-limiting, injuring the economy while corrupting politics. They are residues of the mercantilist mentality, which was a residue of the feudal guild system, which was crony capitalism before there was capitalism. Then as now, commercial interests collaborated with governments that protected them against competition.”).

247. E.g., Will, *supra* note 245 (The North Carolina State Board of Dental Examiners “protects the economic interests of those who elect it, by pretending to protect North Carolinians from the supposed danger of unlicensed people participating in the business of ‘teeth whitening.’”); Elson, *supra* note 244, at 273–76.

248. See William H. Page, *Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation*, 1987 DUKE L.J. 618, 619; Will, *supra* note 245 (“When the Federal Trade Commission initiated an action against the dental board’s behavior, the board said it could not be found in violation of federal antitrust laws because it enjoys ‘*Parker* immunity.’”).

“so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers,” notwithstanding the Sherman Act.²⁴⁹ At the very least, private institutions should not accrue such prerogatives.

This risk of anticompetitive results can be greatest where market participants act as the regulators for their own markets as, for example, Hamilton College argued it did in promulgating parietal rules for the student population.²⁵⁰ Based on purported authority for concerted action, self-regulators may try to claim immunity from antitrust laws.²⁵¹ Absent statutory authority authorizing anticompetitive conduct, however, when self-regulating industries exclude competitors from the market, they are engaged in nothing more than a transparently unlawful boycott.²⁵² And educators are assuredly held to task in some self-regulatory contexts, notably their athletic program cartels.²⁵³ Yet tension arises given cases holding that the quintessential expression of schools’ self-regulation—academic accreditation—is a non-commercial activity beyond the scope of antitrust law.²⁵⁴ In any event, the Second Circuit rejected the notion that the recognition of fraternities on campus categorically exceeds the reach of antitrust law.²⁵⁵

2. *Legal Precedent on Systemic Interdiction of Fraternities*

And yet, despite these lucid competitive concerns, the roll of cases considering universities’ rights to refuse to recognize fraternities (and expel students who join them) is uniform: Supreme Court justices to county court judges have afforded colleges untrammelled discretion to regulate the lives

249. *Parker v. Brown*, 317 U.S. 341, 346 (1943); *see also* Will, *supra* note 245.

250. *See* Bauer, *supra* note 1, at 373 n.210 (“Hamilton also argued that a college’s self-regulation was immune from antitrust scrutiny. The antitrust laws, however, place a legislative limit on self-regulation which restrains trade. *See, e.g., Silver v. N. Y. Stock Exchange*, 373 U.S. 341, 360 (1963). Accordingly, Hamilton’s status as a self-regulating organization was insufficient to defeat the fraternities’ complaint. *Hamilton Coll.*, 128 F.3d at 64.”).

251. *See, e.g., Silver v. N.Y. Stock Exch.*, 373 U.S. 341 (1963).

252. *See* HYLTON, *supra* note 46, at 166–85 (“Boycotts”); *e.g., Nw. Wholesale Stationers v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985); *Silver*, 373 U.S. 341.

253. *E.g., NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984); *NCAA v. Law*, 134 F.3d 1010 (10th Cir. 1998).

254. *See, e.g., Marjorie Webster Junior Coll., Inc. v. Middle States Assoc. of Coll. & Secondary Sch., Inc.*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970); *Found. for Interior Design Educ. Research v. Savannah Coll. of Art & Design*, 73 F. Supp. 2d 829 (W.D. Mich. 1999).

255. *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59 (2d Cir. 1997).

of their students and extirpate organizations that do not meet their approval, without so much as a footnote given over to antitrust implications.²⁵⁶ The first such case dates back to the middle of the nineteenth century,²⁵⁷ and the court's own summary is as concise as any: "E. Hartley Pratt, a student in Wheaton college, joined a secret society known as the Good Templars, in violation of the college rules. For this the faculty 'suspended him from the privileges of the institution until he should express a purpose to conform to its rules.'"²⁵⁸ His father brought a suit for mandamus that his son be reinstated, but the court demurred, finding the college free to make whatever rules it wished for its governance.²⁵⁹ The student "has an undoubted legal right to join either Wheaton college or the Good Templars"²⁶⁰—but not both.

The Supreme Court adopted like reasoning in *Waugh v. Board of Trustees of University of Mississippi*.²⁶¹ There, the university had adopted measures that prohibited the enrollment or granting of degrees to anyone affiliated with a fraternity or sorority, and an applicant to the law school refused to sign the pledge that he was not so affiliated.²⁶² Instead, he brought a lawsuit alleging the university had deprived him of liberty, property, and his rightful pursuit of happiness under the Fourteenth Amendment without due process of law.²⁶³ The Court was unpersuaded, concluding that such rights "are subject in some degree to the limitations of the law, and the condition upon which the State of Mississippi offers the complainant free instruction in its University, that while a student there he

256. See, e.g., *Waugh v. Bd. of Trs. of the Univ. of Miss.*, 237 U.S. 589 (1915); *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2d Cir. 2007); *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pitt.*, 229 F.3d 435 (3d Cir. 2000); *Phi Kappa Tau Chapter House Ass'n of Miami Univ. v. Miami Univ.*, No. 1:12-CV-657, 2013 U.S. Dist. LEXIS 15030 (S.D. Ohio Feb. 4, 2013); *Sigma Chi Fraternity v. Regents of the Univ. of Colo.*, 258 F. Supp. 515 (D. Colo. 1966); *Webb v. State Univ. of N.Y.*, 125 F. Supp. 910 (N.D.N.Y. 1954); *Iowa Beta Chapter of Phi Delta Theta Fraternity v. State*, 763 N.W.2d 250 (Iowa 2009); *Phelps v. President & Trs. of Colby Coll.*, 595 A.2d 403 (Me. 1991); *Beta Sigma Rho, Inc. v. Moore*, 4 Misc. 2d 1030 (Sup. Ct. N.Y. 1965); *Psi Upsilon of Phila. v. Univ. of Pa.*, 591 A.2d 755 (Pa. Super. Ct. 1991); *Mu Theta of Tau Kappa Epsilon v. Lycoming Coll.*, 75 Pa. D. & C. 2d 420 (Pa. Ct. C.P. 1976).

257. *People ex rel. Pratt v. Wheaton Coll.*, 40 Ill. 186, 186 (Ill. 1866).

258. *Id.*

259. *Id.*

260. *Id.* at 188.

261. *Waugh v. Bd. of Trs. of the Univ. of Miss.*, 237 U.S. 589 (1915).

262. *Id.* at 591–93.

263. *Id.* at 594.

renounce affiliation with a society which the state considers inimical to discipline.”²⁶⁴

Such logic has featured in numerous other cases concerning state institutions.²⁶⁵ Judges have held that a state is free to delegate quasi-legislative powers to the regents overseeing the states’ educational institutions to set regulations as they see fit.²⁶⁶ Through these regulations, the “state may adopt such measures, including the outlawing of certain social organizations, as it deems necessary to its duty of supervision and control of its educational institutions.”²⁶⁷ This is particularly the case when the state excludes organizations that purportedly discriminate on the basis of protected classes, given the state’s constitutional duties.²⁶⁸ Even considered in light of competitive concerns, the logic is hard to assail, as the state enjoys immunity from antitrust liability in any event: if a state’s public policy is to disallow fraternities from competition, the Sherman Act cannot stop it.²⁶⁹ Whether the First and Fourteenth Amendments impose restraints on state action based on students’ freedom of association is a different and well-studied question.²⁷⁰

But courts have also condoned private universities’ plenary privilege to interdict disfavored organizations.²⁷¹ In *Phelps v. President & Trustees of Colby College*,²⁷² the remaining members of the local chapter of Lambda

264. *Id.* at 597.

265. *See, e.g.*, *Webb v. State Univ. of N.Y.*, 125 F. Supp. 910 (N.D.N.Y. 1954); *Beta Sigma Rho, Inc. v. Moore*, 4 Misc. 2d 1030 (Sup. Ct. N.Y. 1965); *Sigma Chi Fraternity v. Regents of the Univ. of Colo.*, 258 F. Supp. 515 (D. Colo. 1966).

266. *Beta Sigma Rho*, 4 Misc. 2d at 1035.

267. *Webb*, 125 F. Supp. at 912 (citing *Waugh*, 237 U.S. 589; *Hughes v. Caddo Parish Sch. Bd.*, 57 F. Supp. 508 (W.D. La. 1944), *aff’d*, 65 S. Ct. 562 (1945)).

268. *See, e.g.*, *Sigma Chi Fraternity*, 258 F. Supp. 515 (upholding state school’s ability to expel a fraternity that discriminated on the basis of race); *Beta Sigma Rho*, 4 Misc. 2d at 1033–34 (“One of the pillars upon which State University of New York was founded is that educational opportunities be made available to those qualified, without regard to race, color, religion, creed or national origin. It would be sophistry for the State University to vigorously combat discrimination in its admissions and academic policies and, at the same time, condone those practices among the extracurricular organizations recognized by it.” (quoting a study of State University of New York fraternities and social organizations)).

269. *See, e.g.*, *supra* note 265 and accompanying text.

270. *See generally, e.g.*, Bauer, *supra* note 2; James C. Harvey, *Fraternities and the Constitution: University-Imposed Relationship Statements May Violate Student Associational Rights*, 17 J.C. & U.L. 11 (1990); Gregory F. Hauser, *Social Fraternities at Public Institutions of Higher Education: Their Rights Under the First and Fourteenth Amendments*, 19 J.L. & EDUC. 433 (1990); Gosk, *supra* note 8.

271. *See, e.g.*, *Psi Upsilon of Phila. v. Univ. of Pa.*, 591 A.2d 755, 762 (Pa. Super. 1991); *People ex rel. Pratt v. Wheaton Coll.*, 40 Ill. 186, 188 (Ill. 1866).

272. *Phelps v. President & Trs. of Colby Coll.*, 595 A.2d 403 (Me. 1991).

Chi Alpha challenged Colby's decision in 1984 to ban all fraternities from campus; to prohibit the practice of rushing, pledging, and initiating; and to expel students for failure to comply.²⁷³ They argued that the Maine Civil Rights Act barred the private college from restricting the students' freedom of speech and association by banning their fraternity.²⁷⁴ The Supreme Judicial Court of Maine declined to decide the difficult question of whether the students' or college's associational rights took precedence and simply held the Act did not reach such disputes.²⁷⁵ Unaddressed was whether a private institution could, consistent with antitrust law, really take the severe step of eradicating every other institution from the market.²⁷⁶ Of course, the residential cases discussed earlier in this Part were not so shy, dismissing any fears anent robust competition when universities eliminated their rivals in order to secure their own control over students' lives.²⁷⁷

And there is little doubt that dominion over students' choices—residential and otherwise—is the aim of such fraternity interdictions.²⁷⁸ Universities still seem to view themselves as exclusively responsible for the care and conduct of their students to the point that alien organizations that challenge their control must be quashed or coopted.²⁷⁹ As the epigram to this Article explained, this perspective is hardly different than that of garden-variety monopolists, who desire complete control over

273. *Id.* at 403–04.

274. *Id.* at 404. Almost uniquely, the Maine Civil Rights Act restricts private institutions from infringing rights analogous to those found in the Bill of Rights, which is only applicable to the government absent such a statute.

275. *Id.* at 407–08. The question is difficult because enforcing one group's associational rights often conflicts with another party's: here, the fraternity members sought the right to associate with one another, but enforcing that right implicated the university's right not to associate with them. *See generally* LAURENCE A. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-17, at 1401–07 (2d ed. 1988).

276. *See Colby Coll.*, 595 A.2d at 407–08; Gosk, *supra* note 8, at 167–68.

277. *See supra* Section II.B.

278. *See, e.g.,* Op-Ed., *Harvard's Final Insult*, WALL ST. J. (Apr. 17, 2016, 11:20 AM), <http://www.wsj.com/articles/harvards-final-insult-1460759189> [<https://perma.cc/RUT8-6W66>] (“Campus leftists, who once protested in loco parentis regulations, now aspire to total control of student life. They can’t abide the existence of free institutions beyond their supervision, much less leaving young people alone to determine for themselves the activities that are valuable to their college experience.”); *Delta Kappa Epsilon Alumni Corp. v. Colgate Univ.*, 492 F. Supp. 2d 106, 117 (N.D.N.Y. 2007); *see also* *McCauley v. Univ. of V.I.*, 618 F.3d 232, 247 (3d Cir. 2010) (“[U]niversity students, unlike public elementary and high school students, often reside in dormitories on campus, so they remain subject to university rules at almost all hours of the day.”); *Furek v. Univ. of Del.*, 594 A.2d 506, 516 (Del. 1991) (“[T]he modern university provides a setting in which every aspect of student life is, to some degree, university guided.”).

279. *See supra* Part I.

their domains.²⁸⁰ Such accretion of power is clearly not limited to traditional businesses: in the seminal *NCAA* case, the trial court luridly condemned a “classic cartel” of colleges exerting “absolute control” over its product, which “like all other cartels” demanded artificially high payments, imposed characteristic production limits and punished noncompliance, fixed prices irrespective of demand, and “like all cartels,” parceled out its inflated revenues to its members formulaically.²⁸¹

To conclude, as did *Hamilton College*,²⁸² that the proper market is larger than the college town ignores the reality that locked-in collegians are in fact not free to transfer universities at will.²⁸³ Moreover, contra *Yale College*’s rule,²⁸⁴ it is distinctly unlikely students considered and accepted the effects of parietal regulations on their long-term educational experience and student debt.²⁸⁵ And regardless of *Colgate University*’s tortured quasi-contractual logic,²⁸⁶ no such consideration can be imputed to students and societies who did not sign up for bans on fraternities but had them imposed *in medias res*.²⁸⁷ Some colleges have recognized these realities.²⁸⁸ Why then are others allowed such domineering control, amounting to “nothing less than a frontal assault on the basic policy of the Sherman

280. See *supra* text accompanying note 1; see also *infra* notes 504–05 and accompanying text.

281. Bd. of Regents of Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1300–01 (W.D. Okla. 1982), *aff’d in part & rev’d in part on other grounds*, 707 F.2d 1147 (10th Cir. 1983), *aff’d*, 468 U.S. 85 (1984).

282. See *supra* notes 139–41, 147–50 and accompanying text.

283. See *Eastman Kodak Co. v. Image Tech. Serv., Inc.*, 504 U.S. 451, 474–77 (1992) (discussing the potentially anticompetitive effects of switching costs for locked-in consumers).

284. See *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81 (2d Cir. 2000); see also *supra* notes 181–85, 188–91 and accompanying text.

285. See *Eastman Kodak*, 504 U.S. at 474–77 (finding that consumers cannot always assess aftermarket costs *a priori*).

286. See *supra* notes 213–19 and accompanying text.

287. See *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 87 (2d Cir. 2000).

288. See Timothy M. Burke, *The Dartmouth Decision: The End of Another Greek System?*, FRATERNAL L., Mar. 1999, at 2 (“In an interview with *The Dartmouth*, President Wright appeared to recognize many of the difficulties likely to face the College if it were to attempt the total elimination of the Greek system. Apparently, recognizing that in many cases students have made commitments to fraternities and sororities and perhaps with the understanding that fraternities and sororities and their house corporations have made significant investments based upon the existence of the Greek system at Dartmouth, President Wright said ‘we want to work through this and make sure it works well. We don’t want people to have made commitments or participating in organizations with certain understandings. We are not going to suddenly put them out. We don’t have the authority to put them out. Most of these houses are privately owned.’”).

Act[?]]²⁸⁹ The answer is intimated by opinions distinguishing the academic world from the commercial, even if antitrust analysis still nominally applies.²⁹⁰ The question of what this distinction really is shifts the analysis to a new body of law.

III. LESSONS FOR GREEK-GOWN RELATIONS FROM PARENTAL AND PARIETAL RIGHTS

Various authorities discussed herein refer to a unique relationship between a university and its student;²⁹¹ indeed, some required this *sui generis* status as justification for their holdings.²⁹² This special relationship between universities and their students has gone by several names, the most common of which are the doctrine of *in loco parentis* and parietal rights already mentioned in the cases.²⁹³ The former literally means “in the place of the parent,” and hearkens to the idea that the university in its role as schoolmaster has been literally invested with the power of its students’

289. *United States v. Brown Univ.*, 5 F.3d 658, 677 (3d Cir. 1993) (quoting *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 463 (1986)) (quoted *supra* note 240).

290. *See, e.g.*, *Delta Kappa Epsilon Alumni Corp. v. Colgate Univ.*, 492 F. Supp. 2d 106, 117 (N.D.N.Y. 2007); *see also Brown Univ.*, 5 F.3d at 670–73 (3d Cir. 1993).

291. *See supra* Section II.B; *see also* Hauser, *supra* note 270, at 456–57 (discussing excessive regulations on fraternities that amount to constitutional violations); Op-Ed., *Harvard’s Final Insult*, WALL ST. J. (Apr. 17, 2016, 11:20 AM), <http://www.wsj.com/articles/harvards-final-insult-1460759189> [<https://perma.cc/RUT8-6W66>] (discussing Harvard’s purge of political clubs).

292. *E.g.*, *Colgate Univ.*, 492 F. Supp. 2d at 117; *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 85 (2d. Cir. 2000).

293. *See, e.g.*, Philip Lee, *The Curious Life of In Loco Parentis at American Universities*, 8 HIGHER EDUC. REVIEW 65 (2011); Nicholas Sweeton & Jeremy Davis, Note, *The Evolution of In Loco Parentis*, 13 J. STUDENT AFF. 67 (2004); Peter F. Lake, *The Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1 (1999); Robert D. Bickel & Peter F. Lake, *Reconceptualizing the University’s Duty to Provide a Safe Learning Environment: A Criticism of the Doctrine of In Loco Parentis and the Restatement (Second) of Torts*, 20 J.C. & U.L. 261 (1994); Jackson, *supra* note 24; Theodore C. Stamatakos, Note, *The Doctrine of In Loco Parentis, Tort Liability, and the Student-College Relationship*, 65 IND. L.J. 471 (1990); James J. Szablewicz & Annette Gibbs, *Colleges’ Increasing Exposure to Liability: The New In Loco Parentis*, 16 J.L. & EDUC. 453 (1987); Gerald A. Fowler, *The Legal Relationship Between the American College Student and the College: An Historical Perspective and the Renewal of a Proposal*, 13 J.L. & EDUC. 401 (1984); Richard Cranmer Conrath, *In Loco Parentis: Recent Developments in This Legal Doctrine as Applied to the University-Student Relationship in the United States of America, 1965–75* (June 1976) (unpublished Ph.D. dissertation, Kent State University Graduate School of Education), <http://files.eric.ed.gov/fulltext/ED136672.pdf> [<https://perma.cc/YP3W-EHRY>].

parents to control, forbid, and discipline.²⁹⁴ Parietal rights refer to a more specific application of the same notion: the right of a university to impose regulations for those living within its metaphorical (and literal) walls, particularly with regard to enforcing traditionalist mores prohibiting intermingling of the sexes.²⁹⁵ Although there is some looseness of definition, most authorities consider parietal rights a subset of the more general principle of *in loco parentis* as applied to housing matters.²⁹⁶

In its general application to college students, the *in loco parentis* doctrine is of ancient origin²⁹⁷ but has been met with powerful opposition by the judiciary in the last half century, and most courts now describe it as a dead letter in the university context, or at a minimum severely undercut in logic and theory.²⁹⁸ In fraternity cases, it has been rejected time and time again.²⁹⁹ The particular subset of parietal rights and responsibilities, however, still appears to have some staying power.³⁰⁰ Whether this is because courts now see residential issues as distinguishable from the justifications for rejecting *in loco parentis*, or whether parietal rights have always enjoyed their own independent rationale, modern cases somehow

294. See Lee, *supra* note 293, at 66; Stamatakos, *supra* note 293, at 473–74.

295. See Ward, *supra* note 34; *Mandatory Housing Requirements*, *supra* note 2.

296. See *Delta Kappa Epsilon Alumni Corp. v. Colgate Univ.*, 492 F. Supp. 2d 106, 117 (N.D.N.Y. 2007) (quoted *supra* text accompanying note 221); Fowler, *supra* note 293, at 48 (“Even with the return of the World War II veterans, colleges continued to assert the *in loco parentis* role; they administered numerous parietal rules which were often enforced with little regard for the privacy or due process rights of students.”); Richard B. Evans, Note, “*A Stranger in a Strange Land*”: *Responsibility and Liability for Students Enrolled in Foreign-Study Programs*, 18 J.C. & U.L. 299, 300 (1991) (“Most university administrators embraced the *in loco parentis* doctrine and imposed numerous parietal rules.”); Conrath, *supra* note 293, at 39 (“[Clarence J. Bakken] outlines three basic areas of college life where *in loco parentis* is most applicable: student activities, housing, and student discipline. Bakken feels that the parietal rule used in *housing* is only one aspect of the more basic rule that governs the entirety of college life, that is, *in loco parentis*. He feels, however, that this rule, intended primarily to allow a university to require that unmarried minors live ‘in college-approved housing under rules and regulations established for their physical, moral, and mental protection,’ should be carefully reevaluated before being applied to adults.” (footnote omitted) (quoting Clarence J. Bakken, *Legal Aspects of In Loco Parentis*, 8 J.C. STUDENT PERSONNEL 234, 235 (1967))); *Mandatory Housing Requirements*, *supra* note 2, at 995–97 (discussing parietal rules under *in loco parentis* rubric).

297. See *infra* Sections III.A.1, III.A.2.

298. See *infra* Section III.A.3.

299. See *infra* Section III.B.

300. See *infra* Section III.C.

treat the university's special relationship in residential life as less questionable than in other areas.³⁰¹

A. *The Decline and Fall of In Loco Parentis*

To understand why *in loco parentis* has fallen so dramatically from favor, it will be necessary to trace its evolution from the earliest legal tractates to its emphatic rejection in colleges in the latter half of the twentieth century. As with many bodies of law, the reason for its abandonment is substantially due to societal upheavals rather than purely jurisprudential reevaluation.³⁰² In the case of *in loco parentis*, that upheaval was the broad and university-focused rejection of traditional authority figures during the tumultuous decade of the 1960s.³⁰³ Collegians forcefully emancipated themselves from the tutelage of the university, dispelling the foundation of the *in loco parentis* doctrine's application to them.³⁰⁴ The passage of the Twenty-Sixth Amendment to the United States Constitution in 1971 only formalized what the previous decade had amply proven: college men and women were to be treated as full-fledged adults.³⁰⁵

1. *Blackstone and the Presumption of Paternalism*

The original formulation of the *in loco parentis* doctrine dates back to William Blackstone, who explained in his Commentaries that a parent "may . . . delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *viz.* that of restraint and correction, as may be necessary."³⁰⁶ Blackstone's reference to "correction" is a euphemism for the original context in which the doctrine was asserted: as an affirmative defense by schoolmasters rebutting claims of battery lodged by their pupils.³⁰⁷ One early case, for example, concerned

301. *Cf. Mandatory Housing Requirements*, *supra* note 2, at 998–1000 (examining whether justifications for parietal rules can be disentangled from their wellspring in the *in loco parentis* doctrine).

302. *See* *Sunshine, Lazarus Taxon*, *supra* note 3, at 81, 110–11.

303. *See infra* notes 349–54 and accompanying text.

304. *See* *Bradshaw v. Rawlings*, 612 F.2d 135, 139–40 (3d Cir. 1979); *Lee*, *supra* note 293, at 76.

305. *See* *Lee*, *supra* note 293, at 69, 76; *Healy v. James*, 408 U.S. 169, 197 (1972) (Douglas, J., concurring); *Bradshaw*, 612 F.2d at 140.

306. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *441).

307. *See* *Jackson*, *supra* note 24, at 1144.

a student's being whipped for referring to his instructor disrespectfully.³⁰⁸ These original conceptions of *in loco parentis* were limited to primary and secondary schools, where the pupils were legal minors and thus the parental power conveyed to the schoolmaster was absolute.³⁰⁹ Given the dependability that such students were minors, the doctrine conceptually became more anchored to the relationship of tutor to tutee as justification even when a peculiar student happened to exceed the age of majority.³¹⁰

As adopted and applied in America in the nineteenth century, the doctrine of *in loco parentis* came to afford nigh boundless authority on schools to regulate and discipline their students, subject only to limitations on the most extreme forms of corporal punishment: batteries done with malice, causing permanent injury, or that are clearly excessive.³¹¹ Any other rule or conduct was within the school's prerogative; or as Justice Clarence Thomas has summarized: "The doctrine of *in loco parentis* limited the ability of schools to set rules and control their classrooms in almost no way."³¹² Although such power is fundamentally despotic, its scope was widely accepted³¹³ and rooted in the notion that primary education served the vital end of instilling civic virtue and moral probity; the teacher

must govern these pupils, quicken the slothful, spur the indolent, restrain the impetuous, and control the stubborn. He must make rules, give commands, and punish disobedience. What rules, what commands, and what punishments shall be imposed, are necessarily largely within the discretion of the master.³¹⁴

Given the students' status as children, moreover, such absolute authority is not completely surprising. The law, after all, still recognizes the entitlement of parents today to arbitrarily employ corporal punishment and otherwise exert control over their children³¹⁵—actions that would be

308. *Lander v. Seaver*, 32 Vt. 114, 115 (1859); *see also Morse v. Frederick*, 551 U.S. 393, 414–15 (2007) (Thomas, J., concurring) (discussing *Lander*).

309. *See Morse*, 551 U.S. at 413.

310. *E.g., Morse*, 551 U.S. at 413 n.3 ("My discussion is limited to elementary and secondary education. In these settings, courts have applied the doctrine of *in loco parentis* regardless of the student's age. Therefore, the fact that Frederick was 18 and not a minor under Alaska law is inconsequential." (citations omitted)).

311. *Id.* at 416.; *see Dean v. State*, 8 So. 38, 39 (Ala. 1890).

312. *Morse*, 551 U.S. at 416.

313. *Id.* at 414 n.4.

314. *Patterson v. Nutter*, 7 A. 273, 274 (Me. 1886) (quoted in *Morse*, 551 U.S. at 414).

315. *E.g., In re Welfare of the Children of N.F. & S.F.*, 749 N.W.2d 802, 810 (Minn. 2008) ("We are unwilling to establish a bright-line rule that the infliction of any pain constitutes either physical injury or physical abuse, because to do so would effectively

wholly repugnant to the Constitution and statute were they taken against a competent adult.³¹⁶ Yet there was a further justification: the judiciary's desire to avoid meddling with the internal function and disciplinary procedures of the school to whose governance the student was submitted.³¹⁷ This latter rationale would prove to be the medium by which *in loco parentis* successfully transposed itself to tertiary education at colleges and universities.

2. *Paternalism in Institutes of Higher Education*

The extension of *in loco parentis* from children enrolled in primary school to university students might appear a substantial leap to modern eyes. But one must recall that for much of American history, students in universities were not yet considered adults and were usually legal minors.³¹⁸ The academic career's progression to institutions of higher education was far less ossified, and students often matriculated at colleges well before the age of eighteen.³¹⁹ Tutors and professors were disciplinarian overseers of a strictly defined code of conduct and uniform syllabus that mirrored children's academies: Greek and Latin classics, religious lessons, and history.³²⁰ In short, the universities of yore were much closer continuations of the milieu of secondary schools.

The first cases tentatively equating schoolmasters and schoolchildren with deans and undergraduates arose in the latter half of the 1800s.³²¹ It is generally agreed,³²² however, that the leading judicial acceptance of *in loco*

prohibit all corporal punishment of children by their parents. . . . [I]t is clear to us that the legislature did not intend to ban corporal punishment.”).

316. See *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985) (“[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.”); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (discussing and reaffirming *T.L.O.*); see also *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683–85 (1986) (permitting school to forbid lewd speech because of the minority of the audience).

317. *Morse*, 551 U.S. at 414 (discussing *Sheehan v. Sturges*, 2 A. 841, 842 (1885)).

318. See SYRETT, *supra* note 20, at 15 (“These students were often quite young, many entering [college] as young as ten years old and most graduating well before their twentieth birthdays.”).

319. See *id.*

320. See *id.* at 16–20; Jackson, *supra* note 24, at 1139–40; Fowler, *supra* note 293, at 405.

321. See, e.g., *People ex rel. Pratt v. Wheaton Coll.*, 40 Ill. 186 (Ill. 1866) (cited in Jackson, *supra* note 24, at 1146 n.85 and Lee, *supra* note 293, at 68–69); *North v. Bd. of Trs. of Univ. of Ill.*, 27 N.E. 54 (Ill. 1891) (quoted in Lee, *supra* note 293, at 69).

322. E.g., Lee, *supra* note 293, at 69; Stamatakos, *supra* note 293, at 473–74; Jackson, *supra* note 24, at 1146; Szablewicz & Gibbs, *supra* note 293, at 454.

parentis for universities arrived in *Gott v. Berea College*, a 1913 decision of the Kentucky Supreme Court.³²³ There, an aggrieved restaurateur brought suit against the academy that had forbidden its students from patronizing his establishment.³²⁴ The court was unmoved and took the side of the college:

College authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents as the case may be, and, in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy.³²⁵

Berea College signaled that the ambit afforded to colleges would be as broad as primary schools.³²⁶ All the same—and perhaps by necessity—the emphasis in the context of higher education shifted to the privity of the relationship between college and student, rather than the necessity of corporal discipline to the education of youngsters—the concern that animated the proliferation of *in loco parentis* in the primary school posture.³²⁷

Other cases followed apace: courts around the nation were agreeing *en masse* that university authorities enjoyed little to no restraint on their discretion.³²⁸ In 1924, for example, the Florida Supreme Court adopted virtually the same formulation as *Berea College*, quoting it with approval.³²⁹ This was particularly true in gendered matters: in the same year, the Maryland Supreme Court declared it would defer completely to

323. *Gott v. Berea Coll.*, 161 S.W. 204 (Ky. 1913).

324. *Id.* at 205.

325. *Id.* at 206.

326. *Id.*; see also Jackson, *supra* note 24, at 1146–47.

327. *E.g.*, *Berea Coll.*, 161 S.W. at 205–06; *John B. Stetson Univ. v. Hunt*, 102 So. 637, 640–41 (Fla. 1924); see Fowler, *supra* note 293, at 413–14.

328. See, *e.g.*, *Woods v. Simpson*, 126 A. 882 (Md. 1924); *Barker v. Trs. of Bryn Mawr Coll.*, 122 A. 220 (Pa. 1923); *Booker v. Grand Rapids Med. Coll.*, 120 N.W. 589 (Mich. 1909); see also Jackson, *supra* note 24, at 47 n.95; see also *supra* notes 311–14 and accompanying text.

329. *Stetson Univ.*, 102 So. at 640 (“As to mental training, moral and physical discipline, and welfare of the pupils, college authorities stand in loco parentis and in their discretion may make any regulation for their government which a parent could make for the same purpose, and so long as such regulations do not violate divine or human law, courts have no more authority to interfere than they have to control the domestic discipline of a father in his family.” (citing *Gott v. Berea Coll.*, 101 S.W. 204 (Ky. 1913) (quoted in Lee, *supra* note 293, at 70)).

faculties in matters of discipline and discretion, “especially in dealing with girl students.”³³⁰ And in perhaps the most absurd example, the plaintiff in 1928’s *Anthony v. Syracuse University* found no recourse in the courts for the stated cause for expulsion of not being “a typical Syracuse girl.”³³¹ In the Maryland case, the opprobrious behavior was the plaintiffs’ alleged involvement in an accusation published in the school newspaper “that men officials of the University were making objectionable suggestions to girl students and otherwise exhibiting a wrong moral attitude toward them,” foreshadowing the more specific set of parietal rights that colleges claimed over relations between enrolled men and women.³³²

The relationship as fully realized inured to the mutual benefit of both student and school: it “imposed a duty on the college to exercise control over student conduct and, reciprocally, gave the students certain rights of protection by the college.”³³³ Just as the inherent result of parents’ duty to control a child is that parents may be liable for shirking their duty, so too the doctrine of *in loco parentis* implied that universities could be held responsible when their regulations failed to protect the charges whom they had a duty to protect.³³⁴ For example, in *Brigham Young University v.*

330. *Woods*, 126 A. at 883.

331. *Anthony v. Syracuse Univ.*, 231 N.Y.S. 435, 437 (N.Y. App. Div. 1928).

332. *Woods*, 126 A. at 882.

333. *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir. 1979); accord *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 816–17 (Cal. Ct. App. 1981); *Univ. of Denver v. Whitlock*, 744 P.2d 54, 59–60 (Colo. 1987) (en banc); *Rabel v. Ill. Wesleyan Univ.*, 514 N.E.2d 552, 559–60 (Ill. App. Ct. 1987); *Stamatakos*, *supra* note 293, at 474 (“This latter notion of physical welfare is critical to institutional tort liability: The exercise of legal authority is inextricably bound with the obligations of legal duty, and *Gott* suggests that the *in loco parentis* doctrine imposes a duty to protect the physical welfare of students. Thus, as college administrators governed students with parental authority, courts began to recognize a correlative legal duty to protect the students over which such authority was exercised.”). *Contra Lake*, *supra* note 293, at 6 (calling the reciprocal view of *in loco parentis* as imposing both duties and immunities “misguided and doctrinally incoherent”); *Bickel & Lake*, *supra* note 293, at 271–73 (rejecting reciprocal view); see also *Stamatakos*, *supra* note 293, at 482–84 (distinguishing theories underlying ostensible *in loco parentis* cases finding collegiate liability).

334. See Edward J. Schoen & Joseph S. Falchek, *You Haze, I Sue: A Fraternity Stew*, 18 J. LEGAL STUD. EDUC. 127, 128 n.3 (2000) (describing *in loco parentis* as when “colleges and universities were deemed to have a duty to protect the safety and welfare of their students, as parents are expected to protect their children.”); Angela N. Marshlain, *Non-Hazing Injuries to Fraternity and Sorority Members: Should the Fraternal Association be Required to Assume a Parental Role?*, 5 APPALACHIAN L.J. 1, 13 (2006) (“When the doctrine of *in loco parentis* was applied to universities, college administrators and professors were required to assume a parental role thereby establishing a parent-child relationship between the university and the students. This non-traditional parent-child relationship gave rise to a legally recognized duty which when breached, amounted in

Lillywhite,³³⁵ and in *Hamburger v. Cornell University*,³³⁶ the university was held liable to students injured by chemical accidents upon a finding of negligence in its duties, as exercised by its faculty.³³⁷ Although liability arose from traditional analysis in tort, the underlying relationship giving rise to the duty was *ipso facto* that of a student with a custodial university.³³⁸

3. *The End of Traditional In Loco Parentis at Universities*

With startling uniformity, authorities cite the single case *Dixon v. Alabama State Board of Education*³³⁹ as “sounding the ‘death knell’” for the doctrine of *in loco parentis* in 1961.³⁴⁰ To be sure, it was a case involving obnoxious facts that cried out for judicial intervention: six black students at Alabama State College had been summarily expelled for participating in a civil rights demonstration.³⁴¹ The court of appeals rightly took umbrage, noting that the school was an arm of the state government, and as such “due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct,” including the right to notice of the charges, to a hearing, to present witnesses on his behalf, and to be heard by the highest governing authority of the school.³⁴² Such detailed limitations on a college’s right of internal discipline repudiated *in loco parentis* starkly, although *sub silentio*: the opinion made no mention of the doctrine. Many more opinions followed *Dixon* throughout the 1960s, resting on similar premises that state schools

imposing liability upon the university.” (footnotes omitted); Szablewicz & Gibbs, *supra* note 293, at 454; *Bradshaw*, 612 F.2d at 139; Stamatakos, *supra* note 293, at 474.

335. *Brigham Young Univ. v. Lillywhite*, 118 F.2d 836 (10th Cir. 1941).

336. *Hamburger v. Cornell Univ.*, 172 N.Y.S. 5 (N.Y. App. Div. 1918).

337. *See also* *Barr v. Brooklyn Children’s Aid Soc.*, 190 N.Y.S. 296, 297 (N.Y. Sup. Ct. 1921) (“If it could be said under this complaint that the defendant is a college or university, the defendant would be liable. This is clearly now the law.” (citing *Hamburger*, 172 N.Y.S. 5)). *See* Stamatakos, *supra* note 293, at 474, 474 n.17 (citing *Brigham Young Univ.*, 118 F.2d 836, and *Barr*, 190 N.Y.S. 296, in the context of *in loco parentis*); Szablewicz & Gibbs, *supra* note 293, at 455 (citing *Brigham Young Univ.* and *Barr* in the context of *in loco parentis*).

338. *See* Szablewicz & Gibbs, *supra* note 293, at 455; *supra* note 333 and accompanying text.

339. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

340. Fowler, *supra* note 293, at 408. *See id.* at 408 n.42; *accord, e.g.*, Lake, *supra* note 293, at 9; Jackson, *supra* note 24, at 1149; Lee, *supra* note 293, at 70–71.

341. *Dixon*, 294 F.2d at 151–53.

342. *Id.* at 158.

were not free to violate constitutional rights under the guise of internal regulations.³⁴³

Dixon studiously limited its holding to public institutions of higher education, declaring that relations between private schools and their students were a matter of contract rather than due process.³⁴⁴ Such a model dated back to the early decisions in which the private school's code of conduct and regulations were interpreted in a quasi-contractual fashion.³⁴⁵ Some initial decisions in the 1960s hewed to that line: St. John's University was allowed to expel students violating its Roman Catholic marital rules,³⁴⁶ and Columbia University was permitted to discipline students involved in trespassory protests in the name of civil disobedience, which is the very sort of the behavior *Dixon* had condemned.³⁴⁷ (In fairness, the relationship between a university and its students is generally viewed as contractual to this day.³⁴⁸)

That distinction between public and private did not long outlast the 1960s, however.³⁴⁹ In 1971, the Twenty-Sixth Amendment to the United States Constitution lowered the age of majority to eighteen, granting university students the franchise *en masse*.³⁵⁰ The next year, Justice William O. Douglas wrote that “[s]tudents—who, by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age—

343. *E.g.*, *Marzette v. McPhee*, 294 F. Supp. 562 (W.D. Wisc. 1968) (due process); *Dickey v. Ala. State Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967) (First Amendment); *Hammond v. S.C. State Coll.*, 272 F. Supp. 947 (D.S.C. 1967) (First Amendment); *Knight v. State Bd. of Educ.*, 200 F. Supp. 174 (M.D. Tenn. 1961) (due process).

344. *Dixon*, 294 F.2d at 157; *see Lake, supra* note 293, at 10; *Jackson, supra* note 24, at 1153–54.

345. *See, e.g.*, *Fowler, supra* note 293, at 411–13; *see also Delta Kappa Epsilon Alumni Corp. v. Colgate Univ.*, 492 F. Supp. 2d 106, 116 (N.D.N.Y. 2007).

346. *Carr v. St. John's Univ.*, 187 N.E.2d 18 (N.Y. 1962).

347. *Grossner v. Tr. of Columbia Univ.*, 287 F. Supp. 535 (S.D.N.Y. 1968).

348. *See, e.g.*, *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 481 (S.D.N.Y. 2015) (“In New York, the relationship between a university and its students is contractual in nature.” (quoting *Papaspiridakos v. Educ. Affiliates, Inc.*, No. 10 CV 5628(RJD)(JO), 2013 U.S. Dist. LEXIS 129748, at *9 (E.D.N.Y. Sept. 11, 2013), *aff'd*, 580 F. App'x 17 (2d Cir. 2014))); *Vought v. Teachers Coll., Columbia Univ.*, 511 N.Y.S.2d 880, 881 (App. Div. 1987) (“When a student is admitted to a university, an implied contract arises between the parties which states that if the student complies with the terms prescribed by the university, he will obtain the degree he seeks.” (citing *Carr v. St. John's Univ.*, 231 N.Y.S.2d 410, 413 (App. Div.), *aff'd*, 12 N.Y.2d 802 (1962))).

349. *See Lake, supra* note 293, at 10 (“Following the spirit of the decisions regarding public universities, courts began to decide that private colleges also owed their students fundamental fairness. The courts achieved this through rules of *contract* interpretation and read ‘the contract’ liberally in favor of student rights. . . .” (footnote omitted)).

350. U.S. CONST. amend. XXVI; *see Lee, supra* note 293, at 76.

are adults who are members of the college or university community.”³⁵¹ Following this lead, in *Bradshaw v. Rawlings*,³⁵² the Third Circuit absolved the university of liability where a student injured in a drunken driving accident claimed the university had been negligent in its duty to protect its students *in loco parentis*.³⁵³ In so holding, the court expansively rejected any notion that the college had responsibility for the conduct and safety of its adult students:

As a result of these and other similar developments in our society, eighteen year old students are now identified with an expansive bundle of individual and social interests and possess discrete rights not held by college students from decades past. There was a time when college administrators and faculties assumed a role *in loco parentis*. Students were committed to their charge because the students were considered minors. A special relationship was created between college and student that imposed a duty on the college to exercise control over student conduct and, reciprocally, gave the students certain rights of protection by the college. The campus revolutions of the late sixties and early seventies were a direct attack by the students on rigid controls by the colleges and were an all-pervasive affirmative demand for more student rights. In general, the students succeeded, peaceably and otherwise, in acquiring a new status at colleges throughout the country. These movements, taking place almost simultaneously with legislation and case law lowering the age of majority, produced fundamental changes in our society. A dramatic reapportionment of responsibilities and social interests of general security took place. Regulation by the college of student life on and off campus has become limited. Adult students now demand and receive expanded rights of privacy in their college life including, for example, liberal, if not unlimited, par[iet]al visiting hours.³⁵⁴ College administrators no longer control the broad arena of general morals. At one time, exercising their rights and duties *in loco parentis*, colleges were able to impose strict regulations. But today students vigorously claim the right to define and regulate their own lives. Especially have they demanded and received satisfaction of their interest in self-assertion in both physical and mental activities, and have vindicated what may be called the interest in freedom of the individual will.³⁵⁵

As the nation entered the 1980s, colleges were no longer accountable for the welfare of their students under *in loco parentis*: they could not

351. *Healy v. James*, 408 U.S. 169, 197 (1972) (Douglas, J., concurring).

352. *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979).

353. *Id.* at 144.

354. The official reporter mistranscribed the esoteric term “parietal” as “partial.” Subsequent opinions have recognized and corrected this scrivener’s error. *E.g.*, *Nero v. Kan. State Univ.*, 861 P.2d 768, 773–74 (Kan. 1993).

355. *Bradshaw*, 612 F.2d at 139–40 (footnotes omitted).

assert all-encompassing parental authority over them, but neither were they strictly accountable for protecting them from one another.³⁵⁶ To be sure, there were still situations where colleges were held responsible, but these were at least purportedly in spite of *in loco parentis* rather than because of it.³⁵⁷

Justice Samuel Alito recently criticized *in loco parentis* in the context of public education:

When public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents. It is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State. Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school. It is therefore wrong to treat public school officials, for purposes relevant to the First Amendment, as if they were private, nongovernmental actors standing *in loco parentis*.³⁵⁸

Such arguments are not strictly apposite to non-compulsory institutions such as private schools and tertiary education, but Justice Alito's rebuke highlights the speciousness of the legal fiction of parental delegation.³⁵⁹ Even in private schools, parents hardly exercise control over

356. See *Freeman v. Busch*, 349 F.3d 582, 587 (8th Cir. 2003) (“[S]ince the late 1970s, the general rule is that no special relationship exists between a college and its *own* students because a college is not an insurer of the safety of its students.”); Lee, *supra* note 293, at 76 (“By the early 1970s, *in loco parentis* at universities was a relic of the past.”); Lake, *supra* note 293, at 9–10; Stamatakos, *supra* note 293, at 474–76; e.g., *Rabel v. Ill. Wesleyan Univ.*, 514 N.E.2d 552, 560–61 (Ill. App. 1987) (“The university’s responsibility to its students, as an institution of higher education, is to properly educate them. It would be unrealistic to impose upon a university the additional role of custodian over its adult students and to charge it with the responsibility for assuring their safety and the safety of others.”); *Eisman v. State*, 511 N.E.2d 1128, 1136 (N.Y. 1987); *Beach v. Univ. of Utah*, 726 P.2d 413, 419 (Utah 1986) (“Fulfilling this charge would require the institution to babysit each student, a task beyond the resources of any school. But more importantly, such measures would be inconsistent with the nature of the relationship between the student and the institution, for it would produce a repressive and inhospitable environment, largely inconsistent with the objectives of a modern college education.”).

357. See *infra* Section III.C; Stamatakos, *supra* note 293, at 485–86 (discussing cases cited in Tia Miyamoto, *Liability of Colleges and Universities for Injuries During Extracurricular Activities*, 15 J.C. & U.L. 149 (1988)).

358. *Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring).

359. See, e.g., Ralph D. Mawdsley, *Random Drug Testing for Extracurricular Activities: Has the Supreme Court Opened Pandora’s Box for Public Schools?*, 2003 B.Y.U. EDUC. & L.J. 587, 604 (“*In loco parentis* can be a convenient legal fiction for public schools, but school officials may find that they have exceeded the limits of that fiction by implementing

the curricula or parietal rules, and the notion that they are designating the college as their legal proxy would surprise most if not all parents.³⁶⁰ Whatever force *in loco parentis* had in a more parochial era of education, it should have little relevance now.³⁶¹ Indeed, the Third Circuit lately revisited its ruling in *Bradshaw* and emphatically reaffirmed the death of *in loco parentis*.³⁶²

B. *Paternalism Meets Fraternalism: In Loco Parentis and Greeks*

Thus far the discussion has focused on the relationship of the university and the student body as a whole. Moving from the general to the specific, what then of the student who is also a fraternity member? If the university was once thought to exercise quasi-parental supervision over its charges, might not the same be said of the fraternity over its initiates or the university over the fraternity? In short, perhaps the fraternal structure lends particular strength to the arguments for applying a special relationship between the student and the institutions—fraternal and academic alike—of which he is a member.

1. *Arguments for a Particular Focus on Greek Society*

After all, since their original days, many of the benefits ascribed to fraternal living focused on the moderating force that upperclassmen exert

a policy that some parents neither favor nor would authorize for application to their children.” (footnote omitted)).

360. See, e.g., *id.* Several scholars have discussed the demise of *in loco parentis*. See Lee, *supra* note 293, at 72–76; Lake, *supra* note 293, at 9–10; Stamatakos, *supra* note 293, at 474–76. But see Sweeton & Davis, *supra* 293, at 69–72, 71 (“In conclusion, it is clear that *in loco parentis* is not a relic of the past, but rather a powerful force in the present. The research conducted by Howe and Strauss (2003) illustrates that parents of today’s traditionally-aged college student view themselves as equal partners in the education of their children.”); Ward, *supra* note 34, at 225–26, 225 (“Too, parents often desire to have their sons and daughters supervised by residence hall advisors and counselors. Evidence exists that many parents think that the college is obligated to enforce the *in loco parentis* doctrine vigorously.”).

361. See Lee, *supra* note 293, at 72–76; Lake, *supra* note 293, at 9–10; Stamatakos, *supra* note 293, at 474–76. *Contra* Sweeton & Davis, *supra* 293 (arguing for continued philosophical validity of the doctrine).

362. *McCauley v. Univ. of V.I.*, 618 F.3d 232, 244–45 (3d Cir. 2010) (“Over thirty years ago, in *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979), we recognized that “[w]hatever may have been its responsibility in an earlier era, the authoritarian role of today’s college administrations has been notably diluted.’ . . . The idea that public universities exercise strict control over students via an *in loco parentis* relationship has decayed to the point of irrelevance.” (alteration in original) (quoting *Bradshaw v. Rawlings*, 612 F.2d 135, 138 (3d Cir. 1979)))

on unruly freshmen, acting very much *in loco parentis*: indeed, the fraternity model was often described as a proxy family unit in early literature.³⁶³ One apologia for Greek life declared forcefully in 1922:

A seventh ground on which fraternities may be explained and defended is that they are, in most colleges, the sole substitute for the home and for parental influence and restraint. In too many of our large universities contact with professors is an exceedingly remote and impersonal thing. The healthy, normal restraint of the ordinarily good home and of adult society is wholly lacking. The fraternity supplies this lack as no other association in college life is able to do. *The fraternity house is the home; in the brothers there assembled can be found the substitute for the family; and in the upperclassmen, exercising their salutary restraint upon the underclassmen, can be found the substitute for parental direction and counsel.* This one feature of the system justifies the system as it is now practiced.³⁶⁴

The very terminology of a fraternity or sorority, speaking of brothers and sisters, reinforces the view that the society is something of a family unit.³⁶⁵ Some courts have observed that brotherhood or sisterhood bespeaks complete egalitarianism rather than hierarchy: the mutuality of siblings rather than the authority of parent over child.³⁶⁶ Yet this is not necessarily so; the ubiquitous fraternal practice of assigning new members big brothers or big sisters, as the case may be, dispels any notion that siblings are insusceptible of hierarchy.³⁶⁷ To maul the good work of George Orwell, all fraternity members may be equal, but some members

363. *E.g.*, HOWARD BEMENT & DOUGLAS BEMENT, *THE STORY OF ZETA PSI* 102–03 (2d ed. 1932).

364. BEMENT & BEMENT, *supra* note 363, at 11 (emphasis added).

365. *E.g.*, *Chi Iota Colony of Alpha Epsilon Pi Frat. v. City Univ. of N.Y.*, 443 F. Supp. 2d 374, 377 (E.D.N.Y. 2006) (“Plaintiffs explain that “[t]he single-sex, all male nature of the Fraternity is essential to achieving and maintaining the congeniality, cohesion and stability that enable it to function as a surrogate family and to meet social, emotional and cultural needs of its members.” (quoting the fraternity’s constitution)), *rev’d*, 502 F.3d 136 (2d Cir. 2007).

366. *Alumni Ass’n v. Sullivan*, 572 A.2d 1209, 1213 (Pa. 1990) (“By definition such organizations are based upon fraternal, not paternal, relationships. . . . Fraternal organizations are premised upon a fellowship of equals; it is not a relationship where one group is superior to the other and may be held responsible for the conduct of the other.”).

367. *See, e.g.*, *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 650 (Iowa 2000) (describing death occurring in connection with “a Big Brother/Little Brother ceremony at the fraternity house”); *see also* *Shaheen v. Yonts*, 394 F. App’x 224, 229 (6th Cir. 2010) (discussing *Garofalo*).

are more equal than others.³⁶⁸ These senior members naturally gravitate towards more authoritarian and thus parental roles.³⁶⁹

Lest such orotund conceits be thought restricted to historic authors, a social scientist recently framed an entire anthropological study around the metaphor of fraternity as a family of sorts. In *The Lost Boys of Zeta Psi*, Professor Laurie Wilkie of the University of California at Berkeley tells the story of a local chapter through the lens of the lost boys of J.M. Barrie's *Peter Pan*, unmoored from parental influences and subject only to their own supervision.³⁷⁰ Such a conception reinforces the treatises that saw elder members of the fraternity as the only sources of civilizing influence on the younger, taking the place of absent parents.³⁷¹ Under this view, the fraternity must act *in loco parentis* almost by default, filling a void of necessity.

Some authors have analogously felt that the unruly or sequestered nature of fraternities necessitates particular supervision by the university. Often these sentiments respond to the problem of fraternities' hazing new members, leading some colleges to "regulate them beyond recognition" in an effort to curb such abuses.³⁷² Indeed, university control is generally greatest in the punctilious rules and restrictions imposed on fraternities' recruitment and induction efforts.³⁷³ Similarly, modern colleges often provide social engagement as well as an education, and they may feel it incumbent to attempt to lessen raucous *Animal-House*-like carousing in an effort to avoid injury to their students or liability.³⁷⁴ And, of course, courts have long been deferential to collegiate judgments that fraternities may be banned entirely to maintain academic focus and discipline and that students violating such bans may be excluded from the college.³⁷⁵

368. GEORGE ORWELL, *ANIMAL FARM* 112 (1946) ("All animals are equal, but some animals are more equal than others.").

369. BEMENT & BEMENT, *supra* note 363, at 11.

370. *See generally* WILKIE, *supra* note 35.

371. *See id.* at 23–26, 266–68.

372. Govan, *supra* note 7, at 698–99; *see* Hauser, *supra* note 270, at 435–37.

373. *See* Hauser, *supra* note 270, at 435–36; Sunshine, *Fraternity as Franchise*, *supra* note 3, at 424–25 nn.325–27.

374. *See, e.g.*, Kerri Mumford, Comment, *Who Is Responsible for Fraternity Related Injuries on American College Campuses?*, 17 J. CONTEMP. HEALTH L. & POL'Y 737, 737–38 (2001).

375. People *ex rel.* Pratt v. Wheaton Coll., 40 Ill. 186 (Ill. 1866) (expulsion of student for joining secret society); *see* cases discussed *supra* Section II.C.2.

2. *Judicial Rejection of In Loco Parentis Duties Anent Fraternities*

Notwithstanding the noble conceit of the fraternity as foster family, the law has not embraced this formally. Neither, by judicial lights, is the modern fraternity member uniquely subject to parenting by the university by virtue of his membership, despite the arguments for such heightened scrutiny. As in the more generalized case, the Twenty-Sixth Amendment was generally seen as codifying a rejection of such *in loco parentis* responsibility over college fraternity members.³⁷⁶ The common result is that chapters and campuses alike escape purely vicarious liability for injuries done to or by fraternity members in the mine run of factual postures, even whilst losing their expansive onetime rights to regulate with untrammelled authority.³⁷⁷

In one of the first such cases, the Indiana Court of Appeals rejected arguments that the private Wabash University and fraternity should be responsible for injuries caused by a drunken driving accident involving a fraternity member, finding for the institutional defendants as a matter of law.³⁷⁸ Citing *Bradshaw* with favor, the court held that “students and fraternity members are not children. Save for very few legal exceptions, they are adult citizens, ready, able, and willing to be responsible for their own actions. Colleges and fraternities are not expected to assume a role anything akin to *in loco parentis* or a general insurer.”³⁷⁹ Prudently, the court did allow that there might arise a factual matrix in which a fraternity

376. See Timothy M. Burke, *Fraternities and the Right to Privacy*, FRATERNAL L., Sept. 1983, at 5 (“As recently as the late 1960s, colleges and universities were often said to stand *in loco parentis* to their students. That is, the university administration took the place of the student’s parents while the students were on the campus. Fraternities and their governing bodies were often cast in the same light. . . . While the age of majority is not uniform and often differs for the purpose of purchase or consumption of alcoholic beverages, college students today should generally be viewed as adults, with both the rights and responsibilities consistent with that status.”); Schoen & Falchek, *supra* note 334, at 128 n.3; see also Marshlain, *supra* note 334, at 15–16 (noting reasons for abolishing *in loco parentis* apply with equal effect to fraternities as universities).

377. Mumford, *supra* note 374, at 738 (“Until now, universities have successfully avoided liability for fraternity-related injuries based on the ‘no duty’ rule, following the demise of *in loco parentis* doctrine for universities. The ‘no duty’ rule states that the relationship between the college and the student is simply one that provides education only. The university is under no obligation or duty to control or govern the students’ behavior. . . . Courts continually rely on this analysis of the relationship and the concern that holding the college liable will return it to the strict liability standard of *in loco parentis* as a basis for finding no liability.”).

378. *Campbell v. Bd. of Trs. of Wabash Coll.*, 495 N.E.2d 227, 232–33 (Ind. Ct. App. 1986).

379. *Id.* at 232.

could be held responsible under a general supervisory duty but that the defunct *in loco parentis* doctrine would not suffice.³⁸⁰

The Colorado Supreme Court followed suit the next year in *University of Denver v. Whitlock*,³⁸¹ where a fraternity member sued the university for a paralyzing injury suffered whilst using a trampoline on the Beta Theta Pi fraternity's premises, which was leased from the university.³⁸² The trial court directed a verdict for the university, but a divided panel reversed on appeal, holding that the university had a duty to supervise the fraternity and remove the dangerous plaything.³⁸³ Sitting *en banc*, the Colorado Supreme Court reinstated the directed verdict,³⁸⁴ citing *Bradshaw* extensively, and recognizing that although *in loco parentis* might once have been good law, "in modern times there has evolved a gradual reapportionment of responsibilities from the universities to the students, and a corresponding departure from the *in loco parentis* relationship. Today, colleges and universities are regarded as educational institutions rather than custodial ones."³⁸⁵ Tellingly, the court found that "fraternity and sorority self-governance with minimal supervision appears to have been fostered by the University."³⁸⁶ Accordingly, there was no basis for *in loco parentis* simply because the injury occurred in a fraternity context.³⁸⁷

Two early 1990s cases from Pennsylvania—one state and one federal—serve as additional examples of the overwhelming trend.³⁸⁸ In the state case, a student who was served alcohol at both a college dormitory and fraternity party impleaded the university and fraternity when he was sued for property damage caused by a fire later in the evening.³⁸⁹ The court was unimpressed with the third-party defendants' attenuated connection to the fire and dismissed the impleader, commenting that the plaintiff "would have us impose upon appellees a custodial relationship with University students. Clearly, in modern times, it would be inappropriate to impose an

380. *Id.*

381. *Univ. of Denver v. Whitlock*, 744 P.2d 54 (Colo. 1987) (en banc); see also Szablewicz & Gibbs, *supra* note 293, at 459–61 (tracing the lower court development).

382. *Whitlock*, 744 P.2d at 55–56.

383. *Id.* at 56; see *Whitlock v. Univ. of Denver*, 712 P.2d 1072 (Colo. App. 1985).

384. *Whitlock*, 744 P.2d at 62.

385. *Id.* at 59–60 (citation omitted).

386. *Id.* at 60.

387. *Id.* at 60–61.

388. *Alumni Ass'n v. Sullivan*, 572 A.2d 1209, 1213 (Pa. 1990); *Booker v. Lehigh Univ.*, 800 F. Supp. 234 (E.D. Pa. 1992); see Timothy M. Burke, *Drawing the Line on Liability*, FRATERNAL L., Sept. 1990, at 3 (discussing *Sullivan*).

389. *Sullivan*, 572 A.2d at 1209–10.

in loco parentis duty upon a university.”³⁹⁰ As in the previous cases, the court lauded praise on the “instructive” observations of the *Bradshaw* ruling.³⁹¹

The federal case concerned a sorority member claiming injury after becoming intoxicated at multiple fraternity parties.³⁹² The plaintiff presented the novel argument that Lehigh University had contractually taken on the powers of *in loco parentis* via a binding social policy statement on alcohol and therefore assumed the responsibility for monitoring fraternities and protecting the plaintiff from harm.³⁹³ The court concluded that

even if Lehigh knowingly failed to prevent alcohol consumption, we could not, nor would we, find a duty *in loco parentis*. If we were to hold that the Social Policy created a duty to prevent Lehigh students from engaging in underage drinking, we would be finding that Lehigh was potentially liable *in loco parentis*, despite clear decisions from the Pennsylvania Supreme Court that such cannot form the basis for imposing liability upon a college.³⁹⁴

Yet again, *Bradshaw* was deemed “instructive” and quoted at length.³⁹⁵ It is fair to say that *Bradshaw* has proven highly persuasive in the Greek context,³⁹⁶ other courts are in accord, often including enclaves to *Bradshaw* as well as agreeing in the result.³⁹⁷ Commentators too widely agree that *in loco parentis* is dead in cases involving fraternities.³⁹⁸ College students, including fraternity members, have made a conscious trade: they have reclaimed control of their lives from the pervasive control of the university, but with that freedom comes legal responsibility for the consequences of their own actions.³⁹⁹

390. *Id.* at 1213.

391. *Id.*

392. *Booker*, 800 F. Supp. at 235–36.

393. *Id.* at 236–37.

394. *Id.* at 240 (footnote omitted).

395. *Id.* at 238.

396. *See, e.g.*, Marshlain, *supra* note 334, at 7–9 (describing relationship of *Bradshaw* to fraternity cases).

397. *E.g.*, Millard v. Osborne, 611 A.2d 715 (Pa. Super. 1992); Rabel v. Ill. Wesleyan Univ., 514 N.E.2d 552, 558–59 (Ill. App. 1987).

398. *See, e.g.*, Hauser, *supra* note 270, at 436; Mumford, *supra* note 374, at 738; Rutledge, *supra* note 7, at 368.

399. *See, e.g.*, Univ. of Denver v. Whitlock, 744 P.2d 54, 59–60 (Colo. 1987); *see also* Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979).

C. *Blackstone's Legacy: Parietal Rights and Responsibilities*

Despite all this, the antitrust housing decisions in *Yale College* and *Colgate University*, and to a lesser extent *Hamilton College*, rest on the notion that colleges have a peculiar and particular right to direct the manner and conditions of the lives of their students, right down the location where their students will sleep.⁴⁰⁰ Such far-reaching control sounds identical to the rights granted in the early-century *in loco parentis* cases, even though such sweeping authority has ostensibly been a dead letter for nearly a half century.⁴⁰¹ What really differs between telling someone where she must eat—as in the formative *in loco parentis* case *Berea College*—versus where she must sleep?⁴⁰² Indeed, Hamilton College dictated where its students must eat as well!⁴⁰³ Given the supposedly comprehensive rejection of *in loco parentis*, how is it still making appearances in modern cases in the guise of parietal rights? Even having posed the question, though, it cannot be entirely surprising that an ancient doctrine originally described by the revered Blackstone should retain a certain staying power.⁴⁰⁴

Scholarship has not been blind to a certain limited survival of parietal rights and responsibilities;⁴⁰⁵ some authors have even applauded it as acknowledging the growing view of college not as the start of adulthood but as an extension of adolescence.⁴⁰⁶ Representative of this school of

400. See *Delta Kappa Epsilon Alumni Corp. v. Colgate Univ.*, 492 F. Supp. 2d 106, 117 (N.D.N.Y. 2007); *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 85 (2d Cir. 2000); see also *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 106 F. Supp. 2d 406, 413 (N.D.N.Y. 2000) (“Any housing constraints experienced by students who have chosen to enroll despite the residential policy flow from their implied contract with Hamilton to comply with its rules, including the residential policy.”).

401. See *supra* Sections III.A, III.B.

402. See *supra* notes 323–27 and accompanying text.

403. *Hamilton Coll.*, 106 F. Supp. 2d at 409.

404. Cf. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2796 (2014) (Ginsburg, J., dissenting) (“Moreover, history is not on the Court’s side. Recognition of the discrete characters of ‘ecclesiastical and lay’ corporations dates back to Blackstone.” (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *458 (1765))); Richard E. Myers II, *Requiring a Jury Vote of Censure to Convict*, 88 N.C. L. REV. 137, 139 (2009) (“While there is no question that the civil/criminal distinction is blurring at the margins, the distinction in our common law tradition is as old as Blackstone, and retains strong support today.” (footnotes omitted)).

405. See, e.g., Hauser, *supra* note 270, at 435–37; Szablewicz & Gibbs, *supra* note 293. But see Stamatakos, *supra* note 293, at 472 (arguing new liability not fully akin to former doctrine); Lake, *supra* note 293, at 5–6 (discrediting concerns of a perceived modern return to *in loco parentis*).

406. See, e.g., Sweeton & Davis, *supra* note 293. *Contra* Marshlain, *supra* note 334, at 16.

thought, Professor Eric Posner wrote that the call for more pervasive university oversight “comes not from parents and administrators, but from students themselves, who, apparently recognizing that their parents and schools have not fully prepared them for independence, want universities to resume their traditional role in loco parentis.”⁴⁰⁷ Some students seemingly want to be protected from one another after all.⁴⁰⁸ (Indeed, such sentiments have reached the pupils of Hamilton College as well.⁴⁰⁹) With rights, however, come responsibilities, and several commentators have noted modern cases that imposed liability for failing in duties to protect their students on campus.⁴¹⁰

The archetypal modern case finding a college liable for shirking its supervisory duties is *Furek v. University of Delaware*.⁴¹¹ There, the plaintiff was a pledge of the Sigma Phi Epsilon fraternity, and suffered severe chemical burns when one of the brothers poured a lye-based oven cleaner on him as part of a hazing ritual.⁴¹² The Delaware Supreme Court acknowledged that the “concept of university control based on the doctrine of *in loco parentis* has all but disappeared in the face of the realities of modern college life”⁴¹³ but then went on to harshly criticize *Bradshaw*, *Whitlock*, and other cases rejecting university liability as lacking internal logic or empirical support for their social policy.⁴¹⁴ “Despite the rejection of the *in loco parentis* doctrine, some courts continue to recognize the uniqueness of the student-university relationship,” the court concluded, adding itself to that number.⁴¹⁵ How exactly this unique relationship differed from that under *in loco parentis* went unexplained; the court

407. Eric Posner, *Universities Are Right—and Within Their Rights—to Crack Down on Speech and Behavior*, SLATE MAG. (Feb. 12, 2015, 2:30 PM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/02/university_speech_codes_students_are_children_who_must_be_protected.html [https://perma.cc/U5PN-PUSC].

408. *Id.*; Sweeton & Davis, *supra* note 293. *But see* Ward, *supra* note 34, at 217.

409. *See, e.g.*, Emily Shire, *Hamilton College Students Demand Free-Speech Ban and Want White Faculty Out of Leadership*, DAILY BEAST (Dec. 1, 2015, 8:59 PM), <http://www.thedailybeast.com/articles/2015/12/01/hamilton-students-deliver-list-of-83-demands-to-college-president.html> [https://perma.cc/5RVV-AEVR].

410. *See, e.g.*, Rutledge, *supra* note 7, at 378–84; Mumford, *supra* note 374, at 745–51; Szablewicz & Gibbs, *supra* note 293, at 457–61.

411. *Furek v. Univ. of Del.*, 594 A.2d 506 (Del. 1991); *see* Mumford, *supra* note 374, at 746 (“Although the doctrine of *in loco parentis* has been rejected, there are a few instances where a court has found a special relationship between the university and its students. The landmark case in this area is *Furek v. University of Delaware*. . . .” (footnotes omitted)).

412. *Furek*, 594 A.2d at 509–10.

413. *Id.* at 516–17 (citing *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir. 1979)).

414. *Id.* at 517–18.

415. *Id.* at 518.

observed that “the modern university provides a setting in which every aspect of student life is, to some degree, university guided.”⁴¹⁶ Key to finding liability, however, were the facts that the university had held itself out as regulating fraternities, and that the injury took place on university property, as the fraternity leased their land from the school.⁴¹⁷

In *Nero v. Kansas State University*,⁴¹⁸ on receiving a report of a sexual assault in a residence hall, the university responded by moving the alleged assailant to a different and all-male hall, but took no further action pending resolution of criminal charges.⁴¹⁹ Apparently owing to insufficient housing during an intersession term, the plaintiff and the reported assailant were assigned to the same coeducational dormitory, where she was allegedly assaulted by him in the laundry room.⁴²⁰ The plaintiff brought suit against the university.⁴²¹ As in *Furek*, the Kansas Supreme Court ostensibly recognized that the general rule of *in loco parentis* was defunct,⁴²² holding that “the university-student relationship does not in and of itself impose a duty upon universities to protect students from the actions of fellow students or third parties. The *in loco parentis* doctrine is outmoded and inconsistent with the reality of contemporary collegiate life.”⁴²³

Yet *Nero* went on to reverse the summary judgment for the defendant, opining that a reasonable factfinder could conclude that the university was responsible for the safety of those in its residence halls under premises liability reasoning.⁴²⁴ The same result applied to a fraternity’s duty to protect those within its housing in an analogous case, *Delta Tau Delta, Beta Alpha Chapter v. Johnson*.⁴²⁵ There, the Indiana Supreme Court held that the Greek homeowner could be held responsible when a party guest was sexually assaulted at the chapterhouse, reasoning that the fraternity was or should have been aware of the possibility of its invitees being attacked, given a spate of previous incidents.⁴²⁶ Whether the university or the fraternity is the proprietor of the residence, some courts have been

416. *Id.* at 516.

417. *Id.* at 520–22.

418. *Nero v. Kan. State Univ.*, 861 P.2d 768 (Kan. 1993).

419. *Id.* at 771.

420. *Id.* at 772.

421. *Id.*

422. *Id.* at 773–74.

423. *Id.* at 778 (emphasis added).

424. *Id.* at 780–81.

425. *Delta Tau Delta, Beta Alpha Chapter v. Johnson*, 712 N.E.2d 968 (Ind. 1999).

426. *Id.* at 971 & n.4, 973 & n.5.

willing to hold them responsible for the general safety of those on campus or the property.⁴²⁷

Overall, the continued philosophical viability of the parietal subset of *in loco parentis* rights and responsibilities seems to derive from the unusual control the university still imposes over residential circumstances, intermixed with vaguely paternalistic concerns about sexual safety and practices.⁴²⁸ Such reasoning carries odious echoes of the discretion afforded colleges “in dealing with girl students” by early-century cases.⁴²⁹ Ruling on a case in which a woman alleged her college was negligent in protecting her from sexual assault in its dormitory, a Massachusetts court expounded at length on the general agreement that the university controls and is thus responsible for residential rules and conditions:

This consensus stems from the nature of the situation. The concentration of young people, especially young women, on a college campus, creates favorable opportunities for criminal behavior. The threat of criminal acts of third parties to resident students is self-evident, and the college is the party which is in the position to take those steps which are necessary to ensure the safety of its students. No student has the ability to design and implement a security system, hire and supervise security guards, provide security at the entrance of dormitories, install proper locks, and establish a system of announcement for authorized visitors. Resident students typically live in a particular room for a mere nine months and, as a consequence, lack the incentive and capacity to take corrective measures. College regulations may also bar the installation of additional locks or chains. Some students may not have been exposed previously to living in a residence hall or in a metropolitan area and may not be fully conscious of the dangers that are present. Thus, the college must take the responsibility on itself if anything is to be done at all.

Of course, changes in college life, reflected in the general decline of the theory that a college stands *in loco parentis* to its students, arguably cut against this view. The fact that a college need not police the morals of its resident students, however, does not entitle it to abandon any effort to ensure their physical safety. Parents, students, and the general community

427. See, e.g., *Johnson v. State*, 894 P.2d 1366 (Wash. Ct. App. 1995) (discussed in Lake, *supra* note 293, at 19); *Peterson v. S.F. Cmty. Coll. Dist.*, 685 P.2d 1193 (Cal. 1984) (discussed in Szablewicz & Gibbs, *supra* note 293, at 459); *Relyea v. State*, 385 So. 2d 1378 (Fla. Dist. Ct. App. 1980) (discussed in Szablewicz & Gibbs, *supra* note 293, at 458).

428. In all the cases cited in this section but for *Furek*—which implicated concerns about hazing—the suit at issue involved a sexual attack.

429. *Woods v. Simpson*, 126 A. 882, 883 (Md. 1924); see *supra* notes 330–32; see also Bickel & Lake, *supra* note 293, at 275 (criticizing view of *in loco parentis* as reciprocal doctrine imposing both powers and duties on universities and arguing that “just because students are empowered to speak on sensitive issues does not mean that female students should expect less protection from physical assault by other students.”).

still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm.⁴³⁰

Even with the general demise of *in loco parentis*, the subset of parietal rights and responsibilities asserting control over residential arrangements lingers under a strained sort of premises liability gloss.⁴³¹ The bench is disposed, in such cases, to recognize a special relationship between universities and their students, even if judges are often unwilling to call this relationship what it often seems to be: a narrowly circumscribed continuation of *in loco parentis* doctrine.⁴³² Put simply, if colleges can control the students in their dormitories, they incur a concomitant duty.⁴³³ What this means for the antitrust analysis and fraternities generally will be taken up in the final Part.

IV. STRANGE BEDFELLOWS: RUMINATIONS ON THE UNIVERSITY AND FRATERNITY AS RIVALS

The decline and fall of *in loco parentis* indicates that the authority colleges once wielded will no longer be recognized by the courts in the mine run of cases.⁴³⁴ In all likelihood, increased reliance on the subset of parietal rights reflects attempts by deans to consolidate what authority remains in their hands.⁴³⁵ As courts have demonstrated their willingness to accept even far-reaching parietal rules, colleges have naturally gravitated towards exclusionary regulations under that rubric.⁴³⁶ This brand of

430. *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 335–36 (Mass. 1983) (footnotes and citations omitted).

431. Writing in 1990, Theodore Stamatakos stridently rejected the notion promulgated by some contemporaneous commentators that the *in loco parentis* doctrine was seeing a “second coming.” See Stamatakos, *supra* note 293; see also Bickel & Lake, *supra* note 293. This Article’s arguments are both supported by more recent developments in law, see *supra* Part II, as well as limited to the persistence of *in loco parentis* reasoning in the parietal context—that is, cases in which residential matters are at issue.

432. See, e.g., Jackson, *supra* note 24, at 1151 (“However disguised and reformed, *in loco parentis* survives.”); Schoen & Falchek, *supra* note 334, at 128 n.3 (“This may represent a partial return to the *in loco parentis* doctrine”); Szablewicz & Gibbs, *supra* note 293, at 461–65. But see Stamatakos, *supra* note 293; Bickel & Lake, *supra* note 293.

433. See, e.g., *Mullins*, 449 N.E.2d at 335–36 (cited *supra* text accompanying note 430).

434. See *supra* Sections III.A.3, III.B.2.

435. Ward, *supra* note 34, at 217 (“Moreover, some students have urged that the parietal regulations are an attempt by the university authorities to ‘stand in the shoes of the father’ thereby interfering with the private lives of the student, notwithstanding the demise of the *in loco parentis* doctrine.”).

436. See *id.*; Schonfeld, *supra* note 8 (detailing strategies of numerous colleges that have moved to ban fraternities under parietal rules).

antagonism harkens back to the earliest days of universities and fraternities, when faculties fiercely opposed fraternities on the premise that such societies split the atom of students' loyalty.⁴³⁷ If these are the currents that animate modern Greek-gown relations, the application of antitrust precedents will provide useful guidance; there is little more archetypal to competition law than long-standing competitors grappling for the loyalty and patronage of consumers of their services.⁴³⁸

A. *Twenty-First-Century Colleges and Competition*

As has been noted, the modern university corporation is far different from the cloistered academes of yesteryear.⁴³⁹ Yet as recently as 2000 in *Yale College*, the Second Circuit introduced its thoughts rather jauntily:

We begin with the observation that if a parietal rule requiring some students to reside in college or university housing runs afoul of the antitrust laws, it has largely escaped the notice of the many colleges and universities across the country that have had and continue to have those rules and the notice of the millions of students who have attended those institutions in the more than a century since the Sherman Act was enacted.⁴⁴⁰

If that is so, perhaps it is because by the time the Act came into force in 1890, universities were making peace with their fraternities specifically to accommodate students in Greek housing.⁴⁴¹ As such, the universities of the early twentieth century were not attempting to commit any antitrust violations via their parietal rules; they were actively encouraging or at least allowing the construction of fraternity housing to meet their swelling needs.⁴⁴² Some colleges still insisted students live in dormitories—unless they were in fraternity housing;⁴⁴³ others required only underclassmen to

437. See *supra* Part I.

438. See, e.g., Orley Ashenfelter & Kathryn Graddy, *Anatomy of the Rise and Fall of a Price-Fixing Conspiracy: Auctions at Sotheby's and Christie's*, 1 J. COMPETITION L. & ECON. 3 (2005); *What an Art*, *ECONOMIST*, Aug. 5, 2004 (“The irony is that, for a duopoly, Christie's and Sotheby's were for the most part extremely competitive—particularly in securing great collections for auction. When the two chairmen got together (at Sir Anthony's suggestion), a good deal of their first meeting was taken up with complaints that one house was bad-mouthing the other. As one director points out, collusion was unnecessary: ‘With a duopoly, it's like two people selling tomatoes in a street. If one person raises or lowers prices, the other one's going to follow.’”).

439. See *supra* notes 318–20 and accompanying text.

440. *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 85 (2d Cir. 2000).

441. See *supra* notes 26–29 and accompanying text.

442. See *supra* notes 28–32 and accompanying text.

443. See, e.g., *Ward, supra* note 34, at 219 (discussing *Cooper v. Nix*, 343 F. Supp. 1101 (W.D. La. 1972)); *Mandatory Housing Requirements, supra* note 2, at 1027 n.257, 1039–40

live on campus, allowing students the option of moving to a fraternity thereafter.⁴⁴⁴ And, of course, many colleges did not resort to parietal rules at all.⁴⁴⁵ The recrudescence of parietal rules as the modality for eradicating unwanted fraternity competition has only arisen within the last half century or so.⁴⁴⁶

Moreover, the Second Circuit's observation also ignores sea changes in relevant law between 1890 and the present. Most obvious is the ostensible demise of *in loco parentis* as viable authority.⁴⁴⁷ For much of the century since the Sherman Act was enacted, colleges enjoyed essentially untrammelled authority over their students.⁴⁴⁸ As that doctrine allowed colleges to expel students for any reason (or no reason at all), particularly to protect its control over its charges, a school's ousting students in order to consolidate power over housing would be unremarkable.⁴⁴⁹ Only beginning in the 1960s was despotic *in loco parentis* authority withdrawn, which might reasonably be expected to expose colleges to antitrust liability from which they had previously been insulated.⁴⁵⁰

At the same time, nineteenth-century legislators and scholars likely viewed colleges as ivory towers aloof from commerce.⁴⁵¹ Only in the latter half of the twentieth century has the Supreme Court made transparently

(discussing *Pyeatte v. Bd. of Regents of Univ. of Okla.*, 102 F. Supp. 407 (W.D. Okla. 1952)).

444. See, e.g., *Mandatory Housing Requirements*, *supra* note 2, at 1026 nn.254–55, 992 n.4 (citing the University of Iowa as imposing parietal rules on only unmarried freshmen and sophomores), 1041 (discussing *Mollere v. Se. La. Coll.*, 304 F. Supp. 826 (E.D. La. 1969)); *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59, 61 (2d Cir. 1997).

445. See BRUBACHER & RUDY, *supra* note 21, at 121 (“In the latter half of the nineteenth century, however, the dormitory system came under increasingly heavy fire; college after college began to follow a policy of *laissez faire* in student housing, much the same as in the case of the course of study.”).

446. See Schonfeld, *supra* note 8; Bauer, *supra* note 1.

447. See *supra* Sections III.A.3, III.B.2.

448. See *supra* Section III.A.2.

449. See, e.g., *supra* notes 327–31 and accompanying text.

450. See *supra* Section III.A.3.

451. See BOK, *supra* note 67, at 2–3 (“Before 1900, American universities were small institutions just beginning to assume their modern form. Their principal function was to provide a college education that emphasized mental discipline, religious piety, and strict rules governing student behavior. Thus conceived, they remained quiet enclaves, having little direct impact on the outside world and little traffic with the corporations, the banks, and the legislative bodies that were busy transforming America into a modern industrial state.”); Sun & Daniel, *supra* note 18, at 451–52.

clear that colleges may be the perpetrators of antitrust violations as well.⁴⁵² To the extent colleges that thereafter moved to disadvantage fraternities escaped antitrust scrutiny, the fault may lie with plaintiffs who neglected to plead the novel theory.⁴⁵³ In the twenty-first century, it is entirely reasonable to imagine that the sophisticated educational corporations that compete for talent and research funds, manage billion-dollar endowments, and market patents also wield commercial power.⁴⁵⁴

That federal courts continue to permit colleges the benefits of parietal rights raises serious questions about the judiciary's commitment to the supposed consensus that colleges no longer have the right to control nor the duty to protect their students.⁴⁵⁵ To hold as a matter of law, as did *Colgate University*, that colleges have the prerogative to exercise "parietal rights" to protect their students in a "quasi-parented environment" under a theory of *in loco parentis* imports a dissonant doctrine from another era into modern jurisprudence.⁴⁵⁶ At the very least, if Colgate intends to once again reduce its students to legal incompetence, then it must be assigned the responsibilities that go with that.⁴⁵⁷ On the other hand, some courts have done just that in persevering with residential collegiate liability under attenuated special relationship and premises liability theories, despite the ostensible rejection of *in loco parentis* as such.⁴⁵⁸ If certain colleges are engaged in paternalistic revanchism, at least the regression may prove somewhat reciprocal.⁴⁵⁹ Nonetheless, such backsliding raises serious questions of whether a regime resembling *in loco parentis* still makes good public policy.⁴⁶⁰

452. See *supra* notes 66–73 and accompanying text.

453. E.g., *supra* Section II.B.1; cf. Manley, *supra* note 126, at 3 ("Many colleges and many fraternities overlook the fact that they can commit offenses under the antitrust laws.").

454. See Sun & Daniel, *supra* note 18, at 451–52; see also BOK, *supra* note 67, at 6–7 (noting obsolescence of the "ivory tower" model and transformation of universities following World War II).

455. See *supra* Sections III.A.3, III.B.2.

456. *Delta Kappa Epsilon Alumni Corp. v. Colgate Univ.*, 492 F. Supp. 2d 106, 117 (N.D.N.Y. 2007).

457. See *supra* notes 333–37 and accompanying text; e.g., *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir. 1979).

458. See *supra* Section III.C; e.g., *Furek v. Univ. of Del.*, 594 A.2d 506, 516–18 (Del. 1991).

459. See, e.g., *supra* notes 430–33 and accompanying text.

460. Compare, e.g., Marshlain, *supra* note 334, at 15–17 (arguing *in loco parentis* doctrine fundamentally unfair), and Stamatakos, *supra* note 293, at 488–90 (arguing there are dire consequences of implying that *in loco parentis* doctrine may once again be applied to universities), with *supra* notes 405–09 (commentators opining favorably on the doctrine returning to force).

More functionally, viewing residential arrangements under the rubric of educational prerogatives ignores the modern reality that dormitories are a major economic sector: even considered alone, “Greek organizations own and operate in excess of \$3 billion in real estate, often located in prime locations. These buildings house some 250,000 students. In short, chapter housing is a big business”⁴⁶¹ And if *Brown University* and *Temple University* teach anything, it is that when a college faces students across the bargaining table rather than the professorial lectern, the arguments for applying antitrust protections are at their apogee.⁴⁶² Rental arrangements are logistically and logically distinct from education, as evidenced by colleges without parietal requirements, and the fact that even colleges with parietal regulations collect rent separately from tuition.⁴⁶³ So obvious was this truism that the parties in *American National Bank* assumed as much.⁴⁶⁴ As *The New York Times* recently wrote:

Even when it awards full-tuition scholarships, the university makes money—on dorm rooms and meal plans, books, football tickets, hoodies and school spirit items like the giant Bama banner Ms. Zavilowitz and her roommates bought for the blank wall in the suite’s common area. All told, these extras and essentials brought in \$173 million [to the University of Alabama] last year—on top of \$633 million in tuition and fees, up from \$135 million in 2005. “I hate very much to use this analogy, but it’s like running a business,” [University of Alabama interim provost] Dr. Whitaker said.⁴⁶⁵

Transparently financial motives would severely undermine universities’ arguments that they are not acting as commercial competitors but as educators in promulgating parietal rules.⁴⁶⁶ Like the defendant in

461. Sean P. Callan, *The Chapter House Rules; How Corporate Structure Can Handcuff a House Corporation*, FRATERNAL L., Nov. 2012, at 3–4; see Sunshine, *Fraternity as Franchise*, *supra* note 3, at 388–90. At Colgate, “revenues from real estate and business operations” were roughly \$17 million, compared to tuition and fees of \$77 million. Manley, *supra* note 202, at 1.

462. See, e.g., *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59, 64–65 (2d Cir. 1997).

463. *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 106 F. Supp. 2d 406, 408 (N.D.N.Y. 2000).

464. *Am. Nat’l Bank & Tr. Co. of Chi. v. Bd. of Regents for Regency Univs.*, 607 F. Supp. 845, 846 (N.D. Ill. 1984); see also *Hamilton Coll.*, 128 F.3d at 64–65 (noting that *American National Bank* assumed college residential housing fell within the commercial scope of the Sherman Act).

465. Laura Pappano, *How the University of Alabama Became a National Player*, N.Y. TIMES, Nov. 3, 2016, at ED12.

466. See *supra* notes 113–15 and accompanying text.

Lycoming College, there are often difficult details to explain.⁴⁶⁷ Yale, for example, was not forcing the objecting students to actually live in campus dormitories, which could arguably have some educational aim.⁴⁶⁸ Rather, the university was demanding that students pay rent for vacant rooms assigned to them, even though the students were in fact living off-campus due to their religious objections.⁴⁶⁹ It is hard to discern any pedagogical objective in compelling students to recompense their host universities for unusable residence hall space; the only plausible motivation is to secure income from real estate holdings.⁴⁷⁰ As in *American National Bank*, courts might reasonably fear that the university was engaging in chicanery for pecuniary purposes.⁴⁷¹ Yet it is also hard to fathom how Yale University, with an endowment of \$25.6 billion as of 2015, could seriously be motivated by relatively picayune financial concerns.⁴⁷²

Universities seeking to eliminate fraternities argue cogently that they are acting procompetitively to offer a distinct vision of an educational experience, and students who do not care for it are free to enroll at schools more friendly to Greek life.⁴⁷³ This Article has already discussed why this may not be a fair assessment: prospective students can lack the sophistication to evaluate the long-term impact of different housing options in advance,⁴⁷⁴ and students and fraternities already at the university have been locked in by switching costs if a new policy is promulgated.⁴⁷⁵ Moreover, colleges have not always offered a compelling explanation of why students should not be able to opt out of allegedly compelling residential offerings without forgoing their education—that is, why should

467. See *supra* notes 116–18 and accompanying text.

468. *Hack v. President & Fellows of Yale Coll.*, 16 F. Supp. 2d 183, 187 (D. Conn. 1998) (“Yale denied all of the plaintiffs’ exemption requests and required them to live on campus in the coeducational residence halls. Yale charged the plaintiffs for the residence hall fee, which the plaintiffs paid. The residence hall rooms remain vacant for the plaintiffs’ return. All of the plaintiffs have elected, however, to reside off campus in housing ‘that provides . . . an appropriate environment in which to practice [their] faith.’” (alteration in original)), *aff’d*, 237 F.3d 81 (2d Cir. 2000).

469. *Id.*

470. See *Ward*, *supra* note 34, at 231–34; *Mandatory Housing Requirements*, *supra* note 2, at 995–96.

471. See *supra* notes 94–96 and accompanying text.

472. See Geraldine Fabrikant, *Yale Endowment Returns 11.5%, Eclipsing Harvard’s 5.8%*, N.Y. TIMES, Sept. 24, 2015, at B2.

473. See, e.g., *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59, 61 (1997); *Delta Kappa Epsilon Alumni Corp. v. Colgate Univ.*, 492 F. Supp. 2d 106, 110–11 (N.D.N.Y. 2007); see also *Yale Coll.*, 16 F. Supp. 2d at 196–97.

474. See *supra* notes 284–85 and accompanying text.

475. See *supra* notes 282–83 and accompanying text.

the education and rental businesses be tied together at all?⁴⁷⁶ But the colleges may be right withal; they unarguably have expertise and experience in pedagogical matters and interest in providing a competitive educational offering.⁴⁷⁷ The question is not one that has a clear answer *a priori*.

But for that very reason, cases examining colleges' attempts to eliminate fraternities from the market should afford the searching look dictated by the rule of reason to allow them to weigh proffered procompetitive benefits to the college experience against the potential anticompetitive aspects of banning an entire set of rival institutions.⁴⁷⁸ Such a standard accords with other cases in the educational context.⁴⁷⁹ Dispensing summarily with these suits as a matter of law, as occurred in *Hamilton College*, *Yale College*, and *Colgate University*,⁴⁸⁰ neglects the sensible precedent the Supreme Court set in *Eastman Kodak*.⁴⁸¹ Even the dissent there agreed at least that an examination under the rule of reason was required.⁴⁸² As the Court held:

In the end, of course, Kodak's arguments may prove to be correct. It may be that its parts, service, and equipment are components of one unified market, or that the equipment market does discipline the aftermarket so that all three are priced competitively overall, or that any anticompetitive effects of Kodak's behavior are outweighed by its competitive effects. But we cannot reach these conclusions as a matter of law on a record this

476. See *supra* notes 142–46, 200–03 and accompanying text; *Mandatory Housing Requirements*, *supra* note 2, at 1014–22 (comparing and balancing the financial and pedagogical rationales for parietal rules); cf. *Eastman Kodak Co. v. Image Tech. Serv., Inc.*, 504 U.S. 451, 485–86 (1992) (questioning legitimacy of tying arrangements). But see, e.g., *Hamilton Coll.*, 106 F.3d at 61 (proponing reasons for tying housing to education).

477. See, e.g., *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2420 (2013) (approving deference to university “experience and expertise” in academic value of diversity in assembling its student body) (interpreting *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

478. *Contra Colgate Univ.*, 492 F. Supp. 2d at 117–18.

479. E.g., *United States v. Brown Univ.*, 5 F.3d 658, 678–79 (3d Cir. 1993); *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

480. See *Hamilton Coll.*, 106 F. Supp. 2d at 413–14; *Hack v. President & Fellows of Yale Coll.*, 16 F. Supp. 2d 183, 197 (D. Conn. 1998), *aff'd*, 237 F.3d 81 (2d Cir. 2000); *Colgate Univ.*, 492 F. Supp. 2d at 118.

481. See *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 485–86 (1992).

482. *Id.* at 502 (Scalia, J., dissenting) (“I would instead evaluate the aftermarket tie alleged in this case under the rule of reason, where the tie’s *actual* anticompetitive effect in the tied product market, together with its potential economic benefits, can be fully captured in the analysis.” (citation omitted)). The dissent would have dismissed nonetheless because plaintiff had procedurally forfeited such an evaluation. *Id.* at 502–03.

sparse. Accordingly, the judgment of the Court of Appeals denying summary judgment is affirmed.⁴⁸³

It is difficult to countenance how a trio of district courts in the Second Circuit dared go where the Supreme Court itself feared to tread. Competition in residential aftermarkets at colleges deserves more searching treatment than a handful of summary dispositions.⁴⁸⁴ This prescription matters because juries no less than laws are vital to holding powerful institutions to task.⁴⁸⁵ Counsel for the fraternity thus commented in response to the district court dismissal in *Colgate University*: “There is no question that Colgate monopolizes the number of beds available for people who require them in Hamilton, N.Y. It is bad precedent and I think it is a winnable case if it gets to a jury.”⁴⁸⁶

B. *Fraternities Themselves as the Targets of Anticompetitive Action*

Fraternities are ultimately a fractious family, unable to put up a common front to rival their host university. Faced with campus interdictions, most societies capitulated and surrendered their chapterhouses, leaving only a few agitators to bring suit against universities.⁴⁸⁷ This perpetuates a longer history of Greek-gown relations during which monolithic schools and their long-term faculty have been able to exert their will over the fraternities populated by transitory students.⁴⁸⁸ As Professor Wilkie at Berkeley observed, since their early history “the rivalries between fraternities prevented them from colluding too much. Recall that it took nearly a hundred years for Cal fraternities to join together in an Interfraternity Council.”⁴⁸⁹ But it is just such bumptious

483. *Id.* at 485–86 (majority opinion).

484. *Cf.* *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59, 64–68 (1997).

485. *See* U.S. CONST. amend. VII (“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”); *see also* Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xviii (2015) (“Juries matter.”); *see generally* Peter H. Lousberg, *On Keeping the Civil Jury Trial*, 43 NOTRE DAME L. REV. 344 (1968).

486. Sara Stefanini, *University System Is Not a Monopoly*, LAW360 (June 29, 2007, 12:00 AM), <http://www.law360.com/articles/28308/university-housing-system-is-not-a-monopoly-judge> [https://perma.cc/KK5X-M73C].

487. *See* *Delta Kappa Epsilon Alumni Corp. v. Colgate Univ.*, 492 F. Supp. 2d 106, 108 (N.D.N.Y. 2007); York, *supra* note 201 (“All but one of the Greek-letter organizations turned over their property by this summer.”); *Hamilton Coll.*, 106 F. Supp. 2d at 407–08; *Hamilton Fraternities End Lawsuit vs. College*, SYRACUSE HERALD AM., May 9, 1999, at B1.

488. *See supra* Part I.

489. *See* WILKIE, *supra* note 35, at 256.

rivalries that are typically viewed as promoting the competitive environment that benefits consumers by providing optionality.⁴⁹⁰ For the vast majority of the schools' history, students were able to select amongst very different living arrangements offered by very different landlords: collegiate, fraternal, and private.⁴⁹¹

The effect of market behavior on consumers is the generally accepted metric of modern antitrust analysis.⁴⁹² Yet such a perspective is not inevitably exclusive; might not the Sherman Act also operate to protect small businesses from their larger and more powerful rivals?⁴⁹³ By those lights, the market for housing in many college towns exemplifies a situation in which antitrust protections must be brought to bear: a single entrenched and well-funded incumbent dominating and regulating the market, with a throng of small and contentious competitors vying to split the residuum of consumers.⁴⁹⁴ As can be seen from precedent both legal and practical, absent vigorous application of antitrust law there is little to stop the dominant player from eliminating its smaller rivals beyond its voluntary forbearance.⁴⁹⁵ Indeed, by leveraging its greater financial resources, a school can depend upon its singularity of purpose to succeed,⁴⁹⁶ even when a substantial portion of the initial housing market is initially controlled by fraternities.⁴⁹⁷

490. See Sun & Daniel, *supra* note 18, at 454–55; e.g., *supra* notes 28–32 and accompanying text (rivalry amongst fraternities giving rise to more and superior residential options).

491. See, e.g., *Hamilton Coll.*, 106 F. Supp. 2d at 408 (“Until September 1995, residential services were provided to Hamilton students by a number of fraternities and private landlords in the Clinton, New York area, as well as by Hamilton.”).

492. See Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 312 (2006) (“Antitrust law is said to be a ‘consumer welfare prescription.’” (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979))).

493. See generally Sandeep Vaheesan, *The Evolving Populisms of Antitrust*, 93 NEB. L. REV. 370 (2014).

494. See, e.g., *Hamilton Coll.*, 128 F.3d at 61 (1997) (noting college grossed \$7 million of residential revenue versus \$1 million for fraternities).

495. See *supra* Sections II.B, II.C; e.g., Schonfeld, *supra* note 8.

496. See *Hamilton Fraternities End Lawsuit vs. College*, SYRACUSE HERALD AMERICAN, May 9, 1999, at B1 (recording how all but one of the fraternities challenging Hamilton's action were eventually forced out of the case by mounting costs); Manley, *supra* note 15, at 1.

497. See, e.g., Bauer, *supra* note 1, at 368 (noting that in 1960, “87% of Hamilton students belonged to fraternities”); Schonfeld, *supra* note 8 (“If you have roughly a third of the campus in all-male housing that can self-select, you’ve already set up a little bit of a conflict on gender. Not having that seems to be an improvement from the start.” (quoting Douglas Terp, Vice President for Administration at Colby College)).

True, “[i]t is axiomatic that the antitrust laws were passed for ‘the protection of *competition*, not *competitors*.’”⁴⁹⁸ But also axiomatic is that “[c]ompetition requires competitors” or at least the potentiality of competitors arising.⁴⁹⁹ If collegians are consumers,⁵⁰⁰ and colleges are businesses,⁵⁰¹ preventing the latter from monopolizing the provision of residential services will promote robust competition in a circumscribed market.⁵⁰² Universities’ unified residential offerings may or may not be superior to those offered by fraternities in a free market, but the essence of the Sherman Act is in rejecting command-and-control economies in favor of full-throated capitalism.⁵⁰³ Evidence suggests that students choose fraternities when they offer better options at economical prices, as one would expect in a healthy market.⁵⁰⁴ Conversely, colleges that rid themselves of that competition can act like any other monopolist⁵⁰⁵:

After Hamilton College secured its monopoly power, charges for room and board at Hamilton College increased \$2,310, exceeding the charges of its

498. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)); see Salop, *supra* note 492, at 312 (“However, sometimes conduct that harms competitors benefits consumers, implying that such conduct should be applauded as competition on the merits, not attacked.”).

499. Cory S. Capps & David Dranove, *Healthcare Provider and Payer Markets*, in 1 THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 63, 108 (Roger D. Blair & D. Daniel Sokol eds., 2015); Mitchell Schnurman, *The Virgin Principle: Free Love Field with More Choice*, DALLAS MORNING NEWS (Mar. 15, 2014), <http://www.dallasnews.com/business/business/2014/03/15/the-virgin-principle-free-love-field-with-more-choice> [<https://perma.cc/UG3F-K2HB>]; Allan Fels, *Australia – A Regulator’s Perspective*, in THE POLITICAL ECONOMY OF COMPETITION LAW IN ASIA 379, 402 (Mark Williams ed., 2013) (comparing views of small and large businesses); 151 CONG. REC. 6, 8670 (statement of Rep. Oberstar, introducing the Railroad Competition and Improvement and Reauthorization Act of 2005, May 4, 2005); Emmanuel Celler, *What’s Wrong with “What is Wrong with the Antitrust Laws,”* 8 ANTITRUST BULL. 571, 578 (1963); Henry D. Ostberg, *The Meaning of the “Injury to Competition” Provision of the Robinson-Patman Act*, 32 ST. JOHN’S L. REV. 26, 28 (1957).

500. *Cf. supra* note 464 (discussing *Hamilton College’s* view of *American National Bank* as confirming that rental of dormitory space to students is commercial).

501. See *supra* Section II.A.

502. See Bauer, *supra* note 1, at 371.

503. See *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951); *Missouri v. Nat’l Org. for Women, Inc.*, 620 F.2d 1301, 1302–06 (8th Cir. 1980); HYLTON, *supra* note 46, at 37–47; Sun & Daniel, *supra* note 18, at 454–55.

504. See, e.g., Bauer, *supra* note 1, at 350, 369, 380, 387–88; Sunshine, *Fraternity as Franchise*, *supra* note 3, at 389 & n.86.

505. Manley, *supra* note 202, at 2 (“[A]fter Hamilton College got control of the fraternity houses, the price of room and board went up on the campus and the quality of room and board went down. This is typical behavior of a monopolist.”).

closest rival, Colgate University. At the same time, available living facilities were reduced and students were crowded into spaces designed for fewer people. Hamilton College students received lower quality services at higher prices.⁵⁰⁶

In focusing on fraternities as targets of colleges' conduct, a recent development in Greek-gown relations at Hamilton is instructive. In the spring of 2015, one of the surviving groups, Theta Delta Chi, received sanctions for allegedly holding a party in an off-campus apartment at which alcohol was provided to minors: it was forbidden from recruiting for over a year and from hosting social events for over two years.⁵⁰⁷ The school's newspaper observed that no individual member of the fraternity was punished or even brought before a hearing because the college could produce no competent evidence supporting its allegations.⁵⁰⁸ However, the fraternity itself was subject to the college's plenipotentiary authority: it enjoyed no evidentiary protections, due process, or official hearing to present its case; punishment was imposed at a single dean's sole discretion.⁵⁰⁹ When the fraternity tried to clarify the nature of the

506. Manley, *supra* note 15, at 1.

507. Kevin Welsh, *College Sanctions Theta Delta Chi Fraternity*, SPECTATOR (May 7, 2015), <http://students.hamilton.edu/spectator/news-2015/p/college-sanctions-theta-delta-chi-fraternity/view> [<https://perma.cc/4RAF-GC7D>].

508. *See id.* ("The judicial process against the individuals never even reached a proper hearing, though. Despite evidence of underage drinking at Tops, the Dean of Students office failed to produce evidence connecting any specific house members with the alcohol. Andrew Nachemson '15 faced charges from the Dean of Students Office and with three of his housemates. He said, "[The Dean of Students Office] didn't even have enough evidence to hold a hearing, let alone convict us of any charges.'" (alteration in original)).

509. The article went on:

The lack of compelling evidence did not impede the judicial process facing the Society, however. Whereas the Student Handbook outlines a clear judicial process for students, no guidelines at Hamilton outline a set procedure for sanctioning organizations. This lack of direction means that the Dean of Student's Office retains full discretion over the proceedings. Students facing punishment go through a rigorous process involving either an administrative hearing or a Judicial Board hearing, but Greek organizations simply face the decisions of the Dean of Students Office. Dean Thompson described that in this case, "I met with the president [of TDX] and we agreed underage students had been served . . . then [I] decided on what the sanction would be."

[Nachemson] explained that despite not being found responsible as an individual, he believes his fraternity did not fare as well because "Dean Thompson has absolutely no oversight in terms of doling out punishments to fraternities. She was able to use evidence that wasn't permissible in a Judicial Board hearing to sanction the fraternity, and we were not permitted to counter that evidence with our own."

sanctions, the dean offered the guidance that “she would know a social event when she sees it.”⁵¹⁰ “Facing undefined and all-encompassing scrutiny going forward,” the newspaper concluded, the fraternity “decided to disband rather than jeopardize the status of any of their members.”⁵¹¹ Such Kafkaesque adjudications illustrate how targeting fraternities themselves is far easier than fraternity members, allowing further leverage over the college’s residential rivals.⁵¹²

CONCLUSION

Revisiting Hamilton College today, two decades after its confrontation with fraternities, the sightseer will find it a lovely and well-appointed campus,⁵¹³ if not one wholly untroubled by contretemps.⁵¹⁴ Unsurprisingly,

Bogardus supported this feeling of injustice and further explained his side of TDX’s experience: “our ‘process’ as a fraternity consisted of a single 45-minute meeting with Nancy Thompson during which we were unable to see any of the evidence concerning their decision.” He said that Dean Thompson had already arrived at a conclusion of responsibility and a sanction by the time the fraternity met with her, and that they faced even further unclear scrutiny during the meeting.

Id. (first two alterations in original).

510. *Id.* The dean was presumably not making reference to Justice Potter Stewart’s notorious definition of “hard core pornography”: “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

511. Welsh, *supra* note 507.

512. Compare *supra* note 509 with FRANZ KAFKA, *In the Penal Colony*, in *SELECTED SHORT STORIES OF FRANZ KAFKA* 95, 103 (Willa & Edwin Muir trans., 1993) (“I have been appointed judge in this penal colony. Despite my youth. For I was the former Commandant’s assistant in all penal matters and know more about the apparatus than anyone. My guiding principle is this: Guilt is never to be doubted. Other courts cannot follow that principle, for they consist of several opinions and have higher courts to scrutinize them. That is not the case here, or at least, it was not the case in the former Commandant’s time.”); see also LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND* 37 (VolumeOne Publishing 1998) (1865) (“Fury said to a mouse, That he met in the house, ‘Let us both go to law: I will prosecute you.—Come, I’ll take no denial; We must have a trial: For really this morning I’ve nothing to do.’ Said the mouse to the cur, ‘Such a trial, dear sir, With no jury or judge, would be wasting our breath.’ ‘I’ll be judge, I’ll be jury,’ said cunning old Fury: ‘I’ll try the whole cause and condemn you to death.’”).

513. See Rachel Lieb, Keith McArtney & Evan Klondar, *Opinion, Face Off: Does Hamilton Allocate Its Money Wisely?*, *SPECTATOR* (Feb. 10, 2011), <http://students.hamilton.edu/spectator/2-10-11/opinion/face-off> [<https://perma.cc/3YEB-FBPJ>].

514. See, e.g., *id.*; Emily Shire, *Hamilton College Students Demand Free-Speech Ban and Want White Faculty Out of Leadership*, *DAILY BEAST* (Dec. 1, 2015, 8:59 PM), <http://www.thedailybeast.com/articles/2015/12/01/hamilton-students-deliver-list-of-83-demands-to-college-president.html> [<https://perma.cc/5RVV-AEVR>].

consolidating residential housing under the aegis of the college has not proven a panacea to all ills.⁵¹⁵ Hamilton has surely established a retreat for the mind irrespective of means or upbringing, in the finest traditions of modern academia.⁵¹⁶ But has it done so at the expense of cherished principles of fair play and competition? Further, Hamilton allowed fraternities to continue on campus after neutralizing them as competitors,⁵¹⁷ albeit subject to its indiscriminate oversight,⁵¹⁸ but other universities have not even been that kind to their captive societies.⁵¹⁹ Should colleges be free to abolish the options offered by Greek life entirely? Hamilton's former president, for one, has opined that the school erred in allowing fraternities to remain at all, even in a sort of domesticated state, rather than extirpating them root and branch.⁵²⁰ Recent policy changes at Harvard University, by contrast, illustrate a more nuanced approach that at least partially accommodates both collegiate and fraternal interests to provide students *qua* consumers with some sort of choice.⁵²¹

515. See, e.g., Editorial, *Do We Have Traditions?*, SPECTATOR (Dec. 10, 2015), <http://students.hamilton.edu/spectator/editorial-2015/p/do-we-have-traditions/view> [<https://perma.cc/R3UP-MZ88>] (“The culture of the College remains in transition since the upending of fraternity culture with the banning of houses in the ‘90s. What the College administration needs to realize is that, more than successful sports teams and late night events, the things which break up the monotony of binge drinking and make our time here meaningful are those collective cultures, those momentary rebellions against the normal order which make traditions at a college. The Spectator does not advocate any activities which harm others, but we believe that there is a value in bending the rules for the feeling of togetherness. We believe that the College’s obsession with its own public image is harmful to the experience of students here.”).

516. See, e.g., Sara Harberson, *The Financial Aid Bowl Is the Ultimate High Stakes Game*, FORT WORTH STAR TELEGRAM (Dec. 29, 2015, 5:50 PM), <http://www.star-telegram.com/opinion/opn-columns-blogs/other-voices/article52146205.html> [<https://perma.cc/2P2G-6JZD>]; Jon Marcus, *How One Top College Ended a Policy That Weeded Out Poor Students*, HUFFINGTON POST (Dec. 18, 2015, 10:24 AM), http://www.huffingtonpost.com/entry/how-one-top-college-ended-a-policy-that-weeded-out-poor-students_us_5671dfcee4b0648fe302101e [<https://perma.cc/C5UA-4TX3>].

517. See *supra* note 229 and accompanying text.

518. See *supra* notes 507–12 and accompanying text.

519. See, e.g., Schonfeld, *supra* note 8; *supra* note 256 and accompanying text.

520. Schonfeld, *supra* note 8 (“He pointed to Hamilton College, where he previously served as president, as a school that botched its Greek reforms, opting to maintain frats and sororities but ban their members from dining or living together.”).

521. In 2016, Harvard announced a policy under which members of single-sex fraternal organizations would not be eligible for certain leadership positions that Harvard viewed as representing the college, in order to avoid implicit endorsement of such organizations’ values—leaving students to make their choice as to priorities. Moreover, the new policy was only to be applicable to students matriculating after its announcement, thus avoiding some of the problems of “locked in” consumers, if not the fraternities themselves. See

Yet even if some colleges are treating fraternities highhandedly, perhaps there is room at the intersection of the uniquely American systems of education and competition for some oases of curated experiences akin to Hamilton College.⁵²² The long existence—and persistence—of *in loco parentis* doctrine in residential matters suggests colleges may still have unique prerogatives in their tutelage of young adults.⁵²³ On the other hand, fraternities themselves have enjoyed a lengthy and storied presence at American universities that likewise militates for their continued prerogatives.⁵²⁴ Whatever the outcome, the judicial system owes students, fraternities, and colleges a more thorough airing of the arguments for and against the future of fraternities in higher education than summary dismissals, and antitrust precedent provides an apt framework in which to do so.

C. Ramsey Fahs, *In Historic Move, Harvard to Penalize Final Clubs, Greek Organizations*, HARVARD CRIMSON (May 6, 2016), <http://www.thecrimson.com/article/2016/5/6/college-sanctions-clubs-greeklife/> [<https://perma.cc/3CAS-6EK7>].

522. See DEREK BOK, HIGHER LEARNING 8–34 (1986) (placing competition at the heart of the distinguishing elements of American universities); see also GEORGE FALLIS, MULTIVERSITIES, IDEAS, AND DEMOCRACY 70 (2007) (“The American system of higher education is felt to be unique because of its ‘decentralization, market competition, and institutional pluralism . . . a product largely of historical happenstance and constitutional pluralism.’” (citing BOK, *supra* note 522)).

523. See *supra* Part III.

524. See, e.g., SYRETT, *supra* note 20, at 3–4; Bauer, *supra* note 1, at 410–12.